F. E. BRIGHTMAN
ATTORNEY-AT-LAW
1244 FIRST NATIONAL BANK BLDG.
CHICAGO

THE CORPUS JURIS-CYC ANNOTATIONS

Present all the current cases year by year, cumulatively under one alphabet.

State the new and developing law and not merely the holdings.

Show clearly and at once any extension, modification, distinction, limitation, exception, or qualification made by the new decisions to the text of the parent work—THE CORPUS JURIS-CYC System.

Make the new and developing law and applications of the law alike accessible with the least amount of search and effort.

Discriminate and distinguish new law from merely cumulative precedents.

Reduce in an orderly and scientific manner the thousands of decisions which are handed down each year to the rules and doctrines as they appear in the main body of the CORPUS JURIS-CYC System.

Point out and annotate new and difficult points and conflicts.

Supply a local Supplement for each State annually to answer the question, "What does my State hold?"

The result is a continuous supplement with CLASSIFICATION BY PRINCIPLES, dispensing with the artificialities which must arise in classification by facts. For there can be no better arrangement than one founded on the principles of the law, with their ramifications, exceptions, limitations and qualifications, scientifically stated. The principles in themselves afford the utmost uniformity and permanency of arrangement whereof a growing science like the law is susceptible.

To assert that the law of EVEN ONE year ago is all-sufficient to-day is to assert that the "case law" has not been added to, developed or changed, and that the 30,000 new decisions handed down each year are of no value to the profession.

FREE CITATION SERVICE

A subscriber to the CORPUS JURIS-CYC Annual Annotations can always obtain from us citations of the very latest cases on any proposition.

Upon application our Bureau of Annotations will send him without charge, by mail or telegraph [telegraph charges collect], as he may elect, citations of all cases to any stated proposition in CORPUS JURIS-CYC, subsequent to the last published Annual volume of Annotations.

It will not give him legal advice nor prepare briefs for him, but it will furnish, free, the latest citations to the propositions as above stated.

To receive the most prompt and specific response always give page, section and note number of the proposition in CORPUS JURIS or CYC on which you want citations.

When desired, cases will be photographed for our subscribers at a nominal charge.

Always consult the Annual Annotations to any proposition of law in which you are interested, for you are always likely to find some case there on all fours with your point; for the law is always growing, spreading and sending out new shoots, as well as changing.

Every year brings upward of 100,000 new citations—permanent additions to the System and many of them virtually new law.

SPECIAL PHOTOGRAPHIC SERVICE

We are prepared to furnish our subscribers Photographic Copies from the original reports of cases cited in Corpus Juris, Cyc, or Annotations, or of cases subsequent thereto, at a merely nominal cost per printed page.

MINIMUM charge for any one case 50 cents.

NOTICE! To avoid bookkeeping, as we are giving this service at cost, and to insure prompt answer, the above amount of 50 cents—stamps will do—for each case should accompany your order if sent by mail.

Corpus Juris-Cyc System leads in service

The Annual Annotation Bureau

272 FLATBUSH EXTENSION BROOKLYN, N. Y.

IMPORTANT

AFTER referring to the original Cyc article or Corpus Juris treatise ALWAYS consult the CORRESPONDING PAGE and NOTE number in the ANNOTATIONS for NEW CASES and the CORRESPONDING PAGE number to matter marked NEW for NEW PRINCIPLES.

"THE LAW is the LAST interpretation of the law given by the LAST judge." Don't overlook the latest decisions in this volume.

C. J.-Cyc.

Copyright, 1927
By The American Law Book Company

Copyright, 1928
By The American Law Book Company

Copyright, 1929
By The American Law Book Company

Copyright, 1930
By The American Law Book Company

Copyright, 1931
By The American Law Book Company

TO

CHARLES WALTER DUMONT, LL.D.

the author of the plan of the Cyclopedia of Law and Procedure, the inspiration of the organization which brought that work to completion, and whose creative genius has evolved the plan of Corpus Juris, these volumes are dedicated.

REPORTS COVERED IN THIS VOLUME OF ANNOTATIONS

Reports	Volume	See also
Alabama	213—220	Southern Reporter
Alabama Appeals	21—23	Southern Reporter
Alaska	7	
Alberta Law	20—24	Dominion Law Reports
American Law Reports	39—69	
Appeal Cases (D. C.)	55—58	Federal Reporter
Appellate Division	213—230	New York Supplement
Arizona	26—35	Pacific Reporter
Arkansas	168—181	Southwestern Reporter
Atlantic Reporter	129, p. 393—152, p. 304	
British Columbia	33—41	Dominion Law Reports
California	195—208	Pacific Reporter
California Appeals	67—102	Pacific Reporter
Canada Supreme Court	[1925], p. 1—[1929]	Dominion Law Reports
Colorado	77—87	Pacific Reporter
Connecticut	102—111	Atlantic Reporter
Delaware	32, 33	Atlantic Reporter
Delaware Chancery	14, 15	Atlantic Reporter
Dominion Law Reports	[1925] 2—[1930] 4	
Federal Reporter	5(2d)—44(2d) p. 280	
Florida	88—99	Southern Reporter
Georgia	160—170	Southeastern Reporter
Georgia Appeals	34—41	Southeastern Reporter
Hawaii	28—30	
Hawaii Federal	4	
Idaho	40—48	Pacific Reporter
Illinois	318—339	Northeastern Reporter
Illinois Appeals	232—256	
Indiana	195—200	Northeastern Reporter
Indiana Appeals	81—89	Northeastern Reporter
Iowa	199—208	Northwestern Reporter
Kansas	120—130	Pacific Reporter
Kentucky	208—235	Southwestern Reporter
Louisiana	159—170	Southern Reporter
Louisiana Appeals	1—13	Southern Reporter
Maine	124—128	Atlantic Reporter
Manifoba	34—38	Dominion Law Reports
Maryland	147—157	Atlantic Reporter
Massachusetts	251—265	Northeastern Reporter
Michigan	230—251	Northwestern Reporter
Minnesota	161—180	Northwestern Reporter
Miscellaneous Reports	125—138	New York Supplement
Mississippi	138—157	Southern Reporter
Missouri	307—323	Southwestern Reporter
Missouri Appeals	218—223	Southwestern Reporter
Montana	71—86	Pacific Reporter
Nebraska	113—118	Northwestern Reporter
Nevada	48—51	Pacific Reporter
New Brunswick	51—54	Dominion Law Reports
New Hampshire	81—83	Atlantic Reporter
New Jersey Equity	97—103	Atlantic Reporter
New Jersey Law	100—105	Atlantic Reporter
New Mexico	30—34	Pacific Reporter
New York	240—254	Northeastern Reporter
New York Appellate Division	213—230	New York Supplement
New York Miscellaneous	125—138	New York Supplement
New York Supplement	209, p. 689—245, p. 712	
North Carolina	189—198	Southeastern Reporter
North Dakota	49—58	Northwestern Reporter
Northeastern Reporter	148, p. 241—173, p. 552	
Northwestern Reporter	204, p. 209—233, p. 464	
Nova Scotia	57—60	Dominion Law Reports
Ohio Appeals	18—35	
Ohio Nisi Prius New Series	24—27	

Reports	Volume	See also
Ohio State	112—121	Northeastern Reporter
Oklahoma	111—144	Pacific Reporter
Oklahoma Criminal	19—39	Pacific Reporter
Ontario Law Reports	56—64	Dominion Law Reports
Ontario Weekly Notes	27—37	Dominion Law Reports
Oregon	113—132	Pacific Reporter
Pacific Reporter	237—293, p. 432	
Pennsylvania District and County	5—14, p. 388	
Pennsylvania State	284—300	Atlantic Reporter
Pennsylvania Superior Court	85—98	
Philippine	45—51	
Porto Rico	31—35	
Porto Rico Federal	12, 13	
Rhode Island	46—50	Atlantic Reporter
Saskatchewan Law Reports	18—23	Dominion Law Reports
South Carolina	131—157	Southeastern Reporter
South Dakota	47—54	Northwestern Reporter
Southeastern Reporter	127, p. 833—155, p. 872	
Southern Reporter	104, p. 81—130, p. 927	
Southwestern Reporter	272—300; 1(2d)—32(2d), p. 712	
Tennessee	152—160	Southwestern Reporter
Texas	114—118	Southwestern Reporter
Texas Criminal Appeals	101—113	Southwestern Reporter
United States	268—281	U. S. Supreme Court Reporter
United States Customs Appeals	9—16	
United States Supreme Court Reporter	46—51, p. 91	
Utah	65—70	Pacific Reporter
Vermont	98—101	Atlantic Reporter
Virginia	142—153	Southeastern Reporter
Washington	134—155	Pacific Reporter
West Virginia	98—108	Southeastern Reporter
Wisconsin	187—200	Northwestern Reporter
Wyoming	32—41	Pacific Reporter

HOW TO USE CORPUS JURIS—CYC ANNOTATIONS

These annotations to the published volumes of CORPUS JURIS are prepared upon the general plan made familiar to the profession in CYC ANNOTATIONS. But many improvements designed to facilitate reference and to save space have been introduced.

CORPUS JURIS has been planned with special reference to its use in connection with its annual ANNOTATIONS. The two together constitute at all times an integral treatment of every subject, because every subject once each year is brought up-to-date by the inclusion of all later decisions. To make this possible, every minute text proposition in CORPUS JURIS is keyed with a note number, and particular propositions in the notes are further keyed with subdividing letters and figures. In each year's ANNOTATIONS every subsequent decision upon a proposition contained in either the text or the notes of CORPUS JURIS is set out under the same note, and proposition number. The reader turns from the treatment in CORPUS JURIS to the treatment of all later decisions in the ANNOTATIONS as easily and quickly as turning a page in consecutive reading.

Two classes of matter are contained in the ANNOTATIONS: (1) New citations and further illustrations or applications of existing propositions in CORPUS JURIS; and (2) new text propositions declared for the first time in cases decided after the treatise in CORPUS JURIS on that subject was published.

To find all the case law on any subject, always begin with the treatment in CORPUS JURIS. Having found the desired proposition there stated, you have all the case law up to the date of publication of CORPUS JURIS. Then simply turn to the same page and note number in the ANNOTATIONS, and there find every subsequent decision upon the same point. This concludes your search because the whole field of case law has then been covered. If the desired proposition is not in CORPUS JURIS, it is because it had not then been enunciated, but it is in the ANNOTATIONS if it is in any later case. Such matter is marked "New" in the ANNOTATIONS, and is placed under the page number to which the subject matter relates; it is also given a new note number showing the precise place in the CORPUS JURIS treatment where the matter logically belongs. If the new matter does not relate to any section in CORPUS JURIS, it is given a new note number, placed in the order where it logically would have fallen had it been available in the original treatise, and thereafter all additional cases on the same point will be given the same note number.

The heavy black-faced figures in the ANNOTATIONS refer respectively to page and note number of corresponding matter in CORPUS JURIS. The absence of a particular page and note number in the ANNOTATIONS indicates that there have been no new decisions upon the particular proposition since the date of publication in CORPUS JURIS.

Errata corrected will appear in the ANNOTATIONS under proper page and note numbers, thus rectifying such occasional errors as are inevitable in a work of the magnitude of CORPUS JURIS.

Always consult both CORPUS JURIS and its ANNOTATIONS, but use CORPUS JURIS *first*. Your search for authorities will then be made quick, sure, and complete.

TABLE OF TITLES IN CORPUS JURIS-CYC SYSTEM

Abandonment
Abatement and Revival
Abduction
Abortion
Absentees
Abstracts of Title
Accession
Accident Insurance
Accord and Satisfaction
Accounts and Accounting
Acknowledgments
Actions
Adjoining Landowners
Admiralty
Adoption of Children
Adulteration
Adultery
Adverse Possession
Aërial Navigation
Affidavits
Affray
Agency
Agriculture
Aliens
Alteration of Instruments
Ambassadors and Consuls
Amicus Curiæ
Animals
Annuities
Appeal and Error
Appearances
Apprentices
Arbitration and Award
Architects
Army and Navy
Arrest
Arson
Assault and Battery
Assignments
Assignments for Benefit of Creditors
Assistance, Writ of
Associations
Assumpsit, Action of
Asylums
Attachment
Attorney and Client
Attorney-General
Auctions and Auctioneers
Audita Querela
Bail
Bailments
Bankruptcy
Banks and Banking
Barratry
Bastards
Beneficial Associations
Bigamy
Bills and Notes
Blasphemy
Boiler Insurance
Bonds
Boundaries
Bounties
Breach of Marriage Promise
Breach of the Peace
Bribery
Bridges
Brokers
Builders and Architects [See Architects; Building and Construction Contracts in C. J.]
Building and Construction Contracts
Building and Loan Associations
Burglary
Burglary and Theft Insurance
Canals
Cancellation of Instruments
Carriers
Case, Action on
Cemeteries
Census
Certiorari
Champerty and Maintenance
Charities
Chattel Mortgages
Citizens
Civil Rights
Clerks of Courts
Clubs
Colleges and Universities
Collision
Commerce
Commercial Paper [See Bills and Notes in C. J.]
Common Lands
Common Law
Common Scold
Compositions with Creditors
Compounding Felony
Compromise and Settlement
Concealment of Birth or Death
Conflict of Laws
Confusion of Goods
Consolidation and Severance of Actions [See Actions in C. J.]
Conspiracy
Constitutional Law
Contempt
Continuances
Continuances in Criminal Cases [See Criminal Law in C. J.]
Contracts
Contratos
Contribution
Conversion
Convicts
Copyright and Literary Property
Coroners
Corporations
Costs
Counterfeiting
Counties
Court Commissioners
Courts
Covenant, Action of
Covenants
Credit Insurance
Creditors' Suits
Criminal Law
Crops
Culpa
Curtesy
Customs and Usages
Customs Duties
Cyclone and Tornado Insurance
Damages
Dead Bodies
Death
Debt, Action of
Dedication
Deeds
Dependencies, Colonies, and British Possessions
Depositaries
Depositions
Deposits in Court
Descent and Distribution
Detectives
Detinue
Discovery
Dismissal and Nonsuit
Disorderly Conduct
Disorderly Houses
District and Prosecuting Attorneys
District of Columbia
Disturbance of Public Meetings
Divorce
Domicile
Dower
Drains
Druggists
Drunkards
Dueling

Easements
Ejectment
Election of Remedies
Elections
Electricity
Embezzlement
Embracery
Eminent Domain
Employers' Liability Insurance [See Liability Insurance in C. J.]
Entry, Writ of
Equity
Escape
Escheat
Escrows
Estates
Estoppel
Evidence
Exchange of Property
Exchanges
Executions
Executors and Administrators
Exemptions
Explosives
Extortion
Extradition
Extraterritoriality
Factors
False Imprisonment
False Personation
False Pretenses
Federal Courts
Fences
Ferries
Fidelity Insurance
Finding Lost Goods
Fines, Forfeitures, and Penalties
Fire Insurance
Fires
Fish
Fixtures
Flags
Food
Forcible Entry and Detainer
Foreign Corporations [See Corporations in C. J.]
Forgery
Fornication
Franchises
Fraud
Frauds, Statute of
Fraudulent Conveyances
Game
Gaming
Garnishment
Gas
Gifts
Good Will
Grand Juries
Ground Rents
Guaranty
Guaranty Insurance
Guardian and Ward
Habeas Corpus
Hail Insurance
Hawkers and Peddlers
Health
Health Insurance
Highways
Holidays
Homestead
Homicide
Hospitals
Husband and Wife
Improvements
Incest
Indemnity
Indians
Indictments and Informations
Industrial Co-Operative Societies
Industrial Insurance
Infants
Informations in Civil Cases
Injunctions
Innkeepers
Insane Persons
Insolvency
Inspection
Insurance
Insurrection and Sedition
Interest
Internal Revenue
International Law
Interpleader
Intoxicating Liquors
Joinder and Splitting of Actions [See Actions in C. J.]
Joint Adventures
Joint Stock Companies
Joint Tenancy
Judges
Judgments
Judicial Sales
Juries
Justices of the Peace
Kidnapping
Labor Unions [See Trade Unions in C. J.]
Landlord and Tenant
Larceny
Levees and Flood Control
Lewdness
Liability Insurance
Libel and Slander
Licenses
Liens
Life Insurance
Lightning Insurance
Limitation of Actions
Lis Pendens
Literary Property [See Copyright and Literary Property in C. J.]
Livery-Stable and Garage Keepers
Live-Stock Insurance
Lloyd's Insurance
Logs and Logging
Lost Instruments
Lotteries
Malicious Mischief
Malicious Prosecution
Mandamus
Manufactures
Marine Insurance
Maritime Liens
Marriage
Marshaling Assets and Securities
Master and Servant
Masters' and Employers' Associations
Mayhem
Mechanics' Liens
Mercantile Agencies
Militia
Mills
Mines and Minerals
Miscegenation
Modern Civil Law
Money Lent
Money Paid
Money Received
Monopolies
Mortgages
Motions and Orders
Motor Vehicles
Municipal Corporations
Mutual Benefit Insurance
Names
Navigable Waters
Ne Exeat
Negligence
Neutrality Laws
Newspapers
New Trial
Notaries
Notice
Novation
Nuisances
Oaths and Affirmations
Obscenity
Obstructing Justice
Officers
Pardons
Parent and Child
Parliamentary Law
Parties
Partition
Partnership
Party Walls
Patents
Paupers
Pawnbrokers
Payment
Pensions
Pent Roads
Peonage
Perjury

Perpetuities
Physicians and Surgeons
Pilots
Piracy
Plate-Glass Insurance
Pleading
Pledges
Poisons
Possessory Warrant
Post Office
Powers
Principal and Agent [See Agency in C. J.]
Principal and Surety
Prisons
Private Roads
Prize Fighting
Process
Profanity
Prohibition
Property
Prosecuting and District Attorneys [See District and Prosecuting Attorneys in C. J.]
Prostitution
Public Lands
Public Utilities
Quieting Title
Quo Warranto
Railroads
Rape
Real Actions
Receivers
Receiving Stolen Goods
Recognizances
Records
Recoupment, Set-Off, and Counterclaim [See Set-Off and Counterclaim in C. J.]
References
Reformation of Instruments
Reformatories
Registers of Deeds
Registration of Land Titles
Release
Religious Societies
Removal of Causes
Rent Insurance
Replevin
Reports
Rescue
Review
Rewards
Right of Privacy
Riot
Robbery
Sales
Salvage
Schools and School Districts
Scire Facias
Seals
Seamen
Searches and Seizures
Seduction
Sequestration
Set-Off and Counterclaim
Sheriffs and Constables
Shipping
Signatures
Slaves
Sodomy
Specific Performance
Spendthrifts
States
Statutes
Steam
Stipulations
Street Railroads
Streets and Highways [See Highways; Municipal Corporations in C. J.]
Submission of Controversy
Subrogation
Subscriptions
Suicide
Summary Proceedings
Sunday
Supersedeas
Taxation
Telegraphs and Telephones
Tenancy in Common
Tender
Territories
Theaters and Shows
Theft Insurance [See Burglary and Theft Insurance in C. J.]
Threats
Time
Title Insurance
Toll Roads [See Turnpikes and Toll Roads in C. J.]
Torts
Towage
Towns
Trade-Marks, Trade-Names, and Unfair Competition
Trade Unions
Trading Stamps
Treason
Treaties
Trespass
Trespass to Try Title
Trial
Trover and Conversion
Trusts
Turnpikes and Toll Roads
Undertakings
United States
United States Commissioners
United States Marshals
United States Supreme Court Marshal
Unlawful Assembly
Use and Occupation
Usury
Vagrancy
Vendor and Purchaser
Venue
War
Warehousemen
Waste
Waters
Weapons
Weights and Measures
Wharves
Wills
Witnesses
Woods and Forests
Work and Labor
Workmen's Compensation Acts

1931

THIRD PERMANENT ANNOTATIONS

Supplementing Corpus Juris and its First (1921), and Second (1926) Permanent Annotations, and Cyc and its First, Second, Third, and Fourth Permanent Annotations.

ABANDON

1 C. J.—2–39 174Ark26, 295SW392; 12PaDist&Co 739.
3–41 107Conn101, 139A685.
3–43 12CustA145.
3–46 7PaDist&Co 505; 11PaDist&Co 611, 614 [quotCJ].

ABANDONMENT

5–1 107TexCr414, 296SW585, 586 [cit CJ].
5–2 107TexCr414, 296SW585, 586 [cit CJ].
5–3 107TexCr414, 296SW585, 586 [cit CJ].
5–7 41 Ida216, 240P443. [a] Tex CommnA 282SW798.
5–8 Nebr 228NW864.
6–24 169Ark561, 275SW899, 42ALR 574.
6–30 CalA 284P1051; IndA 166NE 881(2dcase); NH 148A582; 123 Okl 172, 247P103; 125 Okl 175, 256P56, 60 [quotCyc]; 195Wis657, 219NW271, 272 [citCyc].
6–31 15F(2d)565.
6–33 [b] **Abandonment of tangible personal property** is where owner voluntarily relinquishes possession with intention of terminating ownership, without intention of vesting title in another. 143Va439, 130SE385.
6–35 165Ga765, 142SE139 (mere change of residence held insufficient).
7–36 29Ariz304, 241P307; 174Ark757, 296SW735; 44 Ida520, 258P529, 531 [citCJ]; Iowa 227NW833; 49Nev101, 238P344; 123 Okl 172, 247P103; 125 Okl 175, 256P56, 60 [quotCyc]; 12Pa Dist&Co 739; TexCommnA 282SW798; 107TexCr414, 296SW585, 587 [citCJ]; Utah 266P1050, 1052 [citCyc].
7–37 107TexCr414, 296SW585, 587 [cit CJ].
7–38 Conn 152A136; 220Ky800, 295S W1040; 107TexCr414, 296SW585, 587 [citCJ].
7–39 111Conn299, 149A668; 44 Ida520, 258P529, 531 [citCJ]; Iowa 227NW 833; 174Minn11, 218NW172; NH 148A 582; 12PaDist&Co 739; 107TexCr414, 296SW585, 587 [citCJ]; Sask [1928] 1 DomLR479. [c] (1) 204Cal 325, 267P 1085 (abandonment not shown).
8–43 [d] **Failure to claim rents and other benefits under deed and to share in payment of taxes for more than thirty years,** coupled with recognition of title in one or more of heirs of his grantor, may be an abandonment. TexCivA 272SW809. [e] **Evidence held to show abandonment.**–294Pa47, 143A474.
8–44 [c] **Mineral rights** are not lost by nonpayment of taxes unless taxes are separately assessed against minerals. 180Ark678, 22SW(2d)390.
8–46 10Cal 181; 21Cal 291, 82AmD738; 36Cal 333, 95AmD181; 1Nev188, 90Am D484.
9–47 87CalA188, 262P53, 55 [citCJ] (2dcase).
9–54 52Cal 315; 67CalA591, 228P678.
9–55 107TexCr414, 296SW585, 587 [cit CJ]. [a] (13) Mine refuse. 294Pa47, 143A474.
10–56 10Cal 589; 169Ga678, 151SE349; 210Ky612, 276SW540; 235Ky724, 32 SW(2d)49. [e] (1) 75CalA103, 241P 915, 916 [citCJ]. (2) Failure to assert valid title does not amount to abandonment. 9F(2d)587. [f] (1) But see 3La A34.
11–63 169Ga678, 151SE349.
11–64 22Cal 671; 30Cal 192; 36Cal 214; 52Cal 263; 111Cal 599, 44P246; 1 Ida 95.
11–65 294Pa47, 143A474; Sask [1928] 1DomLR479, 486 [quotCyc]. [f] **Evidence insufficient.**–143Va439, 130SE385.
11–69 10Cal 181; 21Cal 291, 82AmD 738; 36Cal 333, 95AmD181; 1Nev188, 90AmD484. But see 5PaDist&Co 231.
11–72½–New. The presumption that a person intends to preserve his property and rights therein does not arise where the property is valueless and a hindrance. 294Pa47, 143A474.
12–76 107TexCr414, 296SW585, 587 [citCJ].
12–80 27F(2d)433.
12–81 TexCommnA 286SW1083.
13–83 169Ark561, 275SW899, 42ALR 574; 294Pa47, 143A474; TexCivA 276 SW342; TexCivA 286SW652 (first taker). [a] (1) TexCommnA 286SW1083 (taking must be in good faith). (2) No prior right to be first taker. TexCivA 286SW652.

ABATE

13–18 8PaDist&Co 510.
13–19 8PaDist&Co 510.

ABATEMENT AND REVIVAL

26–2 323 Ill 269, 154NE101.
26–4 8PaDist&Co 510, 511 [quotCJ].
27–5 8PaDist&Co 510, 511 [quotCJ].
27–13 323 Ill 269, 154NE101, 103 [cit CJ]; 200 Iowa580, 204NW292.
28–16 91CalA356, 267P169; Fla 129S 889.
28–17 198 Iowa1295, 201NW47; 80SW 174. 25KyL2130.
29–23 198Ala57, 73S423; 5Alaska244; 34Ariz43, 267P421; 85Conn260, 82A 586; 131Ga637, 67SE1025; 6Hawaii21; 21 IllA110; 20 IndA515, 51NE143; 203 Mass576, 89NE1045; 236Mass28, 127N E597; 196Mich368, 163NW94; 124 Or 214, 264P359; 20PaSuper1; 22PaDist 1087; 2Hen&M(12Va)308.
30–41 70CalA137, 232P982.
31–53 85Conn260, 82A586; 11Mass 313; 203Mass576, 89NE1045; 236Mass 28, 127NE597; 23NC36; 8 OntPr139; 3Salk1, 91Reprint653.
33–90½–New. In some jurisdictions a plea to the jurisdiction of the court because the action is at law when it should be in equity is unauthorized. 204 Iowa 881, 216NW258.
33–94 [e] 168Ark645, 271SW21.
34–3 TexCommnA 291SW1099.
36–20 225AppDiv484, 233NYS530.
36–21 218Ky282, 291SW377.
37–26 218Ky282, 291SW377.
37–31 164Ga64, 137SE773; Nebr 231 NW506; 141 Okl 271, 284P634.
38–34 117 Oh546, 159NE565.
39–37 [b] **Suits for recovery of land,** brought in county other than situs of land, are not subject to plea in abatement, but remedy of complaining party is to seek removal to proper court. TexCivA 28SW(2d)347(2dcase).
40–42 164Ga64, 137SE773; MoA 28 SW(2d)456.
41–48 164Ga64, 137SE773. [c] **Motion to quash summons** is subject to same attack as if question were raised by answer. 17F(2d)841.
41–51½–New. If lack of jurisdiction arises from a ministerial act in the progress of an action, a motion to quash is proper. 218Ky282, 291SW377.
42–61 [d] **Absence of evidence as to venue** does not entitle defendant to affirmative charge when there is no plea to venue. 214Ala132, 107S73.
44–67 273US119, 47SCt308, 71Led569.
44–72 128Kan461, 278P705; MoA 28 SW(2d)456.
45–75 41GaA91, 151SE815; MoA 31SW(2d)226.
45–76 MoA 31SW(2d)226.
45–77 MoA 31SW(2d)226.
45–78 MoA 31SW(2d)226.
45–79 Ala 127S553; Ala 130S83; 171Ark1, 283SW13; 174Cal 400, 163P 353; 135 IllA54 [aff 231 Ill 82, 83NE102, 12AnnCas323]; 149 Iowa594, 128NW 954; Mass 172NE221; 190Mich347, 157NW271; 221MoA1178, 299SW629; MoA 31SW(2d)226; 51Mont258, 151P 1051; 206AppDiv273, 200NYS372; 125 Misc457, 211NYS342; 192NC824, 135SE 451; 122 Okl 157, 252P1090; 49RI 407, 143A615 [citCJ]; 116Tex1, 285SW1063; 135Wash17, 236P562.
45–80 197NC100, 147SE686.
45–81 210Ky28, 275SW371; 234Mich 296, 207NW888; MoA 31SW(2d)226; 51Nev62, 268P771 [citCJ]; 197NC365, 148SE452; 145Wash532, 261P97 (designed to prevent unnecessary conflict and litigation). See also 116Tex1, 285 SW1063.
46–87 But see 116Tex1, 285SW1063.
47–98 [d] 145Wash532, 261P97 (granting or withholding right of abatement for another action pending is not matter of discretion of court under statute).
48–8 81 IndA6, 139NE700; 84Mont173, 274P495; 125Misc457, 460, 211NYS342 [citCJ] (plea of another action pending is plea in bar); 53ND564, 207NW438, 439 [citCJ]; 120 Or313, 252P80.
49–9 125Misc457, 460, 211NYS342 [cit CJ] (plea of election of remedy is plea in bar).
49–9½–New. Where a plea in abatement is unavailing, defendant is not precluded from setting up as a defense in bar an election of remedies. 125Misc 457, 211NYS342.
49–12 201 Iowa1317, 207NW567; La 120S767(1stcase) (order granting executory process to foreclose mortgage cannot support plea of lis pendens). [b] **Disbarment proceedings.**–220Ala466, 126 S873.
50–27 But see 243 IllA497.
51–42 MoA 31SW(2d)226.
51–44 218Ala192, 118S385; 103WVa 110, 136SE783. See also Fla 126S909. But see 145Wash532, 261P97.
52–47 157Md378, 146A271; Mass 167 NE314.
53–57 134Misc283, 235NYS181.
54–59 103NJEq339, 143A361.
54–59½–New. Where plaintiff brings a suit in chancery within the period of limitations on a claim cognizable only at law, he may under the codes in some jurisdictions before dismissal thereof for want of jurisdiction bring an action at law in anticipation of such ruling. 99 WVa341, 128SE740.
55–65 See 27F(2d)134.
55–73 TexCivA 3SW(2d)864, 873 [cit CJperStanford,J].
56–74 TexCivA 3SW(2d)864, 873 [cit CJperStanford,J].
56–80 22 OhA469, 153NE284.

56-83 4 Ill 201; 52 Ill 113; 79 Ill 209; 157 Ill 579, 41NE902, 29LRA803; 173 Ill 302, 50NE671; 4BlackfInd1; 39 Mich489; 1SCL501; Anstr497; 16Beav 158, 51Reprint737; 9Beav349, 50Reprint378; 1Hare413, 23EngCh413, 66 Reprint1094; 3SmithKB516.

57-84 197NC365, 148SE452.

57-89 116Tex1, 285SW1063. [b] **Fact that amended petition in prior action set up matters involved in subsequent suits** does not subject it to plea in abatement. TexCivA 19SW(2d)89.

58-92 But see 245NYS362.

59-94 But see Mass 167NE314.

59-3 197NC79, 147SE729(2dcase).

60-6 But see 245NYS362.

60-11 99CalA58, 277P886(2dcase); 108Conn484, 143A898; 32PortoRico 392. [a] **After judgment** action is not pending. 82Mont434, 268P512.

61-17 171Ark1, 283SW13; Cal 287 P466; 89CalA690, 265P403; 81Colo 92, 253P830; 162Ga84, 132SE902; 168Ga 451, 148SE162; 212Ky838, 280SW143; 166La457, 117S554 (concursus proceeding); 8LaA550; 172Minn8, 214NW669; 127Misc599, 216NYS753; 245NYS362; 85PaSuper292; 136SC410, 134SE373; 116Tex1, 285SW1063; TexCivA 284 SW643; TexCivA 3SW(2d)599; Wash 289P14. [a] **Another cause added** which might not have been added by amendment to first cause, where there is no bad faith on part of plaintiff and parties are different, does not support motion to dismiss because of pendency of another suit. 126Misc23, 211NYS858.

62-18 8F(2d)1011; 172Minn8, 214NW 669.

62-19 127Misc599, 216NYS753.

62-20 [b] **Suit on guardian's bond in one court** does not prevent another court from passing on his account and discharging him and his sureties. TexCivA 19SW(2d)862.

62-21 [b] **Action for rent and on distress bond.**–136SC410, 134SE373.

63-29 212Ky838, 280SW143; 197NC 100, 147SE686.

63-30½-New. action for conversion of money and action on contract for loan; 125Misc457, 211NYS342.

64-26 236Ky81, 32SW(2d)567.

64-39 210Ky28, 275SW371.

66-57½-New. The fact that a complaint for alienation of affections included an allegation of criminal conversation does not preclude an action for criminal conversation. 215AppDiv833, 213NYS475.

66-61 197NC365, 148SE452, 455 [quot CJ].

66-62 33Ariz272, 264P98; Fla 126S 909; 172Minn8, 214NW669; 117Nebr 661, 222NW42; 116Tex1, 285SW1063; TexCommnA 13SW(2d)673.

67-63 81Colo 92, 253P830, 832 [quot CJ].

67-67 216Ala241, 113S235. See also 30 Ariz581, 249P755.

67-68 81Colo 92, 253P830, 832 [citCJ].

68-76 81Colo 92, 253P830, 832 [citCJ].

68-77 81Colo 92, 253P830, 832 [citCJ].

69-30 171Ark1, 283SW13; 85PaSuper 292.

70-87 216Ala241, 113S235; 171Ark1, 283SW13; Fla 126S909; 158La512, 104 S309; MoA 31SW(2d)226; 51Nev62, 268 P771, 772 [citCJ]; 198NC487, 152SE 386; 85PaSuper292; 136SC410, 134SE 373.

71-92 [1] **Action on insurance policy** is no bar to concurrent action to reform policy. 188Wis140, 205NW800. [m] **Ejectment and injunction against waste.**–85PaSuper292. [n] **Actions to cancel mortgage and to cancel deed.**–171Ark1, 283SW13. [o] **Demand for interest.**–136SC410, 134SE373.

72-96½-New. On the other hand, where facts alleged in a prior action warrant only certain relief, different from that sought in a subsequent action, it is no bar, although it contains a general prayer for relief including that sought in the subsequent action. 171Ark1, 283 SW13.

72-98 81Colo 92, 253P830; 39GaA476, 147SE426; MoA 148W(2d)486 (husband's suit for divorce and wife's suit for separate maintenance); 190NC580, 130SE165; 198NC487, 152SE386; 288 Pa458, 137A170.

72-99 174Ark997, 298SW200 (action on account held not barred where leave to set up cause as counterclaim was denied).

73-1 81Colo 92, 253P830, 832 [citCJ].

73-3 81Colo 92, 253P830.

73-4 MoA 31SW(2d)226.

74-8 Fla 126S909; 212Ky838, 280SW 143, 144 [quotCJ].

74-11 41GaA91, 151SE815; 231Ky558, 21SW(2d)976; TexCivA 285SW909.

74-12 116Tex1, 285SW1063; 145Wash 532, 261P97 (action to enforce contract or cancel mortgage and one to foreclose it pending in separate counties).

75-17 213Ala596, 105S648 (alleged and proved); Ariz 283P281; 171Ark1, 283 SW13; Cal 287P466; 90CalA126, 265P 566; CalA 271P338; 162Ga84, 132SE 902; 168Ga451, 148SE162; 36GaA729, 137SE904; 212Ky838, 280SW143; 218 Ky65, 290SW1041; NJSup 151A470; 126Misc23, 211NYS858; 127Misc40, 215 NYS243; 85PaSuper292; 136SC410, 134SE373; 116Tex1, 285SW1063; Tex CivA 284SW643; TexCivA 3SW(2d)599.

76-19 33Ariz272, 264P98; 91CalA375, 267P178; Fla 126S909; MoA 31SW(2d) 226; 51Nev62, 268P771; 126Misc601, 214NYS208; 137MiscRep11, 242NYS 558.

77-31 216Ala241, 113S235.

77-33½-New. The rule as to abatement when the identity of plaintiffs exists is not affected by bringing in an additional party defendant. 216Ala241, 113S235.

78-46 126Misc601, 214NYS208; 127 Misc40, 215NYS243; 136SC410, 134SE 373.

78-47 36GaA729, 137SE904; 39GaA 264, 146SE794.

78-54 136SC410, 134SE373.

78-55 234Mich296, 207NW888, 889 [quotCJ]; TexCommnA 13SW(2d)673.

79-58 TexCivA 283SW1082.

79-59 36GaA729, 137SE904.

80-63 14F(2d)378 (in action for infringement of patent manufacturer and customer were not privies).

80-64 127Misc40, 215NYS243; 145 Wash532, 261P97, 100 [citCJ] (real parties in interest substantially same).

80-65 171Ark1, 283SW13.

80-66 218AppDiv612, 219NYS34.

80-67 218AppDiv612, 219NYS34.

81-73 127Misc40, 215NYS243.

82-77 51Nev62, 268P771, 772 [citCJ]; TexCivA 283SW1095. See also 81Colo 92, 253P830, 832 [citCJ].

82-78 145Wash532, 261P97, 99 [quot CJ]. See also 81Colo 92, 253P830, 832 [citCJ].

82-79 See also 81Colo 92, 253P830, 832 [citCJ].

83-80 33Ariz272, 264P98.

83-88 1Conn323.

84-91 16F(2d)355; Del 141A618; 261 Mass360, 158NE774 (recognizing rule); 232Mich505, 205NW583; 136SC410, 134 SE373; 147Wash615, 266P1054, 1055 [citCJ].

84-93 116Tex1, 285SW1063; Tex CommnA 24SW(2d)813(3dcase); 145 Wash532, 261P97.

84-97 TexCivA 16SW(2d)836. But see 134Misc146, 235NYS22.

85-98 270US611, 46SCt420; 16F(2d) 355; 181Ark433, 26SW(2d)74; 3Del 221, 134A47; 131Misc129, 226NYS162; 22 OhA469, 153NE284. But see 98CalA 619, 277P509(2dcase). [f] **Mortgage foreclosure suit.**–Ala 128S438.

87-22 9F(2d)165 (ordinary suit where diversity of citizenship involved); 22F (2d)541; 24F(2d)89; 36F(2d)510; 39 F(2d)455.

88-23 22F(2d)541. But see 206Cal 254, 274P326.

88-24 NJSup 136A185 (action in state court stayed).

89-30 TexCivA 275SW473.

89-38 122 Okl 157, 252P1090, 1092 [cit CJ]. See also 116Tex1, 285SW1063.

90-39 122 Okl 157, 252P1090, 1092 [cit CJ].

90-40 34GaA298, 129SE562.

91-41 122 Okl 157, 252P1090, 1092 [cit CJ].

91-41½-New. Only when justified because of defects or peculiar conditions in former action or to broaden relief is second action allowed while another is pending. Mass 172NE221.

91-46 34GaA298, 129SE562.

92-50 TexCivA 285SW909.

92-56 TexCivA 285SW909.

93-62½-New. Petition to cancel deeds obtained by fraudulent promise to marry may be amendable to include additional items involved in subsequent suit without abatement. TexCommnA 29SW (2d)1011.

93-65 Ala 127S553 (judgment recovered in former suit); La 125S860; 251 Mich176, 231NW572; 53ND551, 207N W37.

94-71 See also 29Hawaii571, 575 [quot CJ].

94-73 29Hawaii571, 575 [citCJ&Cyc].

95-74 70CalA137, 232P982; 53SD312, 220NW917, 918 [citCJ&Cyc].

95-75½-New. **Discontinuance after joinder of issue** may be proved at trial to avoid plea of other action pending. 214AppDiv255, 212NYS101.

95-75½-New. A motion for discontinuance of a prior action pending may be entertained at the trial of a subsequent action to avoid a plea thereon if it can be done without substantial prejudice. 214AppDiv255, 212NYS101.

95-78 See also 32PortoRico 392.

95-78½-New. An action on a purchase-money note in which judgment has been rendered cannot be pleaded as a prior action pending by plea in abatement in an action for fraud in the sale of a machine for the price of which the note was given. TexCivA 284SW643.

96-86 See also 131Misc679, 227NYS 189.

97-87 27Hawaii420 (where prior action to obtain declaratory judgment is inapplicable due to facts pleaded, it will not abate subsequent action for quo warranto).

98-1 208Cal 172, 280P947; CalA 274P 552.

100-9 34F(2d)833.

100-13 122 Okl 157, 252P1090, 1092 [citCJ].

101-18 [a] **Plea of litis pendentia not available** after reversal and remand for new trial. 32PortoRico 392.

101-19 74CalA629, 241P574; MoA 22 SW(2d)185; 117Nebr661, 222NW42; 48SD489, 205NW35; TexCommnA 291 SW1099. [c] **In New York.**–125Misc 457, 211NYS342. [d] **Estoppel.**–Tex CommnA 291SW1099.

101-19½-New. But these rules apply only when there is another cause pending between the same parties on the same cause. 125Misc457, 211NYS342.

101-21 24F(2d)89.

102-23 MoA 293SW503.

102-27 128Kan430, 278P8; Mont 277 P631; 197NC365, 148SE452; TexCivA 258SW(2d)923; Utah 278P585.

102-28 176Minn529, 224NW149; 196 NC445, 146SE79; 196NC538, 146SE231. [c] **In New York.**–214AppDiv255, 212 NYS101. [d] **Defense of another action pending held properly pleaded,** though defendant could have proceeded by motion to dismiss. 243NY397, 153NE848.

103-29 243NY397, 153NE848.

103-30 212AppDiv528, 209NYS54. But see 125Misc457, 211NYS342.

103-41 [a] **In New York.**–212AppDiv 528, 209NYS54.

103-42 [b] **Motion to dismiss** under Civ. Pract. Act § 164, must be made within twenty-three days after service of complaint by mail. 215AppDiv187, 213NYS249.

104-45 [a] (1) 165La795, 116S189.

104-47½-New. In New York, a failure to move, under the Civil Practice Act, for dismissal on ground of another action pending is not a waiver of right to raise such defense in answer. 243NY 397, 153NE848.

106-73 See also Iowa 210NW791.

107-85 [a] Iowa 210NW791.

107-97 121 Or165, 254P817, 819 [quot CJ]; TexCivA 1SW(2d)935; TexCivA 29SW(2d)493.

108-98 MinorAla100; 2Stew&PAla 358; 2Ala524; 34Ala97; 203Ala89, 82 S103; 21Ark186; 1BMonKy50; 111 Miss453, 71S746; 4SneedTenn583; PeckTenn275; 86WVa34, 102SE803; 1 Wis401; 169Wis246, 171NW942. See also, 42SD472, 176NW137.

108-98½-New. as, in most jurisdictions, where an action is brought before maturity on a note or other debt;

108-1 121 Or165, 254P817, 819 [quot CJ].
109-2 121 Or165, 254P817, 819 [quot CJ].
109-3 121 Or165, 254P817, 819 [quot CJ].
110-5 See also 29F(2d)566; 96CalA 111, 273P856.
110-10 24F(2d)216; 111Conn112, 149 A252; 155Tenn486, 290SW988 [quot CJ]; TexCivA 281SW1099. [m] **Action against guardian.**-TexCivA 281SW 1099. [n] **Where firm business is carried on in another name,** plaintiff's noncompliance with statute requiring filing affidavit must be pleaded in answer or it will be waived. 85Colo 1, 272P1117.
111-13 [d] **Power of court to quash summons must rest on assumption** that it is void. 83 Or404, 160P144, 163P975. [e] **In Quebec** a writ indorsed with claim for amount of account already rendered cannot be struck out where particulars may be demanded if necessary. 27QuePr43.
113-22 168Ga750, 149SE45; 40GaA 314, 149SE389 (both cases holding failure to serve principal is no ground for abatement as against sureties); 153 Tenn40, 281SW932 (holding that, where one defendant was neither served with process nor appeared, defendant, residing in another county and served with process, can raise question of jurisdiction of his person).
115-39 But see IndA 171NE13.
115-43 215Ala66, 109S358 (plea held properly overruled).
116-64½-New. Pending suits of a Delaware corporation voluntarily dissolving held abated three years after dissolution. 22F(2d)457.
116-64½-New. Cross libelant by pleading libelant's corporate existence after voluntary dissolution held not estopped from thereafter denying its corporate status. 22F(2d)457.
116-64½-New. Abatement of a suit against a corporation after voluntary dissolution can be raised at any time. 22F(2d)457.
116-67 86CalA736, 261P1092; 89CalA 542, 265P369 (statutory disability); 232 IllA517; 122 Or605, 260P203, 55A LR504. But see 289Pa240, 137A230.
116-71 289Pa240, 137A230.
117-12 NC 155SE856.
118-88 232 IllA517 (insanity of wife, who sues for separate maintenance, can be raised only by plea in abatement).
118-91 36GaA396, 137SE85, 92 [cit CJ]; 157Miss576, 128S759.
119-99 122 Or605, 260P203, 55ALR 504.
119-3 But see 289Pa240, 137A230.
120-11 3Del 36, 130A30. Contra Tex CivA 11SW(2d)837.
120-16 310Mo 150, 274SW1075.
121-31 MoA 29SW(2d)170. [a] **Adjudication of insanity after commencement of action by writ of attachment** does not abate action. 49RI 302, 142A 371.
121-33 MoA 13SW(2d)42.
121-36 74Fed543; 247 IllA600 [certiorari granted US 49SCt36 (10th case)]; TexCivA 193SW434; TexCivA 271SW 288; 7NB118.
123-50½-New. **Failure to comply with assumed name statute** will not abate action unless defendants are prejudiced thereby. TexCivA 286SW544.
124-71 TexCivA 295SW295 (does not work abatement); TexCivA 25SW(2d) 1008. [a] **Plaintiff has burden of joining husband defendant married after** suit was brought. TexCivA 25SW(2d) 1008.
124-72 91CalA356, 267P169.
126-85 See also 164Ga575, 139SE34.
127-99 34Ariz43, 267P421; 121 Or289, 254P1016.
129-9 121 Or289, 254P1016.
130-13 TexCommnA 12SW(2d)541.
130-15½-New. Maintenance of action against land settlement board, after transfer of its obligations to department of agriculture, does not result in nonjoinder. CalA 291P907.
132-42 34Ariz43, 267P421 (where misjoinder is not apparent on face of complaint).
133-59 220Ala464, 125S804.
134-69 273US257, 47SCt391, 71L ed 634; 123Kan176, 254P323.
134-70 273US257, 47SCt391, 71L ed 634; Va 153SE649.
135-71½-New. A judgment recovered in a foreign jurisdiction, after appointment of a receiver, binds the company but not the receiver where the receiver had been prohibited from defending the suit and creditor notified to file claim, 319 Ill 105, 149NE802.
135-71½-New. and the fact that the receiver directed counsel in defending such suit does not make the receiver a party to the action as representative of the corporation. 319 Ill 105, 149NE802.
135-72 168Ark756, 271SW954.
136-88 24F(2d)310 (Delaware statute held not changed by repealing statute); 174Ark270, 293SW998; 123Kan176, 254 P323; 143 Okl252, 288P468; 116Tex 366, 292SW179; TexCivA 284SW622. See also TexCivA 15SW(2d)62. [c] **Continuance for three years after dissolution for prosecuting and defending suits.** Va 153SE649.
137-89 174Ark270, 293SW998.
138-96 247 IllA600 [certiorari granted 278US593, 49SCt36, 73L ed525(10th case)] (plea held insufficient to raise question of misnomer).
138-2 155Tenn486, 290SW988 [quot CJ]; 193Wis164, 213NW464 (answer).
138-3 202Cal 557, 261P1017.
138-4 155Tenn486, 290SW988 [quot CJ].
139-14 MoA 218SW(2d)777. But see 48RI 485, 139A308.
140-18 247 IllA600 [certiorari granted US 49SCt36(10thcase)].
140-23½-New. Plea in abatement cannot be taken by demurrer unless as showing insufficient facts to constitute a cause of action. 193Wis164, 213NW 464.
141-31 85Colo 1, 272P1117.
141-32 But see 36F(2d)591.
142-40 15F(2d) 774.
143-44 But see 163Ga357, 136SE137.
143-46 See also 125 Or507, 265P420.
143-47 13F(2d)797; 82Colo 421, 260P 688; 35GaA444, 133SE304; 202 Iowa 1371, 212NW133; 76Mont254, 246P168; 114Nebr173, 206NW760; 188NC711, 125 SE541; Oh 170NE633; 21 OhA255, 153 NE86; Or 289P500; TexCivA 271SW 293; TexCivA 15SW(2d)168; 70Utah1, 257P673. [a] See also 76Mont254, 246P 168.
144-48 9F(2d)328 (substitution of parties plaintiff by reason of death and assignment).
144-55 27F(2d)159 (action not abated by bankruptcy of defendant); 82Colo 421, 260P688; 122Kan77, 251P188; 173Minn325, 217NW381; 221AppDiv 599, 224NYS516; 136Misc848, 241 NYS345; 288Pa320,136A212; TexCivA 286SW633; TexCivA 10SW(2d)391. See also 67Utah578, 248P815. But see 206 Iowa201, 220NW36.
145-57 205 Iowa147, 217NW800; Iowa 227NW637; 122Kan77, 251P188.
146-60 Utah 266P1040, 1042 [citCJ].
146-67 8F(2d)739. [d] (2) Statute does not relate to actions in which government has never been brought before court. 213Ky174, 280SW943.
147-73 32PortoRico 761. [b] (2) Writ abates upon resignation of incumbent against whom originally issued. 32 PortoRico 761.
148-80 21F(2d)168, 170 [quotCJ].
150-98 36GaA396, 137SE85, 92 [citCJ].
150-2 80CalA470, 251P237; 36GaA396, 137SE85, 92 [citCJ]; Kan 291P780; 220MoA812, 278SW818; NJSup 144A 110; 21 OhA88, 153NE86; TexCivA 218SW(2d)540. [d] NJSup 144A110.
151-3 9F(2d)328; 69CalA159, 230P 976; 80CalA470, 251P237; 200 Iowa 257, 204NW412; 122Kan77, 251P188; 220MoA812, 278SW818 (transfer to codefendant); TexCivA 298SW614; Tex CivA 218SW(2d)540.
152-13 200 Iowa257, 204NW412; Utah 266P1040 (failure of trial court to order substitution is not error where defendant made no motion therefor).
153-22 273US257, 47SCt391, 71L ed634; 255 IllA567; 265Mass108, 163NE883; 229Mich635, 201NW951; 148Miss268, 114S484; 228AppDiv704. 239NYS59; 228AppDiv704, 239NYS60; TexCivA 284SW636, 639 [citCJ]; 197Wis578, 222 NW809, 810 [citCJ].
154-28 CalA 291P670; 229Mich635, 201NW951; Mont 289P566; NJSup 151A385; 191NC529, 132SE572; 115 Okl 153, 241P342; 192Wis507, 213NW 301.
154-29 130 Or669, 281P840.
155-33 148Miss268, 114S484; 218Mo A534, 280SW441 (Missouri statute for survival of action for personal injuries is not in pari materia with statute for survival of actions for damages to property rights). But see 148SC1, 145SE539, 61ALR826.
155-34 219Ala173, 121S547 [citCJ]. [a] **Where two statutes relating to wholly different matters are consistent,** repeal of former statute by latter will not be implied, 240NY379, 148NE556, 40ALR792.
155-43 97Fla899, 122S520, 521 [cit CJ]. But see Or 286P593.
155-44 200 Iowa580, 204NW292.
156-48 But see 7F(2d)1171.
157-59 Kan 289P446.
157-66 9F(2d)328.
159-82 128 Or363, 274P509 (joint cause of action).
161-1 100WVa368, 130SE461.
161-3 222AppDiv191, 225NYS449.
161-4 218Ala468, 118S794; 36GaA519, 137SE290; 389 Ill 540, 171NE632.
162-5 247 IllA122.
162-7 NJSup 139A897 (though decedent never served). [a] **Failure to request substitution of executors** on death of defendant abates action. Wash 290P 834.
163-11 197Cal 723, 242P932 (breach of lease by lessees); 36GaA519, 137SE290.
163-13 222AppDiv191, 225NYS449.
164-27 169Ga794, 151SE498.
165-40 310Mo 150, 274SW1075.
166-42 NJCh 151A473.
168-56 165La606, 115S796, 800 [quot CJperO'Neill,CJdisop].
169-65 70CalA680, 234P412 (decree for support in bastardy proceedings); 43 Ida450, 51ALR1438, 254P212, 213 [citCJ]; 165La606, 115S796; Wash 291 P476.
169-66 320Mo916, 9SW(2d)912; Wash 291P476; Can [1925] 1DomLR179.
169-68 208Cal 697, 284P906; 320Mo 916, 9SW(2d)912; 84Mont61, 274P148; 34NM660, 287P694 (action for wrongful death); TexCivA 286SW680; Tex CivA 25SW(2d)989.
170-69 MoA 18SW(2d)247, 251 [citCJ]. See also 38Wyo 358, 267P91 [citCJ].
170-70 165La606, 115S796; Can [1925] 1DomLR179 (as to malicious prosecution).
170-71 Cal 274P65(1stcase).
171-76 32PortoRico 436.
171-77 32PortoRico 436.
171-78 TexCivA 24SW(2d)96. Contra 115Nebr217, 212NW429.
171-84 236Mich214, 210NW326; Tex CivA 25SW(2d)989.
172-86 236Mich214, 210NW326.
174-8 200Cal 754, 254P1105, 1106 [cit CJ]; TexCivA 284SW636, 639 [citCJ].
174-10½-New. **Where the right of action is so entirely personal that one cannot by contract place it beyond his control,** the action will not survive his death. 330 Ill 571, 162NE170.
174-12 TexCivA 284SW636, 639 [cit CJ]; 102WVa475, 135SE597.
175-13 43 Ida450, 51ALR1438, 254P 212, 213 [citCJ]; 330 Ill 571, 162NE170; Wis 231NW597.
175-16 330 Ill 571, 162NE170; 255 Ill A567.
175-20 41CanSC71, 6EastLR119 (action against crown).
175-21 102WVa475, 135SE597.
175-23 97Fla899, 122S520; 148Miss 268, 114S484; 34NM660, 287P694 (all causes in suit survive except on death of a defendant only); ND 229NW282 (meaning of term "obligation" discussed); 130 Or669, 281P840; 102WVa 475, 135SE597. [a] **Statute does not continue interest of deceased,** such as where death of complainant removes whole ground of suit. 97Fla899, 122 S520.
176-26 [a] **But other statutes are construed as providing** for survival of certain causes of action where death of party occurs before suit brought. 34NM 660, 287P694.
177-34 Wyo 288P524.

179–49 144Va848, 130SE784 (death of defendant).
179–50 NJCh 151A473.
179–52 [b] **Administrator of managing partner** not subject to suit by another partner. 44Philippine172.
179–54½–New. Where decedent sought an accounting of another's interest in a copartnership already dissolved, the right to relief would survive. 97Fla 899, 122S520.
179–55 125 Or507, 265P420.
180–65 107Conn174, 139A691, 693 [cit CJ]; NJCh 151A546.
180–67 107Conn174, 139A691.
180–70 6F(2d)1000, 42ALR503.
181–76 8F(2d)321 (action on ex contractu, though declaration sounded in tort); 150Miss245, 116S593; 81Mont68, 261P609; 115 Okl 188, 242P235 [quot CJ]; Wyo 288P524 (where breach results in injury to property right). [e] **Action ex contractu must be brought in that form.–CalA** 291P899.
182–77 90PaSuper554. [c] **Promise to convey house to son.–249NY183, 163NE** 554.
182–78 [b] **Action for money paid for corporation stock,** sold in violation of law, survives. 326 Ill 502, 158NE159.
182–83 219Ala173, 121S547.
185–7 31F(2d)767; 330 Ill 571, 162NE 170; 124Kan66, 257P971; 314Mo 13, 45 ALR1466, 283SW51, 45ALR1466; 321 Mo 811, 12SW(2d)450; MoA 29SW(2d) 743; TexCivA 18SW(2d)760.
185–9 TexCivA 284SW636, 640 [citCJ &Cycl.
186–10 6F(2d)1000, 42ALR503; 155 Wash585, 285P425.
187–26 But see 218MoA534, 280SW441.
187–27 CalA 291P899; 150Miss245, 116 S593; 128Misc192, 218NYS108; 152Va 868, 148SE785. [a] **Where injury to estate from tort is merely incidental and** does not involve injury to specific property, cause of action does not survive. ND 229NW282.
188–31 6F(2d)1000, 42ALR503 (right of action under Anti-Trust Act survives); 128Misc192, 218NYS108; 192 Wis507, 213NW301.
188–32 [g] **Wrongful cancellation of club membership certificates.–339 Ill 426,** 171NE514.
189–35 192Wis507, 213NW301 ("property rights or interests" construed).
190–41 93PaSuper457.
190–44 CalA 291P899 (action for negligence not included).
191–55 142Va197, 128SE644, 646 [cit CJ].
192–65 129Misc183, 221NYS852. But see 321Mo 811, 12SW(2d)450. [d] **Statute held to apply to equity** as well as law actions. 129Misc183, 221NYS852.
194–78 [a] (4) Fraud resulting in pecuniary loss is not damage to goods of testator or intestate within North Dakota statute. ND 229NW282. (5) Naked right of action for fraud is not thing in action arising out of right of property or out of obligation within North Dakota statute. ND 229NW282.
194–79 21F(2d)659 (filing of false reports by national bank directors); 206 Cal 461, 274P959; CalA 284P719; 131 Misc679, 227NYS189; Wash 287P41; 102WVa475, 135SE597.
195–81 200Cal 754, 254P1105; 203Cal 374, 264P485; 203Cal 457, 264P762; 100CalA384, 280P213 (where insured dies, action abates and insurer cannot be sued where judgment against insured is condition precedent); CalA 291P899; 124Kan66, 257P971; 158La842, 104S 740; 263Mass73, 160NE301, 56ALR 1133; 128Misc192, 218NYS108; SD 229 NW383; TexCommnA 291SW1095; Tex CivA 274SW1014; Wyo 288P524.
195–84½–New. In Canada a cause of action against the crown for death, which arises during the lifetime of the sovereign, does not abate on the death of such sovereign. 41CanSC71, 6EastLR 119.
195–85 200Cal 754, 254P1105; Fla 128 S429; 128Misc192, 218NYS108; SD 229 NW383; Wyo 288P524. But see NC 155 SE167(2dcase). [a] **Where same act causes injury to person and to property,** former cause of action abates on death of injured party, while latter does not. 128Misc192, 218NYS108.
196–87 251Mich461, 232NW393; 150 Miss245, 116S593; 84Mont397, 276P 437; NC 155SE167(2dcase); 6PaDist& Co 375. But see 124Kan66, 257P971; 165La606, 115S796. [b] 192Wis507, 213 NW301. [g] **Construction of statute.–** 240NY379, 148NE556, 40ALR792.
197–94 CalA 291P899; 218MoA534, 280SW441 (suit by husband for loss of wife's services does not survive his death); 128Misc192, 218NYS108.
197–95 200Cal754, 254P1105, 1106 [cit CJ]; 158La853, 104S740; 153Tenn 250, 283SW71; TexCivA 274SW1014.
199–3 121Kan85, 245P1052. [d] **Suit for damages cannot be referred to such statute** where petition alleges that death resulted from injury. TexCivA 274SW1014 (where jury found that injury did not contribute to death).
199–10 224Ky332, 6SW(2d)279.
200–17 SD 229NW383.
201–29 [a] **Implied warranty of quality of drugs** does not change action to one ex contractu, in event of negligence. CalA 291P899 (action is ex delicto).
202–40 101CalA399, 281P694.
202–42 Cal 291P184(1stcase); 236 Mich214, 210NW326.
203–46 218MoA534, 280SW441.
203–47 [d] **In Missouri.–218MoA534,** 280SW441.
204–55 192Wis507, 213NW301. [b] **Damages to wife's feelings** on account of alienation of husband's affections or loss of consortium not injury to property. 192Wis507, 213NW301.
204–61 [d] **Action to recover possession of real property** abates on death of plaintiff where his interest descends to his sons and defendant had acquired their interests. 170Ark758, 281SW17.
204–63 191NC529, 132SE572.
207–83 [b] **Remedies.–Mont** 289P566.
207–84 [a] **Order reviving action on death of plaintiff** after judgment and before sale revives all prior proceedings including judgment. 130 Okl 211, 266P 467.
207–85 [d] **Deficiency judgment.–144** Okl 201, 291P79.
207–89 TexCivA 13SW(2d)220.
207–91 115 Okl 188, 242P235.
208–98 Kan 291P744; 166Minn468, 208NW180; 115Nebr217, 212NW429; 133Misc373, 231NYS469; 136Misc634, 244NYS123; 32PortoRico 436. [d] (2) Where husband dies before interlocutory decree becomes final, wife is restored to all marital and property rights in his estate. 116Nebr352, 217NW588.
208–99 32PortoRico 436.
209–3 204 Iowa1312, 216NW693; 166 Minn468, 208NW180. But see 9PaDist &Co 228.
209–3½–New. A wife cannot revive an action to enable her to obtain a larger award out of the estate of her husband where no fraud was practiced on her. 199Wis150, 225NW729.
209–10 30F(2d)211.
209–10½–New. Where a wife dies pending an action by her guardian under a decree in lunacy to annul the marriage on account of her incompetency, the action may be prosecuted by her administrator. 25 OhNPNS123.
209–11 6F(2d)1000, 42ALR503; 28F (2d)222; 326 Ill 502, 158NE159; 148 Miss268, 114S484, 487 [quotCJ]; 150 Miss245, 116S593.
209–12 148Miss268, 114S484, 487 [quotCJ].
210–28 6F(2d)1000, 42ALR503; 326 Ill 502, 158NE159.
211–37 CalA 291P670.
212–43½–New. An action against a majority stockholder to enforce an agreement to repurchase stock survives his death. TexCivA 48SW(2d)662.
213–54½–New. [§ 416a] c½. **Against Superintendent of Banks.** Mandamus proceeding to compel superintendent of banks to certify claims as claims against depositor's guaranty fund survives change in holder of office. 48SD 417, 204NW901.
214–74 128Kan627, 278P752.
215–76 But see 91Fla1024, 109S197.
215–77 But see 329 Ill 166, 160NE169. [a] (2) Under Missouri statute proceeding in mandamus to compel reinstatement of civil service employee and payment of salary survives death of employee. 221MoA784, 288SW85. (3) **In Pennsylvania mandamus does not** abate by death of defendant officer. 14 PaDist&Co 336.
215–84 221MoA784, 288SW85, 87 [cit CJ]; Wash 291P476. [g] **Survival of action is prerequisite to revival.–332** Ill 11, 163NE428.
216–87 199Wis150, 225NW729; 199 Wis111, 225NW731.
218–14 7F(2d)117 (judgment for plaintiff who has transferred his interest pending without substitution of real party in interest is void); 47 Ida306, 274P800; 338 Ill 245, 170NE285(2d case); TexCivA 25SW(2d)989; 148Va 479, 139SE295; 100WVa602, 131SE352.
220–18 MoA 13SW(2d)42; 134 Okl 22, 272P410.
220–19½–New. Upon abatement of action by or against corporation by forfeiture of charter no proceedings can be taken therein until revivor is had in manner provided by law. 123Kan176, 254P323.
220–19½–New. Where action was brought in defendant's lifetime and administrator compromised claim with district court's approval, substitution of administrator is unnecessary. Mont 289P566.
220–20 200 Iowa580, 204NW292.
220–21 94Fla1218, 115S516; 200 Iowa 580, 204NW292, 294 [citCJ].
220–22 97Fla899, 122S520; 125 Or 507, 265P420.
221–27 7Alaska57, 63 [quotCJ].
221–31 230Ky848, 20SW(2d)1017 (order reviving action, instituted by executrix in name of personal representative, with consent of parties, was not void as not revived in proper person's name); 216AppDiv391, 215NYS309; 228AppDiv704, 239NYS59; 228AppDiv 704, 239NYS60. [e] 34NM660, 287P 694. [h] **Executrix of wrongfully discharged school teacher,** substituted as petitioner in mandamus, held entitled to recover teacher's salary to time of death. 216AppDiv391, 215NYS309.
222–34 [a] **Insane lessor's cause of action for fraud in obtaining oil lease** survives to heirs where presumption obtains that estate had no creditors. TexCommnA 291SW1095.
222–34½–New. One who by leave of court filed a complaint or pleading asking for affirmative relief independent from that of plaintiff or defendant in the original action should be classed as a plaintiff rather than as a defendant for the purpose of revival of the action on his death. 172Ark744, 290SW357.
222–37 [a] **Foreign executor of nonresident testatrix** who has paid transfer tax and water rates is entitled to have ejectment action, commenced by testatrix, revived in his name. 127Misc6, 214NYS495.
222–38½–New. In Maine a foreign administratrix may not be substituted in place of deceased plaintiff. 125Me242, 132A697.
222–45 220AppDiv309, 221NYS547.
223–46 82CalA379, 255P773 (executor who is also trustee and legatee of decedent defendant in foreign jurisdiction); 228AppDiv704, 239NYS59.
224–60½–New. Where a suit to recover possession of real property abates at plaintiff's death, revivor in the name of the special administrator of his estate is improper. 170Ark758, 281SW17.
225–64 50Philippine178. [c] 139SC 475, 138SE198.
225–68 213AppDiv574, 211NYS253; 191NC529, 132SE572. [k] **Where will directs real estate to be sold** by executor and converted into money to carry out provisions of will, it is proper to revive suit in name of executor. 123 Okl 207, 255P561.
227–80 206 Iowa693, 214NW673.
228–95 100WVa368, 130SE461.
229–13 178Ark784, 12SW(2d)869; 202 Iowa1094, 211NW488; Mont 289P566. [d] **Revenue collector sued individually.** –34F(2d)700.
230–14½–New. Where breach of covenant was prior to the death of the grantor, and the grantee sued the grantor therefor, no action could be maintained against the heirs of decedent where the grantee had opportunity to present the claim against the gran-

tor's executor and failed to do so. 126 **Okl** 126, 258**P**1046 (under Texas law).

230–14½–New. and in such case cause could not be revived against the heir of the grantor. 126 **Okl** 126, 258**P**1046.

230–19 240**NY**564, 148**NE**706; 115 **Okl** 153, 241**P**342.

231–25 174**Ark**868, 296**SW**706; 225**Ky** 529, 9**SW(2d)**302 (attachment); 118 **Okl** 76, 246**P**844.

231–26 [a] See also 162**Ga**295, 133**SE** 257.

231–28½–New. Where an action should be revived against heirs, a judgment for rents against the executors is improper. 174**Ark**868, 296**SW**706.

231–31 129**Kan**19, 281**P**925.

232–32½–New. Foreign executor of nonresident testatrix is entitled to revive ejectment action where will gave power of sale to executor, suspending power of alienation for twenty years which is permitted in the foreign state. 127**Misc**6, 214**NYS**495 (executor having paid transfer tax and water rates).

232–35 178**Ark**784, 12**SW(2d)**869.

232–38 218**Ala**468, 118**S**794. [d] **In action on certiorari bond,** given on removal of forcible detainer proceedings from justice's court, surety is not entitled to have cause revived in name of representatives of codefendant who died before case was reached for trial where it is not shown that codefendant was principal on bond or had defense to action. 322**Mo**450, 17**SW(2d)** 505.

233–40 339 **Ill** 540, 171**NE**632 (action to remove cloud on title).

233–40½–New. Where a defendant dies after filing an answer amounting to a disclaimer, it is not error for the trial court to proceed with the action without causing a representative of his estate to be brought in. 69**CalA**251, 230**P**993.

233–44½–New. Where husband dies before summons is served and wife only appears, judgment referring only to wife is not fatal although name of husband not stricken from complaint. 35 **PortoRico** 726.

234–52 [e] **Although decedent was not served in lifetime,** substitution of his executors as parties defendant is proper. **NJSup** 139**A**897.

236–69 7**Alaska**57, 63 [quotCJ].

236–72 [a] **In Philippines** upon death of partner during pendency of suit for accounting, his administrator cannot be substituted. 44**Philippine**172.

237–78 **Ark** 30**SW(2d)** 845.

238–86 20**F(2d)**267.

239–92 But see **Mass** 166**NE**831.

240–95½–New. So also, a statute limiting the time within which an action may be commenced by the personal representative of an injured party does not apply to the revivor of an action already commenced by deceased in his lifetime. [1925] 3**DomLR**138, 57 **OntL**93.

240–1 57 **OntL**93, [1925] 3**DomLR**138.

241–2 176**Ark**840, 4**SW(2d)**514; **Ark** 30**SW(2d)**845; 265**Mass**108, 163**NE**883; 118 **Okl** 76, 246**P**844. [d] **In Missouri.–A** 299**SW**135.

[e] **Failure of personal representative of deceased defendant to suggest death** does not stop running of statute of limitations, where bond was filed and notice of appointment given as required. 265 **Mass**295, 164**NE**85. [f] **Statute is no defense** when previous action was commenced within six years from earliest transaction alleged. 226**AppDiv**774, 235 **NYS**43. [g] **Infancy of party** seeking to be made heir does not postpone running of statute. 118 **Okl** 76, 246**P**844.

243–14 **TexCivA** 286**SW**680.

243–15½–New. Where there has been a delay by plaintiff's personal representative in reviving, defendant may move to compel the proper party to continue the action, or in default to obtain a dismissal for lack of prosecution. 57 **OntL**93, [1925] 3**DomLR**138.

246–45 21**AlaA**605, 111**S**44.

247–55 196**Wis**426, 220**NW**194 (service on guardian ad litem of minor children of intestate is unnecessary).

247–58 230**Ky**848, 20**SW(2d)**1017 [cit CJ]; 196**Wis**426, 220**NW**194.

248–70 47 **Ida**306, 274**P**800.

249–76 [a] **In Massachusetts.**–265**Mass** 295, 164**NE**85.

249–78 225**Ky**529, 9**SW(2d)**302 (after consolidation of suit to set aside revivor with original action).

250–83 222**Ky**472, 1**SW(2d)**772.

251–97 221**Ky**524, 299**SW**172.

251–98 [a] 221**Ky**524, 299**SW**172.

252–11 115 **Okl** 153, 241**P**342.

253–15 **Utah** 293**P**7.

253–16 **Minn** 230**NW**122 (default judgment vacated on application of administrator of plaintiff).

253–16½–New. Where the court improvidently permitted the revival by amended petition of an action for personal injuries resulting in death, and the amended petition stated a cause of action by the mother and next of kin of the deceased plaintiff for damages for death by wrongful act and the statute of limitations had not run when the amended petition was filed, defendant should be permitted to answer the amended petition and the action should proceed without the formality of fresh service of summons. 121**Kan**85, 245**P**1052.

253–16½–New. A defendant taking depositions in his own interest enters an appearance in such new action. 170**Ark** 758, 281**SW**17.

254–41 121 **Or**289, 254**P**1016.

254–42 208**Cal** 371, 281**P**500; 111**Conn** 112, 149**A**252; **Iowa** 229**NW**673; 223 **AppDiv**856, 228**NYS**548; **TexCivA** 296 **SW**643; **TexCivA** 5**SW(2d)**570.

255–44 101**CalA**399, 281**P**694. [a] **Intervener in receivership action** cannot object to jurisdiction over defendant. 115**Nebr**41, 211**NW**203.

255–55 164**Ga**64, 137**SE**773. [b] **Defendants residing in county of suit** cannot object to nonresidence of codefendants where case is one of partition and land is located in county. 164**Ga**64, 137 **SE**773.

256–59 122 **Or**605, 260**P**203, 55**ALR**504 (matter in abatement cannot be used under general denial).

256–60 **TexCivA** 284**SW**622.

256–61 21**Fed**218; 137**MoA**308, 118**SW** 500.

257–68 69**CalA**106, 230**P**952; 70**SW** 274, 24**KyL**958; **Mo** 268**SW**93; 137 **MoA**247, 117**SW**698; 206**MoA**132, 226 **SW**991; 209**MoA**570, 239**SW**554; 10 **HowPrNY**162; 74 **Okl** 23, 176**P**937; 74 **Okl** 31, 176**P**907; 121 **Or**289, 254**P** 1016; 152**Wash**272, 277**P**999(2dcase).

257–70 70**SW**274, 24**KyL**958; 137**MoA** 247, 117**SW**698. "The grounds of demurrer now specifically recited in the Civil Code were, under the old practice, grounds for a plea in abatement; and many other defects and irregularities which were also reached by plea in abatement, such as the want of bond for costs in an action brought by a nonresident, a variance between the writ and declaration, the failure of the plaintiff to file the note sued on with the petition, as required by the statute authorizing suit by petition and summons, the misnomer of the plaintiff or defendant, or the omission of the names of the firm or other person to whom an obligation was given by their title or description only, now must be reached by motion, and not by plea in abatement." 70**SW**274, 275, 24**KyL**958.

258–74 197**Cal** 723, 242**P**932; **IndA** 163**NE**517; **La** 119**S**35; **TexCivA** 281**SW** 883; **TexCivA** 284**SW**622; **TexCivA** 30 **SW(2d)**428; **Va** 152**SE**539.

259–77 37**F(2d)**320; 40**GaA**324, 149**SE** 579[2dcase] (amendment of plea not permitted); 244 **IllA**78; **Md** 150**A** 850; 148**Miss**690, 114**S**810; 122 **Or**605, 260**P**203, 55**ALR**504; 154**Tenn**167, 289 **SW**513; **Va** 152**SE**539; 199**Wis**59, 225**NW**401.

260–79 **MoA** 272**SW**998.

261–85 **La** 129**S**543; **TexCivA** 2 **SW(2d)**977; **TexCivA** 5**SW(2d)**240; **TexCivA** 8**SW(2d)**542; **TexCivA** 17**SW (2d)**1100; **TexCivA** 30**SW(2d)**428.

261–87½–New. A record of attachment gives it priority over a previous unrecorded attachment. 25**F(2d)**509.

263–4 **La** 120**S**131.

263–6 **IndA** 171**NE**882(2dcase); **TexCivA** 284**SW**622; **TexCivA** 23 **SW(2d)**853.

263–6½–New. In New York the right to take advantage of defect not apparent on the face of the record is not lost by failure to move in advance of the trial if dilatory plea is set up by way of defense as a bar to the action. 214 **AppDiv**255, 212**NYS**101.

263–6½–New. It is only where certain specified defects are not taken advantage of by motion in advance of trial that defects are waived, under Civ. Pract. Act § 278. 214**AppDiv**255, 212**NYS**101.

263–7 244 **IllA**427.

263–7½–New. A plea in abatement to joining of a defendant is properly stricken where it was not filed until after trial, granting of new trial, and continuance, and was not called to the attention of the court during the term at which it was filed. **TexCivA** 280**SW** 869.

265–26 164**Ga**64, 137**SE**773; 167**Ga**602, 146**SE**446; 39**GaA**741, 148**SE**358(1st case).

266–37 164**Ga**64, 137**SE**773; 133**Misc** 149, 231**NYS**640.

266–37½–New. In New York by statute party desiring to attack pleading by way of dilatory plea, because of defect not appearing on record, may do so on motion and have issue determined in advance of trial, provided motion, if directed against complaint, is made within twenty days of service thereof. 214**AppDiv**255, 212**NYS**101.

266–37½–New. and, if directed against answer, within ten days after service thereof. 214**AppDiv**255, 212**NYS**101.

266–44 213**Ala**414, 104**S**817.

267–54 37**F(2d)**320.

267–56½–New. Amendment to declaration bringing in an additional plaintiff is not an abandonment of the original declaration so as to permit a plea in abatement by defendant, although such plea was previously waived. 154**Tenn** 167, 289**SW**513.

268–77 But see 101**CalA**399, 281**P**694 (appearance by demurrer and supplemental answer of defendant's executrix held not waiver).

268–80 **Miss** 121**S**846.

270–85 101**CalA**399, 281**P**694; **MoA** 300**SW**305.

271–93 [a] (2) Plea of misjoinder of parties plaintiff and causes of action raised by special exception in answer to merits is not in due order of pleading. **TexCivA** 281**SW**883. (3) Due order of pleading requires plea of privilege to be filed before plea to jurisdiction of court. **TexCivA** 3**SW(2d)**835. [b] **Plea in abatement was not waived** because it was not filed before plea of privilege. **TexCivA** 11**SW(2d)**369.

271–1½–New. In Iowa, after trial on matter of abatement, a party will not be allowed in the same action to answer or reply matter in bar. 204 **Iowa** 1052, 216**NW**956.

272–4 107**WVa**598, 149**SE**836. But see 33**PortoRico** 492, 494, 495 [cit&quot Cyc]. [b] 128**Kan**461, 278**P**705.

272–6 148**Miss**690, 114**S**810; **Miss** 121**S**846; **Or** 291**P**498.

272–10 **TexCivA** 281**SW**244; **TexCivA** 4**SW(2d)**209.

273–19 33**PortoRico** 492, 494, 495 [cit& quotCyc]; **TexCivA** 3**SW(2d)**879.

273–26 See also 218**Ala**681, 120**S**165.

275–45 **WVa** 155**SE**658.

275–52½–New. Defendant interposing pleas in abatement for want of jurisdiction should be given the benefit of the doubt in the trial court. 30**F(2d)**826.

275–53 69**CalA**106, 230**P**952; 212**Ky** 838, 280**SW**143; **TexCivA** 275**SW**858, 859 [citCJ]. But see **TexCivA** 25**SW** (2d)229.

276–55 69**CalA**106, 230**P**952.

ABBREVIATIONS

279–14 219**MoA**19, 267**SW**964, 966 [cit CJ].

ABDUCTION

283–20 217**Ky**475, 290**SW**348.

283–22 94**PaSuper**522.

284–27½–New. Under a statute making it a felony to elope with another's wife, adultery subsequent to the elopement is an essential element. 196**NC**387, 145**SE** 784.

284–29 94**PaSuper**522.

284–31 44**Philippine**134 ("statute was intended to protect and defend person and body of woman from vicious and brutal assaults").

284–33 [a] **Marriage as defense.**–48 **Philippine**1.
284–34 3**Del** 225**NW**61.
284–36 3**Del** 227, 134**A**172.
286–53 [b] **Pursuing prosecutrix at** distance is not detention. 222**Ky**120, 300**SW**368.
286–57 [a] **If accused did not know that woman was weak-minded,** he was not guilty of detaining her against her will. 230**Ky**628, 20**SW(2d)**456.
287–59 3**Del** 227, 134**A**172; 114**Nebr** 121, 206**NW**21, 22 [citCJ]; 144**SC**116, 142**SE**245; **SD** 225**NW**61.
287–59½–New. Under the Kentucky statute, if a female has sufficient mind to enable her to consent, and she does consent, to detention for the purpose of carnal knowledge, defendant is not guilty of detaining her against her will for that purpose, irrespective of the age of the female. 227**Ky**387, 13**SW(2d)** 263 (fact that statutory rape may have been committed is immaterial).
287–64 Contra 94**PaSuper**522.
289–86½–New. The words "other immoral purpose" in a statute denouncing the offense of abduction mean other immoral purpose similar to those described in the statute. **SD** 225**NW**61.
291–3 3**Del** 227, 134**A**172.
292–23 44**Philippine**134.
293–26½–New. It need not be alleged that defendant and prosecutrix were not husband and wife, if language of the statute does not contain the exception. 210**Ky**573, 276**SW**512.
293–28 210**Ky**573, 276**SW**512.
295–50 215**Ky**436, 284**SW**1114. [a] **Evidence held to show** abduction with consent rather than by violence. 46 **Philippine**891.
295–54 [a] 44**Philippine**134.
295–56½–New. Where the statute prohibits the mere detention of a female against her will, the taking may be proved by a recitation of the circumstances. 210**Ky**353, 275**SW**866.
295–56½–New. Under the Kentucky statute conviction for the detention of a twelve-year-old female against her will for the purpose of carnal knowledge has been held not justified, under evidence that the girl consented, and it is immaterial that defendant may have committed the crime of statutory rape. 227**Ky**387, 13**SW(2d)**263.
295–57 SD 225**NW**61. [a] 215**Ky**172, 284**SW**1039.
295–58 48**Philippine**533. [a] 125**Kan** 400, 264**P**1043.
295–59 46**Philippine**775; **SD** 225**NW** 61. [b] 217**Ky**475, 290**SW**348. [d] **Evidence held insufficient.**–**SD** 225**NW** 61.
297–82 215**Ky**436, 284**SW**1114.
298–84 252**Mass**158, 147**NE**553.
298–84½–New. Reputation of house in which prosecutrix subsequently stayed is inadmissible. 252**Mass**158, 147**NE** 553.
298–89½–New. Permitting prosecutrix to testify that she lived at an orphanage since infancy is not error. 217**Ky**529, 289**SW**1110.
298–94½–New. Testimony of mother that her daughter informed her of detention shortly thereafter is not admissible in a prosecution for detaining a female against her will. 210**Ky**353, 275 **SW**866.
298–94½–New. The admission of testimony of the mother of the prosecuting witness that her daughter made a complaint has been held erroneous. 225**Ky** 314, 8**SW(2d)**389.
299–2 [d] 44**Philippine**134.
299–7 215**Ky**436, 284**SW**1114; 230**Ky** 628, 20**SW(2d)**456. [d] 217**Ky**475, 290 **SW**348.
300–8 [b] 144**SC**116, 142**SE**245.
300–8½–New. Credibility of the prosecutrix is a question for the jury. 217 **Ky**529, 289**SW**1110.
300–11 [f] **Where prosecutrix is corroborated,** instruction as to necessity of corroboration is properly denied. 252 **Mass**158, 147**NE**553.
300–13½–New. An instruction that if the purpose was personal sexual intercourse the jury must acquit was properly denied. 252**Mass**158, 147**NE** 553.
300–13½–New. If not necessary to allege in an indictment that defendant and prosecutrix were not husband and wife, it is not necessary to refer thereto in the instructions, unless such defense is relied upon by defendant. 210 **Ky**573, 276**SW**512.
300–16 [c] **Evidence held sufficient to** support verdict. 210**Ky**573, 276**SW** 512.
301–20 See also 48**Philippine**620. [a] **Mitigating circumstances.**–50**Philippine** 641.
301–22 [a] See also 209**Ky**623, 273**SW** 454. [d] (2) Jury may consider actual or constructive loss of child's services, expense and trouble in recovering possession, aggravated nature of abduction, and mental suffering and physical injury inflicted on parent. 199 **Ind**660, 161**NE**251. [e] **Basis of action** is loss of services or expenses incurred. 199**Ind**660, 161**NE**251; 209**Ky** 623, 273**SW**454. [f] **That child was in rightful possession of grandparents temporarily under divorce decree** does not justify them in abducting child. 199 **Ind**660, 161**NE**251. [g] **Damages for loss of child's affections** are not recoverable in action by mother except as regards mental or physical effect on her. 199 **Ind**660, 161**NE**251.
301–26 [a] **Instructions properly refused.**–199 **Ind**660, 161**NE**251 (that father's relatives owed him duty not to estrange child from him).

AB INCONVENIENTI

304–36 See also 196**Cal** 404, 238**P**363.

ABODE

304–43 [b] (2) Word abode ordinarily means domicile. 170**Ga**779, 154**SE**240.

ABORTION

310–10 81**CalA**49, 252**P**763; 126**Me** 177, 136**A**817. But see 12**PaDist&Co** 135.
310–12½–New. Under some statutes criminal intent is supplied by proof that the acts were not necessary to save life. 54**ND**779, 211**NW**336.
311–30 [b] (2) "Instrument" includes any means by which external force is applied to produce miscarriage. 36 **Okl Cr**148, 252**P**1106 (finger).
312–33 12**PaDist&Co** 135.
314–54½–New. In some jurisdictions it is made a felony to offer services to assist in the accomplishment of a miscarriage by any notice, advertisement, or otherwise. 76**CalA**114, 243**P**898 (meaning of phrase "or otherwise").
314–57 CalA 292**P**135(2dcase).
315–65 MoA 274**SW**868.
316–82 120**Kan**177, 243**P**326, 327 [cit CJ]; 126**Me**177, 136**A**817; 54**ND**779, 211**NW**336; 106**TexCr**373, 292**SW**889; 155**Wash**63, 283**P**439. [c] **Imminence and certainty of death.**–206 **Iowa**971, 221 **NW**592. [d] **Good faith.**–206 **Iowa** 971, 221**NW**592.
317–83 120**Kan**177, 243**P**326, 327 [cit CJ].
317–85 126**Me**177, 136**A**817, 819 [cit CJ].
317–86 126**Me**177, 136**A**817.
317–87 120 **Kan**177, 243**P**326; 126**Me** 177, 136**A**817.
317–87½–New. Under some statutes where an abortion is performed by a physician necessity must actually have existed. 54**ND**779, 211**NW**336, 341 [cit CJ].
317–87½–New. The innocence of a physician, causing an abortion in the good-faith opinion that it was necessary to save the patient's life, conclusively negatives the guilt of one charged with aiding and abetting him. 206 **Iowa**971, 221 **NW**592.
318–3 76**CalA**114, 243**P**898.
319–27 But see **Mass** 165**NE**413.
319–28 [a] (4) Information charging use of certain instruments and other means unknown to informant is sufficient. 53**SD**205, 220**NW**518.
319–29 But see 53**SD**205, 220**NW**518.
321–49 [e] **Time held not essential element.**–138**SC**58, 135**SE**635.
322–62 126**Me**177, 136**A**817.
322–66 126**Me**177, 136**A**817, 819 [cit CJ]. [a] (4) 126**Me**177, 136**A**817.
323–76 [b] (1) 116 **Or**615, 241**P**843.
323–88 [a] (6) Allegation of use of instrument and proof of use of finger does not constitute variance. 36 **OklCr**148, 252**P**1106.
324–93½–New. [§ 73a] d. **Prior Curettements by Defendant.** There is no presumption that prior curettements by defendant were improper. 155**Wash**63, 283**P**439.
324–94 120**Kan**177, 243**P**326.
324–95 155**Wash**63, 283**P**439. [b] 206 **Iowa**971, 221**NW**592.
324–96 120**Kan**177, 243**P**326.
324–96½–New. As to pregnancy. The state has the burden of proving pregnancy. 126**Me**177, 136**A**817.
324–98 236**Ky**68, 32**SW(2d)**550.
324–99 CalA 292**P**135(2dcase). [a] (4) Drugs used held admissible where there was evidence to show that they were provided and used under defendant's instructions. 138**SC**58, 135**SE**635. (5) Evidence as to visits at various times and happenings thereat held admissible to show intent and as corroborative circumstances. 138**SC**58, 135**SE** 635.
325–4 167**Minn**164, 208**NW**760. [b] (2) Evidence that woman told defendant about her condition and symptoms was incompetent. 264**Mass**314, 162**NE**362.
326–12 126**Me**177, 136**A**817.
326–18 [e] **In Massachusetts.**–264**Mass** 314, 162**NE**362.
327–22 264**Mass**571, 163**NE**189; 84**Pa Super**353 (written statement). [c] **Descriptive statement following signature** of ante-mortem statement held admissible. 94**PaSuper**353.
327–23 236**Ky**68, 32**SW(2d)**550; 26 **OhA**435, 160**NE**500 (declaration held admissible). [a] **Fact that declarant did not die for a week** does not affect admissibility of declaration. 236**Ky**68, 32**SW(2d)**550. [b] **Evidence sufficient** to show belief in impending death. 236 **Ky**68, 32**SW(2d)**550.
327–25 [b] **Admission as a whole.**–236**Ky**68, 32**SW(2d)**550.
328–32 81**CalA**49, 252**P**763 (surgical instruments are admissible to show intent with which drug was administered).
329–40 167**Minn**164, 208**NW**760. 761 [citCJ]; 138**SC**58, 135**SE**635. [b] 196 **Cal** 154, 236**P**135.
329–41 167**Minn**164, 208**NW**760.
330–61 126**Me**177, 136**A**817.
330–62 126**Me**177, 136**A**817. [a] 126 **Me**177, 136**A**817; 264**Mass**564, 163**NE** 168; **Mass** 165**NE**413; **Mo** 278**SW**733; **NJSup** 140**A**249. [f] 120**Kan**177, 243**P** 326; 167**Minn**164, 208**NW**760. [g] **Mass** 165**NE**413. [j] 120**Kan**177, 243**P** 326; 167**Minn**164, 208**NW**760. [k] **Evidence held insufficient to show nonnecessity to save life of deceased.**–334 **Ill** 341, 166**NE**65. [l] **Impeachment of dying declaration.**–236**Ky**68, 32**SW(2d)**550.
330–63 155**Wash**63, 283**P**439.
330–64 [a] 155**Wash**63, 283**P**439. [b] 206 **Iowa**971, 221**NW**592.
331–69 126**Me**177, 136**A**817. [a] 126 **Me**177, 136**A**817.
331–70 116 **Or**615, 241**P**843. [c] 167 **Minn**164, 208**NW**760.
331–78 36 **OklCr**148, 252**P**1106, 1108 [quotCJ].
332–80 [a] (2) 53**SD**205, 220**NW**518, 520 [citCJ].
332–80½–New. The corroboration may come from words or acts of defendant, or from circumstances. 138**SC**58, 135 **SE**635.
332–81 81**CalA**49, 252**P**763; **CalA** 292 **P**135(2dcase). [a] 81**CalA**49, 252**P**763. [b] 81**CalA**49, 252**P**763; 138**SC**58, 135 **SE**635.
332–82 81**CalA**49, 252**P**763.
332–83 264**Mass**217, 162**NE**337 (to fact of pregnancy).
333–97 111**Conn**719, 149**A**213(2dcase).
334–18½–New. Evidence. Plaintiff has the burden of proving that defendant performed an abortion. 262**Mass**109, 159**NE**734.
334–18½–New. Trial. Evidence held insufficient for jury. 262**Mass**109, 159 **NE**734.

ABOUT

334–7 22**AlaA**135, 113**S**471; 123 **Or**20, 261**P**428; 142**SC**386, 140**SE**702.
334–8 163**La**894, 113**S**138; 123 **Or**20, 261**P**428; 51**SD**214, 213**NW**19.
334–10 22**AlaA**135, 113**S**471.

334-13 22AlaA135, 113S471; 51SD214, 213NW19.
336-24 22AlaA135, 113S471.
336-27½-New. Word of safety and precaution intended to cover some slight or unimportant inaccuracy. 102Conn 663, 129A849.
337-31 50Nev340, 259P415.
338-33 [d] **"In and about leased premises"** is not confined to leased parts of building nor parts leased to adjoining tenants. 262Mass458, 160NE262.
338-34 200 Iowa1349, 206NW610. [b] **In designating time for delivery.** 200 Iowa1349, 206NW610.
338-35 22AlaA135, 113S471.
339-37 [c] (1) 215Ala412, 111S427.
339-37½-New. "About" may mean a short time after as well as a short time before a specified date. 215Ala412, 111 S427.

ABSCONDING DEBTOR OR ABSENT DEBTOR

341-70 286Pa213, 133A229 [quotCJ].
341-71 286Pa213, 232, 133A229 [quot CJ].

ABSENTEES

347-25 161La940, 109S770.
347-27 218MoA458, 279SW170.
347-27½-New. Statutes proceed upon the assumption that the owner of the estate is alive. 151Wash289, 275P694 (2dcase).
347-31 235Mich344, 209NW177.
347-32 235Mich344, 209NW177.
348-34 255Mass214, 151NE93.
348-35 255Mass214, 151NE93; 233 Mich108, 206NW513; 235Mich344, 209 NW177. [a] 255Mass214, 151NE93.
348-36 217AppDiv422, 217NYS46.
348-36½-New. Creditors of absentee must proceed as against any absent but living defendant, the absentee's receiver not being an administrator. 262 Mass551, 160NE343.
348-36¾-New. The probate court has only such power as the statute grants. 262Mass551, 160NE343.
348-36¼-New. Administration, based merely upon the presumption of death arising from absence is not binding upon the absentee and may be collaterally attacked. 151Wash289, 275P694 (2dcase).
348-43 [b] **Authority of receiver.**-262 Mass551, 160NE343. [c] **Allowance to receiver.**-262Mass551, 160NE343.
349-55½-New. Nonresident alien, not being entitled to letters of administration an absentee's estate, cannot confer right thereto on others. 137Misc50, 242 NYS235.
349-55¾-New. Public administrator must, or may, in court's discretion, be appointed administrator of absentee's estate where only next of kin is nonresident alien. 137Misc50, 242NYS235.
350-67½-New. An administrator of the estate of an absentee is personally liable to the absentee for funds distributed where he takes a bond to indemnify himself instead of the refunding bond required by statute and by the order of the probate court. 218MoA458, 279SW170.
350-67¾-New. The probate court has no power to accept a bond indemnifying the administrator on distribution, 218MoA458, 279SW170.
350-67¼-New. nor any bond other than the refunding bond required by statute. 218MoA458, 279SW170.
350-72 163La112, 111S617 (fee of curator ad hoc chargeable against interest of absentee in property involved in suit).
352-11 165La1005, 116S488.
354-53 See also 2LaA482.
355-76 178Ark285, 298SW1026.
355-4 La 129S155.
356-5 175Ark285, 298SW1026.
356-6 175Ark285, 298SW1026.
356-28 92FlaS18, 110S539, 544 [cit CJ].
356-29 92FlaS18, 110S539, 544 [cit CJ].
357-45 [c] **Compensation of curator ad hoc is due him as such and not as counsel for absent defendant.** La 129S 155.
358-64½-New. An equity court has no power to proceed against a nonresident after the manner of foreign attachments at law. 14DelCh417, 129A857.
358-64¾-New. A statute relating to jurisdiction over nonresidents apparently confers jurisdiction over a nonresident defendant owning property in the state. 14DelCh417, 129A857.
358-70 228Ky390, 158SW(2d)251 (judgment for sale of land held unwarranted, where no bond was executed).
359-75 163La911, 113S144. But see 166La537, 117S583.
359-92 [b] **Pleading held sufficient.**-163La911, 113S144. [c] **Pleading held insufficient.**-TexCivA 292SW266.
359-1½-New. Judgment may be void where actual service is not had on curator. 163La911, 113S144.

ABSOLUTE OR ABSOLUTELY

360-21 128Misc603, 220NYS50.
361-26 128Misc603, 220NYS50
361-27 128Misc603, 220NYS50.
361-30 128Misc603, 220NYS50.

ABSTRACT

364-54 13F(2d)723, 728 [citCyc].

ABSTRACTS OF TITLE

367-34 21AlaA397, 108S626; 156La 1019, 101S402.
367-36 135 Okl 69, 273P1002 (evidence held to support finding that charges were in accordance with law).
368-38 122Kan149, 251P182.
368-40 111Conn537, 150A509.
368-41 160La987, 107S772, 774 [quot CJ].
368-51 314Mo 151, 282SW698 (constitutionality of statute fixing place for filing mechanics' liens).
368-52 [a] **Abstractor's certificate that there was no mechanic's lien in county where statute directed them to be filed** is not false because purported lien was filed in county where land was situated. 314Mo 151, 282SW698.
368-53 229AppDiv520, 242NYS644.
368-55 21AlaA397, 108S626 [quotCJ]; CalA 248P1035, 1037 [citCJ]; 111Conn 537, 150A509.
368-56 21AlaA397, 108S626 [quotCJ].
368-58 21AlaA397, 108S626; 73CalA 45, 248P1035; 36GaA257, 136SE164; 160La978, 107S772; TexCivA 273SW 908 (misrepresentations, though made in good faith amount to legal fraud). [a] (2) Plaintiff engaging title company can rely on truth and accuracy of examiner's report. 111Conn537, 150A509. [f] **Where damages have accrued,** giving new bond which relates back and covers period when damages accrued does not release sureties on earlier bond. 122 Kan149, 251P182. [g] **Misrepresentation that invalid judgment was valid,** thereby inducing purchase of judgment is breach of contract. 111Conn537, 150 A509.
369-65 [c] **Damage through abstractor's negligence.**-TexCivA 273SW908.
369-66½-New. Where a contract provides that title to abstract shall not pass until agreed price is paid, the abstractor is not liable for false representation in an abstract until the price is paid or the time of payment waived or extended. 21AlaA397, 108S626.
369-68 21AlaA397, 108S626.
370-81 Man [1929] 4DomLR318.
371-90½-New. Defense that timber expiration was in habendum clause of deed is untenable. 160La978, 107S772.
371-90¾-New. Defense that defendant did not sign or certify to correctness of abstract is not sufficient. 160La978, 107 S772.
371-91 28F(2d)459.
371-96 160La978, 107S772, 773 [quot CJ].
371-96½-New. Specific allegations of negligence or want of care and skill are not required. 160La978, 107S772.
371-97 79CalA45, 248P1035, 1037 [cit CJ].
371-2 160La978, 107S772.
371-5½-New. In an action by the vendee of land against an abstractor to recover loss from reliance on abstract furnished to vendor plaintiff must connect himself with contract through vendor. 21AlaA397, 108S626.
371-5¾-New. Evidence was insufficient to show that abstracts were ordered by defendant, in an action for the amount due for abstracts furnished. TexCivA 98SW(2d)501.
371-5¼-New. Whether abstract company omitting judgment from abstract exercised required degree of care is question for jury. 229AppDiv520, 242NYS 644.
371-5½-New. Whether purchaser of realty, in reliance on abstract, was one to whom abstract company owed duty to exercise proper care is question for jury. 229AppDiv520, 242NYS644.

ABUSE

372-10 209Ky15, 272SW24 (or vilify).
372-10½-New. "Revile" or "vilify." To maltreat; to dishonor; to defile; to hurt. 209Ky15, 272SW24.

ABUSE OF DISCRETION

372-16 Okl 286P783. [b] 132SC410, 129SE629.
373-18 [a] **Other statements.**-35 OhA 199, 172NE411.

ABUT OR ABUTTING

376-64 241 IllA71.
376-66 137MiscRep551, 244NYS51.

ACCEPT

377-83 [a] MoA 279SW155.

ACCEPTANCE

378-87 TexCivA 283SW634.
378-88 125Kan278, 264P27, 31 [citCJ].
378-88½-New. Acceptance is a fact with a mental act of intent to receive as one's own or for the owner. 190NC644, 130SE635.
378-88¾-New. Acceptance may relate to a building or personal property, or other thing, which is offered actually or constructively. 190NC644, 130SE635.

ACCESSION

382-4 50RI 336, 147A754.
383-21 181Ark127, 24SW(2d)974; Cal 292P497 (estoppel not shown).
383-22 [a] **Tires attached to truck** do not pass by accession. Mass 168NE 800; 50RI 336, 147A754.
383-27 [a] **Attachment of tires to trucks** does not merge identity of tires into trucks so as to vest title thereto in conditional seller of trucks. 134Misc Rep721, 236NYS28.
384-38 197NC371, 148SE461; 130 Okl 91, 265P626 [quotCyc].
384-39 La 119S564; 130 Okl 91, 265 P626 [quotCyc].
384-40 181Ark127, 24SW(2d)974 (tires placed on automobile). But see 158Tenn 258, 12SW(2d)705 (tire placed on automobile without reserving title becomes part of automobile by accession).
384-41. See also 36GaA109, 135SE509 (dictum).
387-95½-New. Lien law had no application, where automobile having tires under conditional sale was repossessed by seller of car. 181Ark127, 24SW(2d) 974.
388-3 [a] (2) Under code, innocent trespasser is liable for only value of timber at time of conversion, less value added in cutting and preparing it for market. 160Ga697, 128SE801. (3) In equitabe proceeding for recovery of proceeds from sale of timber by innocent trespasser deduction is made for value added by him to property. 160Ga697, 128SE801.

ACCESSORY

390-8 See also 12CustA425.
390-9 See also 12CustA425; 13CustA 569.

ACCIDENT

390-13 184 Iowa423, 166NW363, 168 NW884.

390–14 128 Okl 295, 262P1062, 1064 [quotCJ].

390–17 77CalA343, 246P1055; 124Kan 521, 261PS29; 241Mich441, 217NW27, 28, 58ALR1208 [citCJ]; 220MoA728, 293 SW521; 195NC404, 142SE220; 128 Okl295, 262P1062, 1064 [quotCJ]; 48RI 353, 138A175; TexCivA 294SW932, 933 [citCJ&Cyc]. [b] (5) Mo 286SW66. [g] 117 Or188, 243P96, 100 (citCJ).

391–18 128 Okl 295, 262P1062, 1064 [quotCJ]; TexCivA 294SW932, 933 [citCJ&Cyc]; 147Va471, 137SE456.

391–19 241Mich441, 217NW27, 28, 58 ALR1208 [citCJ]; 128 Okl 295, 262P 1062, 1064 [quotCJ]; 147Va471, 137SE 456. [a] 323 Ill 459, 154NE203; 193NC 266, 136SE726.

391–20 Mich 217NW27, 28 [citCJ].

392–23½–New. An accident is an undesigned contingency; a happening without intentional causation; that which exists or occurs abnormally; something unusual or phenomenal; an uncommon occurrence. TexCivA 271SW217.

392–23½–New. An accident is such an unexpected casualty as occurs without any one being to blame for it. TexCivA 271SW217.

392–23¼–New. Literally, a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency; often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a casualty or mishap. Webster D.; TexCivA 271SW 217.

392–23½–New. Used synonymously with "injury." 125Me374, 134A163.

392–31 322Mo1103, 19SW(2d)707, 65 ALR129.

392–32 317Mo 86, 296SW764, 772 [cit CJ]; TexCivA 271SW217 (without anybody being guilty of negligence in doing or permitting to be done or omitting to do the particular things that caused such casualty).

393–34 TexCivA 271SW217.

393–37 [a] (2) Not synonymous with "unavoidable accident." 21AlaA176, 106 S394.

395–45 77CalA343, 246P1055, 1056 [quotCJ]. [a] **Several results from one cause** held to involve but one accident. 77CalA343, 246P1055.

395–46 77CalA343, 246P1055, 1056 [quotCJ].

ACCIDENTAL

396–51 85Fed401, 29CCA223, 40LRA 653; 169Cal800, 147P1175; 326 Ill 116, 157NE32; TexCivA 283SW621. [c] 323 Ill 459, 154NE203.

ACCIDENT INSURANCE

404–2 14F(2d)530; 157Tenn597, 12 SW(2d)365.

404–2½–New. An accident policy covering total disability has been held not an indemnity against loss of income but against loss of capacity to work. 78 NH100, 97A223.

406–17 See also Eng 17TLR229.

406–19 72SW796, 24KyL1856 (agent made sole judge of risks could waive provision in policy against insuring crippled person).

406–25 193Fed55 [writ of error dism 193Fed53, 113CCA383].

406–26 117Mich521, 76NW5.

406–27 Contra 144MoA380, 128SW 836; 110Tenn720, 77SW937.

406–28 TexCivA 1SW(2d)446, 449 [cit CJ].

407–30½–New. unless insured knew agent had no authority, 106SW290, 32 KyL517.

407–31½New. A provision that notice to general agents in the United States of a foreign insurance company, or any knowledge they obtain as to the business of the company in the United States, shall not be notice or knowledge to the company is unreasonable and will not be upheld by the courts. 144MoA380, 128 SW836.

407–37½–New. Group insurance policy may apply to only two employees actually at work when policy becomes effective and to absent employees after return in good health. NJSup 149A35.

407–37½–New. Under group insurance policy employee may be required to serve certain period before he is insurable. NJSup 149A35.

407–38 22F(2d)700.

407–44½–New. Where a newspaper offered a certain sum in the event any person was killed by accident to any train in which he was traveling as a passenger with a copy of the current number in his possession, a provision that the amount would be paid only to the person or persons adjudged by the editor to be next of kin was binding on all next of kin other than one adjudged by the editor to be the next of kin. Eng 7FCtSess136 (sister adjudged next of kin, and action by brother against her for share defeated).

407–44½–New. The beneficiary under an accident policy providing indemnity for death has no rights until insured has died. 163MoA628, 146SW833; MoA 247 SW1024.

408–54 See also 303Mo 1, 259SW448.

409–62½–New. Conditional delivery is ineffectual to bind insurer unless condition is complied with. 303Mo 1, 259SW 448 (conditional on insured's accepting statements inserted by agent in application).

409–62½–New. A policy, issued pursuant to application, providing that insurance should not become effective before delivery while insured was in good health, and free from effects of injury, disease or bodily infirmity, is held a conditional delivery policy not effective until delivery to insured. 27F(2d)544.

409–63½–New. A provision guaranteeing perfect protection after the policy is in force sixty days does not relieve from liability for death from an accident occurring within the sixty days. 178Ala 492, 60S90.

409–64 125Misc174, 210NYS586 (where policy is for limited time and thereafter "for such further time as may be stated in renewal receipts," when death occurs at time not covered by such renewal receipt company is not liable).

409–65 [a] **Validity of provision.**–252 IllA232.

409–67½–New. A policy issued to a man beyond the age limit is void 59TexCivA 50, 125SW374.

409–67½–New. except where the provision is waived because it is not called to the attention of insured and he is ignorant of the clause. 172Mich59, 137 NW694.

409–67¼–New. A provision fixing the maximum insurance age is not waived by issuing a policy with knowledge that insured will attain such age before the end of the term. 252 IllA232.

409–70 125Kan124, 263P1055; MoA 179SW993 (payment made in time). [d] **Provision was held not to require prepayment of premium.**–TexCivA 17 SW(2d)1088.

409–72 68Colo 550, 191P112 (payment of one of two overdue premiums is insufficient).

409–72½–New. Insured is not required to keep timely tender good after rejection of tender and wrongful forfeiture of policy. 59AppDiv294, 69NYS291.

410–73 [b] **Statutory provisions for days of grace** do not apply to accident policies. TexCivA 10SW(2d)239.

410–74 See also 206Cal475, 274P957. But see 110 Iowa271, 81NW483.

410–74½–New. A collector for a company may continue insurance in force by furnishing money for the premium and forwarding it to the company in a separate fund. 91Nebr89, 135NW373.

410–78½–New. In a suit on a health and accident policy to recover sick benefits, failure to deduct, from recovery, unpaid premiums falling due during period premiums were not paid subsequent to time of commencement of insured's illness, was held error. La 120S424.

410–79 [c] **Paymaster's order.**–159Tenn 556, 20SW(2d)1043 (construed as part of terms of policy).

410–80 240 IllA535; 223Ky758, 4 SW(2d)709; 247Mich172, 225NW515, 517 [quotCJ]; 159Tenn564, 20SW(2d) 1040. [c] **Time of payment.**–159Tenn 556, 20SW(2d)1043 (terms of policy construed as to when premiums payable by paymaster's order out of employee's wages are due).

410–81 [c] **Payment by employer out of insured's wages under provision of policy.**–159Tenn564, 20SW(2d)1040 (duty of insurer to request deduction from last half of monthly wages if amount earned during first half is insufficient).

410–83 240 IllA535; 247Mich172, 225 NW515, 517 [quotCJ]. [e] **Insured is not entitled to notice** where he failed to earn enough to pay his premiums. 72 SC216, 51SE683.

411–84 117Ga116, 43SE433.

411–86 170 IllA527; 69Wash428, 125P 787. [a] (1) 159Tenn556, 20SW(2d) 1043.

411–91 200 IllA467 (as to additional recovery).

411–91½–New. Quitting work and collecting wage is not breach of contract where policy contemplated contingency and bound insured to make payments. Iowa 229NW702.

411–94 But see TexCivA 10SW(2d) 239.

411–95 68Colo 550, 191P112; 212 Ill 382, 72NE363; 171Mich378, 137NW266; 125Misc174, 210NYS586; 88 Or620, 172 P486, LRA1918D1126. But see La 121 S881. [c] **Refusal to accept tender** of payments held to absolve insured from further duty to pay premiums. 161La 357, 108S769.

412–96 12GaA594, 77SE917. See also 208 Iowa974, 224NW53. [a] **Express provisions as to lapse of policy for nonpayment of premiums** must be held binding. 128Me184, 146A341.

412–98 TexCivA 210SW713.

412–99½–New. A policy payable in installments may be held forfeited for nonpayment. 92Miss857, 46S714.

412–99⅓–New. Policy held lapsed under given conditions. 79Ark38, 94SW 923.

412–99¼–New. A provision that the policy having been in force for three consecutive months, insured would be allowed ten days of grace cannot benefit insured, where his policy has been allowed to lapse during any one of the preceding three months. 128Me184, 146A341.

412–99½–New. Where insured was killed policy matured at once and if there was no default before death none could arise afterwards. Iowa 229NW 702.

412–2½–New. To effect restoration, the terms of the policy must be complied with as to payment and acceptance of premium or there must be a contract based on sufficient consideration. 109 IllA609.

412–4 38Utah532, 114P134. [b] **Waiver of nonpayment of premium installment.**–38Utah532, 114P134 (stipulation lapsing policy is for insurer's benefit and insurer may treat policy as in force, though cause for forfeiture exists).

412–5 [c] See also 110Tenn720, 77SW 937.

412–6 223AppDiv169, 227NYS619. See also 67NY478.

413–8 [b] 73 Or278, 144P85.

413–9 MoA 219SW102.

413–10 149Miss289, 115S569; MoA 219SW102 (acceptance and retention is indicative of waiver, though not waiver as matter of law). But see 208 Iowa 974, 224NW53.

413–12½–New. Acceptance of an overdue premium subject to all the terms and conditions of the policy does not waive the requirement of due payment necessary to share in an accumulation benefit. 173Minn547, 218NW104.

413–13 92Ark378, 123SW384, 124SW 764 (forfeiture for nonpayment of premium waived by general agent's conduct); 98PaSuper89. [a] 19AlaA36, 94 S198. [d] 88 Or620, 172P486, LRA 1918D1126 (calling for premiums of month to month insurance later than day when due).

413–16 61 IndA479, 112NE115.

413–19½–New. Where after the expiration of a policy insured paid the annual premium and received a certificate showing renewal for one year from expiration date, such certificate controls duration of risk. 145Va694, 134SE728.

413–19½–New. Where after the expiration of a policy the agent agreed to

carry it and later collected a premium and delivered the certificate showing renewal for year from expiration date, it was held that there was no excess premium. 145Va694, 134SE728.

413-19¼-New. Acceptance of a premium after default constitutes renewal for the term covered by the premium. MoA 275SW962.

413-20 121Kan174, 246P498.

413-20½-New. In light of statutes. A policy must be read in the light of the statutes in force at the time it is issued. 261Mass245, 158NE764.

413-20⅓-New. Mutual agreement. The amount payable on death or disability and the duration and cost of the policy must be understood before there is a binding contract. 303Mo1, 259SW448.

413-20¼-New. Size of type. The statute requiring exceptions to be printed with the same prominence as benefits, and reductions of benefits with greater prominence, is inapplicable to a contract of another state. 182Wis223, 196NW229.

413-20½-New. Debenture certificate attached to policy is construed to mean that the privilege of collecting half of the gross premiums is earned by insured if and when he has paid the annual premium for any immediate preceding continuous period of twenty years without collecting any loss. 101Misc541, 167NYS673.

414-23 203 Iowa623, 213NW259, 51 ALR1327.

414-23½-New. [§ 36a] A1½. **Entire and Severable Contract.** A policy insuring a husband and wife is separable into two distinct contracts of insurance, so that misrepresentation in one has no effect on other. 180Cal 252, 180 P607.

414-23½-New. A policy providing, in consideration of weekly premiums, for weekly sickness or accident benefits and a given sum on the death of insured was entire and indivisible and not several. 18GaA494, 89SE633.

414-23¼-New. Where a policy provides for weekly benefits for sickness or accidents and payment upon the death of insured in consideration of weekly premium, a provision that funeral benefits is weekly term insurance renewable at the option of insurer does not affect the right of insured to continuance of the sickness and accident insurance. 18GaA494, 89SE633.

414-24 215Ala109, 100S7; 65 IndA109, 114NE992; 203 Iowa623, 213NW259, 51ALR1327; 214Ky56, 282SW1112; 221AppDiv494, 224NYS644; 127Misc 344, 216NYS897.

414-25 203 Iowa623, 213NW259, 51AL R1327; 226Ky328, 10SW(2d)1079; 221AppDiv494, 224NYS644; 127Misc 344, 216NYS897; TexCivA 271SW217.

414-26 5F(2d)69; 5F(2d)71 (ambiguous words); 43F(2d)673; 221AppDiv 494, 224NYS644; 127Misc344, 216NYS 97; TexCivA 271SW217. [b] **Applications of rule.**-5F(2d)71 [aff 5F(2d) 69].

414-26½-New. A policy insuring an employer for accidents to employees and an employment contract will be construed together although the policy was executed on a prior date. 19NM 193, 142P798.

414-27 15F(2d)976; 214Ala663, 108S 575; 177Ark87, 7SW(2d)775; 178Ark 1090, 13SW(2d)621; CalA 292P987; 164Ga392, 138SE87; 241 IllA283; 245 IllA180; 245 IllA350; 65 IndA109, 114 NE992; IndA 169NE65; 202 Iowa43, 209NW406; 203 Iowa623, 213NW259, 51ALR1327; Iowa 224NW771; 123Kan 731, 256P981; 214Ky56, 282SW1112; 219MoA323, 271SW1011, 1013 (if the terms are plain and unambiguous they cannot be changed by judicial construction, for that would be making new contract for parties); NJ 150A243; 127 Misc344, 216NYS97; 132Misc761, 230 NYS473; 55ND647, 215NW93, 54ALR 289; 21 OhA129, 152NE796; 114 Okl 223, 245P837; 117 Okl 35, 245P582; TexCivA 269SW507; TexCivA 270SW 246; TexCivA 280SW336; TexCivA 16 SW(2d)834; TexCivA 16SW(2d)842; 147Va471, 137SE456. But see 252 IllA 232.

415-28 203 Iowa623, 213NW259, 51AL R1327.

415-29 32F(2d)995; MoA 17SW(2d) 570; TexCivA 174SW687 (questions and answers construed liberally in favor of insured).

415-30 18F(2d)879 (provision held not ambiguous or misleading); 178Ark 1017, 138W(2d)32; 253 IllA20; 65 Ind A109, 114NE992; 219MoA322, 271SW 1011; 204AppDiv452, 197NYS554; 127 Misc344, 216NYS97; 114 Okl 223, 245 P837; 117 Okl 35, 245P582; TexCivA 197SW237; 147Va471, 137SE456.

416-31 114Nebr505, 208NW632; 204 AppDiv452, 197NYS554; TexCivA 270 SW246.

416-32 144SC417, 142SE593, 599 [quot CJperCothran,J].

416-32½-New. And the rule is inapplicable where the language is unambiguous. 48RI 208, 136A690, 56ALR488.

416-32⅓-New. Provision diminishing liability pro rata, if insured carries other insurance covering same loss, does not apply to life insurance, although life insurance policy provided double indemnity for death through external, violent, and accidental cause. TexCivA 269SW507.

416-33 252 IllA232; 114Nebr505, 208N W632; 135Misc883, 238NYS613 (exceptions and reservations); 55ND647, 215NW93, 54ALR289. [d] **Each word of policy is presumed to have purpose** and must be given effect. 5F(2d) 71. [e] **Policy must be construed as a whole.**-MoA 16SW(2d)663.

416-34 219MoA322, 271SW1011 (rule of interpretation by which meaning of not merely one word but that of several may be arrived at, where there is use or room for construction).

417-38 37F(2d)488; 164Ga392, 138SE 787, 790 [citCJ]; 89 IndA263, 166NE 15; Ont [1927] 3DomLR89.

417-39 164Ga392, 138SE787, 790 [cit CJ]; 36GaA540, 137SE403; 219MoA 322, 271SW1011; 114Nebr505, 208NW 632; 197NC122, 147SE740. [a] **Statement on outside top of contract** that it "provides indemnity for death due to accidental injuries" is not part of contract so as to warrant recovery from all accidental injuries. 38F(2d)724.

417-40 164Ga392, 138SE787, 790 [cit CJ]. [b] **So long as contract is plain and unambiguous, not open to different constructions,** and is so framed that insured is not justified in thinking contract to be something other than it is, it is not within power of court to change it or make a new contract for parties by judicial construction. 219 MoA322, 271SW1011.

417-41 31F(2d)919; 42F(2d)997; 203 Iowa623, 213NW259, 51ALR1327; 208 Iowa594, 224NW494; 154Miss400, 122 S471; 205MoA81, 220SW20 ("surgeon"); 104NJL117, 138A894; 221App Div494, 224NYS644; 197NC122, 147SE 740; TexCivA 289SW1020. [b] **"Sound physical condition."**-38F(2d) 590. [c] **"Superintending"** within provision of policy specifying insured's occupation has been held not restricted to overseeing and directing workmen. IndA 170NE346(1stcase).

418-47½-New. Policy remains a contract of the state of inception, although insured moves into another state, when there has been no forfeiture for nonpayment of dues. 182Wis223, 196NW 229.

418-48 159Tenn556, 20SW(2d)1043.

418-51 Iowa 224NW771; 218Ky825, 292SW511; 100WVa1, 129SE711; 240 Fed462. [e] **Statute does not apply to** accident policies. 94Fed743, 38CCA1.

418-53 209 IllA53 (statements held representations and not warranties).

419-58 See also 112Fed495.

419-61 180 IllA300 (by-law of mutual company limiting liability for death to death occurring within ninety days after accident held not violation of L. [1893] § 15 regarding what must appear in policy); TexCivA 136SW 817 (insured is not bound by policy to abide by void by-law as to venue).

420-77 99CalA723, 279P464 (failure to continue as reader of paper held not to void policy or condition to recovery). [a] **Forfeiture or lapse of contracts of insurance** is not favored. MoA 178SW(2d)570. [b] **Effect of provision requiring notice of other insurance.**-159Tenn531, 19SW(2d)229 (other insurance of which notice is given held to work no reduction of liability under construction of provision).

420-78 139Minn246, 166NW222, Ann Cas1918E508. But see 213Ala300, 104 S522. [a] **Automatic suspension.**-139 Minn246, 166NE222, AnnCas1916E508.

420-78½-New. Where insured notified insurer of a desire to cancel the policy, and ignored insurer's overture for a continuation, and precluded payment of premiums from wages, the policy was canceled. TexCivA 17SW(2d)1088.

420-78½-New. The statute had no effect on insured's voluntary discontinuance of the policy, since insured was not bound to keep the policy in force. TexCivA 17SW(2d)1088.

420-81½-New. Elements of "estoppel" are not essential to waiver of forfeiture as distinguished from waiver of defense of forfeiture. MoA 220SW996.

420-81½-New. Notwithstanding an agreement of the parties, the warranties may, by reason of circumstances, be regarded as waived by the company. 112Kan412, 210P1096.

420-81¼-New. A provision in a policy for forfeiture on nonpayment of the premium is deemed waived by payment of benefits up to date subsequent to the due date of the premium. 93Me461, 45A508.

420-81⅓-New. Where insured changes his occupation with the company's knowledge and is injured in the new occupation, the company cannot rely on false representation as to the duties of the old occupation. 183 Iowa652, 167NW594.

420-81⅓-New. [§ 60a] H½. **Estoppel as to Defects.** After entering into a contract with a married woman, and after receipt of premiums and the occurrence of an accident, insurer is estopped to deny liability on the ground that insured could not recover for the value of her services. 171MoA518, 153 SW789.

420-83 MoA 283SW64; 220AppDiv199, 221NYS157; Man [1923] 2WestWkly 162. [c] **Time as of which avoided.**-19 AltaL514, [1923] 2DomLR782, [1923] 2WestWkly25. [d] **Good faith of insured** does not prevent avoidance of policy where misrepresentation is material. Man [1923] 2WestWkly162.

420-84 Man [1923] 2WestWkly162.

421-85 See also 245NY601, 157NE874.

421-86 But see 180Cal 252, 180P607.

421-87 138Fed629, 71CCA79; 65Ark 295, 45SW1065; 172Cal 261, 156P481; 23TexCivA359, 57SW315. [a] (3) Failure to state that applicant was also sworn special police officer for railway company. 199 Iowa1195, 201NW 595. [d] **Intent to deceive inferred** where insured must have known answer to question asking him to state fully his occupation did not so state. 199 Iowa1195, 201NW595. [e] **Change of occupation.**-202AppDiv681, 195NYS395. [f] **Statement** held not false representation. 156NYS573; 145Wis450, 130 NW475.

421-88 [a] **Statements of weekly earnings** held to have no reference to money for accidental loss but only to questions of weekly indemnity. 128Ky43, 107SW325, 32KyL856. Contra 129Ky 682, 112SW835.

421-89 27F(2d)544, 545 [citCJ].

421-90 73 IndA207, 126NE86; 167 Mich274, 132NW1067, AnnCas1913A847, 160Mich137, 125NW59; TexCivA 72 SW1016. [a] 185Ky664, 215SW821; 40 RI 222, 100A395 [rearg den 40RI 320, 101A6]. [b] **Notice of other insurance insufficient.**-Ala 127S850. [c] **Life insurance as other insurance.**-178Wis428, 190NW97, 29ALR93. [d] **Since written application constitutes contract,** any parol agreement concerning additional insurance is of no effect. 176 Ill 194, 52NE49. [e] **Failure to disclose other applications** on which policies were not delivered does not avoid policy. 27F(2d)544.

421-90½-New. Fraud in obtaining an accident policy may be the basis of a claim by insurer for the return of money paid out. 73 **IndA**207, 126**NE**86.

421-90½-New. Change in condition material to risk between opening of negotiations and issuance of policy must be disclosed to insurer. **Wash** 287 **P**894.

421-91 119**Me**94, 109**A**379.

421-92½-New. An incorrect statement of opinion will not avoid a policy if made in good faith and without intention to deceive. 201 **Iowa**1334, 208**NW** 213 (statement as to whether habits were correct and temperate held one of opinion).

421-94 193**Fed**343, 348, 113**CCA**267; 209 **IllA**53; 201 **Iowa**1334, 208**NW**213; 209**MoA**81, 237**SW**144; 197**NY**420, 90 **NE**947, 26**LRANS**1167, 18**AnnCas**701; 220**AppDiv**199, 221**NYS**157; **TexCivA** 4 **SW(2d)**599 (as to amount of income); 158**Wis**278, 148**NW**878; 179**Wis**431, 190 **NW**910; **Eng** 6**FCtSess**437 (answer to question held material on application of milkman for policy against driving accidents); 54 **OntL**24, 24 **OntWN**246, 55 **OntL**330 (misrepresentation not inducing contract). [a] **Man** [1923] 2**West Wkly**162 (weighing risk and considering premium). [c] **Subsequent loss as criterion of materiality.**–(1) **Man** [1923] 2**WestWkly**162. [d] **Holding statement that insured's policy had never been canceled by another company,** if false, though not material, will avoid policy. 40**RI** 222, 100**A**395 [rearg den 40**RI** 320, 101**A**6].

421-95 See also 107**WVa**380, 148**SE** 319.

421-99 84**Vt**510, 80**A**817. But see **Man** [1923] 2**WestWkly**162.

421-1 157**Tenn**597, 12**SW(2d)**365 (statements held not to constitute false answers). [b] **Other insurance covering same loss.**–157**Tenn**597, 12**SW(2d)** 365.

421-1½-New. or had not received indemnity from another company under a similar policy: 209 **IllA**53.

421-3 [a] 93**AppDiv**524, 87**NYS**821; 111**AppDiv**386, 97**NYS**836.

422-5 [a] See also 158**Wis**278, 283, 148**NW**878 [citCyc].

422-6½-New. Where insured's name was C but he had been represented for many years as E, to put down E in a policy is not such misrepresentation as will avoid it. 45**CalA**332, 187**P**996.

422-8 110**Misc**489, 181**NYS**550.

422-9 172**Cal** 261, 156**P**481, **LRA**1916**F** 1026; 185**Ky**664, 215**SW**821; 103**Miss** 269, 60**S**218; 46**Nev**30, 205**P**801; 197 **NY**420, 90**NE**947, 26**LRANS**1167, 18 **AnnCas**701; 225**NY**480, 122**NE**628 [aff 174**AppDivS**71mem, 159**NYS**1099mem]; 93**AppDiv**524, 87**NYS**821; 111**AppDiv** 386, 97**NYS**836; 135**Wis**259, 115**NW**869, 17**LRANS**1011.

422-12½-New. Where blanks for warranties were not filled out nor signed, the policy cannot be avoided for breach of warranty. 115**NYS**631.

422-13 113**Ark**174, 167**SW**845; 40**App DC**249, 46**LRANS**1108 [certiorari den 238**US**624mem, 35**SCt**662mem, 59**L ed** 1494mem]; 176 **Ill** 194, 52**NE**49; 185 **Ky**664, 215**SW**821; 135**Wis**259, 115**NW** 869, 17**LRANS**1011. [g] (6) Buying and selling cattle held occupation within meaning of policy. 65**Ark**295, 45 **SW**1065. (7) Duties of altering and pressing clothing are within term "tailoress" in application. **TexCivA** 1 **SW(2d)**446. (8) Representation by contractor that his duties were those of "proprietor—supervising only" is not false though sometimes in brick construction he showed his servants how work should be done by himself taking trowel and laying bricks. 127**Va** 140, 102**SE**585. [i] (2) When representation as to temperate habits is not untrue when made, recovery may be had for death two years later, from wood alcohol poisoning. 33**F(2d)**853.

423-14 238**US**624, 35**SCt**662, 59**L ed** 1494. [b] See also **TexCivA** 174**SW**687.

423-15 238**US**624, 35**SCt**662, 59**L ed** 1494. [d] **Does not include** acute attack of bronchitis from which insured had recovered at time policy was accepted. 135**Wis**259, 115**NW**869, 17**LRA NS**1011.

423-17½-New. A clause avoiding a policy for a false statement of weekly benefits is applicable only to weekly indemnity in case of injury and not to injury resulting in death. 28 **OhCir Ct**700.

423-18 47**Colo** 401, 107**P**1087; 204 **Iowa**1108, 216**NW**702; **Iowa** 224**NW** 771 (insured is justified in relying on advice and assistance of soliciting agent in preparing his application for insurance); 59**Kan**521, 53**P**856; 218**Ky**825, 292**SW**511; 72**SW**796, 24**KyL**1856; 81 **Mont**351, 263**P**101; **TexCivA** 1**SW(2d)** 446, 449 [citCJ]. [b] (3) 106**Ark**91, 152 **SW**995, 44**LRANS**493; 218**Ky**825, 292 **SW**511. (6) Where insured who was asked if he had ever had appendicitis stated he had been operated on therefor but agent inserted negative answer against applicant's protest. 81**Mont**351, 263**P**101. [c] See also 131 **Or**327, 279**P** 855.

424-20 **Eng** 6**FCtSess**437; **Eng** [1907] **SC**484.

424-22 33**F(2d)**853.

424-22½-New. Where a renewal policy is issued subject to statements made as to insured's physical condition at the time of renewal, falsity of the statements avoids the renewal policy. 54 **OntL**24, 24 **OntWN**246, 55 **OntL**330.

424-23 85**Colo** 591, 277**P**811 (age of insured); 112**Kan**412, 210**P**1096; 137 **Mich**59, 137**NW**694 (limitation as to age of insured); 94**Wis**253, 68**NW**1009.

424-25 118**Nebr**557, 225**NW**688. But see **TexCivA** 72**SW**1016.

424-26 146**SC**41, 143**SE**668.

424-28 161**La**229, 108**S**464, 45**ALR** 1521.

424-29 72**SW**796, 24**KyL**1856; 128**Misc** 893, 220**NYS**289. [a] 294**Pa**406, 144 **A**294.

424-30 128**Misc**893, 220**NYS**289; 140 **NC**589, 53**SE**354; 146**SC**41, 143**SE**668. [a] **BC** 28**WestLR**425. [e] **Knowledge of former agent** who had nothing to do with application or policy in question is not imputable to insurer. 199 **Iowa** 1195, 201**NW**595.

424-30½-New. Where insurer is without knowledge of the facts there can be no waiver. 54 **OntL**24, 24 **OntWN** 246, 55 **OntL**330.

425-33 37**F(2d)**488 (insured must die as result of injury); **TexCivA** 218**SW** 591 (does not include self-destruction purposely inflicted); **TexCivA** 271**SW** 217. [e] 270**Fed**946.

425-35 184 **Iowa**423, 166**NW**363, 151 **NW**479, 168**NW**884; 241**Mich**441, 217 **NW**27, 58**ALR**1208; 1 **OhA**22, 15 **OhCir CtNS**513, 34 **OhCirCt**76. [b] **There is no substantial difference** between "accidental death" and "death by accidental means." 65**Utah**465, 238**P**259, 41 **ALR**1495.

425-36 85**Fed**401, 29**CCA**223, 40**LRA** 653; 169**Cal** 800, 147**P**1175; 42 **IndA** 483, 85**NE**1032; 180 **Iowa**805, 161**NW** 114; **Iowa** 161**NW**125; 184 **Iowa**423, 166**NW**363; **Iowa** 151**NW**479, 168**NW** 884; 170**Ky**47, 185**SW**496, **LRA**1916**E** 952; 241**Mich**441, 217**NW**27, 58**ALR** 1208; 208**MoA**679, 236**SW**429; **TexCivA** 271**SW**217. [c] 33**F(2d)**853; 262**Mass** 522, 160**NE**415, 56**ALR**1088.

426-37 143**Ga**785, 85**SE**1035; 42 **IndA** 636, 84**NE**772; 113**Minn**510, 130**NW**5; 174**NC**642, 94**SE**289, **LRA**1918**B**508.

426-39 147**Va**471, 137**SE**456. [a] 209 **IllA**147.

426-40 **TexCivA** 3**SW(2d)**478 (unforeseen, involuntary, and unintentional).

426-41 See 28 **OhA**267, 162**NE**680.

426-42 **IndA** 142**NE**18; 216**MoA**507, 270**SW**707; 108**WVa**550, 151**SE**841; 54 **OntL**24, 24 **OntWN**246, 55 **OntL**330. [d] **Means** must also be accidental. 155 **Iowa**737, 133**NW**752, 42**LRANS**562.

426-42½-New. An injury results through accidental means where, in the act which precedes it, something unforeseen, unexpected, or unusual occurs which produces the injury. 241**Mich** 441, 217**NW**27, 58**ALR**1208.

427-44 216**MoA**507, 270**SW**707.

427-45 155**Fed**54, 85**CCA**122; 42**F(2d)** 997; 189**Cal** 406, 209**P**26, 26**ALR**116; 36**GaA**540, 137**SE**403 (policy covers any accident that might happen after original accidental cause of injury); 209 **IllA**147; 243 **IllA**181, 188 [citCJ]; 245 **IllA**180; 253 **IllA**20; 165 **Ind**317, 75**NE** 262, 112**AmSR**232, 1**LRANS**422; 42 **Ind A**483, 85**NE**1032; 42 **IndA**636, 84**NE** 772; 107 **Iowa**538, 78**NW**252, 70**AmSR** 212, 43**LRA**693; 176 **Iowa**110, 155**NW** 241, 157**NW**726, **LRA**1917**A**1050; 161**La** 229, 108**S**464, 45**ALR**1521; 166**MoA**209, 148**SW**116; 188**MoA**457, 174**SW**833; 56 **Nebr**235, 76**NW**562; 102**Nebr**629, 168 **NW**596; 224**NY**18, 120**NE**56; 132**Misc** 200, 229**NYS**669; 119 **Or**357, 249**P**820, 822 [quotCJ]; **Tex** 238**W(2d)**282; **Tex CivA** 280**SW**338; 49**CanSC**115, 16**Dom LR**670, 28 **OntL**537, 13**DomLR**113. But see 221**MoA**626, 287**SW**1053. [a] **Involuntary death by drowning** held accidental. 147 **Ind**543, 44**NE**661, 46**NE** 990.

427-46 33**F(2d)**853 (drinking liquor containing wood alcohol); 85**PaSuper** 398, 402 [citCJ].

427-47 See also 176**Minn**171, 222**NW** 912; **TexCivA** 16**SW(2d)**301 (nitrous oxide).

428-49 190 **Iowa**1172, 179**NW**931; 179 **Wis**431, 190**NW**910. [a] **Death from inhalation of poisonous gases.**–256 **IllA** 47.

428-51 See also 119 **Or**357, 249**P**820, 822 [quotCJperBurnett.J].

428-54 **MoA** 294**SW**97.

428-58 184**Mich**406, 151**NW**593, **LRA** 1916**A**475 (ptomaine poisoning).

428-60 **IndA** 169**NE**65 (falling off tail gate of truck); 221**AppDiv**494, 224 **NYS**644; 49**CanSC**115, 16**DomLR**670, 28 **OntL**537, 13**DomLR**113.

428-61 241**Mich**441, 217**NW**27, 58**ALR** 1208; 28 **OhA**267, 162**NE**680. [a] **Death from freezing when lost while hunting** is accidental within terms of life insurance policy providing for double indemnity. 241**Mich**441, 217**NW**27, 58**ALR**1208.

428-63 22**F(2d)**700; 252**Mass**328, 147 **NE**858; 166**Wis**504, 166**NW**20, **LRA** 1918**C**127.

428-66 230**Ky**341, 19**SW(2d)**973(2d case) (death from bullet intended for another).

428-70 101**Ky**303, 40**SW**909, 19**KyL** 462, 72**AmSR**413.

428-70½-New. apoplexy resulting from excitement at seeing a man burning to death. **TexCivA** 169**SW**389.

429-72 **IndA** 130**NE**874.

429-73 **IndA** 130**NE**874.

429-74 217**MoA**429, 266**SW**1001.

429-75 187 **Ind**447, 120**NE**42. **LRA** 1918**F**646; 170**Ky**47, 185**SW**496. **LRA** 1916**E**952; 107**Tex**582, 182**SW**673, **L RA**1916**E**945, **AnnCas**1918**A**517 [rev **CivA** 145**SW**636]. See also 170**Ky**47, 185**SW**496, **LRA**1916**F**952.

429-78 8**F(2d)**612; 10**AlaA**642, 65**S** 852; 173**Cal** 1, 158**P**1022; 170**Ky**47, 185**SW**496, **LRA**1916**E**952; 219**Mass** 147, 106**NE**607, **LRA**1915**B**872; 159 **Tenn**138, 17**SW(2d)**11; **TexCommnA** 292**SW**193; 60 **OntL**476, [1927] 3**Dom LR**89. [b] **Death** resulting from reopening, in fit of coughing, incision to remove appendix. 193**Ala**90, 69**S**64, **LRA** 1915**E**955.

429-79 42 **IndA**483, 85**NE**1032.

429-81 178**Ky**369, 198**SW**1163, **LRA** 1918**C**101; **TexCivA** 197**SW**889, 198**SW** 810.

429-88 206**Cal** 141, 273**P**560(1st case); 170**Ky**47, 185**SW**496, **LRA**1916**E**952. But see 187 **Ind**447, 120**NE**42, **LRA**1918 **F**646. [a] But see 187 **Ind**447, 120**NE** 42, **LRA**1918**F**646.

429-89 25**AppDC**46; 155 **Iowa**737, 133 **NW**752, 42**LRANS**562. 201 **Iowa**1249, 207**NW**132; **TexCivA** 283**SW**621.

430-90 201 **IllA**295; **IndA** 130**NE**874; 107 **Iowa**538, 78**NW**252, 70**AmSR**1212, 43**LRA**693; **TexCommnA** 292**SW**193; **TexCivA** 283**SW**621; 69**Utah**309, 254**P** 1005. [a] (1) **TexCivA** 280**SW**338; **TexCivA** 16**SW(2d)**357. (2) Caused by lifting heavy substance which fell against insured. 85**Miss**31, 37**S**461. [d] (3) Where insured was suffering from arteriosclerosis. 93**AppDiv**364, 87 **NYS**640. (4) Where accidental strain ruptured cancerous growth and injury could not have occurred but for such growth. 283**Mo** 63, 222**SW**778. [f]

Rupture of kidney.–174Mo 256, 73SW 592, 97AmSR560, 61LRA459.

430–91 35F(2d)667; 174Ky683, 192S W636 (pneumonia); 158NC305, 73SE 1002 (paralysis); 56ND517, 218NW 220, 60ALR962; TexCivA 295SW944; 41Utah112, 124P518; 54 OntL24, 24 Ont WN246, 55 OntL330.

430–96 220MoA780, 275SW988.

430–1 155Fed54, 85CCA122; 179 Ill A330; 42 IndA483, 85NE1032; 204App Div473, 198NYS416 (death from dentist's nitrous oxide while in abnormal condition); TexCommnA 292SW193; TexCivA 295SW944; 54 OntL24, 24 Ont WN246, 55 OntL330; 25 OntWN237 [dism app 24 OntWN317] (preëxisting appendicitis hastened by accident).

430–1½–New. Some policies provide that, "in case of accident or disease resulting thereafter" in specified losses, the full value of the policy may be matured. 142Ark240, 218SW371.

430–1½–New. Under such policy recovery is properly allowed whether the disease existed at the time of the policy or first began afterward. 142Ark240, 218SW371.

430–2 262Fed354 (caused by rubbing head with towel not known to be infected); 24GaA497, 101SE541; 83 IndA 344, 147NE533 (abrasion and puncture with blackhead eradicator); 114Mel, 95 A229; 93Nebr629, 141NW815; 106 Nebr575, 184NW84, 18ALR106; 157 Tenn254, 8SW(2d)369, 64ALR962; 117 Wash7, 200P587; 127Wis67, 106NW 1055, 115AmSR997, 5LRANS926, 7Ann Cas484. But see 197 IllA462. [d] (2) Death from septicæmia from inoculation of accidental wound to finger held primarily caused by wound. 117Wash 7, 200P587. [e] **Under policy providing indemnity for accidental injuries resulting from blood poisoning,** insured can recover for septic poisoning resulting from accidental cut by barber. Tex CivA 318SW(2d)362.

430–3 MoA 272SW995 (blood poisoning resulting from extraction of tooth).

430–3½–New. "Infection" does not include internal inflammations causing pus and germs to form. 77Kan561, 95 P565.

430–3½–New. Blood poisoning of a nurse through streptococcic germs flying from a patient is an injury sustained through accidental means. 203 Cal 465, 265P207, 56ALR860.

430–3¼–New. Such poisoning is a bodily injury. 203Cal 465, 265P207, 56 ALR860.

431–8 42F(2d)399; 133Fed892, 66CCA 622, 68LRA499; 163 Iowa217, 143NW 574, 48LRANS600; 125Kan324, 329, 264P65 [citCJ]; 167Minn340, 209NW 20 [citCJ]; 216MoA507, 270SW707; 114 Okl 223, 245P837; 122 Okl 43, 250P787; 104WVa162, 139SE656, 57ALR968. But see 141 Miss388, 107S520. [a] 163 Iowa 217, 143 NW574, 48LRANS600; 161Ky 163, 170SW525. [d] 125Kan324, 264P 65; TexCivA 244SW863. [e] **Death by shooting while fleeing from officers to avoid arrest** is accidental where officers had no warrant and no probable cause to believe that insured had committed offense. 216MoA507, 270SW707. [f] **Shooting by intoxicated person.**–142 Miss388, 107S520. [g] **Where killing of insured by beneficiary** is intentional and not justified, it is "accidental" within policy. 176Ark525, 3SW(2d) 320. [h] **As dependent upon whether injury was naturally to be foreseen.**–159Tenn138, 17SW(2d)11.

431–9 167Minn340, 209NW20 [citCJ]; 69MoA186; 104WVa162, 139SE656, 57 ALR968.

431–10 232Pa215, 81A207.

431–11 267 Ill 267, 108NE296, LRA 1915E127, AnnCas1916C577 [rev 186 IllA499] (where fight was voluntary). 333 Ill 175, 164NE159(2dcase); 169 Minn53, 210NW634. [a] 174NC642, 94 SE289, LRA1918B508. [b] **Killing of insured while resisting arrest** held not accidental. 211Fed1, 127CCA427. [c] **Insured killed by officer to avenge injury to officer** renders insurer liable. 211 Fed1, 127CCA427.

431–11½–New. The test is, did the conduct of insured show appreciation of hazard of life and limb. 104WVa162, 139SE656, 57ALR968.

431–11⅓–New. Where the insured is the aggressor and a third person kills him in self-defense, he cannot recover. 136 Ark84, 206SW64.

431–11¼–New. Where insured while armed is shot in attempting to recover money lost in a gambling house, death is not accidental. 173Cal 1, 158P1022.

432–12 42F(2d)997; 197Mass101, 83 NE398, 125AmSR332, 14LRANS503, 14 AnnCas290; 219Mass147, 106NE607, LRA1915B872; 32NM34, 250P635, 52 ALR367; 8D 231NW529; 104WVa162, 139SE656, 57ALR968.

432–13 255Fed483, 166CCA559; 270 Fed946; 29F(2d)185 (rupture of vein due to surgical operation); Kan 289P 414; 174Ky683, 192SW636; La 124S 821; 299Pa125, 149A96 (insurer not liable for death where proximate cause of death was hypersusceptibility of individual to particular anæsthetic); 157Tenn 254, 8SW(2d)369, 64ALR962; Tex CommnA 276SW900 (fainting spell or other temporary bodily infirmity may be "accidental means"); TexCivA 15SW (2d)704 (death from heart dilation following overexertion in cranking automobile); 104WVa162, 139SE656, 57ALR 968. [d] **Physical injury caused by voluntary exertion or strain,** which is unaccompanied by anything which is involuntary, unforeseen, and unusual, is not result of "external, violent and accidental means." 8F(2d)612 (cranking automobile). [e] **Accidental means** is not cause through which injury or death occurs where there is unexpected result from intentional act without mischance or mishap in doing of act itself. 220MoA780, 275SW988. [f] **Nature of accident** held immaterial where drowning was due to accident. 178Cal 153, 172P1098. [g] **Injury to eye through infection** from using employer's towel held not caused by external, violent and accidental means. 40GaA692, 151SE 399.

432–14 20F(2d)818 (gas asphyxiation); 28F(2d)707, 61ALR1069; 178 Ark683, 11SW(2d)493, 61ALR1192 (heat prostration or sunstroke causing death); 161La229, 108S464, 45ALR 1521; 241Mich441, 217NW27, 28, 58 ALR1208 [citCJ]; TexCommnA 29SW (2d)980 (administration of anæsthetic); 147Va471, 137SE456. [a] (2) Other instances. NH 149A512. [d] (2) Death from freezing when lost while hunting is within double indemnity provision of life insurance policy. 241Mich441, 217 NW27, 58ALR1208. [i] Mont 292P 253; 32NM34, 250P635, 52ALR367; 85PaSuper398, 402 [citCJ]. [j] **Puncture of bowels** by insertion of tube used to treat hemorrhoids held within policy. 196 Ind629, 149NE164, 42ALR239. [k] **Death caused by milk sickness or alkali poisoning** due to drinking milk from cows grazing on goldenrod is within terms of policy, though cause considered infectious disease from known bacillus. 32NM34, 250P635, 52 ALR367. [l] **Death from ptomaine poisoning** is within policy. 147Va471, 137 SE456. [m] **Death from acute indigestion** is within policy. 147Va471, 137SE 456. [n] **Carbon monoxide poisoning.**–Can [1929] 1DomLR328. [o] **Death from blood poisoning caused by pulling hair from nose** is through "accidental means." 38F(2d)724. [p] **High temperature.**–39F(2d)763. [q] **Death resulting from infection** caused by pulling of wisdom tooth is caused by external, violent, and accidental means. Tex 23S W(2d) 282.

432–15½–New. Strain resulting from voluntary exertion is not accidental injury. 22F(2d)111.

432–15⅓–New. That a policy covering loss of life from violent external and accidental means also contains a provision for indemnity in case of disability not resulting in death does not make it other than a policy of insurance on life. 146Mo 114, 47SW948.

432–16 45CalA462, 187P1070; 226Ky 372, 10SW(2d)1073; 145Wash679, 261 P792 (infection). [a] **"Violence"** means any degree of force whatever. 42F(2d) 997.

433–19 45CalA462, 187P1070; 262 Mass522, 160NE415, 56ALR1088; 145 Wash679, 261P792 (blood poisoning); 60 OntL476, [1927] 3DomLR89 (asphyxiation). [b] (3) Death from blood poison developing in carbuncle caused by bruise held death from external, violent, and accidental means and not disease. 104Wash575, 177P650.

433–20 156Ark109, 245SW307. [a] (1) 136 Iowa140, 113NW566.

433–21 123Minn505, 144NW160, 49 LRANS1022, AnnCas1915A536.

433–25 199AppDiv223, 191NYS474.

434–26 140Ky609, 131SW523.

434–27 84MoA605 (hernia); 85Pa Super398, 402 [citCJ] (vomiting and lump on throat caused by taking poison).

434–28 123Minn505, 144NW160, 49 LRANS1022, AnnCas1915A536 (mental derangement).

434–35 87Vt138, 88A531, 47LRANS 924. [b] **Felon on insured's finger,** resulting from accidental bruise, is "external and visible" mark of wound. 87 Vt138, 88A531, 47LRANS924.

434–43 MoA 248SW984.

435–44 8F(2d)325; 55ND750, 215NW 217, 55ALR1049.

435–46 8F(2d)325; MoA 246SW613; 55ND750, 215NW217, 55ALR1049 (rule applied in use of word "employment"). [c] **Risks held not incidental.**–183 Iowa776, 166NW455 (county engineer drowned in crossing flooded river).

435–47 2 OhA312, 19 OhCirCtNS392; 174Wis208, 182NW845.

435–48 136 Iowa140, 113NW566; Tex CivA 275SW622 (where recreation specifically excepted in provision for reduction in case of increased hazards).

435–49 MoA 215SW591 (inspection of leaky roof held within "ordinary duties about his residence"). [a] **Office duties.**–96Nebr744, 148NW913. [b] **Foreman of lineman gang** held acting in line of his employment in cutting electric wire, to instruct men, under limitation of "overseeing duties only." 179NC489, 102SE887.

435–50 [a] (4) "Supervising" business includes doing of manual labor. 6F(2d)540. (5) Other applications. 257Fed225, 168CCA309 [certiorari den 250US662mem, 40SCt11mem, 63Led 1195mem] (physician and surgeon); 66Ark588, 53SW49, 74AmSR112 (machinist); Kan 289P414. [c] **Risks held not included.**–205MoA81, 220SW20 (veterinarian blood poisoned, under policy covering "surgeon").

436–53 [b] **Period of employment** includes reasonable time for ingress to, and egress from, place of work while on master's premises. IndA 168NE468.

436–56 [e] **"Classification of risks"** defined.–225NY76, 121NE465 [rev 160NYS 247 (rev 158NYS79)]. [f] **"Cattle shipper and tender"** does not include tender of horses in transit. 75Vt249, 54A176. [g] **"Superintendent in woods."**–178 Wis428, 190NW97, 29ALR93. [h] **Statutory requirements.**–274Pa46, 117A406 (insufficient classification of occupation).

436–58 [a] **Injury held within terms of policy.**–277Ark87, 7SW(2d)775.

436–60 124Md130, 91A753, AnnCas 1916D954.

436–61 [a] **"Truckman"** may not include driver of auto truck. 282Pa389, 128A93.

436–61½–New. Where a farmer insured himself against injury, while engaged in ordinary farm labor, injury sustained while traveling about the country to buy live stock is not sustained while engaged in ordinary farm labor. SD 228 NW805.

436–62 BC 12DomLR364, 3WestWkly 630.

436–62½–New. The same rule is true where the agent knew of the more hazardous occupation when making the classification. 79WVa576, 92SE88, LRA 1917D1174.

437–64½–New. Under the provisions of a policy fixing the amount of recovery, where insured changes his occupation, the rate and classifications on file at the time of the injury and not those at the time the policy was issued govern. 261Mass245, 158NE764.

437–64½–New. A statute relating to recovery where insured changes his occupation contemplates that different classifications and rates may be made after issuance of the policy, but before injury occurs, which when filed affect the amount recoverable. 261**Mass**245, 158**NE**764.

437–68 133**Ark**599, 202**SW**689. [a] (1) 69 **IndA**67, 121**NE**296. (3) Tender of horses in transit is not affected by classification of "cattle shipper and tender." 75**Vt**249, 54**A**176. (4) Where powder mill superintendent made application as class "A" risk, and though his occupation was referred to as being under class "E" no such classification in fact existed, it was held that insured was under class "A" as stated in policy. 206 **IllA**327.

438–69 8**F(2d)**325; 103 **Iowa**178, 72 **NW**448, 64**AmSR**170; 61**Kan**351, 59**P** 651, 47**LRA**650; 55**ND**750, 215**NW**217, 55**ALR**1049. [d] (2) Contra 103 **Iowa** 178, 72**NW**448, 64**AmSR**170. (3) Where barber and restaurant keeper was accidentally shot hunting rabbits, it was held that hunting was only incident of daily life and not to be regarded as his occupation as basis for classification to determine amount due under policy. 61**Kan**351, 59**P**651, 47**LRA**650. (4) Where druggist was killed by accidental discharge of gun while cleaning it after return from hunting trip, it was held that limitation as to hazards of hunting had no application. 76**SW**832, 25**KyL**1035(2dcase). [h] **Fatal injury included** under policy reducing benefits for injury received in more hazardous occupation. 87**Wash**237, 151**P**509.

438–70 26**F(2d)**277; 66**Colo** 195, 180**P** 81; 96**Conn**561, 114**A**657; 42**SD**27, 172 **NW**781. [f] **Explosives.**–206 **IllA**327. [g] **Isolated acts.–Can** [1929] 4**DomLR** 823.

438–70½–New. , but the occupation need not in fact be more hazardous, so long as it is so classed by the company. 28**TexCivA**36, 62**SW**927.

438–71 13**F(2d)**113; **TexCommnA** 12 **SW(2d)**183.

438–73 218**Fed**582, 134**CCA**310, **LRA** 1915D312.

438–74 157**Ark**342, 248**SW**553 (providing company might determine relative danger of occupations); 178 **IllA**502 (increase of hazard and amount of indemnity made referable to latest manual of company); 160**AppDiv**719, 145 **NYS**1075 (where one insured as financial reporter is injured while testing in air a flying machine built by himself, he is not engaged in "recreation" within meaning of policy); 55**ND**750, 215**NW** 217, 55**ALR**1049.

438–75 95 **IllA**43; 55**ND**750, 215**NW** 217, 220, 55**ALR**1049 [quotCJ]; 74**Vt** 473, 52**A**1048, 93**AmSR**916. [a] (7) Where insured, who was classified as "assistant technologist" and "oil well broker," became supervisory head of company. 26**F(2d)**277. [b] (2) Change in name of occupation relieving manager of lumber yard of his duty of supervision without changing or increasing hazard of other duties. **TexCivA** 275 **SW**622. (3) Foreman and supervisor held not to change his occupation, within meaning of policy, by cutting an electric wire, while with gang of linemen, instructing them as to work. 179**NC** 489, 102**NE**887. (4) Occupation of altering and pressing clothes is not changed to another occupation by temporarily working for laundry in evening. **TexCivA** 18**SW(2d)**446. [c] **Failure to furnish classifications of hazardous occupations.–TexCivA** 18**SW(2d)**446. [d] **Failure of insurer to furnish information as to amount payable in any event** as required by statute precludes it from claiming disqualification of insured from receiving full insurance under by-law by reason of being injured while engaged in more hazardous occupation. **TexCivA** 18**SW(2d)**446.

438–75½–New. It is immaterial that insured intended when he could to return to his original employment. 8**F(2d)**325.

439–76 8**F(2d)**325; 13**F(2d)**113; 66 **Colo** 195, 180**P**81; 91**Conn**727, 101**A**92; 131**La**475, 59**S**907 (slight variation from daily routine does not change main purpose of his business activity); 79**Nebr** 20, 112**NW**365; 55**ND**750, 215**NW**217, 220, 55**ALR**1049 [quotCJ]. [a] **Quitting work is not change of occupation** in absence of provision in policy to that effect. **Iowa** 229**NW**702.

439–77 257**Fed**225, 168**CCA**309 [certiorari den 250**US**662mem, 40**SCt**11 mem, 62**L ed**1195mem].

439–77½–New. , and it must also appear that the old occupation was abandoned. 257**Fed**225, 168**CCA**309 [certiorari den 250**US**662mem, 40**SCt**11mem, 63**L ed** 1195mem].

439–77½–New. Where insured's occupation is not classified, policy provisions as to the effect of a change do not operate. 26**F(2d)**277.

439–77¼–New. Where the new occupation is in the same class of hazards as that specified, insured may recover as though insured therein. 174**Wis**208, 182**NW**845.

439–78 **IndA** 169**NE**57; 104**Kan**612, 180**P**200; 119**Me**131, 109**A**490; 2 **OhA** 312, 19 **OhCirCtNS**392 (isolated act outside of, but incidental to, regular occupation); 130**Tenn**482, 172**SW**318, **Ann Cas**1916B737. [a] (5) Receiving clerk temporarily directing other men similar to foreman. 96**Nebr**744, 148**NW**913. (6) Insured who helped put out a fire held not to have changed occupation. 26**F(2d)**277. (7) Casual act of insured employed in supervisory capacity in assisting at fire is not change of occupation reducing indemnity. 26**F(2d)**277. [b] **There must be both act and intention** showing purpose to change occupation. 104**Kan**612, 180**P**200.

439–79 189**Cal** 406, 209**P**26, 26**ALR**116; 64**AppDiv**22, 71**NYS**692 (lawyer killed while hunting for pleasure).

439–81 **MoA** 248**SW**984.

439–81½–New. , but it has been held not necessary to show that insured had actually changed his occupation and that the act was "habitual" as distinguished from "casual." 189**Cal** 406, 209 **P**26, 26**ALR**116.

439–81½–New. It is immaterial that the act being done is itself harmless. 61 **Mont**58, 201**P**284, 22**ALR**777.

439–81¼–New. If the act within the more hazardous business is also within the line of insured's employment as insured, he can recover. 179**NC**489, 102 **SE**887.

439–82 [b] **Where insured was killed while engaged in more hazardous occupation** than that insured for, beneficiary could recover amount of insurance which premium paid would have purchased at the classification. 163**La**1016, 113**S**359.

439–82½–New. Operating machine for own amusement. Where policy provides for limitation of amount of recovery if insured is injured while doing any act or thing pertaining to more hazardous occupation, injury while insured is operating machine during noon hour for own amusement is within limitation. 131**La**475, 59**S**907.

440–83 17**F(2d)**596; 23**AlaA**203, 123**S** 92; 207**Cal** 50, 276**P**1004; **CalA** 269**P** 728; 165 **IllA**239; 188 **IllA** 459 (train run on schedule carrying passengers and freight held passenger train); 241 **IllA** 283; 70 **IndA**35, 122**NE**786 (injury in automobile not covered by policy); 207 **Iowa**1101, 224**NW**67; 8**La**332; **Md** 150 **A**732; 154**Miss**400, 122**S**471 (injury while riding on mule is not covered by insurance while riding in horse-drawn vehicle); 104**Nebr**655, 178**NW**507, 103 **Nebr**685, 173**NW**693 (caboose attached to freight train carrying live stock held not passenger car within policy); 183 **AppDiv**170, 170**NYS**431 [mod 100**Misc** 411, 166**NYS**640]; 197**NC**72, 147**SE**693 (motorcycle is not "motor-driven car"); 232**Pa**210, 81**A**212, 37**LRANS**618; 70**Pa Super**382 (not applicable to automobile); **BC** 12**DomLR**364, 3**WestWkly** 630. See also **IndA** 169**NE**65; 232**Ky** 63, 22**SW(2d)**439; 248**Mich**645, 227**NW** 692. [a] 219**Ala**311, 123**S**93 [rev 23**Ala A**203, 123**S**92]. [d] **Aeroplanes.**–213 **Ala**102, 104**S**21, 40**ALR**1171. [e] **Operators of bus line** who by special arrangement carried passengers in small automobile to city where bus line started held private carrier as to such passengers. 4**F(2d)**826. [f] **Motor cycle.**– 161**La**933, 109**S**767, 48**ALR**1086; 132 **Misc**761, 230**NYS**473; **Pa** 151**A**814. [g] **Train wreck.**–203 **Iowa**623, 213**NW**259, 51**ALR**1327. [h] **Passenger vessel.–BC** 12**DomLR**364, 3**WestWkly**630. [i] **Subway platform** is not public conveyance. 179**AppDiv**166, 166**NYS**225. [j] **Character of vehicle as passenger or freight.–CalA** 286**P**729. [k] **Motorcycle on which insured was riding** at time of collision is "motor-driven" car within policy. 156 **SC**117, 152**SE**766. [l] **Loss of life by wrecking or disablement of any motor car.–Alta** [1930] 1**DomLR**121 (recovery where motor car plunged from ferry-boat). [m] **Automobile.–Ark** 318**SW(2d)** 418; **CalA** 292**P**987. [n] **Horse-drawn vehicle.–Ida** 291**P**1072. [o] **Accident while inflating tire** is not covered by wrecking, disablement, or being thrown from automobile, in policy. **Mich** 233 **NW**228.

440–84 172**Ark**344, 288**SW**883; 101**Ga** 64, 28**SE**661, 65**AmSR**288; 116**Ga**264, 42 **SE**522, 94**AmSR**125, 59**LRA**107; 129 **IllA** 360. [c] **Death of insured caused by falling of heavy harvester motor** while it was being lifted from a wagon is not within policy. 143**Wash**201, 253**P**595. [d] **Pay car** is not passenger car. 116**Ga** 264, 42**SE**522, 94**AmSR**125, 59**LRA**107.

440–84½–New. , or to accidents from causes not insured against. 146**Wash** 665, 264**P**410 (policy providing for accident from being "thrown from" automobile).

440–85½–New. Injury to a person riding on a motor cycle held not within the provision relating to accident in a motor-driven car. 104**NJL**117, 138**A**894.

440–85½–New. Injury from wreckage of passenger car is covered by some policies and recovery thereunder may be had where an explosion in the toilet room burst the wall, injuring insured sitting in the interior of the car, although the policy provided it should not cover injury from an explosion. 183**Cal** 65, 190**P**366.

440–85¼–New. Injury while cranking an automobile held not while "in" or "on" a private conveyance. 274**Mo** 260, 202**SW**1078.

440–85½–New. A policy covering injury while "repairing or adjusting automobile" covers a passenger's injury while fixing a flat tire. 26**F(2d)**501.

440–85¼–New. Insurance against being struck by a vehicle propelled by electricity covers the death of a motor cyclist struck by an electric train. 99**CalA** 723, 279**P**464.

440–85⅓–New. One leaving rapidly moving automobile to prevent escape of prisoner is not "accidentally thrown from such car," within meaning of policy. 108**WVa**550, 151**SE**841.

440–85⅓–New. Where road grader blade was bent and side of vehicle was sprained, grader was "disabled" within policy. **Ida** 291**P**1072.

440–86 228**NY**475, 127**NE**584 [aff 183 **AppDiv**170, 170**NYS**431 (aff 100**Misc**411, 166**NYS**640)]; 183**AppDiv**170, 170**NYS** 431 [mod 100**Misc**411, 166**NYS**640]; **TexCivA** 178**SW**306. But see 100**Misc** 411, 166**NYS**640. [a] **Driving hired car** held not being in public conveyance. 299 **Ill** 562, 132**NE**754, 19**ALR**140.

440–87 133**Minn**238, 158**NW**252; 268 **Mo** 373, 187**SW**861; 206**MoA**263, 227**SW** 133; 96**Misc**672, 161**NYS**12; 178**NC**135, 100**SE**266; **TexCivA** 280**SW**336, 337 [quotCJ].

440–88 74**NJL**686, 65**A**1117.

441–93 **Ida** 291**P**1072; 120 **Oh**515, 166 **NE**580 (insured caught in trolley door while boarding trolley and carried short distance).

441–94 [a] 191**Fed**343, 112**CCA**87.

441–95½–New. The loss of a finger due to the closing of a railway car window is not included under double liability for wrecking of a railway car. 133**Ark**599, 202**SW**689.

441–97½–New. Standing or walking on public highway does not include being run over after being thrown from motor cycle. 161**La**933, 109**S**767, 48**ALR**1086.

441–97⅓–New. The term "highway," as used in a policy indemnifying against death or disability where insured is struck on a public highway by a vehicle, does not include a railroad track or the space on a railroad's right of way be-

tween its tracks. 37GaA289, 139SE911.

441-97¼-New. A policy covering injuries sustained if struck or knocked down by a vehicle propelled by steam, gasoline, etc., protected insured if struck by an automobile; and a nut flying off an automobile is not an "automobile." 40 GaA171, 149SE76.

441-97½-New. Eye injury from stone thrown by moving automobile is covered by policy covering injury by being struck by vehicle while walking on highway. 161Tenn41, 28SW(2d)339.

441-2 168Cal 536, 143P780, AnnCas 1915B1120 (where injury occurred while alighting from moving elevator); 183 AppDiv744, 171NYS174 (automobile elevator commonly used for passengers). [c] 209Mich258, 176NW446. [d] **Parties are deemed to have contracted** with reference to common knowledge as to difference between freight and passenger elevators. 183AppDiv744, 171NYS174. [e] **Insured must be assumed to have had full knowledge** of condition. 183 AppDiv744, 171NYS174. [f] **Using elevator to carry automobiles occasionally** does not change character of elevator. 183AppDiv744, 171NYS174. [g] **"Passenger elevator"** is to be considered in customary sense. 183AppDiv744, 171NYS174.

441-5 200MoA460, 207SW281; 48RI 208, 136A690, 56ALR488.

442-6½-New. [§ 99a] H. **Injuries from Collapse of Building.** Where insurer is liable under a policy for death from the collapse of a building, death from the collapse of any substantial portion of a building will render insurer liable. 21 GaA586, 94SE843.

442-6¼-New. Under statute the word "dwelling" as used in a policy covering injuries from the burning of a dwelling may mean a home or place of habitation according to the understanding of the parties. 99Nebr579, 157NW111, AnnCas 1917C409.

442-6¼-New. In such case the term "building" includes a derrick to unload sand barges, constituting the upper portion of a concrete structure. 21GaA586, 94SE843.

442-7 18F(2d)879; 35F(2d)126; 68NJ L79, 52A212 (recovery for death by accidental burning is not barred by schedule covering only certain injuries for which weekly payments are to be made); 110Misc489, 181NYS550; TexCivA 183 SW1196 (injuries received while riding motor cycle). See also 177Ark87, 7SW (2d)775; MoA 186SW948 (provision held valid). [c] 95NJL533, 112A859, 14 ALR983. [d] **While working in public highway.**-151Miss43, 117S334 (insured held not entitled to recover). [e] **Participating in aeronautics.**-32F(2d)7; 43 F(2d)517; 89CalA779, 265P400; 98Fla 1044, 124S817; 200 Ind472, 164NE628; 318Mo 363, 1SW(2d)99, 57ALR615. (4) Exception, in accident insurance policy, of death "from having been engaged in aviation or submarine operations or in military or naval service in time of war," does not include death resulting to passenger in airplane accident in time of peace. 133MiscRep780, 233NYS500. [f] **Engaging in aviation.**-Wis 232NW848. [g] **Blindness.**-235Ky626, 32SW(2d)5.

442-8 See also 187Ky466, 219SW183.

442-8½-New. A street railway switch tender, killed by an automobile, was held not killed on the railroad right of way within an accident policy. 128Misc 893, 220NYS289.

442-8½-New. A street railway switch tender is held not "watchman" within an accident policy excluding watchmen from the provisions of the policy. 128 Misc893, 220NYS289.

442-8¼-New. Clearly excepted risks cannot be made the basis of enforcement of indemnity for losses under the policy. 82Fla128, 89S418.

442-9 214Ala663, 108S575 (includes fatal injuries); 223Ky626, 4SW(2d)398; 230Ky793, 20SW(2d)978; 178Ky193, 198SW727, 6LRA1333; 74Minn505, 77 NW291; 142Miss636, 107S867.

442-10 CalA 289P175; 230Ky793, 20 SW(2d)978; 216Ky806, 288SW766; 142 Miss388, 107S520; 193MoA718, 188SW 314; 103Nebr557, 173NW599. [a] Tex CivA 24SW(2d)512; TexCivA 207SW 160. [g] (3) **Disability from blow inflicted** by person assaulted by insured held within meaning of policy limiting liability to sum of premiums paid. 31 TexCivA111, 71SW391. (4) Where death results from shot by burglar, recovery is limited to one half as provided in policy. 102Minn186, 112NW1065, 120Am SR613. [i] **"Homicide" as used in policy** means intentional killing. 148Miss 173, 114S262, 56ALR681.

442-10½-New. Beneficiary in an accident policy excepting liability for intentional injuries may recover for death resulting from intentional injury by a third person. 87 IndA42, 157NE104.

442-10½-New. The court, in construing an accident policy excepting liability for intentional injuries, must assume that the word "death" was omitted for a reason. 87 IndA42, 157NE104.

442-12 201 Iowa1334, 208NW213, 217 [citCJ]; 44 Okl 578, 145P812, LRA 1915D358; 146SC41, 143SE668, 670 [quotCJ]. [a] 188Ala159, 66S41, LRA 1915A538 (shooting by person fleeing from arrest). [c] 178Ark839, 12SW(2d) 402(1stcase) (applying electrical machine to sleeping person in jest or to awaken).

443-13 143Ga785, 85SE1035 (where insured was mistaken for another by person intentionally inflicting injury); 201 Iowa1334, 208NW213, 217 [citCJ]; 77 Okl 20, 185P1085.

443-14 186 Iowa759, 171NW118; LaA 128S183; 44 Okl 578, 145P812, LRA 1915D358. [b] **Death of insured, shot by officer through mistake,** held not to result from third party's intentional act. LaA 128S183.

443-16½-New. Where the person inflicting the injury had sufficient intelligence to understand the nature and consequences of his act, and the act was voluntary, the injury is within the policy. 188Ala159, 66S41, LRA1915A538.

443-17 146Miss298, 112S483; 148Miss 173, 114S262, 56ALR681.

443-18 183AppDiv42, 170NYS974.

443-19½-New. Within the meaning of a provision declaring against liability for injury intentionally inflicted by a person other than insured, such person may become so intoxicated as to be incapable of having an intention. 27 Ind A327, 61NE207.

443-19½-New. Death caused by shooting by a person so intoxicated as to be incapable of forming an intention is within a policy excluding killing of the insured by the intentional act of another. 142Miss388, 107S520.

443-20 219Ky56, 292SW470.

443-21 142Miss636, 107S867.

443-23 201 Iowa1334, 208NW213.

443-24½-New. Limitations as to injuries caused by robbers which is in small type and without heading held not to apply. 190 Ind68, 129NE325, 14ALR 1329.

444-27 74Colo 217, 220P499. [c] 217 MoA429, 266SW1001. [d] (1) 17F(2d) 4. (2) 74Colo 217, 220P499. (3) 17F (2d)4. [e] **In Colorado.**-87Colo 469, 288 P888. [f] **In Utah.**-65Utah465, 238P259, 41ALR1495. [g] **Not a defense** where insured did not contemplate suicide at time of application. 242Fed762, 155CC A350 [certiorari den 245US657 mem, 38 SCt14mem, 62L ed534 mem]. [h] **Limitation of liability** to fraction of amount otherwise payable where death is by suicide is provided in some policies. 78 AppDiv527, 79NYS608 (holding smaller of two designated sums proper basis for computation). [i] **Suicide** held not accidental injury. 204MoA679, 220SW 1022 [transf Mo 213SW52].

444-28 132 Iowa652, 104NW1131, 7LR ANS223; 158 Iowa356, 139NW463; 283 Mo 442, 223SW70. See also TexCivA 9 SW(2d)743. [a] **Suicide** must be contemplated at time of issuance of policy. 205US489, 27SCt578, 51L ed895 [rev 144Fed356, 75CCA358]. [b] **Statute** prohibiting provision against payment where death is due to suicide does not prohibit limitation of liability because of suicide. 125Fed269 [aff 144Fed356, 75CCA358 (rev 205US489, 27SCt578, 51 L ed895)].

444-28½-New. The parties may agree that suicide shall be no defense. 150 Minn353, 185NW383.

444-28½-New. Under an accident policy silent as to the effect of suicide, insurer is liable although insured committed suicide when insane. 138Minn 424, 165NW474.

444-28¼-New. A provision that suicide is no defense unless shown that the suicide was contemplated at the time of application does not apply to policies against death by accident or self-destruction. Mo 225SW994.

444-28½-New. Insurer is bound by a provision that suicide shall not be a defense. 283Mo 442, 223SW70.

444-28½-New. A provision against death by a person applies where insured committed suicide by taking poison. 153MoA63, 132SW2.

444-29 165Ky532, 177SW254, LRA 1915E656; 193Ky395, 236SW562; 278 Mo 154, 213SW45; 283Mo 442, 223SW 70; 195MoA651, 187SW802; 201MoA 586, 213SW869; 48ND307, 184NW97, 16ALR1390. [b] **Test of legal responsibility for act of self-destruction** by insured is whether he was able to distinguish between right and wrong in doing act. 311Mo 249, 278SW368.

444-30 242 IllA7 (leaping from window of office building); 165Ky532, 177 SW254, LRA1915E656; 312Mo 62, 278 SW735; 218MoA374, 271SW867 (though insured committing suicide while his mental functions were so disturbed or deranged by delirium that he was unconscious of physical nature and consequences of his act, insured is not liable). [b] **Provision that suicide while insane is a defense** held inoperative. MoA 218SW927. [c] **Provision** exempting insurer from liability upon insured's death from suicide while sane held valid. MoA 218SW927.

444-31½-New. General clause as to bodily accidental injury includes suicide. 150Minn353, 185NW383.

444-32½-New. A provision as to the intention of insured to commit suicide at the time of the application applies to accidental, as well as natural, causes. 146Mo 114, 47SW948.

444-35 [a] **Obvious risk is one which would be plain and apparent** to reasonably prudent and cautious person in use of his faculties. 183 Iowa776, 166 NW455.

444-36½-New. As used in an accident policy "unnecessary" means not required by the circumstances of the case, while "obvious" means easily discovered, seen, or understood; plain, manifest, palpable. 92 OhSt87, 110NE542.

444-37½-New. But certain general principles, operative alike in controversies arising ex contractu and ex delicto, have application. 65WVa170, 63 SE962, 22LRANS779.

444-38½-New. It is immaterial whether the injury occurred while in the pursuit of business or pleasure. 79 IndA 157, 137NE575.

444-38½-New. Where a policy provides that it shall not cover injury resulting wholly or partly from explosives of any kind, it is construed not to limit liability only to voluntary exposure to explosives. 183Cal 65, 190P366.

444-39 141Ga413, 81SE120; 24GaA 497, 101SE541; 315Mo 760, 287SW346. [d] **That others were accustomed to do same thing held immaterial** where insured was killed while walking on railroad track. 117Me418, 104A792.

446-41 141Ga413, 81SE120; 75 IndA 295, 128NE773; TexCivA 178SW816.

446-42 127Mich630, 86NW1036. [b] 38PaSuper110.

446-43 65WVa170, 63SE962, 22LRA NS779.

446-45 160MoA571, 140SW939.

447-47 92 OhSt87, 110NE542 (exposure to obvious risk held defense); 65 WVa170, 63SE962, 22LRANS779.

447-48 73WVa473, 80SE779, 50LRA NS1218.

447-49 79 IndA157, 137NE575.

448-53 163AppDiv556, 148NYS1016 [aff 221NY664 mem, 117NE1067 mem].

448-53½-New. Acting in self-defense is not voluntary exposure to unnecessary danger. 142Ga330, 82SE893, Ann Cas1916B267.

448-54½-New. walking on railroad

track; 117Me418, 104A792.

448-50 73WVa473, 80SE779, 50LRA NS1218.

448-60½-New. standing on the steps of a street car; 315Mo 760, 287SW346.

448-61 315Mo 760, 287SW346.

448-62 315Mo 760, 287SW346.

448-62½-New. attempting to leave an elevator while it was in motion or while the doors were being closed; 209Mich 258, 176NW446.

449-78 93PaSuper583.

449-78½-New. continuing duck hunting after accidentally stepping into water trough; SD 231NW529.

449-91 133Minn238, 158NW252.

449-94½-New. running against a wall while playing indoor baseball; 146 Mich521, 109NW1042, 117AmSR655, 7 LRANS938, 10AnnCas449.

449-96½-New. sitting on limb of tree; 45TexCivA14, 99SW423.

449-1½-New. prematurely going on the street after an accident to the knee so as to prolong the disability; 96Md 634, 54A678.

449-4½-New. scaling bank with a loaded gun in hand; 6ND201, 69NW 191, 66AmSR601, 40LRA437.

449-4¼-New. hunting for game with a loaded gun; 6ND201, 69NW191, 66Am SR601, 40LRA437.

449-4¼-New. careless handling of firearm; 64AppDiv22, 71NYS692.

450-7½-New. inhaling chloroform by a practicing physician; 161La229, 108 S464, 45ALR1521.

450-11 141 Iowa74, 117NW1111, 22LR ANS1255; TexCivA 209SW230.

451-18 98Fed930; 176 Iowa399, 158N W401; 140Ky609, 131SW523; 157Ky 270, 162SW1136. [a] (2) Where accident would have occurred and injury been sustained if disease had not existed, company is liable on policy. Mo 240 SW793. [h] **Accident** must be sole cause of death. 98Fed930. [i] **Limitation of liability.**-102Me287, 65A385 (holding "rheumatic fever" to be "rheumatism" within provision).

451-19 155Ky498, 159SW1134. [c] **Where injury sole cause of disability,** fact that insured was also suffering from neuritis during disability will not bar recovery. 65 IndA109, 114NE992.

451-19½-New. Insured must have suffered from the disease prior to, or at the time of the accident. 184AppDiv 280, 171NYS1018.

452-20 [a] See also TexCivA 214SW 456. [b] 121 Iowa528, 97NW91, 63LRA 603 [cit 123NY304, 25NE399, 20AmSR 748, 9LRA617]. [d] **"Disease," is used to denote malady or sickness** entirely apart from wound or hurt producing injury or immediate functional disturbance. 136 Iowa140, 113 NW566.

452-21 [a] **Something enhancing risk.**-56ND517, 218NW220, 60ALR962.

452-25 79Fed423, 24CCA654, 93Fed 621, 35CCA493; 180Cal 326, 181P61; 179 IllA330; 192 IllA475; 140Ky609, 131SW523; 95Minn77, 103NW735, 884; TexCivA 185SW615 (where disease contributed to paralysis, paralysis was not "direct, independent," and exclusive result of fall which hastened it); Tex CivA 214SW456. [a] (2) Disease must proximately contribute to death. 124Miss548, 87S115, 15ALR605. [b] (2) But see 16GaA66, 85SE600. [c] (2) Insured is not entitled to recover for peritonitis resulting from riding bicycle where it is excepted, though accidents while riding bicycle are insured against. 180NY514, 72NE1139. [d] **Mere fact that accident shortens life of insured,** suffering from disease, is not sufficient to warrant recovery. 180Cal 326, 181P 61.

452-27 16GaA66, 85SE600 (though malady contributed to death); 122 IllA 507 [aff 220 Ill 151, 77NE123, 110AmSR 253, 5LRANS933, 5AnnCas155; 212 IllA 354; 184 Iowa423, 166NW363, 168NW 884, 3ALR1295, 151NW479; 224Mass 327, 112NE634, LRA1916E1203; 233 Mass558, 124NE517; 124Miss548, 87S 115, 15ALR605 (latent and inactive disease set in action by accident); 174 Mo 256, 73SW592, 97AmSR560, 61LRA 459 (provision that injury must be due to accident "independent of all other causes" means direct or proximate causes); MoA 274SW917; 220MoA 780, 275SW988, 993 [citCJ]; 93Nebr 629, 141NW815; 96Nebr65, 146NW 1037, 52LRANS1203, AnnCas1916B222; 221AppDiv494, 224NYS644; 21OhA129, 152NE796; Eng [1909] 1KB591, 6B RC517.

453-28 76 IndA161, 129NE707. [a] **Where diseased condition** had no causal connection with injury, accident is sole cause. 192 IllA475.

453-30 16GaA66, 85SE600.

453-32 85Fed401, 29CCA223, 40LRA 653; 180Cal 76, 179P195; 136 Iowa140, 113NW566 (traumatic neuritis, developing from bodily injury while operating mower); 176 Iowa399, 158NW401; MoA 236SW1065; 93Nebr629, 141NW 815; 221AppDiv494, 224NYS644; 158 NC305, 73SE1002 (limitation of liability inapplicable); 21 OhA129, 152NE796; 41 Utah112, 124P518. [d] (1) 133Minn 215, 158NW45. [g] **Diabetes.**-MoA 231SW75. [h] **Cerebro-spinal meningitis.**-192MoA303, 182SW138. [i] **Heart diseases** must be caused by accident; otherwise no recovery will be allowed. 180Cal 76, 179P195.

453-33 106Ark91, 152SW995, 44LRA NS493; 21 OhA129, 152NE796 (arteriosclerosis favorable to development of gangrene will not prevent recovery).

453-34 201 IllA295; 172 Iowa429, 154 NW598, LRA1916B617, AnnCas1918A 706; 38ND584, 165NW982; TexCivA 16SW(2d)842, 844 [citCJ]. [c] **Provision in policy** that only one quarter of face value be paid for accident resulting in hernia held valid. 175 Iowa513, 154 NW409. [d] **Where liability limited to one tenth if injury caused by hernia,** provision will be enforced. 131 Iowa 207, 108NW221, 8LRANS1014. [e] **Where accident caused hernia and then death,** full recovery will be allowed. 41 CalA308, 182P771.

454-36 [b] **Insurer is exempt** where inhalation is voluntary, where provision in policy so stipulates. 184 Iowa1299, 168 NW305. [c] **No recovery** for accidentally breathing illuminating gases which by accident escaped into insured's bedchamber. 99Kan575, 162P1160, LRA 1917D738.

454-38 See also 210Mich327, 178NW19.

454-39 158 Iowa597, 138NW696 (accident policy providing for nonliability in case of death or disability resulting from medical or surgical treatment held not to contemplate such treatment when necessary to relieve insured from results of accidental injury); 224Mass327, 112 NE634, LRA1916E1203; 110Minn291, 125NW264, 26LRANS1004.

454-41 TexCommA . 29SW(2d)980. [b] **Where etherization necessary incident of operation** rendered necessary by accident, insurer is liable. 224Mass327, 112NE634, LRA1916E1203.

454-41½-New. Death caused by a jar which caused separation of foreign particle left in body after operation held accidental. 24GaA487, 101SE305.

455-44 [d] **Driving heavy automobile** from woods back into road on rainy night, causing rupture of blood vessel, held "voluntary overexertion." 25F(2d) 596.

455-45 184 Iowa423, 166NW363, 168 NW884, 3ALR1295, 151NW479 (exertion must be beyond normal strength and insured conscious that he is exceeding limit).

455-53 184 Iowa1124, 169NW448, 2 ALR57.

455-55 [b] Contra 184 Iowa1124, 169 NW448, 2ALR57.

456-57 176 Iowa110, 155NW241, 157 NW726, LRA1917A1050. But see 197 IllA462. [d] **As matter of law** it is not material when germs entered wound. 208 IllA506. [e] **Insurer may limit liability** where death caused by blood poison was due to injury. 257Fed241, 168 CCA309.

456-65 See also 219MoA322, 271SW 1011. [a] **Exception of liability** where injury resulted while insured was engaged in certain occupation "or under any circumstances" from firearms of any kind construed to exempt from liability only while insured was handling firearms or was in an enterprise where firearms were handled. 219MoA322, 271SW1011.

456-66 See also 118Kan523, 235P844.

456-67½-New. A policy excepting gunshot wounds referred only to nonfatal injuries, and insurer was held liable where death resulted from a gunshot wound. 230Ky341, 19SW(2d)973(2d case).

457-69 165Ky532, 177SW254, LRA 1915E656 (clause not unlawful or contrary to public policy). [a] **Provision** held inapplicable to facts. 193Ala84, 69S80.

457-70 [a] 37 Ida667, 219P598 (substantial impairment of judgment essential to safety, and irresponsibility necessary). [b] **That insured had been drinking** does not bar recovery where he was not intoxicated. 186 Iowa759, 171NW118.

457-74 22F(2d)136; 43F(2d)499.

457-74½-New. Death from inhaling chloroform is not death while under influence of intoxicants within the meaning of health and accident policy. 161 La229, 108S464, 45ALR1521.

457-74¼-New. Words "intemperate habit" merely mean the use of intoxicants to excess. 164Wis82, 142NW487.

457-75 Iowa 227NW518; 165Ky532, 177SW254, LRA1916E656 (operation of clause does not require limitation of preceding clause as to injuries during insanity to injuries resulting from acts of insured). [b] **Violation of law regulating speed of motor vehicles** is within provision. 128Kan155, 276P804. [c] **Where policy contained no such provision,** insurer is liable, though death resulted from law violation. 33F(2d)853.

457-76 22F(2d)136 (driving automobile while intoxicated in violation of statute is within exception); Iowa 229 NW702.

457-78 238Pa515, 86A303.

458-79½-New. That insured received an accidental injury while engaged in an unlawful act does not necessarily preclude recovery. 188 IllA293.

458-80 Sask [1928] 3DomLR592 (hunting in violation of game law). [g] **Violation of Prohibition Law.**-33F(2d)853.

458-81 186 Iowa454, 172NW454, 4ALR 1235; 231NY148, 131NE871, 17ALR 1001.

459-84½-New. Such an exception refers to the law of the place of violation, and not solely of the state where the policy was issued. 22F(2d)136.

459-85 111AppDiv386, 97NYS836.

459-89½-New. In view of other exemptions from liability in case of death, an exemption from liability in case of injuries from fighting refers only to nonfatal injuries. 223Ky626, 4SW(2d)398.

459-89¼-New. A provision limiting liability in case of injuries while engaged in rioting, fighting, or strikes, whether or not insured was engaged therein, is effectual to limit the liability of insurer, where the death of insured resulted from injury in a gunshot duel between others. 152Miss811, 118S898 (2dcase).

460-95 209Mich258, 176NW446 (elevator); 66 OhSt246, 64NE123.

461-98 But see 112SC191, 98SE540.

461-4 127Md179, 96A281; TexCivA 216SW455. [a] **Open platform** is not place regularly provided for transportation of passengers. 127Md179, 96A 281.

461-4½-New. Where a policy excluded recovery for injuries while on a caboose used for passenger service and insured was killed on the caboose of a stock train, such caboose was not used for passenger service. 37 Okl 305, 132P333, 46LRANS986 (words "on a caboose" qualified by words "used for passenger service").

461-4¼-New. One insured as a cattle dealer or broker visiting yards by occupation cannot be restricted to passenger cars by the provision of a policy and may go or ride on top of freight cars, where necessary to the pursuit of his business, in the ordinary manner. 18 SD287, 100NW428, 67LRA175.

461-4¼-New. The fact that the car was at the time engaged in passenger service and not the kind of car is the controlling factor in such cases. 37 Okl 305, 132P333, 46LRANS986.

461-9 76 IndA170, 131NE522 (policy

not covering death from being struck by train at highway crossing); 234Pa 58, 82A1093.

461-10 [b] 128Misc893, 220NYS289.

462-12 [a] **Term held applicable to private right of way.**-128Misc893, 220 NYS289.

462-13 [a] **Walking along usual path for pedestrians,** which crossed railroad tracks at grade, is not walking on railroad right of way within exception of policy. 134MiscRep553, 236NYS171.

462-17 TexCivA 178SW816 (attempting to enter train by attracting attention of porter to get him to open vestibule).

462-20 TexCivA 206SW379.

462-25½-New. [§ 160a] 27. **Other Accidents and Risks Excepted.** Injuries received while riding on motor cycle. IndA 147NE156. [a] **Riding in side car of motor cycle** is not within exception excluding injuries received "while riding motor cycle." 237NY391, 143NE231, 35ALR32.

462-25½-New. A passenger in an aeroplane, whether he takes part in the operation thereof or not, is "participating in aeronautics" within the provision exempting such risk. See also 95NJL 538, 112A859, 14ALR983.

462-25¼-New. Where a policy excepts an accident to an automobile able to proceed under its own power after the accident, it should be able, without help or repair, to proceed in the same manner as before the accident and the mere possibility that it might move is not sufficient. 108Kan516, 196P235.

462-25½-New. A clause restricting recovery to one eighth, where the loss results from freezing while insured is not engaged in occupation, is valid. 121 Miss1, 838278, 8ALR229.

462-25⅛-New. One operating a flying machine is restricted to decreased recovery under a policy so providing in case of aeronaut. 160AppDiv719, 145NYS1075 [aff 217NY720, 112NE1073].

462-25½-New. Accident policies often include provisions excluding or limiting liability for injuries received in various branches of the military service or in various capacities in such service. 110Misc489, 181NYS550.

462-26 [a] **Definition of "total disability" in proposed form of policy** not approved. Mass 171NE656.

463-27 190 IllA338; Kan 289P414; 234 Ky358, 28SW(2d)40; 68NH577, 41A 182; 133MiscRep279, 232NYS417; TexCivA 193SW750; TexCivA 16SW(2d) 374, 376 [quotCJ]; 54 OntL24, 24 Ont WN246, 55 OntL330. [b] 164Ga392, 138 SE787. [d] **Particular injuries held total disability.**-138Minn418, 165NW268, LRA1918B504. [e] **Particular injuries held not total disability.**-116Minn147, 133NW472; 172NC762, 90SE897. [f] **Total loss of time.**-63 IndA18, 113NE 760.

463-28 [a] (2) "Total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continually any substantial gainful occupation." 13F(2d)212, 213. (3) Disability is total if it prevents party from performing acts necessary to business in substantially customary and usual manner. 36F(2d)152.

463-29 114Nebr505, 208NW632.

463-30 65 IndA109, 114NE992 (no recovery for total disability where insured refused to work when he had opportunity and was reasonably able).

463-30½-New. Where a policy provides for compensation for total and permanent disability, recovery may be had only where the disability is both total and permanent. 146Miss18, 111S453.

463-30⅓-New. A broken sternum was not a complication within the policy. 140 Iowa626, 119NW79.

463-31 164Ga392, 138SE787, 791 [cit CJ]; 221Ky450, 298SW1080, 1082 [quot CJ].

463-32 164Ga392, 138SE787, 791 [cit CJ]. [b] **Weaver, suffering from tuberculosis,** and advised by doctors not to work, but who continued to work, is not "totally disabled" under policy. 164Ga 392, 138SE787.

463-33 Ark 32SW(2d)310; CalA 284P 946; 164Ga392, 138SE787, 791 [citCJ]; 214Ky56, 282SW1112; 116 Okl 116, 243 P735; NB [1928] 3DomLR814. See also 207 Iowa872, 224NW32.

464-35 61Nebr563, 85NW558. [d] (2) Merchant's inability to perform some kinds or branches of his business is not total disability where he was able to do other kinds or branches substantially and to material extent pertaining to his occupation. 69Minn14, 71NW696, 65 AmSR542, 38LRA537.

464-36 61Nebr563, 85NW558.

464-37 164Ga392, 138SE787, 791 [cit CJ]; 195Ky136, 241SW836 (fifteen minutes at a time); 221Ky450, 298SW1080; Mo 203SW978; 127Misc344, 216NYS897; 113Tex21, 240SW893 (must be able to perform every material duty, with ordinary care, to relieve company); TexCivA 185SW979. [a] TexCivA 160SW 330. [b] **Headaches and inability to see** are sufficient to prevent inspector of technical work from performing any and every kind of duty pertaining to his occupation, though he might be able to perform some part thereof. NJSup 130 A131.

464-37½-New. Under such provisions the word "prevent" does not require a physical absence from the place of employment, it is sufficient that insured is unfitted for his usual duties and hindered in performing them. NJSup 130 A131.

465-40 TexCivA 178SW806 (disability need not be physical).

465-41 157Miss759, 128S750.

465-43 TexCivA 28SW(2d)196. [a] **Where policy provides that total permanent loss of use of both hands shall be considered total permanent disability,** loss of use of both hands entitles insured to indemnity, though he is able to conduct business for profit. 175Minn 210, 220NW561.

465-44 151Wash153, 275P550.

466-47½-New. Under a provision for total permanent disability from performing any kind of manual labor upon which insured depends for a livelihood, he can recover if permanently disabled from following any business by which he could reasonably earn a living. 54 IndA450, 103NE77.

466-47⅛-New. A company insuring against disability preventing every duty pertaining to any business or occupation is liable to insured for disability from performing any kind of business pertaining to his occupation. 155Ky498, 159SW1134.

466-49 17GaA525, 87SE827 (loss of eye not total disability).

466-50 Que 20DomLR978. [c] **Where physician orders person suffering nervous breakdown or neurasthenia** to abstain from any kind of work, it is illness which "totally disables" and "necessarily confines to house" under sick benefit policy. 51QueSC328, 34DomLR 72 [allowing app 46QueSuper187]. [d] **Word "confined" has been construed as** inability to do work rather than physical inability to leave house. 161La357, 1088769. [e] **Confinement to house means** confinement, in substantial sense. 221MoA405, 278SW86. [f] **Commitment to insane hospital** is insufficient. 200 Wis18, 227NW239.

466-51 73Colo308, 215P135 (visits to physician); 256 IllA476; 221MoA405, 278SW86 (substantial confinement is sufficient). But see 221MoA405, 278SW 86. [a] **Insured, suffering from cancer** and able to get about and go unaided to neighboring town, held not "confined to house." 221MoA405, 278SW86.

466-53 185 IllA580; 127Misc344, 216N YS897 ("immediately, continuously and wholly disabled").

466-53½-New. For recurring operation insurer is recurrently liable. 75NH375, 74A1051.

466-53⅛-New. An attempt to return to work held not to defeat recovery for total disability, where insured was in fact totally disabled continuously from the date of the accident. 65 IndA109, 114NE992.

466-54 But see 127Md179, 96A281.

466-55 234Ky358, 28SW(2d)40 (provision is not against public policy or unreasonable). But see 243 IllA453; TexCivA 318SW(2d)333. [b] **Medical treatment** is not necessary if insured is actually under physician's care. 143Minn 302, 173NW670. [c] **"Treatment."**-199 AppDiv223, 191NYS474. [d] **Bonesetter.**-59QueSuper376.

466-56 See also 245 IllA300.

466-56½-New. Where a policy provides that no indemnity would be payable unless insured was regularly attended by physician at least once each seven days, a substantial compliance is sufficient and slight variance of a day or a few days over seven days will not preclude recovery. 127Misc344, 216NYS897.

466-56⅛-New. A clause in a policy relating to indemnity for confining illness under a physician's care has no application to a clause for indemnity for total disability. 122 Or547, 259P902.

466-56¼-New. Where accident necessitates the amputation of a member, insured is entitled to recover, notwithstanding proviso that injuries be such as to require medical attendance at least once in each seven days, in the absence of any question as to good faith or extent of injuries. 28 OhA267, 162NE680.

466-56½-New. Insured's failure to have medical attention required by policy makes prima facie case that he did not suffer total disability. TexCivA 31 SW(2d)333.

466-56¼-New. Confinement in a "licensed hospital" is complied with by confinement in a hospital for the insane, although not licensed. 200Wis18, 227 NW239.

466-57 175Minn210, 220NW561 (presumption as to permanency); 205App Div494, 200NYS261 (tuberculosis held permanent disability); TexCivA 16SW (2d)834. But see 55ND647, 215NW93, 54ALR289. [b] **"Permanent disability"** construed to mean total disability existing continuously no less than sixty days prior to furnishing proof. 160Ga 168, 127SE140. [c] **Policy construed as requiring payment** for temporary total disability. 114Nebr505, 208NW632.

467-58 220Ala104, 124S229; 160 IllA 432; 209 IllA636; 226Ky328, 108SW(2d) 1079; 184Mass8, 67NE868, 100AmSR 540; 116 Okl 116, 243P735; 75 Or47, 146P151, LRA1915D264, AnnCas1917B 1005.

467-61 105 Iowa717, 75NW508. [a] **Exemption against indemnity** for loss of members occurring more than thirty days after accident is held inapplicable to loss of only one member. 172Ark 1098, 292SW389.

467-61½-New. To recover for amputation the case must come within the provisions. 6 OhCirCtNS587, 27 OhCirCt 509.

467-61⅛-New. Fracture of arm. Under a policy covering complete fracture of an arm at or above the wrist, recovery cannot be had for fracture of only one bone of the forearm. 133Miss266, 97S673.

467-62 220Ala104, 124S229. [a] (2) 186MoA22, 171SW570.

467-64 186MoA22, 171SW570 (entire hand severed except little finger which was paralyzed).

467-65 116Miss278, 76S839.

467-65½-New. Where policy provided for complete severance and some part remained, although of no use, no recovery was allowed. 72Fla17, 72S278.

467-65⅛-New. Insurer has a right to specify in the policy at what point amputation must take place to permit recovery. 192MoA159, 177SW803.

467-66 189 Iowa678, 179NW203; 192 MoA159, 177SW803.

468-68½-New. Facts held to constitute permanent and total paralysis. 142Ky 25, 133SW996.

468-68⅛-New. Fractures of any part of limbs including a heel bone are included in a policy covering the breaking of a leg or an arm. 131MoA353, 111SW 518.

468-69 195MoA599, 186SW964.

468-70 140 Iowa562, 118NW880.

468-71½-New. Where a policy provides that loss of sight of both eyes resulting from one accident shall be considered total disability, insured incurring such disability is entitled to recover, regardless of his ability to engage in any gainful occupation. 191NC32, 131SE395, 45 ALR1360.

468-71⅛-New. Sight held lost, even though able to distinguish shadow of

object. **BC** [1920] 2**WestWkly**694, 29**BC** 157, 57**DomLR**102, [1921] 1**WestWkly** 674.

468–71¼–New. The entire sight of an eye is lost when it becomes useless as far as a man's occupation is concerned. 29**BC**157, 57**DomLR**102, [1921] 1**West Wkly**674.

468–71⅛–New. Inability to distinguish objects constitutes total loss of sight. 119**Me**131, 109**A**490, 9**ALR**521.

468–71⅙–New. Recovery allowed, although slight light perception still remained. 141**Tenn**583, 214**SW**78.

468–71⅐–New. "Entire sight" does not mean total blindness. **TexCivA** 163**SW** 421.

468–71⅛–New. Where insured can only distinguish light from darkness, it has been held total blindness. 243**Fed**285.

468–71⅑–New. A physician able to distinguish objects, although unable to use his eyes in operating, has been held not totally blind. 243**Fed**285.

468–71⅒–New. Where the contract of insurance defines "total and permanent blindness" as blindness where no projection occurs, although light perception remains, there can be no recovery for total and permanent blindness where insured can read headlines of newspapers and can see and recognize persons and objects. **TexCommnA** 298**SW**535.

468–71 1/11–New. "Entire sight" of eye is lost, within accident insurance policy, although not completely destroyed, if the sight left is of no practical use or benefit, as in the case of inability to distinguish or recognize objects. 29**F** (**2d**)460.

468–71 1/12–New. Under some policies there can be no recovery for injury to the eye resulting in a total permanent loss of sight where the eyeball is not removed. **TexCommnA** 15**SW**(**2d**)614.

468–71 1/13–New. Under a provision providing for indemnification for the irrecoverable loss of entire sight, insured has been held entitled to recover where he entirely lost the practical use of the eye. 226**Ky**328, 10**SW**(**2d**)1079.

468–71 1/14–New. Liability for loss of sight has been held to attach where insured has lost vision to extent he cannot perceive and distinguish objects. 157 **Miss**97, 127**S**699(2dcase).

468–72 111**MoA**504, 86**SW**491.

468–73½–New. Where insured lost his sight and was disabled at the same time, recovery for loss of sight does not preclude recovery for loss of time. 186**Cal** 488, 199**P**789.

468–73⅓–New. Where loss of time occurred, insured is entitled to recover, although he may also be entitled to recover for the loss of an eye under another clause. 28 **Ida**321, 154**P**493.

468–73¼–New. Facts held to permit recovery for loss of time under the policy. 47**SW**865, 20**KyL**1008.

468–75 54 **OntL**24, 24 **OntWN**246, 55 **OntL**330.

463–77 103**Kan**831, 176**P**989; 124**MoA** 38, 101**SW**152 (inability to attend to business). [a] **Under policy making loss payable if injuries shall** "wholly and continuously disable insured from date of accident" loss is not recoverable where person injured worked one or two nights after accident. 310**Mo** 411, 276**S W**380, 41**ALR**1372. [b] **"Immediately" and "from date of accident"** distinguished. 126**Kan**511, 268**P**851.

468–79 [b] (6) Where insured cut his finger and in twelve hours had blood poisoning, and on third day took to bed, he was held covered by policy provision "which shall from the date of the accident result in continuous disability." 117**Wash**7, 200**P**587. (7) Physician, accidentally injuring hip, having pain and lameness for three days, who then attended business for two weeks and had no pain, and then had pain but continued at business for two and one half months, but died three months after from sarcoma caused by accident, was held "totally and continuously unable to transact all business duties from date of accident" within policy. 107**Nebr**18, 184**NW**903, 24**ALR**191. (8) Felon on bruised finger developed within twenty-four hours. 87**Vt**138, 88**A**531, 47**LRANS** 924. (9) Where one injured on December 27 had to quit working entirely on January 11, injuries occurred "immediately," within meaning of policy. 153 **Wash**542, 280**P**44. [c] (1) 208 **Iowa**894, 224**NW**494. (5) See also 181**MoA**394, 168**SW**843. (7) Where insured returned to work for five weeks after injury and before death, beneficiary cannot recover. 101**CalA**79, 281**P**413. [d] **Instruction that insured could not recover for total disability** where appendicitis developed five days after injury held properly refused where policy did not require disability to result and continue from date of accident. 174**Ark**712, 294**SW**4. [e] **Provision that accident shall "totally and continuously disable the insured from date of accident"** is held not to cover disability caused by septicaemia resulting six days after accident. **MoA** 6**SW**(**2d**)337.

469–81 103**Kan**831, 176**P**989; **NJSup** 130**A**131 (where insured returned to work after accident, but complained of headaches and inability to see, and total disability developed gradually).

469–81½–New. Under a provision as to continuous disability, the beneficiary cannot recover for death where insured performed regular duties after the accident. 224**Ky**377, 6**SW**(**2d**)471.

469–81⅓–New. Under a policy it was held that no liability attaches until the period of disability has ceased. **Tex CivA** 185**SW**1037.

469–81¼–New. Every result traceable to the accident, no matter how remote in time, is potentially caused at the time of the accident. 197**Mass**101, 83**NE**398, 125**AmSR**332, 14**LRANS**503, 14**AnnCas** 290.

469–82 173**NC**532, 92**SE**362.

469–85 102**Nebr**87, 166**NW**121; 41**Utah** 112, 124**P**518 (construing provision).

469–87 179 **Iowa**603, 161**NW**655; 207 **Mich**677, 175**NW**176. [a] **Waiver.**–179 **Iowa**603, 161**NW**655. [b] **Where policy also provides for payment of benefits if death results from surgical operation rendered necessary by injury,** such provision is not limited by provision limiting benefits for death to death occurring within ninety days from accident. 129 **Okl** 114, 263**P**652.

470–89 33**F**(**2d**)479; 121**Kan**174, 246 **P**498 (disability from date of accident); 138**Minn**10, 163**NW**747; 54 **OntL**24, 24 **OntWN**246, 55 **OntL**330 (amputation of leg). See also 174**Wis**208, 182**NW**845. [a] **Insurer held not liable** for loss of foot amputated more than thirty days after accident. 193**NC**166, 136**SE**291. [b] **Provision denying recovery** for loss occurring more than thirty days after accident held not void. 193**NC**166, 136 **SE**291. [c] **Defense is not waived** by filing general denial, where plaintiff's pleading discloses limit exceeded. 32 **F**(**2d**)479.

470–89½–New. Limitation of liability for hernia after policy is in force sixty days is inapplicable to a hernia occurring before the expiration of such time. 87**Vt**128, 88**A**532, **AnnCas**1916**C**447.

470–89⅓–New. Under clause that total disability must have begun within stated time after accident, there can be no recovery for total disability not commencing within such time. **MoA** 24**SW** (**2d**)686.

470–90½–New. [§ 179a] C. **Disability from Date of Accident.** Disability which did not occur until two or three weeks after the "accident," has been held not covered by an accident insurance policy, which provided that the injury should wholly and continuously disable insured from the date of the accident. 151**Wash**396, 275**P**707.

470–91 89 **IndA**263, 166**NE**15 (ignition of gasoline at filling station); **IndA** 167 **NE**156; **MoA** 247**SW**1024 (predisposing causes, or subsequent contributing causes, which result directly from accident will not defeat recovery where accident was proximate cause); 198**NC**498, 152 **SE**396; **TexCivA** 23**SW**(**2d**)832. [e] **When two causes join in causing injury,** one of which is insured against, insured is covered by policy. 99**CalA**723, 279**P** 464.

470–93 32**F**(**2d**)490; 215**Ala**109, 100**S**7. [b] (2) Where destruction of eye was caused by negligent treatment of injury, and not by injury, there can be no recovery of weekly indemnity. 181 **Mich**386, 148**NW**413. [c] **Contra** 196 **Wis**29, 219**NW**448, 62**ALR**675.

470–94 [a] (2) Where peril insured against is efficient predominating cause of loss, it is proximate cause. 161**Tenn** 41, 28**SW**(**2d**)339. [c] (1) See 27 **OhA** 422, 162**NE**636. (2) 6**F**(**2d**)283; **Tex CivA** 185**SW**615. (3) If accident would have happened and injury would have occurred regardless of existing disease, company is liable. **Mo** 240**SW**793.

471–95 [a] **Mo** 203**SW**978 (death from kidney trouble caused by beating by footpads).

471–96 186**Mich**115, 152**NW**983. **LRA** 1915**E**980. **AnnCas**1917**C**459; 124**Miss** 548, 87**S**115, 15**ALR**605; 174**Mo**256, 73 **SW**592; **TexCivA** 23**SW**(**2d**)832; 117 **Wash**7, 200**P**587 (blood poisoning in finger wound). [c] (1) 124**Miss**548, 87**S** 115, 15**ALR**605. (2) Where accident caused diabetes, accident and not disease was proximate cause. **MoA** 231**SW** 75. [e] **Debility or weakened physical condition at time of accident.**–96**Nebr**65, 146**NW**1037, 52**LRANS**1203, **AnnCas** 1916**B**222.

471–97 **TexCivA** 32**SW**(**2d**)525 (not proximate). [b] (2) Where cancerous growth was ruptured by accidental strain, and death resulted, company is not liable under policy insuring against loss resulting solely from accident directly and independent of all other causes. 283**Mo**63, 222**SW**778.

471–99 **TexCivA** 5**SW**(**2d**)629. [c] **TexCivA** 271**SW**181. [d] **Provision in policy made in Texas** that notice should conform to laws of state where contract is made has been held to modify other provisions requiring immediate notice on death of insured. 232**Ky**834, 24**SW** (**2d**)906.

471–1 24**F**(**2d**)694, 695 [citCJ]; 316 **Ill** 552, 147**NE**468; **Mass** 165**NE**429; 119 **Or**591, 250**P**227, 228 [citCJ]; **Tex CivA** 5**SW**(**2d**)629; 54 **OntL**24, 24 **Ont WN**246, 55 **OntL**330.

472–2 40**F**(**2d**)344. See also 38**GaA** 589, 144**SE**678.

472–3 [b] (1) **MoA** 195**SW**535.

472–4 217**Ala**307, 116**S**151, 153 [cit CJ]; 146**SC**41, 143**SE**668.

473–7 119 **Or**591, 250**P**227, 228 [cit CJ].

473–12 214**Ky**56, 282**SW**1112; 192**NY** 587, 85**NE**1107.

473–14 But see 253 **IllA**20.

474–17 232**Ky**834, 24**SW**(**2d**)906.

475–29 87**Colo** 469, 288**P**888 (two years' delay not fatal); 316 **Ill** 552, 147 **NE**468; 256 **IllA**47; **Mass** 165**NE**429; **TexCivA** 291**SW**674. [f] (1) 40**F**(**2d**) 344. [k] **Five days' delay** (after death of insured has been held not to constitute immediate notice). **Mass** 165**NE** 429.

476–40½–New. A provision limiting liability to a fraction of the amount of insurance where notice is not given in the stipulated time is unenforceable under a statute prohibiting stipulations limiting the time to sue to less than a longer period. 99**Miss**404, 55**S**51.

476–40⅓–New. In some jurisdictions a requirement in a policy that notice be given within the period after the accident, short of the statute of limitations, is invalid. 111**Miss**409, 71**S**653.

476–40¼–New. Where a policy requires notice of total disability for a gainful occupation but specifies no time for giving it, neither insured nor his beneficiary is deprived of benefits of the policy by failure to give notice. 74 **Okl** 146, 177**P**601.

476–48 [a] 152**Wash**272, 277**P**999(2d case). [c] **Letter insufficient.**–**Vt** 151**A** 565.

476–49 **SD** 226**NW**555 (notice of fact of accident and injury sufficient).

477–51 38**GaA**589, 144**SE**678; 207 **Iowa**872, 224**NW**32 (statement on insurer's blank sufficient and not inconsistent with claim at trial).

477–54 16**F**(**2d**)721, 49**ALR**1524 (failure to demand benefit every eight weeks held not fatal); **TexCivA** 258**SW**(**2d**) 994.

477–55 **SD** 226**NW**555.

477–58½–New. Formal notice is not required where insurer has actual notice. 35**F**(**2d**)587.

477–59 4**F**(**2d**)292 (requirement of

doctor's notice of disability held reasonable).

477-60½-New. Where a policy requires the written report of a physician or surgeon every thirty days as to the condition of insured as a condition precedent to a recovery, there can be no recovery without proof of compliance with such condition. **TexCommnA** 280 SW762.

477-65 See also 153Wash542, 280P44.

478-67 206 Iowa925, 221NW577. [a] (2) Proofs of death are competent evidence of facts stated, being in nature of admissions. 232Mich101, 205NW116.

478-68 87Colo 469, 288P888 (denial of liability contained in policy); 36GaA 447, 136SE803, 804 [citCJ].

478-68½-New. Where there was a waiver of breach of condition requiring prompt notice, the undertaking of insurer to continue the defense stated was no consideration for a subsequent "nonwaiver agreement." 226AppDiv 516, 235NYS63.

478-70 36GaA447, 136SE803, 804 [cit CJ]; 28Hawaii 404, 431 [quotCJper Peters,CJ]; 126Kan511, 268P851 (offer to pay all or part of loss); 181Mich 386, 148NW413; 123MoA682, 101SW 124; 23SD417, 122NW348.

478-71 28Hawaii 404, 431 [quotCJper Peters,CJ]; 224Ky292, 6SW(2d)239, 240 [citCJ].

478-72 36GaA447, 136SE803, 804 [cit CJ]; 103Kan831, 176P989.

478-76 83 IndA474, 149NE90 (payment); 146SC41, 143SE668. [a] **Admission of liability and part payment** held waiver. 130Kan121, 285P581.

479-81 Vt 151A565.

479-82 131Ark419, 199SW108; 36GaA 447, 136SE803, 804 [citCJ]; 139 Iowa36, 116NW1046, 130AmSR294; 61Kan351, 59P651, 47LRA650; 112Ky184, 65SW 362, 23KyL1438; 119Mo131, 109A490, 9 ALR521; 151NY94, 45NE377; 199Pa 259, 48A972; SD 226NW555.

479-83 28Hawaii404, 431 [quotCJper Peters,CJ]; 59Kan521, 53P856; 103Kan 831, 176P989; 89Me96, 35A1020; 23 SD417, 122NW348.

479-84 28Hawaii404, 431 [quotCJper Peters,CJ]; 59Kan521, 53P856; 103Kan 831, 176P989; 89Me96, 35A1020; 23SD 417, 122NW348.

479-85 214Ky56, 282SW1112; 224Ky 292, 6SW(2d)239; 171MoA518, 153SW 789. [d] But see 199Mich584, 165NW 775.

479-86 25 Ida396, 138P506, AnnCas 1917A112.

479-87½-New. Acknowledgment of claim for disability stating poison ivy as the cause is not a waiver of rights to proof of disability due to accidental injury. 96Conn443, 114A385.

479-88 152Wash272, 277P999(2dcase) (failure to supply forms). But see **TexCivA** 58SW(2d)629.

479-89 253 IllA20.

480-90 59AppDiv321, 69NYS831. Contra 71MoA42.

480-91 201Mass473, 88NE6.

480-92 34 IndA243, 70NE174; 103Kan 831, 176P989; 224Ky292, 6SW(2d)239; 123MoA682, 101SW124.

480-93 50AppDiv144, 63NYS1008.

480-95 50AppDiv144, 63NYS1008; 59 AppDiv321, 69NYS831.

480-96 See also 35F(2d)667.

480-97 175Ala357, 57S852, AnnCas1914 D377; 193Ala84, 69S80; 83 IllA118; 253 IllA20; 127 Iowa25, 102NW190; 17 SW275, 13KyL593; 137Ky544, 126SW 111; 140Ky609, 131SW523; 142Ky25, 133SW996; 150Ky477, 150SW507; 155 Ky498, 159SW1134; 89Me96, 35A1020; 222Mich626, 193NW197; 129Minn18, 151 NW413, LRA1915D1199, AnnCas1916A 154; 143Minn302, 173NW670; 71MoA 42; 122MoA269, 99SW473; MoA 195SW 35; MoA 221SW397; 55Nebr127, 75NW 576; 72Nebr661, 101NW341, 103NW695, 105NW292; 75NH375, 74A1051; 170 NYS27; 226AppDiv516, 235NYS63; 122 Or547, 259P902; 222Pa462, 71A923; **TexCivA** 258SW(2d)994; 83Vt242, 75A 273; 94Vt383, 111A449; 54 OntL24, 24 OntWN246, 55 OntL330. [b] 265Fed 508; 83 IllA118. [c] See also 142Fed 653, 73CCA649. [e] **Unless insurer states** that no waiver is intended. 68Mont121, 190P993, 16ALR601.

481-98 176Ark525, 38W(2d)320 (held waived); 111Ark32, 162SW772; 72Nebr 661, 101NW341, 103NW695, 105NW293. See also 208 IllA596.

481-2 35F(2d)587 (request for autopsy is sufficient if made within reasonable time after death); 35F(2d)667; 232Ky 173, 22SW(2d)593 (provision held reasonable).

481-3 But see 113 ObSt369, 149NE389.

481-3½-New. A demand after autopsy by coroner and preparation for burial is unreasonable when there was ample opportunity to make demand at earlier date. 224 IllA312.

481-3½-New. Demand on beneficiary within reasonable time prerequisite to right of insurer to autopsy under policy. 256 IllA47.

481-6½-New. A provision that if an autopsy is made insurer shall be given timely notice thereof and an opportunity to attend and participate applies only where the autopsy is made with the consent of the sole beneficiary. **TexCivA** 270SW246.

481-6½-New. In an order to base a defense on nonobservance of such provision insurer must allege and prove that the autopsy was made with the consent of such beneficiary. **TexCivA** 270SW246.

481-8 197 IllA462; 191Ky92, 229SW 104.

481-8½-New. Payment of the exact amount claimed in proof of loss, and taking complete acquittance, held a bar to further recovery on account of injury. 101MoA312, 74SW510.

481-9 191Ky92, 229SW104.

481-10 191Ky92, 229SW104; 114NYS 589 [aff 134AppDiv936, 118NYS1116, mod 201NY576, 95NE1130]. [c] **Receipts or agreements held valid full releases.**-130Ga766, 61SE829.

481-11½-New. , or for the loss of an arm from the same accident. 132AppDiv 553, 116NYS975.

481-12 See also 36F(2d)152.

482-14 114NYS 589 [aff 134AppDiv936, 118NYS1116 (mod 201NY576mem, 95NE 1130mem)].

482-15 140Ark336, 215SW689, 141Ark 637, 218SW171; 205 IllA387; 205 IllA 403; 205 IllA404; 83 IndA474, 149NE 90; MoA 300SW1026; TexCivA 193SW 750; TexCivA 295SW1105. [a] 201NY 576, 95NE1130. [c] See also 152Miss 747, 118S437. [d] **Dismissal of action by insured without knowledge** that fraudulent settlement could be set aside held not ratification of settlement. **TexCivA** 193SW750. [e] **Beneficiary could not assert fraud** where misrepresentations were not relied upon. **TexCivA** 158SW(2d)44.

482-15½-New. Settlement on basis of claims under policy is valid and binding regardless of how the courts might have disposed of such claims. 190 Iowa445, 180NW297.

482-16 140Ark336, 215SW689, 141Ark 637, 218SW171; 97CalA659, 275P1003; MoA 300SW1026; 114NYS589 [aff 134 AppDiv936mem, 118NYS1116mem (mod 201NY576mem, 95NE1130mem)]; **TexCivA** 193SW750. [b] **Insurer's disclaimer of liability** dispenses with necessity of refund as condition for rescinding settlement for fraud. 212Ala 576, 103S678.

482-16½-New. A receipt and release executed on receipt of a draft for the amount concededly due for disability is without consideration as a release of claims for death. 166Minn100, 207NW 179.

482-16½-New. Where insured has liquidated demand and insurer admits liability for smaller amount, release of the balance is without consideration and not binding. **TexCivA** 275SW622.

482-16¼-New. Denial of liability by insurer and suggestion of defenses without merit in negotiations for compromise and settlement do not amount to fraud. 235Mich80, 209NW95.

482-16⅛-New. Recovery of balance on a double indemnity policy is not precluded by insured's acceptance of the amount of policy tendered in full settlement by insurer disclaiming liability for accidental death. 32NM34, 250P635, 52ALR367.

482-16⅛-New. Plaintiff, signing receipt in full settlement of all claims on account of injury sustained, cannot recover, unless receipt is avoided. 214Ky 142, 282SW1104.

482-16½-New. Payment of amount admittedly under policy is not a sufficient consideration for the release of an unliquidated amount claimed under the policy. 83 IndA474, 149NE90.

482-16⅝-New. Where policy and release were both obtained under duress, the question of defendant's guilt of such tort is not affected by such release. 205 IllA403.

482-16½-New. No particular form of words is required in the release. 192 Ala91, 68S871.

482-16 1/10-New. and in some states the release need not be in writing. 192Ala 91, 68S871.

482-16 1/11-New. The policy was construed as providing for payment in monthly installments instead of a lump sum. 206 IllA327.

482-16 1/12-New. A provision for payment in installments held waived where insurer did not exercise its option within ninety days. **TexCivA** 197SW237.

482-16 1/13-New. Insured is not estopped to assert liability when he signed a release where insurer did not act within a reasonable time and insured never intended to give the release. 78NH100, 97 A223.

482-16 1/14-New. Receipt of the sum which is the amount of doctor's bills is not a settlement in full. **TexCivA** 200 SW862.

482-16 1/15-New. Facts held not to constitute release of insurer. 139Minn309, 166NW401.

482-16 1/16-New. Where a policy required insurer to defend at his own expense, insured's failure to furnish a supersedeas bond did not release insurer from liability. 139Minn309, 166NW401.

482-16 1/17-New. **An injured person, although an infant, could execute a binding release** under the New York statute, and exclusion of proof that the infant did not knowingly execute the release, or that the release was executed by means of misrepresentations, was error. 133MiscRep406, 231NYS589.

482-16 1/18-New. Payment by insurer of a former judgment in favor of insured is no defense to a subsequent action, where insurer has subsequently collected the premiums. 32F(2d)61.

482-19 32PortoRico 73; 5 OntL544, 2 OntWR272 [dism app 2 OntWR98 (allowing app 1 OntWR777)]. See also 125Minn518, 145NW376.

482-20 32PortoRico 73.

483-38 221Mass464, 109NE447. But see **TexCivA** 138SW(2d)424.

484-44 See also 163MoA628, 146SW 833.

484-46 105WVa197, 141SE789,791 [cit CJ]. See also 191 IllA496. But see 12 F(2d)693, 53ALR49 (may recover for breach of entire contract).

484-48 245 IllA300 [quotCJ].

484-49 218Mich21, 187NW267; 178 Minn535, 228NW148 (not applicable to deferred weekly payments); **NJSup** 131 A679; 55Misc128, 104NYS553 [aff 122 AppDiv897mem, 106NYS1138mem (aff 197NY516mem, 90NE1160mem)]. But see 184Mich406, 151NW593, LRA1916A 475. [c] (2) Disbursements in defense of suit by insured for injuries. 10App Div9, 41NYS631. [g] (2) Limitation does not apply to continuing injury. 60 Utah341, 208P496. (3) Limitation that no benefits are due till disability ceases does not apply where policy provides for definite sum for permanent total disability. 127 Iowa25, 102NW190. [i] **Provision for suit within specified time from date of judgment** against insured in suit for personal injuries by third person bars suit after expiration of such time. **NJSup** 131A679.

485-55 103Kan831, 176P989 (limitation, in policy, to six months void under statute); 107Kan109, 190P592 (provision that action could be brought only within ninety days after judgment

for loss is void under statute); 111Miss 409, 71S653; 152NC358, 67SE927, 20 AnnCas1290 (one year); 17ND380, 116 NW349 (policy limitation to nine months invalid under statute). [c] (2) Statute as to six year minimum limitation for life insurance does not apply to accident policy. 218Mich21, 187NW267.

485–57 73NH425, 62A728. [a] **Total permanent disability.**–137 Iowa25, 102 NW190.

485–60 152NC358, 67SE927, 20AnnCas 1290. See also 27 Okl 496, 112P1026. But see 232Ky834, 24SW(2d)906. [a] **Time it took beneficiary's committee to discover true beneficiary** would be deducted from period of limitation where insurer misled committee. 232Ky834, 24SW(2d)906.

486–67 59AppDiv294, 69NYS291.

486–72 55Wash51, 104P185 (twenty-five days after refusal to pay held reasonable time within which to sue, limitation having been waived). [a] **Waiver held not established** by excuse for refusal to pay, other than that action was barred. 186Mass413, 71NE801, 104Am SR594. [b] **Waiver held not established** by waiver of proofs of loss. 76 NH275, 81A1077, 107S [citCyc].

486–73 185 IllA580; TexCivA 210SW 713 (failure to furnish blanks required for proof); 87Vt128, 88A532, AnnCas 1916C447 (facts held to show waiver).

486–74 36GaA540, 137SE403; TexCivA 185SW615. [b] (3) 136AppDiv908, 120 NYS1135 [mod 203NY453, 96NE744]. [b] (7) Refusal to pay after receipt of proofs. 36GaA540, 137SE403.

487–80 33F(2d)853; 146Ark70, 225SW 298; 184 Iowa423, 166NW363, 168NW 884, 3ALR1295, 151NW479.

487–88 [a] **Circumstances held not to work forfeiture.**–59AppDiv294, 69NYS 291. [b] **Compromise between insured and third person with agreement** that same would not be used in evidence held no defense in view of clause in policy. 179NYS836.

487–90½–New. Elements of "estoppel" are not necessary to constitute waiver of forfeiture as distinguished from "waiver" of defense of forfeiture. Mo 220SW906.

488–93½–New. Failure of insured to sue tort-feasor in jurisdiction favorable to him before trial of suit against him in jurisdiction less favorable to him is no defense to suit on policy for liability for accident. 179NYS836.

488–96½–New. Where, by direct statement in open court and motions and proceedings, a company admits liability for the face of the policy but denies double liability for injury upon a public conveyance, it is estopped to deny that injury was the result of an accident. 129 IllA360.

488–96½–New. Where insurer stated that the claim was disallowed because the company was not satisfied that death was due to an accidental injury, insurer waived any other defense it might have had. 244Mich99, 221NW 162.

488–97½–New. Defense of untruth of warranties is not waived by tender of one fifth of the policy, under defense of exposure to danger, limiting recovery to that amount. 84SC95, 65SE949.

488–99½–New. A company by taking charge of the defense of insured in an action against him, with knowledge of the facts of the accident, waives all defenses to suit by insured on the policy. 178 IllA54.

488–99½–New. Where a company tenders or pays into court in full of all claims the amount named in the policy for partial disability, it cannot question liability on any ground to that amount, although it had interposed defenses to the policy. TexCivA 72SW1016.

488–1 53CalA404, 200P87; 96CalA386, 274P384. [b] (2) But where statutes are not applicable to mutual accident companies, stipulation for suit in county named in certificate is valid. TexCivA 197SW237. [c] **County where insured died.**–TexCivA 10SW(2d)580.

488–1½–New. or insured died. TexCiv A 169SW389.

488–2 96CalA386, 274P384. But see TexCivA 10SW(2d)580.

488–2½–New. Under statutes an action by the assignee of proceeds of policy is properly brought in the county of insured's residence at the time of the loss. 163 Iowa28, 143NW1006.

488–2½–New. In some states a nonresident may sue a foreign insurance company on a policy written outside the state and where the accident or death occurred outside the state, when such company is legally doing business in the state and proper service is made. 119Tenn364, 104SW305.

488–2¼–New. Right to change of venue as affected by failure to serve party see 96CalA386, 274P384.

488–3 TexCivA 48SW(2d)599. [a] **On general demurrer to complaint** on accident policy court may presume that plaintiff having insured's name was entitled to estate of insured and not limited to recovery for death. 172Ark1098, 292SW389.

488–3½–New. A widow may sue in one action individually for death benefits and as representative for weekly sick benefits. 209Ky165, 272SW413.

489–5 36GaA540, 137SE403; 234Ky 838, 29SW(2d)563. [a] 216Ala13, 112 S225. [d] **Petition demurrable.**–143Ga 654, 85SE834.

489–6 32F(2d)479; 37GaA289, 139SE 911 (petition held insufficient). [c] **In Alabama.**–217Ala282, 116S164. [d] **Averment is demurrable** which sets forth new contract of waiver with plaintiff instead of with insured and fails to allege consideration. 71NJL396, 59A 347.

489–10½–New. Failure to allege relationship of beneficiary and insured and survivorship is not fatal after verdict. 217MoA429, 226SW1001.

489–10⅓–New. Where the policy covers an accident while walking in the public highway, complaint not alleging such fact is insufficient. 76 IndA173, 131NE523.

489–11 24GaA497, 101SE541 (allegations sufficient). See also 87 IndA597, 162NE66. [a] (4) as against demurrer that cause of injury was within exception of policy (98Fla1044, 124S817).

489–13½–New. Immediate disability held sufficiently alleged. 34IndA243, 70 NE174.

489–13½–New. Where policy covers only accidents occurring within certain ages, failure to allege that insured was within the prescribed ages at the time of the accident renders the complaint demurrable. 73NJL677, 67A432 [aff 71 NJL396, 59A347].

489–14 TexCivA 218SW591. [a] 122 Okl 43, 250P787.

489–15 35F(2d)262; 157Tenn254, 8SW (2d)369, 64ALR962.

490–17 83 IndA344, 147NE533.

490–18½–New. Under a complaint alleging several causes of death, acting either separately or together, proof of one warrants recovery. IndA 130NE 874.

490–18½–New. Word "fall," used in a complaint, implies an accidental event. 188SD287, 100NW428, 67LRA175.

490–24 [b] **Petition sufficient.**–Tex CommnA 25SW(2d)1093.

490–26 TexCivA 27SW(2d)845.

490–30 [a] **Complaint held sufficient.**–223AppDiv169, 227NYS619.

491–36 See also 182 IllA317.

491–38 36GaA540, 137SE403; TexCiv A 10SW(2d)178 (averment sufficient to warrant recovery of twelve per cent damages and attorney's fees); Tex CivA 13SW(2d)424 (sufficient allegation).

492–53 [a] **Plea held to present good defense** in reduction of recovery. Ala 127S850. [b] **Insurer's affirmative pleading of lack of timely notice** is not waiver of right to urge lapse of policy. Wash 290P698.

492–55½–New. A defense attempted to be pleaded in answer, not supported by allegations of fact, is insufficient. 6 F(2d)540.

493–66 157Miss97, 127S699(2dcase).

493–76 [a] **Affirmative plea held not necessary,** since death by suicide is not caused by accidental means. Mo 240SW 793.

494–81½–New. Facts limiting liability to smaller sum must be alleged. 185 Iowa674, 169NW451 (manner of overturning of automobile).

494–81½–New. Plea as to diminution for an injury received in an occupation classed by the company as more hazardous held sufficient. 28TexCivA36, 62 SW927.

494–86 [a] **Refusal to permit amended rejoinder,** pleading provision that no agent could waive provisions of policy, held proper, no such question being involved. 218Ky825, 292SW511.

494–92 TexCivA 10SW(2d)239.

494–93 212Ala576, 103S678 (allegations in replication as to fraud in securing release held sufficient).

494–99½–New. Under a policy not covering loss by intentional means, the beneficiary must allege and prove death by bodily injuries sustained solely through accidental means. 152Md439, 137A43.

494–99½–New. Waiver of condition is admissible by plaintiff in rebuttal under an answer tendering such issue, although the complaint has no such allegation. 37 Ida667, 219P598.

494–99¼–New. Proof that injury was one excepted by policy may be shown by company, although such injury is not named in the petition. Iowa 135NW 735.

494–99⅓–New. Plaintiff held required to prove waiver of by-law providing for payment of death benefit should death occur within certain period after injury. 179 Iowa603, 161NW655.

494–99¼–New. Where insurer set up release from further liability, the failure of plaintiff to deny the genuineness and due execution of the receipt as it appeared in the answer has been held not to preclude plaintiff from challenging the effect of the receipt on the ground of fraud. 97CalA659, 275P1003.

495–4½–New. Under allegations that proofs of loss were furnished, waiver may not be shown. 316 Ill 552, 147NE 468.

495–4⅓–New. A petition seeking double recovery authorizes recovery for a lesser amount. Mo 199SW1020.

495–5 163 Ill 625, 45NE563, 54AmSR 486; 120Va115, 90SE620.

495–7 20F(2d)818 (asphyxiation); 22 F(2d)700; 30F(2d)80 [certiorari den 49 SCt348, 279US852, 73L ed995(5th case)]; 28Hawaii404, 452 [quotCJ per Peters,CJ]; 184 Iowa423, 166NW363, 168NW884; 201 Iowa1334, 208NW213; 160La854, 863, 107S599 [citCJ]; 152Md 439, 137A43 (falling from window); 37 PaSuper299; TexCivA 198SW(2d)69; TexCivA 197SW316; 145Wash189, 259P 383; 145Wash679, 261P792. See also Eng [1905] 2 Ir1. [a] (1) 212 IllA354. [c] **Presumption not conclusive** but merely evidence in favor of plaintiff. 152Md439, 137A43.

495–9 244Fed556; 87Colo 297, 287P 859; 163 Iowa217, 143NW574, 48 LRANS600; 201 Iowa1334, 208NW213. [b] (2) Facts held to raise conclusive presumption. 12GaA601, 77SE1072.

495–11 152Md439, 137A43; 221Mass 540, 109NE449; 106Nebr575, 184NW 84, 18ALR106; TexCivA 3SW(2d)478, 481 [quotCJ].

495–12 244Fed556 (holding that presumption will prevail if circumstances are consistent with any other theory); 20F(2d)818; 22F(2d)700; 180Cal 252, 180P607; 87Colo 297, 287P859; 175 Ill A511; 161Ky163, 170SW525; 160La 529, 107S395; 160La854, 107S599; 162 La160, 110S186; 152Md439, 137A43; 173Minn191, 217NW123; 149Miss306, 115S548; Mont 292P253; TexCivA 209 SW230; TexCivA 21SW(2d)1071; 145 Wash189, 259P383. But see 131Ark419, 199SW108.

495–13 30F(2d)80 [certiorari den 49 SCt348, 279US852, 73L ed995(5th case)]; 160La854, 107S599; 152Md439, 137A43; 149Miss306, 115S548; Mont 292P253. [a] (2) Circumstantial evidence must be of such quality and weight as to negative every reasonable inference of death by accident. 65Utah 465, 238P259, 41ALR1495.

496–16½–New. Burden is on insurer to show reason for retention of premium where nondelivery during lifetime is claimed to have been waived by reten-

tion of premium. 217MoA302, 261SW 340.

496–20 255Fed483, 166CCA559; 270 Fed946; 15F(2d)737; 20F(2d)818; 176 Ark525, 38W(2d)320; 169Cal 800, 147P 1175; 23GaA323, 98SE252 (accident of travel); 175 IllA511 (burden held on plaintiff to show injury not self inflicted, where accident only issue); 183 IllA 625 (whether issue raised by special plea or not); 239 IllA479; 223Ky600, 4 SW(2d)383; 160La529, 107S395; 160 La554, 107S599; 1LaA509, 512 [citCJ]; 152Md439, 137A43, 50 [quotCJ]; 252 Mass328, 147NE858; 244Mich99, 221N W162 (efficient proximate cause); 173 Minn191, 217NW123; 126Miss73, 87S 896; 288Mo 175, 231SW947; MoA 209 SW602 (insanity of person shooting insured); MoA 218SW689; MoA 221 SW752; MoA 274SW917; MoA 294SW 97; Mont 292P253; 96Nebr381, 147NW 1118; 197NC566, 150SE19; TexCivA 197SW316; 65Utah465, 238P259, 41 ALR1495; 113Wash13, 192P924; 143 Wash201, 253P595; 146Wash665, 264P 410 (act insured against must be established as efficient cause of death). See also 164 Iowa199, 145NW479, 51 LRANS221, AnnCas1915C813. [a] 200 Iowa476, 203NE14; 200 Iowa60, 204NW 406, 41ALR363. [d] **Permanent and total disability.**–TexCommnA 258W(2d) 1093.

496–21 173Ark937, 294SW353; 162La 160, 110S186; 152Md439, 137A43, 50 [quotCJ]; 290Mo 455, 235SW83. [b] **Where evidence was evenly balanced between suicide and accident,** it was held that motive for act was determining factor. 162La160, 110S186.

496–21½–New. [§ 284a] a½. **Time of Death.** Under provision for payment to insured of a certain sum on predecease of beneficiary, burden is on plaintiff, where both insured and beneficiary die, to prove that beneficiary died before insured. 292Fed5.

496–22 43F(2d)312.

496–23½–New. In an action on an employee's policy providing for payment of premiums by deduction from wages, insurer has the burden of showing that insured knew that he was being paid full wages without deduction of premiums. 159Tenn564, 20SW(2d)1040.

496–24 45CalA332, 187P996; 179 Iowa 213, 161NW57, LRA1917C338; 201 Iowa 1334, 208NW213; 146SC41, 143SE668.

497–26 247Fed65, 159CCA283, 7ALR 175; 316 Ill 552, 147NE468. [a] **Where notice is alleged in petition and not denied,** presumption is that it was given. TexCivA 193SW750.

497–28 26F(2d)277; 49ND1053, 194N W739; 260Pa147, 103A536; 37PaSuper 299; 152Wash272, 277P999(2dcase); Eng [1909]AC404. [a] 172Cal 6, 155P 86. [c] **In widow's action upon insurance policy** for death of her husband, presumption of innocence of crime and fraud cast upon insurer burden of proving its allegation that insured's representation as to income was untrue. 45 CalA332, 187P996.

497–29 TexCivA 195SW653.

497–30 100CalA96, 279P1045; 245 IllA 180; 201 Iowa1334, 208NW213; 108 Kan516, 196P235; 129Kan234, 282P 699; 221Mass540, 109NE449; 318Mo 363, 18SW(2d)99, 57ALR615; 146SC41, 143SE668; TexCivA 198SW(2d); Can [1929] 4DomLR823. But see 152Md439, 137A43. Contra Tex 212SW933 [rev TexCivA 178SW816].

497–31 201 Iowa1334, 208NW213; 152 SC450, 150SE127. But see 147Ga608, 95 SE4 [rev 19GaA264, 91SE441].

497–32 128Minn474, 151NW180. Ann Cas1916A277; 260Pa147, 103A536.

497–33 Iowa 229NW702; 37PaSuper 299; 106WVa533, 146SE53, 55 [citCJ].

497–34 82Ark214, 101SW168; 190Mass 171, 76NE665; 112Mich196, 70NW460, 40LRA444; 37PaSuper299; 141Wis43, 122NW721, 25LRANS1241, 18AnnCas 1123.

498–40 But see 180Cal 326, 181P61; 189Cal 406, 209P26, 26ALR116.

498–41 283Mo 442, 223SW70; Mo 240 SW793; 158Wis278, 148NW878.

498–42 139 Iowa36, 116NW1046; 152 Md439, 137A43. But see 152Wash272, 277P999(2dcase). [d] **Beneficiary has burden of proof** when pleading character of accident as assault for robbery in specific terms. 219Ky501, 293SW968. [e] **Burden of proof remains always on plaintiff,** effect of defendant's evidence being merely to overcome plaintiff's prima facie showing and to require plaintiff to disprove exception by preponderance of evidence. 152Md439, 137A43.

499–49 MoA 283SW64; TexCivA 169 SW389.

499–50½–New. Where insurer claims that the condition of insured's eye was the result of a preëxisting disease of long standing, evidence that about four months before the accident insured had engaged in target shooting, and illustrated the keenness of his sight in the same eye is competent. 226Ky328, 108 W(2d)1079.

499–52½–New. Finding of bruised spot on insured's body when preparing it for burial is admissible. 223Ky600, 48W (2d)283.

499–53½–New. Certificate of city clerk as to record of death of insured is admissible, under statute requiring that record state disease or cause of death, and providing that record shall be prima facie evidence of facts recorded. 252 Mass328, 147NE858.

499–53⅓–New. Evidence of amount for which insured settled with railroad is inadmissible as too remote. TexCivA 200SW862.

499–53¼–New. Evidence of sexual perversion some years previous to accident has been held too remote. 272Mo 19, 197 SW95.

499–53⅙–New. Evidence that some years previous plaintiff was found guilty of wife abandonment is inadmissible. 272Mo 19, 197SW95.

499–53⅛–New. Evidence not relating to cause of death is properly excluded. 220Fed622, 136CCA230.

499–53⅐–New. Complaints made to trainman prior to injury are inadmissible. 53Utah543, 173P1168.

499–53⅛–New. A question calculated to prejudice the jury is inadmissible although bearing on the issue of the accident. 152Ark12, 238SW10.

499–53⅑–New. That insured had prior stroke of paralysis is admissible upon his predisposition to paralytic strokes. MoA 221SW752.

499–53 1/10–New. Failure to notify doctor of accident does not preclude beneficiary from showing that death was due to accidental injury. 30TexCivA489, 708W 798.

499–59½–New. Where insured was shot and killed by officers while he was fleeing from arrest, and the officers had no warrant and no probable cause for believing that insured had committed any offense, and the reputation of accused is not in issue, evidence of the bad reputation of insured is inadmissible, 216MoA 507, 270SW707.

499–59⅓–New. particularly where there is no evidence that the officers knew of such reputation. 216MoA507, 270SW 707.

499–59¼–New. That insured complained to the chief of police concerning a threat against him six months before death is inadmissible on the question of the cause of death. 190Cal 421, 213P42, 26ALR123.

499–59⅕–New. Where there is no question of self-defense, evidence that the person who killed insured was seen lying in wait is not admissible. 66SW1033, 23 KyL1999.

499–62 240 Ill 205, 88NE550, 130AmSR 269 [aff 144 IllA38, 25LRANS1256].

499–63 134Wis322, 113NW967, 17LRA NS260.

499–66½–New. Evidence that insured was delirious four hours before the accident is material on the issue of his mental condition at the time of the accident. 152Md439, 137A43.

499–66⅓–New. On the question of suicide, evidence that insured believes in God and is a member of the episcopal church is admissible. 274Mo 83, 201SW 1128.

499–67 246Fed637, 158CCA593.

499–70 113 Iowa259, 85NW24.

499–70½–New. Evidence of having obtained eight other policies one hour before starting on trip is admissible on motive. 113 Iowa259, 85NW24.

499–70¼–New. Evidence tending to show that injury was self-inflicted is admissible. 113 Iowa259, 85NW24.

500–72½–New. Evidence is admissible to show insured's state of mind toward his assailant, by whom he was killed in a shooting affray. 93PaSuper583.

500–76 [b] **Evidence casting doubt upon theory** that deceased was intoxicated is admissible. 128Minn474, 151NW180, AnnCas1916A277.

500–80 66SW1033, 23KyL1999.

500–80½–New. [§ 300a] (7½) **Asphyxiation.** Under provision reducing recovery for death by asphyxiation by "any" kind of gas, evidence as to the kind of gases causing death is admissible. 210 Mich327, 178NW19.

500–80⅓–New. Evidence that other persons with insured at the time of the accident had been drinking and were drunk an hour or two after the accident is properly excluded. 129Kan700, 284P599.

500–80¼–New. Evidence that persons with insured at time of accident were drunk two hours thereafter has been held inadmissible. Kan 289P426.

500–82 194 IllA559.

500–83½–New. Opinions of experts are admissible. 274Mo 83, 201SW1128.

500–84 113 Iowa259, 85NW24.

501–88½–New. Testimony of witness given at coroner's inquest properly excluded. 237Fed78, 150CCA280.

501–89 190Cal 421, 213P42, 26ALR123; 208 IllA506; 221Mass540, 109NE449.

501–90 118Ky716, 82SW364, 26KyL 589, 68LRA285, 4AnnCas1092.

501–94½–New. Evidence showing disability is incompetent where insured refused to submit to examination by insurer's physician. LaA 130S572.

501–95 163 Iowa28, 143NW1006. [c] **Testimony that eye was sightless** is admissible, though witness did not examine eye till ninety days after accident. MoA 195SW540.

501–96½–New. Testimony of insured's physician that death was due to accident is admissible. 202Mass292, 88NE901.

501–1½–New. Evidence as to the physical and mental capacity of the beneficiary at the time an autopsy was performed on the body of insured is admissible on the question as to whether the autopsy was performed with the consent of the beneficiary. TexCivA 270SW246.

501–1½–New. Evidence that the beneficiary did not know that a policy was in force until after insured had been buried is admissible on the question of the good faith of the beneficiary with reference to compliance with the autopsy clause. TexCivA 270SW246.

501–1¼–New. Preliminary proofs stating a first claim for loss of an eye, instead of injury to the eye, have been held properly admitted. 163 Iowa28, 143NW1006.

502–5 136 Iowa140, 113NW566; 111Va 389, 69SE344. [a] **Inadmissibility of application,** because not attached to policy, does not prevent showing that insurer stated insured's age in policy, knowing he was older. 218Ky825, 292 SW511.

502–8 193AppDiv369, 184NYS7.

502–9½–New. For purpose of showing fraud, evidence that plaintiff had on previous occasions acted improperly is inadmissible. 211 IllA66.

502–9⅓–New. Statements of insured concerning his condition are admissible to determine whether representations as to his health were known by him to be false. 38F(2d)399.

502–18 See also Wash 290P698.

502–20½–New. Where the beneficiary was not bound to pay the premium, it is not error to exclude testimony as to whether she did pay it. 98SC273, 82SE 402.

502–20⅓–New. Testimony as to the payment of premiums long after forfeiture for nonpayment of premiums is inadmissible. TexCivA 16SW(2d)335.

503–23½–New. Exclusion of testimony that insurer's agent, with knowledge of the nature of the duties of a telegraph operator, gave him certain classification is error. 131 Or327, 279P855.

503–27½–New. Acts and conduct of deceased are competent on the question whether insured had changed his occupation. 104Kan612, 180P200.

503–34½–New. Insurer's investigator may be questioned as to investigation he made and what he learned therefrom for purpose of rebutting insured's claim that at time he signed release insured's denial of liability was not made in good faith, but not for purpose of proving truth of facts such questions elicited. 235Mich80, 209NW95.

503–34⅛–New. Release of claim under an accident policy need not be in writing in some jurisdictions. 192Ala91, 68S871.

503–36 [a] **Statute does not apply** to accident policies. 94Fed743, 38CCA1.

504–38 220Ala104, 124S229

504–39½–New. [§ 331a] p ½. **Insurance Manual.** Referred to and made part of policy is admissable in evidence. 178 IllA502.

504–39⅛–New. , notwithstanding statutes providing that the policy and application shall constitute the entire contract and that the policy shall state the agreement on its face. 178 IllA502.

504–39¼–New. To show that policy did not cover accidents insurer may introduce certificate of incorporation. 197 MoA457, 196SW100.

504–39½–New. In the absence of evidence that the second policy was in force when insured died, such policy is not admissible in an action on the first policy for the purpose of proportioning the indemnity. 201Ala486, 78S392.

504–46 270Fed946; 19GaA127, 91SE228; 24GaA431, 101SE134; 183 Iowa1279, 168NW212. LRA1918D414; 182Ky125, 206SW170; 185Ky664, 215SW821; 49LaAnn636, 21S721; 126Miss73, 87S896; 163MoA628, 146SW833; TexCivA 18SW(2d)490 (evidence of permanent loss of use of hand and permanent partial disability by injury thereto held to sustain judgment); TexCivA 25SW(2d)994; TexCivA 209SW230; 113Wash13, 192P924. [a] MoA 246SW628. [b] **Evidence showing cause was violent** establishes prima facie that it was accidental. MoA 294SW97. [c] **Evidence held sufficient.**–35F(2d)587; Ark 32SW(2d)310; Kan 289P414; Ky 32SW(2d)5. [d] **Evidence held insufficient.**–217MoA302, 261SW340; Okl 293P204; TexCivA 28SW(2d)1111; Wash 287P894. [e] **Evidence held to sustain** trial court's findings that receipt releasing insurer from further liability under accident policy was procured by means of fraud on insured. 97CalA659, 275P1003.

504–47 252Mass328, 147NE858 (clear proof required to establish suicide). Mo 199SW1020; TexCivA 241SW191; 120Wash31, 206P836.

504–48 208Pa439, 57A830; SD 226NW555 (that insured was injured by being "struck down by automobile"). [a] (1) 262Fed354; 32F(2d)490; 106Ark91, 152SW995, 44LRANS493; 131Ark419, 199SW108; 174Ark712, 294SW4; 178Cal153, 172P1098; 180Cal252, 180P607; 190Cal421, 213P42, 26ALR123; 203Cal465, 265P207, 56ALR860; 207Cal551, 279P425; CalA 291P436; 35Colo19, 83P1013, 9AnnCas916; 87Colo297, 287P859; Ida 291P1072; 199IllA316; 205IllA108; 253IllA20; 196Ind629, 149NE164, 42ALR239 (puncture of bowels); 56IndA111, 104NE991; 84IndA343, 138NE826; IndA 167NE156; IndA 170NE548; 163Iowa217, 143NW574, 48LRANS600 (presumption from shooting in affray with burglar held to make prima facie case); 176Iowa399, 158NW401; 183Iowa1279, 168NW212, LRA1918D414; 184Iowa423, 166NW363, 168NWS84, 3ALR1295, 151NW479; 97Kan540, 155P1088; 103Kan855, 176P664; 104Kan612, 180P200; 130Kan121, 285P581; 76SW832, 25KyL1035; 183Ky117, 209SW44; 162La160, 110S186 (accident, not suicide); 49LaAnn636, 21S721; 221Mass540, 109NE449; 124Minn478, 145NW395; 129Minn18, 151NW413, LRA1915D1199, AnnCas1916A154; 130Minn242, 153NW523; 131Minn461, 155NW643; 136Minn132, 161NW385; 143Minn468, 173NW705; 144Minn282, 175NW111; 145Minn175, 176NW502; 150Minn66, 184NW565; 155Minn271, 193NW463; 163Minn267, 203NW966; 173Minn191, 217NW123 (pistol shot); 111Miss409, 71S653; 146Miss298, 112S483; 266Mo580, 182SW740; Mo 203SW978 (man severely beaten by footpads causing kidney trouble from which he died ten months later); Mo 240SW793; 298Mo619, 251SW924; MoA 221SW752; 209MoA46, 232SW218; 216MoA507, 270SW707; 221MoA460, 282SW64 (to show that insured was not aggressor in encounter in which he was killed); 96Nebr381, 147NW1118; 173AppDiv174, 158NYS1014; 193AppDiv369, 184NYS7; 56ND517, 218NW220, 60ALR962; 21OhA129, 152NE796 (where insured, an elderly man suffering from arteriosclerosis, died from gangrene resulting from stubbing toe on stair); OhA 173NE29; Okl 291P962(2dcase); 92PaSuper256; SD 231NW930; 157Tenn254, 8SW(2d)369, 64ALR962; 160Tenn546, 26SW(2d)159; TexCivA 3SW(2d)478; TexCivA 22SW(2d)1112 (mastoiditis resulting from fall while ice skating); TexCivA 27SW(2d)556; TexCivA 28SW(2d)259; 58TexCivA198, 123SW432; TexCivA 163SW421; TexCivA 177SW169; TexCivA 193SW750; TexCivA 210SW856; TexCivA 214SW456; TexCivA 270SW246; TexCivA 295SW1105 (to justify finding that blow on head caused injury); 65Utah465, 238P259, 41ALR1495; 113Wash13, 192P924; 158Wis278, 148NW878; 179Wis431, 190NW910; 198Wis252, 223NW844. (2) To show that death from blood poisoning in skin abrasion was proximately caused by accident. 127Wis67, 106NW1055, 115AmSR997, 5LRANS926, 7AnnCas484. [b] (1) 22F(2d)136 (to go to jury on issue as to whether defective steering apparatus caused accident); 25F(2d)596; 42F(2d)997; 143Fed271, 74CCA409, 5LRANS657, 6AnnCas955; 270Fed946; 10AlaA642, 65S852; 127Ark254, 192SW216; 28Hawaii404; 163Ill625, 45NE563, 54AmSR486; 71IllA132 [aff 172Ill511, 50NE115]; 191IllA496; 192IllA475; 195IllA421; 197IllA462; 164Iowa199, 145NW479, AnnCas1915C813, 51LRANS221; 200Iowa476, 203NW14; 200Iowa60, 204NW406, 41ALR363 (voluntary drinking of liquor or fusel oil whereby insured drank more than he intended when his hand slipped); 186Mich115, 152NW983, LRA1915E980, AnnCas1917C459 (death due to illness, not accident); 288Mo175, 231SW947; 196MoA383, 195SW545; 29TexCivA159, 67SW1062; 134Va195, 113SE878; 173Wis173, 180NW815. (2) To preclude finding that person was directly disabled as result of accident within policy sued on. 94CalA621, 271P786. (3) Other instances. 37F(2d)96. [c] MoA 294SW97. [g] (1) 158Ky1, 164SW106 (proof that insured died from pistol shot held prima facie case). (3) Proof of policy, and death from stabbing with knife, make out prima facie case. 152SC450, 150SE127.

504–48½–New. external, violent, and accidental means. 253IllA20.

505–49 207Cal551, 279P425. [a] 127Ark254, 192SW216; 180Cal326, 181P61; 105SW433, 32KyL235; La 124S821 (death from arteriosclerosis not effected by traumatic injury); 150Minn66, 184NW565; 32NM34, 250P635, 52ALR367. [b] 178Cal153, 172P1098; 205IllA108; 175Iowa513, 154NW409; LaA 120S431 (as to chronic disease); 133Minn215, 158NW45; 288Mo175, 231SW947; TexCivA 193SW750.

505–50 [a] 49LaAnn636, 21S721; 245NYS430 (to show that infirmity did not contribute to disability). [b] **Evidence held sufficient** to sustain finding that death was not due to bodily infirmity. 56ND517, 218NW220, 60ALR962.

505–51 [c] 203Fed656, 122CCA52; 97Kan540, 155P1088; 229NY54, 127NE481. [d] **In absence of proof that injuries causing death were caused by** burning of whole or part of building, insurer is not liable under policy. 229NY54, 127NE481.

505–51½–New. drowning. [a] **Evidence held sufficient.**–252Mass328, 147NE858.

505–52 [a] 241Fed278; Mont 292P253. [b] 20F(2d)818; 22F(2d)700; 35F(2d)611 (where insured was insane); 84Fed410, 28CCA281; 131Ark419, 199SW108; 180Cal252, 180P607; 158Iowa356, 139NW463; 49LaAnn636, 21S721; Mo 240SW793; 315Mo760, 287SW346; MoA 231SW1049; 209MoA81, 237SW144; MoA 243SW201; TexCivA 198W(2d)69.

505–53 [a] 141Ga413, 81SE120. [c] **Evidence held sufficient.**–22F(2d)136; 195IllA270; 260Pa147, 103A536.

505–54 [a] 137Fed1012 [rev 143Fed271, 74CCA409, 5LRANS657, 6AnnCas955]; 143Fed271, 74CCA409, 5LRANS657, 6AnnCas955; 24GaA497, 101SE541; 183Iowa776, 166NW455; 315Mo760, 287SW346; TexCivA 178SW816. [b] 136Ark84, 206SW64; 91Conn727, 101A92; 76SW832, 25KyL1035; 167Minn340, 209NW20 (to sustain finding that insured assaulted another and received fatal injuries in affray); 221MoA460, 282SW64 (insured not aggressor); TexCivA 177SW1008; TexCivA 197SW816; TexCivA 203SW779; 58Utah622, 200P1017, 17ALR1183.

505–54½–New. that accident was direct result of violation of law. 49ND1053, 194NW739.

505–54⅛–New. insured's violation of law. 128Kan155, 276P804.

505–55 [b] **Evidence held sufficient.**–139Iowa36, 116NW1046, 130AmSR294.

505–56 [a] 155Minn271, 193NW463; MoA 246SW628; 157Tenn254, 8SW(2d)369, 64ALR962; TexCivA 271SW181.

505–57 [a] 27IndA327, 61NE207; 151Ky103, 151SW366, 152Ky42, 153SW14; 164Ky786, 176SW194; 169Minn53, 210NW634; 285Mo379, 227SW96; TexCivA 198W(2d)69. [b] 190Cal421, 213P42, 26ALR123; 253IllA20; 194Iowa1203, 190NW934; 201Iowa1334, 208NW213; 219Ky501, 293SW968 (assault for purpose of robbery); MoA 209SW602; MoA 241SW95.

505–57½–New. that the injury was not intentionally inflicted by another; MoA 294SW97.

505–57½–New. that the injury was one excepted in the policy. 31F(2d)803.

505–58 [a] (1) 35F(2d)587; 106Ark91, 152SW995, 44LRANS493; 180Cal76, 179P195; IndA 167NE156; 119Me94, 109A379; 133Minn215, 158NW45; 144Minn282, 175NW111; 166Minn100, 207NW179; Mo 240SW793; 58TexCivA198, 123SW432; 143Wash201, 253P595 (caused by act not insured against). (2) Death from peritonitis caused by blow was not proximately caused by disease. 133Minn215, 158NW45. [b] **Evidence held insufficient.**–144La401, 80S604; 144La410, 80S607; 121Miss1, 83S278, 8ALR229; 120Va115, 90SE620.

505–58½–New. that loss of eye was due to negligent treatment of injury, and not to injury itself; 181Mich386, 148NW413.

505–60 [a] (1) 4F(2d)501; 183AppDiv744, 171NYS174; TennChA 54SW98. See also CalA 286P729.

505–61 [a] 213AppDiv746, 210NYS96. [b] **Evidence held sufficient.**–168Ky789, 182SW944, AnnCas1917D851; 179Minn19, 228NW440; MoA 246SW628; MoA 247SW1024; TexCivA 38SW(2d)478; 58TexCivA198, 123SW432; TexCivA 178SW806; TexCivA 229SW862; TexCivA 214SW456.

505–62 191Ky226, 229SW1033. [a] (1) 153Ala630, 45S166, 15LRANS252 (held that insured was not entitled to recover on the policy); 207Iowa872, 224NW32 (recovery allowed for total disability for thirteen weeks and partial disability for four weeks); 250Mich176, 229NW427(2dcase); TexCivA 160SW330. (2) To show immediate injury. 110Tex596, 222SW966. [b] **Evidence held sufficient.**–133Ark348, 202SW20; 65IndA109, 114NE992; 155Ky498, 159SW1134; 136SC90, 134SE224; 110Tex596, 222SW966 [answering question cert CivA 160SW330]; TexCivA 200SW862; TexCivA 18SW(2d)678; TexCivA 98W(2d)290; TexCivA 98W(2d)388; TexCivA 22SW(2d)1112; TexCivA 210SW856; 150Wash153, 275P550.

506–62½–New. partial disability; TexCivA 168W(2d)374.

506–63 [a] 201Iowa1334, 208NW213; 218Ky825, 292SW511; 220Ky536, 295SW861; TexCivA 98W(2d)388; TexCivA 28SW(2d)259.

506–64 [a] 94CalA621, 271P786; 116

Miss136, 76S729 (physical condition).

506-65 [a] 65Colo 32, 172P1067; 69 IndA67, 121NE296; 96Nebr744, 148NW 913. [b] **Evidence held sufficient.**–205 IllA254; 194 Iowa59, 187NW467.

506-67½-New. that insured became permanently, totally disabled during the grace period; 29F(2d)977 [certiorari den 49SCt347(6th case)].

506-68 [a] 181Ark407, 26SW(2d)94; La 120S424; 43ND378, 175NW207; Tex CivA 18SW(2d)702(2dcase). [b] **Evidence held insufficient.**–128Me184, 146A 341; TexCivA 16SW(2d)335; 51WVa 38, 41SE227.

506-71 178Ark683, 11SW(2d)493, 61 ALR1192. [a] 55ND647, 215NW93, 54ALR289. [b] **Evidence showing proof of loss was filed with insurer as** required by policy is sufficient. 157 Miss97, 127S699(2dcase).

506-72 [a] GaA 144SE678; 166Minn 100, 207NW179.

506-73 36GaA447, 136SE803; 176Mass 418, 57NE673; 124Minn478, 145NW 395; TexCivA 185SW979. [a] **Evidence held to warrant finding** that insurer waived written proof of loss. 212Ala 588, 103S670.

506-73½-New. that proofs of loss were waived by denial of liability; 166Minn 100, 207NW179.

506-73⅓-New. that the provision that the policy should be effective on the day following the indorsement was waived; 96CalA295, 273P1093.

506-73¼-New. that failure to furnish proof of loss was waived; OhA 173NE 29.

506-74 [a] 17F(2d)4.

506-75½-New. demand as required by the policy; 29F(2d)460.

506-78½-New. fraud in obtaining release of insurer; 83 IndA474, 149NE90.

507-79 [a] 223AppDiv169, 227NYS619. [c] 128Me184, 146A341.

507-80 [a] 179Minn19, 228NW440.

507-82½-New. total partial loss of time entitling insured to weekly indemnities; 17AlaA131, 82S579.

507-82⅓-New. or election to take lump sum payment in lieu thereof; 17 AlaA131, 82S579.

507-82¼-New. loss of sight of eye solely through accidental means within ninety days of accident; IndA 173NE 236.

507-83½-New. Evidence held to show that insured froze to death. 121Miss1, 83S278, 8ALR229.

507-83⅓-New. Evidence sufficient to show that body was that of insured. 193AppDiv369, 184NYS7.

507-83¼-New. Disability held total. 138Minn418, 165NW268, LRA1918B504.

507-83½-New. Evidence held to show that wife survived husband. 202MoA1, 213SW527.

507-83⅙-New. Evidence sufficient that insured did not change his occupation. 155Minn271, 193NW463.

507-83½-New. Evidence sufficient to show total disability not immediate. TexCivA 160SW330.

507-83⅛-New. Evidence held to show insured's notice to insurer that he intended at some future time to take out additional insurance for some indefinite amount. 38SD105, 160NW522.

507-83⅙-New. Evidence sufficient that storm was cyclone justifying double recovery. 156Minn65, 194NW99.

507-83 1/10-New. Evidence to avoid release on the ground of fraud. 174Mass 217, 54NE541.

507-83 1/11-New. Evidence sufficient to identify body. 97Tenn1, 40SW136.

507-87 155Ark381, 244SW436.

507-90 [a] **Evidence held sufficient.**–127Misc344, 216NYS97. [b] **That injury made visible contusion, wound, or mark on exterior of body** of insured held shown by evidence. 127Misc344, 216NYS97.

507-92 173Minn191, 217NW123.

508-94 262Mass522, 160NE415, 56ALR 1088.

508-94½-New. Proof held insufficient to allow recovery for accidental injury where there is doubt as to parol understanding. 17PaSuper360.

508-94⅓-New. Unreasonableness of theory of suicide must receive due consideration in weighing it against more reasonable theory of accident. 274Mo 83, 201SW1128.

508-97 [a] **Evidence held insufficient.**–164 Iowa199, 145NW479, 51LRANS221, AnnCas1915C813.

508-98 183 Iowa1279, 168NW212, LRA 1918D414; 162Wis474, 156NW482, Ann Cas1916D667. [a] **Provision is satisfied** by testimony of witnesses of class described, who, by reason of their presence, can personally speak of such competent and attending facts and circumstances as will fairly justify jury in finding that cause of discharge was accidental. 207 Iowa167, 216NW62.

508-99½-New. Such provision limits insurer's exemption from liability to cases where the accident is not established to insurer's satisfaction. 183 Iowa1279, 168NW212, LRA1918F414.

508-99⅓-New. Wife held eyewitness when she saw insured three minutes before his death. 183 Iowa1279, 168NW 212, LRA1918D414.

508-1 25F(2d)423; 29F(2d)71; 164Ga 392, 138SE787; 40GaA171, 149SE76; 200 Iowa60, 204NW406, 41ALR363; 220 Ky256, 294SW1085; 223Ky600, 4SW (2d)383; 232Mich101, 205NW116; 61 Nebr563, 85NW558; TexCommnA 280 SW762; TexCivA 6SW(2d)387 (fraud inducing compromise). [a] TexCivA 10 SW(2d)178. [b] **Evidence justified instruction** to answer special issue affirmatively. 197NC566, 150SE19. [c] **Evidence held to show intentional injury** as matter of law. 152SC450, 150SE127.

508-2 TexCivA 209SW230.

508-4 241Fed278; 131Ark419, 199SW 108; 175 IllA511; Mont 292P253.

508-5 164Ga392, 138SE787; 61Nebr 563, 85NW558.

508-6 29F(2d)185; NC 155SE870 (holding nonsuit proper, evidence not showing manner of death). [a] 141 Wash153, 251P124.

508-9 318Mo 363, 18SW(2d)99, 57ALR 615.

508-10½-New. Definition of words is for the court. 131MoA353, 111SW518.

508-10⅓-New. Where the issue is either total disability or pretension, it is not error to refuse submission of partial disability. 188 Iowa363, 176NW203.

508-11 IndA 170NE548; 192MoA303, 182SW138; MoA 274SW917; 158NYS 804; TexCivA 43SW898 (whether insurer waived forfeiture by receiving premium after injury).

508-12 92Fed861, 35CCA55; 211Fed1, 127CCA427; 213Fed595, 130CCA175; 220Fed622, 136CCA230; 270Fed946; 271Fed136, 20ALR1118; 15F(2d)737; 30F(2d)328, 63ALR842; 35F(2d)667; 36F(2d)152; 188Ala159, 66S41, LRA 1915A538; 215Ala109, 100S7; 176Ark 525, 3SW(2d)320 (whether unlawfully killed); 43AppDC84; 16GaA66, 85SE 600; 19GaA127, 91SE228; 19GaA264, 91 SE441; 24GaA431, 101SE134; 242 Ill 396, 90NE292; 201 IllA5; 73 IndA50, 124NE714; IndA 170NE548; 127 Iowa 25, 102NW190; 141 Iowa519, 120NW81; 163 Iowa217, 143NW574, 48LRANS600; 184 Iowa423, 166NW363; 184 Iowa1219, 169NW766; 186 Iowa454, 172NW454, 4 ALR1235; 207 Iowa872, 224NW32; 104 Kan612, 180P200; 109Kan61, 197P 1098; 157Ky503, 163SW482; 174Ky 683, 192SW636; 185Ky520, 215SW428; 226Ky372, 10SW(2d)1073; 114Me1, 95 A229; 116Md575, 82A702; 225Mass335, 114NE430; 160Mich535, 125NW414; 167Mich524, 133NW486, 42LRANS140, AnnCas1913A1116; 208Mich654, 176NW 473; 208Mich679, 176NW481; 244Mich 99, 221NW162; 272Mo 19, 197SW95; 274Mo 83, 201SW1128; 288Mo 175, 231 SW947; MoA 200SW80; MoA 221SW 752; 205MoA484, 226SW299; MoA 231 SW75; MoA 247SW1024; MoA 274SW 917; 221MoA626, 287SW1053; 153NY 116, 47NE35, 60AmSR598 [aff 11Misc36, 31NYS865]; 27 OhA422, 162NE636; 225Pa118, 73A1007; SD 231NW930; TexCommnA 276SW900 (whether death due to apoplexy); TexCivA 197SW889, TexCivA 198SW810; TexCivA 214SW 456; TexCivA 148W(2d)944; 147Va471, 137SE456; 194Wis289, 215NW575. See also 252Mass328, 147NE858. [a] 87Colo 297, 287P859; 233Ky840, 27SW(2d)422. [b] **Mere speculative possibility** that death was caused by accident is insufficient to take case to jury. 220Ky256, 294SW1085. [c] **Evidence insufficient to take case to jury.**–177Ark1104, 9SW(2d) 553.

508-12½-New. ; whether shooting of insured by an intoxicated person was intentional; 142Miss388, 107S520.

509-13 270Fed946; 271Fed136, 20ALR 1118; 23F(2d)958; 29F(2d)71; 37F (2d)488; 217Ala282, 116S164; 100CalA 96, 279P1045; 16GaA66, 85SE600; 199 IllA316; 201 IllA5; 201 IllA295; 208 Ill A506; 211 IllA66; 212 IllA263; 237 IllA 86; 256 IllA47; 79 IndA157, 137NE575; 136 Iowa140, 113NW566; 180 Iowa805, 161NW114; 180 Iowa39, 161NW123; 184 Iowa1219, 169NW766; 186 Iowa454, 172 NW454, 4ALR1235; 104Kan612, 180P 200; 184Ky487, 210SW950; 191Ky92, 229SW104; 209Ky165, 272SW413; 224 Ky292, 6SW(2d)239; 160La854, 107S 599; 123Minn505, 144NW160, 49LRA NS1022, AnnCas1915A536; 192MoA303, 182SW138; MoA 221SW752; MoA 274 SW917; 51AppDiv608, 64NYS174 (evidence sufficient to take case to jury); 221AppDiv494, 224NYS644; 193NC485, 137SE430; 256Pa1, 100A494; TexCivA 167SW9; TexCivA 177SW169 (where no one witnessed death); 117Wash7, 200P587; 145Wash189, 259P383; 194 Wis289, 215NW575. [a] **Evidence insufficient to take case to jury.**–219Ky 501, 293SW968. [b] **But where evidence clearly shows that death was result of diseased condition,** refusal of peremptory charge to that effect is improper. 220 Ky256, 294SW1085. [c] **Whether hernia was due to strain, slip, blow, or fall** is question for jury on conflicting evidence. MoA 24SW(2d)686.

509-13½-New. whether death occurred during the period of continuous total disability to labor within the terms of the policy; 166Minn100, 207NW179.

509-14 6F(2d)540; 80NH27, 113A219; 161NC562, 77SE682; 240Pa341, 87A 963; 96Wis390, 71NW363.

509-15 69IndA67, 121NE296; 204 Iowa1108, 216NW702; 104Kan612, 180 P200; 104Nebr219, 176NW670; 240Pa 341, 87A963; 263Pa232, 106A206.

509-16 TexCivA 185SW615.

509-16½-New. whether plaintiff was suffering from an injury or from disease; TexCivA 167SW9 (whether loss was caused by sickness or accident).

509-17 See also CalA 286P729.

509-19 251Pa420, 96A1041; 80Wash 347, 141P690.

509-20½-New. whether death resulted from cause contemplated by policy; 218 Mich358, 188NW498 (septic poisoning).

509-24½-New. as to whether insurer waived a breach of the autopsy clause; TexCivA 270SW246.

509-24¼-New. whether statement in application relating to prior health affects risk; 15F(2d)737.

509-25 MoA 294SW97; MoA 31SW (2d)108.

509-25½-New. whether notice of assessment was properly mailed; 205 IllA 403; 205 IllA404.

509-25½-New. whether a settlement was obtained by fraud; 212Ala576, 103 S678.

509-25¼-New. Where insurer waived all defenses except suicide, he cannot require submission to jury of question whether death was due to culpable negligence. 88Md470, 41A906.

509-25⅓-New. Extent of influence of plaintiff's injury on his will and judgment in making a settlement has been held for the jury. 205 IllA387; 205 Ill A403; 205 IllA404.

509-25⅙-New. Fraud and duress by adjuster held for jury. 205 IllA387; 205 IllA403; 205 IllA404.

509-25⅐-New. Whether insured was so insane as to be unable to comprehend the nature of his act of changing the beneficiary is for jury. 193Ky395, 236 SW562.

509-25⅛-New. Whether a change of risk had taken place is for jury. 69 Ind A67, 121NE296.

509-25⅑-New. Whether an assignment of policy to defendants was obtained by duress is for jury. 162 Iowa671, 144NW 625.

509-25 1/10-New. Agent's testimony that insured's new occupation was more

hazardous did not authorize a directed verdict. 221Mass464, 109NE447.

509–25 1/4–New. Whether a request for an autopsy was reasonably and seasonably made may be a question for the jury. 35F(2d)667.

509–26 6F(2d)540; 15F(2d)737; 30F(2d)328, 63ALR842; 43AppDC84; 204Iowa1108, 216NW702 (knowledge of insurer); 185Ky664, 215SW821; 145Minn175, 176NW502; 220AppDiv199, 221NYS157; 62PaSuper417. [a] 40AppDC249, 46LRANS1108, 35SCt662, 238US624, 59Led1494.

510–27 31F(2d)571; 191Ky92, 229SW104. [a] **Whether beneficiary stated that insured was over or under maximum insurable age** is for jury on conflicting evidence. 218Ky825, 292SW511.

510–27 1/2–New. or materially affected acceptance of the risk; 145Minn175, 176NW502.

510–28 TexCivA 89SW276.

510–29 43F(2d)809; 224Mass327, 112NE634, LRA1916E1203; 145Minn175, 176NW502; TexCivA 89SW276.

510–30 1/2–New. Whether insanity and suicide resulted from influenza was, under the evidence, a question for the jury. 217MoA429, 266SW1001.

510–31 43F(2d)499; 100CalA96, 279P1045; 221Mass540, 109NE449; 125Minn186, 145NW963; 212MoA316, 246SW1002; 161NC562, 77SE682; 260Pa147, 103A536 (proximate cause); TexCivA 16SW(2d)301. [a] **Insanity of suicide for jury.** 283Mo442, 223SW70; 201MoA586, 213SW869.

510–32 285Fed449; 196Iowa375, 194NW194, 29ALR709; 127Mich630, 86NW1036; 173Mich581, 139NW865; 103Miss374, 60S333, AnnCas1915B547 (engaging in difficulty); 106Nebr238, 183NW101, 17ALR188 (aiding peace officer in pursuit of crime suspect); 92OhSt87, 110NE542; 260Pa147, 103A536; 38PaSuper110.

511–34 237Fed78, 150CCA280; 270Fed946; 14F(2d)307; 20F(2d)818; 173Ark937, 294SW353; 220Ky536, 295SW861 (evidence held sufficient for jury); 160La854, 107S599; 117Mich142, 75NW445; 133Mich479, 95NW551; 149Miss306, 115S548 (where evidence permits of different inferences); 195MoA651, 187SW802; MoA 232SW179; 101Nebr219, 162NW637; 179AppDiv166, 166NYS225; 209Pa632, 59A262; TexCivA 209SW230; 113Wash13, 192P924; 145Wash189, 259P383; 179Wis431, 190NW910. [b] **That proofs of death show suicide** does not change rule. 173Ark937, 294SW353. [c] **Question is one of law for court** where evidence of suicide is so strong that no other reasonable inference can be drawn than that of suicide. 149Miss306, 115S548. [d] **Insured's insanity at time** is for jury. 35F(2d)611.

511–39 196Iowa375, 194NW194, 29ALR709.

511–40 MoA 243SW201.

511–41 201Iowa1334, 208NW213; 216Ky806, 288SW766 (directed verdict held proper); 223Ky626, 48SW(2d)398; MoA 241SW95; MoA 294SW97. [b] **Exclusion of all other inferences** than intentional injury is necessary to render evidence insufficient for jury. 152SC450, 150SE127.

511–42 260Pa147, 103A536; 113Wash13, 192P924; 106WVa533, 146SE53.

511–43 43F(2d)499; 260Pa147, 103A536; TexCivA 214SW456.

511–44 80Vt321, 67A821.

511–45 80NH27, 113A219; 263Pa232, 106A206; 80Vt321, 67A821.

511–45 1/2–New. Whether insured was in such position that policy applied is for jury. 127Md179, 96A281.

511–45 1/3–New. Whether the accident was the result of violation of law is for the jury. 186Iowa454, 172NW454, 4ALR1235.

511–45 1/4–New. Whether deceased was intoxicated is for the jury. 128Minn474, 151NW180, AnnCas1916A277.

511–46 36F(2d)152; 186Ala398, 648619; 210Ala607, 98S909; 127Ark286, 192SW206; CalA 284P946; 164Ga392, 138SE787; 281Ill431, 118NE11; 54IndA450, 103NE77; 188Iowa363, 176NW203; 206Iowa925, 221NW577; 184Ky487, 210SW950; 195Ky136, 241SW836; 139Minn192, 165NW1061; 151Minn124, 186NW136; 175Minn210, 220NW561; 157Miss759, 128S750; 78NH100, 97A223; 158NYS804 (extent of disabilities); 120SC328, 113SE141; 153SC401, 151SE67; TexCommnA 25SW(2d)1093; TexCivA 160SW330; TexCivA 31SW(2d)333; 94Vt383, 111A449; 105WVa197, 141SE789.

511–47 218Ala401, 118S753; 220Ala104, 124S229; 19GaA162, 91SE224; TexCivA 18W(2d)490.

511–50 TexCommnA 25SW(2d)1093.

511–50 1/2–New. Whether deceased was continuously disabled from the date of the injury until death is for the jury. Mo 203SW978.

511–50 1/3–New. In an action against an insurance company on its agreement to pay plaintiff her medical, nursing, hospital, and incidental expenses, resulting from an automobile accident, if she refrained from asserting a claim against insured, it was held that the amount of such expenses presented a question of fact, which should have been submitted to the jury for determination. 224AppDiv628, 232NYS53.

511–51 37F(2d)488; 125Kan441, 265P57; 144Miss277, 109S670; 99OhSt343, 124NE223, 7ALR182; 119Or591, 250P227; 108Wash453, 187P335. See also 316Ill552, 147NE468. [a] 121Kan642, 249P579.

512–52 38GaA589, 144SE678; 208IllA506; TexCivA 210SW713.

512–54 30F(2d)328, 63ALR842.

512–55 1/2–New. Whether notice could have been given sooner is for the jury. 247Fed65, 159CCA283, 7ALR175.

512–55 1/3–New. What insured meant in a statement of the accident as to the time of being laid off from employment is a question for the jury. 111MoA504, 86SW491.

512–56 226Ky328, 10SW(2d)1079; 209Mich146, 176NW574 (estoppel); 146SC41, 143SE668; 83Vt242, 75A273; Vt 151A665.

512–58 125Iowa633, 101NW468 (instruction proper); 125Kan441, 265P57 (instructions held proper). [e] **Issues properly submitted.**–TexCivA 99SW740 (whether injuries not inserted in application increased risk).

512–59 125Iowa633, 101NW468 (instruction proper). [a] 39F(2d)443; 250NY281, 165NE293; SD 231NW930. [e] **Instructions held properly refused.**–32F(2d)490.

513–60 218Fed582, 134CCA310, LRA1915D312; 142Ga330, 82SE893, AnnCas1916B267; 79IndA157, 137NE575; 125Kan441, 265P57 (instructions held proper); 283Mo442, 223SW70; MoA 241SW450 (cause of death); MoA 247SW1024 (as to continuous disability and external violent and accidental means); 220MoA780, 275SW988 (sufficient); 55SW179, 93Tex487, 56SW326, 22TexCivA76, 53SW838 (total disability). [a] (5) Where issues were whether shot causing death was accidental or intentional, and if self-inflicted whether insured was sane or insane, omission of test as to knowledge of right and wrong and as to insane impulse is erroneous. 311Mo249, 278SW368. [a] (6) Where death resulted from turning on of gas cock, instruction that policy did not insure against violent death, but only death effected by violent means, held properly refused. 20F(2d)818. [d] (3) Other instructions held proper or not erroneous. 315Mo760, 287SW346. [i] 184IllA259 (burden of proving cause of death); 112Kan356, 210P1086, 29ALR494 (time of giving notice of accident); 209Mich258, 176NW446 (insured's attempt to leave elevator while in motion); Mo 203SW978 ("substantial disability from attending to duties of his occupation"); 285Mo379, 227SW96 (self-defense or unlawfulness of killing of insured by third person); 93Nebr629, 141NW815 (accidental death hastened by disease); 218Pa532, 67A840 (solicitor insuring self in good faith without intent to overinsure). [j] **Instructions held erroneous.**–201IllA295 (as to accidental cause of injury); 208IllA506 (time of giving notice of accidental death); 79IndA157, 137NE575 (voluntary exposure to unnecessary danger); 115Iowa217, 88NW368, 91AmSR153, 56LRA271; 123Minn505, 144NW160, 49LRANS1022, AnnCas1915A536 (visibility of injury); Mo 203SW978 (omission of continuous disability from accident till death); 93Tex487, 56SW326 [aff 22TexCivA76, 55SW179, 23TexCivA359, 53SW838] (total disability). [k] **Time for requesting autopsy.**–35F(2d)587. [l] **Occasional acts in emergency.**–IndA 169NE57.

513–61 180Iowa805, 161NW114; Iowa 161NW125; 125Kan324, 264P65 (instructions held proper); 209Mich258, 176NW446; TexCommnA 276SW900 (duty to do so); TexCivA 18W(2d)490 (definition of permanent partial physical inability to perform labor in which engaged at time of injury, or other work open to insured, held proper); 132Wis624, 113NW50 (injuries during assault for "robbery"); 154Wis82, 142NW487. [a] **Instructions held properly to define terms.**–311Mo249, 278SW368; MoA 294SW97. [b] **Instruction defining "sound condition" held erroneous.**–38F(2d)590. [c] **Instruction defining "passenger automobile" held proper.**–CalA 286P729. [d] **"Total disability"** held properly defined. TexCivA 31SW(2d)333.

513–62 35F(2d)667; 285Mo379, 227SW96.

513–62 1/2–New. , or ignore such a fact, 79IndA157, 137NE575; 285Mo379, 227SW96; 218Pa532, 67A840 (instruction as to self-inflicted injury held proper).

514–63 235Mich80, 209NW95; 220MoA780, 275SW988 (instructions properly refused). See also 111Va389, 69SE344. [g] **Instructions held proper.**–43AppDC84 (truth of applicants' representation); 80IllA499 [rev 182Ill496, 55NE540] (suicide and insanity); 184IllA259 (cause of death eliminating coroner's verdict); 211IllA66 (falsity of insured's answer as to habits); 151Ky103, 151SW366 [reh den 152Ky42, 153SW14] (suicide); 123Md67, 90A780 (notice by company to insured to employ counsel in defending suit); 285Mo379, 227SW96 (death during assault on third person); MoA 231SW75 (cause of death and total disability); 183AppDiv744, 171NYS174 (double indemnity); 72Vt458, 48A639 (cause and manner of accident where evidence wholly circumstantial). [h] **Instructions held erroneous.**–28GaA789, 113SE41 (intentional act of third person); 183IllA625 (referring jury to declaration but not special plea in determining issues); 79IndA157, 137NE575 (voluntary exposure to unnecessary danger); 28TexCivA36, 62SW927 (diminution for occupation classed more hazardous by company); 72Vt458, 48A639 (injuries exactly, rather than substantially, as alleged). [i] **As to presumption of natural death.**–20F(2d)818.

514–64 44IllA38 [aff 240Ill205, 88NE550, 130AmSR269, 25LRANS1256]; TexCommnA 276SW900. [a] 224AppDiv631, 232NYS49 [aff 250NY627, 166NE349(3dcase)]; 104Va222, 51SE209 (proximate cause where injuries and disease involved). [b] 180Cal76, 179P195. [c] 28OhCirCt700 (burden of proof). [d] **Instructions held proper.**–224IllA312; 28OhCirCt700 ("proximate" in sense of "sole" cause).

514–66 1/2–New. Instruction that if evidence is evenly balanced presumption is that death was accidental is erroneous. 152Md439, 137A43.

514–66 1/3–New. Instruction that insured's sanity continued until time of injury and that burden is on defendant to prove sanity during interval held erroneous. 152Md439, 137A43.

514–66 1/4–New. Instruction that insured's fall from window is presumed accidental unless jury finds from preponderance of evidence that it was self-inflicted is erroneous. 152Md439, 137A43.

515–73 1/2–New. Special finding that settlement was induced by undue influence is inconsistent with finding that insured was able to exercise his own judgment. TexCivA 48W(2d)599.

515–73 1/3–New. The verdict is construed to find that no valid release was made. 224AppDiv631, 232NYS49 [aff 250NY627, 166NE349(3dcase)].

515–73 1/4–New. In an action on a policy

excluding liability if insured was violating the law when death ensued, insured is entitled to an answer to a question as to the speed of insured's automobile at the time of the accident in which he was killed where there is evidence that he was driving at an unlawful speed. 129Kan234, 282P699.

515–74 157Ark342, 248SW553.

515–74½–New. Evidence that the release was obtained by misrepresentations has been held to warrant a directed verdict for full recovery. **TexCivA** 15SW(2d)704.

515–76½–New. Where the company's agent had delivered a check for part of the policy to insured before his death, but the check had not been cashed, judgment for the beneficiary should protect the agent against the unpaid check. 98 SC273, 82SE402.

515–78 43F(2d)673; 177Ark87, 7SW(2d)775; 191 IllA496 (death indemnity held payable in installments); 125Kan 441, 265P57 (amount held not excessive); 102Me287, 65A385 (one tenth where disability caused by rheumatic fever); 124Minn478, 145NW395; 128 Okl 75, 260P1109; **TexCivA** 169SW389; 151Wash153, 275P550. [a] 214Ky56, 282SW1112; 175Mass196, 55NE890. See also **TexCivA** 209SW602. [b] 118 Kan779, 236P813; 231Ky305, 218SW (2d)435. [i] 54 OntL24, 24 OntWN246, 55OntL330. [j] **Limitation to single loss for one accident.**–138Minn418, 165N W268, LRA1918B504. [k] **Judgment for lump sum** is not authorized where policy provides that amount of benefit shall be paid in monthly payments, and contains no provision for lump settlement and none is pleaded. **TexCivA** 18SW(2d)446. [l] **Prorating.**–179Wis431, 190NW910. [m] **Provision reducing indemnity pro rata** if insured carried other insurance without written notice to company has been held applicable to accidental death. 43F(2d)673.

515–81½–New. Under a statute requiring the policy to state the exact sum payable, the amount cannot be cut down by provision relating to concurrent insurance, although determinable by calculation. 302Mo 525, 259SW77.

515–81⅓–New. Amount allowed held justified by evidence. 114Nebr505, 208 NW632.

515–81¼–New. Where such policies insure against death or injuries through accident, another policy insuring against loss of life only when caused by accidental means covers the same loss in respect to death of insured. **TexCommnA** 280SW172.

515–81½–New. A statute providing for full payment of the amount named in the policy subject to such legal defenses as insured may have against the "same" does not prevent the parties from stipulating that failure of the insured to give written notice of other insurance covering the same loss shall defeat recovery in whole or in part. **TexCommn A** 280SW172.

515–81⅔–New. The word "same" as used in such statute refers to the amount named in the policy. **TexCommnA** 280 SW172.

515–81½–New. Under the provisions of some policies the amount which insured is entitled to recover is reduced in a ratio therein stated if insured carries other insurance covering the same loss without notice to insurer. **TexCommnA** 280SW172.

515–81⅚–New. Under statute prohibiting reduction of liability below face of policy but excepting from its operation accident policies, a provision in the accident policy limiting recovery where illness is caused by certain diseases is enforceable. **TexCivA** 248SW88.

515–81⅙–New. Where insured held two daily ticket policies, he can recover only on one of them. 183Cal 65, 190P366.

515–81 1/10–New. Where a policy provides for specific losses where disability occurs because of specific loss for which a fixed payment is provided, no recovery can be had for disability. 69 Colo 255, 176P319.

515–81 1/11–New. A clause limiting liability proportionally if insured carries other accident insurance is not contrary to law, immoral, or against public policy. 37SD635, 159NW395, LRA1917B319.

515–81 1/12–New. Insurer may, in a suit on two daily ticket policies, interpose the defense that liability was limited to the amount in one of policies. 183Cal 65, 190P366.

515–81 1/13–New. Such clause covers the life of policy and operates to decrease recovery proportionately where insured takes out another policy without notice to insurer. 37SD635, 159NW395, LRA 1917B319.

515–81¼–New. Such clause is not repugnant to a clause requiring payment of a stipulated sum on death. 37SD635, 159NW395, LRA1917B319.

515–83½–New. Where insured suing for total disability failed to file a claim for a two-week period during which, although disabled, he attempted to work, until he asked for an amendment of the complaint at the trial, he is not entitled to indemnity for such period. 127Misc 344, 216NYS97.

515–84 243 IllA453; 128 Okl 75, 260P 1109, 1112 [quotCJ]. See also 191 IllA 496.

515–85 128 Okl 75, 260P1109.

516–94½–New. Principal sum and weekly indemnity during total disability are both payable to the beneficiary under a policy after death of insured from accident. **TexCivA** 193SW750.

516–95 133MiscRep406, 231NYS589.

516–96½–New. Under a policy providing indemnity for total and partial disability, and also for indemnity for specific total losses, insured is entitled to the amount for total and partial disability, where it exceeds the amount for loss of a hand. 195MoA599, 186SW964.

516–97½–New. Where a policy provides for the allowance of a stated sum for cutting into the abdomen for treatment of organs, the allowance is properly made for an operation for hernia. **MoA** 248W(2d)686.

517–6½–New. Under statutes in some jurisdictions recovery of double indemnity may be had only by insured, and not by the heirs of the beneficiary. 155 La720, 99S542.

517–6⅓–New. Insured's death while riding in an airplane as a passenger held within the provision excepting death resulting from participation in aeronautics from a provision for double indemnity. 43F(2d)517.

517–8 178Ark856, 13SW(2d)591 (not against public policy).

517–12 112Kan356, 210P1086.

517–13 240Fed462.

518–15 98Fla1103, 125S521; 161La229, 108S464, 45ALR1521 (statute not applicable to accidental deaths); La 122S 289; 212MoA316, 246SW1002; 217MoA 302, 261SW340. [d] 107Fed389, 46CCA 364; 30TexCivA521, 72SW621; **TexCiv A** 113SW324. But see **TexCivA** 275SW 622. [e] **In Louisiana.**–161La229, 108S 464, 45ALR1521. [f] **Statutory penalty and attorney's fee** held not allowable against foreign insurance company on policy written in another state. 173Ark 287, 292SW129. [g] **Only insured, not beneficiary,** is entitled to penalty under code. 162La160, 110S186. [h] **Reasonable dispute** does not incur penalty. 26 F(2d)501. [i] **Statute merely fixes maximum amount** of penalty and authorizes court to award any reasonable amount not to exceed it. La 120S431. [j] **Judgment for seven hundred fifty dollars attorney's fees, in suit for two thousand dollars** annual indemnity installment due under accident insurance policy, is held excessive by two hundred fifty dollars. **TexCivA** 13SW(2d)424. [k] **Damages refused.**–**MoA** 23SW(2d) 1071.

518–15½–New. Evidence tending to show refusal to pay death claim held admissible. **TexCivA** 168SW1007.

518–16 4F(2d)501; 89Nebr791, 132NW 405, 88Nebr399, 129NW529 (date of permanent disability); 114Nebr505, 208N W632; **TexCivA** 177SW1008 (where policy does not specify when accrued indemnity should be paid, it is payable on proper proof to insured and interest runs from that time); **TexCivA** 3SW (2d)478 (statutory rate in absence of rate in policy).

518–17 56QueSuper278.

ACCOMMODATION

518–5½–New. ; anything furnished which is desired or needful. 51SD270, 213NW505, 506 [citWebsterUnabridged D.].

518–6½–New. Accommodation implies no consideration to indorser when referring to notes. 160La371, 107S143.

519–7 51SD270, 213NW505, 506 [cit WebsterUnabridgedD.].

519–7½–New. , or credit. 51SD270, 213 NW505, 506 [citWebsterUnabridgedD.].

ACCOMPANY

519–13 214Ala47, 106S175.

ACCORD AND SATISFACTION

523–1. 15DelCh76, 132A144, 145 [quot CJ]; 330 Ill 79, 161NE145, 149 [citCJ]; 139 Okl 16, 280P1087. [a] 14F(2d)260; 165Ga384, 141SE42; Md 150A118; 75 Mont99, 242P425; 54ND189, 208NW 975; 117 Or530, 245P313; **TexCivA** 279 SW513. [c] **Payment made in hope that fraudulent claim would not be pressed** is not accord and satisfaction. 125Misc 853, 213NYS42. [d] **Trade acceptance** held not accord and satisfaction. 104NJ L55, 140A303, 62ALR749.

523–2 [a] **Alta** [1930] 3DomLR999.

523–5 169Ark397, 275SW704; 41GaA 24, 152SE122; 46 Ida153, 266P795, 797 [citCJ]; **TexCivA** 279SW513.

524–7 Cal 292P970; 200Wis100, 227N W263.

524–15 128Me364, 147A655.

524–16 220Ala6, 123S271 (contract, express or implied).

526–34 Mass 169NE913 (deceit).

526–45 226AppDiv445, 236NYS32.

527–53 165Ga384, 141SE42; **TexCivA** 31SW(2d)350.

527–60 165Ga384, 141SE42, 47 [quot CJ].

527–60½–New. Accord and satisfaction occurs and is binding only when there is a well understood and executed agreement to settle or compromise all demands arising between the parties concerning which they dispute. **MoA** 271S W1029.

527–62 34F(2d)367; 220Ala6, 123S271; 163Minn481, 204NW531, 42ALR559; 127Misc59, 215NYS244; 136Misc723, 244 NYS71; 43 OklACR291; 117 Or530, 245 P313; **TexCommnA** 288SW163; **TexCiv A** 293SW296; **TexCivA** 16SW(2d)910, 913 [citCJ]; 200Wis100, 227NW263. [c] **Voluntary assent of creditor is required.**–37F(2d)308.

527–63 285Pa265, 132A125.

527–64 29 OhA192, 163NE500 (note executed as guaranty); 43 OklACR291; 117 Or530, 245P313; 53SD560, 221NW 371.

528–65 124Kan23, 257P979, 982 [citC JJ]; 240Mich266, 215NW392; 117 Or530, 245P313. [a] **Writing unnecessary.**–39 Wyo 331, 271P217.

528–66 82CalA728, 256P557 (acceptance of check not required to be in writing); 124Kan23, 257P979, 982 [citCJ]; 240 Mich266, 215NW392; 117 Or530, 245P 313.

528–66½–New. Basic question of accord and satisfaction is intention of parties. 219AppDiv506, 220NYS270.

528–66⅓–New. Payment of a shipper's claim for conversion of lumber is not accord and satisfaction as to a claim for lumber jettisoned or washed overboard. 27F(2d)1010.

528–67 124Kan23, 30, 257P979 [citCJ]. But see 203 Iowa518, 210NW453.

528–69 34F(2d)367; 220Ala6, 123S271; 197Cal 376, 241P76; 98CalA650, 277P 519; 109Conn244, 146A288; 37GaA412, 140SE412; 4LaA645, 646 [citCyc]; 163 Minn481, 204NW531, 42ALR559; 86 Mont189, 282P852; 226AppDiv322, 235 NYS101; **TexCommnA** 288SW163; **Tex CivA** 293SW296; 200Wis100, 227NW 263.

528–70 165Ga384, 141SE42; **MoA** 31S W(2d)225.

529–75 124Kan769, 262P544.

529–76 MoA 31SW(2d)225.

529–78 43F(2d)537; 127Misc59, 215NY

8244; 43 OklACR291; 90PaSuper189.
529–79 109Conn244, 146A288; 127Misc 59, 215NYS244.
529–80 14F(2d)260; 43F(2d)537; 213 Ala309, 104S796 (surrender of notes with mistaken omission of some material interest not accord and satisfaction); 28 Ariz403, 237P186 (matters not included); 204 Iowa466, 215NW508; MoA 297 SW715; 84Mont116, 274P497, 500 [cit CJ]; 127Misc59, 215NYS244; 119 Okl 228, 249P404; 143 Okl 136, 287P1035; 43 OklACR291; 90PaSuper189; TexCiv A 293SW296; TexCivA 16SW(2d)910. [f] Where one creditor rejected proposition of debtor made to two creditors, acceptance or rejection by other creditor was unnecessary. TexCivA 21SW(2d) 26.
530–81 130Kan676, 288P570; 8LaA 559; 127Misc59, 215NYS244 (inadvertent acceptance of less sum held not accord and satisfaction); 119 Okl 228, 249 P404.
530–82 TexCivA 293SW296.
530–84 14F(2d)260; 203 Iowa518, 210 NW453; 205 Iowa1240, 219NW407, 409 [citCJ]; 128Kan354, 278P19; 226Ky 109, 9SW(2d)1091; 150Miss715, 116S 820, 822 [citCJ]; Miss 130S745(2d case); MoA 271SW1029; 244NY132, 155 NE74; 220AppDiv240, 221NYS71; 224 AppDiv562, 231NYS489 (cause of action continues unextinguished, subject to set-off to extent of payments made); 226 AppDiv445, 236NYS32; 92PaSuper485; 98PaSuper17; TexCommnA 276SW219; TexCivA 283SW314, 315 [citCJ]; Tex CivA 289SW736; TexCivA 16SW(2d) 910; 101Vt276, 143A382.
532–85 213Ky60, 280SW464; TexCivA 283SW314; 68Utah298, 249P1032.
532–86 205 Iowa1240, 219NW407; 206 Iowa507, 220NW74.
532–90 [b] Check dated following day held not received in full satisfaction. 220AppDiv240, 221NYS71.
533–3 213Ky60, 280SW464.
533–7 TexCivA 283SW314.
533–9 TexCivA 271SW633, 636 [citCJ]; TexCivA 283SW314, 315 [citCJ]. But see 49ND1160, 194NW737.
534–12 15DelCh76, 132A144, 146 [cit CJ]; 29 OhA88, 163NE53; TexCommnA 276SW219; TexCivA 271SW633, 636 [citCJ].
534–13 TexCivA 271SW633, 636 [citCJ].
534–14 49ND1160, 194NW737; Tex CommnA 276SW219; TexCivA 271SW 633, 636 [citCJ]; TexCivA 283SW314.
535–27 220Ala6, 123S271.
535–28½–New. Agreement of real owner of judgment is sufficient without assent of nominal plaintiff. 254Mass35, 149NE 677, 41ALR1488.
536–36 68Utah298, 249P1032.
536–37 Md 151A21 (under statute); 68 Utah298, 249P1032; NS [1930] 2DomLR 558 (rule held applicable though cause of action against wrongdoer who settled could be considered either as breach of contract or tort and settlement was made for breach of contract); Ont [1930] 2 DomLR409, 412 [quotCJ]. [f] Forms of satisfaction.–Md 151A21.
536–38 Ont [1930] 2DomLR409, 412 [quotCJ].
537–42 207Cal 465, 279P148.
537–49 Ont [1929] 4DomLR543.
538–63 171Ark517, 284SW760, 46ALR 1519.
539–74 29F(2d)835; 30F(2d)275; 215 Ala172, 110S129; 181Ark148, 25SW(2d) 449; 92Fla295, 109S593; 122Kan19, 251 P431, 434 [citCJ]; 223Ky771, 4SW(2d) 734, 735 [citCJ]; 6LaA46; 254Mass334, 150NE691; Mich 233NW384; 163Minn 481, 204NW531, 42ALR559; 137Miss33, 101S859, 860 [perSmith,CJ,quotCJ]; Mo A 286SW842; MoA 300SW1026; 222Mo A1162, 11SW(2d)1076, 1077 [citCJ]; Mo A 22SW(2d)880; MoA 31SW(2d)225; 84Mont38, 274P296; NJCh 144A25; 32 NM34, 250P635, 52ALR367; 127Misc 59, 215NYS244; 130Misc362, 224NYS 63; 117 Or530, 245P313; TexCommnA 276SW219; TexCivA 280SW270; Tex CivA 282SW894; TexCivA 297SW1059; 141Wash617, 251PS74; 184Wis600, 200 NW398 (acceptance of part of price and unaccepted return of part of goods). [c] (3) Payment of part of amount due on money judgment under agreement that it shall operate as satisfaction in full will not discharge judgment. 70CalA 184, 232P997. (4) Agreement to accept smaller sum part down and balance in monthly installments with right to collect full amount of judgment on default in payment of any installment is not binding accord and satisfaction. 132 Misc126, 228NYS657.
540–75 15F(2d)774; 254Mass334, 150N E91; 32NM34, 250P635, 52ALR367; 219 AppDiv506, 220NYS270; TexCivA 297S W1059; TexCivA 7SW(2d)625.
541–79 70CalA184, 232P997, 998 [cit Cyc].
541–91 TexCivA 284SW225.
542–99 [j] In Alberta.–[1928] 2DomLR 334.
543–1 137Miss33, 101S859 (where agreement is fully executed); 155Miss849, 124S476.
543–4 [c] In Idaho.–41 Ida257, 239P522, 523 [citCJ].
543–5 LaA 124S696; MoA 287SW799; 229AppDiv388, 241NYS609.
544–11 TexCivA 293SW180.
544–13 [d] If demand is discharged in manner different from that called for by contract, there is sufficient new or additional consideration to support transaction as accord and satisfaction. 226Ky 109, 9SW(2d)1091.
544–16 218Ala557, 119S670, 671 [quot CJ].
545–27 39Wyo 331, 271P217, 219 [cit CJ].
545–30½–New. Receipt of partnership note as payment in full of debt of partner is sufficient consideration. 254Mass 35, 149NE677, 41ALR1488.
546–38 98CalA650, 277P519.
547–57 165Ga384, 141SE42, 47 [citCJ]. Errutum.–[b] "38NY648" should read "33NY648."
549–76 218Ala557, 119S670, 671 [quot CJ].
549–80 TexCivA 15SW(2d)1072.
550–83 [b] 39F(2d)416.
551–96 TexCivA 273SW899.
551–7 MoA 48SW(2d)495.
552–8 7F(2d)764; 22F(2d)723; 43F (2d)537; 216Ala314, 113S25; 176Ark 439, 2SW(2d)1115; CalA 284P244; 108 Conn469, 143A566; 46 Ida153, 266P795, 796 [citCJ]; 225Ky629, 9SW(2d)1008; MoA 286SW842; MoA 294SW438; 248 NY243, 162NE20; 223AppDiv175, 228 NYS54, 61 [quotCJ]; 223AppDiv272, 227NYS699; 229AppDiv670, 243NYS 579; 119 Okl 236, 249P412; 139 Okl 16, 280P1087.
552–9 43F(2d) 537; 34 OhA453, 171NE 345 (mutual mistake).
553–10 119 Okl 236, 249P412.
553–12 119 Okl 236, 249P412; 139 Okl 16, 280P1087.
553–13 119 Okl 236, 249P412; 139 Okl 16, 280P1087.
553–18 92Fla295, 109S593.
553–19 TexCivA 16SW(2d)316.
554–27 223AppDiv272, 227NYS699.
554–28 176Ark439, 2SW(2d)1115.
554–30 7F(2d)764.
554–35 18F(2d)724, 52ALR807; 34F (2d)367; 203 Iowa518, 210NW453; 127 Misc59, 215NYS244; 129Misc365, 221N YS357; 225AppDiv354, 233NYS99; 136 Misc438, 240NYS193; TexCivA 279SW 513; Wash 292P409.
554–36 165Ga384, 141SE42, 47 [citCJ]; 129Misc365, 221NYS357; TexCivA 279 SW513.
554–37 216Ala314, 113S25.
554–38 Ala 129S58(2dcase); 40GaA 842, 151SE671; 86Mont169, 282P852; TexCommnA 288SW163; TexCivA 4SW (2d)651, 653 [citCJ]. [e] Full knowledge of all facts is not prerequisite to claim of good faith. 230Ky509, 20SW (2d)276.
555–41 TexCivA 4SW(2d)651, 653 [cit CJ].
555–43 TexCivA 4SW(2d)651, 653 [cit CJ]; 20Wis91.
555–44 172Ark841, 291SW417.
555–45 108Conn469, 143A566, 567 [cit CJ]; 129Ga133, 58SE874; TexCivA 282 SW894; 20Wis91. But see MoA 286SW 842.
555–46 136Misc648, 241NYS695. But see 226AppDiv322, 235NYS101.
556–47 22F(2d)723; 28 OhA162, 162NE 463.
556–48 144Wash215, 257P629, 53ALR 766. [a] 86Mont169, 282P852.
557–51 214Ala613, 108S567.
557–55 28Ariz403, 237P186, 188 [quot Cyc]; 197Cal 376, 241P76; 102CalA232, 282P965; 92Fla295, 109S593; 249 IllA 174; MoA 287SW799; 119 Okl 236, 249 P412, 415 [citCyc]; TexCivA 16SW(2d) 316. [a] (2) One accepting and cashing check received with statement of account is not estopped to deny it was accepted in full satisfaction where there was no express condition that it was to be so accepted. MoA 294SW433.
558–62 [a] (18) "In payment of the items as per statement following indorsement of payee" will constitute payment in full. 125Misc261, 210NYS466.
559–70 [a] (2) Check containing recital "to balance accounts," and in absence of charge of fraud or proceeding to reform instrument for mutual mistake. 247Mich222, 225NW539.
560–71 136SC389, 134SE292, 297 [quot CJ].
560–72 136SC389, 134SE292, 297 [quot CJ].
560–74 130Kan676, 288P570; 198NC6, 150SE614(2dcase).
560–75 197Cal 376, 241P76; 74CalA674, 241P900.
560–77 166Ga789, 144SE285.
561–78 109Conn244, 146A288.
561–79 239Mich194, 214NW100, 101 [quotCJ].
561–80 216Ala314, 113S25; 82CalA728, 256P557; CalA 284P244; 108Conn469, 143A566; 92Fla295, 109S593; 333 Ill 629, 165NE148; 202 Iowa561, 210NW 602; 204 Iowa466, 215NW508; 122Kan 19, 251P431, 434 [citCJ]; 239Mich194, 214NW100, 101 [quotCJ]; 155Miss849, 124S476; 136SC389, 134SE292; 152Va 453, 147SE265.
561–81 239Mich194, 214NW100, 101 [quotCJ].
562–82 239Mich194, 214NW100, 101 [quotCJ].
562–83 35GaA29, 132SE117 (receipt as satisfaction in full); 239Mich194, 214 NW100, 101 [quotCJ].
562–84 239Mich194, 214NW100, 101 [quotCJ]; 240Mich266, 215NW392.
562–85 124Kan769, 771, 262P544 [quot CJ]; Md 150A118; 239Mich194, 214NW 100, 101 [quotCJ]; MoA 287SW799. Contra 74CalA674, 241P900.
562–86 165Ga384, 141SE42; 124Kan 769, 771, 262P544 [quotCJ]; 239Mich 194, 214NW100, 101 [quotCJ].
562–87 124Kan769, 771, 262P544 [quot CJ]; 239Mich194, 214NW100, 101 [quot CJ].
562–88 5F(2d)416; 220Ala568, 126S 637; 169Ark397, 275SW704; 172Ark 841, 291SW417; 33 Ind53; 205 Iowa 1228, 219NW321, 323 [citCJ]; 122Kan 19, 251P431, 434 [citCJ&quotCyc]; 124 Kan769, 771, 262P544 [quotCJ]; 230Ky 509, 20SW(2d)276; 239Mich194, 214NW 100; 240Mich266, 215NW392; 251Mich 654, 232NW386; 155Miss849, 124S476; 156Miss41, 125S705(2dcase); 24NH 289; 212AppDiv483, 209NYS183; 212 AppDiv792, 209NYS727 (acceptance of check with statement on its face, "In full for cancellation of unfilled orders," held accord and satisfaction effecting rescission of contract); 125Misc261, 210 NYS466; 125Misc922, 212NYS301 (accepting check marked "paid in full"); 228AppDiv449, 240NYS118; 229AppDiv 670, 243NYS579; 142SC102, 140SE307; TexCommnA 26SW(2d)189; TexCivA 279SW513; TexCivA 280SW270, 274 [citCJ]; TexCivA 282SW894; TexCivA 25SW(2d)889; 144Wash215, 257P629, 53ALR766; 149Wash360, 271P76; 20 Wis91. But see 170Ark976, 281SW899; 190NC203, 129SE607. [b] See also 54 SD65, 222NW603. [c] Retention of check accompanied by letter stating it to be in full settlement is accord and satisfaction. 126Misc292, 213NYS81 (where amount due was not liquidated).
563–89 124Kan769, 771, 262P544 [quot CJ].
563–90 124Kan769, 771, 262P544 [quot CJ]; 239Mich194, 214NW100.
563–91 172Ark841, 291SW417; 124Kan 769, 771, 262P544 [quotCJ]; 239Mich 194, 214NW100; 137Misc876, 244NYS 48; TexCivA 3SW(2d)468. But see 37

F(2d)308; 220Ala6, 123S271.

563–92 124Kan769, 771, 262P544 [quot CJ]; 212AppDiv483, 209NYS183. [a] **Beginning suit for full amount** within week after receipt of check is notice of nonacceptance of check. **MoA** 271SW 1029.

563–93 **TexCivA** 280SW270, 274 [citC J].

563–95 **TexCivA** 280SW270, 274 [cit CJ].

564–96 **MoA** 271SW1029 (notice sufficient).

564–97 **MoA** 271SW1029 (held pending suit); **TexCivA** 280SW270 (retention of cashier's check for one year held unreasonable).

564–98 240Mich266, 215NW392, 394 [citCJ].

564–1 205 Iowa1228, 219NW321.

564–10 205 Iowa1228, 219NW321.

565–15 249 IllA507. See also **Md** 150A 118.

565–20 15DelCh76, 132A144, 145 [quot CJ]; 165Ga384, 141SE42, 47 [citCJ]; 117Kan722, 233P119, 121 [quotCJ].

566–21 117Kan722, 233P119, 121 [quot CJ].

566–24 165Ga384, 141SE42, 47 [quot CJ].

566–25 165Ga384, 141SE42, 47 [quot CJ].

566–28½–New. Where a check and property are tendered in full satisfaction, the creditor cannot accept the check without the goods. 137Miss33, 101S859.

566–31 165Ga384, 141SE42.

567–36 165Ga384, 141SE42, 47 [citCJ].

567–41 205 Iowa1240, 219NW407, 410 [cit&quotCJ]; 213Ky60, 280SW464; 226Ky109, 9SW(2d)1091; 175Minn357, 221NW238, 239 [citCJ]; 220AppDiv240, 221NYS71; 133Okl11, 270P848, 849 [quotCJ]; 68Utah298, 249P1032. [d] 174Minn264, 219NW155. [h] **Delivery of notes, under assent and agreement,** to creditor's committee is delivery by corporation completing accord and satisfaction. **NJSup** 131A679. **Erratum.–** N. Y.–"Davis v. Spencer, 24 Hun 386" should read "24 N. Y. 386."

568–42 205 Iowa1240, 219NW407, 410 [cit&quotCJ].

568–43 175Minn357, 221NW238, 239 [citCJ].

568–44 175Minn357, 221NW238, 239 [citCJ]; 133 Okl 11, 270P848; **TexCiv A** 283SW314.

568–45 205 Iowa1240, 219NW407; 175 Minn357, 221NW238, 239 [citCJ]; **Tex CivA** 283SW314.

568–49 205 Iowa1240, 219NW407.

568–50 [a] **Agreement to accept final estimate** as final settlement of disputed contract impliedly includes agreement that final estimate shall be approximately correct. **5F(2d)**416.

569–59 34F(2d)367; 216Ala314, 113S 25; 175Minn357, 221NW238 (facts insufficient); 152SC236, 149SE225. [c] **Court of equity will not permit** plea of accord and satisfaction to work injustice, if there is any escape therefrom. **5F(2d)**416.

569–60 40GaA842, 151SE671; 235 IllA 112; **MoA** 293SW466; 212AppDiv572, 209NYS440. [a] (4) Action lies on original note where plaintiff had taken forged renewal note without knowledge of forgery. 235 IllA112.

570–64½–New. That the party had an opportunity to investigate will not prevent setting aside the accord and satisfaction. 129Kan135, 281P921.

570–66. **5F(2d)**416, 419 [quotCJ]; **MoA** 293SW466; **TexCommnA** 276SW219. [a] (2) Mistake in final estimate of road contract, agreed to be accepted in final settlement, of over fifty thousand dollars in total of four hundred thousand dollars held to avoid effect of agreement. **5F(2d)**416. (3) Mistake by which insured reeased insurers on their paying amounts agreed on as their proportions of fixed loss in erroneous belief that another company was also liable for loss is one of fact. **TexCommnA** 276SW 219.

570–67 **TexCommnA** 276SW219.

570–69 50ND123, 195NW300 (signing written contract without reading is conclusive in absence of fraud or mutual mistake).

571–76 245Mich100, 222NW88.

571–79 165Ga384, 141SE42.

571–80 [b] (1) **5F(2d)**416.

572–81 **MoA** 293SW466.

572–86 50ND123, 195NW300.

572–88 152Va453, 147SE265.

573–93 216Ala314, 113S825.

573–3 170Ark206, 279SW381; 80CalA 402, 251P838; 82CalA728, 256P557; 203 Iowa518, 210NW453; 84Mont116, 274P497; 48Nev430, 233P530 [citCJ]; 126 Okl 241, 259P249; 187Wis653, 205 NW418. [a] (2) 170Ark206, 279SW381. [b] **Though surprise not pleaded,** admission of evidence of accord and satisfaction where not specially pleaded is error. 170Ark206, 279SW381 (failure of amendment or court treating pleading as amended).

573–3½–New. On admitting testimony of accord and satisfaction not specially pleaded, court should give defendant leave to amend answer, or state that answer will be treated as amended. 170 Ark206, 279SW381.

573–4 [b] (1) 108Conn469, 143A566.

574–6 82CalA728, 256P557.

574–20 **TexCivA** 282SW921 (sufficient). [a] **TexCivA** 269SW488.

574–20½–New. A plea of accord and satisfaction must allege each of the essential elements. 119 Okl 228, 249P404.

575–23 134Misc462, 234NYS663. But see 220AppDiv427, 221NYS585.

575–28 43 OklACR291.

575–32 41GaA601, 154SE158; 134 Misc462, 234NYS663.

576–36 35GaA620, 134SE190 [citCyc]; 48Nev430, 233P530 [citCJ]; 135Misc 895, 238NYS692.

576–37 48Nev430, 233P530; 119 Okl 228, 249P404; 43 OklACR291; 87 PaSuper228. [e] 85 IndA577, 155NE48.

576–39 But see 48Nev430, 233P530.

577–40 35GaA620, 134SE190 [citCJ].

577–41 226AppDiv445, 236NYS32 (where promise is not accepted as in full satisfaction, payment must be shown).

577–42 35GaA620, 134SE190.

577–43 35GaA620, 134SE190.

578–54 129Misc365, 221NYS357.

580–4 98CalA709, 277P750; 226AppDiv 445, 236NYS32 (accord and satisfaction must be alleged and proved); 43 OklACR291. [c] **Allegation that deed was given to satisfy note and trust deed** is not sustained where deed is not introduced in evidence. **TexCivA** 108SW(2d) 746.

580–6 43OklACR291.

580–11 30F(2d)402; 15DelCh76, 132A 144, 145 [citCJ]; 205 Iowa1228, 219NW 321; 254Mass334, 150NE91; 226AppDiv 445, 236NYS32; 21OhA393, 153NE227; 152Va453, 147SE265; 144Wash104, 256 P1028. [a] **MoA** 287SW799.

580–11½–New. Where settlement is shown, it will be presumed that it disposed of all matters as to which there was controversy. 199Cal 168, 248P658, 47ALR904.

581–13 **Alta** [1930] 3DomLR999.

581–14 See also 28F(2d)373.

581–15½–New. If plaintiff would avoid an accord and satisfaction as to certain items claimed by him to have been mistakenly included, the burden rests on him to prove such fact. 105 NJL391, 144A805.

581–16 [a] **Evidence held admissible.–** **MoA** 318SW(2d)225; **TexCivA** 318SW(2d) 350.

581–27½–New. A letter from the debtor to the creditor offering settlement and tendering a check is admissible. 85 IndA577, 155NE48.

582–28 109Conn244, 146A288.

582–29½–New. **Statements made by plaintiff's son** at time of receipt of check claimed by defendant to be an accord and satisfaction may be shown. 22AlaA72, 112S365.

582–31 See also 236 IllA227.

582–31½–New. Correspondence between parties held properly admitted. 26 OhA135, 159NE589.

582–32 **Alta** [1930]3DomLR999.

582–33 [a] 7F(2d)764; 10F(2d)510; 199Cal 168, 248P658; 108Conn469, 143 A566; **Mass** 171NE453; 240Mich266, 215NW392; 223AppDiv175, 228NYS 54; 50ND123, 195NW300; 54ND189, 208NW975; **TexCivA** 282SW921; 101 Vt276, 143A382. [b] 74CalA674, 241 P900; 79CalA229, 249P37; 102CalA 232, 282P965; 15DelCh76, 132A144; 36GaA458, 137SE125; 40GaA356, 149 SE716; 241 IllA432; 128Me240, 147 A151; 254Mass334, 150NE91; 150Miss 715, 116S820; 221AppDiv779, 223NYS 642; **TexCivA** 283SW314; **TexCivA** 4 SW(2d)651; 144Wash104, 256P1028; 187Wis653, 205NW418. [c] 86CalA610, 261P331; **CalA** 288P1107; **TexCivA** 279SW513; **TexCivA** 283SW314. [d] 124Kan769, 262P544. [h] 50ND123, 195 NW300. [k] **Preponderance of evidence** is sufficient to establish fraud so as to avoid written instrument. 50ND123, 195NW300. [l] **Evidence held sufficient to support finding that there was no bona fide dispute.–**86Mont169, 282P852. [m] **Evidence held to show substantial bona fide dispute.–**139 Okl 16, 280P1087.

582–34½–New. In weighing evidence fact that parties were principal and agent will be considered. 199Cal 168, 248P658.

583–43 180Ark532, 218SW(2d)969; **MoA** 287SW799 (undisputed evidence of written correspondence); **TexCivA** 16 SW(2d)910.

583–44 172Ark937, 290SW933; **MoA** 297SW715; **NJSup** 140A888; 26 OhA 135, 159NE589; **TexCivA** 318SW(2d) 350.

583–45 **Mass** 171NE453.

583–46 218Ala325, 118S570; 204 Iowa 466, 215NW508; **TexCommnA** 288SW 163.

583–47 172Ark937, 290SW933; 202 Iowa561, 210NW602; 54ND189, 208NW 975; 139SC545, 138SE354.

583–48 172Ark937, 290SW933; 202 Iowa561, 210NW602; 204 Iowa466, 215NW508; **MoA** 279SW192; 54ND 189, 208NW975; 90PaSuper189; 139 SC545, 138SE354.

583–50 205 Iowa1240, 219NW407.

583–51 86Mont169, 282P852.

584–53 105NJL391, 144A805; 28 OhA 162, 162NE463.

584–54 [a] **Directing verdict for defendant** at close of plaintiff's case without proof of accord and satisfaction pleaded by defendant is prejudicial error. 21 OhA393, 153NE227.

584–54½–New. And where the evidence conclusively shows an accord and satisfaction, a verdict for defendant is properly directed. 240Mich266, 215NW392.

584–56 43 OklACR291; **TexCivA** 282 SW921. [a] **Instructions held insufficient.–**43 OklACR291.

ACCOUNTS AND ACCOUNTING

596–2 48Philippine309; 32Wyo377, 233P137, 139 [quotCJ].

596–3 32Wyo 377, 233P137, 139 [quot CJ].

596–4 32Wyo 377, 233P137, 139 [quot CJ].

596–5 32Wyo 377, 233P137, 139 [quot CJ].

597–12 **TexCivA** 28W(2d)488.

598–27 97CalA529, 275P977.

598–31 117Ala97, 117S653 (some payments by debtor does not make running account); 147AppDiv214, 131NYS1041.

598–36 17JohnsNY538.

598–38 2CalA665, 84P263; 18CalA614, 123P975; 30CalA91, 157P615; 45CalA 772, 188P603; 47CalA1, 189P1046; 47 CalA470, 190P1076; 60CalA581, 213P 523; 74Ga555, 58AmR447; 3GaA510, 60SE126; 13GaA793, 80SE42; 14GaA 299, 80SE698; 40GaA632, 150SE868; 269 Ill 110, 109NE657; 225Mich76, 195 NW693; 228Mich243, 200NW166; 107 Miss810, 66S214; Mo 254SW22; 238NY 413, 144NE665, 41ALR1412; 147App Div214, 131NYS1041; 188NC514, 125 SE1; 94 Okl 217, 221P747; 143Tenn 237, 227SW443; **TexCivA** 197SW1124; **TexCivA** 199SW685; **TexCivA** 232SW 360; 71Wash41, 127P596; 94Wash63, 161P1049. [a] (7) The decisions speak indifferently of such accounts as open accounts, running accounts, open current accounts, mutual open and current and aside from statutory goverance all these terms mean the same thing. 118 Kan259, 234P972, 32ALR365. [b] (7) Officer of corporation keeping books and crediting himself with salary from time to time. 71Wash41, 127P596. [c] (1) 160Fed197.

599–44 15Ala743; 4Nev101; 3NYSu-

per220; 113Pa402, 6A83; 2Watts&SPa 137; 17Serg&RPa347; 15SCL210; 25 Vt210, 60AmD253.

599-45 87Kan65, 123P863. **AnnCas** 1913D813; 103Miss110, 60S48; 4Nev 101; 17Serg&RPa347; 15SCL210; 21 SD314, 112NW155.

599-48 160Fed197; 2CalA665, 84P 263; 39CalA195, 178P535; 168 Ill 447, 48NE45; 194NC346, 139SE696; 21SD 314, 112NW155.

600-54 2CalA665, 84P263; 168 Ill 447, 48NE45; 21SD314, 112NW155.

600-57 40GaA632, 150SE868; 21SD 314, 112NW155.

601-64 32Ariz80, 255P996; 32Ariz423, 259P676; 18CalA614, 123P975; Okl 261P962; 48Philippine309; 133SC458, 131SE620; 32Wyo 377, 233P137, 139 [quotCJ]. [d] **TexCivA** 22SW(2d)502; 71Wash41, 127P596. [e] 32Ariz80, 255 P996 (items of past-due rent under oral lease).

601-65 32Ariz80, 255P996.

601-66 32Ariz80, 255P996; 32Ariz423, 259P676.

601-69 133SC458, 131SE620. [b] **Stated and rendered account** to which no objection is made is not open. 228Mich 559, 200NW283.

601-70 32Ariz80, 255P996; 133SC458, 131SE620.

601-74 [d] 117Ala97, 117S653 (some payments by debtor does not make running account).

602-83 317Mo 972, 298SW56, 60 [cit CJ].

603-2 [a] **Cases involving long accounts made up of items purely legal in character** are actions at law. 317Mo 972, 298SW56.

608-80 317Mo 972, 298SW56, 60 [quot CJ].

608-81 317Mo 972, 298SW56, 60 [quot CJ]. See also 141Wash560, 252P133.

608-93 141Wash560, 252P133 (refusal).

612-52 125Kan403, 415, 265P66 [quot CJ].

612-53 170Ark931, 282SW14 (accounting between partners); 201 Iowa117, 206 NW665, 666 [citCJ].

612-54 125Kan403, 415, 265P66 [quot CJ].

612-55 74CalA617, 241P406, 407 [cit CJ]; 76CalA58, 243P869 (where no partnership exists); 201 Iowa117, 206 NW665, 666 [citCJ]; 130 Okl 182, 266P 439, 440 [citCJ].

613-59 201 Iowa117, 206NW665. [a] MoA 282SW176.

613-60½-New. Jurisdiction of court of equity must be determined from bill. 292Pa244, 141A47.

613-62 74CalA617, 241P406, 407 [cit CJ]; 76CalA58, 243P869; 163Ga222, 136SE52; 201 Iowa117, 206NW665, 666 [citCJ]; 148Miss278, 114S482, 484 [quotCJ]; 102NJEq189, 140A251.

613-62½-New. In some jurisdictions an action for accounting will not lie as ground for relief in equity unless founded on some known and established equitable ground. MoA 24SW(2d)229.

614-64 MoA 282SW176, 178 [citCJ]; 102NJEq189, 140A251; 124Misc458, 209 NYS105; 292Pa244, 141A47. See also 104Conn169, 132A902.

614-66 [a] 201 Iowa117, 206NW665, 666 [citCJ].

614-67 201 Iowa117, 206NW665.

614-68 250 IllA322; MoA 282SW176, 178 [citCJ]; 291Pa77, 139A588.

615-73 5F(2d)793; 29Hawaii702; MoA 282SW176; 220MoA607, 289SW26.

615-74 218Ala360, 118S806.

615-76 163Ga222, 136SE52; 319 Ill 437, 150NE435.

615-77 241 IllA332.

616-78 319 Ill 437, 150NE435; 124Misc 458, 209NYS105.

616-89 Ida 285P1015.

616-92 285Pa472, 132A579.

616-94 MoA 24SW(2d)229; 289Pa1, 137A120.

617-1½-New. Defendant in an action at law for contribution by cosurety is not entitled to an accounting in equity so as to require a transfer of the case simply because of the defensive plea that plaintiff had failed to apply to the debt funds in his hands belonging to the principal. 201 Iowa117, 206NW665.

617-4 163Ga222, 136SE52.

617-5 5F(2d)793; 103NJEq315, 143A 373; 292Pa244, 141A47.

618-9 218Ala360, 118S806; 250 IllA 322.

618-10 26F(2d)801; 92Fla246, 109S 577; 163Ga222, 136SE52; 292Pa244, 141A47.

618-14 5F(2d)793; 13F(2d)633; 34 F(2d)163; 76CalA58, 243P869; 163Ga 222, 136SE52; 319 Ill 437, 150NE435; 241 IllA332; 292Pa244, 141A47.

619-21 241 IllA332. [a] **Each case must be decided on its own facts.**-292 Pa244, 141A47.

619-24 241 IllA537, 545 [citCJ].

619-25 [a] **Mere difficulty of proof** does not confer jurisdiction on equity. 26F(2d)801.

619-26 13F(2d)633; 26F(2d)801.

620-34 155Tenn605, 296SW1, 53ALR 812.

620-35 155Tenn605, 296SW1, 53ALR 812.

620-36 155Tenn605, 296SW1, 2, 53 AL R812 [citCJ].

620-37 175Ark220, 298SW1001; MoA 282SW176.

620-39 26F(2d)801.

620-42 292Pa244, 141A47; 9PaDist& Co568; 155Tenn605, 296SW1, 53ALR 812.

621-50 Ida 293P320; 292Pa244, 141A 47.

621-52 5F(2d)793; 16F(2d)45, 48 [quotCJ]; 26F(2d)801; 163Ga222, 136 SE52; 41 Ida729, 241P1014, 1016 [cit CJ]; 255Mass118, 150NE907; 245Mich 493, 222NW754; 245NY215, 156NE670; 135MiscRep365, 238NYS91; 292Pa244, 141A47. [a] 138MiscRep29, 244NYS 209. [b] 138MiscRep29, 244NYS209.

622-53 16F(2d)45, 48 [quotCJ]; 98NJ Eq9, 130A281.

622-54 16F(2d)45, 48 [quotCJ]; 255 Mass118, 150NE907 (where defendant was agent in management of plaintiff's property). [c] **Where there is relation of agency and confidence** and agent refuses to account for property of principal which he has received, equity will take jurisdiction, though there is no technical trust. 226AppDiv1, 234NYS 164.

623-59 Cal 292P474; 148Miss278, 114 S482, 484 [citCJ].

623-60 163Ga222, 136SE52; 245NYS 432. [a] **Provision for consolidation of actions** held to prevent assumption of jurisdiction because of multiplicity of suits. 5F(2d)793.

623-61 155Tenn605, 296SW1, 2, 53 AL R812 [citCJ]. But see 245NY215, 156 NE670. [d] **Action of trespass on the case** for damages from railroad's relocation of its tracks, disturbing natural drainage, is not case of complexity. 155 Tenn605, 296SW1, 53ALR812.

623-62 318 Ill 500, 149NE495; 255Mass 118, 150NE907; 245Mich493, 222NW 754; 155Tenn605, 296SW1, 53ALR812.

623-65 250Mich662, 230NW941; 138 MiscRep29, 244NYS209.

624-75 117 Or387, 244P91, 48ALR1043. [b] **Where party not in position to know expenses incurred by employee who refused to have accounting,** former is entitled to accounting in equity for percentage of net profits. 149Md148, 131 A147.

624-78 163Ga222, 136SE52; 99WVa 349, 128SE737, 739 [citCJ].

625-79 99WVa349, 128SE737 (action at law proper remedy where amount fixed by agreement or settlement of disputed boundary involved).

626-3 220MoA607, 289SW26.

627-8 264Mass199, 162NE364.

627-12 255Mass118, 150NE907 [citCJ] (where question of account stated was not raised by pleadings).

628-16 164Ga777, 139SE549.

628-17 164Ga777, 139SE549; 124 Or 509, 264P853. But see 91CalA56, 266P 840.

628-19 232Mich456, 205NW600.

629-23 318 Ill 500, 149NE495 (laches not shown); 240Mich569, 215NW772 (laches not shown); TexCivA 280SW 604, 607 [citCJ].

629-24½-New. Where the prayer for an accounting is incidental to the main action, the right to accounting is not barred where the main cause of action is not barred. TexCivA 280SW604.

629-24¾-New. Fiduciary may voluntarily account twenty years after liability to account accrued, although such accounting could not be adversely compelled. 6PaDist&Co 96.

629-24¼-New. One seeking an accounting for a fraudulent transaction without rescission may do so within the time fixed by the statute of limitations. 240 Mich569, 215NW772.

629-26 [a] **Evidence that money for which accounting is sought did not belong to plaintiff** may preclude decree. 235 IllA374.

629-27 77CalA187, 246P134; 165Ga 728, 742, 142SE90 [quotCJ]; 205 Iowa 1351, 219NW530, 534 [citCJ].

629-28 124Misc458, 209NYS105.

630-30 124Misc458, 209NYS105.

630-42 292Pa184, 140A860, 862 [citCJ].

631-49 23F(2d)171.

633-75 16F(2d)45, 48 [quotCJ].

633-77 [a] 36F(2d)89.

633-78 [a] 215Ala5, 109S108; 166Ga 305, 143SE379; IndA 171NE13; 119 Kan348, 239P751; MoA 294SW727; 131 Misc790, 229NYS21; 11PaDist&Co 551.

633-81 175Ark220, 298SW1001; 15 DelCh379, 138A630. [e] 20F(2d)705; 318 Ill 500, 149NE495 (fraud); 128Misc 151, 218NYS323; 292Pa244, 141A47. [f] 33F(2d)358; 318Mo 1214, 3SW(2d) 381; MoA 24SW(2d)229; 219AppDiv 398, 219NYS625.

634-85 [c] **Bill or complaint held insufficient.**-73CalA511, 238P1048 (information ascertainable from public records).

634-88 218Ala360, 118S806. [b] 215 Ala264, 110S299 (suit by purchaser of interest of party to joint adventure on sale of tracts of land); 218Ala360, 118 S806; 166Ga635, 144SE103.

634-89 [b] 236AppDiv1, 234NYS164.

635-90 CalA 292P1000; 15DelCh379, 138A630; 107WVa205, 148SE7 (bill held insufficient). See also 1LaA115.

635-92 30F(2d)7.

635-93 163Ga222, 136SE52; 169Ga869, 152SE53(2dcase).

635-95 [a] **Averment of verbal renewal** of contract is equivalent to allegation that it was continued on same terms. 149Md148, 131A147.

636-2 165Ga728, 742, 142SE90 [quot CJ].

636-3½-New. Bill implying accrual of profits is sufficient in view of defendant's full knowledge of facts. 149Md148, 131A147 (bill for discovery and accounting for percentage of net profits).

636-6 218Ala296, 118S513.

636-8 33F(2d)358.

637-25 221AppDiv158, 222NYS3.

637-26 30F(2d)7.

638-35 166Ga707, 144SE265 (plea held insufficient); Iowa 231NW431 (holding defendant may plead matters in bar of accounting).

639-59½-New. Where a husband pleads an account for expenses in answer to his wife's action for an accounting, a bill of particulars may be required of him. 226 AppDiv620, 237NYS93.

639-61 IndA 153NE779; 125Kan641, 646, 266P65 [quotCJ]; MoA 282SW176, 178 [citCJ]; 292Pa184, 140A860, 862 [citCJ]; 150Tenn369, 265SW89.

640-64½-New. nor items that may be presented and determined upon the settlement of the account, unless they furnish a reason why accounting should not be had; 124Misc458, 209NYS105.

640-70 33NM176, 262P931, 933 [citCJ].

641-95 255Mass118, 150NE907.

642-96 124 Or276, 261P432.

642-8 33NM176, 262P931, 933 [citCJ]; 87PaSuper153 (bill dismissed if right to accounting not proved); 12 PortoRicoFed119.

642-10 12PaDist&Co 303 (insufficient affidavit of defense). [a] **Account not ordered** under facts of case. 12 PaDist&Co 303.

642-11½-New. Where right to account is clearly shown, decree directing an accounting is proper. 85PaSuper560. [a] **Evidence held sufficient.**-318 Ill 500, 149 NE495.

642-11½-New. Discretion of court. The granting of an accounting rests largely within the court's discretion. TexCivA 286SW647.

643-15 180Ark550, 21SW(2d)961(2d

case) (decree held supported by preponderance of evidence); 201 **Iowa**353, 207**NW**330; 315**Mo** 907, 287**SW**438.

643-21 254 **IllA**264.

643-22 254 **IllA**264; 264**Mass**199, 162 **NE**364; 51**Nev**5, 266**P**917 [citCJ]; 85 **PaSuper**560 (authority for disbursements). [a] **What must be shown to allow credits claimed.**–85**PaSuper**560.

643-25½-New. Where apparent duplication exists, the accounting party has the burden of justifying the charges. 241**NY**544, 150**NE**547.

643-25⅓-New. The burden is on plaintiff to prove the account and show the balance and the amount due. **Iowa** 228 **NW**20.

643-26 221**MoA**695, 285**SW**531, 535 [quotCJ]. [a] **Evidence held sufficient.**–91**CalA**56, 266**P**840 (land transaction).

643-27 221**MoA**695, 285**SW**531, 535 [quotCJ].

643-27½-New. Weight and sufficiency. Evidence held sufficient to sustain judgment for plaintiff. **IndA** 171**NE**13.

643-28 [a] **Evidence held sufficient.**–221**MoA**695, 285**SW**531.

643-30 36**F(2d)**89; **Iowa** 231**NW**431; 33**NM**176, 262**P**931, 933 [citCJ].

643-31 221**MoA**695, 285**SW**531, 535 [cit CJ]. [d] **Decree construed.**–264**Mass** 199, 162**NE**364.

644-40 170**Ark**298, 280**SW**389; 156 **Tenn**571, 3**SW(2d)**1057. [a] **Adjustment of account** under profit sharing agreement. 102**NJEq**338, 141**A**6.

644-41 Que 8**DomLR**431 (determination of value of property involved). [b] **Reference to register to determine profits was unnecessary** where defendant admitted certain profits in bill. 219**Ala** 645, 123**S**38.

644-42 48**Nev**265, 229**P**702.

644-44 150**Va**534, 143**SE**716.

644-45½-New. In accounting by purchaser of business on sale being set aside, master should first hear and decide claims of creditors of purchasing corporation. 31**F(2d)**419.

644-47 125**Kan**641, 646, 266**P**65 [cit CJ]; 247**Mich**217, 225**NW**578 (compliance with court rules).

644-47½-New. Items should not be considered which were included in a prior account. 91**Fla**586, 108**S**488.

645-49½-New. In a suit between persons who had agreed to form a partnership, examination of transactions to determine the amount due from one to the other was properly limited to the time when the joint business terminated. 294 **Pa**535, 144**A**537.

645-49⅓-New. Where the contract was abandoned and an accounting ordered it relates to the time preceding the abandonment and not to what the receiver may do afterward pendente lite. 12 **PortoRicoFed**273.

645-52 91**CalA**56, 266**P**840 (sufficiency of evidence); 329 **Ill** 253, 160**NE**552; **Iowa** 228**NW**20; 229**Mich**167, 201**NW** 215; 236**Mich**683, 211**NW**48; 102**NJEq** 338, 141**A**6 (court cannot assume that party claiming allowance for items had deposited them in business bank account rather than private bank account); 294 **Pa**535, 144**A**537; 298**Pa**42, 147**A**903 (evidence held to sustain finding that notes were for trustee's accommodation); **Utah** 291**P**298; 153**Wash**587, 279**P**1107 (3dcase) (where lessee assumes obligations of lessor to wholesalers on merchandise in leased garage, evidence held not to justify court in treating such sums as advancements to be deducted from subsequent rents). [b] **Party securing decree** fixing terms of accounting cannot have recovery determined on different principles. 5**F(2d)**731. [c] **Evidence held insufficient.**–102**NJEq**338, 141 **A**6.

645-54 221**MoA**695, 285**SW**531, 535 [quotCJ].

645-55 221**MoA**695, 285**SW**531, 535 [quotCJ].

645-58½-New. When exceptions are filed to the report of a referee appointed to take and state an account, it does not become final and conclusive, and the court is without jurisdiction to confirm it or to enter a judgment or to order an execution to issue. 331 **Ill** 49, 152**NE** 123.

645-59 285**Pa**472, 132**A**579; 156**Tenn** 571, 3**SW(2d)**1057 (decree not required to be mathematically exact).

645-60½-New. A decree, awarding defendant a house and lot, in an action for an accounting on an agreement to subdivide and market the property deeded to defendant, was held proper where the property was more salable by so doing. 153**Wash**155, 279**P**400.

645-63 245**NY**215, 156**NE**670. [a] **Recovery on accounting** is compensatory, not punitive. 5**F(2d)**731.

646-67 97**CalA**693, 275**P**997(2dcase). [a] **Where master found that defendant publisher mistakenly believed it had right to publish and market plaintiff's book,** publisher was entitled to allowance for expenses in so doing, even though it knowingly disobeyed order of injunction against further publication. 264**Mass**199, 162**NE**364.

646-68 31**F(2d)**419 (scope of relief where sale of corporate business set aside). [a] (2) Court may adjudicate liens and dispose of garnishment matters. 247**Mich**538, 226**NW**218. [b] **Relief properly denied.**–294**Pa**535, 144**A**537.

646-69 35**GaA**19, 132**SE**125 (rule as to relief where defendant, part owner of house and lot with plaintiff, practiced fraud in sale thereof, stated).

646-72½-New. Credit is allowable to third person for improvements made on land held by him under colorable title from defendant who wrongfully obtained it from plaintiff. 318 **Ill** 500, 149**NE**495.

646-78 [a] (3) Finding of balance due negatives finding in favor of claims made, but not allowed. 166**Minn**215, 208 **NW**3.

647-82 102**NJEq**338, 141**A**6.

647-83 294**Pa**535, 144**A**537.

647-84 MoA 23**SW(2d)**186; 289**Pa**171, 137**A**226. [e] **Parties should have account finally determined** before being put to trouble of appeal. 289**Pa**171, 137 **A**226. [f] **Mode of objecting to grant of decree.**–289**Pa**171, 137**A**226.

648-98 31**F(2d)**419.

649-8 [a] **In Pennsylvania.**–291**Pa**556, 140**A**342.

649-8½-New. That the court has no rules of procedure in assumpsit for account is immaterial as it may adopt rules. 291**Pa**556, 140**A**342.

649-8⅓-New. The court could have a prothonotary determine whether credits claimed by defendant were denied without adopting additional rules. 291**Pa** 556, 140**A**342.

649-21 [b] **Items of extra work** cannot be recovered in action of book account. **Vt** 150**A**148.

650-31 Vt 150**A**148.

650-34 Mass 165**NE**386.

650-36 Mass 166**NE**822 (jury need not find agreement to pay specific sum). [d] **Action for damages for breach of contract** is not on account. 25 **OhA**325, 158**NE**15.

650-37 30**Ariz**197, 245**P**354; **TexCivA** 281**SW**242. [f] **Meaning of "account."**–30**Ariz**197, 245**P**354.

651-38½-New. Where account is on joint contract, failure to prove joint liability precludes recovery against either defendant. **Ala** 130**S**73.

651-50½-New. Recovery may be had on account annexed for money due under contract if plaintiff has fully performed contract. 253**Mass**321, 148**NE**801.

651-50⅓-New. Copy of written statement, sued on in assumpsit in common pleas court, need not be served on defendant. 251**Mich**157, 231**NW**101.

651-52 33**Ariz**250, 263**P**939; 220**MoA** 1077, 279**SW**769; **MoA** 27**SW(2d)**1036; 32**PortoRico** 551.

652-56 22**AlaA**603, 118**S**495(1stcase). [a] But see 37**GaA**448, 140**SE**519. [i] **In suing for balance of liquidated current account** not necessary to allege that balance has been acknowledged and accepted by defendant. 32**PortoRico** 537. [j] **Allegation that balance of account had been admitted** by defendant is not necessary. 32**PortoRico** 551. [k] **Breach** held sufficiently alleged. 220**MoA**1077, 279**SW**769. [l] **All necessary allegations to render defendant liable on any common count** are assumed to be included in count on account annexed. **Mass** 166 **NE**867.

652-58 40**GaA**771, 151**SE**518.

652-61 32**PortoRico** 537; 32**PortoRico** 551.

653-64 32**PortoRico** 537. See also 179 **Ark**954, 18**SW(2d)**916. [a] 32**PortoRico** 537.

653-65 37**GaA**448, 140**SE**519; 40**GaA** 771, 151**SE**518.

653-67½-New. In some jurisdictions items of the account need not be set forth in the pleading. 33**Ariz**261, 263**P** 943.

653-76 See also 7**Alaska**348.

653-81 [a] **Item of interest** included in itemized statement of account held sufficient to support finding of amount of interest due. **TexCivA** 286**SW**593. [b] **Account not showing that it was against indemnitors** has been held insufficient to sustain claims on common counts against defendant and indemnitors. **Ala** 130**S**73.

654-82 37**GaA**448, 140**SE**519; **LaA** 119 **S**459; **TexCivA** 22**SW(2d)**951. [g] **Statement of items in complaint held sufficient.**–179**Ark**954, 18**SW(2d)**916.

654-89 [b] **Verification must be made by person who would be competent witness** if called to testify. 198**NC**769, 153 **SE**403. [c] **Verification held sufficient.**–198**NC**769, 153**SE**403.

654-90½-New. Statute making itemized verified statement of account admissible and prima facie evidence of correctness is strictly construed. 198**NC**769, 153**SE** 403.

655-2½-New. Fact that one item was not due when complaint was filed is immaterial if it had matured when amended complaint was filed. 35**Porto Rico** 512.

655-12 78**CalA**460, 248**P**706; 153**Miss** 29, 120**S**203(2dcase); 32**PortoRico** 537. [a] **Demand for copy of account** must be in writing signed by party making demand, or clearly show that party making demand is party against whom account is set up. 78**CalA**460, 248**P**706.

657-37 See also **MoA** 20**SW(2d)**701.

657-42 10**PaDist&Co** 534.

657-43½-New. Under a statute permitting a denial, stating that account is not just or true, in whole or in part, denial is insufficient where it alleges such facts only by inference or implication. **Tex CivA** 272**SW**508.

657-43⅓-New. A statute requiring such a denial has no application to a verified account in a case obviously not embraced within its terms. **TexCivA** 272 **SW**508.

657-46 TexCivA 265**SW**203.

658-56 111 **Okl** 228, 239**P**244, 245 [quot CJ].

658-57 111 **Okl** 228, 239**P**244, 245 [quot CJ]; 129 **Okl** 142, 143, 263**P**647 [quot CJ entire section].

658-60½-New. Plea of counterclaim or set-off based on alleged mutual account is properly stricken if there is no such account. 40**GaA**632, 150**SE**868.

658-61 145**Miss**87, 110**S**218, 49**ALR**565.

658-61½-New. Where an action is brought on account to recover for goods sold and not on the contract, defendant may introduce evidence contradictory of the contract although he did not deny the contract under oath. 154**Tenn**235, 290**SW**24.

658-62 TexCivA 289**SW**151.

658-62½-New. Defendant may show payment or set up a counterclaim although he fails to answer under oath to a sworn exhibit showing the account sued on. **TexCivA** 289**SW**151.

659-63 37**GaA**352, 140**SE**384 (affidavit must be written and sworn to).

659-72 [a] (2) Trial amendment to answer that debt, if any, was not on account for goods sold but on trade acceptances. **TexCivA** 3**SW(2d)**501. [c] **Explanatory matter.**–179**Ark**954, 18**SW (2d)**916.

659-74½-New. or by changing date on which goods were first sold, **MoA** 27 **SW(2d)**1036.

660-80½-New. General denial to unverified account puts its correctness in issue. 115 **Okl** 193, 241**P**471.

660-83 But see **TexCivA** 272**SW**508. [a] (2) In suit on verified account, answer of defendant held sufficient to admit proof of uncredited payments. **Tex CivA** 17**SW(2d)**145.

660–86 [a] **Plaintiff need not prove complete performance** of contract as alleged to recover under account annexed. **Mass** 166NE567.

660–89 222Ky694, 2SW(2d)369 (in action on account, evidence showing that demands arose out of partnership constitutes variance). [a] (2) Other instances. **MoA** 31SW(2d)86.

661–91 But see **Mont** 287P169.

661–95 203 **Iowa**581, 213NW413 (reasonable value or agreed price of goods sold); 145**Miss**426, 110S864; 115 **Okl** 193, 241P471; 291**Pa**556, 140A342 (rental value of realty); **TexCivA** 21 SW(2d)746. [d] 145**Miss**426, 110S864.

661–96 172**Ark**513, 290SW377; 44**Phillippine**154.

661–99½–New. Any testimony tending to show items are correct shifts burden to defendant without proof of reasonable, or market value of each item. 115 **Okl** 193, 241P471.

661–1 See also 291**Pa**556, 140A342.

661–1½–New. Where apparent duplication exists, the party rendering account must justify such charges. 241**NY**544, 150NE547.

661–1½–New. Defendant has burden of proof where claiming right to certain credits. **LaA** 126S741.

661–2 **La** 121S331(1stcase); 4**LaA**429; 56ND674, 218NW860 (evidence sufficient to sustain verdict for plaintiff); 285**Pa** 472, 132A579 (evidence held sufficient to sustain finding of item); **RI** 140A778 (delivery of goods); **TexCivA** 286SW 593 (evidence held sufficient). [b] (2) In action on account bought at bankrupt sale evidence as to operation of business after sale is admissible to show that plaintiff was not sole owner of debt. 170**Ark**809, 281SW366. [c] **Wage account of third person admissible** where defendant had agreed to pay such account. 142**Wash**344, 253P457. [d] **Evidence of prior written order** which had been completely settled by payment is inadmissible. **TexCivA** 248W(2d)443.

662–3 33**Ariz**250, 263P939.

662–7 **NJ** 141A584.

662–11½–New. Conflicting evidence whether debtor made payment on account or whether payment was for new order, which was admittedly given, authorized judgment against the debtor. **CalA** 275P513.

662–12 **Miss** 126S18 (where account sued on is properly sworn).

662–12½–New. Nor, in such case, is it necessary to prove market or reasonable value of each item to make prima facie case. 115 **Okl** 193, 241P471.

662–14 95**PaSuper**182 (book account offered in evidence is self-sustaining and prima facie evidence of sale and delivery of articles and prices).

662–15 **CalA** 275P513. Contra 33**Ariz** 250, 263P939.

662–16 131 **Or**242, 282P772. But see 127 **Okl** 53, 259P642.

662–21 **TexCivA** 21SW(2d)746; **TexCivA** 286SW593.

663–24 **MoA** 31SW(2d)86; 285**Pa**472, 132A579 (schedule held competent). [d] **Inclusion in defendant's list of creditors** is insufficient to prove correctness of plaintiff's account. 145**Miss**426, 110S864.

663–25½–New. and any witness who would have been qualified to verify account under statute is competent to testify to correctness of account; 115 **Okl** 193, 241P471.

663–26½–New. Any testimony tending to show items are correct is sufficient to make out prima facie case. 115 **Okl** 193, 241P471.

663–27 154**Miss**846, 123S887.

663–29 177**Ark**1178, 9SW(2d)561; **TexCivA** 271SW224.

664–37 [d] **In absence of sworn denial verified account** should be admitted in evidence without further proof. **TexCivA** 278SW958. [e] **Exclusion of verified account**, made according to provisions of statute, is reversible error. **TexCivA** 278SW958.

664–38 37**GaA**352, 140SE384; 141 **Okl** 210, 284P642.

664–39 [a] **Plea in reconvention for breach of contract** is not sworn denial of verified account. **TexCivA** 278SW 958.

664–45 37**GaA**352, 140SE384.

664–49 181**Ark**1146, 26SW(2d)569; 37**GaA**352, 140SE384; **Miss** 126S18; 115 **Okl** 193, 241P471; **TexCivA** 278SW 958; **TexCivA** 30SW(2d)406 (2dcase). [a] (2) Defendant not precluded from proving matter going to foundation of plaintiff's right to recover. **TexCivA** 11 SW(2d)222.

665–50 **TexCivA** 22SW(2d)502 (seller's suit for price of goods on broker's order held proper on open account).

665–51 **TexCivA** 281SW242 (not applicable to action on contract to purchase calendars which was canceled before calendars were ready for shipment).

665–53 **TexCivA** 294SW301. [a] **In suit for rentals of cars,** account showing amount due must be shown to be correct by testimony other then verification. **TexCivA** 294SW301.

665–54 **TexCivA** 294SW301.

666–70 37**GaA**352, 140SE384; 145**Miss** 87, 110S218, 49**ALR**565.

666–71 37**GaA**352, 140SE384.

666–79 **TexCivA** 22SW(2d)951 ("affiant knew those facts").

666–82 **TexCivA** 297SW863.

666–83 **Miss** 126S18.

667–94 216**Ala**398, 113S256.

667–95 37**GaA**352, 140SE384; 153**Miss** 884, 122S103; 115 **Okl** 193, 241P471; 127 **Okl** 53, 259P642.

667–96 37**GaA**352, 140SE384.

667–97 37**GaA**352, 140SE384.

667–99 37**GaA**352, 140SE384.

668–3 37**GaA**352, 140SE384.

668–5½–New. Plea impeaching stated consideration places burden on defendant to prove failure of consideration. **TexCivA** 30SW(2d)406(2dcase).

668–6 111 **Okl** 228, 239P244, 245 [quot CJ]; **TexCivA** 11SW(2d)222.

668–7 111 **Okl** 228, 239P244, 245 [quot CJ].

668–8 111 **Okl** 228, 239P244, 245 [quot CJ].

668–9 111 **Okl** 228, 239P244, 245 [quot CJ].

668–10 111 **Okl** 228, 239P244, 245 [quot CJ].

668–11 111 **Okl** 228, 239P244, 245 [quot CJ].

668–18 146**SC**355, 144SE73 (evidence held sufficient to require submission to jury).

668–20 23**AlaA**190, 122S700(2dcase) [certiorari den 219**Ala**494, 122S701(1st case)]; 124**Kan**319, 259P785; 153**Miss** 884, 122S103; **RI** 140A778; **RI** 141A78. [a] **Evidence held insufficient to take case to jury.**–141 **Okl** 275, 285P8.

668–20½–New. Where plaintiff's action is based on an account composed of various items, it is proper for the court to direct the jury upon such items as are not in dispute and to submit to the jury items as to which the testimony is conflicting. 115 **Okl** 95, 241P1102.

668–20½–New. Where uncontroverted evidence shows that plaintiff owned the open account sued on, it was held unnecessary to present such matter to the jury. **TexCivA** 282SW282.

668–20¼–New. Evidence relative to payment has been held to require a directed verdict for defendant. 132 **Okl** 64, 269P347(2dcase).

668–20½–New. Whether written memoranda is account stated is properly submitted to jury on conflicting evidence. 181**Ark**1146, 26SW(2d)569.

668–20½–New. Whether defendant is entitled to numerous deductions claimed is question of fact for jury. 181**Ark** 1146, 26SW(2d)569.

668–20½–New. Evidence held to preclude nonsuit in action for amount due on book account and for goods sold. **NJSup** 150A211(1stcase).

668–21 166**Ga**707, 144SE265 (instructions held proper under evidence); 41 **GaA**791, 154SE704; **MoA** 16SW(2d)678 (instruction supported by evidence); 121 **Okl** 5, 247P58 (instruction must be applicable to issues). [b] **Instruction which limits interest to be recovered** to six per cent from date of demand held not erroneous as permitting unlawful rate of interest. **MoA** 16SW(2d)678. [c] **Failure to charge held not erroneous.**–41**GaA**791, 154SE704.

668–22 23**AlaA**227, 124S115 (instruction properly refused where performance by defendant is not hypothesized).

669–31 115 **Okl** 193, 241P471. [a] **Evidence held to support finding.**–99**CalA** 347, 278P498.

669–35½–New. If defendant admits the duty to account and files an account, no order of account is necessary, but if he sufficiently denies the duty, issues raised by pleadings must be tried and an account ordered if found required. 291**Pa**556, 140A342.

669–37½–New. Judgment cannot be set aside for failure to show correctness of account where only issue was validity of compromise. 41**GaA**770, 154SE912.

669–39 **TexCivA** 24SW(2d)443. [b] **MoA** 285SW138.

669–40 [a] **In Porto Rico.**–29 **Porto Rico** 710.

670–43 **TexCivA** 24SW(2d)443.

672–72 [a] But see 9**PaDist&Co** 61.

672–76½–New. Book account itself must show against whom charge is made. **CalA** 286P733.

674–1 But see 9**PaDist&Co** 61.

674–4 But see 9**PaDist&Co** 61.

674–10 [c] **Sufficiency of book account.**–99**CalA**769, 279P481.

677–42 [a] (3) Allegation whether contract was oral or in writing not necessary. 11**PaDist&Co** 214. (4) Statement of claim must allege whether contract was written or oral. 10**PaDist&Co** 333. (5) It is not necessary to state whether contract is oral or written. 10**PaDist&Co** 396.

677–50½–New. To recover on an open book account, the balance due must be shown. 99**CalA**769, 279P481.

678–66½–New. A finding that defendants became indebted for materials furnished and services rendered and agreed to pay therefor is not a finding of a book account. 99**CalA**769, 279P481.

678–71 16F(2d)512, 49**ALR**1480; 213 **Ala**14, 104S130; **Cal** 285P851; 77**CalA** 241, 246P152; 3**Del** 137, 132A217; 30 **Hawaii**24, 27 [quotCyc]; 203 **Iowa**384, 212NW731 (doctrine recognized in Iowa); 122**Kan**98, 251P396, 397 [quot CJ]; 255**Mass**587, 152NE623, 47**ALR**1; 217**MoA**691, 275SW62, 64 [citCJ]; 220 **MoA**924, 296SW452; **MoA** 20SW(2d) 564; 75**Mont**261, 242P540; **Nev** 269P 606 [citCJ]; 55**ND**377, 213NW848, 849 [quotCJ]; 192**Wis**168, 212NW286. [a] **Other definitions.**–**CalA** 280P158; 203 **Iowa**581, 213NW413; 83**Mont**353, 272P 534, 537 [citCJ]; 248**NY**480, 162NE493.

679–73 16F(2d)512, 49**ALR**1480.

679–74 16F(2d)512, 49**ALR**1480.

680–76 283**Pa**205, 129A71.

680–77 283**Pa**205, 129A71.

680–81 **Minn** 222NW931(1stcase); 79 **Mont**566, 257P427, 432 [quotCJ].

680–82 79**Mont**566, 257P427.

681–87½–New. An account rendered must be based on some substantial services, and recovery may not be had by the mere sending of the account if no services were rendered for which there was a legal liability. 130 **Or**252, 279P 630 (attorney and client).

681–95 [b] **Approved reconcilement sheets** sent by one bank to another have same legal effect as account stated. **TexCivA** 281SW632.

682–98 But see 190**NC**203, 129SE607.

682–2 77**CalA**241, 246P152; **CalA** 289 P920.

682–8 But see 212**AppDiv**358, 209**NY** 86.

682–9 See also 215**Ala**548, 112S120, 121 [citCJ].

683–12 217**MoA**691, 275SW62, 64 [cit CJ].

683–13 224**AppDiv**583, 231**NYS**457; 283**Pa**205, 129A71, 73 [citCJ].

683–13½–New. **Annual settlements will not bar action** by a former corporation manager for a share of income tax thereafter refunded. 173**Ark**862, 293 SW746.

683–15 233**Mich**594, 207NW817 [cit CJ]; 127 **Or**215, 271P596.

685–30 16F(2d)512, 49**ALR**1480.

685–34 16F(2d)512, 49**ALR**1480; 218 **Ala**97, 117S653; 203**Cal** 748, 265P926; 88**CalA**300, 263P297; 99**CalA**769, 279P 481; **MoA** 20SW(2d)564; 212**AppDiv** 495, 209**NYS**188; 212**AppDiv**572, 209 **NYS**440. [b] **Facts held not to constitute cause of action** on account stated. 168**Ark**547, 271SW342, 40**ALR**383. [c]

Where party receiving account rendered admits its correctness, it is a stated account, binding on both. 248NY480, 162NE493.

685–35 See also 248NY480, 162NE493.

686–36 241NY306, 150NE125.

686–39 252NY247, 169NE372.

686–40 168Ark547, 271SW342, 40ALR383 (the account does not appear to be intended as final adjustment and settlement and facts do not show agreement express or implied that it should be so regarded).

686–44 212AppDiv495, 209NYS188; 55ND377, 213NW848.

686–45 88CalA300, 263P297.

686–46 [a] **"Advertising" appearing at head of letter sent asking indulgence** does not give rise to inference that defendant is disclosed agent of principal to preclude indebtedness of defendant's liability to plaintiff. 241NY306, 150NE125.

686–47½–New. The presumption of liability or account stated arising out of admission of correctness of balance is not rebutted by letter sent which would be construed as mere request for indulgence. 241NY306, 150NE125.

686–48 202 Iowa594, 210NW815; MoA 20SW(2d)564.

686–50 195Wis472, 218NW712.

687–53 88CalA300, 263P297.

687–57 213Ala14, 104S130.

687–58 16F(2d)512, 49ALR1480; 213Ala14, 104S130; 83Mont353, 272P534.

687–59 16F(2d)512, 49ALR1480; 51ND581, 199NW1017.

688–63 157SC371, 154SE641.

688–66 [c] **Acknowledging receipt of statement** and asking for explanation of certain items is insufficient as account stated. 99CalA769, 279P481.

688–68 133Misc640, 233NYS662.

688–69 241NY306, 150NE125.

689–73 But see 165Minn210, 206NW400.

689–75 248NY480, 162NE493; 123 Okl176, 252P431.

690–81 [b] **Subsequent letters requesting payment** to apply on sums advanced by plaintiff are not inconsistent with promise to pay balance agreed on in account stated. MoA 20SW(2d)564.

690–85 Cal 285P851; CalA 280P158.

691–96 16F(2d)512, 49ALR1480; 217Ala297, 116S149 (the inference of its correctness is more or less strong according to circumstances of particular case); 79CalA641, 250P710; 82CalA434, 255P751, 755 [quotCJ]; IndA 163NE240; La 119S451(1stcase); 220MoA924, 296SW452; 79Mont566, 257P427, 432 [quotCJ]. [a] 79CalA641, 250P710. [c] 28F(2d)373. [d] **It constitutes some evidence of debtor's acquiescence in charges,** although goods were delivered to third party. 48RI416, 137A879. [e] **May be regarded as prima facie correct.**–98Fla780, 124S278.

691–97 16F(2d)512, 49ALR1480; 94CalA498, 272P309; La 119S451[1st case] (prima facie correct); 220MoA924, 296SW452; 79Mont566, 257P427, 432 [quotCJ].

691–99 18F(2d)41; 220MoA924, 296SW452; MoA 20SW(2d)564.

691–1 220MoA924, 296SW452; 121 Or133, 253P525.

691–2 16F(2d)512, 49ALR1480; 18F(2d)41; 220MoA924, 296SW452; 248NY480, 162NE493. See also 215Ala548, 112S120, 121 [citCJ].

692–6 16F(2d)512, 49ALR1480.

692–16 MoA 20SW(2d)552(2dcase).

693–17 MoA 20SW(2d)552(2dcase).

693–20 165Minn210, 206NW400.

693–22½–New. Unanswered letters of a cotton factor insisting upon his customer margining his account but making no definite demand do not constitute an account stated. 217MoA691, 275SW62.

694–34 205 Iowa925, 219NW32; Tex CivA 286SW901, 903 [citCJ]. [e] **Bank statement and canceled vouchers.**–22F(2d)33.

694–35 16F(2d)512, 49ALR1480; 49RI159, 139A790. [b] **Discussing settlement** does not constitute account stated. 48SD648, 205NW703.

694–38 245 IllA473.

695–43 199Cal168, 248P658, 47ALR904; Mont 272P534; 133Misc48, 231NYS389 (claim by depositor that account of bank is erroneous must be made within reasonable time after discovering error or account becomes settled).

695–45 83Mont353, 272P534.

695–46 [c] 83Mont353, 272P534.

695–49 [a] **Where right to set off is repudiated in toto,** there is no duty to protest upon receiving statement of items in detail. 18F(2d)724, 52ALR807.

695–50 94CalA498, 272P309 (fruit grower's reference to possible credit of freight rebates which marketing corporation undertook to collect for him held not to affect latter's right to recover on account stated for moneys advanced).

695–53 98Fla780, 124S278 (mere presentation of claim, though unobjected to, creates no liability). See also 83Mont353, 272P534.

695–54 72CalA363, 237P552.

696–57 16F(2d)512, 515, 49ALR1480 [quotCJ].

696–58 16F(2d)512, 49ALR1480.

696–59 16F(2d)512, 49ALR1480.

696–60 16F(2d)512, 49ALR1480.

696–66 Contra 16F(2d)512, 49ALR1480.

697–78 74CalA269, 239P861 [citCJ]; 55ND377, 213NW848.

697–80 74CalA269, 239P861 [citCJ]; MoA 285SW181 (after correction of mistake in computation); 241NY306, 150NE125 (from admission of correctness of balance implied promise to pay at once arises). 51ND148, 199NW444, 446 [citCJ]; 51ND581, 199NW1017; 55ND377, 213NW848.

697–80½–New. To exclude an implied promise to pay at once from an admission of correctness of the account stated, a condition that it shall not be paid until some future time may be shown. 241NY306, 150NE125.

697–80¾–New. If an admission of correctness is final and definite, a mere wish for postponement does not rebut the presumption that the payment was to be at once. 241NY306, 150NE125.

697–80¾–New. But the condition must be definite and indicate that admission is made only on basis that condition be observed. 241NY306, 150NE125.

698–82 51ND581, 199NW1017.

698–83 94CalA498, 272P309, 312 [cit CJ].

698–86 51ND581, 199NW1017.

698–89 77CalA241, 246P152.

698–90 77CalA241, 246P152, 153 [quot CJ]; 241NY306, 150NE125 (condition must be definite and indicate that admission of correctness is only made on understanding that condition is to be observed).

698–90½–New. But a mere wish for postponement of the time of payment will not rebut the presumption of a promise to pay at once. 241NY306, 150NE125.

698–92 83Mont353, 272P534.

699–98 74CalA269, 239P861 (debt shown); 102CalA365, 283P329; CalA 290P1089; 98Fla780, 124S278; 255Mass587, 152NE623, 47ALR1; Mass 165NE885; 220MoA831, 272SW1084; 55ND377, 213NW848; MoA 19SW(2d)516. [f] **Indefiniteness of original agreement.**–MoA 19SW(2d)516.

699–99 72CalA363, 237P552; 98Fla780, 124S278 (where defendant had not accepted goods or assumed to pay therefor before invoice was mailed, there was no basis for account stated); Mass 165NE885; 220MoA831, 272SW1084; 222MoA524, 293SW476; 224App Div583, 231NYS457.

700–9 77CalA241, 246P152, 153 [quot CJ]. See also 74CalA269, 239P861.

701–21 322 Ill133, 152NE572.

701–25 215Ala552, 112S138 (void in toto). See also 215Ala528, 112S102.

702–31 220MoA831, 272SW1084.

702–40 32Ariz381, 259P397.

702–41 32Ariz381, 259P397.

702–47 90CalA525, 265P1024, 1025 [citCJ].

703–59 248NY480, 162NE493.

705–92 213Ala14, 104S130; 248NY480, 162NE493; 213AppDiv6, 209NYS506. See also 94CalA498, 272P309.

705–95½–New. Interest rates may not be changed on the theory of an account stated by sending statements containing higher interest rates. 218App Div495, 218NYS529.

705–95¼–New. Retention without protest of the broker's statements showing higher interest rates does not make plaintiff liable. 218AppDiv495, 218NYS529.

705–95¼–New. Where there is an express interest, contract law will not imply a different agreement as to interest from retention without objection of the account stated. 218AppDiv495, 218NYS529.

705–96 19F(2d)981; 25F(2d)684; 224IllA598; 55ND377, 213NW848; 192Wis168, 212NW286.

705–98 179Minn63, 228NW344; 83Mont353, 272P534; 248NY480, 162NE493; 55ND377, 213NW848, 849 [cit CJ]; 131 Or242, 282P772; TexCivA 281SW632 (action to recover payment shown on approved reconcilement sheets); 192Wis168, 212NW286. [b] **Rule as to conclusiveness** unless fraud, mistake, or omission is shown, does not apply to illegal or fraudulent payments of public moneys by fiscal bodies. 100WVa405, 130SE471.

706–99 CalA 290P1089; 3Del137, 132A217, 219 [quotCJ]; 75Mont 261, 242P540; 83Mont353, 272P534; 49ND625, 192NW974; 55ND377, 213NW848, 849 [citCJ]. [c] **Consideration for new contract** is settlement of original account. 75Mont261, 242P540.

707–4 215Ala552, 112S138; 55ND377, 213NW848, 849 [citCJ].

707–6 221MoA695, 285SW531 (court cannot order accounting).

707–8 MoA 31SW(2d)86.

708–13 199Cal168, 248P658, 47ALR904; 91Fla586, 108S488.

708–15 127 Or215, 271P596 (binding only as to items included).

709–20½–New. Account rendered by one party containing items not chargeable to the other, showing on its face it was not stated in good faith, is not sufficient to sustain finding of balance due between the parties. 120Kan133, 242P454.

709–22 121 Okl5, 247P58; 127 Okl53, 259P642.

709–23 127 Okl53, 259P642.

709–30 101WVa284, 132SE717.

709–31 22F(2d)33; 32Ariz381, 259P397, 400 [citCJ]; 100CalA103, 279P1074; 77Colo496, 238P38; 48Ida424, 282P943; 241 IllA420; 203 Iowa833, 211NW542, 52ALR1297; Mich 233NW185; 83Mont353, 272P534; 51ND581, 199NW1017, 1020 [citCJ] (may be impeached on ground of fraud); TexCivA 286SW901, 903 [quotCJ]; 101WVa284, 132SE717; 192Wis168, 212NW286. See also 215Ala548, 112S120; 248NY480, 162NE493; 133Misc640, 233NYS662 (account stated, in absence of fraud or mistake, is conclusive upon both parties). [a] **Fraud or misrepresentation prior to settlement will not defeat cause of action** unless it appears that it induced defendant to agree to correctness of account. 51ND581, 199NW1017.

711–44 Mich 233NW185.

711–49 Tex 286SW901, 903 [citCJ].

712–53 MoA 285SW181, 182 [citCJ].

712–56 [a] **Statement of account not voided by mistake of law** where retained without objection with knowledge of facts. 83Mont353, 272P534.

713–61 19F(2d)981, 985 [citCJ].

713–79 19F(2d)981, 985 [quot CJ].

714–80 19F(2d)981, 985 [quotCJ].

714–81 19F(2d)981.

714–85 CalA 293P98.

715–2 22F(2d)33.

715–4 MoA 285SW181, 182 [citCJ].

716–11 32Ariz381, 259P397; 79Mont566, 257P427.

719–51 32Ariz381, 259P397.

719–52 179Minn63, 228NW344.

719–58 [b] **Defendant's proof is limited** to showing that plaintiff has no cause of action. MoA 285SW181 (evidence held properly excluded).

720–61 20F(2d)705; 177Ark1156, 98W(2d)565; 131 Or242, 282P772.

720–63 20F(2d)705; 51ND581, 199NW1017 (evidence held sufficient to show fraud).

721–79 192Wis168, 212NW286.

722–87 44Philippine544. But see Mich 233NW431.

722-95 Forms of declarations or complaints on accounts stated see **33Ariz** 250, 263P939; 30Hawaii24.

723-96 77CalA241, 246P152; 222App Div368, 226NYS325; 121 Or133, 253P 525 (complaint held sufficient).

723-5 32Ariz381, 259P397.

723-7 16F(2d)512, 49ALR1480.

723-8 16F(2d)512, 49ALR1480.

723-11 30Hawaii24; 121 Or133, 253P 525.

725-40 32Ariz381, 259P397.

725-48 [e] **Statutes not applicable to actions on account stated.**–Mont 287P 169.

726-52 32Ariz381, 259P397, 400 [cit CJ].

726-55 81CalA360, 253P755.

726-61 220MoA831, 272SW1084; 51N D581, 199NW1017 (must stand on and prove account). [a] **Account held admissible as stated account.**–82CalA434, 255P751.

726-62 51ND581, 199NW1017, 1020 [citCJ].

726-62½-New. or upon any other theory, 220MoA 831, 272SW1084.

726-64½-New. No recovery can be had on quantum meruit. 51ND581, 199NW 1017.

727-71 94CalA498, 272P309 (variance not fatal).

727-74½-New. Answer may make proof of correctness of account unnecessary. 126 Okl 28, 258P278.

727-75 74CalA269, 239P861 (proof need not be of express agreement).

727-75½-New. A contract of sale of personal property alleged in the complaint on an account stated will be presumed to have complied with the statute of frauds. 220MoA831, 272SW1084.

727-78 32Ariz381, 259P397; 130 Or252, 279P630 (in action by attorney against client).

728-80 241 IllA420, 425 [citCJ]; 220 MoA831, 272SW1084, 1086 [quotCJ].

728-81 220MoA831, 272SW1084, 1086 [quotCJ].

728-82 220MoA831, 272SW1084, 1086 [quotCJ].

728-83 See also **MoA** 31SW(2d)86. But see 33Ariz250, 263P939.

728-92 Ind 169NE529; 179Minn63, 228NW344; **Mo** 287SW606; 220MoA 831, 272SW1084. [e] **Evidence that no antecedent debt or contract relationship ever existed is admissible. CalA** 290P 1089.

728-94 51ND581, 199NW1017, 1020 [citCJ]. [a] 19F(2d)981; 20F(2d)678; 219Ala18, 121S23; 31Ariz16, 250P251; 199Cal 168, 248P658, 47ALR904; 79Cal A611, 250P699; 86CalA605, 260P1105; 94CalA498, 272P309; 121 Or133, 253P 525 (to fix time when account was stated); 192Wis168, 212NW286. [b] (1) 16F(2d)512, 49ALR1480; 102CalA365, 283P329; 35GaA467, 133SE652; 179 Minn63, 228NW344; 220MoA924, 296 SW452; 212AppDiv572, 209NYS440; 219AppDiv506, 220NYS270. (2) To rebut presumption of account stated. 241 NY306, 150NE125. (3) To show that defendant acted as agent for another so as to preclude indebtedness of defendant to plaintiff on account stated. 241 NY306, 150NE125.

728-95 219Ala18, 121S23.

728-96 177Ark156, 9SW(2d)565.

729-98½-New. In weighing the evidence, the fact of the relation of principal and agent between the parties will be considered. 199Cal 168, 248P658, 47 ALR904.

729-99 82CalA434, 255P751; 123 Okl 176, 252P431; 121 Or133, 253P525; 131 Or242, 282P772.

729-1 236Mich471, 210NW478.

729-2 MoA 285SW181 (verdict properly directed for plaintiff); 51ND581, 199N W1017.

729-3 TexCivA 19SW(2d)339.

729-4 122Kan98, 251P396; **MoA** 278 SW1084; 218AppDiv495, 218NYS529 (whether statements were sent by brokers and retained without objection); 89 PaSuper476; 48SD648, 205NW703.

729-9 CalA 290P1089.

730-19 [a] (2) 51ND581, 199NW1017. (3) Instruction excluding defense of account stated where it is not pleaded. 220MoA924, 296SW452. [b] **Instructions held improper.**–224 IllA598.

730-22½-New. Judgment reciting "defendants are indebted to plaintiff in" a stated amount does not indicate that the recovery was on an open account. 31 Ariz16, 250P251.

730-22⅓-New. A finding that defendants were indebted for material and services and agreed to pay therefor is not a finding of account stated. 99CalA 769, 279P481.

ACCOUNTS RECEIVABLE

730-1 316Mo694, 294SW1017.

ACCRETION

731-9 192Wis486, 213NW320. See also 49Philippine 504.

ACCRUE

733-21-22½-New. Has some antithesis to "passing." 256Mass519, 153NE4.

733-23 TexCivA 280SW282, 285 [cit CJ].

733-24 NJCh 149A525 (apportioning rent between mortgagor and mortgagee).

ACCUMULATION

734-35 IndA 158NE598; 126Misc862, 215NYS802, 805 [quotCJ&Cyc].

734-36 126Misc862, 215NYS802, 805 [quotCJ].

735-37 126Misc862, 215NYS802, 805 [quotCJ].

ACKNOWLEDGE

738-69 [a] **Acknowledge** is used to mean obligor in bond admits self to be bound for debt, interests and costs; not as formal acknowledgment. 97PaSuper 334.

ACKNOWLEDGMENTS

745-2 217Ky164, 289SW213, 214 [cit CJ].

746-15 172Ark569, 289SW766; 7 PortoRicoFed693.

748-22 DC 42F(2d)604; 241Mich129, 216NW438; 244Mich403, 221NW322.

750-38 175Ark641, 18W(2d)59 (acknowledgment is essential part of conveyance of land). [b] **Statute held not to preclude acknowledgment** of deed containing blank. 128Misc118, 217NYS666.

750-44 96OhSt74, 117NE25.

750-51 119 Or573, 250P218, 250P763.

750-55 [a] **Purpose of statutes** requiring acknowledgment of deeds is to protect creditors and purchasers. 199Cal 344, 249P180.

750-56 199Cal 344, 249P180; 235 IllA 462; 234Ky104, 27SW(2d)679; 244Mich 403, 221NW322; 82NH111, 129A878; **TexCivA** 283SW324; **TexCivA** 291SW 922.

752-58 87Colo 345, 287P641.

752-69 DC 42F(2d)604; **TexCivA** 283 SW324.

752-70 DC 42F(2d)604.

752-71 235 IllA462.

752-75 199Cal 344, 249P180.

755-91 [d] **In Connecticut.**–109Conn 307, 147A4.

755-95 [f] (2) In Oklahoma, chattel mortgage is entitled to record if signed in presence of two witnesses, same as if acknowledged. 87Colo 55, 284P1021.

756-97 168Ark859, 271SW952; 181Ark 943, 28SW(2d)730; 241Mich129, 216NW 438; 244Mich403, 221NW322.

760-12 127Kan551, 274P277.

763-41 NC 154SE52.

765-45 TexCivA 295SW679.

765-48 115Nebr643, 214NW73.

766-54 [a] **TexCivA** 286SW593, 596 [citCJ].

769-5 84CalA142, 257P606; 99NJEq 224, 129A404; 117 Oh206, 158NE184, 58 ALR600.

770-8 178Ark709, 13SW(2d)294; 98 NJEq713, 129A702; 113 Okl 247, 241P 152; 153Tenn11, 282SW201; 151Wash 454, 276P296.

770-9 Fla 126S135; 148Md271, 129A 291; 113 Okl 247, 241P152.

770-13 98NJEq713, 129A702 (defective acknowledgment immaterial where defendants had actual notice and were only parties questioning release); 153 Tenn11, 282SW201.

771-15 17F(2d)377; 153Tenn11, 282 SW201.

771-17 245 IllA148.

772-28 167Ga883, 146SE901.

772-30 68Utah524, 251P29.

772-31 68Utah524, 251P29.

772-34 189NC684, 128SE155; 68Utah 524, 251P29.

773-37 17F(2d)377; 105NJL375, 146 A355 (certificate of notary of another state attached). But see 167Ga883, 146 SE901.

775-53 115Nebr643, 214NW73; 192NC 45, 133SE195.

775-54 TexCommnA 25SW(2d)299. [f] (1) Contra 209Ky806, 273SW476.

776-56 202 Iowa1202, 211NW727.

777-62 TexCivA 277SW213 (to deny acknowledgment).

778-88½-New. A notarial act makes full proof of itself. **La** 121S316.

779-92 156Tenn321, 300SW588.

779-97½-New. Examination before registration. Under some statutes, proof or acknowledgment of the execution of any instrument offered for registration must be examined by a proper officer, and if found in due form, he must so adjudge and order registration of the instrument. 192NC634, 135SE612.

779-97⅓-New. Such statute has been held mandatory. 192NC634, 135SE612.

779-97¼-New. Failure of the officer to sign his name to such an adjudication by him renders the registration a nullity. 192NC634, 135SE612.

779-97⅙-New. But a deed registered without proper compliance with such statute is valid except as to purchasers for value and creditors. 192NC634, 135 SE612.

780-4 122 Okl 210, 253P48; **Okl** 291P 573; 13PaDist&Co 743; **TexCommnA** 280SW574.

781-5 122 Okl 210, 253P487.

782-19 122 Okl 219, 253P1010.

784-40 122 Okl 210, 253P487; 124 Okl 46, 253P990; **SD** 227NW466. [h] **"Action" before "justice of peace"** is mere surplusage not invalidating deed. 215 Ala12, 108SS58.

786-51 152Miss428, 118SS829; 131 Okl 144, 268P245.

786-53 Mass 169NE803. See also 295 Pa120, 144A912.

786-57½-New. Wife acknowledging husband's deed is bound by acknowledgment that she executed it for purposes and consideration therein recited. **TexCivA** 298SW(2d)799(2dcase).

787-60 215Ala12, 108SS58. [d] 122 Okl 210, 253P487.

787-65 TexCivA 271SW311 (conclusive unless impeached).

792-18 193NC791, 138SE162.

792-19 127Misc662, 217NYS274; 193 NC791, 138SE162. [g] **Failure to file certificate of undertaking and oath of office.**–127Misc662, 217NYS274.

793-21 4FCasNo 2,248, 14NatBankrReg 195; 12FCasNo 6,467, 8Ben100; 16 FCasNo 8,778, 2Hask76, 14NatBankrReg 336; 2Ala640; 91Ala416, 8S712; 5 Stew&PAla410; 16Cal 533; 116Ga732, 42SE1026; 122Ga439, 50SE382; 128 Ill 29, 21NE201; 131 Ill 490, 23NE602; 62 IllA96; 65 IllA153; 8 Ind60; 206 Iowa 775, 221NW470; 58Mich242, 25NW175, 8 Mo 328; 46Mo 203 [overr 28Mo 551]; 61 Mo 178; 76Mo 106; 109Mo 260, 19SW 24; 14Nebr174, 15NW318; 5NH420; 20 NH492; 31AppDiv49, 52NYS857; 193 NC791, 138SE162; 21 OhSt662; 10 Serg&RPa160; 14PaCo 272; 95Tenn349, 32SW209; TennChA 48SW114; Tex CivA 26SW841; 2WVa519. [e] **Notary appointed by president of Republic of Texas** is authorized to acknowledge deed. TexCivA 288SW614.

793-23 193NC791, 138SE162.

794-36 207Ky837, 270SW463 [quot CJ].

794-37 207Ky837, 270SW463 [quot CJ].

796-47 193NC791, 138SE162.

799-75 34PortoRico 753.

800-78 209Ky24, 272SW38.

802-3 86Mont276, 283P213.

803-5 189NC684, 128SE155; **TexCivA** 273SW993 (person who identifies himself with transaction by placing his name in face of instrument as active and essential party thereto is not competent to give it authenticity as officer).

804-12 116Nebr84, 215NW796; 198NC 452, 152SE167; **TexCivA** 308SW(2d)518.

805-20 Fla 126S135; 86Mont276, 283

P213; 68Utah524, 251P29, 31 [citCJ].
805-21 189NC684, 128SE155; 68Utah 524, 251P29, 31 [citCJ].
805-22 100WVa422, 130SE663.
806-28 50SD6, 208NW222, 224 [citCJ]. See also 116Nebr84, 215NW796. Contra 235 IllA462. [h] (2) Statute merely validates acknowledgments taken before its enactment, but does not validate acknowledgment taken after its enactment. 252 IllA115. [j] **In Illinois** acknowledgment of corporate trust deed before officer or stockholder of corporation is legal, by statute. 235 IllA462.
807-29 172Ark48, 288SW1.
808-36 116Nebr713, 218NW744; Tex CivA 328SW(2d)492.
808-38 150Md385, 133A121.
808-42½-New. An acknowledgment of a deed taken by one who is an officer in both grantor and grantee corporations is void. TexCivA 283SW324.
809-55 43 OklACR149.
811-78 216Ala349, 113S291.
813-93 159La1087, 106S574 (before signature).
815-13 196NC657, 146SE713.
820-51 233Ky142, 258W(2d)51; Tex CivA 138W(2d)386. But see Tex CommnA 248W(2d)351.
821-65 [b] 152Tenn648, 280SW408. [c] **Evidence admissible** to prove separate acknowledgment. TexCivA 18SW (2d)796. [d] **Evidence held sufficient** to warrant finding of separate acknowledgment. TexCivA 18SW(2d)796.
821-66 152Tenn648, 280SW408; Tex CivA 5SW(2d)831.
823-70 152Tenn648, 280SW408.
824-72 161Tenn128, 29SW(2d)654.
825-94 196NC657, 146SE713.
826-96 196NC657, 146SE713.
827-17 193NC560, 137SE578.
830-48 207 Iowa602, 223NW385.
831-59 17F(2d)377 (Iowa statute).
831-59½-New. Under some statutes the official character of the clerk of court taking acknowledgment of a trust deed must be certified by the judge, the chief justice, or the presiding magistrate of the court. 153Tenn11, 282SW201.
833-70 25F(2d)305 (notwithstanding statutory form including designation in body); 29F(2d)984; 33F(2d)900(1st case). But see 17F(2d)377.
833-71 226Ky557, 118SW(2d)429.
835-88 25F(2d)305; 70CalA184, 232P 997.
836-93 208 Iowa656, 226NW9.
836-99 Ala 129S88.
837-1 201 Iowa538, 207NW596.
839-26 181Ark798, 27SW(2d)1008.
840-29½-New. A deed is void where the officer failed to certify that the contract was not unreasonable as to the wife. 191NC521, 132SE275.
841-38 See also 25F(2d)305.
841-40 29F(2d)984; 35F(2d)321; Ala 129S88; 217Ky393, 289SW241; 30NM 487, 239P525. [b] (3) Iowa 227NW112.
847-56½-New. The subscription is a part of a certificate of acknowledgment. 29F(2d)984.
847-64 209Ky651, 273SW545.
849-77 35F(2d)321.
850-51 85PaSuper418 (where issues properly submitted).
851-93 [b] **Certificate of acknowledgment by partnership held sufficient.**-30 NM487, 239P525.
851-94 30NM487, 239P525; 219AppDiv 668, 220NYS491.
852-1 [d] (2) Acknowledgment reciting persons were known to notary as president and secretary of corporation has been held sufficient. 181Ark798, 27 SW(2d)1008. [e] **Omission of words "with whom I am personally acquainted"** or like words renders registration ineffective as against attacking or judgment creditors. 152Tenn648, 280SW 408.
853-2 [d] **Certificate that person acknowledging deed was grantor described therein without stating his name** may be sufficient. 219AppDiv668, 220 NYS491.
857-40 36F(2d)667.
857-43 181Ark943, 28SW(2d)730.
857-44 99NJEq878, 133A381.
857-45 [a] **Certificate does not certify title to property.**-222MoA153, 28W(2d) 815.
859-57 99NJEq198, 132A305.
860-65 Mo 298W(2d)1100.
865-13 99NJEq198, 132A305.
869-44½-New. **Disqualification of officers to make certificate.** A clerk of court who is a party to the instrument is disqualified under statutes to adjudge whether it shall be admitted to registration. 193NC791, 138SE162.
869-44½-New. Where the clerk is thus disqualified, the instrument may, under statutes, be proved before any justice of the peace of the county of such clerk. 193NC791, 138SE162.
871-68 99NJEq666, 134A181.
872-69 TexCivA 271SW311.
872-70 201 Iowa538, 207NW596.
872-70½-New. The rule applies, although the officer is acting as such under a new appointment. 201 Iowa538, 207NW596 (notary).
872-78 181Ark798, 27SW(2d)1008.
873-79 131Misc99, 226NYS199 (nunc pro tunc order in partition proceeding).
873-80 [a] TexCivA 271SW311.
874-96 NJSup 137A837. [f] **In determining meaning of reacknowledgment**, language of former deed should be included. TexCommnA 258W(2d)299.
874-98 TexCivA 148W(2d)286.
874-99 NJSup 137A837.
875-4 TexCivA 148W(2d)286.
878-25 104Conn291, 132A464.
879-33 [f] **In Texas.**-TexCivA 273SW 993.
879-34 [a] TexCivA 273SW993.
880-43½-New. Failure of the clerk of the superior court to sign an order to register a deed and certificate of acknowledgment has been held not cured by statute. 192NC634, 135SE612.
881-51 168Minn441, 210NW586.
882-61 228AppDiv150, 239NYS281.
883-67 228AppDiv150, 239NYS281.
884-86 But see 134 Okl 19, 272P418.
885-87 99NJEq198, 132A305.
885-95 [c] **Acknowledgment of chattel mortgage.**-252 IllA184 (defects held cured by testimony of justice and docket entry).
886-6 178Ark1150, 138W(2d)624 (proper execution); 213AppDiv36, 209 NYS613; 43 OklACR149; TexCivA 271 SW311. See also 196NC657, 146SE713. [i] **Notary's certificate sufficient** to support finding that deeds were executed by persons having name signed thereto. CalA 289P863.
887-8 Ala 129S88; 23AlaA164, 122S 614 [certiorari den 219Ala402, 122S615 (1st case)]; 179Ark948, 198W(2d)1026 (certificate as to married woman's acknowledgment); 98Fla559, 124S21; Fla 129S892; 138 Okl 177, 280P808; 295Pa120, 144A912 (certificate is not conclusive in case of fraud or forgery); TexCommnA 248W(2d)351; TexCivA 265SW196; TexCivA 277SW213; Tex CivA 282SW930; TexCivA 293SW327; TexCivA 2SW(2d)864; TexCivA 4SW (2d)195; TexCivA 15SW(2d)155; Tex CivA 18SW(2d)687. [b] (1) 224Kyl, 5 SW(2d)278. [u] (2) Certificate of acknowledgment by married woman is conclusive though notary did not explain instrument to her, where there is nothing to show grantee knew it. Tex CivA 2SW(2d)864.
889-10 TexCivA 277SW213.
889-13 99NJEq666, 134A181.
891-22 171Ark912, 287SW373; 175Ark 641, 18SW(2d)59; TexCommnA 12SW (2d)991; TexCivA 4SW(2d)195.
891-25 34F(2d)112; 216Ala349, 113S 291. [i] **False certificate that married woman appeared before notary** is gross fraud permitting her to attack same. TexCivA 277SW213. [j] **Married woman** is not estopped from testifying that she never appeared before notary making certificate of acknowledgment, because she may commit perjury. Tex CivA 277SW213.
892-31 But see TexCivA 271SW311.
892-32 44 Idn643, 258P929; TexCivA 271SW311 (distinction between cases where substantial consideration passed and gratuitous cases); TexCivA 283SW 934.
893-34½-New. Grantee in consideration of love and affection cannot deny right of grantor and heirs to impeach fraudulent certificate of acknowledgment. TexCivA 271SW311.
893-36 See also TexCivA 265SW196.
893-36½-New. Where the grantee is not a party to action involving irregular acknowledgment, the fact that he was present and knew of irregularity does not dispense with allegation of fraud. TexCivA 265SW196.
893-41 99NJEq666, 134A181; 115 Okl 207, 242P264; 43 OklACR149; TexCivA 271SW311. [b] (3) Where instrument is required to be attested by notarial seal, but instead clerk of superior court certifies that it was properly proved, presumption is that it is competent evidence of title. 196NC79, 144SE559.
894-48 169Ark1211, 276SW859; 172 Ark48, 288SW1; Iowa 228NW281; 224 Ky75, 58W(2d)280, 281 [citCJ]; Tex CivA 293SW327.
895-57 26F(2d)672; 146Wash478, 263 P957.
896-59 [f] **Declarations of officer held inadmissible.**-146Wash478, 263P957 (impeaching certificate).
896-60 178Ark1150, 138W(2d)624.
896-61 8D 227NW466 (that initials were added after grantor signed his name held insufficient to impeach certificate).
896-63 34F(2d)112; 208 Iowa739, 224 NW489; 126Kan435, 438, 268P821 [cit CJ]; 99NJEq666, 134A181; 115 Okl 207, 242P264; 122 Okl 210, 253P487; 124 Okl 46, 253P990; 135 Okl 50, 273P 887(2dcase); 135 Okl 123, 276P200; 138 Okl 177, 280P808; 39 OklACR317; 41 OklACR118; 42 OklACR149; 146 Wash478, 263P957. [f] (2) 171Ark 1189, 288SW720.
897-64 233 IllA572 (proof beyond reasonable doubt is sufficient to overcome certificate); 224Ky75, 58W(2d)280, 281 [quotCJ].
898-65 122 Okl 210, 253P487; 41 OklA CR118.
898-67 34F(2d)112; 216Ala349, 113S 291; 169Ark1211, 276SW859; 172Ark 48, 288SW1; Iowa 228NW281; 2LaA 144; Mo 238W(2d)1004(2dcase) (positive testimony of recorder of deeds); 122 Okl 210, 253P487; 41 OklACR118.
898-68 26F(2d)672.
899-74 44 Idn643, 258P929, 930 [citC J]; 334 Ill 19, 165NE147; 115 Okl 207, 242P264; 122 Okl 210, 253P487; 135 Okl 50, 273P887(2dcase); 39 OklACR 317, 319 [quotCJ].
900-75 122 Okl 210, 253P487.
900-76 122 Okl 210, 253P487.
900-77 122 Okl 210, 253P487.
901-80 [d] **Testimony that he falsified certificate** not ordinarily sufficient to set it aside. Iowa 232NW653.
901-81 8D 227NW466.
901-82 124 Okl 46, 253P990.
901-84 41 OklACR118.
902-90 168Minn423, 210NW161 (forged signatures to release of claims). [a] (2) That notary violated statute by taking acknowledgment in absence of parties does not prevent prosecution for forgery in making false certificate of acknowledgment. 171Minn345, 214NW 262. [b] 220MoA429, 276SW96. [c] **Where acknowledgment is one of proximate or concurring causes of loss,** notary is liable. 220MoA429, 276SW96.
902-91½-New. False certificate of acknowledgment is a fraud on the grantor. TexCivA 271SW311.
902-91½-New. **Federal Criminal Code** makes it an offense for an officer authorized to administer oaths or take acknowledgments to make any false acknowledgment or statement in matters submitted to, made with, or taken on behalf of, the United States, required by law or regulation. 21F(2d)571.
902-91¼-New. The statute applies to acknowledgments and statements made in connection with reports of transactions by a permittee under the Prohibition Act. 21F(2d)571.
902-91½-New. Such statute does not apply to an oath or acknowledgment to the report of a permittee made under a regulation which does not require the report to be verified by oath or affirmation. 21F(2d)571.
902-95 220MoA429, 276SW96 (liability based on negligence). [e] **That persons whose signatures to deed of trust were forged did not exist or had slight interest in property** does not affect notary's liability for negligence in taking

acknowledgment. 222MoA153, 2SW(2d) 815.

903-2½-New. No duty is owed to one later relying on certificate of acknowledgment. Mass 169NE803.

903-2¾-New. Statutory form of acknowledgment implying duty held not controlling, where statute permits use of preëxisting forms. Mass 169NE803.

903-3 147Wash611, 266P730, 61ALR805.

903-7 [a] (1) 220MoA429, 276SW96. [b] (2) Person is not required to doubt truth of certificate and verify its statements. 220MoA429, 276SW96.

904-8 [a] **Where notary's negligence is one of concurring proximate causes of loss,** notary is liable although plaintiff was not deceived solely by reliance on notary's certificate. 222MoA153, 2SW(2d)815.

904-11 [a] **Declaration held defective,** not showing relation out of which duty arose. Mass 169NE803.

904-12½-New. In an action for negligence in taking an acknowledgment to a deed of trust on which plaintiff made a loan, failure of the petition to allege the value of the land purporting to be covered by the deed is not fatal where the petition alleges that plaintiff was damaged in the amount of the loan. 222MoA153, 2SW(2d)815.

904-13½-New. In an action for negligence in taking an acknowledgment to a deed of trust on which plaintiff made a loan, the evidence has been held sufficient to take the question of plaintiff's contributory negligence to the jury. 222MoA153, 2SW(2d)815.

904-14 149Miss1, 115S112; 222MoA918, 9SW(2d)668; 192Wis472, 213NW287, 51ALR1478. [a] (3) Where mortgagee does not show extent of injury, he cannot recover amount of mortgage indebtedness. 149Miss1, 115S112. [c] 168Minn423, 210NW161 (fact of reliance is question for jury). [d] **When liability not limited to nominal damages.**–222MoA153, 2SW(2d)815.

904-14½-New. Evidence held insufficient to show acknowledgment. TexCivA 282SW317.

ACQUIESCE

905-7 200Iowa220, 204NW456. [a] 200Iowa220, 204NW456, 458.

ACQUIRE

908-33 [a] See also 79Mont1, 254P868.

ACQUISITION

909-40 199Iowa1331, 203NW715 (acquisition is that which is acquired or gained, Century D.).

ACT

912-71½-New. , a fact, prima facie proof of which may be easily proved or disproved. 25F(2d)160.

ACTIONS

924-1 TexCivA 282SW835, 838 [quot CJ].

924-2 46PhilippineS27, 835 [quotCJ].

925-7 TexCivA 282SW835, 838 [quot CJ]. [a] **Similar definitions.**–Mass 172NE614.

925-8 TexCivA 282SW835, 838 [quot CJ].

925-9 TexCivA 282SW835, 838 [quot CJ].

925-11 TexCivA 282SW835, 838 [quot CJ].

925-12 TexCivA 282SW835, 838 [quot CJ].

925-13 TexCivA 282SW835, 838 [quot CJ].

925-20 TexCivA 282SW835.

925-21 TexCivA 282SW835.

925-21½-New. to obtain certain relief at the hands of the court; TexCivA 282SW835.

925-28 128Misc49, 217NYS231.

925-29 164Minn81, 204NW923, 924 [cit CJ].

925-31 Wis 231NW590.

927-53 La 129S128 (necessity for defendant).

927-56 209Ky811, 273SW531 (where no defendant, no "action").

927-58 84Colo266, 269P997, 999 [cit CJ]; 164La907, 114S832 (there may be parties other than plaintiff and defendant).

928-68 [a] **Suit may be within court's jurisdiction** and yet lack merits. 271US228, 46SCt496, 70Led920.

928-85 [a] **Cause of action** merely gives use to remedy, terms not being synonymous. 41GaA91, 151SE815.

929-6 175Mass71, 55NE812, 51LRA433 [writ of error dism 179US405, 21SCt206, 45Led252].

929-8 16FCasNo 9,030, 2Brock125; 54BarbNY200.

930-9 197Cal364, 240P1015, 1017 [cit CJ]; 47Kan642, 28P617, 27AmSR311; 191NC166, 131SE648, 44ALR610.

930-12 163Ga725, 137SE60.

930-15 [a] (1) See also 77Mont361, 251P137. (2) 163Ga725, 137SE60.

930-19 77Mont361, 251P137.

931-23 77Mont361, 251P137.

931-27 21OhA396, 153NE285.

931-29 209Ky811, 273SW531 (ex parte application, for no legal cause, to increase number of trustees named in will); 21OhA396, 153NE285.

931-30 21OhA396, 153NE285.

931-41 33Fed429; 127Fed573; 129Fed1, 4, 63CCA651; 136Fed1, 69CCA1 [certiorari den 200US621mem, 26SCt757mem, 50Led624mem]; 179Fed556; 15FCasNo 8,411, 1Brock203; 175Ala299, 57S754; 113Me103, 93A41; 61Md510; 104Md351, 65A35; 150Minn512, 185NW953; 161NC324, 77SE235, 44LRANS279. [a] (10) "Local action." 140La264, 72S958; 29ND28, 149NW721.

931-42 33Fed429; 127Fed573; 127Tenn693, 155SW928.

931-43 43Fed219; 48LaAnn1232, 20S687; 48Me255; 75Okl108, 182P703.

932-44 148Miss268, 114S484, 487 [quot CJ]; 150Miss245, 116S593, 596 [quot CJ].

932-45 148Miss268, 114S484, 487 [quot CJ]; 150Miss245, 116S593, 596 [quot CJ].

932-46 148Miss268, 114S484.

933-61 TexCivA 10SW(2d)405.

933-63 33Fed429; 175Ala299, 57S754; 5NY727, 6A648.

933-64 147Cal467, 82P70, 3AnnCas340.

933-65 13Mass324; 148Miss268, 114S484, 487 [citCJ entire subdivision]; 3NH130; 26Gratt(67Va)537.

933-68 315Mo731, 286SW951.

934-71 315Mo731, 286SW951.

934-72 315Mo731, 286SW951.

934-74 315Mo731, 286SW951.

934-75 315Mo731, 286SW951.

934-76 315Mo731, 286SW951.

934-79 315Mo731, 286SW951.

934-95½-New. "Case," "cause," "action," and "suit" held convertible terms each meaning proceeding in court. Fla 128S412.

936-36 See also 240NY307, 148NE532.

936-38 240NY307, 148NE532.

936-42 130Or631, 280P660 (facts alleged must be true or susceptible of proof).

936-43 40F(2d)379.

936-44 297Pa33, 146A113.

936-49 [a] **Other definitions.**–240NY307, 148NE532.

936-50 30F(2d)953.

936-54 115Tex114, 277SW621.

937-60 TexCivA 282SW835, 838 [quot CJ].

937-63 TexCivA 32SW(2d)227.

937-76 232IllA500.

937-77 115Tex114, 277SW621.

937-78 74Mont355, 240P667; 76Mont38, 245P257.

937-82 74Mont602, 241P237; 76Mont38, 245P257.

937-83 161Ga480, 131SE283; TexCivA 271SW190.

937-84 76Mont38, 245P257.

938-87 115Tex114, 277SW621.

938-89 115Tex114, 277SW621.

938-90 31Ariz137, 250P995.

938-91½-New. Facts which constitute breach are as much part of cause as are those which show duty or covenant itself. 115Tex114, 277SW621.

938-92 37GaA439, 140SE386 (dictum).

938-98 161Ga480, 131SE283.

938-6 TexCivA 271SW190; TexCivA 21SW(2d)65.

938-7 TexCivA 271SW190.

938-8 TexCivA 271SW190; TexCivA 21SW(2d)65.

939-22 161Ga480, 131SE283; 37GaA439, 140SE386.

939-30 TexCivA 282SW835.

939-33 74Mont355, 240P667.

940-36 243IllA290; TexCivA 282SW835.

940-39 7Alaska272.

940-41½-New. Where the relief sought is the recovery of money or other personal property, the cause of action is designated a thing in action. 74Mont355, 240P667.

940-55 239IllA447.

940-57 239IllA447.

940-58 239IllA447.

943-94 [b] **Whether proceeding resulting in grant** is judicial proceeding depends, not on thing granted, but on nature of proceeding. 270US568, 46SCt425, 70Led738.

943-3 [a] (6) Ex parte application for no legal cause to increase number of trustees named in will. 209Ky811, 273SW531.

944-8 128Misc49, 217NYS231.

944-9 128Misc49, 217NYS231.

944-9½-New. "It is only in cases where a specific remedy is provided by statute that rights can be enforced otherwise than civil action," that is, by special proceeding. 209Ky811, 273SW531.

944-10 [b] **Ex parte action** is not per se special proceeding but may be civil action. 209Ky811, 273SW531.

944-15 316Mo524, 296SW90; 216AppDiv274, 214NYS732; 138SC74, 136SE19.

944-17 See also 232IllA500.

944-18 39F(2d)496; 216AppDiv274, 214NYS732 (redress of wrongs and maintenance of right not within field of litigation).

945-22 [a] 216AppDiv274, 214NYS732.

945-28 216AppDiv274, 214NYS732.

945-30 216AppDiv274, 214NYS732.

945-33 316Mo524, 296SW90.

946-36 [a] (6) Right to institute and prosecute action to obtain relief sought. TexCivA 282SW835.

946-38 TexCivA 282SW835.

946-40½-New. Right of action is given by the constitution or statutes, or by both, in some jurisdictions. TexCivA 282SW835.

951-35 228AppDiv45, 239NYS134; 158Tenn554, 138SW(2d)795. [a] **Right to maintain action is not dependent on, or affected by, defendant's right to assert counterclaim.**–87CalA278, 261P1039.

951-36 274US316, 47SCt600, 71Led1069; Cal 286P1010; 232IllA500 (cause of action is based on primary right, delict in violation thereof, and remedial right in favor of plaintiff); 253IllA190; Mont 288P1021; TexCivA 31SW(2d)192; 58OntL627, [1926] 3DomLR76.

951-38 See also NJ 131A221.

951-39½-New. A person who has a cause of action has control of it. 74Mont355, 240P667.

951-39¾-New. The right to maintain a suit is a matter of law. 16F(2d)22.

951-39¾-New. and is not subject to be controlled by private conventions of parties. 16F(2d)22.

951-40 [a] **Inclusion in procedural statute** does not affect right 29PortoRico736 (action of damages for seduction created by code of civil procedure and not by civil code).

952-45 33F(2d)13; 164Ga888, 139SE802; 217AppDiv43, 215NYS702. [b] **Statutory duty gives cause of action** in nature of action for negligence, but action in nature of fraud or on statutory warranty is not precluded. 217AppDiv43, 215NYS702.

952-47 164Ga888, 139SE802.

952-50 33F(2d)13.

952-51 230Ky362, 19SW(2d)989; 115Tex551, 285SW1084, 1087 [citCJ].

952-56½-New. Where under statute a person is designated who may make orders under which one would have a claim against another, no right of action accrues until the order is made; 61OntL512, [1928] 1DomLR753.

952-56¾-New. nor can the court supply the deficiency. 61OntL512, [1928] 1DomLR753.

952–58 **Fla** 128S258; **LaA** 122S165; 136SC95, 134SE247. See also 38GaA 509, 144SE400.

952–60 43F(2d)406. See also TexCivA 14SW(2d)935.

953–64 316Mo 621, 291SW136.

953–65 248NY293, 162NE84.

953–74 [a] (7) Failure to comply with statute. 128Me409, 148A146.

953–75 [a] (13) No action lies where plaintiff shows no duty on defendant toward him. 35GaA766, 134SE789. (14) Refusal of lessor to supply lessee with another lease which lessee lost is not actionable although lessee was unable to sell leasehold as result thereof. **Cal** 286P1010.

954–77 **LaA** 126S259; **NJ** 150A824; 217AppDiv43, 215NYS702; 125 Okl 134, 256P916.

954–80 316Mo 524, 296SW90.

955–91 131Misc401, 227NYS163, 169 [citCJ].

955–3 OklCr 274P684.

956–5 214Ala536, 108S358; 131Misc 401, 227NYS163, 170 [citCJ].

957–19 **Alta** [1930] 3DomLR758.

957–22½–New. Rule not applicable against directors of company personally where civil action against company. **Alta** [1930] 3DomLR758.

957–28 119Kan323, 244P227, 229 [cit Cyc].

957–30 **Mo** 26SW(2d)980.

958–38 38F(2d)170; 245 IllA376; 125 Okl 134, 256P916; TexCivA 289SW741.

958–39 **MoA** 258SW(2d)525; 125 Okl 134, 256P916; 7PaDist&Co 165.

959–40 86PaSuper414.

959–48 125 Okl 134, 256P916.

960–58 **Nebr** 230NW669.

960–60 125 Okl 134, 256P916, 918 [cit CJ].

962–79 191NC182, 131SE633, 43ALR 1072; 156Tenn273, 300SW563.

962–84 221MoA472, 282SW512.

963–87 194Wis110, 216NW140.

963–88 128Misc673, 219NYS705.

963–93 82Colo 534, 261P859, 57ALR 203.

964–14 104NJL557, 142A337, 60ALR 102.

964–15 104NJL557, 142A337, 60ALR 102.

965–16 136SC95, 134SE247.

965–18 104NJL557, 142A337, 60ALR 102; 136SC95, 134SE247.

965–22 23F(2d)743 (loss to employer from refusal of union laborers to work); 163La382, 111S794.

966–25 TexCommnA 298SW554. [a] (1) 202 Iowa225, 206NW815.

966–27 TexCommnA 298SW554.

966–28 202 Iowa225, 206NW815; Tex CommnA 298SW554.

966–29 202 Iowa225, 206NW815; Tex CommnA 298SW554.

966–30 TexCommnA 298SW554; Tex CivA 8SW(2d)957, 964 [quotCJ].

967–42 [c] **Action against third party.–TexCivA** 283SW288.

970–76 9PaDist&Co 494.

970–79 136SC95, 134SE247.

970–82 118Nebr489, 225NW471.

971–88 [b] **Mere stimulation of senses causing unpleasant sensation by negligence** of another is injuria sine damno. 41GaA385, 153SE96(1stcase).

971–89 117 Okl 131, 245P852; 136SC 95, 134SE247.

971–93 [a] **Man** [1929] 4DomLR318.

971–95 36F(2d)675; **La** 123S705; 105 NJL345, 144A715(2dcase); 98NJEq432, 131A117; 225AppDiv562, 234NYS2 (novelty neither in theory nor in relief prayed for is bar to action); 19 OhA 107; 195Wis139, 217NW730; 36Wyo 12, 252P790.

972–97 75Mont328, 243P811; 98NJEq 432, 131A117.

972–1 [a] 101NJEq818, 138A898.

972–7 See also 51Nev16, 266P913.

973–11 8F(2d)998; 102CalA507, 283P 93; 80Colo 499, 252P816; 42 Ida169, 244P149; Ill 173NE175; 231Ky546, 21 SW(2d)999; 161La147, 108S316; 161 La707, 109S395; Mo 198W(2d)676; 75 Mont328, 243P811; 134MiscRep149, 234NYS678; 53ND609, 207NW436; ND 231NW851; 297Pa13, 146A262; [a] **Validity of statute.–Mont** 254P174; 152Tenn451, 278SW417. [b] **Court need not go into general propositions or statements of its likely action on possible or even probable future issues.** 281 US462, 50SCt356, 74L ed967(1stcase). [c] **New York Civ. Pract. Act.–135Misc Rep**70, 237NYS86.

973–12 96Fla194, 117S887; 170Ga505, 153SE42; 222Ky564, 1SW(2d)970; 133Misc359, 231NYS585; 227AppDiv 156, 237NYS64; 293Pa490, 143A200; 152Tenn395, 277SW901. [c] **Under Declaratory Judgment Act of Tennessee** (1) owner of land cannot proceed where two brokers are claiming commissions. 152Tenn302, 278SW56. (2) Courts should exercise with caution discretion given under act. 152Tenn302, 278SW56. [d] **Demand by lessor, joined as codefendant with sublessor for declaratory judgment** in action by sublessee for declaration of rights under sublease gave court jurisdiction to determine respective rights of sublessor and lessor, especially in view of failure to object to trial court's view that all parties were before it. 241NY 489, 150NE525. [e] **In Pennsylvania.–**284Pa455, 131A265 (in actual wrong done or threatened necessary); 289Pa 101, 137A132. [f] **In Kentucky.–**213 Ky482, 281SW480; 215Ky823, 287SW 28. [g] **Under Declaratory Judgment Acts.–**234Ky211, 27SW(2d)960; **Mich** 231NW51; **Pa** 150A652. [h] **Prayer in action** to enjoin sale of property for taxes has been held insufficient to advise court that taxpayer was seeking declaratory judgment as to validity of assessment. **CalA** 284P1072. [i] **Statute providing for declaratory decree** authorizes action by parties before wrong committed or damage done. **Fla** 128S 258. [j] **In Connecticut.–**110Conn221, 147A705. [k] **In California.–**100CalA 700, 281P78. [l] **In New York.–**227App Div156, 237NYS64; 135MiscRep158, 237NYS258; 135Misc504, 240NYS113.

973–13 14F(2d)225; 16F(2d)290; 18 F(2d)299; 20F(2d)247; 96Fla194, 117 S887; 44 Ida777, 260P162, 163 [citCJ]; 204 Iowa1195, 213NW264; 161La147, 108S316; 161La707, 109S395; **La** 114 S634; **Mass** 172NE601; 249Mich673, 229NW618; **Mo** 28SW(2d)743, 746 [quotCJ]; 319Mo 128, 38SW(2d)726, 729 [citCJ] (held not applicable); **Mo** 19 SW(2d)676; 75Mont328, 243P811; 78 Mont56, 252P386; 53ND609, 207NW 436; 24 OhA288, 156NE911; 24 OhA 514, 157NE427; 297Pa502, 147A525; 152Tenn395, 277SW901; **Wis** 232NW 842. See also 321Mo 461, 12SW(2d)64; 297Pa13, 146A262. [a] (3) In action to recover whole property return to plaintiff of part does not make question moot. 203Cal 347, 264P477. (4) Other definitions. 87Colo 240, 286P275. [c] (5) In action by executor seeking to rescind agreement to continue lease, he is entitled to declaration of rights on extension. 135MiscRep634, 235NYS595. (6) Court's jurisdiction to determine water rights held not taken away by conveyance of rights of parties since action was not made moot thereby. 70 Utah239, 259P408. [d] 81CalA590, 254 P648. [e] **Attempt to give determination further effect** than that of declaratory judgment sought is erroneous. **Cal** 278P840. [f] **Petitioner's desire to be instructed on law** without actual controversy does not permit of declaratory judgment. 300Pa116, 150A159 (relief not granted under declaratory judgment law where other remedy is available).

974–14 97CalA462, 276P141; 226App Div775, 235NYS4.

974–15 204 Iowa1195, 213NW264; 75 Mont328, 243P811; 105NJL57, 143A536. [a] **Bill to enjoin enforcement of state** law does not merely seek declaratory judgment. 43F(2d)198.

974–17 118Kan265, 234P978 (provisions of declaratory judgment law apply only in case of actual controversy). But see 100CalA700, 281P78.

974–18 221AppDiv36, 222NYS141.

974–19 221Ky113, 298SW1090; 241NY 489, 150NE525; 128Misc778, 220NYS 262; 135MiscRep644, 238NYS666 (necessary allegations and proof); 284Pa 455, 131A265. [a] 130Misc55, 223NYS 606. [b] **Thus future rights in anticipation of events which may not happen not decided unless special facts warrant immediate decision and not unless all parties concerned are present and ready to proceed.** 284Pa455, 131A265. [c] **Declaration of nullity of title of one who has alienated his interest** would be academical. 35PortoRico 105. [d] **Denial by defendant of allegation that she was never lawfully married and affirmative defense** has been held sufficient to raise issue of common-law marriage. 135Misc Rep644, 238NYS666. [e] **Proceeding for declaratory judgment.–**233Ky588, 26SW (2d)481; 299Pa402, 149A639. [f] **Where prayer of complaint calls for declaratory right authorized by statute** judgment of trial court not declaring rights is defective. **Wis** 227NW952. [g] **Rights of all parties** can be determined in proceedings under Declaratory Judgment Act. 298Pa182, 148A94.

974–21½–New. The statute providing for declaratory decrees does not contemplate exploration of procedure antecedent to tax deed to declare it valid as against imperfections in such procedure. 94Fla1087, 114S767.

974–21⅓–New. Where counterclaim tenders same issues, whether complaint for declaratory relief states cause is immaterial. 88CalA731, 264P273.

974–21¼–New. Where city bringing declaratory action neither pleaded nor proved any facts entitling it to affirmative judgment court erred in attempting to give it. **Cal** 287P475.

974–21⅕–New. The courts will not adjudicate when they cannot enforce judgment. 110Conn36, 147A290.

974–21⅙–New. Under Declaratory Judgments statute court should not declare rights of parties on facts which are future, contingent and uncertain. **NJCh** 150A248 (defendant may move to strike complaint for failure to show right to present relief).

974–21⅐–New. Trustee under will is not entitled to declaratory judgment until death of beneficiary. 300Pa116, 150 A159.

974–21⅛–New. In Kentucky. 230Ky 835, 20SW(2d)1015.

974–24 [b] **Collusion is secret agreement** to obtain decision for sinister purpose. 157SC381, 154SE221.

974–30 171Ark607, 286SW811.

974–32 13F(2d)617; 201Cal 502, 258P 387, 393 [citCJ].

975–38 [a] 15F(2d)1003.

975–39 15F(2d)1003; 6LaA72.

975–41 See also **LaA** 126S259.

975–42 136Wash87, 238P985; 148Wash 328, 268P889.

975–45 147SC167, 145SE34.

975–46 147SC167, 145SE34.

976–50 42F(2d)30; 115Tex551, 285SW 1084, 1087 [citCJ]; [1927]CanSC251, [1927] 1DomLR277 (obtaining consent of attorney). [b] **Statutory conditions,** tending to discourage or avoid litigation, should be closely followed. 87 Ind A400, 162NE737.

976–53 115Tex551, 285SW1084.

976–54 115Tex551, 285SW1084, 1087.

976–57 **MoA** 48SW(2d)847; 115Tex551, 285SW1084, 1087 [citCJ].

976–58 115Tex551, 285SW1084, 1087 [citCJ].

977–62½–New. Legal right cannot be lost or forfeited by failure to perform an unnecessary act. 165La1065, 116S 559.

977–64 **NJSup** 143A832(1stcase).

978–92 3LaA123.

979–1 36F(2d)953.

980–34 68Vt315, 35A321.

980–39 220MoA924, 296SW452; 111 Okl 269, 239P640; **Wash** 290P813.

982–64 232 IllA500.

982–65 144Va831, 131SE1 (action must be brought by person alive either in own or representative capacity).

982–70½–New. In ordinary cases, parties, being sui juris, must defend their own interests. 98NJEq444, 131A576.

982–74 75Mont328, 243P811.

982–75 75Mont328, 243P811.

982–76 **La** 114S634; **TexCivA** 11SW (2d)368.

982–77 232 IllA500.

982–78 19F(2d)460; 240Mich515, 215 NW333; 75Mont328, 243P811.

982–79 75Mont328, 243P811.

982–79½–New. Plaintiff's own neglect or nonuse of property does not defeat the right to damages thereto. 259Mass 528, 156NE859.

984–9 [a] (4) Contractor inadvertently signing subcontractor's contract guaranteeing work does not thereby become joint obligor to himself. 241Mich285, 217NW38.

984–18 16F(2d)223; 161Ga884, 132SE 70, 44ALR795; 199 Ind733, 160NE450; 220Ky464, 295SW442; 248Mich85, 226 NW883; 86Mont513, 284P270; 220App Div160, 221NYS11; OhA 172NE689; 149Wash143, 270P297. [a] Citizens of another state cannot prosecute cause of action in manner contrary to laws of forum. 248Mich85. 226NW883.

985–20 16F(2d)223.

985–24 333 Ill 78. 164NE162. 60ALR 353 (law is presumed to furnish remedy for every wrong); 127 Okl 117, 260P32; Utah 26SP1029.

985–26 86 IndA354, 156NE408.

985–29 74CalA350, 240P224.

985–30 TexCommnA 12SW(2d)541.

986–37½–New. The maxim is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failure to invoke it in time, although such failure occurred without fault or negligence on his part. 195Cal 249. 232P457. 36ALR1435.

986–37½–New. The law looks to substance rather than form in determining the legal rights among parties in relation to a given subject matter. 117 Okl 179. 245P881.

986–39 95Fla1010. 117S786.

986–40 189NC790. 128SE404 (allotment of statutory substitute for dower).

987–46½–New. It does not necessarily follow that an action cannot be maintained because no precedent can be found. 202 Iowa695, 210NW926, 49ALR 557.

988–67 313Mo 225, 281SW762, 45ALR 1223; 115Tex551, 285SW1084, 1087 [cit CJ].

988–68 313Mo 225, 281SW762, 45ALR 1223.

988–70 115Tex551, 285SW1084, 1087 [citCJ].

988–71 Fla 130S463.

988–72 178Ark689, 11SW(2d)480; Ga 155SE200; 126Me108. 136A456; 127 Misc104. 215NYS354; 198NC549. 152SE 627; 115Tex551. 285SW1084, 1087 [cit CJ]; TexCivA 21SW(2d)597; TexCivA 22SW(2d)144.

989–75 Ida 292P240; 77Mont91. 250P 11. 14 [citCJ]; 217AppDiv43. 215NYS 702 (remedy held not exclusive).

989–77 23F(2d)426; 313Mo 225. 281S W762. 45ALR1223; 115Tex551. 285SW 1084; TexCivA 21SW(2d)597; TexCivA 22SW(2d)144.

989–78 77Mont91, 250P11, 14 [citCJ]. [b] Where statutory remedy is not entirely adequate for protection of preexisting rights, statutory remedy is necessarily cumulative. 77Mont91, 250P11.

989–80 34F(2d)34; IndA 172NE569; 208 Iowa614, 226NW182; 125Misc535, 211NYS478; 115Tex551, 285SW1084, 1087 [citCJ]; 116Tex59. 286SW195, 196 [citCyc]; TexCivA 290SW852, 858 [cit CJ]; BC [1929] 4DomLR52. [a] (5) To enforce zoning ordinance where remedy is provided for such ordinance injunction will not be granted to private individual. 125Misc535, 211NYS478.

990–82 115Tex551, 285SW1084 (workman's compensation statute).

990–83 115Tex551, 285SW1084, 1088 [citCJ]; TexCivA 290SW852, 858 [cit CJ].

990–88 Ida 292P240; 117 Okl 58, 245P 48.

993–42 137 Okl 248, 278P1115.

995–88 76CalA708, 245P790; 127 Okl 295. 260P745. See also 133 Okl 94, 271 P241.

995–89 76CalA708, 245P790; 127 Okl 295, 260P745. [a] (3) 251 IllA382 (though appearing as assumpsit on justice's docket).

995–89½–New. and from the character of the judgment which might be rendered upon a default, 76CalA708, 245 P790.

995–90½–New. Some decisions state the rule that the character of an action is to be determined by the nature of the issues made by the pleadings and the rights and remedies of the parties. 125 Okl 254, 257P372.

996–96 [a] Action for damages for excessive cost of army cantonments held in assumpsit and trespass on case. 9 F(2d)153.

996–9 37Wyo 419, 263P703 (action held on case rather than trespass).

997–21 233 IllA64, 65 [citCJ].

997–22½–New. Trover is one of the species of an action on the case. 233 IllA 64.

998–46 233 IllA64, 65 [citCJ].

999–61 [b] Case does not lie for breach of contract.–234 IllA276.

1000–78 48Mont249, 136P968.

1003–15 168Ark700, 271SW710 (eliminating distinction between purely concurrent remedies); 201Cal 87, 255P827; 76CalA486, 245P205; 55ND104, 212NW 776; 21 OhA396, 153NE285; 111 Okl 267, 239P596; 128 Okl 65, 261P175; 120 Or600, 253P542; 134SC373, 133SE35. [b] (1) 117 Or306, 244P75.

1003–16 76CalA486, 245P205.

1003–17 76CalA486, 245P205.

1003–18 76CalA486, 245P205.

1003–19 84Mont601, 277P411; 126 Or 43, 268P756; 129 Or32, 275P913(2d case).

1003–20 [a] Conversion and detinue or replevin.–Principles that apply to conversion are distinct from those which apply to replevin or detinue, and same set of facts that would support one will not support other. 201Cal 87, 255P827.

1004–36½–New. The statute must be complied with in order to maintain the action. TexCivA 300SW137.

1005–37 201Cal 87, 255P827; 55ND 104, 212NW776.

1005–38 55ND104, 212NW776; 111 Okl 267, 239P596.

1005–39 76CalA486, 245P205; TexCivA 282SW267.

1005–42 55ND104, 212NW776.

1005–47 50RI 424, 148A315.

1006–48 101WVa263, 132SE885.

1006–49 101WVa263, 132SE885.

1006–51 TexCivA 148A315.

1006–53 243NY28, 152NE454.

1006–54 La 126S547; TexCivA 4 SW(2d)1046, 1055 [quotCJ]. [b] LaA 130S244.

1006–56 [a] (1) See also 163La764, 112 S713. (2) Action in which slander of title is charged may be converted into petitory action. La 120S369(3dcase). (3) Defendants can properly convert slander of title suit into petitory action. La 123S618. (4) In suit for slander of plaintiff's title to land, answer claiming defendants owned three-fourths thereof converted suit into petitory action. La 129S122. [b] Filing of general demurrer to declaration in attachment converts action from suit in rem to action in personam. 41GaA736, 154SE651.

1006–58 169Ga712, 151SE340; NJSup 148A793; 290Pa38, 137A815. But see 160La692, 107S493. [a] (6) Attachment cannot be changed into personal action against garnishee not having seizable property. 290Pa38, 137A815.

1006–59 290Pa38, 137A815.

1006–60 But see NJSup 148A15.

1006–61 147Va125, 136SE673.

1007–62 228AppDiv279, 239NYS206.

1007–64 But see 135MiscRep158, 237 NYS258.

1007–65½–New. Under a complaint alleging breach of employment contract, defendant was not entitled to have a claim for wages submitted to the jury. 222AppDiv197, 225NYS593.

1007–67 MoA 256SW501; 83NH374, 142A702 (referee had no power to transform demand for judgment at law into prayer for equitable relief). [d] Acts not causing change.–155Wash647, 285 P666.

1007–68 228Ky806, 16SW(2d)442; Mo 20SW(2d)650 (where equity suit premised on existence of contract and law would be based on theory, contract did not exist).

1007–70 14F(2d)956; 243NY28, 152NE 454.

1007–71 77Colo 533, 238P69; 34 OhA 464, 171NE346.

1007–74 8F(2d)706.

1007–75 See also Or 288P1053.

1008–79 14F(2d)956.

1008–80 14F(2d)956. [a] (2) Ejectment remains action at law on withdrawal of equitable answer and crossbill before trial. Mo 30SW(2d)77.

1008–82 Mo 29SW(2d)39.

1008–83½–New. A law action by notice of a motion for judgment does not become a chancery proceeding when referred to a special commissioner for report. 146Va225, 135SE672.

1008–84 14F(2d)956; 161La427, 108S 871. [b] Plaintiff after changing summary action to ordinary one by injecting ordinary pleading cannot complain where defendant answers as to ordinary action. 161La427, 108S871. [c] Where action should have been transferred to equity docket it must be governed by rules applicable to equity actions. 234 Ky91, 27SW(2d)684.

1008–91 [1927] AC185, [1926] 4DomLR 213, [1926] 3WestWkly193; 58OntL64, [1926] 1DomLR11 (where petition of right was held to be improper procedure).

1008–93 226AppDiv195, 234NYS449.

1009–2 81CalA763, 254P662. [a] Court will treat application for injunction as application for writ of prohibition. SD 232NW20.

1009–16 291Pa77, 139A588.

1009–18 Utah 276P651.

1010–19½–New. Court without jurisdiction of defendants may not order amendments in proceedings improperly started. 98NJEq512, 131A95.

1010–22 21OhA396, 153NE285.

1010–23 128Misc49, 217NYS231.

1010–32 128Misc49, 217NYS231.

1010–33 128Misc49, 217NYS231.

1011–37 128Misc49, 217NYS231.

1011–38 128Misc49, 217NYS231.

1011–40 128Misc49, 217NYS231. [a] (12) Application by life tenant to sell real estate. 131Misc800, 228NYS323.

1011–42 128Misc49, 217NYS231 (bill of particulars not allowable).

1011–47 Minn 230NW645(1stcase).

1011–49 214AppDiv202, 212NYS60 (where special proceeding to determine conflicting claims of assignee of contractor and trustee in bankruptcy of such contractor to money alleged due from city was held unwarranted). [a] (4) Ex parte proceedings for increase of number of trustees named in will. 209Ky811, 273SW531.

1012–57 128Misc49, 217NYS231 (arbitration proceeding).

1012–60 93CalA532, 269P934 (quo warranto).

1012–68 [a] Title to action whether brought in name of people, state or city has no jurisdictional function. 228 AppDiv279, 239NYS206.

1012–72 86Mont297, 283P430; 228 AppDiv279, 239NYS206. [a] That defendant when appealing attempted to treat case as civil is of no effect in determining whether case was criminal or civil proceeding. 228AppDiv279, 239 NYS206.

1013–82 [a] (7) Controversy over right to money held as evidence in criminal proceeding. 165La1025, 116S496.

1013–83 228AppDiv279, 239NYS206.

1013–90 218Ala674, 120S153; 208Cal 251, 280P942; CalA 284P496; 38GaA 570, 144SE358.

1013–91 218Ala674, 120S153.

1013–92 159Tenn498, 19SW(2d)245.

1013–93 200Cal 251, 280P942; CalA 284P496.

1014–94 [a] Remedy in tort is much broader than action in assumpsit.–248 Mich460, 227NW757.

1014–4 38GaA438, 144SE134; 196NC 61, 144SE515.

1014–6½–New. Count for refusal to return account book belonging to plaintiff held one in tort. 10F(2d)218.

1015–32 124Kan614, 261P826.

1015–33 124Kan614, 261P826. [a] Cal A 287P550.

1015–34 127 Okl 295, 260P745.

1015–35 124Kan614, 261P826; 127 Okl 295, 260P745.

1015–37 36GaA729, 137SE904; 124Kan 614, 261P826.

1015–40 124Kan614, 261P826.

1015–41 CalA 287P550; 127 Okl 295,

280P745. But see 10F(2d)218; 71CalA 42, 234P328.
1016–42 71CalA42, 234P328.
1016–44 36F(2d)265.
1016–46 124Kan614, 261P826.
1017–57 157Miss746, 128S563. [c] To authorize action in tort (1) there must be some active misfeasance or negligence. 9F(2d)937. (2) Willful neglect to perform contract is insufficient. 9F (2d)937.
1017–58 200Cal 251, 280P942.
1017–59 208Cal 251, 280P942; 38GaA 408, 144SE47 (there must be legal wrong committed upon person or property of complaining party).
1017–73 117 Okl 245, 246P426.
1018–78 124Kan614, 261P826.
1018–86 29PortoRico 629.
1018–89 29PortoRico 629.
1019–5 187Wis633, 205NW557 (so far as form of action is concerned, but not as to damages recoverable).
1019–15 124Kan614, 261P826. [a] (5) Others. IndA 162NE55.
1019–16 124Kan614, 261P826.
1020–18 81Colo 463, 256P21; 36GaA 580, 137SE573; Va 152SE336. [a] (3) Separate actions for conversion and replevin held not based on contract, but on possessory right. 81Colo 463, 256P 21.
1020–20½–New. injury resulting from specified want of care, negligence, or carelessness; 159Tenn498, 19SW(2d) 245.
1020–22½–New. action for breach of promise to marry so far as question of damages is involved; 187Wis633, 205N W557.
1020–38 150Wash421, 273P188.
1021–43 239Mich354, 214NW87. [a] (2) 239Mich354, 214NW87.
1021–44 239Mich354, 214NW87.
1021–45 [a] (1) 292Pa228, 140A900.
1022–59 9F(2d)937 (from total omission to perform).
1022–60 9F(2d)937.
1022–61 10PaDist&Co 83.
1022–62 9F(2d)937.
1023–84 MoA 25SW(2d)484(2dcase) (insurance broker).
1023–89 53ND564, 207NW438.
1023–90 53ND564, 207NW438.
1023–91½–New. An action against an elevator company and surety for value of flax stored must proceed in contract and not in conversion. 52ND13, 202NW 135.
1023–94 159Tenn498, 19SW(2d)245.
1024–95 MoA 279SW771.
1024–99 [a] (1) 27 OhA179, 161NE35.
1025–8 [c] Both contract and tort may be relied on unless election is required. Iowa 231NW353.
1025–10 227AppDiv316, 238NYS50.
1025–13 219MoA1, 268SW99.
1026–18 See also 83Montl5, 268P547.
1026–22 [a] (13) Other actions. 167La 111, 118S322.
1028–39 La 115S412 (wrongful death).
1028–40 114Misc425, 187NYS454.
1029–43 [a] 208Cal 251, 280P942.
1029–44 Mass 173NE512.
1029–46 Mass 164NE807.
1029–50½–New. Tenants' complaint, alleging that the landlord, after having rented to them a dwelling house including a supply of water for domestic purposes, disconnected and destroyed such supply, charges breach of contract and not a tort. CalA 274P368.
1029–51 157Ark528, 249SW21.
1029–52 157Ark528, 249SW21.
1029–53 157Ark528, 249SW21.
1030–57 191NC182, 131SE633, 43ALR 1072.
1030–58 191NC182, 131SE633, 43ALR 1072.
1030–59 191NC182, 131SE633, 43ALR 1072.
1030–68 [a] (3) 27 OhNPNS372.
1031–87 291Pa77, 139A588.
1031–89 122 Or579, 260P444.
1031–90 12F(2d)963, 53ALR49; 169Ga 676, 151SE380; 133 Okl 183, 271P938. [a] 161Ga563, 131SE493.
1031–91 206 Iowa1319, 221NW944.
1032–98 221Ky481, 298SW1100; 122 Or579, 260P444; Man [1930] 3DomLR 320.
1032–4 122 Or579, 260P444.
1032–8 122 Or579, 260P444.
1032–12 122 Or579, 260P444.
1032–17 CalA 291P899.
1033–24 22AlaA204, 114S176; 220Ala 443, 125S811 (assumpsit); 88 CalA331, 263P365; 137MiscRep14, 242NYS189; 122 Or579, 260P444; Va 152SE336; 134 Wash433, 235P964. [e] As against wrongdoer who has not been enriched by tort, action in nature of indebitatus assumpsit will not lie, and plaintiff is limited to cause of action in trover. Minn 219NW155.
1033–25 220Ala443, 125S811; 22AlaA 204, 114S176.
1033–26 122 Or579, 260P444; Utah 282 P1040. See also 34F(2d)744.
1034–28 216Ala252, 112S907.
1035–33 See also 34F(2d)744. [a] Buyer waiving alleged tortious retaking of machinery and electing to treat it as sale could not recover for value to him of such property. 34F(2d)744.
1035–34 34F(2d)744.
1035–36 122 Or579, 260P444.
1035–40 161Ga563, 131SE493.
1035–42 161Ga563, 131SE493.
1035–43 161Ga563, 131SE493.
1036–48½–New. Two elements are essential to an action (1) Tort. (2) Receipt of benefit by wrongdoer. 122 Or 579, 260P444.
1036–50 29Hawaii376.
1037–78 292Pa440, 141A257.
1037–87 TexCivA 13SW(2d)997.
1037–88 80CalA122, 251P657; MoA 28 SW(2d)127; 105NJL542, 147A337.
1038–90 Iowa 228NW886; 234Mich385, 208NW609.
1039–34 132 Or145, 285P214 (counterclaim).
1039–37 214Ala458, 460, 108S53 [quot CJ] (held not applicable to facts); Tex CivA 58W(2d)1015, 1017 [quotCJ] (recognizing rule).
1039–41 229Mich630, 201NW954.
1040–57 133Okl 183, 271P938. [a] (1) Utah 282P1040.
1040–64 41GaA697, 154SE301; 234 Ill A276.
1040–65 39GaA53, 146SE42(2dcase); 39GaA170, 146SE567 (except where neglect of duty complained of is specifically provided for by contract itself); 206 Iowa1319, 221NW944.
1041–66 TexCivA 273SW908 (abstractor's negligent omission).
1041–77 258Mass103, 154NE570.
1041–81 211Ky799, 278SW121. [a] Actions for violations of criminal laws are actions in personam. 6F(2d)288.
1041–82 211Ky799, 278SW121.
1041–83 35F(2d)842 (aims and object of action determine its character); 42F (2d)933; 16FCasNo 9,030, 2Brock125; 15F(2d)745; 18Kan296; 211Ky799, 278SW121; 175Mass71, 55NE812, 51LR A433; 78Mont192, 253P254; 10Nev47. [a] Where real estate is attached and summons is served by publication, action is in rem. 78Mont192, 253P254. [b] Offending thing may be made liable for damages for unlawful use, and such liability made enforceable in proceeding in rem. 32F(2d)236.
1041–84 16FCasNo 9,030, 2Brock125.
1042–85½–New. Suits involving mere rights are in personam. 15F(2d)745.
1042–91 34Fed628, 36Fed307mem; 72 Cal 591; 15P769; 75 Ind162; 4 Iowa472, 68AmD669; 94Me27, 46A793; 23Mo 348; 4NebrUnoff334, 93NW1022; 30 Misc119, 61NYS786; 5Watts&SPa556; Eng [1895] 1Ch663.
1042–93 47Kan642, 28P617, 618, 27Am SR311; 74NJEq197, 71A605. [b] 74 NJEq197, 71A605.
1042–94 [a] Action in chancery court for damages as set off against damages recoverable under replevin judgment is not action in rem or quasi in rem. 35 F(2d)842.
1042–94½–New. A res within jurisdiction on which to adjudicate is essential to a suit in rem. 13F(2d)438.
1042–95 [g] Action to remove lien or set aside mortgage of real property is in rem. 6F(2d)10. [h] Action to recover money judgment on note and to foreclose mortgage securing same, in which jurisdiction of court is invoked in ancillary proceedings by garnishment and by attachment, is primarily personal action for recovery of money and not one in rem for foreclosure of mortgage. 124 Okl 7, 253P66. [i] Proceeding to enforce mechanics liens not one in rem. 86 Ill 22; 131 Ill 376, 23NE397. [j] An escheat proceeding under Oregon statute which does not direct seizure of property is not one in rem. 106 Or291, 209P875, 210P885. [k] Suit in equity against married woman to recover debt is not proceeding in rem. 31WVa16, 6 SE252.
1043–4 153Miss405, 121S107.
1043–7 5F(2d)793; 14F(2d)903; 27 F(2d)304.
1044–33 Mo 30SW(2d)616.
1044–39½–New. method of review on appeal. Mo 30SW(2d)616.
1044–43 [a] Question must be determined from pleadings.–Mo 30SW(2d) 616.
1044–44 171Ark61, 283SW4; 161Ga 588, 131SE487, 43ALR1045 (action held one to recover land for breach of condition subsequent); 165Ga113, 139SE820; 168Minn84, 209NW907; 315Mo 442, 286 SW385; MoA 280SW730; 49Nev161, 241P213 (complaint construed as stating cause of action in equity to compel transfer of corporate stock or, in alternative, for damages, and not one at law for conversion); 124Misc545, 209NYS 219; 121 Oh334, 168NE847; 35 OhA384, 172NE446; 297Pa33, 146A113; SD 227 NW469. But see 151Wash561, 276P863 (holding that, under code system, whether action should be viewed as law action or as suit in equity is determinable by reference to all issues raised by pleadings and not by reference to complaint alone).
1044–44½–New. or pleadings generally, 66Utah128, 240P175.
1044–45 165Ga113, 139SE820.
1044–46 165Ga113, 139SE820; MoA 280SW730. But see 114 OhSt312, 151N E189; 26 OhNPNS503. [c] (2) Amendment of equitable action simply demanding personal money judgment does not change it to law action. 200 Iowa366, 202NW568.
1044–47 117Nebr52, 219NW808. But see 168Minn84, 209NW907; 114 OhSt 312, 151NE189.
1044–51 165Ga113, 139SE820; 124Misc 545, 209NYS219; 121 Oh334, 168NE847.
1045–55 135MiscRep365, 238NYS91; 121 Oh334, 168NE847; 65Utah444, 238 P240 (on contract); 66Utah128, 240P 175 (action on note). [c] Only court of law can entertain action for recovery of damages. TexCommnA 291SW876.
1045–57 124Misc545, 209NYS219.
1045–58 119Kan307, 239P993 (contract to pay for rearing of child); MoA 282 SW176; 222AppDiv341, 226NYS226 (exclusive marketing contract between member and coöperative marketing association). [a] (4) Action upon an unexecuted accord for recovery of money damages resulting from breach of agreement. 51ND634, 200NW818.
1045–60 200Wis429, 228NW497.
1045–63 51ND634, 200NW818.
1045–69 [b] 31F(2d)745; 194Cal 114, 228P11; 203 Iowa1385, 214NW576; Mo 8SW(2d)975; 135MiscRep265, 237NYS 682.
1046–75 125 Okl 254, 257P372.
1046–76 33 OhA331, 169NE577; 142SC 46, 140SE247 (action to determine priority of lien).
1046–77 25F(2d)588; 125 Okl 254, 257 P372.
1046–81 [a] (13) Other instances. 92 CalA575, 268P939; Utah 278P529. [b] 43F(2d)521; 173Ark828, 293SW735; 231Ky454, 21SW(2d)825; 125 Okl 254, 257P372; TexCivA 11SW(2d)829.
1046–81½–New. An action to enforce an oral trust in which defendant's legal title to property is recognized is not an action in partition. 126Misc42, 212NYS 612.
1046–82 68CalA198, 228P734; 315Mo 442, 286SW385; 126 Okl 25, 258P263.
1046–85 133Misc64, 231NYS139.
1047–92 18F(2d)908 (stating law of Ohio); 205Cal 581, 271P1083; 167Minn 494, 210NW66; 190NC397, 130SE40; 190NC512, 130SE323; 191NC166, 131 SE648, 44ALR610; 50ND511, 197NW 129; 21 OhA396, 153NE285; 125 Okl 150, 256P910.
1047–95 190NC512, 130SE323; 125 Okl 150, 256P910.
1047–97 317Mo972, 298SW56; 190NC 397, 130SE40; 190NC512, 130SE323 (equitable rights and remedies not de-

stroyed or merged); 191NC166, 131SE 648, 44ALR610; 125 Okl 150, 256P 910; 123 Or469, 259P1064, 260P1099. See 195NC772, 142SE868.

1047–99 125 Okl 150, 256P910. [a] 125 Okl 150, 256P910.

1048–5 221Ky726, 299SW566 (though suit was tried in equity, it was essentially action of ejectment and principles pertaining to such action were applicable); SD 232NW20 (holding an application for injunction not to seek equitable relief).

1048–7 218Ala221, 118S404.

1048–8 194Cal 114, 228P11 (equitable right enforced in court of law); 161Ga 629, 131SE505.

1049–30 MoA 286SW353.

1049–34 317Mo 1133, 298SW773 (pleadings determine whether suit is at law or in equity); 40Wyo 106, 275P115(2d case).

1049–37 Mo 14SW(2d)444. [a] **Action to determine title to land** brought in terms of statute is action at law where neither pleadings nor evidence present equitable issue. Mo 20SW(2d) 870.

1049–38 MoA 24SW(2d)229. See also 318Mo 1214, 3SW(2d)381.

1049–41 136 Okl 40, 275P643.

1050–49 168Ga101, 147SE32; 243NY 28, 152NE454; 50ND511, 197NW129.

1050–50 [a] **Causes of action for personal injuries held not litigable** in suit to enjoin prosecution of actions therefor in another state. 125 Okl 150, 256P 910.

1050–51 30Ariz72, 245P366; 164Ga541, 139SE68.

1050–52 164Ga541, 139SE68.

1051–65 155Miss185, 124S270(2dcase); 160Tenn374, 24SW(2d)894.

1051–69½–New. A legal defense cannot be made the subject of a plea on equitable grounds. 155Md693, 142A590 (forgery).

1051–70 36F(2d)771; Cal 292P474; 40GaA583, 150SE567; 41GaA384, 153SE 85(2dcase); 99NJEq492, 133A703 (fraud); 221AppDiv420, 223NYS184; 134SC373, 133SE35; Wash 291P1085. But see 81Colo 354, 255P625. [a] (9) Equitable title under oral contract in suit at law to confirm title. 169Ark948, 277SW27. [e] **Such statute does not authorize replications** relying on similar defenses. Md 149A442.

1052–72 14F(2d)24; 178Ark1184, 13 SW(2d)826; 86Colo 77, 278P800; 221 MoA764, 285SW761 (answer insufficient to convert suit into one in equity); 118 Nebr472, 225NW230; 144SC137, 142SE 247.

1052–74 40F(2d)269. [a] (3) Mass 171NE281. [e] **Strict construction.**–126 Me192, 137A56. [f] **Defendant's conduct must have been fair and equitable** in order that defense may be interposed. 155Md693, 142A590.

1052–79 15F(2d)726.

1053–83 255Mass558, 152NE337.

1053–86 296Pal, 145A587.

1053–87 But see 125 Or662, 268P60.

1053–89½–New. Where defendant in an action at law is entitled to relief arising out of facts requiring the interposition of a court of equity, and material to his defense, he may set such matters up by answer without the necessity of filing a complaint on the equity side of the court. 116 Or253, 240P886.

1053–93 134SC373, 133SE35. See also 317Mo 1133, 298SW773.

1053–1 [b] **On affirmative equitable defense** action becomes equitable and triable by court. 71CalA64, 234P420.

1054–19 6F(2d)1000, 42ALR503.

1054–31 163La764, 112S713.

1054–33 163La764, 112S713.

1055–36 32PortoRico 811 [quotCJ].

1055–38 32PortoRico 811 [quotCJ].

1055–39 32PortoRico 811 [quotCJ].

1055–47 198NC339, 151SE626.

1055–53 37GaA439, 140SE386, 388 [quotCJ]; SC 155SE841.

1055–54 37GaA439, 140SE386, 388 [quotCJ].

1055–57 225AppDiv221, 232NYS560.

1056–68 232Ky285, 23SW(2d)272; 174 Minn410, 219NW760; 144Miss326, 109 S796. [a] (16) Claim for expenses in investigating insurance loss and for premium. 116Tex418, 293SW802.

1056–69 144Miss326, 109S796.

1056–72 40F(2d)620 (conspiracy between defendants); MoA 29SW(2d)201 (words spoken or articles published on different occasions); Utah 267P1011.

1057–74 131 Okl 219, 268P291.

1057–76 Ala 130S318.

1058–86 7Alaska577; MoA 277SW953; MoA 5SW(2d)649, 651 [citCJ]; 227App Div575, 238NYS296.

1059–98 274US316, 47SCt600, 71L ed 1069.

1059–1 274US316, 47SCt600, 71L ed 1069; 219Ala223, 121S716; 7Alaska 640, 643 [citCJ]; 168Ga171, 147SE383; 48 Ida722, 285P678; 222AppDiv526, 226 NYS468.

1060–4 150Wash178, 272P511.

1060–5 174Minn410, 219NW760.

1060–9 164Ga805, 139SE678.

1061–29 217Ala295, 116S145. [b] (3) Complaint combining three attempted causes of action in one count held irreconcilable as cause of action for conspiracy. 204Cal 97, 266P539.

1062–40 104WVa156, 139SE648.

1063–48 [a] (6) 85CalA607, 259P976.

1063–49 216Ala210, 112S831; 144Miss 326, 109S796; MoA 10SW(2d)334. [a] (1) 46 Ida355, 267P611.

1063–51 84Colo 266, 269P997; 134Misc Rep389, 235NYS321.

1064–60 122Kan156, 251P634.

1064–61 SD 223NW728 (treasurer and surety).

1064–66 216MoA599, 265SW881 (petition by attorney against client on contract of employment and against casualty company upon lien upon client's rights).

1064–66½–New. Nature of proceeding against lessees for breach of lease is not changed from joint and several action to joint action by defendants uniting in their defenses and affirmative pleas. 197Cal 723, 242P932.

1064–68 TexCommnA 272SW1105.

1064–71 [a] TexCommnA 272SW1105.

1064–72 TexCommnA 272SW1105.

1065–80 TexCommnA 272SW1105.

1066–96 16F(2d)734; 164Ga54, 137SE 770; 39GaA170, 146SE567; Tex CommnA 272SW1105; 99WVa456, 129 SE478; 103WVa69, 136SE604. [b] 217 Ala180, 115S230 (in action for failure of lessor to deliver possession of all of leased premises); TexCommnA 272SW 1105.

1066–6 264Mass102, 162NE4.

1068–32 TexCivA 26SW(2d)400.

1068–38 197Mo 15, 93SW1120, 114Am SR743; 289Pa369, 137A612; 9PaDist& Co 357 [quotCJ].

1068–39 9PaDist&Co 551.

1069–52 42BarbNY543; 5HelskTenn 79; 9 Newfoundl 447.

1069–57 127Cal 312, 57P764, 59P698.

1069–57½–New. Joinder of count in tort with that of conversion proper. 10 F(2d)218.

1069–59 90Miss609, 43S469, 122AmSR 321; 136SC231, 134SE222, 223 [quot CJ]. See also 221MoA54, 279SW1053. [a] 221MoA54, 279SW1053; 195NC772, 143SE868.

1069–60 244NY73, 154NE826; 229App Div791, 241NYS726; 136SC231, 134SE 222, 223 [quotCJ].

1069–61 136SC231, 134SE222, 223 [quotCJ].

1069–62 136SC231, 134SE222, 223 [quotCJ].

1069–64 136SC231, 134SE222, 223 [quotCJ].

1070–69 [a] **Equitable action to declare implied trust can be joined** with action to prevent fraudulent conveyance for which legal remedy by attachment could be had. 170Ga906, 154SE445. [b] **Creditors in one suit** may proceed for judgment on debts and to set aside fraudulent conveyances made by common debtor. 170Ga906, 154SE445.

1070–70½–New. ,or relate to independent transactions. 214AppDiv725, 210NYS381.

1071–89 Mass 167NE254.

1071–90 TexCivA 294SW320.

1071–91 See also 133SC326, 131SE265.

1071–92 219Ala100, 121S93.

1071–10 [a] (6) Separate owners of dwellings on street separately charged, if at all, cannot join in one action to recover against street railroad for operation of freight cars. 198 Ind9, 152NE 167, 46ALR1465.

1072–13 141SC476, 141SE365.

1072–15 234 IllA276; 100WVa141, 130 SE132, 134 [citCJ].

1072–16 234 IllA276; 126Kan299, 267 P1110; 100WVa141, 130SE132.

1072–17 105WVa1, 141SE393 [citCJ]. [a] **Causes of action against officer and sureties on his bond cannot be joined** where sureties are liable on only one of them. 105WVa1, 141SE393.

1072–23 234 IllA276; 10PaDist&Co 613, 614 [quotCyc].

1073–25 133SC326, 131SE265 (tortfeasors cannot be sued both separately and jointly).

1073–28 231Ky423, 21SW(2d)658.

1073–29 235Mich656, 209NW832.

1073–35 169Ga676, 151SE380.

1073–36 169Ga676, 151SE380.

1074–39 33Ariz147, 264P468.

1074–41 TexCivA 290SW560; TexCivA 21SW(2d)355; TexCivA 26SW(2d)345; TexCivA 26SW(2d)400.

1074–42 Tex 293SW655; TexCivA 281 SW646; TexCivA 295SW216; TexCivA 17SW(2d)1100. [a] (12) Joinder of actions where different judgments are prayed for against several defendants. TexCivA 218W(2d)355.

1074–55 55ND104, 212NW776.

1075–56 Okl 292P362.

1075–66½–New. In some jurisdictions a cause of action to enjoin the levy and collection of taxes on property unlawfully annexed to a school district may be joined with an action in the nature of a quo warranto proceeding to annul annexation proceedings. 50SD311, 210 NW51.

1075–67 140SC123, 138SE675.

1075–68 140SC123, 138SE675.

1075–71 201Cal 87, 255P827; IndA 154NE780; 241NY7, 148NE771, 41ALR 1216; 217AppDiv7, 216NYS61; 217App Div194, 216NYS507; 219AppDiv41, 219 NYS289; 136SC231, 134SE222. But see 98CalA291, 276P1066. [a] (15) Assumpsit for purchase price of goods cannot be joined with action for replevin. 233Mich633, 208NW28. (16) To recover money on rescission and for breach of warranty. 217AppDiv194, 216NYS507. (17) Action for deceit and fraud in inducing plaintiff to enter contract of partnership and action for accounting of partnership affairs. 136SC231, 134 SE222.

1075–72 217AppDiv7, 216NYS61; 219 AppDiv41, 219NYS289.

1076–73 241NY1216, 148NE771, 41AL R1216.

1076–76 232Mich392, 205NW174. [a] (6) Other instances. 38F(2d)304.

1076–79 217AppDiv7, 216NYS61 (rescission and damages for breach); 219 AppDiv41, 219NYS289 (rules of damages differing). [a] (1) 219AppDiv41, 219NYS289.

1076–84 136SC231, 134SE222. [d] **Purchase price of goods sold and damages for nonacceptance of identical goods.**–230AppDiv69, 243NYS27.

1077–86 127Kan593, 274P284.

1077–90 200 Iowa199, 204NW237. But see 33PortoRico 565.

1077–91 Kan 289P480.

1077–94 169Ga676, 151SE380.

1077–95 193NC576, 137SE705.

1078–13 105Conn230, 135A44; 58ND 660, 227NW185; 33PortoRico 565.

1079–15 127Misc54, 215NYS220; 32 PortoRico 432; TexCivA 293SW322.

1079–29 130MiscRep424, 224NYS66.

1079–31 96CalA671, 274P764. But see 155SC388, 152SE675.

1080–38 234Ky385, 28SW(2d)465.

1080–48 43 Ida64, 249P254, 257 [citCyc]. [a] **Rule used to arrive at conclusion that such actions survive.** 43 Ida64, 249P254. [b] **Causes for fraud in sale of shares survive,** being causes for injury to property, and may be joined. 43 Ida64, 249P254.

1080–52 Utah 279P893.

1080–55 33PortoRico 100 (Code Civ. Proc. § 104).

1081–58 33PortoRico 100 (Code Civ. Proc. § 104).

1081–59 33PortoRico 100 (Code Civ. Proc. § 104).

1081–66 155SC187, 152SE189.

1081–68 [a] **Trover and detinue cannot be made basis of relief on same set**

of facts and in one judgment. 201Cal 87, 255P827.

1081–70 47Ida542, 277P554(2dcase).

1082–81 100WVa141, 130SE132.

1082–84 195Cal 132, 231P987; 71CalA 77, 234P839; 102CalA677, 283P871; CalA 285P734; Ind 161NE251; MoA 9SW(2d)531; 128Misc142, 218NYS281; 195NC12, 141SE348; 195NC339, 142SE 226; 195NC772, 143SE868; 27OhA34, 160NE735; TexCivA 283SW914; Tex CivA 1SW(2d)434; TexCivA 4SW(2d) 639 (on contract and on note growing out of it); TexCivA 26SW(2d)345; 144 Wash668, 258P824. [b] 100NJEq411, 136A186. [c] **Recovery may be had against such defendants as may be liable** according to their respective liabilities. 128Misc142, 218NYS281.

1082–84½–New. even though remedies sought are inconsistent, 126Misc23, 211NYS858.

1082–85 TexCommnA 277SW78.

1082–86 203Cal 246, 263P534; 90CalA 193, 265P870; TexCommnA 277SW78; TexCivA 3SW(2d)882; TexCivA 20SW (2d)154. [a] **Inconsistent causes of action may be joined** where they arise out of same transaction and proof and remedies available in each are substantially same. 203Cal 246, 263P534.

1082–88 83CalA566, 257P199.

1083–93 220AppDiv302, 222NYS7 (where justice would be furthered by severance).

1084–8½–New. Dissimilarity of a suit on a note against the maker and a suit against the maker and persons who did not sign it on a collateral agreement is not the test of multifariousness as subject matter of suits may relate to, or be different parts of, same transaction or the subject matter of one may include entire subject matter of the other. TexCommnA 276SW177.

1084–10 241NY7, 41ALR1216, 148NE 771 ("subject of action" does not mean "cause of action" or "object of action").

1084–12 83CalA566, 257P199; Ind 166 NE668; 197NC174, 148SE39; 197NC 197, 148SE171(2dcase).

1084–13 83CalA566, 257P199. See Tex CivA 8SW(2d)1049.

1084–15 132Misc631, 230NYS458 (actions for goods sold and delivered and on guaranty of payment).

1084–18 92CalA526, 268P682; TexCiv A 20SW(2d)154. [a] (10) See also 83 CalA566, 257P199. (13) Statutory penalty for cutting trees on plaintiff's land, and actual damages for such cutting and the building of camp houses on the land. 144Miss769, 109S851. [c] **Slander and conversion.–SD** 226NW276.

1085–20 [b] **Illustration.–NJCh** 131A 100.

1085–24 202Cal 754, 262P713; 93CalA 654, 269P1115; 316Mo 457, 290SW443; 29 OhA310, 163NE575; 148SC133, 145 SE692. [a] (12) 27F(2d)753. (13) Cause of action for rescission of contract for fraud and cause of action for money had and received, based upon the same transaction, may be joined. 71CalA77, 234P839. (14) Action by bank on note for loan to two of its officers and maker who alone signed note and maker's cross action against one of such officers for judgment over are properly joined. TexCommnA 276SW177. (15) Causes of action for claim and delivery of conditional sales contract and to quiet title to automobile where contract was allegedly wrongfully assigned. Cal 286P 1014. (16) For assault and battery and false imprisonment. 153Va348, 149SE 453.

1085–25 202Cal 1, 258P939; 73CalA 511, 238P1048.

1086–26 But see Ariz 284P149. [a] **In New York.**–127Misc160, 215NYS407.

1086–32 [b] SD 226NW276 (conversion and injury to character could not be joined). [c] **Action for fraud** in obtaining release of damages for death caused by reckless driving of automobile may be joined with count for recover damages for death. 193NC17, 136SE246.

1086–34 TexCommnA 15SW(2d)598; TexCivA 3SW(2d)882.

1086–36 16F(2d)734; 33Ariz147, 264P 468; 164Ga54, 137SE770; 233Mich407, 206NW374; 241Mich478, 217NW565; 84 Mont158, 274P489; Mont 286P406(2d case); 222AppDiv826, 226NYS394; 193 NC576, 137SE705; 34OhA464, 171NE 346; 101Vt233, 143A391; 101WVa457, 132SE882; 105WVa1, 141SE393. [c] MoA 16SW(2d)749. [d] TexCommnA 272SW1105 (action on contract and one in nature of detention).

1087–37 [a] **Passenger injured by negligent driving** of automobile cannot join insurer and insured, though insured's insolvency is not bar to recovery from insurer. 221Ky114, 298SW182.

1087–41 56AppDC318, 13F(2d)290 (construing Code of Laws of District of Columbia relating to joinder of causes); 213Ala125, 104S403; 215Ala398, 110S 822; 225AppDiv557, 234NYS27; 125 Okl 134, 256P916.

1087–41 [d] **In Montana.**–286P406(2d case) (held to permit joinder of foreclosure with conversion).

1088–42 TexCommnA 272SW1105; Tex CivA 281SW646; TexCivA 21SW(2d) 592; TexCivA 23SW(2d)527.

1088–53 164Ga805, 139SE678; 32NM 344, 256P179; 197NC515, 149SE846.

1089–58 146SC225, 143SE796.

1089–59 170Ga419, 153SE29(2dcase); 313Mo 182, 281SW411.

1089–62 313Mo 182, 281SW411.

1089–66 205 Iowa256, 215NW744.

1089–68 37F(2d)527.

1089–70 156Md65, 143A644.

1089–71 27 OhNPN8125 (conversion and cancellation).

1090–74 51SD110, 212NW502.

1090–78 [b] 163Minn303, 204NW159.

1090–84 51SD110, 212NW502.

1090–87 164Ga805, 139SE678.

1090–88 TexCivA 271SW311.

1090–91 123 Okl 163, 252P418.

1090–96 127Kan307, 273P433; TexCiv A 287SW121; Wash 290P994.

1091–97 203Iowa257, 212NW555; 32N M344, 256P179; 195NC12, 141SE348.

1091–1 Contra 129Misc837, 223NYS458.

1091–6 [a] **Action to set aside sale of** corporate stock as in fraud of creditors held improperly joined with action to foreclose mortgage. 138SC106, 136SE 132.

1091–12 107Conn207, 139A780.

1091–16 164Ga888, 139SE802.

1091–17 164Ga888, 139SE802; 55ND 930, 215NW542, 56ALR175.

1092–24 53SD405, 220NW921.

1092–28 217AppDiv194, 216NYS507. See also 219AppDiv41, 219NYS289. [a] **On rescission of contract** proper action is by declaration of the cause in equity and suit on implied promise to repay money received or value of goods. 71Cal A77, 234P839.

1093–39 73CalA511, 238P1048; 313Mo 182, 281SW411; 193NC576, 137SE705.

1093–41 313Mo 182, 281SW411.

1093–43 LaA 129S189(2dcase); TexCiv A 2SW(2d)936. [a] (2) TexCommnA 276SW177; TexCommnA 277SW78. (4) Joinder of parties is question resting largely within discretion of court. Tex CivA 290SW560.

1093–53 TexCommnA 276SW177; Tex CommnA 277SW78; TexCivA 21SW(2d) 355; TexCivA 26SW(2d)345.

1094–56 TexCivA 21SW(2d)355. [a] **In Texas.–CivA** 281SW883.

1094–59 35F(2d)248.

1094–59½–New. Under a statute permitting a person claiming adverse interest in a controversy to be made a party defendant, joining of two legatees in an action by another legatee to enforce forfeiture does not constitute a misjoinder of causes of action. CalA 276P583.

1094–64 160Ga357, 127SE852; LaA 129 S189(2dcase); 313Mo 182, 281SW411. See also 137MiscRep653, 244NYS90.

1094–65 170Ga23, 152SE58; 148Miss 278, 114S482; 313Mo 182, 281SW411; 192NC50, 133SE184; TexCivA 14SW (2d)290.

1094–66 123 Or383, 261P415; TexCivA 281SW883.

1094–67 44 Ida306, 256P950, 52ALR 1386; 29 OhA14, 162NE784 (directed verdict for defendant held erroneous); 123 Or383, 261P415. See also 127Misc 543, 216NYS513. [b] **Successive mortgagees having no community of interest** must sue separately for injuries. 214Ala 57, 106S180.

1094–68 160Ga591, 128SE906 (creditors of insolvent corporation); 194NC741, 140SE734; 123 Or383, 261P415; Tex CivA 281SW883 (action to abate nuisance caused by overflowing drainage system); TexCivA 24SW(2d)786.

1094–69 TexCivA 24SW(2d)786.

1095–73 35F(2d)248.

1095–76½–New. In New York. 212App Div332, 209NYS99.

1095–82 138SC472, 136SE743.

1095–85 38GaA783, 145SE465(1stcase).

1095–86 4 OhDecReprint543, 2ClevL Rep347.

1095–87 33Ariz147, 264P468 (where character of relief is similar in all of assigned causes).

1095–87½–New. A contractor and an assignee of a portion of the earnings under a contract may join in an action for breach thereof. 175Minn236, 220 NW946.

1095–87½–New. Where a dissolved corporation assigned each stockholder a separate interest in a contract, one stockholder cannot sue thereon without joining the other stockholders where defendant had not consented to the obligation being split up. MoA 284SW191.

1095–88 205Cal 54, 269P915; 81Colo 548, 256P657; 313Mo 182, 281SW411. [a] (4) Where one person is fraudulently induced to loan money to a corporation and another is induced to invest money in the corporation in separate transactions, injured parties cannot join as plaintiffs. 81Colo 548, 256P657

1096–92 [a] (2) 152SC153, 149SE595. (6) Life tenant and remainderman cannot join in action of tort upon realty. 100WVa368, 130SE461.

1096–96 NC 155SE248.

1096–98 195Wis458, 218NW834.

1096–99 208 Iowa939, 226NW99; 143 SC264, 141SE450; 106WVa578, 146SE 371. [a] (4) Certiorari by plaintiffs as members of municipal assembly and also as taxpayers. 35PortoRico721.

1096–2 41GaA673, 154SE379.

1097–14 14F(2d)616; 17F(2d)71 (defendants acquiring mining leases under joint application held properly joined on ejectment); 205Cal 128, 270P188; 152Md398, 136A822, 51ALR1291; 237 Mich252, 211NW623; 224AppDiv39, 229 NYS526 (tort and contract against different sets of defendants); 193 NC576, 137SE705; 116 Oh294, 156NE134; 33 PortoRico 100; 51SD374, 213NW943 (joinder held proper); TexCivA 272SW 258; TexCivA 286SW305; TexCivA 14 SW(2d)290; 100WVa141, 130SE132. See also 160Ga460, 128SE580; 33 PortoRico 100. [c] (20) Actions against two separate defendants on separate bills of lading for failure to deliver goods safely. 216AppDiv239, 214NYS 513.

1098–15 TexCivA 265SW196.

1098–17 37F(2d)904; LaA 129S189(2d case); TexCivA 21SW(2d)355; TexCivA 26SW(2d)345; 200Wis628, 229NW34.

1098–18 48RI 496, 139A307; 48RI 485, 139A308.

1098–20 TexCivA 11SW(2d)662.

1098–22 But see 136SC410, 134SE373.

1098–24 157SC106, 154SE106; SD 229 NW380; 103WVa69, 136SE604. [c] **To join tort action with that of contract** arising out of same transaction it must appear that defendants are not wholly alien to each other. 34OhA52, 170NE 178.

1099–26 [a] **In Iowa.**–206 Iowa562, 218 NW306.

1099–26½–New. The rights of two estates jointly liable to widow of one of decedents under agreement may be adjudicated in one action by representative of estate of one against widow individually. 126Misc17, 211NYS864.

1099–26½–New. and as representative of husband's estate. 126Misc17, 211NYS 864.

1099–29 [a] **In Alberta.**–[1928] 2DomLR799.

1099–37 195Cal 132, 231P987; 207Cal 8, 276P1017(2dcase); Cal 290P11; 162 Ga403, 134SE98; 163Ga398, 136SE272; 164Ga888, 139SE802; 170Ga472, 153SE 188; Mont 286P406(2dcase).

1100–38 163Ga398, 136SE272; TexCivA 21SW(2d)355.

1100–39 164Ga888, 139SE802.

1100–40 195Cal 132, 231P987. [a] **That**

different judgments must be entered against several defendants is no objection to joinder. Or 290P556.

1100-42 314Mo 95, 282SW1014 (action to cancel for undue influence eleven deeds to separate grantees).

1100-43 195NC717, 143SE524.

1100-44 194NC797, 139SE691.

1100-49 [a] (5) Judgment creditor's suit against judgment debtor and his grantees of different tracts to set aside such separate conveyances as fraudulent. 230Ky351, 19SW(2d)988.

1101-50 135MiscRep553, 238NYS239; **TexCivA** 16SW(2d)830; **Utah** 27SP585 (complaint held not demurrable for misjoinder); 144Wash16, 255P964; 199 Wis440, 223NW559.

1101-51 144Wash16, 255P964.

1101-53 199Wis440, 227NW26 (action to enforce pro rata share of loan). [a] **TexCivA** 12SW(2d)235.

1101-54 37GaA32, 138SE592; **TexCivA** 10SW(2d)1010.

1101-55 **IndA** 169NE346; 200 **Iowa**199, 204NW237.

1101-56 See also 37GaA32, 138SE592.

1101-60 208 **Iowa**545, 223NW891; 51 SD374, 213NW943. [a] (1) Contra 173 **Minn**57, 214NW778 (guarantor of payment of claim for goods sold held properly joined with buyer). (2) Statute relates to engagements, contracts, agreements, stipulations, bonds, and covenants as well as negotiable instruments. 173Minn57, 214NW778.

1101-60½-New. All persons liable on the same obligation may be joined in the same action. 167Minn494, 210NW 66.

1101-63 197NC50, 147SE695.

1101-64 178Ark1011, 13SW(2d)314.

1102-66 82 **IndA**377, 149NE377; 170 **Minn**164, 212NW185.

1102-67 170Minn164, 212NW185; 53SD350, 220NW918.

1102-69 170Minn164, 212NW185; 197 NC150, 147SE824(1stcase); 53SD350, 220NW918.

1102-70 119Kan68, 237P1035.

1102-70½-New. A single action for rent and on a bond given in a distress proceeding may be brought against the tenant and surety. 136SC410, 134SE373.

1102-71 74CalA621, 241P567; **Wash** 287P36.

1102-73 74CalA621, 241P567; 196NC 445, 146SE79; 51SD633, 216NW366; 100WVa141, 130SE132.

1103-75 21AlaA163, 106S69; 74CalA 621, 241P567; 40GaA695, 151SE406(2dcase); 40GaA786, 151SE528(1stcase); 40GaA848, 151SE692 (petition for malicious prosecution has been held not demurrable on ground of misjoinder of parties); **Ida** 28SP1071; **Mass** 172 NE85; 102NJLaw517, 133A81; 241NY 7, 148NE771, 41ALR1216; **TexCivA** 10 SW(2d)250; **TexCivA** 26SW(2d)682. See also 220Ala661, 127S230.

1103-76 241NY7, 148NE771, 41ALR 1216 (action against one causing personal injury and against physician for negligent treatment cannot be joined).

1103-78 41GaA214, 152SE291; 234Ky 385, 28SW(2d)465; 241NY7, 148NE771, 41ALR1216; 51SD633, 216NW366. [b] **Seizure by sheriff and sale by successor** in foreclosing chattel mortgage do not involve improper joinder of causes. **ND** 232NW6(2dcase).

1103-80 21F(2d)657; 220Ala661, 127 S230; 85Colo346, 276P30; 37GaA666, 141SE223; 39GaA170, 146SE567.

1103-81 216Ala210, 112S831; 84 **IndA** 202, 149NE734; 192NC37, 133SE181 (directors of corporation).

1103-82 84 **IndA**202, 149NE734.

1103-83 84 **IndA**202, 149NE734.

1103-88 40F(2d)620; 134 **Okl** 70, 272 P857; 134 **Okl** 79, 272P868.

1103-91½-New. An action for injuries from a passenger truck against both the transit company and the surety has been held not a misjoinder of causes of action. 192NC545, 135SE460.

1103-91¾-New. There is no misjoinder where allegations against defendants were in the alternative. **TexCivA** 300SW967.

1103-92 31NM568, 249P99 (counts for money loaned).

1103-93 31NM568, 249P99 [quotCJ]; **TexCivA** 16SW(2d)340.

1103-94 31NM568, 249P99 [quotCJ].

1104-97 191NC643, 132SE792 (complaint for fraud of three of defendant's agents held not demurrable for misjoinder of parties).

1104-2 Contra 51SD124, 212NW498; 104WVa156, 139SE648.

1104-3 Contra 104WVa156, 139SE648.

1104-5 But see 223AppDiv767, 227N YS624 (alternative liability).

1104-7 156Md65, 143A644. [a] **In New York.**-129Misc268, 221NYS6.

1104-14 198NC5, 150SE618(2dcase).

1104-16 See also 34 OhA52, 170NE178.

1105-20 100CalA578, 280P695.

1105-21½-New. Creditors holding individual notes of a corporation may join with the receiver in an action against the corporation, its stockholders, and officers to recover property wrongfully withheld. 51SD53, 211NW 965.

1105-23½-New. A petition against an insolvent corporation and individual organizers who transacted business in its name before the minimum capital stock was subscribed has been held not demurrable as seeking to recover on separate and distinct causes of action. 160Ga591, 128SE906.

1105-30 159La1057, 106S564.

1105-31 159La1057, 106S564 (dictum).

1105-38 160Ga357, 127SE852. See also 197NC162, 147SE821.

1106-47 53ND113, 205NW5, 7 [quot CJ]; **TexCivA** 299SW293, 294 [citCJ].

1106-48 274US316, 47SCt600, 71L ed 1069; 12F(2d)693; 13F(2d)210; 16F (2d)578, 581 [citCJ]; 24F(2d)137; 27 F(2d)881; 43F(2d)521; 215Ala150, 110S46; 219Ala131, 121S420; 35Ariz 334, 278P68; 67CalA381, 227P962, 969 [citCJ]; 202 **Iowa**1159, 211NW704; 205 **Iowa**417, 216NW68; 205 **Iowa**1273, 218NW42; 208 **Iowa**933, 226NW43; 125Kan417, 423, 265P53 [citCJ]; **Mass** 169NE548; **MoA** 299SW629; 159 **Tenn**465, 19SW(2d)238; **TexCivA** 299 SW293, 294 [citCJ]; 69Utah293, 254P 784, 787 [citCJ]. See also 228Ky134, 148SW(2d)379.

1107-51 **Ida** 293P327 (holding no attempt made to bring more than one suit on same subject matter); 202 **Iowa** 1159, 211NW704. See also 38GaA509, 144SE400.

1107-53 145Wash576, 261P110 (right depends on evident justice of particular case).

1108-55 154Tenn174, 285SW569.

1108-61 149Wash249, 270P831.

1108-62 [a] **Where complaint states two causes of action in one "case"** before court it may strike one cause without splitting it. **Fla** 128S412.

1108-63 202 **Iowa**1159, 211NW704, 705 [citCJ].

1108-64 202 **Iowa**1159, 211NW704, 705 [citCJ]; 165**La**536, 115S742.

1108-68 202 **Iowa**1159, 211NW704, 705 [citCJ].

1108-68½-New. Rule against splitting applies to claimant involuntarily summoned into court and commanded to set forth his claim. 67CalA381, 227P 962.

1109-77 150Wash559, 274P102. [a] **Mixed action need not be brought for** ownership of real property and for its fruits or their value. 165**La**536, 115S 742.

1109-78 218Ala221, 118S404; 75**Mont** 122, 242P421, 424 [citCJperStark,J].

1109-79 75Mont122, 242P421, 424 [cit CJperStark,J]. See also 149Wash249, 270P831.

1109-80 **Ida** 293P327.

1109-82 69Utah293, 254P784, 787 [cit CJ].

1109-83 84Mont38, 274P296.

1110-84 69Utah293, 254P784.

1110-85 53ND113, 205NW5, 8 [quot CJ].

1110-89 223AppDiv240, 228NYS5; 52 ND324, 202NW657.

1110-92 See also 83Colo 505, 266P1116.

1110-94 320Mo 623, 8SW(2d)858 (recoupment).

1111-1 9F(2d)163; 32Ariz164, 256P 356; 205 **Iowa**1273, 218NW42 (facts not constituting splitting); 207 **Iowa**294, 222NW893; 249Mich331, 228NW715; 170Minn414, 213NW53; **MoA** 283SW 747, 749 [citCJ]; 154Tenn174, 285SW 569.

1111-2 67CalA381, 227P962, 969 [cit CJ].

1111-3 67CalA381, 227P962; **MoA** 283 SW747, 749 [citCJ].

1111-4 13F(2d)210; 37F(2d)527; 202 **Iowa**1159, 211NW704, 705 [citCJ]; **TexCommnA** 13SW(2d)673.

1111-6 37F(2d)527. [a] **Omitted claim must be part of cause of action** sued on and recoverable in such action to come within rule against splitting causes. 37F(2d)527.

1111-8 48 **Ida**412, 282P492; 92PaSuper63 (actions for price of goods and freight paid). [a] (1) **Ida** 290P383 (separate mortgages for principal, additional interest, and commissions).

1112-9 202 **Iowa**1159, 211NW704, 705 [citCJ].

1112-15 202 **Iowa**1159, 211NW704, 705 [citCJ]; 160Tenn158, 22SW(2d)631; 154Wash236; 281P996(2dcase). But see 12F(2d)693.

1112-16 11F(2d)845 (royalties).

1112-20½-New. An action to recover matured installments under a continuing executory contract is no bar to a later action to recover for the wrongful breach of the contract. 202 **Iowa**1159, 211NW704 (effect of repudiation by other party).

1112-21 17F(2d)527; 157Md626, 147A 529; 125MiscR29, 211NYS568; **Tex CommnA** 13SW(2d)673. [a] **Action on surety bond for embezzlement in different years.**-Though surety bond was renewed annually it was but one bond, and but a single cause of action lies for defalcation in different years. 17F(2d) 527.

1113-27 202 **Iowa**1159, 211NW704, 705 [citCJ].

1113-32 216Ala21, 112S428, 430 [cit CJ].

1113-36 **Can [1930]** 3DomLR582.

1113-37 216Ala21, 112S428, 430 [cit CJ].

1114-42 **Iowa** 227NW503.

1114-51 **Me** 149A574.

1115-63 53ND113, 205NW5, 8 [quot CJ]; **Or** 290P233. But see 218Ala221, 118S404.

1115-64 53ND113, 205NW5, 8 [quot CJ].

1115-65 53ND113, 205NW5, 8 [quot CJ]; **Or** 290P233.

1115-66 53ND113, 205NW5, 8 [quot CJ]; **Or** 290P233.

1115-67 See also 53ND113, 205NW5, 8 [quotCJ].

1115-68 125Kan417, 423, 265P53 [cit CJ].

1115-70 **MoA** 298W(2d)721.

1115-71 220Ala56, 124S93; 248Mich 221, 226NW873.

1115-72 248Mich221, 226NW873.

1115-74 202 **Iowa**1159, 211NW704, 705 [citCJ].

1116-83 274US316, 47SCt600, 71 L ed 1069; 170Minn414, 213NW53; 217App Div501, 217NYS277; 154Tenn174, 285 SW569.

1116-84 274US316, 47SCt600, 71L ed 1069; **DelSuper** 151A822; 167Ga821, 145SE851; 205 **Iowa**417, 216NW68, 69 [citCJ]; **TexCivA** 299SW293, 294 [cit CJ].

1116-85 234Ky511, 28SW(2d)765 (one recovery for past, present, prospective or contingent damages).

1116-89 206Cal 22, 272P1045; **Mass** 172NE347.

1116-91 234Ky384, 28SW(2d)471 (recovery of real property and damages for its detention).

1117-94 274US316, 47SCt600, 71L ed 1069.

1117-2 217AppDiv501, 217NYS277; **TexCivA** 6SW(2d)202 (manufacturer and dealer of defective machine).

1117-4 But see 81Colo 121, 253P1066.

1117-7 **Cal** 268P626; **MoA** 9SW(2d) 531.

1117-8 **Utah** 269P132.

1118-10 77Colo 193, 235P375.

1118-11 227AppDiv597, 238NYS508.

1118-17 156SC92, 152SE821.

1118-22 175Minn247, 221NW8.

1118-22½-New. When two or more persons are killed by the same tortious act, and causes of action for each of them are vested in the same parties,

these parties may, at their option, bring one suit for all these deaths, or they may bring separate suits for each death. 174Ark966, 298SW207.

1118-23 Mass 172NE347.

1118-25 141Miss319, 109SS53.

1119-27 146Miss600, 111S584; 197NC100, 147SE686.

1119-28 146Miss600, 111S584.

1119-29 37GaA439, 140SE386; 338Ill 35, 169NE729; 128Misc192, 218NYS108.

1119-30 117Tex439, 68SW(2d)1039, 60ALR890.

1119-32 Ala 130883; 225Ky255, 88W(2d)121.

1119-35 118Okl132, 247P50.

1120-37 225Ky255, 88W(2d)421; 118Okl132, 247P50. [a] **Damage to abutting property from operation of railroad trains in street** is permanent, and only one action for all damages can be maintained. 68Utah309, 249P1036.

1120-43 McA 297S439.

1120-47½-New. Separate suits to cancel leases to different tracts of land held by different persons does not violate rule against splitting. **TexCivA** 258SW(2d)989.

1120-49 36GaA729, 137SE904.

1120-50 172Ark69, 287SW595; 36GaA729, 137SE904.

1121-51 172Ark69, 287SW595; 36GaA729, 137SE904; Mont 292P577.

1121-69 142Va43, 45ALR664, 128SE615.

1121-70 142Va43, 45ALR664, 128SE615.

1121-72½-New. Necessity for consolidation. Actions by persons on a warehouseman's bond need not be consolidated where each may recover the full penalty. 152Wash89, 277P389.

1121-73 160Ga705, 129SE31; 100NJEq365, 135A337; 190NC449, 130SE171, 173 [citCyc]; 132SC410, 129SE629, 632 [quotCJ].

1121-74 190NC449, 130SE171; 132SC410, 129SE629, 632[quotCJ].

1121-75 190NC449, 130SE171; 132SC410, 129SE629, 632 [quotCJ].

1121-76 Ala 129869; 100NJEq365, 135A337; 190NC449, 130SE171; 132SC410, 129SE629, 632[quotCJ].

1122-77 84Mont158, 274P489; 100NJEq365, 135A337; 190NC449, 130SE171; 132SC410, 129SE629, 632 [quotCJ].

1122-78 Mass 164NE802; 100NJEq365, 135A337, 338 [citCJ]; 198NC695, 153SE261.

1123-91 100NJEq365, 135A337.

1123-92 100NJEq365, 135A337.

1123-93 152Tenn97, 275SW340.

1123-3 124Misc66, 209NYS566.

1123-4 160Ga705, 129SE31; 40GaA689, 151SE395; Miss 126S18; 121S138(2d case); Miss 126S18; 84Mont158, 274P489, 491 [citCJ]; 132NY163; 230NYS408 (under statute); 245NYS649; 146SC85, 143SE650; **TexCivA** 288SW602; 149Wash561, 271P823, 826(2dcase) [citCJ].

1124-5 160Ga705, 129SE31; 40GaA689, 151SE395; Miss 126S18; 84Mont158, 274P489; 198NC695, 153SE261 (discretion not abused).

1124-7 100NJEq365, 135A337.

1124-9 212Ky838, 280SW143; 132NYS623; 230NYS408 (under Civ. Pract. Act § 96); 146SC85, 143SE650.

1124-16 Ala 129869; 202Cal478, 261P1001; 166Ga566, 124SE303; 164Ga557, 139SE27; 164Ga869, 139SE799; 36GaA757, 138SE260; 152Miss869, 120S187; 153Miss712, 121S138(2dcase); 227App Div72, 237NYS69. See also 218AppDiv621, 219NYS34. [b] **That actions have no common question** or are not such as can be joined is not conclusive on question whether substantial right would be prejudiced thereby. 222App Div292, 225NYS649.

1125-19 217AppDiv762, 216NYS433 (identity of issues).

1125-24 161La653, 109S345; 227App Div72, 237NYS69; 146SC85, 143SE650.

1125-25 146SC85, 143SE650.

1125-27 222AppDiv852, 227NYS173; 190NC449, 130SE171.

1125-33 36GaA757, 138SE260; 191NC493, 132SE282; 26OhNPN503; 132SC410, 129SE629.

1126-35 164Ga869, 139SE799.

1126-37 TexCivA 275SW287.

1126-41½-New. Under New York Civil Practice Act, it is no longer necessary that both actions be in the name of the same plaintiff or the same defendant. 216AppDiv260, 214NYS533 (identity of parties no longer necessary).

1126-42 164Ga869, 139SE799; 246Ill A464; 191NC493, 132SE282; TexCivA 288SW602; Wash 292P1011.

1127-43 125Okl230, 257P288; 125Okl219, 257P291.

1127-44 7PaDist&Co 57.

1127-45 125Okl230, 257P288; 125Okl219, 257P291.

1127-46 SC 143SE650.

1128-52 202Cal478, 261P1001.

1128-54 132SC410, 129SE629, 632 [quotCJ].

1128-55 132SC410, 129SE629, 632 [quotCJ].

1128-56 132SC410, 129SE629, 632 [quotCJ].

1128-57 165Ga826, 142SE164; 254Mass488, 150NE323; 217AppDiv776, 217NYS236; 132SC410, 129SE629, 632 [quotCJ].

1128-58 163Ga371, 136SE137.

1129-65 177Ark393, 88W(2d)457; 264Mass538, 163NE246(2dcase); Miss 126S18 (same parties, same subject matter, requiring same evidence); 116Nebr610, 218NW584 (proceeding by stockholder of insolvent bank to require payment of deposit as preferred debt and proceeding by receiver to enforce double liability of stockholder held properly consolidated by consent); 160Tenn403, 238W(2d)897 (test of propriety is identity of property involved in tax cases). [a] **Probate proceedings.**-158La585, 104S377.

1129-74 164Ga557, 139SE27.

1129-75 [b] **Mechanic's lien suits** against several defendants should be consolidated. 48Nev274, 229P1095, 232P1081; 48Nev286, 229P1098, 232P1082, 235P1117.

1129-76 124Kan461, 260P618.

1129-76½-New. claims of the owner and a lienor who intervened separately in an action in which attachment was issued. 172Ark821, 290SW603.

1129-80½-New. A motion to set aside an execution sale cannot be consolidated with an action to quiet title where the one seeking consolidation was not entitled to any relief under the motion. Iowa 221NW830.

1129-80¼-New. Two consecutive actions involving same parties and subject matter should not be consolidated where second action cannot be maintained. 198NC695, 153SE261.

1129-80¼-New. Different suits to recover delinquent taxes may be consolidated. 160Tenn403, 238W(2d)897.

1129-83 203Iowa792, 206NW586.

1129-84 227AppDiv803, 237NYS228.

1129-85 Mass 164NE810. [a] (11); suits against coguarantors (132SC410, 129SE629); (12); action for settlement of estate of decedent and action against administrator, heirs, and devisees for bonds converted by decedent (212Ky838, 280SW143); (13) suits by owners and operators of nonunion mines, to enjoin interference with their business by labor unions (18F(2d)839); (14) divorce and accounting in partnership (124Kan461, 260P618); (15) equitable actions by different creditors suing in behalf of themselves and others similarly situated against same defendants attacking alleged conspiracy between defendants to defraud creditors (165Ga652, 141SE651); (16) suits for accounting among members of partnership (254Mass488, 150NE323); (17) vendor's action for specific performance assigned, or reformed if necessary, and action by vendee's assignee to recover down payment and expenses, and for lien therefor (217AppDiv776, 217NYS236); (18) actions to foreclose four mortgages on four adjoining lots (227AppDiv803, 237NYS228); (19) other instances (Fla 128S416).

1129-86 100NJEq365, 135A337. [a] **Consolidation held unauthorized.**-Ala 129869.

1129-87 See also TexCivA 98SW(2d)198.

1130-91 Miss 126S18. [d] (2) Action at law on a note properly consolidated with suit in equity for injunction to prevent fraudulent transfer of deed from husband to wife. 160Ga705, 129SE31.

1130-93 203Iowa792, 206NW586.

1130-95 31F(2d)270.

1130-96 178Ark588, 118SW(2d)469.

1130-98 132Misc623, 230NYS408.

1131-99 But see 217AppDiv762, 216NYS433 [a] **Actions held properly consolidated.**-216AppDiv260, 214NYS533. [b] **Actions by parent and child for personal injuries to child** are required to be consolidated under statute. 94PaSuper406.

1131-6 133Misc149, 231NYS640.

1131-10 230AppDiv559, 245NYS649. [a] (1) 124Misc905, 210NYS817 (supreme court and city court, close actions). [b] **Action brought by defendants in another county** arising out of same transaction is properly consolidated with previous action of plaintiff. 229AppDiv206, 242NYS34.

1131-12 230AppDiv559, 245NYS649.

1131-13 See also 230AppDiv559, 245NYS649.

1132-18 222AppDiv132, 226NYS108 (actions for fraud in sale of goods and for goods sold and delivered); 149Wash561, 271P823(2dcase). [d] **In NewYork.**-124Misc905, 210NYS817.

1132-26 100NJEq365, 135A337 (foreclosure of mortgage); **TexCivA** 198SW(2d)197 (landowners' appeals from award of commissioners of appraisement).

1132-28 100NJEq365, 135A337 (mortgage foreclosure).

1133-31½-New. In an order to authorize consolidation two or more causes must be pending in the appellate court. 114Okl118, 242P531.

1133-31¾-New. Where only one appeal is perfected, a motion to consolidate it with another case not filed nor docketed in the appellate court must be denied. 114Okl118, 242P531.

1133-32 165Ga142, 139SE867.

1133-42½-New. Order referring to consolidated causes only by rule docket numbers is not bad. 160Tenn403, 238W(2d)897.

1133-43 153Miss712, 121S138(2dcase).

1133-44 153Miss712, 121S138(2dcase).

1133-49 [d] **Priority of action** in absence of exceptional circumstances governs in respect to consolidation of actions. 229AppDiv206, 242NYS34.

1134-50 [a] **Right of defendant starting independent action** instead of counterclaiming to open and close may be subordinate to statutory right to consolidate actions. 229AppDiv206, 242NYS34.

1134-55 216AppDiv260, 214NYS533 (generally); 11PaDist&Co 379. See also 132Misc623, 230NYS408. But see 229AppDiv206, 242NYS34.

1134-56 216AppDiv260, 214NYS533 (only in such cases). [a] (2) Where court can plainly see what issues are to be, order may be granted before issues are framed. 216AppDiv260, 214NYS533 (Civ. Pract. Act § 96). [b] **Motion held not premature** to consolidate actions by plaintiffs with actions by defendants which were not yet at issue. 216AppDiv260, 214NYS533 (where court can plainly see what issues are).

1135-64 [a] **Rule relating to motion on notice relates only to ordinary motions for relief** and not to motion presenting question of consolidation. 229AppDiv206, 242NYS34.

1135-75½-New. Life policy not consolidated with action to cancel policy, where insurer had not served answer. 213AppDiv623, 210NYS806.

1135-79½-New. Infant's right to preference as party in one of actions consolidated may be preserved by order permitting preference. 216AppDiv260, 214NYS533 (under Civ. Pract. Act § 138 subd 20 also subd 7).

1135-79¼-New. Where some of parties oppose motion, order should provide which parties are to be deemed plaintiffs and which defendants so that right to open and close may not be left in doubt. 216AppDiv260, 214NYS533 (parties opposing motion may have right preserved).

1135-79¼-New. Where actions were commenced in different counties, order should fix place of trial of consolidated action. 216AppDiv260, 214NYS533.

1135-80 36GaA519, 137SE290; 152

Miss869, 120S187. But see 174**Ark**966, 298SW207.

1136-86 36**GaA**519, 137SE290; **Wash** 292P418.

1136-87 See also **Ark** 32**SW(2d)**447.

1136-89½-New. Where an action by an executor for relief from a contract alleged to have been induced by fraud in which defendant filed a cross petition for judgment on the contract is properly consolidated on the executor's motion, with divers other actions under duly joined issues which might have been the basis of an original action against the executor in the county of suit, the executor may not, after dismissing his action, have proceedings against himself and the estate dismissed on the ground that the probate court which appointed him had sole jurisdiction. 203 **Iowa**792, 206NW586.

1136-89¾-New. Prejudice in permitting consolidation must be considered on motion, and granting of order is finding of want of prejudice.. 227**AppDiv**72, 237 **NYS**69.

1136-90 9**LaA**362, 119S297.

1136-94 **TexCivA** 28**SW(2d)**877.

1136-95 **TexCivA** 173**SW**1173; **TexCiv A** 16**SW(2d)**380.

1136-95½-New. Demurrer to amended complaint on ground of misjoinder of causes of action held waived by answers to original complaints. 194**Wis** 559, 217**NW**307.

1136-4 **TexCivA** 4**SW(2d)**169.

1136-5 233**Mich**633, 208**NW**28 (upon consolidation of action, mistakenly brought in replevin, where plaintiff recovered possession of part of property, with two actions in justice's court for value of rest of property, defendant in replevin actions held entitled to judgment for value of property, taken in replevin actions, and to judgment of no cause of action in second justice's court case, and plaintiff entitled to judgment in first justice's court case).

1136-6 202**Cal** 478, 261P1001; 208 **Iowa**458, 223NW521 (submission of count by certain number held not erroneous).

1136-8 But see 165**Ga**142, 139SE867.

1136-9 99**CalA**240, 279P178 (three verdicts, three sets of findings, and three judgments will be treated as one verdict, one set of findings, and one judgment where three condemnation suits were consolidated). But see **TexCivA** 265SW195.

1137-13 **Ala** 129S69.

1137-18 **TexCivA** 9**SW(2d)**198. [a] **Refusal of motion** to apply proceeds of foreclosure sale after payment of costs to plaintiff's debts was erroneous where plaintiff's foreclosure suit was consolidated with junior lienholder's suit for receiver. **TexCivA** 9**SW(2d)**198.

1137-24 152**Tenn**97, 275SW340.

1137-28 152**Tenn**97, 275SW340.

1137-35 [b] **Court did not err in allowing amendment** for special lien on defendant's land as question was issuable and for jury to determine. 160**Ga**705, 129SE31.

1138-37 **Utah** 267P779.

1138-48 [a] **Order revoking order of consolidation is not error** where defendant moves to vacate order of consolidation of separate and independent transactions at same term. 40**GaA**689, 151 SE395.

1140-95 124**Misc**866, 209**NYS**566.

1141-10 **TexCivA** 275SW473.

1142-33 129**Misc**233, 221**NYS**9.

1143-43 137**Misc**122, 241**NYS**386.

1144-50 130**Misc**569, 224**NYS**330 (on motion for summary judgment).

1144-51 130**Misc**569, 224**NYS**330.

1145-74 **TexCivA** 286SW633.

1145-78 **TexCivA** 286SW633.

1145-79 **TexCivA** 286SW633.

1145-89½-New. Causes of action upon which suits have been instituted should be prosecuted and disposed of with due diligence. **TexCivA** 21**SW(2d)**309.

1146-99 77**Mont**554, 252P377.

1146-6 142**Wash**1, 251P861 (warranty of title to personal property).

1148-33 **TexCivA** 13**SW(2d)**424.

1149-45 122 **Okl** 10, 250P76, 77 [quot CJ]; 193**Wis**164, 213**NW**464 (fraud).

1149-46 96**Fla**719, 119S114; 122 **Okl** 10, 250P76, 77 [quotCJ].

1149-47 17**F(2d)**196; 93**CalA**97, 269P 468; 103**Conn**607, 132A30; 164**Ga**314, 138SE582; 121**Kan**218, 246P1010, 1011 [citCJ]; 160**La**652, 107S478; 246**NY** 152, 158NE56; 122 **Okl** 10, 250P76, 77 [quotCJ]; 160**Tenn**158, 22**SW(2d)**631; **TexCivA** 6**SW(2d)**141; 193**Wis**164, 213 **NW**464. [a] (2) Rule applied where relief is sought relative to doing of an act. 103**Conn**607, 132A30.

1149-48 37**F(2d)**393; 98**Fla**304, 123S 785; 164**Ga**314, 138SE582; 224**AppDiv** 576, 231**NYS**529; 122 **Okl** 10, 250P76, 77 [quotCJ]; **TexCivA** 22**SW(2d)**1112. But see 133**NC**420, 131SE29.

1149-49 122 **Okl** 10, 250P76, 77 [quot CJ].

1149-50 122 **Okl** 10, 250P76, 77 [quot CJ].

1149-51 98**Fla**304, 123S785; 164**Ga**314, 138SE582; 165**Ga**283, 140SE866; 40**GaA**178, 149SE81; 260**Mass**7, 157NE46; 259**Mass**365, 157NE159; **Nebr** 231NW 141; 122 **Okl** 10, 250P76, 77 [quotCJ].

1149-52 122 **Okl** 10, 250P76, 77 [quot CJ].

1149-53 22**AlaA**1, 113S651; 202**Cal** 501, 261P994; 83**NH**374, 142A702; 122 **Okl** 10, 250P76, 77 [quotCJ].

1150-54 165**Ga**283, 140SE866; 122 **Okl** 10, 250P76, 77 [quotCJ].

1150-55 122 **Okl** 10, 250P76, 77 [quot CJ].

1150-56 122 **Okl** 10, 250P76, 77 [quot CJ].

1150-57 122 **Okl** 10, 250P76.

1150-59 232**NYS**165; **TexCivA** 281SW 646.

1150-63 9**LaA**519, 119S435. [c] **Right to equitable relief** is not limited to facts existing at commencement of action. 229 **AppDiv**526, 242**NYS**398.

1150-67 16**F(2d)**378; 31**F(2d)**539.

1150-68 16**F(2d)**378; 245**Mich**24, 222**N W**215; 246**NY**152, 158NE56; 127**Misc** 884, 217**NYS**297 (provided foundation for action when commenced); 129**Misc** 493, 221**NYS**610.

1150-68½-New. , but generally must have cause for some relief at commencement, even in equity. 246**NY**152, 158**N E**56.

1151-70 16**F(2d)**290; 76**CalA**680, 245 **P**795; 164**Ga**314, 138SE582; 317 **Ill** 580, 148NE241 (petition to establish attorney's lien); 259**Mass**365, 157NE159; **Mo A** 29**SW(2d)**721; 138**Misc**564, 240**NYS** 835; 122 **Okl** 10, 250P76; **TexCivA** 1 **SW(2d)**1112.

1151-72 165**Ga**283, 140SE866; 122 **Okl** 10, 250P76.

1151-73 73**CalA**769, 239P358; 172**Minn** 320, 215NW67; 103**NJLaw**200, 134A 834. [a] **Action held not premature.**-27 **F(2d)**101 (suit against trustees for an accounting before death of life tenant).

1151-77 75**CalA**111, 241P917 (action not prematurely commenced); 260**Mass** 7, 157NE46; 259**Mass**365, 157NE159; 172**Minn**320, 215NW67; 151**Wash**237, 275P567. [a] **Suit not prematurely brought.**-160**La**963, 107S711; 144**Va**848, 130SE784; 136**Wash**35, 238P989.

1152-84 53**SD**424, 220NW857, 858 [quotCJ].

1152-86 84**Mont**585, 277P419.

1152-87 84**Mont**585, 277P419.

1152-90½-New. or for directed verdict, 253**Mass**528, 149NE321.

1152-96 158**La**874, 104S747; 84**Mont** 585, 277P419 (waiver by failure to plead in abatement).

1152-99 68**Utah**486, 251P16; **Ont** [1929] 1**DomLR**597.

1153-6 40**F(2d)**269; 196**Cal** 701, 239P 319; 207 **Iowa**239, 222NW413; 319**Mo** 149, 38**SW(2d)**1008; **MoA** 22**SW(2d)**61; **MoA** 29**SW(2d)**721; 211**AppDiv**708, 208 **NYS**228; **TexCivA** 295SW281.

1153-7 201 **Iowa**1186, 207NW247.

1153-16½-New. Date of writ presumed time of commencement in absence of other evidence. 253**Mass**528, 149NE321.

1154-30½-New. Where the court has jurisdiction of the subject matter, irregularities in initial proceedings may be waived. 203 **Iowa**726, 213NW435.

1154-30¾-New. Procedure necessary to confer jurisdiction is altogether separate and distinct from that to be observed in trial. **TexCivA** 30**SW(2d)**911.

1154-32 190**NC**580, 130SE165; 197**NC** 118, 147SE811.

1154-33 223**AppDiv**149, 227**NYS**666; 190**NC**580, 130SE165; 197**NC**79, 147SE 729(2dcase); 12**PaDist&Co** 765. [b] **Date of issuance of writ** is not conclusive evidence of commencement of action. **Mass** 170NE621. [c] **Issuing of rule to show cause not commencement of action.**-41**F(2d)**823.

1154-34 But see 92**Fla**509, 109S583.

1154-35 [a] 12**PaDist&Co** 765.

1154-36 **Mass** 170NE621.

1155-42 196**NC**345, 145SE771; 161 **Tenn**155, 25**SW(2d)**580.

1155-47 77**Mont**554, 252P377; **Tex CommnA** 272SW1105.

1155-49 [a] (4) Complaint mailed to clerk is not filed when placed in clerk's post office box. **Ala** 128S788. (5) Filing requires delivery to official required to file paper. **Ala** 128S788.

1156-50 **Ga** 155SE18.

1156-53 **Ga** 155SE18.

1156-54 40**GaA**847, 151SE663(2dcase); 144**Wash**505, 258P482.

1156-59 116**Nebr**740, 219NW1 (for purpose of summoning defendants in different counties); 22 **OhA**261, 154NE316; 133 **Okl** 267, 271P1035. [a] **Statute held not to apply to divorce proceedings.**-22 **OhA**261, 154NE316.

1156-63 166**Ga**752, 144SE324.

1156-64 [a] **Where cross complaint is filed,** no summons issued, cross action is held commenced by filing of responses and answers thereto. 173**Ark**1024, 296 **SW**27.

1156-66 86 **IndA**653, 159NE469 (action is not kept alive by delivery of summons to officer as pending cause after close of term); 86 **IndA**662, 159NE473 (writ must be executed or kept alive by alias or pluries writs).

1157-71½-New. Where a term has intervened, issuance of alias summons does not constitute commencement of new action where filing of pleading is requisite to commencement. 220**MoA**970, 272 **SW**373.

1157-75 127**Misc**173, 215**NYS**332; 227 **AppDiv**597, 238**NYS**508; 139 **Okl** 167, 281P777.

1157-76 175**Ark**285, 298SW1026.

1157-78 127**Misc**173, 215**NYS**332.

1157-82 203 **Iowa**645, 212**NW**564; 204 **Iowa**958, 216NW10 (where service of notice was quashed). [a] **Failure to file new petition pursuant to original notice** after dismissal without prejudice requires dismissal of action. 203 **Iowa**410, 226NW65 (where plaintiff attempted to refile petition on file in dismissed action).

1158-90½-New. Action is commenced when the clerk delivers the summons to be served 234**Mich**252, 208NW60.

1158-90¾-New. to a person qualified to serve it, 234**Mich**252, 208NW60.

1158-90¼-New. whether to the officer or to plaintiff's attorney. 234**Mich**252, 208NW60.

1158-93 219**MoA**99, 268SW706; **MoA** 286SW420; **MoA** 3**SW(2d)**735.

1158-1 329 **Ill** 158, 160NE222.

1159-2 100**NJEq**181, 135A74.

1159-7 **Wis** 231NW590 (as affecting right to dismissal under Corrupt Practices Act).

1159-9 105**WVa**197, 141SE789 (date of return and filing of notice with clerk in office and not date of notice determines commencement of action).

1159-20 320**Mo** 962, 9**SW(2d)**628.

1161-52 **Nev** 287P957 (refusal of stay proper).

1161-54 127**Misc**82, 215**NYS**174. [a] 147**Wash**615, 266P1054 (actions in state and federal courts).

1162-68 [a] (9) Action for fraud inducing purchase of security may be stayed until sale of property in plaintiff's foreclosure suit, so that maximum loss may be determined. 193**Wis**164, 213**N W**464. (10) Proceedings to secure final accounting of executor and delivery of possession of real estate to devisees need not be dismissed because of necessity of prior determination of heirship but proceedings may be suspended pending such determination. 77**Mont**182, 250P 812. [b] (2) Motion by junior lienor to stay distribution in surplus money pro-

ceeding pending prosecution of its action to marshal securities will be denied when made after litigation of rights, conclusion of surplus money proceeding, and motion to confirm referee's report therein. 127Misc82, 215NYS174. (3) That defendant obtained injunction in foreign jurisdiction prohibiting witnesses from testifying in pending action or giving depositions in foreign state does not give defendant right to stay of action. 176Minn636, 222NW931(2d case). (4) Stay of partition action by one of decedent's heirs in supreme court, so that property might be sold with less expense in Surrogate's Court, was properly denied. 134Misc845, 236NYS427. (5) Other instances. 135Misc715, 238NYS331.

1162–73 217Ala200, 115S302; Mass 169NE147 (discretionary); 53ND551, 207NW37, 39 [citCJ]. [c] **Surplus money proceeding may be stayed pending suit to marshal assets** where it is alleged denial of relief would permit debtor to avoid payment. 218AppDiv160, 218NYS48.

1162–74 156SC43, 152SE721. [b] (3) Lessee's suit to enjoin lessor from suing for possession held improperly stayed to await lessor's action in municipal court. 20F(2d)276.

1163–78 Sask [1928] 2DomLR400.

1163–82 126Misc601, 214NYS208.

1163–82½–New. In such case mere priority in action is insufficient to entitle plaintiff to stay action subsequently started against him. 126Misc601, 214NYS208.

1163–85½–New. Stay should not be granted where no answer has been served in the action which it is sought to stay. 213AppDiv623, 210NYS806.

1163–85¼–New. An action in the supreme court for partition will not be stayed pending probate proceedings where all those having a possible interest have been brought in. 128Misc714, 220NYS141.

1163–86 [d] (3) Where suit was brought against two defendants and escrow holder, one of whom brought suit against the other, and the contractor refused to postpone, first trial held proper. TexCivA 283SW1095.

1163–87 32F(2d)517.

1163–90 126Misc601, 214NYS208; 131Okl 224, 268P256, 257 [quotCJ].

1164–94 210Ky28, 275SW371.

1164–95 131Okl 224, 268P256, 257 [quotCJ].

1164–97 15F(2d)303; 19F(2d)68; 243Mich483, 220NW746.

1164–9½–New. Motion to stay proceedings in action to recover price of materials on ground that plaintiff had instituted proceedings to foreclose mechanic's lien held properly overruled. MoA 25SW(2d)539.

1165–25 BC [1929] 3DomLR370. But see Del 141A618.

1166–32 NJSup 136A185.

1166–35 [a] (3) Other instances. 26F(2d)752.

1167–50 232Ky785, 24SW(2d)616.

1167–58 126Misc269, 212NYS421 (proceeding by Irish free state to recover proceeds of subscriptions made by bondholders to Irish Republic stayed until one or more of such bondholders are brought in in representative capacity). But see 125Misc163, 210NYS502.

1167–58½–New. When rights of parties before the court can be determined without third parties, stay is properly denied. 26F(2d)284.

1167–59 TexCivA 24SW(2d)796 (omission of necessary party).

1167–62 Iowa 229NW673.

1167–74 [a] **Application made after motion to confirm referee's report in surplus money proceeding pending suit to marshal assets** is not too late where denial of motion would make mechanic's lien worthless. 218AppDiv160, 218NYS48.

1168–75 131Okl 224, 268P256, 257 [quotCJ].

1168–75½–New. Laches. Court in its discretion, and as a matter of law, may deny application for stay when made after inexcusable delay and after acquiescence. 127Misc82, 215NYS174.

1168–77 Wis 229NW643(2dcase).

1168–98 27F(2d)52, 59ALR665. [d] **Denial of vacation held proper.**–Plaintiffs, consenting to interpleading of additional parties, are not entitled to vacate stay granted such parties, not served with notice of trial. 133Misc484, 233NYS131.

1169–18 TexCivA 28SW(2d)253.

1169–19 144Wash505, 258P482. [a] (6) Failure to serve summons for nearly four years after issuance held abandonment under the particular circumstances. 15F(2d)733. [b] (2) Void acts of county court in rendering judgment induced by plaintiff did not show abandonment of prosecution. TexCivA 8SW(2d)711. (3) Amendment to complaint, adding party defendant without leave of court, does not constitute abandonment of original action and institution of new one. Ariz 283P279.

1169–20 [a] (3) Where demurrer to complaint by one alleged joint tortfeasor is sustained with leave to proceed against either of two defendants, election to proceed against other defendant alone will constitute abandonment of suit against first named. 34GaA290, 129SE297.

1169–20½–New. Correspondence of attorneys long after abandonment of cause held inadmissible on issue of abandonment. TexCivA 296SW703.

1169–20¾–New. Failure to prosecute action raises presumption of abandonment. TexCivA 296SW703.

1170–21 [a] **No presumption of abandonment** where statement was filed two years and ten months after commencement of suit. 6PaDist&Co 452.

1170–23 163La814, 112S731; 8PaDist&Co 50.

1170–24 163La814, 112S731.

1170–26 TexCivA 280SW243, 246 [citCJ].

1170–27 8PaDist&Co 50; TexCivA 280SW243, 246 [citCJ].

1170–28½–New. Want of action at the time of or just before the dismissal of the case for want of prosecution has been held to control in determining the question of prosecution. TexCivA 8SW(2d)711.

1171–44 Mass 167NE327; 224AppDiv355, 231NYS146.

1171–48 197Cal649, 242P725.

1171–50½–New. An action is terminated when the time for appeal has expired. 50SD474, 210NW668.

1171–50½–New. Trial is not concluded until motions for judgment and for new trial are disposed of. 116Tex29, 285SW1079, 48ALR355.

1171–50¼–New. Divorce action is not discontinued by the presiding justice's death before granting interlocutory judgment. 130Misc905, 225NYS606.

1171–50¾–New. Trial is in progress until submission to trial judge for final determination. 39F(2d)851.

ACTIO PERSONALIS MORITUR CUM PERSONA

1171–2 102WVa475, 135SE597.

ACT OF GOD

1172–15 Mo 300SW769, 773 [citCJ].

1173–24 202Cal239, 259P1096, 1099, 54ALR1392 [quotCJ].

1174–28 [a] (3) Other similar definitions. 149Va809, 141SE834. [b] 1LaA521, 523 [quotCJ].

1174–34 202Cal239, 259P1096, 1099, 54ALR1392 [quotCJ]; 82NH225, 131A601.

1175–35 202Cal239, 259P1096, 1099, 54ALR1392 [quotCJ]; 82NH225, 131A601.

1175–37 1LaA521, 523 [citCJ].

1175–38 82NH225, 131A601.

1175–39 Mo 300SW769, 773 [quotCJ].

1176–41 116Okl 38, 243P190.

1176–47 116Okl 38, 243P190.

1178–57 [b] (1) 118Nebr465, 225NW235.

1178–58 82NH225, 131A601 (negligence contributing to and increasing flowage caused by flood).

1180–72½–New. "Inevitable accident" does not mean absolutely inevitable, but it means not avoidable by any such precaution as a reasonable man doing such act then and there could be expected to take. 179Ark799, 18SW(2d)331.

ACTUAL

1184–68 252Mass306, 147NE740.

1186–84 102Conn684, 129A721; TexCivA 300SW159. [a] (1) 102Conn684, 129A721.

ACTUALLY

1186–89 208Ky606, 271SW693.

1186–89½–New. In fact; in truth. 208Ky606, 271SW693.

ACTUS CURIÆ NEMINEM GRAVABIT

1188–18 [a] 223Ky70, 2SW(2d)1049.

ACTUS NON FACIT REUM NISI MENS SIT REA

1188–30 [b] 195Cal445, 234P91.

ADDITION

1190–77 [b] (3) "In addition thereto" in statute does not necessarily imply increase, accession, or augmentation. 100WVa531, 131SE7. (4) "In addition thereto" in statute is equivalent to "also," "likewise," "besides." 100WVa531, 131SE7.

ADDITIONAL

1191–88 See also 12CustA121.

1191–90 WebsterD [quot 128Misc875, 220NYS281] ("an increase").

1192–10½–New. "additional taxes." 128Misc875, 220NYS281.

ADDRESS

1192–14 [a] **Other definitions.**–70CalA454, 233P404. [b] **Addressed.**–70CalA454, 233P404.

ADEQUATE

1193–24 77Mont205, 250P445.

1193–30 92CalA570, 268P699.

ADJACENT

1194–51 TexCivA 295SW670.

1194–52 TexCivA 295SW670.

1195–54 TexCivA 295SW670.

1195–55 TexCivA 295SW670.

1195–56 TexCivA 295SW670.

1195–59 TexCivA 295SW670.

1195–65 TexCivA 295SW670.

1195–67 TexCivA 295SW670.

1195–70 TexCivA 295SW670.

1196–71 128Kan487, 278P741(2dcase); TexCivA 295SW670.

1196–73½–New. "Adjacent" means very near; close by. 77Colo130, 235P343.

1196–73¼–New. Deviatively it means lying at; present. 77Colo130, 235P343.

1196–73¾–New. Usually connotes contact. 77Colo130, 235P343.

1196–78 TexCivA 295SW670.

1196–79 77Colo130, 235P343 (word has no fixed meaning); TexCivA 295SW670.

ADJECTIVE LAW

1197–8 149Miss455, 115S555. [b] 149Miss455, 115S555.

ADJOIN

1198–10 Mo 296SW815, 817 [citCJ].

ADJOINING

1198–12 See also Mo 296SW815, 817.

1199–23 137Misc551, 244NYS51.

1199–35 [b] (2) Buildings connected by wooden fence and exposed to fire danger in any one. TexCivA 295SW343.

ADJOINING LANDOWNERS

1202–1 TexCommnA 298SW554; 198Wis283, 223NW847. [k] **Boundary determining rights.**–Surface boundary and plane struck through such line to earth's center marks boundary between right and trespass in respect of locus of user of claimed right. TexCommnA 298SW554.

1203–4 CalA 262P377.

1203–5 231Ky745, 22SW(2d)131; 291Pa258, 139A914; TexCommnA 298SW554. [h] **Landowner is not required to erect barriers** to protect himself against negligence of adjoining owners. MoA 295SW830.

1204–9 291Pa258, 139A914 (making fill on upper slope of erosional valley).

1205–24 [a] (3) Doctrine of res ipsa loquitur applies to damage to house from collapse of wall of building in process

of construction on adjoining land. 253 IllA509. (4) In such case burden rests on person constructing building merely to rebut presumption of negligence and not to prove due care. 253 IllA509. [c] (4) To show injury by new use of adjoining premises. 37GaA216, 139SE591.

1205–26 MoA 5SW(2d)649.

1206–32 MoA 300SW311 (evidence that vibration of plaintiff's building was caused by operation of steam shovel in excavating on adjoining land held admissible).

1206–34 20 OhA261, 151NE798.

1206–35 20 OhA261, 151NE798.

1207–46 [a] (2) See also 20 OhA261, 151NE798. (5) Blasting causing only trifling concussion and not causing any injury to property or interference with peaceful enjoyment cannot be enjoined. 20 OhA261, 151NE798.

1207–51 [a] (3) TexCivA 276SW471.

1208–52 97CalA106, 275P492 (in space above land).

1208–59 187Wis598, 204NW510 (owner of encroaching gutter, having notice of proposed height of building to be erected by adjoining owner, cannot complain of its removal by latter).

1208–61 97CalA106, 275P492; 244 Ill A71; 160La52, 106S672; 258Mass221, 154NE763; TexCivA 276SW471; 148 Wash328, 268P889 (removal not denied because of inconvenience to defendant). But see DelCh 145A171. [f] **Action commenced within reasonable time.**–258Mass221, 154NE763.

1208–62 97CalA106, 275P492.

1208–62½–New. Fact that pecuniary damage in land value is not substantial is immaterial. 258Mass221, 154NE763.

1209–64 See also 244 IllA71.

1209–66 258Mass221, 154NE763.

1209–67 97CalA106, 275P492; 234 Ill A458, 476 [citCJ]; 125Kan214, 217, 264 P25 [quotCJ]; 258Mass221, 154NE763 (removal not inequitable, though damage apparently not substantial). But see 244 IllA71.

1209–71 136Wash39, 238P902. [c] **Complaint held sufficient.**–194Wis559, 217NW307. [d] **Persons liable.**–194Wis 559, 217NW307.

1209–71½–New. But one suing to establish boundary line may not recover damages for refusal to remove encroaching building and fence. 161La91, 108 S136.

1210–78½–New. Question of law and fact. In an action for damages for trespass to real property, the question of defendant's liability for construction of a building projecting over the line is one for the jury. 136Wash39, 238P902.

1211–2 MoA 5SW(2d)649, 652 [citCJ].

1212–3 256 IllA255; 259Mass113, 156 NE30; 172Minn428, 215NW840, 55ALR 461; 82Mont467, 267P805; 20 OhA180, 152NE758; 284Pa248, 131A283 (regardless of negligence); 49RI 209, 141A609, 59ALR1241; TexCommnA 298SW554, 559 [citCyc]; 148Va455, 139SE314; 198 Wis233, 223 NW847; Alta [1924] 2DomLR942, [1924] 2WestWkly981. [a] (2) 148Va455, 139SE314. [b] 148Va455, 139 SE314.

1212–7 172Minn428, 215NW840, 55ALR 461; 194Wis559, 217NW307.

1212–8 TexCommnA 298SW554, 559 [citCyc]. [b] **So far as it may be said to be a right in land** it is a right in supported land and not in supporting land. 83CalA485, 256P1116 (not easement).

1212–9 83CalA485, 256P1116.

1213–11 82Mont467, 267P805; 284Pa 248, 131A283; 49RI 209, 141A609, 59 ALR1241; TexCommnA 298SW554, 559 [citCyc]; Alta [1924] 2DomLR942 [1924] 2WestWkly981.

1213–12 20 OhA180, 152NE758.

1214–22 [b] **Power to prevent during statutory period** is essential to application of doctrine of prescription. 82Mont 467, 267P805.

1214–27 259Mass113, 156NE30; 172 Minn428, 215NW840, 55ALR461; 82 Mont467, 267P805; 49RI 209, 141A609, 59ALR1241; TexCommnA 298SW554; 194Wis559, 217NW307. But see 178Ark 375, 10SW(2d)865. [f] **Mere threat or probability of removal of lateral support in future is insufficient basis for damages** where there was no physical disturbance. Wash 286P657.

1215–33 But see 178Ark375, 10SW(2d) 865.

1215–35 284Pa248, 131A283.

1216–37 82Mont467, 267P805, 810 [cit CJ]; 49RI 209, 141A609, 59ALR1241.

1216–38 49RI 209, 141A609, 614, 59AL R1241 [quotCJperRathbun,J,dis.op.].

1216–41 82Mont467, 267P805; 200NY 83, 93NE267.

1218–53 20 OhA180, 152NE758. [b] **Persons to be served.**–82Mont467, 267P 805. [c] **Sufficiency of service.**–82Mont 467, 267P805 (notice in writing left at owner's residence in his absence held sufficient). [d] **Effect of failure to give notice.**–82Mont467, 267P805. [e] **Statute does not require excavator** to furnish support for buildings. 82Mont467, 267 P805.

1218–54 82Mont467, 267P805 (notice held sufficient).

1218–57 82Mont467, 267P805.

1218–61 256 IllA255; 82Mont467, 267P 805. [b] **Right to enter and shore at own expense.**–256 IllA255.

1219–62 82Mont467, 267P805.

1219–63 256 IllA255.

1219–67 [c] (2) 20 OhA180, 152NE758. [f] **That the excavation was made by an independent contractor** held not to relieve owner from absolute duty imposed on him by statute. 103NJLaw434, 135 A877, 50ALR482.

1219–68 136Misc480, 241NYS14.

1219–69 20 OhA180, 152NE758.

1220–76 103NJLaw434, 135A877, 50AL R482.

1220–82 194Wis559, 217NW307; 198 Wis233, 223NW847.

1220–86 198Wis233, 223NW847.

1221–90 194Wis559, 217NW307.

1221–91½–New. A landowner, who had already sued the city for damages to her property abutting on the street resulting from lowering the grade line of the street, cannot subsequently recover from an adjoining landowner for damages caused by his excavation of his lot to the street level. 178Ark375, 10SW(2d)865.

1221–92 168Ga164, 147SE38; 256 IllA 255; 102NJEq213, 140A261; TexCommnA 298SW554; 194Wis559, 217N W307 (general owner held liable for negligence of contractor).

1221–93½–New. A general contractor who sublet excavating work is not liable since the owner cannot delegate the duty to furnish lateral support. 194Wis 559, 217NW307.

1222–2 But see 198Wis233, 223NW847.

1222–3 82Mont467, 267P805 (not deciding question); Alta 5DomLR365, 20 WestLR197, 7WestWkly716.

1223–13 But see 256 IllA255.

1223–23 194Wis559, 217NW307 (complaint held sufficient).

1224–36 MoA 300SW311.

1224–37 104NJLaw26, 138A699.

1224–42 [a] (3) To go to jury on question of negligent excavating. 259Mass 113, 156NE30. (4) To show that land on which building stood would not have subsided in its natural condition. 82 Mont467, 267P805. (5) To support verdict. 232Ky670, 24SW(2d)570.

1225–45 103NJLaw434, 135A877, 50AL R482; 104NJLaw26, 138A699.

1225–46 But see NJ 143A733(1stcase).

1225–48 49RI 209, 141A609, 615, 59AL R1241 [quotCJperRathbun,J,dis.op.].

1226–57 232Ky670, 24SW(2d)570. [a] **Court held to have improperly limited damages,** under evidence. 232Ky670, 24 SW(2d)570.

1226–67 [b] (3) Instruction allowing separate finding of damages to house and lot held not error. 232Ky670, 24S W(2d)570.

1227–73 128Misc419, 219NYS681.

1228–85 [e] Landowner can avail himself of light and air without injuring neighbor or claiming adversely to neighbor. 230AppDiv71, 243NYS385.

1228–87 50ND741, 197NW885, 887, 31 ALR1296 [citCJ].

1229–91 [c] **In Porto Rico.**–33Porto Rico 325(2dcase); 35PortoRico 100.

1229–92 164Minn516, 205NW446, 447 [quotCJ]; TexCivA 276SW471.

1229–94 TexCivA 276SW471; 194Wis 110, 216NW140.

1230–95 251Mich684, 232NW223; 117 Nebr245, 220NW278.

1230–97 [a] **Statute was intended to prevent fences or structures exceeding ten feet** in height measured from natural level of soil. 226AppDiv78, 234NYS384.

1230–98. [c] 226AppDiv78, 234NYS384.

1230–99 219AppDiv747, 220NYS163.

1231–12 [a] (2) To show defendant acted in good faith in erecting screens near boundary. 232Ky842, 24SW(2d) 909.

1231–14 164Ga457, 139SE9.

1232–16½–New. A landowner cannot recover from a contractor for work on adjoining land for damages from water draining onto his land in the absence of proof that the water was discharged by such contractor and not by another independent contractor. 80CalA371, 252 P332.

1233–34 104NJLaw26, 138A699.

1233–35 104NJLaw26, 138A699, 700 [citCJ].

ADJOURNMENT

1235–9 241NY389, 150NE303.

ADJUNCTS

1237–26 See also 12CustAUS425.

ADJUST

1237–32 72CalA179, 236P972.

1237–33 72CalA179, 236P972.

1237–34 TexCivA 294SW953, 958 [cit CJ].

1237–35 TexCivA 294SW953, 958 [cit CJ].

1237–36 TexCivA 294SW953, 958 [cit CJ].

1237–37 72CalA179, 236P972, 975 [quot CJ].

ADJUSTER

1237–41 130 Or50, 278P87.

1237–42 89 IndA59, 165NE766 (appointed).

ADJUTANT

1238–45½–New. The principal staff officer. Webster D. [quot 77Colo516, 238 P44, 46].

ADMINISTER

1239–62 [a] **To "administer" the law,** as used in a statute, has been held to refer to the performance of ministerial acts, rather than to any steps taken to enforce or resist enforcement of law. 34 Wyo 349, 244P135.

ADMINISTRATIVE

1240–78 [d] **"Administrative" commission** performing legislative work delegated to it administers details and acts as "administrative" arm of legislature. 284Pa421, 131A253.

ADMIRALTY

1249–16 35F(2d)602; 216AppDiv274, 214NYS732. [c] **Reference is to general system** of maritime law which was familiar to lawyers and statesmen of country when constitution was adopted. 216 AppDiv274, 214NYS732.

1250–17 84 IndA155, 150NE615; 216 AppDiv274, 214NYS732. [c] **Cross-bill libel for breach of maritime contract** is within jurisdiction of district court. 9F(2d)17.

1250–21½–New. The circuit court could sell vessels where licnors voluntarily submitted themselves to the circuit court's jurisdiction. 180Fed973, 104OCA 129.

1251–46 Can [1926] 4DomLR339, [1926] 3WestWkly241 [app allowed on other grounds [1927]CanExchl, [1927] 1DomLR138].

1251–47 279US109, 49SCt296, 73Led 632 (admiralty jurisdiction is not limited to transportation of goods from one state to another or to foreign countries, but extends to all admiralty and maritime cases); 13F(2d)433; 14F(2d)949; 17F(2d)239; 19F(2d)645; 169Ga325, 150SE424 (absolute and exclusive); 152 Va121, 146SE298 (international or interstate traffic not essential to exclusive admiralty jurisdiction). [a] (2) Phrase refers to concept of jurisdiction when constitution was adopted. 17F(2d)239.

1251–48 [a] **Admiralty jurisdiction**

cannot be acquired by concealing for a time facts showing it does not exist. 270US253, 46SCt212, 70L ed571.

1251–50½–New. An admiralty court is not a court of equity. 9F(2d)838.

1251–50¼–New. If admiralty adopts a statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. 14F(2d)949.

1251–50¼–New. Courts of admiralty will not take or maintain jurisdiction over nonmaritime claims. 14F(2d)949.

1251–50⅛–New. Jurisdiction in admiralty is not limited to liquidated or agreed claims. 15F(2d)749.

1251–50⅛–New. The admiralty court's decision to try or refuse to hear a case is only through the exercise of judicial discretion. 27F(2d)1002.

1251–50½–New. The supreme court of Nova Scotia has jurisdiction in an action for collision within the province's harbor. NS [1929] 2DomLR925.

1251–50⅛–New. Generally, maritime law of United States may be changed by Congress. 35F(2d)602.

1251–50½–New. Maritime law, no less than common law, is capable of growth by judicial decision. 35F(2d)717.

1252–53½–New. Statute of District of Columbia is applicable to action against Emergency Fleet Corporation, that being domicile of such corporation. 16 F(2d)948.

1252–53⅛–New. Jurisdiction and laws of nation follow ship wherever it may be water-borne. 16F(2d)948.

1252–53¼–New. Death statute of District of Columbia applies to action against Emergency Fleet Corporation. 16 F(2d)948.

1252–57 17F(2d)250; 18F(2d)305; 22 F(2d)329; 28F(2d)436; 36F(2d)712; 39F(2d)639.

1252–59 25F(2d)736.

1252–60½–New. Congress cannot delegate to a state power to control maritime matters. 12PortoRicoFed262.

1252–60⅛–New. Admiralty and maritime law itself is subject to change by Congress. 251NY218, 167NE422.

1252–61 278US142, 49SCt88, 73L ed232; 7F(2d)386 (Workmen's Compensation Act); 7F(2d)922 (acceptance of compensation under state law held not election of remedies barring libel in admiralty); 30F(2d)402; 216AppDiv274, 214 NYS732; 152Va121, 146SE298. See also 30F(2d)402. But see 270US59, 46 SCt194, 70L ed470; 31F(2d)497. [b] **Arbitration law of New York** cannot affect remedy admiralty offers. 5F(2d) 218. [c] **Allegation held not to show agreement** that Compensation Act should be measure of future injuries. 7F(2d) 386. [d] **Posting notices** and doing things required by Compensation Act held not to be a holding out to employees of employer's obligations under the act. 7F(2d)386. [e] **Payment of compensation** to plaintiff for injuries as provided by Compensation Act held not to show intention to exclude general maritime law. 7F(2d)386. [f] **Form of agreement** between employer and employee to adopt state law as measure of rights must depend on facts in each case. 7F(2d)386. [g] **Agreement between employer and employee** to adopt state law as measure of rights need not be in writing. 7F(2d)386. [h] **Allegations held not to show** agreement to substitute Compensation Act so as to deprive defendant of benefit of general maritime law. 7F(2d)386. [i] **Allegations that defendant held out to plaintiff** protection of Workmen's Compensation Act held not to show agreement to fix act as measure of rights of parties. 7F(2d)386. [j] **Choses in action for tort** made assignable by compensation law of state include rights arising out of maritime torts. 134Misc370, 235 NYS646. [k] **Statute is not materially prejudicial to maritime law** which makes compensation law applicable to injuries subject to maritime law. 134Misc370, 235NYS646.

1252–63 24F(2d)582.

1252–64 200Cal579, 253P926 (local matters); 296Pa34, 145A603.

1252–64½–New. The state is impotent to confer jurisdiction over the subject matter of maritime tort on industrial board or workmen's compensation commission, with or without consent of the parties. 216AppDiv274, 214NYS732.

1253–65½–New. An employee of a stevedore company injured while on board a vessel has three courses open to him against the steamship company—an action in rem against the vessel, in personam in the admiralty court, or in personam on the common-law side of the state court. 206Cal 622, 275P410.

1253–66 212Ky457, 279SW616; 102 NJLaw337, 132A89; 244NY132, 155NE 74 (where tort is peculiarly maritime, law of state must bend to supreme law of land).

1253–67 274US427, 47SCt695, 71L ed 1135; 4Fed552; 212Ky457, 279SW616, 617 [citCJ]; 12LaA260, 125S469; 309 Mo 224, 274SW758; 216AppDiv274, 214 NYS732; 194NC663, 140SE612; 123Or 326, 262P220.

1253–67½–New. The clause did not confer on any suitor the right to choose between principles of maritime and local law with respect to determining rights and remedies. 216AppDiv274, 214NYS 732.

1253–67½–New. It simply conferred the privilege of having rights and obligations, as sanctioned by the maritime law, determined in the state tribunal when it is competent for the purpose. 216AppDiv274, 214NYS732.

1253–67¼–New. Except for this clause jurisdiction of federal courts is exclusive. 216AppDiv274, 214NYS732.

1253–67⅛–New. Remedy under workmen's compensation acts is not saved to suitors by the clause. 216AppDiv274, 214NYS732.

1253–67⅛–New. Statutes providing for jurisdiction unknown to common law is not within the saving clause and hence ineffective to destroy exclusive federal jurisdiction. 216AppDiv274, 214NYS 732.

1253–67⅛–New. Industrial board held without jurisdiction to award damages for injuries on navigable waters without waiver of cause in admiralty. 244NY 132, 155NE74.

1253–68 200Cal 579, 253P926; 194NC 663, 140SE612.

1253–69 274US427, 47SCt695, 71L ed 1135; 200Cal 579, 253P926; 194NC663, 140SE612.

1253–70 274US427, 47SCt695, 71L ed 1135; 200Cal 579, 253P926; 193Wis515, 213NW658. [a] (1) 193Wis515, 213NW 658 (Death Act). [b] **Alternative request for recovery under Workmen's Compensation Act** held no bar to relief in state court in "common-law remedy" for maritime tort. 274US427, 47SCt695, 71L ed 1135. [c] **Under state statutes giving remedy in nature of common-law relief** recovery is limited to that permitted by Federal Admiralty Law. 274US427, 47 SCt695, 71L ed1135.

1253–70½–New. A state compensation act superseding a state law does not conflict with the Maritime Law, regardless of theory for award. 200Cal 579, 253 P926.

1253–70⅛–New. A seaman, injured on land in connection with the work of launching a boat, held entitled to compensation under the act. 200Cal 579, 253P926.

1253–71 7Alaska192; 309Mo 224, 239, 274SW758 [quotCJ].

1254–72 277Fed391 [mod 263Fed958]; 31F(2d)497; 206Cal 622, 275P410; 309 Mo 224, 239, 274SW758 [quotCJ]. [c] 194NC663, 140SE612. [g] **Admiralty has exclusive jurisdiction** where injury occurred on completed vessel on floating dry-dock on navigable waters. 102 NJLaw337, 132A89.

1254–73 4WallUS411, 18L ed397; 156 Fed692; 159Ky414, 422, 167SW384, AnnCas1915D40 [quotCyc].

1254–77 177US638, 20SCt824, 44L ed 921; 35Fed314; 40Fed677; 135Fed730, 68CCA368; 184Fed305, 106CCA447; 191Fed960, 112CCA372; 209Fed882, 884 [quotCyc]; 235Fed595 (Maine); 11Ark 662; 34CalA210, 167P171; 159Ky414, 167SW384, AnnCas1915D40; 64Miss523, 18739; 39NY19; 43NY554, 3AmR731; 44NY415; 59NY554. [a] **Barge owners acquire no maritime lien against tug as basis of action in rem** if charterer, as owner pro hac vice, was in possession and control at time of stranding. 43 F(2d)858. [b] **Necessity for showing existence of maritime lien.**–43F(2d)858.

1255–78 173Fed471, 97CCA477 [certiorari den 215US600, 30SCt400, 54L ed 343]; 34CalA210, 167P171.

1255–79 93US355, 23L ed903.

1255–80 6BlackInd148.

1255–84 80Fed545, 25CCA628; 13F (2d)382.

1255–84½–New. American ship on high seas retains her allegiance to sovereignty of United States. 13F(2d)433.

1256–89½–New. In admiralty wharf or dock to which vessel is attached is regarded as land not water. 15F(2d)580.

1256–91 25 OhA444, 158NE586, 588 [cit CJ].

1256–92 141US1, 118Ct840, 35L ed631; 80Fed545, 25CCA628; 17F(2d)239; 52 Ill 373; 251NY218, 167NE422; 25 OhA 444, 158NE587, 588 [citCJ].

1256–92½–New. Admiralty jurisdiction extends to libel growing out of negligence of repairer while vessel is in drydock. 13F(2d)3.

1257–93 [i] **Great Lakes are high seas.** 25 OhA444, 158NE587. [j] **Detroit River** is navigable river within jurisdiction of admiralty courts. 242Mich454, 219N W730.

1258–2 23F(2d)103 (seizure in river between states).

1258–10 15F(2d)604; 25F(2d)134 (collision between American vessels in foreign waters); 26F(2d)175 (foreign corporation); 37F(2d)615(1stcase). But see 214AppDiv226, 212NYS56.

1258–11 281US515, 50SCt400, 74L ed 1008; 26F(2d)935.

1259–12 20F(2d)362.

1259–13 281US515, 50SCt400, 74L ed 1008; 15F(2d)202; 19F(2d)528; 22F (2d)326 (in court's discretion); 25F(2d) 984; 33F(2d)280 (libel for recovery of deposit to release cargo from alleged general average lien); 43F(2d)857.

1259–15 22F(2d)326; 27F(2d)1002; [1927]CanExch44, [1926] 64DomLR543, [1926] 3WestWkly309.

1259–16 7F(2d)739 (extreme conditions requiring exercise of admiralty jurisdiction held not to exist); 20F(2d)362.

1260–17 20F(2d)362; 43F(2d)857. [a] (2) District court should not refuse jurisdiction of action to recover deposit given to release cargo from general average lien on ground that general average is to be determined by law of port of discharge where convenience of witnesses would be subserved by retaining jurisdiction. 33F(2d)280. [b] **Matter within discretion of court.**–27F(2d)1002.

1260–17½–New. Generally, where there is a choice of forum, libelant has the right of choice. 27F(2d)1002.

1260–18 16F(2d)984.

1260–22 11F(2d)971.

1260–28 20F(2d)362.

1260–31 27F(2d)1002.

1261–34 40F(2d)652.

1261–35 [c] **Seamen's Act of March 4, 1915,** except as to wages, does not require federal court to take jurisdiction of controversy between seamen and master of foreign ship. 7F(2d)739. [d] **Libel to establish breach of contract** as able seaman with vessel on ground that vessel is unseaworthy and recover balance of wages, suit being between foreigners, cannot be maintained under Comp. St. § 8322. 15F(2d)210.

1262–44 17F(2d)308, 309 [quotCJ].

1262–45 25F(2d)984.

1262–50 30F(2d)951.

1262–57 18F(2d)983. [b] **Vessel in drydock afloat on navigable waters** is within maritime jurisdiction. 214App Div226, 212NYS56. [c] **Vessel moored to wharf or lodged against pier** is within maritime jurisdiction. 214AppDiv226, 212NYS56.

1263–70 5LaA190, 191 [quotCJ].

1264–71 295Pa18, 144A753(2dcase).

1265–30 4F(2d)845.

1265–9 See also 272US675, 47SCt289, 71 L ed472.

1265–11 40F(2d)439. [a] **Unliquidated claims.**–22F(2d)585.

1266–14½–New. Generally, any work performed on navigable waters is essentially maritime in nature and controlled by principles of admiralty. 141**Wash** 172, 251**P**130.

1266–14½–New. Arbitration Act of 1925 (Comp. St. § 1251½—15) contemplates only such agreements as may be carried out in the United States, within the jurisdiction and under control of United States courts. 18**F(2d)**144.

1266–14½–New. Parties to a maritime contract generally contemplate that the Maritime Law will control. 200**Cal** 579, 253**P**926.

1266–15 30**F(2d)**402; 22**AlaA**575, 117**S** 914; 75**CalA**19, 241**P**894; 12**PortoRico Fed**262; 141**Wash**172, 251**P**130. [b] **Admiralty has no jurisdiction** of actions in nature of fraud or deceit arising out of maritime contracts. 16**F(2d)**372.

1266–16 80**Fed**545, 25**CCA**628; 129**Fed** 814, 817 [cit 21**FCasNo** 12,542; 19**FCas No** 11,017, 1**Blatchf&H**385]; 148**Fed**290 [aff 153**Fed**870, 83**CCA**52 (certiorari den 207**US**587mem, 28**SCt**255mem, 52**L ed**352 mem)]; 9**F(2d)**838 (contract relating to ships as instruments of commerce); 16 **F(2d)**372; 28**F(2d)**624; 42**F(2d)**222; 84 **IndA**155, 150**NE**615; 162**La**151, 110 **S**182; 32**Minn**358, 20**NW**354; 73**NJEq** 192, 67**A**1016; 28 **OhSt**602, 22**AmR**397; 113 **OhSt**96, 148**NE**572, 574 [citCJ]. [a] (2) Where the maritime part is divisible from the rest and may be separately adjudicated it is within admiralty jurisdiction. 42**F(2d)**222. (3) Admiralty may take jurisdiction over maritime obligations divisible from nonmaritime provisions. 42**F(2d)**58. [i] **Contracts insuring against injury to employees.**–Where longshoreman was injured while loading British steamer in navigable waters, action against employer's insurers cannot be maintained in state court. **TexCivA** 276**SW**336. [j] **Contract for operation** of vessel is maritime within admiralty jurisdiction. 42**F(2d)**222.

1267–17 148**Fed**426; 84 **IndA**155, 150 **NE**615; 113 **OhSt**96, 148**NE**572, 574 [cit CJ].

1267–18 [h] **Contract for sale of coal to be shipped in vessels** sailing ten days apart, and to be landed at docks, does not involve maritime question. 19**F(2d)** 645. [i] **Bond given by charterer** to secure his performance is not "maritime contract." 151**Fed**440, 444, 80**CCA**670.

1267–20 70**Fed**870, 871; 129**Fed**814; 5 **F(2d)**251; 16**F(2d)**372; 19**F(2d)**645; 40**F(2d)**439; 42**F(2d)**222; 84 **IndA**155, 150**NE**615; 113 **OhSt**96, 148**NE**572. But see 19**F(2d)**777. [a] 36**F(2d)**390. [c] **Through bill of lading** issued by railroad company for carriage of goods which could be made wholly by rail does not become maritime contract because part of transportation is made by water. 5**F(2d)**251. [d] **Employment to upholster boat on river** held not "maritime contract." 84 **IndA**155, 150**NE**615. [e] **False representations inducing issuance of marine insurance** which form basis of action to recover payment ousts admiralty court of jurisdiction. 12**F(2d)** 931.

1267–21 277**US**135, 48**SCt**505, 72**L ed** 820; 7**F(2d)**485; 36**F(2d)**390; 43**F(2d)** 589.

1268–23 42**F(2d)**222.

1268–24 16**F(2d)**372.

1268–25 16**F(2d)**372.

1268–28 129**Fed**814.

1270–52 249**US**119, 39**SCt**221, 63**L ed** 510; 205**Ala**24, 87**S**598; 137**Mass**360; 39**NY**19; 43**NY**52, 3**AmR**660 [aff 3**Lans** 417]; 29**NYSuper**23.

1270–53 249**US**119, 39**SCt**221, 63**L ed** 510; 20**HowUS**393, 15**L ed**961; 22**How US**129, 16**L ed**291; 95**Fed**832; 133**Cal** 479, 65**P**1032, 85**AmSR**215; 23 **OhSt** 565; 75**Pa**297; 94**Wash**477, 162**P**590.

1270–57 121**Pa**231, 15**A**521, 1**LRA**505.

1270–59 23**F(2d)**611; 31**F(2d)**401; 43 **F(2d)**736. But see 37**F(2d)**103(1stcase). [a] (5) Charterer's agreement to ship coal to consignee in vessels sailing a certain number of days apart, and to deliver it on land, has been held not enforceable in admiralty. 27**F(2d)**795 [certiorari den 49**SCt**179(4thcase)].

1271–60 31**F(2d)**804.

1272–71 [b] **Suit for damages to foreign shipment** under railroad through bill of lading against railroad, damages occurring at sea, is cognizable in admiralty. 40**F(2d)**39.

1272–73 15**F(2d)**97. [b] 19**F(2d)**777.

1272–74 7**F(2d)**793.

1272–77½–New. Where the assets of a corporate charterer, impleaded under Admiralty Rule 56, in a shipowner's suit for demurrage had been transferred to another corporation, admiralty had no jurisdiction to apply such assets to the shipowner's claim. 27**F (2d)**795 [certiorari den 49**SCt**178(4th case)].

1272–78 11**WallUS**1, 20**L ed**90; 22**F (2d)**585; 33**F(2d)**293 (admiralty held to have jurisdiction, though action was virtually for money had and received or for accounting of trust funds).

1273–86 16**F(2d)**372. [a] 142**Fed**439, 73**CCA**555; 157**Fed**625, 87**CCA**14, 14 **LRANS**1161. [d] **Contract between agent and Shipping Board** to keep agent insured against cargo liability is not within admiralty jurisdiction. 42**F (2d)**222. [e] **Contract to procure insurance** on cargo is nonmaritime. 42**F (2d)**222.

1273–88 12**F(2d)**931 (action by company to recover payment); 16**F(2d)** 372.

1273–89 10**F(2d)**389 [quotCJ]. [b] **Questions concerning partnership** are not cognizable by admiralty. 10**F(2d)** 389.

1274–94 80**Fed**545, 25**CCA**628.

1274–95 200**Cal** 579, 253**P**926. [i] (1) 200**Cal** 579, 253**P**926. (2) Seaman's assistance in work on shore does not render contract severable. 200**Cal** 579, 253**P**926. [k] **Contract constituting person general passenger and freight agent** is not maritime contract. 86**Fed** 351.

1275–98 [e] **Assistant wharfinger is land employee.**–**Cal** 292**P**120.

1276–6 242**Mich**454, 219**NW**730. [e] **Contract to furnish seine and accessories** to fishing vessel. 9**F(2d)**17. [f] **Slips in navigable river** used for repairing ships partake of nature of main river. 242**Mich**454, 219**NW**730.

1276–7½–New. The formal requirements of a city charter do not control in an admiralty suit by a contractor to recover for extra work not covered by a lump sum contract for repair and equipment of a city dredge. 33**F(2d)** 541.

1276–8 [a] 191**US**17, 24**SCt**8, 10, 48**L ed**73.

1276–12 [b] (1) **PrEdwIsl** [1929] 4**Dom LR**719.

1277–18 9**F(2d)**838.

1277–22 15**F(2d)**886; 40**F(2d)**439.

1278–27 19**F(2d)**645; [a] 9**F(2d)**838 (admiralty court not court of equity).

1278–29 56**Fed**159.

1278–31 2**F(2d)**875.

1279–43 113**Ala**555, 21**S**136, 59**AmSR** 147; 23**Fla**311, 2**S**662. [b] **Agreement of parties cannot confer jurisdiction** over nonmaritime claim attempted to be changed into maritime claim by agreement. 23**F(2d)**95.

1279–46 173**Fed**471, 97**CCA**477 [certiorari den 215**US**600mem, 30**SCt**400mem, 54**L ed**343mem]; 230**Fed**1017; 9**FCas No** 5,038, 2**Abb**74, 1**Sawy**353. [e] **Some authorities** hold that such statutes are enforceable in admiralty against foreign ships. 22**Fed**342. [f] **Effect of Amendment of 1859.**–1**BlackUS**522, 17**L ed**180; 23**Fed**200; 1**FCasNo** 78, 1**Ben US**309; 13**FCasNo** 7,137; 18**FCasNo** 10,-213; 30**FCasNo** 18,169, 2**CliffUS**29.

1279–47 36**Fed**197; 100**Fed**104, 40**CCA** 301; 124**Fed**842; 135**Fed**730, 68**CCA** 368; 147**Fed**847; 156**Fed**302; 156**Fed** 378; 159**Fed**1005; 176**Fed**93, 99**CCA** 107; 176**Fed**499, 100**CCA**57; 184**Fed** 305, 106**CCA**447; 189**Fed**540; 206**Fed** 268, 124**CCA**332 [aff 196**Fed**137]; 265 **Fed**427; 27**F(2d)**72; 2**FCasNo** 647; 8 **FCasNo** 4,283, 11**Blatchf**451 [aff 94**US** 518, 24**L ed**167]; 10**FCasNo** 5,425; 13 **FCasNo** 7,109, 1**Lowell** 375; 14**FCasNo** 7,842; 21**FCasNo** 12,649; 3**Biss**344; 23 **FCasNo** 13,787 [rev 23**FCasNo** 13,788]; 24**FCasNo** 14,364, 1**BrownAdm**537.

1280–48 242**Fed**173. [a] 3**FCasNo** 1,-640, **Crabbe**426; 22**FCasNo** 13,305, 1 **Bond**189; 29**FCasNo** 17,607, 6**McLean** 587.

1281–56 12**F(2d)**970 (any irregularity in initial seizure is waived by filing claim or answer).

1281–61½–New. An American vessel may be searched in a proper case beyond the twelve-mile limit. 31**F(2d)** 499.

1281–65 26**F(2d)**354.

1282–84 274**US**501, 47**SCt**735, 71**L ed** 1171.

1283–96 [c] (2) Admiralty court had jurisdiction of claims asserted against shipowner, and could impose personal liability on petitioner, though court did not have res in its possession. 31 **F(2d)**767. (3) Proceeding for limitation of shipowner's liability amounts to administration of equity in admiralty court. 31**F(2d)**767.

1285–15 272**US**675, 47**SCt**289, 71**L ed** 472; 278**US**142, 49**SCt**88, 73**L ed**232; 15**F(2d)**391 (injury to raft of logs tied to boom in harbor); 16**F(2d)**475; 17**F (2d)**613; 20**F(2d)**465 (injury to ship's carpenter due to negligence of employer); 27**F(2d)**72; 30**F(2d)**247; 169**Ga** 325, 150**SE**424; 1**LaA**536; 7**LaA**495; 240**NY**292, 148**NE**527; 244**NY**132, 155 **NE**74 (in absence of waiver); 214**App Div**226, 212**NYS**56 (admiralty does not claim jurisdiction over torts except purely "maritime torts"). [c] (2) To injury to stevedore working on vessel on navigable waters. 126**Misc**816, 214 **NYS**218. [d] **Want of admiralty jurisdiction** over torts occurring on land is not extended by Merchant Marine Act, provisions relating to damages for injuries sustained "on board vessel or in its service" referring to service on of about the ship. 5**F(2d)**462. [e] **Injury to stevedore** working on vessel on navigable waters is maritime tort. 126 **Misc**816, 214**NYS**218. [f] **Workmen's Compensation Act is not applicable.**–22 **AlaA**575, 117**S**915 (repair work in dry dock on vessels used on navigable waters). [g] **Negligence in failing to exercise proper care in storage of grain on vessel** does not constitute maritime tort. 36**F(2d)**390. [h] **Suit in state court** for employee injured by maritime tort can only be maintained by a seaman. **NJ** 150**A**670.

1285–16 7**F(2d)**741.

1285–17½–New. **State Workmen's Compensation Law**, whether elective or compulsory, cannot displace admiralty jurisdiction of federal courts, or common-law jurisdiction of state court. 217**AppDiv**775, 217**NYS**194.

1285–18 272**US**675, 47**SCt**289, 71**L ed** 472; 6**F(2d)**893; 29**F(2d)**792; 30**F (2d)**402; 31**F(2d)**486; 36**F(2d)**390 (tort committed on navigable waters as distinguished from its committal aboard vessel); 42**F(2d)**742(2dcase); 22**AlaA**575, 117**S**914; 75**CalA**19, 241**P** 894; 244**NY**132, 155**NE**74; 214**AppDiv** 226, 212**NYS**56 (locality of accident governs admiralty jurisdiction thereof); 12**PortoRicoFed**262; 152**Val**121, 146**SE**298 (State Workmen's Compensation Act is inapplicable, if person injured was employed under maritime contract and injured on water within admiralty jurisdiction); 135**Wash**260, 237**P**711, 241**P**969 (remedy of workmen injured while loading ocean ship who work wholly on shore is under state statutes, and maritime law controls if working on vessel); 141**Wash**172, 251 **P**130. See also 5**LaA**284. [c] 240**NY**292, 148**NE**527 (injury on floating raft). [e] **Where locus of accident is maritime, though service is not**, admiralty has jurisdiction. 240**NY**292, 148**NE** 527. [f] **Employee, injured while standing on floating raft** in navigable waters, is governed by maritime law. 240**NY**292, 148**NE**527. [g] **Nature of work may test jurisdiction.**–22**F(2d)** 843; **CalA** 241**P**894; **NJ** 132**A**89; 244 **NY**132, 155**NE**74. [h] **Where locus of work alone** is maritime, state compensation act may in some cases give remedy without violating federal jurisdiction. 244**NY**132, 155**NE**74. [i] **Where both contract and tort are maritime**, state compensation acts do not apply, unless matter is of purely local concern. 22**F(2d)**843.

1286–19 279**US**109, 49**SCt**296, 73**L ed** 632. See also 30**F(2d)**247. [b] **Long-**

shoreman, injured while at work on foreign vessel in navigable waters of United States, is entitled to recover in admiralty for injuries under Merchant Marine Act where longshoreman was not employed by vessel or her owners, but by stevedoring company. 27F(2d) 905.

1286-21 276US467, 48SCt346, 72L ed 656 (case governed by Workmen's Compensation Act); 281US128, 50SCt 303, 74L ed754 (cases governed by Workmen's Compensation Act); 281US 222, 50SCt306, 74L ed819 (what work has direct relation to navigation or commerce must be determined from surrounding circumstances); 281US 233, 50SCt308, 74L ed823 (power of state); 117Ala575, 117S914; 213Ala 202, 104S409 (contract of employment and services thereunder in inspecting and checking lumber from barges and railroad cars is nonmaritime, and death of employee on vessel moored in navigable river while engaged in such service is compensable under Workmen's Compensation Act); 130Or11, 278P986(2dcase) (case governed by Workmen's Compensation Act); 295Pa 18, 144A753(2dcase). [b] **Notwithstanding general maritime jurisdiction,** state Workmen's Compensation Act is applicable when injured employee was engaged in work not directly connected with navigation and commerce. Cal 292P120. [c] **Tests of maritime jurisdiction.**–Cal 292P120. [d] **That employee suffered injury while temporarily on navigable waters** does not alone determine exclusiveness of maritime jurisdiction. Cal 292P120.

1286-24 6F(2d)893; 43F(2d)824.

1286-25 10F(2d)371 (death on land, injury sustained on high seas); 29F (2d)792 (injury to longshoreman on gangplank while passing from dock to ship held not within admiralty jurisdiction). See also 12LaA508, 126S452; 129Misc665, 222NYS394. But see 16F (2d)930 (where injured seaman died in hospital from injuries on ship); 217 AppDiv775, 217NYS194 (where plaintiff's decedent was mortally injured on navigable waters, though he died on land). [f] **Reason for rule.**–10F(2d) 371. [g] **Injury held not maritime tort.** –214AppDiv226, 212NYS56.

1286-25½-New. Accidental death of employee on a dredge in a navigable channel in the state is not exclusively within admiralty jurisdiction. 15F (2d)54.

1286-25⅓-New. Supreme court of state has jurisdiction of action for injuries, under Merchant Mar. Act § 20 as amended, by stevedore on vessel in navigable waters. 104NJLaw122, 139A58.

1287-28 14F(2d)949.

1287-29 32F(2d)236.

1287-29½-New. or **any land structures,** 17F(2d)239.

1287-32½-New. or **submarine power cables,** 17F(2d)239.

1288-37 279US109, 49SCt296, 73L ed 632; 6F(2d)893; 42F(2d)742(2dcase). [a] TexCivA 293SW675 (he cannot recover under state Employers' Liability Act). [c] **Defective wharf.**–6F(2d)893. [d] **Wrongful attachment** consummated by service of process on water held within admiralty jurisdiction. 16F(2d) 475.

1289-57 102Conn511, 129A539.

1289-59 36F(2d)714; 12LaA350, 125S 469; 265Mass268, 163NE869; 105NJ Law178, 143A313 [certiorari den 49SCt 252(5thcase)] (pipe fitter injured on vessel in navigable waters is within exclusive admiralty jurisdiction); 245NYS 337; 49RI476, 144A106; 150Va349, 143SE729; 152Va121, 146SE298. [c] 37F(2d)615(1stcase). [d] CalA 291P 283; 162La151, 110S182. [e] **Injury to stevedore working on vessel on navigable waters.**–126Misc816, 241NYS218. [f] **Injury to machine shop employee repairing launch at small dock.**–147 Wash119, 265P485. [g] **Test of maritime cause, with which federal compensation statute concerns itself,** is that injured workman was on, and had not left, ship at time of injury. 32F (2d)513(2dcase).

1289-60½-New. A stevedoring company's employee, injured on deck, must seek remedy under the Workmen's Compensation Act. 148Md443, 129A 668; NJSup 129A709.

1289-61 270US253, 46SCt212, 70L ed 571.

1289-62 281US38, 50SCt207, 74L ed 686; 39Fed615, 40Fed656; 10F(2d) 371; 12LaA350, 125S469; 124Misc829, 209NYS493. [c] **Under act of March 30, 1920** vessel at fault is liable for action in rem for death of seaman by collision though vessel was Spanish vessel, and under Spanish law no such action is given. 5F(2d)425. [d] **Act giving right of action for death caused by wrongful act on high seas in admiralty** did not affect jurisdiction of any other court. 32F(2d)720.

1289-62½-New. Where a person was killed while doing work on a vessel lying in navigable waters, the widow, to recover for his death, must proceed under the federal statute. 278US142, 49 SCt88, 73L ed232.

1290-65½-New. [§ 126a] (a½). **Action Given by Federal Statute.** The act of March 30, 1920, relating to the maintenance of actions for death on high seas resulting from negligence, is not limited to negligent acts of vessels of limited states to the exclusion of foreign vessels. 5F(2d)674.

1290-65¼-New. The rule prescribed by the federal statute relating to actions for wrongful death on the high seas applies to wrongful death occurring in navigable waters. 27F(2d)72.

1290-66 30F(2d)402; 32F(2d)513(2d case); 10LaA200, 120S548; 248NY225, 162NE13 (New Jersey statute of 1848 not superseded by Workmen's Compensation Act); 296Pa34, 145A603; 193 Wis515, 213NW658. But see 12LaA508, 126S452. [f] **In Massachusetts.**–10F (2d)371. [g] **State industrial commission held to have jurisdiction** in action for wrongful death on navigable waters. 193Wis515, 213NW658. [h] **Admiralty jurisdiction of action under state Workmen's Compensation Act is not exclusive of that of federal district court** where plaintiff's intestate came to his death while working on boat digging canal. 18F(2d)453. [i] **Immaterial that death occurs on land** where injuries suffered during employment on steamship in navigable waters. 248NY225, 162NE 13. [j] **State law of local application only may operate with maritime law,** where it has no effect on it. 32F(2d) 513(2dcase).

1290-66½-New. Death action may be brought for maritime tort in a state court where plaintiff's decedent was mortally injured on navigable waters, notwithstanding he died on land. 217 AppDiv775, 217NYS194 (rule same as before enactment of Workmen's Compensation Law).

1290-66¼-New. Application of local compensation statute, where death of longshoreman occurred on stage resting solely on wharf, held not unconstitutional. 276US179, 48SCt228, 72L ed520.

1290-66¼-New. Death of fisherman returning on waters of Lake Erie is not compensable under Workmen's Compensation Law. 25OhA444, 158NE587.

1291-67 129Fed715, 64CCA243 (statute held not to give lien).

1291-69 27F(2d)72.

1291-75 [b] **After trial, party cannot object to jurisdiction,** where he has admitted same in answer. 16F(2d)812.

1291-77 [d] **Owner of yacht libeled,** having filed libel for possession thus invoking court's aid, cannot question jurisdiction. 10F(2d)256.

1291-77½-New. Waiver of jurisdiction. Failure of stevedore to give notice of election not to be subject to Workmen's Compensation Law as required by state statute does not waive rights under maritime law. 126Misc816, 214NYS218 (since state cannot interfere in field of federal legislation).

1291-77⅓-New. By stipulation of parties to proceed under the Compensation Law, one suing for tort under maritime law in a state court may not be ousted therefrom. 216AppDiv274, 214NYS732.

1292-79 [c] **Decisions of law courts** are not controlling in admiralty. 33F(2d) 541.

1292-80 37F(2d)599; 39F(2d)867.

1292-81 [d] **State legislatures have right to regulate practice, proceedings, and rules of evidence in their own courts,** and such statutes become rule of decisions in action brought in state courts concerning maritime torts. 134 Misc370, 235NYS646.

1292-81½-New. The Suits in Admiralty Act, relating to suits against the United States arising out of its ownership, operation, or control of vessels, applies to libels in personam as well as to those in rem. 30F(2d)254.

1292-82 17F(2d)206. [d] **Suit in personam for salvage.**–Present Admiralty Rules, rule 18, allowing such suit against any party liable for salvage service, does not change former Admiralty Rules, rule 19 allowing such suit against person at whose request or for whose benefit salvage services are performed. 8F(2d)86. [e] **Right to discovery and inspection** of reports made by officers of respondent's vessel to underwriters. 37F(2d)102(2dcase). [f] **Libelant has been held entitled to order directing discovery** of engineers report made to respondent about time of accident and on regular course of duty. 37 F(2d)102(2dcase).

1292-84 9F(2d)1004 (both may be brought against United States under Comp. St. Annot. Suppl. [1923] §§ 1251¼-1251¼L).

1292-87 20F(2d)926 (effect of Suits in Admiralty Act).

1293-38½-New. The United States is not liable in personam if there is no liability in rem against the vessel. 10 F(2d)214.

1293-88⅓-New. Suits in Admiralty Act. The act of March 9, 1920 was passed for the purpose of relieving the United States from the obstruction of commercial traffic by the seizure of merchant vessels. 19F(2d)761.

1293-88¼-New. The effect of the law authorizing proceedings against the United States in case of vessels employed as merchant vessels was to substitute the right of action in personam. 19F(2d)1009.

1293-88⅙-New. The act was intended to substitute an equivalent remedy against the United States in personam for a right in rem against the vessel. 19F(2d)761.

1293-90 [a] 6F(2d)288.

1293-90½-New. Where possession of movable property is changed against the right of the true owner by maritime tort, 10F(2d)35.

1293-90⅓-New. or breach of maritime contract, the owner may vindicate title by proceeding in rem. 10F(2d)35.

1293-90¼-New. A libel in rem against a vessel owned by the United States is expressly prohibited by the Suits in Admiralty Act. 28F(2d)744.

1293-90⅕-New. Abandonment by the Shipping Board of a vessel of the United States to libelants, prosecuting a libel in rem expressly forbidden by such act cannot confer jurisdiction on the court to entertain such libel. 28F(2d)744.

1293-90⅙-New. Libel in rem cannot be stayed to permit arbitration proceedings as contract was made prior to taking effect of Arbitration Act. 36F(2d)773.

1293-91 15F(2d)198; 16F(2d)1003; 24F(2d)710.

1293-93 15F(2d)25 (lien held to exist).

1293-95 17F(2d)318. [a] (3) In order to recover in action in rem it must appear that there exists good cause of action for maritime tort and that maritime lien arises through and by such tort. 24F(2d)710.

1294-98 6F(2d)937. [c] **Vessel must be seized** by government agents to give jurisdiction of libel for forfeiture. 6 F(2d)937. [d] **Seizure of vessel by coast guard** held beyond its authority. 6F(2d)937. [e] **Attaching libelant, who is without assets,** may be required to give security. 36F(2d)426.

1294-3 18F(2d)983.

1294-4 27F(2d)134.

1296-16 [a] **Where part of claim is admitted,** severance need not be of separate causes of action. 40F(2d)442.

1296-17 8F(2d)86. [c] (2) **Federal court in admiralty has jurisdiction over steamship company where it has agents**

on whom service is had with authority to do all matters usually performed by steamship agents. 6F(2d)335. [d] **For suits in nature of in rem to be maintained in personam against United States,** ship must be in part of United States or in one of its possessions. 8 F(2d)87. [e] **Where government owned vessel had been lost** and could not have been proceeded against in rem if privately owned, substituted action in personam against United States in place of action in rem against vessel will not lie. 8F(2d)300. [f] **Where suit brought in wrong district.**–Under Suits in Admiralty Act court has power to change venue to proper district. 19F(2d)761.

1296–17½–New. Under Suits in Admiralty Act, libelant having no place of business in this country cannot maintain an action in personam. 14F(2d)436 (Cuban corporation not entitled to sue where it conducted business through commission agent).

1296–17½–New. General appearance waives the objection that the suit was brought in the wrong district. 19F(2d) 761.

1297–18 8F(2d)81 (no jurisdiction over United States in rem or in personam as substitute under statute where vessel is not in district); 8F(2d)358 (failure to show vessel within district is fatal where act of 1920 as to election to proceed in rem was not in effect at commencement of suit); 14F(2d)232.

1297–19 [b] **In view of Judicial Code § 72** and Admiralty Rules, rule 22 libel in rem may be brought in either division. 14F(2d)107.

1297–19½–New. Ownership pro hac vice of operation does not change situs of ship. 16F(2d)948.

1297–21½–New. Suit against United States may be maintained in district where libelant resides or has principal place of business. 18F(2d)221 (what constitutes "doing business").

1297–23 134Misc370, 235NYS646.

1297–26½–New. Libelant must show capacity to sue at the time of trial as well as at the time of bringing suit. 22 F(2d)457.

1297–29 15F(2d)263 (agent for absent owners).

1298–41 6F(2d)838.

1298–45 35F(2d)549.

1300–62 [a] (2) Act contemplates suits in personam against government as well as in rem. 8F(2d)79; 8F(2d)84. (2) 8 F(2d)86. (3) Act does not authorize suits purely in personam against government, but merely relief in personam in connection with suit in lieu of libel in rem. 8 F(2d)80. (4) Act permits suits purely in personam rather than one of in lieu of in rem proceeding against United States where cause of action exists both in rem and in personam. 8F(2d)87. [b] **Libel in personam for salvage** lies against government independent of any lien upon goods salvaged. 8F(2d)86.

1300–65½–New. Under Admiralty Rules, rule No. 56, a dumper, in the government's libel to recover a penalty for illegal dumping, is entitled to implead the vessel whose alleged negligent navigation made dumping at the prohibited place necessary to save life. 26F(2d) 674.

1300–65½–New. Under Admiralty Rules, rule 56 parties in libel proceedings are entitled to bring in any other vessel or person partly or wholly liable. 26F(2d)674.

1300–69 31F(2d)767 (statute).

1300–70 10F(2d)371 (action begun by injured person).

1300–71½–New. Whether libel by corporation can be revived after its dissolution is question wholly of procedure and depends on practice of admiralty. 24 F(2d)310.

1300–71½–New. Where cause of action survives such dissolution under state law, libel is not terminated by dissolution, but merely suspended. 24F(2d) 310.

1300–71¼–New. and directors of a corporation may, in such case, revive action in the corporate name. 24F(2d) 310.

1301–78 [c] **General appearance** where venue is laid cannot be withdrawn to obviate waiver of jurisdiction. 5F(2d) 674. [d] **Exceptions to libel** may constitute general appearance. 19F(2d) 761.

1301–80 [a] (3) Other instances. 17F (2d)311.

1301–80½–New. Under an exception solely to the jurisdiction of the admiralty court by one appearing specially, the court cannot consider whether the petition will lie at all for reasons other than lack of jurisdiction. 14F(2d)232.

1301–84 [a] (1) See also 4HawaiiFed 39.

1302–88 [b] 31F(2d)265.

1302–92 11F(2d)982.

1302–92½–New. The right to proceed by foreign attachment in libel is determined by the admiralty rules of supreme court. 31F(2d)265.

1302–1 14F(2d)154.

1303–9½–New. Seizure of vessel need not be lawful in its origin to support libel for forfeiture where the vessel is in possession of a collector at the time libel is filed. 13F(2d)433.

1303–12½–New. The court having custody of a vessel may issue process for its seizure in an independent action by another claimant. 21F(2d)236.

1304–21½–New. A bond obligating the obligor to pay judgments on libels which had been or might be filed secures only such claims which should be materialized by suits brought in rem. 10F(2d) 15 (while there continued in existence a res subject to such suits).

1304–21½–New. Independent remedies under bond do not survive a sale in an equity suit. 10F(2d)15.

1304–26 See also 7Alaska268 (amendment).

1304–27 29F(2d)855 (master is "seaman"). [b] **Suit for personal injuries** is within statute. 29F(2d)855 (suit by master of tug). [c] **Statute exempting seamen** (1) from furnishing bond or deposit for costs is liberally construed. 24 F(2d)812. (2) Suit for personal injuries under Jones Act is suit to enforce law enacted for health and safety of seamen within such statute. 24F(2d) 812.

1304–29 [b] **Suit for personal injuries** caused by employer's failure to furnish safe place for work is not such as relieves seaman from giving bond or deposit for costs and fees. 10F(2d)799.

1304–29½–New. or suits to enforce laws made for their safety and health. 10F(2d)799.

1304–30 10F(2d)799. [b] **Only citizens of United States** may sue in forma pauperis. 10F(2d)799.

1305–37 14F(2d)154. [c] **Motion for order summarily directing attorney to file stipulation for value of barge** is denied, there being no fiduciary relationship involved. 36F(2d)272. [d] **Construction of stipulations.**–42F(2d)524.

1306–43 6F(2d)175 (vessel seized for forfeiture for transporting intoxicating liquors on high seas in violation of license cannot be released to claimant on bond); 14F(2d)557 (holding that vessel libeled for forfeiture for second violation of law should not be released); 14F(2d) 697. [a] **Release on bond of vessel seized for violation of national Prohibition Act** held mandatory. 14F(2d)697.

1306–43½–New. After decree of forfeiture, claimant has twenty days to make payment before summary judgment may be entered on bond. 20F(2d) 314.

1306–49 8F(2d)104.

1306–53 8F(2d)104 (where first libel abandoned by claimant at trial is dismissed).

1307–61 18F(2d)1000.

1308–71 23F(2d)843, 845 [citCJ].

1308–73½–New. The requirement of a bond of twenty-five per cent of the total value of the ships and cargo is not excessive. 9F(2d)1008 (in salvage case).

1309–86 [c] **Additional security requires "cause shown,"** where party has named stipulated sum. 42F(2d)780.

1309–88 9F(2d)17; 14F(2d)642; 30 F(2d)360; 30F(2d)466; 39F(2d)867.

1309–88½–New. , provided nature of claim is stated properly, so as to be understood by the court. 9F(2d)17.

1309–90 12F(2d)961.

1309–94 [b] **Ordinarily damage as pleaded should be regarded as sufficient,** in absence of request for specifications. 40F(2d)752(1stcase). [c] **Exceptions to sufficiency,** as not specifying damage, should be sustained on showing ability to furnish information desired. 40F (2d)752(1stcase).

1310–96 36F(2d)269.

1310–97 17F(2d)311. [d] **Vague and indefinite allegation** will be stricken. 17F(2d)311.

1310–98 10F(2d)35; 30F(2d)466. [a] (2) Libel against steamship alone, alleging sums which steamer and cargo were liable to pay, under contract for general average loss, was held insufficient for failure to plead amount due from steamer. 33F(2d)293. [i] (5) Libel need not contain itemized statement of damages, as this is matter of subsequent proof. 21F(2d)865. [l] **Libel to recover ship** for importing liquor in violation of contract of sale held sufficient. 7F(2d)413. [m] **Malice or gross negligence must be shown in cause involving abuse of legal process.**–16F(2d)475.

1311–1½–New. However, material matter not well pleaded may be stricken. 17F(2d)311.

1311–1⅓–New. That part of libel in rem on the admiralty side of the court which attempted to set out the statute of the state held improper. 14F(2d) 243.

1311–2 5F(2d)251. [a] 5F(2d)251. [d] **Incorrect statement of state of incorporation of defendant** held immaterial. 35F(2d)395.

1311–7½–New. Libel for possession without allegation of maritime tort. 10 F(2d)35.

1311–7⅓–New. or breach of maritime contract, is defective. 10F(2d)35.

1311–8 36F(2d)281.

1312–14 [a] **Failure to set out or annex copy of charter party** not ground for exception in view of rule permitting amendment. 18F(2d)983.

1312–15½–New. Surplusage need not be stricken. 17F(2d)311.

1313–35½–New. It is permissible to plead in the alternative when in doubt as to vital fact or law. 20F(2d)214.

1313–35⅓–New. In libel proceedings claimant is bound by the allegations in the answer. 26F(2d)710.

1313–41 40F(2d)442. But see 28F(2d) 725 [certiorari granted 49SCt252(7th case)].

1313–48 19F(2d)441.

1314–52½–New. Cross libel for damages may be required to specify the amount of damages claimed for each item. 14F(2d)244.

1314–55 [e] **One purpose** of interrogatories is to procure evidence supporting libel or answer. 19F(2d)628. [f] **Interrogatories for amplification of libel** is approved method of procedure rather than exceptions to libel that sets forth right of action in general terms. 36F (2d)281.

1314–56 21F(2d)78; 34F(2d)719 (production of copy of log). [b] **Order requiring libelant to answer** interrogatory must be obeyed. 40F(2d)507.

1315–61 [c] **Interrogatories held proper.**–34F(2d)152. [d] **Claimant of one of two vessels** sued jointly may require claimant of other to answer interrogatories annexed to answer. 37F(2d)599. [e] **Interrogatories held objectionable.**–34F(2d)152.

1315–62 See also 37F(2d)599.

1315–63 [a] (5) Interrogatory calling for copy of all writings relative to repairs which ship was undergoing when fire loss occurred in foreign port held objectionable. 34F(2d)152.

1315–64 34F(2d)719 (where subject matter, if competent, was available to interrogator); 35F(2d)549.

1315–67½–New. Interrogatory requiring disclosure of all correspondence as to transaction is proper. 19F(2d)628.

1315–67⅓–New. Interrogatories requiring respondent to state ownership of lighters into which damaged cargo was loaded and manner and dates of unloading are proper. 21F(2d)77.

1315–67¼–New. Further particulars of adversary's case, as distinguished from evidence, may be required. 21F(2d)78.

1316–76 6F(2d)937; 8F(2d)287 (admits facts well pleaded in libel); 30

F(2d)466; 31F(2d)401.
1316-77 276US202, 48SCt256, 72L ed 531 (objection that libel is barred by limitations); 30F(2d)466; 31F(2d)535.
1316-81½-New. Exceptions on jurisdictional grounds are not waived where the same pleading also pleads to merits. 18F(2d)629.
1316-82 29F(2d)792 (libel strictly construed).
1316-82½-New. **It is proper practice** for the court, upon motion for an order therefor, to allow filing not only of exceptions, but of special pleas to the jurisdiction and in bar and to provide for framing of issues on such exceptions and special pleas. 8F(2d)81.
1316-84 11F(2d)906.
1317-88 16F(2d)483.
1317-98 [c] **Libelant should be granted leave to amend libel** whenever he has occasion to do so, and rights of respondent are not affected. 42F(2d)780.
1317-99 15F(2d)204; 16F(2d)460.
1318-1½-New. Where the subject matter of a proposed amendment shows no liability of libelee, an exception should be sustained. 12PortoRicoFed555.
1318-1½-New. The right of libelant to amend the libel cannot be raised on libelant's exceptions to respondent's amended answer, where respondent did not except to the amended libel. 31 F(2d)757(2dcase).
1318-2 7Alaska268.
1318-6 4HawaiiFed43. [a] **Rule not applicable where libel in personam has been barred** by limitation. 17F(2d)311.
1318-8 8F(2d)81 (where libel against government specifically states that libelant has reëlected to proceed in rem and government's appearance is only special).
1318-12 30F(2d)676. [a] (4) Respondent is estopped to deny by amended answer execution of charter parties admitted in its original answer four years before. 23F(2d)846.
1318-15½-New. Affirmative defense is allowable in amended answer. 20F(2d) 214.
1319-26 [b] **Mortgage lien claimant has been held estopped by concession in his petition** of priority of other liens over his claim as intervener in libels against vessel. 32F(2d)876.
1319-29 17F(2d)118. See also 40F(2d) 942. [o] **Cargo insurer** is without right to intervene in shipper's suit for damages to shipment. 42F(2d)295. [p] **Rule authorizing intervention** of person with interest in proceeds in registry of court is limited to such cases. 42F(2d) 295.
1320-30 42F(2d)295. [a] **As dependent on whether cause of action is new.**- 42F(2d)524.
1320-31½-New. Property salvors are presumed to know that all who may be entitled to share in award may intervene. 42F(2d)524.
1320-33 [c] (2) Charterer sued by owner held entitled to implead owner of vessel whose negligence caused damage. 15F(2d)209.
1320-35 28F(2d)1000.
1320-35½-New. **Receivers appointed by court of equity** will not be allowed to intervene without an adequate showing of necessity. 18F(2d)593.
1321-39½-New. **Under Admiralty Rules, rule 56** a third party may not be brought in to determine liability on a nonmaritime agreement to issue bills of lading for another carrier. 19F(2d)155.
1321-39½-New. Under Public Vessels Act of 1925 and Suits in Admiralty Act § 3, the owner of cargo may intervene in shipowner's libel in personam against the United States to recover for damages resulting from collision with government owned vessel. 21F(2d)835.
1321-41 5F(2d)214; 6F(2d)838.
1321-44 32F(2d)343.
1322-48 28F(2d)638. [f] **Cross libel held sufficient.**-9F(2d)17 (in view of admission in answer).
1322-50 14F(2d)949.
1322-54½-New. Cross libels are strictly construed. 14F(2d)949.
1322-54½-New. Filing cross libel submits a party to jurisdiction, despite objection thereto in answer. 26F(2d)175.
1323-58 [b] **Cross libelant held not entitled to have respondent furnish security for money payment which cross-libelant might be decreed to make for half damages to cargo of respondent vessel.** 36F(2d)833.
1323-58½-New. or to determine whether it is practicable for libelant to give security, 8F(2d)599.
1323-61 [c] 43F(2d)857. [f] **Propriety of seizure** may be raised by motion to vacate. 7F(2d)835. [g] **There are no such proceedings in admiralty** as (1) motions to quash or strike libel from the files (21F(2d)573), (2) or motions to remove cases from one district to another (21F(2d)573). [h] **Motion for order allowing filing of exceptive allegations will be denied,** where none of allegations refer to matters of fact within knowledge of court or record. 32F(2d) 359.
1324-63½-New. [§ 228a] c. **Petition under Admiralty Rules, Rule 56.** Under this rule, libelant who fails to adopt or answer claimant's petition against third party cannot complain of its dismissal. 26F(2d)173.
1324-63½-New. Libelant cannot be compelled to establish liability of a third party brought into proceedings by claimant under the rule. 26F(2d)173.
1324-64 13F(2d)535; 16F(2d)460.
1324-65 28F(2d)249.
1324-66 [f] **Admissions in answer** need no proof. 17F(2d)478.
1325-71 16F(2d)707.
1325-72 16F(2d)707.
1327-6 28F(2d)135.
1327-12½-New. Where a suit brought prematurely was conducted and prosecuted by agreement of the parties, only the costs are affected. 23F(2d)579.
1327-14 127Misc677, 217NYS295.
1327-15 127Misc677, 217NYS295 (may not be pleaded as defense). But see 24F (2d)963.
1327-17½-New. **Protests of representatives of libelant to respondent's stevedores against their negligent acts resulting in injury,** which protests were disregarded, is sufficient to relieve libelant of charge of negligence. 16F(2d) 121.
1327-17½-New. Recovery will not be limited to half damages where a tug seeking recovery for fouling an unmarked wreck originally caused wreck. 18F(2d)77.
1328-18 But see 127Misc677, 217NYS 295.
1328-20½-New. [§ 239a] b½. **Modifications of Fellow Servant Rule.** Adoption of such modification does not tend to disturb the rule of maritime law. 134 Wash235, 235P360, 238P581.
1328-23 8F(2d)500; 15F(2d)600.
1328-24 30F(2d)254; 30F(2d)360 (statute not run). [b] **Suit by shipper against United States Fleet Corporation** held not barred or affected by Suits in Admiralty Act of 1920. 7F(2d)893. [c] **Any limitation as to right to institute suit under Suits in Admiralty Act** is matter of defense. 19F(2d)761. [d] **Limitation of suits under Suits in Admiralty Act** against government for damage to cargo does not commence until balance of cargo sold. 19F(2d)761. [e] **Libel in personam against Fleet Corporation** for loss of cargo after vessel deviated from agreed voyage is barred by one-year limitation of Suits in Admiralty Act. 276US202, 48SCt256, 72 L ed531.
1328-25 14F(2d)529; 21F(2d)858.
1328-25½-New. By the Transportation Act of Febr. 28, 1920 § 206(a) a proceeding against the director general in control of vessels was barred if not brought within two years of the passing of the act. 5F(2d)67 (even though loss, under which claim arose, occurred before passage of act).
1328-25⅓-New. Cause of action given by Comp. St. Annot. Suppl. (1923) § 1251½ arises at moment death takes place. 10F(2d)371.
1328-25¼-New. Libel filed against United States sixteen and one half months after the passage of the Public Vessels Act of 1925 is not barred by one-year limitation. 19F(2d)525.
1328-25⅓-New. Review is not barred by limitations which would have barred original suit. 17F(2d)827.
1328-25⅙-New. Admiralty courts are bound only by their own discretion as respects laches. 22F(2d)328.
1328-25⅙-New. As respects the statute of limitations admiralty follows the law. 22F(2d)192.
1328-25⅛-New. Although circumstances may excuse failure to make an earlier claim, the same circumstances may not cause forfeiture of protection against stale claims. 22F(2d)192.
1328-25⅛-New. A vessel's libel, filed May 25, 1925, on a claim against the consignee for towage service rendered April 29, 1919, is barred by laches and limitations. 22F(2d)192.
1328-25 1/10-New. Where the petition for intervention asserted a claim covered by the main suit, running of the statute was determined by the date of the original suit, and not by the date of petition for intervention. 30F(2d)360.
1328-26 13F(2d)925; 13F(2d)927; 21 F(2d)858; 31F(2d)535; 43F(2d)585.
1328-27 8F(2d)500; 21F(2d)858 (discretion of court); 40F(2d)277 (holding it reasonable to allow libelant time to make permanent repairs represented by period it tried to find party responsible for collision); 31F(2d)535; 31F(2d) 686; 31F(2d)759 [aff 31F(2d)761]. [c] (6) Three years. 13F(2d)925. (7) Five years. 13F(2d)927. (8) Delay of nearly twice statutory period. 39F(2d) 551. (9) Delay of almost eight years. 39F(2d)639. [d] (1) 8F(2d)500 (no change of status and no intervening rights). (9) 8F(2d)500 (libel in personam for breach of contract of affreightment brought within five years after accrual of rights).
1329-30 7F(2d)893; 12F(2d)721; 15 F(2d)70; 17F(2d)311; 22F(2d)328; 24 F(2d)438; 24F(2d)441; 31F(2d)620; 34F(2d)627; 34F(2d)660(2dcase); 35 F(2d)261; 39F(2d)551. [d] **Unexplained delay of over four years** in bringing libel for personal injuries rendered libel subject to exception on analogy of state statute. 34F(2d)660(2d case). [e] **Failure to bring suit within local period of limitation** is not excused by proctor's subsequent diligence. 35F(2d)261.
1329-31 31F(2d)686.
1329-36 19F(2d)1009.
1329-38 13F(2d)927; 19F(2d)1009. [a] 19F(2d)1009.
1330-45 12F(2d)721; 31F(2d)535.
1330-47 270US253, 46SCt212, 70L ed 571 (dismissal for want of jurisdiction should recite that ground so as to be without prejudice).
1330-50½-New. If a libel is good in any aspect it should not be dismissed. 8F(2d)86.
1330-50½-New. even though the libellant has not chosen to elect in his libel whether the suit was to proceed in rem or not, under the Suits in Admiralty Act of 1923. 8F(2d)86.
1330-50¼-New. Libel not dismissed for want of prosecution where claimant made no demand for trial. 25F(2d)503.
1331-69 8F(2d)295 (that damage to cargo was due to perils of sea); 17F (2d)308 (foreign law). [e] **Freedom from contributory negligence** must be affirmatively proved by plaintiff. 127 Misc677, 217NYS295.
1332-70 15F(2d)459; 17F(2d)113; 25 F(2d)108 (notwithstanding Equity Rules, rule 46).
1332-71½-New. Evidence taken previous to party being brought in by petition under Admiralty Rules, rule 56 cannot be had against him. 14F(2d) 154.
1332-74 15F(2d)459.
1332-77 [a] (2) Production of log books may not be compelled by interrogatories. 35F(2d)352. (3) Self-serving statements in log are not competent. 35F(2d)352.
1332-77½-New. Written addendum to copy of ship's manifest is incompetent without proof of verity. 19F(2d)441.
1333-81 [a] **Under Admiralty Rules, rule 32,** order as to discovery of documents before trial may properly be made in broad language. 6F(2d)89.
1333-83½-New. Motion for inspection of vessel in cargo damage suit held not to show necessity and denial. 17F(2d) 206.

1333-84 34F(2d)570. [j] **Admissions in answer** may be sufficient proof of facts alleged in libel. 17F(2d)478.
1333-85 [b] **Evidence held insufficient** to show that damage to cargo was due to perils of sea. 8F(2d)295.
1333-86 [b] (2) Evidence and depositions de bene esse taken in actions stayed in limitation of liability proceeding may be used, subject to leave for further examination. 33F(2d)967.
1334-93 7F(2d)235 (wrong title in caption does not prevent issuance).
1334-94 [e] **Written interrogatories** are required by rule of court. 7F(2d)235. [f] **Time for cross-interrogatories** is extended for five days. 7F(2d)235.
1334-98 [a] **Admissions which party contradicts at his peril.**-9F(2d)638.
1334-99 19F(2d)441. But see 40F(2d)507.
1335-4 33F(2d)329.
1335-12 [a] **Finding of proximate cause of collision** held sufficient. 36F(2d)581.
1336-20 [b] (2) Motion to reopen proceedings for limitation of liability for additional testimony should be denied where failure to adduce testimony at trial was apparently due to neglect, if not to design. 33F(2d)775.
1336-21½-New. The rules of Admiralty Courts do not provide for preference whereby limitation of a liability proceeding may be set down for trial on a day certain. 33F(2d)967.
1336-23 35F(2d)602 (right of jury trial by statute).
1337-30½-New. The validity of an asserted lien is not an issue to be referred to the commissioner. 28F(2d)1000.
1338-49 22F(2d)532.
1339-57 24F(2d)846; 35F(2d)736.
1339-58 35F(2d)736; 39F(2d)933 (where evidence is exclusively documentary).
1339-61 16F(2d)259; 22F(2d)532.
1339-66 [f] **Decree held void for uncertainty.**-32F(2d)969. [g] **Decree for part of claim admitted to be due.**-41F(2d)961 (1stcase).
1340-67½-New. Where a question is fully heard without objection as to technical defects, the court should determine the case on the merits. 9F(2d)17.
1340-67¼-New. In a suit for forfeiture of a vessel, a decree of forfeiture must run against the vessel. 20F(2d)314.
1340-67¼-New. Recitals preceding a formal decree are not a part thereof. 20F(2d)314.
1340-67½-New. It is within court's discretion to embody findings in decree in addition to those in opinion, 23F(2d)554.
1340-67⅝-New. or whether to make findings, or write an opinion. 23F(2d)554.
1340-68 [a] **Clerk's failure to enter decree on day delivered to him** held misprision of record. 16F(2d)206. [b] **Decree is final and ready for entry** when signed by judge despite blanks left for costs. 16F(2d)206.
1340-69 22F(2d)904 (refusal to answer interrogatories).
1340-71 14F(2d)107; 23F(2d)493. [b] **Effect of opening default.**-30F(2d)978.
1341-77 28F(2d)744.
1341-78 18FCasNo 10,613, 1Woods279 (decree of admiralty court foreclosing maritime lien can only be attacked for want of jurisdiction); 274US316, 47SCt600, 71Led1069. [c] (2) It may be collaterally attacked by stranger on ground of fraud. 15F(2d)459. (3) But stranger to record undertaking to impeach judgment for fraud or collusion must show that if it is enforced he will be prejudiced in his rights. 15F(2d)459.
1341-78½-New. Decree has no effect as to one not a party. 16F(2d)1003.
1341-78¾-New. Admiralty court has jurisdiction to determine the right of parties properly impleaded as respects a maritime liability. 19F(2d)645.
1341-79 274US316, 47SCt600, 71Led1069.
1341-81 274US316, 47SCt600, 71Led1069.
1341-83½-New. Decree on libel for failing to provide safe place to work not bar to action for injuries caused by negligence of ship's officers. 9F(2d)902.
1341-83⅝-New. In such case the judgment roll in an admiralty suit is properly excluded in the latter action. 9F(2d)902.
1343-96½-New. Court has no power to modify after expiration of ninety days. 15F(2d)857.
1343-1 15F(2d)857; 17F(2d)827; 37F(2d)354 (subsequent decision establishing different rule).
1343-1½-New. Claimants held not to have made sufficient showing to entitle them to libel for review. 15F(2d)857.
1343-1⅝-New. Libel for review in limitation proceedings cannot raise issues which should have been litigated on petition and answer. 15F(2d)857.
1343-2½-New. "Libels of review" are somewhat akin to a bill of review in equity. 37F(2d)354.
1343-5 [b] **Court cannot authorize private sale** without consent of parties in interest. 38F(2d)182. [c] **Sale at place** not in accordance with requirement of warrant of sale is invalid. 38F(2d)182. [d] **Sale for less than two-thirds of value** is not subject to confirmation. 38F(2d)182.
1343-6½-New. Sale of libeled ship need not be made subject to alleged lien of mortgage, default in which occurred subsequent to ship's arrest, since mortgagee's claim, if valid, may attach to proceeds. 15F(2d)713.
1344-30½-New. Intervention to assert lien for taxes held timely. 14F(2d)267.
1345-39 [b] **Circuit court of appeals has jurisdiction** of appeal from decree of dismissal for lack of jurisdiction. 31F(2d)288.
1345-39½-New. Awards under Longshoremen's and Harbor Workers' Compensation Act are reviewable by the admiralty side of the district court. 33F(2d)137.
1345-40 [a] **Sum of three dollars and twelve cents held too trifling** to merit consideration by appellate court. 32F(2d)969.
1345-41 28F(2d)864 [certiorari den 278US579, 49SCt180, 73Led517(2dcase)]; 10CanExch333, 26CanLTOccNotes779.
1346-43½-New. Right of appeal from order sustaining exceptions to libel is not waived because of order granting leave to amend. 15F(2d)749.
1346-46½-New. Appeal does not lie from part of decree, where items thereof are inseparable. 16F(2d)462.
1346-46⅝-New. Questions which have become moot are not considered on appeal. 16F(2d)264.
1346-47 [a] (7) Decree signed by judge and delivered to clerk for entry. 16F(2d)206. (8) Decree dismissing libel by corporation on ground that corporation was dissolved pending action. 24F(2d)310. [c] **Leaving blank for costs** held not to vitiate finality of decree. 16F(2d)206. [d] **Decree directing some proceedings in futuro** held nevertheless final. 16F(2d)206.
1346-48 [g] (2) 19F(2d)489.
1346-49 30F(2d)290(1stcase).
1347-63 [d] **Court may correct clerk's error** in failure to enter decree on day delivered, for purposes of appeal. 16F(2d)206.
1347-65½-New. Admiralty rule prescribing time for docketing case on appeal is directory, and may be relaxed in the interest of justice. 15F(2d)749.
1347-65¼-New. Decree, including costs "to be taxed," is final, requiring application for appeal within three months. 19F(2d)141.
1347-68 [d] **Notice of appeal must be drawn strictly according to Admiralty Rules, rule 3** to avoid rigid application of rule 4. 16F(2d)362.
1348-83 See also 37F(2d)67.
1348-84 10F(2d)692; 33F(2d)275. [a] **What law governs** cannot be raised for first time on appeal. 17F(2d)478.
1348-85 19F(2d)355. [a] 19F(2d)355.
1348-85½-New. Review of final decree may be had, although no exception was taken to order sustaining exceptions to libel, in view of Judicial Code § 269 as amended. 15F(2d)749.
1348-86 28F(2d)249.
1348-87½-New. Matters not raised by answer or argued in the lower court are ignored by the circuit court. 10F(2d)692.
1349-97 [a] **Where notice of appeal fails to name one of respondents,** subsequent notice within season by such respondent supplies any defect. 10F(2d)692. [b] **Notice taken out by proctors without authority** sufficient on later ratification by respondents. 10F(2d)692.
1349-1½-New. Obtaining order extending time to file apostles from judge who did not try case is not prejudicial error. 15F(2d)749.
1349-2 28F(2d)864 [certiorari den 278US579, 49SCt180, 73Led517(2dcase)] (unless parties stipulate otherwise). [d] **Where report of collision was not in court** and appellate court has no knowledge of its contents, no error can be founded on ruling excluding it. 34F(2d)621.
1349-3 28F(2d)864 [certiorari den 278US579, 49SCt180, 73Led517(2dcase)] (court cannot look beyond statement of evidence as approved by trial court, and must affirm decree supported by such statement).
1349-6 29F(2d)491. But see 22F(2d)919.
1350-12½-New. [§ 311a] 7½. **Presentation of Questions in Lower Court.** Suggestion that case involves question of foreign law must be made in lower court. 17F(2d)478.
1350-12⅝-New. Stay of execution against a ship will not be ordered where the ship is being broken up and solicitors of the ship are willing to give a bond. 38BC438, [1927] 2DomLR985.
1350-13 5F(2d)58; 28F(2d)864 [certiorari den 278US579, 49SCt180, 73Led517(2dcase)]; 40F(2d)167.
1350-14½-New. Error assigned in admission of evidence not raised below will not be considered on appeal. 12F(2d)970.
1350-14¾-New. A decree in admiralty, dismissing the petition of respondent, interpleading another under Admiralty Rules, rule 56 as the party primarily liable for the loss of goods shipped, for which recovery was sought, was reviewable on appeal from a final decree against respondent. 30F(2d)247.
1351-16 40F(2d)47.
1351-17 15F(2d)258 (court may examine facts).
1351-18 14F(2d)897; 14F(2d)902; 14F(2d)949; 19F(2d)878; 39F(2d)586. [b] **Eyewitnesses' testimony** to collision supporting trial judge's conclusions will ordinarily not be reviewed. 42F(2d)139.
1351-19 6F(2d)860; 8F(2d)223; 8F(2d)324; 14F(2d)897; 14F(2d)902; 14F(2d)949; 16F(2d)110; 19F(2d)878; 20F(2d)385; 24F(2d)159 (amount of damages); 27F(2d)72; 35F(2d)846; 37F(2d)570; 40F(2d)47; 40F(2d)167; 40F(2d)249; 42F(2d)130; 42F(2d)971. See also 16F(2d)259. [c] **Libel erroneously dismissed does not require reversal** where dismissal was proper upon facts. 40F(2d)39. [d] **Failure to make specific finding** of fact by trial court requires decree vacated and cause remanded. 281US670, 50SCt448, 74Led1105. [e] **Error held not prejudicial** in sustaining exceptions to interrogatories. 40F(2d)417. [f] **Where trial judge saw and heard witnesses** his decision is entitled to greater weight than otherwise. 42F(2d)971.
1351-20 5F(2d)58. But see 29F(2d)20.
1351-23 20F(2d)25. [a] 20F(2d)25.
1353-40 [c] **Answer amended on motion** and same considered when it is only way nature of case can be ascertained. 10F(2d)35 (though libelant may be prepared to prove answer false).
1353-43 29F(2d)491. [a] **Circuit court of appeals may increase,** as well as diminish, allowances in admiralty for personal injuries. 31F(2d)941.
1353-44 [b] (3) Court may increase or decrease award of trial court. 3F(2d)381.
1354-46½-New. Inadvertent error of counsel in drawing decree may be corrected in circuit court of appeals. 19F(2d)744.
1355-68 19F(2d)10; 19F(2d)744; 40F(2d)742.

1356–72 41F(2d)842.
1356–74½–New. Respondent, having impleaded the party found without fault, is taxable with costs to such party. 27 F(2d)989.
1357–3 32F(2d)390(1stcase).
1357–5 8F(2d)358 (failure to raise objection before trial in proceeding in rem). Contra 23F(2d)135.
1358–33 Erratum.–Items taxable on appeal see infra "§ 342" should be "§ 346."
1358–34 [b] **Admiralty Rules, rule 228** does not authorize allowance of items which are not found in table of fees but which are in the English admiralty tariff. 38RC240, [1927]CanExch92, [1927] 2DomLR757, [1927] 1WestWkly515.
1359–37½–New. In libel for salvage, libelant was held not taxable with premiums on excessive release bonds exacted by them. 19F(2d)10.
1359–40 20F(2d)1015.
1360–49 [a] But see 41F(2d)268. [f] **Amount paid by marshal** should be credited on amount taxed. 41F(2d)268.
1360–52 [e] (6) Amount that would have been expended for bond allowed, but not larger amount of interest on cash bond. 14F(2d)371. (7) Premium paid by respondent on release bond held not taxable as costs where only costs allowed were to libelant and one third was adjudged against each respondent. 41F(2d)268.
1361–54 [b] **Premiums on bonds.**–(1) Premiums paid on cost bond are properly taxed under admiralty rules. 8 F(2d)316. (2) Premiums paid on release bond are properly taxed under admiralty rules. 8F(2d)316.
1361–55 40F(2d)742 (holding mailing copy of decisions to proctors by judge's secretary as a courtesy is no evidence of formal notice of any step). [b] **Absent cost bill,** clerk is required to tax costs, fixed and known of "officers of court." 40F(2d)742.
1361–56 40F(2d)742 (holding Admiralty Rules, rule 53, providing for taxing and filing is not superseded by Law and Equity Rules, rule 70).
1361–58 24F(2d)812 (though not required to be prepaid, taxed, and made lien on any judgment entered).
1361–63 10F(2d)692 (irrelevant evidence in transcript introduced by appellant).
1362–81 79Fed368, 24CCA644; 13F(2d) 533; 18F(2d)220; 37F(2d)337. [b] See also 14F(2d)435.
1363–86½–New. Where a case materially changed on appeal, interest will be allowed only from the date of filing the mandate from the appellate court. 67 Fed617.

ADMISSION

1363–3 [b] (3) As defined by Montana statute, "bail" is order of competent court or magistrate that defendant be discharged from actual custody upon bail. 76Mont320, 246P953, 48ALR1425.
1363–8 194Cal555, 229P341; 198Cal 454, 245P821; 69CalA558, 231P767. [a] (3) Statements which merely admit facts or circumstances from which guilt may be inferred are admissions as distinguished from confessions, which acknowledge criminal acts charged. 90 Fla25, 105S130. [c] **Other definitions.**–292Pa16, 140A537.

ADOPTION

1365–23 [f] See also 73Me487, 489, 40 AmR386; 92Conn266, 102A647, 648.

ADOPTION OF CHILDREN

1370–1 83Colo346, 265P690. [a] (10) "Transfer of person from authority of . . . father . . . [to] authority of adopting father." 135Misc521, 238NYS 738. [d] 152Md263, 136A637. [l] **Adoption is proceeding** by which adopting parent assumes parental relationship toward child of another. 196Cal761, 239P36, 37 [citCJ].
1370–2 202Iowa232, 210NW131; 198 Wis128, 223NW434.
1370–3 See 25F(2d)262 [citCJperAnderson,CJ].
1371–10 Mo 276SW71, 78 [citCJ].
1371–14 [a] **In Porto Rico.**–32PortoRico 860.
1371–15 84CalA248, 257P893; 317Ill 597, 148NE312; 234IllA306; 83IndA 456, 148NE163; 212Ky646, 279SW1091 (Roman law basis); 132Misc419, 229 NYS685; 115OhSt139, 152NE387; 24 OhA1, 156NE528; RI 151A131; TexCivA 294SW689, 690 [citCJ]; 145 Wash172, 259P32; 153Wash242, 279P 748.
1371–16 TexCivA 294SW689.
1372–20 124Kan539, 262P16. [a] **In Porto Rico.**–32PortoRico 860.
1372–21 Mo 276SW71; 191NC430, 132 SE295.
1372–23 212Ky646, 279SW1091.
1372–24 290Pa586, 139A737.
1373–28 322Mo1155, 17SW(2d)941.
1373–31 83Colo346, 265P690; 110Conn 463, 148A379; 253IllA372 (substantial compliance sufficient); 256IllA259; 205Iowa772, 218NW469; 227Ky773, 14 SW(2d)183; 152Md263, 136A637; 126 Misc112, 212NYS760; 24OhA1, 156NE 528; 47RI251, 132A545; TexCivA 21 SW(2d)365; TexCivA 25SW(2d)689 (adoption agreement not filed as required); 145Wash172, 259P32; 153 Wash242, 279P748. [e] **Agreement to transfer to adoptive parent** parental authority and custody must be in substantial compliance with statute in order to be valid. TexCivA 19SW(2d)159.
1373–34 220Ala561, 126S635 (common understanding of heirship is not sufficient).
1373–35 88CalA186, 262P1112; 98CalA 158, 276P1045; 317Ill231, 148NE53; Mo 276SW71; 322Mo1155, 17SW(2d) 941; MoA 12SW(2d)523 (but not so as to defeat intent of law); MoA 28SW(2d) 437; 14PaDist&Co343; 47RI251, 132A 545; TexCivA 25SW(2d)689 (holding statutory provisions must be followed excluding all other methods). [c] **Construed in support of rights of natural parent.**–88CalA186, 262P1112 (all doubts so resolved). [d] **Courts will construe every intendment of statutes** relating to adoption in favor of claim of natural parent, and strictly construe them when purpose or effect thereof is to deprive natural parents of possession of child. 98CalA158, 276P1045.
1374–36 253IllA372.
1374–37 125Okl86, 256P54 (or collateral attack).
1374–39 TexCivA 282SW293, 295 [cit CJ].
1375–42 124Kan539, 262P16.
1375–43½–New. Arkansas and Texas adoption statutes are essentially dissimilar and rights and liabilities thereunder are different. 181Ark1112, 29SW(2d) 298.
1375–46½–New. Under statutes in some jurisdictions only persons who are or may become citizens of the United States may adopt a minor child. 75Mont147, 242P959.
1375–46⅓–New. In Porto Rico, by Civ. Code § 211, "adoption is prohibitive to persons having legitimate or legitimated children and to guardians with respect to their wards until they have rendered the accounts of their guardianship." 32PortoRico 860.
1375–46¼–New. Some statutes give no preference to relatives or other persons. 84CalA248, 257P893.
1375–48 196Cal761, 239P36. [a] **After joint adoption** by husband and wife of latter's children by former marriage, subsequent proceedings for adoption by mother were held to be utter nullity. 196Cal761, 239P36.
1375–49 116Tex325, 273SW1109; TexCivA 286SW749.
1375–54½–New. , but in Porto Rico, under Civ. Code § 211, not until the guardian has rendered the accounts of the guardianship. 32PortoRico 860.
1375–57 130Misc793, 226NYS445.
1376–62 87IndA1, 158NE490; 212Ky 646, 279SW1091; TexCivA 294SW689. [b] **Marriage of proposed adoptee** is no obstacle to adoption of adult. 220Ky 590, 295SW896.
1376–62½–New. Child with living parents may be adopted. TexCivA 286SW 749 (Vernon's Sayles Civ. St. Annot. [1914] arts 1–6).
1376–64 [a] **Natural mother** can adopt her children only when parental relationship has been theretofore severed by law. 196Cal761, 239P36.
1376–67 TexCivA 25SW(2d)689 (held invalid as altering legal order of descent). [a] **In Washington** there can be no adoption by contract or agreement in absence of statutory provision therefor. 145Wash172, 259P32.
1376–72½–New. A contract to adopt is not inconsistent with a contract to leave parent's property to the parties adopted in consideration of the latter's living with and taking care of the adopting parent. 311Mo494, 279SW38.
1376–73 See 166Ga788, 144SE317 (contract must be definite and specific); 311 Mo494, 279SW38 (exception to statute of frauds).
1377–75 289Pa579, 137A728.
1377–76 202Iowa232, 210NW131.
1377–81 166Ga788, 144SE317. [a] **Contract does not rest upon surrender of right by adopting parent.**–102CalA 178, 283P331.
1377–87½–New. The contract involves giving the child support, maintenance, and humane treatment during minority. 322Mo435, 16SW(2d)46, 69ALR1.
1378–90 TexCommnA 290SW739.
1378–91 165Ga384, 141SE42.
1378–92 165Ga384, 141SE42.
1378–94 171Ark626, 286SW822, 826 [citCJ]; 181Ark111, 26SW(2d)101(2d case).
1378–95 85Colo28, 273P21. [f] **"Disinherit,"** in promise not to disinherit adopted child, means to cut off from or deprive of an inheritance. 85Colo28, 273P21.
1378–96 Utah 289P103. [a] **Child is not subject of absolute and irrevocable gift.**–Utah 289P103.
1379–4 289Pa579, 137A728.
1379–7 167Ga821, 146SE851; 326Ill 453, 158NE156; 99NJEq39, 133A186; 20OhA479, 152NE729. But see 202 Iowa232, 210NW131. [i] (3) Administrator need not be appointed and made party in action against heir in possession. 165Ga384, 141SE42. [j] **Heirs at law.**–165Ga384, 141SE42. [k] **Petition held not to state good cause of action** against heir. 165Ga384, 141SE42.
1379–9½–New. or where there is specific oral agreement to leave property to adopted child, 311Mo494, 279SW38.
1379–10 77Mont260, 250P823.
1379–12 77Mont260, 250P823.
1379–14 [a] **Contract to receive child by adoption** cannot be specifically enforced to compel adoption with rights of natural-born child. 23OhA462, 155NE 168. [b] **Where no reference to property is made in contract of adoption,** child cannot specifically enforce such contract. 23OhA462, 155NE168.
1379–17 171Ark626, 286SW822, 826 [cit CJ]; 167Ga821, 146SE851; 77Mont260, 250P823.
1380–20 166Minn35, 207NW17 (evidence insufficient to show implied contract). Mo 276SW71 (proof must be clear, cogent, and convincing); MoA 256 SW136 (evidence held sufficient); 289 Pa579, 137A728. [c] 326Ill453, 158NE 156. [d] **If contract is evidenced by writing,** preponderance of evidence is sufficient. 160Ga872, 129SE532. [e] **Evidence held insufficient.**–Mo 276SW71. [f] **Evidence held sufficient.**–167Ga821, 146SE851; Mo 5SW(2d)405.
1380–20½–New. Surrounding circumstances and motive actuating adoption are to be considered in determining existence of agreement to adopt. 311Mo 494, 279SW38.
1380–20⅓–New. The evidence must be clear, strong, and satisfactory. 166Ga 788, 144SE317 (evidence held insufficient).
1380–22 Pa 137A728.
1380–23½–New. Specific performance of agreement to give a child the rights of a natural child will not be granted unless the child's right is clearly established. 99NJEq39, 133A186.
1380–23⅓–New. No recovery for breach,

unless value of services shown. 289Pa579, 137A728.

1380–23¼–New. An oral contract of adoption may be established by the acts and conduct of the parties and inferences therefrom. Mo 5SW(2d)405.

1380–24 [c] (2) Since 1917 order of juvenile court is necessary to effectuate adoption. 199Wis545, 226NW957. [f] **In Texas.–CivA** 19SW(2d) 159.

1381–35 135Misc244, 237NYS658 (effect of abandonment and necessity of notice to parent). [a] 164La149, 113S798. [b] **Unacknowledged written declaration** of mother has been held not "consent" under statute. 135Misc244, 237NYS658.

1381–37 [a] 205 Iowa772, 218NW469.

1381–38½–New. Joinder pro forma by a husband in an instrument of adoption by his wife is not essential to the validity of the adoption under some statutes. 116Tex325, 273SW1109.

1381–38⅓–New. In some jurisdictions the gift of a child by parent to another is generally required to be evidenced by writing. 163Ga272, 136SE60 (construing South Carolina law).

1381–38¼–New. But the acts of the donee upon a parol gift may be such as to estop the parent from denying the gift. 163Ga272, 136SE60 (law of South Carolina).

1381–38½–New. In some jurisdictions deed signed only by father of child is sufficient where parents are separated and mother is mentally deranged and in asylum. Iowa 229NW835.

1381–39 Iowa 229NW835. [b] Iowa 229NW835. [c] **Residence of mother** need not be given where it is stated that she is in lunatic asylum and father's residence is given. Iowa 229NW835. [d] **Recital of father's consent held sufficient.–Iowa** 229NW835.

1381–42 [a] **Instrument authorizing association to secure home for child with persons of its selection** is insufficient to transfer parental custody and control of child to adoptive parents. TexCivA 19SW(2d)159.

1381–43 TexCivA 294SW689, 690 [cit CJ]. [a] **Error in name of child** does not invalidate proceedings where child is sufficiently identified. TexCivA 294SW689. [b] **Name by which child is to be known** need not be stated where child's name is given. Iowa 229NW835.

1381–44 TexCivA 294SW689, 690 [cit CJ].

1382–54½–New. Under some statutes a privy examination and acknowledgment of an instrument of adoption by a married woman as prescribed by statute for acknowledgment of deeds by married women is not essential to the validity of adoption, but an ordinary acknowledgment or proof by witnesses is sufficient. 116Tex325. 273SW1109.

1382–56 See also 32PortoRico 860.

1382–58 [a] **In Porto Rico.–**32Porto Rico 860. [b] **Death of adopting parent before approval** does not deprive court of jurisdiction to pass upon adopting deed under Civ. Code § 209. 32Porto Rico 860. [c] **Approval not merely ministerial act** but involves exercise of judicial discretion. 32PortoRico 860. [d] **Approval is ministerial act.–**135Misc521, 238NYS738.

1382–59½–New. It will be presumed that court made investigation required by statute where court approves adoption order. 135Misc244, 237NYS658.

1382–59⅓–New. Properly executed consent is waived by approval. 135Misc 244, 237NYS658.

1382–67 202 Iowa232, 210NW131.

1383–79 81Mont185, 262P887; 7Pa Dist&Co 505. [b] (1) See also 83CalA 137, 256P484. (3) Strict compliance with statutory requirements is necessary. 83CalA137, 256P484. [c] 116Nebr 450, 218NW89. [e] **In Illinois.–**232 IllA 152; 234 IllA306.

1383–80½–New. As involving the personal rights of parents, it is also a civil suit within statutes authorizing change of venue in any civil suit, the guardian and parents alike having the right to demand such change of venue. MoA 12 SW(2d)523.

1383–80⅓–New. Irregularities in adoption proceeding may be waived. 253 Ill A372.

1383–81 130Misc793, 226NYS445; 24 OhA1, 156NE528; 290Pa586, 139A737. [e] (2) Court is not deprived of jurisdiction by filing of answer by father (322 Ill 95, 152NE554), (3) nor by fact that no provision for appeal is made where adoption is restricted by parent (322 Ill 95, 152NE554).

1383–82 [b] **In New York.–**132Misc419, 229NYS685.

1383–84 [a] **Evidence that father's residence is unknown and recital of fact in record** is not prerequisite to jurisdiction to grant petition for adoption. 172 Ark541, 289SW466.

1383–85 191NC430, 132SE295.

1384–88 13PaDist&Co 755.

1384–89 47RI 375, 133A651. [a] **As meaning "domicile"** (1) term "resides," as used in statute, means place where child has place of domicile. 47RI 375, 133A651. (2) Court of city in which child lived with mother prior to mother's death, and whose father had previously died, has jurisdiction, though child left city before petition was filed. 47RI 375, 133A651.

1384–92 191NC430, 132SE295.

1384–93½–New. General appearance gives court jurisdiction of parent. 253 IllA372.

1384–94 317 Ill 231, 148NE53 (insane parent cannot give consent though represented before court by guardian ad litem); 191NC430, 132SE295, 299 [cit CJ]. But see MoA 12SW(2d)523.

1384–96 MoA 285SW748.

1384–98 317 Ill 231, 148NE53; 317 Ill 597, 148NE312; 329 Ill 299, 160NE579; 256 IllA259; 127Me418, 144A397; Md 152A109; MoA 285SW748 (insufficient); 191NC430, 132SE295. [a] **Petition held sufficient.–**83 IndA456, 148NE163. [b] **Name of child** need not be stated where unknown, and where neither name of mother nor identity of father is known. 172Ark541, 289SW466.

1384–1 But see 14PaDist&Co 343.

1384–1½–New. A clause in a petition "but without rights of inheritance to her estate" is an inclusion of provision of statute denying right of inheritance to adoptive parent rather than an expression of intention to exclude the right of the child to inherit. 155Tenn 378, 293SW532.

1384–1⅓–New. Upon filing of petition court obtains jurisdiction of subject matter. 253 IllA372.

1384–1¼–New. Procedural irregularities in petition may be waived by general appearance. 253 IllA372.

1384–1½–New. Such irregularities when waived do not affect court's jurisdiction of subject matter. 253 IllA372.

1385–3 [a] **Proper rule where husband and wife are living together** would require both to become adopting parents unless good reason is given otherwise. 8PaDist&Co 636.

1385–4 Contra 191NC430, 132SE295.

1385–4½–New. Both parents, if living, should be parties. 191NC430, 132SE 295.

1385–4⅓–New. Caption of petition does not supply defect of parties within the petition. 191NC430, 132SE295.

1385–5 329 Ill 299, 160NE579; 256 IllA 259; 191NC430, 132SE295, 299 [quot CJ]. [a] **Defective allegation is cured** where father denies abandonment and case is tried on such issue and finding of abandonment is made. 253 IllA372.

1385–6 317 Ill 231, 148NE53 (insane parent cannot consent though represented before court by guardian ad litem); 317 Ill 597, 148NE312; 329 Ill 299, 160 NE579 (allegation held insufficient); 127Me418, 144A397; 191NC430, 132SE 295.

1385–7 191NC430, 132SE295.

1385–8 317 Ill 597, 148NE312; 191NC 430, 132SE295. [b] **In Illinois.–**Requiring residence to be stated so far as known, failure to state father's residence is immaterial where he appears. 253 IllA372.

1385–9 317 Ill597, 148NE312. [b] **Insufficient allegation.–**329 Ill 299, 160NE 579 (that father resided in state of Michigan).

1385–11 [a] **Allegation of residence within county is sufficient to give probate court jurisdiction.** 172Ark541, 289 SW466.

1385–11½–New. Name of child must be exactly stated. 8PaDist&Co 636.

1385–12½–New. Name of petitioner must be exactly stated. 8PaDist&Co 636.

1385–14 14PaDist&Co 343.

1385–19 322Mo 1155, 17SW(2d)941 (consent of child under twelve years of age unnecessary).

1385–24 83Colo 346, 265P690; 317 Ill 231, 148NE53; 212Ky430, 279SW640; 162La880, 111S267; 164La149, 113S 798; 322Mo 1155, 17SW(2d)941; 75 Mont147, 242P959; 221AppDiv86, 222 NYS319; 191NC430, 132SE295; 8Pa Dist&Co 636; 12PaDist&Co 739. [c] (2) Consent of parents in writing will be presumed from their failure to appear after notice by summons or publication. 322Mo 1155, 17SW(2d)941. [e] (2) Court is without jurisdiction where mother's consent is lacking. 75 Mont147, 242P959. [f] **Ex parte judgment** held invalid. 212Ky430, 279SW 640. [g] **After issuance of void letters** parent cannot give consent to adoption. 191NC430, 132SE295. [h] **Statute held mandatory** requiring that consent shall be acknowledged and witnessed. 25 Oh A372, 158NE287. [i] **Revocation of consent.–**153Wash242, 279P748.

1386–25 221AppDiv86, 222NYS319.

1386–27 75Mont147, 242P959. [a] **In Illinois.–**317 Ill 231, 148NE53. [b] **Testimony of two witnesses that residence of father of infant is unknown** is sufficient in some jurisdictions to dispense with statutory requirement of his appearance and consent in open court. 172Ark541, 289SW466. [c] **Parent adjudicated insane.–**221AppDiv86, 222NYS 319.

1386–29 7PaDist&Co 364; 13PaDist& Co 755.

1386–31 83Colo 346, 265P690, 692 [cit CJ]; 77Mont260, 250P823; 7PaDist& Co 505; 8PaDist&Co 146; 12PaDist&Co 739. [f] **Abandonment must be willful.** –191NC430, 132SE295. [g] **Parents may change intention** and withhold consent, even where abandonment is shown. 14PaDist&Co 343.

1387–33 241Mich567, 217NW780, 781 [quotCJ] (abandonment by adoptive parent shown); 191NC430, 132SE295, 299 [quotCJ]; 8PaDist&Co 146 (conduct showing abandonment under statute); 12PaDist&Co 739.

1387–34 191NC430, 132SE295, 299 [quotCJ].

1387–36 110Conn463, 148A379.

1387–37 127Me418, 144A397; 120 Oh St91, 165NE574 (statute held constitutional); 25 OhA372, 158NE287. [c] (2) After award of custody of child to mother in divorce proceedings, fact that father is not notified of hearing in adoption proceedings, and is not present, and does not give his consent, does not deprive court of jurisdiction. 119 Kan803, 241P115. [d] 70CalA1, 232P 738; 88CalA186, 262P1112 (consent of father held necessary where mother died after securing interlocutory decree for cruelty but before final judgment).

1388–41 See also MoA 12SW(2d)523.

1388–45 83 IndA456, 148NE163.

1388–46 256Mass140, 152NE311 (decree held not erroneous).

1388–48 13PaDist&Co 755.

1388–55 322Mo 1155, 17SW(2d)941 (child under twelve years of age whose consent is unnecessary); MoA 285SW 748.

1388–56 Mass 171NE815; 6PaDist&Co 506. [d] **In Kansas.–**119Kan803, 241P 115. [e] **In adoption of adult** notice need not be given to adoptee's husband. 220Ky590, 295SW896. [f] **Determination of acts or conduct of parent forfeiting right to notice** of child's adoption proceeding is in discretion of legislature. Mass 171NE815.

1389–57 317 Ill 231, 148NE53; 191NC 430, 132SE295.

1389–58 264Mass112, 162NE225 (alleged father); Mass 171NE815 (jurisdiction of foreign court where no notice given to father); 124 Or480, 264P 842.

1389–59 264Mass112, 162NE225. But

see 317 Ill 231, 148NE53.

1389-61 215AppDiv38, 213NYS70.

1389-63 75Mont147, 242P959; 215App Div38, 213NYS70.

1389-63½-New. In such case the order of adoption is not void 215AppDiv38, 213NYS70.

1389-63¼-New. or voidable unless the finding of abandonment was erroneously made. 215AppDiv38, 213NYS70.

1389-64 [a] **On death of parent** to whom custody was awarded, surviving parent has right to be heard as to disposition of child. 70CalA1, 232P738. [b] **Interlocutory decree of divorce is insufficient** to deprive parent of right to notice. 98CalA158, 276P1045.

1389-67 But see 317 Ill 231, 148NE53.

1389-69½-New. [§ 90a] c. **To Public Officials.** In some jurisdictions, a copy of the petition and a statement containing the names and addresses of the petitioners is required to be served on the state child welfare commission. 121 Or 224, 252P963 (commission server in advisory capacity).

1389-69¼-New. Failure to serve the commission with petition is mere irregularity. 121 Or224, 252P963.

1389-69¼-New. The statute does not authorize any appeal by the commission. 121 Or224, 252P963.

1389-69⅛-New. A finding that the persons to be notified cannot be found within the state is necessary to authorize an order for notice by publication. 322Mo 1155, 17SW(2d)941.

1389-69⅛-New. An order of publication directed to "unknown" parents of minor child sought to be adopted is ineffective. 322Mo 1155, 17SW(2d)941.

1389-69½-New. An order of publication based on an unverified petition alleging that the child's parents have absconded and absented themselves from their place of abode within the state is void in the absence of evidence on finding that they could not be found within the state. 322Mo 1155, 17SW(2d)941.

1389-72 [b] 84CalA248, 257P893.

1389-75 84CalA248, 257P893; 85Colo 28, 273P21, 24 [citCJ]; MoA 12SW(2d) 523 (paramount); 11PaDist&Co 611; 13PaDist&Co 755; Wis 231NW158.

1389-77 29Hawaii 238.

1389-77½-New. Whether child's aunt or grandparents are more suitable to adopt child is question of fact. Wis 231NW158.

1389-79 [b] **After expiration of term in which decree rendered** (1) court cannot revoke of its own motion. 83 IndA 456, 148NE163. (2) Application of stranger to record made within term in which decree was entered but not heard till following term for leave to appear as amicus curiæ and show cause why order should be revoked does not maintain case in court so as to permit modification or revocation at such following term. 83 IndA456, 148NE163. (3) Power of court over its decrees is same as over those in any other class of cases. 83 IndA456, 148NE163.

1390-80 70CalA1, 232P738 (judgment of adoption cannot be attacked collaterally because of errors or irregularities in matter of procedure).

1390-81 MoA 285SW748.

1390-82½-New. Child may be given right of inheritance from adoptive parent, although petition excluded such right. 155Tenn378, 293SW532.

1390-82¼-New. Under a statute providing that a child shall take the name in which it is adopted, a decree providing that the child should retain its own name is not void where the child was adopted in such name. 87 IndA1, 158 NE490.

1390-83 329 Ill 299, 160NE579.

1390-84 191NC430, 132SE295. [a] (1) 25 OhA372, 158NE287. (2) Presumption that all provisions of law relating thereto were complied with subsists till overcome by proof to contrary. 25 OhA372, 158NE287.

1390-85 181Ark111, 26SW(2d)101(2d case).

1390-86 198Wis128, 223NW434. [a] **Ex parte judgment** held invalid. 212 Ky430, 279SW640.

1390-87 83 IndA456, 148NE163. Contra 191NC430, 132SE295.

1390-89½-New. An adoption order need not show on its face compliance with all conditions precedent to jurisdiction. NS [1929] 1DomLR794.

1390-92½-New. Court has right to impose a condition in the decree in adoption that the adoptive parents should not disinherit the child. 85Colo 28, 273 P21.

1390-92¼-New. Where a decree in adoption recited that a promise not to disinherit the adopted child was one of the conditions of the decree, an inhibition against disinheritance was part of the decree in adoption. 85Colo 28, 273 P21.

1391-94 [a] **After lapse of twenty years** decree of adoption cannot be collaterally attacked. 155Tenn378, 293S W532.

1391-96 172Ark541, 289SW466; 83 Colo 346, 265P690 (parents); 81Mont 185, 262P887; Nebr 226NW807 (parent who appears in open court). But see 80 CalA526, 251P939.

1391-98½-New. Void order of adoption cannot estop wife from claiming property as sole beneficiary of husband under will. 181Ark111, 26SW(2d)101 (2dcase).

1391-3 85Colo 28, 273P21; 127Me418, 144A397; MoA 285SW748; 47RI 251, 132A545. [c] **"Person aggrieved."**—Mother of child held "person aggrieved" within meaning of statute. Me 136A 662. [c] **Persons entitled to appeal.**—Ark 31SW(2d)406. [d] **Finding supported by evidence** that child should be awarded to aunt rather than grandparents cannot be disturbed. Wis 231NW 158. [e] **Presumptions indulged in** on appeal. Ark 31SW(2d)406.

1391-4 232 IllA152; 234 IllA306; 75 Mont147, 242P959; 47RI 251, 132A545. [d] **Orders held not appealable.**—28Ariz 605, 238P387. [e] **Neither property rights nor personal liberty** are involved in adoption proceedings to give right to writ of error in absence of statute. 232 IllA152. [f] **Appellants on appeal from decision in adoption proceedings cannot complain of change in property rights** which do not affect them. 232 IllA152. [g] **Relationship of parties is not ground for reversal** in absence of clear showing of abuse of discretion. 84CalA248, 257P893. [h] **Failure of trial court to examine child under twelve years of age** is not ground for reversal. 84CalA248, 257P893. [i] **Prejudice of trial court against contestant** does not require reversal where error is not shown and it does not appear that welfare of child will not be best subserved by order. 84CalA248, 257P893. [j] **In absence of error appearing on record** order will not be reversed. 84CalA248, 257P893.

1391-5 75Mont147, 242P959. See also 32PortoRico 860.

1391-6 NS [1929] 1DomLR794. But see 75Mont147, 242P959.

1391-10 135Misc521, 238NYS738 (necessity of complying with statute).

1391-10½-New. **Statutes dealing with abrogation of adoption** must be substantially complied with. 126Misc112, 212NYS760.

1391-11 149Wash50, 270P128.

1391-14 87 IndA1, 158NE490 (holding setting aside adoption a chancery proceeding).

1392-19 220Ky590, 295SW896; 191NC 430, 132SE295. [a] (1) 87 IndA1, 158N E490, 492 [citCJ]. (2) Heirs of adopter may set aside adoption of adult for inheriting only for fraud or undue influence of adoptee. 220Ky590, 295SW 896, 899 [citCJ]. (3) Heirs cannot have judgment set aside merely on grounds of undue influence or mental incapacity. 228Ky850, 16SW(2d)477.

1392-20 But see 135Misc521, 238NYS 738.

1392-22 162Ga44, 132SE639. [a] 162 Ga44, 132SE639.

1392-24½-New. Record in adoption proceeding can be made to show that alleged mother of child has interest in controversy by petition or motion stating interest. MoA 7SW(2d)704.

1392-26 199Cal 699, 251P205; 137 Wash262, 242P370. [b] (3) Concealment of unlawful relationship between person adopting and adoptee held not such fraud as to warrant setting aside judgment at suit of heir's petitioner. 220Ky590, 295SW896.

1392-27 [a] **Evidence held insufficient to show undue influence.**—228Ky850, 16 SW(2d)477.

1392-28 88CalA186, 262P1112; 6Pa Dist&Co 506. [b] **Decree of adoption without notice** to surviving parent after death of parent to whom custody was awarded in divorce proceedings based on cruelty held properly set aside. 70 CalA1, 232P738.

1393-30 Contra 7PaDist&Co 139.

1393-31 230AppDiv127, 243NYS187; TexCivA 29SW(2d)843(1stcase) (statute). See also 135Misc521, 238NYS738. But see 11PaDist&Co 766. [a] **Court must determine** whether best interests of child will be promoted by granting order of abrogation. 126Misc112, 212 NYS760.

1393-32 11PaDist&Co 611. [a] **Evidence held to show** adopting parents unable properly to support and educate child. 126Misc112, 212NYS760.

1393-33 191NC430, 132SE295.

1393-34 119Kan803, 241P115.

1393-37 But see 135Misc521, 238NYS 738.

1393-38½-New. Under some of the provincial statutes in Canada adoption may be set aside only on the grounds provided for. NS [1929] 1DomLR581.

1393-38¼-New. That natural mother has remarried and has home in which she can raise child does not alone warrant rescission. Md 152A109.

1393-40 [c] **When application deemed made.**—199Cal 699, 251P205.

1393-49 85Colo 28, 273P21 (express condition against disinheritance); 329 Ill 299, 160NE579; 161Minn426, 201N W925; 81Mont185, 262P887 (order valid on its face not subject to collateral attack); Nebr 226NW807; 130 Misc793, 226NYS445; 121 Or224, 252P 963; 47RI 251, 132A545.

1394-50 317 Ill 231, 148NE53; 256IllA 259; 121 Or224, 252P963; 124 Or480, 264P842. [c] (2) Where adoption proceeding is collaterally attacked on ground that mother of adopted child did not give her written consent, extrinsic evidence is admissible to show that she gave her oral consent at time of adoption and has at all times since acquiesced in, and ratified, adoption. 125 Okl 86, 256P54.

1394-50½-New. The sole devisee and legatee under the will of an adoptive parent could not contest a condition of the decree in adoption, that the adoptive parent should not disinherit the adopted child. 85Colo 28, 273P21.

1394-51 317 Ill 231, 148NE53; 317 Ill 597, 148NE312.

1394-52 162Ga44, 132SE639.

1394-53 162Ga44, 132SE639.

1394-55 132Misc279, 229NYS476.

1394-56 [b] **Evidence held insufficient to show adoption.**—322Mo 682, 15SW (2d)818.

1394-60½-New. Both oral and documentary evidence is admissible in support of allegations that there had been a virtual adoption of caveatrix in will contest, by testatrix and her husband. 160Ga872, 129SE532.

1394-61 [b] (1) See also 80CalA526, 251P939. (2) Where nunc pro tunc order of adoption was made, it was held that it was not sufficiently shown that order was based on sufficient evidence of prior proceedings. 13F(2d)19. [f] **Evidence held to show** that written adoption contract constituted entire agreement relating to adoption. 69CalA 552, 231P1010.

1395-62½-New. Evidence held sufficient to warrant verdict for defendant in claimant's action for portion of estate based on alleged adoption. 165Ga 176, 140SE356.

1395-63 87 IndA1, 158NE490; 124Kan 539, 262P16; 212Ky646, 279SW1091; 116Nebr450, 218NW89 (if adoption is unrestricted); 135Misc521, 238NYS738. [d] **Abandonment statutes.**—212Ky646, 279SW1091. [e] **Prosecution for abandonment of adopted child.**—212Ky646, 279SW1091.

1395-64 181Ark1112, 29SW(2d)298;

TexCivA 282SW293, 295 [citCJ]; **TexCivA** 286SW749. [a] (1) 116Tex 325, 273SW1109; **TexCivA** 282SW293. (2) Adoption does not invest person adopted with any contractual or property right but merely makes him legal heir for purpose of inheritance subject to be pretermitted by will and in absence of will entitled to priority, if alive at death of adopter, to persons of remoter rank of descent. 116Tex325, 273SW 1109.

1395-65 [a] **It is not necessary to change name** of child. **MoA** 256SW136.

1395-67½-New. Status of adopted infant and parent toward each other is governed by the statute of forum creating the right of adoption. 212Ky 646, 279SW1091.

1395-68 212Ky646, 279SW1091; **MoA** 28SW(2d)437 (right to act as child's curator).

1396-69 181Ark1112, 29SW(2d)298; 25 ObA372, 158NE287.

1396-70 [b] **In Indiana.**-83 IndA456, 148NE163.

1396-72 **TexCivA** 289SW745. [a] **Statute relative to grounds on which child may be taken from adoptive parent** does not inhibit court from inquiring into condition surrounding child and from placing its custody where best interests of child will be subserved. **TexCivA** 289 SW745.

1396-72½-New. Grant of custody in adoption proceedings is not deprivation of liberty of child. 232 IllA152.

1396-73 212Ky646, 279SW1091.

1396-76 212Ky646, 279SW1091. [c] **Adoptive parent liable for necessaries** furnished adopted child. 212Ky646, 279SW1091. [d] **All civil remedies for enforcing proper maintenance** apply to adoptive parent. 212Ky646, 279SW 1091.

1396-78½-New. To be liable for support when natural parents are living, the adopter must by his own act relieve such parents of the obligation to support the child and voluntarily assume the burden himself. 101TexCr316, 277SW685.

1396-78¼-New. Thus, where parental authority and custody is transferred in writing as provided for by statute, the adoptive parent may not be convicted for failing and refusing to support a child whose natural parents are living. 101TexCr316, 277SW685.

1397-80 85Colo 28, 273P21, 24 [quot CJ].

1397-82 244Mich197, 221NW116; 114 ObSt579, 151NE708.

1397-92½-New. **Articles of adoption cannot be construed as a contract bestowing property rights** upon divorced husband, where nothing is stated as to this. **TexCivA** 286SW749.

1397-92¾-New. Widow's recovery cannot include anything for adopted child, in suit against railroad for employee's death. **LaA** 128S724.

1397-93 181Ark1112, 29SW(2d)298.

1397-94 212Ky646, 279SW1091.

1397-95 [f] **In Texas.**-**CivA** 282SW293.

1398-97 181Ark1112, 29SW(2d)298; 200 Cal 299, 252P1049.

1398-98 205Cal 506, 271P1067; 175 Minn193, 220NW601; 114 ObSt579, 151 NE708; 125 Or53, 263P911.

1398-99½-New. Adoption and apprenticeship are inconsistent. 23 ObA462, 155NE168.

1398-1 116Tex325, 273SW1109; **TexCivA** 282SW293.

1398-1½-New. Citizenship of child born in state, of American mother, cannot be changed by adoption with mother's consent by foreign citizen on mother's remarriage. 130Misc793, 226NYS 445.

1398-7 23 ObA462, 155NE168.

1398-8 145Wash394, 260P259. [b] (1) 145Wash394, 260P259 (contract to make one an heir is not legally effective). (4) Adopted child has no rights of inheritance other than those given by law under which it was adopted. 123Kan718, 256P1004. [e] **Legal status by adoption in New Hampshire** upheld in Vermont where not inconsistent with laws and policies. 98Vt424, 129A166.

1398-9 [c] **No element of estoppel can arise in adoption proceedings for purpose of inheritance.** 220Ky590, 295SW 896.

1399-11 181Ark1112, 29SW(2d)298; 123Kan718, 256P1004; 124Kan539, 262 P16; 175Minn193, 220NW601; 116Nebr 450, 218NW89 (unrestricted adoption); 117Nebr332, 220NW583; 113 ObSt526, 149NE871; 128 Okl 149, 261P920; **TexCivA** 282SW293; **TexCivA** 286SW 749; **TexCivA** 294SW689. [i] **In Vermont.**-98Vt424, 129A166. [j] **Adopting parents** are under no legal obligation to devise property to adopted child. 69 CalA552, 231P1010. [k] **In Ohio.**-113 ObSt526, 149NE871. [l] **Where adoption was joint, claim of misrepresentation made by only one** will not prevent inheritance by child from other. **TexCivA** 286SW749. [m] **Statute is within power of legislature.**-117Nebr332, 220 NW583.

1399-12 205Cal 506, 271P1067 (adopted daughter of husband predeceasing wife has right to inherit common property of husband and wife remaining on wife's death); 29ObA22, 162NE788; 113 ObSt526, 149NE871; 12PaDist&Co 510.

1400-13 232 IllA152 (statute).

1400-18 317 Ill 231, 148NE53; 202 Iowa232, 210NW131, 198Wis128, 223 NW434. [b] **Parol obligation accompanied by virtual, though not statutory, adoption,** and acted on by both parties during obligor's life, may be enforced in equity on death of obligor by decreeing child entitled as a child to property of obligor if latter dies intestate as to property. 160Ga872, 129SE532.

1400-18½-New. Daughter, adopted after making of will, held not to occupy relation of after-born child. 193NC439, 137SE306.

1400-18¼-New. Valid adoption in New York of New York child by a Canadian citizen does not require right of inheritance in Canada. 130Misc793, 226NYS 445.

1400-18¼-New. Adoption of New York child by a citizen of Ontario gives the child the same right of inheritance in New York and Ontario as a natural born child. 130Misc793, 226NYS445.

1400-18½-New. Right to inherit from natural kindred is not affected by adoption. 132Misc279, 229NYS476.

1400-19 135Misc163, 238NYS259.

1400-21 124Kan539, 262P16; 132Misc 279, 229NYS476.

1400-22 51SD113, 212NW488; **Wash** 291P325.

1400-23 **Wash** 291P325; 181Ark1112, 29SW(2d)298; 51SD113, 212SW488.

1401-30 161Minn426, 201NW925. [c] But see **Iowa** 228NW629.

1401-31 232 IllA152 (statute); 123Kan 718, 256P1004; 30 ObA201, 164NE537; 27 OhNPNS344; 284Pa164, 130A319.

1401-33½-New. Under the laws of descent and distribution, an adopted son is not entitled to legacies of his adopted parent who predeceased the testator. 284Pa164, 130A319.

1401-34½-New. In some jurisdictions a like rule applies in case of a second adoption during the lives of the first foster parents. 161Minn426, 201NW 925.

1401-36 [a] **Child cannot inherit** when act declaring her to be heir is repealed. 166Minn35, 207NW17.

1402-38 [b] **As between father of adoptive parent and relations by blood of adopted child,** relations by blood of adopted child are entitled to inherit where child dies without heirs of his body after death of adoptive parent. 31 NM54, 240P991, 42ALR521.

1402-42 116Nebr450, 218NW89 (unrestricted adoption).

1402-42½-New. In Illinois, by statute, adoptive parents do not inherit property acquired by the child from blood kindred. 232 IllA152.

1402-42¾-New. The legislature has power to confer on adoptive parents the right to inherit from the child. 117 Nebr332, 220NW583.

1402-43 181Ark131, 24SW(2d)959; 213 Ky696, 281SW832. [a] **Legal adoption of parent** must be shown. 135Misc385, 237NYS713.

1402-44 213Ala599, 105S686; 181Ark 1112, 29SW(2d)298; 98Fla444, 124S36; 31NM54, 240P991, 998, 42ALR521 [quot CJ].

1402-45 98Fla444, 124S36; 123Kan 718, 256P1004; 228Ky286, 14SW(2d) 1072; **Mass** 171NE815; 31NM54, 240 P991, 998, 42ALR521 [quotCJ]. [g] **Full faith and credit.**-99 NJEq135, 132 A765. [h] **Lack of jurisdiction.**-228Ky 286, 14SW(2d)1072. [i] **In New Jersey.**-**Prerog** 146A656.

1403-46 31NM54, 240P991, 998, 42ALR 521 [quotCJ].

1403-47 181Ark1112, 29SW(2d)298; 123Kan718, 256P1004; 31NM54, 240P 991, 998, 42ALR521 [quotCJ]. But see 124Kan539, 262P16.

1403-48½-New. In New Jersey children adopted under the laws of other states are not entitled to inherit. 99NJEq135, 132A765.

ADULTERATION

2 C. J.—3-15 See also 43F(2d)154.

3-17 38Wyo 47, 264P1023, 57ALR675 (as to amount of virgin wool in woolen articles).

3-21 38Wyo 47, 264P1023, 57ALR675.

3-31 32PortoRico 131.

4-37 [b] **In Porto Rico.**-32PortoRico 131.

4-38 [b] **Under Pure Food and Drugs Act,** brine exceeding amount necessary to preserve peas is adulteration. 191 Wis635, 211NW764.

4-41 32PortoRico 131; 32PortoRico 271; 33PortoRico 15. [b] **In Porto Rico.**-32PortoRico 737.

5-42 32PortoRico 17.

5-44 32PortoRico 131; 32PortoRico 271.

5-47 [d] **Taking orders subject to acceptance or refusal outside of state** does not constitute sale within statute prohibiting sale of medicinal stock foods of which certified copy of label has not been filed with state food and drug commission. 49SD402, 207NW484.

5-48 [c] **In Porto Rico.**-32PortoRico 131.

7-60 32PortoRico 17; 32PortoRico 271; 33PortoRico 239.

7-65 32PortoRico 271. But see 34 PortoRico 319.

9-89 34PortoRico 431; 32PortoRico 737 (rule applied to information charging second offense). [a] 32PortoRico 737 (charging second offense).

9-90 33PortoRico 771.

9-94 32PortoRico 17 (adulteration of milk).

9-98 [a] 32Porto Rico 737. [b] **Judicial notice.**-32PortoRico 17. [c] **Evidence insufficient to destroy presumption** that adulterated milk found at selling station was kept there for sale. 34 PortoRico 319.

9-99 32PortoRico 737 (chemist's report); 33PortoRico 15; 34PortoRico 751 (conviction not prevented because two methods of analysis produce different results); 35PortoRico 548 (conclusive in absence of objection). [a] **University degree** held not necessary to qualification as chemical expert. 32 PortoRico 17 (witness having entered government service through examination).

9-1 35PortoRico 597 (bread). [b] 32 PortoRico 17 (adulteration of milk); 32 PortoRico 131; 32PortoRico 820. [c] **Evidence insufficient to sustain conviction** under charge of offering adulterated milk for sale. 32PortoRico 271; 32Porto Rico 353. [d] **No variance.**-35Porto Rico 546 (adulterated milk case). [e] **Evidence held sufficient** to sustain conviction of sale of adulterated milk. 33 PortoRico 239.

ADULTERY

12-15 30F(2d)823; 4HawaiiFed266, 277 [citCyc]; 4HawaiiFed625, 632 [cit Cyc]. [b] 69Utah53, 252P280, 286 [cit CJperStraup,J].

13-16 152Va965, 146SE289.

13-17 8F(2d)880 (New York). [d] (2) Statute not unconstitutional as denial of equal protection of law. 29Hawaii88.

13-18 30F(2d)823.

14-31 202 Iowa534, 210NW542.

14-35 308Mo560, 274SW70.

15-40 22AlaA563, 117S762; 7PaDist&Co 658.

15-43 66Utah267, 241P838, 839 [quot CJ].
16-72½-New. , or that the codefendant of accused has not been prosecuted. 202 Iowa534, 210NW542.
17-81 But see 41GaA843, 155SE58.
17-83 175Minn218, 220NW563; 52ND 391, 202NW857.
18-99 175Minn218, 220NW563; 52ND 391, 202NW857.
18-2 [c] 52ND391, 202NW857.
19-7 52ND391, 202NW857.
20-31 4HawaiiFed452.
20-37 4Hawaii582, 591 [citCJ]; 202 Iowa534, 210NW542.
20-38 202 Iowa534, 210NW542.
20-39½-New. If indictment is joint, either party may, under statutes, demand a separate trial. 202 Iowa534, 210NW542.
22-64 5PaDist&Co 481.
22-65 21AlaA626, 111S195.
22-70 101Vt30, 139A918.
22-71 202 Iowa534, 210NW542; 9 PaDist&Co 299, 300 [citCJ]; 9PaDist& Co 433; Utah 266P261, 263 [citCJ]; 101Vt30, 139A918.
23-72 46 Ida423, 267P950.
23-76 46 Ida423, 267P950 (opportunity).
24-7 But see 46 Ida423, 267P950.
25-9 86CalA45, 260P313; 196NC387, 145SE784.
25-10 196NC387, 145SE784.
26-34 [c] (3) Cohabitation of defendant in county of birth with woman reputed to be wife. 13PaDist&Co 366.
26-35 247Mich335, 225NW552(1stcase).
26-36 13PaDist&Co 366.
27-40 247Mich335, 225NW552(1st case).
27-45 46 Ida423, 267P950.
28-58 77Colo 563, 238P71, 73 [citCJ]; Utah 266P261 (evidence requiring submission to jury).
28-60 5PaDist&Co 481. [a] 86CalA45, 260P313; 41GaA843, 155SE58; 4Hawaii Fed763; 202 Iowa534, 210NW542; 193 NC786, 138SE134; 193NC787, 138SE 135; 100TexCr508, 271SW907. [b] 22 AlaA563, 117S762; 46 Ida423, 267P950; 99TexCr547, 270SW1028; 100TexCr506, 271SW907; 187Wis136, 203NW755.
29-85 51TexCr643, 104SW898.
29-88 [a] **Other instructions on circumstantial evidence held not erroneous.**–202 Iowa534, 210NW542.
30-94 28Hawaii88. [e] **Sentence held excessive.**–Sentence of imprisonment for one year and fine of five hundred dollars reduced to fine of five hundred dollars. 31 OklCr287, 238P234.
30-95½-New. Indeterminate sentence of three years in penitentiary instead of jail sentence is not objectionable in some jurisdictions. 202 Iowa534, 210NW542.

ADVANCE or ADVANCES

31-5 103NJLaw553, 137A211.
31-6 [a] **Similar definitions.**–136Misc 615, 241NYS648.
32-19 290Pa67, 138A85, 87 [quotCJ].
32-20 290Pa67, 138A85, 87 [quotCJ]. See also 11PaDist&Co 714, 715 [citCJ].
32-21 290Pa67, 138A85, 87 [quotCJ].
32-22 290Pa67, 138A85, 87 [quotCJ].
32-23 290Pa67, 138A85.
33-26 11PaDist&Co 714, 715 [quotCJ].
33-27 290Pa67, 138A85, 87 [quotCJ].
33-28 290Pa67, 138A85, 87 [quotCJ].
33-29 70CalA663, 234P339; 290Pa67, 138A85, 87 [quotCJ].
33-30 290Pa67, 138A85, 87 [quotCJ].
33-31 70CalA663, 234P339; 229Ky162, 16SW(2d)756; 290Pa67, 138A85, 87 [quotCJ].

ADVERSE POSSESSION

50-7 [a] (1) 198Cal 440, 245P422; 80 CalA393, 252P337; 88CalA238, 263P 362; 88CalA441, 263P870; 93CalA97, 269P468; Del 147A165; 91Fla612, 108 S689, 46ALR870; 338 Ill 533, 170NE 749; 83 IndA580, 149NE353; Iowa 232 NW150; 122Kan343, 346, 251P1086 [citCJ]; 219Ky765, 294SW487; 226Ky 116, 10SW(2d)613; 228Ky310, 14SW (2d)1075; 234Ky64, 27SW(2d)382; 234 Ky18, 27SW(2d)399; La 129S686; 256 Mass311, 152NE360 (person cannot hold land adversely to himself); Mass 170 NE807; 235Mich174, 209NW152; 123 Or549, 262P243; Or 283P25; TexCivA 276SW719; TexCivA 298SW662; Tex CivA 30SW(2d)378; 147Wash354, 266P 148; 148Wash328, 268P889; 39Wyo 494, 273P908. (2) Where possession was continuous, actual, open, notorious, peaceable, under color of title to well-described boundaries, some inclosed by fences and cultivated for forty years, title by adverse possession was established despite invalidity of paper title. 212Ky64, 278SW173.
50-8 218Ala160, 117S753; 329 Ill 374, 160NE572.
50-9 87 IndA536, 162NE61(2dcase); 319Mo 660, 4SW(2d)819.
50-15 63Me434; 60Md74.
50-16 201 Iowa902, 208NW290; 147 Miss215, 113S332; 147Miss385, 113S 336.
51-17 147Miss215, 113S332; 147Miss 385, 113S336.
51-17½-New. There can be no title by presumption against the public. 102 NJL443, 131A870.
51-17¼-New. Statute relating to adverse possession does not affect claim by prescription. 213Ala670, 106S194.
51-17¼-New. "Adverse possession" is not synonymous with "adverse claim." TexCommnA 296SW486.
51-17½-New. Title by adverse possession is governed by laws of state where land is situated. NM 288P604.
51-18 279US300, 49SCt306, 73Led700; 213Ala408, 104S797; 213Ala654, 105S 872 (lack of actual possession with payment of taxes or under color of title is sufficient answer to claim of adverse possession under statute); 216Ala416, 113S35; 218Ala160, 117S753; 80CalA 393, 252P337; 81Colo 168, 254P768; 90 Fla51, 105S145; 211Ky682, 277SW 1007; 214Ky247, 283SW106; 217Ky 113, 288SW1053; 219Ky765, 294SW 487; 226Ky685, 11SW(2d)708; 232Ky 601, 24SW(2d)301; 234Ky817, 29SW (2d)573; 160La771, 107S569; 160La 790, 107S576; 169La819, 126S72; 3La A38; 147Miss385, 113S336; 288Pa256, 135A620; TexCivA 276SW719; TexCiv A 292SW260; TexCivA 22SW(2d)749 (possession under grant from sovereign); TexCivA 31SW(2d)168; 70Utah 95, 258P216; 143Va124, 129SE260; 57 OntL268, [1925] 3DomLR794.
52-19 [a] **Only possession which can form basis of prescription acquirendi causa** is that which at least begins by corporeal detention adversely to all others. 158La915, 105S11.
52-20 [b] **"Occupied"** indicates pedis possessio. 190NC568, 130SE161.
53-21 Or 283P25.
53-22 251Mich175, 231NW115; 230 AppDiv447, 245NYS478.
53-25 See also Mo 7SW(2d)347.
53-26 220Ala338, 124S898; 251Mich 175, 231NW115.
54-31 163La785, 112S721; 147Miss 215, 113S332; TexCivA 31SW(2d)168. [b] **Inclosed land.**–211Ky711, 277SW 1025.
54-32 219Ky765, 294SW487.
55-37 156Md123, 142A910.
55-40 TexCivA 278SW252, 254 [cit Cyc].
56-41 Ariz 288P1027; 235Ky316, 31S W(2d)388; 9LaA657, 120S86; 251Mich 370, 232NW212. See also TexCivA 12 SW(2d)811.
56-42 [c] **Possession by church organization.**–250Mich530, 231NW83.
56-43 250Mich530, 231NW83.
56-46 218Ala160, 117S753; 178Ark 709, 13SW(2d)294; Minn 231NW210; 230AppDiv447, 245NYS478; TexCivA 278SW252, 254 [citCyc]; 57NS300, [1924] 2DomLR959.
57-48 195Wis139, 217NW730 (erection of fence along way held not to give title to land on which fence stands).
57-48½-New. Where landowner had actual possession of railroad right of way on stated date it is immaterial that railroad was not ordered sold until later. Iowa 232NW150.
57-49 TexCivA 18SW(2d)821.
58-50 [c] (2) Occupancy of houses by sawmill hands along with erection and operation of saw mill by tenant may be sufficient. TexCivA 29SW(2d)911.
58-51 21Fed103; Ariz 288P1027; 320 Mo 474, 7SW(2d)691; 34Wyo 324, 243P 392, 393 [citCJ]. [b] **Actual residence** on land is not required, if it is occupied and applied to uses for which it is fit. 167Minn356, 46ALR785, 209NW257.
58-52 TexCivA 273SW938 (improvements cannot be considered).
58-55 [b] **Unfenced land,** occupied and in part cultivated, is not to be treated as wild land. 218Ala160, 117S753.
59-69½-New. Erection of store on adjoining lot is of no avail. Mo 28SW(2d) 652.
59-70 92Fla770, 110S341.
60-78 Ariz 288P1027. [a] **In action of trespass,** defendant, basing title on written instrument, need not show inclosure or cultivation. 133SC31, 136SE13.
60-79 328 Ill 399, 160NE1; Mass 167N E270; Mo 29SW(2d)1100; TexCivA 5 SW(2d)200. [b] **Maine statute referring to farms** extends to woodland occupied and used in connection therewith. Me 138A170.
60-82 93CalA512, 269P767; TexCivA 18SW(2d)821.
60-86 126Me299, 138A170; Can [1927] 2DomLR7; 57OntL60; [1925] 3DomLR 55.
61-88 328 Ill 399, 160NE1; Can [1927] 2DomLR7.
61-90 21Fed103; 232Ky602, 24SW(2d) 301; Mo 7SW(2d)347; 100Vt334, 137A 199.
61-91 But see 328 Ill 399, 160NE1.
62-94 92CalA393, 268P465; Tex CommnA 14SW(2d)803.
62-95 [b] 162La981, 111S393.
62-98 TexCivA 275SW90 (possession of five thousand acres not separately inclosed by fence is not adverse to title of one acquiring land from owner). [a] **Where by common custom owners of surrounding lands use large pastures** without either leasing or claiming interest in them, there cannot be adverse possession thereof. TexCivA 275SW90.
62-99 168Ark743, 271SW328; 100Vt 334, 137A199.
62-1 143Va697, 129SE731.
62-2 168Ark743, 271SW328.
62-3 [a] 168Ark743, 271SW328.
63-12 13LaA127, 127S406.
63-13 90CalA201, 265P982.
63-14 90CalA201, 265P982; 92CalA 393, 268P465; 100Vt334, 137A199. [g] **Bluff with wire across ravines and gulches** is sufficient inclosure on which to base claim to land by adverse possession. 177Ark842, 7SW(2d)979.
63-15 100Vt334, 137A199.
64-18½-New. Outer strip of land not fenced by owner does not indicate intention to give land to some other person. 338 Ill 533, 170NE749.
64-20 7F(2d)42 (continuity of possession of land inclosed is essential); 135 Misc233, 237NYS361. But see 168Ark 743, 271SW328.
64-26 236Ky11, 32SW(2d)546. [a] **There must be such continuous and persistent cutting of timber** as to be evidence of claim of ownership. 220Ala338, 124S898.
65-27 213Ala494, 106S150; 219Ala27, 121S19; 226Ky209, 10SW(2d)834; 231 Ky258, 21SW(2d)285; 231Ky404, 21SW (2d)659; 234Ky421, 28SW(2d)472; 235 Ky316, 31SW(2d)388; 162La793, 111S 166; 135Misc796, 238NYS463.
66-45 [a] (11) Storing of building material. TexCivA 276SW719.
66-46 [a] (7) Operations conducted in accordance with neighborhood custom. 213Ala494, 106S150.
67-53 88CalA238, 263P362, 364 [cit CJ]; 251Mich175, 231NW115 [quot CJ]; 18 OhA506.
67-60 75CalA103, 241P915. See also TexCivA 31SW(2d)168.
68-71 SD 227NW839 (on uncultivated land).
69-78 88CalA238, 263P362, 365 [cit CJ]; 6LaA333.
69-79 320Mo 474, 7SW(2d)691. [a] **In Porto Rico.**–32PortoRico 235.
69-81 Mo 7SW(2d)347. See also 213 Ala654, 105S872.
69-84 90Fla51, 105S145.
69-86 Mo 300SW506 (cutting of timber).
70-90½-New. Payment of taxes for over ten years on lands possessed continuously, exclusively, and adversely, except as to a small unidentified portion occupied by defendant, matures claim of

title by adverse possession. **TexCivA** 277SW225.

70-92 228Ky310, 14SW(2d)1075; 235 Ky316, 31SW(2d)388.

70-93 228Ky310, 14SW(2d)1075.

70-94 228Ky310, 14SW(2d)1075. But see 162La793, 111S166.

71-2 [a] 123 Or549, 262P243, 245 [cit CJ].

71-10 4LaA1, 6 [quot Cyc].

71-11½-New. Land which has been abandoned as a public cemetery may be acquired by adverse possession. 218 AppDiv682, 219NYS413.

71-13 167Fed681. [b] **Possession of land includes both surface and minerals** and possession of claimant after his removal of minerals is still adverse. **Tex CivA** 273SW993.

71-14 See also 210Ky612, 276SW540.

72-16½-New. Title to property acquired by adverse possession inures to the benefit of the mineral vendee. 212 Ky64, 278SW173.

72-27½-New. Mere use of waters of pond gives no prescriptive title to its bed. 15DelCh168, 132A891.

72-27⅓-New. Rights in navigable stream which would deprive state of power to improve stream for navigation cannot be acquired by adverse possession. 219AppDiv114, 219NYS497.

72-30½-New. Possession of land between high- and low- water marks of private lake is held not sufficient to ripen into title by adverse possession. 235 Mich174, 209NW152.

73-34 150Md285, 133A126.

73-36⅓-New. Wild lands. A wood lot, used in connection with an adjoining improved farm, is not wild land within the statute relating to acquisition thereof. 126Me299, 138A170.

73-38 86CalA712, 261P1086; 232Ky 602, 24SW(2d)301; **Mo** 7SW(2d)347 (rental and collection of rents as affirmative acts of ownership); **Tex CommnA** 290SW731; **TexCivA** 12SW (2d)811; 144Wash198, 257P631; **Wash** 290P226.

73-39 **Wash** 290P226.

74-47 [b] **Person cannot claim by adverse possession** where he was not in exclusive possession for full statutory period, where other occupied land, but not under him. 27Hawaii621.

75-59 **TexCivA** 295SW679.

75-59½-New. [§ 56½] j. **By Life Tenant for Remainderman.** Where a life tenant's holding is not adverse to the remainderman, possession of the life tenant is, in contemplation of law, possession of the remainderman. 226Ky 116, 10SW(2d)613.

75-60 213Ala494, 106S150; 70CalA283, 233P370; 90Fla51, 105S145; 320 Ill 432, 151NE284; 203 Iowa491, 211NW237 (owners held to have had notice); 147Miss385, 113S336; **Mo** 24SW(2d) 1011 (knowledge of adverse character of possession necessary); 218AppDiv 240, 218NYS78 (open and notorious); **TexCivA** 278SW252, 254 [citCyc].

75-61 213Ala408, 104S797; 80CalA393, 252P337; 88CalA238, 263P362; 81Colo 168, 254P768; 83 IndA580, 149NE353; 210Ky612, 276SW540; 211Ky682, 277 SW1007; 214Ky247, 283SW106; 217Ky 113, 288SW1053; 218Ky617, 291SW 1042; 219Ky765, 294SW487; 234Ky 421, 28SW(2d)472; 147Miss385, 113S 336; **Mo** 24SW(2d)1011; 118 Okl 1, 246 P879; 288Pa256, 135A620; 137SC468, 135SE567; **TexCivA** 275SW303; **TexCivA** 278SW252, 254 [citCyc]; **TexCivA** 292SW260; **TexCivA** 18SW(2d)925 (mental reservations of intentions held insufficient); 70Utah95, 258P216; 143 Va124, 129SE260; 57 OntL268, [1925] 3DomLR794 (must be visible possession). [a] (1) **TexCivA** 12SW(2d)811.

76-62 5F(2d)770; 251Mich175, 231NW 115 [quotCJ]; **TexCivA** 278SW252, 254 [citCyc].

76-64 154Wash42, 280P935.

76-66 70CalA283, 233P370.

76-66½-New. Evidence held insufficient to show that the owner had either actual or constructive notice of adverse possession. 154Wash42, 280P935.

76-67 **TexCivA** 275SW303.

77-69 174Ark669, 297SW1008; 94Fla 937, 114S515, 517 [citCJ]; **TexCivA** 283SW589; **TexCivA** 14SW(2d)348; **TexCivA** 14SW(2d)863.

77-70 Wash 290P226.

77-71 49Nev124, 240P435; **TexCivA** 6SW(2d)396; **Wash** 290P226.

77-72 7PaDist&Co 204.

77-74 39Wyo 494, 273P908.

77-75½-New. Adverse possession and payment of taxes by husband of cotenant held not constructive notice to other. 180Ark260, 21SW(2d)426.

78-86 221Ky566, 299SW197. [a] **Written notice required** by statute is sufficient where in form of offer to city to compromise controversy. 223Ky254, 3SW(2d)620.

78-89 211Ky276, 277SW269 (possession ripened into title).

78-91½-New. The statute applies to one whose adverse possession has not continued for over fifteen years at the time of passage of the statute. 223Ky 254, 3SW(2d)620.

78-93 [b] See also **Iowa** 227NW133.

79-98 171Minn410, 214NW271.

79-1 171Minn410, 214NW271; 123 **Or** 549, 262P243; **TexCivA** 293SW203.

79-3 86CalA712, 261P1086.

79-4 216Ala193, 112S905; 216Ky599, 288SW326; 227Ky30, 11SW(2d)1002.

79-5 5F(2d)770; 162Ga743, 135SE95; 9LaA657, 120S86; 114Nebr226, 206NW 754; **TexCivA** 293SW203. [a] (3) Payment of taxes. 162Ga743, 135SE95. (24) Recorded deed of trust. **TexCivA** 26SW(2d)434. [b] (19) 162La981, 111 S393; **TexCivA** 31SW(2d)168. (21) Maintenance of billboards on unoccupied lands for statutory period without other use of house or lands is not open and notorious adverse possession. **Tex CivA** 278SW252. (22) Where plaintiff had previously offered to buy land from defendant, latter cannot be charged with notice or bound by plaintiff's mental reservation to purchase only part of land which plaintiff did not claim adversely. **TexCivA** 18SW(2d)925.

80-8 5F(2d)770; 7F(2d)42; 213Ala408, 104S797; 213Ala494, 106S150; 218Ala 160, 117S753; 80CalA393, 252P337; 81 Colo 168, 254P768; 90Fla51, 105S145; 320 Ill 432, 151NE284; 328 Ill 399, 160 NE1; 339 Ill 22, 170NE709; 83 IndA580, 149NE353; Iowa 231NW339; 211Ky682, 277SW1007; 211Ky761, 278SW107; 213 Ky746, 281SW1033; 214Ky247, 283SW 106; 216Ky434, 287SW698; 217Ky113, 288SW1053; 219Ky765, 294SW487; 225 Ky365, 8SW(2d)626; 226Ky685, 11SW (2d)708; 232Ky602, 24SW(2d)301; 233 Ky573, 26SW(2d)502; 160La771, 107S 569; 1LaA3; 13LaA686, 128S711; **Mo** 287SW471; 79Mont485, 257P406; 103 NJLaw340, 135A890; 129Misc641, 222 NYS222; 24 OhNPNS170; 118 Okl 1, 246P879; 124 Okl 18, 253P489; 123 Or549, 262P243, 245 [quotCJ]; 288 Pa256, 135A620; 137SC468, 135SE 567; **TexCivA** 273SW938; **TexCivA** 18 SW(2d)925; **TexCivA** 24SW(2d)527; **TexCivA** 31SW(2d)168, 70Utah95, 258 P216; 99Vt384, 133A355; 143Va124, 129SE260; 143Va697, 129SE731; 194 Wis100, 215NW900; 57 OntL268, [1925] 3DomLR794 (constant possession). [a] (5) Other instances. 234Ky18, 27SW (2d)399; 320Mo 474, 7SW(2d)691. [c] **Expansion of plaintiff's claim** under subsequent deed to adjacent property does not interrupt continuity of possession in favor of original boundaries. 5F(2d)770. [d] **In Louisiana.**-162La 793, 111S166. [e] **Continuous occupancy in adverse possession** does not require some one continuously living on the land. 232Ky602, 24SW(2d)301.

82-9 123 Or549, 262P243, 245 [quot CJ].

82-10 123 Or549, 262P243 [quotCJ].

82-11 123 Or549, 262P243, 245 [quot CJ].

82-12 213Ky746, 281SW1033; 251Mich 175, 231NW115 [quotCJ]; 123 Or549, 262P243, 245 [quotCJ]; 143SC445, 141 SE688, 700 [quotCJ]; 143Va124, 129 SE260. See also 214Ala329, 107S830.

82-13 251Mich175, 231NW115 [quot CJ]; 123 Or549, 262P243, 245 [quotCJ].

82-14 218Ala180, 118S332; 123 Or549, 262P243, 245 [quotCJ]; 137SC468, 135 SE567. [a] (1) **TexCivA** 273SW938.

82-15 123 Or549, 262P243, 245 [quot CJ].

82-18½-New. Statute does not run against party until he is in position to protect his title by action. **Mont** 286P 133.

82-19 138SC31, 136SE13.

83-20 169Ga172, 150SE95; 85 IndA528, 152NE870; 225Ky365, 8SW(2d)626 (fact that possession is transferred by mere intruder is immaterial); 167Minn 356, 46ALR785, 209NW257; 114 Oh291, 151NE174, 176 [quotCJ]; 25 OhA450, 158NE654; 49Philippine181, 184 [cit CJ]; 29PortoRico 599; **TexCivA** 273SW 993; 152Va851, 148SE865. [b] **Personal property.**-196Cal 701, 239P319.

84-26 87Colo 584, 290P277; 328 Ill 399, 160NE1; **LaA** 130S139; 167Minn356, 46ALR785, 209NW257; **NC** 155SE856; 197Wis40, 221NW383.

84-27 328 Ill 399, 160NE1; **TexCivA** 273SW993 (conveyance by claimant to corporation whose stock they owned).

85-35 [a] (3) Possession through descent or by transfer of title or possession is in privity. 167Minn356, 46ALR 785, 209NW257.

85-38 165Ga685, 142SE142; 233Ky139, 25SW(2d)57 (where land involved is not contained in grantee's deed description); 234Ky380, 28SW(2d)469; 148Md268, 129A292 (but only where land in dispute was included in claim); 231Mich 585, 204NW768; 198NC168, 150SE878; 114 Oh291, 151NE174. But see 8LaA 635.

86-46 [a] (6) Successive possessions for less than statutory period cannot be tacked, unless by descent cast. 137 SC468, 135SE567.

87-47 But see 103NJEq284, 143A358; 197Wis40, 221NW383.

87-55 NJ 148A719(2dcase).

87-57 25 OhA450, 158NE654; **TexCivA** 273SW993.

87-59 See also **TexCivA** 274SW1021.

87-64 87Colo 584, 290P277.

89-80 But see 220Ala205, 124S661(7th case).

90-1 249Mich382, 228NW694. [a] 225 Ky365, 8SW(2d)626.

91-3 225Ky365, 8SW(2d)626.

91-11 242Mich167, 218NW703.

92-13 See also 86CalA347, 260P942.

92-14 **TexCivA** 1SW(2d)661.

92-16 329 Ill 374, 160NE572.

92-17 329 Ill 374, 160NE572.

92-19 Mo 30SW(2d)126; 99Vt384, 133 A355. [c] 248Mich112, 226NW867.

94-33 NC 155SE856.

94-34 NJ 141A26.

94-34½-New. Where the grantor conveys a specific tract, the grantee may not tack onto the period of his holding of additional tract the period of his grantor's occupancy thereof to make up statutory period required. 235Mich227, 46ALR788, 209NW169; 240Mich558, 215NW702.

94-34⅓-New. A grantor's prescriptive rights to property other than that conveyed, although adjacent, do not inure to the grantee's benefit. 240Mich558, 215NW702.

94-40 Del 147A165 (prior possession, for benefit of religious society, by its officers, available to society after incorporation).

94-41 108Conn1, 142A400.

95-45 222Ky569, 1SW(2d)979; 133 Okl 101, 271P658, 659.

96-58 108Conn1, 142A400, 402 [quot CJ].

96-60 78CalA266, 248P264, 267 [cit CJ]; 108Conn1, 142A400, 402 [quot CJ].

96-64 133 Okl 101, 271P658, 659 [quot CJ] (purchase of building on sale under execution against adverse claimant held insufficient).

96-65 108Conn1, 142A400.

97-68 108Conn1, 142A400, 403 [quot CJ].

97-69 108Conn1, 142A400; 197Wis51, 221NW397.

97-71 **TexCivA** 291SW337.

98-75 197Wis51, 221NW397.

99-91 133 Okl 101, 271P658, 659 [quot CJ].

99-93 **TexCivA** 293SW203.

99-94 228Ky139, 14SW(2d)402; 79 Mont485, 257P406, 409 [citCJ].

100-1 79Mont485, 257P406, 410 [cit CJ].

100-7 See also 232Ky602, 24SW(2d) 301. [a] (1) See also 30Hawaii 204. [k] **Temporary abandonments or periods of vacancy** evincing no intention to abandon possession do not interrupt possession. 86CalA712, 261P1086.

101-17 228Ky313, 14SW(2d)1070; 13 LaA127, 127S406; 124 Okl 18, 253P 489; TexCommnA 296SW481; Tex CommnA 148W(2d)803; 99Vt384, 133A 355.

102-20 99Vt384, 133A355.

102-25 213Ky1, 280SW452, 453 [cit CJ]; 120 Or202, 250P722, 727 [quot CJ].

102-26 213Ky1, 280SW452, 453 [cit CJ]; 120 Or202, 250P722, 727 [quot CJ].

103-29 TexCivA 272SW439.

103-37 TexCommnA 272SW439.

104-48 TexCivA 31SW(2d)167. See also TexCommnA 272SW439.

104-62 TexCommnA 272SW439.

105-66 LaA 130S139; TexCommnA 272SW439.

105-74 171Minn410, 214NW271. [a] Mo 298SW47, 50 [citCJ].

106-75 TexCivA 299SW450.

106-76 171Minn410, 214NW271.

106-85 240Mich439, 215NW353, 354 [citCJ].

107-88 230Fed990, 145CCA184.

107-89 231Ky258, 21SW(2d)285.

107-93 57 OntL60, [1925] 3DomLR55.

107-98½-New. Subdivision of land into lots and sale of part of them does not interrupt possession of occupant. 198 Cal 440, 245P422.

108-7 6LaA130 (where tax debtor redeemed after expiration of redemption period).

108-13 [b] TexCivA 273SW993.

109-16 But see TexCivA 29SW(2d)911.

109-24 220Ala182, 124S217.

110-25 See also 114 OhSt401, 408, 151 NE642 [quotCJ].

110-31 226Ky685, 11SW(2d)708.

110-34 220Ala182, 124S217.

110-34½-New. Judgment for taxes against the record owner and an adverse claimant, void as to the record owner, does not interrupt possession. TexCivA 4SW(2d)117.

110-34¾-New. Sheriff's sale of land breaks the title of an execution defendant remaining in, or subsequently taking possession. TexCivA 4SW(2d)117.

110-34¼-New. A decree enjoining defendant's predecessor in title from inclosing or obstructing an alley has been held to bind defendant and prevent him from acquiring title by continuous adverse possession through such predecessor. 179Ark574, 17SW(2d)296.

110-34½-New. Judgment partitioning land among claimants claiming whole interest is ouster making subsequent possession adverse to alleged cotenants. TexCivA 29SW(2d)911.

111-47-48 See also 93PaSuper452.

112-51½-New. A judgment passing title does not dispossess a prior claimant in possession so as to stop the running of the statute of limitations once the running of the statutes is properly begun under a claim of title. TexCivA 274SW260.

112-57 215Ky364, 285SW235.

114-76½-New. Where the limits of a disseizor's possession are defined by a fence, the fact that the fence is shifted from place to place does not destroy the continuity of possession of so much of the land as was at all times inclosed by the fence. 171Minn410, 214NW271.

115-90½-New. Time during which proceedings to set aside deed were instituted cannot be considered as part of period of adverse possession. 42F(2d) 927.

115-95 [a] **Similarly as to town board.** -127Misc558, 217NYS413.

115-3 [a] 168La588, 122S859 (registry of deed obtained prior to that of claimant's grantor).

115-3½-New. Where a lease was executed after defendant's adverse possession commenced, the severance of estates resulting could not affect defendant's possession. 227Ky30, 11SW(2d) 1002.

115-5 79Mont485, 257P406; 99Vt384, 133A355.

116-6 339 Ill 22, 170NE709.

116-9 167Minn356, 46ALR785, 209NW 257.

117-12 274US544, 47SCt706, 71L ed 1194 (seven years); 16F(2d)395; 74 Ark316, 86SW423, 109AmSR81, 4Ann Cas1097; 76Ark509, 89SW472; 86Ark 280, 110SW1046; 176Ark303, 3SW(2d) 342 (two years' possession under tax deed); 88CalA441, 263P870; 170Ga 135, 152SE466 (seven years under color of title, twenty years in open possession without color of title); 337 Ill 488, 169NE237; 83 IndA580, 149NE353 (twenty years); 122Kan343, 251P1086 (fifteen years); 159La1035, 106S556; 162La657, 110S894 (thirty-one years sufficient); 153Md390, 138A250; 253 Mass92, 148NE450; 234Mich482, 208 NW440 (fifteen years); 237Mich361, 211 NW634 (twelve years not sufficient); 242Mich167, 218NW703; 250Mich437, 230NW507 (fifteen years possession insufficient); 147Miss385, 113S336 (ten years); Mo 31SW(2d)988; MoA 282SW 473 (ten years); 100NJEq244, 135A 506; 195NC189, 141SE570; 197NC574, 150SE13 (seven years under color of title or twenty years without color of title is sufficient); 123 Okl 26, 252P1093; 140 Okl 292, 283P563(2dcase); Or 283 P25 (ten years); 297Pa583, 148A56; 29PortoRico 599; 32PortoRico 639 (ten years); 137SC468, 135SE567 (acts of adverse possession within ten-year period before action are of no effect); SC 155SE833; TexCivA 289SW188; Tex CivA 23SW(2d)743 (three years' possession with color of title); 100WVa 629, 131SE354 (ten years when under color of title). [a] (2) Where period of thirty years required for extraordinary prescription expired after revised civil code went into effect, latter, and not former, civil code is applicable. 29 PortoRico 599. [b] In Georgia.-161Ga 588, 43ALR1045, 131SE487. [c] In Oklahoma.-117 Okl 68, 245P34.

118-17 123 Okl 26, 252P1093.

118-23 214Ky784, 284SW75; 85Mont 375, 278P832.

118-24 80CalA393, 252P337; 81Colo 168, 254P768; 105Conn722, 136A684; 92Fla718, 111S278; 320 Ill 432, 151NE 284; 83 IndA580, 149NE353; 122Kan 343, 346, 251P1086 [citCJ]; 211Ky682, 277SW1007; 219Ky765, 294SW487; 262Mass159, 159NE513; 118 Okl 1, 246 P879; 137SC468, 135SE567; Tex CommnA 276SW418; 143Va124, 129SE 260; 57 OntL268, [1925] 3DomLR794. [b] **Evidence** tending to show that possession by plaintiff not exclusive. 136 SC525, 134SE497.

119-26 NS [1930] 3DomLR996.

120-29 92Fla718, 111S278; 122Kan 343, 346, 251P1086 [citCJ]; 118 Okl 1, 246P879. See also TexCommnA 276 SW418. But see 39Wyo 494, 273P908. [a] **Application of rule.**-(4) 137SC468, 135SE567.

120-31 57 OntL268, [1925] 3DomLR 794 (possession must be exclusive of true owner).

121-33 226Ky82, 9SW(2d)1095; Tex CivA 31SW(2d)168.

121-34 TexCivA 4SW(2d)127.

122-39 123 Okl 26, 252P1093.

122-40 224AppDiv756, 230NYS293.

122-43½-New. Hostile occupancy consists of hostile intent in the mind of the adverse claimant during occupancy and knowledge thereof by the owner. 70 CalA283, 233P370.

122-43¾-New. An adverse claimant need not have known who was the owner of the land in dispute. 118 Or32, 245 P508.

122-44 213Ala408, 104S797; 213Ala 494, 106S150; Ala 127S843; 80CalA393, 252P337; 81Colo 168, 254P768; 90Fla 51, 105S145; 320 Ill 432, 151NE284; 83 IndA580, 149NE353; 123Kan755, 763, 256P813 [citCJ]; 211Ky682, 277SW 1007; 219Ky765, 294SW487; 226Ky 685, 11SW(2d)708; 164La463, 114S98; 6LaA394; 155Md221, 141A525; 235Mich 24, 209NW133; 241Mich282, 216NW 921; 248Mich686, 227NW797; 102NJL 176, 130A598; 118 Okl 1, 246P879; 124 Okl 18, 253P489; 288Pa256, 135A620; 5PaDist&Co 345; 11PaDist&Co 235; 48 Philippine855; 137SC468, 135SE567; TexCivA 273SW938; TexCivA 276SW 719; TexCivA 281SW299; TexCivA 283 SW589; TexCivA 292SW260; 70Utah95, 258P216; 143Va124, 129SE260; 151Va 1005, 145SE718; 197Wis40, 221NW383.

124-45 164La463, 114S98.

124-46 35 OhA1, 171NE367 [quotCJ].

124-46½-New. That adverse claimant has deed or color of title does not dispense with necessity of hostile or adverse possession entirely inconsistent with claim of true owner. TexCivA 277 SW739.

124-48 115 Or375, 237P979; 99Vt384, 133A355.

124-49 5PaDist&Co 345.

124-54 220Ky834, 295SW1018; Mo 286 SW385.

124-56 231Ky522, 21SW(2d)833.

124-57 231Ky522, 21SW(2d)833.

125-59 108Conn1, 142A400.

125-61 80Cal 393, 252P337; 81Colo 168, 254P768; 90Fla51, 105S145 (under claim of right or color of title); 320 Ill 432, 151NE284; 83 IndA580, 149NE353; 206 Iowa419, 218NW332; 214Ky499, 283SW 434; 228Ky206, 14SW(2d)753; 160La 771, 107S569; 240Mich439, 215NW353; 248Mich686, 227NW797; Mo 29SW(2d) 1100; 124 Okl 18, 253P489; TexCivA 275SW303; TexCivA 282SW1115; TexCivA 292SW260; TexCivA 30SW(2d) 807.

127-62 70CalA283, 233P370; 76Mont 600, 248P196; TexCivA 276SW719.

127-63 70CalA283, 233P370; 165Ga422, 141SE188; 151Va1005, 145SE718. [a] **Mere naked possession without claim of right** can never ripen into good faith. 143Va124, 129SE260. [b] **Intention to claim title must be clear** though it need not be expressed. 143Va124, 129SE260.

127-64 143Va124, 129SE260.

127-65 240Mich439, 215NW353.

128-71 214Ala150, 107S94; 9LaA32, 118S776.

128-72 [a] (7) Where adjacent landowners both claim fence, such possession of fence is hostile. 214Ala150, 107 S94.

128-72½-New. Rule that possession under deeds to undivided interests is not hostile to cotenants is inapplicable to deeds of persons claiming under partition judgment. TexCivA 29SW(2d)911.

128-73 240Mich408, 215NW305; 240 Mich439, 215NW353; 308Mo9, 271SW 743; Mo 31SW(2d)988.

128-74 70CalA283, 233P370; 220Ky 471, 295SW462.

128-76 Mass 170NE807.

128-78 228Ky104, 14SW(2d)382.

128-80 240Mich439, 215NW353; 173 Minn145, 216NW782; 76Mont600, 248P 196, 198 [quotCJ]; 39Wyo 494, 273P 908.

128-81 213Ala494, 106S150; 240Mich 439, 215NW353; 76Mont600, 248P196, 198 [quotCJ]; 46Philippine282 (acts on public land held insufficient); 39 Wyo 494, 273P908. [a] (4) Acts of ownership appropriate to condition of land without payment of taxes on part thereof is sufficient adverse possession. 150Md285, 133A126; 240Mich439, 215 NW353. (5) Living on property, constructing buildings, payment of taxes, clearing and cultivation of land, and cutting and marketing timber indicate claim of ownership. 240Mich439, 215 NW353. (6) Purchase of land, consideration for which is paid, and possession pursuant thereto. 180Ark156, 20SW(2d) 639. (7) Sale and payment of purchase price perfected by possession for more than seven years. 180Ark156, 20SW(2d) 639. [d] **Erection of fence by one of coterminous owners** with claim that it is dividing line with knowledge of other is presumptively hostile. 220Ala338, 124 S898.

129-82 76Mont600, 248P196, 198 [quot CJ].

129-83½-New. Possession to be under "claim of title," or "claim of right," need be only possession with intent to appropriate and hold against all comers. 167 Minn356, 209NW257.

129-83¾-New. Title must be apparently good to become the basis of prescription. 160La771, 107S569.

129-85 171Minn410, 214NW271.

129-86 240Mich439, 215NW353.

129-92 35GaA749, 134SE846.

129-94 Mo 286SW385.

129-95 Mo 286SW385.
129-96 90CalA201, 265P982; 90Fla51, 105S145 (hostile to true owner and world at large); 226Ky116, 10SW(2d)613 (claims of others); 171Minn410, 214NW271; TexCivA 18SW(2d)925.
130-98 172Ark417, 288SW912.
130-99 TexCivA 287SW81.
131-3 172Ark417, 288SW912. See also TexCivA 4SW(2d)117.
132-9 73Ark296, 84SW219; 169Ark1177, 278SW12; 162Ga413, 134SE76; 170Ga530, 153SE415; 338 Ill 11, 170NE10; 120 Ind596, 22NE669, 6LRA159; 30 IndA101, 65NE541, 96AmSR333; 134 Iowa661, 112NW169; 206 Iowa680, 218NW575; 123Kan755, 763, 256P813 [cit CJ]; 216Ky652, 288SW299; 220Ky196, 294SW1039; 228Ky538, 15SW(2d)454; 229Ky273, 17SW(2d)263; 182Mass371, 65NE800; 235Mich24, 209NW133; 176Minn324, 223NW612; 21Mont487, 54P963; 74Mont91, 238P884 (occupancy under parol license); NJ 141A26; 102NJL176, 130A598; 102NJL443, 131A870; 114AppDiv596, 99NYS1009; 118 Okl 1, 246P879; 137 Okl 86, 278P292; 214Pa 3, 63A190; TexCommnA 276SW418; 47 Vt182; 150Va17, 142SE405; 195Wis 139, 217NW730. [b] (7) 12LaA503, 125S891 [c] (3) Other instances. Mass 169NE489.
133-10 123Kan755, 763, 256P813 [cit CJ]. [a] **One entering under tenant or licensee** occupies same position as to adverse possession as him under whom he takes. 248Mich686, 227NW797.
133-12 [a] (3) Railroad in possession of street by permission of licensee of city held not to have acquired title by adverse possession. 248Mich686, 227NW797.
133-21½-New. Where a person enters into possession of tribal Indian lands under a rental agreement with members of the tribe and continues in possession after assumption of control of the land by the government, paying rentals to the government, his continued possession after allotment of the lands is presumed to be as tenant of the allottee, and he does not acquire title by adverse possession against the grantee of the allottee. 118 Okl 1, 246P879.
133-22 110NY585, 18NE443, 1LRA487; TexCivA 297SW603.
134-23 Contra 169Ark1177, 278SW12.
134-26 Ariz 288P1027; 170Ga530, 153SE415; 338 Ill 11, 170NE10; 29Hawaii 750, 759 [quotCJ]; 248Mich686, 227NW797; 251Mich434, 232NW208; 195Wis 139, 217NW730.
134-27 123Kan755, 763, 256P813 [cit CJ].
134-29 123Kan755, 763, 256P813 [cit CJ].
134-30 217Ala82, 114S686; 162Ga413, 134SE76; 47 Ida555, 277P430; 248Mich686, 227NW797; 142Wash204, 252P916.
135-31 [b] **Owner can assume, until contrary definitely brought to its notice,** that possession begun under license so continued. 248Mich686, 227NW797.
135-32 [a] 162GaA413, 134SE76.
135-35 320 Ill 432, 151NE284; 241Mich282, 216NW921; NC 155SE856; 123 Or370, 261P69; TexCommnA 272SW439; TexCivA 283SW589; TexCivA 258SW(2d)959; 99Vt384, 133A355. But see 172Ark417, 288SW912. [b] (4) Grantor's deed reciting that grantors made deed to grantee to whom land properly belonged coupled with grantor's acceptance back of deed granting life estate shows grantor's possession to be amicable. 212Ky454, 279SW615. (5) Erroneous description of minor's interest in deed held to show that minor's interest was recognized by parties. Tex CivA 118SW(2d)329. [k] (2) Plaintiff's offer, through agent, to purchase land in question from defendant, made before title by limitation was acquired, destroyed adverse character of prior possession. TexCivA 18SW(2d)925. [n] (4) Attempt to purchase possible outstanding title. 223AppDiv211, 228NYS211. (5) Letter offering to buy tract adjoining writer's land held not to indicate that he claimed no lands adversely beyond true boundary lines of his own land. 177Ark842, 7SW(2d)979. [o] **That railroad abandons use of land for right of way and depot purposes as required by deed does not make its possession adverse to grantor.** 320 Ill 432, 151NE284. [p] **Assertion of title to railroad right of way on theory title would revert,** is inconsistent with claim of right. Iowa 232NW150.
136-36 [a] **Statements by both adverse possessor and owner** concerning a sale shows repudiation of permissive possession. TexCivA 25SW(2d)959.
136-37 226Ky116, 10SW(2d)613.
137-40 5PaDist&Co 345, 346 [citCJ].
137-41 5PaDist&Co 345, 346 [citCJ].
137-42 213Ala217, 104S390; 213Ala 563, 105S652; 220Ala338, 124S898; 201 Cal 74, 255P509 (fence line erected on boundary line); 92CalA393, 268P465; 228Ky104, 14SW(2d)382; 7LaA404; 145 Miss261, 110S509.
138-44 145Miss261, 110S509.
138-48 213Ala563, 105S652 (description in deed).
138-56½-New. Estoppel of plaintiff to deny the correctness of a boundary line does not prevent him from establishing title by adverse possession. 151SC145, 148SE697.
139-60 284Pa19, 130A296.
139-61 108Conn1, 142A400; 171Minn 160, 213NW562; 171Minn410, 214NW 271; TexCivA 291SW263.
139-62 213Ala217, 104S390; 220Ala 338, 124S898; 169Ark376, 275S698; 200 Iowa711, 205NW454; Iowa 231NW339; 125Me249, 132A742; 127Me264, 143A1; 249Mich382, 228NW694; 308Mo 9, 271 SW743; Mo 98SW(2d)947; Mo 308SW (2d)126; NJCirCt 134A299; NJ 141A 26. [f] **Where disputed boundary is marked by fence,** test whether possession is adverse, depends on whether party in possession claims only to true line or to fence. Mo 30SW(2d)126.
141-65 46Philippine518, 524 [quotCJ].
141-68 213Ala217, 104S390; 216Ala 193, 112S905; 220Ala338, 124S898; 169 Ark376, 275SW698; 36GaA738, 138SE 251; 167Minn356, 209NW257; 173Minn 145, 216NW782; Mo 8SW(2d)975 (belief that fence is true boundary does not affect adverse possession); 225AppDiv 586, 233NYS582; 123 Or517, 262P850; 46Philippine518, 532 [quotCJ].
142-70 95Fla90, 116S23, 25 [citCJ].
143-79 201Cal 74, 255P509; CalA 286 P510; 163Ga867, 137SE56; 119Kan 202, 237P913; 250Mich518, 230NW924 [quotCJ]; 320Mo 474, 7SW(2d)691.
144-84½-New. The presumption that the grantor's possession is in subordination to the title conveyed is not continuing, and its probative value diminishes with the lapse of time. 177Ark 723, 7SW(2d)789.
144-91 See also 201Cal 74, 255P509.
145-95 168La588, 122S589; 147Miss 215, 113S332, 333 [quotCJ]; TexCivA 298SW662.
145-96 147Miss215, 113S332.
145-97 147Miss215, 113S332; TexCivA 30SW(2d)807.
145-98 147Miss215, 113S332, 333 [quot CJ].
145-99 147Miss215, 113S332, 333 [quot CJ].
145-1 CalA 286P510; 147Miss215, 113 S332, 333 [quotCJ]; TexCivA 283SW 589; TexCivA 297SW624.
146-2 147Miss215, 113S332, 333 [quot CJ].
146-3 147Miss215, 113S332, 333 [quot CJ].
146-4 [b] **Occupation of railroad right of way by grantor and heirs** held sufficient to show adverse possession. 177 Ark723, 7SW(2d)789.
146-5 215Ky364, 285SW235.
146-9 215Ky364, 285SW235.
147-26 But see 218Ala217, 118S383.
148-33 274US544, 47SCt706, 71Led 1194; 150Md157, 132A595; 265Mass30, 163NE559.
148-40 155Md221, 141A525; Tex CommnA 273SW815.
148-41 [c] **To acquire adverse title to land granted railroad for right of way** possession must be inconsistent with exercise of easement. 142Wash204, 252 P916.
149-45 92Fla913, 110S789.
150-59 219Ala44, 121S45; 228Ky334, 14SW(2d)1085; 294Pa436, 144A413 (gift never made but claim and belief well founded); TexCivA 26SW(2d)434. [c] (2) **Wife who had lived with husband on premises belonging to him had common possession with him till his death.** 86 IndA726, 154NE771.
151-63 172Ark783, 290SW361; Fla 127S855. [e] In Ontario.-Ont [1928] 2 DomLR441.
152-64 172Ark828, 290SW606; 225Ky 70, 7SW(2d)852.
152-65 172Ark783, 290SW361; 209Ky 77, 272SW44; TexCivA 21SW(2d)540 (privies of vendee).
152-66 TexCivA 282SW1115.
152-67 172Ark828, 290SW606; 209Ky 77, 272SW44; TexCivA 272SW297; TexCivA 281SW299.
152-68 TexCivA 272SW297.
153-71 Ida 286P362 (where contract provides that on default purchaser or persons holding under him shall be tenant of vendor).
153-74½-New. Payment of taxes and repairs by executory vendee gives no adverse title. 209Ky77, 272SW44.
153-74½-New. In Ontario, where a person goes into possession under an agreement entitling him to a conveyance upon the performance of a condition by another and remains in possession for the statutory period after the time fixed for performance, he acquires a good title. Ont [1928] 2DomL R990.
153-77 106Conn300, 137A856; 209Ky 77, 272SW44; 217Ky258, 289SW275; 240Mich408, 215NW305. Contra Iowa 227NW133.
154-81 165Ga685, 142SE142.
154-84 225Ky70, 7SW(2d)852.
155-91 209Ky77, 272SW47; TexCivA 48W(2d)102. [b] (2) Where contract provides that on default purchaser or persons holding under him shall be tenants of vendor, purchaser's assignee cannot hold adversely until after surrender. Ida 286P362. (3) In such case under statute relative to possession by tenant assignee's hostile possession cannot commence until five years after default. Ida 286P362.
156-99 TexCivA 31SW(2d)871.
156-11 Mo 24SW(2d)1011.
157-18 217Ky50, 288SW1037.
157-19 217Ky50, 288SW1037.
158-21 217Ky50, 288SW1037, 1039 [cit CJ].
158-23 217Ky50, 288SW1037, 1039 [cit CJ].
158-29 215Ala12, 108S858; 170Ga530, 153SE415; 234Ky104, 27SW(2d)679 [quotCJ]; 117 Or125, 242P616, 619 [cit CJ].
159-32 220Ala205, 124S661(7thcase); Mo 286SW385; 117 Or125, 242P616; TexCommnA 278SW422. [b] **Widow who enters under right of homestead** may repudiate such right and acquire adverse title by independent claim against sons of deceased husband. Tex CommnA 278SW422.
159-33 220Ala205, 124S661(7thcase) (possession plus assertion of ownership); 117 Or125, 242P616.
159-33½-New. The act of the widow must be openly hostile and must some way be actually brought to the attention of those adversely interested. Tex CommnA 278SW422.
160-34 TexCommnA 278SW422 (notice of hostile claim to heirs may be direct or otherwise).
161-49 189NC790, 128SE404; 117 Or 125, 242P616; TexCivA 15SW(2d)672. [a] **Widow purchasing at tax sale** after assignment of dower and receiving tax deed after expiration of time for redemption and making valuable permanent improvements has possession hostile and adverse to all persons. 117 Or 125, 242P616.
161-50 156Miss790, 126S821(2dcase). [a] 189NC970, 128SE404 (after allotment and possession by widow).
161-51 219Ala537, 122S668.
161-52½-New. Widow's attempted conveyance of dower right to one heir with notice to other heirs enabled her grantee to hold adversely to the heirs. 220Ala205, 124S661(7thcase).
161-57 TexCivA 297SW491.
161-61 215Ky57, 284SW410; 191NC 521, 132SE275.
162-65 131Ark335, 198SW518.

162-70 Mo 286SW385. [f] **By purchaser at sale under executory process.**–158La361, 104S115.

163-74½-New. However, purchaser's adverse possession is only to extent of defendant's estate. Mo 286SW385.

164-79 234Ky380, 28SW(2d)469 [quot CJ].

164-83 124 Okl 18, 253P489.

164-84 124 Okl 18, 253P489.

164-85 124 Okl 18, 253P489.

165-1 50Philippine97.

165-2 50Philippine97.

165-7 7PaDist&Co 488.

166-17 MoA 24SW(2d)708; 44Philippine343.

167-23 143Va722, 129SE499.

168-30 TexCivA 273SW938.

168-32 214Ky247, 283SW106; TexCivA 281SW299; TexCivA 292SW260.

168-33 213Ala408, 104S797. [a] TexCivA 273SW938; TexCivA 8SW(2d)301. See also TexCivA 276SW719.

168-35 76Mont175, 246P773. [a] (7) As used within three-year statute of limitations it means something less than paramount right. TexCivA 295SW679. (8) Some writing which defines extent and character of claim to land with parties from whom it may come and to whom it may be made. 161Ga588, 131SE487, 43ALR1045.

169-36 240Mich439, 215NW353, 354 [quotCJ]; 76Mont175, 246P773 (claim of title as meaning color of title); TexCivA 18SW(2d)821.

169-37 201 Iowa902, 208NW290.

169-38 [a] 161Ga588, 131SE487, 43ALR1045. [b] In Louisiana.–6LaA149.

171-58 TexCivA 11SW(2d)329.

171-59 [f] **Deed given under award of school lands subsequently forfeited** has been held not break in title of those claiming by virtue of patent issued to grantor on later application and award. TexCivA 272SW809.

172-68 161Ga588, 131SE487, 43ALR1045; Mo 286SW385; 100Vt334, 137A199.

172-69½-New. The function of a deed under some statutes has no relation to the real title but is merely to give notice of an adverse claim. TexCommnA 280SW748.

172-70 274US544, 47SCt706, 71Led1194; 165Ga422, 141SE188; 89IndA361, 166NE301; 83IndA580, 149NE353; 233Ky139, 25SW(2d)57; 234Mich482, 208NW440; Mo 29SW(2d)39; 76Mont175, 246P773; 123 Okl 26, 252P1093; TexCivA 12SW(2d)811; 100Vt334, 137A199; 39Wyo494, 273P908.

173-72 165Ga703, 141SE907; 143Va697, 129SE731 (corporation paying taxes for seventy years under color of title acquires fee simple to entire tract).

173-73 213Ala494, 106S150; 165Ga422, 141SE188; 234Mich482, 208NW440; Wash 289P1025.

173-74 218Ala525, 119S236(2dcase); 35GaA689, 134SE796 (adverse possession for seven years under written evidence of title); Iowa 231NW438; 164La463, 114S98; 168La226, 121S752 (must show title sufficient to transfer ownership of property); 11LaA74, 123S371; LaA 129S226(1stcase); 123 Okl 26, 252P1093; Or 283P25; TexCivA 18SW(2d)244. See also 213Ala654, 105S872; 90Fla51, 105S145. [c] (1) TexCommnA 280SW748. (2) That occupier may claim rights under deed or other muniment of title does not affect operation of law except where more than one hundred sixty acres is involved. TexCommnA 280SW748. [d] **Statute held to apply** to disseizin of woodlot. 126Me299, 138A170.

173-76 46Philippine282.

174-77 [a] (1) 9F(2d)587. [m] **Decree conveying only right, title, and interest** of parties and will referring thereto shows sufficient color of title. 9F(2d)587. [n] **Where land in one inclosure for prescribed period had been occupied through tenants** by all predecessors in interest, one claiming adverse possession did not have to connect paper title of predecessor in interest with patentee. 86CalA347, 260P942.

174-78 SC 155SE833. [h] **Deed to vendor may be relied on by purchaser as color of title.** 165Ga685, 142SE142.

175-81 76Mont175, 246P773. [a] **Sheriff's deed in sale under execution** and levy following judgment constitute color of title. 166Ga134, 142SE884.

175-82½-New. Claim of holder from grantee of a subsequent deed has no such claim of title or color of title from the sovereignty of the soil as will support a plea of limitation of three years. TexCivA 275SW494.

175-82¼-New. A valid deed conveying title to land is never color of title. 161Ga588, 131SE487, 43ALR1045.

175-83 25 OhA450, 158NE654. But see 196NC657, 146SE713. [e] **Failure to comply with statute** relating to acknowledgment by justice renders deed from wife to husband void, though giving color of title. 191NC539, 132SE290.

175-84 213Ala494, 106S150, 158 [cit Cyc]; 86CalA736, 261P1092; 167Ga498, 146SE187; 217Ky192, 289SW262; TexCivA 289SW1021.

176-85 169La1, 124S125(3dcase); Mo 7SW(2d)347; TexCommnA 280SW748 (under five year statute).

176-85½-New. An escrow deed delivered by the depositary to the grantee is sufficient to constitute color of title where it is not void on its face. TexCommnA 280SW748.

176-86 160La771, 107S569; TexCommnA 280SW748 (under five year statute).

177-89 214Ky247, 283SW106; 164La463, 114S98; 4LaA621; Mo 287SW442, 445 [citCJ]; TexCivA 298SW662.

178-91 164La463, 114S98.

179-99 162Ga743, 135SE95. [a] (2) 153Miss869, 121S845; Mo 7SW(2d)347; 198NC393, 151SE879.

179-99½ 162Ga743, 135SE95; 169Ga395, 150SE584; 214Ky247, 283SW106.

179-1 [c] (14) 214Ky247, 283SW106.

179-3 213Ala494, 106S150; 162Ga743, 135SE95; 170Ga530, 153SE415. [b] (1) 162Ga743, 135SE95. [c] (14) 92Fla718, 111S278; 162La319, 100S489; 168La226, 121S752. (15) Other instances. 169Ga395, 150SE584.

180-4½ 100WVa478, 130SE673 (reference to another deed limits color of title to estate conveyed thereby).

180-7 See also 6LaA172.

181-12 Fla 126S135. [f] (4) Where claimants' chain of title included married woman's deed, without acknowledgment as married woman, such deed, being void, does not show color of title under three-year Texas statute. TexCivA 19SW(2d)173.

182-19 TexCivA 292SW956.

182-22 See also TexCivA 31SW(2d)168.

183-32 190NC826, 130SE840; 195NC832, 143SE857. [c] (6) 190NC180, 129SE450, 41ALR1111. (7) Unless a subsequent purchaser has paid valuable consideration he cannot invoke statute to declare that adversary's deed is not color of title. 190NC826, 130SE840. (8) Unregistered deed is not color of title as to judgment creditor claiming from same source. 190NC14, 128SE494, 40ALR273.

184-33 163La785, 112S721; TexCivA 283SW324. See also 29PortoRico599. But see 165NC663, 81SE925.

184-34 86CalA664, 261P497; 160La771, 107S569.

184-35 [a] (1) TexCivA 283SW324. (2) Possession under five-year statute of part vests title in whole where deed conveyed whole, though deed to grantor conveyed only part. TexCivA 283SW324.

185-36½-New. Absolute title by adverse possession cannot be acquired where predecessor claimed only life estate. 220Ky471, 295SW462.

185-37 217Ky192, 289SW262. [b] **When adverse possession begins.**–217Ky192, 289SW262.

185-48 6LaA149; 6LaA172.

185-49 See also 6LaA149.

185-50 49Nev124, 240P435; TexCommnA 273SW819.

186-55 TexCommnA 238SW(2d)291 (deed held more than mere quitclaim deed). See also TexCivA 9SW(2d)419. [e] **Quitclaim deed subject to previous conveyance** is not proof of character or of fact of possession by adverse claimant. Mass 170NE807.

186-62 112 Okl 289, 241P147. But see TexCivA 9SW(2d)485. [h] **Administrator's deed of allotted lands of deceased Indian on sale prior to removal of restrictions** does not constitute color of title against minor Indian heir. 112 Okl 289, 241P147.

187-64 But see 29PortoRico764. [b] 172Ark28, 287SW755. [e] See also 140 Okl 292, 283P563(2dcase).

188-66 169La1, 124S125(3dcase); 117 Or125, 242P616; 107WVa418, 148SE131.

188-67 90Fla51, 105S145 (tax deed, whether valid or invalid, is color of title); Mo 295SW772, 53ALR884.

188-68 93Fla326, 112S55; 107WVa1, 148SE566.

189-69 TexCommnA 12SW(2d)175 (that defect is latent is immaterial).

189-71 176Ark303, 3SW(2d)342.

189-74 123AppDiv440, 108NYS289. But see 133 Okl 101, 271P658.

190-78 195NC320, 142SE8 (champertous deed).

190-79 **Erratum.**–Strike out "Fisher v. Toxoway Co., 165 N. C. 663, 81 SE 925."

190-80 [a] (1) TexCommnA 280SW748. (2) TexCommnA 280SW748.

190-82 TexCommnA 280SW748 (under five year statute).

190-83 169GaS01, 151SE496; 2KyOp342; TexCommnA 280SW748 (under three year statute).

191-90 213Ala494, 106S150, 158 [cit Cyc].

191-91 217Ky113, 288SW1053; 235Ky316, 31SW(2d)388; 74Tex370, 12SW30.

192-93 But see TexCivA 281SW321.

193-2 172Ark783, 290SW361.

193-3 163Ga471, 136SE440.

193-6½-New. Where plaintiff in a suit to remove the cloud on title paid the full purchase price and went into possession under a supposition of his ownership, the statute referring to possession under contract to purchase has no application in determining his right to title by adverse possession. 234Mich482, 208NW440.

194-8 212Ky64, 278SW173.

194-20 6LaA172.

194-21 Contra 85Mont375, 278P832.

195-26 93Fla143, 112S378; 30Hawaii100; 6LaA538.

196-39 [b] **Oral gift of land** will not support constructive possession. 138SC31, 136SE13.

196-41 89 IndA361, 166NE301.

196-43 But see 123 Okl 26, 252P1093.

197-46 CalA 286P700.

198-64 TexCivA 295SW679.

198-72½-New. A defective written instrument under which title by adverse possession is claimed cannot relate back to the original entry where there was no sufficient prior possession. 88CalA441, 263P870.

199-79 163La785, 112S721; 76Mont175, 246P773; SD 227NW839 (required under statute, but not applicable to prescriptive titles).

199-82 216Ala416, 113S35; Iowa 231NW438; 160La771, 107S569. [b] 160La771, 107S569; 162La793, 111S166; 168LaS02, 123S331.

200-83 See also Can [1928] 4DomLR126 (fraud in concealing title deeds).

201-96 6LaA33.

201-98 165Ga309, 140SE856 (fraud must be actual or positive); 159LaS48, 106S327; 163La529, 112S405. [a] (2) Where vendor was in physical possession under at least color of title, purchaser at succession sale is not required to pursue investigation. 168LaS02, 123S331. [b] (17) By fact that sale was made without warranty of title. 169La1, 124S125(3dcase). (18) That purchaser paid very small price for lots. 169La1, 124S125(3d case).

202-99 But see TexCivA 11SW(2d)329.

202-2 TexCivA 17SW(2d)92. See also 165Ga309, 140SE856. [a] (4) Recitals in deed held not to give knowledge to grantee of grantor's want of title. 163La785, 112S721.

202-3 87Colo265, 286P861 (purchaser having title examined by attorney);

201 Iowa902, 208NW290; 159La848, 106S327.

203–6 166La656, 117S763. [b] **Purchaser at tax sale acquiring property for purpose of defeating mortgage rights of creditor** cannot use that transaction as basis for prescription. 11LaA 27, 122S503.

203–7 32NM124, 252P478. [a] **In Minnesota.**–170Minn58, 212NW13.

203–9 80CalA393, 252P337; 92CalA 393, 268P465; 100CalA152, 280P144; Utah 263P485; TexCommnA 294SW 848; TexCommnA 298SW409 (evidence held to raise issue of defendant's holding under five-year statute of limitations); TexCivA 28SW(2d)253; Utah 276P912; Wash 289P24 (immaterial whether paid under mistake).

204–10 172Ark952, 291SW69; 176Ark 906, 4SW(2d)928; 73Mont306, 236P 673; TexCommnA 294SW848. But see 67Utah45, 245P695.

204–11 337 Ill 488, 169NE237.

204–14 [a] (2) In some jurisdictions, in case of mistake as to boundary line between two lots, it is not essential to acquisition of title by owner of one lot that he pay taxes on land in controversy which is assessed as part of the other lot. 167Minn356, 209NW257, 46ALR785; 173Minn145, 216NW782. [b] **Title of true owner, paying taxes on wild unimproved land,** cannot be defeated by one claiming under color of title and by only constructive adverse possession. 175Ark559, 299SW1012.

204–21½–New. In Minnesota payment of taxes is not essential where the land has not been separately assessed. 171 Minn410, 214NW271.

205–23½–New. In Nevada payment of taxes is not an essential element of adverse possession where the property is exempt from taxation in the hands of the adverse claimant as a place of religious worship. 49Nev124, 240P435.

206–39 [d] 73CalA244, 238P767; 46 Ida137, 266P797. [e] **Payment of taxes on land by mistake** by one out of possession where land is not unimproved and uninclosed cannot vest title. Ark 31SW(2d)426.

206–42 83 IndA580, 149NE353. But see 86CalA664, 261P497.

206–46½–New. In some jurisdictions taxes must be paid before they are delinquent. TexCivA 276SW444.

206–51 TexCommnA 294SW848 (payment before delinquency held essential). But see TexCivA 276SW444; TexCivA 25SW(2d)1001 (taxes must be paid on successive years).

207–55 178Ark709, 13SW(2d)294.

207–56 90CalA582, 266P334.

207–60½–New. Payment of taxes and repairs by executory vendee gives no adverse title. 209Ky77, 272SW44.

208–63 69CalA159, 230P976.

208–64 176Ark906, 4SW(2d)928.

209–69½–New. Failure of owner to assert rights within time fixed by statute after tax sale bars him from asserting record title. 337 Ill 488, 169NE237.

209–74 93CalA97, 269P468; 170Ga135, 152SE466.

209–77 337 Ill 488, 169NE237. But see 38F(2d)472.

209–78 [b] (2) Phrase means land not in possession of anyone. 337 Ill 488, 169NE237.

210–82½–New. Vacant property owner is chargeable with notice of tax sales and deeds in pursuance thereof and allowed seven years to assert his rights. 337 Ill 488, 169NE237.

210–89 TexCivA 299SW450.

211–1 175Ark559, 299SW1012; 176 Ark906, 4SW(2d)928; 180Ark260, 21S W(2d)426.

211–4 332 Ill 620, 164NE186.

212–24 But see 48Philippine424.

213–28 159La409, 105S413 (prescription cannot run against government to lands owned by United States); 127 Misc710, 217NYS544; 40Wyo 156, 274 P1072. [c] **Plea of prescription properly overruled.**–159La409, 105S413.

213–34 165La737, 116S168.

214–38 117Kan622, 233P508; 149Md 484, 132A64; 217AppDiv328, 216NYS 785 (forest preserve); 127Misc710, 217 NYS544. [b] (1) 131 Or554, 284P172 (land under water of navigable river). (2) Title by adverse possession cannot be acquired to submerged land lying below low-water mark. 131 Or554, 284 P172. [k] **Prescription acquirendi causa** cannot run against any part of public domain. 159La409, 105S413.

216–50 6LaA833.

216–54 Mont 286P133. [b] **In Missouri.**–319Mo 149, 3SW(2d)1008.

216–56 193Wis462, 214NW454; 196 Wis313, 220NW532.

217–59 269US82, 46SCt57 (confirmed Spanish land grant).

217–62 219Ala494, 122S821.

217–63 But see 165La737, 116S168. [b] **Adverse possession** cannot give title to right of way granted by congress over public lands. 114Nebr845, 211NW 206.

219–80½–New. There can be no adverse possession of lands allotted to Indians with restrictions upon alienation of the title thereto by Indians so long as such restrictions exist. 112 Okl 289, 241P 147.

219–82½–New. New Mexico statutes of limitation cannot be pleaded against Pueblo Indians without consent of United States. 43F(2d)873.

219–82½–New. Pueblo Lands Act giving claimants of Indian lands right to plead limitation excluded right to plead New Mexico statutes of limitation. 43F(2d) 873.

219–82¼–New. Claimants of Indian Pueblo lands not showing possession until after date fixed by such statute cannot show title by limitation. 43F (2d)873.

219–82½–New. Indian pueblo which acquired fee title under statutes of limitation before such statute cannot be deprived of title by legislative fiat. 43 F(2d)873.

219–83 See also 127Misc558, 217NYS 413.

219–84 [a] 328 Ill 399, 160NE1.

220–89 Can [1928] 3DomLR107 (person claiming title must show forty years' unequivocal and continuous occupation).

220–94½–New. Title by adverse possession to lots created by common law dedication extends to center of street. 316 Ill 477, 147NE373.

221–96 Cal 287P475; 78CalA266, 248 P264; 335 Ill 101, 166NE495; 151Miss 302, 117S836; Mo 28SW(2d)652 (under statute so providing where possession taken after statute became effective); 229AppDiv21, 241NYS17; 124 Or54, 263P386; TexCivA 281SW321 (lands granted to county for educational purposes). But see 39Wyo 494, 273P908.

221–97 88CalA94, 263P313; Ind 171 NE871 (basement projecting under street); 151Miss302, 117S836; MoA 6 SW(2d)1009; 27 OhNPNS564; 19 OhA 412; 124 Or54, 263P386; 107WVa263, 148SE135. [c] **Estoppel.**–124 Or54, 263 P386.

222–98 70CalA635, 233P991; 242Mich 340, 218NW805 (by charter provision); 19 OhA412. [b] **Title to alley could be acquired** by person in adverse possession prior to acts of 1907, except in first class cities. 179Ark705, 17SW(2d) 869.

222–99 124 Or54, 263P386.

222–3 85Colo 388, 276P671.

222–4 19 OhA225.

223–13 [a] **An easement to dock corporation** is not estate against which limitation could run. TexCivA 25SW(2d) 987.

223–21–22 149Md484, 132A64. [a] **Uncompleted canal** is not highway which can be acquired by adverse possession. 143Va697, 129SE731.

223–24 219Ala219, 121S514; 34 OhA 116, 170NE174. See also 251Mich506, 232NW355(1stcase) (alley).

223–25 204 Iowa1021, 216NW739; 149 Md484, 132A64; 47RI 425, 133A806; 54CanSC331, 35DomLR226 [allowing app 16CanExch67]. [d] **"Adverse possession" with reference to abandonment of highways** is such possession as gives warning of private claim to land and will, if not heeded, tend to show that it has been abandoned. 204 Iowa1021, 216NW739.

223–26 [b] (2) **Under statute in Delaware title to land used as road may be** acquired by adverse possession as against state, though property reverted to state when road was closed. Del 147 A165.

224–32 Mont 286P133.

224–33 206Cal 662, 275P789.

225–42 143Va697, 129SE731, 738 [quot CJ].

225–43 143Va697, 129SE731, 738 [quot CJ].

225–49½–New. But whether a railroad has lost its proprietary right in land granted to it by congress in fee, with remoter if not sold to settlers, is a federal question. 216Ala656, 114S53.

225–50 91Fla612, 108S689, 46ALR870; 114Nebr845, 211NW206; 286Pa331, 133 A563; 100Vt26, 134A608. [a] **Title to right of way** acquired by condemnation proceedings cannot be divested by adverse possession so long as railroad operates. 114Nebr845, 211NW206.

226–51 216Ala656, 114S53; 217Ala82, 114S686; 218Ala217, 118S383; 91Fla 612, 108S689, 46ALR870. But see 137 SC468, 135SE567. [a] (1) 137SC468, 135SE567.

226–52 17F(2d)17; 182Ala516, 62S 745; 207Ala194, 92S117; 216Ala656, 114S53.

226–55 91Fla612, 108S689, 46ALR870.

227–58 46Philippine642.

227–63½–New. Prescription does not run against an action of boundary. 1 LaA3.

227–64 176Ark906, 4SW(2d)928.

227–66 310Mo 204, 274SW1049, 1053, 41 ALR382 [citCJ].

227–67 310Mo 204, 274SW1049, 1053, 41ALR382 [citCJ].

228–72 146Va804, 132SE863, 866 [quot CJ].

228–72½–New. County held not entitled to assert defense of adverse possession against school's claim. 155 Tenn212, 292SW462.

228–72½–New. Holders of equitable title may obtain title under ten-year statute of limitations as against holder of legal title. TexCivA 295SW679.

228–72¼–New. Rights by adverse possession may be initiated by trespass against holder of legal title but not by one trespasser against another. Mont 286P133.

228–74 272US21, 47SCt9, 71Led145 (dictum); 124Misc209, 207NYS232 (land appropriated for canal without payment of compensation).

228–77 TexCivA 276SW719 (railway company). [a] (1) 216Ala193, 112S 905, 907 [citCJ]; Del 147A165.

228–79 196NC756, 147SE301(2dcase); 146Va804, 132SE863. See also Ariz 288P1027. [a] **School district.**–11Pa Dist&Co 536.

228–80 11PaDist&Co 536, 540 [quotC J]. [a] **Indian pueblos** are entitled to benefit of New Mexico statutes of limitation. 43F(2d)873.

229–95 175Ark559, 299SW1012; Tex CivA 277SW739; 103WVa514, 138SE 93.

230–98 [a] **Hostile act amounting to ouster** is necessary to destroy constructive possession. TexCivA 277SW739.

230–99 167Ga633, 146SE444; 210Ky 121, 275SW513 (adverse entrant on land in possession of legal title holder); 231Ky404, 21SW(2d)659; 10LaA608, 120S235; 13LaA686, 128S711; 153Miss 869, 121S845; Mo 29SW(2d)39; 76 Mont175, 246P773; 79Mont485, 257P 406; 25 OhA450, 158NE654; 123 Okl 26, 252P1093; 138SC31, 136SE13; 156 SC424, 153SE286; 158Tenn143, 11SW (2d)853. See also 328 Ill 399, 160NE1. [i] **Tenant in possession of adjoining land** can no more acquire title to more land than he has in actual possession by encroachment than can owner of adjoining lands. TexCivA 272SW769.

231–1 83 IndA580, 149NE353.

232–5 5F(2d)770; 228Ky104, 14SW (2d)382; 231Ky404, 21SW(2d)659; 233 Ky139, 25SW(2d)57.

232–9 212Ky836, 280SW150; 231Ky 404, 21SW(2d)659.

233–12 100Vt334, 137A199.

233–18 TexCivA 283SW696.

233–19 TexCommnA 290SW731.

233-25 **TexCommnA** 285SW609.

233-25½-New. Encroachment by enclosure and improvements of small fields on adjoining survey referable to claimant's residence will not warrant recovery of one hundred and sixty acres or more than actual possession. **TexCivA** 272SW769.

234-33 **TexCivA** 287SW100.

234-36½-New. Where defendants acquired title to one hundred sixty acres by limitation before plaintiff's tenant fenced part of it, defendant was held entitled to claim entire tract in the absence of showing that plaintiff reacquired title to the tract thereafter. **TexCivA** 283SW696.

234-37 **NS** [1930] 3**DomLR**996.

235-41 43**F(2d)**873; 218**Ala**525, 119**S** 236(2dcase); 172**Ark**28, 287**SW**755; 178 **Ark**178, 13**SW(2d)**813; 180**Ark**156, 20 **SW(2d)**639; 210**Ky**121, 275**SW**513 (to extent that boundary of land is not in actual possession of another); 212**Ky** 819, 280**SW**137; 216**Ky**243, 287**SW**707; 217**Ky**113, 288**SW**1053; 217**Ky**192, 289 **SW**262; 232**Ky**602, 24**SW(2d)**301; 169 **La**1041, 126**S**547; 2**LaA**715; **Mass** 170 **NE**807; 76**Mont**175, 246**P**773; 25 **OhA** 450, 158**NE**654; 123 **Okl** 26, 252**P**1093; 138**SC**31, 136**SE**13; 156**SC**424, 153**SE** 286; **TexCivA** 276**SW**719; **TexCivA** 16 **SW(2d)**377; 143**Va**697, 129**SE**731; **NS** [1930] 3**DomLR**996. See also 210**Ky** 612, 276**SW**540. [a] **Title bond held to measure extent of property** held adversely. 212**Ky**64, 278**SW**173.

237-42 212**Ky**819, 280**SW**137; 216**Ky** 243, 287**SW**707.

237-43 [b] **Mo** 295**SW**772, 53**ALR**884 (payment of taxes constitutes act of ownership).

237-44 **NC** 154**SE**35.

237-47½-New. Adverse possession extends only to land in actual possession in absence of constructive possession of larger area. **TexCommnA** 296**SW**481.

237-53 138**SC**31, 136**SE**13 (possession under parol gift).

237-54 83 **IndA**580, 149**NE**353.

238-58½-New. Possession of a section of land, entirely inclosed by a stock-proof fence, under deed, is constructively extended to the entire section. **Tex CivA** 9**SW(2d)**760.

238-63 **TexCivA** 291**SW**337.

239-67 [b] **In Georgia.**-35**GaA**689, 134 **SE**796.

239-68 [c] 35**GaA**689, 134**SE**796.

239-70 17**F(2d)**472.

240-73 35**GaA**689, 134**SE**796.

240-76 **TexCivA** 286**SW**909.

240-78 **TexCommnA** 290**SW**731.

241-81 **TexCivA** 297**SW**261.

241-84½-New. Occupancy of the mainland does not give the owner adverse possession to an island occupied by a patentee claiming by well defined boundaries. 221**Ky**789, 299**SW**955.

241-85 219**Ala**27, 121**S**19; 212**Ky**715, 280**SW**99.

242-93 213**Ky**588, 281**SW**542; 218**Ky** 617, 291**SW**1042; 223**Ky**254, 3**SW(2d)** 620 (compromise with city).

242-96 218**Ala**217, 118**S**383; 231**Ky** 258, 21**SW(2d)**285; 24**WVa**606; 28**W Va**34; 63**WVa**394, 61**SE**347. See also 155**Tenn**155, 294**SW**509, 510 [citCJ].

243-3 158**Tenn**162, 11**SW(2d)**677. See also 155**Tenn**155, 294**SW**509, 510 [cit CJ].

244-5 155**Tenn**155, 294**SW**509, 510 [quotCJ].

244-8 **TexCommnA** 290**SW**731; **Tex CommnA** 23**SW(2d)**305.

244-10 214**Ky**516, 283**SW**1055; 217**Ky** 789, 290**SW**713.

244-11 214**Ky**516, 283**SW**1055.

245-20½-New. Constructive possession of same land cannot exist at same time in two adverse claimants, senior prevails. 231**Ky**404, 21**SW(2d)**659.

245-21 See also 210**Ky**121, 275**SW**513.

245-23 155**Tenn**155, 294**SW**509, 510 [citCJ].

246-27 216**Ky**243, 287**SW**707; 216**Ky** 434, 287**SW**698; 217**Ky**138, 289**SW**218.

246-29 210**Ky**121, 275**SW**513 (where junior patentee goes on boundary while senior patentee is in actual possession of boundary).

246-29½-New. **Claim must be to a well-defined boundary for statutory period** where junior holder enters interference adversely. 215**Ky**551, 286**SW** 773.

246-29⅓-New. Junior patentee who had already acquired title by adverse possession of interlock and adjacent land is not confined to interlock. 231 **Ky**404, 21**SW(2d)**659.

246-33 210**Ky**121, 275**SW**513 (junior patentee ipso facto restricted to actual inclosure).

247-34 **TexCommnA** 290**SW**731.

247-36 But see 210**Ky**135, 275**SW**374.

247-37 **TexCommnA** 290**SW**731.

247-40 **TexCivA** 277**SW**739.

248-45 231**Ky**404, 21**SW(2d)**659; **Tex CommnA** 290**SW**731; **TexCivA** 31**SW (2d)**168.

249-47 217**Ky**113, 288**SW**1053.

249-49 208**Ky**653, 271**SW**700 (possession declared to extend to outside boundaries described in deed, regardless of inclosures); 220**Ky**439, 295**SW** 407; 149**Wash**573, 271**P**891.

249-51 193**NC**73, 136**SE**257; 138**SC**31, 136**SE**13, 18 [quotCJ]. [a] **Clearing and inclosure** of portion of land held not notice of claim beyond inclosure. 218**Ky** 617, 291**SW**1042.

249-53 **TexCivA** 272**SW**587.

249-54 See also **TexCommnA** 12**SW (2d)**175.

250-55 17**F(2d)**472; 169**Ga**410, 150**SE** 556; 214**Ky**247, 283**SW**106; 217**Ky**113, 288**SW**1053 (recorded patent); 223**Ky** 493, 4**SW(2d)**401. [e] **Where exterior boundary is not inclosed or marked,** extent of adverse possession must be determined from description in deeds under which color of title is claimed. 214 **Ky**247, 283**SW**106.

250-55½-New. **The possession of one claiming under a patent is coextensive with his patent properly located,** although different from his understanding of the location of the patent. 210**Ky** 121, 275**SW**513.

250-58 Contra 151**Miss**497, 118**S**543.

250-60 **Mass** 169**NE**487.

251-72 176**Ark**1205, 5**SW(2d)**338; 85 **IndA**494, 154**NE**679; 169**La**1, 124**S**125 (3dcase) (bona fide possession under title for whole property where joint ownership unknown to possessor); **Mo** 7**SW (2d)**347; **NJ** 148**A**719(2dcase); 132**Misc** 786, 230**NYS**621 (extent of right is measured by use and enjoyment during prescriptive period); 123 **Okl** 26, 252**P** 1093; 140 **Okl** 16, 282**P**122; **Okl** 292**P** 362; 138**SC**31, 136**SE**13; **TexCivA** 288 **SW**614; 146**Va**804, 132**SE**863.

254-74 33**Ariz**93, 263**P**10; 173**Ark**1180, 291**SW**998; 83**CalA**555, 256**P**1114 (title in fee to sidewalk area subject to easement vested in town for street purposes); 48 **Ida**734, 285**P**474; 227**Ky**30, 11**SW(2d)**1002; 123 **Okl** 26, 252**P**1093; 137**SC**11, 134**SE**859; 197**Wis**51, 221**NW** 397.

254-76 195**NC**832, 143**SE**857 (title superior to subsequent lienor); **TexCivA** 9**SW(2d)**760.

254-77 33**Ariz**93, 263**P**10 (grantee must show transfer by instrument sufficient to pass title); 92**Fla**1045, 118**S**490; 234 **Mich**304, 208**NW**34.

254-77½-New. Where defendant recovered title to the center of a worm fence under adverse possession, the parties should provide for a survey of the strip and its description by metes and bounds to be inserted in the judgment. 197**Wis** 51, 221**NW**397.

254-77⅓-New. There are no equities in favor of a party seeking by adverse holding to acquire the property of another. 75**CalA**103, 241**P**915.

254-78 167**Minn**356, 46**ALR**785, 209**NW** 257, 259 [citCJ]. [b] **Plaintiff claiming by adverse possession** under color of title may introduce grant from state to stranger in proving title. 193**NC**73, 136 **SE**257.

254-79 But see 180**Ark**156, 20**SW(2d)** 639.

254-81 143 **Okl** 106, 288**P**338; **Okl** 292 **P**362. [a] 138**SC**31, 136**SE**13.

254-82 143 **Okl** 106, 288**P**338. [a] **Okl** 292**P**362. [b] 339 **Ill** 540, 171**NE**632; **Okl** 292**P**362. [d] (3) Defense not available where equity arose prior to perfection of title. 203 **Iowa**320, 211**NW** 389.

255-86½-New. Where the owner of a lot had acquired title to an adjoining strip of land by adverse possession and the boundary line between such lot and the adjoining lot had become fixed before the state acquired title to the adjoining lot in tax proceedings, neither the state nor its grantee may disturb such established boundary. 234**Mich** 304, 208**NW**34.

255-87 15**DelCh**37, 131**A**142; 159**La** 1035, 106**S**556.

256-94 163**Ga**776, 137**SE**22; 214**Ky**247, 283**SW**106, 108 [citCJ] (not by tenancy).

256-96 167**Minn**356, 46**ALR**785, 209**NW** 257, 259 [citCJ].

256-97 **Mo** 8**SW(2d)**975 (adverse possession necessary); 193**Wis**462, 214**NW** 454.

256-98½-New. Title acquired to a tract of land by adverse possession cannot be forfeited or divested by an assertion in a trespass to try title of an alternative claim. **TexCivA** 15**SW(2d)**672.

256-98¼-New. Execution defendant's ignorance of execution, and consequent nonacceptance of deed to him from his father's other heirs, do not deprive him of right of ownership by adverse possession. 214**Ky**499, 283**SW**434.

256-98½-New. Apparent abandonment or failure to occupy land does not divest one of. title except where adverse possession has continued for the statutory period. 75**CalA**103, 241**P**915.

256-99 99**Vt**384, 133**A**355. See also **TexCivA** 30**SW(2d)**378.

257-1½-New. or by admissions of the holder's agent. **TexCivA** 8**SW(2d)**301.

257-5 217**Ala**276, 116**S**132.

257-7 33**Ariz**93, 263**P**10, 11 [citCJ].

258-19 129**Misc**641, 222**NYS**222.

258-20 29**PortoRico** 599. [a] See also 29**PortoRico** 599.

258-23 129**Misc**641, 222**NYS**222.

258-24 **TexCivA** 44**SW**1023. [a] (2) **TexCommnA** 290**SW**1086. To same effect **TexCivA** 274**SW**1015.

258-26 225**Ky**365, 8**SW(2d)**626.

258-27 23**Ala**377; 131**Ala**345, 30**S**878; 187 **Ill** 298, 58**NE**386; 86**Minn**165, 90**NW** 369, 91**AmSR**333; 270**Mo** 238, 192**SW** 1018; 60**Wis**500, 19**NW**520. Contra 137 **SC**468, 135**SE**567.

259-28 8**F(2d)**39 (Porto Rico); 23**Ala** 377; 31**Ala**136; 72**Ark**539, 81**SW**1057; 228**Ky**313, 14**SW(2d)**1070; 76**SW**145, 25**KyL**598; **TexCivA** 21**SW(2d)**705.

259-28½-New. Adverse possession may be relied on by special plea. 36**Miss**404 (now changed).

259-28¼-New. In petitory action, plaintiff need not anticipate plea of prescription. 169**La**819, 126**S**72.

259-31 But see 132**Misc**786, 230**NYS** 621.

259-32 **TexCivA** 16**SW(2d)**328. See also 198**Cal** 440, 245**P**422.

259-35 339 **Ill** 540, 171**NE**632. [a] 198 **Cal** 440, 245**P**422. [c] 9**LaA**731, 120**S** 226; 132**SC**328, 128**SE**596 (failure to allege use adverse). [f] **Plea held sufficient.**-170**La**343, 127**S**745.

259-36 **Ky** 74**SW**199; 11**LaA**27, 122**S** 503; 33**Nebr**773, 51**NW**140; 33**Nebr** 775, 51**NW**139, 29**AmSR**506.

259-37 [a] 221**Ky**566, 299**SW**197. [b] **Sufficiency of allegations.**-118 **Okl** 1, 246 **P**879.

259-38 4 **Ind**143.

260-39 8**BarbNY**189; 17**WendNY**564; 1**JohnsNY**156; 10**JohnsNY**475.

260-40 180**Ark**260, 21**SW(2d)**426; 17 **Fla**522; 38 **IndA**184, 75**NE**844; 6 **Iowa** 439; 221**Ky**566, 299**SW**197; **Mo** 300**SW** 506 (sufficient pleading of ten- and thirty-year statutes). [d] (1) **TexCivA** 33 **SW**251. (2) 116 **Ind**103, 18**NE**500. [g] **Defendant pleading twenty years possession** before ancestor's death, cannot take advantage of unpleaded presumption of gift by seven years' possession. 170**Ga**135, 152**SE**466.

260-41 38**Fed**165; 9**FCasNo** 5,173, 1 **Woods**238; **Ala** 39**S**992; 27**Colo** 218, 60 **P**637; 17**Fla**522; 6 **Iowa**439; 21 **Iowa** 463; 14**SW**348, 12**KyL**347; 34**SW**524, 17**KyL**1279; 113**La**600, 37**S**527; 39 **Miss**737; 41**Miss**52; 33**Nebr**775, 51**NW** 139, 29**AmSR**506; 4**NY**508; 8**BarbNY** 189; 35**TexCivA**251, 79**SW**1086; 56**Wis** 520, 14**NW**714; 120**Wis**102, 97**NW**519; **Eng** 5**QB**584, 48**ECL**584, 114**Reprint**

1370. [b] (2) 37 **OklA**277, 118 **Okl** 1, 246P879. [d] 138**NC**476, 51**SE**104.

260-42 38**Fed**165; 30**Cal** 65; 13**Barb NY**147; 1**TennChA**689; 3**Tex**273; 48 **WVa**449, 37**SE**580; **Eng** 2**LJChOS**2; **Eng** 5**Sim**640, 9**EngCh**640, 58**Reprint** 480.

260-42½-New. It need not aver that possession was peaceable. 144**Cal** 578, 77**P**1113.

260-43 [b] **In Colorado.**-28**Colo** 241, 64 **P**200.

261-44 [a] (5) Plea held good notwithstanding omission. 37**Tex**320. [c] **Answer attacking validity of prescriptive owner's deed** is not germane to issue of occupancy presented by petition, and does not constitute counterclaim or set-off. 140 **Okl** 292, 283**P**563(2dcase).

261-47 [a] (1) **TexCivA** 287**SW**100. (2) Defendants claiming each one hundred and sixty acres must plead field notes of larger tract and boundaries of quarter sections. **TexCivA** 31**SW(2d)** 168. [b] **Where owners are in possession of all land not in actual possession of claimant,** absence of pleading or proof identifying particular portion of land in controversy is fatal. **TexCivA** 277**SW**225.

261-53 41**Miss**52; 69**Miss**78, 10**S**554; 35**Wash**434, 77**P**798.

261-54½-New. An allegation in demurrer that the cause is barred by statute has been held sufficient to raise the question of adverse possession. 46**Cal** 7.

262-65¼-New. Pleading and proof. Proof and argument of possession and payment of taxes improper in absence of allegation in respect thereto. 338 **Ill** 11, 170**NE**10.

262-65¼-New. Counterclaim or set-off. In suit to quiet prescriptive title against former owner's claims, defendant cannot assert his record title as counterclaim or set-off. 143 **Okl** 106, 288**P**338.

262-66 216**Ala**604, 114**S**206; **Ala** 127**S** 843; 171**Ark**1187, 284**SW**16; 181**Ark** 597, 27**SW(2d)**88; 196**Cal** 701, 239**P**319; **Cal** 292**P**123; 74**CalA**318, 240**P**521; 88 **CalA**238, 263**P**362; 324 **Ill** 339, 155**NE** 284; **Iowa** 232**NW**150; 217**Ky**138, 289**SW**218; 225**Ky**58, 7**SW(2d)**495; 228 **Ky**705, 15**SW(2d)**437; 8**LaA**573; 13**La A**686, 128**S**711; 127**Me**264, 143**A**1; 154 **Miss**691, 123**S**861; **Mo** 282**SW**53; **Mo** 28**SW(2d)**652; 132**Misc**786, 230**NYS** 621; 191**NC**220, 131**SE**627; 194**NC**231, 139**SE**381; 114 **Okl** 276, 246**P**628 [quot CJ]; 123 **Or**549, 262**P**243; 294**Pa**436, 144**A**413; 138**SC**31, 136**SE**13; 154**Tenn** 334, 285**SW**567; **TexCommnA** 280**SW** 742; **TexCivA** 7**SW(2d)**930; 147**Wash** 354, 266**P**148; 148**Wash**328, 268**P**889; **Wash** 289**P**24.

263-67 100**CalA**517, 280**P**389 (presumption of ownership is with paper title, and to overcome it clear evidence is necessary); 320 **Ill** 432, 151**NE**284; 324 **Ill** 339, 155**NE**284; 191**NC**521, 132 **SE**275; 114 **Okl** 276, 246**P**628, 629 [quot CJ]; 123 **Or**549, 262**P**243; 70**Utah**95, 258**P**216. See also 90**Fla**51, 105**S**145.

263-68 218**Ala**128, 117**S**643; 92**CalA** 393, 268**P**465; 90**Fla**51, 105**S**145; **Mo** 31**SW(2d)**988; 103**NJLaw**340, 135**A**890; 114 **Okl** 276, 246**P**628, 629 [quotCJ]; 292**Pa**378, 141**A**250 (when adverse interest began); **TexCivA** 283**SW**589; **TexCivA** 287**SW**100; **TexCivA** 19**SW (2d)**173; **TexCivA** 25**SW(2d)**1001; **TexCivA** 31**SW(2d)**168; **Wash** 289**P**24.

263-69 114 **Okl** 276, 246**P**628, 629 [quot CJ].

263-69½-New. But under the doctrine of prescription, from one's individual possession, occupation, and user, continuous under claim of title by purchase for over twenty years, without recognition of adverse rights, the law presumes the existence of all the necessary elements of adverse possession or title without fuller proof. 218**Ala**128, 117**S** 643.

263-70 114 **Okl** 276, 246**P**628, 629 [quot CJ]; **NB** [1928] 4**DomLR**317.

263-71 324 **Ill** 339, 155**NE**284; 114 **Okl** 276, 246**P**628, 629 [quotCJ]; **NB** [1928] 4**DomLR**317.

263-72 324 **Ill** 339, 155**NE**284; 214**Ky** 845, 284**SW**98; 114 **Okl** 226, 246**P**628, 629 [quotCJ]; **NB** [1928] 4**DomLR**317.

263-73 70**CalA**283, 233**P**370; 324 **Ill** 339, 155**NE**284; 308**Mo**9, 271**SW**743; 114 **Okl** 226, 246**P**628 [quotCJ]; **Tex CivA** 283**SW**589.

263-74 324 **Ill** 339, 155**NE**284; 114 **Okl** 226, 246**P**628 [quotCJ]; **NB** [1928] 4 **DomLR**317.

263-75 70**CalA**283, 233**P**370; 29**Hawaii** 750; 308**Mo** 9, 271**SW**743; 114 **Okl** 226, 246**P**628 [quotCJ].

263-76 **MoA** 10**SW(2d)**965; 114 **Okl** 226, 246**P**628 [quotCJ].

264-79 **Mass** 165**NE**34; 153**Miss**869, 121**S**845 (claimant without color of title); 138**SC**31, 136**SE**13.

264-80 223**Ky**493, 4**SW(2d)**401; 73 **Mont**306, 236**P**673 (defendant must prove that plaintiff was not possessed for statutory period or that defendant held adversely for that length of time); **TexCivA** 291**SW**597.

264-84 70**CalA**283, 233**P**370; **Iowa** 232 **NW**150; 232**Ky**602, 24**SW(2d)**301; 138 **SC**31, 136**SE**13; **TexCivA** 276**SW**418, 419 [quotCJ].

264-85 **TexCommnA** 276**SW**418, 419 [quotCJ]. [a] **Cultivation of land** over which railroad has right of way is presumed to have been done with railroad's permission. 142**Wash**204, 252**P**916.

264-85½-New. Where one is in peaceable possession of land under claim of title for twenty years, presumption of title arises. 219**Ala**537, 122**S**668.

264-85¾-New. There is no presumption that a purchaser takes possession under a deed so as to make the deed of itself sufficient evidence of possession. 196**NC**780, 147**SE**300.

264-86 37**F(2d)**272; 202**Cal** 557, 261**P** 1017; 70**CalA**283, 233**P**370; 90**Fla**51, 105**S**145; 338 **Ill** 11, 170**NE**10; 338 **Ill** 533, 170**NE**49; **Ill** 173**NE**59; 154**Miss** 691, 123**S**861; **Mo** 281**SW**26; 33**Nebr** 775, 51**NW**139, 29**AmSR**506; 59**NY**46; 54**NYSuper**245; 30**AppDiv**277, 51**NYS** 937 [aff 19**Misc**289, 43**NYS**127]; 191**NC** 521, 132**SE**275; 124 **Okl** 18, 253**P**489; 294**Pa**436, 144**A**413 (child against parent); 70**Utah**95, 258**P**216; 147**Wash** 354, 266**P**148; 39**Wyo** 494, 273**P**908. But see **NJSup** 132**A**295. [b] **Where cross complainant shows legal title** to some interest in land involved, burden of avoiding it by showing superior title by adverse possession is on cross defendants. 215**Ala** 12, 108**S**858.

265-87 154**Miss**691, 123**S**861.

265-88 324 **Ill** 339, 155**NE**284; 118 **Okl** 1, 246**P**879; 124 **Okl** 18, 253**P**489.

265-89½-New. Possession by coterminous owners to agreed line is presumed to be adverse. 218**Ala**334, 118**S** 559.

265-89¾-New. There is no presumption of adverse possession against true owner. 191**NC**521, 132**SE**275.

265-90 29**Hawaii**750; 234**Ky**380, 28**SW (2d)**469; **Mass** 170**NE**807 (possession pursuant to condition of quit-claim deed); 284**Pa**19, 130**A**296, 297 [citCJ]. See also 294**Pa**436, 144**A**413. [d] **Presumption does not arise when** railroad's easement was not superior to equitable claims of original owner's heir based on adverse possession and color of title. 218**Ala**217, 118**S**383.

266-91 284**Pa**19, 130**A**296, 297 [citCJ].

266-92½-New. Where part of land claimed is very small, plaintiff must show entry which covers land up to line of claim. 288**Pa**256, 135**A**620.

266-94 **Mo** 29**SW(2d)**1100; **TexCivA** 15**SW(2d)**159. [b] **Possession of grantee in deed reciting substantial consideration** is presumptively based thereon. **Mo** 29**SW(2d)**1100.

266-1 70**CalA**283, 233**P**370; 39**Wyo** 494, 273**P**908 (though occupancy was under mistaken belief as to true boundary).

267-5 See also 211**Ky**761, 278**SW**107 [citCJ].

267-14 169**La**1, 124**S**125(3dcase).

268-18 But see 93**CalA**512, 269**P**767 (where no taxes were shown to have been levied during certain years, presumption was that no taxes were levied during said years).

268-24 [a] (2) Trespass to try title. **TexCivA** 297**SW**491.

268-26 109**Conn**693, 145**A**573; 85 **Ind A**528, 152**NE**870; 225**AppDiv**586, 233 **NYS**582. [a] **Evidence by plaintiff, not in rebuttal,** but to establish facts not set up in complaint, is inadmissible. 32 **PortoRico**639. [b] **Evidence of defendant's remote grantor's reputation for** honesty and fair dealing held inadmissible on issue of presumed grant. **Tex CivA** 298**SW**154.

268-27 **TexCivA** 293**SW**644.

268-28 225**Ky**365, 8**SW(2d)**626.

268-29 220**Ala**242, 124**S**528; 320**Mo** 746, 8**SW(2d)**824.

268-29½-New. Declarations of deceased owner not in possession are not admissible on the issue of adverse possession. 211**Ky**711, 277**SW**1025.

268-29¾-New. Thus a statement by such person of the intention to divide a lot between plaintiff and defendant is not admissible to disprove the defense of adverse possession. 211**Ky**711, 277**SW** 1025.

268-30 218**Ala**160, 117**S**753.

269-33 76**Mont**1, 245**P**532, 536 [citCJ].

269-35 94**Fla**937, 114**S**515, 517 [citCJ]; **TexCivA** 298**SW**154.

269-42 225**Ky**365, 8**SW(2d)**626.

269-45 94**Fla**937, 114**S**515, 517 [citCJ]; 165**Ga**103, 139**SE**870.

270-46 **Del** 147**A**165 (not admitted to show truth of assertions made).

270-47 **Del** 147**A**165; 165**Ga**103, 139**SE** 870.

271-67½ 162**Ga**743, 135**SE**95.

271-75½-New. Evidence of proceedings by which a third party got the deed under judgment is admissible, where the adverse claimant claims under such deed, to show adverse character of claim. **TexCommnA** 278**SW**422.

272-82 **TexCivA** 272**SW**297 (holding under executory contract of sale).

272-84 **Iowa** 232**NW**150. [a] **Purpose of admission.**-Evidence of offer to purchase lands in controversy is admissible, not for purpose of defeating title already perfected by limitation, but only for purpose of explaining character of defendant's possession. **TexCivA** 8**SW** (2d)301.

272-93 154**Miss**691, 123**S**861.

273-99 **Mo** 298**SW**47.

273-1 **Mo** 298**SW**47; **TexCivA** 7**SW** (2d)611.

273-3 **Iowa** 232**NW**150.

273-11 218**Ala**160, 117**S**753.

274-17 214**Ky**845, 284**SW**98.

274-25 218**Ala**160, 117**S**753.

274-30 218**Ala**160, 117**S**753 (in connection with evidence of actual possession); 320**Mo**474, 7**SW(2d)** 691.

275-33 169**Ga**395, 150**SE**584.

275-35 118 **Or**32, 245**P**508, 509 [citCJ].

275-36 118 **Or**32, 245**P**508, 509 [citCJ].

275-37½-New. Neglect of property by owner held inadmissible to support claimant's claim of title by adverse possession. **RI** 148**A**33.

275-38 177**Ala**78, 58**S**291.

275-40½-New. The fact that the possessor mortgaged the property and offered it for sale has been held admissible to show notoriety of ownership. 218**Ala**160, 117**S**753.

275-40¾-New. Evidence that land was known or called in the community as the possessor's land has been held admissible to show notoriety of ownership. 218**Ala**160, 117**S**753.

275-41¾-New. Tract books are admissible to show color of title. 213**Ala**494, 106**S**150.

276-51 196**NC**780, 147**SE**300.

276-53 [a] **Evidence of invalidity of foreclosure proceedings inadmissible** against one not party to such proceedings. 32**PortoRico** 639.

276-54 162**Ga**743, 135**SE**95.

276-55½-New. Adverse claimant may show good faith of claim by evidence of legal proceedings under which the deed through which he claims was executed. **TexCommnA** 278**SW**422.

276-59 90**CalA**201, 265**P**982; 90**Fla**51, 105**S**145 (adverse possession must be taken strictly and established by clear and positive proof); 163**Ga**679, 136**SE** 795; 166**Ga**705, 144**SE**203 (evidence sufficient to authorize finding against prescription); 169**Ga**172, 150**SE**95; 320 **Ill** 432, 151**NE**284; 324 **Ill** 339, 155**NE**284; 328 **Ill** 399, 160**NE**1 (proof must be strict, clear, positive, and unequivocal); 339 **Ill** 22, 170**NE**709; 338 **Ill** 533, 170 **NE**749; **Ill** 173**NE**59; 211**Ky**761, 278 **SW**107 (evidence must be clear and unequivocal); 225**Ky**355, 9**SW(2d)**49; 235 **Ky**161, 30**SW(2d)**875; 167**La**347, 119**S** 73(2dcase); 234**Mich**304, 208**NW**34; 246

Mich579, 225NW3 (evidence held to show exercise of all control reasonably to be expected); 320Mo474, 7SW(2d)691; 132Misc786, 230NYS621; 118 Okl 1, 246P879; 124 Okl 18, 253P489; 144 Okl 244, 291PS6; .39 OklACR360; 123 Or549, 262P243; TexCommnA 280SW742; TexCommnA 14SW(2d)803; 194 Wis100, 215NW900; 197Wis40, 221NW383. [a] 213Ala494, 106S150; 214Ala637, 108S745; 216Ala193, 112S905; 217 Ala411, 116S113 (as to part); Ariz 288 P1027; 168Ark637, 271SW32; 168Ark743, 271SW328; 171Ark1000, 287SW183; 179Ark1199, 16SW(2d)571; 79 CalA545, 250P185; 86CalA347, 260P942; 86CalA664, 261P497; 93CalA512, 269P767; 100CalA373, 280P191; 101CalA209, 281P506; 87Colo265, 286P861; 108Conn1, 142A400; Del 147A165; 30Hawaii100; 46Ida137, 266P797; 203 Iowa491, 211NW237; Iowa 230NW333; 122Kan153, 251P444; 127Kan601, 274P240; 210Ky461, 276SW156; 211Ky682, 277SW1007; 226Ky116, 10SW(2d)613; 232Ky741, 24SW(2d)560; 158La822, 104S728 (especially in view of admission by defendant); 159La1035, 106S556; 159La1057, 106S564; 160La1046, 107S901; 163La785, 112S721; 167La199, 118S887; 168La588, 122S859; 13LaA686, 128S711; 153Md390, 138A250; 157Md213, 145A554; 265Mass30, 163NE559; 244Mich140, 221NW152; 246Mich300, 224NW391; 250Mich530, 231NW83; 165Minn293, 206NW434; 170 Minn58, 212NW13; 171Minn160, 213N W562; 171Minn410, 214NW271; 173 Minn145, 216NW782; 156Miss424, 125S554; Mo 274SW397; Mo 281SW26; Mo 292SW7; Mo 295SW772, 53ALR884; Mo 8SW(2d)975; Mo 24SW(2d)1042; Mo 29 SW(2d)1100; 76Mont175, 246P773; 114Nebr226, 206NW754; 198NC168, 150SE878; 57ND146, 220NW837; 140 Okl292, 283P563(2dcase); 121 Or332, 254P355; 123 Or517, 262P850 (actual, visible, and substantial inclosure); 128 Or395, 274P918(1stcase); 5PaDist&Co 345; TexCommnA 280SW748; Tex CommnA 283SW484; TexCivA 272SW587; TexCivA 274SW243; TexCivA 277 SW739; TexCivA 284SW318; TexCivA 287SW60; TexCivA 291SW337; TexCiv A 297SW624; TexCivA 3SW(2d)576; TexCivA 9SW(2d)760; TexCivA 11SW (2d)662; TexCivA 12SW(2d)811; Tex CivA 19SW(2d)363; TexCivA 27SW (2d)568; TexCivA 28SW(2d)253; Tex CivA 30SW(2d)378; 67Utah45, 245P695; 146Va804, 132SE863; 144Wash 198, 257P631; Wash 287P27. [b] 9F (2d)587; 16F(2d)841; 17F(2d)472; 26 F(2d)79; 215Ala12, 108S858; 215Ala 457, 111S229; 217Ala411, 116S113 (as to part); 218Ala160, 117S753; 218Ala 334, 118S559; 219Ala27, 121S19; 196 Cal701, 239P319; 198Cal579, 246P43; Cal 290P587; 69CalA50, 230P472; 74 CalA318, 240P521; 83CalA87, 256P479; 86CalA736, 261P1092; 92CalA393, 268P465; CalA 286P700; 103Conn332, 130A286; 165Ga416, 141SE51; 165Ga685, 142SE142; 165Ga703, 141SE907; 320 Ill432, 151NE284; 324 Ill339, 155NE284; 338 Ill11, 170NE10; 338 Ill533, 170NE749; 88 IndA487, 164 NE711; 210Ky461, 276SW156; 211Ky761, 278SW107; 217Ky50, 288SW1037; 217Ky138, 289SW218; 218Ky448, 291SW727; 228Ky313, 14SW(2d)1070; 231Ky253, 21SW(2d)279; 232Ky778, 24SW(2d)599; 166La35, 116S585; 148Md268, 129A292; 149Md318, 131A444; 262 Mass159, 159NE513; 235Mich174, 209NW152; 161Minn431, 201NW919; Miss 123S881(3dcase); Mo 293S140; 319Mo660, 4SW(2d)819; Mo 28SW(2d)652; Mo 29SW(2d)39; MoA 18SW(2d)559; 73Mont306, 236P673; NM 288P604; 230 AppDiv447, 245NYS478; 123 Or370, 261P69; 136SC525, 134SE497; 142SC56, 140SE236; 143SC445, 141SE688; TexCommnA 15SW(2d)575; TexCivA 273SW938; TexCivA 275SW494; TexCivA 281P642; TexCivA 288SW598; TexCivA 15SW(2d)159; TexCivA 19 SW(2d)173; TexCivA 25SW(2d)1001; 100Vt334, 137A199; 143Va124, 129SE260; 142Wash204, 252P916; 148Wash 328, 268P889; 149Wash573, 271P891; 193Wis462, 214NW454; 194Wis100, 215 NW900; 197Wis40, 221NW383. [c] Ill 173NE59; 215Ky551, 286SW773; 224 Ky48, 5SW(2d)481; 232Ky739, 24 SW(2d)554; 241Mich282, 216NW921; 244Mich254, 221NW147; 174Minn171, 218NW549; Mo 300SW497; TexCivA 274SW250. [d] 308Mo9, 271SW743; 32PortoRico235 ("extraordinary prescription" for thirty years not shown); TexCivA 283SW589; TexCivA 285SW 840; TexCivA 19SW(2d)926; 148Wash 328, 268P889. [e] Ariz 288P1027; 166 La656, 117S763; 156Md123, 142A910; Mo 24SW(2d)1042; Mo 29SW(2d)1100. [f] 220Ala338, 124S898; 213Ky588, 281 SW542; 234Ky421, 28SW(2d)472; 13 LaA686, 128S711; 320Mo474, 7SW(2d) 691; TexCivA 24SW(2d)520; TexCivA 29SW(2d)500; 193Wis462, 214NW454. [g] Mo 298SW47; 114Nebr226, 206NW 754; 114 Okl190, 245P589; TexCivA 293SW203. [h] 251Mich175, 231NW 115; TexCivA 27SW(2d)302. [i] 213Ky 746, 281SW1033; 169La1041, 126S517; Mo 24SW(2d)1042; TexCivA 5SW(2d) 232. [j] Iowa 231NW438; 211Ky761, 278SW107; 231Ky761, 22SW(2d)252; 10LaA290, 120S428; Mo 282SW53. [k] 180Ark260, 21SW(2d)426. [l] 234Ky 400, 28SW(2d)477; Wash 290P226. [m] 114 Okl190, 245P589. [n] 168Ark637, 271SW32; 81Colo168, 254P768; 217Ky 50, 288SW1037; 147Wash354, 266P148. [o] 174Ark669, 297SW1008; 68CalA270, 228P1057; Iowa 231NW339; Mo 298 SW47; 190NC826, 130SE840 (evidence of executed swap or transfer of lands held to show adverse and not permissive possession); TexCivA 4SW(2d)117. [p] 181Ark597, 27SW(2d)88; 320 Ill 432, 151NE284; 217Ky50, 288SW1037; 250Mich518, 230NW924; 308Mo9, 271 SW743; Mo 30SW(2d)126; 123 Or370, 261P69; TexCommnA 276SW418. [q] 320Mo474, 7SW(2d)691; Mo 30SW(2d) 126. [r] 163La785, 112S721. [s] 168La 481, 122S589. [t] 169La1, 124S125(3d case). [u] 168Ark743, 271SW328; 202 Cal134, 259P727; 69CalA159, 230P976; 86CalA712, 261P1086. [v] 176Ark303, 3 SW(2d)342. [w] 217Ky50, 288SW1037; 154Miss691, 123S861; 294Pa436, 144A 413. [x] Ariz 288P1027. [aa] 17F(2d) 472. [dd] **Evidence sufficient to show claim under color of title.**–86CalA712, 261P1086; 217Ky50, 288SW1037. [ee] **Evidence sufficient to show exercise of acts of ownership.**–86CalA712, 261P 1086. [ff] **Plaintiff must prove** with as much certainty as in action of ejectment. 288Pa256, 135A620. [gg] **Evidence held insufficient** to show that well-defined boundary continued for statutory period. 215Ky551, 286SW773. [hh] **Evidence held insufficient to establish title to land claimed** as accretion by adverse possession. 174Ark956, 298SW861. [ii] **Evidence held to raise issue** of presumed grant to defendant's remote grantor. TexCivA 298SW154. [jj] **Evidence held insufficient to show privity of title or possession.**–328 Ill 399, 160NE1. [kk] **Evidence held insufficient to show knowledge of claim of adverse holding.**–129 Kan317, 282P724. [ll] **Evidence insufficient to identify land described in pleadings.**–TexCivA 24SW(2d)520.

279–60 74CalA318, 240P521; TexCivA 292SW260; 194Wis100, 215NW900.

279–61 320 Ill 432, 151NE284; 324 Ill 339, 155NE284; 124 Okl18, 253P489. [a] **Facts constituting adverse possession** must be shown in trespass to try title based on limitation. TexCivA 292 SW260.

279–63 324 Ill 339, 155NE284; TexCiv A 286SW315.

279–65½–New. The weight to be given to the testimony of an adverse claimant that he claims only to the true boundary depends on the circumstances of each case. 39Wyo494, 273P908.

279–66 324 Ill 339, 155NE284.

279–66½–New. Adverse or hostile intent may be inferred from the character of the possession. 167Minn356, 46 ALR785, 209NW257.

279–66⅓–New. "Possession" is a mixed question of law and fact. TexCivA 292 SW260.

279–67 213Ala494, 106S150; 218Ala 217, 118S383; CalA 286P510; 318 Ill 490, 149NE465; Ill 173NE59; 234Ky 400, 28SW(2d)477; 126Me299, 138A 170; 153Md449, 138A331; Mass 170NE 807; 232Mich497, 205NW591; 233Mich 400, 206NW309; Mo 282SW53 (credibility of witnesses); Mo 7SW(2d)347; Mo 8SW(2d)975; NJ 148A719(2dcase); 218AppDiv682, 219NYS413; 79NC480; 195NC473, 142SE713; 196NC780, 147 SE300; TexCommnA 273SW422; Tex CommnA 291SW1101; TexCivA 291SW 337; TexCivA 294SW913; TexCivA 295 SW679; TexCivA 4SW(2d)117; Tex CivA 27SW(2d)289 (trial by court); 99 Vt249, 131A14 (possession of land included in deed); 99Vt384, 133A355; 149Wash573, 271P891; Wash 289P 1025. [b] **Character of possession** is for jury. 138SC31, 136SE13. [c] **Width of right of way.**–SC 155SE833.

280–68 137SC468, 135SE567; 99Vt384, 133A355. [a] (3) Question is rarely one of law. TexCivA 294SW913.

281–69 165Ga309, 140SE856 (by direction of verdict); Mass 167NE270; 76 Mont175, 246P773; 39Wyo494, 273P 908. [a] **Adverse possession not shown as matter of law.**–TexCivA 31SW(2d) 501.

281–70 242Mich167, 218NW703; 308 Mo9, 271SW743; Mo 29SW(2d)39; Tex CivA 289SW79. [d] 233Ky139, 25SW (2d)57; 211Ky711, 277SW1025; 153 Md449, 138A331; TexCivA 7SW(2d) 930. [e] 165Ga309, 140SE856; TexCiv A 289SW79; 231Ky522, 21SW(2d)833; TexCivA 18SW(2d)925 (evidence of claimant's offer to purchase land from defendant within statutory period justified directed verdict against claimant).

281–71 RI 148A33; TexCivA 285SW 927. [a] (2) What constitutes substantial inclosure is question of fact. 90CalA201, 265P982.

281–72 TexCivA 31SW(2d)168.

281–75 TexCommnA 276SW418.

281–77 195NC865, 142SE225; TexCiv A 5SW(2d)200; TexCivA 5SW(2d)232; TexCivA 14SW(2d)863.

282–78 213Ala494, 106S150; 169Ark 376, 275SW698; 138SC13, 136SE13; TexCivA 288SW268; TexCivA 1SW(2d) 661.

282–79 [a] 308Mo9, 271SW743; Tex CivA 8SW(2d)301; TexCivA 31SW(2d) 168. [b] 213Ala494, 106S150; 169Ark 376, 275SW698. [c] **Evidence insufficient to go to jury on duration of possession.**–99Vt249, 131A14.

282–80 218Ala217, 118S383; Ala 127S 843; 106Conn300, 137A856; 168La481, 122S589; Mass 170NE807; 103NJLaw 340, 135A890; TexCommnA 276SW 418; TexCommnA 278SW422; TexCiv A 291SW337; TexCivA 294SW633; TexCivA 5SW(2d)200. [a] (6) Whether widow's original possession under homestead right was converted into adverse possession under claim of independent title is question for jury. Tex CommnA 278SW422. (7) Intention of adjacent landowners in holding to certain established or agreed boundary dividing their lands is for jury. 213Ala 563, 105S652.

282–81 213Ala217, 104S390; 70CalA 283, 233P370; 138SC31, 136SE13 (whether plaintiff went into possession under parol gift is for jury); 143Va 124, 129SE260; 39Wyo494, 273P908.

282–82 [a] TexCommnA 14SW(2d) 803; TexCivA 29SW(2d)911.

282–83 169La1, 124S125(3dcase); Wash 290P226.

283–88 169Ark376, 275SW698; Tex CivA 282SW302; TexCivA 27SW(2d) 376.

283–89 213Ala217, 104S390; 169Ark 376, 275SW698.

283–90 93Fla1116, 113S676. See also 196NC657, 146SE713.

283–96 TexCivA 275SW303 (ambiguity in use of word "asserted" instead of "claimed" cured by requested instruction).

283–99 220Ala205, 124S661(7thcase); 324 Ill 339, 155NE284; 195NC189, 141 SE570.

283–5 210Ky121, 275SW513 (court should define extent of possession).

283–6 170Ga135, 152SE466; 39GaA 390, 147SE167. See also 190NC826, 130 SE840. [b] SC 155SE833; TexCivA 18 SW(2d)821. [d] **Instruction not warranted by evidence.**–211Ky711, 277SW 1025. [e] **Instructions held erroneous.**–Mo 286SW385. [f] **Presumptions.**–Tex

CivA 289SW431. **[g] Instructions held correct.**–234Ky400, 28SW(2d)477.
284–7 [a] **Instructions held not erroneous.**–220Ala242, 124S528.
284–9 **TexCivA** 18SW(2d)821.
284–10 175Ark475, 299SW745 (possession must be continuous); 168Ga755, 149SE136 (better practice is to define as in statutes); 219Ky765, 294SW487. [a] (2) Other instances. 170Ga135, 152 SE466.
284–13 **TexCivA** 18SW(2d)821.
284–15 **TexCivA** 289SW1021.
284–20 [b] 86CalA712, 261P1086. [d] **Findings held consistent.**–**TexCommnA** 294SW848. [e] **Finding failing to prove title by deed** does not negative finding that occupancy was originally under deed. **Ariz** 288P1027. [f] **Findings held not contradictory.**–**TexCivA** 25SW (2d)959.
285–21 85 **IndA**494, 154NE679.
285–24½–New. Finding that defendants had actual and constructive possession held to involve a finding that they cultivated and used land and that their possession was peaceable and adverse within the statute. **TexCivA** 283SW696.
287–58 See also 7LaA368.
288–71 [b] **This presumption assumes grant of title asserted** and not former existence of deed, which does not create or convey it. 257Mass483, 154NE79.
289–80½–New. Distinction between title by prescription and title by limitations. Prescriptive title rests on presumption of grant 211Ky682, 277SW 1007.
289–80¼–New. and confers positive title. 211Ky682, 277SW1007.
289–80¼–New. Statute of limitations acts to bar remedy. 211Ky682, 277SW 1007 (applies only where there has been disseizin or actionable invasion of owner's possession).
289–81 103Conn332, 130A286; 257 Mass483, 154NE79; 126Misc879, 216NYS2; 12PortoRicoFed252 (grant presumed on proof of twenty years' adverse possession); 138SC31, 136SE13; **Tex CivA** 290SW818; **Fl&K**448.
289–84 257Mass483, 154NE79.
290–95½–New. The grant is presumed no broader than the extent of adverse use. 126Misc879, 216NYS2.
290–98 150Miss245, 116S593.
291–6 219MoA271, 275SW965.
291–6½–New. The doctrine that acquisition of title to real property by adverse possession presupposes a grant does not apply to the statute of limitations. 88CalA441, 263P870.
291–7 57NJL647, 32A214.
291–9 103Conn332, 130A286; **TexCiv A** 290SW818.
293–31 **TexCivA** 281P642.
293–33 **TexCivA** 290SW818.
293–38 2DanaKy24; 6JJMarshKy162.

ADVERTISEMENT

294–7 76CalA114, 243P898, 900 [citCJ].

AERIAL NAVIGATION

300–8 [b] **Unlimited rights to air space** are not given by maxim. 41F(2d) 929.
301–16 [d] **Absolute ownership** may be limited, to some extent, in great public interest. 41F(2d)929.
306–61 41F(2d)929.
307–77 **Mass** 170NE385.
309–7½–New. In an action on a policy on an airplane, loss is properly fixed by repair bills, in accordance with provision of the application for the policy, showing actual cost of materials plus one and one half times the actual labor cost at current rates, exclusive of extra payment for overtime and overhead. 135Wash558, 238P569, 240P565.

ÆSTHETIC

310–87 127Misc382, 216NYS741. [b] **"'Æsthetic' relates to that which is beautiful or in good taste."**–127Misc382, 386, 216NYS741.

AFFECT

311–5 17F(2d)71.
312–11 254Mass240, 150NE206.
312–14 273US418, 47SCt426, 71L ed 749. **[b] Prices for theater tickets held** not matter affected with public interest. 273US418, 47SCt426, 71L ed749.

AFFIDAVITS

317–1 107TexCr370, 296SW576.
317–2 214Ky84, 282SW762.
318–6 72Mont245, 233P126.
318–7 72Mont245, 233P126.
318–8 72Mont245, 233P126.
318–9 72Mont245, 233P126.
318–14 206 Iowa1187, 221NW840 (verification indispensable to rule).
322–49 **Ala** 128S440.
323–56 214Ala69, 106S507.
325–76 9PaDist&Co 289.
327–90 108TexCr320, 300SW65; 3Que Pr466.
328–91 26QueSuper35.
328–96 22Ky684, 15SW(2d)473.
329–9 49Ark51, 4SW193.
330–25 100TexCr626, 272SW167; 109 TexCr2, 28SW(2d)459; 108TexCr682, 2 SW(2d)845; 111TexCr342, 13SW(2d) 380; 111TexCr652, 13SW(2d)846(2d case); 112TexCr92, 14SW(2d)63(2d case); 111TexCr565, 15SW(2d)632(1st case); 112TexCr412, 16SW(2d)1083; Sask 1WestLR114. But see **OhA** 173NE 36.
333–54 **NJSup** 151A395.
333–58 5QuePr441.
335–71 127Misc169, 216NYS317. [a] (1) 127Misc169, 216NYS317.
336–74 255 IllA484; 256 IllA251.
337–83 111TexCr81, 11SW(2d)321.
338–89 107TexCr370, 296SW576, 579 [citCJ].
348–72 232 IllA240; 205 Iowa1111, 217 NW449, 452 [citCJ]; **TexCivA** 293SW 677. [d] **Affidavit of merits signed only by attorney** who does not commit himself in statements does not satisfy rule. 232 IllA240.
349–79 [m] **Affidavit in some respects defective may be deemed sufficient.**–147 Va720, 133SE593.
350–87 205 Iowa1111, 217NW449; 74 Mont408, 241P233 (affidavit that contract "was to have been performed" in certain county is legal conclusion).
351–88 122Kan460, 252P262.
351–91 [c] **Hearing of application** to strike from files affidavits alleged to contain impertinent matter will be postponed to time of hearing main petition. 2Deac&C119.
351–94 [d] **Failure to read in first person** is immaterial where adverse party is not prejudiced. 26QueSuper35.
354–18 **Del** 130A677, 678 [citCJ].
355–19 37GaA386, 140SE415.
355–20 [b] **Statement by affiant that facts "are known to him of his own personal knowledge"** held equivalent to saying that such facts are true. 32 PortoRico 829.
355–24 **Del** 130A677, 678 [citCJ].
356–28 **Del** 130A677, 678 [citCJ]; 102 NJEq467, 141A564; **NJCh** 147A338.
357–33 32Ariz182, 256P1048.
358–34 35GaA375, 133SE278.
358–37 33PortoRico 24.
359–47 140US151, 11SCt746, 35L ed 391; 162US324, 16SCt801, 40L ed984; 14Del 184, 31A880; 23Nev279, 46P257; 77NJEq208, 77A410 [aff 78NJEq297, 81A1134].
359–51 40GaA848, 151SE692; 125Kan 147, 148, 264P40 [quotCJ].
360–52 125Kan147, 148, 264P40 [quot CJ].
360–57 33PortoRico 24. [a] (2) So also in Porto Rico. 33PortoRico 24. [c] **In Porto Rico.**–33PortoRico 24.
360–60 [b] (2) Jurat reading as though it was sworn to, and subscribed by officer rather than affiant, held to merely indicate a clerical error. 112 TexCr628, 18SW(2d)158.
362–75 32Ariz182, 256P1048; 116Nebr 45, 215NW564.
362–76 125Kan147, 148, 264P40 [cit CJ].
363–91 [g] (4) Jurat in name of county clerk by his deputy is good in view of statute requiring deputy to act in name of his principal. **TexCivA** 285SW 933.
366–9 35GaA414, 133SE294.
366–14 [b] (2) Affidavit is not vitiated because seal of notary does not conform to statute. **OhA** 173NE36.
367–16 183 Iowa1188, 168NW106.
368–31 See also 10QuePr174.
370–58 35GaA375, 133SE278.
371–63 183 Iowa1188, 168NW106.
372–78 214Ky84, 282SW762. **[d] Kinds of affidavits stated.**–189Ala395, 66S686.
372–79 189Ala395, 66S686; **CalA** 279P 1004.
373–82 **CalA** 279P1004.
373–84 [a] **In administrative hearing,** ex parte testimony and affidavits can be considered, if no objection made to reception, and rebuttal and cross-examination permitted. 25F(2d)11.
373–85 16F(2d)805; 20F(2d)247; 253 IllA320; 163La18, 111S481; 164La 1085, 115S278; 139Miss826, 104S297; 128 Or177, 270P911; 138SC328, 136SE 481; **TexCivA** 274SW335; 103WVa590, 138SE201, 202 [citCJ]; 106WVa317, 145SE641. [n] **In Saskatchewan.**–[1929] 2DomLR345.
374–86 **TexCivA** 274SW335.
374–87 225AppDiv881, 233NYS35. [f] **Affidavit of deceased witness has been** held properly excluded. 99CalA409, 278 P885.
374–87½–New. Statute authorizing use in evidence of affidavits made by the parties to interpret conveyance, refers to explanatory affidavits contemporaneously made and of res gestæ of transaction. 213Ala676, 105S881.
374–87½–New. and does not authorize admission of affidavits made many years later and tending to change or destroy the conveyance. 213Ala676, 105S881.
374–87¼–New. And a decree changing the grantee in a deed necessarily based on affidavits improperly admitted is erroneous. 213Ala676, 105S881.
375–1 [d] **In libel action, affidavit in divorce proceedings** of wife of plaintiff is inadmissible. 6F(2d)644.
376–11 42F(2d)904.
376–13 **Can** 4TerrL441.

AFFINITY

378–17 But see **Mo** 28SW(2d)363.

AFFRAY

384–2 125Me451, 134A571.
385–39 169NC284, 84SE529; 194NC34, 138SE441.
390–43 [a] (2) Other evidence held sufficient. 125Me451, 134A571.

AFFREIGHTMENT

393–1 273US326, 47SCt368, 71L ed663.

AFTER

395–35½–New. Word "after" fixes time when performance may be begun. 130 Kan714, 288P764.

AGAINST

400–93 **TexCivA** 298SW(2d)529 (discord or conflict).
400–95½–New. signifies discord or conflict and not harmony. **TexCommnA** 276SW647.

AGE

402–17 77Mont290, 250P973.
402–17½–New. "Age of maturity" means maturity in mind, character, and judgment. 146Miss552, 112S691.

AGENCY

419–1 218Fed925; 20F(2d)57; 169 Iowa542, 151NW500; 202 Iowa70, 209 NW525; 203 Iowa411, 212NW722; Iowa 228NW283; 193Mich533, 160NW425; Mo 286SW368; MoA 28SW(2d)215; 180 AppDiv765, 167NYS810; 59 Okl 42, 157 P1029; 115Tex53, 274SW554. [a] **Independent contractor** is not an agent. 197Ala603, 73S40.
419–2 169 Iowa542, 151NW500; **Tex CommnA** 28SW(2d)588. [a] (4) "Agency arises where the principal authorizes the agent to make engagements in the name of the principal." 164Minn 411, 205NW257. (5) Other definitions. **TexCivA** 25SW(2d)156.
419–4 **Mo** 31SW(2d)39; 116 Okl 36, 243P133, 134 [quotCyc].
419–5 230Ky398, 19SW(2d)1071. But see 292Pa244, 141A47.
419–7 104Conn257, 132A540, 48ALR 259 [citCJ].
419–10 173AppDiv275, 159NYS277.

420–11 164Ga351, 138SE898; 178 Iowa 601, 159NW1030.
420–15 164Ga351, 138SE898; 45 Ida 143, 260P1035; 94Kan584, 146P1157; 173Ky282, 190SW1103; 204Mich658, 171NW374; 108SC131, 98SE336; 99 TexCr441, 270SW179, 180 [quotCJ]; 145Wash277, 259P878; 131Wis243, 110 NW472 ("canvasser"); 168Wis264, 169 NW606.
420–16 21Ariz261, 187P577; 45 Ida 143, 260P1035; 233Ky19, 24SW(2d) 903; 273Mo 341, 201SW100; 36SD531, 156NW76; 99TexCr441, 270SW179, 180 [quotCJ].
420–17 145Wash277, 259P878.
420–19 183Ky815, 210SW467; 130Pa 419, 18A632, 17AmSR778; 145Wash277, 259P878.
421–20 35CalA116, 169P417; 105Wash 602, 178P815. [a] "Agent" may include administrator. 17GaA451, 87SE697; 17 GaA536, 87SE815.
421–21 116 Okl 36, 243P133, 134 [quot Cyc]. [a] 206 Iowa475, 218NW949, 950 [quotCJ].
421–24 [f] 115Ga184, 41SE680 [aff 197US60, 25SCt403, 49L ed663]. [g] 31 Ont658.
421–25 261US174, 43SCt312, 67L ed596.
422–32 [h] **Delivery of chattel with instructions to sell,** at certain price, anything in excess thereof to be retained by party so selling, held relationship of principal and agent, not vendor and purchaser. 19SaskL492, [1925] 3DomLR 565, [1925] 2WestWkly402. [i] **Agency and not sale** held created by contract. 200 Iowa608, 203NW710. [j] **"Agency"–distinguished from "guardianship."–** Agent gets his authority from principal while guardian does not get his authority from his ward. 99Ark344, 137 NW926, AnnCas1913B84. [k] **Agent same as middleman** as applied to real estate transactions. 35CalA116, 169P 417. [l] **Agent or debtor.–**126Kan28, 266P744. [m] **Agent or vendee.–**126 Kan28, 266P744. [n] **Agent or bailee.–** Prospective purchaser of automobile, operating automobile alone with permission of motor company, was bailee of car, and not agent. 196NC348, 145 SE679(2dcase). [o] **Agreement to buy and sell** not agency. Wash 290P853.
422–33 7F(2d)422.
423–34 [a] **In Spanish law** "the intention of the parties will be the principal point to be made clear in doubtful cases." 32PortoRico 58, 63 [quot 10 Manresa Civ. Code p 414].
423–35 197NC147, 147SE822; 149Va 221, 141SE389, 392 [quotCJ].
423–37 240 IllA165; 242 IllA405, 412 [citCyc].
423–38 16F(2d)122.
423–39 [a] 156Tenn666, 4SW(2d)354, 57ALR733 [quotCJ].
423–40 16F(2d)122.
423–41 16F(2d)122.
424–42 16F(2d)122.
424–47 [e] **Buyer held agent** under arrangement for purchase of live stock whereby principal furnished money and instructed as to prices and buyer was given saving on market prices. 45 Ida 143, 260P1035.
424–48 115 OhSt594, 155NE137. [a] **Cost plus contract for construction of school building** is construed as creating relationship of owner and contractor rather than principal and agent. 187 Wis506, 204NW907.
425–55 [b] 162Wis580, 156NW955.
425–57 46 Ida313, 268P31 (one designated trustee to deliver is mere agent).
425–62 222Ky243, 300SW617, 619 [cit CJ].
425–63 96CalA536, 274P423.
425–65 123 Or128, 261P66, 68, 55ALR 269 [citCJ].
426–68½–New. A manager is an agent for a partnership. TexCivA 185SW369.
426–76 28SCL408, 40AmD608; 17SCEq 159.
426–77 216Ky715, 288SW674 [citCJ].
427–90 104Ala176, 16S46; 82NH177, 131A352.
427–91 220Ala568, 126S637; 151Md392, 135A166; MoA 31SW(2d)220; 249NY 1, 162NE565.
428–92 82NH177, 131A352.
428–94 149US194, 13SCt859, 37L ed 699; 262Fed94; 104Ala176, 16S46; 22 Ariz376, 197P980; 136NC11, 48SE501; 139NC299, 51SE1020; 144NC4, 56SE 510; 169NC509, 86SE290; 97Tex432, 79SW516; 23TexCivA340, 55SW608; TexCivA 83SW855; TexCivA 87SW734; 43TexCivA254, 95SW739; 54TexCivA 437, 117SW909; TexCivA 178SW733; TexCivA 225SW875; 39TexCr486, 46 SW643.
428–95 213Ky389, 281SW185, 186 [cit CJ]; MoA 295SW1083, 1088 [citCJ]; 249NY1, 162NE565. [c] 73Mont354, 236P1082.
428–96 168Ga429, 148SE152.
428–97 18F(2d)908; 213Ky389, 281 SW185, 186 [citCJ].
429–98 242 IllA111 (authority to draw checks on bank deposit held not to create general agency); MoA 295SW 1083, 1088 [citCJ].
429–99 213Ky389, 281SW185, 186 [cit CJ]. See also 249NY1, 162NE565.
429–7 94Fla1128, 115S537, 539 [citCJ].
430–23 122Kan420, 251P1105, 1106 [citCJ].
431–25 338 Ill 101, 170NE214; 112 Oh St284, 147NE744.
431–29 338 Ill 101, 170NE214.
432–43 213Ala256, 104S506; 214Ala 501, 108S335, 337 [citCJ]; 131Ark843, 28SW(2d)61; 93Fla805, 113S419, 429, 54ALR1173 [quotCJ]; 27Hawaii537, 542 [quotCycperPeters,CJ]; 164Minn 411, 205NW257; 32 OhA138, 167NE695; Pa 152A98.
432–44 207 Iowa910, 223NW865; 68 Utah407, 250P986.
432–46 TexCommnA 23SW(2d)333. [d] **Contract held not to constitute agency.–**318Mo 784, 18W(2d)163, 58ALR 493.
432–47 170Ga270, 152SE248 (intermediaries, though acts are known to lender, are not his agents and he is not chargeable with their acts); 27Hawaii 537, 542 [quotCycperPeters,CJ]; 207 Iowa786, 223NW517 (offer and acceptance presupposed from relationship); 13LaA337, 125S507; 164Minn411, 205 NW257. [a] (2) Subagency cannot arise without knowledge or consent of principal or agent. 205 Iowa343, 218 NW69.
433–48 164Minn411, 205NW257. [b] **Agent to procure loan.–**119Kan661, 240 P952.
433–49 66Utah351, 242P408, 411 [quot CJ]. [a] 35GaA749, 134SE846; 41GaA 189, 152SE141 (mutual promises held consideration). (2) Gratuitous agency. 229AppDiv155, 251NYS255.
433–50 104Conn36, 132A533. But see 66Utah351, 242P408.
433–51 66Utah351, 242P408, 411 [quot CJ].
433–52 66Utah351, 242P408, 411 [quot CJ].
433–53 124Kan827, 262P547.
433–54 104Conn36, 132A533.
433–56 124Kan827, 262P547.
434–60 70CalA415, 233P366; Ida 286P 920; 206 Iowa475, 218NW949; 197NC 147, 147SE822.
434–61 217AppDiv249, 216NYS582.
434–62 MoA 28W(2d)215.
435–63 213Ala256, 258, 104S506 [cit CJ]; MoA 26SW(2d)812.
435–64 TexCivA 25SW(2d)678 (contract construed to establish agency).
435–66 43F(2d)920; 116 Okl 106, 243 P504, 506 [citCJ].
435–70½–New. One operating an oil station on commission and required to protect the property acts as the agent of the owner of the station. 224AppDiv 229, 230NYS192.
435–71 213Ala256, 104S506; 240 IllA 311, 320 [quotCJ].
435–72 240 IllA311, 320[quotCJ].
435–76 213Ala256, 104S506.
436–79 8F(2d)43; 213Ala256, 104S506; Ariz 293P16; 78CalA728, 246P564; 93 Fla805, 113S419, 429, 54ALR1173 [cit CJ]; Iowa 224NW531; Iowa 229NW 266; 122Kan453, 251P1093, 1095 [cit CJ]; 231Ky5, 20SW(2d)1029; 167La 301, 119S56; Me 151A534; 151Md392, 135A166; MoA 272SW1040, 1042 [cit Cyc]; MoA 298SW1061, 1064 [citCJ]; MoA 2SW(2d)215, 220 [citCJ]; 222MoA 165, 2SW(2d)806; MoA 19SW(2d)758; MoA 26SW(2d)812; NH 150A545; 116 Okl 106, 243P504, 506 [citCJ]; 137SC 319, 135SE473, 476 [citCJ]; 142SC375, 140SE804; 155SC507, 152SE707; TexCivA 9 SW(2d)279; TexCivA 28 SW(2d)877; 89Vt526, 96A9; 107WVa 684, 150SE4; 199Wis529, 227NW33; Eng [1917] 2KB755; Eng [1918]AC626.
436–80 212Ala644, 103S573 (driver of automobile directing passenger to get gas from plaintiff's car held liable for resultant burning of car); MoA 25 SW(2d)138 (seller's manager was buyer's agent for communication of offer); 89Vt526, 96A9.
436–83 MoA 26SW(2d)812.
437–85 8F(2d)43; 214Ala501, 108S335, 337 [quotCJ]; Conn 151A325; Iowa 229 NW266.
437–86 Iowa 229NW266; 219Ky757, 294SW483; MoA 272SW1040; 116 Okl 106, 243P504, 506 [citCJ]. [e] (2) Where negligence of person operating car caused injury to his wife, owner held not liable under arrangement whereby owner and husband each were to drive half way on trip taken for distinct purposes. 194Wis12, 215NW450. [n] **Consignor of goods** whose draft on consignee he negotiated at bank which was dishonored was acting for himself and not for bank when being present for payment by bank and at its suggestion he adjusted his differences with consignee by taking his note which he transferred to the bank taking up draft with proceeds of note. 51ND287, 199NW945.
439–97 99Wash502, 169P968.
439–99 169Ga846, 151SE803.
439–4 [a] (13) To install lighting plant. 35GaA550, 134SE142. (14) To drive automobile. 284Pa479, 131A279. (15) To procure note. MoA 9SW(2d) 856.
440–10 151Md392, 135A166 (general agency in disposing of scrap metal).
440–12 12LaA165, 125S137. (4) T24 Kan827, 262P547. (8) To keep alive insurance policy for benefit of purchaser of automobile. 81NH498, 41ALR1280, 128A807. (9) To route a shipment. Que [1925] 1DomLR390. (10) To procure guaranty. 89 IndA337, 163NE538. (11) Other instances. 7Newfoundl 484 (supplier for fishing voyage is not agent for employer).
440–16 92Fla731, 110S358.
440–17 24 OhA395, 157NE719; TexCivA 32SW(2d)252.
440–18 [c] **Son.–IndA** 170NE862.
441–19 213Ala256, 104S506; 3LaA435, 438 [citCJ]; 133SC353, 131SE146; 132 Wash472, 232P292.
441–22 222MoA165, 2SW(2d)806; TexCivA 286SW541, 543 [citCJ].
442–24 See also 135SC1, 133SE451.
442–28 136SC218, 43ALR1212, 131SE 424, 425 [quot CJ]. [a] 73CalA476, 238 P1062.
442–29 138 Okl 24, 280P295; 136SC 218, 43ALR1212, 131SE424, 425 [quot CJ].
443–30 136SC218, 43ALR1212, 131SE 424, 425 [quotCJ].
443–35 213Ala256, 104S506; 214Ala169, 106S804; 202 Iowa947, 211NW564; 32 OhA158, 167NE695; Pa 152A98; 136SC 218, 43ALR1212, 131SE424, 425 [quot CJ]; TexCivA 286SW541, 543 [citCJ].
443–36 173Ark1181, 291SW805; 202 Iowa947, 211NW564; TexCivA 286SW 541, 543 [citCJ]. See also 136SC218, 43 ALR1212, 131SE424.
444–41 213Ala256, 104S506 (facts must lead to reasonable conclusion of existence of mutual assent); TexCivA 286 SW541, 543 [citCJ].
444–49 290Pa243, 138A758, 759 [cit CJ].
444–50 290Pa243, 138A758, 759 [cit CJ].
444–51 TexCommnA 276SW887, 893 [citCyc]; TexCivA 286SW541, 543 [cit CJ].
445–52 151Md392, 135A166, 173 [cit Cyc]; 84Mont314, 275P748; 290Pa243, 138A758.
445–54 206 Iowa475, 218NW949.
448–70½–New. Loan company may be agent of borrower. 122Okl 216, 253P 982.
448–71 Ont [1929]4DomLR721.
448–75 Ont [1929]4DomLR721.
444–76½–New. Order of referee direct-

ing receiver and trustee who were unfaithful to trust to restore compensation was proper. 44F(2d)62.

448-80 213Ala516, 105S644, 646 [cit CJ]; **SD** 231NW908; 36Wyo 279, 254 P123, 125 [quotCJ]. [d] **Where mortgagee's agent is employed by mortgagor to obtain loan,** he remains agent of mortgagor in transmitting funds to mortgagee. 213Ala516, 105S644 (mortgagor must stand loss of such funds converted by agent). [e] **Where agent is agent of both parties.**–Real estate agent with whom purchaser made deposit pursuant to agreement with vendor who placed property with such agent for sale is agent of both parties. 11LaA594, 123 S366.

449-81 Fla 126S792 (disbursing agent of owner cannot become agent of contractor by entry on owner's books crediting contractor).

449-84 22AlaA272, 117S618 [certiorari den 21SAla66, 117S619].

449-85 219Ala81, 121S66; 83CalA470, 256P1109 (authority to collect money).

451-16½-New. An oral contract to sell real estate is not authority to an agent to receive a check for payment. 322 Ill 67, 152NE584.

451-22 181Ark843, 28SW(2d)61; 61 SW9, 22KyL1528.

452-27 [a] **Power of attorney is not intended** to define authority of agent as to principal. 137MiscRep582, 244NYS244.

452-29 165Ga359, 140SE869; 165Ga 397, 141SE48. [b] **Power of attorney may be either written or oral but oral proof** thereof is admissible only when execution of contract involved may be parol. 170La573, 128S520.

452-31 NJ 137A524; 85PaSuper498.

453-32 [d] **In Louisiana.**–170La573, 128S520.

454-42 See also 231Ky122, 21SW(2d) 153. [c] **Ambiguous language** is construed against principal where party dealing with agent has acted to his prejudice. 215Ala499, 111S231. [d] **Instrument authorizing attorney in fact to complete title** in himself has been held transfer of land certificate, not mere power of attorney. TexCivA 298SW154.

456-64 96OhSt74, 117NE25.

457-73 13F(2d)945; 165Ga359, 140SE 869; 36GaA379, 136SE811.

458-76½-New. An agent's lack of sealed authority has been held not to avoid the effect of an agreement for postponement of sheriff's sale unnecessarily sealed. 291Pa165, 139A745.

459-83 154Md581, 141A343.

459-87 49Cal 586; 18 Ill 106; 5 Ind 237.

460-91 13F(2d)945.

460-92 126Me205, 137A67; 32 OhA138, 167NE695.

460-93 Pa 152A98.

461-97 Pa 152A98. [a] **Mortgage securities.**–92NJL487, 105A195; 94NJEq 526, 121A515; 83NJEq641, 92A353.

461-1 179Ark780, 19SW(2d)1100; Mo A 19SW(2d)772; 127Misc515, 216NYS 713 [citCJ].

461-1½-New. Defendants are held not estopped to deny the agency of a cotton buyer who drew an unauthorized draft on them by paying previous drafts. TexCivA 282SW325.

461-8 TexCivA 286SW541, 543 [citCJ]. [a] (3) Agency by estoppel arises from principal's negligence in failing properly to supervise and control agent's activity. MoA 26SW(2d)794.

461-10 136SC218, 43ALR1212, 131SE 424, 426 [quotCyc]; TexCivA 286SW 541, 543 [citCJ]; TexCivA 3SW(2d) 911, 917 [citCJ].

461-11 22F(2d)302; 40F(2d)21 (holding principal may be bound by agent without express or implied authority); 212Ala608, 103S658; 213Ala256, 104S 506; 216Ala434, 113S299, 300 [citCJ]; 216Ala567, 114S130; Ala 129S18; 98 CalA92, 276P422 (evidence held sufficient to support judgment against principal); CalA 291P629; 37GaA275, 139 SE826 [citCJ]; 41GaA94, 151SE818; 41GaA836, 155SE105(2dcase); 42 IdaI, 243P355; Ida 286P920; 233 IllA132; 249 IllA474; 253 IllA458; 199 Iowa889, 200NW913; 202 Iowa947, 211NW564; 10LaA389, 120S135; 3LaA435, 438 [cit CJ]; 6LaA389; Me 151A537; Mass 165 NE889; 237Mich657, 213NW147, 148 [citCJ]; MoA 285SW516; MoA 26SW (2d)794; 222AppDiv126, 225NYS609; 191NC323, 131SE643; 32 OhA138, 167N E695; 114 Okl 231, 246P2122; 288Pa 325, 135A614; Pa 152A98; Pa 152A 98; 29PortoRico 595, 598 [citCJ]; 135SC1, 133SE451; 142SC375, 140SE 804; TexCommnA 5SW(2d)494; Tex CivA 286SW541, 543 [citCJ]; TexCivA 10SW(2d)1051; 142Va789, 128SE268 (church building committee estopped to repudiate acts of chairman as agent); Eng 31TLR583; Can 14CanExch150, 11 DomLR681, 12EastLR309; Alta 15Dom LR905, 27WestLR160; 23Man641, 14 DomLR577, 25WestLR868, 5WestWkly 452; Man [1927] 2DomLR1031, [1927] 2WestWkly79; Man [1928] 1DomLR 295(1stcase); 4 OntWN721, 23 OntWR 907, 10DomLR33; 8SaskLR91, 23DomL R420, 30WestLR951, 8WestWkly381. See also 136SC218, 43ALR1212, 131SE 424, 426 [quot 65Ala471 and quotCyc].

462-13 213Ala256, 104S506 (bad faith not consisting in holding out but in gainsaying act after third person has acted on it to his injury).

463-14 110Conn635, 149A133; 135SC 1, 133SE451.

463-15 233 IllA132 (steamship company which for over a year held out defaulting special agent under circumstances making him appear as general ticket agent is estopped to deny his general authority to sell tickets); 202 Iowa947, 211NW564; 237Mich657, 213 NW147, 148 [citCJ]; 114 Okl 231, 246P 222; 125 Okl 81, 256P894.

463-16 95CalA365, 272P1084; 107 Conn365, 140A758 (giving apparent power to sell); Fla 126S359; 10LaA 389, 120S135 (parochial and municipal corporations); Mass 171NE643 (holding principal estopped to rely on secret limitation of authority against innocent purchaser from buyer); 83NH47, 138A 297; 141 Okl 14, 283P549, 67ALR1410; TexCivA 286SW541, 543 [citCJ]; Wyo 283P1100.

464-19½-New. The owner of property is not estopped from asserting his ownership as against one who purchases it from the possessor, to whom the owner surrendered possession of the property. 84Mont314, 275P748.

464-25 181Ark1004, 29SW(2d)272; 202 Iowa947, 211NW564; 169La978, 126S444; 121Minn343, 141NW295, 44 LRANS995; 191MoA287, 177SW1092; TexCivA 286SW541, 543 [citCJ]; 35 CanSC133, [1904] AC806; 3 OntWN 701, 21 OntWR291, 2DomLR609; 4 Ont WN155, 23 OntWN128, 7DomLR274.

465-26 73CalA476, 238P1062; MoA 288SW965.

465-27 CalA 285P342; 191MoA287, 177SW1092; MoA 4SW(2d)491.

465-29 173Ark147, 293SW50; TexCiv A 286SW541, 543 [citCJ].

465-30 203 Iowa1001, 213NW571; 237 Mich657, 213NW147, 148 [citCJ]; 177 Minn87, 224NW458; Pa 152A98 (reliance must rest on some reasonable basis); TexCivA 286SW541, 543 [citCJ]; TexCivA 3SW(2d)911.

466-31 MoA 19SW(2d)772; Ont [1929] 2DomLR542.

466-32 Pa 152A98.

466-33 Pa 152A98; TexCivA 286SW 541, 543 [citCJ]. [a] TexCivA 286SW 541, 543 [citCJ].

466-34 SD 224NW929.

466-35½-New. There is no estoppel in cases of personal injury, to deny agency. 145La727, 82S870.

466-36 128Kan220, 277P45 (principal estopped).

466-37 171Ark872, 286SW1010; 104 Conn257, 132A540, 48ALR259; 42 Ida 1, 243P355, 358[quotCJ]; 80Nebr36, 113NW808; 38TexCivA50, 84SW678.

466-38 42 IdaI, 243P355, 358 [quot CJ].

467-39 MoA 3SW(2d)279.

467-44 18F(2d)213; 203 Iowa411, 212 NW722; 207 Iowa343, 223NW102; Mo A 16SW(2d)626; MoA 24SW(2d)1066; NJ 147A398; 117 Okl 210, 245P628, 629 [quotCJ]; 139 Okl 68, 281P286; 121 Or 303, 254P1023, 1024 [citCJ]; TexCivA 272SW803, 806 [citCJ]. [a] (11) Similar definition. 35F(2d)825.

467-45 190NC829, 130SE609, 610 [cit CJ]; 191NC710, 133SE85, 90 [citCJ]; 195NC453, 142SE473.

468-47 Ark 31SW(2d)743.

468-49 253Mass368, 149NE118.

468-52 Iowa 231NW416; 123Kan292, 254P1047; 282Pa562, 128A494. See also 212Ky163, 278SW615.

469-63 35F(2d)825; 92Wash456, 159P 757.

469-67 7F(2d)266; 93CalA21, 268P 974; Iowa 232NW282; 123Kan292, 254 P1047; 56ND194, 216NW564, 565 [cit Cyc]; OhA 173NE211; 103WVa103, 136SE701.

469-68½-New. Sealed instruments. A principal may not be held liable on a sealed instrument in which his name does not appear. 128Misc14, 217NYS 189.

470-71 215Ky448, 285SW208, 209 [cit CJ]; 173Minn394, 217NW362; 29Porto Rico 707; TexCivA 272SW803; Utah 262P281.

470-72 163La799, 112S726; 34Wyo 61, 241P703.

470-74 70CalA157, 232P767; 24 OhA 129, 156NE462.

470-75 Ala 127S506; 70CalA157, 232P 767.

470-76 252 IllA92; 242Mich139, 218 NW664; 1AbbDecNY454, 3Keyes387, 2 TranscrA281, 3AbbPrNS235.

471-81 24 OhA129, 156NE462. [a] **In Ohio.**–24 OhA129, 156NE462.

471-82 99WVa544, 130SE142.

473-92 Utah 262P281, 282 [quotCJ]; 99WVa544, 130SE142.

473-95 139 Okl 68, 281P286.

473-96 234Mich542, 208NW700.

474-98 Kan 292P774.

474-99 222MoA1098, 14SW(2d)31 (may also receive back what he has paid on unratified contract so long as original authority lasts).

474-2 CalA 285P342; 120Kan662, 244 P1047, 1049 [citCJ]; 123Kan292, 254 P1047.

474-3 120Kan662, 244P1047, 1049 [cit CJ].

475-9 40GaA335, 149SE426; 120Kan 662, 244P1047, 1049 [citCJ].

476-18 14F(2d)978; 18F(2d)213, 215 [citCJ]; 40F(2d)21; 217Ala441, 116S 528; Ala 127S506; Ala 130S77; 22Ala A624, 118S671; 181Ark843, 28SW(2d) 61; 196Cal141, 236P301, 39ALR1076; 95CalA456, 273P50; CalA 285P342; 89 Fla242, 103S609; 165Ga193, 140SE496; 34GaA135, 128SE698; 40GaA335, 149 SE426; 42 Ida604, 247P12; 224 IllA 401, 409 [citCJ]; 85 IndA268, 149NE 104; 200 Iowa220, 204NW456; 202 Iowa70, 209NW525; 203 Iowa411, 212 NW722; 123Kan292, 254P1047; 264 Mass246, 162NE354; 237Mich657, 213 NW147; Mich 216NW922; 150Miss386, 116S605, 608 [quotCJ]; MoA 16SW (2d)626; 100NJEq337, 134A659; 97NJ Eq49, 128A882; 99NJEq678, 134A343; 245NYS384; 116 Okl 106, 243P504; 121 Okl 127, 247P978; 123 Okl 110, 252P18; 131 Okl 101, 267P847; 139 Okl 68, 281 P286; 119 Or498, 248P1090; 95PaSuper456; SD 231NW908; TexCivA 7 SW(2d)601; 103WVa103, 136SE701; Can [1925] 1DomLR101; Can [1930] 4DomLR689. [b] **Act of payee of note in receiving payment** from one not authorized to collect it is not ratification of act of such person in receiving additional payment where payee had no knowledge of additional payment or of assumed agency. 202 Iowa70, 209NW 525. [i] **What facts material.**–203 Iowa 411, 212NW722. [j] **Actual knowledge** of the terms of contract is necessary to valid ratification. 169La1120, 126S 679.

477-19 121 Okl 127, 247P978.

477-20 121 Okl 127, 247P978.

478-23 41GaA89, 151SE824.

479-26 14F(2d)978; CalA 285P342; 249Mich99, 227NW778; 137MiscRep 879, 244NYS836.

479-27 150Miss386, 116S605, 608 [quot CJ].

480-29 203 Iowa411, 212NW722.

480-30 173Minn166, 216NW801 (holding rule of ratification as whole not applicable).

480-32 But see 203 Iowa411, 212NW 722 (facts which person of ordinary prudence would ascertain).

481–37 203 **Iowa**411, 212NW722; 117 **Okl** 210, 245P628; 103**WVa**103, 136SE 701.
481–38 131 **Okl** 101, 267P847; 103**WVa** 103, 136SE701.
481–41 22**F(2d)**11; 120**Kan**151, 242P 129; 173**Minn**166, 216NW801; 227**App Div**65, 237NYS51; 190**NC**829, 130SE 609; **ND** 233NW245(2dcase); 120 **Orl**, 251P258; 152**Wash**37, 276P892.
482–42 214**Ala**553, 108S452; 40**GaA** 497, 150SE461; 173**Minn**394, 217NW 362; 220**MoA**223, 282SW729; **OhA** 173 NE211; 120 **Orl**, 251P258; 132 **Or**596, 286P554 (defacement of property accepted); 92**PaSuper**185; **TexCivA** 26 SW(2d)333; 108**WVa**458, 151SE429.
482–44 [a] **Mistaken impression of principal** that contract was other than that made by agent cannot change contract into one, which principal thought had been made. 198**Cal** 252, 244P368.
483–46 **SD** 231NW536.
483–47 **TexCivA** 4SW(2d)199 [citCJ].
483–48 16**F(2d)**895; 130**Kan**798, 288P 549; **MoA** 24SW(2d)1066.
484–49 **MoA** 24SW(2d)1066.
484–51 202 **Iowa**70, 209NW525; **MoA** 24SW(2d)1066. [a] **Ratification of part of unauthorized transaction** is not ratification of part which is severable. 69 **Utah**331, 255P175.
484–60 203 **Iowa**411, 212NW722.
485–62 20**F(2d)**307; **CalA** 285P342.
485–63 20**F(2d)**307.
485–69 203 **Iowa**411, 212NW722; 241 **Mich**426, 216NW922; 282**Pa**562, 128A 494; 146**Va**617, 131SE793.
485–70 203 **Iowa**411, 212NW722.
485–74 95**CalA**456, 273P50.
485–77 146**Va**617, 131SE793.
486–88 97**NJEq**49, 128A882 (power of attorney held to apply only to future acts, and not to be ratification of prior agreement).
487–96 72**CalA**78, 236P956 (sufficient).
487–99 36**GaA**379, 136SE811.
487–4 Alta 11**DomLR**235, 24**WestLR** 259.
488–9 46 **Ida**82, 267P447; 335 **Ill** 322, 167NE80; **Iowa** 232NW282; 237**Mich** 657, 213NW147; **TexCivA** 28SW(2d) 214; 146**Va**617, 131SE793.
488–11 [b] **In Porto Rico.**–29**PortoRico** 707.
489–15 90**CalA**512, 265P1016; 335 **Ill** 322, 167NE80.
489–16 22**F(2d)**454; 144**SC**271, 142SE 623, 642 [quotCJperCothran,J]. [a] 105 **NJL**461, 145A478.
490–18 10**LaA**389, 120S135.
490–19 **CalA** 292P991 (payment of bills by principal); **TexCivA** 284SW322.
490–20½–New. or paid interest on obligation executed by agent; 199 **Iowa**65, 201NW108.
490–21 128**Kan**760, 280P762.
490–25 **MoA** 285SW1028 (by charging amount to agent's account).
490–28 [a] (2) Instances. 92**CalA**194, 267P901.
491–32 [h] **Unauthorized collection of mortgage debt.**–7 **Ont**146.
491–33 151**Md**348, 133A836, 47**ALR**195.
492–35 41**GaA**89, 151SE824; 241**Mich** 426, 216NW922; 249**Mich**99, 227NW778.
492–35½–New. Letters calling attention to unauthorized acts are not ratification. 79**Mont**327, 256P497.
492–39 **Ill** 173NE402; 212**AppDiv**483, 209NYS183, 187 [quotCJ].
492–40 72**CalA**78, 236P956, 960 [cit CJ]; **MoA** 16SW(2d)626; 212**AppDiv** 483, 209NYS183, 187 [quotCJ].
492–41 212**AppDiv**483, 209NYS183.
492–44 144**SC**271, 142SE623, 642 [quot CJ per Cothran, J]; 34**Wyo**61, 241P703.
493–54 **Fla** 126S359.
493–55 8**F(2d)**65; 18**F(2d)**213, 216 [citCJ]; 20**F(2d)**644; 22**F(2d)**11; 33 **Ariz**206, 263P584; 197**Cal** 716, 242P483 (undisclosed principal); 81**CalA**659, 254 P618, 621 [citCJ]; 95**CalA**85, 272P340; 108**Conn**126, 142A674; 168**Ga**429, 148 SE152 (intent as to ratification immaterial); 41**GaA**721, 154SE386; 42 **Ida** 403, 245P683; 202 **Iowa**947, 211NW564; 203 **Iowa**411, 212NW722; **Iowa** 231NW 416; 118**Kan**213, 234P984; 124**Kan**319, 259P785; 130**Kan**165, 285P563; 130 **Kan**798, 288P549; 12**LaA**577, 126S249; 174**Minn**339, 219NW185; 177**Minn**256, 225NW12; **Minn** 230NW641; 82**Mont** 185, 266P394 [citCJ]; 101**NJEq**536, 138A371; 197**NC**162, 147SE819; 50**ND** 330, 196NW303; **ND** 233NW245(2d case); 115 **Ohl**61, 152NE385; 120 **Okl** 250, 252P64; 144 **Okl** 1, 288P975; 121 **Or**303, 254P1023; 122 **Or**523, 259P900; 128 **Or**70, 264P453; 289**Pa**207, 137A 232; 142**SC**375, 140SE804, 805 [quot CJ]; **SD** 231NW908; **TexCommnA** 292 SW195; **TexCommnA** 16SW(2d)287 (ratification of agreements, at least in part, made by subagent); **TexCivA** 17 SW(2d)102; 146**Va**617, 131SE793; 136 **Wash**340, 239P1018; **Wyo** 283P1100. See also 179**Ark**963, 19SW(2d)1107. [f] **Retention of money paid upon fraudulent representations of agent,** with knowledge of facts, constitutes ratification. 190**NC**829, 130SE609.
494–56 8**F(2d)**65 (proceeds of bonds stolen by agent); 23**F(2d)**567; 214**Ala** 553, 108S452; **Ind** 167NE527; 199 **Iowa** 1277, 203NW802; 1**LaA**363; **NJSup** 130A436; 212**AppDiv**483, 209NYS183, 187 [quotCJ]; 195**NC**453, 142SE473; 121 **Or**303, 254P1023.
495–57 190**NC**423, 130SE49 (return of paid note not benefit within rule).
495–59 176**Ark**387, 3SW(2d)53, 55, 58 **ALR**808 [quotCJ]; 74**Conn**689, 51A 1084; 203 **Iowa**1001, 213NW571, 573 [citCJ]; **TexCivA** 294SW900; **Eng** 2**H&C** 113, 159**Reprint**47. [b] **Consideration** necessary to support unauthorized payment by agent that principal may ratify. 190**NC**423, 130SE49.
495–62 218**Ala**352, 118S666; 176**Ark** 387, 3SW(2d)53, 55, 58**ALR**808 [quot CJ]; 81**CalA**659, 254P618, 621 [quot CJ]; 44 **Ida**435, 258P179 [quotCJ]; 212**Ky**253, 278SW583, 585 [quotCJ]; 255**Mass**486, 152NE332; 264**Mass**238, 162NE339; 133**Misc**229, 231NYS544; 86**PaSuper**275.
495–63 212**Ky**253, 278SW583, 585 [quotCJ]; **TexCivA** 294SW900.
496–66 212**Ky**253, 278SW583, 585 [quotCJ].
496–67 203 **Iowa**1001, 213NW571.
496–68 22**AlaA**624, 118S671; 41**GaA**89, 151SE824.
496–70 18**F(2d)**213, 216 [citCJ], 219 **Ala**450, 122S424; 212**AppDiv**483, 209 NYS183; 102**WVa**128, 135SE257.
496–72 18**F(2d)**213, 216 [citCJ]; **Fla** 126S359; 212**AppDiv**483, 209NYS183.
496–74 [a] 169**Ark**169, 273SW396.
496–75 81**CalA**659, 254P618, 620 [quot CJ].
496–76 44 **Ida**435, 258P179.
497–80 81**CalA**502, 253P971 (using construction of derrick on oil properties as selling point).
498–84 202 **Iowa**947, 211NW564; 255 **Mass**486, 152NE332.
498–85 8**F(2d)**65.
498–89 141**SC**232, 139SE465. [b] **By adopting contract the principal is bound by representations** within the scope of the assumed authority. **ND** 233NW245 (2dcase).
499–94 196**NC**97, 144SE554; 122 **Or** 523, 259P900; 136**Wash**340, 239P1018 (indirect benefits).
499–95 234**Ky**469, 28SW(2d)507; 50 **ND**455, 196NW307; 50**ND**850, 198NW 467.
499–98 80**Me**34, 12A732 (mortgage); 24**TexCivA**269, 59SW842; **Eng** [1913] 1**KB**364 (borrowing and discharging principal's debts); **Eng** 2**DeGF&J**38, 63 **EngCh**38, 45**Reprint**536; 21 **OntA**454.
500–1 74**Conn**689, 51A1084; **Eng** 2**H&C** 113, 159**Reprint**47.
500–4 192 **IllA**182. [b] **Assignment under seal validates lease.** 151 **IllA**579.
500–6 147 **IllA**364; 151 **IllA**579; 43 **Misc**384, 87NYS449; 97**PaSuper**551.
500–7 10**Misc**420, 31NYS129; 108**Wis** 186, 84NW174.
500–9 171**Ark**912, 287SW373; **Cal** 289 P623; 70**CalA**458, 233P415; 111**Conn** 412, 150A109; 207 **Iowa**1049, 221NW 914; 214**Ky**526, 283SW1022; 144 **Okl** 1, 288P975; **Can** [1925] 1**DomLR**101.
501–12 **Can** [1925] 1**DomLR**101.
501–13 70**CalA**458, 233P415; 214**Ky** 526, 283SW1022; 92**PaSuper**185.
502–17 82**CalA**553, 256P242; 97**CalA** 600, 275P970.
502–18 168**Ark**1057, 272SW668; 83**Cal** A470, 256P1109; 102**CalA**461, 283P111; **Iowa** 232NW116; 87**PaSuper**106; 29 **PortoRico** 707; 54SD54, 222NW496; **TexCivA** 138SW(2d)384 (by acceptance of postal insurance and part payment).
503–19 218**Ala**336, 118S580; 29**Porto Rico** 707. See also 29 **OhA**44, 163NE37.
503–21 **TexCivA** 272SW803 (evidence held to warrant finding of contract of sale and ratification).
504–25½–New. However, acceptance and filling of order in ignorance of travelling salesman's contract made without authority is not ratification. 212**Ky**253, 278SW583.
504–26 216**Ala**666, 114S60; **TexCivA** 4SW(2d)1016.
504–28 146**Wash**299, 262P968.
505–31 252**Mass**383, 147NE870; 262 **Mass**348, 159NE922; **TexCivA** 282SW 325.
505–34 **TexCivA** 25SW(2d)979.
505–35 216**Ala**567, 114S130; 161**La**641, 109S341; 163**La**799, 112S726; **Mass** 165 NE889.
505–36 **TexCivA** 278SW522, 525, 526 [quotCJ].
505–37 **TexCivA** 278SW522, 525, 526 [quotCJ].
505–38 22**F(2d)**11; 35**F(2d)**825; 216 **Ala**567, 114S130; 335 **Ill** 322, 167NE80; 253 **IllA**458; 203 **Iowa**104, 212NW380; 203 **Iowa**411, 212NW722; 161**La**378, 108 S777; 163**La**799, 112S726; 165**La**106, 115S403; 9**LaA**706, 119S902; 9**LaA**649, 120S94; 2**LaA**257; 3**LaA**15; 13**LaA**335, 127S484; 137**MiscRep**582, 244NYS244; 115 **Ohl**61, 152NE385; 136**SC**458, 134 SE428, 431 [quotCyc]; **TexCivA** 278SW 522, 525, 526 [quotCJ]; 146**Va**617, 131 SE793; **Va** 155SE707. See also 173**Minn** 207, 217NW109.
506–39 **TexCivA** 278SW522, 525, 526 [quotCJ]; **TexCivA** 299SW351.
507–40 203 **Iowa**1034, 213NW929; **TexCivA** 278SW522 (where principal secured insurance on building being erected under unauthorized agreement of agent).
507–42 **TexCivA** 278SW522; 525, 526 [quotCJ] (where principal, knowing of erection of building under unauthorized contract of agent, did nothing to repudiate agency).
508–53 83**Colo** 427, 265P908; 200 **Iowa** 816, 203NW252. [h] **Knowledge of legal effect of material facts** not necessary. 203 **Iowa**411, 212NW722.
508–54 102**CalA**1, 282P408.
509–57 200 **Iowa**816, 203NW252; 163 **La**799, 112S726; 136**SC**458, 134SE428, 431 [quotCyc]; 151**Va**1040, 145SE725.
509–58 136**SC**458, 134SE428, 431 [quot Cyc].
509–59 136**SC**458, 134SE428.
509–60 115 **Ohl**61, 152NE385; 136**SC** 458, 134SE428, 431 [quotCyc].
509–61 9**LaA**649, 120S94; 136**SC**458, 134SE428, 431 [quotCyc]; **TexCivA** 278 SW522; 107**WVa**290, 148SE122; 34 **Wyo** 61, 241P703.
510–62 **TexCivA** 278SW522.
510–63 136**SC**458, 134SE428; **TexCivA** 278SW522.
510–64 136**SC**458, 134SE428, 431 [quot Cyc].
510–69 13**LaA**335, 127S484; 107**WVa** 290, 148SE122.
511–72 50**SD**102, 208NW590.
511–74 50**SD**102, 208NW590.
511–76 [b] **In determining whether there has been ratification** by failure to dissent, it is proper to consider whether principal's dissatisfaction may not be afterthought due to happening of some unexpected event. 34**Wyo** 61, 241 P703.
512–83 **CalA** 291P629; **TexCivA** 278SW 522, 525, 526 [citCJ&Cyc].
512–88 **TexCivA** 278SW522, 525, 526 [citCJ&Cyc].
513–94 [c] **Where principal knows** that further loss will be incurred by other party, he has duty to give notice, especially where continuance of performance will benefit him. **TexCivA** 278SW 522.
513–97 102**CalA**136, 282P539; 82**Colo** 121, 257P355; **LaA** 126S246; 173**Minn** 394, 217NW362; 215**AppDiv**267, 213 NYS519 (seller suing for purchase price); 121 **Or**303, 254P1023; 144**SC** 271, 142SE623, 642 [quotCJperCothran, J]; 106**WVa**79, 144SE884, 885 [citCJ].

[d] 102Conn475, 129A45 (action for rent).

514-98 121 Or303, 254P1023. [d] **Unauthorized credit indorsed on note.**–Payee suing on note does not ratify act of agent in indorsing thereon, as credit, amount of agent's individual indebtedness to maker. **TexCivA** 294SW654.

514-99 Ala 130S396.

514-1 But see 63Utah495, 227P791.

514-2 [c] 102Conn475, 129A45.

515-13 144SC271, 142SE623, 642 [quot CJperCothran,J].

516-21 144SC271, 142SE623, 642 [quot CJperCothran,J].

516-22 144SC271, 142SE623, 642 [quot CJperCothran,J].

517-39 34F(2d)328; 72CalA78, 236P956; 92CalA86, 267P711; 329 Ill 48, 160NE218; 202 Iowa1291, 211NW716; 203 Iowa411, 212NW722; Iowa 231NW416; 164Minn358, 205NW258; MoA 24SW(2d)1066; 215AppDiv267, 213NYS519, 520 [citCJ]; 191NC809, 133SE391; 130 Okl 30, 264P907; TexCivA 272SW639 (principal estopped to deny authority); TexCivA 272SW803, 806 [citCyc] (ratification relates back to time and place of transaction ratified); TexCivA 288 SW627 (power of attorney); Utah 262P 281; 146Va617, 131SE793. [b] 146Va 617, 131SE793.

518-42 202 Iowa1291, 211NW716; TexCivA 15SW(2d)670 (ratification by committee of contract made by member).

518-45 34F(2d)328.

519-54 118NY563, 23NE891.

519-55 202 Iowa1291, 211NW716.

520-62 118Kan213, 234P984, 985 [cit CJ].

520-66 203 Iowa411, 212NW722, 725 [citCJ].

520-67 203 Iowa32, 212NW310; 203 Iowa411, 212NW722, 725 [citCJ].

521-70 203 Iowa411, 212NW722, 725 [citCJ].

521-77 220Ala227, 124S512; 252 IllA 366; 202 Iowa1291, 211NW716; Iowa 232NW282; 166La479, 117S562; 156Md 302, 144A254; 221AppDiv779, 223NYS 642; TexCivA 280SW600; TexCivA 1 SW(2d)400; 66Utah82, 240P1105; 108 WVa85, 150SE235. [i] **Collection of mortgage debt.**–186 Ill 617, 58NE399; 83NJEq641, 92A353; 108Misc378, 177 NYS594; 52PaSuper477; 33NS469.

522-80 72CalA78, 236P956, 960 [citCJ].

522-81 [a] 168Ga429, 148SE152 (acceptance by agent and principal of goods in payment of note).

522-83 291Pa165, 139A745. But see 20 F(2d)961. [c] **Rescission against principal** is permissible to buyer for breach of agreement by seller's agent ratified by seller with knowledge thereof. 215 AppDiv267, 213NYS519.

522-84 82Mont185, 266P394.

523-85 285Pa260, 131A858.

523-89 263Mass15, 160NE297.

523-90 38NJL74.

524-92½-New. Approval of third person to book entry by agent holding money to pay third person does not constitute payment. Fla 126S792.

525-1 [c] **Agreement** held not to constitute employment from year to year. CalA 287P985.

525-5 315Mo 619, 286SW368.

525-7 28Ariz518, 238P332. See also 258Mass273, 154NE565.

526-8 [a] **Contract giving exclusive selling agency** in particular city so long as agent sold two dozen for every thousand population, annually, is not contract at will. 126Misc299, 212NYS615.

526-11 125Kan457, 264P738. [a] (2) Clause providing for renewal upon distributor's selling certain volume of goods was held condition and not limitation on power of renewal and was subject to waiver by principal. 84CalA 669, 258P663. [c] **Consideration** for agreement of extension or renewal has been held sufficient. 84CalA669, 258P 663. [d] **Note expressing willingness of principal to renew contract** has been held not a clause whereby contract was mutually continued from year to year. 13LaA512, 128S180.

526-12 [c] **Renewal agreement held not to contain clause in original agreement** conditioning renewal on volume of **goods sold by agency.** 84CalA669, 258 P663. [d] **Notice of renewal.**–Where contract granting exclusive selling agency gave agent, upon expiration thereof, option to renew agreement, notice of renewal mailed after contract expired came too late. 33F(2d)727.

526-16 102NJL196, 130A665.

527-29 99NJEq652, 134A191, 192 [quot CJ].

528-30 12F(2d)766; 33F(2d)923; 216 Ala645, 114S308; 96CalA292, 273P1101; 99NJEq652, 134A191, 192 [quotCJ]; 191NC291, 131SE757; 163Pa122, 29A 756; Eng 2B&S502, 110ECL502, 121 Reprint1159.

528-31 17F(2d)155, 159 [citCJ]; 99 NJEq652, 134A191, 192 [quotCJ].

529-32 174Ark1010, 298SW209.

529-36 125Kan265, 273, 635, 264P19, 266P101 [citCJ].

530-45 325 Ill 16, 155NE773; MoA 281 SW144, 146 [citCJ]. See also IndA 153NE779.

531-57 93CalA411, 269P672; 98CalA 53, 276P607; 325 Ill 16, 155NE773; 118 Okl 272, 247P1110; 13PaDist&Co 311.

531-59 256Mass85, 152NE88.

531-60½-New. The entire instrument creating the power and the particular circumstances must be construed to determine whether the power is one coupled with an interest. 93CalA411, 269 P672.

531-61 239 IllA229, 233 [citCJ]; 159La 668, 105S26, 28 [quotCJ]. But see 93 CalA411, 269P672. [f] **In Louisiana.**–159La668, 105S26. [g] **Exclusive agency** for management of a building of which agent had lease of part free of rent for twenty years is irrevocable as a power coupled with an interest, and possibility of severing power from the leasehold interest is immaterial. 93Cal A411, 269P672. [h] **"Power coupled with an interest"** exists when the power forms part of the contract and is security for money or for performance of any act which is deemed valuable, and such power is irrevocable. 93CalA 411, 269P672.

532-62 159La668, 105S26, 28 [quotCJ].

532-63 159La668, 105S26, 28 [quotCJ].

532-64 201 Iowa1253, 207NW586; 137 Misc442, 243NYS757.

532-66 118 Okl 272, 247P1110.

532-70 98CalA33, 276P368; 223Ky20, 2SW(2d)1036.

533-71 70Utah124, 258P342, 64ALR 368.

533-72 12F(2d)766.

534-83 18F(2d)197 (contract giving exclusive agency for fertilizer held not to give principal option to terminate); 125Kan265, 273, 635, 264P19, 266P101 [citCJ].

534-85 43F(2d)920; 114Fed399; 130 Fed641, 65CCA19; 12AppDiv487, 42NYS 901; 47AppDiv537, 62NYS506; 70App Div247, 75NYS480; 75AppDiv117, 77 NYS457; 87AppDiv597, 84NYS537; 55 NYSuper173, 13NYSt278.

534-87½-New. Purchaser claiming that agent executed a purchase note without authority must either pay the price or repudiate the entire transaction. 164La 866, 114S715.

534-87½-New. What constitutes reasonable time for agent to recoup expenditures, as regards principal's right to revoke agency. CalA 287P985.

534-88 204 Iowa1208, 212NW726; 116 Nebr729, 218NW753 (where agent was required to sell stated amount of goods in year).

534-91 13PaDist&Co 311.

535-94 13PaDist&Co 311.

535-96 125Kan265, 273, 635, 264P19, 266P101 [citCJ].

535-97 160Tenn390, 25SW(2d)578.

535-98 18F(2d)197; 13PaDist&Co 311. [a] (2) CalA 287P985. [d] **Exclusive agency.**–Contract giving exclusive agency for sale of goods for definite period to purchaser bound to buy in stipulated quantities for cash is not mere mandate revocable at will of manufacturer and seller alone. Can [1929] 3DomLR 843.

536-4 31F(2d)1; 204 Iowa1208, 212 NW726; 251Mich450, 232NW181(2d case); 34NM573, 286P830; 99Vt170, 130A709; Can [1928] 1DomLR193. [g] 116Nebr729, 218NW753 (acceptance of orders after continual breach of condition concerning payment held to constitute waiver). [i] **Agent's failure to make daily report** of calls on prospects does not authorize cancellation of contract, but operates merely as waiver of agent's claims to bonus discount. 219 Ky66, 292SW472.

537-10½-New. Payment of compensation after discovery of acts justifying rescission of contract with purchasing agency does not constitute waiver. 34 NM573, 286P830.

537-13 129 Or413, 272P902 (agency held revocable on happening of certain contingency).

537-13½-New. Failure of agent to carry out terms of agency agreement may be made ground for principal's cancellation of the agreement. 204 Iowa 1208, 212NW726.

538-32 174Ark1010, 298SW209.

538-34 73CalA435, 238P1102.

538-31 But see 164La866, 114S715.

539-37 115 Or366, 237P361 (revocation by death of principal).

540-47 214Ala403, 108S23; Ala 129S 18; 173Ark777, 293SW723; 218Ky163, 291SW6; 72Mont338, 233P613, 615 [cit CJ]; 252NY212, 169NE280(2dcase); 136SC218, 43ALR1212, 131SE424, 427 [quotCJ]; TexCommnA 12SW(2d)147; 149Va500, 140SE674.

540-50½-New. The presumption of continued agency does not apply where the principal gave sufficient notice to the public of revocation of agency. TexCivA 1SW(2d)712.

541-51 TexCivA 23SW(2d)886; Can [1929] 4DomLR416.

541-57½-New. Depositor's statement to bank cashier that he would hold the bank liable for the amount of checks drawn by another on his account, without offering to return the checks to the bank, held not a definite repudiation of the drawer's authority to sign checks. 50SD102, 208NW590.

541-65 214Ala403, 108S23.

542-66 214Ala403, 108S23.

542-68 DelCh.140A694; DelCh 151A 223.

543-83 [b] 315Mo 619, 286SW368. [c] 241NY216, 149NE837.

543-85 84CalA669, 258P663 (letter held sufficient notice of termination of agency and tender back of stock on hand). [a] **Filing of complaint by agent for collection of balance of accounts and rendition of final account** constitutes renunciation. 51Philippine 695.

544-97 208Cal 329, 281P381.

544-1 12F(2d)766, 767 [citCJ].

545-11 35F(2d)182.

546-19 229AppDiv632, 242NYS329 (holding dealer's incapacity to perform, due to bankruptcy, was breach excusing manufacturer from further performance).

546-21 Cal 274P342; CalA 267P151; CalA 290P86; 239 IllA229; 247 IllA 429, 436 [citCJ]; 202 Iowa70, 209NW 525; Iowa 225NW245; 122Kan563, 253 P426; 223Ky20, 2SW(2d)1036. 1037 [quotCJ]; 224Ky493, 6SW(2d)499 (bank acting as agent of depositor); 132 Misc910, 231NYS16; 146SC450, 144SE 162; 70Utah124, 258P342, 64ALR368.

547-31 223Ky20, 2SW(2d)1036; 3Ky Op721.

547-32 233Ky73, 24SW(2d)923; 52SD 318, 217NW390 (authority to insert name of grantee in deed).

547-35 202 Iowa70, 209NW525 (agency payee of mortgage note).

547-36 46 Ida313, 268P31.

548-42½-New. The agency of a company existing during the lifetime of one who represented plaintiffs may be renewed after his death by acts of his son, who was empowered by plaintiffs to manage their affairs. Iowa 225NW 245.

548-44 But see 115 Or366, 237P361.

549-49 141 Okl 14, 283P549, 67ALR 1410.

549-50 141 Okl 14, 283P549, 67ALR 1410.

549-51 89CalA306, 264P560; CalA 267 P151; 239 IllA229; 223Ky20, 2SW(2d) 1036, 1038 [citCJ]; 167La21, 118S488; 70Utah124, 258P342, 64ALR368.

550-53 Cal 274P342.

551-62 MoA 281SW144, 146 [citCJ].

552-77 198Cal 183, 244P343; 237 IllA

233, 236 [citCJ]; 256Mass351, 152NE 707.

552–78 237 IllA233.

553–86 320 Ill 389, 151NE231, 44ALR 1306. [b] **Power of attorney to confess judgment on note** held not revoked by adjudication of insanity of maker. 320 Ill 389, 151NE231, 44ALR1306.

554–11½–New. or the agent repudiates the agency. 315Mo 619, 286SW368.

555–23 49Nev80, 237P377. [a] **Purchaser accepting deed negotiated before agency revoked** by death, has been held liable to pay interest on purchase price only from date he got title. 233Ky73, 24SW(2d)923.

555–25 [a] **Particular contracts construed.–TexCommnA** 23SW(2d)333.

556–32½–New. Letter of an agent should be considered in connection with the contract. 79Mont327, 256P497.

556–32⅓–New. A contract of agency drawn by an experienced real estate operator is to be construed as to its imperfections and ambiguities most strongly against him. 238Mich617, 214NW179.

556–34 47 Ida306, 274P800; 12LaA435, 126S252; 251Mich518, 232NW205; 169 Minn356, 211NW322; 128Misc288, 218 NYS382; 288Pa264, 135A764; 8PaDist &Co 267; 35PortoRico 300 (cancellation of mortgage not within power); Tex CivA 282SW631; TexCivA 25SW(2d) 984; Va 154SE488; Man [1930] 2Dom LR427; Ont [1927] 3DomLR336. [d] **Rule of strict interpretation does not go to extent** of destroying purpose of power. 262Mass555, 160NE532.

557–38½–New. A distinct and independent power cannot be brought into existence by implication from another distinct power. 169Minn356, 211NW 322.

557–39 250NY461, 166NE167; Ont [1927] 3DomLR336.

557–42 262Mass555, 160NE532; 169 Minn356, 211NW322; 128Misc288, 218 NYS382. See also 168Ark1057, 272SW 668.

558–46 169Minn356, 211NW322.

559–49 8PaDist&Co 267. [b] **Power permitting acts generally done in clothing business** does not authorize execution of trust mortgage for benefit of creditors. 251Mich518, 232NW205.

559–50 288Pa264, 135A764, 766 [cit CJ]; 8PaDist&Co 267; TexCivA 282SW 631; TexCivA 299SW344; Man [1930] 2DomLR427.

560–61 99Ark344, 137SW926, AnnCas 1913B84; 52ND752, 40ALR1021, 204NW 818; 113 Or398, 233P547, 557 [citCJ]. [a] **One properly agent of adverse parties** is agent of each only as to matters intrusted to him by each. 251Mich469, 232NW229.

560–64 29F(2d)357; 95CalA365, 272P 1084; 52ND752, 204NW818, 40ALR 1021.

560–67 113 Or398, 233P547, 557 [cit CJ].

560–69 111 Okl 263, 239P576; 116 Okl 106, 243P504; WVa 154SE769.

561–70 TexCivA 258W(2d)678.

561–71 173Ark1181, 291SW993. [a] (3) 200 Iowa434, 204NW298 (receipt of money).

561–72 216AppDiv654, 216NYS65 (actual or apparent).

561–73 216AppDiv654, 216NYS65.

561–73½–New. A person may be authorized to act for another by reason of agency or operation of law. 126Me 205, 137A67.

561–73¼–New. The fact that an agent exceeds his authority cannot be taken advantage of by one who is neither a principal nor a party to the contract. 9LaA241, 119S270.

561–73¼–New. The principal acquires no ownership where the agent purchases property in the name of the principal without authority. 13LaA337, 125S507.

561–76 11LaA522, 124S316; Minn 230 NW641; Minn 231NW615.

561–77 Ark 31SW(2d)945; 124Me329, 128A694 (defendant not estopped to deny knowledge of limitation of agent's authority by signing prior agreement); 113 Or398, 233P547, 557 [citCJ]; 284 Pa485, 131A272; 48SD45, 201NW873, 875 [citCJ]. [a] (2) Knowledge that agent has no authority to enter into contract in writing for certain work puts person dealing with him on inquiry as to authority to contract for work. 42 Ida604, 247P12.

562–81 60Ala496; 145Ala331, 40S393; 214Ala458, 108S53; 173Ark147, 293SW 50; 177Ark164, 6SW(2d)2; 181Ark 1004, 29SW(2d)272; 199Cal 374, 249P 511, 47ALR1012; 89Ga223, 15SE302; 88 Ill 298; 9 IllA183; 242 IllA111; 25 Kan534; 125Kan710, 713, 266P101 [quotCJ]; 126Ky749, 104SW758, 12LRA NS427; 212Ky253, 278SW583; 220Ky 338, 295SW137, 55ALR377; 153Md666, 139A554; 24Mich36; 142Miss92, 107 S282; 143Miss454, 109S274; Miss 115 S402; 155Miss242, 124S344; 157Miss 392, 128S351; 79Mo 204; 126MoA279, 102SW1066; MoA 78W(2d)396; MoA 16SW(2d)107; 55ND817, 215NW268; 26 OhCirCt165; 123 Okl 110, 252P18; 113 Or398, 233P547, 557 [citCJ]; 119 Or498, 248P1090; 284Pa485, 131A272; 292Pa164, 140A871; 294Pa238, 144A 100, 102 [citCJ]; 296Pa467, 146A102; Pa 151A588; 44Philippine19 (person dealing with agent must act with ordinary prudence and reasonable diligence); TexCivA 271SW654; TexCivA 284SW322; TexCivA 286SW541; Tex CivA 25SW(2d)984; 42Wash415, 85P 17, 7AnnCas649; 43Wash527, 86P845, 17AmSR1064; 42WVa430, 26SE516; 103WVa103, 136SE701; 104WVa517, 140SE529; 194Wis1, 215NW436; 40 Wyo1, 273P667; 57N8445, [1925] 1Dom LR353, 357 [citCJ]. [a] (4) "Where the act of agent is not within his implied power, those who deal with such agent are bound at their peril to know extent of his authority." 212Ky253, 278SW 583. [e] **Person knowing that business is conducted in name "Main 203 Tire Service"** cannot presume that man in charge is owner. 253 IllA248.

563–82 NJCh 151A126. See also NC 154SE21.

563–84 CalA 283P895; 224 IllA401 (where agent has received payment in advance for future deliveries of gasoline below market price and transactions are secret and confidential); Minn 230NW277 (inconsistent statements of attorney held to put party dealing with him on inquiry). MoA 31SW(2d)220; 44Philippine19.

563–85 10LaA660, 120S547.

563–86 180Ark125, 20SW(2d)629; 220 Ky338, 295SW137, 55ALR377; 44Philippine19. [b] **Duty to make inquiry may be lessened** to great extent by any showing of benefit accruing to employer. 127Kan279, 273P466.

563–88 44Philippine19.

563–90 42 Ida604, 247P12; 55ND817, 215NW268; 131 Or393, 283P415; 44 Philippine19.

564–91 44Philippine19.

564–92 42 Ida604, 247P12, 14 [citCJ].

564–96 CalA 285P342; 221MoA1101, 297SW119; 44Philippine19.

564–97 TexCivA 294SW654.

564–98 203 Iowa1001, 213NW571; 300 Pa238, 150A636.

564–1 MoA 31SW(2d)220.

564–2 [a] **Constructive notice by recording** of conditional sale does not affect buyer from conditional vendee who has actual authority to sell. 107Conn 365, 140A758.

564–3 206 Iowa469, 220NW49.

565–7 181Ark478, 26SW(2d)896; 34Ga A135, 128SE698; Or 291P352.

565–8 113 Or398, 233P547, 557 [citCJ].

565–10 250NY461, 166NE167.

566–16 5LaA658 [quotCJ].

566–17 40F(2d)835; Ala 129S18; Ala 130S545; 83CalA725, 257P175; 39GaA 160, 147SE126; 8KyOp568; 168La317, 122S51; 5LaA658 [citCJ]; 254Mass551, 151NE66; Mass 165NE396; Mass 171 NE643; MoA 14SW(2d)491; 82NH177, 131A352; 123 Okl 101, 252P29; 127 Okl 295, 260P745, 749 [citCJ]; 130 Or139, 279P289; 94PaSuper95; 34PortoRico 338; 133SC353, 131SE146; TexCommn A 16SW(2d)287; TexCivA 270SW1101; TexCivA 287SW87, 89 [citCJ]; TexCivA 293SW256; TexCivA 5SW(2d)215, 221 [citCJ]; 101Vt452, 144A376.

568–18 124Me329, 128A694; 82NH177, 131A352; 197NC147, 147SE822; 127 Okl 295, 260P745, 749 [citCJ].

569–22 12F(2d)701; 200 Iowa782, 203 NW229; 123Kan292, 254P1047; 219 Ky374, 293SW150; 226Ky479, 118SW (2d)147; 167La540, 119S701; 12LaA435, 126S252; Mass 171NE435; MoA 16SW (2d)107; 82NH177, 131A352; 190NC 423, 130SE49; 113 Or398, 233P547, 557 [citCJ]; TexCivA 299SW274; Ont [1929] 2DomLR542.

570–23 MoA 16SW(2d)107 (provision that oral agreements shall not alter written agreement); TexCivA 8SW(2d) 757.

570–24 127Me65, 141A102.

570–29 152Va715, 148SE811 (one having no knowledge of agent's limited power may deal with agent on faith of ostensible power, whether agency is general or special).

570–30 179Ark963, 19SW(2d)1107 (where limitation on authority of agent entering into contract was unknown to plaintiff, he had right to assume that agent had authority to make contract).

570–31 214Ala181, 106S871; 48Ark 138, 2SW777; 82CalA519, 255P881; 83 CalA441, 257P112; CalA 291P629; 233 IllA132 [citCJ]; 85 IndA591, 155NE 179; 206 Iowa469, 220NW49; 222Ky 198, 300SW592; Me 151A537; 252Mass 253, 147NE742; Mass 165NE396; 251 Mich630, 232NW360; 216MoA673, 271 SW538, 539 [quotCJ]; MoA 4SW(2d) 486; MoA 24SW(2d)249; 116Nebr776, 219NW145; NH 150A545 (probability of misleading others must appear to principal); NJ 146A219; 216AppDiv 654, 216NYS65; 57ND37, 220NW441; 114 Okl 231, 246P222; 128 Okl 286, 262 P672; 289Pa207, 137A232, 234 [quot CJ]; 292Pa194, 140A869, 871 [quot CJ]; Pa 152A98; TexCommnA 16SW (2d)285; TexCivA 285SW670; Tex CivA 285SW681; TexCivA 288SW1090; TexCivA 295SW223; TexCivA 10SW (2d)223; TexCivA 28SW(2d)1102; 199 Wis529, 227NW33; 200Wis40, 227NW 256. [f] **Equitable estoppel** is doctrine on which judicial recognition of apparent authority as basis of liability of principal rests. TexCivA 273SW650. [g] **Illegal contract.–It** is not within apparent scope of agent's authority to enter into illegal contract. 36BC127, [1925] 3DomLR1169, [1925] 2West Wkly708. [h] **Principal not estopped** to deny authority to hire specialist by paying specialist for other work. MoA 8SW(2d)81. [i] **Title of "general attorney"** suggests that holder is more than ordinary agent. 221MoA898, 295 SW1083.

572–32 44 Ill 114, 92AmD154; 233 Ill A132; 85 IndA591, 155NE179; 14Kan 408; 57SW458, 22KyL393; 61SW9, 22 KyL1528; 124Me329, 128A694; 264 Mass246, 162NE354; 30Minn319, 15NW 308; 73MoA1; 126MoA279, 102SW 1066; 216MoA673, 271SW538, 539 [quotCJ]; MoA 9SW(2d)862; 116Nebr 776, 219NW145; 32NJL249, 90AmD 655; 289Pa207, 137A232, 234 [quot CJ]; 292Pa194, 140A869, 871 [quot CJ]; TennChA 59SW455; 2TexAClvCas § 723; 70Utah11, 257P677, 57ALR388; 55Wis515, 13NW485, 42AmR740. [c] **Custom** must be of general nature. 46 Ark210, 55AmR577. [d] **Mere local usage** will not bind principal unless he had notice of it. 101Ala368, 13S491.

573–33 27 OhNPNS215.

573–35 233 IllA132; 206 Iowa469, 220 NW49; Me 151A537; 78Mont40, 252P 313; TexCivA 295SW223; TexCivA 10 SW(2d)422; 149Va500, 140SE674; 135 Wash52, 236P788 [quotCyc].

573–38 TexCivA 3SW(2d)911, 920 [quotCJ].

574–40 169Ark136, 273SW378, 381 [quotCJ]; 172Ark691, 290SW584, 585 [quotCJ]; 179Ark780, 19SW(2d)1100; 181Ark1004, 29SW(2d)272; 199 Iowa 1358, 203NW826; 262Mass555, 160NE 532; 173Minn370, 217NW347; 114 Okl 231, 246P222; 289Pa207, 137A232; Pa 152A98. [a] (1) 173Ark147, 293SW50. [c] **Apparent authority is not founded on principal's negligence** but on his conscious permission of acts in excess of authority conferred. MoA 26SW(2d) 794.

574–41 169Ark136, 273SW378, 381 [quotCJ]; 172Ark691, 290SW584, 585 [quotCJ]; Ark 293SW50.

574–42 169Ark136, 273SW378, 381 [quotCJ]; 172Ark691, 290SW584, 585 [quotCJ]; 173Ark147, 293SW50; 174

Ark332, 295SW49, 51 [quotCJ]; 179 Ark780, 19SW(2d)1100; 181Ark1004, 29SW(2d)272; 114 Okl 231, 246P222; 289Pa207, 137A232; 98PaSuper183.

574–43 72Mont338, 233P613; **Alta** [1930] 4DomLR1032. [b] 254Mass551, 151NE66.

574–44 72Mont338, 233P613. [a] (1) 82CalA519, 255P881.

574–45 CalA 291P629; 12LaA622, 126 S250. [a] MoA 26SW(2d)794. [b] **Intention of principal.**–82CalA519, 255P 881.

574–47 Me 151A537.

574–48 42 Ida604, 247P12, 14 [citCJ]; 150Md470, 133A319; 289Pa207, 137A 232; 135Wash52, 236P788 [quotCyc]. But see 254Mass551, 151NE66.

575–50 See also 164Minn323, 204NW 961.

575–51 40GaA397, 149SE814; 173Minn 370, 217NW347; 135Wash52, 236P788 [quotCyc]; Can [1930] 1DomLR328. See also 233 IllA132.

575–52 12F(2d)701; 40F(2d)21; 75 Ark206, 87SW123; 249 IllA327, 336 [cit CJ]. [b] **Where written order expressly subject to confirmation,** contract not binding because of apparent authority. Tex 285SW641.

576–55 174Ark332, 295SW49; 54Mont 20, 165P1107.

576–56 277 Ill 272, 115NE393, AnnCas 1918B220; Pa 152A98; 199Wis529, 227 NW33. [a] **Acts contrary to orders.**–53 SD113, 220NW479.

576–58½–New. Express authority is based on authority in fact. TexCivA 286SW541.

576–59 173Ark147, 293SW50; Va 154 SE488. [b] **Declarations or conduct of agent** cannot extend authority unless principal acquiesces. 181Ark478, 26 SW(2d)896.

576–63 174Ark332, 295SW49; 199 Iowa1358, 203NW826; 249Mich27, 227 NW727; 173Minn370, 217NW347; 226 AppDiv266, 235NYS1; Pa 152A98; Tex CivA 295SW223. [b] **Uniform Sales Act** does not extend authority of agents beyond what they would be held to possess if statute were not in force. 54ND 559, 209NW996.

576–64 40F(2d)21; 212Ala608, 103S 658; 220Ala227, 124S512; 197Cal 269, 240P289; CalA 289P877; 42 Ida604, 247P12, 14 [citCJ]; 199 Iowa889, 200 NW913; 204 Iowa456, 215NW767; MoA 8SW(2d)81; MoA 14SW(2d)491; 133 Misc652, 233NYS309; 52ND822, 204NW 196; 292Pa194, 140A869; 151Va590, 144SE642 (relation may exist as to third persons even though not existing as between parties); 144Wash206, 257P390. [b] (1) 143Va656, 129SE687. [c] **Ostensible authority** is real authority. 252Mass253, 147NE742.

577–65 40F(2d)21; 128 Okl 286, 262P 672.

577–67 249Mich27, 227NW727.

577–69 83MoA491; 127 Okl 64, 259P 855; TexCivA 286SW541.

577–72 177Ark164, 6SW(2d)2; 150Md 470, 133A319. [g] **Position of "credit manager"** carries implied authority to adjust credits. TexCivA 292SW612. [h] **Drummer** has implied authority to warrant quality of goods sold. 41 Iowa 45; 6CowNY354.

578–76½–New. Implied authority is based on authority in fact. TexCivA 286SW541.

578–77 107WVa290, 148SE122.

578–79 40F(2d)349; 293Pa97, 141A 638 (builder looking after building details held without authority to modify plans).

578–79½–New. In the absence of assent or ratification the principal is not bound by acts of the agent which are against the principal's interests. 202 Iowa15, 209NW516.

578–81 7F(2d)266; 60Ala496; 262 Mass555, 160NE532; 234Mich11, 207 NW856; 169Minn356, 211NW322; MoA 278SW1078; MoA 4SW(2d)486, 487 [citCyc]; MoA 21SW(2d)932; 90NC101, 47AmR516; 128 Okl 286, 262P672; Tex CivA 265SW264, 266 [quotCJ]; Tex CivA 295SW223; 61Vt534, 17A720; 51 Wis224, 8NW155, 37AmR827. [f] (6) Drummer has authority to hire horses. 90NC101, 47AmR516.

580–82 234Mich11, 207NW856; Tex CivA 265SW264, 266 [quotCJ]; Tex CivA 10SW(2d)223.

580–83 TexCivA 265SW264, 266 [quot CJ].

580–84 TexCivA 265SW264, 266 [quot CJ].

580–85 TexCivA 265SW264, 266 [quot CJ].

580–86 TexCivA 265SW264, 266 [quot CJ].

580–87 199Wis529, 227NW33.

581–93 216AppDiv654, 216NYS65.

581–94 216AppDiv654, 216NYS65. [d] **Designation as resident manager** of field office of insurance company held not ground for inference of general authority. 150Md470, 133A319.

581–97 173Ark147, 293SW50, 57 [quot Cyc].

582–99 213Ala516, 105S644, 645 [cit CJ]; 173Ark147, 293SW50, 58 [quot Cyc]; 110Conn452, 148A342; 168Ga429, 148SE152; 226Ky93, 10SW(2d)617; 149Md548, 131A810; MoA 31SW(2d) 220; 82NH177, 131A352; Or 284P179; TexCivA 293SW256; 148Wash435, 269 P496.

582–3 173Ark147, 293SW50, 58 [quot Cyc].

582–4 44Philippine19 (even general authority is not unlimited one).

583–6 173Ark147, 293SW50, 58 [quot Cyc]. [c] **Authority of traveling salesman** is limited to receiving and transmitting orders. 181Ark386, 26SW(2d) 122.

583–9 173Ark147, 293SW50, 58 [quot Cyc]; 242 IllA111 (agent authorized to draw checks cannot do so for own purposes or purposes of self and bank); 251 IllA442; 221MoA898, 295SW1083, 1088 [citCJ].

584–10 80CalA167, 251P327; 35GaA 628, 134SE347.

584–12 Ark 31SW(2d)945; 92Fla731, 110S358; 94Fla1201, 115S512; 34GaA 135, 128SE698; 37GaA105, 139SE89; 233 IllA132; 229AppDiv50, 240NYS537; 123 Okl 110, 252P18.

585–14 173Ark147, 293SW50, 58 [quot Cyc]; 35GaA628, 134SE347; 37GaA 105, 139SE89; 229AppDiv50, 240NYS 537; NC 154SE21; 115 Okl 92, 241P 765; 116 Okl 106, 243P504; 300Pa238, 150A636; 89PaSuper34.

586–16 221MoA898, 295SW1083, 1088 [citCJ].

586–17 173Ark147, 293SW50, 58 [quot Cyc]; 40GaA781, 151SE525. [a] 39Ga A160, 147SE126; 314Mo 1, 282SW706.

586–18 TexCivA 265SW264, 266 [quot CJ]; 145Wash561, 261P86.

586–19 173Ark147, 293SW50; 206 Iowa 469, 220NW49; TexCivA 265SW264.

586–21 173Ark147, 293SW50, 58 [quot Cyc].

586–22 CalA 292P991; 207Ky506, 269 SW545.

586–23 176Ark430, 3SW(2d)42; 70 CalA458, 233P415.

586–24 134Wash262, 235P824 (regardless of whether in principal's name, his own name, or name of another).

586–27 70CalA458, 233P415; 81CalA 659, 254P618. [c] **Building contractor agent of owner** (1) to purchase material to complete building under specifications, has apparent authority to purchase material suitable to building, though not named in specifications. 35 GaA515, 134SE140. (2) Paint is suitable material in such case, though not called for by specifications. 35GaA515, 134SE140.

587–30 173Minn370, 217NW347 (holding sales manager not authorized to purchase car for salesman); 107WVa290, 148SE122 (authority to contract sale not implied from agency to lease).

589–45 12LaA435, 126S252; 292Pa164, 140A871.

589–48 292Pa164, 140A871.

589–49 But see 171Ark912, 287SW373.

589–50 But see CalA 292P991.

590–56 40GaA335, 149SE426.

590–58 40GaA335, 149SE426 (where he has no knowledge of such transaction); 197NC110, 147SE819.

591–67 197NC110, 147SE819.

592–77 212Ky253, 278SW583; 131 Or 393, 283P415. [d] **Construction of written authority.**–67CalA507, 227P943. [e] **Traveling salesman has no implied authority** to join local contractor in making contract with purchaser where latter knew he was traveling salesman. 212Ky253, 278SW583. [f] **Authority to arrange details not covered by contract** does not authorize agent to bind principal by arranging details before completion of contract. Man [1926) 1Dom LR738.

592–77½–New. Where an agent is authorized to sell subject to approval by the principal, the contract is not binding on the latter until ratified by him. 103WVa103, 136SE701.

592–77½–New. A verbal agreement by a factory representative to furnish a salesman to sell goods is not binding where a written agreement appointing a dealer provided to the contrary. Tex CivA 288SW558.

592–78 102CalA1, 282P408; 152Va598, 148SE806.

593–83½–New. Authority to sell a note is not implied from authority to collect the amount due on it. 131 Or 393, 283P415.

593–84 147Ala629, 41S675; 5CalA388, 90P485; 90 Iowa242, 57NW874; 16Kan 571; 75Kan106, 89P15, 10LRANS1138; 57SW458, 22KyL393; 61SW9, 22KyL 1528; 223Ky777, 4SW(2d)707 (merely furnishing name of prospective customer); 65Me135; 58Miss478, 38AmR 336; 79Mo 204; 46MoA404; TennChA 59SW455; 43TexCivA7, 95SW700; 20 Utah443, 58P1112; 55Wis515, 13NW 485, 42AmR740.

593–85 [c] **Private instructions** that orders should be subject to approval not binding on third party. 35Kan687, 12P141.

593–88 70Utah11, 257P677, 57ALR388.

593–89 13LaA253, 126S534(2dcase).

593–90 48 Ida777, 285P476; 212Ky253, 278SW583. See also 33GaA579, 127SE 819. [a] (4) Traveling salesman for shoe manufacturer has no implied authority to give purchaser option to return part of shoes after manufacture and delivery. 48 Ida777, 285P476.

594–92 179Ark328, 15SW(2d)409.

594–93 151Md514, 135A383, 49ALR 1366; 84Mont314, 275P748.

594–96 7 OntL385, 3 OntWR281.

594–2 31Ariz104, 250P766, 768 [cit Cyc]; 70CalA41, 232P489, 491 [citCyc]; 258Mass548, 155NE638; 70Utah11, 257 P677, 57ALR388.

595–4 126MoA279, 102SW1066; 32NJL 249, 90AmD655; 90NC101, 47AmR516; 92Tenn154, 20SW802, 36AmSR81, 18 LRA663; TexCivA 89SW799; 61Vt534, 17A720; 51Wis224, 8NW155, 37AmR 827. [f] **Traveling salesman's authority.**–131 Or580, 283P20.

595–6½–New. A sale by the conditional vendee having actual or implied authority to sell gives a good title as against the conditional vendor. 107Conn365, 140 A758.

595–7 13LaA335, 127S484. [a] (4) Has authority only to solicit orders and transmit to principal for approval. 154 Miss396, 122S489.

596–20½–New. Authority to sell and canvass does not confer power to buy or hire horse or mule to aid in carrying on business. 60Ala496.

596–26 58ND148, 225NW129; TexCivA 32SW(2d)212.

597–31 61Vt534, 17A720.

597–32 61Vt534, 17A720.

597–33 MoA 278SW1078; NJ 138A701; 226AppDiv266, 235NYS1; 131 Or580, 283P20 (conduct of parties disclosing authority to sell goods at discount); 87PaSuper106; TexCommnA 16SW(2d) 287. [b] 220Ky338, 295SW137, 55ALR 377.

597–36 127Kan531, 274P217; 264Mass 246, 162NE354; Mass 171NE435.

598–38 TexCivA 287SW127.

599–44 191NC291, 131SE757.

599–46 216MoA607, 260SW513. [d] **Traveling salesman** has ordinarily no authority to accept orders on other than cash terms. TexCivA 284SW322.

600–48 216MoA607, 260SW513.

600–51 80Me496, 15A59; 105Mass482; 151Miss211, 117S534, 535 [citCJ] (automobile); 155Miss393, 124S487; 65NH 192, 18A251. TexCivA 9SW(2d)374. See TennChA 59SW455.

601–55 52SD30, 216NW586; 198Wis 202, 223NW444.

601–60 TexCivA 7SW(2d)636.

601–61 3F(2d)12, 15 [quotCJ].
601–62 3F(2d)12, 15 [quotCJ]; 41 Iowa45; 46Mo585; 6CowNY354.
602–63 3F(2d)12, 15 [quotCJ]; 142 Miss92, 107S282 (agent cannot warrant soundness of animal foods for any given period of time).
602–64 3F(2d) 12, 15 [quotCJ].
602–64½–New. Under statutes in some jurisdictions authority to sell personal property includes authority to warrant the quality of the property. 78CalA652, 248P732 (tractor).
602–65 11LaA268, 122S153(2dcase); 152Wash37, 276P892.
602–67 6CowNY354.
603–74 24F(2d)329; TexCivA 7SW(2d) 636.
604–77 TexCivA 299SW274; 152Wash 37, 276P892.
604–81 152Wash37, 276P892.
605–84½–New. An agent's warranty of a motorcar does not imply his authority to deliver a new car to replace the one sold should it prove defective. TexCivA 9SW(2d)374.
605–85 3F(2d)12, 15 [quotCJ].
605–86 3F(2d)12, 15 [quotCJ].
605–89 81 Ill 413; 89 Ill 318; 203 Iowa701, 213NW398; 51Mo 89; 55Mo 505; 56Mo 434; 21 Or189, 27P1044; TennChA 62SW218.
605–90 203Iowa701, 213NW398; 55 Mich323, 21NW426; 53Vt402, 38AmR 682; 61Vt534, 17A720. See 51NH56, 12 AmR45.
605–91 101Ala368, 13S491; 89Ga223, 15SE302; 34GaA135, 128SE698; 120 Kan450, 243P1030; 30Minn319, 15NW 308; 25MoA35; 2C&P350, 12ECL164; EngLR 10CP630.
606–92 30Minn319, 15NW308; 30Pa 513. Contra 125Me201, 132A386.
606–93 30Minn319, 15NW308; 54Misc 256, 104NYS363; TennChA 59SW455; 42Wash415, 85P17, 7AnnCas649.
606–94 30Minn319, 15NW308; Tenn ChA 62SW218.
607–5 37GaA619, 141SE314.
607–12 2NYS324.
608–15 99CalA604, 279P216; 44 Ill 114, 92AmD154; 45 Ill 79; 283Pa545, 129A580 (no authority to cancel); 13 SC183. [c] But with purchaser's permission agent can rescind sale and make new one. 220Ala568, 126S637.
608–18 See also 251Mich329, 232NW 232.
608–20 92CalA194, 267P901.
609–26 72CalA94, 236P346, 348 [citCJ]; 134Misc58, 235NYS290; 191NC291, 131 SE757.
609–27 124Me329, 128A694.
609–30½–New. An agent, taking an order for a pumping plant and supervising the installation and taking notes for purchase, has apparent authority to agree to take the plant back if not satisfactory. 172Ark691, 290SW584.
609–32 329 Ill 246, 160NE142.
610–33 94Fla1201, 115S512 (held special agency).
610–37 47 Ida306, 274P800.
610–41 234Mich542, 208NW700.
611–42 SD 224NW949.
611–48½–New. Kinship does not imply agency in sales of real estate. 101WVa 57, 131SE870.
611–48½–New. The authority of a sales agent of real estate brokers to enter into a binding contract for the sale of property in behalf of the firm will not be presumed, where the firm did not own the property. 250NY170, 164NE894.
611–50 34PortoRico 98 (held not to include community property).
611–51 215Ala499, 111S231. [e] Promise to resell does not bind principal where agent had authority only to find purchaser. 154Wash254, 282P58.
611–52 [b] Right to handle contract for sale is more than right to collect payments thereon. Wash 289P1010.
611–54½–New. A power of attorney to sell, lease, or mortgage the principal's interest in land the "same as myself" is not exhausted by a mortgage on the land, but authorizes the execution of a deed on default in payment of the mortgage. 217Ky639, 290SW505.
612–60 29PortoRico 707 (sale with condition of repurchase held binding).
612–61 215Ky606, 286SW884; 169 Minn356, 211NW322; 149Va500, 140SE 674. [b] Inserting purchaser's name.–335 Ill 107, 162NE375.
612–69½–New. Right to handle contract for sale has been held to include right to make sale and to transfer of balance due thereon. Wash 289P1010.
612–70 [a] When coupled with general authority to do all acts owner himself could do, such power has been held impliedly to authorize lease. 149Md548, 131A810.
612–75 But see CalA 289P877.
613–80½–New. An agent empowered to sell land is not authorized to exchange it for merchandise. 8HowUS495, 12L ed 1170.
613–80½–New. An agent empowered to sell land and make title is not authorized to exchange the land for a stock of merchandise. 5HeiskTenn555.
613–82 30Hawaii226; 98 IllA364; 24 Kan384, 36AmR259; 226AppDiv601, 236 NYS185; TexCivA 282SW631.
614–1 226AppDiv601, 236NYS185 (agreement to convey free of encumbrances, with purpose of dividing balance with owner, held not to authorize agent to deed property to corporation controlled by him).
615–14 92Fla731, 110S358; 327 Ill 406, 158NE692; 234Mich542, 208NW 700.
616–18½–New. Vendor may place limitations on agent's authority in contract with agent. TexCivA 8SW(2d)230.
616–22 84CalA714, 258P636 (value, quality and adaptability); 155Md178, 141A550 (representation that land under water was high and dry held binding on principal). See also 100CalA221, 279P 1041.
616–23 TexCivA 8SW(2d)230, 235 [cit CJ] (quality); 152Wash149, 277P445.
617–30 29PortoRico 707. [e] In Porto Rico.–29PortoRico 707.
617–31 But see 83NH47, 138A297.
617–36 327 Ill 406, 158NE692.
618–42 327 Ill 406, 158NE692.
618–43 [c] Securities.–327 Ill 406, 158 NE692.
618–45 Or 291P352. [a] (3) Grantee receiving conveyance from one who obtained land from mother conveying without consideration under power of attorney to sell it is chargeable with notice of fraud. Or 291P352. [b] Conveyance without consideration constitutes legal fraud.–Or 291P352.
619–47½–New. Word "sale" in authorization to make sale in power of attorney, means transfer of title for cash, note, or like. Or 291P352.
619–57 Erratum.–Strike out "Authority of agent to receive mortgage debt see Mortgages [27 Cyc 1388 et seq]."
620–59 329 Ill 246, 160NE142; 125Me 201, 132A386; 144 Okl 301, 291P54. See also 22AlaA624, 118S671. [a] Iowa 225 NW245. [e] Mortgages.–33Fed228; 37 Fed130; 54Ark566, 16SW563; 121Cal 297, 53P805, 54P264; 169 Ill 228, 48NE 412; 191 Ill 249, 61NE92; 73 Iowa638, 35NW663; 75 Iowa601, 39NW914; 8 KanA855, 55P522; 75Minn49, 77NW 414; 75Minn346, 77NW976; 50MoA 356; 47Nebr647, 66NW632; 25NJEq 179; 113NY600, 21NE985; 1AbbNCas 315; 18JohnsNY110; 2SandfChNY325; 121Pa130, 15A497, 6AmSR760, 2LRA 48; 91Wash475, 158P90; 126Wis291, 104NW997, 110AmSR924, 1LRANS891; Ont 25UCQB604.
620–60 CalA 285P342.
620–61 216Ala415, 114S75 (formal written or special oral contract not essential to express authority); 82CalA 553, 256P242 (salesman empowered to close sale may receive payment); 136 SC267, 134SE252. [c] Authority to lend money gives implied authority to receive mortgage payments. 136SC267, 134SE252. [d] Authority to receive checks for shortage in weight.–179Ark 780, 19SW(2d)1100.
620–62 216Ala415, 114S75; 22AlaA272, 117S618 [certiorari den 218Ala66, 117S 619]; 180Ark600, 22SW(2d)398(2d case); 56ND301, 217NW160; 38Wyo 285, 267P92 (chattel mortgagor). [c] Payee of bond and mortgage held agent of transferee for collection. 138SC295, 136SE222.
620–63 MoA 26SW(2d)1004 (authority may be established by showing direct authority, by estoppel, or by course of dealing); 144 Okl 301, 291P54; 100Vt 246, 136A697.
621–65 Ariz 293P16; 207 Iowa147, 217 NW459; 114 Okl 231, 246P222; 289Pa 207, 137A232, 234 [citCJ]; 292Pa194, 140A869, 871 [citCJ].
621–66 203 Iowa1001, 213NW571; Pa 150A636.
621–67 203 Iowa1001, 213NW571.
621–70 CalA 285P342; 132SC340, 127 SE562, 564 [quotCJ]. [a] Mortgages.–63PaSuper204; 33RI 37, 80A186.
621–71 132SC340, 127SE562, 564 [quot CJ].
621–73 CalA 285P342; 46 Ida181, 266 P1089, 1092 [citCJ]; 48 Ida538, 283P 609; 202 Iowa70, 209NW525; 289Pa 207, 137A232; 292Pa194, 140A869; 94 PaSuper41; 132SC340, 127SE562, 564 [quotCJ]; 135SC1, 133SE451; 135SC 365, 133SE834. See also 221MoA1101, 297SW119. [c] See also 94PaSuper41. [e] Mortgages.–207Mass378, 93NE704; 92NJL487, 105A195; 28NJEq13; 83 NJEq641, 92A353; 94NJEq526, 121A 515; 103NY556, 9NE323; 96Wash317, 165P82; Eng 5Exch91, 155Reprint39; Eng 1H&N473, 156Reprint1287; 21 Ont A454; 8 OntPr361; 7 Ont146; Ont 23 UCCP586. [f] Assignee of note and mortgage presenting interest coupon at office of original mortgagee for payment, in accordance with note payable there, does not make mortgagee his agent as respects payment of principal. 206 Iowa1198, 221NW791.
622–74 CalA 285P342. [b] Mortgages. –81Fed27; 68NY130, 23AmR157; 58 Hun66, 11NYS466.
622–75 CalA 285P342. [b] Mortgage note.–105Ark152, 150SW411.
622–76 [a] Mortgage.–15PaDist964.
622–77 202 Iowa947, 211NW564; 114 Okl 231, 246P222; 140 Okl 147, 282P 306.
622–79 46 Ida181, 266P1089; 48 Ida 538, 283P609; 202 Iowa70, 209NW525; 206 Iowa1198, 221NW791; Iowa 225 NW245; 126Kan55, 266P738. See also 144 Okl 301, 291P54. [b] Mortgages.–96Wash317, 165P82.
623–81 53SD282, 220NW482. [a] Mortgages.–28AppDC229.
623–85 43 Ida489, 253P847; 46 Ida181, 266P1089 (possession of old mortgage); TexCommnA 278SW188 (possession of draft). But see 180Ark600, 22SW(2d) 398(2dcase). But see 82 IllA418. [c] Mortgages.–92NJL487, 105A195; 94NJ Eq526, 121A515; 7 Ont146.
623–87 36Wyo 279, 254P123.
623–89 54ND573, 209NW982; 132 Wash472, 232P292 (possession conclusive evidence).
624–92 216Ala415, 114S75; 36GaA764, 138SE272; 80 IllA288 [aff 183 Ill 523, 56NE161]; 202 Iowa70, 209NW525; 73 Wis646, 41NW962.
624–93 46 Ida181, 266P1089.
624–95 214Ala501, 108S335, 337 [citCJ perSomerville,J]; 36GaA764, 138SE272; 9LaA98, 119S80; 135SC365, 133SE834. [c] Mortgages.–63PaSuper204. [d] Payment to one of two payees who has not possession of note cannot defeat assignor of note from recovering thereon against maker. 126Misc583, 214NYS80 (maker's remedy is against payee who received payment without authority).
625–98 133Wash643, 234P662.
625–99 216Ala415, 114S75 (express authority); 22AlaA272, 117S618 [certiorari den 218Ala66, 117S619]; Conn 152A 134; 46 Ida181, 266P1089; 202 Iowa 947, 211NW564; 207 Iowa147, 217NW 459 (interest); Iowa 225NW245; 54ND 573, 209NW982; 57ND208, 220NW840; 140 Okl 147, 282P306; 144 Okl 301, 291 P54; 136SC267, 134SE252; 133Wash 643, 234P662. [b] Mortgage.–34ND187, 157NW1038.
625–1 54ND573, 209NW982; 136SC 267, 134SE252.
626–2 136SC267, 134SE252.
626–5 CalA 285P342; 203 Iowa1001, 213NW571; MoA 26SW(2d)1004.
626–7 36GaA764, 138SE272; 89PaSuper34.
626–8 136Misc355, 239NYS655; 132SC 340, 127SE562.

626–10 [c] **Holder of collaterals to secure loan** has power to authorize debtor and indorser of such collaterals to make collections without possession thereof. 219Ala81, 121S66.

627–11 [d] **Admissions.**–146Miss607, 111S575.

627–13 192Wis551, 212NW949.

627–14½–New. Special authority to receive partial payments of a debt secured by mortgage before maturity does not authorize the agent to receive payment of the entire debt ten years after its maturity where he has not possession of the note and mortgage. 251 IllA442.

627–20 82CalA553, 256P242 (principal applications of rule stated); Iowa 225NW859; 247NY20, 159NE708; TexCivA 272SW258; TexCivA 288SW257; 70Utah310, 260P262, 61ALR456; 192Wis551, 212NW949.

628–23 168Ga429, 148SE152; 86Mont478, 284P525; 194NC371, 139SE689.

628–26 170Minn15, 212NW16; 194NC371, 139SE689; 70Utah310, 260P262, 61ALR456; 137Wash335, 242P356.

628–27 170Minn15, 212NW16; 194NC371, 139SE689; 70Utah310, 260P262, 61ALR456.

628–28 43F(2d)599.

628–34 [b] **Principal may become bona fide holder of note** received by his agent in excess of his authority. 177Ark164, 6SW(2d)2.

629–36 But see 53SD282, 220NW482.

629–37 95CalA365, 272P1084.

629–39 82CalA553, 256P242; 203Iowa731, 213NW398; 119Kan132, 134, 237P885 [citCJ].

629–40 126Kan365, 367, 267P1001 [cit CJ]; 199Wis529, 227NW33.

630–52 168Ga429, 148SE152. [c] **Where agent agrees to receive property in payment of note** in excess of his authority, principal is not bound thereby and may sue on note as bona fide holder. 177Ark164, 6SW(2d)2.

631–55 83Mont573, 273P635.

631–59 39GaA42, 145SE917; 253 IllA248; 193NC481, 137SE422; TexCivA294SW654.

632–65 233 IllA614 (dictum); Iowa225NW859; Kan 292P805; 221MoA1101, 297SW119; MoA 26SW(2d)1004 (authority to collect principal of mortgage when due). [d] **Mortgage.**–68Misc484, 124NYS465. [e] **Interest.**–171Minn469, 214NW472.

632–67 [b] 233 IllA614 (cause of dealing for eighteen years).

632–70 255Mass486, 152NE332; Tex CivA 288SW257.

633–77 39GaA213, 147SE131.

634–2 149Wash99, 270P137.

634–3 36Wyo279, 254P123.

634–6 Ala 129S58(2dcase); 120Kan450, 243P1030; 249Mich99, 227NW778; 144Miss515, 110S442.

634–7 But see TexCivA 272SW821.

635–8 216Ala625, 114S292, 293 [quot CJ]; 120Kan450, 243P1030.

635–9 Iowa 225NW245. [a] MoA 15SW(2d)882.

635–10½–New. Where power of attorney of the mortgagee's agent is on record, release of the mortgage is within the ordinary scope of the agent's business so as to bind the mortgage by release written into the margin of the record of the mortgage on receipt of payment. 213Ala516, 105S644.

635–11 SD 224NW929.

635–14 Ida 288P164, 167 [citCJ]; 233IllA614; 253 IllA368; 204 Iowa456, 215NW767; 10LaA337, 119S573(2dcase); 6LaA693; Mass 165NE474; 84Mont373, 275P761 (though agent not in possession of note upon which part payment was made); 295Pa244, 145A127; 136SC267, 134SE252; 53SD282, 220NW482, 36Wyo279, 254P123. [b] **Delivery of money by lender to intermediary on written order of borrower** is binding on borrower though relationship of principal and agent ordinarily may have existed between lender and intermediary. 207 Iowa808, 221NW796. [c] **Authority of agent to collect.**–34F(2d)112.

635–15 82CalA553, 256P242 (payment by check); Ida 288P164; 207 Iowa1139, 222NW373; 289Pa252, 137A257, 258 [citCJ]; 136SC267, 134SE252; 53SD222, 220NW509 (principle that where one of two innocent parties must suffer, one through whose negligence loss occurred must stand loss held inapplicable); SD 231NW908; Tex CommnA 12SW(2d)167; 144Wash294, 257P840; 145Wash125, 259P16; Wis233NW76; Sask [1929] 4DomLR245. [d] **That agent converts money or negligently loses it** does not deprive payer of right to credit. Ida 288P164.

636–16 56ND301, 217NW160; 47RI466, 134A4.

636–21 37F(2d)637; 214Ala561, 108S367, 368 [quotCJ]; 242 IllA111 (authority to draw checks does not authorize indorsement of checks payable to principal); 32PortoRico169; Tex CivA 20SW(2d)212. [e] **Clerk** is ordinarily without authority to issue commercial paper. 153Tenn113, 282SW194. [f] **Such authority is extraordinary power.**–191MoA287, 177SW1092. [g] **Authority held sufficient.**–234Ky469, 28SW(2d)507.

636–22 134Wash94, 235P18. [c] **All acts done within apparent scope of agent in complete charge** of farm are binding on principal. 133SC353, 131SE146. [d] **Actual instructions will not govern if agent** in complete control of farm acts in such a way that it would have appeared to person of ordinary reason that he had authority. 133SC353, 131SE146.

637–23 SD 224NW929.

637–24 150Md470, 133A319; 191MoA287, 177SW1092. See TennChA 59SW455. See also 89Ga223, 15SE302. [b] (2) Traveling salesman authorized to sell goods and collect therefor has no implied authority to indorse checks payable to principal. MoA 26SW(2d)794.

637–26 214Ala561, 108S367, 368 [quot CJ]; 32PortoRico169 (superintend farm operations).

637–26½–New. Representing a relative in "looking after matters" for her, and accompanying her to the bank frequently, will not show authority to sign checks for her. 34GaA240, 129SE118.

637–29½–New. Authority to indorse commercial paper cannot be implied unless necessary to effect purposes of agency or necessary and customary incident of agent's authority. MoA 26SW(2d)794.

638–30 MoA 282SW105.

638–31 175Ark1002, 1SW(2d)545; 191MoA287, 177SW1092; 136MiscRep141, 239NYS568; TexCivA 299SW344.

638–34 IndA 170NE788; 150Md470, 133A319; TexCivA 288SW1090; Tex CivA 293SW838, 840 [citCJ].

639–35 TexCivA 288SW1090; TexCivA293SW838, 840 [citCJ]; Ont [1927] 1DomLR569.

639–36 262Mass555, 160NE532.

639–40 TexCivA 288SW1090.

640–47 Ont [1927] 3DomLR336.

640–48 MoA 9SW(2d)862.

640–49½–New. Authority to draw and indorse checks does not authorize overdraft. 69CalA370, 231P380.

640–50 215Ala235, 110S34; 283Pa200, 129A52.

642–73 48 Ida100, 279P621.

643–79 76CalA774, 246P77 [dictum]; 82CalA519, 255P881; 127 Okl295, 260P745. [f] **Goods packed under supervision of buyer's agent** and stored in warehouse held accepted by buyer. 191Wis635, 211NW764.

644–83 82CalA519, 255P881; 107Conn393, 140A760, 762, 56ALR1127 [citCJ]; 9LaA649, 120S94.

644–87 84CalA714, 258P636.

644–93 323 Ill 54, 153NE630, 632 [cit CJ]; 248Mich465, 227NW769 (power to accept service of process in person-am); 83NH1, 136A702; 35ND275, 159NW854; TexCivA 273SW650; 23Man641, 14DomLR577, 25WestLR868, 5WestWkly452; 7Newfoundl367; 7Newfoundl795.

645–96 227Ky525, 13SW(2d)520 (agent to manage lot has no authority to disclaim title).

645–99 181Ark478, 26SW(2d)896 (where agency contract stipulates fund); 125Misc405, 211NYS371 (to bind owner to negotiable paper).

645–1 TexCivA 273SW650.

645–3½–New. A general manager has no implied authority to contract to distribute to an employee a share of net profits of business as part of his compensation for services. 199Cal374, 249P511, 47ALR1012.

645–5 66CalA391, 226P809, 812 [cit CJ]; 76CalA774, 246P77, 79 [quot Cyc]; 91CalA654, 267P572, 573 [cit CJ]; 217Ky340, 289SW287; 264Mass238, 162NE339; 57NS445, [1925] 1DomLR353, 359 [citCJ].

646–6 76CalA774, 246P77, 79 [quot Cyc].

646–7 76CalA774, 246P77, 79 [quot Cyc]; 217Ky340, 289SW287.

646–8 66CalA391, 226P809. [a] **Cancellation binding on principal** whether agent had authority to accept or not. 168Ark756, 271SW954.

646–10 72CalA94, 236P346, 348 [cit CJ]; 76CalA774, 246P77, 79 [quotCyc]; 220Ky167, 294SW1048.

646–11½–New. An agent authorized to investigate and report has no authority to enter into an oral contract superseding a written one evidenced by a bond. 221MoA898, 295SW1083.

646–13 172Minn40, 214NW759.

646–14 17 Ind625; 5DalyNY460. [c] **Steward** has no general authority to enter into contracts granting leases or farms for a term of years. Eng 21Beav540, 52Reprint968.

646–15 [a] 60PaSuper345.

647–20 17SW273, 13KyL437; 288Pa264, 135A764.

647–21½–New. Execution of lease by attorney is prohibited by statute in some states. 39AppDC372.

647–21½–New. Church wardens cannot execute leases, as a body corporate, of parish lands in some jurisdictions. Eng 5B&C433, 11ECL529, 108Reprint162.

647–21¼–New. Husband may not execute lease for wife in some jurisdictions. 88Minn116, 92NW521 [foll 24Minn172].

647–21½–New. Mere possession by agent of unregistered lease does not show delivery. 149NC185, 62SE892, 150NC158, 63SE735.

647–23 172Minn40, 214NW759.

647–24 91Misc19, 154NYS229; 22Porto Rico744; Eng 17Beav151, 51Reprint990; Eng 1BroPC341, 1Reprint608; 7Newfoundl367; 7Newfoundl795. See 23Man641, 14DomLR577, 25WestLR868, 5WestWkly452.

647–27 7DalyNY205.

647–28 Eng 4A&E478, 31ECL218, 111Reprint866; Eng 17Beav151, 51Reprint990; Eng 2F&F185.

648–36½–New. In Porto Rico an agent must have express authority in order to lease property for more than six years. 13PortoRico100.

649–53 125Or379, 265P793, 795 [cit CJ] (not general agent).

649–60 95PaSuper336.

650–65 32PortoRico749 (power of attorney giving agent authority to create mortgages, to execute in public or private instruments such contracts as he might make and to sign promissory notes).

650–68 126Kan519, 268P859; 226App Div601, 236NYS185; 134Wash94, 235P18. [b] 101NJL215, 128A595 (automobile sales agent is not authorized to mortgage cars borrowed from principal); TexCivA 25SW(2d)984 (power to create loans on property, not authorizing mortgage).

652–88 153Va484, 150SE403.

652–91 96PaSuper143.

652–94 58Mich385, 25NW377, 55AmR607; 148Miss604, 114S393; MoA 15SW(2d)882; 288Pa389, 135A860; 43Wash527, 86P845, 17AmSR1064. See 20Utah443, 58P1112 (perMiner,J).

652–95 32GaA715, 124SE550 (agent installing lighting plant held apparently authorized to adjust matters with principal's buyer); 212AppDiv483, 209NYS183; TexCivA 292SW612.

653–5 161La378, 108S777.

653–6 219Ky135, 292SW749; 148Miss604, 114S393.

653–8 83Colo427, 265P908; 148Miss604, 114S393. See also 8LaA476.

653–11 MoA 16SW(2d)742.

654–13½–New. Agent has no authority to agree on a settlement for a breach

of warranty. 5CalA388, 90P485.

654-14 148Miss604, 114S393; MoA 30 SW(2d)1087; 87PaSuper243 (selling agent).

654-15 TexCivA 272SW639 (authority to compromise includes authority to release as incident).

655-24½-New. An agent of a broker who waived the right to commission is binding on the principal. 214AppDiv 514, 212NYS361.

655-35 8LaA188. [d] Other instances where suit not authorized. 131 Okl 196, 268P258.

656-33½-New. Letter of attorney from executor, garnishee, authorizing surrogate to receive process does not authorize his representing executor in suit against beneficiary of will. NJ 151 A85.

656-43 134Wash94, 235P18.

657-49 176Ark463, 38W(2d)295 (authority to purchase, manufacture, and ship confers apparent authority to give share of profits to secure advances).

658-59 [a] When coupled with power to sell includes authority to agree on repurchase condition. 29PortoRico 707.

658-70 But see 29Ariz44, 239P297.

658-72 203 Iowa1149, 212NW480. [b] 203 Iowa1149, 212NW480.

659-20 206Cal 231, 273P766.

659-32 215Ky606, 286SW884.

660-89½-New. Power to hire and discharge and fix the compensation of an employee implies power to control his work. 87CalA199, 262P58.

661-98 155Miss242, 124S344 (when authorized by principal).

661-99 12LaA616, 125S768(2dcase).

661-4 39GaA160, 147SE126.

662-5 But see Miss 128S569.

662-6½-New. An agent given general authority to prosecute and settle a claim and to employ an attorney is held to have power of discharge. 215Ala251, 110S296.

662-8 83NH542, 145A139.

662-10½-New. A foreman, whose duties consist in part in taking charge of matters pertaining to injuries to employees, and who is furnished with blanks for reporting injuries, has authority to issue an order to a physician to render additional services to an injured employee. 239Mich516, 215NW 37.

662-10½-New. Such order is binding on the employer, although the foreman erroneously thought that treatment would be under the Workmen's Compensation Act, and so stated in the order. 239 Mich516, 215NW37.

662-10¼-New. A local and subordinate employee has no authority to bind his employer for hospital services rendered to an injured person beyond the period of emergency. 155Miss699, 125S118.

662-13 34Mich247; 83MoA491; 5SC 465; 61Vt534, 17A720. [a] 99NC523, 6SE205.

663-17 21F(2d)447.

663-25 But see 77CalA132, 245P1102.

665-32 41GaA622, 154SE283.

665-40½-New. Where money is received in trust to be delivered to another, and is so delivered before the trust is revoked, the agent is not liable for refund of money. 215Ala638, 112S215.

665-40½-New. Where the drawer made arrangements with the bank that his drafts on another should be paid by the bank which never received any instructions from the drawee who paid the drafts, the drawer was the agent of the drawee as to banking arrangements. 48 Ida100, 279P621.

665-50 CalA 283P895; 258Mass35, 154 NE523. [b] Soliciting agent of cotton factor has no authority to guarantee certain price for cotton. 173Ark1148, 294SW6.

665-52½-New. or make collections, 252 Mass383, 147NE870.

666-53 173Ark1148, 294SW6.

666-59 117Nebr93, 219NW837.

668-77 153SC257, 150SE756.

668-80½-New. A seed company merely transmitting an order for spring rye is held not liable for damages resulting from a shipment by mistake of fall rye. 143Wash557, 255P919.

668-83 135SC339, 133SE910, 912 [quot CJ]; 53SD260, 220NW502, 503 [cit CJ].

668-87 262Mass555, 160NE532.

669-89 TexCivA 276SW480.

669-95 33GaA716, 127SE902, 904 [cit CJ].

670-11½-New. The Porto Rico statute requires that contracts made by agents shall be made by means of authentic documents. 33PortoRico 535.

670-13 35GaA94, 132SE454, 457 [cit CJ].

671-14 35GaA94, 132SE454, 457 [cit CJ].

671-16 102CalA716, 283P370(2dcase). See also 201Cal 219, 256P411.

671-17 5KyOp485.

672-20 Ont [1929] 4DomLR913. See also 48Philippine536, 553 [citCJper Street,J].

672-25 TexCivA 298SW(2d)841; Ont [1929] 4DomLR913.

673-27 197NC110, 147SE819.

673-34 29F(2d)83.

674-42 35GaA94, 132SE454; 192NC732, 135SE870.

675-46 35GaA94, 132SE454. See also 160La992, 107S777.

676-52 But see TexCivA 298W(2d)841.

677-59 82Mont150, 266P869 (contract for cropping mortgaged land held contract of mortgagee, though made in name of agent as party of first part); 69NY343, 25AmR199; 32Misc203, 65 NYS694; 13PortoRico 100.

678-69 193NC395, 137SE322.

679-73 See also 29PortoRico 537.

679-76 299Pa25, 148A909.

680-80 [b] Mortgage in wife's name, signed by husband as agent, is valid and binding mortgage of wife's property where it appears on face of and in recitals of mortgage that loan was made to husband as attorney in fact for wife and that he, personally, was not party to mortgage. 50Philippine115.

680-82 MoA 218SW354.

681-90 171NC200, 88SE252, AnnCas 1918E1186.

681-95 [b] Requirements as to reference in Porto Rico under Mortgage Law see 29PortoRico 537.

682-4 150Wash274, 272P970.

683-11 57OntL38, [1925] 3DomLR217 (party signing not given particular description).

683-15 220MoA1057, 279SW720, 722 [citCJ].

684-16 220MoA1057, 279SW720, 722 [citCJ].

684-20 69NY343, 25AmR199; 32Misc 203, 65NYS694; 13PortoRico 100.

685-32 54ND573, 209NW982; 31 OhA 333, 167NE398; 138 Okl 24, 280P295; 141 Okl 207, 284P895; 121 Or303, 254P 1023, 1025 [quotCJ]; 126 Or64, 268P 746; 130 Or50, 278P87; 288Pa478, 136 A773, 776 [citCJ]; TexCivA 295SW679; 104WVa580, 140SE552, 553 [citCJ]. [c] Express or implied authorization necessary for delegation of agency.-31 OhA 333, 167NE398.

685-33 94Fla1128, 115S537, 538 [cit CJ].

686-47 NJ 139A326, 327 [citCJ]; TexCivA 295SW679.

687-51 136Misc355, 239NYS655.

687-53 129 Okl 130, 132, 263P1088 [quotCJ].

687-58 110Conn452, 148A342.

688-64 TexCivA 287SW1109 [citCJ].

688-66 129 Okl 130, 263P1088; 138 Okl 24, 280P295; 193Wis16, 213NW649, 650 [quotCJ].

688-68 90PaSuper292, 299 [citCJ].

688-73 90PaSuper292, 299 [citCJ].

689-75 94Fla1128, 115S537, 538 [cit CJ]; 166Ga820, 144SE747; 119Kan614, 240P578, 579 [citCJ]; 130Kan438, 286 P237; 262Mass555, 160NE532; 85Mont 419, 279P243; 104WVa580, 140SE552.

689-76 130Kan438, 286P237.

690-87 54ND573, 209NW982.

690-93 130 Or195, 279P539.

692-16 37F(2d)637; 215Ala650, 112S 232, 53ALR134; 179Ark700, 17SW(2d) 884; 78CalA728, 246P564; 15CalA178, 114P83; 70CalA415, 233P366; 80CalA 301, 251P841; 88CalA664, 264P256; 97 CalA452, 275P1005; 8ColoA223, 46P11; Fla 129S773; 329 Ill 21, 160NE130; 83 IndA85, 147NE728; 158La537, 104S318; 19Mich209; 168Minn414, 210NW149, 48 ALR913; 322Mo 1064, 18SW(2d)1043; NJ 147A434; TexCivA 270SW1062; TexCivA 283SW319; TexCivA 28W(2d) 870; TexCivA 19SW(2d)102; 70Utah 203, 259P318, 62ALR54.

693-18 78CalA728, 246P564.

693-20 339 Ill 184, 171NE169.

693-23 80CalA301, 251P841.

693-25 3GaA756, 60SE372; 125 Iowa 1, 98NW159; 177Mass466, 59NE126; 202Mo 173, 99SW1077; 210Mo 429, 109 SW688; TexCivA 283SW319, 322 [cit CJ].

694-28½-New. Agent acting for himself by committing fraud on principal ceases to act within scope of authority. 241NY216, 149NE837.

694-31 101CalA122, 281P419; DelCh 140A694.

694-33 104Conn169, 132A902; Fla 126 S794; Fla 129S773; 207 Iowa41, 217 NW477; 125Kan449, 265P50; 240Mich 319, 215NW300, 302 [citCJ]; 16SMinn 414, 210NW149, 48ALR913; 114Nebr 534, 208NW627; 102NJL196, 130A665, 667 [citCJ]; 244NY168, 155NE88; 136 Misc301, 240NYS713; 198NC169, 151SE102; SD 225NW661; TexCivA 10SW(2d)201; 70Utah203, 259P318, 62 ALR54; Wis 231NW257. [e] 44Philippine343. [f] Merely renting to agent's son will not in itself invalidate lease. 57 NY445.

695-34 78CalA728, 246P564; 240Mich 319, 215NW300, 302 [citCJ].

695-34 [d] (2) Public policy forbids one to contract with himself as agent for another without acquiescence or ratification of principal. 142 Okl 272, 286P792. [f] Bank officer authorized to withdraw funds of depositor and make loans cannot withdraw such funds and lend them to himself. 53SD113, 220NW 479. [g] Express authorization.-142 Okl 272, 286P792.

695-35 78CalA728, 246P564.

695-37 78CalA728, 246P564; 114Nebr 534, 208NW627. [b] 78CalA728, 246P 564.

696-39 114Nebr534, 208NW627.

696-42 78CalA728, 246P564.

696-49 [c] Arrangements looking to agent's continuing in rival business at termination of agency.-37F(2d)637.

697-51 Mass 166NE867.

697-53 18F(2d)515; 31F(2d)1; 78Cal A728, 246P564; 204Cal 247, 267P694 (without reduction for losses); 70CalA 415, 233P366; 151Wash252, 275P541; Fla 126S794; 204 Iowa197, 215NW233; 244NY209, 155NE102; 121 Or427, 251P 299; 88PaSuper57; 88PaSuper133; 49 SD18, 205NW708; 51SD190, 212NW869, 870 [quotCJ]; TexCivA 283SW319, 322 [quotCJ]; TexCivA 19SW(2d)102; 135 Wash209, 237P307; Sask [1930] 2DomLR6.

698-54 15F(2d)807; TexCivA 283SW 319, 322 [quotCJ].

698-55 TexCivA 283SW319, 322 [quot CJ].

698-57 TexCivA 283SW319, 322 [quot CJ].

698-58 TexCivA 283SW319, 322 [quot CJ].

698-59 51SD190, 212NW869, 870 [quot CJ].

698-60 51SD190, 212NW869, 870 [quot CJ].

699-62 Can [1924] 2DomLR951.

699-64 19F(2d)834, 836 [quotCJ]; 120 Or427, 251P299.

699-66 244NY209, 155NE102; 51SD 190, 212NW869, 871 [quotCJ].

700-67 51SD190, 212NW869, 871 [quot CJ].

700-68 237Mich627, 213NW156.

700-70 204 Iowa197, 215NW233 (agent is liable to principal who was equitable owner, where sale was in name of legal title holder); 244NY209, 155NE102; TexCivA 283SW319, 322 [quotCJ].

700-71 83 IndA250, 148NE157; 244NY 209, 155NE102.

700-73 323 Ill 527, 154NE444; 237 Mich627, 213NW156, 158 [citCyc]; 146 Miss270, 111S289; 313Mo 426, 285SW 407, 408 [citCJ]; NJ 147A434; Or 289P 375; 126 Or227, 269P207; 88PaSuper 57; 88PaSuper133; 70Utah203, 259P 318, 62ALR54.

701-74 323 Ill 527, 154NE444; 237Mich 627, 213NW156, 158 [citCyc]; 240Mich

234, 215NW524; 146Miss270, 111S289; 313Mo 426, 285SW407, 408 [citCJ]; 33 PortoRico 473; TexCivA 18SW(2d)343.

701-75 237Mich627, 213NW156, 158 [citCyc]; 33PortoRico 470.

702-76 313Mo 426, 285SW407.

702-77 169Ark1132, 278SW26; 158La 537, 104S318.

702-79 237Mich627, 213NW156; 146 Miss270, 111S289, 290 [citCJ].

702-85½-New. Agent authorized to sell land at minimum price, he to retain all received above such price, may sell to himself. 237Mich627, 213NW156.

702-86 But see Can [1926] 3DomLR 897.

702-87 131Misc99, 226NYS199, 208 [cit CJ].

702-88 92CalA86, 267P711, 712 [cit CJ]; 146Miss270, 111S289. [b] **Matters not constituting ratification.**–146Miss 270, 111S289.

703-90 169Ark1132, 278SW26; 131 Misc99, 226NYS199, 208 [citCJ]; 141 Wash345, 251P577. [a] **Mere fact that agent takes principal's property in his own name under power of attorney does** not denounce transaction as fraud. Cal A 265P263.

703-92 [a] **Statute prohibiting retroactive ratification of unauthorized acts to prejudice of third persons** does not apply in favor of principal's creditor where agent had power through power of attorney to convey to himself and principal ratified transaction. CalA 265 P263.

703-93 323 Ill 527, 154NE444; 177 Minn127, 224NW843; 146Miss270, 111S 289; 136Misc301, 240NYS713; 126 Or227, 269P207; 70Utah203, 259P318, 62ALR54.

703-94 126 Or227, 269P207.

703-95 177Minn127, 224NW843 (may recover damages though agent thereafter acquired title under foreclosure); 146Miss270, 111S289; 70Utah203, 259P 318, 62ALR54. [c] **Defendant cannot assert as defense** in action for damages for wrongfully inserting his name in deed as grantee that his own wrongful act rendered deed nullity. 177Minn127, 224NW843.

704-96 198Cal 652, 246P1049, 46ALR 1156; 136Misc301, 240NYS713.

704-97 175Minn287, 221NW10.

704-99 198Cal 652, 246P1049, 46ALR 1156; 121Kan246, 246P997 (agent authorized to make investments in his discretion held liable for amount charged to principal without her knowledge or consent for securities of his own).

704-1 126 Or227, 269P207.

705-8 244NY209, 155NE102. [a] **Agency precludes purchase by agent and resale at profit to principal.** 104Conn 257, 132A540, 48ALR259.

705-9 93Fla805, 113S419, 428, 54ALR 1173 [citCJ]; 244NY209, 155NE102.

705-10 13PaDist&Co 240 (title taken in name of third person controlled by agent).

706-16½-New. An agent who, with his own money, buys property for himself cannot be compelled to convey it to his principal. 18F(2d)515.

706-26 16F(2d)251, 252 [citCJ]; 26F (2d)80; 169Ark1132, 278SW26; 8Mich 433.

706-27 169Ark430, 275SW522.

706-28 169Ark1132, 278SW26.

707-29 16F(2d)251; 229Mo 68, 129SW 500.

708-34 169Ark1132, 278SW26; 143 Wash347, 255P132, 133 [quotCJ].

708-34½-New. Duty of agent who purchases from principal, to disclose all facts, judged by situation existing at time of sale. 169Ark1132, 278SW26.

708-35 26F(2d)80; 229Mo 68, 129SW 500; 143Wash347, 255P132, 133 [quot CJ].

708-42 240Mich295, 215NW311 (where principal consulted attorney).

708-44 See also 169Ark430, 275SW522.

709-46 151Wash252, 275P541; 320Mo 341, 7SW(2d)1013; 213AppDiv824, 209 NYS5. [g] **Independent contractor not agent** within rule. 105 Okl 52, 233P179. [h] **Execution of power of attorney does not prohibit agent** from dealing with subject matter of agency provided he acts in good faith fairly and honestly and makes full and reasonable disclosure of his intention. 80CalA301, 251P 841. [i] **After termination of agency,** agent may purchase property involved in agency at public auction on sale to satisfy judgment in agent's favor against principal. 51Philippine695.

710-50 151Wash252, 275P541.

710-52 213AppDiv824, 209NYS5.

710-61 91Fla485, 107S636.

712-69 157Fed506, 85CCA98; 90Fla 357, 106S77; 325 Ill 612, 156NE785; 102MoA697, 77SW325; 80NJEq373, 84A 624; 58ND176, 225NW124; 128 Or668, 275P682; 36Wyo 279, 254P123, 125 [cit CJ]; Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

712-70 90Fla357, 106S77; 40GaA573, 150SE470; 333 Ill 321, 164NE671; 207 Iowa808, 221NW796; 250Mich342, 230 NW147; 80NJEq373, 84A624; 133Misc 440, 232NYS351; 128 Or668, 275P682; 51SD40, 211NW973; Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

712-71 Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

712-72 88CalA664, 264P256; 325 Ill 612, 156NE785; MoA 7SW(2d) 387 (held not within rule); 83NH47, 138A 297; Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

712-73 97PaSuper134.

713-76 Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

713-77 4F(2d)427 (one who employs agent to purchase property knowing him to be agent of owner cannot recover money paid for services); Alta [1927] 2DomLR1108, 1111, [1927] 2 WestWkly45 [quotCJ].

713-78 Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

713-79 Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

713-82 107Conn242, 140A105, 107 [cit CJ]; 222Ky183, 300SW633, 636 [cit CJ]; 251Mich469, 232NW229; 144Wash 326, 258P4, 6 [citCJ&Cyc].

713-83 Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

713-84 Alta [1927] 2DomLR1108, 1111, [1927] 2WestWkly45 [quotCJ].

713-85 93Fla805, 113S419, 54ALR 1173; 207 Iowa808, 221NW796; 130 Kan438, 286P237.

714-86 MoA 25SW(2d)138.

714-87 128 Okl 141, 261P921.

714-88 214Ala684, 108S864, 866 [cit CJ]; 231Mich472, 204NW82 (no fraud shown necessary to impress trust); Utah 271P797, 813 [citCJperHansen,J dis op]. But see Fla 126S794.

714-89 DelCh 140A694, 696 [quotCyc].

714-90 DelCh 140A694, 696 [quotCyc].

714-92 13FCasNo 7,254, 2Sawy135; 75 CalA732, 243P443; 101CalA122, 281P 419; CalA 293P136; 90Conn183, 96A 928; 93Fla805, 113S419, 54ALR1173; 62 Ill 76; 329 Ill 21, 160NE130; 5Blackf Ind509; 92 Iowa261, 60NW531; 76Kan 451, 92P709; 8Mich433; 95Minn360, 104NW543; 202Mo173, 99SW1077; 210 Mo 429, 109SW688; Mo 275SW949, 954 [citCJ]; Mo 18SW(2d)445; 36NJEq 174; 59NYSuper503, 15NYS140 [aff 133 NY622mem, 30NE1150mem]; 125 Or 409, 267P530, 533 [quotCJ]; 127 Or 22, 270P905; TexCivA 28W(2d)870, 872 [quotCJ]; TexCivA 19SW(2d)102 (where agent has interest in sale of property belonging to principal, burden is on agent to show that principal had knowledge of every material fact known to agent which might affect principal, and that he freely consented to transaction); 105Va10, 52SE696; 40Wash 673, 82P1000; 42Wash284, 84P861; 45 Wash536, 88P1023; 3WVa183; Eng LR 18Eq524; 36NB42. See 7CalA421, 94P 403; 3GaA756, 60SE372; 144Mich454, 108NW396; 52Misc657, 102NYS499. [e] **Duty to communicate to principal facts which ought, in good faith, to be known** to him. Fla 126S794.

715-93 101CalA122, 281P419; 33GaA 716, 127SE902. [d] **Agent liable for withholding or misstating facts** connected with agency. 215AppDiv617, 213 NYS468 (proof of fraud unnecessary).

715-95 35GaA749, 134SE846; 293Pa 566, 143A195; Can [1927] 2DomLR96.

715-97 85Colo 46, 272P1116; 35GaA 749, 134SE846; MoA 279SW433; 194 Wis135, 215NW820; 58NS389, [1926] 1 DomLR581. [d] **Agent violating general instructions is liable dependent on exercise of care,** but he is liable for violation of specific instructions regardless of care. 41GaA189, 152SE141.

716-99 [b] **Sale on credit over specific protest.**–Garage employee who had financed purchase by his employer of truck for resale held bound to bear loss occasioned by his sale of truck on credit over protest of garage manager. 209Ky 250, 272SW728.

716-5 35GaA749, 134SE846.

717-16 35GaA749, 134SE846, 848 [cit CJ].

717-17 35GaA749, 134SE846, 848 [cit CJ].

717-20 203 Iowa411, 212NW722, 725 [citCJ].

717-21 DelCh 140A694; 229AppDiv 155, 241NYS255.

719-46 203 Iowa32, 212NW310, 311 [citCJ]; MoA 279SW433.

719-50 261Mass153, 158NE328, 54ALR 1328. [a] (7) Where owner directed return of goods by express, and agent delivered them to supposed driver of express wagon, who was in fact impostor. 261Mass153, 158NE328, 54ALR1328.

719-52 261Mass153, 158NE328, 54ALR 1328.

719-53 261Mass153, 158NE328, 54ALR 1328 (delivery to unauthorized person).

719-54 [b] 70Utah203, 259P318, 62 ALR54.

720-66 41GaA189, 152A141; 153Wash 427, 279P585.

720-72 70Utah203, 259P318, 62ALR54.

721-73 35GaA749, 134SE846; 200 Iowa 347, 202NW523. See also 7Mass36, 5 AmD22; 33NJL543.

721-74 179Ark700, 17SW(2d)884; 41 GaA189, 152SE141 (whether agent could have realized greater sum through exercise of care); 245NY245, 157NE125; 156AppDiv795, 142NYS89; 215AppDiv617, 213NYS468 (proof of fraud unnecessary).

721-75 35GaA749, 134SE846; TexCivA 16SW(2d)865.

721-79 See also 173Ark1181, 295SW23.

721-80½-New. An agent is liable for damages arising out of his failure to perform the proper functions of his office. 215AppDiv617, 213NYS468 (proof of fraud is unnecessary).

722-87 35GaA749, 134SE846, 847 [cit CJ].

722-1 18GaA544, 90SE94; 106Kan 808, 190P12, 12ALR216; TexCivA 196 SW647 (all three cases relating to "nonfeasance").

723-2 217Ala153, 115S94, 55ALR1231; TexCivA 21SW(2d)1102.

723-3 DelCh 140A694.

724-24 [b] (2) Agent must use same care as reasonably prudent man with his own property. 215Ala420, 110S895. (3) Attorney as agent need exercise no greater care than ordinary agent. 215 Ala420, 110S895.

724-27 82CalA474, 255P775, 777 [quot CJ]. [a] **Sale on credit.**–11LaA442, 123 S477.

724-28 [b] **Under agreement to sell at best obtainable prices,** to be agreed upon by parties, no breach is shown where it is not shown that principal failed to agree to price obtained. 26 OhNPNS 117.

726-43 35GaA749, 134SE846.

726-44 35GaA749, 134SE846.

726-45 49 Or536, 92P1088, 124AmSR 1066. 19LRANS276.

727-55 [b] **Reasonable time for presenting bill for acceptance.**–153Wash 427, 279P585.

727-58 [a] **Necessity of protest.**–153 Wash427, 279P585.

727-66 170Minn15, 212NW16, 18 [cit CJ].

728-74½-New. **Where an agent accepts a new note in his own name** and surrenders the original note, without the consent of the principal, it amounts to payment to plaintiff and conversion of the note. 220MoA1273, 290SW82.

729-86 35GaA749, 134SE846; 41GaA 189, 152SE141.

729-88 35GaA749, 134SE846.

729-92 121Kan246, 246P997; MoA 279 SW433.

730-94 121Kan246, 246P997; 163La 322, 111S772.

730-98 190NYS769.

730-99 200Ala622, 76S980.

731-5 200Ala622, 76S980; 116Minn 161, 133NW558.
731-7 [a] **Direction to procure policy** meant written policy, not verbal one, though verbal policy might be valid. 16 FCasNo 9,047, Woolw372.
731-21 58NS389, [1926] 1DomLR581.
732-25 BC [1927] 1DomLR1166, [1927] 1WestWkly340. [d] **Speculative live stock trading** held to violate contract requiring ranch managers to preserve and protect stock. 79Mont327, 256P497.
733-45 LaA 125S888.
734-60 121Kan246, 246P997. [a] **Acts held not to constitute ratification.**–37F(2d)637.
734-63 35GaA749, 134SE846, 848 [cit CJ].
734-66 84CalA635, 258P670, 672 [cit CJ].
734-70 200Iowa458, 204NW413.
734-71 35GaA749, 134SE846; 244Mich 351, 221NW179.
734-72 LaA 125S888; 244Mich351, 221 NW179.
735-73 35GaA749, 134SE846.
735-74 35GaA749, 134SE846.
735-77 37F(2d)637; 168Ark763, 271SW 714; 101CalA295, 281P695 (judgment for amount paid to become branch manager not affected by sale of stock with consent of principal); 102CalA541, 283 P829 (nature of duty); 181 IllA519; 1 KyOp611; 124Me384, 130A209; Mass 165NE673; NJSup 132A662; 285Pa199, 131A700; TexCivA 270SW1062; 38Wyo 346, 266P1058. [b] **Ordinarily, relation of principal and agent does not partake of fiduciary character,** and hence is not sufficient to warrant a decree for an accounting, under statute in Massachusetts. Mass 165NE673.
735-80 [b] **Fraud is not necessary element of action** to require return of profit. MoA 24SW(2d)708.
735-81 2LaA746. [d] **Manager of branch as agent could not deduct amounts owing to employees** of branch under contract authorizing deductions of usual and necessary expenses. 37F(2d) 637. [e] **Agent is not liable for sums uncollected.**–251Mich450, 232NW181(2d case).
736-82 See also 181 IllA519.
736-84 MoA 285SW544.
736-84½-New. Agent properly held liable for interest on remittances required under contract to be paid to principal. 37F(2d)637.
736-85 205SD708, 205NW708 (principal may compel accounting of funds placed for investment, though contract is silent).
736-89 NJSup 132A662.
737-95 37F(2d)637; 171Ark872, 286 SW1010; 44Philippine343; 205SD708, 205NW708. [d] **Funds collected.**–91Pa Super417.
737-97 37F(2d)637.
737-98 230Ky710, 20SW(2d)714.
737-1 12GaA137, 124S541.
739-20 [a] **Annual accounting** held not to satisfy agreement faithfully to account in all particulars. 79Mont327, 256P497.
739-26 [d] **Dealer's claim for adjustment made with customers cannot be defeated by manufacturers** suing for balance due, solely on ground that adjustments were not made out on blanks to be furnished by plaintiff when it had refused to furnish them. 237Mich152, 211NW41.
740-33 199Cal168, 248P658, 47ALR 904.
740-34 199Cal168, 248P658, 47ALR 904.
740-36½-New. It is necessary that the principal's acquiescence shall be express. 199Cal168, 248P658, 47ALR904.
741-42 TexCivA 6SW(2d)393, 394 [cit CJ].
744-72 LaA 125S888 (estoppel not shown). [c] **Failure to require strict fulfillment of contract provision** may not render provision nugatory. 251 Mich450, 232NW181(2dcase).
744-74 216Ky51, 287SW226.
744-77 244Mich351, 221NW179.
744-78 160Ga472, 128SE674; 44Philippine343.
746-95 43AppDC462; 98Kan38, 157P 453, 454 [citCyc]; 166AppDiv688, 152 NYS470; 12PortoRicoFed5; 34Man14, [1926] 4DomLR262, [1926] 2WestWkly 780.
746-96 212Ala621, 103S576 [citCJ] (illegal sale of securities by corporation in defense in suit by corporation against officer receiving proceeds for accounting); 243 IllA434, 436 [citCJ].
748-1 243 IllA434, 437 [citCJ].
749-11 91PaSuper417.
751-33 28QueSuper95. [a] 12Porto RicoFed39.
752-40½-New. Although principal reserves right to withdraw at any time any specific business in agent's territory, principal should give agent notice of exercise of this option. 210Ky690, 276SW558.
753-44 Iowa 231NW347 (holding sale not to be one for which seller was not obligated to pay, where not so specified in contract); 170La736, 129S147; MoA 288SW972. [e] **Commission dependent on payment of royalty to principal** held not defeated by reducing royalty without agent's consent. 147Miss374, 112 S7.
754-47 [b] **Contract granting privilege of organizing companies in consideration of commission on sales thereto** held not to include sales to established concern. 147Va252, 137SE374. [c] **Contract provision** reserving right to sell in special cases, is ineffectual where "special cases" was not defined. Iowa 231NW347. [d] **Words "sales made personally" construed.**–TexCivA 29SW (2d)937.
754-53 22AltaL476, [1927] 2DomLR 231, [1927] 1WestWkly486.
754-54 150SC36, 147SE650.
754-56 124Misc742, 209NYS309 (contractual obligation, to pay commissions as long as business is accepted from customers procured by agent, not terminated by discharge of agent).
755-57 [b] **Salesman is entitled to commission after cancellation,** where parties continued transactions. Iowa 231NW347.
755-64½-New. Where plaintiff agreed to terminate the contract by notice, defendant canceling space orders is not liable for commission as to subsequent advertisements billed by the publishers to another company. 33F(2d)923.
756-67 See also 49ND301, 191NW778.
756-76 30F(2d)90.
757-80 33F(2d)923.
757-83 219Ky66, 292SW472.
757-90 [c] **Measure of damages** for breach of exclusive selling agency contract is commission of which agent is deprived. 219Ky66, 292SW472.
758-91 219Ky66, 292SW472.
759-7 [b] **Mitigation of damages for termination of contract.**–43F(2d)625.
760-17 TexCivA 283SW319, 322 [quot CJ].
761-18 NJCir 143A82; TexCivA 283 SW319, 322 [quotCJ]. [b] (1) Sask [1929] 4DomLR183.
761-20 NJSup 130A16 [citCJ]; Tex CivA 283SW319, 322 [quotCJ].
761-26 91CalA165, 266P829, 830 [quot CJ].
763-36 See also 7LaA15.
763-38 105 Okl 52, 233P179.
763-43 88CalA418, 263P568, 572 [quot CJ]; 166Minn306, 207NW633; 88PaSuper258.
764-45 166Minn306, 207NW633.
764-50 135Wash209, 237P307; Man [1929] 4DomLR1045 (agent effecting exchange).
764-51 151Miss382, 118S199.
765-59 105 Okl 52, 233P179; TexCivA 283SW319, 322 [citCJ].
765-61 TexCivA 283SW319, 322 [cit CJ].
766-67 300Pa574, 151A360.
766-74 Mo 18SW(2d)382.
767-80 221MoA1066, 295SW838, 840 [citCJ].
768-89 133Misc355, 232NYS32.
771-15 215Ala73, 109S364, 365 [citCJ].
771-17 215Ala73, 109S364.
772-21 Alta [1929] 4DomLR241.
773-26 215Ala73, 109S364, 365 [quot CJ].
773-28 215Ala73, 109S364.
774-33 [1927]CanSC314, [1927] 1DomLR593.
775-36½-New. Contract with substituted principal.–A corporation cannot evade liability to pay commission for agent's procuring a loan for it on ground that money was not lent to it where new corporation took over its assets in conformity with lender's insistence and money was in fact lent to such new corporation. BC [1925] 3DomLR757.
775-37 36GaA694, 137SE842; BC [1928] 2DomLR121.
775-41 144 Okl 259, 291P74.
776-50 78Nebr775, 111NW845.
776-51 221MoA1066, 295SW838, 840 [citCJ].
777-54 228Ky450, 15SW(2d)270; 78 Nebr775, 111NW845.
777-55 36GaA694, 137SE842. [d] **Where agent's efforts induced by principal materially contribute to sale,** he is entitled to commissions. 206Cal414, 274P519.
777-56 [b] **Contract authorizing agent to sell motor trucks** in certain territory and prohibiting other sales has been held "exclusive selling agency contract." 219Ky66, 292SW472.
778-57 [b] 87PaSuper202.
778-59½-New. An exclusive agency to procure a loan, also does not preclude principal from negotiating a loan himself, [1925]CanSC690, [1925] 3DomLR 968.
778-59¾-New. since the excluding clause in the contract is satisfied by excluding other agents; [1925]CanSC690, [1925] 3DomLR968.
778-59¼-New. and if principal procures loan himself, agent is not entitled to commission therefor. [1925]CanSC 690, [1925] 3DomLR968.
778-61 Sask [1930] 2DomLR63.
779-66 120Kan681, 244P850.
779-69 120Kan681, 244P850.
780-77 36GaA694, 137SE842.
780-78 170La143, 127S393 (acquiescence of one acting jointly does not bind principal).
780-82 [b] 14F(2d)424 (where commission was on gross amount of orders accepted, it was held that agreements with customers to furnish weekly a minimum quantity were not within meaning of contract); 210Ky690, 276 SW558 (contract for commissions, as shown on discount sheet, construed to give commission on net amount received by principal as to items on which discount is allowed). See 242Mich204, 218 NW784. See also Mass 165NE389. [f] (5) Where contract so provides, agent is entitled to only equitable division of commission, in case of assignment of special assistance to him. 210Ky690, 276SW558.
782-84 [c] **Power of attorney conveying to attorneys undivided one-half interest** in "above described tracts or parcels of land" was present transfer of title. TexCommnA 12SW(2d)175.
782-88 Mass 166NE867.
782-90 BC 11DomLR131, 24WestLR57, 4WestWkly513 (agreement "to do square thing" as compensation).
783-95 249 IllA174 [citCJ].
783-98 [d] **Deductions not authorized.**–170La736, 129S147.
784-99 But see BC [1929] 4DomLR400.
786-20½-New. The subagent may be entitled to an accounting as against the principal. 110Conn452, 148A342.
787-25 103NJL553, 137A211, 213 [quotCJ]; 105WVa221, 141SE876, 57 ALR31.
788-28 TexCivA 9SW(2d)400 (right not affected by plaintiff's failure to show that hosiery furnished was also defective). [a] (3) Where manufacturer made customer exclusive agent for sale of shoes and agreed to replenish sizes, agent was entitled to damages on manufacturer's failure to fill in sizes ordered. 30F(2d)90. (4) Agent's failure to make settlements justifies dairy company's declining further to be bound. 251Mich450, 232NW181(2dcase).
789-32 [a] **Where seller had no knowledge of sale** made in exclusive territory of agent, there was no breach of contract. 231Ky240, 21SW(2d)288.
789-34 [a] See also 94Fla55, 113S687.
789-35 [b] Where contract is canceled by principal, agent need not bring suit for cancellation prior to suit for damages. 35F(2d)333.

789-36 143Wash17, 253P1078.
789-37 But see 56ND201, 216NW567.
790-41 43F(2d)625.
790-44 35F(2d)333 (basis on which damages for loss of prospective profits may be calculated). [b] (2) Company having exclusive agency for sale of coal in particular territory with option of renewal is not entitled to damages for loss of profit resulting from principal's failure to renew, where agent suffered loss during time contract was in force. 33F(2d)727. [c] **Breach of contract with distributors for establishment of selling agencies.**-27OhNPNS300.
790-47½-New. Expenses incurred by an agent are recoverable on breach of contract of the agency by the principal, preventing the agent from receiving the benefit from expenditures, 219Ky313, 292SW833.
790-47¼-New. but the agent cannot recover for resale loss on goods without showing that the loss was occasioned by such breach. 219Ky313, 292SW833.
791-49 55Fed451, 5CCA190; 117 Iowa 130, 90NW592; 210Mass8, 95NE961; 96Minn1, 104NW573, 113AmSR603, 1 LRANS445, 6AnnCas973; 101NY205, 4 NE264, 54AmR676; 174NY196, 66NE 731; 123AppDiv148, 108NYS336; 126 Misc299, 212NYS615 (value of contract to agent); 5SilvSup98, 8NYS125; 2 Misc371, 21NYS1092; 6NYSt89; Wash 290P853; 5 OntWN349, 25 OntWR298. [a] (2) Measure of damages is value contract to agent determined by profits to agent before breach, sales in such territory after breach, and business experience of parties in territory. 126 Misc299, 212NYS615. [c] **Damages from agent's own act.**-33F(2d)727.
791-50 33F(2d)727; 55Fed451, 5CCA 190; 177 IllA459; 161Ky542, 171SW 167; 228Ky450, 15SW(2d)270; 96 Minn1, 104NW573, 113AmSR603, 1 LRANS445, 6AnnCas973; 101NY205, 4NE264, 54AmR676; 174NY196, 66NE 731; 2Misc371, 21NYS1092; 6NYSt89. [a] **Where principal made sales within agent's exclusive territory** (1) principal was not entitled to deduct any allowance for overhead charges agent might have had to pay had agent himself made such sales. 296Pa377, 145A 915. (2) Principal is not entitled to allowance from agreed discounts payable to agent, for cost of shipping such tractors from its plant to agent's place of business. 296Pa377, 145A915.
791-51 117 Iowa130, 90NW592; 210 Mass8, 95NE961; 96Minn1, 104NW573, 113AmSR603, 1LRANS445, 6AnnCas 973; 75 Or519, 146P825, 147P525, LRA 1916B268, AnnCas1917B1190; 8SD579, 67NW607, 59AmSR777; 50Utah437, 168 P83; 28 OntL427, 4 OntWN1023, 12 DomLR613. See also TexCivA 9SW (2d)400.
791-53 37CalA590, 174P74; 229App Div679, 243NYS173.
791-55 42F(2d)440. [b] (9) Plaintiff having exclusive right to sell defendant's churns may recover loss of profits due to defendant's failure to ship churns. MoA 279SW238 (supplemental contract allowing direct dealings with subagents held not to prevent recovery). (10) Profits made in twenty-three counties before termination of agency furnish basis for determining profits which could be made in remaining counties. MoA 279SW238 (award of $5,000 held not excessive).
794-68 CalA 293P129; Eng [1924] 2 Ch271. See also 11LaA442, 123S477.
794-69 14F(2d)466, 468 [citCJ]; CalA 288P131; 125Kan641, 266P65 (interest on money borrowed).
794-70½-New. An insurance company, in allowing a financial correspondent, who had procured real estate loans for it, to pay defaulted installments, could reserve its right to collect the entire debt and limit its liability to the correspondent to an accounting for the correspondent's interest. 136SC111, 134 SE275; 136SC179, 134SE285.
795-74 3LaA353, 356 [citCJ]; 79Mont 327, 256P497; TexCivA 28SW(2d)877.
795-77 178Minn114, 226NW206(2dcase) (indebtedness for demurrage).
796-80 Eng [1914] 2Ch271.
797-87 14F(2d)466, 468 [citCJ]; 41 GaA738, 154SE649. But see NJCh 147 A787(2dcase); 127Misc665, 217NYS261.
798-90 252Mass291, 147NE872.
798-92 127Misc665, 217NYS261; 79 Wash10, 139P618, 51LRANS623.
799-94 252Mass291, 147NE872.
800-99 3LaA353, 356 [quotCJ].
800-8 22AlaA220, 114S281.
803-40 103Conn110, 130A79; 251NY 420, 167NE572; 218AppDiv83, 217NYS 820.
803-41 214Ala22, 106S166; 215Ky177, 284SW1045; 253Mass362, 149NE38, 42 ALR1307; 249NY307, 164NE108; 218 AppDiv83, 217NYS820; 115 Or472, 239 P96, 41ALR750; TexCivA 20SW(2d) 139; 68Utah398, 250P982; Utah 276P 645; 7SaskL163, 20DomLR682, 28West LR571, 6WestWkly1149. [a] (2) Cause of action for breach of warranty of authority does not rest on contract itself, but on contract which law implies. 251 NY420, 167NE572. [d] **Under Negotiable Instruments Law** one signing note as agent without authority is liable on note, and not merely for breach of warranty of authority. 222AppDiv383, 226 NYS233.
804-44 13LaA337, 125S507; 251NY420, 167NE572; 137MiscS79, 244NYS36.
805-47 214Ala22, 106S166; 73CalA571, 239P63; 285Pa273, 132A364 (agent assuming to act for nonregistered foreign corporation); Eng [1905] AC302.
805-48 95Va560, 28SE950.
805-50 103Conn110, 130A79; Eng 4 Bing66, 13ECL403, 130Reprint693; Eng Carth90, 90Reprint656; Eng Lev129, 83 Reprint332; Eng 1Salk210, 91Reprint 1297.
806-53 218AppDiv83, 217NYS820; 132 SC498, 129SE830, 832 [quotCJ]; Utah 276P645; Ont 10UCCP65; Eng 3B&Ad 114, 23ECL59, 110Reprint43. But see MoA 3SW(2d)1039.
807-56 214Ala22, 106S166, 167 [cit CJ]; 177Ark1085, 9SW(2d)569; 218 AppDiv83, 217NYS820; 224AppDiv401, 231NYS291; 126 Or317, 269P981; Utah 276P645; 194Wis1, 215NW436.
807-57 253Mass362, 149NE38, 42ALR 1307.
807-58 145Wash66, 54ALR1382, 258P 1035, 1036 [quotCJ].
808-59 Fla 128S635; 132SC498, 129SE 830, 832 [quotCJ].
808-62 20 OhA375, 152NE393, 394 [quot Cyc]; 132SC498, 129SE830, 832 [quot CJ]; NS [1928] 1DomLR548. See also 256Mass233, 152NE235.
808-63 115 OhSt157, 152NE27; 20 Oh A375, 152NE393, 394 [quotCyc]; 132 SC498, 129SE830, 832 [quotCJ].
809-64 Fla 128S635; 132SC498, 129SE 830, 832 [quotCJ].
809-65 132SC498, 129SE830, 832 [quot CJ].
809-66 132SC498; 129SE830, 832 [quot CJ].
809-69 218AppDiv83, 217NYS820. But see TexCivA 15SW(2d)670.
810-74 165La247, 115S475; 160Minn 341, 200NW300; Utah 276P645.
810-75 330 Ill 42, 161NE62. [a] **Statute requiring mandatory to "exhibit powers"** in order to escape personal liability means to explain or make known his authority. 165La247, 115S475.
810-76 165La247, 115S475; 288Pa264, 135A764.
810-79 330 Ill 42, 161NE62; MoA 3SW (2d)1039.
811-82 TexCivA 12SW(2d)648.
811-88 253Mass362, 149NE38, 42ALR 1307; 137MiscS879, 244NYS36.
811-89 TexCivA 20SW(2d)139.
812-92 14F(2d)131, 132 [citCJ]; 16 F(2d)893; 18F(2d)749; 26F(2d)116; 214Ala22, 106S166; 21AlaA531, 109S 573; Ark 3SW(2d)683; 73CalA571, 239 P63; 88CalA349, 263P550, 552 [quot CJ]; 84Colo538, 272P11; 161Ga468, 131SE510; 4HawaiiFed43; 336 Ill 542, 168NE637; 336 Ill 522, 168NE640; Iowa 229NW767; 164La431, 114S86; Me 152 A53; 313Mo169, 281SW422; 218MoA 60, 262SW66; MoA 291SW190, 192 [cit CJ]; 247NY392, 160NE651; 254NY114, 172NE260; 228AppDiv146, 239NYS261; 192NC549, 135SE454; 123 Or469, 259P 1064, 260P1099 (agent leasing property held not liable for failure of disclosed principal to deliver possession); 124 Or 332, 263P391; 10PaDist&Co 41; RI 136 A14; TexCivA 281SW288; 68Utah398, 250P982; 148Va167, 138SE515; 199Wis 139, 225NW822; Ont [1929] 4DomLR 913. But see 281US519, 50SCt372, 74L ed1011. [b] 88CalA349, 263P550.
813-93½-New. By executing a contract in behalf of the principal, the agent does not warrant authority of the principal to contract. 145Miss330, 110S795.
813-95 But see 44Philippine780 (agent obligating his principal to deliver specific property to third person may not thereafter appropriate such property to his own use, regardless of owner's consent).
813-96½-New. An agent of the disclosed principal binds either the principal or himself, but not both. 214Ala22, 106S166.
813-97 88CalA349, 263P550, 552 [quot CJ]; 313Mo169, 281SW422; 199Wis 139, 225NW822.
814-98 88CalA349, 263P550, 552 [quot CJ].
814-99 88CalA349, 263P550, 552 [quot CJ]; 225AppDiv507, 233NYS597; 199 Wis139, 225NW822.
814-1 32F(2d)680; 88CalA349, 263P 550, 552 [quotCJ]; 143Miss33, 108S283; 55ND817, 215NW268; TexCivA 26SW (2d)1100; 143Va815, 129SE513.
814-2 143Miss33, 108S283; 55ND817, 215NW268; 143Va815, 129SE513.
814-3 205 Iowa389, 217NW874.
814-5 18F(2d)749; 73CalA571, 239P 63; 246 IllA550; 218MoA60, 262SW66 (one acting for several persons may contract as agent for others and as principal for himself); NJSup 151A399 (agent cannot thereafter relieve himself of liability); TexCivA 20SW(2d)139. [a] **Agent signing his own name only without referring to any principal on face of instrument** is personally liable, though he is known to be or avowedly acts as agent. 88CalA349, 263P550.
815-6 TexCivA 16SW(2d)867 [quot CJ].
815-12 164La431, 114S86.
816-22 Me 152A53; 137Misc258, 244 NYS448.
816-23 21F(2d)653, 654 [citCJ]; 77Cal A389, 242P872; 201 Iowa561, 207NW 610 (husband claiming to have signed contract for his wife); 166Minn195, 207 NW305; 219MoA74, 266SW327. [a] 75 CalA389, 242P872. [b] **Action for rescission** may be maintained against one who has made contract for undisclosed principal. 166Minn195, 207NW 305. [c] **To action for recovery of payments** after rescission agency is no defense where principal has not been disclosed. 203Cal419, 264P759.
816-24 34Ariz387, 271P713, 714 [quot CJ]; MoA 13SW(2d)1095; 117Nebr355, 220NW598; 98PaSuper530 [quotCJ].
817-25 220Ala562, 126S626; 204Cal 618, 269P645, 62ALR1239; 10CalA719, 103P350; 73CalA571, 239P63; 1GaA 265, 57SE916; 37GaA646, 141SE420; 150 Ill 344, 37NE937; 336 Ill 542, 168 NE637; 252 IllA401; 170La763, 129S 156; 11LaA210, 123S506 (defendant purchasing merchandise without disclosing agency, of which agency plaintiff had no knowledge, is personally liable for purchase price); 254Mass76, 149NE 670; Mass 166NE708; 8MoA223; 75NY 378, 7AbbNCas1, 57HowPr97; 247NY 392, 160NE651; 192NC377, 135SE115; 127 Or364, 272P281; 5PaDist&Co 257; 11 OntWR563, 12 OntWR7.
818-29½-New. However, where a third person has knowledge or notice of the fact of agency, the name of the principal need not be disclosed in the body of the contract. 25F(2d)361.
818-30 196Cal672, 239P313; 95CalA1, 272P343; 170La625, 128S656(2dcase); Mass 167NE308; 171Minn507, 214NW 510.
819-31 96PaSuper293.
819-35 95CalA1, 272P343; 95PaSuper 351.
819-37 9CalA624, 99P1115.
821-42 10FCasNo5,708, 8Biss13; 49 NYS475.
821-42½-New. Signing a contract as agent does not of itself give notice of agency. 25F(2d)361.
821-43 98PaSuper530.
821-46 162Ga403, 134SE98; MoA 287 SW1069; 92PaSuper195. [c] (1) CalA 291P867.
822-47 213Ala19, 104S134 [citCJ]; 224

Ky56, 58W(2d)271, 274 [citCJ]; 230Ky 148, 18SW(2d)975; NJSup 132A662; 148Wash380, 268P873. [d] **Effect of contract disclosing name of principal.**–213Ala19, 104S134.

822-48 Iowa 229NW767; 122Kan479, 252P232, 233 [citCJ]; 164La431, 114 S86; NJSup 142A824; 216AppDiv322, 214NYS366 (before demand for repayment or discovery of mistake); Wash 289P520. [d] **Attorney collecting money pursuant to levy under execution** is liable only for sum remaining in his hands when judgment is set aside. 86 CalA532, 261P732.

823-56 19 OhA424. [c] **Agent not liable** for return of deposit without evidence of assumption of liability. 299Pa 25, 148A909.

824-59 104Conn73, 131A412; 124Misc 901, 209NYS720, 721 [citCJ]; 66Utah 208, 241P309.

824-60 CalA 274P377.

824-62½-New. Agent is not liable for disposition of funds left with his employee without employer's knowledge. LaA 129S394.

824-64 3LaA771, 772 [quotCyc]; Mass 171NE732; 115Nebr579, 213NW966, 52 ALR1393; 58ND20, 224NW913; Tex CivA 138W(2d)983; 148Va167, 138SE 515.

826-74 243NY450, 154NE307.

826-76 243NY450, 154NE307.

826-78 37GaA130, 138SE633; 40GaA 700, 151SE414; MoA 275SW592; MoA 300SW301; 115Nebr579, 213NW966, 52 ALR1393; 148Va167, 138SE515.

826-79 MoA 275SW592; MoA 300SW 301, 304 [citCJ]; 115Nebr579, 213NW 966, 52ALR1393; 243NY450, 154NE307.

827-81 46 Ida231, 266P659; 52ND721, 204NW614, 616 [citCyc]; 105WVa26, 141SE443.

827-82 But see 214AppDiv541, 212NYS 589.

827-83 66Utah208, 241P309 (malicious prosecution).

827-84 16F(2d)893; 174Ark24, 294SW 364; 104Conn73, 131A412; Md 150A 801; Mass 171NE732; NJ 147A398; 141Wash422, 251P868. [c] **In case agent represents quality in good faith** fraud with respect thereto is principal's act alone. Md 150A801.

828-88 332 Ill 150, 163NE544; MoA 275SW592; 243NY450, 154NE307; 112 OhSt476, 147NE645.

828-90 Md 150A801; MoA 275SW 592. See also 332 Ill 150, 163NE544; IndA 158NE255.

829-97 84CalA413, 258P409; 37GaA 130, 138SE633.

829-98 204Cal 535, 269P425, 61ALR 297; 332 Ill 150, 163NE544.

829-3 87PaSuper78, 81 [quotCyc].

830-4 Mass 167NE308.

830-8 90CalA640, 266P592 (on bond to secure payment of contract of sale); 92CalA308, 268P404; 133Misc330, 232 NYS300. [d] **Even though principal has renounced contract,** agent may enforce it. Mass 167NE308.

830-9 286Pa529, 134A494, 496 [citCJ].

831-26 99Vt208, 130A679, 682 [citCJ] (rule not applicable).

832-30 216Ala567, 114S130; 171Ark 45, 283SW362; 181Ark1004, 29SW(2d) 272; 101CalA204, 281P509; 233Ky19, 24SW(2d)903; 126Me205, 137A67; Mass 171NE435; 157Miss392, 128S351; 150NC718, 64SE885; 191NC323, 131SE 643; 196NC730, 147SE5; ND 233NW 245(2dcase); 294Pa238, 144A100; Pa 152A98; 138SC281, 136SE218; 154SC 407, 151SE570; SC 155SE231; TexCiv A 288SW1090; TexCivA 296SW927. [a] 216Ala567, 114S130 (where no prompt repudiation). [e] **Effect of agent's mistake.**–222Ky198, 300SW592. [f] **But misconduct of agent representing several principals** cannot be imputed to one of them not actually at fault. MoA 25SW(2d)138.

832-34 42F(2d)76; 199 Iowa245, 201 NW577; 206 Iowa469, 220NW49; 220 Ky338, 295SW137, 55ALR377; 253Mass 362, 149NE38, 42ALR1307; 83NH1, 136 A702.

832-34½-New. Where principal receives benefits from agent's unauthorized acts, injured party may compel restitution by principal, 215AppDiv267, 213NYS519.

832-34⅓-New. or defend action on contract after himself making restitution. 215AppDiv267, 213NYS419.

832-34¼-New. Under some statutes, where a person transacts business as a trader in his own name without complying with their provisions, all property acquired or used in such business is liable for his debts. 104WVa289, 140SE5.

832-34⅓-New. A private corporation engaged in the general automobile business and buying and selling cars and accessories is a trader within such statutes. 104WVa289, 140SE5.

832-34⅙-New. Automobiles placed with such corporation for storage and sale are acquired and used in the conduct of such business within such statutes. 104WVa289, 140SE5.

832-34½-New. Purchaser may recover from vendors earnest money paid to their agent. 220Ala595, 127S168.

832-35 29F(2d)83; 216Ala567, 114S 130; 171Ark45, 283SW362; 177Ark683, 7SW(2d)800; CalA 292P978; 35GaA 550, 134SE142; 253 IllA333; 218Ky 391, 291SW367; 233Ky19, 24SW(2d) 903; 127Me306, 143A173; Mass 171NE 448; Mo 18W(2d)103; MoA 278SW 1078; 125Misc892, 211NYS647; 150NC 718, 64SE885; 192NC377, 135SE115; 192NC549, 135SE454; TexCivA 288SW 1090; TexCivA 9SW(2d)374 (right of third person to hold principal to extent of agent's apparent authority, having been misled thereby, rests on estoppel); TexCivA 15SW(2d)36. [h] **Action against agent** has been held not an election, since agency being disclosed, agent was not liable. 336 Ill 522, 168NE640. [i] **Sealed contract.**–253 IllA333.

834-37 168La317, 122S51; 226AppDiv 550, 235NYS267; TexCivA 29SW(2d) 841.

834-39 42F(2d)76; 17Ariz491, 154P 1042, LRA1918F713; Ark 294SW6, 11 [citCJ]; 86CalA572, 261P737; 87CalA 642, 262P415; 102CalA1, 282P408, 74 Conn689, 51A1084; 69Ga652; 33GaA 701, 127SE670 (principal is not bound by unauthorized contract of accord and satisfaction issued by agent); 40 GaA525, 150SE462; 48 Ida771, 284P 1030; 830 Ill 42, 161NE62; 82 IllA178; 212Ky163, 278SW615; 12LaA150, 125S 599; MoA 25SW(2d)138; Or 291P352; 288Pa264, 135A764; 86PaSuper85; Tex CivA 287SW127; TexCivA 3SW(2d) 911; TexCivA 32SW(2d)252. See also TexCivA 9SW(2d)374. [h] **Prompt repudiation and no later conduct** by principal to ratify or confirm releases principal. 212Ky163, 278SW615. [i] **Special unauthorized contract without principal's knowledge** made between agent and third party is not binding on principal. 36BC127. [1925] 3DomLR 1169, [1925] 2WestWkly708. [j] **Negotiable instrument.**–134SC188, 132SE 44.

836-40 44Philippine19 (Civ. Code art 1727); TexCivA 18SW(2d)850.

836-47 MoA 8SW(2d)81.

836-48 See also 99NJEq894, 133A423.

836-49 36BC127, [1925] 3DomLR1169, [1925] 2WestWkly708.

836-51 66CalA323, 226P35 (rule inapplicable under facts); 40GaA335, 149 SE426; 246 IllA209; 163Minn362, 204 NW26, 27 [citCJ]; TexCivA 20SW(2d) 139; 152Wash262, 277P854.

837-53 163Minn362, 204NW26; 139SC 299, 137SE734, 736 [quotCJ].

837-54 139SC299, 137SE734, 736 [quot CJ].

837-57 50ND622, 197NW689; TexCiv A 284SW654, 661 [citCJ].

837-58 43F(2d)599; 205Cal 690, 272P 579; 292Pa194, 140A869 (agent's misappropriation of money directed to be paid to third person); 135SC409, 134 SE35. [d] **Mortgagee is not liable for misappropriation by agent** of itself and mortgagor, made possible by mortgagor's negligence. 22F(2d)126. [e] **Fraudulent representations** of real estate agent acting for himself did not invalidate written contract which purchaser made with vendor. 222Ky542, 18W(2d)966. [f] **Where lender's agent embezzles money** given him by lender to discharge liens on borrower's property, lender must suffer loss and borrower's note to lender is discharged to extent of such liens. 177Ark236, 6SW (2d)5.

837-58½-New. A borrower is held not relieved from liability where money loaned to him is misappropriated by his agent. 197NC413, 149SE377.

838-59 40GaA573, 150SE470 (implied consent).

838-60 157Fed506, 85CCA98; 196Cal 768, 239P309; CalA 288P448; 36GaA 230, 136SE180; 339 Ill 184, 171NE169; 149Va113, 140SE264, 56ALR421. [d] **Employment of mortgagee's agent by mortgagor** to obtain loan to discharge mortgage makes former agent of mortgagor, who must stand loss of conversion by agent of money so obtained. 213Ala516, 105S644 (agent of mortgagor for this transaction). [e] **It is immaterial** that agent acted in dual capacity without knowledge by either party that he was so acting. 196Cal 768, 239P 309. [f] **Vendee may rescind** where his agent also acted for vendor, though he has not been injured, and agent intended no wrong and vendor acted in good faith. 196Cal 768, 239P309. [g] **Vendor accepting benefits** from acts of his agent who was also acting for vendee without latter's knowledge that he was acting as vendor's agent cannot disclaim responsibility for such acts. 196 Cal 768, 239P309.

839-62½-New. Where papers are sent to a collecting bank at the request of the debtor, and the bank, after payment to it, fails to remit to the creditor, the debtor will not be discharged. 36Wyo 279, 254P123.

839-63 69Ga652.

839-64 30NM566, 240P469.

840-70 35F(2d)439; 197Cal 716, 242P 483; 72CalA78, 236P956; 83CalA470, 256P1109; Fla 128S841 (vendor may sue both undisclosed principals for balance due although note secured by mortgage for balance was executed by one of principals); 203 Iowa109, 202NW 535; 232Ky583, 24SW(2d)287; 243 Mich344, 220NW754; 246Mich19, 224 NW626; 192NC377, 135SE115, 117 [cit Cyc]; 44Philippine465; TexCivA 278 SW522; 150Va269, 142SE350. [a] 83 CalA470, 256P1109. [i] **Rule is inapplicable** if credit is extended exclusively to agent. Fla 128S841.

841-71 Fla 128S841; 218Ky391, 291 SW367.

841-72 3LaA336, 337 [quotCJ entire paragraph].

841-73 263Mass274, 160NE827; 243 Mich344, 220NW754.

841-74½-New. The rule cannot be invoked by a stranger to the contract. 202 Iowa1362, 212NW125.

842-75 218Ky391, 291SW367; 57 OntL 38, [1925] 3DomLR217 (party signing not given particular description).

842-76½-New. It has been held that the undisclosed principal is liable on an implied contract, even in the presence of an express contract, made by his agent. Mass 166NE629.

842-80 40GaA335, 149SE426; 215Ky 448, 285SW208, 209 [citCJ].

842-81 22AlaA624, 118S671 (unless afterward ratified by him); 176Ark387, 3SW(2d)53, 58ALR808; 246Mich19, 224NW626.

843-82 35GaA553, 134SE114; 253 IllA 333; 129Kan636, 284P369; 223AppDiv 494, 228NYS609; 128Misc14, 217NYS 189; 29Misc136, 60NYS291; 63Misc575, 118NYS627; NYCityCtSuppl 84. But see Pa 151A879. [a] But see 94NY145, 46AmR131.

843-83 128Misc14, 217NYS189 (recognizing rule).

843-89 196Cal 672, 239P313. (creditor of partnership may hold liable assignee assigning debts of partnership, though acting for undisclosed principal); 154 Miss846, 123S887; 95PaSuper410; 44 Philippine465; TexCivA 275SW81.

844-90 154Miss846, 123S887; 95PaSuper410; 44Philippine465; TexCivA 275 SW81; TexCivA 20SW(2d)139.

844-91 70CalA245, 233P381; CalA 286 P727; 8KanA333, 56P1124; 97Md319,

55A623; 248Mich486, 227NW794; 154 Miss846, 123S887 (facts constituting election to proceed against agent); MoA 288SW988; MoA 11SW(2d)1072; MoA 30SW(2d)154; 29AppDiv66, 51NYS391; 138NC191, 50SE619; 134Tenn457, 184 SW12; 152Wash262, 277P854. [d] **Principal and agent are not jointly liable** on contracts made by agent for principal. 70CalA245, 233P381. [e] **Election constitutes an estoppel in pais.**—CalA 290P127.

844-92 70CalA245, 233P381; CalA 286 P727; TexCivA 275SW81. [a] (2) Plaintiff must elect before close of trial which of two defendants he desires or intends to hold liable by judgment. 70 CalA245, 233P381. [b] **Right to sue agent** is not lost because suit is not brought against undisclosed principal also. 7F(2d)676. [c] **Where doubt exists as to relation,** better rule is to hold motion to require election under advisement until liability determined. CalA 290P127.

844-93 CalA 290P127.

844-93½-New. Third party may elect to sue disclosed principal, or to sue both him and undisclosed coöwner, later discovered. TexCivA 278SW522.

845-98 [a] **Default judgment against agent** in action against principal and agent taken before plaintiff acquired knowledge of their relationship does not constitute election, and such judgment may be set aside. 70CalA245, 233P381.

845-4 [b] **Action against principal and agent cannot be converted into alternative suit against principal** by voluntary relinquishment of suit against agent if principal can be held. 137Misc721, 244 NYS283.

846-6 70CalA245, 233P381; CalA 290 P127; CalA 286P727; MoA 30SW(2d) 154. See also 192NC377, 135SE115.

846-8 248Mich486, 227NW794.

847-17 212Ala644, 103S573; 252 IllA 92; MoA 275SW592 (possession of agent is possession of principal); 241NY177, 149NE343; 224AppDiv299, 230NYS192; 135SC123, 133SE205; 17Tex560, 67AmD 675; 141Wash422, 251P868.

848-19 218Ala684, 119S685; CalA 274 P377; 101CalA147, 282P537; 252 IllA 92; 256Mass442, 152NE918; 234Mich 11, 207NW856; MoA 31SW(2d)242; 224 AppDiv299, 230NYS192; 82NH556, 131 A352; 135SC190, 133SE709; 147SC27, 144SE592; 156SC286, 153SE128 (joint tort-feasor); 17Tex560, 67AmD675; TexCommnA 288SW119; 63Utah495, 227P791, 800 [quotCyc]; 66Utah208, 241P309. See also 28F(2d)883.

849-20 234Mich11, 207NW856; 17Tex 560, 67AmD675; 63Utah495, 227P791, 800 [quotCyc].

849-21 176Minn55, 222NW581.

849-22 140Miss479, 106S81; 224App Div299, 230NYS192 [aff 164NE597(3d case)].

849-24 215Ala231, 110S31.

849-28½-New. The principal is liable for all common-law consequences of an agent's wrongdoing in cutting trees on a third party's land including his malice or willfulness. 215Ala231, 110S31.

849-29 177Ark539, 7SW(2d)329; 72 CalA63, 236P344; 85Colo 9, 273P653; 108Conn511, 144A43 (where principal had means of knowledge); 48Ga516; 60 Md36; 60Md404, 45AmR741; 155Md 178, 141A550; 256Mass442, 152NE918; 12AllenMass49; 60Mo 413; Mo 201SW 1138; MoA 31SW(2d)242; NH 149A78 (2dcase); 68AppDiv458, 73NYS924; 1 DalyNY147; 2Disn302, 13 OhDecReprint185; 130 Or139, 279P289; 131 Or 185, 282P546; 138SC295, 136SE222; 138SC354, 136SE300; TexCivA 127SW 1189; TexCivA 281SW244; TexCivA 12SW(2d)1102; 63Utah495, 227P791, 800 [quotCyc]; 14Gratt(55Va)447; Eng LR5 PC394; Eng 16CB104, 81ECL104, 139 Reprint695; Eng 2C&P257, 12ECL559; Eng SC&P316, 34ECL754; Eng 5HLCas 72, 10Reprint824. But see 144Va727, 130SE794. [f] **Original holder of bond and mortgage,** forwarding them to attorney for collection under blank assignment, held liable for attorney's fraud in subsequently selling them. 138SC354, 136SE300, 303 [quotCyc].

850-30 150Md24, 132A278, 281 [quot CJ].

850-31 72CalA57, 236P319 (where principal allowed agent to combine own business with that of principal or attend to both at same time); 200 Iowa 267, 204NW240; MoA 275SW592; 115 Nebr579, 213NW966, 52ALR1393; 82 NH556, 131A352; TexCivA 293SW677. [a] **Owner of motor vehicle** is liable for injuries caused by employee of repair company while delivering car to owner after working hours at owner's consent but without authority of company. 104 Conn467, 133A667, 46ALR838.

851-34 31F(2d)225; 30Ariz253, 246P 546; 104Conn467, 133A667, 46ALR838; NJ 147A398; 224AppDiv299, 230NYS 192 [aff 164NE597(3dcase)]; 225AppDiv 380, 233NYS249; 119 Okl 155, 245P553; TexCivA 274SW295; 66Utah208, 241P 309.

852-36 21F(2d)883; 153Md36, 137A 498; 252Mass383, 147NE870; 114MoA 128, 89SW558; 73NH368, 62A219, 111 AmSR623, 2LRANS993, 6AnnCas675. See also 133 Iowa552, 110NW1046.

853-43 217Ky211, 289SW263.

853-45 217Ky211, 289SW263, 268 [quot CJ].

854-47 212Ala608, 103S658, 661 [quot CJ]; TexCivA 294SW900.

854-48 212Ala608, 103S658, 661 [quot CJ]; 217Ky211, 289SW263; 156Md36, 143A589; 181NC188, 106SE665, 24ALR 538; 136Wash645, 241P19, 20 [citCJ].

855-49 27 OhA179, 161NE35; TexCivA 294SW900. [a] 27 OhA179, 161NE35.

855-49½-New. Principal is held not liable in exemplary damages for an agent's acts where he did not participate in the acts or ratify them. TexCivA 282 SW278.

855-52 321Mo47 9SW(2d)897. See also 225Ky399, 9SW(2d)123; 145Wash338, 260P250.

855-54½-New. Where an agent appointed his subagent, principal is not liable. 135SC123, 133SE205.

855-57 128Misc144, 218NYS494.

856-63 16F(2d)880; 213Ala260, 104S 509 [citCJ]; 177Ark243, 6SW(2d)305; 100CalA221, 279P1041; 41 Ida511, 239 P1049, 1050 [citCJ]; 43 Ida279, 251P 615; 173Minn51, 216NW311; 178Minn 40, 226NW415; 136Miss563, 101S294; 102NJL85, 132A106; 213AppDiv787, 210NYS766; 245NYS696; 53ND718, 207NW487; TexCivA 29SW(2d)841; Wis 230NW615; Eng [1914] 1 Ir378. See also 142Fed16, 73CCA202. [c] 213 Ala260, 104S509 (representation of sales agent that machinery is in good running order). [f] **Mistake of telegraph company** in transmitting message is binding on sender where company acts as his agent. 180Ark422, 21SW(2d)964, 66 ALR195.

856-64 41 Ida511, 239P1049, 1050 [cit CJ]; 102NJL85, 132A106; 53ND718, 207NW487.

856-65 146Cal 91, 79P850; 9CalA136, 98P69; 48Ga516; 41 Ida511, 239P1049, 1050 [citCJ]; 178 Iowa943, 160NW279; 215Ky606, 286SW884; Me 151A725; 60 Md36; 60Md404, 45AmR741; 155Md 178, 141A550; Md 150A801; Mass 172 NE204; 12AllenMass49; Mich 217NW 22; 242Mich139, 218NW664; 173Minn51, 216NW311; 60Mo 413; 254Mo 238, 162 SW197; 102NJL85, 132A106; 101NJEq 466, 138A385; 63NY653mem [aff 2Hun 311, 4 Thomps&C524, 48HowPr193]; 115NY556, 22NE261, 5LRA540; 221App Div779, 223NYS642; 1DalyNY147; 2 Disn302, 13 OhDecReprint185; 66 Or 498, 134P1189; 131 Or580, 283P20; 285 Pa260, 131A858; 157SC464, 154SE657; 151Va976, 145SE735; 14Gratt(55Va)447; 141Wash422, 251P868; Eng LR 5PC394; Eng 16CB104, 81ECL104, 139Reprint 695; Eng 2C&P257, 12ECL559; Eng 8 C&P316, 34ECL754; Eng 5HLCas72, 10 Reprint824. [c] 213Ala260, 104S509 (representations as to horse power machinery will develop. [g] **Innocent vendor is not liable for agent's fraud in making sale.** 102NJL85, 132A106.

857-68 215Ky606, 286SW884; Mass 172NE204; 241Mich392, 217NW22; 213 AppDiv787, 210NYS766. [a] 215Ky606, 286SW884.

857-68 178 Iowa943, 160NW279; 251 Mich469, 232NW229; 141Wash422, 251 P868.

857-69 [b] **In double agency,** where **defrauded principal relies upon statements** as those of his own agent other principal is not liable. 251Mich469, 232NW229.

857-71 NJSup 128A608; TexCivA 8 SW(2d)230. [a] (1) 45 Ida270, 261P 683, 684 [citCJ].

858-72 253 IllA569; 150Miss646, 117S 254; 133Misc229, 231NYS544; 136Misc 500, 241NYS202; 155Wash45, 283P 479. [e] **Fraud on part of agent is prerequisite** to liability by innocent principal on representations which principal has neither authorized nor ratified. 133Misc229, 231NYS544. [f] **Where authority of real estate brokers was limited to procuring purchaser without right to make contract,** brokers' employee had no implied authority to make representation that oil company had offered to lease part of land for filling station for certain rent. Wash 275 P561.

858-73½-New. Representations of an agent on behalf of one principal are not binding on another principal for whom he acts in a subsequent transaction, although the principals are affiliated. 260Mass189, 156NE878.

858-73¼-New. Generally in case of agency for adverse parties, neither principal is responsible to other for representations of agent made in course of transaction. 251Mich469, 232NW229.

858-73¼-New. Principal is not liable for representations of agent for both parties where agent makes representations before becoming his agent, absent participation by principal. 251Mich 469, 232NW229.

858-74 102NJL85, 132A106. [b] **Where reliance was only on fraudulent acts of agent,** principal cannot be held liable therefor in absence of his ratification with knowledge. 102NJL85, 132 A106.

858-75 119MoA93, 96SW313; Eng 7H &N172, 158Reprint437.

859-78 6F(2d)862; 8F(2d)65; 20 F (2d)961, 964 [quotCJ]; 39F(2d)400; 215Ala205, 110S384; Ala 129S46; Ala 130S391; 23AlaA561, 129S300; Ark 31 SW(2d)409; 28Ariz112, 41ALR1274, 236P126, 129 [citCJ]; 33Ariz206, 263P 584, 588 [citCJ]; 168Ark756, 271SW 954; 171Ark1188, 287SW755; 173Ark 875, 293SW1026, 57ALR877; 197Cal 716, 242P483; 75CalA732, 243P443; 87 CalA188, 262P53(2dcase) (notice to highway commission is notice to state); 89CalA485, 265P340; CalA 287P988; CalA 293P136; 82Colo 478, 261P461; 106Conn127, 137A390; 108Conn126, 142A674; 3Del 259, 138A392; 15Del Ch198, 134A97; 36GaA159, 136SE171; 43 Ida540, 253P854, 857 [citCJperGivens,J]; Ida 286P920; 324 Ill 538, 155 NE324; 324 Ill 615, 155NE762; 237 Ill A1, 23 [citCJ]; 237 IllA596; 245 IllA 552; 246 IllA271; 89 IndA318, 164NE 298; 200 Iowa434, 204NW298; 200 Iowa1014, 205NW838; 120Kan151, 242 P129; 207Ky434, 269SW527; 210Ky 429, 276SW115; 217Ky211, 289SW263; 128Me177, 146A258 ("agent" need not be one on whom written notice might be served); 102Md608, 63A70; 156Md 610, 145A204; 261Mass116, 158NE344 (fraud in sale of store); 243Mich578, 220NW699; 321Mo47, 9SW(2d)897; 321Mo 1202, 14SW(2d)561(2dcase); Mo 26SW(2d)942; 90MoA691; 115Nebr 255, 212NW540; 69NH587, 45A414; 83 NH1, 136A702; NH 150A545; NJCh 147A388; 225AppDiv546, 233NYS612; 128Misc299, 218NYS401; 130Misc359, 224NYS344; 126 Okl 265, 259P523; 131 Or393, 283P415; 294Pa406, 144A294; 90PaSuper252; 54SD421, 223NW338; 152Tenn535, 279SW392, 393 [quotCJ]; TexCommnA 288SW119; TexCommnA 23SW(2d)300; TexCivA 281SW600; TexCivA 285SW681; TexCivA 296SW 621; TexCivA 3SW(2d)539; TexCivA 13SW(2d)962; TexCivA 16SW(2d)871; TexCivA 24SW(2d)507; 18Utah183, 55 P559; 66Utah82, 240P1105; 134Wash 262, 235P824; Wash 257P632; Wash 290P866; 108WVa93, 150SE521 (taxi driver held employer's agent to report accidents); 192Wis249, 212NW796, 798 [citCJ]; 46CanSC45, 3DomLR69, 22 OntWR485; NS [1930] 2DomLR415; 2 OntWN993, 19 OntWR38. [a] (1)

104NJL7, 139A805. [g] **Principal retaining benefits of agent's fraud** is chargeable with knowledge of agent. 40F(2d)88.

859-78½-New. Rule not dependent on agent's obedience to instructions. **Tex CivA** 24SW(2d)507.

862-80 324 Ill 615, 155NE762.

862-81½-New. Knowledge of the seller's traveling salesman at the time of receiving an order for goods that the buyer was a wholesaler and was purchasing the goods for resale to certain class of persons was notice to the seller of the particular purpose for which the goods were bought. 128 Or83, 262P939.

862-82 75CalA732, 243P443; 108Conn 126, 142A674 (presumption conclusive); 237 IllA596; 217Ky211, 289SW263; 115Nebr255, 212NW540; **TexCivA** 3 SW(2d)539; 152Va814, 148SE828.

862-83 20F(2d)961, 964 [quotCJ].

863-88 81Mont408, 263P972.

863-89 Or 289P375 (public agents).

863-91½-New. A saleswoman is a proper person to receive and convey to a storekeeper's authorized agent or officer notice by wife, to whom she sold a coat, of the wife's intention not to purchase except upon her own credit. 34GaA111, 128SE699.

863-92 7F(2d)174; 8F(2d)285; 85CalA1, 258P690; Fla 126S794; 327 Ill 406, 158NE692; 240Mich566, 215NW701; TexCivA 296SW678.

864-93 102CalA1, 282P408; 327 Ill 406, 158NE692; 141Miss30, 105S848; 316Mo 1118, 295SW763, 771, 772 [quot Cyc]; 295Pa62, 144A824; **TexCivA** 283 SW604. See also 204US272, 27SCt270, 51Led482 [aff 22AppDC368].

866-95 7F(2d)174; **MoA** 17SW(2d) 651.

866-95½-New. Notice to an independent contractor will not be imputed to the other contracting party. **Utah** 269 P132.

866-99 327 Ill 406, 158NE692; 199 Iowa1195, 201NW595; 117Nebr388, 220 NW830.

867-1 327 Ill 406, 158NE692.

867-2 199 Iowa1195, 201NW595.

867-2½-New. But the rule is announced in some cases that even though the agent receives information while acting for himself he is bound to communicate it when it becomes his duty afterward to act in his agency in reference to the very transaction about which he obtained knowledge that would affect his principal. 152Tenn 535, 279SW392.

867-2¾-New. Hence a salesman receiving notice of dissolution of partnership before selling goods to such firm and while acting for himself is bound when subsequently selling goods to the surviving partner to communicate his knowledge to his principal. 152 Tenn535, 279SW392.

867-5 327 Ill 406, 158NE692; SD 233 NW279 [citCJ].

868-7½-New. Where it is not shown that knowledge of an agent acquired in a transaction prior to the agency extended to the particular matter of which notice is sought to be imputed to the principal nor that the transaction generally was present in the mind and memory of the agent while acting for the principal, notice thereof will not be imputed to the principal. 41 Ida561, 240P446.

868-8 119 Okl 46, 247P993 [citCyc].

864-93 19F(2d)781, 788 [quotCJ]; 20 F(2d)961, 964 [quotCJ]; 39F(2d)400; 213AlaA242, 104S418; Ala 130S180.

869-10 324 Ill 538, 155NE324; 334 Ill 168, 165NE605; 217Ky211, 289SW263; 316Mo 1292, 295SW571; NJ 133A407; 121 Okl 31, 246P623; 298Pa503, 148A 706; **TexCivA** 18SW(2d)1098.

869-11 5F(2d)902, 905 [citCJ] (purchasers of note of corporation from director knowing proceeds are to be used to pay alleged debt from corporation to director are not purchasers for value); 8F(2d)65 (rule inapplicable under facts); 21F(2d)893; 39F(2d)400; 39F (2d)867; 40F(2d)260; 23AlaA561, 129 S300; 207Cal 798, 279P799; Cal 279P 797; CalA 290P623; 165Ga882, 142SE 267; 322 Ill 589, 153NE679; Ind 168 NE869; 200 Iowa1133, 206NW26; Iowa 228NW3; Iowa 230NW342; 217Ky 211, 289SW263; 240Mich319, 215NW 300, 302 [citCJ]; Mich 233NW185; MoA 258W(2d)545; 124 Okl 286, 255P 1015 [citCyc]; 295Pa62, 144A824; 13 PaDist&Co 743; 156SC480, 153SE462; TexCivA 13SW(2d)195; 152Va814, 148 SE828.

870-12 MoA 25SW(2d)545.

871-16 216 Ill 598, 75NE322; 121 Okl 31, 246P623, 625 [quotCJ].

871-17 121 Okl 31, 246P623, 625 [quot CJ]; Or 289P375; TexCivA 24SW(2d) 507; TexCivA 30SW(2d)71T. See also 138NH47, 138A297. [c] **Rule that, if agent and third person act in collusion** to defraud principal, latter is not bound by knowledge of agent, does not apply where principal is seeking to establish liability of third person. 198Cal 252, 244P368.

872-18 121 Okl 31, 246P623, 625 [quot CJ].

872-19 79CalA685, 250P705.

872-20 20F(2d)961, 965 [quotCJ].

872-20½-New. Notice to servant held not notice to lessee where uncommunicated to the latter, and no duty to communicate, under circumstances. 152Md 146, 136A651.

872-21 15F(2d)101; 170Ga185, 152SE 215. But see Ala 130S180; TexCivA 297 SW588.

872-23 TexCivA 294SW654.

872-24 46AppDC27; 249 IllA408; 223 Ky517, 3SW(2d)1095; 163La799, 112S 726. See also 16 Ind287; TexCivA 286 SW495.

873-27 49Philippine985.

873-31 Wis 231NW626.

873-31½-New. Mere excess of authority of agent is defense peculiar to principal. TexCivA 293SW613.

874-33 15F(2d)807, 809 [citCJ]; 90Cal A640, 266P592; 28Hawaii211; 9LaA 490, 121S248; 256Mass436, 152NE893; Mass 167NE674; 12PortoRicoFed158; TexCivA 286SW495.

874-35 Iowa 232NW116, 117 [citCJ]; RI 150A752.

875-41 251Mich7, 231NW45; 222App Div60, 225NYS327. See also RI 150A 752. Contra 162La117, 110S109. [d] **Seller is not entitled to demand name of principal before transferring property** where he made contract for sale with agent admittedly acting for undisclosed principal. NS [1929] 4DomLR813.

876-43 164La841, 114S706, 707 [cit CJ]; Mass 171NE448.

877-45 253 IllA333.

877-51 215Ky448, 285SW208, 209 [cit CJ]; 251Mich7, 231NW45; 147Miss43, 112S700, 703, 53ALR407 [citCJ&Cyc]; Wash 286P651.

877-52 147Miss43, 112S700, 703, 53 ALR407 [citCJ&Cyc]. [d] But see 169 Minn438, 211NW825.

879-62 199 Iowa1277, 203NW802, 805 [citCJ]; 246Mich82, 224NW404 (even though principal is not aware of agent's wrong); MoA 256SW520; 101NJEq373, 139A486; Vt 146A72. [a] **Principal seeking to enjoy fruits of contract secured by agent's fraud** cannot disclaim liability for such fraud. 215AppDiv 416, 213NYS569.

879-64 155Wash45, 283P479.

880-67 MoA 7SW(2d)387.

880-68 41GaA395, 153SE104(2dcase).

880-69 CalA 285P342; 37GaA619, 141 SE314; GaA 155SE777(2dcase); 242 IllA 111; 44Philippine19.

880-75 215Ky448, 285SW208, 209 [cit CJ]; 285Pa199, 131A700. 49Philippine 816. See also 38GaA473, 144SE802(2d case). [a] 215Ky448, 285SW208.

880-76 286Pa529, 134A494, 496 [cit CJ].

881-77 216Ala299, 113S28; 1LaA603, 605 [citCJ].

881-78 216Ala299, 113S28; Mass 171 NE435 (gift manifestly outside authority); 191MoA287, 177SW1092.

881-80½-New. , or that the principal may have some other appropriate remedy against other parties. 191MoA287, 177SW1092.

881-81 148Md449, 129A688. [c] **Where agent in breach of his trust** transfers property to another who has no knowledge of breach, principal has no remedy against transferee. Can [1927] 2DomLR1.

882-86 225AppDiv874, 233NYS810.

883-97 180Ark125, 20SW(2d)629.

884-3 TexCivA 299SW344. [c] **Holder of negotiable securities for value** who had no knowledge of agent's lack of authority to sell is not required to account therefor. 215AppDiv491, 214NYS 33 (agent had apparent authority).

834-4 191MoA287, 177SW1092; 150NC 718, 64SE885 (bona fide purchaser from bank acting as agent for collection only is not liable).

885-9 Mo 18SW(2d)445 (third persons aiding agents in concealing facts); Eng [1911] 2KB489.

886-12 100Vt246, 136A697.

886-18 [b] **Trespass** will not lie to recover rents collected by agent where agency contract does not require payment of identical money and it is not shown that rents were unlawfully collected and misappropriated. 91PaSuper 417.

887-23½-New. Agent cannot avoid liability for failure of principal to determine prior to loss or damage whether agent consummated act for which he was employed. MoA 258W(2d)484(2d case).

887-30½-New. An action of trover or on account stated cannot be used to recover an unadjusted account. 91PaSuper417.

888-34 292Pa244, 141A47.

888-36 245NYS432.

889-41 148Md449, 129A688; 292Pa244, 141A47; SD 225NW661. [d] 104Conn 169, 132A902.

889-42 148Md449, 129A688.

889-43 148Md449, 129A688.

891-54½-New. **Action for money had and received** will lie to recover money collected by an agent after the termination of his agency. 73CalA435, 238P 1102.

891-69 94Fla55, 113S687.

892-71½-New. and in such case the contract made with the agent must be shown. 13F(2d)62.

892-72 292Pa244, 141A47.

892-73 94Fla55, 113S687; 292Pa244, 141A47.

892-74½-New. Price which agent agreed to pay for books may be recovered by principal despite its refusal to deliver after breach of contract. 37F (2d)637.

892-77 Utah 276P645.

892-78 102NJL85, 132A106; Utah 276 P645.

893-88 [c] (2) 244Mich351, 221NW 179.

893-91 18F(2d)908.

894-96 18F(2d)908, 911 [citCJ].

894-97 18F(2d)908, 911 [citCJ].

895-6 100CalA531, 280P543.

895-7 15F(2d)263; 28F(2d)373; 28 Hawaii494; 291Pa448, 140A147, 148 [citCJ]; 103WVa733, 138SE449, 451 [citCJ].

896-9 [a] (1) 34F(2d)120. (2) In order that decree for absent cargo owner's agent can be entered, proof of agent's authority must be shown. 34F(2d)120.

896-13 103WVa733, 138SE449, 451 [cit CJ].

896-14 86CalA32, 260P324, 326 [cit CJ]; 159La236, 105S302, 303 [citCJ]; 147Va960, 133SE685.

897-20 See also 29PortoRico 948.

898-21 147Va522, 137SE614; Eng [1916] 2Ch233.

898-22 147Va522, 137SE614.

898-26 75NY378, 7AbbNCas1, 57How Pr97; 38AppDiv624, 57NYS1133.

898-27 20Ariz400, 181P457; 38AppDiv 624, 57NYS1133.

899-29 177Minn515, 225NW425.

899-31 100CalA531, 280P543 (agent who is liable to principal for price of thing sold may institute in his own name action for purchase price); 103 WVa733, 138SE449, 451 [citCJ].

900-33 5F(2d)708.

901-42 289Pa252, 137A257, 258 [quot CJ].

901-46 289Pa252, 137A257, 258 [quot CJ].

901-46½-New. Agent contracting for several principals may maintain single action for breach. 147Va522, 137SE614.

901-53 CalA 286P727. [e] **Where**

plaintiff is in doubt as to which defendant is liable, or how far liable, or whether as agent or as principal, disclosed or undisclosed, plaintiff may join all defendants, under civil practice act. 133Misc902, 233NYS448. [f] **Where existence of agency is issue,** alleged agent and principal may be joined. **CalA** 290 P127.

902–55 73**CalA**571, 239**P**63; 144**Ga**496, 87**SE**656.

902–56 73**CalA**571, 239**P**63. [c] **Agent participating in fraud on principal** may be joined as defendant. **TexCivA** 271 SW233.

903–63½–New. In an action by a lessor against his rental agent for an accounting of the proceeds of personalty on which plaintiff had a lien for rent, the tenant is not a necessary party. **SD** 225NW661.

903–65½–New. In an action against an attorney at law for secret profits in a leasing transaction of property owned by plaintiffs and others, including defendant's wife, neither such others whom defendant did not represent nor the lessee's agent who was coprincipal with defendant in procuring the lease were proper or necessary parties. 74**CalA**310, 240P43.

903–74 [a] (1) **Complaints held sufficient.**–215**Ala**621, 112**S**245. (2) In action against undisclosed principal. 248 **Mich**486, 227**NW**794.

904–76 215**Ala**621, 112**S**245, 251 [cit CJ]; 41 **Ida**723, 243**P**366; 122 **Or**579, 260**P**444, 447 [citCJ]; 136**SC**218, 43**ALR** 1212, 131**SE**424, 425 [citCJ]; **Tex CommnA** 281**SW**1043, 1044 [quotCyc]; **TexCivA** 290**SW**858, 861 [citCJ]; **Tex CivA** 6**SW(2d)**183, 184 [quotCyc]; 37 **Wyo** 50, 259**P**181, 183 [citCJ].

904–77 87**Colo** 301, 287**P**284; 94**Fla** 159, 113**S**685; 37**GaA**211, 139**SE**585; 13**LaA**270, 127**S**455; 136**SC**218, 43**ALR** 1212, 131**SE**424, 425 [citCJ]; **Tex CommnA** 281**SW**1043, 1044 [quotCyc]. [e] **TexCommnA** 16**SW(2d)**285. See also 87**Colo** 301, 287**P**284.

905–82 **TexCommnA** 281**SW**1043, 1044 [quotCyc]. See also 37**GaA**211, 139**SE** 585.

905–85 138 **Okl** 245, 280**P**826.

905–86 37**GaA**211, 139**SE**585 (allegations held insufficient); 202 **Iowa**15, 209 **NW**516 (insufficient allegations to show authority to make specified contract); 13**LaA**270, 127**S**455 (no showing that defendant was undisclosed principal).

906–87 37**GaA**211, 139**SE**585.

906–88 215**Ala**200, 110**S**286; 80**CalA** 377, 252**P**647, 650 [citCJ].

906–89 215**Ala**200, 110**S**286.

906–94 212**Ala**608, 103**S**658; 134 **Okl** 1, 272**P**436, 438 [citCJ].

907–95 124**Me**329, 128**A**694.

907–98 214**Ala**22, 106**S**166; 161**Ga**468, 131**SE**510; 29**PortoRico** 948.

907–99 83**CalA**566, 257**P**199 (action against agent). [d] **Complaint held insufficient** as against agent for misrepresentation of authority. 87**Colo** 301, 287 **P**284.

907–1½–New. A complaint in an action based on defendant's unauthorized assumption of authority to enter into a contract as agent does not state a cause of action to hold defendant personally liable on the contract in the absence of allegations that he personally bound himself by apt words in the contract. **Utah** 276**P**645.

907–1¼–New. Such complaint does not state a cause of action for breach of implied warranty or deceit where it does not allege defendant's lack of authority or plaintiff's ignorance thereof and reliance on implied authority or misrepresentation of authority. **Utah** 276**P**645.

908–12 [a] (6) Complaint alleging that defendant was plaintiff's agent in leasing premises and looking after collection of rents has been held to state cause of action for accounting of proceeds of personalty sold by lessee. **SD** 225**NW**661.

908–15 **Mass** 165**NE**673.

908–16 49**SD**18, 205**NW**708.

910–34 [b] (4) Petition based on misconduct in failing to obey instructions. 35**GaA**749, 134**SE**846. [h] **In action alleging material violation of instructions,** there need be no specific avermente of negligence. 35**GaA**749, 134**SE** 846. [i] **Allegations held insufficient** to state cause of action for damages. **Tex CivA** 16**SW(2d)**865.

910–37½–New. The petition should clearly disclose whether liability is claimed for breach of contract or for negligence. **TexCivA** 13**SW(2d)**384.

910–40 133**Misc**355, 232**NYS**32 (holding complaint for violation of exclusive selling agency by principal's operation in agent's territory sufficient); 295**Pa**396, 145**A**534 (conclusion of breach without stating facts or time held insufficient). [a] (4) Other instances. 202**Cal** 754, 262**P**713 (full amount recoverable).

911–43 [a] **Agent must allege that his acts were within scope of his authority** and on behalf of principal. 14**F(2d)** 466.

911–44 84**Mont**373, 275**P**761.

911–46 **MoA** 282**SW**105 (allegation sufficient as to agent's indorsement of principal's name on warrants following custom of many years). [c] **Answer that defendant acted in good faith** in believing he was dealing with authorized agent in making settlement of account held not demurrable. **TexCivA** 292**SW** 612.

912–51½–New. In suit by factory to recover price of tires, counterclaim alleging factory's breach by selling tires to competitor held proper. **TexCivA** 288**S W**558.

912–54 214**Ala**181, 106**S**871. But see 126**Kan**365, 367, 267**P**1001.

912–55 **TexCivA** 271**SW**654.

913–58 [c] **Admission only goes to character of agency alleged.**–124 **Okl** 215, 255 **P**706. [d] **Verification may be waived.**– 124 **Okl** 215, 255**P**706.

913–67 See also 94**Fla**55, 113**S**687.

914–80 [a] See also 29**PortoRico** 948.

914–91 [a] **Complaint not amendable** where in asserting cause of action accruing to principal agent does not bring action in name of principal as plaintiff, but in his own name. 29**PortoRico** 948.

915–97 **TexCivA** 10**SW(2d)**196. [a] **Pleadings held sufficient** to present question of agent's authority and issue of estoppel. **TexCivA** 293**SW**838.

915–2½–New. Facts constituting estoppel to deny agency must be pleaded to be available. **TexCivA** 25**SW(2d)**156.

915–3 **TexCivA** 28**SSW**271. See also 3 **LaA**516, 520 [citCJ]; 5**LaA**245, 253 [cit CJ (per Claiborne, J)].

915–12 **CalA** 292**P**529; 35**GaA**749, 134 **SE**846.

916–13 35**GaA**749, 134**SE**846. [b] **Witness could, in giving a history of negotiations,** testify to guaranty, though pleadings made no issue of guaranty. 41**GaA**189, 152**SE**141.

916–17 202 **Iowa**1291, 211**NW**716; **Tex CivA** 290**SW**858; **TexCivA** 18**SW(2d)**432.

917–21 56**ND**194, 216**NW**564.

917–22 153**SC**257, 150**SE**756.

917–27 126 **Okl** 241, 259**P**249, 251 [quot CJ].

917–28 126 **Okl** 241, 259**P**249, 251 [quot CJ].

917–29 126 **Okl** 241, 259**P**249, 251 [quot CJ].

918–38 222**Ky**183, 300**SW**633. [b] (6) Wholesalers who had had previous dealings with defendant through salesman who took orders principally from defendant's son may recover by reason of defendant's relations to her agents, although complaint stated cause of action against defendant personally without mention of agent. 136**SC**218, 43**ALR** 1212, 131**SE**424.

919–39 140**Mo** 172, 39**SW**776.

919–40 6**F(2d)**4.

919–43 **TexCivA** 6**SW(2d)**183. [b] But see **TexCivA** 285**SW**670.

919–47 38**GaA**791, 145**SE**478(2dcase).

919–49 151**Va**590, 144**SE**642.

919–50 151**Md**514, 135**A**383, 49**ALR** 1366; 249**Mich**63, 227**NW**789; **MoA** 26 **SW(2d)**812; 119 **Okl** 155, 245**P**553; 117 **Okl** 161, 245**P**863; 119 **Okl** 296, 249**P** 407; 123 **Okl** 110, 252**P**18; 127 **Okl** 64, 259**P**855; 137 **Okl** 1, 278**P**1096; **Pa** 152 **A**98; 44**Philippine**19; **TexCivA** 25**SW** (2d)156. But see **MoA** 25**SW(2d)**125.

920–51 But see 242**Mich**217, 218**NW** 803.

920–53 44**Philippine**19; **TexCivA** 288 **SW**271; **TexCivA** 25**SW(2d)**156.

920–54 44**Philippine**19; **Wash** 289**P** 1015 (notary before whom deed executed as agent of grantee).

920–63 72**Mont**338, 233**P**613. See also 299**Pa**315, 149**A**482. [b] **Presumption is not evidence.**–335 **Ill** 335, 167**NE**35.

921–67 80**CalA**377, 252**P**647, 650 [cit CJ]; 83**CalA**725, 257**P**175.

921–78 48 **Ida**538, 283**P**609.

921–79 But see **TexCommnA** 278**SW** 188.

922–84 220**Ala**227, 124**S**512 (that agent informed principal of every material fact, if any report of occurrence is shown).

922–94 217**Ala**441, 116**S**528; 95**CalA** 456, 273**P**50.

922–96 [a] **Principal presumed to know** manner in which agent conducted business. **TexCivA** 293**SW**838.

922–98 103**WVa**103, 136**SE**701.

923–10 88**CalA**349, 263**P**550; 228**App Div**402, 240**NYS**139.

923–13 216**Ala**415, 114**S**75; 86**CalA**640, 261**P**493; 97**CalA**397, 275**P**503(1stcase); 37**GaA**729, 731, 141**SE**678 [citCJ]; 46 **Ida**181, 266**P**1089, 1092 [quotCJ]; 88 **IndA**554, 163**NE**620; **Iowa** 229**NW**149; 210**Ky**690, 693, 276**SW**558 [citCJ]; 1 **LaA**544; 7**LaA**114; 9**LaA**98, 119**S**80; 151**Md**514, 135**A**383, 49**ALR**1366; 258 **Mass**585, 155**NE**589; **MoA** 297**SW**985; **MoA** 13**SW(2d)**1095; 114**Nebr**318, 207 **NW**500; 22**CAppDiv**242, 221**NYS**287; 112 **Okl** 23, 239**P**659; 119 **Okl** 155, 245**P**553; 117 **Okl** 161, 245**P**863; 119 **Okl** 296, 249 **P**407; 123 **Okl** 51, 251**P**1000; 123 **Okl** 110, 252**P**18; 127 **Okl** 64, 259**P**855; 137 **Okl** 1, 278**P**1096; 126 **Or**227, 269**P**207; 283**Pa**356, 129**A**99; 290**Pa**243, 138**A**758; 291**Pa**53, 139**A**606; 293**Pa**566, 143**A**195; 300**Pa**507, 150**A**900; **Pa** 152**A**98; 86 **PaSuper**122; 86**PaSuper**275; 96**PaSuper**69; 12**PaDist&Co** 390; 44**Philippine** 19; 47**RI** 466, 134**A**4; 132**SC**212, 128 **SE**423; **TexCivA** 280**SW**600, 602 [cit CJ]; **TexCivA** 286**SW**541; 100**Vt**161, 135**A**702; 134**Wash**221, 235**P**36; **Alta** 15**DomLR**905, 27**WestLR**160; **Man** [1929] 1**DomLR**721. [b] 44**Philippine** 19. [e] **One dealing with agent must be able to trace authority** he relies on to some word or deed of principal. 40 **F(2d)**21.

924–14 151**Md**514, 135**A**383, 49**ALR** 1366.

924–15 **Iowa** 225**NW**245; 210**Ky**690, 693, 276**SW**558 [citCJ]; **Pa** 152**A**98; 89**PaSuper**34; 53**SD**55, 220**NW**144, 145 [citCyc].

925–18 89**CalA**306, 264**P**560 (by death); 229**AppDiv**123, 241**NYS**142.

925–19 299**Pa**315, 149**A**482.

925–24 34**GaA**135, 128**SE**698; 46 **Ida** 181, 266**P**1089, 1092 [citCJ]; 220**Ky** 338, 295**SW**137, 55**ALR**377; 151**Md**514, 135**A**383, 49**ALR**1366; 119 **Okl** 155, 245 **P**553; 119 **Okl** 296, 249**P**407; 123 **Okl** 110, 252**P**18; 137 **Okl** 1, 278**P**1096; 290**Pa**243, 138**A**758; 89**PaSuper**34; 12 **PaDist&Co** 390; 53**SD**55, 220**NW**144; **TexCivA** 286**SW**541.

925–25 **Ark** 31**SW(2d)**945; 36**GaA**379, 136**SE**811; 42 **Ida**604, 247**P**12; 201 **Iowa**502, 207**NW**563; 2**LaA**286; 4**LaA** 441; 4**LaA**467; 154**Miss**396, 122**S**489; **Mo** 1**SW(2d)**103; **MoA** 30**SW(2d)**1087; 114**Nebr**318, 207**NW**500; 248**NY**250, 162**NE**22; 49**ND**777, 193**NW**481; 55**N D**817, 215**NW**268; 57**ND**37, 220**NW** 441; 123 **Okl** 110, 252**P**18; 283**Pa**356, 129**A**99; 296**Pa**26, 145**A**682; 300**Pa**238, 150**A**636; **Pa** 151**A**588; **TexCivA** 9**SW** (2d)277; **Alta** 15**DomLR**905, 27**WestL R**160. [h] **Where principal accepted fruits of agreement** compromising sales contract, evidence of terms of sales contract is admissible without first proving agent's authority to compromise. 87**PaSuper**106.

926–28 83**NH**47, 138**A**297; 250**NY**461, 166**NE**167.

926–36 **TexCivA** 286**SW**541.

926–37 218**Ala**352, 118**S**666; 22**AlaA** 272, 117**S**618 [certiorari den 218**Ala**66, 117**S**619]; **Ariz** 293**P**16; 177**Ark**195, 5 **SW(2d)**939; **CalA** 285**P**342; 46 **Ida**181, 266**P**1089, 1092 [citCJ]; 253 **Ill**248; 203 **Iowa**310, 210**NW**937; 207 **Iowa** 1139, 222**NW**373; **Iowa** 225**NW**245; 144**Miss**515, 110**S**442, 443 [citCJ]; 223 **AppDiv**155, 227**NYS**602; 136**SC**365, 133 **SE**834; 133**Wash**643, 234**P**662.

926–37½–New. or that the payment made to the agent reached the holder

of the security, 22AlaA272, 117S618 [certiorari den 218Ala66, 117S619].

927-39 46 Ida181, 266P1089, 1092 [cit CJ].

927-41 200 Iowa170, 202NW774; 203 Iowa310, 210NW937; MoA 26SW(2d) 1004. But see 177Ark366, 7SW(2d)321.

927-42 200 Iowa170, 202NW774.

927-43 253 IllA248.

927-44 253 IllA248.

927-45 249Mich99, 227NW778; 144 Miss515, 110S442, 443 [citCJ]; 81Mont 44, 261P620.

927-46 249Mich99, 227NW778.

927-47 48 Ida771, 284P1030; 86PaSuper122. [b] TexCivA 271SW654.

928-52 CalA 283P895.

928-53 144Ala545, 39S359.

928-56 83CalA339, 256P839; 253 IllA 248; 200 Iowa220, 204NW456; TexCiv A 9SW(2d)277.

928-58 Ark 318SW(2d)743; 139 Okl 68, 281P286.

928-59 217Ala441, 116S528.

929-62 Alta 15DomLR905, 27WestLR 160.

929-64 117Nebr388, 220NW830.

929-70½-New. In an action to charge defendant as the undisclosed principal, the evidence has been held sufficient to require defendant to show that the alleged agent was the real party in interest. 252 IllA401.

929-73 98PaSuper530. [a] That plaintiff elected to hold principal must be shown by agent. MoA 11SW(2d)1072.

930-78 169Ark1132, 278SW26 (agent for sale of oil leases who purchased himself has burden of showing utmost good faith of transaction); 233Mich425, 207 NW16.

930-82 47 Ida542, 277P554(2dcase).

930-83½-New. Coal handled by agent after refusal of offer to buy at fixed price will be presumed under existing arrangement. 19F(2d)834.

931-87 47 Ida542, 277P554(2dcase).

931-90 LaA 125S888.

931-90½-New. The burden is on plaintiff to prove that the damage was sustained because of defendant's wrongful acts. 262Mass348, 159NE922.

931-91 [b] Sellers, sued for commission have burden of explaining sales in agents exclusive territory. Iowa 231 NW347.

932-96 But see 144Wash543, 258P469.

932-98 98CalA75, 276P383; 106Conn 423, 138A444; 41GaA622, 154SE283; Mass 166NE867. [f] Testimony that sale by agent was to be approved held admissible where agency was special. 100Vt246, 136A697.

932-1 12F(2d)701.

932-2 213Ala256, 104S506; 219Ala53, 121S47; 168Ga429, 148SE152; 37GaA 407, 140SE638; 335 Ill 342, 167NE100; 9LaA649, 120S94; 248Mich465, 227NW 769; 249Mich63, 227NW789; 140Minn 8, 167NW119; 151Miss211, 117S534; 221MoA1101, 297SW119; NJSup 142A 564; 65AppDiv516, 72NYS819; 32Misc 203, 65NYS694; 140 Okl 125, 282P290; TexCivA 24SW(2d)524; 151Va590, 144 SE642; 151Va976, 145SE735; 3 OntWN 1526, 22 OntWR868, 4DomLR643. See also TexCivA 9SW(2d)374. [e] All circumstances surrounding transaction may be taken into consideration in determining whether agents have apparent authority to make contract. 179Ark 963, 19SW(2d)1107. [f] Evidence inadmissible.-TexCivA 26SW(2d)711.

933-3 207 Iowa1139, 222NW373; 106 Okl 35, 233P188 (circumstances); 290 Pa243, 138A758.

933-4 170Ga270, 152SE248; MoA 26 SW(2d)812; 72Mont338, 233P613; 140 Okl 125, 282P290; TexCivA 280SW600; 100Vt246, 136A697. [a] Termination of agency.-72Mont338, 233P613.

933-5 41GaA622, 154SE283; 49TexCiv A426, 109SW224; TexCivA 287SW127; 100Vt246, 136A697.

933-6 Mass 171NE474.

933-8 100Vt246, 136A697.

933-11 283Pa356, 129A99; TexCivA 289SW414.

933-13 6F(2d)4; 219Ala81, 121S66; Ala 130S409; 171Ark45, 283SW362; 173Ark1181, 292SW373; 177Ark1195, 9 SW(2d)558; CalA 292P991; 161Ga93, 129SE778; 224Ky386, 6SW(2d)458, 460 [citCJ]; MoA 278SW830; 221MoA173, 299SW601, 603 [citCJ]; 191NC210, 131 SE577; 126 Okl 241, 259P249; 283Pa 356, 129A99; 86PaSuper275; 50RI 140, 145A874; 53SD337, 220NW855; Tex CivA 273SW932; 100Vt161, 135A702; Va 155SE707. But see 31 OhA38, 166 NE248.

934-14 Ala 130S409; 242Mich217, 218 NW808; 126 Okl 241, 259P249; Pa 152 A95.

935-18 171Ark45, 283SW362; 173Ark 1181, 292SW373; 177Ark1195, 9SW(2d) 558; CalA 286P428; 291Pa53, 139A 606; Pa 152A95; TexCivA 289SW414; 100Vt161, 135A702. [b] (2) Authority to change or abandon written contract cannot be proved by agent. 218Ky422, 291SW356 (architect).

935-19 But see MoA 294SW439.

935-20½-New. Parol evidence is admissible to show agent's authority to fill in grantee's name on deed. 136 Misc206, 240NY8492.

935-21 82Mont150, 266P869, 873 [cit Cyc]. [a] 81Mont509, 264P396.

935-25 44 Ida435, 258P179; 151 IllA 582; MoA 278SW830; 49ND719, 193 NW308; 32 OklACR80.

935-26 [c] Designation of agency in contract with third person and in third person's check to alleged agent amount to mere declarations of agency not binding on alleged principal who had no knowledge of the transaction. 169Ark 430, 275SW522.

935-27 16F(2d)459; 23F(2d)266; 12 CustA56; Ala 130S409; 29Ariz468, 242 P1009; 169Ark430, 275SW522; 173Ark 1181, 292SW373; 173Ark147, 293SW 50; 175Ark784, 300SW388; 178Ark319, 11SW(2d)772; 180Ark877, 23SW(2d) 268; 181Ark478, 26SW(2d)896 (limited agency); 181Ark843, 28SW(2d)61; 82CalA35, 255P235; 101CalA241, 281P 661; 86CalA572, 261P737; 88CalA88, 262P820; 111Conn407, 150A303; 3Del 245, 138A277; 23AppDC398; 37GaA 407, 140SE638; 42 Ida1, 243P355; 44 Ida435, 258P179; 323 Ill 389, 154NE 117; 339 Ill 504, 171NE494; 151 IllA 582; 233 IllA515; 235 IllA401; 246 Ill A209; 85 IndA591, 155NE179; 201 Iowa 1094, 206NW143; 202 Iowa70, 209NW 525; 213Ky843, 281SW991; 223Ky16, 28SW(2d)1031; 223Ky777, 48SW(2d)707; 224Ky386, 6SW(2d)458, 460 [citCJ]; 235Ky283, 30SW(2d)958; 152Md146, 136A651; Mass 171NE474; 244Mich 306, 221NW161; 245Mich44, 222NW 126; 249Mich63, 227NW789; 153Miss 29, 120S203(2dcase); 154Miss396, 122S 489; MoA 256SW516; MoA 278SW830; MoA 296SW838; MoA 299SW601, 603 [citCJ]; MoA 16SW(2d)742; MoA 24 SW(2d)702; 81NH507, 128A685; NJ Sup 146A786(1stcase); 248NY250, 162 NE22; 227AppDiv62, 236NYS669; 191 NC210, 131SE577; 191NC710, 133SE85; 197NC413, 149SE377; 198NC589, 152 SE697; 198NC698, 153SE254; 49ND 719, 193NW308; 57ND37, 220NW441; 58ND685, 227NW226; 24 OhA15, 156 NE155; 31 OhA38, 166NE248; 116 Okl 106, 243P504; 117 Okl 161, 245P 863; 119 Okl 296, 249P407; 120 Okl 28, 250P78; 125 Okl 81, 256P894; 126 Okl 241, 259P249; 127 Okl 64, 259P 855; 127 Okl 215, 260P497; 127 Okl 257, 260P773; 131 Okl 101, 267P 847; 133 Okl 75, 271P166; 43 OklACR 149; 127 Or302, 272P271; 131 Or393, 283P415; 283Pa356, 129A99; 290Pa 243, 138A758; 296Pa467, 146A102; 297 Pa 105, 146A455; 300Pa507, 150A900; Pa 152A95; 92PaSuper213; 12PaDist& Co 390; 50RI 140, 145A874; 132SC511, 129SE213; 53SD275, 220NW521, 523 [quotCJ]; 117Tex124, 298SW550; Tex CivA 280SW600; TexCivA 290SW858; TexCivA 293SW194; TexCivA 299SW 342; TexCivA 299SW474; TexCivA 21 SW(2d)344; 70Utah95, 258P216; 100 Vt161, 135A702; 100Vt443, 138A782; 149Va789, 141SE764; 103WVa530, 138 SE101; WVa 153SE248; 19SWis315, 224NW102; 38Wyo 244, 266P109.

938-28 But see TexCivA 284SW322.

938-31 40F(2d)21; 136Fed179, 69CCA 195; 148Ala448, 42S735; 173Ark1181, 292SW373; 173Ark147, 293SW50; 178 Ark319, 11SW(2d)772; 180Ark877, 23 SW(2d)268; 88CalA88, 262P820; 235 Ill A401; 235Ky283, 30SW(2d)958; 170La 41, 127S358; 252Mass383, 147NE870; 150Mich50, 113NW596; 248Mich465, 227 NW769; 164Minn323, 204NW961; 153 Miss29, 120S203(2dcase); Mo 18SW(2d) 103; 218MoA54, 262SW393; 49ND719, 193NW308; 58ND685, 227NW226; 44 Philippine19; 53SD275, 220NW521, 523 [quotCJ]; TexCivA 293SW194; TexCivA 21SW(2d)344; 66Utah208, 241P309; 40 Wyo 1, 273P667.

938-32 323 Ill 389, 154NE117; 249 Mich63, 227NW789; MoA 285SW779, 782 [quotCJ]; 49ND719, 193NW308 (evidence held insufficient). [c] Conversations of alleged solicitors for attorney with third person are not admissible without prior proof of agency. 235 IllA 401.

938-33 Mass 171NE474.

939-41 42 Ida1, 243P355; 201 Iowa 1094, 206NW143.

939-42 89Ga708, 15SE626 (principal receiving benefit of transaction); 42 Ida 1, 243P355; 233 IllA132.

939-43 93Fed936, 36CCA46 (made in presence of known agents); 29F(2d) 331; 54Ala4; 216Ala605, 114S6; Ala 130S545; 1Ariz377, 25P538; 3Del 245, 138A277; 23AppDC398; 165Ga513, 141 SE211; 37GaA407, 140SE638; 41 Ida 723, 243P366, 367 [citCJ]; 117 IllA 652; MoA 296SW833; MoA 6SW(2d) 995; 31NC49; 68NC56; 68NC356; 198 NC589, 152SE697; 49ND719, 193NW 308 (evidence insufficient to admit declarations); 57ND37, 220NW441; 290Pa243, 138A758; 8WattsPa392; 135 SC365, 133SE834; SC 155SE231; 152 Tenn691, 280SW403, 407 [quotCJ]; TexCivA 271SW256; TexCivA 290 SW858, 860 [citCJ]; TexCivA 58W(2d) 792; TexCivA 12SW(2d)265; TexCivA 21SW(2d)344; TexCivA 26SW(2d)711; 100Vt161, 135A702, 704 [citCJ]; 151Va 590, 144SE642; 135Wash429, 237P 1012. [c] Whether there is sufficient proof of agency to warrant admission of acts and declaration of agent is preliminary question for court. 3WallUS 114, 18L ed116.

940-44 168Ark1116, 272SW644; 37Ga A407, 140SE638; 40GaA397, 149SE814; 191NC710, 133SE85; 152Tenn691, 280 SW403, 407 [quotCJ]; TexCivA 290SW 858, 860 [citCJ]. [a] 308Mo288, 271S W361. [c] Where declarations of agent that he was authorized to institute criminal prosecution were not made at the time the warrants were sworn out but sometime afterward, they are inadmissible. 152Tenn691, 280SW403.

940-45 See also TexCivA 271SW256.

940-46 Ala 130S545; 233 IllA132.

940-47 TexCivA 290SW858, 860 [cit CJ].

940-48 54Ala4; 3Del 245, 138A277; 125Ga222, 54SE65; 37GaA407, 140SE 638; 36Kan552, 13P827; 5Minn339.

940-50 320Mo 146, 6SW(2d)920, 928 [quotCJ].

941-51 214Ala181, 106S871; 201 Iowa 1094, 206NW143.

941-52 38Wyo 244, 266P109 (declarations that he was agent for third person held admissible against him and against surety on his bond).

941-55 222Ky183, 300SW633; TexCiv A 293SW838; TexCivA 9SW(2d)413.

941-58 35Wyo 319, 249P795.

942-64 19SWis315, 224NW102.

942-69 31Colo 256, 72P1052.

942-71 See also Ala 130S409. [a] See also 82CalA553, 256P242 (declaration of president of corporation held admissible).

942-76 SD 226NW267; 100Vt246, 136 A697.

943-82½-New. Fact of agency must be proved before conversations between alleged agents and a third person are admissible. 235 IllA401.

943-83 71CalA479, 235P673; 81Mont 509, 264P396.

943-86 98PaSuper183; TexCivA 270S W1101.

943-90 176Ark1204, 4SW(2d)512 (agent's letter to plaintiff discharging him as employee). [c] Minute books of corporation admissible to show employment of person as manager. 43 Ida 540, 253P854. [d] Contract made with third person held not admissible in is-

sue of authority. 220Ky105, 294SW 774.

944–92 35GaA749, 134SE846; 13LaA 337, 125S507; Mass 171NE448; 128 Misc118, 217NYS666; 49TexCivA426, 109SW224; 100Vt246, 136A697. [b] **Agreement with agent as to "guarantee" of loans** made by agent is not promise to answer for debt of another, and parol proof is admissible thereof. 35GaA749, 134SE846.

944–96 213Ala256, 104S506; Ala 130 S409; 82CalA35, 255P235; 3Del 245, 138A277; 37GaA407, 140SE638; 207 Iowa147, 217NW459; Iowa 224NW531; Iowa 228NW667; 224Ky386, 6SW(2d) 458; MoA 295SW1083; MoA 15SW(2d) 882 (course of dealing); 115 Okl 88, 241 P1099; 127 Okl 64, 259P855; 130 Okl 149, 265P1051; 132 Okl 11, 268P1111, 59ALR528; 132 Okl 213, 270P25; 143 Okl 52, 287P402; 135SC365, 133SE834; 137SC319, 135SE473; SC 155SE231; 54 SD435, 223NW354; TexCivA 287SW 275; TexCivA 12SW(2d)265; TexCivA 22SW(2d)150; TexCivA 24SW(2d)501; TexCivA 27SW(2d)371; 134Wash221, 235P36.

944–97 162Ga302, 133SE239; 37GaA 407, 140SE638; Ida 286P920; 115 Okl 88, 241P1099

945–98 323 Ill 389, 154NE117; 235 Ill A401 (acts of agent, alone, are not enough to establish agency); 70Kan 480, 78P825; 164Minn323, 204NW961; Mo 1SW(2d)103; MoA 30SW(2d)1087; 248NY250, 162NE22; 57ND37, 220NW 441; 117 Okl 161, 245P863; 127 Okl 64, 259P855; 127 Okl 215, 260P497; 127 Okl 257, 260P773; 133 Okl 75, 271P 166; 12PaDist&Co 390; 117Tex124, 298SW550; 143Va656, 129SE687, 691 [citCJ]; 192Wis124, 212NW280; 40 Wyo 1, 273P667. But see TexCivA 284 SW322.

945–99 216Ala605, 114S6; 164Minn 323, 204NW961; 133Misc189, 231NYS 377; 57ND37, 220NW441; 143Va656, 129SE687, 691 [citCJ].

946–1 82CalA519, 255P881; 85 IndA 591, 155NE179; 137SC319, 135SE473, 476 [citCJ]; TexCivA 293SW838; 143 Va656, 129SE687, 691 [citCJ].

946–5 222Ky183, 300SW633; 84Mont 314, 275P748; 226AppDiv266, 235NYS 1; 290Pa243, 138A758; TexCivA 293S W838; Wash 285P1117. [c] See also 46 Ida181, 266P1089.

947–6 175Ark1002, 1SW(2d)545.

947–7 235 IllA401.

947–10 175Ark1002, 1SW(2d)545.

947–11 32F(2d)23; Ariz 293P16; 84 Mont373, 275P761; 222AppDiv233, 225 NYS764; 143 Okl 52, 287P402; 131 Or 580, 283P20 (sale of goods at discount); 290Pa243, 138A758. [c] 140 Okl 147, 282P306.

948–16 249NY322, 164NE113; TexCiv A 289SW414.

948–18 127 Okl 215, 260P497; 44Philippine19.

948–21 100Vt161, 135A702.

948–25 82CalA35, 255P235; 151Md133, 134A37; 73SC48, 52SE789; TexCivA 25SW(2d)979.

949–27 100Vt246, 136A697.

949–28½–New. In determining whether contract of agent is ratified, it is proper to take into consideration all the circumstances surrounding the transaction. 179Ark963, 19SW(2d)1107.

949–29 [a] **Evidence admissible** to explain failure to account. 215Ala420, 110S895.

949–32 51Nev100, 269P606.

949–36 204 Iowa197, 215NW233; Tex CivA 19SW(2d)390; 153Wash427, 279 P585. [d] (1) TexCivA 292SW958.

950–37 204 Iowa197, 215NW233.

950–41 CalA 293P129.

950–42 CalA 288P131; CalA 293P129.

950–44 CalA 288P131.

950–45 CalA 288P131; CalA 293P129.

950–45½–New. , and certain facts may be material to show agent's good or bad faith. 72CalA94, 236P346.

951–52½–New. Evidence showing profits made by defendant are admissible on the amount of damage due to the revocation of an exclusive contract. 96Minn1, 104NW573, 113AmSR603, 1LRANS445, 6AnnCas973.

951–59 105WVa26, 141SE443 (evidence held to sustain judgment against agent for conversion of goods of third person transported for principal).

951–60 [a] 206Cal 414, 274P519; 82Cal A35, 255P235. [b] 17F(2d)919; 206 Cal 231, 273P766; 120 Okl 28, 250P78; 147Va252, 137SE374; Sask [1930] 2Dom LR63.

952–61 82CalA35, 255P235.

952–62 195 IllA572; 161Ky542, 171SW 167; 144Wash543, 258P469. [b] **Evidence held to establish** fraud of agent in sale of real estate lots. 201 Iowa 1253, 207NW586.

952–63 51Nev100, 269P606; 137Misc 582, 244NYS244. [a] TexCivA 283SW 319; TexCivA 16SW(2d)851. [b] 163 La322, 111S772.

952–64 80CalA301, 251P841 (insufficient to show constructive fraud); 262 Mass348, 159NE922 (defendant's advertisement of sale of plaintiff's machinery without plaintiff's consent imported malice).

952–65 19F(2d)834. [a] (11) To show authority of agent to transfer note by indorsement. 50ND573, 196NW820. (12) To support finding of chancellor in favor of agents' claims for compensation. 210Ky663, 276SW561. (13) To show good faith of agent for sale in purchasing for himself. 169Ark1132, 278SW26. (14) That vendor's agent first designed to defraud purchaser when he found timber on land worth more than contract price. 83NH47, 138 A297. (15) To justify conclusion that defendant was owner of establishment in question. 93CalA328, 269P740. (16) To require finding that consideration was procuring lease and making loan as recited in contract. 93CalA411, 269 P672. (17) To warrant finding that plaintiff had not proved that defendant's son was authorized to execute notes sued on. TexCivA 9SW(2d)277. (18) To warrant finding that defendant's father was acting as defendant's agent in renting farm to plaintiff. 151 Va590, 144SE642. (19) To authorize inference of agreement that cotton was to be sold when market value was such that sale of cotton would bring sum sufficient to discharge indebtedness. 39Ga A213, 147SE131. (20) In an action for fraud of grantor's agent. 151Va976, 145SE735. (21) To warrant finding that purchaser of machine from agent had knowledge that agent was without authority to transfer title. Minn 230 NW778. (22) To sustain finding that principal was in possession of automobiles. TexCivA 19SW(2d)365.

952–66 11LaA674, 124S774; Pa 152A 98; 5OntWN552, 25OntWR439.

953–67 147Miss43, 112S700, 53ALR407 (purchaser from agent); 225AppDiv 507, 233NYS597; Utah 276P645.

953–68 80CalA301, 251P841 (insufficient); 219Ky66, 292SW472; 83NH47, 138A297 (evidence to show selling agent's disregard of trust); 133Misc 447, 232NYS475 (evidence held insufficient to show substantial breach of contract).

953–69 43F(2d)920; 83CalA493, 257P 144 (evidence insufficient). [a] 41GaA 609, 154SE286(1stcase). (4) To show breach of contract giving exclusive selling agency. 141Miss762, 105S762.

953–70 94PaSuper374 (principal's contention not sustained).

953–75 25F(2d)361 (evidence held to show notice in third person of fact of agency).

953–76 Iowa 225NW859 (evidence insufficient to show that mortgagor made payment to agent as agent of mortgagee); 157Md107, 145A358 (proof that ostensible owner to whom payment of mortgage was made was in fact agent of assignee of mortgage held insufficient where assignment was recorded); 133 Wash643, 234P662.

953–80 251 IllA454 (insufficient to show that optionee for purchase of stock acted as agent of owner in selling stock); 201 Iowa561, 207NW610 (insufficient to show party signing contract for exchange of land was acting solely as agent for wife); 166Minn195, 207N W305 (evidence sufficient to show sale of bonds by one whose agency was not disclosed to or known to buyer); Tex CivA 28SW(2d)877; 194Wis1, 215NW 436 (evidence held not to warrant finding of holding out as agent to lease). [b] **Evidence held sufficient** to sustain finding that one was trader acting for himself. 177Minn491, 225NW443.

954–81 171Ark485, 284SW762. [a] 7F (2d)266; 32F(2d)195; Ala 129S58(2d case); 30Ariz144, 245P274; 71CalA 479, 235P673; 75CalA737, 243P686; 82 CalA35, 255P235; 92CalA334, 268P438; 93CalA21, 268P974; Ill 173NE402; 260 Mass134, 156NE893; 165Minn366, 206 NW442; 174Minn339, 219NW185; Mo A 16SW(2d)626; 47RI 39, 129A734; TexCivA 3SW(2d)466 (through another agent); TexCivA 9SW(2d)277; Tex CivA 15SW(2d)725; TexCivA 25SW (2d)979; 100Vt232, 136A394, 51ALR 628. [b] (1) 7F(2d)266; 171Ark485, 284SW762; 181Ark478, 26SW(2d)896; 181Ark843, 28SW(2d)61; 102CalA1, 282P408; CalA 283P895; 46 Ida82, 267 P447; 85 IndA268, 149NE104; 203 Iowa1001, 213NW571; 220Ky338, 295S W137, 55ALR377; 13LaA335, 127S 484; 252Mass385, 147NE870; 234Mich 542, 208NW700; Minn 230NW641; 116 Okl 106, 243P504; 123 Okl 110, 252P18; 121 Or303, 254P1023; SD 224NW929; 151Wash613, 276P562; 4AltaL415, 5 DomLR534, 21WestLR462, 2WestWkly 445. (2) To show prompt or effective repudiation of agent's acts. 212AppDiv 483, 209NYS183. (3) Failure to return note or repudiate payment of interest and court costs did not show ratification of unauthorized payment of counsel fees. 190NC423, 130SE49.

954–82 83CalA179, 256P555 (ratification not shown); 37GaA756, 142SE183 (both actual knowledge and ratification may be shown by circumstantial evidence); TexCivA 25SW(2d)979 (holding that ratification is not conclusively shown by delay in repudiating).

954–83 37F(2d)865; 219Ala81, 121S 66; 35Ariz226, 276P521; CalA 284P 697; 31Colo 256, 72P1052; 200 Iowa 139, 204NW216 (agency conclusively presumed, when necessary to protect third persons acting with prudence and in good faith, from similar prior acts of agent ratified by principal); 127Me 293, 143A66 (that one took assignment of mortgage and other furnished money is not inconsistent with relation of principal and agent); NJCh 147A388; 118 Okl 174, 247P671; 126 Or227, 269P207; TexCivA 273SW703; TexCivA 291SW 291; TexCivA 12SW(2d)265 (authority to execute lease). [a] Ala 129S46; 30 Ariz144, 245P274; 168Ark1116, 272SW 644 (agent's own and other testimony); 168Ark1057, 272SW668 (to show power of attorney was not forged); 178Ark 699, 11SW(2d)488; 181Ark265, 25SW (2d)434; 203Cal 453, 264P1096; 205Cal 690, 272P579; 70CalA336, 233P374; 80CalA724, 252P770; 82CalA553, 256P 242; 83CalA725, 257P175; 95CalA365, 272P1084 (agency by estoppel); 102 CalA136, 282P539; CalA 292P991; 76 Colo 550, 233P619; 77Colo 95, 234P 1070; 85Colo 149, 274P172; 35GaA260, 132SE923; 35GaA784, 134SE841; 37 GaA407, 140SE638; 38GaA568, 144 SE346; 41 Ida723, 243P366; Ida 286P 920 (between assignee of mortgage and mortgagee); 233 IllA614 (agency to lend and collect money); 235 IllA191 (agency for corporation); 252 IllA401; Ind 153NE179; IndA 169NE687; 126 Kan519, 268P859; Mass 172NE204; 176Minn294, 223NW137(2dcase); 177 Minn108, 224NW697; 34NM215, 279P 561(2dcase); 214AppDiv689, 213NYS 198; 222AppDiv126, 225NYS609; 115 Okl 88, 241P1099; 118 Okl 147, 247P 374; 125 Okl 81, 256P894; 126 Okl 241, 259P249; 128 Okl 141, 261P921; 124 Or332, 263P391; 64PaSuper388; 48RI 493, 139A300; 135SC365, 133SE834; TexCivA 287SW274; TexCivA 288SW 528; TexCivA 288SW627; TexCivA 6 SW(2d)221; TexCivA 10SW(2d)1051; TexCivA 19SW(2d)380; TexCivA 22SW (2d)150; TexCivA 30SW(2d)711; 63 Utah495, 227P791 (held within apparent scope of authority); Utah 290P161; 100Vt161, 135A702; 144Wash206, 257P 390; 148Wash572, 269P815; 191Wis

635, 211NW764; 35Wyo 319, 249P795. [b] 8F(2d)704; 25F(2d)232; 37F(2d) 856 (holding third persons did not assume to act as agents); 29Ariz96, 239 P787; 169Ark430, 275SW522 (mere declarations of agency); 74CalA310, 240P43; 44 Ida435, 258P179; 46 Ida 181, 266P1089; 323 Ill 389, 154NE117; 85 IndA268, 149NE104; IndA 171NE 881; 200 Iowa170, 202NW774; 203 Iowa310, 210NW937; 202 Iowa747, 210 NW954; 204 Iowa265, 213NW761; 120 Kan681, 244P850; 121Kan793, 250P 286; LaA 129S384; 258Mass585, 155 NE589; 164Minn411, 205NW257; 157 Miss311, 127S900; MoA 286SW401; Mo A 15SW(2d)957; MoA 24SW(2d)702; MoA 26SW(2d)1004; MoA 30SW(2d) 1087; NJCh 144A314; 24 OhA395, 157 NE719; 116 Okl 36, 243P133; 116 Okl 106, 243P504; 117 Okl 300, 246P220; 119 Okl 296, 249P407; 123 Okl 110, 252 P18; 124 Okl 298, 256P23; 127 Okl 212, 260P479; 131 Okl 101, 267P847; 139 Okl 202, 281P792(2dcase); 293Pa566, 143A195; Pa 152A98; 146SC385, 144 SE82; 50SD543, 210NW984; 53SD55, 220NW144; TexCr 28SW(2d)144; Tex CivA 280SW600; TexCivA 282SW325; TexCivA 293SW653; TexCivA 2SW(2d) 351 (to show authority to sign contract); TexCivA 8SW(2d)815; TexCiv A 31SW(2d)309; TexCivA 32SW(2d) 252; 68Utah407, 250P986; 144Va145, 131SE193 (to show that broker who forwarded order was agent of seller); 146Wash299, 262P968; 149Wash357, 270P1031; BC [1930] 3DomLR481. [g] 84CalA669, 258P663 (held extended for year). [i] **Declarations of alleged agent**, though received without objection, are of no probative force. 70 Utah95, 258P216. [j] **Agency may be proved by relation of parties**, and circumstances surrounding transaction. 339 Ill 504, 171NE494. [k] **Evidence authorized inference of consideration for agency.**–41GaA189, 152SE141. [l] **Verbal authority** to make release must be proved by clear and convincing evidence. 107WVa632, 149SE819.

956–84 37GaA407, 140SE638 (evidence held to show attorney's agency for wife); 206 Iowa475, 218NW949 (agent for lender); MoA 22SW(2d)174; 258 Mass585, 155NE589; 122 Okl 216, 253P 982; SD 231NW908; TexCivA 15SW (2d)725; Sask [1930] 2DomLR63. [b] (2) Evidence held to show that intermediary between lender and borrower, embezzling money, was agent of lender. 177Ark236, 6SW(2d)5. (3) Stipulation in the contract between lender and intermediary as to relationship is not conclusive. 207 Iowa808, 221NW796. (4) Evidence held to show agency for lender. Ont [1929] 4DomLR721. [c] **Provision in contract for payment of agent by certain parties** establishes that he was their agent. 319 Ill 60, 149NE 586.

956–85 235 IllA401; 9PaDist&Co 670. See also 86PaSuper275. But see 98Pa Super520.

956–86 172Ark117, 288SW377; 176Ark 238, 3SW(2d)20; 87Colo 353, 287P855 (to receive payment); 99NJEq678, 134 A343; Or 289P503 (direct or circumstantial evidence); TexCommnA 1SW (2d)878; TexCivA 23SW(2d)886; 133 Wash662, 234P665; 43Wash527, 86P 845, 17AmSR1064. [a] (1) 24F(2d) 329 (to warrant fitness of article sold); 31F(2d)414 (to execute trade acceptances); 38F(2d)452 (apparent authority to make adjustment and settle with factor); Ala 129S58(2dcase) (principal's acquiescence must be given weight); 172Ark117, 288SW377; 176 Ark1204, 4SW(2d)512 (authority to discharge employee); 72CalA94, 236P 346 (to use own judgment in settling with buyer or accepting buyer's rejection of goods); 82CalA519, 255P 881; Conn 151A492; 34GaA120, 128SE 222 (authority of farm overseer to purchase supplies); 39GaA213, 147SE131 (to accept and apply proceeds of cotton sale to note); 41GaA836, 155SE105 (2dcase); 233 IllA614 (authority to receive payment); 179 Iowa1005, 162NW 245 (to show authority to receive payment of mortgage debt); 202 Iowa1149, 212NW480; Iowa 232NW498; 125Kan 530, 264P737 (exclusive agency); 128 Kan145, 276P813; 218Ky422, 291SW 356; 229Ky195, 16SW(2d)1018 (to sell and collect for lumber); 9LaA649, 120 S94; 168La317, 122S51 (that cotton growers, including plaintiff, were warranted in relying on broker's general authority as defendant's agent unlimited by secret or private instructions); 116Me140, 100A502 (to show authority to receive payment of mortgage debt); Me 151A537; 255Mass189, 151NE59; 260Mass134, 156NE893; 246Mich296, 224NW325 (that attorney was general agent for mortgagee and had latter's money on hand to loan); 175Minn197, 220NW602; 176Minn496, 223NW779; 177Minn119, 224NW696; 156Miss689, 126S822 (foreman's agency to engage physician to treat workmen on construction job); 218MoA54, 262SW393 (in action to cancel mortgage to show broker was agent of borrower to secure subsequent mortgage and agent of lender to distribute proceeds); MoA 278SW1078 (to show implied authority to bind seller); MoA 291SW512 (authority of owner of note pledged to receive payment); MoA 295SW1083; MoA 15SW(2d)882; 84Mont314, 275P 748; 92Nebr841, 139NW663 (to show authority to receive payment of mortgage debt); 92Nebr845, 139NW665 (to show authority to receive payment of mortgage debt); 83NH47, 138A297 (that agreement extending time for payment under land contract was not against interest of owner); 250NY461, 166NE167; 218AppDiv531, 218NYS 180; 243NYS259 (to make contract with broker); 137Misc582, 244NYS244; 198 NC698, 153SE254; 34ND187, 157NW 1038 (to show authority to receive payment of mortgage debt); 50ND330, 196 NW303 (authority of agent to transfer note by indorsement); 52ND822, 204NW196 (to show authority to receive payment of mortgage debt); 55 ND817, 215NW268; 114 Okl 231, 246P 222; 125 Okl 81, 256P894; 127 Okl 64, 259P855; 130 Or522, 279P867 (to bind defendant to pay note executed in favor of plaintiff by others); 133SC353, 131SE146 (authority to bind defendants in purchase of fertilizer for which manager of farm gave note); 144SC 271, 142SE623 (receiving payment); 54 SD54, 222NW496; TexCivA 293SW630; TexCivA 293SW338; TexCivA 6SW(2d) 221 (to receive goods on credit); Tex CivA 10SW(2d)196; TexCivA 10SW (2d)223; TexCivA 18SW(2d)850; 149 Wash99, 270P137; 199Wis529, 227NW 33; 35Wyo 319, 249P795. (2) To show want of reasonable care or prudence in making unauthorized contract with agent. 42 Ida604, 247P12. (3) Other instances. TexCivA 24SW(2d)725. [b] (1) 218Ala352, 118S666; 219Ala205, 121 S735; 173Ark1181, 291SW993; 181 Ark843, 28SW(2d)61 (authority to sign note); 181Ark1004, 29SW(2d)272; 73 CalA476, 238P1062; 77CalA132, 245P 1102; 80CalA301, 251P841; 102CalA 365, 283P329; CalA 283P895; CalA 291 P629; 34GaA240, 129SE118 (to authorize inference of authority to execute check); 339 Ill 504, 171NE494 (that one lessor had authority to make contract or modify lease); 203 Iowa1001, 213NW571 (to receive payment); Iowa 225NW859; Kan 289P427(1stcase); 213Ky389, 281SW185, 186 [citCJ]; 170 La324, 127S739(1stcase); 12LaA150, 125 S599; 207Mass378, 93NE704 (to show authority to receive payment); 252 Mass385, 147NE870 (to show apparent authority of agent to make contract of guaranty); Mass 166NE573 (to change substance of agreement); 172 Minn433, 215NW842 (to show authority of agent to receive payment of mortgage without possession of note); 176 Minn399, 223NW459; Minn 230NW641; 155Miss699, 125S118; MoA 16SW(2d) 107; MoA 16SW(2d)742; MoA 30SW (2d)1087; MoA 31SW(2d)220; 51Nebr 81, 70NW504 (to show authority to receive payment); NH 136A702 (to show apparent authority to invite visitors to premises); 94NJEq526, 121A 515 (to show authority to receive payment); 253NY270, 170NE915 (to show apparent agent of stockbrokers); 245N YS384; 26ND426, 144NW1077; 28 OhA 356, 162NE746; 119 Okl 296, 149P407; 123 Okl 110, 252P18; 131 Or393, 283P 415 (selling note); 284Pa485, 131A272; Pa 152A98; 91PaSuper604; 44Philippine19 (to receive payment); 53SD113, 220NW479; TexCivA 280SW600; Tex CivA 3SW(2d)911; TexCivA 30SW(2d) 535; 134Wash94, 235P18; 135Wash52, 236P788 (actual or apparent authority to buy apples); Wis 233NW442. (2) To show estoppel of principal to deny agent's authority. 42 Ida604, 247P 12. [f] **Declarations of agent**, standing alone, are insufficient to show authority to do act in question. 42 Ida604, 247P 12. [g] **Evidence held to show that plaintiffs did not hold agent out as authorized to sell.**–181Ark1004, 29SW (2d)272. [h] **Evidence held insufficient to sustain finding** as to extent of agent's authority. Mass 171NE466. [i] **Proof of authority to indorse commercial paper** must be of clearest kind. MoA 26 SW(2d)794. [j] **Circumstances and course of dealing** may be sufficient to establish authority to receive payment of negotiable note. 143 Okl 52, 287P 402.

958–87 TexCivA 287SW87.

958–87½–New. An agency to receive payment may be established by direct or circumstantial evidence. MoA 291 SW512.

958–88 41GaA214, 152SE291 (inference of acts in scope of authority, held authorized). [b] **Evidence held insufficient** to sustain authority of attorney, scrivener of writing purporting to extend terms of lease, where attorney disclaimed authority and there was no evidence of ratification. 31 OhA38, 166N E248.

958–92 253NY444, 171NE701.

959–93 40F(2d)835 (whether agent violated instructions); 222Ky183, 300SW 633; 262Mass348, 159NE922; Mass 166 NE867; 237Mich152, 211NW41 (amount allowable to agent on adjustments); 244Mich351, 221NW179 (genuineness of signature on note forwarded to principal by agent; genuineness of agent's receipts; whether agent turned over amount received to another; whether agent caused false signature to be made, and agent's fraud in inducing principal to accept such note); 198NC589, 152SE697; 125 Okl 166, 256P890; 54 SD435, 223NW354; TexCivA 29SW(2d) 500; TexCivA 30SW(2d)711; 146Va 617, 131SE793. [b] TexCivA 274SW 349. [c] **Jury not bound by testimonies of agent**, but may consider all facts, though contradictory. TexCivA 270SW 1101. [d] **Existence and nature of agreement between plaintiff's agent and defendant** held for jury. 146Va617, 131 SE793. [e] **Evidence held sufficient to raise issue of agency.**–TexCivA 25SW (2d)678.

959–94 28Ariz454, 237P642 (in action for breach of contract of agency for management of real estate); 45 Ida143, 260P1035; 262Mass348, 159NE922; 135Misc547, 239NYS96. [b] **Presumption of continuing relationship** of agency is sufficient to take case to jury, even if orally contradicted. 299Pa315, 149A482.

959–95 46 Ida471, 268P570; 222Ky 183, 300SW633.

959–96 120Kan151, 242P129; 210Ky 690, 276SW558; 79Mont327, 256P497; 31 OhA38, 166NE248; 116 Okl 297, 244 P739; 130 Or195, 279P539; TexCivA 8 SW(2d)230.

959–97 245NY245, 157NE125.

960–98½–New. Whether principal concerted with others to procure order for himself to defraud agent of commission held for jury. TexCivA 29SW(2d)937.

960–2 210Ky690, 276SW558 (proper division between agents, where plaintiff was given assistance pursuant to contract); 242Mich204, 218NW784 (construction of ambiguous oral contract as to whether commissions were payable on receipt and acceptance of or-

ders or when customers had remitted in full); BC 11DomLR131, 24WestLR 57, 4WestWkly513 (agreement "to do square thing" as compensation). [a] **Pleadings and evidence sufficient** to take case to jury. TexCivA 29SW(2d)937.

960–7 32F(2d)23; 213Ala256, 104S 506; 214Ala501, 108S335; 216Ala605, 114S6; 218Ala674, 120S153; 219Ala53, 121S47; Ala 130S409; 173Ark1181, 291 SW805; 34GaA73, 128SE207; 40GaA 377, 149SE799(1stcase); 48 Ida221, 281 P1; 88 IndA518, 162NE372; 213Ky843, 281SW991; 263Mass147, 160NE821; Mass 167NE674; Mass 172NE240; 241 Mich343, 216NW927; 243Mich344, 220 NW754; 249Mich63, 227NW789; 140 Miss479, 106S81; 157Miss392, 128S351; MoA 288SW988; MoA 297SW985; MoA 5SW(2d)682; MoA 21SW(2d)899; 82 Mont185, 266P394; 118Nebr425, 225 NW32; 253NY444, 171NE701; 197NC 208, 148SE42; 57ND43, 220NW630; 115 Okl 88, 241P1099; 116 Okl 297, 244 P739; 125 Okl 166, 256P890; 125 Okl 276, 257P759; 127 Okl 64, 259P855; 128 Okl 141, 261P921; 129 Okl 130, 263 P1088; 130 Okl 111, 265P133; 130 Okl 149, 265P1051; 131 Okl 101, 267P847; 132 Okl 11, 268P1111, 59ALR528; 132 Okl 213, 270P25; 134 Okl 1, 272P436; 138 Okl 24, 280P295; 140 Okl 201, 282P 452; 141 Okl 14, 283P549, 67ALR1410; 130 Or195, 279P539 (whether servant or agent of agent is agent of principal is question of fact); 132SC212, 128SE423; 136SC267, 134SE252; 146SC385, 144 SE82; 147SC27, 144SE592; 150SC433, 148SE364; 155SC507, 152SE707; 54 SD435, 223NW354; TexCommnA 23SW (2d)333; TexCivA 282SW325; TexCiv A 284SW322; TexCivA 285SW699; Tex CivA 287SW275; TexCivA 5SW(2d) 529; TexCivA 5SW(2d)792; 100Vt161, 135A702; 151Va590, 144SE642; 135 Wash429, 237P1012; 198Wis461, 224 NW702.

961–8 118 Okl 181, 247P689.

961–9 34GaA73, 128SE207; Mass 165 NE474; 140Miss479, 106S81.

961–10 175Ark784, 300SW388; 3Del 245, 138A277; 200 Iowa170, 202NW 774; 197NC147, 147SE822; 197NC322, 148SE458; 118 Okl 181, 247P689; 120 Okl 28, 250P78; 120 Okl 174, 252P56; 127 Okl 257, 260P773; 130 Okl 149, 265 P1051; 131 Okl 101, 267P847; 137 Okl 1, 278P1096; 141 Okl 207, 284P895; 297Pa105, 146A445; 96PaSuper69 (binding instructions for defendant required); 47RI 466, 134A4; 142SC375, 140SE804; 100Vt161, 135A702; 152 Wash131, 277P453.

961–11 26F(2d)164; 246Mich19, 224 NW626; 82NH482, 136A136; 123 Okl 51, 251P1000; 125 Okl 81, 256P894; 6 PaDist&Co 638; 132SC212, 128SE423; 147SC27, 144SE592.

962–12 213Ala256, 104S506; 150Md24, 132A278, 281 [quotCJ]; 116 Okl 297, 244P739.

962–16 299Pa315, 149A482. [c] **Whether dealer handled cars of another make, in violation of agreement** is jury question. 42F(2d)440.

962–18 299Pa315, 149A482.

962–19 20F(2d)824; 32F(2d)23; 35F (2d)333; 35F(2d)563; 40F(2d)21; 104 Ala176, 16S46; 218Ala242, 118S674; 218Ala674, 120S153; AlaA 129S711(2d case); 172Ark69, 287SW595; 173Ark 1181, 291SW805; 173Ark1136, 294SW 69; 177Ark195, 5SW(2d)939 (to receive payment); 177Ark1195, 9SW(2d)558; 178Ark458, 10SW(2d)892; 179Ark963, 19SW(2d)1107; 72CalA 94, 236P346 (questions of fact for court in trial without jury); 77CalA462, 247P236; 220Ky105, 294SW774; 222Ky183, 300 SW633; 153Md36, 137A498; 156Md36, 143A589; 264Mass246, 162NE354; Mass 171NE435; 235Mich633, 209NW 807; 241Mich343, 216NW927; 172Minn 433, 215NW842; 173Minn166, 216NW 801; Mo 15SW(2d)945; 216MoA673, 271SW538; MoA 278SW1078; MoA 279 SW433; MoA 297SW119; MoA 4SW (2d)486; MoA 8SW(2d)81; MoA 14SW (2d)491; MoA 14SW(2d)664; MoA 15 SW(2d)882; MoA 21SW(2d)932; MoA 24SW(2d)649; 78Mont40, 252P313; 118Nebr425, 225NW32; NJ 134A776; NJSup 140A401; 220AppDiv263, 221N YS420; 224AppDiv299, 230NYS192; 224AppDiv492, 231NYS552; 115 Okl 88, 241P1099; 125 Okl 276, 257P759; 127 Okl 64, 259P855; 140 Okl 201, 282P452; 141 Okl 14, 283P549, 67ALR1410; 130 Or195, 279P539; 290Pa243, 138A758; RI 132A1; 138SC281, 136SE218; TexCommn A 23SW(2d)333; TexCivA 190SW817; TexCivA 273SW650; TexCivA 281SW 288; TexCivA 284SW322; TexCivA 287 SW275; TexCivA 289SW189; TexCivA 8 SW(2d)735; TexCivA 9SW(2d)374; Tex CivA 19SW(2d)390; Utah 279P499; 101 Vt452, 144A376; Vt 146A250(2dcase) (vendor's agent's authority to agree that, if purchaser bought lots, modern improvements would be made); 143 Wash665, 255P1033; 144Wash294, 257 P840; WVa 153SE248; WVa 154SE 769; Eng 4A&E478, 31ECL218, 111Reprint866; Eng 17Beav151, 51Reprint 990; Eng 2F&F185. [g] See also 97 Mass89.

963–20 150Md24, 132A278; 220AppDiv 263, 221NYS420; TexCivA 284SW322; TexCivA 18SW(2d)692.

964–22 MoA 8SW(2d)81. [a] **Collection of mortgage debt.**–93 Ill 511; 27 IllA232; 85 Iowa543, 52NW497, 39AmSR311; 90 Iowa191, 57NW705; 79Mich181, 44NW 429; 74Minn16, 76NW950; 92NJL487, 105A195; 62NY621; 107Wis453, 83NW 660; 33NS469; 31 Ont436; 12 Ont702.

964–23 275US120, 48SCt57, 72LEd75, 55ALR457; 7F(2d)266; Ark 31SW(2d) 743; 124 Okl 215, 255P706; 297Pa105, 146A445; 53SD113, 220NW479; 135 Wash52, 236P788.

964–24 CalA 291P629; 125 Okl 81, 256 P894; 289Pa207, 137A232; 291Pa53, 139 A606; 292Pa164, 140A871; Vt 148A869 (2dcase).

964–25½–New. Agent's apparent authority to make agreement is question of law. Wash 285P1117.

964–26 104Ala176, 16S46; 6PaDist&Co 638.

964–29 104Ala176, 16S46.

964–30½–New. Whether third person misled by apparent power of agent is for jury to determine. TexCivA 273SW 650.

965–31 225Ky399, 9SW(2d)123. See also 164Minn293, 204NW963.

965–32 MoA 27SW(2d)776; TexCivA 16SW(2d)867.

965–33 TexCivA 24SW(2d)507.

965–34 Okl 291P501.

965–36 MoA 16SW(2d)676.

965–37 171Ark485, 284SW762.

965–38 20F(2d)824; 213Ala256, 104S 506; 173Ark1180, 292SW135; 179Ark 963, 19SW(2d)1107; 83CalA339, 256P 839; 251Mich329, 232NW232; 173Minn 166, 216NW801; MoA 279SW433; MoA 8SW(2d)81; MoA 21SW(2d)193; 57ND 844, 224NW297; TexCivA 284SW322; Utah 279P499. See also TexCivA 9SW (2d)374.

966–39 TexCivA 284SW322.

966–40 171Ark485, 284SW762; Ark 31 SW(2d)743; 283Pa356, 129A99.

966–41 35F(2d)825; TexCivA 278SW 522.

966–41½–New. Where only one reasonable conclusion can be drawn from facts, question for reasonable time for repudiation is one of law for court. TexCivA 278SW522.

966–43 216Ala567, 114S130; CalA 293 P129; 200 Iowa434, 204NW298; Mass 166NE867; 50ND455, 196NW307; 143 Va12, 129SE374.

966–44 40F(2d)835 (instruction properly refused); 168Ala304, 53S303 (charge held erroneous); CalA 288P 131; 170Ga270, 152SE248 (charge held erroneous); 35GaA749, 134SE846; 151 Md392, 135A166; 253Mass368, 149NE 118; Mo 18SW(2d)445 (instructions held proper); MoA 24SW(2d)191; 102 NJL371, 132A750; 191NC323, 131SE 643; 115 Or672, 239P112 (instruction held properly refused); TexCivA 26SW (2d)711 (refusal to instruct as to apparent, implied, and ostensible agency held erroneous).

966–45 41GaA189, 152SE41 (instruction erroneous as confusing liability for violating general and specific instructions); MoA 9SW(2d)681.

967–51 168Ga429, 148SE152 (instruction held proper); 35GaA749, 134SE 846; 86 IndA19, 155NE710. [a] 93Cal A92, 276P422 (instructions held not erroneous); 35GaA784, 134SE841; 127 Kan531, 274P217; MoA 16SW(2d)742 (instruction placing burden on defendants held not erroneous); 133SC353, 131SE146 (warranted by evidence); TexCivA 25SW(2d)979 (held sufficient); 143Va12, 129SE374.

967–52 51Colo 355, 117P999 (requested charge held properly refused upon evidence); 35GaA260, 132SE923; 253Mass 368, 149NE118 (request properly refused); MoA 297SW985; 133SC353, 131 SE146 (instruction that principal would be bound if he knew that agent was holding himself out as such held proper under allegations that defendants made note through agents).

968–53 216Ala567, 114S130 (authority to change specifications, though no authority to change contract); 220Ky105, 294SW774. [a] **Instructions held not erroneous.**–MoA 207SW119; 190NC423, 130SE49; 195NC328, 142SE27; 133SC 353, 131SE146 (instructions relative to scope or apparent scope of authority and estoppel of principal warranted by evidence).

968–54 MoA 285SW516 (instruction warranted by evidence); MoA 16SW (2d)742 (refusal not error under evidence); 132 Or533, 286P560 (instructions held not erroneous); TexCivA 286 SW541; 151Va590, 144SE642.

968–55 CalA 288P131. [b] **Instructions improperly refused.**–TexCivA 26 SW(2d)711.

968–56 35GaA508, 133SE648; 132SC 212, 128SE423.

968–58 261Mass153, 158NE328, 54ALR 1328.

968–59 MoA 8SW(2d)81.

969–61 98CalA92, 276P422; 50ND455, 196NW307. [a] **Evidence sufficient** to authorize affirmative change. 215Ala 420, 110S895.

969–62 [c] **Specific finding on question of ratification held unnecessary.**–93CalA 21, 268P974.

969–64 93CalA411, 269P672.

969–65 71CalA479, 235P673 (findings warranted by evidence). [a] **Evidence sufficient to sustain finding** that person acted as plaintiff's agent. ND 233NW 245(2dcase).

969–66½–New. Proof that act was done by agent will sustain a finding that it was done by the principal. TexCivA 290SW858.

969–70 285Pa426, 132A287.

970–76 45 Ida143, 260P1035.

970–77 173Minn166, 216NW801; 130 Okl 285, 267P266; 43 OklACR149. [a] 134Wash221, 235P36.

971–78 21AlaA593, 110S321; 173Minn 166, 216NW801.

AGGREGATE

973–17 22AltaL482, [1927] 2DomLR 1020, [1927] 1WestWkly981 (aggregate value).

AGGRIEVED

973–29 50Nev181, 254P1080, 1081 [cit CJ].

975–44 254Mass325, 150NE228.

976–49 255Mass611, 152NE220.

AGRICULTURAL

982–53½–New. "agricultural chemistry," 125Misc381, 211NYS635.

AGRICULTURE

988–1 65 IndA408, 117NE507 ("agricultural laborer"); 179 Iowa936, 162NW 249, 7ALR1285 (term defined); 143La 39, 78S143 ("agricultural pursuits"); 197MoA682, 201SW558 ("agricultural product"); 55Utah489, 187P833 ("agricultural laborer").

988–4 [a] **Construction and validity of statute** relating to farm bureau. 126 Kan322, 268P91.

988–9 73CalA268, 238P787. [b] **Collection of information for crop reporting purposes.**–(1) Statute requires landowners or their tenants or agents to furnish information required for crop reporting purposes, and imposes penal obligation for failure to do so. 317Mo403, 296SW 381. (2) Statutes held not unconstitu-

tional as class legislation. 317Mo403, 296SW381.

988-11 See also 85 **IndA**572, 154NE883.

988-12½-New. Violation of rule of corporation commission relative to construction of cotton gins as contempt. 122 **Okl** 45, 250P514 (purchasing machinery and depositing building materials on land).

988-13 214**Ala**38, 106S231. See also 230**AppDiv**252, 243NYS644.

988-15 170**Ga**13, 152SE91; 135**Misc** 539, 239NYS20 (quasi judicial officer). [b] (2) Term of office of inspector cannot be lawfully terminated on mere advice of commissioner of agriculture that inspector's services are unsatisfactory where governor fails to concur in commissioner's actions or to order dismissal of inspector. 98**Fla**212, 123S749. (3) Commissioner of agriculture acts merely in advisory capacity to governor with regard to dismissal of inspectors. 98**Fla** 212, 123S749. [c] **Commissioner of agriculture.**–Where inspector of agricultural department was prevented from performing his duties by refusal of commissioner of agriculture to recognize him, he had right to receive his salary up to time when his tenure was lawfully terminated. 98**Fla**212, 123S749. [d] **Inspector employed by Commissioner is not officer** but employee of department and deputy of commissioner. **Fla** 128 S853(2dcase). [e] **Construction of statute** creating office of inspector in agriculture department. **Fla** 128S853(2d case).

988-16 170**Ga**13, 152SE91. [a] **Appropriation for payment of salary of county agent.**–102**WVa**212, 135SE5. [b] (1) **Right to salary of inspector of department** of agriculture continues till his tenure of office is lawfully terminated. 98**Fla**212, 123S749. (2) Inspector of agricultural department is state officer whose salary is payable monthly upon his own requisition. 98**Fla**212, 123S 749.

988-17½-New. Farmers signing agreement for appropriation of county funds for county agent and demonstration agent cannot withdraw names after agreement becomes effective. **WVa** 153 SE506.

989-19 172**Minn**344, 215NW510.

989-20 See also 172**Minn**344, 215NW 510. [a] **Acceptance of seed under statute** held no estoppel of denial of liability of note given therefor. 172**Minn**344, 215 NW510.

989-21 53SD174, 220NW618; 100**WVa** 461, 130SE654. [a] **Financial inexpediency** does not excuse county court from complying with statute directing it to make appropriation of money for salaries of educational agents. 100**WVa** 461, 130SE654. [b] **In Utah.**–66**Utah** 184, 240P454. (2) Such statute is not unconstitutional as imposition by legislature of tax for county purposes. 66 **Utah**184, 240P454. (3) Appropriation of county funds so authorized is for public purpose. 66**Utah**184, 240P454. [c] **In South Dakota.**–53SD174, 220NW 618.

989-22½-New. Where a landlord and his tenant make application to a county for seed grain at a stated price pursuant to statute and the tenant signs the formal contract and the landlord signs a memorandum at the foot thereof stating that he agrees to the terms thereof as owner, the landlord is liable for payment for the grain furnished. 49**ND** 414, 191NW493.

989-22⅓-New. A statute limiting the time within which a remonstrance may be filed to a petition for an appropriation of money from the general county fund for the use of a farm bureau is mandatory. 114**Nebr**69, 205NW999.

989-22¼-New. In Alberta a lien given by statute to the Province for guaranteeing a loan for the purchase of live stock takes priority over all other charges subsequent to passage of the statute, even though loan was made thereto. **Alta** [1925] 3**DomLR**377, [1925] 2**WestWkly**415.

989-22⅓-New. Incorporated county farm bureau is not entitled to aid where it raises money from yearly dues in excess of statutory provision. 208 **Iowa** 614, 226NW182.

989-26 115**Nebr**579, 213NW966, 52**ALR** 1393.

989-27 57**ND**872, 224NW193. [e] **That agricultural association receives annual grants from county and state,** and transfers title to its property to state in trust, to remain as long as annual appropriations are made, does not constitute such association a public corporation, when state has no authority to regulate policy of association, select its officers, or interfere in its management, though association exists for benefit of public and no profit inures to members. 57**ND**872, 224NW193.

990-31 But see 115**Nebr**579, 213NW 966, 52**ALR**1393.

990-32 [c] **Corporations for coöperative marketing of tobacco crops** held lawful. 88 **IndA**469, 150NE384.

990-32½-New. Court has jurisdiction over member of tobacco growers coöperative association to enjoin him from selling his tobacco. 144**Va**684, 132SE 306.

990-32⅓-New. Provision of rice grower's contract with association as to notice held waived. 174**Ark**1180, 295SW 401.

990-32¼-New. A statute authorizing coöperative cotton gins without adjudication of necessity is valid. 26F (2d)508.

990-32⅕-New. Coöperative marketing acts do not contravene the equal protection clause of the constitution. 25 **Oh NPNS**1.

990-33 [f] **Assessment on shares of stock.**–192**Wis**242, 212NW667. [g] **Adoption of constitution and by-laws.**–County agricultural societies may adopt constitution and by-laws only in substantial conformity with rules and regulations of state board of agriculture. 117**Nebr**397, 220NW688. [h] **Power of state board of agriculture to adopt rules and regulations for organization of county agricultural societies** was not affected by L. (1905) c 2 or amendments thereto. 117**Nebr**397, 220NW688.

990-34 92**Fla**432, 109S331, 333 [citCJ]; 315**Mo** 560, 286SW381, 384 [quotCJ]; 117**Nebr**397, 220NW688 (substantial compliance with rules and regulations of state board of agriculture required). But see 90**CalA**709, 266P604.

991-35 315**Mo** 560, 286SW381 (County Farm Bureau Act held valid).

991-41½-New. Anti-Trust Act exempting agricultural societies from its application is unconstitutional. 9F(2d) 176.

992-47 [b] **Provision that stock of warehousing corporation,** organized only as part of coöperative marketing association, shall be issued only to association's members, held valid. 221**Ky** 67, 297SW695.

992-56½-New. A subscription agreement to a coöperative poultry association is construed to permit owners of fractions of one thousand hens to become subscribers. 197**Cal** 245, 239P 1086.

992-56¼-New. In an action against a subscriber to a subscription agreement for liquidated damages arising from refusal to deliver eggs to plaintiff association, the contention that bona fide subscriptions to such were not secured was held not to be sustained. 197**Cal** 245, 239P1086.

992-56¼-New. Condition of produce sale agreement as to the number of subscribers held complied with. 197**Cal** 245, 239P1086.

992-56⅕-New. An objection that a produce sale agreement differed from one agreed to be signed is held too late. 197**Cal** 245, 239P1086.

992-56⅙-New. Charter of Dark Tobacco Growers Association, by use of term "dark tobacco," and by operation of rule of ejusdem generis, confines its activities to dark tobacco, and it cannot compel its members to deliver burley tobacco for marketing, especially if an earlier association for marketing burley tobacco exists. 212**Ky**185, 278SW597.

992-56⅐-New. A cotton growers coöperative association was held entitled to permanent injunction against a member's breach of contract. 135**SC**19, 133 SE542.

992-56⅛-New. An agricultural association which is not a public association is not immune from a suit in tort. 57**ND** 872, 224NW193.

993-72 [f] (2) Generally. 7**AltaL**383, 18 **DomLR**747, 29**WestLR**654, 7**WestWkly** 245. [i] **Review of decisions of judges of race generally.**–(1) 91**PaSuper**152.

994-73½-New. Refusal of a county agricultural society to allow horse racing at a county fair, based on void suspension by the secretary of the horse association, is unjustified. 208 **Iowa**957, 226 NW90.

994-73¼-New. Money won by horses permitted to race at a county fair pursuant to temporary injunction is properly directed to be paid to the owners. 208 **Iowa**957, 226NW90.

995-89 Me 149A804.

995-90 Me 149A804; 260**Mass**283, 157 NE357 (injury from dog on exhibition); 147**Va**885, 133SE488. [f] **Duty extends to known dangers** which association should reasonably foresee or anticipate. **Me** 149A804. [g] **Liability for injuries to invitees and licensees of lessee for purpose in which it has no interest** is limited to conditions known or imputed to society. **Oh** 172NE659. [h] **Society need not maintain grounds in safe condition at times other than when fair is conducted** unless it knows of dangerous condition. **Oh** 172NE659.

996-93½-New. If races were of character to jeopardize safety of invitee association's duty was to take due precautions to guard him from injury. **Me** 149 A804.

996-93¼-New. Association must use care to safeguard invitee whether horses were managed by it or by licensees or independent contractors. **Me** 149A804.

996-93¼-New. Exhibitor of horse at public fair is invitee under rule requiring association to protect guest from injury by horse. **Me** 149A804.

996-93½-New. Duty to safeguard spectators of horse racing extends to dangers which should be anticipated by association. **Me** 149A804.

996-93⅓-New. It is not negligence per se for association to permit on race track horse known to have habit of trying to leave tracks. **Me** 149A804.

996-1 203 **Iowa**1107, 212NW163. [a] **Degree of care.**–203 **Iowa**1107, 212NW 163.

997-10 213**Ala**264, 104S264 (coöperative marketing association agreement construed not to be unjust and unreasonable); 211**Ky**162, 277SW318 (judgment against member's wife and son of member erroneous).

997-12 115**Nebr**579, 213NW966, 52**ALR** 1393.

997-14½-New. A demurrer to a complaint in an action against an association for personal injuries based solely on the ground that defendant is an arm or agency of the government, and therefore a public corporation, is properly overruled. 57**ND**872, 224NW193.

997-15 136**Wash**160, 239P1. [c] (2) Evidence held sufficient to show defense of constructive fraud in marketing contract. 136**Wash**160, 239P1. [d] **Burden of proof.**–100**CalA**750, 281P84.

997-17 Oh 172NE659.

997-18 203 **Iowa**1107, 212NW163; **Iowa** 228NW48; 260**Mass**283, 157NE357; 147 **Va**885, 133SE488.

998-19 Iowa 228NW48.

998-19½-New. Instructions. The general rules applicable to instructions apply in actions by or against agricultural societies or their agents. 125**Me** 494, 135A198; 147**Va**885, 133SE488.

998-19⅓-New. In an action against an agricultural association for damages for causing plaintiff's expulsion from a horse-trotting association for refusal to obey directions of judges of a race, instructions have been held proper. 91 **PaSuper**152.

998-31½-New. Coöperative Agricultural Associations. Organization. 76**CalA** 1, 243P679; 88 **IndA**469, 150NE384; 123**Kan**169, 254P326; 123**Kan**508, 256P 119; 208**Ky**572, 271SW677; 153**Md**297, 138A29, 56**ALR**1042; 115**Nebr**177, 212 NW39; 54**ND**330, 211NW597; 25 **Oh NPNS**1.

998-31¼-New. Authority of officers and agents. 148**Ky**289, 146SW725.

998–31¼–New. Rights and liabilities of association. 199**Cal** 168, 248**P**658, 47 **ALR**904; 82**CalA**434, 255**P**751; 82**CalA** 641, 256**P**287; 80**Colo** 516, 252**P**813; 82**Colo** 428, 260**P**1080; 124**Kan**773, 262 **P**551; 128**Kan**469, 278**P**716; 148**Ky** 289, 146**SW**725; 177**Minn**211, 225**NW** 22(2dcase); 115**Nebr**177, 212**NW**39; 116**Nebr**753, 219**NW**12; **Nebr** 226**NW** 802; **Okl** 292**P**558; 147**Va**885, 133**SE** 358; 143**Wash**632, 255**P**943.

998–31⅙–New. Rights and liabilities of members. 199**Cal** 168, 248**P**658, 47 **ALR**904; **Cal** 291**P**170; 74**CalA**231, 240 **P**47; 76**CalA**1, 243**P**679; 76**CalA**1, 246 **P**1081; 82**CalA**434, 255**P**751; 100**CalA** 750, 281**P**84; 163**Ga**761, 137**SE**233; 88 **IndA**469, 150**NE**384; 123**Kan**183, 253**P** 1093; 123**Kan**169, 254**P**326; 123**Kan** 508, 256**P**119; 124**Kan**179, 257**P**975; 124**Kan**773, 262**P**551; 125**Kan**296, 263 **P**787; 128**Kan**337, 273**P**5; 128**Kan**350, 278**P**6; 130**Kan**136, 285**P**523; 130**Kan** 522, 287**P**269; **Kan** 292**P**777; 148**Ky** 289, 146**SW**725; 215**Ky**67, 284**SW**399; 215**Ky**276, 284**SW**1069; 217**Ky**320, 289 **SW**253; 248**Mich**695, 227**NW**681; 177 **Minn**211, 225**NW**22(2dcase); 115**Nebr** 177, 212**NW**39; 82**NH**193, 132**A**12; **NJ Ch** 147**A**550; 244**NY**221, 155**NE**106; 137**Misc**579, 243**NYS**92; 191**NC**464, 132 **SE**154, 47**ALR**924; **Okl** 292**P**558; 135 **SC**19, 133**SE**542; **TexCivA** 18**W(2d)** 725; 145**Va**42, 136**SE**472; 147**Va**885, 133**SE**358; 136**Wash**155, 239**P**2; 136 **Wash**160, 239**P**1; 143**Wash**657, 255**P** 918; **Wash** 288**P**251; 199**Wis**379, 226 **NW**378(4thcase).

998–31⅙–New. Rights and liabilities of third persons. 160**Ala**294, 107**S**115; 180**Ark**484, 22**SW(2d)**17; 80**Colo** 516, 252**P**813; 81**Colo** 420, 256**P**325; 81**Colo** 431, 256**P**319; 170**Ga**30, 152**SE**49; 45 **Ida**153, 260**P**1029; 148**Ky**289, 146**SW** 725; 230**Ky**700, 20**SW(2d)**717; 244**NY** 221, 155**NE**106; **TexCivA** 281**SW**629.

998–31½–New. Essentials of contract between member and association. 160 **La**294, 107**S**118; 135**Wash**47, 236**P**561; 199**Wis**379, 226**NW**378(4thcase).

998–31⅚–New. Validity of contract between member and association. **Ala** 126**S**637; 168**Ark**504, 270**SW**946, 1119; 84 **IndA**51, 150**NE**106; 124**Kan**601, 261 **P**570; 129**Kan**528, 283**P**638; 160**La** 294, 107**S**118; 82**NH**193, 132**A**12; 114 **Okl** 77, 243**P**232; 199**Wis**379, 226**NW** 378(4thcase).

998–31⅞–New. Cancellation of contract between member and association. 143 **Miss**558, 108**S**802; **Nebr** 219**NW**12; 190**NC**602, 130**SE**312; 190**NC**608, 130 **SE**505; 199**Wis**379, 226**NW**378(4th case).

998–31 1/10–New. Construction of contract between member and association. **Ala** 104**S**264; 168**Ark**504, 270**SW**946, 1119; 76**CalA**1, 243**P**679; 42 **Ida**12, 47 **ALR**916, 242**P**444; 164**La**126, 113**S**790; 248**Mich**695, 227**NW**681; **Nebr** 212**NW** 39; **TexCivA** 271**SW**178; 135**Wash**47, 236**P**561; 135**Wash**169, 237**P**300; **Alta** [1929] 1**DomLR**515.

998–31 1/11–New. Member's refusal to deliver all his crop declared breach of contract. 168**Ark**504, 270**SW**946, 1119. To accomplish purposes of marketing agreements it is necessary that the corporation have practically absolute control of the disposition and marketing of the product raised by members. 76**Cal A1**, 243**P**679; 86**CalA**689, 261**P**717; 80 **Colo** 516, 252**P**813; 129**Kan**528, 283**P** 638; 208**Ky**572, 271**SW**677; 208**Ky**643, 271**SW**695; 213**Ky**272, 280**SW**1105; 215**Ky**67, 284**SW**399; 143**Miss**558, 108 **S**802; 222**AppDiv**341, 226**NYS**226; 125 **Misc**86, 210**NYS**591; 113 **Or**398, 233**P** 547; 116 **Or**562, 241**P**1011; **TexCivA** 18**W(2d)**725; 134**Wash**145, 235**P**12; **Wash** 288**P**241.

999–58 [e] **Excreta of domestic animals mixed with bedding material not artificially added** is not within operation of some statutes. 69**CalA**195, 230**P** 964.

999–58½–New. Statute in force at time of alleged sale of fertilizer is part of contract. 97**Fla**1, 119**S**513(2dcase).

1000–62 97**Fla**1, 119**S**513(2dcase) (laws providing for liquidated damages to purchaser defrauded, where statement of chemical analysis of fertilizer sold proves untrue, held not unreasonable); 167**Ga**880, 147**SE**77. [a] **Provision making official analysis of fertilizers conclusive evidence** is void as violating due process. **Ga** 155**SE**484.

1000–72½–New. Some statutes require samples to be drawn in the presence of two disinterested witnesses. 142**Miss** 660, 107**S**881.

1000–74 17**F(2d)**196 (name of fertilizer held not deceptive or fraudulent so as to justify refusal to register).

1000–76½–New. The commissioner of agriculture is without authority to refuse to grant registration of a trademark, brand, and tag of a manufacturer, or to provide tags in conformity with the statute on the ground that the applicant in the past has violated provisions of the statute relative to the percentage of constituent parts of the product, where the statute provides its own penalty for failure to comply with its requirements. 142**Miss**844, 108**S**149.

1000–79 190**NC**162, 129**SE**453 (guaranteed analysis).

1000–80 190**NC**162, 129**SE**453.

1001–88 [a] **Tagging is determined as of time and place of delivery** to common carrier. 215**Ala**426, 111**S**214.

1001–90 41**GaA**391, 153**SE**104(1stcase).

1001–91 41**GaA**391, 153**SE**104(1stcase).

1002–9 167**Ga**880, 147**SE**77 (statute held inapplicable).

1002–13 167**Ga**880, 147**SE**77 (certificate of analysis required to be from fertilizer sold); **Ga** 155**SE**484 (resale does not affect right to recover). [b] **Penalties cannot be enlarged by adding interest.**–**Ga** 155**SE**484. [c] **Admissibility of evidence.**–**Ga** 155**SE**484.

1002–14 [d] **Chemical analysis of fertilizer showing deficiency of ingredients** (1) is prerequisite to suit for damages resulting from use of fertilizers under statute in some jurisdictions. 190**NC** 162, 129**SE**453. (2) Defendant sued for price of fertilizer cannot maintain counterclaim for damages without allegation and proof of such chemical analysis, in absence of agreement abrogating statutory requirement. 190**NC**162, 129**SE** 453.

1002–15½–New. If a general analysis of the fertilizer is relied on, a sample need not be taken from the particular lot of fertilizer sold. 167**Ga**880, 147**SE** 77.

1002–15⅓–New. Lack of damage is not shown by an allegation that the actual value of the fertilizer sold exceeded the amount paid. 167**Ga**880, 147**SE**77.

1002–15¼–New. A declaration for liquidated damages, where the fertilizer sold by defendant did not comply with the statement of analysis thereon, has been held to state a cause of action. 97 **Fla**1, 119**S**513(2dcase).

1002–15⅕–New. A certificate of the analysis of a sample not shown to be the same as involved in the suit is erroneously admitted. 167**Ga**880, 147**SE** 77.

1002–15⅙–New. Penalties provided for the sale by a vendor of deficient or falsely or incorrectly branded fertilizer cannot be avoided by showing an agreement between the parties to evade the statute. 167**Ga**880, 147**SE**77.

1002–15⅐–New. The value of the fertilizer sold is immaterial under a statute allowing the purchaser liquidated damages. 97**Fla**1, 119**S**513(2dcase).

1002–15⅛–New. That the value of the fertilizer sold is greater than the amount paid does not relieve the seller from deficiency penalty. 167**Ga**880, 147 **SE**77.

1003–26½–New. In action for the purchase price of fertilizer, the seller must allege delivery of fertilizers containing proper chemical ingredients. 192**NC** 330, 135**SE**141.

1003–26⅓–New. Plea held insufficient as seeking to establish deficiency of fertilizer at time of delivery solely by result of crop. 93**Fla**525, 112**S**553.

1003–33 215**Ala**426, 111**S**214.

1004–39½–New. In an action for price, the buyer under plea of failure of consideration may show breach of warranty implied by law or breach of warranty required by statute. 192**NC**330, 135**SE**141.

1004–39⅓–New. Evidence of adjoining landowner who has used different fertilizer, as to difference in result, is admissible in support of counterclaim for damages due to deleterious matter in fertilizer sold. 135**SC**149, 133**SE**463.

1004–39¼–New. Evidence of results from use are admissible, although no chemical analysis has been made. 192 **NC**330, 135**SE**141.

1004–46 [a] **Charge that if single bag** was untagged at time of delivery to carrier, verdict should be for buyer, held correct. 215**Ala**426, 111**S**214.

1004–48 See also **TexCivA** 13**SW(2d)** 416.

1004–50 See also 202**Cal** 233, 259**P**759.

1004–51 [b] **Mere presence of Johnson grass** is not prohibited under some statutes. 84 **Okl** 54, 202**P**302.

1004–53 TexCivA 13**SW(2d)**416.

1004–53½–New. Destruction of red cedar trees authorized by statute to prevent injury to fruit district entitled owner to indemnity as a matter of right. 135**Misc**589, 239**NYS**20.

1004–53⅓–New. In New York the Commissioner of Agriculture and Markets must have award for destruction of red cedar trees on proof and not on mere view of property. 135**Misc**589, 239**NYS**20.

1004–53¼–New. The term "freeholders," as used in the West Virginia statute providing for control and eradication of apple rust, applies to corporations which own land. 108**WVa**242, 150 **SE**725.

1004–57 319 **Ill** 241, 149**NE**778; 179 **Mo** 8, 77**SW**876, 63**LRA**778.

1005–62½–New. The Virginia Cedar Rust Law providing for destruction of red cedar trees to prevent infection of adjacent apple orchards by plants harbored by red cedar trees is a valid exercise of the police power. 276**US**272, 48**SCt**246, 72**L ed**568.

1005–62⅓–New. The West Virginia statute providing for control and eradication of apple rust is constitutional. 108**WVa**242, 150**SE**725.

1005–73 TexCivA 12**SW(2d)**1082.

1005–75½–New. Evidence sufficient to support finding railroad company guilty of failing to destroy weeds on right of way in accordance with statute. 319 **Ill** 241, 149**NE**778.

1005–78 TexCivA 12**SW(2d)**1082.

1006–87½–New. Cedar Rust Law. The law is constitutional. 14**F(2d)**341; 22 **F(2d)**341 (within police power); 146**Va** 175, 135**SE**813.

1006–87⅓–New. All trees within prescribed limits are to be destroyed whether infected or not. 14**F(2d)**341; 146**Va**175, 135**SE**813.

1006–87¼–New. Petition for damages provided by statute is sufficient where it alleges that certain rust-infected cedar trees, of named value, belonging to petitioner, were destroyed by a state entomologist pursuant to statute and praying for damages as provided by act. 103**WVa**115, 136**SE**699.

1006–87⅕–New. Cedar Rust Law § 1, providing for destruction of trees within a one-mile radius, does not require a similar radius to apply to § 2, governing destruction within a two-mile radius after investigation by a state entomologist. 22**F(2d)**341.

1006–87⅙–New. since both sections of the law are not in conflict as § 1 declares a nuisance per se, while § 2 authorizes destruction only on a finding of nuisance after investigation. 22**F(2d)**341.

1006–87⅐–New. An amendment to the Cedar Rust Law, changing the radius for destruction from one to two miles, is applicable regardless of whether it was adopted by local authorities. 22**F(2d)** 341.

1006–88 Fla 128**S**853(2dcase).

1006–89½–New. Statutes abolishing a board of crop pest commissioners did not abolish regulations adopted by the board, 149**Va**468, 141**SE**128.

1006–89⅓–New. and an indictment charging that defendant violated a rule of the commission is good, although authority to make rules was transferred before violation. 149**Va**468, 141**SE**128.

1006–89¼–New. Statutes relating to potato tuber moths did not deprive pest commissioners of authority to make and

enforce regulations. 149Va468, 141SE 128.

1006–89½–New. Placing a part of the state under quarantine is a valid regulation. 89 IndA416, 165NE552.

1006–89⅛–New. officers may enter the infested property for the purpose of destroying stalks where quarantine regulations are not complied with. 89 IndA 416, 165NE552.

1006–96½–New. [§ 59a] E. **Requirement of Destruction by Owner.** Under some statutes the proper official is required to cause inspection to be made when deemed necessary of premises, orchards, and other places, and if found infested with injurious pests to notify the owner in writing, or the person in charge or possession, of such infection and require its eradication by him. 202 Cal 233, 259P759.

1006–96½–New. California Economic Poison Act is constitutional. 73CalA 268, 238P787.

1006–96¼–New. Term "misbrand" used in the body of the act includes the term "misrepresentation." 73CalA268, 238P787.

1006–96½–New. Power conferred on the director of agriculture under the act is not arbitrary and final. 73CalA268, 238P787.

1006–96⅛–New. A tenant having a crop interest in land has been held entitled to compensation for land burned for cotton growing because of bollworm epidemic. TexCivA 294SW987.

1006–98 38Ga113; 44Ga600; 48Ga405; 54Ga306; 55Ga56; 3LaA433; 3LaA 472; 2LaAnn874; 5LaAnn646; 22La Ann70; 174NC82, 93SE449.

1006–1½–New. Seed is furnished within statute when title is passed under credit arrangement for price, although possession remains with seller. ND 216NW 562.

1006–3 93CalA17, 268P1076 (claim for hay for contractor's horses held not lienable); 42 Ida48, 246P12; 52ND721, 204 NW614 (seed lien is statutory); Tex CivA 290SW289. [c] In Porto Rico.–33 PortoRico 123.

1006–3½–New. In Saskatchewan municipalities selling seed grain are given a lien and other remedies for enforcing liability of purchasers. 16SaskL498, [1923] 1DomLR343, [1923] 1WestWkly 97.

1007–7 40GaA299, 149SE300.

1007–10 42 Ida48, 246P12 (essential that every material requirement be complied with, though statute should be liberally construed). [a] **Statute held inapplicable** to turpentine industry. 90 Fla582, 107S354.

1007–12½–New. Under the North Carolina statute a charge of more than ten per cent over the retail cash price for one item does not invalidate the lien as to other items. 194NC240, 139SE240.

1007–15 6LaA192; NC 155SE575.

1008–17 [d] **Plantation owner** raising crops is "farmer" within Louisiana act, entitled to borrow money and pledge crops. 160La294, 107S117.

1008–18½–New. Under some statutes consent of the owner is necessary to create a lien against his interest for supplies furnished to a tenant. 15SaskL228, 63DomLR715, [1922] 1WestWkly952.

1008–19 34PortoRico 41 (facts held to show that agricultural loan contract not simulated).

1008–23 33PortoRico 123 (mere fact that money is used in planting and cultivation of crop is insufficient).

1008–24 Contra 34PortoRico 141.

1008–25½–New. A contract by which a banking corporation lends money to another corporation engaged only in manufacturing sugar and not in cultivating sugar cane is not a contract for agricultural financing within the Porto Rico statute. 33PortoRico 847.

1009–34 [a] 47 Ida537, 277P428.

1009–35 93CalA390, 269P735 (fruit packer). [b] (1) 13LaA575, 127S91. (5) Person employed by owner of crop in harvesting and threshing same is "farm laborer." 31ND392, 153NW1015.

1009–37½–New. In California laborers employed upon a threshing machine have a statutory lien thereon, which may be enforced in an equitable action to foreclose. 75Cal 199, 16P885; 141 Cal 93, 74P548.

1009–39 48ND971, 973, 188NW43 [cit Cyc]. See 31ND392, 153NW1015.

1009–40 [b] In Idaho.–44 Ida590, 258P 546.

1010–41 Que 27RevLegNS354.

1010–43½–New. Where a farm laborer performs services for which he is to be compensated under an entire contract embracing both lienable and nonlienable items, he is only entitled to lien for value of lienable items when value thereof can be distinguished from the amount due for nonlienable items. 42 Ida231, 245P71.

1010–43½–New. In such case the lien must fail where the value of the lienable services cannot be distinguished. 42 Ida231, 245P71.

1010–43¼–New. In Quebec the privilege of the cost of labor and seed exists only against farms sold with the crop standing and can only be realized against the increase in the price of sale corresponding to the added value given to the farm by the work. 34QueKB469.

1010–45 43Ark168; TexCivA 32SW (2d)671. Contra 20PaCo 92.

1010–48½–New. Under statutes laborer's lien on crop when properly filed relates back to beginning of his work. 198NC511, 152SE501.

1010–50½–New. To give effect to claim of lien which has not been perfected by filing the claim deprives owner of property without due process of law. 42 Ida 48, 246P12.

1010–50⅓–New. A proceeding authorized by statute must be taken in order to perfect a lien. 12AltaL225, 38Dom LR508, [1917] 3WestWkly1029.

1010–52½–New. Seller of fertilizer to preserve crop lien for purchase price is not required to acquaint himself with particular acreage on which each ton was used. 161La446, 108S878.

1011–68 32PortoRico 439.

1011–69 32PortoRico 439 (applying mortgage law rule that amount for which property is responsible should be specified in deed). [a] **Specific amount of additional sum in nature of penalty** for sale of crop to person other than financing mortgagee must be stated, to make contract recordable as mortgage. 32PortoRico 439.

1011–75 [a] In Porto Rico.–32Porto Rico 1.

1011–76 4LaA587. [c] In Porto Rico.–32PortoRico 439.

1012–78 51ND122, 199NW185 (lien effective from date of record). [a] **Second contract** recordable on same theory that second mortgage is admissible to registry. 32PortoRico 1. [b] **Where crop liens were not recorded in state** as required by statute, lien did not follow crops in state as against purchaser for value. 152Va598, 148SE806.

1012–81½–New. In Porto Rico, under St. § 6, contract which comprises placing, modification, or extinction of real'ty right must be recordable under the provisions of the Mortgage Law. 32Porto Rico 439.

1012–84½–New. Statutory lien of county for seed and feed furnished is not effective where contract is filed but not recorded, 51ND122, 199NW185.

1012–84⅓–New. and where indebtedness incurred for such seed and feed is not entered on tax lists as lien against real estate by county auditor. 51ND 122, 199NW185.

1012–85 52ND721, 204NW614 (seed lien statement sufficient); 20PaCo 475; 155Wash1, 283P191 (inspecting officers cannot refuse to file proper lien claims). [d] **Seed lien statement duly filed is valid,** though grain remained part of mass in seller's granaries. ND 216NW 562.

1012–87 42 Ida48, 246P12; TexCivA 189SW1018; TexCivA 283SW570. See also 48 Ida268, 281P470. [a] (3) Laborer, filing no claim till three months after cessation of services, held to acquire no lien on crop. TexCivA 283SW 570. [b] In Idaho.–44 Ida590, 258P546.

1012–90½–New. Notice of lien of agricultural laborer must show on its face substantial compliance with statute. 198NC511, 152SE501.

1012–95 See also 136La1022, 101S403. [e] Contra 125La1, 51S48. [f] In North Dakota.–50ND141, 195NW6.

1013–99½–New. Bank's crop lien held reduced by amount of overdraft due the borrower when the loan was made. 161 La446, 108S878.

1013–99⅓–New. Bank's crop pledge not reduced by amount of checks drawn by borrower on day it borrowed sum secured. 161La446, 108S878.

1013–99¼–New. Bank having lien on sugar crop is not required to account to a seller of fertilizer for cane sold on which neither had a lien. 161La446, 108S878.

1013–99⅕–New. Purchaser of land under agreement for sale is not the owner within the meaning of a statute giving a lien for seed grain. 15SaskL181, 63 DomLR632, [1922] 1WestWkly384.

1013–99⅙–New. Lien for seed grain does not attach where the records of the land titles office do not show ownership in applicant. 4SaskL531, 19WestLR723.

1013–2 [b] **Effect of agreement between creditor and employer,** whereby creditor agreed to gather and sell crop and apply proceeds on employer's debt, did not subordinate laborer's lien on crop. 40GaA299, 149SE300.

1013–8 See also 5LaA638. [b] **Defendant may be entitled to return of fruit** in order to enforce lien thereon for services performed and to be performed. 93 CalA390, 269P735.

1013–9 But see 31ND382, 153NW1012.

1013–9½–New. Landlord receiving value of tenant's interest in crop on which plaintiff had lien and failing to account is liable to plaintiff for amount due. NC 155SE575.

1014–10 26TexCivA109, 61SW723.

1014–14 NC 155SE575. But see 31F (2d)727 (agricultural lien not destroyed by lessor's judgment of eviction for nonpayment of rent). [d] 160La294, 107S 115.

1014–15 29 OhA357, 163NE587.

1014–19 136La1022, 101S403; 26La Ann651; 113NC142, 18SE341.

1014–20½–New. In Saskatchewan Municipalities Seed Grain Act gives lien priority over "any incumbrance wherever created." 16SaskL265, 70DomLR 528, [1922] 3WestWkly747.

1014–21 75NC259; 32PortoRico 1. See also 33PortoRico 123. [b] (2) Recorded pledge by member of coöperative association takes precedence over unrecorded marketing agreement regardless of notice. 160Ala294, 107S115. [d] In Canada.–16SaskL405, [1923] 1DomLR812, [1923] 1WestWkly721.

1014–25 20PaCo 475. Contra 7PaDist 454, 20PaCo 92.

1014–30 [a] **Idaho statute** protects landlord against labor bills contracted by tenant renting on shares. Ida 290P 211.

1014–33 31ND382, 153NW1012 (hauling grain to elevator is not waiver of farm laborer's lien thereon).

1014–33½–New. Question of waiver is one of intent. 31ND382, 153NW1012.

1014–34½–New. Whether the holder of a farm laborer's lien has waived the same is ordinarily a question of intent. 31ND382, 153NW1012.

1015–48 52ND721, 204NW614; 59SC 52, 37SE45.

1015–50 17AltaL513, 63DomLR138, [1922] 1WestWkly1064 (common-law remedy also available).

1015–55½–New. Legal process having prevented complete performance, one entitled to a laborer's special lien may bring foreclosure proceedings for its enforcement. 124Ga228, 52SE333.

1015–55⅓–New. A laborer's special lien may be foreclosed before the entire crop is delivered if it appears that the landlord has no property upon which the lien will attach. 2GaA382, 58SE543.

1016–59 [a] In Idaho.–Ida 290P211.

1016–59½–New. The commencement of an action by a laborer against a holder of the proceeds of the crop is sufficient as against a claim of limitations by a mortgagee in a subsequent suit by him, although he was not a party to the laborer's action. 170Ark771, 281SW379.

1016–59⅓–New. Lienholder may intervene and assert his rights in action in another state. 79Minn39, 81NW547.

1016–59¼–New. Holder of unrecorded

assignment of farm lease reserving one half of crop as rent should be made party in proceeding to foreclose labor liens. **Ida** 290P211.

1016–59⅓–New. Under some statutes failure to make such assignee party does not render judgment invalid as to him. **Ida** 290P211. [a] **Lien of foreclosure judgment** is superior to claim of such assignee although he was not made party. **Ida** 290P211. [b] **Execution sale** to satisfy foreclosure judgment passes title although such assignee was not made party. **Ida** 290P211.

1016–59⅙–New. Statute making holders of unrecorded liens unnecessary parties construed as not limited to mortgage liens. **Ida** 290P211.

1016–60½–New. It is not necessary for a laborer to wait until the end of the year to foreclose his lien where, before the end of the year, the landlord turned the crops over to his creditor. **40GaA** 299, 149SE300.

1016–62 [e] **Complaint held sufficient** in action to foreclose threshing lien. 50 **ND**800, 197**NW**883. [f] **Allegations to support personal judgment.**–46 **Ida**671, 270P618(2dcase).

1016–69 See also 32**PortoRico** 134.

1016–70 5**LaA**312.

1016–72 [a] **On issue of whether plaintiff was employed** as farm laborer exclusion of leases, lien statement, and mortgage signed by plaintiff held error. 54 **ND**543, 210**NW**19.

1016–72½–New. Evidence has been held insufficient to show that value of lienable services of a farm laborer apart from value of nonlienable services. 42 **Ida** 231, 245P71.

1016–72⅓–New. Evidence has been held insufficient to show that the price charged for fertilizer was more than ten per cent above the cash price. 194 **NC**240, 139SE240.

1016–72¼–New. [§ 104a] (5½) **Judgment.** On the failure of a lien the court may enter a personal judgment against defendant alleged to be personally liable. 46 **Ida**671, 270P618(2dcase).

1016–73 See also 100**SC**490, 85SE59. [a] **In Idaho.**–46 **Ida**671, 270P618(2dcase).

1016–73½–New. [§ 105a] (7) **Costs.** In an action to foreclose farm laborers' liens the cost for preparation and filing of the claim of lien cannot be allowed where liens are not foreclosed but personal judgment is rendered. 46 **Ida**671, 270P618(2dcase).

1016–76 76**Ark**282, 88**SW**983; 125**Ga** 230, 53SE592.

1018–8 78**Ala**317.

1020–43 70**NC**538, 71**NC**385.

1020–50½–New. General rules governing appeals apply in actions relating to agricultural liens. 17**GaA**55, 85SE498.

1020–54 50**ND**866, 198**NW**816; 54**ND** 837, 211**NW**590; **Or** 293P410.

1020–55 50**ND**420, 196**NW**311; **Tex CivA** 189**SW**1018; 15**SaskL**364, [1922] 2 **WestWkly**468. [a] **Tenant of owner of land under cropping agreement** whereby each is to pay half of threshing bill and receive half of all crops produced is entitled to threshing lien on landowner's share of crop where tenant threshes grain with his own machine. 50**ND**866, 198**NW**816; 54**ND**837, 211**NW**590.

1020–56 15**SaskL**19, 63**DomLR**359, [1922] 1**WestWkly**283.

1020–57 12**SaskL**140, 46**DomLR**691, [1919] 1**WestWkly**963; **Sask** 65**DomLR** 768, [1922] 1**WestWkly**991; **Sask** 13 **WestLR**428.

1020–57½–New. Statutes providing for such liens are remedial in character and should be liberally construed to effectuate their objects. 50**ND**420, 196**NW**311.

1020–57¼–New. Statute relating to liens on property not yet in existence does not apply to an assignment of rights under an existing contract, nor prevent the making of a contract for threshing for the benefit of a third party. 36**ND**78, 161**NW**608.

1021–57¼–New. In California laborers employed upon a threshing machine have a statutory lien thereon regardless of actual ownership of the machine. 75**Cal** 199, 16P885.

1021–59 12**ND**71, 95**NW**152.

1021–59½–New. Lienors may be permitted to file a supplemental affidavit where the original affidavit does not fully comply with the statute. 15**SaskL** 238, 63**DomLR**705, [1922] 1**WestWkly** 465.

1021–60 50**ND**420, 196**NW**311; 52**ND** 30, 202**NW**855. [a] **Statement must include name of person for whom threshing was done,** spelled correctly so that it may be indexed properly. 52**ND**290, 202**NW**855. [b] **Name of person for whom threshing was done** must be spelled correctly so that claim of lien may be properly indexed. 52**ND**290, 202 **NW**855.

1021–62 50**ND**420, 196**NW**311.

1021–63 [a] **Where parties failed to mention definite price,** law will imply that the "agreed price" required by statute was reasonable value of service at particular time and place. 50**ND**866, 198**NW**816.

1021–64 52**ND**837, 204**NW**854.

1021–65 [a] **Failure of claimant of lien,** satisfied while inchoate, to file lien statement does not render right of one discharging lien subject to inferior liens. 52**ND**837, 204**NW**854.

1021–66½–New. A thresher has no lien where there is no definite agreement as to a rate per bushel for threshing. 23 **Man**832, 14**DomLR**158, 25**WestLR**475; **Sask** 3**DomLR**786, 21**WestLR**285, 2**West Wkly**393; 9**SaskL**267, 29**DomLR**40, 34 **WestLR**1122, 10**WestWkly**1279; 13 **SaskL**212, 51**DomLR**326, [1920] 2**West Wkly** 4; **Sask** [1919] 2**WestWkly**392; **Sask** 6**WestWkly**1084. Contra **Alta** [1919] 1**WestWkly**748.

1021–66¼–New. A lien is one of retention only, and the lienor does not have the right to seize grain by breaking open a granary of the owner. 6**AltaL**52, 11 **DomLR**272, 24**WestLR**268, 4**WestWkly** 637.

1021–66¾–New. The position of a lienholder, under the Thresher Lien Act § 1, is that of a purchaser for value, and he has the right of forcible entry for the purpose of taking a sufficient quantity of grain in satisfaction for his lien. 10 **SaskL**286, 36**DomLR**459, [1917] 3**West Wkly**242.

1021–66½–New. Under the Crop Payment Act of 1915, a thresher has a right to break into a granary in order to obtain the grain which is the security of the price of his threshing bill. **Sask** [1917] 3**WestWkly**453.

1021–67 [a] **Though commingling of grain results** from delivery to elevator, lessee under cropper's contract requiring such delivery does not waive lien by reason thereof. 54**ND**837, 211**NW**590.

1021–71 But see 4**SaskL**294, 16**WestLR** 373.

1021–71½–New. Estoppel. Lessee under cropper's contract is not estopped from asserting a lien on grain threshed because of knowledge of agreement of landlord with party for delivery of grain since the thresher is entitled to the lien irrespective of ownership. 54**ND**837, 211 **NW**590.

1021–71⅓–New. Thresher does not lose lien by failure to measure grain as required by Weights and Measures Act. **Can** 5**TerrL**346.

1021–73 [a] **Effect of invalidity of lien.** –50**ND**511, 197**NW**129.

1021–79½–New. Ownership immaterial. A petition in intervention whereby the intervener claims to be the owner of a threshing machine, and that defendants in the foreclosure suit were not his agents, is demurrable for the reason that the actual ownership of the machine is immaterial. 75**Cal** 199, 16P885.

AIDER AND ABETTOR

1025–33 [a] 23**AlaA**267, 125**S**60(2dcase).

ALCOHOL

1027–80 [c] **Amyl alcohol,** chief constituent of fusel oil, is a direct nerve poison. 200 **Iowa**60, 204**NW**406, 41**ALR** 363.

ALEVOSIA

1030–2 44**Philippine**224.

1030–11 [a] **Element of "alevosia" is present** where slayer makes sudden and unexpected attack with deadly weapon on unarmed and unsuspecting victim under conditions making it impossible for him to flee or make defense before blow is struck. 44**Philippine**224.

1031–19 44**Philippine**224.

1031–20 44**Philippine**224.

1031–22 44**Philippine**224.

1031–24 44**Philippine**478.

1031–25 44**Philippine**478.

1032–28 45**Philippine**137.

1032–29 44**Philippine**224. [a] 44**Philippine**224.

1032–31 45**Philippine**137.

ALIAS

1033–50 [a] 161**La**423, 108**S**794, 795 [citCJ].

ALIBI

1033–57 **Mo** 281**SW**940.

ALIENATE

1034–69 [a] **As used in statute, may** signify wrongful transfer. 118 **Okl** 231, 247P353, 355 [citCJ].

ALIENATION

1036–91 217**AppDiv**624, 216**NYS**664.

1036–92 [a] 32**PortoRico** 428.

1036–93 170**Ark**895, 282**SW**9.

1036–94 [a] Contra 170**Ark**895, 282 **SW**9.

1036–95 170**Ark**895, 282**SW**9. [k] 32 **PortoRico** 428. [l] **Agreement granting park privileges subject to revocation on notice** held not alienation. 217**AppDiv** 624, 216**NYS**664.

ALIENS

1043–1 [h] **"Alien"** not synonymous with "immigrant." 179**Fed**839, 841, 103 **CCA**327.

1043–2 6**F(2d)**670 (owing allegiance to foreign government); 1**BCptII** 150.

1043–6 103**Kan**754, 175P989. [a] (3) Under Immigration Act of 1917, "alien" includes "any person not a native-born or naturalized citizen of the United States." 22**F(2d)**914.

1043–8 113**Nebr**453, 203**NW**640. [c] **In Iowa.**–154 **Iowa**460, 135**NW**53.

1043–9 106**Misc**524, 176**NYS**356.

1043–11 247**Fed**882; 176**Cal** 347, 168P 348, **LRA**1918B185; 105**Kan**317, 182P 395; 92**NJL**415, 105A233, 3**ALR**336; 99 **Misc**626, 164**NYS**454; 109**Misc**306, 179 **NYS**713; 175**NC**435, 95SE851, **LRA**1918 E801, **AnnCas**1918E340.

1045–18 8**F(2d)**473; 29**F(2d)**999.

1045–23½–New. A statute, imposing the burden of proving citizenship or eligibility to become a citizen on one accused of exercising the right or privilege denied to aliens, is ineffectual to establish the presumption of foreign nativity in a prosecution for possessing a firearm of a prohibited length as alien. **CalA** 279P175 (holding that statute cannot create such presumption).

1045–24 **CalA** 278P252 (under Alien Land Law).

1045–24½–New. Under a statute imposing on one accused of assuming the exercise of a privilege or license denied aliens, defendant in a prosecution for possession of firearms cannot be forced to prove his nativity to avoid conviction. **CalA** 280P204(1stcase).

1045–28 [a] (3) Evidence held sufficient to show that native-born American citizen took oath of allegiance to foreign country when joining its military service, thereby expatriating himself. 34**F (2d)**219.

1045–31 **CalA** 278P252.

1046–32 [b] **Not man without country or political status.**–24**F(2d)**316 (child born of Chinese parents on American vessel on high seas).

1046–34 144**US**47, 12**SCt**517, 36**L ed**340; 201**Cal** 236, 256P545, 53**ALR**1279. See also 136**Wash**437, 240P557. [a] **In Washington.**–136**Wash**210, 239P552.

1046–35 17**F(2d)**507; 136**Wash**437, 240 P557. [d] **Statute prohibiting unnaturalized foreign born persons from possessing firearms capable of being concealed** on person is constitutional and valid. 69 **CalA**137, 230P675.

1046–37 [e] **Ordinance prohibiting aliens from conducting lodging house** is void in so far as it applied to immigrant

lodging houses. 228AppDiv719, 239NYS 436 (inconsistent with state policy).

1046–40½–New. He may "acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country." 144US47, 62, 12SCt517, 36 L ed 340.

1047–41 [a] **Prior lien of nonresident alien** cannot be subordinated to lien of resident on deposit in bank. NJCh 150 A226(2dcase).

1047–43 274US392, 47SCt630, 71L ed 1115.

1047–46 See also 274US392, 47SCt630, 71L ed1115.

1047–48½–New. A constitutional provision that white foreigners who became residents of the state shall enjoy the same rights in respect to possession, enjoyment, and descent of property as native born citizens confers no rights upon nonresident aliens. 118 Or260, 246 P741.

1047–50 [b] (1) 200Cal 434, 253P718. [c] **Workmen's Compensation Act of Pennsylvania** precluding recovery by alien parents for death of son held not to conflict with treaty with Italy. 270 US535, 46SCt373.

1048–51½–New. Dominion legislature has exclusive jurisdiction of alienage and naturalization. Eng [1903]AC151.

1048–55 [b] **Alien Land Law**, denying to aliens incapable of citizenship right to acquire, possess, or transfer real estate, held to violate state constitution. 173Ark93, 291SW978.

1048–56 53 Iowa97, 4NW858.

1048–57 [g] **Treaty with China** held to give Chinese no right to own agricultural land in state. 200Cal 434, 253P 718; 201Cal 236, 256P545, 53ALR1279. [a] (22) Under treaty of 1871 with Italy see 164La1, 113S658. [c] 117Nebr809, 223NW664. [e] 268US258, 45SCt490, 69 L ed944. [f] **Treaty with Japan.**–268 US258, 45SCt490, 69L ed944.

1049–58 173Ark93, 291SW978; 200Cal 434, 253P718; 206Cal 782, 276P345. [b] **Police power includes power** to pass alien land laws. 200Cal 434, 253P718.

1049–59 See also 25Vt433. [b] **In regard to agricultural lands**, concern of state does not stop with ownership or control but extends to occupancy as well. 201Cal 376, 257P57.

1049–60 [a] (2) **Right to own land for trade given to Chinese** held not to include ownership of land for agricultural purposes. 200Cal 434, 253P718.

1050–62 207Cal 298, 278P227.

1050–65 195Cal 71, 231P554 (cropping contract with Japanese subject construed to be prohibited by Alien Land Law); 195Cal 84, 231P559 (cropping contract construed to be in violation of Alien Land Law); 195Cal 88, 231P560 (cropping contract held to violate Alien Land Law, though alien was to receive a "bonus" which in addition to monthly salary shall equal a certain percentage of the net profit of the owner resulting of same operation of the land); 195Cal 91, 231P561 (cropping contract with Japanese subject construed to give him the use and benefits arising from the control, occupancy, and enjoyment of real property and therefore invalid under Alien Land Law); 200Cal 434, 253 P718; 201Cal 236, 256P545, 53ALR 1279; Cal 268P1050 (exemptions and effect of violation); 207Cal 90, 276P1015; 207Cal 298, 278P227 (transfer held invalid as between parties); CalA 278P 252 (prosecution for violation); 136 Wash426, 240P554; 136Wash432, 240P 556; 136Wash437, 240P557 (constitutional provision); 142Wash465, 253P 655; 144Wash252, 258P16. [a] **Japanese Alien** ineligible to citizenship is not guaranteed by treaty or otherwise the right to the use and benefit of agricultural lands of the state. 195Cal 84, 231P559. [b] **Alien Land Law** of California does not violate any provisions of state or federal institution or any treaty obligations between this country and Japan. 195Cal 71, 231P554; Cal 256P 545; 201Cal 376, 257P57 (proposed contract held cropping contract within statute).

1050–66 207Cal 298, 278P227; 136 Wash437, 240P557 (act prohibiting leasing of lands to aliens). [a] **Whether alien land law is retroactive** held to depend on legislative intent. 200Cal 434, 253P718.

1051–80 155 Ill 592, 41NE91, 31LRA85.

1051–81 200Cal 434, 253P718.

1052–82 200Cal 434, 253P718.

1052–83 200Cal 434, 253P718; 136 Wash426, 240P554; 136Wash432, 240P 556. [a] **Evidence held sufficient.**–136 Wash426, 240P554. [b] **Evidence held insufficient.**–136Wash426, 240P554; 136 Wash432, 240P556.

1053–85 136Wash426, 240P554.

1053–86 200Cal 434, 253P718, 725 [cit CJ].

1053–90 40F(2d)785; Cal 286P1025; 27BarbNY376.

1054–93 40F(2d)785; 56 Ind363; 74 Ind252; 70Misc412, 128NYS912; 12 PortoRicoFed86.

1054–96 70Misc412, 128NYS912.

1054–97 31F(2d)635 (lineal descendants).

1055–99 [b] **Kentucky statute** confers additional right on alien devisee to hold real estate devised for eight years. 40 F(2d)785.

1055–1 31F(2d)635 (alien corporation is within act).

1055–4 See also 143Cal 135, 76P962.

1055–6 [a] **Treaty permitting alien to take realty by descent** and have reasonable time to sell it is inapplicable to realty passing by devise. 40F(2d)785.

1055–9 3WheatUS594, 4L ed467; 4 JohnsChNY370; 136Wash426, 240P554.

1056–14 136Wash437, 240P557. [b] **Lease of land to subject of Japan** for use as health resort and sanitarium is for "commercial" purpose within intendment of treaty, with Japan. 195Cal 522, 234P102. [c] **Leases of land to aliens for reasonable length of time** are not prohibited under constitutions in some jurisdictions. 136Wash437, 240P557. [d] **Statutes prohibiting leasing of land to aliens are inapplicable** to prior valid leases in some jurisdictions. 136Wash 437, 240P557.

1056–14½–New. A provision of a state constitution prohibiting ownership of lands within the state by aliens and declaring conveyances of such lands to aliens to be void does not prohibit the leasing of lands to aliens for a reasonable term. 136Wash437, 240P557.

1056–23 322 Ill 236, 153NE365.

1056–24 11F(2d)943.

1056–25 11F(2d)943.

1057–28 15SCL452.

1057–32 Cal 286P1025.

1057–33 74 Ind252; 121Kan229, 246P 521; 103Nebr147, 170NW839, 172NW 690.

1058–34 121Kan229, 246P521.

1058–35 5HowUS233, 12L ed130; 143Cal 135, 76P962; 74 Ind252; 150Md235, 133 A723; 103Nebr147, 170NW839, 172NW 690; 114AppDiv56, 99NYS724; 9RI 26. But see 64Conn277, 29A494, 24LRA667. [a] 74 Ind252, 255. [d] **In California.**–149Cal 208, 85P609.

1059–40 Ind 67NE1029.

1063–70 121Kan229, 246P521.

1064–79 143Cal 135, 76P962.

1064–80 6 Ida367, 55P886.

1064–86 21Fed774; 15 Iowa242. [b] Ind 67NE1029.

1065–91 [b] **Rights of nonresident aliens which have vested under treaty** will not be affected by subsequent suspension or abrogation of treaty. 117 Nebr750, 223NW13.

1065–99 117Nebr750, 223NW13 (treaties with Prussia and Hamburg).

1068–11 See also 26 OhNPNS81.

1068–18 [a] **Treaty between United States and Norway** giving subjects of contracting parties right to dispose of goods and effects gives right to dispose of realty. 117Nebr809, 223NW664.

1069–23 126Kan427, 429, 268P849 [cit CJ].

1069–26 316Mo492, 291SW120, 51ALR 877.

1069–33 [d] **Under treaty with Sweden** Swedish subject can inherit personal property from citizen of United States. 119Kan603, 240P586.

1070–35 68Utah344, 250P469, 48ALR 1322.

1070–41 197NC234, 148SE244(2dcase).

1070–42 3Wheat(US)594, 4L ed467 (to sell property pledged to secure debt to alien); 17La312, 36AmD613; 25 OhA 165, 157NE903, 904 [quotCJ]; 26 Oh NPNS81 (diplomatic relations not condition precedent); 12PortoRicoFed86 (habeas corpus). [b] **Russian citizen** may sue, though his government is not recognized. 244NY482, 155NE749.

1070–44 244NY482, 155NE749.

1070–46½–New. A state may limit the access of nonresident aliens to its courts to narrower bounds than those accorded to residents. 118 Or260, 246P741.

1073–75 130Misc605, 224NYS130.

1074–95 [b] **Unlawful possession of dog by unnaturalized foreign-born person.**–14PaDist&Co 170 (statute inapplicable to American-born wife of such person).

1075–3 80CalA783, 252P1061 (alien character of accused is essential element of corpus delicti sufficiently proved by circumstantial evidence in prosecution for being alien in possession of concealed firearm).

1075–4–5½–New. The corpus delicti of the offense of carrying concealed weapons by a foreign born and unnaturalized person includes the foreign nativity and nonnaturalization of the accused. 196Cal 404, 238P363.

1075–4–5½–New. proof of which is subject to the rules of evidence applicable in criminal prosecutions generally, 196 Cal 404, 238P363.

1075–4–5¼–New. and should be established by evidence independent of the extra judicial statements, admissions, or confession of accused. 196Cal 404, 238P363.

1075–4–5½–New. Evidence insufficient to show violation of the Washington Alien Land Law. 144Wash252, 258P16.

1075–6 4F(2d)356; 14F(2d)679; 42F (2d)127; 18BC506, 15DomLR189, 26 WestLR319, 5WestWkly686. [a] NS 13 DomLR288, 22CanCrCas60, 13EastLR 132 (admission generally); 3AustrCLR 649. [a] See also 1BCptlI 150; 4Austr CLR1428; 17AustrCLR433.

1075–8 [c] **Deportation is not punishment** and therefore not subject of pardon. 5F(2d)162. [d] **Commutation by president** of sentence of persons convicted under Selective Draft and Espionage Acts to term already served on condition that they be law-abiding and loyal does not relieve them from deportation under Alien Act of 1920. 5F(2d) 162. [e] **Document issued by president** to person convicted under Selective Draft and Espionage Acts is construed to be commutation and not pardon. 5 F(2d)162.

1075–11½–New. Immigration Act of 1924 abrogates all laws, convention, and treaties inconsistent therewith. 9F(2d) 309 (except treaty rights of alien merchants).

1075–11½–New. Courts cannot admit alien whose admission is not effected pursuant to statute. 18F(2d)576.

1075–11¼–New. Aliens are permitted in the United States as a matter of consent, not by any right. 25F(2d)714.

1075–12 16F(2d)422; 22F(2d)270; 38 F(2d)207.

1076–13 25F(2d)714; 33F(2d)926 (State Department authorized to effectuate order requiring visaed passports); 35F(2d)284. [b] **Regulations of secretary of labor** have force of law. 9F(2d) 342. [c] **Whether alien seeking admission has complied with terms** prescribed by Congress is administrative question. 35F(2d)284.

1076–15 20F(2d)972; 23F(2d)185; 24 F(2d)57; 36F(2d)631.

1076–16 17F(2d)50; 29F(2d)314. [a] (3) Rule held within authority of secretary of labor. 41F(2d)526. [b] **General order of commissioner general of immigration relating to status of aliens residing in foreign contiguous countries**, entering United States to engage in or seek employment, held valid as within powers conferred by federal act and not in violation of treaty. 31F(2d) 785. [c] **Commissioner of immigration** may not make regulations beyond power delegated to him by congress. 24F(2d) 649; 35F(2d)284. [d] **Rules and regu-**

lations prescribed by immigration commissioner are void to extent that they conflict with congressional act or treaty. 40F(2d)42.

1076–21½–New. War power of president under act of congress of 1918 held terminated by Immigration Act of 1924. 17F(2d)50.

1076–21⅓–New. Congress may enlarge powers of secretary of labor in deportation cases. 25F(2d)714.

1076–21¼–New. Passport regulations must be consistent with the provisions of the Immigration Law. 30F(2d)242.

1076–24 81CalA199, 253P169.

1077–37 128Fed375, 380, 63CCA117.

1077–38 [a] (2) 48Fed550; 128Fed375, 380, 63CCA117.

1077–40 128Fed375, 63CCA117; 143 Fed922; 212Fed711, 129CCA321; 3 AustrCLR649. But see 6F(2d)670; 11 F(2d)904. [a] **Not synonymous with "alien."**–179Fed839, 103CCA327.

1077–41 [b] **Amendment May 19, 1921** of Basic Quota Law held not to repeal Act Febr. 15, 1917 § 3, specifying excluded persons. 7F(2d)302. [c] **Penal provision** of War-Time Passport Act held not continued in force. 23F(2d) 500.

1077–41½–New. An act barring deportation of alien seaman three years after landing held not repealed. 17F(2d)557.

1077–41⅓–New. Statute relating to deportation of certain aliens held repealed by later act. 17F(2d)557.

1077–41¼–New. Alien held to have sustained burden of proving five years' residence in Buenos Aires entitling him to come in under Quota Law. 14F(2d) 112.

1077–41⅕–New. Courts in construing the Immigration Act should conform, if possible, to the provision of the Jay Treaty of 1794, providing for free temporary passage across the Canadian border. 24F(2d)649.

1077–41⅙–New. Immigration laws include conventions and treaties relating to immigration, exclusion, or expulsion of aliens. 24F(2d)649.

1077–41⅐–New. Act of March 2, 1921, relating to immigration, did not, as respects deportation, retain in force the war measure provisions of Act Febr. 5, 1917 § 19. 24F(2d)707.

1077–41⅛–New. Act authorizing president to require passport visé on penalty of deportation held not kept in force by subsequent act as respects deportation. 24F(2d)211.

1077–41⅑–New. The Immigration Act must, in case it can reasonably be done, be construed so as not to conflict with the Jay Treaty. 279US231, 49SCt274, 73 Led677.

1077–41 1/10–New. Members of a board of special inquiry having been duly designated to serve, who have taken the prescribed oath, are not required to subscribe to the oath preliminary to each particular hearing. 28F(2d)263.

1077–41 1/11–New. Immigration Act of 1924 relating to deportations of aliens repeals earlier act so far as concerns alien seamen of certain class. 38F(2d) 272.

1077–41 1/12–New. Congress may invest secretary of labor with wide discretion in matter of admitting aliens who otherwise would be excluded. 39F(2d)654.

1077–41 1/13–New. Impersonation may consist of playing fictitious character. 42F(2d)743.

1077–42½–New. The act of 1924 must be construed with a view to preserve treaty rights unless clearly annulled. 268US336, 45SCt539, 69Led985.

1077–43 23F(2d)185. [a] **Aliens of excluded classes** are not allowed to take permanent foothold in United States so as to obtain citizenship. 5F(2d)243. [b] **Boy under eighteen unable to read** held properly excluded under Basic Quota Act, though father was American citizen. 7F(2d)302. [c] **Right of German citizen of Prussia to enter** is governed by Prussian treaty of May 1, 1928, as modified by immigration laws of United States. 23F(2d)949. [d] **Under Jay Treaty of 1794,** member of Six Nations Tribe residing in Canada is entitled to cross boundary to work as skilled structural iron worker. 25F(2d) 71. [e] **Marriage by proxy** is not recognized as establishing marriage status for immigration purposes. 36F(2d)801. [f] **Possession of passport visa** is condition percedent to entry of nonimmigrant. 42F(2d)133. [g] **Smuggled aliens.**–43F(2d)1003.

1077–44 4F(2d)613 (statement on passport by American vice consul is mere statement that he belonged to nonquota class and is not conclusive on immigration officials). But see 35F(2d)284.

1077–46 24F(2d)105 (illiterate alien).

1077–48 16F(2d)532. [a] **Native-born citizen who expatriated himself** and became citizen of Great Britain is alien under Immigration Act of 1917 so as to be subject to removal. 8F(2d)473. [b] **Treaty with Japan.**–36F(2d)422(2d case); 36F(2d)424.

1077–48½–New. Ministers of any religious denomination are excepted from the quota provisions, 10F(2d)38.

1077–48⅓–New. and wives and children of such ministers are also excepted. 10 F(2d)38.

1077–48¼–New. An illiterate woman married by proxy to a resident in America may be admitted as a wife under exception in the law. 12F(2d)927.

1077–48⅕–New. Exclusion of aliens applying for admission as visitors held proper where they were without passports visaed by an American consul. 14 F(2d)679; 22F(2d)288 (British subject coming from Canada and who went to Canada under British passport).

1077–48⅙–New. Immigration authorities may exclude alien applying for temporary entry as visitor. 14F(2d)682.

1077–48⅐–New. Validity of marriage is determined by law of place where performed in connection with immigration statutes. 13F(2d)432.

1077–48⅛–New. American Indians are not among the alien nations. 18F(2d) 282.

1077–48⅑–New. Alien claiming preference as one skilled in agriculture may be excluded where it is shown that such person is an assisted alien likely to become public charge. 12F(2d)636.

1077–48 1/10–New. Illiterate alien seaman previously unlawfully admitted is not entitled to readmission after absence of less than six months after residence of five years. 10F(2d)433 (without examination as to qualifications).

1077–48 1/11–New. Alien seaman's illegal stay for over three years does not legalize his entry. 10F(2d)433 (as affecting right to reënter after temporary absence).

1077–48 1/12–New. Illiterate alien not admissible as immigrant returning after temporary absence to unrelinquished domicile of seven years. 10F(2d)433.

1077–48 1/13–New. Act of congress denouncing as crime departure from an entry into United States by alien when United States at war in violation of executive order was not extended beyond war period. 8F(2d)335.

1077–48 1/14–New. So that alien, entering unlawfully after official termination of war under status continuing policy of deportation, was not subject first to term of imprisonment and then deportation at expiration of term. 8F(2d)335.

1077–48 1/15–New. Quota law fixes numerical test. 9F(2d)900.

1077–48 1/16–New. Immigration law fixes desirability test. 9F(2d)900.

1077–48 1/17–New. Alien must satisfy provisions of both acts. 9F(2d)900.

1077–48 1/18–New. Wife and children of professor who entered to practice profession before act of 1924 exempt from quota provisions. 10F(2d)38.

1077–48 1/19–New. Alien entering United States without passport required by wartime regulations continued in force by the act of 1921 cannot base right of affidavits made prior to departure from United States and before return thereto as equivalent of passport. 8F(2d)940.

1077–48 1/20–New. nor is government estopped by representations of its consular agent at port of departure in alien's country. 8F(2d)940.

1077–48 1/21–New. Alien seaman entering before requirement of immigration visa is not subject to deportation solely because of lack thereof. 10F(2d)980.

1077–48 1/22–New. Failure to pass a literacy test by an alien domiciled seven years, returning from a temporary absence, does not bar admission if otherwise admissible. 22F(2d)314.

1077–48 1/23–New. Procedural forms relating to admission of immigrants may be dispensed with when required by substantive rights. 22F(2d)314.

1077–48 1/24–New. The secretary of labor may waive formal proof of the right to reënter of a domiciled alien. 22F(2d) 314.

1077–48 1/25–New. The secretary has discretion to extend a permit to reënter of a temporarily absent domiciled alien after it has expired. 22F(2d)314.

1077–48 1/26–New. Discretionary power given the secretary of labor to admit immigrants notwithstanding defects in visas does not apply where the immigrant is found inadmissible on other grounds. 24F(2d)489.

1077–48 1/27–New. Where members of a board of special inquiry are properly appointed and take the prescribed oath, they may legally determine an applicant's right to admission. 22F(2d)554.

1077–48 1/28–New. British subjects residing in Canada and employed or seeking employment in the United States are not immigrants and are entitled to admission as temporary visitors for business purposes. 24F(2d)649.

1077–48 1/29–New. Statutes merely prescribing rules for immigration officials' guidance do not warrant deportation of an alien because of noncompliance therewith. 24F(2d)211.

1077–48 1/30–New. Thus an official's failure to sign a passport visé does not warrant deportation under statutes, presidential proclamation, and congressional resolution. 24F(2d)211.

1077–48 1/31–New. The fact that an alien may reënter the country under the Immigration Act because of readjustment of territorial boundaries in the country he came from does not warrant deportation. 24F(2d)211.

1077–48 1/32–New. An able-bodied Japanese woman, possessing one hundred twenty-five dollars, held entitled to enter as a temporary visitor to her husband, working and able-bodied. 22F (2d)864.

1077–48 1/33–New. Authorities cannot exclude an alien applying for admission as a temporary visitor on the assumption that the alien intends to remain permanently. 22F(2d)864.

1077–48 1/34–New. An alien entering the country on the false representation that he was a citizen enters without "inspection" under statute and is deportable. 23F(2d)334.

1077–48 1/35–New. An Italian clarinetist, admitted for a temporary stay, does not forfeit his status as an "artist" under Immigration Laws (Comp. St. § 4289½a (d) by failing to claim it originally. 25F(2d)717.

1077–48 1/36–New. "Business" as used in the Immigration Act of 1924, exempting aliens visiting the United States temporarily for business, does not include ordinary work for hire. 279US231, 49 SCt274, 73Led677.

1077–48 1/37–New. "Immigrant," as used in the Immigration Act of 1924, included every alien coming into the country, either permanently or for temporary purposes. 279US231, 49SCt274, 73Led677.

1077–48 1/38–New. Natives of Roumania domiciled in Canada, who desired to enter the United States temporarily for the purpose of work, are not within the protection of the Jay Treaty, covering British subjects. 29F(2d)314, 30F(2d) 242.

1077–48 1/39–New. A naturalized citizen, who remained in the country of his nativity for more than two years after his departure from the United States, should not be refused admission on the ground that it is presumed that he ceased to be an American citizen. 29F (2d)527.

1077–48 1/40–New. The issuance of a nonquota immigrants' visa, on presentation of an affidavit of the applicants' daughter that they were domiciled in the United States, which was not true, did not change their status. 29F(2d)485.

1077-48½1-New. That an alien, seeking to enter the United States temporarily, was not asked whether he possessed a duly visaed passport, did not prevent his exclusion, where, on examination, the passport presented bore no visa. 29F(2d)314.

1077-48½2-New. Where a person seeking admission was a citizen of the United States, the fact that he possessed a fraudulent permit and passport is not ground for refusing admission. 29F(2d)527.

1077-48½3-New. Failure of an immigrant to have his passport visaed by the American consul is sufficient basis for denial of admission. 30F(2d)242.

1077-48½4-New. No domicile in the United States can be established by an alien whose original entry was unlawful. 30F(2d)346.

1077-48½5-New. The action of consular officers in refusing to issue an immigration visa, is not reviewable by a cabinet officer or other authority. 30F(2d)934.

1077-48½6-New. That an alien applied for a certificate of admission under the quota provision is not a sufficient reason for barring entry as a temporary visitor. 28F(2d)281.

1077-48½7-New. A native-born citizen cannot be excluded, notwithstanding he uses a passport wrongfully obtained and commits perjury in order to gain admission. 28F(2d)44.

1077-48½8-New. The wife of a resident alien is subject to the immigration acts. 4HawaiiFed271.

1077-48½9-New. The fact that an alien seeking admission as professor expects also to act as a church singer does not preclude the view that he enters solely to teach. 32F(2d)542.

1077-48½0-New. The status of a Japanese as a laborer at the time of entry, and not his subsequent status, determines whether his entry was lawful. 33F(2d)926.

1077-48½1-New. Admission of alien cannot be denied on ground that visa was mistakenly or improvidently granted by consul after exhaustion of quota. 36F(2d)801.

1077-48½2-New. Board of special inquiry may refuse admission to alien in first instance where it would refuse him a temporary stay on ground that he is a quota immigrant. 37F(2d)459.

1077-48½3-New. Alien's right to reënter and to remain in United States depends on the facts as they exist when he seeks to return. 37F(2d)935.

1077-48½4-New. Statute does not entitle Japanese visiting Japan after residing in United States following unlawful entry from Hawaiian Islands to reënter on ground that entry into Islands was entry into United States. 38F(2d)207.

1077-48½5-New. Japanese changing his occupation from laborer to merchant after unlawful entry is not entitled to reëntry as merchant. 38F(2d)207.

1077-48½6-New. Instead of excluding aliens unable to meet literacy test, immigration authorities may grant temporary admission under bond. 39F(2d)654.

1077-48½7-New. Whether alien failing to pass literacy test should be deported or temporarily admitted is within discretion of immigration officers. 39F(2d)654.

1077-48½8-New. Alien entering fraudulently and unlawfully acquires no right from occupation. 39F(2d)844.

1077-48½9-New. Under treaty with Japan, editor of Japanese newspaper distributed locally, who is not proprietor or publisher, is engaged in trade entitling him and his wife to enter as nonimmigrants. 40F(2d)42.

1077-48½0-New. Evidence held insufficient to sustain a finding that the alien was a quota immigrant. 35F(2d)284.

1077-48½1-New. Right to enter as nonimmigrant under such treaty is not confined to those engaged in foreign commerce. 40F(2d)42.

1077-48½2-New. Under the Immigration Act and presidential proclamations admission of Japanese laborers to Hawaii does not carry with it the right to admission to the mainland of the United States, notwithstanding the definition of the "United States" as including Hawaii. 33F(2d)926 (entry of Japanese laborer into mainland of United States after admission to Hawaii held unlawful).

1077-49 [a] (2) Alien, procuring passage for consideration paid seamen, without signing on ship's crew, and landing in defiance of law, is a "stowaway," under Immigration Act of Febr. 5, 1917 § 3. 27F(2d)642. [b] **Alien shipping for round trip held "seaman"** not subject to deportation more than three years after landing at port of departure, at expense of ship. 17F(2d)557.

1077-50 22F(2d)270 (act of 1917); 36F(2d)631; 38F(2d)272 (subject to deportation). [a] (3) Statute permitting bona fide seamen to take shore leave irrespective of race is not inconsistent with statute prohibiting paying off or discharging excluded alien seamen. 22F(2d)270. (4) "Leave to land" to alien seaman intending to reship is merely short, though indefinite, time within which seaman must find new berth. 43F(2d)917. [b] **Proceedings to deport alien seaman,** remaining longer than permitted by regulations, may be taken at any time after entry. 32F(2d)623; 32F(2d)894 (not barred by lapse of over three years). [c] **Under act of 1924** dealing with alien seamen, fireman on freight boat bound from foreign port to New York held subject to deportation. 38F(2d)811 (act of 1924 also applicable as to time in which he might be deported). [d] **Status of alien seaman not reshipping till after limitations for deportation** and returning under proper visa. 43F(2d)917.

1077-50½-New. Seaman's identification card does not authorize admission for purpose of permanent residence. 10F(2d)433 (only in pursuit of calling).

1077-50½-New. Domestics.—Under Quota Act alien entering country as visitor but employed as domestic servant at time of application to remain is within exempted class. 5F(2d)749.

1077-50¼-New. Alien seaman, who fails to reship after temporary landing in United States, and engages in other employment, loses seaman status and protection from deportation after three years under Immigration Act. 21F(2d)695.

1077-50⅓-New. Where an alien seaman makes trips on an American vessel during five years following his original arrival, he is not subject to deportation. 29F(2d)586.

1077-50⅓-New. An alien seaman was subject to deportation at the moment when, without intention to reship, but with intention to reside unlawfully in the United States, he deserted his ship. 30F(2d)346.

1077-50½-New. An alien seaman, deserting his ship, was subject to the quota restrictions, and was excluded from reëntry. 30F(2d)346.

1077-50⅝-New. Alien seamen, entering the United States in pursuit of their calling, abandon their status as nonimmigrants under the act of 1924, by engaging in another calling for hire or profit, or entering into the coastwise trade of the United States, or remaining more than sixty days after entry, and are deportable. 33F(2d)334.

1078-52 179Fed839, 103CCA327; 9F(2d)412 (act of 1917); 15F(2d)878; 16F(2d)532; 17F(2d)524 (that alien crossed Niagara River for picnic in Canada, returned same day, and had no intention of remaining in foreign country, held immaterial as affecting deportation for crime within five years after reëntry); 17F(2d)719; 21F(2d)307; 4HawaiiFed691. But see 4HawaiiFed52; 4HawaiiFed97. [d] **Alien going to Mexico for twenty-seven days** held not to evince intention to abandon domicile. 16F(2d)783. [e] **That resident alien had declared intention to become citizen** does not enlarge his rights. 21F(2d)1004. [f] **That resident alien had registered under Selective Service Act** does not enlarge his rights. 21F(2d)1004. [g] **Permit for temporary visit abroad** does not give alien in excluded class right to reënter United States. 25F(2d)902. [h] **Return on American vessel of alien seaman having rights as citizen** does not necessarily constitute a new entry. 24F(2d)64.

1078-53 17F(2d)524 (under Comp. St. § 4289¼ length of absence in foreign country immaterial as affecting liability for deportation for offense committed within five years after reëntry); 21F(2d)307; 24F(2d)57 (going to Canada and returning same day). [a] **Secretary of labor's** promulgation of six months' period as "temporary absence" held not unreasonable. 16F(2d)532. [b] **Return permit** held only prima facie evidence of status. 21F(2d)307.

1078-53½-New. Aliens returning from a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the secretary of labor and under such conditions as he may prescribe. 8F(2d)366.

1078-53¼-New. If at any time within eight years alien obtained domicile in United States it was not unrelinquished when he returned to his native land where he had wife and child and there remained nine years. 8F(2d)366.

1078-53¼-New. Alien landing as seaman and remaining five years not within Act (1917) § 3 providing for readmission on return to United States within six months from departure therefrom. 8F(2d)366.

1078-53½-New. And on such return of seaman in 1925 within six months from departure he was not nonquota immigrant within act of 1924 where never admitted as an immigrant, and where his continuous stay as seaman was illegal for part of the five years when he was subject to deportation. 8F(2d)366.

1078-53⅙-New. Provisions as to return permits and immigration visas held intended as convenient but not essential evidence for determining status of nonquota immigrants. 17F(2d)50.

1078-53⅙-New. Alien's going into Canada and return under bail pending deportation proceedings held a new entry. 17F(2d)647.

1078-53⅛-New. Seamen of excluded classes of aliens are not permitted shore leave. 17F(2d)810.

1078-53⅛-New. Permitting alien to reenter country to save condition of his bail bond held not to estop the department from again proceeding against him. 17F(2d)647.

1078-53⅒-New. Conviction of alien for violation of National Prohibition Act and subsequent surreptitious entry from Canada held to warrant deportation. 17F(2d)647.

1078-53⅓1-New. That alien has applied for naturalization does not enlarge his right to enter or remain in United States. 17F(2d)432.

1078-53⅓2-New. Under Immigration Act of 1924, the fact that an alien had unlawfully resided in the country for five years does not exempt him from provisions of the act and return from temporary visit to Canada is new entry; 17F(2d)432.

1078-53⅓3-New. and fact that he had been permitted to enter after previous visits makes no difference. 17F(2d)432.

1078-53⅓4-New. Immigration rules requiring immigrants returning from temporary visits abroad to present unexpired valid immigration visas or unexpired valid permits to reënter are valid. 21F(2d)852.

1078-53⅓5-New. Secretary of labor has discretion to extend term of permit. 21F(2d)852.

1078-53⅓6-New. Reëntry at a place other than the designated port of entry in violation of statute is ground for deportation. 21F(2d)1004.

1078-53⅓7-New. An alien "admitted and discharged for permanent residence as returning to his home in U. S." Oct. 22, 1923, held not subject of deportation, since the act of May 26, 1924, giving power to deport aliens previously admitted, is not retroactive. 25F(2d)1013.

1078–53½8–New. Where his original entry is unlawful, an alien returning from a temporary absence is not exempt from literacy test. 29F(2d)347.

1078–53½9–New. Reëntry permits issued under the Immigration Act of 1924 prior to July 1, 1924, were not good for admission to the United States before such date. 29F(2d)347.

1078–53½0–New. The act, making all aliens returning from a temporary visit abroad nonquota emigrants, refers to aliens who have been lawfully domiciled in the United States. 30F(2d)346.

1078–53½1–New. The act making all aliens returning from a temporary visit abroad nonquota emigrants must be construed in pari materia with the act exempting certain aliens from literacy test. 30F(2d)346.

1078–53½2–New. The date of return may be taken as the date of "entry" for certain purposes, including the running of the statute of limitations. 33F(2d) 377.

1078–53½3–New. By express statutory provisions, a lawfully resident alien needs no visa or passport to visit Canada where he returns within six months. 36F(2d)239.

1078–53½4–New. A lawfully resident alien, returning from visit abroad, cannot be excluded for crimes committed within this country. 36F(2d)239.

1078–53½5–New. The absence of a record of a resident alien's lawful first entry does not warrant his exclusion as a nonquota immigrant upon his return from abroad. 36F(2d)264.

1078–53½6–New. Status under federal Quota Act. Singing artist held not entitled to status of permanent resident based on original arrival as artist prior to enactment of Quota Act not shown to have been intended to be permanent. 38 F(2d)815.

1078–53½7–New. Where applicant by testimony overcomes presumption arising from his absence, he is entitled to admission. 135Misc672, 240NYS662.

1078–53½8–New. A Japanese, who resided for more than seven years in the United States, is not entitled to reëntry after a visit to Japan under a contract to ship on one American line boat and return on another, where he failed to procure the proper reëntry permit or visaed passport and the secretary of labor refuses permission under discretionary power. 33F(2d)470.

1078–53½9–New. The right of reëntry cannot be predicated upon residence in the United States following unlawful entry. 33F(2d)926 (Japanese laborer unlawfully entering United States from Hawaii held not entitled to return after temporary absence as nonquota immigrant).

1078–53½0–New. An alien entering on a nonimmigrant visa and who overstayed his leave could not reënter from Canada. 35F(2d)281.

1078–53½1–New. A Japanese unlawfully entering the United States and establishing a restaurant business is not entitled to admission, after temporary absence, as a nonimmigrant, under a provision of the Immigration Act permitting aliens to enter under a treaty of commerce. 33F(2d)926.

1078–59 [a] **Communist party** is organization which believes in overthrow of United States government. 17F(2d) 507.

1079–60 6F(2d)233 (alien boy held subject to deportation as having been twice sentenced for crime); 13F(2d) 624; 16F(2d)328; 17F(2d)719; 21F (2d)590; 30F(2d)984; 37F(2d)935. But see 35F(2d)636. [a] **Moral turpitude is baseness;** a serious delinquency measured by general moral standards. 16F(2d)783. [b] **Effect of pardon.**–23F (2d)949. [c] **"Admission"** referred to in statute is not necessarily limited to admissions made in the course of legal proceedings upon criminal charge, such, for example, as plea of guilty. 33F(2d) 377.

1079–60½–New. Recommendation of judge that alien convict be not deported under Immigration L. § 19 to be effective must be made within thirty days after sentence. 11F(2d)899.

1079–61 34F(2d)920 (not every violation of Prohibition Law involves moral turpitude). [a] (1) 203Fed152. **Erratum.**–Strike out "U. S. v. Redfern, 180 Fed. 506; U. S. v. Watchorn, 164 Fed. 152." [c] 38F(2d)498. [e] 17F(2d) 719; 21F(2d)590. [h] **Issuing check without funds** is crime warranting deportation. 16F(2d)328. [i] **Violation of liquor laws** is not cause for deportation. 16F(2d)783. [j] **Violation of National Prohibition Act** is offense involving moral turpitude. 17F(2d)647. [k] **Conviction for making and having wine** for his own use is not crime involving moral turpitude authorizing exclusion. 22F(2d)120. [l] **Adultery** is crime involving moral turpitude. 4HawaiiFed 266; 4HawaiiFed625. [m] **Perjury** is crime involving moral turpitude. 4HawaiiFed625. [n] **Theft** involves moral turpitude. 30F(2d)984. [o] **Second degree manslaughter** does not involve moral turpitude, for conviction of which alien may be deported. 30F(2d)825. [p] **Court must resort to statutes** of state to define moral turpitude. 30F(2d)825. [q] **Petty larceny** is crime involving moral turpitude within statute. 35F (2d)537. [r] **"Lewdness,"** as used in state statute, has been held to connote moral turpitude within act relating to deportation of aliens. 38F(2d) 231. [s] **Violation of Harrison Anti-Narcotic Act** does not involve moral turpitude. 38F(2d)498. [t] **Manslaughter and counterfeiting** involve moral turpitude. 42F(2d)217.

1079–63 [a] **Alien pardoned in foreign country for murder committed there before entry** should be deported. 17F(2d) 534.

1079–64 [a] **Deportation for crimes committed in this country** will not be prevented because alien was guilty of nonextraditable political offenses. 35F (2d)687.

1079–64½–New. Under the act of 1917 authorizing deportation of alien convicted of crime and sentenced to imprisonment for more than one year, alien sentenced to imprisonment for less period is not subject to deportation. 8F(2d)488.

1079–64⅓–New. This is applicable to an alien convicted and sentenced to imprisonment for unlawfully receiving narcotic drugs under Harrison Act providing for deportation as provided in the act of 1917. 8F(2d)488.

1079–64¼–New. Where alien has received full pardon by royal United States decree, deportation is not authorized. 11F(2d)980.

1079–64⅕–New. Where alien has pleaded guilty to offense under Narcotic Act § 2 subd (c), he is subject to deportation. 15F(2d)789.

1079–64⅙–New. Recommendation against deportation. Order entered nunc pro tunc amending sentence by recommending that convict be not deported held insufficient to avoid deportation. 13F(2d)630.

1079–64⅐–New. It is a question of fact whether petty larceny involves moral turpitude determinable upon a consideration of the circumstances of the theft. 27F(2d)438.

1079–64⅛–New. Moral turpitude, sufficient to warrant deportation, is not conclusively implied in a charge of aggravated assault and battery. 28F(2d)287.

1079–64⅑–New. Deportation, after conviction of a crime involving moral turpitude, requires a conviction, an offense of such gravity as to call for a sentence of a year's imprisonment, and one which in itself evidenced moral turpitude. 28F(2d)287.

1079–64⅒–New. An alien's conviction more than five years after entry of itself is insufficient to warrant deportation. 28F(2d)287.

1079–64⅑–New. An alien's suppression at the time of admission of irrelevant facts will not justify his exclusion. 34 F(2d)920.

1079–64½–New. Perjury before the board of special inquiry was not commission of crime involving moral turpitude prior to entry, within the meaning of the act of Febr. 5, 1917. 35F(2d) 284.

1079–64⅓–New. Alien convicted of felony and given indeterminate sentence with maximum of three years is subject to deportation notwithstanding parole after eight months. 42F(2d)716.

1079–64¼–New. Statute applies to alien released from imprisonment before act became effective. 42F(2d)127.

1079–64⅕–New. Alien may be deported for convictions of crimes although leaving and reëntering country before second conviction. 42F(2d)217.

1079–64⅙–New. Alien's imprisonment terminates, within Deportation Law, at time of discharge from prison on parole. 42F(2d)127.

1079–67 4HawaiiFed625.

1079–70 4HawaiiFed230; 4HawaiiFed 335. [a] **Evidence held to justify** exclusion because of physical defects affecting ability to earn living. 9F(2d)900.

1079–71½–New. Physically defective son of minister excluded from entering. 10F(2d)38 (also found suffering from valvular disease of heart).

1079–71⅓–New. Where diseased alien marries an American citizen, after order to be deported, she is nevertheless subject to deportation, the statute providing for naturalization of aliens marrying American citizens not being applicable. 6F(2d)520.

1079–71¼–New. Aliens becoming insane within five years after entry may be deported. 15F(2d)555.

1079–73 9F(2d)412 (act of Febr. 5, 1917). [b] **Under Immigration Act of 1917** it is ground for deportation if alien is probable public charge regardless of his inferior psychopathic condition. 8F (2d)362. [c] **One under indictment under federal laws,** who leaves country for month and then returns, held not under ban. 16F(2d)783. [d] **Evidence held insufficient** to show that alien became public charge within five years after entry. 19F(2d)520. [e] **Probability of alien becoming public charge** at time of entry is dependent on mental condition at that time. 19F(2d)520. [f] **Deportation of alien as of person of constitutional psychopathic inferiority** not upheld in absence of reasons for decision of authorities. 19F(2d)520.

1079–74 17F(2d)646; 21F(2d)590; 24 F(2d)57. [b] **One may become public charge** within meaning of Immigration Act where he has been confined in prison for federal offense. 11F(2d)988. [c] **Evidence that alien is likely to be arrested** for violating Prohibition Law does not warrant deportation. 34F(2d) 920.

1079–76 4F(2d)808 (order of deportation suspended on relatives giving bond that alien liable to deportation for mental condition will not become public charge); 15F(2d)878; 29F(2d)347. [c] (2) Secretary may exercise discretion as to admitting alien child under sixteen, unaccompanied by, or not coming to, parents, if otherwise eligible, if not likly to become public charge. 22 F(2d)472. (3) Where uncle is able and willing to support such child, fact that he is under no legal obligation to support him is not ground for exclusion. 22F(2d)472. [e] 15F(2d)266. [f] **Maintaining alien boy at public expense** in state school for defective children is not ground for deportation where parents were able and willing to pay for maintenance. 6F(2d)1. [g] **Evidence held to show** aliens likely to become public charges. 9F(2d)412. [h] **Evidence held sufficient** to support finding that persons are likely to become public charges. 10F(2d)816. [i] **Arbitrary exclusion of minors unaccompanied by or not coming to one or both of their parents** is unlawful as abuse of discretion where no evidence is given to show that minors are within included class. 13F(2d)96. [j] **Possession of two hundred dollars cash** does not support finding that person is likely to become public charge. 11F(2d)980. [k] **Confinement of alien in jail** for nine months is sufficient proof that he is likely to become public charge. 11F (2d)988. [l] **Alien entering United**

States at point not port of entry and attempting to smuggle inadmissible alien is deportable. 11F(2d)988. [m] **Finding held not sustained** by any evidence. 13F(2d)624. [n] **Burden of proof** is on infant immigrant to show he is not in excluded classes. 22F(2d) 472. [o] **Evidence held sufficient to show** that infant immigrant was not likely to become public charge. 22F (2d)472.

1080-78½-New. Student entering county as nonquota immigrant, under Immigration Act (1924) § 4 subd e, need not at time of admission have available money resources to complete education. 15F(2d)266.

1080-78⅓-New. Provision for exclusion as likely to become public charge does not deal with criminal misconduct or imprisonment therefor, and pendency of indictment against alien at time of entry is not ground for his exclusion as likely to become public charge. 22F (2d)120.

1080-78¼-New. Admission under bond. A bond against an alien becoming a public charge, which is secured by collateral and is conditioned upon his departure by a given date, is forfeited, although he does not become a public charge, where he overstays the time limit without procuring extension. 33F (2d)64 (bond held not exonerated by later extension and admission of alien to bail).

1080-79 12F(2d)636.

1080-80 12F(2d)636.

1080-82 41F(2d)735. [e] **Evidence held to show alien** inmate of and managing house of prostitution. 19F(2d) 470. [f] **What constitutes entering.**-4 HawaiiFed664.

1080-83 [b] **Evidence held sufficient** to sustain finding that alien shared in earnings of prostitute. 19F(2d)520.

1080-84 15F(2d)844; 41F(2d)735. [b] **Prostitute's testimony should be received with caution** in proceeding for deportation for assisting prostitute. 15 F(2d)844. [c] **Evidence held sufficient** to sustain finding on habeas corpus that alien was properly deported for giving assistance to prostitute. 25F(2d)11.

1080-86 12F(2d)639.

1080-88 [c] **Evidence sufficient** to show alien practiced prostitution since arrival. 9F(2d)342 (within act of 1917).

1080-89 16F(2d)105.

1080-89½-New. Under Immigration Act of 1917 denouncing practice of prostitution by alien woman after entry into United States, deportation is not warranted by proof of an isolated act. 8F(2d)355.

1081-95 219Fed328.

1081-98 See also 226Fed141; 37F(2d) 315. [c] **"Exclusion" and "deportation" distinguished.**-6F(2d)336. [d] **Alien seaman** who has abandoned calling and remained in United States more than sixty days after entry is subject to deportation. 24F(2d)654; 25F(2d)902. [e] **Alien seaman given leave to land as intending to reship,** who breaks leave, is not "admitted" into United States. 43F(2d)917. [f] **Statute providing for deportation of alien seaman unless admitted** refers to admissibility when examined. 43F(2d)917.

1081-98½-New. Status of alien as immigrant depends on whether or not he came to this country as temporary visitor. 13F(2d)233.

1081-99 16F(2d)532.

1081-1 26F(2d)458 (entry by fraudulent avoidance of "inspection").

1081-2½-New. A common-law marriage to an American citizen before the Cable Act went into effect makes the wife an American citizen not liable to deportation. 5F(2d)596.

1081-2⅓-New. Minor children of citizen cannot be deported merely because they entered by way of Mexico without having resided there for two years and were admitted by mistake of law or fact. 5F(2d)243.

1081-2¼-New. Aliens convicted under Selective Service Act of 1917 and Espionage Act of 1917 may if found undesirable be deported regardless of period of residence in United States. 5F (2d)162.

1081-2⅕-New. Right to deport for conviction under Narcotic Act depends on recommendation of trial judge. 6F (2d)526.

1081-2⅙-New. Act (1917) § 19 provides that alien convicted of crime involving moral turpitude shall not be deported if court recommends that he be not deported. 8F(2d)983.

1081-2½-New. but such provision does not apply to alien convicted of misdemeanor in reëntering after deportation which does not involve moral turpitude. 8F(2d)983.

1081-2⅛-New. Under such act alien, who has been sentenced to imprisonment for year or more for commission of crime involving moral turpitude, within five years after entry into United States, is liable to deportation. 8F(2d) 663.

1081-2⅛-New. Mere assault and battery does not involve commission of crime involving moral turpitude justifying deportation. 8F(2d)663.

1081-2 1/10-New. But assault with dangerous weapon and shooting person will justify deportation. 8F(2d)663.

1081-2 1/11-New. Alien sentenced to state reformatory until discharged by law because of conviction of assault in second degree committed within five years after entry is held to have been definitely sentenced to imprisonment for year or more where he was incarcerated year and six months and under law no parole was allowable until expiration of thirteen months after beginning of imprisonment. 8F(2d)663.

1081-2 1/12-New. That alien declares intention to become citizen does not affect power to order deportation. 9F (2d)412.

1081-2 1/13-New. One domiciled in United States for seven years before temporary absence is deportable. 9F(2d)412 (where no application made to surety of labor or return).

1081-2 1/14-New. Deportation provisions apply to aliens, not merely immigrant aliens. 9F(2d)412 (act of 1917).

1081-2 1/15-New. Assault with intent to oust person from possession of his property held to justify deportation. 15F(2d)391.

1081-2 1/16-New. Immigration Rules, rule 9 subd D does not apply to nonquota immigrant students who during their studies gain maintenance and tuition by self-supporting labor. 15F(2d) 266.

1081-2 1/17-New. Under Immigration Act of 1917 male alien connected with management of house of prostitution can be deported. 15F(2d)377.

1081-2 1/18-New. Single sentence for conviction of arson under eleven count indictment is not multiple sentence under statute requiring deportation therefor. 26F(2d)288.

1081-2 1/19-New. Disabilities, growing out of commission of offense requiring deportation, removed by pardon. 17F (2d)524.

1081-2 1/20-New. Order of deportation must be predicated on finding of alienage. 22F(2d)174.

1081-2 1/21-New. Perjury committed at an examination before the immigration officers is not open to the claim that it was made after entry. 30F(2d)942.

1081-2 1/22-New. A conviction for petit larceny is one involving moral turpitude. 31F(2d)81.

1081-2 1/23-New. An alien crossing into Mexico and returning within an hour is subject to deportation. 30F(2d)823.

1081-2 1/24-New. A woman resident of a foreign country with whom a domiciled alien has entered into an agreement to marry upon her arrival is not a nonimmigrant alien but is subject to the Immigration Act. 4HawaiiFed266.

1081-2 1/25-New. The wife of a resident alien is subject to the Immigration Act. 4HawaiiFed271.

1081-2 1/26-New. Where course alien pursued is in defiance of law, so that he is subject to deportation under Immigration Act of 1924, court cannot afford him any remedy although his fault was of ignorance only. 38F(2d)272.

1081-2 1/27-New. Alien returning to unrelinquished domicile lawfully acquired must be deported on entering without inspection at unauthorized time and place. 41F(2d)861(2dcase).

1081-2 1/28-New. Indeterminate sentence is sentence for maximum term exceeding one year warranting deportation within statute. 43F(2d)821.

1081-2 1/29-New. Where alien seaman remained beyond time allowed, warrant of deportation is properly issued. 43F (2d)760.

1081-2 1/30-New. Petit larceny held to involve moral turpitude under Deportation Law. 41F(2d)704.

1081-3½-New. An alien cannot be deported for entering without a passport bearing an American Consul's visa. 36 F(2d)503.

1081-9 33F(2d)882 (alien entering without inspection). See also 30F(2d) 573. [a] **Alien entitled to enter** but entering by prohibited means is subject to three-year limitation under the act of 1917. 36F(2d)503.

1081-9½-New. The act of Febr. 5, 1917 provides for deportation at any time within five years from the time of entry. 9F(2d)412; 16F(2d)15.

1081-9⅓-New. Return of alien seaman in 1918 from foreign voyage on American vessel is an entry under the Act of 1917 subjecting him to deportation, on conviction of crime within five years, 16F(2d)15.

1081-9¼-New. Act of Febr. 5, 1917 provides for deportation at any time within five years after expiration of sixty-day period. 43F(2d)760.

1081-11 [a] **Under Immigration Act of 1917** alien subject to deportation within five years from entry may be deported under proceedings begun, though not concluded, within five years. 6F(2d)1. [b] **Deportation ordered** where evidence showed alien had been present in United States less than five years. 32F(2d) 991. [c] **Warrant of deportation,** not merely warrant of arrest, must be issued within statutory period. 33F(2d) 882.

1081-13 [a] **Temporary entry of alien seaman because of sickness** is not "time of entry" within deportation statute where alien subsequently reshipped foreign and returned. 43F(2d)760.

1081-14 9F(2d)412; 23F(2d)918; 30 F(2d)346 (reëntry of alien seaman).

1081-14½-New. Act of Febr. 5, 1917 provides that certain classes of aliens may be deported at any time within five years after entry, 12F(2d)922. [a] **Act does not apply** to alien convicted of violating Narcotic Act. 12F(2d)922. [b] **Deserting alien seaman declaring intention to become citizen** in 1920 and thereafter serving continuously on American merchant ships engaged in foreign trade until 1926 is not subject to deportation on reëntry. 24F(2d)64. [c] **Crime involving moral turpitude** within Immigration Act requiring deportation, includes conviction of concealing assets from trustee in bankruptcy. 24F(2d)57. [d] **Alien committing crime within five years before entry** and at any time thereafter is within statute regardless of whether admission of crime is before or after entry. 24F(2d) 57.

1081-14⅓-New. but does not so limit the time of deportation as respects certain other classes, as to whom it is declared they may be deported, irrespective of time of entry. 12F(2d)922.

1081-14¼-New. Delay due to war conditions and subsequent efforts of alien to prevent deportation will not prevent carrying out order of deportation. 14 F(2d)416.

1081-14½-New. Deportation of alien seaman held governed by three-year limitation of Act (1917) § 34. 20F(2d) 733.

1081-14⅙-New. The limitation in such case runs from the taking into custody under express provision of the statute. 20F(2d)733.

1081-14⅐-New. Three-year rule does not apply to alien temporarily admitted. 26F(2d)266.

1081-14⅛-New. Under Immigration Act member of excluded class is de-

portable at any time within five years. 21F(2d)695.

1081-14⅛-New. The five-year period as provided for in recent statutes has been held not to apply to deportation under the Narcotic Act. 31F(2d)801. [a] **Stowaways.**-27F(2d)642.

1081-14⅛-New. What constitutes "entry" within the meaning of the five-year statute providing for deportation within the five-year period see 279US398, 49 SCt354, 73Led758 ("entry" construed).

1081-14⅛-New. An alien deserting his ship and entering to engage in other pursuits is not within statutory limitations. 30F(2d)346.

1081-14½-New. Five-year limitation of time for deportation begins to run from the time of the last reëntry in the case of an alien seaman shipping on American vessels from time to time in foreign service. 33F(2d)334.

1081-14½-New. Five-year limitation under Quota Act applies to an alien entering in violation thereof. 36F(2d) 503.

1081-14¼-New. As regards deportation of alien seamen who return to this country after voyage to foreign ports there is "entry" and limitations is to be counted therefrom. 37F(2d)315.

1081-14⅛-New. Alien may be deported, notwithstanding more than five years have expired since he entered, where warrant of deportation was issued within such time. 37F(2d)609.

1081-14⅛-New. Rule that statutes of limitation must receive strict construction in favor of government applies as against alien who endeavors to remain in violation of its laws. 37F(2d)609.

1081-14⅛-New. Where alien seeks to avail himself of limitation of time for deportation, he must be able to show that he plainly comes within its terms. 37F(2d)609.

1081-14⅛-New. Immigration Act of 1924, containing no limitation as to time of deportation, which was in effect at time of alien's last entry, controls. 38F(2d)272.

1081-14⅛-New. Aliens arriving when quota full and admitted temporarily for four months may be deported within five years under Quota Act of 1921 when found in country after expiration of four months. 38F(2d)499.

1081-14⅛-New. An alien sentenced to one year in a county jail for theft within five years after entry has been held subject to deportation. 35F(2d)537.

1081-14⅛-New. Time of deportation of alien sentenced to imprisonment. 41 F(2d)853.

1081-14⅛-New. Alien paroled and subject to rearrest held subject to deportation. 41F(2d)853.

1081-14⅛-New. Alien could not be deported where conviction within five years after entry was void under state law. 41F(2d)707.

1081-14⅛-New. Alien could not be deported where sentence was suspended and probation granted. 41F(2d)704.

1081-14⅛-New. Law of state governs conviction of crime committed within five years after entry. 41F(2d)707.

1081-14⅛-New. Alien crossing international boundary line, returning same day, is not subject to deportation for conviction of crime over five years before. 41F(2d)704.

1081-14⅛-New. Act barring deportation of alien seamen three years after landing was not repealed by Immigration Act of 1924. 41F(2d)745.

1082-19½-New. The five-year limitation does not apply to the deportation of any alien managing a house of prostitution. 31F(2d)384.

1082-20 [c] **Where prostitute after entering United States from Russia married citizen of Poland,** she may be deported to Poland. 38F(2d)985.

1082-23 16F(2d)105.

1082-24 [b] 14F(2d)416 (deportation to Poland instead of Austria not error).

1082-25 16F(2d)958; 22F(2d)302. [d] 23F(2d)956.

1082-27 [a] **Alien ordered deported to** Russia cannot be imprisoned indefinitely pending recognition of Soviet government. 5F(2d)238.

1082-27½-New. Deporting an alien convicted of a crime committed in this country to the country from which he came is not an abuse of discretion because he was not allowed to go freely to another country of his choice. 35F(2d) 687.

1083-29 126Fed226; 5F(2d)238. See also 4HawaiiFed520.

1083-30 10F(2d)145; 12F(2d)636; 15 F(2d)377; 17F(2d)507; 22F(2d)174; 30 F(2d)942; 42F(2d)664. [c] 12F(2d)698; 15F(2d)377; 17F(2d)646; 19F(2d)875. [e] 20F(2d)302; 24F(2d)686; 24F(2d) 707. [f] **Indictment** not necessary. 10 F(2d)145. [g] **Variance.**-10F(2d)145. [h] **Total failure of proof** of charge that alien had committed crime of fraud. 10 F(2d)145 (in absence of showing that acts proved constitute crime charged in foreign jurisdiction). [i] **Right of cross-examination** must be observed. 7 F(2d)515. [j] **Affidavit in deportation proceedings** for transporting woman for prostitution held incompetent as evidence. 7F(2d)515. [k] **If witnesses are not produced,** due to inability of authorities to find them, hearing is not unfair. 15F(2d)377. [l] **Weight to be given documentary evidence** is question for determination of board of special inquiry. 12F(2d)636. [m] **Evidence held insufficient** to show alienage. 24F(2d) 686. [n] **Evidence of mental disorder.**-33F(2d)267. [o] **Evidence held sufficient.**-25F(2d)35; 33F(2d)803; 37F (2d)459; 37F(2d)575; 40F(2d)51. [p] **Conflicts in evidence** are solely for decision of immigration authorities. 42F (2d)664. [q] **Burden of proving time and place of entry** is on alien in deportation proceedings. 43F(2d)1003. [r] **Introduction of incompetent evidence** does not necessarily render deportation hearing unfair. 42F(2d)664.

1083-31 [a] **Alien ordered deported to Russia** cannot be required to furnish bond and report to immigration commissioner until he can be deported. 5F (2d)238. [b] **Immigration rule, under general power conferred, denying alien applying for admission right of counsel** before board of special inquiry, held not invalid as denying due process of law. 31F(2d)785.

1083-32 10F(2d)145; 17F(2d)507; 20 F(2d)302; 21F(2d)307; 23F(2d)545 (evidence of connection with house of prostitution sufficient); 24F(2d)57 (fair hearing shown); 25F(2d)35 (denial of fair hearing held not established); 30F (2d)766 (evidence held not to show that officers acted arbitrarily and unfairly); 33F(2d)914; 41F(2d)239; 4HawaiiFed 563. [a] **Persons claiming citizenship** are entitled to have claims determined. 5F(2d)243. [b] **Alien cannot complain** because of failure to subpœna particular witness. 9F(2d)342 (where regulation requires alien affirmatively to show relevancy of proposed evidence). [c] **Evidence held to show that Chinaman was alien.**-16F(2d)492. [d] **Consideration of ex parte affidavit** is not unfair where aliens were represented by counsel who did not object nor ask to cross-examine. 24F(2d)526. [e] **Failure to permit alien's cross-examination of witnesses** after demand subsequent to trial, and while witnesses remained available before their deportation, rendered proceedings unfair. 27F(2d)835. [f] **Refusal of immigration officers to produce for cross-examination** persons by whose ex parte statements the charge was supported deprived alien of fair trial. 27F (2d)835. [g] **Exclusion from temporary admission held not arbitrary or unfair.**-28F(2d)281. [h] **Absence of counsel or opportunity to procure counsel** does not render hearing unfair. 42F(2d)664.

1083-32½-New. Same observance of rules of evidence need not be pursued by immigration officers that attend judicial proceedings. 40F(2d)961.

1083-33 10F(2d)145; 17F(2d)507; 33 F(2d)914 (proceedings held "manifestly unfair" where deportation warrant was issued two days before invited briefs were due).

1083-34 21F(2d)307 (burden is on alien to establish his admissibility); 4 HawaiiFed539. [a] (2) Rules have force of law. 9F(2d)342. [c] (1) See also 4HawaiiFed593. (3) That alien was not advised of right to counsel before examination held not to make hearing unfair. 14F(2d)416. [k] (2) Denial of opportunity for cross-examination is not unfair where testimony is not considered. 23F(2d)545. [l] **Regulations held reasonable.**-9F(2d)342. [m] **Board of special inquiry** has jurisdiction to determine identity of alien as person born in United States. 6F(2d) 957. [n] **Alien seaman** detained by commissioner of immigration is not entitled to hearing before board of inquiry. 20 F(2d)302. [o] **Refusal to disclose names of informants** does not render hearing unfair. 23F(2d)545.

1083-34½-New. An act of the court in permitting an alien to be at large under bond pending determination of right to enter is not an admission of an alien within the immigration acts. 18F(2d) 576.

1083-34½-New. There is a strong presumption that one born in Canada, who all his life has held himself out as Canadian, is an alien. 17F(2d)647.

1083-34¼-New. Actions of officers in accepting an earlier statement of a witness held not arbitrary. 19F(2d)875.

1083-34⅛-New. Evidence held insufficient to show alien in fact a citizen of the United States. 17F(2d)647.

1083-34⅛-New. Designation of alien in consul's visa as "temporary visitor" is not binding on immigration authorities. 13F(2d)943.

1083-34⅛-New. Burden of proof is on alien to show that he is not subject to exclusion under any provision of the immigration laws. 13F(2d)943.

1083-34⅛-New. Requirement of Immigration Law § 23, requiring alien to establish right to remain, applies to second hearing in proceeding pending before enactment. 15F(2d)127.

1083-34⅛-New. Order must specifically direct deportation and not permit alien to return to foreign country when and as he pleases. 16F(2d)958.

1083-34⅛-New. Although a single act of illicit sexual intercourse may not amount to prostitution, solicitation of such conduct may be conclusive evidence of habitual prostitution so as to warrant deportation. 22F(2d)800.

1083-34⅛-New. A prisoner arrested in deportation proceedings is not protected by the presumption of citizenship, and cannot stand mute at a hearing and put the government on proof. 22F(2d)174.

1083-34⅛-New. The burden of proving alienage rests on the government, and if the department makes a finding of the essential facts not based on evidence, the court may intervene by writ of habeas corpus. 22F(2d)174.

1083-34⅛-New. The record of an alleged alien's conviction in a state court is properly received in deportation proceedings. 22F(2d)174.

1083-34⅛-New. Affidavits used in a prosecution in a state court are properly admitted in deportation proceedings where the alien was represented by counsel and did not request that affiants be produced. 22F(2d)174.

1083-34⅛-New. Immigration authorities may use file record containing testimony of the applicant's alleged brother previously denied admission. 24 F(2d)163.

1083-34⅛-New. A letter of applicant to his alleged father seeking to inform the father as to testimony may be used by the authorities. 24F(2d)163.

1083-34⅛-New. Evidence held sufficient to show that relator had been found connected with the management of a house of prostitution. 22F(2d)174.

1083-34⅛-New. False testimony does not vitiate a proceeding when it is not considered and other evidence is sufficient. 23F(2d)545.

1083-34⅛-New. Certiorari will not issue to review an order of the secretary of labor for deportation of an alien to one country rather than to another. 21 F(2d)1009.

1083-34⅛-New. The record of a conviction in the state court is conclusive evidence of the crime therein charged, and hence other evidence relating to the crime committed is improperly con-

sidered. 31F(2d)81.

1083-34½₁-New. Evidence has been held insufficient to support a finding that an alien had been convicted of, or that he admitted commission of, adultery. 30 F(2d)823.

1083-34½₂-New. A finding that an alien has been convicted of, or admits commission of, adultery, prior to entry, is ineffective to support deportation, being in the alternative. 30F(2d)823.

1083-34½₃-New. Evidence has been held insufficient to support a finding that the alien entered for an immoral purpose. 30F(2d)823.

1083-34½₄-New. Although the alien has the burden of proof, the statute does not deny to him the benefit of the prima facie presumption created by a favorable decision of the board of special inquiry. 30F(2d)516.

1083-34½₅-New. An alien, having satisfied the board of special inquiry of his right to admission, cannot be again called upon in deportation proceedings to prove his right to remain in the United States. 30F(2d)516.

1083-34½₆-New. Aliens absent from the country for one year and three months after first entering for a visit, coming in again under visa as temporary visitors, for pleasure, and again absent for one year before arriving for the third time with a nonquota immigration visa, contrary to the departmental rule allowing six months' absence, have been held not to have sustained the burden to establish a domicile within the United States. 29F(2d)485.

1083-34½₇-New. In proceedings to deport an alien connected with a house of prostitution, testimony of the alleged prostitute as to the ownership of the house by the alien and another was incompetent. 24F(2d)799.

1083-34½₈-New. A question to an alleged prostitute whether the alien knew of her prostitution was incompetent. 24 F(2d)799.

1083-34½₉-New. A mere affirmative answer to such question is insufficient to warrant a finding of knowledge. 24 F(2d)799.

1083-34½₁₀-New. Evidence has been held sufficient to warrant a finding that the alien was guilty of managing a house of prostitution. 29F(2d)111.

1083-34½₁₁-New. In proceedings for deportation of an alien on the ground that he managed a house of prostitution, or shared in the earnings of a prostitute, a decree under the National Prohibition Act, closing his restaurant, was immaterial. 27F(2d)835.

1083-34½₁₂-New. Evidence held insufficient to prove "moral turpitude." 27 F(2d)438.

1083-34½₁₃-New. The propriety of a deportation order is to be determined solely by the findings on which the order was based. 34F(2d)920.

1083-34½₁₄-New. The absence of a record of an alien's original entry is not evidence that it was illegal. 36F(2d) 239.

1083-34½₁₅-New. Evidence held to show original entry lawful. 36F(2d)239.

1083-34½₁₆-New. A finding that a stockholder and outside sales manager of corporation was not a "trader" under treaty with Japan is warranted by the evidence. 36F(2d)422(2dcase).

1083-34½₁₇-New. The character given an alien by a certificate for visiting his country is not conclusive as to his status. 36F(2d)422(2dcase).

1083-34½₁₈-New. Evidence held insufficient to furnish ground for deportation, because not constituting voluntary admission of guilt. 37F(2d)935.

1083-34½₁₉-New. All questions of credibility are for immigration officials. 38 F(2d)231.

1083-34½₂₀-New. Burden of proof is on government when alienage is alleged as ground for deportation. 38F(2d)472.

1083-34½₂₁-New. In proceedings to deport alien as prostitute, evidence of American citizenship of father of her husband held to shift to government duty of proceeding with evidence to contrary. 38F(2d)472.

1083-34½₂₂-New. Alien ordered deported without warrant or hearing must be discharged notwithstanding entry in violation of immigration laws. 40F(2d)643.

1083-34½₂₃-New. Showing of illegal entry and fairly conducted proceedings before immigration authorities are essential to justify deportation. 40F(2d)961.

1083-34½₂₄-New. Evidence held insufficient to justify deportation on ground that communist party of which alien was member advocated forceful overthrow of government. 41F(2d)53.

1083-34½₂₅-New. Denial of right to examine inspector conducting investigation of alien's status tends to suppress fair and open hearing required, 40F(2d) 961.

1083-34½₂₆-New. and alien is not accorded fair hearing where such examination is denied and deportation warrant is based solely on oral admissions at investigation. 40F(2d)961.

1083-34½₂₇-New. Commissioner can use sworn statement made by alien in jail on which to base conclusion of fact regarding date of entry. 43F(2d)1003.

1083-34½₂₈-New. Finding of commissioner as to date of entry of alien held justified under evidence. 43F(2d)1003.

1083-35. 17F(2d)507. [a] **By whom signed.**-23F(2d)956. [b] **Warrant for arrest is not fatally defective** for failure to state time and place of acts of immorality charged, where defendant in advance of hearing is supplied with copy of sworn statements on which warrant is issued. 27F(2d)835. [c] **Assistant to secretary of labor** may validly sign warrants for arrest or deportation, instead of secretary, assistant secretary, or second assistant secretary. 35F(2d) 601. [d] **Not open to collateral attack** by evidence that secretary or assistant secretaries specified in statutes were not under disability so as to justify assistant to secretary in signing warrants. 35F(2d)601. [e] **Statutory period within which to issue warrant of deportation.**-43F(2d)1003.

1083-36 [a] **That alien was not permitted to examine warrant of arrest,** that it was not read to him, and that basic evidence was not shown to him, held not vitally important. 14F(2d) 416.

1084-42 9F(2d)342. [a] (2) Signature by assistant to secretary. 35F(2d)601.

1084-43½-New. Alien has no inherent right to bail on arrest. 16F(2d)422.

1084-43½₁-New. [§ 66b] d½. **Bail.** Deportee is entitled to bail during pendency of proceedings. [a] **Bond must be conditioned as required by statute.**-23F(2d)956.

1084-43½₂-New. Warrant of deportation is not void because of improper evidence, not considered by officials. 19F(2d) 875.

1084-43½₃-New. However, under statute, an arrested alien must be admitted to bail. 16F(2d)422.

1084-43½₄-New. A finding that an alien had been convicted or admits commission of a felony is too indefinite to support a warrant of deportation. 15F(2d) 878.

1084-43½₅-New. A warrant should be supported by definite and clear findings. 15F(2d)878.

1084-43½₆-New. Evidence held to support a warrant on the ground of bringing in person for immoral purpose. 15 F(2d)878.

1084-43½₇-New. A deportation warrant, issued because of conviction for, or admission of, perjury, has been held not illegal, where the hearing was had on due notice, and the alien declined to examine the evidence, and his counsel declined to offer evidence on his part. 30 F(2d)942.

1084-43½₁₀-New. An order of deportation must be predicated on finding of alienage. 38F(2d)472.

1084-43½₁₁-New. Propriety of deportation order is determined solely by findings on which it is based. 38F(2d)499.

1084-43½₁₂-New. Departure bonds on temporary admission. Government's recovery on bonds securing aliens' departure after temporary admission is not limited to damages government can show it suffered. 40F(2d)406.

1084-43½₁₃-New. Facts held to show liability of surety on such bonds. 40F(2d) 406.

1084-43½₁₄-New. Commissioner of immigration acting under warrant of deportation is bound by all its terms. 42 F(2d)715.

1084-49 22F(2d)270. But see 24F(2d) 654. [a] **Under Immigration Act of 1917** (1) it is unlawful to pay off or discharge alien employee of vessel arriving from foreign port or place unless duly admitted under laws and regulations. 22 F(2d)270.

1084-50 [b] **Seaman leaving without notice** with wages due is not dismissed or discharged. 42F(2d)168.

1084-51 [a] **In action for penalties for discharge of alien seaman,** evidence held insufficient to sustain decree. 42F(2d) 168.

1084-52½-New. Defendant, aiding and accompanying aliens, held not to "bring into or land in United States" such alien. 19F(2d)805.

1084-52¼-New. Alien does not commit offense by entering illegally. 24F(2d) 905.

1084-52¼₁-New. Bringing in alien not entitled to enter. Direction of verdict of acquittal held improper. 24F(2d)905; 24F(2d)907.

1084-52½₁-New. Aiding and abetting. 24F(2d)907.

1084-52½₂-New. A person who arranges while outside the United States to land an alien not entitled to enter may be held criminally liable. 26F(2d)797.

1084-52½₃-New. Where an alien seaman, entitled to the privileges accorded to his class, deserted immediately after landing, and thereafter shipped as seaman under contract binding his employer to return him to the port of departure, the employer engaging passage for him on another of its ships after the termination of his employment is not liable for a fine as having brought in an "immigrant" not in possession of an immigration visé. 28F(2d)386.

1084-52½₄-New. Under the Immigration Act of 1917, making it a misdemeanor to "bring into or land in the United States, by vessel or otherwise, an alien not entitled to enter, defendant was held guilty where he was prevented from landing aliens only because the motorboat being used caught fire. 32F(2d)239.

1084-52½₅-New. A finding that a penalty is not authorized, under the act of 1924, for bringing in aliens without unexpired immigration visas is justified where it appears that Dominican aliens made affidavits that they were visiting the United States temporarily for pleasure and the steamship company did not and could not, by the exercise of reasonable diligence, know that they were inadmissible. 33F(2d)343.

1084-52½₁₀-New. Court having determined punishment for bringing in of single alien must increase punishment by number of aliens unlawfully brought in or landed. 36F(2d)871.

1084-52½₁₁-New. Evidence as to participation by defendant has been held to make a question for the jury as to his guilt. 36F(2d)871.

1084-52½₁₂-New. Evidence that one defendant asked captain of another ship to take two of them into United States and false representations has been held admissible. 36F(2d)871.

1084-52½₁₃-New. Under Immigration Act (1917) § 8 it is error to sentence defendants to imprisonment without imposing fine. 36F(2d)871.

1084-52½₁₄-New. Under Immigration Act (1917) § 8 the bringing in of alien with intent to land and the landing of such alien are separate offenses subject to separate punishment. 36F(2d)871.

1084-52½₁₅-New. Carriers bringing in aliens are not required to examine them before embarkation to ascertain whether they could meet literacy test. 39F(2d) 654.

1084-52½₁₆-New. Grant of temporary admission to aliens failing to pass literacy test absolves carrier from fine or penalty for bringing them in. 39F(2d) 654.

1084-52½₁₇-New. Multiple fines should

not be imposed for bringing into country alien unable to read and for bringing in same alien as quota immigrant with non quota visa. 40F(2d)220.

1084–52⅓–New. Indictment for unlawfully bringing aliens not entitled to enter into United States on vessel without permission held sufficient. 40F(2d)751.

1084–52⅓–New. Ocean carrier, carrying immigrants having apparently regular visas granted by United States consul, is not subject to fine for bringing in defectives. 43F(2d)203 (Immigration Act of 1917).

1085–53 [a] **Returning aliens.**–23F(2d)910.

1035–61½–New. Under the Immigration Act of 1924 penalties imposed on a steamship company which did not know or could not have known that aliens were not entitled to visas are held unauthorized. 26F(2d)195.

1085–61⅓–New. The decision of the secretary of labor refusing a refund of fines under the act is not final. 26F(2d)195.

1085–64 14F(2d)153. [a] **Refusal of master to accept blanket order of detention** as to alien seamen in no way altered or modified effect of order. 36F(2d)631. [b] **Amended complaint to secure return of fine** imposed for failure to detain alien seamen has been held insufficient to state cause of action. 36F(2d)631. [c] **Notice to detain alien seamen** served in port to which vessel first came has been held effective in port from which vessel subsequently cleared. 43F(2d)544. [d] **Action on bond securing payment of fines has been held not premature** because legality of fines was not previously determined. 43F(2d)544

1035–65 32F(2d)90 (fine illegal); 43F(2d)544.

1085–65½–New. Master may be required to detain alien on board ship. 39F(2d)212 (intention of alien immaterial).

1035–65⅓–New. Immigration Act of 1924 imposes no liability for penalty for failure to detain alien seaman unless demand is brought home to person sought to be charged by notice. 40F(2d)472.

1035–65¼–New. Notice to master of ship is not sufficient notice to local agent of foreign owner under such statute. 40F(2d)472.

1087–88½–New. Under a statute prohibiting concealing or harboring, or attempt to conceal or harbor, or assist or abet others to conceal or harbor, any alien, etc., "harbor" means to clandestinely shelter, succor, and protect improperly admitted aliens, and "conceal" means to shield from observation and to prevent discovery of such aliens. 27F(2d)22.

1088–95 [c] **Salesmen** not included. 4HawaiiFed484.

1088–97½–New. Where the superintendent of a corporation asked to have the corporation advance money to pay an alien friend's passage without any agreement to employ such alien, or promise on the alien's part to repay the corporation, the alien was not subject to deportation. 30F(2d)652.

1088–2 [a] 16F(2d)1005.

1088–2½–New. Failure of alien to make claim of exemption from quota on entry may be considered when subsequently made. 16F(2d)1005.

1089–5½–New. The superintendent of large industrial works is not within the statute excluding aliens whose passage is paid by the corporation. 30F(2d)652.

1090–29 238Fed879 (an action to recover the penalty may be brought in the district where the imported alien was to perform labor for a foreign corporation).

1090–33 See also 213Fed522.

1091–48 See also Que 5DomLR228.

1092–62½–New. Immigration Act of 1924 abrogates all laws, conventions, and treaties inconsistent therewith except treaty rights of alien merchants. 9F(2d)309.

1092–64 [d] **Treaties with China** and statutes enacted thereunder confer no rights or privileges on American citizens of Chinese descent. 4F(2d)533.

1092–65 23F(2d)543.

1092–69 36F(2d)278.

1092–69½–New. Teacher is excluded. 9F(2d)309.

1092–69⅓–New. Person with loathsome disease may be excluded on strength of certificate given on record examination as against objection that first certificate was final and conclusive. 18F(2d)248.

1092–69¼–New. Residence in United States fraudulently obtained creates no right. 18F(2d)119.

1092–69⅕–New. A finding of the board of review is held not to entitle the son of a Chinese merchant to entry where the application for admission was not on the approved form. 23F(2d)847.

1092–69⅙–New. A person whose father was a Chinaman and mother an Englishwoman is of a race ineligible to United States citizenship. 22F(2d)554.

1092–69⅐–New. The immigration department is not bound by its prior decisions admitting Chinese aliens. 24F(2d)820.

1092–69⅛–New. A Chinese seaman, acquitted of drug smuggling, does not thereby forfeit his nonimmigrant status as having changed his occupation. 36F(2d)278.

1092–69⅑–New. A Chinese seaman, shipping on a steamer going coastwise, does not forfeit his nonimmigrant status, since such steamer is not necessarily "in coastwise trade." 36F(2d)278.

1092–70 23F(2d)543. [b] **Though citizens of the Philippines owing allegiance to United States,** Chinese laborers who are not citizens of the United States are not entitled to admission from island territory. 8F(2d)607.

1093–74 U. S. Comp. St. (1901) pp 1311, 1313, 1322; 137Fed875, 70CCA213; 152Fed157, 81CCA409.

1093–76 137Fed875, 70CCA213.

1093–80 137Fed875, 70CCA213; 152Fed157, 81CCA409.

1093–82 59Fed561.

1093–86 292Fed354; 15Philippine592 (Chinese).

1093–87½–New. Chinese seaman rescued at sea becoming partner in restaurant and acting as cook is a laborer subject to deportation. 13F(2d)265.

1093–87⅓–New. The owner of two laundries is not a laborer. 132Fed136.

1093–88½–New. The son of a Chinese father and a Filipino mother takes the status of his father who was a laborer within the exclusion law, 8F(2d)607.

1093–88⅓–New. as against his contention that being illegitimate he took the status of his Filipino mother, presumption of legitimacy not being overcome by sufficient testimony. 8F(2d)607.

1093–89 15F(2d)50; 49Cal402.

1093–90 [b] **Failure to attend school** for reasons beyond student's control, and employment without pay, does not deprive him of status as bona fide student. 24F(2d)213.

1093–91½–New. Chinese teacher is not entitled to enter as person engaged in "trade." 9F(2d)309.

1093–92 6F(2d)201 (right of Chinese merchants to admission is not affected by Immigration Act of 1924).

1094–94 [b] (1) 26F(2d)392. [c] **Engaging in lottery business** held to deprive Chinese resident of status as merchant. 7F(2d)609.

1094–95 [a] (5) Other instances of persons held not to be merchants. 35F(2d)596. [c] **Evidence not sufficiently showing status as a merchant.**–44Philippine14. [d] **Rule applied to British-Indian subject** from excluded territory defined in Act (1917) § 3. 44Philippine14. [e] **Theory of act of 1917** is "that aliens who desire to enter the territory of the United States shall be permitted to enter because they are and have been merchants in the country whence they came, for a period of two years preceding, and not because they desire to enter . . . the territory of the United States to become merchants." 44Philippine14, 19. [f] **Status as merchant must be acquired in China** and not after coming to United States. 39F(2d)844.

1094–98 7F(2d)311 (assistant manager of restaurant).

1094–99 16F(2d)1002.

1094–99½–New. Right of Chinese to remain in United States as a merchant depends on his status at time of entry. 13F(2d)265; 18F(2d)250 (person holding traveler's certificate for one year cannot remain as merchant).

1094–2 33F(2d)125 (evidence sufficient to establish right). [b] **Under act of Febr. 5, 1917** Chinese immigrant, not claiming citizenship is not entitled to a special bond of inquiry. 5F(2d)228.

1094–3 [a] **False testimony given by father of alien** cannot deprive applicant of right to admission if son of American citizen. 42F(2d)714.

1094–4 [c] (4) Chinese merchant who married in the United States, though having wife living in China, is not subject to deportation on return from visit to China, since, if he had not made such visit, he would not have been deportable without conviction for bigamy. 33F(2d)377.

1095–7½–New. Effect of loss of citizenship while abroad.–6F(2d)670.

1095–7⅓–New. The right to return to the United States is forfeited by perjury before the immigration officers. 32F(2d)828.

1095–8 6F(2d)201; 15F(2d)50; 24F(2d)962 (such right rests on judicial construction); 26F(2d)392; 35F(2d)559 (must be child of American-born citizen). But see 4HawaiiFed80; 4HawaiiFed568. [c] (4) Where proof is insufficient to show adoption, child is properly excluded. 12F(2d)769. (5) Chinese, who is citizen by virtue of his birth in United States, cannot invoke advantages conferred upon Chinese merchants, where it is sought to exclude adopted daughter. 12F(2d)769. (6) Where American-born Chinese citizen returns to China and marries and returns with wife and orphan child, wife may be excluded as accompanying alien. 12F(2d)769. (7) Son adopted before Jan. 1, 1924, by native-born American citizen of Chinese race is admissible. 25F(2d)262. (8) Failure to show law of China as to mode of adoption is sufficient to justify exclusion. 25F(2d)262. (9) Adopted son of native-born citizen of United States, both belonging to Chinese race, was not entitled to be admitted to this country prior to enactment of Immigration Act of 1924. 27F(2d)129 (1stcase) [certiorari den 49SCt26(10th case)]. [d] (2) Son becoming twenty-one years of age one day before reaching port is not entitled to enter. 24F(2d)962. [e] **Stepchildren.**–Chinese minor is not entitled to admission because his stepfather is a citizen and resident. 4F(2d)533. [f] **Father of Chinese minor** seeking admission must be merchant at the time. 7F(2d)609. [g] **Chinese student having small interest in mercantile company** for which he worked part time held merchant whose wife was entitled to enter. 15F(2d)51. [h] **Chinese person admitted as student** held entitled to bring his wife with him. 15F(2d)50. [i] **American consul cannot admit Chinese** as minor son of Chinese merchant. 24F(2d)962. [j] **Certificate of commissioner,** reciting that person claimed to be petitioner's father was citizen, is insufficient to show that fact, not being a judgment. 24F(2d)820. [k] **Foreign born son of Chinese merchant** reaching majority before arrival at port may be barred. 41F(2d)362. [l] **Prerequisite to admission** of minor child. 41F(2d)526.

1096–12½–New. That Chinese alien had sold business in which he was lawfully permitted to engage is not grounds for deportation as laborer. 13F(2d)67.

1096–15½–New. One who enters as seaman and remains for seven years to follow other occupations held properly deported. 16F(2d)711.

1096–15⅓–New. A Chinese seaman cannot, after landing, abandon his calling and remain as a laborer. 35F(2d)596.

1096–17 8F(2d)221; 15F(2d)296.

1096–18 8F(2d)221.

1096–19 8F(2d)221.

1096–20 8F(2d)221; 4HawaiiFed337.

1097–21 8F(2d)221; 15F(2d)189. [a] **Evidence held insufficient** to warrant exclusion of Chinese person. 8F(2d)221.

1097–23½–New. Immigration Act of

1924 does not impair the effect of the certificate or abrogate or destroy existing treaty rights. 8F(2d)221.

1097-23½-New. Whether Chinese laborer is entitled to extension of certificate is to be determined by immigration authorities at port of return. 17F(2d)653.

1097-23¼-New. Return certificate does not adjudicate citizenship of petitioner where indorsement shows exception is made to right to enter, if conceded status is found to be false. 18F(2d)119.

1097-23⅛-New. That vice consul erred in denying overtime certificate to Chinese laborer held concluded by direction of department of state. 17F(2d)652.

1097-23⅛-New. Chinese laborer may return after more than two years, where delay is caused by error of vice consul. 17F(2d)652.

1097-23⅛-New. Chinese merchants, residents of French Indo-China, must secure a certificate from the Chinese government since they are subjects of China at the time, under the terms of the act. 275US475, 48SCt160.

1097-23¼-New. A certificate of identification and permission remains in force notwithstanding reasonable delays for business and social purposes and stoppages on the journey for such subject. 4HawaiiFed377.

1097-24½-New. Under Immigration Act of 1924 certificate issued to Chinese under earlier law reciting holder as teacher for four years not sufficient to admit "as professor of a college, academy, seminary or university." 9F(2d)309.

1097-24½-New. Chinese merchant entitled to enter on certificate of authorities of Indo-China. 13F(2d)80.

1097-25 42F(2d)936. [h] **Failure of Chinese laborer to register** is not ground for deportation where not resident at time of passage of Registration Act. 42F(2d)936.

1097-28 22F(2d)774. [a] **Certificate may be annulled in deportation proceeding** by proof of violation of conditions under which it is issued. 22F(2d)774.

1097-28½-New. In Canada, after a certificate of reëntry has been issued, the question of the right to enter cannot be reopened. BC [1928] 1DomLR779.

1098-30 But see 31F(2d)763.

1098-31 134Fed988, 990.

1098-33 [a] **Member of trading firm** is not "laborer" within act. 76Fed450. [b] **Employee in a laundry** held "laborer" despite fact that he had a thousand dollars interest in a grocery business. 83Fed832.

1098-36 See also 4HawaiiFed374.

1098-36½-New. That a Chinese seaman is detained in custody under an immigration warrant beyond the sixty-day period is not a violation of the immigration rules. 36F(2d)278.

1098-41 160Fed207; 20F(2d)107.

1099-42 182Fed256.

1099-43½-New. or speedy trial, 25F(2d)714.

1099-43¼-New. or judicial hearing, 25F(2d)714.

1099-46½-New. Record entry concerning counsel's failure to return borrowed records held not to show unfair attitude of board toward applicant for admission. 15F(2d)636.

1099-46⅛-New. Lapse of time does not bar deportation proceedings. 20F(2d)107.

1099-46¼-New. On application for entry as citizen, the purpose of a hearing is to inquire into the citizenship, and not to develop discrepancies which may support an order of exclusion, 22F(2d)246.

1099-46⅛-New. Such hearing must be fairly conducted. 22F(2d)246.

1099-46⅛-New. A delay of two years between hearing and decision is held not to effect a loss of jurisdiction in the secretary of labor in deportation proceedings. 25F(2d)714.

1099-46⅛-New. The immigration act of 1917 applies in deportation cases for fraud in entering the United States before the passage of the act. 25F(2d)714.

1099-46⅛-New. Resident of United States whose claim to citizenship in deportation proceeding is supported by witnesses not directly contradicted or seriously impeached is entitled to judicial hearing. 40F(2d)741.

1099-47 [a] (3) Reëntry is unlawful where original entry was effected by merchant's certificate fraudulently procured. 39F(2d)844.

1100-67 19F(2d)335.

1100-68 4HawaiiFed653.

1100-79 4HawaiiFed534. [c] **Chinese person** is not entitled to bail in advance of hearing and pending appeal from denial of privilege of landing. 6F(2d)336.

1101-80 [a] **Detention pending deportation** because of inability to give bail is not illegal restraint authorizing relief by habeas corpus. 272Fed330.

1101-91 But see 13F(2d)67.

1101-96 4F(2d)639; 5F(2d)135; 9F(2d)283; 16F(2d)153; 19F(2d)333; 20F(2d)107; 20F(2d)266; 25F(2d)574; 30F(2d)766; 31F(2d)407; 4HawaiiFed653.

1102-2 9F(2d)283; 20F(2d)266; 38F(2d)5.

1102-3 29F(2d)500. But see 22F(2d)774.

1102-4½-New. Presentation of certificate showing discharge by commissioner on ground of citizenship raises a presumption to overcome which affirmative evidence is required. 13F(2d)264.

1102-5½-New. A decision of the board of special inquiry on the admission of Chinese into this country was no more than prima facie evidence of the American citizenship of the Chinese. 30F(2d)65.

1102-5¼-New. That child is of Chinese birth raises no presumption that he knows names of deceased grandparents. 41F(2d)604.

1103-7 [c] **Presumption created by consular certificate** to one seeking admission as a traveler may be overcome by evidence. 16F(2d)171.

1103-10½-New. Statement before and after entry held admissible. 273US103, 47SCt302. [a] **Admission of evidence held, not prejudicial.**-15F(2d)636.

1103-10⅛-New. Long residence and clear record of Chinese laborer held entitled to consideration. 17F(2d)653.

1103-10¼-New. Long residence and clear record of Chinese laborer held to entitle him to reëenter. 17F(2d)653.

1103-10⅛-New. Recital of Chinese person's discharge in commissioner's fee bill is inadmissible. 19F(2d)333.

1103-10¼-New. Chinese person's statements, made when illegally arrested, are admissible. 20F(2d)107.

1103-10½-New. Registers of birth certificates are competent evidence of birth. 20F(2d)388.

1103-10¼-New. Testimony of record in prior cases affecting right of entry of alleged son of domiciled Chinese merchant held admissible. 15F(2d)636.

1103-10½-New. Interpreter need not be sworn. 218Fed432, 134CCA232.

1103-10½-New. Any evidence officials deem worthy of credit may be received, 21F(2d)810.

1103-10½-New. Interview between alien and his attorney is not evidence. 15F(2d)50.

1103-10½-New. In Canada under the Chinese Inauguration Act, the comptroller making the inquiry as to the statistics of an alien is not bound to follow the regular rules of evidence. 46CanCr Cas65, [1927] 2WestWkly597, 37BC295, [1927] 3DomLR692.

1103-10⅛-New. Where an alien is held for deportation on the ground of being a prostitute, evidence of the general reputation of the house in which she lived is admissible. 8BC118.

1103-10¼-New. Statements made by aliens smuggled into the country may be received in administrative proceedings for their deportation. 24F(2d)825.

1103-10½-New. On hearing of application to enter the United States, any credible evidence, as prior immigration records, has been held admissible. 32F(2d)470.

1103-10¼-New. Evidence taken before a single immigration inspector may be considered by the board of special inquiry. 32F(2d)470.

1103-10½-New. Immigration authorities are not bound by strict rules of evidence in their determination of proceedings. 34F(2d)848.

1103-10⅛-New. Testimony contained in other official records, especially where the applicant for admission and witnesses were the same, may be considered by the board of special inquiry. 35F(2d)839.

1103-10½-New. Certificate of physician can be considered by immigration authorities in determining question of citizenship. 43F(2d)718.

1103-13 29F(2d)350; 29F(2d)619; 29F(2d)768; 29F(2d)793 (written instrument, relied on by Chinese wishing to enter United States as adopted son of Chinese merchant, held insufficient to show adoption); 30F(2d)96 (evidence held to sustain denial of application to enter); 30F(2d)516 (evidence held insufficient to establish fraud of Chinese person in obtaining admission as Hawaiian born); 31F(2d)407. [c] 22F(2d)673; 23F(2d)187. [d] 273US103, 47SCt302; 5F(2d)135; 5F(2d)960; 7F(2d)609; 12F(2d)699; 15F(2d)377; 15F(2d)636; 16F(2d)711; 19F(2d)747; 20F(2d)388; 21F(2d)826; 21F(2d)963; 22F(2d)18; 22F(2d)20; 22F(2d)107; 22F(2d)600; 23F(2d)789; 24F(2d)964; 25F(2d)574; 26F(2d)794; 27F(2d)217; 27F(2d)513; 27F(2d)573; 27F(2d)848; 28F(2d)263; 28F(2d)612 [certiorari den 49SCt249(6thcase)]; 29F(2d)108; 32F(2d)513(1stcase); 33F(2d)122(2dcase); 33F(2d)236 (admission gained through fraud); 33F(2d)287; 34F(2d)266; 36F(2d)563; 37F(2d)893; 39F(2d)844; 40F(2d)907; 41F(2d)58(1stcase); 41F(2d)129; 41F(2d)476; 41F(2d)521(2dcase); 41F(2d)526. [e] 17F(2d)653; 22F(2d)246; 22F(2d)926; 25F(2d)886; 27F(2d)650; 30F(2d)65; 31F(2d)738 (erroneous admission of another bearing same name); 31F(2d)763; 32F(2d)359; 36F(2d)978; 41F(2d)126; 41F(2d)522; 44F(2d)239(2dcase). [h] 9F(2d)283; 17F(2d)11; 26F(2d)438 (as son of native-born Chinese); 33F(2d)125. [i] 19F(2d)333; 19F(2d)519; 20F(2d)107; 22F(2d)774 (contradictions in evidence held to render claim of American birth incredible); 23F(2d)174; 27F(2d)885; 35F(2d)506; 40F(2d)741; 43F(2d)459; 43F(2d)718. [m] **Suspicion** does not justify exclusion. 33F(2d)29C. [n] **Evidence held sufficient to establish** that Chinese alien was son of Chinese father, an American citizen. 42F(2d)714.

1103-14 24F(2d)523; 32F(2d)359.

1103-15 24F(2d)523.

1104-17 16F(2d)65; 20F(2d)1014; 34F(2d)848. [a] 35F(2d)347; 35F(2d)398(2dcase); 35F(2d)505. [b] **Determination held arbitrary.**-27F(2d)580; 27F(2d)775; 33F(2d)226; 34F(2d)848. [c] **Immigration officials are bound by rules of reason and logic,** even though not bound by rules of evidence applicable to jury trial. 27F(2d)580. [d] **Court will interfere with determination of immigration authorit.es only** where disregard of principles constitutes denial of due process of law. 34F(2d)848.

1104-18 7F(2d)611. [a] 24F(2d)821.

1104-23 24F(2d)774.

1104-23½-New. Facts on which Chinese person's claim of citizenship rests must be shown to prevent deportation. 19F(2d)333.

1104-23½-New. Discrepancy in testimony held to justify exclusion of Chinese boy claiming citizenship of father. 24F(2d)203.

1104-23¼-New. Where an alien claims admittance as the son of a native-born citizen, determination of the truthfulness of the evidence as to the relationship was held for immigration tribunals. 35F(2d)347.

1104-26 See also 17F(2d)987. [a] **Admission, if error, held harmless.**-36F(2d)563.

1105-32 174Fed674.

1105-36 174Fed674.

1105-39 [c] **Unlawful entry** warrants deportation. 7F(2d)611.

1106-58½-New. An appeal from an immigration official's order denying applicant admission to the United States may be dismissed by the assistant to the secretary of labor. 22F(2d)107.

1106-58½-New. Though the district court on appeal may adopt the commis-

sioner's deportation order, the better practice is for court to make a complete order for deportation. 35F(2d)596.

1106–60 But see 19F(2d)335.

1106–61 17F(2d)737; 19F(2d)335; 22F(2d)550.

1106–62 19F(2d)335.

1106–63 12F(2d)984; 25F(2d)886.

1106–64½–New. Rejection of evidence held harmless. 9F(2d)283 (where opposing evidence sufficient).

1106–64⅓–New. Finding of district judges that Chinese person not citizen entitled to great weight on appeal. 9F(2d)283.

1106–64¼–New. District court cannot review weight of evidence supporting finding of board of special inquiry. 15F(2d)555.

1106–64⅕–New. Objection to use of statement unlawfully obtained from prisoner will not be sustained when made for first time on appeal. 19F(2d)335.

1106–64⅙–New. Admissibility of evidence, not raised by assignment of error, is not reviewable. 20F(2d)107.

1106–64⅐–New. Where record justifies conclusion of medical examiner that alien was insane at time of entry, the court may not examine as to reasons upon which the conclusion was drawn. 15F(2d)555.

1106–64⅛–New. Denials of admissions made before commissioner may preclude review of question of duress. 25F(2d)574.

1106–64⅑–New. On an appeal to the secretary of labor from a denial of application for admission, all the facts shown by the record which was before the board of special inquiry may be considered. 27F(2d)513.

1106–65 But see 25F(2d)302.

1106–67 See also 60Fed890.

1107–88 142US651, 12SCt336, 35Led1146; 27Fed678; 134Fed938; 161Fed592; 182Fed955; 222Fed157; 261Fed73; 35F(2d)506; 41F(2d)526; 43F(2d)465.

1108–89 4HawaiiFed97. [a] **Claim of citizenship** entitled alien sought to be deported to a judicial trial beyond jurisdiction of governmental department. 7F(2d)367.

1108–90 194US279, 24SCt719, 48Led979; 67Fed114; 86Fed117; 87Fed314; 89Fed9; 16F(2d)492.

1108–93 But see 4HawaiiFed241.

1108–94 273US103, 47SCt302, 71Led560; 49Fed146, 1CCA211; 49Fed148, 1CCA210. [a] **Alien** confined several months after order of deportation because government is unable to decide country of his nativity is entitled to release on habeas corpus. 277Fed857. [b] **All evidence** must be before court in habeas corpus proceedings. 277Fed129.

1108–95 273US103, 47SCt302, 71Led560; 191Fed970, 112CCA382; 4F(2d)778; 7F(2d)515; 8F(2d)362; 11F(2d)988; 13F(2d)82; 16F(2d)128; 16F(2d)153; 16F(2d)492; 16F(2d)532; 17F(2d)646; 18F(2d)119; 36F(2d)452; 36F(2d)582; 38F(2d)474; 43F(2d)465; 4HawaiiFed266; 4HawaiiFed340; 4HawaiiFed382; 4HawaiiFed397; 4HawaiiFed520; 4HawaiiFed539. [a] **Immigration officials' action held not arbitrary.**–35F(2d)858; 35F(2d)959(1st case). [b] **Evidence held sufficient.**–35F(2d)559; 35F(2d)955.

1109–96 273US103, 47SCt302, 71Led560; 7F(2d)515 (evidence held insufficient to warrant deportation); 8F(2d)362; 10F(2d)816; 15F(2d)50; 16F(2d)532; 17F(2d)646; 23F(2d)802 (evidence insufficient to warrant deportation); 35F(2d)183(2dcase); 35F(2d)284; 35F(2d)506; 35F(2d)839 (finding held not without support in testimony); 37F(2d)459; 38F(2d)5; 4HawaiiFed426. [a] **Findings not disturbed** on question whether alien was returning to "unrelinquished domicile" within meaning of statute. 10F(2d)433 (substantial evidence).

1109–97 [a] (1) 175Fed274; 222Fed157; 222Fed745, 138CCA199; 227Fed131; 235Fed990, 991; 262Fed762; 17F(2d)646; 28F(2d)281.

1109–98 15F(2d)209.

1109–98½–New. Habeas Corpus may be used to determine proper disposition of alien to be deported. 16F(2d)958.

1109–98⅓–New. Whether a person held by immigration officers for deportation is within a class amenable to a particular jurisdiction may be reviewed by the courts on habeas corpus. 182Fed330.

1109–98¼–New. Where the evidence was not attached to the petition, the court on habeas corpus proceedings, based on the ground that the determination of the immigration authorities was based upon insufficient or illegal evidence, refused to review the findings of the immigration authorities. 199Fed365.

1109–98⅕–New. A statute declaring the secretary of labor's decision as to deportation final is constitutional. 23F(2d)334.

1109–98⅙–New. A Chinaman who had a certificate of residence was not entitled to discharge on habeas corpus where the commission in the deportation proceedings examined into the validity of the certificate date before ordering deportation. 211Fed73, 127CCA569.

1109–98⅐–New. Right to be deported to particular country cannot be determined on habeas corpus. 81Fed562; 240Fed212 (in first instance).

1109–98⅛–New. In Canada where by statute the action of the immigration officer, in determining whether an applicant for admission was suffering from a disease for which the department was authorized to exclude, was not made final, the court on habeas corpus had the right to examine into the question of fact whether a person was afflicted. 12BC454.

1109–98⅑–New. The court may not interfere with a refusal of the consul to visa a nonimmigrant alien's passport. 29F(2d)314.

1109–99 13F(2d)96; 21F(2d)307; 24F(2d)825 (Chinese person smuggled in held not entitled to habeas corpus). [b] **Judicial notice** may be taken of rules and regulations adopted by department of labor pursuant to Immigration Act. 44Philippine14.

1109–99½–New. Opinion that immigration authorities were wrong in their conclusions from discrepancies in testimony does not warrant the court in disturbing their decision. 13F(2d)284.

1109–1 273US352, 47SCt346; 81Fed702; 125Fed641 (hearing held sufficient); 174Fed282; 183Fed92, 105CCA384; 184Fed566, 106CCA546 (where testimony contradictory); 202Fed65, 120CCA381; 203Fed292; 209Fed700; 222Fed745, 138CCA199 (where hearing was held unfair); 227Fed1, 141CCA555; 227Fed131; 265Fed17; 5F(2d)135; 13F(2d)96; 13F(2d)262; 13F(2d)285; 16F(2d)180; 16F(2d)1006; 17F(2d)646; 18F(2d)119; 19F(2d)520; 20F(2d)116; 21F(2d)307; 21F(2d)376; 21F(2d)826 (hearing held fair); 21F(2d)963; 22F(2d)926; 27F(2d)217; 28F(2d)653; 29F(2d)793; 30F(2d)684; 35F(2d)284; 41F(2d)476; 42F(2d)664; 7Alaska644; 33Philippine128; 44Philippine14. [c] **Court cannot control discretion** of immigration authorities in refusing a rehearing. 5F(2d)680. [d] **Unfairness held not shown.**–35F(2d)839; 35F(2d)955.

1109–1½–New. In reviewing the detention of an alien as a stowaway the court will consider whether he is within any of the excluded classes of aliens and whether he affirmatively and satisfactorily showed that he is not; whether the alien made any effort to conceal his passage, or whether he acted in collusion with the ship's master to have his name omitted from the manifest if that were done. 193Fed228.

1109–1⅓–New. The court must endeavor to sustain the action of the department charged with the duty of enforcing the immigration acts. 30F(2d)942.

1109–1¼–New. Where no error of law or manifest abuse of discretion is displayed, the courts will not disturb the action of the immigration officials. 29F(2d)485.

1109–1⅕–New. Where a finding on which a warrant of deportation is based is ineffective because in the alternative, a stay should be granted to permit a new affirmative finding, to be based on the facts, if the evidence is sufficient to support such finding. 30F(2d)823.

1109–1⅙–New. A declaration of intent to enter as a temporary visitor cannot be contradicted in habeas corpus for entrance as a nonquota immigrant. 29F(2d)485.

1109–1⅐–New. It is validity of detention under final order for deportation that must be determined in habeas corpus proceedings. 38F(2d)499.

1109–2 273US352, 47SCt346; 295Fed800. See also 4HawaiiFed344. [a] **Hearing held fair.**–20F(2d)302; 32F(2d)447; 32F(2d)991; 32F(2d)470.

1109–3 222Fed745, 138CCA199; 16F(2d)180; 21F(2d)590 (alien given fair hearing); 41F(2d)239 (hearing without presence of alien or counsel in which photograph was used for identification held unfair).

1110–5 41F(2d)604. [a] **Hearing conducted for purpose of substantiating predetermined conclusion** and not for purpose of developing real facts is not fair, and requires discharge on habeas corpus. 34F(2d)223.

1110–6 21F(2d)376 (rule denying counsel held invalid).

1110–7 16F(2d)180; 29F(2d)527 (failure to consider and pass on issue of alien's citizenship, raised by evidence, rendered hearing unfair). [b] But see 41F(2d)526. [c] 196Fed437; 21F(2d)694. [d] **Expert testimony should be considered** as to alien's mental condition. 15F(2d)576.

1110–11 5F(2d)135; 13F(2d)96; 21F(2d)376; 36F(2d)39. See also 30F(2d)823. [a] **Adverse decision, where only evidence was favorable,** is held denial of fair hearing. 21F(2d)376. [b] **Failure to procure scientific assistance as to age of applicant constituting unfair hearing.**–41F(2d)604.

1110–13 [b] **That member of board of inquiry** is also stenographer does not affect findings. 5F(2d)310. [c] **Difference in personnel of board** excluding applicant from board first hearing matter does not affect findings where all evidence was considered. 5F(2d)310.

1110–16½–New. A district court without jurisdiction in habeas corpus proceedings by applicant for admission in case evidence supports the decision. 21F(2d)963.

1110–16⅓–New. On habeas corpus involving decision excluding alien, question is whether decision was without substantial support in evidence and so arbitrary as to deny due process. 38F(2d)5.

1110–17 21F(2d)307; 35F(2d)559 (even where appellate court so believes). But see 24F(2d)632.

1110–18 7F(2d)612. **See also 30F(2d)**942.

1110–19 4F(2d)778 (taking of testimony in alien's absence with opportunity to be present does not invalidate findings); 5F(2d)135 (inquiry into family relationship not indicative of unfairness where such relationship is basis of his claim of citizenship); 7F(2d)426; 7F(2d)515; 21F(2d)694 (insufficiency of evidence).

1110–19½–New. that decision of board of inquiry indicates disposition to justify action of immigration authorities rather than to consider case impartially. 16F(2d)128.

1111–20 41F(2d)58(1stcase).

1111–23½–New. There is not a denial of a fair hearing because of no opportunity to cross-examine a witness who had gone to another state, where he could not be recalled by commissioner and offer was made to hear witness again if produced by defendant. 13F(2d)285.

1111–23⅓–New. Fair hearing is not denied because alien was not represented by counsel at preliminary hearing. 19F(2d)470.

1111–23¼–New. Delay in hearing is not denial of fair hearing. 273US352, 47SCt346.

1111–23⅕–New. Absence of friend or

kinsman is not such denial. 273US352, 47SCt346.

1111-23⅛-New. Alien whose own testimony showed his conviction of crime involving moral turpitude held not prejudiced by other irregularities. 17F(2d) 719.

1111-23⅛-New. Burden to show citizenship rests upon petitioner. 18F(2d) 119.

1111-23¼-New. Prejudice of board of review affirming exclusion decision of board of special inquiry on evidence does not warrant court on habeas corpus to hear case on merits. 13F(2d) 284.

1111-23⅙-New. Hearing is not unfair because of deprivation of representation by counsel, where deportation order was stayed to permit argument. 19F(2d) 470.

1111-23 1/10-New. A hearing is not unfair because the person to be deported was not represented by an attorney or informed of his right to counsel until a large portion of the testimony had been taken. 261Fed582.

1111-23 1/11-New. nor where exhibits introduced ex parte without the knowledge of the person to be deported were included in the record in the state department where it appears that the order of deportation was not based on anything contained in the exhibits. 261Fed 582.

1111-23½-New. A Chinese person cannot prevail in a habeas corpus proceeding by showing simply that the decision of the inspector or board of special inquiry was wrong. 15Philippine559, 589.

1111-23 1/13-New. "This rule applies when a person seeking to enter the territory of the United States alleges that he is a citizen and is denied admission, as well as when he is prohibited from entering for any other person." 15 Philippine559, 589.

1111-24 226US272, 33SCt31, 57Led 218; 190Fed686; 204Fed847; 207Fed 780; 209Fed675; 209Fed720; 222Fed 151; 266Fed34; 5F(2d)135; 7F(2d) 372; 9F(2d)900; 12F(2d)698; 16F (2d)153; 17F(2d)231; 17F(2d)646; 17 F(2d)987; 20F(2d)972 (bona fide of alien seaman as respects right to shore leave); 21F(2d)307; 22F(2d)926; 23F (2d)334; 24F(2d)105; 24F(2d)163 (conflicting evidence); 24F(2d)632 (when sustained by substantial evidence); 25 F(2d)11; 30F(2d)652; 30F(2d)942 (conflicting evidence not weighed); 31 F(2d)570 (whether alien was minor on entry if supported by substantial evidence); 42F(2d)664. See also 30F(2d) 766. [a] (1) 17F(2d)50. (2) Finding, supported by substantial evidence, will not be reviewed in absence of fraud or mistake. 17F(2d)507. [b] **Evidence held supported by circumstantial evidence** precluding review. 13F(2d)943.

1111-25 24F(2d)211; 25F(2d)262 (evidence insufficient to show adoption of Chinese petitioner by citizen); 4Hawaii Fed484.

1111-27 30F(2d)766.

1111-28½-New. A decision will not be set aside unless it is without any support in evidence. 13F(2d)392.

1111-28⅓-New. Evidence held to warrant exclusion of immigrant. 13F(2d) 392.

1111-28¼-New. Reviewing court will not weigh testimony but will determine whether there was substantial evidence to support decision. 13F(2d)124.

1111-28⅕-New. Evidence held to show alienage of petitioner for purpose of habeas corpus proceedings to secure release. 22F(2d)174.

1111-28⅙-New. Lawful entry and sojourn prior to entry charged to be unlawful are immaterial. 23F(2d)334.

1111-30 273US352, 47SCt346; 16F(2d) 492; 21F(2d)307.

1111-31 16F(2d)492; 20F(2d)116; 40 F(2d)741 (resident claiming citizenship is entitled to judicial determination of question). See also 27F(2d)580. [a] **Upon establishment of bona fide claim of citizenship,** alien is entitled to judicial trial on facts, and department of labor is without jurisdiction. 39F(2d) 246(2dcase). [b] **Discrepancies in testimony in support of application** held to require discharge. 42F(2d)450.

1111-31½-New. Evidence held insufficient to establish right of person of Chinese race to enter as native-born citizen. 15F(2d)847.

1111-31⅓-New. Where evidence on issue of age of Chinese boy seeking admission as son of American citizen is not in proper form, case may be reheard by court or referred to special master to hear and report. 39F(2d)202 (written report of government medical officer as to age held insufficient evidence).

1111-32 15F(2d)50; 15F(2d)296; 16 F(2d)153; 16F(2d)532; 17F(2d)231; 20F(2d)148; 22F(2d)914 (that alien is person of constitutional psychopathic inferiority); 24F(2d)821.

1111-34 8F(2d)362. See also 10F(2d) 38. [a] **Finding held unsupported by evidence.**-10F(2d)38.

1111-35 12F(2d)639.

1111-37 195Fed654.

1111-39½-New. or was suffering from physical defects as affected ability to earn living, 9F(2d)900.

1111-39⅓-New. or is physically defective, 10F(2d)38.

1111-41 8F(2d)355.

1111-41½-New. Where there is no evidence, however slight, that aliens were liable to become public charge, finding by the immigration board held properly set aside. 13F(2d)96.

1111-42 [b] **Admission of Chinese person as citizen is not conclusive** of citizenship on application of another claiming rights of admission as his son. 22 F(2d)600.

1111-43 18F(2d)119. See also 29F(2d) 768.

1111-43½-New. Failure of an order in habeas corpus proceedings discharging an alien to contain a provision retaining the right of the government to renew proceedings has been held not to prevent the government from again renewing proceedings. 29F(2d)287(1stcase) [aff 29F(2d)287(2dcase)].

1112-44 49Fed146, 1CCA211; 49Fed 148, 1CCA209; 15F(2d)576; 17F(2d) 507; 23F(2d)187; 24F(2d)799 (order of deportation based on incompetent testimony set aside); 27F(2d)438.

1112-47 187Fed470; 8F(2d)366; 13F (2d)943; 15F(2d)576; 15F(2d)878; 17F (2d)507; 19F(2d)747; 22 F(2d)800 (questions of fact); 30F(2d)942; 4Hawaii Fed266. [c] (4) Questions of credibility of witnesses and weight of their testimony are not reviewable on habeas corpus. 23F(2d)918. [d] **It is error** to hold new hearing on new evidence. 6F (2d)957. [e] **Finding by board of special inquiry** that relator was not American citizen is conclusive on circuit court of appeals. 6F(2d)957.

1112-51 26F(2d)148.

1112-53 8F(2d)374; 8F(2d)473 (cannot become citizens merely by residing in United States); 21F(2d)28; 31F(2d) 696; 33F(2d)1002; 34F(2d)161; 40F (2d)255; 41F(2d)762; 42F(2d)297; 44 F(2d)241(2dcase); 135Misc670, 239NYS 616. [b] **Upon compliance with uniform rule of naturalization,** alien is entitled to be admitted to citizenship as matter of right. 12F(2d)763. [c] **Naturalization law** must be strictly construed. 25 OhNPN8247. [d] **"Naturalization" creates a political status** which is entirely the result of legislation by congress, and, in the case of a person not born a citizen, naturalization can be obtained only in the way in which congress has provided that it shall be granted, and upon such a showing of facts as congress has determined must be set forth. 171Fed299. [e] **Statutes construed** prospectively unless clear language requires retrospective construction. 35F(2d)960. [f] **Aliens acquire no rights** which are not subject to power of congress to modify. 135Misc670, 239NYS616.

1112-54 8F(2d)374; 14F(2d)668; 20F (2d)978; 40F(2d)1020; 12PortoRicoFed 523.

1112-54½-New. Compliance with conditions imposed by congress ripens the privilege into a right. 33F(2d)1002.

1112-54¼-New. Naturalization laws must be construed in connection with immigration laws. 40F(2d)1020.

1112-54¼-New. Alien seeking citizenship must deal with utmost good faith toward the government. 43F(2d)76.

1112-57 143US135, 12SCt375, 36Led 103; 26F(2d)148.

1113-59½-New. Power is judicial, not ministerial or clerical. 6PaDist&Co 41.

1113-62 [b] 22F(2d)879; 4HawaiiFed 779. See also 4HawaiiFed686.

1113-65 21F(2d)1007. [c] **Armenian** held "free white person" eligible to naturalization. 6F(2d)919, [d] **Filipino** held neither "free white" nor "of African nativity." 22F(2d)879. [e] **Afghan and native of Afghanistan** held not subject to naturalization. 27F(2d)568.

1113-67 21F(2d)1007. [a] (1) 6F(2d) 919.

1114-70 But see 7F(2d)728; 26F(2d) 360.

1114-72½-New. Applicants complying with formalities of law are eligible, although they may have wives or minor children living in a foreign country. 6 PaDist&Co 41.

1114-73 [b] **Chinese woman born in United States and marrying** Chinese citizen is ineligible to citizenship, though marital relation has terminated. 6F(2d)670. [c] **Person of part Chinese blood,** mother Chinese and father son of Portuguese father and Chinese mother, is not free "white person." 21F(2d) 1007.

1114-74 4HawaiiFed671.

1114-79 See also 143US135, 12SCt375, 36Led103.

1114-82 10F(2d)560; 4HawaiiFed60. [c] **Alien member of National Guard** must establish honorable discharge or service on reënlistment to warrant naturalization without proof of five years' residence. 137Misc818, 245NYS889.

1114-86 8F(2d)508; 24F(2d)98; 12Pa Dist&Co 456.

1114-87 8F(2d)508. [b] **In Philippines.**-45Philippine289.

1115-88 See also 7Alaska471. [a] **Alien seaman not entitled to registration.**-43F (2d)917.

1115-89 10F(2d)560 (application must be granted).

1115-91½-New. Service on a foreign vessel is not residence, within meaning of naturalization law, although petitioner's family lived in the United States. 21F(2d)445.

1115-91⅓-New. Naturalization law as amended relative to service on foreign vessels, is declaratory of preëxisting law. 21F(2d)445.

1115-91¼-New. Provisions limiting right of naturalization must be narrowly construed. 25F(2d)245.

1115-91⅕-New. A seaman duly admitted as an immigrant and having established a domicile in good faith in the United States, although employed as a master of ships of foreign registry, is entitled after five years to naturalization. 25F(2d)245.

1115-94 8F(2d)508.

1115-95 8F(2d)508.

1115-97½-New. An alien woman, ineligible to admission because of disease, does not become entitled to naturalization by marrying an American citizen after she is ordered deported. 6F(2d)520.

1115-99 8F(2d)374; 21F(2d)445; 29F (2d)736; 29F(2d)995; 30F(2d)418; 42F (2d)727; 44F(2d)241(1stcase); 135Misc 670, 239NYS616. [a] **Statute must be liberally construed** in favor of petitioner. 12F(2d)763. [b] **Rights of alien respecting citizenship** must be measured as of date when petition is filed. 44F (2d)241(2dcase). [c] **Doubt regarding qualification** must be resolved in government's favor. 42F(2d)727. [d] **Application of amendment providing one year's absence** shall break continuity of residence. 44F(2d)241(1stcase). [e] **No more is demanded of alien** who becomes citizen than natural-born citizen. 42F (2d)845.

1115-1 279US12, 49SCt218, 73Led582; 8F(2d)374; 10F(2d)560; 14F(2d)675; 18F(2d)425; 29F(2d)24; 41F(2d)753.

See also 44F(2d)241(2dcase). But see 135Misc683, 239NYS450. [b] (1) 26F(2d)106; 29F(2d)999; 33F(2d)342 (employing "domicile" as interchangeable with "residence"). (2) Situs of home is not test of residence. 19F(2d)404. [c]. 35F(2d)960. [f] (1) 20F(2d)146. (3) Stay in foreign countries for business purposes for period of years held break in continuous residence. 19F(2d)404. (4) Continuous residence of alien is not established where his family had returned to Italy and he had twice sold out his business and joined them, remaining away an aggregate of more than two years. 21F(2d)432. (5) Alien absent nearly ten months during year immediately preceding date of filing of application and at time when required year's residence in state commenced to run does not establish requisite residence. 33F(2d)365(1stcase). (6) Alien, who after forty months' residence in United States returned to his native land for fifty-two months on business at his American employers' request, is not entitled to have petition for citizenship granted, not having fulfilled "continuous residence" requirement. 34F(2d)139. (7) Alien who went to Europe during five-year period without intending to return to his "residence" is not entitled to citizenship. 33F(2d)364. [m] (2) 22F(2d)301. [n] **When legal residence begins.**–14F(2d)668. [o] **Military service with enemy** under compulsion and subsequent enforced absence abroad held not to constitute loss of residence. 13F(2d)541. [p] **Alien remaining abroad fifteen months** is not entitled to naturalization. 19F(2d)530. [q] **Temporary absence from United States** for nine months within five-year period requires denial of petition for naturalization. 24F(2d)759. [r] **Applicant with residence in Canada** is held not entitled to citizenship, though spending most of time in United States. 26F(2d)106. [s] **Test is one of domicile.**–26F(2d)106. [t] **Alien employed continuously since arrival in United States** by American company as master of vessels of British registry, where his voyages thereon commenced and ended in American ports, is held not to have lived continuously in United States for required five years, though he had established residence in Massachusetts for such time. 22F(2d)747. [u] **After acquiring residence here,** temporary absence from country for business purpose does not defeat right to be admitted to citizenship. 28F(2d)288. [v] **Necessity of legal entry.**–40F(2d)1020 (mere landing without regular entry held not to constitute beginning of residence). [w] **Statute does not operate retrospectively.**–35F(2d)960. [x] **Alien absent continuously for more than one year** during period immediately preceding date of filing petition has been held ineligible where statute became effective subsequent to date of filing petition. 135Misc672, 239NYS619 (1stcase). [y] **Absence of applicant on employer's business** held not break in continuity of residence. 41F(2d)753. [z] **Absence of year or more constituting break in continuity under statute.**–41F(2d)859; 41F(2d)753.

1115–2 8F(2d)880; 51Nev306, 274P809. [c] (3) One convicted of manslaughter will not be naturalized. 13F(2d)954. [h] **Adultery** committed within five years immediately preceding application for naturalization renders applicant ineligible for admission to citizenship. 8F(2d)880. [i] **Violation of important federal or state laws** (1) during probationary period may be ground for denying citizenship. 18F(2d)435. (2) Violation of Volstead Act held to bar naturalization. 17F(2d)275. [j] **Voluntary absence** as general rule is controlling test of loss of residence but only as evidence of state of mind toward place of supposed residence. 13F(2d)541. [k] **One remarried after divorce granted by rabbi** is not entitled to naturalization. 24F(2d)605. [l] **Adulterer's admission** to citizenship is illegal where act occurred within five years of hearing. 26F(2d)114. [m] **One who smuggled wife into United States** after she had been refused admittance because quota of immigrants from her country was exhausted is not entitled to citizenship. 34F(2d)161. [n] **Any presumption as to moral character of alien** operates in favor of government. 43F(2d)648. [o] **Making false certificate of entry and false declaration of intention** in not stating correct name and fact of marriage has been held not to entitle one to citizenship. 43F(2d)438.

1116–3 31F(2d)696; 42F(2d)845; 43F(2d)438. [c] **Views of applicant** alone are not by statute a ground for denying petition. 27F(2d)742 [certiorari granted 278US595, 49SCt80, 73Led526 (6thcase)]. [d] **Fifty year old woman,** otherwise qualified for citizenship, held not disqualified because of her expressed unwillingness personally to bear arms in defense of the United States. 27F(2d)742 [certiorari granted 278US595, 49SCt80, 73Led526(6thcase)]. [e] **Religious scruples against war** is no disqualification. 4HawaiiFed347. [f] **Refusal to bear arms based on conscientious or religious scruples against war** is not act against peace and good order, nor contrary to constitution and laws. 42F(2d)845. [g] **Whether applicant for citizenship will willingly bear arms** is proper inquiry. 42F(2d)845.

1116–4 [a] **It is within court's discretion** to require that applicant for citizenship shall display some ability to read English language. 21F(2d)867.

1116–6 [b] **Person never legally admitted** into United States cannot file valid declaration of intention. 21F(2d)877.

1116–6½–New. Claim of exemption from military service by alien enemy on ground of alienage does not prevent naturalization. 12F(2d)763.

1116–6¾–New. Certificate of arrival of alien seaman permitted to land under immigration law as alien intending to reship is insufficient as basis of petition for naturalization. 8F(2d)374.

1116–6¼–New. Service on ship of foreign registry does not necessarily exclude registration for naturalization purposes. 17F(2d)611. [a] **Service on fruit steamers making trips between Central American states and New Orleans,** though under foreign registry, held not to preclude naturalization. 17F(2d)611.

1116–6½–New. An alien seeking naturalization with no higher purpose than to circumvent the immigration laws is clearly disqualified. 20F(2d)978.

1116–7 21F(2d)181. See also 10F(2d)560.

1116–7½–New. Act of May 9, 1918 makes an honorable discharge certificate prima facie evidence to satisfy all requirements of residence. 14F(2d)675.

1116–7½–New. Naturalization is held not barred by service on foreign vessels for a total of four weeks. 30F(2d)418.

1116–9 143US135, 12SCt375, 36Led103.

1117–10 125Misc564, 211NYS501; Pa152A92.

1117–13 [h] 12PortoRicoFed523. [j] **In New York.**–125Misc564, 211NYS501.

1118–14 125Misc564, 211NYS501.

1118–15 125Misc564, 211NYS501.

1119–23½–New. Federal district court has jurisdiction to cancel a certificate of citizenship illegally granted by the state court. 14F(2d)242.

1119–25 21F(2d)876.

1119–31 25OhNPNS247.

1119–33½–New. Declaration of intention filed in county other than that in which applicant for citizenship resided conferred no jurisdiction on New York state court under naturalization statute. 14F(2d)242.

1119–33¼–New. A ruling of the department of labor requiring an alien to obtain a certificate of arrival before receiving his first papers is in conflict with the Naturalization Law and is without effect. 25OhNPNS247.

1119–35 [a] 26F(2d)750.

1120–36 16F(2d)884. [c] **Under Act June 6, 1906** widow must make application for naturalization not more than seven years after husband's declaration of intention. 276US463, 48SCt328, 72Led654.

1120–39 18F(2d)425; 30F(2d)449. [b] **Validity of declaration** with regard to date of alien's arrival has been upheld. 36F(2d)407.

1120–40 [c] **Where alien has lost citizenship in country of birth and has become citizen of another,** he must renounce allegiance to sovereign of latter country. 23F(2d)966.

1120–43 But see 30F(2d)449 [aff 30F(2d)451]. [b] (3) To clerk or court of district of residence. 10PaDist&Co651.

1120–44½–New. If the alien is not a resident when he attempts to make his declaration of intention such declaration is invalid. 8F(2d)374.

1120–44¼–New. Declaration bearing date earlier than certificate of arrival is not sufficient. 18F(2d)425.

1120–44¼–New. Act of 1929 requiring a certificate of arrival to be issued before the filing of a declaration of intention is not retroactive. 36F(2d)407.

1120–45 43F(2d)438. [c] **Declarant knowingly swearing to false** declaration of intention could not secure amendment thereof. 43F(2d)438.

1120–48 But see 25OhNPNS247.

1120–49 278P17, 49SCt15, 73Led156; 17F(2d)133; 31F(2d)696 (conditions must be strictly complied with). [a] **Doubts existing concerning naturalization** should be resolved against claimant. 276US463, 48SCt328, 72Led654.

1120–49½–New. The applicant has the right to submit her petition and evidence to the court, and have it exercise its judicial judgment in accordance with settled rules of law. 27F(2d)742.

1120–50 21F(2d)71; 51Nev306, 274P809; Pa152A92.

1120–51½–New. Action on application for naturalization by state court will be suspended while habeas corpus proceedings involving deportation of applicant are pending in federal court. 14PaDist&Co301.

1121–52 7F(2d)380; 31F(2d)538. [b] **Alien soldier in military service** of United States overseas at passage of Act May 9, 1918 loses special privilege as to naturalization by failure to exercise same within time limited by statute. 5F(2d)247.

1121–55 18F(2d)425; 51Nev306, 274P809. [a] **Petition need not expressly renounce allegiance** in some cases. 43F(2d)124.

1121–58 14F(2d)668.

1121–59 14F(2d)668; 36F(2d)407 (certificate is prerequisite whatever true date of arrival may be). [a] (1) See also 33F(2d)1002. [a] (2) Nunc pro tunc certificate of arrival may be issued upon evidence other than actual verification of records of arrival at port of entry. 26OhNPNS95. [d] (1) 17F(2d)133. (2) On filing petition court acquired jurisdiction, though certificate not filed at same time. 13F(2d)662. [f] 14F(2d)668. [g] **Certificate of arrival** is essential to valid naturalization. 6F(2d)334. [h] **Nunc pro tunc certificate of entry.**–14F(2d)668. [i] **Power of district director** to issue certificate under regulation of bureau of naturalization held strictly limited to express instructions from bureau. 17F(2d)133. [j] **Form of certificate.**–33F(2d)313. [k] **Indorsement on certificate disclosing unlawful entry** renders petition insufficient. 33F(2d)313. [l] **Certificate required for reinstatement to citizenship of native American woman marrying Canadian and residing in Canada during marital status.**–41F(2d)857.

1121–60 14F(2d)668. [a] (2) Filing certificate twenty days later held procedural irregularity curable by amendment. 13F(2d)662.

1121–62 42F(2d)297.

1121–63 21F(2d)968.

1122–76½–New. Inspection and registration of aliens on arrival are prerequisite to valid petition for citizenship. 14F(2d)668.

1122–76½–New. Alien has not arrived until he has passed required examination to determine whether he is in excluded classes. 14F(2d)668.

1122–76¼–New. Applicants for citizenship are not responsible for default of officials in making proper registration when they report for inspection. 14F(2d)668.

1122–76½–New. A petition of an alien residing in northern division of a district may properly be filed, heard, and

determined in the southern division. 21 F(2d)71.

1122-76¼-New. It has been held that the filing of a petition for naturalization, although defective for want of filing of a certificate of arrival, nevertheless confers jurisdiction upon the court to determine the petitioner's status, and is the proper method of testing such status. 32F(2d)911.

1122-76½-New. Minor over eighteen may present petition in own name without intervention of guardian or next friend. 12PaDist&Co 456.

1122-76¾-New. Time intervening between filing of application and hearing is part of probationary period. 42F(2d) 727.

1122-78½-New. Certificate showing legal entry into United States must be filed with petition. 21F(2d)876.

1122-78¾-New. Mere statement that record of arrival cannot be found is not sufficient. 21F(2d)876.

1122-79 [a] **Authority to require affidavit of allegiance** is impliedly denied by statute requiring oath of allegiance orally in open court. 40F(2d)972(1st case). [b] **Effect of oath.**-42F(2d)842. [c] **Qualifying required oath** to add "so far as they are in accord with moral law of Jesus Christ" justifies refusal of naturalization. Pa 152A92.

1122-80 [a] (2) Oath need not be in any particular words or text. 42F(2d) 842.

1122-81 279US644, 49SCt448, 73Led 889; 29F(2d)999; 41F(2d)762; 51Nev 306, 274P809. [a] 279US644, 49SCt448. See also 41F(2d)762. [f] 20F(2d)978. [i] 20F(2d)978. [j] **Application must be granted.**-10F(2d)560. [k] **Evidence insufficient to prove good moral character.**-20F(2d)978. [l] **Evidence held insufficient.**-279US644, 49SCt448, 73Led 889. [m] **Strict rules of evidence,** applicable to criminal cases, do not apply in hearing on petition for naturalization. 34F(2d)161. [n] **Burden of proving good conduct** rests on petitioner. 34F (2d)161. [o] **Burden of proving continuous residence** for statutory period rests on petitioner. 33F(2d)364.

1123-82 43F(2d)648.

1123-87 Contra 4HawaiiFed578.

1123-90½-New. Court has right to look to certificate of arrival to ascertain whether alien was admitted to this country as permanent resident. 8F(2d)374.

1123-90½-New. Federal statutes do not relieve alien seaman from proof by certificate of arrival that he has been admitted to permanent residence or that he was a resident when declaration of intention was filed. 8F(2d)374.

1123-90¼-New. That alien has not paid head tax will not debar him from remaining permanently, and on subsequent payment of tax he may be naturalized. 14F(2d)624.

1123-90½-New. An alien who applies for a declaration of intention is presumed to be legally a resident of this country. 25 OhNPNS247.

1123-90⅓-New. The court is not bound by the facts in a certificate of arrival. 26F(2d)106.

1123-90½-New. The study of law is evidence of intention to reside in the United States in the future. 26F(2d) 106.

1123-90⅔-New. Alien's declaration may be taken into consideration in connection with other facts not inconsistent with such a declaration. 29F(2d)999.

1123-90⅚-New. Whether the act providing for five years' residence continuously in the United States has been complied with is a question of fact. 29F(2d) 24.

1123-90 1/10-New. It is the duty of the examiner to take all pertinent evidence concerning the fitness of applicant for naturalization. 35F(2d)496.

1123-92½-New. A judgment on decree of naturalization is for all purposes the same as any other decree or judgment rendered by the court in a special proceeding. 125Misc564 211NYS501.

1124-1 15F(2d)285; 17F(2d)28; 35F (2d)186; 125Misc564, 211NYS501. See also 26F(2d)114. But see 7F(2d)728.

1124-2 125Misc564, 211NYS501. See 108Conn292, 142A843. But see 20F(2d) 998.

1124-4 127Misc167, 216NYS271.

1124-6 [b] **Application.**-125Misc564, 211NYS501.

1124-6½-New. State courts have power to correct errors in respect to clerical mistakes 125Misc564, 211NYS501.

1124-6⅓-New. as well as to matters of substance 125Misc564, 211NYS501.

1124-6¼-New. after the term at which the error was made. 125Misc564, 211 NYS501.

1124-6⅙-New. Order denying citizenship containing clause "never to be modified," is in excess of court's jurisdiction and may be modified so as to permit petitioner to renew application. 127 Misc167, 216NYS271.

1124-10 [a] **False representation in application** by communist alien that he was attached to principles of constitution of United States warrants vacation of naturalization order. 40F(2d)255.

1125-15 32F(2d)385. [a] **Certificate of citizenship** granted without certificate of arrival is subject to cancellation. 6F (2d)334. [b] **Cancellation of naturalization.**-18F(2d)246; 18F(2d)435. [c] **That applicant did not intend to become permanent citizen** justifies cancellation of certificate. 18F(2d)577.

1125-16½-New. Naturalization certificate of alien's wife, living in United States for little over year before naturalization with no intent to remain, canceled. 10F(2d)585.

1125-16⅓-New. A statute requiring the filing of a certificate of arrival with a petition for naturalization is mandatory, and failure to file a certificate is ground for cancellation of naturalization. 21F (2d)28.

1125-22 8F(2d)880; 13F(2d)376; 17F (2d)28; 21F(2d)583; 26F(2d)114 (equity); 27F(2d)984; 31F(2d)696; 41F (2d)762; 43F(2d)76. See also 29F(2d) 24. [d] **Alien's belief that changes should be made in form of government** (1) do not indicate lack of attachment to principles of constitution. 12F(2d) 942. (2) Certificate held not subject to cancellation under evidence on ground of permanent residence in native country within five years where defendant's evidence overcomes evidence of United States consul in Italy. 26F(2d)213. [e] **Attempt to create public sentiment** in favor of resuming trade relations with Russian Soviet government does not authorize cancellation of certificate under act. 12F(2d)942. [f] **Government's participation in naturalization** proceedings is held not to estop later action to set aside naturalization order. 22F (2d)879. [g] **Failure to procure certificate** of physical examination and failure to pay head tax not "illegality" within act. 217Fed169.

1125-23 21F(2d)583. [a] **No statute of limitation** runs against cancellation proceedings. 7F(2d)728.

1126-26½-New. A bill lies in the federal court to review a grant of citizenship by the state court. 26F(2d)360.

1126-27 7F(2d)728 (certificate is "illegally procured" when presented qualifications for citizenship have no existence, though no deliberately wrongful imposition is practiced on court).

1126-28 17F(2d)28, 30 [quotCJ].

1126-29 See also 17F(2d)28.

1126-32 [a] (2) Statutory presumption of lack of intention to become permanent citizen of United States, arising from residence abroad, vanishes when confronted by evidence explaining absence. 34F(2d)349. [e] 21F(2d)583. [f] **Evidence insufficient.**-19F(2d)71. [g] **Evidence held admissible.**-31F(2d) 696 (behavior before as well as after granting of certificate of naturalization, on question of fraud). [h] **Evidence held sufficient to warrant cancellation.**-31F(2d)696 (for fraud). [i] **Fraud in procuring certificate not shown.**-33F(2d) 342.

1126-34 13F(2d)376.

1126-36 7F(2d)728 (petition held amendable on view of evidence); 31F (2d)696 (bill held sufficient).

1126-37 17F(2d)28; 31F(2d)696 (affidavit held sufficient).

1126-39½-New. Evidence to authorize the cancellation of a certificate of citizenship must be clear, unequivocal, and convincing in quantity and quality. 12F (2d)942.

1126-39⅓-New. Judgment granting wife of applicant divorce on ground of adultery is conclusive evidence that he did not possess qualification of good moral character, where judgment never attacked. 8F(2d)880.

1126-39¼-New. Court should not cancel certificate merely because it might have resolved doubt against petitioner in first instance. 10F(2d)585.

1126-39½-New. United States is not estopped from instituting cancellation proceedings. 13F(2d)376.

1126-39¾-New. Whether applicant induced court to grant certificate of citizenship by false and fraudulent statements of material facts is question of fact. 12F(2d)942.

1126-39½-New. Burden is on government to prove fraud in procuring citizenship certificate by preponderance of evidence. 12F(2d)942.

1126-40 19F(2d)71; Pa 152A92.

1126-41 12F(2d)763; 13F(2d)376; 19 F(2d)71. [a] **Section of Naturalization Act** conferring exclusive jurisdiction to naturalized aliens does not deny appellate jurisdiction of circuit court of appeals. 270US568, 46SCt425, 70Led738.

1126-43 [c] 8F(2d)880.

1127-44½-New. To be reviewable, the record should contain evidence. 24F(2d) 418.

1127-45 35F(2d)529.

1127-45½-New. Decree admitting applicant to citizenship is effective irrespective of whether certificate of naturalization issues. 40F(2d)972(1stcase).

1127-45½-New. Signature to certificate should be attached in place of naturalized citizen's location when decree was rendered without obtaining his signature to certificate. 40F(2d)972(1stcase).

1127-45¼-New. Clerk of court is not required to furnish certified copy of petition and order showing naturalization of applicant's father. 44F(2d)188.

1128-57 70CalA362, 233P359.

1128-58 70CalA362, 233P359.

1128-61 Mich 233NW205.

1128-64 See also 171Fed299.

1128-67 7F(2d)369; 121Minn376, 141 NW801. [b] 144Fed711. [e] **Certificate of citizenship may be issued to person claiming citizenship through naturalization of parent** only upon application to commissioner of naturalization. 14 PaDist&Co 283.

1129-70 [a] **Residence** of alien father is not imputed to child under statutes relating to citizenship. 23F(2d)489.

1129-71 23F(2d)489. [a] **Alien's residence in United States** as minor before father was naturalized was abandoned by sixteen years absence. 23F(2d)489.

1129-71½-New. The term "parent" as used in the act does not include stepfather. 26F(2d)148.

1129-75 [a] **Under Cable Act of September 22, 1922,** husband's naturalization after order of deportation of wife does not make her citizen. 22F(2d)914.

1129-80½-New. But naturalization of husband does not affect alien wife outside United States. 9F(2d)900.

1129-81 See also 196NC341, 145SE615.

1130-87 6F(2d)209 (indictment held to charge offense of aiding person not entitled thereto to secure naturalization).

1130-87½-New. Surreptitious entry without inspection is an offense. 17F (2d)647.

1130-87½-New. Bringing to United States alien, not admissible under Immigration Act or regulations thereunder, renders person or transportation company bringing such alien subject to a penalty. 19F(2d)773. [a] **When alien claims to be exempt from quota** transportation, company need not investigate merits of alien's claim in order to relieve itself from liability under statute. 19F(2d)773.

1130-87¼-New. Where transportation company pays unauthorized fine under duress, such fine is recoverable. 19F (2d)773.

1130-87⅓-New. Five-year limitation for prosecuting offense of procuring naturalization illegally took such offense out of three-year limitation statute. 41 F(2d)366.

1130-90 [a] (6) Indictment for knowing aiding person not entitled thereto to secure naturalization held sufficient. 17F(2d)771. (7) False answer of applicant as to whether he had ever been ar-

ATTORNEY-AT-LAW
1244 FIRST NATIONAL BANK BLDG.
CHICAGO

rested constituted "perjury." 35F(2d) 496.

1131–98 [b] **Indictment held insufficient.**–19F(2d)807.

1132–11 [a] **Authority of clerk to issue certified copy of order** admitting to citizenship parent of applicant. 14PaDist& Co 283.

ALL

1134–34 205 Iowa114, 213NW414.
1134–36 80Mont102, 258P246.
1134–46 80Mont102, 258P246.
1134–52 118 Or105, 244P868.
1134–57 314Mo 158, 282SW710, 714 [cit CJ].
1136–87 [b] **Includes apparent claim** which is of dignity of "legal title." **Tex CivA** 295SW679.
1138–4 80Mont102, 258P246.
1140–55 118 Or105, 244P868.
1140–64 118 Or105, 244P868.
1141–77 [c] (2) As used in statute giving preference to trust funds held by bank as administrator, term includes money. 205 Iowa114, 213NW414.
1142–99½–New. "all state and county records." 118 Or105, 244P868.
1143–55 15F(2d)937.
1143–57 15F(2d)937.
1144–80 15F(2d)937.
1144–85 15F(2d)937.
1147–73 15F(2d)937.

ALLEGE

1149–35 **MoA** 277SW593.

ALLEY

1150–50 25 OhNPNS85.
1151–53 25 OhNPNS85.
1151–56 25 OhNPNS85.
1151–59 25 OhNPNS85.

ALONGSIDE

1163–23 20F(2d)212.

ALSO

1164–47 75Mont429, 244P287.

ALTER

1165–70 **TexCivA** 272SW577.

ALTERATION

1166–89 177Ark291, 6SW(2d)294 (new or different structure).
1166–91 233Mass595, 124NE439.

ALTERATION OF INSTRUMENTS

1172–1 103NJEq275, 143A346.
1172–2 198Wis525, 224NW742.
1173–7 29CalA659, 661, 156P519 [quot CJ] ("material change or alteration"); 144 Okl 74, 289P742; 53SD228, 220NW 503, 505 [citCJ]; 135Wash488, 238P13, 15 [citCJ]; 29NB420.
1173–8 300Pa267, 150A595. [a] (5) One which so changes terms of instrument as to give it different legal effect from that which it originally had, and thus work some change in rights, interests, or obligations of parties. 316 Mo 1158, 295SW73. (6) "Material alteration" is one which so changes terms of instrument as to give it different legal effect. **MoA** 298SW1048. [d] **Illustrations.–TexCivA** 277SW773.
1173–10 **TexCommnA** 15SW(2d) 607.
1173–11 135Wash488, 238P13, 15 [cit CJ].
1174–14 49IndA178, 97NE130; 300 Pa267, 150A595.
1174–16 331 Ill 107, 162NE375 (change in contract for sale of real property favorable to vendor); **TexCivA** 25SW(2d) 274.
1174–17 80 Okl 103, 194P193 ("material alteration").
1174–18 122Kan1, 252P242, 244 [cit CJ]; 141Miss660, 107S284; **MoA** 9SW (2d)856; 93 Okl 219, 220P585 ("material alteration"); 155Pa429, 26A750; **Tex CivA** 21SW(2d)699 (reduction of amount of note by payee); **Wis** 232NW858.
1175–23 **Cal** 290P583; 127Mc452, 144 A383(2dcase); 236Mich490, 211NW107; 238Mich210, 213NW200; 185Mo 335, 83 SW1077; 114Nebr621, 208NW964; 191 NC679, 132SE796; 144 Okl 74, 289P 742; **TexCivA** 277SW773, 775 [citCJ]; 101WVa522, 133SE154.
1176–24 236Mich490, 211NW107.
1176–25½–New. Where interlineations are not challenged as fraudulent or as inserted without warrant, they are parts of the contract. **TexCommnA** 265SW 135.
1176–26 35Ark146, 37AmR9; 238Mich 210, 213NW200; 6Nebr536, 29AmR369; 7Serg&RPa505, 10AmD485.
1176–27½–New. But such holder may enforce the note according to original tenor. **TexCivA** 277SW773.
1177–32 **Fla** 125S909.
1177–33 251Mich96, 231NW59 (alteration changing deed to one creating estate by entireties); 219MoA112, 268SW676.
1178–50 N. D. Rev. Codes (1899) § 1053; Or. Codes & St. Annot. (1901) § 4527.
1178–51 **NJSup** 131A98; 118 Okl 283, 248P634, 636 [quotCJ].
1178–52 62 Okl 252, 162P1098 ("material alteration"); 130 Okl 229, 266P 778.
1179–53 **MoA** 298SW1048; **Tex CommnA** 285SW818; **TexCivA** 21SW (2d)699 (payee's changing amount invalidates note).
1179–60 236Mich490, 211NW107.
1179–61 218Ala296, 118S513; 238Mich 210, 213NW200.
1179–61½–New. Alteration of deed by striking out assumption of mortgage clause inserted without grantee's knowledge does not create obligation where none existed. 130Kan698, 288P574.
1179–62 100CalA103, 279P1074.
1181–81 **MoA** 16SW(2d)107; **Tex CommnA** 298SW265; **TexCivA** 274SW 210, 214 [citCJ]; **TexCivA** 1SW(2d) 703; **Utah** 276P659.
1182–82 [b] **Material alteration must be shown to have been innocently made** to bring payee of altered note within this rule. **TexCommnA** 285SW818.
1182–85 169Ark954, 277SW539; **Tex CivA** 21SW(2d)699. But see **Tex CommnA** 285SW818.
1183–90 114Nebr621, 208NW964.
1183–91 169Ark954, 277SW539, 540 [citCJ]; **TexCommnA** 285SW818.
1185–15 204 Iowa1283, 213NW617, 622 [citCJ].
1188–42 See also 236Ky18, 32SW(2d) 542.
1188–45 40GaA328, 149SE713; 296Pa 414, 146A94 (instrument admissible in condition as presented).
1189–57 255 IllA127.
1191–65 12F(2d)972; 41F(2d)319; **Ill** 173NE118; 232 IllA44; 200 Iowa1133, 206NW26; 202 Iowa360, 208NW299; 177Minn165, 224NW851; 179Minn586, 229NW565; **MoA** 278SW826; 296Pa414, 146A94; 47RI 237, 132A609; 105WVa 435, 143SE106. [b] (11) Separation of note from contract expressing consideration for note and containing nothing inconsistent with note does not constitute material alteration. 252 IllA68. [g] 50ND455, 196NW307.
1192–71 17F(2d) 865; 175Ark1126, 2 SW(2d)1111.
1193–73 [a] (2) Under Negotiable Instrument Law alteration must be material to vitiate note. 316Mo 1158, 295 SW73.
1193–75 17F(2d)865; 29F(2d)92; 164 La1090, 115S280; 167La230, 119S31; 256Mass66, 152NE347.
1194–76 133Misc644, 233NYS653.
1195–85 122Ark522, 184SW54; 300Pa 267, 150A595.
1195–87 160Minn250, 199NW970.
1196–96 3Camb382, 170Reprint1418.
1196–98 [1922] 2KB461.
1197–6 111Miss39, 71S260 ("material alteration").
1197–8 83Ark36, 102SW715; 125Kan 3, 262P573; 114Nebr621, 208NW964.
1198–12 **TexCivA** 274SW210, 214 [cit CJ].
1198–19 6F(2d)313; 125Kan3, 262P 573; 3KyL418, 11KyOp361; 259Mass 570, 156NE723; 63Pa327, 331, 3AmR 555; **Utah** 276P659.
1199–22 [a] **MoA** 298SW1048.
1199–24 288Fed185 ("material alteration"); 122Kan1, 252P242; 3KyL418, 11KyOp361.
1199–25 244Mich351, 221NW179.
1199–26 **Mo** 29SW(2d)138.
1199–28 **TexCivA** 191SW1181 ("material alteration").
1199–29 118 Okl 118, 247P42.
1200–34½–New. The insertion of "date" in a blank dealing with the commencement of interest is not a material alteration where, under a statutory provision, the instrument drew interest from its date. **MoA** 298SW1048.
1200–39 125Kan3, 262P573; 81 OhSt 348, 90NE1000, 26LRANS99.
1200–40 112US139, 58Ct65, 28Led641; 125Kan3, 262P573; 230Ky91, 18SW(2d) 858; **TexCommnA** 15SW(2d)607; **Tex CivA** 7SW(2d)906. [c] **Change of date of payment** in accordance with provision for extension of time not a material alteration. **Iowa** 211NW228; **Tex CivA** 272SW321.
1201–41 230Ky91, 18SW(2d)858. [a] See also 208 Iowa402, 226NW12, 13 [cit CJ].
1201–42 244Mich351, 221NW179.
1201–47 125Kan3, 262P573.
1201–48 13F(2d)585; 200 Iowa220, 204 NW456; 125Kan3, 262P573.
1202–51 217MoA676, 274SW833.
1202–56½–New. A bona fide holder in due course, ignorant of change in place of payment, may recover on note since original tenor would be same with place of payment omitted. **NJSup** 131A98.
1203–62 125Kan3, 262P573; **Ont** [1930] 1DomLR339.
1203–67 221MoA979, 295SW835, 837 [citCyc]; 102Misc511, 169NYS40 ("material alteration"); 155Pa429, 26A750; **TexCivA** 6SW(2d)224; **Wis** 232NW858; [1912] 2Ch60.
1204–69 57Wash353, 106P907, 32Am SR515; 13NS439.
1204–70 **Ont** 28GrantCh10.
1204–72 [a] **Date of acceptance of bill payable at fixed period after sight** may be inserted where acceptance is undated. 217MoA676, 274SW833.
1210–16 161La261, 108S475.
1210–18 [a] **Whether particular words added constitute alteration** depends on intention of parties. **TexCivA** 7SW(2d) 906.
1210–20 148Miss200, 114S344.
1210–22 **TexCivA** 277SW773, 775 [cit CJ]. [e] **Where a note is attached to another instrument.**–41 Ida151, 238P524.
1211–23 [b] **Erasure of extension memorandum from back of note** and detachment of agreement annexed thereto not material alteration, as note and agreement remain in force despite such charges. 232 IllA44.
1211–24 47 Ida106, 273P947; 32Porto Rico 752.
1211–25 53SD228, 220NW503 (removal of mortgage rider from tLeft insurance policy).
1212–26 **MoA** 278SW826.
1212–27 **TexCommnA** 15SW(2d)607.
1212–29 39GaA705, 148SE354.
1212–31 **MoA** 278SW826.
1212–35 203 Iowa35, 212NW333; **Tex CivA** 27SW(2d)309.
1213–41 203 Iowa35, 212NW333; 35 OhA63, 171NE611.
1213–42 203 Iowa35, 212NW333.
1213–44 219Ala607, 122S814; 161La 261, 108S475; 148Miss200, 114S344, 345 [citCJ].
1213–45 198Wis525, 224NW742.
1213–46 50SD54, 208NW219, 220, 44 ALR1536 [quotCJ]. [a] 50SD54, 208 NW219, 44ALR1536.
1213–47 50SD54, 44ALR1536, 208NW 219, 220 [quotCJ].
1213–49½–New. Alteration of credit indorsed on note by payee's agent without authority does not affect note. **TexCivA** 294SW654.
1214–51 125Kan3, 262P573; 1KyOp 515; 300Pa267, 150A595; **TexCivA** 133 SW941, 943.
1214–52 130 Okl 229, 266P778 (insertion of word "surety" after names of two of three makers without knowledge or consent of one comaker).
1215–58 28F(2d)755; 122Kan1, 252P 242; 162La27, 110S77; 259Mass570, 156NE723; 141Miss660, 107S284; **Utah** 276P659.
1216–69 118 Okl 181, 247P689. But see 144 Okl 74, 289P742.
1216–72 238Mich210, 213NW200.
1216–78 27NS67.
1217–84 [b] **Erasure of corporation name** from letter of guaranty making it appear personal obligation of officers signing invalidates writing. 216AppDiv

92, 214NY8705. [c] **Line drawn through drawer's name** does not amount to an alteration, where it is unexplained and acceptor did not deny liability when bill was presented to him. 29NB420.

1217–86 120Kan256, 243P317.

1218–92 204 Iowa290, 214NW538; 208 Iowa222, 225NW369; 70 Okl 73, 172P 942 ("material alteration"); TexCivA 282SW606. [a] (1) 204 Iowa290, 214 NW538; 316Mo 1158, 295SW73; MoA 9 SW(2d)856. [h] **Procuring another to write his name on face of note** after due date without indorser's consent is material alteration discharging makers and indorsers. MoA 290SW635.

1218–93 MoA 9SW(2d)856.

1219–96 [d] **Insertion of name of wife** in blank left for that purpose is immaterial. NJSup 142A757.

1219–1 316Mo 1158, 295SW73; MoA 9 SW(2d)856.

1220–4 204 Iowa290, 214NW538.

1220–6 See also 201 Iowa481, 207NW 562, 563 [citCJ].

1221–8 236Mich490, 211NW107. See also 338 Ill 620, 170NE777; TexCivA 290SW302, 306 [citCJ].

1222–15 Vt 146A77.

1222–16½–New. No material change is made in a written agreement consisting of notes and a mortgage contemporaneously executed by a change in the place of payment of one of the notes where the note construed with the recitals in the mortgage shows that it was the intention of the parties that the note should be payable at the place where, by the change, it was directed to be paid. TexCivA 274SW210.

1222–17 37ND87, 162NW275.

1223–25 125Kan3, 262P573, 575 [cit CJ]; 296Pa414, 146A94.

1223–25½–New. Sales contract altered by seller after execution held immaterial in determining seller's rights to recover engine sold. TexCivA 296SW653.

1223–26 Fla 1258909; 140Miss452, 106 S12.

1225–31 160La712, 1078500, 501 [cit CJ].

1225–32 160La712, 1078500, 501 [cit CJ].

1225–32½–New. Where a broker after making a sale, accepting delivery of a deed in escrow, at the direction and with the consent of the purchaser makes a resale, the original vendor cannot complain that the broker erased the name of the original grantee and changed the consideration in the deed. MoA 290SW638.

1227–47 91CalA321, 267P138; 98SW 987, 30KyL369 (accidental loss of rider attached to policy).

1227–48 161La261, 1088475.

1228–49 125Kan3, 262P573, 575 [cit CJ]; 126 Okl 93, 258P892, 896 [quot CJ].

1228–50 31Ariz73, 250P367; 125Kan3, 262P573, 575 [citCJ]; 144 Okl 74, 289P 742.

1228–52 155Tenn430, 294SW1101, 52 ALR1411.

1229–54 227Ky719, 13SW(2d)1031; 37 ND87, 163NW275; 144 Okl 74, 289P742 (insertion of name of grantee intended in place of name inadvertently inserted); 7Exch862, 155Reprint1199.

1229–55 37ND87, 163NW275.

1230–57 167Mass426, 46NE52, 57AmSR 466.

1230–59 TexCommnA 286SW200.

1231–69 TexCivA 294SW687.

1231–70 118 Okl 283, 248P634; 27 Ont 398.

1233–88 209Ky603, 273SW455.

1234–89 6F(2d)313; MoA 16SW(2d) 107; 114Nebr230, 206NW770; TexCivA 274SW190; TexCivA 297SW647 [cit CJ]. [f] **Unsolicited signing of note** by stranger as surety without knowledge of other makers held not to affect rights and liabilities of original parties. Tex CivA 297SW647.

1235–92 209Ky603, 273SW455; 114 Nebr230, 206NW770; TexCivA 274SW 190.

1235–96 MoA 16SW(2d)107.

1235–97 114Nebr230, 206NW770 (certificate of deposit).

1236–2 91CalA327, 267P138; Mass 167 NE646. [a] TexCivA 274SW190.

1236–4 TexCivA 274SW190.

1236–7 6F(2d)313; 209Ky603, 273SW 455; 238Mich210, 213NW200.

1238–15 215Ala235, 110834; 105Md 164, 66A47, 10LRANS129 (cashier of bank); 300Pa267, 150A595.

1238–22 300Pa267, 150A595 (authority to discount as implying authority to alter).

1238–23 300Pa267, 150A595.

1238–24 See also 300Pa267, 150A595.

1238–25 160Ky358, 169SW848.

1239–26 214Ala338, 339, 1078832 [cit CJ]; 160Ky358, 169SW848; 241Mich 173, 216NW376; [1912] 2Ch60.

1239–29 CalA 284P1047; 200 Iowa585, 203NW303.

1239–34 [g] **Substitution of grantee** may be made by consent of parties. Iowa 228NW574.

1242–52 38PaCo 553. But see 241Mich 173, 216NW376.

1242–63 212Fed908, 129CCA428; CalA 288P830; 252 IllA545; 52Kan451, 34P 1046, 39AmSR354; 42AppDiv147, 59 NY851.

1242–64 42AppDiv147, 59NY851 (bond).

1243–65 321Mo 815, 128SW(2d)755.

1243–66 204 Iowa1378, 215NW754; 225 Ky733, 98SW(2d)1089; MoA 16SW(2d) 107; 42AppDiv147, 59NY851; 135Wash 488, 238P13.

1243–67 42AppDiv147, 59NY851 (negotiable bond); 92Vt86, 102A477 ("material alteration"). [b] 109SC70, 958E 140, LRA1918D1061 ("material alteration"). [c] 36CalA284, 171P1084 ("material alteration"); 204 Iowa1378, 215 NW754.

1244–68 [d] **Order for goods.–MoA 16 SW(2d)**107.

1244–72 219MoA112, 268SW676 (inserting name of party to contract).

1244–76 252 IllA545.

1245–77 [a] **Five years' delay in procuring omitted signature of accommodated party** does not prevent recovery where payee was inexperienced in business. Wis232NW858.

1245–79 212Fed908, 129CCA428; 42 AppDiv147, 59NY851.

1246–87 9AllenMass387, 85AmD764; Va 153SE799.

1247–91 42AppDiv147, 59NY851; 287 Pa441, 135A214.

1247–92 See also 214Ala338, 1078832.

1247–94 154Miss222, 122S473.

1248–1 17F(2d)865.

1248–5 287Pa441, 135A214.

1249–9 **Erratum.**–Citation should be 6 AllenMass305.

1250–20 5Newfoundl 94, 127.

1251–28 Va 153SE799.

1251–30 1FreemMass375 (filling in forthcoming bond with description of property not in existence).

1252–36 125Kan461, 463, 264P1044 [cit CJ]; 52ND280, 201NW833; TexCivA 58SW(2d)547.

1253–43 52Kan451, 34P1046, 39AmSR 354.

1253–44 212Fed908, 129CCA428.

1254–46½–New. Indorsers are not estopped to deny the validity of an altered note where they denied liability. 259Mass570, 156NE723.

1255–52 SD 227NW372; TexCivA 18SW (2d)703.

1256–59 TexCommnA 26SW(2d)187.

1256–62 86CalA436, 260P892 (ratification depends on facts in each case); MoA 148SW(2d)46 (compromise of conflicting claims held not ratification).

1256–64 See also Va 153SE799.

1257–74 86CalA436, 260P892, 893 [cit CJ].

1258–79½–New. Alteration of a note is waived by the maker's signing a mortgage as security for the note. SD 227 NW372.

1258–85 MoA 16SW(2d)107.

1258–85½–New. A party does not ratify an alteration in a replevy bond by suing on the bond where the court in its judgment considered the bond as in its original form. TexCivA 274SW190.

1258–86 200 Iowa220, 204NW456, 458 [citCJ].

1258–87 200 Iowa220, 204NW456, 458 [citCJ].

1259–94 155Tenn430, 294SW1101, 52 ALR1411.

1259–95 155Tenn430, 294SW1101, 52 ALR1411.

1260–13 [a] 155Tenn430, 294SW1101, 52ALR1411.

1260–16 155Tenn430, 294SW1101, 52 ALR1411.

1260–18 216Ala69, 1128426.

1261–21 133Misc644, 233NY8653. [b] TexCivA 78SW(2d)906.

1262–25 118 Okl 286, 248P611.

1263–34 TexCivA 6SW(2d)224.

1264–40 99WVa544, 130SE142.

1264–40½–New. Sworn plea in effect admitting signature, but setting up material unauthorized alteration, is not strictly plea of non est factum. Tex CivA 291SW583.

1264–41 [a] (3) Other instances. Mo 298SW(2d)138.

1265–47 99WVa544, 130SE142.

1266–57 169Ark954, 277SW539; 39Ga A705, 148SE354. [b] **Statute of limitations** not available to execute fraudulent purpose. TexCivA 275SW258.

1267–82 Fla 1258909; 243 IllA129; 212Ky655, 279SW1069; 222Ky454, 1 SW(2d)767; Mo 208SW(2d)523, 67ALR 476; 20 OhA497, 152NE761; 22 OhA 118, 153NE231; 123 Or88, 259P295; TexCivA 291SW583; TexCivA 78SW(2d) 638; TexCivA 78SW(2d)906. [c] **Presumption is that contract was complete** when party signed it. 225Ky733, 98W (2d)1089.

1268–83 13F(2d)585.

1268–87 216Ala510, 1138525; 39GaA 603, 147SE897; 212Ky655, 279SW1069, 1070 [quotCJ].

1269–88 216Ala510, 1138525; 220Ala 75, 1248110; 176Ark1188, 58W(2d)916; 212Ky655, 279SW1069, 1070 [quotCJ]; 127Me452, 144A383(2dcase); Mass 167 NE646 (burden of showing immateriality of alteration is on party relying on instrument); 185MoA582, 172SW628 (note written in different hands and inks); 133Misc644, 233NY8653; Tex CivA 68SW(2d)224; Ont [1930] 1DomLR339. [d] (2) Proof that receipt had been detached after delivery along perforated line from another instrument is not mutilation requiring holder to explain circumstances of detachment. Nebr 232NW732. [e] **Burden on party claiming benefit of instrument as altered.**–327 Ill 538, 158NE694.

1269–90 200 Iowa220, 204NW456; 212 Ky655, 279SW1069, 1070 [quotCJ].

1269–91 212Ky655, 279SW1069, 1070 [quotCJ].

1269–92 212Ky655, 279SW1069, 1070 [quotCJ].

1269–93 208 Iowa222, 225NW369. [e] 244Mich351, 221NW179.

1270–95 TexCommnA 285SW818. But see Vt 146A77.

1270–96 Vt 146A77.

1270–96½–New. A presumption of fraud is not met by denying the making of an alteration and testifying to facts which might offer basis for such purpose. TexCommnA 285SW818.

1270–98 212Ky655, 279SW1069; 300 Pa267, 150A595 (no presumption as to consent).

1271–5 [a] 220Ala75, 1248110.

1271–7 Mo 308SW(2d)83.

1271–8 212Ky655, 279SW1069 (on plea of non est factum burden is on plaintiff).

1272–9 212Ky655, 279SW1069.

1272–10 Mo 308SW(2d)83.

1272–12 212Ky655, 279SW1069.

1272–13 123 Or88, 259P295.

1272–13½–New. The burden of proving the materiality of an alteration rests on the party pleading alteration. 200 Iowa1133, 206NW26.

1273–17 204 Iowa727, 215NW963.

1273–19 [a] (3) 99WVa544, 130SE142.

1274–21 216Ala510, 1138525; 325 Ill 529, 156NE802; Mo 298SW(2d)138; 120 Okl 81, 250P415; TexCivA 18SW(2d) 703. [c] **Burden on party claiming benefit of instrument as altered.**–327 Ill 538, 158NE694.

1274–23½–New. The burden of proving an alleged alteration of guaranty contract on the guarantor. 216Ala69, 1128426.

1275–27 200 Iowa1133, 206NW26; 202 Iowa681, 210NW952; 203 Iowa972, 213 NW599; LaA 130S848; 165Minn330, 206NW646, 44ALR1238 (erasure of indorsement on note); 167Minn507, 209 NW632; 140Miss452, 106S12; Mo 30

SW(2d)83; 20 OhA497, 152NE761; 21 OhA268, 153NE197; 118 Okl 283, 248P 634; 134 Okl 195, 272P821; 99WVa544, 130SE142. [f] **Instruction held erroneous** as failing to call attention to presumption that alteration was made at or before execution. 20 OhA497, 152NE 761.

1275–28 140Miss452, 106S12.

1276–30 200 Iowa1133, 206NW26.

1276–30½–New. Although where plaintiff's evidence shows that the alteration occurred after defendant signed the contract, defendant need not prove such fact, he still has the burden of producing evidence to show materiality of alterations. 21 OhA268, 153NE197.

1276–33 325 Ill 529, 156NE802; 327 Ill 538, 158NE694; 204 Iowa727, 215NW 963. [c] (1) 327 Ill 538, 158NE694. (2) There is no presumption that alteration of written instrument was made before or after its execution, but fact must be proved. 127Me452, 144A383(2dcase).

1277–35 140Miss452, 106S12, 13 [cit CJ].

1277–38 140Miss452, 106S12.

1278–41 44 Ida423, 258P169 [citCJ].

1278–42½–New. The burden of proof is upon party attempting to impeach record of mortgage. 214Ala338, 107S 832.

1279–46 [a] **Rule is one of law.**–216Ala 510, 113S525. [b] **Statute enacting rule held based on public policy.**–216Ala510, 113S525.

1281–58 164Ala547, 51S263; 204 Iowa 456, 215NW767 (evidence to show erasures unauthorized); 208 Iowa8, 222 NW869; 125Kan3, 262P573.

1282–59 [a] (5) Other instances. 35 OhA63, 171NE611. [f] **Alteration by agent outside scope of authority** is not binding on principal so as to invalidate instrument. 105Md164, 66A47, 10LRA NS129.

1282–60 149Md19, 129A895.

1282–61 149Md19, 129A895.

1282–62½–New. A contract is held not inadmissible because of erasures and interlineation, where the margin of each one bore initials of notary. 81Colo 452, 256P10.

1282–62½–New. Issue of good faith in altering note may be raised by circumstantial evidence. **TexCivA** 1SW(2d) 703.

1283–67 164Ala547, 51S263 (whether after execution); 198 Iowa540, 197NW 439, 441 [citCJ].

1283–68 164Ala547, 51S263 (whether before execution).

1283–69 204 Iowa1378, 215NW754.

1283–70 204 Iowa1378, 215NW754.

1283–71 252 IllA545.

1284–76 [b] **Where there are no suspicious circumstances,** there can be no evidence of alteration requiring explanation. 325 Ill 529, 156NE802. [c] **Instruments held not of suspicious character so as to require explanation.**–325 Ill 529, 156NE802.

1284–83 Mo 30SW(2d)83.

1285–86 MoA 275SW549.

1286–96½–New. On issue of consent, the statement of a defendant that he would not have signed the instrument as altered is immaterial, and its admission is error, whether prejudicial or harmless depending upon other considerations. **MoA** 273SW415.

1287–3 [a] (1) 176Ark196, 2SW(2d) 84; 213Ky312, 280SW134. (30) 327 Ill 538, 158NE694. (31) To show alteration of deed and unauthorized recording of same. 148Md682, 130A325. (32) To sustain finding that interlineations in deed were not made after delivery. 140 Miss452, 106S12. (33) To show amount of indebtedness was interlined long after mortgage was recorded. 217Ky71, 288 SW1014. (34) To sustain finding that contract has not been altered after execution. **TexCommnA** 285SW283. (35) To show alteration in deed. 216Ala510, 113S525. (36) To show alteration of deed of attorney. 216Ala510, 113S525. (37) To sustain finding that deed was altered by forgery with intent to deprive grantors of undivided remaining interest. 80CalA176, 250P289. (38) To sustain finding that defendant signing note after delivery did not sign as guarantor but as original promisor. 316Mo 1158, 295SW73. (39) To show that alteration of order was not done with fraudulent intent. **MoA** 16SW(2d) 107. (40) To support finding that alteration in name of grantee was made before execution and delivery. 296Pa 414, 146A94. (41) To show agreement to reconvey was part of deed from one member of firm to another, rendering such deed equitable mortgage. 127Me 452, 144A383(2dcase). (42) To show that renewal note was altered by transferee by changing rate of interest and name of payee without authority of maker. **Utah** 276P659. (43) To sustain finding that rubber stamp impression of waiver of protest was on note when indorser signed. **SD** 230NW759. (44) Generally. **Va** 153SE799. [b] (1) 216Ala510, 113S525 (evidence of grantee alone); 216Ala619, 114S208; 243 IllA 129; 206 Iowa664, 221NW210; 13LaA 201, 127S99; 321Mo 815, 12SW(2d)755. (14) To show erasures made before delivery of note by maker to payee. 212 Ky655, 279SW1069. (15) To sustain burden of explaining erasures in note. 212Ky655, 279SW1069. (16) To sustain a finding that contract sued on had not been changed after execution. **Tex CivA** 275SW295. (17) To show that place of payment of note was changed with fraudulent intent. **TexCivA** 274 SW210. (18) To show alteration after execution. **TexCivA** 275SW295. (19) Alteration of negotiable instrument apparently made at time and by same hand used in making thereof does not constitute prima facie evidence that it was altered after delivery. 99WVa544, 130SE142. (20) To show alteration of mortgage. 123 Or88, 259P295. (21) To show interlineation in deed, before execution, at grantor's suggestion. 177Ark 27, 5SW(2d)914. (22) To show that payee fraudulently altered note. **Tex CivA** 1SW(2d)703. (23) To show alteration after execution. 38F(2d)743. (24) That trust deed was materially altered after signature without consent. **Mo** 20SW(2d)523, 67ALR476. [e] **Verdict held flagrantly against evidence.**–212Ky655, 279SW1069.

1287–5 123 Or88, 259P295.

1289–14 216Ala510, 113S525.

1289–18½–New. It has been held under the evidence unnecessary to give direct proof showing the identity of the person who made the forged alterations. 80CalA176, 250P289.

1289–18½–New. Testimony of defendants claiming to be sureties that they signed the note in its original unaltered condition and left it with the maker before delivery to the payee is not alone sufficient to authorize the inference that the note was altered by the payee. 37 GaA203, 139SE360.

1289–19 [a] (8) To show alteration in mortgage made with mortgagor's consent. 214Ala338, 107S832. (9) To show authority. 204 Iowa1378, 215NW 754. (10) Other instances. **Kan** 289P 421. [b] (3) To show erasures in note made after delivery with knowledge and consent of maker. 212Ky655, 279SW 1069. (4) To support finding that agent was authorized to bind seller by altering order. **MoA** 16SW(2d)107.

1289–21 86CalA436, 260P892.

1290–28 Ill 173NE118; 255 IllA127.

1291–41 123 Or88, 259P295, 296 [quot CJ].

1292–43 17F(2d)865; 252 IllA68; 204 Iowa1378, 215NW754; **MoA** 293SW66; 248Pa252, 93A1021; **TexCivA** 7SW(2d) 906.

1292–46 21 OhA268, 153NE197.

1292–47 325 Ill 529, 156NE802; 200 Iowa853, 205NW538; 208 Iowa222, 225 NW369; 249Mich86, 227NW668; **ND** 231NW604; 134 Okl 195, 272P821; 10 NB343. See also **TexCommnA** 286SW 200.

1293–48 39GaA603, 147SE897.

1293–52 180Ark428, 21SW(2d)958 (replevin plaintiff entitled to directed verdict against contention of alteration in contract in absence of set-off or counterclaim); 37GaA203, 139SE360; 248Pa 252, 93A1021 (only where doubtful whether instrument was altered in material part should preliminary question of whether it had been altered or changed be submitted to jury).

1293–52½–New. Where there is no evidence as to where alteration of note was made, direction of verdict for defendant in action on note on ground of material alteration after delivery cannot be sustained. 202 Iowa681, 210NW952.

1293–54 13F(2d)585; 18F(2d)54; 200 Iowa1133, 206NW26 (where there was no proof as to time when signature was erased from bond and sheets were removed therefrom); 201 Iowa481, 207 NW562; 140Miss452, 106S12; Mo 30 SW(2d)83; 296Pa414, 146A94 (court sitting as jury).

1294–56 MoA 290SW635 (court sitting as jury); 2NH543; 31 OhCirCt609; 2 Watts&SPa438; 3Jur268.

1294–58 200 Iowa220, 204NW456; 204 Iowa1378, 215NW754 (evidence held to make case for court).

1294–59 91Ga827, 18SE43; 256Mass66, 152NE347.

1295–62 323 Ill 161, 153NE643.

AMBASSADORS AND CONSULS

1300–37 38TLR259.

1300–41½–New. The authority of an agent of a governmental or quasi governmental corporation is presumed to continue until the contrary is proved. 221AppDiv732, 224NYS522.

1300–41½–New. Evidence was held not to show repudiation by governmental or quasi governmental corporation of its agent's authority to employ an attorney. 221AppDiv732, 224NYS522.

1303–68 130Misc618, 224NYS389 (consent of sending state required). [c] **As to wife, family, and domestic servants.**–130Misc618, 224NYS389.

1303–72 [1914] 1Ch139 (secretary of legation held privileged, though unconditional appearance had been entered by him).

1304–83 130Misc618, 224NYS389 (extends to members of attaché's domestic suite). **Erratum.**–Strike out entire note [a].

1304–84 [1914] 1Ch139. [c] (2) Immunity from process extends to wife of secretary of legation. 130Misc618, 224 NYS389.

1304–86 26FCasNo 15,471, 4CranchCC 704; 26FCasNo 15,550, 4CranchCC173.

1305–98 [d] **Chancellor of French consulate** is not entitled to immunity from civil process, in spite of convention giving immunity to consuls, where chancellor was not acting ad interim for consul. 126Misc443, 213NYS168; 126 Misc359, 212NYS704.

1305–2 [a] **Certificate of French ambassador,** that there is no position as vice consul in French service and that "Chancellor" is similar thereto, does not supersede or add to treaty giving civil immunity to vice consuls. 126 Misc445, 213NYS170. [b] **Certificate of secretary of state** that he was informed by French ambassador that defendant was only officer having duties as chancellor does not entitle him to immunity as vice consul under treaty. 126Misc 445, 213NYS170.

1305–4½–New. Treaties. Service on chancellor in office of French consulate general is void under treaty providing that consulate offices and dwellings shall be inviolable. 126Misc445, 213 NYS170.

1306–6 32F(2d)308.

1306–12½–New. Financial attaché of Russian embassy under provisional Russian government, recognized by state department, as custodian of property of Russian government, is authorized to continue suits begun by Imperial Russian Government. 21F(2d)396.

1306–12½–New. Diplomatic agents of one state may maintain actions in another state in behalf of their state where they are recognized as its representatives. 21F(2d)396.

1306–12¼–New. Proof that alleged diplomatic agent represents certain foreign state depends on recognition by political department of United States. 21F(2d)396.

1306–14 [e] **Power to certify acts and documents.**–Nebr 217NW618.

1306–15 7F(2d)605 (instructions from state department held not to authorize

refusal to visé passport of American ship captain). [b] **Consul is responsible** for keeping within his actual powers. 7F(2d)605. [c] **In action against consul** for wrongful refusal to visé passport three hundred and fifty dollars a month and expenses held proper measure of damages. 7F(2d)605.
1307-18 13F(2d)469.
1308-34 80NJEq260, 86A917; 143NYS 678.
1308-37 [a] **Foreign consul as such cannot assert priority** of right of administration conferred by Rev. L. (1905) § 3696 subd 1, on the surviving spouse or next of kin of one of his nationality deceased. 120Minn122, 139 NW300.
1308-37½-New. Under treaty with Roumania chancellor of royal Roumanian consulate may petition for appointment of auditor to make distribution of Roumanian decedent's estate. 12Pa Dist&Co 222.

AMBIGUITY

1313-11 TexCivA 295SW274.
1313-21 MoA 274SW951, 960 [citCJ].
1313-23 144SC417, 142SE593, 598 [quotCJperCothran,J]. [k] **Other definitions.**-32 OhA158, 167NE693.
1314-25 163Minn176, 203NW778; 144 SC417, 142SE593, 598 [quotCJperCothran,J].
1314-26 104Conn318, 132A910 [citCJ].

AMBULANCE CHASER

1316-40½-New. A person, either a lawyer or the agent of a lawyer, who follows up cases of accident in the streets and tries to induce the injured person to bring suit for damages. 239Mich 204, 214NW316, 319 [quotCenturyD.& Cyclop].

AMEND

1316-47 209Ky101, 272SW43.
1316-49 209Ky101, 272SW43 (to improve).
1317-50 [a] 122 Okl 234, 254P47. [b] 122 Okl 234, 254P47.

AMENDMENT

1317-69 78Mont199, 253P260.
1317-70 122 Okl 234, 254P47; 126 Okl 80, 258P861.
1317-73 78Mont199, 253P260.

AMICUS CURIÆ

1322-1 TexCivA 291SW261 [quotCJ].
1322-1½ TexCivA 291SW261 [quotCJ]; TexCivA 293SW625. [a] (2) "An amicus curiæ" is one who, as a stander-by when a judge is in doubt or mistaken in a matter of law, may inform the court. He is heard only by leave and for the assistance of the court, upon a case then before it. He is not a party to the suit and has no control over it. 83 IndA456, 148NE163. [e] **Function of amicus curiæ is to call court's attention** to facts that escaped its consideration. 31NM576, 249P242. [f] **Office of amicus curiæ** cannot be subverted to use of litigant. TexCivA 298SW610.
1322-3½-New. or it may disregard it within judge's discretion, TexCivA 293 SW625.
1322-4½-New. Rulings obtained by amicus curiæ in excess of his authority may be reviewed and set aside on appeal. TexCivA 293SW625.
1323-15 31NM576, 249P242; TexCivA 291SW261. [c] **He is not a party,** nor can he assume functions of party. 31 NM576, 249P242. [d] **He must accept case** with issues made by party. 31NM 576, 249P242.
1323-16 83 IndA456, 148NE163 (no exception lies to order permitting one to be heard as amicus curiæ).
1323-16½-New. Brief amici curiæ presented to court after filing of referee's report and upon argument in disbarment proceedings held in effect, a petition appealing for clemency and an improper attempt to influence the court's decision. 193Wis602, 216NW127, 55 ALR1355.
1323-16¼-New. Where applicant is stranger to proceeding and not an enrolled attorney of court, his application for permission to file brief as amicus curiæ will be denied. 38F(2d)889(2d case).
1323-18 TexCivA 291SW261 [quotCJ].
1323-18½-New. Activities of amicus curiæ are held not to constitute appearance for nonresident defendant. Tex CivA 293SW625.
1323-19 31NM576, 249P242.
1323-20 31NM576, 249P242.
1323-20½-New. Petition by brief amicus curiæ, if deliberate and to influence court, is reprehensible, 193Wis602, 214 NW379.
1323-20¼-New. and if thoughtless and without consideration is entitled to no weight. 193Wis602, 214NW379.
1324-25 TexCivA 293SW625.
1324-27 But see TexCivA 298SW610.
1324-28½-New. He may question the sufficiency of service of process and show that the court has not jurisdiction. TexCivA 293SW625.
1325-49 [a] **Constitutional questions.**-31NM576, 249P242.
1325-52½-New. An attorney cannot urge, as amicus curiæ, the right to represent an insane person in opposing the appointment of a guardian. 198Cal 183, 244P343.
1325-55 23F(2d)287; TexCivA 293SW 625.
1325-56 23F(2d)287. [b] Iowa 230NW 540.
1326-58 23F(2d)287; Utah 279P878 (where decision of court, accepted by all parties as final and alleged indication of court on oral argument that it would grant rehearing, was not based on record).
1326-59 32Wyo 1, 228P502.
1326-63 [a] **Mere assertion** by amicus curiæ in prohibition proceedings against election officials that relator had disqualified himself is insufficient to present question. Mo 308SW(2d)609.
1326-69 197Wis284, 223NW123 (briefs will not be received or considered unless leave to serve and file be first granted). [a] **In Pennsylvania.**-286Pa224, 133A 228.
1326-71½-New. One filing a brief by leave of court and as amicus curiæ is not made a party to the suit by such act alone. 58ND478, 226NW608.

AMOJONAMIENTO

1327-10 44Philippine221. [a] (2) Deslinde y amojonamiento still recognized in Philippines. 44Philippine221.

AMONG or AMONGST

1327-13 71CalA409, 235P670. [b] 71 CalA409, 235P670.

AMORTISEMENT or AMORTIZATION

1328-26 [a] **Under United States Revenue Act** it means deduction equal to depreciation in book value resulting from termination of the war. 16F(2d)164.
1328-26½-New. a sum paid toward the extinction of a liability. 16F(2d) 164.

AMORTIZE

1328-28½-New. To destroy, kill, or deaden. 16F(2d)164.

AMOUNT

1329-37 320 Ill 454, 151NE271; 216Ky 766, 288SW690.
1329-39 216Ky766, 288SW690.
1329-40 320 Ill 454, 151NE271; 216Ky 766, 288SW690.
1329-41 216Ky766, 288SW690.
1330-59 BC [1928] 1DomLR746.

AMPUL

1331-72½-New. A small bottle. 14Cust A332.

ANALYSIS

1333-89 [a] **"Synthesis" distinguished.** -10CustA177.

ANCESTOR

1334-12 87 IndA624, 153NE517; BC [1930] 3DomLR438.
1334-13 134 Okl 127, 272P471.

ANCESTRAL

1335-19 [a] (3) Other definitions. 181 Ark933, 28SW(2d)1048.

ANCILLARY

1336-43 242NY148, 151NE159, 45ALR 622.
1336-44 242NY148, 151NE159, 45ALR 622.

AND

1337-54 [b] **In zoning statute,** "and" was held to be used distributively. 255 Mass160, 150NE892.
1338-61 164Ga317, 138SE666, 670 [cit CJ]; 44 Okl 783, 145P1138, LRA1915E 695.
1338-62 11CustA275; 164Ga317, 138 SW666 (dictum); 209Ky634, 273SW 443; 255Mass160, 150NE892; 8PaDist &Co 77.
1338-63 164Ga317, 138SE666, 670 [cit CJ].
1339-64 220Ky424, 295SW419.
1342-79 [a] (1) 164Ga317, 138SE666.
1344-6 159La872, 106S364.

ANGER

1346-64 76CalA648, 245P461.
1346-66 [b] 76CalA648, 245P461.

ANIMALS

3 C. J.—16-15 141Wash654, 252P96 (periullerton,J).
16-20 261Mass138, 158NE536.
16-23 112Me361, 92A295, LRA1915C 359, AnnCas1917A389; 33Mont299, 83 P485.
16-24 160NYS489.
16-28 81Colo 488, 256P15, 17, 52ALR 1056 [citCyc&CJ].
16-29 93Ga111, 19SE734, 24LRA732; 217Ky205, 289SW204; 116 Oh549, 157 NE13; 126 Or341, 269P883; 3Leigh(30 Va)809; 17Gratt(58Va)617; 141Wash 654, 252P96. [a] (3) 93Ga111, 19SE 734, 24LRA732.
17-35 128Ga631, 58SE152, 10LRANS 1136, 119AmSR404; 219Ky238, 292SW 814; 261Mass138, 158NE536; 307Mo 206, 270SW680; 116 Oh549, 157NE13, 14 [citCJ].
17-37 CalA 288P19; 307Mo 206, 270 SW680; 126 Or341, 269P883.
18-39 318 Ill 272, 149NE275; 231Ky 396, 21SW(2d)480. See also 9PaDist& Co 631.
18-43 25Del 186, 78A493.
18-49 172Minn469, 215NW837.
19-53 144Miss304, 109S731.
19-54 22F(2d)977, 978 [citCJ]; 1 GreeneIowa106.
19-60 81Colo 488, 256P15, 52ALR 1056; 144Miss304, 109S731. [a] (1) 3 BinnPa546.
20-61 TexCommnA 286SW1083, 1085 [citCJ].
20-62 TexCommnA 286SW1083, 1085 [citCJ].
20-72 81Colo 488, 256P15, 17, 52ALR 1056 [citCJ]; 144Miss304, 109S731, 732 [citCJ].
21-75 81Colo 488, 256P15, 17, 52ALR 1056 [citCJ]; 144Miss304, 109S731.
22-97 33Ark207; 61Me108, 14AmR550 (brief); 25CanSC434.
22-98 Ariz 292P1020 (execution purchaser).
23-8 [c] **Evidence insufficient** to show that fox had been so tamed that owner did not lose property rights by escape. 144Miss304, 109S731. [d] **Sufficiency of evidence.**-13LaA677, 128S681. [e] **That cattle were cared for and fed by person's employees** is not evidence of ownership. Ida 290P200.
23-18 103 Ill 30; 318 Ill 272, 149NE 275 (statute held unconstitutional); 126 Or341, 269P883 (dogs over age of eight months); 139Tenn341, 200SW973 (female dogs); 156Tenn544, 3SW(2d)661 (statutes held not unconstitutional). See 143Ky169, 136SW232. See also 11 PaDist&Co 66.
23-20 129Ky274, 111SW688, 33KyL 811, 17LRANS855; 112Miss1, 72S782 (constitution held to permit legislature to provide for licensing dogs); 169NC 462, 86SE291; 3TexA489, 30AmR152; [c] **Statutes need not be uniform throughout commonwealth.** 288Pa81, 135A651.

23–21 217Ky205, 289SW204; 288Pa81, 135A651.
24–22 101Ga563, 28SE981, 39LRA709.
24–22½–New. A statute requiring the payment of a license fee for keeping dogs is an exercise of the police power and is not subject to the constitutional requirement that all taxes shall be equal. 88PaSuper284.
24–23 [1909] 2KB497.
24–32½–New. Possession of untied dog will not subject owner to fine and imprisonment. 6PaDist&Co 368.
24–34 Eng IrRSCL404 (penalty is imposed by way of punishment, and not as compensation to any particular individual).
25–49 47Ida24, 271P935.
26–66 Ida 292P613; 37Ill250; 143Mass453, 9NE831; 41NH283; 53SD286, 220NW486 (bailment of stallion for breeding purposes); 28TexCivA540, 67SW337; 23OntL178, 18OntWR725; Sask 63DomLR399, [1922] 2WestWkly524.
26–69 [a] **Assumption of risk by bailor.**–2TexCivA540, 22SW237.
27–73½–New. Failure of bailee to notify bailor that horse was sick does not show negligence. Ida 292P613.
27–77 53SD286, 220NW486, 488 [cit CJ] (regardless of care or diligence).
27–84 53SD286, 220NW486, 488 [cit CJ].
28–5 [c] **Duty of bailee as to care under lease unavailable where lease not pleaded.**–Ida 292P613.
28–7 180Mass245, 62NE1.
29–10 174Minn549, 219NW908 (where horse was delivered and not returned); 53SD286, 220NW486. [c] **Evidence sufficient to sustain burden.**–174Minn549, 219NW908.
29–18½–New. [§ 49a] cc. **Sufficiency of Evidence.** Evidence has been held insufficient to support a verdict for the bailee in an action for the death of a stallion used for heavy work instead of for breeding purposes only. 53SD286, 220NW486.
29–18½–New. A contract between defendants, having no reference to the work out of which injuries to hired mules arose, is not admissible. TexCivA 300SW967.
29–18¼–New. Evidence was held to show that defendant's negligence was the proximate cause of injuries to hired mules. TexCivA 300SW967.
29–19 [c] **For forms of instructions** upon action for injury by bailee to hired horse see 124Ala596, 26S918.
29–20 175Minn617, 221NW240.
29–25 TexCivA 146SW715.
30–30½–New. [§ 52a] 3½, c. **Rights of Third Persons.** Where plaintiff who loaned money to lessee of sheep had notice of lessor's ownership of sheep in lessee's possession, failure of lessor to file a lease could not be taken advantage of by him. 69Utah401, 255P439.
30–31 13NH436.
30–33 TexCommnA 14SW(2d)823 (contract held of pasturage and not lease); 198Wis447, 224NW729.
30–34 4MetcKy267; 80Mont258, 260P116.
30–34½–New. Where an oral contract for feeding cattle is made on the same day as a written contract and shortly thereafter and is referred to in the written contract, the two should be considered and treated as one contract. 43Ida93, 251P167.
30–35 TexCivA 3SW(2d)886 (contract construed as one to lease fifty nine sections for pasturage purposes authorizing set-off for shortage of acreage); 40Vt197.
30–36 68Iowa764, 28NW62.
30–37 40Wyo283, 276P935 (implied agreement).
31–48 [b] **Amount of hay and corn** fed and value is for the jury. 48SD648, 205NW703.
31–48½–New. Shortage in acreage does not constitute defense to notes given for pasturage. TexCommnA 14SW(2d)823.
31–54 43Ida93, 251P167; 17SaskL52, [1923] 2WestWkly600.
32–59 80Mont258, 260P116 (contract is necessary basis of right to lien); 144Wash661, 258P853; 17SaskL52, [1923] 2WestWkly600.
32–61 98CalA257, 276P1071; 144Wash661, 258P853.
32–62 200Cal494, 254P262 (may be maintained till discharged by payment).
32–63 196MoA411, 197SW711.
32–64 43Ida93, 251P167.
32–66 [a] (4) Other instances. 40Wyo283, 276P935.
33–69 [d] **Agister** who takes care of horse under contract with bailee has no lien against bailor. 196MoA411, 197SW711.
33–71 144Wash661, 258P853.
34–78 144Wash661, 258P853; 40Wyo283, 276P935 (where most of animals were released because of food scarcity). [c] **Person feeding cattle at compensation measured by pound is entitled to lien.**–43Ida93, 251P167. [d] **Purchaser of cattle** is entitled to agistor's lien only after rescission and restoration of cattle has been refused. CalA 287P547. [e] **Lessor under lease of ranch lands for grazing,** and not for pasturage or for furnishing necessities, is not entitled to agistor's lien. TexCivA 32SW(2d)252.
34–82 [b] **In North Dakota.**–49ND437, 191NW626.
34–85 [a] **Contract held not to make persons feeding cattle coöwners.**–43Ida93, 251P167.
34–87 Ala 130S893.
34–90 48Ida643, 284P559.
34–95 144Wash661, 258P853.
35–2 43Ida93, 251P167.
35–4 48Ida643, 284P559.
35–5½–New. Surrender to sheriff seizing property does not waive lien. 144Wash661, 258P853.
35–6 98CalA257, 276P1071. [a] 209Ky49, 272SW17.
36–19½–New. The original owner of the animals, a purchaser from him and a holder of a chattel mortgage may be properly joined in an action to foreclose an agistor's lien. 43Ida93, 251P167.
36–19½–New. In the notes will be found cases in which the complaint has been held sufficient to state a cause of action. 43Ida93, 251P167.
36–19¼–New. Evidence showing circumstances surrounding assertion of lien is competent. CalA 287P547.
36–19½–New. When agistor's lien and costs of sale have been satisfied, balance of sale belongs to seller. CalA 287P547.
36–19¼–New. In some jurisdictions action to foreclose lien is timely when brought within six months after animals were taken from agister. 48Ida643, 284P559.
36–24 30Cal247.
37–29 196NC804, 144SE541(1stcase); Alta [1928] 1DomLR208.
37–30 Vt 152A87.
38–55½–New. The failure of parties pasturing cattle to comply with the owner's demand for delivery thereof on a valid tender of the full amount due rendered them liable for all damages accruing therefrom. 98CalA257, 276P1071.
38–59 [j] **Liability for damages established** for failure to pasture cattle according to contract. Kan 292P773.
38–59½–New. Where a live stock association left cattle with defendants under an agreement as to the division of increase, under which the association was to furnish a bull, evidence was held insufficient to support a judgment for the association's failure to furnish a bull as agreed. Wis 224NW279.
38–59¼–New. Association could not maintain replevin to recover such increase until after division. 198Wis447, 224NW729.
39–60½–New. The evidence was insufficient to show that defendants were induced, by false representations, to enter into a contract to show that cattle were tubercular. 198Wis447, 224NW729.
39–65 99CalA641, 278P1058 (plaintiff need only allege and prove delivery with failure to return on demand).
39–68 21BC114, 22DomLR543, 8WestWkly538.
39–72 99CalA641, 278P1058.
40–86½–New. Weight and sufficiency of evidence. Evidence sustained the conclusion that the loss of animals was through the fault of defendant. 99CalA641, 278P1058.
40–87 196NC804, 144SE541(1stcase).
40–90 [a] **Evidence held sufficient for jury** on questions of existence of pasturage contract and agency for defendant in relation thereto. 122Kan453, 251P1093.
40–90½–New. Findings. Allowance of defendant's claim for pasturage is not inconsistent with the conclusion that the loss of animals is through his negligence. 99CalA641, 278P1058.
41–1 31Ariz89, 250P772.
41–2 31Ariz89, 250P772.
41–6½–New. Brand is identified as whole and not by its separate characters. Ariz 292P1020.
41–8 [c] **Necessity of proof of ownership of brand.**–Ida 290P200.
41–8½–New. In Arizona ownership cannot be shown in a civil case by mere fact that an unrecorded brand is claimed by a person and is on the stock in question. 30Ariz45, 243P916.
42–12½–New. Two brands not same in law where owner adopting new brand failed to rerecord old brand. Ariz 292P1020.
42–16 See also Ariz 292P1020.
42–17½–New. Colloquial usage referring to entire herd by name of principal brand does not affect legal identity of cattle branded differently under law. Ariz 292P1020.
42–20 3AltaL477.
42–22 31Ariz89, 250P772.
44–51 [a] **Written bill of sale properly acknowledged and recorded** with the live stock sanitary board is required under statutes in some jurisdictions. 31Ariz89, 250P772.
44–52½–New. By statute in some jurisdictions the right to use an adopted recorded brand is made a property right. 31Ariz89, 250P772.
45–65 139La147, 71S347.
45–71 [b] **Mark need not be conventional one,** so one who slits ears of colt has been held to have "marked" it. 145Cal110, 78P472.
47–95 [a] 31Ariz357, 253P629. [b] 97Fla336, 120S846(1stcase).
47–10½–New. Verdict of guilty of commission of felony, namely, altering a brand "held sufficient as general verdict." 31Ariz357, 253P629.
47–13 [b] **Submission of breeding cattle to tuberculin test.**–Nebr 229NW332.
48–19½–New. Breach of a contract to breed mares to a stallion is not a ground for damages, at least in the absence of evidence upon which such damages may be estimated with reasonable certainty. Alta [1917] 2WestWkly321.
48–24 177Ark97, 5SW(2d)732.
48–28 177Ark97, 5SW(2d)732, 733 [quotCJ].
50–72½–New. In Canada a prosecution under the Live Stock Pedigree Act is not a prosecution for falsifying a pedigree so as to require the consent of the attorney general. Alta [1928] 3DomLR852 (statute is ultra vires).
50–77 [c] **Act of May 29, 1884** held constitutional as authorizing federal employees to suppress disease among cattle within state. 271US414, 46SCt585.
50–80 41F(2d)241; Cal 287P455; 97Fla750, 122S239 (eradication of cattle fever tick); 204Iowa30, 214NW682 (Bovine Tuberculosis Law); Iowa 232NW412 (bovine tuberculosis); 154Miss765, 122S776; Nebr 229NW332 (examination, inspection, and testing of cattle for bovine tuberculosis); 129Misc94, 221NYS20; 130Misc505, 224NYS289. [a] **Enrollment by county under county area plan for eradication of bovine tuberculosis.**–207Iowa639, 223NW386. [b] **Statutes held not arbitrary or unreasonable.**–117Nebr588, 221NW712. [c] **Constitutionality and construction of Bovine Tuberculosis Law.**–Iowa 232NW412.
50–81 Iowa 232NW412.
50–82 [a] **In Georgia.**–162Ga346, 133SE871.
50–83½–New. A statute, intended for the eradication of bovine tuberculosis and providing for the filing with the board of supervisors of a county of a

petition of fifty one per cent of the owners of breeding cattle in the county as the basis for designating the county as a testing unit and for forwarding of such petition to the board of animal health for action, is not unconstitutional for failure to provide for hearing and notice as to the sufficiency of the petition where no one is affected except signers of the petition. 201 **Iowa**1050, 205**NW** 543.

50–83⅓–New. In exercise of police power legislature may require breeding cattle to be tested for tuberculosis. 202 **Iowa**1019, 210**NW**139.

50–83¼–New. A petition for the enrollment of a county under the accredited area plan for the eradiction of bovine tuberculosis and agreements accompanying petition are sufficient if statute is substantially complied with. 202 **Iowa** 1019, 210**NW**139.

50–83⅓–New. A statute providing for the designation of counties as units for testing cattle for tuberculosis and compelling all owners of breeding cattle to submit their cattle to tests, if a sufficient number of petitions are filed, is a valid exercise of the police power of the state, although no provision is made for notice and opportunity to be heard as to the owners of cattle who have not filed agreements with the secretary of agriculture for the testing of cattle as provided by statute. 208 **Iowa**94, 222 **NW**535.

50–83⅙–New. Adoption of a program for eradicating bovine tuberculosis in the county by popular vote and also by action of the county board of supervisors was sufficient, in the absence of specific provisions in the statute. 248 **Mich**272, 226**NW**899.

50–83½–New. That defendant's herd of cattle had been found free from tuberculosis three years before did not relieve him from a second test under statute. 248**Mich**272, 226**NW**899.

50–85 Cal 287**P**455; 204 **Iowa**30, 214 **NW**682. [b] **Meaning of "systematic inspection, examination and testing of cattle"** for tuberculosis under state statutes in coöperation with federal bureau. **Nebr** 227**NW**319 (evidence showing systematic inspection).

51–87 181**Ark**71, 25**SW(2d)**1 (board may mold rules for changing conditions); 130**Misc**505, 224**NYS**289; 119 **Oh**624, 165**NE**502 (county commissioners may appropriate money from general funds in payment of bills to be incurred by officers, agents, and employees in making tuberculin test); 44**Philippine** 138. [b] **In Illinois.**–235 **IllA**552. [c] **Inspectors of department of agriculture** may enter any premises. 5**PaDist&Co** 773. [d] **Secretary of agriculture cannot enroll county** under plan for eradication of tuberculosis where county is not properly enrolled under county area plan. 206 **Iowa**1150, 221**NW**835.

51–90 181**Ark**71, 25**SW(2d)**1.

51–91 44**Philippine**138.

51–92 97**Fla**750, 122**S**239; 129**Misc**94, 221**NYS**20; 44**Philippine**138. See also 5**PaDist&Co** 773. [a] **Officers may take cow to dip it,** after owner's refusal, and keep cow until owner pays fee, in default of which they can sell cow. 181 **Ark**71, 25**SW(2d)**1.

51–94 130**Misc**505, 224**NYS**289 (commissioner may give tubercular test to animals in tested or untested town).

51–94½–New. A commissioner before making an award on the presumption that an animal was a pure bred must have some evidence of the animal's parentage. 128**Misc**784, 220**NYS**209.

51–94⅓–New. A commissioner cannot give probative force to a certificate of corporation not duly organized or recognized. 128**Misc**784, 220**NYS**209.

51–94¼–New. Where the amount of salvage is unknown, the commission has not sufficient data to give an award. 128**Misc**784, 220**NYS**209.

51–94⅕–New. A decision of the commissioner whether registry association is duly organized is not reviewable. 128 **Misc**784, 220**NYS**209.

51–94⅙–New. In authorizing the secretary of agriculture to designate a county as a unit for testing cattle for tuberculosis, the legislature can require such number of petitions therefor to be filed with him as it deems wise. 208 **Iowa**94, 222**NW**535.

51–94⅐–New. Lack of jurisdiction of the secretary of agriculture to designate a county as a unit for testing animals for tuberculosis because of insufficiency of the number of petitions by cattle owners can be remedied by a curative act. 208 **Iowa**94, 222**NW**535 (statute legalizing designation of county as testing unit held valid).

51–94⅛–New. Where more agreements for testing cattle for tuberculosis are filed than are required by a statute authorizing the secretary of agriculture to designate counties, as testing units, he prima facie has jurisdiction to make the designation. 208 **Iowa**94, 222**NW**535.

51–94⅑–New. In such case withdrawal of some of the signatures before final action does not deprive him of jurisdiction. 208 **Iowa**94, 222**NW**535.

51–94 1/10–New. A decision of the secretary of agriculture as to whether there were sufficient petitions to authorize him to create a county as a testing unit is not subject to collateral attack, in an action to restrain enrollment of a county as a testing unit. 208 **Iowa**94, 222**NW** 535.

51–94 1/11–New. Persons signing petitions and agreement for the creation of a county as a testing unit cannot complain of want of notice and opportunity to be heard. 208 **Iowa**94, 222**NW**535.

51–94 1/12–New. Review of discretion of boards or commissions. Court cannot determine whether board of agriculture has abused its discretion in selection of tuberculin test to be applied to cattle. 27 **OhNPNS**569 (in action to enjoin enforcement of statute).

51–94 1/13–New. Under statutes providing for eradication of tuberculosis among cattle, right is given authorities to enter premises and make test without petition or notice. 27 **OhNPNS**569.

51–97 153**Miss**549, 120**S**434(2dcase) (seizing cattle without legal process).

51–98½–New. Evidence that a county was partially "tick infested" casts the burden on respondents to show that the county finances would not permit the expenditure. 218**Ala**512, 119**S**238(2d case).

51–98⅓–New. Dipping vat inspectors going on premises and taking mules in supposed performance of their duties held not guilty of criminal trespass. **Miss** 130**S**282.

51–99 Iowa 232**NW**412; 243**NY**454, 162**NE**484 (not invalid as denial of equal protection of laws); 129**Misc**94, 221**NYS** 20.

51–1 44**Philippine**138.

51–2 44**Philippine**138.

52–10 154**Miss**765, 122**S**776.

52–13½–New. That creameries within an accredited tuberculosis free area mix cream from untested cows outside of such area with cream from cows within it does not affect the validity of a statute providing for eradication of tuberculosis in cattle by the establishment of quarantine regulations. 166**Minn**498, 207**NW**639.

52–13⅓–New. Search warrant not needed to establish quarantine. 5**PaDist&Co** 773.

52–13¼–New. Where resistance is met, no examination is needed to establish quarantine. 5**PaDist&Co** 773.

53–28½–New. Live stock sanitary board is held not authorized to forbid shipment of salt-cured hides from a tick infested area. 91**Fla**954, 108**S**888.

54–31 Iowa 232**NW**412; 115**Nebr**435, 213**NW**578; 117**Nebr**588, 221**NW**712; 119 **Oh**610, 165**NE**498. See also 130 **Misc**505, 224**NYS**289.

54–32 Iowa 232**NW**412; 115**Nebr**435, 213**NW**578, 580 [citCJ]; 117**Nebr**588, 221**NW**712. [a] **Proclamation declaring statute in operation based on unconstitutional section thereof** held a nullity. 115**Nebr**435, 213**NW**578.

54–33 [a] But see 40**ND**340, 168**NW**601. [b] **In New York.**–218**AppDiv**352, 218 **NYS**329.

54–34 Iowa 232**NW**412.

54–37 [a] **Under statute making county liable** for cattle killed "in process of dipping—for the eradication of cattle tick," county is not liable for ox killed **by becoming tangled in lassoes while being driven to dipping vat.** 140**Miss** 423, 105**S**856.

54–39 16**PortoRico** 358. See also **Iowa** 232**NW**412.

55–42½–New. [§ 154a] 5. **Eradication of Cattle Ticks.** A statute creating a live stock sanitary board for the purpose of quarantining and treating animals within an infested area with the purpose of eradicating the Texas cattle fever tick is constitutional. 154**Miss**765, 122**S**776.

55–42¼–New. Regulations of a live stock sanitary board requiring owners of live stock to carry live stock from there to six miles for the purpose of having them inspected and dipped are not unreasonable. 154**Miss**765, 122**S** 776.

55–42¼–New. The possibility that cattle may die by reason of being dipped does not prevent the enforcement of regulations of the live stock sanitary board. 154**Miss**765, 122**S**776.

55–42⅕–New. Wrongful seizure of stock for purpose of dipping for eradication of cattle tick entitles owner to damages. 157**Miss**202, 127**S**771 (seizure without proper writ).

55–42¼–New. Evidence has been held insufficient to show county finances would not permit expenditure to execute a law for tick eradication. 218**Ala**512, 119**S**238(2dcase).

55–42⅙–New. Statutes do not authorize officers engaged in tick eradication work to fix the fees chargeable against owner of cattle for dipping, but they must be fixed by judicial proceedings in case of the failure of the parties to agree on the amount, and must be based upon a reasonable cost and expense, and not upon an arbitrary valuation. 153**Miss**549, 120**S**434(2dcase).

55–42¼–New. To obtain possession of cattle for the purpose of dipping them, appropriate legal proceedings must be taken wherein the owner may be heard. 153**Miss**549, 120**S**434(2dcase).

55–42⅛–New. Under statutes in some jurisdictions it is the mandatory duty of state veterinarian to eradicate ticks in counties which have become reinfested after completion of eradication therein as evidenced by removal of quarantine restrictions. 163**Ga**618, 137**SE**40.

55–42 1/10–New. Where an owner of animals infected fails or refuses to dip them after notice as provided by statute, such animals are required to be placed in quarantine and dipped and cared for by local inspector at the expense of the owner. 163**Ga**618, 137**SE**40.

55–42 1/11–New. The remedy provided by statute for recovery of such expenses by the local inspector is exclusive. 163 **Ga**618, 137**SE**40.

55–42 1/12–New. In a defense in such proceeding the owner of the animals has ample remedy for contesting the amount claimed by the local inspector. 163**Ga** 618, 137**SE**40.

55–42 1/13–New. Evidence held sufficient to show that cattle dipped were injured by insufficiently diluted solution authorizing recovery against parish. **LaA** 129**S**181.

55–42 1/14–New. Indemnity is payable to owner, and not to mortgagee of stock. 255 **IllA**558.

56–56 116 **Or**554, 240**P**1113, 1114 [cit CJ].

56–60 116 **Or**554, 240**P**1113, 1114 [cit CJ].

57–70½–New. A property owner over whose land infected cattle were driven could sue the carrier for negligent diversion thereof into a district free from infection. **TexCivA** 18**SW(2d)**237 (negligence of station agent).

58–5 [b] **Complaint alleging railroad's duty to transport infected cattle without diverting them** to uninfected areas has been held not limited to breach of shipping contract but also to include railroad's negligence in permitting infected cattle to be diverted into territory free from quarantine. **TexCivA** 18**SW** **(2d)**237.

59–26½–New. In an action against a carrier for diverting infected cattle, causing quarantine of plaintiff's land, the admission in evidence of quarantine notices containing only rubber stamp signatures has been held not error where the inspector of the live stock sanitary

commission testified that he made an inspection and report and that the notice was the customary notice sent out by the commission. TexCivA 18SW(2d) 237.

59-26½-New. Evidence in an action against a railroad company for diverting tick infested cattle to plaintiff causing quarantine of his land has been held sufficient to show defendant's negligence, TexCivA 18SW(2d)350.

59-26¼-New. and plaintiff's freedom from negligence. TexCivA 18SW(2d) 350.

59-26½-New. Sufficiency. Evidence has been held to require conclusion that serum used in tuberculin test had no injurious effect. Iowa 232NW412.

60-33 TexCivA 18SW(2d)237.

60-34 TexCivA 18SW(2d)350 (contributory negligence); TexCivA 18SW(2d) 237.

60-36 [d] Loss of use of land.-TexCivA 18SW(2d)350.

60-36½-New. Plaintiff's damages for the enforced quarantine of his herd, due to the carrier's diversion of infected cattle has been held the difference in the market value of plaintiff's cattle at the end of the quarantine period and the value cattle would otherwise have had. TexCivA 18SW(2d)237.

60-41½-New. Failure to dip cattle in compliance with inspector's notice is not violative of statute. 105TexCr125, 286SW1098.

60-41¼-New. Interference with inspector is ground for arrest. 5PaDist&Co 773.

61-50½-New. It is no defense to prosecution for failure to dip mules exposed to cattle ticks, that defendant could have been liable to indictment for cruelty. 191NC482, 132SE156.

61-50½-New. Failure to dip horses in quarantined pasture after notice constitutes misdemeanor under some statutes. TexCr 31SW(2d)645.

62-61 [b] Evidence held insufficient to support misdemeanor conviction.-TexCr 32SW(2d)200.

62-71½-New. Information held demurrable. 35F(2d)256.

62-79 [c] In Kentucky.-210Ky439, 276 SW126.

63-83½-New. Guilty knowledge must be positively alleged where it constitutes an element of the offense. 210Ky439, 276SW126.

63-94 105Ark698, 151SW990; 27NJL 124, 72AmD352.

64-97 1AikVt226.

65-5 156NC628, 72SE321, 36LRANS 910.

65-8 23Colo 33, 46P112, 58AmSR215, 33LRA836; 81Ga164, 9SE1091; 116Ga 835, 43SE251; 7AllenMass579; 101 Mass34; 32NYS106; 48HowPrNY435; 156NC628, 72SE321, 36LRANS910; 1 AikVt226; Ont 22CanLJ304.

65-11 101Mass34.

66-17 124Ala80, 27S468.

66-20 But see 1GaA292, 57SE992.

67-32 1NYCityCt160.

67-39 But see 18PortoRico 266.

68-55 See 51TexCr397, 102SW114. [a] (1) 12TexA11. (2) 34Tex565; 10TexA 110.

71-32 [1909] 2KB748.

72-1 28TexA530, 13SW992.

73-28 36GaA279, 136SE468.

73-30 [c] 36GaA279, 136SE468; TexCr 22SW39. [d] 35GaA197, 132SE409; 37 MoA480.

74-41 36GaA279, 136SE468.

77-84 9TexA43.

77-86 See also 15TexA249.

78-7 11 Or357, 3P574.

78-19 38 Ill 190; 20 Iowa303.

78-24 11 Or357, 3P574.

79-39 35Mont547, 90P755; 38Tex555.

80-44 [b] Statutes strictly construed.-261Mass138, 158NE536.

80-46 261Mass138, 158NE536.

81-60 56ND276, 217NW173 (statute is satisfied where owner has notice and appears and demands animal).

81-75 56ND276, 217NW173 (statute extends lien to no property other than estrays taken up, and permits no deficiency judgment).

81-76 56ND276, 217NW173.

82-96½-New. Person who takes possession of ordinary bovine running at large and places it with his own stock, one of which is thereafter killed in struggle with the strange animal, cannot recover from the owner of the latter animal. 199 Iowa754, 202NW587.

83-14 Sask [1928] 4DomLR251.

83-18 [b] whether animal which came out of pasture and walked off defective bridge on highway was "traveler" on bridge, within meaning of statute, or "estray" depends on whether owner was guilty of contributory negligence. 79Vt 249, 64A1130, 9AnnCas282.

84-55 176Ark26, 2SW(2d)53.

87-15 265Mass4, 163NE182.

88-23 265Mass4, 163NE182.

89-32 207 Iowa495, 223NW178 (owner of bull is bound to restrain it).

89-33 112 OhSt485, 147NE757; 144 Wash317, 257P838.

89-34 [1925] 2Ir110.

89-36 1LaA336; 3LaA59, 60 [quotCJ]; 13LaA343, 127S413; 254Mass387, 150 NE189; 265Mass465, 164NE385; 129 Misc417, 220NYS768; 192NC804, 136 SE113; [1912] 3KB198 (cat rearing kittens); [1914] 1KB629.

89-37 144Wash317, 257P838, 839 [quot Cyc].

89-38 144Wash317, 257P838, 839 [quot Cyc].

89-40 256Mass157, 152NE245.

90-42½-New. Ownership of vicious animals is not one of the natural inherent rights of property. 217Ala278, 116S137.

90-42½-New. Slightest fault or negligence of owner is sufficient to impose liability for its misconduct. 13LaA343, 127S413.

90-45 29Ariz334, 241P518.

90-46 256Mass157, 152NE245.

91-47 256Mass157, 152NE245; 144 Wash317, 257P838, 839 [quotCyc]. [a] General knowledge is sufficient and it is not necessary that defendant had knowledge of vicious character of dog in attacking one on public highway as distinguished from his premises. 217 Ala278, 116S137.

91-49 36QueSuper481.

92-52 256Mass157, 152NE245.

92-58 70Utah398, 260P855, 857 [cit CJ].

92-59 70Utah398, 260P855.

92-61 35GaA241, 132SE650; 254Mass 387, 150NE189; 82NH500, 136A134; 126Misc838, 214NYS787; Can [1926] 3 DomLR701; 21SaskL265 [1927] 1DomLR493, [1927] 1WestWkly15.

93-72 126Misc838, 214NYS787.

94-74 13LaA410, 128S320.

94-74½-New. In Prince Edwards Island, person leaving team unattended and untied in railway yard is liable for injury caused to property in street when horses ran away. PrEdwIsl [1929] 4 DomLR949.

94-75 35GaA241, 132SE650; 256Mass 1, 152NE44; 157Miss636, 128S771; 144 Wash317, 257P838, 839 [quotCJ].

94-76 100CalA456, 280P199.

94-77 Ont [1929] 3DomLR367.

94-82 157Miss636, 128S771.

96-91 [1923] 2KB212; [1925] 2 Ir110.

96-92 29Ariz334, 241P518; 32Ariz154, 256P503.

96-93 29Ariz334, 241P518 (knowledge may be imputed); 32Ariz154, 256 P 503; 87Colo 374, 287P863; 129Misc417, 220NYS768.

97-99 29Ariz334, 241P518; 32Ariz 154, 256P503; TexCivA 225SW191; 62 OntL314, [1928] 3 DomLR474.

97-5 39TLR112; Man 6WestLR199; 56NS487, [1924] 1DomLR650; 14 Ont WR482, 20 OntL31, 1 OntWN229, 14 Ont WR1125; 51 OntL549, 69DomLR588; 25 OntWN195 [allowing app 24 OntWN 464]. [a] Failure to muzzle dog is not negligence per se. 252NY325, 169NE 401.

97-5½-New. Actions of persons in further frightening an escaping calf in order to constitute the sole proximate cause of injuries to one knocked down by it must have entirely superseded original acts of others in order to prevent its escape. TexCivA 284SW617.

97-8 2OntL462; 18QueSuper105.

97-9 201 Iowa1008, 45ALR498, 208NW 277; Alta [1930] 3DomLR1005.

97-10 TexCommnA 294SW539.

97-11 3 IndA250, 29NE790; 201 Iowa 1008, 45ALR498, 208NW277; Tex CommnA 294SW539; [1916] 1KB206; 106LTRepNS123.

97-12½-New. It is the owner's duty in trying to prevent the escape of a calf which has become frightened not to employ means calculated further to alarm or infuriate it. TexCivA 284SW617.

97-13 3LaA59, 60 [quotCJ]; 165Minn 156, 205NW894; 55ND745, 214NW906, 907 [citCJ]; 116 Okl 46, 243P215, 216 [citCJ]. [b] In Michigan.-246Mich641, 225NW555.

98-14 333 Ill 90, 164NE224; 2LaA113; 229AppDiv430, 242NYS687. [g] In Louisiana.-12LaA191, 125S185.

99-15 3LaA97, 101 [quotCJ].

99-15½-New. A statute making an owner or keeper of a dog liable for any damage done by it is constitutional. 105Conn88, 134A154.

99-15½-New. Under some statutes the owner of a dog is liable for injuries caused by it while not kept within inclosure irrespective of knowledge of viciousness. 47RI 384, 133A656.

99-15¼-New. A place of injury is immaterial to the existence of liability generally. 106Conn200, 137A749.

99-15½-New. Under statute, whoever owns or harbors a dog is liable for injuries sustained as the result of a bite or an attack by the dog. 31 OhA14, 165 NE97.

99-15½-New. Land conveyed to trustees for exclusive use as park by a certain limited class is not a "public park" nor a "public place" within an ordinance barring unmuzzled dogs therefrom, and the owner is not negligent in leading an unmuzzled dog on a leash in such place. 252NY325, 169NE401.

99-16 3LaA97, 101 [quotCJ].

99-18 106Conn200, 137A749.

100-29 34 OhA226, 170NE180.

101-39 116 Okl 46, 243P215.

101-40 55ND745, 214NW906; BC [1930] 2DomLR493 (injury to goat). [a] 55ND745, 214NW906.

101-49 55ND745, 214NW906, 907 [Cit CJ].

101-50 55ND745, 214NW906, 907 [cit CJ].

101-51 [b] (3) No joint action unless it is shown that defendants were acting in concert with common intent to do injury. 12PaDist&Co 495. [c] Separate actions required.-12PaDist&Co 495.

102-53 [b] 2AllenMass207. [c] Horses are domestic animals within meaning of act which provides that "whoever suffers loss by reason of the worrying, maiming or killing of his sheep, lambs, or other domestic animals, by dogs," may have his damages paid from fund arising from dog tax. 2AllenMass207, 209.

102-55 125Me67, 130A859.

103-66 227Ky493, 13SW(2d)516; 48 OntL306, 19 OntWN120, 56DomLR83.

103-67 178Ark689, 11SW(2d)480 (no recovery where affidavit not made within statutory period). [b] Statement of number killed or injured is not necessary under some statutes. 125Me67, 130 A859. [c] Where full results of depredations by dogs were not discoverable till after giving of notice, action may be maintained on award by referee, though number of sheep killed as stated in notice was less than that on which award was based. 125Me67, 130A859.

103-70 227Ky493, 13SW(2d)516. [a] Facts necessary to be found to require appointment of referee stated see 125 Me67, 130A859. [b] Selection of referee is not excused because plaintiff concludes it would avail him nothing to meet and discuss question of damages where officers are satisfied injury was caused by dogs, and they cannot agree as to damages. 125Me67, 130A859.

103-74 [a] Judicial inquiry and finding as to whether damage was caused by dogs is not required, but only investigation by municipal officers. 125Me67, 130A859.

103-75 125Me67, 130A859.

103-79 125Me67, 130A859 (where court cannot say, as matter of law, that award could not have been founded on number of sheep killed as stated in notice); 13 OntWR686.

103-79½-New. Nonprejudicial findings of court in an action on award are not cause for reversal. 125Me67, 130A859.
103-80 12PaDist&Co 495.
104-89 200 Iowa728, 205NW331; 165 Minn156, 205NW894; 116 Okl 46, 243 P215; 6PaDist&Co 367.
104-90 29Ariz334, 241P518; 243 IllA 438; 165Minn156, 205NW894; 116 Okl 46, 243P215; 6PaDist&Co 367; Tex CivA 13SW(2d)712; TexCivA 27SW(2d) 294; 144Wash317, 257P838. But see Wis 230NW53.
104-93 200 Iowa728, 205NW331 (where action is under statute); 47RI 384, 133 A656. [b] Mich 232NW746.
105-98½-New. The statute providing for double damages to persons injured by a dog is to be reasonably interpreted. 83NH122, 139A373.
105-2½-New. Proceeding before a justice for an order directing confinement or destruction of a dog attacking sheep is a special proceeding and is a nonappealable order. 129Misc2, 221NYS302.
105-3 2 OntL593. [b] **Keeping vicious, ferocious, and dangerous dog.**-87 PaSuper110 (where defendant admits he kept dog, only fact in dispute is whether dog was nuisance).
105-8 [c] 222MoA973, 6SW(2d)664 (mother held not liable for daughter's dog in absence of evidence of ownership of premises where dog was kept).
105-10 333 Ill 90, 164NE224; 9LaA375, 119S445(2dcase); 12LaA191, 125S185; 13LaA343, 127S413; [1914] 1KB629.
106-13½-New. Statutory as distinguished from common-law liability rests only on the owner in some jurisdictions. 200 Iowa728, 205NW331.
106-13¼-New. Owner of animal driven in highway is not relieved from liability for injury by it to property of persons near the highway by statutes requiring fencing. 129Kan31, 281P892.
106-13¼-New. Liability of the owner of live stock driven along a highway for injury to property of others nearby other than crops depends on the negligence of those in charge of the live stock. 129Kan31, 281P892.
106-17 [a] (1) Iowa 228NW279.
106-18 [c] **Agricultural society exhibiting dog** in possession and control of owner is not "keeper." 260Mass283, 157NE357.
106-21 29Ariz334, 241P518, 521 [cit CJ].
106-22½-New. or grandson, 29Ariz334, 241P518.
106-23 222MoA973, 6SW(2d)664, 666 [quotCJ].
107-28½-New. The owner of a store has been held not liable to a customer who was bitten by a dog owned and permitted to come into the store by another customer. MoA 272SW1005.
107-30½-New. A dog in the possession of a caretaker was "kept" by her within the statute. 83NH122, 139A373.
107-30½-New. The mere presence of a dog on defendants' premises or acquiescence in its presence was not enough to show ownership or keeping. Mass 165NE15.
107-32 See also 31 OhA14, 165NE97.
107-34 43QueSuper401.
105-41 47RI384, 133A656. [b] **Action for damages** for production by plaintiff's bull of calves from plaintiff's shorthorn cows, not entitled to registration, held to be action for trespass of animals and, as such, barred by six months' limitation. 48SD595, 205NW 669.
108-44 47RI 384, 133A656.
108-46½-New. An action for personal injuries caused by an animal partakes of the characteristics of an action for negligence. 129Misc417, 220NYS768.
108-48½-New. Under some statutes remedy is trespass or trespass on the case. 47RI 384, 133A656.
108-51 333 Ill 90, 164NE224 (it is not necessary for plaintiff to prove exercise of care and caution for her own protection, but that is matter of defense); 129 Misc417, 220NYS768; 32QueSuper193.
108-52 222MoA973, 6SW(2d)664, 666 [quotCJ]. [c] **Contributory negligence is no defense** where animal causing injury is running at large in violation of statute. 157Miss636, 128S771.
109-53 222MoA973, 6SW(2d)664, 666 [quotCJ].
109-55½-New. The statute providing double damages confers no right on a person injured by a dog because of his own fault. 83NH122, 139A373.
109-57 5 OntL375, 2 OntWR142 [dism app 1 OntWR775].
110-60 106Conn200, 137A749. [b] **Willful and intentional provocation of dog** by kicking and annoying held defense. 106Conn200, 137A749.
110-67 47RI 384, 133A656.
110-75 35GaA241, 132SE650; Eng [1923]SC748.
110-76 Mass 165NE15 (if owner and keeper of dog are one, it is immaterial whether declaration charges ownership or keeping or both). [e] **Complaint held to state cause of action.**-100CalA 456, 280P199.
111-80½-New. A declaration alleging in one count that defendants were the owners or keepers of the dog has been held bad. Mass 165NE15.
111-85 70Utah398, 260P855.
111-86 70Utah398, 260P855.
112-95 217Ala278, 116S137.
112-3 [b] **Petition held sufficient.**-TexCivA 21SW(2d)1076.
113-26 But see 29Ariz334, 241P518.
113-27 29Ariz334, 241P518 (sufficient under pleadings to show propensity).
113-29 But see 29Ariz334, 241P518.
114-32 32Ariz154, 256P503.
114-33 40QueSuper441.
114-34 32Ariz154, 256P503; 144Wash 317, 257P838.
114-35 11PaDist&Co 501; Eng 106LT RepNS51.
114-37 10LaA112, 119S555.
115-45 333 Ill 90, 164NE224.
115-55½-New. Evidence of a conversation plaintiff's father had with defendants, wherein the father complained of the dog and defendants informed him that they would take care of their dog, has been held admissible. Mass 165 NE15.
116-68 265Mass465, 164NE385 (account book, showing horse had been rented almost every day for several months before accident, was relevant.
116-69 [b] **Evidence held inadmissible.**-243 IllA438.
116-71 217Ala278, 116S137.
117-86 256Mass1, 152NE44.
117-87½-New. The statute making it a crime to suffer a ram to run at large is competent proof in an action for injuries. 256Mass1, 152NE44.
117-91 [a] (1) 105Conn88, 134A154; 10 LaA112, 119S555; 13LaA343, 127S413. (2) To sustain finding that dogs which killed seven sheep had also killed eleven sheep two days previously. 108Conn152, 142A805. [b] CalA 293P111.
117-91½-New. Evidence held sufficient to justify verdict for defendant on counterclaim for damage done to crops by plaintiff's sheep. NJSup 134A884.
117-93½-New. Evidence justifies finding that a defective latch on a stock yards gate was the proximate cause of the injury by cattle breaking the latch. TexCivA 21SW(2d)1076.
117-95 [a] 12LaA191, 125S185. [b] 254Mass387, 150NE189; 165Minn156, 205NW894.
118-98½-New. Evidence held to sustain the finding that a horse had the propensity to kick. 70Utah398, 260P855.
118-1½-New. [§ 377a] (b½) **Harboring and keeping.** The evidence may be sufficient to show that defendant was harboring and keeping a dog, although the ownership was actually in another. 29 Ariz334, 241P518 (grandson).
118-2 70Utah398, 260P855. [a] 29 Ariz334, 241P518; 32Ariz154, 256P503; 13LaA343, 127S413; 229AppDiv430, 242 NYS687. [b] 100CalA598, 280P699; 165Minn156, 205NW894; TexCivA 27 SW(2d)294.
118-4 9LaA375, 119S445(2dcase).
118-6 70Utah398, 260P855, 858 [cit CJ].
119-11 256Mass157, 152NE245.
119-13 29Ariz334, 241P518.
119-14 29Ariz334, 241P518; 256Mass 157, 152NE245 (single prior act).
119-15 29Ariz334, 241P518; 256Mass 157, 152NE245. [b] **Theory that every dog is entitled to one bite** does not hold in New York. 129Misc417, 220NYS768.
121-29½-New. Evidence held not to show that leaving a horse untied was the proximate cause of the injury. 70 Utah398, 260P855.
121-33 29Ariz334, 241P518.
121-34 29Ariz334, 241P518; 265Mass 4, 163NE182; Mass 165NE15.
121-35 29Ariz334, 241P518 (evidence sufficient to go to jury); 256Mass1, 152 NE44; 256Mass157, 152NE245; 70Utah 398, 260P855.
121-36 29Ariz334, 241P518 (wife's imputed knowledge); 256Mass157, 152NE 245; 95PaSuper127; 70Utah398, 260P 855.
121-37 CalA 277P901; 129Kan31, 281 P892 (evidence sufficient to go to jury); 260Mass283, 157NE357; 265Mass4, 163 NE182; TexCivA 284SW617.
121-38½-New. whether worrying of a horse by a dog was the proximate cause of the rider's injury, 200 Iowa728, 205 NW331.
121-39 256Mass1, 152NE44; 222MoA 973, 6SW(2d)664.
121-42½-New. Evidence that a dog barked at and ran after a horse, although only for a short time and that the reaction of the horse indicated that it was frightened, may present a question for the jury on the issue whether the dog was worrying the horse. 200 Iowa728, 205NW331.
121-43 265Mass465, 164NE385; 224 AppDiv283, 230NYS36 (liability of landlord). [f] 200 Iowa728, 205NW331; 70 Utah398, 260P855. [g] **Instruction on proximate cause held erroneous.**-200 Iowa728, 205NW331.
122-44 256Mass1, 152NE44; 246Mich 641, 225NW555. [c] **Instruction held not objectionable as assuming facts.**-333 Ill 90, 164NE224 (vicious character of dog in view of contradicted evidence).
122-45 29Ariz334, 241P518 (sufficient); Mass 165NE15 (instruction held not misleading). [c] **In action against husband and wife** for injuries for being bitten by dog, plaintiff's instruction permitting recovery against both defendants, though only one of them may have harbored dog or known of its vicious propensities was held error. 222MoA973, 6SW(2d)664.
122-47 265Mass465, 164NE385. [a] **Instructions held proper.**-32Ariz154, 256 P503. [b] **Instruction held insufficient.**-70Utah398, 260P855.
122-51 See also 333 Ill 90, 164NE224.
122-58 32Ariz154, 256P503.
123-69 260Mass283, 157NE357. [e] **Persons liable.**-Agricultural society exhibiting dog in possession and control of owner is not "keeper" within statute assessing double damages. 260Mass283, 157NE357.
125-89 24Mo 199, 69AmD427.
125-90 4 IndT717, 76SW289; 18Wend NY213; Or 289P503; 9PaSuper295; 101Tenn473, 48SW227; 10BC299. [a] **Necessity of permission** of owner of land. Or 289P503. [b] **In Louisiana.**-LaA 130S661.
125-91 6Mass90; Eng LR8Ch756; Eng LR8QB274; Eng LR10CP10; Eng LR1Exch265; Eng 6BC329, 13ECL156, 108Reprint473; Eng 3B&S244, 113ECL 244, 122Reprint92; Eng 12CB160, 74 ECL160, 138Reprint863; Eng 2HBL 527, 126Reprint684; Eng 11JurNS822; Eng 27LTRepNS519; Eng 6Mod311, 87 Reprint1051; Eng 1Salk335, 91Reprint 295; Eng 1Saund322cnote, 85Reprint 456; Eng 1Taunt529, 127Reprint939.
126-92 Eng LR8QB274; Eng 6B&C329, 13ECL156, 108Reprint473; Eng Cro Eliz709, 78Reprint943; Eng 1Salk335, 91Reprint293.
126-94 1Del 142, 25AmD65; 4Del 243; 7Del 287; 97 Ill 424; 56 IllA368; 39 Ind A66, 79NE223; 5Kan167; 5Kan191; 9Kan303; 9Kan597; 41Kan187, 21P 163; 2Me408; 5Me356; 29Me282, 1AmR 586; 33Me62; 6Mass90; 98Mass560, 96 AmD676; 108Mass175, 11AmR335; 115 Mass458, 15AmR119; 132Mass28, 42Am R421; 4MetcMass589; 18PickMass266; 4NH36; 4NH512, 17AmD444; 7NH518; 13NH399, 28NH161; 30NH143; 31NH 147; 37NH331, 72AmD332; 45NH472; 9NJL384; 54NJL498, 24A484; 13NM

131, 79P714; 13NY42; 187NY28, 79NE858, 12LRANS912; 44HunNY320; 46HunNY411; 79Hun210, 29NYS613; 6LansNY299; 22BarbNY574; 37BarbNY516; 47BarbNY562; 60Hun579, 13NYS446; 64Hun633, 18NYS824; 9HowPrNY453; 5DenNY255, 49AmD239 [aff 4NY349, 53AmD384]; 3HillNY38; 4HillNY140, 40AmD274; 3WendNY142, 20AmD678; 17WendNY320; 18WendNY213; 1CowNY78, 13AmD513; 12JohnsNY433; 19JohnsNY385; 13 Or418, 11P62; 18 Or47, 21P934, 4LRA840; 31 Or373, 49P982; 9PaSuper295; 16Vt677; 25Vt116; 31Vt540; 38Vt678; 40Vt40; 44Vt268; 67Vt102, 30A998; 5Wis27; 13Wis637; 43Wis665. See 18 Or385, 23P498, 8LRA135. [b] But see 5 Or311. [c] (3) 7 Watts&SPa367, 42AmD246. (4) 49Pa101, 88AmD491. (5) Where intrusion of animals causes substantial damages, owner is liable. 19Pa298, 57AmD654.

126-95 1Del142, 25AmD65; 4Del423; 7Del287; 43 Ill450; 5 Ind111; 6 Ind141; 7 Ind317; 8 Ind402; 9 Ind290, 68AmDec624; 14 Ind317; 26 Ind370, 89AmD467; 42 Ind173; 75 Ind114; 112 Ind504, 14NE381, 2AmSR213; 11 IndA472, 39NE428, 54AmSR511; 5Kan433; 12Kan315; 28Kan283; 29Kan134; 30Kan336, 2P146; 41Kan187, 21P163; 72Kan110, 83P25; 3Mich163; 9Mich158; 21Mich259, 55AmD59; 4NH36; 4NH512, 17AmD444; 7NH518; 13NH399; 28NH161; 30NH143; 31NH147; 37NH331, 72AmD332; 45NH472; 13NM131, 79P714; 4BarbNY56; 5DenNY255, 49AmD239; 1CowNY78, 13AmD513; 12JohnsNY433; 19JohnsNY385; 24 OhSt48; 9PaSuper295. [c] (3) 68Pa235. [e] **In New York.**–5DenNY255, 49AmD239.

127-96 7 Ind317; 9 Ind290, 68AmDec624; 14 Ind317; 32 Ind437; 33 Ind497; 13Me371; 14Me419; 35Me26; 4NH36; 4NH512, 17AmD444; 7NH518; 13NH399; 28NH161; 30NH143; 31NH147; 37NH331, 72AmD332; 45NH472; 13NM131, 79P714; 4BarbNY56; 5DenNY255, 49AmD239; 1CowNY78, 13AmD513; 12JohnsNY56; 19JohnsNY385; 5 Or311; 18 Or47, 21P934, 4LRA840. [a] **In Utah.**–27SP816.

127-5 [a] **Stock Law not invalid** because city which had theretofore adopted stock law included. **TexCivA** 285SW679.

127-8 123MoA647, 100SW1109.

127-10 82CalA269, 255P877 (sheep being herded and not running at large upon range); 78Ga50, 28SE546; 84Ga804, 11SE1018; 84Ga812, 11SE1021; 84NC158; 86NC8; 86NC391; 97NC143, 1SE613; 97NC388, 1SE641. [d] (2) There is no longer any difference between duty to restrain male and female animals. 205 **Iowa**1240, 219NW407. [e] **In Louisiana.**–1LaA453.

128-11 68Ala129; 71Ala487; 85Ala590, 5S341; 129Ala275, 30S94; 30Ark433; 46Ark207, 55AmR575; 7Colo76, 1P690; 35Colo138, 83P637, 117AmSR179, 9AnnCas1094; 16Conn200; 37Conn123; 90Fla525, 107S269; 39GaA504, 147SE428 (recovery held error where stock law is not in effect); 61 Iowa155, 16NW56; 43Miss233; 50Miss572; 71Miss153, 15S28; 42Mo193; 45Mo22; 66Mo325; 98MoA622, 73SW361; 126MoA446, 80SW910; 32SCL176; 70Tex670, 8SW486; 1TexCivA388, 20SW855; TexCivA69SW177; TexCivA 300SW190. [e] **Where animals are not prohibited from running at large,** owner owes no duty to keep them confined. **TexCivA** 300SW190. [f] **One having right to permit animals to run at large** is not negligent in permitting animals to escape from inclosure. **TexCivA** 300SW190. [g] **Landowner is not required to fence** against sheep or hogs. 10 **Ida**542, 79P459. [h] **In Georgia.**–80Ga781, 6SE589; 81Ga624, 8SE535; 88Ga716; 16SE28; 91Ga141, 16SE966.

129-12 Or 289P503.

129-18 10 Ill130; 43 Ill450; 64 Ill102; 69 Ill469; 70Tex670, 8SW486; 98Va143, 34SE971, 47LRA588. [f] **In British Columbia.**–[1929] 1DomLR998.

130-26½-New. Fruit farmer is not required to fence his property against deer. 5PaDist&Co443.

130-28 12 Ill74; 20 Ill334; 39 Ill186.

131-35 5Wis27; 13Wis637; 43Wis665; 1PinnWis393.

131-37 205 **Iowa**1240, 219NW407.

132-39 205 **Iowa**1240, 219NW407.

133-55 5Wis27.

135-83 35NY302; 54Vt685; **Eng** [1894] 1QB608; **Eng** 12Mod658, 88Reprint1585.

135-85 105Conn342, 135A397.

136-91 105Conn374, 135A396 (Gen. St. § 364); 205 **Iowa**1240, 219NW407.

137-2 [f] **Lessee of timber rights** on wooded lands may impound cattle in proper case. 40GaA183, 149SE97.

141-92 [a] **Lien is not limited to damages for trespasses committed at time cattle were distrained.**–117 **Okl** 203, 245P997.

142-4 129 **Or**620, 278P572 (lien of lessee taking up cattle found on leased premises is not divested by failure to give statutory notice under particular circumstances).

142-7 33Mich103; 1Saund343e, note 2, 85Reprint497.

142-11 18SC168; **Eng** 1Bing341, 8ECL539, 130Reprint138; **Eng** 1Campb285, 170Reprint959; **Eng** 1CB788, 50ECL788, 135Reprint753; **Eng** 5Coke76, 77Reprint169; **Eng** 7H&N747, 158Reprint670. [a] **In case of beasts damage feasant,** tender must be made to the person upon whose lands beasts were taken; tender to his bailiff will not suffice. **Eng** 5Coke76, 77Reprint169.

142-17 10JohnsNY253; **Eng** 15East309, 104Reprint861; **Eng** 6TR298, 101Reprint563.

142-18 **Eng** 1Cowp414, 98Reprint1160; **Eng** 15East309, 104Reprint861; **Eng** 6TR298, 101Reprint563.

142-20 SD 226NW765.

143-41½-New. The owner has the burden of showing that cattle escaped through an opening in a fence negligently caused by distrainer. 40GaA183, 149SE97.

143-44½-New. Weight and sufficiency of evidence. Evidence held insufficient to authorize recovery of cattle by the owner in the absence of showing that the cattle escaped through an opening caused by the negligence of defendants. 40GaA183, 149SE97.

144-50 129 **Okl**235, 264P604.

144-59½-New. Absence of lawful fence does not justify willful trespass by pasturing cattle without consent. 82Colo80, 256P1092.

146-89 [a] 213Ky262, 280SW1103.

146-95½-New. Where defendant's sheep drove plaintiff's cattle from land, making it necessary to feed the cattle hay the value of the hay is special damages required to be pleaded. **Nev** 284P310.

146-5½-New. Complaint held sufficient in action to recover damages for herding live stock within mile of bona fide home or ranch. **Nev** 287P447.

147-13 3LaA127, 130 [quotCJ].

147-17 3LaA127, 130 [quotCJ].

147-35 [b] 82CalA269, 255P877. [d] 88CalA405, 263P573. [g] **Evidence sufficient to warrant finding that damage was caused by defendant's cattle.**–88CalA405, 263P573. [h] **Evidence of loss has been held too indefinite, uncertain and speculative** to be basis of judgment for damages. **Ariz** 288P1029.

148-36 See also 39GaA504, 147SE428 (prima facie case arising from proclamation by road commissioners is rebutted by undisputed evidence that district abutting adjoining state was not fenced).

148-39 39GaA504, 147SE428 (statutory fence).

148-41½-New. The ownership of the animals causing the damage is for the jury. 178Ark1200, 11SW(2d)492.

148-49 84CalA42, 257P573. [e] **Damages held not excessive.**–82Colo80, 256P1092.

148-53 **Ariz** 288P1029; **Utah** 265P745 (amount of damages held sustained by evidence).

148-56 But see **Utah** 265P745.

149-62 **Nev** 284P310.

149-67 [a] **Sufficiency of evidence as to damages.**–84CalA42, 257P573 (finding sustained).

149-69 42 **Ida**408, 245P933 (verdict as value of hay destroyed held excessive). But see **Nev** 284P310.

149-70 But see **Nev** 284P310.

149-80 [a] **Utah** 278P816 (one half of costs only recoverable under laws of 1917).

151-3 148Miss88, 114S124; **Sask** [1927] 3DomLR188 (having grain accessible to stock).

151-5 148Miss88, 114S124.

151-6½-New. One may not kill a valuable animal in a spirit of vengeance. 148Miss88, 114S124.

151-6⅓-New. Under the Canadian statute relative to the storage of threshed grain accessible to stock, an occupant of land is not liable where he stores grain in a granary reasonably fit to keep it inaccessible to stock running at large. **Can** [1928] 2 DomLR319.

151-7 24Kan406; 223AppDiv792, 227NYS739, 741 [citCJ].

151-9½-New. Under the Saskatchewan statute an owner of unfenced land owes to cattle running at large during the season when it is lawful to permit them to do so the same duty as to a licensee. **Sask** [1928] 2DomLR353.

151-9⅓-New. Under such statute it is the duty of such land owner having poison on his land to take every precaution to see that cattle lawfully at large cannot obtain access to it. **Sask** [1928] 2 DomLR353.

152-15 7SaskL104, 18DomLR414, 29WestLR364, 7WestWkly74.

153-26 116 Oh549, 157NE13; 126 Or341, 269P883 (killing by game warden).

153-33½-New. The killing is malicious, if intentional and without just cause or excuse. 217MoA399, 266SW743.

153-34 213Ala393, 104S754; 116 Oh549, 57NE13.

153-42 148Md508, 129A646, 42ALR435.

154-60 156Tenn544, 3SW(2d)661, 666 [citCJ].

155-71 207 **Iowa**1094, 224NW95(2d case) (unweaned, unlicensed pups).

155-72 22AlaA437, 116S509; 148Md508, 129A646, 42ALR435; 141Wash654, 252P96, 97 [citCJ].

156-80 141Wash654, 252P96, 97 [quot Cyc&citCJ].

156-82 175Minn368, 221NW430.

156-83 141Wash654, 252P96.

156-84 175Minn368, 221NW430, 431 [citCJ].

156-85 141Wash654, 252P96.

156-87½-New. A statute providing a complete system for protecting live stock from injury by dogs repeals former acts authorizing killing by judge's order under certain circumstances. 231Ky396, 21SW(2d)480.

157-90 175Minn368, 221NW430, 431 [citCJ].

157-91 141Wash654, 252P96, 97 [cit Cyc].

157-92 141Wash654, 252P96, 97 [cit Cyc].

157-1 [a] **In action to recover double damages,** good faith and actual belief that dog had recently killed or chased defendant's sheep is defense. 217MoA399, 266SW743.

157-3 213Ala15, 17, 104S222 [citCJ]. [c] **Owner should be served with notice** in statutory proceeding against sheep killing dog. 231Ky396, 21SW(2d)480. [d] **Owner is entitled to intervene** and be made party to statutory proceedings against sheep killing dog. 231Ky396, 21SW(2d)480.

157-3½-New. Proceedings to destroy a sheep-killing dog under a former statute are unauthorized where a later statute providing for complete protection for live stock and poultry from injury by dogs does not include the proceedings instituted. 231Ky396, 21SW(2d)480.

158-9 3LaA395.

159-25 5PaDist&Co443. [a] (2) Imminence of danger makes killing legal. 5PaDist&Co443.

159-31 See also 2LaA366.

160-61 [a] 99CalA368, 278P505.

161-72 [a] **Plea that dog killed** had been known to kill or worry sheep need not allege owner's knowledge. 213Ala15, 104S222.

161-73 22AlaA437, 116S509. [a] (2) Plea that dog was nuisance must allege known vicious character and knowledge on part of plaintiff. 22AlaA437, 116S509.

161-86 [a] **Defendant, in action for killing of dog, having admitted killing,** plaintiff has burden of proof only as to its value. **Ky** 117SW413.

161–88 148Md508, 129A646, 42ALR 435; 32 OhA177, 166NE396. See also 217MoA399, 266SW743.
161–98 213Ala393, 104S754; 172Ark 423, 288SW908.
161–98½–New. Evidence of sales of similar dogs in nearby town is admissible to show market value of dog. 172 Ark423, 288SW908.
162–99 [c] **In action for injuries to colt,** parol evidence that colt was entitled to registration was not best evidence under L. (1907) c 434 § 1494–33. 148Wis647, 135NW123.
162–3 136 Iowa27, 111NW983.
162–10 LaA 122S73.
162–16 148Miss88, 114S124 (evidence held sufficient); 20SaskL545, [1926] 3 DomLR339, [1926] 2WestWkly342.
162–17 TexCivA 24SW(2d)478. [c] **Evidence held insufficient** to sustain finding that defendant was responsible for throwing paint buckets into pasture. TexCivA 24SW(2d)478.
162–17½–New. Proof of intentional killing of dog is prima facie showing of legal malice. 217MoA399, 266SW743.
162–18 148Md508, 129A646, 42ALR435 (justification not shown as a matter of law). [b] **Evidence held sufficient** to show necessity to kill dogs engaged in killing chickens when shot. 141Wash 654, 252P96.
163–29½–New. A refusal to charge that testimony as to plaintiff's dogs being at large did not tend to prove justification for the killing and to limit the purpose of the evidence, has been held error. 32 OhA177, 166NE396.
163–32 148Md508, 129A646, 42ALR435.
163–33 148Md508, 129A646, 42ALR 435; 175Minn368, 221NW430; 141 Wash654, 252P96 (necessity).
164–47 219Ky238, 292SW814. See also 156Tenn544, 3SW(2d)661.
164–54 207 Iowa1094, 224NW95(2d case).
164–60 2 IndA586, 28NE1017; 34NH 523, 69AmD516; 35NC33; 48SCL203. [b] **In New York.**–15AbbPrNSNY51; 1 WheelCrNY111; 3CityHallRecNY191.
164–66 103TexCr437, 281SW551 (statutes defining malicious mischief held applicable to wounding of cow trespassing on insufficiently inclosed land). [b] (2) So much of Acts (1921) § 34 c 116 as makes it a crime to harbor a sheep-killing dog is repealed by Acts (1925) c 83. 103WVa634, 138SE199.
164–67 11 Iowa414.
165–69½–New. The state is empowered to protect animals from wanton abuse and destruction. 108TexCr147, 300SW 64.
165–70 Can 1TerrL487. [b] (1) 25Ga A194, 102SE907; 11 Iowa414. (4) "Maim" includes word "injure" and will sustain indictment. 4AlaA139, 58S 973. (5) To "maim" within statute is to injure animal in some way so as to deprive it of, or to render useless, one or more of its useful members. 203MoA 413, 221SW159. (6) Term is synonymous with word "cripple." 4TexA586. [e] **Placing of poisoned flesh in inclosed garden** for purpose of destroying dog which was in habit of straying there was held not to be offense under statute making it indictable "unlawfully and maliciously" to kill, maim, or wound certain animals, including dogs. Eng 2CPD351.
165–76 21 OhA459, 153NE215.
165–79 10 Iowa115; 29Utah417, 82P 465. [c] **Separate offense is committed,** under Pen. St. § 190, each time strychnine was exposed with intent to poison dogs. 215AppDiv282, 213NYS532.
165–84 [a] (4) 75Me562, 46AmR423; 13Tex55; 3Leigh(30Va)809; 17Gratt (58Va)617. See 44TexCr551, 72SW998.
165–86 85 Ill 457. [a] (1) 1HeadTenn 154. (2) 1Wyo 376.
166–90½–New. The word "swine" in a statute includes hogs. 10TexA177.
166–90¾–New. The word "hog" in a statute includes sows. 2SC21.
166–90¼–New. The term domestic animals in a statute includes hogs. 10 Iowa115.
166–90⅝–New. An indictment will lie for poisoning chickens, notwithstanding they are not included in a statute providing for the punishment of the poisoning of horses, cattle, and other beasts. 108Mass304.
166–90¼–New. "Fowl" is animal included in a statute. Eng 61LTRepNS 594.
166–92 Eng 1LeachCC73, 168Reprint 139; Eng 2WBl721, 96Reprint423, 1 LeachCC72, 168Reprint138.
166–98½–New. "Cattle" in statute includes steers. 22Tex591; 20Vt537.
166–99½–New. A Georgia statute which relates to the destruction of inanimate property does not apply to the killing or injuring of a dog. 93Ga111, 19SE 734, 24LRA732.
166–1 [c] 312Mo 68, 278SW981. [d] **Killing an animal belonging to another in honest belief that it is an act of mercy to do so,** the animal being in a helpless and dying condition, is not malicious. Can 1TerrL487.
166–5 Contra 33Ariz432, 265P600.
167–12 2AltaL275, 16CanCrCas312, 10 WestLR646.
167–14 2AltaL275, 16CanCrCas312, 10 WestLR646.
167–15½–New. A dog trailing rabbits at the command and within call or presence of the owner is not at large, although on the property of another. 21 OhA459, 153NE215.
167–15½–New. A dog is at large and vagrant when running at will, absolutely beyond control or call, acting on his own initiative, without connection physical or sympathetic, with its owner. 21 OhA459, 153NE215.
167–16 67Ala106, 42AmR101; 101Mo 188, 13SW956; 94NC888.
167–18 30Ark433.
167–18½–New. A dog trailing rabbits at the command and within call of the owner is not a trespasser, although on the land of another. 21 OhA459, 153NE 215.
167–18½–New. A dog crossing property with its owner for the purpose of hunting is not at large or trespassing. 21 OhA459, 153NE215.
167–21 4NC331; 21 OhA459, 153NE215 (statute held not to exempt defendant's wounding dog which only incidentally worried sheep); 41Tex622; 9TexA206; 12TexA11; 27TexA586, 11SW723; 29 TexA348, 16SW171.
167–25½–New. It is no defense that plaintiff's dog, killed by defendant's dog, had no license. 261Mass138, 158 NE536.
167–26 [a] **Killing in compliance with regulation** promulgated by state secretary of agriculture is not malicious, though regulation may be illegal. 33 Ariz432, 265P600.
167–29 [a] **In Georgia.**–3GaA297, 59SE 823.
168–36 [a] (2) Information for killing dog need not negative exception relative to killing while dog is in act of pursuing, worrying, or wounding live stock or poultry or attacking human being. 91PaSuper37.
168–39½–New. Under same statutes it must be alleged that killing or mutilation was needlessly done. 103TexCr 437, 281SW551.
168–42 92NC802.
168–47 **Dog.**–TexCr 32SW(2d)470.
169–52 105Mass460.
169–55 92NC802.
169–60 92NC802.
169–62 48SCL247.
169–68 108Mass304.
169–77 16 Ind9.
170–87½–New. A conviction of malicious mischief cannot be sustained under a complaint and information charging willfully and wantonly injuring a cow, based on a statute no longer in effect where there is no pleading or proof of the essential element of malicious mischief. 103TexCr437, 281SW551.
170–88 103TexCr437, 281SW551 (that killing or mutilation was needlessly done).
171–97 Can 1TerrL487.
171–5 84Ark623, 106SW953.
171–16 215AppDiv282, 213NYS532.
171–19 [a] 91Ark441, 121SW732; 105 Ark698, 151SW990; 180Ark1167, 20 SW(2d)858; 312Mo 68, 278SW981; TexCr 25SW(2d)622(1stcase); 2AltaL275, 16CanCrCas312, 10WestLR646 (malice). [b] 151Miss513, 118S605; 106WVa601, 146NE628 (malice); Can 1TerrL487 (malice).
172–44 95Fla901, 116S870, 872 [citCJ].
172–45 172Ark480, 289SW324; 95Fla 901, 116S870, 872 [citCJ]. [a] **California Estray Act** repealed all fence laws in all counties except those specified and restored common-law rule as to all counties affected by act. 70CalA647, 234P120.
172–48 176Ark722, 3SW(2d)1000; 84 Mont225, 274P1062. [a] (2) Priv. Acts (1925) c 618 to prevent stock from running at large in White County, designated by population according to federal census of 1920 or any subsequent federal census, is unconstitutional. 152 Tenn660, 280SW688 (large part of county excluded from operation of statute). [c] (5) Ordinance of San Diego County making it misdemeanor to permit domestic animals to run at large on land of any person other than owner is valid and not in conflict with general laws. 70CalA647, 234P120.
173–49½–New. It does not unlawfully discriminate between the resident and the nonresident owner of cattle, 90Fla 398, 106S73.
173–49½–New. nor is it invalid as being discriminatory, vague, indefinite, or uncertain in its provisions. 90Fla398, 106S73.
173–49¼–New. Oregon Umatilla Herd Law does not impliedly except land in Umatilla reservation leased by a white man from an Indian allottee. 129 Or 620, 278P572.
173–54 181Ark1124, 29SW(2d)671 (construction of statute); 155Miss833, 125S427 (state-wide law constitutional as due process); 156Tenn544, 3SW(2d) 661.
173–55 173Ark464, 292SW693.
173–56 176Ark722, 3SW(2d)1000. [a] **Necessity for special legislative act** in creation of stock law district. 181Ark 1124, 29SW(2d)671.
173–58 154Tenn458, 285SW705.
173–59 169Ark261, 273SW1032; 95Fla 901, 116S870.
173–60 39GaA504, 147SE428 (stock law held ineffective).
173–64 173Ark464, 292SW693.
173–65 179Ark1024, 19SW(2d)1022.
173–65½–New. The "No fence law" in Florida has been held not to restrict the ownership of cattle. 90Fla398, 106 S73.
173–65½–New. A statute prohibiting grazing in the township "to" foot of mountain creates stock district to foot of mountain. 176Ark26, 2SW(2d)53.
173–65¼–New. [§ 580a] 1½. **Exemption from Stock Law.** A township which has, on petition, been added to a stock law district already formed has no right under some statutes to be subsequently detached and exempted from the operation of the law. 175Ark888, 1SW(2d)63.
173–65⅝–New. Law relating to seizure and impounding of cattle found roaming at large in county held unconstitutional. Fla 129S330.
173–66 195NC71, 141SE481 (Australian Ballot Law made applicable to Jackson County, North Carolina, is held not to repeal special stock law election act for such county); TexCommnA 280SW 179 (evidence held not to show adoption of Hog Law). [a] **Adoption must be alleged and proved** by party claiming protection of hog law. TexCivA 271SW130. [b] **Evidence insufficient** to show adoption of Hog Law. TexCivA 271SW130. [c] **Evidence of adoption.**–MoA 15SW (2d)890. [d] **Question of law for court** whether statute is in force in particular county. MoA 15SW(2d)890.
174–69½–New. Stock law may be invalid under a constitutional provision for secret ballot. 220Ky480, 295SW438.
174–69¼–New. Such law may be invalid as denying equal protection of law. 220 Ky480, 295SW438.
174–69¼–New. Combining elections on two classes of stock is held not to render election invalid. TexCivA 293SW 295.
174–70 176Ark1141, 5SW(2d)362; 102 TexCr321, 277SW693. [c] **No election on court's own motion.**–102TexCr321, 277SW693.
174–71 217MoA685, 274SW498 (allega-

tions of petition are jurisdictional). [b] **Petition to call election** for adoption of stock law held insufficient. 217MoA685, 274SW498.

174-82 [a] **Court has no authority to order election** for organization of less than whole territory of county into stock law district. 181Ark1124, 29SW (2d)671.

174-84 221MoA85, 290SW96 (court not required to prescribe form of ballot).

174-85½-New. The order of election must follow the petition with respect to description of the territory affected. 102TexCr321, 277SW693.

174-85¾-New. A variance between the description in the order and the petition is fatal to the validity of the election. 102TexCr321, 277SW693.

175-94 [b] **Notice held sufficient.**-179 Ark993, 18SW(2d)1026.

175-97 220MoA232, 283SW712. [a] **Sheriff's return as to posting notices** is held sufficient in absence of any prescribed form of return. 221MoA85, 290 SW96.

175-1 176Ark1093, 5SW(2d)350.

175-4 TexCivA 283SW307.

175-4½-New. One set of officers conducting different elections. Fact that same election officers were appointed to conduct election as to both horses and hogs does not invalidate election where separate ballot boxes were used. Tex CivA 283SW307.

175-5 221MoA85, 290SW96 (form of ballot sufficient under directory statute). [b] **Signature by presiding judge** required by General Election Law to be made on ballots cast at election does not apply to stock law elections. TexCivA 283SW307. [c] **Fact that same form of ballot was used on election as to horses as well as that as to hogs** does not invalidate election where ballots complied with statutory requirements. TexCivA 283SW307. [d] **Irregularity in title of law on ballots** does not void stock law where petitions had correct title. 179 Ark1024, 19SW(2d)1022.

175-11 169Ark261, 273SW1032.

176-12 [a] TexCommnA 280SW179.

176-13 [a] **Returns as from wrong district.**-Irregularity in making returns as from certain voting precinct instead of drainage district for which election was had does not invalidate election. Tex CivA 283SW307.

176-22 163Ga385, 136SE135; 39GaA 504, 147SE428. [a] **Duty of ordinary** on adoption by militia district of stock law to erect fences with gates that may be opened and shut without dismounting from vehicle. 163Ga385, 136SE135.

177-27 169Ark261, 273SW1032 (contest before county court held not provided for).

177-28 But see 219Ala233, 121S913.

177-29 220Ky480, 295SW438.

177-30 [b] **Sufficiency of service of notice** under Alabama statute. 219Ala233, 121S913. [c] **In Texas.**-CivA 18SW(2d) 853.

177-31 219Ala233, 121S913. [b] **In Alabama.**-219Ala233, 121S913.

178-41 Ark 31SW(2d)748; 83Mont540, 273P290 (sufficient).

178-45 [b] **Notice of hearing.**-83Mont 540, 273P290 (notice held sufficient).

179-70 220MoA232, 283SW712. [a] **Record.**-220MoA232, 283SW712. [b] **Petition for certiorari is not substitute for election contest,** although statute failed to provide for contest. 220MoA 232, 283SW712. [c] **Questions of fact not reviewable.**-220MoA232, 283SW712.

179-71½-New. Order of county court having jurisdiction prohibiting running at large by cattle is not subject to collateral attack. Ark 31SW(2d)530.

179-73 72Ark8, 80SW883; 76Ark443, 88SW1000; 89Ark564, 117SW553; 102 Ark373, 144SW514; 121Ga665, 49SE732; 63 Ill 50, 51; 3 IndA250, 29NE790; 28 Iowa491; 43 Iowa168, 171 (both holding contrary); 53 Iowa632, 6NW13; 58 Iowa622, 12NW619; 60 Iowa459, 15NW 286; 73 Iowa723, 36NW760; 110 Iowa 462, 81NW703; 133 Iowa28, 110NW 154; 30Kan336, 2P146; 31Kan622, 3 P305; 46Kan769, 27P126; 70Kan791, 79P662; 82Kan1832, 107P637, 27LRA NS226; 55Me538, 92AmD615; 10Allen Mass151; 121Mich687, 80NW791; 147 Mich288, 110NW1097; 26Minn154, 2 NW163; 52Minn276, 53NW1129; 69 Miss34, 10S43, 30AmSR526; 173MoA 310, 158SW874, 876 [quotCyc]; 78Mont 477, 254P427; 43Nebr277, 61NW622; 80Nebr281, 114NW153; 75NJL245, 67 A338; 21 OhA459, 153NE215; 6 Okl 673, 55P1070; 19 Or291, 24P233; 119 Tenn677, 109SW513; 13TexCivA386, 35 SW333; 33TexCivA523, 77SW268; 50 TexCivA568, 110SW997; TexCivA 156 SW567; 1TexACivCas§264; 46Vt600; 111Wis91, 86NW554; 130Wis275, 110 NW225; Ont 18UCQB96; Ont 25UCQB 572. See also 111Ala546, 20S366, 56 AmSR69, 33LRA364. [a] (1) **Phrase "at large" has been applied to:** (1) Bull. 89Ark564, 117SW553, 554; 110 Iowa462, 81NW703; 32Kan150, 4P136; 46Kan769, 27P126, 127; 82Kan182, 107 P637, 27LRANS226; 130Wis275, 110 NW225. (2) Cattle generally. 133 Iowa 28, 110NW154; 174Mass565, 55NE461; 1AllenMass270; 121Mich687, 80NW791; 147Mich288, 110NW1097; 173MoA310, 158SW874, 876 [quotCyc]. (3) Colt. 111Ala546, 20S366, 56AmSR69, 33LRA 364; 4AllenMass444, 81AmD710; 52 Minn276, 53NW1129. (4) Cow. 102Ark 373, 144SW514; 30Kan336, 2P146; 31 Kan622, 3P305; 70Kan791, 79P662; 120 La767, 45S601; 1AllenMass270, 272; TexCivA 156SW567. (5) Dog. 69Miss 34, 10S43, 30AmSR526; 80Nebr281, 114 NW153; 75NJL245, 67A338. (6) Hog. 72Ark8, 80SW883; 76Ark443, 88SW 1000; 58 Ill 221, 225; 63 Ill 50; 55Me 538, 92AmD615; 119Tenn677, 109SW 513. (7) Horse. 3 IndA250, 29NE790; 60 Iowa459, 15NW286; 6 Okl 673, 55P 1070; 13TexCivA386, 35SW333; 33Tex CivA523, 77SW268; 1TexACivCas§264; 46Vt600; 111Wis91, 86NW554. (8) Insane person. 89Ark9, 115SW953. (9) Mule. 43 Iowa168; 50TexCivA568, 110 SW997. (10) Ram. 19Conn501. (11) Sheep. 19 Or291, 24P233. (12) Steer. 73 Iowa723, 36NW760; 35Kan58, 10P 103. [b] **"The words 'at large' plainly** import that the animals would be 'outside the inclosure of the owner.'" 173 MoA310, 158SW874, 876. [c] **Synonymous with "without" a keeper.** 1Allen Mass270. [d] **"Run at large."**-77Ark 247, 95SW163, 164; 58 Ill 221, 225; 32 Kan150, 4P136, 137; 35Kan58, 10P103, 105; 116Wis643, 93NW808. [e] **"Run or rove at large."**-120La767, 45S601.

179-74 52Cal 455; 129Kan31, 281P892; 78Mont477, 254P427; 21 OhA459, 153 NE215.

179-75 111Ala546, 20S366, 56AmSR69, 33LRA364; 89Ark564, 117SW553; 102 Ark373, 144SW514, 515; 52Cal 455; 52 Cal 653; 103 Ind138, 2NE317; 3 IndA 250, 29NE790; 53 Iowa632, 6NW13; 60 Iowa459, 15NW286, 287; 75 Iowa157, 39 NW242; 75 Iowa163, 39NW248; 31Kan 622, 3P305, 312; 32Kan150, 4P136, 137; 35Kan58, 10P103, 105; 37Kan445, 15P 595; 46Kan769, 27P126, 127; 70Kan791, 79P662, 663; 82Kan182, 107P637, 638, 27LRANS226; 1AllenMass270; 4Allen Mass444, 445, 81AmD710; 174Mass565, 55NE461; 53Mich457, 19NW143; 121 Mich687, 80NW791; 52Minn276, 53NW 1129; 173MoA310, 158SW874, 876 [quot Cyc]; 19 Or291, 24P233; 10Serg&RPa 393; 119Tenn677, 109SW513, 514, 13Tex CivA386, 35SW333, 334; 50TexCivA568, 110SW997, 999; 79Vt249, 64A1130, 9Ann Cas282; 8 Ont583.

180-78 [d] **Dog following owner** is not "running at large." 23CanLJ167.

180-79 95Fla901, 116S870; 33Mont299, 83P485.

180-81 104Conn493, 133A671.

180-82 104Conn493, 133A671.

180-84 104Conn493, 133A671; 46 OhSt 272, 20NE334. [a] 104Conn493, 133A 671.

180-85 104Conn493, 133A671.

181-88 222MoA808, 10SW(2d)338.

181-91 41Minn111, 42NW786.

182-11 See also 1LaA453, 456 [citCJ].

182-14 104Conn493, 133A671.

182-19 See 21Hawaii50, 53 [citCyc].

182-24½-New. It is better pleading to allege to whom the inclosure belongs, although failure to do so will not invalidate the indictment. 69NC23; 70NC 70.

182-29 [a] (1) 172Ark480, 289SW324; 176Ark722, 3SW(2d)1000; 104Conn493, 133A671. (2) Evidence held sufficient to sustain finding of previously allowing horses to run loose on highway. 104 Conn493, 133A671. [b] **Evidence held insufficient to support finding** that owner deliberately turned horses loose on highway. 104Conn493, 133A671.

183-37 21Hawaii532; 169La1014, 126S 511; 33Mont299, 83P485, 486. [b] **In Tennessee.**-154Tenn458, 285SW705. [c] **Statute conferring right has been held constitutional** as against objection that owner is deprived of property without due process of law. 95Fla901, 116S 870.

183-42½-New. Provisions of statute must be strictly complied with. 78Mont 477, 254P427.

183-42¼-New. A claim for previous trespass cannot be joined with a claim for trespass at the time of the seizure. 216Ala42, 112S330.

183-42¾-New. A claim for trespass during the preceding year may be recovered by an action at law and a lien attaches only after judgment. 216Ala42, 112S330.

183-42⅞-New. Under police power of state in connection with prohibiting livestock running at large state may provide for impounding and sale of offending animals under proper regulations. Fla 126S117.

183-53 78Mont477, 254P427.

184-57 Ga 155SE202.

184-64½-New. A person who has impounded cattle infested with fever tick to prevent depredation on crops may cause the tick eradication authorities to take charge of them, although they are at the time in his pasture. 141Miss756, 105S740.

184-64¼-New. That owner threatened suit held not to excuse failure of impounder to have fees and damages assessed. TexCivA 293SW295.

184-65 29Hawaii294.

185-76 78Mont477, 254P427. [b] **Delay of one month** in giving notice held to preclude judgment for defendant in conversion action by owner. 78Mont477, 254P427.

185-84 78Mont477, 254P427; 84Mont 225, 274P1062 (sale under Roundup Act, permitting advertisement and public sale of abandoned horses, which are unbranded or have escaped taxation); Tex CivA 292SW970, 971 [citCJ].

185-87 TexCivA 292SW970.

185-90 [a] **Time of sale.**-84Mont225, 274P1062.

186-14 181Ark596, 26SW(2d)902.

186-16 See also 78Mont477, 254P427.

186-16½-New. Trover lies for failure of impounder to observe statute. 78 Mont477, 254P427.

186-16¾-New. A suit for recovery of a mule alleged to be in the illegal possession of defendant, claiming under sale by the impounding officer, has been held not a collateral attack on the validity of such sale. 9LaA313, 119S477.

187-28 21Hawaii532.

187-29 21Hawaii532; 9LaA313, 119S 477; 78Mont477, 254P427. [b] **Evidence held sufficient.**-181Ark596, 26SW (2d)902.

187-34½-New. Resolution of county commissioners recognizing fences erected around district as legal under code is primary evidence of erection of legal fence and is properly admitted in evidence. 163Ga385, 136SE135.

187-34¼-New. Evidence by plaintiff from personal observation that roads around district had not been closed by gates as required is improperly excluded. 163Ga385, 136SE135.

187-34¾-New. Plaintiff may show that fence and gates have not been erected around district as required by statute making such erection condition precedent to effectiveness of stock law. 163 Ga385, 136SE135.

187-35 21Hawaii532.

187-35½-New. Where plaintiff's animals were confined for several days in violation of law, he is entitled to at least slight damages for their detention. Tex CivA 293SW295.

188-39 See also Ida 290P200.

188-43½-New. Sale and transfer of branded range live stock. Live stock statutes in some jurisdictions indicate legislative purpose to require one who buys range cattle to do something to segregate his purchase from the herd

and brand of the seller and distinguish them from brand of cattle belonging to other owners of range cattle. 31Ariz89, 250P772.

188-43½-New. Failure to take bill of sale for bovine cattle at time of payment constitutes a misdemeanor. CalA 290P116.

188-45½-New. Statutes providing for the inspection and disposition of cattle about to be slaughtered if found not to belong to the shipper of cattle, but making no provision for notice to the owner of the action to be taken, is in violation of due process clauses of both federal and state constitutions. 68CalA 35, 228P546.

188-46 Town Improvement Clauses Act, 1847. Eng 18CoxCC219. [a] **Refusal without good cause** to slaughter for one of public renders licensed operator liable in damages. 162Ga565, 134SE304, 46ALR1480.

188-47½-New. An operator of a licensed slaughterhouse who arbitrarily and without just cause refuses to slaughter animals for a member of the public, although an ordinance requires him to slaughter for the public without discrimination, is liable in damages. 35Ga A133, 132SE461.

188-47¼-New. The damages recoverable for such refusal do not include future profits. 35GaA133, 132SE461.

188-47¼-New. Petitions in actions to recover damages for such refusal have been held good as against general demurrer. 35GaA133, 132SE461.

189-62½-New. Failure to preserve hide unchanged for inspection after killing. The statute requiring preservation of the hide of a bovine animal unchanged for thirty days for inspection after killing is not invalid. 34NM405, 281P481.

190-85 [a] 21Hawaii532.

ANIMO

192-3 92Fla262, 109S463.

ANNUAL

195-41 42 OklACR291 [reh pending].

ANNUITIES

200-2 146Va417, 131SE800.
200-3 146Va417, 131SE800.
200-4 128Misc263, 219NYS295.
201-12 128Misc263, 219NYS295; 133 Misc812, 234NYS99; 141NC525, 54SE 406.
201-13 See also 133Misc812, 234NYS99 (gift of income of trust not payable out of estate and continuing only as long as trust held not annuities).
201-15½-New. Payments out of the income of a trust, regardless of the life of the trust, is an annuity. 133Misc 812, 234NYS99.
202-17 79NY267; 23HunNY596 [app dism 86NY600].
203-28 133Misc812, 234NYS99; 12Pa Dist&Co 553 [citCJ].
203-30 See also 133Misc812, 234NYS 99.
204-39 [p] **Property may be accepted** for annuity agreement as well as cash. 42F(2d)186.
204-40½-New. Annuity contract in consideration of payment of fixed installments is valid. 318 Ill 548, 149NE530.
204-43 [b] **Provisions for nonforfeiture** held not to show fraud. 318 Ill 548, 149NE530. [c] **Provision for withdrawal** held not fraudulent. 318 Ill 548, 149 NE530.
204-45½-New. Annuity contract held not indefinite or ambiguous. 318 Ill 548, 149NE530.
205-49 [f] **Provision for withdrawal** held not against public policy. 318 Ill 548, 149NE530.
206-55 240Mich68, 214NW941 [quot CJ]; Or 291P798. [b] (2) Death of annuitant without issue terminates annuity given by will to testator's grandson during period of trust where action clauses of will showed intent of testator that his property should go to his wife and issue only. 240Mich68, 214NW 941.
208-68½-New. Annuity for the support and maintenance of an insane daughter is not collectable from the estate if the daughter is incarcerated in a state asylum without charge. 232 IllA165.
211-10 148Miss491, 114S328, 332 [cit CJ] (allowance held not abuse of discretion).
212-19½-New. A direction to pay an annuity out of rents and profits charges only such rents and profits, and not the corpus, unless a contrary intention appears, and can be enforced against the trustee personally only in so far as he has received such rents and profits. 148Miss491, 114S328.
212-21 148Miss491, 114S328, 331 [quot CJ].
212-22 148Miss491, 114S328, 331 [quot CJ].
212-23 148Miss491, 114S328, 331 [quot CJ].
213-24 148Miss491, 114S328, 331 [quot CJ].
213-24½-New. The foregoing rule applies notwithstanding the use of words denoting that payment should be made out of rents, issues, profits, and income. 148Miss491, 114S328.
216-52 See also 12PaDist&Co 128.
217-53½-New. Where sum set aside is insufficient, the balance must be made up from other property. 128Misc263, 219NYS295.
217-54 229AppDiv126, 241NYS302.
217-55 229AppDiv126, 241NYS302.
218-62½-New. Evidence held not to show payments under contract of sale of land were intended for maintenance and support of vendor so as to require apportionment on his death. 229AppDiv 126, 241NYS302.
222-12½-New. Annuity company is not engaged in banking business by reason of making loans to contract holders where relation of debtor and creditor does not arise. 318 Ill 548, 149NE530.

ANTICHRESIS

229-93 32PortoRico 280. [a] **Effect of fraudulent termination of contract** by creditor after lease of property to third person see 32PortoRico 280.

ANY

230-14 70CalA663, 234P339.
230-17 [a] (1) 114Nebr194, 206NW765.
230-18 70CalA663, 234P339.
231-19 70CalA663, 234P339, 344 [cit CJ].
231-28 70CalA663, 234P339, 344 [cit CJ]; 144Miss106, 109S849.
232-33 20F(2d)465; 70CalA663, 234P 339; 284Pa444, 131A356.
241-5½-New. "any portion," 143Wash 525, 255P955.
242-24 [a] **"Any real property."**-114 Nebr194, 206NW765.
242-49 35GaA710, 134SE625.
246-2½-New. "in any event," 70CalA 663, 234P339.
247-20 14NM579, 99P338, 20LRANS 239, 20AnnCas128.
248-41 44NB88, 108.

APARTMENT

250-7 TexCivA 278SW513, 515 [citCJ].
251-9 TexCivA 278SW513, 515 [citCJ].
251-10 288Pa428, 135A862.

APOPLEXY

252-27½-New. Apoplexy is a break or rupture of a blood vessel in the brain not produced by any external cause. TexCommnA 276SW900.

APPARATUS

253-36½-New. An outfit of tools, utensils, or instruments adapted to the accomplishment of any branch of work or for the performance of an experiment or operation; a set of such appliances; a group or set of organs concerned in the performance of a single function. 112 Okl 22, 239P595.

APPARENT

253-42 TexCivA 275SW510.
253-44 119Kan380, 240P266.
253-45 119Kan380, 240P266.
253-46 TexCivA 275SW510.
253-54 TexCivA 275SW510.
253-56 TexCivA 275SW510.
253-61 TexCivA 275SW510.
254-69 [a] (2) Refers to cases, not contents. 25F(2d)122.

APPEAL AND ERROR

297-2 23AlaA261, 123S293 (appeals are entirely statutory and cannot be maintained in absence thereof); 203Cal 384, 264P488; 94Fla32, 113S630, 634 [citCJ]; 200 Ind270, 163NE97; 88 Ind A134, 163NE536; 159La693, 106S118; 79Mont530, 257P465; 125Misc572, 211 NYS548; Pa 152A92; 48SD467, 204NW 945; 117Tex200, 299SW869 (no constitutional right to appeal); TexCivA 295 SW941; 101Vt381, 143A676; 196Wis 562, 221NW382. See also 94Fla32, 113S 630, 634 [citCJ]. [h] **Statutes and ordinances with no provision for appeal** to highest court not invalid on that account. 150Md452, 133A465, 46ALR80 (Baltimore Ordinance No. 522). [i] **Limitations in definitions of cases appealable** must be read into sections authorizing appeal. 254NY357, 173NE220.
298-3 168La342, 122S59. See also 116 Nebr118, 216NW309.
299-5½-New. The right to appeal is not absolute. 125Misc572, 211NYS548.
299-5¼-New. The mere establishment of a court of appeal does not of itself fix the right to appeal. 125Misc572, 211 NYS548.
299-9 155Tenn148, 290SW970 [citCJ].
299-10 [a] **Relief is by proper application for review,** writ of error, and in exceptional cases by bill in equity. Mass 173NE507.
299-10½-New. A statute providing for appeals from orders granting new trials is not void for failure to prescribe specific mode of procedure. TexCivA 282SW891.
299-11 224 IllA142; 154Md46, 139A 570; 307Mo 529, 271SW50. See also 94 Fla32, 113S630, 634 [citCJ]. [a] **Statute appointing stenographer to transcribe testimony in chancery cases** applies to preservation of testimony on appeal after it went into effect, though not in effect when case was tried. 168 Ark1033, 275SW653. [b] **In Delaware** rules governing appeals from justice's courts are not applicable to appeals from court of common pleas. 3Del 118, 131A 320.
300-12 254NY146, 172NE271.
300-14 TexCivA 275SW271.
300-16 77Colo 254, 235P568; 98Fla 1076, 125S235(2dcase); 20 OhA141, 153 NE160.
300-17 278US456, 49SCt189, 73Led452 (2dcase).
300-19 CalA 285P856(1stcase); 329 Ill 623, 161NE115; Miss 130S98; 50Nev 153, 254P698; Nev 286P125(1stcase).
300-20 224 IllA142.
300-21 94Fla32, 113S630. [a] (6) It is commencement of new suit to set aside judgment and is not continuation of suit to which it relates. MoA 298SW(2d) 188.
301-22 TexCivA 279SW300; 142Va419, 128SE516 (common-law mode of reviewing judgment of court of record).
302-33 TexCivA 282SW900.
302-34½-New. **In Texas** writ is not abolished by Rev. St. (1911) art 2078 as amended by Acts 39th Leg. (1925) c 18. CivA 284SW310.
302-36 TexCivA 278SW236 (amending act failed to mention writ of error in caption); TexCivA 279SW300; TexCivA 281SW273. [d] **Statute prescribing method of direct appeal only** does not impliedly prohibit appeal by writ of error from certain courts. TexCivA 16 SW(2d)968.
302-39 337 Ill 65, 168NE685; TexCivA 48SW(2d)583; TexCivA 8SW(2d)325; TexCivA 10SW(2d)745.
303-44 See also TexCivA 11SW(2d)374 (removal of cause from trial court to appellate court by writ of error is method of "appeal").
303-45 318 Ill 230, 149NE297; 325 Ill 625, 156NE826; 220MoA995, 271SW 831.
303-46½-New. and may be prosecuted in all cases involving liberty or property rights unless prohibited by statute; 318 Ill 230, 149NE297.
303-50½-New. It may be prosecuted in all cases involving liberty on property rights. 318 Ill 230, 149NE297.
304-52 233 IllA48.
304-53 220MoA995, 271SW831; 221 MoA974, 296SW193; MoA 248SW(2d) 703.

304-56 94Fla32, 113S630, 635 [citCJ]; 117 Oh225, 157NE487.

306-77 90Fla420, 106S427; 319 Ill 426, 150NE270.

306-78 260Mass369, 157NE693.

307-88 318 Ill 169, 149NE16 (errors in final decree are reviewable); 260Mass 369, 157NE693.

308-5 3Del 593, 140A697, 698 [citCJ]; 325 Ill 625, 156NE526; 326 Ill 327, 157 NE247; 233 IllA48; 260Mass369, 157 NE693; Mass 172NE610; MoA 26SW (2d)1008 (order after final judgment reviewed only by appeal).

309-7½-New. opening default judgment is properly reviewed by writ of error for review. 224 IllA417.

309-9 253Mass122, 148NE567; 253 Mass172, 148NE570; Mass 172NE610.

310-13½-New. nor words "judgment in civil action." 253Mass122, 148NE 567; Mass 148NE570.

310-15 [b] (2) Where action at law to establish equitable lien in realty is really suit in equity, it will be treated on review on appeal as though brought up by writ of error. 15F(2d)993.

311-16 19F(2d)841. [c] **Cross petition setting up equitable defense** to action at law may be treated as a counterclaim and its dismissal reviewed by writ of error. 5F(2d)408.

312-22 232 IllA152; 233 IllA48. [a] (18) Forcible entry and detainer of private office. 233 IllA48. (19) Summary proceeding to collect penalty for practicing medicine without license. 102 NJL74, 131A89 (certiorari proper remedy). (20) Adoption proceedings in absence of question involving property rights or liberty of individual. 232 Ill A152.

314-28 36GaA115, 135SE520; 248Mich 676, 227NW724; 218MoA464, 278SW 1045; 117Tex203, 299SW868.

314-29½-New. A party has no right to prosecute an appeal by writ of error from the judgment overruling a plea of privilege. TexCivA 128W(2d)599(1st case).

314-31½-New. Where an appeal has been taken, there is no case in the trial court upon which a writ of error can operate until the case gets back into the trial court. 224 IllA130.

314-31½-New. The writ lies to review judgment on a plea of privilege pronounced in advance of the trial of cause. TexCivA 277SW743.

314-34 [a] (7) Term used in ordinary and legal sense. 222Mass542, 111NE 386. (8) Appeal is judicial proceeding cognizable in court. 87NJEq297, 101A66. (9) Term may mean filing of original petition to review prior proceedings. 66 Okl 70, 167P216. (10) Appeal is remedy for correction of exercise of judicial functions. 101Wash 81, 172P257. 4ALR572.

314-35 64 IndA103, 115NE361; Tex CivA 218SW104 (in larger sense, term includes writ of error); TexCivA 281 SW273; 53Utah601, 174P1126; 2BC 350. [e] **Meaning in statute to be determined by context,** and "appellant" and "appellee" when found in statute may be used in broader sense to include plaintiffs and defendants in error. 142 Va419, 128SE516.

315-36 213Ala92, 104S258; 132SC264, 128SE360.

316-40 [g] **In New Mexico.**-30NM424, 234P1012.

316-42 15DelCh431, 141A277; 240 IllA 488; 79Mont530, 257P465; 142Va419, 128SE516.

316-43 20F(2d)939; 216Ala177, 112S 837; 216Ala224, 112S834; 217Ala511, 116S681; 220Ala406, 125S645; Ala 128 S902; Ala 129S8; 20AlaA531, 104S898; 34Ariz278, 271P25; Ariz 283P726; 70 CalA200, 232P995; CalA 285P332; Cal A 286P732; 110Conn536, 148A369 (statutory privilege); 318 Ill 230, 149 NE297; 329 Ill 582, 161NE56; 330 Ill 234, 161NE311; 338 Ill 426, 170NE313 (1stcase); 339 Ill 162, 171NE186; 240 IllA488; 200 Ind178, 162NE403; 200 Ind608, 165NE545; 157Md160, 145A 375; 239Mich116, 214NW161; 239Mich 116, 214NW409; 243Mich406, 220NW 812; 250Mich450, 231NW89(1stcase); 178Minn286, 226NW846; 148Miss478, 114S336; 307Mo 137, 270SW339; 311 Mo 147, 277SW927; 313Mo 406, 281SW 693; Mo 16SW(2d)91; Mo 30SW(2d) 68; 76Mont476, 248P362; 77Mont466, 251P163; 80Mont293, 260P727; 81 Mont459, 264P127; 82Mont126, 266P 378; 83Mont391, 272P688; 84Mont500, 277P11; Mont 285P177; 116Nebr118, 216NW309; Nebr 233NW253; 48Nev 244, 229P387, 234P518; Nev 292P621; NJ 144A169; NM 290P1019; 127Misc 183, 215NYS437; 129Misc2, 221NYS 302; 245NYS694; 51ND745, 200NW 1013; 58ND904, 228NW416; 33 OklCr 5, 242P290; 43 OklACR270 [reh pending]; 113 Or552, 233P848; 116 Or525, 241P988; 118 Or92, 245P1085; 120 Or 109, 251P308; 125 Or60, 253P12; 131 Or235, 282P1082; 132 Or660, 285P815; Or 291P369; 295Pa237, 145A128 (review limited to determining sufficiency of evidence to sustain decree); 51SD 441, 214NW842; 52SD168, 216NW949; SD 227NW845; 155Tenn148, 290SW 970; TexCommnA 298W(2d)1075; Tex CivA 275SW271; TexCivA 290SW548; 100Vt169, 135A600; 195Wis593, 219NW 344. See also 94Fla32, 113S630, 634 [citCJ]. But see LaA 129S185. [a] 120 Or109, 251P308. [e] **Statute granting right of appeal** is not retroactive unless expressly made so. TexCivA 288SW 502. [f] **Where right is statutory but procedure assumes aspect of common law procedure.**-339 Ill 162, 171NE186. [g] **In Wisconsin** judgment may be attacked by appeal. Wis 231NW585.

318-47 Ariz 283P726; 195Cal 473, 234 P80; 70CalA200, 232P995; 200 Ind178, 162NE403; 207 Iowa797, 223NW515; 217Ky198, 289SW307; 232Ky641, 24SW (2d)261; 307Mo 137, 270SW339; Mo 30 SW(2d)68; 79Mont530, 257P465; 33 OklCr5, 242P290; 116 Or411, 241P333; 118 Or260, 246P741; 122 Or297, 258P 562; 48SD467, 204NW945; 117Tex200, 299SW869.

318-52 98Fla1076, 125S235(2dcase).

319-54 90Fla934, 107S918; Fla 129S 501; 12LaA162, 125S293; 82Mont126, 266P387; 118 Oh273, 160NE836; 122 Or297, 258P562; 132 Or596, 277P820; TexCivA 280SW325; Utah 266P1050. But see 252 IllA457. [a] 11LaA173, 123 S160(2dcase).

319-56 114Nebr867, 211NW19.

319-59 [a] **Words "unless appealed from"** used in statute declaring decree final unless appealed from does not show intention to create technical remedy of appeal instead of writ of error. 3Del 593, 140A697.

319-59½-New. Statute declaring lower court's decision final has same effect as statute expressly prohibiting appeal. 300Pa422, 150A744.

319-60 NJSup 129A241; 189NCS05, 128SE329.

320-70 94Fla32, 113S630.

320-72 269US125, 46SCt52; 94Fla32, 113S630, 635 [citCJ]; Fla 129S501; 224 IllA130; 149Va597, 140SE810. See also 94Fla32, 113S630, 634 [citCJ]. But see 120 Or353, 252P556.

320-75 22 OhA73, 153NE232.

320-76 See also 29Hawaii 545.

321-79 42F(2d)109.

321-82 318 Ill 169, 149NE16 (errors in final decree are reviewable).

321-84 NM 290P1019; TexCommnA 298W(2d)1075; Alta [1926] 4DomLR 364, [1926] 3WestWkly324 (appeal from conviction against corporation entered as judgment for execution held not appealable). [b] (2) Appeal will not lie from judgment of district court for board of pharmacy in penal action against grocer for violation of Pharmacy Act by sale of camphorated oil, remedy by certiorari being exclusive. NJ 141A587. [c] (3) 114 OhSt312, 151NE 189. (4) 20 OhA370, 152NE303. (14) 31 OhA33, 166NE141. (18) Under amendments to constitution only chancery cases are appealable. 20 OhA370, 152NE303. (19) Right of appeal does not depend on sufficiency of pleadings. 20 OhA370, 152NE303. (10) Right of appeal will be determined without regard to amended petition filed by leave in appellate court after perfection of pleader's appeal. 20 OhA370, 152NE 303. (21) Question is not whether cause of action contained facts showing plaintiff entitled to equitable relief, but whether nature of case determined from pleading itself made it chancery case. 20 OhA370, 152NE303. (22) Suit seeking relief by accounting, injunction, and cancellation and surrender of instrument, being one of equitable nature or in chancery, is appealable. 20 OhA370, 152NE303. (23) In action to recover possession of real estate, pleading of defendant in which he asks for quieting of title has effect of making action equitable and subject to appeal. 114 Oh 312, 151NE189. (24) If answer sets up equitable cross demand and asks affirmative relief, action is equitable and appeal may be taken. 114 Oh312, 151 NE189. [c] (25) Appeal to court of common pleas in proceeding to sell real estate of decedent instituted in probate court is not chancery case appealable to court of appeals. 27 OhA1, 160NE635. (26) Answer and cross petition filed on leave of court in court of common pleas on such appeal, which might have been filed in probate court does not make issue in chancery so as to sustain right of appeal. 27 OhA1, 160NE635. (27) Appeal allowed only in chancery proceedings and not in law cases. 33 OhA 548, 170NE38. (28) Issues arising from pleading determine appealability. 33 OhA548, 170NE38. (29) Case involving foreclosure, priority of liens, and subrogation is "chancery case" and appealable under constitutional provision. Oh 171NE849.

323-87 15DelCh431, 141A277; 90Fla 934, 107S918.

323-89 274US195, 47SCt566, 71Led 996; 5F(2d)408. See also 25F(2d)599. [a] **Applications of rule.**-(5) Appeal is proper remedy to review dismissal of cross petition setting up equitable defense to action at law. 5F(2d)408. [c] **Where action at law is really one in equity,** it will be treated on review as appeal, though brought up by writ of error. 15F(2d)993.

324-90 [b] **In Iowa** distinction between suits in equity and appeals therein and actions at law and proceedings in error, is fully preserved. 206 Iowa 1368, 222NW553. [c] **Order for judgment of possession** in action of summary process to recover land is properly presented for review by appeal. Mass 166NE706.

325-95 88 IndA134, 163NE536; 30 OhA39, 163NE577(1stcase). [i] **Removal of public officers by civil action.**-34Wyo 163, 242P322. [j] **Adoption proceedings.**-234 IllA306.

326-99½-New. In Massachusetts, under statute, a review of a ruling allowing a motion to amend a declaration can be had only by report, and a "claim of exceptions and appeal" brings nothing before the appellate division. Mass 167NE266.

326-98½-New. Statutory appeal from statutory proceedings is exclusive method of review. 233 IllA48.

326-5 Mass 173NE239.

326-6 259Mass181, 156NE1, 54ALR 745.

326-8 106Conn411, 138A458. [c] (2) See also 262Mass477, 160NE427. (14) Court has power to enter order as to division of expense of preparing combined bill of exceptions where equal division between parties would be unjust. Mass 167NE910(2dcase). (15) Parties are equally liable for expenses of combined bill of exceptions where they did not ask for order of court in relation thereto. Mass 167NE910(2dcase). (16) Parties aggrieved may unite in single bill of exceptions. Mass 167NE910 (2dcase). [g] (3) Exceptions lie only to rulings on questions of law. Vt 148 A411.

327-16 174Minn66, 218NW234; Tex CivA 258W(2d)1113.

327-18 [a] **Where there was not judgment in lower court,** mandamus is proper method for review. 250Mich684, 230 NW950.

328-20 321 Ill 222, 151NE534.

328-23 TexCivA 280SW275.

329-34 TexCivA 295SW941.

329-36 168Ark1033, 275SW653; 122 Or297, 258P562; TexCivA 298SW314.

330-37 [c] **Statute requiring service of**

orders and judgments does not affect right of appeal lost before approval of statute by failure to serve and file notice of appeal as provided by law. 37 **Wyo** 396, 263P613.

330-41 269US82, 46SCt57; **Cal** 292P 495; **Cal** 292P497; **CalA** 286P1093. See also **CalA** 292P498; **CalA** 292P499 (1stcase).

330-42 **CalA** 286P469(2dcase); **Tex CivA** 295SW941 (statute construed to oust jurisdiction of appeal, perfected, but not submitted, before act became effective).

330-43 **TexCivA** 297SW333; **TexCivA** 298SW312.

331-48 316Mo 609, 291SW462; **Oh** 171 NE849; 37Wyo 61, 258P1018, 1019 [quotCJ].

331-51 224 IllA130, 133 [citCyc].

332-53 224 IllA130, 133 [citCyc]; **Oh** 171NE849; 37Wyo 61, 258P1018, 1019 [quotCJ]. [d] **Where there is decree for accounting** referred to master to take account and appeal is taken from decree determining account, writ of error thereafter sued out to review entire record supplants appeal. 254 IllA264.

332-54 224 IllA130, 133 [citCyc]; 37 **Wyo** 61, 258P1018, 1019 [quotCJ].

332-55 37Wyo 61, 258P1018, 1019 [quotCJ].

333-64 37GaA33, 138SE856. [b] **Decree retransferring cause from equity to law**, after prior transfer is not appealable while action is pending at law. 220Ala406, 125S645.

333-70 37GaA33, 138SE856. [c] (2) Defeated party has right to appeal by writ of error after expiration of term where motion for new trial had not been acted upon. **TexCivA** 285SW627.

333-72 28 OhA75, 162NE604.

333-72½-New. In some jurisdictions the office of motion for new trial in relation to appellate proceedings is solely to preserve exceptions in the form of a proper record, for use whenever, but not until, the proceeding in error may thereafter be brought, 37Wyo 61, 258P1018.

333-72½-New. and under statutes and rules of court the filing, submission for hearing, and exception to an order overruling it are not an integral part of the proceeding in error, so as to require dismissal of a direct appeal pursuant to a statute providing therefor. 37Wyo 61, 258P1018.

334-74 **Mo** 28SW(2d)1035 (appeal lies from order on motion for new trial).

334-80 15F(2d)49; 165Minn293, 206 NW434 (error in findings not carried into judgment); 108WVa71, 150SE231.

334-81 253Mass464, 149NE124.

335-83 107WVa614, 149SE832 (upon rejection of plea in bar).

335-84 49Nev411, 248P46 (it is frivolous to appeal from judgment when application to trial court will give entire relief).

335-85 36F(2d)646.

336-87 **NJSup** 137A415. [a] 83**Colo** 476, 266P213; 103WVa60, 136SE605.

336-88 **Mass** 170NE815.

336-89 **Ala** 128S902.

336-95 82**Colo** 369, 260P108; **SD** 229 NW390.

337-97 105**NJL**156, 144A8 (inadequacy of damages); 105**NJL**367, 144A545 (allowance of interest); 133SC23, 130SE 552.

337-99 105**NJL**629, 147A449(1stcase).

337-5½-New. One who complains of a judgment against him when he was absent should justify his absence in an application for a new trial, and not by appeal. 9LaA5, 118S773(1stcase).

337-10 **NJ** 148A721; **NJ** 151A97.

338-21 220Ala406, 125S645.

338-23 102Conn480, 129A379.

339-33 **TexCivA** 28SW(2d)929 (failure to act in vacation on motion to vacate appointment of receiver).

339-35 154Md40, 139A551 (where mandamus is not proper remedy, appeal from order cannot be considered as appeal by petition).

340-37 3LaA659.

340-39 3Del 593, 140A697.

340-40 12LaA269, 125S490 (order requiring election or ruling striking out demand to restrain foreclosure of chattel mortgage); 102**NJL**262, 132A86; **NJ Sup** 132A88(1stcase); **NJSup** 132A88 (2dcase); **NJSup** 132A88(3dcase).

340-43 102**NJL**262, 132A86; **NJSup** 132A88(1stcase); **NJSup** 132A88(2dcase); **NJSup** 132A88(3dcase).

341-53 156Tenn349, 18SW(2d)781.

342-68 239Mich110, 214NW175 (appeal and motion for rehearing).

342-69 132 Or311, 285P240 (appeal and writ of review).

342-71 41GaA353, 153SE99(2case); 116 Or94, 240P551; **TexCivA** 280SW 841; 37Wyo 61, 258P1018, 1019 [quot CJ]. [f] **Where, after motion for new trial, appeal is taken** it is presumed that the motion is abandoned. **TexCivA** 285 SW627.

343-72 37Wyo 61, 258P1018, 1020 [quotCJ]. [b] **Pending motion to dismiss appeal** appellant cannot be compelled to elect between error or appeal. Oh 171NE849.

343-73 **Oh** 171NE849; 37Wyo 61, 258 P1018, 1020 [quotCJ].

344-79 **TexCivA** 9SW(2d)461 (presentation of exceptions did not constitute an election to appeal from order overruling exceptions so as to preclude appeal from order granting temporary injunction); 37Wyo 61, 258P1018.

344-80 37Wyo 61, 258P1018.

344-81 37Wyo 61, 258P1018.

345-86 218Ala562, 119S610(1stcase); 265Mass116, 163NE766; **Mass** 165NE 496; **Mass** 165NE884; 143Miss184, 109 S8.

345-87 217Ala271, 116S124 (even though bill is amended if practically same case is involved); 44 **Ida**113, 255 P413; **TexCivA** 280SW841.

345-93 [a] (2) Where appellant had one appeal to another court of civil appeals, from judgment of trial court, and appeal was decided as if judgment against appellant was in fact entered of record in minutes of trial court, though entered nunc pro tunc, second appeal will be dismissed. **TexCivA** 274SW640.

345-94 144 **Okl** 164, 289P695; **Or** 291 P391; 54SD535, 223NW732(2dcase); **Wash** 289P18. But see **Cal** 292P647.

346-95 208**Cal** 256, 280P970.

346-96 239 IllA211, 212 [citCJ].

346-97 239 IllA211, 212 [citCJ]; 156 **Tenn**349, 18SW(2d)781.

346-4 141 **Okl** 143, 285P132; **Wash** 290P806.

348-15½-New. Where a cause has been appealed five times after trials saturated with perjury, it will be terminated as a public nuisance by affirmance where the judgment is supported by the evidence. 129Kan19, 281P925, 68ALR415.

348-16 224 IllA130; **MoA** 24SW(2d) 703; 25 **OhA**44, 158NE551; 35**Wyo** 1, 244P1006 [citCJ] (not deciding question). [c] **Subsequent appeal not dismissable** because taken one day prior to dismissal of first appeal. 98Fla186, 123 S699(2dcase).

349-18 30Hawaii429, 431 [quotCJ]; 35**Wyo** 1, 244P1006 [citCJ].

349-21 **Erratum.**-"Meacham v. Pinson, 60 Misc. 217" should be "Meacham v. Pinson, 60 Miss. 217."

349-23 **MoA** 8SW(2d)1021.

350-24 30Hawaii429, 431 [quotCJ]; 164La290, 113S851.

351-32 274US12, 47SCt480, 71L ed898; 161La227, 108S463; 33NM104, 263P 766; **SD** 224NW957; **Wash** 288P255. But see 235Ky180, 30SW(2d)897. [d] (5) See also 164La290, 113S851.

351-34 **TexCivA** 293SW664. [a] (3) Party cannot resort to both methods of appeal for delay only. **TexCivA** 293 SW664. (4) Right to abandon appeal and sue out writ of error is subordinate to appellee's right to have judgment affirmed on certificate. **TexCivA** 293SW664.

352-35 90Fla934, 107S918, 920 [citCJ].

352-36½-New. When time for appeal has not expired, Supreme Court may treat application for certiorari as appeal from judgment of lower court. 181 **Ark**693, 27SW(2d)96(1stcase).

352-37 215Ky100, 284SW1017. [c] **Appeal from order denying new trial after appeal from judgment.**-207 **Iowa** 252, 222NW872.

352-41 148**Wash**638, 269P852.

352-43 324 Ill 89, 154NE412; 216Ky 563, 288SW309; 149Miss764, 116S90.

353-45 218Ky5, 290SW671; 224Ky71, 5SW(2d)269. [d] 127 **Okl** 9, 251P611.

353-46 168Ark763, 271SW714.

353-48 See also 168Ark763, 271SW714.

353-50 166Ga719, 144SE275 ("crossbill of exceptions" is remedy for successful party to review rulings against him in event unsuccessful party succeeds in obtaining judgment in supreme court).

353-50½-New. Cross appeal essential to attack on part of judgment against appellee. 212Ky103, 278SW560.

353-50½-New. Plaintiff's right and obligations to perfect appeal from final decree are not enlarged or diminished by fact that defendant files cross appeal from interlocutory order denying motion to dismiss plaintiff's appeal. 258 Mass190, 154NE856.

353-50¼-New. Where a cross complaint was filed during the trial without the knowledge of the court or of opposing counsel and no notice was taken of it nor any order or judgment rendered concerning it, and no sufficient notice of it was given or filed, a cross appeal based thereon presents nothing for consideration. 68Utah524, 251P29.

353-50½-New. An appeal from a decree rendered subsequent to a decree appealed from by plaintiff is not a cross appeal. 215Ala247, 110S394.

353-50¼-New. Plaintiff's cross appeal was improperly taken when the decree granted him all the relief he sought. 31F(2d)914.

353-51 81**CalA**142, 253P357 (appeal from formal judgment of nonsuit entered upon order is unnecessary where appeal is taken from order of nonsuit); 108Conn1, 142A400; **Mo** 29 SW(2d)83; 50SD346, 210NW157; **SD** 227NW845 (appeal not double where time for appeal has expired as to one of two orders). [c] See also **SD** 227NW 845. [d] See also 50SD346, 210NW157. [e] **Cases submitted on agreed statement of facts** should be brought up for review by appeal or exceptions, but not both. **Mass** 167NE677.

354-52 29**PortoRico** 897 (disposing of three appeals); 50SD568, 210NW992.

354-53 163La1073, 113S459; 50Nev 191, 255P1010.

354-54½-New. Where a single blanket order is made in two probate cases without consolidation, two appeals from such order will not be deemed duplicitous unless it affirmatively appears that the appellant did not file the order appealed from, notice of appeal and appeal bond in each case. 120 **Okl** 199, 250P1015.

354-55 318Mo 948, 28SW(2d)771; 49 **ND**717, 193NW307; 142Va43, 128SE 615, 45ALR664. [b] (2) Where appeal has been taken from two judgments in two causes consolidated for trial purposes in lower court, and appeal in only one case is perfected and docketed, such perfected appeal is properly before the appellate court. 33NM114, 263P502. [c] (2) Where three beneficiaries are represented by same guardians and separate actions are consolidated, the cases require but one bill of exceptions, one record, and one writ of error. 5F(2d)71. (3) In some instances judgment in consolidated action may be reviewed by single bill of exceptions, although separate verdicts were rendered. 36GaA519, 137SE290.

354-56 49ND717, 193NW307; 119 **Okl** 241, 249P376; 142Va43, 128SE615, 45 ALR664.

355-57 35GaA587, 134SE197; 121 **Okl** 273, 249P732. [b] **Extent of review.**-121 **Okl** 273, 249P732.

355-58 244 IllA234; 225Ky100, 7SW (2d)849; 114 **Okl** 118, 242P531; 142Va 43, 128SE615, 45ALR664. [a] (1) 135 **Okl** 52, 274P672.

355-62 163Ga33, 135SE503; 34 **OhA**84, 170NE443.

356-65½-New. Appeal from order setting aside judgment supersedes appeal

from such judgment, 214AppDiv205, 212NYS20.

356–65¼–New. and raises every question necessary to be considered. 214 AppDiv205, 212NYS20.

356–67 34F(2d)27.

356–70 144Fed594, 599, 75CCA396; 81 Cal 408, 21P976, 22P742, 1028, 6LRA 594; 6Fla279; 19Fla19; 14 Ida64, 93 P31; 38 IndA439, 78NE338, 79NE520; 6Kan500, 7AmR575; 27 Okl 854, 113P 920. See to same effect 124Cal 468, 57 P379.

356–71 44Wis584; TexCommnA 12SW (2d)967. [c] **Court of equity** is not one of appellate jurisdiction. 213Ala92, 104 S258.

357–80 169Minn172, 210NW877; Mo 2 SW(2d)743 [quotCJ]. [c] **Judicial proceedings for determination of controversy between adversary parties** wherein rights are enforced or wrongs prevented may be case. Fla 128S862.

357–81 215Ky823, 287SW28; 1LaA371; 169Minn172, 210NW877.

358–84 274US106, 47SCt499, 71Led 949; 16F(2d)782; 174Ark943, 298 SW212; 79CalA199, 249P37; 102Conn 488, 129A384; 26Hawaii171; 201 Iowa 1197, 208NW706; 204 Iowa678, 216NW 41; 162La956, 111S341; 169Minn172, 210NW877; Mo 2SW(2d)743 [quotCJ]; MoA 278SW739, 740 [citCJ]; 78Mont56, 252P386; 116 OhSt16, 155NE555; 136 Okl 20, 275P1064(1stcase); 124 Or332, 263P391; 283Pa264, 129A62; 34Porto Rico 88; 114Tex490, 271SW1108; Tex CivA 272SW290; TexCivA 286SW264; 98Vt477, 129A175; 145Wash25, 258P 836; 36Wyo 522, 257P7. [g] (7) CalA 283P965; TexCivA 297SW904. [j] **In Canada** court is bound to answer abstract questions submitted to it under the Constitutional Questions Act, though no specific litigation before the court. Man [1927] 2DomLR50.

359–85 16F(2d)782; 169Minn172, 210 NW877; MoA 278SW739, 740 [citCJ]; 283Pa264, 129A62; 47RI 251, 132A545.

360–87 TexCivA 272SW290; TexCivA 275SW260.

360–89 168Ark763, 271SW714; 79CalA 199, 249P37; 164Ga391, 138SE774; 45 Ida333, 262P510; 119Kan555, 240P393; Mo 2SW(2d)743 [citCJ]; MoA 278SW 739, 740 [citCJ]; 153Tenn30, 281SW 925, 926 [citCJ].

362–92 146Va417, 131SE689, 132SE705.

362–93 79CalA199, 249P37; 145Wash 25, 258P836. [d] (2) Release pending appeal by plaintiff to one of two joint tort-feasors, not fully set forth in record, is held not to render questions of liability between the tort-feasors moot. TexCivA 297SW244.

364–98 274US106, 47SCt499, 71Led 949; 115 Okl 232, 242P534 (repeal of ordinance, enforcement of which was sought to be restrained).

364–99 164Ga391, 138SE774.

364–3 Mo 2SW(2d)743 [quotCJ].

364–5 164Ga391, 138SE774.

365–8 79CalA199, 249P37.

366–12 175Ark926, 1SW(2d)65; CalA 274P1028 (original jurisdiction in Superior Court); 317 Ill 312, 148NE59; 164La844, 114S707; 174Minn133, 218 NW546; 126 Or417, 270P502; 128 Or 405, 272P171; 288Pa56, 135A639; Tex CivA 291SW266; TexCivA 294SW305; TexCivA 296SW639; TexCivA 296SW 967; TexCivA 297SW234; TexCivA 20 SW(2d)855; TexCivA 23SW(2d)748; TexCivA 29SW(2d)890; Utah 264P968, 973 [citCJ]; 193Wis635, 215NW583; 195Wis545, 218NW829.

367–13 TexCivA 296SW639.

367–14 40F(2d)445; 173Ark781, 293 SW722; 157Miss559, 128S734; Tex CivA 275SW268; TexCivA 291SW644; TexCivA 296SW639.

367–18 Fla 130S11; 219MoA330, 271 SW1014. [d] (5) Waived by failure to take timely appeal from judgment determining preliminary question of jurisdiction though merits not tried in the meantime. 12PaDist&Co 550.

367–19 AlaA 130S520; 47RI 122, 130 A861; TexCivA 8SW(2d)241; TexCivA 294SW244.

368–20 307Mo 10, 269SW395; 219MoA 330, 271SW1014; TexCommnA 299SW 213; TexCommnA 25SW(2d)820. **Erratum.**–Strike out "Fla.—Seaboard Air Line R. Co. v. Ray, 52 Fla. 634, 42 S 714."

368–21 317 Ill 312, 148NE59.

368–26 219MoA330, 271SW1014.

369–28 318Mo948, 2SW(2d)771 (sufficiency of pleading may not be passed upon); 116Tex1, 285SW1063, 1074 [cit CJ].

369–28½–New. In Illinois it is the duty of the court to decline to proceed in a case where it lacks jurisdiction. 318 Ill 193, 149NE292.

369–28¼–New. Decisions of the intermediate appellate court made without jurisdiction are considered void by the supreme court. 232 IllA461.

369–30 278US63, 49SCt61, 73Led184, 62ALR785; US 51SCt8; 36GaA423, 136 SE813; 317 Ill 312, 147NE59; 322 Ill 147, 152NE595; 325 Ill 398, 156NE280; 327 Ill 103, 158NE441; 333 Ill 489, 165 NE163; 162La350, 110S555; 10LaA276, 120S705; 170Minn225, 212NW198, 199 [citCJ]; 174Minn133, 218NW546; Minn 233NW316(2dcase); 315Mo 1239, 288SW 38; 317Mo 122, 296SW123; Mo 297 SW967; 319Mo 854, 5SW(2d)4; Mo 8SW (2d)973; Mo 8SW(2d)979; 322Mo 444, 17 SW(2d)342; Mo 20SW(2d)69; Mo 31SW (2d)805; 49Nev451, 248P893; Nev 254 P698; 31NM514, 247P826; 32Porto Rico 44 [quotCJ]; 116Tex29, 48ALR 355, 285SW1079, 1084 [citCJ]; Tex CivA 275SW96; TexCivA 296SW639; Utah 279P609; 200Wis61, 227NW272; Wis 230NW720.

370–31 32PortoRico 44, 45 [quotCJ]. [a] 32PortoRico 44, 45 [quotCJ].

370–32 TexCivA 296SW639; 227Ky634, 13SW(2d)782.

370–35 36GaA423, 136SE813; 208 Iowa 1133, 224NW505; 170Minn225, 212NW 198, 199 [citCJ].

371–39½–New. Admissions may be considered in construing the record. 319 Mo 337, 4SW(2d)776.

371–44 220Ala12, 123S573(4thcase); 23 AlaA261, 123S293; 34Ariz26, 267P416 (appeal taken before filing of formal judgment); 317 Ill 312, 148NE59; 322 Ill 147, 152NE595; 319Mo 854, 5SW(2d) 4; 322Mo 444, 17SW(2d)342; 49Nev451, 248P893; TexCivA 283SW1112. But see Oh 171NE849.

371–44½–New. Jurisdiction may not be waived by the court. TexCivA 283SW 1112.

371–46 82Mont126, 266P387, 392 [cit CJ]. [b] **Failure to present question by bill of exceptions.**–Where defendants in trespass to try title did not present question of improvements in good faith by bill of exceptions to rejection of evidence thereon, court's failure to pass on question does not affect finality of judgment for purposes of appeal. TexCivA 3SW(2d)822.

371–50 33F(2d)703; 43F(2d)521; CalA 285P332; CalA 285P335; 46 Idal, 265 P701; 143Miss643, 109S721; 143Miss 643, 113S433; 309Mo18, 274SW359; MoA 280SW438; 72Mont449, 235P707; 34NM43, 277P21; 142 Okl 240, 286P340; TexCommnA 13SW(2d)677; TexCivA 27SW(2d)827(2dcase) (jurisdiction of lower court). [c] (2) Burden rests upon appellant to bring himself within reasonable construction of some statute authorizing appeal. 88 IndA134, 163NE 536. [d] **Matters considered in determining jurisdiction.**–208Cal 286, 280P 980; 208Cal 279, 280P982.

372–51 143Ga643, 113S433; 142 Okl 240, 286P340.

372–53 14F(2d)406; 25F(2d)301 (federal court); 37F(2d)14 (finality of order must be determined by appellate court sua sponte); 38F(2d)420; 43F (2d)973; 143Ga643, 113S433; 322 Ill 528, 153NE618; 327 Ill 103, 158NE441; 336 Ill 279, 168NE298; 162La350, 110S 555; 10LaA276, 120S705; 168La997, 123S653; LaA 129S423; 148Miss259, 114S321; 148Miss562, 114S347; 155Miss 721, 124S341; 310Mo 519, 276SW622; Mo 288SW16; 315Mo 1239, 288SW38; Mo 297SW967; 318Mo 135, 298SW760; 319 Mo 569, 4SW(2d)1062; 319Mo 854, 5SW (2d)4; Mo 8SW(2d)973 (jurisdiction may be raised sua sponte by court); Mo 8SW(2d)979; 322Mo 866, 17SW(2d)327; 322Mo 444, 17SW(2d)342; 322Mo 1209, 18SW(2d)428; Mo 19SW(2d)641; Mo 19SW(2d)648; Mo 20SW(2d)69; Mo 31 SW(2d)805; Mo 31SW(2d)1038; MoA 15 SW(2d)860; MoA 23SW(2d)186; Nev 286P120; 31NM576, 249P242; 115 Okl 169, 241P1105 [quotCJ]; 138 Okl 205, 280P574; 141 Okl 205, 284P646; 47RI 108, 130A863; 67Utah501, 248P477; Utah 279P609.

372–56 27Hawaii143 (certifying public contract); Alta [1927] 3DomLR690 (order of master staying mortgage sale). [e] (3) Order of clerk of district court denying motion to tax costs and enter judgment is not appealable. 178Minn 232, 226NW700. [j] **Refusal of district judge to approve sheriff's account for fees** is not reviewable by appeal. Tex CommnA 280SW1062. [k] **In North Carolina.**–189NC805, 128SE329. [l] **If case originates before board, officer, or other tribunal,** reviewable by superior court, no appeal lies to supreme court in absence of statute. Ariz 283P726 (application to state water commissioner). [m] **Where proceeding originates in superior court,** appeal lies to supreme court. Ariz 283P726 (proceeding to determine water rights).

373–57 [g] **In matters of administrative, ministerial, or discretionary actions** there is no right of appeal without express statutory authority. Ind 171NE 65.

373–58½–New. In claim and delivery plaintiff may appeal from clerk's judgment of nonsuit to superior court. 191 NC731, 133SE16.

373–58¼–New. In Ontario judge hearing application under Dower Act for order dispensing with wife's signature to deed is persona designata and no appeal lies from his decision. Ont [1930] 2DomLR 84.

373–59 8F(2d)435 (decision of judge without written waiver prescribed by statute amounts merely to decision of arbitrator).

373–61 7PaDist&Co 592. [b] **Public accountant, who deems himself aggrieved** by refusal of auditor of territory to indorse on public contract his certificate that there is available and unexpended appropriation or balance sufficient to cover amount required by contract, is authorized to appeal from such ruling to justices of supreme court. 27 Hawaii143. [c] **Legislature may grant or withhold** right of appeal from administrative board except as to appeal on constitutional grounds. 14PaDist&Co 327.

374–63 202Cal 760, 262P735; 84 IndA 125, 149NE356 (ruling of state tax board cannot be reviewed); 84 IndA260, 151 NE31; 21SaskL78, [1926] 4DomLR724, [1926] 2WestWkly797.

374–65 CalA 278P468(1stcase); CalA 283P982 (cause of action held to have accrued within city limits as respects rights of appeal; and judgment of intermediate court is final); 35 OhA152, 171NE865. [c] **In California.**–CalA 284 P1095(2dcase).

374–66 82CalA46, 255P248. See also 86CalA187, 260P557. [b] **In California.** –CalA 283P982. [c] **Constitutional question** raised for first time by appellate court's judgment authorizes review by writ of error. 337 Ill 641, 169NE736.

374–66½–New. In Canada the supreme court will not entertain an appeal from a discretionary order of a provincial court of appeals granting a new trial. [1926] CanSC312, [1926] 3DomLR704.

375–69½–New. Phrase "suit or proceeding at law or in chancery" construed. 339 Ill 162, 171NE186 (suit charging defendant with possessing automobile with altered engine number).

375–70 234 IllA306; 193 Ind429, 153 NE890.

376–73½–New. An appeal will not lie from the decision of the minister to forfeit a mining lease for failure to work. NS [1927] 2DomLR588.

376–76 [j] See also MoA 289SW24.

377–78 73Conn715, 49A198. [a] (3) Also, in British Columbia, no appeal lies from decision of judge trying issue with less than legal number of jurors by consent, as judge and jurors are arbitrators. BC [1925] 3DomLR940. (4) Not appealable under statute authorizing

appeal in a "civil action." 42 OhSt312.
377–82 298Pa411, 148A709.
377–83 86 IndA619, 158NE925; 121Kan385, 247P844; 123Kan632, 256P989; 124Kan370, 260P525; 209Ky607, 273SW456; 215Ky335, 285SW207; 216Ky685, 288SW678; 217Ky660, 290SW475; 218Ky376, 291SW408; 221Ky424, 298SW1105; 225Ky105, 7SW(2d)855; 227Ky624, 13SW(2d)782 (judgment void); 231Ky811, 22SW(2d)288; 10LaA525, 121S333; LaA 129S569; 19PickMass546; TexCivA 283SW876; 145Va366, 133SE671; 142Wash44, 252P154.
378–84 142Wash44, 252P154 (five dollars).
379–92 117Or673, 244P82 (rule applied to appeal from that part of decree in specific performance suit providing for recovery of specific amount for attorney's fee less than jurisdictional amount required in action at law); 141Wash14, 250P452. [d] **Order modifying alimony** is reviewable irrespective of amount. 137Wash284, 242P388.
379–95 217Ky647, 290SW519.
380–99 Miss 115S437; TexCivA 6SW(2d)126.
380–2 CalA 285P332; CalA 285P335; 230Ky632, 20SW(2d)467; LaA 130S668; TexCivA 298SW300; TexCivA 4SW(2d)992.
381–7 293Pa478, 143A186.
381–8 [b] 122Kan274, 252P234.
383–35 234Ky396, 28SW(2d)467 (personal injuries).
384–44 But see 225Ky105, 7SW(2d)855.
384–45 225Ky606, 9SW(2d)722; LaA 129S569.
385–53 LaA 129S569.
385–59 [b] **In Nevada.**–48Nev100, 227P1016, 232P783.
388–93 215Ky335, 285SW207; 12LaA162, 125S293 (injunction involving real property rights).
388–95 148Wash120, 268P141.
389–2 [a] **Judgment against town for shutting off water** was not controversy concerning right to levy tolls and taxes. Va 153SE734.
390–12 218Ky244, 291SW47.
392–38 [b] **Jurisdiction will be exercised only so far as validity of statute** is involved. 152Wash327, 277P852.
393–43 225Ky105, 7SW(2d)855. [c] **Claim for minor's lien** is not "title to real estate" so as to fall within the exception as to amount in controversy. 18BC41, 9DomLR439, 23WestLR33.
394–44 218Ky244, 291SW47.
395–51 318Mo 948, 2SW(2d)771, 775 [citCJ].
395–54 318Mo 948, 2SW(2d)771, 775 [citCJ].
395–55 Contra 215Ky1, 284SW83. [a] 215Ky1, 284SW83. [b] (3) If debt is below jurisdictional amount, appellate court does not have jurisdiction merely because debt is secured by contractual lien. 225Ky105, 7SW(2d)855. [c] (2) Under such statute judgment refusing to set off judgment for less than five hundred dollars against mortgage debt in action to foreclose mortgage is not appealable. 218Ky244, 291SW47.
396–59 CalA 285P332.
397–66 See also 218Ky376, 291SW408 [citCJ].
397–67 LaA 129S569. [d] (1) 9LaA313, 119S477.
398–75 LaA 130S668; TexCivA 298SW300 (damages held insufficiently pleaded); 66Utah300, 242P348; 142Wash44, 252P154.
399–79 123Kan44, 254P390.
399–87 9LaA264, 119S268 (evidence is controlling, not pleading).
400–92 117Tex155, 299SW228; 66Utah300, 242P348.
401–96 TexCivA 289SW751, 752 [quot CJ].
401–97 TexCivA 289SW751, 752 [quot CJ].
401–97½–New. or an affidavit for sequestration in a suit to foreclose a mortgage, TexCivA 289SW751.
401–99 231Ky396, 21SW(2d)480.
401–2 29Hawaii846; Iowa 232NW839; 231Ky416, 21SW(2d)656; 5LaA301; 6LaA204; 8LaA333; 117 Or358, 243P1116; 121 Or40, 252P399; 144Va21, 131SE203 (is essence and substance of judgment by which party may discharge himself); 142Wash44, 252P154; Can [1929] 3DomLR686; 61 OntL649, [1928] 2DomLR70. See also 8LaA756.
403–10 123Kan44, 254P390.
403–11½–New. Whether defendants claimed certain items of damage in reconvention for the fraudulent purpose of giving the appellate court jurisdiction is immaterial where such items were not recovered and would not have conferred such jurisdiction. TexCivA 284SW643.
404–14 9LaA264, 119S268.
404–20 145Va366, 133SE671.
405–21 TexCivA 298SW300.
405–26 86CalA191, 260P805; TexCivA 284SW643. [a] (3) In Mississippi, if on appeal from justice's court to circuit court difference between plaintiff's demand and judgment recovered exceeds fifty dollars, he may appeal to supreme court. 142Miss555, 107S383.
406–28 140Miss580, 106S627.
407–30½–New. Where separate assessments on separate lots are each less than the jurisdictional amount but in the aggregate exceed it, an appeal lies from an adverse judgment in the district court on appeal where the controversy over the several assessments was treated throughout as one proceeding. 202 Iowa1155, 211NW856.
407–32 40QueKB386, [1927] 1DomLR159, 7CanBankr694.
407–33 10LaA276, 120S705; LaA 129S569.
408–35 TexCivA 270SW1050; TexCivA 284SW643. But see 142Wash44, 252P154.
408–36 TexCivA 6SW(2d)126.
409–39 124Kan370, 260P525; TexCivA 28SW(2d)233.
410–40 LaA 129S569; LaA 130S668; 142Wash44, 252P154; 40QueKB386, [1927] 1DomLR159, 7CanBankr694.
410–41 [a] 127Kan251, 273P406.
410–43 20SaskL501, [1926] 3DomLR133, [1926] 2WestWkly297.
411–52 124Kan486, 260P972; 209Ky173, 272SW415; 217Ky647, 290SW519; 9LaA264, 119S268; 10LaA703, 120S645.
413–56 229Ky510, 17SW(2d)448.
413–57 152Miss869, 120S187.
413–59 217Ky647, 290SW519; 217Ky660, 290SW475; Miss 116S751; Can [1929] 2DomLR205(1stcase).
415–70 [a] Contra Can [1930] 1DomLR1006(2dcase).
416–81 67Utah501, 248P477.
416–82 TexCivA 298SW300.
417–84 167La520, 119S535.
417–85 146Miss260, 111S293, 294 [cit CJ].
418–87 146Miss260, 111S293, 294 [cit CJ].
418–92 124Kan612, 261P581.
419–96½–New. Where the amount sought on counterclaim exceeds the minimum pecuniary jurisdiction of the supreme court, appeal will be heard, although the original demand was for less than the jurisdictional amount. 322Mo 955, 19SW(2d)721.
419–97 200 Iowa840, 205NW520.
419–1 TexCivA 283SW(2d)876.
419–3 121 Or40, 252P399.
422–25 140Miss580, 106S627.
423–36 TexCivA 11SW(2d)849.
424–39 9LaA655, 121S656; 13LaA575, 127S91.
425–45 11LaA290, 123S409.
426–55 [1927] CanSC17, [1927] 1DomLR356.
426–56 6LaA144.
428–71 [1926] CanSC651, [1927] 1DomLR1056.
430–82 See also 8LaA18.
430–83 TexCivA 292SW288.
432–5 239 IllA496; 5KyOp37; 125Me206, 132A421 (under statute); MoA 19SW(2d)553; 103NJL405, 135A873; TexCivA 293SW335; TexCivA 26SW(2d)669; 142Va244, 128SE524.
433–6 245NYS657.
433–7 15F(2d)443; 16F(2d)337; 37F(2d)14; 40F(2d)353; 214Ala465, 108S35; 216Ala660, 114S40; 220Ala12, 123S573(4thcase); 31Ariz460, 254P232; 173Ark90, 291SW981; CalA 284P514; 82Colo421, 260P688; 108Conn304, 142A838; 163Ga135, 135SE505; 163Ga643, 136SE793; 163Ga662, 136SE911; 164Ga705, 139SE354; 164Ga772, 139SE537; 34GaA333, 129SE290; 36GaA115, 135SE520; 36GaA448, 136SE920; 36GaA703, 137SE848; 45 Ida358, 262P509; 323 Ill 283, 154NE105; 324 Ill 579, 155NE474; 325 Ill 472, 156NE341; 328 Ill 134, 159NE192; 224 IllA417; 232 IllA461; 84 IndA176, 149NE108, 150NE65; 84 IndA642, 151NE830; 87 IndA117, 166NE614; 124Kan475, 260P625; 225Ky346, 8SW(2d)425; 225Ky823, 10SW(2d)277; 234Ky626, 28SW(2d)965; 161La725, 109S402; La 114S489; 170La587, 128S524; 2LaA530; 8LaA189; 151Md52, 133A831; 258Mass319, 154NE863; 232Mich388, 205NW98; 221MoA308, 273SW169; MoA 294SW423; MoA 23SW(2d)186; 79Mont530, 257P465; 103NJL596, 137A568; 105NJL649, 146A423 (1stcase); NJ 148A719(1stcase); NJ 148A762; NJSup 135A59; 241NY541, 150NE546; 193NC834, 136SE732; 30OhA151, 164NE539 (preliminary or interlocutory order is not reviewable); 121 Oh478, 169NE566 (order declaring mistrial is not final order); 133 Okl 59, 270P1106; 113 Or552, 233P848; 289Pa94, 137A127; 290Pa550, 139A452; 294Pa137, 143A786; 88PaSuper158; 89PaSuper484; 97PaSuper386; 98PaSuper162; 44Philippine74; 48RI 60, 135A241; 49RI 421, 143A697; TexCivA 278SW950; TexCivA 284SW350; TexCivA 285SW834; TexCivA 285SW843; TexCivA 4SW(2d)304; TexCivA 5SW(2d)606; TexCivA 13SW(2d)152 (judgment held final); 36Wyo 522, 257P7; BC 11DomLR75, 24WestLR47.
436–8 77CalA786, 247P543; 164Ga772, 139SE537; 334 Ill 383, 166NE90 (1st case); 335 Ill 406, 167NE59; 203 Iowa245, 212NW567; 203 Iowa1399, 214NW561; Iowa 233NW57(2dcase); 124Kan475, 260P625; Mass 173NE439(1stcase); 117 Or271, 243P559; 289Pa94, 137A127; RI 139A427; 156SC89, 152SE825(1stcase); 48SD467, 204NW945; TexCivA 286SW584. [a] **Test of right of appeal from an interlocutory order** is whether question is, or will be, inherent in final judgment and may be presented on appeal therefrom. 203 Iowa1399, 214NW561. [b] **Only by report of judge entering decree** can appeal from interlocutory order be brought to supreme court in Massachusetts. Mass 173NE439(1stcase).
437–11½–New. The reason for the rule is prevention of repeated appeals. 36 Wyo 522, 257P7.
437–11½–New. No appeal lies from an award in expropriation proceedings, even though the court is that of final resort in the province. Can [1927] 2DomLR83.
437–11¼–New. In determining whether any particular form of judicial action is appealable, it is not the form, but the nature of the adjudication, that is considered. 197Wis284, 221NW860.
437–13 216Ala177, 112S837; 220Ky708, 295SW1020; 120 Okl 78, 250P518.
437–14 34Ariz26, 267P416; 142Va244, 128SE524.
437–15 216Ala177, 112S837; 120 Okl 78, 250P518.
438–16½–New. There is no practice of appealing a "cause." 224 IllA417.
438–16½–New. Arbitration and award. Where any award has been entered of record, so much thereof as decrees payment of money becomes in effect final judgment. 90Fla900, 107S241.
438–16¼–New. But a record must show that statement and award were entered of record as the law requires before jurisdiction attaches either to arbitrators or to court to make award final judgment. 90Fla900, 107S241.
438–18 TexCivA 3SW(2d)103.
438–25 216Ala224, 112S834; 203 Iowa1399, 214NW561; 155Miss721, 124S341; 156Miss656, 126S484 (no appeal from decree denying support money pending divorce suit); 156Miss795, 126S838; ND 231NW545; 117 Or271, 243P559; 125 Or60, 253P12; 124 Or214, 264P359; 94PaSuper562; TexCivA 282SW879. [h] 128Misc444, 218NYS315. [i] **Right of appeal from interlocutory order is not guaranteed by constitution.**–TexCivA 282SW879. [j] **Where equity of bill upheld.**–218Ala82, 117S641.

[k] **Pennsylvania statute permitting appeals on jurisdictional questions** does not apply where appeal is not taken from court of first instance. 91PaSuper123.

441–42 326 Ill 327, 157NE247; TexCiv A 18SW(2d)681 (judgment of dismissal).

441–45 176Ark31, 2SW(2d)70; 201Cal 194, 256P202; Fla 128S412; 163Ga643, 136SE793; 163Ga662, 136SE911; 45 Ida358, 262P509; 335 Ill 406, 167NE59; 338 Ill 537, 170NE772; Ind 154NE12; TexCommnA 293SW167; Utah 264P724; 23Vt622; Va 149SE615; 36Wyo 522, 257 P7.

442–46 216MoA614, 260SW538; 34 PortoRico 842; TexCivA 20SW(2d)104.

442–47 Iowa 227NW595; 146Va827, 132SE685. [d] **Final decree terminates suit or definitely determines rights of parties and leaves nothing further to be done by court,** though it may still enter decrees and orders necessary to carry decree into execution. 142Va244, 128 SE524.

442–48 176Ark31, 2SW(2d)70; Ind 166 NE659; 297Pa212, 146A537. See also 157Md160, 145A375.

442–49 23F(2d)682.

442–50 TexCivA 291SW605.

442–53 216Ala380, 113S84; 323 Ill 283, 154NE105; 83Mont391, 272P688.

442–54 200 Ind732, 148NE148; TexCiv A 297SW531; TexCivA 48W(2d)304.

443–56 124Kan475, 260P625. [a] **Orders preserving status quo.**–120 Okl 78, 250P518 (order restraining interference with property).

443–57 Ind 166NE659; 45Philippine 117. [b] **Judgment refusing to strike garnishee's motion to answer nunc pro tunc** after expiration of term, and in allowing filing of answer, is not a final judgment. 34GaA62, 128SE208.

443–58 213Ala374, 104S814 (orders denying motions of public service commission to dismiss appeal from and strike order to supersede order denying application for rehearing after order reducing rates); 31Ariz460, 254P232; 124Kan475, 260P625.

443–59 36F(2d)34; 208Cal 559, 282P 794 (judgment canceling certain conveyances but requiring accounting to referee); 163Ga643, 136SE793; 199 Ind 737, 164NE493; 230Ky375, 19SW(2d) 992; MoA 23SW(2d)186; 79Mont530, 257P465; 52ND155, 201NW997, 38ALR 807 (order overruling objection to jurisdiction of judge is not appealable); 124 Or 214, 264P359; 287Pa578, 135A 721; Utah 264P724 (judgment reciting that jury returned verdict but not awarding any judgment in favor of one party against other is not final); 146 Va827, 132SE685; 47CanSC559, 11DomLR152, 24WestLR131; 48CanSC497, 15DomLR342, 26WestLR570. See also 243NY520, 154NE588; 243NY522, 154 NE589; TexCivA 48W(2d)304.

444–60 108Conn304, 142A838; 163Ga 662, 136SE911; Iowa 231NW431; 243 Mich406, 220NW812.

445–63 [a] 198Cal 525, 246P39. [b] **Words "go hence" held synonymous with "go home"** so as to constitute final judgment. TexCivA 20SW(2d)104.

445–63½–New. A judge, signing an interlocutory judgment, does not make it final. 168La805, 123S332(1stcase).

445–66 323 Ill 283, 154NE105; 79 Mont530, 257P465.

446–71½–New. Judgment of dismissal is final for purposes of appeal. Tex CommnA 288SW406.

446–71¼–New. A memorandum signed by the judge, containing a direction to enter judgment, but containing no finding of issues in the judgment file has been held not appealable as "final judgment." 109Conn45, 145A151.

446–71¼–New. Not every order which ends a proceeding is a final order in the sense relating to appeals. 250NY355, 165NE809.

446–72 [a] In Ohio.–25 OhA153, 157 NE907.

446–82½–New. A decree does not become final and appealable until the subsequent term at which the motion to set it aside is denied. 107WVa192, 147 SE877, 66ALR102.

446–83 19F(2d)503.

446–85½–New. Order that fund paid into court by defendant on suit of plaintiff be paid over to former's trustee in bankruptcy is interlocutory order and not appealable. TexCivA 278 SW950.

446–85¼–New. Decree making interlocutory decree the decree on the bill, although defective in form, is sufficient to give the circuit court of appeals jurisdiction of an appeal therefrom. 23 F(2d)600.

446–88 29F(2d)481 (decree not final judgment); 175Ark128, 298SW865; 97 CalA757, 276P387(1stcase); Fla 128S 412; 47 Ida422, 276P305(1stcase); 85 IndA614, 155NE212; 169La384, 125S 280; 169La475, 125S453; 12LaA21, 124 S853; 148Md390, 130A45; 243Mich406, 220NW812; Mo 8SW(2d)879; 84Mont 500, 277P11; 299Pa291, 149A319 (partition entirely omitting one purpart); TexCivA 282SW608; TexCivA 16SW (2d)312. [b] (2) Judgment sustaining exception of no cause of action as to verbal contract, and overruling it as to written agreement, is not final judgment which is appealable. 168La805, 123S332(1stcase). [h] **Partition** does not become fixed for purposes of appeal till all purparts are awarded. 299Pa 291, 149A319.

447–90 243Mich406, 220NW812. [b] But see 110Conn319, 148A353 (judgment on equitable issues held appealable).

448–91 Va 149SE615 (as regards to time of bringing appeal).

448–92 84 IndA642, 151NE830; 85 Ind A600, 154NE504. [c] **Dismissal of cross complaint.**–85 IndA600, 154NE504.

448–93 20F(2d)845 (reviewing cases); 318 Ill 64, 148NE852; 323 Ill 122, 153 NE718 (order held appealable as to dismissal of cross bill only); 252NY168, 169NE 127; TexCivA 27SW(2d)374. [c] TexCivA 282SW608. [l] **Order is final and appealable** where it restrains plaintiff from seeking to establish lien against defendant's land and canceling lis pendens. TexCivA 282SW608. [m] **Judgment disposing of intervention** where suit against original parties was continued for term will be treated as severed and therefore appealable. Tex CivA 282SW608.

448–93½–New. A decree may be final in its determination of all issues of law and fact and interlocutory as to its mode of execution. 161Ga698, 132SE 626.

448–93¼–New. An order is final and appealable if it settles substantial rights, without reservation as to effect, and is designed to operate before, or irrespective of, final decree in main litigation. 2CF(2d)845.

449–94 269US125, 46SCt52, 70Led195; 171Ark96, 283SW47; 161Ga698, 132SE 626; 323 Ill 283, 154NE105; 254 IllA 264; 250NY296, 165NE454(1stcase) (judgment final though denominated interlocutory); 36BC386, [1927] 1DomLR 279. [a] **In suit for dissolution of partnership,** judgment for accounting and one half of profits shows on its face it is not final appealable judgment. Tex CivA 26SW(2d)669.

449–95 12F(2d)710; 323 Ill 283, 154NE 105.

449–96 195Cal 242, 233P94; 96CalA 365, 274P405; 50Philippine148.

449–96½–New. A judgment, although leaving the case open for further proceedings and affecting only the rights of certain parties, may be final as regards an appeal. 108Conn304, 142A838.

450–97 TexCommnA 286SW193.

450–98 85 IndA62, 152NE877; Tex CommnA 286SW193.

450–99 TexCivA 275SW617 (judgment in general terms disposed of cross action by necessary implication).

450–1 TexCivA 281SW339 (judgment for specific performance held final, though plaintiff had not paid sum on payment of which judgment was to be executed).

451–5 118 Oh106, 160NE629.

451–6 164Ga772, 139SE537.

451–7 22F(2d)715; 100CalA572, 280P 697; 230Ky97, 18SW(2d)965 (order determining construction of deed in action to recover land and damages is not final order); MoA 23SW(2d)186; 33Porto Rico 17.

451–8 75CalA91, 242P82; 318 Ill 64, 148NE852. [c] (1) 75CalA91, 242P82. (3) Order granting motion to substitute new attachment bond is appealable. 75 CalA91, 242P82. [d] **Judgment holding chattel mortgage valid** on creditor's objection to preference by another creditor is final judgment and appealable. 88 IndA179, 155NE262.

451–8½–New. The right to appeal from orders not resting on express statutory authority is sustained on the theory that the order is in effect a final judgment against a party in a collateral proceeding growing out of the action and so far independent of the action itself as to be substantially a final decree. 198 Cal 525, 246P39.

452–9 48SD467, 204NW945.

452–10 176Minn11, 222NW295.

452–12 [a] (33) Order dismissing action after argument of counsel. 36Wyo 318, 255P1. (34) Order which deprives party of mode of trial which law allows him is appealable. 133SC149, 130SE 881. (35) Other instances. 179Minn 136, 228NW558; Pa 151A811.

453–13 [a] (28) Order requiring bill of particulars. 48SD467, 204NW945. (29) Order permitting defendant to pay into court and substitute other claimant as defendant. 176Minn11, 222NW295. (30) Other orders not appealable. Minn 230NW113.

453–17 169Minn392, 211NW470; 198 NC596, 152SE794 (interlocutory order is not appealable unless it prejudicially affects substantial right of party); 41ND 316, 171NW632.

454–20 [a] (3) 32F(2d)844. (39) Order refusing motion to require plaintiff to elect between separate and several acts of negligence and joint acts. 132 SC507, 128SE711. (40) Order vacating ex parte order bringing in additional party defendant. 169Minn392, 211NW470. (41) Other orders held appealable. TexCivA 275SW147. (42) Other instances. 220Ala245, 124S907.

454–21 [a] (24) Denial of motion to direct verdict, not followed by judgment or other disposition of action. 212App Div644, 209NYS419. (25) Order refusing motions to make complaint more definite and certain by setting out ordinances, improvements, and appliances referred to in negligence case. 132SC 507, 128SE711. (26) Order permitting filing of supplementary complaint. 172 Minn368, 215NW516.

455–24 Iowa 231NW431; 25 OhA360, 157NE907; 113 Or552, 233P848 [quot CJ]; 125 Or60, 253P12; 291Pa472, 140 A270.

455–25 50ND638, 197NW589; 132 Okl 107, 269P368; 113 Or552, 233P848 [quotCJ]; 117 Or271, 243P559; 125 Or 60, 253P12; 48SD467, 204NW945.

455–25½–New. Orders from which appeal may be taken must either possess or partake of the quality of finality. 113 Or552, 233P848.

455–27 [a] (1) 21F(2d)152.

456–28 [a] (24) 49ND140, 190NW314. (30) 117 Or271, 243P559. (61) Order requiring bill of particulars. 48SD467, 204NW945. (62) Order denying motion for judgment notwithstanding disagreement of jury. 49ND140, 190NW314. (63) Order directing payment of alimony and suit money pending suit for divorce. 125 Or60, 253P12. (64) Order temporarily enjoining defendant from disposing of his property pending suit against him for divorce. 125 Or60, 253 P12. (65) Order permitting filing of supplementary complaint. 172Minn368, 215NW516. (66) Removing case from court to jury calendar. Wis 232NW 598. (67) Other orders not appealable. Minn 230NW113.

457–29 162Ga659, 134SE921; 163Ga 662, 136SE911. [a] (12) Order refusing to dismiss case. 163Ga662, 136SE911.

457–30 77CalA321, 246P334; Wis 232 NW861.

457–31 194Cal 139, 228P8; 199Cal 699, 251P205; 74CalA152, 239P856; 44 Ida 363, 257P38; 211Ky394, 277SW466; 33 NM109, 263P764; 34NM559, 286P827; 49ND64, 189NW681; Wis 230NW79. But see 213Ala490, 105S651. [a] **Order held not appealable.**–85 IndA600, 154NE

504. [b] **When special orders after judgment appealable.**–198Cal 85, 243P 417.

458–32 199 Ind528, 151NE1; SC 155 SE406; TexCivA 31SW(2d)856. [a] (6) Interlocutory order for delivery of possession of real property held appealable. 199 Ind528, 151NE1. (7) Decree granting all relief prayed for in bill to perpetuate testimony held final decision and reviewable by circuit court of appeals. 32F(2d)734. [b] (4) Other orders not appealable. Minn 230NW113.

458–33 199 Ind528, 151NE1; 50Nev 191, 255P1010. Contra 160La839, 107 S593. [a] In Texas.–CivA 3SW(2d) 103.

458–34 50Nev191, 255P1010; 287Pa 291, 135A131; TexCivA 288SW566.

458–34½–New. An order requiring receivers of a drainage district to pay funds to holders of first issued bonds is appealable. 19F(2d)513.

458–34¾–New. A decree in a receivership proceeding allowing certain claims is not final so as to be appealable. 126 Me603, 139A85.

458–34¼–New. A decree denying recovery on an injunction bond for attorney's fees incurred in obtaining a dissolution is final and appealable. 24F(2d)879.

458–40½–New. An interlocutory order consolidating suits is held not a "final judgment." TexCivA 300SW188.

458–42 258Mass319, 154NE863.

459–45 216Ala380, 113S84; 171Ark96, 283SW47; 176Ark31, 2SW(2d)70; 83 CalA352, 256P580. Compare 243Mich 406, 220NW812.

459–47 86Colo 54, 278P592; 126Me603, 139A85; 99WVa447, 129SE469 (necessary ordinarily that all questions properly raised by pleadings be adjudicated). [d] **Order granting motion to dismiss bill in equity** is not appealable. 9F(2d) 390 (unless followed by final decree).

459–48 [a] (1) 156Miss656, 126S484 (decree denying divorce plaintiff support money pending suit). (8) Order removing complainant and substituting intervener is appealable under statute. 143 Miss467, 106S818.

459–49 148Miss562, 114S347. [a] (1) 142Va244, 128SE524. (15) Decree in will case disallowing special plea of prior suit and requiring defendant to answer held not to make any disposition of prior suit. 142Va244, 128SE524. (16) Interlocutory decree, sustaining demurrer on ground that bill did not state grounds for accounting and discovery and transferring cause to circuit court, is not appealable. 148Miss562, 114S347. [b] **As regards appeal,** more than one final decree may be rendered in cause. 216Ala641, 114S221.

460–51 161La725, 109S402.

460–53 [a] (14) Order appointing surveyor. LaA 130S133. (15) Other instances. 169La384, 125S280.

460–54 [a] (14) Judgment discharging rule to show cause why service and return should not be amended, and holding that return of service of petition and citation was invalid and illegal. 9LaA531, 119S733.

461–57 [a] (1) 161Ga698, 132SE626; 166Ga149, 142SE690. (4) But see 166 Ga149, 142SE690. (7) See also 139Ga 37, 76SE382.

461–59 163Ga643, 136SE793; 164Ga 149, 138SE71; 36GaA448, 136SE920. [a] (1) 89Ga138, 15SE23; Ga 154SE 877(2dcase). (2) 164Ga149, 138SE71. [h] **Bill must assign exception to judgment.**–164Ga609, 139SE61. [i] **Rulings made on hearing of application for interlocutory injunction.**–166Ga449, 142SE 690.

462–62 15F(2d)49; 37F(2d)14; 196 Ind109, 147NE328; IndA 169NE595; Mo 24SW(2d)990; NJ 148A719(1st case); TexCommnA 276SW218; Tex CivA 282SW608; TexCivA 290SW228; TexCivA 295SW316; TexCivA 9SW(2d) 754; TexCivA 10SW(2d)733; TexCivA 11SW(2d)206; TexCivA 24SW(2d)78; TexCivA 27SW(2d)861. [d] TexCivA 284SW330. [g] (7) TexCommnA 285 SW307; TexCivA 10SW(2d)144. [j] **Interpleaded parties.**–TexCivA 274SW 179. [k] **Judgment in favor of demurring defendants** is not appealable where case is undisposed of as to answering defendants. Mo 24SW(2d)990.

464–65 269US411, 46SCt144.

464–67 198Cal 525, 246P39; 164Ga772, 139SE537; TexCivA 295SW264. [a] 206Cal 456, 274P748.

464–67½–New. That a particular judgment may not be final as to all parties to an action does not prevent it from being a final judgment within the statute relative to appeal. 198Cal 525, 246 P39.

464–68 22F(2d)296; 239 IllA496; Tex CivA 291SW960.

464–69 5F(2d)589 (holding decree dismissing one of two defendants final and appealable in view of other defendant's admissions of liability if first defendant was not liable); 147Va720, 129SE489 (where no joint interest between defendants).

465–72 See also 155Tenn121, 290SW 981.

465–74 16F(2d)337; 41GaA771, 154SE 820; GaA 155SE510(1stcase); 32Porto Rico 425 (motion for reconsideration of order setting aside extension granted for filing statement of case). [b] **Where rule for new trial has been made absolute,** there is no final judgment, and appeal from judgment cannot be considered. NJSup 135A59.

465–74½–New. A pending motion for a new trial may be abandoned by taking a writ of error within six months after the entry of judgment, rendering the writ valid. 97Fla615, 123S5.

465–77 83 IndA385, 148NE486.

465–79 146Va256, 135SE681.

466–81 34 OhA295, 170NE879. [c] (3) Appeal from order sustaining demurrer dismissing equitable bill and amending cause into action at law. 101Vt276, 143 A382.

466–82 93CalA615, 270P255; 179Minn 392, 229NW557; Or 288P505(1stcase).

466–83 199Cal 699, 251P205.

467–84 54ND596, 211NW433.

467–88 72CalA51, 236P319; 98Fla999, 124S457; 86 IndA420, 155NE515; MoA 19SW(2d)776 (right may be lost if party negligently fails to defend case); TexCivA 282SW339, 346 [citCyc]. See 96Fla327, 118S60. See also 98Fla999, 124S457.

467–89 22AlaA252, 114S422; 21AlaA 441, 109S179; 21AlaA469, 109S373; 23 AlaA505, 127S912(2dcase); 34GaA217, 129SE8; 51SD154, 212NW868; TexCivA 26SW(2d)659. [b] **Names of partners; erroneous judgment by default.**–20AlaA 643, 104S774. [c] **Judgment entered nunc pro tunc** on replevy bond, without notice to parties interested, was void and could not support proceeding in error. TexCivA 16SW(2d)439.

468–90 225Ky682, 9SW(2d)995.

468–93 215Ala610, 112S202; 91Fla275, 107S342, 343 [citCJ]; Mass 169NE147; 244NY606, 155NE916; TexCommnA 280SW1062.

469–94 91Fla275, 107S342, 343 [citCJ].

469–95 286Pa152, 133A33.

469–96 [e] (1) 43F(2d)777. [f] (1) 174 Minn611, 219NW928 (order not stating it was based exclusively on errors of law). [h] (4) Where attorney for plaintiff in partition suit was appointed special commissioner to make sale and executed bond and entered on discharge of his duties, plaintiff may appeal from decree summarily removing such commissioner without notice. 107WVa384, 148SE484.

470–97 216Ala660, 114S40.

470–2 [a] (7) 245NYS118.

470–7 13LaA248, 128S537.

471–9 11PaDist&Co 45, 46 [citCJ]; 11 PaDist&Co 129, 137 [quotCJ]; 11Pa Dist&Co 345, 346 [citCJ].

472–10 91Fla275, 107S342, 343 [citCJ].

472–12 173Minn183, 217NW106 (denial of motion to strike from calendar); ND 231NW545. [b] **Order denying motion to transfer cause from equity to law side** is interlocutory. 40F(2d)474.

472–14 [a] 39F(2d)847. But see 208 Iowa397, 224NW592. [b] **Order denying motion to transfer equitable issues** in law action to equity side of calendar is appealable. 207 Iowa515, 221NW205.

473–15 But see 167Ga708, 146SE489.

473–21 203 Iowa245, 212NW567.

473–23 74Mont488, 241P240; Nev 287 P957.

473–25 TexCommnA 20SW(2d)758(1st case).

473–25½–New. Statute permitting appeal from order changing place of trial does not apply to order changing place to another place in same county. 198 Cal 649, 246P1044.

473–25¾–New. Order of court setting aside former order granting transfer of cause is not a final judgment if it does not overrule plea of privilege. TexCivA 284SW350.

473–26 12F(2d)667; 37GaA605, 141SE 90; 125Me494, 135A198; ND 231NW 545.

474–28½–New. A decision granting a petition for divorce, but continuing the question of separate maintenance has been held not a "final decision." 49RI 421, 143A697.

474–30 45 Ida358, 262P509, 510 [cit CJ]; 193Wis164, 213NW464.

474–34 NJSup 145A471(2dcase) (direction of verdict); 212AppDiv644, 209 NYS419 (denial of motion to direct verdict, not followed by judgment or other disposition of case). [c] **Orders denying substitution of new judge.**–35 F(2d)507. [d] **Denial of motion for reargument** is not appealable where decided on merits. 136Misc55, 239NYS 127.

474–38 142SC46, 140SE247.

474–40½–New. In Ontario appeal will not lie from exercise of discretion by judge of divisional court directing trial without jury. Ont [1930] 2DomLR565.

475–45 142SC46, 140SE247; [1925]Can SC391, [1925] 2DomLR828.

475–54 Minn 231NW617(1stcase).

475–56 119Kan409, 239P755.

475–57 165Minn361, 206NW642; 167 Minn511, 210NW37; 169Minn145, 210 NW635; Minn 230NW269. But see 91 CalA590, 267P372.

475–61 NJSup 133A481.

475–63 208 Iowa397, 224NW592; Minn 231NW617(1stcase).

476–68 41GaA60, 151SE813.

476–69 132 Okl 107, 269P368.

476–70 215Ala677, 112S203.

476–74 175Ark271, 299SW13 (holding that moving party can refuse to proceed and appeal or go to trial and appeal from adverse decree); 86Colo 174, 279P 41(2dcase); 128Misc501, 219NYS883; 91 PaSuper123.

477–76 90PaSuper66; TexCivA 26SW (2d)658(1stcase).

477–78 37F(2d)48 (order denying application for supplemental summons to bring in another as party is not final appealable order); 205Cal 380, 270P 685; 167Ga352, 145SE660 (order retaining defendant as nominal party); 169 Ga645, 151SE389; 173Minn183, 217NW 106; 105NJL649, 146A423(1stcase). But see 124Misc667, 208NYS801.

477–79 19F(2d)460; 27F(2d)286; 165 Ga382, 140SE754; 154Md599, 141A334; 75Mont132, 242P431 (denying motion); 299Pa76, 149A84.

478–81 Ga 155SE199; 86 IndA214, 156 NE582; 218Ky586, 291SW780; 294Pa 401, 144A423.

479–84 30F(2d)311; 51Nev145, 271P 336; 58ND754, 227NW360; 289Pa94, 137A127; 33PortoRico 325(1stcase); 136Wash532, 240P899 (writ of replevin); 34Wyo 288, 243P123, 126 [citCJ]. [b] **Statute held not to support appeal.**–289Pa94, 137A127.

479–85 103NJL596, 137A568; Oh 153 NE550; 283Pa339, 129A97. See 25F (2d)225, 226 [citCJ].. But see 23Man 678, 14DomLR414, 25WestLR677, 5 WestWkly363.

479–86 123 Or326, 262P220; TexCivA 280SW349.

479–86½–New. or from order refusing application for service by publication; 163Ga311, 135SE925.

479–90 25F(2d)225 (quashing service on ground that person served was not agent of foreign corporation); 117 Okl 244, 246P423.

479–91 15F(2d)610.

480–94 143SC264, 141SE450.

480–1 41F(2d)439; 42F(2d)1009; 98 CalA365, 276P1036; 164Ga705, 139SE 354; 218Ky586, 291SW780; 155Md189, 141A528; Md 147A599(1stcase) (order

allowing leave to amend is not appealable by defendant where demurrer to bill is sustained); 167Minn522, 209NW 30 (granting motion to amend reply); Minn 230NW269; 194NC202, 139SE230; 136Wash532, 240P899.

481-5 [k] **In North Carolina.**–198NC 808, 153SE450.

481-8 30F(2d)311; 214Ala418, 108S 253; 214Ala443, 108S47; 216Ala177, 112S837; 216Ala366, 113S239; 21AlaA 645, 111S321; 32Ariz442, 259P881 (order sustaining demurrer to complaint); 170Ark1194, 280SW357; 176Ark31, 2 SW(2d)70; 203Cal 721, 265P817; 70 CalA137, 232P982; 91CalA737, 267P 571; CalA 287P980(1stcase); CalA 289 P229; 86Colo 232, 280P488(1stcase); 165Ga175, 140SE288; 167Ga352, 145SE 660 (demurrer to part of pleading); Ga 154SE784; 36GaA777, 138SE255; 41 GaA629, 154SE212(2dcase); 29Hawaii 242; 318 Ill 415, 149NE231 (complaint); 319 Ill 129, 149NE779; 336 Ill 203, 168NE303; 239 IllA496; Ind 172 NE353; 208 Iowa1364, 227NW402; Iowa 227NW510(1stcase); 229Ky234, 16SW(2d)1053; 232Ky66, 22SW(2d) 265; MoA 296SW479; Nev 286P125(1st case); 198NC642, 153SE114; 137 Okl 228, 279P354(1stcase); 125 Or56, 242P 842, 265P800; 297Pa289, 146A816(3d case); 32PortoRico 658 (overruling demurrer and allowing time to plead); 136SC231, 134SE222; TexCivA 284SW 611; TexCivA 5SW(2d)185; TexCivA 18SW(2d)820; TexCivA 27SW(2d)644. But see Mass 164NE817.

483-9 32PortoRico 658.

483-11 169Ga377, 150SE552(1stcase).

483-14 Ala 129S571; 84Colo 362, 270P 553; 165GaA591, 141SE664; 36GaA185, 136SE93; 125Me402, 134A539; Md 150 A732; MoA 2SW(2d)193 (judgment dismissing amended petition where defendant had answered original petition); 115 Okl 169, 241P1105; 119 Or 297, 247P761; TexCivA 20SW(2d)104. But see 144Va848, 130SE784. [b] (6) 33F(2d)578 (dismissal of complaint without like dismissal of counterclaim is not appealable as final order); 101 CalA374, 281P531(1stcase) (sustaining demurrer without leave to amend). (7) Order granting leave to file amended pleading. TexCivA 299SW349. [d] (2) But see 115 Oh210, 152NE651, 46ALR 1439. [f] **Where defendant stands on his demurrer,** he may appeal. 122 Okl 205, 253P494. [g] **Where defendant pleads over,** ruling is reviewable only on appeal from final judgment. 122 Okl 205, 253P 494. [h] **Finality of decree sustaining demurrer to bill** is not affected by fact that court was afterward called upon to determine if conditions were complied with. 144Va848, 130SE784.

484-15 MoA 21SW(2d)777 (where plaintiff stood on demurrer and petition was dismissed).

484-17 201 Iowa521, 207NW579; 208 Iowa1364, 227NW402; 115 ObSt210, 152 NE651. See also 33F(2d)749.

484-19 [a] (5) Term bill in statute limiting further appeals from interlocutory order after bill has been upheld by supreme court includes any bill whose equity may be tested by appeal from decree on demurrer. 216Ala224, 112S834. (6) Statute inapplicable to decree retransferring cause from equity to law. 220Ala406, 125S645. [c] (1) 163Ga135, 135SE505. (12) Where judgment sustained general demurrer to second court in action on two counts dismissing it, and overruled general and special demurrers on first count, there being no final disposition of case as to plaintiff, his direct bill of exceptions was premature. 33GaA791, 128SE696. (13) When trial judge passes upon and overrules demurrer to petition at interlocutory hearing in equity case his judgment is reviewable. 166Ga149, 142 SE 690. (14) Where defendant demurred generally and specially to certain paragraphs of equitable petition and court sustained demurrer to such paragraphs but did not sustain general demurrer, judgment striking such paragraphs is not reviewable on writ of error. 166Ga 153, 142SE676. [d] (1) 205 Iowa1262, 217NW625 (where party suffers judgment); 205 Iowa514, 218NW288. (2) 207 Iowa581, 223NW383. (3) 201 Iowa 521, 207NW579. (4) Right to appeal from adverse ruling on demurrer to petition is dependent upon record's showing in some manner that plaintiff elected to stand on petition. 200 Iowa293, 204NW281. (5) Ruling sustaining demurrer without election to stand on pleading not appealable. 205 Iowa1262, 217NW625. [e] (1) But see 115 Okl 169, 241P1105. [g] (3) 259Mass341, 156NE715, 52ALR1149. [k] (2) 196NC 478, 146SE131; 197NC735, 150SE510; 198NC642, 153SE114. [l] (1) 109 Okl 86, 234P623; 123 Okl 163, 252P418 (election to stand on demurrer). (3) Party may elect to stand on demurrer or to plead further reserving exceptions to court's ruling. 137 Okl 228, 279P354 (1stcase). [o] 136SC231, 134SE222. [s] (1) 192Wis507, 213NW301, 57ALR 346.

487-23 232Ky66, 22SW(2d)265 (order compelling election is not appealable).

487-26 208 Iowa397, 224NW592; 170 Minn391, 212NW896; 173Minn183, 217 NW106; 191NC621, 132SE566; 197NC 221, 148SE25(2dcase); 49ND703, 193 NW51; 51ND745, 200NW1013; 53SD 398, 220NW850; 151Va19, 144SE497 (1stcase).

487-27 [a] (2) Appeal lies from order denying motion for judgment on pleadings, under Civ. Pract. Rules, rule 112. 224AppDiv371, 231NYS115.

487-28 92PaSuper85.

487-30 207 Iowa451, 223NW486 (unless appellant has elected to stand on pleading); 121Kan172, 246P520; 121 Kan333, 246P688; 56ND7, 215NW877; 132SC507, 128SE711; 135SC147, 132SE 172; 139SC163, 137SE444; 141SC10, 139SE202; 51SD523, 215NW690; 197 Wis556, 222NW802.

488-33 202 Iowa314, 208NW288.

488-34 214Ala418, 108S253; 203Cal 721, 265P817; 79CalA505, 249P1093; 89CalA167, 264P784; 164Ga772, 139SE 537; 166Ga153, 142SE676; 36GaA590, 137SE412; 38GaA58, 143SE787; 208 Iowa397, 224NW592; Iowa 233NW137; Mo 24SW(2d)1031; NJ 148A762; 198 NC596, 152SE794; 51ND745, 200NW 1013; 135SC147, 132SE172; 138SC318, 136SE297; 141SC86, 139SE174; 141SC 10, 139SE202; 144SC1, 141SE681; 156 SC437, 153SE460. [a] **Order granting motion to strike cause of action** from complaint held not appealable. NJ 148 A762.

489-35 [b] (5) 204 Iowa54, 214NW 705. (6) Order striking amended and substituted petition on mistaken ground that it was repetition of former petition which was held bad on demurrer is appealable without entry of any record that plaintiff "elects to stand on his petition." 200 Iowa293, 204NW281. (7) Appeal lies from refusal to strike misjoined cause of action. 203 Iowa245, 212NW567. (8) Appeal from ruling on motion to strike will not lie unless appellant has elected to stand on pleading. 207 Iowa451, 223NW486. [c] 121 Kan172, 246P520. See also 122Kan796, 253P400. [d] (1) 168Minn277, 209NW 904. (3) Order denying motion to strike out part of pleading as immaterial, irrelevant, and redundant is not appealable. 170Minn391, 212NW896. (4) Order striking out part of answer is appealable. 170Minn391, 212NW896. [j] (5) Wis 230NW720. [k] **In North Carolina.**–198NC767, 153SE449.

489-36 Mo 296SW154.

490-42 33F(2d)578; 219Ala77, 121S 86; 70CalA137, 232P982; 164Ga772, 139SE537; 34GaA306, 129SE289; 244 IllA38 (special plea); 1Gill&JMd311; 136 Okl 67, 276P198 (part of answer). [a] **Judgment overruling demurrer to answer is not final judgment** and bill of exceptions thereto is premature. 41 GaA446, 153SE381(1stcase).

490-43 [a] **Where demurrer to reply has been abolished,** appeal from order overruling demurrer to reply presents nothing for review. Minn 231NW10 (1stcase).

490-48 214Ala418, 108S253; 34GaA 306, 129SE289; 34GaA333, 129SE290; 34GaA348, 129SE575; 14 OhA56; 142 Va244, 128SE524 (decree in will case disallowing special plea of pending prior suit and requiring nonresident defendant to answer is not appealable as final); Wis 230NW720.

491-50 34GaA348, 129SE575; 14 OhA 56.

491-51 [b] (5) Order overruling motion to strike portions of answer alleging immaterial, redundant matter or legal conclusions is not appealable and not involving merits of case. 204 Iowa 54, 214NW705. [c] (2) 121Kan172, 246P520. [j] (4) Motion to strike out portion of answer pleaded as separate defense is reviewable, as in effect order sustaining demurrer. Wis 230NW720.

492-57 213Ala556, 105S590 (sustaining demurrer to plea in abatement of service of process); 103Conn762, 131A 398 (sustaining demurrer); 163Ga643, 136SE793.

492-59 42F(2d)1009; 97CalA757, 276 P387(1stcase).

492-60 222Ky419, 300SW858.

492-63 105NJL150, 143A448 (further bill).

492-67 214Ala418, 108S253; 160Ga 177, 127SE140; 318 Ill 415, 149NE231; 157Md160, 145A375; 136 Okl 67, 276P 198; 32PortoRico 658; TexCivA 287 SW690.

493-72 CalA 285P1086(1stcase); 334 Ill 83, 165NE191 (order dismissing cross bill in chancery is interlocutory order, from which neither writ of error nor appeal will lie till whole case is disposed of); 83Mont391, 272P688. Contra 320 Ill 597, 151NE514.

493-73 318 Ill 64, 148NE852; 125 Okl 186, 256P50.

493-76 Ala 127S544 (order sustaining demurrer to intervening petition). [a] **If intervention is essential to preservation of petitioner's right,** order denying it is appealable. 40F(2d)445 (order held appealable).

493-77 15F(2d)443; TexCivA 290SW 228. See also TexCivA 278SW950.

493-79 178Ark1172, 14SW(2d)222. But see TexCivA 300SW990.

493-82 MoA 18SW(2d)572.

494-87 163Ga643, 136SE793; 153Tenn 40, 281SW932.

494-89 27Ariz527, 234P563; 163Ga 643, 136SE793; 290Pa372, 138A914 (holding course prescribed by statute must be pursued); 298Pa182, 148A94.

495-90 24F(2d)310 (denying revival of action by dissolved corporation).

495-94 6F(2d)1000, 42ALR503 (holding order denying right to revive against executors of deceased defendant is reviewable); 192Wis507, 213NW301, 57ALR346; 199Wis150, 225NW729.

495-98 Iowa 232NW133; 124Kan475, 260P625.

496-13 51ND742, 200NW908 (order setting aside order for examination before trial is not appealable).

496-15 191Wis586, 211NW923.

496-16 203 Iowa84, 212NW342; 127 Or253, 271P729.

497-21 TexCivA 25SW(2d)923.

497-22½–New. No appeal from interlocutory order requiring a witness to file in court a document he has in his possession. 14QuePr386.

497-22⅓–New. A preliminary order requiring witnesses examined before a referee to sign testimony taken before the referee, has been held not a "final order". 30 OhA151, 164NE539.

497-23 25 Oh153, 157NE907.

497-24 126Kan586.

497-26 214Ala120, 106S798; 21AlaA 331, 108S396; 28Ariz598, 238P399; 176 Ark31, 28W(2d)70; 80CalA352, 251P 959; 201Cal 194, 256P202; 81CalA142, 253P357 (order granting nonsuit); 99 CalA381, 278P866; CalA 292P689; 163 Ga662, 136SE911; 45 Ida211, 261P242; 86 IndA214, 156NE582; 79Mont530, 257P465; 125 Or56, 242P842, 265P800; TexCivA 265SW195; TexCivA 5SW(2d) 606; TexCivA 15SW(2d)722.

499-27 77CalA519, 247P218; 90CalA 306, 265P858; 52ND785, 204NW838; Can [1927] 3DomLR796 (appeal from dismissal of petition under Election Act). [b] (4) Where nonsuit is entered as to one of two defendants, other has no appeal from refusal to remove nonsuit. 285Pa241, 132A185. [e] **In Iowa.**–202 Iowa310, 202NW558.

499-28 Minn 230NW645(1stcase) (for want of prosecution). [b] **In New York.**–214AppDiv94, 211NYS41.

499-29 77CalA519, 247P218; Fla 128 S412; Fla 129S889; 323 Ill 452, 154NE 195; 334 Ill 83, 165NE191 (dismissal of cross bill); 208 Iowa1364, 227NW 402; TexCivA 265SW195 (dismissal as to one of joint defendants). [a] (1) 37 F(2d)14. (4) Though order of dismissal becomes final on expiration of time to amend, it is not "final order" where appeal is taken before such time. 37 F(2d)14. [c] (2) Decree of dismissal in case bill is not amended within stated time is final and appealable after expiration of such time. 154Miss584, 122 S531(1stcase).

501-31 213Ala153, 104S274; 219MoA 389, 271SW829; MoA 276SW880; Tex CivA 277SW173 (as to one defendant after peremptory charge in favor of another).

501-33 218Ala219, 118S402; 219Ala 505, 122S831(2dcase).

501-35 [b] (1) 313Mo 406, 281SW693, 694 [citCJ]. (2) 313Mo 406, 281SW 693, 694 [citCJ]. (3) Recital in record that nonsuit voluntary does not make it such. 313Mo 406, 281SW693. (4) Where at close of plaintiff's evidence defendant demurs to evidence and plaintiff takes nonsuit with leave to set aside, such action is considered involuntary nonsuit. 221MoA530, 289SW30(2d case).

502-36 [a] (2) Refusal of trial court to direct verdict for defendant and dismissal of cause without prejudice is reviewable on error. 118 Oh106, 160NE 629.

502-40 TexCivA 48W(2d)304.

502-42 167Minn399, 209NW259.

503-45 207Cal 617, 279P650; 214App Div94, 211NYS41; 193NC834, 136SE 732; ND 231NW545; 56ND269, 217 NW148; 289Pa94, 137A127; 33Porto Rico 992; 49SD173, 206NW925; 52SD 107, 216NW865; TexCivA 286SW584. But see 190NC375, 129SE828. [e] In Iowa.–228NW293.

504-46 249Mich558, 229NW481. [b] (1) 163Ga662, 136SE911. (2) 163Ga 662, 136SE911.

504-48 106Conn13, 136A876, 57ALR 402; 221MoA308, 273SW169 (voluntary nonsuit); MoA 276SW87; 112 Okl 30, 239P456. But see Mo 12SW(2d) 498.

504-49 [a] (4) 308Mo 322, 272SW692. [b] **Voluntary nonsuit.**–308Mo 322, 272 SW692.

504-50 320Mo 185, 7SW(2d)255 (voluntary); MoA 299SW74; TexCivA 4 SW(2d)301.

505-51 308Mo 322, 272SW692; 118 Tex44, 10SW(2d)687.

505-52 [a] 308Mo 322, 272SW692.

505-52½-New. An order overruling a motion to set aside a judgment of dismissal entered on plaintiff's motion is appealable. 220MoA32, 285SW775.

505-55 26F(2d)890 [certiorari den 49 SCt12(1stcase)]; 41F(2d)57(2dcase); 197Cal 467, 241P549; 198Cal 750, 247P 910; 96CalA214, 274P71; 206Cal 389, 274P536(2dcase); 208Cal 105, 280P 522; 71CalA97, 234P432; 73CalA44, 238P177; 76CalA434, 244P932; CalA 276P416; 101CalA548, 281P1047; CalA 292P162; CalA 292P287; 169Ga628, 151SE387; 41GaA308, 153SE74; 225 Ky823, 10SW(2d)277; 154Md63, 139A 564 (motion to withdraw juror is not equivalent to motion for new trial and is reviewable); 252Mass88, 147NE572 (where appeal is from appellate division's decision); 115Nebr58, 211NW 208; NJSup 142A417; 24 OhA514, 157 NE427; 49Philippine362; 116Tex403, 292SW155; TexCivA 280SW325, 327 [citCJ]; TexCivA 295SW941; TexCivA 298SW312; 142Wash478, 253P794. See also 90CalA622, 266P554. But see 164 Ga186, 137SE823. [b] **Order denying motion** for new trial is not appealable in some jurisdictions. 84CalA87, 258P 969. [c] **Where decree is not excepted to** by losing party, granted supersedeas, exceptions to pendente lite exceptions and to overruling motion for new trial are not reviewable. 169Ga628, 151 SE387.

505-55½-New. Appeal does not lie from order denying motion for leave to amend notice of intention to move for new trial, such motion having been heard and denied as part of proceedings on motion for new trial. 198Cal 750, 247P910.

507-59½-New. Where the court declares it would have refused a new trial but for reasons set forth an appeal lies. 296Pa132, 145A703.

507-60 217Ala75, 114S680; 108Conn 680, 144A782. [b] (1) 315Mo 1165, 289 SW609; TexCivA 280SW325, 327 [cit CJ]. (5) 304Mo 674, 264SW810. [d] (3) 142Wash478, 253P794; 144Wash 650, 258P465. [g] **In California.**–195 Cal 59, 231P744. [h] **In Texas.**–CivA 280SW325; CivA 291SW928. [i] 288Pa 549, 137A113, 52ALR506.

507-61 [a] (10) Order of chancery overruling motion to reinstate case, is not appealable, since, under Code (1923) § 6088, appeals from rulings on motion for new trial are limited to actions at law. 218Ala554, 119S664. (11) Appeals from rulings on motions for new trial are limited to cases at law. 218Ala15, 117S462(3dcase). [b] (1) 201 Cal 48, 255P514. But see 71CalA762, 236 P333; 78CalA526, 248P930; 100CalA743, 281P74; CalA 290P300; CalA 292P698. (2) 76CalA434, 244P932. (3) 195Cal 242, 233P94; 76CalA434, 244P932. (6) 196 Cal 323, 237P1070; 200Cal 77, 251P912; 73CalA627, 239P71; 82CalA624, 256P 220. (11) 71CalA97, 234P432 (in equitable action). (12) Under amendment to code provision, orders denying new trials have been held not appealable. 203Cal 44, 262P1084 (order denying new trial in action to condemn land for park purposes); 203Cal 569, 265P241; 87CalA 418, 262P431(2dcase); 90CalA213, 265 P876; 91CalA318, 266P960; 91CalA 324, 266P963; 93CalA358, 269P544. [c] 207 Iowa167, 216NW62. See also 206 Iowa712, 221NW217. [e] (2) 165Minn 396, 206NW728. See also 174Minn606, 219NW291. (6) 174Minn237, 219NW 149. (7) Motion for new trial on ground of direction of verdict constituting error of law is appealable. 176Minn 631, 220NW156. (8) Order granting new trial for insufficiency of evidence is not appealable unless it was second order granting new trial wholly or in part on ground of insufficiency of evidence. 178 Minn232, 226NW700. (9) Order denying new trial is appealable. Minn 230NW 269. (10) Order granting new trial for errors of law and insufficiency of evidence is not appealable unless it expressly states that it is based on errors of law. Minn 230NW787. (11) Order granting new trial is not appealable where not expressly stating therein or in accompanying memorandum that it is based exclusively upon errors of law. 178Minn230, 226NW699. [f] (3) 75 Mont412, 243P812; 79Mont530, 257P 465. [g] (6) Exception in statute which denies right of appeal from order granting or refusing new trial, where specific questions of fact in action triable by court have been tried by jury, does not apply to trial of issue on which a party is entitled to trial by jury. 212AppDiv 470, 208NYS810. [h] (1) 193NC855, 138 SE407. (2) 193NC855, 138SE407. [j] (5) But see 134SC510, 133SE444. (9) 133SC 324, 130SE884 (and conclusion that evidence is inconsistent with verdict). (10) Order granting new trial on ground that evidence failed to support verdict is appealable. 107SC501, 93SE187. [m] **In Georgia.**–164Ga186, 137SE823. [n] **In Texas.**–CivA 281SW305. [o] **In Arizona.**–286P180 (order granting new trial on issue of damages only).

509-62 [f] **Disposition of rule** to show cause is not reviewable. 103NJL194, 135 A354.

509-65 [a] **In California.**–195Cal 242, 233P94; 76CalA434, 244P932.

509-69 20F(2d)733; 213Ala33, 104S 244; 218Ala15, 117S462(3dcase) (rehearing in equity); 219Ala157, 121S 530(1stcase); 220Ala448, 126S110; 225 AppDiv700, 231NYS450. See also 245 NY580, 157NE865. But see 136Misc55, 239NYS127. [a] **Where parties were not entitled to appeal from original order,** they cannot appeal from order denying rehearing on such order. 248Mich 101, 226NW822.

510-80 See also 245NY580, 157NE865. But see 71CalA762, 236P333.

510-85 232Mich388, 205NW98 (denial of motion); 176Minn302, 223NW146.

510-86 [b] (3) 174Minn237, 219NW 149.

510-86½-New. The ruling of the trial court on a motion for judgment on special findings, notwithstanding the general verdict, is appealable if it results in a judgment. 120Kan354, 243P331.

510-86¾-New. Motion for judgment, notwithstanding failure of the jury to return a verdict, is not appealable. 25 OhA153, 157NE907.

510-87 181Ark693, 27SW(2d)96(1st case) (void judgment).

512-4 97PaSuper386.

513-10 22F(2d)834 (judgment adjudicating validity of search warrant).

514-25 19F(2d)503.

514-29 41F(2d)619; Cal 290P7; 325 Ill 199, 156NE280; 104NJL298, 140A 580; 102NJEq486, 141A452; 289Pa171, 137A226; 50RI 13, 144A433; 36Wyo 522, 257P7; Can [1928] 3DomLR178.

516-32½-New. A motion to dismiss an appeal from an order referring the case to the master is determinable by a decision of the supreme court upon the question whether the circuit judge in his discretion was authorized to pass compulsory order of reference. 133SC149, 130SE881.

516-35 254 IllA264.

516-36 27F(2d)810; 34F(2d)27 (order of court denying review of referee's determination that bankruptcy court had jurisdiction); 164Ga332, 138SE774; 169 Ga628, 151SE387 (overruling exceptions to auditor's report not final); 299Pa 348, 149A598.

517-41 [a] **In New Jersey.**–148A721.

517-41½-New. Refusal of the district court to confirm a referee's report is not a "final" decision where the decision does not determine the rights of the parties. 7AltaL346, 17DomLR398 [foll Alta 18DomLR245].

517-43 164Ga332, 138SE774; 196NC 223, 145SE26.

517-47 Utah 284P523 (order authorizing party to retain exhibit held not appealable).

518-48 258Mass190, 154NE856.

518-49 201Cal 201, 255P1097; 36GaA 185, 136SE93; 242 IllA122 (judgment directing application of rents to deficiency in foreclosure is appealable where decree of foreclosure reserved question); 198 Ind207, 151NE610 (confirmation of sale); 199 Ind737, 164NE493.

518-50 91CalA521, 267P367.

518-53 Contra 35PortoRico 442.

519-57½-New. Orders upon matters arising after judgment are not governed by same rules applicable to appeal from orders rendered prior to final judgment. Fla 128S412.

519-58 194Cal 139, 228P8; 201Cal 201, 255P1097; 75CalA437, 243P30; CalA 285P390 (held "special order" under statute); 216MoA614, 260SW538; 218 MoA464, 278SW1045; 246NY237, 158NE 320; 188Wis24, 205NW404. [a] **Order denying motion to offset judgment** on application made after judgment is appealable. 188Wis24, 205NW404.

519-61½-New. Such statutes provide cumulative remedy by appeal. 201Cal 201, 255P1097.

520-86½-New. an order entering personal judgment for deficiency after mortgage foreclosure sale; 34NM559, 286P 827.

520-87½-New. An order paying a deposit to plaintiff in an injunction suit pursuant to a stipulation dismissing the suit and leaving open the question of who was entitled to the deposit and that such question should be the only controversy remaining to be determined is appealable as a special order after judgment, 216MoA614, 260SW538.

520-87¾-New. and an order directing a receiver in an action to quiet title to pay proceeds of the sale of crops to the vendee, which in effect decided that the claim of mortgagee was without the right. 194Cal 139, 228P8.

520-94½-New. order overruling a de-

murrer to a petition for satisfaction of a lien judgment after a decree in the main action which decree was not final; 84**Mont**500, 277**P**11.

520–95½–New. , or an order relieving the party from failure to timely file a bill of exceptions. 98**Cal A**185, 276**P**598.

520–95⅓–New. Order denying reconsideration is not special order reviewable otherwise than by appeal from the judgment. 35**PortoRico** 440.

520–96 **Mass** 165**NE**400; **Minn** 233**NW** 10; **MoA** 293**SW**465, 466 [citCJ]. [a] (3) 203 **Iowa**1064, 213**NW**801. (5) Order denying amendment nunc pro tunc is appealable. 67**CalA**358, 227**P**647.

521–98 91**CalA**521, 267**P**367; **Wis** 230 **NW**607.

521–8 245**NY**580, 157**NE**865 (order denying motion for final judgment); 230 **AppDiv**764, 244**NYS**217.

521–11 202**Cal** 478, 261**P**1001; **CalA** 292 **P**698 (order vacating nonsuit on opening statement is not appealable); 91**Fla**275, 107**S**342; 92**Fla**1015, 110**S**532 [citCJ]; 98**Fla**500, 123**S**857(1stcase); 335 **Ill** 406, 167**NE**59; 177**Minn**474, 225**NW**399; **Minn** 231**NW**617(1stcase); **NM** 290**P** 1019; 125 **Or**258, 266**P**238; 116**Tex**405, 292**SW**523; **TexCivA** 28**SW(2d)**825; 199 **Wis**150, 225**NW**729. [a] **Nonjurisdictional matters covered by judgment** cannot be reviewed except by appeal from judgment itself. 32**PortoRico** 422.

522–12 214**Ala**293, 107**S**810; 215**Ala**216, 110**S**131; 218**Ala**15, 117**S**462(3dcase); 199**Cal** 699, 251**P**205; 200**Cal** 77, 251**P** 912; 90**CalA**191, 265**P**859; 99**CalA**501, 278**P**1062; 100**CalA**743, 281**P**74; **DC** 32 **F(2d)**968; 164**Minn**443, 205**NW**374 (where judgment not unauthorized, though erroneous); 165**Minn**479, 205 **NW**637; 176**Minn**117, 222**NW**527; 103 **NJL**194, 135**A**354; 101**NJEq**780, 138**A** 892; **OhA** 156**NE**423; 33**PortoRico** 398; 33**PortoRico** 800. [c] **Reason for rule.**– 25 **OhA**81, 157**NE**423. [d] **Refusal to pass on motion to set aside judgment** prematurely rendered before term to which it was continued will not be reviewed on writ of error. **MoA** 19**SW(2d)** 553.

523–13 But see 156**Md**16, 142**A**488.

523–14 108**Conn**304, 142**A**838; 323 **Ill** 90, 153**NE**732; 237 **IllA**441; 203 **Iowa** 1028, 213**NW**803; **Minn** 232**NW**322; 132 **Or**1, 271**P**994. See also 228**Ky**554, 15 **SW(2d)**492.

523–15 203 **Iowa**1028, 213**NW**803.

523–16 201**Cal** 201, 255**P**1097; **MoA** 285 **SW**775; **MoA** 295**SW**487; 114**Nebr**442, 207**NW**935; 49**ND**64, 189**NW**681; 29 **OhA**76, 163**NE**36; 54**SD**329, 223**NW**210.

524–17 199**Cal** 190, 248**P**665; 89**CalA** 748, 265**P**389; 98**CalA**365, 276**P**1036; 43 **Ida**784, 255**P**909; **MoA** 285**SW**775; 25 **OhA**239, 157**NE**768.

525–18 201**Cal** 201, 255**P**1097; 71**CalA** 762, 236**P**333; 85**CalA**320, 259**P**340; 99**CalA**501, 278**P**1062 (where facts on which appellant bases claim do not appear from inspection of judgment); 164**Minn**443, 205**NW**374 (refusal to vacate unauthorized judgment); 217**MoA** 1, 272**SW**1010; **MoA** 285**SW**775; 135 **Okl** 228, 275**P**306 (2dcase). [a] (4) 42 **F(2d)**142. [b] **Order vacating adoption order as to one child** but refusing to vacate it as to another is appealable as to part of order refusing vacation as special order made after final judgment. 199**Cal** 699, 251**P**205. [c] **Where appeal from original order would be vain for lack of record** showing rights of aggrieved party, order refusing to vacate original order is appealable. 199**Cal** 699, 251**P**205.

525–20½–New. An appeal lies from an order denying a motion to enter a new and different judgment. 97**CalA**628, 276 **P**122.

525–21 80**CalA**660, 252**P**669; 174**Minn** 611, 219**NW**928; 178**Minn**232, 226**NW** 700; **Minn** 230**NW**787; 79**Mont**530, 257 **P**465; **NM** 290**P**1019.

526–26½–New. In Massachusetts appeal or exceptions lie from decision on the petition in an original action under statute to vacate judgment. **Mass** 170 **NE**815.

526–27½–New. **Resettlement of an order.** In New York an order denying a motion to resettle an order so as to recite all papers used on original motion is appealable where no modification or change of relief granted by original order is sought. 216**AppDiv**844, 215**NYS**800.

526–29 224 **IllA**367 (when order quashes execution and grants defendant time to appear and plead); 218**MoA**544, 280 **SW**82 (motion after time to vacate judgment and motion in nature of writ of coram nobis are independent proceedings and appealable); **TexCivA** 273**SW** 951.

526–30 100**CalA**556, 280**P**554(1stcase); 232 **IllA**461. [a] (13) Appeal from order denying motion to open default is properly before appellate division where only order entered was order entered after reargument. 228**AppDiv**796, 240**N Ys**29.

527–32 213**Ala**662, 106**S**132; 218**Ala** 554, 119**S**664; 220**Ala**305, 124**S**879 (overruling motion to set aside default judgment); **Ala** 128**S**599(1stcase); 20 **AlaA**531, 104**S**898; 78**CalA**199, 248**P** 551.

527–33 196**Cal** 683, 239**P**323; 82**Mont** 434, 268**P**512; 33**NM**532, 271**P**469 (order striking motion to vacate order entering default).

527–35 **NM** 292**P**6 (order setting aside final judgment one hundred and nineteen days after entry); 246**NY**237, 158 **NE**320 (suspending default judgment).

527–36 23**AlaA**550, 129**S**293; 172**Ark** 1177, 290**SW**365; 34**CaA**119, 128**SE**219 (not final judgment); 232 **IllA**461; 207 **Iowa**842, 223**NW**864; 234**Ky**626, 28**SW** (2d)965; 148**Miss**259, 114**S**321; **Mo** 297 **SW**59; 48**Nev**244, 229**P**387, 234**P**518; **TexCommnA** 23**SW**(2d)299(1stcase); **TexCivA** 295**SW**950; **TexCivA** 11 **SW** (2d)329(1stcase). [a] (13) Default having been deliberate and no meritorious defense shown, order may be reversed. 217**AppDiv**665, 217**NYS**378. [b] **In Illinois.**–232 **IllA**461.

528–37 23**AlaA**254, 123**S**278 (mandamus is proper remedy).

529–52½–New. Order overruling objections to allowance and settlement of proposed bill of exceptions is not appealable. **Nev** 292**P**621.

529–57 198**Cal** 85, 243**P**417 (order of trial judge striking his certificate from clerk's transcript); 85**CalA**86, 258**P**1006 (order allowing or refusing certification of reporter's transcript); 99**CalA**641, 278**P**1058 (no appeal from order striking affidavit from reporter's transcript); 8 **LaA**737; **Mass** 173**NE**239; 176**Minn**472, 223**NW**912; 128 **Okl** 165, 261**P**913; 127 **Or**300, 272**P**258 (order vacating invalid orders extending time for filing transcript); 50**RI** 326, 147**A**621, 66**ALR**214 (decree staying execution against person for nonpayment of alimony decree pending appeal therefrom). See also 254 **Mass**14, 149**NE**604.

530–65 **LaA** 129**S**382.

531–66 92**Fla**1015, 110**S**532 [citCJ].

532–67 297**Pa**496, 147**A**519(1stcase).

532–68 98**Fla**108, 123**S**521; 244 **IllA** 357.

532–75 But see 33**PortoRico** 17.

533–88 322**Mo** 281, 15**SW(2d)**809.

533–90 21 **OhA**218, 153**NE**195, 196 [quotCJ].

533–91 43 **Ida**675, 256**P**529; 21 **OhA** 218, 153**NE**195, 196 [quotCJ].

534–5 218**Ala**518, 119**S**240 (order exempting property not final).

536–30 213**Ala**317, 104**S**786; 217**Ky** 810, 290**SW**669; 102**WVa**191, 134**SE** 748; 15**Wis**211; 16**Wis**470; 84**Wis**344, 54**NW**579; 111**Wis**322, 87**NW**230; 48 **CanSC**167, 11**DomLR**634, 25**WestLR**256.

537–31 48**CanSC**167, 11**DomLR**634, 25 **WestLR**256.

537–32 128 **Or**177, 270**P**911.

537–33 44 **Ida**363, 257**P**38; 241**Mich** 318, 216**NW**926; **Alta** [1928] 1**Dom LR**24. [c] **In unlawful detainer proceedings,** where, by the act of 1905, "not more than one appeal shall be allowed in any case," order of district court sustaining memorandum of costs in case appealed from municipal court held not appealable. 32**PortoRico** 8, 9.

537–34 41**Cal** 439; 67**Cal** 406, 7**P**810; 67**Mo** 687; 18**MoA**439; 35**MoA**232; 7 **Mont**346, 17**P**108; 15**Mont**100, 38**P**228.

538–35 22 **OhA**73, 153**NE**232.

539–40½–New. Judgment allowing expenses for preparing application to transfer cause is merely allowance in nature of costs as regards appeal. **Iowa** 232**NW**839.

539–41 79**Fed**277, 24**CCA**578; 28**Cal** 102, 87**AmD**107; 41**Cal** 439; 54**Cal** 192; 224 **IllA**291 (on writ of error); 7**LaA** 655; 43**Me**345; 2**Minn**67; 30**Minn**159, 14**NW**793; 18**MoA**439; 2**Mont**157; 2 **Mont**220; 2**Mont**350; 86**Mont**358, 284 **P**125; 2**Nev**128, 90**AmD**520; 1**Utah**199; 15**Wis**211; 38**Wis**583. See also 33**Mich** 65. But see 12**LaA**420, 125**S**328. [c] **Rule applied,** though order was made after judgment was otherwise complete. 15**Wis**211.

539–42 44 **Ida**113, 255**P**413; 44 **Ida**363, 257**P**38; 4 **Or**114; 9**PaCo** 82; 48**C**388; 21**SC**334. [b] **In Ontario.**–[1929] 4 **DomLR**524.

539–43 51**Wis**595, 8**NW**489.

540–49 74**CalA**152, 239**P**856; 161**Ga**711, 132**SE**547 (writ of error); 44 **Ida**363, 257**P**38; 2**BoswNY**673. [b] **Order on motion to strike cost bill** on appeal is appealable as motion to tax or retax costs. 74**CalA**152, 239**P**856.

540–50 74**CalA**152, 239**P**856.

540–54 [a] **Order not appealable.**–86 **Mont**358, 284**P**125.

540–57 103**Misc**257, 169**NYS**1051; 162 **NYS**762.

541–63 But see 29**F(2d)**712.

541–64 215**Ala**247, 110**S**394.

541–66½–New. An order resetting a case for trial after remittitur from the supreme court is not appealable. 201 **Cal** 438, 257**P**521.

542–67 216**Ala**674, 114**S**57; **MoA** 17**SW** (2d)675.

542–75 164**La**875, 114**S**718; 77**Mont** 466, 251**P**163.

543–81 137**Misc**356, 239**NYS**82 (held not "final order in special proceeding" but merely "motion in the action").

543–84 22 **OhA**315, 153**NE**312 (order to sell land of religious society). [a] (44) Order disapproving portion of sums claimed by sheriff as mileage account entered in statutory proceedings brought by him in district court. **TexCivA** 275 **SW**147. (45) Judgment in certiorari proceedings to review acts of municipal officers under statute. 35**PortoRico** 572. (46) Certiorari to annul resolutions of municipal assembly. 35**PortoRico** 721. (47) Order debarring mortgagee from proceeding in foreclosure action. **Alta** [1930] 4**DomLR**76.

544–85 [a] (11) Other orders not appealable. **Minn** 230**NW**113.

545–87 172**Minn**33, 214**NW**764.

545–89 [a] (38) Final order in proceeding to obtain order to sell real estate under code provisions for selling or incumbering real estate of charitable or religious society or association. 22**OhA** 315, 153**NE**312. (39) Other instances. **CalA** 284**P**514; 232**Ky**155, 22**SW(2d)** 578; 252**NY**284, 169**NE**386; 298**Pa**411, 148**A**709.

546–90 [a] (31) Order directing parties to proceed to arbitration. 100**CalA** 572, 280**P**697.

547–92 [a] (6) Other illustrations. 252**NY**284, 169**NE**386. (7) Order overruling motion to quash alternative writ of mandamus. 58**ND**904, 228**NW**416. [b] (12) Order establishing deposit as preferred claim against insolvent bank's receiver. 204 **Iowa**1186, 216**NW**769.

548–10 65 **Okl** 233, 166**P**193.

548–12 90**Fla**420, 106**S**427.

549–14 73**Mont**426, 236**P**1089 (order permitting amendment of affidavit for writ of attachment is not appealable).

549–17½–New. An order vacating an order dissolving an attachment and levy and reinstating the same is appealable. 164**Minn**130, 204**NW**633.

549–21 **CalA** 288**P**41 (order in effect discharging attachment); 90**Fla**420, 106 **S**427; 152**Md**471, 136**A**896 (appeal will not lie on motion filed after return day); 222**MoA**1051, 6**SW(2d)**68; 145**Wash**365, 260**P**243 (not appealable where left open subject to modification). [b] **Order quashing writ of garnishment** is in effect final judgment which may be reviewed by writ of error. 231**Mich**604, 204**NW**704.

550–22 22**AlaA**615, 118**S**675(1stcase);

216Ky421, 287SW944; MoA 285SW1039 (1stcase); 117 Or271, 243P559.

551–23 48Philippine238, 240 [citCJ].

551–26 48Philippine238.

552–32 See also 5KyOp282. But see RI 143A602.

552–35½–New. A judgment directing the sale of personalty levied upon under foreclosure proceedings, unless defendant executes a bond, is not reviewable by writ of error. 37GaA392, 140SE424.

552–36 12Ala743; 12Ark158; 168Ark754, 271SW703; 10Colo133, 14P317; 45Conn59; 5Kan202; 7Mich103; 22NH103; 2HumphrTenn303; 9YergTenn412; 18SwanTenn90; 28Vt726; 54Vt420; 75Wis309, 43NW952. See also 11Ark180; 36Kan614, 14P156.

552–37 16F(2d)27 (denial of motion to charge trustee); 90Fla420, 106S427, 429 [citCJ].

552–38 11Ala875; 114Ala107, 22S428; 12Ark158; 40Ark531; 181Ark444, 26SW(2d)115; 45Conn59; 2GaA537, 59SE469; 37Iowa620; 136Iowa575, 114NW43; HardKy160; 34LaAnn588; 10PickMass440; 12MetcMass397; 106Mich38, 63NW963; 26Minn303, 3NW695; 40Minn378, 42NW86; 40Minn379, 42NW87; 46Mo391; 19MoA542 [aff 165US27mem, 17SCt996mem, 41Led621mem]; 11Nev187; 12Nev331; 17Okl579, 87P302; 23RI78, 49A395; 28RI32, 65A304; 11SCL488; 1BaxtTenn269; 7LeaTenn620; 23Vt504; 28Vt726; 54Vt420; 14Wash640, 45P312. See 11Del343. But see 14Vt328.

552–39 42Ark283; 1GaA430, 57SE1047; 1Iowa460; 71Iowa120, 32NW202; 82Iowa405, 48NW723; 5Kan202; 60Kan268, 56P502; 7KanA491, 54P286; 99Mass530; 45Mich413, 8NW80; 40Minn378, 42NW86; 41Minn3, 42NW539; 12Nebr321, 11NW300; 9LeaTenn135; 150Wash267, 272P955 (order quashing garnishment writ and vacating judgment). See also 45Mich41, 7NW227. [a] 37Iowa129; 2AllenMass123; 33Wis510. [c] **Judgment affecting defendant's exemption rights.**–60Kan268, 56P502.

553–40 65Fed647, 13CCA77; 27Conn270; 27Conn518; 103Minn268, 114NW955, 20LRANS271.

553–41½–New. order denying motion to discharge garnishee; 174Minn604, 218NW730.

553–47 119Mass71; 75Wis309, 43NW952. But see 166Minn481, 208NW413.

553–49 215Ala166, 110S149; 27Conn270; 27Conn518; 87Ga93, 13SE259; 245IllA589; 23Ind454; 33Kan112, 5P388; 34Kan13, 7P602; 36Kan614, 14P156; 119Mass71; 98Minn141, 107NW966, 116AmSR346; 133Okl59, 270P1106; 296Pa501, 146A603; 161Tenn79, 26SW(2d)126 (order overruling motion to quash garnishment); 35Wis67; 64Wis422, 25NW440; 75Wis309, 43NW952.

553–51 108Ala355, 19S913; 60IllA346 [aff 161Ill316, 43NE1070]; 4Iowa340; 22NH103; 23Vt504. See also 66Tex187, 18SW499; 28Vt726.

553–56 See also 5BaxtTenn640; 1Heisk Tenn754.

553–57 100US104, 25Led527 (question discussed); 111US776, 4SCt700, 28Led599; 131USAppendix clx; 135US207, 10SCt736, 34Led97; 33Ark161; 36Ark532; 95Ark517, 129SW1079; 42Fla387, 28S861 [aff 183US471, 22SCt176, 46Led283]; 204Mass378, 90NE576; 100Mich286, 59NW140; 2Munf(16Va)521; 3Munf(17Va)112; 32Gratt(73Va)657; 75Va747; 76Va21; 78Va413.

553–59 33Ark161; 102Md456, 62A1030, 4LRANS865; 5AnnCas941; 93Mich307, 53NW523; 32NJEq399; 27SCEq364, 62AmD392 (refusal of leave affirmed).

555–69 103NJL405, 135A873.

556–78 219AppDiv261, 219NYS709.

556–81 173Minn464, 217NW488.

557–83½–New. from a citation for contempt. 47Ida207, 275P99.

557–83½–New. from a rule to show cause. 47Ida207, 275P99.

557–86½–New. An order dissolving a previous stay of commitment if on return of the proceeding defendant should persist in refusal to question is not final or appealable. 195Wis33, 217NW649.

558–3 72CalA452, 237P829 (order sustaining demurrer to complaint is not appealable).

558–4 [b] (2) Judgment in habeas corpus proceeding by mother to obtain custody of minor child is appealable as final judgment in special proceeding of civil nature. 77Mont466, 251P163. [d] **Orders not final.**–18F(2d)953.

558–6 108Conn19, 142A452 (mandatory injunction is final judgment though item of damages not disposed of); 164Ga149, 138SE71; Md 148A826 (preliminary injunction and orders held superseded by final decree as regards appeal); 32PortoRico658; 157Tenn211, 7SW(2d)812. [e] **Illustration.**–148Md182, 131A148. [f] **Order overruling demurrer to complaint** in injunction proceedings is not appealable. 32PortoRico658.

559–8 270US587, 46SCt408, 70Led747 (order granting preliminary injunction is not appealable where later permanent injunction was granted); 162Ga591, 134SE300; 164Ga149, 138SE71; 164Ga705, 139SE354 (dictum); 169Ga435, 150SE555(1stcase); 169Ga537, 150SE907(1stcase); Ga 155SE522 (refusal to rule on motion to set aside order); 247IllA263; 252IllA457 (order dissolving injunction as to one party and modifying it as to another); 169La245, 1248842; 6LaA177; Nebr 229NW121; 34OhA295, 170NE879 (restraining order not appealable); 113Or552, 233P848 (dissolving temporary injunction against execution sale); 296Pa228, 145A817(2dcase); RI 142A537 [certiorari den 278US642, 49SCt36, 73Led556(11thcase)] (interlocutory decree in petition by husband for divorce from bed and board, granting husband temporary injunction against wife going on premises of husband and interfering with husband, held not appealable); 50SD284, 209NW651; Tex CommnA 276SW199.

561–9 [b] (4) Order for continuance of preliminary injunction is not appealable. 295Pa529, 145A532(2dcase). [d] (1) 30Ariz72, 245P366.

561–10 [a] (1) 162Ga432, 134SE83; 166Ga149, 142SE690. (2) 164Ga705, 139SE354 (dictum). (4) 169Ga537, 150SE907 (1stcase). (10) Order dissolving previous temporary restraining order is not judgment refusing injunction and is not basis for writ of error. 165Ga502, 141SE295.

561–11 288Pa227, 135A630. [a] (2) MoA 279SD1059.

561–13 [a] (1) 87IndA74, 160NE50. (4) But see Ind 171NE871. (5) Order granting or refusing permanent injunction is appealable. Ind 171NE871.

562–14 [a] (5) Under Code (1923) § 6081, interlocutory order discharging injunction is reviewable by appeal. 216Ala445, 113S411. (6) Decree refusing temporary injunction without prejudice to renew application and ordering cause to be retained for further orders if application is renewed, held to deny injunction, and appealable under Code (1923) § 8307. 218Ala544, 119S660. (7) Order for issuance of temporary injunction is not appealable. Ala 128S902.

562–15 [b] (14) Order refusing to extend injunctive relief granted by prior order held appealable. TexCommnA 13SW677. (15) Order dissolving temporary injunction after temporary restraining order expired has no effect as regards appeal therefrom. TexCivA 27SW(2d)644. (16) Granting or refusing motion to dissolve temporary restraining orders is not appealable under statute. TexCivA 27SW(2d)644.

563–16 [a] (6) 8F(2d)11. (7) 8F(2d)11. [b] (1) 93CalA615, 270P255. [g] (3) Injunction orders granted without notice are not appealable. 80Mont293, 260P727. (4) Order restraining defendant in divorce proceeding from interfering with plaintiff's management of apartment house pending suit is appealable. 82Mont463, 267P803. [k] In Porto Rico.–32PortoRico668.

564–17 [a] (15) Scope of review. 247IllA170.

564–18 Ind 171NE871; 32PortoRico658. [a] (7) Order overruling demurrer to complaint. 32PortoRico658. (8) Interlocutory order revoking temporary restraining order. 169Ga226, 150SE85 (2dcase). (9) Order dissolving prior restraining order and providing for bill of exceptions is not judgment refusing interlocutory injunction. 169Ga300, 150SE215. (10) Decree staying execution for nonpayment of alimony decree is not interlocutory decree of injunction from which appeal lies. 50RI318, 147A621.

565–23 [b] (9) Under act of 1924 no right of appeal exists from mere order dissolving restraining order. 164La1099, 115S283. (10) Suspensive appeal lies from final judgment in injunction matters. 1LaA542.

566–24½–New. A statute authorizing an appeal from an interlocutory order in a specific case other than relating to injunction impliedly forbids appeal from the latter. 113Or552, 233P848.

567–37 171Ark96, 283SW47; 318Ill48, 148NE868 (decree declaring interests of parties and appointing commissioners is appealable); 299Pa294, 149A319 (all purparts must be awarded). [c] **Order on rule to show cause that community property be sold** is appealable as first and only judgment in partition, though previous divorce action was not appealed from. 159La46, 105S95.

567–38 218Ala536, 119S662(1stcase); 169Ga377, 150SE552(1stcase); NM 292P901; 85PaSuper421. [b] (7) Where decree cancels instruments and settles issues as to title, it is final, though cause is continued for further report of commissioners as to rents, improvements, and taxes. 171Ark96, 283SW47.

568–39 205Cal197, 270P453(2dcase); 49Philippine460.

569–42 85IndA407, 152NE857. [a] 297Pa212, 146A537.

569–43 239IllA167; Md 148A414; Md 150A870; 310Mo267, 275SW534.

570–44 [a] (1) 199Cal140, 248P509. (4) 70CalA127, 232P733; TexCivA 300SW985. (5) Though judgment allowing plaintiff nothing in will contest follows ruling sustaining plea in abatement it is not appealable. TexCommnA 12SW(2d)978. (6) Construction of will. 33OhA532, 170NE31. [b] (13) Order suspending executor and appointing administrator pendente lite. 310Mo267, 275SW534. [d] (6) Order of county judge approving and classifying claims. TexCivA 280SW879. [e] (1) 24Man217, 17DomLR466, 28WestLR177, 6WestWkly882. [f] (1) 170Minn338, 212NW902; 48Nev100, 227P1016, 232P783 (order approving final report of administrator appealable, irrespective of amount in controversy). [g] (1) 173Ark188, 293SW1 (decree adjudging rights and ordering sale and distribution). (2) 154Miss800, 122S784, 63LRA1319; 33NM464, 269P329; 49Philippine165. (4) 33NM464, 269P329. [j] (5) 330Ill172, 161NE493 (order denying petition to be declared heir of decedent). (6) Decree sustaining exception to report of appraisers where administration removed from probate to equity court. Ala 128S440.

571–46 164Ga772, 139SE537.

571–47 [a] (7) Order refusing to set aside order denying application to revoke probate of will. 70CalA127, 232P733. (8) Other instances. 202Cal490, 261P709. (9) Judgment that power to fill vacancy on death of executor given by will is valid. 168Ga788, 149SE139. [d] (6) Preliminary order directing administrator to proceed by petition for examination of certain individual as to assets claimed to belong to estate. 142Wash552, 253P816. (7) Orders relative to inclusion or exclusion of property from inventory. 51Philippine75. [e] (4) Order allowing belated claim against estate to be filed in county court. Nebr 231NW833. (5) Order of county court allowing or refusing to allow claim properly presented is not final and appealable. SD 227NW845. [h] (2) 117Nebr551, 221NW694 (order approving items of account, requiring further collections and report and continuing proceedings for further decree). See also 32PortoRico646. [j] (5) Md 148A414. (6) Orders for payment of balance in executor's hands with surcharge in accordance with schedule, has been held not final and not appealable. 297Pa212, 146A537.

573–48½–New. Order denying motion to revoke removal of administration from probate to equity court is nonappealable, being neither "final" nor "interlocutory." Ala 129S8.

573–49 221AppDiv129, 222NYS751; 4OntWN632, 23OntWR732, 9DomLR135. [a] (3) In Kentucky judgment ordering sale and distribution of undivided es-

tate held "final judgment." 220Ky613, 295SW893. [e] 123 Okl 142, 252P34 (order denying petition to strike claim from inventory).

574–53 149Va518, 140SE663.

574–57 195Cal 375, 233P342 (order refusing to remove execution is appealable); MoA 18SW(2d)147 (refusing to set aside adjudication of insanity).

575–62 168Minn283, 210NW85. [a] (20) Order of orphan's court based on discretion of court in considering objections to allowance of commissions for misconduct and little work done by administration. 149Md22, 130A337. (21) Order consenting to compounding by executor of debt of insolvent to estate. 168Minn283, 210NW85.

575–65 46 Ida635, 269P593; 129 Okl 127, 263P1101 (order setting aside order vacating appointment of receiver); 137 Okl 116, 278P294; 116 Or440, 241P 388; 287Pa291, 135A131; TexCivA 292 SW296; TexCivA 9SW(2d)198 (order overruling motion to discharge receiver and allow separate foreclosure is not appealable). [b] **Order appointing receiver is interlocutory**, and is not reviewable till after final disposition of case. 43 OklACR79.

576–67 34F(2d)353; 214Ky364, 283 SW110; 53SD132, 220NW453; TexCivA 29SW(2d)441. [a] **In Oklahoma.**–43 OklACR79.

576–68 17F(2d)900. [d] (5) Supreme court cannot review order refusing to vacate appointment of temporary receiver. 163Ga63, 135SE405. [f] (1) 200 Ind350, 160NE43. [j] (3) Under Rev. St. (1919) § 1469, appeal lies from order sustaining motion to strike from files appellants' motions to revoke order appointing receiver. 319Mo 1105, 8SW (2d)905. [o] (1) TexCivA 5SW(2d)789 (though appellant has not filed answer). (6) Order postponing motion to vacate appointment of receiver is not appealable. TexCivA 2SW(2d)929. [r] **In Oklahoma.**–143 Okl 162, 288P476, 293P 211.

578–70 [a] (1) 206 Iowa746, 221NW 347.

578–71 BC 11DomLR75, 24WestLR47. [a] (6) Order approving current accounts of receiver. 34Ariz278, 271P25. (7) Other instances. 155Md500, 142A 512; TexCivA 9SW(2d)198. (8) Order enjoining defendants from interfering with management of mortgaged property by receiver. 34F(2d)836.

578–72 34Ariz278, 271P25; 173Ark90, 291SW981. But see 89CalA330, 264P 1110.

579–73 203 Iowa1399, 214NW561.

579–74 67Utah514, 248P481, 47ALR 765 (notice of appeal from order approving report of receiver of mortgaged property in foreclosure proceedings held ineffectual). [c] **Decree vacating decree** approving plan of reorganization is obtained by fraud in so far as it orders receiver to send notice to creditors, expenses of which are to be paid by company, which is transferee of assets. 9 F(2d)344 (with reservation of question of ultimate liability).

579–76 73CalA687, 239P65; 214Ky364, 283SW110; 81Mont489, 264P106 (order denying preference); 43 OklACR79, 84 [reh pending, and quotCJ]; 47RI 235, 132A609; 144Wash38, 256P331. [b] (1) Ariz 286P189; 53SD132, 220NW 453. (3) Judgment allowing intervener's claim and ordering payment held final. Ind 170NE327. [d] 176Minn470, 223NW775 (order settling final account); 144Wash38, 256P331. [f] (6) Court order directing payment by receiver of funds of estate in his hands is not subject to further action of court by decree or subsequent order and is therefore appealable. 49Nev115, 239P395. [g] **Approval of receiver's account.**–168La701, 123S296.

580–80½–New. Receiver may not appeal order refusing to punish one for contempt. TexCivA 277SW718.

580–81 155Tenn530, 296SW356.

580–85 214Ky364, 283SW110; 144Wash 38, 256P331.

581–88 43F(2d)777.

581–90 35F(2d)685 (requiring receiver to perform executory contract with intervener, where order is antagonistic to rights of both parties to original suit).

581–91 29 OhA446, 162NE768 (holding that appeal does not lie to court of appeals from order of court of common pleas refusing permission to sue receivers on contract to reorganize and conduct business).

581–6 Fla 128S862 (case within statute allowing appeal); 205 Iowa778, 218 NW475; 254NY15, 171NE889.

582–13 189NC805, 128SE329; 158Tenn 50, 12SW(2d)528(1stcase) (interlocutory orders of court of appeals are not reviewable by supreme court).

583–17 TexCommnA 22SW(2d)1061(1st case).

584–19 [a] (2) Procedure of court of appeals requiring consent remittitur as condition of affirmance and affirming reduced judgment does not involve any question arising under state or federal constitution as affecting filing of petition in error as matter of right. 20 Oh A12, 151NE805.

584–21 252Mass430, 147NE894; 101 WVa708, 133SE390; 22QueKB272.

585–26 101WVa708, 133SE390.

585–27 [a] (3) Order of appellate division, reversing and remitting to compensation commission for reinstatement of award, considered final order. 245 NY574, 157NE863. (4) Dismissal of appeal from judgment is final determination of action. 214AppDiv292, 212 NYS381.

586–31 278US484, 49SCt192, 73L ed 464. [b] **Judgment of Illinois appellate court**, after Illinois supreme court denied certiorari, was reviewable by United States supreme court as being judgment of highest court in state in which decision could be had. 279US 410, 49SCt363, 73L ed766.

586–33 But see 269US411, 46SCt144, 70 L ed339.

586–38½–New. An order refusing a writ of error is not final, unless refused on the ground that the order or judgment of the inferior court is plainly right or the period of limitations for the writ has expired. 101WVa708, 133 SE390.

587–46 33NM104, 263P766; 95PaSuper 228.

588–49 23F(2d)91 (dismissal for lack of parties); 214AppDiv292, 212NYS 381; 51ND842, 200NW1010 (dismissal by district court of appeal from justice's court on jurisdictional grounds is not appealable). [c] (3) Proper practice is to enter judgment on order dismissing appeal and then appealing from judgment. 214AppDiv292, 212 NYS381.

588–52 317 Ill 459, 148NE244; 39Wyo 191, 270P664.

590–74 269US125, 46SCt52, 70L ed 195; 270US593, 46SCt367, 45ALR1370; 74CalA152, 239P856; 325 Ill 43, 155NE 757; 328 Ill 426, 159NE821.

591–76 269US125, 46SCt52, 70L ed195; 278US188, 49SCt158, 73L ed258; 252 Mass430, 147NE894. See also MoA 14 SW(2d)656.

591–79 [b] TexCommnA 294SW516.

593–85 25 OhA514, 157NE427.

593–87 Mo 29SW(2d)83; 217MoA51, 272SW1048. [a] **In North Carolina.**–189NC805, 128SE329.

593–87½–New. In Minnesota it is doubtful whether an appeal can be taken from an order denying a motion to vacate an order dismissing an appeal from the judgment of a justice's court. 168Minn31, 209NW488.

597–4 318 Ill 402, 149NE422 (statute held valid).

598–13 Ala 113S235; Ala 130S194(1st case); 94Fla10, 113S676; 94Fla1096, 114S666; 34GaA67, 128SE223; 28Hawaii403; 204 Iowa54, 214NW705; 213 Ky658, 281SW796; 149Md182, 131A 148; 232Mich388, 205NW98; 110 Okl 8, 234P625; 117 Or18, 242P624; 121 Or 92, 254P800; TexCivA 281SW641; Tex CivA 284SW720; TexCivA 31SW(2d) 860.

598–14 1KyOp337.

598–15 101CalA666, 282P19(2dcase) (minute order or court memorandum reciting that court ordered writ of prohibition issue is not final decree authorizing appeal); TexCivA 300SW990.

599–17 82CalA27, 255P250; Ind 154 NE12. [d] **Conclusion of law "that said cause should be dismissed"** followed by recitation in order book entry that "the same is hereby dismissed" held final judgment as affecting right to appeal. Ind 154NE12. [e] **Judgment on appeal.**–82CalA27, 255P250.

599–18 169Ga226, 150SE85(2dcase).

600–19 32Ariz99, 255P995.

600–35 80CalA599, 251P341; 133SC23, 130SE552 (dictum); Utah 264P724, 725 [quotCJ].

601–36 80CalA599, 251P341; 110 Okl 8, 234P625; 195Wis593, 219NW344. See also 206Cal 635, 275P803.

601–38 34Ariz26, 267P416; Ind 172 NE353; 121 Or92, 254P800; 286Pa55, 132A804; 133SC23, 130SE552 (order confirming master's report); 54SD329, 223NW210 (denying order to show cause); 99WVa447, 129SE469.

602–40 164Ga23, 137SE390; 28Hawaii 403.

602–42 226AppDiv106, 234NYS661.

602–46 70CalA732, 234P409.

602–47 10LaA10, 120S427(1stcase); La 130S867. [a] (1) 1LaA646; 2LaA 180; 3LaA623; 5LaA601(1stcase); 8 LaA474; 8LaA536.

603–50 199Cal 190, 248P665; NJ 150A 192; 23 OhA273, 155NE573. [a] 28 OhA75, 162NE604.

603–52½–New. Where a judgment by default was opened and plaintiff failed to prosecute and was nonsuited with costs to defendant, defendant could not appeal. 224 IllA417.

603–57 MoA 78SW(2d)447; 145Va861, 134SE591, 592 [citCJ]; 101WVa53, 131 SE872, 873 [citCJ]. See also 234 IllA 214; 105WVa527, 143SE304 [citCJ].

604–58 [b] (3) Statute does not apply where face of paper presents question of law. 158La682, 104S616.

604–61 252 IllA584; 121 Or469, 256P 195; 32PortoRico 786 [citCJ].

604–62 20AlaA643, 104S774; 118Kan 347, 235P111; 128Kan120, 276P289 (error appearing on face of record); Sask [1926] 4DomLR1192, [1926] 3 WestWkly699 (court of appeals held to have jurisdiction).

605–67 47RI 357, 133A351.

605–71 121 Or469, 256P195. [a] **Void default judgment held appealable.**–121 Or469, 256P195.

605–73 217AppDiv66, 216NYS1. [b] **Effect of appeal from order denying motion to open default.**–217AppDiv66, 216NYS1.

606–77 [a] (6) Judgment entered after answer has been held improperly stricken out. 219AppDiv261, 219NYS709.

607–84 252Mass574, 147NE847.

607–85 Fla 129S501; 224 IllA417 (as to nonsuit).

607–87 [b] 244 Ill 264, 91NE448.

608–95 But see 167La1032, 120S767 (1stcase).

609–98 128Misc444, 218NYS315; 89 PaSuper11. [c] **"Order" granting judgment on pleadings** without minutes, findings, or conclusions is not subject to appeal. 219AppDiv587, 220NYS132.

609–99 224AppDiv371, 231NYS115 (under Civ. Pract. Rules, rule 113 appeal lies from order denying summary judgment). [b] **Appeal lies from summary judgment**, and, on appeal from order granting it, is necessary. 217App Div59, 216NYS437.

610–4 243 IllA490.

610–5 See also TexCivA 9SW(2d)437.

610–7 36GaA448, 136SE920; 91PaSuper421. But see 151Wash542, 276P891.

610–9 [a] **In Mississippi.**–152Miss388, 118S895.

611–10 159La270, 105S340, 42ALR 635.

611–18 79CalA669, 251P247; 258Mass 494, 155NE459; 265Mass390, 164NE 467; 14Minn513; 14Minn514; 18Minn 316; 172Minn51, 215NW180; 179Minn 381, 230NW257(2dcase); 49ND933, 194 NW113; 297Pa49, 146A150; Utah 276 P159; 195Wis593, 219NW344; 198Wis 296, 223NW835. But see Mass 169NE 433(1stcase).

612–20 252Mass157, 40ALR1443, 148 NE379 (order for judgment entered on case stated); 265Mass390, 164NE467.

613–25 294Pa137, 143A786; TexCivA

277SW801; TexCivA 295SW214; 38 Wyo 511, 268P1025. [c] (1) TexCivA 287SW293.

613-26 85Colo 346, 276P30; 50Nev181, 254P1080. [b] In California.–80CalA 599, 251P341.

614-28 [c] (8) Formal entry and docketing of judgment of superior court affirming judgment of municipal court is not required before appeal may be taken therefrom. 82CalA46, 255P 248. [k] Utah 276P159.

614-29 208Cal 102, 280P358(1stcase); TexCivA 300SW990. [a] 70CalA732, 234P409.

614-33 94Fla1096, 114S666; 130 Okl 152, 266P437.

615-34 80Pa57.

615-39 CalA 277P499. [a] (1) 245NY 646, 157NE893.

616-42 319 Ill 426, 150NE270; 75Mont 466, 244P277.

616-48 164La907, 114S832.

616-49½-New. Proof of appellant's standing as to right of appeal may be required as the first step in the appellate court. 255Mass611, 152NE220 (Gen. L. c 215 § 9).

616-50 132SC264, 128SE360.

616-54 208Ky784, 271SW1095, 1096 [quotCJ].

616-55 108Ala355, 19S913; 98CalA84, 275P865; GaA 155SE340(1stcase); 319 Ill 426, 150NE270; 334 Ill 406, 166NE 52; Ind 171NE65; 206 Iowa488, 221 NW223; 208Ky784, 271SW1095, 1096 [quotCJ]; 226Ky785, 11SW(2d)937; 3 LaA12; 26 OhA186, 159NE851; 116 Or 525, 241P988; TexCivA 291SW948; TexCivA 30SW(2d)337; TexCivA 32SW (2d)390(1stcase); 151Va270, 144SE 422; 151Va913, 145SE311; 103WVa60, 136SE605. [b] 329 Ill 582, 161NE56. [c] 45Mich413, 8NW80; 89Mo 13, 14SW 827.

616-55½-New. In New York, before one not a party to an action can be heard to assert his title to property involved, he should make application to be made a party, otherwise his appeal from the action will be dismissed. 215App Div719, 212NYS388.

617-56 208Ky784, 271SW1095, 1096 [quotCJ].

617-57 See also 121 Okl 40, 247P74.

618-63½-New. A stranger, by connecting himself to the cause on motion to recall and annul a writ of assistance may appeal from the order denying such motion. 204Cal 370, 268P341.

619-72 [1] **Third person claiming superior right** to execution has appealable interest in judgment taxing execution costs. 12LaA603, 126S521.

619-76 43 Ida675, 256P529.

621-92 164La907, 114S832. [a] **Where one of a class of defendants** is appointed to be served and consents to injunction and receiver, individual member of class, not appearing, cannot except to judgment, though alleging that representative, on request, refused to file exceptions. 163Ga27, 135SE489.

621-95 TexCivA 276SW787; TexCivA 48W(2d)566.

622-96 161La984, 109S785; 199Wis 315, 225NW935(2dcase).

622-1 146Va442, 132SE839, 44ALR 1175.

622-3 26 OhA186, 159NE851; 146Va 442, 132SE839, 44ALR1175. See also Mo 277SW907.

622-5 30Hawaii41.

622-10 [a] **Statutory provisions.**–155 Tenn121, 290SW981.

623-14 203 Iowa1152, 211NW423, 427 [citCJ]; TexCivA 158W(2d)86 (warrantor from judgment against warrantee).

623-16 203 Iowa1152, 211NW423, 427 [citCJ]. [e] 294Pa86, 143A500 (may appeal from irregular or illegal judgment entered against executor).

624-18 30F(2d)769; 319 Ill 426, 150NE 270; 329 Ill 582, 161NE56 (relator in quo warranto); 87 IndA647, 154NE24; 213Ky50, 280SW472; 156LaS89, 101S 255 (devolutive appeal by third party which will not prevent sale of property subject to order of seizure and sale in foreclosure); 237Mich143, 211NW46; 169Minn123, 210NW859; 221MoA718, 285SW122, 123 [citCJ]; MoA 7SW(2d) 704; NH 146A89; 286Pa224, 133A228; 292Pa114, 140A768; 36Wyo 30, 252P 789, 790 [quotCJ].

625-23 30F(2d)769; 131 Okl 189, 268 P194.

625-25 319 Ill 426, 150NE270; 164La 907, 114S832; 166La593, 117S729 (primary owner of funds deposited in court for distribution); 286Pa224, 133A228.

625-26 166La593, 117S729 (contractors as warrantors of indebtedness, though not originally parties); Mich 211NW 46.

626-31 See also 118Kan528, 235P827.

627-70½-New. to one entitled to income necessary for support in an action granting an allowance from the estate; 212Ky13, 277SW250.

627-70¾-New. to lessee under lease from state intervening in action and under lease from receiver; 20F(2d) 873.

627-71½-New. Trust beneficiary held "person interested" under statute. Mass 171NE645.

628-81 252 IllA417.

629-94 163La1019, 113S360. [a] **Assignee of cause of action may prosecute appeal.**–Wash 292P416.

629-97 96CalA610, 274P764 (appeal by plaintiff not dismissed on assignment of interest to coplaintiff by clerk under order of court).

629-2 142Wash54, 252P102.

629-3 13F(2d)987; CalA 285P354; 29 Hawaii 849, 851 [citCJ]; 43 Ida675, 256 P529; 319 Ill 426, 150NE270; 237 IllA 166; 1LaA787; 255Mass611, 152NE 220; Minn 233NW10; 221MoA718, 285 SW122; 75Mont466, 244P277, 278 [cit CJ]; 101NJEq776, 139A32; 98NJEq 692, 130A519; 245NYS694; Okl 293P 177; 115Tex147, 277SW619 (application for writ of error refused where record shows no error as respects applicant); TexCommnA 283SW491, 494 [citCJ]; 151Va270, 144SE422; 145 Wash365, 260P243.

631-4 Okl 293P177; 145Wash365, 260 P243. [a] **Order denying change of venue for which no motion was made** is not injurious to defendant who filed affidavit and demand for change of venue but failed to make any motion invoking action of court. 82CalA499, 255 P884.

631-5 255Mass611, 152NE220; 82Mont 198, 266P378, 57ALR1169; 49RI 269, 141A703.

631-7 32PortoRico 767.

631-12 80Mont27, 257P1025.

632-13 222AppDiv724, 226NYS111; 288Pa569, 136A864.

632-15 32F(2d)734; 39F(2d)288; 208 Cal 308, 281P58 (corporate stockholders seeking to intervene were aggrieved by vacation of order granting new trial); 28Hawaii 310, 325 [citCJ]; 255 Mass611, 152NE220. [p] (2) Judgment debtor is aggrieved by order empowering sheriff to break open his safe deposit box to levy attachment on its contents, since, if order is wrong, his constitutional rights will be infringed upon. 240NY187, 148NE185, 39ALR1211; SD 226NW563; TexCivA 286SW519; TexCivA 31SW(2d)856; 151Va270, 144 SE422 (defendant held not aggrieved); 148Wash432, 269P494 (insurance company, setting up possible interest of first beneficiary, who did not appeal, held not aggrieved by, and hence not entitled to appeal from, judgment against it).

633-16 47RI 251, 132A545; 142SC70, 140SE234 (possibility of multiplicity of suits is sufficient burden).

633-17 106Conn582, 138A815. [e] 255 Mass611, 152NE220; 223AppDiv849, 228NYS544 (relatives of one adjudged incompetent not persons aggrieved by order denying application to set aside adjudication of incompetency).

634-18 126Me111, 136A662; 80Mont 27, 257P1025.

634-18½-New. one as to whose contentions the decision appealed from is adverse; 145Wash365, 260P243.

634-20 82Mont198, 266P378, 57ALR 1169.

634-22 319 Ill 426, 150NE270.

634-25 319 Ill 426, 150NE270; 213Ky 50, 280SW472; 82Mont198, 266P378, 57ALR1169; 47RI 251, 132A545.

634-26½-New. Persons claiming to be beneficiaries under a testamentary charitable trust fund are not entitled to appeal from a decree of probate as having direct pecuniary interest in the estate. 106Conn582, 138A815.

634-27 201Cal 555, 258P71 (defaulting defendant held not aggrieved by judgment on cross complaint of codefendant affecting property of plaintiff only); 102CalA606, 283P80.

635-31 49RI 269, 141A703.

635-37 93Fla611, 112S768; 50Nev181, 254P1080.

635-40 31F(2d)914; 207Cal 167, 277 P327; 217Ky806, 290SW665; 226Ky 578, 11SW(2d)426; 229Ky258, 16SW (2d)1045; 168La92, 121S585; 10LaA 146, 122S75; 169La571, 125S621(1st case); 12LaA42, 125S135; 82Mont198, 266P378, 381, 57ALR1169 [citCJ]; 116 Okl 93, 243P214. See also 33PortoRico 98.

635-40½-New. or in accord with his contentions, 145Wash365, 260P243.

635-40¾-New. although based on grounds other than those presented by appellant, 145Wash365, 260P243 (decision on motion to discharge attachment).

636-41 [a] (3) Court will not consider appeal on mere filing of record by prevailing party who was not entitled to file record as appellee under statute. 217Ky806, 290SW665.

636-47 93Fla611, 112S768; 28Hawaii 310, 325 [quotCJ]; 219Ky671, 294SW 168, 169 [citCJ]; 13PortoRicoFed129. [a] (2) Defendant has right of appeal from dismissal without prejudice. Mass 164NE921. [d] **Judgment awarding costs against prevailing parties** does not prevent appeal by unsuccessful parties adversely affected. Ind 171NE65.

637-48 93Fla611, 112S768.

638-3 148Md695, 130A330.

638-4 148Md695, 130A330 (counsel for beneficiary of trust has no such interest as to be entitled to appeal from order overruling exceptions to auditor's disallowance of his fees); 73Mont35, 235P408.

638-8 48 Ida182, 279P713; 52SD572, 219NW258.

639-13 39F(2d)288; TexCommnA 276 SW170.

639-15 206Cal 456, 274P748; 75Mont 132, 242P431. [c] **Writ of supervisory control.**–75Mont132, 242P431.

639-16 TexCivA 8SW(2d)1051.

639-17 101CalA733, 282P401 (labor claimant who merely filed notice of motion for intervention); 75Mont466, 244 P277.

640-24 [c] **Interpleader has a right to appeal,** though there is no judgment against him, even for costs, from judgment charging garnishee for use of creditor of defendant. 60 IllA346 [aff 161 Ill 316, 43NE1070].

640-30 But see 82NH321, 133A447.

640-31½-New. Only defendant can object to refusal of interpleader. 300Pa 154, 150A297.

641-34 99Vt85, 130A583.

642-37 235Ky582, 31SW(2d)890.

643-59 11Del 343; 2GaA537, 59SE469; 157 Ill 176, 41NE636; 136 Iowa575, 114 NW43; 28RI 32, 65A304; 8Humphr Tenn132; 14Vt328; 2Leigh(29Va)512; 100WVa359, 130SE439. [a] **Judgment or order prejudicial to garnishee.**–19 MoA537. [b] **Garnishee cannot appeal** from judgment in main action against defendant. 18Wis31.

643-61 122Ga640, 50SE483; 126Ga662, 55SE927; 40Minn378, 42NW86; 48 Wash101, 92P901.

643-62 [c] **When garnishee answers admitting indebtedness,** he cannot appeal from judgment charging him as garnishee therefor. 45SW770, 20KyL 147. [d] **Where garnishee answered but failed to implead debtor,** his only right to appeal, from judgment rendered without notice, was to secure immunity from further claim against him by debtor. TexCivA 16SW(2d)926.

643-63 37 Iowa379; 3LaAnn623; 113 NC473, 18SE665; 8HumphrTenn132. See 32 IllA612; 19 Iowa165; 38 Iowa 556; 17Vt193, 44AmD329. See also 85 Wis201, 55NW147. [b] **Appeal by de-**

fendant from judgment in reference to garnishee's liability.–99Me463, 59A737.

643–64 56SW424, 21KyL1796; 99Mass 501; 95Minn118, 103NW709, 106NW 304; 28Vt726; 6Gratt(47Va)363; 62 WVa486, 59SE503, 125AmSR983, 13 LRANS757.

643–68 255 IllA395 (third mortgagee held to have appealable interest in order appointing receiver in foreclosure); 50Nev91, 252P322.

643–69 [b] **Junior mortgagee** who has failed to redeem from reconveyance to vendor by tendering to latter amount due on purchase-money notes cannot complain of judgment against him in action of trespass to try title. **TexCivA** 286SW519.

644–73 80Mont27, 257P1025.

644–74 221MoA718, 285SW122, 123 [cit CJ] (decree setting aside will); 288Pa 569, 136A864.

644–75 215Ala538, 112S105 (Code [1923] §§ 6078, 6079, 6088).

645–79 215Ala538, 112S105.

645–80 226Ky767, 11SW(2d)918; 80 Mont27, 257P1025.

645–81 82Mont198, 266P378, 57ALR 1169 (revoking probate).

645–99 200Cal 252, 252P1039; 222App Div724, 226NYS111. But see 200 Iowa 60, 203NW307. [d] **Ordering payment of certain legacies** where there are sufficient assets. 87Colo 175, 285P945.

646–13 288Pa569, 136A864.

646–16½–New. Appeal in individual right, although described as administrator, will preclude dismissal for lack of interest as administrator. 170La411, 127S885.

647–29½–New. Exceptions to a guardian ad litem for a minor are not available to an adult devisee appealing from the decree. 218Ala292, 118S342.

647–33 TexCivA 4SW(2d)566 (guardian enjoined from selling property on theory that order appointing guardian was void).

648–46 200Cal 252, 252P1039; 50Nev 16, 248P891.

649–53 99CalA586, 278P925; NH 146 A89.

649–56 [b] 168La439, 122S284.

650–61½–New. On appeal by the vendor alone from a decree of specific performance in a suit wherein his wife was a party, since he had no interest in inchoate right of dower he was held not aggrieved. 101NJEq295, 137A426.

651–82 But see 204Cal 195, 267P320.

652–85 48 Ida182, 279P713.

653–93 153Md491, 138A343.

653–2½–New. An unsuccessful bidder may not appeal from an order of confirmation. 148Md638, 129A911.

654–6 205 Iowa1248, 218NW24, 26 [citCJ]; 309Mo 612, 274SW688.

654–7 CalA 288P834; NJ 150A421; 283Pa277, 129A104.

654–10½–New. He may appeal from any order affecting his proper rights and duties. 49Nev115, 239P395.

654–13 205 Iowa1248, 218NW24 (appeal by receiver of insolvent bank from order granting preference to depositor); 168Minn365, 210NW38; 49Nev115, 239 P395.

654–14 215Ala538, 112S105.

655–22 87 IndA609, 161NE272 [citCyc]; NJ 150A420.

655–23 168Minn365, 210NW38.

655–23½–New. Where persons intervene to obtain relief against a receiver not obtained in any other form and the issues raised by the pleadings make the proceeding and adversary one in which the receiver is the representative of creditors and of all persons interested in the estate, he is entitled to appeal from an order made in the proceeding directing payment of money. 49Nev115, 239 P395.

656–33 30Hawaii41; 179 IllA209; 237 Mich143, 211NW46. See also 215Ala 538, 112S105.

656–38 237Mich143, 211NW46, 47 [cit CJ].

657–43 [a] **General demurrer,** questioning plaintiff's right to sue as beneficiary under accident policy, held to present question on appeal whether recovery can be had for insured's death only. Ark 292SW389.

658–58 52SD572, 219NW258 (school district).

659–59 107NC305, 12SE279.

659–62 215Ala538, 112S105; 284Pa187, 130A407 [citCJ] (dictum).

659–62½–New. But where dispute is between two classes of distributees, the officer cannot appeal for the benefit of either. 284Pa187, 130A407.

660–70 153 IllA587.

660–78 221MoA718, 285SW122.

661–95 101NJEq273, 137A558.

662–96 96Fla121, 117S791; 101NJEq 273, 137A558 [citCJ].

662–97 118Nebr411, 225NW25, 63ALR 493. [d] (3) 92PaSuper17 (failure of lessor to have summons issued in amicable action of ejectment held error included in waiver); 92PaSuper25 (right to appeal from refusal of court to strike off judgment confessed in amicable action of ejectment held included in waiver); 92PaSuper30. (9) Other instances. 293Pa513, 143A227.

663–98 101NJEq273, 137A558 [citCJ].

664–8½–New. A judgment set aside by order on stipulation may not be appealed from. 211Ky217, 277SW244.

664–10 172Ark964, 291SW100; Mass 170NE815; 35 OhA182, 172NE416.

664–11 322 Ill 372, 153NE749 (state board of education held not estopped because normal school board appeared and defended).

665–15½–New. Where plaintiff was erroneously allowed by the court to recover both rentals paid by him and damages for breach of covenant of his landlord to a repair and sought to take advantage of such action by the court, he is not precluded from prosecuting his own appeal. 197Cal 321, 240P765.

665–16 28Hawaii310, 326 [citCJ&quot CJ]; 225Ky105, 7SW(2d)855; 12LaA 21, 124S853; 121 Okl 4, 246P1099; 300 Pa580, 151A341. See also 206Cal 789, 276P350. [a] (10) Any right that beneficiary had to appeal from order ratifying audit is waived by his request, with which trustees complied, to distribute funds as per audit. 148Md695, 130A 330.

665–17 5F(2d)393; 171Ark539, 286SW 802; Cal 290P1029; 28Hawaii310, 326 [quotCJ]; 11LaA619, 124S546; Tex CivA 4SW(2d)995, 998 [quotCJ]; Can [1928] 1DomLR225 (authority of agent). [b] (1) 43 Ida675, 256P529. (16) Plaintiff does not waive right to appeal from order violating judgment and setting aside service of process without state by filing new affidavit and causing another personal service to be made without state. 163Minn114, 203 NW614. (17) Purchasing property involved at sale under deed of trust. CalA 281P1043. (18) Garnishee's admission of liability to defendant and readiness to pay amount due as court may order. SD 229NW294. (19) Statement in motion for appeal that judgment ought to have been subject to credit. 11LaA619, 124S546. (20) In Ontario party respectfully submitting to ruling of judicial officer wrongfully asserting jurisdiction to determine given matter is not thereby precluded from appealing. Ont [1930] 2DomLR689. [c] **Agreement of parties** as to effect of statute will not deter court from independent consideration. TexCivA 292SW626. [d] **Mistaken citation** in affidavit controverting plea of privilege will not preclude consideration of correct subsection on appeal. TexCivA 292SW626.

666–18 28Hawaii310, 326 [citCJ].

666–25 [a] **Acquiescence by warrantor** against whom defendant had judgment over will not cause defendant's appeal to be dismissed. 159La415, 105S415.

666–25½–New. Moving for dismissal of appeal from a divorce decree will not waive the right of appeal from a subsequent decree remitting a balance of alimony. 168Ark937, 272SW655.

666–25⅛–New. In Iowa it is essential to right of appeal from a ruling on demurrer that the defeated party should unequivocally elect to stand upon the ruling. 204 Iowa54, 214NW705.

666–29 173Minn621, 217NW114.

667–30 247 IllA454.

667–32½–New. Decree in foreclosure has been held not to require plaintiff, as condition precedent to foreclosure, to concede reduction, and estop him to appeal from order of reduction. 29 F(2d)481.

667–33 233 IllA511.

667–40 131 Okl 72, 267P256.

668–45 87Colo 451, 288P623; 165 Ill 340, 46NE227; 168 Ill 233, 48NE144; 173 Ill 489, 50NE1009; 204 Ill 130, 68 NE545; 211 Ill 620, 71NE1115; 238 Ill 582, 87NE291; 116 IllA465; 117 Okl 104, 246P434; SD 231NW937; 197Wis 556, 222NW802; 198Wis97, 223NW430. See also 164 Ill 245, 45NE498. But see 249 IllA280. [a] 35Wyo 381, 249P790, 792 [citCJ].

668–46 Contra 104Conn206, 132A390.

668–48 But see 227AppDiv444, 238NYS 139.

668–54 175Ark35, 298SW873; 169 Ill 623, 48NE306; 208 Iowa1133, 224NW 505; 220AppDiv253, 221NYS279; Tex CivA 275SW260.

669–57 163Ga135, 135SE505; 320Mo 120, 6SW(2d)935 (striking out part of answer); TexCivA 288SW1107.

669–61 323 Ill 90, 153NE732.

669–62 128 Okl 242, 262P679; TexCivA 297SW555.

670–64. TexCommnA 289SW1002.

670–64½–New. Filing abstract of judgment for record in county clerk's office does not preclude prosecution of appeal. TexCivA 279SW857.

671–69 12F(2d)710; 36F(2d)932 (overruling demurrer by consent); 36F(2d) 933; 36F(2d)939; 196Cal 395, 238P78 (appeal dismissed); 205Cal 476, 271P 897 (judgment following forfeiture of bail bonds furnished by surety company held consent judgment); 94CalA 747, 271P1110; CalA 274P997; 98CalA 1, 276P595; 82Colo 463, 260P1081; 334 Ill 137, 165NE598, 65LRA344; 201 Iowa 1159, 208NW725 [citCJ] (consenting that election of school directors was illegal); 216Ky309, 287SW890, 891 [cit CJ]; 9LaA664, 20S79; 6LaA205; 8LaA 248; LaA 128S49; 167Minn101, 208NW 642, 643 [citCJ]; 32PortoRico 786 [cit CJ]; SD 226NW726; TexCivA 281SW 877, 880 [citCycperStanford,J]; TexCivA 282SW900. [b] (9) Person signing waiver of citation and consent to probate of will cannot appeal. 82Colo 463, 260P1081. [c] (1) 196Cal 395, 238P78 (requires dismissal of appeal).

672–70 [d] (2) Plaintiff has been held not entitled to complain of judgment of appellate court requiring it to remit interest or otherwise suffer reversal, where plaintiff entered remittitur within time and judgment was affirmed. 333 Ill 588, 165NE199.

672–71 8F(2d)460; 159La844, 106S 325.

672–72 252 IllA584.

673–73 [a] (4) Order purporting on face to be made on consent of plaintiff only, but in fact against protest of defendant, is not consent order within Ontario statute. Ont [1930] 2DomLR 683.

673–76 168La309, 121S877.

674–77 22F(2d)488 (entered on motion of attorney).

674–84 161La1070, 109S841; TexCivA 282SW900.

674–86 But see MoA 282SW158.

674–89½–New. After a voluntary dismissal, the general rule is that no appeal lies. 33PortoRico 918.

674–91 76Mont284, 246P249.

675–93 195Cal 290, 232P970; CalA 288 P20; CalA 289P206; 43 Idu158, 252P 182; 203 Iowa495, 211NW249; 136 Wash346, 240P4.

675–94 206Cal 592, 275P794; 253 IllA 583 (compliance with order for issuance of building permit); 203 Iowa570, 213 NW217; 164La1099, 115S283 (payment by surety not acquiescence by principal); 231Mich356, 204NW108; 57ND 722, 223NW937.

676–96 CalA 289P206; 224Ky5, 5SW (2d)477; 164La388, 113S886; 51ND 280, 199NW769.

676–1 [f] (1) 88PaSuper147 (where court had jurisdiction of subject matter and parties).

677–4 51ND280, 199NW769.

677–8½–New. Where judgment was entered on only one of separate verdicts on two causes joined in one action, satis-

faction of such judgment does not preclude the issuance of a writ of error to review the second judgment entered later on the other verdict. 235Mich656, 209NW832.

678–11 Ind 171NE65.

678–11½–New. Payment by codefendant is held not to preclude an appeal by the other party from an adverse decree. 116Nebr33, 215NW559.

678–11½–New. The right to complain of an order may be lost by acquiescence therein. 206Cal 592, 275P794.

678–12 43 Ida158, 252P182; 203 Iowa 495, 211NW249; 11LaA195, 123S193 (1stcase); 57ND722, 223NW937; 148 Wash526, 269P793. [c] (5) Redemption of property sold on execution, judgment not being fully satisfied by sale, is not voluntary payment, acceptance of judgment, or abandonment of appeal. 46 Ida 671, 270P618(2dcase).

678–13 51ND280, 199NW769. [c] See also 136Wash346, 240P4.

679–16½–New. Plaintiff's acceptance of the money decreed to be paid as a condition to the establishment of defendant's title will preclude an appeal by plaintiff. 91CalA141, 266P816.

679–17 Ida 290P555.

679–20 221Ky442, 298SW1091.

679–21 40F(2d)852; **Ala** 130S377; 170 Ark82, 278SW639; 98CalA203, 276P627; CalA 290P460; 45 Ida333, 262P510; 125 Kan619, 264P146; 128Kan287, 276P 826; 208Ky764, 271SW1077; 169La 780, 126S59; 148Md695, 130A330; 124 Or652, 265P783 (defendant's acceptance of part of judgment by payment of costs); 194Wis362, 216NW481; **BC** [1930] 4DomLR800. [a] (13) Taking possession of land under ejectment judgment, without paying compensation for improvement made by other party as required by statute. 171Ark82, 278SW 639. [i] **Execution of supersedeas bond** to pay judgment in case of affirmance does not prevent waiver of right of appeal by acceptance of benefits. 171Ark 82, 278SW639. [j] **In Saskatchewan.–Sask** [1928] 2DomLR138.

680–22 207Cal 8, 276P1017(2dcase); Kan 292P750; 148Md682, 130A325; 130 Okl 110, 265P101; 140 Okl 303, 283P 563(1stcase).

680–25 22F(2d)488 (entered on motion of attorney); 25F(2d)85 (party accepting part of property claimed and awarded by judgment not estopped); 85 IndA 320, 154NE20; 194Wis362, 216NW481.

680–27 216Ala16, 112S318; 30Ariz172, 245P360; 105WVa447, 143SE109, 111 [citCJ]. See also 227Ky114, 12SW(2d) 298.

681–31 34F(2d)658; 37F(2d)310; 195 Cal 290, 232P970 (defendant in specific performance by accepting purchase money ordered to be paid as condition of decree waives his right to appeal); 128 Okl 242, 262P679 (judgment for alimony, support of children, and attorney's fees). [i] **Attorney's fee allowed in action to set aside judgment construing will.–128 Kan**287, 276P826 (fee held beneficial part of judgment).

682–34 237 IllA428, 432 [citCJ].

682–35 20F(2d)625; 171Ark260, 284 SW739, 47ALR332; CalA 290P460; 11 LaA266, 123S403(2dcase) (withdrawal of amount tendered and deposited by debtor does not require dismissal of appeal from judgment for that amount). [d] **Creditor's acceptance of dividend** on claim allowed generally does not estop prosecution of appeal from order denying preference. 20F(2d)625.

682–37 222Ky108, 300SW331. [a] But see 31 OhA53, 166NE378. [b] 195Cal 290, 232P970.

683–46 CalA 290P460.

683–51 See also 247 IllA203.

685–81 [a] (3) Where object of appeal is to secure greater relief. CalA 290P460.

685–84 11LaA645, 123S435.

686–88 171Ark675, 286SW865. [a] (4) Part of judgment denying personal deficiency judgment against certain defendants. 171Ark260, 284SW739, 47 ALR332.

686–90 Contra 171Ark260, 284SW739, 47ALR332.

686–97 105NJL112, 143A357 (obtaining show cause rule and arguing matters on merits). [c] **Levy of attachment after order vacating default judgment** is waiver of right to appeal from order. 75Mont512, 244P488. [d] **Injunction.–TexCivA** 284SW347.

686–98 114Nebr150, 211NW19. See also 118Nebr411, 225NW25, 63ALR493. [d] **TexCivA** 279SW916. [g] **Premature filing of request for stay** before decree is entered of record does not preclude review on merits. 114Nebr150, 206NW 768, 211NW19. [h] **Filing claim in bankruptcy proceedings contingent on outcome of appeal** does not deprive creditor of right to appeal from decree holding fraudulent transfer of property to him by bankrupt in payment of claim. 200 Iowa300, 204NW275. [i] **Executing dissolution bond to recover attached property** pending appeal from adverse order to dissolve attachment does not waive right to attack validity of attachment on appeal. 152SC108, 149SE 340.

687–3½–New. Taking of appeal subsequent to writ of error is not ground for quashing writ. 316Mo 609, 291SW 462.

687–10 MoA 20SW(2d)293.

687–16 153Wash509, 280P2.

688–19 84CalA472, 258P138.

688–25 [e] **Proceeding in federal court.** –75Mont555, 244P484.

688–26 200 Iowa736, 205NW361 (unsuccessful attempt to revive cross petition in mortgage foreclosure suit does not prevent appeal from adverse judgment in mechanic's lien suit involving same matters).

688–28 TexCommnA 285SW814.

688–29 167La751, 120S283; **MoA** 6SW (2d)338; 50ND287, 195NW511. [a] See also 34PortoRico 294.

689–41 274US195, 47SCt566, 71Led996; 6F(2d)531; 10F(2d)464; 10F(2d)759 (procedural errors not alleged in bill); 16F(2d)455; 26F(2d)248; 31F(2d)914; 36F(2d)171; 36F(2d)729; 40F(2d)626; 42F(2d)807; 44F(2d)24; 22AlaA241, 114S418; 22AlaA252, 114S422; 29Ariz 198, 240P341; 29Ariz304, 241P307; 168 Ark38, 269SW375 (whether suits are against state); 172Ark975, 291SW62; 180Ark1167, 22SW(2d)169; 206Cal 436, 274P534; 207Cal 657, 280P118; 84CalA 401, 258P120; 88CalA554, 263P844; 91 CalA333, 266P1009; 93CalA166, 269P 180; 94CalA533, 271P525; 96CalA607, 274P578; CalA 284P1051; 81Colo 50, 253P397; 87Colo 461, 288P620; 104 Conn738, 132A451; 105Conn230, 135A 44; 109Conn593, 145A58; 111Conn568, 150A524; 161Ga93, 129SE778; 161Ga 568, 131SE490; 163Ga796, 137SE64; 164Ga839, 139SE663; 36GaA147, 135SE 847; 36GaA777, 138SE270; 40GaA483, 150SE110(2dcase); 27Hawaii369, 379 [citCJperO'Brien,J]; 29Hawaii459; 48 Ida30, 279P407; 321 Ill 341, 151NE886; 324 Ill 200, 154NE898; 324 Ill 483, 155 NE276; 329 Ill 323, 160NE548; 224 IllA533; 224 IllA606; 233 IllA56; 233 IllA143; 233 IllA508; 236 IllA447; 246 IllA550; 247 IllA295; 248 IllA242; 248 IllA361; 249 IllA34; 86 IndA352, 156 NE471; 86 IndA224, 156NE520; 86 IndA411, 157NE446; 201 Iowa1323, 207 NW326; 201 Iowa346, 207NW331; 204 Iowa974, 215NW972; 204 Iowa843, 215 NW973; 119Kan508, 240P395; 121 Kan6, 245P742; 124Kan31, 257P939; 125Kan115, 263P1045; 126Kan807, 811, 271P385 [quotCJ]; 130Kan2, 285P522; 218Ky267, 291SW399; 235Ky574, 31 SW(2d)910; 161La1095, 109S913; 168 La701, 123S296; 1LaA441; 5LaA653; 7LaA150; 8LaA284; 9LaA1, 118S769 (2dcase); 126Me84, 136A459; 126Me 529, 140A201; 252Mass314, 147NE863; 256Mass5, 152NE236; Mass 167NE303; Mass 171NE285; Mass 172NE240; 232 Mich675, 206NW493; 237Mich152, 211 NW41; 238Mich343, 213NW80; 238 Mich74, 213NW456; 238Mich464, 213 NW859; 240Mich7, 215NW35; 240Mich 682, 216NW469; 242Mich139, 218NW 664; 245Mich93, 222NW183; 248Mich 380, 227NW755; 251Mich651, 232NW 348; 169Minn15, 208NW952 (items to be included in damages); 174Minn402, 219NW546; 142Miss379, 107S522; Miss 114S630; 152Miss814, 119S199; 157 Miss890, 128S83; Miss 130S745(2d case); 310Mo 602, 275SW957; Mo 20 SW(2d)34; Mo 28SW(2d)84(2dcase); Mo 31SW(2d)1026; 220MoA1057, 279 SW723; 221MoA853, 288SW88; MoA 14SW(2d)710; 116Nebr706, 218NW734; 49Nev278, 245P285; 82NH462, 136A 370; 103NJL346, 135A815; 103NJL 690, 137A593; 105NJL647, 147A458; NJ 148A651; NJ 150A344(2dcase); 102 NJL176, 130A598; NJ 133A772; NJ 135A81; 31NM521, 247P550; 31NM576, 249P242; 31NM639, 249P1013; 32NM 182, 253P22; 33NM169, 262P529; 34 NM181, 279P71; 34NM227, 279P876; 34NM404, 281P736; 34NM411, 282P 273(1stcase); 34NM409, 282P381; 34 NM573, 286P830; 34NM594, 288P1065 (2dcase); 243NY130, 152NE699; 217 AppDiv647, 216NYS174; 222AppDiv608, 226NYS676; 128Misc458, 219NYS113; 131Misc336, 225NYS756; 194NC647, 140SE306; 53ND621, 207NW1003; 105 Okl 225, 232P14; 112 Okl 82, 240P101; 113 Okl 247, 241P152; 114 Okl 239, 246 P451; 117 Okl 181, 245P594; 118 Okl 85, 246P593; 123 Okl 76, 250P136; 122 Okl 19, 250P524; 124 Okl 286, 256P28; 130 Okl 99, 265P637; 133 Okl 90, 271P 245; 140 Okl 74, 282P679; 141 Okl 212, 285P120; 284Pa11, 130A238; 287Pa 370, 135A127; 288Pa85, 135A858; 290 Pa95, 137A811; 290Pa74, 138A79; 292 Pa244, 141A47; 297Pa468, 147A98; 298 Pa256, 148A102; Pa 151A690; 85Pa Super418; 88PaSuper507; 35PortoRico 220; 35PortoRico 347; RI 133A658; 139SC545, 138SE354; 142SC284, 140SE 560, 57ALR634; 155SC152, 152SE179; 49SD65, 206NW421; 152Tenn152, 274 SW548; TexCommnA 285SW1047; TexCivA 273SW934; TexCivA 277SW 714 (only such assignments properly raised as were preserved below are considered on appeal); TexCivA 279SW 280; TexCivA 285SW897; TexCivA 294 SW989; TexCivA 5SW(2d)559; Tex CivA 10SW(2d)1051; TexCivA 21SW (2d)713 (constitutionality of statute); TexCivA 24SW(2d)742; TexCivA 27SW (2d)340; Utah 290P947; 99Vt45, 130 A580; 100Vt328, 137A324; 101Vt285, 143A394; 101Vt427, 144A194; Vt 150 A148; 151Va845, 145SE321; 153Va98, 149SE509; 136Wash606, 241P10; 142 Wash335, 253P124; 106WVa155, 145SE 165; 196Wis275, 220NW538; 37Wyo 11, 258P576; Can 14DomLR840. But see 35F(2d)586. [c] **Fact that statute provides that courts shall take judicial notice** of law of sister state does not give right to appellant to raise for first time on appeal question as to such law. 264Mass414, 163NE63. [d] **In absence of pleading foreign law or reference thereto on record** defendant may not, under full faith and credit clause of federal constitution, rely on such foreign law. 264Mass414, 163NE63.

692–42 92Fla1062, 111S725, 729 [quot CJ]; NJ 135A81; 113 Okl 247, 241P 152.

692–43½–New. In Illinois judgments in law may be reviewed without formal exceptions. 224 IllA221.

692–43¼–New. Questions not raised by pleading not considered on appeal. 212 Ky 379, 279SW654.

693–45 233 IllA 143; 233 IllA508; 217 AppDiv647, 216NYS174; 128Misc 458, 219NYS113.

693–46 [c] **Appeal is precluded** only where it is limited to severable portion of judgment under circumstances such that judgment can be reversed without affecting appellant's right to retain what he has received from other portions of judgment without necessity on reversal of trial as to sums received. 195Cal 290, 232P970. [d] **Master's report** conclusive where no exceptions were filed. 23 F(2d)464.

694–52 CalA 284P1072; 43 Ida198, 252P865; 164La463, 114S98; Mass 170NE414; MoA 10SW(2d)64 (purchaser's claim for rent); TexCivA 288SW 849; 146Va417, 131SE800; 188Wis 205, 205NW819. See also 168Ga145, 147SE 102. [h] **Effect of failure to submit issue.–**216AppDiv243, 215NYS156.

694–53 204 Iowa974, 215NW972.

694–54 215Ala445, 111S35; 33Ariz56, 262P1; 197Cal751, 242P926, 42ALR

1165; CalA 290P311; 106Conn511, 138A432; 244 IllA104; 201 Iowa148, 205NW833 (damages for breach of contract); 201 Iowa346, 207NW331; 204 Iowa870, 216NW553; 206 Iowa9, 216NW683; 122Kan373, 251P1084; 13LaA228; 127S116; 127Me293, 143A66; 242Mich110, 218NW680; 128 Okl 23, 61P174; 118 Or32, 245P508; Or 263P66; 50SD121, 208NW592; 141 Wash250, 251P282; 188Wis205, 205NW819; 194Wis92, 215NW889. But see 153Miss91, 120S437. [j] In suit to recover money deposited to secure release of arrested person, plaintiff may not for first time on appeal contend that arrest was unlawful. 28Ariz278, 44ALR1495, 237P380.

695-58 169Ark372, 275SW743.

695-59 23F(2d)230; 164La463, 114S98; 167La208, 118S890.

696-61 280US234, 50SCt123, 74Led390 (objections to valuation of street railway's property); 26F(2d)51; 40F(2d)604; 41F(2d)433; 213Ala669, 106S139; 218Ala613, 119S640; 219Ala645, 123S838; 34Ariz68, 267P794; 170Ark1174, 283SW36; 173Ark468, 292SW675; 179Ark600, 17SW(2d)305; Cal 246P207; 204Cal220, 267P311; 205Cal413, 271P494; 74CalA322, 240P50; 74CalA521, 241P274; 86CalA712, 261P1086; CalA 275P825 (2dcase; 102CalA333, 282P997; CalA 288P1096; 83Colo505, 266P1116 (affirmative defenses unsupported by evidence); 105Conn80, 134A250; 163Ga694, 137SE17; 163Ga924, 137SE397; 166Ga786, 144SE284 (issue of forgery, raised in pleadings abandoned by defendants, where not mentioned in trial); 40GaA756,151SE557; 319 Ill 415, 150NE247; 338 Ill 428, 170NE428; Ill 173NE343; 252 IllA290; 253 IllA51; 253IllA339; 201 Iowa1017, 206NW134, 206Iowa562, 218NW306; 206 Iowa405, 220NW6; 121Kan42, 245P1054; Kan 291P757; 226Ky361, 10SW(2d)1076; 161La773, 109S486; 164La204, 113S818; 10LaA268, 120S686; 168LaS50, 123S596; La 129S118; 5LaA274; 8LaA152; 11LaA406, 122S915; 128Me160, 146A80; Mass 171NE727; 238Mich39, 213NW448, 52ALR136; 245Mich192, 222NW103; 245Mich246, 222NW111; 245Mich632, 223NW226; 247Mich624, 226NW656; 167Minn275, 208NW1003; 169Minn15, 208NW952; 169Minn45, 210NW618; 173Minn14, 216NW314; 175Minn236, 220NW946; Minn 231NW194; 142Miss118, 107S553 (ability to comply with order of court requiring return of property by one held in contempt for removing and retaining it); 143Miss492, 108S184 (exemptions); 317Mo 228, 295SW794; MoA 275SW552; MoA 280SW57; 219MoA694, 284SW145; MoA 286SW542; MoA 21SW(2d)880; 78Mont122, 252P796; 104NJL51, 139A394; NJ 148A157; NJCirCt 137A819; 243NY199, 153NE47; 230AppDiv245, 244NYS295; 196NC89, 144SE526; 55ND284, 213NW23; 122 Okl 19, 250P524; 138 Okl 225, 280P568 (excessive tax levy); 287Pa370, 135A127; 44Philippine292 (rule applied to party not appealing); SD 228NW392; 158Tenn1, 11SW(2d)865; TexCommnA 285SW1047; TexCommnA 290SW526; Tex CivA 275SW850; TexCivA 282SW631; TexCivA 295SW638; TexCivA 31SW(2d)150; 65Utah465, 238P259, 41ALR1495; Utah 269P1008; 100Vt117, 135A497; 143Va460, 130SE408; 149Va597, 141SE759; 151Va883, 145SE326; 152Va760, 148SE818; Can [1929] 4Dom LR73. [k] Matters not raised on motion to dismiss appeal in lower court cannot be raised on appeal from order of dismissal. 131SC284, 127SE18. [l] Defense not set up in affidavit of defense is not available on appeal. 285Pa305, 132A368. [m] Necessity for verified plea raising particular question.–TexCivA 32SW(2d)224.

698-62 Ala 129S15; 170Ark258, 280SW357; 319 Ill 415, 150NE247; 208 Iowa1404, 227NW347.

699-66 203Cal 390, 264P237; 44 Ida756, 262P154; NH 147A748.

699-67 232 IllA246 (contributory negligence of plaintiff beneficiary suing for wrongful death of husband); MoA 285SW522; MoA 19SW(2d)758; 132Okl 60, 269P241; 115 Or618, 239P542; TexCivA 4SW(2d)140.

699-68 But see 137Miss55, 101S787.

699-73 101CalA748, 283P86 (last clear chance doctrine not raised below).

700-75 170Ark1174, 283SW36.

700-76 174Ark362, 295SW370, 371; 207Cal 498, 279P152 (action by lessor for damages for lessee's negligent destruction of building); TexCivA 285SW655; Utah 286P631; 100Vt117, 135A497. Contra 198Cal365, 245P184.

700-77 18F(2d)690; 173Ark468, 292SW675; 173Ark1016, 294SW19; 176Ark986, 4SW(2d)949; 179Ark12, 13SW(2d)822 (description of premises in deed of trust); 179Ark110, 4SW(2d)1104; 89CalA551, 265P551; 93CalA116, 269P191; 97CalA462, 276P141 (that agreement to sell land was void); CalA 289P865; CalA 290P317; 236 IllA68; 244IllA466; 85 IndA384, 150NE103; 236Mich351, 210NW300; 168Minn168, 209NW883; 220MoA821, 278SW822; 222MoA339, 297SW91; MoA 23SW(2d)639; 128Misc458, 219NYS113; TexCivA 11SW(2d)533 (lack of proof that insured had at least three employees); TexCivA 12SW(2d)260 (sufficiency of deed and its description); 150Va166, 142SE383. Contra 253Mass374, 41ALR1319, 149NE115, 41ALR1319.

700-79 141Miss253, 106S99, 43ALR79.

700-80 [b] Trial court allowed legal rate of interest rather than that fixed by note is indication that question of usury was brought to attention of court. 9F(2d)256.

700-82 87CalA402, 262P402; 226Ky754, 11SW(2d)926 (gambling transaction); 128Misc458, 219NYS113.

701-83 166Minn306, 207NW633; 152Tenn339, 279SW257; TexCivA 271SW145.

701-84 86Colo493, 283P1042; 201 Iowa1017, 206NW134.

701-87 236 IllA68; 85 IndA384, 150NE103; 208 Iowa325, 223NW763; 307Mo98, 270SW662; 220MoA831, 272SW1084; 222MoA251, 296SW840; 49Nev101, 238P344; NJ 135A668; 197NC687, 150SE330(2dcase); 114 Okl87, 243P722; TexCommnA 23SW(2d)675; 37Wyo412, 263P605. But see 153Miss700, 121S820. [b] (3) Other instances. MoA 27SW(2d)464. [e] Oral agreement for sale of realty and implied vendor's lien will be enforced where statute of frauds not invoked as defense. TexCommnA 23SW(2d)675.

702-88 232Mich675, 206NW493.

702-90 205 Iowa95, 215NW506; 294Pa282, 144A75; 155SC47, 151SE920.

702-91 See also 96CalA455, 274P566.

702-92 167La230, 119S31; 243Mich622, 220NW668 (where defendant also failed to deny execution under oath).

702-94 254 IllA264.

702-7½–New. , or that plaintiff had no insurable interest so as to sustain action on policy. 106Conn119, 137A241.

703-8 96CalA192, 273P1074 (that officers of bank in making representations exceeded authority).

703-9½–New. , or that a municipality had not authorized public improvement, 287Pa370, 135A127.

703-11½–New. A legal question as to the implied authority of an agent may be considered for the first time on review. 224 IllA401.

703-18 233Mich561, 207NW829 (that contract sued on lacked mutuality); Oh 158NE751; 65Utah465, 238P259, 41ALR1495.

704-19½–New. The construction of a written contract may be considered by a reviewing court although no propositions of law were presented to the trial court. 224 IllA401.

704-21 Cal 246P207; TexCommnA 285SW1047. [d] Question insufficiently raised on appeal by defendant's allegation of plaintiff's nonperformance of contract admittedly never executed. CalA288P149.

704-24 163Ga694, 137SE17. [a] Failure to raise foreign corporation's noncompliance with statutes by plea in abatement held not objectionable. 84IndA51, 150NE106.

705-25 129 Okl 148, 264P182.

705-30 167La111, 118S822; 242Mich631, 219NW740; NJ 152A4 (replevin).

706-31 225Ky629, 9SW(2d)1008.

706-32 80CalA352, 251P959.

706-33 150Miss287, 116S285.

706-35 86CalA712, 261P1086; 244Mich515, 221NW617.

706-36 217Ala180, 115S230; 81Colo195, 254P779; 201 Iowa208, 205NW758 (in action to redeem from tax deed); Iowa 229NW750; 242Mich631, 219NW740; 85Mont149, 278P116.

706-37 66Utah394, 243P114, 44ALR1348.

707-41 161La288, 108S485; 13LaA8, 126S742; 179Minn408, 229NW356 (payment); 285Pa305, 132A368; TexCivA 13SW(2d)451; 145Va307, 133SE769.

707-51 161La288, 108S485; LaA 125S518.

708-52 115Nebr882, 215NW131; 156SC238, 153SE141. [a] Question of ratification held sufficiently raised by pleading and evidence below. 137Wash418, 242P353.

708-53 133SC472, 131SE22 (waiver of defects in cancellation of fire policy).

708-54 Cal 246P207; 82Colo313, 260P105; 163Ga694, 137SE17; 160La275, 107S108; 156Miss790, 126S821(2dcase); 115Nebr882, 215NW131; TexCommnA 13SW(2d)683.

708-56 175Ark1152, 1SW(2d) 813; 163Ga694, 137SE17; 244Mich515, 221NW617; TexCivA 12SW(2d)242; 37Wyo 11, 258P576.

708-57 167La149, 118S869.

709-61 214Ala587, 108S529; 72CalA539, 237P775; 94CalA271, 271P109; Del 143A544; 37GaA805, 142SE190; 88IndA339, 156NE571; 147Miss579, 113S206; 118Nebr231, 224NW21; TexCivA 291SW276; 199Wis85, 225NW873. See also 6LaA344. [b] (9) Plea of prescription on appeal cannot be considered unless proof thereof appears from evidence in inferior court. 165La151, 115S441.

710-62 98Fla365, 124S84 (where demurrer to plaintiff's replication as to limitations statute is sustained and plaintiff refuses to plead further, question is not properly presented in court below).

710-69 85CalA46, 258P705; 100CalA482, 280P383; 2AppDC373; 119 Ill 343, 9NE887; 150 Ill 398, 37NE910; 222AppDiv634, 227NYS338. But see 196Mo373, 95SW359; 62SC73, 39SE950.

710-70½–New. Premature action on a bond cannot be raised for the first time on appeal. 200Wis288, 227NW266.

710-73 274US195, 47SCt566, 71Led996; 206Cal524, 274P973; 109Conn583, 145A48 (question not raised by pleading); 111Conn72, 149A231; 111Conn88, 149A233; 111Conn188, 149A778; 111Conn209, 149A838; 162Ga350, 133SE862; 162Ga730, 134SE760; 163Ga924, 137SE397; 164Ga637, 139SE216; 164Ga839, 139SE663; 168Ga67, 146SE908; 168Ga309, 147SE555; 170Ga509, 153SE214; 33GaA481, 127SE157; 35GaA447, 133SE476; 318 Ill 610, 149NE481; 336 Ill 93, 167NE774; Ill 173NE274; 87 IndA110, 166NE672(2d case); Ind 171NE65; 201Iowa476, 205NW847; 204 Iowa150, 214NW594; 128Kan473, 279P7(1stcase); 161La1095, 109S913; 170La76, 127S370 (ground not considered in trial court); 9LaA95, 119S94; 13LaA405, 127S36 (2dcase); 317Mo 986, 296SW778; 319Mo 848, 5SW(2d)54; Mo 19SW(2d) 476; Mo 19SW(2d)1049; 219MoA283, 269SW693; Mo 271SW536; 220MoA896, 296SW 200; 116Nebr541, 218NW393; 117Nebr381, 220NW683; NJ 133A396; 240NY252, 148NE512; 250NY250, 165NE282; 52ND533, 204NW356; 53ND291, 205NW722, 728 [citCJ]; 133Okl 228, 271P253; 285Pa273, 132A364; 288Pa85, 135A858; 50RI 288, 146A777, 66ALR1553; TexCivA 30SW(2d)936. [a] Ruling on question in trial court essential.–162Ga730, 134SE760. [b] Where no attack is made on statute and no decision made by trial court, there is no constitutional question for decision on appeal. 162Ga730, 134SE760.

711-74 [a] (1) TexCivA 5SW(2d)1030. (2) 220MoA896, 296SW200.

711-79 36Ga679, 137SE855; 315Mo713, 290SW135. But see 219MoA283, 269SW693.

711-83½–New. , by objection to an instruction based on statute claimed to be unconstitutional and challenging it

on motion for new trial. 191 Ind475, 151NE390.

712-91½-New. Where an objection is not made in the exception, the constitutionality of the statute is not raised by an objection to the charge. 168GaA 259, 147SE513(2dcase).

712-94 83Colo 89, 262P526; 325 Ill 625, 156NE826; Mo 19SW(2d)1; Mo 23SW (2d)993; Mo 271SW536. [b] Objection raised by exception to charge.-TexCivA 18SW(2d)740. [c] Charge too indefinite to invoke ruling.-Ga 155SE202.

712-95½-New. Where defendant's answer did not present the point that employment such as that of plaintiff under municipal government was covered by civil service regulation, the point is not available on appeal. 80CalA208, 250 P1062.

713-96 167La359, 119S256 (plea of compensation in opposition to receiver's account); 258Mass573, 155NE606; 50ND 511, 197NW129 (where defendant rested without asking any trial of counterclaim). See also 264Mass414, 163NE63.

713-97 But see 200Cal 222, 252P593.

713-99 CalA 286P700; 81Colo 50, 253 P397; 219Ky143, 292SW743; 285Pa 212, 131A733.

714-1 Mo 29SW(2d)39; [e] Indentity of land involved in ejectment to try title as that devised, having been assumed at trial, objection that identity was not established could not be raised in reviewing court. 247Mich168, 225NW 545.

714-5 81Colo 50, 253P397, 399 [citCJ]; 232Ky415, 23SW(2d)596; 320Mo 654, 8 SW(2d)966; TexCivA 24SW(2d)499.

715-13 98CalA84, 275P865.

715-15 See also 232 IllA1.

716-22 220MoA812, 278SW818.

717-27½-New. questions as to possession; 285Pa212, 131A733.

717-33 NH 148A28(2dcase) (items in subcontractor's specifications cannot be questioned on appeal where not questioned in motion to remove default).

717-40 128Mel60, 146A80.

718-49 21F(2d)276, 277[citCJ]; MoA 272SW704; 216MoA683, 273SW746; 220MoA812, 278SW818; 220MoA668, 293SW73; 76Mont415, 248P199; 122 Okl 157, 252P1090; 125 Or563, 267P818; 285Pa273, 132A364; 46Philippine207; 32PortoRico 416.

718-50 6F(2d)531; 14F(2d)940; 19 F(2d)811; 21F(2d)276, 277[citCJ]32 Ariz423, 259P676; 35Ariz457, 281P38; Ariz 287P304; 168Ark670, 273SW7; 179 Ark1104, 20SW(2d)116; 74CalA637, 241 P576; 89CalA275, 264P580; 89CalA612, 265P885; 91CalA779, 267P584; 82Colo 466, 261P4; 111Conn568, 150A524; Ill 173NE376; 232 IllA246; 89 IndA128, 165NE264; IndA 173NE330(2dcase); 204 Iowa391, 214NW685; 206 Iowa309, 218NW340; 126Kan98, 267P21; 214 Ky381, 283SW384; 218Ky145, 291SW 13; 258Mass13, 154NE263; 232Mich2, 204NW764; 238Mich464, 213NW859; Minn 231NW415(2dcase); Mo 256SW 798; 307Mo98, 270SW662; Mo 282SW 25; 315Mo 1165, 289SW609; 316Mo 426, 289SW623; Mo 294SW80; 318Mo 827, 18SW(2d)106, 108[citCJ]; 322Mo 147, 14SW(2d)603; Mo 29SW(2d)97; MoA 256SW499; 216MoA683, 273SW 746; MoA 277SW596; 220MoA812, 278 SW818; MoA 289SW667; 220MoA668, 293SW73; MoA 296SW161; 222MoA251, 296SW840; MoA 297SW985; MoA 6SW (2d)640; 75Mont594, 244P480; 83Mont 452, 272P998; 115Nebr490, 213NW515; 117Nebr262, 220NW276; 49Nev278, 245 P285; NJ 129A202; 31NM457, 247P 270; 32NM5, 250P21; 32NM259, 255 P636; 216AppDiv243, 215NYS156; 222 AppDiv197, 225NYS593; 192NC542, 135 SE464; 192NC577, 135SE466; 192NC 585, 135SE449; 196NC439, 146SE77; 49ND867, 194NW113; 50ND371, 196 NW104, 105[citCJ]; 50ND872, 198NW 675 (that certain organization was partnership); 52ND793, 204NW678; Oh 158NE751; 113Okl 254, 241P789; 114 Okl 5, 242P766; 114Okl 21, 242P1027; 116 Okl 56, 243P194; 117 Okl 233, 245 P850; 120 Okl 211, 251P84; 120 Okl 302, 251P743; 123 Okl 43, 251P985; 125 Okl 194, 257P295; 128 Okl 23, 261P 174; 132 Okl 55, 269P314; 118 Or32, 245P508; 123 Or469, 259P1064, 260P 1099; 126 Or417, 270P502; 285Pa273, 132A364; 298Pa256, 148A102; Pa 151 A796; 85PaSuper418; 44Philippine 519; 33PortoRico 98; TexCommnA 289 SW1000; TexCivA 278SW283; TexCivA 18SW(2d)408; TexCivA 2SW(2d)307; TexCivA 4SW(2d)1046; TexCivA 13SW (2d)905; TexCivA 19SW(2d)605; Tex CivA 32SW(2d)220; Utah 274P457; 98 Vt437, 129A317; 136Wash606, 241P10; 147Wash542, 266P706; NS [1928]2 DomLR229. [c] Thus it is error to consider issue raised by pleading and evidence but waived at trial and on appeal. TexCivA 279SW939. [d] Claim for wages earned could not be asserted for first time on appeal by plaintiff suing for breach of contract. 222AppDiv197, 225 NYS593.

720-51 84 IndA589, 148NE155; 204 Iowa391, 214NW685; 220MoA812, 278 SW818; 220MoA668, 293SW73; 212 AppDiv522, 209NYS150; NC 153SE858; Oh 158NE751; 42 OklACR70.

721-52 14F(2d)940; La 129S118; 247 Mich443, 225NW931; 243NY543, 154 NE597; 114 Okl 5, 242P766.

722-53 32NM259, 255P636.

722-54 Oh 158NE751.

722-61 214Ky381, 283SW384; Tex CommnA 289SW1000.

723-62½-New. as to the effect of reversal of judgment in favor of one defendant on judgment against codefendant; 232Mich2, 204NW764.

723-67 247Mich398, 225NW592; 115 Nebr327, 212NW762.

723-68 285Pa273, 132A364.

723-68½-New. Contention that law of admiralty controls cannot be raised where difference between admiralty and common rules is not pointed out and case proceeded/under common-law rules. 136Wash522, 240P909.

723-69 243NY283, 153NE75.

723-72 274US684, 47SCt755, 71L ed 1297; 41F(2d)356; 44 Ida686, 258P 536; 203 Iowa1068, 213NW935; 204 Iowa15, 214NW562; 219Ky313, 292SW 833; 165Minn433, 206NW711; 141Miss 72, 106S83; 83Mont317, 272P522; 121 Okl 36, 247P47; 117 Or350, 243P91; RI 147A425(2dcase) (consolidation of cases); 65Utah444, 238P240; Utah 287 P320(2dcase); 136Wash606, 241P10.

723-72½-New. Where document filing office of a motion for new trial was so treated by trial court, it will be so treated on appeal. MoA 23SW(2d)1080.

724-74 TexCivA 288SW236.

724-76 8PaDist&Co6.

724-78 274US684, 47SCt755, 71L ed 1297; 25F(2d)295; 200 Iowa1, 201NW 787; 203 Iowa396, 212NW693; 316Mo 1158, 295SW73; Mo 23SW(2d)1058; MoA 19SW(2d)531; MoA 20SW(2d) 944; 130Misc676, 224NYS711; 19 OhA 210; 117 Or350, 243P91; 65Utah444, 238P240. [a](2) Action of bank stockholders on behalf of bank will be considered on appeal, as one in equity. 228AppDiv790, 240NYS45.

725-81 89PaSuper572; 32PortoRico 416 (party electing to bring ordinary action under Code of Civil Procedure is not permitted to invoke, for purpose of defeating appeal by adversary, provisions of unlawful detainer act relating to time within which appeal may be taken).

725-84 31F(2d)671; 219Ala652, 123S 18; 80CalA377, 252P647; 89CalA649, 265P531; Conn 135A93; 201 Iowa190, 206NW828; 220Ky422, 295SW414; 221Ky780, 299SW965; Md 149A566; Mass 168NE157; Mass 169NE548; 115 Nebr490, 213NW515; 49Nev70, 236P 559; 32NM259, 255P636; 34NM594, 288 P1065(2dcase); NM 290P793; 228App Div321, 239NYS16; 291Pa472, 140A270. [a] (2) Regardless of what may have been in the mind of counsel as to theory advanced on oral argument in lower court, appellate court is bound by record, and where petition contains every averment necessary to raise right of equitable retainer though containing matters of surplusage, question presented will be determined as against contention of defendant that plaintiff presented and tried his cause as creditor's bill. 114Nebr126, 206NW749.

726-87 83Colo 468, 266P501; TexCivA 18SW(2d)350.

726-88 Colo 270P668; IndA 162NE 255; 49RI 434, 143A783 (subsequent pleading may be disregarded after decision on merits, in absence of demurrer). But see TexCivA 294SW681.

726-91 Ala 127S907.

727-98 41F(2d)612; 213Ala12, 104S 128; 213Ala132, 104S224, 39ALR1436; 168Ark603, 271SW327; 168Ark859, 271 SW952; 179Ark391, 16SW(2d)17; 71 CalA45, 234P334; 199Cal 286, 249P 188, 51ALR1380; 76CalA207, 244P 936; 91CalA779, 267P584; 45 Ida200, 261P671; 83 IndA515, 149NE88; 200 Iowa948, 205NW770; 202 Iowa654, 210 NW785; 119Kan508, 240P395; 173 Minn14, 216NW314; Mo 256SW798 (validity of charter provision sufficiently presented); 307Mo 98, 270SW662; 320Mo 1077, 9SW(2d)907; 322Mo 386, 15SW(2d)335; 115Nebr490, 213NW 515; Nebr 233NW249; 52ND793, 204 NW678; 115 Okl 51, 241P749; 33Porto Rico 415; 54SD592, 223NW824; Tex CommnA 283SW161; TexCivA 264SW 513 (ultra vires); TexCivA 284SW228; TexCivA 26SW(2d)449; Vt 146A77; 136Wash606, 241P10. See also Mass 168NE745. [e] In absence of allegation of waiver, except as predicated on conversation with certain agent of defendant, evidence of waiver in conversation with different agent cannot be considered. TexCommnA 283SW161. [f] Appellant cannot complain of issues submitted if failing to tender other issues. 193NC94, 136SE294. [g] Failure to request instructions on matter pleaded is abandonment of issue. MoA 287SW1061.

727-99 219Ala68, 121S55; 23AlaA293, 124S399(2dcase); 31Ariz97, 250P763, 766 [citCJ]; 35Ariz457, 281P38; 174 Ark982, 298SW194; 198Cal 16, 243P21; 70CalA778, 234P435; 73CalA304, 238P 822; 84CalA358, 258P115; 84CalA337, 258P397; 85CalA372, 259P453; 87CalA 92, 261P763; 89CalA250, 264P519; 98 CalA686, 277P749; CalA 288P687; 109 Conn693, 145A573; 45 Ida707, 266P 1094; 328 Ill 564, 160NE140; 252 IllA 545; 201 Iowa20, 206NW680; 238Mich 52, 213NW175; 164Minn207, 204NW 929; 312Mo 458, 278SW759; 316Mo 333, 289SW939; 319Mo 87, 5SW(2d) 383; MoA 300SW301; MoA 286SW401; 80Mont468, 260P1055; NM 290P321(2d case); NM 290P322(1stcase); 249NY 68, 162NE586; 112 Okl 293, 240P1039; 124 Or592, 265P435; 29PortoRico 629; 45SC393, 143SE9; TexCommnA 5SW (2d)754; 194Wis595, 217NW318; 39 Wyo 266, 270P1072.

729-3 201 Iowa888, 208NW371.

729-5 87CalA127, 261P1029; 89CalA 594, 265P580; 202 Iowa472, 210NW 558.

729-7 115 Okl 51, 241P749.

729-8 TexCivA 9SW(2d)494.

729-8½-New. Where trial is had in justice and district courts upon the theory of joinder of issue, it cannot be contended that defendant did not, technically speaking, plead to complaint because no pleading appears in the record. 76Mont366, 245P871.

730-18½-New. Where a case was tried on the theory that a plea of intervention was sufficient, judgment against interveners, otherwise erroneous, will not be affirmed because the plea was insufficient. TexCivA 272SW623.

730-20 17F(2d)568; 172Ark991, 291 SW74; IndA 148NE335; 206 Iowa309, 218NW340; 164La463, 114S98; Md 149A566; 240Mich637, 216NW439; Mo 271SW62; 216MoA683, 273SW746; 82 NH543, 136A400, 50ALR1276; 104NJL 218, 141A92; 131 Okl 249, 268P276; 125 Or563, 267P818; TexCivA 271SW 196; TexCivA 290SW286; Vt 151A510; 149Wash414, 271P78.

731-21 216MoA683, 273SW746.

731-22½-New. Similarly where defendant concedes that specific performance is proper relief if a contract is found to exist, such relief may not be denied on appeal because it is inequitable. 242NY99, 151NE144.

732-26 MoA 296SW243; 82NH543, 136A400, 50ALR1276.

732-28 142Va711, 125SE751, 128SE242 (question not charged in pleading, established by evidence or submitted to jury, waived).

733-33 TexCivA 278SW283 (where trial below was on theory that restraining order was to be temporary, appeal is heard on that theory).

733-37 203 Iowa979, 213NW605.

734-42½-New. to marshal assets. Tex CivA 271SW196.

734-43 80CalA122, 251P657 (defendant appealing from judgment in action for money had and received cannot claim surprise where it asked no relief below); Iowa 227NW173 (assertion of rights under statute); TexCivA 276SW 752; TexCivA 21SW(2d)583.

734-46 238Mich508, 213NW867.

734-48 78Mont122, 252P796.

734-48½-New. Where no contention was made at the trial that the issue of future damages was not before the jury, such contention cannot be sustained on appeal. 99Vt219, 131A21, 49ALR 1382.

734-48⅓-New. Where a certain issue was not submitted to the jury, plaintiff cannot seek reversal of an order setting aside the verdict for him and granting a new trial, on the ground that the evidence presented a fair question for the jury on such issue. 216 AppDiv243, 215NYS156.

734-49 95CalA352, 272P805; 239Mich 70, 214NW152; 31NM457, 247P270; 193NC73, 136SE257.

735-50 216Ala623, 114S223; 126 Okl 28, 258P278.

735-51 70CalA148, 232P1010; 73CalA 304, 238P822.

735-54 19F(2d)486; 219Ala645, 123S 38; 80CalA377, 252P647; 96CalA650, 274P557; CalA 288P687; 180 IllA415; 12LaA9, 125S77 (as to value of property); Mo 29SW(2d)64; 222MoA1162, 11SW(2d)1076; MoA 30SW(2d)196; 242NY99, 151NE144; 230AppDiv85, 243NYS567; 114 Okl 21, 242P1027; 126 Okl 28, 258P278; 283Pa313, 129A105; 285Pa273, 132A364; SD 228NW390 (facts admitted by demurrer to reply); TexCivA 279SW939, 941 [citCJ]; 192Wis160, 212NW301; 198Wis512, 224NW737. See also 98CalA30, 276 P133.

736-55 9F(2d)529 (parties assumed to have conceded facts where case was argued below on assumption that answer was true); 92CalA203, 268P396; 167 LaA11, 118S822; 128Me22, 145A250; 233Mich384, 206NW371; 242Mich139, 218NW664; 26 OhA414, 160NE486; 285Pa305, 132A368.

736-56 NC 153SE845 (court's statement as to payment of costs on previous nonsuits held not admission of counsel).

736-57 TexCivA 15SW(2d)62. See also 246 IllA1.

736-58 233 IllA56; 222MoA1176, 15 SW(2d)946; 51ND225, 199NW961, 963 [quotCJ].

737-59 6F(2d)531; 80CalA478, 251P 967 (rule inapplicable where measure of damages adopted by trial court was controverted by defendant during course of trial); CalA 272P1082; 99CalA438, 278P880; 31NM457, 247P270; 50ND 347, 195NW573, 575 [citCJ]; 114 Okl 21, 242P1027; 296Pa377, 145A915; Tex CivA 26SW(2d)451; 192Wis160, 212NW 301.

737-61 CalA 262P783.

738-62 174Ark603, 299SW2; 220App Div170, 221NYS516.

738-68 285Pa273, 132A364; 99Vt78, 130A589.

739-70 TexCivA 30SW(2d)532. [a] **On appeal from order granting new trial,** appellate court will confine itself to grounds specified in motion and other grounds recited in order. MoA 20 SW(2d)928.

740-80 Mass 169NE142 (application of statute not operative when cause arose).

740-81 27Hawaii369, 379 [citCJ,per O'Brien,J].

741-83 Ont [1930] 3DomLR245. See also 232 IllA1.

741-85½-New. The appellate courts of Illinois have the same power. 224 IllA 77.

741-90 But see 207 Iowa776, 223NW 686.

741-93 202 Iowa97, 209NW421 (reliance on inapplicable statute in lower court not preventing reliance on applicable statute on appeal).

742-96½-New. **Matters of substance** may be raised for the first time in the supreme court in some jurisdictions. 38 Wyo 481, 270P1081.

742-97 Pa 151A801; 197Wis159, 221 NW733.

742-3 7F(2d)116; 22F(2d)398; 23F (2d)55; 26F(2d)183; 37F(2d)707; 38 F(2d)10; 214Ala329, 107S830; 22AlaA 252, 114S422; Ala 127S812; 29Ariz198, 240P341; 35Ariz457, 281P38; 170Ark 1011, 282SW353; 79CalA222, 249P30; 84CalA33, 257P569; 89CalA477, 265P 268; 99CalA270, 278P876; 87Colo 97, 285P942; 106Conn302, 138A147; 111 Conn72, 149A231; 36GaA147, 135SE 847; 27Hawaii 399; 27Hawaii 760; 318 Ill 360, 149NE258; 322 Ill 99, 152NE 526; 327 Ill 362, 158NE678; 329 Ill 82, 160NE193; Ill 173NE179; 187 IllA312; 232 IllA398; Ind 154NE28; Ind 171 NE665(1stcase); Iowa 213NW442; 206 Iowa698, 214NW552; 204 Iowa82, 214 NW602; 204 Iowa678, 216NW41; 127 Kan292, 273P427; 128Kan189, 277P57; 130Kan121, 285P581; 231Ky365, 21 SW(2d)488; 4LaA403; 124Me384, 130A 209; 148Md545, 129A839; 254Mass478, 150NE215; 238Mich39, 213NW448, 52 ALR136; 171Minn118, 213NW539; 248 Mich272, 226NW899; 142Miss379, 107 S522; 144Miss861, 110S683; Mo 281 SW686; 315Mo 1100, 287SW604; 319 Mo 644, 5SW(2d)413; 220MoA1050, 279 SW723; MoA 284SW850; MoA 298SW 1055(1stcase); MoA 299SW85; MoA 23 SW(2d)214; 76Mont288, 246P536; NJ 136A167; NJ 132A244; NJ 135A341; 3NJMise981, 130A448; NJ 151A877; 31NM457, 247P270; 32NM247, 252P 1000; 32NM182, 253P22; NM 289P 597; 217AppDiv63, 216NYS109; 194NC 221, 139SE224; 112 Okl 82, 240P101; 135 Okl206, 275P345; 140 Okl 74, 282P 679; 288Pa411, 136A218; 295Pa280, 145A288; 44Philippine27; 34PortoRico 780; RI 150A74; 139SC206, 137SE601; 155Tenn132, 290SW975; TexCivA 275 SW90; TexCivA 275SW481; TexCivA 286SW536; TexCivA 294SW989; Tex CivA 1SW(2d)525; TexCivA 21SW(2d) 699; TexCivA 25SW(2d)224; 99Vt464, 134A588; Vt 147A285; 151Va954, 145 SE722; 193Wis522, 215NW670; 195 Wis341, 218NW188. [c] **Statute obviating necessity of exceptions in equity cases and cases tried to court without jury** does not relieve party from making known objections to proposed action of court and grounds thereof. 31 NM91, 240P990.

744-4 178Minn452, 227NW501; TexCiv A 277SW722.

744-5 254Mass478, 150NE215.

744-7 Mo 285SW428; 31NM91, 240P 990; TexCommnA 280SW571; TexCivA 5SW(2d)244; TexCivA 281SW318; Tex CivA 294SW948. [f] **Peremptory instruction to jury** on how to find on one material issue is fundamental error. TexCivA 19SW(2d)193. [g] **Directing verdict where issues upon recovery sought are controverted** constitutes fundamental error. TexCivA 19SW(2d) 193.

745-8 85CalA691, 259P980.

745-9 49SD46, 206NW471.

745-10 224 IllA584.

745-14 23F(2d)55; 33F(2d)861; Ala 128S447; 85Colo 409, 277P299; 83 Ind A514, 149NE89; 202 Iowa837, 211NW 361; 236Mich84, 210NW299; MoA 294 SW742; NH 151A457; 55ND331, 213 NW492, 494 [citCJ]; 143 Okl 69, 287P 1042; Okl 293P188; 136SC506, 134SE 503; TexCivA 271SW155; TexCivA 274 SW247; TexCivA 283SW1114; TexCiv A 5SW(2d)618; TexCivA 23SW(2d)827; 99Vt425, 134A599; 148Va812, 139SE 500; 152Va446, 147SE201 (rule not complied with); 145Wash416, 260P530 (must be made before verdict). [d] **Where record shows responsive answer was given** by witness before any objection was made assignment that court erred in sustaining objection is without merit. 298Pa546, 148A854.

746-15 178Ark588, 11SW(2d)469; 163 Ga899, 137SE561; 234Mich271, 207NW 866 (failure to direct verdict); 242Mich 14, 217NW775 (objection that issue of fact with respect to negligence was not presented); 247Mich624, 226NW656; 178Minn238, 226NW702; 142Miss806, 108S156; 307Mo 172, 270SW105; 319 Mo 456, 4SW(2d)448; MoA 17SW(2d) 616; MoA 25SW(2d)558; 127 Okl 45, 259P644; TexCivA 11SW(2d)556; Tex CivA 13SW(2d)909; TexCivA 19SW (2d)69. See also 319Mo 149, 3SW(2d) 1008. But see TexCivA 22SW(2d)514.

746-16 21F(2d)683; 25F(2d)398; 40F (2d)228; 213Ala534, 105S901; 216Ala 495, 113S531; 216Ala547, 114S41; 218 Ala292, 118S342; 168Ark606, 217SW 15; 171Ark103, 283SW31; 180Ark1167, 22SW(2d)169; 85CalA440, 259P774; 81 Colo 50, 253P397, 399 [citCJ]; 83Colo 343, 265P693; 105Conn625, 136A687; 109Conn292, 146A717; 111Conn407, 150 A303; 36GaA377, 136SE924; 40GaA 378, 149SE810(2dcase); 327 Ill 362, 158 NE678; 198 Ind393, 153NE768; 84 Ind A666, 151NE836; IndA 168NE702; Iowa 213NW442; 206 Iowa698, 214NW 552; 121Kan6, 245P742; 124Kan582, 261P578; 126Kan419, 268P860; 124Me 365, 129A444; 140Miss537, 106S445; 145Miss31, 110S857; 315Mo 972, 287SW 485; MoA 272SW1053; MoA 298SW 125; MoA 6SW(2d)984; MoA 17SW (2d)658; MoA 31SW(2d)279; NJ 135A 340; 55ND331, 213NW492, 494 [citCJ]; 112 Okl 82, 240P101, 103 [quotCJ]; 144 Okl 1, 288P975; 124 Or179, 264P351, 353 [quotCJ]; 132 Or549, 287P77; 16 PortoRico 337; 142SC284, 140SE560, 57 ALR634; TexCivA 271SW654; TexCiv A 291SW281; TexCivA 294SW913; Tex CivA 4SW(2d)165; TexCivA 17SW(2d) 68; TexCivA 21SW(2d)699; TexCivA 28SW(2d)865; 100Vt268, 137A97; Vt 150A65; 103WVa148, 136SE842, 845 [citCJ]; 105WVa130, 141SE626, 628 [quotCJ].

747-17 112 Okl 82, 240P101, 103 [quot CJ]; 124 Or179, 264P351, 353 [quotCJ].

747-18 84 IndA666, 151NE836; 124 Or 179, 264P351, 353 [quotCJ].

747-19 150Miss715, 116S820.

747-20 140Miss537, 106S445.

748-24 32Ariz135, 256P507; 171Ark 103, 283SW31; 82CalA586, 256P229; 103Conn732, 132A20; 40GaA427, 149SE 711; 83 IndA385, 148NE486; 84 IndA 666, 151NE836; 88 IndA580, 169NE533; 208 Iowa397, 224NW592; 125Me178, 132 A132; Mass 166NE563; Mo 271SW52; Mo 29SW(2d)714; Mo 31SW(2d)792; MoA 296SW1036; MoA 17SW(2d) 658; MoA 19SW(2d)522; 72Mont606, 234P477; 84Mont397, 276P437; 82NH 225, 131A601; NJ 147A641(1stcase); TexCommnA 13SW(2d)59 (objection held to challenge verdict as whole); TexCivA 283SW689; 99Vt91, 130A758; Vt 147A352; 103WVa148, 136SE842, 845 [citCJ]. See also MoA 273SW761.

748-25 213Ala78, 104S250; 32Ariz135, 256P507; 171Ark103, 283SW31; 101 CalA186, 281P514; 88 IndA469, 150NE 384; TexCivA 271SW401 (objection that testimony in deposition was not best evidence, that cross interrogatory showed deponent was without personal knowledge, and testimony was later introduced, the objection cannot be disregarded on ground cross interrogatory was not in evidence at time of objection).

748-26 285Pa212, 131A733.

748-28 222MoA251, 296SW840.

748-29½-New. Where court rendered judgment without order submitting case for judgment, objections to the court's findings go to rendition of judgment as well as to its findings. 214Ky 484, 283SW441.

748-31 181Ark511, 27SW(2d)789; 86 CalA369, 260P846 (motion for continuance in case of surprise at testimony of party's own witness on cross-examination); 71CalA112, 234P869; 320 Ill 56, 150NE403; Mass 165NE479 (unless objections are made in conformity to equity rule).

749-33 216Ala534, 113S613; 220Ala 422, 125S661 (right to file cross-bill

must be raised by motion to strike); 205 Iowa666, 216NW733; 218Ky93, 290 SW1061; MoA 284SW837; 84Mont52, 274P145; 217AppDiv63, 216NYS109 (failure to move for dismissal because no cause of action constitutes waiver of objection); 135Wash248, 237P708. [a] **Informality in raising objection held immaterial.**–217AppDiv651, 217NYS248. [b] **Demurrer submitted without argument.**–That general demurrer to complaint was submitted without argument does not prevent court's consideration, on appeal, of question whether complaint stated cause of action. 84Mont 52, 274P145.

749–34 319Mo 644, 5SW(2d)413; MoA 277SW964; MoA 282SW117; MoA 24 SW(2d)717; 193NC266, 136SE726; 132 Or549, 287P77; Or 292P89; 100Vt172, 135A713, 54ALR371. See also 217App Div57, 216NYS464.

749–35 319Mo 660, 4SW(2d)819.

749–36 8F(2d)993; 25F(2d)441; 41F (2d)625; 254 IllA461 (rule otherwise where verdict advisory); 208 Iowa1310, 227NW163; 234Mich271, 207NW866; 156Miss136, 125S545; 221MoA393, 277 SW945 (demurrer to evidence where court sitting as jury); 51ND533, 200 NW790; 54ND867, 211NW595; 55ND 494, 214NW621; 134 Okl 70, 272P857; 138 Okl 190, 280P305; Okl 292P37; 128 Or286, 274P505(2dcase); 139SC299, 137 SE734. See also 236 IllA168; Mo 19SW (2d)1046. [a] **In trial by court** sufficiency of evidence may be reviewed without demurrer to evidence. 136 Okl 249, 277P915. [b] **On submission of question to court** involving inferences from facts request for judgment necessary for review. 41F(2d)517.

749–37 168Ark606, 271SW15.

749–38 152Miss201, 119S299 (motion to transfer to law court).

749–40½–New. , or by motion to withdraw juror. 285Pa251, 132A120.

749–41 207 Iowa605, 223NW480 (request for continuance necessary); 34 PortoRico 216 (action prematurely brought).

749–41½–New. Error in admitting improper evidence is properly presented by request for charge indicating effect of such evidence. 241NY346, 150NE139.

749–41½–New. In a suit to cancel a deed revived in the name of alleged heirs at law of deceased plaintiff, a denial that such persons were heirs at law will not be considered where not raised at the trial by request for findings or otherwise. 172Ark667, 291SW68 (denial in answer insufficient).

749–41¼–New. An administratrix, not making application to the circuit court for additional time to obtain certified copies of the record of the probate court, cannot impute error. 149SC69, 146SE 677.

749–41½–New. In some jurisdictions material errors arising on face of record are reviewable though not raised on motion in arrest of judgment. MoA 28 SW(2d)120.

749–42 34F(2d)889 (objection raised in motion to direct verdict at close of plaintiff's case and not renewed at close of trial); 35F(2d)142; 169Minn478, 211 NW952; 36Wyo 121, 253P669; 36Wyo 473, 257P484. See also 86Colo 414, 282 P253.

749–43 326 Ill 120, 156NE763; 218Ky 750, 292SW297; 240Mich300, 215NW 375; TexCivA 22SW(2d)508.

750–45 103Conn732, 132A20.

750–50 77CalA367, 246P819; 88 IndA 150, 163NE540 (simple statement that power of attorney was revoked presents no question on appeal). See also 215 Ala526, 112S111.

750–54 77CalA367, 246P819.

750–59 27F(2d)76; Iowa 231NW444 (that debtor was deprived of jury trial); NJ 151A97 (failure to request jury trial). But see 89PaSuper120.

751–71 Iowa 230NW349.

752–82 9F(2d)622.

752–86 8F(2d)576; 19F(2d)486; 23 F(2d)972; 33Ariz147, 264P468; 33Ariz 147, 264P468; 170Ga340, 153SE9; 36 GaA147, 135SE847; 45 Ida579, 264P 382; IndA 157NE450; 253Mass411, 149 NE40; 246Mich668, 225NW494; 307Mo 10, 269SW395; 309Mo 224, 274SW758; Mo 20SW(2d)899; 80Mont293, 260P727; 117Nebr551, 221NW694; 191NC362, 131 SE752; 195NC38, 141SE477; 146SC77, 143SE546; 115Tex238, 280SW542; Can [1930] 4DomLR67. But see LaA 125S 518.

753–87 149Md318, 131A444.

753–90 93Fla611, 112S768; 88 IndA 639, 165NE67; 308Mo 201, 271SW481; 101NJEq799, 138A884, 54ALR1227 (jurisdiction to enter final decree in absence of special reference); 114 Okl 72, 243P501; 143Va332, 130SE421 (jurisdiction of city court to correct assessment of property located in another city). [k] **Objection that wrong remedy is being pursued** cannot be raised for first time on appeal. 217MoA430, 268 SW665.

754–95½–New. Where an action exclusively within the jurisdiction of the circuit court is brought in the superior court, objection to jurisdiction cannot be raised on appeal. 44QueSuper341.

755–5 48Nev373, 233P41.

755–10 See also 31F(2d)283.

755–11 10F(2d)474; Ark 32SW(2d) 622; 336 Ill 522, 168NE640; 244 IllA 282; 201 Iowa99, 202NW604 (objection that court was without jurisdiction of administrator because notice of claim was not properly served); 121Kan6, 245 P742; 197NC735, 150SE510; 38Wyo 223, 266P128, 130 [citCJ]. See also 39 F(2d)309.

766–12 244 IllA276.

756–15 Iowa 230NW349; 226Ky290, 10 SW(2d)1101 (error in ordering transfer of cause from equity to ordinary docket is unavailing to plaintiff, where he made no objection); Pa 151A796.

757–20 18F(2d)813; 23F(2d)919; 24 F(2d)329; 35F(2d)403; 177Ark1091, 9 SW(2d)578; 181Ark876, 28SW(2d)704; 48 Ida654, 284P840; 245 IllA48; 247 IllA265; 125Me183, 132A214; Mass 165 NE410; Mass 167NE272; 50RI 144, 146 A87.

758–23 274US684, 47SCt755, 71L ed 1297.

759–36 243 IllA362.

760–42 TexCivA 18SW(2d)722.

760–45 172Ark1176, 290SW939; IndA 157NE450. But see TexCivA 8SW(2d) 571.

760–50 215Ala205, 110S384; 233Mich 384, 206NW371; TexCivA 9SW(2d)143.

760–50½–New. Failure to transfer a suit to the bankruptcy court is not reversible error in the absence of request. 153Va410, 149SE630.

761–54 169Ark682, 276SW996; 170Ark 506, 280SW977; CalA 262P815; 98CalA 65, 276P597 (failure to prove corporate capacity to sue); 244 IllA66; 80 IndA 677, 138NE791, 148NE675, 141NE249; 6LaA101; 256Mass66, 152NE347; Mass 173NE504; 177Minn119, 224NW696; 319Mo 633, 5SW(2d)1100; 320Mo 605, 8SW(2d)592; Mo 25SW(2d)84; Mont 28SP1021; SD 228NW182; TexCivA 294SW989; TexCivA 23SW(2d)484.

762–59 97Fla679, 122S107(2dcase); TexCivA 295SW295.

762–60 See also 83Colo 346, 265P690.

762–63 [a] 215Ky551, 286SW773.

762–64 84 IndA205, 149NE698; Tex CivA 294SW301; TexCivA 30SW(2d) 506.

762–67 122 Okl 140, 252P54, 49LRA 1141; 126 Or1, 267P1035.

762–70 203Cal 1, 262P1087 (special demurrer in lower court necessary); 80 IndA677, 138NE791, 148NE675, 141NE 249 (right of attorney general to sue in name of city); 123 Okl 43, 251P985; 298Pa423, 148A520.

763–71 217AppDiv647, 216NYS174. But see 31NM641, 249P1074, 58ALR 573.

763–72 217AppDiv647, 216NYS174. See also 97CalA242, 275P514.

764–83 MoA 6SW(2d)1009.

765–84 26F(2d)640 [certiorari den 49 SCt179(6thcase)]; 213Ala369, 104S662; 169Ark755, 276SW1014, 42ALR299; 69 CalA416, 231P355; 82Colo 399, 260P 1019; 92Fla246, 109S577; 252 IllA290; IndA 165NE68; 206 Iowa1025, 219NW 411; 208 Iowa735, 225NW841(2dcase); 213Ky343, 280SW1098; 214Ky381, 283 SW384; 215Ky18, 284SW100; Ky 299 SW199; 231Ky96, 21SW(2d)123; Mass 170NE49 (if full justice can be done to all parties before court); 319Mo 633, 5 SW(2d)1100; Mo 18SW(2d)50; Mo 25 SW(2d)84; 99NJEq444, 131A908 (nonjoinder); 113 Okl 153, 240P119; 119 Okl 82, 248P620; 129 Okl 11, 263P111; 138 Okl 182, 280P834.

766–86 33F(2d)841; 219Ala652, 123S 18; 218Ala109, 117S623; 93Fla611, 112 S768; 251 IllA89; 155Md30, 141A440; 228AppDiv591, 240NYS468; TexCivA 277SW1107; Tex 295SW216; TexCivA 24SW(2d)796. [a] **Decree will not be reversed** for nonjoinder of necessary parties, if they were such, where it is effective to accomplish objects sought by bill. 338 Ill 211, 170NE260.

766–87 317 Ill 535, 148NE317.

766–88 18F(2d)815; 215Ala512, 111S2; 205Cal 184, 270P211; CalA 274P572; 81Colo 195, 254P779; 236 IllA472; 137 SC11, 134SE859; Utah 238P1068.

767–90 215Ala512, 111S2.

767–92½–New. The question of want of the necessary parties may be sufficiently raised by a motion for a directed verdict. 247Mich241, 225NW536.

767–94 206Cal 622, 275P410 (special demurrer); 71CalA112, 234P869; 89 CalA267, 264P526; 99CalA17, 277P 1053; 336 Ill 100, 167NE782; 245 IllA 248; 255 IllA375; 212Ky273, 278SW 578 (where defendants failed to demur especially below for misjoinder of parties, defect is deemed waived on appeal); 215Ky18, 284SW100; 319Mo 633, 5SW(2d)1100; 113 Okl 153, 240P119; 129 Okl 11, 263P111; 138 Okl 182, 280P 834; TexCivA 264SW551; TexCivA 296 SW929; TexCivA 16SW(2d)363; Utah 272P204.

767–95 Del 151A717; TexCivA 26 SW(2d)664(2dcase).

768–98 215Ala512, 111S2; 125Misc178, 210NYS455 (held this was not a proper case for bringing in purchaser as defendant, this being an action for return of deposit by sublessee against lessee).

768–99 80CalA352, 251P959.

768–2 162Ga309, 133SE249; 241 IllA 146; 3LaA162; 258Mass74, 154NE839; TexCivA 25SW(2d)200.

768–6 115 Or281, 237P674.

768–6½–New. Where an intervener goes to trial upon her intervention without seeing that it is first put at issue, introduces evidence under it and submits case, she may not thereafter complain because intervention was not put at issue by taking default or filing answer. 158La921, 105S14.

768–7 145Miss31, 110S857.

769–11 164La521, 114S119; TexCivA 20SW(2d)383.

769–12 164La521, 114S119.

769–13 164La521, 114S119.

769–15 203Cal 433, 264P754; 164La 521, 114S119.

769–16 [b] **Abuse of processes, particularly of prerogative writ,** cannot be overlooked by appellate court, though question not argued below. NJ 151A 861.

769–17 251 IllA89.

770–22 105NJL647, 147A458; 49Philippine107; TexCivA 32SW(2d)703.

770–23 See also 94Fla236, 113S730.

771–33 137Wash268, 242P38. [b] **Whether motion to dismiss was defective** cannot be considered where not raised below. Vt 148A286.

771–34 320 Ill 56, 150NE403; 99Vt17, 130A701.

771–38 101NJEq401, 138A693.

771–39 74CalA322, 240P50; 80CalA 352, 251P959; 87CalA262, 262P61(2d case); 121Kan6, 245P742; 146Miss130, 110S234; 124 Or89, 262P948; 125 Or 111, 265P1094; Utah 283P731.

772–44 103Conn21, 130A81.

772–46 TexCommnA 12SW(2d)990.

773–61 181Ark629, 27SW(2d)793.

773–62 75CalA161, 241P941; 22SKy 708, 15SW(2d)464; 1LaA497; Tex CivA 16SW(2d)874.

773–66 29F(2d)321 [certiorari den 49 SCt347(2dcase)].

773–67 Iowa 220NW338; 121Kan6, 245P742; 84Mont494, 276P946.

774–68 6Ala296; 6PortAla365; 3Stew &PAla317; 25Conn431; 162 Ill 402, 44

NE724; 14 Iowa539; 31 Iowa475; 136 Iowa575, 114NW43; 17Me28; 128Mass 401; 18Nebr303, 25NW94; 75Pa441; TexCivA 279SW280; 32Vt747; 145 Wash236, 259P712; 90Wis464, 63NW 1018. See also 34GaA62, 128SE208. [a] **Jurisdictional defects.**—Where judgment void for want of jurisdiction or where garnishment court is without jurisdiction, objection can be raised for first time on appeal. TexCivA 279SW 280.

774–71 232Ky336, 23SW(2d)551(2d case). [a] (2) Where affidavit vitally defective. TexCivA 279SW290.

774–71½–New. or variance between the affidavit in attachment and the declaration, 213 IllA589.

774–73 TexCivA 286SW303.

774–78 [a] **Sustaining general demurrer to intervention petition** is fundamental error. TexCivA 291SW944.

774–79½–New. Where plaintiff made no objection to litigation of interpleader's claim to garnished fund, he cannot raise objection on appeal. Wyo 291P 809.

774–86 Utah 28SP103.

775–88½–New. or that damages were not awarded plaintiff on denial of mandatory injunction in trial court and damages were nominal; 83 IndA658, 149NE699.

775–89½–New. And where answer is filed with cross answer defendant cannot raise point that court had no jurisdiction. TexCivA 276SW959.

775–92 204 Iowa1178, 216NW625; 302 Mo 92, 256SW1053.

775–98½–New. An objection that a receiver did not execute a bond and take oath as such cannot be raised for the first time on appeal from an order allowing him a fee. 136 Okl 237, 277P 233.

775–1 234 IllA1 (where plaintiff's demurrer to defendant's rejoinder was overruled, and case went to trial without surjoinder, defendant who failed to object below or to move for judgment cannot claim matter in rejoinder was admitted); 220MoA1050, 279SW723.

776–5 220MoA1050, 279SW720.

776–6 177Ark631, 7SW(2d)313.

776–9 320Mo 746, 8SW(2d)824.

776–10 See also CalA 291P688.

777–15 213Ala556, 105S590; 176Ark 553, 3SW(2d)307 (motion or complaint); 125Kan461, 264P1044.

777–16 213Ala556, 105S590; 255 IllA 322 (rule applied to affidavit in support of declaration); MoA 28SW(2d)401; TexCivA 21SW(2d)1086; 152Wash288, 277P833.

777–17 90PaSuper174 (statement of claim). See also TexCivA 270SW1094.

777–18 118Kan531, 235P862; 137 Okl 1, 278P1096.

777–19 40F(2d)260.

777–24 207Cal 414, 278P1038 (general objection held insufficient); 331 Ill 240, 162NE869; 205 Iowa563, 218NW251; 164La409, 114S78; TexCivA 16SW(2d) 852.

778–28 176Ark31, 2SW(2d)70; 76CalA 33, 243P707; 153Miss494, 121S114; 155 Wash14, 283P470.

779–29 TexCivA 285SW909; TexCivA 25SW(2d)913.

779–30 Mass 167NE334.

779–30½–New. On objection to a pleading first made on appeal, every reasonable deduction will be drawn from the pleading in order to uphold it and whatever is necessarily implied in, or is reasonably to be inferred from an allegation will be taken to be directly averred. 85Mont229, 278P143.

779–37 14F(2d)586; 20F(2d)897; 22 AlaA241, 114S418; 213Ala559, 105S 656; 22AlaA199, 114S15; 178Ark143, 10SW(2d)43; 75CalA25, 241P902; 84 CalA714, 258P636 (as to amount due); CalA 292P1000; 83Colo 419, 266P201; 90Fla162, 105S321; 202 Iowa764, 211 NW257; 206 Iowa893, 221NW512; 11 KyOp580; 124Me384, 130A209; MoA 298SW1043; 73Mont110, 236P1085; NJ 141A584; 31NM404, 247P275; 32 OhA 379, 168NE216; 300Pa317, 150A644; TexCivA 278SW1107 (petition cannot be attacked for first time on appeal if it were good on general demurrer); TexCivA 9SW(2d)143; 70Utah57, 257P 1060; 99Vt39, 130A578; 33Wyo 457, 240P449.

780–38 20F(2d)1017; 253 IllA190; 122Kan250, 252P221; 103NJL502, 135 A884; 120 Or353, 252P556; 287Pa92, 134A490; 33Wyo 457, 240P449.

781–40 25F(2d)271; 216Ala495, 113S 531; 22AlaA241, 114S418; 291Pa60, 139A611. [a] (2) Under statute, court of appeals has no power to pass upon sufficiency of bill where no exceptions were taken below, 75Md195, 23A579, 24A226; 103Md624, 64A298, 433; 105 Md336, 66A273; 109Md690, 72A414, 130AmSR552; 10Gill&JMd404, 32AmD 180.

782–41 75CalA96, 241P902; CalA 261 P1021; 97CalA325, 275P472; CalA 292 P1000; 134 Okl 121, 272P466; Utah 276P659.

783–45 CalA 287P133.

784–49 84Colo 456, 271P191.

784–52 23AlaA67, 120S577(2dcase).

784–53 73CalA700, 239P70; 80Mont 374, 260P734.

784–56 TexCivA 275SW481.

784–59 80Mont374, 260P734; TexCivA 3SW(2d)882; TexCivA 20SW(2d)405.

784–60 218Ala350, 118S656; CalA 276 P583; MoA 148W(2d)467; 51ND858, 201NW163; 289Pa369, 137A612; 148 SC446, 146SE420; TexCivA 264SW551; TexCivA 20SW(2d)813.

785–71 214Ala37, 106S336; 218Ala207, 118S389; 219Ala439, 122S419; Ala 130 S795; 170Ga202, 152SE239; 251 IllA 599; 83 IndA701, 149NE909; MoA 282 SW123; TexCivA 4SW(2d)654; TexCivA 28SW(2d)871; 101Vt56, 140A491; 149Va854, 141SE767, 56ALR1358.

786–75 8F(2d)455, 457 [quotCJ]; 34 F(2d)133; 202Cal 679, 262P312; 126 Kan419, 268P860; Mass 165NE15 (where evidence discloses liability); 221 MoA345, 273SW176; MoA 14SW(2d) 12; 217AppDiv63, 216NYS109. [c] (1) 86 IndA695, 159NE761.

786–76 8F(2d)455, 457 [quotCJ]; 97 CalA77, 275P257; CalA 281P1048; CalA 286P482; 83Colo468, 266P501; 97Fla180, 122S559; Fla 128S622; Fla 128S801 (2dcase) (appellate court cannot refuse to notice no cause of action stated); 170Ga691, 153SE767; 326 Ill 226, 157NE245; 236 IllA392; 3LaA169; 3LaA314; 166Minn504, 207NW740; 315 Mo 367, 286SW106; Mo 287SW603; 319 Mo 1196, 8SW(2d)846, 60ALR448; Mo 29SW(2d)103; 221MoA345, 273SW176; 220MoA19, 273SW233; 220MoA753, 275 SW973; 220MoA760, 277SW67; MoA 282SW158; MoA 287SW877; 220MoA 1245, 290SW655; MoA 296SW214 (complaint held sufficient statement of cause of action); 220MoA1337, 296SW464 (defendant held not estopped by failure to raise question as to matter not alleged in petition); MoA 7SW(2)1025; MoA 8SW(2d)1087; MoA 9SW(2d)103; MoA 21SW(2d)633; MoA 29SW(2d) 201; 81Mont68, 261P609; 48Nev373, 233P41; 31NM404, 247P275; 31NM641, 249P1074, 58ALR573; 189NC724, 128 SE324; 190NC190, 129SE413; 195NC 38, 141SE477; 196NC711, 146SE808 (1stcase); 113 Or570, 232P637, 233P 561, 234P261; 117 Or22, 242P600; 119 Or556, 249P632; 120 Or229, 250P876; 130 Or522, 279P867; TexCivA 6SW(2d) 377; TexCivA 28ISW328; TexCivA 295 SW292; TexCivA 299SW476; TexCivA 19SW(2d)826; TexCivA 20SW(2d)405; 37Wyo 365, 261P905. [b] **In North Carolina** supreme court may take notice of the insufficiency ex mero motu. 190 NC764, 130SE614.

787–77 8F(2d)455, 457 [quotCJ]; 22 AlaA199, 114S15; 73CalA368, 238P820; 315Mo 367, 286SW106; 220MoA1337, 296SW464; MoA 296SW254 (petition held sufficient); MoA 4SW(2d)831; 80 Mont374, 260P734; 50Nev352, 259P632; 190NC764, 130SE614; 122 Okl 226, 253 P985; 130 Or1, 278P943; 33Wyo 457, 240P449.

787–78 8F(2d)455, 457 [quotCJ]; 221 MoA1014, 298SW246; 35PortoRico 365.

787–79 8F(2d)455, 457 [quotCJ]; MoA 298SW254; 122 Okl 226, 253P985.

788–83 217AppDiv63, 216NYS109.

788–87 38F(2d)199; 213Ala414, 104 S817; 23AlaA246, 123S265; CalA 261P661; 85Colo 409, 277P299; 243 IllA483; 261Mass417, 158NE785; Mass 165NE25; 153Miss570, 121S119 (counter-affidavit in action on open account); 220MoA708, 293SW471; MoA 25SW(2d)1079; 128 Or248, 275P28; 284Pa361, 131A286 (objection to affidavit of defense); TexCivA 25SW(2d)184.

789–90½–New. or double defenses; 261 Mass417, 158NE785.

789–94 34PortoRico590.

790–98 89CalA209, 264P507.

790–99 232Ky20, 22SW(2d)279; 153 Md14, 137A523; MoA 30SW(2d)643; 146Va553, 131SE835.

790–9 205 Iowa271, 215NW649, 217NW 874; 221AppDiv146, 223NYS107; TexCivA 272SW283; 6AltaL161, 10DomLR 755, 23WestLR884.

790–10 221MoA486, 282SW1051.

790–12 But see 131 Or162, 281P185.

790–14 128Kan354, 278P19.

791–16 218Ala557, 119S670; 92CalA 691, 268P928; 98CalA84, 275P865; 247 Mich201, 225NW531; 320Mo 605, 8SW (2d)592; TexCivA 278SW1107 (if cross petition was good against general demurrer, it is good on appeal in absence of attack below).

791–17 127 Or386, 272P260.

791–18 Mass 165NE660.

791–20 71CalA767, 236P183.

792–24 Mo 16SW(2d)77.

792–25 169Minn504, 212NW194.

792–27 169Minn504, 212NW194; 127 Or481, 272P674 (that bill not certified); 143Va920, 129SE700.

792–29 233 IllA508; 245 IllA148.

792–30 149Md10, 130A66; 292Pa122, 140A774. See also NJ 114A117.

792–31 76CalA409, 244P942.

792–32 16F(2d)948; 205Cal 383, 270P 956; CalA 288P855; 328 Ill 161, 159 NE213; Mass 166NE563; 33NM9, 261 P820; 151SC537, 149SE241; Utah 269 P138; 99Vt329, 132A37. [g] (2) Where, after demurrer to original petition has been filed, plaintiff files amended petition which is complete in itself and does not refer to original petition, and defendant does not demur to amended petition, ruling of trial court on questions raised by demurrer to original petition will not be reviewed on appeal. 117 Okl 181, 245P594.

793–33 70CalA526, 233P810; 76CalA 33, 243P707; 40GaA324, 149SE579 (2d case); IndA 163NE283 (sufficiency of amended complaint); 171Minn118, 213 NW539; Mont 289P1028.

793–34 164La409, 114S78; 40 OklACR 142; TexCivA 21SW(2d)699 (general objection held not to show abuse of discretion).

793–35 120 Or353, 252P556.

793–36 TexCivA 22SW(2d)720. See also 165Ga479, 141SE291.

793–37 [b] **Sustaining demurrer to amended supplemental bill** has been held not to present question for review, whether or not filing had been properly allowed. Mass 166NE563.

793–39½–New. The question of departure in pleadings cannot be presented on appeal in the absence of timely motion to strike in the court below. 40 OklACR142.

793–39½–New. Absent affidavit of surprise appellant cannot complain of amendment making pleading conform to evidence. MoA 28SW(2d)391.

793–42 84CalA775, 258P652; TexCivA 6SW(2d)183; TexCivA 22SW(2d)720; 99Vt329, 132A37; 142Wash520, 253P 819.

794–44 215Ala51, 108S850; 9LaA649, 120S94 (defendant, having failed to object to exception being referred to merits, abandoned right to have exception passed upon).

794–45 22AlaA518, 119S601 (2dcase).

794–51 74CalA1, 239P702.

794–51½–New. that the right to demur was waived; 317Mo 148, 295SW118.

794–53 215Ala150, 110S46; 98Fla422, 123S833.

795–57 39GaA681, 148SE312 (1stcase).

795–57½–New. Appellant cannot complain that trial court did not treat his demurrer as motion to make complaint definite and certain where he made no such motion. 169Ark745, 276SW578.

795–60 233 IllA511.

795–64 But see 99Vt170, 130A709.

795-66 99Vt170, 130A709.
795-68 215AppDiv747, 212NYS260 (technical defects of motion to amend).
795-72 38F(2d)388; 209Ky365, 272SW 883 (order striking answer for want of verification).
796-74 104Conn366, 132A895.
796-77 124Kan582, 261P578. See also 97CalA643, 275P998. [b] (2) Motion to strike parts of answer, but not stating words to be stricken, not reviewable. 199Ind290, 157NE433. [c] **Rule does not preclude review** for absence of sufficient motion, where error is clear, and especially where trial court expressly declined to hear argument on motion to dismiss. 27F(2d)681.
796-81 19F(2d)32; 25F(2d)275 (point not well taken in absence of motion for dismissal at close of case); 25F(2d) 415; 36F(2d)480; 214Ala553, 108S452; 217Ala304, 116S158 (rule of court); Ala 129S46; Ala 130S329; Ariz 288P1029; 73CalA692, 239P95; 203Cal167, 263P 238; Cal 293P25; 75CalA614, 243P24; 78CalA111, 248P299; 108Conn40, 142A 391; 47Ida675, 277P1112; 327Ill 362, 158NE678; 233IllA508; 234IllA359; 235IllA359 (objection must be specific); 237IllA246; 240IllA165; 241IllA55; 241IllA124; 255IllA465; Ind 166NE 434; 200Iowa919, 205NW787; Mo 6SW (2d)843; Mo 12SW(2d)504; 220MoA 401, 286SW736; MoA 295SW134; MoA 4SW(2d)831; MoA 15SW(2d)876; 126 Misc474, 213NYS329 (variance which does not mislead defendant); 219App Div249, 219NYS146; 51ND858, 201NW 163; 121Okl5, 247P58; 288Pa534, 136 A794; 298Pa535, 148A707; 95PaSuper 465; 52SD264, 217NW184; TexCivA 4SW(2d)649; TexCivA 6SW(2d)390; TexCivA 300SW114; 148Va812, 139SE 500; 149Va221, 141SE389; 143Wash 319, 255P380; 146Wash257, 262P639. [a] 217Ala251, 115S168. [b] **Motion for directed verdict is not sufficient** to raise objection as to variance to make question open to review. 235IllA350.
797-83 327Ill 362, 158NE678.
797-84 129Or138, 276P1086.
798-85 41F(2d)336; 214Ala553, 108S 452; 171Ark338, 284SW45; 94CalA 770, 271P1101; CalA 288P792; 109 Conn417, 146A822; 234IllA359; 235Ill A359; 226Ky676, 11SW(2d)713 (defects waived if not objected to); Mo 287SW 634; MoA 23SW(2d)214; 148Va812, 139 SE500; 40Wyo 312, 276P926.
799-86 234IllA359; 255Mass563, 152 NE321; MoA 19SW(2d)505; NJ 147A 645(1stcase).
799-87 CalA 289P900; 318Mo1190, 3 SW(2d)241; 148Va812, 139SE500; 143 Wash319, 255P380; 149Wash1, 270P 113.
799-88 [b] 83CalA148, 256P440.
800-89 219AppDiv249, 219NYS146.
800-92 19F(2d)32.
801-93 Ind 166NE434; 50RI 424, 148 A315; 149Wash424, 271P73.
801-94 Cal 269P657(2dcase); Cal 276 P338; 75CalA614, 243P24; 94CalA703, 271P789; 102CalA510, 283P338; 108 Conn469, 143A566; 118Nebr690, 226NW 421; 219AppDiv249, 219NYS146; 151 Va458, 145SE362.
802-95 323Ill 138, 153NE667, 49ALR 499; 237IllA246.
802-97 Mo 12SW(2d)504; MoA 292SW 738; MoA 22SW(2d)880.
802-97½-New. Motion for continuance must have been made in some jurisdictions where the party claims to have been surprised by the evidence adduced by the adversary in order to avail himself of an objection on appeal. 81CalA 360, 253P755.
802-3 254IllA569.
803-7 22F(2d)804; 318Ill 101, 148NE 857 (where appellant later participated in proceedings); 83NH115, 139A184; 294Pa535, 144A537; 140Wash586, 250 P346.
803-22 45SC148, 143SE17.
803-25 174Ark988, 298SW501.
803-27½-New. to the examination of a party before trial as an adverse party; SD 225NW301.
803-31 23F(2d)395; 221Ky622, 299SW 556; Nebr 231NW503; 152SC178, 149 SE753 (bias or prejudice); TexCivA 9 SW(2d)743.
804-32 NJ 130A732.
804-38 153Miss635, 120S738 (trial premature).
805-43 Utah 273P303.
805-53 9F(2d)393 (case tried in equity and no request for special findings); 220Ala511, 125S655(2dcase); 28Ariz 581, 238P389; 220Ky317, 295SW161; MoA 272SW1053 (argument of counsel); 285Pa241, 132A185; 151SC309, 149SE 14: [c] **Reasonableness of time allowed counsel to examine charge** and prepare exceptions thereto not reviewable in absence of request for extension of time and proper exception to ruling refusing it. TexCivA 272SW826.
805-54 194Wis85, 216NW134. [a] (3) Where court on its own responsibility took the case from the jury without objection or exception, error cannot be predicated on such withdrawal. 31F(2d) 744.
806-55 123Or537, 262P936.
806-62 MoA 285SW1015 (equity action and law action set up in separate counts).
806-71½-New. to order of judge during trial directing receiver in action for conversion to deliver to witness his goods which had been commingled by defendant with those of plaintiff in suit; 117 Or306, 244P75.
806-75½-New. Exclusion of plaintiff from courtroom and failure of defendant to obey order to withdraw also during argument of counsel as to certain line of inquiry on cross-examination. 135Wash248, 237P708.
806-77 198Ind393, 153NE768.
806-79 206Cal190, 273P560 (unless prejudicial effect could not be cured by subsequent action of trial court); 69 CalA708, 231P764; 77CalA78, 246P130; 82CalA141, 255P215; 99CalA17, 277P 1053; 102CalA615, 283P358; CalA 290 P916; 128Kan220, 277P45; 265Mass 382, 163NE251(2dcase); MoA 27SW(2d) 448; 84Mont141, 274P844; 117Nebr238, 220NW262; 33NM577, 273P761 (examining witness out of court room). But see 85CalA691, 259P980. [b] **Request to instruct jury to disregard court's utterances** is not necessary to preserve exception to improper remarks of court. 203Cal116, 263P220.
807-80 97CalA39, 274P987; 78Colo 235, 242P45.
807-88 14F(2d)829; 23F(2d)977; 28 Ariz531, 238P336, 337 [citCJ]; 75CalA 554, 243P33; 78Colo235, 242P45; 41 Ida285, 238P891; 205Iowa834, 210NW 797; 209Ky84, 272SW12; 1LaA1; 1 LaA14(1stcase); 321Mo1244, 14SW(2d) 583; MoA 18SW(2d)545; RI 134A658; 83SC329, 65SE347, 137AmSR815; Tex CivA 278SW278; TexCivA 22SW(2d) 991. [d] **Permitting jurors to question witnesses** resulting in admission of incompetent and irrelevant matter not prejudicial in absence of objection. 211 Ky176, 277SW320.
807-88½-New. Striking of testimony without objection is not subject to review on appeal. 315Mo760, 287SW346.
808-91 39F(2d)62; 213Ala494, 106S 150; 213Ala649, 106S44 (or absence of opportunity to object); 214Ala8, 106 S49; 214Ala15, 106S239; 33Ariz374, 265 P84; Ariz 285P271; 174Ark1030, 298 SW337; 180Ark1167, 22SW(2d)169; Cal 234P675; 198Cal667, 247P195; 208 Cal1, 279P996; 75CalA554, 243P33; 85 CalA140, 259P63; 88CalA554, 263P844; 89CalA336, 265P281; 91CalA294, 266P 1007; CalA 287P354; 85Colo184, 274 P821; 107Conn484, 140A820; 163Ga 796, 137SE64; 35GaA723, 134SE625; 318Ill 350, 149NE247; 329Ill 21, 160 NE130; 335Ill 164, 166NE530; 335Ill 322, 167NE80; 233IllA500; 240IllA 247; 245IllA291; 83IndA415, 148NE 435; 84IndA243, 149NE454; 86IndA 699, 159NE763; 87IndA603, 162NE239; IndA 171NE878; 205Iowa834, 210NW 797; 202Iowa837, 211NW361; 203Iowa 396, 212NW693; Iowa 213NW442; 205 Iowa271, 215NW649; 208Iowa914, 224 NW568; Iowa 229NW177; 120Kan186, 243P287; 122Kan438, 252P223; 129 Kan499, 283P625; 213Ky805, 281SW 1024; 215Ky18, 284SW100; 215Ky682 286SW1078; 216Ky243, 287SW707; 219 Ky652, 294SW188; 222Ky691, 28W(2d) 387; 225Ky510, 9SW(2d)226; 232Ky 602, 24SW(2d)301; 260Mass265, 157NE 532; Mass 173NE429; 232Mich658, 206 NW495; 247Mich150, 225NW535; 249 Mich16, 227NW539; 248Mich665, 227 NW689; Mich 232NW355; 307Mo375, 270SW365; Mo 26SW(2d)942; Mo 29 SW(2d)714; MoA 274SW1098; 220MoA 102, 278SW806; MoA 278SW1084; MoA 285SW512; MoA 286SW157; MoA 296 SW269; MoA 298SW254; MoA 5SW(2d) 689; MoA 7SW(2d)383; 222MoA758, 7 SW(2d)734(2dcase); MoA 9SW(2d)644; MoA 9SW(2d)655; MoA 17SW(2d)599; MoA 24SW(2d)699; MoA 24SW(2d)717; MoA 27SW(2d)1036; MoA 30SW(2d) 1090; 81Mont543, 264P675; 82NH487, 136A139; NH 149A508; NJ 145A237; 31 NM611, 249P1014; 217AppDiv57, 216 NYS464; 197NC639, 150SE122; 58ND 430, 226NW483; 30OhA118, 164NE370; 116Okl82, 243P211; 128Okl71, 261P 170; 128Okl172, 261P944; 131Okl295, 269P265; 122Or162, 257P809; 127Or 196, 270P519; 287Pa370; 135A127; 5Pa Dist&Co 603; 29PortoRico 52; 33Porto Rico 261; 35PortoRico 224; 47RI 215, 132A439; RI 148A595; 132SC230, 128 SE29; 151SC537, 149SE241; 151SC484, 149SE246; TexCivA 281SW244; TexCivA 282SW903; TexCivA 299SW649; TexCiv A 58W(2d)208; TexCivA 6SW(2d)432; TexCivA 7SW(2d)611; TexCivA 13SW (2d)419; TexCivA 18SW(2d)942; Tex CivA 19SW(2d)814; 99Vt91, 130A758; 99Vt329, 132A37; 151Va434, 145SE421; 155Wash647, 285P666; Wash 291P721; 35Wyo300, 249P81; Alta [1929] 4Dom LR397. [e] **Lack of opportunity to object must be shown** or actual objection. 213Ala649, 106S44. [f] **Rule that new trial should be granted where evidence admitted is grossly prejudicial and incurable** does not apply to evidence not seasonably objected to. 213Ala649, 106 S44.
811-92 [b] **Rule awarding new trial for admission of grossly prejudicial error, though no action taken for exclusion,** does not apply to evidence seasonably objected to. 213Ala649, 106S44. [c] **Refusal to grant mistrial** for admission of prejudicial evidence is no ground for complaint in absence of objection. 213Ala649, 106S44 (or lack of opportunity to object).
811-93 115Okl166, 242P164; 130Okl 51, 265P141.
811-94 108Conn738, 143A845; NJ 138 A519.
812-95 232Ky741, 24SW(2d)560; 82 NH225, 131A601 (payments by way of compromise).
812-96 174Ark982, 298SW194; 95CalA 347, 272P767; MoA 24SW(2d)699. But see 100CalA715, 280P1003. [a] (1) Mass 171NE448. (2) 83CalA689, 257P 211; 144Okl9, 291P103. (3) But see 98CalA437, 277P137.
812-97 23AlaA227, 124S115; 83CalA 128, 256P493 (failure to offer preliminary proof); 84CalA174, 257P873; CalA 288P149 (statute); 331Ill 160, 162 NE877 (evidence of interested attorney given in former case received without objection); 232Ky155, 22SW(2d)578; 88PaSuper31; 144Va154, 131SE245 (railroad tariff); 146Wash37, 261P800.
813-98 233IllA500 (inventory).
813-3 244IllA47.
813-4 TexCivA 13SW(2d)151.
813-5 32F(2d)732; CalA 291P663; 82 Colo264, 259P1033; 329Ill 253, 160NE 552; 322Mo158, 16SW(2d)190; 43Okl ACR208 [reh pending].
814-6 337Ill 387, 169NE232; MoA 20 SW(2d)561(2dcase); 29PortoRico 572.
814-7 Ariz 287P440; 240IllA247; Mo 298SW51; MoA 287SW803; 222MoA 1010, 7SW(2d)463; MoA 7SW(2d)749; MoA 24SW(2d)682; 287Pa370, 135A 127.
815-10 MoA 296SW269.
816-16 216Ala29, 112S312.
816-17 Contra 128Or248, 275P28.
816-19 33F(2d)841; 215Ala612, 111S 901; Ala 129S46; 34Ariz230, 270P629; Ariz 287P440; 203Cal291, 264P246; 71 CalA393, 235P461; 103Conn598, 131A 437 (objection not timely); 106Conn 724, 136A867; IndA 157NE7; 206Iowa 771, 221NW489; 120Kan186, 243P287; 152Miss466, 119S203; 321Mo1244, 14 SW(2d)583; Mo 20SW(2d)655; 221

MoA345, 273SW176 (demurrer to evidence not required to save objection to competency of testimony); MoA 282SW454; MoA 24SW(2d)243; 84Mont597, 277P620; 104NJLaw133, 139A5; 112 Okl 3, 239P582; 130 Okl 51, 265P141; 282Pa8, 127A615, 38ALR611 (before its reception); 287Pa370, 135A127; 142SC 247, 140SE581; TexCivA 8SW(2d)550; 142Va197, 128SE644 (too late after verdict). See also 32NM500, 258P1009, 1013 [quotCJ]. [e] 148Wash214, 268P 876. [h] **Objection to parol evidence held premature** in absence of offer to introduce such evidence. 170La602, 128S 649.

817–20 28Ariz531, 238P336; 71CalA 479, 235P673; 92CalA285, 268P430; 102CalA260, 282P961; 103Conn598, 131 A437 (in absence of motion error not reversible); 40GaA328, 149SE713; Iowa 213NW442; 148Md391, 129A354; 263 Mass147, 160NE821; 265Mass433, 164 NE376 (testimony admitted de bene); Mass 167NE521; Mass 169NE495; 242 Mich422, 218NW667; Mo 32SW(2d)288; MoA 273SW764; MoA 297SW721; MoA 20SW(2d)561(2dcase); NH 147A898(2d case); 189NC783, 128SE158 (where court in effect sustained objection made); 193NC266, 136SE726; 54ND 336, 209NW547; 112 Okl 3, 239P582; 115 Okl 166, 242P164; 282Pa8, 127A615, 38ALR611; 285Pa260, 131A858 (motion to strike necessary); 287Pa370, 135A 127; 289Pa381, 137A665; 135SC62, 133 SE533; TexCivA 299SW348; TexCivA 18SW(2d)942 (where no objection was urged till after testimony was in, and no motion was ever made to exclude it, it is not reviewable). See also 32NM 500, 258P1009, 1013 [quotCJ]. But see 98CalA709, 277P750.

817–21 205 Iowa271, 215NW649, 217 NW874; NH 147A898(2dcase); 241NY 346, 150NE139; 189NC783, 128SE158 (where court in effect sustained objection made). See also 32NM500, 258P 1009, 1013 [quotCJ].

817–21½–New. Refusal to grant mistrial for admission of prejudicial evidence is not ground for complaint where no objection was made at trial, 213Ala 649, 106S44.

817–21⅓–New. no showing of absence of opportunity to object, 213Ala649, 106 S44.

817–21¼–New. or no motion made to exclude the evidence. 213Ala649, 106S 44.

817–22 MoA 273SW764; 191NC297, 131 SE735; 125 Okl 144, 256P903; Utah 263P495.

818–23 216Ala454, 113S410; 160Ga634, 128SE903; 165Ga335, 141SE67; 34GaA 36, 128SE213; 37GaA472, 140SE780; Iowa 229NW221; 252Mass328, 147NE 858; 262Mass10, 159NE517 (where no motion made to strike any part); Mass 170NE48; 140Miss537, 106S445; 319Mo 1169, 8SW(2d)586; 213MoA660, 267SW 445; 220MoA760, 277SW67; MoA 297 SW721; 49ND160, 190NW774; 25 OhA 89, 157NE402; 132 Or549, 287P77; Tex CivA 295SW628; TexCivA 299SW277. [i] **Evidence taken on examination of adverse party before trial.–SD** 224NW 951.

818–24 318Mo 318, 300SW283.

818–25 10F(2d)1011; 148Va194, 138SE 721.

819–26 10F(2d)1011; 22F(2d)403; 216 Ala495, 113S531; 220Ala664, 127S233; Ala 130S213; Ariz 285P271; CalA 262 P783; 88CalA67, 262P1106; 89CalA 469, 265P295; 90CalA675, 266P817; 82 Colo 108, 257P348; 83Colo 225, 263P 728; 163Ga899, 137SE561; 164Ga696, 139SE333; 165Ga314, 140SE868; Ga 155SE185; 36GaA767, 138SE244; 37GaA 472, 140SE780; 38GaA337, 144SE11; 39 GaA670, 148SE283(2dcase); 41GaA280, 152SE852(2dcase); Ida 290P405; 243 IllA562; 254 IllA248; 84 IndA666, 151 NE836; 89 IndA393, 166NE615; IndA 168NE702; 203 Iowa485, 210NW767; Iowa 213NW442; 203 Iowa1392, 214NW 592; 205 Iowa51, 217NW557; 205 Iowa 948, 218NW946; Mass 167NE521; 154 Miss846, 123S887; 155Miss227, 124S 331; 312Mo 458, 278SW759; Mo 282SW 53; 315Mo 1068, 287SW474, 315Mo 972, 287SW485; 321Mo 1104, 14SW(2d)425; 322Mo 158, 16SW(2d)190; Mo 20SW (2d)31; Mo 20SW(2d)655; MoA 279SW 438; MoA 299SW121; MoA 5SW(2d) 689; MoA 18SW(2d)114; MoA 27SW (2d)438; 49Nev326, 245P700; 49Nev 451, 248P893; NJ 148A894; NJ 131A 87; 117 Okl181, 245P594; Okl 272P 1017; 123 Or469, 259P1064, 260P1099; 35PortoRico 220; 148SC511, 146SE534; 49SD235, 207NW53; TexCivA 285SW 837; TexCivA 298SW305; TexCivA 8 SW(2d)782; TexCivA 13SW(2d)905; TexCivA 25SW(2d)911; 100Vt268, 137A 97; 101Vt427, 144A194; Vt 150A148; 199Wis115, 225NW738.

822–27 333 Ill 588, 165NE199 (document); MoA 27SW(2d)467 (objection sufficiently broad to include certain evidence). [b] (1) 85CalA440, 259P774. (4) Objection, that written contract is best evidence thereof, is not proper objection to sufficiency of showing that original was lost. 35Wyo 10, 246P27. [d] (1) 312Mo 458, 278SW759; MoA 279SW160. [f] TexCivA 19SW(2d)948 (proper objection is not that testimony is hearsay, but that necessary facts have not been shown to bring it within exception allowing such evidence to be admitted); 100Vt268, 137A97. [g] (1) 130 Or15, 278P954. [t] **Objection to mutilated paper writing** does not raise question as to lack of proof of handwriting. 10F(2d)1011.

823–28 163Ga899, 137SE561; 164Ga 696, 139SE333; 84 IndA666, 151NE836.

823–30 125Me88, 131A1; 315Mo 987, 288SW777; 322Mo 514, 17SW(2d)960; 83NH143, 139A367; NC 154SE322; 32 OhA207, 167NE701; TexCommnA 13SW (2d)334; TexCivA 291SW583. [c] **Failure to restrict consideration of evidence to relevant issue** is not error in absence of request for limitation. Tex CommnA 277SW78.

823–31 252 IllA567; 154Miss325, 122 S373; 123 Or469, 259P1064, 260P1099.

823–33 326 Ill 120, 156NE763; 215Ky 663, 286SW929; MoA 24SW(2d)196; Mont 288P614; 49ND777, 193NW481; 115 Oh67, 152NE188. Contra 151Md 571, 135A373.

823–34 326 Ill 120, 156NE736; 215Ky 663, 286SW929.

824–37 MoA 281SW97; 113Nebr751, 204NW515.

824–38 161Ga978, 133SE512; 47 Ida 542, 277P554(2dcase); 203 Iowa1361, 214NW591; 137SC113, 133SE826, 827 [quotCJ]; 36Wyo 121, 253P669; 36 Wyo 473, 257P484.

824–47 111Conn342, 149A851; 27Hawaii760; 86 IndA699, 159NE763; 321 Mo 140, 9SW(2d)929; 217AppDiv336, 216NYS727; 34 OhA244, 170NE661. [a] 296Pa568, 146A153. [e] **Where no offer of proof is made by party excepting to exclusion of evidence,** it cannot be known that excepting party was injured by exclusion. 254Mass551, 151NE66. [f] **Where court does not duly take evidence** in determining preliminary proceeding, such error is not waived. 41 NB509, 14DomLR146.

825–48 Ala 130S199.

825–49 212Ala325, 104S808; 22AlaA 602, 118S495(2dcase).

825–50 See also 70Utah224, 259P326, 328 [citCJ].

825–50½–New. Where evidence is improperly admitted on one ground, party offering it cannot urge for first time on appeal that it was admissible on another ground. RI 134A658.

825–52 Mo 276SW611; 319Mo 660, 4 SW(2d)819; 43 OklACR321, 322 [reh pending, and quotCJ]; 142Wash580, 253P1083.

825–53 32F(2d)119; 33F(2d)841; 34 F(2d)436; 35F(2d)172; 36F(2d)922; 42F(2d)440; 43F(2d)920; 212Ala325, 104S808; 218Ala171, 118S328(2dcase); 220Ala445, 125S659; 77CalA164, 247 P212; 82CalA12, 254P914; 85CalA 468, 259P965; 97CalA144, 275P245; 97CalA87, 275P456; CalA 288P792; Fla 128S639(2dcase); 161Ga329, 130SE566; 166Ga39, 142SE150; 34GaA40, 128SE 210; 29Hawaii750; 325 Ill 474, 156NE 485; 232 IllA430; 88 IndA693, 165NE 526; 203 Iowa485, 210NW767; 119Kan 212, 237P911 (rejected offer not followed up by affidavit or other sworn evidence of what appellant would have been able to prove); 119Kan333, 239P 1103; 122Kan294, 252P256; 209Ky619, 273SW439; 223Ky707, 4SW(2d)716; 226Ky647, 11SW(2d)700; 226Ky703, 11SW(2d)712 (avowals); 254Mass168, 149NE664; 258Mass551, 155NE604; 263 Mass147, 160NE821; Mass 164NE478 (1stcase); Mass 165NE660; Mass 166 NE644 (before master); Mass 169NE 905; Mass 171NE651; 170Minn341, 212 NW599; 309Mo 241, 274SW437; Mo 276 SW611; 317Mo 1061, 297SW968, 54 ALR644; Mo 1SW(2d)121; 319Mo 660, 4SW(2d)819; 321Mo 840, 12SW(2d)747; MoA 256SW542; MoA 271SW1005; 220 MoA489, 274SW103; MoA 279SW160; 220MoA1294, 290SW1014; MoA 293SW 455; MoA 15SW(2d)363; MoA 16SW (2d)672; MoA 18SW(2d)528; MoA 24 SW(2d)187; MoA 28SW(2d)391; MoA 32SW(2d)130; 217AppDiv336, 216NYS 727; 52ND307, 202NW642, 643 [citCJ]; 52ND910, 204NW621; 31 OhA273, 167 NE407; 43 OklACR321, 322 [reh pending, and quotCJ]; 125 Or144, 265P1096 (insufficient offer as to measure of damages); 47RI 186, 131A643; 49SD1, 205 NW710; 52SD198, 217NW190; 52SD 245, 217NW200; 99Vt244, 131A10; 100 Vt443, 138A782; 152Wash492, 278P 178; Wash 288P265. [a] MoA 279SW 253. [h] **Question so general as to call for legal or illegal evidence gives right and duty** to enlighten court as to what is expected to be proved. 213Ala649, 106S44. [i] **Offer held insufficient.–Vt** 147A285. [j] **Reviewing court cannot determine whether exclusion is prejudicial** in absence of offer of proof. Mass 171NE462. [k] **If one possesses additional evidence making rejected evidence competent,** offer of proof will authorize review of ruling rejecting evidence. MoA 28SW(2d)121.

827–54 136SC9, 134SE145.

827–55 203 Iowa5, 212NW348.

827–57 123 Or579, 263P896.

827–64 203 Iowa676, 213NW431; 83 Mont194, 271P444; 99Vt191, 130A697. But see 209Ky619, 273SW439.

827–65 MoA 273SW213.

827–66 320Mo 57, 6SW(2d)576, 587, 67 ALR489 [quotCJ]; MoA 18SW(2d)528; 52ND307, 202NW642, 643 [citCJ].

828–67½–New. The rule is subject to exception where the question plainly calls for illegal evidence. 213Ala649, 106S44.

828–68½–New. Duty to enlighten the court as to what is expected to be proved by the witness arises only when the question asked is so general that the answer may be either legal or illegal evidence. 213Ala649, 106S44.

828–70 75CalA161, 241P941; 77CalA 164, 247P212; 166Minn308, 207NW644; Mo 28SW(2d)84(2dcase).

828–71 45 Ida159, 261P239.

828–72 See also 84Colo 565, 272P621.

828–74 Iowa 229NW249; 125Kan431, 264P1036; 251Mich92, 230NW922; 178 Minn452, 227NW501; Miss 111S309; MoA 24SW(2d)183; 128 Okl 172, 261P 944; 138 Okl 141, 280P591; 35Porto Rico 908; Wis 231NW580.

829–75 23AlaA454, 126S886; 206Cal 524, 274P973; 102CalA124, 282P405; 90NYS1068; 127 Or481, 272P674.

829–81 200 Iowa961, 205NW838; 121 Kan180, 246P976; 134 Okl 70, 272P 857; Or 285P229.

830–82 24F(2d)527 [citCJ]; 31F(2d) 13; 127 Okl 4, 259P561, 562 [quotCJ].

830–83 28Ariz581, 238P389 (permitting plaintiff's wife to testify with child in her lap); MoA 275SW358; MoA 277 SW50; 81Mont393, 264P115; 191NC 297, 131SE735; 124 Or691, 265P433; 100Vt1, 134A706. [k] (1) 39F(2d)826; Or 292P89.

830–84 174Ark194, 295SW38; 152 Md536, 137A299; 156Md489, 144A698; Mass 166NE867; 293Pa448, 143A116; TexCivA 13SW(2d)995 (motion to withdraw question); 195Wis114, 217NW694. [a] 297Pa576, 147A830.

831–85 256 IllA401; Mass 166NE867; MoA 272SW117; MoA 6SW(2d)984; 193NC73, 136SE257, 259 [citCJ]; 295 Pa455, 145A505; Vt 147A281 (witness answering before counsel can object).

832–86 [a] TexCivA 294SW641.

832–89 TexCivA 1SW(2d)754.

832–93 MoA 296SW1036.

832–94½–New. Demonstration of in-

jury, not objected to, cannot be raised. MoA 30SW(2d)784.

832-96 84CalA736, 258P627 (cross-examination). [b] (1) 295Pa342, 145A293. (6) MoA 24SW(2d)686; 152Va 38, 146SE353.

833-1 149Miss56, 115S117.

834-5 208Ky112, 270SW998; 191NC 297, 131SE735.

834-6 100CalA593, 280P550.

834-8 33NM623, 274P50(1stcase) (relevancy not questioned where refused solely for lack of foundation).

835-21 233Ky497, 26SW(2d)34.

836-29 7F(2d)21; 7F(2d)581; 10F(2d) 447; 10F(2d)464; 16F(2d)455; 17F (2d)894; 23F(2d)55; 35F(2d)791; 36 F(2d)220; 37F(2d)896(1stcase); 216 Ala275, 113S300; 217Ala251, 115S163; 236 IllA447; Mass 173NE516; 236Mich 471, 210NW478; 168Minn497, 210NW 634; 178Minn40, 226NW415; MoA 14 SW(2d)483; MoA 27SW(2d)765; 196NC 484, 146SE204; NC 154SE626; 51ND 858, 201NW163; 51ND909, 201NW509; 57ND262, 221NW69; 118 Okl 274, 247 P985; 132 Okl 92, 269P365; 284Pa518, 131A376; 160Tenn316, 24SW(2d)898; TexCommnA 7SW(2d)521; TexCivA 272 SW555 (where plaintiff did not move to set aside jury's findings, but moved for judgment thereon); TexCivA 272SW 587; TexCivA 278SW457 (where appellant "nowhere questioned" sufficiency of evidence to support verdict, it must stand); TexCivA 6SW(2d)372; Tex CivA 8SW(2d)550; TexCivA 20SW(2d) 405; 99Vt45, 130A580; 100Vt90, 135A 10. But see TexCivA 278SW459; Tex CivA 10SW(2d)1030.

837-30 236 IllA447; Mass 171NE477. [a] Contra TexCivA 294SW331.

837-31 Utah 290P970.

838-32 Ind 166NE434; 116Nebr706, 218NW734. [a] (19) Res ipsa loquitur, 138SC113, 135SE877. (20) Erection of buildings in accordance with agreement. 110Conn4, 147A1. (21) Plaintiff being corporation. 179Ark910, 18SW(2d)903. [c] Motion to set aside verdict cannot supply deficiency of such objection. 82 NH443, 136A254. [d] Reason why motion for directed verdict is necessary is to allow opponent opportunity to supply deficiency. 82NH443, 136A254.

838-35 Ala 128S233; CalA 287P133; 233 IllA69 (failure to prove premises involved in forcible entry action were within jurisdiction); 225Ky629, 9SW (2d)1008; Wash 288P1063.

839-36 32NM481, 259P618.

839-37 247Mich168, 225NW545; 249 NY159, 163NE135 (foreign law).

839-39 118 Okl 51, 246P588.

839-39½-New. In equity, evidence may be reviewed without demurrer to evidence or motion for judgment. Okl 293 P245.

839-40 25F(2d)441; 29F(2d)233; 29 F(2d)402; 42F(2d)611; 44F(2d)24; 44F(2d)40; 40GaA436, 149SE812(2d case); 224 IllA425; 236 IllA447; 241 Mich156, 216NW420; 221MoA393, 277 SW945; 75Mont1, 241P631; 101NJEq 401, 138A693; NJ 134A308; NJ 144A 178(1stcase); 249NY391, 164NE327; 252NY459, 169NE645; 221AppDiv146, 223NYS107; 49ND838, 193NW658; 51 ND508, 200NW44; 54ND867, 211NW 595; 56ND690, 219NW209 (motion for directed verdict or new trial); 57ND 262, 221NW69; 58ND812, 228NW212; 113 Okl 105, 239P570; 114 Okl 244, 246 P617; 118 Okl 274, 247P985; 120 Okl 196, 250P1005; 125 Okl 144, 256P903; 127 Okl 45, 259P644; 127 Okl 182, 260 P42; 133 Okl 260, 272P363; 134 Okl 66, 272P874; 136 Okl 51, 275P640; 136 Okl 60, 276P230; 143 Okl 69, 287P1042; 144 Okl 18, 288P1072; 144 Okl 200, 291P 105; 135SC307, 133SE545; SD 225NW 299 (motion for directed verdict and for judgment notwithstanding verdict); TexCivA 297SW258; 100Vt308, 137A 205. See also MoA 14SW(2d)511; 50 ND371, 196NW104. But see TexCivA 291SW281. [c] (2) Exception to denial of motion for nonsuit at close of evidence cannot be considered in absence of similar motion when plaintiff rested. NC 154SE406. [g] Objection to testimony as attempt to vary terms of written contract has been held not available in absence of motion to strike answer. 71CalA479, 235P673. [h] In Oklahoma.-278P828. [i] Challenge first in motion for new trial held too late.-139 Okl 16, 280P1087. [j] Motion for new trial is not appropriate method for raising objection. NM 289P596; 138 Okl 171, 280P842.

840-41½-New. Where defendant asked no instructions or findings of fact but stood on his general denial of liability, an exception to the judgment containing all of the findings of fact is sufficient to preserve the question of the sufficiency of the evidence to support the judgment. 216MoA561, 260SW129.

840-42 See also 48 Ida789, 285P676.

840-43 240 IllA247; 88 IndA86, 163NE 279; TexCivA 6SW(2d)372.

841-46 33F(2d)449; 33F(2d)508; 34 F(2d)10; 38F(2d)595; 40F(2d)228.

841-47 32F(2d)442; 33F(2d)841; 33 F(2d)881; 38F(2d)581 (declaration of law).

841-49 23F(2d)914 (court can consider only whether evidence supported verdict); 42F(2d)353; NJ 148A611(1st case); TexCivA 29SW(2d)446. See also 220MoA948, 7SW(2d)403. But see Tex CivA 275SW732.

841-52½-New. Where movant was not entitled to have his motion for a directed verdict considered, because made after the jury had retired, but the trial court in its discretion did so and refused to grant it, the supreme court can properly review such ruling. 151 SC417, 149SE162.

841-54 32F(2d)851; 319Mo 1120, 6SW (2d)870; 247NY392, 160NE651; 45SC 155, 143SE15; 157SC174, 154SE118; 48SD580, 205NW384.

842-55 146Va366, 131SE815. [d] Grounds of demurrer to evidence.-146 Va366, 131SE815. [e] Error based on ground of demurrer not sufficiently stated will not be considered by appellate court. 146Va366, 131SE815.

842-62 7F(2d)535; 23F(2d)266; Okl 253P84.

843-65 106Conn698, 138A787.

843-67 6F(2d)712; 26F(2d)51; 37F (2d)707; 170Ark842, 281SW910; 171 Ark103, 283SW31; 172Ark1177, 288SW 892, 893; 173Ark1180, 292SW135; 177 Ark17, 5SW(2d)336; 78Colo 235, 242P 45; 86Colo 360, 281P746; 81Colo 370, 256P1; 82Colo 288, 259P1025; 85Colo 409, 277P299; 86Colo 414, 282P253; 106Conn506, 138A442; 56AppDC333, 13 F(2d)305; 27Hawaii760; 244 IllA434; 204 Iowa456, 215NW767; 205 Iowa1349, 219NW418; 207 Iowa490, 233NW162; 126Kan736, 271P398; 208Ky832, 272 SW16; 211Ky402, 277SW493; 224Ky 48, 5SW(2d)481; 148Md628, 129A915; 152Md536, 137A299; 249Mich127, 227 NW707; 161Minn533, 201NW936; 165 Minn65, 205NW701; 165Minn117, 205 NW885; 165Minn210, 206NW400; 165 Minn417, 206NW725 (party fearing requested instruction so misplaced in general charge that it might be misapplied by jury); 169Minn45, 210NW618; 169 Minn106, 210NW846; 170Minn53, 212 NW9; 172Minn134, 215NW198; 172 Minn574, 216NW237; 173Minn595, 218 NW562; 178Minn622, 227NW662; Minn 230NW125; 315Mo 1181, 289SW913; MoA 278SW1084; MoA 16SW(2d)643; MoA 30SW(2d)626; 81NH522, 129A768, 42ALR176 (and, conversely, where they are, appellant is entitled to full benefit of his position); NH 146A508; NJ 129 A182; 34NM146, 278P361; 196NC51, 144SE545(2dcase); 50ND397, 196NW 100; 54ND867, 211NW595; 34 OhA244, 170NE661; 109 Okl 141, 234P607; 113 Okl 99, 239P895; 115 Okl 31, 241P121; 117 Or608, 244P873; 120 Or181, 250P 628; 125 Or251, 266P229; 285Pa251, 132A120; 297Pa576, 147A830; 91Pa Super364; 50SD601, 211NW447; 53SD 369, 220NW878; 158Tenn333, 13SW (2d)322; 116Tex522, 295SW920; Tex CivA 277SW403; TexCivA 277SW1116; TexCivA 278SW950; TexCivA 278SW 1107 (objections not made below are waived and deemed approved); TexCivA 284SW650; TexCivA 286SW536; Tex CivA 289SW169; TexCivA 290SW846; TexCivA 300SW201; TexCivA 4SW(2d) 1013; TexCivA 5SW(2d)578; TexCivA 6SW(2d)439; TexCivA 7SW(2d)115; TexCivA 9SW(2d)478; TexCivA 12SW (2d)811; TexCivA 13SW(2d)974; Tex CivA 17SW(2d)1097; TexCivA 19SW (2d)207; TexCivA 20SW(2d)369; Tex CivA 22SW(2d)709(1stcase); TexCivA 22SW(2d)753; TexCivA 28SW(2d)288; 143Va875, 129SE339; 151Va165, 144SE 456; Va 152SE357; Wash 292P99; 34 Wyo 199, 242P415. But see 85CalA691, 259P980. [b] In Texas.-CivA 278SW 950. [c] In New York.-217AppDiv537, 216NYS558.

845-72 223AppDiv555, 229NYS70; 134 SC367, 133SE27, 28 [quotCJ]. See also TexCivA 286SW536.

845-73 MoA 283SW729 (motion in arrest not necessary).

845-74 171Ark103, 283SW31.

845-75 168Ark943, 272SW663; 171Ark 103, 283SW31; 172Ark1177, 288SW892, 893; 172Ark729, 290SW942; 172Ark 927, 291SW58; 172Ark947, 291SW66; 176Ark780, 4SW(2d)919; 180Ark1167, 22SW(2d)169; 181Ark1147, 29SW(2d) 674; Ark 31SW(2d)304; Ark 31SW(2d) 947; Ark 32SW(2d)633; 81Colo 57, 253 P400; 83Colo 211, 263P933; 84Colo 376, 270P656; 87Colo 374, 287P863; 36GaA 377, 136SE924; 242 IllA151; 307Mo 307, 270SW318; MoA 273SW761; 221 MoA577, 284SW156; MoA 9SW(2d)685; 74Mont176, 240P829 (holding that instruction to which no tenable objection was made became law of case); 104NJL 387, 140A397; 50ND397, 196NW100; 124 Or179, 264P351; 285Pa251, 132A 120; 48RI 478, 139A302; 116Tex522, 295SW920; TexCivA 294SW913; Tex CivA 9SW(2d)185; TexCivA 16SW(2d) 550; TexCivA 25SW(2d)197; TexCivA 26SW(2d)327; Utah 278P816; 148Va 194, 138SE721; 149Va318, 141SE228; 152Va446, 147SE201; Va 152SE539. [e] Objection that charge is general one not authorized by statute is sufficient without specifically pointing out prejudice. TexCommnA 280SW557. [f] After objection and exception to ruling thereon, party is not required to prepare and tender proper charge. TexCivA 297 SW894.

846-76 171Ark103, 283SW31; 172Ark 937, 290SW933; 172Ark927, 291SW58; 81Colo 57, 253P400; 164Minn401, 205 NW282; 49ND1119, 194NW691; 285Pa 251, 132A120.

846-79 192NC647, 135SE791; 48RI 478, 139A302; TexCivA 277SW212; Tex CivA 9SW(2d)449 (objection made for first time in motion for new trial is too late); 151Va985, 144SE624.

846-80 181 IllA308; 128Me92, 145A 748; 173Minn186, 217NW99.

846-81 TexCivA 277SW212 (objection not considered); TexCivA 285SW1100.

846-82 94CalA770, 271P1101; 134SC 367, 133SE27; 145SC196, 143SE31.

846-83 Md 149A275; MoA 21SW(2d) 907; 134SC367, 133SE27; TexCivA 286 SW307.

846-84 171Ark103, 283SW31; 85Colo 530, 277P306; 226Ky30, 10SW(2d)482; 127 Or518, 273P701 (that doctrine of last clear chance was eliminated); Tex CivA 278SW1107 (submitting several subjects in one question).

847-85 171Ark103, 283SW31; 134SC 367, 133SE27; TexCivA 286SW536; TexCivA 26SW(2d)327.

847-86 298Pa313, 148A300. [a] 208 Ky832, 272SW16.

847-89 36GaA377, 136SE924.

847-91 171Ark103, 283SW31; 125Kan 252, 264P59; 172Minn134, 215NW198.

847-93 172Ark1177, 288SW892, 893; 36GaA377, 136SE924; 165Minn241, 206 NW393; 172Minn134, 215NW198; Tex CivA 294SW913.

847-94 36GaA377, 136SE924; 233Mich 53, 206NW547; Mo 19SW(2d)465.

847-94½-New. , or argumentative; 217 Ala295, 116S145.

848-95 233Ky38, 24SW(2d)915; 322 Mo 469, 17SW(2d)337; TexCivA 290SW 299; TexCivA 20SW(2d)847. See also TexCivA 279SW484.

848-96 234Ky631, 28SW(2d)961.

848-97 See also 170Minn53, 212NW9.

848-99 TexCivA 294SW913; TexCivA 8SW(2d)767 (failure to object); Tex CivA 28SW(2d)232.

848-1 172Ark1177, 288SW892, 893.

848-3 TexCivA 295SW343.

848-6 MoA 14SW(2d)478.

848-11½-New. Objection that charge

was general in case tried on special issues is sufficient. **TexCivA** 4**SW(2d)**169.

848–11¼–New. An objection to a particular portion of a charge is not ground for reversal where the same matter in other portions is not objected to. **Tex CivA** 4**SW(2d)**169.

848–11¼–New. Where defendants objected to a charge submitting generally whether the contract had been performed according to terms, they need not object to a charge submitting the question whether the work had been according to the written contract. **TexCivA** 4 **SW(2d)**169.

848–13 100**CalA**503, 280**P**394(2dcase); 105**Conn**482, 136**A**95; **Iowa** 232**NW**421; 235**Ky**229, 30**SW(2d)**950; 312**Mo** 173, 279**SW**89; **Mo** 285**SW**482; 315**Mo** 987, 288**SW**777; 321**Mo** 697, 12**SW(2d)**735 (failure to request instructions is not reviewable in absence of objection); 220 **MoA**542, 287**SW**865; **MoA** 14**SW(2d)** 478; **MoA** 21**SW(2d)**899.

849–17 [a] **Plaintiff has not burden of having jury properly instructed on law** of case. **MoA** 14**SW(2d)**478.

849–19 218**Ala**233, 118**S**262 (party who believes charge is misleading as to issues should seek explanation thereof at trial).

849–19½–New. Plaintiff, electing to go to jury without instructions, may insist on recovery on every theory of law which entitles him to recover under the evidence. **MoA** 14**SW(2d)**478.

849–20 124 **Okl** 286, 255**P**1015; 129 **Okl** 128, 263**P**1094; 140 **Okl** 201, 282**P**452; **Vt** 146**A**72; **Vt** 146**A**812.

849–21 124 **Okl** 286, 255**P**1015; 140 **Okl** 201, 282**P**452.

849–22 [b] (2) 190**NC**180, 129**SE**450, 41 **ALR**1111. (3) Court instructing on negligence of defendant must also instruct on contributory negligence without request, since it was substantive feature of trial. 197**NC**171, 148**SE**30. [c] (3) Objection pointing out omission in instruction is sufficient predicate for reversal without specially requested charge. **Tex CommnA** 18**W(2d)**570. (4) Under Rev. St. of 1925 appellant could not complain of submission of special issue without informing jury as to law, where he did not request court to further instruct jury. **TexCivA** 18**SW(2d)**692.

850–24 275**US**236, 48**SCt**80; 6**F(2d)** 877; 9**F(2d)**289; 22**F(2d)**939; 32**F(2d)** 851; 35**F(2d)**30; 36**F(2d)**933; 37**F(2d)** 648; 44**F(2d)**150; 218**Ala**599, 119**S**644; 172**Ark**1176, 290**SW**590; 173**Ark**1181, 291**SW**419; 173**Ark**84, 291**SW**1001; 200 **Cal** 628, 254**P**256; 70**CalA**415, 233**P**366; 91**CalA**405, 267**P**114; 98**CalA**268, 276 **P**1055; **CalA** 279**P**474; **CalA** 284**P**719; **CalA** 284**P**1056; **CalA** 290**P**108; 87**Colo** 374, 287**P**863; 103**Conn**408, 131**A**408; 103**Conn**520, 131**A**501; 105**Conn**410, 135 **A**390; 109**Conn**206, 145**A**890; 111**Conn** 33, 149**A**782; 96**Fla**620, 119**S**333; 162 **Ga**428, 134**SE**72; 34**GaA**1, 128**SE**75 (failure to request more specific instructions); 35**GaA**704, 134**SE**623; 36**GaA**28, 134**SE**822; 36**GaA**377, 136**SE**924; 39 **GaA**490, 147**SE**420; **Ida** 290**P**405, 407 [citCJ]; 83 **IndA**407, 147**NE**292; **IndA** 148**NE**505; 83 **IndA**500, 149**NE**137; 88 **IndA**176, 156**NE**594; 87 **IndA**360, 158 **NE**596; 201 **Iowa**1083, 205**NW**972; 206 **Iowa**514, 219**NW**305; 207 **Iowa**1001, 221 **NW**949; 207 **Iowa**490, 223**NW**162; 208 **Iowa**458, 223**NW**521; **Iowa** 229**NW**237; **Iowa** 229**NW**321; **Kan** 292**P**773; 211 **Ky**402, 277**SW**493; 214**Ky**36, 281 **SW**1036; 224**Ky**254, 6**SW(2d)**234; 224**Ky**274, 6**SW(2d)**264; 224**Ky**292, 6**SW(2d)**239; 227**Ky**203, 12**SW(2d)**287; 227**Ky**613, 13**SW(2d)**784; 228**Ky**197, 14**SW(2d)**757; 232**Ky**702, 23**SW(2d)** 564; 232**Ky**503, 23**SW(2d)**945, 68**ALR** 1481; **La** 112**S**418; 125**Me**44, 130**A**737; 232**Mich**276, 205**NW**134; 239**Mich**260, 214**NW**96; 242**Mich**422, 218**NW**667; 244 **Mich**319, 221**NW**318; 247**Mich**164, 225 **NW**566; **Mich** 233**NW**321; **Mich** 233**NW** 365; 161**Minn**533, 201**NW**936; 165**Minn** 417, 206**NW**725; 168**Minn**105, 209**NW** 624; 172**Minn**526, 215**NW**854; 176**Minn** 331, 223**NW**605; 179**Minn**351, 229**NW** 319; 310**Mo** 227, 274**SW**1025; **Mo** 278 **SW**412; 320**Mo** 655, 8**SW(2d)**918; **MoA** 14**SW(2d)**453; **MoA** 256**SW**499; **MoA** 271**SW**1005; 219**MoA**234, 271**SW**1023; **MoA** 280**SW**444; 220**MoA**38, 285**SW**757; 220**MoA**919, 296**SW**190; **MoA** 298**SW** 101; **MoA** 14**SW(2d)**694; **MoA** 14**SW** **(2d)**972; **MoA** 17**SW(2d)**608(3dcase); **MoA** 21**SW(2d)**195; **MoA** 22**SW(2d)**185; **Nebr** 230**NW**662; 102**NJL**408, 132**A**333; 101**NJEq**401, 138**A**693; 104**NJL**132, 139 **A**17; **NJ** 139**A**528; 104**NJL**306, 140**A** 422; **NJ** 141**A**11; 104**NJL**218, 141**A**92; **NJ** 130**A**225; 189**NC**285, 127**SE**8; 190 **NC**308, 130**SE**29; 51**ND**909, 201**NW**509; 52**ND**324, 202**NW**657, 661[citCJ]; 116 **OhSt**432, 156**NE**599; 20**OhA**385, 153**NE** 238; 21 **OhA**251, 153**NE**127; 31 **OhA** 248, 166**NE**909; 31 **OhA**401, 166**NE**918; 34 **OhA**490, 171**NE**409; **OhA** 173**NE**197; 100 **Okl** 109, 228**P**481; 115 **Okl** 31, 241**P** 121; 141 **Okl** 256, 284**P**866; 142 **Okl** 74, 285**P**84; 35**Okl Cr**332, 250**P**435; 117 **Or** 608, 244**P**873; **Or** 288**P**401; 283**Pa**331, 129**A**109; 284**Pa**267, 131**A**260; 285**Pa** 260, 131**A**858; 291**Pa**387, 140**A**148; 298 **Pa**329, 148**A**474; 88**PaSuper**199; 89**Pa Super**428; 134**SC**367, 133**SE**27; 138**SC** 124, 135**SE**801; 141**SC**238, 139**SE**459; 148**SC**152, 145**SE**699; **TexCivA** 292**SW** 966; **TexCivA** 297**SW**682; **TexCivA** 299**SW**321; **TexCivA** 4**SW(2d)**599; **Tex CivA** 12**SW(2d)**811; **TexCivA** 22**SW(2d)** 680; 66**Utah**394, 243**P**114, 44**ALR**1348; 141**Wash**689, 252**P**131; **Wash** 287**P**29; **Sask** [1926] 4**DomLR**1017. See also 155 **SC**356, 152**SE**646. But see 40 **OklACR** 117. [b] **Charge free from prejudicial error and not misleading** will not be reversed for inadequacy in absence of request for specific instructions. 284**Pa** 59, 130**A**398.

852–25 219**MoA**234, 271**SW**1023; **MoA** 271**SW**1029.

852–26 278**US**496, 49**SCt**231, 73**Led** 473; 200**Cal** 628, 254**P**256; 96**CalA**84, 273**P**820; 96**CalA**169, 273**P**866; **CalA** 290**P**497; 166**Ga**220, 142**SE**868; 168**Ga** 552, 148**SE**395(2dcase); 170**Ga**585, 154 **SE**149; 39**GaA**596, 147**SE**919; 39**GaA** 670, 148**SE**283(2dcase); 85 **IndA**450, 150 **NE**31; **IndA** 166**NE**257; 205 **Iowa**666, 216**NW**733; 125**Kan**252, 264**P**59; 220 **Ky**314, 295**SW**152; 229**Ky**444, 17**SW** **(2d)**231; 239**Mich**260, 214**NW**96; **MoA** 287**SW**852; **MoA** 5**SW(2d)**665; **MoA** 20 **SW(2d)**952; **MoA** 22**SW(2d)**65; 105 **NJL**204, 143**A**444; **NJ** 145**A**236; 192**NC** 638, 135**SE**614; 196**NC**359, 145**SE**684; 20 **OhA**385, 153**NE**238; 21 **OhA**251, 153 **NE**127; 113 **Okl** 99, 239**P**895; 118 **Okl** 113, 247**P**87; 122 **Okl** 282, 254**P**725; 295**Pa**203, 145**A**73; 298**Pa**352, 148**A**527; 91**PaSuper**364; 49**RI** 3, 139**A**500; 138 **SC**318, 136**SE**297; 148**SC**511, 146**SE**534.

853–27 200**Cal** 628, 254**P**256; 202 **Iowa** 643, 210**NW**761; 203 **Iowa**1232, 210**NW** 770; 205 **Iowa**666, 216**NW**733; 130**Kan** 798, 288**P**549; 214**Ky**36, 281**SW**1036; 226**Ky**30, 10**SW(2d)**482; **Md** 148**A**122; 241**Mich**652, 217**NW**787; 249**Mich**431, 228**NW**763; **Mo** 256**SW**819; 219**MoA**234, 271**SW**1023; 219**MoA**336, 271**SW**834; **MoA** 9**SW(2d)**644; **MoA** 9**SW(2d)**672; **MoA** 32**SW(2d)**296; 191**NC**125, 131**SE** 417; 196**NC**359, 145**SE**684; 196**NC**499, 146**SE**85; 196**NC**516, 146**SE**209; 118 **Okl** 113, 247**P**87; 122 **Okl** 282, 254**P**725; 297**Pa**591, 147**A**832; 45**SC**196, 143**SE**31; **TexCivA** 291**SW**614; 153**Wash**549, 280 **P**50. [a] **Rule held not applicable to substantive, material, and essential features of charge,** under statute. **NC** 146 **SE**570. [b] **Instruction held sufficient compliance with statute,** in absence of request for more specific instruction. 196**NC**461, 146**SE**66(1stcase).

854–28 43**F(2d)**499; 85 **IndA**450, 150 **NE**31; 52**ND**324, 202**NW**657, 661 [cit CJ]; 122 **Okl** 282, 254**P**725.

854–29 173**Ark**455, 292**SW**662; 38**GaA** 440, 144**SE**140(2dcase); 102**NJL**408, 132**A**333; 104**NJL**130, 138**A**896; 118 **Okl** 113, 247**P**87; 122 **Okl** 282, 254**P**725.

854–30 122 **Okl** 282, 254**P**725.

854–30½–New. Under statutes in some jurisdictions requiring the court to instruct the jury in writing upon law applicable to case, exceptions to failure to give proper instructions are available on appeal, although such instructions were not requested. 68**Utah**85, 249**P**437.

854–31 49**RI** 3, 139**A**500.

854–32 219**MoA**234, 271**SW**1023; **MoA** 15**SW(2d)**899; **MoA** 17**SW(2d)**621; **MoA** 23**SW(2d)**1087; **MoA** 27**SW(2d)** 739.

854–33 9**F(2d)**289; 32**F(2d)**851; 109 **Conn**206, 145**A**890; 87 **IndA**360, 158**NE** 596; 226**AppDiv**102, 234**NYS**425; 127 **Okl** 106, 260**P**26; **TexCivA** 16**SW(2d)** 550; **TexCivA** 18**SW(2d)**796 (failure to object or request charge is waiver of defense).

855–34 39**GaA**206, 146**SE**345; 221**MoA** 188, 299**SW**137; **MoA** 7**SW(2d)**370; 133 **Okl** 168, 271**P**835; 296**Pa**132, 145**A**703; **TexCivA** 15**SW(2d)**106. See also 196 **NC**712, 146**SE**804.

855–35 45**SC**196, 143**SE**31; 144**Wash** 553, 258**P**497.

855–36 219**MoA**234, 271**SW**1023.

855–37½–New. Giving charge with misleading tendencies is not reversible error, since opposing party may ask for explanatory charge. **Ala** 128**SS**894.

855–38 120**Kan**565, 244**P**844, 849 [cit CJ]; **Vt** 147**A**771.

855–39 43**F(2d)**499; 98**CalA**268, 276**P** 1055; 84 **IndA**354, 148**NE**489; 226**Ky** 561, 10**SW(2d)**1064; 227**Ky**423, 13**SW** **(2d)**254; 235**Ky**109, 29**SW(2d)**595; 244 **Mich**319, 221**NW**318; **Minn** 231**NW**716; 315**Mo** 883, 289**SW**540; **Mo** 31**SW(2d)** 1014; 219**MoA**429, 275**SW**979; 220**MoA** 38, 285**SW**757; 220**MoA**575, 287**SW**861; 220**MoA**919, 296**SW**190; **MoA** 1**SW(2d)** 218; **MoA** 4**SW(2d)**831; **MoA** 5**SW(2d)** 682; 193**NC**262, 136**SE**723; 51**ND**113, 199**NW**191 (contributory negligence after ample instruction on last clear chance); 30 **OhA**300, 165**NE**47; 122 **Okl** 282, 254**P**725; 47**RI** 147, 131**A**543; **Tex CivA** 277**SW**711; **TexCivA** 8**SW(2d)**560; **TexCivA** 32**SW(2d)**703. But see **Tex CivA** 7**SW(2d)**878; **TexCivA** 18**SW(2d)** 679(2dcase). [a] **Tender of definitions not necessary** where refusal to define was properly objected to. **TexCivA** 27 **SW(2d)**838.

855–39½–New. Defining facts necessary to constitute codicil. 219**Ala**340, 122 **S**354.

856–40 120**Kan**565, 244**P**844, 849 [cit CJ]; 242**Mich**14, 217**NW**775; 315**Mo** 987, 288**SW**777; 34**NM**573, 286**P**830; 122 **Or**24, 256**P**770; **TexCivA** 281**SW** 244; 141**Wash**689, 252**P**131.

856–41 85**Colo** 409, 277**P**299; 85 **IndA** 450, 150**NE**31; 165**Minn**417, 206**NW** 725; 320**Mo** 655, 8**SW(2d)**918; **NJ** 139 **A**528; 122 **Or**24, 256**P**770; **TexCivA** 277**SW**152 (failure of charge properly to submit burden of proof as to amount of damages); **TexCivA** 286**SW**326; **Tex CivA** 298**SW**642; **TexCivA** 12**SW(2d)** 1102; **TexCivA** 27**SW(2d)**838.

857–42 78**CalA**353, 248**P**737.

857–46 141**Wash**689, 252**P**131.

857–48 103**NJL**427, 135**A**886.

857–49 35**GaA**704, 134**SE**623; **Ida** 290 **P**405; 202 **Iowa**643, 210**NW**761; **MoA** 14**SW(2d)**456; **MoA** 289**SW**343; **MoA** 290**SW**86; 222**MoA**370, 3**SW(2d)**256; **MoA** 7**SW(2d)**749; **MoA** 16**SW(2d)**672; **MoA** 22**SW(2d)**881; 27 **OhA**13, 160**NE** 640; 29 **OhA**505, 163**NE**919; 34 **OhA** 339, 171**NE**248; 299**Pa**380, 149**A**662; 49 **RI** 209, 141**A**609, 59**ALR**1241; **Tex CommnA** 7**SW(2d)**872; **TexCivA** 279**SW** 484. [a] **Instruction covering rule in general way** sufficient in absence of request for more specific instructions. 284 **Pa**59, 130**A**398.

857–50 229**Ky**538, 17**SW(2d)**422.

857–52 180**Ark**1167, 22**SW(2d)**169. See also **MoA** 14**SW(2d)**453.

857–53 **MoA** 293**SW**797.

857–54 21 **OhA**251, 153**NE**127.

857–58 **TexCivA** 16**SW(2d)**550.

858–67 177**Minn**127, 224**NW**843.

858–70 224**Ky**274, 6**SW(2d)**264; 298 **Pa**256, 148**A**102.

858–73½–New. or contributory negligence. 87 **IndA**360, 158**NE**596.

858–75½–New. failure to differentiate between insulting language and assault as defined by statute; 55**ND**104, 212 **NW**776.

858–76½–New. to charge on measure of damages; 8**F(2d)**16.

858–78 116 **OhSt**432, 156**NE**599.

858–85½–New. , or to separate issues involved. **TexCivA** 277**SW**230.

858–87 42 **Ida**770, 248**P**473; 339 **Ill** 276, 171**NE**271; 219**Ky**765, 294**SW**487; 227**Ky**203, 12**SW(2d)**287; 229**Ky**716, 17 **SW(2d)**1008; 128**Me**376, 147**A**759(2d case); **Mo** 31**SW(2d)**1065; 118**Nebr**465, 225**NW**235; 191**NC**685, 132**SE**787; 57 **ND**741, 224**NW**167; 124 **Okl** 64, 253**P** 1021; 116**Tex**253, 288**SW**425; **Tex**

CommnA 298SW528; TexCommnA 12 SW(2d)991 (manner of submission does not present fundamental error); Tex CivA 289SW152; TexCivA 289SW190; TexCivA 4SW(2d)599; TexCivA 4SW (2d)641; TexCivA 5SW(2d)242; Tex CivA 14SW(2d)887; TexCivA 20SW(2d) 369; TexCivA 22SW(2d)490; TexCivA 26SW(2d)1103; TexCivA 30SW(2d)697. But see 215Ala177, 110S376; 154Md195, 140A70.

858–88 252NY127, 169NE112.

858–89 219Ky765, 294SW487; 124 Okl 64, 253P1021.

858–89½–New. Request for correct instructions is tantamount to a specific objection pointing out error in the instruction given. 169Ark682, 276SW996.

858–89¾–New. A proper objection pointing out alleged defects in the charge given is sufficient without the submission of a special charge. Tex CommnA 15SW(2d)210.

859–90 218Ala674, 120S153; 172Ark 937, 290SW933; MoA 28SW(2d)391; TexCivA 285SW1100; 136Wash397, 240 Pl. [c] IndA 166NE601.

859–92 224AppDiv136, 229NYS682 (where court interrupts attempted request to which exception is taken).

859–93 36F(2d)219. [b] Each proposition of law must be contained in separate request, or request must be correct in law in every respect. 190NC617, 130SE306.

859–94 179Minn428, 229NW867. But see Minn 230NW580.

859–98 MoA 273SW761 (material modification renders instruction the court's instruction, and objection to instruction as requested is not sufficient as to instruction given).

860–3 9F(2d)289; 108Conn622, 144A 468; 34GaA1, 128SE75 (failure to object at time of elimination of issue); 223Ky581, 4SW(2d)380 (written request); 166Minn487, 208NW194; MoA 279SW761; 228AppDiv502, 240NYS 355; NC 155SE856; Tex 288SW627; TexCommnA 276SW162; TexCommnA 293SW554; TexCivA 275SW90 (special issues); TexCivA 277SW742 (special defense waived); TexCivA 280SW882; TexCivA 282SW819; TexCivA 283SW 938; TexCivA 286SW558; TexCivA 289SW93; TexCivA 293SW935; Tex CivA 1SW(2d)408; TexCivA 13SW(2d) 411; TexCivA 23SW(2d)818; TexCivA 24SW(2d)776 (trial court's failure to submit issues on defendant's cross action); 19SaskL464, [1925] 3DomLR 251, 30CanCrCas231, [1925] 2WestWkly 360. But see TexCivA 12SW(2d)589. [d] Though requested special issues were incorrect, error is assignable on failure to submit correct issues. Tex CivA 26SW(2d)311.

860–6 239Mich295, 214NW110, 55ALR 1157.

860–7 213AppDiv791, 210NYS737. See also TexCivA 294SW948.

860–7½–New. Failure to object to submission held not to preclude review where defendant was previously denied instructed verdict on same issue. Tex CommnA 293SW554.

861–8 151SC280, 148SE870. [a] Failure of motion for directed verdict to specify grounds cannot be raised for first time on appeal. 176Minn52, 222 NW340.

861–9 14F(2d)734; 80Colo 412, 252P 348; 203 Iowa1194, 212NW354; Mo 256SW819; 195NC328, 142SE27; 127 Okl 273, 260P753; 135SC163, 133SE 550; TexCommnA 12SW(2d)991; Tex CivA 274SW991; TexCivA 276SW947; TexCivA 283SW687; TexCivA 283SW 689; TexCivA 290SW299; TexCivA 290 SW544; TexCivA 296SW979; TexCivA 297SW232; TexCivA 2SW(2d)980; Tex CivA 5SW(2d)181; TexCivA 5SW(2d) 197; TexCivA 5SW(2d)208; TexCivA 6SW(2d)372; TexCivA 7SW(2d)1099; TexCivA 10SW(2d)1040; TexCivA 13 SW(2d)481; TexCivA 14SW(2d)286; TexCivA 14SW(2d)887; TexCivA 25 SW(2d)197; 67Utah171, 246P535; 197 Wis382, 222NW320. But see 198Wis34, 223NW425. [f] 236Mich471, 210NW 478. [g] TexCivA 274SW247.

861–10 17F(2d)986. But see TexCivA 11SW(2d)621.

861–14½–New. Where the submission of special issue is erroneous as not confining the jury to the allegations of the petition, it is not necessary to require that special issue on the question involved be submitted in order to maintain on objection to the issue submitted. TexCivA 280SW882.

861–14¼–New. Failure to object to form of submission of question does not preclude party from raising question that there was no evidence to warrant submission. 14F(2d)734.

861–14¼–New. Where a special question is submitted to the jury after argument and close of instructions instead of before argument as provided by court rule, counsel should ask to reopen the argument instead of merely reserving exception. 239Mich150, 214 NW117.

861–14½–New. Error assigned for failure to instruct on certain issue without merit in the absence of a request. Tex CivA 295SW639.

861–14½–New. A party cannot complain of failure to withhold an issue from the jury, where such issue was not included in his request for withdrawing certain issues. 208 Iowa641, 224NW58.

861–14½–New. Appellant, who did not ask for a conditional verdict, cannot be heard to complain of failure to obtain it. 296Pa1, 145A587.

861–17 [a] Right of reargument.–Iowa 209NW435.

862–20 125Misc288, 210NYS712; 285 Pa251, 132A120; TexCommnA 24SW (2d)363 (inflammatory matter de hors record where first objection was on motion for new trial); TexCivA 274SW 991 (where prejudicial effect would probably not be removed by instruction to disregard).

862–21 28F(2d)958 (absence of motion for mistrial); 214Ala339, 108S29; 30 Ariz347, 247P122, 125 [citCJ]; 172Ark 671, 290SW953; 180Ark567, 22SW(2d) 373; 180Ark980, 23SW(2d)972 (first objection in motion for new trial); 72 CalA757, 238P143; 88CalA601, 263P 1031; 97CalA377, 275P840; 101CalA 218, 281P681; CalA 286P456; 111Conn 99, 149A399; 35GaA528, 134SE126; 320 Ill 56, 150NE403; 337 Ill 555, 169 NE753; 234 IllA105; 256 IllA401; 211 Kyl, 276SW1058 (misconduct of plaintiff and counsel); 224Ky419, 6SW(2d) 491; 265Mass382, 163NE251(2dcase); 238Mich198, 213NW112; 249Mich281, 228NW778; 179Minn325, 229NW136; Minn 231NW829; 148Miss357, 114S 611; 154Miss325, 122S373; Mo 274SW 1046; Mo 289SW877; 320Mo 34, 8SW (2d)7; 321Mo 697, 12SW(2d)735; 322 Mo 469, 17SW(2d)337; Mo 26SW(2d) 766; Mo 31SW(2d)1045; MoA 283SW 732; MoA 291SW161; MoA 296SW470 (motion to strike cross-examination as to any offense does not preserve for review counsel's improper remark of conviction); MoA 27SW(2d)733; 84Mont 141, 274P844; Nebr 231NW503; 82NH 533, 136A364; NJ 148A896; 50ND538, 196NW755; 26 OhA392, 160NE495; 27 OhA386, 160NE863; 32 OhA465, 168NE 234; 116 Or554, 240P1113; 120 Or181, 250P628; 123 Or647, 263P881; 285Pa 212, 131A733; 285Pa251, 132A120; SD 228NW385(1stcase); TexCommnA 12 SW(2d)558; TexCivA 277SW722; Tex CivA 281SW1110; TexCivA 293SW210; TexCivA 22SW(2d)550; TexCivA 23 SW(2d)522; 141Wash321, 251P574; 143Wash522, 255P923; Wash 288P265; Wash 291P725. But see TexCivA 4 SW(2d)169.

863–22 320Mo 839, 8SW(2d)873; 215 AppDiv840, 213NYS605; 155Tenn189, 291SW1064; 199Wis608, 227NW396.

863–23 MoA 285SW803 (error in court's ruling must also be pointed out); MoA 25SW(2d)133 (objection sufficient).

863–27 CalA 290P80; 35GaA528, 134 SE126; 224Ky419, 6SW(2d)491; Miss 119S824; 319Mo 214, 6SW(2d)39; Mo 31SW(2d)792; MoA 286SW428; 50ND 538, 196NW755; 116 Or554, 240P1113. But see 216Ala479, 113S507; MoA 277 SW585.

864–28 319Mo 644, 5SW(2d)413.

864–30 NH 137A364.

864–31½–New. An objection must always precede the exception. 3Del 53, 130A267.

864–32 117Nebr813, 223NW4; 118 Nebr533, 225NW462.

864–35 30Ariz347, 247P122; 106Conn 119, 137A241; 202 Iowa837, 211NW 361; 148Miss809, 114S866.

864–36 202 Iowa837, 211NW361; Tex CivA 10SW(2d)243.

865–37 148Miss809, 114S866.

865–40 180Ark980, 23SW(2d)972 (failure to insist on court's answering questions of jurors); 34GaA252, 129SE117 (transactions in presence of jury).

865–46 Md 148A232 (failure of judge entirely to obliterate words stricken from instruction).

865–50 83CalA204, 256P848; CalA 286 P733; 86Colo 350, 281P746; Ida 290P 405; 240 IllA247; 315Mo 535, 286SW 53; 315Mo 1136, 287SW1031; MoA 19 SW(2d)505; 123 Or469, 259P1064, 260 P1099; 134SC191, 132SE173; TexCivA 271SW441; TexCivA 285SW866; Tex CivA 286SW894; TexCivA 32SW(2d) 369. [d] Mere defects in verdict must be saved by motion in arrest of judgment. MoA 31SW(2d)86.

866–51 315Mo 1136, 287SW1031.

866–55 134SC191, 132SE173.

866–58 201Cal 217, 256P419.

867–60 But see 110Conn108, 147A370.

867–61 [a] 126 Okl 139, 258P274.

867–61½–New. that verdict in personal injury case is excessive; 104Conn508, 133A686.

867–64 [b] Joint defendants' failure to request special finding voids objection to general verdict. 46RI 478, 129A 339.

867–74½–New. Where no objection is made in the lower court to the form or scope of a motion to set aside the verdict, such question is not before the appellate court. 101Vt514, 144A856.

867–75½–New. , nor can the court's refusal to accept an irresponsive verdict be considered in the absence of objection below. 144Miss861, 110S683.

867–77 TexCivA 275SW487. [a] Verdict resting upon testimony wholly without probative value cannot stand, even though no objection was interposed to testimony when offered. 34GaA183, 129 SE16.

868–83 TexCommnA 291SW857; Tex CivA 275SW90; TexCivA 286SW326; TexCivA 19SW(2d)140; TexCivA 19SW (2d)151; TexCivA 21SW(2d)574. But see TexCommnA 273SW831.

868–84 TexCivA 27SW(2d)558.

868–84½–New. Advantage may be taken on appeal of errors affecting one specification of negligence only, even though no interrogatories have been submitted. 110Conn108, 147A370.

868–84½–New. Defendant failing to request that jury be required to make answer more specific, cannot complain on appeal that answer is indefinite. IndA 171NE878.

868–85 TexCommnA 276SW211; Tex CivA 16SW(2d)969.

868–92 252Mass535, 147NE895; 33 PortoRico973.

868–93½–New. Declarations of law in an action at law tried by the court sitting as a jury cannot be reviewed on appeal where no objections were made thereto at the trial. 307Mo 98, 270SW 662.

868–93½–New. Where trial without jury was due to the erroneous belief of the judge and counsel that it fell under a statute providing for trial of certain controversies without jury, the circuit court of appeals can correct the error by sending the case back for legal trial. 8F(2d)435.

868–94 219Ala27, 121S19; 21AlaA593, 110S321; 177Ark718, 9SW(2d)6; 69 CalA286, 230P986; 105Conn722, 136A 684; 247Mich620, 226NW658; Mich 233NW356 (1stcase); 174Minn507, 219 NW758; 220MoA743, 276SW409; 81 Mont382, 263P967; 33NM78, 260P1086; 33NM624, 274P50 (2dcase); 132 Or673, 288P196; 32PortoRico676; 32PortoRico 688; TexCivA 273SW874; TexCivA 290SW286; TexCivA 1SW(2d)681; Tex CivA 28SW(2d)850; TexCivA 31SW (2d)329; 135Wash214, 237P308; 193

Wis522, 215NW670; Wyo 288P12.

869-95 84CalA775, 258P652; 122Kan 563, 253P426; 31NM457, 247P270; Tex CivA 294SW603; 34Wyo 317, 243P130.

869-96 33Ariz1, 261P629; 120Kan8, 242P461; 40 OklACR479; 50SD641, 211 NW604; TexCivA 284SW608.

869-97 83CalA148, 256P440; 95CalA 772, 273P613; 220MoA743, 276SW409.

870-4 23F(2d)55; 24F(2d)180; 30F (2d)97; MoA 282SW743; 73Mont339, 237P209; 117 Okl 181, 245P594 (absence of request by appellant); 126 Okl 162, 259P209; 132 Or673, 288P196; TexCivA 275SW169; Wyo 288P12. See also 32PortoRico688.

870-7 193Wis522, 215NW670.

870-9 44F(2d)24; 238Mich253, 213NW 150.

870-10½-New. Where the court refused to hold the proposition as requested, marking the same "refusal," the reviewing court will examine such ruling despite appellant's failure to raise below the precise question upon which the appellate decision is based. 232 Ill A1.

870-10¼-New. An appellate court will not strike out a finding on an issue not made or litigated in the absence of a motion to amend findings. 171Minn116, 213NW542.

870-10¼-New. The denial of a request for a corrected finding and judgment, made after judgment but during the term, may be reviewed on exception allowed by the trial judge. 18F(2d)879.

870-11 [a] (3) Motion seeking to eliminate from findings certain statements, on ground that they were not best evidence, has been held unavailing, where no objection to evidence or motion to strike on trial was made. 109Conn589, 145A271. (4) No motion to correct finding is required, but approved practice is to file such motion in order to apprise trial court of corrections desired. 109Conn609, 145A44. (5) Findings cannot be complained of on appeal where no motion to correct and insert facts was made. 109Conn376, 146A819. [c] In Michigan.-232Mich657, 206NW364. [d] In New Jersey.-129A747.

871-12 [a] **Sufficiency of evidence cannot be considered** in absence of motion or request at or before close of trial of action on stipulation by court without jury to find generally or to make special findings, and sufficiency of special findings made by court is not challenged. 8F(2d)726.

871-13 44F(2d)24.

871-15½-New. Relief that may be granted on appeal will not be limited because less relief was requested in the motion to amend the findings and conclusions than was authorized. 177Minn 189, 224NW852.

871-17 19F(2d)32, 35 [citCJ]; 215Ala 579, 112S207; 235 IllA89; 249 IllA555.

872-18 218Ala637, 119S844 (2dcase); 41 Ida 729, 241P1014 (objection that order of reference did not authorize findings); 331 Ill 225, 162NE833; 235 IllA 89; 256 IllA175; Kan 291P935; 254 Mass274, 150NE186 (not in conformity with Equity Rules [1905], rules 31, 32); 307Mo 375, 270SW365; 194NC357, 139 SE689; NC 154SE623; 106WVa96, 144 SE874.

872-22 151Va81, 144SE602.

873-23 19F(2d)32, 35 [citCJ]; 41 Ida 729, 241P1014.

873-26 254 IllA264.

873-28 299Pa272, 149A486.

873-31 156Tenn529, 3SW(2d)167 (sufficient exception to report of sale of homestead).

873-31½-New. Objection to the use of stenographic notes of testimony before the committee is not reviewable in the absence of remonstrance or other pleading. 103Conn532, 131A399 (where committee had died before reporting).

873-31¾-New. Where no timely objection was made to filing of supplemental report after term, but objections to such report as well as to original report were filed, appellants cannot complain as to time of filing. 312Mo 694, 281SW725.

873-36 217Ala511, 116S681; Ala 129 S60; 203Cal 26, 263P240; CalA 291P 618; 232 IllA398; 10LaA437, 121S351; NJ 135A81; 144 Okl 18, 288P1072; 101 WVa650, 133SE365, 46ALR799.

873-37 [a] **Thus** refusal to grant motion for mistrial in admitting prejudicial evidence is no ground for complaint where no objection made or motion made to exclude evidence. 213Ala649, 106S44.

873-39 205 Iowa1103, 216NW109.

873-41 Ida 287P953.

873-42 TexCivA 16SW(2d)914.

874-51 232 IllA398.

874-53½-New. that the approval of grounds of motion was insufficient; 34 GaA178, 128SE694.

874-59½-New. An objection to the sufficiency of the approval and filing of an amendment to a motion for a new trial cannot be raised for the first time in the appellate court. 37GaA695, 141SE 511.

874-64 MoA 284SW822; NJ 135A81; TexCivA 273SW934 (rule applied to motion for rehearing).

874-68 Ala 129S472; 181Ark892, 28 SW(2d)703; 207Cal 221, 277P490; 69 CalA719, 232P734; 83Colo 99, 262P921; GaA 155SE794; 233 IllA508; 200 Ind 616, 165NE911 (judgment partially valid); 202 Iowa265, 209NW422; 216Ky 674, 288SW301; 218Ky93, 290SW1061; 222Ky108, 300SW331; 226Ky345, 10 SW(2d)1083 (failure of judgment to protect defendant against claims of attaching creditors); 159La46, 105S95 (appellate court is not authorized to amend judgment in partition where no application is made below); 240Mich 279, 215NW325; 170Minn58, 212 N 13; 222MoA153, 2SW(2d)815; 33NM 128, 262P226; 289Pa44, 137A122; Tex CivA 5SW(2d)836. But see 148Miss397, 114S613. [b] **Decree against all instead of one partner** in suit for accounting will not be disturbed on appeal in absence of objection. 289Pa44, 137A 122.

875-69 MoA 284SW808 (held irregular as being default judgment); TexCivA 294SW270. [k] In North Dakota.-50 ND123, 195NW300. [l] **Holder of inferior mortgage** cannot for first time on exceptions pendente lite set up that judgment was illegal because earlier judgment was not foreclosed. 34GaA 217, 129SE8. [m] **Judgment void for want of jurisdiction.**-218Ky248, 291SW 49. [n] **Judgment without prejudice** in personal injury action, after trial on merits, will not be affirmed as to reservation on technical points found by court, but not raised. CalA 284P701.

875-70 CalA 291P670; 288Pa411, 136 A218. [a] 231Ky223, 21SW(2d)269 (2dcase); 102NJL164, 130A627. [g] **Failure to require election between agent and undisclosed principal.**-TexCivA 275 SW81.

876-78 MoA 27SW(2d)1045; 113 Okl 220, 241P186; 53SD424, 220NW857 (premature entry). [d] **Only record proper is before appellate court** where irregularity in entry of default judgment is not called to lower court's attention. MoA 27SW(2d)1045.

876-81 289Pa414, 137A599. [b] 289 Pa414, 137A599.

876-82 232Mich675, 206NW493; 176 Minn254, 223NW142. But see 40GaA 336, 149SE435.

877-83 315Mo 535, 286SW53.

877-91 31NM334, 245P252.

878-94 [b] **Though objection was not made, nor effort made to require election,** judgment against both principal and agent will not be allowed to stand. TexCivA 275SW81.

878-96 83NH115, 139A184; 30NM517, 239P865.

878-99 TexCivA 289SW425.

878-1 33F(2d)701; 4MetcKy118; 5Ky Op542.

878-7 319Mo 149, 3SW(2d)1008.

878-7½-New. Failure to give proper notice of entry of a judgment in a case taken under advisement is not available as error if no motion to vacate the judgment was made. 30NM517. 239P865.

878-7½-New. especially where appellant succeeded nunc pro tunc in obtaining consideration of his objections and their incorporation in the record. 30NM 517, 239P865.

879-9 172Ark1177, 288SW914; 233 Ill A508 (objection that judgment was rendered against defendant, after dismissal of other defendants, without amendment of pleadings). [a] 254 IllA511 (not presented by motion for directed verdict).

879-10 238Mich253, 213NW150; MoA 31SW(2d)86; NM 274P417.

879-11 22F(2d)939; 172Ark1177, 288 SW914. See also 86 IndA411, 157NE446.

880-18 26F(2d)574; 171Ark1179, 287 SW577, 59ALR1237; 197Cal 765, 242P 918; 208Cal 19, 280P130; 91CalA664, 267P578; 83Colo 254, 263P406; 105 Conn242, 135A38; 327 Ill 219, 158NE 426; 173Minn325, 217NW381; 179Minn 297, 229NW87; Mo 16SW(2d)219; 219 MoA383, 271SW1003; NJ 135A342; NJ 139A904; 250NY170, 164NE894; 223AppDiv533, 229NYS390; 50ND959, 198NW544; TexCivA 276SW752; Tex CivA 18SW(2d)356.

881-20½-New. that it did not appear what amount was paid to insured by insurer of automobile in an action against defendant for damages for collision; 84 IndA243, 149NE454.

881-21 35F(2d)272; 324 Ill 238, 154 NE904; 245 IllA295; 119Kan399, 239 P972; 118 Or542, 247P804; TexCivA 24SW(2d)1113 (allowing greater rate of interest). Contra TexCivA 275SW423.

881-24 219MoA383, 271SW1003.

881-24½-New. , or that plaintiff was only entitled to a personal judgment and not to a lien. Ind 154NE28.

881-25 206 Iowa475, 218NW949 (by motion to correct); 171Minn461, 214NW 288; 219MoA383, 271SW1003; 157SC 371, 154SE641.

881-25½-New. Appellant cannot complain of quantity of land subjected to lien under statute where he did not request trial court to limit area. 34NM 540, 286P157.

882-32 Mo 26SW(2d)988; 219MoA383, 271SW1003.

882-33 98CalA638, 277P516; CalA 277 P518 (objection as to filing of affidavits of merits); 98Fla146, 123S525; NJ 147 A498. [f] **Motion to vacate judgment** in claim and delivery predicated on erroneous theory of title and ownership of defendant held properly denied. 69Cal A719, 232P734.

882-39 218Ala145, 117S655.

882-40 151Va143, 144SE606.

883-45½-New. An action of the trial court in reassembling a jury and permitting them to correct the verdict has been held reviewable without motion in arrest of judgment. 153Md102, 137A 506.

883-45½-New. The action of the trial court in refusing to vacate a default judgment is not reviewable in the absence of a motion supported by a proper showing. 137 Okl 29, 277P657(1st case).

883-47 142Wash335, 253P124. [a] (2) On appeal from motion to recall execution, supreme court will not consider objection to confirmation of referee's report finding stenographer's bill correct, where there was no objection or exception to report and no appeal from confirmation. 194NC357, 139SE689.

884-63 29Ariz198, 240P341; 30Ariz144, 245P274; 104 Ind108, 3NE619; 14Mich 33; 136Mich658, 99NW877; 321Mo 282, 10SW(2d)914; 64Hun633, 19NYS43; 156Tenn19, 300SW574; 75Tex516, 13 SW34; TexCivA 294SW687; 67Wis455, 30NW617.

885-66 13 Ind388; 4Kan535; 39Nebr 774, 58NW277.

885-74 202 Iowa503, 210NW530; Iowa 227NW337; 32PortoRico 644 (amount not objected to in lower court).

886-83 Ida 289P74; 7LaA86; 7LaA 700; 309Mo 612, 274SW688 (question of right to appeal from judgment of quasi-judicial body).

886-84 5KyOp624; 159La280, 105S 343; 165La478, 115S662; 170La355, 127 S866; La 129S532; 2LaA279; 7LaA 190; 8LaA67.

886-89 165Ga844, 142SE283 (absence of brief of evidence); 154Miss188, 122 S469(2dcase).

886-93 See also 167Minn248, 208NW803.

886-93½-New. Error in prosecuting appeal instead of writ of error disregarded in the absence of a motion to dismiss. 9F(2d)393.

886-95 108Conn74, 142A473 [app dism 278US570, 49SCt82, 73Led511(2dcase)] (objection to transfer between superior courts of appeal); MoA 24SW(2d)183; 134Wash182, 235P355.

888-15 10F(2d)447; 10F(2d)464; 35F(2d)791; 104Conn508, 133A686, 170Ga432, 153SE19; 204Iowa1178, 216NW625; 207Iowa1161, 224NW562; 9LaA198, 119S548 (plea in reconvention); LaA 130S263; 252Mass314, 147NE863; 319Mo214, 6SW(2d)39; 189NC783, 128SE158; 192NC287, 134SE855; 117Or608, 244P873; TexCivA 288SW276; TexCivA 30SW(2d)375; 100Vt179, 136A20. See also Mass 171NE727. [n] **Alleged error mentioned only in motion for new trial** raises no question for review. 87IndA431, 155NE185.

889-16 213Ala232, 104S406; 219Ala439, 122S419; 22AlaA483, 118S170 [certiorari den 218Ala174, 118S172]; 170Ark921, 282SW6; 168Ga81, 146SE897 (1stcase) (judgment not ruling on demurrant's petition does not present sufficiency of petition); 48Ida351, 282P80; 212Ky146, 278SW570; 2LaA153; LaA 126S584; 220MoA251, 284SW167 (misjoinder of causes); 194NC744, 140SE726; TexCommnA 16SW(2d)533; TexCivA 285SW338; TexCivA 297SW312; TexCivA 4SW(2d)241; TexCivA 19SW(2d)397; TexCivA 19SW(2d)605; TexCivA 25SW(2d)224.

889-17 215Ky551, 286SW773; TexCivA 285SW338. [a] **General demurrer,** not presented to trial judge is waived unless presenting question of fundamental error. TexCommnA 291SW1095.

890-18 Okl 292P353.

890-19 33F(2d)841; 107Conn484, 140A820; 41GaA317, 152SE847; 2KyOp208; 9LaA198, 119S548; Mass 167NE521; 220MoA489, 274SW103; MoA 297SW721 (ruling not sufficiently definite); 191NC297, 131SE735; 192NC287, 134SE855; 122Or162, 257P809; 132SC230, 128SE29; 135SC163, 133SE550; 142SC284, 140SE560, 57ALR634; 36Wyo473, 257P484. [a] (2) General statement of court that it would exclude portions of disposition contradicting defendant's pleadings before defendant read disposition has been held not such ruling on competency of evidence as may be made ground of exception. 192NC287, 134SE855. [e] **Final ruling.**–137SC113, 133SE826.

890-20 26F(2d)890; 33F(2d)841.

890-23 170Ark921, 282SW6, 8 [citCJ]; 13LaA468, 126S733. See also 34GaA62, 128SE208.

890-23½-New. Where defendant moved for a judgment in its favor, and the court ordered the cause submitted for decision, defendant's contention that it is entitled to dismissal is available on appeal, since implicit in the court's final decision in plaintiff's favor was a ruling denying a motion for dismissal. 34F(2d)116.

891-24 168Minn248, 210NW55; MoA 5SW(2d)709; 82NH533, 136A364; 116Or554, 240P1113.

891-24½-New. A request for a ruling has been held unnecessary, in view of the opposing counsel's statement. 82NH434, 136A250.

891-25 245Mich93, 222NW183; 33PortoRico612.

891-26 MoA 1SW(2d)232.

892-27 32Ariz135, 256P507; 125Mo178, 132A132; Mo 273SW110; 315Mo972, 287SW485; 78Mont357, 254P174; NJ 133A772; TexCivA 289SW159; TexCivA 22SW(2d)488; 100Vt179, 136A20.

893-29 219Ala24, 121S30; 103Conn598, 131A437; 96Fla620, 119S333; 126Me133, 136A696; 315Mo972, 287SW485; Mo 2SW(2d)785; 321Mo378, 11SW(2d)268; TexCommnA 12SW(2d)552; TexCivA 286SW258; TexCivA 289SW159; TexCivA 10SW(2d)1051 (examination of witness).

894-32 CalA 291P848; NJ 151A603(1st case); NJ 133A772.

894-34 204Cal618, 269P645, 62ALR1239.

894-35 83Colo468, 266P501.

894-38 TexCivA 12SW(2d)604.

894-47 201Cal162, 256P204.

895-49 125Me249, 132A742.

895-50 39GaA647, 148SE357; 206Iowa1368, 222NW553. See also 163La701, 112S655, 660 [citCJ]; 102NJLaw94, 131A292, 293 [citCJ].

895-52 6F(2d)531; 7F(2d)116; 15F(2d)532; 16F(2d)108; 16F(2d)392; 22F(2d)33; 26F(2d)890; 31F(2d)948(2d case); 33F(2d)508; 35F(2d)172; 40F(2d)831; 41F(2d)177; 42F(2d)53; 216Ala671, 114S49; 175Ark1169, 1SW(2d)807; 200Cal654, 254P567 (parties); 201Cal162, 256P204; 92Fla903, 110S536; 164Ga790, 139SE566; 165Ga651, 141SE646; 37GaA344, 140SE390; 39GaA242, 146SE640; 40GaA538, 150SE436(1stcase); 27Hawaii760; 199Ind33, 154NE6; 84IndA676, 151NE26; 202Iowa196, 209NW276; Iowa 213NW442; 204Iowa678, 216NW41; 208Iowa458, 223NW521; 214Kyl, 282SW553; 258Mass234, 154NE765; Mass 173NE547; 167Minn417, 209NW1; 168Minn453, 210NW626; 169Minn120, 210NW637; 171Minn118, 213NW539; 311Mo147, 277SW927; 319Mo214, 6SW(2d)39; MoA 298SW1055(1stcase); MoA 23SW(2d)214; 78Mont199, 253P260; 83NH586, 144A263(1stcase) (reviewing court should consider only such exceptions as have been regularly taken); 101NJL561, 134A896; 103NJL645, 137A419; 104NJL434, 140A416; NJ 145A637; NJ 143A733(1stcase); NJ 147A336; NM 289P597; 250NY517, 166NE307(1stcase); Oh 158NE751; 123Okl15, 250P430; 131Okl190, 268P266; 134Okl46, 272P882; 117Or598, 243P787; 117Or608, 244P873; 120Or181, 250P628; 122Or24, 256P770; 123Or461, 260P1014; 289Pa65, 137A127; 85PaSuper164; 93PaSuper307; TexCivA 286SW536; TexCivA 28SW(2d)892; Vt 150A148; 146Va617, 131SE793; 36Wyo473, 257P484. See also 102NJLaw94, 131A292, 293 [citCJ]. [a] **This necessity is not obviated by motion** to set aside verdict and exception to overruling thereof. 82NH443, 136A254.

897-53 TexCivA 286SW536.

898-54 [a] 201Iowa1317, 207NW567; 206Iowa964, 221NW506 (exceptions unnecessary under statute).

898-59 NJCh 134A360.

898-60½-New. Assignment of error will not take the place of an exception. 22F(2d)33.

898-61 [b] (3) Order refusing to dismiss action after lapse of five years is not one deemed excepted to under statute. 207Cal617, 279P650. [e] (6) All exceptions in appeals from municipal court cases can be included in one bill, if made within thirty days after judgment. 234IllA448. (7) Other instances. 338Ill145, 170NE276. [h] (2) Where exceptions are incorporated in bill of exceptions, exception is deemed to be taken to each ruling without formality of timely exception. 198SD532, 104NW249. [i] (1) 85PaSuper164. [j] **In New Jersey.**–131A624; 135A340. [k] **In Texas.**–CommnA 15SW(2d)1017.

898-62 MoA 18SW(2d)569; 103NJL628, 139A12; 32NM431, 258P569.

899-65 Cal 205P624.

899-66 39GaA647, 148SE357.

899-68 MoA 2SW(2d)215.

899-76 50Nev99, 251P721.

899-76½-New. Exception to ruling is not required where the trial judge anticipated an exception if plaintiff decided to appeal. 103NJL628, 139A12.

900-80 79CalA527, 250P195; 83NH23, 136A751.

900-83 See also 141Wash689, 252P131.

900-85½-New. Exception must be taken to the court's allowance, not to the argument itself. 82NH387, 134A344.

900-85⅓-New. Where a verdict is directed, and the losing party excepts to the overruling of a motion for a new trial, but does not complain of direction of the verdict, the reviewing court will consider only the question whether the verdict is supported by the evidence. 38GaA569, 144SE339.

900-96 14F(2d)56; 16F(2d)248; 26F(2d)403; 43F(2d)499; 220Ala127, 124S294; 79CalA527, 250P195; 3Del53, 130A267 (exception must be clearly to ruling of court); 164Ga811, 139SE716; 165Ga349, 141SE74; 169Ga710, 151SE362; 152Md529, 137A347; Md 148A216; Md 148A585; 82NH415, 135A20, 52ALR858; 103NJL690, 137A593; 31NM91, 240P990; 123Or33, 261P57; 287Pa420, 135A107; 10PortoRico325; 132SC176, 129SE137; TexCivA 294SW925; 100Vt334, 137A199; 101Vt285, 143A394; Vt 147A771; Vt 150A132. [b] (2) Court will not presume that exception intended erroneous ruling when it goes to correct ruling. TexCivA 294SW925. [e] **General exception to judgment** with specific exception to prior ruling held sufficient. 164Ga609, 139SE61.

901-97 16F(2d)210; 79CalA527, 250P195; 165Ga413, 141SE67; 103NJL690, 137A593; 287Pa420, 135A107; 15PortoRico111; 35PortoRico74; TexCivA 272SW587; TexCivA 294SW925. [e] 37GaA658, 141SE433 (exception that judgment is contrary to law should specify wherein it is contrary to law).

902-98 142Va197, 128SE644 [quotCJ].

902-99 142Va197, 128SE644, 646 [quot CJ]. [a] (6) Others. 101Vt356, 143A276.

902-5 14F(2d)86; 16F(2d)210; 164Ga811, 139SE716; 152Md289, 136A269; 99Vt329, 132A37. See also 132SC176, 129SE137. [b] **Defendant making specific exceptions** is deemed to have waived other exceptions. 172Ark117, 288SW377.

902-6 31NM91, 240P990; OhA 173NE298.

903-7 IndA 149NE451.

903-11½-New. 86Colo414, 282P253.

903-13 Fla 130S453; 165Ga446, 141SE212; 37GaA344, 140SE390; 164La409, 114S78; 8LaA507; 193NC94, 136SE294 (allowance of amendment to complaint); 96PaSuper146; TexCivA 278SW459; TexCivA 280SW608; TexCivA 282SW606; TexCivA 297SW312. [a] **Judgment overruling demurrer** becomes law of case when unexcepted to. 37GaA268, 140SE767.

903-14 68Utah507, 251P23.

903-15 But see 12LaA228, 125S140(2d case).

903-16 34GaA27, 128SE12 (ruling becomes law of case); 37GaA344, 140SE390; 40GaA97, 148SE755 (cannot be made ground for new trial); 226Ky554, 11SW(2d)427; 134Okl107, 272P380. [c] **Law of case.**–40GaA119, 149SE70(1stcase).

904-17 36F(2d)942 (exception to overruling demurrer pleading limitations held unnecessary).

904-18 122Okl240, 254P57.

904-20 CalA 260P316; 37GaA344, 140SE390; 38GaA570, 144SE358 (sufficiency of answer raised by exception to judgment sustaining motion to strike without hearing evidence). [a] (1) 234IllA552.

905-24 40GaA97, 148SE755 (cannot be made ground for new trial); 171Minn118, 213NW539; 218MoA516, 279SW232.

905-28 TexCivA 14SW(2d)1043; 68Utah507, 251P23.

905-29 [a] (4) In North Carolina plaintiff must except to denial of motion. 191NC621, 132SE566.

906-30 3NM602, 240P307. [b] (5) Exceptions pendente lite, containing no assignment of error on allowance of amendment to declaration. 40GaA427, 149SE711.

907-42 78Mont199, 253P260. [b] **Preliminary rulings on pleadings** are reviewable without exceptions. 270US349, 46SCt284. [c] **Plea in abatement.**–264Mass414, 163NE63.

907-43 218MoA516, 279SW232 (plea in abatement for illegal service of process). But see 38F(2d)766.

907-46 [a] (2) Order setting aside appointment of referee appointed on agreement of parties will not be reviewed in absence of exception by complaining party. 127Okl182, 260P42.

907-49 TexCivA 7SW(2d)611 (intervention).

907-50 9F(2d)622.

907-53 132Okl107, 269P368.

907-56 MoA 272SW701.

907-57 39GaA139, 146SE330; 11LaA

22, 122S143. [a] **Exception to refusal for continuance not waived** because plaintiff, when given option for continuance of only two days, chose to go to trial at once. **TexCivA** 282SW608.

908–59 MoA 283SW736, 738 [citCJ].

908–61 MoA 5SW(2d)709; 78Mont199, 253P260; 113 Okl 251, 241P138 (trial in absence of party).

908–62 270US349, 46SCt284; MoA 283 SW736, 738 [citCJ].

908–63 323 Ill 269, 154NE101.

908–64 152Md289, 136A269. But see 219Ala411, 122S401.

909–69 Ga 155SE185 (overruling motion to try forgery issue separately); 103NJL115, 134A675. [c] **Reasonableness of time allowed to counsel to examine charge and prepare exceptions** thereto is not reviewable in absence of request for extension of time and proper exception to ruling refusing it. **Tex CivA** 272SW826.

909–70 198 Ind393, 153NE768; Iowa 220NW58.

909–74 221Ky622, 299SW556; MoA 27 SW(2d)778; 191NC408, 132SE9.

909–75 225Ky480, 9SW(2d)220.

909–79 143SC135, 141SE174, 56ALR 953.

909–81 77CalA78, 246P130; 99CalA17, 277P1053; 78Colo 235, 242P45; 165Ga 349, 141SE74; 207 Iowa605, 223NW 480; 122Kan445, 252P215; 221MoA 1034, 278SW1081; MoA 287SW816; 23 OhA323, 155NE564; 47RI 193, 131A695 (in reception of evidence); 146Va617, 131SE793.

910–82 172Ark671, 290SW953; 104 Conn419, 133A209; 201 Iowa709, 207 NW794; 208 Iowa222, 225NW369; Mass 167NE235; 316Mo 1338, 296SW375; 320Mo 371, 8SW(2d)11; MoA 279SW 438; MoA 286SW428; MoA 295SW517; MoA 27SW(2d)733; NJ 148A896; 215 AppDiv840, 213NYS605; 27 OhA386, 160 NE863; 117 Or598, 243P787; 289Pa65, 137A127; TexCivA 32SW(2d)264; 104 WVa417, 140SE340. [a] (6) 32F(2d) 195. [b] (6) Where public interest is involved, failure to particularize exception does not preclude correction of error. 279US310, 49SCt300, 73Led706.

911–88½–New. Failure to except to refusal to transfer cause to equity does not waive the question where motion is made to reconsider, and exception is taken to refusal. 204Ky662, 265SW30.

911–88¼–New. An exception to statements of counsel is not sufficient to preserve the question for review. 3Del 53, 130A267.

911–89 TexCivA 294SW347.

912–92 18F(2d)858; 110Conn22, 147A 139; 235Ky164, 30SW(2d)876; 153Md 419, 138A324; 171Minn518, 213NW919; 174Minn131, 218NW455; 83NH57, 138 A314; 142SC247, 140SE581.

912–95 219Ala100, 121S93; 220Ala111, 124S228; 164Ga69, 137SE760; 27Hawaii760; 86 IndA699, 159NE763; 206 Iowa920, 221NW582; 168Minn453, 210 NW626; 169Minn106, 210NW637; 173 Minn458, 217NW495; 315Mo 760, 287 SW346; 319Mo 644, 5SW(2d)413; Mo 31SW(2d)792; MoA 272SW998; 220Mo A489, 274SW103; MoA 282SW454; Mo A 289SW977; MoA 14SW(2d)972; 83 NH57, 138A314; NJ 130A16; 217App Div336, 216NYS727; 191NC297, 131SE 735; TexCivA 265SW193; Utah 273P 512; 99Vt512, 134A710; 100Vt161, 135 A702; Va 154SE499; 103WVa532, 138 SE102; 33Wyo 326, 239P531; 36Wyo 473, 257P484, 491 [citCJ].

913–97 20F(2d)897; 221MoA67, 294 SW123; MoA 25SW(2d)551; 104NJL 434, 140A416; 128 Okl 172, 261P944; 290Pa415, 139A127; 36Wyo 473, 257P 484.

914–98 255 Ill A1; 206 Iowa1298, 221 NW953; 318Mo 1155, 6SW(2d)947; 320 Mo 1058, 10SW(2d)47; NJ 148A773; 217AppDiv336, 216NYS727; 297Pa576, 147A830; 35PortoRico 74. [a] In Georgia.–154SE886(1stcase).

914–99 315Mo 760, 287SW346; 83NH 57, 138A314; 33 OhA311, 169NE480; 283Pa331, 129A109.

915–3 35F(2d)172; 39GaA139, 146SE 330; 153Md419, 138A324; 36Wyo 473, 257P484. [b] (1) 194NC199, 139SE 228; 28 OhA297, 162NE675 (where counsel stated what he expected to prove); 100Vt161, 135A702.

916–6 221AppDiv524, 224NYS689 (exception not taken to denial of request to strike out testimony).

916–9 39GaA139, 146SE330; 320Mo 672, 8SW(2d)599 (review limited); Mo 24 SW(2d)116 (refusal to permit cross-examination of defendant); MoA 286SW 428; 221MoA974, 296SW193 (leading question); MoA 296SW437; MoA 26 SW(2d)818; 83NH411, 143A524; 24 Oh A129, 156NE462; 288Pa541, 136A798; 47RI 193, 131A695; TexCivA 284SW 983; 36Wyo 473, 257P484.

916–10 210Ky642, 276SW152; 214Ky 521, 283SW973; 233Ky673, 26SW(2d) 551; 234Ky18, 27SW(2d)399; 234Ky 508, 28SW(2d)780; MoA 287SW852. [d] **Objection to testimony at time deposition is taken** does not obviate requirement. 233Ky673, 26SW(2d)551.

917–11 TexCivA 282SW819.

917–22 9F(2d)289; 34GaA201, 129SE 14; 255Mass189, 151NE59; 226AppDiv 102, 234NYS425; 47RI 395, 133A621; 146SC355, 144SE73; TexCivA 272SW 283; TexCivA 285SW908; TexCivA 296 SW950; TexCivA 5SW(2d)224; TexCivA 24SW(2d)776; 136Wash397, 240P1. [b] 42F(2d)53. [e] (1) 219AppDiv249; 219NYS146.

918–23 30F(2d)520; 35F(2d)864; 38 F(2d)462; 168Gal12, 147SE115; MoA 287SW1061; NJ 145A630(1stcase); NJ 145A471(2dcase); 243NY130, 152NE 699; TexCivA 23SW(2d)879; Utah 279 P499; 100Vt308, 137A205; Vt 146A 248. But see TexCommnA 15SW(2d) 1017. Contra TexCivA 277SW189. [a] (1) 166Ga105, 142SE559. (12) Where plaintiff excepts to denial of motion to direct verdict on all four counts set up in complaint, assignments of error to separate counts fail, where there are no separate motions for verdict or exceptions taken. 8F(2d)613. (13) Exception to verdict does not raise question that court erred in directing verdict because of conflict in the evidence. Ga 155SE476. [b] (1) 181Ark886, 28SW (2d)710. (9) Assignment in bill of exceptions that verdict as directed is contrary to law is not exception to direction of verdict and raises no question as to error in directing verdict. 37GaA683, 141SE321. [d] (2) Withdrawal of case from jury is reviewable without exception where recited in judgment under statute. TexCommnA 15SW(2d)1017.

919–24 [a] (2) Under statute supreme court may review action of court in directing verdict, where no exception was taken, where verdict recited that jury "by direction of the court finds for plaintiff." 198Wis140, 223NW571(2d case), 64ALR1284.

919–27 See also 225AppDiv605, 233NYS 519.

919–34 5F(2d)562; 6F(2d)531; 7F (2d)352; 9F(2d)32; 9F(2d)289; 10F (2d)89; 14F(2d)893; 16F(2d)392; 23F (2d)266; 26F(2d)361; 29F(2d)402; 32 F(2d)851; 32F(2d)974; 35F(2d)30; 21AlaA118, 105S713; 21AlaA393, 108S 643; 177Ark17, 5SW(2d)336; 163Ga694, 137SE17; 40GaA332, 149SE582; 40GaA 383, 149SE806; 27Hawaii760; 87 IndA 19, 154NE510; 88 IndA176, 156NE594; 201 Iowa709, 207NW794; 201 Iowa1352, 208NW308; 203 Iowa721, 211NW430; 202 Iowa1382, 212NW137; 203 Iowa 1194, 212NW354; Iowa 213NW442; 203 Iowa1361, 214NW591; 204 Iowa456, 215 NW767; 208 Iowa70, 221NW941; 207 Iowa605, 223NW480; 208 Iowa914, 224 NW568; 213Ky122, 280SW494; 224Ky 48, 5SW(2d)481; 227Ky754, 14SW(2d) 170; 5KyOp63; 153Md312, 138A269; 153Md586, 139A285; 154Md195, 140A 70; 255Mass486, 152NE332; Mass 168 NE776; 164Minn414, 205NW276; 165 Minn117, 205NW885; 167Minn327, 209 NW16; 167Minn369, 209NW33; 168 Minn453, 210NW626; 170Minn175, 213 NW899, 51ALR542; 171Minn518, 213 NW919; 172Minn526, 215NW854; 174 Minn216, 218NW891; 174Minn434, 219 NW552; 175Minn22, 220NW162; 309 Mo 560, 274SW703; 220MoA542, 287SW 865; 102NJL343, 132A749; 102NJL585, 133A409; NJ 130A225; NJ 130A367; NJ 133A80; 103NJL23, 135A270; NJ 136A415; NJ 138A114; NJ 140A889; 223AppDiv555, 229NYS70; 219AppDiv 189, 219NYS548; 113 Okl 90, 239P230; 114 Okl 46, 243P134; 115 Okl 31, 241P 121; 117 Okl 233, 245P850; 136 Okl 26, 275P1045; 143 Okl 190, 283P300; 144 Okl 200, 291P105; RI 133A349; 48RI 227, 136A843; 49RI 3, 139A500; 135SC 62, 133SE533; 157SC359, 154SE645; 50 SD601, 211NW447; TexCivA 286SW 536; TexCivA 298SW631; TexCivA 10 SW(2d)263; TexCivA 10SW(2d)756; TexCivA 27SW(2d)305(2dcase); 66Utah 394, 243P114, 44ALR1348; Utah 273P 974; 101Vt459, 144A378; Vt 147A346; 152Wash492, 278P178; 155Wash609, 285P663; 33Wyo 200, 238P237. See also 197NC12, 147SE435. [a] **Declarations of law by court in action at law tried by it sitting as jury** cannot be reviewed on appeal in absence of exceptions. 307Mo 98, 270SW662.

922–36 41F(2d)625; 203 Iowa1194, 212 NW354; 207 Iowa495, 223NW178; 168 Minn347, 210NW78; 169Minn45, 210 NW618; 174Minn434, 219NW552; 178 Minn411, 227NW358; 77Mont110, 250P 819; 84Mont32, 273P1047; 86Mont579, 284P545; 212AppDiv601, 209NYS497; 223AppDiv555, 229NYS70; RI 136A692; 49RI 18, 139A466; 54SD435, 223NW 354; 54SD521, 223NW726; SD 228NW 182; 69Utah123, 252P677; 99Vt499, 134A700; 147Va960, 133SE685; Wash 292P416.

922–37 226AppDiv102, 234NYS425; 135 SC62, 133SE533.

922–38 99Vt91, 130A758.

922–38½–New. Counsel, afforded no opportunity to except to oral charge, cannot present objections, but must present exceptions in appellate court. Tex CivA 32SW(2d)216.

922–40 7F(2d)116; 10F(2d)89; 14 F(2d)86; 14F(2d)893; 16F(2d)210; 16 F(2d)248; 16F(2d)392; 19F(2d)72; 32 F(2d)451; 37F(2d)708; 40F(2d)228; 214Ala329, 107S830; 215Ala177, 110S 376; 216Ala495, 113S531; 21AlaA281, 107S716; 172Ark273, 288SW901; 165 Ga349, 141SE74; 34GaA203, 128SE915; 202 Iowa1382, 212NW137; Iowa 213NW 442; 205 Iowa621, 218NW334; 208 Iowa1350, 227NW404; 256Mass262, 152 NE230; 262Mass437, 160NE249; Mass 173NE549; 82NH175, 131A440 (general instruction held to raise question of whether instruction should have been given at all); 103NJL690, 137A593; NJ 137A795; NJ 142A821; NJ 146A674 (1stcase); NJ 149A39; 219AppDiv189, 219NYS548; 136 Okl 51, 275P640; 121 Or519, 254P809; 123 Or33, 261P57; 287 Pa420, 135A107; 41RI 227, 136A843; TexCivA 296SW950; TexCivA 1SW(2d) 917; 65Utah548, 238P278; 99Vt366, 133A359; 100Vt334, 137A199; 101Vt 285, 143A394 (exception not specific); 152Wash1, 277P74.

923–41 165Ga349, 141SE74; 204 Iowa 857, 216NW33; 105NJL359, 144A601; 105NJL408, 144A812; NJ 145A105; 121 Or519, 254P809; 285Pa212, 131A733; 96PaSuper456; TexCommnA 15SW(2d) 218 (exception to charge as whole does not preserve for review objection that charge was general). [a] 14F(2d)893. [b] (36) That charge failed to permit consideration of all testimony. NJ 137 A795. (37) "Last part of the charge on the whole." 256Mass262, 152NE230. (38) "To charge as whole." 39GaA265, 147SE160. (39) Others. 147SC58, 144 SE579. [c] In Pennsylvania.–88Pa Super199.

924–42 14F(2d)893; 258Mass249, 154 NE757; 101Vt94, 141A594.

924–46 [a] (1) 101Vt1, 139A776.

925–47 16F(2d)210; 16F(2d)392; 36 F(2d)921; 36F(2d)925; 41F(2d)514; 41F(2d)569; 216Ala495, 113S531; 170 Ark346, 280SW354; 39GaA265, 147SE 160; Mass 170NE467; 103NJL690, 137 A593; NJ 137A795; 123 Or33, 261P57; 287Pa420, 135A107; 138SC31, 136SE13; 100Vt334, 137A199. [a] (6) 155Wash 564, 285P433 (assuming and commenting on facts). (10) 36F(2d)927. (22) Exception "for reasons stated in foregoing exception" held incomplete and not considered. 134SC114, 132SE163.

926–48 32F(2d)1000; 38F(2d)8; 205 Iowa95, 215NW506; 100Vt1, 134A706; 101Vt356, 143A276.

926-49 152Wash508, 278P181, 65ALR 1019.
926-50½-New. Exception when taken should be accompanied by statement of ground for suggested qualification. 82 NH175, 131A440.
926-53 130 Okl 23, 264P912. [b] (2) Mere inadequacy of charge may be assigned as error under general instruction, but ordinarily court will not reverse on such assignments alone. 285 Pa561, 132A810. [c] **In Virginia.**-142 Va197, 128SE644.
927-54 216Ala495, 113S531.
927-55 5F(2d)562; 13F(2d)361; 14 F(2d)893; 16F(2d)248; 22F(2d)554; 23F(2d)266; 44F(2d)150; **Ark** 32SW (2d)160; 39GaA371, 147SE163(2dcase) (error not shown by exception to failure to give requested charge); 201 **Iowa** 1083, 205NW972; 201 **Iowa**263, 207NW 117; 202 **Iowa**1229, 211NW875; 202 **Iowa**1382, 212NW137; 203 **Iowa**628, 213 NW274; **Iowa** 213NW442; 125Me44, 130A737; 151Md68, 134A33; 176Minn 373, 223NW605; 309Mo 560, 274SW 703; **MoA** 19SW(2d)522; 103NJL427, 135A886; **NJ** 141A168; 105NJL391, 144A805; **NJ** 131A882; **NJ** 137A719; **NJ** 146A653; **NJ** 146A688(2dcase); 25 **OhA**183, 158NE497; 29 **OhA**457, 163NE 728; 32**OhA**26, 167NE589; 115 **Okl** 31, 241P121; 133SC256, 130SE893; **TexCivA** 298SW642; **TexCivA** 8SW(2d)560; 66 **Utah**394, 243P114, 44**ALR**1348; 99Vf91, 130A758; 100Vt185, 135A769; 100Vt 179, 136A20; 101Vt477, 144A380; Vt 147A346; 146Va804, 132SE863; 141 **Wash**689, 252P131; 150**Wash**443, 273P 527(2dcase). [b] (1) 202 **Iowa**1382, 212 NW137; **TexCivA** 298SW642; 152**Wash** 272, 277P999(2dcase). (14) Exceptions taken by referring to requests by number are too general. **Vt** 147A352. [c] (1) 131 **Or**140, 282P113. [e] **Exceptions held too general.**-**Vt** 147A771.
929-56 155Md210, 141A547.
929-58 14F(2d)893; 100Vt1, 134A706.
929-59½-New. Defendant's right to a correct instruction is saved by exception to denial of incorrect requested charge. 83NH439, 144A57.
930-66 [a] (2) 218Ala206, 118S381. (3) Exception presumed is not conclusive. 218Ala206, 118S381. [d] (1) 237 **Mich**182, 211NW749. [g] 89**PaSuper** 428 (may except generally and thereunder assign all actual errors of law).
930-67 [b] **OhA** 173NE32.
931-71 201 **Iowa**1317, 207NW567 (dismissed without prejudice); 31NM366, 246P910; **NJ** 137A563; 132SC498, 129 SE830.
932-72 207Cal 617, 279P650; 39GaA 139, 146SE330; 249NY296, 164NE104 (effect of indictment raised by exception to motion to dismiss).
932-75½-New. Skeleton bill of exceptions held good against motion to dismiss. 99Vt85, 130A583.
932-77 43F(2d)537; **TexCivA** 291SW 614. [b] (4) Respondent cannot have additional grounds to sustain circuit court's findings. 144SC490, 142SE716. (5) Exception that verdict was contrary to law and preponderance of evidence in case is too general. 146SC355, 144 SE73. [e] **Exception held sufficient.**-44 F(2d)24.
933-78 21AlaA23, 104SE870 (exception to verdict and judgment in jury trial presents nothing for review); **NJ** 130A 517.
933-84 15F(2d)918; 22F(2d)638; 35 F(2d)861; 40F(2d)882; 32**Ariz**299, 258 P253, 55**ALR**975; 34**Ariz**536, 273P534; 102**Conn**529, 129A527 (exception must be based on grounds disclosed by rules); 233 **IllA**572; 87 **IndA**440, 159 NE11 (amended findings); 202 **Iowa**196, 209NW276; **Mont** 289P1043; 82NH105, 129A873; 33NM78, 260P1086; 33NM 593, 273P12; 34NM181, 279P71; **NM** 290P1022; 192NC231, 134SE485; 195 **NC**203, 141SE587; 286Pa351, 133A495; 295Pa228, 145A128; 299Pa200, 149A 179; 299Pa155, 149A195; **TexCommnA** 298SW273; **TexCommnA** 27SW(2d)144 (1stcase); 99Vt329, 132A37; 135Wash 214, 237P308; 136**Wash**146, 238P977; 136**Wash**597, 241P5; 143**Wash**24, 254 P464; 147**Wash**16, 264P992; 152**Wash** 211, 277P843; 153**Wash**155, 279P400; 192**Wis**458, 212NW288; 193**Wis**403, 214 NW342.
934-86 17F(2d)536; 23F(2d)670; 29 F(2d)278; 30F(2d)46 [certiorari den 279US858, 49SCt352, 73**L ed**999 (11th case)]; 202 **Iowa**196, 209NW276; 232 **Mich**680, 206NW307; 233**Mich**312, 206 NW525; **TexCivA** 5SW(2d)783; 136 **Wash**597, 241P5; 147**Wash**56, 264P 1008.
935-88 15F(2d)918; 23F(2d)477; 30F (2d)97; **TexCivA** 284SW608; **TexCivA** 28SW(2d)892 (where both parties agreed to statement of facts); 99Vt329, 132A37. See also 103**Conn**41, 130A86.
935-90 134**Wash**331, 235P809.
935-91 [f] (2) **TexCivA** 274SW249; **Tex CivA** 281SW217; **TexCivA** 3SW(2d)589; **TexCivA** 25SW(2d)671; **TexCivA** 30SW (2d)381. [i] **In Wyoming.**-37**Wyo** 78, 259P185.
936-92 143**Wash**691, 254P457.
936-93½-New. Exceptions are not necessary where exception to judgment is noted of record in judgment entry. **Tex CivA** 276SW951.
936-96 104**Conn**165, 132A397; 111**Conn** 466, 150A696 (on motion to correct); 31NM599, 248P1096; 99Vt329, 132A37; **Vt** 147A693. [a] (4) 99Vt329, 132A37; **Vt** 148A752. (17) In not stating court's refusal to find material "admitted or undisputed" fact or "found fact "without any evidence." 111**Conn**466, 150A696.
937-97 99Vt329, 132A37.
937-99 30F(2d)97; 99Vt329, 132A37.
937-1½-New. Exceptions may be based only on refusal to find material fact admitted or undisputed, 103**Conn**624, 131A420.
937-1⅓-New. finding in doubtful language, 103**Conn**624, 131A420.
937-1¼-New. or finding of material fact without evidence to support it. 103 **Conn**624, 131A420.
937-1⅙-New. That fact not found is material insufficient basis for written exception. 103**Conn**624, 131A420 (must appear fact undisputed).
937-2 220Ala219, 124S743; 103**Conn** 678, 131A838; 82 **IndA**156, 145NE521; **IndA** 167NE535; 264**Mass**235, 162NE 307; 34NM181, 279P71; 192NC231, 134 SE485; 283Pa488, 129A563 (exceptions apply to trial cases and not where hearing is on pleading and judgment forthwith entered). [d] **Bill of exceptions** showing that at conclusion of all evidence defendant moved for judgment and excepted to denial of its motion has been held to present reviewable question. 35F(2d)859 (exception to denial of motion for judgment at conclusion of all evidence).
938-5 See also 265**Mass**335, 163NE876.
938-6 **IndA** 169NE333.
938-10 [a] See also 31NM54, 240P991, 999, 42**ALR**521 [quotCJ]. [f] **In New Mexico.**-31NM54, 240P991, 42**ALR**521. [g] **In Texas.**-**CivA** 276SW951.
939-12 [c] (1) 41F(2d)222; 34NM20, 275P769. [d] **Exception to decision brings before court** any error that may inhere in such decision. 47**RI** 153, 130A 593.
939-14½-New. Assignments of error should be based on exceptions to findings and not on denial of motion to correct finding. 103**Conn**678, 131A838.
939-17½-New. [§ 826a] (j) **Declarations of Law.** Where no objections were made or exceptions saved to refusal of requested declarations of law, the action of the court is not reviewable. **MoA** 300SW1001.
939-19 245 **IllA**346; 212Ky13, 277SW 250; 213Ky658, 281SW796; 235Ky582, 31SW(2d)890; 148**Miss**397, 114S613; **NJ** 129A747; 31NM576, 249P242. See 27F (2d)521.
940-20 161Ga877, 132SE81; 164Ga277, 138SE155; 170Ga153, 152SE246; 39GaA 244, 146SE922 (in absence of exception to final judgment exception pendente lite to judgment overruling demurrers to petition raises no question for review); 39GaA670, 148SE301(1stcase); 323 **Ill** 269, 154NE101; 202 **Iowa**579, 210 NW787, 50**LRA**139; 78**Mont**199, 253P 200; 140 **Okl** 152, 282P311 (where cause was submitted on agreed statement of facts); **TexCommnA** 27SW(2d)144(1st case); **TexCivA** 285SW832; 99Vt329, 132A37. [a] (1) 130 **Okl** 277, 267P270 (failure to except to judgment as to one of several causes of action). [d] (1) 163 **Ga**19, 135SE403; 99Vt329, 132A37. (13) Exception to final judgment held sufficient to question rulings of exceptions to demurrers and final judgment of dismissal. 33GaA435, 127SE153. (14) Exception that judgment is contrary to law because certain issues of fact were involved is insufficient. 170Ga13, 152SE 91. [e] (1) 164Ga609, 139SE61; 40GaA 385, 149SE791; 323 **Ill** 269, 154NE101; 34NM666, 287P286 (general exception sufficient). [f] (5) Nothing was presented for review on appeal where no exceptions were taken except to final findings and judgment. 34F(2d)883.
942-22 319Mo 149, 3SW(2d)1008.
942-24 **Ala** 128S174; **NJ** 129A747; **Tex CivA** 31SW(2d)843.
942-25½-New. In some jurisdictions an objection that judgment is not authorized by the verdict and pleadings is not available on appeal in the absence of an exception to the trial court's refusal to modify it. 172**Ark**1177, 288SW914.
942-25½-New. Plaintiff is entitled to appeal from a judgment because of irregularity, irrespective of the nature of the proceeding adopted. 103**NJL**628, 139A12.
942-26 15F(2d)329; 17F(2d)536; 20F (2d)897; 24F(2d)180; 27F(2d)521 (special findings); 28F(2d)793 [certiorari den 279US836, 49SCt251, 73**L ed**984 (3dcase)]; 33F(2d)449; 35F(2d)791; 42F(2d)460; 79**CalA**527, 250P195; 248 **Mich**585, 227NW716; 250**Mich**198, 229 NW513; **MoA** 300SW1020; 83NH47, 138A297; **NJ** 144A178(1stcase); **Tex CivA** 7SW(2d)630; 101Vt366, 143A543; 147**Wash**408, 266P171. [a] **In absence of exception to findings,** there will be no review of whether evidence supports judgment. 100Vt117, 135A497.
943-27 79**CalA**527, 250P195; 166**Ga** 223, 142SE739; **Vt** 146A250(1stcase). [b] (1) 100Vt117, 135A497. (3) Exception to denial of defendant's motion for directed verdict because of failure of plaintiff to establish case is sufficient to raise question of sufficiency of evidence though no exception was saved to denial of motion for nonsuit. 117 **Or**455, 244P509, 46**ALR**245.
944-28 44F(2d)24.
944-37 85**Colo** 243, 274P930; 88 **IndA** 327, 163NE842; **IndA** 169NE333; 146 **Va**10, 135SE685. [c] (2) 170**Minn**175, 213NW899, 51**ALR**542.
945-40 43 **Ida**734, 255P909. See also 83NH474, 144A261.
945-41 159**La**535, 105S611 (sufficiency of bond on suspension appeal); **MoA** 22SW(2d)853.
945-44 43 **Ida**784, 255P909; 150**Md**347, 133A114; 52**SD**339, 217NW507.
945-45 [c] **Simple exception to order overruling separate motions** to set aside default held sufficient as against contention that it was joint exception. 85 **IndA**581, 151NE15.
946-50 127 **Okl** 182, 260P42.
946-52½-New. or to amend or correct a record of the judgment, 199 **Ind**311, 157 NE441.
946-56 **MoA** 24SW(2d)165.
946-62 30**Hawaii**29; 253 **IllA**413; 89 **IndA**637, 167NE720(2dcase); **IndA** 171 NE882(1stcase); 248**Mich**545, 227NW 688.
946-63 152**Md**289, 136A269; 321**Mo** 282, 10SW(2d)914.
946-64 152**Md**289, 136A269; **Wash** 286 P43.
946-65 30**Ariz**144, 245P274; 166**Ga**806, 144SE274; **MoA** 14SW(2d)657.
947-69 39GaA139, 146SE330.
947-73 332 **Ill** 253, 163NE702; 254**Mass** 507, 150NE322; 198NC530, 152SE493 (2dcase); 98Vt492, 129A234.
948-74 253 **IllA**274; 254 **IllA**264.
948-75½-New. All questions raised by motion for judgment on special findings have been held to be saved by exceptions to a conclusion of law. **IndA** 154NE392.
948-76 174**Ark**1067, 298SW351; 216**Ky** 582, 288SW316; 223**Ky**346, 3SW(2d)653; 227**Ky**306, 12SW(2d)856; 261**Mass**116, 158NE344; **NJ** 146A213; 98Vt492, 129 A234; **WVa** 155SE122. [c] (1) 165**Ga** 808, 142SE149. (2) Exceptions held insufficient. 230**Ky**757, 20SW(2d)752.
949-81 265**Mass**199, 164NE69.
949-82 **Ala** 129S81.
950-98 17F(2d)536; 253 **IllA**274; 194 **NC**357, 139SE689. But see **Mass** 168NE 521(3dcase). [d] (8) Exception to judg-

ment is sufficient to bring up action of trial court in overruling exceptions to auditor's report. 165Ga826, 142SE164.

951-8 150SC414, 148SE227.

952-11 TexCivA 5SW(2d)789.

952-24 20F(2d)803, 808 [citCJ]; 205 Cal 102, 269P1105; 37GaA483, 140SE 776; 203 Iowa721, 211NW430; 285Pa 521, 132A712. See also 245Mich548, 222 NW744, 65ALR1033. [f] **Recitals that exceptions** were taken before judgment held nugatory. 270US349, 46SCt284, 70 L ed624. [g] **Exceptions not taken at proper time** cannot be incorporated nunc pro tunc. 270US349, 46SCt284, 70L ed 624.

953-27 39GaA606, 147SE911(2dcase); 41GaA206, 152SE587; 41GaA758, 154SE 914; 151Md285, 134A214; 153Md698, 142A384; 311Mo 147, 277SW927; 37Pa Super611; Vt 148A484. [g] **Extention of time to file exceptions to findings** is properly refused where no application therefor was made within time allowed by court rule for filing exceptions and motion for extension is based on illness of counsel who had other competent counsel associated with him. 242Mich 263, 218NW651.

954-29 148Miss809, 114S866; MoA 297 SW451. [a] **Exception to improper argument made at close of argument** has been held to be seasonably made. 82 NH472, 136A261.

954-31 148Miss809, 114S866.

954-32 36F(2d)941 (refusal of directed verdict).

954-33 40GaA558, 150SE565.

954-37 203 Iowa721, 211NW430; 2 NebrUnoff598, 89NW617; TexCivA 295 SW283. But see 339 Ill 276, 171NE271.

955-44 83 IndA514, 149NE89; 153Md 586, 139A285; 142SC284, 140SE560, 57 ALR634.

956-45 Ala 127S518; 35GaA648, 134SE 344; 83 IndA514, 149NE89; 240Mich 71, 214NW937.

957-50 See also 28F(2d)268 (exception to master's allowance of claim). [a] In Michigan.–233Mich523, 207NW14.

957-52 NJ 137A881.

957-54 NJ 137A881.

957-55 8F(2d)943 (ruling adverse to appellee not reviewable in absence of exception); 170Ga296, 152SE834; NJ 137A881.

958-60 210Ky642, 276SW152; 218Ky 93, 290SW1061; 224Ky18, 4SW(2d) 1106; 82NH209, 131A597; 82NH415, 135A20, 52ALR858; TexCivA 300SW 985; 78Wash201, 139P218.

958-63 218Ky93, 290SW1061; 227Ky 195, 12SW(2d)315. But see 86Colo 414, 282P253.

958-64 257Mass554, 154NE181; NJ 137 A524; NJ 147A725(2dcase) (granting rule to show cause why verdict should not be set aside without reservation of exceptions); NJ 150A223(2dcase). [a] (2) Me 151A537.

959-70 NJ 141A163; NJ 150A321; NJ 151A854; NJ 151A877.

959-71 NJ 130A522. [a] (5) 103NJL 537, 138A119. (6) 103NJL383, 135A 865. (7) Where matters on which reserved exceptions are based are specified, argued, and determined upon return of rule, right of review is lost. 103 NJL323, 136A741.

959-72 91Fla260, 107S406.

960-79 168Ark662, 271SW27; 177Ark 1106, 9SW(2d)322; 178Ark911, 12SW (2d)901 (as basis for cross appeal); 85 Colo 498, 277P467; Ind 170NE81; 119 Kan691, 241P242; 124Kan440, 260P638; 125Kan53, 262P1022; 210Ky803, 276SW 838; 214Ky31, 282SW551; 167Minn417, 209NW1; Mo 285SW428, 429 [quotCJ]; 321Mo 654, 12SW(2d)438; Mo 18SW(2d) 441 (though matter is incorporated in bill of exceptions); MoA 280SW76; MoA 284SW855; MoA 31SW(2d)583; 115Nebr271, 212NW616; 123 Okl 15, 250 P430; 132 Okl 296, 270P563; 134 Okl 46, 272P882; 143 Okl 33, 287P722; 290 Pa74, 138A79; 143SC1, 141SE144; 53 SD34, 219NW892 (appeal considered as one from judgment only); 155Tenn148, 290SW970; 154Tenn507, 297SW735; TexCivA 281SW637; TexCivA 18SW(2d) 937; TexCivA 3SW(2d)819; TexCivA 10SW(2d)1051; 102WVa409, 135SE388; 105WVa505, 143SE232. See also 160Ga 813, 129SE92. But see 124Kan780, 262 P607; 219MoA283, 269SW693. [a] (1) TexCivA 285SW682; TexCivA 20SW (2d)360. (2) In cases tried before jury, motion for new trial is essential to review of question of fact. TexCivA 274 SW1006.

962-80 91Fla260, 107S406; 158La682, 104S616; MoA 29SW(2d)736; TexCivA 288SW602.

962-82 229Ky198, 16SW(2d)1024.

963-88 See alsoTexCivA 271SW410.

963-88½-New. , and a motion for a new trial is not necessary to authorize the appellate court to review questions of law timely excepted at the trial and apparent on the record. TexCivA 283SW 642.

963-88⅓-New. In New Brunswick, where a party at the trial of an action in a county court has moved for a dismissal and for judgment non obstante veredicto, he need not move for a new trial upon substantially the same grounds before appealing. NB [1928] 2DomLR960.

963-89 [a] **Appeal taken within term which judgment rendered brings record proper up for review,** though defendant filed no motion in arrest or for new trial. MoA 7SW(2d)301. [b] **Motion for new trial is unnecessary** for review of order on contested fact, question arising on motion, not on pleadings. Okl 291P965 (2dcase).

963-89½-New. Only the sufficiency of the pleadings will be considered in absence of motion. 117Nebr52, 219NW 808.

963-89⅓-New. Where a motion for a new trial is abandoned, the court of civil appeals can only consider fundamental errors. TexCivA 285SW627.

963-90 177Ark296, 6SW(2d)312; 177 Ark523; 7SW(2d)4; 84CalA33, 257P 569; 86 IndA352, 156NE471; 86 IndA 695, 159NE761; 216Ky652, 288SW299; 234Ky838, 29SW(2d)563; 175Minn436, 221NW648 (only question presented is whether findings of fact sustain conclusions of law); MoA 279SW175; MoA 300SW1039 (constitutional question); 115 Okl 100, 242P1043; 119 Okl 216, 249 P401; 122 Okl 59, 250P795; 122 Okl 274, 254P729; 127 Okl 65, 259P869; 132 Okl 264, 270P316; 135 Okl 35, 273P 898(2dcase); 138 Okl 1, 280P278; Okl 292P352; 49SD135, 206NW695; 155 Tenn148, 290SW970; 155Tenn132, 290 SW975; TexCivA 22SW(2d)707. [a] (2) That case is tried on documentary evidence and oral testimony does not dispense with necessity of motion for new trial though evidence is uncontroverted. 128 Okl 48, 261P150. [b] (1) TexCivA 297SW503;, TexCivA 17 SW(2d)1077. (7) TexCivA 274SW1006 (not necessary). (8) Rule in Texas seems firmly established that no motion for new trial is necessary where case is tried by court without jury. TexCivA 278SW323. [c] In South Dakota.–51SD 154, 212NW868.

963-91 98CalA714, 277P759; 41GaA 287, 152SE589(2dcase); 245 IllA346.

963-93 Mo 29SW(2d)126.

963-94½-New. Where the parties, after the evidence is all in, agree that the jury be dismissed and that the court decide the question of law involved, and the court decides such question and renders judgment accordingly, no motion for a new trial is necessary. 116 Okl 169, 243P743.

963-94⅓-New. The filing and overruling of a motion for a new trial in the lower court, is not a necessary requisite to jurisdiction of the appellate court. 39Wyo 476, 273P543.

963-94¼-New. In one jurisdiction, in the absence of a motion for a new trial, review is limited to whether the evidence sustains the findings and whether the findings sustain the judgment. 177 Minn53, 224NW461.

964-96 211Ky526, 277SW843 (where both parties treat action as equity cause); 225Ky823, 10SW(2d)277.

964-96½-New. and Montana. 81Mont 185, 262P887.

964-98½-New. In Tennessee a motion for a new trial is not necessary to review the action of the chancellor on evidence which does not bear on issues submitted to a jury. 158Tenn289, 13SW (2d)51.

964-99¼-New. In Tennessee a motion for a new trial is not necessary for review of law and facts on appeal from a decree in chancery. 155Tenn148, 290 SW970.

964-1 317Mo 828, 297SW382.

964-3 115Nebr271, 212NW616; 117 Nebr619, 222NW40; 117Nebr619, 225 NW49(2dcase), 61ALR724.

964-5 115Nebr702, 214NW640; 118 Nebr231, 224NW21.

964-9 154Tenn507, 297SW735.

964-10 122 Okl 192, 253P105; 51SD 279, 213NW362.

965-15 MoA 295SW806 (error apparent of record reviewable).

965-19 [a] (3) After judgment for plaintiff on merits, appeal lies from order dissolving attachment to which bill of exceptions was filed in term time, where plaintiff moved for rehearing of motion, though no motion for new trial was filed. 221MoA250, 2SW(2d)187, 188 [citCJ].

965-24½-New. No motion for a new trial is necessary to review an order sustaining a motion to dissolve a garnishment whether evidence was introduced on the hearing of the motion or not. 113 Okl 287, 241P485.

966-32 222MoA389, 5SW(2d)681.

966-32½-New. In Missouri a motion for a new trial is necessary in order to secure a review of an order dismissing an appeal from a justice's court on the ground that the entry made by the justice was fraudulent. 222MoA389, 5SW (2d)681.

966-32⅓-New. A motion in the circuit court on appeal from a justice's court to dismiss for lack of jurisdiction, being a demurrer, is preserved without a motion for a new trial. MoA 296SW845.

966-33 TexCommnA 276SW203. [a] In Texas.–CommnA 276SW203.

966-34 176Ark822, 4SW(2d)510; 181 Ark693, 27SW(2d)96(1stcase); 121Kan 820, 250P345; 213Ky327, 280SW1097; 220Ky813, 295SW1010; Mo 23SW(2d) 1058; MoA 27SW(2d)711; MoA 28SW (2d)120; MoA 29SW(2d)736; SD 227 NW469; 154Tenn507, 297SW735; 37 Wyo 61, 258P1018; 39Wyo 476, 273P 543.

966-35 29Ariz218, 240P348; 34 OhA 192, 170NE592.

966-36 171Ark1187, 287SW182; 180 Ark1129, 21SW(2d)423; Ind 150NE407; 89 IndA506, 164NE316; 119Kan545, 240 P856 (motion held to have been filed in time); 231Ky99, 21SW(2d)124; 235Ky 701, 32SW(2d)57; MoA 24SW(2d)1054 (ruling on motion to set aside filed forty-three days after trial held not reviewable); MoA 31SW(2d)583; 110 Okl 138, 236P880; 117 Okl 266, 246P457; 122 Okl 192, 253P105; 122 Okl 250, 254 P72; 132 Okl 296, 270P563; 134 Okl 46, 272P882; 135 Okl 239, 275P343; 137 Okl 278, 278P1094(1stcase); 139 Okl 204, 281P803; 142 Okl 110, 285P 843; 143 Okl 220, 289P315; 41 OklACR 100; TexCivA 291SW335. But see Kan 293P392. [a] **Motion held timely.–Tex CivA** 29SW(2d)877.

967-38½-New. Where judgment was improperly entered on pleading and evidence after granting new trial, error is reviewable on appeal taken from judgment during term it was rendered, though motion for new trial was not filed in time. MoA 23SW(2d)1058.

967-39 169Ga832, 152SE103; 168Minn 453, 210NW626; 112 Okl 28, 239P594 (order overruling motion not on file at time order made, has been held nullity); 114 Okl 121, 244P416; 104WVa144, 139 SE645; 104WVa178, 139SE653. [d] (1) 127Kan234, 273P440, 62ALR211. (5) Failure to appear when court denied motion will not prevent consideration of grounds assigned in motion where objections had been argued. 130Kan478, 287P608. [e] In Oklahoma.–122 Okl 124, 254P104, 39OklACR72. [f] **Motion to reform judgment** has been held in legal effect motion for new trial sufficient as basis for assignments of error. TexCommnA 5SW(2d)500. [g] **Motion to set aside order sustaining motion for judgment on pleadings** may be treated

as motion for new trial. 221MoA779, 288SW959.

967–40 201Cal 162, 256P204; 164Ga51, 137SE756; 41GaA361, 152SE923; GaA 155SE509(2dcase); 114 Okl 121, 244P 416. [a] (1) 34GaA252, 129SE117. See also 34GaA321, 129SE565. (4) 34GaA 36, 128SE213. (5) Grounds of new trial not approved by trial judge will not be considered. Ga 155SE321.

967–40½–New. A ground of motion must be sufficiently complete in itself so as not to require the reviewing court to refer to the record to determine the question. 34GaA166, 128SE779; 34GaA 321, 129SE565; 35GaA573, 134SE187; 36GaA276, 136SE469; 37GaA171, 139SE 111.

967–41 Ark 31SW(2d)750; Mo 32SW (2d)580(1stcase); MoA 29SW(2d)205 (1stcase); MoA 29SW(2d)207.

967–42 170Ark745, 281SW354; 171Ark 594, 285SW365; 171Ark1033, 287SW 194; 171Ark1179, 287SW577, 59ALR 1237; 173Ark457, 292SW662; 174Ark 1161, 298SW494; 176Ark1204, 3SW(2d) 979; 180Ark1167, 22SW(2d)169; 181 Ark1145, 24SW(2d)319(2dcase); CalA 282P508; CalA 292P1006; 82Colo 81, 257P260; 159Ga769, 127SE103; 162Ga 598, 134SE316; 164Ga51, 137SE756; 166 Ga132, 142SE665; 166Ga523, 143SE 761; 166Ga877, 144SE652; 167Ga66, 144SE903; 167Ga657, 146SE485; 168 Ga269, 147SE567; 169Ga235, 149SE785; 38GaA337, 144SE11; 38GaA431, 144SE 218(2dcase); 38GaA473, 144SE802(2d case); 39GaA454, 147SE413; 41GaA 610, 154SE206(2dcase); 333 Ill 143, 164 NE129; 88 IndA432, 164NE414; 84 Ind A354, 148NE489; IndA 151NE7; 85 IndA327, 151NE346; 87 IndA220, 159 NE28; 119Kan545, 240P856 (motion held sufficient); 121Kan431, 247P640; 122Kan291, 251P1078; 225Ky510, 9SW (2d)226; 227Ky754, 14SW(2d)170; 168 Minn453, 210NW626; 169Minn120, 210 NW637; 171Minn518, 213NW919; Mo 270SW977; Mo 281SW420; 312Mo 694, 281SW725; 315Mo 338, 286SW76; 315 Mo 1136, 287SW1031; Mo 293SW140; 318Mo 865, 1SW(2d)94; Mo 2SW(2d) 760; Mo 2SW(2d)785; 319Mo 1240, 6 SW(2d)565; 321Mo 310, 11SW(2d)16; Mo 14SW(2d)561(1stcase); 322Mo 147, 14SW(2d)603; MoA 15SW(2d)910; Mo 19SW(2d)1046; MoA 30SW(2d)784; Mo 31SW(2d)4; 219MoA383, 271SW1003; MoA 274SW857; 217MoA187, 274SW 901; 220MoA102, 278SW806; MoA 278 SW1078; MoA 278SW1084; MoA 14 SW(2d)710; MoA 19SW(2d)505; MoA 19SW(2d)531 (overruling motion to transfer cause to equity docket); MoA 20SW(2d)561(2dcase); MoA 32SW(2d) 130; 49ND160, 190NW774; 51ND671, 200NW688; 51ND863, 200NW1007; 57 ND321, 221NW881; ND 229NW371; 135 Okl 91, 274P469; 51SD59, 212NW213; TexCivA 282SW958; TexCivA 294SW 702; TexCivA 5SW(2d)785; TexCivA 11SW(2d)191 (unless fundamental); Tex CivA 22SW(2d)502; TexCivA 23SW(2d) 522; TexCivA 23SW(2d)827; TexCivA 25SW(2d)224; TexCivA 26SW(2d)665; 151Wash447, 276P297(2dcase); 102WVa 370, 135SE286; 104WVa144, 139SE645; 104WVa178, 139SE653; 105WVa453, 143SE98; 195Wis341, 218NW188. But see 226Ky5, 10SW(2d)460. [d] (2) Instruction, excepted to and affecting verdict, may be reviewed as contrary to law though no specific reference was made thereto. 102WVa197, 135SE13. [f] (1) 159Ga769, 127SE103; 163Ga 149, 135SE721; 167Ga843, 146SE835; 168Ga269, 147SE567; 39GaA111, 146 SE518(2dcase); 34GaA229, 128SE921; 35GaA170, 132SE241; 35GaA200, 132 SE917; 35GaA425, 133SE292; 39GaA 265, 147SE160; 39GaA452, 147SE410; 39GaA529, 147SE778(2dcase); GaA 155 SE343; GaA 155SE383(2dcase). (6) 35 GaA170, 132SE241. (10) Ground complaining of direction of verdict should show wherein court erred in directing verdict. 35GaA200, 132SE917. (11) Where so incomplete as to require reference to brief of evidence or record, ground will not be reviewed. 34GaA 40, 128SE210. [g] **Assignments set out in amendment filed out of time,** but not contained in original motion for new trial, cannot be considered. 180Ark980, 23SW(2d)972.

967–42½–New. But in Arizona failure to specify that findings are insufficient is not necessary to waive point on appeal. 29Ariz1, 239P514.

968–43 51SD46, 211NW803; TexCivA 296SW959.

968–44 173Ark1181, 292SW105; 37Ga A33, 138SE856; 235Mich279, 209NW59; 118 Okl 217, 246P1094; 132 Okl 264, 270 P316; 133 Okl 96, 271P240(2dcase); 135 Okl 35, 273P898(2dcase); 49SD135, 206NW695; TexCivA 291SW335. But see TexCivA 10SW(2d)1016.

968–44½–New. Appeal not considered if motion for a new trial was acted on after adjournment of term. TexCivA 271SW936.

969–45 222MoA448, 7SW(2d)428 (motion for new trial in circuit court of city of St. Louis).

969–46 37GaA547, 140SE904; 199 Ind 33, 154NE6; 201 Iowa709, 207NW794; 10LaA437, 121S351; 233Mich157, 206 NW498; 234Mich271, 207NW866; 235 Mich236, 209NW63; 242Mich651, 219 NW632; 246Mich117, 224NW613; 251 Mich92, 230NW922; MoA 295SW1090; 78Mont199, 253P260; 115 Okl 100, 242 P1043; 132 Okl 264, 270P316; 133 Okl 96, 271P240(2dcase); 135 Okl 35, 273P 898(2dcase); Okl 292P352; 49RI 455, 143A673. But see 222MoA448, 7SW(2d) 428.

970–48 MoA 289SW22; MoA 295SW 132.

970–49 TexCivA 12SW(2d)1082.

971–52 [a] **In Philippines.**–51 Philippine796.

971–53 TexCommnA 288SW123.

971–54 162Ga487, 134SE165.

972–59 [a] (13) Refusal to allow filing of quo warranto may be directly excepted to. 170Ga562, 153SE520. [b] **In Oklahoma.**–32 OklACR80. [c] **In Kentucky.**–210Ky575, 276SW500.

972–60 233Ky366, 25SW(2d)1023 (where no evidence was heard); 112 Okl 7, 242P763; 125 Okl 184, 256P520; 141 Okl 205, 284P646.

972–61 Mo 18SW(2d)441 (rulings on motion to quash summons and return); 222MoA1036, 7SW(2d)398; MoA 30SW (2d)638.

972–62 See also 176Ark822, 4SW(2d) 510.

972–66½–New. In some states a motion for a new trial is not essential to a review of the decision of the court as to a jurisdictional fact. 210Ky575, 276 SW500.

972–67 255 IllA189 (failure to appoint guardian ad litem). [a] **Error in overruling motions** to require plaintiff separately to state and number its causes of action and to make petition more definite and certain will not be considered on appeal where not presented in motion for new trial. 124 Okl 42, 254P31. [b] **Order overruling motion to quash summons** is not reviewable unless properly presented in motion for new trial. 133 Okl 196, 271P1026.

973–74½–New. An assignment of failure to appoint a guardian ad litem for a minor defendant as ground for a new trial presents no question for review on appeal. 89 IndA632, 166NE773.

973–75 320Mo 746, 8SW(2d)824.

973–78 [a] **Motion based on irregularity of proceedings by which party was prevented from having fair trial** is insufficient to present ground. 132 Okl 107, 269P368.

973–79 177Ark1106, 9SW(2d)322; 223 Ky296, 3SW(2d)613; MoA 14SW(2d) 529.

973–84 120 Okl 253, 252P41; 123 Okl 163, 252P418. But see 125 Okl 114, 256 P748.

974–85 135 Okl 87, 274P19; 136 Okl 296, 277P637. But see 120 Okl 253, 252 P41. [a] **Where defendant has pleaded further,** action of trial court in overruling demurrer to petition will not be reviewed unless it is presented in motion for new trial. 96 Okl 163, 220P925; 121 Okl 53, 247P97. [b] **In Oklahoma.** –123 Okl 163, 252P418.

974–93 But see 40GaA649, 150SE924.

974–97 320Mo 746, 8SW(2d)824.

974–98 Mo 18SW(2d)441; Mo 26SW (2d)760; MoA 5SW(2d)644. [b] (1) Contra MoA 5SW(2d)644. [c] 41GaA 380, 152SE909(1stcase).

975–8 Mo 26SW(2d)946.

975–12 123 Okl 53, 251P1017.

975–15 120Kan90, 242P124; 133 Okl 96, 271P240(2dcase).

975–16 34GaA151, 128SE181 (refusal to try attachment and traverse together).

975–16½–New. Where, after a decision against defendant, based on an ex parte hearing without requisite notice, and without his knowledge, he fails to move for a new trial as provided by statute, he waives want of notice. 6F(2d)559.

975–17 215Ala491, 111S205; 198 Ind 393, 153NE768.

975–18 215Ala491, 111S205. Contra 128Kan600, 278P736.

976–24 234Ky252, 27SW(2d)978 (refusal of court to disqualify interested jurors).

976–27 174Ark282, 295SW713; 181Ark 1145, 24SW(2d)319(2dcase); 97CalA 144, 275P245; 78Colo 310, 241P539; 82Colo 51, 256P1088; 166Ga89, 142SE 271 (ground sufficiently presented); 168 Ga112, 147SE115; 34GaA29, 128SE67 (appellate court not required to refer to brief of evidence); 38GaA337, 144SE11; 38GaA414, 144SE35; 39GaA454, 147SE 398(1stcase); 41GaA492, 153SE379; 41 GaA512, 153SE431; 86 IndA666, 152NE 873; 87 IndA333, 158NE294; 120Kan90, 242P124; 122Kan767, 253P414; 123Kan 427, 255P1113; 123Kan755, 256P813; 124Kan443, 260P647; 125Kan668, 265 P1106; 125Kan727, 265P1113; 126Kan 331, 267P961, 174Minn131, 218NW455; 178Minn120, 226NW516; Mo 285SW 449; 319Mo 432, 3SW(2d)1004; 321Mo 1244, 14SW(2d)583; 322Mo 765, 18SW (2d)42; Mo 256SW750; MoA 283SW 732; 221MoA881, 288SW109; MoA 22 SW(2d)651; MoA 29SW(2d)207; Nebr 230NW669; 100WVa319, 130SE483; 101WVa602, 133SE333; 102WVa320, 135SE185; 102WVa409, 135SE388; 106 WVa134, 145SE39 (motion to set aside verdict held insufficient); WVa 155SE 125; 37Wyo 509, 263P711. [a] (3) 254 IllA362; 256 IllA485. (4) Erroneous admission of evidence of damage will not be considered on appeal unless raised by motion for new trial. 254 Ill A362. [b] (3) Where appeal is from judgment, motion for new trial is not necessary to present errors in rulings on evidence. Iowa 232NW133. [f] Tex CivA 23SW(2d)842 (where error preserved in bill of exceptions). [i] **Ground duly presented.**–38GaA412, 144 SE40.

977–28 181Ark1145, 24SW(2d)319(2d case); 82Colo 51, 256P1088.

978–34 [a] **Competency of attorney as witness.**–Ground of motion is insufficient where failing unqualifiedly to allege that witness was attorney for party in prior suit. 169Ga243, 150SE76.

978–36 82Colo 51, 256P1088; 161Ga 829, 132SE79 (must state ground of objection and that such ground was stated to judge at time evidence was admitted); 163Ga87, 135SE433; 163Ga271, 136SE81; 166Ga784, 144SE246 (ground held insufficient); 34GaA40, 128SE210; 38GaA431, 144SE218(2dcase) (ground held incomplete within itself); 38GaA 473, 144SE802(2dcase); 38GaA732, 145 SE479(1stcase) (ground of motion for new trial not complete within itself cannot be considered); 39GaA670, 148SE 283(2dcase); 40GaA646, 151SE54; 41 GaA512, 153SE431; IndA 167NE563(2d case); 118Kan439, 235P847; 128Kan 172, 276P833; 101WVa602, 133SE333. See also 39GaA111, 146SE518(2dcase).

978–36½–New. ground of motion excepting to rejection of opinion evidence must disclose facts rendering it admissible under exceptions to general rule. 34GaA166, 128SE779.

978–37 82Colo51, 256P1088; 168Ga248, 147SE574; 160Ga872, 129SE532; 162 Ga295, 133SE257, 163Ga37, 135SE487; 167Ga114, 144SE891; 169Ga243, 150SE 76; 169Ga172, 150SE95; Ga 154SE785; 34GaA40, 128SE210; 35GaA170, 132SE 241; 35GaA568, 134SE177 (documentary evidence); 37GaA686, 141SE326; 37GaA737, 141SE673; 38GaA814, 145SE

891(1stcase); 41GaA280, 152SE852(2d case); GaA 155SE375; GaA 155SE789 (1stcase); 123Kan427, 255P1113; 124 Kan252, 259P801; 127Kan83, 272P151; 127Kan248, 273P461; 127Kan624, 274 P247; 128Kan164, 276P807; 128Kan 159, 277P37; 129Kan766, 284P427; Mo 285SW449. See also Kan 289P442. But see 118Kan470, 235P1054; 127Kan573, 274P237.

978-33 127Kan708, 275P201; 227Ky 431, 13SW(2d)279; 317Mo 108, 296SW 157; 317Mo 782, 297SW20; 320Mo 672, 8SW(2d)599; MoA 300SW311; 221MoA 1173, 300SW997.

978-33½-New. A ground of a motion for a new trial is defective where it discloses that no objection was made to the admission, the evidence itself, and that the only objection was to the question propounded. 34GaA229, 128SE 921.

978-33¼-New. Ground of motion for new trial showing objection sustained to plaintiff's questioning a witness is without merit where no further ruling of court was procured. 169Ga243, 150 SE76.

978-41½-New. or where the court sustained a demurrer to the evidence, 127 Kan354, 273P462.

978-43½-New. or in admitting or excluding evidence, 35Wyo 4, 246P29.

978-46 MoA 274SW857.

978-47 84 IndA705, 149NE89 (ruling sustaining objection to question not set out in form or substance in motion for new trial will not be considered on appeal). [b] **Sufficiency of assignment.-MoA** 18SW(2d)114.

979-51 222MoA495, 280SW1050; 125 Okl 96, 256P900; 133 Okl 96, 271P240 (2dcase).

979-52 42 Ida770, 248P473; 121Kan 793, 250P286; 127Kan855, 275P171; 128Kan164, 276P807.

979-54 220Ala127, 124S294; 100CalA 266, 279P1062; 319Mo 744, 8SW(2d) 38; 321Mo 840, 12SW(2d)747; Mo 32 SW(2d)288; MoA 4SW(2d)478; MoA 9SW(2d)644 (refusal of mistrial); MoA 18SW(2d)564; MoA 25SW(2d)133 (general assignment of error sufficient); MoA 25SW(2d)499; 131 Okl 263, 268P 715. [a] **Assignment of error held sufficient** to direct attention of trial court to error complained of. TexCivA 274 SW991.

979-55 [a] **Failure to assign.-100CalA** 266, 279P1062.

979-55½-New. Absence of exception to prejudicial argument permits raising the issue of impropriety as a matter of law upon motion to set aside verdict. 99 Vt91, 130A758.

979-57 122Kan445, 252P215.

979-58 MoA 27SW(2d)448.

979-64 176Ark511, 3SW(2d)337; 167 Ga667, 146SE473(2dcase); 39GaA502, 147SE592 (assignment held insufficient); 210Ky803, 276SW838; Mo 285 SW428 (other errors held immaterial in absence of complaint of instruction directing verdict for defendant). Contra TexCommnA 284SW937. [a] (2) Where motion for new trial stated that directed verdict was contrary to law and without supporting evidence, but did not raise point that there were fact questions for jury, no question is presented for decision. 161Ga17, 129SE434; 165Ga168, 140SE287. (3) Ground complaining of direction of verdict should show wherein court erred in doing so. 35GaA200, 132 SE917. (4) Motion for new trial on ground that verdict was contrary to law and evidence and assignment of error to overruling of motion on all grounds thereof held not to raise point for review that direction of verdict was erroneous. 166Ga880, 144SE659.

979-64½-New. , where the point is not raised before the trial court. 50SD240, 209NW360.

980-65 30Ariz383, 247P135; 91Fla260, 107S406; 50ND123, 195NW300; 118 Oh 106, 160NE629; SD 223NW721(3dcase); WVa 153SE298. But see 34GaA58, 128 SE219. [c] **Court will only consider whether directed verdict is supported by evidence,** where there is no complaint of it either in bill of exceptions or in motion for new trial. 40GaA149, 148SE919 (2dcase).

980-66 36Wyo 94, 252P1034. Contra 37Wyo 509, 263P711.

980-69½-New. Issues of fact raised on motion to dismiss for lack of prosecution are not reviewable in the absence of a motion for a new trial. 82Colo 419, 260P1018.

980-70 216Ala275, 113S300; 172Ark 498, 289SW474; 172Ark575, 290SW51; 181Ark1146, 28SW(2d)67; 81Colo 501, 256P312; 84Colo 67, 268P538; 39GaA 111, 146SE518(2dcase); 41GaA538, 154 SE159; 244 IllA434; 87 IndA6, 159NE 767; 122Kan186, 250P1059; 220Ky151, 294SW1066; 223Ky564, 4SW(2d)367; 228Ky635, 15SW(2d)497; 237Mich182, 211NW749; 164Minn414, 205NW276; 173Minn458, 217NW495; 174Minn216, 218NW891; 174Minn434, 219NW552; 319Mo 890, 5SW(2d)15; Mo 7SW (2d)347; Mo 23SW(2d)45; Mo 23 SW(2d)1045; MoA 272SW998; MoA 286SW157; MoA 287SW661; MoA 289SW977; MoA 290SW621; 222 MoA1189, 1SW(2d)1028; MoA 25 SW(2d)499; 33Wyo 200, 238P287. [f] **Fundamental error,** available on appeal, though not brought forward in motion for new suit. TexCivA 275SW410. [g] **Objection not brought forward on motion for new trial** can be referred to in showing court was informed of particular defect claimed. TexCivA 275SW 410.

981-74 178Ark90, 10SW(2d)39; 162 Ga620, 134SE616; 166Ga877, 144SE652; 167Ga843, 146SE835; 170Ga1, 152SE65 (request to charge must be shown); 170 Ga123, 152SE222; 170Ga349, 153SE11; 170Ga495, 153SE37 (ground for new trial given in argumentative manner); 35GaA569, 134SE346 (must be alleged that requested instructions were pertinent and applicable to facts of case); 37GaA34, 138SE584 (record must show evidence supporting refused charge); 38 GaA431, 144SE218(2dcase); 38GaA473, 144SE802(2dcase); 39GaA70, 146SE518 (1stcase); 39GaA265, 147SE160; 41 GaA423, 153SE229(2dcase); 41GaA564, 153SE778(1stcase); 41GaA538, 154SE 159; 41GaA610, 154SE206(2dcase); MoA 289SW343. [a] (1) NJ 149A348. (4) Modification of requested instruction must be material in order to make it instruction of court so as to require complaint in motion for new trial. MoA 273SW172. [b] (1) Ga 155SE185. But see 317Mo 108, 296SW157; MoA 273SW 172. (3) 116Nebr208, 216NW659. [e] **Where contentions of complaining party are not shown in ground of motion to be supported by evidence,** such ground complaining of court's failure to charge such contentions is too defective to be considered. 36GaA28, 134SE822. [f] **Motion must allege** that party was injured by instructions. 162Ga620, 134 SE616. [g] **Pertinency** of requested instruction must be alleged. 38GaA337, 144SE11. [h] **Assignments held sufficient.-MoA** 296SW161.

982-78 But see 54ND867, 211NW595.

982-83 See also 35GaA476, 133SE642.

983-91 Mo 31SW(2d)1026. [c] But see MoA 31SW(2d)86.

983-99 MoA 18SW(2d)535.

984-10 40GaA646, 151SE54; 41GaA 492, 153SE379.

984-10½-New. A motion for a new trial is necessary to preserve the objection that the verdict was arrived at by chance. 43 Ida405, 252P675.

984-12 21AlaA593, 110S321; 84Colo 540, 272P10; 120Kan90, 242P124; Mo 281SW420; 51SD306, 213NW578. See also 89 IndA181, 164NE506.

984-14½-New. The objection that the findings are not supported by the pleadings may be raised in the appellate court, although no motion for a new trial was made. 73CalA504, 239P51.

984-15 119Kan409, 239P755; Mo 19 SW(2d)287.

984-16½-New. An objection that the findings were incomplete and that the court failed to find on material issues cannot be considered on appeal where the party objecting does not point out in what respect the findings were incomplete or what material issues had not been covered by the findings made. 75CalA614, 243P24.

984-17 29F(2d)712; 88 IndA580, 169 NE533 (errors of law are presented by exceptions to conclusions of law); 127 Kan148, 272P170.

984-17½-New. In some jurisdictions the question whether conclusions of law are sustained by the findings of fact cannot be raised on appeal from an order denying a motion for a new trial where not presented to the trial court in the motion. 147Minn172, 179NW737; Minn 210NW392.

984-18 MoA 29SW(2d)205 (1stcase).

984-19 170Minn58, 212NW13; 317Mo 1344, 300SW798; Mo 31SW(2d)1026 (form); 222MoA153, 2SW(2d)815; 124 Okl 240, 255P700; 120 Okl 155, 250P 904 (question as to whether judgment was void held not raised by motion); 37Wyo 509, 263P711. [f] TexCivA 273 SW885.

985-20 MoA 24SW(2d)165 (exception to overruling petition to satisfy judgment on attachment bond); MoA 26SW (2d)1008; 141 Okl 31, 285P844 (overruling of objection to conformation of sale). But see 144 Okl 243, 291P93.

985-21 199 Ind311, 157NE441.

985-28 89 IndA637, 167NE720 (2dcase) (complaint for new trial); 124 Okl 240, 255P700; 131 Okl 276, 268P726; 136 Okl 122, 276P721 (proceeding to vacate judgment). [a] **In proceeding for assessment of damages on injunction bond,** motion for new trial is necessary to bring up matters of exception for review. 218MoA468, 279SW249.

985-29 TexCivA 11SW(2d)567 (judgment rendered on conflicting answers of jury constitutes "fundamental error").

985-33 85 IndA5, 152NE294; 128Kan 120, 276P289.

985-33½-New. The objection that the judgment is not supported by the pleading may be raised in the appellate court although no motion for a new trial was made. 73CalA504, 239P51.

985-33¼-New. The right of appellee to have the judgment amended in his favor is not lost by failure to apply for a new trial in the lower court, where an answer to the appeal has been timely filed. 167La28, 118S597.

985-34 216Ala275, 113S300; 20AlaA 617, 104S559; 29Ariz218, 240P348; 178 Ark911, 12SW(2d)901 (general ground raises only question of support by substantial evidence); 180Ark1018, 24SW (2d)328; Cal 284P1111; 82Colo 316, 259P509; 167Ga667, 146SE473 (2dcase); 168Ga112, 147SE115 (directed verdict); 37GaA683, 141SE321; 44 Ida478, 258P 931; 253 IllA413; 121Kan622, 249P 675; 124Kan440, 260P638; 125Kan53, 262P1022; 226Ky290, 10SW(2d)1101; 232Mich25, 204NW701; 232Mich295, 205NW83; 237Mich76, 211NW75; 243 Mich309, 220NW710; 251Mich688, 232 NW353; 162Minn509, 202NW68; 49ND 838, 193NW658; 51ND909, 201NW509; 54ND867, 211NW595; 58ND812, 228 NW212; 118 OhSt106, 160NE629; 25 OhA252, 157NE901; RI 130A497; 50 RI153, 146A618, 65ALR375; TexCommnA 276SW667 (whether submitted on general charge or special issues); TexCivA 290SW307; TexCivA 23SW (2d)827; TexCivA 27SW(2d)354; 99Vt 446, 134A603; 141Wash367, 251P567. See also 245 IllA357. [e] (2) Motion for new trial not necessary where motion for directed verdict made, seasonably followed by motion non obstante on same grounds, one of which was sufficiency of evidence. 51ND508, 200NW 44. (3) Motion for directed verdict challenging sufficiency of evidence on any theory raises question of law reviewable on appeal from judgment provided appellant moved for new trial or judgment non obstante in response to trial judge's request in denying motion for directed verdict. 51ND533, 200NW 790. [f] **In Florida.-91Fla260,** 107S 406.

986-35 154Tenn507, 297SW735; TexCivA 286SW599. [a] **Objection to charge** is not prerequisite to complaint that finding was against preponderance of evidence. TexCivA 292SW284.

986-36 238Mich457, 213NW705; 285Pa 202, 131A731.

986-37 251 IllA564 (sufficient); 50SD

240, 209NW360; Vt 147A352. But see 166Ga818, 144SE381. [b] (3) Assignment that finding that employee did not receive injury by fall from ladder was contrary to preponderance of evidence held sufficient to show challenge to verdict. TexCivA 292SW284. [c] **Specifications held insufficient.**–322Mo 137, 14 SW(2d)652.

987–38 225Ky30, 7SW(2d)509; 80Mont 239, 260P119; 82Mont312, 267P207; 83Mont252, 272P245 (whether any substantial evidence); 85Mont31, 277P433 (2dcase). See also 37Wyo130, 259P 804.

987–39 53SD34, 219NW892.

987–41 84Colo 498, 271P630; 88 IndA 327, 163NE842; IndA 167NE535; 202 Iowa196, 209NW276; 121Kan622, 249 P675; 122Kan613, 253P404; 126Kan 310, 267P977; 127Kan627, 274P261; 128Kan357, 278P41; Kan 291P935; 25 OhA252, 157NE901; 34 OhA192, 170 NE592; 48Philippine857; 50Philippine 844; 49SD120, 206NW475; SD 231NW 943. See also 235Mich57, 209NW144. But see 41 Ida729, 241P1014; 80Mont 480, 261P273. [b] (1) 85 IndA5, 152 NE294 (holding no question presented for appeal). But see IndA 167NE535. [e] **Changes of procedure have been effected in some jurisdictions** by statutes whereby it is held that appellate court may determine whether there is any substantial evidence to support the findings or judgment. 80Mont374, 260P 734.

988–43 But see 41 Ida729, 241P1014.

988–44 81Mont543, 264P675; 49ND 980, 194NW388; 33 OhA358, 169NE584. [c] **In Oklahoma.**–139 Okl 102, 281P258.

988–44½–New. Under a provision of some court rule, no motion is necessary to review sufficiency of evidence to sustain the referee's findings adopted by the trial court. 50SD134, 208NW 779.

988–45 23AlaA67, 120S577(2dcase); 178Ark513, 11SW(2d)1; 206Cal 504, 274 P971; 91CalA129, 266P964; 83Colo 528, 266P1112; 44 Ida478, 258P931; 254 Ill A362; 86 IndA352, 156NE471; Iowa 224NW493; 128Kan189, 277P57; 128 Kan365, 278P23; 220Ky151, 294SW 1066; 226Ky415, 11SW(2d)105; 233 Mich157, 206NW498; MoA 19SW(2d) 505; 50ND91, 194NW917; 144 Okl 199, 291P102; TexCivA 1SW(2d)356. See also MoA 297SW719. But see MoA 264 SW449. [b] (1) 101Vt285, 143A394. (5) That verdict is excessive is too general a ground. 39GaA467, 147SE430. (6) Assignment held sufficient. 31 OhA488, 166NE391.

989–48 [a] 170Minn175, 213NW899, 51 ALR542.

989–52 247Mich398, 225NW592; 196 Wis305, 220NW179. See also 133SC23, 130SE552.

989–57 [b] **In Utah.**–269P103.

989–59 [b] (3) Question reserved for supreme court is not in proper form where it does not admit of categorical answer. 107Conn409, 140A639.

990–61½–New. Reserved questions which cannot be answered categorically are not in proper form. 104Conn192, 132A561.

992–76 [b] (2) 128Me539, 145A893(1st case).

993–77 [a] (9) Offer of proof may be reported in lieu of evidence. 263Mass 334, 160NE812. (10) Voluntary report of material facts by judge had same effect as report of findings of fact. 264 Mass112, 162NE225. [k] **Case is not properly reported** where no ruling is made, no verdict rendered, and facts as to liability are not agreed upon. 259 Mass142, 155NE870. [l] **Record held not to show** that case was not entered "as soon as may be" in conformity with statute. 254Mass471, 150NE223. [m] **Where superior court judge orders verdict for defendant after jury's verdict for plaintiff,** case is properly before supreme court on report. 263Mass349, 161NE272, 62ALR311. [n] **Report should state evidence** bearing on questions in issue though not in detail but summarily. Mass 168NE99. [o] **Where leave was reserved to enter verdict** for defendant on return of verdict for plaintiff, but before it was recorded, and motion was denied, case was properly before supreme judicial court. Mass 167NE663. [p] **Successful plaintiff has right to make suggestions** concerning form of trial judge's report to appellate division. Mass 172NE216. [q] **It is discretionary** with judge of superior court to report case tried by jury. Mass 173NE239.

993–77½–New. The statute requiring entry of report "as soon as may be" must be complied with. 254Mass137, 149NE705; 254Mass161, 149NE710.

993–77½–New. The statute requiring entry of report "forthwith" must be complied with. 254Mass159, 149NE707.

993–77¼–New. A "report" is an extension of the record showing what was in the judge's mind when the decision was made. 259Mass259, 156NE424.

993–77½–New. A supplemental report filed after argument in the supreme judicial court is received only to interpret the original report. 259Mass259, 156NE 424.

993–78 [a] (2) Appellant has no right to have evidence reported unless request is made before evidence is offered. 256Mass78, 152NE71. (3) Unless evidence is reported, only question before appellate court is whether conclusion reached is consistent with facts. 256 Mass78, 152NE71. [c] **Trial court's statement that justice required case be reported** and that it had been reported in reasonable time is taken as true on appeal. 253Mass340, 148NE807. [d] **Engagements and health of judge** are ground for reporting case. 253Mass340, 148NE807.

993–79 See also 256Mass537, 152NE 740. [a] (1) 263Mass145, 160NE447 (verdict, findings of facts, or agreement as to facts are essential). [i] **Delay in filing report in supreme judicial court** from Dec. 7, 1926 to Febr. 8, 1927 is not compliance with statutory requirement to enter report "as soon as may be." 259Mass36, 155NE659. [j] **Reviewing court is bound** by statement in report of trial judge that report contains all evidence material to questions reported. Mass 168NE99.

993–79½–New. Supreme judicial court is bound by recital of facts in report. 253Mass606, 149NE666.

994–80½–New. A rule of the district court requiring the party requesting the report to file a draft within five days from notice of finding has been held within power, reasonable, and peremptory. 256Mass535, 152NE881.

994–81 [a] **Probate court** may certify to circuit court only in case of will contest. 248Mich360, 227NW813 (power of circuit court).

995–85 174Minn66, 218NW234; 176 Minn529, 224NW149 (sole question for appellate court is whether demurrer is to be sustained and not sufficiency of particular reasons for or against demurrer).

995–86 319Mo 275, 3SW(2d)1025, 61 ALR1269 (except as to rulings on constitutional questions already made).

995–87 [b] (4) No question of law thereto is presented in absence of demurrer or exception to sufficiency thereof. NH 147A898(1stcase). [k] (3) 83 NH148, 140A163.

996–89 230AppDiv799, 244NYS603. [h] (1) 240NY684, 148NE757. (6) 240 NY684, 148NE757. (9) Appeal will be dismissed where answers to questions certified will not be decisive of appeal (240NY684, 148NE757; 243NY585, 154 NE615), (10) or questions cannot be answered (240NY684, 148NE757). (11) Where motion for amendment is denied upon ground of laches, court will not consider appeal, as question of laches could not be considered even if certified. 243NY585, 154NE615. (12) Appellate division could not certify question to review decision granting new trial, in view of right to appeal by stipulating for judgment absolute. 230AppDiv799, 244NYS603.

997–92½–New. In certifying case to supreme court under L. (1919) c 2 the trial court must exercise its discretion and determine that the question of law is doubtful and determinative of the issue. 50ND569, 197NW136. [a] **Questions which may not be certified.**–50ND 569, 197NW136.

997–92½–New. The statute authorizes the certification of questions only where the determination of a pending cause depends wholly or principally upon the construction of the law and such construction is of great moment in the cause. 50ND606, 197NW225.

997–92¼–New. The making of mere advisory opinions to the trial court is not contemplated by the law providing for certification of questions to the supreme court. 51ND198, 199NW482.

997–92½–New. Where neither party is dissatisfied but certification is made for a third person, the question will be dismissed. 51ND198, 199NW482.

997–92⅙–New. Under statutes of 1919 provision is made for certification of questions of law to the supreme court. 50ND569, 197NW136.

997–92⅐–New. Statute is applicable and intended to be invoked only when in pending cause at issue it becomes apparent that the determination of the cause will depend principally or wholly upon construction of law applicable thereto, and such construction or interpretation is in doubt and vital or of great moment in the cause. 50ND569, 197NW136.

997–92⅛–New. When answer to question turns upon issues or facts not clearly settled or ascertained, certification of the question is not within the statute. 52ND134, 202NW130.

997–92⅑–New. Question of law must be clearly stated and not involve questions of fact or those of mixed law and fact, involving inferences of fact from particular facts stated. 52ND134, 202NW 130.

997–93½–New. Where a conclusion reached by a court of appeals is in direct conflict with the decision of a court of appeals of another district, the case must be certified to the supreme court for final decision. 20 OhA375, 152NE 393.

998–95 48RI 92, 135A601.

998–99 [a] (1) RI 137A219. (4) Question must be doubtful, important, formally raised, and one requiring ruling below. RI 137A219. (5) Only questions of law should be certified, 47RI 420, 133A802.

999–2 [a] **Premature certification** where respondents named in bill and served with process have not filed demurrer plea or answer and no decree pro confesso has been entered as provided by statute. 47RI 101, 130A594. [b] **Suit for specific performance** is not certifiable though involving construction of will where will is not material or relevant to issues. RI 133A657. [c] **Bill for specific performance of agreement to purchase real estate** owned by complainant as trustee under will is not certifiable under statute. 47RI 382, 133 A648.

999–2½–New. On certification of constitutional questions the supreme court will not entertain motions to dismiss motions in a lower court. 50RI 288, 146A777, 66ALR1553.

999–4 118Tex255, 14SW(2d)53 (commission of appeals is bound by findings of fact recited in certificate). [a] (4) TexCommnA 12SW(2d)540. [b] (6) TexCivA 287SW1111.

1000–7½–New. [§ 934a] (23½). **West Virginia.** When a case is dismissed in the circuit court on motion to quash the summons and return, the supreme court of appeals has no jurisdiction to review by certificate of the trial court the questions arising on the motion. 103WVa 29, 136SE512.

1000–7⅓–New. A final order cannot be reviewed by certificate. 103WVa29, 136 SE512.

1000–7¼–New. Questions arising on challenge to a statement filed under statute in an insurance case may be certified. 104WVa605, 140SE681.

1000–7½–New. A court inferior to the circuit court may not certify questions in cases pending before it to the supreme court of appeals or to a circuit court. 108WVa425, 151SE173.

1000–10 [a] (4) **Application by com-**

missioners of irrigation district for order to change name of district involves no constitutional question on which questions can be reserved to supreme court. 35Wyo 73, 246P918. [b] **Necessity of specific objection.**–37Wyo 488, 263P621.

1002–28½–New. The fact that a trial court made a ruling on the disputed point will not bar an appellate court from reviewing. 27Hawaii335.

1003–45 225Ky100, 7SW(2d)849; 142 Wash594, 254P245.

1004–46 91Fla485, 107S636; 116Nebr 394, 217NW603; 136 Okl 72, 276P215 ("adverse party"). [i] (3) Receiver appointed in another suit not made party till after appeal is not necessary party. 34PortoRico 285.

1004–47 5F(2d)153. [n] (6) Sureties on bond on appeal to circuit court are not necessary parties to appeal from circuit court's judgment against appellant and sureties. 153Miss209, 119S795.

1005–49 33NM109, 263P764, 766 [quot CJ].

1005–55 29F(2d)712 (parties held not necessary); 160Ga392, 128SE177 (and must be made parties to bill of exceptions); 198 Ind79, 151NE385. [g] **Necessary party** is one directly affected by appeal. 98Fla1026, 125S237.

1006–56 29F(2d)712; 98Fla1026, 125S 237; Fla 129S501

1006–58 16F(2d)355; 38F(2d)396. [f] **In Mississippi.**–149Miss523, 115S707.

1007–60 16F(2d)355; 39F(2d)800; 293 Pa529, 143A197.

1007–62 29F(2d)712 (unless record shows severance).

1007–66 217Ala75, 114S680; 133 Okl 140, 271P852.

1007–68 7F(2d)576.

1003–70 149Va39, 140SE277.

1008–71 16F(2d)355; 16F(2d)838; 29 F(2d)712; 33F(2d)841 [citCJ]; 39 F(2d)800; 90Fla403, 105S819 (and it is not necessary to cite as appellees parties whose interests will not be affected); Fla 129S501; 321Mo 654, 12SW(2d)438.

1008–72 [b] (2) Defendant enjoined could appeal without joining other parties enjoined. 10F(2d)153 (where interest was separate). (3) Other instances. 256 IllA357.

1009–76 5F(2d)153; 15F(2d)236; 16 F(2d)355; 26F(2d)350; 39F(2d)800; Ala 129S2; Fla 129S501. [c] (2) Where parties permit case to go to judgment on appeal without objecting to fact that parties have not been summoned, validity of judgment cannot be questioned on such ground. 149Miss 523, 115S707. [d] **Where decree pro confesso** was taken against all defendants except appellants, it is not necessary that all appeal or be detached from appeal. 33F(2d)104.

1010–77 198 Ind79, 151NE385.

1010–78 16F(2d)886. See also 26F(2d) 350. [f] (1) 329 Ill 650, 161NE117. (2) 329 Ill 650, 161NE117. [h] (2) 15F(2d) 236.

1011–79 10F(2d)153.

1011–81 [m] **In Mississippi.**–149Miss 523, 115S707.

1012–82 91Fla39, 107S247; 335 Ill 299, 167NE106. [b] **Interveners** who did not appeal from final judgment cannot join in appeal duly perfected by plaintiffs. TexCivA 11SW(2d)837.

1012–82½–New. In an action in which verdict was returned in favor of defendants, a person who was made a defendant below but whose interests were adverse to verdict may be made a party plaintiff to bill of exceptions. 160Ga 638, 128SE807.

1012–85 5F(2d)153 (failure to join necessary party in appeal is not "m'stake" curable by amendment); 22F(2d)624; 26F(2d)350 (decree held joint); 38 F(2d)396; 199 Ind528, 151NE1; 21 OhA314, 153NE221. [b] Contra 25 OhA 546, 159NE484. [m] **In case of joint and several judgment against tort-feasors** having no right of contribution, joinder of all defendants in error proceedings is unnecessary. 21 OhA314, 153NE221. [n] **In malicious prosecution,** two defendants may prosecute error without joining other defendants. 21 OhA486, 153NE223.

1014–88 216Ala623, 114S223; 98Fla 1026, 125S237; Fla 129S501.

1014–90 16F(2d)271; 90Fla403, 105S 819 [citCJ]; 91Fla284, 107S918; 94Fla 236, 113S730, 732 [citCJ]; 98Fla1026, 125S237; 160Ga392, 128SE177 (and must be made parties to bill of exceptions); 168Ga101, 146SE761(2dcase); 196 Ind520, 148NE474; 86 IndA605, 156 NE167; 208 Iowa596, 226NW140, 144 [citCJ]; 217Ky398, 289SW233; 129 Okl 168, 264P140; 136 Okl 72, 276P215; 129 Or469, 278P588. See also 246 IllA 590. [b] **Only adverse parties** are necessary in an appeal. 116 Or525, 241P 988.

1015–91 165Ga591, 594, 141SE664 [cit CJ].

1015–92 But see 162Ga839, 134SE923.

1015–94 16F(2d)271.

1015–95 [a] (3) Where garnishee has paid money into court and has been discharged and only question remaining is who is to receive money, garnishee is not necessary party. 113 Okl 116, 239 P618.

1015–96 Fla 129S501. [d] **Generally** parties in default need not be made parties to appeal. Fla 129S501.

1016–98 212Ky13, 277SW250 (appeal from allowance of counsel fees); 217Ky 398, 289SW233.

1016–2 [e] **Mayor.**–24 OhA445, 157NE 905. [f] **Board of county commissioners is not necessary party** on appeal from judgment for defendants in action against individual members of board for negligence. 138 Okl 110, 280P456.

1016–5 94Fla236, 113S730, 733 [citCJ]; 98Fla1242, 125S381. [c] **Purchaser at sheriff's sale** is necessary party to appeal from confirmation of sale. 114 Okl 125, 244P413.

1017–9 See also 94Fla236, 113S730.

1017–11 16F(2d)227; 24F(2d)907; 91 Fla485, 17S636; 94Fla236, 113S730, 733 [quotCJ]; 170Ga694, 153SE771; 325 Ill500, 156NE758; 83 IndA415, 148 NE435; 84IndA144, 149NE647; 214Ky 389, 283SW397; 116 Or371, 239P817 (chairman of board of school directors is not necessary party to appeal from judgment against them in quo warranto proceedings).

1017–12 160Ga400, 128SE397. [b] 86 IndA653, 159NE469. [j] **Purchaser of receiver's certificates** in mortgage foreclosure before appeal from order allowing issuance of certificates need not be joined in appeal. 248NY562, 162NE525.

1018–13 16F(2d)227; 225Ky100, 7SW (2d)849.

1018–14 Ind 166NE285; 221Ky131, 297SW1114.

1018–15 [a] (2) Where suit is dismissed on demurrer of one defendant, other defendants who did not appear who are interested in sustaining judgment are necessary parties to bill of exceptions. 160Ga420, 128SE178.

1018–15½–New. or who is in default, having made no appearance, 116 Or371, 239P817.

1018–16 16F(2d)886.

1018–17 [a] (1) 214Ky389, 283SW397. (4) Principal on appeal bond is not necessary party to appeal by surety from order after judgment. 33NM109, 263P 764. [g] 38F(2d)396 (unnecessary party). [r] **In suit by administrator for sale of certain land,** where cross complaint of one defendant asked that lands set off to three others be sold first, such three owners must be deemed potential appellants so that if one of them appeals he need not name the others. 196 Ind520, 148NE474. [s] **Defendant in will contest** who admitted complaint was true and consented to have will set aside and for whom judgment was rendered against appellant, held not adverse parties, whom appellant would have to join as appellee on appeal of codefendant. 196 Ind341, 148NE409.

1018–17½–New. The purchaser at a master's sale to whom a deed was executed is a necessary party to proceedings to vacate an order of confirmation including appeal. 93Fla983, 113S117.

1019–21 216Ala81, 112S444, 445, 52 ALR536 [citCJ]. [d] (3) Corespondent of individual demurrant need not be made party to appeal from decree sustaining demurrer. 216Ala81, 112S444, 52ALR536. (4) Corespondent of cotenant, demurring to bill to quiet demurrant's claim of exclusive ownership, is not adversary party required to be made party to appeal from decree sustaining demurrer. 216Ala81, 112S444, 52ALR 536.

1020–22 144Va831, 131SE1 (must be taken by person alive).

1020–23 144Va831, 131SE1 (must be sued out by person alive).

1021–34 10LaA707, 122S128.

1021–36½–New. The filing of a petition in error by the one defendant in an attempt to appeal in the names of all defendants may be a nullity. 41 OklACR 20.

1021–38 147Va196, 136SE597. [c] **Writ of error** awarded against one dead when application was made is nullity. 147Va196, 136SE597.

1021–39 320Mo 916, 9SW(2d)912; Tex CivA 293SW859. [d] **In Illinois.**–255 IllA567.

1022–40 Can [1925] 3DomLR1009, [1925] 3WestWkly49. See also 4LaA 604.

1022–41½–New. A charge of the parties while the appeal is pending has no retrospective effect on the admission of evidence. 160La175, 106S735.

1022–41½–New. A proceeding resulting in adjudication of incompetency and appeal from an order denying vacation thereof will abate on the death of the alleged incompetent. 223AppDiv849, 228NYS544.

1022–42 219Ky721, 294SW154; Can [1925] 3DomLR1009, [1925] 3West Wkly49.

1022–46 320Mo 916, 9SW(2d)912.

1023–48 But see 203Cal457, 264P762.

1023–50 320Mo 916, 9SW(2d)912; 222 MoA187, 297SW100.

1023–51 See also 4LaA376. [a] **Where no legal representative has been appointed,** it is duty of party to request return of record to trial court for proper proceedings. 297Pa496, 147A519(1st case).

1023–52 38Wyo 358, 267P91 [citCJ].

1023–53 10LaA707, 122S128; 134 Okl 139, 272P447; 136 Okl 112, 277P643 (1stcase); 143 Okl 27, 287P72; 143 Okl 28, 287P73. See also 214Ala309, 107S 812.

1024–57 27Hawaii 755.

1024–58 See also 220MoA812, 278SW 818.

1025–65½–New. The successor of a dissolved corporation cannot be substituted as appellant. 273US257, 47SCt 391, 71Led634.

1025–66 214AppDiv156, 211NYS849 (on entry of final judgment executor may appeal as of right). See also Can [1925] 3DomLR1009, [1925] 3West Wkly49. [l] **Order reviving case** in name of special administration, where appellant died pending appeal, held proper. 172Ark1135, 291SW999.

1026–68 214AppDiv156, 211NYS849 (all legatees named in will where action is one in partition).

1026–71 22AlaA44, 111S896.

1027–75 43 Ida675, 256P529.

1027–79 169La743, 125S875 (publication and notice by registered mail to representative's address if known); Can [1925] 3DomLR1009, [1925] 3West Wkly49.

1027–80 149Md689, 132A265.

1027–82 See also 321Mo 613, 12SW(2d) 481.

1029–90 219Ky721, 294SW154; 321 Mo 613, 12SW(2d)481 (revivor timely); MoA 12SW(2d)768; 143 Okl 84, 291P 25. See also MoA 256SW117.

1029–93 16F(2d)838; 167Ga54, 145SE 45; 247Mich372, 225NW573; 196NC58, 144SE535. See also Can [1928] 1DomLR343. [c] See also 33NM109, 263P 764.

1030–95 22F(2d)624; 98Fla1026, 125 S237; 161La288, 108S485.

1030–96½–New. In order to be necessary parties to a bill of exceptions, intervenors whose interventions were allowed by orders of court passed after entry of previous judgment excepted to should have become parties of record by filing their interventions before the bill of exceptions was certified by the judge. 165Ga591, 141SE664.

1030–96½–New. Where the original appeal was taken by plaintiff only from

a judgment dismissing her petition, another party could not join an appeal from a subsequent judgment not entered against plaintiff. 227Ky67, 11 SW(2d)978.

1030-96¼-New. Right of one intervening first on appeal to raise certain issues. 36F(2d)747.

1030-98 But see 227Ky114, 128SW(2d) 298.

1030-3 [b] **Where, pending appeal of boundary dispute,** party sells his interest, deed being made subject to decision of case, such party remains party in interest. 212Ky92, 278SW602.

1030-3½-New. A defendant who transferred his interest to plaintiff after a judgment was rendered in favor of defendants is not a necessary party to an appeal by plaintiff. 308Mo 309, 272SW 691.

1030-3¾-New. Defendant, having been enjoined from operating his motor vehicles to carry those with whom he had contracted, was entitled to have his rights determined on appeal, although another firm had acquired complainant's rights in its certificate of convenience and necessity after decree in lower court. 50RI 37, 144A891.

1031-14 181Ark694, 27SW(2d)93.

1032-15 181Ark694, 27SW(2d)93.

1032-22 5F(2d)952.

1032-29½-New. A firm which acquired all rights and interest in complainant's certificate of convenience and necessity, after a decree in the lower court, can not be substituted as complainant on appeal. 50RI 37, 144A891.

1032-30 164Ga117, 137SE776; 198 Ind 79, 151NE385 (repeal of statutes). See also 16F(2d)355. [i] **Under statute,** purchaser at sale under foreclosure became party of record in subsequent proceedings to set aside judgment and is therefore party to appeal therein. 29 F(2d)712. [j] **Parties on appeal should not be designated "appellant, plaintiff in error,"** and "appellee, defendant in error," since person perfecting appeal is appellant and opponent is appellee, and party desiring writ of error is plaintiff in error and opponent defendant in error. TexCivA 19SW(2d)171.

1032-30½-New. Parties should be designated appellant and respondent, and plaintiff's name should come first in the title of the case on appeal, in a civil appeal under the Practice Act. 103NJL 483, 135A883.

1033-32 90Fla192, 105S404.

1033-32½-New. A prayer of appeal for defendants generally without limiting it to an individual defendant must be deemed as taken for all. 176Ark658, 3 SW(2d)984.

1033-32¾-New. Appeal reciting that appellant appeals from final decree sufficiently implies claim that appellant is party aggrieved. Mass 172NE87.

1033-33 85Colo 218, 274P935.

1034-38 200 Ind129, 154NE490.

1034-40 80 IndA606, 148NE674. [d] **Plaintiff cannot have judgment dismissed** against two individuals, one being member of partnership, because original action was against partnership. 21 OhA486, 153NE223. [e] **To determine necessary parties,** court will look to record and regard substance rather than form. Ind 171NE65.

1034-43 43F(2d)973; Ind 170NE857. See also 90Fla112, 105S123.

1034-47 85Colo 218, 274P935; 210Ky 654, 276SW563; 102NJL164, 130A627 (under Practice Act action, of court may be reviewed after judgment).

1035-49 TexCivA 289SW721. [c] **In New Jersey.**-102NJL164, 130A627.

1035-51 91Fla39, 107S247; 160Ga697, 128SE801.

1035-52 5F(2d)153; 90Fla343, 106S 408; 91Fla284, 107S918; 94Fla954, 114 S781; 96Fla168, 117S791; 98Fla230, 123S737; 98Fla1026, 125S237; 98Fla 1242, 125S381; Fla 129S742(3dcase); 160Ga392, 128SE177; 160Ga420, 128SE 178; 166Ga726, 144SE211; 168Ga101, 146SE761(2dcase); 39GaA624, 147SE 798(1stcase); 89 IndA285, 165NE524; 86 IndA605, 156NE167; 86 IndA290, 157NE101; IndA 170NE616; 232Ky 485, 23SW(2d)951; 13LaA566, 128S 201; NJ 151A476; 21 OhA314, 153NE 221; 136 Okl 72, 276P215; 129 Or469, 278P588; TexCivA 289SW721. But see 41GaA671, 154SE456(2dcase). [j] **In Arkansas.**-168Ark155, 269SW354. [k] 134 Okl 111, 272P443. [l] **In Florida.**-98Fla1026, 125S237. [m] **Appeal only against intervener,** without plaintiff who obtained judgment being made party, will be dismissed. 230Ky146, 18 SW(2d)1015.

1036-53 165Ga403, 140SE878.

1036-54½-New. But failure to serve heirs or legal representatives of deceased codefendant is not ground for dismissing cause for defect in necessary parties. TexCivA 277SW743 (death before plaintiff sued writ of error).

1036-54¾-New. An appeal in the name of a deceased person being fatally defective, it will be dismissed on motion. 144Va831, 131SE1 (defect not cured by general appearance of representative).

1036-55 29 OhA489, 163NE915.

1036-58 92Fla237, 109S421; 164Ga 790, 139SE566; MoA 26SW(2d)52; 6 SaskL366, 13DomLR182, 24WestLR903, 4WestWkly1219.

1037-59 [b] **Appeal in name of deceased person is fatally defective** and cannot be amended. 144Va831, 131SE1.

1037-61½-New. Exceptions by party cannot be amended to make as plaintiff in error real party in interest not shown dissatisfied. GaA 155SE340(1st case).

1037-62 212Ky13, 277SW250.

1037-63 26F(2d)350.

1038-67 169Ga199, 149SE788.

1038-70 167Ga214, 144SE735 (where parties acknowledged service to bill of exceptions).

1038-71 85Colo 218, 274P935.

1039-2 69CalA186, 230P967; 71CalA 105, 234P857; 98Fla1076, 125S235(2d case) (rights of adversary party); 198 Ind127, 149NE350; 234Mich224, 207NW 842; 239Mich116, 214NW161; 239Mich 447, 214NW409; 148Miss478, 114S336; Mo 16SW(2d)91; 73Mont147, 237P528; 81Mont459, 264P127; 116 Or411, 241P 333; 116 Or525, 241P988; 122 Or179, 257P701; 122 Or306, 258P562; 131 Or 235, 282P1082; Or 291P369; TexCivA 275SW271; TexCivA 281SW641; 104 WVa328, 140SE50.

1039-4 334 Ill 510, 166NE60; 85 IndA 407, 152NE857.

1039-7½-New. Statutes repealed before the action was commenced are inapplicable. 34NM107, 277P967.

1039-8 192NC52, 133SE172. See also 94Fla20, 113S663.

1039-10 222Ky652, 1SW(2d)1059.

1040-11 218MoA464, 278SW1045; 32 PortoRico 780 (thirty days); 50SD481, 210NW675. [c] (4) In Tennessee, Act (1871) c 59 is repealed by Acts (1885) c 65. 155Tenn506, 296SW14.

1040-12 37F(2d)511; 214Ala118, 107S 83; 168Ark122, 269SW55; 176Ark31, 2 SW(2d)70; 101CalA66, 282P19(2dcase); 123Kan142, 254P334; 160La371, 107S 143; 258Mass190, 154NE856; Mass 169 NE433(1stcase); 239Mich116, 214NW 161; 79Mont530, 257P465; 117 Okl 284, 246P858; 125 Okl 184, 256P520; 122 Or 179, 257P701; 90PaSuper66; 93PaSuper457; TexCivA 29SW(2d)412; Vt 150 A459; 4 OntWN828, 24 OntWR113, 9 DomLR274. See also 94Fla86, 113S745. [a] **Particular appeals held timely.**-79 Mont530, 257P465.

1040-12½-New. An appeal is not filed "forthwith" as provided by statute when a period of six months elapses between accrual of right and entry of appeal. 258Mass190, 154NE856.

1042-17½-New. Premature appeals. A motion for a new trial was premature where no judgment had been entered, and hence no appeal could be taken from an order overruling the motion. 32Ariz 99, 255P995.

1042-18 15F(2d)526; 20 OhA141, 153 NE160; 295Pa390, 145A430 (statute held not to deny due process). [b] **Statutes not construed modified by subsequent act** unless intent clearly appears, or they are so inconsistent as to be in conflict. 50Nev181, 254P1080.

1042-18½-New. Statutes limiting the time for taking an appeal and writ of error are mandatory and jurisdictional. 15F(2d)526.

1042-19 146Miss157, 110S368; 49Nev 139, 241P217 (statute held not applicable to judgments rendered before its enactment).

1042-20 201 Iowa533, 207NW533; 201 Iowa657, 208NW74; 146Miss157, 110S 368; 145Miss887, 111S444; 15QuePr 326.

1043-23 71CalA155, 234P910 (three years, in view of code limitations of sixty days).

1043-25 15F(2d)526; 201 Iowa140, 206 NW821. [a] 169Minn131, 210NW628; 32PortoRico 780; 50SD568, 210NW992; TexCivA 25SW(2d)878; 68Utah398, 250 P982.

1043-26 Ala 128S599(1stcase); 121Kan 172, 246P520; 130Kan333, 286P219; 169Minn131, 210NW628; Mont 287P941; 34NM518, 284P1020 (writ of error to order in supplementary proceedings); 143 Okl 258, 288P605; 50SD568, 210NW992; Utah 290P950.

1043-27 32PortoRico 416. [a] **Party electing ordinary action** is estopped to claim benefit of unlawful detainer act provisions shortening ordinary term for appeal under general statute. 32Porto Rico 416.

1043-28 252 IllA457; 122Kan215, 252 P459; 129Kan759, 284P407; 299Pa196, 149A470; 97PaSuper152.

1043-29 214Ala293, 107S810; 214Ala 418, 108S253; 71CalA155, 234P910; 137 Okl 221, 279P306(1stcase).

1043-30 101CalA659, 282P23; 97Pa Super317.

1043-31 NM 269P329.

1044-32 Iowa 202NW778 (appeal from order denying new trial, though time for appeal from judgment has elapsed); 207 Iowa167, 216NW62, 62LRA31; 50 Nev377, 262P935. [b] (1) 50SD240, 209 NW360; SD 224NW957. (3) In Iowa an appeal taken more than six months after entry of judgment, but within that time after overruling motion for new trial, preserves on appeal matters properly presented in motion and not inhering in judgment. 201 Iowa748, 206 NW609.

1044-35 33NM464, 269P329.

1044-36 29F(2d)481; 167La430, 119S 416; 129 Okl 298, 264P884; Okl 291P 553; 287Pa291, 135A131.

1044-37 Ida 292P242; 123 Okl 43, 251 P985; 296Pa228, 145A817(2dcase). [b] **Where preliminary injunction is dismissed,** statutory ten-day period does not apply to appeal from final judgment, but general law as to appeals governs. 166La1059, 118S134.

1044-38 139 Okl 198, 281P792(1stcase); Okl 292P335(1stcase). [b] **In Iowa.**-232 NW835.

1044-42 32PortoRico 780 (general statute held to apply under state of facts).

1045-44 [a] (2) Under some statutes order of dismissal is final judgment within code provision requiring appeals from such judgments to be taken within six months. 28Ariz598, 238P399.

1045-44½-New. , and between judgment for plaintiff and judgment against plaintiff on counterclaim. 68Utah398, 250P982 (in unlawful detainer suit).

1045-45 295Pa390, 145A430.

1046-46 [b] (2) Where defendant did not stand on demurrer to petition but pleaded further, order overruling demurrer is reviewable on appeal from final judgment taken within six months after overruling of motion for new trial where such motion was necessary although more than six months have elapsed since order overruling demurrer. 123 Okl 163, 252P418.

1046-47 139 Ill 392, 28NE738; 120Kan 3, 242P472 (ruling striking from petition matter involving merits of action); 19Md234; 2DougMich299; 2Nev16; 137NY409, 33NE489; 14NYSuper569; 3 PaigeNY470; 4PaigeNY561; 7PaigeNY 87; 33SC522, 12SE367; 41WVa339, 23 SE571, 56AmSR843; 73WVa81, 79SE 1091. See also 3Gill&JMd133; 17SC 143. Contra 93Ala245, 98S719; 96Ala227, 108S848; 53Kan181, 36P60; 1KanA492, 41P71; 27 Okl 754, 116P428, 35LRANS 1174.

1046-48 168Ala469, 53S228; 4Ariz158,

36P499; 201Pa439, 50A928; 1Rob(40 Va)20.

1046–53 35Wyo 1, 244P1006 [citCJ].

1046–56½–New. Where defendant could have brought alleged errors before the court at the time of the first appeal, he cannot be heard on a writ of error. 224 IllAl.

1047–58 239Mich116, 214NW161; 245 Mich292, 222NW730; 112 Okl 30, 239P 456; 127 Okl 9, 251P611; 144 Okl 150, 289P721; 143Wash614, 255P915.

1047–59 234Mich224, 207NW842; 116 OhSt185, 155NE797; 127 Okl 9, 251P 611. [a] 234Mich224, 207NW842.

1047–60 239Mich116, 214NW161; 47 NS49, 11DomLR224, 12EastLR572. [b] **In Washington.**–143Wash614, 255P915.

1047–65 See also 103WVa233, 136SE 854.

1047–67 36F(2d)5.

1048–75 1LaA25.

1048–76 1LaA25.

1049–88 16F(2d)27; 43F(2d)593; 181 Ark288, 25SW(2d)425; Ark 31SW(2d) 953 (decree refusing to vacate former decree held not final); 12LaA21, 124S 853; Md 150A732; Mont 287P941 (time not extended by filing of formal order); 294Pa493, 144A427; 146Va827, 132SE 685. [c] (3) Judgment in action for strict foreclosure of land contract, fixing time for compliance with its terms, and providing that it shall become final without further order on failure to comply, is final judgment. 50SD474, 210 NW668.

1049–89 [b] **Where only judgment in case is on demurrer,** time for appeal is counted therefrom. Md 150A732.

1049–90 131 Okl 240, 268P309; Va 149 SE615.

1050–92 146Va256, 135SE681. But see 119 OhSt474, 164NE515.

1050–96½–New. Where an intervention filed after the making of a report of sale in a foreclosure suit prayed that intervention be treated as an objection to the confirmation, the time to appeal runs from the order of confirmation. 174Ark19, 294SW362.

1050–98 Minn 233NW10.

1050–99 49SD167, 206NW688 (even though modified judgment is denominated nunc pro tunc). [a] (2) Under Massachusetts statute, where judge after filing of motion to dismiss appeal made additional findings, appellant is allowed to present appeal "as soon as may be." Mass 166NE725.

1050–1½–New. Denial of motion for rehearing and modification of decree does not operate to extend the time of appeal from the first decree. 247Mich272, 225 NW493(1stcase).

1051–2 50SD122, 208NW581.

1051–9 19F(2d)915; 204Cal 466, 268P 1055 (motion for new trial); CalA 286P 447 (notice of appeal held too late where notice of intention to move for new trial was not served in time); 205 Iowa1103, 216NW109 (pleading designated as "motion to reconsider order" may serve purpose of motion for new trial); 123 Okl 163, 252P418; 128 Okl 48, 261P150; TexCivA 48SW(2d)222. [d] (1) 112 Okl 7, 242P763; 123 Okl 163, 252P418; 122 Okl 192, 253P105; 122 Okl 261, 254P100; 125 Okl 184, 256P 520; 130 Okl 241, 266P1106; 140 Okl 121, 282P634; 141 Okl 205, 284P646; 142 Okl 175, 286P339; 40 OklACR446 [reh pending]. (2) 122 Okl 192, 253P 105; 133 Okl 90, 271P245; 140 Okl 152, 282P311. (3) 123 Okl 163, 252P418; 122 Okl 261, 254P100; 144 Okl 243, 291P93. (4) Motion for new trial of contested issue of fact not arising on pleadings but upon motion is unnecessary and does not extend time for perfecting appeal from order. 112 Okl 7, 242P763; 125 Okl 184, 256P520. (5) Where motion and order denying new trial are no part of record of trial court which can be brought up on appeal by transcript, they do not extend time. 126 Okl 90, 258 P740. (6) Where agreed statement of facts on which case was tried embraced only certain facts and left certain ultimate facts to be found by court, time for serving case-made runs from date of order overruling motion for new trial. 133 Okl 90, 271P245. [e] 125 Okl 184, 256P520. [f] **Where motion for new trial is filed within statutory period but not disposed of for several days thereafter, when amended motion is filed, appeal perfected within statutory period after disposal of amended petition is timely.** 115Tex515, 284SW935. [g] **Where motion for new trial is premature,** it is ineffectual to extend time for appeal. 207Cal 112, 276P992 (motion filed before findings and conclusion).

1051–10 270US151, 46SCt241, 70Led 518; 13F(2d)605; 13F(2d)607; 19F (2d)915; 20F(2d)733; 36F(2d)5; 38 F(2d)431; 41F(2d)51; 213Ala292, 104S 641; 215Ala246, 110S402; 22AlaA636, 119S241; 199Cal 249, 248P905; 199Cal 532, 250P400; 84CalA736, 258P627; 87 CalA590, 262P337; 99CalA347, 278P 498; CalA 284P672; 92Fla931, 110S 873; 39GaA288, 146SE646; 84 IndA176, 149NE108, 150NE65; 207 Iowa167, 216 NW62, 62LRA31; 13LaA253, 126S534 (2dcase); Mo 279SW415; 118Nebr72, 223NW461; 118Nebr231, 224NW21; 124 Okl 24, 253P977; 40 OklACR446 [reh pending]; 116 Or94, 240P551; 66Utah 290, 241P1055; Utah 266P1050; 34Wyo 153, 242P326 (proceedings for removal of county officer). See also Cal 269P925. But see 218Ala31, 117S467; IndA 162 NE63; Iowa 228NW582. [a] (1) 48 Ida 221, 281P1. [d] (1) 137 Okl 151, 278P 391. [e] **Application for writ of error** filed more than thirty days after court of civil appeals overruled first motion for rehearing held too late irrespective of second motion. TexCommnA 300SW23. [f] **In absence of new ruling** or different disposition by court of civil appeals, time for filing writ of error runs from overruling of original motion for rehearing. TexCommnA 300SW23. [g] **Limitation tolled by petition for rehearing not filed in prescribed time** for taking appeal where petitioner acted in good faith and reasonably. 41F(2d)51.

1053–11 179Ark337, 15SW(2d)978; Cal 269P925 (appeal held timely); 82CalA 306, 255P532; 97CalA628, 276P122 (appellate jurisdiction is not defeated by failure to serve notice of new trial on party left unaffected by denial of motion); 79Mont530, 257P465; 48Nev235, 228P1095; Okl 291P965(2dcase); 118 Tex195, 13SW(2d)666(1stcase); TexCivA 283SW572; TexCivA 286SW1008; TexCivA 287SW1103; TexCivA 29SW (2d)412. But see 206Cal 130, 273P550; 206Cal 769, 276P573. [i] (4) Serving and filing of notice of intention to move for new trial does not waive notice of entry of judgment, and on failure to serve notice of entry of judgment power of court to pass on motion for new trial does not expire in two months after serving and filing notice of intention to move. 197Cal 288, 240P764. (5) Service upon one of two plaintiffs of notice of intention to move for new trial is sufficient initiation of new trial proceeding. 199Cal 212, 248P676. [j] **Appeal from order denying motion for new trial** and appeal from judgment are entirely separable and independent matters. 49SD 167, 206NW688. [k] **Motion by bill of review under statute to set aside judgment.**–TexCivA 283SW572.

1053–12 50Nev181, 254P1080.

1054–13 135 Okl 35, 273P898(2dcase); 141 Okl 31, 285P844.

1054–14½–New. An order granting a new trial until affirmed on appeal or until the time to appeal has expired does not vacate the judgment so as to prevent an appeal therefrom. 202Cal 468, 261P706.

1054–14¾–New. An appeal from judgment more than three months after entry but within one month after going down of remittitur on reversal of an order granting a new trial is not timely under statute. 202Cal 468, 261P706.

1054–15 [a] **Where order purporting to grant new trial is void,** time to appeal from judgment began at expiration of two months from rendition of verdict and is not extended to date of going down of remittitur on appeal reversing such order. 202Cal 468, 261P706.

1054–18½–New. In some jurisdictions writ of error may be prosecuted directly from judgment entered and time is not extended by bill of review. TexCivA 29SW(2d)412.

1054–19 24F(2d)172 (appeal from modified decree); 27F(2d)852 [certiorari den 278US651, 49SCt176, 73Led 562(4thcase)].

1054–20 Ala 128S599(1stcase); 204Cal 172, 267P313; 41 Ida718, 241P1020; 79 Mont530, 257P465; 23 OhA23, 154NE 346; 135 Okl 35, 273P898(2dcase); 86 PaSuper501; 94PaSuper246. [c] **Proceeding to set aside judgment resulting in order later reversed** does not extend time to appeal. 216AppDiv770, 215NYS 88.

1054–21 115 Or580, 239P202.

1054–23½–New. Where a motion to vacate an order is automatically overruled by failure of the court to rule on the motion within the prescribed time after rendition of the order, appeal from the order overruling the motion more than the statutory time after the automatic overruling must be dismissed. 33Ariz 283, 264P101.

1054–23¾–New. Motion to vacate judgment not filed within time allowed for motion for new trial cannot be treated as motion for new trial. Mo 24SW(2d) 990.

1055–28 118 Or416, 247P143.

1055–29½–New. The vacation and reëntry of a judgment does not extend the time to appeal. 118 Or416, 247P143.

1055–29¾–New. An order vacating a judgment without reciting any mistake, casualty, or misfortune justifying such action, and the entry of another judgment to the same effect, both based on a stipulation of attorneys for the parties, cannot restore the right to appeal lost before entry of the first order by failure to serve and file notice of appeal. 37Wyo 396, 263P613.

1055–29¼–New. Such stipulation cannot enhance the power of the court to restore the right to appeal after it has been lost by lapse of time. 37Wyo 396, 263P613.

1055–33½–New. The rule to show cause why exceptions should not be filed nunc pro tunc will not extend the time to appeal. 94PaSuper246.

1055–34 214Ala489, 108S379, 381 [cit CJ]; 70CalA732, 234P409; 92Fla931, 110S873; 39GaA788, 149SE56; 217Ky 198, 289SW307; 49Nev139, 241P217; 112 Okl 30, 239P456; 122 Okl 192, 253P 105; 125 Okl 184, 256P520; 126 Okl 90, 258P740; 128 Okl 281, 262P674; 130 Okl 241, 266P1106; 131 Okl 188, 268P 235 (from date of judgment or order); 137 Okl 151, 278P391; 140 Okl 121, 282 P634; Okl 291P965(2dcase); 50SD568, 210NW992; TexCivA 281SW575 (writ of error). [c] (4) 116 Or532, 241P1010. [d] **Date of announcement in open court,** rather than date of signing of formal findings and judgment, is date of final judgment under statutes in some jurisdictions. 50Nev181, 254P1080.

1056–35 113 Okl 485, 241P485 (order dissolving garnishment).

1056–36 170Ark839, 281SW384 (decree in vacation); 199Cal 249, 248P905; 199 Cal 532, 250P400; 94CalA227, 270P 1002; CalA 287P146 (where no motion for new trial); 92Fla123, 109S803 (Rev. Gen. St. [1920] § 3168); 4HawaiiFed 245; 154Md249, 140A208; 115Nebr385, 213NW342; Nebr 229NW894; 31NM 430, 246P899; Or 287P222; SD 231 NW527; Wash 287P900; 189Wis461, 205NW388; Sask [1929] 2DomLR265 (order not made or pronounced in open court). [a] **Entry of judgment upon appealable order** is not authorized and does not extend time to appeal. 176Minn 470, 223NW775. [b] **Entry of judgment on order dismissing appeal** is essential to limit time within which it may be reviewed, and to end litigation. 214App Div292, 212NYS381. [c] **Recording by clerk of chancellor's decree in minutes** constitutes entry. 98Fla186, 123S699 (2dcase).

1057–37 [b] 168La736, 123S308. See also Or 287P222. [j] (1) But see 100 CalA526, 280P538. [k] **Announcement of decision entered in minutes** constitutes rendition of judgment fixing time to appeal though no formal judgment is signed at time. 49Nev139, 241P217. [l] **Order discharging garnishment.**–126 Okl 138, 258P879. [m] **Order allowing motion for judgment n. o. v.**–287Pa202, 134A625. [n] **"Entered of record" and**

"spread upon the journal" mean one and the same thing, to wit, "entered on the journal." 115Nebr385, 213NW342. [e] **Where order is entered granting motion for summary judgment,** and judgment is entered thereon after time in which to appeal from such order has expired without an appeal therefrom, defendant has right to appeal from such judgment. 248NY654, 162NE563.

1057–38 208Cal 590, 283P810 (clerk's attempt to cancel first entry of judgment is without effect).

1058–42 208Cal 590, 283P810; 130Misc 200, 224NYS179.

1058–44 117 OhSt323, 158NE650; 189 Wis461, 205NW388 (entry by clerk upon judgment and order book).

1058–45 120 OhSt445, 166NE376; Tex CivA 295SW214.

1059–48 264Mass453, 162NE894 (decree of probate court). [a] (1) 166La 774, 117S826; 169La983, 126S500 (if signed three days after rendition).

1059–50 35PortoRico 201.

1059–55½–New. In California, when findings are required, the judgment is not rendered for purposes of appeal until they have been signed and filed. 199 Cal 532, 250P400.

1059–55½–New. Failure to file the findings will not postpone the running of the period for appeal where the judgment was decided on a question of law. 98CalA267, 276P1119.

1059–56 16F(2d)27.

1059–57 98CalA267, 276P1119(2dcase); 199Cal 249, 248P905; 98CalA267, 276P 1119; CalA 287P146.

1060–58 201Cal190, 255P798; 208Cal 27, 280P112; 169Minn131, 210NW628; 127Misc183, 215NYS437; 49ND777, 193 NW481; 50ND558, 197NW146; 55ND 42, 212NW439; 32PortoRico 767 [cit CJ]; 131SC284, 127SE18; 68Utah517, 251P26, 28 [quotCJ]; 200Wis318, 228 NW492 (service of order, without proof thereof, does not limit time to appeal). But see 101CalA666, 282P19(2dcase). [f] (4) Beginning of limitation on right to appeal strictly construed in favor of appellant. 32PortoRico 767. [g] **Plaintiff's service on defendant** does not limit time as to successful codefendants who filed cross answer, but who did not serve plaintiff with copy of judgment. 127Misc183, 215NYS437.

1060–59 68Utah517, 251P26, 28 [quot CJ]. [b] Contra ND 230NW292.

1060–59½–New. When a decree is entered in vacation, an appeal may be begun without waiting for service of notice. 247Mich161, 225NW514(1stcase).

1060–60 201Cal 152, 255P791. [c] (1) 68Utah517, 251P26. [g] (5) Unsigned copy of notice given by clerk filed with papers in case on appeal is sufficient to start time running. 35PortoRico 440. [h] **Filing of notice.**–33PortoRico 733.

1061–63 201Cal 152, 255P791.

1061–64 131SC284, 127SE18 (notice need not be given by all adverse parties).

1062–78 52SD168, 216NW949 (by extension of time to perfect appeal).

1062–79 247Mich161, 225NW514(1st case).

1063–87 144Va831, 131SE1 [quotCJ].

1063–92 [f] 129 Okl 118, 263P645.

1064–99 92Fla123, 109S803; MoA 12 SW(2d)768. [a] **General statute staying limitation on time to commence proceedings** on death of party does not apply to appeals or petitions for writs of error. 144Va831, 131SE1.

1064–3 200 Ind608, 165NE545; 264 Mass475, 163NE162; 127 Or16, 256P 1043; Vt 150A459. [e] **Giving notice of appeal** held insufficient under federal statute. 15F(2d)526. [f] **District court should determine,** when evidence is conflicting, whether appeal was seasonably allowed. 38F(2d)215.

1065–9 48Nev449, 232P1083, 236P678, 239P1000.

1065–10 213Ala551, 106S136; 32 OhA 38, 167NE375. [c] **In Mississippi.**–152 Miss437, 119S170.

1065–11 32F(2d)736.

1065–17 Ala 118S587. [a] **Appeal perfected when bond was filed,** though not approved till after expiration of time for taking appeal. Ala 128S389(1stcase).

1065–19 32 OhA38, 167NE375 (proceeding commences on date of summons).

1066–26½–New. In Porto Rico inclusion of case in calendar is one of necessary steps by which appeal is perfected. 35PortoRico 339 (appeal from municipal to district court).

1066–27 25F(2d)288; 32F(2d)750 (defect in jurisdiction cannot be waived by filing briefs on merits); 36F(2d)5; 168 Ark122, 269SW55; 181Ark788, 27SW (2d)1024; 203Cal 306, 265P246; 208Cal 590, 283P810; 199Cal 532, 250P400; 101CalA666, 282P19(2dcase); 84Colo 423, 271P178; 240Mich413, 215NW343; Nebr 227NW446(1stcase); 116 OhSt185, 155NE797; 114 Okl 228, 245P987; 121 Okl 266, 249P927; 122 Okl 192, 253P 105; 126 Okl 90, 258P740; 133 Okl 58, 270P1111; 135 Okl 230, 275P633; 139 Okl 198, 281P792(1stcase); 144 Okl 101, 289P732; Okl 292P569; TexCivA 281 SW575; TexCivA 282SW263; 200Wis 61, 227NW272.

1067–28 9F(2d)64; 19F(2d)503; 19 F(2d)915; 36F(2d)5; 38F(2d)396; 214 Ala418, 108S253; 215Ala246, 110S402; 217Ala192, 115S155; Ala 128S219; 168 Ark122, 269SW55; 194Cal 139, 228P8; 199Cal 249, 248P905; 86CalA763, 261P 499; 90CalA191, 265P859; 100CalA107, 279P843; CalA 285P856(1stcase); 92 Fla933, 110S874; 97Fla384, 120S851; 98Fla197, 123S666; 98Fla954, 124S466; 129Kan350, 282P593(1stcase); 217Ky 198, 289SW307; 221Ky413, 298SW 1090; 225Ky679, 98W(2d)1003; 225 Ky681, 98W(2d)1004(1stcase); 239 Mich116, 214NW161; 240Mich413, 215 NW343; 249Mich599, 229NW429; 174 Minn133, 218NW546; 79Mont530, 257P 465; 83Mont611, 277P1118(1stcase); 49Nev139, 241P217; 49ND777, 193NW 481; 27 OhA9, 160NE638; 113 Okl 287, 241P485; 117 Okl 128, 245P619; 114 Okl 228, 245P987; 117 Okl 284, 246P 858; 118 Okl 209, 247P970; 118 Okl 211, 247P972; 121 Okl 266, 249P927; 122 Okl 192, 253P105; 126 Okl 90, 258P 740; 128 Okl 97, 261P209; 128 Okl 281, 262P674; 130 Okl 241, 266P1106; 135 Okl 63, 273P1004; 139 Okl 231, 281P 952(1stcase); 141 Okl 205, 284P646; 141 Okl 31, 285P844; 144 Okl 235, 291P 110; Okl 291P553; 115 Or580, 239P 202; 13PaDist&Co 511; 127 Or300, 272 P258; 33PortoRico 753; 33PortoRico 851; 33PortoRico 910; 49SD616, 208 NW160; 52SD168, 216NW949; SD 231 NW527; TexCommnA 300SW23; Tex CivA 281SW575; TexCivA 282SW263; TexCivA 286SW1008; 68Utah21, 249P 118; Vt 150A459 (exceptions fail when appeal fails); 144Va831, 131SE1 (must be presented within time prescribed by statute); 148Va231, 138SE470; 150 Wash370, 273P185; 154Wash349, 282P 207; 34Wyo 332, 243P394; Wyo 289P 368. But see 208 Iowa1256, 224NW574.

1068–29 39GaA170, 146SE567.

1068–30 49SD616, 208NW160 (order overruling motion for new trial is appealable after time to appeal from judgment has expired).

1068–31 104WVa328, 140SE50, 51 [quotCJ].

1068–32 104WVa328, 140SE50.

1068–36 107Conn365, 140A758 (plea in abatement).

1069–42 15F(2d)526; 17F(2d)768; 19 F(2d)915; 38F(2d)215; Ala 128S219; CalA 285P856(1stcase); Conn 151A 491; 94PaSuper383; 104WVa328, 140 SE50, 51 [quotCJ]; 18BC10, 9DomLR 758, 23WestLR1, 3WestWkly717; 35 BC70, [1925] 3DomLR547, [1925] 2 WestWkly614; Ont [1930] 3DomLR76.

1069–43 6F(2d)553; 26F(2d)935; 179 Ark337, 158W(2d)978; 20 OhA141, 153 NE160; 116 Okl 165, 243P737; 117 Okl 12, 245P868; 94PaSuper383; 104WVa 328, 140SE50, 51 [quotCJ]; 35BC70, [1925] 3DomLR547, [1925] 2WestWkly 614.

1070–45 104WVa328, 140SE50; 35BC 70, [1925] 3DomLR547, [1925] 2West Wkly614 (only under very special circumstances and when necessary in interest of justice will time be extended by appellate court).

1070–47 117 Okl 266, 246P457, 458 [quotCJ].

1070–48 117 Okl 266, 246P457, 458 [quotCJ].

1070–49 117 Okl 266, 246P457, 458 [quotCJ].

1070–50 6F(2d)553; 117 Okl 266, 246 P457, 458 [quotCJ].

1070–52½–New. by provision in judgment that it should operate as a supersedeas for a stated period, 35GaA508, 134SE119.

1070–54 38F(2d)215. But see 41F(2d) 146.

1070–54½–New. , by changing date on which judgment is entered, 35 OhA 450, 172NE565.

1070–57 108Conn451, 143A525; 240 Mich444, 215NW413 (delayed appeal from probate court); 48RI 14, 135A 156; 154SC262, 151SE470; 18BC10, 9 DomLR827, 23WestLR407, 3WestWkly 717; Que 20RevDeJur21, 15DomLR 461; Sask [1928] 4DomLR429 (after notice). [c] **Canada supreme court; bankruptcy.**–[1925] CanSC275, [1925] 3DomLR311. [d] **Under Michigan statute governing delayed appeals from probate courts** question whether estate has been distributed, where order of distribution has been made but there has been no actual distribution to those entitled so as to preclude appeal, is one of law. 240Mich444, 215NW413. [e] **What constitutes "taking" appeal** under statute. 249Mich599, 229NW429.

1071–58 154SC262, 151SE470 (four days notice to opposite party required). [b] (1) 25ColoA386, 138P69.

1071–59 36F(2d)5; 25ColoA386, 138P 69 (attempted extension not applied for within extended time allowed by judgment is void); 249Mich599, 229NW429; 154SC262, 151SE470; 52SD168, 216NW 949.

1071–60 Mass 173NE432.

1071–62 240Mich444, 215NW413.

1071–63 240Mich444, 215NW413.

1072–66 108Conn451, 143A525 (without notice to adverse party); 254Mass 95, 149NE675; 232Mich568, 205NW482 (granting of motion to extend time, made almost a year after decree on due notice was settled, signed, and filed, and over six months after expiration of last extension, is discretionary with trial judge); 240Mich444, 215NW413. [a] 232Mich568, 205NW482. [b] **Motion to review taxation** in nature of appeal, extension of time is within discretion of judge. 6SaskL308, 11DomLR 191, 24WestLR358, 4WestWkly715.

1072–69 20F(2d)314; 249Mich506, 229 NW419 (court's delay in signing order extending time); 93PaSuper379 (appeal dismissed on hearsay depositions as to mistake of clerk in being unable to find papers showing filing of appeal); 7SaskL111, 15DomLR803, 27 WestLR1, 5WestWkly1260. [w] **Failure of clerk to enter judgment** in judgment book, at time it is rendered, cannot extend time within which to appeal. 58 Ind592.

1073–71 154SC262, 151SE470; 61 OntL 642, [1928] 2DomLR82.

1073–72 117 Okl 12, 245P868. [a] 118 Kan367, 234P949. [b] **Constructions.**–47RI 139, 131A551.

1074–73 6SaskL88, 11DomLR486, 24 WestLR370, 4WestWkly713.

1074–74 239Mich646, 215NW26. [c] (2) Other instances. 250Mich286, 230 NW179.

1074–75 238Mich186, 213NW124; 154 SC262, 151SE470. [c] **Stipulation must be filed within statutory period** after date of decree. 238Mich186, 213NW 124.

1074–77 71CalA604, 236P369. See also 108Conn451, 143A525. [c] (6) No waiver by acceptance of legal and timely service of writ. 146Va256, 135SE 681.

1075–78 15F(2d)526; 19F(2d)915; 36 F(2d)5; IndA 170NE107; 200Wis61, 227NW272. See also 52SD168, 216NW 949. [e] **Failure of counsel to object to filing motion for new trial** more than three months after judgment did not prevent dismissal of appeal. 36F(2d)5.

1075–83 [a] **Appeal not taken in time allowed for suspensive appeal,** cannot be allowed as such. LaA 130S843(1st case).

1075–84 34GaA62, 128SE208; 34GaA 119, 128SE219; 34GaA67, 128SE223; 36GaA782, 138SE255(1stcase); 36GaA

777, 138SE255(2dcase); 41GaA606, 154SE215(1stcase); 28Hawaii403; 251Mich104, 230NW923; 313Mo406, 281SW693; NJSup135A59; 191NC215, 131SE567; 196NC9, 144SE297 (where order for examination of adverse party is obtained, appeal from such order prior to examination is premature); 196NC93, 144SE534(1stcase); 122Okl52, 250P802; 122Okl275, 254P723; 285Pa299, 132A350; 297Pa197, 146A538; 300Pa21, 150A92.

1076-86 30F(2d)311.

1076-87 36GaA782, 138SE255(1stcase); 36GaA777, 138SE255(2dcase); 39GaA288, 146SE646; 12LaA21, 124S853; 13LaA169, 127S410(1stcase); 153Miss405, 121S107; 105NJL324, 144A605; NJSup135A59; 191NC215, 131SE567; 194NC202, 139SE230; 37Wyo475, 263P620. But see 154Wash206, 281P491. [a] (17) Where new trial is granted, unless plaintiff files remittitur of part of verdict in his favor, plaintiff may not appeal from order till and unless he refuses to accept reduced verdict. 285Pa299, 132A350. (18) Judgment affirming decision of clerk that he had right to allow sureties to justify in his discretion. 191NC215, 131SE567(1stcase). (19) Appeal from order setting aside voluntary nonsuit. 313Mo406, 281SW693. (20) Others. Mo 8SW(2d)879.

1077-88 28Hawaii403; Wash287P900. [f] (1) 297Pa496, 147A519(1stcase). (2) Appeal taken after rendition but before formal entry of judgment will not be dismissed. 82CalA46, 255P248. [g] **Appeal prayed in open court** is not premature where order granting it is incorporated in judgment. 30NM469, 240P811. [h] **Abstract filed before judgment entered.**–Under statute appeal will be dismissed when abstract of record is filed in supreme court before judgment appealed from has been entered upon court record of trial court. 200Iowa1222, 206NW102. [i] **Appeal taken before findings have been signed and filed** is premature where case is one in which findings were required and requested. 199Cal532, 250P400. [j] **Appeal bond not enough to confer jurisdiction** on appellate court. TexCivA295SW214. [k] **Appeal before entry of judgment** is not fatal irregularity. Or287P222.

1077-89 112Okl28, 239P594 (where motion for new trial is necessary); 122Okl52, 250P802; 129Okl113, 263P649; Utah266P1050. [b] **Order made before filing of motion.**–122Okl52, 250P802.

1077-89½-New. , or where a rule for a new trial was made absolute. NJSup135A59.

1077-93½-New. An appeal from an order sustaining a demurrer to a declaration in a tort action is not premature. 259Mass341, 156NE715, 52ALR1149.

1078-97 160Ga546, 128SE793.

1078-3 28F(2d)753; 322Ill147, 152NE595; 232Ky19, 22SW(2d)256(1stcase); 165La563, 115S752; 4LaA554; 250Mich347, 230NW175(2dcase) (where judgment appealed from is under $500); 31NM430, 246P899; 31NM514, 247P826, 827 [citCJ]; 245NY528, 157NE845; 245NY531, 157NE846; 245NY564, 157NE858; 245NY572, 157NE862; 245NY574, 157NE863; 245NY580, 157NE865; 245NY602, 157NE875; 246NY235, 158NE314; 250NY355, 165NE809; 214AppDiv156, 211NYS849 (from order of appellate division and interlocutory judgment entered thereon); Can [1928] 3DomLR706. But see 31F(2d)519. [g] (4) Consent is required for appeal from unanimous affirmance by appellate division of judgment for plaintiff entered on verdict directed by court. 245NY509, 157NE837. (15) Decision of appellate division affirming interlocutory direction of trial court is not reviewable without permission of that court. 246NY203, 158NE74. (16) Permission is required for appeal from affirmance by appellate division of an order not a final order. 245NY530, 157NE846. (17) Where appellate division unanimously reverses order granting new trial, and reinstates verdict, permission is necessary for appeal to court of appeals, as it amounts to unanimous affirmance of verdict. 246NY235, 158NE314. Four justices of Appellate Division constitute quorum and unanimous affirmance by them requires leave to appeal to Court of Appeals. 254NY146, 172NE271. [h] **Order granting appeal is jurisdictional prerequisite.**–31NM514, 247P826. [i] **Waiver or consent** cannot obviate necessity for order allowing appeal. 31NM514, 247P826. [j] **Where order allowing appeal is recalled,** but transcript of appeal is, nevertheless, filed, appeal will be dismissed. 161La217, 108S420. [k] **Where order of appeal has expired,** it is equivalent to no order. 165La563, 115S752. [l] **In Michigan** statute requiring application for writ of error where amount involved is less than five hundred dollars and requiring statement that contest of will is involved, where such is fact, does not apply to appeals to supreme court on case-made. 241Mich39, 216NW384. [m] **Failure to obtain order allowing appeal** is cured by approval of bond on appeal. 32F(2d)182. [n] **Amount in controversy.**–Iowa232NW839. [o] **Where appeal allowed within statutory time,** formal order allowing same is not necessary. 43F(2d)670.

1079-4 264Mass475, 163NE162 (in equity); 245NY195, 156NE663 (appeal is matter of right where constitutional question is involved); 254NY357, 173NE220; 253NY356, 171NE568. [e] (2) Vendor's lien or mortgage lien is not a statutory lien within St. Suppl. (1924) § 950, providing for appeals as on matter of right. 215Ky198, 284SW1018. [f] **In Louisiana.**–161La725, 109S402. [g] **In New York.**–228AppDiv881, 240NYS312; 228AppDiv881, 240NYS313.

1079-6 20OhA12, 151NE805 (petition in error in supreme court can only be filed upon order directing court of appeals to certify its record). See also 127Okl165, 260P77.

1079-9½-New. Where a constitutional question is not presented, writ of error is not a matter of right. 117OhSt325, 158NE651.

1079-10 215Ky100, 284SW1017. [c] **In Kentucky.**–215Ky100, 284SW1017; 215Ky198, 284SW1018. [d] **Application or notice of appeal not presented to judge** but merely filed with clerk cannot be construed as application duly made. 32F(2d)750. [c] **In New York.**–230AppDiv799, 244NYS603.

1080-11 222MoA1051, 6SW(2d)68. [h] **In Kentucky.**–224Ky107, 5SW(2d)893. [i] **Acts not constituting allowance.**–32F(2d)750.

1080-12 227AppDiv821, 237NYS501; Sask [1929] 4DomLR877. [c] **In PortoRico.**–35PortoRico809.

1081-17 [b] (1) 213Ky658, 281SW796. (5) After expiration of term of circuit court at which judgment was rendered or became final, exclusive right to grant appeal rests with clerk of court of appeals. 224Ky107, 5SW(2d)893.

1081-19 252IllA536.

1081-21 24F(2d)823; 40F(2d)871; 90Fla867, 107S185; 250Mich347, 230NW175(2dcase) (where judgment less than $500); 127Okl166, 260P55; 130Okl200, 266P438; Tex32SW(2d)452; [1925]CanSC275, [1925] 3DomLR311; 35BC70, [1925] 3DomLR547, [1925] 2WestWkly614 (time will not be extended by appellate court except under special circumstances and in interest of justice). [a] **If no time is fixed by statute,** application for appeal must be made within reasonable time. 102WVa251, 135SE246.

1081-22 180Ark401, 21SW(2d)180 (appeal taken at same term is properly taken though no record was made thereof).

1082-23 126Okl138, 258P879. [a] 117Okl128, 245P619; 38Wyo421, 267P689.

1082-25½-New. Where appeal was granted in open court, the court may be required to enter an order nunc pro tunc. 180Ark401, 21SW(2d)180.

1082-28 See also 4LaA522.

1082-30 40F(2d)871 (notice of appeal not application); 215Ky198, 284SW1018; 220MoA995, 271SW831; 114Okl27, 242P1041; 141Okl31, 283P1002(1stcase); TexCommnA277SW1039.

1082-31 [b] **In Kentucky.**–215Ky100, 284SW1017.

1083-36 153Md491, 138A343.

1084-52 145Wash551, 261P90 (court must review judgment on any proper application in absence of statute prescribing manner of exercising constitutional right of appeal).

1084-53 [j] **In Louisiana.**–159La535, 105S611. [k] **Petition held sufficiently** in compliance with statute. TexCivA295SW245.

1085-55 [b] (2) The petition or motion for appeal need not state it is a suspensive or devolutive appeal. 159La535, 105S611.

1085-56 TexCommnA292SW863.

1085-59 See also 30Hawaii494.

1085-61 [c] **Affidavits held sufficient.**–MoA291SW1081.

1085-62 100Vt366, 137A321.

1086-67 [c] **Prayer for appeal to supreme court,** by city filing transcript in appellate court, which was only proper court, is not ground for dismissing appeal. IndA159NE554.

1087-72 319Mo401, 4SW(2d)438 (petition held sufficient); 220MoA995, 271SW831.

1087-73 221MoA377, 289SW341, 342 [quotCJ].

1088-78 48RI4, 135A50.

1088-80 141Okl130, 284P27; 115Tex148, 278SW177 (question of amount of interest allowed in case, not presented in application for writ of error, was not considered).

1088-82 104Conn165, 132A397; 138Okl1, 280P278, 67ALR885 (errors will not be considered on appeal unless properly assigned); TexCommnA17SW(2d)783; TexCommnA18SW(2d)590 (will not consider alleged fundamental error not presented in petition).

1088-85½-New. Appellants may file amendments to specifications of error before argument. 43Ida675, 256P529.

1088-85⅓-New. In Rhode Island it is held that findings of fact may be reviewed although not with exceptions thereto specifically set forth in reasons of appeal. 48RI66, 135A327.

1088-85¼-New. General allegations that the decree is against the evidence or law are sufficient. 48RI66, 135A327.

1088-89 [a] (4) Where properly signed petition for writ of error was presented to court of civil appeals, absence of signature from copy filed with clerk does not deprive supreme court of jurisdiction. TexCommnA280SW571. (5) Omission of affiant's signature to affidavit containing jurat signed by officer is not fatal to affidavit or order granting appeal. MoA17SW(2d)567.

1089-96 176Ark481, 2SW(2d)1092; 209Ky771, 273SW469; Tex32SW(2d)452.

1089-98 11LaA77, 120S246 (appeal filed within three days of return day is timely); 112Okl30, 239P456. [a] **In Ohio.**–118Oh145, 160NE614.

1089-98½-New. Notice of filing. Constructive notice of filing of petition in error may be given only in cases allowed by statute. 38Wyo421, 267P689.

1089-1 15Okl680, 83P718 (either transcript of proceedings in court below or case-made); 47Okl542, 149P135; 138Okl243, 280P814(1stcase). [b] **Cross petition in error** need not be accompanied by case-made or transcript. 112Okl30, 239P456. [c] **In Oklahoma.**–122Okl36, 252P11.

1089-3½-New. In passing on application for special appeal from judgment adjudging infant a neglected child, record in habeas corpus proceedings is considered. Mo32SW(2d)69.

1089-3⅓-New. Applicant for special appeal cannot inquire into state of mind of Supreme Court judge who granted appeal. Mo32SW(2d)69.

1089-4 100Vt366, 137A321.

1090-8 38Wyo241, 266P128. [i] **No amendment after motion to quash.**–220MoA995, 271SW831.

1091-18 33OhA475, 170NE27.

1091-21 161La725, 109S402.

1091-23 161La725, 109S402.

1091-24 217Ky647, 290SW510; 229AppDiv721, 241NYS435 (denied under evi-

dence); 154Tenn513, 290SW31; 100Vt 366, 137A321. [a] (1) Sask [1928] 4 DomLR771. [g] (4) Motion for leave to appeal from order and interlocutory judgment thereon should be denied. 214 AppDiv156, 211NYS849. [h] 154Tenn 513, 290SW31. [i] (1) Can [1928] 3DomLR660; Can [1928] 3DomLR937. (2) Can [1928] 3DomLR487 (construction of statute of purely provincial concern, though of general public interest throughout province). (8) Leave should not be granted because applicant wants further litigation. 4 OntWN1405, 24 Ont WR735, 12 DomLR853; 7 OntWN452. (9) Leave to appeal to supreme court of Canada from British Columbia court of appeal should be refused where applicant would not have fairly arguable case to present. Can [1929] 2DomLR 106. (10) In Saskatchewan. [1929] 4 DomLR877.

1092–25 241NY504, 150NE530; 241NY 507, 150NE531; 241NY511, 150NE533; 241NY543, 150NE547; 241NY577, 150 NE562.

1092–29 Tex 32SW(2d)452.

1093–31 161La725, 109S402.

1093–35 Ont [1927] 3DomLR831.

1093–37 [1927]CanSC134, [1927] 1DomLR810, 8CanBankr199. [b] (1) 217App Div253, 217NYS762. (7) 217AppDiv 253, 217NYS762. [d] 20SaskL545, [1926] 3DomLR339, [1926] 2WestWkly 342. [e] In Texas.–115Tex511, 283SW 1071. [f] In Canada.–58 OntL648, [1926] 3DomLR142.

1094–38 [a] See also Can [1928] 3DomLR700.

1094–41 167La520, 119S535. [k] (2) Court may treat as mere inadvertence indorsement of fact that appeal, and not writ of error, was allowed. 151Va229, 144SE460.

1094–41½–New. Where the judgment refused preliminary injunction, an appeal will not be dismissed because the order on its face granted an appeal from the judgment dissolving a restraining order. 163La976, 113S167.

1095–42 221MoA377, 289SW341, 342 [citCJ].

1096–58 38F(2d)215 (actual allowance of appeal by trial judge is effective though no record is made thereof).

1096–66 6F(2d)281.

1097–72 41F(2d)208 (construction of court rules); 92Fla237, 109S421; 92 Fla875, 111S128; 97Fla484, 121S472(1st case); 97Fla484, 122S117 (delay in return date held not warranted by fact that supreme court took recess); 98Fla 1076, 125S235(2dcase); 164La1017, 115 S130; 165La143, 115S416. [a] (6) Date of judgment on merits determines term to which appeal from judgment on plea in abatement is returnable. 221MoA311, 273SW148. [c] (4) Order of appeal lapses with expiration of return day therein fixed. 165La563, 115S752.

1098–76 170La813, 129S212(2dcase); 11 LaA467, 123S391.

1099–82 214Ala1, 106S228.

1100–99 243NY629, 154NE634; 254NY 86, 171NE916; 222AppDiv821, 226NYS 392. [b] (3) 170Ark794, 281SW368. [d] (2) Court cannot dispense with constitutional limitation on right to appeal. 243NY587, 154NE616. [e] One who refuses new trial and stipulates for judgment absolute must abide by result. 252NY502, 170NE121.

1101–3 TexCivA 281SW300; TexCivA 289SW152. See also TexCivA 272SW 571. But see 252NY284, 169NE386. [b] Dictum in opinion of intermediate appellate court is not approved by refusal of writ of error by court of final resort. TexCivA 281SW339.

1101–7 Mo 277SW907; Mo 19SW(2d) 752.

1101–10½–New. or where appellants waived right to appeal, 169La829, 126S 206.

1102–16 220AppDiv724, 221NYS496.

1102–17 Fla 128S825; 30Hawaii91. [b] Offer to set off claim against defendant is not compliance with law requiring payment of accrued costs. Fla 128S825.

1102–19 Fla 128S825.

1102–21 CalA 285P888; 45 Ida369, 263 P988 (on appeal by both parties, plaintiff's appeal was dismissed on refusing to pay his share of cost of procuring transcript); 258Mass190, 154NE856. See also 244 IllA437. [c] (3) 150Md 429, 133A601. [d] (2) West Virginia statute, requiring deposit within three months after docketing of appeal of sufficient sum to pay for printing record, is mandatory and requires dismissal of writ of error for failure to comply with requirement. 104WVa328, 140 SE50. (3) Fee of clerk of supreme court should be treated as deposited with clerk of circuit court where clerk received and filed notice of appeal before receiving deposit. SD 227NW442. (5) In Virginia. 142Va419, 128SE516. (6) In California. CalA 286P732.

1103–23 228Ky628, 15SW(2d)509 (clerk may not collect ten dollars of costs on failing to comply with rule as to indexing transcript).

1103–25½–New. Where plaintiff in error fails to offer substitute for printed record, authorized by statute, within the statutory time for paying costs of printing, the appellate court is without jurisdiction to hear the case on merits. 142Va419, 128SE516.

1103–25¼–New. A statute authorizing a substitute for a printed record where appellant is unable to pay the cost of printing applies to writs of error as well as appeals. 142Va419, 128SE516.

1103–26 163Ga666, 136SE794; LaA 130S854; 131 Okl 188, 268P235; 37Wyo 34, 258P587, 588 [citCJ]; Wyo 291P 314. [e] Costs of prosecution in forma pauperis will not be awarded in circuit court of appeals. 23F(2d)190.

1104–28 37Wyo 34, 258P587, 588 [cit CJ].

1104–32 107US378, 28Ct911, 27L ed 609; 29Ariz377, 242P435 [quotCJ].

1105–47 [f]. Stay bond preventing writ of prohibition.–75CalA91, 242P82.

1106–52 13Ark293; 153Md491, 138A 343; 85Me360, 27A252; 132 Okl 298, 270 P567. [b] (1) 75CalA695, 243P54.

1106–54 45 Ida296, 261P774; 86 IndA 420, 155NE515; 165La437, 115S648; 11 LaA173, 123S160(2dcase); 50Nev419, 264P980; 245NY527, 157NE844; 245 NY528, 157NE845(1stcase); 245NY529, 157NE845(4thcase); 245NY608, 157NE 878; 230AppDiv767, 244NYS218; 134 Okl 99, 274P24; TexCivA 272SW220; TexCivA 5SW(2d)789.

1107–57 27Hawaii129; 45 Ida296, 261P 774; 151Miss372, 118S178; 82Mont198, 266P378, 57ALR1169; 49Nev273, 244P 896; 31NM50, 240P811; 245NY527, 157 NE844; 245NY528, 157NE845(1stcase); 245NY529, 157NE845(4thcase); Tex CivA 277SW801. [d] Failure to file bond as appeal is equitable, though not controlling, consideration for appellees. 236Mich480, 210NW332.

1107–57½–New. An accounting directed by a decree has been held not premature where the appeal was not accompanied by statutory bond. 152Md289, 136A269.

1108–61 31F(2d)338. See also 236Mich 480, 210NW332.

1109–73 47 Ida342, 275P779 (appeal dismissed); 13LaA329, 127S431. Contra 220Ala634, 127S199.

1109–74½–New. No obligation can be written into an appeal bond not provided for by statute. 146Va680, 132SE 848.

1109–74¼–New. The court should, if possible, treat a bond as a suspending bond in accordance with the party's intentions. 146Va680, 132SE848.

1109–74¾–New. Where a petition by devisees for an order requiring an executor to render his final account, settle the estate, and deliver possession of real estate to devisees is denied and an appeal is taken from the order as a whole, only a single bond is required. 77Mont182, 250P812.

1111–84 220AppDiv724, 221NYS496.

1112–2 42 Ida782, 247P785.

1115–18½–New. Intervener praying that judgment be rendered for plaintiff against defendant was not before appellate court when plaintiff failed to file bond. 13LaA329, 127S431.

1115–19 149Miss764, 116S90.

1116–27 30Ariz120, 245P282; 47 Ida 342, 275P779 (deposit of check held sufficient); 146Wash154, 262P235. [j] Party depositing security is pledgor and beneficiary is pledgee, so that upon default pledgee may dispose of security and account for surplus. 105NJL336, 146A372.

1116–30 TexCommnA 13SW(2d)355.

1116–31½–New. No writing is required on a deposit of money in lieu of a bond. 77Mont182, 250P812.

1116–31½–New. An appeal will not be dismissed for lack of formal notice to the attorney for the adverse party of the making of a deposit in lieu of an undertaking, after exceptions were filed to the sureties thereon, where failure is reasonably excused. 55ND616, 214 NW913.

1116–33 47 Ida342, 275P779. [a] Appeal rendered ineffective by withdrawal and substitution.–47 Ida342, 275P779.

1118–55 27Hawaii129.

1118–57 20 OhA425, 152NE674; Va 154SE542. [c] Will must be probated and oath taken to entitle one to become "executor" under exemption statute. TexCivA 25SW(2d)889.

1119–66 32NM452, 259P431.

1121–84 216Ala35, 112S323.

1121–85 [a] (1) 216Ala293, 112S903; 217Ala208, 115S301. (2) Statute authorizing appeal by married woman without bond from judgment subjecting property to sale or for payment of money applies to all personal judgments for recovery of money including assault and battery. 213Ala7, 105S170 [rev A 105S169]. (3) But this rule does not apply to judgment in ejectment. 215Ala671, 112S137. (4) She has such right though some portions of decree are not appealable without giving security for costs. 217Ala208, 115S301. (5) Married woman is not authorized to appeal without bond from decree in suit to quiet title. 220Ala55, 124S94. (6) Judgment merely for costs against married woman is not judgment for payment of money, within statute respecting appeal without security for costs. Ala 128S219.

1121–87½–New. United States suing in state court as guardian for Indian wards must give appeal bond although judgment for costs cannot be collected against United States. Ariz 285P281.

1121–87¾–New. United States so suing is not exempt from giving appeal bond notwithstanding state statute exempting guardians suing in representative capacity. Ariz 285P281.

1121–87¼–New. In such case comity does not release United States from necessity of filing bond. Ariz 285P281.

1122–88 31NM108, 242P331.

1122–89 CalA 286P743; 170La893, 129 S520. [f] State comptroller.–31NM108, 242P331. [g] Superintendent of banks. –50SD328, 210NW102. [h] Superintendent of banks.–35Ariz425, 279P264 (1stcase). [i] State land settlement board.–CalA 286P743.

1122–93 220Ala505, 126S169; IndA 159 NE554; 54SD307, 223NW200 (township held not municipal corporation so as to be exempt); TexCivA 8SW(2d)772; TexCivA 22SW(2d)537. [f] Charity hospital.–7LaA690; 8LaA264.

1123–6 TexCommnA 14SW(2d)819 (1st case).

1124–7 226Ky744, 11SW(2d)932; 156 Tenn544, 3SW(2d)661. [d] Effect of possession of exempt property.–TexCivA 280SW295; TexCivA 287SW666. [e] Such statute should not be construed so as to impair exercise of right of appeal. TexCivA 288SW483. [f] Subject-matter of suit.–220Ala417, 125S660. [g] Not construed so as to impair right. –TexCivA 26SW(2d)412.

1124–10 77Colo 197, 235P338.

1124–11 77Colo 197, 235P338, 339 [cit CJ]; 226Ky744, 11SW(2d)932.

1124–12 77Colo 197, 235P338, 339 [cit CJ].

1125–20 148Va20, 138SE502.

1125–21 37GaA149, 139SE88 (bill of exceptions dismissed on failure to pay costs within ten days after submission, where affidavit is erroneously attested).

1125–24 TexCivA 299SW497 (application held sufficient even though erroneously designated as application for mandamus).

1126–29 TexCivA 30SW(2d)599. [a] Identification insufficient.–TexCivA 30 SW(2d)599.

1126-29½-New. Affidavit attested by tax receiver is not sufficient to relieve counsel from payment of costs. 37GaA 149, 139SE88.

1126-29½-New. One applying for permission to appeal in forma pauperis after the time for filing exceptions cannot rely on the bill and is not entitled to a copy thereof, although he is entitled to have furnished such portions of the record as will manifest errors. 226Ky744, 11SW(2d)932.

1126-34½-New. Where it appears that one of several appellants was not authorized to represent the others, his affidavit in their behalf is insufficient to relieve them from necessity of giving bond. TexCivA 280SW295.

1126-35 155Tenn506, 296SW14; **Tex CivA** 23SW(2d)444; 148Va20, 138SE 502. [c] (3) See also 155Tenn506, 296 SW14. [d] (2) Notice of filing of affidavit of inability to pay costs in lieu of appeal bond is not required under some statutes. TexCivA 5SW(2d)867.

1126-36 TexCivA 275SW271. [a] (1) TexCivA 278SW324 (dictum). (2) Tex CivA 30SW(2d)599. (8) But see 117Tex 411, 6SW(2d)84. (13) 117Tex411, 6SW (2d)84. (19) Where affidavit is made before officer other than court trying case, it is prima facie sufficient to warrant appeal forma pauperis if filed with court trying case while in session, at same term, and approved by him. Tex CivA 278SW324. (20) Mere nonresident may make proof of inability to pay costs on appeal before county judge of his residence. TexCivA 288SW483. (21) Acts of trial court on pauper's affidavit more than seven months after new trial was denied are void and not basis for appellate jurisdiction. 117 Tex411, 6SW(2d)84. (22) Where court reconvened for new term immediately on adjournment of term at which case was tried, and appellants made their proof of inability to pay costs of appeal at new term and within time prescribed by statutes for making such proof, appellants thereby made proof of inability to pay costs of appeal. Tex CivA 12SW(2d)1042. (23) Making of affidavit before notary public, and filing it with clerk of trial court, is insufficient to give appellate court jurisdiction of appeal attempted to be perfected by an affidavit in forma pauperis in lieu of bond. TexCivA 13SW(2d)958.

1127-38 226Ky744, 11SW(2d)932.

1127-39 TexCivA 26SW(2d)412 (affidavit made before judge of county of appellant's residence). [a] **Proof made before county judge of appellant's residence** consists merely of affidavit. Tex CivA 26SW(2d)412. [b] **In making proof before court trying case** appellant must bring affidavit before trial judge while on bench holding session. Tex CivA 26SW(2d)412.

1127-40 TexCivA 23SW(2d)444; Tex CivA 26SW(2d)412 (appellant entitled to transcript unless contest successful). But see TexCivA 32SW(2d)669. [b] (1) TexCivA 275SW271; TexCivA 5SW(2d) 867. [d] TexCivA 26SW(2d)412. [e] **Burden of proof on contestant.**-TexCivA 26SW(2d)412 (appellee).

1128-42 336Ill439, 168NE346; Tex CivA 275SW287.

1128-44½-New. , or would not be fatal, 167La137, 118S865.

1128-54½-New. As affecting a motion to dismiss for insufficiency of a writ of error bond, where an administrator appears as plaintiff in error he need not be made a defendant in error. TexCivA 291SW650.

1131-83 See also 166La564, 117S719.

1131-84 216Ala623, 114S223.

1132-94 TexCivA 275SW287.

1132-98 [d] **Bond to state** on appeal from denial, on court's own motion, of ex parte application for appointment as administrator, does not satisfy statutory requirement of bond running to adverse party. 29Ariz377, 242P435. [e] **Bond should run to unpleaded warrantor** in action of trespass to try title. TexCivA 298SW476.

1133-99 TexCivA 275SW287.

1133-5 29Ariz377, 242P435.

1133-6½-New. A mere stakeholder who is not a necessary party to the appeal need not be named as a payee in the bond. TexCivA 280SW350.

1133-7 TexCommnA 285SW813. [d] (2) TexCivA 275SW287.

1134-9 TexCommnA 285SW813; Tex CivA 12SW(2d)1045 (statutory). But see 149Wash500, 271P329 [reh den 149 Wash500, 274P712(2dcase)].

1134-9½-New. Where there was consolidation in a lower court of an action for trespass to try title, and an action by a defendant thereon against vendor for breach of warranty, vendor's appeal bond was sufficient without naming as obligee in the bond the other defendant in trespass to try title action. TexCivA 275SW287.

1136-31 [c] **In Mississippi,** under statute, appeal bonds must have more than one surety therein, unless surety is guaranty company. 153Miss719, 121S 485(2dcase).

1137-43 123Or461, 238P1114.

1138-53 [a] **Surety on appeal bond to intermediate appellate court** is not disqualified as surety on appeal from such court. TexCivA 6SW(2d)126.

1139-72 See also 9PaDist&Co280.

1140-75 See also 108Conn93, 142A469.

1140-82 3LaA639.

1142-2 [b] **Surety held sufficient.**-8LaA1.

1142-6 10LaA50, 119S757 (1stcase) (rule to test surety on appeal bond should be filed in trial court). [a] **Burden is on one furnishing bond** to produce evidence to satisfy court of solvency of surety. 11LaA173, 123S160 (2dcase).

1142-7 See also 10LaA50, 119S757 (1st case).

1143-14 44Ida113, 255P413.

1143-16 84Mont470, 276P430.

1145-34 Or291P392.

1146-53 84Mont470, 276P430.

1147-63 40Ida782, 238P291; 30NM424, 234P1012. But see 89CalA600, 265P 359.

1147-65 89CalA600, 265P359; 44Ida 113, 255P413; 51SD282, 213NW509.

1148-74 159La535, 105S611 (bond need not state whether appeal is suspensive or devolutive); 167La520, 119S535 (held sufficient). [a] **In Louisiana.**-159 La535, 105S611.

1148-82 82Colo 503, 261P874.

1148-83½-New. The undertaking must identify the appeal which it is intended to support. 69CalA60, 230P456.

1148-83½-New. An undertaking on appeal must specify the purpose for which it is given. 77Mont182, 250P812.

1149-99 167La137, 118S865.

1149-2 TexCivA 285SW627.

1150-25½-New. Where the surety fails to sign an affidavit of his financial condition, a security attached may supply the defect. 162La935, 111S333.

1150-26½-New. That a bond fails to describe as a corporation the plaintiff in error, which is so designated in all the pleadings and in petition in error, does not affect validity of the bond. TexCivA 291SW650.

1151-38 TexCivA 18SW(2d)1114 (bond payable to successful plaintiff only need not name defendants not appealing).

1151-39 41Ida673, 241P1022; 120Okl 199, 250P1015; TexCivA 297SW868.

1154-63 TexCivA 30SW(2d)599.

1155-78 120Okl199, 250P1015.

1155-81 42Ida782, 247P785 (bond reciting that it was given as required by named statute held sufficient as bond on appeal from judgment).

1156-86 [c] **In absence of motion to dismiss appeal,** appellate court is not justified in declining jurisdiction of appeal. TexCivA 25SW(2d)207.

1156-89 99TexCr588, 271SW612. [e] **In Louisiana.**-159La793, 106S307. [f] **Appeals held not dismissable.**-Wis 232 NW549.

1157-94½-New. Although there were two defendants in the court below, plaintiff appealing need furnish security only in the one sum of five hundred dollars. 24Man641, 20WestLR257.

1158-3 [a] **In Oregon.**-116Or532, 241P 1010.

1158-8 35OhA211, 172NE405.

1158-12 85IndA407, 152NE857.

1158-15 [a] See also TexCivA 30SW (2d)404.

1159-23 [d] (19) Motion to dismiss suspensive appeal from money judgment, on ground that amount of bond was not fixed by judge, may be filed in appellate court. 9LaA565, 119S442(1st case).

1160-27 30Ariz120, 245P282.

1160-29½-New. A two thousand dollar supersedeas bond was held sufficient, on appeal from an order appointing a receiver in a mortgage foreclosure suit, the estimated value of the property being one hundred thousand dollars. 94 Fla637, 114S526.

1161-30 [b] **Amount held not excessive.**-243IllA358.

1161-40 30Ariz120, 245P282.

1162-44 3CAriz120, 245P282. [a] (2) Where clerk of trial court has estimated probable costs of appeal pursuant to Arizona statute, and appeal is perfected by filing bond, his jurisdiction is terminated and he has no jurisdiction to re-estimate costs. 30Ariz120, 245P282.

1162-58 Or291P392. [k] 159La793, 106S307.

1164-63 41Ida673, 241P1022.

1167-78 220Ala690, 127S171; 41Ida 673, 241P1022. But see 47Ida103, 272 P1015.

1166-78½-New. But bond filed as supersedeas too late cannot be sustained as cost bond where it does not contemplate payment of "all costs that may be adjudged against him on said appeal" as required by statute. 31NM 323, 244P889.

1166-82 LaA 130S843(1stcase). See also 6LaA50.

1166-84 166La564, 117S719.

1167-95 Contra 8PaDist&Co 59.

1167-6 See also 165La478, 115S662.

1167-9 But see 167La137, 118S865.

1168-25 168La406, 122S126. [b] **Appeal cannot be dismissed** in absence of motion to correct error in signing affidavit instead of bond. 168La406, 122 S126.

1168-31 44Ida751, 260P431. [f] (2) Or 291P392.

1169-36 [a] **In Idaho.**-44Ida751, 260P 431.

1170-51 19F(2d)710.

1172-83 87IndA624, 158NE517; 202 Iowa782, 211NW417; 51Philippine251.

1172-87 [a] **Cross appeal to higher appellate court.**-Where both parties appeal, one to a higher appellate court than other, court should approve bonds submitted by both without prejudice to right of appellant to higher to move in lower to stay appeal to latter court. 57 OntL200, [1925] 3DomLR592 (appeal to supreme court of Canada; cross appeal to privy council).

1174-8½-New. On appeal from the superior court to the king's bench, it is the court of king's bench which must pass upon the regularity of the security. 16 QuePr223.

1174-9 [a] (4) Where appeal bond was filed by clerk but no approval was indorsed thereon and cash was subsequently accepted in lieu thereof, such acceptance constitutes approval within meaning of statute requiring approval of appeal bonds. 30Ariz120, 245P282.

1174-11 202Iowa940, 211NW415.

1174-12 [e] (3) 218Ala332, 118S587.

1175-20 118Okl85, 246P593.

1175-24½-New. Under Canadian statute judge of court appealed from, on application for approval of security for appeal to Supreme Court of Canada, cannot determine whether appeal will lie. Sask [1930] 2DomLR425.

1175-25 197Wis573, 223NW83.

1175-27 201Iowa1233, 207NW793; 202 Iowa940, 211NW415. See also 202Iowa 782, 211NW417.

1178-59 202Iowa782, 211NW417; Nev 280P321(1stcase); 31NM323, 244P889 (cost bond); 32NM452, 259P431.

1178-63 Nev 280P321(1stcase). [b] (6) Affidavit and bond for appeal from court of common pleas deposited in office of judge of court of common pleas with knowledge of clerk held filed in time, though file mark was not attached thereto within such time. 177Ark579, 7 SW(2d)318.

1179-71 TexCivA 28SW(2d)312.

1180-80 215Ala246, 110S402; 198Ind

127, 149NE350; 166La774, 117S826; 7 LaA657; Mont 285P177; 49Nev273, 244 P896; 50Nev153, 254P698; 51Nev370, 277P1(1stcase); 31NM323, 244P889 (cost bond); 25 OhA352, 157NE815; 155Tenn506, 296SW14; TexCommnA 271SW75; TexCivA 277SW805 (twenty days after expiration of term in which judgment rendered); TexCivA 279SW 871; TexCivA 286SW1008; TexCivA 288SW469; TexCivA 297SW310; Tex CivA 2SW(2d)364; TexCivA 9SW(2d) 445; TexCivA 16SW(2d)1099; TexCivA 22SW(2d)319; TexCivA 29SW(2d)484 (1stcase); 68Utah21, 249P118; Va 154 SE542; 155Wash458, 284P753. See also 244 IllA437. But see 199 Ind528, 151NE 1; 1LaA458 (devolutive appeal). [c] **Filing appeal bond by nonresident** thirty days after adjournment of term limited to six weeks held ineffective. TexCivA 297SW310.

1181-84 TexCivA 26SW(2d)311.

1181-84½-New. , or unless omission to file was due to "mistake or accident." 68Utah21, 249P118.

1182-89 252 IllA536.

1182-92 MoA 9SW(2d)248.

1182-96 TexCommnA 271SW75.

1183-1½-New. or filed for entry, 31NM 430, 246P899.

1183-2 [d] (1) TexCommnA 292SW 531; TexCivA 2SW(2d)281. (2) Tex CivA 2SW(2d)364.

1183-3 [a] (3) Bond held filed too late. 152Wash532, 278P412(1stcase). (4) Failure to file bond within five days after giving premature oral notice of appeal is not ground for dismissal where bond was filed within five days after timely written notice. Wash 288P255.

1183-10 Sask [1930] 3DomLR656.

1184-11 241 IllA376.

1184-18 45 Ida776, 265P703 (subsequent service on defendant who was not adverse party does not vitiate bond).

1184-19 13LaA169, 127S410(1stcase).

1185-20 33 OhA284, 169NE35.

1185-22 42 Ida821, 248P468; 45 Ida 776, 265P703 (service by mail).

1185-22½-New. Bond filed before entry of judgment, which was subsequently entered nunc pro tunc, confers no jurisdiction on appellate court. TexCivA 277SW801.

1185-23 128Misc422, 220NYS200.

1185-26 47 Ida722, 278P224(2dcase); 49ND323, 191NW490; Or 288P507(1st case).

1185-28 But see 51SD282, 213NW509.

1185-30 [c] **Mailing not valid service** where attorneys refused to accept delivery on condition of receipting therefor. 128Misc422, 220NYS200.

1185-31 30NM424, 234P1012.

1185-33½-New. In some jurisdictions service by mail is complete on the first day after the date of deposit in the post office that the mail leaves such post office for the place to which it is sent. 127 Or16, 256P1043.

1185-33¾-New. Where an undertaking is not filed within the statutory period by reason of mistake or accident, appellant should give respondent notice of the application or order for the filing of the undertaking. 68Utah21, 249P118.

1185-33¾-New. Defendant, being a resident of the county of venue, should have filed an appeal bond within twenty days after notice of the appeal was given. TexCivA 296SW631.

1185-35 25 OhA352, 157NE815.

1186-36 25 OhA352, 157NE815.

1186-41 82Colo 503, 261P874; 317 Ill 312, 148NE59; 166La497, 117S568 (statute not repealed); 128 Okl 41, 260P 1059; 123 Or461, 238P1114; 132 Or596, 277P820; TexCivA 288SW634; Tex CivA 26SW(2d)311 (filing of defective bond gives court jurisdiction); Tex CivA 31SW(2d)856.

1188-48 128 Okl 41, 260P1059 (error in christian name of defendant obligor).

1188-49 157Miss728, 127S276; Tex CivA 25SW(2d)274. [d] (1) 100CalA 349, 279P1018.

1189-50 TexCivA 19SW(2d)784.

1190-59½-New. A bond covering an order dissolving an injunction cannot be amended so as to be effective as to an order denying a motion to vacate an injunction. 252 IllA457.

1191-63 TexCivA 288SW634.

1191-65 [a] **Doubt in application of statute relating to additional bond** must be resolved in favor of constitutional right to appeal. 170La747, 129S151.

1191-69 TexCivA 271SW644; TexCivA 276SW787. See also SD 213NW509. But see 208Cal 27, 280P112.

1192-73 213Ala367, 104S806.

1194-87½-New. Where sureties have not joined in an application to amend, leave will be denied, 50SD331, 210NW 156.

1194-89 IndA 163NE51 (trial court has no authority at subsequent term to permit substitution of another surety). [c] 50SD258, 209NW337. [d] **In South Dakota.**-50SD258, 209NW337.

1194-96 But see La 129S664.

1195-3 [b] **Question of sufficiency of amount of bond** can be determined only by appellate court and not by clerk of lower court after appeal has been perfected. 30Ariz120, 245P282.

1195-4 See also La 129S664.

1196-10 [b] **In Louisiana.**-158La1041, 105S57 (holding that appellant could not furnish additional sureties after the two days had elapsed); 170La747, 129 S151.

1196-11 [a] **In Louisiana.**-170La747, 129S151.

1197-22 220Ala634, 127S199; 2KyOp 261; 2KyOp549. [c] **In Saskatchewan.**-Sask [1930] 3DomLR656.

1197-27 44 Ida751, 260P431 (statutes requiring exceptions to bond within prescribed time are not applicable where bond is void).

1198-28 170La813, 129S212(2dcase); TexCivA 31SW(2d)856.

1198-33 [b] **Waiver not shown.**-51SD 282, 213NW509.

1199-38 50Nev153, 254P698.

1199-39 49SD287, 207NW100.

1199-41 [a] **Waiver not shown.**-51SD 282, 213NW509.

1200-50 [a] 51SD282, 213NW509. [l] **Within thirty days after filing of transcript.**-TexCivA 19SW(2d)445; Tex CivA 19SW(2d)784. [m] **Within twenty days.**-Ida 285P1020.

1201-51 16F(2d)355; 220Ala634, 127S 199.

1202-53 1LaA214; 6LaA236.

1202-62 170Minn225, 212NW198; MoA 29SW(2d)188; MoA 29SW(2d)227 (statute held mandatory); 50Nev416, 264P 980; Nev 286P120; 113 Okl 115, 239P 569; 144 Okl 243, 291P93; 116 Or411, 241P333; 154SC262, 151SE470; Tex CivA 275SW96; TexCivA 285SW627; TexCivA 288SW502. [h] **Trouble and expense of serving notice of appeal on adverse parties** does not excuse failure to serve all adverse parties. 81Mont459, 264P127. [i] **Substitution of another surety on appeal bond** at subsequent term is treated as vacation appeal requiring service of notice. IndA 168 NE51. [j] **Service of notice is not excused** though good cause exists for failure. MoA 29SW(2d)188.

1203-64 See also MoA 29SW(2d)188.

1203-66 204 Iowa720, 216NW8, 10 [cit CJ]; TexCivA 4SW(2d)278 (appeal from denial of injunction).

1204-68 TexCivA 285SW627. But see MoA 29SW(2d)188.

1204-74 16F(2d)355; 16F(2d)886; 19 F(2d)693; 169La963, 126S439; 3LaA 294; 4LaA22; 11LaA301, 123S392; 11 LaA295, 123S394; LaA 125S464(1st case); 152Miss437, 119S170 (where no bond is required); 30NM469, 240P811; TexCivA 30SW(2d)404; 153Wash565, 280P88. [f] **In Oklahoma.**-138 Okl 110, 280P456.

1204-75 169La681, 125S853; 5LaA337; 6LaA441. [e] **Where bond is required and is not filed till after adjournment,** notice of appeal must be given by summons to answer appeal. 152Miss437, 119S170.

1205-77½-New. Notice of appeal in open court is necessary to appellate jurisdiction in some jurisdictions. Tex CivA 286SW604.

1205-82 15F(2d)314. [g] **Præcipe for summons.**-121 OhSt627, 172NE375(1st case).

1206-92 31NM443, 247P306.

1206-95½-New. Mere approval of a bond by the trial judge cannot operate as a writ of error. 31F(2d)519.

1207-96 [e] **Description held sufficient.**-TexCivA 295SW245.

1207-7 92Fla237, 109S421.

1207-9 35GaA664, 134SE193; 38Wyo 421, 267P689. See also Tex 265SW140.

1208-12 [d] 221MoA974, 296SW193. [e] **Persons to be served.**-308Mo 309, 272 SW691. [f] **Service on attorney.**-308 Mo 309, 272SW691. [g] **Power of attorney to waive service.**-308Mo 309, 272SW 691.

1209-22 97Fla479, 121S466 ("writ of error" is mere instrument to bring up record in aid of exercise of appellate jurisdiction; hence not every defect in such writ will be allowed to defeat exercise of such jurisdiction).

1209-26½-New. When purported writ is not even colorably the writ of the court to which it is returnable, it is not amendable. 92Fla237, 109S421.

1209-29 92Fla237, 109S421 [citCJ]. [b] (5) That writ is not tested in name of chief justice, as required by Comp. Gen. L. (1927) § 4618, does not deprive circuit court of jurisdiction, defect being amendable under statute. 97Fla479, 121S466.

1209-30 92Fla237, 109S421.

1209-30½-New. Formal defects may be regarded as amended if the writ is not issued contrary to statutes. 92Fla237, 109S421.

1210-31 92Fla237, 109S421.

1210-33 86Colo 286, 281P361.

1210-34 [d] **Scire facias not being served within reasonable time,** writ of error will be dismissed. 86Colo 286, 281 P361.

1210-36 214Ala1, 106S228.

1210-37 214Ala1, 106S228.

1211-44 15F(2d)314.

1211-47 TexCivA 299SW915. [e] **Constructive notice of filing of petition in error.**-38Wyo 421, 267P689.

1212-53 170La813, 129S212(2dcase).

1212-54 [d] **Municipal corporation.**-201 Iowa186, 206NW954.

1212-62 2LaA182. [g] **Corporations.**-23 OhA224, 155NE254.

1213-64 2LaA163. [b] **Failure to serve one improperly named obligee on bond** does not oust appellate court's jurisdiction. TexCivA 23SW(2d)757.

1213-64½-New. Counsel specially appearing to move to quash service of process must be deemed defendant's agents, on whom citation can be served on appeal from an order granting the motion. 25F(2d)225.

1213-65 177Ark121, 6SW(2d)829; 165 La104, 115S383 (service after filing of transcript in supreme court is too late); MoA 29SW(2d)188; 127Misc183, 215 NYS437. [a] (5) Notice of intention to appeal, served four days after remittitur, in accordance with order granting new trial nisi, was served in time, under Code Civ. Proc. (1922) § 646, though more than ten days after order granting new trial. 146SC355, 144SE73.

1213-66 127Misc183, 215NYS437.

1213-67 16F(2d)838.

1214-70 32 OhA38, 167NE375.

1214-72 TexCivA 31SW(2d)833.

1214-73 TexCivA 299SW915. [e] Colo 262P925.

1214-74½-New. Service on the mayor of the municipal corporation which is the sole adverse party is sufficient, although notice is not addressed to the mayor but to the municipal corporation. 201 Iowa186, 206NW954.

1214-76 [b] (2) See to same effect Tex CivA 274SW1019.

1215-77 TexCivA 31SW(2d)833. [b] **Burden of proof.**-22 OhA315, 153NE312.

1215-84 [e] **After motion to quash and timely service** of briefs pointing out defect, writ cannot be amended so as correctly to describe judgment. 220 MoA995, 271SW831.

1216-43½-New. In some jurisdictions appeals are properly filed by deputy clerk of district court acting as deputy clerk of court of appeal. LaA 130S354.

1216-90 MoA 29SW(2d)227.

1216-91 131 Okl 55, 267P842 (held sufficient).

1216-92½-New. Notice of appeal is not a writ, summons, or process. 204 Iowa 3, 214NW729.

1216-99 27Hawaii682; 43 Ida391, 252 P493; 47 Ida722, 278P224(1stcase)

(though in default); 47 Ida735, 279P 409; 204 Iowa606, 215NW615; Iowa 225NW942 (notice of appeal must be served on appellee or his attorney); 29 PortoRico 764; 66Utah290, 241P1055. See also 126 Or91, 267P820, 268P980. [i] **Parties who have defaulted** must be served with notice where their interests would be prejudicially affected by reversal. 43 Ida391, 252P493.

1217–3 204 Iowa606, 215NW615; 82 Mont21, 265P673; Or 287P223 (sureties on injunction undertaking not parties); 33PortoRico 933; 66Utah290, 241 P1055; Utah 290P161 (party who disclaims).

1217–4 [c] 50SD328, 210NW102.

1217–5 81Mont459, 264P127; 34Porto Rico 575 (person not party to suit); 50 SD328, 210NW102. [k] **Where default not entered.**–81Mont459, 264P127.

1218–6 204 Iowa606, 215NW615; 29 PortoRico 764. But see 81Mont459, 264 P127. [b] **Receiver.**–153Wash565, 280P 88.

1218–8 [a] **In adjudication involving real property** heirs of deceased parties must be made parties and served with notice of appeal. 116 Or525, 241P988.

1218–9 43 Ida391, 252P493; Ida 290P 723; 45 Ida776, 265P703; 46 Ida16, 266 P430 (party given part interest in water by decree is adverse party); 47 Ida 735, 279P409; 48 Ida481, 282P947; 206 Iowa589, 221NW193; 208 Iowa596, 226 NW140, 144 [citCJ]; 77Mont182, 250 P812; 81Mont459, 264P127; Nev 286 P120; ND 232NW10; 128 Or236, 271P 740; 11PaDist&Co 102; 34PortoRico 573; 50SD328, 210NW102; TexCivA 31 SW(2d)833; Wis 232NW549. [e] (2) Under statutes in some states service of notice upon party, not appearing in action or suit, is not necessary. 121 Or 432, 248P145. [f] **All adverse parties must be served** under statute providing for service on "adverse party." 81Mont 459, 264P127.

1219–10 Ida 290P723; 206 Iowa712, 221NW217; 77Mont182, 250P812; 118 Or520, 247P753; 128 Or236, 271P740; 32PortoRico 856; SD 227NW483. [e] (1) 81Mont459, 264P127. (2) Appeal will not be dismissed because notice not served on defaulted party who at time of attachment of property involved in action of intervention had conveyed it by public instrument. 32PortoRico 856. [f] **Defendant served with process and appearing but not pleading within time allowed** is not entitled to notice. 81Mont 459, 264P127. [g] **Defaulting defendants, who had contracted to purchase claims on which trust was sought to be impressed,** held not adverse parties entitled to notice where no attack is made on transaction. 48 Ida18, 279P293. [h] **Defendants never served with process nor appearing** are not adverse parties required to be served with notice. 48 Ida18, 279P293. [i] **Intervening holder of assignment** for renewal insurance commissions is not adverse party. ND 232NW10.

1220–12 [b] **Only parties to record are entitled to notice** though they might be adversely affected by appeal judgment. 48 Ida182, 279P713.

1220–13 43 Ida391, 252P493; 50SD328, 210NW102.

1220–15 201 Iowa1281, 208NW284. [i] **Coparty who would be inconvenienced and detrimentally disturbed in occupancy of property** if appeal is sustained must be served with notice. 199 Iowa 1122, 201NW24. [j] **In Iowa.**–229NW 156.

1221–16 48 Ida481, 282P947; Nev 286 P120.

1221–17 201 Iowa253, 207NW119; 202 Iowa262, 208NW321; 204 Iowa1011, 216 NW765; Iowa 218NW625; 29PortoRico 764; 144Wash1, 255P924.

1222–21½–New. An attorney appearing for two defendants but appealing for only one need not serve notice on the latter where the record shows no withdrawal of the attorney as to the latter. 198Cal 333, 244P1081.

1222–21⅓–New. No service of notice of appeal is necessary to a party who has been defaulted. 143Wash187, 254P529.

1222–21¼–New. Where the attorney for the appealing defendant was also the attorney for defendant who did not appeal, it is unnecessary to make separate service of notice of appeal on defendant not appealing. 48 Ida481, 282P947.

1222–22 73Mont169, 235P406; 48Nev 244, 229P387, 234P518 (surplusage not ground for dismissal); 116 Or411, 241 P333. [a] 116 Or411, 241P333. [d] But see 203Cal 286, 263P810; 203Cal 665, 265P806. [e] **Liberal construction** should be given notice, so as not to defeat right of appeal. 167Minn447, 209 NW267. [f] **In Montana.**–73Mont169, 235P406.

1223–25 200Cal 646, 254P269; MoA 29 SW(2d)227; 128 Or236, 271P740; Tex CivA 276SW724, 725 [citCJ]. [a] (1) 72CalA16, 236P219; 74CalA714, 241P 905.

1223–26 200Wis318, 228NW492.

1223–28 [a] (1) 156SC437, 153SE460. (7) See also 81CalA676, 254P587.

1223–28½–New. Notice of appeal is void and appeal will be dismissed if revenue stamps are not affixed before expiration of time for appeal. 34PortoRico 233.

1223–30 170La212, 127S604; TexCivA 291SW281; TexCivA 5SW(2d)789. [e] **In Washington** practice should be encouraged. Wash 292P418 (notice held sufficient).

1224–31 34PortoRico 148 (pleading filed as "motion for appeal" held sufficient compliance with requirement); TexCivA 5SW(2d)789.

1224–32 46 Ida16, 266P430; 208 Iowa 596, 226NW140 (must unequivocally disclose party for whom intended and who is to be affected); 126 Or91, 267P820. [e] **Separate notices of appeal, addressed to different parties,** constitute substantial compliance with statutory requirements. 47 Ida322, 276P35. [f] **Failure to address notice to adverse party is fatal defect,** though he is served by virtue of fact that he is represented by attorney for appellant. 48 Ida481, 282P947.

1224–33 [b] **In Montana.**–81Mont459, 264P127. [c] **Notice addressed to "above named defendants who have appeared herein and to their attorneys"** is sufficient though some defendants had not appeared. 81Mont459, 264P127. [d] **If notice required is to municipality,** though service is on named official required, it may be addressed to municipality or its therein named attorney. 208 Iowa596, 226NW140.

1224–34 But see 208 Iowa596, 226NW 140. [a] (1) 81Mont459, 264P127.

1224–37½–New. Where the statute does not require the notice to be addressed, failure to address the notice is not fatal to the validity of the notice. 116 Or411, 241P333.

1224–39 124 Or102, 259P207. But see 116 Or411, 241P333.

1224–43 But see 54SD329, 223NW210.

1224–44 48Nev244, 229P387, 234P518. [a] (3) Excludes any appealable orders or rulings not included in term "judgment" as defined by code. 34PortoRico 328. [b] **Appeal from order denying new trial** may accompany appeal from judgment. 54SD329, 223NW210.

1225–45 [a] **Notice by one joint tortfeasor** held not to include judgment against other tort-feasor. CalA 284P 519.

1225–47½–New. Where a statement and notice of appeal refer to a judgment for plaintiff in the original action, neither the judgment dismissing the petition in a suit for a new trial, nor any pleadings or rulings therein, can be considered. 228Ky51, 14SW(2d)165.

1225–48 121 Or402, 245P1086. But see 206 Iowa488, 221NW223.

1225–49½–New. Plaintiff, after an order refusing an application for writ of assistance, giving notice that he would reserve the right to appeal, is precluded where the notice of appeal and exceptions were confined to a later order on second application. 135SC446, 134SE1 (2dcase).

1225–49⅓–New. On appeal from judgment after answer, the court can consider the pleadings although the notice of appeal does not mention a motion for judgment on the pleadings or bring up an earlier order for review. 247NY131, 159NE886.

1225–49¼–New. Appeal from an order denying a motion to set aside judgment cannot operate as an appeal from judgment on the merits where the time for appeal from the judgment had expired. 199Wis602, 227NW270.

1225–49⅕–New. Matters determined in judgment as to which no notice of appeal was served not presented for review. Iowa 232NW640.

1225–51 220Ala113, 124S291; Fla 129 S501; Iowa 222NW899; 35PortoRico 584 (reference to judgment only as an order); Wash 287P900. [d] **Notice is sufficient where judgment identified** by certified copy thereof furnished by appellee and referred to in his motion to dismiss appeal. 34PortoRico 328. [e] **Appellate court will confine review to orders specified** in appeal where appeal is from several interlocutory orders. 98 Fla565, 124S814.

1225–52 35PortoRico 584.

1225–53 See also 121 Or402, 245P1086. [a] (1) 73Mont169, 235P406. (5) Where it was not due to fault of appellant. 160 La813, 107S584.

1226–55 178Minn601, 228NW174 (naming wrong county held fatal).

1226–56 [c] **Amount need not be stated.**–34PortoRico 328.

1226–57 200Cal 646, 254P269; 74CalA 714, 241P905; 78CalA638, 248P754; 92 CalA31, 267P596; 44 Ida228, 256P102; 48Nev244, 229P387, 234P518; 116 Or 411, 241P333; 121 Or402, 245P1086; 126 Or683, 250P235; 124 Or102, 259P 207.

1227–58 204 Iowa1122, 216NW629 (specification as to particular part of judgment appealed from held conclusive on appellant); 208 Iowa1193, 225 NW261 (appeal held one from entire order); 130 Okl 277, 267P270 (failure to give notice of appeal from judgment as to one of two causes of action precludes review thereof); Utah 292P206 (intent shown to appeal from entire judgment).

1227–59 48Nev244, 229P387, 234P518.

1227–60 [b] (2) Appeal from decision and judgment is not appeal from order denying new trial. Kan 291P935.

1227–65 Iowa 222NW899. [a] **Notice held sufficient.**–Fla 129S501.

1227–66 Iowa 202NW778. [g] **Caption should be construed with body of notice of appeal** to ascertain parties to appeal. Fla 129S501.

1227–66½–New. Notice of appeal by city attorneys without specifying which of two defendants appeals perfects appeal for the city. TexCivA 279SW916.

1228–67 57ND262, 221NW69 (only errors appearing on judgment roll are considered where no specifications of error were served with notice of appeal). [d] **Leave to amend refused.**–Alta [1930] 2 DomLR821.

1228–69 89Fla499, 105S101 (should be signed by appellant or solicitor).

1228–73 201 Iowa1042, 206NW129.

1229–77 219Ala447, 122S426 (notice not signed by appellant); 84CalA303, 257 P909 (entitling notice in police court instead of in recorder's court); 48Nev 244, 229P387, 234P518 (superfluous matter); 227AppDiv444, 238NYS139; 126 Or883, 250P235; Utah 290P161. [c] (3) Reasonable time to correct errors in citations of appeal is granted for errors on part of court officers. 160La813, 107 S584. [e] (3) In Porto Rico. 33Porto Rico 598.

1229–78 48Nev244, 229P387, 234P518 (where time has not expired).

1229–79 48Nev244, 229P387, 234P518 (defect or informality did not mean total failure); 116 Or525, 241P988. [b] **Unsigned notice of appeal** (1) is nullity requiring dismissal of appeal (201 Iowa 1042, 206NW129), (2) not rendered any less nullity because appellee and clerk of court execute acknowledgment of service on notice (201 Iowa1042, 206NW129), (3) nor by fact that reverse side of notice carries title of case and indorsement of name of appellant's attorney (201 Iowa1042, 206NW129). [c] **Notice of appeal cannot be amended to cure defect** and render otherwise duplicitous notice effective, though surplus matters may

be stricken therefrom to clear record. 54SD329, 223NW210.

1230–80 228AppDiv794, 240NYS1.

1230–81½–New. That appellant did not file notice of appeal with the clerk of the court below is not ground for dismissal of the appeal. **TexCivA** 291SW674.

1230–81⅓–New. Sufficiency of notice of appeal not served on appellee's attorney cannot be reached by affidavit. **Iowa** 225NW942.

1230–82 48Nev244, 229P387, 234P518; 116Or525, 241P988; **Wash** 288P924.

1230–83 48Nev244, 229P387, 234P518. But see **TexCivA** 291SW281.

1230–86 43 **Ida**391, 252P493; 32**Porto Rico** 618 (service on clerk of court other than one issuing order changing venue from which appeal taken). [a] (3) Where firm dissolved, service of citation addressed to firm, on named person who conducted business under firm name and assumed all liabilities, at his legal domicile, is authorized by statute. 158**La** 616, 104S388. [b] **Service on alleged secretary** who disclosed relationship is not service on school district. **TexCivA** 279SW871.

1231–88 [j] (1) 205 **Iowa**1103, 216NW109. [k] **Where one defendant had defaulted.**–Notice of appeal is properly served on counsel of remaining defendant who had moved to dismiss case as to other defendant who had defaulted. 47 **Ida**636, 277P699.

1232–93 IndA 168NE584 (vacation appeal).

1232–94 116 **Or**525, 241P988.

1232–98 201**Cal** 152, 255P791; 122**Kan** 767, 253P414; **Minn** 233NW316(2d case); 35**PortoRico** 577 (appeal dismissed); **Utah** 290P161; 198**Wis**154, 223NW446. [a] 49**ND**777, 193NW481. [c] (1) 45 **Ida**23, 260P432; 122**Kan** 767, 253P414; **Okl** 251P496; 129 **Okl** 121, 263P649. [i] (2) But see 45 **Ida** 23, 260P432. [j] **Jurisdiction.**–27**Hawaii**682.

1234–2 [a] **Where solicitor's clerk is unavoidably absent,** time to give notice of appeal will be extended. **Alta** 15**DomLR**701, 26**WestLR**671, 5**WestWkly**1020.

1234–5 [a] (2) Appeal will not be dismissed for failure to file notice of appeal in time where timely service of notice was made, 135**Wash**156, 237P498 (appeal from decree determining water rights).

1234–8 27**Hawaii**682; 42**NB**315.

1235–11½–New. On motion to extend the time to appeal, the supreme court will enter upon the question of competency of the appeal. 49**CanSC**587, 18**DomLR**217, 23**CanCrCas**194, 6**WestWkly** 462.

1235–14 37**Wyo** 475, 263P620.

1235–17 208 **Iowa**531, 224NW95(1st case) (appeal not dismissed for defect in second notice where first notice gave supreme court jurisdiction).

1235–19 131 **Okl** 55, 267P842 (judgment for division of jointly acquired property of husband and wife being divorced); **TexCivA** 30SW(2d)404.

1235–20 130 **Okl** 286, 267P268 (held sufficient when given within ten days after judgment rendered). [d] **In Texas.**–**TexCivA** 290SW186.

1235–22 121 **Or**432, 248P145; 32**Porto Rico** 618 (applying Code Civ. Proc. § 296). See also 48**Nev**244, 229P387, 234P518. [c] **Notice to court clerk other** than clerk of court from which appeal taken is insufficient. 32**PortoRico** 618.

1236–23 [e] **Service on city.**–Notice of appeal addressed to city and served on mayor held sufficient, though not addressed to mayor. 203 **Iowa**1324, 214NW687.

1236–30½–New. On appeal from order changing venue, notice must be served on the clerk of court issuing the order and not on that of the court to which the case is transferred. 32**PortoRico** 618.

1236–31 47 **Ida**322, 276P35 (where parties reside at different places). [c] **Mailing of notice of appeal by registered letter with request for return receipt** held valid service, notwithstanding respondent's attorney refused to sign receipts. 219**AppDiv**865, 221NYS197.

1236–33 33**PortoRico** 851; 143**Wash** 440, 255P656.

1236–33½–New. In some jurisdictions service is complete on the first day after the date of deposit in the post office that the mail leaves such post office for the place to which it is sent. 127 **Or**16, 256P1043.

1237–37 247**Mich**161, 225NW514(1st case); 33**PortoRico** 851. [b] **In Porto Rico.**–33**PortoRico** 851.

1237–42½–New. Failure properly to record notice of entry of appeal affects only the court's jurisdiction over the person of appellee, where it was filed with the clerk within the time allowed. 98**Fla**186, 123S699(2dcase).

1237–43 [f] (2) Burden is on one challenging service to show by clear and convincing evidence incorrectness and inaccuracy of return. 22 **OhA**315, 153NE312.

1237–46 TexCivA 10SW(2d)185 (return not showing that true copy of citation to defend writ of error was served on adverse party in person or when citation was served held fatally defective). [a] (1) See also 34**PortoRico** 680. (2) Affidavit as whole considered in determining sufficiency. 34**PortoRico** 148. (3) Failure to state prepayment of postage fatal. 34**PortoRico** 148.

1238–53 214**Ala**1, 106S228; 22**AlaA**433, 116S506; 74**CalA**562, 241P280; 43 **Ida** 391, 252P493; 45 **Ida**564, 263P1001; 47 **Ida**735, 279P409; 89 **IndA**17, 165NE560 (1stcase); 87 **IndA**624, 158NE517; 204 **Iowa**1, 213NW397; 206 **Iowa**840, 221NW517; **Iowa** 229NW156; 165**La**104, 115S333 (failure to pray process and have it issued); 167**La**133, 118S864; 10**LaA**146, 122S75; 170**La**621, 128S655; 11**LaA**471, 123S410(1stcase); **Kan** 291P935; 170**Minn**225, 212NW198; 308**Mo** 309, 272SW691; **MoA** 29SW(2d)188; 48**Nev**244, 229P387, 234P518; 127**Misc** 183, 215NYS437; 49**ND**323, 191NW490; 113 **Okl** 115, 239P569; 121 **Okl** 47, 247P376; 135 **Okl** 103, 274P475(1stcase); 136 **Okl** 122, 276P721 (appellate court acquires no jurisdiction); 139 **Okl** 102, 281P258 (notice of intention to appeal); 140 **Okl** 152, 282P311; 142 **Okl** 291, 286P890; 32**PortoRico** 618; 33**PortoRico** 938; **TexCivA** 271SW644; **TexCivA** 282SW668; **TexCivA** 30SW(2d)338; 66 **Utah**290, 241P1055; 136**Wash**346, 240P4; 150**Wash**389, 273P200(1stcase). [a] 167**La**1014, 120S630. [b] **Failure to serve notice held not ground for dismissing appeal** where notice to appellees was issued from supreme court. 200 **Ind**129, 154NE490.

1239–54 SD 233NW289(1stcase); **SD** 233NW284; **SD** 233NW288(1stcase); **SD** 233NW287.

1239–55 Iowa 228NW270.

1239–56 Utah 290P161.

1239–58 See also 32**PortoRico** 618.

1239–59 31**F(2d)**519; 208**Cal** 27, 280P112; 206 **Iowa**589, 221NW193 (where no prejudice).

1239–60 74**CalA**562, 241P280; 89 **IndA** 12, 164NE320 (mistake of fact necessary to relieve appellant from failure to give notice of appeal); 133**Misc**432, 232NYS496.

1239–61 163**La**976, 113S167.

1240–62 34**NM**436, 283P52(2dcase); **NM** 290P742. See also 34**NM**421, 283P52(1stcase).

1240–62½–New. Failure to serve notice of appeal on persons required to be served is not cured by service on them of notice of appeal taken out of time from an order not substantially modifying the order originally appealed from. 33**PortoRico** 938.

1240–63 170**Minn**225, 212NW198.

1240–64 196**Cal** 73, 235P734; 2**LaA**75. [a] **Approval of supersedeas bond** has been held not waiver of notice. **MoA** 29SW(2d)188.

1240–65 [a] 196**Cal** 73, 235P734.

1240–66 [c] **Stipulation for consolidation of appeals** from judgment and from order overruling motion for new trial does not constitute waiver of notice of appeal to any of respondents. 43 **Ida** 391, 252P493.

1241–74 214**Ala**1, 106S228; 47 **Ida**322, 276P35. See also 7**LaA**62.

1241–78 Iowa 222NW899; 38**Wyo** 421, 267P689 (motion to strike bill of exceptions held not waiver).

1241–79 214**Ala**1, 106S228; 91**Fla**284, 107S918; 163**La**976, 113S167; 95**Pa Super**71. See also 25**F(2d)**271. [b] (4) Jurisdiction is not conferred by general appearance of defendant in error after time for filing appeal has expired. 129 **Okl** 121, 263P649.

1242–87 IndA 163NE51.

1243–91 38**Wyo**421, 267P689, 690 [cit CJ].

1243–92 MoA 14SW(2d)669.

1243–94 167**La**133, 118S864; **TexCivA** 299SW915. See also 204 **Iowa**3, 214NW729.

1243–94½–New. A motion to quash the writ of scire facias on the ground of want of jurisdiction of the person and of the subject matter is a general appearance giving the appellate court jurisdiction. 82**Colo** 602, 262P925.

1243–96 196**Cal** 73, 235P734. [b] **Notice of appeal.**–196**Cal** 73, 235P734.

1243–98 73**Mont**169, 235P406.

1243–98½–New. But belief that opponent will not appeal if the other does not in the absence of fraud is not an excuse for failure to perfect the appeal. 258**Mass**431, 155NE455.

1243–99 98**Fla**1076, 125S235(2dcase); **Fla** 126S761; 15 **Ida**254, 97P40; 5**Cush Mass**493; 101**NC**428, 7SE566; 101**NC** 526, 8SE335. [b] **In Florida.**–89**Fla** 499, 105S101. [c] **Burden of making and entering** proper copies of exceptions rests equally upon all parties to combined bill of exceptions. **Mass** 167NE910(2dcase).

1243–2 But see 89**Fla**499, 105S101.

1243–4 19**HowUS**182, 15**L ed**594; 109 **US**110, 3**SCt**78, 27**L ed**874; 201**Cal** 152, 255P791; 106**NC**478, 11SE515; 108**NC** 792, 13SE112; 190**NC**154, 129SE195 (rule of court mandatory, not directory); 191**NC**263, 131SE637. [b] 160**Ga**703, 128SE890; 259**Mass**463, 156NE717; 190 **NC**154, 129SE195; 191**NC**263, 131SE637; 191**NC**777, 133SE162; 192**NC**37, 133SE181. [c] **In Georgia.**–160**Ga**703, 128SE890. [d] **Neither judges, solicitors, attorneys, nor parties** can dispense with rules as to time of docketing. 191 **NC**777, 133SE162.

1244–5 43**Cal** 42; 24**HowPrNY**89 (till return is filed in appellate court).

1244–6 See also 6**Pa**376.

1244–7 65**Me**366. But see 34**Wyo** 476, 245P298, 303 [citCJ].

1244–10 259**Mass**74, 156NE41; 259 **Mass**615, 156NE684 (failure of judge to report all evidence held not excuse); 259**Mass**595, 156NW708; 261**Mass**18, 158NE167; **Mass** 165NE675 (delay held insufficient to warrant dismissal); **Mass** 173NE432; 100**NC**347, 5SE192; 191 **NC**777, 133SE162; 192**NC**52, 133SE172. [a] (1) 45**Cal** 269 (must show that opposite party was in default at time calendar was to be made up). (2) Motion denied where appellee failed to proceed as rule allowed him to do. 91**NC**158.

1245–20½–New. Advantage of delay resulting from defendants' effort to avoid duplication of expense could not be taken by plaintiff on motion to dismiss the appeal where both parties appealed. **Mass** 165NE675.

1245–21 259**Mass**615, 156NE684.

1245–24 See also 191**NC**263, 131SE637.

1245–27 **Mass** 165NE675. But see 190 **NC**154, 129SE195; 191**NC**263, 131SE637.

1245–32 259**Mass**595, 156NE708; 259 **Mass**463, 156NE717.

1245–34½–New. Where for good reason the cause is not ready for hearing, it is permissible for appellant, within time prescribed by mandatory rule of court, to docket record and move for certiorari, which may be allowed by court in its discretion. 190**NC**154, 129SE195.

1245–34⅓–New. Where delay is not due to negligence, appellant may apply for certiorari to bring up the transcript. 191**NC**777, 133SE162; 192**NC**52, 133SE172.

1246–37 16**Va**304.

1246–41 192**NC**37, 133SE181.

1246–43 [c] (3) Letter to clerk with check for expenses in preparing papers for appeal. 265**Mass**390, 164NE467.

1246–45½–New. Willingness to share

the expense in a combined bill of exceptions is not equivalent to compliance with the statute, and failure so to comply requires dismissal. **Mass** 167**NE** 910(2dcase).

1246–45⅓–New. Where a dispute has arisen between parties to a combined bill of exceptions, any party who wants his exceptions considered must print and enter the exceptions at his own expense. **Mass** 167**NE**910(2dcase).

1246–45¼–New. Where a combined bill of exceptions has been filed, one excepting party cannot stand idly by and compel the other to pay all expenses and still preserve his rights as an excepting party. **Mass** 167**NE**910(2d case).

1246–45½–New. Request for inclusion of case in calendar must be accompanied by required revenue stamp in order to perfect appeal. 35**PortoRico** 835.

1246–47 See also 191**NC**263, 131**SE**637.

1246–48 94**Fla**653, 114**S**507. See also 89**Fla**499, 105**S**101.

1247–50 94**Fla**653, 114**S**507.

1247–50½–New. Where, on special appearance for the purpose of moving to dismiss an appeal, appellees question the jurisdiction of the court as to the cause as well as to the persons of appellees, they thereby place themselves in the status of entering a general appearance. 94**Fla**653, 114**S**507.

1247–51 See also 113**NC**283, 18**SE**212.

1247–52 259**Mass**463, 156**NE**717.

1247–54 **Fla** 126**S**761; 155**Wash**14, 283 **P**470. [b] **Court will not seek to detect errors not apparent of record.**–13 **LaA**150, 127**S**427.

1247–55 11**LaA**435, 123**S**515.

1247–59 177**Ark**121, 6**SW(2d)**829.

1248–62 98**Fla**996, 124**S**458 (special appearance by motion to quash writ of error); **IndA** 168**NE**471(2dcase) (filing petition for extension of time within which to file brief in answer).

1248–69 But see 175**Ark**926, 1**SW(2d)** 65.

1249–85 38**Wyo** 421, 267**P**689, 690 [cit CJ].

1249–86 89**Fla**499, 105**S**101; 98**Fla**186, 123**S**699(2dcase); **IndA** 163**NE**51; **MoA** 14**SW(2d)**669; **NM** 290**P**742.

1249–86½–New. But where notice to dismiss the appeal for lack of jurisdiction of the person containing general grounds is filed after the appeal has become inoperative, it is ineffectual as a general appearance or waiver. 89**Fla** 499, 105**S**101.

1250–89 98**Fla**1076, 125**S**235(2dcase).

1250–93 33**F(2d)**861; 2**KyOp**549; 156 **Miss**775, 127**S**283; 31**NM**48, 240**P**810 [citCJ]; 95**PaSuper**71; **TexCivA** 291 **SW**650; **TexCivA** 13**SW(2d)**918.

1251–9½–New. that cost bond was not contained in transcript; 31**NM**48, 240 **P**810.

1251–16½–New. Appearance in the appellate court of a guardian ad litem of an infant whose appointment in a court below was unauthorized by statute could not make plaintiff who prevailed in the court below the appellee so as to be entitled to file the record with the appellate court. 217**Ky**806, 290**SW**665.

1252–27 32**F(2d)**750.

1252–28 220**Ala**634, 127**S**199; 33**Ariz** 235, 263**P**628; 78**CalA**790, 248**P**1077; 161**Ga**634, 131**SE**495; 164**Ga**7, 137**SE** 567; 318 **Ill** 174, 149**NE**14; 249 **IllA** 252; 202 **Iowa**773, 211**NW**413; 161**La** 996, 109**S**814; 239**Mich**110, 214**NW**175; 321**Mo** 624, 12**SW(2d)**91; **Mo** 28**SW(2d)** 1008; **MoA** 7**SW(2d)**309 (when order granting appeal is made); **MoA** 17**SW (2d)**567; 51**Nev**26, 267**P**497; **Oh** 171 **NE**330; 113 **Okl** 280, 241**P**752; 122 **Okl** 56, 250**P**802; 136 **Okl** 29, 275**P**1036; 51 **Philippine**251; 117**Tex**170, 299**SW**230; **TexCivA** 275**SW**478; **TexCivA** 288**SW** 281; **TexCivA** 296**SW**990; **TexCivA** 21 **SW(2d)**92; **Utah** 266**P**1050; **Wash** 290 **P**430; 23**QueKB**22.

1253–30 247 **IllA**294; 6**LaA**245; 9**LaA** 65, 118**S**843; 51**Nev**26, 267**P**497; **Nev** 280**P**887; 117**Tex**170, 299**SW**230; **Wis** 229**NW**636.

1253–31 89**Fla**446, 105**S**126 (statute relative to obtaining supersedeas on appeal from interlocutory decisions does not require supersedeas to be obtained to acquire or preserve jurisdiction of supreme court when case has been removed by appeal duly taken, especially where whole merits are involved); 161 **Ga**634, 131**SE**495 (approval of bill of exceptions and signing of writ of error by judge); 164**Ga**7, 137**SE**567; 51 **Philippine**251; 51**Philippine**403 (after approval of bill of exceptions trial court is without jurisdiction to consider motion to add defendant); **TexCivA** 295**SW**245; **TexCivA** 5**SW(2d)**867 (after approval of affidavit of inability to pay costs in lieu of appeal bond, county court is without jurisdiction to enter order disallowing appeal). [b] **Where extension of time for preparing and serving case-made has not expired,** trial court has jurisdiction to withdraw execution, set aside order of sale, and permit filing of supersedeas bond, though term has expired and time allowed by previous order for filing of bond has expired. 114 **Okl** 110, 243**P**499.

1253–32½–New. Entry of report of judge to full bench in supreme court deprives superior court of jurisdiction. 254**Mass**137, 149**NE**705.

1254–35 25**F(2d)**329; 40**F(2d)**445. [a] **Filing of appeal bond pending action on motion for cancellation of order permitting appeal** does not divest court of jurisdiction to rescind order. **LaA** 130**S**133.

1254–38 37**F(2d)**849; **Ark** 30**SW(2d)** 218; 239**Mich**110, 214**NW**175; **Mo** 28 **SW(2d)**1008.

1254–39 **Utah** 276**P**908. But see 70 **CalA**368, 233**P**82.

1255–40 201**Cal** 438, 257**P**521; 150**Md** 271, 132**A**627; 155**Tenn**506, 296**SW**14.

1255–41½–New. Appealing party should not attempt to circumvent movant to dismiss for want of prosecution of appeal by making a speedy entry in the appellate court. 254**Mass**137, 149 **NE**705.

1255–43 31**Ariz**128, 250**P**885, 887 [cit CJ]; 78**CalA**790, 248**P**1077; 91**CalA** 324, 266**P**963; 89**Fla**446, 105**S**126 (when jurisdiction of supreme court attaches it is exclusive as to subject covered by appeal); 90**Fla**864, 107**S**185; 161**Ga**634, 131**SE**495; 164**Ga**7, 137**SE** 567; 164**Ga**744, 139**SE**532, 533 [quot CJ]; 318 **Ill** 174, 149**NE**14; 202 **Iowa** 773, 211**NW**413; 160**La**101, 106**S**708; 3**LaA**397; 262**Mass**477, 160**NE**427; 99 **NJEq**707, 134**A**189; **NJCh** 145**A**544(2d case); 128 **Okl** 251, 262**P**664; 39 **OklA CR**378; 116 **Or**371, 239**P**817 [citCJ] (second judgment based on subsequent service of summons on defendant not served prior to appeal cannot be rendered); 44**Philippine**62; 51**Philippine** 251; **TexCommnA** 293**SW**167; **Wash** 290**P**430. [f] (2) Preliminary injunction pending appeal continued till hearing of appeal. **TexCivA** 277**SW**1115. [g] **Nunc pro tunc order cannot restore jurisdiction of trial court** lost by allowance of appeal. 37**F(2d)**849. [h] **After appeal is taken** powers of both trial and appellate courts are determined by statutes regulating appeals. **Wis** 230**NW**607.

1257–44 215**Ala**247, 110**S**394; 258**Mass** 494, 155**NE**459; 99**NJEq**707, 134**A**189; 136 **Okl** 29, 275**P**1036. [g] 161**Ga**634, 131**SE**495.

1257–45 82**CalA**27, 255**P**250 (quashing levy under execution and restraining execution of judgment); **CalA** 291**P**650; 34 **OhA**335, 171**NE**319; **TexCivA** 275 **SW**478 (court has power to issue injunction to enforce jurisdiction); **Tex CivA** 278**SW**466. [e] 115**Nebr**199, 212 **NW**210. [l] **Where court below failed to order filing of bond** for issuance of injunction, appellate court may order filing of such bond. **TexCivA** 278**SW** 466. [m] **Restraining enforcement of judgment.**–82**CalA**46, 255**P**248. [n] **Supreme court has no jurisdiction** to direct clerk of chancery court to prepare transcript in forma pauperis. **Ark** 30 **SW(2d)**218.

1258–46 89**Fla**446, 105**S**126 (where taken with or without supersedeas). [e] **Order of trial court made long after appeal** cannot be set aside by Supreme Court in absence of record. 208 **Cal** 562, 282**P**796.

1258–47 89**Fla**446, 105**S**126 (where taken with or without supersedeas). [a] (2) **Trial court cannot dispose of case by** dismissal or otherwise to interfere with authority of appellate court under constitution to make its jurisdiction effective. 89**Fla**446, 105**S**126. (3) Lower court has no power to dismiss case after decision by appellate court but before mandate has been sent down. 77**Mont** 214, 250**P**609. [e] **Supreme court has inherent power to prevent any action by lower court** which would render appeal ineffective. 74**CalA**494, 241**P**270. [f] **Garnishment obtained after judgment** will not be set aside by appellate court on appeal from order granting new trial. **Fla** 126**S**280.

1258–48 See also **Nev** 280**P**887.

1258–49 77**Mont**214, 250**P**609.

1258–50½–New. Where the trial court has lost and the appellate court has acquired jurisdiction by appeal, the parties cannot by consent reinvest the trial court with jurisdiction to make any order in the case. 77**Mont**214, 250**P**609.

1258–50⅓–New. After appeal from decree dismissing bill to restrain sale of property under trust deed, trial court cannot require further undertaking on temporary injunction. **DC** 41**F(2d)**103.

1258–50¼–New. Rule that appellate court's jurisdiction is exclusive may be relaxed where writ is used to interfere with litigants below and appellate court cannot do complete justice. **WVa** 153**SE** 502.

1258–50⅕–New. , but application therefor should be made to appellate court. **DC** 41**F(2d)**103.

1258–54 78**CalA**790, 248**P**1077; 166**La** 879, 118**S**69; 194**NC**308, 139**SE**610. See also 89**Fla**446, 105**S**126, 127, 128 [cit CJ].

1259–57 78**CalA**790, 248**P**1077; 166**La** 879, 118**S**69. But see 198**Wis**24, 223**NW** 89.

1259–59 163**Ga**27, 135**SE**489.

1259–60 199**Cal** 194, 248**P**668; 89**Fla** 446, 105**S**126, 128 [citCJ] (case may be such that lower court may take further judicial proceedings after interlocutory appeal, unless supersedeas duly obtained); 163**Ga**27, 135**SE**489; 321**Mo** 624, 12**SW(2d)**91 (judgment held not interlocutory); 102**NJEq**357, 140**A**783 (not impairing appeal); 194**NC**308, 139 **SE**610; 300**Pa**21, 150**A**92; **TexCommnA** 23**SW(2d)**331; **Wyo** 285**P**788. [a] (2) Appeal from order overruling pleas of privilege does not suspend trial on the merits unless pleas are sustained. **TexCivA** 285**SW**907. [b] (4) Sustaining demurrer to one of several specific defenses in answer. 152**SC**317, 149**SE**840. [e] (4) Other instances. **Wyo** 285**P**788. [f] **Appeal from order overruling plea of privilege** does not preclude trial on merits pending appeal. **TexCivA** 24**SW(2d)** 805.

1260–62 73**CalA**687, 239**P**65; **CalA** 284 **P**950; 90**Fla**864, 107**S**185; 106**WVa**10, 144**SE**564, 565 [citCJ]. [b] **Dismissal.**–89**Fla**446, 105**S**126. [c] **Though interlocutory appeal duly taken is without supersedeas,** subsequent proceedings of trial court do not deprive appellate court of jurisdiction and all orders of trial court including final decree are subject to order or decree made on appeal from interlocutory order. 89**Fla** 446, 105**S**126. [d] **After certifying bill of exceptions** to judgment granting temporary injunction and appointing receiver, trial judge loses jurisdiction of bill of exceptions. 163**Ga**27, 135**SE**489.

1260–63 70**CalA**368, 233**P**82.

1260–63½–New. By filing of notice of appeal the lower court loses jurisdiction of the subject matter of judgment appealed from. 73**CalA**687, 239**P**65.

1261–67 **TexCivA** 282**SW**612.

1261–70 160**Tenn**500, 26**SW(2d)**152. [b] **Audits stated in conformity with decree prevail or fail** as decree is affirmed or reversed on appeal. 152**Md** 289, 136**A**269.

1261–71 **Cal** 270**P**392; **CalA** 277**P**352; 318 **Ill** 174, 149**NE**14; 102**NJEq**357, 140 **A**783.

1262–72 289**Pa**327, 137**A**459.

1262–74 122**Kan**274, 276, 252**P**234 [cit CJ]. [d] **Deed set aside** is effective till final hearing or appeal. **TexCivA** 277 **SW**1115.

1262–75 [a] **Appeal from order granting new trial amounts to continuation**

of trial on merits. 317Mo707, 296SW386.

1262–75½–New. In Louisiana devolutive appeal cannot avail either the defendant or an outsider in defense of an order of seizure and sale in executory proceedings. 156La889, 101S255.

1263–85 Iowa 229NW147; 217Ky384, 289SW280; 163La378, 111S792; 13LaA490, 127S452(1stcase) (devolutive appeal); 31NM593, 248P885. See also 3LaA24; Utah 289P132.

1263–87 27Hawaii362, 367 [citCJ]; 101NJEq518, 139A332.

1263–89 27Hawaii362, 367 [citCJ]. [a] **Process should not be issued on decree forthwith,** if effect will be to destroy subject matter of appeal. **NJCh** 134A901.

1263–89½–New. The lower court retains jurisdiction over equity cause to see that plaintiff obtains what he was entitled to under facts upon which there was judgment requiring the directors of the corporation to obtain a permit for the issuance of stock. 199Cal194, 248P668.

1264–1 129Kan14, 281P865 (taking appeal from order denying new trial did not bar renewal and reconsideration of motion within same term); 235Mich668, 209NW846 (jurisdiction not ousted by filing of claim of appeal); 74Mont558, 241P636. [c] 128Misc665, 219NY847.

1264–2 118Kan281, 235P115.

1264–3 29Hawaii454; 239Mich110, 214NW175 (without leave of appellate court); **TexCommnA** 293SW167. See also 180Ark980, 23SW(2d)972. But see 244Mich192, 221NW113.

1265–6 40F(2d)445; 75CalA695, 243P54; 235 IllA488, 498 [quotCJ]; **Or** 290P1098(1stcase); 87PaSuper270. [a] **Mistake of fact resulting in judgment** cannot be remedied by motion to vacate judgment after perfecting appeal. **Or** 290P1098(1stcase).

1265–7 235 IllA488, 498 [quotCJ]; **MoA** 178W(2d)567 (notice required); 32SCEq52 (upon newly discovered evidence); 109TexCr289, 4SW(2d)49. [a] **Jurisdiction below to vacate approval of appeal bond** and to vacate judgment is not affected by issue of order from appellate court extending preliminary injunction. 235 IllA488. [b] **Court must first vacate order approving bond,** before it can vacate decree or judgment on motion. 235 IllA488.

1265–9½–New. Where the district court desires to consider motion to vacate while writ of error is pending, it should ask leave of the circuit court of appeals. 9F(2d)902.

1265–9½–New. If leave is granted and the lower court decides to reopen judgment of dismissal, it may then request remittitur. 9F(2d)902.

1265–10 40F(2d)445; **Ark** 30SW(2d)218; 160La430, 107S294; 31NM443, 247P306; **Or** 290P1098(1stcase); 87PaSuper270; 33PortoRico178 [citCJ]; **TexCivA** 5SW(2d)263. [b] **In Porto Rico.**–33PortoRico178.

1266–11 69CalA688, 232P499; 77CalA727, 247P594; 80CalA776, 252P1072 (clerical errors in order granting new trial); 94Fla86, 113S745, 746 [citCJ]; **Mo** 28SW(2d)1008; 123Or280, 261P55; 107WVa192, 147SE877, 66ALR102; **Wis** 230NW607. [d] **Order fixing amount of bond** to be given to suspend execution of judgment requiring payment of specific sum of money may be rescinded by court which granted it even after transcript is filed in appellate court. 161La996, 109S814.

1266–12 196Cal395, 238P78; 202Cal359, 260P869; 69CalA688, 232P499 (corrections of clerk's error in entering judgment in equity case before adoption of findings of jury by court); 91CalA521, 267P367; 99CalA134, 277P1049; 94Fla86, 113S745, 746 [citCJ]; 49Nev411, 248P46; **Wis** 230NW607.

1267–13 15F(2d)236; 73CalA687, 239P65.

1267–14 69CalA688, 232P499 (court pending appeal may correct manifest clerical error not affecting substantial rights).

1267–15½–New. Where granting of suspensive appeal by court was illegal, judge had jurisdiction to amend order. 159La463, 105S510.

1267–16 219Ala123, 121S412; 220Ala560, 126S634. [b] 219Ala123, 121S412.

1268–17½–New. The trial court may, by nunc pro tunc order, permit the filing nunc pro tunc of the sheriff's return of service of summons. 123Or280, 261P55.

1268–18 9LaA288, 120S99. See also 46Philippine578. [a] **Jurisdiction of appellate court is not affected** by filing of answer to amended complaint. 192NC50, 133SE184.

1268–19 13LaA309, 127S139 (plea of estoppel filed after argument); **BC** [1930] 2DomLR224.

1268–23 14F(2d)700; 78CalA790, 248P1077; 246Mich231, 224NW365; 50Nev113, 252P943, 944 [citCJ]; 195NC714, 143SE528; **TexCivA** 275SW478. [b] See also 76CalA331, 244P951.

1269–24 49SD10, 205NW704 (conveyance by executrix appointed pending appeal upheld as in pursuance of contract of sale of decedent).

1269–25 90CalA169, 265P555.

1269–29 DC 41F(2d)103.

1269–29½–New. Pending appeal, appellate court may grant ancillary writs to preserve status of property or matter in controversy until appeal is decided. **TexCivA** 28SW(2d)826.

1269–31 69CalA682, 232P161; 58ND899, 228NW223 (by lower court).

1270–33 247Mich185, 225NW568 (refusal to continue receivership held not abuse of discretion).

1270–35 220Ala529, 126S102 (appeal from appointment without supersedeas); 154Miss812, 123S825.

1270–36 [c] **Statute authorizing appointment pending appeal** authorizes appointment pending error. 34OhA558, 171NE422.

1270–39½–New. It is beyond the power and jurisdiction of the court to appoint a receiver in an entirely different cause of which the court had lost jurisdiction because another judge of the same court had previously certified a bill of exceptions which was then pending in the court of appeals. 164Ga744, 139SE532.

1270–39½–New. After perfection of an appeal, the district court is without jurisdiction to grant a motion dismissing an application for the receiver. **Tex CivA** 218SW(2d)92.

1270–40 245NY641, 157NE891 (restraining body execution); **TexCivA** 2SW(2d)324.

1270–41 227Ky768, 14SW(2d)160 (injunction held not abuse of discretion).

1270–41½–New. Texas court of civil appeals cannot issue writ of injunction to restrain enforcement of judgment in absence of filing of proper statutory cost of supersedeas bond. **TexCivA** 276SW963.

1270–42 30F(2d)121 (order unwarranted); 78CalA790, 248P1077; **TexCivA** 295SW316. [c] **Increase of security.**–78CalA790, 248P1077.

1270–42½–New. On the other hand it has been held that the appeal deprives the lower court of jurisdiction to enjoin the enforcement of the judgment. 161Ga567, 131SE529.

1271–43½–New. Continuance of temporary injunction pending appeal operates only to preserve status quo. **DC** 41F(2d)103.

1271–44 82CalA1, 254P915 (injunction is enforceable not only against parties but against agents having knowledge or persons acting in collusion); 86CalA259, 260P922. [a] **But where stay of injunction on decree pending appeal was erroneously refused,** defendant will not be punished for contempt. **NJCh** 134A901.

1271–44½–New. Filing notice of appeal from injunction pendente lite transfers to supreme court jurisdiction to determine validity of contempt order. **CalA** 292P650.

1271–46 44Philippine62.

1271–49 30NM505, 240P202; 49Or595, 90P1110. [e] **Purpose of supersedeas is to preserve subject of litigation,** so that appellate jurisdiction may be effective, or to make delay of litigation on appeal as small detriment or burden as possible to interests involved. 89Fla446, 105S126.

1272–50 TexCivA 21SW(2d)70.

1273–58 [a] **Where enforcement of decree will injure property,** decree enjoining party from using his property in certain manner should be restrained pending appeal. **NJCh** 134A901.

1273–59 25F(2d)329; 27F(2d)992; 40F(2d)796; 216Ala167, 112S818; 202Cal10, 258P942 (where judgment adjudges place nuisance and forbids its use for any purpose for period of time); 76CalA331, 244P951; 89Fla446, 105S126 (right to supersedeas regulated by statute); **Fla** 130S33; 161La971, 109S780; 167La215, 118S893; 177Minn79, 224NW464; 31NM443, 247P306; 31NM593, 248P885; 197NC644, 150SE178; 98PaSuper77; 51SD527, 215NW692; 52SD572, 219NW258 (against school district); 192Wis358, 212NW655. See also 74CalA272, 239P862. But see 198Wis24, 223NW89; 198Wis342, 224NW108. [c] **Appellant's failure to file supersedeas bond** does not prejudice appellee. NM 289P69. [d] **Construction of particular statutes requiring bond.**–Cal 289P617.

1273–60 217Ala200, 115S302 (appeal by married woman from decree dissolving temporary injunction); **Cal** 289P617; 198NC702, 153SE263; **Oh** 171NE849; 51Philippine251. See also 22AlaA60, 112S96. [b] **In California.**–201Cal87, 255P827. [c] **Garnishment proceedings.**–TexCivA 218SW(2d)70.

1273–61 74CalA487, 241P415; 69Utah413, 255P668.

1273–61½–New. Appeal from judgment to enjoin, although bond be given, does not vacate such judgment, 199Ind634, 157NE51.

1273–61½–New. nor authorize carrying into effect the thing sought to be restrained. 199Ind634, 157NE51.

1273–62 [1925] CanSC104, [1925] 3DomLR131 (holding supreme court of Canada without power to stay proceedings in absence of security to satisfaction of court appealed from); 3AltaL236.

1274–64 202Cal10, 258P942; 89Fla446, 105S126 (requirement of bond or order, or both).

1274–65 89Fla446, 105S126.

1274–66 97Fla28, 119S149 (supersedeas is generally invoked to maintain status quo of property or rights constituting subject matter of litigation, pending appellate proceedings); 130Kan752, 288P760; 132Or122, 283P745; 7AltaL56, 15DomLR231, 26WestLR434. [a] (1) See also 7LaA474; 8LaA6. (2) It is character of bond and time within which it is filed that determines whether appeal is suspensive or devolutive one. 159La535, 105S611. (3) Defendant appealing from judgment on merits has absolute right to suspensive appeal. 165La1000, 116S486. (4) Under proper order granting appeal, character of appeal is fixed by amount of bond and time within which it is filed. **LaA** 130S354.

1274–67 [a] **In Louisiana.**–159La535, 105S611.

1275–71 93CalA221, 269P559; 43Ida618, 253P838; 288Pa217, 135A730; 8PaDist&Co59. [i] (1) 161La778, 109S488. (3) Where appellant obtained order for both suspensive and devolutive appeal and gave bond within two days after judgment was rendered, it was suspensive appeal. 159La535, 105S611. [j] **Supersedeas bond executed pursuant to void order granting appeal** is nullity and may be disregarded. 224Ky107, 5SW(2d)893.

1275–73 149Va406, 141SE237.

1276–80½–New. A garnishee is not entitled to a stay of proceedings in an action by his creditor after entry of judgment against plaintiff in the garnishment suit and before appeal therefrom and supersedeas thereof. 31NM593, 248P885.

1276–80½–New. A garnishee is entitled to a stay of proceedings in an action by his creditor where plaintiff in the garnishment suit has appealed from a judgment against him and superseded the judgment. 31NM593, 248P885.

1276–81 200Cal 316, 253P136; 93Fla 269, 111S626; 9LaA42, 118S833 (where property seized under fieri facias is claimed by third party by affidavit, and seizing creditor's rule to set aside affidavit is dismissed latter has right to appeal suspensively from judgment). [e] (2) 44 Ida155, 255P644. [f] (13) Other instances. **TexCivA** 30SW(2d) 545.

1277–83 200Cal 316, 253P136; 203Cal 365, 264P255 (judgment dismissing cross complaint); **Mont** 292P904; 31 NM443, 247P306. [e] (3) Other instances. **CalA** 291P650; **Mont** 292P904.

1278–87 200Cal 316, 253P136; 199Cal 556, 250P394. [a] (1) **TexCivA** 30SW (2d)545. [b] (4) Order quashing execution. 200Cal 316, 253P136.

1278–88 31NM443, 247P306, 309 [cit CJ]; **TexCommnA** 29SW(2d)1031.

1279–92 248Mich101, 226NW822; 142 SC46, 140SE247.

1279–1 **TexCommnA** 29SW(2d)1031 (judgment of disbarment).

1280–11 206Cal 118, 273P555; **MoA** 275 SW592. [b] **In Iowa.**–232NW835.

1280–11½–New. That the statute mandatorily requires an injunction does not deprive the court of power to suspend the operation of an injunction pending appeal. 130Misc177, 223NYS650.

1280–11⅓–New. A judgment restraining the removal or sale of products of untested bovine herd may be suspended, pending appeal, on the ground that the law is unconstitutional. 130Misc177, 223NYS650.

1281–12 21F(2d)172.

1281–13 206Cal 118, 273P555.

1281–13½–New. Perfection of the appeal from an order denying a temporary restraining order transferred the entire controversy to the appellate court, and the district judge was thereby deprived of authority to make any order disturbing the then existing legal status of the parties. **TexCivA** 9SW(2d)273.

1281–14 39GaA220, 146SE500(2dcase) (bill of exceptions to judgment denying injunction does not operate as supersedeas); 127Kan651, 274P728; 30 NM505, 240P202; **TexCivA** 288SW606; **TexCivA** 8SW(2d)955. [b] **Pleadings must show** injunction applicant to be entitled to relief prayed for, for original jurisdiction of appeal court to attach. **TexCivA** 288SW606.

1282–18 272US658, 47SCt222, 71L ed 463; 51Nev179, 272P1.

1282–19 272US658, 47SCt222, 71L ed 463; 16F(2d)906. [a] **After order dismissing decree** injunction can be issued only by court having authority. 272 US658, 47SCt222, 71L ed463.

1282–20 32F(2d)324; 197Cal 649, 242 P725. [b] **Power exists regardless of which party is plaintiff or defendant.**–197Cal 649, 242P725. [c] **Effect of separate order staying injunction.**–197Cal 649, 242P725. [d] **Question of maintaining status quo does not go to jurisdiction of court** but arises only in consideration by trial court of rules which should guide it in exercise of discretion. 197Cal 649, 242P725. [e] **What status quo preserved.**–197Cal 649, 242P725. [f] **Matters considered in determining question.**–197Cal 649, 242P 725.

1282–23 21F(2d)172; 161Ga432, 131SE 46.

1282–24 21F(2d)172; 165Ga159, 140 SE360.

1283–25 [b] **Balance of convenience and exposure to damage** as between the parties is the test if discretion is to be exercised. 21F(2d)172.

1283–26 21F(2d)172.

1283–26½–New. A mandatory injunction requiring the removal of a fence is unauthorized after refusal of a restraining order and appeal. **TexCivA** 9 SW(2d)273.

1283–27 [a] (1) 3LaA18; 3LaA789. See also 3LaA20 (sufficiency of bond). [d] (1) 161La778, 109S488; 168La342, 122S59; 3LaA18. (3) 161La778, 109S 488; 13LaA73, 126S254. (7) Where suspensive appeal is refused by court that has issued preliminary injunction, appellate court or any judge thereof may allow suspensive appeal in aid of its jurisdiction. 163La627, 112S509. (8) Trial court cannot grant order staying proceedings under writ of seizure and sale pending decision of devolutive appeal from order denying preliminary injunction. 161La778, 109S488. (9) Suspensive appeal from order granting preliminary injunction will not be granted except in cases of emergency and manifest abuse of discretion. 169 La265, 125S72. (10) Preliminary injunction issued on rule nisi does not entitle defendants to suspensive appeal as matter of right. **LaA** 129S688. [f] (2) **Nebr** 227NW145. (4) Whether order is temporary restraining order or temporary injunction is to be determined from form and substance of order in connection with entire record. **Nebr** 227NW145 (order held not temporary injunction). [g] **In California.**–197Cal 649, 242P725. [h] **In Texas.**–**TexCivA** 276SW471. [i] **In Georgia.**–39GaA220, 146SE500(2dcase).

1285–29 [b] **On appeal from order refusing to vacate receivership,** supersedeas to suspend order appointing receiver cannot be granted. **TexCivA** 19SW(2d) 456.

1285–34 116 Or532, 241P1010.

1286–37 217AppDiv66, 216NYS1; 198 Wis24, 223NW89. See also 89Fla446, 105S126.

1286–40 76CalA481, 245P459; 208Ky 543, 271SW596; 102NJEq357, 140A 783; [1925] CanSC104, [1925] 3DomLR 131 (pending application for leave to appeal to judicial committee).

1287–41 206Cal 118, 273P555; 208Ky 543, 271SW596; **TexCivA** 30SW(2d)545.

1287–43 52SD572, 219NW258.

1287–45 76CalA481, 245P459; 230App Div85, 243NYS567.

1288–47 See also 225Ky100, 7SW(2d) 849.

1288–49 200Cal 274, 252P726; 82CalA 46, 255P248 (pending appeal to district court from judgment of superior court affirming judgment of municipal court); 101CalA92, 281P73; 245NY641, 157NE 891; 221AppDiv113, 222NYS633 (proceedings to appraise minority stock); 152SC325, 150SE313; 50SD150, 208NW 782.

1289–54½–New. The state supreme court has power to order a stay of proceedings under its decree pending final disposition of the case on writ of error issued by the United States supreme court. 236Mich422, 210NW496.

1289–54⅓–New. An order fixing the amount of a stay bond on appeal from a judgment staying execution of judgment and restoring possession of real property for the purpose of maintaining the status quo pending appeal is within the jurisdiction of the trial court, although an appeal from a prior judgment has been perfected. 90CalA169, 265P555.

1289–58 29F(2d)457; 88CalA259, 263P 338; 93CalA615, 270P255; 90Fla772, 107S264; 169La265, 125S72; **LaA** 129S 688; 50Philippine552; 12PortoRicoFed 544; 149Va406, 141SE237.

1290–63 200Cal 274, 252P726; 74CalA 272, 239P862; 88CalA259, 263P338; 97 Fla28, 119S149; 44 Ida155, 255P644.

1290–65 46 Ida1, 265P701, 702 [citCJ]; 236Mich422, 210NW496; **TexCivA** 273 SW902.

1290–66 201Cal 217, 256P419; 208Cal 601, 283P291; **CalA** 292P546; 97Fla28, 119S149; 46 Ida1, 265P701, 702 [Cit CJ]; 236Mich422, 210NW496; 12Porto RicoFed544; 149Va406, 141SE237.

1290–69 **CalA** 291P421; 97Fla28, 119S 149. [e] **In British Columbia.**–[1929] 4 DomLR607.

1290–69½–New. where petition admits that if judgment is affirmed in toto no prejudice will be suffered by him; 196 Cal 557, 238P673.

1291–72 206Cal 118, 273P555; 97Fla 28, 119S149.

1291–75 198Wis24, 223NW89.

1291–76½–New. , or is affirmed by appellate court as rendered; 196Cal 557, 238P673.

1291–77 [a] **Appeal from order refusing to vacate receivership brought more than twenty days after order appointing receiver** is too late to entitle party to supersedeas to latter order, if construed as also an appeal from latter order. **Tex CivA** 19SW(2d)456.

1291–80 96CalA371, 274P360.

1291–83 217AppDiv66, 216NYS1.

1292–85 [a] **After reversal of judgment on appeal,** right of appellant to writ becomes moot and application properly denied. 207Cal 199, 277P337(1stcase).

1292–86½–New. Motion to strike application is not the proper practice. 82 Colo 285, 260P103.

1292–87 90Fla772, 107S264.

1292–90½–New. In cases where a stay order merely has the effect of obtaining delay in the matter of coming to an issue upon merits, the better practice may be to require notice to appellee of application for such order before granting it. 90Fla772, 107S264.

1292–96 **Nebr** 227NW145.

1292–97½–New. Where a mandamus case is held in abeyance awaiting final disposition of the case pending an appeal, it is proper for the court to grant a request for a final decision on application for supersedeas. 81Colo 548, 256 P657.

1292–97⅓–New. The burden of proof being on petitioner for a writ of supersedeas, allegations of the answer to the petition must be accepted as true, in the absence of any evidence. 96CalA 371, 274P360.

1293–98 13F(2d)69; 153SC1, 150SE 310. [f] **Though requirement of security from municipal corporations is forbidden** by statute, discretionary power to grant stay on condition is unimpaired. 249NY26, 162NE573.

1293–99 **Mont** 292P904.

1293–8 **Fla** 129S918(2dcase). [b] **Order failing to fix amount of bond** held not valid. 165La437, 115S648.

1294–11½–New. In some jurisdictions order for devolutive and suspensive appeal and bond required for suspensive appeal sustain appeal. **LaA** 130S354.

1294–19 216Ala167, 112S818; 91CalA 743, 267P709; 102CalA213, 283P107 (applicable when attachment involved applies only to judgment on merits); 337Ill 378, 169NE176; 31NM443, 247P 306; 217AppDiv66, 216NYS1; 132 Okl 298, 270P567; 284Pa593, 131A467 (otherwise appeal quashed); [1925] CanSC 104, [1925] 3DomLR131. But see 9LaA 65, 118S843. [g] **Appeal from foreclosure judgment.**–69Utah413, 255P668.

1295–20 [a] **In New Brunswick.**–[1928] 2DomLR960.

1296–22 216Ala167, 112S818; 200Ind 350, 160NE43; 217AppDiv66, 216NYS 1; **TexCivA** 276SW963.

1296–23 56ND385, 217NW516. [b] (3) 170La423, 127S889. (8) Defendant can stay execution of writ in executory proceedings by suspensive appeal with bond and by enjoining sale. 11LaA208, 123S513.

1297–29 52SD572, 219NW258.

1298–32 31NM593, 248P885. [d] **Right to supersedeas without bond is waived** by failure to appeal within time usually allowed for supersedeas. 31 NM593, 248P885.

1299–39 170La839, 129S364; 13LaA 490, 127S452(1stcase); **TexCivA** 29SW (2d)484(1stcase).

1299–41 **TexCivA** 270SW1052, 1053 [quotCJ]. [a] (2) Supersedeas bond filed in addition to cost bond, but after lapse of time for perfecting appeal declared to suspend execution. **Tex CivA** 270SW1052.

1300–47 [b] **Cost bond** on appeal does not operate as stay bond. 232Mich568, 205NW482.

1301–52 But see 201Cal 450, 257P503.

1301–59 [b] (2) One named as executor in will but who had never qualified held proper surety for appeal bond of heirs on decision under will. 36GaA 768, 138SE265.

1302–61½–New. Where a supersedeas bond is filed with the clerk of the court, and approved, the bond is sufficient for the purpose for which it was given, until quashed or set aside in a direct proceeding, although the sureties thereon are ineligible. 43 OklACR160.

1302–64 [c] **Where, through mistake of attorney's clerk,** notice of justification was given seven days too soon,

supersedeas should be granted. 100 **CalA**85, 279**P**1035.

1303–76 TexCivA 276**SW**963. [d] (3) In Louisiana order granting suspensive appeal need not designate amount of bond when judgment is specific. **LaA** 130**S**354. [f] **Stipulation to pay costs** is not necessary under statute. **Tex CivA** 276**SW**963. [g] **Surplusage.–Tex CivA** 276**SW**963. [h] **Appellate court is never authorized to fix amount of stay bond** required by statute. **Cal** 291**P**833. [i] **Order fixing amount of stay bond may be made ex parte.–Cal** 291**P**833.

1304–77 [b] (1) 9**LaA**156, 119**S**450 (interest included but costs excluded); 168**La**736, 123**S**308. (4) Surety construed to be liable as for suspensive bond. 159**La**535, 105**S**611. [i] **In Mississippi.–**153**Miss**195, 119**S**206.

1306–79 [c] (1) **Cal** 291**P**833. [f] (4) Judgment ordering defendants to purchase property held not "judgment for specific sum of money." 161**La**996, 109 **S**814.

1308–83 TexCivA 19**SW(2d)**106 (appeal dismissed on failure to correct).

1308–86 Fla 126**S**776(2dcase); 170**La** 423, 127**S**889 (discretion of court on suspensive appeal); 31**NM**443, 247**P** 306; **TexCommnA** 29**SW(2d)**1031 (where judgment not for specific amount); **TexCivA** 19**SW(2d)**456 (appeal from order appointing receiver). [a] (1) **Fla** 128**S**422. (3) 247**Mich**185, 225**NW**568. [b] (4) Judge's action becomes arbitrary when amount fixed clearly excessive. 170**La**423, 127**S**889. [c] **Illegal condition regarded as surplusage.–Fla** 126**S**776(2dcase).

1309–88 Mont 292**P**904.

1310–89½–New. The surety on the bond must be unconditionally bound. 159**La**535, 105**S**611. [a] **Surety held unconditionally bound.–**159**La**535, 105**S** 611.

1310–89½–New. Power of legislature to fix different amount in cases of corporations and individuals is supreme. 284 **Pa**593, 131**A**467 (in absence of constitutional prohibition).

1310–90 93**Fla**269, 111**S**626.

1310–94 Fla 129**S**918(2dcase). [a] 224 **Ky**107, 5**SW(2d)**893. [b] **Bond executed before appeal is granted** is void. 224 **Ky**107, 5**SW(2d)**893. [c] **In Kentucky.** –224**Ky**107, 5**SW(2d)**893.

1310–95 Fla 129**S**918(2dcase); 225**Ky** 682, 9**SW(2d)**995 (bond invalid where not attested). [e] (3) Undertaking complying with statute operates as stay in spite of court's refusal to approve. 92**CalA**97, 267**P**708.

1311–5 Fla 129**S**918(2dcase). [c] **Place of filing.–**215**Ky**100, 284**SW**1017. [d] **Mailing bond addressed to clerk of trial court** is not delivery of bond to clerk within statute. **AlaA** 130**S**312.

1311–12 43 **OklACR**160. See also 95 **Fla**383, 116**S**10.

1311–13 41 **Ida**233, 238**P**527; 43 **Okl ACR**160; 50**SD**150, 208**NW**782. [k] **Manner, time, and place of raising objections.–**159**La**535, 105**S**611. [l] **While order fixing amount of stay bond continues in effect,** neither trial court nor appellate court may require additional security. **Cal** 291**P**833.

1312–14 See also 4**LaA**547.

1312–15½–New. After bond, as fixed by trial court, has been filed, appellate court cannot require additional bond. 50**SD**150, 208**NW**782.

1312–15½–New. Where person for whose benefit a supersedeas bond is given is dissatisfied with the bond, the proper practice is for him to move in the court having jurisdiction of the proceeding for an order, that the bond be amended or a new bond filed and that, on default thereof, the order of supersedeas be vacated and set aside. 43 **OklACR**160.

1313–17 TexCivA 7**SW(2d)**627 (objection too late).

1313–18 Cal 291**P**833 (ex parte order); 7**LaA**124. [e] **Motion to vacate order permitting amended undertaking** heard after appeal from order discharging writ had been reversed, declared to present a moot question. 195**Cal** 600, 234**P**881.

1313–18½–New. Where an order discharging an attachment and releasing property therefrom is reversed on appeal, the question of the validity of an undertaking to stay proceeding upon such order pending appeal and of a subsequent order permitting the filing of a new undertaking becomes moot and a motion to vacate such order will be dismissed. 195**Cal** 600, 234**P**881.

1313–19 [b] **In Florida.–**126**S**764.

1313–19½–New. But the appellate court cannot vacate a stay where the bond has been filed in accordance with the direction of the trial court in the absence of fraud, inadvertence, or mistake. 50**SD** 150, 208**NW**782.

1313–19⅓–New. The superior court has no jurisdiction to vacate or modify an order theretofore made for the issuance of an injunction pending appeal after the regular submission of a motion therefor. 78**CalA**790, 248**P**1077.

1315–27 Fla 126**S**764.

1315–29½–New. Abandonment. Where appellant abandons a writ of error by suing out a second writ to same judgment, the supersedeas effected upon first writ is necessarily also abandoned. 89 **Fla**379, 104**S**779.

1315–31 Ala 127**S**829; 89**Fla**446, 105**S** 126; 225**Ky**100, 7**SW(2d)**849; **Nebr** 229 **NW**121; 150**Wash**267, 272**P**955. See also 81**Colo** 39, 253**P**477.

1315–32 89**Fla**446, 105**S**126; 90**Fla**772, 107**S**264; **Fla** 126**S**776(2dcase); **Fla** 128**S**12; 224**Ky**107, 5**SW(2d)**893; 172 **Minn**102, 214**NW**776; 30**NM**505, 240**P** 202; 31**NM**443, 247**P**306; **Utah** 289**P** 588.

1316–33 42**F(2d)**26; 89**Fla**446, 105**S** 126.

1316–37 91**CalA**743, 267**P**709; 204 **Iowa** 1312, 216**NW**693; 225**Ky**100, 7**SW(2d)** 849; 150**Wash**267, 272**P**955.

1317–38 31**Ariz**370, 253**P**633; **Iowa** 232**NW**835; 30**NM**505, 240**P**202. But see **Utah** 289**P**588.

1318–40½–New. Effect of supersedeas to be determined upon consideration of particular facts of case and of controlling provisions and principles of law applicable. 89**Fla**446, 105**S**126.

1318–41 225**Ky**100, 7**SW(2d)**849 (from time issued). [d] **In proceedings involving possession of real property** stay does not become effective till appeal has been perfected in manner prescribed by law. 90**CalA**169, 265**P**555 (appeal held perfected).

1318–42 See also 69**Utah**413, 255**P**668. [a] (4) Failure to file petition in error within statutory time after making of order discharging temporary injunction causes order to become operative. 123 **Okl** 43, 251**P**985.

1319–47 173**Ark**90, 291**SW**981; 90**CalA** 169, 265**P**555 (execution of writ of restitution prevented). [n] **Alternative judgment for property or its value.–**201 **Cal** 87, 255**P**827.

1320–48 224**Ky**65, 5**SW(2d)**475. [j] **Appeal from order in certiorari proceedings** to review denial by village board of building permits simply stays further action of builder in such proceedings and does not affect right to mandamus order. 127**Misc**895, 217**NYS**353. [k] **On appeal from order denying right to intervene,** execution of judgment for sale is not stayed. **Wyo** 292**P**897.

1321–49 Fla 128**S**12.

1321–50 Fla 126**S**776(2dcase).

1321–54½–New. Appropriately limited supersedeas on appeal from an order appointing a receiver in a foreclosure suit does not necessarily prevent proceeding in the trial court. 94**Fla**637, 114**S**526.

1321–56½–New. , nor prevent collection of costs imposed in preliminary injunction proceedings. 34**PortoRico** 280.

1322–68 [a] **Evidence insufficient** to go to jury. 198 **Iowa**686, 200**NW**219.

1322–71 [b] **Inequality of distribution** held insufficient to carry case to jury. 198 **Iowa**686, 200**NW**219.

1323–73 TexCivA 7**SW(2d)**899.

1323–80 82**CalA**580, 256**P**226, 228 [cit CJ].

1323–81 31**Ariz**370, 253**P**633, 635 [quot CJ].

1323–83 31**Ariz**370, 253**P**633, 635 [quot CJ].

1324–85 31**Ariz**370, 253**P**633, 635 [quot CJ].

1325–97 [a] (7) In Idaho attachment may be continued in force pending appeal from judgment for defendant by filing additional undertaking under statute and by timely perfection of appeal. 43 **Ida**618, 253**P**838. (8) In Texas perfecting appeal preserves lien of attachment pending appeal without necessity of supersedeas bond. **TexCivA** 285 **SW**894. (9) Issuance of writ of supersedeas in favor of appellant held not to affect expiration of attachment lien nor rights or duties of attaching party thereunder. 205**Cal** 472, 271**P**749.

1325–4 Utah 289**P**588 (by contempt proceedings or otherwise).

1325–6 [a] **Temporary injunction dissolved,** but continued in effect pending appeal, is operative till disposition on appeal. **TexCivA** 297**SW**872.

1325–7½–New. An order of a justice of the appellate court, that the judgment "be superseded until the final disposition of said cause" indorsed upon an application for a writ of error praying for such relief, has been construed as suspending the operation of a prohibitory injunction. 30**NM**505, 240**P**202.

1325–7½–New. In New York, notice of appeal from a judgment dismissing an injunction suit brought by a municipal corporation does not automatically revive or continue a temporary injunction granted without security or condition. 249**NY**26, 162**NE**573.

1326–9 128 **Okl** 251, 262**P**664.

1326–11 50**Nev**113, 252**P**943.

1326–13 224**Ky**65, 5**SW(2d)**475.

1326–20 58**ND**899, 228**NW**223.

1327–21½–New. In a judgment creditor's suit to enforce a lien on property jointly owned, where by stipulation money was deposited in lieu of property, an appeal from an order appointing a receiver did not stay the proceedings and prevent entry of a default judgment, especially where appellant invoked the lower court's jurisdiction by motions. 206 **Iowa**637, 220**NW**67.

1327–23½–New. A judgment recorded in the mortgage book before or after a suspensive appeal has been perfected from a judgment enjoining enforcement of such judgment can have no effect as creating a judicial mortgage during the pendency of the suspensive appeal as against persons who acquired rights in the debtor's property pending the appeal and before final judgment. 164**La** 775, 114**S**650.

1327–23½–New. Registry in the mortgage book of a judgment making a foreign judgment executory, execution of which had been enjoined on the same day as a suspensive appeal was taken from a judgment dissolving the injunction, is null and void and does not create a judicial mortgage during the pendency of the appeal. 164**La**775, 114**S**650.

1327–23¼–New. The judicial mortgage resulting from such premature registry is dormant during the pendency of such appeal. 164**La**775, 114**S**650.

1327–23½–New. but is revivified with all legal effect when the judgment on appeal affirming the judgment dissolving the injunction becomes final. 164 **La**775, 114**S**650.

1328–30 84**CalA**237, 257**P**906; **Iowa** 229**NW**147; 128 **Okl** 251, 262**P**664; 149 **Va**597, 140**SE**810. See also 201**Cal** 450, 257**P**503.

1329–35 89**Fla**400, 104**S**858; **Ill** 173**NE** 179; 197 **Ind**675, 151**NE**24; 204 **Iowa** 678, 216**NW**41; 29**PortoRico** 740; **Tex CivA** 283**SW**611.

1329–36 TexCivA 283**SW**611.

1329–37 41**F(2d)**177; 247 **Ill**A301, 303 [citCJ]; 204 **Iowa**678, 216**NW**41; **Kan** 290**P**3; 29**PortoRico** 740; **TexCivA** 283 **SW**611; **TexCivA** 13**SW(2d)**974; **Tex CivA** 28**SW(2d)**247.

1329–39 [d] **TexCivA** 282**SW**958.

1330–42 21**AlaA**645, 111**S**318. [e] **In Texas.–CivA** 275**SW**173; **CivA** 286**SW** 607; **CivA** 286**SW**623.

1330–44 274**US**195, 47**SCt**566, 71**L ed** 996; 5**F(2d)**816; 6**F(2d)**797; 7**F(2d)** 565; 9**F(2d)**306; 12**F(2d)**896; 22**F(2d)** 624; 26**F(2d)**183; 26**F(2d)**337; 29**F** **(2d)**493; 35**F(2d)**403; 220**Ala**210, 124 **S**665(1stcase); 220**Ala**594, 127**S**163; 89

CalA382, 264P537; 81Colo195, 254P779; 83Colo374, 265P694; Colo 291P1036 (statute of frauds); 103Conn279, 130A576; 105Conn230, 135A44; 111Conn313, 149A782; Conn 151A512; 90Fla419, 106S406; 164Ga162, 137SE829; 165Ga123, 139SE861; 165Ga651, 141SE646; 37GaA642, 141SE429; 38GaA496, 144SE341(1stcase); 38GaA534, 144SE387; 38GaA521, 144SE397 (refusal to dismiss attachment); 38GaA659, 145SE99(2dcase); 39GaA688, 148SE287(2dcase); 41GaA308, 153SE74; 41GaA542, 153SE777(1stcase); 29Hawaii763; 44Ida478, 258P931; 318Ill360, 149NE258; 322Ill265, 153NE351; 325Ill464, 156NE471; 199Ind33, 154NE6; 204Iowa678, 216NW41; 204Iowa1178, 216NW625; 208Iowa21, 222NW855; Iowa 232NW812; 151Md181, 135A139; 256Mass250, 152NE335; 232Mich291, 205NW128; 234Mich224, 207NW842; 235Mich236, 209NW63; 235Mich379, 209NW137; 245Mich93, 222NW183; Mich 233NW373; 141Miss24, 105S751; 152Miss792, 119S194 (appeal granted to settle principles of cause); 308Mo142, 271SW773; Mo 274SW399; 310Mo48, 274SW764; Mo 294SW1014; Mo 318SW(2d)4; MoA 272SW704; MoA 274SW1102; MoA 3SW(2d)1041; MoA 9SW(2d)872; 81Mont393, 264P115; 83Mont400, 272P525; 48Nev449, 232P1083, 236P678, 239P1000; 102NJL590, 134A752; 103NJL346, 135A815; NJSup 142A757; NJSup 147A576; NJSup 151A476; NJ 151A603; 31NM576, 249P242; 194NC333, 139SE606; NC 154SE847; 53ND551, 207NW37; 114Okl87, 243P722; 126Okl238, 259P257; 127Okl65, 259P869; 127Okl106, 260P26; 132Okl26, 269P276; 135Okl91, 274P469; 143Okl33, 287P722; 32OklACR80; 115Or608, 239P105; 117Or286, 243P778; 122Or162, 257P809; 285Pa241, 132A185; 292Pa86, 140A766; 296Pa40, 145A686; Pa 151A690; 86PaSuper364; 88PaSuper507; 32Porto Rico 55 (discretionary with court to consider appeal where fundamental question presented); 133SC472, 131SE22 (objection not made in supreme court by exception not considered); 50SD226, 209NW343; 50SD337, 210NW155; SD 232NW45; 155Tenn296, 291SW835; 115Tex342, 282SW558; 115Tex446, 283SW479; Tex 293SW1114; TexCommnA 265SW130 (ruling of court of civil appeals law of case in absence of assignment of error thereto); TexCommnA 276SW203; TexCommnA 276SW678 (errors not presented in petition for writ of error); TexCommnA 276SW903; TexCommnA 285SW264; 116Tex489, 294SW844; TexCommnA 300SW27; TexCommnA 1SW(2d)568; Tex CivA 265SW264; TexCivA 271SW172; TexCivA 278SW323; TexCivA 278SW924; TexCivA 281SW637; TexCivA 282SW267; TexCivA 282SW668; TexCivA 283SW246; TexCivA 283SW330; Tex CivA 285SW659; TexCivA 285SW682; TexCivA 286SW607; TexCivA 286SW623; TexCivA 288SW270; TexCivA 293SW243; TexCivA 293SW315; TexCivA 294SW660; TexCivA 297SW304; Tex CivA 298SW447; TexCivA 300SW107; TexCivA 3SW(2d)819; TexCivA 10SW(2d)178; TexCivA 12SW(2d)618; Tex CivA 16SW(2d)541(3dcase); TexCivA 17SW(2d)113(2dcase); TexCivA 17SW(2d)841(2dcase); TexCivA 20SW(2d)797; TexCivA 21SW(2d)746; TexCivA 26SW(2d)293; TexCivA 32SW(2d)703; TexCivA 17SW(2d)1087; Utah 280P1053; Utah 283P731; 99Vt91, 130A758; 147Va178, 136SE660; 151Va883, 145SE326; 195Wis341, 218NW188. See also 318Mo28, 298SW817; 294Pa282, 144A75. [e] Texas statute requiring petition for writ of error to set out grounds does not apply to appeals from trial court to court of civil appeals. TexCivA 284SW698.

1332–45 TexCivA 21SW(2d)1101.

1332–46 192Wis218, 212NW275. [c] Statute requiring court to give judgment without regard to technical errors does not require review of errors not assigned as prescribed by court rule. 5F(2d)318.

1332–47 274US195, 47SCt566, 71L ed996; 31Ariz267, 252P189; 325Ill464, 156NE471; Mo 274SW399; TexCommnA 276SW203; TexCivA 278SW924; Tex CivA 288SW606; TexCivA 5SW(2d)1030.

1332–52 [d] In Michigan.–234Mich224, 207NW842.

1333–54 31Ariz267, 252P189; 164Ga162, 137SE829; MoA 22SW(2d)881; 155Tenn296, 291SW835; 70Utah398, 260P855. See also 167Minn389, 209NW263.

1333–55½–New. No formal assignment of errors is necessary where the appeal is on the judgment roll alone. 48Nev449, 232P1083, 236P678, 239P1000.

1333–55⅛–New. An assignment of errors is unnecessary where the parties stipulate that the question involved is one of law and clearly set forth the question. 79CalA164, 249P43.

1333–55¼–New. Under the statutes of North Dakota, where the statement of the case demands retrial of the entire case in the appellate court, specifications of error are not required by either statute or rules of court. 58ND881, 228NW217.

1333–57 45Philippine216.

1333–58 TexCommnA 12SW(2d)967; TexCivA 282SW668.

1333–59 23F(2d)919 (that action should be at law instead of in equity).

1334–61 TexCivA 21SW(2d)1101.

1334–63 TexCivA 24SW(2d)757.

1334–68 78CalA460, 248P706; 104Conn366, 132A895; 234IllA1; LaA 126S584; 83Mont430, 272P679; 284Pa361, 131A286; 295Pa455, 145A505; TexCivA 26SW(2d)400; 33Wyo457, 240P449.

1334–69 100CalA221, 279P1041; 234IllA1 (order sustaining demurrer to rejoinders); 242IllA438; TexCivA 1SW(2d)481.

1335–71 221MoA683, 285SW161.

1335–73 291Pa18, 139A492; 70Utah398, 260P855.

1335–81 95PaSuper465; TexCivA 285SW670.

1335–84 32PortoRico55.

1335–87 236IllA472.

1335–87½–New. that infant defendants were not represented by guardian; TexCivA 276SW750.

1335–88 236IllA472; 158Tenn1, 11SW(2d)865.

1336–5 88CalA601, 263P1031; 179Minn325, 229NW136; 320Mo672, 8SW(2d)599; 33OhA475, 170NE27; TexCommnA 276SW203.

1336–7 36F(2d)161; 36F(2d)166; Ala 128S170; CalA 284P943; 164Ga69, 137SE760; 168Ga451, 148SE162; 40GaA834, 151SE665(2dcase) (incomplete assignment); 232Mich680, 206NW307; 221MoA708, 285SW130; 222MoA260, 296SW183; 289Pa216, 137A247; 294Pa286, 144A135; 300Pa507, 150A900; 45Philippine216 (failure to produce attesting witness in probate proceedings); TexCommnA 276SW203; TexCivA 293SW1114; TexCivA 4SW(2d)666; 70Utah398, 260P855; 40Wyo261, 276P444.

1336–10 TexCivA 12SW(2d)1106.

1337–11 31F(2d)282; 28Ariz585, 238P390; 35Ariz69, 274P638; 35Ariz155, 275P5; 196Cal279, 237P747; 100CalA606, 281P655; 102CalA361, 282P1017; CalA 287P578; CalA 289P221; 111Conn297, 149A687(1stcase); 34GaA58, 128SE219 (judgment overruling motion for new trial not reversed where any evidence authorizing verdict directed); 44Ida478, 258P931; 250Mich591, 230NW926(1stcase); NJ 133A79; 51ND730, 200NW905; 299Pa402, 149A639; 300Pa384, 150A638; Pa 151A586; 50SD625, 211NW461; 52SD158, 216NW887; 53SD372, 220NW874 (error in overruling motion for new trial must be assigned); 160Tenn316, 24SW(2d)898; TexCivA 272SW587; TexCivA 282SW854; TexCivA 293SW243; TexCivA 293SW346; TexCivA 6SW(2d)224; TexCivA 10SW(2d)144; TexCivA 16SW(2d)166; TexCivA 26SW(2d)293; TexCivA 26SW(2d)463; TexCivA 31SW(2d)669. See also 96CalA597, 274P614. [a] (1) 321Mo887, 13SW(2d)648. (2) It is not ruling on motion for finding, but finding that does substantial injury and final decision is challenged by specifications in motion for new trial that it was not sustained by sufficient evidence and was contrary to law. IndA 154NE682. [b] Purported assignment seeking to have appellate court search statement of facts to determine whether evidence supports verdict does not present fundamental error. TexCivA 294SW243.

1337–12½–New. A specification of insufficiency of evidence is unnecessary where the parties stipulate that the question involved is one of law and clearly set forth the question. 79CalA164, 249P43.

1337–15 5F(2d)318; 215Ala311, 110S396; 85CalA535, 259P958; 78Colo235, 242P45; 106Conn153, 137A721; 235Mich236, 209NW63; 246Mich91, 224NW343; 249Mich127, 227NW707; Mo 23SW(2d)1045; 80Mont480, 261P273; 51SD369, 213NW946; TexCivA 12SW(2d)599(2dcase); TexCivA 13SW(2d)974; TexCivA 22SW(2d)502; Utah 273P974; 33Wyo200, 238P287.

1338–16 36F(2d)933; 78Colo235, 242P45; 232Mich276, 205NW134; 235Mich236, 209NW63; MoA 297SW435; 80Mont480, 261P273.

1338–17 TexCivA 281SW244.

1338–19 245Mich93, 222NW183; 308Mo142, 271SW773; Mo 30SW(2d)1018; 88PaSuper507; TexCivA 4SW(2d)1023.

1338–22 [a] Assignment held sufficient.–40GaA835, 151SE682.

1338–24 168Ga112, 147SE115; TexCivA 277SW189; TexCivA 295SW193; TexCivA 15SW(2d)654(1stcase).

1338–26 200Cal161, 252P587; 95CalA727, 273P147; 199Ind582, 159NE428; TexCivA 288SW609; TexCivA 289SW1021; TexCivA 300SW967 (assignment held too general); TexCivA 1SW(2d)759; TexCivA 13SW(2d)995. [a] 35GaA779, 134SE812; 329Ill288, 160NE559; 128Kan189, 277P57; 310Mo48, 274SW764; 319Mo432, 3SW(2d)1004.

1338–27 41F(2d)222 (failure to make requested finding); 104Conn372, 132A895; 237Mich294, 211NW991; Mont 289P1043; 33NM593, 273P12; 292Pa532, 141A446; 299Pa200, 149A179; 299Pa155, 149A195; TexCivA 271SW646; TexCivA 276SW951; TexCivA 281SW264; TexCivA 282SW267; TexCivA 283SW330; TexCivA 6SW(2d)175; TexCivA 8SW(2d)226; TexCivA 24SW(2d)450. See also 86PaSuper558.

1339–28 104Conn300, 132A455; Conn 151A492; 199Ind33, 154NE6; 83IndA512, 148NE176; 177Minn189, 224NW852; TexCommnA 285SW264; 65Utah1, 233P569.

1339–31 Mo 19SW(2d)287; Wyo 288P12.

1339–31½–New. that the court failed to file findings and conclusions within the time required by statute; TexCivA 294SW653.

1339–37½–New. A claim that the verdict is against the weight of evidence is not a proper ground of appeal. 104NJL132, 139A17.

1339–37½–New. That the verdict is excessive is not a proper ground of appeal. 104NJL132, 139A17.

1339–39 192NC231, 134SE485; 300Pa485, 150A889 (dismissal of exceptions to report of referee).

1339–41 37F(2d)69 (assignment too general); 40GaA835, 151SE682; 170Minn58, 212NW13; 33NM593, 273P12; 192NC121, 133SE407; 50SD625, 211NW461; TexCivA 1SW(2d)759; TexCivA 5SW(2d)836.

1340–42½ 45Ida499, 263P481; 151Md181, 135A139; 318Mo397, 1SW(2d)122; 192NC121, 133SE407; 29Porto Rico595 (damages); 53SD378, 220NW869 (interest); TexCivA 294SW270; TexCivA 1SW(2d)356.

1340–44 232Mich680, 206NW307.

1340–44½–New. In New Jersey, that judgment for defendants should have been for plaintiff is not a proper ground of appeal from the supreme court sitting in the first instance but is a proper ground of appeal from the supreme court sitting as a court of review. 104NJL106, 139A28.

1341–45 329Ill582, 161NE56; 156Tenn19, 300SW574; TexCivA 294SW687.

1341–46 100NJEq532, 135A893; TexCommnA 14SW(2d)829.

1341–48 89IndA637, 167NE720(2dcase); Mo 274SW399; 115Okl100, 242P1043; Okl 292P352; 44Philippine83 (in case of failure to assign supreme court bound by facts found by lower court); 50SD240, 209NW360 (sufficiency of evidence); TexCivA 273SW885;

TexCivA 275SW224. [a] **Party cannot assume position on retrial which is inconsistent** with that on first trial and on appeal. 224 IllA474. [b] **On subsequent appeal where only addition to record is granting of motion,** original respondent need not specify errors. 36 Wyo 100, 251P955.

1341–60 116 Okl 82, 243P211.

1341–72½–New. Action of intermediate appellate court in overruling assignments of error. TexCommnA 29SW(2d) 999.

1341–76 29F(2d)493. See also 49Nev 1, 234P30.

1342–78 TexCivA 278SW250; TexCivA 5SW(2d)185.

1342–79 Fla 128S402; TexCommnA 14SW(2d)829; 118Tex644, 23SW(2d)697; TexCivA 277SW401 (jurisdictional defect); TexCivA 278SW250; TexCivA 278SW323; TexCivA 280SW613; TexCivA 282SW831; TexCivA 283SW212; TexCivA 283SW217; TexCivA 283SW246; TexCivA 283SW315; TexCivA 284SW314; TexCivA 286SW607; TexCivA 286SW623; TexCivA 287SW298; TexCivA 288SW606; TexCivA 289SW152; TexCivA 294SW252; TexCivA 294SW276; TexCivA 294SW660; TexCivA 297SW874; TexCivA 298SW456; TexCivA 299SW953; TexCivA 3SW(2d)527; TexCivA 5SW(2d)223; TexCivA 5SW(2d)1030; TexCivA 11SW(2d)263; TexCivA 12SW(2d)618; TexCivA 16SW(2d)166; TexCivA 18SW(2d)732; TexCivA 19SW(2d)382; TexCivA 21SW(2d)746; TexCivA 23SW(2d)436; TexCivA 24SW(2d)542; TexCivA 25SW(2d)907(1st case); TexCivA 26SW(2d)400; TexCivA 27SW(2d)317; TexCivA 30SW(2d)930; Utah 270P349, 362 [citCJ]. See also 105NJL575, 146A212. [b] **Examination of statement of facts** not necessary in determining whether there is fundamental error apparent of record. TexCivA 285SW1110.

1343–80 90Tex298, 38SW29, 750, 35LRA241; Tex 265SW142; TexCivA 97SW507; TexCivA 271SW142; TexCivA 271SW145; TexCivA 271SW180; TexCivA 271SW242; TexCivA 273SW946; TexCivA 273SW951; TexCivA 275SW152; TexCivA 278SW250; TexCivA 16SW(2d)360 (examination of statement of facts called for).

1343–81 TexCivA 271SW145; TexCivA 281SW637.

1343–82 TexCommnA 284SW937; TexCommnA 293SW805; TexCommnA 12SW(2d)967; TexCivA 281SW637 (examination of statement of facts); TexCivA 285SW1110; TexCivA 290SW841; TexCivA 294SW252; TexCivA 298SW311; TexCivA 298SW447; TexCivA 16SW(2d)412; TexCivA 19SW(2d)814; TexCivA 30SW(2d)930. See also TexCivA 291SW658.

1343–85½–New. It is the duty of the appellate court, in the absence of any assignments, to inspect the record on appeal in order to determine if there is any such fundamental error as constitutes an obstacle to affirming the judgment of the trial court. TexCivA 11SW(2d)583.

1343–88 138SC409, 136SE885; TexCivA 278SW250; TexCivA 21SW(2d)30; TexCivA 21SW(2d)1101; TexCivA 26SW(2d)400. But see TexCivA 17SW(2d)1077. [a] TexCivA 281SW349. [b] TexCivA 281SW349. [c] **Judge selected by parties,** without disqualification of regular judge, cannot render valid judgment, and fundamental error being judicially voted, no assignment is necessary. TexCivA 278SW250. [d] **Fundamental error is suggested** by proposition questioning jurisdiction of commissioner's court. TexCivA 24SW(2d)83.

1343–89 118Tex644, 23SW(2d)697.

1343–91 32PortoRico 55.

1343–93 Fla 123S767; 98Fla373, 123S765 (appellate court will take notice of defect where it is apparent that bill in equity is without equity though appellant has ignored it); NJ 133A880; TexCivA 6SW(2d)377; TexCivA 13SW(2d)997; TexCivA 22SW(2d)707; TexCivA 22SW(2d)741. But see TexCivA 11SW(2d)263.

1344–94 TexCivA 11SW(2d)583; TexCivA 16SW(2d)959; TexCivA 16SW(2d)969.

1344–96 TexCivA 275SW152; TexCivA 291SW944; TexCivA 4SW(2d)218; TexCivA 5SW(2d)861; TexCivA 10SW(2d)736; TexCivA 21SW(2d)87.

1344–98 TexCivA 8SW(2d)241.

1344–3½–New. Sustaining general demurrer to plea held fundamental ruling not requiring assignment of error. TexCivA 24SW(2d)1106.

1344–6 TexCivA 8SW(2d)522 (error not fundamental).

1344–10 25F(2d)262; 40GaA246, 149SE308; 81Mont44, 261P620 (in equity case); TexCivA 16SW(2d)340.

1345–11 TexCivA 28SW(2d)297 (giving peremptory instruction).

1345–17 TexCivA 5SW(2d)861.

1345–18 115Tex342, 282SW558.

1345–19 TexCommnA 284SW937; TexCivA 274SW259; TexCivA 4SW(2d)159; TexCivA 5SW(2d)861; TexCivA 18SW(2d)733.

1345–21½–New. Error in rendering judgment that plaintiff take nothing instead of dismissing suit is fundamental error which court will correct on appeal. TexCivA 283SW217.

1345–24 143Miss587, 108S799 (interest and five per cent damages); 118Tex644, 23SW(2d)697 (amount of judgment held not fundamental); TexCivA 24SW(2d)77.

1345–25 NJ 133A880; TexCivA 278SW250 (judgment a nullity); TexCivA 280SW914; TexCivA 294SW341; TexCivA 12SW(2d)228; TexCivA 27SW(2d)825.

1345–26 TexCivA 5SW(2d)205.

1346–27 TexCivA 300SW641.

1346–28 132NYS778.

1346–36½–New. Texas rule. Where trial court has decided that evidence raises certain material issues and submits such issues of fact in form of special issues to the jury and jury have returned findings, the court in rendering judgment may disregard immaterial findings; but cannot disregard material findings. TexCivA 271SW441.

1346–36⅓–New. Trial court is not at liberty to set aside part of material findings and render judgment on remaining one. TexCivA 271SW441.

1346–36¼–New. The error is so fundamental as to authorize reversal without assignment, where the findings of the jury are conflicting, or too uncertain to sustain judgment. TexCivA 291SW573.

1346–36½–New. A finding of negligence, without testimony sustaining it, is not fundamental error authorizing a reversal of judgment for plaintiff without an assignment of error. TexCommnA 12SW(2d)967.

1346–46 TexCivA 8SW(2d)249.

1347–51 TexCommnA 276SW203.

1347–53 169Ga628, 151SE387.

1347–54 12F(2d)896; 22AlaA385, 115S857; CalA 288P80; LaA 130S817(1st case); NJSup 130A371 (case not exhibiting specifications of rulings of court with which appellant is dissatisfied); NJSup 149A353(1stcase); 198NC476, 152SE165; 55ND494, 214NW621; 35PortoRico 123; 115Tex446, 283SW479; TexCommnA 276SW903; TexCommnA 14SW(2d)829; TexCivA 276SW951; TexCivA 283SW189; TexCivA 285SW678; TexCivA 285SW682; TexCivA 286SW623; TexCivA 287SW1118; TexCivA 9SW(2d)425; TexCivA 20SW(2d)360. [b] **Motion to set aside affirmance for failure to assign errors** is prerequisite to consideration of merits of appeal. 219Ala478, 122S652 (mode of procedure).

1348–55 37F(2d)511; 90Fla419, 106S406; 162Ga717, 134SE760; 39GaA576, 147SE775(3dcase); Ind 172NE601; 2LaA1; 307Mo529, 271SW50; 322Mo207, 14SW(2d)440; MoA 21SW(2d)201; NJSup 130A371 (case not exhibiting specifications of rulings of court with which appellant is dissatisfied); 33NM308, 265P717 (statute not applicable to defective assignment); 197NC81, 147SE735; 88PaSuper31; 35PortoRico 123; TexCivA 9SW(2d)445; TexCivA 22SW(2d)149.

1348–56 TexCivA 285SW678; TexCivA 285SW682; TexCivA 290SW809; TexCivA 290SW841; TexCivA 298SW311; TexCivA 1SW(2d)937; TexCivA 8SW(2d)693; TexCivA 19SW(2d)123; TexCivA 17SW(2d)1077.

1349–59 30Ariz25, 243P611; 111Conn132, 149A225; 166Ga850, 144SE665 (assignment of error not approved by trial court will not be considered); Mo 7SW(2d)347; 89PaSuper485; 29PortoRico 740; TexCivA 9SW(2d)193; TexCivA 21SW(2d)746 (bill of exceptions held not assignment of error); TexCivA 31SW(2d)333; Utah 284P1000 (rules not complied with). [a] (1) 29PortoRico 740; 132SC335, 128SE358. (3) Motion to reform judgment held not motion for new trial and not to constitute "independent assignment of error." TexCivA 298SW447. [c] **In Texas.–CommnA** 276SW667. [d] **Where assignments of error were substantial copies of formal assignments imperfectly stated in motion for new trial,** such assignments were not objectionable on ground that they were not copies of assignments in motion for new trial. TexCivA 16SW(2d)1100. [e] **Assignments preserved in notice for new trial.–TexCivA** 30SW(2d)381.

1349–60 218Ala424, 118S636.

1349–61 214Ala545, 108S362.

1349–63 TexCommnA 284SW937; TexCivA 4SW(2d)159.

1349–64 TexCivA 19SW(2d)363.

1350–65½–New. Assignments of error must appear to be assignments to the appellate court and not specifications of error presented to the trial court on motion for a new trial. 51SD59, 212NW213.

1350–65⅓–New. There must be a specific assignment of error of law by the losing party. 39GaA265, 147SE160.

1350–66 NJSup 145A471(2dcase).

1350–76 196Ind520, 148NE474; 199Ind137, 155NE707; Ind 166NE285. [f] **Omission not fatal** where names otherwise sufficiently appearing. Ind 171NE65.

1352–92½–New. No formal plea is necessary to present the question of adjudication on a former review. 224IllA1.

1352–95 34Wyo397, 244P222 [citCJ].

1352–96 21AlaA127, 106S67; 110Okl146, 236P414 [quotCJ&Cyc].

1352–98 218Ala350, 118S656; 333Ill313, 164NE676; 86IndA432, 158NE486; 123Okl42, 252P428; 133Okl196, 271P1026; 39Wyo476, 273P543.

1353–99 85Colo57, 273P646.

1353–1½–New. Where one joint appellant assigns a certain error which the other does not, judgment will be affirmed as to appellant not assigning error. TexCivA 283SW189.

1353–2 85Colo57, 273P646 (joint assignment makes improper specifications of error attacking power of eminent domain affecting town only).

1353–5½–New. Assignment of error for refusal to give one of the defendants a separate trial cannot be considered, where several other defendants join in the assignment. 333Ill313, 164NE676.

1354–23 [1] (6) Joint assignment claiming error in court's refusing affirmative charge as to one of parties 21AlaA127, 106S67 (where other party not entitled to charge). (7) Where appellants were sued jointly and judgment was joint, rule that assignment of error must be good as to all who unite in it is inapplicable. 40Wyo350, 280P889.

1356–32 NJ 138A512. [b] **Verdict in equity case.**–135Okl208, 275P331. [c] **Assignments upon rulings made after appeal taken** will not be considered on appeal from judgment. 34PortoRico157. [d] **Assignment that supreme court erred in affirming judgment of district court** entitles appellant to argue in court of errors and appeals all of grounds assigned in supreme court. NJ 151A630.

1356–33 NJSup 139A904 (grounds of appeal pointing to no judicial action raise no question). [b] **Facts of case,** but no judicial action, are insufficient. NJ 133A880.

1356–34 102NJL716, 133A478; NJ 133A880.

1356–38 IndA 168NE613.

1356–39 89PaSuper146; 50SD226, 209 NW343.

1356–40 MoA 24SW(2d)249; 88PaSuper31; 92PaSuper245.

1356–40½–New. Assignments of error to the denial of a motion for a new trial present nothing for review so far as they relate to matters occurring during the course of the trial and before verdict. 18F(2d)912.

1356–40½–New. , but may properly present for review questions relating to the verdict or matters subsequent thereto. 18F(2d)912.

1356–41 [b] **Assignments in addition to those in new trial** may be filed especially where errors arise subsequent to motion. TexCivA 3SW(2d)585.

1357–43 217Ala421, 116S518; 85 IndA 418, 154NE692.

1357–44 TexCivA 295SW679.

1357–47 76CalA293, 244P923; CalA 288P80; 104Conn472, 133A582; 104 Conn501, 133A576; 27Hawaii369, 373 [citCJ]; 203 Iowa1253, 213NW218; Iowa 213NW442; 204 Iowa678, 216NW 41; NJ 139A427; TexCivA 274SW228; TexCivA 281SW264; TexCivA 284SW 693.

1357–48 35F(2d)30; 213Ala656, 106S 172; 214Ala301, 107S857; 20AlaA616, 104S559; Ariz 291P993; 83Colo 89, 262 P526; 102Conn609, 129A785; 104Conn 472, 133A582; 104Conn501, 133A576; 104Conn519, 133A746; 104Conn585, 134 A73; 110Conn615, 149A219; 111Conn 106, 149A397; 162Ga487, 134SE165; 165Ga304, 140SE859 (assignment must be complete within itself); 169Ga832, 152SE103; 37GaA369, 140SE520; 39 GaA809, 148SE621; 40GaA497, 150SE 461; 27Hawaii369, 373 [citCJ]; 43 Ida 803, 255P411; 45 Ida290, 261P772 (assignments construed only as specifications of insufficiency of evidence); 318 Ill 360, 149NE258; 200 Iowa204, 202NW 515; 203 Iowa1253, 213NW218; Iowa 213NW442; 204 Iowa678, 216NW41; Iowa 231NW323; Iowa 232NW483; 151Miss211, 117S534; MoA 256SW120; 222MoA483, 280SW720; MoA 21SW (2d)635; 102NJL716, 133A478; 104 NJL162, 139A29; NJ 139A427; NJ 139 A528; NJ 146A376; 105NJL580, 147 A537; NJ 150A321; 102NJL521, 133A 788; NJSup 140A888; NJSup 147A 336; NJSup 147A448; 123 Okl 259, 253 P87; 139 Okl 178, 281P769; Okl 292P 827; 92PaSuper245; 95PaSuper553; 96PaSuper24; 29PortoRico 740; 132SC 335, 128SE358; 50SD28, 208NW172; 51SD46, 211NW803; SD 231NW539; TexCommnA 276SW667; TexCommnA 18SW(2d)273; TexCivA 283SW341; Tex CivA 283SW611; TexCivA 284SW693; TexCivA 285SW338; TexCivA 288SW 264; TexCivA 293SW346; TexCivA 295 SW679; TexCivA 10SW(2d)257; Tex CivA 20SW(2d)351; TexCivA 24SW (2d)76; TexCivA 32SW(2d)238; 136 Wash624, 241P1; 39Wyo 476, 273P 543. See also 34GaA40, 128SE210. [c] **In Texas.**–CommnA 276SW667. [d] **Following language of specifications of error on motion for new trial is good practice.** 51SD59, 212NW213.

1359–49 85Colo 397, 277P5; 111Conn 589, 151A166; 318 Ill 360, 149NE258; 318Mo 10, 298SW766; 104NJL162, 139 A29; NJ 139A427; 102NJL521, 133A 788; 29PortoRico 740.

1359–50½–New. Under rules of court in some jurisdictions assignment of error must also point out the grounds upon which claim of error is based, 50 SD28, 208NW172.

1359–50½–New. and must clearly point out wherein the alleged error was prejudicial. 50SD28, 208NW172.

1359–51 33PortoRico 319; TexCivA 295SW320.

1359–51½–New. Assignment may be considered notwithstanding indefiniteness where meaning is clear from statement read in connection with brief. Ida 291P1074.

1359–52 [a] (3) TexCivA 281SW264. (6) 204 Iowa678, 216NW41; 136Wash 624, 241P1. (9) 23F(2d)652. (27) Brief, abstract of law contended to be applicable, does not supply absence of specific assignments. 310Mo 397, 276 SW631. (28) That court erred in overruling legal objections. 318 Ill 360, 149 NE258. (29) That court erred in denying motion for new trial. 318 Ill 360, 149NE258. (30) That court erred in overruling motion in arrest of judgment. 318 Ill 360, 149NE258. (31) That court erred in entering judgment on findings. 318 Ill 360, 149NE258. (32) That findings and judgment are contrary to law. 318 Ill 360, 149NE258. (33) That there are other errors apparent upon face of record. 318 Ill 360, 149NE258. (34) That there are other errors prejudicial to this plaintiff in error, manifest, upon the face of record. 35Wyo 4, 246P29 [citCJ]. (35) That "the court erred in finding issues for the plaintiff and rendering the judgment on file." 103Conn 249, 130A164. (36) That court erred, insisting that testimony go to jury. 162 Ga487, 134SE165. (37) That court erred, in charging jury and in refusing to charge as requested. 136Wash624, 241P1. (38) That verdict of jury is contrary to evidence and against law. 136Wash624, 241P1. (39) That "court erred in overruling plaintiff's objections to charge and issues submitted by court to jury." TexCivA 283SW341, 343. (40) That instructions requested "should have been given." 76CalA293, 244P923, 930. (41) That court erred in dismissing defendant's claim. 104Conn 472, 133A582. (42) That court erred in not permitting certain defenses to be set up and adjudicated. 141SC407, 139SE 842. (43) That there is error in record. 218Ala156, 117S652. (44) That court erred in awarding injunction and accounting. 36F(2d)224. (45) That finding is not sustained by evidence. IndA 169NE678. (46) That court erred in law of case. 161Tenn293, 30SW(2d)601. (47) Other instances. Iowa 232NW483; TexCivA 23SW(2d)781. (48) In general. Conn 151A335. [b] (1) 169Ga 126, 149SE892 (on all orders overruling demurrers and on exceptions pendente lite); 47 Ida119, 272P254; 203 Iowa 1253, 213NW218; 315Mo 442, 286SW 385; 318Mo 1, 298SW762; NJ 133A 880.

1360–53 29PortoRico 740; TexCivA 281 SW264.

1361–54 TexCivA 25SW(2d)675; Tex CivA 28SW(2d)264.

1361–57 AlaA 118S501.

1361–59 TexCivA 31SW(2d)675.

1361–60 TexCivA 281SW264; TexCivA 28SW(2d)247.

1361–60½–New. , and such propositions must be germane to the assignment of error. TexCivA 288SW276.

1361–61 291Pa470, 140A339.

1361–62 207 Iowa274, 222NW851.

1361–64½–New. Assignments which are too general cannot be aided by propositions asserted thereunder. TexCivA 281 SW264.

1361–64½–New. Propositions in briefs cannot take the place of valid assignments. TexCivA 281SW264.

1362–70 [a] (6) In New Jersey, on appeal, from judgment of affirmance by supreme court sitting as review court, to court of errors and appeals, only proper assignment is that supreme court erred in giving judgment of affirmance. 102NJL716, 133A478.

1362–71 35F(2d)30; 213Ala656, 106S 172; 214Ala301, 107S857; 216Ala676, 114S137; 217Ala10, 115S77; 104Conn 112, 132A473; 106Conn119, 137A241; 108Conn683, 145A273; 110Conn184, 147 A762, 66LRA1121; 96Fla667, 119S116; 98Fla513, 123S919; 318 Ill 360, 149NE 258; 85 IndA624, 155NE261; 200 Iowa 948, 205NW770; 203 Iowa1253, 213NW 218; 207 Iowa959, 221NW451; 221MoA 67, 294SW123; 221MoA135, 296SW460; 105NJL415, 144A604; NJSup 130A225; 285Pa202, 131A731; 289Pa65, 137A127; 289Pa356, 137A603; 298Pa256, 148A 102; 88PaSuper31; 88PaSuper106; 97 PaSuper489; 132SC335, 128SE358; Tex CommnA 14SW(2d)1015; TexCivA 274 SW335; TexCivA 275SW184; TexCivA 276SW302; TexCivA 283SW879; Tex CivA 293SW346; TexCivA 295SW947, 948 [citCJ]; TexCivA 6SW(2d)377; TexCivA 8SW(2d)550 (assignment held multifarious); TexCivA 13SW(2d)974; TexCivA 14SW(2d)300; TexCivA 20SW (2d)266; TexCivA 26SW(2d)463; Tex CivA 26SW(2d)726; TexCivA 30SW(2d) 685; TexCivA 31SW(2d)675; TexCivA 32SW(2d)238; 136Wash624, 241P1. See also 219Ala33, 121S42. But see MoA 24SW(2d)202. [a] **Where rulings are combined and argued as single assignment,** court will not reverse if any one of rulings is free from error. 217 Ala10, 115S77; 22AlaA269, 115S74.

1363–74 214Ala483, 108S359, 45ALR 1026; TexCivA 20SW(2d)266.

1363–75½–New. Assignment of error complaining of distinct rulings may be considered by court in its discretion. TexCivA 277SW427 (especially where rulings closely connected).

1363–75½–New. Assignments which are but the statement of an abstract rule of law or a statement of the pleader's conclusion as to the effect of the evidence must be overruled. TexCivA 13SW(2d)959.

1363–76 86 IndA92, 156NE181.

1364–77 310Mo 48, 274SW764; Tex CommnA 276SW219.

1364–78 220Ala581, 126S857; 203 Iowa 596, 213NW236; 220MoA367, 286SW 445; 193NC849, 138SE123; 51SD59, 212NW213; TexCivA 284SW693; Tex CivA 4SW(2d)249; TexCivA 24SW(2d) 76; Utah 290P954. See also TexCivA 28SW(2d)611.

1364–78½–New. And in some jurisdictions reference simply to pages without specifying the lines, or otherwise pointing out the error, is insufficient. 200 Iowa204, 202NW515.

1364–80 84Colo 572, 272P623; 200 Iowa204, 202NW515; Iowa 233NW28 (reference insufficient); 220MoA367, 286SW445; TexCivA 275SW184; Utah 269P518 (questions).

1364–81 Utah 269P518.

1364–83 Iowa 218NW147; Iowa 232 NW483; 36Wyo 121, 253P669.

1364–84 22AlaA168, 113S641. [a] 152 Wash532, 278P412(1stcase).

1365–85 164Ga23, 137SE390; 83 IndA 385, 148NE486; 115 Okl 214, 242P546. [a] (4) Assignment complaining of order overruling demurrer is not considered where demurrer is not in record. 115 Okl 214, 242P546.

1365–86 115 Okl 214, 242P546. See also 44 Ida739, 260P164, 167 [citCJ].

1365–87 247Mich291, 225NW569.

1366–95½–New. Where assignment raises no question which will support proposition based thereon, proposition will be overruled. TexCivA 279SW493.

1366–95½–New. Proposition will be confined to own scope embraced in assignment on which based. TexCivA 279SW493.

1366–96 213Ala656, 106S172; 23AlaA 305, 124S504; 42 Ida277, 245P86; 84 IndA202, 149NE734; 87 IndA347, 154 NE882; 220MoA753, 275SW973; 50SD 641, 211NW604; TexCivA 290SW274; 33Wyo 457, 240P449. [a] (1) 41GaA 759, 154SE718. (7) Assignment on judgment sustaining demurrer to petition is sufficient where it recites as ground that petition as amended set forth cause of action. 166Ga274, 142 SE870. (8) Bill of exceptions, besides reciting all proceedings, including disallowance of amendment and sustaining of demurrer, specifies errors complained of. 40GaA119, 149SE67. (9) Assignments raising single question as to whether controverting plea of plaintiff was sufficient to show prima facie venue in county where suit was brought alleged only conclusions raised question of fundamental error. TexCivA 19SW (2d)826. (10) Others. 219Ala33, 121S 42. (11) In general. TexCivA 25SW (2d)675. [b] (3) Where proposed demurrer was neither set out in exceptions, attached as exhibit or otherwise identified. 170Ga22, 152SE96(2dcase). (4) Too indefinite. TexCivA 25SW(2d) 964. (5) Assignment that court erred in sustaining motion to strike affirmative defenses on each and all grounds there stated, where various reasons were given, presented nothing for review. Iowa 227NE403. (6) Others TexCivA 13SW(2d)959.

1367–1 213Ala656, 106S172; 214Ala 109, 106S686; 23AlaA305, 124S504; 220Ala578, 126S631; TexCivA 4SW(2d) 574; TexCivA 19SW(2d)814; TexCivA 25SW(2d)964. [c] **Assignment challenging order overruling demurrer is sufficient** where there were many grounds of demurrer addressed to right to maintain bill in equity. 213Ala50, 104S538. [d] **Rulings assigned jointly as error must be good in toto or** assignment will be held bad. 213Ala626, 106S172.

1367–2 TexCivA 19SW(2d)814.

1368–3 [a] **Assignment complaining of overruling general demurrer is sufficient** to question action of court in overruling three general demurrers to three respective defenses, constituting general demurrer to special answer. TexCivA 290SW835.

1368–6 179Ark766, 19SW(2d)1018, 64 ALR1258.

1369–24 194NC729, 140SE722; TexCivA 285SW918; TexCivA 288SW248. [b] **Assignments held insufficient.–Ida** 286P603 (that court erred in granting injunction).

1369–28 TexCivA 10SW(2d)441; TexCivA 22SW(2d)720; TexCivA 22SW(2d)753. [b] **Assignments held insufficient.–Mo** 294SW1014.

1370–30½–New. Assignment of error in limiting the time for defendant to present a case to the jury is too general. Mo 294SW1014.

1370–31 TexCivA 287SW683; TexCivA 17SW(2d)1077.

1370–32 20F(2d)897; 218Ala156, 117S652; 220Ala559, 126S885; 31Ariz267, 252P189; Ariz 286P819; 82Colo 133, 257P359; 85Colo 551, 277P468; 162Ga 487, 134SE165; 163Ga444, 136SE410; 37GaA447, 140SE432; 37GaA369, 140SE520; 206Iowa771, 221NW489; 207Iowa1271, 224NW576 (assignment of overruling motion to strike evidence); 307Mo 529, 271SW50; Mo 274SW692; Mo 289SW565; Mo 294SW1014; 220MoA474, 274SW945; MoA 277SW605; MoA 282SW135; MoA 7SW(2d)456; NJ 141A174; 105NJL156, 144A8; 124Or94, 262P851; 32PortoRico 334; TexCivA 271SW145; TexCivA 294SW238; TexCivA 295SW320; TexCivA 22SW(2d)961; 143Va 36, 129SE239 (assignment referring to various bills of exception requiring court to search ninety-one pages of printed record too vague and general).

1370–33 CalA 284P226; 84Colo 572, 272P623; 163Ga444, 136SE410; 165Ga 335, 141SE67; 165Ga349, 141SE74; 35GaA469, 134SE113; 36GaA767, 138SE244; 37GaA369, 140SE520; 40GaA745, 151SE561; 200Iowa204, 202NW515; 200Iowa1133, 206NW26; 207Iowa1052, 224NW89 (assignment referring only to lines and pages of abstract held not considered); 322Mo 329, 18SW(2d)892; 222MoA483, 280SW720; 102NJL647, 133A407; 105NJL580, 147A537; NJSup 135A340; NJSup 137A412; 113Okl 105, 239P570; 117Or286, 243P778; 51SD85, 212NW493; 53SD372, 220NW874.

1370–34 20F(2d)545; 20F(2d)897; 32F(2d)119; 33F(2d)841; 162Ga371, 134SE69; 165Ga304, 140SE859; 165Ga349, 141SE74; 35GaA469, 134SE113; 36GaA354, 136SE540; 37GaA369, 140SE520; 39GaA282, 146SE770; 39GaA475, 147SE591; 40GaA571, 150SE561; 222MoA483, 280SW720; MoA 283SW57; NJSup 135A340; 88PaSuper31; 92PaSuper425; 160Tenn403, 23SW(2d)897; Tex 293SW1114; TexCivA 278SW943; TexCivA 279SW911 (review restricted to evidence set out in assignment); TexCivA 295SW679. [a] 30F(2d)18; 38F(2d)599. [b] 36GaA354, 136SE540; 37GaA81, 138SE920.

1371–35 161Ga329, 130SE566; 166Ga 632, 144SE18; 115Okl 214, 242P546; 152Va715, 148SE811.

1371–36 161Ga823, 131SE889. [a] **Assignment of error in excluding testimony is insufficient** in absence of showing that appellant did not subsequently have full opportunity to develop and present such testimony. 47Ida542, 277P554(2d case).

1371–36½–New. Assignment relating to admission of testimony which includes questions, objections, and answers is sufficient. 203Iowa628, 213NW274.

1371–37 87CalA231, 261P1027; 163Ga 444, 136SE410; MoA 24SW(2d)249; NJSup 135A341; 115Okl 214, 242P546. [a] (4) Assignment that court erred in sustaining plaintiff's objection to each and every question asked defendant's witnesses is fatally indefinite. 204Iowa 661, 215NW628. [b] **Assignment of errors that court erred in statements and rulings** made in reference to evidence of witness held insufficient for indefiniteness, where some rulings were correct. 168Ga766, 149SE138.

1372–39 TexCivA 293SW835.

1372–40 214Ala364, 107S821; 291Pa 470, 140A339; TexCivA 276SW302; TexCivA 282SW930; TexCivA 282SW935; TexCivA 32SW(2d)494.

1372–41 218Ala156, 117S652; 163Ga 444, 136SE410; 36GaA767, 138SE244; 37GaA447, 140SE432; 322Mo 158, 16SW(2d)190; 216MoA572, 259SW518; NJSup 135A340; 32PortoRico 334. See also 167Ga667, 146SE473(2dcase).

1373–42 79CalA380, 249P536; 90CalA 213, 265PS76; 165Ga436, 141SE187; 42Ida277, 245P86; 43Ida337, 252P186; 44Ida478, 258P931; Idn 286P603; 164Minn401, 205NW282 (assignment sufficient); NJ 141A174; 49ND96, 190NW177; 50SD240, 209NW360; 51SD59, 212NW213; 51SD85, 212NW493; 117Tex 261, 1SW(2d)857; TexCivA 277SW210; TexCivA 281SW264; TexCivA 282SW633; TexCivA 294SW899; TexCivA 24SW(2d)83; 66Utah229, 241P221. [b] (6) 25F(2d)262; 29Ariz313, 241P510; 90CalA390, 266P320; 207Iowa155, 222NW530; MoA 32SW(2d)116; 51SD85, 212NW493; TexCivA 291SW674; Utah 286P638.

1373–43 10F(2d)464; 35Ariz69, 274P638; 79CalA380, 249P536; 95CalA327, 272P772; 104Conn355, 132A913; 165Ga 436, 141SE187; 41Ida155, 238P530; 42Ida277, 245P86; 43Ida337, 252P186; 44Ida478, 258P931; Mo 294SW1014; NJ 138A705; NJSup 130A367; 49ND96, 190NW177; TexCivA 264SW513; TexCivA 274SW228; TexCivA 277SW210; TexCivA 279SW611 (multifarious); TexCivA 280SW348; TexCivA 281SW264; TexCivA 289SW718; TexCivA 289SW1023; TexCivA 292SW257; TexCivA 294SW899; TexCivA 2SW(2d)883. But see 207Iowa155, 222NW530. [a] **Assignments held insufficient.–Utah** 279P499.

1373–43½–New. "That undisputed facts show appellants are entitled to judgment" held too general. TexCivA 279SW895.

1374–44 169Minn120, 210NW637.

1374–51 TexCivA 280SW869.

1374–57 TexCivA 275SW184; TexCivA 283SW341; TexCivA 284SW693; TexCivA 293SW346. See also TexCivA 13SW(2d)974. [a] (2) Special issue. TexCivA 13SW(2d)974. (3) Proposition that none of issues submitted to jury was sustained by evidence is too general. TexCivA 17SW(2d)1095. [b] (2) In Illinois, objection to submission of issue to the jury is sufficiently assigned as error in assignment that court erred in not holding on fact as matter of law because of undisputed evidence. 232IllA398.

1374–58 21AlaA23, 104SE870 (assignment of error in rendering verdict and judgment not broad enough to cover error in giving affirmative charge not assigned as error); 39GaA502, 147SE592; 204Iowa678, 216NW41; Iowa 227NW823; Iowa 229NW907(1stcase); 58ND812, 228NW212; TexCommnA 1SW(2d)878; TexCivA 275SW184; TexCivA 284SW693; TexCivA 293SW835; TexCivA 6SW(2d)215. [b] (6) Iowa 232NW483. (11) TexCivA 275SW184. (15) Error in direction of verdict assigned because pleadings raised issue and not also assigning that the evidence raised such issue. TexCivA 275SW184. (16) Other instances. 166Ga880, 144SE659; TexCivA 7SW(2d)964. (17) Assignment that court overruled motion for directed verdict as shown on specified page of abstract, where motion was based on several grounds. 208Iowa 1350, 227NW404. [c] (1) 40F(2d)228; 22AlaA611, 118S501; 41GaA60, 151SE813; 203Iowa596, 213NW236; TexCommnA 6SW(2d)341 (embracing all evidence). (11) That court erred in refusing to grant directed verdict. MoA 7SW(2d)732. (12) Other instances. 30F(2d)520. [d] **Consideration of assignments of error is immaterial,** where instruction to find for defendant, if evidence is sufficient to warrant presentation of issues to jury, is fundamental error. TexCivA 16SW(2d)907.

1375–59 [b] (6) Assignment that bill in equity stated grounds for equitable relief raises question of improper dismissal of bill without hearing on merits. 233IllA591.

1375–59½–New. Although generally the assignments of error do not conform to the rules of the circuit court of appeals denial of motion for directed verdict may be considered on review. 5F(2d)22 (where it is reasonably certain that request for directed verdict was refused and exception properly taken).

1376–60 31Ariz239, 251P891; 172Ark 584, 289SW759; 76CalA293, 244P923; 98CalA257, 276P1071; 85Colo 409, 277P299; 104Conn404, 133A214; 162Ga 487, 134SE165; 39GaA265, 147SE160; 46GaA571, 150SE561; IndA 169NE347 (2dcase) (waived); 208Iowa1350, 227NW404; 246Mich139, 224NW649; MoA 17SW(2d)658; MoA 29SW(2d)215; NJ 139A427; NJ 139A528; 105NJL408, 144A812; NJSup 135A341; NJSup 137A795; NJSup 140A8; NJSup 147A379; 133Okl 104, 271P635, 638(2dcase) [cit CJ]; 39OklACR368; TexCivA 283SW341; TexCivA 294SW267; TexCivA 1SW(2d)917; TexCivA 13SW(2d)974; 151Va72, 144SE466. [a] (5) Other instances. MoA 296SW249. [b] **Assignments held insufficient.–40GaA99, 148SE772; MoA 27SW(2d)1046.**

1376–62 TexCommnA 1SW(2d)602.

1376–62½–New. Although generally the assignments of error do not conform to the rules of the circuit court of appeals denial of special charges may be considered on review. 5F(2d)22 (where it is reasonably certain that request was refused and proper exception taken).

1376–62⅓–New. The appellate court need not supplement an insufficient assignment by referring to the argument. 31Ariz239, 251P891.

1376–63 214Ala596, 108S514; 310Mo 665, 276SW49; Mo 294SW1014; MoA 299SW66; 102NJL647, 133A407; 104NJL84, 140A327; NJ 150A321; NJSup 135A341; NJSup 137A795; NJSup 144A324; NJSup 149A338; 133Okl 104, 271P635, 638(2dcase) [citCJ]; 289Pa65, 137A127; TexCivA 283SW341; TexCivA 4SW(2d)1003; TexCivA 13SW(2d)974. [a] (5) Other instances. TexCivA 10SW(2d)422; TexCivA 12SW(2d)829 (2dcase).

1377–64 Mo 293SW386 (if form is not objectionable); 289Pa65, 137A127.

1377–65 213Ala550, 105S707; 216Ala 676, 114S137; 23AlaA595, 129S489.

1378–66 117Or286, 243P778. See also 216Ala196, 112S755.

1378–68 10F(2d)361 (error not considered on noncompliance); 37F(2d)708; 207Iowa274, 222NW851; 105NJL134, 143A366; NJ 147A398; NJSup 129A484; NJSup 135A341.

1378–69 31Ariz239, 251P891; TexCivA 277SW403.

1378–70 Contra Iowa 227NW823.

1379–71 31Ariz239, 251P891; 31Ariz 386, 253P899; 76CalA293, 244P923; 163Ga87, 135SE433; 170Ga788, 154SE325; 40GaA328, 149SE713; 205Iowa1009, 218NW903; MoA 271SW1029; MoA 24SW(2d)1072.

1379–72 TexCivA 283SW910.

1379–74 TexCivA 293SW346; TexCivA 21SW(2d)347.

1379–82 [a] (11) Assignment that instructions are erroneous, wholly unwarranted, and not justified by evidence is insufficient. 31Ariz239, 251P891.

1380–86 285Pa251, 132A120.

1380–88 See also 285Pa251, 132A120.

1380–89 221MoA1066, 295SW838. See also 216Ala676, 114S137.

1380–89½–New. that "court erred in

overruling objection to charge," **Tex CivA** 283SW341.

1380–89⅓–New. or in overruling exceptions to instructions; 203 **Iowa**5, 212 **NW**348.

1380–94 **MoA** 17SW(2d)658.

1380–96 39GaA265, 147SE160.

1381–10½–New. that there is conflict between the instruction for plaintiff and the instruction for defendant; **MoA** 15 **SW(2d)**923.

1381–11½–New. that "instruction was invasion of province of jury to hear and determine cause;" **TexCivA** 279SW 895.

1381–11⅓–New. that charge did not present all issues; 104**Conn**404, 133A 214.

1381–11¼–New. that charge was inadequate and not a sufficient guide to the jury on all questions of law; 104**Conn** 404, 133A214.

1381–11⅙–New. that charge was too broad; 104**Conn**404, 133A214.

1381–11⅙–New. that charge did not apply to issues; 104**Conn**404, 133A214.

1381–11⅐–New. that charge contained matters of law which were too far fetched; 104**Conn**404, 133A214.

1381–11⅛–New. that the court erred in giving certain instructions in that they did not correctly state the law. 221**MoA** 1066, 295SW838.

1381–13 25**F(2d)**408 (general assignment presents no question except whether findings support judgment); 88**CalA**388, 263P834; 88**CalA**391, 263 P835; 104**Conn**696, 134A231; 37**GaA** 767, 142SE199 (assignments held sufficient); 87 **IndA**603, 162NE239 (error in amount of recovery should be raised under specification that decision was contrary to law and not under specification that amount of recovery was too large); 103**NJL**553, 137 A211; 32NM124, 252P478; **TexCivA** 294SW1115; **TexCivA** 17SW(2d)852; 68**Utah**544, 251P359; **Utah** 269P1035. [a] (2) Where judge made no specific findings of fact and record showed that only question of law was involved, assignment that findings were contrary to law was sufficient, being as definite as judgment permitted. 180**Ark**4, 20SW **(2d)**642. [d] (4) Attack upon conclusion does not involve review of evidence. The evidence can be considered only upon request for correction of finding. 102 **Conn**609, 129A785. [e] **Proposition based on assumption of facts contrary to unattacked findings of court** presents no error on appeal. **TexCivA** 24SW(2d) 450.

1381–14 167**Minn**101, 208NW642; 171 **Minn**499, 214NW477; 297**Pa**212, 146A 537; 51**SD**306, 213NW578; 65**Utah**507, 243P790. See also **TexCivA** 279SW500. [b] (1) 165**Minn**266, 206NW404; 170 **Minn**230, 212NW196. (2) Specifications of insufficiency of evidence to warrant findings are sufficient where they refer to findings by number. 85**CalA**714, 259 P1017.

1381–15 [f] **As to errors in denying motion to amend findings.**–165**Minn**266, 206NW404.

1382–17 85**CalA**624, 260P347; 89**CalA** 43, 264P292; 92**CalA**292, 268P449; **CalA** 278P873(2dcase); 103**Conn**88, 130 A75; 165**Ga**436, 141SE187; 42 **Ida**277, 245P86; 87 **IndA**364, 159NE166; 166 **Minn**396, 208NW26; 167**Minn**101, 208 NW642; 171**Minn**499, 214NW477; 103 **NJL**553, 137A211; 51**SD**306, 213NW 578; 52**SD**156, 216NW886; 54**SD**146, 222NW690; **TexCivA** 279SW611 (multifarious); 68**Utah**544, 251P359; **Utah** 272P225. See also **TexCivA** 10SW(2d) 149.

1382–19 45 **Ida**499, 263P481; 85 **IndA** 5, 152NE294; **TexCivA** 17SW(2d)113 (2dcase).

1382–20 50**SD**641, 211NW604.

1383–29 [a] **Conclusiveness of findings of fact** to which no error is assigned becomes final and conclusive. **TexCivA** 24 **SW(2d)**507.

1383–29½–New. An assignment that findings, conclusions, and judgment are contrary to law and evidence must specify the respects in which the evidence is insufficient. 42 **Ida**277, 245P86.

1383–29⅓–New. Under such assignment the appellate court will not search the record to ascertain whether the evidence is insufficient. 42 **Ida**277, 245P86.

1383–29¼–New. On appeal, a claim that the court should have found substantially the whole of the draft finding can rarely be made in good faith, and violates the rules of court as well as those of good practice. 109**Conn**609, 145 A44.

1383–29⅕–New. Under an assignment that there is no evidence to support a finding, the court considers only the question of whether there is any evidence. **TexCivA** 12SW(2d)269.

1383–29⅙–New. It will not be held that an assignment of error is not good to any part where the assignment attacks the whole amount allowed merely because the appellate court finds that the allowance of one item is not erroneous. 40**Wyo** 226, 278P76.

1383–29⅐–New. Reasons of appeal based on the failure of the court to correct a finding by the addition of certain findings are insufficient, when at variance with court rules and practice, and compel the court to review the evidence to determine where the weight lies. 109 **Conn**505, 147A26(1stcase).

1383–29⅛–New. Reasons of appeal which are conclusions which must be drawn from subordinate facts are insufficient under some rules and practice. 109**Conn**505, 147A26(1stcase).

1383–30 [b] **Assignments held sufficient.**–169**Ga**358, 151SE796.

1383–35½–New. An assignment of error that the provision of an order sustaining exceptions to an auditor's report, that the issues of fact involved in such exceptions be referred to a jury "by appropriate questions to be propounded to the jury as the court shall determine to be suitable and proper," was contrary to law is sufficient. 161**Ga** 711, 132SE547.

1383–36 40**GaA**157, 149SE91(1stcase); 43 **Ida**337, 252P186; 203 **Iowa**1253, 213 NW218; **TexCivA** 293SW664; **TexCivA** 9SW(2d)1055(1stcase); **TexCivA** 17SW **(2d)**1093; **TexCivA** 26SW(2d)293.

1384–37 **TexCivA** 6SW(2d)377.

1384–38 **NJ** 151A854; **NJSup** 140A 401; **TexCivA** 277SW776; **TexCivA** 282 SW633; **TexCivA** 289SW718; **TexCivA** 13SW(2d)974.

1384–39 **TexCivA** 16SW(2d)160. But see **TexCommnA** 16SW(2d)261.

1384–40 35**F(2d)**328; 46 **Ida**492, 269P 100; **TexCivA** 289SW718; **TexCivA** 24 **SW(2d)**83. See also 39**GaA**496, 147SE 722. But see **TexCivA** 13SW(2d)974. [b] (2) But where such assignment is supplemented by assignment of undue sympathy as reason, assignment is sufficient. **Mo** 294SW1014.

1384–41 167**Ga**657, 146SE485; 205 **Iowa** 1009, 218NW903; **NJ** 141A174. See also **TexCivA** 13SW(2d)974. But see 203 **Iowa**1253, 213NW218.

1384–43 **TexCivA** 275SW184; **TexCivA** 300SW102. [a] (3) Assignment of error on direction of verdict as contrary to law does not raise point that verdict was not demanded and is insufficient. 41 **GaA**383, 153SE93(1stcase).

1384–44 206 **Iowa**925, 221NW577.

1384–47 98**CalA**257, 276P1071; 40**GaA** 814, 151SE541 (assignment amounts to nothing more than amplification of general grounds). But see **Mo** 294SW1014. [c] (3) Assignment that verdict is excessive and contrary to instructions. 203 **Iowa**1253, 213NW218.

1385–51½–New. That verdict was too indefinite to support judgment, overruled, where judgment's recital of stipulation was not challenged by assignment of error. **TexCivA** 270SW1112.

1385–52 218**Ala**613, 119SW640; 31**Ariz** 267, 252P189; 165**Ga**436, 141SE187; 40 **GaA**157, 149SE91(1stcase); 49**SD**102, 206NW231; **TexCommnA** 6SW(2d)341; **TexCivA** 264SW513; **TexCivA** 282SW 286; **TexCivA** 283SW611; **TexCivA** 293 SW346; **TexCivA** 295SW646; **TexCivA** 297SW231; 36**Wyo** 121, 253P669. But see 250**Mich**198, 229NW513. [a] (3) Error in judgment sustaining demurrer and dismissing case held sufficient. 162 **Ga**139, 133SE855. (4) Assignment that decree is contrary to evidence and that court erred in failing to hold as requested. 25**F(2d)**813.

1385–52½–New. Assignment of error to "action of the court in signing the judgment as appears in the record" may be treated as an exception to the judgment including answers given to issues. 194 **NC**19, 138SE348, 349.

1385–53 20**F(2d)**897; 36**F(2d)**220; 43 **F(2d)**976; 31**Ariz**267, 252P189; **Ariz** 291P993; 162**Ga**717, 134SE760; 165**Ga** 436, 141SE187; 166**Ga**633, 144SE20; 38 **GaA**662, 145SE96; 29**Hawaii**548; 29 **Hawaii**713; 40 **Ida**402, 233P516; 45 **Ida**499, 263P481; 48 **Ida**77, 279P412 (1stcase); 48 **Ida**351, 282P80; 307**Mo** 529, 271SW50; **NJ** 139A528; **NJSup** 130A522; **TexCivA** 279SW611; **TexCivA** 281SW622; **TexCivA** 282SW286; **Tex CivA** 283SW611; **TexCivA** 284SW693; **TexCivA** 295SW646; **TexCivA** 18SW(2d) 1109; **TexCivA** 8SW(2d)693; **Utah** 272 P225; 37**Wyo** 509, 263P711; 39**Wyo** 476, 273P543. [a] (2) **TexCivA** 283SW 611. (3) **TexCivA** 19SW(2d)814. (20) that court erred in rendering judgment in favor of plaintiff. (**TexCivA** 17SW (2d)113[2dcase]). (21) that court erred in rendering judgment in favor of "appellant." (48 **Ida**288, 282P90). [b] (1) 165**Ga**655, 141SE805.

1386–55 162**Ga**228, 133SE345.

1386–56 31**Ariz**267, 252P189; 37**GaA** 688, 141SE433; 39**GaA**809, 148SE621; 46 **Ida**492, 269P100; 87 **IndA**364, 159NE 166; **TexCivA** 264SW513; **TexCivA** 286 SW558; **TexCivA** 292SW257; **TexCivA** 48SW(2d)98; **TexCivA** 8SW(2d)778; **TexCivA** 16SW(2d)160. [a] 136 **Okl** 197, 277P231.

1386–57 10**F(2d)**464; 31**Ariz**267, 252P 189; 46 **Ida**492, 269P100; **TexCivA** 282 SW286; **TexCivA** 286SW558; **TexCivA** 292SW925; **TexCivA** 295SW646. But see **TexCivA** 17SW(2d)93.

1386–57½–New. or contrary to pleadings; 31**Ariz**267, 252P189.

1386–58 35**F(2d)**330; 151**Miss**211, 117 S534; **TexCivA** 277SW776; **TexCivA** 286SW558; **TexCivA** 2SW(2d)488; **Tex CivA** 5SW(2d)235; **TexCivA** 6SW(2d) 215; **TexCivA** 8SW(2d)550; **TexCivA** 8SW(2d)764; **TexCivA** 10SW(2d)144; **TexCivA** 11SW(2d)367(2dcase); **Tex CivA** 17SW(2d)469.

1387–60 320**Mo**962, 9SW(2d)628.

1387–63½–New. An assignment that judgment rendered was contrary to law because there was no evidence or facts before the court when judgment rendered is not equivalent to showing that there was no evidence, being merely an assertion of reason for assignment. 161**Ga** 495, 131SE470.

1387–64 **SD** 228NW189; **TexCommnA** 280SW561; **TexCivA** 280SW916.

1387–67 **TexCivA** 25SW(2d)197.

1387–72½–New. Assignment that court erred in ordering partition is too general. **TexCivA** 279SW611.

1387–73 297**Pa**7, 146A145; 91**PaSuper** 259; 91**PaSuper**265; 96**PaSuper**146.

1388–77 48**RI** 125, 140A779.

1388–80½–New. Contention that court violated statutory provisions by not specifically declaring in its decree respective rights of parties in land to be partitioned is but to say that court erred in exercise of its jurisdiction. 196**Cal** 395, 238P78.

1388–82 204 **Iowa**678, 216NW41; 92**Pa Super**189. See also **TexCivA** 11SW(2d) 826.

1388–86 98**Fla**941, 124S732.

1388–87 38**GaA**483, 144SE345; 40**GaA** 745, 151SE561.

1389–94 40**GaA**633, 151SE42.

1389–95 But see 218**Ala**350, 118S656.

1389–3 129 **Okl** 125, 263P1083; 132**Okl** 264, 270P316; 135 **Okl** 35, 273P898(2d case).

1389–5 243 **IllA**576. [d] (1) 251 **IllA** 299; 58**ND**812, 228NW212. [e] **Assignment praying for review of evidence** and rulings and assigning error because judgment was contrary to law and direction of verdict was error is not assignment of error to judgment on motion for new trial. 40**GaA**450, 150SE 168.

1390–6 251 **IllA**299; **Mo** 279SW415.

1390–6½–New. It is unnecessary to allege as error in the petition in error or to assign on appeal the overruling of a motion for a new trial in order to have the court pass on errors of law alleged

to have occurred at the trial. 40 **OklACR** 113.

1390-7 33**GaA**733, 127**SE**898; 162**Ga** 487, 134**SE**165.

1391-11 37**GaA**734, 141**SE**672.

1391-12½-New. Any error in setting aside a judgment dismissing motion for new trial for want of prosecution necessarily enters into and affects later final judgment granting new trial. 161**Ga** 690, 132**SE**62.

1391-12¼-New. and hence specific assignments of error on such antecedent judgment are insufficient to give supreme court jurisdiction without general or specific assignment of error on the final judgment granting new trial. 161 **Ga**690, 132**SE**62.

1391-13 **MoA** 296**SW**239.

1391-14 42**F(2d)**48; 31**Ariz**267, 252**P** 189; **Ariz** 291**P**993; 85**Colo** 551, 277**P** 468; 168**Ga**377, 147**SE**881(1stcase) (assignment based on refusal of new trial on ground of unconstitutionality of statute held insufficient to present constitutionality of statute for review); 36**GaA** 182, 136**SE**287; 29**Hawaii**750; **Ida** 287 **P**953; 201 **Iowa**871, 208**NW**297; 203 **Iowa**5, 212**NW**348; 204 **Iowa**678, 216 **NW**41; 206 **Iowa**925, 221**NW**577; **Iowa** 227**NW**823; **Iowa** 231**NW**323; 170**Minn** 221, 212**NW**167; 173**Minn**529, 217**NW** 933; 307**Mo** 529, 271**SW**50; 310**Mo** 43, 274**SW**764; **MoA** 285**SW**170; **MoA** 285 **SW**549; 220**MoA**542, 287**SW**865; **MoA** 296**SW**216; 289**Pa**414, 137**A**599; 293**Pa** 256, 148**A**102; **TexCivA** 280**SW**852; **Tex CivA** 284**SW**693; **TexCivA** 285**SW**662; **TexCivA** 292**SW**555; **TexCivA** 293**SW** 677; **TexCivA** 294**SW**267; **TexCivA** 1 **SW(2d)**759; **Utah** 272**P**225; 103**WVa** 532, 138**SE**102. [b] (1) **Minn** 230**NW** 895. [e] (1) **TexCivA** 273**SW**951; **Tex CivA** 275**SW**173. (7) **TexCivA** 273**SW** 951; **TexCivA** 10**SW(2d)**422. (10) **Tex CivA** 273**SW**951. (12) Appeal may be predicated on assignment of error in denying motion for new trial on default judgment without filing formal statutory instrument which is only required in absence of a motion for new trial. **TexCivA** 273**SW**951. (13) It is optional with appellant whether to treat grounds in motion for new trial as his assignment of errors. **TexCivA** 23**SW(2d)**827.

1393-19 307**Mo** 529, 271**SW**50 (that court erred in rendering judgment for respondents too broad); 50**SD**627, 211 **NW**602.

1393-20 [a] (3) No cause for reversing judgment denying new trial is presented by general assignment of error, that verdict is contrary to charge of court. 34 **GaA**201, 129**SE**14. (4) Other instances. 157**Tenn**99, 7**SW(2d)**52. [d] (4) Assignment of error alleging refusal of motion to open judgment is required, by Super. Ct. Rules, rule 28, to quote verbatim motion, rule, and judgment thereon. 91**PaSuper**265.

1394-21 **TexCivA** 279**SW**902 (where conclusions of law and fact filed after final judgment rendered). [a] **Assignments relating to matters occurring after judgment** need only be incorporated in brief of appellant. **TexCivA** 27**SW(2d)** 873.

1394-22 243 **IllA**530; 244 **IllA**420; 248 **Mich**68, 226**NW**876 (appellee's failure to embody assignment in bill of exceptions prevents review thereof); 121 **OhSt**604, 172**NE**374(1stcase); **TexCivA** 282**SW** 899; **TexCivA** 287**SW**298; **TexCivA** 300 **SW**990; **TexCivA** 1**SW(2d)**759; **Tex CivA** 27**SW(2d)**547. [d] (2) Failure of clerk separately to authenticate specifications of error as required by statute is not jurisdictional defect. 34**Wyo** 476, 245**P**298. [e] **In Texas.-CivA** 286**SW** 656; **CivA** 292**SW**269.

1394-23 23**AlaA**428, 126**S**420(2dcase); 197 **Ind**675, 151**NE**824; **TexCivA** 292 **SW**589 (only fundamental error considered, if assignments are not copied in transcript); **TexCivA** 29**SW(2d)**804. [b] **What constitutes compliance.-91Fla** 316, 107**S**404.

1394-24 **TexCivA** 272**SW**562; **TexCivA** 278**SW**323; **TexCivA** 282**SW**899; **Tex CivA** 288**SW**842; **TexCivA** 289**SW**1017; **TexCivA** 293**SW**243; **TexCivA** 293**SW** 677; **TexCivA** 16**SW(2d)**412. [a] (1) **TexCivA** 278**SW**323. (6) Filing of assignment of errors required by rule, based upon matter presented by bill of exceptions, is not in compliance with special rule requiring complete assignment of errors. 91**Fla**316, 107**S**404. (7) Bill of exceptions in transcript is no compliance with rule. **TexCivA** 16**SW (2d)**412. [b] (1) **TexCivA** 282**SW**899. (2) Statutory requirement that assignment of error be filed with clerk and brought up in transcript is directory only, as regards matters occurring after judgment. **TexCivA** 27**SW(2d)**873. [c] **In Texas.-CivA** 279**SW**902 (where conclusions of law and fact filed after final judgment rendered). [d] 98**Fla**941, 124 **S**732.

1395-25 219**Ala**478, 122**S**652 (such affirmance is in nature of judgment by default); 91**Fla**316, 107**S**404; 197 **Ind** 675, 151**NE**824; **TexCivA** 282**SW**899; **TexCivA** 29**SW(2d)**804 (law is mandatory); **Utah** 290**P**954 (failure to comply where errors appear held not jurisdictional). But see **TexCivA** 278**SW** 323.

1395-26 But see 244 **IllA**420.

1395-27 **TexCivA** 10**SW(2d)**257 (assignment not considered).

1395-30 165**Ga**844, 142**SE**283 (assignments of error held filed in time when made in bill of exceptions); 143**Miss** 587, 108**S**799; 149**Miss**764, 116**S**90 (by rule of supreme court and not by statute limiting time for direct appeal); **MoA** 24**SW(2d)**202; **TexCivA** 3**SW(2d)** 535. [d] **Supreme Court Rules rule 55** in effect requires appellant to file assignment of error before he files in lower court statement of question for appeal. 6**PaDist&Co** 592.

1396-33 23**AlaA**543, 129**S**304; 244 **IllA** 420; 209**Ky**771, 273**SW**469. But see 31 **F(2d)**519.

1396-33½-New. , or motion to correct judgment overruled. 143**Miss**587, 108**S** 799.

1397-38½-New. Where respondent approves, and court allows and signs, assignment of errors after instead of before settling and signing bill of exceptions without objection, it is too late to raise objection in appellate court. 56**AppDC**351, 13**F(2d)**957.

1397-46½-New. That the signatures of appellant's attorneys appearing on the original specifications of error were omitted from the copy filed with the clerk as service on respondent, absent from the county, does not render such service insufficient. 34**Wyo** 476, 245**P** 298.

1397-47 15**F(2d)**491; 19**F(2d)**1; 29 **Ariz**121, 239**P**795; 111**Conn**47, 149**A** 415; 205 **Iowa**752, 218**NW**499; 50**Nev** 205, 255**P**999; **NJ** 138**A**510. [a] 19**F** (2d)1.

1397-48 33**F(2d)**37; **MoA** 26**SW(2d)** 859(1stcase) (setting out errors of referee but not that of court); **SD** 231**NW** 539 (judgment affirmed on failure to supply deficiencies). See also 318**Mo** 10, 298**SW**766.

1397-51½-New. that errors relied on are general and vague and are conclusions of law based on admission and rejection of evidence, which evidence they do not disclose, in ground for dismissal of appeal; **NJSup** 135**A**340.

1397-55 214**Ala**542, 108**S**362; 29**Ariz** 121, 239**P**795.

1398-56½-New. on the ground that alleged assignments of error do not refer to the specifications on which they are based, or to the record or the page where the specifications may be found; 54**SD**374, 223**NW**319(2dcase).

1398-56¼-New. on the ground that alleged specifications do not comply with the statute relative to the settling of the record upon transcript. 54**SD**374, 223**NW**319(2dcase).

1398-58½-New. that there was some confusion in naming defendants; 80 **IndA**606, 148**NE**674.

1398-60½-New. or for failure of assignment of errors to refer to the pages of the transcript where it is short and correctable. 54**SD**374, 223**NW**319.

1398-63½-New. The fact that judgment upon which error was assigned was misnamed does not render the assignment of error insufficient. 163**Ga** 857, 137**SE**382.

1398-63¼-New. A single question of law continuously and conspicuously appearing throughout the record may be considered, although assignments of error are not in the proper form. **SD** 225 **NW**713.

1398-63¾-New. Where it appears that no errors in proceedings at law are presented to equity court in partition proceedings, motion to strike assignment of error relating thereto must be granted. 220**Ala**511, 125**S**655(2dcase).

1398-64 252 **IllA**567; **TexCivA** 283**SW** 246.

1398-73 48**Nev**175, 228**P**306.

1398-74½-New. **Prosecuting an error** to the appellate court is a waiver of assignments of error where another assignment presents questions determinable by that court. 240 **IllA**357.

1398-80 29**Ariz**121, 239**P**795. But see 170**Minn**230, 212**NW**196.

1399-81 33**NM**308, 265**P**717 [citCJ]; **TexCommnA** 6**SW(2d)**341 (statement of facts).

1399-83 98**Fla**941, 124**S**732. But see 243 **IllA**530. [g] 98**Fla**941, 124**S**732.

1399-85 246**Mich**117, 224**NW**613.

1399-87 [a] **Practice of amending specifications after appeal has been perfected** should not be encouraged. **Ida** 290 **P**200.

1399-88½-New. After the statutory time for perfecting appeal has expired the petition in error cannot be amended by incorporating a new assignment of error. 122 **Okl** 128, 251**P**1006.

1400-93 199 **Ind**137, 155**NE**707.

1400-95½-New. An amendment to assignments is not required on appeal, where the questions presented were raised in the original bill of exceptions and disposed of in the opinion. 246**Mich** 117, 224**NW**613.

1400-96 [d] **Wife's answer to husband's appeal held sufficient** to authorize review of judgment on her demand. 161**La**121, 108**S**307.

1400-99½-New. Plaintiffs' answer to an appeal, praying that legitime be fixed at greater interest than allowed in the lower court, cannot be considered on appeal. 10**LaA**117, 119**S**776.

1401-9 155**Miss**858, 125**S**433 (plea in bar necessary as to conditions arising subsequent to taking appeal).

1401-10 155**Miss**832, 125**S**86.

1401-17½-New. Where plea and replication are referred to commission to take proof and report, court will consider only question on plea and replication and proof reported. 253 **IllA**583.

1401-17¼-New. Termination of litigation and obligations incurred in operations under building permit held sufficient grounds for release of errors on appeal from order for issuance of permit. 253 **IllA**583.

1402-24½-New. Appellee, by filing an answer to appeal, waived right to object to various informalities and irregularities. 12**LaA**8, 124**S**844(1stcase).

1402-25 237 **IllA**428, 431 [citCyc].

1402-27½-New. Motion to carry demurrer back to plea admits averments in plea as does failure to take issue thereon. 237 **IllA**428.

1402-38 [a] (3) By asking for review on merits defendants waive right to review overruling of exception of misjoinder. 10**LaA**219, 120**S**672.

1402-41 10**LaA**109, 119**S**768; **LaA** 130 **S**828.

1402-45 [c] **In Louisiana.-169La**229, 124**S**837 (where appellee filed no answer to appeal asking for change of judgment, court of appeals should not have made change); 9**LaA**525, 119**S**729; 9**LaA**402, 120**S**497; 10**LaA**170, 120**S**639; 10**LaA** 276, 120**S**705; 10**LaA**134, 120**S**894; 9 **LaA**544, 121**S**208(1stcase); 162**La**929, 112**S**713.

1402-45½-New. Judgment rejecting certain items of plaintiff's claim is final where plaintiff neither appealed nor answered defendant's appeal. 170**La**736, 129**S**147.

1402-45¼-New. In Louisiana, in absence of appeal by defendant or answer to appeal, court cannot pass on exceptions and special pleas. **LaA** 130**S**639.

1402-45¼-New. Where appeal by materialman, who recovered for indebtedness but was denied lien, is not an-

swered, judgment cannot be increased even if record justified. **LaA** 130S569.

1403–56½–New. Demurrer admits the truth of the assignment of errors of fact so far as they are legally assignable, and that record is true as to the assignment of errors of law, while denying that either is sufficient to reverse judgment. 206**Mass**408, 92**NE**623; **Mass** 148**NE**449.

1403–57 7**F(2d)**522, 42**ALR**1121; 26**F(2d)**78; 149**Miss**761, 116S91; **TexCivA** 17**SW(2d)**136; **Utah** 267**P**1009.

1403–58 **Fla** 129S865; 323 **Ill** 380, 154**NE**149; 75**Mont**356, 243**P**582; **TexCivA** 5**SW(2d)**547; **Utah** 270**P**349, 361 [cit CJ].

1403–59½–New. Where a decree appealed from was in plaintiff's favor and granted all the relief he sought, it was not open to him to assign or argue cross errors, and his cross appeal was improperly taken. 31**F(2d)**914.

1403–60½–New. Cross error assigned by party not affected by error will not be heard. 103**WVa**132, 136**SE**697.

1403–60¼–New. A motion to review is not precluded by a new trial granted defendant on the refusal of plaintiff to remit damages where not absolute because of plaintiff's appeal. 197**Wis**432, 222**NW**451.

1403–60¼–New. Under the statute authorizing motion for review by respondent, respondent, granted a new trial on plaintiff's refusing to remit part of the damages awarded, was entitled to have a review of the entire situation on plaintiff's appeal from new trial. 197**Wis** 432, 222**NW**451.

1403–61 242 **IllA**516; **TexCivA** 275**SW** 96 (under rule one hundred and one cross assignments are not entitled to consideration). See also 194**Wis**520, 217**NW**298.

1403–62 319 **Ill** 366, 150**NE**286; **Tex CivA** 275**SW**96; **TexCivA** 299**SW**297.

1404–63 See also 246 **IllA**528.

1404–64½–New. Even though the only errors assigned on the question of allowance of attorney's fees appear in cross errors, the whole question is before the court. 224 **IllA**17.

1404–65 8**F(2d)**943; 218**Ala**341, 118**S** 578; 220**Ala**664, 127**S**233; **Ariz** 291**P** 997; 78**Colo** 464, 242**P**636; 83**Colo** 272, 263**P**723; 85**Colo** 9, 273**P**653; 90**Fla**595, 106**S**473; **Fla** 129**S**865; 318 **Ill** 350, 149 **NE**247; 339 **Ill** 530, 171**NE**621; **Ill** 173 **NE**179; 180 **IllA**412; 242 **IllA**233; **IndA** 148**NE**414; 196 **Ind**710, 149**NE**560; 84 **IndA**396, 151**NE**395; **IndA** 170**NE**85; 162**La**929, 111**S**331; 234**Mich**224, 207 **NW**842; 153**Miss**635, 120**S**738; 80**Mont** 480, 261**P**273; 83**Mont**501, 272**P**994; **Tex CommnA** 291**SW**193; **TexCommnA** 14 **SW(2d)**823; **TexCivA** 274**SW**1002 (failure to appeal from judgment on plea over or file cross assignment of error); **TexCivA** 275**SW**96; **TexCivA** 284**SW** 265; **TexCivA** 286**SW**253; **TexCivA** 288 **SW**1090; **TexCivA** 1**SW(2d)**481; **Tex CivA** 5**SW(2d)**598; **TexCivA** 8**SW(2d)** 217; **TexCivA** 12**SW(2d)**620; **TexCivA** 27**SW(2d)**286; **TexCivA** 30**SW(2d)**419; 65**Utah**1, 233**P**569; 70**Utah**310, 260**P**262, 61**LRA**456; **Utah** 268**P**562; **Utah** 270**P** 349, 361 [citCJ]; **Utah** 275**P**592; **Utah** 291**P**926; 192**Wis**635, 212**NW**405; 37 **Wyo** 136, 259**P**804; 40**Wyo** 350, 280**P** 889. [a] (6) 35**Ariz**147, 274**P**1047(3d case). (23) 80**Mont**480, 261**P**273. (24) 80**Mont**480, 261**P**273. (29) Party failing to take cross appeal cannot insist on decree more favorable to him than given in lower court. 118 **Or**502, 247**P**780. (30) Overruling of demurrer to petition. 70**Utah**310, 260**P**262, 61**LRA**456. (31) Denial of motion for nonsuit. 70 **Utah**310, 260**P**262, 61**LRA**456. [b] (3) Appellee has right to have verdict or judgment appealed from corrected, provided he files answer within delay provided by law asking for such correction. 167**La**28, 118**S**597. [c] (2) On appeal granted to settle principles of cause, appellee, deeming question of admission of evidence over his objection one of controlling principles, should take cross appeal and file cross assignments of error. 152**Miss**792, 119**S**194.

1405–72 136 **Okl** 123, 276**P**723.

1405–76 337 **Ill** 222, 168**NE**912.

1405–77 256 **IllA**459. See also **TexCivA** 288**SW**852.

1405–78½–New. Cross assignments need not be incorporated in the transcript. **TexCivA** 4**SW(2d)**102.

1405–79 **TexCivA** 283**SW**638; **TexCivA** 29**SW(2d)**794. But see **TexCivA** 4**SW** **(2d)**102.

1406–88 See also **Utah** 270**P**349. [a] **Assignment of want of jurisdiction** to dissolve bankrupt corporation presents only question whether court has jurisdiction of subject matter and person of defendant. 50**SD**627, 211**NW**602.

1406–90 See also 149**Miss**764, 116**S**90.

1406–90½–New. Mortgagee appellee, assigning cross error in master's report which finds usury in note in foreclosure suit, may have question reviewed without having objected to report. 318 **Ill** 28, 148**NE**882.

1406–90½–New. Where appellant seeks review of the entire decree, appellee may have reviewed any question presented by proper cross assignments. 318 **Ill** 28, 148**NE**882.

1406–91½–New. The rule that filing of assignments of error constitutes an admission by appellant that the record is correct applies to both parties in so far as the right to urge that the record is incorrect as matter of right is concerned, unless application is made prior to submission of the cause, except in exceptional cases. **Miss** 121**S**835.

1406–95 124 **Okl** 225, 254**P**718.

1407–96 124 **Okl** 225, 254**P**718.

1407–99 245 **IllA**233. But see **TexCivA** 28**SW(2d)**270.

1407–1 **TexCivA** 17**SW(2d)**167(1st case).

1407–2 But see **TexCivA** 295**SW**297; **TexCivA** 24**SW(2d)**77; **TexCivA** 25**SW** **(2d)**1008.

1407–3 13**LaA**150, 127**S**427 (reviewing court will not seek to detect errors not patent on face of record in absence of brief). [a] (3) Neither party need file brief on appeal in injunction cases. **TexCivA** 8**SW(2d)**955.

1407–4 255 **IllA**462 (duty to answer contention of adversary on vital point).

1407–3½–New. In Texas, where appeal presents fundamental question such as sufficiency of petition stricken on general demurrer, it is entitled to consideration whether briefed or not. **Tex CivA** 288**SW**1100.

1407–9 **TexCivA** 27**SW(2d)**838. [a] **Failure to comply with court rules** may result in striking briefs from files. 86 **Colo** 93, 278**P**609.

1407–10 **TexCivA** 293**SW**664. [a] **Trial brief** is insufficient. 316**Mo** 1090, 292**SW**1031. [b] **Court has discretion** to determine sufficiency. **CalA** 291**P**869.

1407–11 217**Ala**180, 115**S**230; **Cal** 292 **P**494; 104**Conn**121, 132**A**399; 200 **Ind** 732, 148**NE**148; **TexCivA** 286**SW**607; **TexCivA** 296**SW**637; **TexCivA** 300**SW** 148. [a] **Where appellant is unable to employ attorney** in trial and appellate courts, his brief has been considered, though court would be justified in disregarding it as not complying with rules and statutes in form or substance. **Tex CivA** 288**SW**1100.

1408–12 200 **Ind**129, 154**NE**490; **Tex CivA** 286**SW**607; **TexCivA** 296**SW**637.

1408–13 200**Cal** 309, 253**P**1115; **Mo** 16**SW(2d)**91; **MoA** 292**SW**1068.

1408–14 23**AlaA**130, 122**S**182; 205**Cal** 71, 269**P**921; **MoA** 17**SW(2d)**584; **Tex CivA** 296**SW**637.

1408–14½–New. , or strike the brief, **Tex CivA** 286**SW**607; **TexCivA** 286**SW**610.

1408–14½–New. and require rebriefing. **TexCivA** 286**SW**607; **TexCivA** 286**SW** 610.

1408–16 85**CalA**273, 259**P**341; **Tex CivA** 288**SW**602; **TexCivA** 7**SW(2d)**638. See also **TexCivA** 277**SW**220. [a] **Tex CivA** 1**SW(2d)**343. [b] **Motion to dismiss or affirm for defective brief** is disregarded, where parties' cause was argued and submitted on merits by stipulation and appellant had filed extensive supplement to brief. 207**Cal** 154, 277**P**481. [c] **Fundamental error will be considered** though appellant's brief is dismissed. **TexCivA** 21**SW(2d)**8.

1408–16½–New. Matter not a part of the record should not be printed in briefs or commented on. 166**Minn**45, 207**NW**178; **TexCivA** 5**SW(2d)**802.

1408–16½–New. A case improperly briefed, with a voluminous record presented, is not read and judgment is affirmed. 212**Ky**433, 279**SW**656.

1408–16¼–New. Index. Although brief lacks an index, court may consider it. **TexCivA** 283**SW**261; **TexCivA** 5**SW(2d)** 802.

1408–16½–New. In Texas it is stated to be the established practice of the court of civil appeals to consider upon their merits all questions presented in the appellant's brief, unless precluded from doing so by some imperative rule of practice or procedure. **TexCivA** 1**SW** **(2d)**706.

1408–16¼–New. Violation of rules in the preparation of a brief has been held to warrant the court in refusing to consider points or propositions set forth, except if they disclose fundamental error. **TexCivA** 7**SW(2d)**674.

1408–16½–New. The court will review fundamental error regardless of a defective brief. **TexCivA** 18**SW(2d)**762.

1408–16¼–New. Matters not set out in an essential part of the brief will not be considered by the appellate court. 89 **IndA**625, 167**NE**623.

1408–17½–New. Where the appellate court ordered a rehearing on its own motion after the death of a party and directed the filing of briefs, a brief should not be stricken because entitled in the name of the deceased party instead of his administrator. 241**Mich**191, 216**NW**433.

1408–17½–New. A motion to strike a brief because it carries in its title the name of an appellant eliminated from the appeal will be denied where the consideration of the scope of the appeal must be disposed of on appeal on merits rather than on motion to strike. 48 **Ida**536, 283**P**1040.

1408–18 23**AlaA**9, 119**S**696; 199**Cal** 446, 249**P**857; 87**CalA**246, 262**P**78(3dcase); **CalA** 269**P**551; **CalA** 287**P**550; **CalA** 288**P**80; 197 **Ind**426, 151**NE**226; 87 **Ind A**19, 154**NE**510; 88 **IndA**237, 157**NE** 111; 87 **IndA**309, 159**NE**691; 87 **IndA** 6, 159**NE**767; 208 **Iowa**698, 223**NW**756 (1stcase); 311**Mo** 49, 277**SW**562 (compliance with rule assumed); **MoA** 294**SW** 97; **MoA** 17**SW(2d)**584; 131 **Okl** 235, 268**P**286; 32**PortoRico** 205; **TexCivA** 286**SW**607; **TexCivA** 286**SW**610; **Tex CivA** 299**SW**512 (statement of facts not such as is contemplated by rules); **Tex CivA** 22**SW(2d)**1104. See also **TexCivA** 15**SW(2d)**116. [b] **Failure of appellant** to present in brief affidavit in support of motion to vacate judgment relieves respondent from presenting affidavit used in his behalf in lower court. 72 **CalA**244, 236**P**962. [c] **Form and nature.–TexCivA** 286**SW**610. [d] **In Texas.–CivA** 296**SW**637. [e] **Statute requiring that statement recite instructions** when error is predicated on giving or refusal of instructions is not complied with where appellant recites only part of instructions given. **IndA** 167**NE**563(2dcase). [f] **That proposition is multifarious** is not ground for striking out brief. **TexCivA** 21**SW(2d)** 559(2dcase).

1408–19 99**CalA**17, 277**P**1053.

1408–20 92**CalA**242, 267**P**921; 170**Ga** 202, 152**SE**239.

1408–21 [b] **That appellate court wrongly decided gaming cases** is not proper argument in lower court brief. **NJ** 133**A**477.

1409–22 102**CalA**117, 282**P**421; 38**GaA** 351, 144**SE**146(1stcase); 198 **Ind**608, 154 **NE**378; 307**Mo** 529, 271**SW**50; 285**Pa** 521, 132**A**712; 52**SD**387, 217**NW**676 (brief containing over three hundred pages of unnecessary questions and answers in addition to sixty-six pages required will not be considered). [a] **Condensed recital of evidence** in narrative form has been held sufficient under court rule. **IndA** 168**NE**198.

1409–23 35**PortoRico** 35.

1409–24 69**CalA**705, 231**P**766; **TexCivA** 286**SW**607; **TexCivA** 22**SW(2d)**1104.

1409–25 23**AlaA**550, 129**S**293; 307**Mo** 455, 270**P**688; 317**Mo** 815, 296**SW**790; **MoA** 282**SW**61; **MoA** 283**SW**749; **MoA** 1**SW(2d)**851 (statement held insuffi-

cient); **MoA** 9SW(2d)823.

1409-26 17F(2d)770; 197Cal 224, 239 P1054; 202Cal 295, 260P290; 73CalA 622, 238P1054; 92CalA526, 268P682; 165Ga151, 140SE287; 87 IndA19, 154 NE510; 163Minn193, 203NW624; MoA 283SW749 (rule cannot be waived by counsel); MoA 17SW(2d)584; 117Nebr 237, 220NW271; 53SD508, 221NW373.

1409-27 99CalA700, 279P190(1stcase); TexCivA 286SW607.

1409-27½-New. Where appellant fails to set out evidence in record and appellee refers thereto in his brief, the court will without searching the record hold that reversible error is shown. IndA 157NE7.

1409-27¼-New. Where appellant fails to make necessary recitals in the record, he cannot compel appellee to set out such recitals in his brief to show error was not committed. IndA 157NE7.

1409-27¼-New. There is a sufficient compliance with code requirements as to printing record in brief where appellant appends in his opening brief a supplement of more than one hundred pages largely devoted to excerpts from the evidence. 201Cal 26, 255P199.

1409-27½-New. Where a brief contains only appellant's version of testimony in condensed narrative form, the appellate court is not required to make more than a cursory examination of the typewritten record on file. 94CalA657, 271P575.

1409-27¼-New. Findings of fact should not be stated in briefs. 35Porto Rico 35.

1409-27½-New. That appellant inserted in his brief a statement of facts not agreed to by appellee nor approved by the court was held not a sufficient ground for striking out the brief. Tex CivA 21SW(2d)559(2dcase).

1409-28 171Ark1188, 287SW999; 195 Cal 354, 233P330; 76CalA137, 243P887; 82CalA94, 254P919; 87CalA246, 262P78 (3dcase); 91CalA324, 266P963; 91CalA 195, 266P985; 91CalA538, 267P112; 102CalA420, 283P99; CalA 285P1086 (2dcase); 199 Ind33, 154NE6; 199 Ind 643, 158NE594; 89 IndA468, 166NE 773; 86 IndA9, 155NE617; 312Mo 694, 281SW725; 32PortoRico 205; TexCivA 293SW664; TexCivA 294SW977; 100Vt 185, 135A769. See also 91CalA596, 267 P145. [a] 82CalA94, 254P919. [b] In Porto Rico.–32PortoRico 205. [c] **Where respondent prints some of record** or challenges appellant's statements concerning it, appellant should print in brief matters relied on to overcome respondent's contentions. 91CalA195, 266 P985.

1409-29 32PortoRico 205.

1409-30 199Cal 446, 249P857; 222MoA 296, 297SW163. [b] (3) Brief not containing statement of facts or assignment of errors, but merely referring appellate court to brief filed in lower court, is insufficient. 32PortoRico 205.

1409-31 199Cal 446, 249P857.

1409-33 95CalA752, 273P69; CalA 285 P1086(2dcase); 200 Ind613, 165NE754; 122 Okl 53, 250P918; 99Vt6, 130A679.

1409-34 195Cal 354, 233P330; 307Mo 529, 271SW50.

1409-35 195Cal 354, 233P330; 87CalA 143, 261P767; 87CalA246, 262P78(3d case); 91CalA195, 266P985; 98CalA 548, 277P181. See also 72CalA57, 236P 319. [a] In California.–203Cal 721, 265 P817 (defects held to justify affirmance on motion).

1409-35½-New. In some jurisdictions the statutory requirement is merely directory. 76CalA137, 243P887.

1409-35⅓-New. The reviewing court may examine the transcript to determine whether there is merit in the appeal, although portions of the record to which appellant desires to call the court's attention have not been printed in the brief as provided by statute. 90 CalA183, 265P550.

1409-35¼-New. Whether briefs contain portions of the record necessary to a proper review or whether the merits may be reviewed without them presents a question addressed to the discretion of the appellate court. 85CalA273, 259 P341.

1409-35⅕-New. Failure of appellant to incorporate portions of the record does not require affirmance on motion where the evidence is not extensive and the record can be examined with no greater inconvenience than if it had been incorporated in the brief. 85CalA273, 259 P341.

1409-35⅙-New. In Oklahoma errors in admission of evidence are not reviewable where brief of party complaining does not set forth testimony and objection made. 143 Okl 190, 288P300.

1409-36 Ariz 286P180; CalA 284P224 (2dcase); 212Ky433, 279SW656 (voluminous record not read); 167Minn428, 209NW317; 285Pa521, 132A712; SD 226NW267 (reference must be to pages of abstract and not of transcript). [a] In Texas.–115Tex148, 278SW177. [b] **Nonobservance of rule** will lead to suppression of brief, unless corrected. 297 Pa7, 146A145.

1409-37 5F(2d)137; 84CalA110, 257P 447; CalA 269P551; 199 Ind643, 158 NE594; Ind 164NE496; 87 IndA603, 162NE239; Mo 256SW750; 52SD8, 216 NW550; 158Tenn53, 12SW(2d)711; TexCivA 294SW641; TexCivA 294SW 977; TexCivA 22SW(2d)983; Vt 151A 642 (evidence supporting requested finding must be pointed out). [a] **Sufficiency of compliance with rules.**–CalA 290P609.

1410-41½-New. In some jurisdictions a brief will not be stricken out because references to folios are too few where the brief is of value. 48 Ida383, 283P 522.

1410-42 29F(2d)829; 218Ala637, 119 S844(2dcase); 23AlaA227, 124S115; 29 Ariz227, 240P351; 198Cal 129, 243P 439, 43ALR1235; 161Ga557, 131SE363; 163Ga807, 137SE45; 34GaA207, 128SE 918; 35GaA647, 134SE330; 37GaA278, 139SE920; 198 Ind70, 152NE277; 87 IndA462, 151NE735; 88 IndA411, 164 NE277; 210Ky285, 275SW797; 240 Mich36, 214NW833; 317Mo 125, 295SW 109; 319Mo 401, 4SW(2d)438; 216MoA 572, 259SW518; 220MoA1112, 296SW 257; 221MoA1217, 299SW816; MoA 9 SW(2d)103; 222MoA763, 9SW(2d)673; MoA 17SW(2d)397; MoA 17SW(2d) 615; MoA 24SW(2d)249; MoA 31SW (2d)583; 117Nebr237, 220NW271; 193 NC849, 138SE123; 194NC98, 138SE 424; 113 Okl 105, 239P570; 113 Okl 150, 240P104; 114 Okl 21, 242P1027; 118 Okl 120, 247P80, 47ALR822; Okl 292P353; 115 Or608, 239P105; 119 Or 682, 250P1098; 122 Or498, 259P891; 127 Or509, 272P893; Or 289P1051; 49 SD46, 206NW471; 49SD381, 207NW 217; 52SD8, 216NW550; TexCivA 274 SW228; TexCivA 275SW473; TexCivA 279SW928; TexCivA 282SW860; Tex CivA 283SW246; TexCivA 286SW607; TexCivA 293SW837; TexCivA 294SW 605; TexCivA 12SW(2d)242; TexCivA 26SW(2d)658(1stcase); Utah 283P731; 34Wyo 119, 241P1068; Wyo 283P1097.

1411-43 [a] 41F(2d)627.

1411-46 [a] **Failure to state that court erred in any particular in specification of error** is not cured by anything in "points and authorities." MoA 26SW (2d)859(1stcase).

1411-46½-New. Where the assignments are separately stated and numbered under "points and authorities," there is sufficient compliance with the rule, although there are no separate assignments of error in the brief. 216 MoA561, 260SW129.

1411-49 MoA 17SW(2d)615. [a] **Separate brief should accompany motion to dismiss appeal** for failure to copy in brief assignment of error as filed. 31 NM395, 246P902.

1411-50 116Tex489, 294SW844; Tex CivA 275SW224; TexCivA 280SW609; TexCivA 283SW529; TexCivA 286SW 607; TexCivA 288SW254; TexCivA 293 SW284; TexCivA 13SW(2d)959. See also TexCivA 283SW315; TexCivA 12 SW(2d)829(2dcase).

1411-51 116Tex489, 294SW844; Tex CivA 271SW392; TexCivA 271SW646; TexCivA 273SW946; TexCivA 274SW 335; TexCivA 275SW222; TexCivA 275 SW224; TexCivA 282SW860; TexCivA 282SW930; TexCivA 283SW217; Tex CivA 283SW246; TexCivA 283SW315; TexCivA 283SW529; TexCivA 284SW 232; TexCivA 284SW296; TexCivA 284 SW989; TexCivA 285SW918; TexCivA 288SW842; TexCivA 289SW422; Tex CivA 290SW808; TexCivA 291SW265; TexCivA 293SW584; TexCivA 298SW 303; TexCivA 3SW(2d)819; TexCivA 4 SW(2d)1023; TexCivA 9SW(2d)193; TexCivA 10SW(2d)422; TexCivA 11SW (2d)367(2dcase) (briefs not containing assignments of error stricken); Tex CivA 13SW(2d)146; TexCivA 22SW (2d)717; TexCivA 22SW(2d)983(1st case); TexCivA 22SW(2d)1104 (grounds for dismissal); TexCivA 23SW(2d)444 (stricken); TexCivA 25SW(2d)907(1st case); TexCivA 29SW(2d)794; Tex CivA 32SW(2d)369; TexCr 1SW(2d) 322 (assignments not copied into brief are not considered unless fundamental). See also TexCivA 11SW(2d)583. [a] (3) TexCivA 291SW265. (5) 116Tex 489, 294SW844; TexCivA 9SW(2d)193 (rule 32). (8) TexCivA 282SW930; TexCivA 282SW935. See also TexCivA 10SW(2d)422. (9) Appellant's motion, after original opinion was filed, for permission to attach assignments of error to brief, overruled. TexCivA 29SW(2d) 794. [b] (2) Appellee's failure to file motion to strike appellant's brief does not cure defect. TexCivA 29SW(2d) 794. (3) In general. TexCivA 29SW (2d)795(1stcase). [c] TexCivA 280SW 609. [d] **Amendment of brief to conform to rule will not be granted** where record presents no fundamental error and if amendment granted court would be required to go through brief in detail and cull out assignments pertinent to propositions urged. TexCivA 275 SW222.

1412-52 116Tex489, 294SW844.

1412-53 TexCivA 287SW298.

1412-53½-New. Assignments of error in brief need not be verbatim copies of corresponding grounds of motion for new trial. TexCivA 288SW1109.

1412-54 218Ala445, 118S647; Ala 130 S776; 195Cal 354, 233P330; 72CalA757, 238P143; 85CalA377, 259P368; 99CalA 108, 277P1061; CalA 288P702; 81Colo 468, 256P305; 45 Ida541, 263P1002 (sufficient); 45 Ida584, 264P381; 193 Ind581, 149NE79; 199 Ind33, 154NE6; Ind 171NE65; 83 IndA415, 148NE435; 83 IndA445, 149NE90 (brief must indicate what judgment or ruling was appealed from); IndA 151NE7; 84 IndA 253, 151NE13; IndA 152NE177; IndA 157NE7; 201 Iowa378, 207NW351; 206 Iowa309, 218NW340; 208 Iowa1350, 227 NW404 (not only for benefit of court, but also of adversary); 212Ky433, 279 SW656 (voluminous record not read); 265Mass85, 163NE867; 236Mich393, 210 NW247; 307Mo 375, 270SW365; MoA 272SW703; MoA 7SW(2d)1018; MoA 17SW(2d)392; MoA 19SW(2d)514; 74 Mont531, 241P322; 103NJL589, 137A 549; 194NC98, 138SE424; 116 Okl 213, 243P955; 118 Okl 120, 247P80; Okl 272 P851; 135 Okl 174, 274P871; 142 Okl 242, 286P316; 32PortoRico 205; 33 PortoRico 13; 34PortoRico 495; 50SD 315, 210NW17; 50SD561, 210NW982. [d] 50SD561, 210NW982; 52SD8, 216 NW550; TexCivA 275SW242; TexCivA 277SW194; TexCivA 278SW924 (errors at trial, not assigned and briefed, are waived); TexCivA 283SW217; Tex CivA 296SW669; TexCivA 5SW(2d) 586; TexCivA 22SW(2d)680; TexCivA 28SW(2d)264; TexCivA 31SW(2d)860; 136Wash624, 241P1. [b] (2) Clear statement treated as assignment of errors. Nebr 232NW612. [k] TexCivA 285SW678. [l] **Statement that special findings were defective,** uncertain, and ambiguous, that no judgment could be rendered thereon, and contained evidence and not facts, held insufficient because not pointing out the defects, uncertainties, and ambiguities. IndA 152NE177. [m] **Briefs held sufficient.**–CalA 291P869.

1413-56 216Ala495, 113S531; 195Cal 354, 233P330; 71CalA683, 236P174; 72 CalA757, 238P143; 78CalA353, 248P 737; 86 CalA800, 802, 261P1043; CalA 284P224(2dcase); 234 IllA173 (court is not bound to search abstract for errors in conduct of trial which are not in brief); 236 IllA392; 83 IndA541, 149 NE184; IndA 152NE177; Iowa 231NW

440; **MoA** 274SW857; **MoA** 281SW83; **MoA** 7SW(2d)1018; 103NJL589, 137A 549; 105NJL408, 144A812; **NM** 290P 743; 194NC760, 140SE807; 114 **Okl** 87, 243P722; 134 **Okl** 39, 272P851; 135 **Okl** 74, 274P27; 142 **Okl** 242, 286P316; 34 **PortoRico** 495; **TexCivA** 292SW296; **TexCivA** 297SW283; 99Vt46, 130A679; **Vt** 130A749.

1414–57 **Nebr** 232NW612; **TexCivA** 297SW283.

1414–58 **TexCivA** 275SW423; **TexCivA** 288SW254(1stcase); **TexCivA** 288SW 254(2dcase); **TexCivA** 7SW(2d)605; **TexCivA** 17SW(2d)167(1stcase). [a] **Assignment requiring examination of record** and statement of facts is not fundamental nor error apparent on record. **TexCivA** 297SW283.

1414–61 **TexCivA** 4SW(2d)1023.

1414–62 41F(2d)625; 41F(2d)627 (noncompliance with this rule is alone ground for affirmance); 214Ala542, 108 S362; 141 **Okl** 281, 285P22 (judgment affirmed if specifications of error are not separately stated and numbered); **Tex CivA** 31SW(2d)675.

1414–63 [a] **Disregard of rule** warrants affirmance of judgment. 131 **Okl** 237, 268P192; 131 **Okl** 235, 268P286.

1414–64 **Iowa** 228NW314; **Iowa** 228 NW316.

1414–65 42 **Ida**770, 248P473 (specification that evidence was insufficient to sustain verdict sufficiently presents question of plaintiff's failure to comply with Blue Sky Law); 308**Mo** 453, 273 SW95 (assignment of errors under various subdivisions of points and authorities held sufficient); **MoA** 256SW98; **MoA** 17SW(2d)549; **MoA** 19SW(2d) 553; **TexCivA** 289SW714. [b] (2) Assignments of error in points and authorities constitute substantial compliance with statute and rule. 315**Mo** 1336, 290SW123. (3) Where record shows that only one assignment of error could be made and points and authorities are directed thereto, appeal will not be dismissed for failure to comply with rule. 317**Mo** 157, 296SW798, 53ALR1064. [c] **In Missouri.–A** 17SW (2d)549.

1414–66 199 **Ind**719, 154NE478; 32 **PortoRico** 205 (applying Sup. Ct. Rules, rule 42); **TexCivA** 288SW259; **TexCivA** 16SW(2d)541(3dcase); 99Vt45, 130A 580. [a] **In Iowa.–201 Iowa**378, 207NW 351.

1415–67 **MoA** 7SW(2d)730; **MoA** 24 SW(2d)202; 35**PortoRico** 427. [a] **Where sole point raised is error in sustaining demurrer** and point is properly made under points and authorities, appeal will not be dismissed. **MoA** 16 SW(2d)676.

1415–68 316**Mo** 1090, 292SW1031.

1415–68½–New. In some jurisdictions where briefs of plaintiff in error contain no assignments of error the appellate court need only inquire whether the original pleadings are sufficient to support the judgment and whether the trial court had power to render any judgment against appellant. **TexCivA** 289 SW714.

1415–69 322**Mo** 697, 16SW(2d)49. [a] **Motion to strike brief denied** where amendment by permission cures defects. 47 **Ida**636, 277P699.

1415–69½–New. Where the appeal involves a public interest, questions will be considered regardless of omissions in formal presentation of errors. 315 **Mo** 1336, 290SW123.

1415–69¼–New. If there is but one point in the case it will be considered, although the brief contains no assignment separately alleged. **MoA** 297SW 995.

1415–70 83 **IndA**85, 147NE728; 100Vt 371, 137A321.

1415–71 218**Ala**616, 119S635; **Ind** 164 **NE**496; 83 **IndA**85, 147NE728; 83 **IndA** 541, 149NE184; **IndA** 152NE177; 86 **IndA**55, 155NE835; **IndA** 157NE7; 86 **IndA**505, 158NE631; 322**Mo** 514, 17 SW(2d)960; 221**MoA**537, 282SW1037; **MoA** 289SW345; 220**MoA**1337, 296SW 464; 222**MoA**1189, 18SW(2d)1028; **MoA** 4SW(2d)843; **MoA** 24SW(2d)249; 35 **PortoRico** 427; **TexCivA** 277SW194; **TexCivA** 297SW555; 99Vt65, 130A749.

1415–72 254 **IllA**289; 89 **IndA**361, 166 **NE**301; 83 **IndA**541, 149NE184 (questions refused not considered where place in record where they may be found not pointed out); **IndA** 167NE563(2dcase); 35**PortoRico** 224; 35**PortoRico** 427; 101 Vt250, 143A290.

1415–73 88 **IndA**693, 165NE526 (condensed recital of evidence); **IndA** 152 NE177; 115 **Okl** 31, 241P121; 117 **Okl** 96, 245P571; 122 **Okl** 53, 250P918; 122 **Okl** 224, 253P1016.

1416–75 332 **Ill** 304, 163NE675; **Ind** 166NE434; 84 **IndA**205, 149NE698; **IndA** 151NE7; **IndA** 152NE177; 87 **IndA**220, 159NE28; 35**PortoRico** 427.

1416–76 83 **IndA**85, 147NE728; **IndA** 152NE177; 35**PortoRico** 427.

1416–76½–New. Where appellant's brief does not make comparison of allegations of pleadings the appellate court will not make the comparison. 75**CalA** 462, 242P1075.

1416–76⅓–New. Appellant's brief, not containing an order striking his evidence or any bill of exceptions thereto, cannot be considered. **TexCivA** 8SW (2d)522.

1416–76¼–New. Appellant alleging error as to rejected offers of proof must set forth specific instances. **Mo** 20SW (2d)655.

1417–87 **TexCivA** 32SW(2d)695.

1417–90 199 **Ind**33, 154NE6; 317**Mo** 442, 297SW39 (objections to report of special master and court's findings thereon not carried into brief); **TexCivA** 283SW217.

1418–93½–New. Where erroneous findings of fact contributed largely to plain error in conclusions of law, conclusions will be passed on, although specifications of error were technically too general. 45 **Ida**541, 263P1002.

1418–94 100Vt185, 135A769.

1418–95 99**CalA**17, 277P1053. [a] **Other statements held too general.–Mo** 20SW(2d)655.

1418–95½–New. Mere references to questions and answers and objections thereto as contained in motion for new trial are insufficient. 198 **Ind**581, 149 NE79.

1418–96 195**Cal** 354, 233P330; 91**CalA** 689, 267P558.

1418–97 127 **Okl** 182, 260P42; **TexCivA** 18SW(2d)334.

1418–99 93**CalA**717, 270P232(2dcase); **CalA** 286P1059; 52**SD**8, 216NW550; **TexCivA** 3SW(2d)568 (must set forth evidence). [a] **Merely printing evidence favorable to appellant alone** is not compliance with statutory requirement that appellant should print portions of record he desires to call to attention of court. 80**CalA**752, 252P1071.

1418–1 87**CalA**758, 262P764; 53**SD**34, 219NW892. [a] **No question presented on appeal** as to sufficiency of evidence, where testimony of only seven of thirteen witnesses is set out. 85 **IndA**39, 152NE293.

1418–2 102**CalA**342, 283P312; 198 **Ind** 581, 149NE79; 84 **IndA**122, 150NE118; 52**SD**8, 216NW550.

1418–4½–New. In some jurisdictions the sufficiency of evidence will not be considered on appeal, unless appellant's brief affirmatively states that it contains all material evidence. 49**SD**120, 206NW475.

1418–4⅓–New. Ground is not considered in the absence of presentment of assignment in a brief for refusal to grant a new trial. 52**SD**8, 216NW550.

1419–7½–New. Assignment that the court erred in directing a verdict for plaintiff must specify the particulars in which the action of the trial court is alleged to be erroneous. 50**SD**561, 210 NW982.

1419–8 92**CalA**285, 268P430; 236 **IllA** 392; 88 **IndA**253, 157NE55; 84 **IndA** 243, 149NE454; 84 **IndA**253, 151NE13; 84 **IndA**643, 151NE734; 85 **IndA**476, 152 NE183, 154NE390; 86 **IndA**170, 154NE 877; **MoA** 272SW704; **MoA** 274SW857; 74**Mont**176, 240P829; 103**NJL**589, 137A 549; 113 **Okl** 195, 240P1045; 115 **Okl** 31, 241P121; 130 **Okl** 300, 267P476; 132 **Okl** 191, 270P33; **TexCivA** 286SW607. [c] (2) 253 **IllA**20. [e] **Refusal of instructions cannot be considered** where those given are not set out. 84 **IndA**512, 151NE620.

1419–8½–New. Where complaint is not set out in the brief, the court of appeals cannot say that the trial court erred in refusing to strike out interrogatories. **IndA** 152NE294.

1419–9 88 **IndA**253, 157NE55; 84 **IndA** 253, 151NE13; 85 **IndA**476, 152NE183, 154NE390.

1419–10 171**Ark**1188, 287SW999.

1419–11 236 **IllA**392.

1419–14 171**Ark**1188, 287SW999.

1419–15½–New. Assigned error, although not specifically mentioned in brief, will be considered where the principle involved is presented by propositions with authority cited, and they are argued and insisted upon. 215**Ala**407, 110S818.

1419–16 198 **Ind**581, 149NE79; **IndA** 152NE177; 50**SD**561, 210NW982.

1420–21½–New. of a motion for leave to amend pleading, 72**CalA**757, 238P143.

1420–22 198 **Ind**581, 149NE79.

1420–22½–New. In the absence of complaint in the brief, the court of appeals cannot say that the trial court erred in overruling a motion in arrest of judgment. 85 **IndA**5, 152NE294.

1420–25 199 **Ind**33, 154NE6.

1420–26 92**CalA**230, 268P385 (evidence not in brief); 83 **IndA**690, 149NE732; 84 **IndA**333, 151NE365; 100Vt185, 135A 769.

1420–28 52**SD**8, 216NW550.

1420–31 **CalA** 262P815 (material portions of testimony in record warranting review of finding); 198 **Ind**581, 149 NE79. (court's rulings complained of and objections taken thereto must be pointed out); 83 **IndA**690, 149NE732 (in absence of evidence court cannot presume what is law of another state on question raised); 319**Mo** 401, 4SW(2d)438 (motion in arrest of judgment); 49**Nev**310, 246P1 (objection that cost bill was not in conformity with rule of court); 50**SD** 561, 210NW982; **TexCivA** 275SW242 (failure to specify calculations of interest); **TexCivA** 289SW1017; **Tex CivA** 297SW55 (admission of exhibit not reviewed where brief does not show circumstances under which it was admitted); **TexCivA** 25SW(2d)197.

1421–35 **TexCivA** 274SW335; **TexCivA** 275SW161; **TexCivA** 275SW171; **Tex CivA** 275SW175; **TexCivA** 275SW410; **TexCivA** 279SW889 (proposition not followed by statement will be overruled); **TexCivA** 281SW264; **TexCivA** 282SW860; **TexCivA** 284SW232; **Tex CivA** 285SW333; **TexCivA** 286SW607; **TexCivA** 289SW420; **TexCivA** 293SW 677; **TexCivA** 297SW578; **TexCivA** 3 SW(2d)527; **TexCivA** 4SW(2d)227; **Tex CivA** 4SW(2d)574; **TexCivA** 7SW(2d) 627; **TexCivA** 8SW(2d)750; **TexCivA** 19SW(2d)784; **TexCivA** 22SW(2d)720; **TexCivA** 30SW(2d)506; **TexCivA** 31SW (2d)519. See also **TexCivA** 13SW(2d) 974.

1421–36 **TexCivA** 285SW333; **TexCivA** 4SW(2d)1023; **TexCivA** 5SW(2d)586; **TexCivA** 11SW(2d)826; **TexCivA** 12SW (2d)829(2dcase); **TexCivA** 13SW(2d) 974; **TexCivA** 14SW(2d)949; **TexCivA** 28SW(2d)850; **TexCivA** 32SW(2d)238. [f] **"Proposition" defined.–TexCivA** 286 SW607.

1422–37 **TexCivA** 264SW513; **TexCivA** 286SW607; **TexCivA** 8SW(2d)318; **Tex CivA** 8SW(2d)782; **TexCivA** 15SW(2d) 159; **TexCivA** 22SW(2d)338; **TexCivA** 22SW(2d)720; **TexCivA** 30SW(2d)522; **TexCivA** 32SW(2d)220; **TexCivA** 32SW (2d)363; **TexCivA** 32SW(2d)369. [e] **TexCivA** 27SW(2d)305(2dcase) (propositions too general); **TexCivA** 32SW (2d)244. [f] **TexCivA** 271SW646; **Tex CivA** 281SW264. [g] **TexCivA** 30SW (2d)522. [k] **TexCivA** 275SW184. [l] **Reference to transcript** for bill of exceptions from which to extract facts insufficient. **TexCivA** 279SW889.

1423–38 **TexCommnA** 276SW219; **Tex CommnA** 14SW(2d)1015; **TexCivA** 281 SW264; **TexCivA** 282SW930; **TexCivA** 285SW333; **TexCivA** 286SW607; **Tex CivA** 286SW610; **TexCivA** 1SW(2d) 1109; **TexCivA** 4SW(2d)1023; **TexCivA** 5SW(2d)586; **TexCivA** 5SW(2d)785; **TexCivA** 7SW(2d)638; **TexCivA** 7SW (2d)964; **TexCivA** 8SW(2d)318; **Tex CivA** 8SW(2d)561; **TexCivA** 10SW(2d) 243; **TexCivA** 13SW(2d)974; **TexCivA** 14 SW(2d)300; **TexCivA** 31SW(2d)364. See

also TexCommnA 14SW(2d)1015; Tex CivA 13SW(2d)974. [f] (1) TexCivA 5SW(2d)735; TexCivA 9SW(2d)193. [g] (1) TexCivA 4SW(2d)1023; TexCivA 9SW(2d)193. [h] TexCivA 275SW184.

1423–39 TexCivA 275SW175; TexCivA 10SW(2d)739; TexCivA 13SW(2d)974. [a] (1) TexCivA 264SW513; TexCivA 5 SW(2d)785; TexCivA 32SW(2d)703. (5) TexCivA 6SW(2d)439.

1423–40 TexCivA 275SW184 (proposition cannot aid defective assignment). But see TexCivA 25SW(2d)207.

1424–41 TexCivA 272SW601 (proposition too general); TexCivA 275SW175; TexCivA 279SW889; TexCivA 286SW 607; TexCivA 287SW81; TexCivA 4SW (2d)654; TexCivA 10SW(2d)422; Tex CivA 13SW(2d)726; TexCivA 14SW(2d) 337; TexCivA 15SW(2d)150; TexCivA 22SW(2d)720; TexCivA 28SW(2d)247; TexCivA 29SW(2d)893; TexCivA 30SW (2d)350; TexCivA 31SW(2d)329; Tex CivA 32SW(2d)244.

1424–42 TexCivA 274SW215; TexCivA 274SW335; TexCivA 280SW334 (propositions held sufficiently to indicate assignments to which they were germane); TexCivA 4SW(2d)1023; TexCivA 6SW (2d)432; TexCivA 7SW(2d)638; Tex CivA 9SW(2d)407; TexCivA 10SW(2d) 422; TexCivA 13SW(2d)974; TexCivA 22SW(2d)720; TexCivA 30SW(2d)423. [b] (1) TexCommnA 289SW1003; Tex CivA 286SW607. (2) TexCommnA 289 SW1003; TexCivA 286SW607; TexCivA 286SW610. (3) TexCivA 286SW607.

1424–44 TexCivA 15SW(2d)159.

1424–45 TexCivA 275SW184 (proposition cannot enlarge assignment of error by ground not presented below); Tex CivA 285SW333; TexCivA 288SW870; TexCivA 7SW(2d)596; TexCivA 7SW (2d)638; TexCivA 10SW(2d)1030; Tex CivA 23SW(2d)405; TexCivA 30SW(2d) 356. See also TexCivA 12SW(2d)829 (2dcase). [i] (1) TexCivA 294SW641. [o] (1) TexCivA 4SW(2d)1003. [p] **Briefs will be stricken if rule is not observed.** TexCivA 18SW(2d)678.

1427–46 TexCivA 275SW175; TexCivA 280SW609; TexCivA 281SW264; Tex CivA 7SW(2d)638.

1427–47 TexCivA 298SW140; TexCivA 299SW913; TexCivA 11SW(2d)583.

1428–49½–New. If there is evidence in the record to support the conclusion asserted by counsel in the statement in support of the proposition, it should be set out for inspection by the appellate court. TexCivA 275SW117.

1428–50 IndA 169NE869; 307Mo 529, 271SW50; MoA 283SW732; MoA 1SW (2d)218; 49Nev35, 234P690; NJ 135A 815, 816 [citCJ]; TexCivA 22SW(2d) 881. See also Mo 294SW1014; 101Vt 514, 144A856.

1428–51 23AlaA9, 119S696; 199 Ind 719, 154NE478; 200 Ind613, 165NE754; 83 IndA380, 148NE497; 307Mo 529, 271 SW50; 220MoA507, 275SW984; 43 Okl ACR57 [reh pending]; TexCivA 275SW 117.

1428–53 22AlaA38, 111S762; 22AlaA 82, 112S537; 76CalA354, 244P1089; 80 CalA752, 252P1071; 83CalA648, 257P 187; 83CalA666, 257P538; 88CalA554, 263P844; 96CalA66, 273P590; CalA 281 P1043; CalA 285P1086(2dcase); 81Colo 468, 256P305; 41 Ida538, 240P600; 43 Ida93, 251P167; Ida 290P383; 232 IllA 359 (point not argued in brief is waived); 245 IllA667; 200 Ind613, 165 NE754; 83 IndA415, 148NE435; IndA 156NE169; 208 Iowa698, 223NW756(1st case); Iowa 227NW328; 216Ky414, 287 SW916; 222Ky405, 300SW885; 163 Minn193, 203NW624; 307Mo 529, 272 SW50; Mo 31SW(2d)4; 220MoA507, 275SW984; MoA 1SW(2d)218; MoA 22 SW(2d)892; MoA 24SW(2d)249; 77 Mont214, 250P609; 77Mont260, 250P 823; 49Nev35, 234P690; NJ 135A815, 816 [citCJ]; 32NM124, 252P478; 195 NC102, 141SE474; 116 Okl 149, 243P 723; 121 Okl 288, 249P905; 122 Okl 224, 253P1016; 124 Okl 300, 256P46; 125 Okl 202, 257P298; 127 Okl 59, 259P 854; 131 Okl 98, 267P629; 131 Okl 267, 268P731; 134 Okl 39, 272P851; 135 Okl 74, 274P27; 135 Okl 174, 274P871; 43 OklACR57 [reh pending]; 32PortoRico 464; 34PortoRico 780; 35PortoRico 427; TexCivA 275SW117; TexCivA 283 SW246; TexCivA 296SW902; TexCivA 298SW303; Vt 147A771. [c] **Supreme court of Porto Rico** "has no time for independent investigation and determination of more or less doubtful questions in the absence of adequate development by counsel for appellant." 32PortoRico 464.

1429–54 See also MoA 276SW87.

1429–54½–New. Mere abstract statements of law, not applied to errors assigned, present no question for consideration. 85 IndA418, 154NE692.

1429–54⅓–New. Abstract propositions of law not applied to any phase of the case will not be considered. 87 IndA 360, 158NE596.

1429–54¼–New. The argument is not a necessary part of the brief and can be omitted. 89 IndA625, 167NE623.

1429–55 76CalA354, 244P1089. See also 214Ala412, 108S233.

1429–56½–New. Court is not restricted to consider only points made in briefs as to sufficiency of answer. 37F(2d)137.

1429–57 89 IndA625, 167NE623; 171 Minn475, 214NW469; 115 Okl 214, 242P 546.

1429–58 84 IndA542, 149NE361.

1429–59 84 IndA542, 149NE361; 318 Mo 453, 300SW758 (sufficient); 318Mo 723, 300SW769; 125 Okl 202, 257P298.

1429–60 125 Okl 202, 257P298.

1430–62 83CalA666, 257P538.

1430–67½–New. Mere suggestion as to the unconstitutionality of statute does not require the court to search the authorities to support appellant's contention. 99CalA108, 277P1061.

1430–73 319Mo 250, 3SW(2d)352(2d case) (substantial compliance sufficient).

1430–74 Mo 24SW(2d)133.

1430–77 [a] (2) On motion to dismiss appeal for failure to present points separately. 101CalA170, 281P503(1st case).

1430–78½–New. In Texas new rules do not require statement from record to be separated from argument, TexCivA 286 SW607.

1430–78⅓–New. but if they are separated, statement should precede argument. TexCivA 286SW607.

1430–78¼–New. In some jurisdictions a brief will not be stricken out for failure separately to state propositions of law where the brief is of value. 48 Ida 383, 283P522.

1430–78½–New. Where separate numbered assignments are made, rules require each assignment to be argued separately. 35PortoRico 35.

1431–89 220Ala194, 124S423 (though rulings are not definitely located, propositions thereon followed by citations of authorities may be considered).

1431–89½–New. In Porto Rico all errors must be assigned first and then argued separately one by one. 34Porto Rico 321.

1431–90 22AlaA82, 112S537; 80CalA 752, 252P1071; 83CalA648, 257P187; 90CalA675, 266P817; CalA 285P371; 41 Ida538, 240P600; 43 Ida93, 251P167; 45 Ida143, 260P1035; Ida 290P383; 83 IndA294, 148NE203; 84 IndA542, 149 NE361; 87 IndA347, 154NE882; 204 Iowa30, 214NW682; 212Ky433, 279SW 656 (voluminous record not read); Miss 130S745(1stcase); MoA 22SW(2d)892; 194NC240, 139SE240; 195NC102, 141SE 474; 113 Okl 102, 239P256; 116 Okl 149, 243P723; 116 Okl 151, 243P725; 118 Okl 231, 233, 247P353, 356; 121 Okl 288, 249P905; 124 Okl 300, 256P46; 125 Okl 202, 257P298; 134 Okl 39, 272P 851; 136 Okl 12, 275P1049; 43 Okl ACR57 [reh pending]; 34PortoRico 563; 34PortoRico 661 (defect in pleading not considered); TexCivA 293SW664; Tex CivA 2SW(2d)324. [a] **Presumption.**–156Miss1, 124S432(2dcase).

1431–91 43 Ida93, 251P167; 84 IndA 542, 149NE361; 222MoA1168, 11SW (2d)1068; 247NY332, 160NE388; 194 NC240, 139SE240; NC 146SE521; 118 Okl 231, 233, 247P353, 356; 127 Okl 59, 259P854; 131 Okl 98, 267P629; 131 Okl 267, 268P731; 134 Okl 39, 272P851; Okl 292P73(1stcase); Okl 292P353; 43 OklACR57 [reh pending]; 68Utah85, 249P437; 100Vt232, 136A394, 51LRA 628. [a] **Mere insistence without citation of authority** is held not to prevent waiver of assignments by a failure to argue same on appeal. 214Ala542, 108S 362.

1431–92 9LaA566, 119S290; Mo 20SW (2d)655; 32PortoRico 688.

1431–93 Mo 20SW(2d)655 (in numerical order).

1431–95 [a] 203 Iowa1068, 213NW935.

1431–97½–New. Under some court rules counsel should cite the volume and page of the official reports when citing state decisions, 115 Okl 248, 242P854.

1431–97⅓–New. and a failure to comply with the rule is ground for striking the brief from the files. 115 Okl 248, 242P854.

1431–99½–New. Citation of every publication in which Kentucky cases are reported is permissible. 212Ky619, 279 SW1075 (helpful to court).

1431–99⅓–New. In Texas where a brief is over twenty pages long there must be an index containing a list of all cases and authorities cited, alphabetically arranged, and referring to pages of brief, where cited. TexCivA 286SW610.

1431–1 240 IllA85; Ind 166NE153(1st case); IndA 163NE515; 245Mich135, 222NW89; 220MoA1050, 279SW723; 32PortoRico 432. See also 233 IllA432.

1432–2 85Colo 419, 276P972; TexCivA 271SW646; TexCivA 283SW925. See also TexCivA 21SW(2d)559(2dcase).

1432–4½–New. A portion of appellee's brief as to matters wholly irrelevant will be stricken out on motion. 202 Iowa1396, 212NW142.

1432–5 NJ 135A815, 816 [quotCJ]; 124 Okl 225, 254P718; 127 Okl 146, 259P 863.

1432–7 NJ 135A815, 816 [quotCJ]; 124 Okl 225, 254P718; 130 Or444, 277P722.

1432–8 NJ 135A815, 816 [quotCJ].

1432–9 NJ 135A815, 816 [quotCJ].

1432–10 164Minn466, 203NW228, 205 NW449, 206NW380; NJ 135A815, 816 [quotCJ]; 124 Okl 225, 254P718; 127 Okl 146, 259P863.

1432–13 164Minn466, 203NW228, 205 NW449, 206NW380.

1433–18 94Fla1197, 115S510; 170Ga 202, 152SE239; 235 IllA89. [a] **Where striking scurrilous matters from brief** was "useless formality," court merely censured attorneys. 235 IllA89. [b] **Proper procedure where brief contains scurrilous matter** is to strike entire brief, leaving offending counsel without hearing, or continue case for new brief. 235 IllA89.

1433–20 165Minn128, 206NW46; 33 PortoRico 481.

1433–21 33PortoRico 481.

1433–22 127 Okl 146, 259P863.

1433–23 48Nev1, 226P309, 232P1080.

1433–23½–New. An unwarranted attack on the character of a party may be stricken from a brief on the court's own motion. 165Minn128, 206NW46.

1434–32 204Cal570, 269P614; 72CalA 757, 238P143; 79CalA257, 249P215; 82 CalA723, 256P285; CalA 262P808; 9Z CalA360, 268P459; 323 Ill 498, 154NE 226; 84 IndA202, 149NE734; 201 Iowa 208, 205NW758; 202 Iowa1090, 211NW 250; Iowa 227NW823. [b] (3) Mo 20 SW(2d)509. (10) Rendition of judgment. MoA 19SW(2d)776. [c] **Rule not violated** where point gradually evolved, though not precisely stated in opening brief. 48Nev373, 233P41. [d] **Grant of leave to present new arguments.**–Wash 291P721.

1434–33 79CalA257, 249P215.

1434–38 Wash 291P721.

1434–41 But see 207Cal 39, 276P993.

1435–42½–New. An appellant cannot complain of theory of decision on appeal that oral agreement wrought novation, where respondent presented question in his brief and appellant in his reply brief took notice thereof but refused to discuss it, claiming it was not in issue. 75CalA737, 243P686.

1435–42⅓–New. Appellant's reply brief advancing additional propositions will be considered in the absence of a motion to strike. TexCivA 295SW679.

1435–42¼–New. A question raised in the original brief and apparently withdrawn in reply brief need not be considered by the appellate court. 81Colo 306, 255 P622 (unconstitutionality of statute).

1435–43 220Ala44, 124S91 (additional brief cannot retroactively vitalize as-

signment of error waived on submission of cause); 87 **IndA**171, 158**NE**229; 208 **Iowa**1350, 227**NW**404 (unavailable to supply deficiency in original specifications of error). [a] (4) Errors in legal conclusions not presented in original brief will not be considered. 87 **IndA**171, 158**NE**229. [c] **Supplemental brief** filed by leave of court held to cure any defect in the record theretofore existing. 198**Cal** 645, 246**P**1043. [d] **Objections made in supplemental brief,** not assigned as error, are presumed to have been waived. **TexCivA** 297**SW**275.

1435–44 102**CalA**192, 282**P**974.

1435–45 **TexCivA** 294**SW**641; **TexCivA** 11**SW(2d)**234.

1435–48 **TexCivA** 294**SW**641; **TexCivA** 8**SW(2d)**522.

1435–49 [b] **In California.**–199**Cal** 446, 249**P**857.

1435–52 202**Cal** 295, 260**P**290.

1436–55½–New. A supplemental brief presented by appellant to amplify his oral argument on appeal on the judgment roll alone will not be stricken from the files because it makes a point, not assigned as error in the original brief, that the complaint does not state a cause of action. 48**Nev**449, 232**P**1083, 236**P**678, 239**P**1000.

1436–55½–New. Language in brief criticizing trial court and jury is not allowable. 103**NJL**589, 137**A**549.

1436–55¼–New. Where defects in a brief are supplied by a supplemental brief filed with leave of court, motion to affirm judgment based on the defects is denied. 205**Cal** 70, 269**P**657(1stcase).

1436–59½–New. Persons interested but not parties to appeal may file briefs. 237 **IllA**166.

1436–60 [c] (3) Appeal will not be dismissed for failure to deliver copy of appellant's brief to appellee's counsel, without application having been made to clerk for copy thereof. 196**NC**105, 144**SE**521(1stcase).

1436–63 **MoA** 283**SW**729 (service held sufficient).

1436–65½–New. Failure to serve brief in time is held not excused by custom. 45 **Ida**294, 261**P**771.

1436–67½–New. A showing sufficient to justify an extension of time to file a brief will not constitute adequate excuse for failure to apply for an extension within the time fixed by the rules. 47 **Ida**721, 279**P**412(2dcase).

1436–68½–New. , or the bill of exceptions. 34**GaA**138, 128**SE**691.

1437–72 But see **MoA** 21**SW(2d)**214.

1437–78½–New. In Texas, failure of appellant to serve briefs in time to enable appellee to brief his defense has been held ground for dismissal of brief. **TexCivA** 288**SW**861.

1437–79 38**Wyo** 70, 264**P**704.

1437–79½–New. **In Texas** briefs filed without notice and not served on appellee are properly stricken. **TexCivA** 15**SW(2d)**664(1stcase).

1437–79½–New. Failure to notify the adverse party of the granting of an extension of time to file a brief is not ground for dismissal of an appeal. 34 **NM**206, 279**P**562(2dcase).

1437–79¼–New. Appellant's brief will be stricken where appellees are not furnished with copy of appellant's brief in time to prepare and file their brief. **TexCivA** 22**SW(2d)**682.

1437–85 **MoA** 9**SW(2d)**823.

1438–89 [i] **In Kentucky.**–213**Ky**658, 281**SW**796.

1438–90 49**SD**287, 207**NW**100 (mailing on last day of period sufficient); **Tex CivA** 294**SW**915.

1438–91 **TexCivA** 298**SW**476.

1438–92 **TexCivA** 8**SW(2d)**203 (rule mandatory). [c] **Time of arrival of brief at original appellate district** may be taken as time to be considered in measuring default. 102**CalA**630, 283**P** 361.

1438–93 **TexCivA** 298**SW**476. [a] **Striking of appellant's brief** as to appellees not served takes them out of the case, though other appellees filed briefs. **TexCivA** 298**SW**476.

1438–93½–New. **In Indiana** the time appellee's petition to dismiss an appeal is pending is not considered in computing the time for filing an appellee's brief. **IndA** 163**NE**51.

1438–98 101**CalA**608, 281**P**1074; 103 **NJL**483, 135**A**883; **TexCivA** 273**SW**647; **TexCivA** 273**SW**648; **TexCivA** 293**SW** 1119; 40**Wyo** 72, 275**P**115(1stcase).

1439–99 97**CalA**42, 274**P**1023; 29**Porto Rico** 579 (matter within discretion of appellate court); 34**PortoRico** 361 (dismissal denied if good reason shown where filed on motion to dismiss); 35 **PortoRico** 481; **TexCivA** 296**SW**974.

1439–3 35**PortoRico** 481.

1439–5 215**Ala**701, 109**S**923; **TexCivA** 297**SW**1100.

1439–7½–New. A brief not filed in time will not be received for filing or considered in the absence of a showing of a reason or excuse for the delay. 18 **F(2d)**572.

1439–12 **Ida** 288**P**419.

1440–16 30**NM**424, 234**P**1012 (motion to dismiss tolls limitations on filing brief).

1440–19 113 **Okl** 117, 239**P**570; 139 **Okl** 188, 281**P**797 (cross appeal deemed abandoned and cross petition dismissed after delay, for two years).

1440–23 52**SD**239, 216**NW**948; 52**SD** 238, 216**NW**949(1stcase); 52**SD**237, 216 **NW**949(3dcase); **SD** 229**NW**300.

1440–24 **TexCivA** 277**SW**713 (ten days ample time to prepare and file reply brief so as not to require dismissal of appeal); **TexCivA** 293**SW**865; **TexCivA** 21**SW(2d)**8 (where appellee failed to file brief though ample time allowed him). But see **TexCivA** 273**SW**893. [a] **Brief will not be stricken** where appellee has not been prejudiced by delay. **TexCivA** 1**SW(2d)**404. [b] **Motion to strike appellant's brief for failure to file it in time** must be overruled when motion not filed within required time. **TexCivA** 24**SW** (2d)794.

1440–25½–New. Striking of appellant's brief does not necessitate the dismissal of an appeal. **TexCivA** 280**SW**916.

1440–26 **TexCivA** 6**SW(2d)**231; **Tex CivA** 8**SW(2d)**203; **TexCivA** 15**SW(2d)** 664(1stcase); 99**TexCr**652, 271**SW**608.

1440–27 **TexCivA** 276**SW**750.

1440–29 **TexCivA** 280**SW**613; **TexCivA** 8**SW(2d)**203 (fundamental error was considered where apparent on face of record and assigned).

1440–30 **TexCivA** 280**SW**916; **TexCivA** 290**SW**783; **TexCivA** 294**SW**915; **Tex CivA** 297**SW**868; **TexCivA** 299**SW**272 (ruling on demurrer held to present question of fundamental error); **Tex CivA** 1**SW(2d)**506; **TexCivA** 5**SW(2d)** 802 (direction of verdict and exclusion of evidence held not to present fundamental error); **TexCivA** 10**SW(2d)**1011; **TexCivA** 29**SW(2d)**804; **TexCivA** 32**SW** (2d)527(1stcase). But see **TexCivA** 10 **SW(2d)**1011. [a] **Judgment in complicated boundary case** should be affirmed, instead of dismissing cause for appellant's failure to file briefs. **TexCivA** 297**SW**263. [b] **Where defendant in error acquiesces in submission notwithstanding striking of brief of plaintiff in error,** court must ascertain whether record presents fundamental error. **TexCivA** 1**SW(2d)**506. [c] **As dependent on sufficiency of time for appellee to reply.**–**TexCivA** 5**SW(2d)**802. [d] **Matters not constituting fundamental error apparent on face of record.**–**Tex CivA** 1**SW(2d)**506.

1440–32½–New. Brief filed over four months after the cause has been placed on file in the appellate court in violation of rules and without excuse for delay will not be considered, although appellee has had ample time to file a reply brief. **TexCivA** 280**SW**613.

1440–32⅓–New. A brief, filed only three days before submission of appeal was required to be stricken. **TexCivA** 10**SW(2d)**261(1stcase).

1440–33 [b] **TexCivA** 280**SW**916.

1440–34½–New. **In Porto Rico** "failure to file a brief in time may, and generally does, result in the dismissal of the appeal if the appellee asserts his right in due form, but that omission does not constitute a jurisdictional question and if the circumstances justify it the court has the discretion to overlook it." 29**PortoRico** 579.

1440–34⅓–New. The appellate court will disregard a brief filed out of time and after notice of motion for dismissal, unless convinced that the appeal is meritorious or a doubtful question is involved. 33**PortoRico** 126.

1441–37 See also 236 **IllA**307.

1441–45½–New. Failure of respondent to file brief justifies reversal of judgment if plaintiff in error's brief appears reasonably to sustain any assignment of prejudicial error. 129 **Okl** 218, 264**P** 141.

1441–45⅓–New. **In Porto Rico** the supreme court will not exercise its discretion in favor of an appellant who files his brief after the expiration of the time allowed therefor and after a motion to dismiss has been made, unless it is convinced that there is a meritorious appeal. 33**PortoRico** 126.

1441–48½–New. **In Texas** court will strike out brief where it is not filed in time. **CivA** 282**SW**627.

1441–48⅓–New. Postponement is frequently the penalty where appellant so desires. 33**PortoRico** 13.

1441–49 90**CalA**360, 265**P**881; 102**CalA** 630, 283**P**361 (sufficiency of excuse is question for court to determine); **CalA** 287**P**135 (inadvertence of clerk in office); **NM** 289**P**69; 35**Wyo** 1, 244**P** 1006. [a] **Reliance on system** adopted to call duties to attorney's attention is justified to some extent. 90**CalA**360, 265**P**881. [b] **Illness of attorney's clerk** whose duty it was to keep record of time for taking appeals may furnish sufficient excuse. 90**CalA**360, 265**P**881. [c] **In Porto Rico.**–33**PortoRico** 13.

1441–50 35**Ariz**528, 281**P**213 (showing held insufficient); 53**SD**596, 221**NW**699 (diligence not shown).

1442–60 See also **Iowa** 226**NW**103.

1442–60½–New. mistaken belief of counsel that the time to file briefs had been extended, sufficient time remaining to prosecute a new proceeding in error; 35**Wyo** 1, 244**P**1006.

1442–67 72**CalA**10, 236**P**207; 102**CalA** 630, 283**P**361; **NM** 289**P**69; 33**Porto Rico** 126; **TexCivA** 2**SW(2d)**473; **Tex CivA** 22**SW(2d)**1101.

1442–68 **TexCivA** 2**SW(2d)**473.

1442–69 See also 94**CalA**660, 271**P**538 (appellant's ignorance of rule is not of itself sufficient).

1442–70½–New. that cause was set down for argument earlier than expected; 45 **Ida**294, 261**P**771; 45 **Ida** 292, 261**P**772.

1442–75 102**CalA**630, 283**P**361.

1442–75½–New. Appellant's alleged lack of employment and consequent inability to pay the costs of an appeal have been held not a valid excuse for failure. 94**CalA**660, 271**P**538.

1443–77½–New. In Porto Rico the appellate court will not exercise its discretion to admit a brief filed after notice of motion for dismissal where the questions raised are without merit. 33 **PortoRico** 743.

1443–77⅓–New. Where it appeared that all negotiations for settlement were definitely terminated in time to permit filing of brief. 102**CalA**630, 283**P**361.

1443–77¼–New. Affidavit presented to excuse failure to file within extended time not explaining failure to apply for further extension or delay in filing brief until after motion to dismiss appeal is insufficient to prevent dismissal. 35 **PortoRico** 481.

1443–78 73**CalA**765, 239**P**380.

1443–81 **TexCivA** 283**SW**261.

1443–87 See also 32**PortoRico** 417.

1443–89½–New. Under statutes in some jurisdictions the supreme court alone may grant an extension after it has acquired jurisdiction of the cause. 131 **Or**350, 270**P**476(1stcase).

1443–90 100**CalA**215, 279**P**810(1stcase) (motion for relief from default of city department in failing to file brief in time was granted where delay was due to mistake in records); 100**CalA**525, 280**P**394 (1stcase).

1443–90½–New. **In Porto Rico** phrase "without prejudice to the rights of the parties" in refusal to grant extension

means that, if appellant files a brief before motion to dismiss, the motion will not be entertained. 132PortoRico 417.

1444-94 TexCivA 28W(2d)312; TexCivA 13SW(2d)739.

1444-1 23AlaA108, 121S457(2dcase); 21AlaA561, 110S58; 196Cal756, 239P35; 115Or510, 238P1112; Wis 232NW845(1stcase). See also CalA 274P587; 32PortoRico 815. [b] In Oregon.-131 Or 23, 278P580(1stcase).

1444-2 118Okl231, 233, 247P353, 356; 121Okl295, 249P723; 121Okl295, 250P1117; 121Okl295, 250P1118; 124Okl243, 255P684; 135Okl59, 273P1005; 143Okl296, 288P953; 40OklACR272.

1444-2½-New. and same rule holds in Wyoming, 36Wyo245, 254P127.

1444-2½-New. and in South Carolina. 195NC478, 142SE705.

1444-3 Iowa 226NW36; 123Kan32, 254P332; 52SD239, 216NW948; 52SD238, 216NW949(1stcase); 52SD237, 216NW949(3dcase); 52SD259, 217NW190; 53SD428, 221NW22; 53SD431, 221NW23(1stcase); 53SD433, 221NW23(2dcase); 53SD434, 221NW23(3dcase); 53SD437, 221NW24(1stcase); 53SD427, 221NW24(2dcase); 53SD430, 221NW24(3dcase); 53SD457, 221NW55(1stcase); 53SD427, 221NW55(2dcase); 53SD446, 221NW56; 53SD429, 221NW80; 53SD430, 221NW84; 54SD591, 223NW825; SD 233NW293(1stcase); SD 233NW276(2dcase); SD 233NW277(1stcase); SD 233NW289(1stcase); SD 233NW293(2dcase); SD 233NW287; SD 233NW288(1stcase); SD 233NW284.

1445-4 Iowa 221NW779(1stcase); Mo 274SW399; Mo 293SW133; MoA 286SW134.

1445-6 But see 82Colo421, 260P688.

1445-9 218Ky756, 292SW327.

1445-12½-New. In Kentucky judgment will not be disturbed against the party for whom the brief was not filed, where the statement of appeal is defective and does not show which appellant is prosecuting the appeal. 212Ky222, 278SW565.

1445-13 23AlaA543, 129S304 (appeal dismissed); 10LaA699, 122S134. See also 4LaA27; 4LaA563; 6LaA71(1st case).

1445-13½-New. In Louisiana, in absence of brief or note of evidence, judgment must be affirmed. 170La706, 129S137.

1445-13½-New. A judgment which is apparently correct, superficially considered, will be affirmed on appeal, when no brief is filed. 11LaA435, 123S515.

1445-13¼-New. In Louisiana a default judgment based on legal evidence will be affirmed where appellant makes no appearance and files no brief; 6LaA71(1st case).

1445-13½-New. and where appellant makes no appearance by filing his brief or otherwise and the court finds no error, judgment will be affirmed. 6LaA164.

1445-13½-New. Where case is submitted on briefs to be filed and none are filed and case is not argued and no errors are apparent, judgment will be affirmed. LaA 130S660(1st case).

1445-13½-New. Where appellee's authorities are in point and neither oral argument nor brief is presented by appellant, judgment should be affirmed. LaA 130S365.

1445-16 190NC330, 129SE726.

1445-17 Mass 172NE871. [a] **Motion to dismiss appeal as to one appellant** who failed to file brief will be granted but without prejudice to the rights of the other appellant. 114Nebr173, 206NW760.

1445-19½-New. In Porto Rico if appellant shows diligence and promptly files a brief before motion to dismiss is heard, the court will generally use its discretion to allow the filing thereof. 32PortoRico417.

1445-20 TexCivA 288SW541; TexCivA 2SW(2d)347; TexCivA 14SW(2d)916(1stcase); TexCivA 22SW(2d)149; TexCivA 23SW(2d)444; TexCivA 32SW(2d)488(1stcase). [a] But see TexCivA 285SW694.

1445-21 TexCivA 293SW315; TexCivA 14SW(2d)916(1stcase) (cause may not be dismissed). See also TexCivA 283SW307.

1446-22 TexCivA 282SW831; TexCivA 283SW307; TexCivA 288SW250; TexCivA 5SW(2d)223; TexCivA 10SW(2d)261(1stcase); TexCivA 16SW(2d)1112 (court may inspect record for fundamental error); TexCivA 20SW(2d)1090 (1stcase); TexCivA 29SW(2d)795(1st case); TexCivA 29SW(2d)804. See also TexCivA 12SW(2d)242.

1446-23 TexCivA 274SW179; TexCivA 276SW768; TexCivA 290SW808; TexCivA 298SW609; TexCivA 4SW(2d)218 (in absence of fundamental error, overruling general demurrer fundamental error); TexCivA 17SW(2d)167(1stcase) (court may dismiss appeal without inspection of record for fundamental errors).

1446-23½-New. It is the duty of the court of civil appeals to dismiss an appeal of its own motion where appellant has filed no brief. TexCivA 298SW609.

1446-27 155Wash14, 283P470.

1446-29 128Okl100, 261P553. [a] **In absence of brief for appellee,** statement of case and assigned errors in appellant's brief are taken as accurate. AlaA 130S520.

1446-30½-New. **In Arizona,** on failure of appellee to file a brief or argue a case, the appellate court will ordinarily reverse. 31Ariz214, 251P553; 32Ariz119, 256P114.

1446-31 See also 200Cal521, 253P1114; 200Cal520, 253P1115 (reversal on consent of respondent).

1446-31½-New. In the absence of any brief on the part of respondent the appeal may be determined upon those portions of the record printed in appellant's brief. 68Cal483, 228P717.

1446-33 233IllA579.

1446-34 233IllA579 (where municipality's interests were involved).

1446-34½-New. In Illinois, where appellee fails to file brief, it will be assumed that appellant's brief and abstract fully and correctly state the facts. 253IllA569.

1446-35 Ind 163NE487; Ind 171NE378. See also 88IndA447, 164NE507.

1446-37 Ind 171NE378; 85IndA168, 151NE436 (appellate court may treat failure to file brief as confession of reversible error prima facie shown by appellant); 88IndA355, 163NE846(1st case); IndA 168NE38 (appellee cannot complain of error in decision). [a] (3) It was held that while failure of appellee to file brief might be taken as confession of error, yet court may decide case on its merits. 84IndA86, 150NE60. (4) Discretionary power of court to reverse should not be exercised unless appellant's brief makes prima facie showing of reversible error. Ind 163NE487.

1447-42½-New. In Louisiana, judgment maintaining an exception of no cause of action will be reversed where the petition appears to present a cause of action and defendant fails to file a brief. 3LaA454.

1447-42½-New. Where no brief is filed by appellees and no party in interest appears to oppose the relief asked for by appellant, judgment will be reversed. 7LaA695.

1447-44½-New. **In Montana,** on respondent's failure to file brief, court determines theory of case from pleadings, proof, and records. 80Mont515, 261P264.

1447-45½-New. In New Hampshire, in the absence of a brief or argument for plaintiff, no error is apparent in the exclusion of evidence, and exceptions thereto are overruled. 82NH558, 133A446.

1447-46 102Okl174, 228P963; 111Okl236, 239P1117; 111Okl237, 239P1117; 114Okl75, 243P1118; 114Okl75, 243P1118; 114Okl125, 245P1113; 114Okl150, 245P1113; 114Okl150, 245P1113; 114Okl150, 245P1114; 114Okl151, 245P1114; 114Okl156, 245P63; 114Okl192, 245P1113; 114Okl192, 245P1113; 114Okl226, 245P1114; 114Okl227, 245P1113; 114Okl227, 245P1114; 114Okl227, 245P1114; 114Okl239, 246P1117; 114Okl243, 246P385; 114Okl254, 246P1117; 114Okl293, 246P1117; 116Okl178, 243P943; 117Okl204, 245P994; 117Okl284, 246P858; 118Okl231, 247P353; 118Okl231, 247P356; Okl 247P1115; 119Okl61, 248P318; 119Okl120, 249P317; 120Okl226, 253P273; 120Okl260, 250P792; 120Okl301, 251P607; 121Okl25, 246P1100; 121Okl35, 241P1118; 121Okl40, 246P1117; 121Okl155, 247P1118; 121Okl156, 248P611; 121Okl213, 241P1119; 121Okl189, 249P1115(5thcase); 121Okl190, 249P1115(6thcase); 121Okl190, 249P1116(1stcase); 121Okl189, 249P1116(2dcase); 122Okl50, 250P495; 122Okl50, 250P534; 122Okl53, 250P1117; 122Okl53, 250P1118; 123Okl37, 251P733; 122Okl107, 251P1118; 122Okl140, 252P1116; 122Okl233, 253P481; 123Okl9, 252P837; 123Okl81, 252P48; 124Okl63, 253P1014; 124Okl215, 255P706; 122Okl262, 254P91; 122Okl261, 254P100; 122Okl260, 254P716; 122Okl266, 254P722; 124Okl226, 254P739; 124Okl238, 255P149; 124Okl247, 255P577; 124Okl295, 256P28; 125Okl202, 257P298; 125Okl224, 257P322; 126Okl18, 257P1104; 126Okl139, 258P274; 126Okl71, 258P732; 126Okl84, 258P732; 127Okl174, 259P1055; 127Okl256, 260P755; 128Okl100, 261P553; 128Okl245, 262P682; 129Okl127, 263P1101; 129Okl290, 264P822(2dcase); 129Okl290, 264P823(2dcase); 129Okl291, 264P822(1stcase); 129Okl291, 264P823(1stcase); 129Okl296, 264P883; 129Okl299, 264P884; 130Okl120, 265P631; 130Okl121, 265P632(1stcase); 130Okl121, 265P632(2dcase); 130Okl225, 266P767; 130Okl281, 267P259; 131Okl154, 267P835; 133Okl61, 270P1103(1stcase); 133Okl251, 271P635(1stcase); 134Okl40, 272P879; 135Okl170, 274P665; 135Okl225, 275P339; 135Okl302, 275P621; 136Okl185, 276P742; 138Okl244, 280P811; 142Okl86, 285P81; 138Okl243, 280P815(1stcase); 138Okl228, 280P827; 139Okl12, 280P1071; 139Okl184, 281P773(1stcase); 139Okl204, 281P780(1stcase); 139Okl188, 281P797; 140Okl139, 282P297(1stcase); 140Okl57, 282P609; 140Okl254, 282P1096(1st case); 141Okl121, 284P15(1stcase); 141Okl139, 284P297(1stcase); Okl 291P962(1stcase); 34OklCr59, 244P817; 36OklACR554; 37OklACR536; 39OklACR162; 40OklACR39(1stcase); 40OklACR39(2dcase); 40OklACR39(3dcase); 40OklACR442(1stcase); 40OklACR442(2dcase); 40OklACR682; 41OklACR18; 42OklACR92; 45OklACR407.

1447-48 [a] **Supreme court need not search record to ascertain facts,** though it may do so if justice demands. 131Or157, 282P109.

1447-48½-New. Such failure constitutes a waiver of the right to be heard. 131Or157, 282P109.

1447-49 TexCivA 28SW(2d)1102 (statement of record in appellant's brief is taken as correct).

1447-50 TexCivA 31SW(2d)839. [a] **Statement of case in appellant's brief will be regarded as true** where appellee files no brief. TexCivA 23SW(2d)883.

1447-51 208Ky401 270SW998 (affirm judgment on both original and cross appeals); 6LaA162(2dcase) (where review of evidence shows judgment to be correct); 118Tex277, 14SW(2d)811 (where record shows no fundamental error); TexCivA 290SW1118; TexCivA 300SW971.

1447-52 9LaA342, 119S285; TexCivA 24SW(2d)462 (without search of record for fundamental error). [a] (4) Where record discloses fundamental error, reversal must be ordered instead of dismissal of appeal. 118Tex277, 14SW(2d)811. (5) Court authorized to dismiss appeal without inspecting record for fundamental error. 118Tex277, 14SW(2d)811.

1447-52½-New. Rules applicable to default by either party. TexCivA 290SW900.

1447-57 Cal 234P675; 102CalA213, 283P107; IndA 168NE204 (same defect in original, amended, and answer briefs justifies court's assumption of correctness).

1448-58 5F(2d)421; 6F(2d)818; 68

CalA198, 228P734; GAA 155SE43; 258 Mass431, 155NE455; 319Mo52, 3SW (2d)387 (admission that evidence conflicts is admission that issue is for jury); TexCivA 287SW687, 690 [citCJ]; 33Wyo 457, 240P449, 452 [quotCJ].

1448-59 MoA 4SW(2d)843; 33Wyo457, 240P449, 452 [quotCJ].

1448-59½-New. Failure to present entire case in one brief is waiver of part not presented. 99NJEq160, 133A66.

1448-60 175Ark352, 299SW16 (statement as to correct date of entry of decree where record is erroneous); 93CalA 654, 269P1115; 311Mo 49, 277SW562; NH 151A709; TexCivA 271SW401; Tex CivA 272SW611; TexCivA 300SW123; TexCivA 19SW(2d)331.

1448-65 [a] **Record treated as disclosing presentation and denial of motion for new trial where not denied in appellee's brief.** 90CalA390, 266P320.

1448-67 324 Ill 43, 154NE472; 87 IndA 370, 161NE568.

1449-68 102CalA192, 282P974.

4 C. J.—39-1 280US117, 50SCt57, 74 L ed221, 65ALR939; 209Ky674, 273SW 449; 150Md235, 133A723; 252Mass376, 147NE903; 261Mass403, 15NE789; 238Mich178, 213NW76; 24 OhA29, 155 NE806. See also 295Pa425, 145A525.

39-1½-New. But it has been held that, where jurisdiction of both superior and supreme court are questioned, it will be passed upon, although matter does not appear on record. 47RI 108, 130A 863.

39-3 248 IllA160; 317Mo 122, 296SW 123. See also 123 Or615, 257P822 (contents of transcript necessary and sufficient to give jurisdiction); 126 Or91, 267P820. See also 320Mo 486, 8SW(2d) 613. [d] **Thus jurisdiction of trial court must affirmatively appear from transcript.** TexCivA 277SW401. [e] **Amount.**–318Mo 135, 298SW760.

39-4 248 IllA301.

39-6 TexCivA 295SW646.

40-10 [c] (3) Affidavit held insufficient as method of showing interest of appellant who was not party to action. 221 MoA392, 277SW948.

40-10½-New. The notice of appeal need not appear of record. TexCivA 276SW 724.

40-10½-New. Jurisdiction by appeal court obtained where copies from lower court's minutes show order calling and continuing term. TexCivA 288SW 634.

40-13 86 IndA432, 158NE486 (title page of transcript held not part of proceedings). [d] **Showing in affidavit of appeal.**–221MoA392, 277SW948.

40-18 170La10, 127S347(2dcase).

41-26 240Mich627, 216NW415 (files held to show timely appeal).

41-29 But see Nev 280P887.

43-42 214Ala1, 106S228; 48Nev32, 226 P902, 233P842 (paper marked "notice of appeal" not made part of record, or certified to, or showing service has no place in file on appeal); 136 Okl 282, 277P922 (notice of intention to appeal); Wyo 287P85(1stcase).

43-43 TexCivA 274SW1019; TexCivA 279SW871 (all defendants in error); Wyo 287P320(1stcase). [d] **Where service is upon attorneys,** record must affirmatively show it was alias citation and that previous citation had been issued for service on parties and returned not served, giving reasons for failure of service as required by statute. Tex CivA 274SW1019.

43-45 [c] **Entry of record of notice of appeal previously given in open court** is established by court signing minutes, as required by law, making new order overruling motion for new trial filed with clerk and recorded in minutes. TexCivA 276SW724. [d] **Affirmative evidence of fact of notice in open court sufficiently shown.**–130 Okl 286, 267P 268. [e] **Notice in open court should be noted on trial docket** and incorporated in judgment under mandatory statute. TexCivA 17SW(2d)84.

43-46 214Ala1, 106S228; TexCivA 274 SW1019.

43-47 TexCivA 274SW1019.

43-51 See also Nev 280P887.

44-59 4LaA633; 317Mo 122, 296SW 123; 42CanSC156. [d] (2) Supreme court cannot conjecture that stated number of shares of corporate stock of stated par value are of actual value exceeding jurisdictional amount. 317Mo 122, 296SW123.

44-60 42CanSC156 (that title to lands or future rights affected).

45-64 97Fla486, 121S469(2dcase); 42 Ida636, 248P19 (stenographic report insufficient); 327 Ill 472, 159NE34 (appeal in tax sale proceeding dismissed notwithstanding stipulation); 104NJL 162, 139A29; NJ 139A246; NJ 133A 481; 110 Okl 8, 234P625; 113 Okl 228, 240P1067; 113 Okl 146, 243P186; 130 Okl 152, 266P437; 132 Okl 216, 270P2; 132 Okl 179, 270P3; 135 Okl 74, 274P 27; 32PortoRico 547; 133SC23, 130SE 552; TexCivA 278SW507; TexCivA 300 SW990; Utah 284P523 (minute entry insufficient); Wyo 282P1061(1stcase). [i] (2) Original notice of entry, to be considered, must be incorporated in record. Utah 293P12. [n] **Oral decision** is of no avail for purposes of appeal without order making it of record. 42 Ida 636, 248P19. [p] (2) Appeal dismissed when judgment not included in record. 32PortoRico 547. [q] **Entry and date thereof** must be shown. Wyo 289P1094.

46-65 TexCivA 278SW507 (appellate court will not pass on exceptions to ruling on pleadings without judgment or order thereon in record).

46-67 TexCivA 8SW(2d)312 (transcript of docket entries not sufficient).

46-71 [a] **Appeal from order denying motion** for new trial dismissed where only record of order was reporter's transcript. 42 Ida636, 248P19.

46-72 113 Okl 146, 243P186; 136 Okl 282, 277P922; 32PortoRico 547 (showing in statement of case of note of default entered by clerk insufficient). [d] (2) Copy in transcript of docket entries of trial judge is not sufficient. TexCivA 8SW(2d)312.

47-73 136 Okl 176, 276P737 (in minutes transcribed into record).

47-80 TexCivA 284SW330.

47-81 TexCivA 277SW803.

48-85 But see TexCivA 9SW(2d)767.

48-86 [d] TexCivA 272SW247.

48-89 Minn 233NW316(2dcase); Tex CivA 283SW177.

48-90 TexCivA 293SW1113.

49-93 203Cal 44, 262P1084.

50-1 TexCivA 271SW131; TexCivA 275SW845; TexCivA 283SW177.

50-2 TexCivA 275SW845.

50-3 TexCivA 275SW845; TexCivA 283SW177.

50-6 222MoA510, 281SW75.

50-6½-New. On appeal from default judgment on amended complaint record must disclose acquisition of jurisdiction over defendant by service of amended complaint or waiver thereof, 75Mont 466, 244P277.

50-6½-New. and in such case there is no presumption of jurisdiction. 75Mont 466, 244P277.

50-7 Iowa 233NW47 (record insufficient); TexCivA 283SW177 (unless omitted by appellant's consent).

50-8 TexCivA 271SW131; TexCivA 283SW177; TexCivA 24SW(2d)757.

50-9 222MoA510, 281SW75.

51-14 [a] TexCivA 274SW666.

51-15 31Ariz337, 253P439; 98Fla156, 122S224.

51-16 31Ariz337, 253P439.

51-17 31Ariz337, 253P439.

51-18 [a] (8) Default judgment on delinquent tax. TexCivA 271SW131.

51-21 222MoA510, 281SW75 (record held sufficient).

53-41 121 Or92, 254P800; TexCivA 283SW212.

54-54 31Ariz337, 253P439.

54-55 31Ariz337, 253P439; 106Conn1, 137A26.

54-58½-New. In some jurisdictions, where record does not already contain reasons for judgment, trial judge, on receiving notice of appeal, must forthwith file brief statement of reasons which shall be attached to record and printed. 85PaSuper245.

55-60 329 Ill 585, 161NE53; 248 IllA 174; 230Ky78, 18SW(2d)866 (sufficient); 49Philippine540. [c] **Evidence upon jurisdictional issue,** properly filed within prescribed time and in prescribed manner after the trial, is part of record. 210Ky575, 276SW500.

55-61 55AppDC375, 6F(2d)678; 215 Ky604, 286SW690; 128 Or414, 274P313.

55-61½-New. An assignment of error in permitting the giving of testimony through an interpreter must be overruled where the record does not show that the testimony was so given. Tex CivA 286SW558.

55-62 165Ga435, 141SE65; 258Mass 611, 155NE635.

55-65 243 IllA298; 222AppDiv764, 226 NY867.

55-73 [c] 126Kan544, 268P833.

56-74 174Ark1179, 299SW353.

56-74½-New. Where controlled by statute. Exceptions to a register's report, without a notation of the supporting evidence at the foot of each, cannot be considered. 218Ala500, 119S232.

56-75 170Ark1192, 282SW678. See also Mass 166NE734.

56-76 339 Ill 400, 171NE504; 247 IllA 252. But see 218Ala332, 118S587. [b] See 28F(2d)177 [certiorari den 49SCt 179(10thcase)] (failure of record to show details forming basis of decree is not to be commended). [c] **Rule requiring note of testimony does not apply** to reports of registers from which appeal is taken when statute deals specifically therewith. 218Ala500, 119S232. [d] **No note of testimony** is required, where material averments on which equities of bill rested are not denied. 218 Ala500, 119S232.

56-77 332 Ill 173, 163NE344. [a] 339 Ill 400, 171NE504.

56-84 329 Ill 585, 161NE53.

56-86½-New. Decree dismissing bill or refusing to sustain defense for lack of evidence requires no evidence to support it. 339 Ill 400, 171NE504.

57-96 [d] (2) Clerk's certificate that transcript was charged to appellant's attorneys is sufficient showing of filing of reporter's transcript with clerk. Or 291P369.

59-19 82 IndA377, 149NE377 (showing held sufficient); 235Ky46, 29SW(2d) 599. See also TexCivA 277SW176. [c] (2) Notice of time and place of signing bill of exception in vacation may be shown by affidavit of trial judge. 145 Va694, 134SE728. [h] **Only reasonable certainty is required** that a bill of exceptions is the one named in the order making it a part of the record. 102WVa 355, 135SE175. [i] **Bill of exceptions becomes part of record by order of court.**–319 Mo963, 5SW(2d)378.

60-20 But see 322Mo 842, 16SW(2d)72.

60-24½-New. A bill of exceptions is part of the record. 101WVa440, 133SE 114.

60-25 See also TexCivA 286SW558.

61-27 IndA 168NE204.

61-29½-New. Affidavit of attorney as to reasons for failure to file on time cannot be considered not being part of record. 170Ark424, 279SW1001.

61-30 87 IndA670, 162NE417; 88 IndA 643, 165NE444(1stcase); IndA 168NE 204. [b] (1) 240Mich627, 216NW415 (filing of case-made within time of extension).

62-34 240 IllA607, 618 [citCJ].

62-35 240 IllA607, 618 [citCJ].

63-41 95CalA727, 273P147; 81Colo 50, 253P397; 98Fla156, 122S224; 86 IndA 23, 149NE458; 228Ky51, 14SW(2d)165; 264Mass414, 163NE63; RI 132A733; TexCivA 283SW212; TexCivA 283SW 626. See also 219Ala225, 121S526. [a] (11) Failure to allow time to answer. 131SC289, 127SE20.

64-47 174Ark84, 294SW378; 81Colo 50, 253P397; 330 Ill 558, 162NE126; 201 Iowa709, 207NW794; 232Mich675, 206 NW493; NJSup 138A308; 123 Okl 76, 250P136; 124 Okl 286, 256P28; 135 Okl 206, 275P345.

65-48 19F(2d)177; TexCommnA 14 SW(2d)1015.

65-50 20AlaA616, 104S559 (must show ruling complained of); 29Ariz468, 242 P1009; 249 IllA259; 202 Iowa1386, 212 NW161; 203 Iowa243, 212NW467; 209 Ky95, 272SW381; TexCivA 294SW660. See also 124 Okl 286, 256P28.

65-52 23F(2d)914. [a] **Statute requiring appellate court to give judg-**

ment after examination of whole record without regard to technical errors does not affect rule. 23F(2d)914.

66-61 TexCivA 288SW1109; 100Vt371, 137A321.

66-64 [a] (8) Ruling denying application for continuance. TexCivA 17SW (2d) 469. (9) Ruling on motion by receiver to strike additional objections to his report. Iowa 229NW819.

68-72 MoA 28SW(2d)368. See also 243 IllA518.

68-73 22AlaA199, 114S15 (motion to strike); 199 Ind290, 157NE433; TexCivA 151SW1142; TexCivA 283SW341; TexCivA 288SW1109; 100WVa508, 130 SE666.

68-74 13LaA380, 128S314; TexCivA 278SW950 (record failed to show ruling below on special exceptions to petition, and they are deemed waived); TexCivA 283SW341; TexCivA 285SW935; TexCivA 288SW1109; TexCivA 27SW (2d)597; 35Wyo 482, 251P468. [d] TexCivA 3SW(2d)832.

68-75 35F(2d)474; 106Conn724, 136A 867; 50Nev352, 259P632.

68-77 TexCivA 282SW612.

68-78 TexCivA 288SW1109.

68-79 215Ala554, 112S122; 216Ala426, 113S289; 220Ala86, 124S234(1stcase); 31Ariz267, 252P189; 162Ga263, 133SE 469; TexCivA 282SW631; TexCivA 28S SW276; TexCivA 288SW1109; TexCivA 20SW(2d)405; TexCivA 25SW(2d)964. [b] TexCivA 11SW(2d)380; TexCivA 15SW(2d)207.

69-81 [a] (2) Where record proper does not show specific ruling on demurrer, supreme court will not consider assignment of error based thereon. 215 Ala554, 112S122.

69-82 35Wyo 482, 251P468.

69-84 84 IndA354, 148NE489 (record held to show demurrer was overruled); TexCivA 3SW(2d)545; TexCivA 12SW (2d)618. [a] TexCivA 12SW(2d)618. [f] **Transcript must show order or decree** refusing to sustain exceptions to amended petition. TexCivA 17SW(2d) 130(2dcase).

69-87 MoA 290SW451; 105NJL117, 143A354; TexCivA 288SW598; TexCivA 22SW(2d)991; TexCivA 23SW(2d) 405; 136Wash4, 238P982.

69-88 TexCivA 287SW687; TexCivA 3 SW(2d)1113; TexCivA 22SW(2d)688; 150Va108, 142SE393.

70-90 6F(2d)844; 25F(2d)247; 90Fla 737, 108S211; 36GaA276, 136SE469; IndA 168NE607; 202 Iowa1386, 212NW 161; 217Ky671, 290SW483; 225Ky173, 7SW(2d)1065; 243Mich309, 220NW710; 308Mo 683, 273SW1062; MoA 278SW 738; 122 Or162, 257P809; TexCivA 284 SW691; TexCivA 286SW558; 136Wash 4, 238P982. [a] (7) To letters. 36 GaA276, 136SE469.

70-91 218Ala616, 119S635; 36GaA276, 136SE469; 83 IndA514, 149NE89; TexCivA 286SW558.

70-92 TexCivA 4SW(2d)666; TexCivA 6SW(2d)432; TexCivA 9SW(2d)458.

71-93 TexCivA 286SW599.

71-94 Ariz 283P279; 105Conn625, 136 A687; 202 Iowa1386, 212NW161; 308 Mo 683, 273SW1062; TexCivA 299SW 687; TexCivA 4SW(2d)241; TexCivA 8SW(2d)327 (grounds of objection); TexCivA 16SW(2d)874; TexCivA 22SW (2d)520; 145Va681, 134SE692.

71-96 104Conn366, 132A895; 50ND371, 196NW104.

71-97 104Conn740, 133A213; Ill 173 NE179; 252 IllA10; IndA 156NE414; 202 Iowa141, 209NW408; 202 Iowa333, 208NW726; 94Kan258, 146P356; 121 Kan93, 246P183; 122Kan814, 253P600; 129Kan627, 284P438; 210Ky600, 276 SW515; 217Ky389, 289SW290; 128Me 445, 148A680; 150Md347, 133A114; 152 Md439, 137A43; 238Mich5, 213NW152; 155Miss580, 124S791; MoA 271SW1005; MoA 290SW671; 82NH558, 133A446; 223AppDiv127, 227NYS522; 126 Okl 251, 259P268; 134 Okl 70, 272P857; 134 Okl 79, 272P868; Okl 293P225; TexCivA 284SW691; TexCivA 3SW(2d) 822; TexCivA 22SW(2d)341; TexCivA 25SW(2d)881. See also 212Ky56, 278 SW162. But see 124 Or219, 263P891. [d] 128Me230, 146A705.

72-99 168Cal 624, 143P1024; 72CalA 736, 238P110; 101CalA274, 281P1081; 81Colo 389, 255P628; 182Mich449, 148 NW810; 238Mich5, 213NW152; 78 Or 158, 151P721, 152P497; 97PaSuper483; 141Wash86, 250P947.

72-1 177Ark1193, 5SW(2d)922; 199 Cal705, 251P311; NJSup 130A439. See also 36GaA149, 136SE319.

72-2 TexCivA 276SW339.

72-3 29Hawaii564; 121Kan93, 246P 183; 190NC108, 129SE181 (competency and materiality must be shown); 22 OhA430, 153NE277; 7PortoRico 255.

73-4 TexCivA 276SW339; TexCivA 8 SW(2d)699; TexCivA 18SW(2d)722.

73-5 157SC144, 154SE97; 141Wash86, 250P947. See also 96Fla151, 117S853.

73-6 7PortoRico 255; TexCivA 276SW 339; TexCivA 282SW819; TexCivA 284 SW608.

73-7 29Hawaii90, 94 [quotCJ].

73-8½-New. A bill must reserve questions of law relating to the exclusion of the evidence. TexCivA 274SW335.

73-9 32F(2d)627; 33Ariz128, 262P995, 998 [citCJ]; 85CalA273, 259P341; 86 CalA284, 260P815; 105Conn539, 136A 85; DC 32F(2d)943; 331 Ill 277, 162NE 865; 128Me445, 148A680 (certificate of incorporation); 152Md439, 137A43; 262 Mo 69, 170SW1143; 34NM411, 282P273 (1stcase); 74 Or126, 144P396; 49RI 151, 141A307 (ledger sheets); TexCivA 42SW124 (deed); TexCivA 274SW292; 150Wash200, 272P516. But see 223App Div127, 227NYS522. [a] 190 Ill 520, 60 NE881 (transcript of testimony taken at former trial). [d] **But whether document is hearsay** may be determined, although it is not set out in record. 152Md439, 137A43. [e] **Notwithstanding documents are transmitted under rule or** practise allowing original papers to be certified for "inspection," they should be made part of record. 100 IllA565. [f] **Though appellant had not possession of writing** and could not copy it into bill of exceptions, its exclusion cannot be reviewed. 110MoA166, 84SW1136.

74-11 33Ariz128, 262P995; 50Philippine676.

74-12 230Ky648, 20SW(2d)472.

74-13 36F(2d)934; 47 Ida542, 277P554 (2dcase); 190 NC423, 130SE49; RI 150 A77.

74-14 114Ala449, 22S20; 189Ala553, 66S495; 11AlaA657, 66S946; 13AlaA 485, 69S225; 178Ark1199, 10SW(2d)1; 142Ga324, 82SE899; 15GaA778, 84SE 232; 39GaA238, 146SE651; 41GaA317, 152SE847; 255 IllA1; 168 Iowa238, 150 NW71; 172 Iowa336, 154NW497; 202 Iowa141, 209NW408; 204 Iowa456, 215 NW767; 208 Iowa348, 223NW366; 208 Iowa369, 226NW151; Iowa 232NW282; Iowa 232NW483; 119Kan333, 239P1103 (sworn statement required); 122Kan 601, 253P546; 128Kan220, 277P45; 129 Kan256, 282P595; 160Ky239, 169SW 689; 227Ky741, 13SW(2d)1040; 228Ky 83, 14SW(2d)413; 233Ky38, 24SW(2d) 915; 219Mass231, 106NE863; Mass 171 NE651; Miss 130S91; Miss 130S93; Mo 175SW900; 190MoA328, 177SW329; 168NC428, 84SE700; 168NC454, 84SE 765; 169NC169, 85SE289; 190NC108, 128SE181; 190NC423, 130SE49; 191NC 137, 131SE29; 193NC854, 138SE341; 118 OhSt622, 163NE198; 122 Okl 240, 254P57; 126 Okl 117, 258P902; 132 Okl 191, 270P33; 134 Okl 1, 272P436; 143 Okl 66, 287P716; 74 Or126, 144P396; 124 Or197, 264P362; 131 Or631, 284P 183; TexCivA 169SW932; TexCivA 171 SW251; TexCivA 172SW739; TexCivA 283SW924; TexCivA 284SW691; TexCivA 286SW258; TexCivA 295SW263; TexCivA 7SW(2d)639; TexCivA 8SW (2d)327; TexCivA 13SW(2d)995; TexCivA 16SW(2d)160; TexCivA 17SW (2d)856; TexCivA 21SW(2d)559(2d case); TexCivA 26SW(2d)672; TexCivA 28SW(2d)247; TexCivA 28SW(2d) 270; TexCivA 32SW(2d)220; 89Vt133, 94A497, AnnCas1918A465; 117Va810, 86SE98; 117Va836, 86SE161; 145Va 307, 133SE769; 101WVa535, 133SE131; 38Wyo 393, 267P512. See also Tex CommnA 293SW159. But see 39GaA238, 146SE651. [c] 147Wash538, 266P185, 57LRA959. [e] (2) Testimony on former trial, which was said to be contradicted by testimony introduced, must be made part of record on appeal, or question of contradiction cannot be considered. 98MoA489, 72SW728. [f] (2) Other instances. 84CalA211, 257P584. [g] (3) Ruling may be reviewed when abstract shows what offered evidence "tended to prove," without setting out in full questions asked. 99 Iowa435, 68 NW802. [j] **In Michigan.**-246Mich390, 224NW324(2dcase).

76-15 112 Ind302, 14NE80; 193NC854, 138SE341; 122 Okl 240, 254P57.

76-17 TexCivA 295SW263; TexCivA 11SW(2d)662; TexCivA 13SW(2d)995; TexCivA 16SW(2d)136; TexCivA 26 SW(2d)672; TexCivA 28SW(2d)622.

76-19 151Miss267, 117S596, 61ALR709 (record not showing that trial court refused to permit introduction of evidence); TexCivA 16SW(2d)136.

76-20 But see 258Mass456, 155NE452. [a] **But city may, under power of eminent domain, open such a street,** dedication of which was not seasonably accepted. 288Pa434, 136A669.

76-21 19 OhA64.

76-24 177 Iowa478, 152NW625.

76-27 162Ky620, 172SW1055.

77-28 37GaA683, 141SE321; 200 Iowa 922, 205NW779.

77-29 110Conn255, 147A841(2dcase); 90Fla787, 108S211; 202 Iowa1386, 212 NW161; 234Ky18, 27SW(2d)399; 233 Mich200, 206NW373; 108Miss199, 66S 524; MoA 290SW451; TexCivA 11SW (2d)821; TexCivA 13SW(2d)995; Tex CivA 20SW(2d)137. But see Conn 151A 321.

77-30 89Conn382, 94A290; 200 Iowa 922, 205NW779.

77-34 TexCivA 282SW819.

77-35 [a] **When certain portions of depositions were excluded,** entire depositions should have been set out in record. 176 Ill 545, 52NE328.

77-35½-New. An erroneous refusal of the trial court to allow defendant offering plaintiff's deposition to read cross-examination therein will not require reversal where the cross-examination is not in the record. 44 Ida560, 260P150.

78-40 83Colo 528, 266P1112; 3Del 53, 130A267; 98Fla132, 123S564; 50ND 371, 196NW104.

78-41 121 Or232, 253P529.

78-43 203 Iowa82, 212NW377; 240 Mich228, 215NW321. But see 129Kan 700, 284P599.

78-44 148Va331, 138SE637; 148Va 573, 139SE275; 150Va108, 142SE393; Va 153SE365. But see TexCivA 32SW (2d)216.

78-45 TexCivA 13SW(2d)879; 144 Wash85, 256P1029.

78-46 227Ky423, 13SW(2d)254; 240 Mich228, 215NW321; TexCivA 13SW (2d)979.

79-47 161Ga711, 132SE547 (that requests were preferred by complaining party); 43 Ida780, 254P1055.

79-48 108Conn622, 144A468; 203 Iowa 82, 212NW377; TexCivA 293SW664; TexCivA 19SW(2d)123.

79-49 TexCivA 293SW664.

79-50 Mass 172NE220.

79-52 104Conn660, 133A915; 32NM 431, 258P569; 40 OklACR479 [rehearing pending]; TexCivA 275SW169. [a] 56ND276, 217NW173. [b] TexCivA 275 SW169.

79-53 104Conn660, 133A915; TexCivA 275SW169.

79-54 32NM431, 258P569.

79-54½-New. Findings will be corrected only when it is reasonably necessary fairly to present a claimed error of law. 104Conn660, 133A915.

80-55 286Pa351, 133A495.

80-56 192NC231, 134SE485.

80-59 [i] **Burden is on excepting party** to produce before reviewing court record showing that exception was saved. Vt 150A148.

80-60 218Ala206, 118S381; Ariz 283P 279; DC 37F(2d)824; 20 Iowa642, 207 NW743; 255Mass480, 152NE240; 264 Mass166, 162NE300; 220MoA131, 230 SW1055; 198NC549, 152SE627; 136 Okl 94, 276P482(1stcase); 136 Okl 80, 276P485; RI 148A32; 150SC414, 148 SE227; 99Vt353, 132A136; 146Va617, 131SE793.

82-61 174Ark84, 294SW378; 161Ga 698, 132SE626; 165Ga118, 139SE811; 165Minn266, 206NW404 (where there was no motion for new trial noting ex-

ceptions); 311Mo 147, 277SW927; Tex CivA 2SW(2d)488; 100Vt86, 135A3. [c] In Massachusetts.–255Mass480, 152 NE240 (Superior Ct. Rules, rule 45).

82-63 265Mass85, 163NE867; 99Vt 353, 132A136.

82-64 192NC230, 134SE483; 100Vt 371, 137A321.

83-65 109 Okl 86, 234P623.

84-67 311Mo 147, 277SW927. But see 165Minn266, 206NW404.

85-83 [a] In Georgia.–37GaA642, 141 SE429.

85-87 MoA 17SW(2d)983.

85-88 MoA 28SW(2d)368; TexCivA 1 SW(2d)950.

85-90 [a] (1) 254 IllA289.

85-93 MoA 274SW532.

85-94 35F(2d)474.

86-95 84 IndA354, 148NE489.

86-99 30F(2d)937(1stcase); Ariz 283 P279; 81Colo 389, 255P628; 86Colo 330, 282P193 (objection to intervening petition as evidence); 165Ga118, 139 SE811; 85 IndA1, 147NE727; 87 IndA 672, 162NE414; 225Ky173, 7SW(2d) 1065; 165Minn266, 206NW404; Tex CivA 278SW278; TexCivA 5SW(2d) 579; Vt 148A752. [l] Exception to exclusion of agreement purporting to recite terms of original contract presents nothing for review, where document is not incorporated in bill of exceptions by direct quotation or by reference. 128Me230, 146A705.

87-1 83 IndA514, 149NE89; TexCivA 278SW278.

87-2 100Vt90, 135A10.

88-9 233Ky464, 26SW(2d)20; 233 Mich200, 206NW373; 220MoA131, 280 SW1055; 83NH586, 144A263(1stcase).

88-10 146Va617, 131SE793.

88-12 30F(2d)937(1stcase); 201 Iowa 642, 207NW743; 227Ky423, 13SW(2d) 254; 254Mass599, 150NE874; MoA 274 SW532; NJ 131A882; 198NC161, 150 SE881(2dcase); OhA 172NE836; 127 Okl 27, 259P556.

88-13 127 Okl 27, 259P556.

89-14 DC 32F(2d)943; 127 Okl 27, 259 P556. But see 129Kan700, 284P599.

89-17 152Md529, 137A347; 233Mich 200, 206NW373. [f] 311Mo 147, 277SW 927.

89-18 218Ala206, 118S381.

90-19 227Ky423, 13SW(2d)254.

90-23 MoA 287SW1061.

90-27 [d] Bill of exceptions to final judgment also excepting to judgment sustaining demurrer was sufficient to bring up question of correctness of judgment sustaining demurrer. 166Ga 633, 144SE20.

90-29 [c] 198NC777, 153SE397.

91-30 37GaA689, 141SE797; 101Vt 285, 143A394 (exception sufficiently shown). [a] Ala 130S383.

91-38 39GaA670, 148SE301(1stcase); 265Mass335, 163NE876.

91-39 [a] In Georgia.–37GaA689, 141 SE797. [b] Exceptions pendente lite to judgment striking parts of answer cannot be considered where there is no sufficient assignment of error upon final judgment. 37GaA688, 141SE433.

92-45 240 IllA488; 201 Iowa642, 207 NW743; MoA 286SW159; 129 Okl 280, 264P609; 131 Okl 38, 267P620; Tex CivA 295SW675; 36Wyo 540, 257P5. [a] (9) Motion to quash execution. MoA 296SW477(1stcase). [h] Trial practice that exceptions are taken as of course does not obviate necessity of writing exceptions into record. MoA 24 SW(2d)165.

92-46 225AppDiv587, 233NYS522.

92-48 Ala 130S216; MoA 17SW(2d) 584 (only record proper considered); 113 Okl 228, 240P1067; TexCivA 290 SW809; TexCivA 290SW841. [g] In Missouri.–A 291SW1080.

93-50 177Ark1106, 9SW(2d)322; 136 Okl 251, 277P667; 142 Okl 175, 286P 339; TexCivA 288SW270.

93-52 TexCivA 290SW809; TexCivA 290SW841.

94-55 SD 231NW943.

94-60 37Wyo 509, 263P711.

95-62½-New. Motion for new trial is not made part of bill of exceptions by statement of court in final certificate to the bill, that defendant duly filed its motion for new trial which is part of the record herein. 35Wyo 4, 246P29.

95-62½-New. A mere recital in the case made that a motion for a new trial was overruled and exceptions allowed is insufficient. 113 Okl 228, 240P1067.

95-66 MoA 256SW1100.

95-70 91Fla589, 110S252.

95-71 215Ala554, 112S122; Ala 130S 216; 90CalA390, 266P320; 224Mich 188, 221NW149; 49Nev172, 241P1079; 132 Okl 264, 270P316.

96-74-75 222MoA510, 281SW75; 118 Okl 217, 246P1094; 130 Okl 144, 265P 1048. [b] (2) Where record contains no order overruling motion for new trial, mere recital in clerk's minutes incorporated in case-made that motion was overruled and exceptions allowed is insufficient for review. 42 OklACR287.

96-77 37Wyo 509, 263P711. [a] See also 215Ala554, 112S122. But see 218 Ala201, 118S393.

96-80½-New. Rule that order sustaining motion for new trial is not reviewable where record does not show affirmatively that ruling was based upon pure question of law applies to cases tried by court without a jury as well as those tried with jury. 120Kan64, 242P129.

96-81 215Ala554, 112S122; 216Ala263, 113S229; Ala 130S216; Ala 130S401; AlaA 129S705(2dcase); 201 Iowa709, 207NW794; MoA 274SW856; MoA 286 SW159. [d] (2) Other instances. 101 WVa440, 133SE114. [i] It is not necessary to except to judgment previously rendered in bill of exceptions to decision denying new trial. 160Ga813, 129 SE92.

97-83 214Ala282, 107S801; 215Ala554, 112S122; 218Ala55, 117S634 (exception reserved); 218Ala201, 118S393; Ala 129S20(2dcase); 22AlaA275, 114S 786; 22AlaA633, 118S766(2dcase); 22 AlaA636, 119S241; 23AlaA294, 124S 404; 23AlaA310, 124S669; 37Wyo 509, 263P711. [c] Bill of exceptions which recites fact of trial, verdict, motion for new trial, overruling of same, and exception to judgment overruling motion, is sufficient to bring before reviewing court all assignments properly made in motion. 160Ga813, 129SE92.

97-85½-New. Where trial court announced decision by letter instead of in open court as required by proper procedure, appellate court will consider exceptions on the merits, even though the exceptions were not noted on the record. 3Del 53, 130A267.

97-90 TexCivA 16SW(2d)432.

98-91 See also 317Mo 1119, 298SW63.

98-4 Nev 292P1 (holding nothing before court but judgment roll). [a] (6) Transcript. Vt 148A411. [c] Redundant matter should not be included in record or court will impose costs upon responsible parties. 148Md682, 130A 325.

99-5 320Mo 10, 6SW(2d)333, 334 [quot CJ]. [a] (1) 241 IllA180.

99-6 48 Ida596, 284P1027.

100-10 154Miss481, 122S535.

100-14 TexCivA 284SW991.

100-21 121 Okl 44, 247P676; 137 Okl 300, 279P354(2dcase); TexCivA 3SW (2d)544; TexCivA 3SW(2d)545; Tex CivA 8SW(2d)312; TexCivA 11SW(2d) 380; TexCivA 24SW(2d)78; TexCivA 24 SW(2d)79; TexCivA 30SW(2d)404. See also 24F(2d)791. [b] TexCivA 1SW(2d) 681.

101-28 Vt 148A879.

101-29 [b] See also 38Wyo 182, 265P 453.

102-35 [a] 102Conn702, 130A238 (not demurrable, because order sought to be reviewed was interlocutory judgment).

102-35½-New. Under a statute on dismissal of a bill a request to report the material facts to full court was construed as a request for a report of the facts found. 258Mass190, 154NE856.

102-35½-New. And a voluntary filing of findings of fact by a trial judge had the same effect as filing pursuant to statute. 258Mass190, 154NE856.

102-35¼-New. Under statute a report of the judge is in the nature of an extension of the record showing in writing what was in the mind of judge when his decision was made. 258Mass 190, 154NE856.

102-37 218Ala354, 118S644; 246 IllA 79.

102-41 218Ala487, 119S209; 29Ariz 574, 243P598, 599 [citCJ]; 30Ariz546, 249P549, 550 [citCJ]; 67CalA468, 227P 676; 84CalA248, 257P893; 95CalA447, 273P84 (but it may be cited); 80Colo 536, 252P815; 48 Ida596, 284P1027; 154 Md477, 141A111; 136 Okl 302, 276P730; 285Pa561, 132A810; 7AltaL138, 17Dom LR385, 28WestLR701, 6WestWkly651. [i] (2) Trial court should not allow case to come to supreme court on appeal, without filing of record and opinion stating reasons for its ruling, that auditor had arrived at wrong conclusion on question indicated, as required by Sup. Ct. Rules, rule 58. 295Pa406, 145A577. [p] Opinion of trial court may be examined to ascertain grounds on which rulings were made and judgment entered. 17F(2d)15. [q] Unchallenged statement in opinion as to jury's division of compensation and punitive damages considered as verity. 288Pa518, 137A171. [r] Statement as to theory on which case was decided, made at close of argument on motion for new trial, is not part of record. 99CalA641, 278P 1058.

103-42 80Colo 536, 252P815.

104-44 80Colo 536, 252P815.

104-48 31F(2d)862.

104-50 [c] In Mississippi.–113S190.

104-51 34F(2d)883.

104-52 29F(2d)559; 80Colo 536, 252P 815; 108Conn285, 142A737.

104-53 8F(2d)241; 80Colo 536, 252P 815. But see 100CalA692, 280P1021.

105-55 171Minn39, 213NW543; 176 Minn631, 220NW156 (memorandum directed to be made part of order); 287 Pa92, 134A490. [a] In Minnesota.–171 Minn39, 213NW543.

105-56 See also 246 IllA394.

105-58 176Minn592, 224NW247 (reference in memorandum of trial court to foreign statute, not pleaded and proved, does not bring it into case for consideration).

106-68 129 Okl 280, 264P609.

106-79 [a] Denial of jurisdiction for want of service need not be shown in bill of exceptions where record shows continuous denial of jurisdiction. 271 US195, 46SCt479.

107-85 253 IllA274; 220MoA743, 276 SW409; 129 Okl 280, 264P609; 128 Or 684, 274P1104. But see 329 Ill 82, 160 NE193. [j] Record held required to be construed as showing demurrer and answer was filed by all defendants. 217Mo A630, 274SW503. [k] Answer filed by defendant not appealing is no part of record on appeal by codefendant from order overruling his demurrer to petition. 128Kan749, 280P900. [l] Abandoned petition no part of record.–Mo 31 SW(2d)21.

107-86 220MoA743, 276SW409. But see MoA 19SW(2d)510.

107-90½-New. or a withdrawn pleading, TexCivA 4SW(2d)289.

108-94 116Tex489, 294SW844. [c] Oral pleadings can be made part of record only by agreement, testimony, or bill of exceptions. 116Tex489, 294SW844. [d] Oral pleadings will not be considered unless incorporated into record. Tex CivA 23SW(2d)759.

108-95½-New. Although an amended petition is set forth in hæc verba in the bill of exceptions only, direct reference to it in the record proper is sufficient to incorporate it therein. 322Mo 842, 16 SW(2d)72.

108-99 93Fla1128, 114S425.

109-3 146Va747, 132SE694.

109-9 253 IllA242; 129 Okl 280, 264P 609.

110-15½-New. A demurrer withdrawn by stipulation of the parties is not part of the record on appeal. 50Nev42, 249P 1068.

110-18 129 Okl 280, 264P609. See also 34PortoRico 708.

111-39 See also TexCivA 286SW661.

112-43 But see 228AppDiv707, 239NYS 229(1stcase); Utah 290P367.

112-50 86Colo 330, 282P193.

113-54½-New. Exhibits referred to by appellee in an amendment to appellant's abstract, but claimed by appellant to have no existence, are not a part of the record. Iowa 228NW20.

113-55 253 IllA274.

114-67 328 Ill 399, 160NE1 (supple-

mental bill); 251 IllA353; MoA 28SW(2d)368; 143Va206, 129SE367; 151Va883, 141SE138.

114–68 251 IllA353.

115–75 184 IllA61. [a] (1) 318Mo 821, 300SW1086.

115–78 But see 218Ala468, 118S794.

117–84 See also MoA 296SW239.

117–85 [a] 318Mo 821, 300SW1086.

117–88 171Ark539, 286SW802, 803 [cit CJ].

117–91 318Mo 1206, 5SW(2d)46.

117–92 103NJL323, 136A741; TexCivA 8SW(2d)804. [b] (2) Amendments recited in order granting leave held part of record. 241 IllA180. [d] **Abandoned pleading can be brought into record only** by introducing it into evidence and making it part of bill. MoA 14SW(2d)21.

117–93 57ND649, 223NW704.

117–95 TexCivA 2SW(2d)909 (erasure from pleadings).

118–97 320Mo 746, 8SW(2d)824. [f] **Judgment roll.**–43Mont102, 115P25.

118–1 TexCivA 292SW956.

118–2 TexCivA 282SW267.

118–4 251 IllA262 (proffered amendment erroneously disallowed by chancellor considered part of record).

119–10½–New. Averments in amended bill held not before supreme court on appeal from decree overruling demurrer. 160Tenn311, 23SW(2d)667.

119–16 217Ala295, 116S144; 205Cal158, 270P181; 77CalA187, 246P134; CalA262P1103; 184 IllA60; 253 IllA274; 318Mo 821, 300SW1086; MoA 280SW76; TexCivA 281SW321; TexCivA 8SW(2d)571. [a] TexCivA 280SW238 (admission under which privilege of opening and closing evidence and argument was granted). [k] **Agreement for continuance on plea of privilege** without prejudice to plea is part of record. TexCivA 19SW(2d)144.

120–18 77CalA187, 246P134.

120–21 See also TexCivA 8SW(2d)571.

120–23 TexCivA 291SW276; 151Va883, 141SE825.

120–24 [b] **Agreed statement of case signed by counsel and approved by court** long after date of final decree forms no part of record on appeal. 32F(2d)849.

120–26 169Ark509, 275SW753; TexCivA 14SW(2d)102. [d] (2) Copy of agreed statement of facts signed by counsel and filed not considered if not approved by trial judge and made part of record. 41GaA668, 154SE292(2d case).

121–30 154Md550, 140A844.

121–38 [b] 253 IllA274. [c] **Motion not called to attention of court** is not part of record without incorporation in certificate of evidence. 253 IllA274.

121–39 337 Ill 612, 169NE747; Mo 30SW(2d)77; 130 Okl 225, 266P767; 133 Okl 6, 270P842; 136 Okl 94, 276P482(1st case); 136 Okl 80, 276P485; 36Wyo 540, 257P5. [a] (7) An erroneous or void order. 102CalA141, 282P978.

123–44 77CalA187, 246P134; 36Wyo 540, 257P5.

124–46 317 Ill 561, 148NE293; 336 Ill 267, 168NE283; 252 IllA560; Mo 5SW(2d)3; 109 Okl 86, 234P623; 133 Okl 6, 270P842; 140 Okl 25, 282P147(1stcase); 36Wyo 540, 257P5.

124–48 137 Okl 221, 279P306(1stcase).

125–50½–New. On exception to order settling case, failure to present necessary matters by appendix to case as settled precluded consideration thereof. 151SC67, 148SE713.

125–60 33NM396, 268P568.

126–69 115 Or666, 239P829.

127–78 317 Ill 425, 148NE306; 129 Okl 112, 265P655; 131 Okl 38, 267P620 (attachment).

127–83 MoA 283SW736; MoA 17SW(2d)983.

127–88½–New. Answers not introduced in evidence on trial of plea of privilege have no place in transcript on appeal from order overruling plea. TexCivA 2SW(2d)331.

127–89 177Ark1106, 9SW(2d)322; 317 Ill 561, 148NE293; TexCivA 274SW309; TexCivA 282SW903; TexCivA 283SW910; TexCivA 292SW281; TexCivA 11SW(2d)207.

129–90 TexCivA 274SW309; TexCivA 26SW(2d)327.

129–99 177Ark1106, 9SW(2d)322; Fla 127S306 (order of reinstatement).

130–3 Fla 127S306 (order of nonsuit).

130–13 222MoA1051, 6SW(2d)68.

131–15 [a] **If testimony was taken on hearing of motion,** it should be included as part of record. Md 148A231.

131–21½–New. In the absence of a showing in the record that a preliminary injunction not prayed for was granted, an appeal from alleged granting will be dismissed. TexCivA 286SW573.

132–39 317 Ill 561, 148NE293.

133–43 MoA 294SW436.

133–45 7F(2d)468; 18F(2d)369; Ala 128S139; CalA 286P480; 86Colo 368, 281P918(1stcase); 86Colo 330, 282P193; 55AppDC375, 6F(2d)678; 320 Ill 365, 151NE234; 325 Ill 109, 156NE350; 244 IllA166; 256 IllA459; 84 IndA169, 150NE398; 233Ky682, 26SW(2d)519; 154Md550, 140A844; 258Mass190, 154NE856; 259Mass26, 155NE658; 261Mass403, 158NE789; 51Nev142, 271P337; 51Nev344, 276P11; 30NM400, 234P673, 40ALR406; 21 OhA52, 153NE104; 125 Okl124, 256P915; 135 Okl 35, 273P898(1st case); Or 284P179; 286Pa177, 133A159; TexCivA 286SW599; TexCivA 293SW204; TexCivA 294SW605; TexCivA 32SW(2d)672; TexCivA 30SW(2d)676; 142Va550, 129SE368; 143Va206, 129SE367; 154Wash376, 282P205; 199Wis602, 227NW270; Wyo 256P566.

133–45½–New. , even though proceeding in lower court was a special statutory one; 320 Ill 365, 151NE234.

136–46 152Md335, 136A648; 125 Okl124, 256P915; TennChA 54SW109.

136–47 55AppDC375, 6F(2d)678; 152Md335, 136A648.

136–48 55AppDC375, 6F(2d)678; 149Miss517, 111S457.

137–49 149Miss517, 111S457.

138–68½–New. **Testifying through an interpreter** cannot be availed of as error where such fact is not shown by the record, and the bill of exceptions is not reserved to the court's ruling. TexCivA 286SW558.

138–69 334 Ill 64, 165NE189. [f] **In Alabama.**–218Ala500, 119S232; 219Ala87, 121S91 (in both cases rule held inapplicable).

138–72 [c] **In Massachusetts.**–258Mass190, 154NE856.

139–77 Mass 170NE804 (only question is whether facts found are necessarily inconsistent with general conclusion). [a] 108WVa569, 151SE846(2dcase). [d] **In Oregon.**–291P369.

139–81½–New. In Illinois, evidence could become part of the record by a stenographic report of the trial. 320 Ill 365, 151NE234.

140–92 31 OhA482, 166NE423 (motion to vacate decree). [e] **In chancery suit** extraneous matters brought in by affidavit, oral proofs, and affidavits not contained in master's report are not part of record. 253 IllA274.

140–95 But see MoA 19SW(2d)553.

141–2 18F(2d)369; 261Mass403, 158NE789; 147Miss211, 113S325; 78Mont170, 253P313; 222AppDiv764, 226NYS67 (maps, where weight of evidence not involved because facts stipulated and no exceptions taken); TexCivA 289SW714. [o] **Diagrams** should be photographed and incorporated in record. CalA 291P896.

141–3 18F(2d)369; 252 IllA536; MoA 283SW720; Nev 285P485; TexCivA 289SW714.

142–8 [c] **Pennsylvania practice.**–299Pa450, 149A695.

142–9 252 IllA536; 78Mont170, 253P313.

142–11 TexCivA 292SW262.

142–13 154Miss481, 122S535. [b] **Public plats.**–154Miss481, 122S535.

142–14½–New. A book in the Spanish language not translated into English has no place in the record. TexCivA 276SW769.

142–15 336 Ill 482, 168NE514; 222MoA990, 6SW(2d)655; 33NM345, 267P62.

142–18 187 IllA441.

143–20 329 Ill 82, 160NE193.

144–21 151Wash480, 276P300.

145–27 197Cal 224, 239P1054; 21 OhA52, 153NE104, 105 [citCJ]; 115 Or666, 239P829. [d] 154Wash137, 281P340.

145–28 Wash 287P35.

145–29 197Cal 224, 239P1054.

145–32½–New. But absence of affidavit from record is not proof that it was not considered by court on motion to open default. RI 131A553 (where court mentioned it in opinion).

146–38 29 OhA349, 163NE506.

147–45 160Ga792, 129SE108.

147–51 115 Or666, 239P829 (summons).

148–59 [e] **Affidavit introduced in original suit and not introduced in ancillary** suit is not part of record on appeal in ancillary suit. 38F(2d)233.

148–60 NJSup 139A897.

149–67 18F(2d)369.

150–33½–New. A party complaining that notice of taking depositions which were introduced against him was not served on him should incorporate in the record the notice and proof of service thereof so that the court may be advised as to the character of the service. 115 Okl 95, 241P1102.

150–37 253 IllA274.

151–98 71CalA105, 234P857; 235Ky835, 32SW(2d)411. [d] TexCivA 298SW140.

152–99 212Ky665, 279SW1069; TexCivA 286SW749.

153–3 216Ala275, 113S300; 106Conn167, 137A745; 89 IndA474, 166NE250 (must appear that instructions refused were tendered before argument); 118 Okl 274, 247P985; TexCivA 286SW749.

154–14 [e] (3) Under Courts of Civil Appeals Rule, rule 24 assignment of error in instruction not shown to have been given except by bill of exceptions is not properly presented. TexCivA 286SW599.

154–17 198 Ind376, 153NE761. [b] **Instructions may become** part of record by signing by appellant or attorney, IndA 157NE64.

155–19 88 IndA93, 163NE289.

155–20 84 IndA202, 149NE734.

155–21 84 IndA243, 149NE454.

155–21½–New. and by attorney requesting them. 84 IndA202, 149NE734.

155–27 89 IndA353, 166NE545(2dcase).

156–32 25F(2d)271; 253 IllA274.

156–35 196Cal 401, 238P87 (findings to which exceptions were taken should be included in judgment roll). But see 218MoA617, 266SW336. [f] 39 OklACR359.

156–36 [d] **In Georgia.**–35GaA19, 132SE125.

157–39 TexCivA 288SW845.

158–50 TexCivA 289SW1040.

159–61 [a] (3) Findings and conclusions becoming detached from bill of exceptions after presentation for signature will be considered as part of record. MoA 17SW(2d)986.

159–62 [a] **Findings not ordered to be filed** held not part of record. 32NM246, 255P404. [b] **When not filed in trial court within time** required by statute, findings of fact cannot be considered by appellate court. TexCivA 286SW614.

159–63 253 IllA414; 254Mass471, 150NE223; 256Mass195, 152NE630; 262Mass463, 160NE245; MoA 295SW806; 26 OhA383, 160NE491. See also Ala 127S540. [a] (3) Containing what amounts to finding of facts is sufficient to support judgment. NJ 151A64(2dcase). [g] (2) TexCivA 278SW282. (5) Findings filed ten days after adjournment of court cannot be considered for any purpose. TexCivA 278SW282. [j] (1) TexCivA 4SW(2d)604; TexCivA 4SW(2d)630.

159–63½–New. Even though the evidence is not preserved, findings become part of record and must be considered where the clerk of the superior court is directed to send up findings under the statute. 29Ariz1, 239P514.

160–65½–New. It is improper practice for appellant to convert proposed findings, rejected by the court, into a bill of exceptions or statement of case by incorporating them in the record and assigning rulings of the trial court as error. 72CalA94, 236P346.

160–66 33NM396, 268P568. [a] TexCivA 15SW(2d)702. [c] (2) Requested findings of fact and conclusions of law not brought into record by bill of exceptions or certificate of trial judge will not be considered. 31NM91, 240P990.

160–68 [b] **In Texas.**–CivA 282SW669.

160–68½–New. **In New Mexico** a written request for findings of fact and con-

clusions of law is considered a part of the record proper. 33NM86, 262P175.

160–68½–New. Exceptions of findings and refusal to make findings and conclusions are not part of the record. 33 NM91, 262P177.

161–77 135 Okl 290, 275P633.

161–78 233Mich200, 206NW373; Nebr 227NW457 (affidavits in support of motion not embodied in bill of exceptions will not be considered); 109 Okl 86, 234 P623; 135 Okl 290, 275P633; 137 Okl 300, 279P354(2dcase); 142 Okl 175, 286 P339; 144 Okl 235, 291P110. See 26F (2d)890 [certiorari den 49SCt12(1st case)]. But see 23AlaA294, 124S404.

162–79 13F(2d)723 (Missouri rule); 213Ala550, 105S707; 215Ala612, 111S 901; 21AlaA389, 108S628; 216Ala275, 113S300; 23AlaA513, 128S116(1stcase); 91Fla589, 110S252; 253 IllA413; 116 Nebr827, 219NW189; 50Nev427, 265P 705; 124 Okl 243, 255P684; 125 Okl 190, 256P719; 38Wyo 26, 264P97. But see 252 IllA460. [d] **If record contains motion for new trial and judgment thereon,** it need not be set out in bill of exceptions. 213Ala550, 105S707 (but it must contain sufficient recital to show making of motion, ruling thereon, and exception thereto). [e] **Bill of exceptions need only show ruling and exception** where motion for new trial is set out in extenso in record. 21AlaA341, 108S622.

163–81 36Wyo 48, 252P1019. [a] 141 Okl 253, 284P1115(1stcase). [f] (1) 318Mo 821, 300SW1086.

163–82 121 Okl 44, 247P676.

164–84 218Ala55, 117S634 (statute); 33NM396, 268P568.

164–88 See also 154Wash588, 283P447.

164–92 233 IllA500 (evidence that jury reached verdict by improper method); MoA 287SW810.

165–2 21 OhA52, 153NE104. [d] **Motion for judgment on pleadings** and exceptions to court's ruling thereon become part of record for review only by bill of exceptions. 318Mo 821, 300SW 1086.

165–5 31NM576, 249P242; 129 Okl 280, 264P609.

165–6 253 IllA414; 190NC187, 129SE 403; 113 Okl 146, 243P186; 130 Okl 144, 265P1048.

166–9 21AlaA569, 110S63.

166–20 253 IllA311.

166–23 TexCivA 10SW(2d)412.

167–25–26 67CalA531, 228P355, 356; 205 Iowa176, 218NW46; TexCivA 282 SW669.

167–27 5F(2d)582 (order denying motion to dismiss petition for removal of executrix, heard after entry of decree removing executrix and appointing receiver, held reviewable on appeal from decree); 39Wyo 14, 269P29, 30 [quot CJ].

167–29 215Ala19, 108S760; Ill 173NE 390; MoA 31SW(2d)241; MoA 14SW (2d)692; 34 OhA439, 171NE373; 135 Okl 290, 275P633; 144 Okl 235, 291P 110; Or 257P19; TexCivA 279SW576 (motion or independent suit to set aside judicial sale); Utah 290P950; Wyo 291 P918. See also Ill 173NE390. [e] **Facts in affidavit** (1) in support of motion to vacate entry of dismissal without prejudice must be preserved by bill of exception. 21 OhA52, 153NE104. (2) On appeal from denial of motion to quash execution, evidence should appear in bill. MoA 14SW(2d)699.

167–31½–New. Motion to open judgment and supporting affidavit not part of common-law record. 233 IllA515.

168–32 MoA 31SW(2d)241.

168–33 But see MoA 14SW(2d)693.

168–34 48Nev253, 240P925; 66Utah22, 239P475, 476 [quotCJ].

168–35 66Utah22, 239P475, 476 [quot CJ].

168–36 76CalA354, 244P1089; 32Porto Rico 660. [a] (1) 76CalA354, 244P 1089. [e] **Appeal from order approving items of memorandum of costs dismissed** when transcript does not contain judgment imposing such costs. 32PortoRico 660.

169–43 [d] **Statute enumerating books to be kept by clerk of court** has no bearing on question whether execution is part of record proper. 39Wyo 14, 273P 545.

169–44 39Wyo 14, 269P29, 30 [quot CJ]. [c] **Where order quashing execution does not indicate grounds** on which motion to quash was based, or grounds of objection to order, questions presented by petition in error cannot be determined, in absence of bill of exceptions. 39Wyo 14, 273P545.

169–54 See also 33NM91, 262P177.

169–57½–New. A copy of a brief in the circuit court of appeals tendered as an exhibit to the brief in the supreme court is no part of the record in the supreme court. 279US792, 49SCt484, 73Led960.

169–58 MoA 278SW1056.

170–60½–New. A circuit court's refusal to dismiss an appeal from a justice's court is not reviewable when not presented by a bill of exceptions. MoA 1 SW(2d)849.

170–62 MoA 1SW(2d)849.

170–66½–New. An amendment allowed by an intermediate court to a pleading in the justice's court cannot be considered on appeal where not incorporated in record. TexCivA 23SW(2d)759.

171–67 Miss 120S820; Or 284P179.

171–68 12PaDist&Co 420 (affidavit as to date of filing of report of viewers).

171–69 165Ga207, 140SE364. But see 163La555, 112S415.

172–74 122 Okl 192, 253P105.

173–87½–New. A bill of exceptions not directed by the trial judge to be made a part of the record cannot be considered. 104WVa479, 140SE326.

173–88 24F(2d)791; 325 Ill 472, 156NE 341; 23 IndA139, 55NE41. But see 292 Pa422, 141A239. [h] **Eliminating essential portions.**–98Fla156, 122S224.

174–91 218AppDiv201, 218NYS171. See also MoA 295SW826 (admission).

174–93½–New. A stipulation that the transcript shall be a statement on appeal relieves appellant from applying for certiorari to bring up the matter dehors the record. 103NJL628, 139A12.

174–96 CalA 292P1088.

175–3 220MoA1139, 296SW469; 220 MoA1139, 296SW469.

175–8 91CalA187, 266P959; 116Nebr 118, 216NW309.

175–9 116Nebr118, 216NW309 (motion to supply lost exhibits must be addressed to district court).

176–16 [e] TexCivA 275SW849.

177–22 22AlaA226, 114S285; 180Ark 797, 22SW(2d)1005; 181Ark693, 27SW (2d)96(1stcase); 44 Ida363, 257P38; 244 IllA314; 226Ky744, 11SW(2d)932; 156Md447, 144A345; Mo 285SW428; MoA 296SW239; 34 OhA499, 171NE357; 137 Okl 95, 278P311; 43 OklACR35; TexCommnA 23SW(2d)681 (denial of request for findings of fact and conclusions of law); TexCivA 286SW584; TexCivA 290SW228; TexCivA 295SW297; 142Wash142, 252P692; 159Wis179, 149 NW738; 38Wyo 511, 268P1025. [a] (17) Ruling of court excluding depositions. 169La229, 124S837. [o] (2) Where appeal is on the judgment roll alone, review is limited to determining: Whether complaint states cause of action; whether findings are within issues; whether findings support judgment; whether reversible error appears on face of record concerning matter of law. 71 CalA77, 234P839. (3) Judgment roll is sufficient record for review of all rulings which appear thereon and of sufficiency of pleadings and findings to support judgment. 203Cal 772, 265P931. [x] **In Oklahoma.**–129 Okl 121, 263P649.

179–24 215Ala36, 109S156; 170Ark 152, 279SW1002; 232 IllA240; 245Mich 292, 222NW730; 174Minn66, 218NW 234; 320Mo 10, 6SW(2d)333; MoA 8 SW(2d)1087; 34PortoRico 361; 160 Tenn294, 23SW(2d)669; TexCivA 8SW (2d) 730. [a] (1) But see 232 IllA44. (2) On appeal from order sustaining demurrer. 232 IllA240. [d] **Judgment sustaining demurrer to complaint** is reviewable without case or bill of exceptions. 165Minn482, 205NW888. [e] **Ruling on motion for judgment on pleadings.**–Ruling sustaining motion for judgment on pleadings may be reviewed without case or bill of exceptions. 165Minn482, 205NW888. [f] **Hearing on facts stated in bill and decree.**–241 Mich186, 216NW388.

179–25 44 Ida92, 255P318; 226Ky744, 11SW(2d)932; 156Md447, 144A345; Mass 168NE736; 136 Okl 145, 276P741. [a] (3) Review of order for judgment on pleadings requires no settled case. 178Minn442, 227NW891.

180–29 156Md447, 144A345.

180–31 35GaA420, 133SE297.

180–33 196Cal 401, 238P87 (grounds for appeal appearing in judgment roll); TexCivA 286SW584; TexCivA 293SW 659.

180–33½–New. Special proceedings. On appeal from a final order in special proceedings for substitution of attorneys, the case and exceptions need not be made. 131Misc119, 226NYS211.

180–33½–New. A bill of exceptions is necessary to make a transcript part of the record, the record being otherwise limited to pleadings, process, verdict, and judgment. 24F(2d)791.

180–34 13F(2d)723 (Missouri rule); 17F(2d)83; 23F(2d)914; 30F(2d)881; 37F(2d)69 (failure to sustain plea of res judicata); 37F(2d)648; 215Ala183, 110S133; 216Ala168, 112S835; 216Ala 275, 113S300; AlaA 130S163(1stcase); 173Ark1181, 292SW105; 174Ark144, 294SW389; 177Ark1106, 9SW(2d)322; 75CalA437, 243P30; 88CalA554, 263P 844; 83Colo 406, 266P211; 55AppDC 375, 6F(2d)678; Fla 128S31(3dcase) (constitutionality); 35GaA436, 133SE 348; 36GaA80, 135SE318; 317 Ill 425, 148NE306; 320 Ill 56, 150NE403; 233 IllA515; 235 IllA112; 243 IllA154; 244 IllA437; 247 IllA295; 247 IllA435; 253 IllA123; 256 IllA459; 209Ky338, 272 SW886; 210Ky600, 276SW515; 214Ky 748, 284SW397; 215Ky432, 284SW1106; 222Ky126, 300SW339; LaA 129S244; 125Me206, 132A421; 126Me529, 140A 201; Mass 168NE78; 233Mich200, 206 NW373; 238Mich178, 213NW76; 249 Mich22, 227NW710; 167Minn5, 208NW 198; 173Minn611, 216NW244; 178Minn 282, 226NW847; MoA 279SW175; Mo 5SW(2d)3; 321Mo 282, 10SW(2d)914; MoA 280SW76; MoA 283SW73b; MoA 298SW1043; MoA 12SW(2d)763(1st case); MoA 14SW(2d)657; MoA 16SW (2d)615; 78Mont190, 253P270; 82Mont 260, 266P645 (under laws of 1921, superseding laws of 1915, permitting review without bill of exceptions); 49Nev319, 245P703; 51Nev162, 271P691; Nev 292 P620; 20 OhA505, 152NE204; 26 OhA 240, 159NE850; 29 OhA349, 163NE506; 116 Okl 82, 243P211 (ruling on motion to quash service); 123 Okl 15, 250P430; 132 Okl 295, 270P562; 136 Okl 12, 275P 1049; 136 Okl 94, 276P482(1stcase); 136 Okl 251, 277P667; 47RI 122, 130A 861; TexCivA 273SW883; TexCivA 274 SW655; TexCivA 275SW162; TexCivA 275SW169; TexCivA 278SW278; TexCivA 278SW331; TexCivA 283SW591; TexCivA 285SW858; TexCivA 286SW 552; TexCivA 286SW558; TexCivA 288 SW270; TexCivA 288SW1113; TexCivA 292SW976; TexCivA 293SW226; TexCivA 294SW1115; TexCivA 299SW 506; TexCivA 300SW223; TexCivA 1 SW(2d)683; TexCivA 2SW(2d)333; TexCivA 2SW(2d)471; TexCivA 5SW (2d)567; TexCivA 8SW(2d)550; TexCivA 8SW(2d)782; TexCivA 9SW(2d) 1055(1stcase); TexCivA 10SW(2d)238; TexCivA 15SW(2d)663; TexCivA 18SW (2d)678; TexCivA 23SW(2d)404; TexCivA 24SW(2d)501; TexCivA 32SW(2d) 238; 147Va758, 133SE788; 146Wash 577, 263P959; 147Wash659, 267P43; 148Wash479, 269P827; 154Wash376, 282P205; 101WVa602, 133SE333; 102 WVa370, 135SE286; 102WVa409, 135 SE388; 104WVa144, 139SE645; 104 WVa178, 139SE653; 105WVa453, 143 SE98; 105WVa505, 143SE232; Wis 230 NW33 (questions of fact). See TexCivA 7SW(2d)911. [d] (1) 28 Ill 68; 73 Ill 320; 77 Ill 493; 109 Ill 245; 19 Ind 130; 22 Ind453; 25 Ind316. (4) 128 Or177, 270P911. (23), as to construction of will (20 OhA505, 152NE204), (24) as to admission or exclusion of evidence (TexCivA 278SW278), (25) sufficiency of evidence to support verdict (TexCivA 278SW331), (26) alleged error in failure to submit issues to jury (TexCivA 278SW331), (27) to ruling on motions in regard to pleadings (253 IllA 123), (28) to objection to attorney's fees as costs (254 IllA289). [i] (2) In Hawaii. 30Hawaii29. [s] (2) Bill of excep-

tions cannot supply statement of facts. TexCivA 293SW677. (3) Where record contains no bill of exceptions court of civil appeals cannot consider objections to court's actions as to original, amended, or supplemental petitions or as to admission or rejection of evidence. Tex CivA 8SW(2d)687. [t] **Dismissal on ground of complaint to state cause of action.**–165Minn482, 205NW888. [u] **In Georgia.**–35GaA420, 133SE297. [v] **Bill must contain recital that matter relied on appeal transpired below** as part of proceedings in cause. 235 IllA 112. [w] **Appeal being taken after trial on merits is from entire judgment,** and evidence should be brought up with record or that statement of facts should be made. 11LaA657, 123S444.

181–76 101WVa683, 133SE381.

183–35 34F(2d)133; 34F(2d)612; 31 Ariz18, 250P252; 177Ark250, 6SW(2d) 21; 180Ark1018, 24SW(2d)328 (oral evidence not brought in by bill of exceptions); 80CalA618, 252P737; CalA 265P511; 90CalA663, 266P568; 91CalA 141, 266P816; 96CalA488, 274P438; 100CalA64, 279P669; 55AppDC375, 6F (2d)678; 45 Ida579, 264P382; 253 IllA 311; 213Ky262, 280SW1103; 149Md 304, 131A450; 238Mich178, 213NW76; 243Mich544, 220NW750; 320Mo 617, 8 SW(2d)900; 78Mont190, 253P270; 82 Mont497, 267P802; 29 OhA349, 163NE 305; 131 Okl 226, 268P269; 144 Okl 101, 289P732; Okl 292P353; TexCivA 288SW279; 149Va482, 140SE656.

184–36 24F(2d)791; 32F(2d)182; 119 Ark629, 178SW375; 80CalA618, 252P 737 (sufficiency of evidence not considered); 224Ky165, 5SW(2d)1073; 261 Mass242, 158NE779; 173Minn625, 217 NW597; 178Minn415, 227NW357(1st case); 141 Okl 30, 283P1002(2dcase); 128 Or101, 269P221; TexCivA 297SW 573; TexCivA 10SW(2d)412; TexCivA 11SW(2d)374; TexCivA 16SW(2d)832; TexCivA 21SW(2d)1109; 144Wash481, 258P31; 152Wash545, 278P675; 147 Wash14, 264P717; 147Wash386, 266P 187. But see 97CalA707, 276P153. But see 146Wash440, 263P602. [a] 165 Minn268, 206NW396; 175Minn619, 221 NW648.

185–40 233 IllA515 (motion to open judgment and supporting affidavit).

185–43 TexCivA 16SW(2d)832.

185–43½–New. sufficiency of evidence to support findings, 96CalA488, 274P 438.

185–46 TexCivA 28SSW1113.

185–47 238Mich178, 213NW76.

185–47½–New. action of court in submitting or failing to submit specific issues. TexCr 28SSW1113.

186–60 121Or590, 256P186.

186–61 121 Or590, 256P186.

186–62 TexCivA 8SW(2d)258. [d] 239 Mich10, 214NW216.

187–64 TexCivA, 275SW169; TexCivA 284SW606. [b] TexCivA 294SW653.

187–67 206 Iowa1368, 222NW553; 71 Mont165, 227P811 (appeal from order dissolving temporary injunction); 125 Or347, 267P524.

187–69½–New. In some jurisdictions there is no such thing as a bill of exceptions in an equity case. 131 Or235, 282P1082.

187–72 Vt 150A459. [d] **In Vermont.**–(1) 150A459.

188–76 [a] (2) When evidence was stricken from record in equity case, matters arising on assignments of error only can be considered. 108 Iowa 17, 78NW674.

189–84 274US91, 47SCt497, 71L ed942, 55ALR705. [b] **Case held to be before appellate court** on all issues on appeal from district court where no claim was made in probate court as to lack of jurisdiction to construe will. TexCivA 291SW924.

189–86 55AppDC375, 6F(2d)678.

190–91 213Ala255, 104S517; 23AlaA 305, 124S504; 173Ark1160, 293SW1037; 93Fla383, 112S621; 238Mich178, 213 NW76; 164Minn452, 205NW372 (appeal must be determined on pleadings and findings in absence of settled case or bill of exceptions); 129 Okl 280, 264P 609; 122 Or394, 259P426; TexCivA 283 SW591; TexCivA 285SW339; TexCivA 25SW(2d)279; 104WVa144, 139SE645; 104WVa178, 139SE653. [i] **Surprise as ground for new trial** not considered in absence of bill. 211Ky588, 277SW983. [j] **Order quashing execution levy** cannot be reviewed without bill of exceptions. Wash 287P35.

190–92 71Mont165, 227P811; 136 Okl 12, 275P1049.

191–93 TexCivA 285SW339; 11LaA 657, 123S444. [b] **Error in ruling on special exceptions** to answer is not precluded from review by absence of statement of facts, since presumption would be indulged that court permitted no evidence that would have established pleas stricken out by exceptions. TexCivA 19SW(2d)800.

191–95 Ind 164NE496 (voir dire examination).

191–96 [b] **Permitting witness to testify through interpreter** may not be considered where no bill of exceptions was reserved to court's ruling. Tex CivA 286SW558.

191–97 83 IndA478, 149NE103; 211 Ky1, 276SW1058 (misconduct of plaintiff and counsel); 238Mich178, 213NW 76; 33NM295, 265P35; 129 Okl 280, 264P609; TexCivA 4SW(2d)569.

191–99 83 IndA478, 149NE103.

192–4 214Ky729, 283SW1052; 178Minn 141, 226NW404.

192–8 320 Ill 365, 151NE234; 115 Oh 32, 151NE769.

192–9 217Ala438, 116S526; 247 IllA 136; IndA 169NE532; 238Mich178, 213 NW76; TexCivA 50SW205; TexCivA 284SW968; TexCivA 289SW75; Tex CivA 8SW(2d)782; TexCivA 13SW(2d) 151; TexCivA 22SW(2d)959; TexCivA 24SW(2d)488; Utah 280P729; 150Va 108, 142SE393; 100WVa319, 130SE 483; 102WVa320, 135SE185; 102WVa 409, 135SE388; WVa 155SE125; 199 Wis366, 224NW741(1stcase). [a] (2) Overruling of motion to strike out "all the evidence" of certain witness cannot be reviewed, when bill of exceptions sets out only part of evidence given by particular witness. 31 IndA350, 67NE 1006. [e] **When record does not show that certain evidence was in writing,** objection that oral testimony of fact was received cannot be considered. 20 TexCivA697, 50SW422. [f] **Exclusion of photographs of collision** by lower court will not be considered by appellate court where no bill of exceptions containing such question appeared in record. TexCivA 19SW(2d)77.

194–11 29F(2d)80; 31Ariz18, 250P 252; 82CalA249, 255P529; 101CalA58, 281P407; 82Colo 285, 260P103; 85 Mont389, 278P836; 115 Okl 40, 241P 476; TexCivA 285SW331; TexCivA 289 SW75; TexCivA 290SW1118; TexCivA 24SW(2d)488; TexCivA 28SW(2d)1107.

194–12½–New. of refusal to vacate default judgment; 66Utah22, 239P475.

194–13 5HeiskTenn401.

194–14 85 IndA621, 155NE221; 222 MoA1168, 11SW(2d)1068.

194–17 TexCivA 290SW1118.

196–34 87 IndA333, 158NE294; 12 MartLa305; MoA 295SW851 (equity case); 18Mont591, 46P816. [a] (2) Where claimed verdict in decision is contrary to law. 87 IndA333, 158NE 294.

197–35 87 IndA333, 158NE294.

197–38 90 IllA3; 87 IndA333, 158NE 294; 120Wis331, 97NW905.

198–39 112 Ind302, 14NE80; 117 Ind 450, 20NE132, 10AmSR76, 3LRA221; 87 IndA333, 158NE294; 119 Okl 241, 249P376. [k] (2) Where questions are raised in motion for new trial requiring consideration of particular parts only of evidence, such parts alone are necessary in bill of exceptions. 87 IndA333, 158NE294.

199–44 104Conn112, 132A473; 87 IndA 333, 158NE294.

199–45 87 IndA333, 158NE294.

202–69 [a] **Reviewing court cannot hold as matter of law** that trial court erred in denying directed verdict. 256 Mass269, 152NE312.

202–70 252 IllA443.

202–72 TexCivA 286SW552.

202–74 218Ala529, 119S238(1stcase); Mich 213NW76; Or 293P412; Or 293P 422; TexCivA 295SW939; TexCivA 13 SW(2d)974; TexCivA 22SW(2d)947; TexCivA 24SW(2d)488. [f] (4) Record prepared by defendant and allowed by court after death of stenographer, containing full report of charge, is sufficient. 50RI 473, 149A380(2dcase). [h] (2) Submission of duplicitous issue containing two material questions, one of which could be answered in affirmative and one in negative, with peremptory instruction to answer both in affirmative or negative, is error which may be considered without bill of exceptions. TexCivA 19SW(2d)193.

204–90 152Wash407, 278P169. [a] (1) TexCivA 7SW(2d)911.

205–91 TexCivA 280SW901; TexCivA 23SW(2d)860. [b] TexCivA 280SW901.

205–93 [a] (2) Appellant may proceed by alternative method under Code Civ. Proc. § 953a notwithstanding there was no reporter present at hearing because there was no office for him to perform. 198Cal 85, 243P417. (3) In such case it is duty of trial judge to authenticate all papers, records, and files which are not subject to certification solely by clerk and which are essential to proper determination of appeal. 198Cal 85, 243P417. (4) Such code provision authorizes preparation of record under its provisions though appeal is on judgment roll alone. 198Cal 85, 243P417.

205–94 215Ala586, 112S193; 320 Ill 365, 151NE234; 34 OhA439, 171NE373; TexCivA 1SW(2d)677; 154Wash376, 282P205 (memorandum decisions referred to in brief); Vt 150A459.

206–95 213Ala255, 104S517; 165Minn 268, 206NW396 (without approval of court). [b] (2) Question of waiver or election cannot be presented by incorporating in record proper agreed statement of facts. 213Ala255, 104S517.

206–96 MoA 289SW24.

207–2 197Cal 224, 239P1054.

208–7 320 Ill 365, 151NE234.

208–8 TexCivA 11SW(2d)355.

208–9 215Ala586, 112S193.

208–10½–New. bill of exceptions allowed and filed in compensation case; 315Mo 781, 287SW337.

208–13 69CalA437, 231P598.

209–19 197Cal 224, 239P1054. [c] **In Porto Rico.**–33PortoRico 967.

209–20 [a] **Transcript of proceedings not filed in office of clerk of trial court** is not part of record. 50Nev42, 249P 1068.

209–21 196Cal 401, 238P87; 77CalA 248, 246P155; 230Ky795, 20SW(2d) 983 (official transcript of evidence, approved, signed, and ordered filed as part of record and intended as bill of exceptions under court order, is sufficient on appeal); 48Nev108, 227P1018, 233P844, 236P1101; 49Nev313, 244P 1010. [c] (3) Where judgment is entered upon directed verdict, transcript settled according to statute becomes record on appeal without other papers. Ida 290P200. [f] (4) Instructions offered at trial and refused and clerk's record of order denying motion for new trial and specification of grounds of motion should be included in reporter's transcript settled by trial judge. 195 Cal 477, 234P321. [g] **Extension of time for filing.**–33PortoRico 900. [h] Certification of evidence in equity case serves purpose of bill of exceptions so far as preservation of evidence is concerned. 206 Iowa1368, 222NW553.

210–22 77CalA248, 246P155; 227Ky 836, 14SW(2d)157.

210–23 [g] (1) 76CalA606, 245P438. (2) Court rule relating to filing of transcript has no application to time allowed for preparation thereof and time for preparation is not regulated by rule or statute. 76CalA606, 245P438. [h] **As affected by pendency of motion for new trial.**–81CalA265, 253P340. [i] **Extension of time.**–33PortoRico 808.

210–29½–New. The appellate court has no power to order the lower court to permit a transcript to be filed as a bill of exceptions after the time for filing has expired and the record of appeal has been filed. 50Nev42, 249P1068.

210–29½–New. In Porto Rico, where appellant elects to use the stenogra-

pher's notes, he cannot abandon this method after the expiration of the time for proceeding thereunder and proceed by a statement of the case or bill of exceptions. 33PortoRico 808.

210–30 TexCivA 299SW506. [c] **That transcript of minutes used on motion is entitled "bill of exceptions"** does not destroy its efficacy. 81Mont509, 264P396.

211–32 TexCivA 286SW558.

212–40 [a] (1) TexCivA 23SW(2d)860.

212–43 14F(2d)1022; 17F(2d)337; 31Ariz337, 253P439; 178Ark1199, 11SW(2d)3; 173Ark1160, 293SW1037; CalA 289P933; CalA 283P981; CalA 292P1010(3dcase); 89Fla193, 104S856; 256IllA459; 9LaA469, 121S767(2dcase); 11LaA195, 123S193(1stcase); 238Mich178, 213NW76; 307Mo375, 270SW365; Mo 274SW399; MoA 22SW(2d)56; MoA 12SW(2d)763(1stcase); 51Nev335, 275P2(1stcase); NJSup 146A63(1stcase); 135Okl35, 273P898(1stcase); 193NC749, 138SE128; 116OhSt735, 158NE89; 120OhSt612, 169NE297(1stcase); 125Okl124, 256P915; 138Okl243, 280P814(1stcase); TexCivA 277SW1113; TexCivA 283SW591; TexCivA 286SW558; TexCivA 293SW1119; TexCivA 22SW(2d)313(1stcase); TexCivA 13SW(2d)958; Wash 290P855; Wyo 291P918. But see 51Nev26, 267P497; 51Nev38, 268P45; NC 154SE737; 53SD340, 220NW854. [b] (2) Judgment would be affirmed where only questions presented by appeal required consideration of evidence not in record because bill was presented subsequent to sixty days allowed appellant. 89IndA563, 167NE543(1stcase). [g] **In Oklahoma.**–144Okl148, 289P748.

213–44 238Mich178, 213NW76; 193NC749, 138SE128.

213–47 TexCivA 13SW(2d)958.

213–48 35F(2d)452; 217Ala511, 116S681; 22AlaA226, 114S285; 173Ark1160, 293SW1037; 240Mich444, 215NW413; 221MoA290, 3SW(2d)281; MoA 295SW806; 49Nev313, 244P1010; 24OhA451, 158NE193; TexCivA 274SW655 (judgment not sustained in absence of necessary allegation in petition material to plaintiff's right of recovery). [a] (3) Error predicated on conflicting findings is fundamental error. TexCivA 295SW939. [g] **In Wisconsin.**–232NW525.

214–49 210Ky803, 276SW838; MoA 289SW16(1stcase); 222MoA1051, 6SW(2d)68; NC 154SE737; TexCivA 273SW1119; TexCivA 275SW162. [h] 153Wash222, 279P570(1stcase). [i] **In California.**–196Cal401, 238P87.

214–51 TexCivA 10SW(2d)218.

214–51½–New. Where no proper bill of exceptions is before the appellate court, there is nothing to review except the record proper. 315Mo781, 287SW337.

214–51½–New. In Texas, under rules of courts of civil appeals, where the record contains no statement of facts or evidence and no brief for appellee, the court may decide the case on the issues presented by appellant's brief. TexCivA 178SW593.

214–52 109Conn164, 145A751, 63LRA428; Utah 290P161 (jurisdictional prerequisites); Utah 290P367. [d] **Cross-bill of exceptions** pursuant to statute cannot be regarded as main bill. Ga 155SE192.

215–53 [d] 158MoA612, 138SW928.

216–58 3Del 53, 130A267.

216–59 3Del 53, 130A267, 270 [citCJ].

216–63½–New. Where the statute gives a party an option to file a bill containing the substance of the proceedings relating to the points involved, or a transcript certified by the court reporter, the trial court cannot dictate which method the party may adopt. 51Nev412, 278P363.

216–65 RI 132A733.

217–67 [a] **Where bill of exceptions refers to transcript** and makes it controlling, filing of transcript is deemed completion of bill of exceptions. 99Vt216, 130A587.

217–68 20AlaA531, 104S895 (to present proceedings not otherwise presented by record); 90CalA410, 265P992; 81Colo359, 255P450; 173Minn611, 216NW244; 107WVa645, 150SE2(2dcase).

217–70 253Mass427, 149NE154.

218–79 Md 148A453.

218–83½–New. Some statutes, making the right to a bill of exceptions dependent on motion for a new trial, apply only to cases in circuit and criminal courts, and do not apply to cases in chancery courts. 158Tenn289, 13SW(2d)51.

219–94 15Ida467, 98P715.

219–99 127Me351, 143A272.

220–2 [a] 102Conn702, 130A238.

220–3 40GaA633, 151SE42. [f] **Tex CivA** 294SW917. [g] **Paper stipulated by attorneys and certified by clerk** as transcript is not bill of exceptions. 24F(2d)791. [h] **Statement held not bill of exceptions.–Me** 149A837.

222–23 90CalA410, 265P992.

223–25 RI 134A11.

223–35 90CalA410, 265P992; 37GaA518, 140SE777; 37GaA514, 140SE786 (signing held sufficient). See also 165Ga403, 140SE878. [b] (1) 37GaA518, 140SE777. (2) Signing on next page after end of bill sufficient. 36GaA22, 135SE492.

224–39 [g] **Incorporation of two exceptions in single bill** held improper. 152Md273, 136A640.

224–40 321Mo162, 9SW(2d)950. [e] **Rulings made on hearing of application for interlocutory injunction.**–166Ga149, 142SE690.

224–41 139SC66, 137SE331.

225–45 222MoA1051, 6SW(2d)68.

225–49 [b] (2) Under Rev. St. (1919) § 1460, allowance of term bill of exceptions does not exhaust power to allow bill of exceptions at subsequent term to which case was continued. Mo 294SW80. [c] **Rule applies.**–311Mo147, 277SW927.

225–50–51 222MoA1051, 6SW(2d)68.

225–53 See also 166Ga877, 144SE652 (where pleadings make one suit, interveners are entitled to bill of exceptions). [b] **Coappellant may show error by bill of exceptions filed by coparty.**–171Ind323, 86NE417 [rev A 82NE1013].

225–54 163Ga42, 135SE407.

225–56 170Ga367, 152SE899(1stcase).

225–56½–New. Upon filing of cross petition in error a bill of exceptions became available to the cross petitioner in error as to all errors to which such bill showed him to have reserved exceptions. 30OhA268, 164NE779.

226–58 72CalA757, 238P143; 109Conn164, 145A751, 63LRA428. [a] (2) But statement of petitioner's counsel, not objected to, at hearing on petition to vacate judgment held properly included in bill of exceptions. Mass 168NE732. [e] **Bill must contain matter relied upon to impeach verdict** for misconduct of jury. 233IllA500. [f] **Statutory requirements.–CalA** 258P91. [g] **Bill of particulars** cannot be included in exceptions. Utah 290P367.

226–59 125Me526, 134A801; 49Nev35, 234P690 (assigned error in striking out portion of answer disregarded, where notice of motion to strike was not included so as to inform reviewing court what portion was stricken). [a] (2) Bill of exceptions which recites fact of trial, verdict, motion for new trial, overruling of same, and exception to judgment overruling motion is sufficient to bring before reviewing court all assignments properly made in motion. 160Ga813, 129SE92.

226–60 [c] **Irregularities occurring in courtroom** must be included and made up from reporter's notes showing occurrence, objection, and exception. 72CalA757, 238P143.

226–61½–New. It is not proper practice to make the entire record part of the bill of exceptions to rulings on evidence, by reference. 125Me88, 131A1.

226–62 105Conn249, 135A37; 202Iowa625, 210NW758; 79Mont485, 257P406; 225AppDiv587, 233NYS522; RI 142A537. See also 11SW14, 10KyL883. [d] 24F(2d)370.

227–63 79Mont485, 257P406.

227–71 214Ala612, 108S515; 105Conn342, 135A397, 53ALR481; 165Ga435, 141SE65; 254IllA440 (record showing evidence court considered on hearing on stipulated facts); 126Or395, 270P474 (2dcase).

228–72 105Conn342, 135A397, 53LRA481.

229–80 315Mo1332, 289SW869; Tex CivA 283SW910.

230–91 276US386, 48SCt358, 72Led620; CalA 290P1073; Fla 129S752. See also 41F(2d)625. [b] 87IndA426, 166NE671.

230–92 See also 35OhA433, 172NE543. [b] **Statements of witnesses and of others present at trial as to testimony given** is insufficient. 90CalA410, 265P992.

230–93 6F(2d)797; 16F(2d)781; 33F(2d)713 (narration should be in first person and not in third person); 41F(2d)625; MoA 25SW(2d)551; 198NC432, 152SE38(2dcase). See also 218Ala219, 118S402. [b] **In Texas.–CivA** 284SW698.

231–95 TexCommnA 12SW(2d)997.

231–95½–New. , or to dismiss appeal, 41F(2d)225.

231–1 214Ala612, 108S515; 128Me445, 148A680 (certificate of incorporation).

232–3 246IllA169.

232–6 [a] **Where depositions on file are copied into transcript** as referred to in order of court, and bill of exceptions refers to them by names of witnesses, they are sufficiently identified and incorporated into record. 23Ark543.

232–7 276US386, 48SCt358, 72Led620.

233–10 [a] (1) 99WVa622, 129SE397.

233–13 218Ala390, 119S4.

234–18 276US386, 48SCt358, 72Led620. [a] (5) Other instances. 218Ala390, 119S4. [c] (10) Other instances. 218Ala390, 119S4. [h] (3) Reference in purported bill of exceptions to depositions and containing transcript thereof without identifying them as being once used at trial ineffectual for any purpose. 210Ky803, 276SW838.

235–19 Utah 290P161.

237–39 Fla 128S31(3dcase); WVa 155SE667 (notes must be transcribed into longhand).

237–41 WVa 155SE667. [a] (2) Transcript must be certified by the trial judge. WVa 155SE667. [b] (1) WVa 155SE667. [c] **Time of certification.–WVa** 155SE667.

238–43 WVa 155SE667.

238–53 170Ark801, 281SW8; 245IllA607.

238–55 [f] 220Ky536, 295SW861.

239–56 170Ark801, 281SW8.

239–60 36Wyo540, 257P5. [c] (2) Statement in bill that plaintiff introduced "following motion, affidavit and stipulation, which is hereto attached," without further incorporation or identification, is insufficient. 252IllA560.

240–61½–New. , or be incorporated into a bill of exceptions and attested by the trial judge. 235IllA532.

240–61½–New. It is not sufficient to incorporate motions and affidavits in the record over the clerk's certificate. 235IllA532.

240–66½–New. In order that the reviewing court may consider an error in excluding or admitting evidence, a motion for a new trial, presenting the error, must be embodied in a bill of exceptions. 35Wyo4, 246P29.

241–70 88IndA643, 165NE444(1stcase); 100Vt376, 138A778 (written findings are required before allowing bill of exceptions).

241–75 72CalA757, 238P143; 90CalA410, 265P992; 16GaA599, 85SE933; 254IllA60; 128Me230, 146A705; 265Mass186, 163NE742; 118Or300, 246P718; 51Philippine757; TexCivA 8SW(2d)327; TexCivA 11SW(2d)338; TexCivA 28SW(2d)622.

242–76 127Me351, 143A272.

242–78 128Me230, 146A705; TexCivA 28SW(2d)611.

243–82 TexCivA 28SW(2d)611.

243–83 195Cal95, 231P739.

243–84 200Cal50, 251P913; 90CalA410, 265P992.

243–84½–New. Bill of exceptions to judgment as contrary to law must specify wherein it is contrary to law. 37GaA688, 141SE433.

243–86½–New. Time of objections. Bill of exceptions not showing presentation of overruled objections before reading of charge as required by statute, is insufficient. TexCivA 25SW(2d)969.

243–90 165Ga403, 140SE878 (defect held fatal unless amended).

243–92 218Ala55, 117S634; 218Ala206, 118S381 (and recite what court said); 72CalA757, 238P143; 210Ky803, 276SW838; 254 IllA60; 32NM431, 258P569; 47RI193, 131A695 (otherwise not reviewable). But see 252 IllA460. [a] (4) 22AlaA275, 114S786. But see 222MoA448, 7SW(2d)428.

244–95½–New. Statement of trial judge that exceptions to admission of testimony are saved under court rule does not relieve appellant from writing exceptions in bill. MoA 24SW(2d)249.

244–2 183Ala273, 61S80, AnnCas1916A543; 3AlaA545, 57S1013; 3Del 53, 130A267. [c] 147Me7, 140A688.

245–6 286Pa177, 133A159.

247–13 3Del 53, 130A267.

247–16 87 IndA426, 166NE671; 75 Mont99, 242P425.

247–17½–New. Signing of a bill of exceptions is not a part of the settlement. 75Mont99, 242P425.

247–17½–New. Therefore, where the bill was actually settled in the county where the cause was tried by a judge called in from another district, its later transmission to him in the county of his residence where he signed it did not render the bill subject to a motion to strike from the files. 75Mont99, 242P425 (rights of appellant not defeated by failure of judge to follow law).

247–18 Utah 280P230. [f] **Successful litigant is not required to prepare and file bill of exceptions** to preserve his rights on his adversary's appeal, and order giving leave to successful party to prepare bill of exceptions is unavailing. 321Mo162, 9SW(2d)950.

247–24 162Ga501, 134SE301; 247 IllA295; 253 IllA414; 87 IndA371, 161NE567; Mass 173NE539; 51Philippine796 (presentation held timely); Utah 280P230. [j] (1) 161Ga711, 132SE547. [p] **In Oregon.**–121 Or688, 257P19; 127 Or406, 257P20, 62ALR574. [q] **In Georgia.**–161Ga698, 132SE626.

247–24½–New. A reporter's transcript constituting a proposed bill of exceptions becomes a bill of exceptions by operation of law without settlement where no motion for correction is made. 51Nev412, 278P363.

248–25 129 Okl112, 263P655; TexCivA286SW552; TexCivA 11SW(2d)593; 36 Wyo540, 257P5.

248–30 15F(2d)491; 18F(2d)577; 178 Ark168, 10SW(2d)19; 196Cal401, 238P87; 78CalA199, 248P551; Fla 128S31 (3dcase); 30Hawaii29; 254Mass551, 151NE66; 32NM242, 255P393; 199Wis366, 224NW741(1stcase). [k] (4) In Georgia. 36GaA423, 136SE813. [l] **In New Mexico.**–31NM96, 241P31.

249–36½–New. The parties cannot, by stipulation or affidavit, cause that to become a bill of exceptions which is not such in a legal sense. 18F(2d)369.

250–41 334 Ill510, 166NE60.

251–48 But see 32NM242, 255P393. [b] 32NM225, 252P997.

251–50 205Cal6, 269P525.

251–51 36GaA423, 136SE813.

251–52 126 Or395, 270P474(2dcase).

251–53 36GaA423, 136SE813; 75Mont99, 242P425 (quære whether under statute judge may settle bill of exceptions outside of county in which cause tried); 126 Or395, 270P474(2dcase).

252–54 36GaA423, 136SE813.

252–57 89 IndA524, 165NE262.

252–60 IndA 169NE89.

254–70 334 Ill510, 166NE60.

255–81 IndA 168NE471(2dcase) (judge pro tempore of municipal court); 83 Mont452, 272P998.

255–82 212Ala480, 103S460.

256–87½–New. A special judge, still living, whose term has not expired, may attest bill at subsequent term, although another special judge presides. 218Ky391, 291SW367.

256–89 78CalA199, 248P551; 210Ky600, 276SW515; 253Mass427, 149NE154 (financial preciseness not required); 48 RI48, 135A244. [g] **In Wisconsin.**–199 Wis602, 227NW270.

257–95. 253Mass427, 149NE154 (clerical errors disregarded).

257–97 51Nev412, 278P363. [e] **Where exhibits are illegible so that it is difficult or impossible to copy them,** circuit judge or chancellor may hear and determine matters involved and perfect bill. 150Miss813, 117S242.

257–98 Mass 167NE273. [c] **Disallowance** is notice thereof to petitioner present at hearing of exceptions. 252Mass154, 147NE672.

257–2 37F(2d)849. [c] **Judge may order counsel to supply copy** of official transcript and refuse to sign bill for failure so to provide. 213Ala292, 104S641.

257–3 Fla 129S752.

257–5 87 IndA426, 166NE671.

257–8 152Wash407, 278P169.

258–9 [i] **In Indiana.**–87 IndA426, 166NE671. [j] **Aid of counsel.**–WVa 152SE862.

258–10½–New. The court may refuse a bill of exceptions or modify it with explanation, but should not strike out any part thereof. TexCivA 299SW927.

258–11 Fla 129S752.

258–13 TexCivA 286SW584; TexCivA293SW677.

259–14½–New. Such a statute has been held not mandatory, particularly where all parties are before the court, when the bill is prepared and settled. Tex CivA 286SW584.

259–17½–New. In the absence of prejudice, submission within extended time but beyond statutory time is held not error. 150Md429, 133A601.

259–20 [b] (2) Time begins to run under such statute from notice of entry of judgment, or, if proceeding for new trial is pending, from notice of decision denying such motion or other termination thereof. 195Cal242, 233P94. (3) Filing of notice of appeal from judgment is equivalent to service of notice of entry of judgment under such statute. 195Cal242, 233P94. (4) Where motion for new trial is automatically denied by force of statute, appellant is deemed to have notice thereof of date of expiration of statutory period. 195 Cal242, 233P94. (5) Time for proposing bill is not suspended by taking of appeal from order dismissing motion for new trial. 195Cal242, 233P94.

260–24 [b] **Appellee has duty of supplying** omitted portions of record. 32 NM233, 252P1000.

260–25 152Wash169, 278P169.

260–26 TexCivA 293SW677; 152Wash407, 278P169.

260–29 254Mass551, 151NE66; 278 Mont199, 253P260; 48RI483, 139A298. [b] (6) Code Civ. Proc. § 652 does not apply where trial court has for any reason refused to settle bill of exceptions. 207Cal769, 279P764.

261–31½–New. The court will not consider a petition to establish the truth of a bill of exceptions after it has been finally disallowed. 254Mass256, 150NE296.

261–31½–New. Questions of law, as grounds for setting aside a verdict are those in connection with trial and not questions touching allowance and establishment of exceptions. 257Mass409, 153NE888.

261–32 217Ala414, 116S116; 23AlaA548, 129S295(2dcase); 168Ark892, 272SW684; 254Mass551, 151NE66.

261–33 [e] **Mere failure of trial judge to sign bill within sixty days** does not give Supreme Court power to settle bill of exceptions. Ala 128S449. [f] **Refusal of trial court to allow additional time** for settlement of bill is not sufficient reason for supreme court to grant relief. 207Cal769, 279P764.

262–35 23AlaA548, 129S295(2dcase) (contents of bill).

262–42 254Mass256, 150NE296; 254 Mass551, 151NE66. [d] **In California.**–69CalA782, 232P464. [e] **After case is made up and ready for hearing on appeal,** request to supreme court to consider new exceptions is too late. 151SC433, 149SE226.

263–43 69CalA782, 232P464 (thirty days after action of judge in striking out substance of bill held not unreasonable).

263–44 Mass 170NE67(1stcase); 48RI48, 135A244.

263–46 254Mass551, 151NE66.

263–48 257Mass409, 153NE888.

263–48½–New. , and allege that the bill had been disallowed. 253Mass498, 149NE203.

263–50 253Mass498, 149NE203; 258 Mass190, 154NE856 (petition defective on face).

263–50½–New. A petition referring to motions as raising "questions of law" presents nothing for consideration where no copies of the motions were annexed. 257Mass409, 153NE888.

263–50½–New. A petition must be filed within the time specified by rule of court or within extensions thereof. 257 Mass409, 153NE888.

263–51 [a] (1) 253Mass498, 149NE203.

263–54 [c] **Fee.**–Clerk may not receive petition for filing except on payment of fee. 252Mass154, 147NE672. [d] **Not filed in time.**–252Mass154, 147NE672.

263–55 257Mass409, 153NE888.

263–56 253Mass498, 149NE203; Mass 170NE67(1stcase) (service by mail).

263–56½–New. Motion for amendment unwarranted in law and cannot be allowed or considered. 254Mass14; 149 NE604.

263–56½–New. However, a correction of a clerical error may be allowed. 254 Mass14, 149NE604.

263–57 [a] (1) 254Mass551, 151NE66. (2) Defendant's petition to establish bill of exceptions cannot be treated on merits, where defendant declined to pay any expenses of printing combined bill of exceptions. Mass 167NE910(2dcase).

263–58 253Mass427, 149NE154. But see 254Mass14, 149NE604.

263–59 [a] **Petition dismissed** when no substantial question of law is set forth in bill of exceptions. 225Mass148, 114 NE79.

264–60½–New. Adjudication that exceptions are frivolous does not bar determination as to their conformability to the truth. 254Mass14, 149NE604.

264–60½–New. Exceptions not saved will not be considered on petition to establish exceptions. 254Mass551, 151 NE66.

264–60¼–New. It is proper to strike out part of exceptions which ought not to have been allowed and to allow the rest of the bill where such parts are separate and distinct. 254Mass551, 151NE66.

264–60½–New. It is not error for a court to return a bill of exceptions with a statement that no more papers be filed unless the court so orders. 257 Mass409, 153NE888.

264–60½–New. Allowance of bill without hearing held is nullity. 48RI48, 135A244.

264–61 254Mass551, 151NE66. [c] **Proof of bill of exceptions through appointment of commissioner** is remedy intended only for cases in which party has attempted in good faith to obtain allowance of bill of exceptions. 262 Mass534, 160NE278.

264–66½–New. The judge who disallowed exceptions is not a proper witness before the commissioner to whom a petition for allowance is referred. 254 Mass551, 151NE66.

264–68 253Mass427, 149NE154 (no real question of law presented).

264–69½–New. Presumption that a party did not receive notification to present a bill of exceptions for allowance is not sufficient to overcome the presumption that the clerk sent the notice as required by court rule. 265Mass310, 163NE900.

264–69½–New. Defendant waives whatever rights he has, where plaintiff's exceptions are dismissed, by asserting that his exceptions were brought merely to render nugatory plaintiff's exceptions. Mass 167NE910(2dcase).

264–70 254Mass551, 151NE66. [b] 254 Mass551, 151NE66. [e] **Exceptions held not established.**–262Mass534, 160NE278.

264–70½–New. The burden of proof is on the excepting party claiming that the clerk did not give notice regarding presentation of the bill. 265Mass310, 163 NE900.

264–71½–New. Failure to give notice of

hearing or allowance of bill without hearing may be obviated by agreement or motion to assign appeal for hearing on merits. 48RI 48, 135A244.

265-76 168Ark892, 272SW684; 203 Iowa661, 213NW428. [a] 168Ark892, 272SW684. [b] 168Ark892, 272SW684.

265-78 170Ark839, 281SW384; Iowa 207NW342; 206 Iowa780, 221NW483.

265-81 170Ark839, 281SW384; Iowa 229NW673 (defendants).

265-82 Iowa 207NW342; 203 Iowa661, 213NW428; TexCivA 11SW(2d)593.

266-93 Fla 129S752. [j] **Notice not required** where bill of exceptions and amendments were filed with clerk within ten days allowed by statute. CalA 287 P132.

267-96 Utah 290P161. [b] **In Nevada.**–48Nev32, 226P902, 233P842.

267-98 149Va500, 140SE674.

267-8 [h] **In Georgia** assignment of error contained in bill of exceptions presented for certification more than sixty days after date of order excepted to is too late. 37GaA776, 142SE173.

269-9 Fla 130S28.

269-12 See also 220MoA268, 296SW205.

269-13 213Ala115, 104S28 (statute in force at time of presentation governs); 23AlaA569, 129S322 (within 90 days); CalA 285P856(1stcase); 161Ga495, 131 SE470 (within sixty days after decision where court remains in session longer than thirty days); 35GaA367, 133SE 268; 40GaA73; 149SE52; 231Mich634, 204NW749; 240Mich444, 215NW413; 49Nev172, 241P1079; 157Tenn339, 8SW (2d)477; 101Vt311, 143A307; 36Wyo 540, 257P5. See also 160Ga813, 129SE 92. [c] (1) 39GaA472, 147SE404(2d case). (2) Moving party in settling bill of exceptions must proceed with diligence. 207Cal 364, 278P440. [e] (1) 36GaA133, 135SE762; 38GaA694, 145 SE495(1stcase); 39GaA15, 145SE912(2d case). (2) 39GaA15, 145SE912(2dcase). (3) 36GaA156, 136SE98. (5) Exceptions presented on Nov. 20 to judgment dated Oct. 19, held not within thirty days, and could not be considered. 39 GaA647, 148SE357. [p] **In Philippines.**–45Philippine117. [q] **In absence of service of notice of entry of judgment,** no limitation on time to settle bill existed until time for appeal expired. Wis 230NW33. [r] **Settlement on day presented not necessary.**–Fla 129S752.

270-14 [a] (2) Bill presented March 4, 1927, and signed and approved May 5, 1927, last day not being Sunday, was untimely because not signed within sixty days after presentment. 218Ala 529, 119SE238(1stcase).

270-15 See also IndA 169NE89.

271-19 Or 280P658. [a] **In case of excusable neglect** court is given discretion in some states to allow and settle bills of exceptions after statutory time has elapsed. 67Utah283, 247P294.

271-23 207Cal 364, 278P440; 123 Or 615, 257P822.

271-27½-New. Under statutes, exceptions to rulings before trial must be preserved by a term bill of exceptions. 221MoA67, 294SW123 (rule applied to application for continuance before trial).

271-29 [a] (2) Court's action in refusing to settle bill of exceptions and dismissing proceedings held not abuse of discretion in view of plaintiff's delay of seven months. 207Cal 364, 278P440.

271-30 127 Or655, 259P420 (where rule is merely directory).

271-32 165Ga383, 140SE847; 35GaA 505, 133SE749; 35GaA508, 134SE119; 35GaA562; 134SE182 (sixty days from date of judgment where court had not adjourned more than thirty days from date thereof); 253 IllA414; 227Ky836, 14SW(2d)157; 240Mich444, 215NW413; 72Mont449, 235P707. See also 29F(2d) 739; 49Nev172, 241P1079. [c] (2) Bill of exceptions presented within ninety days after decree overruling motion for new trial is timely. 216Ala43, 112 S360. [e] **Presentation to clerk.**–72Cal A755, 238P130. [f] **Cannot be waived by counsel.**–41GaA664, 154SE288(2d case).

272-33 240Mich444, 215NW413.

272-36 36GaA133, 135SE762; 206 Iowa 1368, 222NW553; 232Ky267, 22SW(2d) 914.

272-38 161Ga495, 131SE470 (filing within sixty days sufficiently shown); 36GaA133, 135SE762; 88 IndA643, 165 NE444(1stcase).

273-41 8F(2d)216; 15F(2d)491; 18 F(2d)278; 37F(2d)849.

273-42 [b] (2) Tender of bill of exceptions on or about last day of time limited is sufficient although approved and signed after time, where illness of judge prevented actual presentation. 37F(2d)849.

273-43 8F(2d)134 (by order continuing all pending matters to succeeding term); 15F(2d)526; 18F(2d)278; 21 F(2d)42 (bill held not signed or filed during time extended).

273-44½-New. A court rule as to the time for settlement has been held to extend the term of court only to the needs of precise compliance with the rule. 22F(2d)796.

273-45 Wis 230NW33.

273-48 8F(2d)216; 22F(2d)655; 220 MoA623, 288SW1000. [a] (3) See also 220MoA1335, 296SW456. [h] **Order inadvertently entered,** extending time for lodging bill of exceptions, should be so determined by district court rather than requiring determination by court of appeals. 32F(2d)387.

275-49 153Md16, 137A357; 221MoA67, 294SW123.

276-56 153Md16, 137A357.

276-57 22F(2d)655.

277-58 29F(2d)739; 317 Ill 561, 148 NE293.

277-60 35GaA508, 134SE119 (tender required within thirty days after final adjournment); 221MoA67, 294SW123 (at subsequent term when judgment and motion for new trial was decided).

277-62 24F(2d)3 (where new trial was granted).

277-64 227Ky836, 14SW(2d)157.

277-67 149Va500, 140SE674.

278-69 [c] **In Philippines.**–45Philippine117.

278-69½-New. The time allowed by the court to present a bill of exceptions begins to run from the end of the term; 90Fla571, 107S183.

278-70 50Nev99, 251P721; 225AppDiv 477, 233NYS506; Wis 230NW33; Utah 293P12. [a] **Where appellant was not served with notice of entry of judgment,** he had thirty days from date of service of notice of appeal or extended time to prepare, serve, and file bill of exceptions under statutes. Utah 276P908. [b] **Where notice is not given or waived** appellant may prepare and serve bill any time before or after appeal. Utah 293P12.

278-73 13F(2d)607; 81CalA265, 253P 340; 181 IllA414. [f] **Where exceptions are filed during term** it is immaterial whether time for filing was extended by motion for new trial. 41F(2d)356.

279-76 215Ala693, 112S305; 97Fla390, 121S461; 50Nev427, 265P705. Tex CommnA 286SW197. See also 218Ala 31, 117S467.

279-77 197Cal 112, 239P850; Utah 280 P230 (time not enlarged where, under statute, by interposing motion for new trial, running of time from notice of entry of judgment was rendered ineffectual).

279-79 See also 50Nev427, 265P705.

279-83½-New. The failure of the trial judge to notify counsel of the overruling of a motion for a new trial does not have the effect of extending the time for presenting bills of exception for approval. 35GaA367, 133SE268.

279-84 Fla 129S752.

280-86 Utah 293P12.

280-88 81Colo 269, 254P999.

280-89 218Ala529, 119S238(1stcase).

280-93½-New. On appeal from an order refusing to modify a judgment, the time for filing a bill of exceptions is within ten days after objections, and exceptions to ruling as prescribed by statute. 50Nev99, 251P721.

280-95 240Mich444, 215NW413 (where no oral testimony was taken); 35Porto Rico 442. [c] 181 IllA461.

280-96 29F(2d)801; 200Cal 452, 253P 704; 210Ky575, 276SW500 (bill of exceptions, including transcript of evidence upon jurisdictional fact, held properly made part of record); 247Mich168, 225NW545; Mich 233NW427; 48Nev 32, 226P902, 233P842; 35PortoRico 442 (extension granted ex parte). But see 240Mich444, 215NW413. [g] **On good cause shown.**–Where there was no justification or excuse for attorney's delay, trial court held without authority to grant extension of time provided by statute. 200Wis1, 227NW236.

281-97 37F(2d)849; TexCommnA 23 SW(2d)328 (judge's indorsement of approval). [e] 30NM599, 240P302.

282-5 30F(2d)687(1stcase); 248Mich 581, 227NW723(1stcase) (judge entering judgment).

282-6 246Mich412, 224NW392.

282-8 33NM318, 267P70. But see Mass 173NE539.

282-9½-New. Some statutes provide that the time allowed for filing and serving a bill of exceptions may be extended upon good cause shown by the court, any justice of the supreme court, judge, referee, or judicial officer. 48Nev 108, 227P1018, 233P844, 236P1101.

282-14 72Mont449, 235P707 (within fifteen days). [b] (1) 85 IndA621, 155NE221. (2) 87 IndA371, 161NE 567.

282-16 199Cal 190, 248P665; 80CalA 337, 251P932; 97Fla486, 121S469(2d case); 334 Ill 510, 166NE60; 224Ky83, 5SW(2d)482; 227Ky836, 14SW(2d)157; 153Md698, 142A384; Mass 173NE539; 233Mich283, 206NW308; 246Mich316, 224NW324(1stcase); 49Nev172, 241P 1079; 119 Or74, 248P163; 32PortoRico 89; Utah 266P267 (till defendant is relieved from fault by proper application and showing); Utah 280P230 (rule stated with exceptions); 200Wis1, 227NW 236. But see 233Mich72, 206NW318. [c] (2) **In federal court** further extension of time for exceptions after ninety-day extension could not be granted without adversary's consent, and after term consent would not confer jurisdiction. 32F(2d)387. [j] **In Montana.**–73Mont490, 237P483. [k] **In Porto Rico.**–32PortoRico 89.

283-17 41F(2d)146.

283-19½-New. The court may extend the time sixty days for settling exceptions within the last extension where the stenographer's certificate was filed and a further stay granted during twenty days following judgment and two further stays of twenty days granted. 246 Mich536, 224NW348(1stcase).

284-25 252 IllA536; 227Ky836, 14SW (2d)157.

285-29 85Colo 121, 273P1042. [b] (2) Order to file late bill of exceptions with record has same effect as express extension of time. TexCivA 3SW(2d) 585.

285-30 72Mont449, 235P707 (order of extension of time made before filing of notice of intention to make such motion was not proper settlement on denial of motion for new trial).

285-36 [b] (1) 246Mich536, 224NW 348(1stcase). (2) On affidavit showing that transcript could not be reduced to proper form within time, extension for settling bill was properly granted without stenographer's certificate. 245 Mich548, 222NW744, 65ALR1033.

285-37 [b] 32NM233, 252P1000.

286-43 See also 200Cal 452, 253P704.

286-45 24F(2d)3 (order intending to extend time for filing bill but merely extending time for filing transcript is effective to permit bill to be filed within extended time).

287-53 17F(2d)84.

288-60 [d] **Void ex parte orders extending time to settle bill of exceptions** is of no effect, and judge is justified in refusing to settle bill of exceptions. 207 Cal 769, 279P764.

288-64 22F(2d)796; 177Ark628, 7SW (2d)326; 192NC52, 133SE172.

288-65 252 IllA536.

288-66 48Nev108, 227P1018, 233P844, 236P1101.

288-67 231Mich634, 204NW749; 233 Mich283, 206NW308. [a] (1) 241Mich 83, 216NW417. (2) At any time within twenty-day period court may, without production or filing of stenographer's certificate, extend time to settle bill beyond such period, but not beyond time

limited by statute, where attorney for prevailing party consents thereto in open court or by written stipulation. 241Mich 83, 216NW417. (3) Order written in journal by attorney for prevailing party extending time if proper appeal bond is filed amounts to written stipulation within foregoing rule, and, in filing of bond, time is automatically extended. 241Mich83, 216NW417.

288-68 75Mont99, 242P425.

288-70½-New. Discussion of possible compromise and failure of respondent's attorney to object to continuances is not equivalent to a stipulation for extention of time to present the bill. 80Cal A337, 251P932.

283-71 200Cal 452, 253P704; 241Mich 83, 216NW417.

289-75 33NM184, 262P225.

289-77 31NM610, 248P1101.

289-80½-New. In some jurisdictions the court may grant an extension where the proper stenographer's certificate is filed. 237Mich520, 212NW89.

289-81 119 Or74, 248P163. [b] 81Colo 269, 254P999. [c] (4) Order held invalid. 51Nev236, 274P1.

289-81½-New. Application for extension does not operate as waiver of service of notice of entry of judgment. Utah 293P12.

290-82 31NM610, 248P1101 [citCJ]. But see IndA 169NE886.

290-83 [b] Where decision is conditional, as denial of motion for new trial on remittitur, time is computed as of time of expiration of condition, and not as of date of order. 35GaA720, 135SE 107.

290-90 See also 244Mich677, 222NW73.

290-93 32F(2d)387; 37F(2d)849; 254 Mass551, 151NE66.

290-93 [a] (1) 24F(2d)3.

291-94½-New. In the absence of a showing in the record, the court will assume that a second extension was made within the time limited by the first extension. 150Md347, 133A114.

291-95 15F(2d)48; 249Mich48, 228NW 524.

291-97 [a] (7) In refusing to grant third extension where nothing was done except preparation and presentation of motion for new trial. 249Mich48, 228 NW524. [b] Grant of extension is erroneous where no excuse for long delay was given. Wis 230NW33.

291-5 71CalA773, 236P336; 86CalA 728, 261P1096; Utah 262P274 (refusal to strike bill held not error). [b] (4) Counsel's ignorance of amendment shortening time for serving and presenting bill. 80CalA337, 251P932. (5) Unusual press of business of appellant's attorney. 80CalA337, 251P932. [c] Granting of application is discretionary.-71 CalA773, 236P336; 80CalA337, 251P932. (2) Denial of motion for relief will not be reviewed in absence of abuse of discretion. 80CalA337, 251P932. [d] Basis for exercise of discretion.-90 CalA106, 265P568. [e] Order relieving from default before party is in default is nullity. 86CalA728, 261P1096. [f] Six-months period after which no relief from default is obtainable under California statute does not begin to run till some action is taken by adverse party based on default or some order of court is made as result of default. 86CalA 728, 261P1096.

292-6 71CalA773, 236P336; 240Mich 444, 215NW413. [a] Mistake of law held ground for relief. 200Cal 452, 253 P704.

292-8 90CalA106, 265P568 (refusal of relief held justified). [f] Failure to serve bill mentioned in motion does not warrant refusal to hear motion. 71CalA 773, 236P336. [g] Affidavit of merits by attorney who knows facts is proper. 71CalA773, 236P336. [h] Sufficiency of notice of motion.-86CalA728, 261P1096. [i] Evidence held insufficient to show default so as to justify refusal to certify bill of exceptions on ground of default. CalA 285P356.

292-11½-New. Matter of relief is entirely within the trial court's discretion. 200Cal 452, 253P704; 80CalA337, 251P 932.

292-15 But see CalA 285P356.

293-18 Utah 280P230.

293-19½-New. or failure to file assignment of errors before settling bill of exceptions, 19F(2d)177.

293-20 196Cal 585, 238P684.

293-21 196Cal 585, 238P684 (acknowledging service of proposed bill and procuring order extending time to serve amendment); 153Md221, 138A25.

293-23½-New. An objection to failure to serve a bill of exceptions within the time limited is not waived by submitting proposed amendments and at the same time specifically reserving all objections. 76CalA366, 244P953.

293-23½-New. Acknowledging the receipt of notice of settlement without repeating reservation of objections to failure to serve in time is not a waiver of such failure where on the following day notice of the motion to dismiss the proceedings on the ground stated was given. 76CalA366, 244P953.

293-23¼-New. A request for extension of time for the preparation of amendments operates as a waiver of objection that the bill was not filed in time. 86 CalA728, 261P1096.

293-23½-New. Consent not to rely on delay in filing a bill of exceptions may not be implied by failure to appear and object thereto after notice has been given respondent and his counsel of the time and place of settlement. Utah 280P 230 (delay not excused where silence of respondent not misleading).

293-25 78CalA199, 248P551.

293-27 276US386, 48SCt358, 72L ed620; 17F(2d)83; 178Ark168, 10SW(2d)19; 256 IllA459; 254Mass551, 151NE66; 48 Nev449, 232P1083, 236P678, 239P1000; 30 OhA486, 165NE745 (certificate held insufficient); 129 Okl 112, 265P655; 125 Or118, 266P244; TexCivA 286SW552; TexCivA 198SW(2d)193. See also 39GaA 99, 146SE329(2dcase).

294-31 [d] (3) If trial judge is not able to correct bill and so certifies, certificate would not render bill of exceptions effective. 30 OhA486, 165NE745.

294-31½-New. Statement of grounds of exceptions added to bill of exceptions and not signed by trial judge is no part of bill. TexCivA 32SW(2d)216.

295-34½-New. Interpolation by judge of supplemental statement in certificate has no effect, and bill of exceptions is regarded as certified as true. 40GaA 336, 149SE435.

295-38 24F(2d)3 (must be signed before expiration of term or period of extension); 123 Or615, 257P822. [c] (3) In federal courts, bill of exceptions must be signed during term at which judgment was granted unless extension was granted during such term. 18F(2d)278.

296-40 123 Or615, 257P822.

296-48 17F(2d)83; 48Nev449, 232P 1083, 236P678, 239P1000.

297-51 276US386, 48SCt358, 72L ed620.

297-56 Utah 290P161.

298-58 227Ky836, 14SW(2d)157; 138 Okl 4, 280P262. [c] But see Miss 113S 190.

298-62 328 Ill 156, 159NE189. [a] (2) Mere absence of filing stamp of clerk is not fatal in case bill was filed as matter of fact. Utah 290P161. [c] In Tennessee.-152Tenn552, 280SW23.

298-63 220MoA1335, 296SW456 (defendant held required, on continuance, to take leave to file term bill). [a] (2) It is not necessary prerequisite to right to file bill that trial court should issue order during term at which exceptions are taken. 222MoA268, 296SW205.

298-69 24Mo 159; 61Mo 373; 72Mo 283; 83Mo 589; 92Mo 516, 2SW312; 94Mo 317, 7SW270; 119Mo 427, 24SW1030.

299-71 168Ark1127, 272SW643; 164 Ga391, 138SE787; 34GaA169, 128SE 691; 35GaA505, 133SE749; 169Ga733, 151SE376; 328 Ill 156, 159NE189; 220 Ky439, 295SW407; 258Mass190, 154NE 856; 259Mass463, 156NE717; MoA 274 SW871; 320Mo 146, 6SW(2d)920 (term bill); 47RI 122, 130A861; 157Tenn339, 8SW(2d)477; TexCivA 18SW(2d)1114 (appeal is not subject to dismissal for failure to file in time); 104TexCr112, 283 SW171. See also 222MoA268, 296SW 205. [d] 218MoA464, 278SW1045; 221 MoA47, 297SW1001. [i] (3) Time does not commence to run till decree is filed, where decree is made in vacation. 170 Ark839, 281SW384. [q] In Montana.-74Mont558, 241P636. [r] In Texas.-CivA 286SW614. [s] 127 Or406, 257P 20, 62ALR574.

300-72 168Ark1127, 272SW643; 170Ark 424, 279SW1001 (not filed within time allowed by court); 164Ga391, 138SE 787; 168Ga269, 147SE567; 328 Ill 156, 159NE189; 244 IllA420; 83 IndA546, 149NE188; 224Ky181, 5SW(2d)1039; 157Tenn339, 8SW(2d)477; 160Tenn294, 23SW(2d)669; 104TexCr112, 283SW171.

300-73 224Ky181, 6SW(2d)1039 (judgment not warranted by pleadings may be reversed).

300-74 88 IndA35, 163NE107; 320Mo 146, 6SW(2d)920 (continuance); MoA 9SW(2d)538. See also 148Wash479, 269 P827. [b] 168Ark1127, 272SW643 (order in vacation).

300-75 328 Ill 156, 159NE189 (where bill is presented to judge within period for filing but not signed by him till after expiration, it may be filed within reasonable time after signature, but failure to file within five days thereafter was unreasonable); 122 Or179, 257P701; 35 PortoRico 442 (excuse for failure to move for further extension); 49SC374, 27SE388 (insufficient excuse).

300-76 259Mass463, 156NE717.

300-81½-New. Bill of exceptions can be filed only after allowance and order for filing. 36Wyo 540, 257P5.

300-82 89 IndA506, 164NE316; 225Mo 51, 123SW862; 158MoA612, 138SW928. See also 220MoA1335, 296SW456.

300-82½-New. , or during the term at which the new trial is denied; 83 IndA 546, 149NE188.

301-84 [c] See also 87 IndA670, 162NE 417. (2) Leave to file granted after overruling of motion for new trial held unauthorized. IndA 171NE19.

301-86 [b] Where no leave of court is obtained, order of trial judge in vacation extending time is unavailing. 168 Ark1127, 272SW643.

301-86½-New. Order extending time must be made while court is in session, and bill filed pursuant to order in vacation granting extension will not be considered. 168Ark1127, 272SW643.

302-88½-New. Bill may be filed before being served provided service is in time. 16GaA14, 84SE483.

302-90 245 IllA132. [b] Order filing bill of exceptions after end of term is original rather than nunc pro tunc. Mo 28SW(2d)1008.

302-91½-New. Nunc pro tunc order will be given effect as of date court took action and not as of date of order. 160 Tenn294, 23SW(2d)669.

302-93 TexCivA 275SW849.

303-2 328 Ill 156, 159NE189; 83 IndA 546, 149NE188; 184MoA365, 171SW23; 47RI 122, 130A861; 104TexCr112, 283 SW171.

303-2½-New. Affidavit of attorney as to reasons for failure to file on time cannot be considered on appeal. 170Ark 424, 279SW1001 (not part of record).

303-3 160Ga792, 129SE102 (writ of error dismissed when service not affected, acknowledged, or waived); 162 Ga558, 134SE315; 164Ga30, 137SE377; 36GaA194, 136SE165. [b] Persons to be served.-164Ga30, 137SE377. [c] In Massachusetts excepting party is not required by statute or court rules to mail or deliver to adverse party copy of bill of exceptions. 256Mass397, 152NE 621.

303-6 167Ga548, 146SE191(2dcase); 41GaA18, 152SE121 (interveners not interested).

304-8 [a] (2) In suit on note secured by mortgage on land against maker and grantee who assumed obligation thereof, where judgment was rendered for grantee and against maker only, failure to serve bill of exceptions on maker is not ground for dismissal of writ on motion of grantee. 162Ga323, 133SE861.

304-11 163Ga770, 137SE15.

304-14 163Ga770, 137SE15. [d] (2) Service may be made by leaving copy at residence of attorney where attorney is absent from county of his residence and defendant in error is nonresident. 163 Ga770, 137SE15.

304-16 164Ga790, 139SE566 (attorney for intervener). [a] 163Ga770, 137SE 15.

304-20 163Ga770, 137SE15; 225AppDiv 477, 233NYS506. [c] (2) Where service of bill is acknowledged within statutory time, appeal will not be dismissed because bill is not settled within such

time. 70Utah441, 261P9.

305-23 Utah 266P267.

305-26 35GaA57. 132SE103; 37GaA 391, 140SE428 (affidavit held too indefinite as to date of service).

305-27 163Ga770, 137SE15; 169Ga733, 151SE376.

305-28 37GaA395, 140SE424 (affidavit held insufficient to show timely service or acknowledgment).

305-30 160Ga420, 128SE178; 167Ga 548, 146SE191(2dcase). [b] 160Ga420, 128SE178. But see 165Ga403, 140SE 878. [c] (2) Since act of 1911 acknowledgment relates to persons whom attorney represented in lower court. 160 Ga420, 128SE178.

306-34 GaA 155SE493(2dcase).

306-36 94CalA141, 270P730; Fla 129S 752; Fla 129S752; 329 Ill 418, 160NE 742.

306-37 Fla 129S752.

306-39 207Cal 769, 279P764; Fla 129S 752; 329 Ill 418, 160NE742; 233Mich 200, 206NW373; 116 OhSt640, 157NE 477; 15 OhA182; 34 OhA499, 171NE 357.

307-40 [c] In Georgia.-166Ga614, 144 SE17.

308-49½-New. Mandamus will lie where the court vacated an order granting an extension of time to settle a bill of exceptions without a reasonable excuse for vacating it. 246Mich536, 224 NW348(1stcase).

308-50 30F(2d)687(1stcase).

309-52 329 Ill 418, 160NE742 (matters not rendering bill "untrue").

309-57 40GaA23. 148SE632; 156Tenn 327, 5SW(2d)471 (not containing all evidence); 152Wash407. 278P169.

310-62 90CalA410, 265P992.

310-64½-New. , or where the petitioner had proceeded under the alternative method provided by statute of requesting a transcript or preparing a bill of exceptions, and the action of the court covered by the proposed bill was covered by the transcript. 197Cal 79, 239 P717.

310-65 329 Ill 418, 160NE742 (dilatory tactics of relator in original case held immaterial).

311-70 29F(2d)58; 41GaA602, 154SE 157.

311-76 [e] **Unexplained delay of** nearly seven months. 207Cal 364, 278P440.

311-77 205Cal 710. 272P572.

312-90 38GaA453, 144SE147(2dcase). [c] **Rule requiring petition for mandamus** to compel judge to certify bill of exceptions to be filed within twenty days after refusal of judge to certify is in conflict with statute which must prevail. 167Ga451, 146SE27.

313-91 [a] **Determination whether proper discretion exercised in refusing to sign bill.-Fla** 129S752.

313-92 94CalA141, 270P730.

314-11 233Mich200, 206NW373.

314-13 15F(2d)897; 171Ark103, 283 SW31; 165Ga439, 141SE300; 311Mo 147, 277SW927. [e] **Appellant accepting bill of exceptions** as qualified by trial judge is bound by such qualification. TexCivA 283SW924.

314-13½-New. Neither counsel nor presiding judge can act to an amended bill of exception when once allowed with the consent of all parties. 125Me 526, 134A801.

315-16½-New. The trial court may, by nunc pro tunc order, amend a bill of exceptions by ordering incorporation therein of a document which is shown by the bill to have been offered and received in evidence at the trial. 315Mo 1332, 289SW869.

315-17 Nev 285P485; Nev 292P620.

316-22 166Ga176, 142SE667 (amendment of bill so as to specify brief of evidence as part of record). [c] (2) Appellate court cannot consider document as incorporated by amendment, where no motion to amend was made in trial court. 315Mo 1332, 289SW869. [d] **Bill of exceptions may be amended** by making plaintiff, as administrator, defendant in error. 163Ga326, 136SE 403.

316-25 166Ga143, 142SE687 (amendment to specify parts of record including brief of evidence).

316-26 [a] (3) Court is not authorized to amend to show exception not taken, though rule of court deemed exception saved to any adverse ruling. MoA 2 SW(2d)215.

316-28 165Ga403, 140SE878 (parties are bound by service); 165Ga439, 141 SE300. But see 160Ga420, 128SE178.

316-30 162Ga659, 134SE921; 165Ga 403, 140SE878 (denomination of parties by words "et al").

316-31 But see 35 OhA433, 172NE543.

316-32 [b] **Prevailing party may have exceptions** to substantial irregularities incorporated in bill by amendment. 78Mont199, 253P260.

316-33 90CalA410, 265P992.

317-35 335 Ill 402, 167NE89; 311Mo 147, 277SW927; MoA 2SW(2d)215. But see 15F(2d)897.

317-36 335 Ill 402, 167NE89; 311Mo 147, 277SW927.

317-37 15F(2d)897; 335 Ill 402, 167 NE89; 311Mo 147, 277SW927; MoA 2SW(2d)215. [d] **Nunc pro tunc order amending bill of exceptions** is proper only where record shows facts authorizing correction. MoA 286SW159.

317-38 311Mo 147, 277SW927.

318-44 [a] (2) Application made more than ten months after settlement of bill is too late. CalA 290P673.

318-52 316 Ill 452, 147NE494; Mo 28 SW(2d)1008. [b] **Amendment within time for filing bill is by original,** rather than nunc pro tunc, entry. Mo 28 SW(2d)1008.

318-53 15F(2d)897.

319-57½-New. In Kentucky 215Ky 106, 284SW1009 (St. § 2380-1 et seq.; Civ. Code Pract. § 518).

319-59 [b] Contra 15F(2d)897.

319-60 40GaA81, 149SE50(2dcase) (trial judge cannot certify bill of exceptions more than once).

319-62 218Ala201, 118S393; Miss 119 S168; 48Nev449, 232P1083, 236P678, 239P1000; 283Pa352, 129A81 (additional exceptions may not be filed six months after expiration of statutory time).

319-64 But see TexCivA 286SW584.

320-68½-New. The trial judge should refuse to allow a proposed amendment of a draft bill of exceptions after the expiration of the time limited for serving and filing a proposed bill where the proposed amendment would amount to an entirely new draft bill. 90CalA410, 265P992.

320-68½-New. The death of the court reporter four years after the trial does not excuse the incompleteness of a draft bill of exceptions where no showing is made as to why the transcript was not obtainable before the reporter's death. 90CalA410, 265P992.

320-73 TexCivA 286SW584. [a] **Judge need not personally correct bill** but must indicate corrections. 35 OhA433, 172NE543.

320-77 51Nev412, 278P363 (substantial compliance at least with statute required). [c] **In absence of showing as to nature or form of proposed amendment,** refusal to permit amendment to draft bill of exceptions is proper. 90 CalA410, 265P992. [d] **Burden is on plaintiff, deeming defendant's proposed bill incorrect** in statement of fact, to proceed as prescribed by statute for correction. 51Nev412, 278P363.

320-78 51Nev412, 278P363; Nev 286P 417.

321-84½-New. Circuit judge has been held without authority on motion for amendment of exceptions to determine contents of exceptions. 151SC433, 149 SE226.

321-87 53Ark250, 13SW765; 12Mich 384; TexCivA 286SW584. [a] **Writ does not lie** where bill is imperfect. 145Ala351, 40S965; 53Ark250, 13SW 765.

321-91 15 OhA182; 30 OhA486, 165NE 745. [a] See also 116 OhSt640, 157NE 477.

321-97 Nev 286P417.

322-99½-New. In some jurisdictions, where the trial court has improperly refused to amend, the appellate court may consider the document part of the record. 315Mo 1332, 289SW869.

323-18½-New. Ruling of the trial court overruling a motion to amend a bill of exceptions may be reviewed on appeal. 315Mo 1332, 289SW869.

323-30 TexCivA 275SW849; 99Vt216, 130A587 (motion reaches only defects apparent on face of bill).

323-32 129 Or216, 277P107.

324-34 35GaA254, 133SE269 (motion denied).

324-35 124 Or102, 259P207.

324-36 29F(2d)201; 23AlaA569, 129S 322. But see 187 IllA443 (on motion to strike bill for failure to fill in time, affidavits to show appellant's lack of fault may not be considered).

324-37 121 Or688, 257P19; 38Wyo 26, 264P97; 38Wyo 421, 267P689.

324-38 Utah 266P267.

324-40 See also 41 Ida491, 239P277.

324-41 82Mont497, 267P802.

324-42 48Nev449, 232P1083, 236P678, 239P1000.

324-43 240Mich444, 215NW413; Nev 292P1; 33NM238, 264P951.

324-46 189Ala672, 66S646; 194Ala661, 69S604.

324-49 78Mont442, 254P879.

324-51 16F(2d)27; 188Ala243, 66S 476; 220Ala72, 124S113; 33Ariz235, 263 P628; 157Tenn339, 8SW(2d)477; 104 TexCr112, 283SW171.

325-54 192Ala98, 68S813; 109Miss14, 67S649. [c] 192Ala98, 68S813.

325-55 29F(2d)201 (showing no exceptions to rulings).

325-62 12AlaA557, 68S522.

325-64½-New. Although bill of exceptions relates to interlocutory matter, exceptions may be adjudged to be immaterial, frivolous, and intended for delay. 254Mass14, 149NE604.

325-64½-New. ; and where trial judge's approval of bill was withdrawn at same term as given. TexCivA 286 SW584.

325-72 187 IllA607.

325-73 Or 280P658.

326-74½-New. that bill was acknowledged on a day judicially known to be Sunday; 35GaA57, 132SE103.

326-78 [b] **Not stricken if settled and signed in time to be included in transcript.-34NM600, 287P290(1stcase).**

326-79 40F(2d)606.

326-79½-New. failure to certify bill within twenty days from date of final judgment appealed from; 163Ga489, 136 SE433.

326-80 40F(2d)606; 99Vt216, 130A587. See also Utah 290P161.

326-83 Utah 290P161.

326-86 158Tenn289, 13SW(2d)51.

326-86½-New. failure to serve notice of denial of new trial; Utah 278P585.

326-89 See also 8F(2d)946.

326-93 254 IllA521.

326-95 [a] 31NM96, 241P31.

326-97½-New. that no person is named as defendant in error; 163Ga398, 136 SE272.

327-98½-New. A bill of exceptions on appeal from an order dismissing a motion for a new trial is not subject to motion to dismiss on the ground that the order was not appealable. 195Cal 242, 233P94.

327-98½-New. Where a bill of exceptions indicates that exception was taken to the granting of a nonsuit, and complaint is directed to error in permitting judgment to be rendered dismissing the suit, the bill will not be dismissed because of the inadvertent use of the term directing verdict instead of granting nonsuit. 35GaA420, 133SE297.

327-98¼-New. Bill of exceptions is not subject to dismissal merely because it fails to specify all material parts of the record. 34GaA102, 128SE203.

327-98½-New. Where certain questions in the bill are not moot, a motion to dismiss a bill of exceptions on the ground that the questions have become moot will be denied. 163Ga618, 137SE 40.

327-98½-New. A bill will not be dismissed on the ground that it appears on its face that the judgment was not a final disposition of the cause below and that the cause is still pending in the trial court. 163Ga398, 136SE272.

327-98½-New. Bill will not be stricken out when established pursuant to local act creating county court. 213Ala 665, 106S170.

327-98½-New. A bill will not be stricken for clerical error, self-correcting. 219Ala298, 122S41.
327-7 99Vt216, 130A587.
328-13 But see **TexCivA** 286SW584.
328-22 220MoA484, 276SW84.
329-25 16F(2d)27; 29F(2d)201; 29F(2d)403; 220Ala444, 125S608(1stcase); 30NM599, 240P302; 33NM238, 264P951; NM 288P1048.
329-26 17F(2d)84; 87Colo147, 285P756; 318Ill360, 149NE258; Ill 173NE390. [a] 16F(2d)27. [c] (2) Where granting of motion to strike reporter's transcript from files leaves no question which appellate court can consider, appeal will be dismissed. 41Ida491, 239P277.
329-28 17F(2d)84. But see 78Mont442, 254P879. [c] **In absence of statement of facts,** rulings are not revised unless it manifestly appears from bill of exceptions and record that rulings on evidence are erroneous. **TexCivA** 272SW252.
329-29 Nev 292P1; 124Or102, 259P207.
329-32½-New. That exceptions have been found to be immaterial and intended for delay is not a ground for denying a petition to establish the truth of the exceptions. 254Mass14, 149NE604.
329-32¼-New. Where a bill is stricken from the record, the case is the same as if an appeal had been prosecuted without a bill of exceptions. 224Ky83, 5SW(2d)482. [a] **Questions reviewable.**–224Ky83, 5SW(2d)482.
330-38 2Dak467, 11NW497; 142NC621, 55SE342; 28SC565, 6SE577. [c] (2) 225AppDiv587, 233NYS522.
330-40 45NYS309, 26NYCivProc190.
330-42 [d] (3) **TexCr** 288SW1113. (4) In absence of statement of facts objections to submission, or failure to submit, specific issues to jury cannot be considered. **TexCr** 288SW1113. (5) Verdict for plaintiffs after remand for trial on merits held not reviewable without statement of facts. **TexCivA** 292SW263.
331-43 [b] (3) Court of civil appeals may rule on exceptions where enough appears in bill of exceptions to justify consideration though no statement of facts is brought up. **TexCivA** 300SW250.
331-46 [c] (2) Bill of exceptions cannot supply statement of facts. **TexCivA** 280SW901.
331-50 **MoA** 22SW(2d)56; 225AppDiv587, 233NYS522; **TexCommnA** 5SW(2d)767.
332-56 **MoA** 271SW873; **MoA** 27SW(2d)69 (statement held sufficient); 225AppDiv587, 233NYS522; 122Okl240, 254P57. [f] **Statements held sufficient.**–Ark 31SW(2d)136; 222MoA296, 297SW163; NJSup 137A563. [g] **It cannot be supplemented by mere reference** to records of another case. 122Okl240, 254P57. [h] **Nothing can be construed as part of case-made** unless it is actually incorporated therein. 122Okl240, 254P57.
333-63 N. D. Rev. Codes (1899) §§ 8256, 8257. [h] **Case-made containing only recitals as to record** is insufficient. 114Okl130, 244P777. [i] **In Oklahoma.**–136Okl251, 277P667.
333-64 225AppDiv587, 233NYS522. [b] But see 222MoA763, 9SW(2d)673.
334-71 225AppDiv587, 233NYS522. [f] **In determining materiality for purpose** of being represented in case on appeal, each case must be dealt with on its own facts. 225AppDiv587, 233NYS522.
335-72 246Mich511, 224NW358; 225AppDiv587, 233NYS522. [i] NH 151A457.
335-74 See also 218AppDiv201, 218NYS171.
335-77 102Conn480, 129A379.
335-78 NJ 141A163.
336-80 105Conn595, 136A111; 127Me182, 142A481; 262Mass270, 159NE604; 223AppDiv353, 228NYS163 (where only one party appeals); 127Okl7, 259P548; 130Okl199, 266P467; 153SC390, 150SE890; **TexCivA** 286SW599. [c] **Sufficiency of evidence will not be reviewed** where case-made fails to contain record or copy of such evidence. 135Okl130, 276P207. [d] **In Missouri.**–294SW1014. [e] **Statement of facts filed by trial judge** is not report of evidence. Mass 170NE804.
336-81 43Mo557.
336-82½-New. The trial judge in equity cannot be compelled to report all material evidence. 259Mass615, 156NE684.
337-88 172Ark1103, 292SW143.
337-89 168La251, 121S760.
337-90 **TexCivA** 26SW(2d)1088.
337-92 218AppDiv201, 218NYS171. [c] 218AppDiv201, 218NYS171.
339-9 **TexCivA** 8SW(2d)189. See also 72Mont527, 235P327.
340-16 [a] (2) Motion for new trial and ruling made thereon must be incorporated in case-made on appeal from action of court refusing to vacate judgment for fraud in procurement. 122Okl59, 250P795.
340-17 15PortoRico228; 15PortoRico559; **TexCivA** 281SW321. [k] **Documents received in evidence and not included** in settled case will not be considered on appeal. 168Minn402, 210NW282. [l] **Exhibits presented for incorporation after service and approval of statement** cannot be considered as part of record proper. NC 155SE602 (clerk has no duty to insert exhibits).
342-29 225AppDiv587, 233NYS522.
342-34 **TexCivA** 218SW(2d)363. See also 108Conn680, 144A782. [a] (3) Court improperly refused to make finding of facts where plaintiff did not separately state claimed errors of law in request for finding. 109Conn690, 145A20(1stcase). [c] **Exceptions need not be set out in finding** where request for findings not in accordance with rule. 111Conn47, 149A415.
343-39 71CalA105, 234P857; **MoA** 271SW873.
343-40 [b] **In Texas.**–**CivA** 292SW561.
343-43 106Conn503, 138A367.
344-56½-New. Where matter inserted in a case-made after settlement by the trial judge and without notice to the adverse party constitutes a purported case-made in another case between the same parties, and the appellant is attempting to reverse two separate judgments upon one case-made and one petition in error, the attempted appeal will be dismissed for duplicity. 114Okl118, 242P531.
344-56¼-New. A statement of facts filed in one of two cases involving the same facts and tried together should be considered as a statement of the facts in both. 152Wash437, 278P157.
344-57 [c] **In Oklahoma.**–117Okl259, 246P585.
345-58 But see Okl 292P1115.
345-58½-New. Where case-made is not presented until several days after the time fixed by notice, such case-made is a nullity when there is no further notice or waiver of it. 113Okl116, 239P569.
345-60 [f] **Where it is necessary to serve only two parties,** case-made must be served personally upon each party or their attorneys of record. 135Okl104, 274P462.
346-66 NC 154SE737; 122Okl192, 253P105; 130Okl200, 266P438; 139Okl102, 281P258; 141Okl31, 285P844; **TexCivA** 300SW148. [b] (6) **TexCivA** 172SW205. (8) Statement of facts in evidence, or motion for new trial, is included within statute providing for filing after term time **TexCommnA** 286SW197. [i] **Determination of question.**–NC 154SE737.
347-67 125Okl184, 256P520; Okl 292P42(1stcase).
347-68 [a] **In Porto Rico.**–32PortoRico425.
347-73½-New. The court of civil appeals may order a filing of statements of facts after filing of an appeal bond without a bill of exceptions to the trial court's refusal to extend the time for filing. 117Tex205, 300SW17.
347-76 116Okl169, 243P743; 148Wash646, 269P801 (statement filed too late).
347-77 215Ala172, 110S129; 32PortoRico425. [a] **Rule inoperative in absence of entry of judgment.**–156SC73, 152SE815.
347-78 225AppDiv477, 233NYS506.
348-79 **TexCivA** 18SW(2d)1114.
348-83 116Okl169, 243P743; 122Okl24, 250P537; 122Okl192, 253P105; 139Okl102, 281P258.
348-86½-New. A like rule applies where the parties agreed that the jury be dismissed and that the court decide the question of law involved, and the court decided such question and rendered judgment accordingly. 116Okl169, 243P743.
348-86¼-New. **In Texas** refusal of the trial court to file statement after timely request is erroneous. **CivA** 279SW312 (request immediately after entry of order overruling motion for new trial made more than thirty days after rendition of judgment).
348-87 116Okl165, 243P737; 156SC73, 162SE815. [b] (2) Authority is limited by statute to judge before whom cause was tried. **TexCivA** 21SW(2d)321. (3) Judge who heard and overruled motion for new trial is not authorized to extend time where cause was tried before another judge. **TexCivA** 21SW(2d)321. [c] **Special judge who tried case** has power to grant necessary extensions of time. 35PortoRico875. [d] **In South Carolina.**–156SC73, 152SE815.
348-88 229Ky53, 16SW(2d)505, 64ALR648 (properly filed within extended time); 231Mich449, 204NW101; 174Minn97, 218NW453; 221AppDiv317, 224NYS4; 190NC154, 129SE195; 131Okl79, 267P661 (right of assigned judge to extend time); **TexCivA** 13SW(2d)739; **TexCivA** 16SW(2d)968 (properly filed within extended time); 141Wash345, 251P577. See also 32PortoRico425. [a] (2) First extension of time is matter of right on ex parte application. 234Mich581, 208NW697. (3) Statute requiring production of certificate of stenographer that transcript of testimony has been ordered is mandatory, and failure to comply therewith deprives court of right to grant extension of time. 236Mich437, 210NW497. (4) Court is without jurisdiction to grant extension beyond twenty days allowed by law where stenographer's certificate filed with application fails to state that testimony will be furnished as soon as possible. 237Mich520, 212NW89. [j] **Statute does not give trial court authority to abrogate rules of supreme court.**–190NC154, 129SE195. [k] **Effect of extension.**–**TexCivA** 21SW(2d)321.
349-91 **TexCivA** 13SW(2d)739.
349-94 231Mich449, 204NW101; 54ND817, 211NW589.
349-94½-New. A judge who has certified his disqualification is without power to make an order extending time in which to serve a case-made. 36OklACR157.
349-94¼-New. Approval by a judge of a statement of facts after approving attorney's refusal to sign them because not prevented in time held to amount to an extension of time for filing. **TexCivA** 285SW627.
349-94¼-New. Where the time for filing a bill of exceptions was extended, a bill of evidence can be filed within the extended time, although the order of extension does not extend the time for filing the bill of evidence. 228Ky317, 14SW(2d)1082.
349-94½-New. To authorize additional time to be given by the appellate court applicant must show that the lower court refused reasonable time and that it is impossible to make, serve, and file the case within the statutory period or extension thereof by the lower court. 139Okl105, 281P230.
350-99 142Okl250, 286P782.
350-1 233Mich140, 206NW532 (nunc pro tunc order made after expiration of statutory time held void); 113Okl115, 239P574; 113Okl186, 240P618; 117Okl283, 246P614; 121Okl46, 47, 247P398; 121Okl103, 247P974; 121Okl47, 247P376; 121Okl47, 247P376; 125Okl186, 256P50; 128Okl90, 261P196; 137Okl163, 278P639(1stcase); Okl 292P42(1stcase); 33PortoRico798 (motion in unlawful detainer case, made within

ten days following filing of notice of appeal, held timely).
350-2 121 **Okl** 47, 247P376; 121 **Okl** 47, 247P376; 122 **Okl** 152, 252P836; 130 **Okl** 173, 266P435; 135 **Okl** 104, 274P 462; 136 **Okl** 76, 276P482(2dcase); 136 **Okl** 80, 276P486(1stcase); 137 **Okl** 16, 278P266.
350-3 234**Mich**581, 208**NW**697 (second extension); 117 **Okl** 12, 245P868.
350-3½-New. Jurisdiction of court once lost by failure of counsel to obtain extension of time cannot be restored by stipulation of counsel or even by order of court. 234**Mich**581, 208**NW**697.
350-4 114 **Okl** 227; 130 **Okl** 173, 266P 435; 131 **Okl** 15, 267P465 (void order cannot be modified); 137 **Okl** 304, 280P 266(1stcase). [c] 148**Wash**479, 269P827 (statute held mandatory).
351-6 231**Mich**449, 204**NW**101 (second extension properly set aside in absence of excuse for delay). [c] **In Michigan.**-234**Mich**581, 208**NW**697.
351-7 234**Mich**581, 208**NW**697 (first extension).
351-8 117 **Okl** 12, 245P868. [e] **In Michigan.**-234**Mich**581, 208**NW**697.
351-10 143**Wash**229, 255P123. See also 34**PortoRico** 31.
351-11 234**Mich**581, 208**NW**697 (not alone legal ground for extensions of time beyond first). [a] **If oral agreement or written offer to stipulate is relied upon in good faith** by counsel, not otherwise delinquent, it may be moving consideration for court to give opportunity to present case for settlement after expiration of first extension where delay imputable to court stenographer to furnish transcript of testimony. 234 **Mich**581, 208**NW**697.
351-11½-New. Where no order extending the time for settling a case is made within the statutory time after the entry of judgment, a stipulation extending the time and waiving irregularities cannot give the appellate court jurisdiction. 231**Mich**634, 204**NW**749.
351-12 113 **Okl** 228, 240P1067 (recital in order denying new trial held sufficient). But see **TexCivA** 31**SW(2d)**675. [e] **Review of order.**-121 **Okl** 209, 249P 734. [f] **Indorsement by trial judge on statement of facts** is sufficient extension of time for filing. **TexCommnA** 23**SW (2d)**328.
352-17 136 **Okl** 76, 276P482(2dcase) (order extending time from "this date"); 141 **Okl** 154, 284P293(2dcase).
352-23 107**Conn**77, 139**A**505.
352-24 [b] (2) Words "from this date" have been construed as meaning from day on which order was made. 122 **Okl** 152, 252P836. [d] **Recital "60-10-5 days to make and serve case-made"** means that sixty days is given for appellant to prepare and serve a case-made and ten days for appellant to serve amendments and that case is to be settled on five days' notice, and is sufficient. 113 **Okl** 228, 240P1067.
352-25 231**Mich**634, 204**NW**749; **NC** 154**SE**737; 121 **Okl** 294, 250P90; 122 **Okl** 192, 253P105; 129 **Okl** 66, 263P136 (cannot be considered as transcript); 134 **Okl** 106, 272P1029; 135 **Okl** 104, 274 P462; 137 **Okl** 163, 278P639(1stcase); 137 **Okl** 304, 280P266(1stcase); 140 **Okl** 152, 282P311; 141 **Okl** 154, 284P293(2d case); 141 **Okl** 30, 285P16; 142 **Okl** 250, 286P782; 117**Tex**205, 300**SW**17; **Tex CivA** 282**SW**329; **TexCivA** 283**SW**1092; **TexCivA** 18**SW(2d)**1114 (appeal held not subject to dismissal for failure to file in time); **TexCivA** 11**SW(2d)**374; **Tex CivA** 13**SW(2d)**739 (clerk of trial court cannot receive statement after time for filing); 142**Wash**417, 253P450; 148 **Wash**285, 268P866 (stricken on motion). [c] (3) Judge's attempted settlement of case without finding waiver of service within time does not cure failure to serve case within time. **NC** 154**SE**737. [g] **In Texas.-CivA** 18**SW(2d)**907.
353-26 But see **TexCivA** 26**SW(2d)**356.
353-27 117 **Okl** 283, 246P614.
353-29 34**PortoRico** 756.
353-30 231**Mich**634, 204**NW**749; 72 **Mont**449, 235P707; 113 **Okl** 186, 240P 618; 121 **Okl** 123, 248P569; 122 **Okl** 152, 252P836; 122 **Okl** 192, 253P105; 125 **Okl** 186, 256P50; 125 **Okl** 184, 256 P520; 129 **Okl** 66, 263P136; 130 **Okl** 173, 266P435; **Okl** 276P482(3dcase); 136 **Okl** 80, 276P486(1stcase).
353-32 234**Mich**581, 208**NW**697 (failure of court stenographer to furnish transcript of testimony); **TexCivA** 282**SW** 264; **TexCivA** 282**SW**329; **TexCivA** 282 **SW**348. See also 141**Wash**107, 250P647. [a] (7) Excuses held sufficient. 34 **PortoRico** 493.
354-35 [a] (5) Affidavit of court stenographer that she was ill is no excuse. **TexCivA** 27**SW(2d)**317.
354-38 **TexCivA** 18**SW(2d)**907.
355-39 114 **Okl** 131, 244P765; 129 **Okl** 168, 264P140; 136 **Okl** 72, 276P215. [b] (7) Where judgment is rendered in favor of three defendants, adjudging each one-third interest in property, case-made must be served on each or their attorneys of record. 113 **Okl** 114, 239P 581. (8) Where one of two defendants sued as partnership appeals and the other does not, and appealing defendant asks no relief against his codefendant, and he will not be affected by any judgment of appellate court, he need not be served with case-made. 113 **Okl** 228, 240P1067. [d] **In Oklahoma.**-134 **Okl** 111, 272P443 ("opposite party" means all parties who have interest in upholding judgment or decree sought to be reversed). [e] **"Opposite party."**-138 **Okl** 110, 280P456 (means all parties who have interest in upholding judgment sought to be reversed).
355-40 129 **Okl** 168, 264P140; 134 **Okl** 105, 272P378(2dcase); 134 **Okl** 138, 272 P454; 135 **Okl** 13, 275P1058 (on each adverse party or his attorney); 136 **Okl** 251, 277P667; 140 **Okl** 232, 282P1099 (1stcase).
355-42½-New. Service on attorney of deceased successful party in joint judgment is a nullity, neither administrators nor heirs being brought in by proceedings to revive. 117 **Okl** 259, 246P 585.
355-45 140 **Okl** 176, 282P608.
356-46 [c] (1) 143 **Okl** 185, 287P1026 (order attempting to limit time from date of service of case-made is void). (5) Order providing for beginning of time to suggest amendments from date of service of case-made is void so far as it attempts to limit time for amendment. **Okl** 292P66(2dcase). (6) Time begins to run from expiration of time allowed within which to make and serve case-made. **Okl** 292P66(2dcase).
357-57 **TexCivA** 10**SW(2d)**412.
357-58 126**Ga**635, 55**SE**498.
357-59 **TexCivA** 22**SW(2d)**1088 (nondelegable).
357-60 14**F(2d)**829; 165**Ga**435, 141**SE** 65; 193**NC**35, 136**SE**193; 193**NC**749, 138**SE**128; 119 **Okl** 20, 248P871; **Tex CivA** 272**SW**252; **TexCivA** 275**SW**162; **TexCivA** 278**SW**331; **TexCivA** 283**SW** 544; **TexCivA** 283**SW**1092; **TexCivA** 287**SW**129; **TexCivA** 300**SW**250; **Tex CivA** 22**SW(2d)**1088; 143**Va**206, 129**SE** 367; 142**Va**550, 129**SE**368. [e] **Approval is nullity** where statement contained stipulation that maps may be attached to statement after approval. **TexCivA** 278**SW**331.
358-70 247**Mich**161, 225**NW**514(1st case); **TexCivA** 272**SW**252 (statement of facts may not be withdrawn from appellate court that appellant may have it signed by judge). [e] (2) Court is without power to extend time to settle case after expiration of twenty days after entry of decree. 239**Mich**447, 214 **NW**409. (3) Circuit judge may not sign order extending time to settle case unless he has before him certificate of stenographer showing that copy of record has been ordered. 239**Mich**447, 214 **NW**409. (4) It is duty of counsel to see that such certificate is presented to judge and duty cannot be shifted to judge. 239**Mich**447, 214**NW**409.
359-71 See also 55**ND**149, 212**NW**834.
359-72 143 **Okl** 185, 287P1026; 39 **OklACR**76 [reh pending].
359-79 **TexCivA** 285**SW**339.
359-81 [d] **Where delay is caused by court's requesting amendments,** bill presented within time allowed by law, but not settled within time allowed, may be considered. 89**CalA**160, 265P 298.
359-84 114 **Okl** 197, 244P591; 118 **Okl** 223, 247P38. [a] 144 **Okl** 101, 289P732. [d] (3) **Where plaintiff in error fails to present case-made for settlement at time and place specified, another notice must be served.** 144 **Okl** 101, 289P732. [h] (1) 32**PortoRico** 856. (2) Clerk of district court is under no duty to notify approval or disapproval of statement of case. 32**PortoRico** 597.
360-85 113 **Okl** 228, 240P1067.
360-86 113 **Okl** 228, 240P1067.
360-87 113 **Okl** 228, 240P1067.
360-92½-New. Notice becomes functus officio when case-made is not presented at time and place designated. **Okl** 293 P187.
360-93 85**Colo** 121, 273P1042.
361-6 140 **Okl** 176, 282P608.
361-7 140 **Okl** 176, 282P608.
361-9 118 **Okl** 237, 247P52; 136 **Okl** 75, 275P653 (case-made held void); 138 **Okl** 230, 280P825; 144 **Okl** 16, 289P 349; 144 **Okl** 101, 289P732; **Okl** 292P 66(2dcase); **Okl** 292P569; **Okl** 293P 187 (case-made held void); **Okl** 293P 262(1stcase).
361-10 118 **Okl** 223, 247P38; 118 **Okl** 237, 247P52; 128 **Okl** 16, 260P1062; 133 **Okl** 58, 270P1111.
362-12 113 **Okl** 228, 240P1067.
362-13 113 **Okl** 228, 240P1067.
362-15 129 **Okl** 298, 264P889; **Tex CivA** 32**SW(2d)**483 (phrase "the judge" construed).
362-23 129 **Okl** 144, 265P1078; 140 **Okl** 7, 282P120(1stcase); 32**PortoRico** 38. But see **TexCivA** 32**SW(2d)**483.
362-23½-New. **In Porto Rico** where statute permits appellant to prepare statement of case himself or ask stenographer to make transcript of evidence, and he elects former course, the judge is bound to approve the statement or order an amendment but is not authorized to order a statement of the case to be substituted by transcript of evidence provided for by Act (1917) No. 27. 32 **Porto Rico** 38.
363-25 34**PortoRico** 836. [b] (1) 144 **Okl** 114, 289P304. (3) Presiding judge is not authorized to settle case-made where necessary motion for new trial is disposed of after expiration of term of office. 144 **Okl** 114, 289P304.
363-35 132 **Okl** 297, 270P562(2dcase).
364-41 [c] **If judge absent at time and place noticed,** another notice must be served. 136 **Okl** 75, 275P653.
364-44 131 **Or**235, 282P1082.
364-45 127 **Okl** 9, 260P43; 131 **Okl** 267, 268P731; 132 **Okl** 297, 270P562(2d case).
366-70 225**AppDiv**587, 233**NYS**522.
366-71 218**AppDiv**201, 218**NYS**171.
366-72 243**Mich**530, 220**NW**888; 141 **Okl** 103, 284P72.
366-74 32**PortoRico** 597. [g] **Court not bound to suggest amendments.** 32 **PortoRico** 597. [h] **Trial court has power to require attorneys to make additions** where case does not contain all testimony. 218**AppDiv**201, 218**NYS**171.
366-75 [c] **Withdrawing and substituting paragraph of proposed case** held proper. 136**SC**458, 134**SE**428.
367-79 [b] **In Porto Rico.**-32**Porto Rico** 597. [c] **Reasonable discretion.**-225**AppDiv**587, 233**NYS**522.
368-91 [a] **NC** 155**SE**602.
368-92 **TexCivA** 299**SW**649.
369-94½-New. **Signing the original statement of a case on appeal by the judge directing that certain evidence and his charge be inserted therein has been held not compliance with the statute.** 190**NC**775, 130**SE**616.
369-99 193**NC**749, 138**SE**128; 129 **Okl** 66, 263P136; **TexCivA** 273**SW**883; **Tex CivA** 275**SW**162.
370-3 **TexCivA** 275**SW**162. [a] **Tex CivA** 292**SW**586.
370-7 125 **Okl** 124, 256P915.
370-9 125 **Okl** 124, 256P915.
370-14 42 **OklACR**287 [reh pending]; 152**Wash**407, 278P169. [d] **Case-made may be corrected at any time before case is finally decided by appellate court** by adding thereto omitted parts of record of trial court. 42 **OklACR**287 [reh pending]. [e] **In Oklahoma.**-142 **Okl** 110, 285P843.
371-17½-New. A case-made cannot be corrected so as to supply attestation by the clerk of the trial court under seal of the court after the expiration of the

period for appealing the case. 125 Okl 124, 256P915.

371-18 [a] correction by a party settled and signed by trial judge in absence of adverse party and without notice or waiver thereof of time and place of settling and signing it is a nullity, and record stands as if no correction had been made. 42 OklACR287 [reh pending].

371-19 [a] Effect of unauthorized alteration.-114 Okl 118, 242P531.

371-20 102Conn501, 129A274; 114 Okl 118, 242P531; 30PortoRico 98, 100 [quotCJ]; TexCivA 828W672; 41Tex CivA212, 90SW940; 53TexCivA154, 115 SW117, 123; TexCivA 278SW331. [c] In Texas.-CivA 278SW331.

371-21 30PortoRico 98, 100 [quotCJ]; 35PortoRico 128 (after attorneys have certified to correctness and completeness of record and transcript approved by lower court and filed).

371-22 51 Okl 628, 151P1178; 30Porto Rico 98.

371-23 102Conn501, 129A274 (statutory method for correction of statement of facts); 30PortoRico 98; 86Wash547, 150P1132. [c] Procedure in Porto Rico see 32PortoRico 647.

371-23½-New. Motion in appellate court to correct record should be filed when court below denies motion to amend rather than after transcript has been filed in appellate court. 35Porto Rico 128.

372-24 35AppDiv379, 54NYS827; 193 NC749, 138SE128; 46 Okl 652, 149P 242; 51 Okl 628, 151P1178; 32Porto Rico 647 (call of supplemental certificate covering evidence refused admission and not included in statement of case).

372-30 See also 226AppDiv222, 235 NYS153.

373-37 See also 226AppDiv222, 235 NYS153.

373-47 107NC68, 12SE44; 114NC282, 19SE225; 122NC410, 29SE361; 137NC 99, 49SE76; 158NC594, 74SE98.

374-50 137NC99, 49SE76.

374-52 151NC327, 66SE221 (laches preclude remedy).

374-55½-New. and within the statutory time, 138NC20, 50SE445.

375-63 [b] Refusal to add findings is not reversible error where unsupported by evidence, sufficiently embodied in other findings, or containing undisputed matter. 104Conn539, 133A666.

375-64 [a] 104AppDiv26, 93NYS215. [b] Order settling proposed case on appeal will be reversed, with direction to take proof and make record of nature and contents of exhibits, where plaintiff did not furnish sufficient proof and court failed to take proof thereof. 221 AppDiv839, 224NYS385.

375-68½-New. Where a case-made is lost by defendant in error or through his fault, and a substituted case is not signed and settled by the trial judge as a true, correct, and complete copy of the original, and plaintiff in error objects to the substitute as not a true, correct, and complete copy of the original, the judgment will be reversed and the case remanded for a new trial. 124 Okl 79, 254P501.

375-69 99CalA718, 279P227 (where court refused to settle reporter's transcript on ground that appellant is guilty of contempt, mandamus will issue). See also TexCivA 26SW(2d)1088.

376-70 TexCivA 73SW1067 (certiorari held not proper remedy).

376-77 See also 207Cal370, 278P859.

376-79 [a] NJSup 147A643 (especially where parties could not agree).

376-80 TexCivA 283SW1092.

376-82½-New. Application to direct judge to make findings.-103Conn754, 131 A738.

376-83 Ky 31SW(2d)910. See also 151NC327, 66SE221.

376-86 122 Okl 252, 254P80; 129 Okl 21, 263P135; 129 Okl 66, 263P136; Tex CommnA 280SW546.

377-94½-New. Where a case-made is filed in the court clerk's office before it is settled and signed by the trial judge, and is not filed after it is settled and signed, it is a nullity and gives the appellate court no jurisdiction to consider any error therein complained of. 119 Okl 20, 248P871.

377-1 121 Okl 156, 248P611; 122 Okl 24, 250P537; 122 Okl 252, 254P80; 137 Okl 22, 278P267; TexCommnA 280SW 546.

378-3 [a] (1) TexCommnA 280SW546. (7) District court may permit filing of statement of facts subsequent to expiration of ninety days after perfecting of appeal if such filing does not delay filing of transcript in court of civil appeals within time prescribed by law. Tex CommnA 280SW546.

378-7 32PortoRico 597.

378-8 167Minn84, 208NW546.

378-9 TexCivA 280SW621; TexCivA 283SW1092.

378-10½-New. A case-made not filed with the clerk of the trial court as required by law, although certified as a transcript, cannot be considered for any purpose where it does not present questions properly reviewable on the transcript. 125 Okl 124, 256P915.

378-10⅓-New. A case-made filed in the appellate court in connection with a petition in error cannot be considered for the purpose of showing the proceedings in the court below where it was never filed with the clerk thereof. 125 Okl 124, 256P915.

378-11 31Ariz1, 250P246; 193NC749, 138SE128; TexCivA 297SW917. [b] Statute requiring statement of facts to be agreed to by parties or signed by judge is mandatory. TexCivA 297SW 917.

378-13 31Ariz1, 250P246; TexCivA 297 SW917.

378-17 See also 253Mass157, 148NE 379, 40ALR1443.

378-17½-New. An agreed statement of facts signed by the parties, approved by the presiding judge, recited in the judgment as being the basis therefor, and filed with the clerk complies with the statute without being again agreed to after trial. TexCivA 280SW328.

378-17½-New. Such statement is sufficient although not approved by the trial judge. TexCivA 380SW328.

379-20 67CalA379, 227P645.

379-22 33Ariz235, 263P628. But see TexCivA 273SW934.

379-23 198NC779, 153SE398; TexCivA 288SW279; TexCivA 68W(2d)215; Tex CivA 18SW(2d)702(1stcase); TexCivA 26SW(2d)671; 142Wash417, 253P450; 148Wash479, 269P827; 153Wash222, 279P570(1stcase); Wash 291P708.

379-26 292Pa149, 140A862 (agreed facts held insufficient); 34PortoRico 722 (recital of proceedings without any evidence).

379-29 But see TexCivA 198W(2d)622.

380-35 TexCivA 32SW(2d)483.

380-48 See also TexCivA 288SW279.

381-54 Contra 152Wash562, 278P686.

381-55 227Ky836, 14SW(2d)157. [a] Whether findings support verdict and judgment is generally only question before appellate court, with transcript of evidence stricken. 227Ky836, 14SW(2d) 157.

381-56 But see NJSup 151A479.

381-58½-New. A statement cannot be amended by a supplemental statement filed after the time for filing the original. TexCivA 17SW(2d)130(2dcase).

381-60 267 Ill 32, 107NE859.

381-63 [a] Purpose of certification is to make evidence part of record. 206 Iowa 1368, 222NW553.

381-65 94Fed274, 36CCA239; 182 Ill 126, 55NE126; 193 Ill 537, 61NE1074; 196 Ill 193, 63NE690; 36 Ill 638; 41 IllA 249; 73 IllA427; 82 IllA223; 92 IllA 157; 100 IllA214; 107 IllA227. [f] Where there is decree dismissing bill upon merits, rule does not apply because that is proper decree to render in ordinary equitable cause if complainant offers no proof at all at hearing. 133 Ill 291, 24NE428; 161 Ill 281, 43NE1074; 171 Ill 205, 49NE363; 111 IllA90. [g] To sustain decree for want of equity, it is not necessary to preserve evidence on record, as such decree is proper one to render in case of total failure of evidence or insufficient evidence. 69 IllA238; 94 IllA582. [h] Rule applies to orders in cause as well as to final decree. 95 IllA 427. [i] Only where party obtains affirmative relief does rule apply. 171 Ill 205, 49NE363; 101 IllA509.

382-67 34F(2d)400 (want of approval and certification of court).

383-85½-New. Evidence, even if documentary, which forms no part of pleadings must be certified by judge and not by clerk. 34PortoRico 543.

383-86 104Conn501, 133A576; 104Conn 742, 133A575.

383-88 267 Ill 32, 107NE859.

383-91 [c] When record contains no evidence in any form, decree rests solely on findings of fact in it. 102 IllA360.

384-92 See also 187 IllA613, 619.

384-94½-New. Unless preserved by a certificate of evidence, motions to dismiss cannot be considered. 224 IllA130.

384-94⅓-New. Admissibility of evidence to show compliance with the law and the state commission's rules cannot be considered in the absence of reference to such rules. 106Conn302, 138A147.

384-96 131 Or235, 282P1082; 34Porto Rico 543.

385-2 104Conn660, 133A915.

385-2½-New. A trial judge in an equity suit cannot be required to make a report of all material evidence. 259Mass 615, 156NE684.

385-2¼-New. Failure to demand that evidence on a trial of an equitable proceeding be taken in writing or certified by the trial judge and the reporter, as provided by statute, is not a waiver of appeal where the reporter took evidence and had general instruction from the court to make a complete record, and it was the court's custom to have certificates filled out, signed, and attached to the notes. 206 Iowa1368, 222NW553.

385-2¼-New. Litigants should not be prejudiced by technical insufficiency of performance of the clerk's purely ministerial duty to enter in docket the filing of the shorthand reporter's notes of trial of each claim in bank receivership proceedings. 206 Iowa1368, 222NW553.

385-4 107Conn77, 139A505. [a] (2) Under present statute (Code [1924] § 11432), shorthand notes of evidence on trial in equitable action may be made part of record by certification whenever occasion therefor arises. 206 Iowa1368, 222NW553. (3) Certification of shorthand reporter's notes of evidence on trials of bank receivership claims nearly eighteen months after entry of last of decrees allowing claims is made within reasonable time, where receiver proceeded on notice to have certification made when absence thereof was called to his attention, authenticity of notes was not questioned, and claimants did not suffer from delay, which did not delay submission of appeal. 206 Iowa1368, 222 NW553.

385-9 247Mich168, 225NW545.

386-16½-New. Motion to correct findings filed after the statutory period by adding facts contradictory to findings, properly denied. 103Conn750, 131A593.

386-23 13F(2d)723; 308Mo 278, 276SW 1020. [a] (2) 13F(2d)723. (3) "An abridgment." 13F(2d)723.

386-24 See also 123 Or615, 257P822.

386-25 255 IllA21.

386-25½-New. An abstract is a pleading of the party filing it. 233 IllA566.

386-28 13F(2d)723 (Missouri practice); 172Ark167, 288SW11; 246 IllA 296; MoA 298SW1042(2dcase); 123 Or 19, 259P916; 152Wash562, 278P686. See also 80Colo 420, 252P346.

387-33 30Ariz253, 246P546; 323 Ill 343, 154NE137; 328 Ill 193, 159NE220; 221MoA1173, 300SW997. [c] Defendants, cross appealing, need not file additional or duplicate abstract. Iowa 228 NW562.

387-35½-New. A cross appellant need not duplicate an appellant's abstract, and an amendment thereto accompanied by a certificate of cross appellant's counsel that appellant's abstract and the amendment contain all of the record is sufficient. 200 Iowa419, 203NW697.

387-36 235 IllA257; 202 Iowa324, 208 NW305; MoA 271SW873; MoA 277SW 596. [h] Photostatic copies of documents are not sufficient under rules, where reproduction is minute and illegi-

ble without straining. 235 IllA257. [1] **Showing as to court in which and by whom original petition was filed** is sufficient where facts appear on cover and title page of abstract and by reference to such pages in abstract. 308Mo 278, 276 SW1020.

388-40 9ColoA154, 47P973 (marginal references to folio numbers in bill of exceptions).

388-44 See also MoA 278SW1053.

388-46 MoA 177SW794; MoA 291SW 1080; MoA 13SW(2d)1101; MoA 14SW (2d)657. See also MoA 278SW1053.

389-49 [d] **Sufficient compliance.**–308 Mo 278, 272SW72.

389-50½-New. The cover and title page constitutes a part of the abstract. 308 Mo 278, 272SW72.

389-51 Ariz 286P180; 252 IllA82; 202 Iowa324, 208NW305; 205 Iowa1233, 219 NW266; SD 232NW17. [c] (4) Index should indicate nature or contents of exhibits. TexCivA 28SW(2d)921. (5) Index of exhibits should give brief statement of what exhibit is. SD 232NW 17. (6) If exhibit is letter, index must show sender, addressee, and date. SD 232NW17.

389-52 307Mo 455, 270P688.

390-62½-New. The clerk's short form of transcript, constituting merely a transcript of the evidence, cannot cure a defective abstract of the record showing only an amended petition and answer. 219MoA31, 267SW943.

390-63 323 Ill 343, 154NE137; 308Mo 278, 272SW72; MoA 29SW(2d)243. [e] **Where abstract was mere index,** it was sufficient if only proposition was presented for review. 233 IllA553 (as to jurisdiction below was sufficiently set out). [f] **Bill of exceptions.**–319Mo 963, 5SW(2d)378. [g] **Findings of fact and conclusions of law in equity case** need not be set out in abstract. Or 282P119. [h] **Assignments of error have no place in abstract,** under revised rules in some jurisdictions. Or 284P837.

390-63½-New. It is only necessary that the abstract, taken as a whole, show the essential facts in the record. 308Mo 278, 272SW72.

391-66 318 Ill 128, 149NE1; 323 Ill 343, 154NE137; 233 IllA1; 233 IllA566; 235 IllA398; 244 IllA466; 247 IllA301; 320 Mo459, 8SW(2d)61. [c] (2) Appellate court may determine what abstract shall contain. 122Or 179, 257P701.

392-67 31Ariz267, 252P189; 84Colo 507, 271P625; Ill 163NE825; 233 IllA1 (abstract must show errors relied upon, as court will not search record for ground for reversal); 233 IllA566.

392-69 252 IllA536.

392-70 108Conn524, 143A846; 318 Ill 128, 149NE1; 236 IllA275; 218MoA629, 267SW44; MoA 300SW1000 (insufficient); MoA 8SW(2d)879; 83Wash271, 145P175. [c] (5) Other instances. 256 IllA531.

393-71 224 IllA9; 236 IllA275.

393-73 29Ariz227, 240P351; 318 Ill 128, 149NE1. But see 242 IllA37.

393-74 29Ariz227, 240P351; 236 IllA 275.

393-75 224 IllA9.

393-76 170Ark771, 281SW379; 318 Ill 128, 149NE1; 224 IllA9.

393-80 297Pa47, 146A148.

393-81 Iowa 229NW696.

394-83 84Colo 99, 268P533, 534 [cit CJ]; 236 IllA275; 252 IllA82.

394-84 236 IllA275.

394-86 178Ark96, 10SW(2d)28.

394-87 But see 218MoA629, 267SW44.

394-87½-New. In Massachusetts, on appeal in equity case, court is not empowered to order abridgment of evidence. 258Mass190, 154NE856.

394-88 [e] **Oral testimony in record** in question and answer form need not be reviewed. TexCivA 24SW(2d)805.

395-96 318 Ill 128, 149NE1.

396-8 233 IllA500. But see 127 Or599, 273P337. [g] **Instructions sufficiently presented.**–256 IllA531.

396-10 106Conn302, 138A147.

396-14 233 IllA500. [a] 233 IllA500.

397-16 31Ariz267, 252P189; 233 IllA 566 (rulings on demurrers); 203 Iowa 243, 212NW467.

397-17 233 IllA566.

397-21 [a] MoA 277SW939 (sufficient). [f] (2) Record stating that motions and judgment are set out in bill of exceptions is sufficient. MoA 277SW939.

398-24 But see 255 IllA209.

398-25½-New. The insufficiency of the recital in the abstracts as to the judgment appealed from is not ground for dismissal where the manuscript of the judgment and order allowing the appeal certified by the clerk sets out the same in full. 216MoA614, 260SW538.

398-26 But see Or 282P119.

398-28 235 IllA587 (grounds for motion must be stated). [a] (5) , a motion for change of venue (235 IllA587).

398-29 13F(2d)723 (Missouri rule); 174Ark1180, 298SW330. [c] (5) Other instances. MoA 277SW939. [f] **Not required in case tried by court without jury.**–254 IllA115.

399-32 82Colo 61, 256P1093; Utah 269 P518. [k] See also MoA 277SW939.

401-50 MoA 282SW61. [f] (3) Statement that bill of exceptions was filed, signed, and made part of record is sufficient as to fact that there was bill of exceptions which was signed by trial judge. 319Mo 963, 5SW(2d)378.

402-52 315Mo 781, 287SW337.

402-57½-New. Where a bill incorporated in the abstract purports on its face to be a bill in a different case, it cannot be accepted as the proper bill. 315Mo 781, 287SW337.

402-59 218MoA590, 265SW856 (waived by failure to proceed under court rule).

402-64 233 IllA1.

404-72 206 Iowa539, 218NW907(2d case), 58ALR1359; MoA 26SW(2d)1008. [d] (8) Other instances. 256 IllA147.

404-73 177Ark1194, 7SW(2d)321; 318 Ill 128, 149NE1; 323 Ill 343, 154NE137; 235 IllA398 (where court did not feel justified to search record, abstract being insufficient); 256 IllA401; Iowa 226 NW56; 219MoA31, 267SW943; MoA 27SW(2d)746.

405-74 168Ga133, 147SE380; MoA 281 SW139 (where bill of exceptions supplies omissions).

405-80 126Mo 159, 28SW492.

405-82 MoA 287SW1084.

405-83½-New. Where, in a reply brief, appellant admits that the facts are stated correctly by the master in his report, although the master's conclusions of law are claimed to be erroneous, the decree will not be affirmed pro forma. 242 IllA37.

406-84½-New. An abstract will not be stricken because of its unnecessary length making it practically a transcript. Iowa 222NW154.

406-84½-New. The court may refuse to consider an unnecessarily voluminous abstract on appeal from judgment sustaining a motion for a new trial where the only injury suffered by appellant would be the expense of a new trial. MoA 20SW(2d)958.

406-85 221MoA1173, 300SW997. [d] **In Missouri.**–26SW(2d)988.

406-86 255 IllA21 (additional abstract insufficient); 201 Iowa709, 207NW794 (under rule of court); Mo 15SW(2d)941. But see Ill 173NE108. [d] **In Iowa.**–201 Iowa709, 207NW794.

406-87 34Ariz68, 267P794; Iowa 226 NW103; Or 284P837. [g] (3) In Illinois cross errors assigned on dismissal of cross bill cannot be considered on appeal from decree dismissing original bill in absence of abstract of cross bill. 339 Ill 530, 171NE621. (4) In Iowa appellee failing to file amended abstract in support of alleged cross errors is not entitled to be heard thereon. Iowa 226 NW103.

407-91 202 Iowa314, 208NW288.

407-95½-New. An assertion by appellee, by way of a so-called amendment to appellant's abstract, that appellant procured the very order appealed from, will be disregarded where appellee neither denies the correctness of appellant's abstract nor supports his assertion by any record or by any allowable correction of the abstract. 202 Iowa314, 208NW288.

407-95½-New. Respondent may furnish additional abstract showing that not all of evidence has been preserved, refusing to supply omissions, thereby preventing review of evidence. MoA 25SW(2d)566.

407-96 321Mo 1244, 14SW(2d)583; 322 Mo 218, 14SW(2d)590, 62ALR835.

407-97½-New. Where the abstract of appellant is a scant one, and respondent without objection files an additional abstract, it becomes practically the abstract in the case. 307Mo 651, 271SW 754.

407-97⅓-New. Omissions from appellant's abstract may be cured by respondent's abstract including the matter omitted. Mo 289SW925; 216MoA 626, 260SW516.

407-97¼-New. Where, by an amendment duly filed, appellee denies a statement in the original abstract, such denial must be taken as true under a rule of court in the absence of certification of the record by appellant. 205 Iowa261, 215NW724, 61ALR851.

407-97⅓-New. Respondent filing additional abstract supplying alleged omissions cannot complain of court's considering appellant's demurrer to evidence. Mo 26SW(2d)988.

407-97¼-New. Where recital of respondent's additional abstract that all of evidence has not been presented in original abstract is not denied, evidence cannot be reviewed. MoA 25SW(2d)566.

407-1 See also MoA 256SW565. [d] **Additional abstract containing matter admitted to be true** is properly allowed though filed six days before hearing on appeal in short form. Mo 26SW(2d)988.

408-5 201 Iowa709, 207NW794(certification of record unnecessary); 206 Iowa201, 220NW36; 319Mo 1240, 6SW (2d)565; Mo 29SW(2d)50; MoA 287 SW816; MoA 289SW977. See also Mo 29SW(2d)91. [f] **Certification of record is necessary** to sustain record in case of denial of additional abstract. 201 Iowa709, 207NW794.

409-18 287Pa59, 134A441.

410-21 308Mo 278, 272SW72. See also MoA 26SW(2d)796.

410-25 [c] **Failure to serve abstract in time** cannot be cured by serving supplemental affidavit over protest of respondent. MoA 26SW(2d)807.

411-29 Iowa 230NW359 (amendment setting out amendment to petition filed after submission of case without notice or leave will not be considered); MoA 13SW(2d)1101. [a] **Matter properly incorporated in record.**–Iowa 232 NW633.

411-30 [b] **Correction of transcript** must be made from material in existence of record when transcript is compiled. 119 Or74, 248P163.

411-32 MoA 17SW(2d)584.

411-33½-New. In the absence of certification of the record, an amendment to the abstract must be accepted as the corrected record. 202 Iowa652, 210NW 769.

411-33½-New. On an application for permission to file an amended abstract, the question is whether granting of the petition will be likely to aid in properly adjudicating the appeal. 50SD315, 210 NW17.

411-38 127 Or11, 270P499(2dcase).

411-41 MoA 28SW(2d)147; MoA 17SW (2d)584.

412-42 218MoA629, 267SW44 (if time for filing is past); MoA 286SW123.

412-43 [a] MoA 282SW61.

412-44 Iowa 232NW156. But see 222 MoA763, 9SW(2d)673.

412-45½-New. A faulty abstract cannot be corrected by appellant after suggestion of defect by the adverse party if the time for filing is past. 218MoA 629, 267SW44.

413-58 253 IllA333.

413-61 But see MoA 18SW(2d)528.

413-62 See also 204 Iowa207, 215NW 250, 54ALR1116.

413-63 See also 207 Iowa1091, 224NW 84.

413-63½-New. Motion to strike out part of abstract made for first time in brief after cause has been submitted on appeal is not appropriate remedy. Wash 288P265.

413-64 165Ga435, 141SE65.

413-65 137Ga635, 73SE1051; 160Ga 792, 129SE108; 162Ga148, 132SE895 (not considered where approved by trial

judge after bill of exceptions was certified): 163Ga271, 136SE81; 168Ga133, 147SE380; 39GaA607, 147SE805; 39GaA606, 147SE911(2dcase); 40GaA744, 151SE556(2dcase). See also 39GaA222, 146SE914. [b] **Fact that brief of evidence cannot be considered** because of trial judge's unauthorized approval after bill of exceptions was certified does not require dismissal of bill of exceptions. 162Ga148, 132SE895. [c] **Brief of evidence consisting of colloquies between court and counsel and rulings on testimony** does not show bona fide effort to prepare brief and will not be considered. 40GaA744, 151SE556(2d case).

413-67 165Ga435, 141SE65.

414-69 163Ga512, 136SE408; 165Ga 435, 141SE65.

414-71 163Ga271, 136SE81; 164Ga450, 139SE27; 36GaA354, 136SE540. [a] (1) 164Ga450, 139SE27 (dictum); 39GaA 707, 148SE289; 39GaA222, 146SE914. [b] 39GaA607, 147SE805. [g] 37GaA489, 140SE786. [i] **Brief as statutorily required in motion for new trial** must be had, even though case is not one seeking review of judgment on motion for new trial. 39GaA607, 147SE805.

414-72 163Ga271, 136SE81.

414-74 164Ga450, 139SE27.

415-76 163Ga271, 136SE81; 165Ga151, 140SE287. [b] (1) But see GaA 155 SE356(2dcase).

415-77 170Ga550, 153SE424.

415-78½-New. Where no copy of the instrument is embodied in the record, but the brief shows that a duly recorded mortgage was introduced in evidence covering certain property at a certain place, the brief is construed to refer to a mortgage containing a proper description. 36GaA142, 135SE848.

415-82 165Ga435, 141SE65; 166Ga277, 142SE870. But see 39GaA704, 148SE 347.

416-83 165Ga435, 141SE65.

416-86 161Ga464, 131SE53.

416-87 See also 163Ga547, 136SE423.

416-95 40GaA649, 150SE857(1stcase).

416-3 77CalA341, 246P563; 121 Or590, 256P186.

417-4 Or 288P505(1stcase).

417-5 45 Ida579, 264P382 (loss of reporter's notes preventing transcript of evidence leaves matter before supreme court on judgment roll, and motion to dismiss will be denied).

417-6 245 IllA153.

417-7 47 Okl 542, 149P135.

417-9 243 IllA450. But see 75CalA25, 241P920.

418-15 159La280, 105S343; 170La355, 127S866; NJSup 138A112; 143Wash 229, 255P123; 107WVa645, 150SE2(2d case).

418-18 144Ky506, 139SW757; 143 Wash229, 255P123. See also 34Porto Rico 192. [d] **But where plaintiff and defendant appeal from different parts of same judgment,** defendant cannot use plaintiff's transcript in absence of stipulation. 68CalA46, 228P351.

418-18½-New. Parties may stipulate that their separate appeals may be heard on single transcript. 68CalA46, 228P351. [a] **Effect of such stipulation** is that transcript is sufficient for determination of both appeals. 68CalA 46, 228P351.

419-20 33Ariz235, 263P628 (necessity of bill of exceptions, statement of facts, or transcript is determined by whether either party does or does not file notice with clerk requesting it); 201Cal 683, 258P380 (notice to clerk is filed in time where court granted relief from default); 80CalA717, 252P786 (transcript of evidence may not be considered on appeal in absence of timely notice to clerk to furnish it); CalA 285P856(1st case); 12LaA8, 124S844(1stcase); 170 La654, 129S118; 131 Or242, 276P281; TexCivA 27SW(2d)374. [h] **Time allowed by statute** for requesting transcript from clerk is not extended by motion to vacate order permitting amendment of complaint made after judgment. 80CalA717, 252P786.

419-20½-New. In Porto Rico the court may not compel appellant to prepare **the transcript** where the statute gives him the alternative right to prepare the statement of the case, and he so elected. 32PortoRico 38.

420-33 86CalA106, 260P310.

420-34 144SC41, 142SE801.

420-35 [a] **Where application for order is not made within five days after perfecting appeal,** appeal will be dismissed. Ida 290P395.

420-36 See also 206Cal 263, 274P56. [a] (1) 207Cal 370, 278P859; 94CalA 217, 270P1001. (2) Time to file notice of request for transcript begins to run from notice of entry of judgment, or, if proceeding for new trial is pending, from notice of decision denying such motion or other determination thereof. 195Cal 242, 233P94. (3) Filing of notice of appeal from judgment is equivalent to notice of entry of judgment for purpose of setting time running within which to request transcript. 195Cal 242, 233P94. (4) Where motion for new trial is automatically denied by force of statute, appellant is deemed to have notice thereof of date of expiration of statutory period. 195Cal 242, 233P94. (5) Time for requesting transcript is not suspended by taking of appeal from order dismissing motion for new trial. 195Cal 242, 233P94. [d] **Notice to clerk to prepare transcript is jurisdictional** where appeal is by alternative method. 76CalA606, 245P438. [e] **Effect of failure to give notice.**–203Cal 772, 265P931.

420-37 [b] **Filing of undertaking to pay cost of preparing transcript** is not jurisdictional. 76CalA606, 245P438.

420-37½-New. Defects appearing in a request for a transcript are not jurisdictional to an appeal. 203Cal 422, 264 P747(2dcase).

420-37⅓-New. Certification by the trial court of a transcript is equivalent to relief from a default as respects notice. 203Cal 422, 264P747(2dcase).

420-41 20CalA280, 128P1023, 1026 (requirement directory and not jurisdictional); 71CalA105, 234P857. See also 90CalA753, 266P574. But see Cal 292 P123. [a] **Notice and request** may be made after determination of motion for new trial. 201Cal 198, 256P209. [b] **Applications in actions in other courts.**–202Cal 445, 261P474. [c] **Appeals of judgments of other courts.**–85CalA80, 258P1003. [d] **Statutory time** for requesting transcript must be complied with. CalA 277P145. [e] **Time for filing demand for record.**–CalA 277P145. [f] **Though request for transcript is not filed within statutory time,** transcript could be used where no notice of termination of proceedings for new trial was given. 99CalA372, 278P928. [g] **Omission to request** transcript may be cured where transcript is in fact prepared and transmitted to appellate court. 99CalA 323, 278P871 (in equity). [h] **Where transcript had been certified more than year** prior to hearing and granting of motion to terminate proceeding for written demand for transcript, order terminating proceeding was ineffectual. 102 CalA545, 283P123.

420-41½-New. The filing of notice of appeal by defendant from judgment conclusively establishes the actual knowledge of its rendition. 78CalA163, 248P292.

420-41¼-New. Appearing in open court after filing a motion for an order allowing him to file a request for a transcript, and calling attention to the notice and expressing readiness to appear, is not sufficient application within six months. 78CalA163, 248P292.

420-41¼-New. Defendant seeking an order to file a request for a transcript must move for the particular relief desired as indicated in his notice of motion. 78CalA163, 248P292.

420-42½-New. Denial of defendant's motion to direct the stenographer to deliver copies of the minutes omitted and containing prejudicial remarks is error. 131Misc46, 225NYS657.

420-42⅓-New. Under statutes a direction to the clerk given forthwith to print the record is timely. Mass 166 NE857.

420-43 71CalA105, 234P857; 116Nebr 802, 219NW242 (time to file may be extended by court for sufficient reasons); 32NM94, 251P387. [b] (2) Statement of evidence to be included in record, even though indorsed "præcipe," is not equivalent of præcipe which should state parts of record to be incorporated and should be accompanied by proof of service upon appellee. 33F(2d) 121.

420-44 [b] (2) In some jurisdictions præcipe calling for partial transcript must state question to be presented. 31NM88, 240P987 (præcipe held sufficiently to state question presented for review); 33NM116, 263P510. [c] **Præcipe held sufficient to bring up partial record.**–NM 290P742.

420-49 197Cal 79, 239P717; 89 IndA 524, 165NE262. [a] See also 33NM345. 267P62. [e] **Præcipe calling for transcript of all papers, documents, orders, and entries** held to include motion for new trial and bill of exceptions. IndA 169NE887.

420-50 32NM243, 255P405.

421-51 180 Ind666, 103NE737 (general præcipe includes judgment); IndA 149 NE451. [a] (2) Where præcipe calls for complete transcript of exceptions, motions and affidavits made part thereof are sufficiently in record. 85 IndA581, 151NE15.

421-52 36 IndA67, 75NE50.

421-53 222Ky135, 300SW337.

421-55 226Ky744, 11SW(2d)932. [a] (2) 222Ky135, 300SW337.

421-57 CalA 292P975. But see CalA 292P1088.

421-57½-New. The remedy for delay in preparing the transcript on appeal under the alternative method is in the trial court in some jurisdictions. 76 CalA606, 245P438.

421-58 18F(2d)716; 218Ky248, 291 SW49; 59Tex499.

422-59 48Nev274, 229P1095, 232P 1081; TexCivA 8SW(2d)267; TexCivA 11SW(2d)187; TexCivA 21SW(2d)599. [e] (1) 6Wis67. [g] 51 Or457, 91P540 (binding of transcript record). [o] **Underlining.**–13LaA705, 129S177(2dcase).

423-66½-New. Transcript prepared pursuant to repealed statute cannot be considered. Nev 291P704.

423-68 [b] **In Illinois.**–253 IllA414.

423-70 [a] **Pleadings** should be entered in chronological order, amended pleadings taking the place of originals. TexCivA 18SW(2d)353.

424-80 78CalA582, 248P704; 132 Okl 297, 270P562(2dcase) (order sought to be reviewed). [c] (2) Pleadings and so much of testimony and decrees as bear on point presented should be exhibited in transcript. 98Fla156, 122S 224. [h] 111La554, 35S744. [p] **In Oregon.**–122 Or179, 257P701. [q] **Error in reinstating dismissed cause** cannot be reviewed where transcript did not contain order dismissing cause, or reinstating it. TexCivA 297SW878. [r] **Minnesota supreme court rule** is intended to encourage every possible shortening of printed record that will not jeopardize arguments to be presented. 223NW677.

425-81 98Fla156, 122S224.

425-82 33PortoRico 134. See also CalA 284P1053.

425-83 [e] **Transcript of judgment roll** together with notice of appeal is sufficient record on appeal if appellant elects to prosecute his appeal on such record. 196Cal 401, 238P87.

425-84 14NY435; 58NY85; 60NY73; 1HunNY252. 4Thomps&C1, 47HowPr 162; 4HunNY804 [aff 63NY57]; 8HunNY547; 2Thomps&CNY292 [aff 59NY342]; 119 Or74, 248P163. [c] **On appeal from order granting new trial on specified grounds,** appellant is required to present only such parts of record, including facts, as are necessary for consideration of grounds stated in order. 135Wash116, 237P293.

426-85 14NY435; 58NY85; 60NY73; 1HunNY252, 4Thomp&C1, 47HowPr 162; 4HunNY804 [aff 63NY57]; 8HunNY547; 2Thomps&C292 [aff 59NY342].

426-86-88 [m] **Proceedings after judgment.**–TexCivA 276SW439.

426-89 49Nev172, 241P1079 (proceedings in regard to motion for new trial held to have no place in transcript); 123 Or615, 257P822.

427-92 197Cal 224, 239P1054.

427-95 163 IllA366.
427-99 TexCivA 285SW339; TexCivA 294SW913. See also 160Tenn294, 23SW(2d)669.
428-4 127 Or406, 257P20, 62ALR574.
428-5 But see 127 Or406, 257P20, 62 ALR574.
428-10 127 Or406, 257P20, 62ALR574. [a] **Clerk should transmit such part of record as he has** or which may have been specified with certificate showing reason why bill, statement, or transcript or missing portion of record is not transmitted. 33Ariz235, 263P628. [b] **If bill, statement, or transcript are filed after transmission of record,** clerk should transmit them with date of filing, whereupon supreme court will determine on motion to dismiss whether time for filing should be extended for good cause shown under statute. 33Ariz235, 263P628.
429-16 173 Ind105, 88NE1073, 89NE485.
429-26 See also 33PortoRico 134.
429-27 138 Okl 240, 280P822.
430-28 IndA 166NE601.
430-31 149SC69, 146SE677.
430-32½-New. A record in two volumes, neither containing the entire testimony, should contain an explanation in each volume to prevent the court from being misled. 297Pa212, 146A537.
431-33 [a] (1) 130 Okl 37, 264P910. [d] **In Mississippi.**-145Miss895, 111S450.
431-40 See also 218Ala97, 117S653.
431-43 214Ky511, 283SW1061; 88Vt479, 92A974. [a] 75CalA25, 241P920. [f] **Narrative form** is not required in all cases. 322Mo842, 16SW(2d)72.
431-43½-New. **On appeal from intervention in attachment proceedings** evidence introduced in trial of main action, but not considered in intervention proceedings, cannot be included in transcript. 107Conn425, 140A754; 126Kan521, 268P847; Ky 118SW324; 32Porto Rico 184; 37Utah457, 110P56.
432-43¼-New. The evidence should not be arranged in an order other than that in which it was introduced. 18F(2d)912.
432-45 75CalA25, 241P920.
432-48 TexCivA 28SW(2d)333. [b] **Paper impossible to reproduce without great inconvenience** may, by proper order, be sent up in original. 39F(2d)16.
432-50 135Ala227, 33S842; 75CalA25, 241P920.
432-52 201Cal 48, 255P514; 75CalA25, 241P920. [d] (2) 231Ky135, 21SW(2d)143.
433-54 [a] **Where stenographer's notes are stricken out for failure to comply with statute and rules of court,** court will not examine original documents sent up after expiration of time for perfecting appeal. Miss 119S168.
433-57-58 [b] (1) 75CalA25, 241P920. (2) Judge's order that paper be sent up in original does not dispense with requirement that they be copied in record. 39F(2d)16. [k] **Necessity for application.**-150Miss813, 117S242. [l] **In Mississippi.**-119S168. [m] **Rules not applicable to exhibits** other than printed or written documents. 39F(2d)16. [n] **Copies by court reporter** of original papers, when introduced under stipulation that he might make and certify copies, should be sent up on appeal like other exhibits. Ida 293P323.
434-59½-New. Original records which are sent to the appellate court remain part of the trial court records. Miss 121S835.
434-60 Utah 293P12.
434-63 131 Or242, 281P123(2dcase).
434-64 98Fla889, 124S443; 32Porto Rico 184.
435-66 Tex 285SW637.
435-67 TexCivA 32SW244. See 218Ala155, 117S667.
435-70 [g] **On appeal from part of decree only,** transcript must contain certified copy of entire decree, not simply part thereof. Or 288P505(1stcase).
435-71 201Cal 48, 255P514.
436-73 201Cal 48, 255P514 (judgment roll and certificate held sufficient to support appeal and prevent dismissal).
437-81 10Wyo 181, 68P14.
437-82 Or 288P505(1stcase). [f] **Service of notice of appeal on all adverse parties** must be shown. Or 288P505(1st case).
437-84 147Miss211, 113S325.
437-90 98Fla156, 122S224 (particularly where by stipulation material matters showing existence of pending cause are eliminated); 23 IndA139, 55NE41.
438-91-95 [c] **Conduct of defendant's counsel** held tantamount to stipulation that testimony omitted by plaintiff was in record. 125Misc252, 210NYS479.
438-96 294Pa562, 144A750; 294Pa567, 144A753(1stcase); 295Pa120, 144A912; 296Pa10, 145A591; 296Pa26, 145A682; 296Pa285, 145A836.
438-97 96PaSuper24. [b] (2) Pages of appeal books should be numbered at top of pages. 9BC6.
438-3 96PaSuper24.
438-4 [c] 105NJL580, 147A537 (or necessarily pertinent portions thereof). [h] **Arguments on objections** to evidence are improperly included with evidence. 108Conn659, 144A473. [i] **Printing evidence held improper.**-110 Conn166, 147A561; 110Conn178, 147A594.
439-6 [a] (1) 284Pa287, 131A281; 285Pa202, 131A731; 286Pa319, 133A510; 290Pa267, 138A841; 292Pa532, 141A446; 293Pa385, 143A129; 296Pa377, 145A915; 297Pa252, 146A896(2dcase); 298Pa256, 148A102; 298Pa329, 148A474; 299Pa333, 149A473; 300Pa242, 150A480; 300Pa428, 150A620; 300Pa885, 150A889; 300Pa507, 150A900; 87PaSuper126. (2) Where answering them in way appellant desires would not lead to just determination of ultimate matter in issue, they will not be considered. 284Pa287, 131A281. [c] (2) Statement of question involved, showing how questions arose with specific reference to place in record for further information, does not comply with court rule. 297Pa294, 147A56(3dcase). (3) Statement of questions involved should present propositions for judicial determination in such manner that point of law embraced may be readily understood in general way. 297Pa294, 147A56(3d case). [d] **Supreme court's review of case is limited** by statement of question involved. 298Pa256, 148A102.
439-7 286Pa319, 133A510.
439-8 286Pa319, 133A510.
439-10 286Pa319, 133A510; 297Pa576, 147A830.
439-12 Cal 291P412; 102CalA141, 282P978; 335 Ill 402, 167NE89.
440-20 146Wash154, 262P235.
440-21½-New. A supplemental transcript showing a conversation between the court and members of the jury immediately after recording of the verdict and before discharge, to the effect that the jury were not influenced by evidence erroneously admitted, has been held entitled to be filed in an appeal. 98CalA714, 277P759.
440-22 [f] **Supplemental transcript** correcting trial court's minutes need not be filed within original return day. 159 La280, 105S343.
440-24 77CalA248, 246P155; 152Md335, 136A648; 154Md550, 140A844 (evidence).
440-25 77CalA248, 246P155; 77CalA252, 246P157; Fla 120S764(1stcase); 231Ky135, 21SW(2d)143 (where record is made up of original papers not certified). But see 29Ariz1, 239P514.
441-29 247Mich168, 225NW545.
441-32 52SD339, 217NW507. But see Minn 232NW740.
441-33 29Ariz546, 243P404; 71CalA105, 234P857 (court's certificate insufficient); 94CalA449, 271P346; CalA 285P354 (reporter's transcript); CalA 285P875; CalA 286P1073; CalA 287P537; 42 Ida782, 247P785; 332 Ill 253, 163NE702; 252 IllA536; 119 Okl 20, 248P871; 138 Okl 240, 280P822; 140 Okl 25, 282P147(1stcase); 33PortoRico 409; Wyo 284P123 (transcript of evidence). See also 75CalA25, 241P920. [e] (2) In Oklahoma, where proceedings in error are by transcript of record, transcript must be authenticated by clerk within time fixed by statute for filing petition in error. 122 Okl 252, 254P80. [f] **Case-made not certified as transcript** cannot be treated as such. 129 Okl 125, 263P1083; 130 Okl 173, 266P435.
441-34 197Cal 224, 239P1054; 161Ga556, 131SE282; 164Ga277, 138SE155; 252 IllA536; 197 Ind556, 151NE418; IndA 165NE786; Md 149A1; 48Nev449, 232P1083, 236P678, 239P1000; 127 Or107, 269P232; 127 Or107, 270P767; 142Va550, 129SE368. See also TexCivA 10SW(2d)756. [c] (2) In absence of proper certificate that bill has been filed, longhand manuscript is not part of record. 197 Ind556, 151NE418. [g] **Sufficiency of certification.**-89 IndA477, 167NE348. [h] **Bill need not be certified by clerk of trial court** where original bill constitutes transcript. Nev 280P887.
442-35 160Ga792, 129SE102; 161Ga556, 131SE282.
442-36 164Ga277, 138SE155.
442-37 48Nev449, 232P1083, 236P678, 239P1000.
443-44 32NM246, 255P404; 127 Okl255, 260P771; 138 Okl 240, 280P822; TexCivA 28SW(2d)881.
443-45 TexCivA 28SW(2d)881.
443-48 NJ 147A394(1stcase) (held insufficient when neither certified by chancellor nor agreed upon by parties); TexCivA 19SW(2d)98 (court, in approving statement of facts filed by court reporter, agreed on by parties, need not state in certificate that it prepared statement of facts from its own knowledge).
443-49 30F(2d)881.
443-50 TexCivA 300SW123.
443-51 129 Okl 66, 263P136; 134 Okl106, 272P1029; 141 Okl 30, 283P1002(2dcase); 142 Okl 250, 286P782. [b] (2) Where six months have elapsed since final order appealed from, it is too late to supply certificate of clerk of trial court certifying to record as transcript. 129 Okl 66, 263P136. [c] **Necessity for direction of trial judge.**-137 Okl 22, 278P267. [d] **Attestation made by clerk before certificate is signed by trial judge** is nullity. 137 Okl 22, 278P267.
443-53½-New. The certificate of the clerk that the case-made is correct will not obviate the necessity for authorization by the trial judge. 129 Okl 144, 265P1078.
443-54½-New. In Georgia it is unnecessary that trial judge approve evidence reported by auditor. 35GaA19, 132SE125.
443-55 77CalA248, 246P155; 77CalA252, 246P157; 98CalA108, 276P403; 100CalA725, 280P1028; CalA 285P875; CalA 288P93; CalA 290P901; 98Fla1020, 124S750; 40GaA397, 149SE805(1stcase) (brief of evidence); 41GaA285, 152SE605; 44 Ida363, 257P38; 48 Ida306, 281P1113; MoA 292SW1068; 32NM431, 258P569; 29 OhA327, 163NE563; 100Vt161, 135A702; 146Va225, 135SE672. See also 203Cal 541, 264P1095; 38GaA814, 145SE891(2dcase). [a] (1) 40GaA397, 149SE805(1stcase) (containing brief of evidence). (5) Blueprints. TexCivA 12SW(2d)811. [h] **Notice to clerk to prepare proceedings** is not part of transcript to be certified by trial judge on appeal under Code Civ. Proc. § 953a. 88CalA238, 263P362. [i] **Rule inapplicable** to appeals from judgment wherein intermediate orders excepted to may be reviewed. Ida 292P232.
443-55½-New. **Papers certified by the clerk do not become part of record** on appeal without having been allowed and settled by the trial judge or stipulation of the parties. 50Nev99, 251P721.
444-56 67CalA531, 228P355, 356.
444-58 93CalA455, 269P665.
444-59 67CalA531, 228P355, 356; Ida 289P74; Ida 290P405.
445-60 48 Ida71, 282P378.
445-61 71CalA105, 234P857.
445-62 71CalA105, 234P857 (or stipulated by parties); 78CalA582, 248P704; 86CalA402, 260P841 (judge); 220MoA760, 277SW67 (failure of trial court to certify substituted instructions is not ground for dismissal of appeal but merely ground for not considering errors predicated thereon).
445-62½-New. A stipulation that the instructions as copied and compared by the clerk may be inserted in the transcript and that the clerk's certificates as to the number of pages may be corrected

accordingly but that other objections are not waived is not a stipulation that the instructions are those given. 71CalA 105, 234P857.

445-63 124 Okl 254, 255P680 (on appeal from county to district court, county judge may certify to transcript where clerk fails to do so).

445-65 76CalA354, 244P1089; 77CalA 341, 246P563; 90CalA792, 266P583; 98 CalA268, 276P1055 (requirements held fulfilled); 164Ga277, 138SE155. [f] (3) Only means by which instructions offered at trial and refused and clerk's record of order denying motion for new trial and specification of grounds of motion can be made part of reporter's transcript is by action of trial judge including them therein and certifying to their correctness. 195Cal 544, 234P321. (4) Where there was no reporter present to take down proceedings, trial judge is not authorized to certify to correctness of transcript. 75CalA606, 243P27. [m] (2) Case-made signed and settled by successor to judge who tried case is nullity, in absence of showing as to inability of trial judge to do so. 127 Okl 9, 260P43. [n] **Ruling by first of two judges sitting in case** cannot be reviewed under certificate of second judge. 164Ga277, 138SE155. [o] **Matters in court of original venue.**–51 Iowa220, 1 NW505. [p] **In California.**–286P1073 (affidavits constituting evidence certified by clerk improperly before court).

446-70 76CalA354, 244P1089; 77CalA 248, 246P155; 77CalA252, 246P157; 77 CalA341, 246P563; Mass 171NE14.

446-71 206Cal 456, 274P748. [h] **In Arkansas.**–169Ark368, 275SW706. [i] **Where cause was removed after appeal** from portion of decree, certification of transcript by clerk of trial court is proper. 20F(2d)873.

446-73 [i] (1) 195Cal 544, 234P321. (2) On such appeal it is competent for clerk to certify judgment roll and notice of appeal. 198Cal 85, 243P417. (3) Where clerk's transcript contains only such documents, judge may refuse to certify it. 198Cal85, 243P417. (4) Such papers are only papers which clerk is competent to certify. 198Cal 85, 243P 417. [j] **In California.**–78CalA74, 248P 256; 86CalA343, 260P824.

447-76 105Cal 268, 38P730; 71NC55.

447-79 34PortoRico 575 (clerk's disqualification is immaterial where judgment roll was certified by attorneys for appellee and another attorney acting with clerk as attorney for appellant).

447-83 32PortoRico 785 (same rule applied to certificate seeking to supply omitted order).

447-85 [b] (3) Where stenographer taking testimony is not official stenographer, his certificate is insufficient. 131 Or235, 282P1082. (4) Transcript of testimony not shown to have been filed with county clerk and certified by temporary reporter not shown to have been appointed by judge cannot be considered. Or 291P369.

448-89 IndA 169NE887 (clerk's certificate in statutory form). [a] (3) Certificate to testimony by stenographer reporting evidence, reciting that each witness was duly sworn as required by law, is incomplete for failure to certify that witness was sworn to tell truth, whole truth, and nothing but truth. 131 Or 235, 282P1082.

450-5 71CalA105, 234P857; 113 Okl 225, 240P1059.

450-9 113 Okl 225, 240P1059; 121 Okl 216; 135 Okl 104, 274P462; Wyo 289P 1094. [g] **Failure of certificate expressly to state that record "is true and correct"** does not render it insufficient where fact otherwise appears. 34Wyo 476, 245P298.

451-13 44 Ida363, 257P38.

451-15 GaA 155SE372 (sufficient); 50 Nev366, 261P652 (must state that bill contains substance of proceedings relating to point involved). [f] **Certificate of trial judge that bill was filed and served in time** held surplusage. 48Nev 32, 226P902, 233P842.

452-19 50Nev366, 261P652.

452-25½-New. Where delay in certification of a bill is due to the retention of the bill by appellant's attorney for an unreasonable time after it had been returned to him for correction, the bill will be dismissed. 37GaA637, 141SE 213.

453-31 114 Okl 253, 246P444; WVa 152SE862 (statute directory merely). [m] **Certificate held insufficient.**–218App Div201, 218NYS171.

454-38 136 Okl 145, 276P741.

454-41 154Md550, 140A844, 847 [cit CJ]; 127 Okl 255, 260P771.

454-46 136 Okl 251, 277P667; 105WVa 435, 143SE106 (held sufficient).

455-52½-New. Statement that bill contained all evidence given and offered is sufficient to bring the incorporated copies into the bill. IndA 152NE288.

455-57½-New. A certificate of the immateriality of omitted evidence is required in some jurisdictions. 32NM94, 251P387.

455-60 30NM400, 234P673, 40ALR406.

456-66½-New. Certificate of trial judge to bill of exceptions need not be under seal. 254 IllA115.

456-72 78Mont334, 254P184.

457-78½-New. The appellate court will refuse to direct the trial judge to certify the evidence where appellants flagrantly failed to follow the proper procedure in a motion to correct the findings. 109 Conn354, 146A613.

457-79 197Cal 591, 241P849; 49Philippine79. [e] (2) Trial judge will not be required to certify record on appeal from order which is not appealable. 198 Cal 85, 243P417. [h] **Writ of mandate will not be denied** because amendments, incorporation of which court had power to require, were not incorporated in reporter's manuscript. 197Cal 591, 241 P849. [i] **Where appeal is taken under alternative method under statute** mandamus is proper remedy to compel trial judge to certify portion of record which could not be certified by clerk. 198Cal 85, 243P417.

457-80 245NY564, 157NE858; 228App Div388, 238NYS588.

458-85 [a]-(2) Must be "clearly and legibly typewritten or printed in black ink," under Supreme Court Rules, rule 11. 93Fla276, 112S53. [c] **In Kentucky.**–209Ky451, 272SW917.

458-91 307Mo 455, 270P688; 245NY 564, 157NE858.

458-93½-New. If appellant fails to have transcript printed as required by rule of court, he is not entitled to have evidence considered. 73Mont139, 235P 767.

459-6 [b] (2) Verification of bill need not be printed. 233Mich597, 208NW 148.

460-11 But see 145Wash408, 260P662.

460-13-14 33Ariz235, 263P628; 168 Ark122, 269SW55; 94Fla909, 114S773 (statute relating to particular appeal held not to conflict with court rule requiring filing of transcript); 227Ky836, 14SW(2d)157; LaA 130S873; 116Nebr 802, 219NW242; 122 Or179, 257P701; 122 Or146, 257P812; Wyo 291P314.

460-15 161La18, 108S110; 167La473, 119S431; 12LaA8, 124S844; Wyo 291P 314. See also 243 IllA509.

461-21 123 Or615, 257P822. [f] **That transcript was forwarded at instance of appellee** is immaterial. 192NC37, 133SE 181.

461-23 217Ala208, 115S301 (appeal by married woman); 30Ariz120, 245P282.

461-27 10LaA50, 119S757(1stcase); 122 Or146, 257P812. [e] **Filing of transcript is jurisdictional,** and nothing will take its place. 30 OhA97, 164NE365. [f] **No jurisdiction is acquired** by supreme court unless transcript is filed in time. Nebr 233NW253.

462-31 [c] 5LaA733. [g] **Transcript, not containing transcript of original proceedings** in justice's court, not indorsed, and not showing who obtained it, need not be considered. TexCivA 297SW532.

463-32½-New. Filing of transcript without index within statutory time does not substantially violate statute although transcript is returned for proper preparation. Ida 285P1020.

463-32⅓-New. Actual filing of record or portion of it which cannot properly be filed is of no avail. Wyo 289P1094.

463-33 41F(2d)208; 213Ala659, 106S 138; 33Ariz235, 263P628; 97CalA674, 275P983; 99CalA649, 279P201; 91Fla36, 107S415; Ga 154SE698; Ga 155SE468; 38GaA743, 145SE469(2dcase); 45 Ida 566, 263P1000; 243 IllA509; 249 IllA 272; 201 Iowa137, 206NW670 (thirty days before second term at which appeal can be submitted); 224Ky107, 5 SW(2d)893; 225Ky354, 8SW(2d)377; 1LaA152; 157Miss728, 127S276 (reasonable time); Mo 28SW(2d)1008; MoA 283SW729; 74Mont308, 240P371 (holding invalid statutory provision in L. [1925] c 19); 48Nev108, 227P1018, 233 P844, 236P1101; 119 Or74, 248P163; 122 Or45, 257P337; 122 Or146, 257P 812; 123 Or615, 257P822; 122 Or315, 259P203; 32PortoRico 790; TexCivA 2 SW(2d)881; TexCivA 20SW(2d)1105 (1st case). [q] **In Iowa.**–201 Iowa757, 207NW740. [r] **In Oregon.**–122 Or179, 257P701. [s] **Construction of "first or return term" to which exceptions are returnable.**–Ga 154SE698.

464-34 122 Or179, 257P701.

464-36 206 Iowa766, 221NW449.

464-40 170La105, 127S380 (transcript filed one day after return day fixed in order of appeal is not fatal to appeal); 122 Or315, 259P203; TexCivA 283SW 903; 145Wash408, 260P662.

465-42 19F(2d)710; 34PortoRico 690 (time runs from time of filing notice of appeal in lower court); 35PortoRico 935 (time runs from date on which transcript of evidence is approved); TexCivA 1SW(2d)1114 (transcript, statement, and bill of exceptions); TexCivA 2SW(2d)881. [a] 161La18, 108S110; 164 La1017, 115S130; 11LaA27, 122S503; 13LaA234, 126S600. [d] (1) 50Nev42, 249P1068. [e] **In Porto Rico.**–33Porto Rico 798. [f] **Time of arrival at clerk's desk** rather than time of posting determines time of filing. Nebr 233NW253.

465-45 122 Or315, 259P203; 32Porto Rico 790.

465-46 [a] **Word "within,"** as used in Oregon statute, means not beyond thirty days from time appeal is perfected. 132 Or596, 277P820.

465-51 32PortoRico 790 (governor's proclamation closing public offices construed in effect as declaring holiday within rule).

465-52½-New. The time for filing the transcript on appeal by the alternative method under the California statute and supreme court rules begins to run from the certification of the transcript. 76 CalA606, 245P438.

465-53 197Cal 591, 241P849. [f] **Right of appellant to statutory time for preparation of transcript** after termination of proceedings for new trial is not impaired by fact that he filed his notice of intention to appeal and request for transcript before required time. 197 Cal 591, 241P849.

466-55 213Ala659, 106S138; 205 Iowa 913, 218NW926; 122 Or179, 257P701; 123 Or615, 257P822; 122 Or315, 259P 203; 33PortoRico 780 (extension improperly refused). [a] (1) 122 Or179, 257P701. (2) 122 Or179, 257P701. [h] (4) Though court's action is ex parte it is final and cannot be rescinded and appeal defeated. 158La727, 104S632. (5) Order inadvertently rendered after return day, granting to appellant an additional delay for filing transcript of appeal after return day, will be rescinded by the supreme court on its own motion; such an order cannot save appeal. 9LaA 104, 118S844. [i] **Motion to set aside appellant's default** in not filing transcript of record, points, and authorities, within time prescribed by law and court rules, and extend time for filing transcript, is addressed to sound discretion of appellate court. 96CalA630, 274P605. [j] **Effect of extension.**–170La10, 127S 347(2dcase). [k] **Extension to prepare and file** does not extend time to reduce exceptions to writing. Wyo 293P370.

466-56 [a] **Mistake in order extending time** in stating that it was in application of defendant instead of plaintiff does not require dismissal of direct appeal. 37Wyo 61, 258P1018.

466-58 35PortoRico 105.

466-59 34PortoRico 690 (extension of time for preparing). [a] See also 33NM 318, 267P70.

466-60 51Nev26, 267P497; 131 Or350, 270P476(1stcase) (to extend time for filing printed abstracts and briefs); 34

PortoRico 690 (extension of time for filing after approval by trial judge).

466-61 161**La**18, 108**S**110; 167**La**473, 119**S**431; 126 **Or**487, 245**P**1117, 266**P**634, 270**P**778 (transcript filed in time). [a] (1) 161**La**18, 108**S**110. (2) 161**La**18, 108**S**110. (3) 13**LaA**706, 129**S**175. (6) Other instances. 126 **Or**487, 245**P**1117, 266**P**634, 270**P**778.

466-61½-New. In some jurisdictions an order extending the time in which to file a transcript is not premature when made after the entry of judgment and service and filing of the notice of appeal and filing of the undertaking. 132 **Or**596, 277**P**820.

467-63 [b] **Recital in order extending time**, that it was made on oral motion of official court reporter because he was not able to furnish transcript of evidence in time, does not require dismissal of direct appeal. 37**Wyo** 61, 258**P**1018.

467-67 [c] (2) 128 **Or**403, 240**P**890. (3) Statute in force before application for extension has been held to require notice of filing. 122 **Or**297, 258**P**562. (4) Under L. § 554, as amended by Gen. L. (1927) c 316, three days' notice is required, and order made without notice is void. 122 **Or**315, 259**P**203. (5) Notice required to be in writing held jurisdictional. 127 **Or**455, 272**P**259.

467-68 27**Ariz**566, 233**P**1050; 224**Ky** 107, 5**SW(2d)**893; 9**LaA**104, 118**S**844 (order inadvertently rendered after return day canhot save appeal); 5**LaA**661; 50**Nev**416, 264**P**980 (sufficient compliance with rule); 122 **Or**179, 257**P**701; 123 **Or**615, 257**P**822; 122 **Or**315, 259**P** 203; 129 **Or**116, 276**P**683(2dcase); 132 **Or**596, 277**P**820; 34**PortoRico** 690; 35 **PortoRico** 935. [b] **Federal circuit court of appeals has power to extend time** so as to authorize filing of return to appeal, though extension made by district court after time therefor had expired was inoperative. 33**F(2d)**119.

467-69 123 **Or**615, 257**P**822. [c] 9**LaA** 128, 118**S**842; 9**LaA**104, 118**S**844.

467-70 244 **IllA**234.

467-71 [a] 243**Mich**530, 220**NW**888.

468-75 See also **CalA** 286**P**1073.

468-75½-New. Where appellant was justified in believing that the clerk had sufficient time after the notice was given; 167**La**359, 119**S**256.

468-84½-New. An application by appellant for an extension of time in which to file his abstract owing to the delay of the clerk of the trial court in entering the judgment appealed from will be granted as a matter of course. 200 **Iowa** 1222, 206**NW**102.

468-94½-New. Where stenographer failed to make transcript of evidence within period of extension, motion to compel him to do so is held equivalent to motion for new extension. 32**PortoRico** 414.

468-94¼-New. Court certifying evidence amounts to extension of time to file transcript. 103**Conn**750, 131**A**593.

468-95 122 **Or**315, 259**P**203.

469-99 [a] (1) 116 **Or**532, 241**P**1010. (2) 116 **Or**532, 241**P**1010.

469-5 201**Cal** 152, 255**P**791; 102**CalA** 393, 283**P**79; 163**La**575, 112**S**491; **MoA** 21**SW(2d)**214 (where lower court had improperly granted equitable relief and delay in serving abstract was slight); 102**NC**487, 9**SE**488; 131 **Or**23, 278**P**580 (1stcase) (filing of abstract or transcript of testimony is not jurisdictional where transcript is filed in time); 70**Utah**441, 261**P**9; 145**Wash**408, 260**P** 662. [c] **Statute directory.**–74**CalA**273, 240**P**61. [f] **Trial court may terminate proceedings** on failure to file transcript in time. 74**CalA**273, 240**P**61. [g] **Term time appeal** held admissible where transcript was not filed within sixty days after appeal bond. 87 **IndA**624, 158**NE**516. [h] **Day's delay** in filing transcript of testimony and abstract does not require dismissal of appeal, where transcript filed in time. 131 **Or**23, 278**P**580 (1stcase).

469-6 **Cal** 289**P**620; 89**Fla**499, 105**S**101 (duty of appellate court under statute to dismiss); 91**Fla**36, 107**S**415; 48 **Ida** 75, 279**P**422; 88 **IndA**160, 163**NE**599(1st case); **IndA** 170**NE**107; 206 **Iowa**766, 221**NW**449; 224**Ky**107, 5**SW(2d)**893; 225**Ky**354, 8**SW(2d)**377; 161**La**18, 108**S** 110; 162**La**601, 110**S**828; 167**La**473, 119 **S**431; 74**Mont**308, 240**P**371; **OklCr** 292 **P**1046(1stcase); 84 **Or**102, 164**P**586; 122 **Or**179, 257**P**701; 122 **Or**146, 257**P**812; 34**PortoRico** 690; **TexCivA** 278**SW**927 (appeal dismissed); **TexCivA** 278**SW**931 (appeal dismissed); **TexCivA** 20**SW(2d)** 1105(1stcase); 144**Wash**564, 258**P**507; 37**Wyo** 527, 264**P**86; 38**Wyo** 70, 264**P** 704. [a] (2) If statement of facts or transcript of reporter's notes is not seasonably filed, transcript is not part of record and may be stricken from files. 27**Ariz**566, 233**P**1050. (3) Where delay in filing transcript is inexcusable, document will be struck from record. 33**Ariz** 235, 263**P**628.

470-7 24**F(2d)**198; 37**F(2d)**511; 169 **Ark**368, 275**SW**706; 74**CalA**273, 240**P** 61; 199**Cal** 190, 248**P**665; 205**Cal** 478, 271**P**751; 72**CalA**139, 236**P**953; **CalA** 283**P**981; **CalA** 287**P**148; **CalA** 289**P**905 (1stcase) (dismissal denied); 89**Fla**499, 105**S**101; 34**GaA**169, 128**SE**691; 38**GaA** 743, 145**SE**469(2dcase); 38**GaA**683, 145 **SE**503(2dcase); 45 **Ida**566, 263**P**1000; **Ida** 290**P**395; 244 **IllA**234; 200 **Ind**608, 165**NE**545; 89 **IndA**17, 165**NE**560(1st case); 89 **IndA**12, 164**NE**320; 201 **Iowa** 757, 207**NW**740; 205 **Iowa**913, 218**NW** 926 (acknowledgment of timely service by appellee is immaterial); 224**Ky**107, 5**SW(2d)**893; 164**La**290, 113**S**851; 164 **La**1017, 115**S**130; 167**La**59, 118**S**692(1st case) (presumption of abandonment); 170**La**402, 127**S**882; 11**LaA**283, 123**S**519 (1stcase); 12**LaA**700, 127**S**1(2dcase); 13**LaA**706, 129**S**175; **LaA** 130**S**662; **LaA** 130**S**873; 1**LaA**195(1stcase); 2**LaA**182; 3**LaA**478; 4**LaA**502; 4**LaA**553; 5**LaA** 663; 148**Md**387, 129**A**347; 152**Miss**437, 119**S**170; 118 **Or**122, 246**P**209; 131 **Or** 242, 276**P**281; **Utah** 284**P**1000; 144**Wash** 564, 258**P**507; 37**Wyo** 527, 264**P**86; 38 **Wyo** 511, 268**P**1025; **Wyo** 287**P**83. [d] (1) 32**PortoRico** 856. [e] **Where reporter was at fault causing delay in filing transcript**, appeal will not be dismissed. 74**CalA**273, 240**P**61. [f] **In Louisiana.**–162**La**601, 110**S**828.

471-8 243 **IllA**509; **Mo** 30**SW(2d)**983; **Vt** 145**A**258(1stcase).

472-9 72**CalA**139, 236**P**953 (no estoppel shown); 202 **Iowa**1109, 211**NW**479; 163**La**575, 112**S**491. [c] **TexCivA** 2**SW** (2d)312.

472-10 208 **Iowa**596, 226**NW**140.

472-12 79**CalA**756, 251**P**243 (where appellant's brief raised points not requiring transcript); 70**Utah**441, 261**P**9. [b] 40 **Ida**481, 234**P**686.

472-14½-New. The supreme court will refuse to dismiss where respondent has not presented or filed a certificate of the clerk as required by rules. 50**Nev**99, 251**P**721.

472-15 202 **Iowa**1109, 211**NW**479. Contra 35**PortoRico** 197.

473-16 202 **Iowa**1109, 211**NW**479; 35 **PortoRico** 582.

473-19 202 **Iowa**1109, 211**NW**479.

473-21 213**Ala**659, 106**S**138; 76**CalA** 489, 244**P**952; 91**CalA**129, 266**P**964 (congestion in printing office); 102**NC** 487, 9**SE**488; **TexCivA** 272**SW**252; **Tex CivA** 13**SW(2d)**390; **TexCivA** 29**SW(2d)** 823. [b] But see 116 **Or**626, 239**P**108.

474-24½-New. In some jurisdictions it is held that the matter of diligence in presenting the record on appeal should be a subject of investigation in the trial court. 89**CalA**160, 265**P**298.

474-27 96**CalA**630, 274**P**605; **TexCivA** 289**SW**91.

475-28 72**CalA**139, 236**P**953; **Md** 147**A** 662(1stcase).

475-33 [a] (2) Court ordering new bond substituted where original appeal bond had been lost within sixty days. 220**Ala**664, 127**S**233. [b] (3) Where appellant, incapacitated by injury, had not requested preparation of transcript. 91**CalA**119, 266**P**828. [d] **Failure of mail** to deliver in time for regular delivery is not sufficient excuse. **Nebr** 233 **NW**253.

476-36 213**Ala**659, 106**S**138.

476-47 148**Md**387, 129**A**347.

477-50 102**CalA**393, 283**P**79; **Nebr** 233 **NW**253; 32**PortoRico** 414. [a] (1) 68 **CalA**302, 228**P**872. (5) Failure of stenographer to file notes on time imputable to appellant. 32**PortoRico** 589. (6) Failure of stenographer to apply for further extension, equivalent to appellant's failure to prosecute. 32**Porto Rico** 589. (7) Motion stating that stenographer had not complied with order of court regarding preparation of transcript of evidence and urging that coercive means be used held to amount to motion for an extension until transcript delivered to mover. 32**PortoRico** 414. (8) Lack of transcript of evidence ascribed to appellant and not to stenographer. 35**PortoRico** 250. [c] (3) Clerk's illness and lack of help will not prevent dismissal. **Ga** 155**SE**468.

477-51 197**Cal** 800, 241**P**851; 162**La** 601, 110**S**828; 10**LaA**474, 120**S**655; 10 **LaA**430, 120**S**658; **LaA** 130**S**855; 148 **Md**387, 129**A**347; 322**Mo** 218, 14**SW(2d)** 590, 62**ALR**835; **Wyo** 287**P**83. [g] (2) Failure of clerk to transmit completed record chargeable to appellant. 32 **PortoRico** 589. [h] **Illness of clerk and shortage of clerical help** does not prevent dismissal for failure to transmit exceptions within time. **Ga** 154**SE**698.

478-54 45 **Ida**566, 263**P**1000; **Nebr** 233**NW**253; **TexCivA** 289**SW**91; **Wyo** 287**P**83.

478-55 **Nebr** 233**NW**253. See also 32 **PortoRico** 589.

479-59 **CalA** 287**P**148.

479-60 205**Cal** 478, 271**P**751.

479-66 [b] (1) 185 **IllA**1. (3) Where transcript is actually presented to clerk for filing in time and received for such purpose, it will be deemed to have been so filed, though file mark was not placed on it at time. 124 **Or**71, 240**P**881. [c] **Transmission of record to supreme court by private person**, though violating rule of supreme court, complies with statute and is not ground for dismissal. **Ga** 155**SE**18.

479-66½-New. The record is not timely completed by filing specifications of errors and the clerk's certificate of original papers and omitting certified copies of journal entries. 37**Wyo** 527, 264**P**86.

480-70½-New. Where notice of appeal and supersedeas bond have been lost or destroyed, county judge and clerk of county court are competent witnesses, 124 **Okl** 254, 255**P**680.

480-70¼-New. and books and records of the court, if they contain entries relating thereto, are competent evidence. 124 **Okl** 254, 255**P**680.

480-70¼-New. Where the **record** is filed with the clerk, it is no longer subject to control of the court but is the voice of the court. 192**NC**37, 133**SE**181.

480-71 [j] **Motion will not be heard or granted** where proceeding in error must be dismissed. 38**Wyo** 26, 264**P**97.

480-74½-New. The parties with the consent of the trial court could withdraw the bill of exceptions before transmission to appellate court and resubmit the case to the jurisdiction of the trial court. 44**Philippine**62.

480-74¼-New. The supreme court will permit the withdrawal of the record or case-made for the purpose of including matter omitted only where it appears that such matter is of record in the court from which the appeal is taken. 136 **Okl** 251, 277**P**667.

481-75 [f] (1) 48 **Ida**95, 279**P**619(1st case). (7) Purchasers at sheriff's sale must be served with case-made on appeal from order confirming sale. 114 **Okl** 125, 244**P**413.

481-76 **MoA** 283**SW**729 (delivery held sufficient). [f] **Service of copy of reporter's transcript.**–41 **Ida**491, 239**P**277. [g] **Time is fixed by date on which case is reset for hearing**, and under statutes and rules abstract served thirty days prior thereto is timely. 315**Mo** 781, 287 **SW**337.

481-77 104**Conn**112, 132**A**473; 39**GaA** 613, 147**SE**914; **MoA** 26**SW(2d)**1008; 114 **Okl** 125, 244**P**413. [j] **In Nevada.**–48**Nev**32, 226**P**902, 233**P**842.

482-81 [d] **In absence of prejudice**, failure to serve copy of clerk's transcript on adverse party within time, by oversight, does not warrant dismissal. **Ida** 293**P**319.

482-86 98**Fla**156, 122**S**224; **Ida** 287**P** 205; **Ill** 172**NE**45; 202 **Iowa**652, 210 **NW**769; 3**LaA**553; 3**LaA**589; 13**LaA** 189, 127**S**421(1stcase); **Mass** 171**NE**14; **Mich** 230**NW**911; **MoA** 271**SW**873; **MoA** 24**SW(2d)**165; 198**NC**549, 152**SE**

627; 198NC782, 153SE396. [b] (4) Motion to dismiss appeal cannot be sustained on theory that no motion for new trial nor exception to overruling of same are shown by abstract, where such facts appear anywhere in record (Mo 8SW(2d)879), (5) or on theory that abstract and bill of exceptions were commingled (Mo 8SW(2d)879). (6) Identification of exhibits in abstract index by alphabetical letters does not require dismissal of appeal under Sup. Ct. Rules, rule 16. 319Mo 250, 3 SW(2d)352(2dcase). (7) Failure to note in abstract exception to granting of motion for new trial is not ground for dismissal. MoA 30SW(2d)1094. (8) Other instances. 34NM436, 283P52. (2dcase). [c] **Dismissal on appellant's motion** is not favored where he was in part responsible for defects complained of. TexCivA 274SW179. [d] **Where abstract of record and bill of exceptions are so commingled that one cannot be distinguished from other,** appeal will be dismissed. MoA 1SW(2d)848.

483–87 35Ariz264, 276P523(1stcase); 90CalA753, 266P574; 93CalA437, 269P722; 41GaA668, 154SE292(2dcase); Ill 173NE108; 214Ky511, 283SW1061; 154Miss481, 122S535; NJSup 136A709; 34NM344, 280P922(1stcase); 34Porto Rico 543; TexCivA 283SW212; 137 Wash704, 242P26.

483–88 TexCivA 274SW179; TexCivA 16SW(2d)432.

484–89 34NM206, 279P562(2dcase) (certiorari for diminution of record).

484–90 121 Oh125, 167NE365.

484–91 Fla 126S279 (variance not ipso facto authorizing, but may furnish cause for dismissal); MoA 8SW(2d)879; MoA 8SW(2d)1020.

484–93 222MoA510, 281SW75.

484–94 [a] **Motion for diminution of record** to include matters properly parts of bill of exceptions will be denied when made after time within which court had time to settle bill of exceptions. 15F(2d)491.

484–94½–New. A stipulation which is not in the record or abstract will not be considered. 318 Ill 616, 149NE591.

484–94½–New. Appeal from an order dismissing proceedings for a bill of exceptions to be used on two appeals will be denied where the record does not show such proceedings or order and no appeal from such an order. 201Cal 48, 255P514.

484–94¼–New. Where an appeal is without merit, an alleged violation of rules in presenting the appeal will not be considered. 259Mass339, 156NE678.

484–94⅓–New. Where, notwithstanding a material omission, the record shows a vital error regardless of what might be shown by the portions omitted, a reversal will follow. 154Miss481, 122S535.

484–95 216Ala380, 113S84; 23AlaA91, 121S448(1stcase); 98Fla1020, 124S750; 48 Ida306, 281P1113; 50Nev366, 261P652 (positive requirements cannot be ignored); 31NM88, 240P987. [b] **Failure of record to show separate authentication of specifications of error** is not ground for dismissal of appeal where it does not appear that omission was due to fault of appellant. 34Wyo 476, 245P298. [i] **In Missouri.**–322Mo 218, 14SW(2d)590, 62ALR835. [j] **Where clerk's certificate was not made till after expiration of time for filing record,** appeal must be dismissed. Wyo 289P1096(3dcase).

485–96 86CalA343, 260P824.

485–97 88CalA284, 263P299.

485–98 98Fla1020, 124S750; 40GaA633, 151SE42; 40GaA745, 151SE561.

485–99 80CalA61, 251P338.

485–99½–New. A statute preventing dismissal for want of technical conformity to statutes or rules of practice in bringing up cases for review will not prevent the dismissal of a bill of exceptions for lack of certification. 161Ga 556, 131SE282.

485–99⅓–New. In some jurisdictions the appellate court will ordinarily allow on appeal a record not properly certified to be completed. 30Ariz194, 245P353.

485–99¼–New. A motion for such relief will not be granted where a substantial right of the adverse party would be denied. 30Ariz194, 245P353.

485–1 179Ark1199, 14SW(2d)545(1st case); 71CalA683, 236P174; 160Ga792, 129SE108 (failure to include evidence consisting of affidavits); 165Ga207, 140 SE364; 166Ga143, 142SE687 (motion to dismiss denied on record as without merit); 168Ga40, 146SE767; 37GaA 489, 140SE786; IndA 168NE471(2d case); 170La706, 129S137; 11LaA303, 123S415; 126Me603, 139A85; 146Miss 672, 113S175; 221MoA300, 278SW90; MoA 296SW1045; 295Pa241, 145A75; 34PortoRico 593; 99WVa622, 129SE 397. [a] (8) Failure to incorporate testimony at hearing on demurrer to exceptions to final report of receiver held not to require affirmance of order overruling exceptions. 175Ark318, 299SW 29. (9) Decree will not be affirmed against claim that finding is contrary to evidence, though record is incomplete, where everything germane is presented. MoA 279SW1059. (10) Where judgment roll is properly before court, appeal will not be dismissed because of absence of record of testimony prepared under Code Civ. Proc. § 953a. 203Cal 772, 265P931. [d] **In absence of evidence incorporated in record,** court will only consider pleadings. 214Ky31, 282 SW551.

486–3 168La251, 121S760; 250Mich 556, 231NW76. But see 125Me206, 132 A421.

486–4–5 12LaA420, 125S328; 221MoA 300, 278SW90.

486–4–5½–New. That evidence is not in record does not deprive the appellate court of jurisdiction. IndA 168NE471 (2dcase).

486–6 MoA 286SW123; MoA 13SW (2d)1101; MoA 17SW(2d)983; 50Nev 24, 249P565. See also MoA 256SW1100. But see MoA 21SW(2d)201.

486–9 225AppDiv780, 232NYS56; 227 AppDiv760, 236NYS475 (appeal dismissed and matter remitted to supply defect). But see 103Conn41, 130A86. [a] (2) Appeal not dismissed because copies of findings and judgment served on respondents were not signed where those on file were signed by trial judge. 51Nev38, 26SP45.

486–10 TexCivA 283SW212.

486–12 Fla 128S877(1stcase); 10LaA 146, 122S75; MoA 13SW(2d)1101; 113 Okl 228, 240P1067; 137 Okl 153, 278P 392; TexCivA 272SW247.

487–13 113 Okl 228, 240P1067.

487–15½–New. , or dismiss the appeal, 35 OhA42, 171NE614.

487–16 41F(2d)625.

487–17 174Ark1180, 298SW357; 321 Mo 162, 9SW(2d)950.

487–18 40GaA633, 151SE42.

487–20 161Ga832, 132SE206; 141SC13, 139SE203.

488–21 21F(2d)414; 162Ga139, 133SE 855. [e] **Failure of appellant or his counsel to authenticate draft of bill of exceptions** will not prevent consideration where no prejudice results. 69 CalA437, 231P598. [f] **Failure to abbreviate bill properly** is not ground for disregarding it. 74Mont176, 240P829.

488–22 TexCivA 292SW586; TexCivA 24SW(2d)75.

488–23 MoA 10SW(2d)956; 137 Okl 300, 279P354(2dcase); TexCivA 297SW 501; Utah 269P518.

488–29½–New. An appeal will not be dismissed for failure of the abstract to refer to pages of the transcript, where the record is short and can be corrected. Utah 276P908.

488–29⅓–New. Appeal will be dismissed on motion of respondent where appellant quoted at length from testimony instead of ultimate facts and only testimony most favorable to appellant was shown. Mo 19SW(2d)294(2dcase).

488–31 See also TexCivA 291SW650.

489–32 101CalA373, 281P518(1stcase) (where nonobservance of rule was brought to appellants' attention); Fla 126S279 (transcript containing "copies" instead of "recited" proceedings); 143 Miss221, 108S505 (reversed and remanded where no transcript); 79Mont256, 255P1058; 33NM385, 268P569 (dismissal required on partial record where, under statute, præcipe does not specify question sought to be reviewed); 195 NC862, 142SE221. See also 33NM631, 274P51. But see 33NM102, 263P509. [a] 79Mont256, 255P1058. [f] **In Texas.–CivA** 297SW506. [g] **Failure of præcipe for partial transcript to state questions to be reviewed** is ground for dismissal of appeal. 33NM116, 263P 510. [h] **In Wyoming.**–289P1094.

489–33 See also 11LaA345, 123S353. [f] **Failure of judge** to file findings and conclusions within ten days after adjournment of court held no excuse for not filing transcript on appeal. Tex CivA 297SW506. [g] **Failure to file findings and conclusions** is ground for reversal where request therefor was timely. TexCivA 297SW506.

489–36 16F(2d)177; 165La407, 115S 637; MoA 283SW729; MoA 285SW168; 48Nev449, 232P1083, 236P678, 239P 1000 (judgment roll omitted and transcript not properly prepared and certified). [b] **In California.**–200Cal 739, 255P178. [c] **Defects in request for transcript** are not ground for dismissal where sufficient transcript is duly presented. 203Cal 721, 265P817.

489–39½–New. Technical objections are not favored, the appellate court reviewing the decisions on all facts before the lower court wherever possible. 203Cal 422, 264P747(2dcase).

490–40 176Ark11, 1SW(2d)801; 39GaA 707, 148SE289; 40GaA397, 149SE805 (1stcase) (no brief of evidence presented).

490–41 35GaA19, 132SE125. See also 146Va827, 132SE685.

490–42 146Miss17, 111S442; 197NC 126, 147SE741; Tex 9SW(2d)445 (no answer). But see 222MoA510, 281SW 75.

490–43 179Ark1199, 14SW(2d)545(1st case); 97Fla219, 120S334(3dcase).

490–45 7SaskL419, 20DomLR88, 29 WestLR273.

490–47–48 23AlaA552, 129S312(2d case); NC 155SE564 (no summons and complaint in record); TexCivA 271SW 246; TexCivA 27SW(2d)294. But see 222MoA510, 281SW75. [c] **Jurisdiction of trial court** being only question as to completeness of record, it is not only right but duty of appellate court to notify parties of deficiency and afford opportunity to perfect. TexCivA 18SW (2d)712.

491–54 But see 315Mo 781, 287SW337.

491–56 213Ala14, 104S130; MoA 21SW (2d)645 (omission of certain exhibits); 49RI 421, 143A697.

491–57 162Ga139, 133SE855.

491–59 161Ga605, 131SE476.

491–61 [a] (7) Appeal not dismissed simply because document not offered in evidence is included in transcript. 158 La1083, 105S85.

492–65 159La18, 105S85 (will ignore document not offered in evidence and included in transcript).

492–68 98Fla941, 124S732; 49Nev172, 241P1079; 219AppDiv557, 220NYS435; 26CanSC58; 47CanSC382, 10DomLR289, 12EastLR210 (last two of which hold that either party may have included in record written reasons of one of judges below not available till after appeal case had been formally settled). [j] 107 Conn89, 139A507. [n] **Instructions.**–69 CalA4, 230P961. [o] **Amendments on appeal.**–219AppDiv557, 220NYS435. [p] **Where order from which appeal is sought to be taken is not appealable,** case is not brought within jurisdiction of reviewing court by amendment of record under statute. 207 Iowa842, 223 NW864. [q] **New matter being repetition of matter in transcript,** amendments not allowed. 155SC340, 152SE 652.

493–70 110Conn217, 147A673 (corrections in jury's finding will not be made merely to secure meticulous accuracy of details). See also 19BC80, 15DomLR 659, 26WestLR882, 5 WestWkly1288. [a] **Findings may not be corrected** to include evidential facts. 106Conn315. 138A122.

493–70½–New. That date of filing in-

dorsed upon bill of exceptions incorrectly indicated that bill was filed prior to certification by judge does not require bill to be dismissed after correction of the mistake. 160Ga638, 128SE807.

493-70½-New. A bill of exceptions may be remanded for correction in accordance with facts existing at the time it was settled. 241Mich383, 217NW329.

493-70¼-New. Neither bill of exceptions nor record may be remanded for addition of action taken in the trial court to meet error assigned and argued before the appellate court and under advisement. 241Mich383, 217NW329. [a] **Supplemental opinion of trial court given after argument and submission to appellate court** cannot be brought up to refute affidavit filed on motion for new trial. 241Mich383, 217NW329.

493-70½-New. An amendment of the record to show the entry of judgment after the service and before the filing of the notice of appeal will be denied as futile. 37Wyo475, 263P620.

493-70¼-New. Sheriff's return of service of bill of exceptions cannot be amended so as to show that the copy served was not a true copy. 37GaA624, 141SE316.

493-70½-New. Transcript of record is a duly certified and sealed public document, and any alteration of the transcript, except under open and public sanction of the court from which it emanated, is inexcusable. TexCivA 19SW(2d)156.

493-71 196Cal401, 238P87; 69CalA4, 230P961; 78CalA74, 248P256; 167Minn248, 208NW803; 140Miss151, 106S16; Mo 28SW(2d)1008; TexCivA 280SW609; TexCivA 48W(2d)1046. [e] **After term at which judgment was rendered** record can be amended only upon minutes in possession of court or judge. Wyo 288P1058.

493-72 69CalA4, 230P961.

493-74 78CalA74, 248P256; 155Miss804, 125S338; TexCivA 286SW584 (dictum). [j] (3) Trial court cannot amend record more than six months after certification of transcript. 202Cal319, 260P793.

493-77 69CalA4, 230P961.

493-78 71CalA105, 234P857; 136 Okl122, 276P721; TexCivA 48W(2d)1046. But see TexCivA 286SW584.

494-79 196Cal395, 238P78; 202Cal319, 260P793; 78CalA74, 248P256; 227Ky735, 13SW(2d)1028; 140Miss151, 106S16; Miss 120S820; 155Miss804, 125S338; TexCivA 15SW(2d)1102; Tex CivA 29SW(2d)815; 40Wyo89, 275P101. [c] **In Nevada.**–49Nev172, 241P1079.

495-82 30PortoRico98.

495-85 196Cal401, 238P87; 78CalA74, 248P256; 78CalA582, 248P704; 155Miss804, 125S338; TexCivA 283SW591.

495-86 TexCivA 286SW584.

495-87 2LaA430; 6LaA297.

495-89 101CalA144, 281P411(1stcase) (unless prejudicial to adversary); MoA 283SW720; 123 Or280, 261P55. [c] 85CalA15, 258P985 (under statute). [g] **Evidence not considered by trial court in granting change of venue** cannot be incorporated in transcript for purpose of sustaining legality of transfer. 32PortoRico619.

496-91 19BC45. [c] **In Porto Rico.**–32PortoRico589.

496-92 Miss 121S835; 129 Okl66, 263P136 (correction of case-made); 101Vt285, 143A394. [a] (1) 136 Okl145, 276P741. (4) 122 Okl252, 254P80. (6) Case-made may be amended to show order overruling motion for new trial at any time before final decision, though time for filing petition in error and case-made has expired. 127 Okl65, 259P869. (7) Appellate court is without jurisdiction to permit case-made to be withdrawn for purpose of having it duly authenticated. 130 Okl37, 264P910. (8) Case-made cannot be amended after expiration of time to appeal so as to show attestation of clerk of trial court to certificate and signature of trial judge. 134 Okl106, 272P1029. [h] **Before final decision.**–127 Okl65, 259P869. [i] **While appeal pending.**–101CalA144, 281P411(1stcase).

496-93 169Ga192, 149SE873 (failure, through oversight, to suggest diminution of record till statutory time has elapsed, is no ground for petition suggesting diminution); 50Nev366, 261P652.

496-95 98CalA579, 277P364.

496-96 202Cal319, 260P793.

497-98 TexCivA 300SW972.

497-99 71CalA105, 234P857; 259Mass259, 156NE424.

497-3 But see TexCivA 10SW(2d)763.

497-4 75Mont466, 244P277 (refused); TexCivA 15SW(2d)1090. [d] (2) On motion for rehearing it is too late for appellant to attack for first time controlling finding of trial court, and undertake to substitute such finding with directly contrary finding. TexCivA 8SW(2d)226.

498-6 107Conn77, 139A505; Miss 121S835; TexCivA 274SW179.

499-14 220MoA489, 274SW103; MoA 27SW(2d)1036; MoA 30SW(2d)1094.

499-18 Miss 120S820. [b] **Service of notice on attorney for adverse party** is sufficient. TexCivA 280SW609.

499-20½-New. Reasons for failure to follow statutory proceedings to correct should be stated in application. 284Pa538, 131A591 (trial court should be petitioned before removal of record to appellate court).

499-20¼-New. Upon application to the trial court for authentication of items improperly included in the clerk's transcript, respondent may object to an inclusion in the record before allowance thereof. 78CalA74, 248P256.

499-21 Miss 121S835; TexCivA 297SW1070. [b] **Notice of recertification of transcript.**–67CalA420, 227P938.

499-23 169Ga192, 149SE873 (transmission of portion of record held unnecessary). But see 155Miss804, 125S338. [c] **In California.**–67CalA531, 228P355, 356.

500-24 84IndA264, 151NE137.

500-31 118 Or122, 239P816.

500-33 29Ariz546, 243P404; 67CalA424, 227P940; Mo 28SW(2d)1008 (subject to amendatory motions); MoA 283SW720; 26CanSC58; 47CanSC382, 10DomLR289, 12EastLR210. [d] **In Alabama.**–213Ala292, 104S641.

500-34½-New. The appellate court itself will not assume to change or amend a record duly certified to it on appeal. 216AppDiv805, 215NYS802.

500-34¼-New. Letter giving reason for defects in record and requesting clerk to inform court is insufficient for consideration of appeal. 13LaA189, 127S421(1stcase).

500-35 104Conn743, 133A579; 107Conn242, 140A105 (court will order transcript of proceedings added to finding); 107Conn79, 140A119 (fact is stricken only where found without evidence, and added only if admitted or undisputed). But see 111Conn544, 150A700.

500-38 See also 106Conn731, 138A58.

500-38½-New. Findings will not be corrected unless correction has been made part of appeal. 106Conn315, 138A122.

500-38¼-New. Findings of specific facts by the trial court cannot be set aside on appeal except in the manner provided by the rules of the reviewing court. 110Conn271, 147A822.

501-39½-New. In Pennsylvania application to appellate court must state reasons for not following statutory method and be accompanied by certificate from trial judge that he desires to consider matter. 284Pa538, 131A591.

501-41 216Ala216, 113S61; 88CalA284, 263P299; CalA 287P537 (return of transcript for approval denied); 7LaA98; 8LaA481; LaA 129S226(1stcase); LaA 129S260; 265Mass396, 164NE453; NH 151A452; 216AppDiv805, 215NYS802; 38Wyo511, 268P1025; 78SaskL389, 20DomLR497, 7WestWkly679. [b] (1) 80CalA271, 251P697; 10LaA703, 120S645. [f] **Appellate court may properly authorize temporary withdrawal of record** for correction and amendment. 202Cal445, 261P474. [g] **In Louisiana.**–167La861, 119S479(1stcase); 10LaA169, 120S663(1stcase). [h] **Remanding for amendment of record.**–265Mass396, 164NE453.

501-41½-New. An appeal from an order recommitting the case to another master on the ground that the master had made a finding on the cause of action set out in an amended bill, although not originally pleaded, will be treated as a return of record, although such order ordinarily could not be reviewed until an appeal from the final decree, unless reported under statute. 265Mass396, 164NE453.

501-42 [b] **Successful plaintiff cannot require appellate division** to pass upon suggestions by remanding case for correction. Mass 172NE216.

501-46 128 Or140, 247P1077. [a] (2) To supply exception to overruling on motion for new trial, where it does not appear such exception was taken. 37Wyo509, 263P711.

501-47 202Cal319, 260P793 (supreme court has power more than six months after certificate to permit withdrawal of transcript for amendment of bill of exceptions); Wyo 288P1058.

501-47½-New. Nor will appellate court allow application to be made to lower court for allowance of bill of exceptions when no such bill has ever been presented to that court. 115 Or666, 239P829.

501-47¼-New. , or where the omission is due to laches of the parties seeking relief. 37Wyo509, 263P711.

502-48 [a] **It is duty** of superior court to follow implicitly, and not travel outside terms of rescript remanding case to it for limited purpose of enabling it to determine whether record is correct or should be amended. 265Mass396, 164NE453.

502-48½-New. An order allowing an amendment and recommitting the case to another master must be set aside where the motion does not state that the subject matter was fully and fairly tried and that the amendment is to make the record conform to the rescript. 265Mass396, 164NE453.

502-49 [a] (2) Remand for amendment does not discharge case as whole and send it back to superior court for exercise of its general jurisdiction. 265Mass396, 164NE453.

502-50 69CalA4, 230P961.

502-50½-New. In proceeding to review action of court in correcting transcript showing what instructions were given by court, what at request of parties, and what were requested and refused it becomes important to know what were requested by appellant and refused. 69CalA4, 230P961.

502-50¼-New. It is not error to deny a motion that a report of the evidence be certified where the time therefor had expired. 258Mass190, 154NE856.

502-51 178Ark406, 10SW(2d)886, 61ALR1138; Miss 121S835 (stipulation that clerk's amendment of record may be made supplement to authentic record). But see TexCivA 17SW(2d)130.

502-55 [a] 152Miss312, 119S914. [b] (2) Amendment to case-made relates back to date of filing. 127 Okl65, 259P869. [c] (2) Record is not affected by unauthorized amendment. MoA 2SW(2d)215. [d] **Where appellant supplies defects in record by addenda,** motion to dismiss will be denied. MoA 256SW111. [e] **Appellant filing bill as qualified,** without objection, is bound by such qualification. TexCivA 294SW290.

502-57 320Mo954, 8SW(2d)966; Nev 280P887. But see 101Vt285, 143A394.

503-59½-New. Respondent waives objections to errors, irregularities, and omissions in an appeal, not amounting to jurisdictional defects by obtaining additional time to file reply brief by stipulation, and order of court and by failure to move promptly for dismissal of appeal. 48Nev108, 227P1018, 233P844, 236P1101.

503-59¼-New. A rule that informalities are waived by not filing a motion within thirty days after the filing of the transcript has been held inapplicable to a transcript filed without authority after expiration of the time therefor. TexCivA 289SW91.

503-59¼-New. Nor is this rule appli-

cable to a transcript filed without authority after the time fixed by the clerk. **TexCivA** 289SW91.

503–61 48**Nev**449, 232**P**1083, 236**P**678, 239**P**1000.

503–63 216**Ala**4, 112**S**433; 48**Nev**449, 232**P**1083, 236**P**678, 239**P**1000. [e] **Laches.–TexCivA** 286**SW**614.

503–64 **MoA** 22**SW(2d)**56; **NC** 154**SE** 829; 119 **Okl** 98, 248**P**1107; **TexCivA** 22**SW(2d)**1088.

503–65 91**PaSuper**588. But see 101**Vt** 285, 143**A**394. [g] (1) 255 **IllA**161.

504–74 105**Conn**342, 135**A**397, 53**ALR** 481; 109**Conn**662, 145**A**50; 109**Conn** 602, 145**A**61; 110**Conn**546, 148**A**549; **TexCivA** 274**SW**179. But see 104**Conn** 742, 133**A**575. [b] **Transcript cannot be corrected** by additional abstract. **MoA** 297**SW**730. [c] **Attempt to secure alteration** in bulk in finding by substituting draft-finding cannot be considered. **Conn** 151**A**492.

504–74½–New. An attempt to have claims of law incorporated in the finding constitutes an attempt to rectify the appeal and must come up on the exceptions. 105**Conn**342, 135**A**397, 53 **ALR**481 (Gen. St. §§ 5830, 5836).

504–75 **CalA** 290**P**534; 149**Miss**517, 111**S**457; **Wash** 286**P**95. [j] (7) By certificate of stenographer as to order inadvertently omitted from record. 32 **PortoRico** 785. (8) By certified copy of record entries. **MoA** 286**SW**123 (failure of abstract proper to show filing of motion for new trial). (9) Failure to file bill of particulars at trial or make it part of record. **Utah** 290**P**367. [k] **Facts included in effect in finding** need not be supplied. 106**Conn**264, 137**A** 753. [l] **Service.–TexCivA** 27**SW(2d)** 374.

505–76 41**GaA**668, 154**SE**292(2dcase); 149**Miss**517, 111**S**457.

505–78 255 **IllA**161.

505–79½–New. or by the clerk, 149 **Miss**517, 111**S**457.

505–82 41**F(2d)**356.

505–82½–New. The appellate court will not permit a copy of a contract to be attached to an amended answer which was filed over an objection after a stipulation on the agreed statement of facts was filed. 31 **OhA**375, 166**NE**691.

505–84 215**Ala**166, 110**S**13; 67**CalA**379, 227**P**645; **Fla** 128**S**31(3dcase); 11**LaA** 345, 123**S**353; 220**MoA**760, 277**SW**67 (purported instructions supplied in place of lost instructions and shown to be incorrect); 50**Nev**42, 249**P**1068; 32**NM**246, 255**P**404; **TexCivA** 288**SW** 279. See also 245**NY**573, 157**NE**862; **Wash** 290**P**855. [e] **Motion to strike** held defective in form on ground "that evidence did not warrant finding." 105 **Conn**429, 135**A**568. [f] **Matters necessary for determination of issue** of adjudication of bankruptcy, such as petition in bankruptcy and creditors' reply thereto, cannot be stricken from statement of fact. **TexCivA** 19**SW(2d)**445. [g] **Motion too general.–Nev** 292**P**620.

506–85 67**CalA**379, 227**P**645; 83**Colo** 207, 263**P**715; 48 **Ida**596, 284**P**1027; 83 **Mont**581, 273**P**1055; 48**Nev**449, 232**P** 1083, 236**P**678, 239**P**1000; 50**Nev**42, 249 **P**1068; **Nev** 281**P**603(2dcase); 36**Wyo** 540, 257**P**5.

506–86 334 **Ill** 193, 165**NE**616.

506–87 9**F(2d)**63 (transcript not certified and incomplete); 29**F(2d)**403; **TexCivA** 22**SW(2d)**1088. But see 150 **Wash**676, 274**P**698.

506–89 But see 48 **Ida**71, 282**P**378.

506–93 223**Ky**482, 3**SW(2d)**1092; **TexCivA** 299**SW**349. [b] **Showing required** by one moving to strike errors from transcript. **Fla** 126**S**279.

506–93½–New. A transcript will not be stricken from the record for an omission of the clerk to sign his certificate to the record. 145**Miss**895, 111**S**450.

506–94 30**PortoRico** 98.

506–95 **TexCivA** 18**SW(2d)**732.

506–95½–New. Findings of fact, resting on reasonable inferences from the testimony, cannot be stricken out. 109 **Conn**662, 145**A**50.

506–96 23**AlaA**108, 121**S**457(2dcase); 220**Ala**444, 125**S**608(1stcase); 41 **Ida** 491, 239**P**277; 228**Ky**471, 15**SW(2d)** 286; **Miss** 119**S**168; 31**NM**50, 240**P**811. [a] 35**PortoRico** 105. [b] (4) **Bill of exception copied from stenographic report of trial,** permitted by local law, is not to be stricken out. 220**Ala**210, 124**S**420. [d] **On appeal from order denying motion for new trial** reporter's transcript, not properly identified as one used at hearing and not settled by trial judge, will be stricken on motion. 48 **Ida**71, 282**P**378.

506–98 141**Miss**196, 106**S**524.

506–98½–New. An entire transcript on appeal under the alternative method should not be stricken because a portion of the evidence was taken in the absence of the official stenographer after the court had set aside the submission of the case where the parties knew of, and failed to object to, the absence of the reporter and the court certified to the correctness of the portion including the proceeding down to the first submission, and such portion is sufficient for a determination on the merits. 200**Cal** 261, 252**P**727 (objectionable portion severable from remainder).

506–98½–New. In such case the portion of the transcript showing proceedings taken in the absence of the official stenographer is not subject to motion to strike in the absence of prejudice to the moving party. 200**Cal** 261, 252**P**727 (presumption that moving party was benefited).

506–98¼–New. Failure of the record to show that statutory notice to the stenographer to transcribe the minutes was filed is not ground for striking the stenographer's transcript where timely notice was shown to have been actually given and the clerk's certificate shows the filing of the original notice with him. 149**Miss**517, 111**S**457.

507–99 22**AlaA**226, 114**S**285 (court cannot ex mero motu strike bill of exceptions not signed within time); 228**Ky** 317, 14**SW(2d)**7082; **Miss** 130**S**293; 48 **Nev**108, 227**P**1018, 233**P**844, 236**P**1101 (motion to strike out parts of record made more than two months after filing of transcript held too late); **Tex CivA** 285**SW**627; **TexCivA** 22**SW(2d)** 475(2dcase). But see **TexCivA** 22**SW** **(2d)**1088.

507–8½–New. Failure to serve memorandum of errors on motion for a new trial within the time has been held not to require striking the transcript under assignment for insufficiency of evidence. 50**Nev**205, 255**P**999.

507–8⅓–New. Where the certificate to a bill of exceptions cannot be amended to conform with the statute, the bill must be stricken. 50**Nev**366, 261**P**652.

507–8¼–New. A bill of exceptions cannot be stricken ex mero motu for not being signed within the time allowed, in the absence of motion to strike. 22 **AlaA**226, 114**S**285.

507–8½–New. In some jurisdictions failure to file the note of the order in which the testimony was introduced is not ground for striking out the evidence. 153**Miss**545, 120**S**822.

507–8⅓–New. Where the only evidence introduced on the trial was depositions and instruments of written evidence, such evidence will not be stricken from the record for failure to notify the stenographer attending court, who merely made a note of the order in which the evidence was introduced. 153**Miss** 545, 120**S**822.

507–8½–New. A motion to strike a transcript should be denied, where appellant was unable to procure a complete transcript sooner because of the reporter's delay and tendered a completed transcript with his opposition to the motion. 130 **Or**444, 277**P**722.

507–8⅓–New. The expedient of withdrawing a motion to expunge from the record certain matter as being scandalous and impertinent after the motion had been favorably decided may not be successfully resorted to to prevent a decision on an appeal of the important question involved. 225**AppDiv**92, 232 **NYS**282.

507–8⅓–New. A motion to strike certain pages of the settled record because the judge's certificate was insufficient and because the transcript was uncertified is properly denied, where movant fails to point out defects in the certificate, and the alleged defects were stated only in the form of legal conclusions. 54**SD**608, 224**NW**230.

507–8 1/10–New. A motion to strike a transcript on the ground that the appeal can be taken only on the judgment roll will be denied where an examination thereof is necessary to determine the limited scope of the appeal. 48 **Ida** 536, 283**P**1040.

507–10 130**Kan**647, 287**P**906 (court may send for record on its own initiative); 145**Miss**895, 111**S**450; **Miss** 121**S**835; **TexCivA** 286**SW**584. [a] 32**NM**233, 252**P**1000. [b] **Applications to perfect record are usually granted as matter of course,** unless not seasonably made or appear to be futile. 82**NH**472, 136**A**261.

507–11 152**Miss**437, 119**S**170.

507–12 145**Miss**895, 111**S**450.

507–18 Contra **TexCivA** 172**SW**739. [a] **Where appellant denies recital of respondent's abstract that part of evidence has been omitted,** appellate court will cause original bill of exceptions to be certified to ascertain truth. **MoA** 25 **SW(2d)**566.

508–19 67**CalA**420, 227**P**938; 67**CalA** 424, 227**P**940; 47 **Ida**322, 276**P**35; 141 **Miss**196, 106**S**524; 149**Miss**197, 115**S** 345; **Nev** 292**P**1; **Nev** 292**P**620; 103 **NJL**628, 139**A**12; **TexCivA** 286**SW**584.

508–21 [a] **Motion for diminution will be granted without prejudice** to consideration of validity and effect of order amending bill of exceptions where such question may more conveniently and satisfactorily be considered and determined in connection with appeal upon its merits. 195**Cal** 546, 234**P**1113.

508–23½–New. Appellant is entitled to certiorari to preserve right of appeal, not lost by laches or neglect, pending final settlement of case by judge in compliance with statute. 190**NC**775, 130**SE**616.

508–23½–New. Appellant is entitled to certiorari where failure to perfect appeal is due to act or error of court or officers and not any neglect chargeable to him. 190**NC**775, 130**SE**616.

508–24 98**Fla**908, 124**S**810; 126 **Or**91, 267**P**820.

508–26 **Miss** 121**S**835.

508–27 [b] **Necessity for application to trial court in first instance.**–195**Cal** 544, 234**P**321.

508–28 215**Ala**19, 108**S**760; **Or** 290**P** 1098(1stcase).

509–32 159**La**280, 105**S**343.

509–32½–New. Certiorari will be denied where no statement of the case was served or no record was filed in the supreme court. 193**NC**540, 137**SE**585 (1stcase).

509–33 53**TexCivA**154, 115**SW**117, 123; 58**TexCivA**255, 124**SW**688.

509–34 31**NM**48, 240**P**810.

509–35 67**CalA**420, 227**P**938 (omission of notice of appeal); 141**Miss**196, 106**S** 524; **TexCivA** 286**SW**584. [e] **Record on appeal can be corrected** only by certiorari. **TexCivA** 275**SW**260. [f] **Nunc pro tunc orders of trial court.**–67**CalA** 424, 227**P**940. [g] **Instructions.**–100 **CalA**512, 280**P**379(1stcase).

509–36½–New. An amended motion for a new trial, attempted to be made the basis for assignments of error in the appellate court, is not jurisdictional in the supreme court on writ of error, in the sense that the order for its transmission will be made as incident to the exercise of jurisdiction on a motion for certiorari to perfect the record. **Tex CommnA** 12**SW(2d)**967.

509–37½–New. Appellant's motion to have certain documents certified and filed as part of clerk's transcript will be granted where such documents are such as would be included in judgment roll and may be certified by clerk alone. 67 **CalA**531, 228**P**355, 356.

509–38 199**Cal** 699, 251**P**205; 69**CalA**1, 230**P**208 (order directing judge to certify whether appellants waived findings on other issues denied); **Miss** 120**S**820; 82**NH**472, 136**A**261; **TexCivA** 276**SW** 724; **TexCivA** 10**SW(2d)**185 (deficiencies in sheriff's return not requiring dismissal of writ). See also **Wis** 233**NW** 98.

509–41 31**F(2d)**243; 196**Cal** 683, 239 **P**323; 78**CalA**74, 248**P**256; **CalA** 288**P**

93; CalA 292P1011(1stcase); Miss 121 S835; Nev 292P1; TexCivA 30SW(2d) 668. [a] **Where deposition was not marked for identification,** appellate court cannot direct it to be certified as part of record. CalA 288P93.

510-44 TexCivA 18SW(2d)712. See also 202Cal 277, 259P1102.

510-45 96CalA682, 274P755.

510-46½-New. Motion for diminution of record will not be granted to permit insertion of new orders not yet made. 48 Ida608, 284P1028.

510-46½-New. Motion to remand for further hearing and not diminution of record is remedy where trial judge refused to consider evidence on motion for new trial. 48 Ida810, 285P478.

510-46¼-New. Matters not considered by trial court cannot be brought up by suggestion of diminution of records. 48 Ida810, 285P478.

510-49 197 Ind385, 151NE4.

510-49½-New. Filing motion to strike motion for diminution of record filed under court rule which goes to merits of motion for diminution is bad practice. Nev 280P887.

510-50 171Fed365, 96CCA257; 120NC 29, 26SE650. See also 83Colo 406, 266 P211.

510-54 [c] (2) Certiorari may be applied for to correct lower court's minutes, even at time of argument and though payment was rendered three years before. 159La280, 105S343. [d] **Want of diligence** in acting to compel clerk to certify printed transcript by waiting until argument on case entered into. 9F(2d)63.

511-68 166Minn346, 207NW737, 46 ALR1167.

511-70 GaA 155SE43; 126 Or91, 267 P920, 268P980.

511-72½-New. Paper filed in mandamus proceeding denominated "decision of court" will be trusted as a judgment on application for order directing trial judge to certify whether findings of facts were waived by parties, where the parties agreed that such paper was a judgment. 69CalA1, 230P208.

511-74½-New. Motion for diminution for certification of service of notice of intention to move for new trial must give reason for seeking certificate in such manner. 48 Ida608, 284P1028.

512-75 215Ala683, 112S207.

512-82½-New. Where the minutes of the court below show that papers omitted from the record were duly filed, it is incompetent to contradict the minutes by evidence of the clerk or other officers of the court. 141Miss196, 106S524.

512-84 197 Ind385, 151NE4.

512-90½-New. An assignment of error that the original complaint in unlawful detainer before a justice of the peace was not sworn to, as required by statute, is without merit, where the clerk's return to a writ of certiorari discloses that such complaint was signed and sworn to. MoA 14SW(2d)474.

512-91 214Ala385, 108S38; 214Ala593, 108S536, 46ALR1201; 215Ala112, 110S 27; 30Ariz45, 243P916, 44ALR754 (minute entry in record that trial by jury had been waived binding on reviewing court); 197Cal 224, 239P1054; 204Cal 570, 269P614 (record containing no evidence contra to findings prevents contention of insufficiency of evidence); CalA 262P808; 91Fla39, 107S247; 91 Fla1007, 109S320; 95Fla984, 117S507 (2dcase); 41GaA383, 153SE93(1stcase); 233 IllA591, 593 [citCyc]; 237 IllA475; 128Kan167, 277P51; 213Ky317, 280SW 1090; 125Me509, 131A574 (record made at trial is ruling, on appeal); 127Me 167, 142A377; 236Mich471, 210NW478; 241Mich608, 217NW919; Miss 120S820; 153Miss545, 120S822; Miss 121S835; Miss 121S846; 155Miss227, 124S331; Miss 130S293; 221MoA409, 282SW59 (waiver of jury); Nebr 229NW894 (as to dates of final order and filing of motion for new trial); 33NM356, 267P 74; 190NC187, 129SE403; 191NC369, 131SE731; 192NC834, 134SE483; 193 NC851, 138SE121; 194NC674, 140SE 442; 194NC745, 140SE732; 194NC742, 140SE733; NC 153SE845; OhA 172NE 694; 117 Okl 194, 245P997; 117 Okl 156, 246P833; 127 Okl 27, 259P556, 558 [citCJ]; 131 Or235, 274P918(2dcase); 155SC356, 152SE646; TexCivA 271SW 302; TexCivA 289SW127; TexCivA 23 SW(2d)449; 101Vt285, 143A394; 149 Va157, 140SE269; 152Va520, 147SE 220; 147Wash101, 265P462; Wash 290 P704; Wash 292P418. But see 39Wyo 14, 273P545. [d] (1) 196Cal 395, 238P 78. (2) Are controlling in controversy concerning demand for jury on certain date. 101CalA218, 281P681. [g] **Transcript prima facie correct** where no objection in trial court. 284Pa538, 131A 591. [h] **Transcript is not evidence that things not shown** did not occur. 147Wash375, 266P186. [i] **In absence of appeal from order settling case or transcript of record,** court can consider only trial court's statement of what transpired at trial. 151SC280, 148SE 870.

514-92 116 Oh640, 157NE477; 127 Okl 27, 259P556, 558 [citCJ]; Utah 290P 161.

514-93 Miss 121S835; 190NC187, 129 SE403; 127 Okl 27, 259P556, 558 [cit CJ]; 129 Or216, 277P107.

514-94 216Ala527, 113S587, 588 [quot CJ]; LaA 130S354; Miss 121S835; 218 MoA468, 279SW249; 127 Okl 27, 259P 556, 558 [citCJ].

514-95 171Ark607, 286SW811; 161Ga 401, 131SE176; Miss 121S835; MoA 294SW433; 151Wash480, 276P300.

514-96 196Cal 395, 238P78; 72CalA383, 236P364; 91CalA206, 266P975; Ga 155 SE18; 330 Ill 640, 162NE139; 254 IllA 489 (stipulation of parties); 89 IndA 17, 165NE560(1stcase); Miss 121S835; MoA 6SW(2d)338; NJ 139A490; 116 Oh640, 157NE477; 127 Okl 27, 259P556, 558 [citCJ]; 12PaDist&Co 420; TexCivA 283SW1112; TexCivA 299SW349; 151Wash480, 276P300 (oral argument on appeal); Wyo 288P1058. [c] **Clerk's minutes.**-122 Okl 104, 251P496.

514-96½-New. Record cannot be contradicted by assignment of error. 233 IllA591.

515-99 TexCivA 283SW1112.

515-1½-New. Allegations in a motion to set aside a judgment are assumed to be true when the motion was demurred to. 224 IllA367.

515-2 215Ala112, 110S27; 218Ala616, 119S635; 171Ark477, 284SW537; 174 Ark1161, 298SW494; 207Cal 39, 276P 993; Cal 291P412; 81CalA427, 254P606 (statement of court regarding record in former action); 91CalA103, 267P172 (judgment roll); CalA 289P169; 94 Fla490, 114S317; 168Ga301, 147SE571; 237 IllA475; 120Kan444, 243P1051; 213 Ky720, 281SW816; 13LaA253, 126S534 (2dcase); Miss 120S820; 315Mo 781, 287SW337; 219MoA389, 271SW829; MoA 296SW479; MoA 24SW(2d)715; 191NC727, 133SE7; NC 155SE566; 32 OhA16, 165NE746; SD 231NW935; TexCivA 299SW528; TexCivA 8SW(2d)561; TexCivA 10SW(2d)441; TexCivA 11 SW(2d)234; TexCivA 23SW(2d)840; TexCivA 26SW(2d)430; TexCivA 30SW (2d)577; 151Va143, 144SE606; 141 Wash186, 251P127; 100WVa508, 130 SE666. But see 98Fla197, 123S666. [a] 171Ark1188, 285SW378. [d] **Where appellant fails to observe statutory method for bringing into record,** by bystanders' bill of exceptions, its exceptions to the rulings of the trial court as contained in the judgment roll, the appellate court is bound by such recitals. 168Ark892, 272SW684. [e] **Where record does not show supporting proof therefor,** recital in decree does not entitle reviewing court to consider it as fact. 154Md477, 141A111.

515-4 See also TexCivA 16SW(2d)550.

515-4½-New. A recitation in an order granting a petition for the receiver, that it was granted, raises no presumption against the record showing that the original petition was filed thereafter. TexCivA 288SW566.

515-6 214Ala593, 108S536, 46ALR1201; 218Ala599, 119S644; 219Ala162, 121S 543; 171Ark103, 283SW31; CalA 284P 950; 91Fla589, 110S252; 161Ga629, 131 SE505; IndA 149NE652 (evidence made part of record by incorporation in bill of exceptions); 125Me88, 131A1 (reviewing court will not correct bill by search of record); Me 131A205; 153Md 102, 137A506; 264Mass112, 162NE225; 249Mich281, 228NW778; 116 Oh640, 157 NE477; 34 OhA499, 171NE357; 127 Or 406, 257P20, 62ALR574; 123 Or 615, 257P822; 126 Or395, 270P474 (2dcase); TexCivA 275SW849; Tex CivA 294SW284; TexCivA 295SW 628; TexCivA 2SW(2d)470; TexCivA 4SW(2d)241; TexCivA 4SW(2d)1023; Utah 280P230; Vt 146A252. See also TexCivA 279SW543. [e] **Bill complaining of remarks by plaintiff's counsel** does not show error, court having qualified bill by stating that argument was proper. TexCommnA 14SW(2d)1015. [f] **Qualification of bill by court** binds party who accepts it. TexCivA 16SW (2d)380. [g] **Qualification, appended by court to bill of exceptions** to admission of testimony, that it was admitted without objection, or elicited on cross-examination by appellant, held sustained by record. TexCivA 13SW (2d)419. [h] **Truth or falsity of bill of exceptions** lies with trial court. 34 OhA 499, 171NE357. [i] **Party accepting bill of exception with qualification** by trial judge is bound by qualification. TexCivA 18SW(2d)942. [j] **Court's qualification to bill of exceptions** must be accepted as true. TexCivA 28SW(2d)611.

516-8 Ga 155SE18; 233Ky464, 26SW (2d)20.

516-9 40GaA633, 151SE42; 116 Oh640, 157NE477.

516-10 220Ala72, 124S113 (that judge back-dated signature on bill not signed in time may be shown by affidavit).

516-10½-New. Where it affirmatively appears that the judge exercised discretion in favor of certifying the transcript upon respondent's objection to certification, it sufficiently appears that appellant was granted relief although not applying therefor on presenting excuses for failure to give the clerk timely notice to prepare the transcript. 201 Cal 26, 255P199.

516-14 127 Okl 27, 259P556; 128 Okl 165, 261P913; 135 Okl 74, 274P27; 286 Pa449, 133A642; TexCivA 284SW632.

516-14½-New. In the absence of evidence in a statement of facts controverting the court's conclusion, a finding cannot be reviewed on appeal. TexCivA 15SW(2d)664(2dcase).

516-16 22AlaA217, 114S275 (presumptively true); 201Cal 152, 255P791; 69 CalA669, 232P169; 163Ga547, 136SE 423; 48 Ida596, 284P1027; 228Ky390, 15SW(2d)251; 48Nev32, 226P902, 233 P842 (whether bill is properly settled and allowed is for appellate court); NJ 148A761; 129 Or216, 277P107; TexCivA 271SW936; TexCivA 2SW(2d) 881; 70Utah456, 261P15; 145Wash571, 261P96; Wash 290P820. See also NC 154SE829. But see Okl 293P262(1st case).

517-18 Okl 292P66(2dcase); Okl 292 P569.

518-27½-New. or by aliunde unsworn attack on motion to dismiss on ground that evidence sent up was not evidence filed by auditor; 35GaA19, 132SE125.

518-28½-New. Appellee's denial of a statement contained in an abstract will be taken as true in the absence of certification of the record. 203 Iowa103, 212NW559.

518-28¾-New. Recitation in additional abstract that part of evidence has been omitted from appellant's abstract will be taken as true unless denied. MoA 25SW(2d)566.

518-31 106Conn287, 137A751.

518-32 203Cal 126, 262P1094.

518-33 106Conn287, 137A751; 39GaA 603, 147SE897; IndA 169NE886; TexCommnA 12SW(2d)196; TexCivA 11 SW(2d)355; TexCivA 23SW(2d)757.

518-34 171Ark477, 284SW537; 203Cal 180, 263P198; LaA 124S636; TexCivA 276SW787.

518-37 21AlaA589, 110S697; 171Ark 477, 284SW537; 168Minn402, 210NW 282; 49Nev411, 248P46 (on appeal on judgment roll alone outside records showing correction of clerical error in judgment pending appeal held proper to be considered); 133 Okl 58, 270P 1111; Okl 292P569; Okl 293P187; Okl 293P262(1stcase). But see 22AlaA217, 114S275.

519-40½-New. Where there is a conflict between a special ground of a motion for new trial and the brief of the

evidence, the latter will prevail. 40GaA 314, 149SE389.

519–42 138SC157, 135SE881.

519–51 Nebr 227NW313.

519–61 203 Iowa82, 212NW377.

519–64 172Ark485, 289SW321; 82Colo 294, 259P1041.

520–65 20AlaA531, 104S895; 173Ark 1128, 293SW1041; 170Ga153, 152SE 246; 37GaA489, 140SE786; IndA 155 NE614; TexCivA 298SW177 (exclusion of evidence shown by bill is controlled by record showing its admission).

520–66 81Colo 454, 256P315; 224Ky 274, 6SW(2d)264; 227Ky735, 13SW(2d) 1028.

520–67 190NC151, 129SE190; 198NC 448, 152SE405; 133 Okl 58, 270P1111; Okl 293P187. [a] **Judgment as part of record proper** will control statement of case on appeal. 190NC151, 129SE190.

520–68 TexCivA 299SW649 (incorrect filing date on cover wrapper).

521–70 TexCivA 281SW604; TexCivA 286SW599; TexCivA 293SW641; Tex CivA 295SW646; TexCivA 297SW879 (in case of conflict between bill of exceptions and agreed statement of facts, latter controls); TexCivA 300SW206; TexCivA 1SW(2d)925; TexCivA 6SW (2d)206; TexCivA 18SW(2d)782; Tex CivA 32SW(2d)494. See also TexCivA 11SW(2d)385; TexCivA 12SW(2d)263; TexCivA 12SW(2d)1054.

521–72 221MoA1173, 300SW997. But see Iowa 229NW673.

521–76 214Ala612, 108S515; 214Ala 671, 108S561; 220Ala664, 127S233; Ark 32SW(2d)447; 200Cal 284, 253P 137; 69CalA653, 231P1005; 76CalA58, 243P869; CalA 287P562; 82Colo 288, 259P1025; 108Conn173, 143A51; 98Fla 156, 122S224; 164Ga462, 139SE15; Ga 155SE767; 45 Ida464, 262P862; 46 Ida 474, 270P618; Ill 161NE486; 235 IllA 112; 204 Iowa421, 213NW765; 129Kan 280, 282P749; 215Ky604, 286SW690; 11LaA303, 123S415; Mass 168NE78 (arguments based on rulings and evidence not made part of bill of exceptions cannot be considered); Mo 271SW749; 220 MoA743, 276SW409; 221MoA1033, 295 SW515; MoA 24SW(2d)715; MoA 27 SW(2d)1046; MoA 28SW(2d)379; MoA 30SW(2d)646; 81Mont170, 261P962; 82Mont434, 268P512; Mont 289P388; 50Nev298, 258P232; NJSup 130A814; 34NM540, 286P157 (error cannot be predicated on doubtful state of record); 247NY332, 160NE388; 194NC64, 138SE 412; 198NC782, 153SE396; 116 OhSt 16, 155NE555; 23 OhA448, 155NE149; 24 OhA509, 156NE608; 117 Okl 194, 245 P997; Or 284P179; Or 288P1053; 289 Pa429, 137A605; RI 132A733; 134SC 10, 131SE778; TexCommnA 6SW(2d) 86; TexCommnA 23SW(2d)312; Tex CivA 270SW1042; TexCivA 278SW243; TexCivA 279SW312; TexCivA 288SW 481; TexCivA 299SW458; TexCivA 4 SW(2d)1029; TexCivA 32SW(2d)238; TexCivA 32SW(2d)483; Utah 278P585; Utah 280P729 (docket not made part of bill of exceptions); 100Vt443, 138A782; 142Va342, 128SE604. [c] (2) Controverting affidavit to plea for change of venue must be set out in detail for review of motion granting plea. TexCivA 278SW243. [d] **Trial court's rulings can be considered** only in light of facts appearing in finding. 106Conn315, 138 A122. [e] **Failure to abstract necessary parts of record constitutes waiver of** objection. 338 Ill 228, 170NE308. [f] **While reviewing court should construe record against unsuccessful party,** record must be construed reasonably. Vt 147A698.

522–77 24 OhA1, 156NE528; 24 OhA 509, 156NE608; 67Utah487, 248P127.

522–78 183 Ind88, 108NE226; 194NC 64, 138SE412; 84 OhSt424, 95NE913, AnnCas1912C737; TexCommnA 12SW (2d)991; TexCivA 271SW142; TexCivA 271SW145; TexCivA 271SW180; Tex CivA 271SW242; TexCivA 271SW410 (not fundamental error); TexCivA 271SW441 (amounting to fundamental error); TexCivA 275SW423; Tex CivA 275SW510; TexCivA 278SW314 (fundamental errors); TexCivA 278SW 453 (fundamental error did not appear); TexCivA 279SW939 (appeal from instructed verdict raises questions of fundamental error); TexCivA 280SW 916; TexCivA 281SW328; TexCivA 283 SW689; TexCivA 285SW1110; Tex CivA 294SW276; TexCivA 294SW900; TexCivA 5SW(2d)178; TexCivA 8SW (2d)522; TexCivA 9SW(2d)425; Tex CivA 22SW(2d)706 (error held not fundamental); TexCivA 29SW(2d)853; Tex CivA 32SW(2d)369. See also TexCivA 275SW617. [a] (1) TexCivA 270SW 1042; TexCivA 288SW861. (5) Sustaining special exceptions after filing of general and special denial is fundamental error. TexCivA 278SW314. (6) Fundamental error held shown. Tex CommnA 12SW(2d)961; TexCivA 12 SW(2d)1106; TexCivA 13SW(2d)974; TexCivA 14SW(2d)926; TexCivA 15SW (2d)137. (7) Fundamental error held not shown. TexCommnA 13SW(2d)74; TexCivA 10SW(2d)1016; TexCivA 13 SW(2d)398; TexCivA 15SW(2d)159. (8) Fundamental error need not be sought in statement of facts. TexCivA 20SW(2d)405. (9) That certain findings or all findings are unsupported by facts is not fundamental error because necessitating investigation of facts to discover it. TexCivA 27SW(2d)547. [b] **By transcript.**–125 Okl 186, 256P50. [c] **"Errors apparent of record" do not include** those which are ascertained by reading statement of facts. TexCivA 22SW(2d)1104. [d] **Error in judgment appearing on face of record** held fundamental. TexCivA 24SW(2d)796.

522–78½–New. The appellate court will not decide a question presented, but not suggested in the statement of questions involved. 291Pa387, 140A148.

522–78½–New. Fundamental error does not exist where all evidence must be examined to ascertain its existence. Tex CivA 28SW(2d)837.

523–79 220Ala140, 124S388; TexCivA 292SW956. But see 245 IllA211.

523–80 82Colo 391, 260P524; MoA 19 SW(2d)531.

523–83½–New. Court will not consider assignment that another cause was pending when case was tried where record of pending cause not brought before appellate court. 142Va702, 128SE364.

523–84 91CalA333, 266P1009; 323Ill 498, 154NE296; 339 Ill 384, 171NE531; Ill 173NE274; 231Ky416, 21SW(2d) 656; LaA 130S257(1stcase); Mass 168 NE736; 250Mich556, 231NW76; 292Pa 184, 140A860; TexCivA 285SW655; 192 Wis480, 213NW474 (estoppel). See also 214Ala422, 108S253; NJSup 129A 202. [b] (1) 98CalA50, 276P387(2d case); (2) CalA 292P672. (7) In absence of testimony question of laches cannot be considered. 250Mich556, 231NW76. [c] 104Conn539, 133A666. [e] **Plea of statute of limitations.**–323 Ill 498, 154NE 226.

523–84½–New. Record failing to disclose amount claimed affords no basis for determining objection that consent judgment was in excess of amount prayed for. TexCivA 26SW(2d)382.

523–85 82Colo 391, 260P524; 116Tex 489, 294SW844.

523–86 31NM576, 249P242.

523–88½–New. In absence of testimony, question whether court functioned as court of record cannot be considered. 250Mich556, 231NW76.

524–91 [c] **Record sufficient to show** that court allowed substitution of party plaintiff. CalA 292P1000.

524–92 231Mich317, 204NW112.

524–94 244 IllA241; TexCivA 1SW(2d) 1114.

524–97 5F(2d)816; 205Cal 102, 269P 1105; CalA 260P316; 234Ky608, 28SW (2d)955; 220MoA152, 281SW110; 103 NJL553, 137A211; 49SD524, 207NW543 (sufficiency of allegations of counterclaim); TexCivA 300SW247; TexCivA 27SW(2d)597; Utah 290P367 (resolved against appellants). [c] **Refusal to strike paragraph of complaint** will not be considered where record shows no motion presented to, or ruling made by court thereon, but simply notice of intention to move to strike. 75Mont52, 243 P1082.

525–99 NJSup 130A814 (rule applied to refusal to permit defense). See also 90Fla282, 105S823.

525–5½–New. Where appellant fails to show that his amended answer was filed with the court's permission before announcement of ready for trial, his assignment based on the court's striking it will be overruled. TexCivA 280SW 849.

525–9 19F(2d)311; 195Cal 95, 231P 739; 98CalA675, 277P534; 166Ga222, 142SE857; 2KyOp222; 217MoA76, 273 SW204; 220MoA743, 276SW409; MoA 279SW751; 122 Or394, 259P426; Va 154SE515.

525–9½–New. or that motion was made. 35PortoRico 552 (to amend amended complaint).

525–10 106Conn724, 136A867; MoA 22SW(2d)892; TexCivA 272SW562 (where record fails to show that after allowance, amendment was made). [a] (2) In absence of evidence it cannot be determined whether court erred in permitting amendment of pleas. 153Miss 712, 121S138(2dcase).

525–10½–New. An appeal from an order denying a motion to strike an amendment to a complaint is not considered where a copy of the order is not in the record. 80CalA717, 252P786.

526–11 85 IndA281, 151NE531.

526–12 22AlaA385, 116S108; 123 Okl 248, 253P84; TexCivA 264SW513; Tex CivA 30SW(2d)668. [a] TexCivA 299 SW476.

526–14 9F(2d)361 (amended complaint); Ala 130S203; TexCivA 10SW(2d)272. [a] (2) Where record does not show that demurrers had been refiled or reassigned after amendment of counts, rulings thereon cannot be considered on appeal. 217Ala438, 116S526.

526–15½–New. The instructions should have been made a part of the record if appellant desires to present to the appellate court the question whether the trial court erred in overruling demurrer to the answer. 231Ky160, 21SW(2d) 250.

526–18½–New. Omission from record of demurrer and rulings thereon is immaterial in view of facts of record and judgment rendered. 211Ky226, 277SW 245.

526–18½–New. Necessity for record to disclose whether answer was filed before judgment sustaining demurrer to petition or thereafter. 233Ky549, 26SW(2d) 503.

526–20 220Ala601, 127S173 (refusal of continuance); 245 IllA602; 153Miss 712, 121S138(2dcase) (refusing application for continuance); MoA 29SW(2d) 234; TexCivA 32SW(2d)494. [b] **On appeal from order setting aside order of publication and service upon nonresident defendants,** record should show whether personal liability only is sought, whether nonresidents are proper or necessary parties, and whether bill was filed. 98Fla156, 122S224.

527–22 104Conn665, 134A265.

527–27½–New. The ultimate rights in the proceeds of sales of a corporation's property cannot be considered on appeal from an order directing payment to a receiver, and his retention thereof subject to the court's further order, where not presented by the record. 155 Md500, 142A512.

527–28 97Fla447, 121S471; 163Ga512, 136SE408; TexCivA 18SW(2d)844.

527–29 163Ga512, 136SE408.

527–31½–New. Contention that statute is invalid in prescribing penalty for contempt of liquor injunction is not considered where nothing in record concerned violation. 318 Ill 198, 149NE294.

527–31¼–New. Where it is not shown by the judgment or by recital in the bill of exceptions that an interlocutory injunction was refused because the court was without jurisdiction, no question as to jurisdiction is presented. 162Ga 560, 134SE166.

527–31¼–New. Amount of injunction bond not increased where no showing of what damages might be sustained. SC 155SE228.

527–32 16Colo 95, 26P321; Iowa 220 NW338; 31Kan672, 3P525; 25Me256; 60Me342; Md 148A231; 9GrayMass315; 128Mass401; 50Mich362, 15NW511; 4

HeiskTenn335; 86Tenn495, 7SW638.

528–35 67Utah487, 248P127. [e] **Order overruling plea of privilege,** entered by one not shown in transcript as being authorized to act, cannot be considered on appeal. TexCivA 16SW(2d)900.

528–39 125 Or111, 265P1094 (grounds of motion for nonsuit).

528–42 213Ala391, 108S789.

528–43 Ind 170NE853.

529–45½–New. The reviewing court cannot determine whether granting a jury trial was error, where the motion below to dismiss the jury for failure to pay jury fees in accordance with court rules is never passed on, and rules of court are not contained in the record. 97CalA452, 275P1005.

529–46 Ind 164NE496; IndA 169NE 89; 9LaA147, 119S489; MoA 278SW783; MoA 31SW(2d)566.

529–48 87CalA99, 261P1049 (record held properly to present question).

529–50½–New. Error cannot be predicated on the overruling of challenges for cause where the record does not disclose that the challenges were made after plaintiff in error's peremptory challenges had been exhausted. 30 OhA328, 165 NE363.

529–52 39GaA139, 146SE330; 331 Ill 38, 162NE157; 118Kan370, 235P126 (necessarily restricted to matters disclosed by limited record); 254Mass478, 150NE215; 98Vt492, 129A234 (list of exceptions construed as part of master's report when sufficiency of record is unchallenged). [a] **Remonstrance based on rulings before committee not reviewable** unless it sets out circumstances under which made. 103Conn532, 131A 399 (other facts if necessary).

529–53 25F(2d)271; 254Mass488, 150 NE323; 254Mass507, 150NE322; 261 Mass116, 158NE344; 264Mass199, 162 NE364; 264Mass343, 162NE691; 264 Mass355, 162NE778; 264Mass447, 162 NE895; 264Mass538, 163NE246(2d case); 265Mass81, 163NE655; 265Mass 262, 163NE767(2dcase); 265Mass85, 163 NE867; 265Mass390, 164NE467; Mass 168NE174(2dcase); Mass 168NE521(3d case); 98Vt492, 129A234.

530–54 98Vt492, 129A234.

530–55 254Mass478, 150NE215.

530–63 320 Ill 56, 150NE403; 244 IllA 264; 216Ky648, 288SW289. [a] (15) Coercion of jury, record not showing anything improper. 209Ky338, 272SW 886. (16) Claim that case was taken from jury by motion of both parties cannot be considered where motion on part of one party is not contained in bill of exceptions. 23F(2d)914. (17) Other instances. 233 Ky1, 24SW(2d) 942; TexCivA 7SW(2d)610.

530–65 81Colo 276, 255P610; 33Porto Rico 895.

530–67 119Kan738, 241P246; 216Ky 108, 287SW362; 170Minn248, 212NW 200; 172Minn134, 215NW198; MoA 25 SW(2d)499; ND 232NW6(2dcase); 131 Okl 263, 268P715.

530–68 104Conn419, 133A209; 208 Iowa 222, 225NW369; 236Mich471, 210NW 478; 242Mich497, 219NW665; 168Minn 93, 209NW867; 319Mo 744, 8SW(2d) 38; Mo 31SW(2d)974; MoA 277SW596 (opening statement); MoA 287SW810; 221MoA1110, 298SW121; MoA 20SW (2d)561(2dcase); MoA 26SW(2d)802; 32 OhA465, 168NE234; TexCommnA 12 SW(2d)558; TexCivA 296SW669; Vt 150A128(2dcase); 104WVa417, 140SE 340. But see MoA 290SW462. [c] **Setting out only complainant's conception of purport of language** of counsel complained of is insufficient. 181Ark649, 26SW(2d)1108. [d] **Justification for improper argument** should be shown in record on appeal. 157Miss452, 128S336.

531–69 225Ky480, 9SW(2d)220.

531–70 TexCivA 287SW120.

531–71 168Minn93, 209NW867; MoA 287SW810; TexCivA 4SW(2d)320; Tex CivA 17SW(2d)1102.

531–72 [a] **Enough facts must be stated** to make ruling intelligible. TexCivA 28 SW(2d)611.

531–75 TexCivA 28SW(2d)611.

531–80½–New. The bill of exceptions must show that the argument was outside the record or not in response to, or provoked by, appellants' counsel. Tex CivA 3SW(2d)568.

531–80¼–New. Bill of exceptions to argument must show that argument was not justified by evidence or responsive to opposing argument. TexCivA 28SW(2d) 611.

531–80¼–New. Bill of exceptions to argument not showing that argument was not justified by evidence is insufficient. TexCivA 28SW(2d)622.

531–80½–New. Bill of exceptions to argument is insufficient where it shows that argument was in reply to remarks of opposing counsel. TexCivA 28SW (2d)622.

531–84 85Colo 409, 277P299 (subject of conversation had between juror and witness during recess not shown). [b] **Thus alleged misconduct of jury in not diminishing damages held not shown.** TexCivA 279SW929 (where sufficiently shown verdict was diminished).

531–85½–New. Nor is act of court in ordering jury to return to its room where it does not appear in bill of exceptions. 211Ky396, 277SW461.

532–90 5F(2d)816; 18F(2d)716; 18F (2d)912; 23F(2d)287; 36F(2d)589; 214 Ala612, 108S515; 218Ala624, 119S654; 177Ark865, 8SW(2d)446; 76CalA58, 243 P869; 77CalA137, 246P150; 92CalA156, 268P947; 161Ga464, 131SE53; 166Ga 277, 142SE870; 334 Ill293, 165NE790; Iowa 232NW812; 129Kan502, 283P509; 213Ky262, 280SW1103; 214Ky31, 282 SW551; 215Ky604, 286SW690; 227Ky 343, 12SW(2d)1108; 1MartNSLa281; 10LaA169, 120S663(1stcase); 256Mass 404, 152NE715; 257Mass107, 153NE337; 261Mass72, 158NE339, 55ALR330; Mass 169NE504; Mass 169NE508; Mo 26SW(2d)603; 196NC503, 146SE82(2d case); 119 Okl 216, 249P401; 127 Okl 7, 259P548; 123 Or667, 263P914; 52SD 252, 217NW192; 157Tenn339, 8SW(2d) 477; TexCivA 294SW605; TexCivA 299 SW913; TexCivA 300SW247; 104WVa 479, 140SE326; WVa 155SE667; Wyo 256P566; Wyo 287P436. See also 9 Iowa329. [b] **Failure to make evidence part of record** gives appellant no standing on appeal. 103Conn716, 131A558 (on claim verdict not supported by evidence). [c] **Court may determine venue of suit,** though evidence heard below on trial of plea of privilege is not before it, character of suit for venue purposes being question of law, determinable solely from allegations of petition. TexCivA 15SW(2d)126. [d] **In Massachusetts.**–169NE897(2dcase). [e] **Where no evidence is reported, only questions of law appearing on face of record are presented** on appeal. Mass 170NE59.

532–90½–New. Reviewing court may consider evidence only for the purpose of correcting a finding of the trial court. 106Conn315, 138A122.

533–91 214Ala291, 107S835; 176Ark 212, 2SW(2d)1109; 104Conn54, 132A 553; 166Ga670, 144SE206; 251Mich92, 230NW922; MoA 26SW(2d)859(2d case); 289Pa569, 137A807; TexCivA 288SW845.

534–92 289Pa569, 137A807; TexCivA 284SW691; TexCivA 286SW599; Tex CivA 288SW845; TexCivA 6SW(2d) 195; TexCivA 14SW(2d)300. [b] **Testifying through interpreter.**–TexCivA 286SW 558.

534–93 322Mo469, 17SW(2d)337; Tex CivA 13SW(2d)747; TexCivA 28SW(2d) 622. [c] **Violation of parol evidence rule** cannot be determined by Appellate Court where written instrument involved is not contained in abstract. MoA 21SW(2d) 206.

534–94 Ariz 283P279.

534–95 8PaDist&Co 6.

534–97 86 IndA9, 155NE617.

534–97½–New. Claim that defendant was estopped by language of opening statement must be ruled against objection where opening statement is not in record. MoA 27SW(2d)467.

535–99 218Ala328, 118S552; Ala 127 S519; 23AlaA118, 121S690(2dcase); 36 GaA354, 136SE540; 45 Ida464, 262P 862; 84 IndA205, 149NE698; 167Minn 428, 209NW317; 317Mo 782, 297SW20 (photograph); 320Mo 746, 8SW(2d)824; 73Mont385, 236P545; NJ 147A398; 196 NC382, 145SE691. [a] **Objection to evidence, as varying terms and conditions of deed,** cannot be considered where terms and conditions of deed are not set out. 160Ga831, 129SE546. [b] **Photographs.**–317Mo 782, 297SW20.

535–1 TexCivA 5SW(2d)185.

535–2 Conn 151A351; TexCivA 286SW 599. See also 49Nev35, 234P690.

535–3 MoA 296SW470.

535–5 89CalA594, 265P580.

535–6 TexCivA 1SW(2d)754.

535–8 12F(2d)710; 18F(2d)635; 25F (2d)271; 40F(2d)882; 43F(2d)312; 215Ala683, 112S207; 216Ala610, 114S 204; Ala 128S396; Ala 130S194(1st case); 21AlaA546, 109S893; 29Ariz1, 239 P514 (question of error in modifying findings cannot be considered where evidence is not before it); 29Ariz198, 240 P341; 31Ariz1, 250P246; 180Ark1167, 22SW(2d)398(1stcase); 198Cal 129, 43 ALR1235, 243P439; 198Cal 278, 245P 178; 200Cal 50, 251P913; 200Cal 222, 252P593; 206Cal 740, 276P335; 69CalA 286, 230P986; 72CalA722, 238P119; 75 CalA779, 243P713; 77CalA137, 246P 150; 79CalA318, 249P235; 81CalA659, 254P618; 87CalA402, 262P402; 97CalA 264, 275P533; 81Colo 359, 255P450; 81 Colo 411, 255P985; 82Colo 59, 256P 1091; 85Colo 83, 273P884; 104Conn596, 134A63; 109Conn662, 145A50; 97Fla 591, 121S793(2dcase); 163Ga271, 136SE 81; 39GaA187, 146SE783; 72 Ill 456; 89 IndA361, 166NE301; IndA 151NE 361; 87 IndA333, 158NE294; IndA 168 NE613; 2GreeneIowa125; 14 Iowa597; 31Kan672, 3P525; 118Kan370, 235P 126; 125Kan278, 264P27; 126Kan675, 271P282; 129Kan280, 282P749; 215Ky 604, 286SW690; 220Ky151, 294SW1066; 125Me520, 134A563; 154Md273, 141A 125; 253Mass597, 149NE597; 254Mass 128, 149NE685; 254Mass274, 150NE 186; 254Mass584, 150NE866; 255Mass 235, 151NE63; 254Mass576, 151NE87; 256Mass23, 152NE70; 256Mass226, 152 NE615; 256Mass308, 152NE80; 257 Mass503, 154NE187; 259Mass83, 156NE 40; 259Mass259, 156NE424; 259Mass 490, 156NE687; 259Mass515, 156NE 701; 259Mass495, 156NE704; 259Mass 478, 156NE727; 260Mass81, 156NE897; 261Mass261, 158NE662; 261Mass489, 159NE437; 262Mass165, 159NE624; 262Mass332, 159NE918; 262Mass463, 160NE245; 262Mass534, 160NE278; 263Mass107, 160NE333; 262Mass595, 160NE405; 263Mass76, 160NE408; 262 Mass573, 160NE426; 263Mass585, 161 NE596; Mass 166NE566; Mass 166NE 747; Mass 166NE754; Mass 166NE828; Mass 166NE857; Mass 167NE298; Mass 167NE305; Mass 168NE777; Mass 169 NE423; Mass 171NE491; Mass 171NE 651; Mass 171NE724; Mass 172NE87; Mass 172NE220; Mass 172NE790; Mass 172NE871; Mass 173NE537; 50Mich 362, 15NW511; MoA 283SW736; 167 Minn384, 209NW22; 167Minn413, 209 NW37; 307Mo529, 271SW50; Mo 31SW (2d)792; 218MoA590, 265SW856; MoA 271SW1005; 221MoA1033, 295SW515; MoA 6SW(2d)968; MoA 7SW(2d)729; NH 147A747; 32NM94, 251P387; 193 NC413, 137SE314; 144 Okl 148, 289P 748; 124 Or197, 264P362; Or 288P1053; 10Pa42; 23Pa24; 50Philippine144; 52 SD252, 217NW192; 157Tenn339, 8SW (2d)477; TexCivA 290SW1118; TexCiv A 292SW956; TexCivA 296SW929; Tex CivA 3SW(2d)484; TexCivA 13SW(2d) 142; TexCivA 30SW(2d)939; TexCivA 31SW(2d)329; 65Utah597, 239P501; 66 Utah612, 245P329; Utah 273P512; Utah 292P214; 146Va827, 132SE685; 141 Wash381, 250P107; 147Wash16, 264P 992; 33Wyo 271, 238P284; Wyo 284P 123. See also Mass 171NE721. But see 219Ala108, 121S388. [a] **Where evidence not reported,** findings of fact must stand. 256Mass169, 152NE367. [b] **Where evidence is entirely documentary it is sufficiently set forth** in printing of entire judgment roll, including findings which set out all documents. 92CalA329, 268P463. [c] **Findings are accepted as true** where evidence is not reported. Mass 169NE897(2dcase); Mass 169NE 915.

537–9 200Cal 50, 251P913; 166Ga305, 143SE379.

538–10 Mass 172NE878.

538–11 Ind 156NE414; 202 Iowa652,

210NW769; 251Mass479, 146NE787; 157SC144, 154SE97. See also Tex 265 SW142.

538-14 31F(2d)408; 102CalA53, 282P519; 109Conn732, 144A894(2ndcase); 118Kan370, 235P126; TexCommnA 285 SW264.

539-15 8F(2d)613 (where exception was taken to denial of motion for directed verdict on all counts of complaint and bill contains evidence on only two counts); 18F(2d)369; 213Ala425, 104S843; 216Ala168, 112S835; 22AlaA611, 118S501 (record not containing ruling); 82Colo288, 259P1025; 86IndA473, 158NE579; 260Mass399, 157NE364; MoA 7SW(2d)729; MoA 30SW(2d)1035; 121Oh468, 169NE564(2d case); 118OhSt106, 160NE629; 122Or394, 259P426; 151SC309, 149SE14; 53SD34, 219NW892; TexCommnA 285SW264; TexCivA 290SW1118; Tex CivA 22SW(2d)947; Wyo 287P436. [a] 217Ala180, 115S230. [c] In Texas.–CivA 293SW703.

539-16 MoA 296SW1036; MoA 22SW(2d)61; MoA 29SW(2d)721.

539-17 32F(2d)423; 213Ala306, 104S765; 214Ala558, 108S370; 215Ala166, 110S13; 217Ala441, 116S528; 219Ala366, 122S357; 21AlaA176, 106S394; 165Ga892, 142SE285; 214Ky511, 283SW1061; 261Mass403, 158NE789; 16Porto Rico406; 34PortoRico296; TexCivA 16SW(2d)914 (ordinances). See also 85IndA663, 155NE516. But see 85IndA234, 150NE418.

539-18 214Ala558, 108S370; IndA 168NE465 (absence of exhibits referred to in bill of exceptions will not preclude appellate court from determining if there was any evidence sustaining averments in complaint, where verdict was directed for defendant).

539-19 8F(2d)946; 16F(2d)781; 97Fla591, 121S793(2dcase); 84IndA542, 149NE361; 127Kan122, 272P138; 177Minn602, 225NW924, 66ALR1; 179Minn536, 229NW873; MoA 25SW(2d)566; 50SD274, 209NW543; Utah 272P931 (notwithstanding annexation by reference). [a] Reporter's certificate with other facts appearing from record is sufficient. Ill 173NE115.

541-20 276US336, 48SCt358, 72Led620; 37F(2d)26 (affirmatively shown on face of record); 43F(2d)312; 1KyOp421; TexCivA 299SW649.

541-29 84IndA542, 149NE361.

541-30½-New. Where bill of exceptions does not show affirmatively or inferentially that it contains all evidence, it is insufficient. 168Ark103, 269SW357.

541-31 4IndT443, 69SW931 (recitals held insufficient).

541-32½-New. A judge's certificate that the record contains all the evidence as to certain matters is insufficient to present other questions. IndA 156NE414.

541-32½-New. A recital in a judgment rendered in passing on a motion as to what facts appeared in the evidence on the hearing of the motion is a sufficient certification as to the evidence adduced on the hearing of the motion. 37GaA280, 139SE829.

542-34 [a] Words "all testimony relating to" specific issue are insufficient to carry inference to that bill contained all evidence adduced, at trial. 168Ark103, 269SW357.

542-35 [a] Testimony as to particular issue.–168Ark103, 269SW357.

542-40 8F(2d)134 (court's charge required to be set out in record); 32F(2d)943; 215Ala542, 112S110; 180Ark277, 20SW(2d)861; 83CalA100, 256P567; CalA 289P662; 106Conn728, 137A721; Ill 172NE765; 220Ky151, 294SW1066; 222Ky517, 1SW(2d)952; 226Ky703, 11SW(2d)712; 215Ky805, 287SW1; 83Mont194, 271P444; TexCivA 15SW(2d)129. [b] 156Miss507, 126S33.

542-42 215Ala542, 112S110.

542-43 Mo 293SW140; 24OhA509, 156NE608.

543-44 180Ark277, 20SW(2d)861; 181Ark1146, 27SW(2d)995; 207Cal8, 276P1017(2dcase); 81CalA772, 254P926; 83CalA100, 256P567; 150Md347, 133A114; TexCivA 282SW860.

543-47 125Kan199, 263P778.

543-48 125Me44, 130A737.

543-49 93CalA1, 268P1061; CalA 279P1028.

543-54 TexCivA 32SW(2d)703.

543-55 217Ala119, 115S99; 219Ala366, 122S357; 104Conn740, 133A213; Ind 156NE414; 320Mo162, 9SW(2d)950; 82NH558, 133A446; 198NC771, 153SE457; TexCivA 288SW861; TexCivA 32SW(2d)703; Utah 273P303; Vt 146A812; 101WVa675, 133SE388. Compare 108Conn285, 142A737.

545-57 44Ida500, 258P1078.

545-59 148Wash479, 269P827.

545-65 87IndA333, 158NE294 (such part as necessary to advise appellate court of pertinency or materiality of ruling or matter to be received); 240Mich228, 215NW321.

545-68 218Ala350, 118S656; 22OhA430, 153NE277.

545-69 84IndA542, 149NE361.

546-75 219Ala24, 121S30; 22AlaA541, 118S258 (omission of oral charge prevents review of refusal of written charge, but not giving of such charge); 172Ark562, 289SW761; 180Ark293, 21SW(2d)171; 79CalA318, 249P235; 79CalA380, 249P536; 84Colo567, 271P625; 85IndA476, 152NE183, 154NE390; 89IndA474, 166NE250; 89IndA640, 166NE607; 89IndA634, 166NE778; 125Kan199, 263P778; 128Me50, 145A400, 67ALR239.

547-77 Mass 168NE792.

547-82 103Conn279, 130A576.

547-86 83Colo592, 267P604 (finding not contradicted by record held proper); 102Conn529, 129A527; 121Or590, 256P186; RI 133A620; 51SD306, 213NW578; 52SD156, 216NW886. [a] Without separate finding of facts, neither evidence nor question of law presented by it is reviewable. 12F(2d)693. [b] Necessity of showing all findings are included.–It must affirmatively appear that special findings reported include all findings made, before appellate court can pass on sufficiency thereof to sustain general verdict. NH 147A747.

547-87 95CalA772, 273P613; 102Conn480, 129A379; 102Conn529, 129A527 (rules of court for correction of finding declared founded on the jurisdiction to correct recital without impairing trial court's jurisdiction to find the facts); 104Conn660, 133A915; MoA 28SW(2d)368; TexCivA 288SW270.

548-89 107Conn216, 140A477; 244Mich692, 222NW156.

548-90½-New. Appellate court may not review questions of refusal to make requested findings in absence of draft findings from record. 103Conn678, 131A838.

548-90¼-New. Appellant cannot object to failure of the trial judge to file his findings within the time fixed by statute, where such failure does not appear in record. TexCivA 284SW634.

548-90¼-New. Appellate court cannot consider a refusal to make requested findings where the motion therefor is accompanied by neither transcript of evidence nor written exceptions. 105Conn342, 135A397, 53ALR481 (Gen. St. [1918] § 5830).

548-91 77CalA137, 246P150; 79CalA662, 251P814; 82CalA249, 255P529; 94CalA104, 270P742; 97CalA302, 275P517; 110Conn693, 147A38; 332Ill253, 163NE702; 118Kan370, 235P126; 254Mass37, 149NE632; 255Mass118, 150NE907; 256Mass299, 152NE90; 256Mass404, 152NE715; 258Mass431, 155NE455; 259Mass490, 156NE687; Mass 156NE700; 259Mass495, 156NE704; 259Mass478, 156NE727; 260Mass594, 157NE700; 261Mass1, 157NE725; 261Mass72, 158NE339, 55ALR330; 264Mass303, 162NE334; 265Mass265, 163NE851; 265Mass563, 164NE475; 265Mass555, 164NE622; Mass 165NE873; Mass 170NE804; Mass 170NE807; Mass 170NE826; 167Minn413, 209NW37; 23OhA33, 155NE166; 115Okl283, 242P1044; 121Or590, 256P186; 44Phillippine172; 101Vt356, 143A276; 146Wash615, 264P413, 56ALR1117. [d] When undisputed character of evidence omitted is disclosed by evidence, the evidence should accompany exception to failure to find. 102Conn529, 129A527. [e] No statement of evidence necessary where finding is attacked because not containing an admitted or undisputed fact. 102Conn529, 129A527. [f] In Philippines.–44Philippine172.

548-92 29F(2d)559; 79CalA662, 251P814; 102CalA783, 283P840(2dcase).

548-93 105Conn342, 135A397, 53ALR481.

548-94 104Conn660, 133A915.

549-2 206Cal740, 276P335; 73CalA9, 238P120 (plaintiff has burden of proving other indebtedness to which sum admitted to have been paid might have been applied); 87CalA711, 262P457; 95CalA113, 272P331; 220Ky151, 294SW1066; 216MoA614, 260SW538 (record held insufficient to enable appellate court to determine propriety of order for payment of deposit to plaintiff in injunction suit after dismissal of suit pursuant to stipulation reserving question of disposition of deposit); MoA 282SW751; 221MoA1173, 300SW997 (punitive damages); MoA 7SW(2d)730; MoA 14SW(2d)511; NJ 138A511; TexCivA 286SW889; TexCivA 15SW(2d)116; TexCivA 20SW(2d)405.

549-5 NJSup 143A864.

549-5½-New. The omission of the evidence as to the reasonableness of an amount allowed as attorney's fee on hearing of motion therefor precludes a review by appellate court of the reasonableness of the amount allowed. 114Nebr194, 206NW765.

549-6 153Md674, 139A545; 257Mass107, 153NE337; 30OhA206, 164NE538. [a] Errors in decree below as to title of heirs is waived by bringing up record in appeal from order for sale of land to pay debt. 235IllA63.

549-7 CalA 287P151; 215Ill100, 74NE89; 257Mass107, 153NE337; 250Mich556, 231NW76; TexCivA 287SW121. [d] Refusal to set aside judgment will not be reviewed where abstract does not contain all evidence upon which court acted. MoA 7SW(2d)734.

550-8 But see 149Wash419, 271P80.

550-11 TexCivA 294SW341.

550-13 See also TexCivA 294SW988.

550-14 232Ky680, 24SW(2d)553. [a] Affidavit of default held sufficient.–ND 228NW420.

550-16½-New. A motion to set aside a default and the evidence in support thereof cannot be reviewed where no motion or evidence in support thereof is shown. 69Utah527, 256P792.

550-20 215Ala494, 111S237; 220Ala624, 127S192; 103Conn678, 131A838 (motion to set aside verdict); Ida 287P953; IndA 166NE774; 205Iowa1300, 217NW803; Mo 271SW749; 311Mo147, 277SW927 (record held to show that evidence, admission of which was specified by judge as ground for new trial, was in fact excluded on plaintiff's motion); 24OhA82, 156NE248; 283Pa459, 129A457; 155Tenn491, 296SW3, 53ALR1086; 146Wash615, 264P413, 56ALR1117.

551-21 177Ark271, 6SW(2d)15.

551-22 144Okl9, 291P103.

551-24 22AlaA639, 119S245(1stcase); 84IndA264, 151NE137; 83IndA415, 148NE435, 928.

551-25 244Mich183, 221NW149.

552-27 29Ariz313, 241P510 (record showing no motion made); 75CalA437, 243P30; 202Iowa1351, 212NW114; 204Iowa421, 213NW765; 311Mo147, 277SW927; Nev 293P25(1stcase); RI 132A733.

552-28 Mo 276SW71.

552-31 75CalA732, 243P443; 200Iowa479, 203NW247; 202Iowa503, 210NW530; Mass 172NE340; 34PortoRico250 (stenographer's fees for transcript furnished plaintiff); TexCivA 10SW(2d)394; TexCivA 21SW(2d)707.

553-32 12PaDist&Co808.

553-33½-New. On appeal from decision of intermediate appellate court dismissing appeal, for failure diligently to prosecute, the decision will not be disturbed in the absence of findings of fact or showing of evidence. 261Mass231, 158NE764.

553–35 5F(2d)659; 7F(2d)335; 216 Ala288, 112S815; 31Ariz337, 253P439; 176Ark941, 5SW(2d)360; 177Ark145, 5 SW(2d)941; 195Cal 95, 231P739; 206 Cal 436, 274P534; 72CalA288, 236P 937; 77CalA716, 247P523; 85CalA714, 259P1017; 101CalA195, 281P533 (basis for stipulated judgment); CalA 285P 356; 83Colo 343, 265P693; 102Conn 692, 129A716; 105Conn488, 136A78; 107Conn1, 138A905; 111Conn666, 151 A189 (assigned errors not made part of finding); 164Ga462, 139SE15; 165 Ga472, 141SE207; 165Ga479, 141SE291; 166Ga818, 144SE381; 43 Ida198, 252P 865; 318 Ill 198, 149NE294; 331 Ill 25, 162NE142; 232 IllA596 (where record disclosed entry of decree below in term time, and there was no amendment of record, appellate court refused to consider question of alleged failure to enter decree below in term time); 235 IllA112; 202 Iowa1351, 212NW114; 204 Iowa421, 213NW765; Iowa 226NW 168; 215Ky5, 284SW101; 225Ky767, 10SW(2d)287; 226Ky834, 11SW(2d) 961; 231Ky99, 21SW(2d)124; 234Ky 558, 28SW(2d)737; 235Ky831, 32SW (2d)415; 235Ky749, 32SW(2d)324(2d case); 125Me526, 134A801; 126Me409, 139A227; 148Md345, 129A506; Mass 165NE382; 229Mich178, 201NW193; 233Mich597, 208NW148; 237Mich554, 212NW955; 238Mich52, 213NW175; 239Mich563, 215NW1; 244Mich174, 221 NW285; 165Minn241, 206NW393; MoA 30SW(2d)1094; MoA 277SW50 (instruction); 79Mont158, 255P5; NJSup 137A567; NJCh 150A196; 129Misc545, 222NYS696; 192NC154, 134SE425; 192 NC834, 134SE483; 116 Oh640, 157NE 477; 29 OhA349, 163NE506; 287Pa274, 135A232; 292Pa122, 140A774 (construction of letter); 297Pa212, 146A 537; RI 133A620; 132SC212, 128SE 423; Tenn 30SW(2d)278; TexCommnA 284SW921; TexCivA 283SW217; Tex CivA 288SW566; TexCivA 290SW286; TexCivA 297SW864; TexCivA 4SW(2d) 1046; TexCivA 11SW(2d)234; Tex CivA 16SW(2d)973; TexCivA 21SW (2d)574; TexCivA 30SW(2d)676; Tex CivA 31SW(2d)329; TexCivA 32SW(2d) 695; 67Utah578, 248P815; 100Vt425, 138A780; 142Va550, 129SE368; 154 Wash137, 281P340; 154Wash682, 283 P198; Wash 290P834; 103WVa248, 137 SE898; 104WVa479, 140SE326. [e] But see **TexCivA** 1SW(2d)681. [f] **Whether an ordinance is authorized by civil code section** authorizing municipal corporations to prohibit gambling and operation of gambling houses cannot be determined where the language of the ordinance is not before the supreme court. 28Ariz278, 237P380, 44ALR1495. [g] **Only record as it stood before jury** may be considered. 50RI 210, 146A 621.

554–36 219Ala261, 122S167; 198Cal 278, 245P178; TexCivA 285SW858.

554–36½–New. Appellee's uncontroverted statement that power of attorney relied on by appellants is not in the record may be accepted. TexCivA 295SW 679.

554–36¾–New. The rule of the United States circuit court of appeals, providing that original papers may be sent up, was intended to permit the transfer of disputed documents, maps, blue prints, models, and exhibits which cannot be incorporated in the record. 18 F(2d)369.

554–37 78Mont170, 253P313; 49Nev 35, 234P690; 51Nev38, 268P45; Tex CivA 290SW286; TexCivA 21SW(2d) 326; 100Vt425, 138A780. [a] (7) Colloquy between court and counsel cannot be considered against formal findings. 48Nev181, 228P588, 232P782. (8) Memorandum written by judge for guidance of counsel in preparing findings and giving reasons for findings. 72CalA757, 238P143. [b] (3) 78Mont 170, 253P313.

555–38 28Ariz585, 238P390; 78Mont 170, 253P313; 49Nev35, 234P690.

555–39 219Ala346, 122S406.

555–40½–New. Where the record does not contain an order overruling a motion for a new trial, a mere recital in the case made that the motion was overruled and exceptions overruled is insufficient. 130 Okl 173, 266P435.

555–41 235 IllA112; 220MoA152, 281 SW110; TexCivA 294SW665.

556–42 220MoA152, 281SW110; Tex CivA 27SW(2d)284. [a] (6) Ruling of trial court on exceptions. TexCivA 27 SW(2d)621.

556–43 220MoA152, 281SW110; Tex CivA 285SW691; TexCivA 286SW599; TexCivA 286SW661; TexCivA 291SW 272; TexCivA 293SW688; TexCivA 294 SW665; TexCivA 296SW631; TexCivA 2SW(2d)470; TexCivA 13SW(2d)997; TexCivA 25SW(2d)717; 36Wyo 540, 257P5. But see 222MoA510, 281SW75; MoA 2SW(2d)147. [a] (3) Assignments calling in question action of trial court on special exception not considered where presented by bill of exceptions only. TexCivA 277SW152; TexCivA 291SW272; TexCivA 293SW913. [b] (1) MoA 286SW123; 36Wyo 540, 257 P5. But see 311Mo 147, 277SW927.

557–44 259Mass256, 156NE70; 220 MoA152, 281SW110; TexCivA 295SW 352.

557–45 18F(2d)369; 205 Iowa176, 218 NW46; 32NM431, 258P569.

557–46 222MoA510, 281SW75.

557–47 222MoA510, 281SW75.

557–48 93CalA526, 269P709; 41GaA24, 152SE122; 333 Ill 158, 164NE173, 61 ALR649; 128Kan167, 277P51; MoA 24 SW(2d)715; 51Nev36, 268P44; 287Pa 216, 134A397; SD 230NW848; 143Va 896, 129SE678. [a] (4) That certain instructions were given. 8F(2d)134.

557–49 279US792, 49SCt484, 73L ed 960; 180Ark1141, 24SW(2d)338; 89 CalA6, 264P336; CalA 291P688; 81 Colo 548, 256P657; 111Conn27, 149A 205; 164Ga462, 139SE15; 36GaA80, 135SE318; 323 Ill 109, 153NE603; 243 IllA521; 245 IllA454; 215Ky226, 284 SW1052; 223Ky571, 4SW(2d)364; 231 Ky99, 21SW(2d)124; 9LaA425, 121S 227; 170La887, 129S518; 126Me409, 139A227; 148Md90, 129A22; Mass 148 NE78 (documents attached to brief but not part of bill of exceptions); Mass 165NE474; 237Mich554, 212NW955; 156Miss8, 125S912(2dcase); 222MoA 768, 8SW(2d)98; MoA 8SW(2d)1020; MoA 24SW(2d)710; 215AppDiv637, 214 NYS386 (or affidavit); 144 Okl 9, 291P 103; TexCivA 283SW611; 112TexCr 152, 15SW(2d)650. But see 127Me182 142A481.

558–50 86Colo 330, 282P193 (argument in supreme court on unpleaded and unproved affirmative defense); 243Mich 634, 220NW770; 52SD528, 219NW206; 52SD594, 219NW477; SD 230NW243; 137Wash299, 242P37.

558–53 RI 144A442; TexCivA 22SW (2d)467.

558–53½–New. Statement by court to counsel. Oral statement, made during colloquy between court and counsel, which is not incorporated in findings, should not be weighed against formal findings. 48Nev181, 228P588, 232P782.

558–53¾–New. It may be proper for counsel to present with his brief a map, plat, or drawing although such map, plat, or drawing was not introduced in evidence. 123Kan393, 254P366.

558–54 18F(2d)369; 22F(2d)769; 72 CalA757, 238P143; 102CalA141, 282P 978; 91Fla1007, 109S320; 337 Ill 612, 169NE747; 204 Iowa82, 214NW602; 206 Iowa780, 221NW483 (misconduct of counsel); 224Ky419, 6SW(2d)491; 225 Ky480, 9SW(2d)220; 227Ky341, 13SW (2d)242; 158La745, 104S701; 126Me 603, 139A85; 170Minn248, 212NW200; Minn 230NW472; 190NC74, 128SE467 (affidavit filed after argument, without notice to plaintiff, or motion not part of record); 196NC7, 144SE374; 130 Okl 27, 264P904; 117Tex205, 300SW17. [b] 145Wash390, 260P255.

559–55 18F(2d)369; 130 Iowa254, 106 NW642; 208Ky658, 271SW1100; 161 La288, 108S485; 165La151, 115S441; 9LaA726, 120S223(1stcase); LaA 125S 518; Mass 171NE14; 46Mich551, 9NW 849 (mere deduction from evidence made after judgment as basis for review); 237Mich554, 212NW955; Mo 271SW500; MoA 286SW123; MoA 286 SW353; MoA 297SW730; 73Mont35, 235P408; 12PortoRicoFed223; RI 132 A733; TexCivA 7SW(2d)949; TexCivA 16SW(2d)973; 143Wash588, 255P936; 18BC629; Man 18DomLR682; Que 20 DomLR587.

559–57 TexCivA 276SW724.

559–58 TexCivA 272SW290 (as where motion to dismiss motion made on ground that question was moot court could consider affidavits of matter occurring after appeal was perfected to determine its jurisdiction).

560–60 See also 151Ala532, 43S843.

560–61 145Wash25, 258P836.

560–61½–New. reasons for granting new trial. 311Mo 147, 277SW927.

560–63 35F(2d)421. See also 145Va 653, 134SE675.

560–63½–New. Appellate courts have power to receive documentary and record evidence dehors the trial record for the purpose of sustaining, although not for reversing, a verdict or decision otherwise unimpeachable. 133Misc720, 233NYS295.

560–64 TexCivA 7SW(2d)949.

560–65 TexCivA 15SW(2d)1060.

560–65½–New. In order not to deprive appellant of his appeal, where notes of the evidence were not taken below, it has been held that witnesses may retestify on appeal but no new evidence will be admitted. 3AltaL259.

560–66 339 Ill 201, 171NE148.

560–67 MoA 273SW151, 153 [citCJ].

560–68 201 Iowa378, 207NW351.

561–77 316Mo 1058, 293SW770.

561–79 20F(2d)133; 143Wash588, 255 P936.

562–82 333 Ill 158, 164NE173, 61ALR 649.

562–83 152Miss814, 119S199.

562–84½–New. Where the affirmative of an unsubmitted issue is conceded, the matter will be considered as if the jury had answered the issue in the affirmative. TexCivA 300SW123.

562–84¾–New. Evidence not before the lower court will not be considered, although brought into the record by agreement after final judgment. 108 WVa293, 150SE745.

562–85 12F(2d)693; 32F(2d)1004(2d case); 38F(2d)455; 170Ga585, 154SE 149; 177Minn602, 225NW924, 66ALR1. See also 152Wash469, 278P193. But see 244Mich529, 221NW630; 148Va331, 138SE637.

562–85½–New. A finding of the trial court, being somewhat variant on a given point, may be read in the light of the court's memorandum. 104Conn169, 132A902.

562–85¾–New. The same appellate court's opinion in a former action against a corporation on a note, attached to the suit against the officer thereof on the note, must be looked to in determining whether the reason absolving the corporation is sufficient to decide the liability of the officer. 165 La247, 115S475.

562–85¼–New. The opinion of the trial court cannot be relied on as a substitute for a certified statement of facts. 33PortoRico 319.

562–1 201Cal 190, 255P798; 82Colo 421, 260P688; 158La557, 104S367; 159 La1019, 106S550; 7LaA277; 7LaA425; 26 OhA122, 158NE588.

562–4 159La1019, 106S550.

562–8 TexCr 288SW1114.

563–12 9F(2d)902; 68CalA239, 228P 731; 91Fla284, 107S918, 920 [citCJ]; 324 Ill 89, 154NE412; 199 Ind742, 161 NE4; 226Ky785, 11SW(2d)937; 161La 10, 108S107; 121 Or333, 255P330.

563–13 91Fla284, 107S918, 920 [citCJ].

563–14 But see 9F(2d)902.

563–16–17 68CalA239, 228P731; 91Fla 284, 107S918, 920 [citCJ].

564–23½–New. After judgment or decree, appellant cannot as of right dismiss his own appeal. 25F(2d)78.

564–28 116Nebr802, 219NW242. But see 86CalA165, 260P556.

564–29 But see Fla 126S766(2dcase).

564–29½–New. Where withdrawal of the main bill of exceptions is allowed, the cross bill will be dismissed. 34GaA 169, 128SE588.

564–29¾–New. Dismissal of cross bill of exceptions, upon allowance of withdrawal of main bill, does not operate as affirmance of judgment excepted to therein. 34GaA169, 128SE588.

564-32½-New. Election commissioners who have perfected term appeal to avoid lower court's mandate, and who thereafter abandon the appeal, which is dismissed, will not be entitled to withdraw the transcript to perfect a vacation appeal. 197 **Ind**675, 151**NE**824.

564-34 Contra 235 **IllA**488.

564-36 68**CalA**239, 228**P**731; 116**Nebr** 802, 219**NW**242; 121 **Or**338, 255**P**330.

565-43 93**CalA**455, 269**P**665; 82**Colo** 421, 260**P**688; 84**Colo** 374, 270**P**552; 131 **Or**350, 270**P**476(1stcase). See also **LaA** 130**S**228.

565-43½-New. Where an appeal does not lie and no valid objection can be levied against the judgment or order brought up, the appeal will be dismissed. 103**NJL**596, 137**A**568.

565-44 82**Colo** 421, 260**P**688; 233**Mich** 200, 206**NW**373.

565-45 209**Ky**811, 273**SW**531 (void judgment).

565-47 Contra 127**Kan**613, 274**P**271 (1stcase).

565-48 164**La**1017, 115**S**130. See also 7**LaA**409.

565-49 35**PortoRico** 572 (failure to include judgment in record cured before hearing).

565-49½-New. Where an appeal is based wholly upon an additional finding made by the trial court without jurisdiction after the adjournment of the term at which the judgment was rendered, the appeal will be dismissed. 42 **OklACR**296 [reh pending].

565-49½-New. In case of any doubt of plaintiff's right to a judgment on the pleadings on appeal from a refusal to enter judgment for want of a sufficient affidavit of defense, the appeal should be dismissed and the case remitted for trial. 87**PaSuper**205.

565-49¼-New. The supreme court's denial of application for mandamus under supervisory jurisdiction, is not res judicata between the parties in an appeal, and constitutes no ground for dismissal of such appeal. 168**La**1030, 123 **S**664.

565-50 **Ga** 138**SE**787; 5**LaA**618(1st case); 122 **Or**297, 258**P**562; 87**PaSuper** 574; 138**SC**113, 135**SE**877(2dcase) (dismissal of appeal for violation of court rule by too long, involved, and argumentative exceptions held unwarranted).

565-52 48**Nev**244, 229**P**387, 234**P**518 (appeal should not be dismissed for failure to serve bill of exceptions or copy of record or judgment roll until appellant had opportunity to cure defect). See also **Nev** 280**P**887 (statute prohibiting dismissal without opportunity to amend is liberally construed).

565-53 163**Ga**893, 137**SE**14; 165**Ga**288, 140**SE**878 (failure to designate all parties fully in bill of exceptions); **Mo** 16 **SW(2d)**91; 130 **Okl** 144, 265**P**1048 (failure to include in record copy of judgment or order); 136 **Okl** 251, 277**P**667; 122 **Or**297, 258**P**562; 33**PortoRico** 279; 33**PortoRico** 967.

566-54 245**NY**509, 157**NE**837; 245**NY** 529, 157**NE**845; 245**NY**528, 157**NE**845; 245**NY**530, 157**NE**846(1stcase); 245**NY** 531, 157**NE**846(2dcase); 245**NY**564, 157 **NE**858; 245**NY**572, 157**NE**862; 245**NY** 574, 157**NE**863; 245**NY**580, 157**NE** 865; 246**NY**235, 158**NE**314.

566-54½-New. ; failure of record to contain a copy of the final order or judgment sought to be reviewed; 127 **Okl** 39, 259**P**551.

566-54⅓-New. failure of the record to show a timely notice of appeal; 122 **Okl** 104, 251**P**496.

566-56 161**La**725, 109**S**402.

566-59 168**Ark**122, 269**SW**55, 56 [citCJ perMcCulloch.CJ]; 161**La**725, 109**S** 402; **Mich** 214**NW**161; 117 **Okl** 284, 246 **P**858; 118 **Okl** 209, 247**P**970; 118 **Okl** 211, 247**P**972; 126 **Okl** 138, 258**P**879; 127 **Okl** 166, 260**P**55; 128 **Okl** 281, 262 **P**674; 131 **Okl** 226, 268**P**269; 52**SD**168, 216**NW**949.

567-60 **CalA** 292**P**1088; 42 **Ida**132, 243 **P**824; **Ida** 288**P**419; 161**La**725, 109**S** 402; 122 **Okl** 192, 253**P**105; 32**Porto Rico** 89; 52**SD**168, 216**NW**949; 144 **Wash**564, 258**P**507. See also 116 **Okl** 165, 243**P**737 (failure to perfect proceedings in error).

567-62 35**PortoRico** 339.

567-63 41 **OklACR**100.

567-63½-New. failure to file motion for a new trial; 122 **Okl** 59, 250**P**795.

567-66½-New. failure of the transcript of the record or case-made to show that the judgment appealed from was entered in the journal of the court; 41 **OklACR**48.

567-71 245**NY**564, 157**NE**858 (failure to file return and printed papers).

567-74 48**Nev**244, 229**P**387, 234**P**518; 113 **Okl** 114, 239**P**574; 121 **Okl** 47, 247 **P**376; 121 **Okl** 47, 247**P**376; 122 **Okl** 104, 251**P**496; 66**Utah**290, 241**P**1055.

567-74½-New. failure of the record to show service of notice of appeal; 36 **Wyo** 459, 256**P**661.

567-74⅓-New. failure to give notice of appeal in open court; **TexCivA** 286**SW** 604.

567-75 [b] **Acknowledgment of service** of bill of exceptions by attorneys representing plaintiff, suing individually and as administrator, held sufficient. 163**Ga**326, 136**SE**403.

567-76 [h] **Failure to serve bill of exceptions on defendant in error interested in sustaining judgment** is ground for dismissal. 164**Ga**30, 137**SE**377.

567-76½-New. naming of attorneys for the proper parties instead of the parties; 196 **Ind**653, 147**NE**919.

568-77 114 **Okl** 239, 246**P**451.

568-78 161**La**725, 109**S**402; 31**NM**50, 240**P**811; 241**NY**578, 150**NE**562; **NY** 157**NE**844; 245**NY**528, 157**NE**845(1st case); 245**NY**529, 157**NE**845(3dcase); 245**NY**608, 157**NE**878; 129 **Or**456, 278 **P**82.

569-81 7**LaA**583; **TexCivA** 284**SW**654.

569-82 176**Minn**632, 221**NW**643. But see 82**Colo** 503, 261**P**874.

569-83 158**La**557, 104**S**367; **Md** 151**A** 662; 241**NY**578, 150**NE**562; 126 **Or**487, 245**P**1117, 266**P**634, 270**P**778 (motion denied for failure to file transcript in time); 122 **Or**45, 257**P**337; 123 **Or**19, 259**P**916; 33**PortoRico** 808; 144**Wash** 564, 258**P**507. [b] **In Porto Rico.**-32 **PortoRico** 799.

570-84 129 **Or**456, 278**P**82; 32**Porto Rico** 89; 33**PortoRico** 134; 35**Porto Rico** 105. [b] **In Porto Rico.**-32**Porto Rico** 89.

570-84½-New. failure to give notice of filing of transcript; 122 **Or**297, 258 **P**562.

570-85 33**PortoRico** 409.

570-87 127 **Okl** 7, 259**P**548.

570-90 122 **Okl** 127, 251**P**1048.

570-91 35**GaA**505, 133**SE**749; 162**Ga** 558, 134**SE**315; 163**Ga**893, 137**SE**14; 164**Ga**391, 138**SE**737; 36**GaA**194, 136**SE** 165; 37**GaA**395, 140**SE**424; 37**GaA**391, 140**SE**428 (insufficient affidavit of service); **Md** 151**A**662; **Md** 151**A**662; 193 **NC**35, 136**SE**193; 121 **Okl** 294, 250**P** 90; 122 **Okl** 192, 253**P**105; 129 **Okl** 168, 264**P**140; 132 **Okl** 295, 270**P**562(1st case); 121 **Or**688, 257**P**19; **TexCivA** 297**SW**501. [g] **Lack of settled case** signed by judge is not ground for dismissing appeal from order appointing receiver in proceedings supplementary to execution, where referee has taken and reported evidence. 168**Minn** 102, 209**NW**754.

570-91½-New. failure to attach case-made or transcript of record to petition in error; 123 **Okl** 146, 252**P**11.

570-93 161**Ga**698, 132**SE**626 (motion to dismiss denied); 35**GaA**367, 133**SE** 268.

570-95 **TexCivA** 297**SW**670. See also 6**LaA**456.

571-98 37**GaA**688, 141**SE**433. But see 37**GaA**792, 141**SE**925.

571-99 113 **Okl** 117, 239**P**570; 118 **Okl** 233, 234, 247**P**356; 29**PortoRico** 579; **TexCivA** 285**SW**940; **TexCivA** 13**SW** (2d)958.

571-2 82**Colo** 421, 260**P**688; 164**Ga**772, 139**SE**537; 165**Ga**175, 140**SE**288; **NJ Sup** 135**A**59; 122 **Okl** 52, 250**P**802; 122 **Okl** 275, 254**P**723. [a] See also 216**Ky** 540, 287**SW**971.

571-4 216**Ala**660, 114**S**40; 82**CalA**624, 256**P**220; 90**CalA**191, 265**P**859; 82**Colo** 421, 260**P**688; 164**Ga**772, 139**SE**537; 165**Ga**175, 140**SE**288; 245**NY**573, 157 **NE**862; 25 **OhA**153, 157**NE**907; 127 **Okl** 39, 259**P**551. But see **TexCivA** 21 **SW(2d)**598. [d] **In New York.**-245**NY** 646, 157**NE**893.

572-7 119 **Okl** 241, 249**P**376. [b] **Where separate and distinct cases are** consolidated by one case-made and one petition in error is sought to be brought up, appeal is duplicitous and will be dismissed. 121 **Okl** 213, 247**P**353.

572-8 **Kan** 291**P**744; 41 **OklACR**20.

572-12½-New. or in the certificate of the clerk to the transcript; 113 **Okl** 225, 240**P**1059.

572-15½-New. Unexcused failure to file a motion for a new trial in time is ground for dismissal in some jurisdictions. 122 **Okl** 192, 253**P**105.

572-16½-New. inclusion in notice of appeal of unnecessary matter; 48**Nev** 244, 229**P**387, 234**P**518.

572-31 22**AlaA**226, 114**S**285. [c] **Excusable neglect.**-195**Cal** 566, 234**P**1112.

572-31⅓-New. in the absence of a bill of exceptions in the record; 49**Nev**313, 244**P**1010.

572-31¼-New. failure to file a bill of exceptions where the transcript and abstract present reviewable questions; 127 **Or**406, 257**P**20, 62**ALR**574.

572-31½-New. failure to file a bill of exceptions in time; 124 **Or**94, 257**P**23, 262**P**851.

573-39⅓-New. slight delay in preparation of the transcript on appeal under the alternative method; 76**CalA**606, 245 **P**438.

573-42 170**La**813, 129**S**212(2dcase); 32 **PortoRico** 38; 34**PortoRico** 752. [d] **Error of the court** in ordering preparation of transcript where appellant entitled under statute to choose filing of statement of case instead. 32**PortoRico** 38.

573-43 89**CalA**748, 265**P**389 (error in brief in stating date of order appealed from); 161**Ga**832, 132**SE**206; **MoA** 283 **SW**729; **MoA** 7**SW(2d)**309; 128 **Or**140, 247**P**1077. [f] **Failure to file transcript of record within lawful time** not ground for dismissal of appeal when transcript is being prepared in trial court. 35**PortoRico** 288.

573-43½-New. insufficiency of the notice of appeal; 126 **Or**683, 250**P**235, 270 **P**753.

573-46 6**LaA**236. [a] **Absence of court order approving bond** or authorizing clerk to do so is not ground for dismissal where approval appears on filed bond. 254 **IllA**521.

573-48½-New. irregularity or insufficiency of the abstract capable of conviction; 308**Mo** 278, 276**SW**1020.

573-51 **Nev** 280**P**887.

574-73½-New. A proceeding in error will not be dismissed for failure of the appellate court, without fault of plaintiff in error, to rule on motion to fix time for filing briefs and records and advance the cause for a hearing where all necessary papers and journal entries are before the court and plaintiff in error has filed a brief on the merits. 34**Wyo** 153, 242**P**326.

574-73⅓-New. An appeal will not be dismissed for failure of appellant to file his argument within the time prescribed by court rules where prejudice does not appear. 203 **Iowa**1139, 212**NW**709.

574-73¼-New. Moving party's delay precludes dismissal. 153**Md**221, 138**A** 25.

574-73⅕-New. Failure of cross plaintiff to prepare, serve, and settle a case-made and file it with the cross petition in error has been held not a ground for dismissal. 133 **Okl** 5, 270**P**574.

574-74 Contra 176**Ark**481, 2**SW(2d)** 1092.

574-75 193**NC**35, 136**SE**193; 193**NC** 749, 138**SE**128. [a] 190**NC**330, 129**SE** 726.

574-76 38**GaA**555, 144**SE**350; 121 **Or** 688, 257**P**19. [a] 129 **Okl** 144, 265**P** 1078.

574-77 10**F(2d)**311; 200**Cal** 309, 253**P** 1115; 89**Fla**446, 105**S**126, 127 (statute giving power to quash); 91**Fla**275, 107 **S**342, 343 [citCJ]; 98**Fla**559, 124**S**21; **Fla** 126**S**383; **Fla** 128**S**851; 3**LaA**625; 174**Minn**401, 219**NW**457; 178**Minn**232, 226**NW**700; 114 **Okl** 239, 246**P**451; 121 **Okl** 55, 247**P**87; 122 **Okl** 105, 251**P**81; 127 **Okl** 7, 259**P**548; 128 **Okl** 38, 260**P** 1063; 131 **Okl** 189, 268**P**194; 131 **Okl** 224, 268**P**256; 135 **Okl** 35, 273**P**898(2d case); 142 **Okl** 240, 286**P**340; 32**Porto Rico** 598 (rule 59). [b] 97**Fla**876, 122

8523; Fla 126S291. [d] **Where questions presented have long been decided adversely to appellant's contention,** appeal will be held frivolous. 137 Okl 9, 278P1114 (question as to right of congress to provide for removal of restrictions against alienation of homestead allotments of members of Chickasaw Tribe of Indians).

574–78 208Cal 645, 283P943; 233 IllA 69; 161La725, 109S402; 161La728, 109S403; 161La1070, 109S841; 163La1073, 113S459; 168La1005, 123S655, 67ALR1183 (where appeal is heard on merits); 168La1030, 123S664; 170La355, 127S866. [b] **Appeal by city from order overruling demurrer to complaint,** in cause of action brought in favor of city, is frivolous and unwarranted. 198Wis581, 225NW188.

575–79 20F(2d)873; Fla 128S851; 17Minn631, 220NW156; 32PortoRico 799 (appeal not shown frivolous); 35PortoRico 921; 35Wyo 183, 247P305.

575–80 274US106, 47SCt499, 71Led949; 8F(2d)794; 21F(2d)910; 32F(2d)968; 28Ariz464, 237P960; 32Ariz118, 256P113; 195Cal 264, 232P463; 199Cal 747, 251P807; 200Cal 381, 253P323; 203Cal 262, 263P801; Cal 292P637; 85Colo 496, 277P471(1stcase); 92Fla995, 110S546; 161Ga286, 130SE680; 161Ga734, 132SE386 (no merit in motion to dismiss on ground questions decided by trial court have become moot); 162Ga84, 132SE755; 164Ga734, 139SE426; 166Ga224, 142SE857; 168Ga482, 148SE274; 170Ga891, 154SE350(1st case); 42 Ida25, 242P977; Ill 173NE175; Ind 171NE377; 86 IndA723, 159NE694; 202 Iowa973, 210NW93; 204Iowa439, 215NW716, 718 [citCJ]; 204Iowa724, 215NW946 (question not moot); 205 Iowa235, 217NW630; 206Iowa952, 221NW560; 208 Iowa401, 227NW332; Iowa 232NW118; 123Kan378, 254P1036; 126Kan162, 266P932; 208Ky784, 271SW1095; 218Ky402, 291SW362; 161La435, 108S874; 164La733, 114S634; 4LaA47; 5LaA334; 13LaA580, 128S540(1stcase); LaA 130S633; 126Me147, 136A810; 165Minn484, 205NW894; 169Minn172, 210NW877; 142Miss416, 107S550; Mo 198SW(2d)676; MoA 278SW739; Nebr 230NW452; 30NM482, 239P524; 31NM591, 249P107; 33NM528, 270P799; 34NM451, 283P905; 192NC384, 135SE131; 192NC580, 135SE456; 198NC404, 151SE871 (moot question); NC 155SE616; 52ND720, 204NW182; 55ND515, 214NW802; ND 230NW292; 116 OhSt739, 158NE8(2dcase) [foll 82 OhSt237, 92NE21]; 116 OhSt729, 158NE8(5thcase) [foll 82 OhSt 237, 92NE21]; 112 Okl 252, 240P1042; 113 Okl 199, 240P738; 113 Okl 286, 241P484; 114 Okl 196, 245P858; 116 Okl 236, 244P422; 127 Okl 126, 260P14; 128 Okl 282, 262P659; 132 Okl 52, 270P87; 136 Okl 144, 276P740; 136 Okl 201, 277P230; 138 Okl 244, 280P830(1st case); 138 Okl 241, 280P833; 139 Okl 52, 281P222; 139 Okl 60, 281P233; 140 Okl 252, 282P1099(2dcase); 141 Okl 85, 284P2; 143 Okl 69, 287P1041; Okl 292P66(1stcase); 122 Or68, 256P389; 131 Or685, 284P197; 291Pa357, 140A128 (disclaimer by claimant of liquors sought to be forfeited); TexCommnA 238W(2d)331; TexCivA 272SW290; TexCivA 275SW260; TexCivA 286SW530; TexCivA 293SW258; TexCivA 293SW337; TexCivA 28W(2d)359; TexCivA 48W(2d)566; TexCivA 218W(2d)92; 146Va426, 131SE689; 146Va426, 132SE705; Wis 232NW842. But see IndA 172NE801. [a] (4) TexCivA 286SW530. (8) Question whether defendants should be enjoined from carrying out contract becoming moot where contract abandoned. 201 Iowa912, 208NW505. (9) Appeal from temporary restraining order restraining defendant in use of specified personal property will be dismissed when property has been destroyed. 42 Ida25, 242P977. (10) Where, on appeal by surviving mortgagor from order granting probate claimant's right to redeem from foreclosure sale, it appears that time for redemption lapsed without attempt to redeem. 204 Iowa439, 215NW716. [i] 74Mont558, 241P636. [j] **Where question became moot pending appeal by reason of lack of order maintaining existing status,** fact that petition sought general equity relief was not sufficient to entitle plaintiff to restoration of status and affirmative relief. 8F(2d)794. [k] **Ordinance passed after suit begins will not render question moot** where party is entitled to relief as determined by facts existing at time of bringing action. MoA 300SW1041. [l] **Questions held not moot.**–SD 228NW802. [m] **Where there is left any material question for determination,** court should not dismiss appeal on ground question has become moot. CalA 289P206.

576–81–82 Iowa 196NW287; 309Mo408, 274SW407; 52ND904, 204NW834. See also 144Va286, 132SE187.

577–83 176Ark774, 4SW(2d)15, 58ALR534 (right to damages); 169Ga349, 150SE92; 248Mich190, 226NW897; Mo 274SW1067.

577–85 273US135, 47SCt319, 71Led580, 50ALR1.

577–86 216Ala167, 112S818; 30Ariz54, 243P910 (in suit for injunction against street improvement, appeal not dismissed after completion of the work, since plaintiffs would probably resist collection of taxes on their property and raise questions as to legality of the improvement); TexCivA 32SW(2d)480.

577–86½–New. or by appellant, Tex CivA 198W(2d)784.

577–87 171Ark1079, 287SW581; 75CalA697, 243P892; 160Ga775, 129SE68 (where railroad resumed service after appeal from denial of application for receiver to operate it and injunction against future dismantling); 129Kan244, 282P732; 76Mont332, 247P166; 33NM394, 268P786; 34NM335, 281P460; TexCommnA 299SW225; TexCivA 275SW253.

577–88 36GaA219, 136SE103; 54SD385, 223NW318; SD 228NW802. See also 164Ga445, 139SE2.

577–90½–New. That constitutionality of the act was involved does not prevent the case from becoming moot where the acts to be enjoined have been committed. 218Ky402, 291SW362.

577–91 32Ariz118, 256P113; Mo 28SW(2d)743; 197NC675, 150SE332. [a] (2) Appeal from refusal to enjoin submitting ballot to voters to pass on amendment to constitution became moot through holding election and approval of proposed amendment and will be dismissed. 32Ariz118, 256P113.

577–92 274US106, 47SCt499, 71Led949; 89Fla74, 104S857; 329 Ill 380, 160NE747; Miss 115S343 (act performed). [e] **Death of county clerk before** determination of appeal in action to compel him to issue warrant raises question to become moot and is ground for dismissal of appeal. 115 Okl 151, 241P151.

577–93 42 Ida25, 242P977; 325 Ill 259, 156NE279; 329 Ill 380, 160NE747; 204Iowa530, 215NW497; 206 Iowa952, 221NW560; 208 Iowa1401, 227NW332; Iowa 232NW118; 126Me147, 136A810; 157Tenn168, 7SW(2d)40; TexCommnA 25SW(2d)826; TexCivA 272SW290; TexCivA 128SW(2d)1072(2dcase).

578–3 181Ark312, 26SW(2d)77; 207Cal 395, 279P136; Cal 292P637; 92Fla995, 110S546; 167Ga52, 144SE771; 48 Ida478, 282P940(1stcase); Ill 173NE175; Ind 171NE377; 88 IndA251, 162NE237(1stcase); Iowa 229NW724; Iowa 231NW341; 227Ky1, 11SW(2d)963; 235Ky17, 29SW(2d)615; 164La1013, 115S128; 265Mass19, 163NE257; NJPrerog 149A349; 31NM443, 247P306; 192NC384, 135SE131; 52ND904, 204NW834; 144 Okl 39, 289P354; 288Pa312, 136A240; TexCommnA 29SW(2d)958; TexCivA 286SW572; TexCivA 286SW573; TexCivA 12SW(2d)1072(2dcase); TexCivA 20SW(2d)221; Wis 232NW842. [a] (3) Where prior to submission of cause refreshment stand, sought to be enjoined from being established and operated, had been completed and put in operation, question involved on appeal from dismissal of suit became moot. TexCivA 19SW(2d)857. (4) Where pending injunction suit to restrain construction of filling station, structure has been completed. TexCivA 22SW(2d)727(1stcase). [c] **In suit to prohibit placing name of certain person on ballot,** issues were moot after election had been held, and cause on appeal will be dismissed. 98Fla981, 124S463.

578–4 36F(2d)111; 38F(2d)444; 208Cal 544, 282P957; 155Md638, 142A506; Mont 285P185.

578–4½–New. The reviewing court should not refuse relief from an order of the county court refusing to dissolve an injunction, notwithstanding respondent's claim that the injunction was a mere restraining order, which expired before the date of the order refusing to dissolve it. TexCivA 21SW(2d)743.

578–5½–New. or where a congressman, certification of whose election is sought to be enjoined, has qualified and occupies his seat, 202 Iowa973, 210NW93.

578–6–7 28Ariz464, 237P960; CalA 288P803; 243 IllA142, 145 [citCJ]; 86IndA723, 159NE694; 234Ky771, 29SW(2d)37 (expiration of school term); 126Me147, 136A810; 34PortoRico 126. But see 200 Ind275, 161NE262; 160La617, 107S466; 34PortoRico 655.

579–10 126Me147, 136A810. [a] **Where county is real party in interest,** appeal will not be dismissed because terms of office of official party defendants have expired. Iowa 196NW287.

579–11½–New. Where the life of a rent commission has expired, it is without power to prosecute or defend on appeal from a decision in which it is involved, since only a moot question is presented. 6F(2d)716.

579–12 23F(2d)378 (as to claimants whose claims had been settled, appeal will be dismissed); 207Cal 36, 276P575; 164Ga734, 139SE426; 35GaA345, 133SE281; Iowa 232NW118; 213Ky408, 281SW185; 226Ky785, 11SW(2d)937; 130 Or618, 280P340(1stcase); 131Or685, 284P197; 118Tex224, 13SW(2d)666(2dcase); TexCommnA 281SW1044; TexCommnA 287SW1111; TexCivA 272SW290; TexCivA 293SW258; TexCivA 21SW(2d)23; 99Vt473, 134A585.

579–13 213Ky408, 281P185.

579–13½–New. or an application for rehearing joined by all parties, 158La648, 104S486.

579–14 See also 226Ky785, 11SW(2d)937.

579–16 TexCivA 276SW770.

579–17½–New. , or where the settlement itself is in controversy. 143Wash582, 255P932.

579–19 36F(2d)225; 85Colo 473, 276P981; 161La147, 108S316; 161La725, 109S402; 4LaA603; 12LaA233, 125S887(1stcase); MoA 278SW739; 101NJEq776, 139A32; 98NJEq692, 130A519; 32NM517, 259P821; 48Philippine 16; TexCivA 279SW874. But see Ida290P555; 169La866, 126S219; 11LaA110, 120S779. [j] **Satisfaction without knowledge or consent of party defendant** of judgment still standing of record does not authorize dismissal of appeal. 57ND426, 222NW480.

580–20 317Mo 1119, 298SW63 (case is not moot where judgment was paid under execution); 288Pa217, 135A730.

580–22 269US244, 46SCt83, 70Led255.

580–23 14F(2d)107.

580–25 199Cal 243, 248P916; 128 Okl242, 262P679.

580–26 Iowa 232NW722.

580–28 113US215, 58Ct432, 28Led983; 216Ala366, 113S239; 218Ala235, 118S271; 195Cal 242, 233P94; 87CalA418, 262P431(2dcase) (nonappealable order denying motion for new trial); 90CalA191, 265P859; 90CalA390, 266P320; 90CalA622, 266P554; 98Fla1076, 125S235(2dcase) (parties); 162Ga591, 134SE300; 36GaA448, 136SE920; Ga 155SE18; 85 IndA614, 155NE212; 213Ky291, 280SW1108; 230Ky97, 18SW(2d)965; 158La557, 104S367; 233Mich283, 206NW308; 320Mo 185, 7SW(2d)255; 101NJEq780, 138A892; 245NY509, 157NE837; 113 OhSt703, 150NE920; 116 OhSt730, 158NE7(1stcase); 116 OhSt731, 158NE8(3dcase); 116 OhSt736, 158NE7(3dcase); 116 OhSt737, 158NE8(1stcase); 116 OhSt738, 158NE7(4thcase); 119 Okl 20, 248P871; 120 Okl 78, 250

P518; 127 Okl 166, 260P55; 113 Or552, 233P848; 118 Or260, 246P741; Tex CommnA 292SW525; TexCivA 293SW 1113; TexCivA 296SW639; TexCivA 268W(2d)669 (judgment not being final); TexCivA 27SW(2d)861; 142 Wash478, 253P794; Can [1928] 3 DomLR178; Can [1928] 3DomLR687. See also 108Conn304, 142A838. [d] **Error in overruling plea** to jurisdiction may not require reversal where same result was reached by sustaining general demurrer. TexCivA 291SW972. [e] **Repeal of statute giving jurisdiction of appeal** is ground for dismissal of pending undetermined appeal. 70CalA200, 232P995. [f] **Where non-suit against one tort-feasor** and no judgment against other appear from record, appeal will be dismissed. NJ 148A719(1stcase). [g] **Record held not to show lack of jurisdiction.**–TexCivA 23SW(2d)748.

581–29 46 Ida541, 269P89; 79Mont530, 257P465; 115 Or580, 239P202; Tex CommnA 299SW213 (reversal and rendering judgment held error).

581–31 171Ark285, 284SW770; 242 Mich481, 219NW705 (where court refused to transfer case to law side of court).

581–36½–New. Where the record of proceedings after judgment fails to disclose an extension of time for the hearing of a motion for a new trial after the expiration of the time to appeal from the judgment, an appeal from an order denying a motion for a new trial after the expiration of such time will be dismissed. 50SD474, 210NW668.

581–38 213Ky291, 280SW1108; 2LaA 758; 5LaA589; 7LaA120; 140Miss580, 106S627 (court will dismiss in own motion where lack of jurisdiction appears); TexCivA 17SW(2d)841(1stcase); 145Va 366, 133SE671; Can [1928] 3DomLR 706.

582–41 33 OhA553, 170NE191(1stcase). [a] **Unauthorized reinstatement of dissolved temporary injunction** does not authorize dismissal of appeal. 219Ala 447, 122S426.

582–42 163La15, 111S475; Nebr 229 NW894 (failure to file within three days).

582–43 81Colo 449, 255P1100; 86Colo 330, 282P193; TexCivA 296SW973. See also 51SD493, 215NW492.

582–44½–New. Where a motion for a new trial was premature because filed before judgment in a case tried before the court, the appeal will be dismissed. 114 Okl 47, 242P234.

582–44½–New. Untimely filing of a motion for a new trial is not ground for dismissal of the appeal where a certified transcript of the judgment and order granting the appeal were timely filed. 315Mo 781, 287SW337.

582–45 206Cal 772, 276P574. [a] (2) Appeal from order overruling motion dismissed where notice of intention to move was not filed within time limited by statute and extended time was not granted for sufficient cause. 51SD257, 213NW15. [b] **In South Dakota.**–224 NW957.

582–46 SD 227NW442 (settlement of record omitted).

582–47 195Cal 473, 234P80 (appeal dismissed if not brought to trial within one year from entry in superior court); 100 CalA102, 279P834(1stcase); 110Conn 680, 149A137; 202 Iowa1202, 211NW 727; 225Ky354, 8SW(2d)377; 161La 725, 109S402; 5LaA745; 258Mass611, 155NE635; 259Mass615, 156NE684; Mass 172NE641; 102NJEq274, 140A 323; 241NY578, 150NE562; 245NY602, 157NE875; 195NC365, 142SE230; 116 Oh743, 158NE7; 32PortoRico 598 (rule 59); 35PortoRico 25; 35PortoRico 46; TexCivA 283SW303; TexCivA 297SW 559; TexCivA 22SW(2d)682 (appellant's brief stricken). But see 41GaA 671, 154SE456(2dcase). [a] (3) Steps taken by appellant in interlocutory proceedings (alimony), such steps being independent of the perfection and prosecution of appeal in principal action (divorce). 32PortoRico 598. [b] (5) Other facts requiring denial of motion. Mass 172NE641. [h] **In Indiana.**–168 NE471(2dcase).

583–51 [a] **In California.**–195Cal 473, 234P80.

583–55 137 Okl 246, 278P1116.

583–57 NH 146A89; 230AppDiv764, 244NYS217; 103WVa60, 136SE605.

583–57½–New. Where purported appeal is not taken from an appealable order, it must be dismissed. 74CalA562, 241 P280.

583–58 128Kan691, 280P763 (motion to dismiss denied on facts showing rule inapplicable); 11LaA208, 123S513; 12 LaA162, 125S293. But see 208Cal 647, 284P220.

584–59 164La233, 113S828.

584–62 29F(2d)59; CalA 291P265; 216Ala71, 112S460; 168Ark763, 271SW 714; 203Cal 262, 263P801; 79CalA199, 249P37; CalA 284P514 (final judgment); CalA 287P152; 77Colo 161, 235 P338; 164Ga391, 138SE774; 167Ga620, 146SE318; 119Kan824, 241P249; 125 Kan393, 264P742; 165La873, 116S217; 167La215, 118S893; 167La1041, 120S 770(1stcase); 170La266, 127S623; 12 LaA684, 127S24; 156Md552, 144A703; 140Miss812, 106S626 (void order to create school district superseded by later valid order); 155Miss882, 125S86; Mo 298SW(2d)696; Mo 298SW(2d)696; 84Mont173, 274P495; NJPrerog 149A 349; 30NM482, 239P524; 113 OhS833, 148NE581; 133 Okl 5, 270P574; 131 Or 685, 284P197; 49SD302, 207NW65; TexCommnA 25SW(2d)826; Wis 232 NW842.

585–64 See also 94Fla86, 113S745; 9LaA30, 118S775. But see 39F(2d)5; 87Colo 240, 286P275. [a] (5) Appeal from interlocutory order after final decree has been rendered and no appeal taken therefrom will generally be dismissed, because error in interlocutory order is cured or rendered immaterial by final decree. 89Fla446, 105S126, 127. [b] 203Cal 150, 263P218; 200 Iowa359, 204NW401; 119Kan824, 241 P249; 165Minn484, 205NW894; 112 Okl 252, 240P1042; 143 Okl 272, 288P 461; Okl 292P66(1stcase). [g] (8) Matters involved in appeal from order refusing to grant injunction pendente lite and dissolving temporary restraining order theretofore issued have not become moot because of orders granting nonsuit and denying leave to file amended and supplemental complaint where both orders have been set aside and motions to vacate orders vacating previous order are still pending. 195 Cal 209, 232P147. (9) Enactment of zoning ordinance forbidding erection of buildings of kind involved will not justify dismissal of appeal from judgment enjoining erection of building. MoA 5SW(2d)699. [h] **Amendments to decree or judgment.**–94Fla86, 113S745.

585–64½–New. Appeal from interlocutory order taken before final decree is rendered will not be dismissed merely because no appeal is taken from the final decree, unless the final decree renders harmless or immaterial. 89Fla446, 105S126, 127.

585–64½–New. The appeal will not be dismissed where the intervening event concerns but one of two pleas. 165 La737, 116S168.

585–65 32F(2d)78; 101CalA666, 282 P19(2dcase) (where order improvidently made below is modified); 86 IndA66, 155NE832; 203 Iowa583, 213NW209; Miss 110S359; 144Miss899, 110S839; 227AppDiv802, 237NYS367; Tex CommnA 23SW(2d)331; TexCivA 29 SW(2d)764; 144Wash38, 256P331. But see 248Mich450, 227NW811. [a] (3) Defendant's appeal must be dismissed where he failed to file bill of review to set aside subsequent judgment. Tex CivA 24SW(2d)488. [c] 102Conn488, 129A384. [j] **Subsequent decree disposing of property in hands of receiver** will not render moot question raised by appeal from order appointing receiver. 206 Iowa746, 221NW347.

585–66 14F(2d)352; NJSup 136A193; 114 Okl 103, 243P228; 153Wash495, 280 P26.

586–68 217Ky384, 289SW280.

586–69 271US426, 46SCt552, 70Led 1019; 16F(2d)917; 208Cal 544, 282P 957; 118 Or614, 245P502.

586–69½–New. That defendant, by motion entertained and overruled by trial judge to revoke order of injunction and appointment of receiver is afforded a hearing on grounds alleged in petition for injunction and receiver which was one of grounds of complaint in bill of exceptions, will not furnish ground for dismissal of the writ of error. 161Ga 634, 131SE495.

586–69½–New. Where a party to an action in a state court, after taking an appeal, causes an action to be instituted in a federal court involving the same parties and the identical subject, it will be deemed an abandonment of the appeal and the appeal will be dismissed on motion of respondent. 126 Okl 20, 257P1107.

586–69¼–New. Where the demand of plaintiff was dismissed for lack of jurisdiction the demand in reconvention must also be dismissed. 9LaA264, 119 S268.

586–70 [c] **Insufficiency of bond** is waived by appearing to contest appellant's motion for extension of time for filing brief and by delay of eight months before making motion to dismiss on this ground. 200 Ind732, 148NE148.

586–71 215Ala680, 112S205; 48Nev 108, 227P1018, 233P844, 236P1101; 26 OhA122, 158NE588. [h] **Failure to move to dismiss till after submission on final hearing of separate and independent appeal** does not constitute waiver of right to dismissal. 224Ky 107, 5SW(2d)893.

586–72 [a] **Failure to state as ground** for motion to dismiss that appeal is frivolous prevents assigning this ground in subsequent motion to dismiss. 72 CalA244, 236P962.

587–79½–New. Where argument on consolidated bill of exceptions, acquiesced in by other parties, was continued to await commissioner's report, such continuance was not a waiver of right to move to dismiss. Mass 167NE 910(2dcase).

587–80 12F(2d)758; 102CalA630, 283 P361; CalA 289P179; CalA 291P430; 158La682, 104S616; 170Minn230, 212 NW196; MoA 1SW(2d)851; 133 Okl 5, 270P574; 34PortoRico 328. But see 90 CalA360, 265P881. [b] (1) 123 Or461, 238P1114. [d] **Appeal taken in name of party after adjudication in bankruptcy** will not be dismissed where receiver applies for order of substitution and motion is granted. 170Minn230, 212NW196.

587–84 88CalA284, 263P299; 102CalA 545, 283P123; 202 Iowa627, 210NW758; 33PortoRico 497; 33PortoRico 970. [a] (1) 72CalA139, 236P953. (2) 72CalA139, 236P953. [e] **Where transcript of record was filed on same day that notice of motion to dismiss was given,** appeal will not be dismissed in absence of showing whether transcript or notice was filed first. 203Cal 772, 265P931.

588–87½–New. An appeal will not be dismissed for failure to file assignments of error prior to the return day where they were filed with the transcript before the motion to dismiss was filed. 31NM108, 242P331.

588–87½–New. In Nevada. 48Nev235, 228P1095 (rule applied to motion on ground that trial court had not disposed of respondent's objections to bill of exceptions); 49Nev313, 244P1010 (failure to file properly prepared and certified transcript of record).

588–87¼–New. Such statute should be liberally construed. 48Nev235, 228P 1095.

588–89 164Ga772, 139SE537; 5LaA 443; 44Philippine168 (motion by appellee granted). [a] (8) Where event occurs without fault of defendant, which renders it impossible for appellate court to render effectual relief. 27Hawaii415. (9) Where issue involved is moot question. 27Hawaii415.

588–90 164Ga772, 139SE537.

589–95½–New. Where the facts are before the court and the interests of the parties demand termination of the controversy, dismissal without prejudice will be denied. 221Ky750, 299SW989.

589–96 31Ariz128, 250P885; Cal 234P 675; Iowa 233NW137. [c] **Merits of**

F. E. BRIDGE
ATTORNEY-AT-LAW
1244 FIRST NATIONAL BANK BLDG.
CHICAGO

motion to dismiss should not be gone into on motion to strike the motion to dismiss. 198**Cal** 665, 246**P**1040.

589–99 43 **OklACR**79 [reh pending].

589–99½–New. Where time to appeal has expired, no useful purpose is served by permitting appellee to docket case and move to dismiss appeal; therefore cause will merely be stricken from docket. 168**Ark**122, 269**SW**55.

589–3 104**Conn**351, 133**A**106.

589–7 154**Miss**396, 122**S**753(1stcase).

589–8 104**Conn**351, 133**A**106.

589–10 156**Miss**1, 123**S**853(2dcase) (motion on ground of bar by statute of limitations taken as plea in bar of appeal).

589–10½–New. Where judgment appealed from is not final judgment from which an appeal will lie, exclusive remedy is by motion to erase and not by plea in abatement. 110**Conn**319, 148**A** 353.

589–11 **Fla** 129**S**501; 78**Mont**357, 254 **P**174.

589–12 214**Ala**293, 107**S**810; 218**Ala** 554, 119**S**664; 36**GaA**423, 136**SE**813; 318 **Ill** 415, 149**NE**231; 232 **IllA**461; 6**LaA** 204; 197**NC**735, 150**SE**510; 115 **Okl** 169, 241**P**1105 [quotCJ]; 43 **OklACR**79 [reh pending]; 118 **Or**92, 245**P**1085; 48 **SD**467, 204**NW**945; 52**SD**168, 216**NW** 949; **TexCivA** 78**W(2d)**605. [a] 6**LaA** 204. [b] (2) Other instances. **Miss** 130 **S**684.

590–13 18**F(2d)**953; 33**F(2d)**578; 216 **Ala**177, 112**S**837; **Ala** 128**S**902; 22**AlaA** 615, 118**S**675(1stcase); 176**Ark**31, 28**W** **(2d)**70; 109**Conn**45, 145**A**151; 98**Fla** 485, 124**S**18(1stcase); 232 **IllA**461; 207 **Iowa**1350, 224**NW**513; 167**Minn**522, 209 **NW**30; 115 **Okl** 169, 241**P**1105 [quot **CJ**]; 120 **Okl** 78, 250**P**518; **TexCivA** 10 **SW(2d)**412; 100**Vt**176, 136**A**22; **Wis** 232**NW**598. [a] 219**Ala**157, 121**S**530 (1stcase); 220**Ala**448, 126**S**110 (order striking petition for rehearing for want of jurisdiction). [d] (1) 203**Cal** 569, 265**P**241; 318 **Ill** 415, 149**NE**231; 319 **Ill** 129, 149**NE**779; 155**Miss**721, 124**S** 341; 156**Miss**656, 126**S**484 (decree denying divorce plaintiff support money pending suit). [g] **Duty of court** to notice of its own motion that order is not appealable. 9**F(2d)**390.

590–14 9**LaA**223, 119**S**887; **TexCivA** 296**SW**973; 100**Vt**48, 134**A**635.

590–15 118 **Or**92, 245**P**1085.

590–16 98**Fla**1242, 125**S**381 (omission of necessary parties); **Fla** 129**S**501.

591–17 **Fla** 128**S**412; 36**GaA**423, 136**SE** 813; 9**LaA**54, 118**S**837; 9**LaA**116, 118 **S**839; 13**LaA**269, 127**S**639; 319**Mo** 250, 3**SW(2d)**352(2dcase); 52**SD**168, 216**NW** 949. [d] 165**Minn**482, 205**NW**888. [l] **Delay in filing transcript.**–91**CalA**119, 266**P**828 (facts not depriving court of jurisdiction to dismiss).

591–18 10**LaA**703, 120**S**645; 49**RI** 421, 143**A**697; 52**SD**168, 216**NW**949; 100**Vt** 111, 135**A**1. [e] 170**Minn**225, 212**NW** 198. [h] 45 **Ida**296, 261**P**774. [l] **Appeal taken after judgment** was set aside may not be dismissed where judgment was reinstated before motion to dismiss was made. 213**Ala**391, 108**S**789. [m] **No assignment of error** was contained in appellant's brief. **MoA** 7**SW(2d)**731.

591–19 **TexCivA** 276**SW**768. [b] **Tex CivA** 276**SW**768; 37**Wyo** 474, 263**P**615, 616 [citCJ].

592–35 13**LaA**566, 128**S**201. See also 204 **Iowa**221, 215**NW**235.

593–38 226**Ky**785, 11**SW(2d)**937.

593–48 35**Ariz**528, 281**P**213.

593–49 38**F(2d)**396.

594–52 198**Cal** 665, 246**P**1040.

594–57 322**Mo** 842, 16**SW(2d)**72. [j] **Service by mail.**–35**PortoRico** 582.

594–59½–New. Where notice is served on appellant by one of respondents, it is immaterial whether notice was given by other respondent. 48 **Ida**95, 279 **P**619(1stcase).

594–62 206 **Iowa**589, 221**NW**193 (motion held timely under rules); 161**La** 227, 108**S**463; 225**AppDiv**477, 233**NYS** 506; 26 **OhA**122, 158**NE**588.

595–67½–New. Motion to dismiss for want of legal right to appeal more than three days after the transcript of appeal has been held timely. 159**La**844, 106**S**325.

595–67½–New. Motion to dismiss for want of legal right to appeal may be made at any time. 159**La**844, 106**S** 325.

595–67¼–New. A motion to dismiss based upon matters existing at the time of submission of the appeal on the merits and made subsequent thereto will be disregarded. 22**AlaA**217, 114**S**275.

595–67⅙–New. A motion to dismiss after appeal has been decided will not be heard. 197 **Ind**646, 151**NE**689.

595–67⅙–New. Motion to dismiss for acquiescence in judgment need not be made within three days of filing transcript. 169**La**866, 126**S**219.

595–68 104**Conn**351, 133**A**106; **LaA** 129**S**196 (acquiescence); 20 **OhA**12, 151 **NE**805.

595–69 9**LaA**104, 118**S**844; 12**LaA**275, 124**S**609. [b] But see 11**LaA**59, 123**S** 181(1stcase). [c] **Lack of jurisdiction first noticed on motion for** rehearing warrants dismissal. **TexCivA** 279**SW** 871. [d] **Proper time to attack jurisdiction** of supreme court is when appeal is heard, not after decree has been entered. 236**Mich**60, 209**NW**923.

595–70–71 **TexCivA** 21**SW(2d)**92.

595–72 **Iowa** 216**NW**753; 205 **Iowa**460, 218**NW**311; **LaA** 128**S**49; 13**LaA**507, 128**S**177. [a] (2) Where not taken within prescribed time, motion to dismiss appeal need not be filed within three days after filing transcript. 167**La**430, 119**S**416, (3) Motion to dismiss has been held too late. 13**LaA**507, 128**S**177. [b] **In Ohio** motion must be made before trial in court of appeals. 115 **Oh** 403. 154**NE**317.

596–73 87**Colo** 249, 286**P**278; 48**Nev** 108, 227**P**1018, 233**P**844, 236**P**1101; 321 **Mo** 358, 11**SW(2d)**11; 152**Va**868, 148**SE** 785. See also 85**Colo** 346, 276**P**30. [i] **Reasonable promptness.**–206 **Iowa**766, 221**NW**449 (motion to dismiss sustained). [m] **Motion held not too late.**–**LaA** 130**S**873.

596–76 218**Ala**554, 119**S**664; 22**AlaA** 217, 114**S**275.

597–79 7**LaA**651; 84**Mont**141, 274**P**844; **TexCivA** 30**SW(2d)**522. See also 44 **Ida** 751, 260**P**431. [a] (1) 8**LaA**174. (3) Motion based on want of citation may be made after three days. 8**LaA**605. [b] 116 **Or**626, 239**P**108 (motion on ground of failure to file undertaking).

597–80 231**Ky**625, 21**SW(2d)**1003. See also 204**Cal** 466, 268**P**1055. But see 224 **Ky**107, 5**SW(2d)**893. [b] But see 167 **La**59, 118**S**692(1stcase).

597–81 224**Ky**107, 5**SW(2d)**893.

597–86½–New. , and under some statutes supreme court is required to decide motions to quash such proceedings, although case has not been reached for final hearing upon regular call of the docket. 89**Fla**446, 105**S**126, 127.

598–87 **TexCivA** 21**SW(2d)**743.

598–88 [a] **Proper form of prayer for relief** under statutes is in alternative either to dismiss or affirm. 206 **Iowa**766, 221**NW**449 (failure to file abstract in time).

598–91½–New. A statement in the brief of defendant in error that notice of suing out a writ of error should be served on all adverse parties or their attorneys is a sufficient motion to dismiss for failure to serve such notice where defendant in error is a minor. 308**Mo** 309, 272 **SW**691.

598–91⅓–New. Where a motion is made to dismiss the application for a writ of error after the writ has issued, it will be treated as a motion to dismiss the writ itself. 82**Colo** 391, 260**P**524.

598–92½–New. Motion not stating whether it is addressed to appeal from judgment or appeal from order denying new trial or both is too general. **Nev** 292**P**1.

598–93 208**Cal** 102, 280**P**358(2dcase); 49**SD**341, 207**NW**155.

598–97 50**Nev**99, 251**P**721. [c] (8) Conclusion in certificate that time for presenting and filing transcript and bill of exceptions had long since passed was not statement of the facts required to be set forth. 94**CalA**185, 270**P**686. (9) Where appellee did not show by certificate or by affidavit whether or not time within which transcript might be prepared had expired, motion to dismiss appeal must be denied. 94**CalA**185, 270 **P**686. [k] **Motion to dismiss appeal of owner of dog ordered to be killed** must be overruled where affidavit offered by owner averring that value of dog was five hundred dollars was not controverted. 231**Ky**396, 21**SW(2d)**480.

599–98 **Ill** 173**NE**175; 11**LaA**655, 124**S** 562(1stcase). See also 45 **Ida**776, 265**P** 703.

599–1½–New. A motion to dismiss, so far as based on matters not appearing in the record should be accompanied by affidavit or other showing. 48**Nev** 235. 228**P**1095.

599–1⅓–New. A motion to dismiss on the ground that the bill of exceptions has not been filed with the trial court clerk must be denied where the bill bears what purports to be a notation of its having been duly filed and what purports to be the clerk's certificate that it is a true bill. 48**Nev**235, 228**P** 1095.

599–2 202**Cal** 277, 259**P**1102 (showing proceedings causing question to become moot); 168**Ga**439, 148**SE**81; 41 **Ida**129, 238**P**308 (motion held to state no valid ground for dismissal); 163**La**1073, 113 **S**459; 170**La**612, 128**S**652; 254**Mass**50, 149**NE**659 (question not shown to be moot); **TexCivA** 31**SW(2d)**329. [j] **Sufficient prima facie showing.**–195**Cal** 242, 233**P**94. [k] **Motion to dismiss motion made for dismissal of cause as moot**, both motions may be considered, and affidavits of matters occurring since appeal was perfected may be considered to ascertain jurisdiction. **TexCivA** 272 **SW**290. [l] **Motion to dismiss as moot** may be considered by court of civil appeals. **TexCivA** 272**SW**290.

600–6 But see 222**MoA**64, 300**SW**554.

600–6½–New. In some jurisdictions it is the practice to serve notice of a motion to dismiss, 200**Cal** 739, 255**P**178.

600–6⅓–New. and service may be made by mail. 200**Cal** 739, 255**P**178.

600–6¼–New. Under code provisions as to mailing, service is held to be complete at the time of deposit of the notice in the mail. 200**Cal** 739, 255**P**178.

600–6⅕–New. And the mere fact of nonreceipt of a notice sent through the mail is not sufficient to establish that an affidavit of mailing is false and fraudulent. 200**Cal** 739, 255**P**178.

600–6⅙–New. In a jurisdiction where service of motion is required, return of service is insufficient where it fails to state facts showing that the person served was of suitable age and discretion. **Or** 280**P**659.

600–7 **CalA** 289**P**650 (sufficient excuse for delay in filing points and authorities shown); 34**NM**436, 283**P**52(2dcase) (defect cured before hearing and motion denied); **SD** 224**NW**957. [d] **Where facts are merely statement of pleadings in lower court,** motion to dismiss will be passed on face of papers. 169**La**780, 126**S**59. [e] Motion to dismiss on ground that it raised question of law need not be considered, where consequence to cause must be same in either event. **Mass** 168**NE**736. [f] **In absence of jurisdictional grounds** motion to dismiss will not be granted unless prejudice is shown or ends of justice require dismissal. **NM** 290**P**742.

600–8 Contra 164**Ga**734, 139**SE**426.

600–9 167**Ga**416, 145**SE**855. [c] **Question of fact.**–**TexCivA** 8**SW(2d)**228.

600–10 126 **Okl** 1, 257**P**772.

600–12 208**Cal** 644, 283**P**942; **TexCivA** 29**SW(2d)**823.

601–14 [c] 10**LaA**785, 122**S**907(1st case).

601–18½–New. Where grounds of motion are that appellant failed to file properly certified transcript, motion will be denied where after permission granted at hearing of motion he files duly certified copy of transcript. 67**CalA**379, 227**P**645.

601–18⅓–New. Motion to dismiss appeal from order striking defendant's notice of intention to move for new trial from files, based solely on ground that if appeal from judgment is dismissed appeal from such order would be ineffectual, will be denied. 197**Cal** 288, 240 **P**764.

601–18¼–New. Motion to dismiss writ

of error will be denied where prior to its making the writ was abandoned and became ineffectual by appellants suing out second writ to same judgment. 89 **Fla**379, 104S779.

601-18⅓-New. Court, on motion to dismiss appeal as frivolous, will finally dispose of appeal, where superficial examination of record reveals no substantial error. **Fla** 128S810(2dcase).

601-18¼-New. Where the record does not show that citation of appeal was issued or served, the case may be remanded for completion of the record to show such facts or for issuance and service of citation. 6**LaA**297.

601-18½-New. Separate motions to dismiss filed simultaneously by different parties will be disposed of together if convenient or promotive of justice. **NM** 290P742.

601-20 206 **Iowa**766, 221**NW**449.

601-22 43**F(2d)**670.

601-24 159**La**1019, 106S550; 32**Porto Rico** 616. [c] (2) Necessary to submit to appellate court certified copy of transcript, where motion based on alleged invalidity of such transcript. 32 **PortoRico** 616.

601-25 16**F(2d)**886. [d] **Evidence held insufficient** to show timely execution, delivery, and approval of supersedeas bond. **AlaA** 130S312.

602-26 45 **Ida**333, 262P510; **TexCivA** 272SW290 (motion to dismiss supported by release and affidavits); **TexCivA** 275SW260. See also 218**Ky**402, 291SW 362. [d] **Court of civil appeals has jurisdiction to hear motion to dismiss** on ground of settlement, and motion to dismiss such motion, as having come too late; on determination of these questions court may consider affidavits and other documents of matters occurring since appeal was effected to ascertain such matters of fact as may be necessary to proper exercise of jurisdiction. **Tex CivA** 272SW290.

602-31 **TexCivA** 270SW1050.

602-32 81**Mont**459, 264P127; 50**Nev**42, 249P1068; 57**ND**722, 223**NW**937; **ND** 232NW10; 34**PortoRico** 307 (to show that party not served with notice of appeal was adverse party); **SD** 224NW 957. [b] **Evidence held insufficient to show** that order extending time to file transcript was not filed. 124 **Or**71, 240 P881, 263P66.

602-33 195**Cal** 582, 234P370; 91**Fla**275, 107S342; 158**La**557, 104S367; 166**La** 883, 118S70 [reh den 166**La**891, 118S 73]; 48**Nev**32, 226P902, 233P842; **Nev** 286P120 (whether other persons should have been made parties to motion for new trial is not involved); 51**ND**842, 200NW1010 [citCJ]; 124 **Or**214, 264P 359; **Vt** 150A459; 197**Wis**98, 221NW 401; 36**Wyo** 318, 255P1. [d] **Objection that appellant in opening brief had failed to point out error** was one that could not be raised on motion to dismiss. 100**CalA**556, 280P554(1stcase). [e] **Fault or negligence by reason of which record is incomplete** is conclusion which must be determined by court. 12**LaA**8, 124S844(1stcase). [f] **Right to maintain action** cannot be determined on motion to dismiss appeal from judgment refusing preliminary injunction. 168**La**1005, 123S655, 67**ALR** 1183.

603-35 201**Cal** 190, 255P798; 205**Cal** 71, 269P921; 130 **Or**519, 265P438; 36 **Wyo** 318, 255P1.

603-36-37 195**Cal** 582, 234P370.

603-38½-New. The court will not entertain jurisdiction and pass on settled case in order to determine the question of court costs. **TexCivA** 272SW290.

603-38⅓-New. A statute requiring the supreme court to quash upon motion appeal proceedings taken for delay does not require an examination of doubtful questions properly raised, but its purpose is to enable to quash where assignments of error are so plainly without merit as to lead to the conclusion that the proceedings were merely taken for delay. 89**Fla**446, 105S126.

603-38¼-New. Where it does not appear from a cursory examination of the record without investigation or argument that assignments of error are palpably without merit, or if debatable questions of law or fact are raised, a motion to quash on the ground that appellate proceedings were taken for delay will be denied and the case will be held for hearing in its regular order in the docket. 89**Fla**446, 105S126.

603-39 [d] 137 **Okl** 280, 279P335 (counter-affidavits showing that question had not become moot).

603-40 142**Wash**489, 253P822.

603-41 163**La**1019, 113S360.

603-42½-New. Where the answer to a motion to dismiss a writ of error fails directly to deny the facts stated in the motion, they will be accepted as true. 161**Ga**286, 130SE680.

603-42⅓-New. Where a certificate of the trial judge, that the brief of the evidence has been altered after approval attached to the motion as an exhibit is not denied, the writ of error must be dismissed. 40**GaA**262, 149SE282.

603-43 34**PortoRico** 493 (rehearing denied).

604-46 **TexCivA** 8SW**(2d)**228.

604-53 236 **IllA**68; 159**La**251, 105S307 (and asking for amendment of judgment).

604-54-55 233 **IllA**48 (where motion was made before appellant filed his brief, and motion was reserved to hearing by appellate court).

604-57 See also 37**GaA**33, 138SE856 (1stcase).

604-58 [c] **Bill of exceptions to order which was not final judgment** may be entered as exceptions pendente lite. 169**Ga**377, 150SE552(1stcase).

605-65½-New. Where appeal is entered by two defendants in their own name and the name of another defendant dismissed from the cause, and the time for taking appeal has not elapsed, the court may dismiss on a motion of appellee with leave to enter a new appeal. 90 **Fla**112, 105S123.

605-65⅓-New. An order denying a motion to dismiss an appeal on the ground that it was taken for delay bars consideration thereof on affirming judgment. 144**Wash**296, 257P842.

605-65¼-New. Where it appears that, after a partial trial, the lower court refused to proceed further or render an appealable judgment, the appellate court, under its superintending control, will dismiss the appeal and direct the trial court to grant a new trial. 127 **Okl** 39, 259P551.

605-65½-New. 166**Ga**153, 142SE676.

605-65⅓-New. On dismissal of an appeal from a decree dismissing a suit to enjoin, the case will not be remanded for trial on the question of damages. 156**Md**552, 144A703.

605-65⅓-New. Exceptions to order dismissing petition unless amended, though premature, could operate as exceptions pendente lite. **Ga** 154SE784.

605-69 116 **Or**668, 242P842 (substantial compliance with order directing dismissal of appeal on failure to supply omissions in transcript).

605-72 91**Fla**284, 107S918; 161**La**725, 109S402. But see 164**La**233, 113S828. [f] **To "dismiss an appeal"** is to "refuse to review it." 161**La**725, 109S402. [g] **Dismissal carries with it specifications of error** of party whose appeal is dismissed. 82**Mont**198, 266P378, 57**ALR** 1169.

606-73 [d] **After dismissal court** is without jurisdiction to pass upon motion for affirmance. 87**CalA**143, 261P 767.

606-75 [b] **Fixing time to answer.**-51 **SD**523, 215NW690.

606-76½-New. Dismissal implies that it is not a determination of merits of appeal. 72**CalA**383, 236P364.

606-76⅓-New. Dismissal of appeal duly perfected is an attempted abdication of a jurisdiction which the court must exercise in a proper case. 72**CalA** 383, 236P364.

606-76¼-New. Dismissal of an appeal from a consent order appointing a receiver does not uphold sufficiency of the pleadings or validity of an order appointing a receiver. 77**CalA**99, 246P 86.

606-81 174**Ark**1127, 298SW507 (dismissal with prejudice on appellant's motion); 72**CalA**383, 236P364 (code); 87**CalA**143, 261P767; 37**GaA**683, 141SE 321; 128 **Okl** 245, 262P658; 129 **Okl** 232, 264P210. [b] **In California.**-87 **CalA**20, 261P714.

606-87 207**Cal** 221, 277P490.

606-89½-New. Where an appeal must be dismissed for failure to comply with rules and statutes relating to the filing of a printed abstract and the time within which a printed abstract may be filed has expired, it is immaterial whether the appeal is dismissed or the judgment is affirmed. 307**Mo** 455, 270P688.

607-90 328 **Ill** 206, 159NE191 (dismissal held not to extend power of county court over cause beyond term); 235 **IllA**488, 499 [citCJ]; 289**Pa**327, 137A 459; 32**PortoRico** 167. See also 48 **Philippine**284, 287 [citCJ]. [i] **Voluntary dismissal of appeal from order changing venue** does not terminate case. 32**PortoRico** 167.

607-93 215**Ky**100, 284SW1017; 167**La** 751, 120S283; 1**LaA**354; 7**LaA**116; 7 **LaA**273; 10**LaA**209, 120S649; 10**LaA** 188, 120S778; 100**NJEq**555, 135A801; 118 **Or**531, 247P316; 119 **Or**74, 248P 163. See also 159**La**1019, 106S550. [d] (4) 164**La**290, 113S851; 4**LaA**175. (16) Failure to do anything further after perfecting appeal. 201 **Iowa**240, 207 **NW**121. (17) Failure to submit brief on question whether action survived death of respondent or to take steps for substitution of party in respondent's place. 84**CalA**311, 257P905.

608-94 235 **IllA**488 (by motion to vacate approval appeal bond, though court has no jurisdiction to enter such order). [d] **Where appellant goes to trial** without asking for postponement pending appeal from interlocutory order, appeal becomes abortive. **NB** [1925] 3 **DomLR**189.

608-94½-New. or causes a second writ of error to be issued out to the same final judgment. 89**Fla**379, 104S779.

609-9 30**Ariz**194, 245P353; 35**Ariz**528, 281P213.

609-10 30**Ariz**194, 245P353.

609-12 [a] **Necessity of showing effort to secure extension of time within proper time** or that for some especially good reason he could not secure same. 154 **SC**262, 151SE470.

609-14 311**Mo** 208, 278SW686. But see 338 **Ill** 158, 170NE320.

610-17 189**NC**747, 128SE146 (where no valid excuse given for failure to comply with rules of practice).

610-18 30**Ariz**194, 245P353.

611-29 161**Ga**882, 132SE217.

611-30½-New. , or inability of court stenographer to get out and deliver transcript of evidence, 311**Mo** 208, 278SW 686.

611-36½-New. Allowance of a motion to reinstate may be granted by the supreme court on rehearing of motion after denial and at a term subsequent to such denial without violating the constitution or the supreme court rules. 115 **OhSt**177, 152NE660.

611-42 33**F(2d)**121.

612-44 149**Miss**676, 115S786.

612-45 149**Miss**676, 115S786.

612-49 [a] (2) 68**CalA**634, 229P996.

612-51½-New. , or where it clearly appears that appeal was improperly or erroneously dismissed, 68**CalA**634, 229 P996.

613-60 8 **Ind**487; 29**MoA**366; 133**App Div**863, 117**NYS**1097; 5**HowPrNY**358, **CodeRepNSNY**74 (note of issue is required to contain date of issue according to which clerk must make up calendar); 2**PaigeNY**277 (cases on appeal are placed on calendar of chancellor as of date they were originally entitled to be placed on calendar of court below).

613-62½-New. Ordinarily a case in the supreme court reached in the regular order on the docket will not be passed to the foot of the calendar or continued except by consent of both parties. 7**Nebr** 201, 29**AmR**382.

613-63 [a] **In Georgia.**-160**Ga**703, 128 SE890.

613-64 113**AppDiv**315, 99**NYST** (appeal from final order in mandamus proceedings); 34**Wyo** 163, 242P322.

613–67 168La394, 122S122.
613–69½–New. or the circumstances are extraordinary, 179NY596, 72NE316.
613–70 [a] **Where settlement of estate** depends on decision of appeal in question, it will be advanced for immediate consideration. 196Ind520, 148NE474.
613–70½–New. Where counsel for appellee concedes that reversible error was committed in sustaining his demurrer to plaintiff's answer and dismissing the same, a motion to advance will be granted. 212Ky762, 280SW103.
614–74 179NY596, 72NE316.
615–92 29F(2d)403; 108Conn143, 142A677. See also 109Conn45, 145A151.
615–96½–New. ; where the return on a citation does not show proper service; TexCivA 299SW915.
616–97½–New. Where a case has been stricken from the docket on the ground that the record did not show that notice of appeal was given, it should be reinstated upon submission of a certified copy of the entries in the trial court's docket, showing that notice of appeal was given. TexCommnA 280SW174.
617–7½–New. Not duty of clerk of appellate court to notify appellant that calendar will be called on certain day. 35PortoRico 339.
617–12½–New. That the court declined the offer of plaintiff to exhibit his person in a malpractice case is held not to preclude the supreme court's reviewing of the trial court's ruling on a motion for a new trial. 218Ala453, 118S807.
617–12½–New. The court of appeals must pass on the question of motion for judgment on pleadings regardless of a former action of another court of appeals which overruled the demurrer. 33OhA150, 168NE763.
617–13 [b] **Arguments should be confined to points made in brief.** 232 IllA583; 232 IllA589. [c] **Points made in brief but not argued** are considered waived. 233 IllA240.
617–15 [d] **Fact that exceptions recited that case was set for hearing on respondent's answers** held not ground for arguments based on strict equity practice. 254Mass491, 150NE324.
617–19 163Ga843, 137SE550; 234 IllA173 (court is not bound to search abstract for errors not argued); 232 IllA359. See also 82NH558, 133A446.
617–20 163Ga843, 137SE550; 232 IllA359.
617–21½–New. Where assignments of error are argued in bulk as presenting the same question, assignments in group bearing no relation to the question are not considered. 214Ala291, 107S835.
617–21¼–New. Reviewing court need not reject contention because path followed is different from that marked out in argument. 253NY496, 171NE756(1st case).
618–30 [c] **Party who waives brief** thereby waives right to real argument. 86Colo 236, 280P878.
618–30½–New. When the record presents no question for review, a request of appellant for permission to argue the case orally will be denied. 84 IndA169, 150NE398.
618–41½–New. A statute forbidding decision of a case on a point not raised in opening or answering briefs without first giving the parties an opportunity to be heard on the point is complied with by submitting the question for reargument. 48Nev373, 233P41.
618–42 143Cal596, 77P452.
618–45 194NC760, 140SE807. [b] **Cross-bill presenting exceptions** controlling case if sustained, will be disposed of first. 41GaA587, 153SE785(2d case).
619–48 27F(2d)286; 203Iowa1390, 214NW545; 162La335, 110S495; 167La801, 120S373; 170La355, 127S866; Or292P1029. [g] **Consolidation not permissible.**–299Pa354, 149A650.
619–50 158Tenn407, 15SW(2d)1 (where presented on appeal in one record). But see 220Ala448, 126S110.
619–56 [g] **Cases on review must be heard at first term and decided before** end of term. Ga 154SE698.
620–61 45Ida292, 261P772 (motion denied where no briefs or points were filed); 4LaA469; MoA 15SW(2d)868 (1stcase) (continued to permit appointment of trustee on suggestion of plaintiff's conviction of felony and imprisonment).
620–85 TexCivA 285SW940. [f] **Stay pending appeal to judicial committee.**–Supreme court of Canada may stay its proceedings pending application for leave to appeal to the judicial committee of the privy council. [1925]CanSC 104, [1925] 3DomLR131.
621–87½–New. Appeal will not be stayed in the absence of competent evidence to support it. 50Nev269, 257P618.
621–2 174Minn1, 214NW797; 53ND756, 208NW556, 558 [citCJ]; 115 OhSt177, 152NE660 (in furtherance of justice); 144SC365, 142SE651, 658 [quotCJper Cothran,J]. See also 116Nebr118, 216NW309. [a] **Filing of opinion by appellate court sitting en banc** held final and conclusive, precluding subsequent rehearing. 144SC365, 142SE651.
622–8 158La682, 104S616.
622–9 94Fla347, 115S669; 257Mass91, 153NE322. See also 53ND756, 208NW556, 558 [citCJ].
622–10 But see 86 IndA527, 158NE627.
622–11 40 Ida772, 236P732, 733 [cit CJperTaylor,J dissenting]. [e] **Office of rehearing** is reëxamination of questions applicable to merits of case as presented on appeal, and not to vacate or set aside properly and correctly rendered judgment. 219Ala478, 122S652.
622–12 94Fla347, 115S669.
622–13 172Minn314, 215NW431; 37 Wyo 1, 257P5.
623–14 29Ariz357, 241P514 (reargument of propositions already considered not permitted); 101CalA748, 283P86; 28Hawaii208; 123Kan393, 254P366; MoA 275SW549; RI 147A425(2dcase); 37Wyo 1, 257P5; 37Wyo 124, 263P105 (1stcase); 37Wyo 237, 263P105(2d case). See also TexCivA 276SW475.
623–15 Or 291P375; 49RI 99, 140A3; 37Wyo 1, 257P5.
623–17 TexCivA 23SW(2d)542. [a] **Where relief granted corrects alleged error of decree,** rehearing will be denied. 11LaA180, 123S190(2dcase).
623–18 127 Or107, 269P232.
623–22 120Kan427, 243P1050.
624–26 42F(2d)439; 121 Or236, 254P1022; 122 Or68, 256P769; 34PortoRico 130; RI 138A54; 37Wyo 1, 257P5.
624–39½–New. **Where appellee filed no brief,** he will not be granted a rehearing. TexCivA 293SW865.
624–39½–New. Rehearing will not be granted on the ground that the court expressed an opinion upon a point not argued by counsel, where the point was not material to the decision of the case. 28Hawaii157.
624–39¼–New. Rehearing will not be granted because the opinion was written by a judge not present at the oral argument. TexCommnA 295SW577.
624–39½–New. Where a divisional court has allowed an appeal in the absence of a respondent, it has no power to order a reargument. Eng [1914] 2 KB421.
624–39¼–New. Rehearing may not be had to obtain an explanation of the language in the opinion. 94Fla347, 115S669.
624–39½–New. Principles and rules of law decided in the appellate court's opinion are not subject to review on petition for rehearing. 94Fla347, 115S669.
624–39¼–New. Failure of one of appellant's attorneys to arrive in the court room until after the argument is not ground for a rehearing. 126 Or91, 267P820, 268P980.
624–40 204 Iowa520, 215NW707.
625–50 174Minn1, 214NW797.
626–54 160La109, 106S711; 101Vt285, 143A394. [b] 81CalA23, 253P770. [f] **Where incompleteness is due to appellant's fault and no steps are taken** to complete record before submission, motion for rehearing will be too late. La 123S910.
626–57 101Vt285, 143A394. [a] (10) Failure of record through oversight to show true state of facts is ground for rehearing. 152Tenn360, 277SW898.
627–67 40 Ida772, 236P732, 733 [citCJ perTaylor,J dissenting].
628–68 51Nev188, 272P3.
628–69 154Miss396, 122S753(1stcase).
628–73 204 Iowa520, 215NW707.
629–84 123Kan435, 255P973. See 123Kan452, 255P979.
629–85 120Kan610, 245P157; 123Kan435, 255P973.
629–87 40 Ida772, 236P732, 733 [citCJ perTaylor,J dissenting]; 128Kan1, 275P1095; 150Md125, 132A587; 320Mo617, 8SW(2d)900; 51Philippine154.
629–88 80Colo 380, 252P353; 40 Ida772, 236P732, 733 [citCJperTaylor,J dissenting]; IndA 171NE310(1stcase); 154Miss396, 122S753(1stcase); MoA 16SW(2d)1007; 48Nev100, 227P1016, 232P783; Nev 230P97; 34NM632, 286P979; 146SC41, 143SE668; TexCivA 298SW476; TexCivA 3SW(2d)468; TexCivA 11SW(2d)209. [f] (2) A like rule applies to claim that instruction was erroneous in stating that care was required of master in furnishing safe place to work. MoA 7SW(2d)716.
631–93 TexCivA 3SW(2d)468.
631–94 29Ariz357, 241P514.
631–95 214Ala553, 108S452.
632–99 221MoA823, 293SW460; MoA 24SW(2d)660.
632–7 128Kan40, 275P1080 (rehearing denied).
634–14 WVa 137SE756.
634–23 53SD378, 220NW869.
634–26 Ill 172NE63; Mass 167NE656; 115Nebr711, 216NW556.
634–27 Ill 172NE63; IndA 168NE41; 115Nebr711, 216NW556. [a] (3) Defendants in error, on dismissal of application of writ of error of plaintiffs in error, were not entitled to file motion for rehearing, where they failed to apply for writ of error. TexCommnA 16SW(2d)522.
635–30½–New. A party is not entitled as of right to file an amended motion for rehearing. TexCivA 290SW573.
635–31 94Fla347, 115S669; 40 Ida772, 236P732, 733 [citCJperTaylor,J dissenting]; IndA 172NE659. [a] (4) Eighteen-page petition divided into twenty one paragraphs, citing many authorities and sections of statute involved, and portions of abstracts and briefs, has been held not in compliance with court rule. 83Colo 176, 263P408. (5) Petition must set out fact or point overlooked. 94Fla347, 115S669. (6) Petition amounting to joinder of issue with court as to correctness of conclusions on points passed on should be denied. 94Fla347, 115S669. (7) Petition merely pointing out phrase or sentence in opinion sought to be clarified is insufficient. 94Fla347, 115S669.
635–32 320Mo617, 8SW(2d)900.
635–34 Or 288P1015.
635–38½–New. Extraneous petitions, filed by outsiders not parties to the action and not attorneys at law, had no place in the petition. 196NC160, 144SE693.
635–39 86 IndA527, 158NE627 (ground for rehearing, unsupported by argument or authorities, held waived); 87 IndA59, 160NE48; 34Wyo 84, 241P607, 707.
636–45 TexCivA 30SW(2d)596.
637–55 7LaA294; MoA 299SW844; 105TexCr68, 286SW1088. [b] (5) Petition mailed on last day allowed for filing but not received by clerk until next day will not be considered. 34Wyo 84, 241P607, 707. [e] (2) Application for rehearing of case, coming within supervisory jurisdiction of supreme court, filed on fourteenth day, is filed within time according to statute. 169La44, 124S140.
638–59 34Wyo 84, 241P607, 707.
638–60 TexCivA 281SW1087 (delay excused by necessity for procuring new attorneys); 34Wyo 84, 241P607, 707.
638–61½–New. Where the lower court has not entered judgment, application may be had within the term. 105TexCr68, 286SW1088.
638–64 [a] **Statute permitting correction** at subsequent term of errors in judgments or decrees held not to authorize correction of record. 152Tenn360, 277SW898.
639–70 48Nev1, 226P309, 232P1080

(reply to petition stricken out as frivolous).

639-78 123Kan414, 257P939; TexCivA 281SW344.

639-79½-New. A rehearing is denied where the evidence sustains the decree, and there is no reversible error. 96Fla 870, 118S423(3dcase).

639-80 123Kan414, 257P939; 239Mich 530, 215NW46.

640-87 164La278, 113S847; 193Wis 579, 214NW451, 215NW455. [d] 193 Wis588, 214NW326, 215NW455.

640-92 40 Ida772, 236P732, 733 [quot CJperTaylor,J dissenting].

640-93 40 Ida772, 236P732, 733 [quot CJperTaylor,J dissenting].

640-94½-New. To ask again for rehearing, applicant must bring himself within reservation subject to which the rehearing was refused. 161La175, 108 S405.

641-95½-New. A suggestion of error will be dismissed where appellee had opportunity to argue questions on appellant's previous suggestion of error. 152Miss342, 118S535(2dcase).

641-96 126Kan460, 267P1105 (impertinent and scandalous matter).

641-2 50SD186, 208NW328 (denial of petition for rehearing on "merits" determines all issues).

641-3½-New. Under court rules in some jurisdictions, motion will be denied as of course where the moving party withholds the record for a stated period. 117Nebr411, 221NW17.

641-5 143Miss765, 109S789, 790 [cit CJ].

641-6 143Miss765, 109S789, 790 [cit CJ].

641-7 143Miss765, 109S789, 790 [cit CJ].

641-9 49Nev310, 244P1012, 246P1.

641-11 [a] 307Mo 98, 270SW662.

642-14 See also Nebr 229NW773.

642-15½-New. Where the judgment was annulled by the reviewing court, such judgment was final as to those who did not apply for a rehearing, notwithstanding the reviewing court reached different conclusion on a rehearing. 168 La369, 122S68.

642-15¾-New. A decree on rehearing becomes final on the day it is handed down. 167La348, 119S252(1stcase).

642-16 307Mo 98, 270SW662.

642-17 TexCommnA 299SW885.

642-19 118Tex433, 16SW(2d)516.

642-21½-New. The court will consider only requests in the petition for which a rehearing was granted. 10LaA158, 120S240.

642-21¼-New. On second rehearing appellant is not deemed to have waived points not urged at first rehearing. Mo 31SW(2d)1026.

642-21½-New. On rehearing after transfer to court in banc appellant can raise any point covered by his motion for new trial. Mo 31SW(2d)1026.

642-22 214Ala553, 108S452; 206Cal 697, 276P995(1stcase); 94CalA498, 272P 309; 94CalA782, 273P58; 317 Ill 251, 148NE12; 224 IllA1; 245 IllA498; 196 Ind323, 147NE142, 148NE413; 196 Ind 341, 141NE51, 146NE577, 148NE409; IndA 149NE454; 130Kan1, 284P623(2dcase) (questions not determined or presented); 12LaA330, 122S140; 144Miss 233, 109S601; 146Miss498, 112S390; 154Miss755, 124S73; 318Mo 723, 300 SW769; MoA 295SW524; MoA 22 SW(2d)84; 50Nev191, 255P1010; 31 NM576, 249P242; 53ND291, 205 NW722; TexCommnA 276SW660; 118Tex16, 9SW(2d)1104(1stcase); Tex CommnA 32SW(2d)181; TexCivA 270 SW1062; TexCivA 272SW497 (assignments abandoned by failure to present propositions). TexCivA 14SW(2d)78; TexCivA 15SW(2d)68; TexCivA 15SW (2d)130; 68Utah49, 249P128; 35Wyo 244, 252P1026. [c] **Points not argued or presented in briefs** may not be considered. 31NM576, 249P242.

643-23 TexCivA 290SW769; TexCivA 8SW(2d)552.

643-24 164La767, 114S647; 31NM576, 249P242.

643-25 52SD182, 216NW948. [a] (1) 168Ark1033, 275SW653. (3) Affidavit of material witness repudiating his testimony may be considered for purpose of determining whether or not new trial should be permitted. 168Ark1033, 275 SW653.

643-26 [c] **Court on rehearing** may consider affidavit of witness repudiating his testimony or counter-affidavits to determine propriety of new trial. 168 Ark1033, 275SW653. [d] **Discretion of court.**-157Tenn461, 9SW(2d)692.

643-32½-New. Brief filed on petition for rehearing without leave, and containing arguments not in petition will be stricken. Nev 290P1025.

643-35 165Ga705, 141SE909 (opinion affirming on technical grounds withdrawn and one on merits substituted); 123 Or539, 259P419, 262P938 (judgment reversed and action dismissed). See also 120 Or557, 251P907. [a] 238Mich 206, 213NW455. [c] **Opinion modified** by allowance of reasonable attorney's fees in foreclosure actions. 127 Or75, 270P918.

644-39 119Kan57, 237P651; 120 Or 470, 247P151.

644-47 220Ala511, 125S655(2dcase).

644-48 274US195, 47SCt566, 71Led996; Ala 129S472; 170Ark921, 282SW6; 179 Ark857, 18SW(2d)356; 199Cal 705, 251 P311; 98CalA306, 277P123; 204 Iowa 678, 216NW41 (purpose of review is to correct errors); 130Kan2, 285P522; 11 LaA594, 123S366 (court of appeals cannot review matters where no appeal was taken); 126Me34, 136A459; 254Mass 434, 150NE196; 251Mich651, 232NW 348; 155Miss91, 124S69 (question of liability as between codefendants); 222 AppDiv840, 226NYS749; TexCommnA 292SW525; TexCivA 285SW933. Tex CivA 2SW(2d)331; WVa 153SE248. See also 225AppDiv780, 232NYS56. [a] (1) See also 105WVa621, 143SE349. (2) Till court below undertakes to give preference, in suit to set aside conveyance as in fraud of creditors, question of preference cannot be reviewed. 153Va 392, 149SE624. [d] (2) Constitutionality of taxation provisions in statute relating to organization of bridge and highway districts will not be considered in proceeding to review legality of formation of district. 207Cal 722, 279P 989. [i] (2) Reviewing court will not pass upon issue not passed upon by trial court. 81Mont248, 263P693. [j] **Courts should recognize and enforce** matter fatal to recovery on final result, when it first appears. 135Wash368, 237 P987. [k] **In Illinois.**-234 IllA15. [l] **Appellate court may take judicial notice** of changed economic conditions to warrant amount of verdict claimed excessive. 235 IllA198. [m] **Questions of fact** expressly excluded from consideration by trial court will not be considered by appellate court. 81Colo 454, 256P 315. [n] **Motion to retax costs not heard or determined by trial court** cannot be considered by supreme court on appeal. 127 Or393, 272P265. [o] **Whatever inference jury may have drawn** as to insurance, indemnity by reason of facts appearing in friendly suit cannot be reviewed. 220Ala201, 124 S740. [p] **Constitutional questions.**-179 Ark886, 19SW(2d)1000. [q] **Question of measure of damages not passed on by trial court** is not before Supreme Court for decision. Miss 129S100. [r] **Question not decided in trial court** is not reviewable on appeal. NM 289P801. [s] **Decrees not yet reached.**-153Va410, 149 SE630. [t] **Questions held not properly presented.**-Pa 147A242.

645-49½-New. As affects review, all judgments may be classified as either judicial facts, findings, or as rulings based on judicial discretion. 20F(2d) 235.

645-49¾-New. The first duty of the appellate court, aside from upholding the law, is to determine whether the case has been properly presented and fairly tried. TexCivA 4SW(2d)257.

645-49¼-New. Where there is an incomplete transcript, the court will consider the appeal on its merits. 91CalA 324, 266P963.

645-51 Mass 166NE765(2dcase).

645-52 272US658, 47SCt222, 71Led 463; 18F(2d)755; 34F(2d)605; Ala 127S155; 222MoA193, 297SW94; 191NC 744, 133SE5; 192NC626, 135SE627; 193 NC413, 137SE314; 157Tenn391, 8SW (2d)495, 62ALR495; TexCivA 277SW 743 (conclusion of law not binding on appellate court as finding of fact); Tex CivA 292SW618.

645-54½-New. The construction of a contract whether by court or jury is reviewable where the contract and the evidence are fully transferred. 81NH 451, 130A145.

645-54¾-New. The trial court is in no better position than the appellate court as to what inference should be drawn from facts where the evidence thereon is not in serious dispute. 140Wash613, 250P49.

645-57 23F(2d)55.

645-58 NH 149A498.

645-65 TexCivA 28SW(2d)288.

645-67 NJSup 137A561.

646-68 NJSup 147A654.

646-69 NJSup 147A654; 146Wash143, 262P131. [b] **Appellate court cannot say method of avoiding injury is contributory negligence as matter of law** because it would not have used it. 102 CalA615, 283P358.

646-70 NJSup 147A654.

646-71 TexCivA 292SW599; TexCivA 18SW(2d)744; TexCivA 21SW(2d) 1076; 146Wash143, 262P131.

646-74 36F(2d)589; 146Wash143, 262 P131.

646-75 102Conn529, 129A527; NJSup 133A766.

646-75½-New. whether contract of sale was based on sample, and what the sample was; 102Conn529, 129A527.

646-75¼-New. the quality of a sample on which the contract was based; 102Conn529, 129A527.

646-77 168Ark892, 272SW684.

646-79 194NC729, 140SE722; 122 Okl 53, 250P918.

646-80 See also TexCivA 275SW75.

646-85 [a] **Whether debtor's efforts** to acquire actual occupancy of land in connection with intention were sufficient to make it homestead held fact question. TexCivA 297SW271.

647-99 But see 23AlaA416, 125S398.

647-15 5F(2d)167 (whether plaintiff's gin was produced by redistillation of pure spirit over juniper berries and other aromatics); 18F(2d)755; 30F (2d)981; 39F(2d)851; 175Ark1169, 1 SW(2d)34; 78CalA49, 248P258; 82 CalA786, 256P290; 85CalA475, 259P 770; CalA 261P489; 89CalA345, 264P 789; 94CalA530, 271P554; CalA 284P 715; 108Conn142, 142A741 (that broker was procuring cause of sale); 109Conn 441, 146A834 (whether driver of autotruck was owner's agent at time of accident); 109Conn466, 146A846; 110 Conn49, 147A31 (whether parties intended written order to embody entire oral agreement or only part); 335 Ill 500, 167NE114; 200 Ind319, 163NE 263; 119Kan112, 237P928; 234Ky440, 28SW(2d)504(1stcase); Me 132A742; 259Mass490, 156NE687; 262Mass247, 159NE909; Mass 170NE49; Mass 171 NE491; Mass 173NE516; Mo 19SW(2d) 865(1stcase) (whether land became public road by use and maintenance); MoA 285SW516; 82NH193, 132A12; NH 149 A498 (waiver of right to jury trial); NH 151A452; NJ 133A292; NJSup 132 A651; NJSup 140A30; 253NY17, 170 NE477; 119 Oh419, 164NE418; 120 Oh 620, 169NE296(1stcase); 30 OhA435, 165NE55; OhA 166NE906(2dcase) (meeting of minds of parties to release of insurer from liability); 144 Okl 225, 291P100; Or 289P369; 288Pa434, 136 A669; 294Pa47, 143A474; 51SD170, 212NW914; TexCivA 275SW75; Tex CivA 297SW294 (subrogation of assignee of mortgage to rights of holders of first liens); TexCivA 12SW(2d)1056; TexCivA 14SW(2d)109; TexCivA 20SW (2d)1099; TexCivA 24SW(2d)524; Tex CivA 28SW(2d)190; TexCivA 31SW (2d)882; 146Wash143, 262P131; 146 Wash131, 262P143; 192Wis456, 212NW 257.

647-16 34F(2d)377; 44F(2d)144; 336 Ill 482, 168NE514; 142SC477, 141SE15; TexCivA 32SW(2d)696; Va 150SE398.

648-17 CalA 288P437 (construction of oil lease); 104Conn430, 133A677; 107 Conn312, 140A734 (construction of contract in light of circumstances); 82NH

342, 134A520 (deeds); **TexCivA** 292 SW618.

648-18 85Colo 9, 273P653; 82Mont312, 267P207. [a] **Where there is some evidence to support verdict,** refusal of new trial is not error of law. 154SC411, 151 SE569.

648-19 125Me480, 135A95; **TexCivA** 299SW939.

648-21 **TexCivA** 274SW277.

648-21½-New. or ruling sustaining demurrer to evidence; 121Kan793, 250P 286.

648-22 39F(2d)851 (ultimate facts); 492NC626, 135SE627; **TexCommnA** 288 SW817; **TexCivA** 283SW642. [c] **Correction of finding of trial court made from subordinate facts found** is a question of law and to attack such finding no recourse can be had to evidence. 103 Conn157, 130A121.

648-23 **TexCivA** 288SW283.

648-25½-New. Abuse of discretion in setting aside a verdict and a judgment based thereon constitutes error of law. 35GaA203, 132SE916.

648-26 279US792, 49SCt484, 73L ed 960; 82NH443, 136A254; 154SC390, 151SE617; **TexCommnA** 285SW283; Wash 290P809.

648-28 [a] **Court may review evidence** to determine whether it was reasonably doubtful that there was prejudicial misconduct of jurors. **TexCivA** 298SW149.

648-28½-New. When an issue of undue prejudice from evidence may be raised held a question of law. 82NH304, 133A 16, 45ALR1409.

648-32 18F(2d)755; 26F(2d)557 (interpretation of written instrument); 75 CalA1, 241P938; 102Conn529, 129A527; 107Conn294, 140A483; 108Conn13, 142 A389; 109Conn577, 145A27; 36GaA185, 136SE93; 339 Ill 426, 171NE514 (measure of damages); 125Me480, 135A95; Minn 231NW214; Mo 278SW387 (questions on demurrer); 221MoA868, 287SW 819; 83NH564, 145A666; NH 146A508; 193NC413, 137SE314; 195NC203, 141SE 587; 122 Or597, 260P222, 55ALR180 (whether contract is supported by consideration); **TexCommnA** 10SW(2d) 977; **TexCommnA** 24SW(2d)372; **Tex CivA** 1SW(2d)688 (error in argument of counsel); **TexCivA** 9SW(2d)146; **Tex CivA** 22SW(2d)514; **TexCivA** 24SW (2d)465; **TexCivA** 30SW(2d)344; 197 Wis35, 221NW390.

648-32½-New. The rule that the construction of a contract is a question of law reviewable on appeal is inapplicable where the conclusion of law depended upon a finding of facts dependent on extrinsic and conflicting evidence. 88 CalA515, 263P1033.

648-33 108Conn732, 142A405; 220MoA 1050, 279SW723; 83Mont214, 271P433. [a] (1) 335 Ill 500, 167NE114. [b] (4) Construction of ambiguous contract, when parol evidence is adduced to aid therein. **TexCivA** 20SW(2d)1099. [c] **In Alabama.**–24Ala243, 107S210.

649-34 273US548, 47SCt462, 71L ed 767, 59ALR1; 34F(2d)605. See also 14 F(2d)705.

649-35 220Ala145, 124S204 (court will review only those assignments of error that may have prejudicially affected amount of recovery); 201Cal 530, 258P 60; 203Cal 51, 262P757; 85CalA332, 259P470; 162Ga718, 134SE781; 163Ga 841, 137SE14; 35GaA414, 133SE294; 36GaA729, 137SE904; 37GaA624, 141 SE316; 37GaA686, 141SE326; 252Mass 376, 147NE903; Mass 164NE654; **Tex CivA** 293SW650; Utah 289P103 (moot questions). [a] 22AlaA343, 115S690; 90CalA351, 265P862; 235 IllA265; 204 Iowa1220, 216NW953; 119Kan824, 241 P249; 52ND720, 204NW182; 112 Okl 295, 240P636; **TexCivA** 21SW(2d)713 (abstract propositions of law); 66Utah 245, 240P161, 42ALR347. (3) Whether one whose money was used in buying mortgage should share in proceeds of foreclosure held academic question where no proceeds. 33 OhA303, 169NE 314. [b] (1) 82CalA525, 255P861; 84 CalA669, 258P663; 90CalA193, 265P 870; 91CalA388, 267P148; CalA 267P 750; 94CalA511, 271P514; CalA 271P 755; 101CalA666, 282P19(2dcase); 89 Fla74, 104S857; 97Fla750, 122S239, 65 ALR508; 42 Ida522, 247P740; 45 Idal, 261P667; 45 Ida333, 262P510; 330 Ill 97, 161NE133; 235 IllA265; 200 Iowa 357, 204NW423; 208 Iowa94, 222NW 535; 121Kan551, 247P871; 232Ky176, 22SW(2d)582; 12LaA31, 124S606; Mass 164NE618; 235Mich369, 209NW 131; Mo 30SW(2d)97; MoA 16SW(2d) 598; 32NM517, 259P821; 34NM335, 281P460; 52ND720, 204NW182; 112 Okl 295, 240P636; 143 Okl 27, 287P72; 143 Okl 28, 287P73; 33PortoRico 265; 49SD381, 207NW217; **TexCivA** 297SW 520; **TexCivA** 9SW(2d)494; **TexCivA** 11SW(2d)605; **TexCivA** 21SW(2d)92; 146Va758, 132SE853; 103WVa567, 137 SE895. But see 46 Idal, 265P701; MoA 5SW(2d)677. (4) Questions held not moot. 279US392, 49SCt372, 73L ed754; 199Cal 21, 248P235. (5) Right of mining company to have license issued held not moot question. 118 Or629, 247P 775. (6) Question of paving between tracks of street railroad is moot question after affirming order in companion case authorizing discontinuance of street car service. 144Va24, 131SE330. (7) Payment of judgment under protest will not compel appellate court to review. 235Mich369, 209NW131. (8) Court will not review validity of corporate election more than a year after it is held. 220Ky551, 295SW865. (9) In action to enjoin illegal levy of special tax against adjacent property owners for public improvements, completion of improvement and issuance of bonds therefor does not render question moot. 120 Okl 187, 250P920. (10) Other instances. 208Cal 508, 282P787; 169Ga 709, 151SE481(2dcase).

649-36 274US614, 47SCt718, 71L ed 1234; 281US249, 50SCt315, 74L ed832; 281US462, 50SCt356, 74L ed967(1st case); 5F(2d)908; 15F(2d)612; 16 F(2d)782; 21F(2d)346; 24F(2d)299; 25F(2d)225; 30F(2d)313; 42F(2d)142; 213Ala551, 106S136; 213Ala660, 106S 142; 214Ala479, 108S344; 219Ala188, 121S704(2dcase); 20AlaA594, 104S287; 21AlaA133, 106S195; 31Ariz347, 253P 626; 171Ark1088, 287SW380; 176Ark 176, 28W(2d)1106 (moot questions); 200Cal 667, 254P551; 201Cal 219, 256P 411; 75CalA189, 242P881; 76CalA519, 245P209; 76CalA530, 245P451; 88CalA 322, 263P371; 91CalA294, 266P1007; CalA 267P750; 98CalA489, 277P172; 102CalA213, 283P107; CalA 288P149; CalA 291P227; CalA 292P529; 81Colo 134, 254P153; 81Colo 230, 254P777; 82 Colo 466, 261P4; 83Colo 510, 267P605; 87Colo 461, 288P620; Colo 291P1024; Colo 291P1034; 104Conn206, 132A390; 106Conn99, 136A869; 107Conn9, 139A 305; 107Conn197, 139A698; 94Fla474, 113S680; 160Ga449, 128SE393; 162Ga 664, 135SE195; 163Ga867, 137SE556; 164Ga391, 138SE774; 164Ga485, 139 SE11, 53ALR1286; 164Ga657, 139SE 347; 164Ga774, 139SE543; 164Ga805, 139SE678; 165Ga309, 140SE856; 165 Ga335, 141SE67; 35GaA196, 132SE646; 35GaA331, 132SE925; 35GaA425, 133 SE264; 35GaA723, 134SE804; 36GaA 92, 136SE107; 36GaA519, 137SE290; 37GaA239, 139SE590; 37GaA439, 140 SE386; 37GaA344, 140SE390; 37GaA 563, 140SE902; 40GaA802, 151SE562; 45 Ida229, 261P673; 45 Ida571, 264P 229; 48 Ida810, 285P478; 319 Ill 56, 149NE584; 320 Ill 61, 150NE268; 327 Ill 500, 159NE38; 232 IllA523; 233 IllA240; 233 IllA262; 234 IllA151; 234 IllA234; 234 IllA605 (rule applied to question of garnishee's set-off on notes of judgment debtor held by him, where decision on appeal was based on finding that garnishee owed nothing to judgment debtor); 235 IllA265; 235 IllA359; 235 IllA387; 236 IllA84; Ind 155NE55; 86 IndA593, 159NE33; IndA 171NE217; 200 Iowa1355, 206NW631; 201 Iowa902, 208NW290; 205 Iowa297, 215NW621, 217NW876; 204 Iowa678, 216NW41; 204 Iowa1331, 217NW245; Iowa 233NW153; 124Kan440, 260P 638; 130Kan359, 286P247; 208Ky835, 272SW34; 212Ky354, 279SW335; 213 Ky696, 281SW832; 216Ky563, 288SW 309; 217Ky384, 289SW280; 217Ky647, 290SW519; 234Ky249, 27SW(2d)965; 235Ky640, 32SW(2d)18; 159La892, 106 S371; 162La956, 111S341; 165La256, 115S479; 9LaA535, 119S725; 168La 527, 122S716; 11LaA547, 123S408; 12 LaA222, 125S765; 255Mass186, 150NE 885; 255Mass583, 152NE40; 258Mass 279, 154NE767; Mass 164NE654; Mass 169NE548; Mass 172NE601; 231Mich 567, 204NW761; 235Mich516, 209NW 561; 236Mich501, 211NW71; 250Mich 182, 229NW599; Mich 231NW139 (moot question); 164Minn195, 204NW 648; 166Minn392, 208NW15; 167Minn 174, 208NW809, 209NW913 (enforcement of order by state commission as to switching facilities); 171Minn65, 212 NW738; 173Minn365, 217NW369; 144 Miss343, 109S854; 146Miss422, 111S 558; Miss 111S605; 152Miss792, 119S 194; Mo 274SW37; 310Mo 602, 275SW 957; 315Mo 276, 286SW3; Mo 23SW (2d)167; MoA 278SW1062; 220MoA 1050, 279SW723; MoA 282SW107; 77 Mont260, 250P823; 77Mont466, 251P 163; 86Mont562, 284P539; Nebr 229 NW22; 82NH426, 135A159; 248NY73, 161NE423; 220AppDiv549, 222NY896; 228AppDiv627, 238NY8370; 189NC820, 128SE321; 191NC710, 133SE85; 193 NC278, 136SE879; 193NC775, 138SE 129; 198NC430, 152SE156; 198NC589, 152SE697; 198NC782, 153SE396; 52 ND108, 204NW892; 53ND1, 204NW 847; 23 OhA409, 155NE163; 24 OhA 169, 156NE418; 35 OhA429, 172NE445; 113 Okl 254, 241P789; 114 Okl 16, 243P 195; 115 Okl 195, 241P740; 115 Okl 275, 242P861, 862; 127 Okl 171, 260P 4; 129 Okl 153, 263P1096; 134 Okl 229, 273P228; 143 Okl 220, 289P315; 116 Or317, 241P40; 122 Or285, 258P205, 58 ALR339; 122 Or579, 260P444; 285Pa 540, 132A718; 287Pa14, 134A394; 287 Pa337, 135A105; 288Pa277, 135A856; 291Pa556, 140A342; 297Pa308, 146A 903; 300Pa92, 150A165; 133SC458, 131 SE620; 142SC531, 141SE156; 150SC 289, 148SE49; 151SC362, 149SE109; 156SC89, 152SE825(1stcase); 48SD581, 205NW717; 157Tenn211, 7SW(2d)812; 117Tex34, 297SW206; **TexCommnA** 281 SW1044; **TexCommnA** 283SW161; **Tex CommnA** 285SW285; **TexCivA** 277SW 152; **TexCivA** 279SW314 (after surrender and acceptance of auto, issues concerning ownership and right to damages on replevy bond are moot and not considered); **TexCivA** 280SW621; **TexCivA** 281SW221; **TexCivA** 285SW 918; **TexCivA** 288SW861; **TexCivA** 289 SW159; **TexCivA** 289SW199; **TexCivA** 298SW630; **TexCivA** 28W(2d)356; **Tex CivA** 28W(2d)963; **TexCivA** 3SW(2d) 824; **TexCivA** 12SW(2d)1045; **Tex CivA** 27SW(2d)599; **TexCivA** 28SW (2d)173; **TexCivA** 29SW(2d)794; 102 TexCr392, 278SW206; 66Utah128, 240 P175; Vt 151A654; 146Va813, 132SE 692; 146Va695, 132SE853; 145Va138, 133SE793; 145Va307, 133SE769; 149 Va560, 140SE831; 149Va262, 141SE 138; 149Va406, 141SE237; 149Va815, 141SE868; Va 152SE336; 136Wash 606, 241P10; 145Wash25, 258P836; 145Wash430, 260P669; 150Wash676, 274P698; 148Va601, 139SE288; Wash 290P705; 101WVa582, 133SE325; 193 Wis382, 214NW366; 194Wis634, 217 NW282; 34Wyo 332, 243P394; 36Wyo 522, 257P7. But see Mass 167NE669; NJSup 137A580. [e] **Where alleged errors are not likely to occur upon retrial.**–23 OhA104, 154NE747. [f] **Only when facts plainly appear and clearly call for** rulings of new and advanced principles will they be made. 299Pa32, 148A912. [g] **Law questions depending on facts not proved** will not be considered. NM 289P801.

650-37 272US576, 47SCt198, 71L ed 420; 272US579, 47SCt199, 71L ed421; 274US614, 47SCt718, 71L ed1234; 276 US245, 48SCt230, 72L ed551; 214Ala 305, 107S449; 214Ala415, 108S235; 29 Ariz468, 242P1009; 170Ark1194, 281 SW23; 200Cal 760, 255P188, 52ALR569; 78Colo 6, 238P29; 82Colo 395, 260P 114; 86Colo 372, 282P191; 160Ga620, 128SE891; 160Ga886, 129SE539; 161 Ga413, 131SE159; 161Ga672, 132SE442; 162Ga185, 132SE753; 162Ga560, 134SE 166; 162Ga664, 135SE195; 163Ga774, 136SE901; 163Ga867, 137SE556; 164Ga 9, 137SE558; 164Ga485, 139SE11, 53 ALR1286; 164Ga774, 139SE543; 164 Ga872, 139SE671, 54ALR1246; 164Ga 805, 139SE678; 165Ga103, 139SE870;

165Ga243, 140SE364; 165Ga335, 141SE67; 168Ga825, 149SE193; 34GaA105, 128SE198 (where question of disqualification of juror not likely to arise at another trial); 35GaA723, 134SE804; 35GaA769, 134SE808; 35GaA763, 134SE833; 36GaA143, 136SE85; 36GaA92, 136SE107; 36GaA357, 136SE807; 36GaA701, 138SE81; 36GaA703, 137SE848; 37GaA1, 138SE859; 37GaA239, 139SE590; 37GaA366, 140SE893; 37GaA716, 141SE513; 37GaA733, 141SE818; 37GaA734, 141SE672; 37GaA737, 141SE917; 41GaA587, 153SE785(2d case); 233 IllA262; 235 IllA160; 236 IllA34; 198 Ind127, 149NE350; 202 Iowa663, 210NW916; Iowa 213NW221; 124Kan440, 260P638; 124Kan649, 261P555; 127Kan310, 273P459; 215Ky77, 284SW405, 47ALR483; 215Ky85, 284SW409; 254Mass441, 150NE184; 237 Mich232, 211NW734; 141Miss92, 106S95; 308Mo 253, 271SW770; 309Mo 475, 274SW718; 316Mo 1104, 295SW757; MoA 271SW851; 114Nebr777, 209NW619; 221AppDiv492, 224NYS660; 196NC675, 146SE716; 117 Okl 156, 246P833; 117 Okl 190, 245P891; 120 Okl 1, 249P742; 120 Okl 3, 249P917; 122 Okl 47, 250P796; 122 Okl 160, 252P410; 124 Okl 7, 253P66; 125 Okl 219, 257P291; 127 Okl 20, 259P565, 39 OklACR240; 117 Or637, 244P531; 122 Or579, 260P444; 124 Or384, 262P252; 47RI251, 132A545; TexCommnA 272SW771; Tex CivA 274SW284; TexCivA 275SW310; TexCivA 275SW410; TexCivA 291SW279; TexCivA 293SW279; Wash 288P646; 149Va235, 141SE260; 135Wash555, 238P637; 145Wash430, 260P669; 101WVa711, 133SE695; 103WVa23, 136SE505; 104WVa324, 140SE49, 55ALR452; 188Wis30, 205NW407. [f] **Appellate court will not consider** question of law till fact has been finally determined in trial court. 49SD9, 205NW666. [g] **On ordering new trial,** unnecessary questions are not considered. 233 IllA240. [h] **In Ohio.**–119 Oh575, 165NE93. [i] **Where judgment is affirmed,** motion to dismiss writ of error will not be considered. 170Ga578, 153SE354. [j] **On affirmance of judgment** on main bill of exceptions, cross bill will be dismissed. Ga 155SE192.

650–37½–New. And so on affirmance of a judgment matters not necessary to a determination of the case need not be passed on. 32Ariz560, 261P35; 79CalA433, 249P876; 122Kan647, 253P549; 164Minn466, 203NW228, 205NW449, 206NW380; 171Minn25, 213NW47; 121 Or360, 253P6; 122 Or306, 258P820; 50 SD40, 208NW221; 145Wash403, 260P258.

650–37½–New. Nor will the court consider matters which could not alter the conclusion. 103Conn537, 131A505.

650–38 213Ala393, 104S754; 220Ala130, 124S300; Cal 292P474; 79CalA433, 249P876 (where one ground of demurrer is well taken, other grounds will not be considered); 170Ga148, 152SE82; 37GaA742, 142SE208; 38GaA497, 144SE351(2dcase); 39GaA710, 148SE279(2d case); 40GaA468, 150SE169; 235 IllA387 (where appellate court affirms decree dismissing bill for want of equity, it is unnecessary to decide if court below erred in denying appellant's motion to amend bill); 199 Ind708, 160NE347; IndA 152NE839; IndA 171NE304; 141Miss92, 106S95 (offset); Mo 298SW(2d)103; 289Pa492, 137A672; TexCivA 289SW199; TexCivA 295SW947; TexCivA 38SW(2d)519; TexCivA 21SW(2d)58; TexCivA 21SW(2d)87; 66Utah128, 240P175; 100WVa38, 130SE136; 105WVa6, 141SE397.

650–38½–New. parties; 189NC820, 128SE321.

651–39 213Ala393, 104S754; 213Ala545, 105S867; 214Ala257, 107S825; 214Ala479, 108S344; 90CalA622, 266P554; 84Colo 99, 268P533; 232 IllA523 (admission of evidence where same facts were established by other evidence, unattacked); 227Ky120, 128W(2d)276, 62ALR1353; 152Md536, 137A299; 245Mich179, 222NW157; 189NC757, 128SE161; 288Pa102, 135A763; 288Pa277, 135A856; TexCivA 278SW330 (where appellee made out prima facie case, in action on note, without evidence attacked as incompetent); 151Va1018, 145SE827.

651–40 213Ala393, 104S754; 220Ala81, 123S898; 29Ariz468, 242P1009; 35GaA763, 134SE833; 36GaA701, 138SE81; 37GaA756, 142SE183; 234 IllA151; 235 IllA359; 220MoA367, 286SW445; MoA 296SW247; 81NH522, 129A768, 42ALR176; NH 146A508; 146Va695, 132SE853; 101WVa711, 133SE695.

651–40½–New. Exceptions to issue destroyed by jury's answer to first issue are not considered. 191NC125, 131SE416.

651–42 165Ga534, 141SE653; 167Ga615, 146SE452; 167Ga718, 146SE460; 38GaA240, 144SE34; 40GaA633, 151SE42; 41GaA644, 154SE198; GaA 155SE375.

651–44½–New. on motions to strike certain documents from bill of exceptions, 213Ala551, 106S136.

651–46 52ND351, 202NW807.

651–47 283Pa264, 129A62.

651–48 249Mich89, 227NW674; NJ 144A715(1stcase); 197NC644; 150SE178.

651–49 162Ga222, 133SE251; 165Ga703, 141SE907 (general grounds); 142Va350, 128SE462.

651–49½–New. or continuance, 200 Iowa357, 204NW423.

651–53 197Cal148, 239P1061; 70CalA614, 234P121; 107Conn1, 138A905; 262Mass588, 160NE434; 71Mont165, 227P811; TexCivA 22SW(2d)488; 100Vt443, 138A782; Wyo 293P354. [a] **Where jury finds bonds sued for did not belong to plaintiff,** question whether defendant was put on notice of infirmities is immaterial. 287Pa337, 135A105.

651–54 Ind 155NE55; 85 IndA494, 154NE679; TexCommnA 22SW(2d)1061(2d case).

652–55 195Cal262, 232P464 (where findings insufficient to support judgment, court will not determine other questions of law not likely to arise on retrial); 9CalA692, 267P555; 160Ga886, 129SE539; 161Ga636, 131SE361; 162Ga661, 135SE195; 163Ga774, 136SE901; 165Ga89, 139SE805; 166Ga717, 142SE86; 166Ga555, 144SE116; 168Ga725, 149SE39; 36GaA729, 137SE904; 41GaA286, 152SE590; 41GaA564, 153SE778(1stcase); 233 IllA240 (on ordering new trial); 235 IllA160; 83 IndA500, 149NE137 (other theories need not be considered if one is found sufficient); TexCivA 277SW711; TexCivA 286SW307; TexCivA 3SW(2d) 106; TexCivA 30SW(2d)921; 152Wash339, 277P834 (1stcase); 106WVa60, 144SE720.

652–56 214Ala305, 107S449; 43 Ida354, 253P849; 66Utah128, 240P175 (estoppel to set up fraud as defense); 145 Wash403, 260P258. See also 221AppDiv492, 224NYS660.

652–57½–New. The appellate court does not consider complaints as to error regarding the verdict when it is unnecessary to review, as when the case must be tried again for other errors. 233 IllA262.

652–58 281US439, 50SCt360, 74L ed950; 84CalA240, 257P914; 93Fla849, 112S846; Ga 155SE765; 163Ga385, 136SE135; 198 Ind127, 149NE350; Ind 166NE281; 159La892, 106S371; 242Mich247, 218NW766; 198NC782, 153SE396; 116 OhSt16, 155NE555; 124 Okl 7, 253P66; TexCommnA 288SW809; TexCivA 31SW(2d)882. [a] **Upon deciding invalidity of statute** upon one ground, court will not consider other grounds of attack. 164Ga485, 139SE11, 53ALR1286.

652–58½–New. questions as to repeal of statutes, 143Miss489, 108S180.

652–59 214Ala303, 107S453.

652–60 258Mass279, 154NE767.

652–61½–New. The legal sufficiency of defense not sustained by the evidence will not be reviewed on appeal. 214App Div689, 213NYS198.

652–61½–New. Where a receiver is discharged, the appellate court will not determine the propriety of the appointment of the receiver or part of the order directing the receiver to report. 98 Fla946, 124S719.

652–62 See also 234 IllA605.

652–64 TexCivA 285SW918.

652–65 224AppDiv411, 231NYS230; 114 Okl 144, 244P798. See also Mo 285SW182.

652–65½–New. Assignment of error raised by cross bill of exceptions, relating to matters which will probably arise at another trial, will be decided. 34GaA77, 128SE238.

652–65½–New. Where counsel stipulate that, in case of reversal, appellate court should pass on merits, which was not done by lower court, it will do so. 13F(2d)701.

652–65¼–New. Where an injunction was erroneously dissolved and property delivered so as to prevent a decree for specific performance, the question of defendant's liability for damages has not become moot. 243Mich698, 220NW760.

652–65¾–New. Questions argued, not necessary to the disposition of the case, may be decided if further litigation may be thereby probably avoided, provided some useful result will follow the decision. 83NH401, 143A68.

652–67 MoA 30SW(2d)182. [a] (1) 265Fed524; 23F(2d)652 (notwithstanding waiver in open court). (4) Where single issue of fact triable by jury is tried without written waiver, court cannot look beyond process, pleadings, and judgment. US 12F(2d)895. [c] **Review depends on record** showing written jury waiver. 16F(2d)459. [d] **Where jury trial waived,** otherwise than by written stipulation, review under writ of error is limited to questions arising on process, pleading, and judgment. 24F(2d)960. [e] **Review where jury waived.** –44F(2d)57(1stcase).

652–69 136Wash426, 240P554.

652–71–72½–New. Waiver of jury and trial by judge makes his findings and verdict the same as a verdict of the jury. 9F(2d)749.

652–71–72½–New. Under federal statutes providing a civil case in the district court may be tried without jury on written stipulation, questions reviewable on writ of error are limited where no written stipulation waiving jury was made as to those arising on process, pleading, or judgment. 12F(2d)895.

652–71–72¼–New. Where the issues were tried by the court without a written stipulation waiving the jury required by the statute, the review is limited to process, pleadings, and judgment. 32F(2d)630; 32F(2d)849.

652–71–72½–New. Sufficiency of the evidence to support the judgment in favor of plaintiff, where a jury trial was waived by written stipulation, was preserved for review. 32F(2d)66.

652–71–72¼–New. An issue on which the jurisdiction depends is not reviewable where the jury was waived without a written stipulation and evidence submitted to the court. 31F(2d)757(1st case).

652–71–72½–New. Action of ejectment held one at law for purposes of appeal. Utah 286P625 (reviewed only for error).

652–71–72¼–New. Where both parties move for directed verdict, court must consider record as though trial had been by appellate court. 251Mich407, 232NW187.

652–73 17F(2d)924; 19F(2d)841; 28F(2d)857; 215Ala586, 112S193; 37GaA268, 140SE767; 253 IllA185 (where no proposition of law was submitted); Miss 111S605; 118 Or231, 246P359; 159Tenn612, 21SW(2d)626; TexCivA 291SW276; 100Vt314, 137A194. But see 151Wash430, 276P891. [a] 19F(2d)841.

653–76½–New. , or form of action, Mont 288P616.

653–78 206 Iowa426, 218NW303; Iowa 227NW899; 139Miss574, 104S452; NJ Sup 137A833; TexCivA 282SW874; 100Vt314, 137A194.

653–80 TexCivA 291SW276; Vt 146A254. See also 100Vt314, 137A194.

653–82 82Mont115, 265P676.

653–82½–New. Matter inadmissible in interpretation of act appearing in agreed statement of fact is not entitled to consideration. 103Conn565, 131A560.

653–82¼–New. The court's adoption of a referee's report, on stipulation for reference to hear and report, is equivalent to trial on stipulation waiving jury and reviewable as such. 17F(2d)536.

653–82¼–New. On review of a case tried

without jury, evidence cannot be considered, except as it is involved in alleged erroneous rulings. 17F(2d)536.

654-90½-New. In New York power of review of court of appeals, on appeal submitting certified question, is limited to such question. 240NY307, 148NE532.

654-91 MoA 28SW(2d)368.

654-92 See also 28F(2d)89. [b] (5) 15F(2d)317; 22F(2d)893. (6) 15F(2d)317. (7) 17F(2d)372. (9) Testimony is not reviewable. 17F(2d)372. [h] (3) In absence of findings of fact, circuit court of appeals cannot inquire into facts and conclusions of law on which judgment was based. 23F(2d)921. [j] (1) 15F(2d)317. [n] (15) 15F(2d)317.

654-93 270US349, 46SCt284, 70L ed624; 274US195, 47SCt566, 71L ed996; 274US684, 47SCt755, 71L ed1297; 2F(2d)801 (jury waived); 5F(2d)408 (in action at law tried by court on stipulation on weight of evidence, finding of court is not reviewable); 9F(2d)394; 10F(2d)70 (law side of case); 15F(2d)1019; 35F(2d)272; 39F(2d)438; 42F(2d)460; Ala 128S132; 78CalA184, 248P280; MoA 29SW(2d)176; MoA 29SW(2d)230; TexCivA 28SW(2d)877. [a] **Where only ruling disclosed is such as is implicit in final judgment,** nothing is presented for review. 37F(2d)346(2d case).

654-93½-New. Requirement of stipulation waiving jury trial under Comp. St. § 1587 is not complied with by a statement in the trial court's opinion that the action was referred to the referee, the jury being waived. 15F(2d)10.

654-93⅓-New. On a review of a law action tried to court without a jury, written waiver of jury not being filed as required by Comp. St. § 1587, the only question considered is whether the complaint and special findings support the judgment. 15F(2d)10.

654-94 274US655, 47SCt755, 71L ed1297; 16F(2d)455; 21F(2d)1. See also 10F(2d)127. [a] **Right to review of rulings is not lost** because general or special findings apparently sufficient to support judgment are thereafter made by court. 279US792, 49SCt484, 73L ed960.

654-95 270US349, 46SCt284, 70L ed624; 2F(2d)801 (wrongful admission of evidence); 4F(2d)821; 13F(2d)125; 16F(2d)108; 17F(2d)480; 18F(2d)837; 20F(2d)897; 30F(2d)642; 36F(2d)589 (held conclusive as to disputed fact questions); 39F(2d)55; 39F(2d)851. See also 28F(2d)89.

654-96 34F(2d)883. [a] 6F(2d)844.

654-97 9F(2d)394; 15F(2d)317; 18F(2d)837; 23F(2d)55; 39F(2d)438; 39F(2d)851. See also 28F(2d)89; 28F(2d)770(2dcase); 30F(2d)580.

654-97½-New. In the absence of exceptions taken to ruling or findings of the court on facts. 15F(2d)918.

654-97⅓-New. A general finding is conclusive in the absence of a request at the conclusion of a trial for specific findings. 15F(2d)918.

654-98½-New. The appellate court is limited by the status created by a written stipulation waiving a jury, as regards the necessity for a request for findings and conclusions. 28F(2d)459.

654-99 10F(2d)70; 18F(2d)954; 23F(2d)55; 30F(2d)46 [certiorari den 49SCt352(11thcase)]; 31F(2d)547; 32F(2d)442; 37F(2d)876; 39F(2d)851. [d] 24F(2d)31. [j] **Reason of judge** for his conclusions is not special fact finding. 22F(2d)638. [k] **Sufficiency of facts** found to support judgment is reviewable. 28F(2d)89.

654-99½-New. A court, in deciding a case on the referee's report under reference, without a written stipulation, acts as arbitrator, and the trial is not by court without jury. 17F(2d)536.

654-99⅓-New. The opinions of a referee or trial court, on trial without jury, are not special findings for purposes of review. 17F(2d)536.

654-99¼-New. Upon an oral stipulation of facts to the trial court, the appellate court is without authority to review the findings or a refusal of a request for findings. 22F(2d)802.

654-99⅕-New. Appellate review is limited to sufficiency of facts specially found and to rulings excepted to and presented by a bill of exceptions. 275US471, 48SCt153.

654-99⅙-New. Questions relating to matters of fact were found not reviewable where the complaining party requested no special findings of fact or conclusions of law. 28F(2d)459.

654-99⅐-New. An action at law, submitted to the trial judge without a written waiver of jury cannot be reviewed unless the declaration does not support the judgment. 30F(2d)881.

654-99⅛-New. Failure to make formal request to remand for further findings does not preclude a review of errors assigned to the trial court's failure to make findings. 31F(2d)924.

654-99⅑-New. Findings of fact by the trial court will not be disturbed if supported by substantial evidence. 31F(2d)547.

654-99 1/10-New. Where there is no specific finding of fact, there must be evidence to support judgment. 128Me388, 147A868.

654-99 1/11-New. Where no special finding of fact is requested, judgment must be affirmed if sustained by any evidence on any theory. MoA 22SW(2d)206.

655-1 216Ala193, 112S905.

655-3 218Ala645, 119S851.

655-3½-New. In Alabama, on appeal from judgment, court's inquiry is limited to sufficiency of evidence to support judgment. 20AlaA642, 104S776.

655-3⅓-New. In Arizona appellate court is bound to uphold general judgment for defendant rendered by the trial court without filing findings of fact if there is a reasonable theory of the case upon which judgment can be sustained and there is sufficient evidence in support thereof. 28Ariz514, 237P958.

655-5 [b] **Where findings support judgment,** appellant, in order to prevail on appeal, must obtain such correction as will remove one or more of essential findings. 107Conn1, 138A905.

655-9 125Kan334, 263P798.

655-10 217Ky138, 289SW218; 234Ky353, 28SW(2d)35.

655-13 240Mich71, 214NW937; 242Mich51, 217NW792; 242Mich56, 217NW775; Mich 233NW356(1stcase). See also 245Mich211, 222NW74. [a] 240Mich71, 214NW937; 241Mich62, 216NW369.

655-13½-New. In Missouri, if the court has not been requested to make a finding of facts, judgment must be sustained if the evidence, viewed in the light most favorable to the prevailing party, will support the judgment. A 14SW(2d)29.

655-14½-New. In Missouri, where there is a general finding and no declarations of law or findings of fact are asked or given the judgment will be affirmed if there is any evidence tending to support it on any theory presented by the evidence. 217MoA410, 266SW762.

655-14⅓-New. In Minnesota, in the absence of trial upon merits and proper findings, equitable defenses and matters alleged in diminution of damages or by way of counterclaims are not properly before the court for determination. 169Minn15, 208NW952, 210NW856.

655-14¼-New. In Missouri, in the absence of a declaration of law or finding of fact requested or given, judgment will be affirmed on any theory of the trial court's action. 222MoA1, 300SW546.

655-14⅕-New. Where no finding of facts is made, judgment will not be disturbed if there is any theory upon which the decision may be upheld. MoA 289SW658.

655-14⅙-New. In Montana, in the absence of a request for special findings, there is no ground for a complaint that it is impossible to determine the grounds on which the trial court rendered the judgment. 85Mont256, 278P828.

655-14⅐-New. In New Mexico appellate court will not review evidence on issues respecting which no request for findings was made. NM 291P292.

655-14⅛-New. One desiring to review judgment in case tried before court without jury and to question conclusions must have written findings of fact and law. NM 289P596.

655-14⅑-New. Where special findings are not requested and none are made, judgment discharging mechanic's lien is not reviewable. NM 291P292.

655-16 240NY307, 148NE532 (power of review of court of appeals limited to questions certified). See also 224App Div568, 232NYS26. [a] **Statute passed subsequent to certification** of question to court of appeals could not appeal answer as to whether appellate division acted correctly. 240NY379, 148NE556, 40ALR792.

656-19½-New. In Nevada, findings outside of issues will be disregarded. 50Nev99, 256P1058.

656-19⅓-New. In North Carolina, court must state facts constituting defense so that supreme court may determine merits. NC 154SE662.

656-20 TexCommnA 12SW(2d)169; TexCivA 271SW424; TexCivA 274SW243 (in absence of findings of fact and conclusions of law, judgment will not be disturbed if it can be sustained on any theory of evidence); TexCivA 276SW340; TexCivA 281SW622; TexCivA 282SW645; TexCivA 288SW840; TexCivA 297SW231; TexCivA 298SW645; TexCivA 299SW264; TexCivA 6SW(2d)221; TexCivA 15SW(2d)702; TexCivA 27SW(2d)567; TexCivA 29SW(2d)500; TexCivA 31SW(2d)843.

656-20½-New. Where the judgment is general, both as to negligence and damages, it will be sustained if a case is made out on either division of allegations made. TexCivA 264SW524.

656-20⅓-New. In an action on an employment contract under which plaintiff was entitled to share in net profits, the appellate court will not determine whether the jury made a mistake in making deductions in the absence of separate findings on disputed items. TexCivA 48SW(2d)1029.

656-20¼-New. Where the trial judge files no findings or conclusions, every issue of fact raised by the evidence must, on appeal, be resolved against appellant. TexCivA 21SW(2d)372(1st case).

656-21 See also 192Wis480, 213NW474.

656-21½-New. In Missouri, in the absence of findings, the judgment must be affirmed if supportable on any theory. 220MoA1067, 279SW727.

656-22 20F(2d)897 (memorandum opinion held not special finding of fact); 30F(2d)46 [certiorari den 49SCt352(11thcase)]; 87IndA301, 159NE467 (pleadings are not considered where there are special findings).

656-23 270US349, 46SCt284, 70L ed624.

656-24 7F(2d)581; 36F(2d)37.

656-31 TexCivA 286SW614.

656-31½-New. Where findings do not show that amount found was more or less than legal damages, court cannot determine propriety of judgment. Utah 287P908.

656-32 32F(2d)576; 39F(2d)851; 34Ariz536, 273P534; 79CalA55, 248P1065; 107Conn1, 138A905 (findings held conclusive in absence of subordinate fact findings); 110Conn452, 148A342; Ind 153NE179; 295Pa90, 144A895(1stcase); TexCommnA 17SW(2d)777; TexCivA 286SW647; Wis 230NW607. See also 228Ky313, 14SW(2d)1070; 295Pa455, 145A505; SC 145SE627; 151Wash403, 276P94. [c] **Rule that appellate court cannot weigh evidence,** if there is any to support fact findings of court without jury, is inapplicable, where there is stipulation of facts. MoA 16SW(2d)663. [d] **Matter pleaded was not presented for review,** where no request was made for any finding of fact thereon. 32F(2d)887.

657-33 28F(2d)459; 175Minn382, 221NW426; 319Mo824, 5SW(2d)10; 212AppDiv358, 209NYS6 (within power of appellate division to correct findings made upon rendition of interlocutory judgment).

657-34 179Ark592, 17SW(2d)293; TexCivA 20SW(2d)1090(2dcase).

657-35 But see 88CalA192, 263P325.

657-35½-New. The appellate court may affirm or reverse on an issue not passed on by the trial court. 21F(2d)692.

657-37 20F(2d)14; 23F(2d)652; 23F(2d)656; 31F(2d)280; 33F(2d)841; 237

IllA419; 224MoA393, 277SW945; 220 MoA1067, 279SW727; MoA 21SW(2d) 937; TexCivA 297SW231. Contra 233 IllA293; 233 IllA360; 243 IllA314. [b] (1) 233 IllA293; 233 IllA360. [d] 32F (2d)119 (general finding of fact or conclusions of law cannot be reviewed in absence of request for declaration of law). [h] (2) Where no instructions were asked, given, or refused in case tried before court without jury, only questions reviewable are errors apparent on face of record proper, and question whether under issues plaintiff made prima facie case. MoA 5SW(2d)708.

658–38 220MoA1067, 279SW727.

658–39 320Mo 514, 8SW(2d)597 (presumption is that court tried case on proper theory and entered proper judgment); 221MoA568, 282SW1033.

658–40 320Mo 514, 8SW(2d)597; MoA 256SW116; 220MoA1067, 279SW727; 220MoA396, 286SW732; MoA 286SW407; MoA 294SW734; 222MoA215, 297SW84; 221MoA1217, 299SW816; MoA 5SW(2d)662; 222MoA1029, 9SW(2d)808(2dcase); MoA 14SW(2d)672; MoA 21SW(2d)209; MoA 21SW(2d)937; MoA 29SW(2d)230; MoA 29SW(2d)176; MoA 30SW(2d)643.

658–41 23F(2d)652.

658–44 222MoA221, 296SW1049.

658–46 237 IllA419; 245 IllA295.

658–49 221MoA393, 277SW945 (whether evidence is sufficient to make prima facie case).

659–52 23F(2d)477. See also 333 Ill 588, 165NE199.

659–56 307Mo 172, 270SW105; Mo 298 SW47; MoA 256SW509; MoA 11SW(2d) 59 (on substantial evidence); MoA 31 SW(2d)108. [c] **Case will be considered on evidence most favorable to party in whose favor judgment was rendered** in absence of declarations of law. 221 MoA568, 282SW1033. [d] **Overruling of demurrer to evidence will be upheld if sustainable on any theory,** where no declaration of law or finding of fact was requested. 221MoA898, 295SW1083.

659–57½–New. In federal courts, request for declarations of law is essential to review of general finding of fact. 38F(2d)561.

659–59 14F(2d)53; 26F(2d)33 (judgment in case transferred from law side); 219Ala645, 123So838; 55AppDC330, 5F (2d)753; 147 IllA646 (appeal does not terminate case); 307Mo 529, 271SW50; 316Mo 97, 289SW922; 221MoA317, 273 SW229; 221MoA428, 289SW349; MoA 1SW(2d)241; 115 Okl 179, 242P204; 135SC190, 133SE709; 155Tenn148, 290 SW970; TexCivA 142SW37; 66Utah 418, 243P377; Utah 276P912; 2Rand (23Va)247. [i] **Misunderstanding of evidence by trial judge.**–Where reasons given by trial judge in themselves show he misunderstood evidence, court will review findings in light of whole evidence. [1925]CanSC685, [1925] 3DomLR113. [j] **In Alabama.**–220Ala511, 125So655(2d case). [k] **Correctness of decree determined upon undisputed findings of fact.** –Utah 292P214.

660–61 307Mo 529, 271SW50.

660–62 307Mo 529, 271SW50; MoA 300 SW1037.

660–66½–New. The circuit court is required to hear the equitable branch of the case on appeal where it was tried on equitable defenses alone. 10F(2d) 70 (although not before the court on appeal).

660–66½–New. An error in granting an injunction is reviewable where the jury was waived, defendants failed to request findings of fact or move for judgment, and court made no findings. 13F(2d) 977.

660–66¼–New. Only when affirmative relief is prayed for, that can be granted by court of equity alone, is law suit converted into equity suit as to review. MoA 22SW(2d)206.

660–67 126 Okl 93, 258P892; 128 Okl 183, 261P935. See also 51SD127, 212 NW491.

660–69 See also 68NYS91.

660–70 122Kan533, 253P578; 123 Okl 151, 254P706; 126 Okl 93, 258P892; 128 Okl 183, 261P935; 141Pa73, 21A507.

660–76 316Mo 891, 292SW702; 321Mo 1244, 14SW(2d)583.

661–79 3Del 259, 138A392. [a] (8) Referee's report, dealing entirely with conclusions of law, is reviewable under decree of reference. 22F(2d)126. (9) Findings may be examined and determination made whether they support judgment where parties consent to reference of issues. 278US160, 49SCt 144, 73Led243. (10) In determining weight of findings, circuit court will consider fact that witnesses were not heard. 27F(2d)82. (11) Other matters. 43F(2d)315. [f] (5) Requests for findings of fact made to master to find and report facts held to present nothing for review. Mass 156NE700. (6) Court will not examine all testimony, where complaining party has made no analysis of testimony which he conceives applicable to his requests. 259Mass499, 156NE846. (7) Findings of master that allegations of bill were proved are conclusive in supreme judicial court, where evidence is not reported and there is no exception to his report. 261Mass116, 158NE344. (8) Where rule directed master to find and report facts, request for finding by plaintiff presents nothing for consideration. 259Mass515, 156NE701. (9) On appeal from final decree, master's ruling on admissibility of evidence held reviewable. Mass 169NE428. (10) Auditor's rulings regarding admissibility of evidence are reviewable on exception to denial to recommit. Mass 172NE 855. [h] Mo 25SW(2d)783.

662–81 126Me84, 136A459.

662–82 6F(2d)531; 38F(2d)731; 71 CalA45, 234P334; 76CalA33, 243P707; 81Colo 463, 256P21; 83Colo 468, 266P 501; 111Conn528, 150A506; 232 IllA 246; 233 IllA56; 252 IllA168; 203 Iowa 661, 213NW428; 203 Iowa1361, 214NW 591; 204 Iowa391, 214NW685; Iowa 230NW359; 218Ky145, 291SW13; 232 Mich2, 204NW764; 168Minn347, 210 NW78; 312Mo 458, 278SW759; 315Mo 465, 287SW337; Mo 289SW877; 319Mo 633, 5SW(2d)1100; 220MoA1062, 282 SW86; 220MoA668, 293SW73; 222MoA 128, 2SW(2d)824; MoA 295SW524 (law cases); 78Mont221, 254P412; 99NJEq 864, 132A678; 212AppDiv522, 209NYS 150; 193NC73, 136SE257; 195NC76, 141SE460; 195NC92, 141SE484; NC 154SE624; 37 OklACR698, 114 Okl 283; 125 Okl 194, 257P295; 126 Okl 202, 259 P572; 128 Okl 23, 261P174; 131 Okl 249, 268P276; 123 Or469, 259P1064, 260P1099; 122 Or579, 260P444; 124 Or 332, 263P391; 285Pa273, 132A364; 290 Pa107, 138A81; 291Pa383, 140A143 (petition and answer as basis of rule to show cause why service of process should not be set aside); 85PaSuper 418; 91PaSuper286; 33PortoRico 98; 47RI 395, 133A621; RI 135A321; RI 145A311; RI 149A595; TexCivA 270 SW1099; 152Va520, 147SE220; 143Wash 61, 254P461. [a] (4) On action for wrongful death of plaintiff's husband, her contributory negligence cannot be made question for first time on appeal. 232 IllA246. [b] **Rule applies to theory of decision.**–122 Or579, 260P444.

662–84 216Ala49, 112So330; 76Colo 569, 233P622; 202 Iowa1351, 212NW114; 235Mich511, 209NW562; Mo 32SW(2d) 578; MoA 284SW186; MoA 25SW(2d) 520; Mont 285P668; NJSup 138A308; 128 Okl 228, 262P212; 285Pa273, 132A 364; 286Pa331, 133A563; 289Pa424, 137A796; 35PortoRico 654; 53SD546, 221NW264; TexCommnA 38SW(2d)67; TexCivA 278SW932 (ruling below sustained if warranted on any proper theory); TexCivA 292SW288; TexCivA 22 SW(2d)969; TexCivA 25SW(2d)994; Utah 285P646. See also TexCommnA 277SW629. But see CalA 280P392. [a] **Where trial judge rightly tried case on certain theory,** judgment will not be reversed though appellee's counsel asserted different theory. 240Mich621, 216 NW431.

662–84½–New. , without regard to any other theory presented as ground for affirmance. 128 Okl 228, 262P212.

662–85 76CalA33, 243P707; 221 MoA 1207, 299SW598; 218AppDiv341, 218 NYS317; TexCivA 278SW932 (general demurrer to petition).

662–86 70CalA614, 234P121.

662–87 6F(2d)531; 203 Iowa661, 213 NW428; Minn 232NW710; 138 Okl 190, 280P305, 66ALR894. [a] **In absence of objection to charge, it became "law of the case."**–RI 148A901.

662–88 200 Iowa25, 202NW236, 41ALR 495; 253Mass528, 149NE321; NJSup 138A308.

662–90 NJ 151A596; NJSup 138A308.

662–91 29Ariz574, 243P598; Ariz 290P 152; 84CalA557, 258P428; 86CalA659, 261P519; 94CalA361, 271P503; CalA 289P897; 46 Ida652, 270P138; 202 Iowa 787, 211NW364; 202 Iowa1351, 212NW 114; Iowa 226NW34 (motion for new trial, presenting several grounds, if sustained generally, will not be set aside unless motion could not have been sustained on any of grounds urged); 120 Kan130, 242P481; 315Mo 507, 286SW 38; 319Mo 835, 5SW(2d)28; Mo 10SW (2d)663; Mo 28SW(2d)1035; 216MoA 626, 260SW516 (order not specifying grounds); 220MoA1062, 282SW86; MoA 4SW(2d)499; MoA 9SW(2d)863; MoA 10SW(2d)965; MoA 30SW(2d)768; 81 Mont509, 264P396; 84Mont141, 274P 844; 57ND885, 224NW306; 289Pa424, 137A796; 293Pa548, 143A180; TexCivA 291SW564; 135Wash116, 237P293; 135 Wash231, 237P292; 153Wash10, 279P 100; 38Wyo 276, 266P1059. See also 101 Vt285, 143A394.

662–91½–New. Instruction of trial court becomes law of the case. 215App Div189, 213NYS362.

662–91¾–New. Where it is impossible to say upon which one of two theories upon which the case was presented the jury returned the verdict complained of and it cannot be sustained on one theory, appellant is entitled to a new trial. 51ND533, 200NW790.

662–91¼–New. In a reviewing order granting a new trial, grounds in the motion for a new trial not stated in the order may be considered. MoA 297SW 980.

663–92 270US49, 46SCt197, 70Led465; 10F(2d)474 (recovery in court's opinion); 13F(2d)740; 16F(2d)112; 23F (2d)972; 28F(2d)911 [certiorari den 279US837, 49SCt251, 73Led984(6th case)]; 31F(2d)547; 32F(2d)968; 36F (2d)661; 39F(2d)62; 213Ala50, 104S 538; 214Ala32, 106S182; 217Ala75, 114 S630; 21AlaA401, 108S636; Ariz 289P 989; 170Ark440, 280SW20; 177Ark613, 7SW(2d)783; 180Ark973, 23SW(2d) 983; 197Cal 321, 240P765; 201Cal 210, 256P210; 68CalA134, 228P720; 70CalA 614, 234P121; 83CalA18, 256P298; 88 CalA716, 264P265; CalA 288P36; 82 Colo 466, 261P4; 107Conn117, 139A702; 110Conn668, 149A392; 111Conn38, 149 A393; Fla 127S333; 163Ga27, 135SE 489; 163Ga440, 136SE436; 164Ga609, 139SE61; 38GaA534, 144SE387; 232 Ill A523; 89 IndA5, 165NE446; 202 Iowa 1008, 209NW744; 203 Iowa104, 212NW 380; 205 Iowa1139, 217NW255; 208 Iowa291, 225NW452; 122Kan814, 253 P600; 125Kan62, 262P545; 208Ky594, 271SW666; 216Ky736; 288SW733; 217 Ky160, 289SW219; 223Ky29, 2SW(2d) 1033; 225Ky610, 9SW(2d)727; 234Ky 127, 27SW(2d)672(1st case); 7LaA286; 258Mass65, 154NE572 (dictum); 262 Mass463, 160NE245; Mass 165NE660; Mass 168NE174(2dcase); Mass 172NE 603; 233Mich373, 206NW532, 42ALR 1267; 240Mich79, 214NW973; 321Mo 1052, 15SW(2d)329; Mo 19SW(2d)662; Mo 26SW(2d)611; 220MoA743, 276SW 409; 218MoA516, 279SW232; 75Mont 99, 242P425; 76Mont254, 246P168; 77 Mont260, 250P823; 82Mont115, 265P 676; 84Mont470, 276P430; Mont 287P 170; Mont 292P908; 102NJL601, 133A 200; 30NM566, 240P469; 32NM252, 255 P630; 34NM277, 280P398; 50ND309, 195NW659; 52ND410, 203NW182, 39 ALR915; 54ND582, 210NW83; 19 OhA 1; 19 OhA324; 24 OhA514, 157NE427; 31 OhA181, 164NE64(2dcase); 32 OhA 263, 167NE899; 116 Okl 88, 243P181; 117 Okl 68, 245P34; 131 Okl 277, 268P 727; 134 Okl 99, 274P24; 139 Okl 16, 280 P1087; 123 Or339, 262P223; 123 Or644, 263P390; 286Pa331, 133A563; 290Pa43, 138A217; 47RI 240, 132A610; 51SD407, 214NW809; 53SD34, 219NW892; 53SD 421, 220NW858; 53SD597, 221NW697; 54SD113, 222NW671; SD 230NW233; TexCommnA 276SW667; TexCommnA 277SW629; TexCommnA 280SW174; TexCommnA 285SW307; TexCommnA 286SW167; TexCommnA 290SW529;

TexCommnA 290SW739; TexCommnA 292SW182; TexCommnA 3SW(2d)75; TexCommnA 6SW(2d)341; TexCommnA 12SW(2d)196; TexCommnA 12SW(2d)1009; TexCommnA 16SW(2d)255; TexCommnA 24SW(2d)5; TexCivA 276SW773; TexCivA 286SW47; TexCivA 288SW1111; TexCivA 293SW305; TexCivA 1SW(2d)363; TexCivA 4SW(2d)1029; TexCivA 6SW(2d)414; TexCivA 8SW(2d)280; TexCivA 15SW(2d)702; TexCivA 21SW(2d)87; TexCivA 26SW(2d)308; 67Utah90, 245P977; Utah 274P863; 99Vt78, 130A589; 99Vt464, 134A588; 100Vt112, 135A715; 145Va175, 133SE759, 47ALR308; 136Wash35, 238P989; 136Wash645, 241P19; 147Wash659, 267P43; 107WVa650, 150SE12; 34Wyo378, 244P216. [a] (2) Charge of court "becomes law of case" in so far as no complaint is made regarding it. Vt 147A352. [c] **Judgment against defendant in representative capacity cannot be sustained as a personal judgment** where plaintiff expressly refused to proceed against defendant in personam, though true nature of action is personal. WVa 155SE658.

664-93 93Fla366, 112S64; 95Fla90, 116S23; Mo 271SW52; MoA 10SW(2d)342; MoA 16SW(2d)705; MoA 30SW(2d)650; 80Mont363, 260P1042; 102NJL128, 130A626; 102NJL144, 130A632; TexCivA 275SW261; TexCivA 282SW891; TexCivA 288SW1111; TexCivA 300SW253; TexCivA 3SW(2d)468; 136Wash112, 238P897; 144Wash90, 256P1035; 198Wis154, 223NW446. [a] 144Wash90, 256P1035. [b] **Where record discloses nothing on its face** to show that dismissal was justified, respondents have right to show that action of trial court was justified for any reason. CalA 278P469(2dcase). [c] **Order granting new trial must disclose particular ground therefor** if review is to be confined to that ground. 152Wash62, 277P84.

664-94 275US243, 48SCt63; 163Ga440, 136SE436; Iowa 231NW304; 33NM78, 260P1086; 144Wash90, 256P1035; 102WVa432, 135SE386.

664-96 271US263, 46SCt503, 70Led938; Mass 169NE151. [a] Cal 290P33. [b] **Appellate courts will look to result** rather than to any peculiar language contained in judgments of lower courts. TexCivA 21SW(2d)87.

664-97 35F(2d)110; 331Ill395; 163NE139 (court reviews judgment and not reasons assigned therefor); 332Ill627, 164NE142; MoA 9SW(2d)661; 53SD421, 220NW858 [quotCJ].

664-97½-New. Where the sole ground upon which the trial court based its ruling granting a new trial is untenable, appellant is entitled to reversal, unless the record affirmatively shows that the motion ought to have been sustained on some other ground. 121Kan324, 246P994.

664-97⅓-New. Where, notwithstanding a mistake of law alleged to have been committed by the trial court in the decision of a case, the decision is sustainable on other grounds, the appellate court will not consider, as ground of its decision, a theory of law to show such mistake, which theory was not presented to the trial court. 285Pa273, 132A364.

664-97¼-New. In reviewing a lower court's ruling granting or refusing a new trial, the appellate court will accept limitation of ground for ruling only as such limitation appears in the final order disposing of motion. 136Wash112, 238P897.

664-97⅙-New. Judgment erroneous because based on unproved ground cannot be sustained on another ground neither pleaded nor proved. 232Ky63, 22SW(2d)439.

664-98 Ala 129S571; Mass 169NE891; NJ 148A717; TexCivA 21SW(2d)87. [a] CalA 286P1074; 85Colo304, 275P928. But see 83Colo468, 266P501.

664-99 Ida 290P200; 208Iowa341, 223NW403; MoA 19SW(2d)541; 83NH236, 141A136; NH 146A508; 19OhA1; 99Vt464, 134A588.

665-2 214Ala32, 106S182; 229Ky771, 17SW(2d)1029; 69Utah123, 252P677. [a] 169Minn45, 210NW618, 77Mont110, 250P819.

665-3 207Cal379, 278P858; CalA 291P896; Mo 271SW52; NJ 147A442.

665-4 109Conn158, 145A884; 208Iowa759, 225NW939; Iowa 232NW140; 217Ky160, 289SW219; 228Ky844, 16SW(2d)482; 240Mich79, 214NW973; 86Mont562, 284P539; 82NH289, 133A22; 102NJL128, 130A626; 51SD407, 214NW809; TexCivA 13SW(2d)918.

665-5 339Ill184, 171NE169; 123Or339, 262P223.

665-8 315Mo318, 286SW100; 79Mont220, 255P346.

665-9 220Ala436, 126S845; Ala 128S789; 204Cal515, 269P433; Cal 290P441; 94CalA361, 271P503; 40GaA611, 150SE850; 204Iowa1080, 216NW697; 127Kan581, 274P286; 311Mo417, 277SW927; 315Mo507, 286SW38; 317Mo614, 296SW739; 317Mo1255, 298SW69; Mo 10SW(2d)663; MoA 256SW520; 221MoA1204, 300SW840; MoA 10SW(2d)342; MoA 20SW(2d)289; MoA 24SW(2d)649; MoA 27SW(2d)1051; ND 231NW785; 134Okl215, 273P349; 289Pa169, 137A178; 295Pa130, 145A64; 295Pa527, 145A576(1stcase); 300Pa405, 150A665; 300Pa584, 151A343; 144SC76, 142SE48; 145SC196, 148SE31; 54SD113, 222NW671; TexCivA 282SW891; TexCivA 291SW313; 136Wash645, 241P19; 144Wash90, 256P1035; 152Wash62, 277P84; 102WVa432, 135SE386. [a] 315Mo507, 286SW38. But see 220Ala624, 127S192. [b] In Washington.-136Wash112, 238P897. [c] In Pennsylvania.-(1) 294Pa518, 144A529, 63ALR297. (2) 296Pa313, 145A820. [d] **Order granting new trial may be reversed only** where court below granted relief on single ground insufficient in itself and denied relief on other grounds. 300Pa405, 150A665. [e] **Order granting new trial without specifying ground** will not be reversed unless trial court abused its discretion or verdict was required as matter of law. 153Wash31, 278P1074.

665-11 218MoA414, 277SW600.

665-13 199Ind528, 156NE545; Pa 152A102.

665-14 [b] (1) 74CalA681, 242P100. (7) On appeal on judgment roll alone court considers only whether complaint states cause of action, whether findings are within issues, whether judgment is supported by findings, and whether reversible error as to a matter of law appears on face of record. 71CalA77, 234P839. (8) Appellate court must look to judgment roll alone to ascertain facts. 67CalA468, 227P676. (9) Where appeal is on judgment roll alone without bill of exceptions, questions whether findings support judgment and whether judgment grants relief warranted by finding, if properly made, are only questions open for review. 79CalA662, 251P814. [c] (4) Since abolition of appeal from order on motion for new trial, questions formerly raised on motion for new trial are reviewable on appeal from final judgment. 74Mont558, 241P636. (5) Where case was determined below solely on pleadings which were before appellate court, it could determine whether judgment was warranted. 86Mont100, 282P1045. [f] In Iowa.-202Iowa314, 208NW288. [g] **On appeal from refusal to enter summary judgment** see 285Pa498, 132A702. [h] In Minnesota.-230NW473. [i] In South Dakota.-227NW469.

665-15 50Nev298, 258P232; 291Pa35, 139A586 (judgment non obstante veredicto).

666-16 50Nev298, 258P232. [c] (2) Where motion for new trial below is premature and invalid, appeal is from final judgment only. 51SD127, 212NW491. [d] In Kansas.-130Kan691, 288P745.

666-17 44Ida92, 255P318; 130Kan691, 288P745; 49Nev254, 243P817; 50SD310, 210NW18; 50SD633, 211NW448; 51SD127, 212NW491; 52SD534, 219NW121; 54SD492, 223NW713; 54SD501, 223NW717. [c] In Oklahoma.-112Okl28, 239P594.

666-18 69CalA782, 232P464.

666-20 See also 54SD492, 223NW713.

666-21½-New. [§ 2558b] a⅓. **On Appeal from Judgment Sustaining Demurrer.** Rights of parties, dependent on facts which have not been developed, should not be discussed. TexCivA 5SW(2d)861 (equities cannot be considered).

666-21⅓-New. On an appeal from a judgment alone, evidence on the record can be looked into only to see if it substantially supports the verdict. 78Mont199, 253P260.

666-21¼-New. On an appeal from a final decree, there is nothing open except question whether the decree was in conformity with the pleading and report. 254Mass375, 150NE171.

666-21⅙-New. The appellate court may properly determine whether injunctive relief may be granted, where the bill seeks to enjoin breach of contract. 17F(2d)739.

666-21⅛-New. On exception to "findings of fact, conclusions of law, and to the judgment as whole," brought up for review, question is open whether pleadings and facts found support judgment. 35F(2d)859, 860.

666-21⅐-New. Only question on appeal from final decree is whether decree was within scope of bill and supported by facts found. Mass 172NE204.

666-21⅙-New. The question whether the amount of the verdict is excessive is one that cannot be raised on an appeal from judgment entered thereon. NJSup 147A585.

666-21⅑-New. In Pennsylvania, on appeal from final decree, only question is whether findings support decree. 299Pa200, 149A179.

666-21 1/10-New. On appeal from entire judgment appellant may raise any incidental questions. 34PortoRico571.

666-22 But see CalA 281P1048.

666-23 TexCommnA 284SW210.

666-25 234IllA183. Contra TexCommnA 284SW210. [b] **Where proofs are submitted and made part of record,** appellant may assign as error that proofs negative right to relief. 234IllA183.

667-26 5F(2d)582.

667-27 101CalA599, 281P1058. [a] In Texas.-CivA 283SW883.

667-32 Fla 129S501.

667-32½-New. Since the law favors a hearing on the merits, the appellate court will review the defaults wherever such hearing is made possible. 200Cal452, 253P704.

667-32⅓-New. The only question for review is the correctness of the failure to render final judgment on exceptions to the judgment vacating the judgment denying a motion to vacate the order setting aside the default for failure to render final judgment. 39GaA242, 146SE640.

667-32¼-New. The only issue presented for review on appeal from an order vacating default under statute is whether or not the trial court abused its discretion in making the order. CalA 281P1048.

667-35 33Ariz232, 263P625 (court is without jurisdiction to review or modify judgment); Mont 285P668.

667-38½-New. Only question presented is whether meritorious defense against cause of action on which judgment was rendered has been shown. MoA 25SW(2d)118.

667-38⅓-New. On appeal from order opening judgment by confession appellate court will determine only whether abuse of discretion. 298Pa431, 148A841.

667-41 See also 238Mich151, 213NW110, 51ALR1303. [f] **Issues of fact, if any, are disregarded on appeal.** 238Mich151, 213NW110, 51ALR1303.

667-41½-New. On appeal from order, dismissing complaint for failure to state cause of action, the only question is whether the facts set forth entitled plaintiff to some relief against defendant. 210AppDiv587, 206NYS700.

667-43 217AppDiv163, 216NYS389; 222AppDiv460, 226NYS576 (averments of answer are immaterial); 225AppDiv360, 233NYS153. See also 200Cal681, 254P557; 258Mass196, 155NE7. [a] **On appeal from judgment sustaining demurrer to petition,** answer cannot be considered. 220Ky246, 294SW1069.

667-44 36Wyo318, 255P1.

667-45 222AppDiv883, 232NYS657. [r] **Matters pertaining to merits** cannot be considered on appeal from decree dismissing for want of jurisdiction. 271 US426, 46SCt552, 70Led1019. [s] **After demurrer to answer was carried back** to petition and sustained, appeal from dismissal of petition on failure of petitioner to plead over does not present question of validity of answer. 210Ky830, 276SW897. [t] **Dismissal for failure to make petition more specific.**–202 Iowa 314, 208NW288. [u] **On appeal from order of dismissal** with prejudice, entire merits of case held open for appellate court's consideration. 36Wyo 318, 255 P1. [v] **On appeal from order denying motion to dismiss complaint** court cannot determine whether individual defendants signed corporation's contract as principals or witnesses. 219AppDiv 486, 220NYS340. [w] **On appeal from dismissal for want of jurisdiction,** court will not review propriety of dismissal on merits. 24F(2d)169. [x] **Upon dismissal for want of prosecution,** question is whether dismissal was proper under all circumstances. 328 Ill 582, 160NE 113. [y] **On appeal from order of dismissal without prejudice,** reviewing court is without jurisdiction to pass on merits of issues dismissed. TexCivA 5SW(2d)606. [z] **Whether there was cause of action need not be considered** where, upon error assigned in weighing evidence, appellate court decides against reversal of judgment in favor of defendant. 35PortoRico 431. [aa] **Appeal from judgment of dismissal on plaintiff's failure to amend pleadings** after plea in abatement is determined from condition of case when plea was sustained. TexCivA 25SW(2d)184.

667-45½-New. Where demurrer to petition was sustained, only question was whether petition stated good cause of action. 233Ky549, 26SW(2d)503.

667-48 214Ala385, 108S38; 219Ala60, 121S49.

668-49 67Utah90, 245P977.

668-51½-New. [§ 2560a] c½. **On Appeal from Order Denying Summary Judgment.** Whether facts alleged in the defense could be established under rules of evidence could not be determined. 213AppDiv54, 209NYS522.

668-51½-New. Only question on appeal from judgment of nonsuit is whether evidence was sufficient for jury. 193 NC317, 136SE874.

668-51¼-New. Where plaintiff was nonsuited on the ground of contributory negligence as matter of law, the sole question on appeal is whether he was, as matter of law, guilty of contributory negligence. 201Cal 57, 255P500.

668-51⅙-New. Exceptions to the granting of nonsuit raise only the question of the sufficiency of the evidence to sustain the petition. 40GaA280, 149SE287.

668-51⅙-New. Appellate court will express finding of fact in review of judgment of nonsuit. 227AppDiv219, 237 NYS539.

668-52 9F(2d)799; 50RI 452, 148A600. But see Md 137A306. [f] **Examination of entire record** for error becomes duty of appellate court in case of directed verdict. 152Md367, 136A829; TexCivA 273SW657. [g] **On reviewing direction of verdict for defendant,** question is whether there is any evidence to support plaintiff's claim. 48RI 274, 137A470. [b] **Refusal of general affirmative charge sustained.**–Ala 130SE196.

668-54½-New. On an instructed verdict the appellate court will review the entire record. TexCivA 296SW621.

668-55½-New. The question on demurrer to the evidence is, was liability sustained under any possible view. 219MoA 19, 267SW964.

668-55⅓-New. On an appeal from a motion for finding and judgment upon the evidence, where the record does not show the basis for ruling, the court will consider the sufficiency of the evidence and the rules of law applicable to the case. IndA 154NE682.

668-55¼-New. Where defendant did not stand on demurrer at the close of plaintiff's case, the supreme court will search all the testimony to determine whether plaintiff's case was aided by defendant's proof. Mo 20SW(2d)31.

668-57 91Fla982, 109S98; 228AppDiv 37, 238NYS401. [c] **In Pennsylvania.**–288Pa461, 136A695. [d] **To determine whether result would be changed on new trial,** appellate court, on appeal from order granting new trial, may consider assignment of error that, if trial court had not committed error during trial, case would be presented in which new trial should not be granted, under doctrine of compensated error. 81Mont509, 264P396.

668-57½-New. An application to set aside a verdict as against the weight of evidence is addressed to the appellate division, as well as the trial justice. 221AppDiv164, 223NYS81.

668-58 108Conn680, 144A782; 109Conn 732, 144A894(2dcase); 95Fla90, 116S 23; 98Fla970, 124S729; Fla 129S763; Fla 130S432; MoA 4SW(2d)499 (instructions); TexCivA 287SW130; Tex CivA 13SW(2d)452. But see 142 Okl 265, 286P799. [b] 102Conn448, 129A41. [c] But see Cal 290P441. [f] **Errors occurring in main trial.**–135Wash368, 237 P987. [g] **Ground of motion for nonsuit** because verdict for plaintiff would be against weight of evidence held to raise no issue on appeal. 82NH440, 136A 259. [h] **Amount of verdict** may be considered in determining whether errors have been prejudicial. Cal 290P441.

668-60 But see 88PaSuper475.

669-64½-New. , or ruling on a motion for judgment notwithstanding the verdict; 52ND113, 204NW849.

669-65 87 IndA541, 161NE568; 152 Wash339, 281P994(2dcase). But see 198 Cal 16, 243P21. [a] (4) Where motion granted solely for error in instructions, sufficiency of evidence cannot be considered. 86CalA136, 260P588.

669-69 218Ala55, 117S634; 39GaA208, 146SE349(1stcase); 216AppDiv791, 215 NYS516.

669-71 198Cal 16, 243P21; 161Ga568, 131SE490; 177Minn240, 225NW84. [b] (1) 218Ala520, 119S230. (2) Order overruling demurrer to complaint is not reviewable on appeal from order denying alternative motion for judgment notwithstanding verdict, or for new trial. 177Minn240, 225NW84.

670-76 35F(2d)717 (amount of verdict).

670-76½-New. , the amendment of a verdict pursuant to order, ND 225NW 811.

670-88 MoA 4SW(2d)499; MoA 10SW (2d)965; TexCivA 287SW130.

670-88½-New. giving or refusing instructions, MoA 10SW(2d)965.

670-89½-New. sufficiency of evidence to support verdict, 285Pa151, 131A726.

670-91 206 Iowa1263, 222NW16.

670-91½-New. Consideration of error in failure of the court to charge the jury on the particular point when properly before the court upon the usual alternative motion is in reference to motion for new trial and not motion for judgment notwithstanding the verdict. 165Minn 374, 206NW716.

670-91⅓-New. On appeal from an order granting judgment notwithstanding the verdict, the only question presented is whether the evidence is sufficient to sustain the verdict. 165Minn374, 206 NW716.

670-91¼-New. On appeal from an order denying a motion for judgment non obstante veredicto, the appellate court should consider a ruling of the trial judge excluding a ground of recovery from the jury. 166Minn87, 207NW194.

670-91⅕-New. An exception to a judgment denying motion for nonsuit is not considered where the case proceeded to verdict for plaintiff and motion for a new trial included grounds that the verdict was contrary to and unsupported by, the evidence. 36GaA168, 136SE89.

670-91⅙-New. Where the appellant limits the rule to show cause to question of damages only, the court will not consider other contentions. NJSup 135 A81.

670-91⅐-New. On appeal from ruling on motion for judgment notwithstanding verdict. Where defendant rests on motion for judgment notwithstanding the verdict, the only question is whether it clearly appears that plaintiff is not entitled to recover. 169Minn45, 210NW618.

670-91⅛-New. Where plaintiffs in error seeking a review of judgment granting first new trial conceded that the verdict in their favor was not demanded, judgment granting new trial will be affirmed without undertaking to adjudicate whether or not the contrary verdict was demanded. 39GaA208, 146SE349 (1stcase).

670-92 201Cal 201, 255P1097.

670-92½-New. On appeal from an order granting temporary injunction, error in granting a restraining order not appealed from, and which ceased to be effective when a temporary injunction was granted, will not be considered. 120 Kan316, 243P329.

670-92⅓-New. On appeal from order denying motion to dissolve temporary injunction, only question reviewable is whether refusal to dissolve injunction was error. TexCivA 283SW332.

670-92¼-New. On appeal from order refusing to grant temporary injunction the illegality of an appointment of deputy officials cannot be considered. 83 Mont130, 269P396.

670-92⅕-New. The fact that the county commissioners' contract may result in expending more than the amount permitted without bids cannot be considered. 83Mont130, 269P396.

670-92⅙-New. Assignment of error in overruling a motion to set aside a verdict of the jury as contrary to law and evidence, will be considered on appeal practically as on demurrer to the evidence. 151Va985, 144SE624.

670-93 12F(2d)896; 214Ala341, 107S 903; 45 Ida468, 263P992 (only question raised by appeal of intervener); 323 Ill 122, 153NE718; 208 Iowa764, 224NW 45 (conclusive); 159La1001, 106S544; 151Md52, 133A831; 115Nebr131, 211NW 993; 289Pa525, 137A673; 155SC152, 152SE179; 157Tenn582, 12SW(2d)372 (law of case); TexCivA 278SW508; Utah 275P772; 37Wyo 389, 262P22. But see CalA 280P392; CalA 284P701; Wis 229NW636. [c] TexCivA 278SW 508.

671-94 198Wis24, 223NW89.

671-94½-New. On appeal from a without prejudice reservation in a judgment on the merits, the entire judgment is reviewable. CalA 280P392.

671-95 35Ariz226, 276P521; 171Ark 561, 285SW29; 203Cal 183, 263P231.

672-97 88PaSuper158; 155Tenn207, 291SW447. [c] **On appeal from summary judgment** for want of sufficient defense, no questions of law will be determined. 284Pa78, 130A301.

672-97½-New. [§ 2564a] h. **On Appeal from Interlocutory Injunction Orders.** On an appeal from an order granting a temporary injunction, plaintiff may insist that the court confine itself to consideration of the propriety of granting temporary injunctions. 23F (2d)968.

672-97⅓-New. On appeal from an order granting a temporary injunction, the appellate court will not determine finally any matters which may arise on trial of merits. 83Mont244, 271P455.

672-97¼-New. Questions going to the merits of the lessor's original foreclosure action cannot be determined on appeal from a preliminary injunction enjoining the lessor from selling the lessee's chattels mortgaged to secure rent. 100CalA 491, 280P380.

672-97⅕-New. On appeal from order granting injunction, case need not be made out as required on final hearing. Ind 172NE353.

672-97⅙-New. [§ 2564b] i. **Appeals from Orders Appointing Receiver.** On appeal from the refusal of the circuit court to set aside its interlocutory order appointing a receiver where the only purpose and relief sought in the case was the appointment of a receiver, the supreme court by express terms of statute may hear and determine the merits of the case as the right to appoint re-

ceiver. 309Mo 433, 274SW789.

672-97⅞-New. An order providing for the retention of property until further order presents no question of title. 206 Iowa746, 221NW347.

672-97⅛-New. [§ 2564c] j. **Appeal from Dissolution of Preliminary Injunction.** On appeal from dissolution of a preliminary injunction, the appellate court does not pass on the merits of the case but only examines the record to determine whether the action of the trial court was based on a reasonable ground. 292Pa 547, 141A483.

672-97⅛-New. [§ 2564d] k. **Appeal from Order Granting Temporary Injunction.** Only question for review is validity of order. SC 155SE228.

672-1 260Mass369, 157NE693.

672-2 146Va349, 131SE788.

672-3 11F(2d)913; 18F(2d)371; 42F(2d)109; 102Conn640, 129A786; 47RI 232, 132A613. [b] **Review is directed to determine** validity of final judgment on whole record. MoA 294SW423.

672-4 13F(2d)588; 27Hawaii544; 47 RI 232, 132A613. [a] 18F(2d)371; 47 RI 232, 132A613. [g] **Credibility of witnesses** cannot be reviewed. 27Hawaii 544. [h] **Excessiveness of verdict in personal injury action** cannot be considered by United States circuit court of appeals. 42F(2d)611.

672-5½-New. Indication in granting a writ of error of a particular point which challenged the court's attention does not preclude consideration of other assignments of error. TexCommnA 5SW(2d) 973.

672-7 253NY166, 170NE532; 288Pa56, 135A639; 155Tenn148, 290SW970. [a] **In New Jersey.--Sup** 149A356(1stcase).

672-7½-New. Demurrer to a petition may be considered, although answer is not withdrawn. 30OhA84, 163NE921.

672-7⅞-New. Judgment awarding defendant damages where the pleadings raised no issue of damages is reviewable on appeal. 86CalA412, 260P832.

673-16 Vt 148A411.

673-18½-New. Where a suit is reported on a bill and demurrer after entry of an interlocutory decree overruling the demurrer, the allegations of the bill must be taken as true. 254Mass240, 150 NE206.

673-18⅓-New. On a report in an action against an express company for loss of a dog in transit, the question whether liability was established may be considered directly. 126Me489, 139A 784.

673-18¼-New. On a report, the case is to be determined on as much of the evidence as is legally admissible. 127Me 65, 141A102.

673-18⅙-New. On report of case, technical questions of pleading may be treated as waived. 128Me218, 146A695.

673-18⅛-New. Report brings before supreme judicial court rulings on fact and evidence for review. Mass 171NE 477.

673-22 224 IllA380 (where view of trial court is not disclosed).

673-23 18F(2d)369; 23AlaA416, 125S 398; Ala 127S155; 203Cal 44, 262P 1084; Mass 169NE268 (correspondence); 317Mo 572, 296SW389 (evidence must be considered as whole); MoA 15 SW(2d)957 (all the evidence); 115 Oh 376, 154NE249; 24 OhA514, 157NE427; TexCommnA 293SW159; TexCommnA 5SW(2d)767; 36Wyo 132, 255P355. But see 235Ky749, 32SW(2d)324(2d case). [a] (1) See also 83Mont452, 272 P998. [b] **Evidence at close of whole case must be looked to** by appellate court to determine whether plaintiff was guilty of contributory negligence. MoA 284SW845. [c] **Evidence or contentions conflicting with well-known physical laws** do not impress appellate court. 232Ky107, 22SW(2d)452. [d] **In determining propriety of order granting temporary injunction,** only record as it existed at time writ is granted can be considered. TexCivA 21SW(2d)382.

673-23½-New. But an appellate court need not, on its own motion examine the whole record to determine whether appellant was prejudiced by erroneous rulings. 36Wyo 132, 255P355.

673-24 Vt 148A411 (transcript of proceedings).

673-28 SD 227NW469.

673-29 36F(2d)37.

673-31 TexCivA 297SW588.

674-34 Mo 32SW(2d)605.

674-41 39F(2d)896; 74Mont176, 240P 829 (method of carrying on business prior to transactions between plaintiffs and defendant not considered).

674-42 221MoA311, 273SW148.

674-44 11F(2d)943; 24 OhA514, 157 NE427.

674-51½-New. On appeal from a decree granting injunction the appellate court may review evidence and determine questions of fact as well as of law. 190 NC74, 128SE467.

674-51⅓-New. In determining whether the verdict is the result of passion or prejudice, various circumstances will be considered in addition to the evidence. 145Miss702, 110S586.

674-51¼-New. Where court below sustained motion by defendant for directed verdict based on several grounds, only those grounds relied on by appellee on appeal need be considered by appellate court. 202 Iowa681, 210NW952.

674-51⅕-New. In considering the evidence, excerpts should not be relied on disassociated from their settings. 146 Va594, 131SE850, 46ALR186.

674-51⅙-New. Evidence not noted by register on submission may not be considered. 215Ala579, 112S207.

674-51⅐-New. The ultimate effect on complaining party of the lower court's judgment must be considered in determining whether it is prejudicial. 24 OhA514, 157NE427.

674-51⅛-New. Assignments of error as to evidence cannot be noticed where the evidence is not part of the record. 11 F(2d)943.

674-51⅑-New. In passing on a motion for judgment n. o. v., the appellate court was held only entitled to consider the complaint and the answers thereto, answers to interrogatories, and the verdict. IndA 163NE839.

674-51 1/10-New. Contracts and circumstances of execution must be considered on conflicting evidence whether the later contract was independent of the prior one. 10LaA442, 121S328.

674-51 1/11-New. The appellate court cannot disregard evidence of deceased's statements to a third person admitted under statute in considering title of defendant in whose name deceased purchased property. 50RI 86, 145A312.

674-51 1/12-New. In the absence of an allegation in a bill, a fact recited in judgment cannot be considered. 30F(2d)16.

674-51 1/13-New. On appeal from an order granting a temporary injunction, the reviewing court looks to the petition alone in determining whether the action of the trial judge is proper. Tex CivA 21SW(2d)382.

674-51 1/14-New. All material papers embraced in a transcript on appeal from an order granting an injunction, which are either referred to or directly made part of the application for injunction, will be considered. TexCivA 21SW(2d) 72.

674-51 1/15-New. Testimony of defendant called as witness by plaintiff can be considered in reviewing motion for nonsuit of another defendant. CalA 290P489.

674-52 86Colo 330, 282P193 (evidence); Mo 15SW(2d)923; NJSup 147A585.

674-53 34F(2d)353; 321Mo 1104, 14 SW(2d)425; 142 Okl 74, 285P84. But see 153Miss327, 121S144; 222AppDiv 835, 226NYS669. [a] **Court may consider briefs in former appeal** to determine what was adjudicated. 48RI 72, 135A402. [b] **Opinion on prior appeal** may be examined, though not introduced in evidence. 118Nebr792, 226NW444.

675-56½-New. A statute permitting the omission on a second appeal of so much of the record as appears on the first appeal does not authorize the court on a second appeal to consider evidence in the record on the first appeal in passing on the sufficiency of the evidence on the second trial. Miss 106S517.

675-56⅓-New. but only authorizes the court on the second appeal to consider such parts of the record on the first appeal as are in permanent form and not altered by subsequent proceedings. Miss 106S517.

675-56¼-New. In order to avail himself of such statute appellant must indicate such purpose in his application for appeal. Miss 106S517.

675-57 76CalA162, 244P156; 83CalA 74, 256P595; 84CalA142, 257P606; 85 CalA764, 260P361; 91CalA324, 266P963 (in absence of stipulation); CalA 274P 572; 42 Ida567, 248P447; 228Ky806, 16 SW(2d)442; MoA 294SW439; 212App Div502, 209NYS380; TexCivA 24SW (2d)488.

675-58 32F(2d)124; CalA 268P451; Iowa 226NW724(2dcase); 93PaSuper 355.

675-58½-New. In determining whether the verdict is the result of passion or prejudice the court will consider other verdicts in the case, as well as the evidence. 145Miss702, 110S586.

675-62 152Miss522, 20S214 (exhibits not attached are not considered); 24 OhA73, 156NE227; TexCivA 27SW(2d) 561. But see IndA 148NE337.

675-63 220Ala639, 127S210; 220Ala 605, 127S178; 36GaA554, 137SE646; 339 Ill 540, 171NE632; IndA 148NE335; 206 Iowa562, 218NW306; 213Ky703, 281SW824; 128Me545, 148A681(1st case) (amendment part of original declaration); 155Md86, 141A518; Mo 31SW(2d)67; TexCommnA 272SW771 (where special exception to plea of failure of consideration sustained before introduction of evidence). See also 78 Mont145, 252P872. [c] (3) On review only facts well pleaded will be considered. 148Md90, 129A22. (4) Entire record considered in determining whether overruling demurrer to complaint was prejudicial. IndA 171NE304. [f] **Allegations stricken from complaint** will not be considered as matter of right in absence of agreement or consent of parties or equivalent recital of court. 81 Colo 468, 256P305.

675-63½-New. Evidence may be considered to determine whether error in overruling demurrer was prejudicial. IndA 149NE652.

675-63⅓-New. Reviewing court in passing upon the sufficiency of a counterclaim may consider its allegation in connection with the reply thereto. Tex CivA 285SW838.

675-65 77Colo 200, 234P1064 (only question to consider is whether pleading states cause of action); 197 Ind386, 151 NE134; 83 IndA250, 148NE157; IndA 166NE779.

675-65½-New. In case of general demurrer the appellate court will not consider special grounds set up, but only the general one. 152Miss542, 120S195.

675-66 MoA 298SW1059.

675-67 310Mo 48, 274SW764; 78Mont 357, 254P174. [a] **Discharge of writ of attachment** reviewed only on question of original complaint then before court and not on complaint after later amendment. 78Mont357, 254P174.

676-82½-New. In reviewing a judgment for plaintiff on the pleadings the appellate court can consider only such pleadings as the trial court permitted the parties to file. 21 OhA244, 153NE172.

676-82⅓-New. An amended declaration to which defendant pleaded after his demurrer to his original declaration was overruled must be regarded on appeal as pleading de novo. 149Md304, 131A 450.

676-82¼-New. Allegations of an unanswered pleading are not to be treated as facts on appeal, there being no decree pro confesso. 19F(2d)513.

676-82⅕-New. In reviewing judgment on the pleadings, only such pleadings as the court allowed will be considered. 21 OhA244, 153NE172.

676-82⅙-New. The sufficiency of an amended petition only will be considered where the original petition was ignored by the verdict and judgment. 224Ky165, 5SW(2d)1073.

676-82⅐-New. The appellate court must consider pleadings not stricken in the trial court. TexCivA 48SW(2d)1046.

676-82⅛-New. On the question whether an amended answer stated a defense, the court cannot consider the original

answer which was abandoned. **MoA 14 SW(2d)**21.

676–82⅕–New. Pleading of each party may be considered, for it may be that one party supplies essentials omitted by the other. **TexCommnA** 13**SW(2d)** 74.

676–82⅒–New. Where an amended petition is substituted for an original, it cannot be considered by the appellate court, although included in the transcript. **TexCivA** 10**SW(2d)**1023.

676–82 1/11–New. Where motion to strike out matters in answer should have been allowed, appellate court considers case without regard to such matters. **Mass** 171**NE**830.

676–82 1/12–New. Testimony to sustain allegations of negligence, not submitted to the jury, but pertinent to one or more issues submitted, cannot be relied on to show prejudice in overruling special exceptions. **TexCivA** 20**SW(2d)**248.

676–82 1/13–New. Where execution of deed set forth in answer is admitted in supplemental petition, reviewing court can consider deed as if embodied in original petition. **TexCommnA** 25**SW(2d)** 603.

676–82 1/14–New. In determining whether judgment is supported by pleadings, court will consider pleadings of both parties. **TexCivA** 29**SW(2d)**905.

676–82 1/15–New. Court of civil appeals may look to pleadings of both parties to ascertain issues involved in prior litigation. **TexCivA** 31**SW(2d)**154.

676–82 1/16–New. On appeal on merits, supreme court can review order overruling demurrer to complaint in so far as it involved merits. **Wis** 232**NW**566.

676–82 1/17–New. Abandoned pleading superseded by amended pleading will not be considered, though copied in transcript. **TexCivA** 32**SW(2d)**244.

676–84 216**MoA**663, 272**SW**101; **Tex CivA** 23**SW(2d)**879.

676–86½–New. Where defendant introduces evidence pertaining to the issues after the denial of his motion for a nonsuit, such evidence will be considered in reviewing the question of the propriety of the ruling on the motion. 120 **Or**181, 250**P**628.

676–87 218**Ky**543, 291**SW**773; **NH** 151 **A**457. [f] **Instructions and rulings thereon cannot be reviewed** without findings of fact surrounding rulings. 108 **Conn**285, 142**A**737.

677–88 [a] **In considering sufficiency of evidence,** instructions given are accepted as law of case. 36**F(2d)**176.

677–90 [a] **Issues to be considered.**–247 **Mich**667, 226**NW**650.

677–91 See also **Mo** 300**SW**280.

677–95½–New. In considering a charge the appellate court cannot go into the evidence but is confined to the finding claimed to be proved. 107**Conn**68, 139 **A**649.

677–95⅓–New. The reviewing court cannot consider infliction, force, or emphasis used by the presiding justice in giving a charge. 126**Me**605, 139**A**460.

677–95¼–New. In passing on sufficiency of objection to charge, appellate court may consider requested issues on same subject. **TexCivA** 28**SW(2d)**565.

677–96 But see **TexCivA** 276**SW**460.

677–5 119 **Oh**360, 164**NE**345. [a] **Corrections to findings** are considered on review only where facts are uncontradicted. 103**Conn**352, 130**A**472.

677–6 **TexCommnA** 277**SW**1053.

677–6½–New. Findings unsupported by evidence must be disregarded. 66 **Utah**82, 240**P**1105.

677–8 87 **IndA**6, 159**NE**767.

678–14 85 **IndA**636, 154**NE**288 (evidence not considered); 35**Wyo** 108; 247 **P**699.

678–14½–New. In New Brunswick where the case turns on the question of fact, the court may either accept findings or draw its own conclusions from the evidence. **NB** [1925] 3**DomLR**293.

678–14⅓–New. Testimony of defendant as to payment of an obligation will not be disregarded, on the ground that, after testimony was given to the effect that the payment was on another obligation, he did not deny this testimony. 70**CalA** 561, 232**P**58.

678–14¼–New. **Findings properly set** aside by the trial court as not sustained by the evidence will not be considered for any purpose. **TexCivA** 272**SW**550.

678–14⅕–New. In determining whether the special findings are inconsistent with the general verdict, the court cannot look to the evidence. 319 **Ill** 344, 150**NE**276.

678–14 1/6–New. A decree may be referred to to ascertain the meaning of the findings. 101**Vt**147, 141**A**682.

678–14⅙–New. In determining whether the answers to issues are conclusive against appellant, unanswered issues will be considered as though answered in appellant's favor. **TexCivA** 1**SW(2d)** 667.

678–14⅛–New. The substance of affidavits filed on motion for new trial cannot be considered in connection with the contention that the evidence did not support the findings for plaintiff. 205 **Cal** 11, 269**P**612.

678–17 But see 104**Conn**519, 133**A**746.

678–18½–New. Only evidence adduced at the trial can be considered by the reviewing court where motion for new trial is based on the contention that the verdict was against the weight of evidence. 235**Mich**217, 209**NW**129.

678–23 **TexCivA** 273**SW**666.

678–28½–New. The trial court having disregarded the rule given the jury in reducing damages, the supreme court in reviewing the order of the trial court will act as if there had been no decision on the merits by the trial court. **RI** 135**A**321.

678–30 310**Mo** 642, 276**SW**60.

678–32 206 **Iowa**527, 219**NW**318(2d case); 3**LaA**267.

678–33 See also **Mo** 31**SW(2d)**1059.

678–34 308**Mo** 617, 273**SW**1071, 1073 [citCJ].

679–35 See also 151**Miss**18, 117**S**329.

679–37 29**Ariz**1, 239**P**514 (affidavits in support of motion for new trial); 181 **Ark**1145, 26**SW(2d)**576(2dcase); 45 **Ida** 472, 262**P**1052; 149**Md**522, 131**A**834 (foreign statute not proved below); 254 **Mass**268, 150**NE**3; 232**Mich**345, 205**NW** 140; **MoA** 272**SW**707; 222**MoA**990, 6 **SW(2d)**655; **MoA** 10**SW(2d)**665; 23 **OhA**127, 155**NE**245; 29 **OhA**59, 162**NE** 779; 295**Pa**146, 144**A**904; **TexCivA** 284 **SW**251; **TexCivA** 1**SW(2d)**708; 197 **Wis**414, 222**NW**251.

679–38 [b] **MoA** 17**SW(2d)**392.

679–39 5**F(2d)**918; 29**Ariz**156, 240**P** 275; 177**Ark**55, 5**SW(2d)**742; 176**Ark** 1149, 6**SW(2d)**28; 90**Fla**787, 108**S**211; 123**Kan**286, 255**P**48; 9**LaA**137, 119**S** 483; 251**Mich**96, 231**NW**59; 304**Mo** 685, 264**SW**775 (equity case); 121 **Okl** 129, 247**P**974; 40 **OklACR**508 [rehearing pending]; **TexCivA** 271**SW**186; **Tex CivA** 287**SW**687; **TexCivA** 4**SW(2d)** 999; **TexCivA** 12**SW(2d)**1037; **Tex CivA** 28**SW(2d)**861; 150**Va**386, 143**SE** 702. [a] **In equity case** evidence improperly considered by trial court will be rejected. 213**Ala**491, 105**S**643 (cause will be considered only on relevant evidence shown by transcript).

679–40 **TexCivA** 271**SW**186; **TexCivA** 287**SW**687; **TexCivA** 13**SW(2d)**936; **TexCivA** 15**SW(2d)**77; **TexCivA** 30**SW** **(2d)**715.

679–41 **CalA** 292**P**979; **Minn** 231**NW** 236; 114 **Oh**523, 151**NE**645; **TexCivA** 294**SW**295; **TexCivA** 7**SW(2d)**661.

679–42 25**F(2d)**247; 80**CalA**609, 252**P** 733; 82**CalA**174, 255**P**222; **CalA** 285**P** 1062(2dcase); **IndA** 149**NE**454; 168**La** 37, 121**S**183; 6**LaA**468; 317**Mo** 1344, 300**SW**798; **MoA** 13**SW(2d)**569; 82 **Mont**150, 266**P**869; 226**AppDiv**638, 236 **NYS**489 (its weight will be determined in light of whether prerequisites to its admissibility are complied with); 50 **ND**494, 196**NW**953; **TexCivA** 273**SW** 690 (hearsay constituting admission against interest); **TexCivA** 8**SW(2d)** 550. See also 154**Md**414, 141**A**348.

679–43 180**Ark**1104, 24**SW(2d)**330; 11 **LaA**602, 123**S**367; **Md** 148**A**826; **Mass** 165**NE**660; 234**Mich**11, 207**NW**856; **Mo** 298**SW**51 (rule held not affected by defendant's suggestion of matter on appeal); 320**Mo** 672, 8**SW(2d)**599; 82**NH** 500, 136**A**134; 131 **Or**327, 281**P**182(1st case); 54**SD**107, 222**NW**667 (disregards all incompetent evidence); **TexCommnA** 294**SW**537; 101**Vt**356, 143**A**276; 37 **Wyo** 448, 263**P**960.

679–44 253 **IllA**416; 168**La**608, 122**S** 866; **MoA** 9**SW(2d)**845; 131 **Or**327, 279 **P**855; **TexCivA** 298**SW**154; 65**Utah**354, 236**P**1105 (only admissibility considered in absence of stipulation of parties); 153**Wash**669, 280**P**62 (supreme court will consider excluded evidence properly before court as offer as though it had been regularly admitted in evidence).

680–45 177**Ark**55, 5**SW(2d)**742; 152 **Mo** 638, 54**SW**506; 319**Mo** 65, 3**SW(2d)** 712.

680–51 [a] (1) Contra. 80**CalA**74, 251 **P**330.

680–52 175**Ark**128, 298**SW**865; 205**Cal** 380, 270**P**685; 102**Conn**702, 130**A**238; 98**Fla**197, 123**S**666 (final decree in mortgage foreclosure being unappealed from, questions of service of process and qualification of special master are not reviewable); 203 **Iowa**245, 212**NW** 567; 148**Miss**259, 114**S**321; 135**Misc** 724, 238**NYS**310; **ND** 231**NW**545; 137 **Okl** 116, 278**P**294; 113 **Or**552, 233**P** 848; 156**SC**437, 153**SE**460; **TexCivA** 286**SW**584. But see **TexCivA** 26**SW(2d)** 670. [b] 105**NJL**150, 143**A**448; 50**RI** 339, 147**A**756. [c] (1) 80**CalA**74, 251**P** 330; **TexCivA** 3**SW(2d)**527 (failure to appeal from prior order held waiver). [d] **Order directing testimony in arbitration proceeding to be taken** held not reviewable on appeal from order confirming arbitrators' award, as it was made at appellant's request and approved as to form by appellant who took advantage of it. 226**AppDiv**397, 235**NYS**370. [e] **Abandoning appeal from order overruling plea of privilege** is waiver of right to have such error considered on appeal from subsequent judgment. **TexCivA** 16**SW(2d)**900. [f] **Final judgment itself held reviewable** as well as order appealed from. 252**NY** 347, 169**NE**605.

680–53 **Cal** 292**P**647; 44 **Ida**250, 256**P** 523; 203 **Iowa**245, 212**NW**567; **Mass** 172**NE**87; **Minn** 230**NW**473; 51**Nev**145, 271**P**336; 107**WVa**192, 147**SE**877, 66 **ALR**102 (every appealable decree which has become final within eight months prior to appeal). [a] (2) Order denying change of venue is not reviewable on appeal from final judgment. 44 **Ida** 250, 256**P**523. [c] 261**Mass**242, 158**NE** 779. [d] **Nonappealable orders and orders from which no appeal has been taken stand** on same footing. **Minn** 230 **NW**473.

680–54 198**Cal** 649, 246**P**1044; 203 **Iowa**245, 212**NW**567.

681–56 174**Ark**224, 294**SW**1010.

681–60 207**Cal** 617, 279**P**650.

681–66 **TexCivA** 286**SW**584.

681–68 29**F(2d)**92; 70**CalA**137, 232**P** 982; 39**GaA**738, 149**SE**56; 45 **Ida**229, 261**P**673; 46 **Ida**1, 265**P**701; 253 **IllA** 242; 109 **Okl** 86, 234**P**623.

681–69 But see 24**F(2d)**145.

681–69½–New. order striking demurrer to complaint as frivolous; 54**SD** 329, 223**NW**210.

681–73 But see 246**NY**203, 158**NE**74.

681–75 But see 92**PaSuper**85.

681–76 **SD** 227**NW**81.

681–77 **SD** 227**NW**81.

682–81 **Ariz** 291**P**1005; 195**Cal** 242, 233**P**94; 76**CalA**434, 244**P**932; 101**CalA** 388, 281**P**690 (propriety of trial court's action); **Minn** 230**NW**473; **SD** 229**NW** 390. But see 10**LaA**437, 121**S**351; **Mich** 221**NW**69; 288**Pa**549, 137**A**113, 52**ALR** 506. Contra 175**Minn**346, 221**NW**424.

682–81½–New. orders dismissing motions for a new trial; 195**Cal** 242, 233**P** 94.

682–81⅓–New. orders refusing to vacate order granting new trial; **Minn** 230**NW**473.

682–82 220**Ala**305, 124**S**879; 78**CalA** 199, 248**P**551; **TexCivA** 11**SW(2d)**329 (1stcase).

682–86 46 **Ida**1, 265**P**701 (dissolving temporary restraining order); 288**Pa** 227, 135**A**630.

682–91 69**CalA**276, 231**P**349.

682–93 85**CalA**353, 259**P**452; 339 **Ill** 540, 171**NE**632 (order dismissing bill as to one defendant); 12**LaA**233, 125**S** 189; 252**NY**347, 169**NE**605. [a] (11) Order vacating judgment entered on

default. 148Miss259, 114S321. (12) Order dismissing motion for new trial. 195Cal 242, 233P94. (13) Order transferring case from law to equity. 174 Ark988, 298SW501. (14) Denial of motion to retransfer case from chancery to circuit court. 175Ark271, 299SW13. (15) Order quashing service of summons. CalA 251P957. (16) Order denying motion to vacate service of summons on foreign corporation. 58ND 754, 227NW360. (17) Finding as to amount required to be deposited in court to cover taxes, penalties, and interest is reviewable on appeal from final judgment in action to set aside tax deed. 85Mont398, 279P231.

683–5½–New. order refusing to enter judgment for want of sufficient affidavit of defense; 92PaSuper85.

683–8 TexCivA 1SW(2d)358; Wash 289P527.

683–9 [b] (1) See also 219AppDiv261, 219NYS709. [f] **Attachments.**–197Cal 439, 241P86.

683–11 123Kan603, 256P986; 254Mass 375, 150NE171; 265Mass571, 164NE 483; TexCivA 285SW918; TexCivA 26 SW(2d)470.

683–11½–New. On appeal from a judgment in favor of an intervener the court cannot review an order nonsuiting the original plaintiff on his own motion which is not before the court on appeal. 29Ariz468, 242P1009.

683–11¼–New. In some jurisdictions the propriety of an order appointing a receiver cannot be reviewed on appeal from final judgment but only on appeal from the order itself. 49Nev451, 248P 893.

683–11¼–New. Where judgment sustaining demurrer provides that it shall operate as a dismissal and the petition is not amended, judgment cannot be made subject to exceptions pendente lite. 39GaA788, 149SE56.

683–12 216Ala224, 112S834; 90Fla42, 105S147 (rule also applies to appeals based on decree pro confesso); 93Fla 611, 112S768; 157Md389, 146A233; 254 Mass274, 150NE186; 255Mass67, 150 NE860, 44ALR1374; 36Wyo 522. 257P 7. [b] (1) 98Fla186, 123S699(2dcase) (though decree taken pro confesso).

684–13 262Mass165, 159NE624; 148 Miss164, 114S268; 101WVa561, 133SE 158. But see 220Ala620, 127S206. [b] **Decree overruling plea in abatement** cannot be reviewed, where defendant did not appeal or assign errors. 153Tenn 40, 281SW932.

684–14 148Miss164, 114S268.

684–15 216Ala530, 113S589.

684–16 Mass 167NE303.

684–17 257Mass509, 154NE175; 261 Mass242, 158NE779.

684–18 93Fla611, 112S768.

684–19½–New. On appeal from an order modifying a decree taken after the expiration of the time for appealing from the original decree, the original decree and the findings and conclusions upon which it was based are not before the appellate court. 119 Or654, 250 P743.

684–19¼–New. An error in granting a temporary injunction pendente lite will not warrant reversal of permanent injunction. 225Ky218, 7SW(2d)1037.

684–21 218 Ala195, 118S379; 198 Ind 207, 151NE610 (appealable, but merits of case as adjudicated may not be further reviewed); 202 Iowa141, 209NW 408; 151Md43, 134A29; MoA 282SW 451 (nunc pro tunc entry of judgment). But see Minn 231NW222. [c] **Orders which may be passed upon.**–85CalA86, 258P1006.

685–23 Ind 172NE309.

685–24 197Cal 79, 239P717; 200Cal 77, 251P912; 173Minn250, 217NW127; 57 ND262, 221NW69 (as to sufficiency of evidence); 125 Or343, 267P523. [a] (2) Bill of exceptions duly presented and signed as regards judgment on motion for new trial is sufficient to preserve and present for review rulings on trial of original cause as well as on motion for new trial under Code (1923) § 6433. 21AlaA389, 108S628. [b] 32Ariz 370, 259P282, 56ALR903. [f] (1) 197 Cal 79, 239P717. (2) Order striking affidavits in motion for new trial is presented for review on application for transcript including all matters and orders arising on motion for new trial. 197Cal 79, 239P717. (3) Under Park and Playground Act order denying new trial in action to condemn land for park purposes may be reviewed on appeal from final judgment. 203Cal 44, 262P1084.

685–24½–New. order striking notice of intention to move for new trial; 75Mont 1, 241P631.

685–25 20AlaA531, 104S898 (order overruling motion to set aside default judgment); 206Cal 428, 274P536(1st case); 73CalA368, 238P820.

686–34½–New. order of confirmation of sale in suit for foreclosure of mortgage; 114Nebr764, 209NW609.

686–45½–New. Portion of judgment as to costs is reviewable on appeal from final judgment despite failure to file cost bills. 102CalA192, 282P974.

686–47 39F(2d)847; 41F(2d)305; 216 Ala486, 113S516; 206Cal 456, 274P748; 99CalA1, 277P905; 204 Iowa603, 215 NW645; 196NC752, 147SE288; 116 Or 108, 239P541; 285Pa43, 131A657 (merits not considered on appeal from decree refusing preliminary injunction); Tex CivA 16SW(2d)385.

686–49 204 Iowa603, 215NW645.

687–50 255 IllA45; 199 Ind528, 156NE 545; 204 Iowa603, 215NW645.

687–54 279US229, 49SCt266, 73L ed 675; 9F(2d)246 (merits ought not be determined); 255 IllA199; 83Mont21, 269P162 (matters of pleading and practice held not subject to review); 50ND 365, 195NW660; 295Pa529, 145A532(2d case); 97PaSuper164; 50RI 409, 148A 803 (on appeal from preliminary injunction, court should determine whether bill lacks equity); TexCivA 20SW(2d) 355. But see 39F(2d)896.

687–55 216Ala486, 113S516; 334 Ill 46, 165NE143; TexCivA 5SW(2d)263; Tex CivA 14SW(2d)86.

688–60½–New. to orders denying motion to set aside judicial sale; TexCivA 279SW576 (which made no attack on judgment under which sale was made).

688–64 197NC10, 147SE681.

688–65 219Ala77, 121S86; 164Ga837, 139SE676; 190NC389, 130SE53; 191NC 677, 132SE660; 197NC4, 147SE682.

688–67 190NC389, 130SE53.

688–67½–New. Difficulties due to contradictory nature of allegations are not before the appellate court upon demurrer. 106Conn642, 139A106, 55ALR1319.

688–67¼–New. Where there has been no final judgment, defendant cannot, in a bill of exceptions to a judgment, overruling his general demurrer to plaintiff's petition, except to an order striking his answer. 37GaA778, 142SE565.

688–67¼–New. An appeal from an order sustaining a demurrer and dismissing the case at plaintiff's cost, unless amendment is made within a dated time, brings up both questions, although a formal order dismissing the case is thereafter made. 127Kan115, 272P126.

688–69 16F(2d)371; 200Cal 374, 253P 148; 80CalA660, 252P669; CalA 291P 451; 98Fla197, 123S666; 98Fla954, 124 S466; 207 Iowa121, 222NW351; 13LaA 566, 128S201; 148Md682, 130A325; 157 Md376, 146A240; 253Mass321, 148NE 801; 255Mass52, 151NE167; 246Mich 511, 224NW358; 177Minn103, 224NW 700; 152Miss260, 119S180; Mont 279P 253 (order held final); 129 Or116, 276P 683(2dcase); TexCivA 27SW(2d)374; Wis 230NW33; Wis 230NW79. But see 204 Iowa541, 215NW609. [d] **Prior interlocutory decree** from which appeal could be taken may not be considered on appeal from subsequent order, after time for appeal from first order had passed. 213Ala614, 105S689. [e] **Appeal from order granting new trial** is not within application of statute providing that on appeal from judgment court may review verdict and decision and intermediate order or decision excepted to which involves merits or necessarily affects judgment. 81Mont509, 264P396.

689–71 200Cal 374, 253P148; 80CalA 660, 252P669; 100CalA103, 279P1074 (where judgment is unappealed from, only facts embraced in findings can be considered on appeal from order denying motion to vacate judgment and enter different one on ground that conclusions of law were incorrect and not supported by findings of fact); 101CalA 736, 282P433; 211Ky259, 277SW276; 232Ky336, 23SW(2d)551(2dcase); Tex CivA 23SW(2d)781; 152Va842, 148SE 687. But see TexCivA 279SW916. [c] **On appeal from order setting aside judgment and entering another judgment** in lieu thereof because conclusions of law inconsistent with findings of fact, question to be determined is whether original conclusions of law were in conflict with findings of fact. 99CalA17, 277P 1053.

689–73 16F(2d)371.

690–78 255Mass52, 151NE167.

690–79½–New. from judgment for costs; 167Minn352, 209NW315.

690–80½–New. A decision of a federal district court, remanding a cause removed from a state court, cannot be reviewed on appeal from a decree dismissing an ancillary suit by the removing defendant for an injunction. 25F(2d) 861.

690–81½–New. There is no question concerning the order directing execution of judgment presented where there is no appeal therefrom. 211Ky259, 277SW 276 (on appeal from order refusing to set aside allowance of attorney's fees).

690–82 198 Ind661, 154NE492; 208 Iowa341, 223NW403.

690–83 168Ark859, 271SW952; 82Colo 408, 260P685; 218Ky221, 291SW29; Tex CivA 294SW873; TexCivA 27SW(2d) 597.

690–84 168Ark859, 271SW952; 76CalA 601, 245P439; 86CalA736, 261P1092; 102CalA192, 282P974; 82Colo 408, 260P 685; 162Ga664, 135SE195; 44 Ida651, 258P534; 243 IllA129; 119Kan788, 241 P467; 213Ky371, 281SW163; 10LaA 582, 121S310; 315Mo 367, 286SW106; 240NY187, 148NE185, 39ALR1211; 49 SD174, 207NW74; TexCivA 283SW1098; TexCivA 294SW873; 136Wash270, 239P 562; 152Wash257, 277P695; 107WVa 309, 148SE107.

691–85 38F(2d)984; 41F(2d)305; 215 Ala266, 110S389; 220Ala152, 124S867; 171Ark24, 283SW41; 199Cal 344, 249P 180; 199Cal 437, 249P852; 206Cal 742, 276P347; Cal 289P821; CalA 269P940; 102CalA192, 282P974; 82Colo 408, 260P 685; 44 Ida534, 258P525; 44 Ida651, 258P534; 336 Ill 93, 167NE774; 86 Ind A552, 156NE411; 199 Ind528, 156NE 545; IndA 169NE342; IndA 170NE92; 205 Iowa331, 217NW876; Iowa 227NW 521; 218Ky691, 291SW1054; 226Ky 794, 11SW(2d)943; 164La332, 113S 866; 168La241, 121S757; 221MoA718, 285SW122; MoA 30SW(2d)1049; 114 Nebr266, 207NW31; NJ 130A732; 54 ND519, 210NW3; 123 Okl 206, 251P 1012; 287Pa478, 135A109; 154SC267, 151SE579; TexCivA 282SW819; Tex CivA 283SW212; TexCivA 284SW1098; TexCivA 290SW866; TexCivA 294SW 873; TexCommnA 24SW(2d)9; Tex CivA 18SW(2d)267; 195Wis488, 218NW 826. [a] (11) Striking from answer specific allegations of fact provable under pleaded general denial. Iowa 207 NW342. (12) Assignment of error complaining that in action to restrain cutting of timber defendant's prayer for reformation of deed was granted without making grantor party to action is not considered prejudicial where plaintiff has no title whatever. 169Ark1177, 278 SW12. [b] (4) Refusal to allow preferred stockholder, claiming lien for value of stock, is held not prejudicial in view of insufficient assets. 218Ky586, 291SW780.

691–86 273US359, 47SCt400, 71L ed634; 13F(2d)105; 15F(2d)972; 215Ala143, 110S372; 175Ark50, 297SW1022; 104 Conn83, 132A467; 104Conn107, 132A 395; 93Fla611, 112S768; 163Ga703, 136 SE893; 36GaA698, 137SE850; 234 IllA 9; 235 IllA431; 83 IndA478, 149NE103; 87 IndA433, 157NE456; 121Kan728, 250 P324; 210Ky92, 275SW16; 2LaA497; 234Mich461, 208NW443; 172Minn591, 216NW537; 315Mo 367, 286SW106; 248 NY293, 162NE84; TexCommnA 292SW

536; **TexCivA** 278SW478; **TexCivA** 294 SW286; **TexCivA** 295SW1105; 196 **Wis**635, 220NW209. [a] (10) Instructions favorable to appellant. 235 **IllA** 431. (11) Where court gave instruction at appellant's request as to damages, more favorable than correct statement thereof, he cannot complain of instructions as to damages. 234 **IllA**9. (12) Instructions as to damages favorable to appellant. 36**GaA**698, 137SE850.

692–87 219**Ala**37, 121S25; 173**Ark**250, 292SW150; **Cal** 290P22; 78**CalA**745, 248P762; 82**Colo** 399, 260P1019; **Colo** 292P601; 337 **Ill** 555, 169NE753; 339 **Ill** 400, 171NE504; **Ill** 173NE281; 237 **IllA** 488; 209**Ky**803, 273SW472; 231**Ky**346, 218W(2d)452; 84**Mont**263, 275P273; 116 **Or**343, 241P59; 121 **Or**407, 255P 471; **TexCivA** 286SW307; **TexCivA** 2 **SW(2d)**961 (rulings favorable to intervener and affecting plaintiff only are immaterial and not injurious to defendant); 33**Wyo** 271, 238P284. [a] (2) Assignment of error by plaintiff, that petition was dismissed without determination of rights and titles of several parties, will not be considered, if judgment in effect decides that all right and title of plaintiff vested in defendants by virtue of deed. 307**Mo** 336, 270SW638.

692–88 90**CalA**606, 266P570; **Tex CommnA** 286SW193. [a] (4) 216**Ky**411, 287SW942.

692–89 169**Ark**1177, 278SW12; 217**Ky** 842, 290SW720; 168**Minn**227, 209NW 507; **TexCivA** 290SW866; **TexCivA** 297 SW555; 152**Wash**250, 277P846.

692–91 181**Ark**124, 24SW(2d)958; 333 **Ill** 31, 164NE194; 199 **Ind**528, 156NE 545; 223**Ky**389, 3SW(2d)762; 230**Ky**365, 19SW(2d)983; **Mich** 214NW245; 305**Mo** 188, 264SW656, 34**ALR**1399; 190**NC** 375, 129SE828; 192**NC**784, 136SE9; **TexCivA** 295SW266; **TexCivA** 7SW(2d) 611; **TexCivA** 27SW(2d)354; 148**Va** 573, 139SE275; 100**WVa**422, 130SE663, 665 [citCJ].

693–92 31F(2d)893; 76**CalA**590, 245P 434; 102**CalA**656, 283P823; 323 **Ill** 498, 154NE226; 86**IndA**632, 155NE712; 204 **Iowa**857, 216NW33; 12**LaA**216, 125S 778; 241**Mich**474, 217NW332; **Minn** 232 NW715; **Mo** 20SW(2d)888; **MoA** 21SW (2d)890; 117**Nebr**136, 219NW843; 118 **Nebr**533, 225NW462; **NJSup** 147A469 (1stcase); 31 **OhA**290, 166NE592. [a] (9) Failure to enter judgment against codefendant where appellant is individually liable in tort action cannot be urged. 85**IndA**21, 149NE567.

693–95 15F(2d)996; 170**Ark**771, 281 SW379; 88 **IndA**409, 164NE312; 211**Ky** 791, 278SW124; 12**LaA**266, 125S502; **TexCivA** 5SW(2d)602; **TexCivA** 15SW (2d)66; **TexCivA** 16SW(2d)563. [a] (3) Without complaint by garnishee court will not consider appellant's contentions that garnishees were ordered to pay sums into court without answers filed by them, or proof of appellant's liability. 211**Ky**791, 278SW124.

694–96 **IndA** 156NE584.

694–98 15F(2d)996; 17F(2d)263; 219 **Ala**609, 123S202; 220**Ala**664, 127S233; 32**Ariz**130, 256P365; 72**CalA**725, 238P 150; 74**CalA**254, 240P298; 90**CalA**276, 265P1010; 96**CalA**42, 273P595; 107 **Conn**425, 140A754; 196 **Ind**710, 149NE 560; 201 **Iowa**20, 206NW680; 201 **Iowa** 1325, 207NW781; 203 **Iowa**792, 206NW 586; 203 **Iowa**688, 213NW213; **Iowa** 216NW762; 208 **Iowa**641, 224NW58; **Iowa** 232NW504; 121**Kan**488, 247P441; 212**Ky**103, 278SW560; 213**Ky**373, 281 SW187; 213**Ky**460, 281SW485; 215**Ky** 5, 284SW101; 215**Ky**307, 284SW1077; 226**Ky**179, 10SW(2d)846; 229**Ky**598, 17 SW(2d)703; 231**Ky**96, 21SW(2d)123; 235**Ky**435, 31SW(2d)695; 159**La**1035, 106S556; 160**La**449, 107S302; 161**La** 446, 108S878; 163**La**198, 111S675; 165 **La**94, 115S380; 10**LaA**170, 120S639; 170**La**736, 129S147; **LaA** 122S137; 11 **LaA** 629, 124S564(1stcase); 13**LaA**309, 127S139; 148**Md**381, 129A362; 232**Mich** 682, 206NW527; 235**Mich**210, 209NW 188; 238**Mich**289, 213NW169; 248**Mich** 34, 226NW680; 144**Miss**292, 109S792; 152**Miss**792, 119S194; 307**Mo**576, 271SW 365; **Mo** 274SW37; 318**Mo**139, 18W (2d)127; 319**Mo**542, 4SW(2d)760; 221 **MoA**329, 273SW772; **MoA** 278SW1053; 222**MoA**8, 300SW526; **MoA** 3SW(2d) 251; **MoA** 30SW(2d)621; **Mont** 288P 614; **NJSup** 148A17; 244NY251, 155NE 116; 223**AppDiv**353, 228NYS163; 225 **AppDiv**29, 232NYS84; 225**AppDiv**557, 234NYS27; 227**AppDiv**758, 236NYS 476; 192**NC**395, 135SE151; **OhA** 172NE 702; 114 **Okl** 267, 246P455; 135 **Okl** 296, 275P628, 65**ALR**573; 299**Pa**86, 149 A163; **RI** 144A109; **RI** 149A595; 155 **Tenn**256, 291SW1074; 159**Tenn**328, 17 SW(2d)523; **TexCommnA** 273SW821; **TexCommnA** 284SW542; **TexCommnA** 1SW(2d)271; **TexCommnA** 14SW(2d) 834; **TexCivA** 13SW(2d)711; **TexCivA** 19SW(2d)120; **TexCivA** 30SW(2d)419; **Utah** 272P941; 142**Wash**624, 253P1070; 145**Wash**320, 260P532; 146**Wash**361, 263P188; 193**Wis**370, 214NW374, 53 **ALR**771; 36**Wyo** 232, 254P128, 129 [quotCJ]; 40**Wyo** 350, 280P889. See also 78**Mont**532, 255P1052, 1055 [citCJ]. But see 215**Ky**128, 284SW91. [a] (3) 23 **AlaA**187, 122S297; 11**LaA**162, 123S184. (4) 207**Cal** 200, 277P475. (7) 202 **Iowa** 1356, 212NW116. (8) On plaintiff's appeal on rejected claim against decedent's estate, executors cannot raise questions of admissibility of testimony till judgment is rendered against them. 99**CalA** 671, 279P168. [b] (1) 78**Mont**532, 255P 1052; **TexCivA** 274SW1002 (failure to appeal from judgment on plea over or assign cross error). (2) Court cannot reverse judgment for error committed against appellant where same result would have been attained had trial court not committed errors against respondent appearing in the record by bill of exceptions. 78**Mont**532, 255P1052. [c] (2) Where party is satisfied with result of trial he may, nevertheless, if other party brings case up for review, seek correction of certain rulings made against him by cross bill of exceptions so as to prevent their repetition in event of new trial. 35**GaA**436, 133SE348. (3) By filing such cross bill he places himself in attitude of being willing to abide judgment below if it is left undisturbed. 35**GaA**436, 133SE348. (4) Questions made in the cross bill will be considered only where judgment on main bill is reversed or modified. 35**GaA**436, 133SE 348. (5) It is duty of appellate court to hear argument on cross bill and decide questions therein made if reversal of judgment is ordered. 35**GaA**436, 133 SE348. (6) Where main bill showed error in refusing to permit sequestered witness to testify, and defendant therefore was not entitled to affirmance of judgment, and cross bill showed error in refusing to dismiss petition, it was unnecessary to deal with merits of main bill. 35**GaA**436, 133SE348.

695–99 39F(2d)577; 201**Cal** 726, 258P 959; 76**CalA**726, 245P800; **CalA** 290P 892; **Ind** 148NE414; 203 **Iowa**688, 213 NW213; 206 **Iowa**39, 218NW56; 208 **Iowa**44, 222NW864; 158**La**1052, 105S 63; 159**La**1035, 106S556; 160**La**449, 107S302; 166**La**656, 117S763; **Mass** 173 NE406; 232**Mich**682, 206NW527; 240 **Mich**558, 215NW702; 217**MoA**567, 272 SW1014; 221**AppDiv**415, 223NYS358; 119 **Or**645, 250P760; 50**SD**383, 210NW 194; **TexCivA** 14SW(2d)877(2dcase); **TexCivA** 19SW(2d)120; **TexCivA** 28SW (2d)193; **Utah** 267P1009; **Utah** 273P 512; **Utah** 291P926; 150**Wash**370, 273 P185; **BC** [1930] 2**DomLR**215. [b] 9 **La**525, 119S729; 169**La**1079, 126S665; 11**LaA**246, 122S505; 11**LaA**113, 123S154; 13**LaA**309, 127S139; 13**LaA**141, 127S 456(2dcase).

696–2 17F(2d)263; 172**Ark**1177, 290 SW587; 177**Ark**170, 6SW(2d)36; 97 **CalA**492, 275P878; **MoA** 290SW83; 137 **Misc**384, 244NYS2; 144**Va**782, 130SE 773 (failure to include attorney's fee in judgment). [a] (4) Defendant in action for injunction, recovering balance on its cross complaint and not appealing therefrom, has no right to further recovery on appeal. 208**Cal** 114, 280P 535.

696–4 10**LaA**219, 120S672; 11**LaA**442, 123S477 (where defendant's reconventional demand was rejected below and defendant neither appealed nor answered plaintiff's appeal, such rejection is not before appellate court).

696–5 119 **Or**645, 250P760; 148**Wash** 495, 269P807.

696–6 317 **Ill** 312, 148NE59; 123 **Okl** 225, 253P81; 131 **Okl** 277, 268P727; 136 **Okl** 123, 276P723. But see 151**Miss**329, 118S179.

696–7 166**Minn**425, 208NW182. But see 149**Miss**766, 115S897; 221**MoA**152, 297SW727; **NM** 291P489.

696–7½–New. Any ground urged at trial. 126**Misc**203, 213**NYS**211.

696–7⅓–New. or anything which would not prejudice appellant because first advanced on appeal may be advanced to sustain the judgment. 126**Misc**203, 213 **NYS**211.

696–7¼–New. Respondent cannot urge affirmance on the ground that the verdict was properly directed on a ground of motion refused by the trial judge, where no notice was given that such ground of affirmance would be urged. 149**SC**424, 147SE315.

696–7⅕–New. Judgment for defendant in an action for the price of machinery will not be affirmed because the item shipped differed from that ordered where the record does not show if such was the case, as appellee contends. 23 **AlaA**244, 123S260.

696–8 [a] 220**Ky**413, 295SW408.

696–9 201 **Iowa**1107, 206NW959; **Tex CivA** 284SW288; **TexCivA** 10SW(2d) 415.

697–11 8F(2d)943; 13F(2d)532; 41F (2d)637; 218**Ala**341, 118S578; 200 **Iowa** 446, 204NW287; 208 **Iowa**764, 224NW 45; **Iowa** 232NW504; 212**Ky**273, 278 SW578; 254**Mass**274, 150NE186; 235 **Mich**258, 209NW66; 235**Mich**282, 209 NW179; 236**Mich**520, 211NW103; 222 **MoA**307, 297SW129; 291**Pa**507, 140A 506; **RI** 146A405(1stcase); **Utah** 287P 926 (defendant not entitled to affirmative relief); 142**Va**43, 128SE615, 45**ALR** 664; 192**Wis**338, 212NW646; 194**Wis** 61, 215NW444. [d] **Party failing to file answer to appeal** is not entitled to amendment of judgment. 159**La**231, 105S300.

697–13 10F(2d)679; 26F(2d)348; 43 F(2d)306; 33**Ariz**128, 262P995 (upon codefendant's appeal); **Ida** 288P427; 165**La**1091, 116S568; 7**LaA**494; **LaA** 125S483(2dcase); 12**LaA**244, 125S632; 13**LaA**141, 127S456(2dcase); 239**Mich** 216, 214NW245; 250**Mich**196, 229NW 405; **MoA** 26SW(2d)796; 244NY182, 155NE93; 130 **Or**159, 279P264(2dcase); **TexCommnA** 298SW273; **TexCommnA** 5SW(2d)972; **TexCivA** 278SW246; **Tex CivA** 283SW645; **TexCivA** 9SW(2d)198. [h] **Propriety of judgment discharging codefendant cannot be raised** by appellant against whom judgment was rendered when codefendant is not made party to appeal. **TexCivA** 278SW246. [i] **Where widow appealed in her own right but not as guardian of her children**, she could not complain of order directing receiver under mortgage to pay surplus of rents collected during redemption period to administrator to pay debts where she had received her share of surplus. 202 **Iowa**611, 210NW810.

698–14 208 **Iowa**80, 224NW803; 239 **Mich**216, 214NW245.

698–16 236**Mich**531, 211NW62; 244**NY** 182, 155NE93.

698–18 127**Kan**215, 272P931; 123 **Or** 579, 263P896.

698–19 213**Ala**654, 105S872 (party defendant who has received all that he is entitled to by partition decree may not complain on appeal of error affecting coparty only); 214**Ala**619, 108S518; 21 **AlaA**539, 110S697; **Ariz** 283P279; 195 **Cal** 27, 231P340 (defendant in detinue cannot complain that findings were contradictory with relation to what portions of property he was actually in possession of at commencement of action, where right to specific items was defined in findings and transferees had either not appeared or had not appealed); 83**CalA**111, 256P551; 84**CalA** 448, 258P418; 92**CalA**203, 268P396; **CalA** 279P172; 83**Colo** 242, 263P719; **Ida** 288P427; 338 **Ill** 552, 170NE756; 253 **IllA**51; **IndA** 156NE584; 200 **Iowa** 905, 205NW541; 202 **Iowa**503, 210NW 530; **Iowa** 231NW444; **Iowa** 232NW 666; 123**Kan**558, 256P114; 208**Ky**382, 271SW69; 217**Ky**729, 290SW696; 226 **Ky**347, 10SW(2d)1112; 166**La**1080, 118 S225; 149**Miss**523, 115S707; **Mo** 281 SW951; 221**MoA**160, 290SW78; **MoA** 287SW803; **MoA** 13SW(2d)555; 285**Pa** 241, 132A185 (entry of nonsuit for one

defendant where two separate torts are alleged); 48SD581, 205NW717 (holding that erroneous judgment dismissing sureties on administratrix's qualifying bond cannot be availed of by sureties on bond for sale of real estate); 159 Tenn337, 19SW(2d)273; TexCivA 278 SW865; TexCivA 281SW1106; Tex CivA 282SW267; TexCivA 284SW617; TexCivA 9SW(2d)190; TexCivA 10SW (2d)149; TexCivA 11SW(2d)244; 191 Wis602, 211NW795; 35Wyo 482, 251P 468, 469 [citCJ]. [b] (1) 105WVa184, 142SE444. [c] **Cross defendant against whom judgment was rendered** favoring defendant below cannot allege error in court's failure to enter judgment dismissing from record plaintiff below, who had settled with defendant. TexCivA 278SW865.

699-21 [a] MoA 18SW(2d)106.

699-23 78Mont494, 254P869.

699-26 IndA 167NE721; 190NC512, 130SE323.

699-27 Iowa 229NW210; 217Ky738, 290SW677; Mo 285SW482; MoA 282 SW109; MoA 10SW(2d)327; Va 154SE 499. See also 318Mo 502, 300SW479.

699-28 214Ala619, 108S518; 21AlaA 589, 110S697; 101CalA503, 282P10(2d case).

699-33 148SC133, 145SE692.

699-36 21AlaA412, 109S168; 218MoA 651, 266SW330.

699-36½-New. One defendant may not complain that it is denied a new trial while granted to codefendant. 9F(2d) 6 (rights between them not affected).

700-33 34Ariz95, 268P181; 97CalA144, 275P245; 232Ky670, 24SW(2d)570; 249Mich76, 227NW759 (question asked jury on voir dire); MoA 22SW(2d)185; MoA 22SW(2d)860; NC 154SE43; 54 ND178, 208NW977, 979 [citCJ]; 54ND 193, 209NW231, 234 [citCJ]. [a] **Rule applicable** to error invited in intermediate court. 329 Ill 82, 160NE193.

700-39 214Ala291, 107S835; 215Ala 309, 110S411; 85CalA624, 260P347; 93Fla611, 112S768; Fla 126S290; 42 Ida821, 248P468; 47 Ida217, 273P943; 47 Ida395, 276P47; 321 Ill 283, 151NE 880; 328 Ill 426, 159NE821; 232 IllA 169; 235 IllA22; 85 IndA450, 150NE 31, 33 [citCJ]; 198 Ind429, 153NE890; Ind 154NE28; IndA 148NE505, 507 [cit CJ]; 204 Iowa346, 213NW240; 217Ky 389, 289SW290; 224Ky848, 7SW(2d) 493; Mich 233NW365; 167Minn101, 208 NW642; 156Miss507, 126S33; 315Mo 1091, 287SW610; 220MoA1067, 279SW 727; 115Nebr711, 214NW647; 54ND 178, 208NW977, 979 [citCJ]; 54ND 36, 209NW231, 234 [citCJ]; 56ND 276, 217NW173; 129 Okl 70, 263P 1091; 133 Okl 14, 270P838; 113 Or544, 233P540; 285Pa251, 132A120; 35Porto Rico224; 48RI 483, 139A298; TexCivA 296SW683; TexCommnA 285SW599; TexCommnA 11SW(2d)778; TexCivA 279SW939 (party inducing court to act on certain assumption cannot say assumption not correct); TexCivA 286SW 307; TexCivA 294SW647; TexCivA 32 SW(2d)513; 143Va133, 129SE341; 148 Va231, 138SE470; 102WVa673, 135SE 478, 480 [citCJ]; 102WVa215, 136SE30, 31 [citCJ]; 104WVa286, 140SE4; 105 WVa46, 141SE434. See also 214Ala415, 108S235.

700-39½-New. except where action was induced by fraud or mistake, 162Ga240, 133SE242.

700-40 245 IllA307; 217MoA613, 274 SW969; 117 Oh43, 158NE83; 42 Okl ACR296 [reh pending]; 155Wash256, 284P76. [a] **It is policy of law** that cases be tried on merits and not on defects of pleading or violation of rules of evidence. TexCivA 294SW240.

700-42 TexCivA 297SW692.

700-42½-New. Appellant did not waive its rights as to the question of damages, where it went into the question before arbitrators only after strenuous objection and on a clear understanding that it did not waive its rights by so proceeding. 226AppDiv397, 235NYS 370.

700-43 13F(2d)617; 198 Ind429, 153 NE890; 122 Or337, 255P603 (dictum). But see 38F(2d)431; TexCommnA. 24 SW(2d)9; TexCivA 23SW(2d)748.

700-44 122 Or337, 255P603 (dictum). But see 25F(2d)722(1stcase).

700-44½-New. Defendant, who, instead of demurring, answered to merits and sought injunctive relief, is precluded from asserting on appeal that court was without equitable jurisdiction. Or 291 P369.

700-45 [b] TexCivA 278SW283 (proceedings in vacation).

700-45½-New. A defendant who has waived his general demurrer and agreed that the cause be heard by the trial court on the merits cannot complain on appeal that the court was without jurisdiction to hear the cause. 170Ark445, 280SW380.

701-46 Mo 298SW756.

701-47 271US220, 46SCt526, 70Led 915; 35F(2d)907; 101CalA592, 281P 1070; CalA 292P166; 48 Ida643, 284P 559; Iowa 232NW140; 165Minn433, 206 NW711; 150Miss458, 117S117; 321Mo 795, 12SW(2d)451; 321Mo 840, 12SW (2d)747; Mo 25SW(2d)1055; 221MoA 683, 285SW161; 32NM259, 255P636; 34NM323, 281P22; 34NM545, 286P154; 196NC433, 146SE66(2dcase); TexCivA 4SW(2d)1046; TexCivA 17SW(2d)852; Va 154SE558; 100WVa464, 130SE807, 809 [quotCJ]. [a] (5) In suit against tenant for possession of water rights, where he has pleaded lease, he cannot on appeal assert that relationship of landlord and tenant did not exist because water rights were incorporeal hereditaments in which tenancy could not exist. 48Nev41, 226P1102. [b] **Rule held not applicable.**-147Va252, 137 SE374.

701-48½-New. A lessor, acquiescing in a lessee's action for accounting and recovery of crops, and cross complaining for affirmative relief by way of accounting, cannot complain of plaintiff's choice of remedy. 48 Ida236, 281P374.

701-49 13F(2d)617; 15F(2d)48; 17F (2d)568; 20F(2d)56; 23F(2d)287 (validity of statute); 23F(2d)464; 29F (2d)776; 34F(2d)245; 36F(2d)907(2d case); 21AlaA412, 109S168; 32Ariz135, 256P507; 32Ariz381, 259P397; 33Ariz 294, 264P471; Ariz 287P304; Ariz 291 P995; 176Ark196, 2SW(2d)84; 207Cal 676, 279P775; 88CalA20, 263P538; 95 CalA320, 272P775; 95CalA352, 272P 805; 96CalA576, 274P445; 97CalA112, 274P1009; 97CalA393, 275P866; CalA 289P920; CalA 290P458; 83Colo 193, 265P682; 86Colo 435, 282P568; 87Colo 142, 285P755; 87Colo 374, 287P863; 41 GaA38, 152SE136; 328 Ill 426, 159NE 821; 336 Ill 100, 167NE782; 337 Ill 555, 169NE753; 234 IllA403; 252 IllA567; 253 IllA396; 83 IndA690, 149NE732; 84 IndA115, 150NE116; 85 IndA327, 151NE346; IndA 171NE202; 201 Iowa 346, 207NW331; 201 Iowa481, 207NW 562; 204 Iowa857, 216NW33; 205 Iowa 283, 218NW66; Iowa 219NW324 (plaintiff assuming burden of proof of novation); 205 Iowa1349, 219NW418; 206 Iowa144, 220NW72; 207 Iowa490, 223 NW162; 208 Iowa325, 223NW763 (construction of written agreement); Iowa 229NW241; Iowa 230NW359; 120Kan 510, 243P1045; 218Ky145, 291SW13; 233Ky290, 25SW(2d)405; 235Ky229, 30 SW(2d)950; 126Me423, 139A225; 245 Mich146, 222NW160; 248Mich387, 227 NW764; 174Minn216, 218NW891; 179 Minn268, 228NW933; Miss 110S873; 307Mo 98, 270SW662; Mo 276SW26, 42ALR1319; Mo 285SW403(2dcase); 313Mo 492, 285SW965; Mo 286SW95; 315Mo 1136, 287SW1031; 315Mo 1025, 288SW59; 317Mo 1096, 298SW795; 317 Mo 1344, 300SW798; 319Mo 1137, 6SW (2d)886; 217MoA104, 273SW418; 220 MoA1067, 279SW727; 221MoA657, 284 SW204; MoA 284SW850; 221MoA993, 295SW830; MoA 295SW833; 221MoA 974, 296SW193; MoA 296SW269; 222 MoA251, 296SW840, 843 [citCJ]; MoA 296SW1057; 222MoA59, 300SW523; MoA 2SW(2d)123; MoA 5SW(2d)682; MoA 7SW(2d)370; MoA 9SW(2d)664; MoA 23SW(2d)209; MoA 24SW(2d) 660; MoA 26SW(2d)1020; MoA 29SW (2d)726; 76Mont415, 248P199; 78Mont 221, 254P412; 79Mont25, 255P11, 54 ALR1091; 82Mont364, 267P299; 49Nev 310, 244P1012, 246P1; 51Nev188, 272 P3; 31NM599, 248P1096; 33NM593, 273P12; 34NM594, 288P1065(2dcase); 135NY40, 31NE994, 31AmSR809 [rev 15 NYS418]; 156NY341, 50NE963 [rev 91 Hun636, 35NYS1013]; 170NY564, 62 NE1101 [aff 35AppDiv165, 66NYS921]; 69Hun450, 23NYS463; 134Misc9, 234 NYS659; 228AppDiv402, 240NYS139; 192NC475, 135SE339; 193NC278, 136SE 879; NC 146SE570; 52ND793, 204NW 678; 56ND60, 215NW913; 116 Okl 218, 244P31; 135 Okl 121, 274P674; 136 Okl 69, 276P182; 142 Okl 36, 284P1115(2d case); 141 Okl 288, 285P10; 42 OklACR 100; Or 291P349; 285Pa356, 132A172; 287Pa304, 135A260; 290Pa107, 138A 81; 299Pa17, 148A915; 54SD521, 223 NW726; TexCommnA 276SW177; Tex CommnA 11SW(2d)507; TexCivA 275 SW410; TexCivA 279SW484; TexCivA 298SW154; TexCivA 23SW(2d)414; Utah 280P239; Vt 147A287; 143Va469, 130SE393; Wash 288P217; 100WVa 464, 130SE807, 809 [quotCJ]; 107WVa 75, 146SE885; 40Wyo 44, 273P681. [a] (9) Cross appellant asking that judgment be affirmed in part estopped to complain that court without power to try case without jury. 212Ky491, 279 SW958. (10) Where petition alleged that defendant was bound to exercise highest degree of care to avoid injury to servant, but introduces evidence and requests instructions based on theory of defendant's duty to exercise only reasonable caution and care, he must adhere to theory on which case was actually tried on appeal. 217MoA104, 273 SW418. (11) Where complaint is sufficient to sustain judgment of foreclosure of chattel mortgage or one in claim and delivery and plaintiff tried it on latter theory, presenting sole issue of right of possession, he was bound by that theory and cannot claim error because court adopted such theory. 75Mont36, 241P 617. (12) Pedestrian who tried and submitted his action for personal injuries on theory of common-law duty of automobile driver cannot, on appeal, rely on statutory duty. 316Mo 1235, 293 SW142. (13) Plaintiffs, trying case on theory that they claimed riparian right, could not, on appeal, urge common-law appropriation as basis for judgment. 207Cal 739, 279P1001.

702-51½-New. Where in a suit upon a contract defendant in the trial court defended upon the theory that the contract, for certain reasons, was void, the assigning of an additional reason why the contract is void upon appeal does not amount to a change of theory, where the question was properly presented to the trial court by motion for new trial. 134 Okl 136, 272P455.

702-51½-New. An issue of law presented by the pleadings, which has not been waived, may be urged on appeal by appellant who on record was entitled to a verdict and against whom judgment has been ordered notwithstanding the verdict. 177Minn509, 225NW445.

702-53 172Minn110, 215NW192; Tex CivA 23SW(2d)757.

702-54 TexCivA 264SW517. See also MoA 24SW(2d)671.

702-55 249Mich115, 227NW799.

702-56 47 Ida542, 277P554(2dcase); Mo 30SW(2d)97; 123 Or280, 261P55.

702-57 98CalA84, 275P865.

702-58 MoA 25SW(2d)566. [a] **Where directors of corporation answer amended complaint and go to trial as if properly joined,** they cannot object on appeal that amendment to original complaint which was against corporation alone, whose powers had been suspended, was improper. 99CalA528, 279P202.

702-60½-New. Where defendant, though not a necessary party, moved to consolidate actions making him one, he cannot complain of error thereby invited. 102CalA192, 282P974.

702-60½-New. Plaintiff, in a foreclosure suit, in which a prior encumbrancer made an appearance and claimed a fund in the receiver's hands, cannot, on appeal by such encumbrancer, object that he was not a party defendant where he was treated as such during trial, although plaintiff had not joined him in the complaint. 109Conn329, 146A724.

702-60¼-New. Plaintiff who tried cause

as though there had been substitution of parties below cannot deny there was formal substitution. **MoA** 24**SW(2d)**671.

702–60½–New. Defendant recognizing the authority and capacity of plaintiff to sue is estopped, after an adverse decision, to question such capacity. **SD** 228**NW**182.

702–61 205**Cal** 541, 271**P**1091(2dcase); 76**Mont**396, 247**P**326.

702–62 102**Conn**626, 129**A**782.

702–64 [a] **Party withdrawing pleadings** cannot complain of error in previously sustaining demurrers and exceptions thereto. **TexCivA** 297**SW**692.

702–64½–New. Where defendant withdrew plea and demurrer sustained to new and similar plea, he cannot complain. 215**Ala**598, 111**S**641.

702–65 90**Fla**595, 106**S**473; 219**Ky**715, 294**SW**149; **Mo** 30**SW(2d)**71; **TexCivA** 275**SW**267; **TexCivA** 287**SW**149.

702–66 73**CalA**421, 238**P**1096; 101**CalA** 736, 282**P**433; 35**GaA**707, 134**SE**798.

702–67½–New. Defendants, appellants, cannot, after an adverse ruling, withdraw from the case an issue which they tendered. 99**CalA**666, 279**P**194.

702–68½–New. Where demurrer to appellant's pleading was sustained, he cannot, on appeal therefrom, claim facts contrary to those well pleaded. 325 **Ill** 464, 156**NE**471.

702–68¼–New. An error in a proceeding to trial on false assumption that plea of privilege had been overruled is not invited by defendant since the court knows the character of the order entered on plea. **TexCivA** 288**SW**1107.

702–68¼–New. Where plaintiff declines to amend to meet meritorious grounds of demurrer, the court will not reverse judgment sustaining demurrers and dismissing the petition. 168**Ga**320, 147**SE** 390(1stcase).

702–68½–New. Defendant, having brought issue into case, cannot complain that it would have been misjoinder if included in complaint. **NM** 291**P**287.

702–68¾–New. or that it was barred by another action pending. **NM** 291**P**287.

703–69 105**NJL**408, 144**A**812. [a] (2) Other instances. 83**CalA**148, 256**P**440.

703–71 **NJSup** 131**A**616; 147**Wash**667, 267**P**46.

703–71½–New. , or by introducing evidence on question claimed not to be sufficiently pleaded by adversary. 71 **CalA**767, 236**P**183.

703–72 96**CalA**512, 274**P**584; 316**Mo** 333, 289**SW**939; 40**Wyo** 89, 275**P**101. [a] (2) Where plaintiff subsequent to execution elected to proceed by order to show cause against defendant and his surety, he could not complain of absence of adverse pleadings. 209**Ky**785, 273**SW**497. (3) Use of copy of petition held not to prejudice defendant in possession of original pleadings in injunction suit. **TexCivA** 289**SW**1024.

703–74½–New. Where the court indicates willingness to grant a continuance, appellant cannot complain of allowance of amendment at the trial. 45 **Ida**175, 260**P**1092.

703–74¼–New. Defendant cannot complain of amendment at trial where he was given opportunity to continue case but elected to proceed with trial. 203 **Iowa**57, 212**NW**360.

703–74¼–New. Where defendant allowed issues to be made and trial had on the theory that plaintiff's pleading sufficiently presented a plea of waiver, defendant on appeal cannot for the first time object to its sufficiency. 208 **Iowa** 325, 223**NW**763.

703–74½–New. Where a case was tried on the theory that a claim was pleaded, defendant cannot on appeal claim that it was not pleaded. 221**MoA**657, 284**SW** 204.

703–74¾–New. Plaintiff, having gone to trial on issues raised by defendant's pleas, cannot challenge their form or sufficiency. **DC** 37**F(2d)**824.

703–74¾–New. After participating in trial on merits, appellant cannot successfully contend on appeal that bill was not sufficiently definite. 40**F(2d)**796.

703–74⅞–New. Estoppel as to issues on which cause tried. **CalA** 288**P**792.

703–74⅞–New. Where an executor who purchased goods for the estate and gave a note therefor was sued by a creditor both on the note and the original cause of action, and his demurrer to the count on the note on the ground that it was the individual obligation of the maker was sustained and no exception was taken, he cannot object to the second count on the ground that the original obligation was merged in the note. 169**Ga**9, 149**SE** 568.

703–74 1/10–New. A party cannot object that an issue was not presented by the adverse party's pleading where the issue was injected by his own evidence. 48 **Ida**810, 285**P**478.

703–74 1/11–New. Where a will contestant introduced evidence attempting to prove allegations, as though fully denied, he cannot, on appeal, complain of the insufficiency of the answer. 99**CalA** 617, 279**P**196.

703–74½–New. Defendant cannot complain of election between causes required by court at defendant's request. **Minn** 232**NW**622.

703–75 214**Ala**239, 107**S**98; 219**Ala** 353, 122**S**437; 78**CalA**298, 248**P**270; 83 **Colo** 147, 263**P**26, 56**ALR**814; 39**GaA**50, 146**SE**39; 48 **Ida**810, 285**P**478; 204 **Iowa** 1331, 217**NW**245; 121**Kan**91, 245**P**1044; 260**Mass**225, 157**NE**347; **MoA** 22**SW (2d)**61; 220**AppDiv**253, 221**NYS**279; 190**NC**863, 129**SE**583; 191**NC**507, 132**SE** 286; 54**ND**336, 209**NW**547; 115 **OhSt** 25, 153**NE**264; **TexCommnA** 299**SW**885; **TexCivA** 281**SW**891; **TexCivA** 288**SW** 532; **TexCivA** 16**SW(2d)**380; **TexCivA** 23**SW(2d)**414; 66**Utah**394, 243**P**114, 44 **ALR**1348. See also 39**GaA**50, 146**SE**39.

703–76 178**Ark**486, 12**SW(2d)**13; 86 **CalA**179, 260**P**608; 99**CalA**660, 279**P**208 (2dcase) (hearsay testimony); 234 **IllA** 151 (evidence from incompetent witness); 203 **Iowa**1264, 212**NW**545; 211 **Ky**396, 277**SW**461; 230**Ky**132, 18**SW (2d)**954; 222**MoA**483, 280**SW**720; **MoA** 289**SW**359; **MoA** 5**SW(2d)**689; **MoA** 9 **SW(2d)**644; **NJ** 138**A**519; **NJ** 141**A**667; 105**NJL**240, 143**A**336; 191**NC**13, 131**SE** 402; 191**NC**42, 131**SE**380; 138 **Okl** 201, 280**P**570; 141 **Okl** 256, 284**P**866; **RI** 139 **A**650; **TexCommnA** 24**SW(2d)**28; **Tex CivA** 275**SW**430; **TexCivA** 281**SW**891; **TexCivA** 13**SW(2d)**419.

703–76½–New. Where defendant in objection to evidence of attorney's fees, alleged that the mortgage was in evidence and before the court and the jury, he is estopped from contending to the contrary. 219**Ala**366, 122**S**357.

704–77 214**Ala**431, 108**S**347; 176**Ark** 1188, 5**SW(2d)**916; 252 **IllA**428; 212**Ky** 709, 279**SW**1100; 221**MoA**345, 273**SW** 176; **MoA** 289**SW**977; **MoA** 8**SW(2d)** 1078; **MoA** 18**SW(2d)**564; 298**Pa**329, 148**A**474; **TexCivA** 272**SW**594; **TexCivA** 293**SW**322; 145**Va**694, 134**SE**728; 145 **Wash**520, 261**P**84 (cross-examination).

704–78 204**Cal** 4, 266**P**273; 83**Colo** 82, 262**P**523; 331 **Ill** 160, 162**NE**877; 254 **Ill A**289; 256 **IllA**485; 319**Mo** 87, 5**SW(2d)** 383; 320**Mo** 916, 9**SW(2d)**912; 322**Mo** 147, 14**SW(2d)**602; **Mo** 30**SW(2d)**118; **Mo** 31**SW(2d)**21; 220**MoA**175, 282**SW** 515; **MoA** 285**SW**1018; **MoA** 8**SW(2d)** 1078; 113 **Or**544, 233**P**540; 129 **Or**197, 276**P**1108; **TexCivA** 282**SW**903; **Tex CivA** 284**SW**691; 36**Wyo** 473, 257**P**484.

704–79 85 **Colo** 530, 277**P**306; 232**M'ch** 271, 205**NW**122; **MoA** 285**SW**1028; 129 **Misc**574, 221**NYS**747; 293**Pa**385, 143**A** 129; **TexCivA** 274**SW**335; **TexCivA** 20 **SW(2d)**351; **TexCivA** 25**SW(2d)**186; 36 **Wyo** 473, 257**P**484.

704–79½–New. or on redirect, **Iowa** 209 **NW**435.

704–80 230**Ky**157, 18**SW(2d)**983; 232 **Mich**271, 205**NW**122.

704–81 17**F(2d)**986; 172**Ark**671, 290 **SW**953; 192**NC**433, 135**SE**133; 196**NC** 72, 144**SE**537; 156**SC**1, 152**SE**753. [b] **Where party subsequently develops same evidence** on cross-examination, admission of evidence held not prejudicial. **TexCivA** 23**SW(2d)**398.

705–82 180**Ark**980, 23**SW(2d)**972; 82 **Colo** 346, 259**P**515; **IndA** 168**NE**709; **Iowa** 227**NW**580; **MoA** 295**SW**477; **MoA** 17**SW(2d)**376; 129 **Or**161, 276**P**265; 99 **Vt**366, 133**A**359. [a] (1) 82**Colo** 346, 259**P**515.

705–83 205**Cal** 519, 271**P**1055; 168**Minn** 93, 209**NW**867.

705–85 **TexCivA** 285**SW**832; **TexCivA** 38**W(2d)**832.

705–86 26**F(2d)**594; 121**Kan**42, 245**P** 1054; **Mo** 38**W(2d)**244; 85**Mont**114, 278**P**110.

705–87 152**Wash**257, 277**P**695.

705–89 **TexCivA** 88**W(2d)**206. See also 249**NY**381, 164**NE**324.

705–89½–New. Party unsuccessful in effort to exclude improper testimony does not waive error by examining witness as to such testimony. 200 **Iowa** 1100, 205**NW**956.

705–90 50**SD**590, 211**NW**457.

705–91 **MoA** 16**SW(2d)**219; 27 **OhA**279, 161**NE**230.

705–91½–New. Defendant refusing to go before auditor appointed to determine damages is in no position to complain of evidence tentatively taken to arrive at figure. 9**F(2d)**227.

705–91½–New. An exception to admission of records on one ground held not to preclude the exceptor from raising the question on appeal that the records could not be proved by a particular witness. 83**NH**538, 145**A**263(2dcase).

705–92 14**F(2d)**734; 99**Vt**227, 131**A**16.

705–94 214**Ky**156, 282**SW**1072.

705–95 See also **MoA** 272**SW**984. [a] (1) 331 **Ill** 465, 163**NE**338; 105**NJL**504, 146**A**52. (7) Where motion is made for directed verdict. 75**Mont**516, 244**P**194.

705–95½–New. By acknowledging the incompetency of a witness the party invites error of which he cannot complain. **Ind** 164**NE**496.

705–95½–New. Defendant cannot complain on appeal of alleged error in excluding evidence where the error, if any, was of his own making. 297**Pa**576, 147 **A**830.

705–96 5**F(2d)**439; 85**CalA**720, 260**P** 342; 41 **Ida**729, 241**P**1014; 224 **IllA**35; 232 **IllA**169; 236 **IllA**303; 210**Ky**92, 275 **SW**16; **MoA** 284**SW**857; 222**MoA**238, 296**SW**860.

706–97½–New. , or claim anything by virtue of its existence. 293**Pa**459, 143**A** 113.

706–98 190**NC**24, 128**SE**485.

706–99 10**F(2d)**969; 83**CalA**137, 256**P** 484; 85**CalA**440, 259**P**774; 88**CalA**344, 263**P**376; 233 **IllA**1; 220**Ky**439, 295**SW** 407; 251**Mich**7, 231**NW**45; **Mo** 298**SW** 51; 221**MoA**807, 287**SW**1079; 142**Wash** 118, 252**P**680; 102**WVa**673, 135**SE**478, 480 [citCJ]; 102**WVa**215, 136**SE**30, 31 [citCJ]. [a] (3) In suit to foreclose mortgage defendant's compliance with order to file brief first held not to estop her from urging plaintiff's failure to prove that no action at law had been brought for debt. 113**Nebr**827, 205**NW** 566. [b] **Where sufficiency of evidence** was challenged in motion for new trial, reviewing court must review evidence, notwithstanding appellant had not challenged trial court's findings of fact supporting judgment. **TexCivA** 297**SW**575.

706–1 **TexCommnA** 1**SW(2d)**861.

706–2 **Iowa** 228**NW**316; 308**Mo** 487, 272 **SW**925; **MoA** 265**SW**113; **MoA** 265**SW** 116; **MoA** 6**SW(2d)**640; 220**MoA**973, 6 **SW(2d)**664; **MoA** 23**SW(2d)**209; **MoA** 27**SW(2d)**52; **TexCivA** 282**SW**919; **Tex CivA** 287**SW**127; **TexCivA** 23**SW(2d)** 405; **TexCivA** 28**SW(2d)**1088; **TexCivA** 29**SW(2d)**905. See also 143 **Okl** 33, 287 **P**722.

706–3½–New. by a motion for judgment on special findings notwithstanding the general verdict, 120**Kan**354, 243 **P**331.

706–4 233 **IllA**1 (admission in pleadings); **Iowa** 227**NW**337; **Mo** 30**SW(2d)** 146; **MoA** 273**SW**125; 143 **Okl** 206, 288 **P**964. [a] (2) Admission in answer of execution of mortgage precludes party objecting for insufficient proof of execution. 9**F(2d)**256. (3) Other instances. 35**PortoRico** 529.

706–4½–New. , or by requesting submission of special issue on question involved, **TexCivA** 272**SW**587.

706–4½–New. or of special issues going to heart of case after refusal of instructed verdict. **TexCivA** 272**SW**587.

706–4½–New. , or where information was peculiarly within knowledge of defendant. 10**LaA**134, 120**S**894.

706–5½–New. A party whose issue is not submitted substantially as requested is not estopped from asserting that the verdict is against the preponderance of the evidence. **TexCommnA** 6**SW(2d)**92.

706–5½–New. Omission to introduce

assignment after laying foundation will not prevent reversal of nonsuit where assignment sued on was treated as in evidence. 204Cal 337, 268P332.

706–5¼–New. Defendant filing remittitur cannot, on appeal from an order granting new trial, contend that demurrer to the evidence should have been sustained. MoA 10SW(2d)965.

706–5½–New. Defendant should not be permitted to complain, after adverse judgment, of lack of medical testimony concerning the permanent character or extent of plaintiff's injuries where he could have introduced evidence concerning the matter. 28 OhA183, 162NE614.

706–6 MoA 275SW358; MoA 25SW(2d) 494.

707–8½–New. Where defendant's counsel waited for answer to objectionable question before objecting it is too late and there is invited error. MoA 25SW (2d)491.

707–8¾–New. Question held not objectionable for uncertainty where opposite party cross examined witness on meaning of uncertain words. TexCivA 23SW (2d)401.

707–9 85Colo 184, 274P821.

707–10½–New. Where a peremptory instruction for plaintiff was given at his request at the conclusion of defendant's evidence, plaintiff cannot complain that he was thus deprived of the opportunity to offer evidence in rebuttal. TexCivA 280SW238.

707–11 41F(2d)600; 215Ala402, 110 S705; 31Ariz515, 254P1065; 172Ark 534, 289SW490; 172Ark898, 291SW431; 179Ark690, 18SW(2d)321; 198Cal 157, 244P338; Cal 292P451; 69CalA9, 230P 958; 81Cal A270, 253P776; 85CalA140, 259P63; 91CalA440, 267P158; 81Colo 399, 255P627; 55AppDC280, 4F(2d)947; 167Ga657, 146SE485; Iowa 229NW210; 211Ky588, 277SW983; 220Ky458, 295 SW452; 220Ky719, 295SW1014; 222 Ky531, 1SW(2d)972; 148Md257, 129A 214; Md 148A238; 232Mich271, 205NW 122; 243Mich350, 220NW762 (breach of promise and seduction submitted to jury as separate causes of action at defendant's request; 167Minn248, 208NW803; 145Miss475, 111S105; 312Mo 643, 281 SW44; Mo 281SW686; 315Mo 1091, 287 SW610; 315Mo987, 288SW777; Mo 293 SW375; Mo 26SW(2d)969; Mo 29SW (2d)97; Mo 31SW(2d)1026; MoA 273 SW754; MoA 278SW805; 220MoA414, 279SW736; MoA 286SW720; MoA 291 SW161; MoA 296SW1055; MoA 297SW 980; 115Nebr711, 214NW647; 25 OhA 157, 157NE825; 117 Okl 233, 245P850; 137 Okl 168, 278P640; TexCivA 275SW 303; TexCivA 296SW683; TexCivA 299 SW668; TexCivA 28SW(2d)861; 142 Va331, 128SE518 (party who draws instruction cannot make hypocritical objections to form); 142Va769, 128SE55; 147Va542, 137SE493; 141Wash293, 251 P558; 155Wash609, 285P663. See also MoA 296SW161; 230AppDiv361, 244 NYS576. [e] **Party is not estopped to complain of error,** by rule of invited error, unless it appears from record that court was led or induced by him to commit error. TexCommnA 17SW(2d)793.

703–13 220Ky719, 295SW1014.

703–14 172Ark534, 289SW490.

703–16 117 Okl 233, 245P850.

703–19 MoA 15SW(2d)363.

703–21 174Ark10, 294SW357; 312Mo 643, 281SW44; 315Mo 987, 288SW777; 315Mo 987, 288SW777; Mo 20SW(2d) 659; 218MoA122, 262SW396; 221MoA 414, 279SW736; MoA 288SW972; MoA 292SW1054; MoA 27SW(2d)762; Tex CommnA 288SW823; TexCivA 281SW 652. But see 120 Okl 279, 251P56. [b] **Where inconsistency was created by erroneous requests of both parties,** inconsistent or erroneous charge on material issue may be complained of by either party injured. Utah 270P349.

708–22 339 Ill 276, 171NE271.

708–23 120 Okl 279, 251P56.

708–25½–New. Failure of plaintiff's counsel to state matters omitted in charging on contributory negligence when the court requested an opinion is not a waiver of an exception to charge. 222AppDiv413, 226NYS479.

708–25⅓–New. Where counsel of party at close of charge stated that he had no exception thereto, the charge was proper as to that party. Vt 146A250(1stcase).

708–25¼–New. Where court's failure to instruct was due to defendant's failure to submit instructions, defendant cannot assign failure to instruct as error. CalA 288P81.

709–26 168Ark1063, 272SW670 (dictum); 173Ark84, 291SW1001; 175Ark 618, 299SW1016; 178Ark1046, 13SW (2d)306; 69CalA9, 230P958; 85CalA233, 258P1104; 86CalA627, 261P334; 88CalA 67, 262P1106; 325 Ill 474, 156NE485; 327 Ill 207, 158NE380; 331 Ill 49, 162 NE123; 224 IllA42; 233 IllA216 (instruction similar to one complained of was requested and given for appellant); 252 IllA550; 256 IllA569; 256 IllA581; 85 IndA301, 154NE24; IndA 163NE283; IndA 168NE246; 220Ky708, 295SW 1020; 222Ky531, 1SW(2d)972; 227Ky 91, 11SW(2d)985; 232Mich8, 204NW 708; 309Mo 638, 274SW815; Mo 278 SW412; Mo 285SW403(2dcase); 315 Mo 760, 287SW346; Mo 287SW634; 317 Mo 492, 297SW353; 317Mo 1061, 297SW 968, 54ALR644; 318Mo 421, 1SW(2d) 791; 320Mo 371, 8SW(2d)11; 321Mo 168, 9SW(2d)960; 321Mo 840, 12SW(2d) 747; Mo 19SW(2d)1033; Mo 19SW(2d) 1040; Mo 24SW(2d)116; Mo 29SW(2d) 97; MoA 273SW754; 217MoA613, 274 SW969; MoA 278SW1063; MoA 281SW 139; MoA 286SW720; MoA 288SW100; MoA 294SW747; MoA 5SW(2d)682; MoA 9SW(2d)103; MoA 10SW(2d)75; MoA 17SW(2d)557; MoA 21SW(2d)899; MoA 22SW(2d)884; 20 OhA385, 153NE 238; 128 Okl 165, 261P913; 122 Or24, 256P770; 129 Or169, 276P1094; TexCiv A 272SW510; TexCivA 286SW326; Tex CivA 290SW846; TexCr 288SW1113; 69Utah123, 252P677; 105WVa46, 141 SE434. See also MoA 30SW(2d)647; Utah 270P349. But see Iowa 228NW 880; Mo 5SW(2d)409; TexCivA 4SW (2d)169. [b] (3) One defendant cannot complain of instruction given by court where it has failed to object to similar instruction given at request of its co-defendants. 309Mo 638, 274SW815. [d] 221MoA1071, 296SW167. [e] 168Ark 1063, 272SW670. [f] **Erroneous instruction not invited.**–322Mo 886, 18SW(2d) 40. [g] **Fact that defendant requested special charges objectionable as being too general** did not invite error in giving general charges. TexCommnA 17SW (2d)793. [h] **Correct instruction** cannot invite incorrect instruction. IndA 168 NE198 (mental capacity). [i] **Instruction relative to undue influence** has been held not to work estoppel in such manner as to obviate errors on instruction on unsoundness of mind. IndA 168NE198.

710–28 IndA 166NE257; TexCivA 9 SW(2d)511.

710–31 MoA 294SW758; MoA 14SW (2d)664.

710–35 MoA 278SW1063.

710–36 319Mo 744, 8SW(2d)38; 218 MoA109, 262SW399; MoA 1SW(2d) 218; MoA 12SW(2d)95.

710–37 MoA 293SW79; 128 Or609, 275 P603.

710–38 MoA 5SW(2d)682; 133Wash 664, 234P657.

710–39 TexCommnA 17SW(2d)793.

710–40½–New. Where a party has obtained a like ruling on his instructions, he cannot complain of a defect in his opponents. 224 IllA42.

710–40¾–New. For a requested special charge to operate as a waiver of objections to the judge's charge, it must be the same in substance and effect as the erroneous part of such charge. Tex CommnA 280SW198.

710–40¼–New. Where erroneous matter contained in a judge's charge was embraced in a requested special charge in conjunction with other matter, objection to the erroneous matter is not waived. TexCommnA 280SW198.

710–41 168Ark818, 271SW462; 106 Conn153, 137A721; 35GaA45, 132SE 228; 41GaA472, 153SE444; 41 Ida98, 238P296; 45 Ida662, 264P869 (on burden of proof of contributory negligence); 85 IndA450, 150NE31 [citCJ]; IndA 148NE505, 507 [citCJ]; 208Ky 497, 271SW587; 229Ky538, 17SW(2d) 422; 174Minn216, 218NW891; 307Mo 98, 270SW662; 308Mo 487, 272SW925; Mo 274SW369; Mo 284SW141; Mo 289 SW591; 319Mo 1028, 5SW(2d)6; 320 Mo 746, 8SW(2d)824; Mo 26SW(2d) 962 (matter regarded in issue by both parties); 217MoA104, 273SW418; MoA 277SW588; MoA 282SW520; 221MoA 559, 285SW134 (last clear chance); MoA 287SW1061; MoA 1SW(2d)238; MoA 5SW(2d)687; MoA 12SW(2d)95; MoA 26SW(2d)869; 77Mont456, 251P 768; 57ND43, 220NW630; 29 OhA211, 163NE304(2dcase); 125 Okl 176, 256P 906; 122 Or24, 256P770; SC 155SE 136; TexCr 288SW1113.

711–42 283Pa331, 129A109.

711–43 150SC130, 147SE834.

711–44 Mo 287SW634; 322Mo 718, 17 SW(2d)511; 218MoA84, 262SW686; Nebr 228NW531.

711–45 80CalA109, 250P693; 104Conn 297, 132A405; 41 Ida98, 238P296.

711–50 Md 148A238; MoA 20SW(2d) 587.

711–51 172Ark562, 289SW761.

711–52 See also 315Mo 883, 289SW540.

711–52½–New. Party who uses requested instruction modified by court cannot complain of modification. 156 Miss507, 126S83.

711–53 10F(2d)467.

712–56 See also 321Mo 887, 13SW(2d) 648 (where based on evidence not requested to be withdrawn by complaining party).

712–57 10F(2d)467; 212Ky404, 279 SW642.

712–59 169Ark1211, 277SW540; 170 Ark689, 280SW627; 244 IllA47; 223Ky 525, 4SW(2d)410; 145Miss793, 110S 833; 319Mo 644, 5SW(2d)413; 320Mo 536, 9SW(2d)632; 222MoA184, 296SW 1047 (in absence of special demurrer); MoA 4SW(2d)501; MoA 26SW(2d) 1020; MoA 26SW(2d)863; Nebr 230 NW588; 285Pa251, 132A120; Tex CommnA 14SW(2d)58; TexCivA 272 SW283; TexCivA 279SW939; TexCivA 282SW635; TexCivA 284SW643; Tex CivA 285SW1100; TexCivA 287SW121; TexCivA 294SW625; TexCivA 294SW 905; TexCivA 297SW555; TexCivA 298 SW617; TexCivA 299SW913; TexCivA 4SW(2d)1019; TexCivA 5SW(2d)618; TexCivA 20SW(2d)803; TexCivA 28SW (2d)173; TexCivA 30SW(2d)423. [b] 187Wis653, 205NW418. [d] **Counsels' agreement that court determine remaining fact questions,** closed such matters from appellant in appellate court. 229 AppDiv433, 242NYS273.

712–60 [b] **Submitting to jury matter taken from special issue tendered by appellant** was invited error, of which appellant cannot complain. TexCivA 16SW(2d)390. [c] **Error in using language in which complaining party's requested charge was couched** cannot be basis of complaint. TexCivA 18SW(2d) 679(1stcase).

712–61 207 Iowa567, 221NW514; 208 Iowa369, 226NW151; Mo 15SW(2d) 917; MoA 27SW(2d)1033; MoA 28SW (2d)440; 112 Okl 94, 240P81; 285Pa 251, 132A120; TexCommnA 285SW599; TexCivA 272SW283; TexCivA 277SW 742; TexCivA 279SW939; TexCivA 294 SW905; TexCivA 295SW229; TexCivA 295SW283; TexCivA 10SW(2d)733; TexCivA 11SW(2d)593; TexCivA 15 SW(2d)46(2dcase); TexCivA 19SW(2d) 166; TexCivA 28SW(2d)173. See also TexCivA 284SW977.

712–61½–New. Rule has no application where appellant questions sufficiency of evidence to sustain findings of jury on special issues tendered. TexCivA 272 SW283.

712–62 121Kan728, 250P324.

713–63 MoA 7SW(2d)370; MoA 15SW (2d)964; 225AppDiv454, 233NYS461; 56ND553, 218NW217. [d] MoA 7SW (2d)370.

713–64 3F(2d)710; 94CalA782, 273P 58. But see TexCivA 24SW(2d)742 (party having first objected to submission of any issue being overruled requested submission could complain of withdrawing issue).

713–65 3F(2d)710; 238Mich508, 213 NW867; 239Mich295, 214NW110, 55 ALR1157; 249Mich518, 229NW506.

713–66 97CalA87, 275P456 (error held

invited). [a] **Thus in absence of objection at time of submission party estopped to claim or appeal no evidence to sustain issue.** 82**NH**175, 131**A**440.

713–67 **Minn** 230**NW**259; 190**NC**62, 128**SE**730 (issues in accord with pleadings).

713–68 169**Ark**748, 276**SW**599 (assumption of risk); 312**Mo** 458, 278**SW** 759; 314**Mo** 515, 284**SW**439; **MoA** 282 **SW**62; **MoA** 285**SW**520 (question of law); 34**NM**146, 278**P**361 (submission of question to jury procured through interrogatories).

713–69 202 **Iowa**1338, 212**NW**154; **MoA** 23**SW(2d)**209.

713–71½–New. Defendant cannot complain that the court sustained his motion for withdrawal of issues of negligence and submission of the case under the res ipsa loquitur rule. 208 **Iowa** 369, 226**NW**151.

713–73 See also 318**Mo** 666, 300**SW**795. But see 218**MoA**109, 262**SW**399.

713–73½–New. Parties will not be permitted to deny that an action was fully submitted to the court when both parties moved to direct the verdict at the close of the evidence. 202 **Iowa**58, 209 **NW**430.

713–73½–New. Where the jury were excused but not discharged and the court without objection took motions under advisement and at a later term without objection sustained one of the motions and entered judgment accordingly, it will be presumed that the jury rightfully discharged. 202 **Iowa**58, 209 **NW**430.

713–73¼–New. Appellant is not estopped from complaining of error in submission of the construction of the statute to the jury by argument of counsel in support of the validity of the statute. 34**GaA**103, 128**SE**226.

713–73½–New. Defendant does not lose the right to persist in contention of lack of evidence on a certain issue by reason of being compelled to join in the submission of such issue to the jury. 315**Mo** 266, 285**SW**961, 54**ALR**1336.

713–73¾–New. Error in submitting defense generally instead of under separate issues held not invited by defendant. **TexCommnA** 6**SW(2d)**111.

713–73½–New. A party who failed to request the submission of an issue to the jury is estopped to complain of his adversary's instruction expressly withdrawing such issue. 322**Mo** 1039, 17**SW (2d)**518.

714–74 150**Wash**646, 274**P**713.

714–75 **TexCivA** 273**SW**622; **Utah** 267 **P**1011.

714–75½–New. , nor where the instruction was refused at his instance; 142 **Wash**22, 251**P**873.

714–76 312**Mo** 30, 278**SW**747.

714–80 See also **TexCivA** 25**SW(2d)** 969.

714–80½–New. But a party is not estopped to assign error upon refusal of a requested instruction because he asks other instructions presenting the most favorable view of law that the court will entertain. 69**CalA**9, 230**P**958.

714–81½–New. Where, after refusal of a requested instruction, defendant obtains instructions on punitive damages, this does not prevent him from taking advantage of the court's error in refusing such requested instruction. 154 **Miss**680, 123**S**859.

714–81½–New. Defendant does not waive error in refusal of instruction that humanitarian doctrine was not involved by joining in submission of such doctrine. 132 **Or**648, 286**P**991.

714–82 **Fla** 126**S**290; 13**LaA**175, 124**S** 776.

714–84 201**Cal** 155, 255**P**825; 47 **Ida** 217, 273**P**943.

714–84½–New. Nor can a party object to submission to the jury where he requested instruction. 120**Kan**77, 242**P** 131.

714–85 **TexCivA** 11**SW(2d)**187.

714–87 [c] **Parties held estopped to** deny waiver of jury trial where counsel, questioned as to desire for jury, replied that his clients were not in court. **Tex CivA** 297**SW**692.

714–88 31**Ariz**39, 250**P**356; 101**NJEq** 799, 138**A**884, 54**ALR**1227 (moving for reference).

714–89 **IndA** 169**NE**60.

715–91 34**F(2d)**245; 122**Kan**451, 251**P** 1077. [a] **Party asking instruction** that burden of proof was on other party cannot complain of denial of right to open and close. 145**Miss**683, 110**S**237.

715–92 99**CalA**583, 278**P**912. See also **Mo** 318**SW(2d)**1045; **TexCivA** 25**SW(2d)** 717.

715–93 239**Mich**485, 214**NW**402; **Mo** 19**SW(2d)**630.

715–93½–New. Argument of defendant's counsel that plaintiff, in an action for death from an automobile collision, had already collected insurance and that the insurance company was the real party in interest, is not a ground for complaint where evidence of insurance payments had been received without objection. 100**CalA**266, 279**P**1062.

715–94 215**Ala**47, 109**S**278.

715–96 319**Mo** 1169, 8**SW(2d)**580; **Mo A** 292**SW**1062.

715–1½–New. Defendant who, after direction of verdict for plaintiff, secured submission of the case to the jury which was instructed not to let direction for plaintiff influence it cannot object on appeal that the direction of the verdict was reversible error. 214**AppDiv**504, 212**NYS**296.

715–1½–New. A defendant who requested the court to render judgment in his favor on a verdict for plaintiff and who seeks to have it affirmed on appeal is not estopped from resisting plaintiff's attempt to reverse the judgment by showing that the verdict was more favorable to plaintiff than he was entitled to and that plaintiff was not entitled to any judgment under the verdict. **TexCivA** 281**SW**877.

715–1¼–New. Whether error in rendering judgment on an improper verdict was invited is immaterial: power to render the verdict is not given by the parties' consent but by law. **Tex CommnA** 299**SW**852.

715–2 **TexCivA** 21**SW(2d)**39.

716–3 **CalA** 274**P**572.

716–4 **MoA** 27**SW(2d)**495.

716–6 319**Mo** 1169, 8**SW(2d)**580 (finding by jury).

716–7 95**CalA**106, 272**P**307.

716–7½–New. , or based upon his own testimony. 123**Kan**508, 256**P**119.

716–8 94**CalA**200, 270**P**1016; 338 **Ill** 347, 170**NE**295 (failure to introduce evidence).

716–10½–New. Where the issue is presented to the jury at the instance of appellant, it may not be raised on appeal. 285**Pa**199, 131**A**700.

716–10½–New. Where there was no allegation as to damages and no recitation of facts entitling plaintiffs to damages, plaintiffs could not complain that the court failed to find that no damages resulted. 98**CalA**121, 276**P**404.

716–11 218**Ala**292, 118**S**342; **Ala** 128**S** 450; 162**Ga**240, 133**SE**242; **MoA** 279 **SW**208; 141**Wash**571, 251**P**885; 107 **WVa**220, 148**SE**9; 195**Wis**488, 218**NW** 826.

716–12½–New. Where grantees in conveyance set aside for fraud and want of consideration expressly refused to contest allegations of fraud and want of consideration, they cannot complain of a decree adjudicating creditors' rights. 153**Va**410, 149**SE**630.

716–15 20**F(2d)**1; 98**CalA**489, 277**P** 172.

716–16 [a] **One not legally complaining of judgment** may not insist on its modification or reversal. 232**Ky**485, 23 **SW(2d)**951.

717–18 47 **Ida**13, 271**P**927; **TexCivA** 22**SW(2d)**704.

717–19½–New. Appellant cannot complain that damages are excessive where he objected to admission of evidence which he claims on appeal was the correct way to prove damages. 232 **IllA** 169.

717–20 172**Ark**151, 287**SW**738; 174**Ark** 603, 299**SW**2; **CalA** 292**P**672; 328 **Ill** 426, 159**NE**821; 236 **IllA**541; 219**App Div**789, 220**NYS**324; **TexCivA** 277**SW** 172 (on cross-examination). See also 87**Colo** 584, 290**P**277.

717–21 78**Colo** 254, 241**P**541; 310**Mo** 419, 276**SW**614 (failure to object to evidence of damage to building by fall of scaffold in suit for indemnity); 82**NH** 533, 136**A**364. See also 147**Wash**277, 266 **P**142.

717–21½–New. , or in accordance with stipulations agreed to by him. **Ind** 154 **NE**28.

717–22½–New. But error in computing damages, although in accord with the testimony of appellant in the trial court, will be corrected in appeal, where error is manifest from the record and not a matter in controversy in the trial court. 200 **Iowa**121, 204**NW**260.

717–23½–New. Appellant cannot complain that the verdict was the result of passion or prejudice where the only evidence which might have prejudiced the jury was given by his own witness and related to his own trickery. 71**CalA** 683, 236**P**174.

717–23½–New. A party cannot complain that judgment was for less than the damages sustained where it does not appear that it was rendered for a less amount than he claimed. 319 **Ill** 421, 150**NE**266.

717–23¼–New. An allegation that recovery against a telegraph company for more than five hundred dollars with interest would be unconstitutional does not render inclusion of interest invited error. **TexCommnA** 11**SW(2d)**777.

717–23½–New. Under some circumstances defendant cannot complain of a decree allowing attorney's fees. 130 **Or** 570, 281**P**123(1stcase).

717–24 85**Colo** 555, 277**P**763; 91**Fla**982, 109**S**98; 219**Ky**119, 292**SW**765. [b] (3) Where plaintiff's motion is sustained, he may not complain that defendant is granted new trial on his counterclaim. **MoA** 296**SW**247. (4) Where defendant accepts terms on which order extending time for filing notice of intention to move for new trial was made, he cannot question it. **SD** 227 **NW**62.

717–26 329 **Ill** 82, 160**NE**193; 86 **IndA** 709, 159**NE**771; 147**Wash**475, 266**P**684.

717–27½–New. Appellee is not estopped to object that the appeal was not taken within the time allowed by law by participating without objection in the settlement of the transcript on appeal. 199 **Cal** 532, 250**P**400.

717–27½–New. As concerns time provided by statute for writ of error no action by defendant in error can estop him from raising objection. 15**F(2d)** 526.

717–27¼–New. Respondent who led appellant to believe the record was sufficient cannot claim on appeal that the point was not covered by the findings. 25**F(2d)**653.

717–27½–New. Where a party was not obliged to serve an amendment to a bill of exceptions, failure to do so did not estop such party to object to the court's jurisdiction to sign the bill of exceptions. 22**F(2d)**796.

717–28 20**F(2d)**803; 162**Ga**240, 133**SE** 242; 164**Ga**23, 137**SE**390; 86 **IndA**62. 155**NE**836; **SD** 226**NW**748.

717–29 164**Ga**23, 137**SE**390; 226**Ky**554, 11**SW(2d)**427.

717–30 81**Colo** 39, 253**P**477; 162**Ga**240, 133**SE**242; 7**LaA**698; 196**NC**242, 145**SE** 231; **TexCivA** 275**SW**257; 148**Wash**110, 268**P**144 (stipulation for modified judgment). [e] (2) Defendants, acquiescing in part of judgment which is in response to allegations in complaint, are estopped to contend that complaint does not state cause of action. 207**Cal** 395, 279**P**136. [h] **Parties to foreclosure proceeding,** having abandoned exceptions to report of sale by commissioner, cannot complain because judge dismissed them. 248**Mich**101, 226**NW**822.

718–31 14**F(2d)**907; 34**Ariz**43, 267**P** 421; 92**Fla**347, 109**S**424; 93**Fla**611, 112 **S**768; 150**Miss**827, 117**S**257; 31**NM**593, 248**P**885; 240**NY**341, 148**NE**543 (employee held precluded from denying existence of joint election of employer and employee to come under Workmen's Compensation Act); 49**ND**522, 191**NW** 951; **TexCivA** 281**SW**1110.

718–32 150**Wash**142, 272**P**78. [a] (16)

NJSup 136S717. (21) Where defendant pleads to declaration containing misnomer of defendant. 234 IIIA350.

718-33 14F(2d)907; 164Ga23, 137SE390.

718-33½-New. , unless consent was obtained by fraud or mistake. 162Ga240, 133SE242.

718-34 93Fla611, 112S768; 234 IIIA350; 146Va789, 132SE844.

719-35 Iowa 231NW482.

719-36 70CalA148, 232P1010; Iowa 231NW482; 249Mich573, 229NW449; 156Miss410, 124S786 (refusal of offer of correction); NM 240P18; 116 Okl 53, 243P514; 121 Okl 36, 247P47; 129 Okl 70, 263P1091; 291Pa485, 140A544 (failure to object to statement of court that certain act was not urged is negligence); 33PortoRico 98; TexCivA 48SW(2d)635; 70 Utah57, 257P1060. [a] (3) Where counsel did not accept court's offer to withdraw case from jury if they had been taken by surprise, they could not complain on appeal. 136SC448, 134SE415

719-37 Ind 172NE309; Iowa 230NW359; 168Minn347, 210NW78; MoA 296SW269; 240NY341, 148NE543; RI 133A435; TexCivA 275SW193; TexCivA 284SW296; TexCivA 297SW503. [a] (4) Party consenting to submission of case on certain issues waives all others. TexCivA 279SW939. (5) Where attorneys assented to court's treating action to rescind lease as one in deceit, objection to recovery on such theory is untenable. 215AppDiv546, 213NYS323.

719-37¼-New. has consented to the substitution of an adverse party; 31NM593, 248P885.

719-40 252 IIIA567.

719-41 93Fla611, 112S768. But see 78Mont357, 254P174. [a] (2) 234 IIIA350.

719-41½-New. has acquiesced in the trial court's interpretation of his own ambiguous pleading; 202 Iowa1396, 212NW142.

719-42 102Conn640, 129A786; 317 Ill501, 148NE319.

719-43 107Conn712, 142A458. [b] (2) 151SC484, 149SE246; TexCivA 18SW(2d)942.

720-44 85CalA624, 260P347.

720-46½-New. or abandoned a line of cross-examination without making certain of meaning of court's ruling; 199Cal307, 249P11.

720-47 252 IIIA423; 213Ky184, 280SW924; 231Mich695, 204NW693; 179Minn293, 229NW97; Minn 232NW326; 194NC19, 138SE318; 146SC209, 143SE811 (2dcase); SD 228NW389.

720-48 MoA 148SW(2d)478; TexCivA 128W(2d)1082.

720-49 170Minn15, 212NW16; MoA 16SW(2d)219 (submission of issue of recovery under counterclaim); MoA 299SW74. But see MoA 297SW146.

720-49½-New. or has stipulated to refer all books to an accountant in partnership accounting; 72CalA468, 237P833.

720-50 221MoA974, 296SW193.

720-51½-New. allowance of attorney's fees, 120 Or554, 252P961.

720-52 106Conn254, 138A136; 190NC468, 130SE613.

720-53 254 IIIA264.

720-53½-New. or facts in accordance with which a certain finding is made. TexCivA 275SW193.

720-54½-New. or has conceded liability for certain expenses in a stated amount; 167Minn327, 209NW16.

721-55 14F(2d)907; CalA 28SP134 (remarks of court); GaA 155SE794; Mass 146NE649; 250Mich172, 229NW463.

721-55½-New. Where verdict is amended by the consent of both counsel, neither can subsequently object. Mass 167NE669.

721-55½-New. , or where he has acquiesced in the determination of a motion for a new trial before the making of additional findings held under advisement. 42 OklACR296 [reh pending].

721-56 See also 161Ga711, 132SE547.

721-59 MoA 78SW(2d)429.

721-65 163Ga694, 137SE17; NJSup 132A508.

721-66½-New. Where plaintiff elects to proceed against one alleged joint tort-feasor alone after demurrer of the other sustained on the ground of misjoinder, assignment of error to order sustaining demurrer presents no question. 34GaA290, 129SE297.

722-67 187 IIIA167; 216Ky509, 287SW974; 235Mich258, 209NW66; TexCivA 276SW935; TexCivA 292SW555.

722-73½-New. By appealing from a judgment defendant waives the question of the constitutionality of the statute on which it was based. 224 IIIA454.

722-75 MoA 26SW(2d)854(2dcase).

722-76 Mass 173NE439(2dcase) (where prosecution of appeal was not justified).

722-77 But see 72CalA288, 236P937.

722-83 83Colo 305, 264P1092 (application to amend should be made to trial court); 259Mass523, 156NE683; Wis 230NW702; 78SaskL254, 20DomLR216, 29WestLR275, 7WestWkly64. [b] (2) Disclaimer limiting undivided interest claimed by plaintiffs does not correct error in not making others parties. 170 La887, 129S518.

723-87 233Mich407, 206NW374; 248 Mich160, 226NW830; 102NJL128, 130A626. But see 284Pa147, 130A421.

723-88 35F(2d)462; 262Mass214, 159 NE630; 264Mass414, 163NE63; 233 Mich407, 206NW374; 244Mich179, 221 NW289; 248Mich160, 226NW830; 249 Mich431, 228NW763; Mich 233NW221; 83NH383, 142A707; 33NM583, 274P52 (to correct error not affecting substantial rights); NM 291P924; 285Pa521, 132A712; 292Pa304, 141A27. [d] (1) Mo 38SW(2d)706. (3) Creditors' bill to cancel judgment debtor's deed to wife without consideration is amendable on appeal to cure defective allegation that demand antedated transfer, particularly where such fact was inferentially alleged. 34F(2d)396.

723-88½-New. To amend, it must be shown that facts sought to be added were recently discovered. 274US15, 47SC502, 71Led901, 54ALR869.

723-89 7F(2d)814; 39F(2d)900; 31 Ariz39, 250P356; 180Ark154, 20SW(2d)610 (complaint treated as amended); 180 Ark4, 20SW(2d)642; CalA 288P714; 28Hawaii310; IndA 168NE702 (complaint amendable in trial court); 167 La149, 118S869; 7LaA375; 259Mass523, 156NE683; 233Mich407, 206NW374; 235Mich168, 209NW150; 235Mich234, 209NW171; 236Mich545, 211NW37; 242Mich217, 218NW803; 51Nevl. 266P916; 104NJL158, 138A889; NJ 139A319; 33NW64, 260P849; 246 NY234, 158NE313 (court of appeals); 143 Okl 220, 289P315; 285Pa521, 132A712; 152Wash241, 277PS34 (2dcase); 153Wash1, 279P88; Wash 287P899. See also 78Mont228, 253P257. [b] **Amendments deemed as made.**-Ind 166NE434; 89 IndA393, 166NE615; 199 Wis188, 225NW727. [c] **Amendment to conform to proof being merely formal is deemed to have been made** without prejudice to appellant. 36F(2d)943. [d] **Pleading will be considered amended** to conform to proof where testimony was admitted without objection. 180 Ark550, 21SW(2d)961(2dcase).

724-90 259Mass523, 156NE683 (amendment denied). [a] **Omissions in complaint which may be supplied under Civ. Pract. § 105** are omissions which might be fatal unless supplied. 246NY234, 158NE313.

724-90½-New. Where, upon the bill of complaint as unamended, the amended decree of the trial court must be reversed, the court will refrain from amending so that any motion to amend may upon remand be addressed to the trial court as it should have been in the first instance prior to submission. 28 Hawaii310.

724-91 NS [1930] 2DomLR208.

724-92 259Mass523, 156NE683.

724-93 37Wyo 365, 261P905.

724-93½-New. If the motion by plaintiff to amend his petition to conform to the proofs is unavailing, where the evidence would not support a judgment in his favor. 115Nebr848, 215NW140.

724-93¾-New. In an equity suit the appellate court will not remand the case to the trial court for amendment of the complaint to conform to the proof since substance will not be sacrificed to form. 129 Or534, 277P1005.

724-98 318Mo387, 18SW(2d)787; 103 NJL323, 136A741. [a] **In New York.**-227AppDiv795, 237NYS155.

724-6 29F(2d)712 (affidavits); 95CalA228, 272P810; 96CalA682, 274P755; 164 La1013, 115S128; 165La222, 115S466 (remanded, if necessary, for additional evidence); 165La398, 115S633; 33NM605, 273P925; TexCommnA 287SW47; TexCivA 273SW630. [1] **In Saskatchewan.**-Sask [1929] 3DomLR80.

725-7 207Cal106, 277P118; 102CalA474, 283P87 (rule of court); CalA 289P899; RI 134A853. [a] **Where points on which appellant relies were raised in trial court but no continuance asked for** he cannot introduce evidence in appellate court. CalA 285P336(2dcase) (power to take additional evidence does not allow cause to be tried de novo as of right).

725-7½-New. Proof not sustaining issue, reversal for retrial of such issue is proper rather than order for taking testimony in reviewing court. CalA 291P864.

725-10 CalA 289P899; 152Md392, 136A892, 52ALR158.

725-12 97Fla749, 750, 122S239, 65ALR508.

725-12½-New. On appeal from an order refusing to vacate a default judgment, where application to vacate default was accompanied by an affidavit of merits and the proposed answer presenting valid prima facie defense, further proof will be denied. 50SD512, 210NW735.

726-13 [a] **Previous trial presupposed.**-126 Or417, 270P502.

726-14½-New. Appeal in equity is trial de novo. 9F(2d)256.

726-14¾-New. Trial de novo in supreme court means that case will be tried on same pleadings and evidence on which it was tried in district court. Nebr 229NW121.

726-15 169Ark997, 278SW658 (on appeal from circuit court there is no trial de novo); 175Ark1169, 299SW43; Ark 30SW(2d)825; 204 Iowa1072, 216NW673; 206 Iowa161, 220NW7 (action at law not triable de novo); Iowa 229NW763; 154Md550, 140A844; 247Mich587, 226NW220(2dcase) (action for damages for fraudulent misrepresentation not triable de novo); 127 Or235, 271P734; 142Wash348, 253P458. [c] (1) 116Nebr352, 217NW588. [f] Appeal from order vacating award does not bring controversy into appellate court for trial de novo. 55ND463, 214NW273. [g] Appeal from denial of license by secretary of banking necessitates trial de novo. 5PaDist&Co 397. [h] **In North Carolina.**-189NC805, 128SE329. [i] **Action at law tried to court under** special waiver of jury is not triable de novo. 200 Iowa1285, 206NW303. [j] **Action to recover compensation for improvements** is at law and not triable de novo. 307Mo576, 271SW355. [k] **Demand for trial treated as surplusage.**-36Misc53, 72NYS591 [aff 73AppDiv619 mem, 76NYS1018mem]. [l] **Independent action for debt,** brought by defendant's former wife to recover for money expended in support of a minor child, was held not one which should be considered de novo on appeal. MoA 9SW(2d)823. [m] **Where parties stipulate to consolidate issues of two cases,** one of which is action at law growing out of transaction involved in other action, and to try them to court, consolidated action will be considered one triable to court and may be tried de novo in appellate court. 58ND478, 226NW608. [n] **Action at law without jury** is not triable de novo. Iowa 233NW108.

726-16 50ND478, 196NW554 (appeal in special proceedings and jury cases tried to court without jury not triable de novo); 51ND730, 200NW905; 54ND91, 209NW204.

726-17 33F(2d)816 (creditors' proceeding against debtor's assignee for equitable distribution of fund); 37F(2d)237; 42F(2d)646; 214Ala243, 107S210; 220Ala54, 124S92; 169Ark792, 276SW605; 169Ark997, 278SW658. 169Ark

1181, 278SW48; 170Ark272, 280SW374; Ark 281SW657; 171Ark117, 283SW379; 172Ark914, 290SW938; 174Ark234, 295 SW4, 53ALR534; 174Ark1072, 298SW 353; 175Ark271, 299SW13; 177Ark177, 6SW(2d)10; 178Ark862, 12SW(2d) 772, 68ALR1303; 178Ark1150, 13SW (2d)624; 179Ark448, 17SW(2d)286; 180Ark620, 22SW(2d)167; 15DelCh431, 141A277; 201 Iowa701, 208NW72; 202 Iowa129, 209NW303; 202 Iowa866, 211 NW410; 203 Iowa979, 213NW605; 204 Iowa819, 216NW104; 205 Iowa483, 218 NW325; 207 Iowa100, 222NW361; 208 Iowa623, 226NW32 (trial de novo on appeal from denial of injunction); 208 Iowa1241, 227NW118; Iowa 228NW 561; Iowa 228NW570; Iowa 229NW 844; Iowa 232NW653; Iowa 232NW 670; Iowa 232NW729; 234Mich224, 207NW842; 236Mich197, 210NW260; 238Mich497, 213NW699; 241Mich177, 216NW456; Mo 274SW460; Mo 275SW 936; 311Mo 110, 277SW922; 316Mo 891, 292SW702; Mo 5SW(2d)405; 320Mo 474, 7SW(2d)691; Mo 26SW(2d)611; MoA 272SW698; Mo 30SW(2d)1009; Mo 31SW(2d)993; 217MoA187, 274SW 901; MoA 277SW939; 221MoA510, 282 SW83; 221MoA510, 282SW83; 220MoA 223, 282SW729; 221MoA917, 222MoA 540, 288SW785; 220MoA1238, 290SW 459; 222MoA268, 296SW205; MoA 299 SW127; MoA 6SW(2d)961; MoA 13SW (2d)1085; MoA 14SW(2d)537; MoA 14 SW(2d)686; MoA 16SW(2d)722; MoA 19SW(2d)772; MoA 20SW(2d)294 (interpleader suit); MoA 21SW(2d)222; MoA 22SW(2d)174; MoA 24SW(2d) 215; MoA 24SW(2d)704; MoA 29SW (2d)161; MoA 30SW(2d)771; 114Nebr 266, 207NW31; 114Nebr522, 208NW 630; 114Nebr636, 209NW241; 116Nebr 706, 218NW734; Nebr 231NW751; Nebr 231NW781; 49ND1086, 194NW 830; Oh 171NE849; 30 OhA179, 164 NE643 (regardless of errors); 124 Okl 193, 255P577; 126 Okl 193, 259P589; 130 Okl 79, 262P1067; 120 Or427, 251P 299; 123 Or280, 261P55; 123 Or111, 261P72; 123 Or383, 261P415; 124 Or 249, 264P428; 125 Or347, 267P524; 130 Or189, 279P633 (findings of lower court not binding on supreme court); Or 291P369; 152Tenn97, 275SW340; 155Tenn148, 290SW970; Utah 274P 457; Utah 289P103; 146Va715, 133SE 492; 135Wash146, 237P297; 145Wash 338, 260P250; 155Wash217, 283P1081; Wash 289P1013. See also Me 152A268. But see 158Tenn394, 13SW(2d)49. [a] **Court may abide by judgment** of chancellor. 308Mo 272, 271SW768. [b] **In Pennsylvania**, where there is no testimony to justify conclusions of chancellor, or his conclusions are dependent only on inferences from proven facts, appellate court considers evidence as if matter were presented de novo. 287Pa431, 135A 103. [c] **In Montana** supreme court on appeal in equity case cannot try case de novo. 81Mont393, 264P115. [d] **In Tennessee.**–160Tenn500, 26SW(2d)152.

726-18½-New. On appeal in equity case, where there was no finding of a jury on the question of laches, which the trial court regarded as determinative, it must be considered de novo as any other question arising on an appeal in equity. 158Tenn289, 13SW(2d) 51.

726-18¼-New. The supreme court, while reviewing evidence in an equity case, does not try the case de novo. Mo 19SW(2d)284.

727-19 201 Iowa1317, 207NW567; 119 Or237, 243P548; Or 291P369; Wash 289P1013. [b] (16) Where defendant appealed from favorable decree, court, on plaintiff's appeal from taxation of costs, must consider controversy regarding costs de novo. 205 Iowa156, 217NW829.

727-21 58ND386, 226NW627 (whether findings sustain judgment).

727-22 See also 97Ky543, 31SW129. [a] **Where parties in trial court recognized suit as equitable** and tried it as such, it will be tried de novo in appellate court. 208 Iowa698, 223NW756(2d case).

727-27½-New. When a jury is called to sit even in an advisory capacity in an equitable action, such trial is not deemed trial without jury and the parties are not entitled on appeal to trial de novo. 55ND42, 212NW439.

727-28 201 Iowa117, 206NW665; MoA 256SW103.

727-29 [a] **Proceedings to determine heirship** are not case for equitable jurisdiction. 114Nebr266, 207NW31.

727-30½-New. A strictly equitable issue injected into an action at law, which was held on the law calendar and tried exactly as it would have been tried in equity, will be treated on appeal as in equity and tried de novo. 200 Iowa1, 201NW787.

728-39½-New. An action to recover compensation for improvements put on land is an action at law and not triable de novo on appeal. 307Mo 576, 271SW 365.

728-40 44 Ida729, 262P152; MoA 256 SW525 (cases in nature of suits in chancery); MoA 299SW127; 112 Okl 295, 240P636. But see 204 Iowa1331, 217NW 245.

728-41 Iowa 231NW361; 236Mich197, 210NW260; 114Nebr126, 206NW749; 52ND380, 202NW860. [b] **Adverse party** not appealing may not have decree modified in his favor. 234Mich224, 207 NW842.

728-42 321Mo 297, 10SW(2d)946.

728-43 217MoA187, 274SW901 (holding that all evidence will be carefully reviewed).

728-44½-New. Appreciable weight must be given to the determination of the trial court. 52ND380, 202NW860.

728-45 37F(2d)237 (appellate court may make own decree); 218Ala334, 118 S559; 220Ala54, 124S92; 232Mich194, 205NW49 (findings of trial court not conclusive but entitled to great weight); 311Mo 110, 277SW922; 318Mo 1089, 2 SW(2d)593; Mo 14SW(2d)441 (must review evidence and render findings of fact); Mo 30SW(2d)1009; MoA 282SW 473; MoA 297SW184; MoA 20SW(2d) 912; 114Nebr714, 209NW499; 53ND 797, 208NW82; 54ND35, 208NW847; 54ND883, 211NW979; 57ND655, 223 NW707; 299Pa190, 149A193; Utah 282 P1034. But see 176Ark1082, 5SW(2d) 318; 179Ark763, 18SW(2d)341. [b] 55 ND392, 213NW495.

728-46 219Ala360, 122S463; 169Ark 792, 276SW605 (allowed to stand, unless clearly against preponderance of evidence); 181Ark492, 26SW(2d)876; 244Mich341, 221NW129; Mo 26SW(2d) 611; 217MoA187, 274SW901; 220MoA 535, 279SW184; 114Nebr499, 209NW 499; 53ND797, 208NW82; 54ND35, 208NW847; 54ND883, 211NW979; Utah 278P529 (not bound to redetermine truth or falsity of controverted allegations of fact). See also MoA 14SW(2d) 686. But see 178Ark1150, 13SW(2d) 624. [a] (1) 116Nebr352, 217NW588; 58ND475, 226NW628. (2) Deference usually yielding to findings of chancellor upon disputed questions where evidence is oral. 307Mo 19, 269SW599.

728-46½-New. In Arkansas, chancellor's findings are allowed to stand unless they are against the preponderance of evidence. 169Ark1181, 278SW48.

728-46½-New. 172Ark704, 290SW46.

728-46½-New. In North Dakota, unless appellant has demanded a trial anew of the entire case, all questions of fact not specified will be deemed to have been properly decided by the trial court. 50ND312, 195NW825.

728-46¼-New. Judgment of the trial court upon the facts must have weight with the reviewing court, especially when based upon the testimony of witnesses appearing in person before the trial court. 50ND381, 195NW969.

728-46½-New. The reviewing court is charged under statute with the duty of trying questions of fact de novo. 155 Tenn148, 290SW970.

728-46½-New. Waivers may be taken into consideration and given effect. 244 Mich504, 221NW635.

728-46½-New. Grounds for decree of lower court held not conclusive on reviewing court trying case de novo. 220 Ala342, 124S896.

728-48 Nebr 230NW449 (with exception of new matter after first trial); 289Pa297, 137A268. [c] **In Montana.**–81Mont330, 263P421. [d] **In Iowa.**–230NW359. [e] **Whether petition in appellate court tenders other and different issues** than those in lower court is determined by comparison between petitions filed or submitted in respective courts. Nebr 230NW449 (petitions need not be in precisely same language though ultimate facts relied on must be substantially same). [f] **Pleading held to allege other and different issues.**–Nebr 230NW449 (motion to strike sustained).

729-49 246Mich606, 225NW638.

729-52 207 Iowa191, 217NW75; 124 Kan582, 261P578; 30 OhA179, 164NE 643 (omission of finding).

729-53 MoA 1SW(2d)241.

729-57 172Ark1177, 289SW467.

729-58 [a] **Appellant cannot complain that there was no formal finding of facts** where issues are tried de novo. 155 Wash101, 283P678(2dcase).

729-59½-New. Where chancellor nisi had all the parties and their witnesses before him, he was better able to reach the truth, and under the circumstances the appellate court will abide his judgment, although hearing the case anew. 308Mo 272, 271SW768.

730-64 [g] **Improperly stricken plea of statute of limitations** will be treated as still in record. 202 Iowa866, 211NW 410.

730-66 [a] **In Michigan.**–238Mich74, 213NW456.

730-70 177Ark177, 6SW(2d)10 (competent evidence only).

730-71 [f] **True division line cannot be located** where evidence was not fully developed. Ark 29SW(2d)1084.

731-73 Iowa 230NW351 (review must be of record as presented to trial court); 121 Or474, 245P316, 256P193 (deed bearing date long subsequent to decree rejected); 135Wash146, 237P297.

731-74 129 Or98, 276P282.

731-74½-New. **Reference** may be ordered and the referee directed to make findings of fact and report conclusions of law. 117 ObSt258, 158NE606.

731-74¼-New. Evidence may be submitted under same rules applicable in trial court. Oh 171NE849.

731-81 28F(2d)177; 22AlaA153, 113S 492; Ala 130S776; 31Ariz337, 253P439; 170Ark530, 280SW677; 181Ark629, 27 SW(2d)793; Ark 30SW(2d)223; 195Cal 364, 233P337; 195Cal 655, 235P438; 200Cal 556, 254P542; 67CalA468, 227 P676; 68CalA139, 228P676; 74CalA 637, 241P576; 76CalA354, 244P1089; 78CalA298, 248P270; 78CalA184, 248P 280; 80CalA20, 251P232; 80CalA609, 252P733; 81CalA629, 254P622; 83CalA 201, 256P608; 85CalA388, 259P484; 89 CalA264, 264P491; 90CalA183, 265P 550; 95CalA29, 271P1111(2dcase); 97 CalA414, 275P500(2dcase); 98CalA175, 276P611; 99CalA8, 277P893; 99CalA 60, 277P898; CalA 292P1010(3dcase); CalA 293P86; CalA 293P91; 80Colo 420, 252P346; 81Colo 134, 254P153; 81Colo 63, 255P451; 81Colo 413, 255P 989; 82Colo 369, 260P108 (where only one error is assigned, record is presumed otherwise good); 90Fla162, 105 S321; 92Fla503, 109S433; 92Fla1110, 111S386; Fla 129S499; 320 Ill 365, 151 NE234; 339 Ill 384, 171NE531; 199 Ind 634, 157NE51; 124Kan705, 261P831; 212Ky433, 279SW656; 217Ky301, 289 SW238; 235Ky37, 29SW(2d)635; 9LaA 342, 119S285; 9LaA292, 119S468(1st case); 5LaA121; 5LaA536; 6LaA647; 6LaA653; 257Mass415, 154NE80; 316 Mo 953, 292SW419; 244Mich226, 221 NW168; Miss 130S99; Miss 130S745 (1stcase); 320Mo 617, 8SW(2d)900; 221 MoA1173, 300SW997; MoA 1SW(2d) 848; MoA 24SW(2d)671; 77Mont91, 250P11; 77Mont524, 251P1057; 78Mont 170, 253P313; 78Mont357, 254P174; 79 Mont550, 257P1016; 78Mont415, 258P 236; 81Mont560, 264P679; 82Mont434, 268P512; 85Mont265, 278P520; Mont 289P574; 30NM517, 239P865; 32NM 124, 252P478; 32NM259, 255P636; 33 NM78, 260P1086; 136NYS232; 190NC 265, 129SE593; 190NC603, 130SE507; 193NC332, 136SE926; 193NC854, 138SE 341; 194NC333, 139SE606; 194NC303, 139SE613; NC 154SE76; 51ND336, 199

NW369, 36ALR465; 57ND885, 224NW306; ND 228NW456; 122 Okl 62, 250P1027; 39 OklACR221 [reh pending]; 124 Or276, 261P432; 285Pa378, 132A178, 43ALR862; 5PaDist&Co 503; 87PaSuper280; 33PortoRico 169; Tex CommnA 265SW142; TexCivA 272SW830 (presumed appellant waived question where he did not request submission of issue); TexCivA 289SW155; TexCivA 290SW831; TexCivA 291SW313; TexCivA 294SW984; TexCivA 297SW667; TexCivA 1SW(2d)425; Tex CivA 5SW(2d)777; TexCivA 25SW(2d)259; TexCivA 29SW(2d)855; 100Vt351, 137A329; 101Vt514, 144A856; 147Va493, 137SE365; 147Va409, 137SE370; 145Wash56, 258P1027. See also Tex CommnA 286SW185; TexCivA 13SW(2d)133. [a] **Even though judgment is presumed to be correct,** reversal must be granted when there is manifest error. 11LaA532, 123S906.

732–82 22AlaA153, 113S492; 31Ariz337, 253P439; 172Ark656, 290P372; 201Cal105, 255P750; CalA 284P1072; 86Colo330, 282P193; 252 IllA212; 199Ind643, 158NE594; IndA 154NE806; 217Ky301, 289SW238; 171Minn113, 213NW550; 225Ky682, 9SW(2d)995; 216MoA614, 260SW538; MoA 284SW525; MoA 288SW979; MoA 29SW(2d)170; 78Mont170, 253P313; 78Mont357, 254P174; 194NC333, 139SE606; NC 155SE253(1stcase); Okl 292P353; 33Porto Rico 481.

732–83 213Ala547, 105S691; 219Ala208, 121S914; 124Kan705, 261P831; 78Mont170, 253P313; 78Mont357, 254P174; Mont 285P668; 194NC333, 139SE606.

732–84 220Ala683, 127S500(2dcase) (statute regulating trial does not repeal rule); 88CalA554, 263P844; 98CalA108, 276P403; 204 Iowa678, 216NW41; 124Kan705, 261P831; 129Kan280, 282P749; 250Mich652, 231NW65; MoA 299SW55 (effect of signing subscription agreement after employment of attorney); 78Mont170, 253P313; Nebr 230NW680; 190NC603, 130SE507; 190NC638, 130SE743; 193NC854, 138SE341; 197NC655, 150SE113; 53ND614, 207NW442; 117 Okl 276, 246P232; 129 Okl 296, 264P889; 122 Or394, 259P426; Or 291P369; SD 225NW301; Utah 290P367.

732–85 220Ala624, 127S192; 21AlaA560, 110S322; 22AlaA153, 113S492; 22AlaA639, 119S245(1stcase); 31Ariz337, 253P439; 199Cal307, 249P11; 67CalA468, 227P676; 77CalA542, 247P224; CalA 262P345; 88CalA554, 263P844; CalA 289P641; 80Colo420, 252P346; 323 Ill498, 154NE226; 339 Ill384, 171NE531; 196 Ind379, 148NE410; 199 Ind634, 157NE51; 199 Ind643, 158NE594; 87 IndA115, 158NE628; 87 IndA603, 162NE239 (court will not search record to reverse judgment); 202 Iowa658, 210NW753; 124Kan323, 259P684; 124Kan705, 261P831; 217Ky301, 289SW238; 12LaA132, 125S299; 236Mich471, 210NW478; 242Mich591, 219NW678; 216MoA614, 260SW538; MoA 23SW(2d)1100; Mont 286P410; 190NC603, 130SE507; 190NC638, 130SE743; 193NC854, 138SE341; 194NC333, 139SE606; 197NC655, 150SE113; 50ND511, 197NW129; 53ND656, 207NW492; 55ND770, 215NW271; 57ND14, 219NW948; 57ND224, 221NW1; 116 Okl 129, 243P730; 117 Okl 276, 246P232; 134 Okl 99, 274P24; 39 OklACR221 [reh pending]; 122 Or394, 259P426; TexCivA 291SW313; TexCivA 292SW956; TexCivA 28SW(2d)611; TexCivA 30SW(2d)930; 99Vt65, 130A749; 101Vt471, 144A375; Vt 150A128(2dcase); 147Va900, 133SE484; 153Va14, 149SE517.

732–86 15F(2d)321; 216Ala676, 114S137; 169Ark463, 275SW905; 203Cal26, 263P240; 203Cal543, 264P1100; 206Cal740, 276P335; 76CalA137, 243P887; 77CalA542, 247P224; 78CalA284, 248P268; 85CalA80, 258P1003; 86CalA382, 260P898; 87CalA224, 261P1064; 87CalA246, 262P78(3dcase); CalA 262P345; 90CalA387, 266P294; 91CalA195, 266P985 (appeal under alternative method); 92CalA161, 267P928; 92CalA495, 268P483; CalA 274P997; 99CalA60, 277P898; 102CalA133, 282P507; CalA 288P80; 80Colo420, 252P346; 39GaA265, 147SE160; 44 Ida560, 260P150; 317 Ill203, 148NE69; 254 IllA469; IndA 157NE7; 89 IndA468, 166NE773; 204 Iowa678, 216NW41; 204 Iowa1216, 216NW728; 124Kan705, 261P831; 130Kan520, 287P260; 162La59, 110S88; 10LaA699, 122S134; 13LaA130, 127S402; 125Me44, 130A737; 127Me452, 144A383(2dcase); 171Minn113, 213NW550; 317Mo614, 296SW739; 320Mo617, 8SW(2d)900; MoA 292SW1068; 221MoA1173, 300SW997; MoA 20SW(2d)167; 78Mont170, 253P313; 78Mont445, 253P890; 80Mont102, 258P246; 82Mont218, 266P398; Mont 285P668; Mont 289P574; 32NM124, 252P478; 33NM78, 260P1086; 34NM409, 282P381; 222AppDiv292, 225NYS649; 193NC854, 138SE341; 194NC333, 139SE606; 196NC474, 146SE88(1stcase); 197NC222, 148SE38; 197NC268, 148SE233, 63ALR1357; 197NC223, 148SE315; 50ND511, 197NW129; 51ND336, 199NW869, 36ALR465; 53ND656, 207NW492; 54ND91, 209NW204; 55ND770, 215NW271; 57ND123, 220NW621; ND 228NW456; 117 Okl 276, 246P232; 143 Okl146, 252P827; 135SC173, 133SE1539; 141SC145, 139SE393, 55ALR677; 143SC417, 141SE681; TexCivA 275SW242; TexCivA 278SW321; TexCivA 281SW306; TexCivA 290SW831; 70Utah203, 259P318, 62ALR54; Vt 150A133; 146Va475, 131SE827; 148Va594, 139SE279; 152Va395, 147SE211 (appellee assigning cross error); 152Va635, 148SE807; 153Va392, 149SE624; Va 154SE565; 145Wash56, 258P1027; 60 OntL63, [1927] 1D=mLR1024. See also 97CalA144, 275P245. [a] **Appellate court does not search record for grounds upon which to predicate error.**–Vt 151A642.

733–87 28F(2d)177 [certiorari den 278US655, 49SCt179, 73Led564 (10thcase)]; 216Ala676, 114S137; 217Ala511, 116S681; 77CalA542, 247P224; 88CalA554, 263P844; 90CalA126, 265P566; 93CalA124, 269P175; CalA 269P551; 102CalA42, 282P438; 102CalA133, 282P507; CalA 287P562; CalA 292P186; 82Colo285, 260P103; 92Fla974, 110S527; 94Fla899, 114S441; 204 Iowa678, 216NW41; 217Ky301, 289SW238; 226Ky347, 10SW(2d)1112; 10LaA468, 121S322; Mo 151A146; 156Miss8, 125S912(2dcase); 216MoA614, 260SW538; 76Mont201, 245P949; 77Mont524, 251P1057; 78Mont170, 253P313; 85Mont256, 278P828; 190NC108, 129SE181; 195NC26, 141SE539; 195NC102, 141SE474; 196NC38, 144SE368(1stcase); 196NC382, 145SE691; 196NC494, 146SE135(2dcase); 196NC477, 146SE146(2dcase); 196NC506, 146SE215; 197NC6, 147SE617; 197NC492, 149SE691; 197NC655, 150SE113(1stcase); 198NC638, 152SE893; NC 154SE76; 33PortoRico 169; 33PortoRico 466; 134SC435, 132SE828; 139SC95, 137SE329; 139SC117, 137SE343; 143SC193, 141SE362; 149SC338, 147SE324; 150SC45, 147SE661; SC 153SE640; SC 155SE619; TexCivA 272SW830 (burden of overturning presumption in support of judgment by showing contrary facts); TexCivA 292SW956; TexCivA 293SW305; TexCivA 1SW(2d)425; TexCivA 4SW(2d)165; TexCivA 28SW(2d)877; TexCivA 29SW(2d)855; TexCivA 32SW(2d)238; Utah 273P319; Utah 290P367; 146Va246, 135SE809; 147Va493, 137SE365; 148Va594, 139SE279; 150Va534, 143SE716; 151Va136, 144SE432; 153Va392, 149SE624; 153Va449, 150SE394. But see 219AppDiv181, 219NYS148. [a] **Appellant has burden in appeal in equity cause** of showing that record will not sustain conclusion below on any theory. 78Mont170, 253P313. [b] **Excepting party** has burden of showing error. Mass 168NE78.

733–88 104Conn112, 132A473; 92Fla1062, 111S725, 729 [quotCJ]; 165Ga304, 140SE859; 145Va681, 134SE692; 151Va1005, 145SE718.

733–88½–New. On appeal from a judgment in an action tried by the court appellant's burden is to show that the record will not sustain the conclusion of the court upon any admissible theory. 75Mont369, 243P1093.

733–89 16F(2d)589; 233Mich32, 206NW539; 33PortoRico 627, 644 [citCJperWolf,J dis op]; 101Vt514, 144A856.

733–91 72Mont527, 235P327 (where party did not testify and it could not be determined that he would be prejudiced by judgment).

734–95 MoA 296SW164; 100Vt351, 137A329; 145Wash243, 259P717.

734–96 220Ala415, 125S681; 31Ariz337, 253P439; 83CalA764, 257P203; 83Colo587, 267P792.

734–97 339 Ill184, 171NE169; 339 Ill304, 171NE267.

734–7 Me 149A833(2dcase); 156SC203, 152SE878.

734–8½–New. However, presumption is not indulged in favor of judgments of commissioners' court. TexCivA 294SW868.

734–12 171Ark1151, 287SW394; 91Fla1007, 109S320.

734–14 203Cal44, 262P1084; 43 Okl ACR35; TexCivA 289SW726; TexCivA 295SW193.

734–15 220Ky226, 294SW1073; Miss 106S517; 36Wyo522, 257P7. [a] **Presumptions of regularity do not apply,** where exceptional condition as basis for exceptional action is required to appear affirmatively of record. 213Ala391, 108S789.

735–19 TexCivA 275SW214 (presumption in favor of judgment not indulged when record shows error).

735–24½–New. Records in former cases identified by order of court as copies of original record will be presumed to be such. 217Ky87, 288SW1045.

735–25 16F(2d)589; 214Ala62, 106S396; 214Ala114, 106S604; 220Ala81, 123S898; 169Ark509, 275SW753; Ark 31SW(2d)953; 198Cal278, 245P178; 200Cal572, 253P929; 201Cal605, 258P85; 79CalA482, 250P183; 200Cal482, 253P921 (on appeal on judgment roll alone); 97CalA302, 275P517; CalA 288P146; CalA 288P728; 98Fla889, 124S443; 47 Ida430, 276P306; 317 Ill425, 148NE306; 320 Ill365, 151NE234; 237IllA475; Iowa 232NW430; 211Ky742, 277SW1032; 213Ky720, 281SW816; 222Ky135, 300SW337; 225Ky86, 7SW(2d)827; 231Ky160, 21SW(2d)250; 5LaA123; Mass 173NE409; 81Mont170, 261P962; 49Nev35, 234P690; 32NM124, 252P478; 34 OhA439, 171NE373; 123Okl 218, 253P99; 116 Or410, 241P340; 134 Okl 39, 272P851; 51SD500, 215NW529; SD 231NW943; TexCivA 276SW724 (that court duly signed his minutes in open court as required by law); TexCivA 283SW1092; TexCivA 283SW1095; TexCivA 284SW296; TexCivA 284SW297; TexCivA 291SW350; TexCivA 294SW988; TexCivA 27SW(2d)374 (absent statement of facts); TexCivA 32SW(2d)369; 143Va206, 129SE367; 142Wash474, 253P646; Wash 292P429; 36Wyo48, 252P1019. See also 98CalA121, 276P404. [a] (1) 34F(2d)589; CalA 290P617(2dcase); TexCivA 277SW724; TexCivA 283SW1095. (2) CalA 279P463; CalA 290P591(2dcase). (8) TexCivA 283SW1092. (9) where there is no statement of fact, conclusions of law, or bill of exceptions, in absence of fundamental error appearing on face of record (TexCivA 277SW724), (10) where there is neither statement of fact nor findings of fact by court (TexCivA 20SW(2d)405). [b] **In absence of statement of facts** (1) presumption is indulged to support judgment. TexCivA 275SW214. [c] **Appellate court will presume that records of former proceedings support court's conclusion that issues have been tried** where they are not made part of record. 208Cal193, 281P61. [d] **Absence of bill of exceptions** makes it conclusive that evidence is against defeated party who brings case for review. 86Colo330, 282P193. [e] **Map or blackboard used at trial,** but not reproduced in record must be assumed to have guided court in determining responsibility for accident. CalA 292P523.

735–26 TexCivA 283SW591.

735–27 276US386, 48SCt358, 72Led620; 22F(2d)804; 23F(2d)55; 37F(2d)652; 40F(2d)796; 213Ala178, 104S494; 214Ala62, 106S396; 214Ala114, 106S604; 214Ala279, 107S751; 217Ala511, 116S681; 218Ala613, 119S640; 20AlaA573, 104S288; 35Ariz110, 274P775; 169Ark509, 275SW753; 170Ark409, 279SW1011; 172Ark21, 287SW757; 172Ark619, 290SW64; 173Ark1021, 293SW

1009; 178Ark143, 10SW(2d)43; 178 Ark1199, 11SW(2d)3; 178Ark666, 11 SW(2d)446; 180Ark46, 20SW(2d)317 (sufficiency of evidence to sustain allegations of complaint); 180Ark 154, 20SW(2d)610; 180Ark1141, 24SW (2d)338; 181Ark334, 25SW(2d)754; 181 Ark279, 25SW(2d)1050; Ark 31SW(2d) 413; 200Cal 572, 253P929; 200Cal 688, 254P1097 (dictum); 202Cal 643, 262P 755; 206Cal 740, 276P335; Cal 289P 617; 72CalA278, 236P971; 76CalA162, 244P156; 76CalA354, 244P1089; 79CalA 598, 250P703; 80CalA618, 252P737; 200 Cal 482, 253P921; 93CalA124, 269P175; 102CalA53, 282P519; 102CalA488, 283 P363; CalA 288P29; CalA 288P146; CalA 288P728; CalA 288P823; CalA 288P863; CalA 290P662; CalA 291P 438; CalA 291P440; CalA 292P179; CalA 292P678; 84Colo 250, 269P22; 55 AppDC375, 6F(2d)678; 90Fla375, 105S 842 (finding of chancellor); 47 Ida430, 276P306; 320 Ill 365, 151NE234; 329 Ill 253, 160NE552; 337 Ill 222, 168NE 912; 338 Ill 605, 170NE683; Ill 173NE 52; 243 IllA154; Ind 172NE908; 85 IndA221, 152NE864; 202 Iowa259, 209 NW273; 118Kan340, 235P93; 211Ky 390, 277SW466; 214Ky75, 282SW780; 217Ky87, 288SW1045; 223Ky230, 3SW (2d)623; 227Ky836, 14SW(2d)157; 8 LaA662; 11LaA450, 123S474; 13LaA 136, 127S410(2dcase); Md 149A556; 252Mass376, 147NE903; Mass 171NE 14; 320Mo 617, 8SW(2d)900; 320Mo 526, 8SW(2d)927; MoA 293SW426; MoA 294SW436; MoA 296SW1036 (that evidence not in record would show situation unfavorable to appellant); 222MoA 389, 5SW(2d)681; 49Nev35, 234P690 (every intendment drawn in favor of judgment, when appeal is on judgment roll); 193NC413, 137SE314; 25 OhA 239, 157NE768; 119 Okl 216, 249P401; 116 Or410, 241P340; 116 Or536, 241P 990; 286Pa137, 133A150; 287Pa224, 134A460; 47RI 232, 132A613; 157SC 144, 154SE97; 51SD500, 215NW529; 53 SD26, 219NW883; SD 232NW45; Tex CivA 273SW665; TexCivA 280SW845; TexCivA 280SW879; TexCivA 280SW 901; TexCivA 281SW315; TexCivA 281 SW626; TexCivA 282SW846; TexCivA 283SW591; TexCivA 283SW607; Tex CivA 287SW129; TexCivA 294SW984; TexCivA 300SW114; TexCivA 300SW 135; TexCivA 300SW220; TexCivA 1 SW(2d)661; TexCivA 6SW(2d)215; TexCivA 7SW(2d)911; TexCivA 11SW (2d)837; TexCivA 13SW(2d)979; Tex CivA 21SW(2d)750; TexCivA 22SW(2d) 736(1stcase); TexCivA 27SW(2d)1109; Utah 269P485; Wash 289P1013. But see 235Ky705, 32SW(2d)54. [a] (8) In detinue for rule where bill of exceptions stated "this was all testimony in substance" but failed to set out evidence of value, it will be presumed that there is other evidence supporting judgment as to value. 21AlaA113, 105S430. (9) Contract not in record will be presumed to support judgment. 222Ky126, 300 SW339. [b] **Rule does not apply** where record shows findings. 200Cal 688, 254 P1097.

736-28 179Ark524, 16SW(2d)1000; TexCivA 18SW(2d)804.

736-30 87 IndA333, 158NE294 (evidence); 153Md501, 138A665; 322Mo 1017, 18SW(2d)13; 5PaDist&Co 503.

736-31 287Pa92, 134A490.

736-33½-New. Sufficiency of pleadings is only question reviewable. 211Ky390, 277SW466.

736-33½-New. On appeal from an order denying a motion to vacate a judgment on the ground that it is void on its face, where the case-made does not contain the pleadings of the adverse party, it will be presumed that issues were joined on all material allegations. 123 Okl 218, 253P99.

736-34 10F(2d)272 (findings of fact assumed correct); 40F(2d)351; 213Ala 547, 105S691; 214Ala114, 106S604; 215 Ala640, 112S243; 21AlaA547, 109S894; 28Ariz553, 237P955; 171Ark1188, 285 SW378; 175Ark209, 298SW1035; 177 Ark250, 6SW(2d)21; 181Ark243, 25SW (2d)440; 67CalA468, 227P676; 71CalA 34, 234P860; 85CalA607, 259P976; 98 CalA121, 276P404; CalA 288P792; 87 Colo 275, 288P408; 102Conn612, 129A 718; 104Conn596, 134A63; Ida 289P 85; 326 Ill 82, 157NE28; 334 Ill64, 165 NE189; 199 Ind166, 154NE480; 85 IndA584, 155NE54; Ind 158NE516; 201 Iowa247, 207NW241; Iowa 228NW98; Iowa 230NW381; 221Ky576, 299SW 196; 254Mass14, 149NE604; 320Mo617, 8SW(2d)900; MoA 31SW(2d)546; 78 Mont170, 253P313; 81Mont170, 261P 962; NJ 139A703; NJSup 133A778; TexCommnA 299SW875; TexCivA 271 SW424; TexCivA 273SW940; TexCivA 281SW242; TexCivA 283SW324; Tex CivA 283SW633; TexCivA 289SW714; TexCivA 296SW669; TexCivA 32SW(2d) 655; Vt 130A759; 142Va550, 129SE 368; 142Wash474, 253P646; 150Wash 178, 272P511 (findings assumed warranted in absence of statement of facts); 196Wis275, 220NW538.

736-35 173Ark1121, 295SW1; 110Conn 255, 147A841(2dcase); 92Fla1062, 111 S725, 729 [quotCJ]; 232 IllA193; 252 IllA536; 87 IndA333, 158NE294 (presumption of additional evidence); 226 Ky347, 10SW(2d)1112; SD 231NW897; TexCommnA 12SW(2d)995; Tex CommnA 18SW(2d)602; TexCivA 289 SW1021; 33Wyo 271, 238P284; 36Wyo 522, 257P7. See also 147Wash375, 266 P186. [a] **Without evidence on record,** no presumption on appeal that city ordinance was not complied with. 232 IllA 193.

736-36 236 IllA412; Ind 158NE516; IndA 168NE242; TexCivA 16SW(2d) 860.

736-37 219Ala219, 121S514; Ala 128S 794; 34Ariz536, 273P534; 71CalA34, 234P860; 197 Ind498, 150NE413; 317 Mo 1010, 297SW50; Mo 31SW(2d)201. But see CalA 284P1053.

737-40 107Conn281, 140A721; Miss 130S484; 310Mo 171, 275SW44.

737-45 TexCivA 17SW(2d)130(2dcase).

737-48 23AlaA31, 120S297; TexCivA 2 SW(2d)864 (acknowledgment by married woman).

737-50 20AlaA643, 104S774 (mortgage admitted in evidence and not incorporated in bill of exceptions).

737-53 AlaA 130S171(2dcase); CalA 279P172 (that lease involved in suit contained clause for apportionment of rent if premises were transferred); TexCivA 295SW229.

737-54 220Ala654, 127S221; 87CalA 721, 262P779 (proper construction of contract); 102CalA756, 283P874; Mo 19SW(2d)691; 298Pa431, 148A841 (form of document). But see CalA 284P 984.

737-55 234Ky376, 28SW(2d)43.

737-58 251Mich525, 232NW377; 150 Wash370, 273P185 (appellate court will assume that trial court denied lien solely because of lack of notarial seal). [a] (24) Where trial court in action of replevin proceeded to trial and decided case on merits after dismissal, it will be presumed, on appeal from judgment for plaintiff in action on replevin bond, that replevin action was regularly reinstated after dismissal. 69CalA251, 230P993. (25) Court will be presumed to have been guided to some extent by diagram of place of accident not made part of record on appeal. 72CalA13, 236P354. (26) That contract relating to indorsement of collateral notes as security did not contravene statute prohibiting sale of evidence of debt by pledgee. 76Mont 445, 247P336. (27) Where facts stipulated by parties do not show incontestable clause in policy, court must assume absence of such clause. 125Misc670, 211 NYS755. (28) That indemnity company reimbursed assured express company for payment of lost travelers' checks in good faith and without fraudulent collusion. TexCivA 274SW1002. (29) That community estate existed at time father guaranteed payment of notes assigned to daughter. TexCivA 278SW 243. (30) That judgment recited was one on merits. 34Wyo 317, 243P130. (31) Other facts presumed. 25F(2d)565; 83CalA627, 257P163; 199Ind166, 154 NE480; 202 Iowa1270, 211NW860; Iowa 217NW622; 313Mo 27, 281SW445; 316Mo 640, 291SW106; MoA 256SW536; 51Nev40, 268P41; 102NJEq85, 140A 235; 126 Okl 103, 258P750; 50SD604, 211NW446; TexCommnA 5SW(2d)491; TexCivA 283SW324; TexCivA 283SW 633; TexCivA 283SW927; TexCivA 2 SW(2d)500. (32) That plaintiff was regularly employed under provisions of civil service regulations. 80CalA208, 250P1062. (33) That proposed county bond issue for necessary expenses was for permissible necessary purposes. 194 NC412, 140SE34. (34) That mortgagor paid legal rate of interest. 196Wis159, 216NW137. (35) Other presumptions. 218Ala440, 118S638; 203Cal 233, 263P 802; 204Cal 329, 267P1079; 85CalA31, 258P712; 85CalA518, 260P351; 86CalA 421, 260P961; 97CalA157, 274P1022; Mass 166NE863; 320Mo 746, 8SW(2d) 824; 136 Okl 226, 277P219; TexCivA 16 SW(2d)542; 149Wash294, 270P1025; 152Wash545, 278P675. (36) That sale of land to satisfy liens was satisfactory to owners where they do not complain of price obtained. 230Ky365, 19SW(2d) 983. (37) That recorded plat of addition to village was acknowledged. Mo 25SW(2d)83. (38) That verbal chattel mortgage, foreclosure of which was granted below, was presumed to exist, in absence of statement of facts. Tex CivA 19SW(2d)328. (39) Relationship of husband and wife. Vt 147A698. (40) Where no complaint is made by county collector as to form of objections to tax, they will be presumed to be in proper form. 336 Ill 506, 168NE294. (41) Appellate court, in absence of showing in affidavit of counsel that client did not consent to order of revivor, will presume that consent of client was obtained. 230 Ky848, 20SW(2d)1017. (42) Other instances. Mo 19SW(2d)679; MoA 30SW (2d)160.

738-59 Ala 129S60; CalA 292P271; 106Conn627, 138A809 (that decedent's estate was as large at date of will as at death); 109Conn329, 146A724 (reviewing court will not assume that senior encumbrancer took possession of premises under strict foreclosure decree); Iowa 217NW622; Iowa 230NW351; MoA 14SW(2d)969; 150SC130, 147SE 834; TexCivA 287SW77; TexCivA 22 SW(2d)760; TexCivA 24SW(2d)542 (ultimate facts); 154Wash529, 282P922. [a] **Where ruling is so palpably erroneous** that no possible evidence would authorize it, presumption will not be indulged. 223Ky230, 3SW(2d)623.

738-62 201Cal 639, 258P373.

738-64 TexCivA 25SW(2d)221.

738-65 160La1019, 107S891; 144 Okl 14, 289P347.

738-68 Utah 289P146.

738-69 316Mo 483, 291SW132 (existence of confidential relation could not be assumed to invalidate gift); Mo 28SW (2d)97.

738-74 [e] **Where judge can reasonably be disqualified under facts stated in certificate of disqualification,** appellate court assumes that such condition existed. 95Fla748, 116S637.

739-77 35Ariz164, 275P8; 165Minn349, 206NW457; 317Mo 1078, 298SW83.

740-91 TexCivA 23SW(2d)757.

740-92 TexCivA 284SW991.

740-3 270US438, 46SCt326, 70LEd669 (removal case); 195Cal 364, 233P337; 72CalA757, 238P143; 94Fla104, 113S 892; 236 IllA442; 211Ky551, 277SW 832; 153Md380, 138A255; 78Mont357, 254P174; 126 Or466, 260P998; 116Tex 489, 294SW844; TexCivA 286SW303.

740-4 MoA 296SW191; 126 Or466, 260 P998; TexCommnA 15SW(2d)579; Tex CivA 16SW(2d)433 (sufficient evidence to support jurisdiction). [a] See also MoA 23SW(2d)1089.

740-8 94Fla104, 113S892; 328 Ill 472, 160NE76; 233 IllA553.

740-8½-New. Jurisdiction of municipal court is not presumed, but must appear from the record. 35PortoRico 640.

740-10 258Mass103, 154NE570; 78 Mont357, 254P174; 48RI 134, 136A241; 116Tex489, 294SW844.

740-11. 104Conn728, 134A220.

741-14 219Ala37, 121S25; 236 IllA442; Ind 172NE124; LaA 130S254; 164Minn 440, 205NW438. [a] **It will not be assumed that fraud was perpetuated** in making party defendant solely to obtain jurisdiction of codefendant when it does not appear from inspection of pleadings. 144Va154, 131SE245.

741-15 See also 97CalA302, 275P517.

741-17 219Ala581, 122S693.

741-19 203Cal 183, 263P231. [a] **Affi-**

davits in favor of prevailing party will be taken as true where affidavits on motion are conflicting. 203Cal183, 263P231.

741-20 178Ark1068, 138W(2d)297 (1st case); 206Cal22, 272P1045; 93CalA553, 269P968; 55ND770, 215NW271; 33PortoRico13; TexCivA 296SW902.

741-21 TexCivA 258W(2d)280.

741-24 TexCivA 279SW879; TexCivA 286SW626. But see TexCommnA 287SW241. [a] (2) Appellate court will assume that facts alleged to controvert defendant's plea of privilege were established by proper proof. TexCivA 198W(2d)826.

741-25 173Ark705, 293SW43; 68Utah530, 251P354.

741-27½-New. The appellate court will refuse to assume that a plea of privilege was sustained because the court disbelieved plaintiff's testimony constituting prima facie case. TexCivA 300SW199.

741-27¾-New. There is no presumption that a controverting affidavit to defendant's plea of privilege referred to a particular defendant, where there were several defendants. TexCivA 178W(2d)153.

741-28 83CalA627, 257P163 (authority of trustee under trust deed to act for beneficiaries); 78Mont357, 254P174.

742-30 143Wash588, 255P936.

742-35 84Colo498, 271P630; 93Fla203, 111S512; 13LaA170, 127S647(1st case).

742-36 237 IllA475; MoA 98W(2d)92.

742-37½-New. Court will assume minors below were represented by a guardian. TexCivA 276SW750.

742-39½-New. The appellate court must assume that no curator ad hoc was appointed for an absent defendant in the absence of showing of appointment in the record. 165La1005, 116S488.

742-40 180Ark41, 20SW(2d)310.

742-42 See also 178Ark995, 138W(2d)13.

742-43 CalA 277P909.

743-45 105Conn177, 134A810.

743-46 152Md335, 136A648. [e] (4) 11LaA450, 123S474.

743-47 98CalA842, 275P865; 218Ky172, 291SW21. [b] 224 IllA336.

744-53½-New. It will be assumed that persons authorized by court by entry on writ, to act as next friend appeared and authorized continuance of trial. 82NH221, 131A688.

744-53¾-New. It is presumed that matters favorable to, and peculiarly within, movant's knowledge do not exist. 29F(2d)623.

744-54 16F(2d)589; CalA 288P143(1st case); Tex 285SW683; TexCivA 16SW(2d)874.

744-55 20AlaA609, 104S445.

744-56 141SC72, 139SE183.

744-57 See also TexCommnA 138W(2d)74. But see 298Pa574, 148A858.

744-63 220Ala399, 125S644.

744-64 31NM366, 246P910.

744-67 98Fla14, 122S789.

745-70½-New. That the pleading presents the theory on which the case was tried is assumed. 218Ala520, 119S230.

745-70¾-New. No presumption that rule requiring chancery pleadings to be printed before hearing cause was not complied with. 41F(2d)728.

745-71 95CalA535, 273P47 (where there was no doubt as to sufficiency of complaint to be resolved against appellant); 240 IllA165; 238Mich151, 213NW110, 51ALR1303; 148Miss182, 114S264; 315Mo367, 286SW106; 219MoA19, 267SW964; 78Mont357, 254P174; 49Nev35, 234P690; 222AppDiv34, 225NYS552; 217AppDiv43, 215NYS702; 192NC820, 135SE321; 116Or549, 240P879; 119Or691, 250P1101; 50SD319, 210NW81; TexCivA 278SW1107; TexCivA 281SW306; TexCivA 68W(2d)377. See also 95CalA452, 273P63. [a] **Where suit dismissed on exceptions,** facts shown by petition must be taken as true. 159La652, 106S20.

745-72 315Mo367, 286SW106; 78Mont357, 254P174; TexCivA 278SW1107, 33Wyo457, 240P449.

745-72½-New. or where defendant did not stand on his demurrer, 119Or691, 250P1101.

745-73 217MoA613, 274SW969.

745-73½-New. But under the rule that pleadings must be construed most strongly against the pleader, facts will not be presumed in the absence of averment thereof. 210Ky75, 274SW1113 (that stock was dividend bearing).

745-74 Cal 268P626; 160La763, 107S566; 238Mich151, 213NW110, 51ALR1303; 251Mich578, 232NW200; 78Mont357, 254P174; 79Mont566, 257P427; 253NY166, 170NE532 (on appeal from order striking out defenses); 217App Div43, 215NYS702; TexCommnA 295SW591. See also TexCivA 294SW915.

745-76 168Ga659, 148SE735; 129Kan563, 283P511; 243NYS102, 152NE690; 291Pa18, 139A492; TexCivA 178W(2d)63. [a] **Only complaint can be considered on defendant's motion for judgment on pleadings** on same basis as if up on general demurrer. CalA 284P1035.

745-76½-New. or where defendant, appealing, failed to settle the case for review, 241Mich186, 216NW388.

745-76¾-New. or where absence of authenticated transcript precludes review of facts, Or 291P369.

745-78 CalA 287P133; 161Ga495, 131SE470.

745-79 TexCivA 278SW459 (in absence of exceptions, court will presume petition to show cause of action in its face).

745-85½-New. It will be presumed that a motion to make a petition more definite and certain was disposed of before judgment. 222MoA12, 300SW538.

745-87 83CalA69, 256P594 (presumption is that no testimony was introduced contradicting admission); 39Wyo423, 273P687.

745-88 TexCivA 280SW286.

745-89 16F(2d)589.

745-90 CalA 286P1073.

745-92 CalA 285P724; 243NY102, 152NE690; 147Wash158, 265P155. See also 291Pa383, 140A143.

745-93 100CalA195, 279P1064.

746-98 216Ala426, 113S289. See also TexCivA 271SW424.

746-9½-New. Exceptions to order overruling defendant's plea of abatement to sufficiency of service by publication is without merit where record is sufficient to raise presumption that publication was made as provided by law. 161Ga495, 131SE470.

746-9¾-New. The court may presume that an answer to a complaint in a former action between the same parties properly denied material averments of the complaint or tendered issue on all the material facts. 90CalA390, 266P320.

746-17½-New. Knowledge of counsel of a motion to verify the answer is assumed in the absence from record of the contrary. 226Ky412, 11SW(2d)107.

746-18 [a] **In absence of statement of facts** it will be presumed that testimony offered substantial cross action. TexCommnA 23SW(2d)681.

747-32 213Ala209, 104S429; 214Ala114, 106S604; 219Ala157, 121S538; 34Ariz380, 271P865; 34Ariz544, 273P536; Ariz 282P937; Ariz 285P684; 178Ark507, 108W(2d)906; 195Cal569, 234P371; 208Cal251, 280P942 (amended complaint); 102CalA677, 283P871; 84Colo362, 270P553; 86Colo446, 282P1068; 170Ga239, 152SE237; 41GaA90, 151SE825; 83Ind250, 148NE157; 206Iowa775, 221NW470; 120Kan439, 244P4; 216Ky332, 287SW892; 222Ky602, 18W(2d)1054; 232Ky365, 23SW(2d)601; 162La671, 111S55; 162La1085, 111S464; 169La712, 125S861; 169La789, 126S42; 10LaA795, 123S181(2d case); 12LaA415, 125S883; 125Me402, 131A539; 149Md541, 131A774; 153Md501, 138A665; 258Mass43, 154NE516; 260Mass466, 157NE353; 263Mass223, 160NE804; 264Mass396, 163NE75; Mass 166NE575; Mass 169NE657; Mass 171NE281; 157Mass836, 127S704; 314Mo486, 284SW129; 318Mo292, 300SW1108; 319Mo445, 38W(2d)1021; 322Mo376, 15SW(2d)815; 82Mont434, 268P512; 131Misc553, 228NYS231; 217App Div43, 215NYS702; 196NC504, 146SE134; 30OhA345, 165NE101; 132Or405, 285P1111; 29PortoRico745; 48RI426, 138A188; TexCommnA 276SW177; TexCommnA 281SW1047, 44ALR1143; TexCommnA 299SW224; TexCivA 265SW196; TexCivA 272SW317; TexCivA 272SW325; TexCivA 274SW639; TexCivA 280SW903; TexCivA 291SW602; TexCivA 296SW680; TexCivA 297SW265; TexCivA 297SW865; TexCivA 299SW692; TexCivA 28W(2d)899; TexCivA 68W(2d)129; TexCivA 138W(2d)432; TexCivA 288W(2d)178; 149Va798, 141SE776. [a] **Hearing of evidence cannot be imputed to judge** in hearing on general exceptions to bill, since it be merely idle proceeding. TexCommnA 128W(2d)961. [b] **Trial court's ruling on demurrer to complaint must be tested by allegations therein.**—87Colo31, 285P169.

747-34 178Ark816, 128W(2d)408; 97Fla899, 122S520; Mass 167NE321; MoA 128W(2d)938; TexCivA 138W(2d)395 (2dcase); TexCivA 19SW(2d)795 (if, assuming that allegations in petition are true, it appears that good grounds existed for recovery, demurrer was properly overruled); TexCivA 21SW(2d)305. [a] **Where demurrer was sustained** (1) allegations of bill are on appeal taken most strongly against pleader. 141Miss643, 107S197. (2) Complaint is not entitled to liberal construction where demurrer was sustained. 121Or432, 253P869.

747-35 216Ala504, 113S609, 54ALR1413; Ark 293SW389; 204Cal384, 268P643; TexCivA 20SW(2d)383.

747-36 244 IllA241; 220Ky613, 295SW893. [a] **Where no demurrer appears in record,** it is presumed that court did not err in overruling same. 21AlaA128, 106S870.

747-38½-New. Every intendment in favor of sufficiency of pleadings must be indulged by the appellate court. TexCivA 9SW(2d)372.

747-40 TexCivA 27SW(2d)565.

747-42 98CalA230, 276P636 (general demurrer); 37GaA530, 140SE918. [a] **Where general and special demurrers were interposed,** provision in ruling that motion might be made to file amended complaint stating cause of action does not warrant presumption that only general demurrer was sustained. 83CalA638, 257P137.

747-49 See also 39GaA387, 147SE190.

747-55½-New. Where an examination of the pleadings distinctly shows that the court, in passing on a demurrer, considered it as going to the merits of the case and held that there was no cause of action stated in the petition, it will be deemed to have sustained a general demurrer. TexCommnA 281SW1047, 44ALR1143.

747-55¾-New. On appeal from an order overruling demurrer to a bill, the court of appeals will assume bona fides of the transaction sought to be set aside where there is no allegation to the contrary. 153Md598, 139A280.

747-55¼-New. Where plaintiff refused an opportunity to amend after demurrer was filed, it must be presumed that he has stated his case precisely as he hopes to recover. 195NC517, 142SE761.

747-55½-New. In Virginia supreme court of appeals, on appeal from judgment sustaining demurrer, follows the statement in notice on motion for judgment. 153Va746, 151SE295.

747-57 21AlaA404, 108S636.

748-59 220MoA760, 277SW67; TexCommnA 148W(2d)823.

748-60 201Cal643, 258P945.

748-64 215Ala150, 110S46; 39GaA387, 147SE190; 105NJL336, 146A372; TexCommnA 293SW554. [b] **It is presumed that all grounds are sustained.**—156SC103, 152SE876.

748-64½-New. Where a demurrer contains grounds of general and of special demurrer and the trial judge in sustaining it does not state the grounds of his decision, the judgment will be treated as sustaining the demurrer on all grounds. But see 216Ala504, 113S609, 54ALR1413.

748–65 218Ala602, 119S652; MoA 286 SW842; MoA 16SW(2d)674; Tex CommnA 23SW(2d)681; TexCivA 272 SW266; TexCivA 272SW623; TexCivA 283SW910; TexCivA 288SW276; Tex CivA 292SW651; TexCivA 298SW614.

748–72 211Ky226, 277SW245 (that demurrer was sustained).

748–72½–New. Demurrer, not adverted to in the appellate court, is deemed abandoned. LaA 124S636.

748–73 Mass 165NE897; Mass 167NE 266.

749–74 95CalA452, 273P63; 101CalA 769, 282P820; 168Ga288, 147SE522 (it is assumed that court held unnecessary allegations offered to meet objection to petition where court dismissed on other grounds); 78Mont114, 252P803; 20 OhA244, 153NE172; 21 OhA244, 153 NE172.

749–75 205 Iowa382, 218NW62.

749–76 221Ky745, 299SW723.

749–83 73CalA511, 238P1048; 78Mont 114, 252P803.

749–84 73CalA511, 238P1048; 78Mont 114, 252P803. See also 201Cal 643, 258 P945.

749–85 73CalA511, 238P1048; CalA 288P855.

749–88½–New. Conditions. It is presumed that conditions existed which justified the trial court in imposing conditions on allowing the amended plea. 213Ala588, 105S672.

749–88½–New. Where transcript does not contain original answer, it will be presumed that amendment thereto presented new issues. TexCivA 29SW(2d) 493.

749–91 218Ala420, 118S912; 22AlaA 199, 114S15; 243 IllA450; 88 IndA267, 163NE613; 88 IndA674, 164NE294; 233Mich32, 206NW539; 243Mich376, 220NW658(2dcase); 318Mo 723, 300SW 769; MoA 4SW(2d)831; 72Mont527, 235P327; 74Mont293, 240P384; 78 Mont228, 253P257; 85Mont389, 278P 836; NJ 129A232; NM 291P287; 222 AppDiv498, 227NYS78; 222AppDiv651, 224NYS464 (date of written agreement); 121 Okl 5, 247P58; 126 Okl 120, 258P758; 129 Okl 28, 263P448; 134 Okl 25, 272P414; 136 Okl 166, 276P 750; 283Pa146, 129A60; 89PaSuper 261; 35PortoRico 529; 140Wash415, 249P781; 142Wash520, 253P819; 146 Wash572, 264P15; 147Wash86, 265P 167; 151Wash112, 275P65; 152Wash 545, 278P675; 153Wash85, 279P91. See also 25F(2d)398. But see 127Me 418, 144A397.

750–92 Ark 294SW21; 178Ark143, 10 SW(2d)43; Ida 286P914; IndA 170NE 788; 121Kan18, 245P1041; 121Kan431, 247P640; 245Mich93, 222NW183 (bill of particulars); 312Mo 458, 278SW759; MoA 299SW121; MoA 300SW313; 221 MoA1231, 300SW531; 222MoA1, 300 SW546; MoA 15SW(2d)964; MoA 25 SW(2d)491; MoA 27SW(2d)49; MoA 28SW(2d)1044; 75Mont66, 241P623; 77Mont229, 250P963; 78Mont228, 253P 257; 80Mont374, 260P734; 84Mont158, 274P489; 86Mont33, 281P753; Mont 288P1023; Mont 290P252; 113 Okl 150, 240P104; 129 Okl 28, 263P448; 136 Okl 226, 277P219; 138 Okl 141, 280P 591; 140Wash415, 249P781; 145Wash 247, 259P716; 145Wash335, 259P1084; 148Wash136, 268P141; 149Wash184, 270P434; 154Wash376, 282P205; 155 Wash113, 283P668; Wash 288P265; 192Wis174, 212NW262; 197Wis250, 221NW743; 33Wyo 457, 240P449; 38 Wyo 530, 269P27. [a] (4) 75Mont1, 241P631.

750–93 33NM64, 260P849; 146Wash 440, 263P602; 147Wash14, 264P717; 150Wash178, 272P511.

750–96 Ark 294SW21; 174Ark982, 298 SW194; 175Ark253, 299SW44; 121 Kan431, 247P640; 173Minn145, 216NW 782; 220MoA1245, 290SW655; 78Mont 228, 253P257; 81Mont281, 264P132; 85Mont229, 278P143; 86Mont562, 284P 539; 145Wash679, 261P792; 150Wash 676, 274P698; 192Wis174, 212NW262; Wyo 290P561.

750–97 200 Ind535, 165NE323.

750–2 178Ark489, 11SW(2d)5.

750–3 Ariz 291P1003; 171Ark1000, 287SW183; 125Me206, 132A421; 50RI 140, 145A874.

750–9 113 Okl 150, 240P104; 121 Okl 5, 247P58.

750–9½–New. where the amendment would change substantially the defense set up; 113 Okl 150, 240P104.

750–10 254 IllA489; Mo 30SW(2d)146.

750–12 125 Okl 250, 257P1101, 53ALR 943; 37Wyo 365, 261P905.

750–12½–New. , or where amendment would not be in furtherance of justice. 121 Okl 5, 247P58.

751–15½–New. Where decision of court is adverse to petitioner, his petition cannot be considered as amended on appeal. 35PortoRico 718.

751–16 214Ala447, 108S40; CalA 289 P234; 82Colo 432, 261P456; NJ 145A 634 (continuance of motion; 229App Div217, 241NYS605; TexCivA 4SW(2d) 668 (allegations of plea in abatement are assumed true).

751–17 170Ga202, 152SE239.

751–18 Mass 166NE563 (holding that motion made was one heard and decided).

751–20 Mont 286P410; TexCivA 3SW (2d)892; 149Va798, 141SE776.

751–21 22F(2d)657; DC 41F(2d)103; 206 Iowa1242, 219NW490; 232Mich245, 205NW106; 248Mich247, 226NW860 (decree); 248Mich486, 227NW794; 248 Mich450, 227NW811 (order denying motion to dismiss bill); 251Mich224, 231NW577(2dcase); 223AppDiv603, 229NYS121; 225AppDiv149, 231NYS 477; 221AppDiv371, 223NYS418; 227 AppDiv130, 237NYS123. See also 251 Mich83, 231NW91. [a] **On appeal from order denying defendant's motion to dismiss complaint,** all facts alleged in complaint must be taken as true. 227 AppDiv156, 237NYS64.

751–22 225AppDiv597, 234NYS18.

751–22½–New. The appellate court cannot assume that the trial court considered the affidavit of plaintiff's counsel that defendant had information and belief of plaintiff's allegations, as contradicting defendant's denial. 100CalA195, 279P1064.

751–24 CalA 292P531; 157Md376, 146 A240.

751–26 161Ga495, 131SE470 (overruling motion to vacate order of court declaring that service by publication had been made); 78Mont357, 254P174.

751–27 20F(2d)845; SD 225NW301.

752–31½–New. Order vacating notice for examination before trial is exclusively presumed to be on merits, 126Misc 316, 212NYS705.

752–31½–New. for the meanings of the order and grounds on which it was made must be determined from the order itself, in connection with papers on which it was made, without speculation. 126 Misc316, 212NYS705.

752–33 [a] (9) That cause was properly advanced on calendar. 79CalA721, 250P880.

752–36 CalA 289P169.

752–38 See also TexCivA 10SW(2d)235.

752–43 270US587, 46SCt408, 70L ed747 (averment in bill for injunction must be taken as true on appeal from decree granting permanent injunction after motion to dismiss bill was overruled); SC 155SE228 (as to amount of bond); Tex CivA 286SW573. [a] **Appellant must assign** and show error in granting of injunction. 193NC32, 135SE480. [b] **That proper undertaking was required** will be presumed. Ida 288P419. [c] **Sworn allegations of bill for injunction** must be taken as true by reviewing court in determining propriety of order granting temporary injunction. TexCiv A 21SW(2d)382.

752–44 34F(2d)18; 193NC207, 136SE 489; 196NC506, 146SE215.

752–45 98CalA108, 276P403; 190NC 265, 129SE593; 197NC492, 149SE691; TexCivA 289SW198. [a] TexCivA 25SW (2d)936.

753–46 196NC506, 146SE215; TexCivA 273SW665; TexCivA 9SW(2d)1055(2d case).

753–46½–New. On appeal from an order continuing an injunction, it will be presumed that on trial on the merits the court will impose terms which will protect defendants. TexCivA 4SW(2d) 293.

753–46¼–New. On appeal from judgment granting injunction pendente lite, the complaint will be given a most liberal construction to support the judgment. 86Mont218, 283P219.

753–48 337 Ill 612, 169NE747; 244 IllA 218; 78Mont357, 254P174.

753–49 [a] **Motion to dissolve, not shown passed on** except in trial on merits, will be presumed referred to merits. LaA 128S715.

753–51½–New. The appellate court will assume that payment was made prior to attachment where the trial court apparently made the same assumption. 92 CalA360, 268P459.

753–52 38Wyo 223, 266P128.

753–53 20F(2d)845; 82Colo 280, 260 P101 (denial of motion for discharge); 207 Iowa948, 222NW8; 259Mass259, 156 NE424; 195NC389, 142SE322; TexCivA 9SW(2d)198; 140Wash586, 250P346.

753–56 But see MoA 30SW(2d)203.

753–60 177Ark486, 9SW(2d)81 (absence of evidence).

753–62½–New. Where record is silent as to why supplementary interrogatories were allowed to be introduced without offering the original and no injury to appellant appears, error will not be presumed. 213Ala627, 105S869.

753–63 165Ga685, 142SE142.

754–74½–New. Renewal in another form of denied motion presumed to be with leave of court. 77Colo 85, 234P 695.

754–74¼–New. All intendments will be indulged in favor of the validity of the trial court's denial of an order to permit inspection of plaintiff's books. 81CalA 471, 254P287.

754–74¼–New. Defendant's consent presumed to withdrawal of defendant's counsel on eve of trial. Wash 291P721.

754–75 48 Ida236, 281P374.

754–75½–New. , or that the case was triable to court. 143Wash20, 254P452.

754–76 [a] **In Alabama.**–213Ala391, 108 S789.

754–81½–New. A recital in the judgment that trial by jury was waived by the parties must be presumed to be correct. 35Ariz164, 275P8.

754–83 219Ala676, 123S57; 101CalA 218, 231P681; 225Ky480, 9SW(2d)220; MoA 18SW(2d)147.

754–84 168Ark1028, 272SW856 (drawing names from box for struck jury); 82Colo 432, 261P456. [a] **In absence of formal showing** that special venire was not necessarily drawn, it must be presumed that court exercised proper discretion in denying defendant's motion for jury from regular panel. CalA 279 P474.

754–86 35GaA376, 133SE288; 222Ky 496, 18W(2d)957; TexCommnA 298SW 554. [a] **Intelligence and impartiality of jurors** will be presumed. 168Ark626, 271SW7.

754–87 86Mont553, 284P769.

754–88 113TexCr488, 22SW(2d)460(2d case).

755–95 218Ala637, 119S844(2dcase). See also 272US701, 47SCt286, 71L ed481; CalA 262P1103.

755–97 NJ 151A97.

755–98 30 OhA151, 164NE539 (suitable person).

755–2 295Pa381, 145A427. [a] **There is no presumption** in favor of register's opinion over that of trial judge. Ala 127S819.

755–7½–New. Motion to recommit the auditor's report is in the court's discretion. 255Mass591, 152NE83.

755–7¼–New. Where the auditor's findings are agreed to be final, rulings on admission of evidence are reviewable on motion to recommit. 255Mass591, 152 NE83.

755–7¼–New. It is presumed that the trial court would itself determine any controversy with respect to any owelty allowed by the commissioners to partition. 328 Ill 388, 159NE782.

755–7½–New. Unless it may be inferred from recitals in the findings of the referee and those of the court that reference to the referee was general in character, it must be presumed that it was a special reference for the benefit of the court. 205Cal 158, 270P181.

755-8 77CalA164, 247P212; 12LaA380, 124S532.

755-11 21AlaA257, 107S224; 81Colo 202, 254P764.

755-12½-New. A ruling of the trial court is presumed to have remained intact where reversal is not shown. 222 MoA307, 297SW129.

755-16 **Where record discloses no evidence introduced** in response to issue tendered by plaintiff, to cross complaint of defendant, appellate court will assume no evidence was offered on subject. 75 CalA779, 243P713.

756-21 170Minn383, 212NW905.

756-24 82CalA586, 256P229; 82Colo 328, 259P1028 (sincerity in asking questions); 218MoA698, 268SW102; MoA 294SW762; MoA 18SW(2d)528; MoA 22SW(2d)58; MoA 22SW(2d)215.

756-25 312Mo173, 279SW89; MoA 274 SW1100; MoA 28SW(2d)113; 24OhA 357, 157NE311; TexCivA 295SW675; TexCivA 32SW(2d)264.

756-26 217Ky301, 289SW238; Mo 271 SW500; 24 OhA317, 156NE235.

756-27 TexCivA 6SW(2d)408.

756-30 [a] **Rules of evidence** excluding ex parte affidavit are presumed to be known to counsel. TexCivA 283SW938.

756-30½-New. It must be presumed that the arguments of counsel for defendant had been made in the hearing of the court and that their general nature is within the memory of the court. Mo 271SW500.

756-35 But see 48RI 244, 137A2.

756-38½-New. The jury is not presumed to have knowledge of the allegation of the particular matter of defense in the absence of instruction thereon. 318 Ill 570, 149NE469.

756-39 216Ala435, 113S306; 21AlaA 560, 110S322; MoA 21SW(2d)206 (parol evidence); 192NC829, 135SE870; Tex CivA 10SW(2d)1016. See also 214Ala 593, 108S536, 46ALR1201. [a] **General admission of testimony imports** finding of necessary preliminary facts. 259Mass 401, 156NE538.

757-40 MoA 288SW992; 32 OhA26, 167 NE589 (error not called to appellate court's attention is presumed not to exist).

757-41 CalA 290P317; 155SC526, 152 SE699.

757-42 121Kan254, 246P674; 116Nebr 827, 219NW189.

757-43 100WVa452, 130SE810. [a] **Indorsement as supplementary abstract** is no proof for appellate court to say that it is not complete. TexCivA 24SW(2d) 499.

757-44 Ariz 287P440 (presumed admitted as res gestæ rather than on ground not disclosed by record); 88CalA554, 263P844; 38GaA422, 144SE125; 51Nev 306, 274P809; 116 Or536, 241P990.

757-46 TexCivA 288SW471.

757-47 7PortoRico 129.

757-51 80CalA618, 252P737.

757-52½-New. From a statement of facts showing admission of pleadings in evidence, the reviewing court will assume that they were admitted only for the proper purpose, not as proof of facts stated therein. TexCivA 272SW(2d)629.

757-53 TexCivA 18SW(2d)804.

757-56½-New. Where appeal comes up in judgment roll alone, without bill of exceptions, it will be presumed that no objection on ground of variance was made in trial court. 73CalA692, 239P 95.

757-57 223Ky230, 3SW(2d)623.

758-59 218Ala659, 119S643; 220Ala81, 123S898; 84Colo 99, 268P533.

758-61 45 Ida159, 261P239; 51Nev299, 274P811 (presumed that trial court determined competency of bank book containing erasure); TexCivA 283SW674.

758-63 23AlaA118, 121S690(2dcase).

758-64 SD 230NW805(3dcase); Tex CivA 271SW397.

759-65 74CalA278, 240P32; 233 IllA56; 190NC868, 129SE814; 48RI 493, 139A 300; TexCivA 288SW471.

759-67 74CalA278, 240P32.

759-72 18F(2d)903; 131 Or327, 279P 855.

760-79½-New. Appellate court cannot assume that jury would disregard evidence showing plaintiff's contributory negligence. Ala 128S602.

760-80 See also MoA 28SW(2d)121.

760-81 13LaA670, 128S721(1stcase).

760-82 74CalA278, 240P32; 29Porto Rico 852 (evidence of another pending action); RI 147A875.

760-89 [a] **Ruling of court, such as one admitting plaintiff's evidence after defendant has closed its evidence,** that can be made as matter of discretion, will be presumed to have been so made. Vt 147 A352.

760-91 99Vt343, 132A45.

760-92 84Mont397, 276P437.

760-93 99Vt343, 132A45; 100Vt161, 135A702.

760-93½-New. It will not be assumed that improper use was made of erroneous evidence regarding expert's competency. Vt 151A568.

761-1 47 Ida211, 273P757.

761-3½-New. In absence of request for instructions in respect of admission of evidence or no exceptions taken to charge, any error in admission of evidence which was inconsistent with rule of law as finally given must be assumed to have been waived. Mass 169NE74.

761-3½-New. Where wrong objection is made to evidence, it is presumed that proper objection, not urged was waived. NJSup 147A641(1stcase).

761-9 95CalA1, 272P343.

761-16½-New. Where the trial court has certified exhibits, it will be presumed, in absence of any objection, that they were admitted in evidence. 50SD 536, 210NW976.

761-17 10F(2d)277 (qualified as experts).

761-18 Vt 151A642.

761-24 TexCommnA 276SW647; Tex CivA 8SW(2d)527.

762-25 216Ala435, 113S306.

762-27 36GaA377, 136SE924.

762-27½-New. It is presumed that party calling experts established their qualifications as far as possible and that further examination would be ineffectual. TexCivA 30SW(2d)364.

762-31½-New. It is presumed that there was no arbitrary rejection or acceptance of testimony by triers of fact, 75CalA44, 242P109.

762-31¼-New. but that they have, for sufficient legal reasons, accepted as true, testimony with which the final result arrived at harmonizes, 75CalA44, 242P 109.

762-31¼-New. and have rejected as of no probative value testimony which tended to lead to an opposite conclusion. 75CalA44, 242P109.

762-31½-New. The trial judge is presumed to be acquainted with the reputation of the witnesses. 168LaI95, 121S 741.

762-32 Ariz 287P300; 19Ark247; 205 Iowa752, 218NW499; 206 Iowa1291, 222 NW12; 208 Iowa1157, 225NW346; 154 Md188, 140A40 (contributory negligence); 154Md171, 140A64; 241Mich 343, 216NW927; 58Miss572; 318Mo 486, 18SW(2d)113; 221MoA167, 299SW100; 217AppDiv468, 216NYS755; 217AppDiv 647, 216NYS174; 221AppDiv402, 222 NYS740; 125Misc252, 210NYS479; 219 AppDiv181, 219NYS148; 195NC5, 141SE 343; 78Pa257; 285Pa378, 132A178, 43 ALR862; 294Pa265, 144A131; 52SD30, 216NW586; 6LeaTenn133; TexCivA 289 SW712; TexCivA 16SW(2d)306. See also Pa 145A81. [a] **Party attacking verdict** as being without support of evidence has burden of proof. 147Va 208, 136SE591.

762-33 7F(2d)335; 31F(2d)53; MoA 18SW(2d)575; 115Nebr589, 214NW1; 217AppDiv163, 216NYS389; 217AppDiv 468, 216NYS755; 291Pa536, 140A503; 296Pa400, 145A909; TexCivA 289SW 442; TexCivA 290SW228.

762-34 9Mo 161; MoA 298SW1061; MoA 299SW116; MoA 18SW(2d)575; 115Nebr589, 214NW1; 217AppDiv468, 216NYS755; 217AppDiv647, 216NYS 174; 222AppDiv152, 225NYS570; 285 Pa378, 132A178, 43ALR862.

762-35 206 Iowa90, 219NW44; MoA 18 SW(2d)114.

762-35½-New. In reviewing the refusal of the trial court to submit the issue of contributory negligence in an action for personal injuries, the evidence must be considered in the light most favorable to defendant. 222MoA138, 1SW(2d) 1030.

762-35½-New. In such case the appellate court cannot consider a conflict in testimony. 222MoA138, 1SW(2d) 1030.

762-37 127Mel67, 142A377; 122 Okl 62, 250P1027; TexCivA 24SW(2d)757 (time of filing). [a] **Statement in report that case was dismissed by clerk** is insufficient to overcome presumption that case was dismissed by court order in due course. 127Mel67, 142A377. [b] **Docket entry that dismissal was by clerk under rule of court** raises presumption that dismissal was with sanction of presiding justice. 127Mel67, 142 A377.

762-38 14F(2d)933; 29F(2d)566; 222 MoA307, 297SW129; TexCivA 18SW (2d)719.

762-39½-New. On appeal from judgment dismissing complaint, plaintiff is entitled to have every controverted fact determined in his favor, 214AppDiv259, 212NYS189.

762-39½-New. and to have the most favorable inferences drawn therefrom. 214 AppDiv259, 212NYS189.

762-39¼-New. Under statutes in some jurisdictions dismissal of suit before submission on merits is presumed to have been without prejudice to the right to renew it in the absence of proof to the contrary. 169Ark657, 276SW586.

762-39½-New. The court on appeal will assume that the lower court fully considered the facts before it and thought there was sufficient reason to refuse an order of dismissal. 309Mo 341, 274SW 380.

762-39¼-New. The dismissal of an action for plaintiff's failure to amend or to annex documents to his petition, as required by the court on defendant's motion, is not ground for reversal in the absence of showing of excuse for such failure or of error in requiring the amendment or annexation of documents. 122 Okl 62, 250P1027.

762-39½-New. Where the grounds upon which an order on judgment of dismissal are based are made a part of the judgment of the trial court, it will not be assumed that the court may have acted on other grounds. 43 OklACR35.

762-40 259Mass26, 155NE658.

762-43 33NM295, 265P35; 217AppDiv 468, 216NYS755; 217AppDiv647, 216 NYS174; 220AppDiv265, 221NYS512; 224AppDiv148, 229NYS757; 126Misc563, 214NYS136; 219AppDiv181, 219NYS 148; 227AppDiv369, 237NYS552; Tex CivA 283SW910; 150Wash529, 273P752. But see 205 Iowa483, 218NW325. [a] (9) Plaintiff's evidence cannot be disregarded. 195NC860, 142SE221. [b] **Evidence adduced must be taken as true.**– 126Misc563, 214NYS136.

762-43½-New. Findings most favorable to plaintiff will be accepted, 215App Div617, 213NYS468.

762-43½-New. and findings contradictory thereto, 215AppDiv617, 213NYS468.

762-43¼-New. or not supported by the evidence will be disregarded. 215App Div617, 213NYS468.

763-44 332 Ill 173, 163NE344 (absence of certificate of evidence).

763-54 See also 29F(2d)331.

763-55 73CalA95, 238P133; 83Colo 406, 266P211. See also TexCivA 274SW 655. [a] **Where ground for motion was stated in affidavit,** it must be assumed that court believed allegations to be true. 203Cal 504, 265P180.

763-58 213Ala153, 104S274; 198Cal 290, 244P1077; 78CalA293, 248P555; 93CalA252, 269P755; 322Mo 746, 18SW (2d)500; 78Mont97, 252P382; 219App Div181, 219NYS148; 227AppDiv422, 237 NYS436.

763-59 8F(2d)728; 75CalA323, 242P 887; 85Colo 346, 276P30; 27Hawaii381, 383 [citCJ]; 78Mont97, 252P382; Mont 292P909; 223AppDiv810, 227NYS609; 121 Or628, 257P16; 125 Or280, 266P627; 132 Or609, 286P144; Or 291P1009; 285 Pa177, 131A720; 290Pa303, 138A838; SC 150SE769; 135Wash675, 238P626.

764-60 69CalA325, 231P366; 87CalA 246, 262P78(3dcase); 102CalA516, 283 P143; 84Colo 225, 268P1021; 27Hawaii 381, 383 [citCJ]; 126Me202, 137A62; Mo

A 27SW(2d)61; 78Mont97, 252P382; 33NM295, 265P35; 215AppDiv23, 213 NYS58; 216AppDiv247, 214NYS713; 221AppDiv494, 224NYS644; 221AppDiv 497, 224NYS656; 223AppDiv810, 227 NYS609; 223AppDiv563, 229NYS378; 224AppDiv438, 231NYS306; 217AppDiv 204, 216NYS588; 218AppDiv495, 218 NYS529; 219AppDiv181, 219NYS148; 229AppDiv372, 242NYS11; 193NC831, 136SE722; 121 Or628, 257P16; 290Pa 288, 138A830; 290Pa303, 138A838; 136 SC337, 134SE385. [a] 198Cal 290, 244 P1077.

764–61 198Cal 290, 244P1077; 75CalA 323, 242P887; CalA 265P532; 90CalA 114, 265P517; CalA 285P1062(2dcase); CalA 291P896; 126Me202, 137A62; 78 Mont97, 252P382; 219AppDiv181, 219 NYS148; 227AppDiv140, 237NYS355; 190NC608, 130SE505; 190NC877, 130SE 610; 192NC597, 135SE610; 192NC804, 136SE113; 193NC831, 136SE722; 193 NC317, 136SE874; 193NC485, 137SE 430; 197NC628, 150SE184; 115 Or456, 239P98; 121 Or628, 257P16; 290Pa288, 138A830; 290Pa303, 138A838; 297Pa 454, 147A103; 299Pa25, 148A909; 136 SC337, 134SE385; 67Utah90, 245P977; 70Utah72, 257P1066.

764–62 Cal 290P33; 102CalA723, 283 P833; Ga 155SE7; 219AppDiv181, 219 NYS148; 193NC831, 136SE722; 196NC 134, 144SE833.

764–63 198Cal 290, 244P1077.

764–64 CalA 292P148.

764–65 7F(2d)468 (grounds of motion for nonsuit presumed sufficient where record is silent); 198Cal 290, 244P1077; 219AppDiv181, 219NYS148.

764–65½–New. , even though such evidence was erroneously admitted, 198Cal 290, 244P1077.

764–65¼–New. unless inherent improbability of evidence denies it all claim of belief; 78Mont97, 252P382.

764–66 198Cal 290, 244P1077; 75CalA 323, 242P887; 93CalA252, 269P755 (conflict disregarded); 102CalA744, 283P 850; CalA 285P1062(2dcase); 194NC 656, 140SE598. See also 127Me190, 142 A585.

764–67 121 Or628, 257P16.

764–68 98CalA358, 276P1052; 116 Or 237, 240P891; 121 Or628, 257P16; 157 SC174, 154SE118.

764–73 190NC603, 130SE507 (cannot assume plaintiff's further evidence would make out case).

764–74 85CalA475, 259P770.

764–75½–New. Judgment for defendant on the merits after refusal of nonsuit is presumed not to have resulted from the legal insufficiency of the evidence. 97CalA414, 275P500(2dcase).

764–76 124Kan754, 262P541; 151Md 154, 134A201; 151Md392, 135A166; Md 148A543; 307Mo 607, 271SW788; Mo 274SW692; 315Mo 254, 286SW16; Mo 20SW(2d)676; Mo 21SW(2d)873; Mo 31SW(2d)14; MoA 281SW456; MoA 282 SW89; MoA 289SW358; MoA 289SW 987; 221MoA898, 295SW1083; 222MoA 187, 297SW100; 220MoA1142, 297SW 430; 221MoA152, 297SW727; 222MoA 1089, 11SW(2d)1057; MoA 15SW(2d) 387; MoA 16SW(2d)716; MoA 21SW (2d)195; MoA 21SW(2d)899; MoA 23 SW(2d)1100; MoA 30SW(2d)1044; Mo A 31SW(2d)575; MoA 31SW(2d)113; 33 NM295, 265P35; 189NC303, 127SE3; TexCivA 296SW627. See also Mo 8SW (2d)937; MoA 24SW(2d)708. [a] (1) 315Mo 254, 286SW16; 221MoA530, 289 SW30(2dcase). (2) 315Mo 883, 289SW 540; MoA 293SW508; MoA 294SW103; 220MoA1142, 297SW430. (4) Most favorable evidence for adverse party will be taken as true, where lower court overrules party's demurrer to evidence. 310 Mo 642, 276SW60. [b] Incompetent evidence disregarded.–121 Okl 172, 249P 270.

764–77 MoA 10SW(2d)673. [a] Defendant's evidence must be disregarded, unless it strengthens plaintiff's evidence. 222MoA180, 296SW817; MoA 296SW 838.

764–80 125Kan515, 264P1073; 128Kan 187, 276P820; 130Kan731, 288P572; Md 150A728; 307Mo 607, 271SW788; 308Mo 48, 271SW983 (where jury return verdict for plaintiff); 315Mo 254, 286SW16; 315Mo 1181, 289SW913; 316 Mo 278, 290SW429; 316Mo 835, 293SW 379; 317Mo 782, 297SW20; 318Mo 263, 300SW268; 318Mo 79, 18SW(2d)172; 320Mo 34, 8SW(2d)7; Mo 16SW(2d)100; 322Mo 11, 16SW(2d)212; Mo 20SW(2d) 34; Mo 20SW(2d)906; Mo 28SW(2d) 84(2dcase); Mo 30SW(2d)37; MoA 256 SW124; 218MoA645, 266SW496; 219 MoA19, 267SW964; MoA 274SW864; 220MoA429, 276SW96; MoA 279SW177; MoA 279SW241; MoA 281SW126; MoA 281SW456; MoA 282SW89; MoA 282 SW490; 221MoA600, 283SW65; MoA 284SW180; MoA 284SW521; MoA 284 SW824; 220MoA38, 285SW757; MoA 286SW738; MoA 286SW745; MoA 288 SW988; MoA 288SW992; MoA 289SW 345; MoA 295SW524; 222MoA226, 297 SW112; 222MoA296, 297SW163; 221 MoA152, 297SW727; MoA 18W(2d)852; 222MoA1220, 5SW(2d)101; MoA 7SW (2d)438; MoA 7SW(2d)448; 222MoA 1044, 9SW(2d)676; 222MoA1089, 11SW (2d)1057; 222MoA1098, 14SW(2d)31; MoA 14SW(2d)701; MoA 15SW(2d)387; MoA 15SW(2d)876 (where defendant did not stand on demurrer but offered evidence); MoA 19SW(2d)510; MoA 21SW (2d)907; MoA 25SW(2d)508; MoA 27 SW(2d)61; MoA 28SW(2d)372; MoA 30 SW(2d)647, MoA 30SW(2d)1044; MoA 31SW(2d)105; MoA 31SW(2d) 580; 146 Va366, 131SE815; 151Va614, 144SE713. See also 316Mo 916, 292SW1039. [a] 315Mo883, 289SW540; 219MoA19, 267 SW964; MoA 284SW815; 221MoA837, 286SW125; 221MoA616, 287SW806; 221MoA936, 288SW950; MoA 291SW 159; MoA 293SW428; MoA 7SW(2d) 716; MoA 7SW(2d)749; MoA 23SW(2d) 193; 146Va366, 131SE815.

764–80½–New. Demurrant's evidence can be considered only so far as it aids other party. 220MoA9, 285SW123.

764–81 152Md216, 136A609; 114 Okl 220, 245P879; 146Va366, 131SE815; 148Va60, 138SE503, 54ALR1485.

765–82 MoA 11SW(2d)1060; 116 Okl 99, 243P506.

765–82½–New. Defendant's evidence will be disregarded unless it strengthens plaintiff's case. MoA 290SW649.

765–83 314Mo 288, 284SW482.

765–84½–New. Where adverse judgment was rendered on both pleadings and evidence, plaintiffs were not entitled to reversal on a mere showing that the cause of action might have been stated in the petition. TexCivA 8SW (2d)723.

765–84⅓–New. Demurrer to evidence assumed to be properly overruled where demurrer not pressed nor error assigned on refusal thereof. Mo 31SW(2d)50.

765–85 13F(2d)758; 14F(2d)90; 43F (2d)45; 213Ala494, 106S150; 215Ala 166, 110S13; 169Ark948, 277SW27; 171 Ark614, 285SW361; 171Ark1176, 287 SW166; 172Ark262, 287SW766; 175 Ark223, 298SW1016; 176Ark1204, 3SW (2d)979; 204Cal 509, 269P437, 59ALR 435; 202 Iowa849, 211NW500; 205 Iowa1074, 215NW740; 206 Iowa151, 218 NW293; 208 Iowa24, 221NW197; 125 Kan515, 264P1073; 152Md367, 136A829; 152Md508, 137A293; 153Md666, 139A 554; 261Mass336, 158NE768; 235Mich 318, 209NW44, 45ALR1477; 238Mich 181, 212NW960; 238Mich658, 214NW 138; Mich 233NW327; Mich 233NW 425; 141Miss677, 105S478; 145Miss 809, 110S836; 146Miss498, 112S390; 148Miss157, 114S260; 157Miss439, 128 S327; Miss 130S489; 220MoA720, 293 SW468; 220MoA869, 295SW129; MoA 21SW(2d)211; Nebr 231NW141; 82NH 350, 134A574; 33NM295, 265P35; 212 AppDiv699, 209NYS569; 218AppDiv 216, 218NYS1; 219AppDiv181, 219NYS 148; 222AppDiv326, 225NYS709; 117 Or652, 244P665, 245P317; 121 Or628, 257 P16; 124 Or384, 262P252; 285Pa 378, 132A178, 43ALR862; 285Pa502, 132A707; 287Pa370, 135A127; 291Pa 451, 140A141; 48RI 296, 137A776, 53 ALR365; 49RI 32, 139A652, 62ALR 967; 134SC185, 132SE47; 136SC337, 134SE385; 52SD30, 261NW586; Tex CommnA 285SW275; TexCivA 282SW 334; TexCivA 285SW922; TexCivA 286 SW1113; TexCivA 288SW236; Tex CivA 289SW164; TexCivA 289SW712; TexCivA 290SW552; TexCivA 295SW 646; TexCivA 18SW(2d)343; TexCivA 28SW(2d)839; TexCivA 32SW(2d)502; 70Utah29, 257P1050; 99Vt425, 134A 599; 99Vt446, 134A603. See also Tex CivA 9SW(2d)185.

765–85½–New. But the decision below will be restrained where it is based upon sufficient uncontroverted evidence. Tex CivA 273SW657.

765–86 2F(2d)913; 13F(2d)758;. 23F (2d)777; 24F(2d)347; 39F(2d)840; 172 Ark932, 290SW966; 180Ark505, 21SW (2d)851; 107Conn393, 140A760, 56ALR 1127; 201 Iowa1302, 207NW602; 203 Iowa705, 213NW388; 204 Iowa1385, 213 NW403, 53ALR964; 205 Iowa1074, 215 NW740; 235Ky529, 31SW(2d)899; 236 Mich90, 210NW222; 236Mich136, 210 NW314; 238Mich181, 212NW960; 238 Mich658, 214NW138; 145Miss809, 110S 836; 146Miss498, 112S390; 148Miss157, 114S260; 118Nebr472, 225NW230; Nebr 229NW337; Nebr 231NW141; 218App Div216, 218NYS1; 219AppDiv181, 219 NYS148; 129 Okl 32, 263P440; Tex CommnA 285SW275; TexCivA 275SW 617 (disregarding conflicts and contradictions); TexCivA 282SW334; Tex CivA 286SW529; TexCivA 289SW164; TexCivA 290SW552; TexCivA 291SW 597; TexCivA 25SW(2d)212; 70Utah29, 257P1050; Wash 290P874. [a] 261 Mass336, 158NE768 (probative force); TexCivA 282SW334.

765–87 33F(2d)89 (court must read evidence in light of what jury reasonably might have found if they believed defendant's affirmative evidence); 43F (2d)63; 33Ariz101, 261P969, 57ALR107; 172Ark137, 287SW740; 178Ark230, 10 SW(2d)873; 233Mich400, 206NW309; 146Miss498, 112S390; 218AppDiv654, 219NYS331; 224AppDiv492, 231NYS 417; 226AppDiv343, 234NYS357; 290Pa 283, 138A834; 49RI 191, 141A461; Tex CommnA 29SW(2d)982; TexCivA 273 SW650; TexCivA 289SW164; TexCivA 293SW350; TexCivA 48W(2d)1046. [a] Thus all evidence admitted or which should have been admitted, and inferences therefrom, favorable to defendant, must be accepted as true. 284 Pa3. 130A256.

765–88 13F(2d)758; 14F(2d)93; 17F (2d)930; 18F(2d)279; 25F(2d)247; 25 F(2d)563; 30F(2d)20; 36F(2d)886; 37 F(2d)668; 38F(2d)1; 43F(2d)286; Ariz 283P273; 172Ark494, 289SW465; 172 Ark932, 290SW966; 173Ark112, 292SW 111; 173Ark633, 293SW36; 174Ark1000, 298SW347; 176Ark766, 4SW(2d)17; 176 Ark958, 4SW(2d)923; 178Ark1200, 12 SW(2d)777(1stcase); 82CalA503, 255P 868; 109Conn158, 145A884; 160Ga550, 128SE751 (all evidence in favor of plaintiff must be taken as true); 243 Ill A 251; 200 Iowa678, 205NW462; 201 Iowa 1302, 207NW602; 202 Iowa100, 209NW 427; 202 Iowa109, 209NW440, 46ALR 1447; 203 Iowa705, 213NW388; 204 Iowa1385, 213NW403, 53ALR964; 205 Iowa1074, 215NW740; 205 Iowa929, 218 NW912; 206 Iowa292, 220NW322; 208 Iowa117, 224NW579; Iowa 227NW333; 217Ky612, 290SW493; 225Ky645, 9SW (2d)993; 228Ky771, 15SW(2d)1001; 254 Mass180, 150NE9; 255Mass273, 151NE 305, 45ALR788; 261Mass336, 158NE 768; 265Mass176, 163NE752; 238Mich 181, 212NW960; 238Mich361, 213NW 168; 238Mich658, 214NW138; 241Mich 57, 216NW403; 242Mich287, 218NW 774; 246Mich408, 224NW333; 249Mich 440, 229NW488; 140Miss479, 106S81; 141Miss881, 106S110; 145Miss18, 110S 841; 148Miss157, 114S260; 221MoA773, 287SW885; MoA 11SW(2d)67; MoA 27 SW(2d)61; MoA 31SW(2d)267; 212App Div699, 209NYS569; 131Misc333, 228 NYS281; 218AppDiv216, 218NYS1; 219 AppDiv181, 219NYS148; 225AppDiv 380, 233NYS249; 228AppDiv569, 240 NYS225; 22 OhA379, 153NE877; 31 OhA446, 167NE482; 31 OhA470, 167 NE493; 132 Or500, 286P517; 292Pa 489, 141A300 (court must take plaintiff's statements as verity); 48RI 296, 137A776, 53ALR365; RI 145A14; 151 SC83, 148SE703; 52SD30, 216NW586; 52SD43, 216NW601; SD 230NW754; TexCommnA 285SW275; TexCivA 282

SW334; TexCivA 286SW529; TexCivA 290SW552; TexCivA 293SW349; Tex CivA 2SW(2d)288; TexCivA 4SW(2d) 159; TexCivA 5SW(2d)582; TexCivA 18SW(2d)1093; 66Utah539, 244P906; 70Utah29, 257P1050; 99Vt39, 130A578; 99Vt280, 131A788; 37Wyo 275, 260P 1089; Wyo 285P781. [b] Court must take evidence in its entirety to determine whether certain facts were shown. Iowa 227NW833.

765-90 13F(2d)758; 205Cal 188, 270P 364 (denials not considered); TexCivA 292SW599.

765-90½-New. . or inconsistent. 202 Iowa100, 209NW427.

765-91 213Ala494, 106S150; 172Ark 671, 290SW953; Iowa 218NW492; 152 Md367, 136A829; 238Mich457, 213NW 705; 241Mich383, 217NW329, 57ALR 262; 148Miss157, 114S260; 157Miss 252, 128S111(2dcase); 220MoA720, 293 SW468; 220MoA869, 295SW129; MoA 10SW(2d)331; 193NC262, 136SE723; 121 Or628, 257P16; 285Pa202, 131A731 (binding instructions); 285Pa502, 132 A707; 143SC223, 141SE375; TexCivA 289SW712.

765-92 236Mich136, 210NW314; 296 Pa1, 145A587 (binding instructions); 296Pa10, 145A591; 157SC174, 154SE 118; 70Utah145, 258P565.

765-93 25F(2d)366; 26F(2d)164; 213 Ala494, 106S150; 172Ark671, 290SW 953; 177Ark1146, 9SW(2d)580; 82 Colo 509, 261P864, 55ALR1285; Iowa 228NW886; 152Md367, 136A829; 231 Mich466, 204NW131; 231Mich546, 204 NW752; 234Mich140, 207NW825; 238 Mich457, 213NW705; 241Mich383, 217 NW329, 57ALR262; 241Mich624, 217 NW898; 148Miss157, 114S260; 148 Miss659, 114S730; Miss 130S499; Mo 287SW434; 220MoA273, 286SW153; MoA 288SW941; MoA 289SW970; MoA 293SW451 (and all reasonable references of fact drawn); 220MoA869, 295SW 129; 220MoA1112, 296SW257; MoA 296 SW437; MoA 20SW(2d)601; NJSup 145A476; 193NC262, 136SE723; 26 OhA 79, 159NE843; 116 Or237, 240P891; 121 Or628, 257P16; 125 Or300, 266P910; Or 291P1009; 285Pa502, 132A707; 286 Pa477, 133A817, 47ALR699; 287Pa370, 135A127; 289Pa560, 137A731; 294Pa 282, 144A75; 136SC337, 134SE385; 148 SC69, 145SE712; TexCivA 289SW712; TexCivA 292SW599; TexCivA 6SW(2d) 387; TexCivA 21SW(2d)352; 100Vt455, 138A739; Vt 147A352; Vt 147A694.

766-94 286Pa477, 133A817, 47ALR699.

766-96 CalA 292P979; 241NY318, 150 NE129, 43ALR522; 216AppDiv647, 216 NYS102; 226AppDiv195, 234NYS449; 219AppDiv181, 219NYS148. See also 241NY318, 150NE129.

766-97 216AppDiv647, 216NYS102; 40 Wyo 274, 276P532.

766-98 TexCivA 14SW(2d)360 (absence of statement of facts). See also Tex CivA 13SW(2d)918.

766-3 116 Or536, 241P990.

766-3½-New. Reviewing court may not assume that such motion was made where the record offers no evidence thereof. 212Ky655, 279SW1069.

766-3½-New. It is not assumed that an erroneous direction of verdict for certain defendants influenced the jury to find for other defendants who had a different defense, on the issue between plaintiffs and them alone. 141Miss253, 106S99.

766-3¼-New. In personal injury case where the verdict was directed for defendant on the ground of plaintiff's contributory negligence, the appellate court will assume that defendant was guilty of negligence. 238Mich658, 214NW138.

766-3½-New. Court directing verdict is presumed not to have considered incompetent evidence, although admitted. Iowa 229NW750.

766-3⅓-New. In reviewing order directing verdict, appellate court will apply rules analogous to those governing review of order granting nonsuit. CalA 292P979.

766-4 216AppDiv818, 215NYS624.

766-5 216AppDiv818, 215NYS624.

766-5½-New. Where a verdict was directed for defendant at close of the opening statements for both sides, all inferences will be drawn in support of petition and plaintiff's statement. 32F (2d)74.

766-7 8F(2d)16 (issue presumed submitted where not contended on appeal that evidence was insufficient to support verdict); 22F(2d)360; 168Ark1167, 272 SW656; 177Ark1194, 291SW441; 203 Cal 758, 265P805; 86CalA595, 261P481; 81Colo 134, 254P153; 85Colo 340, 275 P935; 104Conn334, 132A901; 104Conn 419, 133A209; 104Conn508, 133A686; 106Conn329, 138A220; 163Ga694, 137 SE17; 45 Ida64, 260P699; 253 IllA176; 211Ky390, 277SW466 (to authorize verdict); 218Ky246, 291SW37; 125Me411, 134A506, 47ALR1156; 125Me460, 134 A628; 128Me50, 145A400, 67ALR239; 253Mass424, 149NE159; 258Mass264, 154NE579; 261Mass142, 158NE326; 261Mass120, 158NE349; Mass 164NE 486; 232Mich399, 205NW124 (presumption indulged that counsel assumed to have knowledge not disclosed by proofs, where court instructed that jury should not be influenced by expressions of counsel as to what had been proved or disproved); 241Mich343, 216NW927; MoA 4SW(2d)1104; MoA 30SW(2d) 646; 103NJL118, 134A738; NJSup 130 A639; 192NC829, 135SE870; Or 293 P412; Wash 290P828; 39Wyo 423, 273 P687. See also 190NC854, 129SE190. [c] Evidence will be given most favorable view in passing on sufficiency of evidence to support instruction. Mo 30 SW(2d)37.

767-8 125Me411, 134A506, 47ALR 1156; 261Mass142, 158NE326.

767-9 31F(2d)98; 81Colo 134, 254P 153; DC 37F(2d)824; 163Ga694, 137SE 17; 124Me381, 130A130; 125Me386, 134 A198; Me 134A506, 47ALR1156; 128 Me79, 145A744; Me 151A200; 258Mass 446, 155NE432; 261Mass142, 158NE 326; 264Mass249, 162NE347; Mass 169 NE411; NC 154SE626; 144SC89, 142SE 39.

767-10 NC 154SE626; 116Tex522, 295 SW920.

767-11 CalA 288P694; 81Colo 134, 254 P153; 104Conn419, 133A209; 120Kan 689, 244P1059; MoA 275SW549.

767-12 68CalA326, 229P348; MoA 284 SW174; 99Vt499, 134A700.

767-13 [a] (10) That trial judge presented charge to attorneys for inspection and gave them time to object. Tex CivA 278SW1107.

767-16 8F(2d)16 (not presumed to refuse proper charges).

768-18½-New. In determining an objection that an instruction was not supported by any substantial evidence, the evidence will be construed most favorably to respondent. Mo 5SW(2d)395.

768-21 83CalA201, 256P608 (presumption as to request).

768-22 70CalA652, 234P107; 71CalA 105, 234P857; 85CalA140, 259P63; 90 CalA764, 266P606; 91CalA440, 267P 158.

768-24 36GaA626, 137SE856.

768-29½-New. The appellate court must view a charge as a jury untrained in law would view it. TexCommnA 300 SW41.

768-29⅓-New. It is presumed that improper submission of an issue caused an adverse finding which would justify a verdict against plaintiff. 151Wash279, 275P713.

768-29¼-New. No presumption of judge's knowledge of counsel's position with respect to instructions arises from counsel's position on the same subject in a former trial. 86Colo 414, 282P253.

768-30 168Ark77, 269SW41; 169Ark 88, 272SW853; 175Ark209, 298SW1035; 178Ark235, 10SW(2d)362; 180Ark532, 21SW(2d)969; 181Ark1146, 27SW(2d) 995; Cal 292P970; 79CalA380, 249P 536; 104Conn419, 133A209; 104Conn 508, 133A686; 105Conn631, 136A479; 45 Ida64, 260P699; 201 Iowa1083, 205 NW972; 126Me413, 139A231; 126Me 583, 140A374; 253Mass424, 149NE159; 253Mass594, 149NE630; 255Mass599, 152NE87; Mass 168NE792; 192NC144, 134SE407; 193NC274, 136SE869; 193 NC805, 138SE173; 194NC798, 139SE 701; 195NC795, 143SE833; 196NC178, 145SE11; 196NC196, 145SE17; 198NC 150, 150SE884; 198NC475, 152SE169; NC 155SE253(2dcase); NC 155SE865 (1stcase); 116 Or536, 241P990; 103 WVa248, 137SE898. [a] (1) Mo 292 SW58.

769-32 79CalA380, 249P536; 85 IndA 476, 152NE183, 154NE390; 207 Iowa 872, 224NW32; 83Mont194, 271P444. [b] Where all the instructions given and refused have not been set out in abstract, appellate court must presume that jury was correctly instructed upon issues. 168Ark1168, 272SW660.

769-34 79CalA380, 249P536; 93CalA 370, 269P710; Mass 169NE787.

769-37 291Pa531, 140A522.

769-38 79CalA380, 249P536; 100CalA 249, 279P1061 (court may also presume error not prejudicial); 85 IndA476, 152 NE183, 154NE390.

769-40 174Ark1180, 298SW330; 36GaA 626, 137SE856.

769-41 262Mass91, 159NE526; 103 WVa248, 137SE898, 899 [citCJ].

769-42 217Ala511, 116S681; 47 Ida430, 276P306; 85 IndA221, 152NE864; 121 Kan55, 245P1012; 121Kan822, 246P497; 154Md550, 140A844; 153Miss494, 121S 114; 193NC274, 136SE869.

770-43 21AlaA547, 109S894; 240Mich 228, 215NW321.

770-46 165Ga534, 141SE653; TexCivA 20SW(2d)1070(3dcase).

770-47 217Ala511, 116S681; 85 IndA 221, 151NE361; 84 IndA542, 149NE 361; TexCivA 8SW(2d)552.

770-49½-New. An ambiguous charge is interpreted to support judgment. Tex CommnA 13SW(2d)74.

771-50 MoA 3SW(2d)1050.

771-55 Or 289P369; 136SC21, 134SE 234; TexCivA 274SW263.

771-57½-New. It is presumed that the court gave the jury plaintiff's declaration to read while deliberating. 234 IllA 359.

771-57¼-New. Where there is doubt as to whether improper conduct of jury happened after the verdict was agreed upon, the reviewing court is required to treat it as occurring during the deliberation of the jury. TexCommnA 277 SW106.

771-58 14F(2d)940; 35F(2d)350; 213 Ala286, 104S643 (presumption cumulative where finding supported by verdicts on two trials); 181Ark1, 24SW(2d)878; 181Ark299, 25SW(2d)760; Ark 32SW (2d)174; Cal 289P623; 78CalA289, 248 P281; CalA 287P540; CalA 288P81; CalA 290P497; CalA 292P987; 81Colo 50, 253P397; 93Fla387, 112S264; 319 Ill 344, 150NE276; Ill 173NE270; 240 IllA165; 83 IndA478, 149NE103; 121 Kan749, 250P292; 124Kan705, 261P 831; 11LaA532, 123S906 (verdict approved by trial court is presumed correct); 148Md345, 129A506; Mass 165 NE424; 246Mich689, 225NW580; 170 Minn399, 212NW605; Miss 129S599 (knowledge of jury that if they found for plaintiff on issue of liability they must find for him on issue of damages); Mo 3SW(2d)244; 216MoA683, 273SW746; 220MoA38, 285SW757; 220 MoA847, 294SW745; MoA 25SW(2d) 138; MoA 29SW(2d)221; 51ND784, 200 NW909; 121 Or604, 256P641; 129 Or 44, 276P244; 283Pa331, 129A109; 284 Pa260, 131A181 (findings presumed true); 284Pa267, 131A260 (facts will be assumed as found by jury); 284Pa 277, 131A241; 286Pa359, 133A566; 292 Pa106, 140A622; 299Pa109, 149A159; 299Pa163, 149A186; 299Pa236, 149A 190; 45SC196, 143SE31; 49SD506, 207 NW478; 51SD85, 212NW493; 52SD359, 217NW635; TexCommnA 271SW79; TexCivA 272SW536 (that jury was composed of men of ordinary intelligence); TexCivA 289SW189; TexCivA 295SW 675; TexCivA 16SW(2d)160; TexCivA 25SW(2d)969; TexCivA 27SW(2d)911; TexCivA 29SW(2d)883; 142Wash65, 252P155; 148Wash429, 269P813. [a] Thus plaintiff's story is accepted as true on appeal from judgment in his favor. 285Pa116, 131A665.

771-59 240 IllA165; 87 IndA110, 166 NE672(2dcase); 87 IndA6, 159NE767; 130Kan707, 288P582.

771-60 148Md345, 129A506.

771-61 TexCommnA 13SW(2d)74.

771-62½-New. Where the court did not submit, nor the defendant request, submission of issue whether assured gave

written notice of accident, it is presumed that the defense rested on error in refusing peremptory instruction. TexCivA 291SW674.

771–62½–New. In an equity case the presumption that the chancellor knew that the jury's answers were advisory is not overcome by the record showing that the court approves and adopts the answers of the jury. MoA 300SW1004.

771–62¼–New. Counsel is presumed to have had form of verdict submitted to him before the jury's retirement. 86 Colo 350, 281P746.

771–71 83CalA655, 257P447; MoA 9SW (2d)103; MoA 208SW(2d)587; Tex CommnA 15SW(2d)602; TexCivA 148W (2d)72.

771–72 204 Iowa135, 214NW564; 253 Mass99, 148NE463; TexCivA 274SW 263; TexCivA 78W(2d)902.

771–74 95CalA228, 272P810.

771–75 203Cal 390, 264P237; 80CalA 590, 252P739; CalA 286P729; 85GaA 376, 133SE288; 206 Iowa70, 220NW17 (jury presumed of average intelligence, but not that they are expert in diction); 210Ky129, 275SW380; 315Mo 535, 286 SW53; 191NC297, 131SE735; 192NC 638, 135SE614; 121 Or165, 254P817; TexCivA 281SW306. See also TexCivA 29SW(2d)911. [a] 81CalA86, 253P178.

771–76 171Ark594, 285SW365; 197Cal 148, 239P1061; 208Cal 364, 281P380; Cal 290P14; 85CalA332, 259P470; 86 CalA595, 261P481; 87CalA684, 263P 353; 90CalA764, 266P606; CalA 284P 1056; CalA 291P681; CalA 293P78; 41 Ida697, 243P647; 41 Ida723, 243P 366; 240 IllA165; 85 IndA332, 154NE 44; Ind 170NE81; 89 IndA403, 164NE 300; Iowa 230NW302; Iowa 232NW 500; 221Ky148, 298SW385; 224Ky419, 6SW(2d)491; 145Md32, 125A439; Mass 165NE15; Mass 167NE235; Mass 172 NE224; Mass 172NE349; 241Mich361, 217NW32; 309Mo 560, 274SW703; 315 Mo 535, 286SW53; 321Mo 140, 9SW(2d) 929; Mo 19SW(2d)679; Mo 30SW(2d) 1018; MoA 5SW(2d)644; MoA 19SW (2d)522; MoA 22SW(2d)185; MoA 28 SW(2d)1044; 75Mont493, 244P298; 48 Nev78, 227P1009; 83NH143, 139A367 (presumption not conclusive); NH 146 A865; NJSup 137A428; 222AppDiv481, 226NYS673; 194NC583, 140SE193; 114 Oh560, 151NE667; 30 OhA143, 164NE 429(2dcase); 27 OhA133, 160NE881; 127 Okl 128, 260P16; 121 Or165, 254P 817; 121 Or604, 256P641; 123 Or193, 261P422; 93PaSuper178; 49RI 449, 144 A158; 116Tex253, 288SW425; Tex CommnA 298SW526; TexCivA 274SW 263; TexCivA 277SW722; TexCivA 291SW674; TexCivA 294SW977; Tex CivA 297SW238; TexCivA 297SW896; TexCivA 10SW(2d)739; Utah 265P751; 137Wash190, 242P13; Wis 229NW860. [a] (1) 85Mont492, 279P374, 66ALR 587. (5) Jury assumed to have considered all elements stated in instruction in determining damages. 114 Oh560, 151NE667. [b] **Where instructions are conflicting,** it is not presumed that jury disregarded erroneous instruction. CalA 288P89. [c] **Limitations of rule.–Mass** 172NE224.

772–77 218Ky535, 291SW785; MoA 277SW581; 221MoA715, 285SW524; 220MoA355, 286SW718; MoA 9SW(2d) 685; MoA 26SW(2d)851; TexCivA 287 SW87; 63Utah495, 227P791.

772–78 See also TexCivA 78W(2d)661.

772–79 198 Ind376, 153NE761. [a] **On contradictory instructions,** court will not presume that jury followed correct rule to exclusion of incorrect one. 35 OhA164, 171NE862.

772–81 MoA 284SW857; MoA 287SW 850. See also MoA 277SW969.

772–82 73CalA748, 239P373; 36GaA 428, 136SE830; 213Ky750, 281SW993; 315Mo 535, 286SW53; MoA 24SW(2d) 208.

772–83 MoA 284SW857; MoA 287SW 850.

772–86 244Mich319, 221NW318; 141 Miss655, 107S195 (measure of damages).

772–88 213Ala635, 105S897; 208Cal 105, 280P522; Cal 289P623; 97CalA 264, 275P533; 98CalA65, 276P597; 105 Conn640, 136A681; 170Minn399, 212 NW605; 156Miss326, 126S14; Mo 297SW 353; TexCivA 286SW343; TexCivA 291 SW667; 142Wash65, 252P155. [a] **Judgment on general verdict, finding defendant guilty as charged in declaration charging negligence and willful and wanton injury,** must be reversed where latter charge is not supported. 253 IllA 589.

772–89 9F(2d)538; 33F(2d)675; 38F (2d)557; Ark 18SW(2d)54; 176Ark525, 3SW(2d)320; 177Ark807, 8SW(2d)436; 178Ark845, 12SW(2d)779; 195Cal655, 235P438; 203Cal26, 263P240; 75CalA 732, 243P443; 76CalA293, 244P923; 85CalA332, 259P470; 86CalA627, 261P 334; 94CalA66, 270P719; 98CalA759, 277P894; 102CalA615, 283P358; CalA 284P719; CalA 289P190; CalA 290P 108 (on conflicting evidence); 84Colo 511, 272P6; 42 Ida458, 246P304; 88 IndA117, 163NE527; Me 151A558; 252 Mass314, 147NE863; Mo 292SW58; 241 NY327, 150NE132, 43ALR880; 252NY 360, 169NE610; 35 OhA471, 172NE559; 287Pa295, 135A206; 288Pa180, 135A 735; 300Pa1, 149A644; 50RI 496, 149A 612; SD 226NW731; Tex 286SW276; TexCivA 295SW679; TexCivA 48W(2d) 232; TexCivA 25SW(2d)969; Utah 282 P1040; Sask [1926] 4DomLR1017. [a] (6) In libel action verdict for plaintiff for even nominal damages is conclusive that defendant failed to justify publication by establishing its truth. 241NY 327, 150NE132. [c] **Where issue was submitted under conflicting evidence,** appellate court must assume that jury's verdict for plaintiff meant rejection of defendant's evidence on the issue. 28 OhA245, 162NE748.

773–91 75Mont493, 244P298.

773–92 [a] **Where evidence preponderates** against plaintiff on issue of warning, it is assumed that verdict was based on other negligence alleged. 157 Miss266, 126SS27.

773–93 142Wash65, 252P155.

773–94 251 IllA299 (presumed that jury based verdict on count supported by evidence). [a] **Where verdict for plaintiff on complaint containing several counts is general as to damages** and evidence is insufficient to sustain one count, court cannot segregate damages as between various counts. 82CalA605, 255P864.

773–95 260Mass193, 156NE863.

773–96½–New. Where the verdict of the jury may be on one of two possible theories, one of which would be error, and the court cannot determine on which theory the verdict is based, a new trial must be ordered. 215AppDiv 549, 214NYS268.

773–98 CalA 289P190 (negligence).

773–99½–New. It will be presumed that the jury found in favor of defendant not referred to in the verdict. 118 Nebr705, 226NW318(2dcase).

773–1 Ark 32SW(2d)316.

773–2 38F(2d)972; 39F(2d)445; 33 Ariz536, 266P1; 35Ariz302, 277P68; Ariz 286P820; 169Ark23, 273SW15; 169Ark920, 277SW39; 170Ark1194, 279 SW354; 170Ark576, 280SW363; 170 Ark809, 281SW366; 171Ark34, 283SW 1; 172Ark323, 288SW399; 172Ark729, 290SW942; 172Ark1053, 292SW120; 174Ark6, 294SW416; 174Ark274, 294 SW999; 174Ark258, 295SW27; 174Ark 1180, 297SW1020; 175Ark944, 1SW (2d)88; 175Ark1148, 2SW(2d)1; 178 Ark513, 11SW(2d)1; 179Ark631, 17SW (2d)889; 179Ark690, 18SW(2d)321; 179ArkS12, 18SW(2d)340; 179Ark1015, 19SW(2d)1102; 180Ark840, 23SW(2d) 263; 180Ark980, 23SW(2d)972; 180 Ark1067, 23SW(2d)980; 181Ark626, 26 SW(2d)1107; 181Ark892, 28SW(2d) 703; Ark 32SW(2d)310; Ark 32SW (2d)316; Ark 32SW(2d)438; Ark 32 SW(2d)440; 195Cal655, 235P438; 196 Cal355, 237P1079; 197Cal148, 239P 1061; Cal 286P1001; Cal 290P14; Cal 291P173; Cal 292P451; 72CalA57, 236 P319; 82CalA141, 255P215; 83CalA 655, 257P447; 88CalA678, 263P1025; 91CalA700, 267P563; 91CalA752, 267P 731 (conflicting evidence); 93CalA1, 268P1061 (party's testimony accepted as true); 97CalA87, 275P456; 100CalA 441, 280P197; CalA 288P1099; CalA 291P903; 109Conn706, 145A504; 109 Conn500, 147A16 (where lower court set aside jury's verdict as not supported by evidence); 335 Ill 164, 166NE530; 207 Iowa1278, 224NW815; Iowa 227 NW915; 209Ky355, 272SW899; 261 Mass207, 158NE668; Mass 167NE 663; 244Mich137, 221NW273; 244Mich 511, 221NW637; 248Mich399, 227NW 694; 250Mich491, 230NW909; Mich 233NW345; 173Minn616, 216NW783; 313Mo 42, 281SW737; 317Mo 1096, 298 SW795; Mo 298SW(2d)76; MoA 291SW 187; 220MoA847, 294SW745; 220MoA 869, 295SW129; MoA 48W(2d)847; MoA 58W(2d)689; MoA 10SW(2d)75; MoA 29SW(2d)221; 79Mont158, 255P 5; 85Mont78, 277P622, 64ALR772; 85 Mont492, 279P374, 66ALR587; NH 149 A872; 226AppDiv205, 234NYS560; 57 ND785, 224NW202; 113 Or544, 233P 540; 284Pa209, 130A432; 284Pa267, 131A260; 284Pa277, 131A241; 285Pa 399, 132A194; 286Pa359, 133A566; 288 Pa140, 135A903; 289Pa13, 136A856; 289Pa560, 137A731; 290Pa365, 138A 852; 291Pa526, 140A541; 292Pa200, 140A877; 293Pa9, 141A623; 294Pa315, 144A139; 296Pa568, 146A153; 297Pa 199, 146A551; 297Pa233, 146A598; 299 Pa380, 149A662; 300Pa55, 150A153; 86PaSuper57N; 134SC135, 132SE828; 155SC531, 152SE717; 156SC158, 153SE 119; 51SD85, 212NW493; 51SD500, 215NW529; SD 225NW223; Tex CommnA 280SW740; TexCommnA 298 SW554; TexCommnA 6SW(2d)86; Tex CommnA 12SW(2d)1002; TexCommnA 15SW(2d)562; TexCivA 281SW232; TexCivA 281SW297; TexCivA 285SW 693; TexCivA 286SW633; TexCivA 287 SW91; TexCivA 289SW189; TexCivA 291SW343; TexCivA 293SW184; Tex CivA 299SW676; TexCivA 1SW(2d) 649; TexCivA 3SW(2d)539; TexCivA 10SW(2d)243; TexCivA 19SW(2d)94; TexCivA 22SW(2d)157; TexCivA 27SW (2d)354 (absent timely objections); TexCivA 27SW(2d)371; TexCivA 27SW (2d)844; TexCivA 28SW(2d)853; Tex CivA 28SW(2d)877; Vt 130A759; 145 Va681, 134SE692; 148Va812, 139SE 500; 152Va910, 143SE720 (on motion to set aside verdict); Va 152SE539; 145Wash56, 258P1027; 147Wash419, 266P169; 151Wash86, 274P1050 (supreme court must accept facts as testified to on behalf of plaintiff on appeal from judgment for plaintiff); 100WVa 679, 131SE563; 102WVa320, 135SE185. See also 226Ky179, 10SW(2d)846; SC 155SE438; TexCivA 12SW(2d)1050; 151Va590, 144SE642. [b] 83CalA655, 257P447; 292Pa537, 141A496. [c] **Evidence tending to support verdict** must be assumed to have been accepted as true by jury. 177Ark807, 8SW(2d) 436. [d] **In conflict of testimony,** it is presumed that jury disbelieved witnesses whose testimony conflicted with verdict, believing those supporting it. 40 F(2d)858.

773–5 21AlaA547, 109S894; 174Ark 144, 294SW389; 71CalA683, 236P174 (burden on appellant to show otherwise); 80CalA122, 251P657; 97Fla591, 121S793(2dcase); 247 IllA295; 120Kan 712, 244P840; 121KanS22, 246P497; 227Ky836, 14SW(2d)157; 86Mont314, 283P427; 9PortoRico 311; TexCivA 28SSW1095; 148Wash136, 268P141; 36 Wyo 436, 256P665. [a] **In absence of motion for new trial,** appellate court will presume that evidence was legally sufficient to support verdict. 180Ark 1018, 24SW(2d)328.

774–6 213Ala306, 104S765 (failure of bill to state it contains all or substance of all evidence); 214Ala279, 107S751; 174Ark144, 294SW389; MoA 285SW 120; 36Wyo 436, 256P665.

774–7 TexCivA 28SSW1095; TexCivA 21SW(2d)1109; TexCivA 22SW(2d) 311; TexCivA 23SW(2d)860. But see TexCivA 14SW(2d)360.

774–8 [a] **Conclusive presumption.–**180 Ark1084, 24SW(2d)336.

774–9½–New. The appellate court must assume that the trial court accepted the testimony supporting the verdict as true. 31Ariz84, 250P564.

774–9¼–New. It will not be presumed that the jury gave undue weight to competent evidence, although such evidence appears of doubtful credibility. 81Colo 121, 253P1066.

774–10 29Ariz300, 241P35; 41 Ida697,

243P647; 155Miss893, 125S552; Tex CivA 291SW590.

774–11 MoA 26SW(2d)838.

774–15 169Ark938, 277S718; TexCivA 27SW(2d)928.

774–16 TexCommnA 29SW(2d)1052; TexCivA 275SW200; TexCivA 29SW (2d)507. See also 117Tex242, 1SW(2d) 1084; TexCommnA 29SW(2d)1024.

774–17 TexCivA 275SW214; TexCivA 8SW(2d)217.

774–19 319 Ill 344, 150NE276; 127Kan 34, 272P155. [a] **Findings against appellant** on unsubmitted issue cannot be presumed where not supported by evidence. TexCivA 300SW123.

774–20 319 Ill 344, 150NE276; 121Kan 822, 246P497; 127Kan741, 275P164.

774–21 87 IndA6, 159NE767.

774–21½–New. Where certain special issues were unanswered, the court, on appeal, will not assume that the jurors would have given answers contradictory of answers made to other issues. TexCivA 19SW(2d)821.

774–22 TexCommnA 271SW79; TexCommnA 276SW211; TexCommnA 299 SW857; TexCommnA 5SW(2d)494; 118 Tex124, 12SW(2d)106; TexCommnA 13 SW(2d)74; TexCommnA 23SW(2d)308; TexCivA 273SW697; TexCivA 274SW 298 (where issues were not submitted and no requests for submission were made); TexCivA 275SW90 (where there is evidence to support finding on special issue submitted to jury, it is presumed that court found thereon in such manner as to support its judgment where party waived objection to defective form of special issue submitted); TexCivA 275SW200; TexCivA 275SW 397; TexCivA 275SW481; TexCivA 276 SW779; TexCivA 278SW462; TexCivA 278SW485; TexCivA 279SW563; Tex CivA 280SW869; TexCivA 281SW632 (in absence of request for finding of fact or conclusion of law); TexCivA 281SW646 (issue not requested to be submitted); TexCivA 283SW180; Tex CivA 284SW705; TexCivA 287SW81; TexCivA 288SW1095; TexCivA 289SW 111; TexCivA 289SW189; TexCivA 290 SW858; TexCivA 291SW337; TexCivA 293SW333; TexCivA 293SW664; Tex CivA 294 SW625 (evidence insufficient to warrant presumption that court made finding on issue not requested); Tex CivA 294SW633 (in absence of request for submission of issue); TexCivA 2 SW(2d)980; TexCivA 4SW(2d)581; Tex CivA 5SW(2d)783 (where case was submitted on special issues relating to one ground of relief only, there is no presumption that judgment is supported by court's findings on another ground); TexCivA 6SW(2d)202; TexCivA 6SW (2d)403; TexCivA 8SW(2d)527; Tex CivA 9SW(2d)458; TexCivA 10SW(2d) 388; TexCivA 10SW(2d)763; TexCivA 11SW(2d)549; TexCivA 12SW(2d)633; TexCivA 12SW(2d)655; TexCivA 15SW (2d)36; TexCivA 15SW(2d)77; TexCivA 16SW(2d)321; TexCivA 16SW(2d)363; TexCivA 17SW(2d)1102; TexCivA 19 SW(2d)207 (issue not submitted on submission of special issues); TexCivA 22 SW(2d)680; TexCivA 23SW(2d)811; TexCivA 25SW(2d)881; TexCivA 26SW (2d)1095; TexCivA 27SW(2d)616; Tex CivA 27SW(2d)928; TexCivA 31SW(2d) 465; Wis 233NW76. See also TexCivA 279SW484; TexCivA 15SW(2d)150. But see TexCommnA 13SW(2d)59; Tex CommnA 13SW(2d)78; TexCommnA 15 SW(2d)234; TexCivA 294SW625; Tex CivA 11SW(2d)594; TexCivA 22SW (2d)508. [b] TexCommnA 5SW(2d) 494.

775–23 TexCivA 288SW1095; TexCivA 10SW263.

775–24 TexCivA 10SW(2d)132.

775–24½–New. Such statute does not authorize a presumption that the trial court made a finding which, without respect to the findings made by the jury on issue submitted, would support the judgment. TexCivA 281SW587.

775–24⅓–New. Questions not requested to be submitted deemed determined adversely to appellant. TexCivA 274SW 298.

775–24¼–New. Where exception to an amendment alleging illegality was sustained and no issue tendered upon it, there is a presumption of waiver by parties and court. TexCivA 271SW145.

775–24½–New. Failure to tender issue essential to relief prayed and not submitted by court will be treated as waiver and abandonment of such ground of recovery, and no presumption indulged that trial court determined issue in favor of judgment issued. TexCommnA 1SW (2d)591; TexCivA 271SW188.

775–24⅙–New. In determining whether the evidence raises a defensive issue which should have been submittd to the jury, only evidence favorable to defendant's contention will be considered and all evidence to the contrary will be disregarded. TexCivA 274SW349.

775–24⅐–New. Where evidence warranted submission of special issue, but there was no such submission nor request therefor, it was presumed under statute that the trial court found on such issue favorably to appellee and in support of judgment. TexCivA 278SW 341.

775–24⅛–New. Where pleadings raise an issue which was not submitted and there is sufficient evidence, it is presumed under statute that the trial court found issue in appellee's favor. Tex CivA 278SW341.

775–24⅛–New. Presumption indulged in providing that there is evidence to support facts so presumed. TexCivA 278SW485.

775–24⅒–New. Facts to support judgment will be presumed, provided testimony is sufficient to support and warrant such finding. TexCivA 279SW484; TexCivA 279SW563.

775–24⅑–New. Where meaning of interpolation in jury finding is problematical it will be resolved in support of verdict. TexCivA 279SW493 (in absence of explanation).

775–24⅓–New. Where the trial court refused to submit a special issue as to the amount of salvage in an action on a fire insurance policy a presumption of total loss to support the judgment is precluded. TexCommnA 299SW895.

775–24⅓–New. The reviewing court will presume that the court determined issues it was permitted to pass on in favor of the prevailing party. TexCivA 299SW928.

775–24¼–New. Where special issues are neither requested nor submitted the appellate court will not presume that they were found in favor of appellee. TexCivA 28W(2d)352.

775–24⅕–New. The reviewing court cannot presume in support of judgment that the trial court found issues of waiver and estoppel in plaintiff's favor where such issues were not submitted to the jury. TexCivA 4SW(2d)988.

775–24⅙–New. When a case is submitted on special issues the jury are not presumed to know what facts are essential to entitle plaintiff to recover. Tex CommnA 9SW(2d)1104(2dcase).

775–24⅐–New. Where an issue was not submitted to the jury, and the record on appeal contained no statement of facts the appellate court must assume that the issue was not raised by the testimony. TexCivA 20SW(2d)1070(3d case).

775–24⅛–New. In absence of contrary showing, it will be presumed that issues not submitted to jury were excluded for lack of evidence. Minn 230NW472.

775–24⅑–New. The reviewing court's finding of evidence to support an unsubmitted issue must be based on the record before it. TexCivA 21SW(2d) 13.

775–24⅒–New. An unsubmitted and unrequested issue will be deemed determined against defendant if relating to correlative and incidental matter. TexCivA 20SW(2d)803.

775–24½–New. Appellate court will not imply that difference in value of land with and without improvements is same as value of improvements, in absence of evidence. TexCivA 27SW(2d)862.

775–26 23F(2d)825; 28F(2d)596; 29F (2d)982; 41F(2d)914; 213Ala592, 105S 679; 214Ala327, 107S816; 215Ala256, 110S273; 215Ala511, 110S804; 216Ala 298, 113S32; 217Ala431, 116S163 (rule applies to both general and special findings); 218Ala484, 119S17; 218Ala659, 119S643; 23AlaA105, 121S456 (doubt resolved in favor of finding); Ala 128S 796; 21AlaA569, 110S63; 23AlaA246, 123S265 (every doubt must be resolved favorably to trial court's decision); 28 Ariz505, 238P330; Ariz 288P1027; 169 Ark1211, 278SW16; 171Ark817, 286SW 971; 173Ark1021, 293SW1009; 195Cal 95, 231P739; 197Cal1, 239P332; 198 Cal 46, 243P657; 200Cal192, 252P602; 200Cal 396, 253P134; 205Cal 245, 270P 447; 206Cal 389, 274P536(2dcase); Cal 292P123; 67CalA468, 227P676 (not overthrown by inferences); 68CalA198, 228P734; 68CalA383, 229P710; 71CalA 77, 234P839; 74CalA637, 241P576; 76 CalA264, 244P608; 78CalA282, 248P 286; 79CalA390, 249P524; 79CalA482, 250P183; 81CalA387, 253P752 (liberally construed to support judgment); 84CalA775, 258P652; 86CalA382, 260P 898; 87CalA224, 261P1064; 88CalA393, 263P558; 90CalA387, 266P294 (on conflicting evidence); 93CalA358, 269P 544; 95CalA793, 273P628; CalA 281P 1043; 101CalA532, 281P1104; CalA 284 P971; CalA 290P62 (on conflicting evidence); CalA 290P623; CalA 292P 523; CalA 292P996; CalA 292P1000; 81Colo 202, 254P764; 82Colo 582, 262 P87; 92Fla503, 109S433; 92Fla974, 110S527; 328 Ill 193, 159NE220; 241 IllA189; 198 Ind456, 152NE806; Ind 170NE857; 122Kan563, 253P426; 123 Kan608, 256P995; 217Ky301, 289SW 238; 232Ky415, 23SW(2d)596; 234Ky 597, 28SW(2d)760; 1LaA154; 3LaA13; 4LaA193; 5LaA193; 128Me324, 147A 415; 253Mass60, 148NE217; 258Mass 103, 154NE570; Mass 172NE209; 154 Miss691, 123S861; 310Mo 313, 275SW 940; MoA 17SW(2d)597; 71Mont165, 227P811; 76Mont175, 246P773; Nebr 231NW517; NJSup 133A778; 190NC 860, 129SE585; 195NC56, 141SE535; NC 154SE76; 49ND156, 190NW1010; 50ND478, 196NW554; 50ND723, 197 NW866; 51ND336, 199NW869, 36ALR 465; 52ND49, 201NW696; 52ND273, 202NW852; 52ND648, 204NW178; 53 ND749, 210NW158; 54ND891, 211NW 984; 55ND112, 212NW518; 55ND321, 213NW488; 55ND348, 213NW733; 57 ND123, 220NW621; 57ND224, 221NW 1; 139 Okl35, 280P1075; 285Pa305, 132A368; 299Pa211, 149A168 (under statute, where jury disagreed); 49SD 130, 206NW691; 50SD69, 208NW404; SD 231NW943; Tex 293SW899; Tex CivA 273SW900 (judgment will not be disturbed if it can be sustained on any theory); TexCivA 283SW345; TexCivA 286SW593; TexCivA 289SW155; Tex CivA 289SW188; TexCivA 14SW(2d) 109 (in absence of statement of facts); TexCivA 27SW(2d)890; Vt 147A270; 142Va550, 129SE368; 154Wash693, 283 P444(2dcase); Wash 290P850. But see 38F(2d)220; 220Ala338, 124S898; Wis 233NW76. [a] 68CalA218, 228P715. [b] 82Colo 582, 262P87. [d] **In passing on sufficiency of evidence to sustain findings**, evidence is viewed in light most favorable thereto, all evidence favorable to opposite contention being rejected and only evidence tending to sustain findings being considered. Tex CivA 278SW347. [e] **Presumption is that, if additional findings had been made**, they would be adverse to appellant. CalA 287P151. [f] **Findings adverse to appellants on issues upon which appellants offered no evidence** are presumed correct. CalA 291P227.

775–26½–New. whether made on plaintiff's evidence or on evidence of both parties, 215AppDiv617, 213NYS468.

775–27 31Ariz60, 250P363; 31Ariz478, 254P485; 71CalA77, 234P839; 92Fla 503, 109S433; TexCivA 283SW345; Tex CivA 286SW593; TexCivA 289SW155; TexCivA 29SW(2d)434; 142Va550, 129 SE368. [a] **Finding, misplaced among conclusions of law**, may be treated as finding of fact where appeal is on judgment roll alone. 99CalA341, 278P496.

775–28 31Ariz478, 254P485; 122Kan 563, 253P426; 1LaA536; TexCivA 297 SW578; TexCivA 25SW(2d)224.

775–29 221MoA568, 282SW1033; 49Nev 342, 246P688; 32NM124, 252P478; 119 OhSt256, 163NE493; TexCivA 286SW 593; TexCivA 289SW188.

775–30½–New. There is no presumption that court sitting without jury was prejudiced by suggestions of fact in ques-

tions or offers of evidence to which objections were sustained. 72CalA757, 238P143.

775-31 216Ala510, 113S525; 216Ala 519, 113S535.

775-32 TexCivA 21SW(2d)713. But see Mass 169NE142.

775-33½-New. Presumption concerning findings of trial court does not obtain as in law actions. 51ND219, 199 NW948.

775-33¼-New. Findings of trial court, although not in conformity with its written opinion introduced in evidence on motion for new trial, must on appeal be taken as embodying conclusion of trial court on all questions of fact submitted for decision. 68CalA432, 229P 968.

775-35½-New. Finding amounting to conclusion of law on undisputed facts carries no presumption of fact on appeal. 199 Iowa773, 202NW884.

775-35½-New. When a fact contended for is not found, the presumption is that evidence was not satisfactory. 97CalA 414, 275P500(2dcase).

775-35¼-New. All controverted questions of fact must be resolved in favor of judgment, where judgment refused recovery for conversion. TexCivA 21 SW(2d)341. [a] Construction of findings.-101CalA694, 282P429.

775-42 TexCivA 295SW679; TexCivA 8SW(2d)217; TexCivA 8SW(2d)806; TexCivA 19SW(2d)153. See also Tex CivA 12SW(2d)242.

775-47 200Cal 50, 251P913; 77CalA306, 246P816; 78CalA536, 248P779; 79CalA 662, 251P814; 80CalA717, 252P786; Mass 168NE745; 315Mo 442, 286SW385. See also 80CalA520, 252P334.

776-48 76CalA635, 245P432; 79CalA 662, 251P814; 90CalA663, 266P568; 102CalA783, 283P840(2dcase); 87 IndA 220, 159NE28. See also 127Kan391, 273 P411.

776-49½-New. In the absence of contrary showing it will be presumed that a finding was based on the theory on which the case was tried, and that there was evidence offered in support thereof, notwithstanding the absence of an express allegation in the complaint. 49 Nev438, 248P887.

776-49½-New. Where a finding of the trial court is in accordance with evidence introduced, it will be presumed on an appeal on the judgment roll alone, in the absence of contrary showing, that the parties treated the complaint as sufficient to justify the admission of its evidence and that the evidence was admitted without objection. 76CalA635, 245P432.

776-49¼-New. Appellate court cannot assume that decree was based on particular issue where there were other issues in case. Mo 25SW(2d)84.

776-50 20F(2d)897; 36F(2d)625; 176 Ark1206, 3SW(2d)297; 206Cal 213, 273 P547; 208Cal 578, 283P67 (evidence inconsistent with finding will be presumed rejected); 74CalA231, 240P47; 74CalA 674, 241P900; 78CalA536, 248P779; 86CalA269, 260P952 (presumed on appeal from judgment for plaintiff that trial court believed plaintiff's testimony); 86CalA636, 261P324; CalA 266 P312 (including incompetent evidence received without objection); MoA 2SW (2d)159; 133SC1, 130SE57; Tex CommnA 10SW(2d)534(2dcase); Tex CivA 296SW678; TexCivA 28SW(2d) 259; Utah 284P997; Vt 151A642; 134 Wash1, 235P4; 144Wash668, 258P824. See also TexCivA 9SW(2d)394. [a] That controlling effect was given to matter not supporting judgment will not be presumed. TexCivA 22SW(2d)961.

776-51 74CalA674, 241P900; Mass 165 NE881; TexCivA 296SW678; TexCivA 15SW(2d)191; 99Vt65, 130A749.

776-51½-New. and that evidence admissible against only part of defendants was not considered in so far as it affected the others; 30Ariz45, 243P916, 44ALR754.

776-52 31Ariz478, 254P485.

776-54 49Nev326, 245P700.

776-55 218Ala219, 118S402; TexCivA 21SW(2d)701 (judgment rendered wholly on inadmissible testimony).

776-56 214Ala150, 107S94; 31Ariz147, 250P993; 31Ariz478, 254P485; 80CalA 752, 252P1071; 43 Ida654, 254P215; 321Mo 330, 11SW(2d)41; 49SD373, 206 NW576; TexCivA 275SW248.

776-57 215Ala424, 110S899; 22AlaA 518, 119S601(2dcase); 31Ariz147, 250 P993; 31Ariz235, 251P723; 31Ariz478, 254P485; 35Ariz69, 274P638; Ariz 285 P271; 176Ark328, 2SW(2d)1089, 59ALR 899 (especially where finding is expressly based thereon); 177Ark55, 5SW(2d) 742; 177Ark718, 9SW(2d)6; 76CalA207, 244P936; 92CalA161, 267P928; 100 CalA606, 280P711; 81Colo389, 255P 628; 87Colo 432, 288P890; 55AppDC 330, 5F(2d)753; 90Fla787, 108S211; 163Ga272, 136SE60; 169Ga139, 149SE 885; 43 Ida654, 254P215; 319 Ill 35, 149NE588; 319 Ill 372, 150NE330; 321 Ill 324, 151NE915; 328 Ill 273, 159NE 235; 334 Ill 233, 165NE624; Ill 172NE 736; 241 IllA189; 246 IllA100; 246 IllA 451; 246 IllA457; 252 IllA329; 202 Iowa1202, 211NW727; 204 Iowa1331, 217NW245 (where rulings on evidence were withheld and court certified, on subsequent ruling excluding it, that such evidence was not considered); Iowa 229NW199; 121Kan180, 246P976; 123Kan696, 256P799; 124Kan423, 260 P609; 129Kan453, 283P636; LaA 129 S431; 126Me254, 137A692; 319Mo 65, 3 SW(2d)712; MoA 277SW964; 71Mont 165, 227P811; 79Mont269, 256P373; 81Mont200, 263P433; 84Mont373, 275 P761; 50Nev234, 255P1014; 51ND336, 199NW869, 36ALR465; 55ND546, 214 NW857; OhA 168NE394; 124 Okl 193, 255P577; 132 Or684, 288P210; 16PortoRico 599; 49SD96, 206NW236; 49SD 373, 206NW576; 50SD69, 208NW404; 50SD208, 208NW985; 51SD554, 215NW 881; 53SD556, 221NW268; 54SD1, 222 NW297; SD 226NW339; SD 226NW 763; SD 229NW934; TexCommnA 12 SW(2d)114, 63ALR435; TexCommnA 27SW(2d)144(2dcase); TexCivA 273SW 974; TexCivA 277SW449 (admission not ground for reversal); TexCivA 278 SW492; TexCivA 282SW940; TexCivA 292SW942; TexCivA 296SW963; Tex CivA 3SW(2d)507; TexCivA 5SW(2d) 822; TexCivA 11SW(2d)214; TexCivA 12SW(2d)233; TexCivA 14SW(2d)300; TexCivA 25SW(2d)907(2dcase); Tex CivA 25SW(2d)911; TexCivA 29SW(2d) 434; 144Wash668, 258P824; 154Wash 83, 280P929; 155Wash624, 285P652; 195Wis203, 217NW416. But see 93CalA 775, 270P382; 206 Iowa1217, 220NW 333.

777-58 30Ariz234, 245P932; 81Colo 1, 252P886; TexCivA 22SW(2d)147; Vt 151A642. [a] Court will not presume lower court considered evidence not contained in statement of facts. TexCivA 292SW642.

777-59 TexCivA 271SW424.

777-59½-New. Presumed that court rejected testimony which was untrue and unworthy of belief. 67CalA507, 227P 943.

777-59½-New. It is assumed that the court disregarded a statement of a witness inconsistent with the judgment and accepted a different statement of the same witness with which the judgment could be reconciled. 100CalA658, 280P1008.

777-59¼-New. It will not be presumed that trial court gave undue weight to testimony of doubtful credibility. SD 230NW20.

777-59½-New. or that irreconcilability of testimony with other parts of testimony of same witness was not apparent to trial court. SD 230NW20.

777-60 26F(2d)19; 216Ala298, 113S 32; 197Cal 1, 239P332; 94CalA530, 271 P554; 97CalA414, 275P500(2dcase); 83 Colo 533, 266P713; 1LaAOrleans154; 83Mont214, 271P433; 83Mont265, 271P 612; 50ND478, 196NW554; 50ND723, 197NW866; 55ND348, 213NW733; 137 Okl 10, 278P265; 15PortoRico 216; 16 PortoRico 198; 47RI 215, 132A439; 143SC307, 141SE556; TexCivA 5SW (2d)777; 146Va475, 131SE827. See also CalA 291P681. [a] (1) TexCivA 293 SW690.

777-61 36F(2d)747; 30Ariz234, 245P 932; 31Ariz97, 250P763; 197Cal 674, 242P713; 199Cal 286, 249P188, 51ALR 1380; 71CalA448, 235P656 (on question of contributory negligence evidence taken as favorable to plaintiff); 80CalA 520, 252P334 (in absence of necessary finding, court will presume absence of evidence to support it); 87CalA151, 262 P51; 88CalA319, 263P305; 97CalA597, 275P994; 98CalA604, 277P538; 98CalA 796, 277P541; 99CalA182, 278P243; 99CalA462, 278P935; 102CalA117, 282 P421; CalA 283P859; CalA 287P133; CalA 288P819; CalA 291P681; CalA 292P549; CalA 293P91; CalA 293P 156; IndA 151NE622; 10LaA240, 120 S399(2dcase); 318Mo 865, 1SW(2d)94; MoA 13SW(2d)578 (appellate court must take plaintiff's testimony as true, and allow him all reasonable inferences to be drawn therefrom); 77Mont260, 250P 823; NJSup 146A685(1stcase); 51ND 863, 200NW1007; 52ND648, 204NW 178; 55ND348, 213NW733; 123 Okl 284, 253P75; 49SD373, 206NW576; Tex CommnA 280SW740; TexCivA 285SW 1096; TexCivA 288SW1095 (dictum); TexCivA 290SW791; 70Utah95, 258P 216; 100Vt351, 137A329, 331 [citCJ]; 108WVa529, 151SE846(1stcase). [a] (1) 35Ariz378, 278P370; 173Ark1182, 295SW725; 179Ark877, 18SW(2d)352; 195Cal404, 234P82; 73CalA627, 239P 71; CalA 260P816; 91CalA715, 267P 741; 92CalA171, 267P884; 100CalA177, 280P187; CalA 285P382; 83Colo 419, 266P201; Mo 24SW(2d)1042; MoA 291 SW190; Mont 286P133; TexCivA 286 SW593; TexCivA 292SW563; TexCivA 3SW(2d)466; TexCivA 6SW(2d)206; TexCivA 12SW(2d)269; TexCivA 13SW (2d)130; TexCivA 24SW(2d)1113; Tex CivA 27SW(2d)270; TexCivA 30SW(2d) 522; 37Wyo 448, 263P960 (uncontradicted evidence). (2) 220MoA396, 286 SW732; TexCivA 286SW593; TexCivA 6SW(2d)206. (3) 73CalA627, 239P71; 99CalA450, 278P892; TexCivA 286SW 593. (8) 73CalA627, 239P71. (9) Reviewing court, to test sufficiency of evidence, adopts view most favorable to the findings. 169Ark1211, 278SW16.

777-62 53ND749, 210NW158.

777-63 93CalA202, 269P682; 95CalA 352, 272P805; 98CalA548, 277P181; TexCivA 299SW695; TexCivA 15SW (2d)1085.

777-64 35OhA239, 172NE422.

777-65 35Ariz488, 279P253.

777-67 24F(2d)791; 92CalA292, 268P 449; 92CalA400, 268P457; CalA 269P 764; TexCivA 293SW677.

777-68½-New. Upon conflicting oral evidence presumptions are in favor of trial court's findings. 20AlaA598, 104S 444.

777-68⅓-New. Presumption is that court adopted that interpretation of testimony which is consistent with court's findings. 82NH139, 130A846.

777-69 15F(2d)312; Ala 127S540; 169 Ark509, 275SW753; 171Ark607, 286SW 811; Ark 32SW(2d)616; 201Cal 639, 258P373; 206Cal 13, 272P1044; 70CalA 432, 233P394; 71CalA611, 235P742; 80 CalA363, 252P656; 85CalA31, 258P 712; 92CalA86, 267P711; 94CalA498, 271P555; 102CalA783, 283P840(2d case); CalA 284P241; CalA 284P496; CalA 285P354; CalA 286P455; CalA 286P480 (findings taken as facts); 82 Colo 503, 261P874; 165Ga435, 141SE 65; 48 Ida203, 281P377; 332 Ill 173, 163NE344; 334 Ill 64, 165NE189; 202 Iowa259, 209NW273; 1LaA232; 254 Mass63, 149NE608; 263Mass143, 160NE 448; 165Minn268, 206NW396; 167Minn 384, 209NW22; 78Mont170, 253P313; 85Mont389, 278P836; 86Mont33, 281P 753; 51Nev315, 274P921; 53ND614, 207NW442; 57ND224, 221NW1; 115 Okl 283, 242P1044; 119 Or237, 243P548; 128 Or101, 269P221; 46Philippine370; 51SD157, 212NW872; 53SD646, 222NW 269; 157Tenn339, 8SW(2d)477; Tex CivA 280SW845; TexCivA 281SW315; TexCivA 281SW626; TexCivA 286SW 285; TexCivA 291SW350; TexCivA 5 SW(2d)160; TexCivA 9SW(2d)292; TexCivA 15SW(2d)42; TexCivA 16SW (2d)309; 66Utah612, 245P329; Utah 264P975; Utah 284P997; Utah 285P 1008; 146Va210, 135SE702; 141Wash

381, 250P107; 146Wash440, 263P602. See also 29F(2d)321 [certiorari den 279 US850, 498Ct347, 73Led993(2dcase)]. But see 117Or505, 243P89, 244P664. [a] (1) 194Cal139, 228P8; 204Cal424, 268P631; 208Cal550, 282P950; 70CalA432, 233P394; 79CalA598, 250P703; 79CalA662, 251P814; 82CalA564, 256P239; 88CalA157, 263P318; 88CalA385, 263P833; 88CalA554, 263P844; 90CalA41, 265P844; 90CalA213, 265P876; 89CalA612, 265P885; 90CalA463, 265P1035; 91CalA103, 267P172; CalA 286P463; CalA 286P740; CalA 287P149; CalA 287P366; 317Mo828, 297SW382; 147Wash14, 264P717; 154Wash485, 282P911. (3) Where no conflict in findings appears. CalA 287P151. [b] **It will be presumed that there was no evidence from which other facts could be found** where record contains findings of fact but no evidence. 300Pa485, 150A889.

777–70 21AlaA546, 109S893; 31Ariz1, 250P246; 206Cal789, 276P350; 87CalA744, 263P249; 97CalA64, 275P262; 97CalA492, 275P878; 255IllA288 (where exhibits were omitted from bill of exceptions); 211Ky450, 277SW464; 217Ky87, 288SW1045; 227Ky341, 138SW(2d)242; 2LaA637; 322Mo654, 158SW(2d)842; 32NM94, 251P387; 16Porto Rico406; 51SD157, 212NW872; Tex CivA 275SW716. But see 339Ill400, 171NE504.

777–70½–New. Where there is no evidence to support the decree, correctness of the court's findings will not be presumed. TexCivA 276SW936.

778–74 But see 73CalA692, 239P95.

778–74½–New. The court must resolve conflicting evidence to support the judgment and to consider the testimony by the prevailing party as correct. CalA 275P513.

778–75 16F(2d)106; 19F(2d)476; 29Ariz23, 239P290; 29Ariz398, 242P337; 31Ariz18, 250P252; 31Ariz33, 250P354, 49ALR1311; 31Ariz147, 250P993; 31Ariz224, 252P512; 32Ariz90, 255P991; 34Ariz472, 272P652; 35Ariz155, 275P5; 35Ariz378, 278P370; 35Ariz457, 281P38; Ariz 286P822; Ariz 288P1027; Ariz 289P512; Ariz 292P1025; 172Ark31, 287SW769; 174Ark1127, 298SW507; 175Ark659, 300SW390; 194Cal574, 229P327; 202Cal630, 262P732; 68CalA83, 228P717; 68CalA198, 228P734; 68CalA270, 228P1057; 69CalA711, 232P467; 70CalA132, 233P394; 70CalA458, 233P415; 73CalA539, 238P1081; 78CalA298, 248P270; 78CalA184, 248P280; 81CalA499, 253P1112 (facts of which court could take judicial notice); 82CalA249, 255P529; 91CalA715, 267P741 (liberal construction); 94CalA104, 270P742; CalA 280P1013; 101CalA532, 281P1104; 102CalA361, 282P1017; CalA 284P244; CalA 285P722; CalA 289P648; 80Colo536, 252P815; 86Colo191, 279P46(2d case); 43Ida93, 251P167; 129Kan475, 283P620; 252Mass547, 147NE847; 259Mass490, 156NE687; Mass 168NE535; Mass 170NE49; Mass 171NE828; 222MoA894, 6SW(2d)668; MoA 25SW(2d)1075; 73Mont339, 237P209; 74Mont54, 238P586; 80Mont20, 257P1041; 80Mont102, 258P246 (in mandamus); 84Mont68, 274P151; 85Mont256, 278P828; 86Mont169, 282P852; 49Nev342, 246P688; 51Nev40, 268P41; NH 147A747; NJ 138A701; NJSup 135A696; 212AppDiv622, 209NYS486; 197NC163, 147SE816; NC 155SE154; NC 155SE238(1st case); 127Okl55, 259P857; 128Okl142, 261P927; 117Or350, 243P91, 244P83; 287Pa280, 135A253; TexCommnA 265SW130; TexCommnA 288SW137; TexCommnA 290SW529; TexCommnA 292SW187; TexCommnA 22SW(2d)1061(2dcase); TexCommnA 24SW(2d)5; TexCommnA 27SW(2d)144(2dcase); TexCommnA 29SW(2d)963; TexCommnA 29SW(2d)1062; TexCivA 271SW196; TexCivA 271SW256; TexCivA 272SW346; TexCivA 273SW889; TexCivA 273SW900; TexCivA 277SW199; TexCivA 277SW449; TexCivA 279SW489; TexCivA 283SW584; TexCivA 283SW880; TexCivA 284SW621; TexCivA 286SW307; TexCivA 288SW842; TexCivA 289SW127; TexCivA 289SW188; TexCivA 290SW791; TexCivA 292SW591; TexCivA 293SW223; TexCivA 293SW313; TexCivA 293SW935; TexCivA 297SW584; TexCivA 297SW1067; TexCivA 299SW456; TexCivA 2SW(2d)888; TexCivA 3SW(2d)466; TexCivA 4SW(2d)185; TexCivA 4SW(2d)253; TexCivA 5SW(2d)160; TexCivA 5SW(2d)547; TexCivA 5SW(2d)550; TexCivA 6SW(2d)221; TexCivA 7SW(2d)1106; TexCivA 9SW(2d)753; TexCivA 10SW(2d)189; TexCivA 11SW(2d)214; TexCivA 12SW(2d)611; TexCivA 16SW(2d)408; TexCivA 16SW(2d)982; TexCivA 20SW(2d)366(2dcase); TexCivA 21SW(2d)744; TexCivA 22SW(2d)471; TexCivA 27SW(2d)871; TexCivA 27SW(2d)890; TexCivA 31SW(2d)192; TexCivA 31SW(2d)478; 100Vt51, 134A853; Vt 148A867; Vt 150A138; Wis 230NW31; 34Wyo304, 243P126. But see 98Vt429, 129A302. [a] (5) On appeal from judgment refusing mandamus to require payment of irrigation district warrants, it is presumed that court found for respondent on contention that district had directed him not to pay warrants and that payment thereof had been stopped. 80Mont102, 258P246. (6) Verdict for plaintiff in automobile collision requires assumption that plaintiff was not contributorily negligent. 174Ark130, 297SW856.

779–76 Ariz 283P287; 80Colo536, 252P815; 82Colo582, 262P87; 121Kan291, 246P1017; Mass 172NE250; 152Miss191, 119S173; 31NM611, 249P1014; 113Okl295, 241P812; 127Okl290, 260P743; 128Okl97, 261P209; 135Okl69, 273P1002 (presumption that court passed on merits of counterclaim and did not base decision on statute of limitations); TexCivA 293SW690; TexCivA 6SW(2d)206; TexCivA 9SW(2d)1044; TexCivA 27SW(2d)270; 40Wyo106, 275P115(2dcase). But see 205Iowa567, 218NW286.

779–77 73CalA700, 239P70; 83CalA399, 256P879; 88CalA319, 263P305; 89CalA86, 264P497; CalA 290P145; 99Vt17, 130A701.

779–77½–New. or where issue is not submitted. TexCivA 272SW830.

779–78 26F(2d)890; 75Mont304, 243P806; 80Mont102, 258P246; 81Mont271, 263P93; 81Mont587, 264P667; 197NC223, 148SE315; TexCivA 277SW449; TexCivA 289SW188; TexCivA 12SW(2d)618; TexCivA 15SW(2d)654(2dcase).

779–79 31Ariz224, 252P512; 75Mont304, 243P806; 81Mont113, 261P618; 81Mont271, 263P93; TexCivA 283SW584; TexCivA 284SW621; TexCivA 5SW(2d)547; TexCivA 8SW(2d)258.

779–80 TexCivA 279SW489; TexCivA 3SW(2d)920; TexCivA 18SW(2d)747; TexCivA 24SW(2d)465.

779–81 TexCivA 6SW(2d)224.

779–82 26F(2d)890; TexCivA 289SW127; TexCivA 16SW(2d)408.

779–83 197Cal1, 239P332; 68CalA270, 228P1057; 76CalA726, 245P800; 85CalA624, 260P347; 90CalA41, 265P844; 91CalA420, 267P356; 92CalA86, 267P711; 101CalA704, 282P425; 259Mass490, 156NE687. See also 206Cal13, 272P1044. [a] TexCivA 272SW346.

779–83½–New. Where testimony is conflicting, other findings necessary to support the judgment will be implied. 80Mont374, 260P734.

779–84 194Cal139, 228P8; 82CalA249, 255P529; Mass 172NE232; TexCivA 277SW449; TexCivA 285SW949; TexCivA 290SW307; TexCivA 12SW(2d)1094. [b] **Where neither of two controlling issues is submitted to jury,** neither will be resolved by presumption in support of judgment. TexCivA 284SW989.

779–85 68CalA270, 228P1057; TexCivA 280SW247; 99Vt353, 132A136; 34Wyo304, 243P126.

779–86 201Cal53, 255P508; TexCommnA 296SW495; 100Vt292, 137A336. See also 82Mont574, 268P787.

779–86½–New. or with statement of fact; TexCivA 277SW199.

779–87 TexCivA 271SW183.

779–88 NH 148A25.

779–88½–New. where the record shows that the trial court did not consider evidence on which proposed implied finding is based; TexCommnA 276SW209.

779–90 201Cal53, 255P508.

779–90½–New. Permissible inferences of fact will not be drawn from findings where the court, making finding, could have made such inference, but chose not to do so. 241NY455, 140NE514.

779–90¾–New. Where suit was brought to recover on notes securing vendor's lien, judgment could not be sustained on the theory of implied finding that plaintiff accepted conveyance as extinguishment of notes. TexCivA 279SW857.

779–90¼–New. The appellate court may not supply findings based on merely permissible inference of fact where the trial court which might have drawn such inference chose not to do so. 241NY455, 150NE514.

779–91 Ind 168NE185; Ind 168NE879.

779–93 Ind 168NE879.

779–94 83IndA631, 149NE460.

780–97 [a] **In California.**–86CalA382, 260P898.

780–97½–New. Findings are to be construed together, and, if possible, are to be reconciled so as to prevent conflict on material points. 68CalA218, 228P715.

780–97¾–New. In California the findings of fact are, if possible, to be reconciled so as to prevent any conflict upon material issues. 81CalA387, 253P752.

780–1 32F(2d)35; 37F(2d)310; 216Ala16, 112S318; 218Ala292, 118S342; 218Ala500, 119S232 (register); 218Ala593, 119S631; 169Ga852, 151SE807; 300Pa485, 150A889; SC 155SE736. But see 218Ala296, 118S513.

780–3 But see 218Ala268, 118S282.

780–9 214Ala243, 107S210. [a] **Register's finding as to reasonable attorneys' fee presumed correct.**–214Ala243, 107S210.

780–10 Ill 173NE281; 263Mass63, 160NE317; 193NC413, 137SE314; 39Okl ACR359.

780–11 18F(2d)269.

780–14 192NC714, 135SE862.

781–18½–New. There are no presumptions in favor of the finding where the witness was examined orally before the commissioner not in open court. 219Ala159, 121S534.

781–19 218MoA629, 267SW44.

781–20 See also TexCivA 279SW508.

781–21 Ariz 283P287.

781–21½–New. Conclusion of the judge from facts, is not subject to the presumption which obtains respecting finding of facts. 218Ala484, 119S17.

781–21¾–New. No presumption favors conclusion of trial court where testimony taken by deposition not in judge's presence. Ala 130S222.

781–23 21F(2d)298; 168Ark1167, 272SW656; 71CalA112, 234P869; 76CalA635, 245P432; 87CalA684, 263P353; 94CalA703, 271P789 (conflict in evidence is resolved in favor of plaintiff); 100CalA503, 280P394(2dcase) (where evidence is conflicting, doubts are resolved in favor of respondent, on appeal attacking verdict as excessive); CalA 289P940; 83IndA478, 149NE103; MoA 291SW145; MoA 296SW212 (unless so excessive as to show prejudice); MoA 296SW855; Nebr 233NW450; TexCivA 285SW655; TexCivA 300SW641; TexCivA 20SW(2d)405; 39Wyo423, 273P687.

781–24 21F(2d)298; 213Ala306, 104S765 (where bill of exceptions failed to state that it contained all, or substance of all, evidence); Ariz 286P371; Ariz 291P995; 71CalA683, 236P174 (assumed jury deemed evidence sufficient to justify its verdict); 88CalA1, 262P1100; 98CalA345, 276P1059(2dcase) (reasonable amount); 100CalA503, 280P394(2dcase) (where instruction did not separate general damage from special, court will presume that sum awarded was for injuries and not for special damages); CalA 288P834; CalA 291P597 (conflict resolved in favor of respondent); 227Ky423, 13SW(2d)254 (in accordance with instructions); Mass 173NE436; 308Mo77, 271SW806; Mo 28SW(2d)760; Mo 23SW(2d)1045; MoA 285SW183 (plaintiff's evidence taken as true); 80Mont480, 261P273; NJ 137A835; 195NC409, 142SE483; 45SC196, 143SE31; TexCivA 288SW476; TexCivA 300SW142. See also TexCivA 277SW722.

781-25 240 **Ill**A165; **Mo** 218SW(2d)873; **NJ** 143A552; 31**NM**457, 247P270; **Tex CivA** 297SW275; 102**WVa**40, 135SE262, 48**ALR**806.

781-27 21F(2d)298. [a] **Thus** it will not be presumed that improper item was included in general verdict where other items equaled or exceeded full amount of verdict. 99**Vt**387, 131A845.

781-28 **Iowa** 230NW336.

781-28½-New. or rendered judgment for an improper amount, **TexCommnA** 276SW660.

781-29½-New. It will not be presumed that the trial court sitting without a jury acted from passion, prejudice, or improper motive in assessing the damages in the absence of some showing to such effect. 71**CalA**112, 234P869.

782-31 **MoA** 14SW(2d)46.

782-33½-New. Where the verdict was for defendant in a personal injury case, and conceding defendant negligent, entitling plaintiff to some damage, it will be presumed that the jury regarded a proper amount nominal only. 71**CalA** 671, 236P200.

782-33½-New. The appellate court will not presume that an undivided interest in an oil leasehold is the proportionate share of the entire leasehold in the absence of findings. **TexCommnA** 291SW538.

782-33¼-New. The appellate court must assume that the trial court specifying items allowed intended to disallow omitted items. 84**CalA**567, 258P 453.

782-36 153**Md**674, 139A545.

782-37 **TexCivA** 275SW242.

782-39 27 **OhA**133, 160NE881.

782-39½-New. Where the amount is greater than sued for but less than the bill and interest prayed for, it will be presumed that the addition thereto was for interest. **TexCivA** 276SW752.

782-40 203**Cal** 26, 263P240.

782-43 213**Ala**306, 104S765; 214**Ala**20, 106S225; 218**Ala**623, 119S861(2dcase); 30**Ariz**485, 249P64; 203**Cal** 26, 263P 240; 94**CalA**463, 271P509; **CalA** 293P 165; 102**Conn**448, 129A41; 103**Conn** 683, 131A420 (motion to set aside verdict); 104**Conn**516, 133A591; 91**Fla**497, 107S641; 196 **Ind**379, 148NE410; 210 **Ky**600, 276SW515; **Mo** 288SW(2d)1035; **NJSup** 137A524; 285**Pa**202, 131A731; 293**Pa**548, 143A180; **TexCommnA** 271 SW75; **TexCivA** 293SW677; 99**Vt**434, 134A591; 152**Wash**457, 277P993. See also 95**CalA**205, 272P761.

782-43½-New. A stipulation waiving denial of a new trial by operation of law may be presumed. 104**Conn**28, 132 A401.

782-44 214**Ala**20, 106S225; 214**Ala**492, 108S388; 217**Ala**511, 116S681; **Ala** 127 S504; 89**CalA**351, 264P806 (new trial unless part of verdict is remitted); 103 **Conn**683, 131A420 (motion to set aside verdict); 104**Conn**516, 133A591; 108 **Conn**505, 143A888; 91**Fla**497, 107S641; 96**Fla**375, 118S211; 321**Mo** 105, 98**W (2d)**939; **Mo** 288SW(2d)1035 (acceptance of evidence most favorable to plaintiff); **MoA** 248SW(2d)649; 81**Mont**509, 264P396 (presumption that court determined that movant could prevail on new trial); **NH** 146A641; 57**ND**885, 224NW306; 131 **Okl** 138, 267P1049; 49 **SD**514, 207NW461; **TexCivA** 282SW 891. See also 80**CalA**776, 252P1072. [a] 219**MoA**543, 282SW480.

782-45 214**Ala**20, 106S225; 215**Ala**511, 110S804; 103**Conn**520, 131A501 (refusal to set aside verdict for plaintiff); 111 **Conn**219, 149A671 (respondent's evidence given favorable interpretation); 148**Miss**809, 114S866; 317**Mo** 1061, 297 SW968, 975, 54**ALR**644 [citCJ]; **Mo** 12 SW(2d)508(2dcase); **MoA** 7SW(2d) 412; 79**Mont**158, 255P5; 50**Nev**24, 249 P565; 285**Pa**202, 131A731; **Tex CommnA** 271SW75; **TexCommnA** 18W (2d)861; **TexCommnA** 16SW(2d)534; **TexCivA** 293SW869; **TexCivA** 18SW (2d)821. [a] **Thus** it must assume all evidence to have been properly admitted. 285**Pa**202, 131A731.

782-46 88 **IndA**265, 163NE626(1st case).

783-51 [a] **Granting motion sustained on appeal** where ground therefor may or may not have existed. 214**Ala**492, 108S388.

783-52 But see 82**CalA**586, 256P229.

783-54½-New. In the absence of a contrary showing it is presumed that the court did not violate the statute in granting a second new trial. 315**Mo** 318, 286SW100.

783-55 35**GaA**126, 132SE414.

783-61 **TexCivA** 18SW(2d)821.

783-62 **Nebr** 229NW894.

783-63 **TexCivA** 293SW869.

783-65 **Ark** 30SW(2d)223.

783-66 **SD** 226NW748.

784-72 100**CalA**725, 280P1028 (appellate court cannot assume that appellants did not have sufficient notice to present defense on motion for new trial, where no record was made).

784-76½-New. There is no presumption that the court acted on good cause in extending time to give notice of intention where the record affirmatively shows insufficient cause. 51**ND**257, 213 NW15.

784-77 83**Mont**452, 272P998; **Tex CommnA** 299SW852.

784-81 **RI** 145A169.

784-82 213**Ala**306, 104S765; 170**Ark** 573, 280SW22; **TexCommnA** 299SW 852. [a] **On appeal from denial of motion for new trial because of juror's misconduct,** appellate court must take most favorable view of evidence. **Tex CivA** 198SW(2d)373.

784-83 213**Ala**306, 104S765.

784-84 86 **IndA**300, 154NE876.

784-84½-New. Presumption in favor of a ruling of the trial court on a motion decided wholly on affidavits, although not as strong as where based on conflicting oral testimony, still obtains where the affidavits are conflicting. 79 **Mont**144, 255P20, 52**ALR**33.

784-88½-New. On motion for new trial for misconduct in weighing juror's testimony, he is esteemed man of ordinary intelligence and honesty. **TexCivA** 30 SW(2d)503.

784-90 32**Ariz**203, 256P1055; **CalA** 289 P897; **CalA** 292P186; 202 **Iowa**328, 208 NW374; **Mo** 29SW(2d)710; **MoA** 27SW (2d)1051; 78**Mont**273, 254P165; **Tex CivA** 188SW(2d)189. See also 147**Wash** 222, 265P472.

785-91 311**Mo** 147, 277SW927; 315**Mo** 507, 286SW38; 317**Mo** 614, 296SW739; 322**Mo** 1039, 17SW(2d)518. But see 300**Pa**405, 150A665; **TexCivA** 293SW 305.

785-91½-New. Where the record discloses ground or grounds on which motion was granted, appellant must show that the ground on which the motion was granted does not support it. 311 **Mo** 147, 277SW927.

785-91¾-New. In California, where a motion for a new trial was made on all legal grounds and the order granting it made no reference to the insufficiency of the evidence, the appellate court must presume that the trial court found the evidence sufficient. 100**CalA**266, 279P 1062.

785-92 30**Ariz**546, 249P549; 91**CalA** 731, 267P593; **CalA** 292P186; 46 **Ida** 652, 270P138; **Mo** 32SW(2d)578; **MoA** 248SW(2d)215; **MoA** 248SW(2d)641; **MoA** 278SW(2d)499; 78**Mont**273, 254P165. See also 153**Wash**31, 278P1074. But see 205**Cal** 651, 272P585; **CalA** 289P897. Contra 195**Cal** 185, 232P131.

785-93½-New. In California the statute lays the law as follows, "when a new trial is granted on the grounds of insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise on appeal from such order, it will be presumed that the order was not based on that ground." 198**Cal** 16, 243 P21.

785-93¼-New. **Minute order granting new trial** is conclusively presumed to set forth an action taken by the court and governs where it contains no specifications of insufficiency of evidence. 203 **Cal** 180, 263P198.

785-93¼-New. Under such statute the appellate court is precluded from considering the question whether or not the evidence is sufficient to support the verdict unless it is insufficient in law and without material conflict on any material point. 198**Cal** 16, 243P21.

785-93½-New. Such statute has no application to an appeal from an order granting a new trial made prior to the enactment of the statute and which did not specify the ground on which it was made, and which was made on a motion specifying insufficiency of the evidence as one of the grounds. 68**CalA**83, 228P 717.

785-95 **Cal** 290P441; 84**CalA**180, 257P 877 (under statute).

785-95½-New. In passing on a motion for a new trial for insufficiency of evidence, the court will accept as true all evidence tending to sustain findings and disregard all evidence to the contrary. 196 **Ind**520, 148NE474.

785-97 See also 68**CalA**358, 229P868.

785-3½-New. Where the record does not show the trial court's ground for granting new trial, the supreme court may assume it may have been granted because the verdict was against the weight of evidence where the court on appeal affirmed an order because the trial court may have sustained motion on such ground. 315**Mo** 318, 286SW 100.

785-3¼-New. Although the court will not reverse an order granting a new trial, which specifies insufficient ground, and other sufficient grounds complained of in motion exist, the burden is on respondent to show such other sufficient grounds. **MoA** 8SW(2d)110.

785-3¼-New. It must be presumed that the trial court did its duty in granting a new trial on the ground that the verdict was contrary to the weight of the evidence. 146**Wash**577, 263P959.

785-3½-New. The fact that the trial court denied a motion on condition of the party's consent to remit excess damages does not raise the presumption that the verdict was the product of passion and prejudice justifying a new trial. 87**CalA**736, 262P800.

785-3¾-New. Where the motion was in part addressed to the discretion of the court, the appellate court will presume that the ruling was a matter of discretion. 101**Vt**514, 144A856.

785-3½-New. The reviewing court cannot assume that the absence of defendant and counsel, when the case was called for trial, was due to circumstances which would suggest that the trial court, on its own motion, should order a new trial. 12**LaA**380, 124S532.

785-4 See also **TexCommnA** 14SW(2d) 1024.

785-7½-New. It is presumed that the court in overruling a motion made on a statutory ground of perjury was satisfied that the party had not perjured himself. **MoA** 282SW507.

785-9 **TexCivA** 11SW(2d)234.

785-10 172**Ark**1, 285SW359; 171**Ark** 607, 286SW811; 234**Ky**608, 28SW(2d) 955; 13**LaA**150, 127S427.

785-11 100**CalA**243, 279P828 (where nonsuit was granted and judgment was subsequently signed, appellate court will presume that trial judge intended such subsequently signed judgment to be judgment in case); **CalA** 286P481; 9 **LaA**220, 120S131 (properly filed and recorded); **Md** 150A787; 115 **Okl** 40, 241 P476; **TexCivA** 272SW562 (presumed parties were given notice of entry nunc pro tunc); **TexCivA** 289SW425; 68**Utah** 452, 250P1049; **Wyo** 288P1058. See also 38**Wyo** 511, 268P1025.

785-13½-New. In the absence of appeal, the court will presume that the prevailing party was satisfied with the decree given. 254**Mass**375, 150NE171.

785-13¼-New. Where the record contains no order staying the entry of judgment on a verdict so as to relieve the clerk of his duty to enter judgment within a stated time as required by statute, and does not show such entry, it may be assumed that the entry was stayed. 80**CalA**599, 251P341.

785-13¼-New. No inference may be indulged that judgment was on the merits. **CalA** 265P327.

785-13½-New. A reviewing court may not read into a judgment an assumed state of facts which would make the judgment a bar to a subsequent action. **CalA** 265P327.

785-14 200 **Iowa**760, 205NW350; 127 **Me**167, 142A377; 53**SD**441, 221NW51; **TexCommnA** 286SW185; 116**Tex**489, 294 SW844; **TexCivA** 26SW(2d)663. See also **Mo** 12SW(2d)508.

785-15 218Ky691, 291SW1054; TexCivA 290SW276.
786-18 71CalA649, 236P180.
786-22 71CalA649, 236P180.
786-23 71CalA77, 234P839.
786-24 [a] **On failure to request submission of issue,** supported by sufficient evidence, to jury, court is presumed to have found against appellant thereon. TexCivA 298SW177.
786-26 216Ala426, 113S289.
786-29 214Ala114, 106S604; 168Ark 760, 271SW710; 180Ark895, 23SW(2d) 251; 71CalA448, 235P656; 76CalA354, 244P1089; Fla 128S420 (recitals in decree); 184 IllA60; 184 IllA61; IndA 154 NE672; 217Ky87, 288SW1045; 159La46, 105S95; MoA 4SW(2d)875; 77Mont91, 250P11; 79Mont550, 257P1016; 81Mont 543, 264P675; Mont 290P252; 49Nev35, 234P690; ND 228NW420; 115 Okl 40, 241P476; TexCivA 286SW633; TexCivA 293SW677; TexCivA 10SW(2d)574; 149 Va755, 141SE759; 39Wyo 423, 273P687.
786-30 164La260, 113S840.
786-31 195Cal 404, 234P82; 199Cal 286, 249P188, 51ALR1380; 73CalA151, 238 P746; 83CalA317, 256P609; 90CalA 443, 265P971; CalA 288P716; CalA 288P1107; 77Mont91, 250P11; 79Mont 550, 257P1016; 78Mont415, 258P236; 81Mont543, 264P675; 285Pa378, 132 A178, 43ALR862; 285Pa502, 132A 707; 288Pa522, 136A785; 290Pa415, 139A127; 158Tenn323, 13SW(2d)318; TexCommnA 6SW(2d)86; TexCivA 280SW895; TexCivA 285SW1096; Tex CivA 286SW633; TexCivA 297SW339; 99Vt78, 130A589. [a] **Controverted evidence** must be resolved in favor of judgment. 101CalA436, 281P692.
786-32 TexCivA 297SW275.
786-34 232Mich112, 205NW142; 245 Mich88, 222NW155, 62ALR1528; 251 Mich110, 230NW912; ND 231NW854; 286Pa393, 133A632; 289Pa320, 137A 451; 290Pa43, 138A217; 291Pa35, 139 A586; 291Pa536, 140A503; 292Pa237, 140A903; 292Pa458, 141A263; 293Pa 355, 143A18; 296Pa222, 145A861; 154 Wash630, 283P194. See also 284Pa248, 131A283.
786-34½-New. , and where the only error alleged is in not entering judgment in defendant's favor non obstante veredicto all the evidence and inference therefrom favorable to plaintiff must be taken as true, and all unfavorable to him, if depending solely on testimony, must be rejected, 291Pa451, 140A141.
786-35 173Ark898, 294SW1; 71CalA 611, 235P742; 79CalA662, 251P814; 253 IllA311; 256 IllA459; 322Mo 654, 15 SW(2d)842; 82Mont497, 267P802; Mont 290P252; 51Nev32, 267P827; NJSup 142A756; 34NM161, 279P69; 119 Okl 216, 249P401; TexCivA 289SW714; Tex CivA 292SW561; TexCivA 292SW624; TexCivA 297SW573; TexCivA 1SW(2d) 425; TexCivA 1SW(2d)501; 148Wash 285, 268P866. [a] (2) 82Mont260, 266P 645.
787-36 71CalA611, 235P742; 329 Ill 253, 160NE552; 214Ky31, 282SW551. [a] 217Ky87, 288SW1045.
787-38 329 Ill 253, 160NE552.
787-41 10LaA30, 121S196(1stcase).
787-42½-New. A reviewing court will not assume that evidence existed beyond the scope of the allegations of the petition. 219Ala659, 123S207.
787-43½-New. There is no presumption of correctness of the decree in an equity suit as to part not based on evidence heard personally by the presiding judge. 218Ala637, 119S844(2dcase).
787-46 30Ariz234, 245P932; 33Ariz 288, 264P103; Ariz 284P353; 195Cal 354, 233P330; TexCivA 283SW345; Tex CivA 292SW259; TexCivA 293SW632; TexCivA 294SW988; TexCivA 10SW (2d)574; TexCivA 14SW(2d)109; Tex CivA 15SW(2d)120. [a] **In absence of statement of facts,** every reasonable presumption must be indulged consistent with pleadings to support judgment. TexCivA 297SW501.
787-47 68CalA218, 228P715; 68CalA 121, 228P740; 68CalA270, 228P1057; 70CalA98, 232P763; 70CalA245, 233P 381; 79CalA482, 250P183; 88CalA192, 263P325; 90CalA41, 265P844; 91CalA 333, 266P1009; 94CalA621, 271P786; 95CalA352, 272P805; 97CalA703, 276P 118; 41 Ida257, 239P522; 120Kan8, 242 P461; 30NM517, 239P865; 31NM457, 247P270; 32NM124, 252P478; 33NM 176, 262P931; 33Wyo 271, 238P284.
788-48 TexCivA 294SW988.
788-50 See also 77CalA287, 246P345.
788-50½-New. **Judgment, notwithstanding jury's findings,** will be inferred, warranted by evidence in absence of statement of facts, findings of fact, and conclusions of law. TexCivA 2SW(2d)873.
788-52 34Ariz380, 271P865; 172Ark 1, 285SW359; 1LaA310; 11LaA498, 124 S193; 73Mont180, 235P770 (all reasonable inferences in form or sufficiency of pleadings will be indulged).
788-52½-New. , and in favor of refusal to vacate the same. TexCivA 272SW507.
788-53 181Ark279, 25SW(2d)1050 (presumed that no answer to cross complaint was filed).
788-54 163La15, 111S475; 9LaA370, 120S533(1stcase); 1LaA641; 2LaA767; 3LaA469; 4LaA370; 11LaA42, 122S894 (1stcase); TexCivA 24SW(2d)805.
788-55 79CalA245, 233P381.
788-58½-New. Allegations in answer are conclusively presumed to be true. 89CalA75, 264P341.
788-63 256 IllA445.
789-67 199 Ind311, 157NE441.
789-68 219Ala208, 121S914 (presumption that default was set aside); 180Ark 46, 20SW(2d)317; 199Cal 699, 251P205; 98CalA638, 277P516; CalA 277P518; 101CalA561, 281P1101; CalA 285P895; MoA 282SW447; 82Mont434, 268P512; RI 136A244; TexCivA 293SW677; 69 Utah527, 256P792. But see 335 Ill 181, 166NE503. [c] 113 Okl 251, 241P138.
789-69 72CalA244, 236P962; 99CalA 222, 278P257(2dcase); 100CalA103, 279 P1074 (any uncertainty in finding is resolved against appellant from order denying motion to vacate); Colo 292P 599; 4LaA195; MoA 294SW1019; MoA 31SW(2d)241; 131 Or117, 282P111; TexCommnA 280SW554.
789-69½-New. It will be presumed that motion in arrest of judgment was properly granted. 149Md304, 131A450.
789-69⅓-New. It will be presumed that ruling opening judgment by confession was correct. 233 IllA515.
789-73 MoA 28SW(2d)418.
790-81½-New. It is assumed that the court gave the parties opportunity for hearing as to the order pursuant to the mandate of the appellate court. 29F(2d) 712.
790-81⅓-New. Where the form of motion to set aside a default judgment does not appear in the record, it is assumed that the motion covered all the relief granted by the court. 101CalA561, 281 P1101.
790-83 37F(2d)216; 75CalA732, 243P 443; 102CalA122, 282P522(1stcase); 134Misc9, 234NYS659; 148Va528, 139 SE317; 146Wash61, 261P785.
790-84 Ind 169NE529; 202 Iowa503, 210NW530; 147Wash490, 266P703; 150 Wash178, 272P511.
790-93½-New. It will be presumed that the order denying a motion to retax costs was made after judgment so as to be appealable rather than before judgment. 76CalA354, 244P1089.
790-93⅓-New. Failure to exact a cost bond from one substituted as party plaintiff does not avoid the substitution order, the assumption being that such party was solvent. 228Ky806, 16SW (2d)442.
791-95 170La212, 127S604 (presumption is that motion was made in open court); TexCivA 23SW(2d)757; 34Wyo 476, 245P298.
791-97 177Ark195, 5SW(2d)939. [a] **Evidence held insufficient to overcome presumption** that affidavit for appeal was filed as recited in judgment. 177 Ark195, 5SW(2d)939.
791-98 12LaA58, 125S167(1stcase); LaA 125S464(1stcase).
791-99 108Conn451, 143A525.
791-2½-New. that the record in chancery order book is an accurate transcript of original notice; 89Fla499, 105 S101.
791-3½-New. Where the record continued in the same form for seventy-four days, it will be presumed that the original notice bore the signature of counsel for appellant. 89Fla499, 105S101 (especially where there is affirmative evidence).
791-7 TexCivA 7SW(2d)627.
791-9 Mass 166NE857.
791-11 See also 284Pa593, 131A467.
791-15 101 Iowa514, 70NW761; Iowa 232NW133; 54SD329, 223NW210.
792-18 167La133, 118S864.
792-24½-New. that notice of appeal truthfully stated appellants' representative capacity; 43 Ida675, 256P529.
792-27½-New. It is presumed that no extension of time for appeal was asked, 31Ariz128, 250P885.
792-27⅓-New. or if asked that it was rightly refused. 31Ariz128, 250P885.
792-27¼-New. In the absence of a copy of a case-made it will be presumed that the findings of the trial judge that the case-made as tendered by plaintiff was incomplete and insufficient to justify attestation by trial judge, were correct. 129 Okl 21, 263P135.
792-28½-New. Where the record fails to show that notice of entry of judgment had been served which would start limitation of time for an appeal running, the action will be deemed to have been pending in the district court when the proceedings were had. 57ND14, 219NW 948.
792-31½-New. that the court would attempt to dispose of the case by successive final judgments each covering parts of the matters in controversy; 83Mont 391, 272P688.
792-32½-New. There is a presumption that the judge complied with the law in fixing the amount of the appeal bond. 159La793, 106S307.
792-32⅓-New. **Effect of failure to appeal.** There not being any appeal by certain defendant from judgment in conversion, it may be assumed that such defendant was guilty of conversion. 96 CalA133, 273P1109.
792-36½-New. Refusal to consider motion to dismiss bill of exceptions is presumed equivalent to denial of motion. 253Mass340, 148NE807.
792-37 32NM225, 252P997; TexCivA 299SW649. [b] 69CalA437, 231P598.
792-38 Ida 286Pa24(2dcase) (by judge of another district); 32NM225, 252P 997.
792-40 [a] **Order of court purporting to file bill of exception** construed. 101WVa 650, 133SE365, 46ALR799.
792-44½-New. A bill of exceptions not signed by unconcerned bystanders as required by statute is not presumed to have been presented and approved by the chancellor although on file at the time the chancellor filed his decree. 170Ark 839, 281SW384.
792-44⅓-New. Where there is no bill of exceptions or findings before the reviewing court, it will be presumed that evidence was sufficient to sustain judgment on issue of fact. 116 OhSt188, 156NE 119.
792-44¼-New. It is presumed that bill of exceptions was filed by party complaining in error proceedings. 34 OhA 499, 171NE357.
793-45 36GaA133, 135SE762.
793-46 184 IllA50.
793-47 But see 48Nev32, 226P902, 233 P842.
793-49 IndA 172NE783.
793-55 [a] (4) Under statute requiring judge to sign and then file bill it will be presumed he approved bill on or before date on which it was filed. TexCivA 286SW584.
793-61 See also 213Mass194, 99NE968; 265Mass358, 164NE82.
793-62½-New. , and that the court properly gave relief from default in not filing the bill in time. 71CalA773, 236P336.
793-64½-New. Where transcript of testimony is settled by the trial judge within the six-months period after default of appellant in giving notice of request for transcript, it will be presumed that relief from default was granted upon objection raised or that default was waived by failure of respondent to object. 79CalA756, 251P243.

793–64½–New. Where respondent certified to the correctness of the transcript of testimony filed after default in giving notice of request for the transcript, he is presumed to have waived default by failure to object in the trial court. 79 **CalA**756, 251P243.

793–65 23F(2d)253; 105**Conn**429, 135 A568; 111**Conn**27, 149A205; 111**Conn** 626, 151A168 (evidence certified will be assumed all revelant evidence given); **Mass** 172NE73; **MoA** 22SW(2d)61 (applicable in equity); **MoA** 29SW(2d)721; **NH** 151A452; **TexCivA** 284SW634. See also **LaA** 130S883.

794–66 **TexCivA** 284SW634.

794–69 34 **OhA**499, 171NE357; 18BC 35, 9**DomLR**564, 23**WestLR**563, 4**West** Wkly145.

795–87 [a] **Exception taken by one defendant** is presumed taken for all where bill names all and is prosecuted by others. **RI** 150A610.

795–93 213Ala391, 104S789; 201Cal 152, 255P791; 76**CalA**29, 243P877.

795–94 170**Ark**771, 281SW379; 196Cal 395, 238P78; 76**CalA**29, 243P877; 239 **IllA**360; **Iowa** 232NW811; 164**La**225, 113S825; 154**Miss**481, 122S535; 131 **Or** 242, 276P281; 34**PortoRico** 288. But see 145**Miss**599, 111S94. [a] (13) Assumed that matters omitted would be most favorable to respondent. 221**MoA**1173, 300SW997.

796–99½–New. and that omitted evidence would have been included if in appellant's favor; 72**CalA**722, 238P119.

796–10½–New. Appellate court is bound by facts in defendant's answer where judgment purports to be on merits after full hearing and evidence is not brought up in transcript. 158**La**659, 104S490.

796–10½–New. Presumption is that material portions omitted from abstract of record would support judgment. 81**Colo** 63, 255P451.

796–10¼–New. By statute it will be presumed that the judge approved the statement of facts only on due proof that the parties were unable to agree. **Tex CivA** 300SW123.

796–10½–New. Mere appearance of respondent's attorneys at the time the judge other than the one trying the case certified the transcript does not authorize the assumption of respondent's acquiescence therein. 90**CalA**792, 266P 583.

796–13½–New. It will be presumed that appellant has complied with the statute requiring that the attention of the court be called to portions of the record relied on for reversal. 203**Cal** 721, 265P817.

796–15 8F(2d)922 (matters of procedure); 15F(2d)652; 16F(2d)210; 20 F(2d)235; 32F(2d)442; 43F(2d)485; 214Ala10, 106S188; 214**Ala**465, 108S35; 215**Ala**9, 109S101; 216**Ala**486, 113S516; 200**Cal** 706, 254P560; 201**Cal** 530, 258 P60 (granting equitable relief); 86 **CalA**728, 261P1096; 95**CalA**224, 272P 760, 97**CalA**30, 275P448; 98**CalA**6, 276 P377 (question of laches); **CalA** 280P 701; 84**Colo** 450, 271P185; 91**Fla**275, 107S342, 343 [citCJ]; 91**Fla**1064, 109S 225; 92**Fla**503, 109S433; 93**Fla**954, 113 S100; 94**Fla**882, 114S527; 339 **Ill** 184, 171NE169; 170 **IllA**304 (matters of practice in municipal court); 88 **IndA** 549, 165NE260; 124**Kan**261, 259P788; 211**Ky**729, 277SW1018; 161**La**981, 109S 784; 152**Md**289, 136A269; 154**Md**267, 140A205, 56**ALR**697; **Mass** 166NE563; 240**Mich**156, 215NW350; 148**Miss**491, 114S328; 80**Mont**159, 260P128; 221 **AppDiv**164, 223NYS1; 198**NC**783, 153SE452; **NC** 154SE829; 52**ND** 165, 201NW830; 32 **OhA**16, 165NE746; 118 **Okl** 97, 246P830 (ruling on motion); **Okl** 292P833 (disqualification of judge); 285**Pa**377, 132A286; 285**Pa**413, 132A 355; **Pa** 151A811; 48**RI** 4, 135A50; 134 **SC**435, 132S828; 155**SC**179, 152SE176; **SD** 229NW934; **TexCommnA** 280SW 753; 69**Utah**340, 255P416; 140**Wash** 625, 250P52; **Eng** 84**LJKB**712; 4 **Ont WN**632, 23 **OntWR**732, 9**DomLR**135. See also **RI** 131A553. [d] 98**NJEq**690, 130A655; 285**Pa**101, 131A718. [f] 77 **Mont**30, 248P219. [l] **Adjournment of term** to distant day in sound discretion of trial court is nevertheless subject to **review.** 102**WVa**327, 135SE174. [m] **Motion to disqualify judge for prejudice or bias is addressed** to sound discretion of judge and his ruling will not be reversed in absence of abuse of discretion. 120 **Okl** 12, 249P920. [n] **Appellate court, in absence of abuse of discretion,** will not interfere with appointment by court of equity of medium for executive of deed of trust. 146**Va**197, 135SE882. [o] **Stipulations.**–152**Wash**104, 277P450. [p] **Granting petition for removal** is within discretion of court. **Mass** 169NE 151.

796–15½–New. , or where the decision is based on mistake of law; **RI** 131A 553.

797–16 40 **Or**415, 67P295 (discretion that is not subject to review on appeal is such exercise of authority in mode of proceeding for enforcement of rights or the redress of wrongs as is reasonably designed to promote substantial justice).

797–17 91**Fla**275, 107S342, 343 [citCJ].

797–18 16F(2d)210 (dictum); 92**Fla** 224, 109S306; 124**Kan**261, 259P788 (abuse must be clear or manifest); **Mass** 172NE340; 120 **Okl** 12, 249P920; 48**RI** 4, 135A50; 132**SC**78, 129SE131; **Tex** 32SW(2d)637. [c] **Refusal of petition in nature of quo warranto** is reviewable on appeal. **TexCivA** 17SW (2d)63. [d] **Arbitrary departure from constant practice of courts** as to heeding requests of creditors in appointment of commissioners to sell real estate will be reviewed. 107**WVa**524, 149 SE385, 64**ALR**1536(2dcase).

798–19 34F(2d)916 (must be within permissible limits); 142 **Okl** 293, 286P 891. [a] **Discretion exercised to unjustified purpose and against reason** constitutes abuse of judicial discretion. 144 **Okl** 295, 290P1098.

798–20 132**SC**410, 129SE629.

798–20½–New. **In New York** questions of discretion are reviewable by the appellate division and not the court of appeals. 241NY340, 150NE137.

798–20½–New. Within this rule is the refusal of the court to grant a motion to withdraw a juror. 241NY340, 150 NE137.

798–20¼–New. Abuse of discretion is not shown by fact that appellate court would have decided otherwise. 200**Cal** 374, 253P148.

798–21–22 272**US**701, 47**SCt**286, 71**L ed** 481; 200**Cal** 721, 254P945 (modification of divorce decree relating to custody of children); 69**CalA**66, 230P462; 90 **CalA**753, 266P574; 94**CalA**530, 271P 554; **CalA** 290P492; **Fla** 127S861; 246 **Mich**231, 224NW365; 143**Miss**277, 107 S868; 80**Mont**159, 260P128; 83**Mont** 343, 272P532; 58**ND**244, 225NW805; 25 **OhA**239, 157NE768; 35 **OhA**199, 172 NE411; 33**PortoRico** 627, 644 [citCJper Wolf,J dis op]; 134**SC**435, 132SE828; **SC** 155SE237; **Vt** 148A285; 151**Wash** 447, 276P297(2dcase); **Wash** 288P265. See also 135**SC**365, 133SE834.

798–23 92**CalA**230, 268P385; 222**MoA** 346, 300SW845; 49**SD**514, 207NW461.

798–25 89**CalA**94, 264P307.

798–28 93**Fla**740, 112S616.

798–31 82**NH**105, 129A873.

798–32 213**Ky**330, 280SW1099; 256 **Mass**568, 153NE13; 220**MoA**1222, 299 SW155; 140**SC**14, 138SE401; **TexCivA** 1SW(2d)434; 36**Wyo** 12, 252P790. [c] (1) 169**Minn**392, 211NW470. [d] (1) See also 206**Cal** 20, 272P1058. (2) Discretion in allowing or refusing intervention is not reviewable. 12F(2d)474. (3) Intervention is generally within sound discretion of court. 297**Pa**140, 146A557.

799–34 18F(2d)567; 18F(2d)817; 19 F(2d)311; 37F(2d)660; 217**Ala**71, 114 S684; 176**Ark**126, 2SW(2d)63; 195**Cal** 655, 235P438; **Cal** 291P411; 80**CalA**74, 251P330; 84**CalA**485, 258P652; 87**CalA** 684, 263P353; 96**CalA**760, 274P1020; 97**CalA**304, 275P523; 100**CalA**403, 280 P218; **CalA** 288P863; 56**AppDC**342, 13 F(2d)313; 91**Fla**1064, 109S225; 91**Fla** 853, 109S314; 93**Fla**1015, 113S89; 98 **Fla**847, 124S441; 43 **Ida**142, 249P890; 44 **Ida**469, 258P180; **Ind** 167NE124; **IndA** 159NE21; 200 **Iowa**853, 205NW 538; 204 **Iowa**916, 216NW264; 207 **Iowa**1052, 224NW89; **Iowa** 228NW878; 121**Kan**199, 246P1009; 123**Kan**746, 256 P997; 212**Ky**444, 279SW620; 213**Ky** 392, 281SW183; 215**Ky**62, 284SW421; 216**Ky**483, 288SW337; 128**Me**393, 148A 147, 68**ALR**481; 157**Md**136, 145A385; 157**Md**239, 145A550; **Mass** 165NE884; **Mass** 173NE439(1stcase); 239**Mich**101, 214NW142; 171**Minn**209, 213NW742; 174**Minn**297, 219NW180; 178**Minn**549, 228NW150(1stcase); 308**Mo** 453, 273 SW95; **Mo** 23SW(2d)45; 221**MoA**944, 288SW794; **MoA** 297SW999; **MoA** 10 SW(2d)75; **MoA** 24SW(2d)686; **MoA** 29SW(2d)193; 76**Mont**160, 248P864; 78**Mont**22, 252P316; 78**Mont**114, 252P 803; 81**Mont**200, 263P433; 86**Mont**150, 282P494; 113**Nebr**688, 204NW516; 245 **NY**573, 157NE862; 190**NC**783, 130SE 842; **NC** 155SE734; **NC** 155SE871(1st case); 51**ND**158, 199NW480; 52**ND**209, 202NW404; 20 **OhA**244, 153NE172; 21 **OhA**244, 153NE172; 113 **Okl** 293, 241P 1095; 116 **Okl** 10, 243P154; 117 **Okl** 156, 246P833; 123 **Okl** 113, 252P433; 124 **Okl** 174, 254P713; 126 **Okl** 251, 259 P268; 130 **Okl** 33, 264P911; **Okl** 293 P188; 120 **Or**588, 253P363, 53**ALR** 1052; 124 **Or**332, 263P391; 124 **Or**691, 265P433; 300**Pa**161, 150A296; 144**SC** 125, 142SE245; 50**SD**492, 210NW733; **TexCommnA** 276SW170; **TexCivA** 19 SW(2d)591; **TexCivA** 24SW(2d)1101 (2dcase); 149**Wash**587, 271P894. See also 33**PortoRico** 13.

799–35 19F(2d)311; 99**CalA**205, 278P 468(2dcase); 43 **Ida**496, 253P383; 119 **Kan**518, 240P947; 124**Kan**33, 257P964; 86**Mont**169, 282P852; 113 **Okl** 293, 241 P1095; **SD** 226NW948.

799–36 73**CalA**511, 238P1048; **MoA** 286SW353; 78**Mont**114, 252P803. See also 149**Md**10, 130A66.

800–37 123**Kan**746, 256P997; 164**La** 144, 113S796.

800–37½–New. on the day the case was set for trial. 43 **Ida**142, 249P890.

800–39 124 **Okl** 174, 254P713.

800–40 174**Ark**293, 295SW19; 197**Cal** 117, 239P1050 (denial of motion); 85 **CalA**533, 259P1007; 86**CalA**125, 260P 586; **CalA** 284P673; 44 **Ida**469, 258P 180; 45 **Ida**175, 260P1092; 176**Minn** 331, 223NW605; 315**Mo** 927, 288SW20; 78**Mont**22, 252P316; **Mont** 289P571; 115**Nebr**271, 212NW616; 51**ND**158, 199 NW480 (after evidence is all in); 118 **Okl** 161, 247P110; 122 **Okl** 244, 254P 741; 126 **Okl** 251, 259P268; 132 **Okl** 5, 269P269; 138 **Okl** 77, 280P449; 120 **Or** 588, 253P363, 53**ALR**1052; 124 **Or**71, 263P66; **TexCivA** 280SW914; **TexCivA** 9SW(2d)177; **TexCivA** 20SW(2d)409; 196**Wis**319, 220NW186 (refusing amendment except on condition of continuance of case over term and payment of adversary's taxable disbursements). [c] 195**Cal** 655, 235P438; **MoA** 22SW (2d)860; 113**Nebr**688, 204NW 516; 132 **Or**689, 288P212; 50**SD**492, 210NW733.

800–40½–New. at the close of the evidence, 119**Kan**518, 240P947.

800–42 80**CalA**74, 251P330; 317 **Ill** 247, 148NE40.

800–44 124**Kan**33, 257P964.

800–47 85**CalA**533, 259P1007; 239 **Mich**656, 215NW19; 81**Mont**509, 264P 396; 126 **Okl** 251, 259P268.

800–49 43 **Ida**142, 249P890; **TexCivA** 6SW(2d)183.

800–49½–New. or cross complaint, 43 **Ida**142, 249P890.

800–50 317 **Ill** 247, 148NE40 (from divorce to separate maintenance).

800–54 52**ND**617, 204NW683; 144**SC** 125, 142SE245. [a] 167**Minn**323, 209 NW32.

801–56 88 **IndA**518, 162NE372; **IndA** 168NE204; 201 **Iowa**888, 208NW371; 122**Kan**215, 252P459; 166**Minn**53, 206 NW929; 31**NM**457, 247P270, 272 [citCJ]; 117 **Okl** 46, 245P641; 118 **Okl** 294, 248P639; 131 **Okl** 272, 268P270; **Okl** 292P335(2dcase); **Okl** 293P235.

801–57 16F(2d)210; 91**Fla**1064, 109S 225; 148**Va**573, 139SE275.

801–59 44 **Ida**491, 258P362; 145**Va**94, 133SE781.

801–61 216**Ala**326, 113S79; 22**AlaA**199, 114S15; 252 **IllA**352; 86 **IndA**666, 152 NE873; 100**NJEq**541, 135A770; 193**NC** 814, 138SE169; 115 **Okl** 195, 241P740; 288**Pa**36, 135A650; **TexCivA** 1SW(2d) 703; **BC** [1928] 3**DomLR**33; **BC** [1928] 4**DomLR**383. [a] (3) Striking out amended answer is not reviewable on

appeal. 27F(2d)286. (4) Court may strike amended pleading filed without leave, not allowable if leave asked. 207 Iowa1052, 224NW89.

802-66 US 41F(2d)693; 29F(2d)703; 171Ark611, 285SW353; 78CalA751, 248 P934; 97CalA144, 275P245 (imposing terms); 83NH588, 146A815(1stcase); 134SC228, 132SE614; 147Wash542, 266 P706.

802-69 86CalA32, 260P324.

802-71½-New. motion to elect; 128 Or 476, 274P903(2dcase).

802-73½-New. ruling on motion for leave to file answer, 189NC724, 128SE 324.

802-73½-New. ruling on motion to allow verification of answer previously filed to verified complaint, 189NC724, 128SE324.

802-73¼-New. , and permitting pleadings to be filed out of time. 118 Okl 228, 246P1090.

802-74½-New. The discretion of the trial court in permitting a garnishee to answer after judgment has been rendered against him will not be reviewed in the absence of abuse. 35 GaA422, 133SE298.

802-74⅓-New. Refusal of judgment for want of sufficient affidavit of defense will not be disturbed unless it is clear and free from doubt that the court erred. 291Pa435, 140A138.

802-74¼-New. Whether defendant shall be required to file his grounds of defense rests in the discretion of the trial court, the exercise of which will not be reversed in the absence of abuse. 148Va640, 139SE300.

802-74½-New. Where the statute vests the trial judge with discretion to permit pleadings to be filed out of time, his ruling thereon will not be reversed except where abuse of discretion is shown. 138 Okl 1, 280P278, 67ALR885.

802-74⅔-New. Order refusing judgment for want of sufficient affidavit of defense will not be disturbed in absence of clear abuse of discretion. 300 Pa52, 150A153(1stcase).

802-75 339 Ill 371, 171NE510.

803-77 118 Okl 71, 246P476.

803-77½-New. A motion to revoke an order directing an attaching creditor to pay the amount due on a valid chattel mortgage and for rehearing is addressed to the trial court's discretion, and will only be disturbed for abuse. Mass 167NE649.

803-80½-New. The court's denial of an allowance to the attaching officer for custody and storage of attached property is not reviewable in the absence of abuse of discretion. 48RI 4, 135A 50.

803-86 102 Ind251, 1NE507; 30Mich1; 49Minn521, 52NW139; 47Wis641, 3NW 369.

803-87 278US322, 49SCt157, 73L ed 402; 278US509, 49SCt220, 73L ed480; 279US229, 49SCt266, 73L ed675; 122 Fed776, 58CCA576; 5F(2d)777; 9F (2d)246; 13F(2d)123; 13F(2d)850; 14 F(2d)569; 29F(2d)679; 30F(2d)385; 84CalA485, 258P630; CalA 261P1026; 93Fla740, 112S616; Fla 128S821; 161 Ga842, 131SE885; 163Ga894, 137SE 251; 165Ga366, 140SE761; 165Ga449, 141SE200; 167Ga322, 145SE507; 169 Ga765, 151SE505; 170Ga27, 152SE53 (1stcase); 170Ga279, 152SE575; Ga 154SE787; 43 Ida371, 252P489; 242 IllA343; 87 IndA686, 159NE697; 164 Minn519, 204NW629; 172Minn179, 215 NW215; MoA 30SW(2d)791; 83Mont 21, 269P162; 83Mont244, 271P455; 217 AppDiv146, 216NYS391; 50ND365, 195 NW660; 54ND69, 208NW833; 58ND 244, 225NW805; 129 Okl 184, 265P646; 133 Okl 125, 271P666 (discretion held not abused); 300Pa21, 150A92; 85Pa Super122; 90PaSuper545; 50RI 409, 148A803; TexCivA 273SW665; Tex CivA 275SW177; TexCivA 278SW952; TexCivA 279SW312; TexCivA 282SW 834; TexCivA 294SW624; TexCivA 300 SW953; TexCivA 8SW(2d)329; Tex CivA 11SW(2d)327(2dcase); TexCivA 19SW(2d)462; TexCivA 24SW(2d)778; 104WVa296, 140SE15. [a] 195Cal 569, 234P371; 170Ga829, 154SE452; 255 IllA199; Ind 172NE353; 86Mont218, 283P219; 93PaSuper248; 4SD102, 55 NW759; TexCivA 32SW(2d)246. [b] (1) 195Cal 569, 234P371; 94Fla890, 114 S509; 256 IllA540; 201 Iowa625, 207 NW755 (temporary injunction); 167 Minn330, 209NW5. (2) Especially will court decline to disturb refusal of temporary injunction against enforcement of order of school board temporarily excluding unvaccinated pupils from public school where such order has expired ex vi termini. 201 Iowa625, 207 NW755. [c] 128 Okl 3, 261P366; 137 Okl 81, 277P1036; Pa 152A102; 96 PaSuper356; 104WVa296, 140SE15.

804-88 126Fed920, 61CCA450; 39F (2d)896; 160Ga793, 129SE62; 160Ga 848, 129SE89; 160Ga893, 129SE285; 161Ga629, 131SE505 (credibility of witnesses); 165Ga192, 140SE288; 165Ga 366, 140SE761; 165Ga449, 141SE200; 166Ga705, 144SE169; 168Ga769, 149SE 43; 169Ga33, 149SE636; 169Ga567, 150 SE817; 169Ga567, 150SE906.

804-89 281US331, 50SCt288, 74L ed 881; 5F(2d)500; 9F(2d)246; 13F(2d) 850.

804-90 33F(2d)390; 217AppDiv191, 217NYS482; 218AppDiv377, 218NYS 339. [d] **Whether agreement of railroad constituted abandonment of passenger station site** is one of law as regards review of order granting temporary injunction. 33F(2d)390.

804-91 218AppDiv377, 218NYS339.

804-95½-New. Granting temporary injunction is, in the discretion of the court, subject to review. 94Fla890, 114 S509.

804-95⅓-New. Refusal of temporary injunction, not clearly against the weight of the evidence, cannot be held erroneous on appeal. 94Fla890, 114S 509.

804-96 17F(2d)900; 29Ariz267, 240P 1027; 204Cal 524, 269P443; 69CalA682, 232P161; 82CalA723, 256P285; 167Ga 322, 145SE507; 169Ga567, 150SE817; 168Minn102, 209NW754; 311Mo 551, 279SW122; 54ND627, 210NW498; 144 Okl 105, 289P728; 300Pa479, 150A902; 51Philippine549; 32PortoRico 364; Tex CivA 288SW566; TexCivA 298SW456; TexCivA 11SW(2d)244; 107WVa136, 147SE483. [d] **Discretion of lower court will be scrutinized on appeal** and will not be upheld unless appointment was for best interests of parties. 311 Mo 551, 279SW122. [e] **Judgment refusing to vacate appointment of receiver** will be reversed where trial court abused its discretion. 120 Okl 16, 250P 74.

805-97 IndA 169NE691; 259Mass259, 156NE424.

805-98 RI 150A74; 107WVa524, 149 SE385, 64ALR1536(2dcase). [a] (2) 38 F(2d)186.

805-98½-New. The power to review carries with it the corresponding power and duty to reverse the judgment of the trial court if, in the appellate court's opinion, the receiver should not, in the exercise of what the appellate court deems sound judicial discretion, have been appointed. TexCivA 19SW (2d)212.

805-99 25F(2d)574; Minn 232NW1; Tex 285SW639; TexCivA 28SW(2d) 259; NS [1927] 3DomLR371. [j] **Admission in evidence** of depositions, where personal attendance could have been had, is not reversible error. 55 AppDC309, 5F(2d)270. [k] **Overruling objection, to interrogatories** answered in deposition, as leading, is not reversible error. TexCivA 28SW(2d)259.

806-1½-New. Discretion of special commissioner will not be disturbed except for clear abuse. MoA 29SW(2d) 199.

806-2 TexCivA 25SW(2d)923 (error rendered harmless by subsequent order). See also 196NC9, 144SE297. [a] (5) Limiting scope in tort action. 240 NY552, 148NE701. [c] **Striking interrogatories for discovery** held not abuse of discretion. 150Wash494, 273 P739.

806-3 Nebr 231NW809.

806-6 But see 151Md52, 133A831.

807-15 272US701, 47SCt286, 71L ed 481; 121 Or215, 253P1046; 295Pa381, 145A427; 48Philippine70; 132SC410, 129SE629; 156SC429, 153SE283. See also 283Pa313, 129A105.

807-15½-New. Exception to refusal of master to state views of law presents no question of law. 263Mass63, 160 NE317.

807-15⅓-New. Discretion in overruling exceptions to report will not be interfered with in absence of abuse. 169 Ga852, 151SE807.

807-16 43F(2d)976; 254Mass274, 150 NE186; 261Mass72, 158NE339, 55ALR 330; 261Mass242, 158NE779; Mass 171 NE324. See also 164Ga474, 139SE18.

807-19 30Ariz294, 246P765; 86CalA 266, 260P954; 99CalA398, 278P869; CalA 288P714; 78Colo 6, 238P29; Ida 287P947; 217Ky683, 290SW494; 234 Ky252, 27SW(2d)978; 171Minn250, 213 NW918; 318Mo 318, 300SW283; 74 Mont393, 240P823; 86Mont163, 282P 861; 193NC352, 137SE136; 195NC532, 142SE783; 196NC358, 145SE681(1st case); 197NC84, 147SE680; 55ND770, 215NW271; ND 231NW283; Okl 292 P833; SC 155SE828; Utah 278P816; 100WVa733, 132SE746; Sask [1925] 3 DomLR163, [1925] 2WestWkly167.

808-22 205Cal 201, 270P453(1stcase); 78Colo 6, 238P29; 195NC532, 142SE783.

808-23 193NC352, 137SE136; 55ND 770, 215NW271; Sask [1925] 3DomLR 163, [1925] 2WestWkly167.

808-27 [a] (2) Whether there was abuse of discretion in denying motion for change of venue is to be determined from what was before court at time of motion and not what developed later. 30Ariz294, 246P765.

808-28 78Colo 6, 238P29; 74Mont393, 240P823.

808-29 29F(2d)162; 160Ga705, 129SE 31; 170 IllA304; 153Miss712, 121S 138(2dcase); Miss 126S18; 84Mont158, 274P489; 222AppDiv292, 225NYS649; 190NC449, 130SE171. [d] (2) Exercise of discretion will be disturbed where party is deprived of substantial right. 146SC85, 143SE650. [e] **If facts do not warrant consolidation, an order consolidating actions may always be reviewed.** Ala 129S69.

808-30 NJ 146A313.

808-31 73CalA218, 238P728; TexCivA 298SW631.

809-32 215Ala688, 112S239; 218Ala 599, 119S644; 219Ala369, 122S608; 220Ala601, 127S173; 173Ark956, 293 SW1015; 174Ark84, 294SW378; 176 Ark1188, 5SW(2d)916; 177Ark177, 6 SW(2d)10; 178Ark635, 12SW(2d)18; 88CalA281, 263P383; 101CalA411, 281 P714; 83Colo 587, 267P792; Fla 129 S700; 165Ga472, 141SE207; 169Ga770, 151SE381(2dcase); 36GaA54, 135SE 224; 39GaA371, 147SE163(2dcase); 41 GaA51, 152SE148; 29Hawaii434; 43 Ida654, 254P215; 240 IllA254, 260 [citCJ]; Iowa 231NW332; 120Kan575, 244P1063; 122Kan814, 253P600; 125 Kan76, 262P1030; 231Ky305, 21SW (2d)435; 233Ky1, 24SW(2d)942; 2LaA 280; 5LaA452; 11LaA22, 122S143; 125Me494, 135A198; Mass 168NE78; 236Mich294, 210NW231; 174Minn297, 219NW180; 176Minn331, 223NW605; 142Miss199, 106S633; 153Miss722, 121 S156; 308Mo 201, 271SW481; 76Mont 93, 244P1007; 84Mont158, 274P489; 50 Nev46, 249P865; 116 Okl 224, 243P933; 119 Okl 42, 249P141; 121 Okl 252, 249 P285; 128 Okl 23, 261P174; 131 Okl 110, 267P835; 139 Okl 16, 280P1087; 139 Okl 164, 281P773(2dcase); 39 OklACR378; 115 Or668, 240P222; 126 Or384, 270P501; 89PaSuper179; 33 PortoRico 13; 148SC419, 146SE237; CommnA 116Tex325, 273SW1109; TexCivA 286SW552; TexCivA 293SW915; TexCivA 298SW631; TexCivA 11SW (2d)214; 144Va752, 130SE802; 144Va 220, 132SE326; Sask [1926] 4DomLR 174, [1926] 2WestWkly671.

809-33 215Ala688, 112S239; 41Ida 257, 239P522; Md 149A4; 142Miss 199, 106S633; 50Nev46, 249P865; 131 Okl 193, 268P228; 115 Or668, 240P222; 300Pa569, 151A362; CommnA 116Tex 325, 273SW1109. [a] **Especially where absent witness is party litigant** is rule applicable. TexCivA 286SW552.

809-34 84CalA499, 258P438 (member of party's family); 36GaA54, 135SE 224; 120Kan575, 244P1063; 76Mont93, 244P1007; TexCivA 8SW(2d)326.

809-35 76Mont93, 244P1007.

809–36 [a] 114Nebr438, 208NW139.
809–37 308Mo 201, 271SW481.
809–38 169Ark73, 272SW843; 39 Okl ACR378.
809–39 165Ga472, 141SE207; 260Mass 369, 157NE693.
809–40 240 IllA254, 260 [citCJ]; 1LaA 402; 100Vt328, 137A324. [a] (2) Refusal held error where failure to subpœna witnesses in time was not fault of party. 316Mo 609, 291SW462.
810–42 23F(2d)55 (special findings by court); 173Ark970, 291SW74; 181Ark 649, 26SW(2d)1108; 125Kan76, 262P 1030; 154Md63, 139A564; 235Mich521, 209NW667; Mo 293SW386; 321Mo 798, 12SW(2d)476; Mo 19SW(2d)630; MoA 273SW244; 220MoA452, 276SW105; 244NY274, 155NE123; 122 Or498, 259 P891; 291Pa185, 140A269; 291Pa187, 140A270; TexCommnA 298SW526; Sask [1929] 2DomLR890. [a] 240Mich 156, 215NW350 (transfer of cause from equity to law side of court after delay); 244NY274, 155NE123; Wash 290 P222. [b] Censuring counsel held abuse of discretion.–48RI 244, 137A2.
810–43 117 Okl 300, 246P220; 40 Okl ACR122.
810–46 109Conn87, 145A659; 135Wash 248, 237P708.
810–47 [a] Court's decision as to opening and closing case is not reviewable on appeal. 143Miss277, 107SS868.
810–48 78Colo 6, 238P29.
810–48½–New. failure of trial judge to make requested findings of fact; 262 Mass247, 159NE909.
810–50 34F(2d)660(1stcase); 200Cal 706, 254P560; 92PaSuper110; 100WVa 117, 130SE994. [b] Order setting aside default judgment based on fact found under rule of court will not be set aside on appeal. 100WVa117, 130SE94.
811–54 90Fla435, 106S79; Fla 126S 305; 212Ky844, 280SW148; 33Porto Rico 627, 644 [citCJperWolf,J,disop]; 151Va220, 144SE430.
811–55 219Ala112, 121S404, 64ALR 640; 123Kan88, 254P348; 151Md309, 134A322; 322Mo 1001, 17SW(2d)528; 196NC203, 145SE3; 123 Or632, 263P 400; 148SC392, 146SE245; SC 155SE 577; TexCivA 279SW929. [a] 118 Or 568, 247P815. [b] (2) Exercise of trial court's discretion as to extent of examination of jurors on voir dire is reviewable only for clear abuse. Okl 292 P335(2dcase).
812–56 97Fla591, 121S793(2dcase); 151Md309, 134A322.
812–57 13F(2d)585; 105Conn392, 135 A293; 39GaA462, 147SE720; 221MoA 537, 282SW1037; NH 149A498; 35 PortoRico 43 (entries in loose-leaf ledger); 157SC392, 154SE431; 50SD 175, 208NW776 (fraud); TexCivA 277 SW760; TexCivA 292SW577; TexCivA 295SW311. [c] (3) Other instances. 142Wash571, 253P797. [c] (1) 126Me 583, 140A374.
813–58 102Conn708, 130A184; 105 Conn429, 135A568; 238Mich447, 213 NW710; 240Mich677, 216NW391; 49 RI 18, 139A466; 142SC125, 140SE443; 155SC526, 152SE699.
813–60 218Ala645, 119S851; 240Mich 677, 216NW391; Vt 130A759.
814–63 214Ala663, 108S575; 79CalA 339, 249P533; CalA 288P841; 81Colo 113, 253P827; 164Minn466, 203NW228, 205NW449, 206NW380; 167Minn394, 209NW311, 46ALR1495; 168Minn259, 209NW905; 134 Okl 164, 272P461; 115 Or562, 237P690, 239P193; TexCivA 277 SW760; TexCivA 283SW877; TexCivA 284SW680; TexCivA 297SW258. [c] TexCommnA 273SW838. [d] (1) 46 Ida355, 267P611. [e] (1) 22F(2d)136; 79CalA 406, 249P837; 207 Iowa167, 216NW62, 62ALR31; MoA 285SW783; Okl 291 P962(2dcase); 194Wis480, 215NW908. [g] (1) 41F(2d)578; 91CalA460, 267 P132; CalA 290P146; Ida 286P616; 105NJL165, 143A369; 127 Okl 273, 260 P753; 128 Okl 29, 261P189; 115 Or 562, 237P690, 239P193; 49RI 198, 141 A466; 50RI 192, 146A773. (4) 173 Minn468, 217NW593. (5) TexCivA 18 SW(2d)782. (6) Whether no one but specialist can testify as medical expert is reviewable question of law. 194NC 289, 139SE443, 54ALR855. (7) Other instances. NJ 150A387. [h] Qualification of witness to give opinion.–TexCivA 8SW(2d)306.
815–64 46 Ida214, 267P222; Mass 167 NE235; Mass 168NE792.
815–67 198Cal 1, 242P939; 242Mich 217, 218NW803; 116Nebr18, 215NW 556; 125 Okl 202, 257P298; 148Va699, 139SE328; 101WVa12, 138SE749.
816–68 198Cal 1, 242P939; 109Conn 616, 145A231; 152Md536, 137A299; 242 Mich217, 218NW803; 322Mo 813, 18SW (2d)467; Mo 24SW(2d)116; 125 Okl 202, 257P298; 139 Okl 95, 281P259; 32 PortoRico 334; 104WVa12, 138SE749. [a] 156Miss182; 125S52(4dcase). [b] (3) Order of proof is discretionary with trial court. 32PortoRico 334.
816–69 124 Okl 97, 254P75; 125 Okl 202, 257P298.
816–71 119Kan735, 241P451.
817–73 34Ariz230, 270P629; 120Kan 474, 244P2; 149Miss42, 115S115; 124 Okl 97, 254P75; 148Va699, 139SE328; 151Wash245, 275P559; 104WVa12, 138 SE749.
818–77 202 Iowa778, 211NW228; 207 Iowa252, 222NW872; 124Kan261, 259 P788; 166Minn308, 207NW644; 179 Minn99, 228NW447; NJSup 130A823; 127 Okl 203, 260P481; 43 OklACR213; 33Wyo 457, 240P449.
818–78 202 Iowa778, 211NW228; 204 Iowa1046, 216NW952; 124Kan261, 259 P788; 166Minn308, 207NW644; 127 Okl 203, 260P481; 153Wash345, 279P 595 (where there was only general objection, no claim of surprise, or application for continuance); 33Wyo 457, 240P449.
818–79 IndA 168NE613; 202 Iowa778, 211NW228; 207 Iowa252, 222NW872; 124Kan261, 259P788; 232Ky702, 23SW (2d)564; 166Minn308, 207NW644; 179 Minn99, 228NW447; Mo 30SW(2d)77; 222MoA153, 28SW(2d)815; 127 Okl 203, 260P481; 143 Okl 140, 287P1003; 43 OklACR213; 33Wyo 457, 240P449.
818–84 206 Iowa328, 218NW568.
819–97 122KanS14, 253P600.
819–13 119 Okl 42, 249P141.
820–22 328 Ill 27, 159NE237; 234Ky 385, 28SW(2d)465; 139 Okl 1, 281P234; 123 Or661, 263P890; TexCivA 293SW 835; TexCivA 10SW(2d)760; 39Wyo 141, 270P537.
821–33 207 Iowa252, 222NW872; 154 Tenn241, 290SW39, 50ALR1369.
821–40 TexCivA 26SW(2d)299; 152 Wash681, 279P107.
821–41 328 Ill 27, 159NE237.
822–47 328 Ill 27, 159NE237.
822–49 328 Ill 27, 159NE237.
822–62 195Cal 699, 235P45; 104Conn 585, 134A73; 29Hawaii750; 86 IndA 160, 155NE212; 154Md204, 140A48; 23NMich447, 213NW710; 322Mo 787, 16 SW(2d)85; NJ 139A30; 52ND925, 204 NW889; 131 Okl 242, 268P303; RI 134 A13; TexCivA 28SW(2d)907 (competency); TexCivA 20SW(2d)248 (admissibility of opinion and conclusion of witness); Vt 130A759; 155Wash678, 286P286 (qualification of expert). [a] TexCivA 8SW(2d)743. [c] (1) 86 IndA79, 156NE165. [b] MoA 294SW747. [j] 204Cal 485, 268P905. [k] Qualifications of witness.–TexCivA 20SW(2d)266; Vt 147A352 (as expert).
823–63 Ala 130S541; 99CalA240, 279 P178; 204 Iowa555, 215NW664; 121 Kan797, 250P308; 238Mich5, 213NW 152; 238Mich74, 213NW456; Mo 256 SW819; MoA 285SW549; 82NH225, 131A601; 54ND166, 209NW212, 45ALR 1487; 124 Okl 71, 254P14; 131 Okl 242, 268P303; 98PaSuper510; TexCivA 19 SW(2d)451; 101Vt427, 144A194; Vt 147A346; WVa 154SE769. [b] 129 Okl 240, 264P172. [m] Test of use or abuse of discretionary power is whether sufficiently wide range has been allowed to test credibility of witnesses and weight of evidence, not whether some particular question should have been allowed. 99CalA240, 279P178.
824–65 170Minn482, 212NW944.
824–67 202Cal 424, 261P298; 176Minn 210, 222NW924; NJSup 151A484; 55 ND580, 214NW855; TexCivA 18SW (2d)778; 38Wyo 190, 266P117.
824–68 114Nebr106, 206NW19.
824–69 Nebr 230NW769; Vt 150A65.
825–71 Iowa 229NW236.
826–94 102WVa491, 135SE578.
826–96 161Ga93, 129SE778; 102WVa 491, 135SE578.
826–3 TexCivA 283SW927.
827–8 80CalA342, 251P818; 106Conn 119, 137A241; 94Fla218, 114S246; 35 GaA465, 134SE120; 204 Iowa156, 215 NW767 (right to open and close); 206 Iowa328, 218NW568; 321Mo 310, 11SW (2d)16; 322Mo 787, 16SW(2d)85; Mo 19SW(2d)630; 21SMoA563, 267SW6; MoA 273SW244; MoA 280SW79; MoA 284SW850; MoA 300SW301; MoA 300 SW1048; 222MoA128, 28SW(2d)821; 222MoA370, 38SW(2d)256; MoA 5SW (2d)689; MoA 9SW(2d)655; MoA 16 SW(2d)633; 103NJL351, 135A786; NJSup 130A439; 195NC350, 142SE19; 124 Okl 84, 253P1017; TexCivA 272SW 501; TexCivA 277SW760; TexCivA 287 SW120; TexCivA 289SW93; TexCivA 3SW(2d)568; TexCivA 7SW(2d)926; TexCivA 22SW(2d)753; TexCivA 23SW (2d)522; TexCivA 28SW(2d)108S. [a] To same effect 101WVa3, 131SE862. [g] (3) Refusal of court to rebuke counsel and direct jury to disregard remark will not be reviewed where remark was provoked by counsel for adverse party. MoA 24SW(2d)686. [j] Decision of trial court as to right to open and close not reviewable. 190NC617, 130SE306. [k] Refusal to withdraw juror.–NJSup 130A206. [l] Conduct of counsel.–32 OhA465, 168NE234. [m] Discretion of court in determining course to take on improper argument is subject to review. MoA 21SW(2d)166.
827–9 Mo 281SW951; TexCivA 13SW (2d)909. [b] Court's discretion as to division of time for argument will not be reviewed on appeal. 143Miss277, 107 S868.
827–10 143 Okl 134, 288P283; 144Va 154, 131SE245 (giving or refusing instructions at late stage of case is within discretion of trial court and not reviewable unless failure of justice is caused thereby).
827–13 NJ 151A754.
828–18½–New. Extent to which the court may comment on the evidence is largely discretionary, and discretion will not be disturbed on appeal if it is reasonably exercised. 107Conn17, 139A270.
828–18¾–New. Refusal of oral requests to charge does not lay any basis for an appeal. 108Conn544, 143A886.
828–19 104Conn54, 132A553; 75Mont 493, 244P298; 138SC169, 136SE209; 140SC107, 138SE622; TexCivA 285SW 840; 155Wash133, 283P1076; 100WVa 154, 130SE125. [b] Court's interpretation of answer to special issue will not be disturbed if reasonable. TexCommnA 26SW(2d)189.
828–20 [a] Whether findings of court without jury shall be special or general is discretionary. 7F(2d)535.
828–22½–New. Discretion of the trial court in submitting special questions after argument and at the close of instructions is not reviewable in the absence of abuse of discretion. 239Mich 150, 214NW117. [a] Abuse of discretion not shown.–239Mich150, 214NW 117.
828–23 43 Ida371, 252P489; 261Mass 409, 158NE763; 138SC151, 135SE875; 140SC107, 138SE622; 67Utah171, 246 P535.
828–26 [b] Failure to direct issue in injunction suit when it should have been directed is ground for reversal though not requested by either party. Va 129SE215.
829–31 103Conn267, 130A571.
829–33 230Ky465, 19SW(2d)107S; 154 Md604, 141A416; 50ND141, 195NW6.
829–35½–New. Refusal to permit interrogation of the jury as to newspaper articles held not available on appeal. 220MoA1302, 290SW1012.
829–36 210Ky92, 275SW16; 221Ky 505, 299SW176; Miss 112S607; Nebr 230NW588; 107WVa440, 148SE496.
829–38 178Ark635, 12SW(2d)18 (dismissal for lack of prosecution); 179 Ark367, 15SW(2d)997; 198Cal 490, 246 P324; 203Cal126, 262P1094; 204Cal 15, 266P281; 208 Iowa1199, 227NW

108; 227Ky183, 12SW(2d)321 (judgment dismissing cross petition must be affirmed, though proper procedure would have been motion to strike); 125Me520, 134A563; 98NJEq359, 129A241; 103NJL537, 138A119; 245NY152, 156NE647; 52ND28, 202NW852; 115Okl195, 241P740; TexCivA 22SW(2d)753. See also 289Pa65, 137A127. [a] (1) 204Cal595, 269P446; 84CalA750, 258P673; CalA265P973; 298Pa137, 148A50. [g] (1) 103NJL537, 138A119. (2) 39GaA597, 148SE12; 103NJL537, 138A119. [h] **Ruling on plaintiff's motion to dismiss without prejudice** made after submission of case to court on trial without jury will not be disturbed in absence of abuse of discretion. 40 OklACR128.

830-39 32F(2d)689; 274US65, 47SCt491, 71Led929; 198Cal490, 246P324 (nonsuit); 212AppDiv587, 209NYS360; TexCivA 299SW506.

830-40½-New. **Where complaint completely fails to state cause of action,** denial of motion to dismiss may be reconsidered on appeal. 216AppDiv234, 214NYS634.

830-40¾-New. In such case, where complaint may be readily amended, a new trial will be granted. 216AppDiv234, 214NYS634.

830-41 203Cal504, 265P180; Fla129S889; 36GaA199, 136SE112; 37GaA110, 139SE100; 105WVa46, 141SE434.

830-42 22F(2d)626; 179Ark256, 15SW(2d)326; CalA293P95; 236Mich294, 210NW231. [a] 163Ga694, 137SE17; 165Ga422, 141SE188. [b] **Question involved is not weight of evidence,** but sufficiency of evidence to go to jury. TexCivA 294SW883.

830-43½-New. Summary judgment. The court's refusal to enter judgment for want of sufficient affidavits of defense will not be disturbed where appellant's rights are not plain. 284Pa144, 130A398.

830-43¾-New. Denial of judgment notwithstanding verdict will not be disturbed where interests of right and justice require new trial. 292Pa135, 140A853.

830-44 146Va366, 131SE815.

830-45 5F(2d)562; 9F(2d)6; 9F(2d)32; 10F(2d)361; 13F(2d)352; 26F(2d)296; 26F(2d)522; 28F(2d)463; 29F(2d)402; 29F(2d)551; 35F(2d)624; 37F(2d)480; 37F(2d)709; 43F(2d)45; 44F(2d)24; 218Ala209, 118S396; Ala129S12 (chancellor's discretion concerning rehearing); 33Ariz110, 262P609; Ala129S919; 35Ariz144, 274P1042; 170Ark919, 281SW674; 204Cal515, 269P433; 205Cal651, 272P585; Cal289P844; 85CalA18, 258P725; 95CalA336, 272P613(2dcase); 98CalA145, 276P394(2dcase); CalA285P857; CalA290P120; Cal290P441; 102Conn448, 129A41; 103Conn683, 131A420 (motion to set aside verdict); 106Conn1, 137A26; 111Conn103, 149A218; 111Conn115, 149A406; DC 32F(2d)943; DC 40F(2d)812; 91Fla853, 109S314; 93Fla253, 111S631; 163Ga796, 137SE64; 37GaA320, 140SE398; 39GaA41, 145SE910; 41Ida697, 243P647; 47Ida395, 276P47; Ida287P951; 201Iowa506, 207NW761; 202Iowa1389, 212NW127; 205Iowa346, 217NW877 (false testimony); Iowa226NW34; Iowa231NW304; Iowa232NW116; Iowa232NW174; 119Kan786, 241P113; 128Kan394, 278P36; 208Ky204, 270SW789; 215Ky254, 284SW1005; 217Ky729, 290SW696; 10LaA437, 121S351; 11LaA22, 122S143; 12LaA531, 126S531; 149Md304, 131A450; 258Mass257, 154NE546; 264Mass18, 161NE621; 264Mass533, 163NE251(1st case); 238Mich178, 213NW76; 238Mich112, 213NW458; 238Mich447, 213NW710; 240Mich549, 215NW364; 168Minn39, 209NW896; 170Minn215, 212NW449; 172Minn366, 215NW516; Mo276SW636; 315Mo1165, 289SW609; 319Mo744, 8SW(2d)38; Mo20SW(2d)684, 66ALR263; MoA 277SW962 (grant of new trial on question of fact not disturbed); MoA 281SW137; MoA 283SW743; MoA 299SW118; MoA 20SW(2d)559; MoA 29SW(2d)243; 81Mont509, 264P396; 116Nebr549, 218NW379; 103NJL194, 135A354; 189NC303, 127SE3; 49ND115, 190NW176; 52Md497, 203NW675; 55ND339, 213NW574; 55ND794, 215NW280; 57ND885, 224NW306; ND229NW371; ND230NW298; 118Okl193, 247P351; 119Okl187, 249P330; 120Okl116, 251P989; 120Okl121, 252P395; 123Okl17, 253P40; 128Okl106, 261P551; 131Okl138, 267P1049; 143Okl116, 287P999; 143Okl114, 287P1039; 283Pa304, 129A91; 283Pa395, 129A112; 285Pa81, 131A654; 285Pa202, 131A731; 285Pa299, 132A350; 287Pa280, 135A253; 287Pa370, 135A127; 289Pa414, 137A599; 289Pa533, 137A609; 289Pa560, 137A731; 291Pa387, 140A148; 292Pa139, 140A853; 295Pa99, 144A829(2dcase); 295Pa525, 145A532(1stcase); 297Pa204, 146A574; 298Pa256, 148A102; 299Pa321, 149A494; 300Pa1, 149A644; 85PaSuper108; 87PaSuper58; 87PaSuper327; 88PaSuper193 (rule not changed by statute); 88PaSuper475; 89PaSuper179; 91PaSuper580; 96PaSuper162; 97PaSuper244; RI129A3; RI144A442; RI150A460; 134SC435, 132SE828; 150SC459, 148SE478; 151SC164, 148SE889; 48SD624, 205NW663; 53SD195, 220NW530; TexCommnA 271SW75; TexCivA 274SW161; TexCivA 275SW430; TexCivA 278SW881; TexCivA 282SW891; TexCivA 285SW674; TexCivA 286SW923; TexCivA 290SW548; TexCivA 291SW313; TexCivA 291SW564; TexCivA 7SW(2d)926; Utah275P582; Vt130A759; 99Vt434, 134A591; 101Vt514, 144A856; Vt148A750; Va153SE711; 136Wash645, 241P19; 142Wash15, 251P883; 147Wash619, 267P37; 148Wash495, 269P807; Wash287P206; 188Wis512, 205NW420 (grant of new trial in furtherance of justice); 193Wis187, 212NW648; 194Wis501, 217NW297; 198Wis228, 224NW104; 200Wis299, 227NW278; 38Wyo276, 266P1059; [1925] ACCan819, [1925] 3DomLR1009, [1925] 3WestWkly49. [a] (2) 118Okl136, 246P1088 (order granting new trial); 118Okl167, 247P692 (error as to unmixed question of law shown); 124Okl94, 254P26; 133Okl181, 271P949; 137Okl27, 277P665; 360OklACR100. (4) 232Ky340, 23SW(2d)558. (9) Where it cannot be said that evidence impelled verdict as matter of law and that there were no errors of law committed by court order sustaining, without stating grounds, motion based both on insufficiency of evidence and error of law, ruling will not be disturbed. 129Okl127, 263P1084. [b] (2) Trial court's decision, in such case, setting aside verdict on ground that ends of justice were not served thereby, will not be disturbed. 218Ala169, 118S172. [d] 41F(2d)733. [e] (1) 5F(2d)949; 17F(2d)480; 23F(2d)55; 24F(2d)3.

831-46 Ala127S504 (failure to follow language of statute immaterial); 73CalA218, 238P728; Iowa231NW304; 287Pa280, 125A253 (dictum); RI133A658; TexCommnA 271SW75; 99Vt434, 134A591. [a] 138Okl123, 280P586.

832-47 21AlaA222, 107S909; 29Ariz574, 243P598; 69CalA586, 231P1007; 90Fla905; 107S339; 95Fla415, 116S26; Fla129S763; Iowa232NW174; Fla130S601; 234Ky618, 28SW(2d)966; 319Mo1137, 6SW(2d)886; MoA 279SW217; MoA 299SW118; MoA 299SW118; MoA 15SW(2d)874; MoA 24SW(2d)215; 116Nebr549, 218NW379; 56ND772, 219NW228; 139Okl123, 281P586; 139Okl249, 281P782 (not review unless court is shown to have erred on question of law); 300Pa405, 150A665; 300Pa584, 151A343; 50SD301, 209NW958; 54SD113, 222NW671; 136Wash645, 241P19; 101WVa314, 132SE744; 103WVa156, 136SE837; 106WVa206, 145SE272; 38Wyo276, 266P1059; Wyo281P1000. See also 37GaA346, 140SE423. [a] 29Ariz574, 243P598; 42Ida547, 246P966. [b] (1) 161Ga838, 131SE896; 166Ga279, 142SE873; 168Ga769, 149SE35(1stcase) (where court directed verdict on first trial and direction was reversed, granting new trial after verdict is first grant of new trial); 170Ga577, 153SE359(2dcase); 170Ga577, 153SE360(1stcase); 34GaA244, 129SE109; 35GaA247, 132SE648; 35GaA465, 133SE647; 35GaA625, 134SE329; 40GaA72, 148SE753; 40GaA312, 149SE388(1stcase) (notwithstanding trial judge, in granting new trial, may have erroneously predicated judgment on ground that verdict rendered was entirely without supporting evidence). (6) Order granting new trial to one of two codefendants will not be disturbed when verdict has been rendered against both and set aside as to one. 136Wash645, 241P19. [f] (4) Weight of jury's decision is to be determined in trial court and not by court on appeal. 121Kan69, 245P1062. [g] 40Ida555, 234P937. [h] In Pennsylvania.–88PaSuper193. [i] **Appellate court cannot review** action of lower court granting a new trial. TexCivA 25SW(2d)636.

832-47½-New. Ruling of motion not reviewable unless binding instruction in favor of appellant should have been given. 285Pa202, 131A731.

832-47¾-New. The discretion of the court in granting a new trial on the ground that the verdict is the result of passion or prejudice will not be interfered with unless abused. 315Mo318, 286SW100.

832-47¼-New. The discretion of the trial court in denying a motion to set aside an order overruling a motion for a new trial is not reviewable in the absence of abuse. 43OklACR20.

832-48 204Cal136, 266P954; 90CalA555, 266P297; Fla130S601; 161Ga711, 132SE547; Iowa204NW253; 206Iowa1263, 222NW16; 232Ky594, 24SW(2d)311; 238Mich178, 213NW76; 168Minn39, 209NW896; MoA 10SW(2d)965; MoA 20SW(2d)167; 128Okl106, 261P551; 36OklACR100; 289Pa414, 137A599; 291Pa582, 140A525 (refusal of new trial for false testimony); TexCommnA 18SW(2d)578; TexCivA 275SW430; TexCivA 286SW923; TexCivA 289SW143; TexCivA 13SW(2d)750; 101Vt143, 141A684; 101WVa314, 132SE744; 188Wis512, 205NW420 (grant of new trial in furtherance of justice); [1925] ACCan819, [1925] 3DomLR1009, [1925] 3WestWkly49. [a] (3) 118Okl167, 247P692. (5) There is abuse of discretion in denying new trial where it is doubtful from record whether improper conduct of jury affected verdict. TexCommnA 277SW106. (6) Granting new trial on ground that jury question had not been presented when contrary is true under record constitutes abuse of discretion. 201Iowa506, 207NW761. (7) Order dismissing motion for new trial in divorce case, on ground that defendant was in contempt of court for noncompliance with order of court previously made allowing alimony, constitutes abuse of discretion. 199Cal749, 251P1118. [c] **Discretion not abused.**–138Mich178, 213NW76. [d] **Appellate court should consider entire state of record** in determining whether trial court abused its discretion in granting plaintiff new trial. 85CalA55, 258P988.

832-49 28F(2d)463 (reviewable); 42F(2d)48.

833-50 175Minn346, 221NW424.

833-53 21AlaA222, 107S909; 91Fla89, 107S350; 98Fla970, 124S729; Fla130S432; 36GaA695, 138SE86; 202Iowa328, 208NW374; 168Minn218, 210NW44; 319Mo857, 5SW(2d)374 (granting new trial contrary to supreme court decision); 322Mo1039, 17SW(2d)518; MoA 28SW(2d)215; MoA 20SW(2d)928; ND231NW785; 118Okl167, 247P692; 118Okl193, 247P351; 128Okl106, 261P551; 285Pa81, 131A654; 52SD554, 219NW254; 153Wash669, 280P62; 200Wis299, 227NW278. [b] **Question of law held not involved.**–128Me328, 147A427.

833-54 47Ida395, 276P47; MoA 281SW137; MoA 284SW831; 118Okl167, 247P692.

833-55 149Wash527, 271P582. See also 285Pa151, 131A726.

833-56 CalA282P508.

833-57 10F(2d)764; 13F(2d)352; 43F(2d)397; Ala130S224 (in view of court's superior opportunities); 198Cal32, 243P423 (proceedings for partial distribution of estate of deceased per-

son); 199Cal759, 251P778; 204Cal141, 267P102 (affidavits not considered); 208Cal493, 282P10(1stcase); 67CalA424, 227P940; 84CalA557, 258P428; 89CalA351, 264P806; 90CalA37, 265P514; 91CalA26, 266P597; 92CalA230, 268P385; 96CalA530, 274P430; 100CalA441, 280P197; 100CalA634, 280P996; 101CalA388, 281P690; CalA285P893; CalA293P165; 102Conn529, 129A527; 104Conn419, 133A209; 108Conn505, 143A888; 91Fla497, 107S641; 161Ga587, 131SE362; 164Ga696, 139SE333; 168Ga272, 147SE389; 170Ga577, 153SE359(2dcase); 35GaA487, 133SE639; 36GaA692, 137SE912; 36GaA754, 138SE264; 37GaA346, 140SE423; 37GaA331, 140SE527; 42Ida547, 246P966; 42Ida597, 248P14; Ida285P361; 204Iowa1080, 216NW697; 219Ky119, 292SW765; 170Minn215, 212NW449; 315Mo318, 286SW100; 319Mo1137, 6SW(2d)886; Mo29SW(2d)710; Mo32SW(2d)578; MoA24SW(2d)203; MoA31SW(2d)246; 78Mont273, 254P165; 83Mont452, 272P998; 196NC712, 146SE804; 50ND622, 197NW689; 52ND455, 203NW324; 52ND497, 203NW675; 55ND339, 213NW574; 55ND836, 215NW538; 56ND937, 220NW446; 57ND885, 224NW306; 285Pa299, 132A350 (where evidence was partly oral and was given by witnesses whom trial court saw and heard); 287Pa370, 135A127; 293Pa9, 141A623; 91PaSuper536; 134SC435, 132SE828; 155SC356, 152SE646; 49SD9, 205NW666; 49SD514, 207NW461; 50SD301, 209NW958; 69Utah284, 254P781; 100Vt1, 134A706; 143Wash537, 255P942; 153Wash509, 280P2 (appellate court need not review evidence). See also 91CalA213, 266P956. [c] (2) Order granting new trial will not be disturbed. 198Wis228, 224NW104. [f] 29Ariz574, 243P598; 237Mich652, 212NW879; Vt148A285. See also MoA7SW(2d)296 (against weight of evidence). [g] **Weight of evidence** will not be reviewed. 317Mo880, 297SW370. [h] **That plaintiff made prima facie case** does not necessarily show abuse of discretion in granting new trial after verdict for plaintiff. MoA30SW(2d)1094.

834-58 199Cal759, 251P778; 10F(2d)764; 108Conn163, 142A808; 91Fla497, 107S641.

834-59 198Cal32, 243P423; 203Cal210, 263P226; 85CalA55, 258P988 (where new trial was granted by lower court); 92CalA732, 268P951; 164Ga696, 139SE333; 166Ga192, 142SE742; 39GaA515, 147SE775(1stcase); 42Ida547, 246P966; 240Mich671, 216NW413; 78Mont273, 254P165; 287Pa370, 135A127; 69Utah284, 254P781; 142WashI5, 251P883; Wash289P27.

834-60 214Ala181, 106S871; 161Ga414, 131SE158; 162Ga428, 134SE72; 162Ga413, 134SE76; 36GaA100, 135SE495; 36GaA692, 137SE912; 37GaA735; 141SE914; 238Mich447, 213NW710; 170Minn215, 212NW449; Mont289P571; 285Pa251, 132A120; 287Pa370, 135A127; 296Pa561, 146A141. [a] 317Mo880, 297SW370.

834-61 91Fla497, 107S641; 49SD514, 207NW461.

834-62 Ala128S789; 214Ala20, 106S225 (unless great weight of evidence supports verdict); 109Conn500, 147A16 (appellate court gives much weight to conclusion of trial court in setting aside verdict); 91Fla89, 107S350; 142Wash15, 251P883.

834-63 199Cal759, 251P778; 69CalA586, 231P1007; 222MoA633, 300SW834; MoA7SW(2d)309; MoA27SW(2d)499; MoA30SW(2d)1094.

834-64 310Mo642, 276SW60.

834-65 199Cal759, 251P778; 163Ga815, 137SE240 (where verdict was directed, but evidence warranted jury finding for other party); 36GaA695, 138SE86; 36GaA754, 138SE264; 37GaA423, 140SE525; 56ND772, 219NW228 (must appear cause or ground had actual existence); 130Okl136, 138, 265P1068 [quotCJ]; 90PaSuper303.

835-67 7F(2d)855; 8F(2d)930; 15F(2d)660; 26F(2d)522; 28F(2d)463; 35F(2d)859; 176Ark671, 3SW(2d)973; 180Ark757, 22SW(2d)387; 202Cal681, 262P719; 70CalA98, 232P763; 80CalA61, 251P338; 98CalA268, 276P1055; 99CalA695, 279P467; 101CalA186, 281P514; CalA285P1052; CalA293P111; 37GaA320, 140SE398; 44Ida423, 258P169; 121Kan749, 753, 250P292 [citCJ]; 238Mich112, 213NW458; 129Kan499, 283P625; 234Ky347, 28SW(2d)3; 13LaA448, 128S182; 164Minn105, 204NW550; 166Minn308, 207NW644; 172Minn366, 215NW516; 177Minn441, 225NW389; Mo276SW71; MoA1SW(2d)247; MoA19SW(2d)902; MoA20SW(2d)167; Nebr230NW102; Nebr230NW453; 50ND813, 197NW854; 51ND20, 198NW679; 51ND815, 201NW348; 52ND380, 202NW860; 54ND31, 208NW555; 57ND885, 224NW306; 115Okl84, 241P758; 118Okl291, 248P651; 125Okl106, 256P753; 128Okl9, 260P1064; 128Okl160, 261P222; 131Okl176, 268P212; 142Okl195, 285P983; Okl293P220; 116Or113, 239P829; 85PaSuper108; 97PaSuper233; TexCivA271SW430; TexCivA273SW937; TexCivA280SW251; TexCivA280SW1074; TexCivA23SW(2d)516; TexCivA29SW(2d)855; 193Wis187, 212NW648. [b] 205Iowa346, 217NW877; 235Mich217, 209NW129; 128Okl9, 260P1064. See also 126Okl63, 258P913. [d] **Doubt as to sound exercise of discretion of trial court** will be resolved in favor of ruling on motion. MoA1SW(2d)247. [e] **Any doubt as to whether trial court's discretion was soundly exercised** in ruling on motion must be resolved in favor of ruling made. MoA19SW(2d)902.

835-68 235Mich217, 209NW129; 166Minn308, 207NW644; 54ND31, 208NW555; 128Okl9, 260P1064; 131Okl104, 267P850; 146Wash59, 261P642.

835-69 68CalA494, 229P885; 89CalA69, 264P511.

835-70 89CalA69, 264P511; 121Kan749, 753, 250P292[citCJ]; 238Mich447, 213NW710; 166Minn144, 207NW313; 54ND31, 208NW555; 128Okl9, 260P1064; 131Okl104, 267P850.

835-71 54ND31, 208NW555; 88PaSuper84.

835-72 200Iowa1063, 205NW979. [b] 113Okl295, 241P812; 40OklACR117. [c] **Sufficiency of motion** is only question to be determined in some jurisdictions. 114Okl121, 244P416.

836-73 28F(2d)872; 40F(2d)463; 215Ala533, 112S112; 202Iowa643, 210NW761; MoA24SW(2d)203; 91PaSuper538; 136Wash270, 239P562; 104WVa445, 140SE141, 142 [citCJ].

836-74 22AlaA199, 114S15; 84CalA557, 258P428; 89CalA351, 264P806; 170Minn250, 212NW413; 315Mo507, 286SW38; 316Mo384, 289SW332; 219MoA234, 271SW1023; MoA295SW828 (granting new trial after refusal of remittitur); 117Nebr786, 222NW633 (order requiring reduction of verdict as condition for denying new trial not reversed unless discretion abused); 215AppDiv1, 212NYS749; 49ND243, 191NW949; 56ND607, 218NW862; 57ND500, 222NW621; 285Pa81, 131A654; 287Pa370, 135A127; 296Pa385, 145A916(1stcase); 92PaSuper68; 45SC196, 143SE31; 157SC320, 154SE217; Vt147A352; Vt152A41; 69Utah340, 255P416; 142Wash563, 253P800; 106WVa206, 145SE272. [d] 316Mo384, 289SW332.

836-75 108Conn735, 143A844; 315Mo507, 286SW38; 215AppDiv1, 212NYS749; 285Pa81, 131A654; 69Utah340, 255P416; 136Wash270, 239P562; 142Wash563, 253P800.

836-75½-New. Review is only in exceptional circumstances. 285Pa81, 131A654.

836-76 22AlaA24, 111S755; 230AppDiv738, 243NYS471; 69Utah340, 255P416.

836-76½-New. The discretion of the trial court in requiring a remittitur will not be disturbed in the absence of abuse. 154Tenn260, 290SW33, 51ALR193.

836-77 92Fla210, 109S632; 36GaA706, 137SE842; 202Iowa1389, 212NW127; 166Minn308, 207NW644; 52ND380, 202NW860; 57ND885, 224NW306.

837-83 See also 231Ky332, 21SW(2d)468.

837-86 201Cal560, 258P73; 116Nebr297, 216NW810; 131Okl176, 268P212.

837-87 97CalA377, 275P840; 116Nebr297, 216NW810.

837-88 108Conn191, 142A742; 331Ill322, 163NE17; 254IllA469; 165Minn241, 206NW393; 169Minn303, 211NW309; 322Mo787, 16SW(2d)85; 124Okl84, 253P1017; TexCommnA284SW539; TexCivA10SW(2d)243; TexCivA18SW(2d)702(2dcase); TexCivA28SW(2d)225.

837-89 39F(2d)443; 94CalA463, 271P509; 168Minn39, 209NW896; 168Minn248, 210NW55; MoA10SW(2d)75; 55ND794, 215NW280; TexCivA280SW1074; TexCivA293SW322; TexCivA9SW(2d)146; TexCivA10SW(2d)397; TexCivA16SW(2d)925; TexCivA20SW(2d)409; TexCivA22SW(2d)704; 151Va363, 144SE477. But see TexCivA4SW(2d)569. [f] (3) There is abuse of discretion in denying new trial where it is doubtful whether improper conduct of jury affected verdict. TexCommnA277SW106. (4) Where evidence taken by trial judge leaves it reasonably doubtful as to effect of improper conduct of jury on amount of verdict, appellate court will set verdict aside. TexCommnA5SW(2d)765. (5) If there is reasonable doubt as to effect of misconduct of jury in discussing attorney's fees while determining damages for death by negligent injury, trial court should grant new trial, which, if refused, must be reversed on appeal. TexCivA9SW(2d)146. (6) Other instances. Tex32SW(2d)637.

838-90 35GaA469, 134SE113.

838-93½-New. the consideration by the jury of matters not in evidence; TexCivA7SW(2d)926.

838-94 103WVa156, 136SE837.

838-99 37GaA331, 140SE527; Minn230NW895.

838-2 200Iowa176, 204NW416; 50SD568, 210NW992; TexCivA291SW335.

838-6½-New. extending time for notice of intention to move for new trial; 51SD257, 213NW15.

838-7 81CalA772, 254P926 (refusing to set aside verdict on affidavit based on information and belief).

838-12½-New. ; setting aside so much of verdict as relates to damages. 190NC649, 130SE638 (where prejudice does not affirmatively appear).

838-14 188Wis24, 205NW404.

838-17 114Okl110, 243P499.

838-17½-New. recalling execution; 122Okl128, 251P1006.

838-18½-New. setting aside an order of sale; 114Okl110, 243P499.

838-18⅓-New. selection of commissioner to make sale under deed of trust; 102WVa339, 135SE179.

838-19 124Okl236, 254P968.

839-21 332Ill177, 163NE343; 124Okl236, 254P968; 139Okl56, 281P238 (motion to confirm or set aside execution sale).

839-23½-New. petition for review; 128Me328, 147A427.

839-25 121Kan793, 250P286; 244NY606, 155NE916.

839-26 178Ark635, 12SW(2d)18; 90CalA755, 266P574; 82CalA624, 256P220; 109Conn45, 145A151; Conn151A491; 213Ky392, 281SW183; 227Ky96, 11SW(2d)998; 151Md52, 133A831; 169Minn392, 211NW470; Mont285P668; 103NJL194, 135A354; 99NJEq409, 131A907 (opening decree); 31NM639, 249P1013; 113Okl220, 241P186; 113Okl224, 241P173; 120Okl190, 250P1025; 136Okl246, 277P583(2dcase); 285Pa286, 131A859; 86PaSuper116; 86PaSuper118; 90PaSuper128; 90PaSuper502; 29PortoRico795; TexCivA286SW598; TexCivA296SW643; Wash289P527; Wash290P218; 34Wyo509, 245P295. See also 294Pa488, 144A403.

839-27 15F(2d)610; 217Ala381, 116S419; 35Ariz78, 274P776; 200Cal374, 253P148; 70CalA137, 232P982; 72CalA268, 236P930; 82CalA624, 256P220; 90CalA337, 265P867; 99CalA222, 278P257(2dcase); 106Conn281, 137A857; 107Conn164, 140A114; 91Fla275, 107S342; 98Fla1004, 124S751; 169Ga432, 150SE645; 38GaA287, 143SE912; 40GaA568, 150SE569(2dcase); 332Ill236, 163NE672; Iowa231NW440; Iowa232NW811; 121Kan793, 250P286; 123Kan217, 254P1028; 213Ky392, 281SW183; Mass168NE732 (no exception lies); 237Mich

554, 212NW955; 315Mo 209, 286SW25; 103NJL194, 135A354; 101NJEq780, 138A892; 31NM639, 249P1013; 49ND577, 192NW765; 54ND864, 211NW818; 113 Okl 220, 241P186; 113 Okl 224, 241P173; 120 Okl 190, 250P1025; 39 OklACR 352; 283Pa544, 129A637; 286Pa299, 133A504; 287Pa24, 134A418; 294Pa176, 144A84; 86PaSuper327; 86PaSuper405; 86PaSuper499; 86PaSuper501; 88PaSuper34; 88PaSuper510; 90PaSuper180; 90PaSuper370; 35PortoRico 658; Tex CivA 296SW643; 152Wash624, 279P106; Wash 290P222; 199Wis602, 227NW270; 34Wyo 509, 245P295. See also 99NJEq409, 131A907. [c] 286Pa299, 133A504; 89PaSuper471. [d] **Decision on application to strike off judgment** of non prosequi will not be reversed on appeal except to correct manifest abuse of discretion. 293P454, 143A115.

840–30 200Cal 374, 253P148; 35GaA 203, 132SE916; Mo 29SW(2d)126; 113 Okl 224, 241P173; 136 Okl 202, 277P 239.

840–33 213Ala339, 105S171; 21AlaA 446, 109S184; 33Ariz232, 263P625; 196 Cal 683, 239P323; 199Cal 246, 248P923; 200Cal 374, 253P148; 201Cal 70, 255P 499; 205Cal 202, 270P451; 71CalA336, 235P86; 77CalA120, 245P1104; 84CalA 379, 258P105; 86CalA37, 260P573; 89 CalA75, 264P341; 89CalA295, 264P552; 94CalA356, 271P349; 95CalA144, 272P 610; 95CalA390, 272P1080; 96CalA422, 274P579; 98CalA638, 277P516; CalA 277P518; 101CalA561, 281P1101; 77 Colo 578, 238P40; 87Colo 573, 290P274; 201 Iowa614, 206NW37; Fla 130S419 (2dcase); 201 Iowa791, 208NW323; 207 Iowa1382, 224NW596; Iowa 229NW 694; 122Kan793, 253P214; Me 149A 622; 177Minn619, 225NW283(1stcase); MoA 283SW57, 58 [quotCJ]; MoA 26 SW(2d)815; 75Mont332, 243P576; 80 Mont266, 260P124; 82Mont434, 268P 512; 85Mont604, 281P540; NJCh 150A 3; NJCh 150A436; NJ 151A98; 58ND 273, 225NW798; 58ND664, 227NW188; NJSup 137A415; 31NM639, 249P1013; 49ND993, 194NW689; 50ND388, 196 NW108; 52ND74, 201NW991; 54ND 108, 208NW852; 54ND864, 211NW818; 55ND206, 212NW830; 56ND297, 217 NW172; 56ND568, 218NW605; 112 Okl 237, 240P713 (much stronger showing of abuse of discretion is required, where judgment has been set aside, even after term at which it was rendered, than where application was refused); 113 Okl 251, 241P138; 117 Okl 85, 245P65; 119 Okl 187, 249P330; 119 Okl 212, 249P 339; 127 Okl 117, 260P32; 128 Okl 139, 261P931; 143 Okl 286, 288P986; 300Pa 540, 151A12; 92PaSuper254; 51Philippine930; 50Philippine756; 29PortoRico 795; RI 150A125; 50SD512, 210NW 736; 53SD441, 221NW51; 54SD149, 222 NW688; TexCivA 271SW134; TexCivA 272SW507; TexCivA 278SW466; Tex CivA 283SW230; TexCivA 296SW643; TexCivA 297SW235; 69Utah527, 256P 792; Utah 290P950; 146Va553, 131SE 835; 150Wash605, 274P177; 34Wyo 509, 245P295. [d] **Discretion to set aside default judgment not reviewable** when ruling is made at same term at which judgment was rendered. TexCivA 278 SW466

840–34 199Cal 246, 248P923; 200Cal 374, 253P148; 86CalA700, 261P492; 94 CalA356, 271P349; CalA 287P558; 77 Colo 578, 238P40; 201 Iowa791, 208NW 323; 178Minn549, 228NW150(1stcase); MoA 283SW57, 58 [quotCJ]; MoA 22 SW(2d)178(2dcase); Mont 285P668; 128 Okl 139, 261P931; 133 Okl 233, 271 P248; 139Okl 6, 281P297; 146Va553, 131SE835; 40Wyo 449, 278P538. [b] **Denial of application** will be carefully scanned. CalA 291P262.

841–45½–New. ; that defendant did not know that summons and complaint could be issued and signed by attorney without authentication by court. 54ND 864, 211NW818.

841–46 199Cal 246, 248P923; 75Mont 332, 243P576 (no great abuse need be shown where motion is denied); Nebr 229NW13; 127 Okl 117, 260P32; 125 Or 347, 267P524; 34PortoRico 638; 34 Wyo 509, 245P295. [c] 57ND496, 222 NW620. [d] **Where default is deliberate and no meritorious defense,** order opening default may be reversed. 217 AppDiv665, 217NYS378. [e] **Appellate court is more inclined to reverse** for failure to set aside judgment taken by default or on ex parte hearing than if on merits. Iowa 231NW453.

841–51 94CalA593, 271P548.

841–52 TexCivA 298SW300.

841–54½–New. The court's decision on an application for leave to file a bill of review will not be reversed in the absence of abuse of discretion. 153Md 697, 142A380.

842–55 30F(2d)687(1stcase); 200Cal 452, 253P704; 86CalA728, 261P1096; MoA 286SW159; 54ND817, 211NW589; 55ND149, 212NW834; 127 Or406, 257P 20, 62ALR574; TexCommnA 280SW 546; TexCivA 6SW(2d)215. [c] **Discretion not abused** (1) where court refused to settle bill of exceptions but dismissed proceedings in view of plaintiff's delay of nearly seven months. 207Cal 364, 278P440.

842–55½–New. Relief from default in not filing bill of exceptions in time being discretionary with trial court, ruling thereon will not be disturbed in absence of dispute. 71CalA773, 236P336.

842–55¾–New. Appellate court will not interfere, unless there has been an abuse of discretion. 67Utah283, 247P294.

842–55¼–New. No abuse of discretion appears in allowing bill after prescribed period, where notice of application was served on adverse party, and appellant made uncontroverted showing that delay was due to severe illness. 67Utah 283, 247P294.

842–56 169La265, 125S72; 114 Okl 110, 243P499; 149Va406, 141SE237. [a] (2) Other instances. Fla 126S776(2dcase).

842–58 18F(2d)223 (attorney's fees held excessive); 12F(2d)755; 14F(2d) 586; 25F(2d)701; 37F(2d)216; 40F (2d)265; 42F(2d)152; 217Ala215, 115S 248; 218Ala440, 118S638; 170Ark298, 280SW389; 179Ark391, 16SW(2d)17; 180Ark441, 21SW(2d)961(1stcase); 85 Colo 247, 274P931; 167Ga531, 146SE 126; 250 IllA192; 122Kan814, 253P 600; 123Kan696, 256P799; 165La1091, 116S568; 246Mich231, 224NW365; 171 Minn113, 213NW550; 321Mo 282, 10SW (2d)914; MoA 12SW(2d)95; 32NM247, 252P1000; 121 Or655, 257P26; 29Porto Rico 951; 32PortoRico 75; 32Porto Rico 464; 32PortoRico 509; 32Porto Rico 767; 32PortoRico 849 (abuse of discretion not shown); 33PortoRico 6; 34PortoRico 321; 136SC34, 134SE220; 160Tenn325, 24SW(2d)888; 161Tenn 324, 30SW(2d)250 (interest); TexCivA 7SW(2d)913; 140Wash452, 249P980; 62 OntL178, [1928] 2DomLR998; Sask [1928] 1DomLR820. But see 157Miss 788, 128S560. [a] (1) 220Ala78, 124S 197; CalA 287P116; 217Ky660, 290SW 475; 34PortoRico 294; 34PortoRico 421; 34PortoRico 546; 100WVa612, 131 SE455 (discretion abused). (2) 171 Minn113, 213NW550. (6) or guardian ad litem 38F(2d)605. [b] In British Columbia.–[1928] 2DomLR605.

842–60 161Ga711, 132SE547; 200 Iowa 479, 203NW247; Okl 275P634.

843–61 93Fla269, 111S626.

843–62 TexCivA 11SW(2d)187 (appellee's cross action).

843–65 273US103, 47SCt302, 71Led 560; 273US359, 47SCt400, 71Led684; 15F(2d)672; 16F(2d)781; 35F(2d)142 (on appeal, entire evidence must be considered, on question of its legal sufficiency, to carry issues to jury); 21AlaA 183, 107S735; 218Ala186, 118S333; 171 Ark225, 283SW374; 171Ark338, 284SW 45; 71CalA671, 236P200; 77CalA82, 246 P90; 83CalA307, 256P570; CalA 292P 186; CalA 292P132; 102Conn529, 129A 527; 104Conn430, 133A677; 110Conn 625, 149A127; 35GaA170, 132SE241; 35 GaA203, 132SE916; 35GaA413, 133SE 297; 35GaA563, 134SE180; 36GaA788, 138SE256; 318 Ill 570, 149NE469; 237 IllA86; 200 Iowa65, 204NW432; 203 Iowa960, 211NW238; 208 Iowa228, 225 NW268; 119Kan126, 237P648; 120Kan 260, 242P1024; 123Kan616, 256P955; 124Kan423, 260P609; 164La514, 114S 116; 126Me583, 140A374; 127Me11, 140 A608; 252Mass376, 147NE903; 259 Mass490, 156NE687; 264Mass414, 163 NE63; Mass 172NE207; Mass 172NE 250; Mass 172NE610; 234Mich356, 208 NW437; 240Mich671, 216NW413; 311 Mo 49, 277SW562; Mo 298SW51; 220 MoA1050, 279SW723 (mixed question of law and fact); MoA 294SW103; MoA 295SW477; MoA 10SW(2d)334; MoA 13SW(2d)1076; MoA 20SW(2d)584 (in reviewing decision on defendant's requested peremptory instruction, sufficiency of evidence must be tested in light of entire record); MoA 31SW(2d) 108; 103NJL502, 135A884; 103NJL 645, 137A419; 103NJL372, 137A555, 54 ALR623; NJ 139A221; NJ 146A40 (1st case); 252NY127, 169NE112; 230App Div389, 244NYS663; 191NC744, 133SE 5; 193NC274, 136SE869; 193NC805, 138SE173; 194NC289, 139SE443, 54 ALR855; 194NC583, 140SE193; 198NC 817, 151SE245; 126 Okl 117, 258P902; 118 Or542, 247P804; 122 Or162, 257P 809; 122 Or597, 260P222, 55ALR180; 123 Or72, 260P999; 123 Or69, 260P 1011; 128 Or177, 270P911; 134SC435, 132SE828; 142SC125, 140SE443; 45SC 196, 143SE31; TexCommnA 280SW740; TexCommnA 285SW275; TexCommnA 1SW(2d)602; TexCommnA 24SW(2d) 385(1stcase); TexCivA 283SW562; Tex CivA 289SW1027; Utah 285P285(2d case); 147Va409, 137SE370; 147Va471, 137SE456, 52ALR363; 142Wash699, 253 P636; Wash 290P853; BC 15DomLR 618, 27WestLR56. But see 103Conn598, 131A437; 228Ky582, 15SW(2d)479; Mass 165NE671. [b] (33) Conclusion of trial court that services of brakeman were interstate not disturbed. 284Pa 577, 131A484 (unless contrary appears). (34) As to who was liable as between plaintiff and defendant for fee of attorney retained to compel delivery of goods incident to sales transaction between parties. 167Minn334, 209NW14. (35) Question of fraud. 167Minn362, 209NW27. (36) Whether representation of wrong model of automobile increased risk of loss or degree of hazard. 167Minn362, 209NW27. (37) Unlawful intent to exact usurious interest. 219 MoA74, 266SW327. (38) Waiver of terms of insurance agency contract. 123 Or539, 259P419, 262P938. [i] In Louisiana.–161La718, 109S399. [j] In Utah. –280P729.

844–66 273US103, 47SCt302, 71Led 560; 18F(2d)279; 19F(2d)177; 214 Ala243, 107S210; 215Ala220, 109S878; 20AlaA620, 104S835; 32Ariz395, 259P 402; 33Ariz483, 266P6; 168Ark1028, 272SW856; 172Ark729, 290SW942; 174Ark1, 294SW414; 175Ark1170, 300 SW448; 177Ark1195, 9SW(2d)558; 178Ark111, 10SW(2d)503; 178Ark417, 10SW(2d)867; 180Ark994, 23SW(2d) 624; 199Cal 641, 250P676; 202Cal 626, 262P740; 206Cal 396, 274P517; 207 Cal 8, 276P1017(2dcase); Cal 290P22; 69CalA711, 232P467; 72CalA545, 237P 791; 75CalA664, 243P71; 75CalA692, 243P701; 76CalA468, 245P223; 76CalA 741, 246P102; 77CalA164, 247P212; 79 CalA55, 248P1065; 79CalA257, 249P 215; 80CalA342, 251P818; 81CalA295, 253P328; 81CalA476, 253P960; 82CalA 141, 255P215; 83CalA493, 257P144; 84 CalA130, 257P586; 84CalA55, 258P988; 89CalA275, 264P580; 89CalA628, 265P 378; 91CalA470, 267P346; 94CalA450, 271P342; 94CalA493, 271P383; 95CalA 505, 273P39; CalA 285P325; CalA 291 P886; CalA 292P979; 78Colo 310, 241 P539; 81Colo 202, 254P764; 102Conn 529, 129A527; 36GaA788, 138SE256; 28 Hawaii 211; 28Hawaii 404; 30Hawaii 12; 335 Ill 368, 167NE40, 64ALR760; 198 Ind679, 154NE489; 87 IndA175, 155NE52; 199 Ind290, 157NE433; IndA 151NE433; Ind 162NE409; 86 IndA 505, 158NE631; 88 IndA399, 164NE 284; 88 IndA674, 164NE294; 89 IndA 393, 166NE615; IndA 170NE94; 207 Iowa239, 222NW413; 217Ky642, 290 SW506; 229Ky293, 16SW(2d)1046; 164La514, 114S116; 127Me187, 142A 727; 149Md443, 131A822; 152Md105, 136A50; 259Mass26, 155NE658; Mass 172NE250; 235Mich111, 209NW94; 241Mich383, 217NW329, 57ALR262; 310Mo 48, 274SW764; 311Mo 49, 277 SW562; 315Mo 318, 286SW100; 322Mo 937, 18SW(2d)510; Mo 19SW(2d)865 (2dcase); Mo 24SW(2d)143; Mo 25SW (2d)777; MoA 274SW106; MoA 274SW 1102; MoA 278SW805; 220MoA1302;

290SW1012; MoA 282SW725; MoA 286 SW150; MoA 290SW119; MoA 290SW 462; MoA 290SW644; MoA 294SW450; 221MoA1173, 300SW997; MoA 2SW (2d)115; MoA 5SW(2d)689; MoA 6SW (2d)633; MoA 10SW(2d)971; MoA 16 SW(2d)1012; MoA 17SW(2d)376; MoA 17SW(2d)983; MoA 20SW(2d)944; MoA 20SW(2d)971; MoA 21SW(2d)202; MoA 25SW(2d)1075; MoA 30SW(2d) 621; MoA 30SW(2d)1044; 82Mont218, 266P398; 85Mont492, 279P374, 66ALR 587; 51Nev299, 274P811; 83NH10, 138A 315; 103NJL645, 137A419; 105NJL560, 143A347; 105NJL359, 144A601; NJSup 131A87; NJSup 140A888; 251NY237, 167NE428; 190NC869, 129SE804; 53 ND291, 205NW722; 119 OhSt419, 164 NE418; Oh 172NE668; 115 Okl 76, 241 P794; 126 Okl 117, 258P902; 130 Okl 155, 265P762; 128 Or28, 273P707; 130 Or32, 278P972; 130 Or189, 279P633; 117 Or173, 242P1114; 121 Or259, 253P 873; 122 Or162, 257P809; 124 Or89, 262P948; 127 Or326, 266P254; 126 Or 487, 266P634; 125 Or300, 266P910; 125 Or515, 266P1067; 126 Or26, 268P 750; 285Pa202, 131A731; 33PortoRico 995(1stcase); 34PortoRico 661; 35 PortoRico 757; 144SC183, 142SE348; 156Tenn479, 3SW(2d)1053; Tex CommnA 285SW275; TexCommnA 285 SW283; TexCivA 275SW96; TexCivA 275SW232; TexCivA 275SW295; Tex CivA 281SW1090; TexCivA 289SW169; TexCivA 4SW(2d)121; 68Utah486, 251 P16; 69Utah391, 255P435; Utah 280P 729; 143Va903, 129SE493, 45ALR280; 148Va479, 139SE295; 136Wash534, 240 P902; 146Wash478, 263P957; 102WVa 491, 135SE578; Sask [1928] 3DomLR 541. [d] **In case requiring higher degree of proof than is usually required,** reviewing court will examine record to see whether court below has acted upon requisite degree of proof. 115 OhSt11, 152NE14. [e] **Injured plaintiff's statement incompatible with testimony as to how accident occurred** has been held not ground for reversal. 77CalA164, 247P 212. [f] **Weight of testimony as to facts assumed in hypothetical question** will not be reviewed by appellate court where there is any competent supporting testimony. 241Mich383, 217NW 329, 57ALR262. [g] **Disparity in number of witnesses.**–Question as to effect of testimony of one witness as against number of witnesses testifying to contrary is matter for trial court. 89CalA 768, 265P505. [h] **Duty of supreme court to consider evidence** and take judicial notice of ultimate facts or conclusions to be drawn from record. Mo 25SW(2d)777.

844–67 38F(2d)741; 40F(2d)858 (holding court must give full credence to veracity of witnesses whose testimony tends to sustain verdict); CalA 291 P597; CalA 292P287; 196Ind460, 148 NE477; 84IndA473, 151NE434; IndA 167NE156; IndA 170NE564; 127Me 137, 142A727; Mass 165NE872; Mo 298SW756; Mo 29SW(2d)76; MoA 287 SW1061; MoA 296SW255; 221MoA 1123, 298SW107; 221MoA1158, 298SW 125; MoA 31SW(2d)552; 196NC675, 146SE716; Okl 293P250; 52SD116, 216 NW868; TexCommnA 2SW(2d)831; TexCivA 281SW232; TexCivA 284SW 283; TexCivA 295SW229; TexCivA 296 SW939; TexCivA 300SW985; TexCivA 5SW(2d)878; TexCivA 21SW(2d)594; TexCommnA 25SW(2d)588; TexCivA 25SW(2d)642. [a] (1) 241Mich199, 217 NW47 (where defendant's testimony was contradictory); MoA 4SW(2d)875. (2) Evidence in favor of appellant need not be considered unless it aids appellee's case. MoA 294SW450. [b] **All evidence favorable to plaintiff** in error must be rejected. TexCivA 278SW492.

844–68 16F(2d)199; 68CalA69, 228P 393; 76CalA232, 245P235; 81CalA476, 253P960; 102Conn529, 129A527; 86 IndA493, 158NE626; 217Ky670, 290 SW475; 127Me187, 142A727; 78Mont 551, 254P866; 127 Or256, 270P784; 12 PortoRico 330; 16PortoRico 19; 16 PortoRico 309; 16PortoRico 658.

844–69 16F(2d)781; 220Ala25, 123S 225; 170Ark1193, 282SW999; 237 IllA 86; 89 IndA393, 166NE615; 123Kan 616, 256P955; 247Mich522, 226NW213 (2dcase); MoA 6SW(2d)633; 122 Or 162, 257P809; TexCivA 284SW283; TexCivA 289SW169; TexCivA 300SW 985 (only inquiry is whether there is evidence in record justifying finding); TexCivA 30SW(2d)388; Wash 290P 333.

844–69½–New. whether there is substantial evidence to support findings; CalA 281P1043.

844–70 273US359, 47SCt400, 71L ed 684.

844–71 214Ky833, 284SW84; 15Porto Rico 669. [a] **Question is not whether there is sufficient evidence** to warrant judgment for appellant, but whether judgment rendered is substantially supported by evidence. 86CalA284, 260P 815.

844–72 195Cal 354, 233P330; 197Cal 148, 239P1061 (negligence); 88CalA 339, 263P548.

844–74 274US65, 47SCt491, 71L ed929; 160La387, 107S234; 262Mass247, 159 NE909; 9PortoRico 20; 14PortoRico 39; 14PortoRico 585.

845–75 TexCivA 3SW(2d)874.

845–76 71CalA671, 236P200.

845–78 76CalA267, 244P919.

845–79 175Ark1170, 300SW448.

845–80 274US65, 47SCt491, 71L ed929; Utah 280P729.

845–82 80Mont414, 260P1047.

845–82½–New. On death of trial judge before decision of motion for new trial reviewing court has duty to weigh sufficiency of evidence to support verdict. 47RI 136, 131A545.

845–82¼–New. It is the province of reviewing court to decide only the question, whether the trial court committed error in denying motion for new trial. 235Mich111, 209NW94.

845–82¼–New. **Where evidence is wholly circumstantial,** finding should be sustained where supported by a reasonable deduction from the evidence, 172Minn 439, 215NW678.

845–82½–New. even though reviewing authority deems an opposing inference more reasonable, 172Minn439, 215NW 678.

845–82½–New. unless it is clear that the whole evidence is in manifest and undeniable preponderance against the inference made. 172Minn439, 215NW 678.

845–82½–New. The issue on a bill of exceptions to a ruling directing a verdict for defendant with a stipulation for remand for hearing if it is found that the action can be maintained on the evidence is whether the action can be maintained on the evidence as it stood at the close of plaintiff's testimony. 128 Me358, 147A602.

845–82½–New. Appellate court in determining sufficiency of evidence to support finding must consider evidence in its most favorable aspect for opposite party. TexCivA 32SW(2d)225.

845–83 Mass 167NE323; 191NC744, 133SE5.

845–84 281US670, 50SCt448, 74L ed 1105.

845–85 318 Ill 570, 149NW469.

845–86 15F(2d)672; 22AlaA68, 112S 543; 102Conn529, 129A527 (where jurisdiction of supreme court cannot be enlarged to permit retrial of facts either by legislative enactment, rules of court or consent of the parties); 161La 718, 109S399. [c] (1) 228AppDiv37, 238 NYS401. (4) 220AppDiv480, 221NYS 675. [d] **In Alabama.**–213Ala592, 105S 679 (when such court had better opportunity to pass on evidence). [e] **On motion for judgment after jury trial is waived,** exceptions to refusal present only question whether there was substantial evidence. 15F(2d)672.

845–87 43F(2d)549; 213Ala237, 104S 663; 216Ala610, 114S204; 176Ark1205, 5SW(2d)344; 38Cal 522; 200Cal 374, 253P148; 68CalA83, 228P717; 70CalA 458, 233P415; 73CalA565, 239P60; 77CalA341, 246P563; 78CalA743, 248 P754; 90CalA183, 265P550; CalA 284P477; 29Colo 102, 67P164; Colo 288P629; 87Colo 445, 290P784; 42 Ida338, 245P389; 102 Ind251, 1NE 507; Ind 159NE753; 58 Iowa601, 12 NW623; 121Kan617, 249P593; 29Me 485; 43Mich454, 5NW654; 222MoA 1176, 15SW(2d)946 (refusing to vacate judgment); 82NH408, 135A27; NJSup 138A466; 196NC641, 146SE592; 113 Okl 295, 241P812; 128 Okl 97, 261P209; 23Pa24; 88PaSuper34; 143SC152, 141 SE363; TexCivA 286SW647; TexCivA 3SW(2d)930. See also TexCivA 279SW 879. [c] 200Cal 374, 253P148; 201Cal 70, 255P499; 86CalA37, 260P573. [d] **Court's refusal to direct verdict** will not be disturbed when sustained by sufficient evidence. NJSup 138A466.

846–88 34F(2d)264 (proceeding to enforce its own order); NJ 146A176; 127 Okl 70, 259P851.

846–91 203Cal 183, 263P231; 73CalA 565, 239P60; 83CalA403, 256P846 (order denying change of venue reversed); 87CalA301, 262P452; 58ND62, 225NW 128; TexCivA 272SW824 (will not reverse order overruling plea of privilege merely because evidence may preponderate against it); TexCivA 287SW58. [a] **Inferences from facts proved** are peculiar premise of trial court on trial of plea of privilege. TexCivA 279SW 879.

846–94 CalA 291P255; 198NC73, 150 SE701.

846–95 161Ga829, 132SE79; 35GaA563, 134SE180; Ind 164NE496.

846–98 82CalA88, 255P229; 167Ga833, 146SE734.

846–99 42 Ida338, 245P389.

846–1 TexCivA 15SW(2d)722.

846–2½–New. Where defendant did not stand on his demurrer at the close of plaintiff's case, the question whether the case was made for the jury must be determined by the appellate court. MoA 21SW(2d)195.

846–3 173Minn584, 218NW99; 195NC 484, 142SE706; 198NC77, 150SE673; 113 Okl 295, 241P812; 131 Okl 289, 269 P292.

846–4 220Ala620, 127S206 (increasing injunction bond); 77CalA341, 246P563; 160Ga424, 128SE194; 213Ky648, 281 SW826; NC 154SE76; TexCivA 286SW 647. But see 190NC835, 130SE835. [b] **In North Carolina.**–193NC32, 135SE480; 193NC207, 136SE489.

847–5 69CalA682, 232P161; TexCivA 286SW647.

847–7 CalA 288P1099 (as to what was real order of court); 127 Okl 70, 259P 851; TexCivA 286SW647.

847–8 170Ark794, 281SW368; 91CalA 65, 266P821; Ind 159NE753; IndA 170 NE791; 166Minn494, 207NW20; MoA 282SW447; 192NC626, 135SE627.

847–11½–New. , and to findings of court that error was corrected. 82NH 180, 131A596 (where enough appears in record to warrant).

847–11¼–New. Judge at trial properly decides whether erroneous conduct of counsel has been corrected. 82NH180, 131A596.

847–11¼–New. In weighing evidence to sustain conclusion of probate court that all property in distribution proceeding was the separate property of the wife, consideration must be given to all well established presumptions of law affecting the acquisition or possession of real and personal property by spouse during coverture and the increase thereof in the light of circumstances appearing in each particular case. 196Cal 547, 238 P353.

847–12 172Minn284, 214NW890; Tex CivA 277SW425.

847–13 Mass 165NE127; Mass 169NE 145; 172Minn250, 215NW181; TexCivA 293SW194.

847–14 265Mass270, 163NE888; Mass 165NE1; 172Minn284, 214NW890; NJ Sup 137A817; 127 Okl 273, 260P753; 293Pa45, 141A631; 50RI 50, 144A883; Vt 151A642.

847–18 NJSup 149A117.

847–20 206Cal 213, 273P547; 46 Ida 355, 267P611. But see TexCivA 296SW 939.

848–27 [b] **Evidence considered.**–IndA 148NE501.

848–30 217Ala506, 116S686; 127 Okl 273, 260P753; TexCivA 277SW425.

848–32 227Ky431, 13SW(2d)279 (admission of widow's testimony as to de-

ceased's condition held prejudicial in action on group life policy).
848–33 242 IIIA466.
848–35 14F(2d)90; 38F(2d)599; 43F(2d)45; 170Ark1194, 280SW629; 176Ark1188, 5SW(2d)916; 179Ark631, 17SW(2d)889; 181Ark946, 28SW(2d)728; 180Ark1167, 22SW(2d)169; 180Ark562, 22SW(2d)378; 181Ark299, 25SW(2d)760; 181Ark1132, 29SW(2d)683; 200Cal644, 254P269; 204Cal101, 266P803; 76CalA293, 244P923; 84CalA448, 258P418; 85CalA35, 258P988; CalA 284P1062; CalA 292P186; CalA 292P987; 97Fla489, 121S805; 37GaA272, 139SE830; 28Hawaii458; 42 Ida270, 245P98; 232 IIIA277; 232 IIIA430; 234 IIIA164; 123Kan1, 253P561; 229Ky113, 16SW761; 229Ky830, 18SW(2d)280; 234Ky438, 28SW(2d)493; 235Ky835, 32SW(2d)411; 125Me347, 133A911; 149Md443, 131A822; 263Mass500, 161NE596; 235Mich536, 209NW838; 241Mich383, 217NW329, 57ALR262; Mo 292SW67; Mo 19SW(2d)865(2dcase); MoA 274SW106; MoA 274SW1102; 220MoA1067, 279SW727; 230MoA131, 280SW1055; MoA 287SW852; MoA 22SW(2d)364; 76Mont160, 248P864; 85Mont492, 279P374, 66ALR587; 127Misc20, 215NYS761; 53ND291, 205NW722; 31OhA77, 166NE427; 111 Okl 279, 239P663; 115 Okl 84, 241P758; 119 Okl 55, 248P319; 122 Okl113, 250P1001; 121 Or628, 275P16; 286Pa359, 133A566; 128 Or121, 270P772; 127 Or235, 271P734; 127 Or461, 271P976, 62ALR644; 292Pa106, 140A622; 298Pa130, 148A58; 91PaSuper536; 144SC183, 142SE348; TexCivA 279SW879; TexCivA 281SW1090; TexCivA 295SW945; TexCivA 297SW1063; TexCivA 12SW(2d)604; TexCivA 13SW(2d)965; TexCivA 28SW(2d)309; TexCivA 23SW(2d)827; Utah 272P229; 149Va318, 141SE228; Va 152SE357; 150Wash185, 272P731. See also LaA 130S885.
848–36 273US103, 47SCt302, 71L ed560; 12F(2d)917; 14F(2d)65; 43F(2d)685; 176Ark1203, 5SW(2d)308; 199Cal286, 249P188, 51ALR1380; 201Cal610, 258P88; 202Cal279, 260P291; 96CalA219, 274P93; 206Cal396, 274P517; 207Cal8, 276P1017(2dcase); Cal 292P960; 68CalA244, 228P865; 71CalA448, 235P656; 74CalA576, 241P579; 75CalA585, 243P28; 76CalA761, 245P810; 82CalA83, 254P942; 83CalA542, 257P140; 84CalA130, 257P586; 97CalA676, 275P967; 99CalA599, 279P210; 100CalA731, 281P76; 101CalA167, 281P428; CalA 284P477; CalA 285P910; CalA 287P116; CalA 288P117; CalA 288P1086; CalA 289P234; CalA 289P875; CalA 292P1089; 8Colo434, 260P1079; 83Colo111, 262P1016; 83Colo387, 265P901; 106Conn731, 138A58; 110Conn689, 146A820(1stcase); 110Conn635, 149A133; 111Conn528, 150A506; 162Ga735, 134SE771; 42 Ida270, 245P98; 124Kan386, 260P632; 208Ky382, 271SW69; 210Ky429, 276SW115; 213Ky692, 281SW813; 214Ky849, 284SW77; 235Ky795, 32SW(2d)346; 159La1049, 106S561; 9LaA729, 120S231; 12LaA508, 126S452; 13LaA304, 126S727; 12LaA557, 126S540; LaA 128S676; 254Mass105, 149NE674; 264Mass414, 163NE63; Minn 231NW414; 319Mo 149, 3SW(2d)1008; 220MoA1067, 279SW727; MoA 22SW(2d)58; MoA 25SW(2d)551; MoA 27SW(2d)438; MoA 30SW(2d)621; 76Mont160, 248P864; 84Mont68, 274P151; 49Nov261, 244P897; NJSup 137A817; NJ151A855; NM 288P1065(1stcase); 114Okl 21, 242P1027; 123 Or69, 260P1011; 47RI 35, 129A602; 50SD73, 208NW406; SD 227NW67; TexCivA 275SW232; TexCivA 275SW295; TexCivA 6SW(2d)206; TexCivA 6SW(2d)393; TexCivA 29SW(2d)855; Wash 287P891; TexCivA 30SW(2d)797; TexCivA 31SW(2d)501; 39Wyo 46, 270P163; 39Wyo141, 270P537; Sask [1928] 4DomLR87. But see 223AppDiv101, 227NYS489. [a] 82Mont559, 268P549, 58ALR1304; 83Mont430, 272P679; 85Mont492, 279P374, 66ALR587. See also 75CalA585, 243P28. [b] **Weight and credit to be given to testimony of any witness is for trier of facts, who has right to disbelieve testimony even when it is not contradicted.** 307Mo 536, 271SW43. [c] **When testimony improbable, incredible or inherently impossible** as shown by surrounding circumstances findings based thereon will be set aside. Mont 292P725.
849–37 123Kan461, 256P145; 253Mass205, 148NE609; 262Mass573, 160NE426; 285Pa472, 132A579.
849–38 232 IIIA277; 123Kan461, 256P145 (referee); 159La1049, 106S561; 79Mont158, 255P5; 118Nebr442, 225NW119; 27 OhA499, 161NE293.
849–39 83Colo 374, 265P694; 28Hawaii458; 214Ky833, 284SW84; 159La1049, 106S561; 85Mont492, 279P374; 111 Okl 279, 239P663; TexCivA 286SW558; TexCivA 25SW(2d)979.
849–41 125Kan461, 264P1044; 222MoA984, 6SW(2d)661; MoA 18SW(2d)520. [a] MoA 285SW803.
849–42 85CalA377, 259P368; 88CalA67, 262P1106.
849–43 199Cal286, 249P188, 51ALR1380; 119 Okl 55, 248P319.
849–45 18F(2d)200, 202 [citCJ].
849–46 18F(2d)200, 202 [citCJ]. [b] 18F(2d)200, 202 [citCJ].
849–47 SD 230NW759. But see 216Ky303, 287SW357.
849–49 AlaA 129S705(2dcase); 151Md558, 136A61. See also 177Ark392, 7SW(2d)15. [a] **Testimony of wife in husband's action for alienation of affections** will be closely scrutinized. 221MoA748, 286SW412.
849–49½–New. The appellate court may not ignore physical conditions by which witness is circumstanced or the maxima potentialities of his vision. TexCommnA 277SW78.
849–49¼–New. The appellate court has the same right to draw conclusions from silence or evasivenes of witnesses as has the trial court. 14F(2d)705.
850–50 168Ark1167, 273SW381; 180Ark757, 22SW(2d)337; Ark 30SW(2d)825; 102CalA280, 282P990; 110Conn604, 149A400, 68ALR1044; 11LaA670, 124S690; 240Mich671, 216NW413; 321Mo 168, 9SW(2d)960; MoA 19SW(2d)559; 54ND189, 208NW975; 124 Or384, 262P252; TexCivA 273SW690; TexCivA 273SW979; TexCivA 281SW297; TexCivA 282SW257; TexCivA 293SW210; TexCivA 23SW(2d)522; TexCivA 29SW(2d)940; Vt 130A759; Wash 287P894. [c] 92CalA656, 268P1083. [d] **Application of law as given to jury.**–169Minn45, 210NW618. [e] **Power to interfere with verdict as to facts** should be exercised cautiously. 93Fla30, 111S525. [f] **Where verdict may be sustained on any reasonable theory,** it will not be disturbed. 203Cal167, 263P238.
850–51 273US359, 47SCt400, 71L ed684; 5F(2d)502; 14F(2d)90; 15F(2d)535; 18F(2d)831; 20F(2d)339; 22F(2d)671; 30F(2d)46 [certiorari den 49SCt352(11thcase)]; 33F(2d)473; 39F(2d)537; 41F(2d)569; AlaA 129S793; 32Ariz13, 255P486; 167Ark84, 267SW780; 169Ark938, 277SW18 (on question properly submitted under instructions); 170Ark498, 280SW12; 171Ark103, 283SW31; 171Ark225, 283SW374; 171Ark1005, 287SW189; 172Ark28, 287SW755; 172Ark273, 288SW901; 173Ark1181, 292SW373; 173Ark921, 293SW1045; 175Ark618, 299SW1016; 176Ark26, 2SW(2d)53; 176Ark341, 2SW(2d)1113; 176Ark495, 3SW(2d)345, 57ALR39; 176Ark705, 3SW(2d)988; 176Ark1204, 4SW(2d)523; 177Ark1134, 10SW(2d)45; 178Ark111, 10SW(2d)503; 179Ark53, 14SW(2d)238; 181Ark299, 25SW(2d)760; Ark 32SW(2d)624; Cal 287P464; 69CalA415, 233P366; 91CalA84, 266P616; 92CalA145, 267P887; 102CalA615, 283P358; CalA 290P1062; CalA291P903; 82Colo 328, 259P1028; 84Colo 342, 270P659; 105Conn366, 135A391; Conn 152A72(2dcase); 36GaA81, 135SE447; 37GaA174, 139SE98; 41GaA791, 154SE704; 85 IndA301, 154NE24; 88 Ind253, 157NE55; 86 IndA294, 157NE101; IndA 167NE156; IndA 172NE576; 202 Iowa791, 211NW405; 207Iowa1133, 224NW93; 129Kan759, 284P407; 217Ky320, 289SW253; 222Ky531, 1SW(2d)972; 234Ky645, 29SW(2d)650; 4LaA472; 126Me603, 138A867; 126Me498, 139A675; 154Md698, 141A498; 235Mich640, 209NW830, 48ALR737; 240Mich199, 215NW372; 178Minn400, 227NW356(1stcase); Mo 23SW(2d)1013; MoA 275SW592; 220MoA1067, 279SW727; 220MoA131, 280SW1055; MoA 281SW98; MoA 1SW(2d)227; MoA 9SW(2d)543; MoA 24SW(2d)708; MoA 28SW(2d)432; MoA 29SW(2d)221; 115Nebr711, 214NW647; NJ 137A561; 102NJEq17, 138A465; 190NC849, 129SE156; 194NC812, 140SE289; 195NC853, 141SE384; 198NC536, 152SE499; 51ND858, 201NW163; 119 OhSt37, 162NE110; 21 OhA251, 153NE127; 26 OhA373, 159NE848; 29 OhA145, 163NE218; 34 OhA499, 171NE357; 113 Or544, 233P540 (appellate court cannot say as matter of law that presumption of negligence arising from facts is overcome); 115 Or656, 239P825; 122 Or162, 257P809; 124 Or332, 263P391; 125 Or428, 266P875 (rule by constitutional provision); Or 289P375; 219Pa119, 139A627; 285Pa141, 131A723 (based on sufficient evidence); Pa 151A694; 85PaSuper418; 87PaSuper342 (case tried twice); 95PaSuper465; 53SD222, 220NW509; TexCivA 296SW683; TexCommnA 10SW(2d)977; TexCommnA 277SW1057; TexCommnA 280SW179; TexCommnA 1SW(2d)868; TexCivA 281SW275; TexCivA 284SW643; TexCivA 290SW1118; TexCivA 292SW925; TexCivA 292SW935; TexCivA 294SW256; TexCivA 296SW950; TexCivA 300SW145; TexCivA 3SW(2d)539 (supported by evidence); TexCivA 7SW(2d)623; TexCivA 11SW(2d)540; TexCivA 16SW(2d)900; TexCivA 25SW(2d)186; TexCivA 31SW(2d)485; TexCivA 32SW(2d)525; 143Va187, 129SE379; 144Va371, 132SE322; 147Va542, 137SE493; 148Va762, 139SE483; 149Va318, 141SE228; 151Va165, 144SE456; 151Va785, 145SE249; 151Va815, 145SE255; 152Va484, 147SE461; Va 152SE357; 144Wash85, 256P1029; 144Wash150, 257P241; Wash 287P658; 101WVa11, 131SE865; 187Wis626, 205NW556; Eng [1926]NIr131. [a] (1) 222MoA128, 2SW(2d)824; NJ 137A561; NC 153SE344; 124 Or89, 262P948; TexCivA 4SW(2d)257; 143Va777, 129SE684. (4) Verdict in respect to fraud and collusion conclusive on appeal. 169Ark968, 279SW15 (in action on insurance policy). (5) Jury's verdict on question of fraud in case involving only injunctive relief is not conclusive. 217Ky320, 289SW253. [b] (1) 20F(2d)339; 181Ark1061, 29SW(2d)284; 110Conn625, 149A127; 318Mo 723, 300SW769; MoA 26SW(2d)866; MoA 28SW(2d)674; 115Nebr711, 214NW647; Oh 171NE835; TexCommnA 29SW(2d)984; TexCivA 26SW(2d)305 (where finding was unchallenged); 147Va542, 137SE493; 144Wash85, 256P1029; Man [1928] 4DomLR887; Sask [1928] 4DomLR29. (2) If evidence sustains either one of two acts of negligence submitted, verdict will stand where no motion was made to withdraw either issue from jury and no exception to charge submitting both. 168Minn491, 210NW390. [c] (1) 87CalA563, 262P481; 92CalA285, 268P430; CalA 286P1091; CalA 290P895; Mo 26SW(2d)770; 115Nebr711, 214NW647; 122 Or162, 257P809; TexCivA 10SW(2d)1021; TexCivA 32SW(2d)696; 144Wash85, 256P1029. (3) Rule applied where jury found contributory negligence on three specific grounds. TexCivA 7SW(2d)1099. [g] 131 Or123, 282P99. [j] (3) Unless answers to interrogatories are irreconcilably inconsistent with general verdict, judgment will not be disturbed. 87 IndA110, 166NE672(2dcase). [k] **Proximate cause.**–MoA 28SW(2d)674. [l] **Appellate court may not speculate on mental attitude of jury in reaching verdict.**–Iowa 232NW421.
851–52 89CalA267, 264P526; 254 IIIA440; TexCivA 283SW531. See also 249NY272, 164NE49.
851–53 2F(2d)936; 33F(2d)37; 31Ariz24, 250P254; 169Ark662, 276SW591, 42ALR1194; 173Ark921, 293SW1045; 180Ark298, 21SW(2d)430; 86Colo 236, 280P878; 163Ga370, 136SE163; 36GaA22, 135SE492; 36GaA189, 136SE112; 36GaA516, 137SE407; 36GaA692, 137SE912; 41 Ida653, 240P932; 47Ida215, 273P759; 162 IIIA600; 122Kan805, 253P248; 212Ky361, 279SW342

(issues fairly presented); 214Ky97, 282 SW776; 241Mich343, 216NW927; 242 Mich123, 218NW694; 148Miss200, 114 S344; MoA 282SW737; MoA 24SW(2d) 707; 117Nebr262, 220NW276; 195NC 859, 142SE430; NC 155SE733; 20 OhA 216, 151NE788; 112 Okl 1, 239P599; 112 Okl 202, 240P732; 113 Okl 192, 240 P621; 115 Okl 84, 241P758; 115 Okl 280, 242P565; 116 Okl 21, 243P248; 119 Okl 125, 249P333; 120 Okl 68, 250P512; 123 Okl 48, 251P1046; 122 Okl 194, 253 P481; 124 Okl 131, 254P4; 124 Okl 235, 254P962; 124 Okl 233, 254P969; 125 Okl 194, 257P295; 125 Okl 239, 257P 314; 127 Okl 220, 260P502; 128 Okl 234, 262P694; 131 Okl 263, 268P715; 134 Okl 65, 272P850; 144 Okl 284, 290P 1106; 40 OklACR233 [reh pending]; 285Pa199, 131A700; 142Va738, 128SE 61 (conclusive where all questions properly submitted under evidence); 143Va 789, 129SE680; 143Wash176, 254P1083. [b] (2) Jury's finding on question of contributory negligence of occupant of back seat of automobile in engaging in conversation with occupant by her side at time automobile ran into train held conclusive in action against driver for injuries. 297Pa458, 147A100. [c] 35 F(2d)611; 143Wash176, 254P1083.

851–53½–New. where the law offers no barriers to the judgment entered on the verdict; 238Mich189, 213NW163.

851–54 41 Ida285, 238P891; 156 IllA 498; 159 IllA555; 162 IllA438; 162 IllA440; 162 IllA532; 169 IllA559; MoA 273SW157; 20 OhA216, 151NE788.

852–55 See also 232Ky285, 238W(2d) 272; TexCivA 18SW(2d)267.

852–56 28F(2d)340; 39F(2d)826; 43 F(2d)920; 28Ariz581, 238P389; 31Ariz 24, 250P254; 168Ark1167, 273SW363; 170Ark272, 280SW374; 171Ark338, 284 SW45; 171Ark733, 286SW804, 48ALR 349; 171Ark1010, 287SW370; 172Ark 723, 290SW579; 173Ark1181, 291SW 805; 175Ark1169, 299SW43; 175Ark 618, 299SW1016; 175Ark767, 300SW 400; 176Ark356, 3SW(2d)49; 177Ark 1193, 5SW(2d)922; 179Ark303, 15SW (2d)405(1stcase); 195Cal 655, 235P438; Cal 292P970; 88CalA174, 263P255; 95 CalA162, 272P591; 97CalA311, 275P 526; 102CalA436, 283P317; CalA 284P 719; CalA 284P946; CalA 290P465; 83 Colo 313, 264P1091; 86Colo 326, 281P 358 (ample evidence); 87Colo 498, 289P 599; 160Ga732, 129SE57; 162Ga556, 134SE303; 163Ga703, 136SE893; 163 Ga604, 136SE914; 164Ga550, 139SE2; 34GaA178, 128SE694; 34GaA187, 128SE 923; 35GaA156, 132SE253; 36GaA81, 135SE447; 36GaA91, 135SE496; 36GaA 140, 135SE759; 36GaA168, 136SE89; 36 GaA166, 136SE100; 36GaA189, 136SE 111; 36GaA189, 136SE112; 36GaA159, 136SE171; 36GaA163, 136SE178; 36 GaA181, 136SE336; 36GaA344, 136SE 471; 36GaA467, 137SE131; 37GaA22, 138SE527; 36GaA619, 138SE592; 37GaA 148, 139SE129; 37GaA770, 141SE921; 37GaA771, 142SE185; 27Hawaii161; 42 Ida349, 245P95; Ida 288P162; Ida 289 P74; 156 IllA498; 232 IllA193 (evidence amply sufficient to support finding of negligence); 232 IllA430; 239 IllA292; 253 IllA148; 200 Iowa895, 205NW470; 122Kan805, 253P248; 127 Kan673, 275P181; 216Ky525, 287SW 973; 229Ky37, 16SW(2d)489; 233Ky 139, 25SW(2d)57; 233Ky763, 26SW(2d) 753; 233Ky756, 26SW(2d)1035; 7LaA 421; 7LaA758; 125Me96, 131A5; Me 138 A473; 234Mich693, 209NW138; 238Mich 198, 213NW112; Mich 233NW420; 164 Minn414, 205NW276; 179Minn428, 229 NW867; Miss 111S309; Mo 18SW(2d) 401(2dcase); MoA 274SW532; MoA 277 SW578; MoA 297SW171; MoA 9SW (2d)860; MoA 30SW(2d)1090; 115Nebr 270, 213NW372; 116Nebr615, 218NW 424; NJ 147A544; NJ 131A91; 198NC 168, 150SE878; 54ND189, 208NW975; 20 OhA194, 153NE119; 116 Okl 53, 243 P514; 131 Okl 242, 268P303; 132 Okl 11, 268P1111, 59ALR528; 132 Okl 60, 269P241; 132 Okl 70, 269P255; 132 Okl 55, 269P314; 132 Okl 213, 270P25; 133 Okl 11, 270P848; 134 Okl 1, 272P436; 136 Okl 226, 277P219; 122 Or162, 257P 809; 123 Or343, 262P247; 126 Or8, 268 P765; Or 276P668; 85PaSuper394; 85 PaSuper436; 88PaSuper386; 88PaSuper394; TexCivA 296SW683; TexCivA 265SW193; TexCivA 271SW195; TexCivA 274SW298; TexCivA 275SW 90; TexCivA 275SW224; TexCivA 281 SW1090; TexCivA 282SW947; TexCivA 283SW180; TexCivA 284SW600; TexCivA 286SW326; TexCivA 287SW 153; TexCivA 291SW279; TexCivA 292 SW589; TexCivA 293SW210; TexCivA 293SW630; TexCivA 295SW625; TexCivA 299SW649; TexCivA 2SW(2d)939; TexCivA 2SW(2d)977; TexCivA 4SW (2d)222; TexCivA 4SW(2d)241; TexCivA 5SW(2d)569; TexCivA 13SW(2d) 481; TexCivA 19SW(2d)75 (appellant's evidence not supported by pleadings); TexCivA 20SW(2d)158; TexCivA 20SW (2d) 1073; TexCivA 21SW(2d)6; TexCivA 25SW(2d)642; Vt 130A759; 142 Va769, 128SE55 (verdict authorized by evidence under instructions); 145Va681, 134SE692; 152Va453, 147SE265; 144 Wash85, 256P1029; 148Wash506, 269P 817 (abundant evidence); Wash 289P 526; 192Wis269, 212NW643; 192Wis 330, 212NW671; 193Wis105, 213NW 666; 195Wis19, 216NW522; 196Wis 625, 220NW651; Can [1929] 4DomLR 1052(2dcase); Sask [1926] 4DomLR 1017, [c] TexCivA 28SW(2d)1098 (verdict based on evidence).

852–57 273US359, 47SCt400, 71Led684; 21F(2d)406; 28F(2d)830; 38F(2d)557; 38F(2d)599; 173Ark810, 294SW401; 75CalA737, 243P686; CalA 284P1041; CalA 290P80; 45 Ida509, 263P477; 233 IllA545; 219Ky524, 293SW1089; 153 Miss327, 121S144; 315Mo 478, 286SW 36; 321Mo 27, 10SW(2d)649; MoA 14 SW(2d)475; 20 OhA483, 152NE681; 111 Okl 274, 239P472; 127 Okl 106, 260P 26; 123 Or50, 260P1012; 124 Or585, 265P417; 295Pa219, 145A80; 296Pa1, 145A587; 85PaSuper394; 51SD190, 212 NW869; TexCivA 275SW622; TexCivA 278SW503; TexCivA 3SW(2d)882; 136 Wash111, 238P913.

853–58 177Ark1194, 9SW(2d)13; Ark 32SW(2d)310; 84Colo 62, 268P535; 26 GaA619, 106SE812; 36GaA766, 138SE 265; 38GaA274, 143SE781; 38GaA328, 144SE29; 39GaA706, 148SE302; 40GaA 593, 151SE56; 45 Ida313, 262P873; 237 IllA570; Iowa 233NW26; 212Ky361, 279SW342; 229Ky293, 16SW(2d)1046; 127Me222, 142A781; 164Minn523, 205 NW63; MoA 8SW(2d)1043; 48Nev319, 232P206; 55ND817, 215NW268; 121 OhSt462, 169NE562; 114 Okl 297, 246P 842 (any competent evidence); 115 Okl 76, 241P794; 126 Okl 232, 259P224; 43 OklACR155 [reh pending]; 116 Or113, 239P829; 118 Or32, 245P508 (by constitutional provision); 123 Or469, 259 P1064, 260P1099; 132 Or161, 285P219; 294Pa197, 144A88; 138SC281, 136SE 218; TexCommnA 277SW84 (any evidence to sustain conclusions); TexCivA 274SW170; TexCivA 275SW224; TexCivA 280SW848; TexCivA 280SW918; TexCivA 282SW278; TexCivA 290SW 196; TexCivA 5SW(2d)785; TexCivA 21SW(2d)1086; TexCivA 27SW(2d)642; TexCivA 27SW(2d)844; TexCivA 31 SW(2d)515; TexCivA 31SW(2d)846; 153Va261, 145SE366; 191Wis635, 211 NW764, 50ALR69; 35BC119, [1925] 3 DomLR467, [1925] 1WestWkly673; NB [1927] 1DomLR1036. See also TexCivA 8SW(2d)699.

853–59 25F(2d)247; 35F(2d)587; 36 F(2d)176; 36F(2d)330; 37F(2d)320; 38F(2d)972; 40F(2d)586; 41F(2d)542; 29Ariz574, 243P598; 32Ariz457, 259P 884; 168Ark976, 272SW357; 168Ark 1168, 272SW660; 170Ark393, 279SW 1031 (substantial evidence); 172Ark314, 288SW723; 172Ark711, 290SW58; 172 Ark821, 290SW603; 172Ark937, 290SW 933; 172Ark729, 290SW942; 172Ark 877, 291SW426; 173Ark1180, 291SW 430; 173Ark903, 294SW14; 174Ark1, 294SW414; 174Ark603, 299SW2; 176 Ark1204, 2SW(2d)47; 176Ark435, 2SW (2d)1100 (some substantial evidence); 176Ark1205, 2SW(2d)1112 (any substantial evidence); 176Ark448, 3SW(2d)310; 176Ark616, 3SW(2d)692; 176Ark1204, 3SW(2d)979; 176Ark802, 4SW(2d)22; 176Ark1075, 5SW(2d)291; 177Ark60, 5SW(2d)729; 176Ark1188, 5SW(2d) 916; 177Ark195, 5SW(2d)939; 177Ark 1085, 5SW(2d)969; 177Ark1174, 9SW (2d)788; 178Ark1199, 10SW(2d)1; 178 Ark111, 10SW(2d)503; 178Ark417, 10 SW(2d)867; 178Ark804, 10SW(2d)882, 61ALR914; 178Ark1199, 10SW(2d)900; 178Ark546, 11SW(2d)451(2dcase); 178 Ark736, 11SW(2d)473; 178Ark329, 11 SW(2d)761; 178Ark933, 12SW(2d)887; 178Ark732, 14SW(2d)230; 179Ark71, 14SW(2d)240; 179Ark186, 14SW(2d) 547; 179Ark584, 17SW(2d)302; 179 Ark631, 17SW(2d)889; 179Ark816, 19 SW(2d)1010; 180Ark12, 20SW(2d)313; 180Ark1167, 22SW(2d)169; 180Ark757, 22SW(2d)387; 180Ark844, 22SW(2d) 1020; 181Ark1145, 28SW(2d)699; 181 Ark946, 28SW(2d)728; 181Ark1037, 28 SW(2d)1073; 181Ark1096, 29SW(2d) 304; 181Ark1146, 30SW(2d)853; Ark 31SW(2d)302; Ark 31SW(2d)304; Ark 32SW(2d)174; 197Cal 598, 242P76; Cal 289P623; 75CalA664, 243P71; 78 CalA526, 248P930; 91CalA460, 267P 132; 91CalA700, 267P563; CalA 269P 459; 93CalA182, 269P556; 94CalA66, 270P719; 94CalA562, 271P532; CalA 277P339; CalA 287P538; CalA 288P 1099; CalA 290P108; Fla 126S784; 28 Hawaii404; 30Hawaii12; 41 Ida697, 243 P647; 41 Ida703, 243P649; Ida 287P 201; 120Kan585, 245P115; 124Kan798, 262P564; 125Kan3, 262P573; 222Ky 731, 2SW(2d)381; 310Mo 48, 274SW 764; 310Mo 287, 275SW541; 318Mo 139, 1SW(2d)127; 319Mo 619, 5SW(2d)447; Mo 7SW(2d)347; 319Mo 744, 8SW(2d) 38; Mo 8SW(2d)922; 320Mo 1130, 9SW (2d)596; 322Mo 11, 16SW(2d)212; Mo 26SW(2d)988; Mo 29SW(2d)39; 218 MoA352, 275SW51; 219MoA81, 268SW 645; MoA 276SW89; MoA 278SW1078; 222MoA483, 280SW720; MoA 281SW 456; 221MoA460, 282SW64; 221MoA 537, 282SW1037; 221MoA380, 283SW 741; MoA 285SW516; MoA 286SW150; 221MoA748, 286SW412; MoA 286SW 745; 221MoA858, 287SW842; 222MoA 296, 297SW163; MoA 298SW1067; MoA 300SW1023; MoA 6SW(2d)981; MoA 7SW(2d)417; MoA 13SW(2d)560; MoA 14SW(2d)46; MoA 19SW(2d)559; MoA 21SW(2d)880; 76Mont254, 246P168; 77Mont110, 250P819; 78Mont180, 253 P237; 78Mont415, 258P236; 85Mont 492, 279P374; 33NM295, 265P35; 34NM 26, 275P378; 34NM146, 278P361; 30 OhA389, 165NE358; 32 OhA110, 167 NE613; 105 Okl 69, 231P500; 121 Or 658, 257P10; 122 Or547, 259P902; 123 Or50, 260P1012; 126 Or26, 268P750; 127 Or326, 271P986; 50SD516, 210NW 737; TexCommnA 17SW(2d)777; TexCivA 274SW168; TexCivA 1SW(2d)373; TexCivA 6SW(2d)231; TexCivA 10SW (2d)263; 68Utah85, 249P437; 69Utah 340, 255P416; 143Va187, 129SE379; 136Wash410, 240P355; 142Wash699, 253P636; 145Wash582, 260P1074; 147 Wash350, 265P1084; 147Wash619, 267 P37; Wash 290P996.

853–60 77CalA481, 246P1086; MoA 26 SW(2d)866; 82Mont559, 268P549, 58 ALR1304; 193Wis105, 213NW666. See also 31 OhA488, 166NE391. [a] That admitted circumstances make witness' story seem improbable will not justify reversal on ground that verdict is contrary to evidence. 78CalA526, 248P930.

853–61 88CalA313, 263P369; CalA 290 P482; 102Conn660, 129A777 ("any reasonable evidence" to support); 119Kan 391, 239P770; 224Ky292, 6SW(2d)239; 176Minn227, 222NW929; 321Mo 199, 9 SW(2d)901, 60ALR639; 109 Okl 8, 234 P713; 110 Okl 17, 235P921; 110 Okl 39, 235P1104; 111 Okl 220, 239P236; 111 Okl 239, 239P623; 112 Okl 86, 240P110; 112 Okl 94, 240P81; 112 Okl 188, 240P 743; 112 Okl 293, 240P1039; 113 Okl 90, 239P230; 113 Okl 99, 239P895; 113 Okl 102, 239P256; 113 Okl 188, 240P 702; 113 Okl 295, 241P812; 114 Okl 21, 242P1027; 114 Okl 30, 243P206; 114 Okl 107, 244P40; 114 Okl 119, 244P194; 114 Okl 185, 245P44; 114 Okl 297, 246 P842; 115 Okl 31, 241P121; 115 Okl 152, 243P732; 115 Okl 193, 241P471; 115 Okl 264, 242P249; 116 Okl 21, 243P 248; 116 Okl 24, 243P175; 116 Okl 62, 243P172; 116 Okl 287, 245P562; 117 Okl 10, 242P522; 117 Okl 65, 245P557;

117 Okl 108, 244P1114; 117 Okl 147, 245P652; 118 Okl 96, 246P842; 118 Okl 159, 247P413; 119 Okl 1, 245P894; 119 Okl 101, 248P1112; 119 Okl 182, 249P 306; 119 Okl 230, 249P397; 119 Okl 360, 249P723; 120 Okl 57, 249P508; 120 Okl 66, 249P739; 120 Okl 68, 250P 512; 120 Okl 69, 250P488; 120 Okl 150, 250P776; 121 Okl 53, 247P97; 121 Okl 117, 247P1107; 121 Okl 127, 247P978; 121 Okl 207, 249P389; 122 Okl 53, 250P 918; 120 Okl 215, 251P82; 123 Okl 61, 251P1001; 123 Okl 151, 254P706; 123 Okl 206, 251P1012; 123 Okl 48, 251P 1046; 123 Okl 289, 253P287; 124 Okl 108, 254P80; 123 Okl 186, 254P496; 124 Okl 34, 254P703; 124 Okl 251, 255P 685; 124 Okl 196, 255P710; 125 Okl 190, 256P719; 125 Okl 166, 256P890; 125 Okl 147, 256P908; 125 Okl 194, 257 P295; 125 Okl 239, 257P314; 125 Okl 276, 257P759; 124 Okl 213, 258P160; 127 Okl 27, 259P556; 127 Okl 193, 260P 46; 127 Okl 220, 260P502; 128 Okl 39, 260P1060; 128 Okl 45, 261P139; 128 Okl 75, 260P1109; 128 Okl 151, 261P 947; 128 Okl 215, 262P208; 128 Okl 293, 262P693; 128 Okl 303, 262P1070; 129 Okl 12, 264P897; 129 Okl 118, 263 P645; 129 Okl 148, 264P182; 129 Okl 195, 264P151; 129 Okl 207, 264P156; 129 Okl 269, 264P138; 129 Okl 296, 264 P889; 130 Okl 30, 264P907; 130 Okl 92, 265P627; 130 Okl 111, 265P133; 130 Okl 162, 265P1057; 130 Okl 237, 266P763; 130 Okl 251, 267P252; 130 Okl 252, 267P256; 130 Okl 300, 267P 476; 131 Okl 77, 267P618; 131 Okl 98, 267P629; 131 Okl 108, 267P840; 131 Okl 132, 268P221; 132 Okl 281, 270P15; 133 Okl 191, 271P945; 134 Okl 43, 272P 405; 134 Okl 65, 272P850; 135 Okl 206, 275P345; 136Okl 26, 275P1045; 134 Okl 13, 276P175; 136 Okl 271, 277P 591; 137 Okl 82, 277P1026; 137 Okl 164, 278P626(2dcase); 138 Okl 50, 280 P407; 138 Okl 201, 280P570; 138 Okl 256, 280P790; 138 Okl 176, 280P804; 138 Okl 182, 280P834; 139 Okl 210, 281 P780(2dcase); 140 Okl 12, 282P125; 140 Okl 8, 282P154; 140 Okl 70, 282P 319; 141 Okl 282, 285P17; 143 Okl 134, 288P283; 143 Okl 299, 288P960; 144 Okl 120, 289P291; 144 Okl 56, 289P703; Okl 291P962(2dcase); Okl 292P37; Okl 293P220; 40 OklACR589 [reh pending]; 42 OklACR70; 43 OklACR57 [reh pending]; 43 OklACR149; 43 OklACR155 [reh pending]; 289Pa277, 137A272; 151SC391, 149SE111 (where verdict reasonable and proper); TexCivA 283SW 261; 100Vt51, 134A853; 37BC266, [1926] 3DomLR265, [1926] 2WestWkly 433. See also 85PaSuper164. [a] 125 Okl 176, 256P906. [b] 321 Ill 168, 151 NE573; 116 Okl 82, 243P211; 129 Okl 235, 264P604; 130 Okl 82, 265P650; 131 Okl 13, 267P480; 131 Okl 210, 268 P243; 136 Okl 60, 276P230; 138 Okl 190, 280P305, 66ALR894; 138 Okl 138, 280P589; 139 Okl 16, 280P1087; 138 Okl 286, 281P139; 140 Okl 80, 282P635; 141 Okl 256, 284P866; 142 Okl 89, 285 P27; 43 OklACR247 [reh pending]; 43 OklACR282. [c] Where there is credible supporting evidence, reviewing court cannot disturb verdict. 34 OhA 499, 171NE357.

853-62 320 Ill 577, 151NE526; 253 IllA 176; 166Minn45, 207NW178; 87Pa Super83; 52ND198, 217NW190; Tex CivA 297SW339; 152Va236, 146SE265.

853-63 196Cal 639, 238P944; 98CalA 610, 277P347; CalA 291P848; CalA 291 P912; 35GaA763, 134SE806 (trover); 37GaA358, 140SE395; IndA 162NE446 (it is only where but one reasonable inference can be drawn that appellate court will interfere); 203 Iowa555, 213 NW247; 228Ky430, 15SW(2d)254; Mass 165NE20 (any view of testimony); MoA 78W(2d)302; 119 Okl 84, 248P 598; 126 Okl 150, 259P125; 129 Okl 151, 264P180; 130 Okl 294, 267P471; 131 Okl 295, 269P265; 102WVa491, 135 SE578. See also 133SC256, 130SE893. [a] 125 Okl 260, 257P797.

853-63½-New. , and sufficiency of the evidence depends on the credibility of witnesses; 102WVa491, 135SE578.

854-64 32F(2d)567; Ariz 286P817; 196Cal 639, 238P944; 204Cal 387, 268 P345; 99CalA573, 278P906; 102CalA 221, 282P1009; 107Conn304, 140A 751; 203 Iowa960, 211NW238; 169 Minn218, 210NW996; 174Minn402, 219 NW546; 310Mo 1, 274SW1079; MoA 22SW(2d)654; 31 OhA229, 166NE916; 125 Okl 260, 257P797; TexCivA 272SW 299; TexCivA 273SW690; TexCivA 292 SW924; TexCivA 18W(2d)493; Tex CivA 4SW(2d)599; 67Utah354, 248P 132; 149Va318, 141SE228.

854-65 76CalA267, 244P919; 81CalA 747, 254P679.

854-66 41GaA230, 152SE602(1stcase); 172Minn98, 214NW795.

854-67 237Mich274, 211NW625; 127 Misc20, 215NYS761; 53SD491, 221NW 93.

854-67½-New. where verdict is not flagrantly against the evidence; 210Ky 559, 276SW547.

854-68 200Cal 726, 254P891; 77Mont 110, 250P819.

854-69 149Va318, 141SE228.

854-70 31Ariz239, 251P891; 100CalA 409, 279P1083; 109Conn500, 147A16; 237 IllA86; 88 IndA616, 164NE304; 226 Ky706, 11SW(2d)968; 126Me598, 138A 527; 105NJL391, 144A805; 98 Okl 183, 224P716; 111 Okl 279, 239P663; 111 Okl 301, 239P609; 112 Okl 20, 239P674; 113 Okl 147, 240P79; 113 Okl 190, 240 P621; 113 Okl 254, 241P789; 113 Okl 257, 241P746; 113 Okl 291, 241P1105; 115 Okl 81, 241P742; 117Okl 185, 245 P858; 117 Okl 299, 246P240; 122 Okl 47, 250P796; 124 Okl 84, 253P1017; 124 Okl 123, 254P79; 124 Okl 235, 254 P962; 126 Okl 285, 259P232, 233; 127 Okl 203, 260P481; 128 Okl 23, 261P 174; 128 Okl 236, 262P690; 40 OklACR 27 [reh pending]; 133 Okl 14, 270P838; 133 Okl 17, 270P850; 117 Or652, 244P 665, 245P317 (rule incorporated in Oregon constitution); 120 Or364, 251P 713; 121 Or309, 252P87; 121 Or628, 257P16; 50SD434, 210NW675; Tex CivA 273SW640; TexCivA 10SW(2d) 760; TexCivA 15SW(2d)100; Va 154 SE492; Va 154SE553; Va 154SE575; 186Wis116, 202NW299 (credible evidence).

854-71 43F(2d)557; 173Ark1181, 294 SW994; CalA 291P597; CalA 292P173; 83Colo 313, 264P1091; IndA 168NE495; 245Mich146, 222NW160; Minn 231NW 415(2dcase); 310Mo 287, 275SW540; 111 Okl 279, 239P663; 111 Okl 301, 239P 609; 112 Okl 97, 240P317; 113 Okl 147, 240P79; 113 Okl 190, 240P621; 113 Okl 254, 241P789; 113 Okl 257, 241P746; 113 Okl 291, 241P1105; 115 Okl 81, 241 P742; 116 Okl 151, 243P723 (where verdict is supported by any competent evidence); 117 Okl 299, 246P240; 122 Okl 47, 250P796; 123 Okl 61, 251P1001; 124 Okl 84, 253P1017; 124 Okl 123, 254P 79; 124 Okl 235, 254P962; 124 Okl 280, 256P34; 126 Okl 285, 259P232, 233; 127 Okl 203, 260P481; 128 Okl 23, 261P174; 128 Okl 236, 262P690; 133 Okl 14, 270P 838; 133 Okl 42, 271P237(2dcase); 133 Okl 245, 271P422; 142 Okl 195, 285P 983; 143 Okl 206, 288P964; 40 OklACR 27 [reh pending]; 43 OklACR282; 121 Or531, 255P606; 126 Or160, 269P210, 59 ALR875; 130 Or32, 273P711; Tex CommnA 13SW(2d)351; 150Wash157, 272P723, 63ALR200.

854-72 149Va906, 141SE860.

854-73 85PaSuper394.

854-73½-New. , or the appellate court could not say jury was not justified in reaching its conclusion from evidence in case; 234 IllA105.

854-73¼-New. where verdict is not so inconclusive as to be unsatisfactory; 35BC119, [1925] 3DomLR467, [1925] 1 WestWkly673.

854-73¾-New. , where the verdict is supported by completely satisfying evidence. 287Pa337, 135A105.

854-74 CalA 286P1078 (slight evidence); 76Mont254, 246P168; 77Mont 110, 250P819.

854-74½-New. Verdict not disturbed because evidence is doubtful. 233 IllA 432.

854-75 Colo 241P153; 328 Ill 610, 160 NE226; 243 IllA576; 218Ky26, 290SW 1034; 125Me386, 134A198; 127Me377, 143A466; Nebr 223NW21(2dcase) (verdict held not result of bias and prejudice); NJ 132A201; 31 OhA525, 166 NE698; Vt 130A759.

855-76 34F(2d)25; 32 OhA177, 166NE 396; 31 OhA525, 166NE698.

855-77 125Me160, 132A209; Mich 233 NW185.

855-78 30F(2d)578; 87CalA440, 262P 380; 101Vt143, 141A684.

855-79 TexCivA 283SW910.

855-79½-New. unless the verdict is manifestly against the clear weight of the evidence. 235Mich111, 209NW94.

855-80 157 IllA345; 162 IllA600; 125 Kan668, 265P1106; 217Ky320, 289SW 253; 219Ky534, 293SW1071; 224Ky48, 5SW(2d)481; 251Mich372, 232NW216; MoA 298SW101 (palpable error); 119 Okl 254, 249P1110; 115 Or523, 239P 102; 132 Or46, 284P567; TexCommnA 285SW811; 65Utah465, 238P259, 41ALR 1495; 146Va641, 132SE840; Va 154SE 499; 100WVa688, 131SE552; PrEdwIs [1925] 3DomLR829 (no evidence). See also 93Cal 745, 270P374; 235Ky835, 32 SW(2d)411.

855-80½-New. unless it appears unreasonable, 106Conn396, 138A127.

855-80¾-New. or illogical, 106Conn396, 138A127.

855-80¼-New. or contrary to rules of law; 106Conn396, 138A127.

855-81 219Ala427, 122S416, 65ALR 1097; 220Ky217, 294SW1050; 6LaA50; Minn 232NW629; NJ 146A687; 114 Oh St144, 150NE734; 31 OhA229, 166NE 916; TexCivA 30SW(2d)375; Va 154SE 499. See also 176Ark666, 4SW(2d)25.

855-81½-New. Judgment sustained by pleading and evidence must be affirmed by reviewing court. 212Ky655, 279SW 1069.

855-81¾-New. Findings must be given effect where it is not sought to set them aside or to attack them on appeal, TexCivA 279SW567.

855-81¼-New. or unless evidently based upon, or influenced by, irregularity, bias, unfairness, passion, or inadequate consideration of testimony. 218AppDiv220, 218NYS155.

855-82 213Ala672, 106S147; Ala 128 S228; 75CalA664, 243P71; 83Colo 313, 264P1091; 104Conn229, 132A451; 203 Iowa555, 213NW247; 217Ky11, 288SW 1022; 238Mich112, 213NW458; 173Minn 622, 217NW485; 77Mont110, 250P819; 116Nebr112, 216NW191; 116Nebr297, 216NW810; 104NJL215, 141A2; 127 Misc20, 215NYS761; 19 OhA349; 20 Oh A216, 151NE788; 29 OhA101, 163NE 206; 124 Or384, 262P252; 285Pa141, 131 A723; 85PaSuper164; TexCivA 280SW 914; 100Vt51, 134A853; 146Va670, 132 SE698; 145Va681, 134SE692; 136Wash 111, 238P913.

856-84 244 IllA522; 30PortoRico 115.

856-84 See also 238Mich242, 213NW 158.

856-84½-New. The reviewing court cannot substitute findings required for recovery, no matter how tenable, for the verdict found. 109Conn735, 146A 612 (insufficient facts to set verdict aside).

856-85 174Ark553, 297SW833; 37GaA 423, 140SE525; 232 IllA398; 233 IllA 229; 27 OhA355, 161NE288; 49SD319, 207NW49.

856-86 27Hawaii280; 234 IllA89; Tex CivA 272SW807; TexCivA 276SW956; 194Wis333, 216NW653.

856-87 93CalA666, 270P263. [a] Whether evidence warranted submission of case to jury may be determined by reviewing court. 221MoA1250, 300SW 321.

856-88 CalA 287P116; 93Fla30, 111S 525; 34GaA190, 128SE922; 37GaA423, 140SE525; 234 IllA89; IndA 169NE 358; 2LaA176; Miss 115S727; MoA 278 SW1044 (mere suspicion); 113Nebr751, 204NW515; 114Nebr318, 207NW500; 35 OhA164, 171NE562; 111 Okl 301, 239 P609; 112 Okl 20, 239P674; 114 Okl 297, 246P842; 116 Okl 106, 243P504; 116 Okl 287, 245P562; 118 Okl 271, 247 P969; 120 Okl 257, 250P784; 122 Okl 47, 250P796; 123 Okl 110, 252P18; 123 Okl 258, 253P55; 128 Okl 75, 260P1109; 128 Okl 292, 262P663; 129 Okl 40, 263 P130; 139 Okl 284, 282P303; Okl 293P 264; 43 OklACR155 [reh pending]; 124 Or189, 264P355; TexCommnA 296SW 877; TexCivA 283SW531; TexCivA 10 SW(2d)1030; TexCivA 16SW(2d)910; 143Va46, 129SE219; WVa 155SE540; Ont [1930] 1DomLR268 (finding of negligence). [c] 154Miss720, 123S855. [e]

280US486, 50SCt198, 74Led562; 85 IndA450, 150NE31; 77Mont446, 251P 546; 224AppDiv314, 230NYS640; ND 231NW854. [f] See also 299Pa568, 150 A169. [i] **Appellate court after finding** that appellant's claim was supported by substantial evidence cannot on reversal of the judgment of the trial court direct trial court to enter judgment for appellant, but can only remand for new trial. 307Mo 536, 271SW43. [j] **Verdict based partly on view by jury** should be set aside if unsupported by substantial testimony. 156Miss693, 126S650, 68ALR167.

857-89 274US65, 47SCt491, 71Led929; 74Mont245, 240P376; 113 Okl 295, 241 P812; 123 Okl 110, 252P18; 136 Okl 218, 277P269; Can [1929] 2DomLR81.

857-90 217Ala297, 116S149; 105Conn 628, 136A383; 212Ky655, 279SW1069 (flagrantly against evidence).

857-90½-New. , or refused to direct a verdict. 233 IllA196.

857-91 234 IllA89; 129 Okl 151, 264P 180; TexCivA 276SW956; TexCivA 3 SW(2d)874; 153Va649, 151SE135; 194 Wis119, 215NW822. But see MoA 20 SW(2d)580. [a] (2) Verdict for plaintiff in action for personal injuries and property damages resulting from collision between automobile driven by plaintiff and street car will be reversed where contrary to undisputed physical facts. 91PaSuper95. [b] **Verdict contrary to unimpeached, uncontradicted testimony of interested party** will be set aside. TexCivA 280SW276.

857-92 321 Ill 168, 151NE573 (appellate court is not precluded by lack of contradiction in testimony); 2LaA269; 57ND559, 223NW190; 124 Or384, 262P 252; 194Wis333, 216NW653.

857-93 Ariz 286P817; CalA 290P597; 104Conn229, 132A451; 221MoA748, 286 SW412; Sask [1930] 4DomLR938.

857-94 234Mich347, 208NW453; 21 OhA251, 153NE127.

857-97 194Wis119, 215NW822.

857-99 104Conn229, 132A451; 114Nebr 53, 205NW942, 207NW528; 124 Or384, 262P252; 299Pa63, 149A85.

857-1 TexCivA 16SW(2d)548.

857-1½-New. Supreme court will scrutinize a verdict more critically and interfere more readily where result is to deprive the owner of control of his own property than in any other. 200 Iowa 1258, 206NW90.

857-1⅔-New. A constitutional provision precluding the court from reëxamining a question of fact tried by jury is not intended to deprive it of its judicial function of rejecting evidence which is unreasonable and contrary to all human experience. 124 Or384, 262P 252.

857-1¼-New. , or where it is based upon speculation or conjecture. 124Kan 259, 259P683.

857-1⅓-New. Where evidence as to essential findings is insufficient, the verdict will be reversed. 276US165, 48SCt 215, 72Led513.

857-1⅓-New. If concluding verdicts are wrong, the appellate court should revise them. 218Ala453, 118S807.

857-2 32Ariz154, 256P503; 171Ark 1029, 287SW168, 49ALR316; 202Cal 668, 262P311; 206Cal 428, 270P931; 206Cal 286, 274P351; Cal 293P62; 76 CalA293, 244P923; 88CalA698, 264P 259; 90CalA144, 265P558; CalA 280P 154; 100CalA373, 280P191; 100CalA 498, 280P377; 101CalA110, 281P435; 40 Ida565, 234P935; 233 IllA432; 253 IllA176; Ind 166NE297; 206 Iowa950, 221NW505; 227Ky91, 11SW985; 127 Me187, 142A727; 148Miss575, 114S396; Mo 287SW628; MoA 298SW254; NJSup 149A117; 25 OhA157, 157NE825; 105 Okl 268, 232P411; 127 Okl 45, 259P 644; 295Pa523, 145A531; 295Pa553, 145A582; 298Pa130, 148A58; 298Pa 256, 148A102; 298Pa244, 148A105; 299Pa79, 149A104; 53SD228, 220NW 503, 61ALR306; TexCivA 272SW299; TexCivA 272SW346; TexCivA 273SW 690; TexCivA 276SW460; TexCivA 288SW1111; TexCivA 296SW683; Tex CivA 4SW(2d)211; TexCivA 32SW (2d)668; 143Va920, 129SE700; Va 154 SE547; Wash 291P336. But see 164 Minn213, 204NW928.

858-3 6F(2d)797; 14F(2d)602; 16F(2d) 190; 17F(2d)689; 18F(2d)279; 20F(2d) 339; 30F(2d)669; 34F(2d)10; 35F(2d) 172; 35F(2d)465; 41F(2d)542; 216Ala 282, 113S261; 216Ala516, 113S581; 220 Ala237, 124S519; Ala 128S233; 21AlaA 545, 109S895; 23AlaA190, 122S700(2d case) [certiorari den 219Ala494, 122S 701(1stcase)]; 28Ariz497, 238P327; 28 Ariz518, 238P332; 29Ariz334, 241P518; 30Ariz491, 249P66; 30Ariz569, 249P751; 31Ariz21, 250P253; 31Ariz65, 250P364; 31Ariz224, 252P512; 32Ariz154, 256P 503; 33Ariz474, 266P3; 35Ariz302, 277 P68; 35Ariz373, 278P368(2dcase); Ariz 286P817; 168Ark795, 271SW460; 168 Ark818, 271SW462; 169Ark7, 272SW 867; 169Ark136, 273SW378; 170Ark 694, 280SW656; 171Ark103, 283SW31; 171Ark464, 284SW533; 171Ark611, 285 SW353; 171Ark1127, 287SW371; 172 Ark255, 288SW897; 172Ark273, 288SW 901; 172Ark498, 289SW474; 177Ark 1195, 291SW442; 172Ark1031, 291SW 793; 173Ark263, 292SW102; 172Ark 1053, 292SW120; 173Ark455, 292SW 662; 173Ark769, 293SW1030; 173Ark 1136, 294SW69; 173Ark1182, 294SW 705; 174Ark332, 295SW49; 174Ark463, 295SW727; 174Ark527, 295SW970; 174 Ark529, 296SW33; 174Ark682, 297SW 839; 175Ark487, 299SW750; 175Ark 1170, 1SW(2d)54; 176Ark1205, 2SW (2d)1085; 176Ark1203, 3SW(2d)50; 176 Ark511, 3SW(2d)337; 176Ark780, 4SW (2d)919; 177Ark984, 8SW(2d)459; 178 Ark1199, 10SW(2d)4(2dcase); 178Ark 458, 10SW(2d)892; 178Ark329, 11SW (2d)761; 179Ark39, 14SW(2d)255; 179 Ark742, 18SW(2d)345; 180Ark1030, 23 SW(2d)988; 180Ark1003, 24SW(2d)846; 180Ark890, 25SW(2d)19; 181Ark517, 26SW(2d)579; 181Ark1146, 28SW(2d) 67; 181Ark1072, 29SW(2d)279; 181 Ark1110, 29SW(2d)280; 181Ark1147, 29 SW(2d)674; Ark 31SW(2d)756; Ark 31 SW(2d)963; 197Cal 176, 239P1090; 197 Cal 702, 242P703; 200Cal 726, 254P891 (where evidence is not inherently improbable); 200Cal 348, 254P532; 201 Cal 185, 256P200; 203Cal 621, 265P814; 204Cal 101, 266P803; 204Cal 387, 268P 345; 205Cal 563, 271P1072; 207Cal 275, 277P1043; 208Cal 770, 284P1105(2d case); Cal 289P614; Cal 291P184; 70 CalA283, 233P370; 73CalA1, 238P163; 73CalA605, 238P1087; 75CalA737, 243 P686; 75CalA692, 243P701; 76CalA 293, 244P923; 76CalA767, 246P74; 77 CalA481, 246P1086; 78CalA660, 248P 774; 84CalA750, 258P673; 85CalA55, 258P988; 85CalA233, 258P1104; 86CalA 402, 260P841; 86CalA474, 260P957; 87 CalA38, 261P1069; 87CalA440, 262P 380; 88CalA601, 263P1031; 89CalA81, 264P532; 91CalA440, 267P158; 91CalA 470, 267P346; 95CalA532, 272P1087; 95 CalA617, 273P165; 97CalA112, 274P 1009; 97CalA764, 276P359; 98CalA759, 277P894; 99CalA583, 278P912; 99CalA 557, 279P183; 100CalA498, 280P377; 102CalA405, 283P148; CalA 284P1083; CalA 286P1078; CalA 289P940; CalA 290P48; CalA 290P481; CalA 290P597; CalA 290P924; CalA 291P444; CalA 292P173; CalA 292P287; CalA 292P 1089; 80Colo 375, 251P224; 81Colo 399, 255P627; 81Colo 370, 256P1; 83Colo 204, 263P713; 84Colo 433, 271P187; 85 Colo 340, 275P935; Colo 291P1019; 104 Conn229, 132A451; Conn 152A135; 90 Fla1, 107S440; 94Fla586, 114S366; 95 Fla991, 117S391; 97Fla679, 122S107(2d case); 164Ga696, 139SE333; 35GaA786, 134SE800; 36GaA90, 135SE496; 37GaA 272, 139SE830; 37GaA407, 140SE399; 37GaA472, 140SE780; 39GaA454, 147 SE413; 41GaA393, 153SE84(1stcase); 41GaA622, 154SE283; 27Hawaii262; 41 Ida697, 243P647; 41 Ida707, 243P650; 41 Ida723, 243P366; 42 Ida349, 245P 95; 44 Ida478, 258P931; 45 Ida28, 260 P426; 45 Ida175, 260P1092; 46 Ida505, 269P91; 46 Ida492, 269P100; 47 Ida 661, 279P416, 65ALR900; 48 Ida221, 281P1; Ida 287P944; 162 IllA600; 232 IllA430; 233 IllA262; 235 IllA410; 255 IllA465; 199 Ind290, 157NE433; 84 IndA 478, 151NE620; IndA 170NE94; 204 Iowa391, 214NW685; 204 Iowa197, 215 NW233; Iowa 220NW38; Iowa 224NW 64; Iowa 229NW846; 119Kan372, 239 P759; 122Kan242, 251P1079; 122Kan 433, 252P211; 122Kan728, 253P240; 123Kan277, 255P74; 125Kan530, 264P 737; 127Kan520, 274P269; 214Ky1, 282SW553; 216Ky838, 288SW741; 217 Ky6, 288SW1056; 218Ky32, 290SW 1070; 219Ky307, 292SW791; 219Ky438, 293SW1082; 219Ky524, 293SW1089; 223Ky727, 4SW(2d)695; 224Ky254, 6 SW(2d)234; 226Ky179, 10SW(2d)846; 226Ky561, 10SW(2d)1064; 231Ky141, 21SW(2d)236; 232Ky539, 23SW(2d) 942; 234Ky639, 28SW(2d)956; 164La 529, 114S122; 10LaA427, 121S371; 125 Me36, 130A512; 125Me96, 131A5; 125 Me214, 132A423; 126Me389, 138A689; 126Me605, 139A460; 127Me85, 141A185; 127Me222, 142A781; 232Mich41, 204NW 710; 242Mich497, 219NW665; 245Mich 277, 222NW123; 248Mich557, 227NW 775; 249Mich431, 228NW763; 251Mich 594, 232NW184(2dcase); 168Minn518, 210NW406; 169Minn517, 211NW683; 172Minn139, 215NW785; 173Minn163, 216NW803; Minn 232NW797; 141Miss 129, 106S265; 140Miss789, 106S531; 145 Miss475, 111S105; Miss 112S707; 148 Miss456, 114S35; 148Miss575, 114S396; 151Miss711, 118S441; 307Mo234, 270SW 658; Mo 271SW749; 310Mo 227, 274 SW1025; Mo 285SW482; Mo 292SW67; MoA 15SW(2d)922; MoA 15SW(2d)945; 218MoA679, 267SW70; 219MoA222, 269 SW942; MoA 275SW599; 221MoA409, 282SW59; 220MoA355, 286SW718; MoA 282SW749; 221MoA537, 282SW1037; 221MoA600, 283SW65; MoA 284SW161; MoA 293SW428 (substantial evidence); 221MoA1037, 295SW803; 221MoA1173, 300SW997; 222MoA128, 2SW(2d)824; MoA 4SW(2d)478; MoA 17SW(2d)615; MoA 18SW(2d)564; MoA 21SW(2d)201; MoA 23SW(2d)193; MoA 24SW(2d)657; MoA 30SW(2d)645; MoA 31SW(2d)102; MoA 31SW(2d)113; MoA 31SW(2d) 552; 73Mont321, 236P550; 75Mont294, 243P803; 78Mont199, 253P260; 78Mont 551, 254P866; 78Mont415, 258P236; 80 Mont431, 261P253; 84Mont1, 273P1051; 84Mont494, 276P946; Mont 286P415; 114Nebr53, 205NW942, 207NW528; 115 Nebr789, 215NW111, 61ALR1; NJ 140 A444; NJ 151A94; NJ 133A766; 241 NY470, 150NE519; 191NC827, 132SE 596; 194NC792, 139SE436; 194NC798, 139SE701; 198NC140, 150SE876; NC 154SE749; NC 154SE847; 49ND838, 193NW658; 51ND158, 199NW480; 56 ND423, 217NW845; 58ND58, 225NW 79; ND 230NW6; 22 OhA450, 154NE 58; 118 OhSt392, 161NE25; 21 OhA251, 153NE127; 23 OhA176, 155NE566; 23 OhA532, 155NE703; 25 OhA157, 157NE 825; 26 OhA575, 160NE502; 27 OhA 355, 161NE288; 30 OhA456, 164NE768 (1stcase); OhA 173NE263; 109 Okl 89, 234P713; 111 Okl 230, 239P222; 116 Okl 1, 243P150; 116 Okl 108, 243P237; 117 Okl 96, 245P571; 118 Okl 23, 246P 478; 121 Okl 5, 247P58; 122 Okl 113, 250P1001; 120 Okl 215, 251P82; 123 Okl 248, 253P84; 122 Okl 194, 253P481; 127 Okl 290, 260P743; 128 Okl 239, 262 P660; 129 Okl 130, 263P1088; 132 Okl 43, 269P319; 132 Okl 248, 270P81; 133 Okl 104, 271P635(2dcase); 133 Okl 285, 271P1036; 134 Okl 25, 272P414; 138 Okl 50, 280P407; 138 Okl 53, 280P464; 138 Okl 55, 280P466(1stcase); 138 Okl 56, 280P466(2dcase); 140 Okl 70, 282P 319; 140 Okl 80, 282P635; 43 OklACR 157; 119 Or682, 250P1098; 120 Or588, 253P363, 53ALR1052; 121 Or519, 254P 809; 121 Or658, 257P10; 124 Or1, 263 P886; 127 Or523, 272P890; 128 Or286, 274P505(2dcase); 127 Or101, 274P903 (2dcase); 128 Or673, 275P670; 129 Or 36, 276P262, 63ALR1133; 129 Or197, 276P1108; 129 Or342, 277P815; 285Pa 141, 131A723; 293Pa9, 141A623; 294 Pa265, 144A131; 86PaSuper253 (evidence held not sufficient to warrant binding instructions); 91PaSuper286; 91PaSuper364; 91PaSuper524; 91PaSuper536; 93PaSuper117; 94PaSuper145; 94PaSuper349; 94PaSuper351; 95Pa Super43; 47RI 136, 131A545 (unless strong preponderance against); RI 141 A183; RI 147A874(1stcase); 153SC73, 150SE351; 48SD477, 205NW38; 49 SD506, 207NW478; 50SD434, 210NW 675; 51SD46, 211NW803; 51SD190, 212 NW869; 51SD369, 213NW946; 54SD 50, 222NW494; 54SD81, 222NW598; SD 223NW721(3dcase); SD 225NW223; SD 226NW567; SD 228NW385(1stcase);

SD 231NW900; 154Tenn260, 290SW33, 51ALR193; TexCivA 296SW683; Tex CommnA 18SW(2d)594; TexCommnA 25 SW(2d)327; TexCivA 272SW266; Tex CivA 274SW1008 (where the evidence presents a fact case); TexCivA 276SW 795; TexCivA 278SW326; TexCivA 279SW605; TexCivA 279SW929; Tex CivA 282SW666; TexCivA 283SW542; TexCivA 286SW273; TexCivA 286SW 495; TexCivA 286SW558; TexCivA 286 SW559 (conclusive); TexCivA 288SW 1111; TexCivA 289SW696; TexCivA 291SW664; TexCivA 292SW572; Tex CivA 293SW34; TexCivA 293SW842; TexCivA 294SW645; TexCivA 294SW 988; TexCivA 295SW347; TexCivA 295 SW958; TexCivA 297SW232; TexCivA 297SW628; TexCivA 297SW896; Tex CivA 298SW658; TexCivA 299SW659; TexCivA 300SW177; TexCivA 4SW(2d) 84; TexCivA 4SW(2d)315; TexCivA 4 SW(2d)568; TexCivA 5SW(2d)183; Tex CivA 5SW(2d)230; TexCivA 8SW(2d) 550; TexCivA 10SW(2d)223; TexCivA 10SW(2d)574; TexCivA 10SW(2d)756; TexCivA 11SW(2d)341; TexCivA 12 SW(2d)257; TexCivA 14SW(2d)104; TexCivA 14SW(2d)887; TexCivA 17SW (2d)187; TexCivA 20SW(2d)351; Tex CivA 23SW(2d)827; TexCivA 24SW(2d) 527; TexCivA 27SW(2d)558; TexCivA 30SW(2d)412; TexCivA 32SW(2d)278; 65Utah548, 238P278; Utah 278P809; 98Vt433, 129A157; 143Va36, 129SE239; 143Va656, 129SE687; 144Va138, 131SE 129; 146Va475, 131SE827; 144Va496, 132SE334; 146Va670, 132SE698; 146 Va654, 132SE700; 146Va641, 132SE 840; 146Va789, 132SE844; 145Va681, 134SE692; 146Va229, 135SE703; 147 Va263, 137SE465; 147Va542, 137SE493; 148Va573, 139SE275; 148Va699, 139SE 328; 149Va882, 141SE829; 150Va101, 142SE387; Va 143SE887; 151Va363, 144SE477 (unless trial court committed error of law); 151Va345, 146SE363; 153 Va156, 149SE473; 153Va704, 151SE 133; Va 154SE499; Va 154SE545; 134 Wash128, 235P2; 135Wash588, 238P 631; 136Wash216, 239P557; 136Wash 632, 241P26; 140Wash482, 249P984; 141Wash422, 251P868; 143Wash168, 254P1091; 143Wash522, 255P923; 144 Wash150, 257P241; 144Wash676, 258P 832; 149Wash316, 270P1029; 152Wash 1, 277P74; 153Wash538, 280P15; Wash 290P706; Wash 290P710; Wash 290P 874; 103WVa614, 138SE371; 105WVa 171, 141SE788; 107WVa75, 146SE885; 107WVa158, 147SE545; WVa 152SE 864; 193Wis6, 212NW654; 196Wis625, 220NW651; 198Wis527, 224NW743; 36 Wyo 37, 253P17; BC [1930] 4DomLR 73. See also 332 Ill 150, 163NE544; 146 Va574, 132SE687. [a] (3) 202Cal 626, 262P740 (contributory negligence); 79 Mont158, 255P5. (11) 221MoA121, 293 SW789. (13) Others. 225Ky846, 10 SW(2d)456; MoA 10SW(2d)351; Tex CivA 9SW(2d)406; 151Va72, 144SE466. [c] **Verdict should be construed as settling** all controversial questions of fact. Fla 126S749.

859–4 CalA 290P108; 81Colo 365, 255 P460; 104Conn28, 132A401; 107Conn 160, 139A647; Ind 166NE297; IndA 151NE67; 85 IndA510, 151NE508; 86 IndA33, 155NE709; 235Mich616, 209 NW550; 190NC868, 129SE814; 111 Okl 301, 239P609; 114 Okl 119, 241P194; 123 Okl 76, 250P136; 124 Okl 120, 254P 45; 133 Okl 104, 271P635(2dcase); 43 OklACR57 [rch pending]; TexCivA 282 SW278; TexCivA 286SW495; 146Va 789, 132SE844; 136Wash632, 241P26. See also 142Va690, 128SE259.

859–5 169Ark662, 276SW591, 42ALR 1194; 173Ark769, 293SW1030; 181Ark 1145, 288SW(2d)1054; 85Colo 488, 277P 469; 85Colo 491, 277P470; 37GaA174, 139SE98; 324 Ill 207, 155NE628; 234 Ky385, 28SW(2d)465; 311Mo 249, 278 SW368; 194NC798, 139SE701; NC 153 SE629(1stcase); 117 Okl 6, 244P770; 123 Okl 76, 250P136; 127 Okl 45, 259P 644; 145Va489, 134SE576; 136Wash 624, 241P1; 101WVa341, 132SE751. See also 190NC857, 129SE193.

859–7 22F(2d)939; 32Ariz154, 256P 503; 34Ariz230, 270P629; 168Ark1167, 273SW363; 173Ark1104, 295SW16; 178Ark1085, 13SW(2d)301 (substantial evidence); 70CalA108, 232P986; 73 CalA695, 239P54; 77CalA481, 246P 1086; 85CalA216, 258P1107; 88CalA 67, 262P1106; 81Colo 501, 256P312; 90 Fla1, 107S441; 160Ga865, 129SE528; 35GaA426, 133SE272; 36GaA276, 136 SE469; 37GaA472, 140SE730; 44 Ida 478, 258P931; 45 Ida288, 261P671; 45 Ida604, 264P384; 48 Ida276, 281P469; 234 IllA164 (where evidence is conflicting, only question involved in appeal is sufficiency of evidence to sustain verdict); 253 IllA328; 84 IndA192, 149 NE651; IndA 151NE7; 125Kan3, 262 P573; 161Minn492, 201NW937 (where testimony in favor of verdict is not so inherently improbable or contradictory as to be unworthy of belief); 171Minn 25, 213NW47; 174Minn320, 219NW 159; 178Minn621, 227NW853; 80Mont 431, 261P253; 156Miss182, 125S529(4th case); 116Nebr297, 216NW810; 51ND 673, 200NW780; 117 Okl 10, 242P522; 124 Okl 286, 255P1015; 125 Okl 166, 256P890; 126 Okl 238, 259P257; 127 Okl 45, 259P644; 127 Okl 214, 260P 480; 129 Okl 75, 263P105; 121 Or519, 254P809; 123 Or610, 263P64; 49SD 394, 207NW166; 52SD97, 216NW860; 52SD116, 216NW868; TexCivA 275SW 224; TexCivA 276SW460; TexCivA 283SW880; TexCivA 294SW695; Utah 262P269 (holding contradiction immaterial after verdict); 142Va690, 128SE 259 (where evidence sustains verdict and no errors of law); Wash 288P927; 195Wis200, 217NW306. See also 169 Ark1015, 277SW541.

859–8 176Ark1204, 4SW(2d)512 (some substantial evidence); 102CalA345, 283 P115; 42 Ida408, 245P933; 43 Ida405, 252P675; 45 Ida427, 262P831, 56ALR 317; Ida 290P405 (substantial evidence); 215Ky805, 287SW1; Mont 291 P1042; 113 Okl 147, 240P79; 115 Okl 34, 241P186; 117 Okl 6, 244P770; 118 Okl 158, 247P370; 122 Okl 156, 252P 829; 126 Okl 64, 258P918; 130 Okl 92, 265P627; 134 Okl 195, 272P821; 41 OklACR59; 117 Or22, 242P600; 52SD 359, 217NW635; TexCommnA 292SW 536; TexCivA 273SW619; TexCivA 273 SW649; 146Va22, 135SE677. See also 30Ariz204, 245P673; 105 Okl 74, 231P 532.

859–9 234 IllA234 (willful and wanton negligence); TexCivA 282SW317; Tex CivA 297SW534.

859–9½–New. Where verdict is sustained by evidence, although conflicting, it is conclusive on appeal. Tex CivA 278SW476.

859–9½–New. Where jury answered issues submitted and the pleadings justified introduction of evidence, the verdict cannot be set aside. TexCivA 278 SW476.

860–10 173Ark424, 292SW380; IndA 151NE7; 125Me392, 134A449; 127Misc 20, 215NYS761; MoA 28SW(2d)432; 22 OhA450, 154NE58; 25 OhA157, 157 NE825; 117 Or613, 244P874; 285Pa 141, 131A723.

860–11 171Ark469, 284SW724; 82CalA 751, 256P224; CalA 285P1053; 160Ga 865, 129SE528; 41 Ida697, 243P647; 41 Ida703, 243P649; 232 IllA277 (where main point of case was supported by testimony of one witness and controverted by another); 79Mont158, 255P5; NJ 147A115; 128 Or369, 274P 905; 290Pa63, 137A864.

860–12 21AlaA545, 109S895; 233 IllA 539 (size of verdict held to indicate absence of passion and prejudice); 125 Kan252, 264P59 (answers to special interrogatories held not to show prejudice); 127Me91, 141A321; MoA 282SW 749; NJ 137A881; NJ 133A865; 32 OhA177, 166NE396.

860–13 27Hawaii 262; 58ND263, 225 NW459; 23 OhA445, 155NE700; 60 OntL56, [1927] 1DomLR1145.

860–14 21AlaA545, 109S895; 324 Ill 207, 155NE28; 232IllA277; 233 IllA 320; 233 IllA432; 233 IllA539; 234 IllA234; 235 IllA410; 255 IllA263; 255 IllA465; 256 IllA47; 215Ky184, 284SW 1022; 216Ky732, 289SW666; 223Ky 446, 3SW(2d)1082; 225Ky270, 8SW (2d)399; 234Ky243, 27SW(2d)952; 235Ky419, 31SW(2d)625; 160La387, 107S234; 232Mich17, 204NW575; 234 Mich217, 207NW911; 235Mich616, 209 NW850; 242Mich326, 218NW673; 220 MoA131, 280SW1055; 116Nebr208, 216 NW659; 127Misc20, 215NYS761; 20 OhA191, 151NE802; 20 OhA380, 152 NE673; 25 OhA157, 157NE825; 32 OhA207, 167NE701; 34 OhA499, 171 NE357; 35 OhA204, 172NE409; OhA 173NE33; RI 132A733; RI 133A439; 52SD183, 217NW203; TexCivA 298SW 308; 146Va670, 132SE698; Va 154SE 522; 99WVa677, 129SE752; 101WVa 404, 132SE738; 105WVa46, 141SE434. See also NJ 146A359. [a] TexCivA 19 SW(2d)373. [c] **Unless evidence of successful party is impeached** or prima facie case overturned, verdict should not be set aside. 233Ky276, 25SW(2d) 398.

861–15 Ark 295SW27; 219Ky524, 293 SW1089. See also 232 IllA277.

861–16 127Misc20, 215NYS761.

861–17 150Va95, 142SE385. [a] **Where there is nothing in subject matter of testimony to render it inherently improbable,** testimony cannot be discredited by appellate court. 207Cal 657, 280P118. [b] **Contrary to physical facts.–MoA** 22SW(2d)858.

861–18 114Nebr53, 205NW942, 207NW 528; TexCivA 297SW336.

861–19 127Me80, 141A183; 73Mont 321, 236P550; 213AppDiv42, 209NYS 693.

861–20 TexCivA 283SW627.

861–21 174Ark905, 298SW342; CalA 283P895.

861–22 86Colo 216, 280P488(2dcase).

861–24 38F(2d)599; 34Ariz230, 270P 629; 174Ark1180, 297SW1020; 175Ark 1169, 299SW43; 178Ark1188, 5SW(2d) 916; 179Ark631, 17SW(2d)889; 180 Ark1167, 22SW(2d)169; 180Ark562, 22 SW(2d)378; 180Ark1003, 24SW(2d) 846; 181Ark818, 28SW(2d)68; 181Ark 1132, 29SW(2d)683; 206Cal199, 273P 560; CalA 285P918 (verdict based on negative testimony); CalA 289P178; IndA 151NE7; IndA 168NE191; IndA 173NE289; IndA 172NE576; 126Kan 614; 119Kan864, 241P442; 210Ky437, 276SW111; 217Ky11, 288SW1022; 234 Ky347, 28SW(2d)3; 161La24, 108S112; 164La546, 114S153; LaA 128S317; Md 148A244; 238Mich74, 213NW456; 246 Mich113, 224NW416(3dcase); Minn 230 NW793 (evidence unsatisfactory but not so conclusive against verdict as to justify judgment notwithstanding verdict); 310Mo 48, 274SW764; Mo 28SW(2d) 1035; MoA 272SW707; MoA 273SW 157; MoA 273SW221; 216MoA683, 273 SW746; 220MoA1034, 278SW1081; MoA 285SW529; 221MoA807, 287SW 1079; MoA 288SW100; MoA 298SW 1067; MoA 9SW(2d)1070; MoA 19SW (2d)534; MoA 19SW(2d)559; MoA 27 SW(2d)1036; 117Nebr154, 219NW896; 82NH236, 133A9; 103NJL346, 135A 815; 103NJL502, 135A884; 103NJL 372, 137A555, 54ALR623; NJ 132A244; NJ 137A719; NJ 143A217; NJSup 149 A345(1stcase); NJSup 151A484; 31 OhA77, 166NE427; 111 Okl 230, 239P 222; 111 Okl 301, 239P609; 43 OklACR 57 [rch pending]; 121 Or628, 257P16; 128 Or121, 270P772; 285Pa251, 132A 120; 287Pa370, 135A127; 298Pa130, 148A58; 45SC196, 143SE31; Utah 263 P495; Utah 272P229; Utah 273P515; 136Wash410, 240P355; 136Wash624, 241P1. But see 103Conn302, 130A377. [a] **Thus appellate court does not substitute its own judgment for that of jury on weight of evidence.** Tex CommnA 277SW78.

862–25 2F(2d)857; 32Ariz154, 256P 503; 168Ark1167, 273SW363; 172Ark 821, 290SW603; 174Ark813, 296SW 708; 178Ark417, 10SW(2d)867 (verdict based on substantial evidence); 181Ark 674, 27SW(2d)516; CalA 285P918; 3 Del 200, 134A50; 97Fla489, 121S805; 43 Ida439, 252P870; 233 IllA432 (where testimony, by reasonable intendment, supports verdict); 208Ky639, 272SW 672; 217Ky11, 288SW1022; 222Ky332, 300SW861; 318Mo 421, 18SW(2d)791; 216MoA683, 273SW746; MoA 278SW 805; 23 OhA249, 154NE66; 29 OhA67, 162NE777; 124 Okl 120, 254P45; 41 OklACR59; TexCommnA 18SW(2d)594; TexCivA 273SW979 (on weight of evidence, court looks to body of evidence as whole); TexCivA 4SW(2d)1058; 148Va 699, 139SE328.

862–26 216Ala267, 113S271; 171Ark

1187, 284SW16; 93Fla520, 112S558; 35GaA413, 133SE297; 327 Ill 180, 158 NE389; 232 IllA398 (special finding manifestly against weight of evidence); 244 IllA441; 253 IllA450; 254 IllA49; 210Ky437, 276SW111; 211Ky158, 277 SW313 (flagrantly against evidence); 212Ky844, 280SW148; 214Ky838, 284 SW95; 217Ky11, 288SW1022; 224Ky 383, 6SW(2d)480; 225Ky173, 7SW(2d) 1065; 225Ky767, 10SW(2d)287; 227Ky 490, 13SW(2d)496; 229Ky572, 17SW (2d)756; 232Ky285, 23SW(2d)272; 234 Ky639, 28SW(2d)956; 234Ky389, 28 SW(2d)474; 235Ky643, 32SW(2d)39; 231Mich213, 203NW868; 234Mich195, 207NW307; 238Mich74, 213NW456; 240Mich536, 215NW317; 240Mich671, 216NW413; 241Mich624, 217NW898; 242Mich145, 218NW653; NJ 146A48; NJSup 149A335; 22 OhA450, 154NE58; 30 OhA528, 165NE865; 19 OhA49; 20 OhA216, 151NE788; 21 OhA322, 153NE 302; 21 OhA486, 153NE223; 22 OhA 413, 153NE274; 25 OhA157, 157NE825; 31 OhA229, 166NE916; 7PaDist&Co 723; RI 133A439; TexCivA 272SW639 (finding set aside when against overwhelming weight of evidence); TexCivA 283SW531; TexCivA 295SW625; Tex CivA 296SW961; TexCivA 48W(2d) 1023; TexCivA 13SW(2d)965; 102WVa 491, 135SE578; 102WVa567, 135SE 667; 195Wis572, 217NW723. See also TexCivA 10SW(2d)739. But see 104 Conn229, 132A451. [b] (2) Unless under undisputed physical facts court of appeals in personal injury case can say that accident could not possibly have been due to defendant's alleged negligence, judgment must be affirmed. 200 Cal 726, 254P891. (3) Evidence that falling of plaster from old building was due to vibration of oil pipes running under premises held not unbelievable. 221 MoA657, 284SW204.

863–27 105Conn366, 135A391; 157 IllA 345 (contrary to law); 162 IllA600 (contrary to law); 21 OhA322, 153NE302.

863–28 178Ark1199, 10SW(2d)900; 104Conn229, 132A451; 105Conn366, 135 A391; 109Conn526, 147A8; Miss 105S 787; MoA 10SW(2d)957; NJSup 149A 122; 21 OhA322, 153NE302; 31 OhA 77, 166NE427; Or 292P1094(1stcase). [a] **Verdict not flagrantly against evidence** to indicate passion or prejudice. 211Ky444, 277SW511.

863–29 AlaA 129S705(2dcase); 90Fla 580, 106S413; 95Fla73, 116S30; 96Fla 656, 118S916; Fla 129S341; 245 IllA 357; 246 IllA118; 256IllA557; 209Ky 315, 272SW718 (flagrantly against evidence); 210Ky789, 276SW846; 211Ky 458, 277SW820 (verdict flagrantly against evidence); 230Ky244, 18SW(2d) 978; 231Ky282, 21SW(2d)451; 233Ky 112, 25SW(2d)44; 232Mich362, 205NW 137; 234Mich347, 208NW453; 114Nebr 362, 207NW511; NJ 146A49(1stcase); NJ 151A64(1stcase); 3NJMisc988, 130 A454; 129Misc329, 221NYS363; 19 OhA 243; TexCivA 279SW546 (verdict manifestly wrong); TexCivA 282SW666; TexCivA 298SW142; TexCivA 4SW(2d) 1058; TexCivA 11SW(2d)631; TexCivA 12SW(2d)604; TexCivA 20SW(2d)369 (against overwhelming weight of evidence); 150Va219, 142SE409; 100WVa 29, 129SE747; 106WVa714, 146SE823. [a] (6) Verdict supported only by scintilla of evidence sufficient to warrant submission of issue to jury may be so flagrantly against evidence as to require reversal of judgment. 230Ky244, 18SW (2d)978. [b] 200Cal 726, 254P891. [c] **Verdict held not flagrantly against evidence.**–234Ky347, 28SW(2d)3.

863–30 30 Oh442, 164NE797. [a] 23 OhA522, 155NE493.

863–31 43 Ida439, 252P870; MoA 15 SW(2d)922; 118Nebr449, 225NW238.

864–32 104Conn334, 132A901; 109Conn 58, 145A54; 36GaA767, 138SE244; 36 GaA766, 138SE265; 37GaA351, 140SE 525; 235 IllA112; 200 Iowa684, 205NW 459; 228Ky582, 15SW(2d)479; 230App Div389, 244NYS663; TexCivA 10SW(2d) 760; 146Va670, 132SE698; 149Va560, 140SE831; 136Wash534, 240P902. See also MoA 12SW(2d)933. But see 46RI 478, 129A339. [d] (1) 39GaA785, 148 SE542 (unless evidence demanded verdict rendered). (2) See also 234 IllA234. (6) Words of trial judge, questionable as approval, held sufficient to sustain judgment. 39GaA785, 148SE542.

864–33 20F(2d)339; 176Ark375, 3SW (2d)38; 181Ark818, 28SW(2d)68; 70 CalA148, 232P1010; 163Ga796, 137SE 64; 164Ga696, 139SE333; 35GaA496, 134SE327; 36GaA767, 138SE244; 37 GaA369, 140SE520; 37GaA351, 140SE 525 (some evidence); 37GaA476, 140SE 920; 37GaA471, 141SE63; 38GaA348, 144SE38; 38GaA395, 144SE46; 39GaA 454, 147SE413; 39GaA403, 147SE536(2d case); 41GaA487, 153SE378; 41GaA512, 153SE431; 41GaA482, 153SE536(1st case); 41GaA543, 153SE610(2dcase); GaA 155SE383(1stcase); 320 Ill 56, 150 NE403; Ill 173NE372; 191 Ind475, 151 NE390; 84 IndA253, 151NE13; Mich 233 NW378; Mich 233NW385; 170Minn250, 212NW413; MoA 288SW992; 80Mont 431, 261P253; 130 Okl 92, 265P627; 293Pa9, 141A623; 296Pa1, 145A587; RI 129A264; RI 131A198; RI 133A437; RI 133A658; RI 136A839; RI 150A497; 157SC392, 154SE431; TexCivA 21SW (2d)352; NB [1928] 1DomLR217. [a] TexCivA 286SW559.

864–34 Cal 291P184; 161Ga93, 129SE 778; 161Ga587, 131SE362; 38Ga440, 144SE140(2dcase); 162Ga598, 134SE 316; 163Ga92, 135SE410; 170Ga332, 152SE902(2dcase); 34GaA188, 129SE 21; 34GaA192, 129SE20; 34GaA431, 129SE792; 34GaA445, 129SE798; 35 GaA174, 132SE239; 35GaA204, 132SE 144; 35GaA302, 133SE42; 35GaA379, 133SE104; 35GaA379, 133SE272; 35 GaA472, 134SE119; 35GaA563, 134SE 180; 35GaA569, 134SE346; 36GaA32, 134SE821; 36GaA182, 136SE287; 36 GaA766, 138SE265; 37GaA147, 139SE 126; 37GaA79, 139SE130; 37GaA325, 140SE392; 37GaA369, 140SE520; 37 GaA476, 140SE920; 38GaA409, 144SE 129(2dcase); 38GaA655, 145SE103; 38 GaA686, 145SE476(2dcase); 40GaA496, 150SE434(1stcase) (any evidence); 41 GaA246, 152SE848 (supported by some evidence); 41GaA393, 153SE84(1st case); 41GaA323, 153SE91(3dcase); GaA 155SE499(1stcase); 27Hawaii826; 164Minn526, 205NW452; 170Minn49, 212NW8; 170Minn313, 212NW593; Mo A 272SW707; 77Mont110, 250P819; 80 Mont431, 261P253; 128 Okl 23, 261P 174; 88PaSuper261; RI 133A435; 49 RI 392, 143A602; TexCivA 292SW610; Vt 148A874; 145Wash481, 260P996; 196Wis334, 220NW375. [b] 36GaA57, 135SE320. [d] 176Ark1203, 5SW(2d) 308; 179Ark690, 18SW(2d)321; Mo 292 SW67.

865–36 155SC507, 152SE707.

865–37 89CalA275, 264P580; 86Colo 229, 279P719; 84 IndA253, 151NE13; 164La529, 114S122; RI 146A405(2d case). See also 34GaA380, 129SE297.

865–38 43 OklACR157; 49RI 3, 139A 500.

865–39 37GaA471, 141SE63; 41GaA 287, 152SE592; 41GaA380, 153SE94(2d case).

865–40 161Ga93, 129SE778; 27Hawaii 826; 3LaA731; 168Minn450, 210NW 290.

865–41 320 Ill 56, 150NE403; 169Minn 399, 211NW471; MoA 272SW707; MoA 284SW857; 222MoA128, 2SW(2d)824; 82NH443, 136A254. [a] **Court's approval of jury's findings is conclusive** that jury were not influenced by prejudice or passion. 123Kan696, 256P799.

865–43 219Ala623, 123S27.

865–44 But see 217Ala297, 116S149.

865–47½–New. The verdict of the jury, approved by the trial court, will be treated by the appellate court as on a demurrer to the evidence. 151Va173, 144SE 485.

865–48 217Ala301, 116S154; 181Ark 946, 28SW(2d)728; 169Ga734, 151SE 506; 162La571, 110S759; NH 147A413; 26 OhA478, 160NE93; 283Pa307, 129A 112; 285Pa251, 132A120; RI 133A658. [a] 220Ala125, 124S286.

866–49 216Ala454, 113S410; 22AlaA 541, 118S258; 331 Ill 58, 162NE117; 238Mich447, 213NW710. See also 20 Oh A93, 153NE151.

866–50 290Pa551, 139A266.

866–51 4F(2d)756; 20F(2d)339; 213 Ala672, 106S147; 217Ala292, 116S142; 20AlaA580, 104S288; 21AlaA545, 109S 895; 22AlaA279, 114S791; 23AlaA227, 124S115; 33Ariz374, 265P84; 168Ark 670, 273SW7; Cal 292P451; 69CalA656, 231P1012; CalA 288P116; 160Ga763, 129 SE65; 161Ga382, 131SE65; 35GaA170, 132SE241; 35GaA249, 132SE645; 35GaA 366, 133SE284; 35GaA425, 133SE292; 35GaA469, 134SE113; 35GaA470, 133 SE643; 35GaA762, 134SE787; 36GaA 767, 138SE244; 37GaA792, 142SE173; 40GaA269, 149SE316; 41GaA564, 153SE 778(1stcase); GaA 155SE495; 123Kan 696, 256P799; 125Kan199, 263P778; 129Kan418, 283P493(2dcase); 163La 1083, 113S463; 164La529, 114S122; 320 Mo 746, 8SW(2d)824; MoA ,18W(2d) 247; 75Mont557, 244P506; 80Mont431, 261P253; NJ 137A845; 51ND784, 200 NW909; 53ND708, 208NW104; 118 Okl 158, 247P370; 131 Okl 242, 268P303 (remark of trial court held insufficient to show disapproval of verdict); 289Pa 356, 137A603; RI 131A693 (evidence held not to justify disturbance); 47RI 193, 131A695; RI 133A809; RI 140A1; RI 140A912; RI 143A611; RI 148A581; 50RI 473, 149A380(2dcase); 144SC89, 142SE39; 50SD364, 210NW156; Tex CivA 277SW742; TexCivA 291SW571; 67Utah171, 246P535; 148Wash173, 268 P142; 99WVa677, 129SE752. See also 107Conn236, 140A121.

866–51½–New. , unless clearly contrary to the weight of evidence. 318 Ill 528, 149NE483.

866–52 83Colo 225, 263P728; 160Ga763, 129SE65 (even though there appears to be preponderance of evidence against it); 35GaA353, 133SE645; 123Kan696, 256P799; 129Kan213, 282P588(1stcase); 230Ky64, 18SW(2d)879; 233Mich20, 206 NW308; 82Mont1, 264P930; 85Mont 492, 279P374; Mont 285P184; 49SD340, 207NW58. [b] **Rule is inapplicable** where conflict is in statements of party's own witnesses but refers to conflicting statements in testimony given by opposing witnesses. 80Mont414, 260P 1047.

866–52½–New. where the evidence was susceptible of different interpretations, 123Kan696, 256P799.

866–54 123Kan696, 256P799; RI 136A 688; 133SC353, 131SE146 (unless there are errors of law in submitting case to jury).

866–54½–New. Finding based on conflicting evidence, leaving mind in doubt, will not be revised. 229Ky43, 16SW(2d) 492(1stcase).

866–55 10LaA537, 120S227 (manifestly erroneous); 169Minn399, 211NW471; 169Minn397, 211NW472.

867–58 80Mont431, 261P253 (dictum).

867–59 169Minn399, 211NW471; 169 Minn397, 211NW472; 116Tex253, 288 SW425.

867–60 171Ark1187, 286SW810.

867–62½–New. A verdict applying a wrong standard of the case is not given added force by the approval of a trial justice. RI 131A542.

867–63 10LaA715, 123S172 (opinion of trial judge should be given extraordinary weight); 319Mo 1137, 6SW(2d) 886. But see Wis 229NW549. [a] **Where there was little contradiction of plaintiff's testimony,** court cannot hold that presumptions for plaintiff were sufficiently rebutted to warrant judgment for defendant, notwithstanding verdict for plaintiff. 290Pa21, 137A867.

867–64 215Ky647, 286SW851. But see 104Conn28, 132A401.

867–65 Can [1926] 3DomLR690.

867–66 218AppDiv220, 218NYS155; 146 Va475, 131SE827.

867–66½–New. A verdict set aside is not entitled to the same weight on appeal as one sanctioned by the court, 148 Va829, 139SE513.

867–66½–New. and the evidence is not to be viewed altogether as on demurrer to the evidence. 148Va829, 139SE513.

867–66¼–New. The verdict will not be set aside unless it was contrary to the evidence or without evidence to support it. 148Va829, 139SE513.

867–67 81Colo 399, 255P627; 36GaA594, 137SE637; 3NJMisc1064, 130A517; 153 Va221, 149SE491. [e] (1) 235Ky699, 32SW(2d)25. [g] (2) 19 OhA41. (5) Court of appeals will not grant new trial on weight of evidence where one new

trial has been granted on that ground. 113 OhSt113, 148NE398; 23 OhA323, 155 NE564. (6) Where former verdict between same parties is set aside by trial court as against weight of evidence, court of appeals cannot set aside second verdict on that ground. 25 OhA116, 157NE500. (7) Reviewing court cannot reverse judgment on weight of evidence where trial court had previously set aside verdict. 31 OhA73, 166NE203 (5thcase).

868–68 36GaA594, 137SE637; 51ND 237, 199NW860; Can [1926] 3DomLR 655.

868–72 229AppDiv758, 242NYS592.

869–79 25 OhA116, 157NE500.

869–81 168GaA769, 149SE35(1stcase).

869–86 See also 25 OhA116, 157NE500.

869–89 114Nebr362, 207NW511; 48RI 301, 137A781; TexCivA 286SW673.

869–90 48RI 301, 137A781; [1927] Can SC242, 59 OntL628, [1927] 1DomLR99.

869–92 114Nebr362, 207NW511.

869–95 TexCivA 286SW673.

869–96 16F(2d)240; 17F(2d)981; 39F (2d)445; 39F(2d)537; 40F(2d)374; 213 Ala522, 105S874; 35Ariz60, 274P639; 169Ark825, 277SW337 (unless clearly excessive); 75CalA516, 243P43; 77CalA 328, 246P559; 84CalA743, 258P1000; 87CalA185, 261P1047; 95CalA428, 273 P76; CalA 289P940; 104Conn508, 133A 686; Conn 138A147; 35GaA236, 133SE 519; 162 IllA438; Iowa 209NW435; 232 Ky702, 23SW(2d)564; 9LaA417, 121S 250(1stcase); 11LaA380, 122S293; 125 Me88, 131A1; 154Md195, 140A70; 235 Mich379, 209NW137; 168Nebr347, 210 NW78; 157Miss88, 127S727; MoA 273 SW780; MoA 298SW254 (except in extreme cases); MoA 21SW(2d)883; 103 NJL502, 135A884; NJSup 149A356(1st case); 33NM117, 263P504; 219AppDiv 214, 219NYS591; 20 OhA349, 152NE208 (alienation of affections); 32 OhA451, 168NE230; 137 Okl 168, 278P640 (approximate correctness of verdict admitted upon appeal); 113 Or544, 233P540; 132 Or328, 285P261; 291Pa211, 139A 878; 47RI 186, 131A643; 138SC241, 136 SE234; 156SC158, 153SE119; Tex CommnA 1SW(2d)602; TexCivA 274SW 335; TexCivA 286SW559; TexCivA 297 SW244; TexCivA 12SW(2d)811; 141 Wash190, 251P123; 142Wash648, 253P 1076; 105WVa555, 144SE100; [1927] CanSC20, [1927] 1DomLR705. See also 30Ariz204, 245P673. But see 181 Ark1096, 29SW(2d)304. [a] 39F(2d)7. [c] (3) Ordinarily it is duty of lower court to control amount of verdict. 293 Pa441, 143A131. (4) Supreme court can interfere on appeal only to prevent manifest injustice. 298Pa256, 148A102. [e] **Damages for discomfort and annoyance** must be left to trial court's discretion. Cal 291P825.

870–97 21AlaA545, 109S895; CalA 246 P559; 100CalA545, 280P557; CalA 283 P886; 104Conn508, 133A686; 109Conn 706, 145A504; Mo 26SW(2d)929; MoA 296SW855; MoA 7SW(2d)412; 222MoA 740, 9SW(2d)824; MoA 26SW(2d)838; TexCivA 286SW559. See also RI 148A 603(1stcase).

870–98 CalA 291P903; 239Mich485, 214 NW402; 20 OhA349, 152NE208; 151 Va740, 145SE342; 152Wash681, 279P 107.

870–99 169Ark235, 275SW329; 75CalA 516, 243P43; MoA 293SW503; 112 Okl 97, 240P317; 155Wash141, 283P707 (substantial evidence); 102WVa215, 136 SE30.

871–1 220Ala436, 126S845; 21AlaA545, 109S895; 92CalA35, 267P721 (absence of passion or prejudice); 84 IndA463, 151NE349; 232Ky285, 23SW(2d)272; 248Mich399, 227NW694; 168Minn111, 209NW895; 317Mo 1225, 298SW69; Mo 2SW(2d)785; 51ND158, 199NW480; 20 OhA349, 152NE208; 24 OhA509, 156NE 608; 105WVa555, 144SE100. [a] **That verdict is same amount as aggregate value of articles** sued for does not warrant conclusion of jury's influence by passion and prejudice. Ariz 293P16.

871–4½–New. In Illinois the appellate court may revise or correct the amount of damages where the proper motion to assess has been made and ruled upon below. 232 IllA589.

871–4½–New. The test in determining whether a verdict should be set aside for inadequacy or excessiveness is whether it is so far from fair and reasonable compensation as to shock the sense of justice. 109Conn526, 147 A8.

871–5 Mo 300SW465 (every case must stand on its own facts); 219MoA405, 271 SW880.

871–6 14F(2d)587; 16F(2d)240; 23F (2d)794; 77CalA481, 246P1086; 104 Conn508, 133A686; 35GaA528, 134SE 126; 335 Ill 368, 167NE40, 64ALR760; 236 IllA227; 125Me36, 130A512; 125 Me164, 132A130; Me 149A580; 234 Mich471, 208NW611; 239Mich485, 214 NW402; 218MoA698, 268SW102; 219 MoA234, 271SW1023; 220MoA452, 276 SW105; NJ 137A528; NJ 144A116; 119 Okl 1, 245P894; 295Pa168, 145A81; 47RI 186, 131A643; 45SC196, 143SE31; 146Va637, 131SE787. See also 94CalA 703, 271P789. [a] **In Texas.–CommnA** 277SW1050. [b] **In New Jersey.**–103 NJL645, 137A419. [c] **Verdict awarding reasonable punitive damages** will not be disturbed where there was issue of wantonness. Ala 128S139.

871–7 35GaA694, 134SE822; 28 OhA 208, 162NE610; 117 Okl 108, 244P1114.

871–8 168Ark1167, 272SW848 (undisputed evidence warranting recovery for plaintiff of at least amount of verdict); 77CalA481, 246P1086; 88CalA678, 263 P1025; GaA 155SE494; 162 IllA438; 235 IllA198; 228Ky184, 14SW(2d)768; 170Minn313, 212NW593; Nev 269P 1008; 134 Okl 70, 272P857; 137 Okl 143, 278P349; 102WVa215, 136SE30; 105WVa201, 141SE779; 39Wyo 84, 270 P167. See also 146Va10, 135SE685. [d] **On appeal** judicial notice of changed economic conditions may be taken to support verdict. 235 IllA198.

871–8½–New. or unless unsupported by the evidence; 102WVaA673, 135SE 478.

871–9 254 IllA289; 132 Okl 72, 269P 350, 59ALR584; 143 Okl 101, 287P1014; 63Utah495, 227P791.

871–10 171Ark994, 287SW185; 77CalA 481, 246P1086; 90CalA384, 265P955; 44 Ida658, 259P1; 88 IndA176, 156NE 594; 123Kan187, 253P1096; 300Pa569, 151A362. See also Mo 31SW(2d)50.

871–11 81Colo 121, 253P1066; 219App Div214, 219NYS591.

871–12 234Mich471, 208NW611.

871–13 106Conn302, 138A147; 220MoA 452, 276SW105; 220MoA1, 285SW112; 3NJMisc981, 130A448.

871–13½–New. where there is nothing in the record to justify the conclusion that the verdict was not the result of cool and dispassionate consideration of the jury; 67CalA372, 227P710.

872–14 See also 51ND237, 199NW860.

872–15 81CalA40, 252P1078; 126Kan 560, 268P825; 127Me278, 143A63; 321 Mo 887, 13SW(2d)648; 219AppDiv 214, 219NYS591; 120 Or588, 253P363, 53ALR1052; TexCivA 276SW460; 142 Wash507, 253P814. [a] (2) Mo 31 SW(2d)1045.

872–15½–New. where it does not appear that damages awarded were materially greater than the evidence would justify; 48SD400, 204NW899.

872–16 Mo 265SW91.

872–17 105NJL8, 143A617; 115 Okl 166, 242P164; 117 Okl 108, 244P1114; 125 Okl 157, 256P921; 138 Okl 53, 280 P464; 138 Okl 55, 280P466(1stcase).

872–17½–New. unless it clearly appears that the jury were governed by passion or prejudice, or through inadvertence or mistake as to law have departed materially from the measure of damages fixed by law, 30Ariz204, 245P 673.

872–18 MoA 21SW(2d)635. [a] **Evidence is taken in view most favorable to plaintiff.–TexCivA** 276SW460.

872–19 29Ariz300, 241P35; 197Cal 598, 242P76; 197Cal 702, 242P703; 201 Cal 560, 258P73; 75CalA96, 241P902; 76CalA569, 245P468; 77CalA164, 247 P212; 80CalA109, 250P693; 82CalA141, 255P215; 82CalA215, 255P755; 84CalA 259, 257P871; 85CalA332, 259P470; 88 CalA678, 263P1025; 89CalA721, 265P 541; 92CalA656, 268P1083; 94CalA703, 271P789; 95CalA428, 273P76; 100CalA 503, 280P394(2dcase); 100CalA545, 280 P557; 100CalA775, 281P95 (question of existence of passion or prejudice is one primarily for determination of trial court); CalA 285P879; CalA 286P1097; CalA 287P526; CalA 288P834; CalA 291P641; CalA 291P597; CalA 291P 874; 92Fla339, 110S529; 93Fla387, 112 S264; 35GaA694, 134SE822; 37GaA 265, 139SE825; 37GaA626, 141SE430; 41 Ida106, 238P517; 41 Ida697, 243P 647; 41 Ida703, 243P649; 42 Ida789, 248P438; 44 Ida658, 259P1; 84 IndA 463, 151NE349; 207 Iowa137, 222NW 436; 119Kan404, 239P750; 123Kan470, 255P1109; 218Ky84, 290SW1064; 219 Ky290, 292SW829; 223Ky262, 3SW(2d) 649; 223Ky812, 4SW(2d)741; 224Ky 274, 6SW(2d)264; 226Ky415, 11SW(2d) 105; 227Ky423, 13SW(2d)254; 227Ky 686, 13SW(2d)1016; 227Ky690, 13SW (2d)1022; 228Ky184, 14SW(2d)768; 228Ky658, 15SW(2d)470; 230Ky165, 18 SW(2d)981; 160La998, 107S777; 232 Ky702, 23SW(2d)564; 233Ky781, 26SW (2d)757; 234Ky427, 28SW(2d)479; 126 Me99, 136A354; 235Mich111, 209NW 94; 240Mich671, 216NW413; 251Mich 628, 232NW194; 168Minn450, 210NW 290; 169Minn218, 210NW996; 169Minn 229, 210NW997; 170Minn248, 212NW 200; 171Minn47, 213NW372; 171Minn 399, 214NW761; Miss 112S607; 153 Miss741, 121S482; 155Miss207, 124S 325; 157Miss746, 128S563; 219MoA405, 271SW880; 220MoA1, 285SW112; 220 MoA1229, 298SW1069; 77Mont110, 250 P819; Mo 292SW67 [citCJ]; MoA 285 SW151; MoA 291SW145; 222MoA296, 297SW163; 222MoA740, 9SW(2d)824; MoA 21SW(2d)195; 24 OhA509, 156NE 608; 31 OhA46, 166NE243; 34 OhA 317, 170NE599; 35OhA204, 172NE409; 137 Okl 180, 278P645(2dcase); 112 Okl 3, 239P582; 115 Okl 166, 242P164; 123 Okl 248, 253P84; 125 Okl 144, 256P903; 125 Okl 157, 256P921; 129 Okl 70, 263 P1091; 138 Okl 53, 280P464; 138 Okl 55, 280P466(1stcase); 86PaSuper359; 93PaSuper101; 93PaSuper290; 45SC 196, 143SE31; SD 225NW654; TexCivA 9SW(2d)382; TexCivA 27SW(2d)357; TexCivA 281SW259; 146Va637, 131SE 787; 152Va484, 147SE461; 135Wash 99, 237P14; 143Wash176, 254P1083; 152Wash681, 279P107; 152Wash657, 279P114 (where verdict was deliberate judgment of jury); 102WVa673, 135SE 478; 102WVa215, 136SE30; 105WVa 555, 144SE100; 105WVa453, 143SE98. [a] (2) Verdict of four thousand dollars for injuries to woman's side, abdomen, right foot and leg, confining her to bed for about two weeks, and causing her pain and inconvenience because of swollen ankle for about seven weeks, held so excessive as to warrant inference of passion and prejudice. 31 OhA 488, 166NE391. [b] (1) 136Wash410, 240P355. (8) Where damages for mental and physical suffering were proportionate to extent of suffering, held no conclusion of prejudice or partiality. TexCivA 18SW(2d)189. [c] **Verdict held not excessive.**–142Wash507, 253P 814.

873–20 234Mich471, 208NW611 (value of personal services difficult to estimate); Mo 16SW(2d)190; 77Mont110, 250P819; BC [1929] 4DomLR142.

873–20½–New. or except upon considerations of the most persuasive character. 104Conn508, 133A686.

873–21 99CalA264, 278P442; CalA 286 P1048; 129Kan766, 284P427; 171Minn 47, 213NW372; 219MoA234, 271SW 1023; MoA 17SW(2d)994 (verdict approved by trial judge); 51ND237, 199 NW860; 58ND263, 225NW459; 149 Wash483, 271P264.

873–23 35Ariz60, 274P639; 69CalA779, 232P178; 75CalA96, 241P902; 88CalA 1, 262P1100; 104Conn508, 133A686; 44 Ida658, 259P1; 123Kan470, 255P1109; 125Me164, 132A130; 239Mich485, 214 NW402; 240Mich671, 216NW413; 218 MoA698, 268SW102; 219MoA234, 271 SW1023; MoA 295SW818; MoA 258W (2d)122; TexCivA 276SW460; 142Wash 507, 253P814; 102WVa673, 135SE478.

873–25 35F(2d)717.

873–31 68CalA317, 229P57 (finding of malice as ground for exemplary damages conclusive on appeal, when sup-

ported by sufficient evidence); 86Mont 314, 283P427; 128 Okl 145, 261P929.
873–33 234 IllA234; 217Ky292, 289SW 247; 231Ky211, 218W(2d)272; 288Pa 134, 135A736. But see 38F(2d)159.
873–34 142Va197, 128SE644.
873–35 300Pa569, 151A362.
873–36 137 Okl 143, 27P349.
874–39 29Ariz334, 241P518; 77CalA 328, 246P559 (dictum); CalA 291P269; 84 IndA192, 149NE651; 84 IndA463, 151 NE349; IndA 172NE783; 235Ky640, 32 SW(2d)18; 115 Okl 166, 242P164. [a] In such case, if trial court did not correct abuse, supreme court must. 285Pa 116, 131A665.
874–40 84 IndA192, 149NE651; 115 Okl 166, 242P164; Utah 269P1008.
874–41 115 Okl 166, 242P164; RI 133 A345; 142Va197, 128SE644.
874–42 95Fla73, 116S30; 298Pa256, 148A102; TexCivA 272SW308. [a] Punitive damages.—MoA 297SW169.
874–43 297Pa204, 146A574.
874–45 CalA 284P1056; 37GaA693, 141 SE668; 129Kan766, 284P427 (remittitur held not to show passion or prejudice): 238Mich390, 213NW453; 320 Mo 839, 8SW(2d)873; MoA 277SW581; NJ 131A87; 157Tenn173, 7SW(2d)38.
874–48 29Ariz334, 241P518 (punitive damages remitted in lower court); IndA 172NE783; 176Minn203, 223NW94; 31 OhA488, 166NE391. But see 84 IndA 463, 151NE349. Contra 144Miss804, 110 S510. [a] MoA 248W(2d)660. [c] That court of own motion entered remittitur of sixty per cent, indicated that verdict was result of prejudice. 34 OhA490, 171 NE409.
874–50½–New. The duty of the reviewing court to grant relief from excessive verdicts is limited, where the court in banc has substantially reduced the verdict. 295Pa168, 145A81.
874–51 21AlaA545, 109S895; 92Fla292, 109S597, 598 [citCJ]; Mo 26SW(2d) 618; MoA 283SW743.
874–52 21AlaA545, 109S895; 88 IndA 176, 156NE594; Iowa 209NW435.
874–53 229Ky229, 16SW(2d)1060; 230 AppDiv389, 244NYS663.
875–56 177Ark631, 7SW(2d)313.
875–57 11LaA700, 124S716.
875–58 21AlaA545, 109A895; Miss 110 S519; 155Miss207, 124S325; 132SC212, 128SE423; TexCivA 118SW(2d)586; 152 Wash681, 279P107; 104WVa445, 140SE 141. [c] Award of nominal damages does not necessarily indicate passion or prejudice. 128Kan466, 278P727.
875–62 Mo 26SW(2d)618.
875–63 194Wis119, 215NW822.
875–64 22AlaA24, 111S755.
875–66 109Conn526, 147A8.
875–68 194Wis119, 215NW822.
875–69 221MoA798, 288SW80; 42 Okl ACR70 [reh pending]; 125 Or428, 266P 875.
876–70 221MoA798, 288SW80.
876–71 121Kan490, 247P449; 229Ky 820, 18SW(2d)273; 142Miss210, 106S 753; 83Mont170, 271P609; 42 OklACR 70 [reh pending]; 125 Or428, 266P875; 116Tex538, 295SW922. [a] 42 Ida245, 245P92.
876–72 136 Okl 174, 276P707.
876–73 264Mass166, 162NE300.
876–75 85CalA360, 259P460.
876–77 138SC169, 136SE209 (appellants must show that findings of lower court in equity are against preponderance of evidence). See also 25F(2d)588.
876–78 1F(2d)975; 5F(2d)183; 9 F(2d)749; 12F(2d)917; 13F(2d)1; 15 F(2d)509; 16F(2d)199; 16F(2d)272; 16F(2d)274; 16F(2d)781; 16F(2d)841; 20F(2d)647; 20F(2d)803; 23F(2d)325; 23F(2d)652; 26F(2d)603 (great weight is attached to findings of trial judge); 26F(2d)775; 30F(2d)97; 32F(2d)442; 33F(2d)437; 35F(2d)126; 40F(2d)31; 41F(2d)648; 214AlaA430, 108S243; 214 Ala558, 108S370; 215Ala16, 108S863; 215Ala87, 109S377; 215Ala511, 110S 804; 215Ala476, 111S29; 215Ala550, 112S115; 22AlaA54, 112S179; 22AlaA 63, 112S184; 216Ala298, 113S32; 219 Ala188, 121S704 (1stcase); Ala 130S211; Ala 130S677; AlaA130S898; 20AlaA642, 104S776; 21AlaA183, 107S735; 21AlaA 285, 107S724; AlaA 129S793; 31Ariz 169, 251P446; 31Ariz478, 254P485; 169 Ark43, 272SW834; 171Ark675, 286SW 865; 171Ark817, 286SW971; 172Ark 1176, 290SW53; 174Ark377, 295SW363; 174Ark381, 295SW381; 173Ark1182, 295SW725; 175Ark1148, 2SW(2d)1; 176Ark1203, 5SW(2d)308; 177Ark663, 7SW(2d)336; 179Ark1113, 20SW(2d) 177(2dcase); 200Cal 644, 254P269; 200 Cal 550, 254P542; 201Cal 225, 256P419, 55ALR157; 204Cal 329, 267P1079; 206 Cal 389, 274P536(2dcase); 206Cal 635, 275P803; 207Cal 96, 276P995(2dcase); 68CalA696, 230P12; 69CalA165, 230P 995; 71CalA448, 235P656; 72CalA222, 236P960; 74CalA591, 241P897; 77CalA 219, 246P143; 77CalA381, 246P824; 77 CalA548, 247P520; 78CalA184, 248P 280; 79CalA222, 249P30; 79CalA203, 249P42; 79CalA626, 250P580; 84CalA 142, 257P606 (where evidence is sufficient to satisfy trial court); 86CalA535, 261P744; 88CalA174, 263P255; 90CalA 776, 266P594; 94CalA614, 271P539; 95 CalA297, 272P613(1stcase); 97CalA398, 275P861; 98CalA143, 276P363(1st case); 102CalA342, 283P312; 102CalA 541, 283P829; CalA 285P868; CalA 288 P830; CalA 290P900; CalA 291P221; CalA 293P91; CalA 293P111; CalA 293 P133; 81Colo 195, 254P779; 81Colo 315, 255P453; 82Colo 13, 257P247; 83Colo 387, 265P901; 85Colo 5, 273P19; 103 Conn436, 130A668; 104Conn139, 132A 565; 105Conn625, 136A687; 107Conn 229, 140A116; 107Conn79, 140A119; 107 Conn451, 140A826; 108Conn13, 142A 389; 108Conn349, 143A165; 108Conn 602, 143A881; 111Conn103, 149A218; Conn 151A335; 92Fla121, 109S422; 92 Fla347, 109S424; 94Fla218, 114S246; 94Fla851, 114S452; 27Hawaii20; 29 Hawaii364; 42 Ida118, 243P653; 235 IllA410; 249 IllA15; 200 Iowa1285, 206 NW303; 200 Iowa1349, 206NW610; 202 Iowa196, 209NW276; 202 Iowa1356, 212 NW116; 203 Iowa396, 212NW693; 203 Iowa1390, 218NW545; 204 Iowa1325, 217NW262; 205 Iowa578, 218NW262; 206 Iowa527, 219NW318(2dcase); Iowa 219NW484; Iowa 220NW55; 206 Iowa 761, 221NW467; 206 Iowa939, 221NW 567; Iowa 222NW376; 207 Iowa1310, 224NW512; Iowa 228NW11; Iowa 228 NW263; Iowa 229NW173; Iowa 229 NW763; Iowa 230NW404; Iowa 231 NW350; 118Kan246, 234P964; 121Kan 737, 250P260; 122Kan65, 251P411; 124 Kan382, 260P627; 124Kan386, 260P 632; 125Kan62, 262P545; 125Kan76, 262P1030; 213Ky824, 281SW1010; 214 Ky56, 282SW1112; 220Ky9, 294SW 786; 230Ky798, 20SW(2d)979; 233Ky 771, 26SW(2d)1025; 234Ky257, 27SW (2d)963; 235Ky795, 32SW(2d)346; 163 La505, 112S397; 164La514, 114S116; 164La905, 114S729; 168La57, 121S301; 169La13, 124S129; 170La345, 127S746 (entitled to great weight); 1LaA277; 1LaA312; 1LaA410; 1LaA457; 1LaA 476; 1LaA570; 1LaA637; 1LaA643; 1 LaA644; 1LaA701; 1LaA748; 2LaA91; 2LaA128; 2LaA221; 2LaA277; 2LaA 320; 2LaA616; 2LaA741; 2LaA749; 2 LaA762; 3LaA183; 3LaA136; 3LaA 151; 3LaA184; 3LaA457; 3LaA459; 3 LaA533; 3LaA552; 3LaA566; 3LaA 616; 3LaA626; 3LaA660; 4LaA52; 4 LaA165; 4LaA434; 4LaA442; 4LaA 612; 4LaA616; 5LaA166; 5LaA169; 5 LaA182; 5LaA183; 5LaA185; 5LaA 315; 5LaA321; 5LaA322; 5LaA328; 5 LaA331; 12LaA79, 125S301; 13LaA140, 127S411(2dcase); 125Me249, 132A742; 125Me485, 135A98; 251Mass6, 146NE 269; 252Mass279, 147NE821; 253Mass 90, 148NE448; 254Mass105, 149NE674; 255Mass569, 152NE54; 257Mass483, 154 NE79; 258Mass13, 154NE263; 258Mass 269, 154NE761; 260Mass178, 156NE 903; 261Mass1, 157NE725; 261Mass 355, 158NE767; 261Mass385, 158NE 795; 262Mass588, 160NE434; Mass 165 NE15; Mass 173NE433; Mass 173NE 495; Mass 173NE516; Mass 173NE534; 240Mich141, 215NW339; 241Mich282, 216NW921; 241Mich285, 217NW38; 251Mich407, 232NW187; Mich 233NW 428; 165Minn181, 206NW390; 167Minn 428, 209NW317; 167Minn479, 209NW 490; 174Minn442, 219NW457; 145Miss 23, 110S862; 148Miss164, 114S268; 315 Mo927, 288SW20; Mo 19SW(2d)865(1st case); Mo 30SW(2d)77; Mo 30SW(2d) 126; MoA 272SW701; 220MoA743, 276 SW409; MoA 278SW1062; MoA 286SW 832; 222MoA545, 292SW81 (evidence not weighed by appellate court); 222 MoA193, 297SW94; 222MoA935, 11SW (2d)77; MoA 25SW(2d)484(2dcase); MoA 25SW(2d)525; MoA 25SW(2d) 551; MoA 26SW(2d)794; MoA 27SW (2d)438; MoA 28SW(2d)432; MoA 28 SW(2d)443; 74Mont398, 240P825; 79 Mont566, 257P427; 85Mont389, 278P 836; Mont 287P629; 113Nebr801, 205 NW288; 115Nebr770, 215NW102; 117 Nebr617, 221NW958; 82NH91, 129A 876; 83NH459, 144A67; NJ 133A84; 104NJL30, 139A725; 102NJL164, 130A 627; NJ 130A436; NJ 132A651; NJ 136A414; NJ 137A558; 104NJL34, 139 A322; NJ 139A806; 104NJL248, 139 A900; 252NY422, 169NE632; 220App Div160, 221NYS11; 130Misc800, 225 NYS381; 189NC748, 128SE337; 190NC 331, 129SE725; 190NC599, 130SE498; 190NC853, 129SE193 (commissioner in partition); 191NC373, 131SE740; 193 NC555, 137SE582; 196NC756, 147SE301 (2dcase); 198NC705, 153SE327; 22 OhA487, 153NE909; 24 OhA21, 155NE 649; 113 Okl 280, 241P752; 115 Okl 291, 243P141; 116 Okl 113, 243P749; 116 Okl 197, 244P35; 116 Okl 291, 244P 775; 117 Okl 135, 245P629; 117 Okl 136, 245P646; 117 Okl 167, 245P550; 118 Okl 170, 247P667; 119 Okl 259, 250 P103; 120 Okl 51, 250P427; 120 Okl 202, 251P54; 120 Okl 282, 251P43; 120 Okl 292, 251P474; 121 Okl 265, 249P 411; 122 Okl 190, 247P66; 122 Okl 176, 253P51; 122 Okl 205, 253P494; 124 Okl 174, 254P713; 127 Okl 171, 260P4; 127 Okl 277, 260P741; 127 Okl 275, 260P 755; 128 Okl 142, 261P927; 129 Okl 48, 262P682; 129 Okl 155, 265P1064; 131 Okl258, 268P729; 131 Okl 299, 269P 243; 134 Okl 104, 272P378(1stcase); 139 Okl 102, 281P982(1stcase); 142 Okl 157, 286P14; 42 OklACR100; 116 Or102, 239P812; 117 Or374, 243P554; 117 Or 438, 243P773; 119 Or178, 249P1099; 120 Or411, 252P75; 120 Or490, 252P 707; 122 Or 225, 258P192; 122 Or306, 258P820; 123 Or461, 260P1014; 123 Or 111, 261P72; 124 Or25, 263P913; 124 Or272, 264P438; 125 Or515, 266P1067; 125 Or323, 267P398; 126 Or610, 268P 742; 127 Or276, 270P497; 128 Or142, 273P954; 128 Or216, 274P116(1stcase); 129 Or58, 276P260; 129 Or511, 277P 823; 129 Or663, 278P963, 64ALR1396; 130 Or189, 279P633; 131 Or108, 280P 337; 131 Or376, 282P554(2dcase); 131 Or580, 283P20; 132 Or92, 284P832; 132 Or667, 288P202; Or 289P1051; Or 289P1067; Or 293P420; 284Pa73, 130A 304; 285Pa305, 132A368; 286Pa41, 132 A804; 286Pa119, 133A217; 287Pa14, 134A294; 287Pa115, 134A463; 290Pa 79, 137A910; 290Pa566, 139A450; 294 Pa1, 143A206; 294Pa535, 144A537; 295 Pa62, 144A824 (when supported by competent evidence); 295Pa501, 145A 507; 297Pa153, 146A541; 297Pa551, 147A657; 299Pa284, 149A184; 85Pa Super406 (have effect of verdict); 87 PaSuper289; 88PaSuper562; 90Pa Super103; 90PaSuper266; 97PaSuper 223; 97PaSuper134; 8PaDist&Co 691; 48Philippine848; 138SC157, 135SE881; 150SC36, 147SE650; 50SD69, 208NW 404; 154Tenn494, 290SW387; 155Tenn 132, 290SW975; 157Tenn391, 8SW(2d) 495, 62ALR495; TexCommnA 12SW (2d)175; TexCivA 265SW210 (on question of limitations); TexCivA 271SW 435; TexCivA 273SW892; TexCivA 275 SW295; TexCivA 277SW768; TexCivA 282SW825; TexCivA 283SW345; Tex CivA 286SW307; TexCivA 288SW598; TexCivA 290SW560; TexCivA 291SW 583; TexCivA 293SW888; TexCivA 297 SW501; TexCivA 299SW264; TexCivA 2SW(2d)351; TexCivA 6SW(2d)206; TexCivA 10SW(2d)173; TexCivA 10SW (2d)590; TexCivA 11SW(2d)829 (implied findings); TexCivA 15SW(2d)35; TexCivA 15SW(2d)1081; TexCivA 16 SW(2d)371; TexCivA 20SW(2d)1073; TexCivA 21SW(2d)372(1stcase); Tex CivA 24SW(2d)764; TexCivA 26SW(2d) 671; TexCivA 27SW(2d)835; TexCivA 28SW(2d)892; TexCivA 29SW(2d)853; TexCivA 30SW(2d)577; TexCivA 30SW (2d)1110; TexCivA 31SW(2d)501; Tex CivA 32SW(2d)685; 143Va150, 129SE 333; 147Va493, 137SE365; 151Va136, 144SE432; 141Wash581, 252P107; 146 Wash358, 262P980; 152Wash469, 27SP 193 (trial court's conclusions are entitled

to great weight); 154Wash582, 282P926; Wash 287P872; Wash 290P998; 37 Wyo 98, 259P520; Wyo 283P1100; 83LJKB 875 [app allowed on other grounds [1915] 1KB400; 23TLR616; [1926] Can SC331, [1926] 1DomLR384; Can [1927] 2DomLR97; Can [1928] 1DomLR623; BC [1927] 2DomLR373; BC [1929] 4 DomLR240. See also 95CalA772, 273P 613; 142Wash348, 253P458. But see 218 Ala484, 119S817. [b] 149Va755, 141 SE759. [c] (1) 214Ala287, 107S807. (7) Construction of Connecticut statute. 102 Conn529, 129A527. (8) Other instances. 39F(2d)851. [f] **In Oregon.**—117 Or633, 244P870. [g] **Entire evidence will be considered** by reviewing court in determining whether trial court erred in making findings, and not merely portions referred to in appellant's brief. 84 CalA211, 257P584. [h] **Findings of judge disposing of case after death of judge hearing testimony** held not entitled to weight usually given findings. 292Pa343, 141A146. [i] **Chancellor's findings on testimony taken before examiner** will not be given same effect as verdict of jury. Fla 129S499. [j] **Where trial court has not substantially departed from rules governing case,** its findings will not be disturbed on appeal. 48 Ida18, 279P293. [k] **Uncontradicted testimony** must be accepted as correct. 13LaA318, 127S758.

877–79 43F(2d)521; Ariz 292P1020; 74CalA396, 240P1025; 96CalA460, 274P 769; 100CalA330, 279P1016; CalA 292 P276; 104Conn660, 133A915; IndA 151 NE336; 252Mass574, 147NE847; 80 Mont374, 260P734; 81Mont113, 261P 618; 81Mont271, 263P93; 290Pa566, 139A450; TexCivA 272SW346; TexCivA 118SW(2d)829; BC [1927] 2DomLR159. But see CalA 290P145. [a] **Judgment resting on finding of no fraud,** to be disturbed it must be held that uncontroverted evidence showed fraud. Tex CivA 28SW(2d)837.

877–80 12F(2d)917; 16F(2d)272; 16 F(2d)274; 17F(2d)366; 19F(2d)448; 19F(2d)504; 20F(2d)235; 23F(2d)416; 27F(2d)20; 28F(2d)693; 29F(2d)353; 34F(2d)435; 37F(2d)508; 38F(2d)229; 40F(2d)265; 40F(2d)323; 214Ala77, 106S399; 214Ala287, 107S807; 214 Ala420, 108S238; 31Ariz478, 254P485; 32Ariz90, 255P991; 171Ark1036; 287 SW170; 175Ark482, 300SW927; 201 Cal 225, 256P419, 55ALR157; 201 Cal 518, 258P55; 203Cal 187, 263P 237; 205Cal 386, 270P934; 205Cal 491, 271P1059; 206Cal 524, 274P973; 207Cal 8, 276P1017(2dcase); Cal 290 P8; Cal 291P830; 67CalA432, 227P 679; 67CalA458, 227P627; 71CalA767, 236P183; 72CalA94, 236P346; 73CalA 285, 238P780; 74CalA500, 241P272; 75 CalA418, 242P894; 76CalA468, 245P 223; 76CalA741, 246P102; 77CalA381, 246P824; 77CalA548, 247P520; 83CalA 41, 256P476; 83CalA635, 257P130; 83 CalA666, 257P538; 84CalA358, 258P 115; 84CalA438, 258P411; 85CalA31, 258P712; 86CalA459, 261P315; 86CalA 636, 261P324; 87CalA753, 262P467; 89 CalA6, 264P336; 90CalA432, 265P991; 91CalA585, 267P124 (though based largely on depositions); 92CalA178, 267 P898; 93CalA224, 269P573; 96CalA 400, 274P411; 98CalA6, 276P377; 100 CalA188, 279P840; 100CalA152, 280P 144 (finding warranted by evidence); 102CalA67, 282P518 (material evidence); 102CalA620, 283P344; CalA 284P987; CalA 287P116; CalA 288P 792; CalA 290P110; CalA 291P585; CalA 291P629; CalA 291P663; 80Colo 459, 252P812; 81Colo 202, 254P764; 81Colo 413, 255P989; 82Colo 13, 257P 247; 83Colo 111, 262P1016 (legal and competent evidence); 83Colo 510, 267P 605; 86Colo 270, 281P111 (competent evidence); 87Colo 584, 290P277; Colo 292P602; 102Conn529, 129A527; 104 Conn17, 131A742 (refusal to strike proper); 111Conn422, 150A105; 92Fla 347, 109S424; 27Hawaii544; 29Hawaii 228; 29Hawaii866; 45 Ida707, 266P 1094; Ill 172NE736; 163 IllA89; 200 Ind319, 163NE263; IndA 169NE869; IndA 173NE289; 202 Iowa292, 209NW 465; Iowa 213NW408; 204 Iowa1046, 216NW952; Iowa 229NW763; Iowa 232 NW124; Iowa 233NW108; 118Kan341, 235P103; 119Kan811, 241P446; 121Kan 619, 249P608; 121Kan858, 250P332; 123Kan513, 255P978; 124Kan382, 260 P627; 125Kan510, 265P39; 128Kan646, 278P1067; 130Kan243, 285P574(2d case); 211Ky679, 277SW1013 (supported by all evidence adduced); 9LaA 358, 120S498(1stcase); 2LaA679; 6LaA 199; 9LaA367, 119S282; 126Me362, 138 A553; Me 151A890; 252Mass328, 147 NE858; 253Mass340, 148NE807; 253 Mass368, 149NE118; 253Mass548, 149 NE413; 262Mass191, 159NE735; Mass 167NE635 (amply supported by evidence); Mass 172NE70; Mass 172NE 647; 233Mich312, 206NW525; 240Mich 18, 214NW944; 241Mich285, 217NW 38; 179Minn315, 229NW133; Minn 231 NW200; Minn 232NW789; Mo 276SW 611; 220MoA837, 272SW75; MoA 279 SW165; 221MoA568, 282SW1033; MoA 290SW635; 80Mont308, 260P1039; NJ 138A511; 104NJL170, 139A222; NJ 138A466; 104NJL248, 139A900; 104 NJL343, 140A295, 56ALR910; NJ 144 A116; NJ 145A240; NJ 146A595(1st case); NJSup 148A158; NJSup 148A 648; NJ 152A11; 243NY333, 153NE 437; 212AppDiv528, 209NYS54; 193 NC802, 138SE167; 194NC729, 140SE 722; 195NC822, 143SE835; 198NC270, 151SE191(1stcase); NC 153SE848; NC 154SE43; 51ND815, 201NW348; 58ND 55, 224NW679; 116 Okl 57, 243P220; 126 Okl 108, 258P866; 127 Okl 203, 260 P481; 81Mont170, 261P962; 130 Okl 67, 264P811; 130 Okl 27, 264P904; 130 Okl 71, 265P117; 132 Okl 141, 269P 1067; 133 Okl 214, 271P1017; 134 Okl 164, 272P461; 138 Okl 98, 280P439; 141 Okl 122, 284P43; 144 Okl 9, 291P 103; 144 Okl 227, 291P542; 117 Or438, 243P773; 121 Or259, 253P873; 122 Or 651, 259P1067; 30 Or401, 280P492; 130 Or408, 280P495(1stcase); 132 Or667, 288P202; Or 289P1051; 284Pa69, 130 A300; 286Pa351, 133A495; 288Pa478, 136A773; 288Pa491, 136A777; 291Pa 276, 139A844; 292Pa194, 140A869; 292 Pa476, 141A302; 293Pa566, 143A195; 294Pa203, 143A913; 295Pa366, 145A 440; 298Pa400, 148A511; 300Pa280, 150A599; 85PaSuper406; 89PaSuper 261; 92PaSuper390; RI 133A3; 155 SC38, 151SE785; 49SD68, 206NW423; TexCommnA 299SW889; TexCommnA 148SW(2d)794; TexCommnA 16SW(2d) 255; TexCivA 272SW819 (conclusions having support in evidence); TexCivA 273SW889; TexCivA 273SW892; Tex CivA 274SW281; TexCivA 275SW232; TexCivA 275SW498; TexCivA 276SW 757; TexCivA 277SW714; TexCivA 277 SW768; TexCivA 279SW513 (clearly supported by evidence); TexCivA 280 SW254; TexCivA 281SW622; TexCivA 283SW345; TexCivA 283SW607; Tex CivA 287SW276; TexCivA 287SW1118 (1stcase); TexCivA 287SW1118(2d case); TexCivA 289SW196; TexCivA 293SW217; TexCivA 297SW294; Tex CivA 6SW(2d)206; TexCivA 9SW(2d) 498; TexCivA 11SW(2d)662; TexCivA 16SW(2d)371; TexCivA 17SW(2d)138; TexCivA 17SW(2d)141; TexCivA 19SW (2d)372; TexCivA 20SW(2d)1073; Tex CivA 22SW(2d)1105; TexCivA 24SW (2d)97; TexCivA 30SW(2d)1110; Utah 290P169; Vt 148A867; 141Wash51, 250 P449; 141Wash538, 251P882; 143Wash 694, 253P597; 146Wash492, 263P732; 192Wis623, 211NW776; 192Wis482, 213NW283; Alta [1929] 4DomLR397; BC [1927] 2DomLR159; BC [1927] 2 DomLR373; BC [1929] 2DomLR64; Sask [1928] 1DomLR992. [a] 139 Okl 42, 280P1093; 152Wash538, 278P428. [b] **Conclusion which finds support in the record** is not contrary to great weight of evidence, and not plainly erroneous or manifestly wrong, has the effect of the verdict of a jury. 21AlaA 26, 104S871.

878–81 30F(2d)33; 172Ark98, 287SW 758; 178Ark1199, 10SW(2d)1; 178Ark 82, 10SW(2d)32; 179Ark516, 16SW(2d) 1001; 200Cal 204, 252P599; 202Cal 569, 262P297; 202Cal 778, 262P742 (evidence practically uncontradicted); 203 Cal 1, 262P1087; 204Cal 342, 268P342, 58ALR1176 (ample competent evidence); 205Cal 715, 272P1063; 96CalA 219, 274P93; 206Cal 428, 274P536(1st case); 206Cal 389, 274P536(2dcase); 74 CalA564, 241P408; 78CalA108, 248P 274; 80CalA609, 252P733; 83CalA148, 256P440; 83CalA366, 256P844; 83CalA 537, 257P121; 87CalA127, 261P1029; 88CalA706, 264P549 (abundant evidence); 89CalA682, 265P523; 90CalA 193, 265P870; CalA 268P451; 96CalA 451, 274P358(2dcase); 97CalA30, 275P 448; 98CalA637, 277P371(2dcase); 99 CalA153, 277P1093; 101CalA741, 282P 399; CalA 289P217; 86Colo 135, 278P 614(1stcase); 106Conn665, 138A790; 47 Ida507, 276P966; 48 Ida206, 280P 1036; 244 IllA370; IndA 169NE333; 207 Iowa1198, 224NW500; 119Kan476, 239P764; 120Kan99, 242P471; 125Kan 62, 262P545; 126Kan114, 266P933; 256 Mass58, 152NE104; 265Mass350, 164 NE87(2dcase); Mass 170NE73; 173 Minn529, 217NW933; Mo 30SW(2d)77; MoA 16SW(2d)667; MoA 30SW(2d)182; 74Mont398, 240P825; 34NM298, 280P 254; ND 212NW414; 55ND112, 212NW 518; 129 Okl 85, 263P456; 131 Okl 249, 268P276; 132 Okl 17, 269P274; 124 Or 25, 263P913; 284Pa397, 131A250 (when based on sufficient evidence); 287Pa14, 134A394; 290Pa566, 139A450; 292Pa 532, 141A446; 295Pa374, 145A425; 85 PaSuper3; 85PaSuper236; 85PaSuper 498; 86PaSuper299; 86PaSuper322; 90 PaSuper168; 97PaSuper598; TexCivA 282SW829; TexCivA 290SW818; Tex CivA 298SW662; TexCivA 19SW(2d) 197; TexCivA 20SW(2d)236; TexCivA 21SW(2d)365; TexCivA 22SW(2d)961; TexCivA 24SW(2d)465; TexCivA 29SW (2d)843(1stcase); 66Utah507, 243P790; 70Utah95, 258P216; 143Wash699, 255P 141; 149Wash102, 270P293; WVa 153 SE112(1stcase); 195Wis589, 219NW 426; Eng 23TLR616; Sask [1929] 2 DomLR619. See also TexCivA 27SSW 492. [a] **Findings based on evidence consisting of transcript of testimony in former action** will not be disturbed. CalA 268P451.

878–82 12F(2d)909; 13F(2d)113; 17 F(2d)693; 25F(2d)415; 26F(2d)28; 27 F(2d)240; 28F(2d)463; 31F(2d)751; 32F(2d)121; 40F(2d)2; 42F(2d)736; 43F(2d)337; 30Ariz197, 245P354; 30 Ariz234, 245P932; 30Ariz270, 246P551; 31Ariz60, 250P363; 168Ark1167, 271SW 964; 175Ark1148, 2SW(2d)1; 176Ark 1206, 3SW(2d)297; 177Ark497, 6SW (2d)826; 177Ark663, 7SW(2d)336 (any substantial evidence); 177Ark809, 7SW (2d)988; 177Ark1023, 8SW(2d)462; 179Ark600, 17SW(2d)305; 179Ark1113, 20SW(2d)177(2dcase); 180Ark671, 22 SW(2d)553; 196Cal 86, 236P138; 198 Cal 163, 244P340, 44ALR1341; 200Cal 232, 252P330; 201Cal 584, 258P47; 205 Cal 252, 270P672; 96CalA121, 273P859; 208Cal 256, 280P970; Cal 292P123; 70 CalA552, 233P995; 71CalA448, 235P 656; 73CalA136, 238P108; 73CalA68, 238P169; 73CalA627, 239P71; 73CalA 732, 239P350; 76CalA511, 245P221; 78 CalA49, 248P258; 78CalA511, 248P735; 80CalA342, 251P818; 80CalA501, 251P 973; 81CalA295, 253P328; 83CalA366, 256P844; 83CalA696, 257P189; 84CalA 220, 257P898; CalA 258P642; 84CalA 775, 258P652; 86CalA382, 260P898; 90 CalA201, 265P982; 91CalA213, 266P 956; 91CalA201, 266P1005; 92CalA495, 268P483; 92CalA613, 268P675(1stcase); 92CalA504, 268P675(2dcase); 94CalA 533, 271P525; 94CalA614, 271P539; 94 CalA729, 272P315 (whether there is substantial evidence in record supporting finding is only question for determination); 95CalA378, 272P803; 95CalA551, 272P1114; 97CalA605, 275P979; 99 CalA60, 277P898; 99CalA182, 278P243; 101CalA532, 281P1104; 102CalA192, 282P974; CalA 284P1038; CalA 285P 910; CalA 286P510; CalA 286P1057; CalA 288P111; CalA 288P1089; CalA 291P454; CalA 291P641; CalA 292P 140; CalA 292P996; 92Fla121, 109S 422; 29Hawaii250; 42 Ida118, 243P 653; 43 Ida129, 250P1081; 44 Ida240, 256P98; 46 Ida657, 270P621; Ida 289P 72; 200 Ind616, 165NE911; 201 Iowa 651, 207NW764; 122Kan65, 251P411; 123Kan116, 254P322; 123Kan217, 254P 1028; 123Kan393, 254P366; 127Kan 279, 273P466; 176Minn198, 222NW931 (1stcase); 177Minn111, 224NW849(2d case); 307Mo 72, 270SW105; 307Mo

375, 270SW365; 307Mo 447, 270SW101; Mo 280SW707; 313Mo 256, 281SW417; 315Mo 442, 286SW385; 315Mo 568, 287 SW445; 315Mo 1336, 290SW123; 317 Mo216, 295SW83; 317Mo 505, 297SW 362; Mo 300SW497; 318Mo 408, 300SW 506; 318Mo 865, 1SW(2d)94; 319Mo 149, 3SW(2d)1008; 319Mo 824, 5SW (2d)10; Mo 8SW(2d)975; 321Mo 1104, 14SW(2d)425; Mo 19SW(2d)865(1st case); Mo 24SW(2d)1042; Mo 25SW (2d)83; Mo 30SW(2d)126; Mo 256SW 750; 217MoA410, 266SW762; MoA 273 SW125; MoA 274SW491; MoA 276SW 89; 220MoA743, 276SW409; MoA 278 SW784; MoA 279SW751; 222MoA510, 281SW75; 222MoA510, 281SW75; MoA 286SW729; MoA 287SW1064; 220MoA 1266, 290SW85; MoA 291SW190; 222 MoA276, 297SW138; MoA 2SW(2d)178; MoA 2SW(2d)635; MoA 6SW(2d)973; MoA 9SW(2d)257; 222MoA1029, 9SW (2d)808(2dcase); MoA 11SW(2d)1063; 222MoA1113, 14SW(2d)683; MoA 16SW (2d)107; MoA 16SW(2d)612; MoA 16 SW(2d)691; MoA 18SW(2d)93; MoA 18SW(2d)147; MoA 19SW(2d)297; MoA 23SW(2d)214; MoA 26SW(2d) 794; MoA 27SW(2d)438; MoA 29SW (2d)240; 75Mont369, 243P1093; 75 Mont401, 244P141; 76Mont359, 246P 771; 80Mont102, 258P246; 82Mont218, 266P398; 83Mont68, 271P695; 84Mont 297, 275P265; 30NM487, 239P525; 30 NM566, 240P469; 31NM382, 245P870; 31NM457, 247P270; 33NM97, 262P173; 33NM441, 268P1026; 33NM577, 273P 761; 33NM617, 273P916; 33NM647, 275 P90; 34NM13, 275P767; 34NM411, 282 P273(1stcase); 34NM413, 282P382; 34 NM549, 286P160; 34NM579, 286P420; 34NM587, 286P828; NM 288P1065(1st case); NM 290P321(1stcase); NM 290P 797; NM 291P294; NM 291P489; NM 291P492; 190NC256, 129SE595; 191NC 166, 131SE648, 44ALR610; 51ND82, 199NW133; 25OhA120, 157NE308; 30 OhA435, 165NE55; 120Or411, 252P75; 123Or461, 260P1014; 129Or511, 277P 823; Or 289P1051; 16PortoRico 696; 50SD116, 208NW718; 51SD1, 211NW 690; 51SD27, 211NW972; 54SD54, 222 NW496; TexCommnA 292SW187; 68 Utah486, 251P16; Utah 262P274; Wash 291P1103; 103WVa124, 136SE777; 187 Wis598, 204NW510 (substantially supported by evidence); 34Wyo 53, 241P 219; 36Wyo 268, 254P130; 36Wyo 361, 255P593, 53ALR554; 38Wyo 165, 265P 450 (rule held applicable though evidence on basic issue was by deposition); 39Wyo 46, 270P163 (though some of sustaining evidence was in form of deposition). [a] 99CalA566, 278P905, But see 82CalA342, 255P523.

878–82½–New. where there is competent evidence legally and reasonably susceptible of the weight given it below; TexCivA 278SW492.

879–83 32Ariz392, 259P401; 32Ariz 395, 259P402; 35Ariz130, 274P1043; Ariz 286P822; Ariz 289P512; 202Cal 143, 259P735; 206Cal 526, 275P440; 71 CalA534, 235P745 (not disturbed where possible to support them); 84CalA714, 258P636; 87CalA1, 261P524; 89CalA 628, 265P378; CalA 290P79; 107Conn 1, 138A905; 111Conn475, 150A693; 111 Conn544, 150A700; Conn 151A351; 162 GaA189, 132SE756; 202 Iowa1356, 212 NW116; 165La646, 115S811; 176 Minn419, 223NW770; 178Minn275, 226 NW933; 316Mo 333, 289SW939; MoA 14SW(2d)465; 104NJL418, 140A292; 109 Okl 236, 235P205; 111 Okl 254, 239 P625; 112 Okl 210, 239P246; 113 Okl 170, 240P649; 113 Okl 278, 241P768; 113 Okl 280, 241P752; 114 Okl 276, 246 P628; 115 Okl 6, 240P1040; 115 Okl 153, 241P342; 115 Okl 176, 241P781; 115 Okl 207, 242P264; 116 Okl 27, 243 P153; 116 Okl 29, 243P731; 116 Okl 163, 243P738; 116 Okl 197, 244P35; 116 Okl 241, 244P424; 116 Okl 285, 244 P781; 116 Okl 291, 244P775; 117 Okl 54, 244P768; 117 Okl 92, 244P774; 117 Okl 93, 245P555; 117 Okl 100, 245P576; 117 Okl 135, 245P629; 117 Okl 136, 245 P646; 117 Okl 141, 245P829; 117 Okl 255, 245P990; 117 Okl 297, 246P451; 118 Okl 170, 247P667; 118 Okl 174, 247 P671; 118 Okl 283, 248P634; 119 Okl 82, 248P620; 120 Okl 20, 250P109; 120 Okl 22, 250P72; 120 Okl 51, 250P427; 120 Okl 81, 250P415; 120 Okl 89, 250P 515; 120 Okl 92, 250P529; 120 Okl 199, 250P1015; 120 Okl 202, 251P54; 120 Okl 292, 251P474; 121 Okl 252, 249P 285; 121 Okl 265, 249P411; 121 Okl 298, 249P943; 122 Okl 188, 253P88; 122 Okl 190, 247P66; 122 Okl 176, 253 P51; 122 Okl 205, 253P494; 123 Okl 52, 251P997; 123 Okl 66, 251P993; 123 Okl 222, 253P56; 124 Okl 97, 254P75; 124 Okl 179, 254P739; 125 Okl 172, 256P 925; 125 Okl 173, 256P926(1stcase); 125 Okl 174, 256P926(2dcase); 125 Okl 161, 256P932; 126 Okl 162, 259P209; 126 Okl 202, 259P217; 126 Okl 241, 259 P249; 127 Okl 20, 259P565; 127 Okl 173, 260P3; 127 Okl 171, 260P4; 127 Okl 277, 260P741; 128 Okl 142, 261P 927; 128 Okl 282, 262P675; 219 Okl 48, 262P682; 129 Okl 58, 263P145; 130 Okl 91, 265P626; 130 Okl 118, 265P642; 131 Okl 16, 267P477; 131 Okl 79, 267P 661; 131 Okl 237, 268P192; 131 Okl 258, 268P729; 132 Okl 230, 270P41; 133 Okl 34, 270P1098; 133 Okl 97, 271 P238; 133 Okl 191, 271P945; 133 Okl 212, 271P1009; 134 Okl 104, 272P378 (1stcase); 135 Okl 50, 273P887(2dcase); 135 Okl 69, 273P1002; 135 Okl 101, 274 P478; 135 Okl 117, 274P648; 135 Okl 214, 275P312; 135 Okl 242, 275P333; 135 Okl 206, 275P345; 136 Okl 40, 275 P643; 136 Okl 83, 276P183; 136 Okl 213, 277P246; 136 Okl 261, 277P649; 136 Okl 249, 277P915; 138 Okl 180, 280 P805; 138 Okl 295, 281P126; 139 Okl 176, 281P766; 139 Okl 233, 281P950; 139 Okl 232, 281P957; 140 Okl 215, 282 P454; 141 Okl 183, 284P288; 142 Okl 157, 286P14; 142 Okl 251, 286P778; 142 Okl 230, 286P907; 144 Okl 69, 289 P260; 144 Okl 68, 289P737; 144 Okl 147, 290P181(1stcase); 144 Okl 275, 291 P66; 42 OklACR100; 43 OklACR149; 43 OklACR173 [reh pending]; 43 Okl ACR263; 43 OklACR282; 88PaSuper 562; 132SC94, 128SE861; TexCommnA 295SW581; TexCivA 48W(2d)121; Tex CivA 8SW(2d)546; TexCivA 14SW(2d) 300; TexCivA 32SW(2d)225; 101Vt42, 140A160; 135Wash404, 237P1002; Alta [1929] 1DomLR391. See also 144 Okl 51, 289P352(2dcase).

879–84 12F(2d)917; 16F(2d)33; 16F (2d)781; 28Ariz505, 238P330; 34Ariz 472, 272P652; 70CalA283, 233P370; 71 CalA767, 236P183; 75CalA205, 242P 746; 80CalA501, 251P973 (any substantial evidence); 84CalA420, 258P107; CalA 288P866; CalA 289P940; 36GaA 172, 136SE90; 121Kan218, 246P1010; 121Kan291, 246P1017; 126Kan527, 268 P839; 240Mich141, 215NW339; 125Me 249, 132A742; 250Mich9, 229NW446; Mo 288SW(2d)652; 83NH206, 140A174; 3NJMisc990, 130A371; 103NJL440, 135 A897; NJ 141A584; NJ 143A819; NJ 135A501; NJ 142A308; 189NC748, 128 SE337; 119 Okl 259, 250P103; 120 Okl 285, 251P48; 127 Okl 275, 260P755; 116 Or25, 240P227; 121 Or259, 253P 873; Or 289P1067; 139SC455, 138SE 177; 156SC480, 153SE462; TexCivA 273SW892; TexCivA 276SW959.

879–84½–New. where supported by fair preponderance of the evidence; 127Misc 24, 215NYS217.

879–84½–New. if on any view it can be sustained: Mass 168NE535.

879–85 102Conn529, 129A527. See also 67CalA507, 227P943.

879–86 215Ala476, 111S29; 35Ariz130, 274P1043; 35Ariz254, 276P839; 195Cal 354, 233P330; 199Cal 286, 249P188, 51 ALR1380; 68CalA478, 229P858; 75Cal A125, 241P919; 76CalA468, 245P223; 79CalA641, 250P710; 83CalA23, 256P 446; 92CalA161, 267P928; CalA 288P 702; CalA 289P656; CalA 290P591(2d case); CalA 291P591; 107Conn417, 140 A823; 220Ky9, 294SW786; 223Ky674, 4SW(2d)684 (where doubt exists); 230 Ky154, 18SW(2d)973; Mass 172NE250; 21OhA288, 152NE764; 30OhA442, 164 NE797; 21OhA288, 152NE764; 24OhA 21, 155NE649; 25OhA120, 157NE308; TexCivA 299SW695; Utah 276P659; Utah 290P169.

879–88 12F(2d)917; 15F(2d)906; 201 Cal 15, 254P1117; 79CalA55, 248P1065; 83CalA655, 257P447; 235 IllA410; 224 Ky249, 5SW(2d)1076 (doubt raised); 1 LaA288; MoA 21SW(2d)193; MoA 23 SW(2d)205; 85Mont78, 277P622, 64 ALR772; 32OhA111, 167NE614; 35 PortoRico 49; 35PortoRico 286; 35 PortoRico 697; 47RI 35, 129A602; Ont [1929] 1DomLR465; Sask [1929] 2DomLR226 (except under extraordinary circumstances); Sask [1930] 2DomLR930. See also 108Conn733, 143A844.

879–89 12F(2d)917; 16F(2d)33; 219 Ala614, 123S78; 29Ariz23, 239P290; 172Ark527, 290SW43; 71CalA767, 236 P183; 87CalA382, 262P357; 98CalA 610, 277P347; 101CalA122, 281P419; CalA 283P970 (any competent evidence); CalA 284P933; Ind 168NE 454; 120Kan205, 243P324; 121Kan291, 246P1017; 127Mc264, 143A1; Mass 168 NE540; Mass 169NE905; 237Mich165, 211NW36; MoA 30SW(2d)621; 115 Nebr770, 215NW102; Nebr 232NW732; NJ 132A482; NJ 136A599; 33NM193, 263P29 (circumstantial evidence); 215 AppDiv204, 213NYS486; 189NC748, 128SE337; 113 Okl 104, 239P632; 125 Okl 250, 257P1101, 53ALR943; 113 Or 627, 233P537; 117 Or633, 244P870; 121 Or259, 253P873; 154SC390, 151SE 617; TexCivA 273SW892; TexCivA 274SW249; TexCivA 276SW959; Tex CivA 21SW(2d)1078 (where there is some evidence; TexCivA 28SW(2d)892; 154Wash120, 281P14.

880–90 CalA 265P957; 91CalA350, 266 P1022; 102Conn529, 129A527 (conclusion that buyer had not lost right to repudiate contract, declared legally and logically drawn from subordinate fact found); 107Conn417, 140A823; 109 Conn673, 145A38. [a] **Subordinate facts.**–102Conn529, 129A527.

880–90½–New. where the trial court's findings are in accordance with the merits of the case. 211Ky162, 277SW 318 (where mind is left in doubt as to truth).

880–90¾–New. where substantial justice has been done. 162 IllA532; 163 IllA89; 167 IllA400; 167 IllA632.

880–91 81CalA758, 254P681 (where not so weak that they cannot be upheld as matter of law); 35PortoRico 43.

880–92 81Colo 202, 254P764; 118Kan 341, 235P103; 127Misc24, 215NYS217. [a] **Appellate court will not substitute its judgment on facts** for that of trial court. 127Misc24, 215NYS217.

880–93 220Ky9, 294SW786; 225Ky 521, 9SW(2d)528; MoA 14SW(2d)458.

880–93½–New. findings sustained regardless of evidence of contrary tendency and effect; TexCivA 278SW492.

880–94 12F(2d)649; 15F(2d)618; 17 F(2d)221; 20F(2d)78; 22F(2d)38; 26 F(2d)583; 30F(2d)862; 37F(2d)201; 40F(2d)394; 214Ala420, 108S238; 215 Ala256, 110S273; 215Ala511, 110S804; 218Ala503, 119S15(2dcase); 218Ala484, 119S17; Ala 129S58(2dcase); 81CalA 758, 254P681; 95CalA481, 272P1106; 94Fla851, 114S452; 125Kan725, 266P 649; 9LaA403, 120S496 (findings not reversed where issues are correctly determined); 10LaA629, 121S205(2d case); 9LaA544, 121S208(1stcase); 1 LaA22; 1LaA23; 1LaA31; 1LaA36; 1 LaA96; 1LaA242; 1LaA258; 1LaA 431; 1LaA520; 1LaA745; 1LaA768; 1 LaA779; 1LaA788; 2LaA74; 2LaA 209; 2LaA211; 2LaA227; 2LaA298; 2 LaA337; 2LaA479; 3LaA42; 3LaA 148; 3LaA217; 3LaA264; 3LaA266; 3 LaA332; 3LaA399; 3LaA419; 3LaA 537; 3LaA739; 3LaA743; 4LaA34; 4 LaA367; 4LaA384; 4LaA386; 4LaA 478; 4LaA513; 4LaA571; 4LaA643; 5 LaA114; 5LaA151; 5LaA154; 5LaA 159; 5LaA161; 5LaA172; 5LaA298; 5 LaA427; 5LaA428; 5LaA440; 5LaA 444; 5LaA538; 5LaA539; 5LaA550; 5 LaA583; 5LaA585; 5LaA590; 5LaA 595; 5LaA601(2dcase); 5LaA611; 5 LaA612; 5LaA615; 5LaA643; 5LaA 656; 5LaA659; 5LaA660; 5LaA664; 5 LaA684; 5LaA747; 6LaA17; 6LaA45; 6LaA90; 6LaA91; 6LaA98; 6LaA 101; 6LaA113; 6LaA114; 6LaA156; 6LaA199; 6LaA229; 6LaA321; 6LaA 385; 6LaA414; 6LaA416; 6LaA417; 6LaA425; 6LaA516; 6LaA560; 6 LaA573; 6LaA599; 6LaA677; 6LaA 685; 6LaA703; 6LaA759; 6LaA798; 6 LaA821; 6LaA845; 7LaA28; 7LaA36; 7LaA49; 7LaA87; 7LaA109; 7LaA 112; 7LaA261; 7LaA269; 7LaA283; 7LaA318; 7LaA349; 7LaA355; 7

LaA432; 7LaA459; 7LaA468; 7LaA473; 7LaA478; 7LaA495; 7LaA503; 7LaA509; 7LaA624; 7LaA625; 7LaA642; 7LaA644; 7LaA673; 7LaA692; 7LaA724; 7LaA741; 7LaA751; 8LaA36; 8LaA37; 8LaA65; 8LaA96; 8LaA135; 8LaA155; 8LaA156; 8LaA191; 8LaA249; 8LaA263; 8LaA294; 8LaA297; 8LaA370; 8LaA444; 8LaA446; 8LaA504; 8LaA505; 8LaA509; 8LaA670; 8LaA702; 8LaA782; 11LaA150, 119S757(2dcase); 10LaA24, 120S418 (1stcase); 9LaA363, 120S488; 9LaA394, 120S502; 9LaA392, 120S507; 9LaA397, 120S509; 10LaA76, 120S513; 10LaA376, 120S652; 9LaA388, 120S730 (2dcase); 10LaA738, 122S908(1stcase); 11LaA57, 123S150; 11LaA340, 123S337 (clearly erroneous); 11LaA276, 123S379 (clearly erroneous); 11LaA572, 123S488 (clearly erroneous); LaA 123S502 (2dcase); 11LaA669, 124S602; 11LaA668, 124S619; 12LaA110, 124S692; 12LaA171, 125S162(1stcase); 12LaA335, 125S165; 12LaA132, 125S299; 13LaA355, 126S723; 13LaA304, 126S727; 13LaA625, 127S655; LaA 128S676; 13LaA677, 128S681; LaA 130S857; 125Me485, 135A98; Me 136A667; 128Me62, 145A405; 128Me386, 147A867; 150Md60, 132A376; 252Mass574, 147NE847; 253Mass368, 149NE118; 256Mass466, 152NE880; 259Mass554, 156NE855; 259Mass534, 156NE865; 260Mass178, 156NE903; 261Mass417, 158NE785; 263Mass121, 160NE424; 265Mass420, 164NE608; Mass 165NE119; Mass 165NE873; Mass 165NE889; Mass 169NE430; Mass 170NE73; 165Minn468, 206NW940; 34NM199, 279P873; 25 OhA120, 157NE308; 129 Okl 228, 264P200; 285Pa305, 132A368; 14PaDist&Co 298; 14PortoRico 255; 14PortoRico 803; 32PortoRico 290; RI 145A169; RI 148A33; RI 150A753; TexCivA 275SW498; 142Va209, 128SE521; 142Va135, 128SE546 (last two of which cases holding that finding must be plainly wrong); 196Wis426, 220NW194; BC [1927] 2DomLR373; BC [1928] 2DomLR79; NS [1929] 1DomLR697.

880–95 La 114S116 (findings are entitled to great weight); Mont 286P133.

880–96 280US420, 50SCt220, 74Led 524; 33F(2d)881; 215Ala476, 111S29; 205Cal 252, 270P672; Cal 287P496; 81CalA476, 253P960; 81CalA523, 254P 276; 82CalA449, 255P892; 88CalA515, 263P1033; 203Cal 766, 265P941; 95CalA336, 272P613; CalA 292P132; 127Me1, 140A606; 256Mass58, 152NE104; 172Minn98, 214NW795; 219MoA195, 270SW427; 122 Or306, 258P820; 132SC94, 128SE861; 52SD590, 219NW557; Tex CivA 29SW(2d)855; 69Utah194, 253P676; 142Va209, 128SE521. [b] (2) Where court cannot say that there is no evidence to support implied finding of trial court. 74CalA322, 240P50.

880–97 30F(2d)33; 215Ala118, 110S131; 219Ala183, 121S701; 170Ark1039, 282SW975; 171Ark675, 286SW865; 172Ark31, 287SW769; 173Ark949, 294SW64; 77CalA164, 247P212; 82Colo 13, 257P247; 45 Ida707, 266P1094; 324 Ill 457, 155NE349; 167 IllA400; 248 IllA490; 249 IllA15; 217Ky138, 289SW218; 229Ky655, 17SW(2d)731; 237Mich165, 211NW36; 241Mich282, 216NW921; 247Mich121, 225NW533(2dcase); 164Minn307, 204NW950; 81Mont200, 263P433; 83Mont49, 270P642; 85Mont78, 277P622, 64ALR772; 34NM277, 280P398; 51ND336, 199NW869. 36ALR465; 51ND361, 199NW858; 52ND273, 202NW852; ND 209NW204; 54ND805, 211NW587; 55ND112, 212NW518; 55ND348, 213NW733; 57ND123, 220NW621; 57ND456, 222NW474; 22 OhA487, 153NE909; 20 OhA518, 152NE767; 25 OhA120, 157NE308; 32 OhA405, 168NE213; 119 Okl 254, 249P1110; 124 Okl 1, 253P291; 122 Okl 277, 254P748; 130 Okl 184, 266P452; 130 Okl 245, 266P768; 131 Okl 214, 268P287; 133 Okl 130, 271P675; 141 Okl 32, 283P984; 141 Okl 44, 283P985; 151SC152, 148SE722 (unless against weight of testimony); 48 SD602, 205NW661; 49SD68, 206NW423; 50SD208, 208NW985; 54SD288, 223NW49; 54SD625, 224NW190; SD 227NW84; SD 227NW380; SD 230NW805(3dcase); TexCivA 17SW(2d)141; Utah 282P1034; 151Va136, 144SE432; 135Wash322, 237P735; 143Wash253, 255P104; 146Wash358, 262P980 (unless against preponderance of evidence); 147Wash158, 265P155; 149Wash357, 270P1031; 101WVa154, 132SE197; 105WVa473, 143SE101; 106WVa513, 146SE51; 192Wis456, 212NW257; 192Wis283, 212NW783; 194Wis56, 215NW453. See also 123 Okl 18, 252P11.

880–98 29F(2d)712; 214Ala349, 107S907; 157 IllA345; 162 IllA500; 165Minn181, 206NW390; 145Va422, 134SE690; 143Wash423, 255P370; 36Wyo361, 255P593, 53ALR554.

880–99 20F(2d)78; 34F(2d)25; 219Ala183, 121S701; 181Ark377, 26SW(2d)70; CalA 292P523; 104Conn285, 132A459; Mass 167NE762; Mass 171NE732; 315Mo 442, 286SW385; 125 Or323, 267P398; 299Pa568, 150A169; 142Va135, 128SE546.

880–99½–New. unless unsupported by subordinate facts. 106Conn315, 138A122.

880–2 17F(2d)366; 120Kan581, 244P1065 (facts held not to show passion or prejudice); 10LaA468, 121S322; 22 OhA487, 153NE909; 32PortoRico 432; Vt 130A759; 192Wis283, 212NW783.

880–2½–New. , unless clearly shown to be based upon obvious error of law or upon a serious mistake or misconception of fact, 20F(2d)816.

881–3 68CalA139, 228P676; 6LaA98; Mass 169NE430.

881–4 81CalA758, 254P681; 157 IllA345 (contrary to law); Mass 167NE229; 151SC152, 148SE722; Wis 231NW276.

881–4½–New. unless contrary to law, 106Conn315, 138A122.

881–5 104Conn467, 133A667, 46ALR838; 119 OhSt369, 164NE347.

881–6 77CalA164, 247P212; RI 133A648.

881–7 Iowa 230NW371; 6LaA91(1st case); 6LaA156; 51ND82, 199NW133; 121 Or332, 254P355; 145Wash341, 260P252; 152Wash469, 278P193. See also 199Wis99, 225NW700; 199Wis178, 225NW825.

881–7½–New. The appellate court should be slow to interfere with findings of the trial court concerning the physical condition of premises which it has personally inspected by consent of counsel. 215AppDiv301, 213NYS637.

881–8 12F(2d)649.

881–9 219Ala503, 122S815; 83CalA585, 257P152; 94CalA621, 271P786; 95CalA545, 272P1100; CalA 285P384; CalA 288P866; CalA 292P523; 261Mass355, 158NE767; 164Minn307, 204NW950; 119 OhSt256, 163NE493; 39 Okl ACR390; TexCivA 275SW163; [1926] CanSC331, [1926] 1DomLR384. [d] In Texas.–CivA 275SW163.

881–11 TexCivA 275SW498.

881–13 315Mo 568, 287SW445.

881–14 75CalA125, 241P919.

881–15 83Colo 430, 266P217.

881–16½–New. Where there is no appeal from an act of the court in amending findings, they stand as amended on appeal. 103Conn693, 131A417.

881–16¾–New. Findings of fact based in part on oral evidence will not be set aside unless clearly wrong. 258Mass502, 155NE641.

881–16¼–New. A judgment of the trial court based on a special finding made by it on a jury trial, where the court was of the opinion that there was only one judgment which could be lawfully rendered, is to be given the same effect as a judgment entered on a directed verdict. 203Cal 224, 263P799.

881–16½–New. An appellate court is reluctant to reverse a case on appeal from second hearing where much time and expense has been incurred. Ida 28SP157(1stcase).

882–18 107Conn417, 140A823 (correction of finding is proper method of review); NS [1929] 4DomLR1053(1st case). See also Sask [1928] 4DomLR207.

882–19 10F(2d)293; 14F(2d)382; 17F(2d)22; 215Ala123, 110S39, 48ALR1437; Mont 289P1028; TexCivA 24SW(2d)465; 68Utah472, 251P11; 5AltaL245, 7DomLR45, 22WestLR91, 2West Wkly1036. [e] **Where uncontradicted testimony of witness did not render it undisputed fact,** supreme court is not warranted in adding it to trial court's finding. 102Conn529, 129A527.

882–20 122Kan771, 253P225; 237Mich577, 212NW972; 128 Or142, 273P954; Utah 285P285(2dcase).

882–21 28F(2d)463; 218Ala453, 118S80; 69CalA310, 231P748; 121Kan681, 249P588; 5AltaL245, 7DomLR45, 22WestLR91, 2WestWkly1036.

882–22 21AlaA183, 107S735; 31Ariz169, 251P446; 173Ark1182, 295SW725; 70CalA245, 233P381; CalA 287P116; 84Colo 174, 269P574; 40 Ida402, 233P516; 42 Ida108, 244P401; 42 Ida300, 245P73; 323 Ill 486, 154NE207; 163IllA38; 163 IllA360; IndA 169NE333; 121Kan681, 249P588; 236Ky5, 32SW(2d)565; 3LaA450; 233Mich494, 207NW1; 222MoA545, 292SW81; 222MdA193, 297SW94; MoA 24SW(2d)673; 82NH304, 133A16, 45ALR1409; 33NM411, 268P1026; NM 289P996(2dcase); 55ND399, 213NW498; 112 Okl 81, 239P622; 117 Okl 100, 245P576; 118 Okl 212, 247P1004; 121 Okl 154, 248P584; 119 Okl 145, 249P373; 123 Okl 66, 251P993; 136 Okl 158, 275P649; TexCivA 2SW(2d)883.

882–23 26F(2d)583; 42F(2d)197(2dcase); 162 IllA384; 168La326, 122S54; 1LaA395; 2LaA62; 2LaA303; 3LaA280; 3LaA781; 4LaA505; 4LaA715; 5LaA537; 6LaA21; 6LaA195; 6LaA460; 9LaA73, 118S771(2dcase).

882–25 237Mich577, 212NW972; Mont 292P725; TexCivA 273SW640. [a] **Amending findings of fact.**–27Hawaii 258.

882–26 90CalA535, 266P329; 317 Ill 468, 148NE323; IndA 169NE333; 205Iowa1369, 219NW399; 33NM605, 273P925; 287Pa115, 134A463; 68Utah472, 251P11; BC [1929] 4DomLR724. See also 86 IndA326, 157NE448. [c] **Evidence held insufficient.**–103Conn537, 131A505. [d] **Assumption of fact because of lack of denial held error.** 103Conn537, 131A505.

883–27 129Kan426, 283P632 (reversal not required).

883–28 107Conn417, 140A823; 162 IllA384; MoA 21SW(2d)937; 246NY63, 158NE21.

883–30 82CalA342, 255P523; IndA 151NE433; 255Mass569, 152NE54.

883–31 107Conn417, 140A823; 47RI411, 133A796.

883–32½–New. Testimony is not to be considered piecemeal, but as a whole. 101Vt42, 140A160.

883–32½–New. In cases tried to a jury, supplemental findings of the court are not binding on appeal. TexCivA 13SW(2d)195.

883–32¼–New. A finding of the trial court made on an erroneous assumption as to the true status of the parties to an action cannot be accorded the weight usually given to such findings. 199Wis76, 225NW751.

883–32½–New. Trial court's conclusion upon subordinate facts is reviewable. 111Conn352, 150A60.

883–33 5F(2d)137; 8F(2d)729; 10F(2d)687 (findings not reëxamined on controverted question of fact); 12F(2d)733; 15F(2d)780; 15F(2d)906; 16F(2d)199; 19F(2d)277; 20F(2d)14; 20F(2d)67; 25F(2d)621; 26F(2d)601; 30F(2d)330; 35F(2d)104; 35F(2d)943; 36F(2d)306; 36F(2d)581; 37F(2d)508; 37F(2d)516; 38F(2d)10; 41F(2d)305; 42F(2d)736; 213Ala592, 105S679; 214Ala602, 108S508; 214Ala615, 108S591; 214Ala619, 108S518; 215Ala87, 109S377; 218Ala156, 117S652; 218Ala447, 118S665; 219Ala251, 121S912; Ala 128S174; 20AlaA648, 104S891; 21AlaA83, 105S434; 21AlaA113, 105S430; 21AlaA593, 110S321; 22AlaA617, 118S676; 28Ariz536, 237P645; 29Ariz23, 239P290; 29Ariz380, 241P959; 31Ariz65, 250P364; 31Ariz235, 251P723; 32Ariz135, 256P507; 32Ariz392, 259P401; 34Ariz340, 271P717; Ariz 284P153; Ariz 286P183; Ariz 288P1029; Ariz 292P1025; 169Ark1211, 278SW16; 170Ark767, 281SW393; 172Ark593, 289SW770; 173Ark1180, 292SW673; 173Ark777, 293SW723; 176Ark328, 28SW(2d)1089, 59ALR899; 177Ark663, 7SW(2d)336; 179Ark700, 17SW(2d)884; 195Cal 354, 233

P330; 196Cal 497, 238P1034; 196Cal 666, 239P314; 197Cal 1, 239P332; 197 Cal 269, 240P289; 197Cal 396, 240P 1010; 197Cal 723, 242P932; 198Cal 333, 244P1081; 198Cal 329, 245P176; 199 Cal 641, 250P676; 200Cal 192, 252P602; 200Cal 396, 253P134; 200Cal 644, 254P 269; 200Cal 348, 254P532; 201Cal79, 255P795; 204Cal 194, 256P202; 202 Cal 333, 260P550, 55ALR423; 202Cal 394, 260P878; 203Cal 173, 263P234; 203Cal 409, 264P747(1stcase); 203Cal 569, 265P241; 204Cal 2, 266P290; 204 Cal 441, 268P635; 204Cal 570, 269P614; 93CalA775, 270P382; 206Cal 468, 274P 966; 206Cal 661, 275P784; 207Cal 212, 277P480; 207Cal 574, 279P432; 207 Cal 617, 279P650; 207Cal 582, 279P653; 208Cal 1, 279P996; 208Cal 415, 281P 502; Cal 285P318; Cal 285P851; Cal 287P92; Cal 287P341; Cal 288P72; Cal 289P613; Cal 289P616; Cal 290P 583; Cal 291P183; Cal 291P577; Cal 292P465; Cal 292P960; 67CalA414, 227 P781; 67CalA480, 227P933; 68CalA1, 228P49; 68CalA69, 228P393; 68CalA 189, 228P673; 68CalA478, 229P858; 69CalA180, 230P984; 69CalA184, 230P 677; 70CalA30, 232P759; 70CalA47, 232P498; 70CalA204, 232P1002; 70 CalA283, 233P370; 71CalA50, 234P329; 71CalA112, 234P869; 71CalA197, 234P 926; 71CalA221, 234P928; 71CalA251, 235P62; 71CalA308, 235P76; 71CalA 448, 235P656; 72CalA222, 236P960; 72 CalA323, 237P401; 72CalA354, 237P 389; 72CalA576, 237P776; 73CalA136, 238P108; 73CalA68, 238P169; 73CalA 388, 238P720; 73CalA204, 238P727; 74CalA87, 239P422; 74CalA333, 240P 39; 74CalA576, 241P579; 75CalA96, 241P902; 75CalA783, 242P216; 75CalA 286, 242P879; 75CalA614, 243P24; 76 CalA137, 243P887; 76CalA264, 244P 608; 76CalA288, 244P950; 76CalA530, 245P451; 77CalA78, 246P130; 77CalA 201, 246P163; 77CalA164, 247P212; 77 CalA690, 247P536; 78CalA49, 248P258; 78CalA145, 248P283; 78CalA282, 248P 286; 78CalA347, 248P296; 78CalA460, 248P706; 78CalA511, 248P735; 78CalA 713, 248P750; 79CalA55, 248P1065; 79 CalA257, 249P215; 79CalA252, 249P 219; 79CalA270, 249P221; 79CalA533, 250P205; 79CalA762, 251P227; 80CalA 450, 252P652; 80CalA704, 252P667; 81 CalA295, 253P328; 81CalA254, 253P 337; 81CalA387, 253P752; 81CalA360, 253P755; 81CalA347, 253P947; 81CalA 476, 253P960; 81CalA629, 254P622; 81 CalA763, 254P662; 82CalA235, 255P 235; 82CalA233, 255P266; 83CalA317, 256P609; 83CalA493, 257P144; 83CalA 725, 257P175; 84CalA90, 257P581; 84 CalA211, 257P584; 84CalA130, 257P 586; 84CalA358, 258P115; 84CalA689, 258P458; 85CalA1, 258P690; 84CalA 560, 258P702; 85CalA46, 258P705; 85 CalA355, 259P359; 85CalA656, 259P 1104; 86CalA37, 260P573; 86CalA382, 260P898; 87CalA117, 261P743; 86CalA 535, 261P744; 87CalA169, 261P1051; 87CalA224, 261P1064; 87CalA680, 262 P462; CalA 262P808; 88CalA322, 263 P371; 88CalA281, 263P383; 88CalA 399, 263P553; 88CalA393, 263P558; 88 CalA748, 264P289; 89CalA160, 265P 298; 89CalA628, 265P378; 89CalA674, 265P520; 89CalA594, 265P580; 90CalA 193, 265P870; 90CalA311, 265P968; 90 CalA447, 265P1038; 90CalA387, 266P 294; CalA 266P312; 90CalA751, 266P 341; 90CalA762, 266P352; 90CalA673, 266P375; 90CalA730, 266P588; 91CalA 165, 266P829; 91CalA310, 266P980; 91CalA588, 267P121; 91CalA364, 267P 125; 91CalA428, 267P127; 91CalA400, 267P130; 92CalA161, 267P928; 92CalA 464, 268P453; 92CalA393, 268P465; 92 CalA495, 268P483; 92CalA679, 268P 725; 93CalA21, 268P974; 93CalA358, 269P544; 93CalA214, 269P555; 93CalA 509, 269P749; 93CalA717, 270P232(2d case); 94CalA188, 270P1006; 94CalA 335, 271P208; 94CalA370, 271P356; 94 CalA602, 271P564; 94CalA657, 271P 575; 94CalA647, 271P760; 94CalA621, 271P786; 95CalA106, 272P307; 95CalA 159, 272P314; 95CalA378, 272P803; 95 CalA745, 273P142; 95CalA768, 273P 611; 96CalA57, 273P612; 96CalA611, 274P603; 97CalA64, 275P262; 97CalA 325, 275P472; 97CalA285, 275P476; 97CalA329, 275P819; 97CalA650, 275P 1001; 98CalA75, 276P383; 98CalA145, 276P394(2dcase); 99CalA127, 277P852; 99CalA357, 278P500; 99CalA519, 278P 915; 99CalA510, 278P1049; 100CalA 338, 279P1006; CalA 280P158; 100CalA 424, 280P211; 100CalA618, 280P710; 100CalA629, 280P713; 101CalA146, 281 P399; 101CalA153, 281P415 (conflict in evidence must, on appeal, be resolved in favor of judgment); 101CalA164, 281 P432; 101CalA295, 281P695; 102CalA 592, 283P103; CalA 283P946; CalA 284P470 (conflict in evidence must be material and substantial); CalA 284P 520; CalA 284P694; CalA 284P958; CalA 285P371; CalA 285P382; CalA 285P907; CalA 285P910; CalA 285P 1052; CalA 286P498; CalA 287P367; CalA 287P510; CalA 287P515; CalA 288P114(2dcase); CalA 288P138; CalA 288P814; CalA 288P819; CalA 289P 189; CalA 289P209(2dcase); CalA 289 P224; CalA 289P234; CalA 290P588; CalA 290P590; CalA 290P1042; CalA 291P438; CalA 291P606; CalA 291P 621; CalA 291P856; CalA 291P879; CalA 289P656; CalA 289P875; CalA 290P62; CalA 290P114; CalA 290P 898; CalA 292P518; CalA 292P659; CalA 292P672; CalA 293P122; CalA 293P175; 76Colo 550, 233P619; 78Colo 254, 241P541; 81Colo 50, 253P397; 81 Colo 100, 253P1057; 81Colo 365, 255P 460; 81Colo 413, 255P989; 81Colo 505, 256P18; 81Colo 454, 256P315; 82Colo 13, 257P247; 82Colo121, 257P355; 82 Colo 204, 257P1079; 82Colo 263, 258P 1113; 82Colo 285, 260P103; 83Colo 82, 262P523; 83Colo 99, 262P921; 83Colo 143, 263P16; 83Colo 325, 265P97; 83 Colo 374, 265P694 (court searches record for testimony most favorable to judgment); 83Colo 387, 265P901; 83 Colo 413, 265P906; 85Colo 551, 277P 468; 85Colo 572, 277P471, 68ALR656 (2dcase); 86Colo 491, 282P1066; 86 Colo 524, 283P547; 87Colo 67, 285P165 (though evidence preponderates against findings); 87Colo 207, 286P109; 87Colo 345, 287P641; 87Colo 391, 288P177; Colo 291P1023; 102Conn529, 129A527 (ascertaining truth from conflicting and incongruous facts is function within exclusive jurisdiction of trial court and not reviewable); 103Conn750, 131A593 (motion to correct denied); 103Conn 758, 131A392 (refusal to find as requested); 104Conn259, 132A540, 48ALR259; 106Conn724, 136A867; 106Conn264, 137 A753; 106Conn731, 138A58; 108Conn 142, 142A741; 110Conn540, 148A377; 111Conn722, 150A64; 111Conn727, 150 A705; 111Conn733, 151A192; Conn 151 A512; 55AppDC269, 4F(2d)936; 162 Ga735, 134SE771; 164Ga600, 139SE72; 165Ga449, 141SE205; 36GaA631, 137SE 907; 28Hawaii211; 41Ida715, 241P 607; 43 Ida343, 251P1051; 43 Ida319, 251P1118; 43 Ida758, 254P797; 43 Ida 675, 256P529; 44 Ida469, 258P180; 44 Ida534, 258P525; 45 Ida49, 260P 693; 46 Ida62, 266P413; 46 Ida181, 266 P1089; 45 Ida707, 266P1094; 46 Ida 112, 268P8; 46 Ida526, 269P98; 47 Ida497, 277P550; 48 Ida30, 279P407; 48 Ida37, 279P410; Ida 288P897; Ida 290P205; Ida 290P552; 333 Ill 588, 165 NE199; 337 Ill 362, 169NE228; 232 IllA 513; 241 IllA189; 245 IllA180; 197 Ind 430, 151NE220; 200 Ind535, 165NE323; 200 Ind616, 165NE911; Ind 168NE873; IndA 168NE37; 200 Iowa255, 204NW 221 (where direct evidence was not introduced though available); 201 Iowa 327, 207NW372; 201 Iowa931, 208NW 503; 202 Iowa924, 211NW232; 205 Iowa 389, 217NW874; 205 Iowa567, 218NW 286; 206 Iowa1036, 220NW364; Iowa 224NW493; 118Kan234, 234P959; 121 Kan716, 250P265; 123Kan393, 254P 366; 123Kan654, 256P987; 124Kan 155, 257P926; 125Kan62, 262P545; 124 Kan745, 262P1025; 125Kan76, 262P 1030; 126Kan495, 268P820; 126Kan 527, 268P839; 126Kan677, 271P270; 128Kan446, 279P4; 217Ky225, 289SW 260; 217Ky231, 289SW257; 218Ky 308, 291SW380; 226Ky1, 10SW(2d)467; 233Ky749, 26SW(2d)1043; 161La789, 109S492; 164La260, 113S840; 9LaA 384, 120S493; 1LaA534; 12LaA61, 125 S312(1stcase); LaA 129S199; LaA 130 S843; 251Mich492, 232NW199; Mich 233NW394; Mich 233NW437; 167Minn 516, 208NW994; 170Minn509, 213NW 41; 171Minn116, 213NW542; 179Minn 151, 228NW608; 144Miss480, 110S120; Mo 282SW53; Mo 298SW776; 319Mo 824, 5SW(2d)10; MoA 274SW489; MoA 278SW797; MoA 278SW803; MoA 282SW1048; 221MoA764, 285SW761; MoA 286SW407; MoA 288SW965; MoA 290SW151; MoA 28W(2d)154; MoA 2 SW(2d)159; MoA 19SW(2d)25; MoA 20SW(2d)944; MoA 21SW(2d)1; MoA 27SW(2d)138; MoA 28SW(2d)432; MoA 31SW(2d)269; 76Mont359, 246P 771; 76Mont403, 247P554; 79Mont233, 255P733; 81Mont1, 261P288; 81Mont 361, 263P425; 83Mont430, 272P679; 84 Mont195, 274P501; 84Mont597, 277P 620; 84Mont579, 277P805; 85Mont446, 278P1009; Mont 285P174; Mont 292P 725 (circumstances precluding contrary conclusion); 49Nev90, 237P534; 49Nev 278, 245P285; 49Nev299, 245P292; 50 Nev80, 251P351; 50Nev234, 255P1014; NJ 13SA517; NJ 136A424; NJ 136A 720; 33NM193, 263P29; 193NC555, 137 SE582; 55ND717, 215NW146; 22 OhA 487, 153NE909; 25 OhA393, 158NE228; 120 Okl 250, 252P64; 125 Okl 161, 256P 932; 130 Okl 118, 265P642; 132 Okl 32, 269P301; 133 Okl 191, 271P945; 43 OklACR173 [reh pending]; 116 Or119, 240P432; 120 Or490, 252P707; 121 Or 259, 253P873; 122 Or306, 258P820; 122 Or572, 260P224; 123 Or111, 261P 72; 124 Or592, 265P435; 130 Or252, 279P630; Or 291P1017(2dcase); 286Pa 119, 133A217; 85PaSuper3; 95PaSuper 45; 97PaSuper70; 9PortoRico 117; 10 PortoRico 52; 14PortoRico 365; 14 PortoRico 561; 16PortoRico 736; 19 PortoRico 74; 32PortoRico 95; 32Porto Rico 180; 32PortoRico 701 (unless manifest error, passion, or prejudice is shown); 33PortoRico 193; 34PortoRico 422; 34PortoRico 483; 34PortoRico 849; 35PortoRico 297; 35PortoRico 751; RI 139A651; 134SC284, 132SE 581; 51SD554, 215NW881; SD 225NW 655; SD 232NW17; 117Tex10, 295SW 917; TexCommnA 277SW1047; Tex CivA 274SW319; TexCivA 276SW719; TexCivA 277SW228 (finding on sufficient testimony); TexCivA 281SW596; TexCivA 285SW644; TexCivA 285SW 670; TexCivA 288SW1111; TexCivA 289SW127; TexCivA 290SW791; Tex CivA 296SW641; TexCivA 296SW985; TexCivA 297SW277; TexCivA 297SW 1067; TexCivA 299SW456; TexCivA 2 SW(2d)347; TexCivA 4SW(2d)86; Tex CivA 6SW(2d)206; TexCivA 6SW(2d) 221; TexCivA 7SW(2d)1103; TexCivA 10SW(2d)745; TexCivA 11SW(2d)525 (1stcase); TexCivA 12SW(2d)618; Tex CivA 14SW(2d)321; TexCivA 15SW(2d) 132; TexCivA 15SW(2d)654(2dcase); TexCivA 15SW(2d)1113; TexCivA 17 SW(2d)93; TexCivA 17SW(2d)104; TexCivA 18SW(2d)715; TexCivA 19SW (2d)572 (presumed finding); TexCivA 22SW(2d)1105; TexCivA 28SW(2d)270; TexCivA 30SW(2d)522; TexCivA 30SW (2d)577; TexCivA 30SW(2d)661; Tex CivA 30SW(2d)1110; TexCivA 32SW (2d)224; TexCivA 32SW(2d)492; Tex CivA 32SW(2d)660; 66Utah181, 240P 273; 69Utah194, 253P676; Utah 276P 659; Utah 280P1042; 100Vt351, 137A 329; 136Wash194, 239P216; 136Wash 196, 239P391; 136Wash226, 239P550; 136Wash632, 241P26; 140Wash703, 249 P789; 141Wash190, 251P123; 141Wash 581, 252P107; 141Wash619, 252P139; 144Wash16, 255P964; 144Wash241, 257 P622; 144Wash543, 258P469; 147Wash 246, 265P479; 147Wash318, 265P737; 150Wash433, 273P200(2dcase); 151 Wash450, 276P298; 153Wash587, 279P 1107(3dcase); 154Wash646, 283P179; Wash 290P226; 103WVa665, 138SE376; 104WVa589, 140SE685; 187Wis598, 204NW510 (held binding on appeal); Wis 230NW714; 36Wyo 90, 252P1027; 36Wyo 268, 254P130; 36Wyo 310, 254P 689; 36Wyo 413, 256P84; 37Wyo 98, 259P520; 37Wyo 412, 263P605; 38Wyo 301, 266P1066; 38Wyo 442, 268P185; 38Wyo 469, 269P40; 40Wyo 215, 276P

448; 40Wyo 411, 278P551; Wyo 287P 316; Wyo 293P354; Wyo 293P373; Man [1929] 4DomLR993; Sask [1926] 4DomLR389; Sask [1928] 4DomLR 732; Sask [1930] 1DomLR271. See also 29Hawaii332; 29Hawaii698 (both cases holding that findings were given great weight); 151Va481, 145SE302. But see NS [1925] 3DomLR318 (court reversing on conflicting evidence concerning fact not included in findings). [b] 96CalA66, 273P590; 109Conn693, 145A573. [f] 141Wash619, 252P139. [k] (3) Appellate court will not weigh evidence when trial judge, by stipulation, made decision not only on transcript of evidence taken before his predecessor, but also on evidence taken before judge who decided case and after authorized examination of premises involved. 42 Ida108, 244P401. [v] **Findings not disturbed where conflicting evidence does not preponderate against them.**–136Wash194, 239P216; 136Wash 196, 239P391; 136Wash226, 239P550. [w] **Facts found by trial court based on conflicting testimony will be accepted as findings in so far as appeal is concerned.** 154Wash83, 280P929. [x] **Same weight as jury's verdict** is accorded to decision on disputed fact by trial court. Iowa 231NW350. [y] **Trial court's findings, based largely on supreme court's decision in prior case,** are not entitled to same weight as findings based solely on disputed evidence. 155Wash 459, 284P738. [z] **Trial court is at liberty to accept as true testimony** of plaintiff's witnesses in reference thereto where testimony is conflicting. 101CalA 186, 281P514.

884–35 74CalA560, 241P281; 44 Ida 240, 256P98; 159La1049, 106S561; 169 Minn321, 211NW163; 171Minn116, 213 NW542; 81Mont1, 261P238; 82Mont 336, 266P1103; 123 Or237, 261P689; 35 PortoRico 579; 134Wash249, 235P14 (where evidence does not preponderate against finding); 188Wis129, 205NW 797.

884–36 159La1049, 106S561; 9LaA325, 120S501(1stcase); LaA 130S234(4th case).

884–36½–New. where there is substantial evidence supporting contentions of both parties; 31Ariz169, 251P446.

884–37 25F(2d)951; 215Ala561, 112S 127; 35Ariz232, 276P523(2dcase); Ariz 283P287; 198Cal 177, 244P330; 198Cal 579, 246P43; 202Cal 624, 262P715; 208 Cal 172, 280P947; 68CalA517, 229P874; 68CalA347, 229P1114; 70CalA561, 232 P58; 70CalA351, 233P350; 70CalA412, 233P403; 71CalA308, 235P76; 72CalA 481, 237P756; 76CalA672, 245P777; 79 CalA611, 250P699; 82CalA20, 254P937; 82CalA728, 256P557; 87CalA471, 262P 46; 88CalA761, 264P300; 89CalA157, 264P306; 89CalA382, 264P537; 90CalA 443, 265P971; 91CalA176, 266P849; 91 CalA206, 266P975; 91CalA715, 267P741 (subtsantial evidence); 95CalA685, 273 P585; 95CalA772, 273P613; CalA 274 P552; 98CalA180, 276P634; 99CalA136, 278P249 (sufficient evidence); 99CalA 641, 278P1058 (sufficient support in evidence); 100CalA606, 280P711; 101CalA 167, 281P428; 102CalA345, 283P115 (some evidence); CalA 286P709 (sufficient evidence); CalA 286P736 (sufficient evidence); CalA 288P1096; CalA 290P317; 76Colo 569, 233P622; 81Colo 413, 255P989; 86Colo 185, 279P40; 86 Colo 234, 279P721(1stcase); 111Conn 717, 149A405(1stcase); 41 Ida257, 239P 522; 41 Ida547, 240P593; 41 Ida561, 240P446; 45 Ida49, 260P693; 45 Ida 290, 261P772 (substantial evidence); 45 Ida464, 262P862; 45 Ida577, 264P 868; 46 Ida574, 269P101; 47 Ida115, 273P6(1stcase); 47 Ida374, 276P34; 48 Ida643, 284P559; Ida 288P427; 197 Ind 430, 151NE220; 201 Iowa931, 208NW 503; 122Kan771, 253P225; 123Kan654, 256P987; 125Kan62, 262P545; 126Kan 495, 268P820; 128Kan797, 280P892; 159La1049, 106S561; 166Minn214, 207 NW319 (supported by evidence); 174 Minn507, 219NW758; 76Mont396, 247P 326; 81Mont375, 263P415; 50Nev234, 255P1014; NJ 138A517; 247NY145, 159NE891; 113 Okl 278, 241P768; 116 Okl 79, 243P149; 120 Okl 282, 251P43; 124 Okl 174, 254P713; 127 Okl 171, 260 P4; 140 Okl 16, 282P122; 294Pa555, 144A748; 85PaSuper145 (sufficient evidence); 52SD380, 217NW640; SD 226 NW766; 69Utah391, 255P435; 136 Wash378, 240P9; 102WVa484, 135SE 606; 108WVa71, 150SE231; 108WVa 503, 152SE5; Sask [1928] 1DomLR612. [a] (1) 178Ark475, 11SW(2d)763; 201 Cal 750, 258P595 (existence of documentary evidence does not prevent application of rule); 202Cal 701, 262P730; 206 Cal 421, 274P522; 68CalA244, 228P865; 74CalA396, 240P1025; 84CalA52, 257P 542; 84CalA611, 258P440; 84CalA750, 258P673; 85CalA204, 259P71; 85CalA 377, 259P368; 85CalA475, 259P770; 86 CalA610, 261P331; 92CalA194, 267P 901; 95CalA347, 272P767; 97CalA499, 275P993; CalA 286P1057; 77Colo 95, 234P1070; 42 Ida118, 243P653; 43 Ida 93, 251P167; 46 Ida286, 269P84; 47 Ida 772, 278P1016; 48 Ida643, 284P559; 205 Iowa1055, 218NW918; Iowa 227NW 523; 119Kan286, 239P965; 128Kan257, 276P830; 222MoA1165, 13SW(2d)1086; MoA 28SW(2d)432; 75Mont493, 244P 298; 78Mont254, 255P1067; 80Mont 374, 260P734 (though evidence appears inherently weak); 83Mont214, 271P433; 83Mont430, 272P679; 84Mont549, 276P 948; 86Mont169, 282P852; Mont 285P 181(2dcase); 118Nebr179, 224NW9; 48 Nev312, 231P1095; 49Nev326, 245P700; Wash 290P984; 34Wyo 119, 241P1068; Wyo 282P1061(2dcase); Wyo 284P123. (3) Though finding is contrary to testimony given by plaintiff, it will not be disturbed where there is substantial evidence to support it. 84Mont116, 274P 497. (4) Applies to ambiguous written contract of sale as well as to other contracts. 101CalA552, 281P1097. [b] 86 CalA382, 260P898; Ida 290P377; 169 Minn62, 210NW603; 120 Okl 292, 251 P474; 127 Okl 290, 260P743; 149SC 185, 146SE815(1stcase); 52SD453, 218 NW595; 38Wyo 329, 266P1062, 61ALR 615. [e] (1) Imp [1930] 1DomLR481. See also 82CalA255, 255P543. [f] **Where there is some evidence to sustain finding,** finding is conclusive. 149SC22, 146SE605. [g] **Where there are disputed issues of fact or conflicting inferences** to be drawn therefrom, conclusion of trial judge will not be disturbed, unless plainly erroneous or manifestly wrong. 218Ala537, 119S667. [h] **Finding supported by evidence on essential and controlling facts** must be sustained where evidence is conflicting. 151Wash671, 276P535.

885–39 16F(2d)199; 31F(2d)914; 214 Ala619, 108S518; 29Ariz380, 241P959; 35Ariz457, 281P38; 199Cal 641, 250P 676; 69CalA399, 231P375; 70CalA561, 232P58; 73CalA140, 238P749; 74CalA 576, 241P579; 79CalA55, 248P1065; 81 CalA295, 253P328; 90CalA717, 266P 550; 81Colo 50, 253P397; 83Colo 343, 265P693; 102Conn529, 129A527; 42 Ida 545, 247P12; 200 Ind616, 165NE911; 159La1049, 106S561; 307Mo 536, 271SW 43; 78Mont254, 255P1067; 82Mont218, 266P398; 85Mont256, 278P828; 49Nev 90, 237P534 (finding of trial court based on evidence of one witness not reversed on appeal); 254NY128, 172NE265; 55 ND585, 214NW901; 122 Or64, 255P392; 123 Or208, 261P686; 286Pa119, 133A 217; 46Philippine386; 32PortoRico 554; 53SD388, 220NW863; TexCivA 275SW232; Utah 265P748; 141Wash 581, 252P107; 145Wash129, 259P379; 147Wash101, 265P462; 39Wyo 141, 270 P537; BC [1930] 1DomLR588. See also 201Cal 79, 255P795; 187Wis71, 203NW 927.

885–40 217Ky225, 289SW260; 217Ky 231, 289SW257; 234Ky95, 27SW(2d) 675; 234Ky653, 28SW(2d)971(1stcase); 161La24, 108S112; 29PortoRico 803 (appellate court will decide in favor of defendant when "record shows an oath against an oath").

885–41 14F(2d)705; 14F(2d)897; 14 F(2d)902; 14F(2d)949; 20F(2d)67; 25 F(2d)387; 214Ala602, 108S508; 220Ala 219, 124S743; 20AlaA598, 104S444; 21 AlaA285, 107S724; 23AlaA544, 128S899 (1stcase); 83Colo 430, 266P217; 241 IllA189; 208Ky481, 271SW552; 224Ky 289, 6SW(2d)253; 13LaA680, 128S670; 236Mich268, 210NW243; 48Nev181, 228 P588, 232P782; 22 OhA487, 153NE909; 24 OhA21, 155NE649; 25 OhA265, 158 NE9; 118 Okl 147, 247P374; 126 Okl 63, 258P913; 132 Okl 210, 270P45; 134 Okl 156, 273P213; 137 Okl 278, 279P 329; 137 Okl 288, 279P340; 138 Okl 208, 281P276; 32PortoRico 180; 35 PortoRico 431; 49SD130, 206NW691; 52SD559, 219NW244; 54SD412, 223NW 335; SD 227NW881(2dcase); TexCivA 293SW593; 69Utah194, 253P676; Utah 265P748; 140Wash703, 249P789; 141 Wash50, 250P456; 141Wash619, 252P 139; 142Wash637, 254P236; 143Wash 22, 254P254; 144Wash16, 255P964; 144Wash195, 257P395; 148Wash277, 268P869; Wis 230NW610. See also 197Wis163, 221NW856. [a] 142Wash 637, 254P236; 143Wash22, 254P254. [b] **Finding of fraud held not against** clear weight of evidence. 236Mich268, 210NW243.

885–42 19F(2d)277; 215Ala315, 110S 465; 215Ala424, 110S889; 21AlaA285, 107S724; 71CalA221, 234P928 (as matter of law); 160La387, 107S234; 10 LaA9, 119S580; 10LaA19, 120S519; 10 LaA771, 123S169; 12LaA557, 126S540; LaA 130S60; 125Me485, 135A98; 263 Mass288, 160NE892; MoA 290SW624; 113Nebr801, 205NW288; 27 OhA499, 161NE293; 32PortoRico 95; 32Porto Rico 180; 32PortoRico 235 (fundamental error in weighing evidence not shown); RI 145A441; 50RI 434, 148A 318; RI 149A860; RI 150A122; 148Va 594, 139SE279; 150Va231, 142SE361; 153Va118, 149SE441 (palpably erroneous); 99WVa310, 129SE127; 108WVa 157, 150SE523; 108WVa154, 150SE524; 37Wyo 432, 263P607; Can [1928] 3Dom LR870.

886–43 73CalA627, 239P71.

886–43½–New. or unless abuse of discretion is shown; 72CalA757, 238P143.

886–44 33F(2d)894; 25 OhA393, 158 NE238; 32PortoRico 701; 33Porto Rico 6.

886–44½–New. or where the trial judge misapprehended the evidence, 25 F(2d)387.

886–45 15PortoRico 175; 15PortoRico 464; 15PortoRico 761; 16PortoRico 203; 16PortoRico 265; 16PortoRico 599; 20PortoRico 163; 20PortoRico 305; 21PortoRico 23; 21PortoRico 484; 32PortoRico 95; 32PortoRico 180; 32 PortoRico 566; 32PortoRico 701; 34 PortoRico 187; 34PortoRico 213; 35 PortoRico 382; 35PortoRico 435 (prejudice not shown).

886–46 67CalA432, 227P679; 73CalA 136, 238P108; 79CalA55, 248P1065; 83 CalA352, 256P580; 100CalA217, 279P 810(2dcase); CalA 291P684.

886–47 74CalA576, 241P579; 99CalA 602, 278P1056(1stcase); 84Colo 99, 268 P533; 32PortoRico 554. [a] **Appellate court will not determine whether it would have made same finding** as made by trial court, but whether finding actually made was based on evidence in which there was substantial conflict. 68CalA23, 228P412.

886–48 [a] **Thus,** where district court and court of circuit appeals make same finding of fact on conflicting evidence, it is binding on supreme court where there is any evidence to sustain finding. TexCommnA 277SW84.

886–48½–New. , and in the absence of showing material fact found without evidence, 103Conn750, 131A593.

886–48½–New. or that any undisputed fact was omitted. 103Conn750, 131A 593 (motion to correct denial).

886–48¼–New. The trial court's findings must be accorded considerable weight in deciding disputed questions of fact, where such court had the benefit of hearing and observing witnesses. 151Wash187, 275P543.

886–49 1LaA766.

886–52 201Cal 689, 258P588 (mere ipse dixit of one that his act was not with intent to defraud creditor will not create conflict in testimony); 202Cal 215, 259P947; 82Mont150, 266P869; 153Va295, 149SE817.

886–53 162La209, 110S324; 289Pa579, 137A728.

886–53½–New. where the situation presents not so much a dispute as to evidence or veracity of witnesses as op-

portunity for differences of opinion with respect to inferences from circumstances; 14F(2d)705.

887-55 93Fla311, 112S80; **Ida** 286P920; **Sask** [1930] 4DomLR366.

887-57 See also **NS** [1925] 3DomLR318.

887-57½-New. Rule has no application where the trial court has not seen or heard the witnesses. 44 **Ida**299, 256P535.

887-59 12F(2d)917; 30F(2d)46 [certiorari den 49SCt352(11thcase)]; 33F(2d)841; 216Ala381, 113S298; 216Ala603, 114S192; **AlaA** 129S793; 202Cal98, 259P433; 206Cal617, 275P412; 208Cal256, 280P970; 70CalA552, 233P995; 76CalA33, 243P707; 84CalA272, 258P155; 87CalA82, 261P766; 89CalA628, 265P378; 96CalA568, 274P401(2dcase); 97CalA30, 275P448; **CalA** 282P958; **CalA** 283P970; **CalA** 290P486; **CalA** 290P1042; 86Colo234, 279P721(1st case); **Colo** 292P602; 102Conn529, 129A527; 103Conn624, 131A420; 104Conn165, 132A397; 108Conn19, 142A452; 47Ida374, 276P34; 47Ida368, 276P302(1stcase); **Ida** 286P364; 319Mo149, 3SW(2d)1008; **MoA** 288SW798; **MoA** 25SW(2d)539; 74Mont420, 240P821; **NJ** 145A237; 31NM457, 247P270; 25OhA393, 158NE238; 28OhA427, 162NE753; **OhA** 173NE16; 117Okl141, 245P829; 123Or111, 261P72; **SD** 232NW907; **TexCivA** 272SW346; **TexCivA** 29SW(2d)855; **TexCivA** 30SW(2d)797; **TexCivA** 32SW(2d)225; 68Utah486, 251P16; **Utah** 280P729 (except in extreme cases); 146Wash700, 264P704; 149Wash701, 272P40; 150Wash494, 273P739; 150Wash554, 274P176; 154Wash396, 282P377; 200Wis347, 228NW476. But see 31F(2d)702; 215AppDiv617, 213NYS468; 151SC152, 148SE722. [a] **Trial judge is in better position** to determine weight of testimony than reviewing court. **CalA** 287P518.

887-59½-New. , or where the evidence does not preponderate against the court's findings. 52SD219, 217NW178.

887-60 76CalA33, 243P707; 90CalA18, 265P536; 86IndA411, 157NE446; **Kan** 289P406; 213Ky824, 281SW1010; **NJ** 147A588; 124Or30, 263P888; 123Or661, 263P890; **TexCivA** 28SW(2d)281; 154Wash625, 282P928 (unless evidence preponderates against finding).

887-61 81CalA176, 253P191; **MoA** 1SW(2d)232; 142Okl251, 286P778; 33PortoRico332.

887-62 27F(2d)296 [certiorari den 278US635, 49SCt32, 73Led552(12thcase)]; 213Ala592, 105S679 (clearly wrong or contra great weight of evidence); 213Ala612, 105S802 (unless plainly contrary to great weight of evidence); 213Ala642, 106S57 (evidence ore tenus); 214Ala615, 108S591; 215Ala112, 110S27; 215Ala256, 110S273; 216Ala603, 114S192; 217Ala421, 116S518; 20AlaA642, 104S776; 21AlaA66, 106S56 (evidence given ore tenus); 168Ark629, 271SW13; 181Ark994, 28SW(2d)1067; 82Colo13, 257P247; 82Colo98, 257P351; 331Ill58, 162NE117; 212Ky830, 280SW147; 231Ky202, 21SW(2d)254(2dcase); 234Ky525, 28SW(2d)771; 237Mich577, 212NW972; 241Mich413, 217NW8; 246Mich538, 224NW385; **Minn** 232NW1; 142Miss641, 107S885; 72Mont527, 235P327; 83Mont68, 271P695; 52ND1, 201NW696; 52ND648, 204NW178; 21OhA385, 153NE162; **OhA** 173NE16; 120Okl285, 251P48; 124Okl46, 253P990; 126Okl63, 258P913; 136Okl302, 276P730; 136Okl162, 276P735; 137Okl278, 279P329; 142Okl168, 285P968; 42OklACR279 [reh pending]; 48SD474, 205NW47; **SD** 229NW376; **SD** 230NW759; **SD** 231NW908; 134Wash39, 234P1032; 143Wash253, 255P104; 143Wash699, 255P141; 146Wash695, 261P792; 146Wash700, 264P704; 155Wash624, 285P652; **Wash** 290P853; **Wash** 291P323; 106WVa513, 146SE651; 108WVa308, 151SE183; 192Wis283, 212NW783; 194Wis628, 217NW311; **Wis** 231NW276. See also 10F(2d)759. But see 249Mich586, 229NW499. [d] **Findings held not against preponderance of evidence.-Wash** 287P891.

888-63 **Mont** 288P454.

888-63½-New. unless the finding is inherently improbable or overwhelmed by other evidence. 127Me516, 145A134.

888-64 15F(2d)509; 216Ala603, 114S192; 20AlaA642, 104S776; 23AlaA310, 124S669; **Ill** 173NE59; 30Ohs72, 165NE862.

888-65 27F(2d)296 [certiorari den 278US635, 49SCt32, 73Led552(12thcase)]; 215Ala511, 110S804; 82Colo13, 257P247; 241Mich42, 216NW460; 35PortoRico757; **TexCivA** 13SW(2d)965.

888-65½-New. Where there is nothing in the record showing that the judgment is a shock to the senses or that grave error was committed, the judgment cannot be reversed as manifestly against the weight of the evidence. 32OhA111, 167NE614.

888-65½-New. Findings will not be disturbed where the appellate court cannot find that evidence preponderates against them. 153Wash198, 279P395.

888-66 40F(2d)27; 82Colo13, 257P247; 247IllA48; 231Ky202, 21SW(2d)254; 234Ky257, 27SW(2d)963; 237Mich577, 212NW972; 241Mich42, 216NW460; 249Mich647, 229NW514; **Mont** 289P1028; 33NM251, 264P947 (unsupported by substantial evidence); 129Okl164, 264P188; 132Okl48, 269P302; **TexCivA** 10SW(2d)144; 154Wash280, 281P994(1stcase); **Wis** 228NW494. See also 86IndA326, 157NE448. [a] **Finding of ultimate fact** cannot stand if probative facts on which finding is based lead to repugnant conclusion. 203Cal453, 264P1096. [b] **Where it appears that judge misunderstood evidence** and overlooked weight and importance of facts, appellate court will review findings in light of whole evidence. [1925]CanSC685, [1925] 3DomLR113.

888-66½-New. or where contrary to undisputed and, not inherently probable testimony, **Minn** 230NW795.

888-68 **CalA** 283P323; 104Conn300, 132A455; 111Conn722, 150A64; 163La872, 113S130; 54ALR538; 11LaA380, 122S293; 1LaA67; **MoA** 15SW(2d)909; **Or** 289P1067; 152Tenn614, 279SW1043 (requirement of remittitur by trial judge); **TexCivA** 292SW563, 567 [cit Cyc]; **TexCivA** 297SW864; 136Wash194, 239P216. [b] (2) Where trier of facts in exercise of discretion has refused to allow punitive damages, such action is not reviewable. 154Miss691, 123S861. [d] **In Porto Rico.**-29PortoRico977, 980. [e] **In California.**-202Cal501, 261P994.

888-69 94Fla851, 114S452; 9LaA358, 120S498(1stcase); 136Wash628, 241P2; **BC** [1929] 4DomLR142.

888-70 68CalA69, 228P393; **CalA** 288P814; 234Ky164, 27SW(2d)688; 10LaA512, 120S781; 50SD307, 210NW49. See also **La** 129S649.

888-72 52SD252, 217NW192.

888-75 136Wash194, 239P216; **Sask** [1929] 3DomLR457. [a] **In Saskatchewan.**-[1930] 2DomLR234.

888-76 **CalA** 291P641; **Sask** [1929] 3DomLR457.

888-78 163La872, 113S130, 54ALR538; 9LaA402, 120S497; 1LaA387; 1LaA612; 29PortoRico977; **BC** [1929] 1DomLR977.

888-78½-New. ; unless the amount is so disproportionate to the injury as to shock the conscience at first glance; 19SaskL384, [1925] 3DomLR370, [1925] 1WestWkly1051 (not so excessive as to be shocking).

889-80 19SaskL384, [1925] 3DomLR370, [1925] 1WestWkly1051.

889-80½-New. An award of damages will not be set aside because the trial judge made separate awards for ordinary and punitive damages where the aggregate is fair. **Ont** [1929] 1DomLR111.

889-83 112Okl81, 239P622; **TexCivA** 273SW640; **Sask** [1929] 4DomLR750.

889-84 14F(2d)382; 39F(2d)896; 215Ala474, 111S7; 220Ala553, 126S854; 84Colo174, 269P574; 111Conn709, 151A177; 45Ida49, 260P693 (dictum); 122Kan460, 252P262; 123Kan616, 256P955 (dictum); 256Mass367, 152NE635; 264Mass112, 162NE225; **Mass** 165NE873; 55ND399, 213NW498; 49SD582, 207NW657; 54SD85, 222NW596.

889-87 But see 59OntL661, [1927] 1DomLR653.

889-87½-New. Where a material part of the testimony was oral, the conclusion of the trial court will not be disturbed. 42Ida108, 244P401.

889-88 31Ariz169, 251P446; 97CalA414, 275P500(2dcase); **CalA** 277P1107 (conflicting evidence presented in depositions); 167Minn37, 208NW423; 102WVa574, 136SE42. [a] 71CalA705, 236P162.

889-89 17F(2d)924; 254IllA440; 116Okl30, 243P721; **TexCivA** 21SW(2d)713. But see **TexCivA** 284SW308, 309.

890-90 37GaA347, 140SE778; 223Ky420, 3SW(2d)1071. [a] 252Mass535, 147NE895.

890-91 See also 41F(2d)517.

890-92 215Ala76, 109S166; 216Ala569, 114S185; 218Ala268, 118S282; 220Ala555, 126S855; 123Kan461, 256P145; **Mass** 172NE855; 150Miss827, 117S257; 320Mo362, 8SW(2d)616; **Mo** 25SW(2d)783; 218MoA617, 266SW336; 121Or215, 253P1046. [a] (2) Findings of master, regardless of circumstances under which reference is made, are merely persuasive, and should be set aside if against preponderance of evidence. 172Ark1177, 289SW781. [b] (1) 322Ill406, 153NE662; 253IllA520. [d] 220MoA963, 272SW711 (rule applied to findings of referee).

890-93 214Ala243, 107S210.

890-94 19F(2d)981; 24F(2d)35; 44F(2d)54; 216Ala569, 114S185; 103Conn279, 130A576; 128Me307, 147A227(2dcase); 254Mass248, 150NE210; 255Mass235, 151NE63; 256Mass456, 152NE712; 258Mass494, 155NE459; 261Mass412, 158NE753; 262Mass583, 160NE321; **Mass** 170NE621; **Mass** 171NE324; **Mo** 25SW(2d)783; **NH** 150A549; 230AppDiv577, 245NYS389; 115OhSt376, 154NE249; 121Or215, 253P1046; 86PaSuper324; 103WVa526, 138SE99. [b] (1) 254Mass444, 150NE193; 256Mass528, 152NE749. (3) 252Mass492, 147NE854. (4) If evidence is not reported and there is no objection to master's report, his findings are conclusive in supreme court. 261Mass116, 158NE344. [e] 254Mass18, 149NE603. [g] (1) 220MoA963, 272SW711 (court is not bound by findings of referee, though his report is entitled to much weight). (3) Findings of referee are in nature of special verdict. 220MoA963, 272SW711. [i] 252Mass492, 147NE854. [j] **In Illinois.**-329Ill629, 161NE104. [k] **In Massachusetts.**-**Mass** 171NE42.

891-96 193NC851, 138SE121; 133Okl123, 271P641; 103WVa526, 138SE99.

891-97 103WVa526, 138SE99.

891-99 **Mass** 170NE621; 150Miss827, 117S257; 191NC447, 132SE157; 192NC816, 135SE120; 192NC714, 135SE862.

891-1 121Or215, 253P1046. [a] 156NY1, 50NE422 [aff 89Hun126, 34NYS1085].

892-6 33F(2d)501 (without convincing evidence to contrary).

892-8 23F(2d)803; 218Ala593, 119S631; 254Mass444, 150NE193; 256Mass311, 152NE360; 256Mass169, 152NE367 (unless clearly wrong); 260Mass81, 156NE897; 264Mass199, 162NE364; **Mass** 171NE721. [b] (2) Findings of public service commission will not be disturbed. 103WVa526, 138SE99.

892-9 34F(2d)25; 103WVa526, 138SE99.

892-10 33F(2d)501 (unless error or mistake clearly appears).

892-15 **Mass** 172NE250. See also 272US400, 47SCt144, 71Led316.

892-16 214Ala243, 107S210; 294Pa47, 143A474.

892-23½-New. The report of the register is not controlling where the question is not submitted to him but is determined by the court. 218Ala637, 119S844(2dcase).

892-25 4OntWN128, 23OntWR137, 7DomLR20 (erroneous omission to bring all facts before master).

892-25½-New. Reviewing court determines for itself correct inferences which ought to be drawn from the evidence and facts found by the master. 253Mass205, 148NE609.

892-25½-New. The appellate court, in dealing with facts found by a master, has the power of drawing inferences unaffected by the conclusions reached by him. **Mass** 165NE7.

892–26 19F(2d)412; 20F(2d)647; 181 Ark198, 25SW(2d)772(2dcase); 162La 205, 110S202; 103WVa526, 138SE99.
893–27 5F(2d)137; 19F(2d)981; 21F (2d)161; 78Colo 421, 242P638; 222Ky 298, 300SW900; 152Wash469, 278P193; 103WVa526, 138SE99.
893–29 42 Ida567, 248P447; 214Ky800, 284SW82.
893–31 123Kan461, 256P145; Ky 299 SW199.
893–33 19F(2d)412; 42F(2d)79; 115 OhSt376, 154NE249.
893–35 50RI 375, 147A891.
893–39 259Mass499, 156NE846.
893–40 [a] Master's decision as to weight to be given oral testimony is seldom disturbed. Mass 171NE721.
893–41 253 IllA469. But see 329 Ill 629, 161NE104.
894–42 103WVa526, 138SE99.
894–43 86Mont19, 282P37; 103WVa 526, 138SE99.
894–44 244 IllA228; 253 IllA520.
894–56 5F(2d)416; 6F(2d)179; 13F (2d)40; 15F(2d)756; 16F(2d)911; 18 F(2d)269; 18F(2d)474; 20F(2d)625; 23F(2d)1002; 33F(2d)511; 37F(2d) 637; 218Ala292, 118S342 (effect of jury verdict); 218Ala500, 119S232; 165 Ga808, 142SE149; 338 Ill 552, 170NE 756; 203 Iowa254, 212NW471; 123Kan 461, 256P145; 126Kan429, 268P828; 127 Kan76, 272P121; 220Ky9, 294SW786; 224Ky71, 5SW(2d)269; 227Ky306, 12 SW(2d)856; 228Ky395, 15SW(2d)242 (1stcase); Mass 167NE641; Miss 109S 906; 312Mo 694, 281SW725; 316Mo 354, 289SW796; MoA 282SW135; 192NC 296, 134SE641; 194NC813, 140SE289; 194NC571, 140SE292; 288Pa541, 136A 798; RI 144A145; 133SC23, 130SE552 (in law case); 133SC395, 131SE18 (concurrent findings not contrary to clear preponderance of evidence or controlled or influenced by error held within rule); 142SC477, 141SE15; SC 155SE619; SC 155SE736; 157Tenn60, 6SW(2d)319; Va 153SE709; Va 153SE841; Va 155SE 707; 101WVa561, 133SE158. [b] (1) 42F(2d)79; 148Va860, 139SE490; 101 WVa561, 133SE158. (3) Conclusions, findings, and recommendations of master, approved by trial court, are presumed correct. 27F(2d)478. [c] 134SC 54, 131SE319. [d] (1) 312Mo 694, 281 SW725; 316Mo 354, 289SW796. (2) Decree overruling or confirming master's conclusions of fact in law case is as binding on supreme court as verdict of jury. 146SC385, 144SE82.
895–57 19F(2d)764; 98Fla270, 123S 757; 169Ga139, 149SE885; 338 Ill 552, 170NE756; 128Kan149, 276P828; 129 Kan269, 282P573; MoA 294SW93 (substantial evidence); MoA 28SW(2d)147; 191NC713, 135SE770; 193NC851, 138 SE121; 194NC44, 138SE349; 196NC 116, 144SE694; 196NC208, 145SE5; 140 Okl 282, 283P242, 68ALR900; 299Pa 272, 149A486; 135SC33, 133SE222; 144 SC3, 141SE720; 108WVa81, 150SE233; 192Wis168, 212NW286. [a] 216MoA 590, 262SW59 (substantial evidence); 90PaSuper225. [a] See also 312Mo 694, 281SW725. [b] 195NC614, 143SE8. [d] Concurrent findings practically fix facts. –134SC54, 131SE319.
895–60 18F(2d)492; 207Cal 200, 277P 475; 254 IllA264; 203 Iowa254, 212NW 471; 225Ky629, 9SW(2d)1008; 118Nebr 520, 225NW678; 143Va291, 130SE411; 101WVa561, 133SE158.
895–60½–New. , or is disputed. 198Wis 416, 224NW720.
895–61 8F(2d)570; 18F(2d)269; 18F (2d)474; 24F(2d)514; 26F(2d)621; 218 Ala500, 119S232. See also 161Ga978, 133 SE512. [c] Where evidence is not reported, master's findings, confirmed by court, are conclusive on appeal, unless plainly wrong or mutually inconsistent. Mass 166NE863.
895–62 253 IllA520; 253 IllA546; 216 Ky512, 287SW975; Ky 299SW199; Okl 291P26; 143SC325, 141SE564; 144SC 70, 142SE36.
896–63 93PaSuper392; Va 153SE709.
896–64 40F(2d)873 (unless without substantial evidence supporting it); 150 SC244, 147SE874; WVa 155SE660.
896–64½–New. unless against a clear preponderance of the evidence, 150SC 244, 147SE874.
896–68 27F(2d)478 [certiorari granted 278US596, 49SCt177, 73Led527(2d case)]; 317 Ill 184, 148NE2; 253Mass 79, 148NE374; MoA 282SW176; 4 Ont WN128, 23 OntWR137, 7DomLR20 (all facts not brought out before master).
896–74 20F(2d)625; 33F(2d)501.
896–77 300Pa217, 150A606 (holding supreme court warranted in accepting court's finding in preference to auditor's where evidence consisted of depositions); 142SC477, 141SE15; WVa 153 SE250.
896–78 22F(2d)282 (conflicting testimony); 32F(2d)762.
896–80 194NC44, 138SE349; 195NC 614, 143SE8.
897–81 272US658, 47SCt222, 71Led 463; 18F(2d)483; 39F(2d)21; 215Ala 474, 111S7; 216Ala519, 113S535; 170 Ark272, 280SW374; 170Ark1194, 281 SW657; 172Ark914, 290SW938; 173Ark 123, 292SW409; 15DelCh431, 141A277 (where evidence heard on depositions and before examiners); 93Fla67, 111 S541; 28Hawaii590; 201 Iowa701, 208 NW72; 204 Iowa11, 214NW572; 205 Iowa227, 217NW626; Iowa 232NW501; 210Ky663, 276SW561; 213Ky692, 281 SW813; 233Ky19, 24SW(2d)903; 256 Mass351, 152NE707; 260Mass45, 157NE 82, 52ALR1125; Mass 172NE250; Mass 172NE599; 231Mich209, 203NW665; 233Mich584, 207NW806; 241Mich177, 216NW456; 310Mo 313, 275SW940; 311 Mo332, 278SW377; Mo 293SW136; 317 Mo1047, 297SW960; 318Mo 192, 300SW 1088; 320Mo 605, 8SW(2d)592; Mo 29 SW(2d)692; 218MoA39, 264SW1000; 220MoA963, 272SW711; 220MoA223, 282SW729; MoA 287SW781; MoA 296 SW164; 221MoA1056, 296SW263; MoA 297SW978; MoA 3SW(2d)397; MoA 6 SW(2d)968; MoA 14SW(2d)12; MoA 20 SW(2d)164; MoA 21SW(2d)903; MoA 24SW(2d)704; 75Mont532, 244P501 (unless new trial or additional testimony necessary); 81Mont44, 261P620; 81 Mont185, 262P887; 86Mont43, 281P749, 69ALR416; 114Nebr806, 210NW279; 115Nebr697, 214NW633; 254NY128, 172 NE265; 189NC737, 128SE149 (suit to enjoin enforcement of void tax ordinance); 197NC223, 148SE315; 111 Okl 231, 239P141; 112 Okl 79, 239P618; 111 Okl 299, 239P637; 112 Okl 168, 240P604, 608; 113 Okl 164, 240P62; 115 Okl 248, 242P854; 115 Okl 298, 243P137; 116 Okl 68, 243P497; 116 Okl 199, 244P176; 117 Okl 227, 245P831; 119 Okl 4, 244P 166; 119 Okl 62, 248P315; 122 Okl 81, 251P591; 123 Okl 167, 252P21; 123 Okl 142, 252P34; 122 Okl 179, 252P1088; 124 Okl 193, 255P577; 125 Okl 126, 256 P515; 125 Okl 114, 256P748; 125 Okl 254, 257P372; 125 Okl 294, 258P262; 126 Okl 120, 258P758; 126 Okl 93, 258P 892; 127 Okl 141, 259P838; 128 Okl 188, 261P941; 128 Okl 172, 261P944; 128 Okl 147, 262P199; 128 Okl 247, 262P654; 130 Okl 79, 262P1067; 129 Okl 265, 264 P628; 133 Okl 156, 271P681; 135 Okl 198, 274P886; 136 Okl 127, 276P709; 138 Okl 163, 280P609; 144 Okl 17, 289 P350(1stcase); 144 Okl 176, 289P774; 41 OklACR85; 42 OklACR70; 43 Okl ACR79 [reh pending]; 116 Or641, 242P 613 (under statute); 120 Or427, 251P 299; 123 Or111, 261P72; 123 Or383, 261 P415; 300Pa542, 151A15; 66Utah373, 242P950. See also MoA 290SW624.
897–82 Kan 291P757; 253Mass55, 147 NE899; 261Mass72, 158NE339, 55ALR 330; 82NH449, 136A257; NJ 151A729 (2dcase); 217AppDiv247, 216NYS637. [a] (2) Finding of fact as to time of delivery of quitclaim deed is conclusive on appeal. 84Colo 203, 269P14. [b] (2) Court will not weigh conflicting evidence. Ind 169NE843. [c] In Montana.–73Mont 518, 238P591.
897–82½–New. Mere numerical weight of testimony may not be regarded by the appellate court as conclusive. 214 Ky436, 283SW396.
897–83 5F(2d)13; 14F(2d)519; 21F (2d)280; 29F(2d)982; 32F(2d)762; 35 F(2d)945; 35F(2d)948; 37F(2d)272; 123Kan755, 256P813; 310Mo 313, 275 SW940; MoA 24SW(2d)218; 81Mont 330, 263P421; 192NC180, 134SE449; 115 Okl 207, 242P264; 70Utah95, 258 P216. See also MoA 274SW112. [a] Evidence held insufficient to disturb finding of chancellor as to settlement. 211Ky421, 277SW471.
897–84 213Ala390, 104S756; 214Ala58, 106S185; 214Ala673, 108S587; 214Ala 278, 107S750; 220Ala620, 127S206; 91 Fla706, 108S671; 98Fla233, 123S740 (findings of chancellor on testimony taken before examiner); 217Ky357, 289SW 252; 218Ky550, 291SW744; 221Ky529, 299SW173; 119 Okl 22, 248P838; 286Pa 137, 133A150; 287Pa216, 134A397; 287 Pa431, 135A103; 288Pa434, 136A669; 289Pa535, 137A610; 296Pa414, 146A94; 297Pa58, 146A564; 153Va149, 149SE476. See also 286Pa57, 132A795. But see 297 Pa252, 146A896(2dcase).
898–86 16F(2d)666; 21F(2d)280; 32 F(2d)559; 33F(2d)248; 35F(2d)578; 40F(2d)25; 170Ark272, 280SW374; 174 Ark170, 294SW388; 95CalA352, 272P 805; 96CalA23, 273P600(2dcase); Del 141A197; DC 41F(2d)426; 94Fla885, 114S527; 210Ky805, 276SW833; 212Ky 315, 278SW834; 219Ky47, 292SW516; 220Ky212, 294SW1027; 220Ky205, 294 SW1032; 220Ky687, 295SW991; 222Ky 132, 300SW327; 224Ky56, 5SW(2d)271; 229Ky195, 16SW(2d)1018; 234Ky597, 28SW(2d)760; 259Mass523, 156NE683; Mass 172NE81; 233Mich584, 207NW 806; 147Miss296, 111S874; 307Mo 529, 271SW50; 307Mo 682, 271SW489; Mo 272SW944; Mo 276SW12; 311Mo 332, 278SW377; 315Mo 525, 289SW825; 316 Mo 333, 289SW939; 316Mo 517, 291SW 459; 316Mo 1213, 293SW405; Mo 286 SW95; Mo 4SW(2d)459; 320Mo 954, 8 SW(2d)966; 321Mo 1, 9SW(2d)967; Mo 14SW(2d)441; Mo 20SW(2d)523; Mo 26SW(2d)611; Mo 28SW(2d)665; Mo 29SW(2d)103; Mo 31SW(2d)978; Mo 31 SW(2d)1002; MoA 256SW548; 218MoA 54, 262SW393; MoA 271SW1016; MoA 272SW99; MoA 273SW118; MoA 279SW 153; MoA 293SW81; MoA 293SW794; 222MoA268, 296SW205; MoA 299SW 147; 222MoA941, 300SW540; MoA 9SW (2d)848; MoA 9SW(2d)856; MoA 21 SW(2d)222; MoA 25SW(2d)799; MoA 30SW(2d)771; 72Mont527, 235P327 (where under statute court could draw any fair inference from facts testified to. appellate court must place greater reliance than otherwise necessary on findings of trial court, when evidence is not presented by question and answer); 254NY128, 172NE265; 54ND883, 211 NW979; 117 Okl 141, 245P829; 119 Okl 95, 248P629; 123 Okl 284, 253P75; 124 Okl 207, 255P561; 126 Okl 25, 258P 263; 130 Okl 62, 264P814; 131 Okl 79, 267P661; 42 OklACR70; 118 Or192, 244 P1093; 132 Or38, 284P562; 48RI 267, 137A221; 50RI 86, 145A312; 158Tenn 394, 13SW(2d)49; TexCivA 20SW(2d) 255; 66Utah373, 242P950; Utah 274P 457; Va 153SE894. [a] (2) 213Ala390, 104S756. [b] (2) 114Nebr806, 210NW 279.
898–87 14F(2d)519; 32F(2d)252; 214 Ala692, 108S752; 215Ala652, 112S224; 218Ala637, 119S844(2dcase); 321 Ill 354, 151NE871; 210Ky429, 276SW115; Md 150A717; Mass 165NE428; Mass 167NE323; 241Mich570, 217NW773; 241Mich632, 217NW777; 147Miss296, 111S874; 307Mo 682, 271SW489; Mo 274SW460; 311Mo 332, 278SW377; 316 Mo 333, 289SW939; Mo 28SW(2d)665; 217MoA354, 266SW992; 222MoA984, 6 SW(2d)661; MoA 19SW(2d)776 (where evidence is parol as well as written); MoA 20SW(2d)930; 135 Okl198, 274P 886. [a] 213Ala390, 104S756; MoA 20SW(2d)944; Nebr 231NW751.
898–88 37F(2d)633; 215Ala652, 112S 224; 168Ark547, 271SW342, 40ALR383; 210Ky805, 276SW833; 211Ky706, 277 SW1014; 212Ky273, 278SW578; Mo 297 SW954; Mo 28SW(2d)665; 217MoA187, 274SW901; 219MoA133, 268SW691; 221MoA657, 284SW204; MoA 293SW 435; MoA 296SW442; MoA 11SW(2d) 1066; 115Nebr708, 214NW632; 299Pa 190, 149A193; 48RI 267, 137A221; Va 153SE799; 102WVa331, 135SE182.
898–89 176Ark830, 4SW(2d)515; 231 Ky57, 21SW(2d)134; 320Mo 754, 9SW (2d)880; 219MoA342, 271SW836; 45 OklACR310.
898–90 210Ky805, 276SW833; 211Ky 730, 277SW1016; 212Ky273, 278SW

578; 212Ky315, 278SW834; 213Ky544, 281SW795; 213Ky692, 281SW813; 213 Ky785, 281SW987; 215Ky678, 286SW 983; 216Ky671, 288SW294; 217Ky762, 290SW684; 217Ky773, 290SW711; 218 Ky57, 290SW1048; 226Ky676, 11SW (2d)713; 227Ky773, 14SW(2d)183; 228 Ky211, 14SW(2d)766(2dcase); 228Ky 369, 15SW(2d)292; 228Ky357, 15SW (2d)298; 228Ky645, 15SW(2d)446; 228 Ky790, 15SW(2d)1005; 230Ky575, 20 SW(2d)444; 231Ky767, 22SW(2d)256 (2dcase); 232Ky59, 22SW(2d)422; 233 Ky192, 25SW(2d)365; 234Ky447, 28 SW(2d)504(2dcase); 235Ky502, 31SW (2d)893; 235Ky574, 31SW(2d)910; 237 Mich1, 211NW29; Miss 107S563 (close question on facts); 77Mont260, 250P823.

898–91 Del 141A197; 213Ky692, 281 SW813; 316Mo 674, 291SW109; Mo 20 SW(2d)523; 217MoA187, 274SW901; 222MoA984, 6SW(2d)661; MoA 15SW (2d)382; MoA 28SW(2d)443 (holding that court may weigh evidence and make finding of fact de novo); 300Pa542, 151 A15 (where findings disapproved by court in banc); Utah 265P748.

898–92 16F(2d)666; 21F(2d)280, 282 [citCJ]; 34F(2d)245; 176Ark1082, 5 SW(2d)318; 181Ark1146, 27SW(2d) 792; Ark 32SW(2d)443; 200Cal 743, 254P1101; Cal 287P102; 73CalA539, 238P1081; 77CalA341, 246P563; 80 CalA729, 252P757; 83CalA782, 257P 560; 85CalA360, 259P460; 93CalA214, 269P555; CalA 285P715; 92Fla347, 109 S424; 94Fla672, 114S384; 94Fla851, 114S452; 95Fla889, 116S863; 98Fla 599, 124S1; 98Fla695, 124S34 (substantial evidence); Fla 130S9 (supported by substantial evidence); Fla 130S914; 43 Ida255, 251P623; 43 Ida431, 253P132; 318 Ill 218, 149NE306; 86 IndA686, 159 NE697; 123Kan393, 254P366; 126Kan 705, 271P395; 212Ky92, 278SW602; 213Ky580, 281SW525; 216Ky51, 287SW 226; 225Ky288, 8SW(2d)404; 225Ky 804, 10SW(2d)294; 226Ky685, 11SW (2d)708; 229Ky613, 17SW(2d)711; 232 Ky844, 24SW(2d)912; 235Ky810, 32SW (2d)401; 126Me591, 136A288; 127Me 340, 143A266; 262Mass203, 159NE530; Mass 172NE117; 238Mich386, 212NW 974; 241Mich632, 217NW777; 144Miss 392, 109S905; 148Miss478, 114S336; 153Miss359, 121S130; MoA 272SW701; 33NM519, 270P886; 217AppDiv247, 216 NYS637; NC 155SE865(2dcase); 115 Okl 179, 242P204; 116 Okl 192, 244P 198; 116 Okl 239, 244P175; 116 Okl 293, 244P762; 118 Okl 31, 248P645 (when not clearly against weight of evidence); 119 Okl 62, 248P315; 120 Okl 40, 248P561, 51ALR1215; 120 Okl 111, 250P788; 132 Okl 5, 269P269; 135 Okl 123, 276P200; Okl 293P223; Okl 293P 224; 127 Or57, 270P913; 285Pa223, 132A166; 285Pa353, 132A171; 285Pa 472, 132A579; 288Pa434, 136A669; 288 Pa527, 136A796; 289Pa44, 137A122; 289Pa131, 137A173; 289Pa233, 137A 235; 290Pa388, 139A122, 55ALR311; 291Pa53, 139A606; 292Pa244, 141A47; 294Pa442, 144A426; 294Pa535, 144A 537; 298Pa475, 148A695 (supported by evidence); 151SC114, 148SE704, 63ALR 965 (sufficiently supported by evidence); 50SD378, 210NW198; TexCivA 15SW (2d)139; TexCivA 18SW(2d)689; Utah 290P173; 100V499, 135A15. [a] (1) 99CalA492, 278P918; 92Fla750, 110S 126; 94Fla1184, 116S4; Fla 128S611; Ind 169NE843; Mass 166NE758; 165 Minn384, 206NW719; Miss 111S460; Miss 120S218(1stcase); 128 Okl 125, 261 P371; 132 Okl 141, 269P1067; 289Pa 233, 137A235; 289Pa535, 137A610; 296 Pa408, 146A24; 296Pa482, 146A91; 297 Pa176, 146A536; 88PaSuper104; 88Pa Super196; 152Wash353, 277P829. [b] Ark 31SW(2d)127(1stcase); 94Fla1184, 116S4; Iowa 230NW371; 212Ky315, 278SW834 (where in addition, mind of appellate court was left in doubt by evidence); Ky 11SW(2d)943; 232Ky363, 23SW(2d)548; 40 OklACR589 [reh pending]. (2) Affirmed 178Ark862, 12 SW(2d)772, 68ALR1303. [c] 338 Ill 400, 170NE208(2dcase); 255 IllA11; 210Ky429, 276SW115; 217Ky642, 290 SW506; Mo 31SW(2d)978; 123 Or549, 262P243; 298Pa1, 147A848. [d] Where chancellor's findings are sustained by weight of evidence, apart from verdict of jury, they will be sustained. 212Ky92, 278SW602. [e] Where trial court makes findings in accord with answers by jury to special interrogatories in foreclosure suit, question whether decision of court is or is not supported by evidence is referable to findings and not to verdict of jury. 76CalA232, 245P235. [f] Finding based on inferences from facts proved will be upheld where authorized under evidence. 291Pa258, 139 A914. [g] Where wide range of evidence was presented, discretion of trial court as chancellor should not be disturbed. TexCivA 8SW(2d)258.

899–93 98CalA430, 277P149; 42 Ida 121, 244P407; 81Mont185, 262P887; 217AppDiv247, 216NYS637; 102WVa331, 135SE182. But see 38F(2d)10.

899–94 See also RI 131A545.

899–94½–New. or unless not in accordance with just rights of parties, 231 Mich209, 203NW665.

899–95 14F(2d)519; 18F(2d)483; 18 F(2d)839; 19F(2d)857; 21F(2d)280 (dictum); 28F(2d)7; 28F(2d)177 [certiorari den 278US655, 49SCt179, 73Led 564(10thcase)]; 34F(2d)25; 35F(2d)77; 40F(2d)333; 214Ala278, 107S750; 217 Ala134, 115S819; 90Fla162, 105S321; 91 Fla425, 108S169; 91Fla706, 108S671; 92Fla1110, 111S386; 92Fla470, 112S48; 96Fla683, 118S737(1stcase); 96Fla567, 118S816(1stcase); 97Fla46, 119S522; 97Fla530, 121S800; 97Fla881, 122S272; 98Fla233, 123S740; 98Fla695, 124S34; Fla 127S338; Fla 128S801(2dcase); Fla 129S773; 329 Ill 59, 160NE147; 211Ky 421, 277SW471 (reasonable certainty that chancellor erred); 213Ky75, 280SW 481; 214Ky436, 283SW396; 220Ky557, 295SW859; 222Ky370, 300SW878; 223 Ky339, 3SW(2d)644; 127Me543, 142A 780; 127Me328, 143A169; 127Me452, 144A383(2dcase); Me 149A833(2dcase) (decision of single justice); 151Md43, 134A29; 254Mass33, 149NE613; 259 Mass523, 156NE683; 259Mass608, 156 NE842; 264Mass112, 162NE225; Mass 165NE671; Mass 170NE833; Mass 171 NE727; Mass 171NE730; Mass 172NE 234; 140Miss452, 106S12; 148Miss164, 114S268; 149Miss711, 115S397; 156 Miss424, 125S554; MoA 291SW512; 291 Pa258, 139A914; RI 131A554; Utah 271P797; 104WVa513, 140SE480. [a] 222Ky626, 18W(2d)1048. [b] 217Ky 329, 289SW292. [d] (1) 214Ala673, 108 S587; 317Mo 1047, 297SW960; 128 Okl 125, 261P371; 296Pa376, 146A30(1st case); 97PaSuper463. [e] (2) Findings may be sustained, though record contains positive uncontradicted testimony to contrary. 81Mont393, 264P115. [g] Me 151A146; Mass 172NE209. [h] (1) 293Pa85, 141A721; 296Pa474, 146A 107; 300Pa542, 151A15. (2) Findings of chancellor, based on evidence and approved by trial court, must be given same weight as verdict of jury, and will not be disturbed on appeal. 297Pa252, 146A896(2dcase).

900–96 14F(2d)519; 18F(2d)483; 18 F(2d)839; 29F(2d)383; 217Ala190, 115 S184; 168Ark117, 269SW53; 168Ark 981, 272SW869; 169Ark792, 276SW605; 170Ark135, 279SW13; 170Ark272, 280 SW374; 170Ark1194, 281SW657; 170 Ark931, 282SW14; 171Ark912, 287SW 373; 172Ark176, 287SW1001; 173Ark 1181, 292SW408; 173Ark123, 292SW 409; 173Ark1181, 293SW1023; 173Ark 1182, 293SW1028; 174Ark79, 294SW 993, 52ALR1263; 173Ark1182, 295SW 34; 175Ark30, 298SW481; 174Ark956, 298SW861; 175Ark1169, 1SW(2d)34; 175Ark902, 1SW(2d)40; 175Ark614, 1 SW(2d)49; 176Ark1203, 2SW(2d)13; 176Ark196, 2SW(2d)84; 176Ark463, 3 SW(2d)295; 176Ark786, 4SW(2d)897; 176Ark986, 4SW(2d)949; 176Ark1013, 5SW(2d)309; 176Ark1170, 5SW(2d) 927; 177Ark288, 6SW(2d)292; 177Ark 66, 7SW(2d)758; 177Ark1193, 7SW(2d) 763; 177Ark703, 7SW(2d)780; 177Ark 860, 7SW(2d)985; 177Ark770, 9SW(2d) 3; 177Ark1194, 9SW(2d)14; 177Ark 589, 9SW(2d)19; 178Ark1200, 10SW (2d)33; 178Ark67, 10SW(2d)41; 178 Ark399, 10SW(2d)861; 178Ark432, 10 SW(2d)878; 178Ark966, 12SW(2d)906; 178Ark1200, 12SW(2d)912; 178Ark 1200, 13SW(2d)585; 178Ark1098, 13SW (2d)587; 179Ark1198, 16SW(2d)13; 179Ark391, 16SW(2d)17; 179Ark494, 16 SW(2d)591; 179Ark448, 17SW(2d)286; 179Ark1029, 18SW(2d)1028, 65ALR 1446; 180Ark321, 21SW(2d)428; 180 Ark432, 21SW(2d)604; 180Ark1116, 24 SW(2d)321; 181Ark96, 24SW(2d)976; 181Ark1145, 25SW(2d)753; 181Ark 1146, 26SW(2d)1113; 318 Ill 218, 149 NE306; 321 Ill 354, 151NE871; 329 Ill 334, 160NE597; 330 Ill 160, 161NE515; 331 Ill 643, 163NE424; 331 Ill 523, 163 NE468; 334 Ill 67, 165NE343; 335 Ill 517, 167NE792; 211Ky294, 277SW262 (findings held against weight of evidence); 211Ky303, 277SW255 (against weight of evidence); 213Ky125, 280SW 932; 213Ky309, 280SW136; 218Ky770, 292SW322; 221Ky732, 299SW729; 224 Ky236, 5SW(2d)1039; 225Ky25, 7 SW(2d)496; 233Ky19, 24SW(2d) 903; Miss 107S563; 144Miss392, 109S905; 145Miss330, 110S795; 146 Miss707, 111S844; 156Miss842, 127S 291; Mo 282SW392; Mo 293SW136; MoA 13SW(2d)569; 74Mont50, 237P 1103; 74Mont531, 241P322; 76Mont 175, 246P773; 76Mont332, 247P166; 76 Mont375, 247P328; 77Mont30, 248P219; 77Mont221, 250P600; 80Mont64, 257P 1038; 81Mont185, 262P887; 81Mont 311, 263P683; 81Mont393, 264P 115; 81Mont543, 264P675; 81Mont 560, 264P679; 82Mont574, 268P737; 84Mont68, 274P151; Mont 292P725; 105 Okl 79, 231P282; 111 Okl 16, 237P 445; 111 Okl 299, 239P637; 112 Okl 27, 239P465; 112 Okl 105, 240P76; 112 Okl 168, 240P604, 608; 113 Okl 164, 240P 62; 114 Okl 105, 243P718 (unless contrary to clear weight of evidence); 114 Okl 181, 245P603; 115 Okl 99, 243P146; 115 Okl 179, 242P204; 115 Okl 207, 242 P264; 116 Okl 68, 243P497; 116 Okl 104, 243P188; 116 Okl 192, 244P198; 116 Okl 199, 244P176; 117 Okl 43, 246 P873; 117 Okl 51, 244P772 (unless contrary to weight of evidence); 117 Okl 141, 245P829; 117 Okl 144, 245P620 (clear weight of evidence); 117 Okl 227, 245P831; 117 Okl 303, 246P425; 118 Okl 85, 246P593; 118 Okl 242, 247P391; 118 Okl 291, 248P651; 119 Okl 4, 244P 166; 119 Okl 62, 248P315; 119 Okl 297, 249P393; 120 Okl 111, 250P788; 121 Okl 164, 249P325; 122 Okl 81, 251P591; 123 Okl 33, 251P729; 123 Okl 167, 252P 21; 123 Okl 181, 252P437; 122 Okl 179, 252P1088; 123 Okl 284, 253P75; 124 Okl 55, 254P41; 124 Okl 193, 255P577; 125 Okl 217, 257P307; 126 Okl 25, 258P 263; 126 Okl 120, 258P758; 126 Okl 108, 258P866; 126 Okl 93, 258P892; 127 Okl 55, 259P857; 128 Okl 125, 261P 371 (unless against clear weight of evidence); 128 Okl 188, 261P941; 128 Okl 172, 261P944; 128 Okl 247, 262P654; 130 Okl 79, 262P1067; 129 Okl 11, 263P 111 (clearly against weight of evidence); 130 Okl 62, 264P814 (clear weight of evidence); 130 Okl 33, 264P 911; 130 Okl 281, 267P263; 130 Okl 295, 267P472; 132 Okl 5, 269P269; 132 Okl 217, 270P54 (judgment held not against clear weight of evidence); 133 Okl 17, 270P850; 133 Okl 27, 271P145; 133 Okl 61, 271P155; 134 Okl 70, 272P 857; 134 Okl 86, 272P865; 135 Okl 142, 276P193; 136 Okl 127, 276P709; 137 Okl 10, 278P265; 138 Okl 177, 280P808; 139 Okl 35, 280P1075; 138 Okl 293, 281 P135; 139 Okl 86, 281P272; 139 Okl 278, 281P977; 140 Okl 155, 282P313; 140 Okl 227, 282P617; 140 Okl 77, 282P 619; 140 Okl 271, 282P1104; 140 Okl 256, 283P231; 142 Okl 152, 286P322; 143 Okl 270, 288P479; 144 Okl 110, 289 P756; 144 Okl 176, 289P774; 144 Okl 156, 289P1105; 144 Okl 102, 290P190; Okl 291P26; Okl 291P33; 144 Okl 225, 291P100; Okl 291P524; Okl 291P538; Okl 291P550; 144 Okl 222, 291P567; Okl 292P71; 37 OklACR67 (unless against weight of evidence); 38 OklACR 424 (unless against clear weight of evidence); 41 OklACR118; 42 OklACR70 [reh pending]; 43 OklACR261; 133SC1, 130SE57; TexCivA 17SW(2d)1093; Utah 279P502; 135Wash156, 237P498; 106WVa265, 145SE384; 106WVa429, 145SE744; 106WVa605, 146SE620; 107 WVa141, 147SE490; 108WVa180, 150SE 525; 108WVa191, 150SE609; 108WVa 321, 150SE749; 108WVa585, 152SE10; 108WVa701, 152SE790. See also 117

Okl 260, 246P448; 119 Okl 219, 250P 422; 120 Okl 10, 249P722; 123 Okl 146, 252P1; 123 Okl 151, 254P706; 124 Okl 207, 255P561; 128 Okl 300, 263P119. But see 81Mont330, 263P421.

900–97 213Ala390, 104S756; 169Ark 463, 275SW905 (unless against weight of evidence); 175Ark1169, 1SW(2d)552; 338 Ill 433, 170NE199(2dcase); 338 Ill 322, 170NE273; 338 Ill 172, 170NE430; 156Md221, 144A257; 142Miss676, 107S 865; 133 Okl 264, 271P1042. See also 119 Okl 46, 247P993; 119 Okl 22, 248P 838; 119 Okl 95, 248P629.

900–97½–New. In a writ to determine whether the legal limit has been reacted, the supreme court may go over the evidence. 191NC775, 133SE1.

900–98 16F(2d)666; 25F(2d)397; 32 F(2d)762; 39F(2d)608; 213Ala390, 104 S756; 214Ala278, 107S750; 220Ala360, 125S228; 35Ariz488, 279P253 (where trial court disregarded advisory verdict); 170Ark1193, 280SW996; 171Ark 576, 286SW873; 174Ark492, 295SW 966; 180Ark1167, 20SW(2d)857; 67 CalA575, 228P62; 79CalA55, 248P1065; 79CalA748, 250P1106; 80CalA301, 251 P841; 85CalA360, 259P460; 99CalA60, 277P898; CalA 289P875; 78Colo 20, 238P52; 91Fla706, 108S671; 92Fla121, 109S422; 92Fla899, 110S529; 95Fla 880, 116S862; 97Fla46, 119S522; 165Ga 366, 140SE761; 165Ga449, 141SE200; 318 Ill 374, 149NE253; Ind 162NE409; 123Kan393, 254P366; 125Kan568, 264P 1038; 208Ky585, 271SW664; 208Ky 782, 271SW1083; 209Ky332, 272SW 890; 211Ky72, 277SW301 (where doubt as to truth of whole case); 211Ky421, 277SW471; 211Ky706, 277SW1014; 212Ky273, 278SW578; 213Ky477, 281 SW477; 214Ky499, 283SW434; 217Ky 762, 290SW684; 218Ky550, 291SW744; 216Ky51, 287SW226; 223Ky79, 2SW (2d)1067; 225Ky7, 7SW(2d)489; 225 Ky669, 9SW(2d)1002; 226Ky770, 11SW (2d)909; 227Ky353, 13SW(2d)266; 228 Ky171, 14SW(2d)384; 228Ky139, 14SW (2d)402; 228Ky374, 15SW(2d)246, 66 ALR139; 228Ky522, 15SW(2d)487; 229 Ky369, 17SW(2d)207; 230Ky365, 19 SW(2d)983 (where evidence is in confusion); 231Ky284, 21SW(2d)445; 232 Ky755, 24SW(2d)607; 125Me509, 131A 574; 150Md575, 133A328; 232Mich661, 206NW479; 166Minn195, 207NW305; 171Minn116, 213NW542; Miss 108S506; 144Miss392, 109S905; Miss 111S459; 149Miss632, 115S714; 150Miss711, 116 S616; Miss 120S203(1stcase); 154Miss 265, 122S200; 156Miss552, 126S195; 316Mo 158, 295SW73; Mo 29SW(2d) 91; 218MoA516, 279SW232; 219MoA 133, 268SW691; MoA 282SW469; 221 MoA657, 284SW204 (especially where case has been tried by jury); MoA 286 SW401; MoA 300SW1004; MoA 13SW (2d)1085; 75Mont66, 241P623; 76Mont 375, 247P328; 81Mont382, 263P967; 81 Mont543, 264P675; *81Mont560, 264P 679; Mont 292P585; 115Nebr271, 212 NW616; 115Nebr708, 214NW632; 126 Okl 93, 258P892; 287Pa431, 135A103; 48RI 267, 137A221; TexCivA 19SW(2d) 404; 143Va291, 130SE411; 150Va534, 143SE716; Va 153SE804 (in case of doubt); 102WVa151, 135SE616; 102 WVa454, 135SE390; 103WVa456, 137 SE883; 103WVa463, 137SE892. See also 169Ark816, 277SW11. But see MoA 18SW(2d)140. [a] (1) 213Ala390, 104S 756; 215Ala652, 112S224; 99CalA450, 278P892; 99CalA492, 278P918; 42 Ida 118, 243P653; 318 Ill 374, 149NE253; 217Ky762, 290SW684; Miss 111S459; 311Mo 332, 278SW377; MoA 299SW127; 76Mont375, 247P328; 114Nebr806, 210 NW279; 115Nebr271, 212NW616; 115 Nebr708, 214NW632; 116Nebr706, 218 NW734; 51ND219, 199NW948; 128 Okl 125, 261P371; 50RI 194, 146A814; 135Wash322, 237P735. (3) Reviewing court will consider that fact in reviewing evidence. 114Nebr714, 209NW499. (4) When evidence on material questions of fact is in irreconcilable conflict, reviewing court will consider fact that trial court observed witnesses and their manner in testifying. 114Nebr636, 209 NW241. (5) Where court made personal examination of physical facts and oral evidence was conflicting and irreconcilable, appellate court will consider fact that such examination was made and that trial court had opportunity to observe witnesses and their manner of testifying. 114Nebr806, 210NW279. [b] **Finding of fact approved by court en banc,** on conflicting evidence, cannot be disturbed. 300Pa312, 150A616.

900–99 179Ark651, 17SW(2d)314; 195 Cal 548, 234P398, 38ALR1186; 198Cal 46, 243P657; 79CalA748, 250P1106; CalA 289P227 (amply supported); 86 Colo 127, 278P616; 92Fla121, 109S422; 98Fla695, 124S34; 47 Ida157, 274P110; 215Ky551, 286SW773; 225Ky58, 7SW (2d)495; 234Ky440, 28SW(2d)504(1st case); 171Minn116, 213NW542; 150 Miss750, 117S122; 155Miss55, 122S747; 302Mo 92, 256SW1053; Mo 281SW431; MoA 21SW(2d)903; 125 Okl 126, 256P 515; 126 Okl 93, 258P892; 283Pa5, 129 A67, 39ALR1064; 285Pa472, 132A579. [a] 99CalA450, 278P892; 92Fla121, 109 S422; 42 Ida121, 244P407; 48 Ida178, 279P619(2dcase); Miss 111S459; 319 Mo 65, 3SW(2d)712; Nev 287P274. [c] **This rule is binding on superior court** as well as on supreme court. 288Pa434, 136A669.

901–1 25F(2d)813; 32F(2d)762; 33F (2d)248 (obvious error of law or serious mistake of fact); 70CalA614, 234P 121; 90Fla335, 105S821; 92Fla224, 109 S306; 92Fla121, 109S422; 92Fla899, 110S529; Fla 129S773; 221Ky576, 299 SW196; Mass 170NE112; 140Miss452, 106S12; Miss 108S506; 150Miss473, 116S883; 157Miss365, 128S79; 74Mont 318, 239P1040; RI 146A415(1stcase); 50RI 363, 147A886; 103WVa456, 137 SE883; 105WVa332, 142SE438. [c] 93 Fla342, 112S75. [e] **Except for obvious error of law or serious mistake of fact.**–5F(2d)13.

901–1½–New. unless on consideration of the whole case it can be said with reasonable certainty that the chancellor erred. 210Ky663, 276SW561.

901–2 215Ala104, 109S756; 169Ark 1212, 277SW347 (finding not against preponderance of evidence); 170Ark 1193, 280SW996; 172Ark460, 289SW 753; 172Ark1177, 291SW63; 173Ark 1181, 292SW694; 173Ark1182, 293SW 1028; 178Ark1199, 13SW(2d)4 (not against preponderance of evidence); 180 Ark342, 22SW(2d)25; 180Ark620, 22 SW(2d)167; 317 Ill 441, 148NE308; 318 Ill 374, 149NE253; 319 Ill 35, 149 NE588; 320 Ill 357, 151NE276; 337 Ill 396, 169NE258; 209Ky299, 272SW748 (unless against preponderance of evidence or creates more than doubt); 222 Ky370, 300SW878 (finding held not clearly against evidence); 240Mich73, 214NW937; Miss 111S459; 75Mont66, 241P623; 75Mont532, 244P501; 76 Mont332, 247P166; 76Mont375, 247P 328; 77Mont260, 250P823; 82Mont73, 265P15; 85Mont375, 278P832, 65ALR 968; 20 OhA518, 152NE767; 119 Okl 46, 247P993 (unless clearly against weight of evidence); 123 Okl 142, 252P 34; 130 Okl 79, 262P1067; 138 Okl 11, 280P281; 140 Okl 21, 282P149; 141 Okl 288, 285P10; 41 OklACR118; Tex CivA 264SW545; 135Wash322, 237P 735. [a] **Decree that there was no resulting trust** is not set aside as contrary to weight of evidence, where it was shown that wife allowed title to remain in husband for more than twenty years. 319 Ill 35, 149NE588. [b] **Findings held not against preponderance of evidence.**–180Ark1167, 20SW(2d)857.

901–2½–New. , and mind is left in doubt as to truth. 211Ky398, 277SW 462.

901–2⅓–New. A finding in an equity case will not be disturbed on appeal simply because there is a conflict in testimony. 42 Ida121, 244P407.

901–2¼–New. The chancellor's finding, based on conflicting oral testimony and his own inspection of the property concerned, cannot be held erroneous as a matter of law. Mass 167NE233.

902–3 93Fla342, 112S75; 93Fla531, 112S555; Fla 129S912(1stcase); 318 Ill 218, 149NE306; 200 Iowa1327, 206 NW136 (reasonableness or unreasonableness proper to be considered); 232 Ky809, 24SW(2d)592; 322Mo 697, 16 SW(2d)49; 254NY128, 172NE265; 293 Pa529, 143A197; 108WVa354, 151SE1. [a] (2) **Decree distributing amount of** recovery in stated proportions to plaintiffs where it did not appear how many and who were all of the distributees. 165Ga724, 142SE96. [c] Miss 118S632 (1stcase); 154Miss265, 122S200.

902–4 176Ark1205, 2SW(2d)1084; 207 Cal181, 277P330; 92Fla129, 109S238; 93Fla531, 112S555; 93Fla1004, 113S 374; 95Fla769, 116S497; 330 Ill 106, 161NE99; Ill 173NE118; 217Ky810, 290SW669; 222Ky370, 300SW878; 228 Ky357, 15SW(2d)298; 229Ky738, 17SW (2d)1024; 235Ky161, 30SW(2d)875; 142Miss77, 107S273; 145Miss330, 110S 795; 310Mo 313, 275SW940; Mo 297SW 391; 81Mont44, 261P620; 20 OhA261, 151NE798; 115 Okl 248, 242P854; 114 Okl 190, 245P589; 117 Okl 144, 245P 620 (clearly against weight of evidence); 122 Okl 188, 253P88; 125 Okl 137, 256P883; 125 Okl 254, 257P372; 125 Okl 294, 258P262; 127 Okl 141, 259 P838; 128 Okl 125, 261P371; 128 Okl 260, 262P650; 130 Okl 5, 264P887; 130 Okl 184, 266P452; 131 Okl 144, 268P 245 (clearly against weight of evidence); 135 Okl 142, 276P193; 139 Okl 240, 281 P760; 43 OklACR221; Okl 293P245; 146SC385, 144SE82; 99WVa509, 129SE 393; 104WVa486, 140SE483; 106WVa 642, 147SE22; 107WVa632, 149SE819.

902–4½–New. when unsupported by evidence; 287Pa216, 134A397.

902–5 229Ky836, 18SW(2d)285.

902–6 171Ark912, 287SW373; 195Cal 548, 234P398, 38ALR1186; Ind 169NE 843; 310Mo 313, 275SW940; 43 OklACR 79 [reh pending]; 285Pa472, 132A579; 300Pa542, 151A15.

902–9 120 Okl 128, 250P916; 285Pa472, 132A579; 287Pa216, 134A397.

902–12 28F(2d)755; 213Ala679, 105S 890 (on question of giving affirmative charge appellate court is only to deal with sufficiency of evidence for submission to jury); 219Ala205, 121S735; Ariz 286P180; 170Ark670, 280SW635; 179Ark256, 15SW(2d)326; 201Cal 392, 257P74 (whether plaintiff guilty of contributory negligence as matter of law); 73CalA695, 239P54; 89CalA103, 264 P589; 37GaA171, 139SE133 (nonsuit sustained); 225Ky645, 9SW(2d)993; 235Ky800, 32SW(2d)348; 11LaA187, 123S166(2dcase); 125Me519, 134A544; 126Me202, 137A62; 126Me458; 139 A480 (direction of verdict sustained); 261Mass491, 159NE523; 233Mich400, 206NW309; 251Mich105, 231NW61; MoA 272SW1040 (evidence will be taken at face value); 198NC454, 152 SE163; 119 Okl 125, 249P333; 124 Okl 74, 254P37; 118 Or32, 245P508; 130 Or 612, 280P344 (denial of nonsuit and of directed verdict sustained); 298Pa130, 148A58; 143SC223, 141SE375; 54SD435, 223NW354; 116Tex277, 1SW(2d)866; TexCivA 8SW(2d)690; TexCivA 10SW (2d)172; TexCivA 12SW(2d)589; Tex CivA 32SW(2d)699; 142Wash213, 252P 699; Sask [1928] 3DomLR626. See also 233 IllA384. [a] (1) 231Mich466, 204 NW131; 233Mich400, 206NW309; 154 Miss74, 122S490; 119 Okl 125, 249P333; 124 Okl 74, 254P37; TexCivA 275SW96; TexCivA 290SW552. (2) 338 Ill 89, 169 NE811; 81NH264, 125A435. (3) Ida 290 P200; 231Ky673, 22SW(2d)104; 94Pa Super599; TexCivA 290SW552. (5) In reviewing refusal of defendant's request for peremptory instruction amounting to demurrer to evidence, court must determine whether there was substantial evidence to establish elements of plaintiff's cause of action. 220MoA1099, 297 SW108. (6) Rule that directed verdict admits truth of adversary's evidence and inferences legitimately drawn therefrom must be applied in light of other facts established beyond controversy. Ida 290P200. (7) Other instances. TexCivA 28SW(2d)219. [b] (1) 3F(2d)710; 9F(2d)44; 15F(2d)913; 18F(2d)223; 18 F(2d)369; 172Ark691, 290SW584; 176 Ark179, 2SW(2d)15; 180Ark610, 228W (2d)31; 238Mich508, 213NW867; 114 Nebr505, 208NW632; 55ND836, 215NW 538; 122 Or306, 258P820; 122 Or523, 259P900; 127 Or302, 272P271; 54SD 581, 223NW826; SD 225NW721; Tex CivA 271SW653; TexCivA 299SW655. (2) 6F(2d)869; 16F(2d)39; 17F(2d) 46; 18F(2d)223; 18F(2d)369; 18F(2d) 957; 27F(2d)633 [certiorari den 498Ct

179(1stcase)]; 28F(2d)755; 37F(2d) 865; 169Ark1046, 277SW513; 172Ark 691, 290SW584; 177Ark875, 8SW(2d) 452; 179Ark1014, 18SW(2d)1020(1st case); 181Ark156, 25SW(2d)23(2dcase); 47 Ida519, 277P562; 47 Ida658, 277P 814; 48 Ida261, 281P370; 48 Ida580, 283P613; 238Mich508, 213NW867; 240 Mich549, 215NW364; 55ND836, 215NW 538; 56ND265, 217NW177; 122 Or523, 259P900; 127 Or276, 263P907. (3) Miss 114S36; 122 Or306, 258P820. (4) 83 Mont573, 273P635. (5) 15F(2d)913; 27F(2d)633 [certiorari den 49SCt179 (1stcase)]. (6) If decision is right in law and supported by substantial evidence. 238Mich257, 213NW61. (7) Appellate court is limited to questions of law and whether any facts proved that will support finding. 17F(2d)472. (8) Court's decision on facts is reviewable as in equity case, and appellate division may reverse on facts if finding is against weight of evidence. 223App Div306, 228NYS241. (9) Appellate court is only concerned with legal sufficiency of evidence to support verdict directed. SD 225NW721. (10) Where plaintiff secures directed verdict after defendant has moved to dismiss complaint for failure of proof, defendant is held not deprived of right to appellate review on question of justification of direction. 33F(2d)89. [d] 163Ga755, 137SE57. [e] **Where verdict is manifestly against weight of evidence**, there being no evidence to prove defendant's liability, it is reversible error to refuse directed verdict for defendant. 233 IllA 196. [f] **Where one party moves for directed verdict**, court's decision stands the same as jury's verdict, 229AppDiv 433, 242NYS273. [g] **If any ground of action pleaded has support in evidence**, refusal of peremptory instruction will be upheld. MoA 22SW(2d)877.

903-13 TexCivA 300SW148.

903-13½-New. or where there is no evidence to support a verdict for appellant, TexCivA 277SW173.

903-14 125Me507, 131A308; 153Miss 592, 121S292; TexCivA 300SW148. [d] **Order of dismissal as to certain defendants** will be sustained if there is any evidence in record to justify it. 34Ariz 43, 267P421.

903-14½-New. , especially where all the data before the trial court are not submitted to the appellate court, 22 AlaA 210, 114S278.

903-14¾-New. or unless it is convinced that the evidence is not so conclusive that the opposite verdict could not have been sustained. 10F(2d)437 (on conflicting evidence).

904-15 25F(2d)398 (on findings after request for direction from both parties); 30F(2d)901; 31F(2d)826; 42F(2d)399; 215Ky22, 284SW94; 244Mich641, 222 NW146; 245Mich179, 222NW157; 128 Okl 215, 262P208; 99Vt425, 134A599.

904-16 11LaA108, 120S706; NJ 139A 221; 95PaSuper238.

904-17 29F(2d)331.

904-18 RI 133A440.

904-18½-New. If any of the evidence would sustain verdict for plaintiff, refusing to direct verdict for defendant is proper. 10F(2d)289.

904-18¾-New. Verdict founded on conflicting evidence will not be set aside because of trial court's refusal to direct verdict. 3Del 53, 130A267.

904-18¼-New. It has been held that the court's refusal to grant a nonsuit is not assignable as error. 289Pa65, 137 A127.

904-18½-New. It is immaterial on an appeal from a judgment of nonsuit that there may be sufficient evidence to justify an inference contrary to plaintiff's recovery. 98CalA138, 276P424.

904-19 126 Okl 161, 259P211; Va 153 SE731. See also 136 Okl 5, 275P618.

904-20 [a] (1) 149Va906, 141SE860. (2) Court has nothing to do with preponderance of evidence or credibility of witnesses. 145Va681, 134SE692. (3) In action for fraud, where court sustained defendant's demurrer to plaintiff's evidence, appellate court will review whole evidence and will not disturb judgment unless it is clearly against weight of evidence. 42 OklACR 59.

904-21 154Md290, 141A363 (all evidence must be considered); 310Mo 184, 274SW827; MoA 273SW1078; MoA 299 SW116; MoA 17SW(2d)363; 102WVa 215, 136SE30. See also 101WVa499, 133 SE116. [a] **Defendant's evidence disregarded** except as it supports plaintiff's case in determining whether demurrer properly overruled. 149Md189, 131A343. [b] **Where defendant refuses to stand on demurrer to evidence** but goes forward with evidence in its own behalf, appellate court must consider all evidence. MoA 271SW540. [c] **Where demurrer at close of plaintiff's case is waived by defendant's putting in his own evidence**, ruling of trial court on demurrer at close of entire evidence raises question depending on consideration of entire evidence. 220MoA948, 7 SW(2d)403. [d] **In considering demurrer to plaintiff's evidence** question will be determined on plaintiff's evidence alone. MoA 31SW(2d)590.

904-22 122Kan775, 253P409; MoA 10 SW(2d)331; 126 Okl 238, 259P257; 128 Okl 215, 262P208; 149Va140, 141SE836; 102WVa673, 135SE478; 102WVa215, 136SE30. [e] **Lack of direct evidence on a material point** will not warrant disturbing ruling of lower court. 102WVa 215, 136SE30.

904-22½-New. Where defendant refused to stand on its demurrer to evidence, and went forward with its evidence the appellate court was required to consider all evidence introduced in determining if plaintiff made a case for the jury. MoA 271SW540.

904-22¾-New. Where there is no evidence reasonably tending to support the defense interposed, the appellate court will not reverse the judgment of the trial court sustaining plaintiff's demurrer to defendant's evidence. 114 Okl 147, 244P793.

904-22¼-New. In equity where upon weighing the evidence the court sustains the demurrer thereto and rendered judgment for defendant, it will not be reversed unless it is against the clear weight of the evidence. 118 Okl 103, 246 P608.

904-22½-New. Where evidence is conflicting, supreme court will reverse ruling of trial court sustaining demurrer. 142 Okl 8, 285P48.

904-23 91Fla89, 107S350; 49RI 12, 139 A473 (where order grants new trial unless plaintiff remits part of damages, trial court's decision on question of excessiveness of verdict has persuasive force); TexCivA 280SW251; TexCivA 288SW(2d)288; 102WVa432, 135SE386.

904-24 222MoA247, 296SW846 (reviewing court will not pass upon evidence in determining whether sustaining of motion was justified except for such purpose).

904-25 91Fla89, 107S350. [b] **Unless it appears that judicial discretion has been abused** in its exercise, resulting in injustice, or that law has been violated, order granting new trial will not be reversed. 91Fla434, 108S846.

904-25½-New. An order granting a new trial will not be disturbed where it is granted on general grounds. 145Wash 287, 259P1083.

904-26 49RI 12, 139A473; 49RI 146, 141A331; 102WVa432, 135SE386. [a] 177Minn276, 225NW22(1stcase). See also Mo 31SW(2d)998.

904-27 21AlaA393, 108S644; 67CalA 424, 227P940 (probative force of evidence is for trial court, though not conflicting); 216MoA626, 260SW516; MoA 24SW(2d)649; MoA 31SW(2d)257.

905-29 68CalA83, 228P717; 322Mo 137, 14SW(2d)652; MoA 256SW520; 216MoA626, 260SW516; MoA 20SW(2d)301; MoA 24SW(2d)215.

905-30 37GaA782, 142SE178 (first grant of new trial).

905-31 216Ala661, 114S55; Ala 127S 504; Cal 291P412; 68CalA83, 228P717; 88CalA141, 262P778; 91Fla89, 107S350; 42 Ida547, 246P966; 204 Iowa1080, 216 NW697; MoA 48SW(2d)499; MoA 24SW (2d)215; 49RI 146, 141A331; 135Wash 231, 237P292; 140Wash670, 250P32; 145 Wash287, 259P1083.

905-33 AlaA 130S164(1stcase); 91Fla 89, 107S350.

905-34 Ala 127S504; MoA 11SW(2d) 1112; RI 136A247; 49RI 12, 139A473; RI 141A330; 106WVa522, 146SE49.

905-35 67CalA424, 227P940; Iowa 204 NW253; 55ND339, 213NW574.

905-35½-New. , or unless evidence is such that no verdict in favor of party to whom new trial is granted could be allowed to stand. MoA 24SW(2d)641.

905-37 Fla 114S242; 120 Or144, 251P 763; 143Va777, 129SE684. [b] **Where evidence is not physically impossible** or inherently incredible and is sufficient to support verdict, it is reversible error to set it aside. 143Va777, 129SE684.

905-38 73CalA667, 239P78; 92CalA732, 268P951; MoA 24SW(2d)649; 221App Div164, 223NYS1.

905-38½-New. Where admission of irrelevant evidence was not prejudicial, order granting new trial therefor will be reversed. 36BC1, [1925] 3DomLR 979, [1925] 3WestWkly81.

905-38¾-New. The trial court's finding on a motion for a new trial that papers sent to the jury room by mistake were not calculated to affect the verdict is an inference drawn from subordinate facts, and reviewable. 109Conn 722, 145A563.

905-38¼-New. The appellate court will sustain the verdict, although set aside by the trial judge, unless against the law or the evidence. 151Va581, 144 SE610.

905-39 105Conn628, 136A383; 49RI 146, 141A331.

905-40 213Ala492, 105S663; 171Ark 1187, 287SW182; CalA 286P456; 157 Miss822, 128S870; Mo 274SW377; 83 NH501, 144A787; RI 135A158; 50RI 405, 148A324; TexCivA 271SW430; TexCivA 280SW251; TexCivA 22SW (2d)467; TexCivA 28SW(2d)232; 151 Wash245, 275P559. [c] **On denial of motion for new trial based on allegation of jury's misconduct** (1) appellate court will not disturb ruling if record does not leave it reasonably doubtful whether alleged misconduct affected verdict. TexCommnA 278SW839. (2) Decision of questions of fact raised by opposing affidavits held final. 37GaA 500, 140SE782. [d] **Certainty as to misconduct of jury need not be** disclosed by record to warrant appellate court to reverse denial of motion for new trial, it being sufficient if record shows reasonable doubt as to purity of verdict. TexCommnA 278SW839. [e] **Appellate court could not say jury was not qualified** where evidence conflicted and record was incomplete. 35 OhA16, 171NE352.

905-41 162Ga102, 132SE644; 163Ga 580, 136SE785; 163Ga761, 137SE233; 165Ga694, 141SE900; 165Ga836, 142SE 72; 168Ga240, 146SE905; 36GaA28, 134SE822; 36GaA56, 135SE109; 36 GaA22, 135SE492; 36GaA168, 136SE 89; 36GaA166, 136SE100; 36GaA195, 136SE111(2dcase); 36GaA189, 136SE 111(3dcase); 36GaA163, 136SE178; 36 GaA181, 136SE336; 37GaA146, 139SE 134; 37GaA542, 141SE57; 37GaA797, 142SE210; 37GaA818, 142SE201; 38 GaA446, 144SE223(3dcase); 38GaA659, 145SE99(2dcase); 41GaA610, 154SE206 (2dcase); 236Mich471, 210NW478; 168Minn39, 209NW896; Nev 286P120; 124 Okl 251, 255P685; 137 Okl 82, 277 P1026 (remark of trial judge held not to show disapproval of verdict); 88Pa Super507; TexCommnA 18SW(2d)578; TexCivA 8SW(2d)512; TexCivA 14SW (2d)307; 145Wash316, 259P1087 (facts set out in affidavits accepted as true by reviewing court in absence of controverting affidavits); 105WVa118, 141SE 631. [b] 125Me517, 133A435. [c] **Guiding principle** is whether, as reasonable men, jury could have found verdict upon evidence. 91Fla539, 108S186, 45 ALR865.

906-42 161Ga382, 131SE65; 165Ga 837, 142SE163; 166Ga192, 142SE742; 128Kan354, 278P19; ND 228NW456; RI 137A148; TexCommnA 24SW(2d) 372; TexCivA 290SW905; TexCivA 19 SW(2d)930.

906-44 [a] (1) 86 IndA269, 157NE57;

168Minn248, 210NW55.

906-45 215Ala511, 110S804; 217Ala114, 115S8; 220Ala559, 126S885; 236Mich471, 210NW478.

906-48 91Fla539, 108S186; 45ALR865; 238Mich112, 213NW458.

906-48½-New. Where alleged misconduct of a party in feigning illness to prejudice the jury is made a ground for application, denial of a new trial will be affirmed in the absence of evidence showing that the illness was feigned or that the conduct affected the verdict. TexCivA 286SW558.

906-49 See also 36GaA194, 136SE166.

906-49½-New. The appellate court reviews the evidence as to the alleged misconduct of the jury as a basis for a motion for new trial where the record discloses that the trial court declined to pass on such evidence. TexCommnA 278SW539.

906-49½-New. The court was the judge of the credibility of jurors who testified in a hearing on motion for a new trial as to misconduct of the jury. TexCivA 19SW(2d)930.

907-51 TexCivA 24SW(2d)465.

907-56 235Mich337, 209NW204.

907-57 293Pa524, 143A231.

908-62½-New. Where the jury may have been misled by the ruling, and, but for the ruling, might have properly arrived at a contrary verdict, the excepting party is aggrieved, and the error is prejudicial. 127Me406, 144A1.

908-63 6F(2d)721; 9F(2d)525; 13F(2d)704; 13F(2d)747; 15F(2d)321; 16F(2d)395; 36F(2d)171; 41F(2d)640; 213Ala346, 104S653, 39ALR1263; 214Ala553, 108S452; Ala 113S44; 220Ala411, 125S650; 6PortAla365; 169Ark235, 275SW329; 169Ark920, 277SW39 (reversal only for errors prejudicial to complaining party); 171Ark1029, 287SW168, 49ALR316; 179Ark831, 18SW(2d)369; 180Ark453, 21SW(2d)858; 80CalA609, 252P733; 96CalA192, 273P1074; CalA 286P481; 4ColoA204, 35P277; 104Conn596, 134A63; Fla 127S338; Fla 129S340(1stcase); 160Ga865, 129SE528; 36GaA631, 137SE907; 37GaA314, 140SE396; 47Ida395, 276P47; 2Ill340; 323Ill519, 154NE337; 325Ill474, 156NE485; 167IllA632; 234IllA151; 248IllA609; 197Ind350, 149NE178; IndA 170NE332; 1Iowa86; 204Iowa678, 216NW41; 126Kan675, 271P282; 220Ky317, 295SW161; 222Ky531, 1SW(2d)972; 227Ky741, 13SW(2d)1040; 150Md114, 132A594; Md 150A854; 50Mich358, 15NW509; 249Mich63, 227NW789; 156Miss813, 127S287; 308Mo453, 273SW95; 316Mo1050, 294SW1012; 217MoA105, 273SW418; MoA 287SW850; 222MoA370, 3SW(2d)256; MoA 4SW(2d)831; MoA 6SW(2d)632; 76Mont1, 245P532; Nebr 231NW812; 194NC231, 139SE381 (judgments may not be reversed for slight error or for erroneous rulings not material or prejudicial in legal sense); 195NC76, 141SE460; 195NC788, 143SE861; OhA 173NE208; 117Okl276, 246P232; 123Okl206, 251P1012; 124Okl213, 258P160; 128Okl215, 262P208; 129Okl70, 263P1091; 133Okl145, 271P643, 648 [quot CJ]; 142Okl53, 285P82; 123Or72, 260P999; 285Pa212, 131A733 (for slight error not affecting merits which could have been corrected had court's attention been called thereto); 299Pa321, 149A494; Pa 151A676; 5PaDist&Co263; 34PortoRico153; 151SC391, 149SE111; 157SC469, 154SE855; 9LeaTenn135; 116Tex253, 288SW425; TexCivA 51SW256; 21TexCivA338, 51SW279; TexCivA 273SW940; TexCivA 274SW284; TexCivA 3SW(2d)840; TexCivA 22SW(2d)989; 135Wash116, 237P293; WVa 153SE515; BC [1928] 4DomLR511. [b] **Technical errors** as to matters not seriously disputed are immaterial. 214Ala8, 106S49. [c] **Questions pertaining to right of recovery** will not be considered on appeal from judgment for appellant. 215Ala8, 108S857. [d] **Error, to be reversible,** must be material, prejudicial, and amount to denial of some substantial right. 192NC826, 135SE534. [e] **Where court applies wrong principle of law** to prejudice of party, judgment must be reversed on appeal. 51Nev285, 274P194. [f] **Material errors of law** require reversal. 127Or599, 273P337.

903-64 33F(2d)473; 213Ala346, 104S653, 39ALR1263; 20AlaA576, 104S284; 35Ariz334, 278P68; 179Ark831, 18SW(2d)369; 197Cal765, 242P918; 87CalA246, 262P78(3dcase); 58IllA443; 123Kan242, 255P55; 220Ky682, 295SW981; 231Ky160, 21SW(2d)250; 233Ky476, 26SW(2d)26; 234Ky558, 28SW(2d)737; 165Minn349, 206NW457; MoA 284SW850; 222MoA370, 3SW(2d)256; MoA 5SW(2d)682; 117Nebr636, 222NW57; Nebr 228NW866(2dcase); 190NC776, 130SE845 (verdicts and judgments not set aside for harmless error); 31OhA248, 166NE909; 115Okl41, 242P157; 133Okl145, 271P643, 648 [quotCJ]; 123Or72, 260P999; 85PaSuper97; TexCivA 276SW298; Can [1929] 4DomLR73.

903-64½-New. Whether errors are reversible depends on the character and amount of proof supporting the finding and judgment. 325Ill474, 156NE485.

903-64¾-New. Courts must act on the record, and cannot speculate as to what the parties might or might not have done if the error had not occurred. 27F(2d)71.

903-65 13F(2d)747; 72CalA545, 237P791; 110Conn108, 147A370; 35GaA39, 131SE922; 325Ill474, 156NE485; IndA 167NE535; 232Ky680, 24SW(2d)553; 321Mo287, 11SW(2d)26; 103NJL617, 137A543; 30NM566, 240P469; 190NC284, 129SE721; 193NC541, 137SE658; 199NC464, 149SE555(1stcase) (error committed on trial); 115Okl41, 242P157; 128Okl132, 261P918; 128Okl215, 262P208; 138SC31, 136SE13; TexCivA 281SW877; TexCivA 289SW169; TexCivA 4SW(2d)1019; 192Wis160, 212NW301. [b] But see Ala 127S505.

909-66 82NH246, 132A570; 194NC231, 139SE381; 143Va187, 129SE379; 199Wis115, 225NW738.

909-67 21AlaA584, 110S323; 89CalA275, 264P580; 92Fla339, 110S529; 235IllA319 (where appellant had no cause of action); Iowa 233NW106; 221MoA448, 282SW459; NJ 143A739; 191NC376, 131SE742; 197NC673, 150SE193; 33OhA393, 169NE586; 119Okl84, 248P598; 120Okl57, 249P508; Pa 151A674; TexCivA 294SW1115; TexCivA 3SW(2d)576; TexCivA 28SW(2d)843. [a] (3) Where defendant has no valid defense to plaintiff's demand, error in trial is not prejudicial. 50SD255, 209NW339.

909-68 42F(2d)440; 35Ariz334, 278P68; CalA 290P497; 104Conn257, 132A540, 48ALR259; 92Fla339, 110S529; 317Ill401, 148NE274; 249Mich63, 227NW789; 35OhA164, 171NE862; 115Okl41, 242P157; TexCivA 28SW(2d)865.

909-69 36GaA692, 137SE912; Miss 105S496; 128Okl132, 261P918; TexCivA 274SW242; TexCivA 26SW(2d)308; 145Va199, 133SE881; 149Va406, 141SE237; 106WVa183, 145SE177.

910-70 252IllA194; 87IndA597, 162NE66; MoA 279SW771.

910-71 69CalA606, 232P152; 109Conn292, 146A717 (unless inflexible rules of adjective law require it); Fla 126S356; IndA 170NE332; 223Ky685, 4SW(2d)677; 167La712, 120S61; 9LaA354, 120S506; 217MoA105, 273SW418; NJ 142A818; 128Okl215, 262P208; TexCivA 283SW591; Utah 290P947; 147Va937, 133SE576; Wis 232NW566.

910-71½-New. Evidence which very nearly insufficient as matter of law to sustain verdict requires reversal for errors not otherwise constituting ground for reversal. TexCivA 279SW906.

910-71½-New. It has been held that an erroneous procedure is ground for reversal although the same result might have been reached had the proper procedure been followed. 13F(2d)740.

910-72-73 142Wash417, 253P450.

911-74 218Ala616, 119S635; 23AlaA20, 122S467(2dcase); 168Ark64, 269SW57 (prejudice assumed unless judgment is correct under undisputed evidence); 41GaA536, 153SE784(1stcase); 199Ind290, 157NE433; 87IndA333, 158NE294; 206Iowa1217, 220NW333; Iowa 232NW133; 165Minn349, 206NW457; NJ 147A45 (presumption that error is harmful where it may have controlled decision); 22OhA475, 154NE61; 118Or568, 247P815; 131Or501, 281P120; TexCommnA 283SW765; TexCommnA 298SW526; TexCommnA 1SW(2d)602; TexCivA 293SW914; TexCivA 4SW(2d)169; TexCivA 11SW(2d)621; TexCivA 18SW(2d)740; TexCivA 30SW(2d)344; Utah 270P349. But see 82Colo509, 261P864, 55ALR1285; 211Ky791, 278SW124. [a] (6) Under Judicial Code § 269, as amended in 1919, former federal rule has been greatly relaxed, and if record fairly indicates that error was not prejudicial, reversal is not necessary. 13F(2d)704. [e] In Indiana.—87IndA333, 158NE294.

911-75 41GaA536, 153SE784(1stcase) (presumption rebutted); TexCommnA 283SW765; TexCivA 278SW225 (where judgment for costs, in favor of one defendant who failed to answer, was held harmless even if erroneous, in absence of showing by appellant that this defendant has incurred some costs); TexCivA 9SW(2d)146; TexCivA 26SW(2d)336 (offending party has burden of showing absence of prejudice). [b] **But a party complaining of misjoinder** of independent causes must affirmatively show prejudice. TexCivA 26SW(2d)400.

912-76 Mo 270SW375, 377 [quotCJ]; TexCivA 17SW(2d)182.

912-77 5F(2d)562; 20F(2d)845; 214Ala62, 106S396; 217Ala511, 116S681; Ala 128S602; 28Ariz581, 238P389; 198Cal157, 244P338; 202Cal251, 259P752 (must show miscarriage of justice); 203Cal26, 263P240; 206Cal740, 276P335; 70CalA432, 233P394 (appellant must point out prejudice); 78CalA733, 248P727; 79CalA318, 249P235; 87CalA669, 262P770 (must show miscarriage of justice); 88CalA354, 263P578; 93CalA182, 269P556; 100CalA503, 280P394(2dcase); CalA 293P78; 80Colo420, 252P346; 92Fla503, 109S433; 92Fla1062, 111S725; 34GaA316, 129SE573; 37GaA314, 140SE396; 41GaA538, 154SE159; 44Ida651, 258P534; Iowa 226NW103; 129Kan150, 281P881; 125Me178, 132A132; Me 149A385; 265Mass186, 163NE742; Mass 165NE660; Mass 172NE349; Mo 270SW375, 377 [quotCJ]; 220MoA1034, 278SW1081; Mo 31SW(2d)792; MoA 285SW768; MoA 291SW163; 86Mont240, 283P222; Mont 289P571; Nebr 232NW585; 190NC301, 129SE822; 193NC541, 137SE658; 30OhA118, 164NE370; 117Okl276, 246P232; 128Okl226, 262P203; 85PaSuper97; SD 226NW755; SD 227NW469; TexCivA 274SW671; TexCivA 275SW242; TexCivA 281SW306; TexCivA 284SW643; TexCivA 7SW(2d)661; TexCivA 9SW(2d)382; TexCivA 20SW(2d)248; 99Vt425, 134A599; 101Vt285, 143A394; 153Va149, 149SE476 (complaining party has burden of showing prejudicial error); 142Wash417, 253P450; 144Wash440, 258P321. But see Utah 275P582.

912-77½-New. Under this rule, the test is whether in the circumstances of the particular case it sufficiently appears that the rights of the complaining party have been injuriously affected. 99Vt219, 131A21, 49ALR1382.

912-78 MoA 278SW783; TexCommnA 298SW401. See also 213AppDiv8, 209NYS502.

912-79 199Ind290, 157NE433. But see TexCivA 22SW(2d)951; TexCivA 22SW(2d)1080. Contra 214Ala62, 106S396.

912-80 Contra 133Okl130, 271P675.

912-81½-New. A party objecting to the amendment of a pleading during the trial has the burden of showing prejudice. 179Minn19, 228NW440.

912-82½-New. In Alabama it is held that error as to matter of pleading is not grounds for reversal unless the court is of the opinion as matter of fact that the error was injurious to substantial rights. 214Ala553, 108S452.

912-82½-New. In the absence of the evidence, it will be presumed that no harm was suffered by the allowance of amendment of pleas. 153Miss712, 121S138(2dcase).

912-83 Iowa 226NW922(2dcase); Iowa 233NW51; 128Me393, 148A147,

68ALR481; TexCommnA 294SW536; TexCivA 283SW920. But see 86CalA402, 260P841. [b] **Jury are presumed intelligent,** in determining whether erroneous admission of documentary evidence affected party's substantial rights. 30 OhA118, 164NE370.

913-84 214Ala553, 108S452; 91CalA 715, 267P741; 216Ky119, 287SW353; 265Mass494, 163NE255; 322Mo158, 16 SW(2d)190; MoA 4SW(2d)875; 114 Okl 21, 242P1027; 120 Okl 282, 251P 43; 124 Okl 235, 254P962; 128 Okl 234, 262P694; 133 Okl 14, 270P838; 144 Wash440, 258P321.

913-85 144SC212, 142SE516; TexCivA 18SW(2d)750.

913-86 203Cal 26, 263P240 (evidence as to matters presumed); 220Ky753, 295SW1025; 322Mo 158, 16SW(2d)190; TexCivA 292SW594; TexCivA 9SW(2d) 69.

913-91 But see Ala 130S211.

913-93 49SD96, 206NW236.

914-94 Iowa 231NW331. But see 203 Iowa676, 213NW431.

914-95 214Ala553, 108S452; CalA 284 P681; 88 IndA693, 165NE526; 205 Iowa752, 218NW499; 209Ky619, 273 SW439; 128Me445, 148A680; Mass 169 NE787; 120 Okl 282, 251P43; 295Pa 349, 145A437; 50SD230, 209NW338.

914-96 198Cal 157, 244P338; 47 Ida 430, 276P306.

914-97 20F(2d)619; 37F(2d)271; 218 Ala233, 118S262; 41 Ida653, 240P932; 262Mass437, 160NE249; MoA 280SW 726; MoA 281SW452; 81NH522, 129A 768, 42ALR176; 112 OhSt500, 147NE 910; Oh 170NE641; TexCommnA 280 SW557; 116Tex253, 288SW425; Tex CommnA 298SW268; TexCivA 281SW 331; TexCivA 287SW71; TexCivA 4 SW(2d)159 (evidence most favorable to appellant alone considered); 69Utah323, 255P172; Utah 270P349. See also 243 IllA298. But see 203 Iowa194, 212NW 354. [d] **The test** is "whether the jury could have been misled." 81NH522, 129 A768, 42ALR176.

914-98 112 OhSt500, 147NE910; 69 Utah323, 255P172.

915-2 69Utah323, 255P172.

915-3 MoA 281SW452.

915-8 214Ala553, 108S452; TexCivA 292SW638.

915-9½-New. Repetition and a number of instructions, abstract and argumentative, have been held not to raise the presumption of prejudicial error. MoA 17SW(2d)359.

915-10 135SC62, 133SE533.

915-12 220Ky682, 295SW981.

915-13 TexCommnA 284SW539.

915-14 82NH408, 135A27.

915-15 218Ky111, 290SW1057; Tex CommnA 13SW(2d)334; TexCivA 3SW (2d)106.

915-16 But see TexCommnA 298SW 526.

915-17½-New. Denial of the right to be heard by counsel affirmatively implies injury, casting on the other party the burden of showing the contrary. 218Ala541, 119S672.

915-20 153Miss712, 121S138(2dcase).

915-23 [a] **Failure to file findings** as requested is presumed prejudicial error, where evidence was conflicting. TexCivA 26SW(2d)430. [b] **Failure to make requested findings** will be presumed prejudicial. TexCivA 27SW(2d) 873.

915-24 190NC284, 129SE721; SD 227 NW380.

916-25 43 Ida93, 251P167.

916-26½-New. Misconduct of jurors. It will not be presumed that misconduct of jurors is prejudicial, and the party complaining must make affirmative showing of prejudice. 201 Iowa 1044, 207NW984.

916-29 217Ala65, 114S800 (denial of motion to qualify jurors as to interest in indemnity company).

916-29½-New. Citation of inapplicable authorities in court's opinion is harmless error. 32PortoRico 464.

916-29¼-New. Invading province of jury. It is a legal inference that prejudice arises by eliminating from a jury a material fact properly pleaded. 22 OhA475, 154NE61.

916-29¼-New. Error, assigned in an ex parte order directing the receiver to pay the costs of litigation, is harmless where the receiver made no disbursements. 98Fla946, 124S719.

916-29½-New. Misconduct of juror in failing to attend view pursuant to order of court need not be shown to be prejudicial. 137 Okl 231, 278P1102.

916-31 12F(2d)649; 218Ala637, 119S 844(2dcase); 180Ark947, 23SW(2d)611; 181Ark606, 26SW(2d)1114; 69CalA399, 231P375; 97CalA583, 275P990; CalA 291P879; 84Colo 174, 269P574; 104 Conn404, 133A214; 109Conn292, 146A 717; 111Conn209, 149A838; 164Ga23, 137SE390; 84 IndA694, 151NE12; 202 Iowa924, 211NW232; 203 Iowa1380, 214 NW546; Iowa 232NW124; 214Ky643, 283SW1015; 216Ky764, 288SW687; 168 La736, 123S308; 170La654, 129S118; 238Mich198, 213NW112; 241Mich349, 217NW18; Mo 26SW(2d)929; MoA 272 SW1045; MoA 27SW(2d)487; MoA 27 SW(2d)739; MoA 30SW(2d)621; 80 Mont293, 260P727; 244NY168, 155NE 88; 217AppDiv206, 216NYS516; 192NC 502, 135SE323; 52ND31, 202NW653; 22 OhA255, 154NE342; 35 OhA91, 172 NE298; 118 Or436, 235P694, 246P733; 156SC203, 152SE878; SD 226NW644; TexCivA 283SW205; TexCivA 297SW 888; TexCivA 2SW(2d)980; TexCivA 11SW(2d)668; Utah 276P651; 149Wash 249, 270P831.

917-32 213Ala393, 104S754; 214Ala 447, 108S40; 90CalA443, 265P971; 103 Conn503, 131A25; 166Ga222, 142SE857; 118 Or436, 235P694, 246P733; 138SC 241, 136SE234.

917-33 213Ala393, 104S754; 219Ala 439, 122S419; 143Miss146, 108S424.

917-34 35GaA133, 132SE461.

917-35 157Miss3, 127S575.

917-37 220Ala598, 127S176; MoA 277 SW953.

917-39 28F(2d)89; 32F(2d)561; 216 Ala73, 112S437; 219Ala353, 122S437; Ark 294SW707; 176Ark1206, 3SW(2d) 297; 83CalA542, 257P140; 97CalA583, 275P990; 84Colo 27, 267P1064; 168Ga 301, 147SE571; 207 Iowa1293, 224NW 820; 255Mass611, 152NE220; 171Minn 475, 214NW469; 175Minn115, 220NW 551; MoA 279SW438; 193NC798, 138 SE135; 143 Okl 131, 288P281; 292Pa 574, 141A476; TexCivA 270SW1101; TexCivA 281SW234; TexCivA 21SW(2d) 754(2dcase); 143Va469, 130SE393; 143 Va656, 129SE687. [a] (4) Ruling requiring children proposing will for probate to prove their legitimacy is too favorable to one contesting probate on ground of illegitimacy. 255Mass611, 152NE220(2dcase). [j] **Error in cross-examination of expert** in action under statute for wrongful death against physician is harmless as respects defendant, where answers were favorable to him. 218Ala609, 119S647.

918-40 230Ky39, 18SW(2d)877; 178 Minn347, 227NW352; 140Miss397, 105 S854; Mo 285SW482; 56ND265, 217 NW177; TexCivA 3SW(2d)1113.

918-42 15F(2d)942; 24F(2d)676; 35 F(2d)273; 214Ala109, 106S686; 214Ala 627, 108S573; 215Ala185, 110S281; 215 Ala191, 110S137; 216Ala455, 113S403; Ala 130S203; 28Ariz531, 238P336; 29 Ariz121, 239P795; 31Ariz302, 252P1012; 35Ariz488, 279P253; 169Ark532, 275 SW912; 170Ark346, 280SW354; 170Ark 644, 280SW652; 178Ark304, 10SW(2d) 882, 61ALR914; 179Ark412, 16SW(2d) 469; Ark 31SW(2d)530; 80CalA109, 250P693; 200Cal 265, 252P1045; 207 Cal 279, 277P1045; 79CalA234, 249P 223; 81CalA270, 253P776; 81CalA772, 254P926; 82CalA542, 255P858; 90CalA 390, 266P320; 97CalA524, 275P1029; CalA 291P269; 104Conn297, 132A405; 105Conn528, 136A76; 106Conn551, 138A 479, 53ALR1042; 111Conn317, 150A17; 109Conn292, 146A717; 110Conn108, 147A 370; 161Ga477, 131SE281; 162Ga295,133 SE257; 169Ga294, 150SE164; Ga 154SE 793; 33GaA523, 127SE151, 37GaA74, 139 SE83; GaA 155SE51; 42 Ida349, 245P95; 224 IllA312; 243 IllA129; 246 IllA467; 255 IllA305; 88 IndA532, 164NE705; IndA 170NE92; 200 Iowa705, 205NW 351; 205 Iowa291, 217NW880; 206 Iowa 1134, 221NW802; 207 Iowa113, 222NW 416, 62ALR1174; Iowa 224NW589; Iowa 232NW137; 120Kan585, 245P115; 210 Ky508, 276SW133; 211Ky624, 277SW 986; 213Ky336, 281SW170; 219Ky389, 293SW155; 231Ky72, 21SW(2d)135; 231Ky720, 22SW(2d)105; 234Ky243, 27 SW(2d)952; 234Ky427, 28SW(2d)479; 235Ky211, 30SW(2d)885; 150Md114, 132A594; 151Md664, 135A835; 152Md 536, 137A299; 255Mass486, 152NE332; Mass 164NE820; 234Mich490, 208NW 455; 238Mich390, 213NW453; 239Mich 37, 214NW170; 239Mich676, 215NW3; 244Mich649, 222NW91; 150Miss621, 116 S287; 308Mo 142, 271SW773; Mo 274 SW373; 310Mo 48, 274SW764; 315Mo 367, 286SW106; 320Mo 655, 8SW(2d) 918; 322Mo 469, 17SW(2d)337; 322Mo 765, 18SW(2d)42 (refusal of requested instruction); Mo 19SW(2d)465; MoA 272SW117; MoA 272SW984; MoA 274 SW507; MoA 275SW48; 218MoA352, 275SW51; MoA 279SW212; MoA 282 SW123; 220MoA720, 293SW468; 220 MoA1112, 296SW257; MoA 282SW170; MoA 293SW483; MoA 297SW197; MoA 1SW(2d)218; MoA 14SW(2d)972; MoA 15SW(2d)378; MoA 15SW(2d)868(2d case); MoA 17SW(2d)621; MoA 23SW (2d)1100; MoA 25SW(2d)558; MoA 32 SW(2d)118; 79Mont91, 254P1070; 86 Mont314, 283P427; 116Nebr297, 216NW 810; 240NY588, 148NE717; 244NY168, 155NE88; 217AppDiv206, 216NYS516; 191NC690, 132SE788; 193NC456, 137 SE324; 194NC221, 139SE224; 198NC 389, 151SE877; 49ND478, 191NW772; 51ND673, 200NW780; 19 OhA94; 21 OhA12, 153NE103; 21 OhA12, 153NE 102; 21 OhA308, 153NE131; 22 OhA 255, 154NE342; 26 OhA79, 159NE843; 34 OhA327, 171NE318; 113 Okl 254, 241 P789; 115 Okl 139, 241P772; 128 Okl 23, 261P174; 128 Okl 234, 262P694; 132 Okl 167, 269P1076, 61ALR218; 133 Okl 145, 271P643, 648 [quotCJ]; Okl 292P 335(2dcase); 117 Or306, 244P75; 124 Or 585, 265P417; Or 293P422; 298Pa352, 148A527; 8PaDist&Co 6; RI 147A664; 133SC335, 131SE592; 133SC353, 131SE 146 (instruction that agency cannot be proved by what agent says out of court held favorable to principal); 134SC86, 131SE774; 140SC123, 138SE675; 147 SC58, 144SE579; 152SC178, 149SE753; 159Tenn130, 17SW(2d)13; TexCivA 276 SW445; TexCivA 291SW667; 65Utah 548, 238P278; 142Va769, 128SE55; 147 Va178, 136SE660; 151Va173, 144SE485; 152Va236, 146SE265; 143Wash541, 255 P947; 148Wash359, 268P884; 192Wis 249, 212NW796.

919-43 15F(2d)942; 174Ark10, 294SW 357; 70CalA624, 234P113; 104Conn703, 134A246; 201 Iowa1179, 207NW235; 151Md664, 135A835; 253Mass37, 148 NE101; 221MoA188, 299SW137; 83NH 383, 142A707; 104NJL519, 140A408; 217AppDiv537, 216NYS558; 194NC809, 140SE300; 23 OhA535, 156NE231; Tex 293SW901.

919-44 169Ark136, 273SW378; 171Ark 34, 283SW1; 203 Iowa1194, 212NW354; 232Mich276, 205NW134; 311Mo 92, 277 SW908; 315Mo 367, 286SW106; 319Mo 619, 5SW(2d)447; 220MoA720, 293SW 468; 221MoA727, 285SW772; MoA 7 SW(2d)723; 191NC690, 132SE788; 193 NC456, 137SE324; 48SD554, 205NW 654; 197Wis538, 222NW821. See also MoA 15SW(2d)853. [a] (4) Charge overemphasizing necessity of establishing conspiracy between defendants is not prejudicial to defendant. 103Conn 708, 131A497.

919-45 174Ark10, 294SW357; 321Mo 378, 11SW(2d)268; MoA 24SW(2d) 1069.

919-46 171Ark34, 283SW1; 80CalA208, 250P1062; CalA 284P681; 169Ga237, 149SE790; 203 Iowa1194, 212NW354; 151Miss532, 118S541; 322Mo 765, 18SW (2d)42; MoA 282SW170; MoA 18SW (2d)131; 196NC237, 145SE235; 122 Okl 101, 251P495.

919-47 Cal 290P22.

919-48 181Ark1037, 28SW(2d)1073; MoA 19SW(2d)902.

919-49 171Ark34, 283SW1.

919-50 32Ariz463, 259P1049; 319Mo 1169, 8SW(2d)580; 19 OhA68; 33 OhA 47, 168NE619.

919-51 133SC335, 131SE592; TexCivA 26SW(2d)722.

920-52 169Ark309, 275SW333; 98CalA 257, 276P1071; 39GaA371, 147SE163(2d case); 151Md664, 135A835.

920-53 8F(2d)16; 28Ariz454, 237P642; 31Ariz206, 251P550; 102CalA254, 283P 100; 161Ga477, 131SE281; 35GaA92, 132SE259; 35GaA444, 133SE304; 39Ga A173, 146SE561; 40GaA4, 148SE757; 47 Ida430, 276P306; 208 Iowa70, 221 NW941; 226Ky306, 10SW(2d)1109; 151 Md664, 135A835; 316Mo 1266, 296SW 105 (comparative negligence where contributory negligence not pleaded); MoA 293SW483; MoA 5SW(2d)687; MoA 7SW(2d)370; MoA 24SW(2d)717; Minn 231NW204; 155Miss75, 124S74; 79Mont 91, 254P1070; 117 Or319, 244P79, 44 ALR1397; 121 Or236, 252P400. [a] 15 F(2d)942.

920-55 TexCivA 19SW(2d)166.

920-56½-New. or of other instruction not applicable to the facts, 214Ala627, 108S573.

920-58 234Ky639, 28SW(2d)956.

920-59 29Ariz280, 240P1031; 170Ark 644, 280SW652; 86CalA595, 261P481.

920-61½-New. Defendant cannot complain that plaintiff failed to ask instructions in her own behalf. MoA 19SW(2d) 510.

920-62 214Ala613, 108S567; 218Ala 375, 118S561; 232Ky564, 24SW(2d)296; 317Mo 492, 297SW353.

920-63 218Ky337, 291SW395; 232Mich 154, 205NW196; 232Mich409, 205NW 113; 241Mich349, 217NW18; 115 Okl 139, 241P772; TexCommnA 27SW(2d) 125; TexCivA 290SW283. [b] **Plaintiff cannot complain** of submission of apparent legal issue to jury where case was finally disposed of as equitable issue. 138SC169, 136SE209.

921-64½-New. or where the court would have been warranted in instructing a finding on the question, 8F(2d) 689.

921-65 34Ariz482, 272P918; 179Ark 363, 19SW(2d)1107; 109Conn292, 146A 717.

921-66 TexCivA 5SW(2d)824.

921-67 34Ariz489, 272P921; 35Ariz 285, 276P846.

921-67½-New. Submission of the question whether an expert witness' opportunity for judging the genuineness of a signature would qualify him is not erroneous. 294Pa425, 144A416.

921-68 173Ark1181, 294SW994; 87 CalA684, 263P353; 37GaA792, 142SE 173; 119Kan307, 239P993; 148Md381, 129A362 (where relief is in accordance with prayer of bill); 231Mich585, 204 NW768; Minn 230NW778 (fixing value more generously than evidence warranted); NJ 133A74; 52SD528, 219NW206; TexCivA 276SW322; TexCivA 16SW(2d) 925 (issues answered in appellant's favor). [h] **Inadequate verdict in personal injury action** cannot be complained of by plaintiff on his appeal if his own negligence contributed to injury, or unless defendant was negligent. 166Minn425, 208NW182.

921-69 10F(2d)22; 84CalA567, 258P 453; 84CalA775, 258P652; 88CalA481, 263P826; 101CalA186, 281P514; Mo 30 SW(2d)71; 197NC539, 149SE686(2d case); TexCivA 25SW(2d)935; 199Wis 263, 225NW138. [b] (2) 89CalA690, 265 P403.

922-71 12F(2d)649; 213Ala491, 105S 643 (error is not prejudicial where there is no severance in assignment of errors); Ariz 286P825; 203Cal 583, 265 P218; 207Cal 167, 277P327; CalA 259 P468; 83Colo 99, 262P921; 45 Ida349, 262P512; 84 IndA694, 151NE12; 205 Iowa248, 216NW73; 211Ky526, 277SW 843 (judgment more favorable than that to which appellant is entitled); 9LaA 505, 121S261; LaA 129S168; 141Miss 407, 106S518; 289Pa171, 137A226; 52 SD201, 217NW187; TexCommnA 1SW (2d)568; TexCivA 2SW(2d)980; Tex CivA 3SW(2d)527; WVa 153SE515; 197Wis173, 221NW750. [k] **That judgment gives appellant relief to which he it not entitled under issues** furnishes no ground for complaint for appellant. 84 IndA694, 151NE12. [l] **Failure of judgment to be in alternative.**-SD 231NW 538.

922-71½-New. or proceedings which lead up to it, 10F(2d)22.

922-75 217Ala81, 114S688; 219Ala 645, 123S38; 28Ariz443, 237P384; 168 Ark943, 272SW663; 174Ark90, 294SW 361; 175Ark944, 1SW(2d)88; 203Cal 1, 262P1087; 203Cal 233, 263P802; 71 CalA683, 236P174 (verdict reduced by court); 72CalA323, 237P401; 96CalA 306, 273P1114; 97CalA43, 274P1006; 98CalA787, 277P1099; 102CalA623, 283 P393; CalA 284P1047; CalA 288P134; CalA 288P702; CalA 293P141; 86Colo 317, 281P363; 105Conn366, 135A391; 36GaA356, 136SE806; 168GaA112, 147 SE115; 245 IllA338; 252 IllA5; 84 IndA396, 151NE395; IndA 167NE535; 118Kan202, 235P119; 214Ky643, 283 SW1015; 223Ky619, 4SW(2d)748; 246 Mich689, 225NW580; 249Mich500, 229 NW587; 171Minn25, 213NW47; MoA 21SW(2d)932; NJ 133A72; NJ 133A 778; NJ 135A62; NJSup 150A191; 229 AppDiv407, 242NYS335; 115 Okl 193, 241P471; 137 Okl 90, 278P281; 127 Or 450, 271P741; 141SC238, 139SE459; TexCommnA 15SW(2d)223; TexCivA 274SW319; TexCivA 289SW79; Tex CivA 290SW299; TexCivA 293SW221; TexCivA 299SW917; TexCivA 4SW(2d) 88 (date of accrual of interest); Tex CivA 8SW(2d)561; TexCivA 10SW(2d) 238; TexCivA 19SW(2d)89; TexCivA 23SW(2d)890; 70Utah203, 259P318, 62 ALR54; 134Wash128, 235P2; 193Wis 370, 214NW374, 53ALR771.

923-76 TexCivA 16SW(2d)1100; 155 Wash171, 283P1091.

923-77 See also 91CalA11, 266P601.

923-80 235Ky640, 32SW(2d)18.

923-81 205Cal 89, 269P932; NJ 135A 62.

923-86 84 IndA636, 150NE319; SD 227 NW369. [a] 144Miss194, 109S704.

923-88½-New. **Plaintiff cannot complain** of granting a new trial on defendant's motion for judgment notwithstanding the verdict, where the evidence was insufficient and defects could be supplied on another trial. 53ND340, 205NW875.

923-88⅓-New. Where plaintiffs had judgment for the difference between the agreed price and the market value, in accordance with their prayer, but defendant was given judgment for the market value, which was in accordance with plaintiffs' prayer, and not on defendant's cross action, it is not error as against defendant to adjudge that each party pay his own costs. TexCivA 12 SW(2d)1102.

923-88¼-New. That a bond for a suspensive appeal greatly exceeds the amount required furnishes no ground for complaint by appellee. 168La736, 123S308.

923-89 [b] **Remarks held prejudicial even though favorable to complaining party.**-134SC412, 132SE811.

924-97 13F(2d)747; 43F(2d)537; 214 Ala8, 106S49 (as to matters on which no material dispute); 219Ala265, 122S29; 99CalA534, 278P932; 81Colo 50, 253P 397; CalA 291P451; 322 Ill 613, 153NE 633; 171 IllA597; 167Minn479, 209NW 490; MoA 275SW592; 128 Okl 23, 261 P174; 286Pa114, 133A31 (defendants lost nothing by trial in equity, where on appeal they claimed they were entitled to trial at law). [a] (5) Error, if any, in granting motion to strike from complaint invalid ordinance is not prejudicial. 117 Or411, 244P313. (6) Inadvertent use of word "plaintiff," instead of "defendant," in motion for new trial will be disregarded on appeal. IndA 168NE613.

924-98 13F(2d)747; 214Ala181, 106S 871; 81Colo 50, 253P397; 106Conn254, 138A136; 203 Iowa792, 206NW586; 205 Iowa621, 218NW334; 232Ky680, 24 SW(2d)553; 26 OhA135, 159NE589; 128 Okl 23, 261P174; TexCivA 18SW (2d)845. See also 151Md503, 135A369.

924-1 85CalA607, 259P976; 95CalA 144, 272P610; CalA 285P1081; 160Ga 705, 129SE31; 165Ga685, 142SE142; 169Ga240, 150SE206(2dcase); 121Kan 279, 246P1004; 121Kan405, 247P637; 145Miss31, 110S857; MoA 25SW(2d) 558; Minn 231NW401; TexCivA 289 SW1067; TexCivA 1SW(2d)672; Tex CivA 26SW(2d)664(2dcase); 148Va651, 139SE325.

925-2 171Ark828, 286SW969; 180Ark 500, 22SW(2d)45; 96CalA31, 273P849; 88CalA411, 263P566; 97Fla679, 122S 107(2dcase); 242 IllA548; 218Ky691, 291SW1054; 230Ky351, 19SW(2d)988; 242Mich676, 219NW734; Mo 9SW(2d) 947; 130 Or522, 279P867; Or 290P556; 49SD580, 207NW978; TexCivA 11SW (2d)404; TexCivA 12SW(2d)662; Tex CivA 21SW(2d)97; TexCivA 22SW(2d) 961; TexCivA 32SW(2d)224; 149Wash 319, 270P1038.

925-3 164La175, 113S808; TexCivA 2 SW(2d)936 (where action voluntarily dismissed).

925-4 TexCivA 275SW242; TexCivA 277SW701. [a] **Conversely,** prejudicial misjoinder of insurance company with defendants in negligence action is ground for reversal. TexCivA 284SW 321.

925-5 Ariz 288P1034 (nonjoinder raised only when parties are indispensible); 75CalA212, 242P518; CalA 291P698; 47 Ida794, 279P302; 331 Ill 308, 163NE1; 251 IllA89; Iowa 216NW 88; 218Ky691, 291SW1054; 230Ky99, 18SW(2d)968; Utah 290P367. [d] **In married woman's action** for personal injuries nonjoinder of husband is harmless. 284Pa267, 131A260 (where damages recovered no greater than in joint action and judgment is bar to claim by husband. [e] **Decree reversed** where in disregard of duty to decline to proceed unless necessary parties are brought in. 220Ala411, 125S650.

926-10 36F(2d)646; 201Cal 36, 255P 800; 114Nebr173, 206NW760.

926-11 34Wyo 332, 243P394.

926-13½-New. Failure to serve complaint in intervention on defendant though irregularity did not prejudice defendant where findings were against intervener. CalA 289P169.

926-15 207 Iowa800, 218NW533.

926-20 170Ark758, 281SW17.

926-22 123 Or651, 262P263.

926-23 170Ark758, 281SW17.

926-27½-New. because one is made a party by a bill of interpleader, 145Miss 31, 110S857.

926-29½-New. because suit was brought in name in which plaintiff did business instead of in his individual name as the real party in interest, 121 Kan405, 247P637.

926-30½-New. because a minor suing for personal injuries bore his mother's surname in the proceedings, but his father's name in school, 128Kan365, 278 P23.

926-31½-New. Bringing in new party defendant prejudicial to original and later defendant is error. 215AppDiv19, 213NYS138.

926-31⅓-New. A judgment upon a claim for breach of contract in favor of an assignee under an oral assignment will not be reversed because the assignor was the beneficial owner where the assignor was a witness so that defendant was not prejudiced. 121Kan 279, 246P1004.

926-31¼-New. Allowing an agent of real party in interest to sue as plaintiff has been held harmless error, where the judgment in the proceedings was binding on the principal. 285Pa426, 132A287.

926-31⅕-New. Failure to give to the jury an amendment striking defendant was harmless error where the jury were charged that defendant was eliminated. 38GaA280, 143SE905.

926-31⅙-New. Judgment should be reversed where unsuccessful litigant became insane during trial and no guardian was appointed. Nebr 231NW843.

926-33 240Mich661, 216NW446.

926-34 205Cal 782, 272P1048.

927-40 27F(2d)71; Ariz 287P444; 169 Ark363, 275SW748; 202Cal 134, 259P 727; CalA 284P956; 36GaA358, 137SE 99; 208 Iowa912, 223NW894; Iowa 229 NW159; 215Ky647, 286SW851; 226Ky 347, 10SW(2d)1112; 161La282, 108S 483; 217AppDiv713, 215NYS683. But see 178Ark906, 12SW(2d)893. [a] See also 217Ky842, 290SW720. [c] **Decree overruling demurrer to bill** presenting no cause of action in equity is not error where it states legal cause of action. 140Miss513, 106S447. [d] **Federal appellate court will transfer case from**

law to equity or vice versa on its own motion though objection not raised below, where otherwise failure of justice would result. 40F(2d)626. [e] **Refusal of jury trial** is not ground for reversal where evidence would have warranted binding instructions. **Wash** 288P217.

927-42 15F(2d)535; 21F(2d)280; 36F(2d)646; 214Ala102, 106S621; 216Ala4, 112S433; **Ala** 130S63; 201Cal605, 258P85; 204Cal247, 267P694; 74CalA629, 241P574; 76CalA541, 245P476; 77CalA578, 247P247; 82CalA532, 255P854; 85CalA607, 259P976; 87CalA92, 261P763; 92CalA501, 268P487; 97CalA144, 275P245; 81Colo39, 253P477; 84Colo456, 271P191; 43Ida93, 251P167; 46Ida231; 266P659; 182IllA145; 88IndA267, 163NE613; 213Ky346, 281SW174; 126Me35, 135A825; 84Mont158, 274P489; 51Nev150, 271P467; 136Misc837, 241NYS68; 28OhA361, 162NE722; **TexCivA** 28SW(2d)333; **TexCivA** 3SW(2d)1113; **TexCivA** 6SW(2d)414 (clerical errors); **TexCivA** 29SW(2d)520; 134Wash108, 234P1029; 135Wash189, 237P305; **Wash** 290P850. [a] **Clerical error** in transposing words "plaintiff" and "defendant" is no ground for reversal. 213Ala510, 105S654.

927-44 216Ala4, 112S433.

927-47½-New. bill in chancery not held bad for lack of proper address, where otherwise correct and has been disposed of on merits; 90Fla375.

928-51 **TexCivA** 288SW283.

928-53 **TexCivA** 12SW(2d)811.

928-55 **Utah** 269P1014.

928-56 126Me35, 135A825.

928-59 235Ky574, 31SW(2d)910.

928-64 214Ala102, 106S621; **CalA** 277P909; 99CalA303, 278P448; **IndA** 172NE131; **TexCivA** 299SW665; **TexCivA** 27SW(2d)258. See also 67CalA659, 228P383.

928-66 81Colo39, 253P477.

928-67½-New. by answer, **MoA** 296SW442.

928-68 83IndA701, 149NE909; **TexCivA** 299SW325.

928-69 215Ala205, 110S384.

928-71 See also 37Wyo365, 261P905.

928-73 312Mo458, 278SW759.

928-75½-New. That complaint specified different rule of damages than that upon which judgment was recovered is not reviewable if damages awarded were proper for cause of action alleged. 216AppDiv198, 215NYS90.

928-75¾-New. Where a bill in equity relative to possession of trust property filed in the court having possession of the property is in reality an ancillary bill, the appellate court will not reverse because unable to give it a proper cognomen. 241Mich146, 216NW472.

928-76 75CalA692, 243P701; 92CalA526, 268P682; **IndA** 148NE501; 128Kan107, 275P1081, 67ALR966; 31NM568, 249P99 [quotCJ]; 212AppDiv332, 209NYS89; **TexCivA** 2SW(2d)936 (where action voluntarily dismissed); **TexCivA** 17SW(2d)1100; **TexCivA** 18SW(2d)267; **TexCivA** 32SW(2d)255(2d case).

929-77 219Ala155, 121S510; 219Ala581, 122S693 (cure of error by special finding of court); **Ala** 127S832; **Ala** 130S401; 22AlaA68, 112S543; 102CalA669, 283P845(2dcase); 36GaA552, 137SE414; 201Iowa1317, 207NW567; **Iowa** 227NW158; 126Me35, 135A825; **Miss** 116S888; **MoA** 285SW538; 220AppDiv704, 221NYS437; 29PortoRico754; 33PortoRico136; **TexCivA** 289SW155; **TexCivA** 10SW(2d)172; **TexCivA** 15SW(2d)1053; **TexCivA** 32SW(2d)369.

929-78 **IndA** 148NE337 (separating acts of negligence complained of and stating them specifically in separate counts).

929-78½-New. overruling motion to separate two alleged several causes of action; 82Colo264, 259P1033.

929-83 49SD524, 207NW543; **TexCivA** 10SW(2d)272; **TexCivA** 31SW(2d)679.

929-85 **TexCivA** 11SW(2d)369; **Va** 152SE539.

929-87 23AlaA246, 123S265; 203Cal1, 262P1087; 83IndA380, 148NE497 (where court fully and clearly found facts notwithstanding its erroneous ruling on pleadings); 230Ky78, 18SW(2d)866.

929-88 42Ida48, 246P12; 100WVa405, 130SE471 (failure to traverse special plea when facts alleged provable under general issue).

930-93 219Ala27, 121S19.

930-94 20AlaA576, 104S284.

930-96 142Wash230, 252P703.

930-2 **TexCivA** 294SW267.

930-5 91Fla304, 107S635.

930-5½-New. A ruling as to the sufficiency of the pleading, antecedent to an exception, is harmless, even though erroneous. 89IndA645, 165NE449.

930-6 92Fla796, 110S354; **Iowa** 228NW878; 48RI470, 138A865.

930-9 215Ala225, 109S873; 216Ala239, 113S53; 216Ala534, 113S613; 86IndA440, 157NE10; 31NM568, 249P99 [quot CJ]; **TexCivA** 4SW(2d)241. Contra **TexCivA** 278SW333 (error in sustaining plaintiff's general demurrer to defendant's plea is fundamental error, and requires reversal). [a] **Thus** denying injunction against sale of property for taxes not reversible error where part of pleading bad on special demurrer. 149Md569, 131A749 (though technical error of general demurrer).

931-10 218Ala196, 118S377; 21AlaA363, 108S402; 41GaA49, 152SE146; **IndA** 149NE652; 31NM568, 249P99 [quot CJ]; **TexCivA** 3SW(2d)501; **Utah** 290P958. But see 216Ala564, 114S135. [a] **Reversible error** where demurrant stands on it. 31NM568, 249P99.

931-14 **TexCivA** 281SW1090; **TexCivA** 6SW(2d)219 (full hearing on cross action presenting identical issues).

932-16 **Iowa** 206NW956.

932-18 219Ala662, 123S845; **TexCommnA** 298SW401 (on writ of error to judgment, in effect affirming judgment sustaining demurrer to defense of failure of consideration for rules, only question held to be correctness of sustaining demurrer); **TexCivA** 295SW253; **TexCivA** 22SW(2d)341.

932-19 215Ala225, 109S873; 217Ala278, 116S137; 22AlaA250, 114S420.

932-20 111Conn124, 149A246; 232Ky622, 24SW(2d)265.

932-21 213Ala15, 104S222; **IndA** 148NE501.

932-24 216Ala547, 114S41.

932-29 219Ala692, 123S215 (error in sustaining demurrer to plea in recoupment based on plaintiff's negligence held harmless where verdict was rendered for plaintiff under plea of contributory negligence).

932-31½-New. Improper sustaining of a general demurrer is reversible error, even if special exceptions were properly sustained. **TexCivA** 278SW333.

932-31¼-New. Instances of error in sustaining demurrer held prejudicial. **Ala** 112S428; 22OhA220, 153NE924.

932-31¼-New. Instances of error in sustaining demurrer held harmless. **Ala** 112S426; 8YIndA19, 154NE510.

932-31½-New. Sustaining general demurrer that replication of settlement was no answer to plea of non detinet has been held prejudicial. 23AlaA286, 124S394(2dcase).

932-32 214Ala4, 106S335; 214Ala591, 108S534; 215Ala114, 110S19; 215Ala118, 110S131; 215Ala13, 112S225; 215Ala690, 112S344; 216Ala78, 112S356; 216Ala97, 112S454; 216Ala388, 113S250; **Ala** 127S844; **Ala** 129S46; **Ala** 130S329; 198IndA608, 154NE378; **Iowa** 233NW257; 220Ky71, 294SW800; 22OhA228, 153NE523; **TexCivA** 30SW(2d)902. [a] (3) Erroneous rulings on complaint have been held harmless where charge on amended count gave all benefit to be derived by proper charge on rejected counts. 215Ala494, 111S237.

933-33 213Ala631, 105S886; 214Ala415, 108S235; 214Ala593, 108S534; 215Ala36, 109S156; 22AlaA476, 116S508; 23AlaA227, 124S115; 111Conn564, 150A523; **Fla** 129S769; 86IndA632, 155NE712; 88IndA327, 163NE842; **Iowa** 233NW257.

933-34 214Ala476, 108S382; 215Ala36, 109S156; 215Ala528, 112S102; 216Ala381, 113S298.

933-36 219AlaA486, 122S664.

933-37 214Ala302, 107S810; 219Ala374, 122S630, 65ALR1473.

933-38 219Ala298, 122S41; 220Ky74, 291SW798.

933-39 214Ala561, 108S367.

934-43 **IndA** 165NE84.

934-46½-New. where the plea was good only in the defense of part of the count claiming exemplary damages, 214Ala415, 108S235.

934-47 223Ky619, 48SW(2d)748.

934-49½-New. , or where the instructions gave defendant the full benefit of the defense. 128Or172, 273P953.

934-53 214Ala305, 107S449; 205Iowa514, 218NW288.

934-54 165Ga655, 141SE805.

934-55½-New. Sustaining a demurrer to a count requiring more proof than remaining counts has been held not error. 216Ala290, 113S18, 52ALR1075.

934-55¼-New. Error in sustaining a demurrer to interrogatories contained in an answer is harmless where the matters to which the interrogatories related were particularly within the knowledge of defendant. 36Wyo12, 252P790.

934-56 216Ala534, 113S613; 31Ariz347, 253P626; 37GaA409, 140SE766; **MoA** 296SW239; **TexCivA** 8SW(2d)194.

934-57 **Ala** 127S832 (where relevant evidence was introduced); 231Ky160, 21SW(2d)250; **TexCivA** 293SW346; **TexCivA** 18SW(2d)782; **TexCivA** 20SW(2d)248. But see **TexCivA** 30SW(2d)939.

934-58 215Ala133, 110S299; 21AlaA395, 108S651; 127Okl128, 260P16; 43OklACR47 [reh pending].

934-58½-New. where evidence admitted without objection covered alleged defects in the pleading; 86IndA92, 156NE181.

935-59 [a] **Overruling demurrer to garnishee's answer** as evasive is not reversible error. 213Ala195, 104S334.

935-60 220Ala581, 126S857.

935-61 **Miss** 129S599. But see **TexCivA** 283SW1108.

935-61½-New. where the answer or reply supplies allegations omitted from the petition; 35Wyo381, 249P790.

935-62 80IndA677, 138NE791, 148NE675, 141NE249; 127Okl128, 260P16; **TexCivA** 277SW438 (improper evidence). See also 199Ind290, 157NE433.

935-63 214Ala181, 106S871; 216Ala547, 114S41.

935-64 5F(2d)498.

935-65 36F(2d)943; 39F(2d)900; 216Ala554, 114S45 (where defects of allegation were supplied by actual evidence); 181Ark288, 25SW(2d)425; **IndA** 149NE565.

935-66 83CalA424, 257P99; 197Ind28, 149NE639; 224Ky83, 5SW(2d)482; **MoA** 293SW66; **TexCivA** 8SW(2d)527; **TexCivA** 13SW(2d)395(2dcase); **TexCivA** 20SW(2d)361.

935-67 See also 199Ind290, 157NE433.

935-67½-New. where facts found are within the issues, and conclusions of law are correctly stated; 85IndA418, 154NE692.

935-67¼-New. where special findings could rest upon another count similar to the one demurred to. **IndA** 153NE179.

935-67¼-New. where a finding supplying an omission is warranted; **IndA** 164NE307.

935-68 99CalA510, 278P1049.

935-68½-New. or by testimony received without objection; 86IndA129, 154NE36.

935-69 26F(2d)403; 213Ala234, 104S413; 218Ala541, 119S672; 86Mont228, 283P226.

935-69½-New. , or where a fair trial was had. 83IndA680, 149NE912.

935-69¼-New. Error in overruling demurrer to complaint has been held not reversible error where the case was tried as if the proper allegation had been made. 22AlaA226, 114S285.

935-69¼-New. Error in overruling a demurrer to a petition challenged on a ground of misjoinder is cured by sustaining a demurrer to the evidence and withdrawing evidence as to all causes of action but one. 127Okl263, 260P777.

935-69½-New. Where evidence showed that defendant waived breaches of warranty, error, in overruling demurrer to a complaint showing breaches, is harmless. **IndA** 168NE699.

935-69¾-New. The appellate court must look to the whole record in determining

whether error in overruling demurrer to a complaint was prejudicial. **IndA** 168 **NE**699.

935–70 30**F(2d)**882; 214**Ala**4, 106**S**335; 215**Ala**254, 110**S**316; 218**Ala**520, 119**S** 230; 178**Ark**103, 10**SW(2d)**894; 68**CalA** 538, 229**P**883; 74**CalA**629, 241**P**574; 79 **CalA**390, 249**P**524; 80**CalA**363, 252**P** 656; 85**CalA**332, 259**P**470; 99**CalA**663, 279**P**167; 100**CalA**424, 280**P**211; 101 **CalA**482, 281**P**1036; **CalA** 284**P**1082; **IndA** 148**NE**335; **IndA** 148**NE**337; 84 **IndA**354, 148**NE**489; **IndA** 148**NE**501; 87 **IndA**597, 162**NE**66; 88 **IndA**267, 163 **NE**613; **IndA** 169**NE**71; **TexCivA** 277 **SW**438; **TexCivA** 11**SW(2d)**614.

935–71 **Ga** 155**SE**27(2dcase). 33**PortoRico** 3.

935–71½–New. It has been held not harmless error to overrule a demurrer to a petition which alleged substantial performance of contract but did not allege facts constituting such performance. 35**Wyo** 381, 249**P**790.

935–71¾–New. Error in overruling special demurrer to a petition has been held to render further proceedings nugatory. 165**Ga**178, 140**SE**493.

935–72 **TexCivA** 276**SW**773.

935–72½–New. where answer merely alleges substantially same facts averred in complaint, 80 **IndA**677, 138**NE**791, 148**NE**675, 141**NE**249.

935–73 213**Ala**448, 105**S**728; 217**Ala** 153, 115**S**94, 55**ALR**1231; **TexCivA** 276 **SW**773.

936–74 120**Kan**273, 243**P**311.

936–76 [a] **Even if evidence is offered,** appellant's proper remedy is to object thereto or request proper instructions to jury. 215**Ala**311, 110**S**396.

936–78 192**CalA**266, 267**P**926; 87 **IndA** 347, 154**NE**832; **TexCivA** 19**SW(2d)**829 (finding for plaintiff on cross action).

936–79 82**CalA**249, 255**P**529.

936–79½–New. where the court's instructions did not present the matters pleaded, 43 **OklACR**47 [reh pending].

936–79¾–New. or where the same result was reached by the verdict as if the cause of action set forth in the counterclaim had been disposed of on demurrer, 44 **Ida**500, 258**P**1078.

936–83½–New. Where overruling of demurrer to a defense is prejudicial, the judgment will be reversed. 22 **OhA**220, 153**NE**924.

936–83¾–New. Error in overruling exception to answer is not prejudicial where testimony negatived injury to plaintiff. **TexCivA** 300**SW**223.

936–83¾–New. Error is not harmless where it is clearly erroneous and prejudicial to the adverse party. 216**Ala**564, 114**S**135.

936–83⅞–New. Error in overruling a demurrer is not ground for reversal where demurrant was not harmed by such ruling. 127 **Okl** 153, 260**P**16.

936–83¼–New. To warrant a reversal of judgment, rendered after filing of the answer, for error in overruling a demurrer to the complaint on the ground of uncertainty, some error prejudicial to defendant's substantial rights, as distinguished from abstract error, must appear. 97**CalA**365, 275**P**477.

936–83½–New. If the complaint is duly challenged by demurrer for lack of averments of fact, overruling of demurrer would not operate to cause reversal where facts are fully supplied by the evidence. 220**Ala**104, 124**S**229.

936–83⅞–New. If the court erroneously adjudged the pleading good and, in giving instructions to the jury based them on issues as if they had been properly pleaded, there could not possibly have been any prejudicial error in overruling demurrer to the answer. 231**Ky**160, 21 **SW(2d)**250.

936–84 109**Conn**292, 146**A**717 (where court later ruled that allegations would not support claim for relief); 160**Ga** 488, 128**SE**65; 163**Ga**525, 136**SE**545; 165**Ga**685, 142**SE**142; **IndA** 151**NE**622; 88 **IndA**222, 162**NE**27; 127 **Okl** 153, 260 **P**16; **TexCivA** 275**SW**242.

936–85 35**F(2d)**183(1stcase); 214**Ala** 22, 106**S**166; 214**Ala**282, 107**S**801; 21 **AlaA**161, 106**S**58; **IndA** 154**NE**672; 85 **IndA**494, 154**NE**679.

936–86 **TexCivA** 25**SW(2d)**969.

937–89 107**Conn**380, 140**A**724.

937–90 87 **IndA**110, 158**NE**487; **Tex CivA** 19**SW(2d)**124; **TexCivA** 22**SW (2d)**1107.

937–93 214**Ala**282, 107**S**801; 219**Ala** 662, 123**S**45.

937–94 **Ala** 127**S**524. But see 199 **Ind** 290, 157**NE**433.

937–94½–New. where defendant received the full benefit of the defense under another plea; 213**Ala**191, 104**S**397.

937–99½–New. where a general issue was pleaded, and plaintiff failed to make out a prima facie case; 214**Ala**302, 107 **S**810; 214**Ala**281, 107**S**811.

937–3 **TexCivA** 294**SW**665. [a] **Errors held prejudicial.**–199 **Ind**290, 157 **NE**433.

937–4 220**Ala**295, 125**S**26 (where case tried on that count); 37**GaA**344, 140**SE** 390; **Ind** 169**NE**524.

937–6 163**Ga**525, 136**SE**545; 35**GaA**59, 132**SE**399; 36**GaA**2, 135**SE**448; 36**GaA** 22, 135**SE**492; 37**GaA**254, 139**SE**573; 41**GaA**484, 153**SE**442 (demurrer not renewed to substituted count); 41**GaA** 484, 153**SE**442(2dcase) (demurrer to substituted count not renewed); 45 **Ida**175, 260**P**1092; **TexCivA** 282**SW** 958; **TexCivA** 8**SW(2d)**756; **TexCivA** 19**SW(2d)**829; 151**Va**72, 144**SE**466.

937–7 [d] **Where both parties, by joinder of issue, ignore plea,** and verdict directed under general plea, error in overruling demurrer to it is harmless. **Fla** 128**S**831.

938–9 32**NM**182, 253**P**22.

938–10 31**Ariz**347, 253**P**626; 72**CalA** 339, 237**P**408; 38**GaA**534, 144**SE**387; 128**Me**512, 149**A**143; 144**Miss**560, 108 **S**907; **TexCivA** 20**SW(2d)**383.

938–11 197 **Ind**457, 151**NE**333; **Tex CivA** 293**SW**939.

939–21 214**Ala**528, 108**S**342; 81**Colo** 315, 255**P**453; 91**Fla**230, 107**S**528; 93 **Fla**1128, 114**S**425; 163**Ga**841, 136**SE** 914; 167**Ga**170, 144**SE**893; 232 **IllA**44 (holding that ruling permitting striking out of plea of general denial is not reversible where affidavit of merits failed to show defense to action); 254 **IllA** 289; **IndA** 169**NE**77; 202 **Iowa**924, 211 **NW**232; 207 **Iowa**1385, 224**NW**809; 264**Mass**102, 162**NE**4; **NJ** 151**A**873; 120 **Or**96, 251**P**715. [a] (3) Other rulings held prejudicial. **Mo** 271**SW**749. [b] **Failure to rule on motion to strike cross-complaint** is harmless where defendant concedes evidence insufficient to support it. 35**PortoRico** 74.

939–22 15**F(2d)**802; 215**Ala**311, 110**S** 396; 216**Ala**454, 113**S**410; **Ala** 130**S** 554; 102**CalA**669, 283**P**845(2dcase); 162**Ga**664, 135**SE**195; 166**Ga**523, 143**SE** 761; 35**GaA**133, 132**SE**461; 35**GaA**628, 134**SE**347; **GaA** 135**SE**324; 39**GaA**496, 147**SE**722; **IndA** 150**NE**393; 85 **IndA** 356, 151**NE**20; 87 **IndA**371, 161**NE**567; **IndA** 169**NE**596; 200 **Iowa**1059, 205**NW** 863 (striking out legal conclusion); 201 **Iowa**818, 208**NW**301; 203 **Iowa**897, 209 **NW**432; 202 **Iowa**924, 211**NW**232; 203 **Iowa**661, 213**NW**428; **Iowa** 231**NW**705; **Miss** 111**S**309; 220**MoA**743, 276**SW**409; **MoA** 28**SW(2d)**368; **TexCivA** 11**SW (2d)**383; 69**Utah**293, 254**P**784; 69**Utah** 376, 255**P**430; 146**Va**553, 131**SE**835; 145**Wash**582, 260**P**1074; 36**Wyo** 448, 256**P**1035. See also 214**Ala**415, 108**S**235. [a] (1) See also 94**Fla**571, 113**S**716. (2) Where plea is erroneously stricken and judgment for plaintiff is rendered on declaration containing defective ad damnum clause, judgment will be reversed. 91**Fla**304, 107**S**635.

939–23 **GaA** 135**SE**324; 87 **IndA**110, 166**NE**672(2dcase); **Iowa** 207**NW**342; 203 **Iowa**661, 213**NW**428; **MoA** 285**SW** 741; **Tex** 293**SW**910.

940–24 220**Ala**302, 125**S**36; 217**Ky**491, 290**SW**333; 175**Minn**276, 221**NW**6 (admissible under general denial); 220**MoA** 743, 276**SW**409; 69**Utah**376, 255**P**430; 101**WVa**110, 132**SE**866. [a] 69**Utah**376, 255**P**430; 101**WVa**110, 132**SE**866. [b] 220**Ala**302, 125**S**36; **IndA** 151**NE**622; **TexCivA** 25**SW(2d)**212.

940–25 20**F(2d)**816; 214**Ala**364, 107**S** 821; 216**Ala**645, 114**S**308; 102**CalA**582, 283**P**866; 94**Fla**571, 113**S**716; 38**GaA** 534, 144**SE**387; **IndA** 154**NE**672; 200 **Iowa**1059, 205**NW**863; 201 **Iowa**533, 207**NW**533; 202 **Iowa**924, 211**NW**232; 203 **Iowa**661, 213**NW**428; **TexCivA** 18 **SW(2d)**942; 69**Utah**376, 255**P**430; **Utah** 273**P**512; 148**Wash**31, 267**P**777 (where facts sufficiently appear in record).

940–27 **Iowa** 207**NW**342; 203 **Iowa**661, 213**NW**428. [a] **Where stricken matter is in issue** through defendant's counterclaim, error in striking may be harmless. 203 **Iowa**661, 213**NW**428.

940–28 85 **IndA**169, 151**NE**396.

940–28½–New. where part of the pleadings struck out contains statements necessarily inconsistent with prior pleadings; 146**Va**553, 131**SE**835.

941–29 **TexCivA** 293**SW**838.

941–30 41**GaA**189, 152**SE**141.

941–34 **MoA** 299**SW**832, 834 [citCJ].

941–34½–New. where the claim sought to be set up was concluded by admitted allegations of pleadings of the adverse party; 134**SC**228, 132**SE**614.

941–34¾–New. Where cause was tried on an amended pleading in which the paragraphs stricken were not repeated. 20**F(2d)**816.

941–36 205 **Iowa**621, 218**NW**334. [b] 219**Ala**374, 122**S**630, 65**ALR**1473.

941–39 [a] **Nor is it harmless** to strike allegations from answer where remaining similar allegations are not as specific, and are defective. **TexCivA** 26 **SW(2d)**295.

941–41½–New. Striking of cross petition by defendant against codefendants is harmless where action between defendants is subsequently tried out and goes to judgment. 201 **Iowa**636, 207 **NW**795.

941–41¾–New. Judgment directing a verdict for defendant, where the evidence under a plea of general issue did not as a matter of law demand a directed verdict, and where it did not affirmatively appear that on another trial a valid and legal agreement of accord and satisfaction untainted by fraud would as a matter of law be established, is erroneous. 39**GaA**350, 147**SE**135.

941–42 34**F(2d)**367; **IndA** 150**NE**393; 217**Ky**781, 290**SW**662; 233**Ky**734, 26 **SW(2d)**1039; 29 **OhA**399, 163**NE**310; 150**Wash**443, 273**P**527(2dcase); 39**Wyo** 141, 270**P**537.

941–43 137**Wash**177, 242**P**2.

941–45 See also 43 **OklACR**282.

941–45½–New. where the matter was surplusage; 43 **OklACR**282.

941–48 **Ida** 292**P**222.

941–50 48 **Ida**203, 281**P**377; 123**Kan** 457, 256**P**143.

942–56 207 **Iowa**711, 223**NW**541.

942–57½–New. Error in refusing to strike portions of an answer is harmless where plaintiff stood on a demurrer which admitted a complete defense to his action. 201 **Iowa**818, 208**NW**301.

942–59 See also 263**Mass**129, 160**NE** 410. [a] **Cure of error** by subsequent allowance of motion. 263**Mass**129, 160 **NE**410.

942–62 318**Mo** 28, 298**SW**817; 33**NM**18, 262**P**178 (misnomer).

942–63 **Ga** 142**SE**857; 247 **IllA**141.

942–64 84**Colo** 129, 268**P**521.

942–66 117 **Okl** 46, 245**P**641.

942–67 85 **IndA**342, 154**NE**39; **IndA** 148**NE**337; 84 **IndA**354, 148**NE**489; 88 **IndA**222, 162**NE**27; 20 **OhA**1, 151**NE** 784; 32 **OhA**207, 167**NE**701; 117 **Okl** 46, 245**P**641; 126 **Okl** 64, 258**P**918; 34 **Wyo** 299, 242**P**1111. [a] **Refusal to grant motion held error.**–85 **IndA**9, 150 **NE**70.

942–68 46 **Ida**792, 272**P**703.

943–69 154**Miss**325, 122**S**373.

943–70 118**Kan**221, 235**P**122; 160**La** 325, 107**S**126; **MoA** 289**SW**356; 146**Va** 553, 131**SE**835.

943–70½–New. Error in compelling election between causes of action instead of requiring separate statement is harmless where judgment was recovered for amount claimed. 132 **Or**587, 286**P**995.

943–71 **Mass** 165**NE**655.

943–76 8**F(2d)**922.

943–79½–New. Refusal to compel defendant setting up counterclaim to elect whether he would proceed on tort or on contract is harmless. 201 **Iowa**148, 205 **NW**833 (in view of evidence eliminating plaintiff's defense of settlement).

943-80 38F(2d)388; 40F(2d)606; 215 Ala426, 111S214; 205Cal 102, 269P 1105; CalA 260P316; TexCivA 279SW 563 (allegations immaterial in view of jury finding). See also TexCivA 30SW (2d)419. [c] (1) TexCivA 272SW296. [d] **Where no evidence subsequently introduced,** allowing of supplemental complaint has been held not error. 86 IndA55, 155NE835.

943-81 16F(2d)355; 69CalA413, 231P 346; 76CalA264, 244P608; 86CalA507, 261P747; CalA 261P1023; 97CalA692, 276P156(1stcase); CalA 284P477; CalA 288P863; 78Colo 6, 238P29; 81 Colo 50, 253P397; 93Fla1128, 114S425; 35GaA120, 132SE140; 37GaA254, 139 SE573; 123Kan457, 256P143; 124Kan 33, 257P964; 13LaA201, 127S99; 248 Mich593, 227NW720; 179Minn19, 228 NW440; 150Miss738, 117S124 (amendment to demurrer); 315Mo 1136, 287SW 1031; 131Misc407, 226NYS751; 225 AppDiv81, 232NYS178; 32 OhA207, 167 NE701; 138 Okl 77, 280P449; 116 Or 210, 240P877; 300Pa507, 150A900; 143 SC325, 141SE564; TexCivA 296SW979; TexCivA 299SW499; TexCivA 300SW 641; TexCivA 28W(2d)909; TexCivA 21SW(2d)97; TexCivA 23SW(2d)820; 149Va406, 141SE237; 155Wash394, 284 P754. [a] **Ineffectual attempt to reserve by amendment** exception to ruling requiring election between defendants held not harmful to other party against whom plaintiff elects to proceed. 38GaA 280, 143SE905.

944-82 13LaA201, 127S99 (reiteration).

944-83 109Conn292, 146A717; 169Ga 622, 151SE28; GaA 135SE324; MoA 288SW369; 51SD534, 215NW694; Utah 273P502.

944-83½-New. Failure of the court to suggest a defect in the pleading before denying relief and give the party an opportunity to amend is alone cause for reversal. 102WVa638, 135SE903.

944-83¾-New. Where there was no issue on additional amendments to a bill and a crossbill at the time of submission of the case, pendant several years, during which no service was had on opposing counsel, there was no prejudicial error. 219Ala652, 123S18.

944-84 89CalA535, 265P292; CalA 290 P1080; 315Mo 1136, 287SW1031; MoA 10SW(2d)75; 105NJL408, 144A812. [c] **Allowing amendment to petition in suit for specific performance** is reversible error where amendment sought to detail allegation of consideration for contract which was in law void for uncertainty and indefiniteness. 161Ga965, 132SE385. [d] **Allowing amendment in suit for constructive eviction** by deceased landlord, by adding allegations that executrix individually continued such eviction, has been held reversible error. 219AppDiv569, 220NYS293.

945-86 Cal 287P503; 98CalA50, 276P 387(2dcase); 38GaA581, 144SE680; 83 NH383, 142A707.

945-87 MoA 28SW(2d)427 (where amended prayer played no part in shaping judgment).

945-89 TexCivA 272SW562.

945-90 127 Or497, 272P673.

945-92 78Colo 6, 238P29.

945-94 87CalA320, 262P461 (after taking of evidence had ceased); 81Colo 50, 253P397; SD 228NW182; TexCommnA 298SW265.

945-94½-New. where the issues raised are not submitted to the jury, 29F(2d) 402.

945-99 36GaA631, 137SE907.

945-99½-New. An amendment striking allegations of fact of which the law does not allow proof is harmless. 116 Or210, 240P877.

945-99¾-New. Amendment of answer to allow damages for breach of contract held not prejudicial. Utah 286P635.

945-1 93Fla1128, 114S425; 51SD534, 215NW694.

945-3 48 Ida37, 279P410; 52SD198, 217NW190. [a] (3) Where assumption of risk was not issue in case, refusal to amend answer so to plead is not error. 32 OhA232, 167NE403.

945-4 16F(2d)355; 35Ariz373, 278P 368(2dcase); 91CalA206, 266P975; 144 Md623, 125A441. But see 52ND617, 204NW683.

946-5 See also 118 Okl 275, 247P979.

946-9 34GaA156, 128SE777; 51SD534, 215NW694.

946-10 207Cal 167, 277P327; 84CalA 787, 258P709 (where verdict directed); 37GaA254, 139SE573; NJ 148A775 (within sound discretion of court); Tex CivA 286SW901. [a] 142Miss768, 107S 561.

946-10½-New. That amended complaint was not filed is not ground for reversal. 211Ky396, 277SW461 (where not verified).

946-14 29Ariz334, 241P518 (color of dog which bit plaintiff produced in court and identified by him); 31Ariz 347, 253P626; 202Cal 359, 260P869; 87CalA320, 262P461; 91CalA71, 266P 612; 91CalA715, 267P741; 94CalA498, 272P309; 96CalA576, 274P445; CalA 280P154; CalA 284P517; CalA 285P 359; CalA 289P875; 169Ga409, 150SE 551(2dcase); 40GaA683, 151SE517; 47 Ida675, 277P1112; 323 Ill 510, 154NE 235; 232 IllA430 (no important variance complete case being otherwise proved); 241 IllA58; 119Kan411, 239 P961; 121Kan18, 245P1041; 123Kan 164, 253P1097; 10LaA224, 120S654; Mass 166NE822; 251Mich92, 230NW 922; 153Miss314, 120S732; 217MoA645, 274SW923; 219MoA211, 269SW665; 80 Mont492, 261P261; 84Mont158, 274P 489; NJ 135A335; 193NC541, 137SE 658; 124 Okl 64, 253P1021; 126 Okl 64, 258P918; 136 Okl 69, 276P182; SD 226 NW948; TexCivA 277SW727; TexCivA 295SW320; TexCivA 4SW(2d)603; Tex CivA 14SW(2d)132; TexCivA 24SW (2d)768; TexCivA 27SW(2d)877; Va 154SE568; 135Wash558, 238P569, 240 P565; 34Wyo 378, 244P216. See also 200 Iowa916, 205NW766. [a] (1) 123 Kan164, 253P1097. (3) 123Kan164, 253 P1097. [e] **Prejudicial error.**-92CalA 575, 268P939. [f] **Admission of testimony to prove unpleaded accord and satisfaction held prejudicial error,** especially where testimony is of doubtful credibility. 98CalA709, 277P750.

946-14½-New. Material variance is ground for reversal. 222AppDiv25, 225 NYS330.

946-14¾-New. Variance between description in deed and judgment canceling it as fraudulent does not justify reversal, as it could be corrected. 234 Ky697, 27SW(2d)975.

946-15 220Ala385, 125S403; 208Cal 578, 283P67 (striking out repetitious portions of deposition); 94Fla291, 114 S239; Ga 154SE788; 329 Ill 82, 160NE 193; 52SD453, 218NW595. [j] (2) Where plaintiff voluntarily gave security. 220Ala385, 125S403. (3) Failure to require nonresident plaintiff to give security or of plaintiff to give security when ordered may be ground for reversal. SD 231NW897. [k] **Refusal of court to order further answers to interrogatories** may be without prejudice. 85Colo 57, 273P646; 254Mass308, 150 NE151. [l] **Ruling on plea of privilege** will not be reversed if there is sufficient evidence to raise issue of fact. TexCivA 293SW671.

947-16 89CalA314, 264P556; 35GaA42, 132SE119; 198 Ind695, 154NE666; 87 IndA507, 159NE555; 52SD436, 218NW 148; TexCivA 288SW845; TexCivA 298 SW631; TexCivA 4SW(2d)320. [a] 209 Ky674, 273SW449.

947-21½-New. , or is found by the court; Tex 286SW611.

947-23 See also 300Pa569, 151A362.

947-23½-New. where it is not shown what the witness' testimony would be; 215Ala547, 112S124.

948-28 102CalA396, 283P336.

948-32 [a] **Prejudicial error.**-228Ky 446, 15SW(2d)271.

948-34 208 Iowa133, 217NW472 (withdrawal of issue).

948-35 200 Ind307, 163NE225; Tex CivA 296SW929; Va 152SE539.

948-40½-New. Where an order of change of venue is made under circumstances allowing defendant a change as a matter of right, the order will not be reversed because it requires the performance of idle acts. 49ND224, 190 NW812.

948-40¾-New. Error in refusing to transfer an action to the county of defendant's residence is harmless where by additional pleadings, intervention, or consolidation of actions, the nature of the final action as tried becomes such that it might have been brought originally against all defendants in the county in which the original action or actions were brought. 203 Iowa792, 206 NW586.

948-40¼-New. Error in overruling motions to transfer causes of action against individual defendants in a creditor's suit against stockholders of an insolvent corporation to the counties of their residence is harmless where, by amendment and consolidation of actions, the issue as finally presented is such that defendants were properly joined and suable in the county where the action was pending. 203 Iowa792, 206NW 586.

948-40½-New. Failure to sustain exception to paragraph of affidavit controverting plea of privilege is not prejudicial where another paragraph, and proof, show venue properly laid. Tex CivA 6SW(2d)147.

948-41 157Md136, 145A385; TexCivA 282SW627.

948-42 TexCivA 290SW831.

949-48 89Ga771; 60 Ind202.

949-52 [b] **Motion by plaintiff to vacate attachment** on failure to file additional securities for costs has been held not prejudicial to defendant. 254NY 107, 172NE143.

949-54½-New. Where the court denied defendant's motion to strike additional affidavits filed in support of attachment, but allowed him to file additional affidavits, defendant was not prejudiced. 145Wash365, 260P243.

949-54¾-New. Delay in filing a statutory bond to dissolve an attachment held not to have damaged plaintiffs. 264Mass303, 162NE334.

949-55½-New. nor where, on motion to vacate an order of appointment, defendant was afforded a hearing which served all purposes of notice in the first instance; 54ND627, 210NW498.

949-56½-New. Trustholders of deed cannot complain of appointment of receiver, where full amount of claim was tendered and held by court for them. TexCivA 25SW(2d)166.

949-57 16F(2d)330.

949-58½-New. **An order in receivership proceedings,** in which the court disregarded the transaction against which appellant brings exception, held not reversible, where the transaction, if regarded, would have favored appellant. 168Ga497, 148SE334.

949-58¼-New. **Admission of testimony of witness while receiver was not present, held not reversible error,** where the receiver was remiss in justifying his absence and in making timely objection. 168Ga497, 148SE334.

949-58¼-New. An order, declining to abate receivership proceedings, on a plea to abate the attachment proceedings and not the receivership proceedings, held not reversible error. 168Ga 497, 148SE334.

949-58½-New. Where order appointing receiver in foreclosure shows no reason for excusing bond, appointment without bond is reversible error. 255 IllA395.

950-65 NJ 134A185.

950-66 Mass 171NE448 (holding no prejudice, where award was set aside, in refusing request that inadequate referee's award indicated prejudice); NJ 151A97.

950-67 103Conn532, 131A399 (rulings on remonstrances which failed to attack fundamental finding held harmless); 161Ga698, 132SE626.

950-68½-New. In the Philippines failure of the clerk to issue the commission and certify the oath of the referee is not ground for reversal of the judgment. 50Philippine864.

950-68¾-New. Failure to give notice of filing of the report of the referee is not ground for reversal where not prejudicial. 50Philippine864.

950-69 25F(2d)847; 220Ala82, 124S 234(1stcase); 169Ark825, 277SW337 (denial of request for jury inspection); 77CalA164, 247P212; 81CalA690, 254P 671 (separate trial where two actions consolidated by stipulation); 90CalA 382, 265P968; 38GaA681, 145SE470(1st case); 203 Iowa1270, 212NW134; Iowa

233NW257; 214Ky754, 284SW403; 215 Ky644, 286SW846; 263Mass476, 161NE 593 (erroneous rulings cured by findings); MoA 273SW165 (refusal to declare mistrial); 24 OhA374, 157NE708; 124 Okl 84, 253P1017; 123 Or571, 263P 901 (consolidation of cases for purposes of trial); 138SC445, 136SE757; Tex CivA 282SW947; Sask [1930] 3DomLR 955. [b] (2) Court's rebuke to audience applauding at close of argument by plaintiff's counsel. 99Vt91, 130A 758. [d] (1) 146Wash628, 264P421 (nonsuit). (7) Where case was tried to court and evidence introduced presents legal question for court only and there is no question of fact that could have been determined by jury. 113 Okl 216, 240P623. (8) Where defendant's own testimony established plaintiff's cause of action so clearly as to require directed verdict for plaintiff. 123Kan508, 256P119. [j] (4) Error, if any, in granting jury trial on special issues is cured where court adopts their findings. 70CalA108, 232P986. [w] (3) Denying plaintiff's right to open and close where he has burden of proof. TexCivA 278 SW462. (4) Where failure of consideration and fraud are only issues in action on note, refusal to permit defendant's counsel to open and close is reversible error. MoA 22SW(2d)854. (5) Other instances. 157Miss452, 128S 336 (denial of competent interpreter for material witness); 245NYS492. [x] (1) 125Misc876, 212NYS393. [bb] Tex CivA 281SW257. [ii] **Permitting emotional demonstration of plaintiff as witness** on stand to exhibit claimed effect of injuries held not reversible error. 232Mich300, 205NW199. [jj] **Refusal to stop trial** and require plaintiff to bring in bills for materials furnished defendant held harmless. 214Ala8, 106 S49. [kk] **Permitting defendant to open and close** argument, where burden of proof is on plaintiff, not basis for reversal if harmless. TexCivA 278SW 462. [ll] **Exclusion of defendant from court room** held not prejudicial. 77 CalA164, 247P212. [mm] **Refusal to permit more time to take proof** because of illness is not prejudicial where abundant time prior to illness was available and suit was not brought within statutory time. 217Ky56, 288SW1030. [nn] **Refusal of separate trial not prejudicial.**–84Colo 129, 268P521. [oo] **Denial of defendant's motion to produce defendant in court** in action for death from shooting where defendant was confined in penitentiary and no attempt had been made to procure his deposition. Iowa 220NW338. [pp] **Right to open and close.**–39GaA400, 147SE397. [qq] **Consolidation** of suit to enforce liens on lease with suit to cancel lease was, if error, harmless. TexCivA 25 SW(2d)200. [rr] **Refusal to try plea of privilege** before issue on merits is harmless where facts established residence in county. TexCivA 26SW(2d) 687.

951–73½–New. When no material issues of fact were made by pleadings, sustaining a motion to submit the case within thirty days after filing of the reply has been held not prejudicial error. 215Ky514, 285SW241.

951–74 8F(2d)922; 172Ark414, 288SW 910; 176Ark303, 3SW(2d)342; 180Ark 90, 20SW(2d)626; 203 Iowa1270, 212 NW134; 233Ky55, 24SW(2d)925; 233 Ky485, 26SW(2d)11.

951–74½–New. Refusal to transfer is not harmless when either court or jury might have found either way under evidence. 204Ky662, 265SW30.

951–74¾–New. Transfer of a cause is immaterial where the decree is given to the party objecting. 174Ark1180, 295SW401.

951–75 25F(2d)726; 171Ark1151, 287 SW394; 208Cal315, 281P70; 75CalA 516, 243P43; 310 Mo1, 274SW1079; SC 155SE577; TexCivA 7SW(2d)926. [e] **Conduct in requiring completion of panel** from jurors present, violating statute, is prejudicial. 226Ky534, 11SW (2d)148.

952–76 [a] **Error held prejudicial.**–Mich 233NW377(1stcase).

952–77½–New. The incompetency of a juror is harmless where the verdict found was demanded by the evidence and was directed by the court. 35GaA 412. 133SE285.

952–78 75CalA516, 243P43; 80CalA 590, 252P739; 246Mich36, 224NW434; 172Minn591, 216NW537; 322Mo 1001, 17SW(2d)528 (where verdict was unanimous which was more than was required); MoA 295SW818; 80Mont431, 261P253; ND 225NW811. But see 242 Mich402, 218NW795; 82Mont492, 267 P801. [c] (1) See also MoA 297SW719. (3) Other instances. 245Mich97, 222 NW83.

952–79 87CalA99, 261P1049.

952–83 39Wyo 58, 270P154.

952–85 118 Or568, 247P815.

952–86 153Va437, 150SE389. [a] **Where juror is son of witness,** but witness is not examined, denying challenge is harmless. Ala 129S51.

952–88 TexCivA 290SW1108.

953–91 30Ariz347, 247P122; 206 Iowa 753, 221NW508 (where not shown that impartial jury were not secured).

953–94 But see TexCivA 283SW694.

953–97 224Ky274, 6SW(2d)264.

953–98½–New. Allowing plaintiff a peremptory challenge after he had passed jury, unless injury is shown, is harmless. CalA 285P918.

953–1 179Ark831, 18SW(2d)369; 43 Ida337, 252P186; 233 IllA539; 126Kan 59, 266P740; 225Ky480, 9SW(2d)220; 245Mich624, 223NW230; 20 OhA93, 153 NE151; OhA 173NE33; TexCommnA 12SW(2d)997; TexCommnA 24SW(2d) 372; TexCivA 297SW896 (discussion of railroad's settlement offer after verdict was reached); TexCivA 297SW1063; TexCivA 300SW659; TexCivA 17SW (2d)494; TexCivA 26SW(2d)726. [a] **Supreme court has jurisdiction** to determine misconduct of jury in arriving at verdict. TexCommnA 292SW536. [b] **Misconduct affecting only defendant,** cannot prejudice plaintiff. Tex CivA 17SW(2d)494. [c] **Where evidence leaves it reasonably doubtful** as to effect of jury's misconduct, it is reversible error. TexCommnA 25SW(2d) 290.

953–2 222AppDiv712, 225NYS37; Tex CommnA 12SW(2d)997; TexCivA 284 SW664; TexCivA 285SW330; TexCivA 2SW(2d)902 (basing decision on award of industrial board in suit to set aside such award); TexCivA 17SW(2d)494; TexCivA 30SW(2d)344. [b] **Unless it appears that no probable injury** was occasioned, misconduct of jury will require reversal. TexCivA 26SW(2d)336. [c] **If verdict of only one juror** was materially influenced by jury's misconduct, judgment will be reversed. Tex CivA 28SW(2d)288.

954–3 Ala 130S379.

954–7½–New. The refusal of the bailiff to bring the jury into court for instructions as to the customary amount of attorney's fees allowed in personal injury cases is not reversible error when the allowance made by it for attorney's fees was remitted. 68CalA604, 229P1015.

954–7¾–New. Certainty that misconduct of jurors affected the verdict is not necessary for reversal. TexCivA 285SW665.

954–7¼–New. A statement by an officer to the jury, after retirement, regarding the right to return a five-sixths verdict, is not prejudicial so as to vitiate the verdict. 198Wis586, 225NW 197.

954–8 215Ala494, 111S237; 87CalA669, 262P770; 102CalA405, 283P148; Iowa 213NW221 (dictum); TexCivA 26SW (2d)726.

954–10 201 Iowa1044, 207NW984; Iowa 213NW221.

954–14 23AlaA20, 122S467(2dcase); 43 Ida337, 252P186; 230Ky465, 19SW(2d) 1078; 194NC403, 140SE21. [b] **Allowing note,** having no reference to case, to go to juror does not require reversal. 157Miss822, 128S870.

954–15 194NC403, 140SE21 (magnifying glass).

954–16 239Mich530, 215NW46; Tex CivA 38SW(2d)468.

954–21 202 Iowa837, 211NW361.

955–22 43 Ida337, 252P186; 230Ky 465, 19SW(2d)1078; TexCivA 12SW (2d)558. But see 115 Okl 202, 242P 212.

955–24½–New. Failure to give the jury written instructions when they first retired, and the fact that the jury dispersed before the court directed them to retire and return another verdict which they did for a smaller amount, is not prejudicial error. SD 227NW 193.

955–31 [a] **Permitting testimony to be read to jury** at their request after jury had been deliberating is not reversible error. TexCivA 30SW(2d)930.

955–32 65Utah395, 237P948. [a] **It is prejudicial error** where instruction is incorrect. 39F(2d)521.

955–35 36F(2d)330; 217Ala295, 116S 145; 220Ala189, 124S417; 171Ark315, 284SW20; 172Ark813, 290SW377; 176 Ark616, 3SW(2d)692; 199Cal 307, 249 P11; 204Cal 446, 268P620; 82CalA141, 255P215; CalA 292P192; 111Conn219, 149A671; 162Ga371, 134SE69; 34GaA 345, 129SE555; 37GaA737, 141SE673; 40GaA4, 148SE757; 232 IllA430; 233 IllA384; 234 IllA28; 205 Iowa1240, 219 NW407; 123Kan620, 256P1019; 223Ky 727, 4SW(2d)695; 233Mich594, 207NW 817; 238Mich198, 213NW112; 247Mich 361, 225NW508(2dcase); 165Minn282, 206NW446; 166Minn45, 207NW178; 170Minn221, 212NW167; Minn 233NW 241; 315Mo 1181, 289SW913; MoA 284 SW525; MoA 24SW(2d)686; 129 Okl 22, 263P126; 140 Okl 8, 282P154; 39 OklACR360; 118 Or210, 221P554, 246 P713; 121 Or424, 254P1019; 286Pa536, 134A446; 300Pa428, 150A620; 138SC 445, 136SE757; 149SC303, 147SE333; SC 155SE231; TexCommnA 284SW940; TexCivA 290SW302; TexCivA 1SW(2d) 661; TexCivA 12SW(2d)265; TexCivA 19SW(2d)77; 141Wash571, 251P885; 154Wash344, 282P218; 103WVa346, 137SE530. [a] **Remarks of court after pronouncing judgment.**–122Kan814, 253 P600. [b] **Improper remarks cured by instructions.**–171Ark315, 284SW20.

956–36 35F(2d)452; 216Ala628, 114S 200; 206Cal 504, 274P971; 68CalA171, 228P873 (overruling proposed motion for directed verdict in presence of jury); 69CalA708, 231P764 (alleged misconduct held not prejudicial); Ga 154 SE788; 84Mont141, 274P844; TexCivA 281SW306; TexCivA 22SW(2d)467. [a] **Refusal to permit counsel to sum up** evidence before submitting case held not prejudicial. 38F(2d)545.

956–38 122 Or547, 259P902. See also 198Cal 1, 242P939.

956–41 141Miss55, 105S858 (stating that as a fact as to which there was no dispute); NJ 135A342; 113 Or544, 233P540 (in view of instructions given); TexCivA 8SW(2d)194.

956–43 315Mo 1181, 289SW913; 296Pa 568, 146A153; 99Vt464, 134A588.

956–45 122Kan445, 252P215.

956–46½–New. instructing the witness to answer "yes" where counsel insisted on an answer to an excluded question; RI 145A100.

956–47½–New. Comment of judge, amounting to truison, that ages of children are known by mothers, where age of child was in issue, not reversible error. 232 IllA430.

956–47½–New. Court's incorrect statement of law addressed to counsel is cured by a subsequent correct statement in the charge. 99Vt464, 134A588.

956–48 109Conn117, 146A17; 248Mich 652, 227NW684; Mo 9SW(2d)156; NJ 135A342.

956–49 NJ 135A342.

956–50 214Ala32, 106S182; 233 IllA 384 (directed verdict); TexCivA 283SW 914.

956–53 194NC11, 138SE345; 51ND946, 201NW687 (remarks amounting to wrong reason for correct ruling).

956–54½–New. where plaintiff failed to make out a cause of action; 219AppDiv 741, 220NYS162.

956–55 319 Ill 344, 150NE276; 315Mo 1181, 289SW913; NJ 135A342.

957–64 203Cal 116, 263P220; 85CalA 691, 259P980; 83Colo 430, 266P217 (private interviews between defendant and trial judge require reversal regardless of effect); 107Conn242, 140 A105; 248 IllA531; 248 IllA540; 241

Mich383, 217NW329, 57ALR262; MoA 285SW155; 222AppDiv456, 226NYS 734; Okl 292P829; Okl 292P833; 134 SC412, 132SE811; TexCommnA 276SW 426 (improper examination of witness); TexCommnA 284SW940; TexCivA 17 SW(2d)182. [a] (1) 220Ky808, 295SW 1064. (2) Nebr 227NW321; TexCivA 17SW(2d)110. (9) That appellant could take his exception and any other exception which he wanted, that it would not do him much good. 124Misc879, 209NYS764. (10) Addressed to audience in courtroom, containing automobile drivers, calling their attention to speed statutes and cautioning them to avoid killing people, where such remarks were injected in midst of charge as to negligence in operation of automobiles. 115 OhSt266, 152NE666. (11) Statement in presence of jury that answer to issue would cause plaintiff's attorney some worry whereupon jury were permitted to change answers. TexCommnA 284SW940. (12) Expressing opinion on controverted fact. 339 Ill 426, 171NE514. [d] **Trial judge's absence during summation** required new trial, since summation is material part of trial. 227AppDiv736, 236NYS577.

957-64½-New. Oral communication between court and foreman of jury after jury retired, although no wrong intended, required reversal. TexCivA 27 SW(2d)897.

957-65 32Ariz479, 260P191, 57ALR55; 178Ark1007, 13SW(2d)14; 181Ark649, 26SW(2d)1108; 96CalA478, 274P568 CalA 286P761 (improper questions); 165Ga892, 142SE285; 48 Ida310, 282P 72; Ida 287P944 (in opening statement); 234 IllA28; 126Kan59, 266P 740; 130Kan158, 285P571; 210Ky92, 275SW16; 224Ky419, 6SW(2d)491; 227Ky690, 13SW(2d)1022; 234Ky385, 28SW(2d)465; 243Mich458, 220NW 783; 249Mich281, 228NW778; 166Minn 45, 207NW178; 178Minn353, 227NW 203; 148Miss357, 114S611; 217MoA 354, 275SW67; MoA 291SW508; MoA 296SW437 (levity); 222MoA128, 2SW (2d)824; 50ND959, 198NW544; 27 OhNPNS548; Okl 292P356; 132 Or67, 284P276; 97PaSuper131; TexCivA 284 SW983; TexCivA 292SW935; TexCivA 3SW(2d)519 (reading copy instead of original pleading); TexCivA 21SW(2d) 754(2dcase); 99Vt191, 130A697; 36 Wyo 12, 252P790.

957-66 33F(2d)60; 213Ala252, 104S 433; 214Ala23, 106S242; 216Ala455, 113S403; 217Ala292, 116S142, 62ALR 626; 220Ala309, 125S51 (trial by court); Ala 128S211; Ala 130S541; 80 Cal 590, 252P739; 203Cal 26, 263P240; 86CalA288, 260P838; CalA 293P80; 86 Colo 326, 281P358; 234 IllA173 (inflammatory remarks); 237 IllA488; 244 IllA330; 253 IllA450 (where counsel for both parties were equally in fault); 119Kan864, 241P442; 122Kan 339, 252P468; 123Kan533, 255P969; 123Kan603, 256P986; 128Kan365, 278 P23; 210Ky92, 275SW16; 212Ky310, 278SW1095 (demagogical argument); 218Ky600, 291SW1027; 223Ky745, 4 SW(2d)697; 224Ky419, 6SW(2d)491; 231Ky788, 22SW(2d)281; 234Ky385, 28 SW(2d)465; 150Md511, 133A322; 239 Mich390, 214NW172; 242Mich217, 218 NW803; Mich 233NW321; Minn 232 NW717; 154Miss325, 122S373; 154Miss 890, 124S62(3dcase); 156Miss77, 125S 539; 310Mo 72, 274SW1031; Mo 19SW (2d)630; Mo 30SW(2d)445; MoA 273 SW137; MoA 286SW428; MoA 291SW 161; MoA 295SW818; MoA 296SW851; MoA 24SW(2d)682; MoA 27SW(2d) 714; MoA 30SW(2d)441; MoA 31SW (2d)596; NJSup 149A526 (where no request for charge to disregard was asked); 52ND48, 203NW192; 26 OhA478, 160NE93; 112 Okl 3, 239P582; TexCommnA 276SW203; TexCivA 279SW 519; TexCivA 281SW289; TexCivA 281 SW318; TexCivA 286SW565; TexCivA 290SW274; TexCivA 290SW283; Tex CivA 292SW594; TexCivA 294SW977; TexCivA 295SW675; TexCivA 296SW 669; TexCivA 297SW238; TexCivA 1 SW(2d)437; TexCivA 7SW(2d)926; TexCivA 10SW(2d)243; TexCivA 10SW (2d)397; TexCivA 12SW(2d)257; Tex CivA 21SW(2d)691; TexCivA 27SW (2d)296; TexCivA 27SW(2d)610; Tex CivA 28SW(2d)941; TexCivA 28SW (2d)1088; TexCivA 29SW(2d)885; Tex CivA 31SW(2d)846; TexCivA 31SW (2d)850; 151Va173, 144SE485; 141 Wash190, 251P123; 153Wash14, 279P 94; 102WVa135, 135SE253; 36Wyo 12, 252P790.

957-67 88CalA740, 264P270; 95CalA 428, 273P76; 97CalA377, 275P840; CalA 290P48; CalA 290P80; 45 Ida636, 264P377; 232 IllA246; 232 IllA277; 128Kan524, 278P764, 65ALR1213; 130 Kan338, 286P669; 218Ky59, 290SW 1044; 219Ky307, 292SW791; 167Minn 369, 209NW33, 913; 175Minn153, 220 NW418; 177Minn13, 224NW259; MoA 286SW428; 21 OhA314, 153NE221; 131 Okl 263, 268P715; SD 232NW904; Tex CivA 279SW929 (permitting counsel to ask questions and withdraw them without answer not prejudicial); TexCivA 295SW675; 144Wash553, 258P497. See also 75CalA516, 243P43.

957-68 168Ark626, 271SW7; 106Conn 119, 137A241; 224 IllA574; 256 IllA63; 229Ky113, 16SW(2d)761; 229Ky293, 16 SW(2d)1046; 235Mich217, 209NW129; 249Mich76, 227NW759; 320Mo 839, 8 SW(2d)873; 321Mo 378, 11SW(2d)268; MoA 2SW(2d)169; MoA 9SW(2d)655; MoA 16SW(2d)633; TexCivA 287SW 120; TexCivA 300SW963; TexCivA 11 SW(2d)380; TexCivA 17SW(2d)471; TexCivA 22SW(2d)514 (reasonable doubt as to prejudice); TexCivA 31 SW(2d)850; 152Va773, 148SE678. [a] (12) TexCivA 19SW(2d)77. (17) See also 122Kan339, 252P468. (28) 82NH 533, 136A364. (44) 242Mich402, 218NW 795. (49) Asking improper question in cross-examination where not insisted upon or answered. 233Mich514, 206NW 996. (50) Improper argument of counsel on a matter which defendant was competent to testify but did not testify held not reversible error. 80 IndA 556, 148NE643. (51) Comments on failure to call witness alleged to have been present in court, which, when informed that such witness was dead and he was mistaken as to fact, were promptly retracted and the error acknowledged. TexCivA 273SW666. (52) Offer of improper evidence before court, outside of presence of jury, with no persistent efforts by counsel to get evidence improperly before jury, not prejudicial. 211Ky669, 278SW100. (53) Repeated efforts to get inadmissible evidence before jury cured by admission of similar evidence from admissible source. 232 IllA277. (54) Improper question not prejudicial where defendant later testified to same effect. 232 IllA277. (55) Misconduct of counsel in endeavoring to get improper evidence before jury immaterial where evidence of defendant's liability is clear. 232 IllA246. (56) Counsel's erroneous statement of law which is not applicable to any issue submitted and which cannot affect jury's consideration of issues in case is harmless. TexCivA 286 SW565. (57) Reference to witness as servant and slave of defendant incapable of thinking for himself, except at master's bidding. 218Ky337, 291SW 395. (58) Where question is asked by court without objection, similar question by counsel is not prejudicial. 99 Vt425, 134A599. (59) Remarks not "couched in language of polite society" but otherwise proper. TexCivA 288SW 276. (60) Statement in presence of jury that jury were evidently mistaken in their answer to finding. TexCivA 284 SW983. (61) Attempt to read matter not in evidence. 146Wash163, 262P 119, 55ALR1218. (62) Permitting plaintiff to read to jury amended petition after special exceptions have been sustained thereto. TexCivA 20SW(2d) 363. (63) Other instances held harmless. NH 149A498. [b] **Improper argument held not to have misled jury** so as to require reversal. 80 IndA556, 148 NE643.

957-68½-New. Where the court submitted an issue to the jury previously left out is no error where council failed to request permission for further argument covering the issue. 136SC506, 134SE503.

957-68⅓-New. Epithets by counsel, based on facts shown, do not require reversal. TexCivA 19SW(2d)89.

958-69 168Ark626, 271SW7.

958-70 22AlaA279, 114S791; 63CalA 1, 268P1061; 237 IllA488; 123Kan533, 255P969; 218Ky337, 291SW395; 318 Mo 318, 300SW283; 134 Okl 266, 274P 1085; TexCivA 273SW866; TexCivA 279SW519; TexCivA 286SW565; Tex CivA 290SW283; TexCivA 295SW675; TexCivA 296SW669; TexCivA 299SW 682; TexCivA 7SW(2d)926; TexCivA 22SW(2d)753; TexCivA 29SW(2d)799; (1stcase).

958-71 97CalA731, 276P149; 123Kan 533, 255P969; Mo 271SW500; 101Vt 514, 144A856.

958-72 75CalA516, 243P43; 97CalA87, 275P456; 97CalA731, 276P149; 237 IllA488; 123Kan533, 255P969; 212Ky 310, 278SW1095; Mo 271SW500; Tex CivA 278SW881; TexCivA 286SW565; TexCivA 10SW(2d)397.

958-76 215Ala309, 110S411.

958-77 123Kan533, 255P969.

958-80 201Cal 560, 258P73; 36GaA698, 137SE850; 210Ky792, 276SW800; 220 Ky388, 295SW445; 242Mich497, 219 NW665; 172Minn591, 216NW537; MoA 280SW74; Or 292P1094(2dcase); Tex CivA 6SW(2d)408.

959-81 36GaA698, 137SE850; 239 IllA 403; 251 IllA342; 224Ky419, 6SW(2d) 491; 172Minn591, 216NW537; 320Mo 1011, 8SW(2d)982; 29 OhA438, 163NE 633; Vt 150A128(2dcase).

959-82 30Ariz204, 245P673; 36GaA 698, 137SE850; 121 Or232, 253P529.

959-83 224 IllA574; 119Kan864, 241P 442; 210Ky792, 276SW800; MoA 282 SW507; 142Wash259, 252P939. But see MoA 22SW(2d)58.

959-83½-New. That instruction to disregard misstatement was not given not necessarily fatal. 82NH180, 131A596 (if error corrected means need not be considered); 100Vt268, 137A97 (care of prudent person).

959-84 216Ala479, 113S507; Ala 128S 389(2dcase); Ala 130S541; 197Cal 148, 239P1061; 97CalA731, 276P149 (statements of counsel to court during impanelment of jury, that verdict for plaintiffs would affect jurors' interests, if they were stockholders in named insurance company); CalA 290P491; CalA 293P80; 321 Ill 518, 152NE580; 248 IllA446 (no necessity that verdict be excessive); 254 IllA192; 200 Iowa495, 203NW794; 205 Iowa365, 218NW31; Iowa 229NW667; 231Ky346, 21SW(2d)452; 233Ky464, 26SW(2d)20; 154Md63, 139A564; 234 Mich385, 208NW609; 238Mich198, 213 NW112; 242Mich558, 219NW736; 245 Mich277, 222NW123; 246Mich130, 224 NW636; Minn 230NW792; 155Miss376, 124S356; 317Mo 782, 297SW20; 319Mo 1040, 6SW(2d)591; 321 Mo 378, 11SW (2d)268; Mo 20SW(2d)906; MoA 272 SW1080; MoA 277SW585 (as to failure to produce witnesses); 222MoA43, 299SW622; MoA 7SW(2d)456; MoA 27 SW(2d)722; MoA 31SW(2d)105; 118 Nebr533, 225NW462; 227AppDiv31, 237 NYS90; 30 OhA242, 164NE783; 122 Okl 200, 253P504; 137 Okl 231, 278P 1102 (repeated asking of incompetent questions); 283Pa485, 129A566; Tex CommnA 288SW123; TexCommnA 13 SW(2d)334; TexCivA 273SW666 (rule stated); TexCivA 283SW568; TexCivA 283SW699; TexCivA 285SW675; Tex CivA 286SW565; TexCivA 290SW825; TexCivA 297SW474; TexCivA 297SW 596; TexCivA 1SW(2d)688; TexCivA 1 SW(2d)921; TexCivA 4SW(2d)169; TexCivA 4SW(2d)1003; TexCivA 8SW (2d)554; TexCivA 13SW(2d)909; Tex CivA 19SW(2d)829; TexCivA 26SW (2d)435; 100Vt210, 136A388; 100Vt 268, 137A97; 149Va82, 140SE314, 57 ALR490; 152Va773, 148SE678; 195Wis 498, 218NW832. [a] **Reversible error cannot be predicated on presence of several incompetent questions** in record, when trial court ruled correctly thereon. 227Ky841, 14SW(2d)174. [b] **Improper questions.**-49ND708, 193NW312.

959-85 279US310, 49SCt300, 73Led 706; 216Ala479, 113S507; 329 Ill 288,

160NE559; 259Mass211, 156NE15; MoA 290SW462; 113 OhSt164, 148NE641; 292Pa575, 141A495; TexCivA 273SW666; TexCivA 283SW568; TexCivA 286SW565; TexCivA 3SW(2d)106; Tex CivA 28SW(2d)1100.

959-86 216Ala479, 113S507; 242Mich402, 218NW795; 172Minn543, 216NW233; 179Minn127, 228NW552; TexCivA 286SW565 (recognizing rule); TexCivA 22SW(2d)514; TexCivA 26SW(2d)718.

959-87 TexCivA 285SW675; TexCivA 286SW565 (recognizing rule).

959-87½-New. , or where not based on evidence or inferences to be drawn therefrom. 100Vt268, 137A97.

959-88 41F(2d)542; 229Ky113, 16SW(2d)761; 140Miss375, 105S770; Tex CommnA 293SW808; TexCivA 1SW(2d)688. [a] **Overwhelming weight of evidence** to support verdict or necessity of setting aside any other verdict cannot make improper argument harmless. TexCommnA 283SW765.

959-89 197Cal148, 239P1061; 97CalA731, 276P149; TexCivA 272SW291. [a] **Improper argument** held to require reversal whether or not preponderance of evidence supported verdict for claimant. TexCivA 1SW(2d)921.

959-90 83CalA408, 256P870; CalA 288P675; 253IllA426; 256IllA210; 234Mich385, 208NW609; 122Okl200, 253P504; 143Okl196, 288P309; 118Or248, 246P723.

959-90½-New. Where counsel by his conduct sought continuously to prejudice the jury, it is such prejudicial conduct as to require reversal. 214AppDiv337, 212NYS435 (where evidence was in sharp conflict).

959-90¼-New. Allowing exception to argument without warning the jury to disregard it is held, in effect, a ruling that the argument was proper. 100Vt210, 136A388.

959-90¼-New. Where the court rules that an improper argument is proper, there is reversible error. 100Vt268, 137A97.

960-91 7F(2d)583; 247Mich593, 226NW246; MoA 291SW163. [a] (5) Refusal to permit plaintiff's counsel to open and close. Mo 31SW(2d)774. [b] (2) Refusal to permit legitimate argument held error. 216Ala248, 112S737. (3) Denying defendant permission to argue case to jury. 231Ky416, 21SW(2d)656.

960-91½-New. Limitation of the argument of counsel on each side to three hours has been held not prejudicial, in the absence of any objection or showing of injury. 99CalA240, 278P476.

960-94 Md150A263; 164Minn466, 203NW228, 205NW449, 206NW380 (former officer of plaintiff corporation permitted to be examined as on cross-examination under statute); 314Mo438, 284SW471, 47ALR25; 143Okl101, 287P1014; TexCivA 21SW(2d)547; Wis229NW860 (where conclusion was only one that could be drawn from previous testimony).

960-95 Minn230NW128.

960-99 54SD501, 223NW717.

960-1½-New. or could not have changed the result, 161Ga837, 132SE79.

960-5½-New. In an action for an injury received in a fall, judgment for plaintiff will not be reversed for his reference to the insurance company made in answer to a question as to why he went to see a certain doctor, MoA 7SW(2d)448.

960-5¼-New. nor for the doctor's reference to the insurance company, in explaining the difference between the testimony and the written report. MoA 7SW(2d)448.

960-6 206Iowa514, 219NW305.

960-7½-New. Error in permitting a witness to be examined as upon cross-examination is harmless, where his testimony is in all ways consistent with the version of facts as contended for by the adverse party. 58ND430, 226NW483.

960-8½-New. Where a partially conflicting account, given by plaintiff's witness at a former trial, was offered to show that his testimony was unworthy of belief, permitting plaintiff to show that the witness, shortly after the shooting, made a similar statement to that testified to by him on the subsequent trial, it is reversible error. 225AppDiv19, 232NYS66.

960-9 16F(2d)39; 75CalA516, 243P43; TexCivA 20SW(2d)226.

961-10 14F(2d)893.

961-11 48SD400, 204NW899.

961-16 14F(2d)893.

961-17 MoA 12SW(2d)938.

961-19 75CalA516, 243P43.

961-20½-New. Where the main issue is closely contested, depending largely on the testimony of a witness who on cross-examination denied having done certain acts toward another person, the admission of testimony of such person asserting such acts to show hostility and affect credibility was prejudicial. 218AppDiv422, 218NYS428.

961-20½-New. and the prejudice was not obviated by instructions limiting the effect of the testimony, 218AppDiv422, 218NYS428.

961-20¼-New. The admission of impeaching testimony, if an error on account of the witness' admission that he had made a contradictory statement out of court, does not require a reversal. TexCivA 10SW(2d)1051.

961-21 83CalA391, 257P124; MoA 31SW(2d)117.

961-25 227AppDiv430, 237NYS348.

961-27½-New. Exclusion of impeaching evidence prejudicial error when appellee was sole witness in own behalf and excluded testimony important as to his credibility. 212Ky149, 278SW573.

961-28 203Iowa776, 209NW452.

961-34 90CalA764, 266P606; 219MoA519, 282SW535; MoA 285SW803; TexCivA 300SW659.

962-40 See also 87CalA440, 262P380.

962-43 37GaA407, 140SE638; 204Iowa1046, 216NW952; 205Iowa483, 218NW325; 233Ky563, 26SW(2d)495; 156Miss182, 125S529(4thcase); 116Nebr18, 215NW556; 132Okl238, 270P26; TexCivA 9SW(2d)182; 38Wyo151, 265P446. [c] (6) Reopening trial of judgment creditor's suit to set aside fraudulent conveyance is not prejudicial where only additional evidence consisted of files and record in suit in which judgment was recovered. 33Wyo457, 240P449. (7) Considering letter after taking of evidence is not error where writer of letter was examined and cross-examined as witness. 153Va128, 149SE503.

962-45 IndA163NE599(2dcase); 316Mo742, 293SW111; TexCivA 272SW517 (where merely cumulative); TexCivA 10SW(2d)1040.

962-47 88IndA61, 163NE121; MoA 277SW588; 118Or568, 247P815 (refusal of testimony in rebuttal which party had had opportunity to testify to on his direct examination); TexCivA 26SW(2d)299 (refusing to allow recall of witness).

962-47½-New. Judgment not reversed when fatal defect in proof could not be cured. 9F(2d)733 (on refusal of court to reopen case).

962-47¾-New. Admitting improper rebuttal evidence, after the withdrawal of an objection, is not reversible error. Mo 287SW634.

962-48 122Or498, 259P891; 130Or32, 273P711.

963-51 Va154SE492.

963-51½-New. Failure of court to suspend trial and order production of bills not error where they would not have affected situation. 214Ala8, 106S49.

963-51¾-New. In an action in which a photographic copy of an application for a bond was used under an agreement that the original should later be substituted, failure to give defendant an opportunity to examine the original, when filed, although error, has been held not reversible, where the reviewing court permitted an examination, under statute. 97CalA492, 275P878.

963-59 83CalA578, 257P103 (motion to strike out irrelevant portion of deposition).

963-60½-New. or shortening prescribed time for taking depositions; CalA 290P300.

963-63 TexCivA 295SW347.

963-68 6F(2d)712; 6F(2d)873; 19F(2d)781; 35F(2d)265; 220Ala194, 124S423; 31Ariz302, 252P1012; 180Ark947, 23SW(2d)611; 203Cal374, 264P485; 83CalA41, 256P476; 89CalA275, 264P580; 101CalA218, 281P681; 107Conn535, 141A657; 42Ida338, 245P389; 245IllA264; IndA152NE177; Iowa231NW651; 151Md571, 135A373; Mass165NE127; 241Mich129, 216NW438; 241Mich343, 216NW927; 165Minn103, 205NW886; 170Minn451, 212NW815; 175Minn190, 220NW550; 321Mo140, 9SW(2d)929; 82Mont336, 266P1103; 117Nebr636, 222NW57; 83NH236, 141A136; NJ147A445; NJ142A366; 191NC468, 132SE151; 292Pa366, 141A244; 299Pa79, 149A104 (ruling must be harmful to justify reversal); 300Pa569, 151A362 (order of proof); RI150A79; 136Wash312, 239P1011; 200Wis367, 228NW503; 33Wyo457, 240P449. [f] **Permitting witness to give evidence out of jury's hearing** is not error where he gave same evidence in presence of jury. 221MoA715, 285SW524. [g] **Reversal of previous ruling** on objection to evidence held not prejudicial. 208Iowa70, 221NW941.

964-69 TexCivA 286SW336.

964-70 6F(2d)712; 68CalA789, 230P458; Md148A836; 224AppDiv280, 229NYS687; TexCivA 23SW(2d)808.

964-71 28F(2d)459.

964-72 Minn231NW194.

964-74 170Ga62, 152SE112 (question being error of court in directing verdict, minor errors of admissibility need not be passed on).

964-76 83CalA41, 256P476.

964-77 299Pa25, 148A909.

964-79½-New. , or where there was issue on question to which evidence related. 21AlaA66, 106S56.

964-80 217MoA119, 273SW768; 51Nev5, 266P917 (error in placing burden of proof); 221AppDiv376, 222NYS737. [a] **Where case is close, rulings must be free of substantial error.**—235IllA22.

964-82 [a] MoA 14SW(2d)12. [e] **Question calling for hearsay** testimony is harmless where witness gave no such testimony. 124Or179, 264P351.

964-83½-New. Weighing evidence in equity case by rule at law rather than equity rule that a sworn answer is to be regarded as evidence is ground for reversal, although the same result might have been reached had the proper procedure been followed. 13F(2d)740.

964-85 19F(2d)781; 20F(2d)897; 22F(2d)360; CalA263P316; 319Mo644, 5SW(2d)413; 84Mont141, 274P844; 33NM623, 274P50(1stcase); 25OhA120, 157NE308; OhA168NE394 (where case is tried before judge without jury); 117Or608, 244P873; 52SD198, 217NW190 (admitted facts); TexCivA 297SW879; TexCivA 13SW(2d)995; 101WVa411, 132SE870; 33Wyo326, 239P531.

964-86 215Ala148, 109S881; 42Ida522, 247P740; 257Mass272, 153NE784; 319Mo644, 5SW(2d)413.

965-88 216Ala663, 114S182; 218Ky59, 290SW1044; Md148A124; 217MoA691, 275SW62; MoA 27SW(2d)1052; NJ147A445; 3NJMisc1050, 130A536; 285Pa260, 131A858; TexCivA 297SW258.

965-89 Md148A124.

965-91 215Ala612, 111S901; Ala129S20(2dcase); 22AlaA483, 118S170; MoA7SW(2d)749; NJ137A716; 69Utah557, 257P658.

965-92 36F(2d)934; 219Ala223, 121S716; 209Ky442, 272SW912; 156Md489, 144A698; Mass167NE235; 103NJL658, 137A405; 196NC712, 146SE804; 30OhA300, 165NE47. [a] (1) 223Ky727, 4SW(2d)695.

965-94 22AlaA282, 115S221.

966-98 75Mont493, 244P298; TexCivA 3SW(2d)1113; 35Wyo358, 249P799.

966-2 [a] (2) NJ140A887.

966-5 218Ala290, 118S506(2dcase); 213Ky789, 281SW1028; MoA296SW1036; TexCivA 30SW(2d)1108; Utah267P1011. But see Mo287SW634.

966-6 215Ala612, 111S901; 216Ala296, 113S54; 204Iowa638, 215NW713; Iowa232NW421; Iowa233NW257; 320Mo57, 6SW(2d)576, 67ALR489; TexCivA 295SW675; TexCivA 300SW659.

966-7 16F(2d)108; 22F(2d)524; 212Ky709, 279SW1100.

967-9 147Va208, 136SE591.
967-11 202 Iowa43, 209NW406; 69 Utah557, 257P658.
967-12 215Ala97, 109S751; 220Ala207, 124S737; 86Mont562, 284P539; NJ 140 A578; TexCivA 18SW(2d)778 (leading questions); 69Utah557, 257P658.
967-13 82Colo 497, 261P872; TexCivA 300SW659.
967-15 84CalA142, 257P606.
967-15½-New. Where after exclusion from a hypothetical question the expert witness gave the answer desired objecting party cannot complain. 203 Iowa5, 212NW348.
967-16 42F(2d)111; 218Ala290, 118S 506(2dcase); 233 IllA143; 220Ky85, 294SW820; Md 151A400; 241Mich383, 217NW329, 57ALR262; 249Mich76, 227 NW759; 251Mich597, 232NW371; MoA 26SW(2d)807 (question abandoned unanswered); 99Vt191, 130A697. [a] Where question was allowed after being reframed, no error may be claimed, on refusal to permit question. CalA 238P841.
967-17 74CalA10, 239P429; 85CalA 332, 259P470; 94CalA441, 271P374; 204 Iowa456, 215NW767; 130Kan338, 286P669; 229Ky284, 17SW(2d)233; MoA 98W(2d)681; 52ND925, 204NW 889; 54ND801, 211NW435; 141 Okl 133, 284P21; TexCivA 281SW234; Tex CivA 28SW(2d)911 (immaterial); Tex CivA 32SW(2d)703.
967-18 204 Iowa456, 215NW767; 143 Okl 99, 287P1019.
967-19 33F(2d)876 (receiving opinions of experts in absence of hypothetical questions); 203 Iowa467, 212NW886.
967-20 233 IllA143.
967-21 CalA 279P474; 101CalA218, 281P681; 220Ky85, 294SW820.
967-22 35F(2d)611; MoA 287SW803; MoA 293SW1051; MoA 298SW134 (held not prejudicial where attorney had opportunity to add omitted facts); 159 Tenn86, 16SW(2d)20; 65Utah465, 238P 259, 41ALR1495.
967-23 Ala 129S466; 253 IllA498; 152 Md536, 137A299; 241Mich383, 217NW 329, 57ALR262; 145Miss683, 110S237. But see 100CalA357, 280P204(2dcase).
968-25 216Ala43, 112S360; 220Ala194, 124S423; 101CalA218, 281P681; 254 IllA289; 204 Iowa456, 215NW767; 52 ND925, 204NW889.
968-30 218Ky585, 291SW785; 123 Or 632, 263P400.
968-31½-New. or where the error was cured by subsequent introduction of omitted evidence; 120 Or286, 249P627.
968-33½-New. Question in poor form harmless error where it could not have influenced verdict. 233 IllA143.
968-35 148Md188, 129A31 (question leading but admission not prejudicial).
968-35½-New. A hypothetical question embracing facts not shown by the evidence is prejudicial. 78Colo 6, 238P 29.
968-36 Ala 130S807; 71CalA82, 234P 863; 100CalA775, 281P95; 106Conn86, 136A871; 88 IndA399, 164NE284; 149 Md533, 131A762 (error not prejudicial); 150Md429, 133A601; 156Md680, 145A 177; 235Mich633, 209NW807; 312Mo 173, 279SW89; MoA 275SW358; MoA 279SW438; 220MoA303, 286SW709; MoA 6SW(2d)628; MoA 10SW(2d)351; MoA 26SW(2d)52 (answer not prejudicial); NJ 141A163; 245NYS695; 51 ND889, 200NW910; 54ND336, 209NW 547; 293Pa524, 143A231; 295Pa455, 145A505; TexCivA 286SW901; TexCivA 9SW(2d)182; TexCivA 30SW(2d)503; 100Vt334, 137A199. But see CalA 285P 409; MoA 24SW(2d)196. [a] (5) Cross-examination for purpose of impeachment. Mo 20SW(2d)684, 66ALR263 (error not cured by exclusion of testimony). (6) Other instances. Iowa 232 NW677; MoA 15SW(2d)356; 225App Div16, 232NYS46.
968-36½-New. Error in permitting nominal party who did not appear to be called and cross-examined is not ground for reversal where not prejudicial. Minn 230NW277.
968-37 214Ala239, 107S98; 68CalA171, 228P873; 69CalA114, 230P464; CalA 290P597; 107Conn535, 141A657; 41 Ida 729, 241P1014; IndA 151NE33; Iowa 209NW435; 204 Iowa15, 214NW562; 207 Iowa232, 222NW412; 150Md429, 133A601; 253Mass490, 149NE311; 166 Minn374, 208NW22; 74Mont236, 239P 1037; 213AppDiv471, 210NYS668; 118 Or568, 247P815; TexCivA 108W(2d) 1043; 100Vt334, 137A199; 101Vt94, 141A594; Wash 290P842(1stcase).
968-38 36F(2d)932; 204 Iowa555, 215 NW664; 205 Iowa483, 218NW325 (permitting defendant in equity case to bring out material testimony on cross-examination); 121Kan797, 250P308; 235Mich633, 209NW807; 169Minn313, 211NW311; 176Minn138, 222NW904; 312Mo 173, 279SW89; Mo 26SW(2d) 618; MoA 285SW549; MoA 286SW150; 116Nebr112, 216NW191; 130 Okl 237, 266P763; Utah 276P651; 100Vt395, 138 A725, 54ALR1369; 142Wash571, 253P 797. [a] Limiting cross-examination impeaching witness to show his prejudice against city sued for damage. 216 AppDiv468, 215NYS521.
969-40 67CalA372, 227P710; 69CalA 114, 230P464; 73CalA476, 238P1062; 82 CalA532, 255P854; 85CalA468, 259P 965; 255 IllA1; 88 IndA399, 164NE284; 204 Iowa456, 215NW767; 166Minn478, 208NW190; MoA 98W(2d)685; NJ 141 A584; 29 OhA467, 163NE728; 118 Or 568, 247P815; 132 Or46, 284P567; 286 Pa31, 132A800; 295Pa455, 145A505; RI 148A316; 50SD226, 209NW343; 53 SD588, 221NW675; 153Wash549, 280P 50. See also 206 Iowa771, 221NW489; 172Minn250, 215NW181.
969-40½-New. and the matter was not disputed; 50SD226, 209NW343.
969-41 218Ala468, 118S794; 95CalA 195, 272P333; 34GaA321, 129SE565; 334 Ill 107, 165NE650; 148Md345, 129 A506; 221MoA1151, 298SW103.
969-43 95CalA162, 272P591; 100Vt 334, 137A199.
969-45 97CalA605, 275P979.
969-46 150Md429, 133A601.
969-47½-New. The exclusion of proper testimony on cross-examination to show inconsistent statements may be prejudicial. TexCivA 17SW(2d)110.
969-48 89CalA435, 264P782; Iowa 220 NW38; 172Minn250, 215NW181.
969-50 3F(2d)710 (defendant accepted witness as his own); NJ 138A705; 135 Wash429, 237P1012.
969-51 Ark 31SW(2d)421; Utah 275P 592.
969-52 99CalA153, 277P1093; Md 150 A787; SD 231NW930; 69Utah557, 257 P658; 99Vt499, 134A700.
969-53 93CalA455, 269P665.
969-54 Mass 172NE71; 99Vt499, 134A 700.
969-55 216Ala26, 112S307; 258Mass 234, 154NE765.
969-55½-New. Undue restriction of cross-examination on material issue is ground for reversal. 41 Ida729, 241P 1014.
969-55¾-New. Whenever counsel is rightly seeking by cross-examination to bring a helpful light on the subject of inquiry, it is harmful error to deny him the right. 97Fla591, 121S793(2dcase).
969-55¼-New. Refusal to permit cross-examination of a witness who had previously testified by deposition is harmless where appellant was subsequently permitted to and did examine the witness as his own. 207Cal 485, 279P800.
969-56 5F(2d)183; 5F(2d)787; 10 F(2d)127 (admission of parole evidence before execution of writing harmless, where it does not tend to alter or vary the writing); 14F(2d)734; 19F(2d)67; 30F(2d)349; 33F(2d)60; 35F(2d)265; 36F(2d)625; 36F(2d)921; 42F(2d)48; 42F(2d)440; 43F(2d)920; 213Ala125, 104S403; 213Ala214, 104S505; 213Ala 494, 106S150; 214Ala364, 107S821; 216 Ala299, 113S28; 216Ala426, 113S289; 216Ala472, 113S529; 22AlaA204, 114S 176; 216Ala663, 114S182; 217Ala33, 114S468; 217Ala39, 114S470; 218Ala 290, 118S506(2dcase); 219Ala223, 121 S716; 219Ala384, 122S322; 220Ala190, 124S418; 220Ala194, 124S423; Ala 128 S606; Ala 130S213; 21AlaA591, 111S 200; 32Ariz596, 261P48; 33Ariz64, 262 P489; 171Ark594, 285SW363; 173Ark 937, 294SW353; 176Ark1188, 5SW(2d) 916; 199Cal 523, 250P397; 200Cal 628, 254P256; 201Cal 560, 258P73; 203Cal 26, 263P240; 204Cal 4, 266P273; 207 Cal 515, 279P134; Cal 292P451; 68 CalA139, 228P676; 68CalA789, 230P 458 (where substantial justice has been done); 71CalA197, 234P926; 72CalA 94, 236P346; 81CalA347, 253P947; 81 CalA423, 254P289; 85CalA624, 260P347; 86CalA572, 261P737; 87CalA684, 263P 353; 88CalA331, 263P365; 89CalA227, 264P501; 89CalA628, 265P378; 92CalA 513, 268P379; 93CalA455, 269P665; CalA 279P474; CalA 284P1056; CalA 286P714; CalA 289P221; CalA 290P 630; CalA 290P1062; 78Colo 235, 242 P45; 78Colo 310, 241P539; 81Colo 389, 255P628; 81Colo 370, 256P1; 102Conn 735, 130A102 (harmless under circumstances); 105Conn33, 134A223; 106 Conn127, 137A390; 106Conn286, 137A 753; 108Conn58, 142A572; 111Conn 497, 150A511; 92Fla339, 110S529; 97 Fla591, 121S793(2dcase); 160Ga831, 129SE546; 163Ga742, 137SE69; 164 Ga696, 139SE333; 164Ga811, 139SE 716; 165Ga449, 141SE205; 166Ga209, 143SE149; 168Ga766, 149SE138; 34 GaA321, 129SE565; 35GaA34, 132SE 123; 35GaA438, 134SE122; 35GaA469, 134SE113; 35GaA515, 134SE140 (evidence of custom); 36GaA70, 135SE 439; 36GaA354, 136SE540; 36GaA684, 137SE843; 37GaA229, 139SE822; 38 GaA424, 144SE127; 39GaA214, 146SE 512(2dcase); 39GaA597, 148SE12; 40 GaA30, 148SE666; 40GaA4, 148SE757; 40GaA332, 149SE582; 40GaA341, 149 SE657; 41GaA211, 152SE264; 27 Hawaii177; 43 Ida255, 251P623; 46 Ida181, 266P1039; 46 Ida512, 269P 987; 48 Ida798, 285P673; 318 Ill 11, 148NE862; Ill 173NE479; 232 IllA450 (superfluous evidence); 232 IllA589; 236 IllA601; 237 IllA279; 244 IllA441; 253 IllA190; 80 IndA556, 148NE643; IndA 149NE79; 85 IndA361, 151NE15; 87 IndA462, 151NE735; IndA 157NE 464; IndA 169NE57; 199 Iowa875, 200 NW321; 200 Iowa204, 202NW515; 200 Iowa1169, 206NW141; Iowa 209NW 435; 204 Iowa804, 213NW757; 204 Iowa335, 213NW762; 203 Iowa1392, 214NW592; 205 Iowa271, 215NW649; 208 Iowa24, 221NW197; 207 Iowa585, 223NW397; 207 Iowa872, 224NW32; 208 Iowa914, 224NW568; Iowa 231NW 323; Iowa 231NW651; 119Kan796, 241 P462; 120Kan572, 245P114; 121Kan 474, 247P868; 121Kan614, 249P583; 122Kan339, 252P468; 123Kan39, 254 P383; 123Kan508, 256P119; 125Kan 66, 262P587; 125Kan206, 263P1079; 125Kan252, 264P59; 125Kan641, 646, 266P65; 126Kan675, 271P282; 127 Kan83, 272P151; 129Kan140, 281P 919; 129Kan759, 284P407; 130Kan488, 287P603; Kan 292P939; 214Ky272, 283SW96; 214Ky416, 283SW402; 218 Ky535, 291SW785; 219Ky528, 293SW 1091; 219Ky715, 294SW149; 220Ky 388, 295SW445; 224Ky383, 6SW(2d) 480; 228Ky184, 14SW(2d)768; 229Ky 113, 16SW761; 231Ky700, 22SW(2d) 98; 232Ky670, 24SW(2d)570; 233Ky 211, 25SW(2d)363; 233Ky276, 25SW (2d)398; 234Ky508, 28SW(2d)780; 235Ky197, 30SW(2d)882; 12LaA186, 125S147(2dcase); 124Me369, 129A488; Me 136A459; 128Me50, 145A400, 67ALR 239; 148Md391, 129A354; 148Md545, 129A839; 150Md429, 133A601; 151Md 571, 135A373; 151Md658, 135A838, 50 ALR280; 153Md119, 137A484; 153Md 156, 138A7; 154Md604, 141A416; Md 148A238; Md 148A246; 253Mass548, 149NE413; 254Mass438, 150NE224; 255Mass72, 150NE898; 255Mass104, 151 NE84; 255Mass591, 152NE83; 258Mass 343, 155NE22; 259Mass46, 156NE61; 259Mass376, 156NE533; 262Mass191, 159NE735; 263Mass147, 160NE821; 265Mass189, 163NE906; Mass 165NE 416; Mass 165NE881; Mass 166NE768; Mass 169NE495; 232Mich300, 205NW 199; 239Mich37, 214NW170; 240Mich 360, 215NW341; 241Mich343, 216NW 927; 242Mich253, 218NW801; 247Mich 226, 225NW549; 165Minn358, 206NW 443; 168Minn111, 209NW895; 168Minn 248, 210NW55; 169Minn229, 210NW 997; 173Minn207, 217NW109; 173Minn 529, 217NW933; 174Minn127, 218NW 462; 177Minn13, 224NW259; 178Minn 471, 227NW491; Minn 231NW790; 153 Miss892, 122S95; 156Miss410, 124S786; 155Miss588, 124S795; 157Miss746, 128S

563; 307Mo 336, 270SW638; Mo 271SW 749; 310Mo 1, 274SW1079; 312Mo 342, 278SW1000; 319Mo 644, 5SW(2d)413; 322Mo 158, 16SW(2d)190; Mo 18SW (2d)445; Mo 19SW(2d)691; Mo 26SW (2d)618; Mo 29SW(2d)64; Mo 30SW (2d)118; MoA 272SW1087; MoA 275 SW586; MoA 275SW592; MoA 279SW 165; MoA 279SW761; 222MoA483, 280SW720; 221MoA715, 285SW524; 221MoA748, 286SW412; MoA 290SW 638; 221MoA67, 294SW123; MoA 4SW (2d)831; MoA 5SW(2d)644; MoA 5 SW(2d)659; MoA 8SW(2d)1082; MoA 14SW(2d)694; MoA 17SW(2d)658; MoA 18SW(2d)520; MoA 31SW(2d)86; MoA 31SW(2d)580; 73Mont385, 236P 545; 84Mont141, 274P844; Mont 289P 571; 117Nebr786, 222NW633; 103NJL 502, 135A884; NJ 138A516; NJ 131A 898 (evidence held harmless); NJ 135 A667; NJ 143A153; NJSup 148A158; NJSup 150A580; 244NY168, 155NE88; 244NY251, 155NE116; 126Misc858, 215 NYS584; 190NC89, 129SE177; 191NC 297, 131SE735; 192NC433, 135SE133; 193NC798, 138SE135; 196NC89, 144SE 526; 198NC812, 150SE699(2dcase); 49 ND838, 193NW658; 52ND925, 204NW 889; 54ND439, 209NW974; 55ND353, 213NW841; 55ND817, 215NW268; 58 ND263, 225NW459; ND 232NW897; 21 OhA227, 153NE166; 28 OhA88, 162NE 623; 29 OhA399, 163NE310; 115 Okl 153, 241P342; 115 Okl 280, 242P565; 117 Okl 185, 245P858; 120 Okl 108, 250 P892; 120 Okl 282, 251P43; 124 Okl 235, 254P962; 125 Okl 276, 257P759; 128 Okl 234, 262P694; 129 Okl-288, 264 P824; 130 Okl 149, 265P1051; 133 Okl 14, 270P838; 139 Okl 26, 278P1083; 118 Or 421, 247P139; 119 Or682, 250P 1098; 121 Or259, 253P873; 122 Or511, 259P890; 122 Or498, 259P891; 122 Or 579, 260P444; 123 Or647, 263P881; 129 Or435, 277P291; 130 Or424, 278P981; Or 289P375; Or 291P349; Or 291P380; 287Pa431, 135A103; 292Pa366, 141A 244; 95PaSuper212; 14PortoRico 437; 16PortoRico 412; 32PortoRico 235; 32 PortoRico 591; 34PortoRico 426; 132 SC398, 129SE199; 142SC284, 140SE560, 57ALR634; 147SC227, 145SE135; 157 SC469, 154SE855; SC 155SE842; 48SD 400, 204NW899; 49SD256, 207NW102; 50SD561, 210NW982; SD 225NW216; TexCommnA 273SW834; TexCommnA 276SW203; TexCommnA 32SW(2d)645; TexCivA 265SW267; TexCivA 274SW 253; TexCivA 274SW260; TexCivA 275 SW481; TexCivA 276SW746; TexCivA 277SW152 (admission of evidence of market value of lease not prejudicial); TexCivA 277SW407 (admission of evidence not harmless); TexCivA 277SW 742; TexCivA 278SW272; TexCivA 278 SW939 (where erroneously admitted evidence did not enter into trial court's judgment); TexCivA 280SW251; Tex CivA 281SW244; TexCivA 281SW289; TexCivA 281SW883; TexCivA 281SW 1090; TexCivA 283SW316; TexCivA 283SW914; TexCivA 284SW632; Tex CivA 285SW340; TexCivA 289SW159; TexCivA 290SW781; TexCivA 290SW 1108; TexCivA 291SW337; TexCivA 293SW250; TexCivA 295SW625; Tex CivA 297SW232; TexCivA 298SW154; TexCivA 298SW631; TexCivA 300SW 650; TexCivA 1SW(2d)369; TexCivA 1 SW(2d)720; TexCivA 4SW(2d)1041; TexCivA 5SW(2d)252; TexCivA 8SW (2d)306; TexCivA 10SW(2d)1040; Tex CivA 12SW(2d)599(2dcase); TexCivA 14SW(2d)886; TexCivA 15SW(2d)200; TexCivA 16SW(2d)954; TexCivA 18SW (2d)237; TexCivA 19SW(2d)175; Tex CivA 19SW(2d)451; TexCivA 22SW(2d) 467; TexCivA 22SW(2d)991; TexCivA 27SW(2d)287; TexCivA 27SW(2d)558; TexCivA 27SW(2d)568; TexCivA 27SW (2d)621; TexCivA 31SW(2d)839; Tex CivA 32SW(2d)212; 65Utah395, 237P 948; 65Utah424, 237P945; 69Utah557, 257P658; Utah 273P515; Utah 273P 974; Utah 279P499; Utah 280P235; 98Vt492, 129A234; 99Vt65, 130A749; 101Vt427, 144A194; Vt 147A352; Vt 147A771; Vt 151A568; Vt 151A642; 148Va699, 139SE328; 151Va173, 144SE 485; 153Va261, 145SE366; 149Wash409, 271P85; 149Wash573, 271P891; 155 Wash147, 283P691; 155Wash564, 285P 433; 101WVa675, 133SE388; 39Wyo 195, 271P19. See also MoA 296SW269; 83NH489, 144A848. [c] **Where complaining party had opportunity to cross-examine witness,** it is not prejudicial error for court to overrule objections to questions as not calling for reasonable value. 213Ala625, 105S661. [d] **Evidence held not prejudicial.**–Mass 172NE 113.

969–56½–New. Permitting juror to question witnesses resulting in admission of incompetent and irrelevant matter is not prejudicial, 211Ky176, 277SW 320 (no objection by counsel).

969–56½–New. or where it does not affect the substantial rights of the parties. 103NJL537, 138A119.

970–57 21F(2d)292; 26F(2d)403; 213 Ala665, 106S170; 215Ala426, 111S214; 219Ala353, 122S437; 220Ala75, 124S 110; Ala 129S88; Ala 130S213; 20AlaA 582, 104S343; 21AlaA591, 111S200; 198Cal 667, 247P195; 204Cal 354, 268P 334, 60ALR1381 (where mother wept upon identifying photograph of deceased son); 70CalA336, 233P374; 83CalA111, 256P551; 97CalA398, 275P861; 98CalA 75, 276P383; 100CalA12, 279P829; CalA 288P684; 83Colo 225, 263P728; 104Conn728, 134A220; 106Conn286, 137 A753; 163Ga703, 136SE893; 159Ga 837, 127SE117; 34GaA165, 128SE589; 42 Ida48, 246P12; 44 Ida729, 262P152; 233 IllA522; 236 IllA84; 236 IllA601; 85 IndA161, 152NE723; 123Kan457, 256P143; 129Kan19, 281P925, 68ALR 415; 215Ky401, 285SW245; 225Ky 846, 10SW(2d)456; 229Ky538, 17SW (2d)422; 229Ky572, 17SW(2d)756; 125 Me88, 131A1; 151Md571, 135A373; Mass 168NE166; 248Mich184, 226NW 882; 103NJL200, 134A834; 105NJL 193, 143A435; 244NY168, 155NE88; 211AppDiv832, 208NYS814; 217AppDiv 57, 216NYS464; 193NC73, 136SE257; 52ND48, 203NW192; 23 OhA319, 156NE 149; 133 Okl 168, 271P835; 128 Or83, 262P939; 287Pa431, 135A103; 34Porto Rico 661; 142SC284, 140SE560, 57ALR 634; TexCivA 265SW267; TexCivA 272 SW517; TexCivA 272SW821 (no bearing on issues); TexCivA 283SW611; TexCivA 294SW295; TexCivA 23SW (2d)755; TexC'vA 25SW(2d)717; Tex CivA 27SW(2d)842; 99Vt249, 131A14; 152Wash10, 277P75. See also 68CalA 326, 229P348. [d] (1) 46 Ida355, 267 P611; TexCivA 283SW316.

971–58 26F(2d)403; 206Cal 199, 273P 560; 97CalA398, 275P861; 97CalA731, 276P149; CalA 285P715; CalA 286P 1078; Conn 143A568; 110Conn125, 147 A366; 111Conn178, 149A774; 111Conn 521, 150A520; 93Fla387, 112S264; 163 Ga703, 136SE893; 333 Ill 588, 165NE 199; 232 IllA246 (erroneous admission of evidence harmless where evidence of defendant's negligence is clear); 236 IllA84; 151Md658, 135A838, 50ALR 280; 156Md662, 145A342; Mass 164NE 486; 232Mich19, 204NW722; 240Mich 300, 215NW375; 321Mo 140, 9SW(2d) 929; MoA 293SW503; MoA 13SW(2d) 578; MoA 15SW(2d)868(2dcase); 49 Nev80, 237P377; 104NJL133, 139A5; 34NM411, 282P273(1stcase); 244NY168, 155NE88; 211AppDiv832, 208NYS814; ND 231NW859; 116 Okl 155, 243P758; RI 150A753; 151SC474, 149SE254; Tex CommnA 294SW193; TexCivA 281SW 244; TexCivA 290SW276; TexCivA 294 SW984; TexCivA 2SW(2d)864; Tex CivA 3SW(2d)1113; TexCivA 11SW(2d) 354; TexCivA 12SW(2d)633; TexCivA 16SW(2d)429; TexCivA 21SW(2d)547; 198Wis252, 223NW844. [c] (1) 192 NC236, 134SE647. (2) Where it corroborated other witnesses. Me 149A385. (3) Same testimony already given. 198 NC494, 152SE393(2dcase).

971–58½–New. where the cause is tried de novo in the appellate court, 217MoA 354, 266SW992.

971–59 202Cal 359, 260P869. See also 98NJEq713, 129A702.

971–60 21F(2d)292; 220Ala75, 124S 110; Ala 127S829; 91CalA448, 267P 164; 98CalA714, 277P759; 92Fla18, 109 S635; 96Fla620, 119S333; Iowa 224NW 548; 265Mass339, 163NE902; Mass 169 NE157; MoA 256SW501; 217AppDiv 57, 216NYS464; 31 OhA46, 166NE243; TexCommnA 23SW(2d)673; TexCivA 294SW913; TexCivA 19SW(2d)802; TexCivA 25SW(2d)717; 145Va448, 134 SE588; 146Wash478, 263P957.

971–61 214Ky272, 283SW96; 37Wyo 432, 263P607, 612 [citCJ].

972–62 219Ala392, 122S349; 233 IllA 522; 130Kan338, 286P669; 209Ky665, 273SW506; 214Ky272, 283SW96; 315 Mo 713, 290SW135; Mo 10SW(2d)651; Mo 18SW(2d)445; MoA 17SW(2d)983; 196NC780, 147SE300; 31 OhA46, 166NE 243; 138 Okl 201, 280P570; 51SD369, 213NW946; TexCivA 290SW226.

972–63 TexCivA 277SW441; TexCivA 291SW337; TexCivA 27SW(2d)880. See also 220MoA273, 286SW153.

972–65 118 Or62, 216P743, 245P1083. [a] **Where evidence admitted might have been limited by requested cautionary instruction.** NJ 150A414.

972–66 CalA 284P1056; 209Ky665, 273SW506; 125Me88, 131A1; MoA 300 SW1000; 195NC328, 142SE27; Tex CivA 286SW749.

972–67 213Ky689, 281SW823.

972–69 38GaA487, 144SE403; 101NJ Eq401, 138A693; TexCivA 28SW(2d) 622.

972–69½–New. Admission of evidence that, in former action against appellant, judgment was that plaintiffs therein take nothing, then such admission is not prejudicial. 196 Ind520, 148NE474.

972–69¼–New. Admission of evidence that did not mislead judge who tried the case not ground for reversal. 196 Ind520, 148NE474.

972–69¼–New. No error where neither cause of action nor defense was based upon the evidence. 191NC493, 132SE 282.

972–69½–New. A judgment will not be reversed on the ground that proper evidence improperly influenced the jury. 204Cal 415, 268P644.

972–69½–New. A judgment will not be reversed on the ground that proper evidence improperly influenced the jury. CalA 290P80.

972–70 14F(2d)940; 15F(2d)714; 16 F(2d)734; 23F(2d)266; 28F(2d)579 [certiorari den 279US837, 49SCt251, 73 L ed984(9thcase)]; 33F(2d)564; 41 F(2d)122; 214Ala132, 107S73; 216Ala 625, 114S292 (irrelevant evidence of summons and complaint in another suit against defendant); 216Ala265, 114S 292; 219Ala392, 122S349; Ala 130S 778; 22AlaA385, 116S108; 171Ark594, 285SW363; 199Cal 562, 250P572; 97 CalA569, 275P892; CalA 282P435; 82 Colo 395, 260P114; 109Conn1, 144A 471; 160Ga886, 129SE539; 165Ga103, 139SE870; 37GaA239, 139SE590; 38 GaA582, 144SE921(1stcase); 41GaA 195, 152SE263; 43 Ida505, 256P88; 44 Ida435, 258P179; 320 Ill 317, 150NE 911; 320 Ill 449, 151NE239; 232 IllA 165; 237 IllA309; 84 IndA264, 151NE 137; 198 Ind633, 154NE485; IndA 160 NE52; 203 Iowa1297, 214NW574; 208 Iowa222, 225NW369; 212Ky60, 278SW 149 (where mere contradictory evidence was admitted as substantive evidence, and may have affected jury); 212Ky 146, 278SW570; 215Ky128, 284SW91; 217Ky148, 289SW215; 225Ky635, 9SW (2d)998; 226Ky424, 11SW(2d)87; 261 Mass35, 158NE273; 261Mass333, 158 NE660; Mass 172NE224; 234Mich528, 208NW691; 243Mich373, 220NW654; 249Mich391, 228NW687; 179Minn67, 228NW546; 317Mo 782, 297SW20; MoA 281SW97; 220MoA1099, 297SW108; MoA 291SW153; MoA 299SW118; MoA 10SW(2d)957; MoA 24SW(2d)196; 250 Mich398, 230NW181; 113Nebr718, 204 NW520; 83NH23, 136A751; 83NH401, 143A68; NJ 141A590; 241NY327, 150 NE132, 43ALR880; 242NY216, 151NE 212; 243NY130, 152NE699; 127Misc 272, 215NYS798; 221AppDiv817, 224 NYS209; 132Misc772, 230NYS353; 230 AppDiv330, 243NYS597; 194NC753, 140SE724; 195NC491, 142SE772; 50 ND394, 196NW98; 51ND287, 199NW 945; 19 OhA427; 22 OhA234, 153NE 922; 27 OhA386, 160NE863; 27 OhA 179, 161NE35; 121 Okl 129, 247P974; 124 Okl 155, 254P7; 128 Okl 118, 261P 216; 132 Or145, 285P214 (testimony as to custom); 47RI 378, 133A618; 50RI 445, 148A597; 136SC389, 134SE292; 51SD214, 213NW19; SD 226NW644 (evidence inadmissible as res gestæ);

TexCommnA 283SW154; TexCommnA 29SW(2d)1038; TexCivA 270SW1099; TexCivA 271SW401; TexCivA 282SW261; TexCivA 300SW256; TexCivA 300SW641; TexCivA 8SW(2d)306; TexCivA 25SW(2d)639; TexCivA 25SW(2d)902; Utah 275P582; Utah 282P1030; 99Vt244, 131A10; 102WVa595, 136SE47. [c] **Admission of oral agreement varying written contract.**–TexCommnA 283SW154. [d] **Error in admission of secondary evidence.**–Ala 128S608.

973–71 Ala 128S239; 72CalA169, 236P979 (where evidence almost entirely circumstantial); Mo 31SW(2d)21; 217MoA119, 273SW768; 227AppDiv430, 237NYS348; Wis 229NW549.

974–72 226Ky322, 10SW(2d)1104; 217MoA119, 273SW768; 31OhA28, 166NE151; TexCivA 275SW206.

974–73 170Ark421, 279SW995 (hearsay tending to establish claim of partnership); 35GaA769, 134SE808; 123Kan128, 253P1090; 212Ky201, 278SW554 (where truth of answers to applications for insurance was for jury, admission of incompetent evidence that he never had heart disease is prejudicial); Me 150A494; 127Misc272, 215NYS798; OhA 173NE197; TexCommnA 25SW(2d)813 (findings of court based on testimony); TexCivA 270SW1099; TexCivA 285SW869; TexCivA 15SW(2d)1060.

974–74½–New. , where such evidence was particularly called to the attention of jury by judge. 191NC130, 131SE400.

974–75 MoA 31SW(2d)575; 227AppDiv70, 237NYS34; TexCivA 18SW(2d)750.

974–76 34GaA240, 129SE118; 41GaA195, 152SE263 (irrelevant testimony); 237IllA309; 252Mass397, 147NE883; 242Mich204, 218NW784. [c] **Admission of expert testimony invading province of jury** held prejudicial. 102NJL307, 131A905.

974–77 218Ky497, 291SW737. [a] (3) Permitting testimony as to insurance in a negligence action. TexCivA 284SW321.

974–79 16F(2d)734; 198Ind633, 154NE485; 200Iowa403, 204NW247; 222AppDiv347, 225NYS761. [a] (4) In action for personal injuries from automobile accident, admitting evidence that defendant said he was heavily insured was held prejudicial error. 198Ind633, 154NE485.

974–80 248Mich534, 227NW673.

974–81 Ala 130S202(2dcase); 130Or282, 279P279; 47RI378, 133A618.

974–81½–New. Admission of contradictory evidence without charge that it was only competent to contradict a witness is prejudicial. 212Ky60, 278SW149.

974–81½–New. Error in the admission of incompetent evidence as to defendant's intention to remove property, in attachment suit, coupled with charge that attachment is lawful if plaintiff believed defendant had such intention, is prejudicial. TexCivA 278SW350.

974–81¼–New. Admission of evidence without qualification is reversible error. TexCivA 293SW865.

974–82 18F(2d)912; 214Ala622, 108S600; 168Ark943, 272SW663; 181Ark299, 25SW(2d)760; 79CalA69, 248P1039; 107Conn670, 142A461; 40GaA633, 151SE42; 144Md623, 125A441; 148Md391, 129A354; 150Md571, 133A470; 154Md604, 141A416; 155Md178, 141A550; Md 148A267; Mass 166NE867; 177Minn441, 225NW389; 144Miss256, 109S706; Mo 294SW1014; MoA 280SW85; MoA 289SW22; MoA 298SW254; MoA 14SW(2d)972; 193NC670, 139SE232; 196NC178, 145SE11; 198NC278, 151SE861; 48RI123, 136A1; 49RI151, 141A307; SD 226NW339; TexCivA 274SW200; TexCivA 274SW215; TexCivA 285SW897; TexCivA 294SW913; TexCivA 295SW320; TexCivA 8SW(2d)787; TexCivA 9SW(2d)394 (admission of books of account was not prejudicial where entries in books merely reflected contents of invoices which were in evidence); TexCivA 10SW(2d)394; TexCivA 10SW(2d)400; TexCivA 18SW(2d)726; TexCivA 28SW(2d)225; TexCivA 28SW(2d)611; Vt 130A759; 151Va363, 144SE477; 151Va985, 144SE624; Va 154SE499; 35Wyo358, 249P799.

975–85 TexCivA 8SW(2d)750.

975–88 15F(2d)790; 18F(2d)858; 24F(2d)481; 28F(2d)1; 28F(2d)687; 30F(2d)811; 35F(2d)667; 40F(2d)255; 213Ala260, 104S509; 215Ala436, 111S17; 216Ala400, 113S401; 218Ala201, 118S393; 31Ariz347, 253P626; 33Ariz64, 262P489; 33Ariz474, 266P3; 173Ark84, 291SW1001; 173Ark937, 294SW353; 175Ark246, 298SW1029, 1031 [quotCJ]; 175Ark618, 299SW1016 (hearsay); 180Ark877, 23SW(2d)268; 198Cal16, 243P21; 204Cal329, 267P1079; 205Cal733, 272P740; 207Cal154, 277P481; 71CalA479, 235P673; 71CalA752, 236P365; 82CalA141, 255P215; 83CalA771, 257P185; 93CalA366, 270P263; CalA 289P221; CalA 290P1049; 104Conn318, 132A910; 108Conn659, 144A473; 92Fla339, 110S529; 93Fla387, 112S264; 160Ga268, 127SE868; Ga 141SE51; 165Ga449, 141SE205; 165Ga534, 141SE653; 166GaS93, 144SE663; 36GaA538, 137SE286; 37GaA240, 139SE686; 37GaA278, 139SE920; 43Ida654, 254P215; 224IllA180; 234IllA183; 246IllA451; 86IndA38, 155NE717; 89IndA403, 164NE300; 337Ill520, 169NE324; 340Ill34, 172NE32; 252IllA286; IndA 167NE625; 205Iowa16, 212NW138; 207Iowa720, 223NW405; Iowa 230NW570; 119Kan738, 241P246; 119Kan816, 244P844; 213Ky575, 281SW530; 214Ky838, 284SW95; 220Ky493, 295SW426; 229Ky284, 17SW(2d)233; 148Md279, 129A348; 148Md403, 130A331; 148Md545, 129A839; 149Md533, 131A762; 150Md511, 133A322; 151Md503, 135A369; 151Md571, 135A373; 152Md29, 135A488, 50ALR1385; 153Md119, 137A484; Md 148A424; 248Mich118, 226NW832; 251Mich461, 232NW393; 161Minn440, 201NW929 (admission of statements of one examined as witness to same effect); 169Minn313, 211NW311; Minn 231NW244; 315Mo166, 285SW729; 318Mo502, 300SW479; 219MoA211, 269SW665; MoA 273SW764; MoA 275SW575; MoA 285SW797 (hospital records); MoA 296SW255; MoA 297SW730; MoA 12SW(2d)518; MoA 26SW(2d)52; MoA 28SW(2d)440; MoA 29SW(2d)230; 79Mont198, 255P737; 49Nev326, 245P700; 50Nev46, 249P865; NJ 133A83; 244NY168, 155NE88; 135Misc639, 239NYS157; 50ND330, 196NW303; 21OhA129, 152NE796; 112Okl86, 240P110; 116Or554, 240P1113, 241P1009; 121Or133, 253P525; 122Or579, 260P444; 131Or27, 279P635. 67ALR1; 290Pa415, 139A127; 219Pa119, 139A627; 295Pa101, 144A828; RI 137A778; 49SD225, 207NW108; SD 227NW469; TexCommnA 299SW885; TexCivA 270SW1101; TexCivA 278SW956; TexCivA 283SW271; TexCivA 283SW679; TexCivA 283SW927; TexCivA 285SW925; TexCivA 287SW141; TexCivA 288SW614; TexCivA 289SW155; TexCivA 289SW414; TexCivA 291SW578; TexCivA 294SW984; TexCivA 297SW232; TexCivA 300SW641; TexCivA 2SW(2d)505; TexCivA 10SW(2d)438; TexCivA 12SW(2d)552; TexCivA 14SW(2d)88; TexCivA 16SW(2d)298; TexCivA 16SW(2d)429; TexCivA 17SW(2d)838; TexCivA 17SW(2d)858; TexCivA 18SW(2d)726; TexCivA 23SW(2d)398; TexCivA 28SW(2d)877; 70Utah57, 257P1060; Utah 290P970; Vt 147A771; 136Wash295, 239P831; 136Wash312, 239P1011; 145Wash119, 259P15; 199Wis162, 225NW831, 64ALR180; 36Wyo473, 257P484. [a] (2) 217MoA645, 274SW923. (8) Admission of evidence as to sending of dray tickets by plaintiff harmless where each ticket is verified by plaintiff's president. 214Ala8, 106S49.

976–89 229Ky284, 17SW(2d)233.

976–90 TexCivA 285SW700.

976–91½–New. or other writing, 149Md533, 131A762.

976–91¼–New. ledger sheets, 168Minn502, 210NW395.

976–92 34F(2d)927; 36GaA1, 135SE319; Mo 31SW(2d)50; 81Mont382, 263P967; 197NC639, 150SE122; 198NC278, 151SE861; 35PortoRico224; TexCivA 282SW940; TexCivA 31SW(2d)858; 100Vt443, 138A782.

977–93 TexCivA 6SW(2d)403.

977–95 174Ark194, 295SW38; 255IllA288; 156Miss326, 126S14; Mo 282SW38 (on cross-examination); 51ND237, 199NW860; TexCivA 7SW(2d)902; TexCivA 18SW(2d)237.

977–96 209Ky148, 272NW418.

977–97 See also 170Ga585, 154SE149.

977–98½–New. There is prejudice where court cannot tell what weight jury gave to either properly or improperly admitted evidence, especially where latter was only evidence on material fact. 212Ky146, 278SW570.

977–99 35F(2d)667; 213Ala494, 106S150; 217Ala304, 116S158; 169Ark88, 272SW853; 169Ark235, 275SW329; 88CalA88, 262P820; 87CalA684, 263P353; 38GaA591, 144SE815; 224IllA180; 204Iowa456, 215NW767; 226Ky703, 11SW(2d)712; 148Md628, 129A915; 154Md204, 140A48; 252Mass552, 148NE105; 263Mass147, 160NE821; Mo 2SW(2d)760; NJ 136A717; 191NC468, 132SE151; 134Okl1, 272P436; 35PortoRico603 (deposition); SD 228NW409; TexCivA 273SW874; TexCivA 275SW423; TexCivA 289SW190; TexCivA 9SW(2d)388; TexCivA 18SW(2d)726; 69Utah557, 257P658; Utah 263P495; 144Va154, 131SE245 (erroneous admission of railroad tariff not reversible error where part relied on agreed with testimony previously received without objection).

978–1 177Ark993, 8SW(2d)457; Mo 3SW(2d)244, 250 [quotCJ]; 191NC468, 132SE151; TexCivA 7SW(2d)1096.

978–2 199Iowa902, 200NW713; 153Miss237, 120S823; TexCivA 282SW819.

978–3 202Iowa561, 210NW602.

978–3½–New. A copy of a document introduced without notice to produce the original, the contents of the copy having been evinced on cross-examination, has been held harmless. 197NC322, 148SE458.

978–4 220Ala75, 124S110; Ala 127S668; Ala 129S88; 21AlaA66, 106S56; 168Ark1116, 272SW644; 169Ark235, 275SW329; 177Ark60, 5SW(2d)729; 181Ark1146, 26SW(2d)569; CalA 279P1032; 165Ga416, 141SE51; Ga 155SE473; 340Ill180, 172NE161; 206Iowa780, 221NW483; 249Mich16, 227NW539; 179Minn490, 229NW869; 310Mo287, 275SW540; 219MoA429, 275SW979; 219MoA590, 282SW141; MoA 294SW747; MoA 26SW(2d)807; 244NY168, 155NE88; 197NC465, 149SE585(1st case) (admission on cross-examination); 51ND237, 199NW860; 123Or632, 263P400; 287Pa61, 135A210; 35PortoRico512; 53SD29, 219NW890; Tex 286SW611; TexCivA 272SW510; TexCivA 275SW430; TexCivA 282SW876, 878 [cit CJ]; TexCivA 282SW891; TexCivA 4SW(2d)140; TexCivA 14SW(2d)939; TexCivA 18SW(2d)942; 192Wis197, 212NW257.

979–8 223Ky262, 3SW(2d)649 (oral evidence of railroad rule covered by general custom); Mo 23SW(2d)1049.

979–9 244NY168, 155NE88.

979–10 214Ky838, 284SW95; 220AppDiv284, 221NYS481.

979–11 31Ariz302, 252P1012.

979–14 TexCivA 290SW292.

979–15 86CalA269, 260P952; TexCivA 7SW(2d)1096.

979–22½–New. promissory notes, 201Iowa159, 205NW534 (to show falsity of pretense as to unsecured debts).

979–23 244NY168, 155NE88; Tex 286SW611.

979–23½–New. corporate minute book, TexCivA 282SW876.

979–23¼–New. pages of a report, 100Vt443, 138A782.

980–32 181Ark1145, 28SW(2d)1077; CalA 289P221; 42Ida349, 245P95; TexCivA 282SW1115.

980–34 194Cal574, 229P327 (forfeiture by buyer of sums paid on default in completion of performance).

981–35 94CalA48, 270P704.

981–36 106Conn127, 137A390; TexCivA 6SW(2d)211.

981–37 [b] **Permitting use of nonstandard publication purporting to set forth American mortality tables** is not prejudicial, if evidence of expectancy based thereon is found correct on comparison

with standard publications. 34NM146, 278P361.

981–38 83NH29, 137A445. See also 233 IllA262.

982–42 94CalA473, 271P353; 242 IllA 565; TexCivA 12SW(2d)595.

982–42½–New. Admission of evidence as to duty imposed by contract harmless where it adds no force to noncontract obligation imposed by law. 142Va 690, 128SE259.

982–43 [a] **Where facts covering each question were gone into in minute detail.**–23AlaA561, 129S300.

982–44 39F(2d)376; 213Ala286, 104S 643; 215Ala118, 110S131; 105Conn429, 135A568; 164Ga696, 139SE333; 165Ga 416, 141SE51; 36GaA492, 137SE107; 37GaA34, 138SE584; 41GaA1, 151SE 823; 27Hawaii177; 233 IllA522; 234 IllA183; 86 IndA331, 157NE445; 204 Iowa638, 215NW713; 212Ky443, 279 SW621; 214Ky416, 283SW402; 215Ky 401, 285SW245; 148Md257, 129A214; 151Md503, 135A369; 151Md658, 135A 838, 50ALR280; 116Minn153, 207NW 311; 176Minn234, 223NW98(2dcase); 315Mo 713; MoA 274SW837; MoA 18 SW(2d)545; 82NH225, 131A601; NH 146A161; NJSup 149A39; 29 OhA438, 163NE633; 122 Or579, 260P444; 154SC 126, 151SE228; TexCivA 278SW956; TexCivA 283SW271; Vt 147A771; 147 Va304, 137SE507; 152Va38, 146SE353; 136Wash295; 239P831; 141Wash689, 252P131.

982–45 40F(2d)897(2dcase); 213Ala78, 104S250; 21AlaA51, 105S716 [certiorari den 213Ala554, 105S718]; 100CalA 217, 279P810(2dcase); 36GaA492, 137 SE107; 37GaA369, 140SE520; 233 IllA 500 (as to damages); 86 IndA331, 157 NE445; Iowa 229NW173; 151Md503, 135A369; Md 150A854; 176Minn294, 223NW137(2dcase); 80Mont480, 261P 273; 197NC639, 150SE122; 151SC391, 149SE111; TexCivA 277SW407; TexCivA 282SW1115; TexCivA 288SW598; TexCivA 3SW(2d)482 (same witness on cross-examination); TexCivA 17SW (2d)1093; TexCivA 21SW(2d)754(2d case); TexCivA 22SW(2d)329; TexCivA 26SW(2d)394; TexCivA 27SW(2d) 880; TexCivA 27SW(2d)294; 100Vt 443, 138A782; 101Vt42, 140A160; Vt 150A148. But see TexCivA 21SW(2d) 347.

983–48 213Ala286, 104S643; 204 Iowa 638, 215NW713; 243Mich638, 220NW 737.

983–49 TexCivA 26SW(2d)435.

983–50 285Pa260, 131A858.

983–51 101CalA482, 281P1036.

983–52 219Ala223, 121S716.

983–53 213Ala286, 104S643; 219Ala18, 121S23; 219AlaA225, 121S526; 48 Ida 447, 282P864; 295Pa455, 145A505; TexCivA 11SW(2d)593.

983–54½–New. Rule applied to admission of evidence by witness incompetent by reason of interest. 234 IllA183.

983–55 43F(2d)309; 27Hawaii161. See also 151Md503, 135A369.

983–56 253 IllA509; IndA 163NE240. [a] (2) Erroneous admission of hearsay evidence that payment was part payment on note held not cured by defendant's testimony that he paid such amount, but it was in settlement of whole debt. 78Colo 371, 242P51.

983–57 215AlaA118, 110S131; 215Ala 126, 110S143; 73CalA189, 238P719; 102Conn558, 129A538; 242 IllA166; 221Ky498, 299SW207 (explanatory evidence held not to remove prejudice); 232Mich300, 205NW199; 132 Okl 55, 269P314; 289Pa519, 137A670; 115Tex 490, 283SW769; TexCivA 295SW639; 36Wyo 473, 257P484.

983–59 43F(2d)537; 30Ariz204, 245P 673; Iowa 232NW483; Me 151A537; 122 Or579, 260P444; TexCivA 12SW (2d)558.

983–60 TexCivA 12SW(2d)1077.

984–61 TexCivA 12SW(2d)1054.

984–64 101WVa675, 133SE388. [a] (1) 214AppDiv800, 210NYS490.

984–66 See also 285Pa260, 131A858.

984–68–69 81Colo 452, 256P40; MoA 17SW(2d)562; 84Mont397, 276P437.

985–71 213Ala637, 105S899.

985–72 198NC698, 153SE254.

985–74 81Colo 452, 256P10.

985–75 201Cal 518, 258P55.

985–76 Mo 30SW(2d)1018.

985–83 213Ala699, 106S41 (technical errors); 23AlaA294, 124S404; 203Cal 291, 264P246; 80CalA501, 251P973; 81 Colo 69, 255P449; 47 Ida726, 278P224 (3dcase); 236 IllA84; 253 IllA540; IndA 172NE576; 118Kan221, 235P122; 220Ky74, 294SW798; 219MoA429, 275 SW979; 285Pa350, 132A174; TexCivA 278SW871; TexCivA 278SW881; Tex CivA 282SW935; TexCivA 284SW643; TexCivA 8SW(2d)743; TexCivA 14SW (2d)304; 187Wis282, 202NW701 (evidence expressly declared in findings not to have been considered). [f] **Erroneous admission of evidence tending to enhance damages** (1) is cured by verdict that is not excessive. TexCivA 278 SW881. (2) Considered harmless in absence of assignment of error directed to excessiveness of verdict. TexCivA 278SW871.

985–85 220Ky74, 294SW798; TexCivA 4SW(2d)241.

985–86 50SD208, 208NW985.

985–87 150Md571, 133A470; MoA 293 SW66; 125 Okl 276, 257P759; RI 129A 3; RI 141A330 (verdict for full amount claimed); TexCivA 22SW(2d)971.

986–88 220Ala581, 126S857; 205Cal 642, 272P573; 80CalA501, 251P973; 165Minn146, 205NW948; 83NH91, 139 A366; TexCivA 4SW(2d)639; TexCivA 12SW(2d)1070; TexCivA 18SW(2d)702 (2dcase); TexCivA 23SW(2d)879; 39 Wyo 266, 270P1072. [b] 150Md571, 133A470.

986–89 TexCivA 282SW819.

986–90 71CalA393, 235P461; 88CalA 748, 264P289.

986–90½–New. Admitting bill of sale without proper proof harmless in view of finding of existence of oral contract. NJ 131A898.

986–91 207 Iowa711, 223NW541; Iowa 229NW750.

986–93 TexCivA 289SW169. See also Mass 170NE621.

986–94 TexCivA 287SW127; TexCivA 289SW169.

987–95 See also 232 IllA589.

987–98 30F(2d)285 [certiorari den 49 SCt265(3dcase)]; 169Ark1008, 277SW 533; 197Cal 723, 242P932; 67CalA753, 228P365; 69CalA763, 232P465; 83CalA 424, 257P99; 89CalA264, 264P491; 92 Fla339, 110S529; 317 Ill 362, 148NE42; 319 Ill 326, 150NE242; 200 Iowa1169, 206NW141; 204 Iowa174, 214NW529, 62ALR432; 208 Iowa682, 223NW489; 10LaA492, 120S115; 82NH318, 133A 340; 296Pa462, 146A122; 140SC123, 138SE675; 50SD561, 210NW982; SD 224NW951; TexCivA 276SW773; TexCivA 283SW611; TexCivA 286SW901; TexCivA 3SW(2d)478; TexCivA 6SW (2d)180; 149Va344, 141SE231; 151Va 590, 144SE642; 136Wash35, 238P989; 145Wash372, 260P251.

987–99 MoA 30SW(2d)1035; TexCivA 276SW773; 136Wash35, 238P989; 145 Wash372, 260P251.

987–1 214Ky514, 283SW1059; TexCivA 284SW309; 98Vt486, 129A299.

987–2 39GaA301, 147SE154; 317 Ill 362, 148NE42 (so as to facts on which final and unimpeachable judgment rests when action is unsuccessful one to enjoin enforcement of such judgment).

987–2½–New. Where it is probable plaintiff could make a better showing, erroneous judgment against him will be reversed. 99Vt249, 131A14.

987–3 214Ala341, 107S903; 171Ark15, 284SW23; 95CalA447, 273P84; 82Colo 258, 259P1042; 36GaA538, 137SE286; 37GaA34, 138SE584; 224 IllA217; 232 IllA430 (dictum); 236 IllA601; 119 Kan706, 241P693; Minn 230NW114; 157Miss256, 126S35; 217AppDiv57, 216 NYS464; 135SC131, 133SE208; TexCivA 289SW190; 63Utah495, 227P791. See also 233 IllA500.

988–4 219Ala201, 121S704(2dcase), 64 ALR553; NJSup 149A532(1stcase) (under stipulation for nominal damages).

988–5 84CalA42, 257P573; CalA 290P 80; 37GaA34, 138SE584; 90 Ill 356; 232 IllA430 (dictum); 236 IllA601; 320 Mo916, 9SW(2d)912; 217AppDiv57, 216 NYS464; RI 139A301; TexCivA 18SW (2d)782; 151Wash486, 276P542; 152 Wash560, 278P423(1stcase).

988–7 214Ala257, 107S825; 219Ala 206, 121S736; 204 Iowa174, 214NW 529; TexCivA 13SW(2d)995.

988–8 219Ala374, 122S630, 65ALR1473.

988–9 Colo 291P1019.

988–12 9F(2d)6; 243 Ill 263, 90NE 673; RI 132A886.

988–14 192 IllA74; 208 Iowa215, 225 NW251. [a] (3) Where there is nothing in evidence from which to segregate excessive portion of verdict from damages to be allowed, remittitur will not cure error in admission of evidence. 232 Ill A165.

988–14½–New. Same rule applies to findings by court. 232 IllA165.

989–16 36F(2d)939; 218Ala260, 118S 506(2dcase); 219Ala162, 121S543; 28 Ariz454, 237P642 (promptly ordering testimony stricken sufficient admonition to jury not to consider it); 92CalA656, 268P1083; CalA 291P681; 35GaA45, 132SE228 (instruction, withdrawing evidence as to character of plaintiff, was held not misleading, though names of witnesses were not stated); 27Hawaii 65; 45 Ida509, 263P477; 204 Iowa44, 214NW564; 122Kan438, 252P223; 208 Ky830, 271SW1096; 144Md623, 125A 441; 150Md429, 133A601; 152Md536, 137A299; 256Mass10, 152NE97; 317 Mo 492, 297SW353; 321Mo 798, 12SW (2d)476; 322Mo 147, 14SW(2d)603; Mo A 292SW1062; 103NJL323, 136A741; 194NC760, 140SE807; TexCivA 290SW 1108; TexCivA 16SW(2d)399; Tex CivA 22SW(2d)338; TexCivA 32SW(2d) 703; Vt 147A771; 143Wash522, 255P 923. [a] (3) CalA 291P681. (7) Immaterial res gestæ statements in personal injury action. 79CalA406, 249P 837. [g] **Striking out evidence without direction to jury to disregard it is insufficient to cure error.** 329 Ill 288, 160 NE559.

989–17 88CalA627, 264P564; 253 IllA 107; 249Mich391, 228NW687; 198NC 746, 153SE319 (holding that, when inadvertence is protracted and injury would result, court cannot cure error of admission without ordering mistrial); 101WVa263, 132SE885; 101WVa337, 132SE887. [a] (2) 101WVa263, 132SE 885; 101WVa337, 132SE887.

989–19 216AppDiv468, 215NYS521. But see 100CalA629, 280P713.

990–23 329 Ill 288, 160NE559.

990–25 31F(2d)85; 219Ala291, 122S 173; 32Ariz479, 260P191, 57ALR55; 168Ark626, 271SW7; 71CalA82, 234P 863; 90CalA764, 266P606, 609 [citCJ]; 37GaA771, 142SE185; 251 IllA342; 204 Iowa44, 214NW564; 210Ky600, 276SW 515; 212Ky443, 279SW621; 218Ky508, 291SW718, 51ALR1258; 235Ky388, 31 SW(2d)624; Mass 172NE224; 251Mich 92, 230NW922; Mo 282SW53; 316Mo 1338, 296SW375; Mo 2SW(2d)785; 194 NC760, 140SE807; NC 154SE667; 25 OhA214, 157NE794; 40 OklACR233 [reh pending]; 119 Or626, 250P742; 122Or498, 259P891; 300Pa78, 150A 155; 152SC178, 149SE753; TexCivA 281SW244; TexCivA 283SW232; Tex CivA 290SW544; TexCivA 9SW(2d)182; TexCivA 20SW(2d)351; 147Va178, 136 SE660; 137Wash326, 242P372; 99WVa 431, 129SE313; 36Wyo 37, 253P17, 19 [citCJ].

990–26 29Ariz334, 241P518; 243 IllA 337; 242Mich676, 219NW734; Mo 287 SW634; 40 OklACR233 [reh pending]; 118 Or248, 246P723. [a] (4) After timely objection, permitting incompetent answers in depositions to be read and then instructing jury to disregard them is error. 20 OhA1, 151NE788.

990–27 (5) Other instances where error not cured. 251 IllA192.

990–28 168Ark626, 271SW7.

991–29 168Ark626, 271SW7; 101WVa 411, 132SE870.

991–31 204Cal 136, 266P954.

991–32 29F(2d)83; TexCivA 14SW(2d) 307.

991–33 218Ala674, 120S153; 168Ark 626, 271SW7; Ark 30SW(2d)840(2d case); 203 Iowa518, 210NW453; 202 Iowa1386, 212NW161; 207 Iowa1293, 224NW820, 62ALR1419; 208 Iowa 1157, 225NW346; 233Ky781, 26SW(2d) 757; Md 150A856; 172Minn591, 216NW 537; Mo 2SW(2d)785; MoA 274SW917;

222MoA980, 6SW(2d)659; 83NH10, 138 A315; 104NJL130, 138A896; 25 OhA 356, 158NE501; 129 Okl 75, 263P105; Or 250P472; 121 Or604, 256P641; 299 Pa268, 149A318; 151SC44, 148SE648; TexCivA 291SW337; TexCivA 299SW 293; TexCivA 28SW(2d)844; 143Wash 537, 255P942; 145Wash77, 258P839; 99WVa452, 130SE810 (testimony volunteered by witness); 36Wyo 37, 253P17. [a] (5) To disregard evidence res inter alios. 203 Iowa518, 210NW453.

992-34 103NJL323, 136A741, 746 [cit Cyc].

992-37 Ala 130S202(2dcase); Tex CommnA 293SW558.

992-38 257Mass272, 153NE784; 135SC 307, 133SE545; 148Va699, 139SE328.

992-39 199Cal 562, 250P572; 34GaA 321, 129SE565; 199 Iowa1143, 201NW 112; 310Mol, 274SW1079; RI 136A11.

992-40 13F(2d)364; 220Ala242, 124S 528; 207 Iowa137, 222NW436; Mass 169NE74; 192NC647, 135SE791; 118 Oh494, 161NE534.

992-41 207 Iowa367, 223NW100; 80 Mont214, 260P711; 193NC166, 136SE 291.

993-42 173Ark84, 291SW1001; CalA 284P1056.

993-44 226AppDiv406, 235NYS553.

993-45 198 Ind633, 154NE485.

993-46 32 OhA270, 167NE402 (instruction that matters in improper evidence are not binding).

993-48 242Mich668, 219NW743.

993-49 But see 82NH236, 133A9.

993-50 42 Ida729, 249P771.

994-52 317Mo782, 297SW20.

994-54 28Ariz454, 237P642.

994-54½-New. Charging that jury should disregard statements containing conclusions and not facts is insufficient to cure error. 215AppDiv390, 213 NYS697 (where warning was not repeated in court's charge to jury and sending out statements in toto).

994-55 168Ark875, 271SW951; 176Ark 1188, 5SW(2d)916; 90CalA764, 266P 606; IndA 151NE33; IndA 170NE564; 222Ky531, 1SW(2d)972; 315Mo 535, 286 SW53; 83NH99, 138A544; 102NJL411, 132A670; 3NJMisc1050, 130A536; 124 Or332, 263P391; TexCivA 273SW634; TexCivA 8SW(2d)561; 99Vt512, 134A 710; 151Va173, 144SE485.

994-56 164Ga552, 139SE31; 138 Okl 143, 280P606, 65ALR1092.

995-57 See also 179Minn67, 228NW546.

995-58 203 Iowa1361, 214NW591; Minn 230NW823.

995-59 203 Iowa1361, 214NW591; 226 Ky813, 11SW(2d)953; 230Ky449, 20SW (2d)82; 247Mich255, 225NW605; MoA 282SW737; MoA 296SW823; MoA 20 SW(2d)580; TexCommnA 24SW(2d) 370; TexCivA 276SW790; TexCivA 283 SW1073; TexCivA 293SW644; TexCivA 299SW325; TexCivA 7SW(2d)902; Tex CivA 28SW(2d)622.

995-60 317Mo 782, 297SW20.

995-62 215Ala646, 112S219; 176Ark 212, 2SW(2d)1109; Conn 139A782; 243 IllA337; Iowa 209NW435; Minn 232 NW795; 141 Okl 133, 284P21; Utah 262P274; Utah 263P495.

996-63 315Mo 713, 290SW135.

996-64 100CalA545, 280P557; 322Mo 147, 148SW(2d)603.

996-67 Mont 289P571; 21 OhA322, 153NE302.

996-68 8F(2d)930 (impeaching testimony); 215Ala114, 110S19; 35GaA84, 132SE122; 319 Ill 344, 150NE276; MoA 297SW451; 115 Okl 153, 241P342; 136 SC525, 134SE497.

996-72½-New. or of mailing of original, 153Md312, 138A269.

997-73½-New. to skiagraph admitted without proof of identity, 319 Ill 344, 150NE276.

997-74 45 Ida628, 264P231; 83Mont 194, 271P444; 31NM557, 240P303.

997-84 44 Ida435, 258P179; 33 OhA 265, 169NE308.

997-85 41F(2d)578; 214Ala501, 108S 335; 82CalA20, 254P937; 40GaA341, 149SE657; 85 IndA435, 150NE239; 200 Iowa204, 202NW515; 123Kan277, 255 P74; 235Mich633, 209NW807; 168Minn 259, 209NW905; 220MoA367, 286SW445; 318Mo 421, 1SW(2d)791; 52ND688, 204 NW344; 52ND925, 204NW889; 112 Okl 86, 240P110; 127 Or256, 270P784; Tex CivA 274SW253; TexCivA 31SW(2d) 669; 107WVa245, 148SE109.

997-86 197Cal 70, 239P844; 161Ga615, 131SE535; Iowa 209NW435; TexCivA 5SW(2d)170; Utah 273P515; WVa 155 SE174.

998-87 202 Iowa561, 210NW602.

998-88 213Ala260, 104S509; 215Ala 304, 110S387; 71CalA752, 236P365; 82 CalA281, 255P532; 40GaA4, 148SE757; 200 Iowa40, 203NW569; 203 Iowa467, 212NW886; 322Mo 514, 17SW(2d)960; 148Va699, 139SE328.

998-91 120Kan474, 244P2.

998-92 See also 161Ga615, 131SE535.

998-93 152Md536, 137A299; TexCivA 274SW253.

998-94 See also 203 Iowa467, 212NW 886.

998-1½-New. , or where hypothetical question, improperly assuming fact not in evidence, was answered in manner ignoring assumption. 152Md536, 137A 299.

998-3 160Ga886, 129SE539.

999-8 130 Or282, 279P279 (as to amount of damages); RI 133A658; Tex CivA 275SW206; TexCivA 5SW(2d) 170.

999-10 41F(2d)578; 108Conn74, 142A 473; 237 IllA279; 191NC297, 131SE 735; TexCivA 289SW87.

999-11 31Ariz302, 252P1012; 44 Ida 729, 262P152; 193NC583, 137SE724. See also 168Ark1116, 272SW644.

999-12 92CalA464, 268P453.

999-14 71CalA752, 236P365; 235Mich 536, 209NW838; 191NC297, 131SE735; 50ND573, 196NW820; SC 155SE136; TexCivA 289SW87.

999-16 82Colo 395, 260P114; 44 Ida 491, 258P362; 238Mich669, 214NW236; 244Mich99, 221NW162; 122 Okl 101, 251P495; 43OklACR291; 49RI 332, 142 A536; 54SD521, 223NW726; TexCivA 275SW198; 142Va350, 128SE462.

999-17 164Ga552, 139SE31; 44 Ida491, 258P362; 238Mich669, 214NW236; 125 Or522, 267P519.

999-20 227AppDiv208, 237NYS235.

999-20½-New. Admission of letters containing hearsay statements which tend to arouse passion and prejudice and to enhance damages is reversible error. 115 Oh468, 154NE727.

999-21 8F(2d)709; 204 Iowa819, 216 NW104, 321Mo 330, 11SW(2d)41; 321 Mo 1244, 14SW(2d)583; Mo 19SW(2d) 662; MoA 297SW184; MoA 6SW(2d) 961; 196NC79, 144SE559; 142 Okl 152, 286P322. [b] Equity trial before jury.- 211Ky450, 277SW464 (chancellor could set aside jury verdict and enter judgment as he sees fit under evidence).

999-22 8F(2d)726; 18F(2d)837; 202 Cal 542, 261P1006; 72CalA94, 236P346; 123Kan226, 255P28; 125Kan485, 264P 1047; 316Mo 640, 291SW106; Mo 8 SW(2d)975; MoA 284SW186; 221MoA 757, 288SW73; MoA 289SW977; MoA 8SW(2d)88; MoA 16SW(2d)630; MoA 26SW(2d)999; 33NM169, 262P529; 51 ND336, 199NW869, 36ALR465; 55ND 321, 213NW488; 112 Okl 212, 239P989; 118Or62, 216P743, 245P1083; 35Porto Rico 390; TexCivA 281SW283; 66Utah 229, 241P221; 135Wash254, 237P289; 155Wash624, 285P652; 195Wis294, 218 NW179; 40Wyo 106, 275P115(2dcase).

1000-23 26F(2d)28; 215Ala670, 112S 136; 31Ariz147, 250P993; 35GaA414, 133SE294; 204Iowa819, 216NW104; 221MoA67, 294SW123; 81Mont573, 264 P394; 85Mont149, 278P116; 51ND336, 199NW869, 36ALR465; 52ND28, 202 NW852; 58ND209, 225NW323; 113 Okl 295, 241P812; 124 Okl 193, 255P577; 141 Okl 90, 284P624; 121Or259, 253P 873; 128 Or142, 273P954; 132 Or684, 288P210; 49SD96, 206NW236; 50SD 208, 208NW985; 51SD27, 211NW972; TexCivA 281SW283; TexCivA 284SW 612; TexCivA 17SW(2d)835(2dcase); 103WVa124, 136SE777; 125Wis19, 103 NW220.

1000-24 5F(2d)13; 8F(2d)709; 13F (2d)356; 20F(2d)897; 30F(2d)671; 39F(2d)62; 31Ariz147, 250P993; 70Cal A336, 233P374; 85CalA377, 259P368; 90Fla787, 108S211; 92Fla750, 110S126; 331 Ill 182, 162NE888; 333 Ill 588, 165 NE199; 334 Ill 281, 165NE793; 335 Ill 52, 166NE477; 38 IndA327, 163NE842; IndA 169NE678; 128Kan699, 280P916; 233Ky88, 25SW(2d)69; 126Me254, 137 A692; 173Minn529, 217NW933; 81 Mont573, 264P394; 33NM414, 269P56; 52ND28, 202NW852; Or 262P415; 129 Or32, 275P913(2dcase); 53SD565, 221 NW601; 54SD1, 222NW297; 54SD54, 222NW496; 54SD515, 223NW723; SD 226NW560; TexCommnA 23SW(2d) 673; TexCivA 275SW248; TexCivA 284 SW612; TexCivA 295SW653; TexCivA 2SW(2d)864; TexCivA 6SW(2d)180; TexCivA 6SW(2d)206; TexCivA 11SW (2d)214; TexCivA 13SW(2d)419; Tex CivA 22SW(2d)475(1stcase); TexCivA 24SW(2d)778; TexCivA 25SW(2d)907 (2dcase); TexCivA 28SW(2d)259; 66 Utah340, 242P391; 103WVa124, 136SE 777; 37Wyo 432, 263P607.

1001-25 174Ark1180, 295SW401; MoA 26SW(2d)999.

1001-26 13F(2d)356.

1001-28 35F(2d)924; 136 Okl 249, 277 P915.

1001-29 30Ariz234, 245P932; 89CalA 361, 265P271; 105Conn625, 136A687; 29Hawaii638; Mass 165NE679; MoA 286SW353; TexCivA 284SW612; Tex CivA 2SW(2d)281; TexCivA 22SW(2d) 961.

1001-31 218Ala645, 119S851.

1001-32 107Conn312, 140A734; 35Ga A 107, 132SE411; MoA 297SW179; TexCommnA 12SW(2d)114, 63ALR435; TexCivA 12SW(2d)601; TexCivA 21 SW(2d)701; TexCivA 25SW(2d)907(2d case); TexCivA 30SW(2d)492; Sask [1930] 2DomLR54. [h] Where court is unable to know how far trial court was influenced by evidence erroneously admitted, judgment will be reversed. 20 AlaA643, 104S774.

1002-33 291Pa109, 139A619; TexCivA 15SW(2d)139.

1002-34 80CalA415, 252P752; 255 Ill A462(documentary evidence); 126Me 254, 137A692; MoA 16SW(2d)630; 82 NH160, 139A750.

1002-35 88CalA393, 263P558.

1002-36 34Wyo378, 244P216.

1002-37 Mo 291SW485 (in equity case appeal court disregards incompetent evidence).

1002-40 204Cal 251, 268P367; CalA 259P84; CalA 260P571; CalA 277P 1107; 121Kan29, 245P1036; 262Mass 422, 160NE251; Me 152A84; MoA 21 SW(2d)880; 54ND336, 209NW547; 49 RI358, 142A375; 54SD325, 223NW208; TexCivA 280SW918; Wash 292P737.

1002-41 70CalA614, 234P121; 72CalA 757, 238P143; 85 IndA342, 154NE39; 201 Iowa266, 207NW243; 150Md511, 133A322; 257Mass272, 153NE784; 258 Mass331, 155NE18; 237Mich264, 211 NW661; 310Mo 1, 274SW1079; 218Mo A698, 268SW102; 191NC297, 131SE 735; 54ND543, 210NW19; 55ND580, 214NW855; 135SC149, 133SE463; Utah 263P495.

1002-42 99CalA482, 278P894.

1002-43 207 Iowa1001, 221NW949; 247Mich361, 225NW508(2dcase).

1002-44 85 IndA342, 154NE39; 237 Mich264, 211NW661.

1003-51½-New. Striking of preliminary question is harmless when the substantive question is not asked. 203 Iowa5, 212NW348.

1003-52 96CalA236, 273P1080; 177 Minn425, 225NW273; NJ 145A106(1st case).

1003-53½-New. where irresponsive answer was to an immaterial question; 258Mass331, 155NE18.

1003-53¼-New. where an answer contained a conclusion, but was not harmful to the party objecting, and the conclusion was correct; 96CalA236, 273P 1080.

1003-55 97CalA311, 275P526; 308Mo 453, 273SW95.

1003-56 150Md511, 133A322; 175Minn 153, 220NW418.

1003-58 237Mich264, 211NW661.

1003-59 121Kan281, 246P673; 234 Mich610, 208NW690; 75Mont594, 244P 480; 53SD392, 220NW860.

1003-61 6F(2d)873; 214Ala473, 108S 339; 215Ala278, 110S465; 218Ala384, 118S565; 219Ala208, 122S23, 25; 70CalA 408, 233P391; CalA 277P350; CalA 293

P133; CalA 291P663; 164Ga450, 139SE 27; 336Ill 482, 168NE514; 84 IndA398, 150NE665; 88 IndA554, 163NE620; 208 Iowa8, 222NW869; 120Kan403, 243P 1047; 123Kan722, 256P975; 125Kan 563, 264P1075; 128Kan341, 277P1016; 232Ky726, 24SW(2d)580; 254Mass337, 150NE692; 236Mich425, 210NW488; Minn 230NW826; 149Miss42, 115S115; MoA 256SW158; MoA 300SW311; MoA 3SW(2d)399; MoA 28SW(2d)456; 77 Mont539, 252P368; 33NM356, 267P74; 243NY450, 154NE307; 222AppDiv485, 226NYS698; 63Misc43, 225NYS690; 218AppDiv557, 218NYS605; 226AppDiv 102, 234NYS425; 227AppDiv103, 237 NYS120; 115 ObSt161, 152NE385; 27 OhA366, 161NE553; 120 Okl 1, 249P 742; 5PortoRico 17; 51S359, 213NW 947; TexCivA 271SW143; TexCivA 273 SW932; TexCivA 273SW1118; TexCivA 282SW296; TexCivA 284SW322; Tex CivA 295SW234; TexCivA 2SW(2d)939; TexCivA 21SW(2d)41; Vt 148A481; 147 Va263, 137SE465; 200Wis233, 227NW 868, 66ALR1325; NB [1925] 3DomLR 189. [a] (5) Exclusion of evidence that husband had abandoned wife before execution of deed by wife. TexCivA 279 SW895 (in action to try title where deed constituted part of chain of title). [c] (1) 218MoA414, 277SW600. [h] **Exclusion of question on cross-examination** held error even where question does not indicate answer. 203 Iowa676, 213 NW431.

1004–62 82NH304, 133A16, 45ALR 1409; 148Va331, 138SE637.

1004–63 24F(2d)153; 28F(2d)868; 36 F(2d)646; 212Ala325, 104SS08; 213Ala 551, 106S136; 217Ala304, 116S158; 21 AlaA609, 110S561; 218Ala619, 119S833; Ala 130S216; 30Ariz569, 249P751; 176 Ark188, 5SW(2d)916; 200Cal 147, 252 P597; 200Cal 299, 252P1049; 68CalA 789, 230P458 (where substantial justice has been done); 78CalA49, 248P 258; 83CalA720, 257P452; 84CalA142, 257P606; 84CalA689, 258P458; 85CalA 786, 260P399; 87CalA246, 262P78(3d case); CalA 290P668; CalA 292P162; 81Colo 389, 255P628; 81Colo 370, 256P 1; 107Conn380, 140A724; 109Conn221, 146A494(2dcase); 163Ga796, 137SE64; 35GaA438, 134SE122; 38GaA428, 144 SE135(2dcase); 40GaA606, 150SE852; 44 Ida729, 262P152; Ida 290P200; 48 Ida364, 282P79; 85 IndA36I, 151NE15; 84 IndA676, 151NE26; 201 Iowa553, 207 NW533; 203 Iowa485, 210NW767; 203 Iowa1124, 212NW147; Iowa 213NW 442; 208 Iowa458, 223NW521; 208 Iowa1265, 227NW129(2dcase); Iowa 231NW331; 124Kan443, 260P647; 129 Kan759, 284P407; 217Ky191, 290SW 333; 169La797, 126S64; 128Me445, 148A 680; 254Mass110, 149NE543; 255Mass 104, 151NE84; Mass 170NE619; 231Mich 585, 204NW768; 232Mich276, 205NW 134; 238Mich527, 213NW710; 243Mich 638, 220NW737; 251Mich407, 232NW 187; 166Minn7, 206NW934; 167Minn 437, 209NW317; 168Minn111, 209NW 895; 175Minn449, 221NW715; 176Minn 360, 223NW677; 155Miss207, 124S325; Miss 130S479; MoA 274SW951; 220 MoA1034, 278SW1081; MoA 279SW 173; MoA 291SW163; 77Mont477, 251 P517; 84Mont141, 274P844; Mont 289 P571; 102NJL131, 130A612; 3NJMisc 108G, 130A639; NJ 151A77; NJ 151A 852; NM 290P214; 195NC777, 143SE 865 (exclusion of impeaching question); 49ND1119, 194NW691; 55ND580, 214 NW855; 21 OhA496, 153NE252; 23 OhA 33, 155NE166; OhA 173NE249; 116 Okl 21, 243P248; 120 Okl 282, 251P43; 129 Okl 288, 264P824; 133 Okl 14, 270P838; Okl 291P38; Okl 292P74; 287Pa431, 135A103; 138SC113, 135SE877; 145SC 53, 142SE828; 157SC392, 154SE431; 49 SD1, 205NW710; 49SD256, 207NW102; 52SD43, 216NW601; TexCommnA 280 SW753; TexCivA 289SW79; TexCivA 296SW902; TexCivA 3SW(2d)466; Tex CivA 24SW(2d)786; TexCivA 26SW(2d) 672; TexCivA 27SW(2d)610; TexCivA 32SW(2d)656; 68Utah323, 249P1064; 99Vt343, 132A45; Vt 148A481; 141 Wash369, 251P585; 142Wash391, 253P 452; Wash 287P206; 191Wis159, 215 NW829; Wis 228NW746. [a] (5) Error in excluding affidavit is not prejudicial where evidence furnished complete rebuttal of any prima facie case deducible from affidavit. 128Me230, 146 A705.

1004–64 10F(2d)312; 14F(2d)937; 14 CustAUS439; 213Ala692, 106S145; 219 Ala380, 122S338; 199Cal 305, 249P10; 70CalA614, 234P121; 81CalA535, 254P 310; 96CalA568, 274P401(2dcase); 102 CalA272, 282P1019; 84Colo 376, 270P 656; Conn 152A136; 163Ga796, 137SE 64; 41GaA684, 154SE458; 240 IllA395; 201 Iowa533, 207NW533; 203 Iowa1124, 212NW147; 204 Iowa239, 213NW775; 124Kan443, 260P647; 125Me292, 133A 164; 260Mass151, 157NE40; 262Mass 261, 159NE508; Mich 233NW384; Mo 274SW1046; MoA 14SW(2d)6; 82NH 304, 133A16, 45ALR1409; 191NC297, 131SE735; 117 Okl 25, 245P624; 117 Okl 300, 246P220; 134 Okl 70, 272P857; 134 Okl 79, 272P868; 287Pa431, 135A103; 295Pa501, 145A507; 299Pa17, 148A915; 155SC526, 152SE699; TexCivA 286SW 249; TexCivA 297SW557 (excluding deed in suit to try title where no definite land was described); TexCivA 4 SW(2d)241 (no finding on issue); Tex CivA 17SW(2d)469; TexCivA 18SW(2d) 687; TexCivA 32SW(2d)513; 146Wash 283, 263P190.

1005–65 TexCivA 25SW(2d)979.

1005–67½–New. Exclusion, after the conclusion of the trial and when defendant no longer had opportunity to supply the omission, was error requiring reversal. 28F(2d)463.

1005–68 15F(2d)473; 214Ala286, 107S 808; 215Ala420, 110S895; 217Ala120, 115S816; 172Ark821, 290SW603; 205Cal 128, 270P188; 74CalA10, 239P429; 71 CalA251, 235P62; 80CalA450, 252P652; 95CalA195, 272P333; 98CalA143, 276P 363(1stcase); 102CalA299, 283P298; CalA 291P879; 165Ga451, 141SE306 (where part of evidence may have been admissible); 33GaA523, 127SE151; 41 GaA203, 152SE581(3dcase); 327 Ill 180, 158NE389; 254 IllA 576; 203 Iowa897, 209NW432; Iowa 213NW442; Iowa 231 NW331; 227Ky88, 11SW(2d)976; 148 Md560, 129A836; Md 150A452; 253 Mass383, 149NE313; 254Mass599, 150NE 874; 258Mass331, 155NE18; 238Mich 527, 213NW710; 244Mich226, 221NW 168; 170Minn370, 212NW584; 173Minn 51, 216NW311; MoA 293SW1051; 175 Minn449, 221NW715; 177Minn441, 225 NW389; 221MoA715, 285SW524; MoA 16SW(2d)654; MoA 24SW(2d)187; 74 Mont236, 239P1037; 34NM411, 282P273 (1stcase); 122 Okl 282, 254P725; 116 Or222, 240P873; 119 Or450, 249P173; 132 Or374, 284P830; 134SC93, 131SE 677; TexCivA 286SW749; TexCivA 298 SW654; TexCivA 6SW(2d)227; Tex CivA 26SW(2d)474; TexCivA 32SW (2d)220; 66Utah229, 241P221; 143Va 36, 129SE239 (deed which in no way illuminated sole and vital issue of fact); 147Va960, 133SE685; 148Va331, 138SE 637; 195Wis78, 217NW927. [d] **Exclusion of irrelevant** evidence is not ground for reversal. 213Ala649, 106S44. [e] **Offer of proof showing answer irrelevant** makes exclusion of question harmless. 213Ala649, 106S44. [f] **Exclusion of evidence offered to refute conclusion in pleading** is harmless. 116 Or222, 240P 873.

1006–70 111Conn299, 149A668; 200 Iowa139, 204NW216; 206 Iowa514, 219 NW305; Mass 171NE668; 170Minn370, 212NW584; 49ND235, 191NW347; 111 Okl 279, 239P663.

1006–72 Ariz 284P149; 168Ga451, 148 SE162; 253 IllA176; 207 Iowa1052, 224 NW89; 308Mo 453, 273SW95; 125 Or 389, 266P900; TexCivA 29SW(2d)484 (2dcase) (evidence as consistent with appellee's as with appellant's claim).

1007–74 15F(2d)946; 149Miss543, 115 S782; Miss 120S191(4thcase).

1007–75 15F(2d)946; 88CalA706, 264P 549; 213Ky235, 280SW966.

1007–76 Iowa 218NW470; 148Md628, 129A915.

1007–77 [a] (2) Exclusion of deposition offered by defendant, which facts would defeat defense raised. 149Md522, 131A834.

1007–79 TexCivA 295SW646.

1007–84 176Minn360, 223NW677.

1007–86 105NJL117, 143A354.

1008–90 13F(2d)704; 86CalA347, 260P 942; 156Md329, 144A363; Mass 169NE 268; Mo 20SW(2d)659; RI 129A3; Tex CivA 10SW(2d)597; TexCivA 24SW(2d) 524; TexCivA 28SW(2d)288.

1008–91 258Mass360, 155NE16; Vt 148 A874.

1008–92 CalA 264P772; MoA 294SW 755; TexCivA 31SW(2d)854.

1008–94 223Ky444, 3SW(2d)1073; 249 Mich63, 227NW789; TexCivA 28SW (2d)288.

1008–95 34F(2d)182; 197NC64, 147SE 683.

1008–97 99CalA742, 279P670; 230Ky 465, 19SW(2d)1078 (verdict based on issue not affected by exclusion); TexCivA 26SW(2d)672.

1009–98 13F(2d)704; 215Ala494, 111S 237; 205 Iowa621, 218NW334; 217Ky 389, 289SW290; 151Miss852, 119S827; MoA 277SW593.

1009–1 171Ark968, 287SW173; Tex CivA 28SW(2d)865. [a] (1) 177Ark865, 8SW(2d)446.

1009–2½–New. A finding by a jury that there was no conspiracy is not conclusive where evidence of declarations of co-conspirator was excluded after the making of a prima facie case. TexCivA 286SW241.

1009–3 213Ala692, 106S145; Ala 128S 602; 178Ark1106, 13SW(2d)303; 96 CalA671, 274P764; 84Colo 433, 271P 187; 202 Iowa1038, 208NW334, 210NW 241; 204 Iowa239, 213NW775; Iowa 233NW28; 213Ky689, 281SW823; 214 Ky514, 283SW1059; 162La649, 110S 891; 128Me458, 148A673; 179Minn490, 229NW869; Miss 115S343; 77Mont406, 251P157; 23 OhA79, 155NE147; 119 Okl 72, 247P983; 287Pa115, 134A463; 32PortoRico 509; 49RI 112, 140A469; 133SC458, 131SE620; TexCivA 287SW 683; TexCivA 4SW(2d)193; TexCivA 6SW(2d)180; 69Utah376, 255P430; 98 Vt486, 129A299; 154Wash490, 282P913; 196Wis426, 220NW194; 40Wyo 274, 276P532. [a] (2) 39GaA773, 148SE534. (3) Interpleader fails to make prima facie case. MoA 28SW(2d)121. [c] **Where defendant is liable because of estoppel** to assert accommodation character of his note, he is not prejudiced by rejection of evidence of conspiracy to obtain the note and its subsequent use as security to third parties for advances by party accommodated. 50ND487, 196 NW550.

1010–4 258Mass145, 154NE577; Tex CivA 5SW(2d)876, 877 [citCJ]; 150Va 442, 143SE681.

1010–5 202 Iowa1038, 208NW334, 210 NW241.

1010–6 Ala 128S602.

1010–6½–New. So also where, in suing to collect an account, defendant proves payment, error in excluding account books of plaintiff is not prejudicial. 32 PortoRico 509.

1010–7 8F(2d)957; 17F(2d)963; 213 Ala551, 106S136; 215Ala68, 109S148; 215Ala143, 110S372; 220Ala308, 124S 875; 171Ark399, 284SW755; 200Cal 265, 252P1045; 201Cal 530, 258P60; 202 Cal 205, 259P755; 93Cal 775, 270P382; 73CalA476, 238P1062; 89CalA511, 265P 318; 89CalA721, 265P541; CalA 266P 312; 91CalA206, 266P975; 92CalA715, 268P948; 94CalA104, 270P742; 98CalA 189, 276P591; 100CalA217, 279P810(2d case); 107Conn670, 142A461; 110Conn 49, 147A31 (cumulative evidence); 163 Ga796, 137SE64; GaA 155SE51; 232 IllA430; 240 IllA165; 240 IllA307; 253 IllA176; 88 IndA561, 163NE107; 201 Iowa550, 207NW574; 206 Iowa51, 220 NW51; 206 Iowa771, 221NW489; 149 Md474, 132A70; 155Md243, 141A706; 255Mass340, 151NE317; 258Mass306, 154NE835; 263Mass147, 160NE821; 264Mass364, 162NE735; 232Mich399, 205NW124; 309Mo 560, 274SW703; MoA 274SW532; Mo 30SW(2d)56; MoA 277SW591; MoA 4SW(2d)875; MoA 8 SW(2d)1082; MoA 9SW(2d)534; MoA 9SW(2d)856; MoA 30SW(2d)1101; 77 Mont406, 251P157; NJ 137A769; 191NC 257, 131SE653; NC 155SE452; 54ND434, 209NW790; 56ND423, 217NW845; 19 OhA1; 124 Okl34, 254P703; 116 Or222, 240P873; 120 Or117, 250P739; 283Pa307, 129A112; 32PortoRico235 (refusal to submit cumulative documentary evidence on question of payment of taxes); 145SC53, 142SE828; SC 155SE136; 159 Tenn86, 16SW(2d)20; TexCivA 275SW 96; TexCivA 293SW835; TexCivA 6SW

(2d)227; TexCivA 6SW(2d)403; Tex CivA 8SW(2d)512; TexCivA 16SW(2d) 429; TexCivA 21SW(2d)694; TexCivA 31SW(2d)850; Vt 147A346; 142Wash 391, 253P452; 143Wash4, 253P1081; 147Wash345, 265P1082; 40Wyo 393, 277 P807. [b] 201Cal 456, 257P505.

1010-8 42F(2d)197(2dcase); 215Ala 126, 110S143; 215Ala548, 112S120; 223 Ky564, 48SW(2d)367; 149Md474, 132A 70; Mo 256SW1031; TexCivA 275SW 96; Va 153SE832.

1011-9 [b] (2) Exclusion of testimony is not error in absence of proceedings to ascertain ground of general verdict. 34 OhA244, 170NE661.

1011-10 68CalA789, 230P458 (bias of witness).

1011-11 Iowa 229NW236.

1011-12 209Ky598, 273SW438.

1011-13 Ala 127S519; 99CalA791, 279 P490; 160Ga831, 129SE546; 86 IndA 82, 156NE166; 128Me230, 146A705; 233Mich117, 206NW559; 169Minn106, 210NW846; 221MoA715, 285SW524; 217AppDiv537, 216NYS558; 31 OhA8, 166NE145; TexCivA 28SW(2d)312. [c] (2) Records of probate court concerning insanity of plaintiff's mother. 121 Kan797, 250P308.

1011-14 215Ala157, 110S1.

1012-15 NJ 136A604.

1012-16 214Ala187, 106S811; 215Ala 126, 110S143; 78CalA49, 248P258; 85 Colo 519, 277P773; 107Conn568, 141A 652; 109Conn221, 146A494(2dcase); Ida 291P1055; 232 IllA430; IndA 152 NE287; 89 IndA490, 167NE151; 202 Iowa273, 209NW393; 149Md474, 132A 70; 154Md604, 141A416; 265Mass143, 164NE72; 165Minn396, 206NW728; 317 Mo 1010, 297SW50; Mo 9SW(2d)159; MoA 297SW721; 58ND846, 228NW214; 129 Okl 301, 264P898; Or 292P93; 86 PaSuper303; 142SC125, 140SE443; 159 Tenn86, 16SW(2d)20; TexCivA 290SW 292; TexCivA 297SW1091; TexCivA 22SW(2d)1085; 99Vt343, 132A45; 147 Wash345, 265P1082. But see 152Wash 492, 278P178.

1012-20 MoA 287SW1064.

1012-22 214Ala615, 108S591; Ala 128 S433; 83CalA128, 256P493; 83CalA720, 257P452; Miss 129S599; 102NJL131, 130A612; TexCivA 298SW305.

1013-23 TexCivA 23SW(2d)494.

1013-24 232 IllA430; 229Ky37, 16SW (2d)489.

1013-26 13F(2d)704; 215Ala612, 111S 901; 125Me471, 134A801; 151Miss852, 119S827; 129 Okl 200, 264P147; 52SD 324, 217NW393; TexCivA 300SW659; TexCivA 5SW(2d)240.

1014-27 13F(2d)704; 95CalA162, 272 P591; 252Mass270, 147NE882; 222 MoA370, 3SW(2d)256.

1014-30 Mass 164NE820.

1014-31 28 OhA88, 162NE623.

1014-32 40GaA158, 149SE73 (information sought covered by statute).

1014-34 35F(2d)465; 214Ala349, 107 S907; 214Ala473, 108S339; 214Ala479, 108S344; 215Ala278, 110S465; 216Ala663, 114S182; 217Ala 108, 114S915; CalA 258P411; 85CalA 468, 259P965; 89CalA653, 265P357; 91 CalA770, 267P591; 106Conn506, 138A 442; 163Ga796, 137SE64; 35GaA126, 132SE414; 47 Ida542, 277P554(2dcase); 200 Iowa210, 202NW574; 211Ky402, 277 SW493; 259Mass272, 156NE254; 164 Minn523, 205NW63; 218MoA281, 269 SW633; 221MoA478, 282SW97; 83NH 236, 141A136; 103NJL372, 137A555, 54 ALR623; NJ 140A573; 3NJMisc869, 130A225; 190NC231, 129SE580; 21 OhA 516, 153NE234; 53SD574, 221NW 597; 53SD588, 221NW675; TexCivA 287SW145; TexCivA 3SW(2d)486.

1017-48 215Ala118, 110S131; 216Ala 381, 113S298; 22AlaA211, 114S273; 23AlaA112, 121S499(2dcase); 220Ala 155, 124S208; 96CalA161, 273P875; 89 CalA107, 264P776; 99CalA13, 277P874; CalA 287P562; 170Ga135, 152SE466; 40GaA150, 149SE172; 200 Iowa210, 202 NW574; 124Kan333, 259P698; 209Ky 84, 272SW12; 125Me44, 130A737; 152 Md273, 136A640; 152Md439, 137A43; Md 149A4; 245Mich418, 222NW699; Mo 18SW(2d)445; MoA 256SW542; MoA 279SW253; NJ 143A144; 190NC 231, 129SE580; 191NC137, 131SE629; 133SC249, 130SE755; TexCivA 295SW 311; TexCivA 10SW(2d)1030; TexCivA 12SW(2d)263; 69Utah123, 252P677. [a] (6) Exclusion of evidence regarding speed of vehicle rendered harmless when witness testified vehicle was going at "awful rate of speed." Wash 288P 276.

1017-49 121Kan749, 752, 250P292 [quotCJ].

1017-50 121Kan749, 752, 250P292 [quotCJ]; 191NC1, 131SE407 (evidence excluded on cross-examination substantially given by witness on later cross-examination in answer to general questions without objection).

1017-51 214Ala349, 107S907; 121Kan 749, 752, 250P292 [quotCJ].

1017-52 121Kan749, 752, 250P292 [quotCJ].

1017-53 214Ala187, 106S811.

1017-54 [b] TexCommnA 288SW169.

1017-55 [a] Vt 147A352.

1017-56 57MoA471.

1018-57 219Ala201, 121S704, 64ALR553 (2dcase).

1018-58 25F(2d)415; 41F(2d)578; 213 Ala545, 105S867 (where other witness stated enough facts for jury to draw conclusions as to fact excluded); 214 Ala187, 106S811; 214Ala132, 107S73; 220Ala155, 124S208; 21AlaA252, 107S 228; AlaA 130S516; 179Ark816, 19SW (2d)1010; 97CalA628, 276P122; CalA 286P456; CalA 287P562; 170Ga135, 152 SE466; 40GaA649, 150SE857(1stcase); 86 IndA35, 155NE709; 121Kan749, 752, 250P292 [quotCJ]; Md 148A238; 259 Mass272, 156NE254; 247Mich361, 225 NW508(2dcase); 222MoA370, 3SW(2d) 256; 104NJL519, 140A408; 47RI 186, 131A643; TexCommnA 280SW753; 70 Utah72, 257P1066.

1018-59 TexCivA 28SW(2d)1100 (where other witnesses were interested).

1018-61 MoA 10SW(2d)344.

1018-65 6F(2d)644; 9F(2d)593; 161Ga 615, 131SE535; 232Ky142, 22SW(2d) 571; 126Me261, 137A773; 154Md604, 141A416; Mass 165NE115; TexCommn A 280SW753.

1018-66 217Ky738, 290SW677; 126Me 261, 137A773; NJ 147A196.

1019-67 6F(2d)644; 219Ala662, 123S 45; 126Me261, 137A773; 155Miss588, 124S795. See also 122Kan339, 252P468.

1019-69 213Ala699, 106S41; 27Hawaii 161; 99Vt227, 131A16 (where verdict shows that jury rejected claim which evidence was introduced to meet).

1019-73½-New. or where evidence is immaterial in view of findings; 253Mass 383, 149NE313.

1019-76 8F(2d)726; 23F(2d)825, 829 [citCJ]; 202Cal 279, 260P291; 71CalA 251, 235P62; 82CalA532, 255P854; 312 Mo 609, 280SW424; 321Mo 330, 11SW (2d)41 (equity); Mo 19SW(2d)662; 19 OhA36; 50SD378, 210NW198; Wash 292P737. See also TexCommnA 298SW 273.

1020-77 96CalA18, 273P831; 46 Ida 326, 268P6; 329 Ill 555, 161NE91; 32 NM5, 250P21; 49SD442, 207NW449 (negative testimony); 16PortoRico 342; 16PortoRico 378; TexCivA 6SW(2d)180.

1020-78 49SD442, 207NW449 (negative testimony); SD 227NW882.

1020-78½-New. Where evidence formally excluded was taken and is in the record on review, there is no error. 5F(2d) 71.

1020-79 39GaA496, 147SE722; 85 IndA 356, 151NE20; 218Ky246, 291SW37; 51 ND581, 199NW1017 (denial of motion to dismiss counterclaim harmless where jury found against counterclaim). See also 202Cal 36, 258P1090.

1020-80 164Minn105, 204NW550; 33 NM414, 269P56, 58 [citCJ]; NJ 145A8; 105NJL624, 146A180.

1020-83 See also 242NY339, 151NE641.

1020-84 83CalA179, 256P555; 55ND 686, 215NW158; 55ND664, 215NW160; 58ND881, 228NW217; 23 OhA40, 155NE 158; TexCivA 8SW(2d)743; Wash 286P 282.

1020-87½-New. A judgment of dismissal will not be reversed merely because the lower court followed a bad practice and entertained a motion for nonsuit, in an action seeking both legal and equitable relief. 85Colo 83, 273P884.

1020-89 But see Okl 291P569.

1020-90 122 Okl 208, 253P485; 143 Okl 290, 288P981 (evidence introduced by demurrant).

1020-94½-New. The sustaining of a demurrer to plaintiff's evidence is harmless error where the ruling was correct except as to a small uncontested amount which was allowed in the judgment. 123 Kan344, 255P43.

1020-94¼-New. It is reversible error to overrule a demurrer to plaintiff's evidence where no evidence was offered in support of an allegation necessary to a recovery. 127 Okl 53, 259P642.

1020-94¼-New. It is reversible error to sustain a demurrer to the evidence where the evidence presents disputed questions of fact. 43 OklACR450.

1021-95 285Pa241, 132A185.

1021-95½-New. Where the complaint contains no substantial cause of action and thus will not support the judgment, an affirmative charge in defendant's favor, based on other matters, will not injure plaintiff, but the situation is otherwise where the complaint merely states a cause of action defectively. 218Ala 520, 119S230.

1021-95¼-New. Error in failure to rule on defendant's motion at close of plaintiff's evidence is harmless where case was tried to court. Iowa 232NW812.

1021-96 84Mont549, 276P948; 143Wash 401, 255P134.

1021-5 CalA 285P382.

1021-8 191NC832, 133SE167.

1021-9½-New. where defendant's defeat on counterclaim was in effect general damages for plaintiff. 75CalA732. 243P443.

1021-10 CalA 287P575.

1021-15½-New. Granting of a nonsuit at the close of plaintiff's evidence in an equity case is not ground for reversal where plaintiff's whole evidence is insufficient to prove a cause of action. 78 Colo 36, 238P59.

1021-17½-New. Refusal to permit defendant to dismiss a cross statement of a claim before judgment after permitting plaintiff to dismiss the statement of claim is prejudicial error to defendant. 27 OhA439, 161NE355.

1022-18 14F(2d)956; 214Ala553, 108S 452; 203 Iowa985, 213NW567; 220Ala 549, 126S869; 41GaA420, 153SE229(1st case); 204 Iowa661, 215NW628; 211Ky 450, 277SW464; 148Md140, 129A7; 254 Mass501, 150NE326; 232Mich392, 205 NW174; MoA 277SW362; Mo 30SW (2d)83; 128Misc263, 219NYS295; NC

155SE158; TexCivA 293SW342; Vt 148 A750. [e] **Refusal to give withdrawal instructions** on abandoned issues is not reversible error. 220MoA9, 285SW123. [f] **Where court directed verdict against defendant on counterclaim,** and verdict for plaintiff involved finding which would defeat counterclaim, it was not prejudicial error. 230Ky39, 18SW(2d) 877. [g] **Directing verdict for defendant in one case in cross action** was not nonprejudicial because such party recovered verdict in other case. Mass 166 NE867.

1022-19 254Mass599, 150NE874; Tex CivA 294SW883.

1022-20 83CalA424, 257P99; 115 OhSt 298, 152NE641; TexCivA 21SW(2d)563.

1022-21 35GaA240, 132SE651; 69Utah 250, 253P900. [c] 215Ala489, 111S210.

1022-22 153Md329, 138A233; 232Mich 392, 205NW174; 193NC541, 137SE658.

1022-31 128Misc263, 219NYS295.

1022-32 151Md422, 135A185.

1022-34 118 Oh167, 160NE683.

1022-34½-New. when plaintiff makes out a prima facie case, 124 Okl 247, 255 P696.

1022-35 84 IndA398, 150NE65; 214Ky 7, 282SW186; 234Ky670, 28SW(2d)988.

1022-36 213Ala672, 106S147; NJ 137A 580; TexCivA 289SW111.

1023-39 219Ky510, 293SW1079.

1023-42 204 Iowa1108, 216NW702.

1023-44 213Ala286, 104S643; 214Ala 553, 108S452.

1023-46 161Ga414, 131SE158; 166Ga 223, 142SE739; 169Ga288, 150SE149; 169Ga309, 150SE203; 34GaA190, 128SE 922; 35GaA200, 132SE917; 35GaA399, 133SE266; 37GaA280, 139SE910; 40GaA103, 149SE71.

1023-47 See also 21AlaA130, 106S214. [a] **It is error to direct verdict** for defendant at close of plaintiff's case where defendant has failed to press pleaded defense of accord and satisfaction. 21 OhA 393, 153NE227.

1023-47½-New. In an action for damage by fire, it is reversible error to refuse to direct the verdict for defendant, where it clearly appears that the proximate cause of damage was an act of the agent of the owner. 112 OhSt543, 147NE913.

1023-48½-New. Where plaintiff moved for directed verdict which was opposed by defendant, and the record fairly justifies the inference that the trial court assumed, from colloquy between counsel at the close of the trial, that both parties agreed that the case might be considered as if the verdict had in fact been returned for plaintiff pursuant to peremptory direction by the court, a new trial will not be ordered because no verdict was in fact directed or returned and no findings of fact made by the trial court. 50ND573, 196NW820.

1023-48½-New. Where, by erroneously sustaining objections to offers of proof, the court excluded the question of fact for the jury, direction of the verdict was error. 77Mont539, 252P368.

1023-48¼-New. Where both parties moved for a directed verdict, the appellate court decides only whether there was substantial evidence to support the verdict or whether there were any errors of law. 14F(2d)61.

1023-48½-New. The appellate court must accept conclusions of fact of the trial court, after motion by both parties for a directed verdict, supported by substantial testimony. 19F(2d)177.

1023-48¾-New. Refusal of defendant's withdrawal instruction, directed to the issue abandoned by plaintiff, is not prejudicial error. MoA 285SW170.

1023-48⅞-New. Denial of motion to introduce evidence after direction of verdict on motion of both parties is not ground for reversal in absence of prejudice. Nebr 230NW680.

1023-49 169Ark271, 273SW715; 36GaA 357, 136SE807; 255 IllA106; 216Ky693, 288SW682; 220AppDiv723, 221NYS494; 221AppDiv394, 223NYS93; 115 Oh589, 155NE143; TexCommnA 300SW41; Tex CommnA 18SW(2d)263.

1023-49 TexCommnA 7SW(2d)521; Tex CivA 278SW496; TexCivA 283SW627; TexCivA 4SW(2d)336; TexCivA 10SW (2d)1030; TexCivA 14SW(2d)97; Tex CivA 22SW(2d)508; TexCivA 31SW(2d) 513; 99Vt249, 131A14.

1023-50 TexCivA 278SW496.

1023-51 36GaA357, 136SE807. But see TexCivA 22SW(2d)488.

1023-54 TexCivA 284SW989; TexCivA 19SW(2d)193 (jury peremptorily instructed to find in affirmative or negative on improper combination of two issues).

1024-55 37GaA733, 141SE818.

1024-56 16F(2d)461; 36F(2d)480; 32 Ariz135, 256P507; 169Ark1008, 277SW 533 (where plaintiff is entitled to recover under undisputed facts); 160Ga634, 128SE903; 203 Iowa185, 210NW762; 204 Iowa857, 216NW33; 230Ky341, 19 SW(2d)973(1stcase); Mich 233NW378; 197NC526, 150SE34; 147SC487, 145SE 400 (where evidence supported verdict); 52SD448, 218NW597 (submission on application made after beginning of term); TexCommnA 292SW536; TexCommnA 12SW(2d)972; TexCivA 272SW497 (assuming facts determined in preceding issue); TexCivA 272SW597; TexCivA 283SW679; TexCivA 290SW1108; Tex CivA 291SW299; TexCivA 294SW913; TexCivA 299SW665; TexCivA 4SW(2d) 985; TexCivA 15SW(2d)170; TexCivA 20SW(2d)363; TexCivA 21SW(2d)754 (2dcase); TexCivA 23SW(2d)405; Tex CivA 23SW(2d)516; TexCivA 27SW (2d)354; TexCivA 28SW(2d)865; Tex CivA 28SW(2d)173; TexCivA 32SW (2d)363; TexCivA 32SW(2d)396; Tex CivA 32SW(2d)703.

1024-57 16F(2d)461; 203 Iowa185, 210 NW762; TexCivA 299SW325; TexCivA 4SW(2d)205; TexCommnA 14SW(2d) 797; TexCivA 17SW(2d)68; TexCivA 23SW(2d)739. [a] **Error in recording juror's answer to special issues is harmless** if evidence did not raise any fact issues as to those special issues. Tex CivA 25SW(2d)659.

1024-58 21 OhA322, 153NE302; Tex CivA 286SW958; TexCivA 4SW(2d)84; TexCivA 11SW(2d)191; TexCivA 22SW (2d)991; TexCivA 26SW(2d)1081.

1024-59 233Ky563, 26SW(2d)495 (in absence of showing of jury's allowance for issue); TexCivA 11SW(2d)529; TexCivA 25SW(2d)916; TexCommnA 26SW(2d)199; TexCivA 26SW(2d)697.

1024-60 TexCivA 300SW201; TexCivA 15SW(2d)46(2dcase); TexCivA 22SW (2d)467.

1024-61 200 Iowa705, 205NW351; 263 Mass409, 161NE612; 150SC289, 148SE 49; TexCivA 275SW423; TexCivA 294 SW913; TexCivA 295SW311; TexCivA 15SW(2d)46(2dcase); TexCivA 17SW (2d)494; TexCivA 19SW(2d)166; Tex CivA 22SW(2d)1107; TexCivA 23SW (2d)820; TexCivA 26SW(2d)474. See also TexCivA 31SW(2d)1094 (special issues not forming basis of judgment are treated as surplusage).

1024-62 204 Iowa857, 216NW33; 220 Ky536, 295SW861; TexCommnA 287 SW1094; TexCivA 275SW423; TexCivA 290SW1108; TexCivA 4SW(2d)140; TexCivA 9SW(2d)185; TexCivA 15SW (2d)46(2dcase); TexCivA 15SW(2d) 207; TexCivA 18SW(2d)702(2dcase); TexCivA 28SW(2d)578; TexCivA 28SW (2d)906; 200Wis87, 227NW284; 200 Wis504, 228NW126. [a] (5) Error in respect of issue of exemplary damages is harmless where such damages were not awarded. TexCivA 289SW414.

1025-63 TexCivA 297SW534; TexCivA 19SW(2d)211 (improper submission of negligence issue cured by verdict of contributory negligence).

1025-63½-New. where the court might have been warranted in determining the question as a matter of law; 203 Iowa 35, 212NW333.

1025-64 16F(2d)461; 198NC536, 152 SE499.

1025-65 85 IndA327, 151NE346; Tex CivA 274SW991 (submission of combination of two issues not error where one uncontroverted); TexCivA 277SW 1116; TexCivA 278SW341; TexCivA 18 SW(2d)810; TexCivA 24SW(2d)527.

1025-66 TexCivA 274SW667 (in appellant's favor); TexCivA 283SW914; Tex CivA 291SW299; TexCivA 295SW352.

1025-68½-New. where submission to the jury was not necessary; TexCivA 293SW838.

1025-69 MoA 293SW66; TexCivA 31 SW(2d)333; 200Wis80, 227NW247.

1025-69½-New. where the judgment was supported by findings on other issues properly submitted; TexCivA 300 SW975.

1025-70 MoA 20SW(2d)166.

1025-70½-New. Separate submission of issues may cure error in submitting them as a single issue where the findings of the jury are not in such conflict as to form a basis on which to predicate the judgment. TexCivA 281 SW608.

1025-70¾-New. Submission of an issue embracing two distinct issues of fact is reversible error, notwithstanding the issues are subsequently submitted separately, where the jury's answers are directly contradictory. TexCivA 281SW 608.

1025-70¼-New. In a case triable to the court, the submission of an issue to a jury without settlement of the issue as prescribed by rules of court is not reversible error where the court had power to submit an issue to a jury on its own motion. 171Minn475, 214NW469.

1025-70½-New. Irregularity of procedure in the chancellor's submitting the issue to the jury is harmless since the finding is advisory only. 224Ky245, 5 SW(2d)1077.

1025-71 171Ark225, 283SW374; 206 Iowa328, 218NW568; 243Mich458, 220 NW783; 172Minn591, 216NW537; 220 MoA251, 284SW167; 222MoA1112, 296 SW257; MoA 27SW(2d)1046; 19 OhA 57; 28 OhA30, 162NE434; 35 OhA361, 172NE533; TexCivA 2SW(2d)866; Tex CivA 5SW(2d)862; 146Va357, 131SE 803; 103WVa408, 137SE656. [a] **Withdrawal of plea of estoppel** was not error, since it was merely a question of law. 170La37, 127S356.

1025-72 263Mass15, 160NE297; 309Mo 638, 274SW815; Mo 23SW(2d)1013; 285Pa399, 132A194; 295Pa425, 145A 525.

1026-73 27F(2d)32; 201 Iowa148, 205 NW833; 309Mo 638, 274SW815; OhA 153NE859. But see IndA 163NE517.

1026-76 285Pa399, 132A194.

1026-83 Mo 23SW(2d)1013; 19 OhA57.

1026-84 Mo 23SW(2d)1013.

1026-84½-New. where peremptory instruction for appellee would have been proper; 103WVa408, 137SE656.

1026-85 220MoA1112, 296SW257.

1026-88 225AppDiv719, 231NYS331.

1026-89 26 OhA414, 160NE486.

1026-89½-New. Where jury's finding is warranted, propositions directed at form of issue should be overruled. Tex CivA 29SW(2d)799(1stcase).

1027-90 232Ky639, 24SW(2d)295; MoA 24SW(2d)238; 191NC117, 131SE 369 (failure to submit definite issue in conflicting evidence is ground for reversal); 49ND1086, 194NW830; 22 OhA475, 154NE61; 133 Okl 104, 271P 635(2dcase); TexCommnA 276SW222; TexCommnA 299SW220; TexCommnA 2SW(2d)276; TexCommnA 25SW(2d) 320; TexCivA 283SW694; TexCivA 289 SW152; TexCivA 294SW699; TexCivA 299SW336; TexCivA 1SW(2d)703; Tex CivA 5SW(2d)792; TexCivA 11SW(2d) 247; TexCivA 14SW(2d)863; TexCivA 16SW(2d)869; TexCivA 19SW(2d)605; TexCivA 28SW(2d)312; TexCivA 28SW (2d)565; TexCivA 30SW(2d)681; Tex CivA 31SW(2d)518. [a] (3) TexCivA 19SW(2d)144 (failure to submit issue of unavoidable accident). (6) Refusal to submit special issue as to different contract held prejudicial error. Tex CivA 277SW711. (7) Failure to submit issue of statute of frauds. 221AppDiv 490, 224NYS648. (8) Judgment on verdict finding negligence must be reversed where court submitted no issue of negligence found causing injuries. 199Wis334, 226NW395.

1027-91 42F(2d)816; 202 Iowa791, 211 NW405; 124Kan370, 260P525; 218Ky 119, 290SW1059; MoA 10SW(2d)665; 198NC642, 153SE114; 289Pa369, 137A 612; TexCommnA 276SW162; Tex CommnA 290SW526; TexCivA 285SW 859; TexCivA 300SW181; TexCivA 9

SW(2d)284; TexCivA 23SW(2d)535; TexCivA 28SW(2d)173; TexCivA 24SW(2d)527; TexCivA 30SW(2d)930. [b] Failure to submit question of nominal damages is not ground for new trial. 202 Iowa442, 210NW460.

1027-92 202 Iowa791, 211NW405; 289 Pa369, 137A612; TexCommnA 12SW(2d)963.

1027-94 MoA 19SW(2d)534; 195NC 302, 142SE10; TexCommnA 290SW 526; TexCivA 272SW299; TexCivA 287 SW149; TexCivA 15SW(2d)36; Tex CivA 19SW(2d)355 (finding on another issue, rendering question based on erroneous assumption immaterial); Tex CivA 19SW(2d)916; TexCivA 28SW(2d) 288; 200Wis471, 229NW64. [a] (4) Other instances. 208 Iowa369, 226NW 151. [e] Refusal to submit issue of negligence harmless where jury found contributory negligence. TexCivA 19 SW(2d)211.

1027-95 202 Iowa791, 211NW405; Tex CommnA 14SW(2d)797; TexCivA 293 SW664; TexCivA 14SW(2d)1049.

1028-98 TexCivA 12SW(2d)633.

1028-99 155Wash345, 284P100.

1028-2 TexCivA 13SW(2d)414.

1028-3 81NH520, 129A270; Tex CommnA 290SW526; TexCivA 291SW 667; TexCivA 297SW244. [a] (4) Other instances. 41F(2d)569.

1028-4 TexCivA 291SW929; TexCivA 4SW(2d)320; TexCivA 8SW(2d)561; 195Wis67, 217NW655.

1028-4½-New. Error in refusing to submit party's issue to jury is not rendered harmless by finding on similar issue submitted by his opponent. Tex CivA 29SW(2d)534.

1028-5 MoA 2SW(2d)199.

1028-6 MoA 31SW(2d)113; NJ 138A 206.

1028-7 21AlaA306, 107S722.

1028-8 214Ala341, 107S903; 33Ariz 128, 262P995; 203 Iowa672, 213NW219; 244Mich649, 222NW91; TexCivA 279 SW563 (error harmless in view of findings of jury); TexCivA 280SW914; Tex CivA 282SW884; TexCivA 6SW(2d)439; TexCivA 10SW(2d)597; TexCivA 10SW (2d)756; TexCivA 31SW(2d)669; Wis 221NW762.

1028-10 41 Ida106, 238P517.

1028-12½-New. Where peremptory instruction to find for appellee would have been proper, errors in connection with submission of special issues become immaterial. TexCivA 275SW622.

1028-13 233Mich23, 206NW491; 115 OhSt91, 152NE753; TexCivA 31SW(2d) 684.

1028-14 115 OhSt91, 152NE753.

1029-16 236 IllA386. [c] Prejudicial error.-NB [1930] 2DomLR756.

1029-17 [a] TexCivA 275SW473.

1029-18 236 IllA386; 119Kan508, 240P 395; TexCivA 17SW(2d)1102.

1029-20 236 IllA386; TexCivA 297SW 534.

1029-23 TexCivA 9SW(2d)458.

1029-24 234Mich497, 208NW434.

1029-27 TexCivA 18W(2d)917.

1029-27½-New. where trial court renders judgment which should have been rendered, although not based on answers to issues; TexCivA 285SW1115.

1029-28½-New. It is not reversible error for the court to refuse to compel the jury to answer more specifically certain questions submitted to them. 121 Kan674, 249P685.

1029-28¾-New. Submission of law issues to the jury and a decision of equitable issues by court held not prejudicial error. 143Wash401, 255P134.

1029-28¼-New. Error, if any, in submitting special issues of negligence is held to require reversal, notwithstanding the probability that the jury would in any event have found defendant negligent in another respect. 22F(2d)69.

1029-30 273US359, 47SCt400, 71Led 684; 6F(2d)721; 9F(2d)32; 10F(2d) 969; 15F(2d)790; 16F(2d)251; 23F (2d)567; 33F(2d)876; 35F(2d)611; 36 F(2d)176; 37F(2d)488; 39F(2d)305; 215Ala666, 112S129; 216Ala642, 114S 298; 218Ala489, 119S13; 23AlaA187, 122S297; 219Ala636, 123S76, 63ALR 805; 220Ala242, 124S528; Ala 130S807; 218Ala90, 117S681, 61ALR938; 28Ariz 454, 237P642; 29Ariz554, 243P405; 32 Ariz135, 256P507; 32Ariz436, 259P881; 168Ark84, 269SW66; 168Ark943, 272 SW663; 170Ark1194, 279SW354 (instruction not contradictory or prejudicial); 172Ark671, 290SW953; 175 Ark618, 299SW1016; 178Ark90, 10SW (2d)39; 179Ark831, 18SW(2d)369; Ark 32SW(2d)436; 198Cal157, 244P338; 200Cal628, 254P256; 202Cal359, 260P 869 (as to burden of proof); 203Cal291, 264P246; Cal 290P571; Cal 292P451; 68CalA171, 228P873; 68CalA494, 229P 885; 70CalA415, 233P366; 72CalA57, 236P319; CalA 238P954; 74CalA598, 241P422; 76CalA293, 244P923; 76 CalA569, 245P468; 78CalA733, 248P 727; 199Cal545, 250P565; 81CalA690, 254P671; 82CalA751, 256P224; 83CalA 204, 256P848; 85CalA233, 258P1104; 85CalA571, 259P968; CalA 259P973; CalA 260P337; 89CalA653, 265P357; 89CalA710, 265P536; 90CalA390, 266P 320; 90CalA764, 266P606; CalA 269P 459; 102CalA58, 282P525; CalA 290P 80; CalA 293P112; CalA 293P129; 80 Colo412, 252P348; 83Colo211, 263P 933; 87Colo498, 289P599; 103Conn647, 131A408 (charge held not prejudicial); 105Conn528, 136A76; 107Conn568, 141 A652; 109Conn100, 145A644(2dcase); 110Conn217, 147A673; 92Fla442, 109S 457; 92Fla339, 110S529; 160Ga497, 128 SE66; 161Ga587, 131SE362; 162Ga428, 134SE72; 163Ga807, 137SE45; 163Ga 761, 137SE233; 163Ga899, 137SE561; 164Ga421, 138SE902; 164Ga696, 139SE 333; 165Ga422, 141SE188; 165Ga451, 141SE306; 165Ga682, 142SE98; 35GaA 372, 133SE479; 35GaA723, 134SE804; 35GaA767, 134SE831; 36GaA469, 137SE 130; 36GaA497, 137SE277; 36GaA698, 137SE850; GaA 139SE580; 38GaA280, 143SE905; 38GaA597, 144SE668; 40GaA 4, 148SE757; 40GaA188, 149SE85 (instruction favorable to appellant); 41GaA 62, 151SE672; 43 Ida214, 250P648, 50 ALR1418; 43 Ida661, 254P528; 48 Ida 163, 280P220; 323 Ill 498, 154NE226; 232 IllA295; 232 IllA439; 233 IllA522; 234 IllA151 (where instructions given fairly covered law applicable to case); 234 IllA 359; 234 IllA502; 235 IllA362 (instructions that certain allegations in declaration are material); 236 IllA426; 237 IllA279; 242 IllA166; 245 IllA113; 255 IllA305 (contradictory instructions); 255 IllA465; 197 Ind263, 149NE643; 87 IndA27, 154NE41; 83 IndA500, 149NE 137; IndA 149NE652; 85 IndA435, 150 NE239; IndA 151NE7; 84 IndA253, 151 NE13; 85 IndA361, 151NE15; IndA 151 NE33; IndA 165NE774; IndA 167NE 551; IndA 168NE246; IndA 168NE585; 200 Iowa165, 204NW265; 201 Iowa1179, 207NW235; 203 Iowa661, 213NW428; 205 Iowa271, 215NW649, 217NW874; 204 Iowa456, 215NW767; 204 Iowa857, 216NW33; 204 Iowa810, 216NW47; Iowa 218NW147; 208 Iowa24, 221NW 197; 206 Iowa925, 221NW577; 206 Iowa884, 221NW661; 206 Iowa1134, 221 NW802; 208 Iowa1157, 225NW346; Iowa 228NW26; Iowa 228NW48; Iowa 229NW237; 119Kan389, 239P968; 119 Kan399, 239P972; 119Kan411, 239P 961; 120Kan273, 243P311; 121Kan614, 249P583; 123Kan651, 256P809; 129 Kan203, 282P741; 130Kan650, 287P 708; Kan 289P409; 209Ky239, 272SW 717; 210Ky508, 276SW133; 212Ky404, 279SW642 (charge not prejudicial); 213 Ky248, 280SW974; 213Ky689, 281SW 823; 214Ky36, 281SW1036; 217Ky603, 290SW483; 220Ky74, 294SW798; 220 Ky708, 295SW1020; 222Ky531, 1SW (2d)972; 223Ky608, 4SW(2d)388; 223 Ky681, 4SW(2d)679; 226Ky338, 10SW (2d)1086; 231Ky346, 21SW(2d)452; 233Ky97, 25SW(2d)65; 234Ky183, 27 SW(2d)699; 151Md664, 135A835; 152 Md694, 137A514; 255Mass486, 152NE 332; 259Mass376, 156NE533; 259Mass 439, 156NE740; 262Mass377, 160NE 268; 228Mich636, 200NW457; 234Mich 490, 208NW455; 235Mich351, 209NW 132; 235Mich542, 209NW827; 235Mich 633, 209NW807; 236Mich412, 210NW 211; 238Mich390, 213NW453; 239Mich 536, 215NW38; 242Mich591, 219NW 678; Mich 221NW69; 246Mich689, 225 NW580; 251Mich688, 232NW353; 169 Minn106, 210NW846; 170Minn313, 212 NW593; 178Minn353, 227NW203; Minn 231NW204; Minn 231NW716; Minn 232NW708; 142Miss806, 108S156; 147Miss603, 111S578; 146Miss758, 111S 867; 152Miss377, 118S828; 155Miss804, 125S338; 157Miss759, 128S750; Mo 256 SW819; 302Mo538, 259SW83; 309Mo 638, 274SW815; Mo 282SW423; 315 Mo478, 286SW36; 315Mo1214, 289 SW639, 50ALR268; 315Mo883, 289 SW540; 315Mo713, 290SW135; 317 Mo181, 296SW755; 317Mo1255, 298 SW69; 318Mo79, 18SW(2d)172; 319 Mo1028, 5SW(2d)6; Mo 5SW(2d) 395; 320Mo672, 8SW(2d)599; 320 Mo819, 8SW(2d)884; 320Mo1011, 8SW (2d)982; 322Mo299, 15SW(2d)825, 65 ALR599; Mo 18SW(2d)401(2dcase); 321Mo1190, 18SW(2d)433; Mo 21SW (2d)873; Mo 26SW(2d)988; Mo 29SW (2d)64; Mo 30SW(2d)1018; 217MoA 528, 269SW404; MoA 271SW540; MoA 272SW987; MoA 273SW221; MoA 274SW845; MoA 275SW575; 220MoA429, 276SW96; MoA 280SW 1048; 221MoA478, 282SW97; MoA 282SW181; MoA 285SW149; MoA 285SW1028; 220MoA337, 286SW434; 222MoA1312, 293SW453; 220MoA720, 293SW468; 220MoA1142, 297SW430; MoA 300SW993; MoA 6SW(2d)640; MoA 6SW(2d)676; MoA 7SW(2d)374; MoA 14SW(2d)701; MoA 16SW(2d) 619; MoA 16SW(2d)742; MoA 17SW (2d)557; MoA 21SW(2d)886; MoA 24 SW(2d)1072; MoA 25SW(2d)125; MoA 26SW(2d)843; MoA 27SW(2d)487; MoA 28SW(2d)391; MoA 30SW(2d)203; 114Nebr42, 205NW937; 115Nebr749, 214NW635; 116Nebr297, 216NW810; 117Nebr636, 222NW57; 118Nebr395, 225NW36; Nebr 230NW495; NJ 147A 445 (limiting tenants' damages); 102 NJL374, 131A886; NJ 131A134 (ground of objection to charge insufficient); NJ 144A190(1stcase); NJSup 150A574 (holding instruction on damages not prejudicial where verdict was reduced); 3NJMisc1020, 130A445; 190NC62, 128 SE730; 191NC690, 132SE788; 49ND 478, 191NW772; 57ND262, 221NW69; 114 OhSt144, 150NE734 (error in applying res ipsa loquitur doctrine to case held not prejudicial, since defendant admitted negligence charged); 19 OhA94; 20 OhA385, 153NE238; 21 OhA322, 153 NE302; 22 OhA82, 153NE341; 32 OhA 451, 168NE230; 34 OhA183, 170NE604; OhA 173NE445; 113 Okl102, 239P256; 115 Okl109, 241P809; 113 Okl291, 241 P1105; 115 Okl241, 242P205; 114 Okl 21, 242P1027; 118 Okl275, 247P979; 119 Okl84, 248P598; 120 Okl57, 249P 508; 125 Okl239, 257P314; 125 Okl 276, 257P759; 126 Okl139, 258P274; 128 Okl132, 261P918; 129 Okl288, 264 P824; 133 Okl145, 271P643; Okl 292 P335(2dcase); 113 Or184, 232P642, 36 ALR1391; 120 Or353, 252P556; 121 Or 492, 256P197; 122 Or498, 259P891; 124 Or332, 263P391; 126 Or602, 268P1009; 127 Or490, 272P670; 129 Or435, 277P 291; 131 Or123, 282P99; 291Pa387, 140 A148; 292Pa293, 141A41; 298Pa256, 148A102; 95PaSuper144; 97PaSuper 229; 134SC474, 132SE819; 135SC307, 133SE545; 145SC196, 143SE31; 147SC 227, 145SE135; 150SC289, 148SE49; SC 155SE588; 49SD256, 207NW102; 50 SD536, 210NW976; TexCivA 296SW 683; TexCivA 274SW284; TexCivA 278 SW1107; TexCivA 281SW350; TexCivA 282SW884; TexCivA 285SW1105; Tex CivA 290SW283; TexCivA 291SW317; TexCivA 294SW978; TexCivA 295SW 308; TexCivA 1SW(2d)754; TexCivA 2SW(2d)939; TexCivA 9SW(2d)511; TexCivA 29SW(2d)835; TexCivA 31SW (2d)1103; TexCivA 32SW(2d)240; 63 Utah495, 227P791; 69Utah401, 255P 439; Utah 287P320(2dcase); Vt 148A 869(2dcase); 145Va199, 133SE881; 147 Va263, 137SE465; 148Va331, 138SE637; 149Va344, 141SE231; 136Wash295, 239 P831; 141Wash278, 251P571; 142Wash 25, 252P164; 143Wash541, 255P947; 145Wash292, 259P1083; Wash 290P 831; Wash 290P864; 102WVa595, 136 SE47; 104WVa12, 138SE749; 105WVa 201, 141SE779; 107WVa245, 148SE109; 195Wis341, 218NW188; 197Wis241, 221 NW762; 199Wis567, 227NW17; Wis 232NW593; 34Wyo415, 244P637; 35 Wyo300, 249P81. See also 232 IllA246. [b] Mo 293SW386; MoA 294SW132. [e] 234 IllA359. [g] (5) Error in defining "highest degree of care" was harmless where defendant conceded case

for jury. **MoA** 28SW(2d)113. (6) Other instances. **MoA** 30SW(2d)196. [h] (5) Error in instruction on comparative negligence held not prejudicial. 178 Minn261, 226NW934. (6) Other cases defining "degree of care." **IndA** 168NE 709; **Mo** 31SW(2d)792. [j] (2) Other instances. **Cal** 292P451. [q] 168Ark 84, 269SW66 (plaintiff entitled to recover upon undisputed evidence). [v] **Tex CivA** 287SW71. [w] **No prejudicial error** resulted in reciting contention of plaintiff in her exact words. 190NC866, 129SE726. [x] **Instruction on theory of damages.**–3NJMisc827, 130A206. [y] **Alleged error in combining several propositions in one question** not injurious where jury needed to pass on all propositions to make finding. **TexCivA** 278SW1107. [z] **Error in instructions given cured by other proper instructions given** covering same matter. 233 IllA522. [aa] **Instructions more favorable to appellant than to appellee cannot be complained of,** where they correctly state the law. 232 IllA295. [bb] **Instruction that party "must satisfy jury"** is not prejudicial where material issue was undisputed. 232 IllA439. [cc] **Error cured by correct instructions given,** covering whole case. 235 IllA112. [dd] **In suit on employee's group life insurance policy,** reference to certificate from employer that defendant was within group insurance policy is not prejudicially erroneous. **MoA** 7SW(2d)746. [ee] **Material change** in written charge after presentation to counsel and reading to jury, even if accidental, is, under statute, prejudicial. **TexCivA** 15SW (2d)1098. [ff] **Instruction requiring finding of fact, though established by uncontroverted evidence,** instead of assuming it as established, is not harmful. **MoA** 17SW(2d)603. [gg] **Reading pleadings** to jury was not prejudicial where court made independent statement of issues. 34 OhA563, 171NE424. [hh] **Failure to define terms in special issue** is harmless where another issue presented same matter in more specific manner. **TexCivA** 30SW(2d)930.

1031–31 274US277, 47SCt613, 71L ed 1045; 10F(2d)154 (instructions held reversible error); 41F(2d)1; 41F(2d) 490; 43F(2d)668; 214Ala396, 108S26; 215Ala407, 110S818; **Ala** 130S388; 33 Ariz206, 263P584; 172Ark881, 290SW 936; 181Ark925, 29SW(2d)676; 203Cal 180, 263P198; **Cal** 290P441; 68CalA 484, 229P867; 72CalA63, 236P344; 73 CalA748, 239P373; 85CalA69, 258P 1006; 81Colo 125, 254P156; 91Fla695, 109S223; **Fla** 109S625; 35GaA120, 132 SE140; 35GaA769, 134SE808; 37GaA 638, 141SE215; 37GaA756, 142SE183; 235 IllA49; 235 IllA160; 253 IllA437; 253 IllA551; 85 IndA354, 154NE34; 85 IndA332, 154NE44; 198 Ind633, 154NE 485; 85 IndA510, 154NE508; 202 Iowa 192, 209NW523; 204 Iowa231, 213NW 380; **Iowa** 226NW116; 213Ky736, 281 SW980; 231Ky31, 20SW(2d)1023; 233 Ky187, 25SW(2d)355; 154Md168, 140 A32; 127Me7, 140A688 (prejudicial omission); 236Mich214, 210NW326; Mich 233NW395; 179Minn94, 228NW 442; Minn 230NW826; **Mo** 276SW26, 42ALR1319; 315Mo1025, 288SW59; Mo 300SW280 (conflicting instructions); Mo 19SW(2d)285; Mo 30SW(2d)1015; **MoA** 256SW155 (conflicting instructions); **Mo** 271SW535; 222MoA467, 230SW726; **MoA** 282SW522 (failing to consider material evidence in plaintiff's case); **MoA** 299SW1107; 222MoA138, 1SW(2d)1030; **MoA** 14SW(2d)664; **MoA** 16SW(2d)604; **MoA** 20SW(2d) 968; 113Nebr727, 204NW813; **Nebr** 228NW528; 241NY346, 150NE139; 241 NY385, 150NE302; 243NY34, 152NE 456; 243NY118, 152NE695; 212AppDiv 332, 209NYS99 (erroneous instructions on burden of proof, and on probability as basis of verdict, sufficient ground for reversal, in case depending on circumstantial evidence); 219AppDiv498, 220 NYS457; 219AppDiv685, 220NYS705; 223AppDiv46, 227NYS336; 219AppDiv 249, 219NYS146; 191NC416, 131SE723; 195NC236, 141SE750; 51ND688, 200NW 793; 58ND524, 226NW624 (authorizing recovery of punitive damages); 115 OhSt298, 152NE641 (instruction unjustifiably allowing damages in nature of punitive damages); 26 OhA447, 160NE 493; 121 Or552, 255P477; 298Pa588, 148A864; Pa 151A590; 48RI 227, 136 A843; 154Tenn241, 290SW39, 50ALR 1369; **TexCivA** 3SW(2d)857 (insufficient instruction on burden of proof); **TexCivA** 3SW(2d)900; **TexCivA** 4SW (2d)169 (referring to pleadings to determine issues when some allegations not sustained by evidence); **TexCivA** 5 SW(2d)242; **TexCivA** 16SW(2d)295; **TexCivA** 30SW(2d)810; **Utah** 272P207; **Utah** 287P929; 152Va649, 148SE794; 153Va762, 151SE149; 135Wash527, 238 P574; 136Wash554, 240P913; 140Wash 650, 250P59; 107WVa440, 148SE496; 195Wis498, 218NW832; **Wyo** 287P308. [a] (1) 196Cal 308, 237P1066; 235 IllA 49; 202 Iowa1008, 209NW744; 208 Iowa174, 225NW342; 120Kan591, 244P 867; **Mo** 26SW(2d)962; 222MoA467, 280SW726; **TexCommnA** 298SW268. (2) 196Cal 308, 237P1066; 255 IllA447. (8) Error in placing burden on wrong party is not cured by correct instructions given for appellant. 235 IllA49. (9) Where numerous acts of negligence were alleged in complaint for death of passenger struck by street car, instruction requiring plaintiff to prove all allegations was prejudicial error. 109 Conn221, 146A494(2dcase). (10) Charge to find for defendant if evidence of parties was of equal weight held error, where defendant had burden of proof. 97Fla648, 122S2(1stcase). [b] (1) 217 Ala137, 115S105; 204 Iowa231, 213NW 380; 136Wash369, 240P14. (7) Where charge placed greater burden of proof than law requires on appellant. 35GaA 769, 134SE808. [c] (1) 82NH94, 129A 882. (2) 75Mont52, 243P1082. [f] 198 Ind633, 154NE485. [p] **Instruction advising minority to yield to majority** is reversible error as prejudicial. 169Ark 920, 277SW39. [q] **Instruction that violation of rule of industrial commission** was negligence per se is prejudicial error as bearing on question of negligence. 241NY346, 150NE139. [r] **Erroneous instructions given at request of codefendant,** may be basis of complaint, if prejudicial. 235 IllA160. [s] **Omission of issues, theories, or defenses.**–196Cal 308, 237P1066. [t] **Erroneous measure of damages.**–40 OklACR562 [reh pending]. [u] **Award of damages on two causes of action.**–217AppDiv83, 216NYS 545. [v] **Charge which fails to define the issues to be determined** and explain the questions of fact in dispute is prejudicial error. 24 OhA466, 155NE804. [w] **Charge that improbabilities in evidence may be treated as defense** is prejudicial error. 204 Iowa231, 213NW380. [x] **Where it appears reasonably doubtful** whether defendant has been prejudiced, judgment should be reversed. 116Tex253, 288SW425. [y] **Misstatement of fact on question of contributory negligence** held prejudicially erroneous. 109Conn221, 146A494(2dcase). [z] **Misstatement of evidence held prejudicial.**–247Mich164, 225NW566. [aa] **Error in definition of "proximate cause"** has been held not harmless. **TexCivA** 18SW(2d)740.

1031–32 274US277, 47SCt613, 71L ed 1045; 179Ark352, 15SW(2d)977; 196 Cal 308, 237P1066; 73CalA748, 239P 373; 85Colo 327, 275P908; 41 Ida653, 240P932; **MoA** 273SW741; **MoA** 274SW 524; **MoA** 6SW(2d)975; 230AppDiv 473, 245NYS313; 21 OhA118, 152NE 778; 23 OhA500, 155NE701; 116 Okl 30, 243P243; 123 Okl 7, 251P738; 151 SC44, 148SE648; 143Va903, 129SE493, 45ALR280; 136Wash369, 240P14; 101 WVa621, 134SE204, 47ALR800. [a] **Contradictory instructions** held misleading and ground for reversal. **MoA** 273SW415. [b] **Instructions not prejudicial as misleading.**–20 OhA470, 152NE 684.

1031–33 274US277, 47SCt613, 71L ed 1045; 215Ala407, 110S818; 196Cal 308, 237P1066; 91Fla695, 109S223; **Fla** 126 S758; 41 Ida653, 240P932; 85 IndA332, 154NE44; 199 Iowa1143, 201NW112; Miss 105S449 (conflicting instructions); 316Mo 26; **MoA** 23SW(2d)1080; 26 OhA414, 160NE486; 116 Okl 30, 243P 243; 118 Okl 118, 247P42; 120 Okl 279, 251P56; 124 Okl 13, 253P496; 144 Okl 18, 288P1072; 144 Okl 67, 289P714; **TexCivA** 271SW228. [a] 112 OhSt500, 147NE910. [b] 72CalA63, 236P344. [c] **Contradictory instructions** require reversal of judgment. 42 Ida369, 246P 311.

1031–34 274US277, 47SCt613, 71L ed 1045; 218Ala674, 120S153; **Cal** 292P 451; 84CalA599, 258P616; 107Conn242, 140A105; 163Ga774, 136SE901; 41GaA 62, 151SE672; 85 IndA354, 154NE34; 232Ky785, 24SW(2d)616; 315Mo 987, 288SW777; **MoA** 281SW452; 241NY 385, 150NE302; 219AppDiv685, 220 NYS705; 219AppDiv249, 219NYS146; 195NC236, 141SE750; 198NC180, 151SE 94; 52ND343, 202NW814; **TexCommnA** 10SW(2d)707.

1032–35 220Ky330, 295SW164; 241NY 346, 150NE139.

1032–35½–New. Failure to instruct on the measure of damages in a personal injury action is reversible error. 120 Okl 279, 251P56.

1032–35½–New. When instructions announce both correct and incorrect views, the case must be reversed for there is no means of knowing which one the jury followed. 124 Okl 13, 253P496.

1032–36 213Ala494, 106S150; 215Ala 285. 110S312; 215Ala407, 110S818 (recognizing rule); 217Ala282, 116S164; **Ala** 127S188; **Ala** 130S203; **Ala** 130S 413; **Ala** 130S896; 21AlaA176, 106S 394; 29Ariz121, 239P795; 168Ark678, 272SW64 (practically meaningless); 173Ark729, 293SW9; 174Ark146, 294 SW395; 200Cal 628, 254P256; **Cal** 288 P781; **Cal** 288P784; 70CalA148, 232P 1010; 97CalA731, 276P149; 102CalA 405, 283P148; **CalA** 288P131; 105Conn 410, 135A390; 108Conn484, 143A898; 109Conn428, 147A136 (description of wanton misconduct); 92Fla442, 109S 457; 163Ga755, 137SE57; 164Ga421, 138SE902; 164Ga552, 139SE31; **Ga** 139 SE902; 35GaA668, 134SE350; 36GaA 168, 136SE89; 36GaA469, 137SE130; 37GaA237, 139SE580; 38GaA443, 144SE 143(2dcase); 39GaA353, 146SE920; 41 GaA263, 153SE96(2dcase); 41GaA538, 154SE159; 317 Ill 165, 147NE735; 318 Ill 445, 149NE507 (withdrawing evidence from jury); 224 IllA65 (typographical errors); 224 IllA312 (as to instruction advising jury that they are sole judges of facts); 232 IllA430; 233 IllA320 (instruction too lengthy and confusing); **IndA** 173NE330(2dcase); Iowa 204NW253; 205 Iowa271, 215NW 649; **Iowa** 229NW177; 123Kan651, 256 P809; 127Kan821, 275P136; 213Ky 248, 280SW974; 222Ky531, 1SW(2d) 972; 226Ky179, 10SW(2d)846; 233Ky 686, 26SW(2d)525; 152Md694, 137A 514; **Md** 149A275; **Mass** 165NE393; 232Mich486, 205NW596; 234Mich693, 209NW138; 240Mich228, 215NW321; 243Mich634, 220NW770; 245Mich418, 222NW699; Mich 233NW352; 168Minn 319, 210NW75; 178Minn305, 227NW39, 68ALR359 (use of word "fraud"); Minn 233NW237; 151Miss829, 119S315; 157Miss759, 128S750; **Mo** 281SW441; **Mo** 287SW634; 316Mo 278, 290SW429; **Mo** 293SW375; 319Mo 233, 3SW(2d)371 (prejudicial); **Mo** 30SW(2d)56; **MoA** 274SW507; **MoA** 278SW826; 221MoA 727, 285SW772; **MoA** 288SW100; **MoA** 294SW446; **MoA** 300SW993 (referring to another instruction for definition of negligence); 222MoA165, 2SW(2d)806; **MoA** 7SW(2d)374; **MoA** 8SW(2d)1082; **MoA** 10SW(2d)528; **MoA** 21SW(2d) 886; **MoA** 25SW(2d)133 (instruction on presumption held not prejudicial where there was no attempt to rebut); **MoA** 31SW(2d)546; 117Nebr136, 219NW843; **Nebr** 230NW495 (mere inexactness in language); 3NJMisc759, 130A4; 3NJ Misc869, 130A225; 193NC262, 136SE 723; 53ND520, 206NW784; 118 Oh257, 160NE710; 21 OhA88, 153NE86; 3? OhA389, 165NE358; 112 Okl 86, 240P 110; 129 Okl 207, 264P156; 133 Okl 168, 271P835; 141 Okl 50, 283P990; 141 Okl 256, 284P866; 117 Or319, 244P 79, 44ALR1397 (damages); 118 Or111, 244P71; 119 Or682, 250P1098; Or 293 P412; 91PaSuper157; 134SC474, 132SE 819; **TexCommnA** 25SW(2d)597; **Tex CivA** 294SW978; **TexCivA** 4SW(2d) 153; **TexCivA** 11SW(2d)621; **TexCivA**

18SW(2d)246; TexCivA 22SW(2d)550; TexCivA 23SW(2d)516; 147Va802, 128SE46 (ambiguity harmless in view of evidence and correct statement of law by instructions as whole); 142Va331, 128SE518; 145Va448, 134SE588; 145Va549, 134SE550; Va 154SE522; 143Wash229, 255P123; 148Wash93, 268P145; 150Wash646, 274P713; 155Wash141, 283P707; 155Wash133, 283P1076; 100WVa629, 131SE354; 188Wis30, 205NW407; 199Wis115, 225NW738. But see TexCivA 271SW228. [a] 233 IllA320; 208 Iowa24, 221NW197. [e] MoA 27SW(2d)1079; 124 Or197, 264P362. [o] But see 321Mo952, 13SW(2d)547. [w] (2) Instruction relating to carrier's alleged delay in furnishing cars for interstate shipment is not reversible error though failing to require proof of carrier's negligence where its whole defense and excuse for delay was based on strike of shopmen not available to it in absence of timely notice to shipper. 218MoA314, 274SW90. [z] 168Ark678, 272SW64. [aa] **Instructions that are too long**, but correctly stating law, not reversible. 232 IllA430. [ab] **Use of word "satisfaction"** as applied to preponderance of evidence is fatal only where prejudicial. 29Ariz121, 239P795. [ac] **Use of word "damages" instead of word "penalty"** in instruction in action for negligence based on statute limiting recovery for death is not prejudicial. 313Mo246, 281SW690. [ad] **Charge in exact language of supreme court decision**, wherein principle of law was correctly stated, and verdict was twice for same party, held not cause for reversal. 168Ga442, 148SE88. [ae] **Ignoring material issue** is prejudicial. 320Mo623, 8SW(2d)858. [af] **Referring jury to petition for description of property** has been held harmless where there was no dispute as to property. MoA 290SW647.

1032–36½–New. Failure to mark the instructions "Given" before handing to the jury has been held not prejudicial error. 242 IllA166.

1033–37 33F(2d)60; 218Ala489, 119S13; Ala 127S188; Ala 130S416; 30Ariz144, 245P274; 30Ariz204, 245P673; 30Ariz491, 249P66; 168Ark678, 272SW64; 178Ark241, 10SW(2d)377; 195Cal655, 235P438; 201Cal701, 258P596; 206Cal199, 273P560; 70CalA381, 233P346; 75CalA266, 242P736; 78CalA733, 248P727; 78CalA526, 248P930; 80CalA444, 251P952; 85CalA571, 259P968; CalA259P973; 87CalA38, 261P1069; 91CalA470, 267P346; CalA 269P459; 94CalA703, 271P789; 97CalA87, 275P456; 100CalA678, 280P989; CalA 293P80; 108Conn115, 142A812; 163Ga807, 137SE45; 167Ga737, 146SE739; 168Ga868, 149SE207 (error not requiring new trial); 170Ga208, 152SE474; 36GaA377, 136SE924; 37GaA74, 139SE83; 37GaA314, 140SE396; 37GaA458, 140SE431; 39GaA353, 146SE920; 39GaA213, 147SE131; 41GaA62, 151SE672; 43 Ida214, 250P648, 50ALR1418; 43 Ida505, 256P88; 45 Ida427, 262P881, 56ALR317; 48 Ida310, 282P72; 233 IllA143 (where all instructions, taken collectively, were proper); 242 IllA111; 88 IndA616, 164NE304; IndA 166NE257; IndA 170NE614; 200 Iowa165, 204NW265 (instruction submitting question of existence of admitted facts); 202 Iowa1338, 212NW154; 203 Iowa1194, 212NW354; 203 Iowa430, 212NW751; 205 Iowa271, 215NW649; Iowa 229NW177; 204Ky733, 265SW289; 208Ky723, 271SW1038; 217Ky603, 290SW483; 221Ky729, 299SW732; 222Ky115, 300SW335; 226Ky561, 10SW(2d)1064; 241Mich540, 217NW783; 172Minn591, 216NW537; 174Minn277, 219NW92; 142Miss806, 108S156; 157Miss157, 127S274; 317Mo524, 297SW404; 317Mo1061, 297SW968, 54ALR644; 320Mo371, 8SW(2d)11 (instruction too general under pleadings where proof covered only specific matters complained of in petition); 320Mo916, 9SW(2d)912; 321Mo798, 12SW(2d)476; 321Mo887, 13SW(2d)648; 322Mo592, 17SW(2d)945; 322Mo1103, 19SW(2d)707, 65ALR129; Mo 21SW(2d)873; Mo 26SW(2d)618; MoA 271SW540; MoA 273SW741; 221MoA478, 282SW97; MoA 282SW150; MoA 282SW530; MoA 285SW102; 222MoA370, 3SW(2d)256; MoA 7SW(2d)429; MoA 7SW(2d)448; MoA 10SW(2d)322; MoA 13SW(2d)1088; MoA 17SW(2d)658; MoA 31SW(2d)546; 86Mont240, 283P222; 114Nebr42, 205NW937; 116Nebr499, 218NW130; Nebr 230NW769; 3NJMisc827, 130A206; 191NC408, 132SE9; 19 OhA161; 21 OhA6, 152NE780; 21 OhA255, 153NE86; 21 OhA322, 153NE302; 21 OhA482, 153NE272; 29 OhA393, 162NE677; 29 OhA489, 163NE915; 30 OhA389, 165NE358; 115 Okl280, 242P565; 117 Okl96, 245P571; 129 Okl22, 263P126; 118 Or568, 247P815; 120 Or286, 249P627; 121 Or492, 256P197; 295Pa301, 145A303; 132SC59, 128SE849; 146SC178, 143SE648; 152SC88, 149SE331; 155Tenn235, 291SW452; TexCivA 285SW1105; Utah 282P1040; Utah 283P160; 147Va576, 137SE500; 136Wash295, 249P831; 140Wash427, 249P778; 142Wash25, 252P164; 144Wash553, 258P197; 146Wash257, 262P639; 150Wash157, 272P723, 63ALR200; 34Wyo415, 244P637; 36Wyo473, 257P484. [c] 79Mont220, 255P346. [d] (2) Unnecessary hypothesis was harmless. 218Ala55, 117S634. (3) Charge was not harmful, since favorable to defendant. 38GaA487, 144SE403. [e] **Embodying matters not in dispute** is not prejudicial error. 208Iowa24, 221NW197. [f] **Instructions consisting merely of statements of law**, which are unnecessary, is not prejudicial error. 229Ky53, 16SW(2d)505, 64ALR648. [g] **Instruction that one defendant surgeon might not be liable for act of other** was not prejudicial, where both denied act complained of. 39GaA597, 148SE12.

1034–38 217Ala119, 115S99; 168Ark658, 271SW19; 40GaA4, 148SE757; 40GaA659, 150SE565(1stcase); 224 IllA123 (where there was no evidence as to correct basis and no indication as to influence of jury); 83 IndA500, 149NE137; 207 Iowa574, 223NW365(2dcase); 209Ky730, 273SW555 (loss of time and permanent impairment of earning power); 178Minn353, 227NW203; MoA 292SW738; MoA 20SW(2d)537 (medical expenses not pleaded but shown by evidence); MoA 28SW(2d)411; MoA 28SW(2d)1044; NJSup 149A39; 196NC383, 145SE774; 115 Okl139, 241P772; 144 Okl123, 289P281; TexCivA 294SW273; TexCivA 78SW(2d)902; TexCivA 21SW(2d)754(2dcase); 147Va576, 137SE500.

1034–39 37F(2d)320; 180Ark844, 22SW(2d)1020; 78CalA526, 248P930 (as to driving automobile at speed prohibited by statute); 81CalA690, 254P671; 104Conn83, 132A467; 105Conn689, 136A693; 43 Ida214, 250P648, 50ALR1418; 89 IndA358, 164NE708; 89 IndA403, 164NE300; IndA 167NE551; 204 Iowa1055, 216NW774; 208Ky788, 271SW1085; 172Minn591, 216NW537; 217MoA105, 273SW418; MoA 285SW768; MoA 31SW(2d)262; NJ 138A519; 191NC408, 132SE9; 52 OhA451, 168NE230 (operating automobile at certain speed where there was no evidence of such speed); TexCivA 294SW235; 150Wash157, 272P723, 63ALR200; Wis 229NW860 (harmless, considering all evidence).

1035–40 30Ariz204, 245P673; 197Cal296, 240P785; 204Cal415, 268P644; 78CalA526, 248P930 (as to passing other vehicles going in same direction in violation of statute); 218Ky197, 291SW401; Ky 26SW(2d)12; 316Mo1143, 295SW751; MoA 256SW1076; MoA 287SW848; MoA 9SW(2d)541; 21 OhA322, 153NE302; 30 OhA21, 164NE59; 115 Okl139, 241P772; TexCivA 272SW308; 142Wash25, 252P164; 36Wyo473, 257P484.

1035–41 146Va22, 135SE677.

1035–42 29F(2d)689; 70CalA33, 232P486 (error cured by other instructions); 315Mo713, 290SW135.

1035–46 204Cal354, 268P334, 60ALR1381; 70CalA381, 233P346; 97CalA452, 275P1005.

1035–47 21 OhA6, 152NE780.

1035–49 91Fla345, 108S173.

1035–54½–New. burden of proof devolving on holder of promissory note in due course. 50ND487, 196NW550.

1035–55 Mo 4SW(2d)819.

1035–61 153SC179, 150SE683.

1035–64½ proximate cause. Tex 293SW901.

1035–65½–New. that property could not be taken for public use without compensation. 140Wash427, 249P778.

1036–66 See also TexCivA 285SW1105.

1036–66½–New. Statements of court, if misleading, are not prejudicial in view of subsequent statements. 285Pa320, 131A856.

1036–67 171Ark978, 287SW187; 180Ark596, 22SW(2d)32; 86CalA136, 260P588; 9NCalA126, 276P618; 91Fla1011, 109S201; 165Ga437, 141SE201; 166Ga220, 142SE868; 168Ga678, 148SE659; 34GaA276, 129SE125 (instruction limiting issues to one of two defenses); 37GaA781, 141SE917; 40GaA117, 149SE91(2dcase); 41 Ida129, 238P308; 253 IllA551; 197 IndA206, 150NE101; 85 IndA332, 154NE44; 201 Iowa253, 207NW119; 203 Iowa127, 208NW497; 202 Iowa1386, 212NW161; 208Ky723, 271SW1028; 148MdI88, 129A31; Mich 233NW178; 171Minn516, 213NW537; 319Mo52, 3SW(2d)287; Mo 25SW(2d)96; Mo 271SW535; 219MoA519, 282SW535; MoA 18SW(2d)133; 114Nebr42, 205NW937; 114Nebr353, 207NW669; 117Nebr411, 220NW590; 118Nebr465, 225NW235; 118Nebr449, 225NW238; Nebr 231NW153; 33NM529, 270P896; 241NY340, 150NE137; 218AppDiv448, 218NYS366; 194NC231, 139SE381; 195NC138, 141SE286; 53ND904, 208NW236; 23 OhA43, 154NE64; 25 OhA214, 157NE794; 32 OhA333, 168NE543; 111 Okl301, 239P609; 117 Okl96, 245P571; 120 Okl70, 254P496; 121 Okl127, 247P978; 124 Okl286, 255P1015; 129 Okl142, 263P647 (instruction based on incompetent evidence to which motion to strike out was directed); 136 Okl214, 277P274; 144 Okl67, 289P714; 118 Or568, 247P815; 130 Or50, 278P87; RI 130A497; 51SD424, 214NW816; TexCivA 10SW(2d)1040; TexCivA 148W(2d)867; 65Utah435, 238P253; 69Utah323, 255P172; 147Wash589, 266P727. [a] (3) Where instructions conflict with respect to material matter, new trial will be granted. 197NC689, 150SE334. [c] **Excluding issue which would make defendant liable** held erroneous and reversible. 149Md443, 131A822. [d] **Unless clearly harmless**, instruction unsupported by evidence is reversible error. IndA 170NE548.

1036–68 Ala 130S192; Ariz 293P16; 110Conn367, 148A139; 85 IndA332, 154NE44; 214Ky189, 282SW1087; 114Nebr353, 207NW669; 227AppDiv103, 237NYS120; TexCommnA 18SW(2d)602; 69Utah323, 255P172.

1036–69 220Ala649, 127S216; Ala 129S60; 179Ark481, 17SW(2d)309; CalA284P1086; 35GaA87, 132SE106; 319Mo52, 3SW(2d)387; Mo 31SW(2d)1065; 115Nebr1, 211NW190, 56ALR1403; Nebr 231NW153; 83NH64, 139A86; 241NY340, 150NE137; 218AppDiv448, 218NYS366; 225AppDiv415, 233NYS388; 115 OhS124, 152NE630; 23 OhA43, 154NE64; 25 OhA214, 157NE794; 111 Okl301, 239P609; 96PaSuper431; TexCivA 13SW(2d)899; Wis 230NW618.

1036–70 15F(2d)28; 84CalA721, 258P686; 251Mich696, 232NW397(2dcase); 321Mo358, 11SW(2d)11; 81NH522, 129A768, 42ALR176; 28 OhA30, 162NE434; TexCivA 275SW181.

1036–72 235Mich80, 209NW95; 197NC296, 148SE318; 25 OhA116, 157NE500.

1036–73 35GaA508, 133SE648 (ratification); 247Mich322, 225NW548.

1036–74 83NH501, 144A787.

1037–75½–New. Instruction improperly placing burden of proof on defendant is reversible error. TexCivA 18SW(2d)1089(2dcase).

1037–76 202Cal638, 262P327; CalA286P1091; 111Conn580, 150A709; 40GaA741, 151SE659; 242 IllA111; 127Kan783, 275P131(2dcase); 221Ky439, 298SW1089; 236Ky1, 328W(2d)548; 233Mich53, 206NW547; 172Minn591, 216NW537; Mo 6SW(2d)843; MoA 7SW(2d)719; MoA 22SW(2d)185; 34OhA244, 170NE661; TexCivA 284SW261; TexCivA 285SW1105; TexCivA 291SW317; TexCivA 3SW(2d)573; TexCivA 26SW(2d)435; 67Utah238, 247P293; 149Va344, 141SE231. [b] (1)

TexCivA 21SW(2d)754(2dcase). [c] **Failure to instruct on matter rendered immaterial** by an admission is not error. MoA 271SW1005.

1037-77 20AlaA576, 104S284; 165Ga 437, 141SE201; 254 IllA192 (not cured by general instruction); 85 IndA510, 154NE508; Mo 24SW(2d)143; Mo 25SW(2d)96; MoA 274SW524; 222MoA 417, 7SW(2d)307; 242NY251, 151NE 442; 243NY34, 152NE456; 53 OhA500, 155NE701; 133 Okl 104, 271P635(2d case); 144 Okl 18, 288P1072; 48RI 79, 135A481; TexCivA 278SW873 (where charge, in submitting issue, assumed facts in controversy); 144Va330, 132S E320. [c] **Instructions held prejudicial error.**–106Conn302, 138A147.

1037-78 Ind 166NE677(1stcase); 171 Minn516, 213NW537; 227AppDiv51, 236 NYS87; 154Wash66, 280P932.

1037-82½-New. , or where the court comments argumentatively against appellant on his calling a witness who was not permitted to testify, 171Minn516, 213NW537.

1037-82½-New. or where instruction amounts to a direction of verdict. 222 AppDiv144, 226NYS184.

1037-83 32Ariz135, 256P507; 79CalA 234, 249P223; CalA 288P834; CalA 293P112; 109Conn87, 145A659; 165Ga 414, 140SE872; 208 Iowa325, 223NW 763; 259Mass439, 156NE740; MoA 274 SW917; 217MoA645, 274SW923; MoA 282SW131; MoA 300SW993; 222MoA 165, 2SW(2d)806; MoA 10SW(2d)334; MoA 28SW(2d)379; 34 OhA183, 170NE 604; SD 225NW299.

1038-85 215Ala562, 112S145; 22AlaA 267, 115S73; 85 IndA428, 151NE700; 228Ky197, 14SW(2d)757; Mo 31SW(2d) 50; 217MoA645, 274SW923; MoA 6 SW(2d)648; MoA 14SW(2d)491; MoA 14SW(2d)664; MoA 22SW(2d)215.

1038-86 104Conn83, 132A467.

1038-90 MoA 296SW269.

1038-91 105NJL134, 143A366; 105 NJL391, 144A805; TexCivA 7SW(2d) 934.

1038-92 33F(2d)876.

1038-94 165Ga414, 140SE872.

1038-96 40GaA397, 149SE814; 315Mo 1025, 288SW59; MoA 17SW(2d)359; 243NY118, 152NE695; 32 OhA301, 168 NE52; 32 OhA333, 168NE543 (assuming that city owed no duty to maintain bridge safe for bicycles held invasive of jury's province); TexCivA 278SW873 (charge on weight of evidence in submitting issue to jury); TexCivA 18SW (2d)829; 100WVa394, 130SE478.

1039-99 133SC458, 131SE620.

1039-4 220MoA429, 276SW96; 87Pa Super436.

1039-5 233Mich234, 206NW356.

1039-6 See also 148SC161, 145SE790.

1039-8 145Va549, 134SE550.

1039-9 179Minn94, 228NW442; 321Mo 358, 11SW(2d)11; Mo 28SW(2d)84(2d case); MoA 273SW741.

1039-10 219Ala662, 123S45; 172Ark 1177, 288SW892; 36GaA552, 137SE414; 256 IllA569; 120Kan260, 242P1024 (good faith); 214Ky36, 281SW1036; MoA 27SW(2d)709; 19 OhA272; 7Pa Dist&Co 562; TexCivA 7SW(2d)934. See also 244Mich319, 221NW318.

1039-11 40GaA158, 149SE73 (overemphasis, though inapt, not constituting reversible error).

1039-12 318Mo1190, 3SW(2d)241.

1039-15 172Ark1177, 288SW892; 164 Ga552, 139SE31.

1039-16 106Conn302, 138A147; 243 Ill A298; 205 Iowa271, 215NW649; 216Ky 237, 287SW706; 233Mich117, 206NW 559; 316Mo 728, 293SW105; Mo 30SW (2d)1018; MoA 288SW100; 191NC13, 131SE402 (in sound discretion of court and not error in view of repetition of instructions in favor of complaining party).

1040-23 110Conn255, 147A841(2dcase); 40GaA814, 151SE541. [c] TexCivA 286 SW526. [i] **Informal and irregular manner of communicating instructions.**–NJ 134A308.

1040-23½-New. In Ohio, where a written request is made before the argument, failure to give proper instruction is ground for reversal. 24 OhA509, 156 NE608.

1040-24 228Ky197, 14SW(2d)757; Nebr 251NW747.

1040-26 323 Ill 498, 154NE226. [a] 252 IllA151.

1040-27 170Ga37, 151SE923; 211Ky 450, 277SW464; 123 Okl 284, 253P75; 128 Okl 183, 261P935; 129 Okl 85, 263 P456.

1040-28 35Ariz488, 279P253; 140 Okl 271, 282P1104.

1041-30 211Ky450, 277S464 (supported by evidence).

1041-32 16F(2d)251; 213Ala699, 106 S41 (technical errors not prejudicial); 172Ark534, 289SW490; Ark 32SW(2d) 613; 68CalA494, 229P885; 72CalA57, 236P319; 103Conn760, 130A571; 111 Conn317, 150A17; 162Ga428, 134 SE72; 165Ga408, 140SE844; 34 GaA345, 129SE555; 36GaA760, 138 SE272; 45 Ida636, 264P377; 237 IllA279; IndA 148NE335; IndA 168NE 246; 204 Iowa857, 216NW33; 220Ky 74, 294SW798; 223Ky444, 3SW(2d) 1073; 231Ky365, 21SW(2d)488; 170 Minn399, 212NW605; 173Minn443, 217 NW505; 146Miss758, 111S867; MoA 275SW572; 79Mont91, 254P1070; 81 NH520, 129A270; 193NC456, 137SE324; 196NC617, 146SE531; 24 OhA162, 156 NE240; 25 OhA319, 158NE195; 30 OhA 389, 165NE358 (error held not prejudicial); 31 OhA73, 166NE203(5thcase); 111 Okl 220, 239P236; 124 Or332, 263P 391; 283Pa331, 129A109; 285Pa350, 132A174; RI 129A3; 49SD220, 207NW 87; 52SD359, 217NW635; TexCivA 15 SW(2d)1053; TexCivA 23SW(2d)739; 143Va168, 130SE403; 149Va147, 140 SE275; 136Wash270, 239P562; 149 Wash638, 272P36; 102WVa197, 135SE 13; 106WVa518, 146SE57; 36Wyo 12, 252P790.

1041-33 14F(2d)38; 172Ark715, 290 SW594; 102CalA221, 282P1009; 85Colo 406, 276P676; 104Conn23, 131A744; 164Ga696, 139SE333; 167Ga843, 146SE 835; 36GaA433, 137SE79; 36GaA760, 138SE272; 41GaA765, 154SE714; 324 Ill 339, 155NE284; 246 IllA385; 80 IndA 677, 138NE791, 148NE675, 141NE249; Kan 289P401; 212Ky486, 279SW622 (in view of overwhelming weight of evidence); 221MoA1022, 298SW250; MoA 24SW(2d)657; 85Mont248, 278P 509; Nebr 232NW620; 196NC512, 146 SE130; 198NC812, 150SE699(2dcase); 138 Okl 147, 280P622; TexCivA 279SW 567 (in view of evidence); 67Utah238, 247P293; 142Va331, 128SE518 (where evidence did not preponderate in favor of complaining party); 143Va439, 130 SE385; 148Va331, 138SE637; 108WVa 607, 152SE8; 36Wyo 12, 252P790.

1042-34 37F(2d)271; 217Ala153, 115S 94, 55ALR1231; 180Ark1064, 23SW (2d)971; 164Ga696, 139SE333; 35GaA 553, 134SE114; 36GaA433, 137SE79; 43 Ida265, 251P621, 623 [citCJ]; 47 Ida 395, 276P47; 202 Iowa1008, 209NW 744; 222Ky757, 28W(2d)397; 227Ky 120, 12SW(2d)276, 62ALR1353; Mo 278SW79; Mo 31SW(2d)1014; MoA 23 SW(2d)1095; 191NC376, 131SE742; 193NC456, 137SE324; 294Pa300, 144A 280; TexCivA 31SW(2d)1103; 148Va 60, 138SE503, 54ALR1485; 149Va344, 141SE231; 199Wis320, 226NW392. [a] MoA 20SW(2d)166 (instruction harmless where there could be no recovery on counterclaim).

1042-35 8F(2d)689; 29F(2d)18; 42 F(2d)817; Ala 128S894; CalA 284P 719; 214Ky514, 283SW1059; 218Ky 365, 291SW353; 235Mich351, 209NW 132; 308Mo 187, 271SW512; 32 OhA 333, 168NE543; 122 Okl 224, 253P1016; 132SC63, 128SE850; TexCivA 284SW 309.

1042-36 214Ala577, 108S578; 235Ky 492, 31SW(2d)725; 308Mo 187, 271SW 512; MoA 283SW743; MoA 26SW(2d) 838; 114 OhSt278, 151NE187; 138SC 169, 136SE209 (instruction harmless where no verdict was rendered on issue submitted); 147Va758, 133SE788.

1042-37 214Ala577, 108S578; GaA 155 SE51; 86 IndA434, 157NE61; 207 Iowa 490, 223NW162; 220Ky74, 294SW798; 228Ky239, 14SW(2d)775; 231Ky630, 21SW(2d)1006; MoA 293SW66; 116 Nebr718, 218NW751; 49ND235, 191NW 347; 21 OhA143, 153NE95; 125 Okl 276, 257P759; 119 Or691, 250P1101; 118Tex607, 23SW(2d)343; TexCivA 280 SW895; 146Va747, 132SE694; 135 Wash116, 237P293.

1042-37½-New. Judgment based on general verdict only in favor of defendant which would be justified on finding on either of two special issues in his favor will not be reversed for error in giving special request which relates exclusively to one issue where the record discloses no reversible error as to the other issue. 21 OhA17, 152NE908.

1043-38 71CalA82, 234P863; CalA 284 P719; 165Ga422, 141SE188; 209Ky 803, 273SW472; 238Mich198, 213NW 112; 239Mich536, 215NW38; MoA 19 SW(2d)559 (instruction on immaterial fact); TexCivA 271SW430; TexCivA 280SW895; TexCivA 4SW(2d)568 (as to damages where verdict for defendant); 148Va331, 138SE637. See also 197Wis601, 222NW826. [a] (2) An erroneous instruction on question of damages in action for personal injuries is not reversible error where jury found defendant was not guilty. 238Mich198, 213NW112.

1043-38½-New. The giving of an erroneous instruction is harmless where the issue to which it relates is rendered immaterial by the verdict of the jury. 239Mich536, 215NW38; 165Minn146, 205NW948.

1043-39 153Md586, 139A285. [a] **Error in instructions as to one defendant is immaterial** where verdict for plaintiff against other defendant amounted to finding of nonliability. Mo 26SW (2d)969.

1043-41 32F(2d)974; 33Ariz206, 263P 584; 207Cal154, 277P481; 339 Ill 276, 171NE271; 155Md681, 142A501; NJ 139A894; 148Va331, 138SE637.

1043-42 218Ala11, 117S466.

1043-43 TexCivA 22SW(2d)490.

1043-44 43 Ida505, 256P88.

1043-45 16F(2d)251; 214Ala341, 107S 903; 215Ala148, 109S881; 169Ark532, 275SW912; 181Ark946, 28SW(2d)728; 203Cal374, 264P485; 165Ga408, 140SE 844; 35GaA668, 134SE350; 37GaA278, 139SE920; 224 IllA180 (where counsel was not present but there was no dispute as to measure of damages); 224 IllA217; 232 IllA430; 200 Iowa434, 204 NW298; 204 Iowa174, 214NW529, 62 ALR432; 121Kan275, 246P1005; 220 Ky74, 294SW798; 151Md664, 135A835; 239Mich270, 214NW84; Mo 26SW(2d) 764; Mo 32SW(2d)288; 217MoA55, 273 SW186; MoA 277SW593; MoA 300SW 315; MoA 9SW(2d)103; MoA 24SW (2d)183; 198NC812, 150SE699(2dcase); 19 OhA68; 111 Okl 220, 239P236; 120 Or181, 250P628; 132SC59, 128SE849; 144SC349, 142SE591; 155SC356, 152SE 646; 49SD220, 207NW87; TexCivA 21 SW(2d)754(2dcase); TexCivA 30SW (2d)1108; 65Utah548, 238P273; Utah 263P495; 146Va641, 132SE840; 135 Wash116, 237P293; 34Wyo 415, 244P 637. [a] (4) In action to recover damages for breach of contract to employ plaintiff for life, instructions permitting recovery of compensation receivable for remainder of life is not prejudicial, where verdict barely covered compensation up to date of trial. 169Ark 532, 275SW912. [b] See also 166Ga93, 142SE554. [f] (1) 127 Or320, 272P273 (attorney's fee). [g] 220Ala581, 126S 857.

1044-46 214Ala341, 107S903; 219Ala 206, 121S736; 180Ark947, 23SW(2d) 611; 209Ky84, 272SW12; Mo 12SW (2d)433; 116Tex538, 295SW922.

1044-47 15F(2d)897; 98CalA257, 276 P1071; 90Fla632, 106S462; 35GaA668, 134SE350; 41GaA88, 151SE925; Ida 286P603 (exemplary damages); 212Ky 709, 279SW1100; 220Ky74, 294SW798; Mo 2SW(2d)760; MoA 294SW439; 196 NC232, 145SE8; 120 Or181, 250P628; 154Wash547, 283P186.

1045-48 8F(2d)16; 16F(2d)251; 215 Ala285, 110S312; 70CalA148, 232P 1010; 232 IllA430; 233 IllA278; 89 IndA490, 167NE151; 151Md664, 135A 835; MoA 277SW362; 220MoA251, 284 SW167; MoA 299SW121; 30 OhA143, 164NE429(2dcase); 115 Okl 139, 241P 772; Okl 292P12; Okl 292P335(2d case); 284Pa59, 130A398 (verdict ad-

mitted by appellant not to be excessive); **TexCivA** 299SW301. [a] (4) Erroneous instruction to include element of damages without charge "as shown by evidence," cured by verdict for damages not excessive under theory of liability in case. 233 **IllA**278.

1045–49 73**CalA**467, 238P825; 207 **Iowa** 895, 223NW745; 232Ky539, 23SW(2d) 942; 151Md664, 135A835; 148**Miss**827, 114S734; 63**Utah**495, 227P791; 145 **Wash**81, 259P13.

1045–50 215**Ala**148, 109S881; 44 **Ida** 250, 256P523; 121**Kan**275, 246P1005; **TexCivA** 297SW676; 146**Va**641, 132SE 840.

1045–50½–New. An instruction stating wrong rule of damages held ground for reversal, notwithstanding a showing that the jurors did not follow such instruction but based their verdict on the correct rule. 218**AppDiv**126, 217 NYS877.

1045–51 40**GaA**808, 151SE531; 220**MoA** 575, 287SW861; 195**NC**102, 141SE474; 117 **Or**306, 244P75; 127 **Or**256, 270P 784; 101**Vt**514, 144A856. See also 197 **Wis**16, 221NW418.

1046–52 219**Ala**374, 122S630, 65**ALR** 1473.

1046–53 205 **Iowa**291, 217NW880.

1046–53½–New. , or on the issue of defendant's liability for any damages. 143 **Miss**551, 108S729.

1046–55½–New. An instruction authorizing interest is not prejudicial where no interest is allowed. 212**Ky**709, 279 SW1100.

1046–56 179**Minn**67, 228NW546; 146 **Miss**394, 111S588; **Miss** 129S599; 223 **AppDiv**493, 229NYS64; 99**Vt**464, 134A 588.

1046–57 255 **IllA**373; 89 **IndA**353, 166 NE545(2dcase); 179**Minn**127, 228NW 552; 154**Miss**325, 122S373; 318**Mo** 444, 300SW1102.

1046–59 **Mass** 170NE403; 146**Miss**394, 111S588; 228**AppDiv**730, 239NYS160; 152**Wash**580, 278P681.

1046–61½–New. An instruction requiring finding of costs for plaintiff is harmless error. 36**GaA**168, 136SE89.

1046–61¼–New. An instruction resulting in the adopting of a wrong rule of damage is prejudicial error. 244**Mich** 351, 221NW179.

1046–61¼–New. Error in an instruction on the measure of damages in not referring to the possibility of loss rather than profit from completion of the work has been held harmless. 156**Md** 558, 144A705.

1046–62 260**Mass**202, 156NE875; 221 **MoA**1022, 298SW250; 21 **OhA**17, 152 NE908; **TexCivA** 280SW895; **TexCivA** 291SW940; **TexCivA** 299SW668; **Tex CivA** 17SW(2d)1095; 104**WVa**12, 138 SE749; 107**WVa**158, 147SE545.

1047–63 217**Ala**255, 115S171; 81**CalA** 270, 253P776; 87 **IndA**642, 149NE367; 204 **Iowa**174, 214NW529. 62**ALR**432; 119**Kan**751, 241P437; 152**Md**268, 136A 636; **Mo** 26SW(2d)988; **MoA** 274SW 1100; 21 **OhA**210, 153NE115; 25 **OhA** 124, 158NE496; **TexCommnA** 276SW 162; **TexCivA** 118SW(2d)380; **TexCivA** 20SW(2d)324; 149**Wash**281, 270P802; 155**Wash**564, 285P433. But see 32 **OhA** 89, 167NE604.

1047–65 69**CalA**123, 230P970; 86**Colo** 159, 279P49; 26 **OhA**447, 160NE493; 151**Va**458, 145SE362.

1047–66 117**Ark**223, 174SW537; 84 **CalA**750, 258P673; 34**GaA**192, 129SE 19; 35**GaA**325, 132SE921; 224 **IllA**606; 202 **Iowa**1180, 211NW696; **Iowa** 227NW 902 (error not cured by remittitur); 240 **Mich**228, 215NW321; 220**MoA**766, 276 SW1038; **MoA** 7SW(2d)452; **MoA** 7SW (2d)746; **NJ** 135A660; 21 **OhA**282, 152 NE757. But see 195**NC**282, 142SE17.

1047–67 204**Cal** 101, 266P803 (where another instruction covered words stricken); 41 **Ida**703, 243P649 (instruction on damages); **IndA** 164NE290; 152 **Md**241, 136A615; 129 **Or**435, 277P291. [g] **Where modifications are not set forth in record,** court cannot say that trial court acted improperly. 148**Md** 345, 129A506.

1048–69 152**Md**216, 136A609.

1048–75½–New. Amending an instruction to find for defendants by striking out a portion directing the same result has been held error and prejudicial because of another instruction. 179**Ark** 214, 14SW(2d)1107.

1048–76 16**F(2d)**578; 27**F(2d)**833; 39 **F(2d)**62; 43**F(2d)**719(1stcase); 213**Ala** 494, 106S150; 216**Ala**149, 112S422; 217 **Ala**120, 115S16; 219**Ala**228, 121S521, 64**ALR**1022; 220**Ala**190, 124S418; 220 **Ala**649, 127S216; **Ala** 127S835; **Ala** 128 S145; **Ala** 128S233; 30**Ariz**347, 247P 122; 171**Ark**399, 284SW755; 172**Ark** 219, 288SW717; 205**Cal** 563, 271P1072; 207**Cal** 279, 277P1045; 78**CalA**617, 248 P741; 82**CalA**660, 256P457; 89**CalA**721, 265P541; 92**CalA**35, 267P721; 96**CalA** 236, 273P1080; 100**CalA**775, 281P95; 82**Colo** 351, 260P101; 108**Conn**126, 142 A674; 92**Fla**339, 110S529; 98**Fla**582, 124S6; 40**GaA**188, 149SE85; 41**GaA**49, 152SE146 (where appellant was estopped on question); 319 **Ill** 326, 150NE242; 233 **IllA**278 (refusal of instructions is not reversible error where other instructions sufficiently cover matter in requested instructions); 233 **IllA**320; 234 **IllA**151 (where instructions given fairly covered law applicable to case); 251 **IllA** 150 (abstract failing to show at whose request instruction was submitted); 84 **IndA**264, 151NE137; 85 **IndA**301, 154 NE24; 87 **IndA**27, 154NE41; 84 **IndA** 253, 151NE13; 85 **IndA**361, 151NE15; **IndA** 151NE33; **IndA** 168NE604; 206 **Iowa**328, 218NW568; 123**Kan**88, 254 P348; 123**Kan**457, 256P143; 130**Kan** 650, 287P708; 217**Ky**491, 290SW333; 218**Ky**594, 291SW1037; 224**Ky**303, 6 SW(2d)237; 230**Ky**465, 19SW(2d)1078; 231**Ky**720, 22SW(2d)105; 233**Ky**763, 26SW(2d)753; 151**Md**68, 134A33; 255 **Mass**104, 151NE84; 255**Mass**243, 151NE 91; 255**Mass**334, 151NE313; 260**Mass** 102, 156NE735; 263**Mass**147, 160NE 821; **Mass** 170NE51; 235**Mich**568, 209 NW814; **Mich** 233NW440; 170**Minn** 332, 212NW533; 175**Minn**190, 220NW 550; 178**Minn**561, 228NW154; 146**Miss** 758, 111S867; 153**Miss**741, 121S482; 155**Miss**104, 124S66; 315**Mo** 760, 287SW 346; 315**Mo** 353, 287SW341; 315**Mo** 713, 290SW135; 320**Mo** 725, 8SW(2d)607; 320**Mo** 1011, 8SW(2d)982; 320**Mo** 791, 9SW(2d)972; 322**Mo** 158, 16SW(2d)190; **Mo** 26SW(2d)929; **Mo** 30SW(2d)56; **Mo** 31SW(2d)4; **Mo** 31SW(2d)792; **MoA** 271SW1005; **MoA** 275SW599; **MoA** 277 SW368; 220**MoA**251, 284SW167; **MoA** 285SW118; **MoA** 285SW529; **MoA** 287 SW810; **MoA** 293SW449; **MoA** 296SW 838; **MoA** 6SW(2d)648; **MoA** 14SW(2d) 488; **MoA** 15SW(2d)370; **MoA** 28SW (2d)391; **MoA** 32SW(2d)145; **MoA** 31 SW(2d)596; **Nebr** 230NW495; **NJ** 145 A226; **NJSup** 149A526; **NC** 155SE252; 49**ND**478, 191NW772; 33 **OhA**47, 168 NE619; 119 **Okl** 84, 248P598; 125 **Okl** 239, 257P314; 128 **Okl** 132, 261P918; **Or** 293P412; 145**SC**53, 142SE828; 148 **SC**392, 146SE245; **TexCivA** 281SW275; **TexCivA** 297SW896; **TexCivA** 8SW(2d) 238; **TexCivA** 10SW(2d)739; **TexCivA** 17SW(2d)108; **Utah** 273P974; 145**Va** 199, 133SE881; 149**Va**882, 141SE829; 142**Wash**25, 252P164; 142**Wash**101, 252 P540; 104**WVa**238, 139SE737; 107**WVa** 181, 147SE759; **WVa** 152SE859. See also 213**Ala**617, 105S805; **Mo** 31SW(2d) 50. [a] (7) 214**Ky**833, 284SW84. [b] (1) 68**CalA**494, 229P885; 53**SD** 574, 221NW597. (3) Failure to define terms held not reversible error. 38**GaA** 431, 144SE218(2dcase).

1049–77 92**Fla**18, 109S635; 92**Fla**339, 110S529; 233**Ky**230, 25SW(2d)370; 136**Wash**410, 240P355.

1049–80 213**Ala**494, 106S150; 224 **IllA** 312; 254**Mass**599, 150NE874; **TexCivA** 284SW261; **TexCivA** 286SW276; **Tex CivA** 8SW(2d)561. [a] **Instructions given held correctly to cover law on subject.**–5**F(2d)**22.

1049–81 213**Ala**494, 106S150; 218**Ala** 468, 118S794; 96**CalA**84, 273P820; 38 **GaA**487, 144SE403; 46 **Ida**355, 267P611 (statute of limitations); 84 **IndA**264, 151NE137; 210**Ky**407, 276SW117; 252 **Mass**397, 147NE883; **Md** 148A242; 221 **MoA**1089, 295SW501; **MoA** 300SW301; 127 **Or**490, 272P670; **TexCivA** 275SW 415. See also 132 **Okl** 55, 269P314.

1049–81½–New. or where the instruction was dependent upon a finding which the jury did not make, 21 **OhA**143, 153 NE95.

1049–82 37**F(2d)**296; 173**Ark**27, 291 SW816; 177**Ark**1064, 9SW(2d)325; 204 **Cal** 228, 267P546; 93**CalA**370, 269P710; 104**Conn**83, 132A467; 85 **IndA**301, 154 NE24; 200 **Iowa**65, 204NW432; 208 **Iowa**275, 225NW406; 125**Me**96, 131A5; 252**Mass**397, 147NE883; 254**Mass**501, 150NE326; **Mo** 298SW806; **Mo** 3SW (2d)244; 157**Miss**256, 126S35; 217**MoA** 429, 266SW1001; **MoA** 288SW992; **MoA** 296SW216; **MoA** 12SW(2d)520; **MoA** 25SW(2d)491. [c] (1) **Iowa** 213NW442; 208 **Iowa**458, 223NW521; **MoA** 287SW 801; **TexCivA** 286SW661. (2) Where issue is not submitted in any way, it is as effectually withdrawn as though withdrawn in express terms. **Iowa** 213NW 442.

1049–83 336 **Ill** 11, 167NE807; **Md** 135 A50; 245NY383, 157NE502. See also 220**MoA**542, 287SW865. But see 35**F** (2d)563.

1049–83½–New. Indorsing reasons for refusal has been held not prejudicial, although the statute provides for indorsement of "given" or "refused." 217 **Ala**304, 116S158.

1049–83¼–New. Failure to instruct that plaintiff must have been engaged in interstate commerce to recover is harmless where the evidence shows that he was so engaged when injured. **Iowa** 227 NW646.

1049–84 22 **OhA**82, 153NE341.

1050–85 217**Ala**255, 115S171; 21**AlaA** 130, 106S214; 21**AlaA**369, 108S632; 21 **AlaA**555, 110S53; 80**Cal** 371, 252P332; **Conn** 135A93; 105**Conn**482, 136A95; 92 **Fla**18, 109S635; 36**GaA**143, 136SE85; 41**GaA**204, 152SE266; 85 **IndA**301, 154 NE24; 204 **Iowa**253, 212NW936; 121 **Kan**784, 250P335; 212**Ky**738, 280SW93; 232**Ky**98, 22SW(2d)448; 233**Ky**224, 25 SW(2d)366; **Md** 150A856; 260**Mass**206, 156NE884; **Mass** 164NE816; 250**Mich** 469, 231NW109; 175**Minn**280, 220NW 949; 150**Miss**715, 116S820; 317**Mo** 524, 297SW404; **MoA** 274SW939; **MoA** 29 SW(2d)741; 78**Mont**415, 258P236; 82 **Mont**559, 268P549, 58**ALR**1304; **Nebr** 232NW777; 82**NH**350, 134A574; 241**NY** 385, 150NE302; 243**NY**34, 152NE456; 213**AppDiv**616, 211NYS25; 132**Misc**56, 228NYS658; 195**NC**453, 142SE473; 113 **OhSt**164, 148NE641; 115 **OhSt**160, 152 NE666; 121 **Oh**371, 169NE291; 21 **OhA** 186, 152NE781; 21 **OhA**210, 153NE115; 22 **OhA**82, 153NE341; 24 **OhA**15, 156NE 155; 27 **OhA**355, 161NE288; 35 **OhA** 204, 172NE409; 115 **Okl** 76, 241P794; 120 **Okl** 3, 249P917; 128 **Okl** 29, 261P 189; 130 **Okl** 23, 264P912; **Okl** 293P 250; 52**SD**223, 217NW211; 53**SD**144, 220NW451 (contributory negligence); **TexCommnA** 285SW302; **TexCivA** 294 SW865; **TexCivA** 300SW641; **TexCivA** 7SW(2d)878; **TexCivA** 14SW(2d)887; **TexCivA** 18SW(2d)744; **TexCivA** 18SW (2d)762; 67**Utah**242, 247P476; **Utah** 266 P504; 101**Vt**1, 139A776; **Vt** 150A132; 149**Wash**1, 270P113; 106**WVa**711, 146 SE879; 194**Wis**358, 216NW528. [b] 51 **SD**11, 211NW809; **TexCivA** 290SW806. [c] (4) In action for fraud in misrepresenting depth of lot, it is prejudicial error to refuse to charge that if purchaser from inspection knew depth of lot he could not recover for misrepresentation. 113 **OhSt**164, 148NE641.

1050–86 169**Ga**237, 149SE790 (failure to instruct as to time to acquire prescriptive title); **Mass** 170NE77. See also **Nebr** 232NW777.

1050–86½–New. Failure of the court of its own motion to give an instruction on a material issue clearly raised by the pleadings and the evidence is reversible error. 40 **OklACR**117.

1050–86¼–New. Failure of the court on its own motion properly to instruct the jury upon the decisive issues formed by the pleadings and the evidence constitutes reversible error. 133 **Okl** 104, 271 P635(2dcase).

1050–87 241 **IllA**502.

1050–88 241 **IllA**502; 218**MoA**563, 267 SW6.

1050–90 **CalA** 288P834.

1051–95 38**GaA**487, 144SE403.

1051–96 [a] **Failure to charge on burden of proof** held harmless where evidence was undisputed. 170**Minn**332, 212 NW533.

1051–98½–New. Refusal to instruct on probative value of declarations is not ground for reversal where the case is not close and evidence favors appellee. 233 **Ill**A320.

1051–98⅓–New. Refusal to instruct on probative force of plaintiff's declaration held not erroneous. 233 **Ill**A278.

1051–99 16F(2d)578; 213**Ala**699, 106S 41 (technical, not prejudicial); 180**Ark** 1043, 23SW(2d)965; 89**CalA**710, 265P 536; 92**Fla**18, 109S635; 44 **Ida**620, 258 P555; **IndA** 148NE335; 87 **IndA**433, 157NE456; 208 **Iowa**949, 225NW414, 65 **ALR**817; 260**Mass**225, 157NE347; 146 **Miss**758, 111S867; **MoA** 256SW531; 222 **MoA**738, 7SW(2d)441; 115**Nebr**639, 214 NW66; 31 **OhA**73, 166NE203(5thcase); 34 **OhA**563, 171NE424 (where general verdict could be based on different issue); 126 **Okl** 64, 258P918; **TexCivA** 26 SW(2d)672. [b] **It is reversible error to refuse special charges** pertinent to issues and evidence and stating law correctly. 21 **OhA**210, 153NE115 (error not cured by general verdict). [c] **Erroneous instruction** held not harmless. 49**RI** 50, 139A664.

1051–1 162**Ga**664, 135SE195; **MoA** 30 SW(2d)621; 123 **Or**193, 261P422; **Tex** 284SW261; **TexCivA** 280SW342; **Tex CivA** 286SW487; **TexCivA** 11SW(2d) 572; **TexCivA** 14SW(2d)1049.

1051–2 **IndA** 148NE501; 152**Va**508, 147 SE243. [a] (2) See also **TexCivA** 290SW 846.

1052–3 190**NC**108, 129SE181; 155**Wash** 564, 285P433.

1052–4 198 **Ind**633, 154NE485; **MoA** 24SW(2d)657.

1052–5 72**CalA**736, 238P110; **CalA** 288 P805; 256 **Ill**A476; 170**Minn**332, 212 NW533; 115**Nebr**639, 214NW66; **Nebr** 232NW620. [a] 234**Ky**183, 27SW(2d) 699.

1052–6 **Ala** 128S447; 181**Ark**415, 26SW (2d)80; 122 **Okl** 224, 253P1016.

1052–7 178**Ark**1106, 13SW(2d)303.

1052–8 35**GaA**273, 133SE57; 44 **Ida**620, 258P555; 87 **IndA**433, 157NE456; 146 **Va**813, 132SE692.

1052–9 210**Ky**407, 276SW117; 259**Mass** 181, 156NE1, 54**ALR**745; 126 **Okl** 64, 258P918; 132 **Okl** 72, 269P350, 59**ALR** 584; 152**SC**178, 149SE753 (contributory negligence); **TexCivA** 25SW(2d)969.

1052–10 80**Colo** 420, 252P346; 262**Mass** 68, 159NE499; **TexCivA** 48W(2d)222.

1052–11 254**Mass**118, 149NE693; **Mo** 282SW53.

1052–12 85**CalA**360, 259P460.

1052–12½–New. , or where there was more than one issue upon which to base a general verdict as to one of which there was no error. 24 **OhA**48, 156NE 157.

1052–12¼–New. In an action for death, refusal of an instruction on an issue of prior settlement with another joint tortfeasor has been held prejudicial error, not cured by interrogatories. 30 **OhA** 528, 165NE865.

1052–13 215**Ala**47, 109S278; 219A298, 122S41; 205 **Iowa**621, 218NW334; 210 **Ky**407, 276SW117; **Mo** 20SW(2d)659. [b] 83**Colo** 204, 263P713.

1053–14 216**Ala**235, 113S49; 241**Mich** 361, 217NW32; 322**Mo** 514, 17SW(2d) 960; **MoA** 29SW(2d)207; 132 **Okl** 72, 269P350, 59**ALR**584; 85**PaSuper**97; **Tex CivA** 28SW(2d)839.

1053–15 132 **Or**106, 284P579 (appeal by plaintiff); **TexCivA** 288SW251.

1053–16½–New. or is not excessive, 312 **Mo** 173, 279SW89.

1053–17 85**PaSuper**97.

1053–21 149**SC**454, 147SE596. See also **TexCivA** 30SW(2d)397.

1053–25 See also **Ala** 128S145.

1053–25½–New. Refusal of an instruction on damages is not prejudicial error where it could not have affected the result in view of the verdict. 209**Ky**239, 272SW717.

1053–25¼–New. Error in failing to give an instruction based on defendant's version of an assault has been held harmless, where the jury found under plaintiff's version. 226**Ky**739, 11SW(2d)930.

1053–26 **TexCommnA** 1SW(2d)594; **Tex CivA** 6SW(2d)202.

1053–27½–New. Inadvertent omission of judge to instruct as to measure of damages may be cured by remittitur. 232**Mich**300, 205NW199.

1053–27⅓–New. The rule of damages applicable is immaterial on the basis of the jury's findings. **TexCivA** 277SW 701.

1053–29 [c] 321**Mo** 1244, 14SW(2d) 583.

1053–30 318**MoA**408, 300SW506.

1053–31 221**MoA**448, 282SW459; **MoA** 27SW(2d)72.

1053–32 109**Conn**484, 147A18. [a] **Judgment will be reversed** where court gave declaration of law conforming to theory repudiated by supreme court decision. 319**Mo** 1085, 7SW(2d)695.

1053–32½–New. Where propositions of law on a particular question were not presented to the trial court, the question is not properly before the supreme court for review. 330 **Ill** 238, 161NE525 (effect of repeal of statute).

1054–46 181**Ark**1145, 28SW(2d)699; **MoA** 21SW(2d)880; 111 **Okl** 116, 238P 488; 144**SC**89, 142SE39; 144**Wash**440, 258P321. [f] **Where proper amount awarded,** plaintiff was not injured because jury arrived at amount improperly. **TexCivA** 300SW142.

1054–44 **Ala** 129S60; 228**Ky**194, 14SW (2d)751; 232**Ky**702, 23SW(2d)564; 24 **OhA**162, 156NE240; 25 **OhA**197, 158NE 282; **RI** 136A841; **TexCivA** 27SW(2d) 608. [d] **Jury's departure from court's charge** in assessing damages is reversible error. **TexCivA** 297SW258.

1054–45 **TexCommnA** 292SW536; **Tex CivA** 11SW(2d)207.

1055–47½–New. Where jury's findings on material issue are sustainable, it is immaterial whether or not their finding on an immaterial issue is supported by evidence. **TexCivA** 278SW270.

1055–47⅓–New. No miscarriage of justice results in failure or refusal of jury to follow instructions on plaintiff's theory of case where the verdict accords with the proper theory. 75**CalA**737, 243 P686.

1055–47¼–New. No prejudicial error results from refusal of party's request for poll of the jury where all the jurors favored a verdict for the party and so announced on the return of the verdict which was recorded. 200**Cal** 161, 252P587.

1055–47⅙–New. Plaintiff has been held not injured where defendant remitted cost required to remove usable timber. **TexCivA** 300SW142.

1055–47⅛–New. Conflict in the jury's verdict on determinative issues in answer to special issues constitutes reversible error. **TexCivA** 15SW(2d)690.

1055–48 150**Md**655, 133A338; 173**Minn** 443, 217NW505.

1055–50 83 **IndA**541, 149NE184; 115 **Okl** 193, 241P471.

1055–52 153**SC**309, 150SE789.

1055–53½–New. Where the evidence was too general to support a verdict for loss of profits, uncertainty as to whether they were included in the general verdict is ground for reversal. **MoA** 19SW(2d)544.

1055–55½–New. Where there was apparently a jury question in the case, it was prejudicial error for the trial court to substitute its verdict under the guise of amending or correcting the verdict. 52**SD**82, 216NW854.

1055–53⅓–New. Correction of formal error in a verdict in the presence of counsel and jury, and with the jury's approval, is harmless. **Mass** 167NE669.

1055–56 220**MoA**963, 272SW711; **Tex CivA** 293SW842; **TexCivA** 25SW(2d) 186 (jury's answering questions in alternative, where not required, not prejudicial).

1055–57 **TexCommnA** 284SW539; **Tex CivA** 295SW305; 193**Wis**370, 214NW 374, 53**ALR**771.

1055–58 189**Wis**60, 205NW326.

1055–60 **TexCivA** 288SW627.

1055–61 **TexCommnA** 284SW539.

1055–62 **TexCivA** 287SW81; **TexCivA** 23SW(2d)739.

1055–63 **TexCivA** 17SW(2d)494.

1055–65 **TexCivA** 7SW(2d)1099.

1056–66 198**NC**418, 151S865(1stcase). [a] **Special verdict** not disclosing upon which of two theories of negligence, one of which is unsound, it is based, is fatally defective. 50**ND**163, 195NW157.

1056–66½–New. Where the verdict of the jury and the judgment of the court are inconsistent with the findings of the jury as to material facts shown by answers to interrogatories reasonably supported by the evidence, they are erroneous and the judgment should be reversed. 195**Wis**498, 218NW832.

1056–66⅓–New. The receipt of a general verdict with special findings in an equity case is harmless where the court adopted the special findings. 48**Nev**205, 228P615, 239P801.

1056–66¼–New. Failure of the jury to make a specific finding in the verdict on defendant's set-off is not reversible error where the jury were told to allow set-off on certain facts found and the amount of the verdict indicated that the jury did so. 309**Mo** 560, 274SW703.

1056–66⅙–New. Where the verdict of the jury and the judgment of the court are inconsistent with the findings of the jury as to the material facts shown by answers to interrogatories reasonably supported by the evidence, they are erroneous and the judgment should be reversed. 124 **Okl** 24, 253P977.

1056–68 **TexCivA** 18SW(2d)845.

1056–72 119**Kan**751, 241P437.

1056–76 77**CalA**727, 247P594; 80**CalA** 20, 251P232; 88**CalA**100, 262P790; **Vt** 151A642.

1056–77 **MoA** 273SW429.

1056–78 246**NY**63, 158NE21; **TexCivA** 13SW(2d)448.

1056–78½–New. or based on misplaced burden of proof, 107**Conn**312, 140A734.

1056–78⅓–New. or in irreconcilable conflict, 97**CalA**703, 276P118.

1056–79 175**Ark**300, 299SW619; 201 **Cal** 750, 258P595; 204**Cal** 441, 268P635; 205**Cal** 34, 269P638; 96**CalA**121, 273P 859; **Cal** 289P821; 68**CalA**139, 228P 676; 76**CalA**726, 245P800; 77**CalA**66, 246P113; 80**CalA**104, 251P663; 82**CalA** 116, 255P257; 83**CalA**148, 256P440; 83 **CalA**74, 256P595 (apparently conflicting findings); 84**CalA**567, 258P453; 88**CalA** 192, 263P325; 88**CalA**20, 263P538; 90 **CalA**311, 265P968; 91**CalA**213, 266P956 (conflicting findings); 92**CalA**697, 268P 946; 95**CalA**327, 272P772; 96**CalA**396, 274P390; 98**CalA**345, 276P1059(2d case); **CalA** 290P613; 111**Conn**162, 149 A405(2dcase); 259**Mass**499, 156NE846; 265**Mass**335, 163NE876; 173**Minn**468, 217NW593 (finding not sustained by evidence); 176**Minn**225, 222NW926; 220 **MoA**963, 272SW711; **TexCivA** 281SW 339; **TexCivA** 291SW692; **TexCivA** 11 SW(2d)850; 38**Wyo** 285, 267P92.

1056–80 99**CalA**510, 278P1049; **Tex CivA** 288SW627.

1056–82 31**Ariz**73, 250P367; 76**CalA** 726, 245P800; **TexCivA** 15SW(2d)702. [b] **Judgment which is correct conclusion** from facts found should not be reversed because of inconsistent conclusions. 31**Ariz**73, 250P367.

1057–83 31**Ariz**73, 250P367; 96**CalA** 121, 273P859; 206**Cal** 723, 276P107; 208**Cal** 19, 280P130; 69**CalA**416, 231P 355; 80**CalA**104, 251P663; 92**CalA**270, 267P911; 98**CalA**489, 277P172; 81**Colo** 454, 256P315; **TexCivA** 8SW(2d)196; **TexCivA** 13SW(2d)717. [a] (5) Judgment on verdict will not be disturbed where evidence supports all conclusions necessary to support judgment, though facts found by jury are insufficient to sustain judgment. **TexCivA** 298SW140.

1057–84 72**CalA**94, 236P346; 87**CalA** 344, 262P403; **CalA** 290P1080; **Tex CommnA** 15SW(2d)223; **Utah** 278P811.

1057–84½–New. Where findings are irreconcilably in conflict, judgment will be reversed. 80**CalA**284, 251P810.

1057–85 8F(2d)115; 42F(2d)353; 196 **Cal** 380, 238P81; 201**Cal** 750, 258P595; 205**Cal** 34, 269P638; 96**CalA**76, 273P 839; 96**CalA**31, 273P849; 69**CalA**195, 230P964; 70**CalA**204, 232P1002; 73**CalA** 225, 238P722; 73**CalA**627, 239P71; 76 **CalA**29, 243P877; 77**CalA**66, 246P113; 79**CalA**560, 250P411; 81**CalA**686, 254P 578; 84**CalA**689, 258P458; 85**CalA**355, 259P359; 87**CalA**169, 261P1051; 87**CalA** 344, 262P403; 88**CalA**34, 263P285; 92 **CalA**715, 268P948; 94**CalA**691, 271P 916; 95**CalA**106, 272P307; 95**CalA**320, 272P775; 95**CalA**505, 273P39; **CalA** 274 P572; **CalA** 275P513; **CalA** 277P1107; 100**CalA**373, 280P191; 100**CalA**531, 280 P543; **CalA** 281P1043; 101**CalA**274, 281P1081; 101**CalA**672, 281P1090; 102 **CalA**107, 282P418; 102**CalA**342, 283P

312; **CalA** 286P498; **CalA** 288P721; **CalA** 289P189; **CalA** 291P281; **Conn** 151A492; 166Ga435, 141SE65; 27Hawaii544, 571[quotCJ]; 42 Ida277, 245P86; 44 Ida719, 260P158; 84 IndA636, 150NE319; IndA 153NE779; 128Kan390, 277P796; 245Mich213, 222NW198; 167Minn413, 209NW37; 171Minn116, 213NW542; 173Minn145, 216NW782; 174Minn115, 218NW464; Minn 230NW128; Minn 231NW798; Minn 233NW243; 85Mont149, 278P116; 85Mont389, 278P836; 49Nev342, 246P688; 194NC250, 139SE369; 196NC641, 146SE592; 44Philippine343; SD 226NW264; SD 227NW380; SD 230NW805(3dcase); TexCivA 271SW178; TexCivA 271SW441 (court may not disregard any material finding); TexCivA 274SW335; TexCivA 275SW111 (unsupported by evidence); TexCivA 281SW315; TexCivA 289SW746; TexCivA 298SW454; TexCivA 7SW(2d)638; TexCivA 11SW(2d)368; TexCivA 18SW(2d)754; TexCivA 26SW(2d)348; 70Utah57, 257P1060; Utah 264P975; Utah 278P811; 99Vt356, 133A248; Vt 151A642. [a] (7) Declaration of legitimacy in connection with recovery by administratrix of decedent's property. 44Philippine343. (8) Finding of fact on issue not made or litigated and involving, possibly, one not a party to action will be disregarded. 171Minn116, 213NW542. [c] (5) Where evidence justifies finding of negligence on one ground, it is immaterial that findings on other issues of negligence are against weight of evidence. TexCivA 6SW(2d)432. (6) Other instances. 207 Iowa581, 223NW383. (7) Finding of no agreement for specific compensation of attorney, not supported by evidence, is not prejudicial where undisputed finding of discharge of attorney for good reason is made. CalA 280P559. [d] See also 179 Minn284, 229NW130. [e] 101CalA436, 281P692. [i] **Inconsistent findings do not require reversal** unless irreconcilable and material. 87CalA344, 262P403.

1058–87 201Cal 726, 258P959.

1058–89 Cal 292P465; 70CalA432, 233P394; 75CalA205, 242P746; 87CalA231, 261P1027; 93CalA27, 268P1093; 95CalA75, 271P1114; 102CalA445, 283P112; 119Kan788, 241P467 (inaccurate use of word, where meaning intended can be ascertained from context); 167 Minn479, 209NW490 (clerical mistake as to amount); MoA 31SW(2d)86; 131 Okl 249, 268P276; TexCivA 282SW844; TexCivA 284SW634; TexCivA 290SW235; TexCivA 2SW(2d)285; Wash 290P850. But see 94CalA716, 271P758; TexCivA 278SW282. [h] See also 48 Ida37, 279P410. [n] **Failure to file findings** of fact and conclusions of law where no injury results does not require reversal. TexCivA 28SW(2d)892. [o] **In Texas** under statute, trial judge's failure timely to file findings and conclusions when requested requires reversal when issues of fact are raised. TexCivA 31SW(2d)1090 (to obviate error appellees must file statement of facts).

1058–89½–New. Filing of findings of fact and conclusions of law fourteen days late has been held reversible error. TexCivA 276SW485.

1058–90 73CalA304, 238P822.

1058–91 TexCivA 11SW(2d)815.

1059–93 111Conn53, 149A237; TexCivA 274SW335.

1059–94 86 IndA411, 157NE446; 85 Mont11, 277P437.

1059–96 84CalA701, 258P612; 94CalA742, 271P1098; 81Colo 454, 256P315.

1059–97 81Colo 454, 256P315.

1059–98½–New. The appellate court may disregard conclusions of law challenged and base a valid judgment upon other conclusions of law. 88 IndA543, 164NE709.

1059–99 39F(2d)438; 196Cal 768, 239P309; 201Cal 53, 255P508; 74CalA231, 240P47; 80CalA520, 252P334; 81CalA164, 253P352; 89CalA314, 264P556; 91CalA307, 266P989 (counterclaims); 92CalA504, 268P675; 102CalA783, 283P840(2dcase); 47 Ida253, 274P112; 175 Minn252, 220NW951; 52SD172, 217NW180; TexCivA 4SW(2d)97; TexCivA 21SW(2d)51; 70Utah1, 257P673. See also TexCommnA 23SW(2d)681. [a] TexCivA 293SW914; TexCivA 298SW614; TexCivA 3SW(2d)585. [b] But see 152 Wash234, 277P995. [c] In Porto Rico. –33PortoRico 235.

1059–1 29Ariz227, 240P351; 202Cal 770, 262P748; 68CalA111, 228P544; 68CalA121, 228P740; 68CalA554, 229P1002; 73CalA304, 238P822; 74CalA646, 241P581; 80CalA74, 251P330; 80CalA91, 251P654; 82CalA249, 255P529; 89CalA314, 264P556; 91CalA333, 266P1009; 101CalA704, 282P425; 102CalA160, 282P981; CalA 288P110; CalA 290P1051(2dcase); 41 Ida257, 239P522; 42 Ida108, 244P401; 42 Ida270, 245P98; 44 Ida719, 260P158; Ida 290P552; 164Minn136, 204NW639; 177Minn425, 225NW273; 78Mont134, 252P800; NC 154SE662; 92PaSuper110; 32PortoRico 280; 32PortoRico283; TexCivA 276SW485; TexCivA 284SW608; TexCivA 294SW284; TexCivA 300SW105; TexCivA 5SW(2d)836; TexCivA 26SW(2d)430; TexCivA 27SW(2d)286; 100Vt425, 138A780; Vt 150A133. See also 32Porto Rico 180. [a] (1) TexCivA 273SW934; TexCivA 283SW924; TexCivA 296SW970. (2) Failure to file in time allowed is not reversible error where it appears that no other judgment could have been rendered. TexCivA 279SW552. [b] **Absence of injury must be shown or** failure to make findings will require reversal. TexCivA 26SW(2d)744.

1059–2 TexCivA 296SW970.

1059–5 32F(2d)887; 200Cal 204, 252P599; 70CalA204, 232P1002; 73CalA441, 238P1104; 87CalA178, 262P768; 88CalA405, 263P573; 93CalA27, 268P1093; 99CalA45, 277P1096; 99CalA742, 279P670; CalA 280P559; CalA 281P1043; 47 Ida772, 278P1016; Mo 29SW(2d)64; MoA 271SW1005; 78 Mont134, 252P800; 49ND768, 193NW733; 124 Or25, 263P913.

1059–6 201Cal 53, 255P508 (contributory negligence); 68CalA111, 228P544; 82CalA586, 256P229; 82CalA710, 256P279; CalA 288P792; Ida 290P552; TexCivA 15SW(2d)42.

1059–6½–New. where a request for separate findings of fact and conclusions of law was not made until after the court had announced what the judgment would be; 117 Okl 43, 246P873.

1060–7 75CalA785, 243P453; 81CalA347, 253P947; 91CalA538, 267P112; 91CalA715, 267P741; 97CalA698, 275P1015; 99CalA742, 279P670; CalA 291P248.

1060–9 31F(2d)735; 79CalA347, 249P545; 42 Ida108, 244P401.

1060–10 CalA 284P685.

1060–11 94CalA104, 270P742.

1060–12 Cal 286P1012; 68CalA111, 228P544; 70CalA432, 233P394; 72CalA111, 236P220; 73CalA539, 238P1081; 74CalA646, 241P581; 75CalA389, 242P872; 80CalA74, 251P330; 80CalA91, 251P654; 80CalA377, 252P647; 81CalA295, 253P328; 83CalA720, 257P452; 85CalA388, 259P484; 87CalA406, 262P396; 88CalA192, 263P325; 91CalA333, 266P1009; 94CalA104, 270P742; 95CalA297, 272P613(1stcase); 95CalA327, 272P772; 95CalA378, 272P803; 95CalA545, 272P1100; 100CalA736, 281P106; 101CalA712, 282P420; 101CalA704, 282P425; CalA 282P1003; CalA 290P1079; CalA 292P155(1stcase); TexCivA 284SW608; Utah 285P299.

1060–13 200Cal 204, 252P599; 73CalA627, 239P71; 79CalA347, 249P545; 80CalA363, 252P656; 84CalA701, 258P612; 87CalA344, 262P403; 92CalA156, 268P947; CalA 287P550; 47 Ida272, 274P1069; 34NM86, 278P206; TexCivA 4SW(2d)185.

1060–13½–New. Where the mind of the court acted on specific questions in assessing damages, it was immaterial that the measure of damages applied was not clearly expressed in the findings. TexCivA 1SW(2d)738.

1060–14 MoA 274SW1106 (where court proceeds on correct theory); 32Porto Rico 235 (noncompliance with statutory requirement is not ground for reversal); TexCivA 30SW(2d)407.

1060–15½–New. The fact that the court made findings of fact and conclusions of law, although unnecessary, is not of itself reversible error. 118 Or546, 247P772.

1060–20 75CalA299, 242P914; 121Kan490, 247P449; TexCivA 288SW870.

1060–20½–New. , unless the evidence is conclusive in favor of such proposed findings or so strong that findings to the contrary could not stand. 167Minn479, 209NW490.

1060–20¾–New. An addition to a finding made after the expiration of the term at which the judgment was rendered, but while a motion for a new trial was pending, is not ground for reversal where appellant was not prejudiced thereby. 121Kan246, 246P997.

1060–20¼–New. A refusal of the court to modify its findings of fact is not ground for reversal in the absence of prejudice. 121Kan246, 246P997.

1060–22 67CalA432, 227P679 (newly discovered cumulative evidence); 78CalA203, 248P553; TexCivA 23SW(2d)514.

1061–23 207 Iowa959, 221NW451; 243NY397, 153NE848; 193NC541, 137SE658. [a] **Denial held prejudicial.**–206 Cal 389, 274P536(2dcase).

1061–25½–New. Where a motion for a new trial was not disposed of at the time set, because of the absence of the trial judge from his district, it is reversible error for the trial court to dispose of and deny the motion on a later date without notice. 40 OklACR53 [reh granted].

1061–25¾–New. Where the court could not say that the verdict rendered was the only one legally possible, error in overruling a motion for a new trial was not harmless. 166Ga877, 144SE652.

1061–26 106WVa60, 144SE720. [c] **Noncompliance with court rule** of time to file authorities not prejudicial where appellant was given same opportunity. CalA 285P893.

1061–29½–New. It has been held prejudicial error to set aside nominal verdict for plaintiff over defendant's objection where defendant is entitled to directed verdict. WVa 155SE115.

1061–30½–New. Proceeding on retrial. Litigating counterclaim, which had been dismissed on retrial, is ground for reversal. 216AppDiv195, 214NYS659 (court cannot tell that finding for defendant was based on defense properly set up).

1061–32 14F(2d)813; 16F(2d)417; 38F(2d)153; 218Ala195, 118S379; 220Ala140, 124S388; 205Cal93, 269P1109; 61ALR366; Cal 287P102; Cal 281P835; 77CalA219, 246P143; 85CalA607, 259P976; CalA 261P1053; 90CalA447, 265P1038; 97CalA365, 275P477; 84Colo 62, 268P535 (judgment on counterclaim); 107Conn52, 139A700; 166Ga39, 142SE150 (allowing attorney's fees); 167Ga20, 144SE780 (inaccurate description); 34GaA316, 129SE573; 47 Ida604, 277P570; 244 IllA241; 244 IllA370; 256 IllA401; Ind 168NE185; IndA 173NE333; 203 Iowa792, 206NW586; 203Iowa1149, 212NW480; 127Kan581, 274P286; 226Ky456, 11SW(2d)140; 231Ky682, 22SW(2d)111; 253Mass185, 148NE450; 222MoA763, 9SW(2d)673; NJ 146A190(2dcase); 195NC449, 142SE584; Okl 292P829; 130 Or577, 281P178; 286Pa421, 133A554; 290Pa43, 138A217; 90Pa Super463; 32PortoRico 565; 32Porto Rico 767; 50SD627, 211NW602; SD 228NW798; TexCivA 13SW(2d)953; TexCivA 18SW(2d)224; TexCivA 274SW671; TexCivA 283SW1098; TexCivA 295SW639; TexCivA 3SW(2d)947; 148Va573, 139SE275; 134Wash108, 234P1029; 193Wis350, 214NW349, 53ALR281; 34Wyo 324, 243P392; 38Wyo 182, 265P453. [a] (1) 16F(2d)417; Wyo 286P372. (2) 193Wis350, 214NW349, 53ALR281. [c] **Error held prejudicial.**–Ala 122S682; TexCivA 16SW(2d)973. [d] **Error in granting judgment for defendant notwithstanding verdict** will not preclude affirmance where defendant's motion for directed verdict could have been sustained. Iowa 229NW909. [e] **Rendering judgment on merits** instead of dismissing suit on plaintiff's failure to appear at trial is fundamental error. TexCivA 29SW(2d)966.

1062–33 255 IllA400; 49Nev411, 243P46; 32PortoRico 565; 32PortoRico 767. [a] (3) Judgment using "complaint" instead of "complaints." 32Porto Rico 767.

1062–35 40F(2d)882 (error superfluous, but harmless); 235Ky301, 31SW (2d)367; 286Pa421, 133A554.

1062–36 13F(2d)281; 179Ark954, 18 SW(2d)916 (holding no reversible error where judgment allowed questionable claim but rejected another, complaint being treated as amended to conform to proof, and there was no surprise); 212Ky400, 279SW647; 30NM 566, 240P469; 70Utah203, 259P318, 62 ALR54. [b] **Error held harmless** in fixing measure of damages as reasonable value at Japan instead of Seattle, where it was uncontroverted that value at Seattle was greater than amounts awarded. 214AppDiv541, 212NYS589. [c] **Error held not harmless.**–223Ky79, 2SW(2d) 1067.

1063–37 291Pa22, 139A582; 32Porto Rico 565.

1063–39 31 OhA482, 166NE423; 291 Pa556, 140A342; TexCivA 18SW(2d) 267.

1063–40 See also 44 Philippine 186.

1063–41 32PortoRico 565; TexCivA 287 SW121.

1063–42 88CalA731, 264P273.

1063–43 317Mo1344, 300SW798 (joint and several judgment); NJSup 151A 476.

1064–44 302Mo 92, 256SW1053; 66 Utah459, 244P210. [a] **Prejudicial error.**–66 Utah459, 244P210.

1064–45½–New. to judgment on accounting by trustee; 35Ariz457, 281P 38 (allowance of stock dividend as principal instead of income).

1064–47 See also 145Va653, 134SE675.

1064–47½–New. allowing attorney's fees to be included in the amount required to redeem from a foreclosure decree. 130 Or110, 279P274.

1064–55 280US469, 50SCt192, 74L ed 551; 138SC157, 135SE881 (error of trial court in entry of judgment on verdict held reversible error).

1064–55½–New. Giving judgment for the amount claimed where the verdict of the jury is in excess thereof is no ground for reversal. TexCivA 279SW 603 (defendant cannot complain of judgment for full amount claimed).

1064–55⅓–New. A foreclosure decree for an excessive amount must be reversed where redemption might have been had but for such error. 170Ark 568, 280SW654.

1064–55¼–New. In a suit to foreclose a mortgage in which some of the defendants were infants, error in prematurely rendering the decree before the expiration of ninety days after issues were joined is reversible error where the answer of the guardian was not filed before the decree. 170Ark568, 280SW654.

1064–55⅓–New. Judgment not merely dismissing complaint but determining rights of party in advance of their assertion is too broad. 243NY545, 154NE 598.

1064–55⅙–New. Error in entering judgment non obstante is prejudicial where questions presented are for jury. 45 Ida229, 261P673.

1064–55½–New. The court's failure to give plaintiff judgment against an insolvent, if error, is harmless, when defendant was adjudicated a bankrupt, since plaintiff can submit a claim in bankruptcy. 175Ark1148, 2SW(2d)1.

1064–55⅛–New. Entry of default judgment pursuant to a summons returnable on a past date is reversible error. 152 Miss4, 119S911(1stcase).

1064–56 MoA 273SW133; NJ 130A736.

1064–60 242 IllA370; 50SD269, 209 NW544.

1064–62½–New. Failure of the judge to modify the judgment by reducing the amount to that required of plaintiff as condition of granting a new trial is not ground for reversal. 50SD240, 209NW 360.

1064–66 93Fla1128, 114S425(2dcase) (entry of default, where plaintiff succeeded on merits to general issue filed); 163Ga843, 137SE550; 70Utah19, 257P 1046. But see Oh 171NE89. [1] **But after stipulation for dismissal** for certain defendant, judgment inadvertently entered requires reversal. CalA 288P 151.

1064–66½–New. Entry of default judgment on process fixing the return day at a past date is harmful error. 136Miss 237, 101S363.

1064–66⅓–New. A premature decree on the day an answer of the guardian ad litem for minor defendants was filed has been held prejudicial where no proof was taken. 176Ark658, 3SW(2d)984.

1065–67 216AppDiv548, 215NYS338.

1065–71 176Ark1023, 5SW(2d)330; 257 Mass409, 153NE888; MoA 290SW624; NC 154SE625; TexCivA 286SW315; 149Wash158, 270P425. See also 190NC 512, 130SE323. [g] **Insufficient allegations of defense** in motion to vacate judgment are harmless where defendant filed general denial. MoA 294SW1019.

1065–73 [a] **Where award of arbitrators was void,** error in ordering that award as well as judgment thereon be set aside is harmless. 88CalA523, 263 P842.

1066–80 98Fla146, 123S525 (holding that failure of court file to contain bill when returned to clerk by cross complainant's counsel is not prejudicial to complainant).

1066–83½–New. Denial of motion to vacate orders erroneously amending summons and complaint will be affirmed. 216AppDiv230, 214NYS765 (proper procedure being appeal from order of amendment).

1066–84 102CalA474, 283P87; 131 Or 648, 284P177 (directing issuance of execution while temporary restraining order existed).

1066–85 217MoA554, 272SW1006.

1066–89 38F(2d)455; 166Ga288, 142 SE875; 39GaA244, 146SE922; Iowa 222NW899; 257Mass409, 153NE888; TexCivA 280SW614; Vt 144A861.

1067–98½–New. dismisses an appeal instead of affirming judgment on record where result would be same; 130Kan 53, 285P554.

1067–8½–New. Error in requesting remittitur to consider custom to vacate judgment of dismissal without specific motion is not error on which complaint could be made. 9F(2d)902.

1067–8⅓–New. Failure to file complete transcript of record where plaintiffs relied on judgment in another case has been held not prejudicial. 234Ky380, 28SW(2d)469.

1067–10 213Ala656, 106S172; 97CalA 696, 276P117; 9LaA76, 118S791; 258 Mass53, 154NE557; 222MoA193, 297SW 94; TexCivA 287SW687, 690 [citCJ]; TexCivA 23SW(2d)449.

1067–13 85CalA140, 259P63; CalA 286 P733; 157Tenn461, 9SW(2d)692. [a] (3) Mo 26SW(2d)766. [c] **Appeal from order granting new trial** is deemed abandoned by statement in brief of will contestants that they "are not here urging reversible error." 200Cal 710, 254 P561.

1067–15 317Mo 1141, 298SW37; 103 NJL346, 135A815. But see 10LaA478, 120S703(2dcase).

1068–16 272US429, 47SCt136, 71L ed 335; 273US359, 47SCt400, 71L ed684; 9F(2d)306; 23F(2d)287; 23F(2d)652; 38F(2d)968; 39F(2d)341; 41F(2d)183; 213Ala550, 105S707; 213Ala551, 106S 136; 213Ala656, 106S172; 214Ala8, 106 S49 (errors not original, merely restated in brief); 214Ala10, 106S188; 214 Ala107, 106S599; 214Ala181, 106S871; 214Ala187, 106S809; 214Ala476, 108S 382; 214Ala542, 108S362; 214Ala602, 108S508; 215Ala678, 112S230; 216Ala 72, 112S341; 216Ala318, 113S56; 216 Ala495, 113S531; 217Ala39, 114S470; 21AlaA50, 105S697 (not insisted upon in brief); 21AlaA55, 105S719; 21Ala A252, 107S228; 21AlaA643, 111S316; 23AlaA458, 126S889; 23AlaA544, 128S 899(1stcase); 70CalA432, 233P394 (prejudice must be pointed out); 77 CalA716, 247P523; 100CalA249, 279P 1061 (bill of exceptions failing to incorporate any assignment of insufficiency of evidence); CalA 284P464; CalA 289P922; 82Colo 10, 256P635; 106Conn460, 138A362; DC 39F(2d)512; 96Fla568, 120S4; 162Ga767, 135SE90; 164Ga51, 137SE756; 164Ga185, 138SE 54; 33GaA806, 128SE812; 35GaA92, 132SE259; 162Ga487, 134SE165; 36 GaA528, 137SE101; 36GaA513, 137SE 404; 37GaA779, 142SE176; 39GaA496, 147SE722; 321 Ill 298, 151NE920; 323 Ill 498, 154NE226; IndA 149NE454; 84 IndA122, 150NE118; 160La516, 107 S390; 11LaA474, 123S900(2dcase); 169La989, 126S502; 161La607, 109S 83; 10LaA166, 119S553; La 122S77; 1LaA315; 231Ky275, 21SW(2d)289; 234Ky400, 28SW(2d)477; 125Me160, 132A209; 126Me32, 135A824; 254Mass 308, 150NE151; 255Mass189, 151NE59; 256Mass221, 152NE320; 256Mass478, 153NE8; 257Mass413, 153NE881; 258 Mass40, 154NE519; 259Mass499, 156NE 846; 261Mass47, 158NE321; 261Mass 233, 158NE668; 261Mass417, 158NE 785; 261Mass479, 159NE441; 262Mass 22, 159NE449; 262Mass583, 160NE321; Mass 165NE884; Mass 170NE400; Mass 170NE826; Mass 172NE82; 156 Miss8, 125S912(2dcase); Mo 289SW 591; Mo 31SW(2d)1010; 220MoA474, 274SW945; MoA 287SW810; MoA 295 SW477; MoA 295SW818; MoA 4SW (2d)1100; MoA 11SW(2d)1098; MoA 18SW(2d)114; 102NJL624, 133A417; 101NJL561, 134A896; 103NJL346, 135 A815; NJ 139A427; 31NM576, 249P 242; 32NM338, 255P785; 129 Okl 153, 263P1096; 123 Or33, 261P57; 295Pa 455, 145A505; 298Pa431, 148A841; 299Pa1, 148A904; 47RI 395, 133A621; RI 133A652; 160Tenn294, 23SW(2d) 669 (assignments not waived); TexCivA 278SW924; TexCivA 279SW928 (assignments of error not brought forward in appellant's brief); TexCivA 283SW 217; TexCivA 5SW(2d)1030; TexCivA 30SW(2d)697; 100Vt169, 135A600; 193 Wis522, 215NW670; 40Wyo 44, 273P 681.

1068–17 31NM576, 249P242; TexCivA 288SW1100.

1068–20 220Ala224, 124S863, 66ALR 1454.

1068–22 272US429, 47SCt136, 71L ed 335; 273US359, 47SCt400, 71L ed684; 5F(2d)935; 34F(2d)492; 41F(2d)625; 43F(2d)976; 213Ala329, 104S831; 213 Ala551, 106S136; 213Ala656, 106S172; 214Ala10, 106S188; 214Ala107, 106S 599; 214Ala209, 106S852; 214Ala325, 107S840; 214Ala435, 108S250; 214Ala 602, 108S508; 214Ala631, 108S759; 215Ala76, 109S166; 215Ala311, 110S 396; 216Ala495, 113S531; 218Ala156, 117S652; 218Ala420, 118S912; 218Ala 645, 119S851; 20AlaA596, 104S439; 21 AlaA252, 107S228; 21AlaA591, 111S 200; 21AlaA643, 111S316; 22AlaA199, 114S15; 22AlaA602, 118S495(2dcase); 22AlaA617, 118S677; 29Ariz227, 240P 351; 195Cal 95, 231P739; 195Cal 132, 231P987; 196Cal 468, 238P703, 44ALR 1; 198Cal 129, 243P439, 43ALR1235; 204Cal 101, 266P803; 205Cal 102, 269P 1105; 71CalA50, 234P329; 71CalA683, 236P174; 85CalA273, 259P341; CalA 260P316; 93CalA370, 269P710; 94CalA 303, 271P134; 101CalA769, 282P820; 81Colo 468, 256P305; 106Conn460, 138A 362; 97Fla350, 121S95(2dcase); 97Fla 749, 750, 122S239, 65ALR508; 161Ga 557, 131SE363; 162Ga349, 133SE842; 162Ga767, 135SE90; 164Ga51, 137SE 756; 164Ga185, 138SE54; 165Ga109, 139SE818; 164Ga738, 139SE543; 165 Ga837, 142SE163; 167Ga416, 145SE 855; 169Ga115, 149SE645; 170Ga242, 152SE445; Ga 155SE192; 34GaA115, 128SE213; 34GaA149, 128SE590; 34 GaA207, 128SE918; 35GaA275, 132SE 779; 35GaA476, 133SE642; 35GaA550, 133SE879; 162Ga487, 134SE165; 35 GaA647, 134SE330; 36GaA163, 136SE 178; 37GaA278, 139SE920; 39GaA93, 146SE323(3dcase); 41 Ida538, 240P 600; 41 Ida703, 243P649; 42 Ida451, 245P934; 47 Ida119, 272P254; 47 Ida 668, 279P291; 199 Ind33, 154NE6; 88 IndA469, 150NE384; IndA 153NE179; 86 IndA641, 159NE164; 206 Iowa309, 218NW340; 208 Iowa311, 223NW247 (2dcase); 210Ky285, 275SW797; 214 Ky1, 282SW553; 216Ky819, 288SW 749; 224Ky419, 6SW(2d)491; 169La 877, 126S223; 9LaA537, 119S740; 253 Mass368, 149NE118; 258Mass53, 154NE 557; 258Mass559, 155NE633; 259 Mass499, 156NE846; 263Mass15, 160 NE297; 263Mass295, 160NE889; Mass 173NE549; 236Mich393, 210NW247; 240Mich36, 214NW833; 242Mich497, 219NW665; 167Minn248, 208NW803; 175Minn197, 220NW602; Mo 274SW

399; Mo 282SW414; 315Mo 1068, 287 SW474; 316Mo 698, 291SW494; 317Mo 125, 295SW109; 318Mo 10, 298SW766; 318Mo 397, 1SW(2d)122; Mo 5SW(2d) 395; 319Mo 769, 5SW(2d)420; 320Mo 877, 8SW(2d)881; 320Mo 1011, 8SW (2d)982; Mo 20SW(2d)659; Mo 24SW (2d)133 (error assigned but not otherwise presented in brief); Mo 24SW(2d) 116; 216MoA572, 259SW518; MoA 265 SW107; MoA 274SW1102; MoA 278SW 826; MoA 281SW83; MoA 283SW57; MoA 284SW857; 221MoA683, 285SW 161; MoA 285SW783; MoA 287SW852; MoA 293SW66; MoA 293SW1051; 222 MoA1112, 296SW257; 221MoA1250, 300 SW321; MoA 2SW(2d)189; 222MoA 370, 3SW(2d)256; MoA 3SW(2d)1041; MoA 7SW(2d)370; MoA 7SW(2d)410; MoA 10SW(2d)334; MoA 13SW(2d) 555; MoA 16SW(2d)672; MoA 17SW (2d)615; MoA 18SW(2d)137; MoA 22 SW(2d)654; MoA 24SW(2d)183; MoA 25SW(2d)499; MoA 28SW(2d)372; MoA 29SW(2d)736; MoA 31SW(2d)86; 76Mont366, 245P871; 83Mont452, 272 P998; 49Nev35, 234P690; 32NH91, 129 A876; NJ 139A528; 105NJL415, 144 A604; NJ 144A621; NJ 140A889; NJ 137A819; 31NM576, 249P242; 32NM 124, 252P478; 32NM338, 255P785; 194NC98, 138SE424; 195NC851, 141SE 541; 197NC174, 148SE39 (exception to overruling demurrer); 197NC458, 149 SE552; 53ND551, 207NW37; 113 Okl 105, 239P570; 113 Okl 150, 240P104; 114 Okl 21, 242P1027; 114 Okl 46, 243 P134; 115 Okl 1, 240P1063; 118 Okl 120, 247P80, 47ALR822; 122 Okl 224, 253P1016; 127 Okl 59, 259P854; 129 Okl 153, 263P1096; 130 Okl 33, 264P 911; 43 OklACR57 [reh pending]; 115 Or608, 239P105; 119 Or682, 250P1098; 122 Or498, 259P891; 123 Or33, 261P57; Or 289P1051; 34PortoRico767; 47RI 395, 133A621; RI 133A652; RI 148A 581; 131SC284, 127SE18; 49SD46, 206 NW471; 49SD262, 207NW98; 49SD381, 207NW217; 53SD372, 220NW874; SD 226NW583; SD 231NW900; Tex 293 SW910; TexCivA 274SW228; TexCivA 275SW171; TexCivA 278SW924; Tex CivA 283SW217; TexCivA 289SW159; TexCivA 297SW512; TexCivA 1SW(2d) 759; TexCivA 3SW(2d)468; TexCivA 9SW(2d)1049; TexCivA 10SW(2d)144; TexCivA 27SW(2d)917; TexCivA 30SW (2d)577; Utah 262P274; Utah 275P 499; Utah 280P1053; Utah 283P731; 98Vt492, 129A234; 145Wash390, 260P 255; 35Wyo92, 247P721; Wyo 283P 1097; Wyo 293P381. [a] 35F(2d)330. [b] (1) Mass 166NE822; 321Mo 955, 13 SW(2d)646. (3) Alleged defense not treated in appellant's brief is deemed waived. 264Mass181, 162NE356. [g] **Where brief refers to one thing and assignment relates to another,** assignment of error is waived. 23AlaA227, 124S115.

1069–23 20F(2d)873; 33F(2d)60; 35 F(2d)330; 35F(2d)421; 38F(2d)159; 213Ala551, 106S136; 214Ala107, 106S 599; 214Ala339, 108S29; 214Ala430, 108S243; 214Ala602, 108S508; 215Ala 311, 110S396; Ala 130S318; 21AlaA 338, 108S619; 21AlaA393, 108S643; 21 AlaA643, 111S316; 22AlaA199, 114S15; 33Ariz128, 262P995; 33Ariz466, 266P 6; 177Ark1194, 291SW441; 179Ark 816, 19SW(2d)1010; 195Cal 132, 231P 937; 71CalA50, 234P329; 72CalA292, 237P390; 81CalA278, 253P344; 82CalA 751, 256P224; 88CalA528, 264P516 (argument and authority); 92CalA258, 267 P914; 82Colo 10, 256P635; 106Conn 460, 138A362; 96Fla203, 118S54; Fla 119S146(2dcase); 97Fla1007, 122S570; 163Ga326, 136SE403; 35GaA476, 133SE 642; 36GaA163, 136SE178; 37GaA722, 141SE670; 42 Ida451, 245P934; 328 Ill 388, 159NE782; 240 IllA295; 245 IllA 221; 245 IllA361; 252 IllA5; 253 IllA 190; 197 Ind28, 149NE639 (assignments of error not supported by argument or citation of authorities considered as waived); 203 Iowa310, 210NW 937; 202 Iowa1351, 212NW114; 206 Iowa309, 218NW340; 206 Iowa884, 221 NW661; 208 Iowa528, 224NW39; Iowa 228NW48; Iowa 228NW98; Iowa 228 NW658; Iowa 230NW381; 9LaA537, 119S740; 126Me32, 135A824; 252Mass 552, 148NE105; 254Mass7, 149NE548; 254Mass584, 150NE866; 255Mass189, 151NE59; 255 Mass340, 151NE317; 257 Mass518, 154NE251, 49ALR958; 258 Mass40, 154NE519; 258Mass264, 154 NE579; 258Mass323, 154NE850; 258 Mass425, 155NE454; 260Mass265, 157 NE532; 261Mass47, 158NE321; 261 Mass417, 158NE785; 262Mass242, 159 NE625; 262Mass137, 159NE743, 56ALR 784; 262Mass422, 160NE251; 263Mass 34, 160NE274; 262Mass595, 160NE405; 264Mass303, 162NE334; 264Mass475, 163NE162; 264Mass560, 163NE167; 264Mass538, 163NE246(2dcase); 265 Mass41, 163NE653; 265Mass81, 163NE 655; 265Mass143, 164NE72; 265Mass 301, 164NE89; Mass 165NE410; Mass 166NE629; Mass 166NE719; Mass 166 NE758; Mass 166NE879; Mass 167NE 235; Mass 167NE314; Mass 170NE385; Mass 173NE549; Mass 173NE551; 235 Mich689, 209NW840; 240Mich36, 214 NW833; 167Minn248, 208NW803; Minn 230NW117; 315Mo 1068, 287SW474; MoA 293SW1051; MoA 293SW435; 222 MoA1112, 296SW257; MoA 6SW(2d) 995; MoA 22SW(2d)654; 77Mont214, 250P609; 77Mont260, 250P823; 84Mont 397, 276P437; Mont 293P294; 49Nev 35, 234P690; 103NJL346, 135A815; NJ 150A321; NJ 151A843; NJ 151A603 (1stcase) (nonsuit); NJ 131A123; 31 NM576, 249P242; 194NC240, 139SE240; 58ND512, 228NW212; 139 Okl 178, 281 P769; 123 Or33, 261P57; 130 Or444, 280P657; 34PortoRico 153; 35Porto Rico 224; RI 133A652; RI 148A581; 138SC169, 136SE209; 49SD381, 207NW 217; 53SD458, 221NW49; SD 224NW 951; SD 226NW583; TexCivA 297SW 512; Utah 290P759; 145Wash146, 259 P17, 54ALR393; 146Wash569, 264P2; 149Wash29, 270P110; 193Wis522, 215 NW670; 195Wis58, 217NW740; 37Wyo 488, 263P621; Wyo 293P373. [a] (1) 127Me547, 142A865; 254Mass520, 150 NE854.

1070–24 263Mass228, 161NE240; Mass 168NE678; TexCivA 275SW171.

1070–25 79CalA257, 249P215; 84 IndA 202, 149NE734; 201 Iowa208, 205NW 758. See also 92CalA156, 267P716.

1070–27 272US429, 47SCt136, 71L ed 335; 273US359, 47SCt400, 71L ed684; 235Mich689, 209NW840; Mo 30SW(2d) 729.

1071–31 272US429, 47SCt136, 71L ed 335; 273US359, 47SCt400, 71L ed684; 216Ala381, 113S298; 220Ala44, 124S91 (mere repetition of assignment); 20 AlaA573, 104S288; 86CalA605, 260P 1105; 41 Ida703, 243P649; 43 Ida255, 251P623; 45 Ida143, 260P1035; 199 Ind 33, 154NE6; 8 IndA312, 34NE851; MoA 8SW(2d)1078; 100Vt65, 135A5. [f] **Even if reasons assigned in brief are bad,** instruction to which exception was taken may be condemned on appeal. MoA 285SW1036.

1071–32 71CalA649, 236P180.

1072–33 36Wyo132, 253P658; 38Wyo 267, 267P86 (same question raised by two assignments may be presented under either).

1072–36 163La369, 111S789.

1072–39 163Ga771, 137SE231; 164Ga 185, 138SE54; 170La76, 127S870; 238 Mich39, 213NW448, 52ALR136; 144 Okl 202, 291P115.

1072–41 218Ala645, 119S851; 75CalA 44, 242P109; 81CalA406, 253P945; 161 Ga739, 132SE83; 166Ga536, 143SE893; 84 IndA122, 150NE118; 253Mass368, 149NE118; 254Mass7, 149NE548; 255 Mass189, 151NE59; 255Mass591, 152NE 83; 258Mass40, 154NE519; 261Mass40, 158NE270, 57ALR974; 262Mass299, 159 NE629; Mass 165NE91; Mass 168NE 161; Mass 168NE785; Mass 172NE72; 248Mich263, 226NW862; Mo 298SW51; 316Mo 1303, 295SW102; MoA 297SW 715.

1073–42 21AlaA643, 111S316; MoA 293 SW428; TexCivA 48W(2d)1029.

1073–43 21AlaA401, 108S636; 173Ark 1181, 291SW419; 178Ark111, 10SW(2d) 503; 81CalA61, 252P1082; 41 Ida703, 243P649; 245 IllA248; 255 IllA189; 256 IllA401; 255Mass189, 151NE59; 257Mass518, 154NE251, 49ALR958; Mass 165NE393; MoA 296SW239; MoA 297SW721; MoA 23SW(2d)225; 197NC 429, 149SE399; 47RI 395, 133A621; 156SC397, 153SE473. [f] (2) Contention court erred in denying motion for directed verdict abandons motion for nonsuit. NJ 151R630. [i] **Where law was pertinently discussed in relation to sufficiency of evidence,** it was held that there was no waiver as to instructions. 36Wyo 132, 253P658.

1074–44 323 Ill 498, 154NE226; MoA 298SW134; MoA 14SW(2d)511. [c] 128Me346, 147A423; 319Mo 432, 3SW (2d)1004.

1074–45 TexCivA 283SW217; 65Utah 597, 239P501 (insufficiency of evidence to support findings).

1074–49 220Ala371, 125S215; 170Ga 509, 153SE214; Ga 154SE887; Ida 287 P949; 199 Ind33, 154NE6; 13LaA495, 128S196; 264Mass253, 162NE319; 232 Mich291, 205NW128; 82NH426, 135A 159; 49SD381, 207NW217.

1075–50 83NH122, 139A373.

1075–51 Mass 168NE812.

1075–52 98Fla422, 123S833 (points not argued); 98Fla576, 124S24; 35GaA 476, 133SE642; 36GaA163, 136SE178; 39GaA654, 148SE296; 264Mass386, 162 NE770; MoA 16SW(2d)674.

1075–55 218Ala156, 117S652; 181Ark 1146, 28SW(2d)67; 72CalA484, 237P 763; CalA 289P897; 166Ga705, 144SE 203; 169Ga511, 150SE905; 170Ga292, 152SE573; 41GaA314, 152SE852(1st case); 202 Iowa1351, 212NW114; 231 Ky365, 21SW(2d)488; 100Vt1, 134A 706. But see 166Ga818, 144SE381; 221 MoA733, 285SW779. [a] (1) 166Ga555, 144SE116; 40GaA239, 149SE424 (general grounds).

1076–58 329 Ill 75, 160NE155; 335 Ill 402, 167NE89; 245 IllA295; 157Miss 571, 128S565; MoA 16SW(2d)709; 254 NY357, 173NE220; TexCivA 23SW(2d) 759 (jurisdiction of justice court must be determined by pleadings before it at time of trial and not by affidavits filed on appeal). [a] In Ohio.–118 OhSt131, 160NE610.

1076–59 321 Ill 431, 151NE884; 324 Ill 222, 154NE900; 241Mich170, 216NW 396; 155Miss890, 125S99(1stcase) (denial of motion to dismiss appeal to intermediate court on ground that judgment was satisfied is not reviewable where no evidence was introduced); 198NC69, 150SE631; 131 Or162, 281P 185; TexCommnA 294SW848. But see TexCommnA 27SW(2d)153. [a] 36Wyo 191, 253P858.

1077–62 46 Ida697, 270P1056.

1077–63 321 Ill 431, 151NE884.

1077–64 See also TexCivA 272SW247.

1077–66 TexCommnA 280SW751.

1077–67 274US195, 47SCt566, 71L ed 996; 178Ark666, 11SW(2d)446; 321 Ill 431, 151NE884; 340 Ill 196, 172NE 35; 127Kan850, 275P154; 190NC543, 130SE176; TexCommnA 277SW1039; TexCommnA 285SW295; TexCommnA 285SW1041; TexCommnA 288SW169; TexCommnA 288SW1063; TexCommnA 1SW(2d)568; 117Tex474, 8SW(2d)633, 66ALR916.

1077–67½–New. Thus, in the absence of an application for a writ of error, a complaint of a prevailing party will not be considered on review of the intermediate court affirming decision. TexCommnA 277SW629.

1077–68 275US220, 48SCt87; 329 Ill 75, 160NE155; 151Miss211, 117S534; Miss 119S354; 155Miss890, 125S99(1st case); 246NY203, 158NE74; TexCommnA 277SW1039; TexCommnA 280 SW174; TexCommnA 288SW150; TexCommnA 288SW1063. But see 249NY 150, 163NE132. [d] **Questions raised on motion for rehearing** in court of civil appeals may be considered in supreme court though not presented on original hearing in court of civil appeals. TexCommnA 280SW571. [e] **Assignments of error** not considered by court of civil appeals must be considered by commission of appeals where reversal of court of civil appeals was recommended. TexCommnA 3SW (2d)72.

1078–69 TexCommnA 12SW(2d)967.

1078–70 112 Okl 295, 240P636.

1078–73 MoA 285SW771.

1079–80 321 Ill 431, 151NE884.

1079–85 [b] **Where appellant has not**

complied with rules of intermediate court, supreme court will not adjudge such court in error for refusing to consider case on merits. 156**Tenn**349, 1 **SW(2d)**781.

1080–95 33**NM**46, 261**P**818; **Tex CommnA** 299**SW**231; **TexCommnA** 277 **SW**1043; **TexCommnA** 1**SW(2d)**878.

1080–96 242**NY**97, 150**NE**614; 24 **OhA** 514, 157**NE**427. [b] But see 216**Ala**557, 114**S**67. [e] **In absence of opinion court of appeals** is not justified in interfering with determination of appellate division denying arbitration, where such determination is possibly supported by valid grounds. 242**NY**97, 150**NE** 614.

1080–97 245**NY**393, 157**NE**506; **Tex CommnA** 276**SW**185 (reference to requested issues which should have been submitted held broad enough to include issue as to whether contract was signed on condition that it should not be binding unless signed by another).

1081–99 **TexCommnA** 280**SW**561; **Tex CommnA** 16**SW(2d)**285.

1081–4 249**Mich**461, 229**NW**431; 221 **MoA**834, 286**SW**144; 241**NY**340, 150**NE** 137; 132**SC**176, 129**SE**137; 160**Tenn** 535, 26**SW(2d)**626; **Can** 8**DomLR**724, 2 **WestWkly**923 (reducing recovery). See also **TexCommnA** 286**SW**200.

1081–6 251**Mich**167, 231**NW**94 (reinstatement of appeal). But see 155**Miss** 890, 125**S**99(1stcase).

1081–13 116**Tex**538, 295**SW**922; **Tex CommnA** 280**SW**742. [b] (4) Question of fair trial outside of rulings on questions of evidence, on charge of court, and other matters of legal right, are addressed to discretion of appellate division and are not reviewable by court of appeals. 241**NY**340, 150**NE**137.

1082–17 161**Tenn**324, 30**SW(2d)**250 (interest).

1082–18½–New. A decision as to whether a fair and impartial trial was had is within the discretion of an intermediate court, in some jurisdictions, and is not reviewable. 241**NY**340, 150 **NE**137.

1082–18½–New. A unanimous affirmance of the intermediate court is an indication that a fair trial was had. 241 **NY**340, 150**NE**137.

1082–81 116**Tex**489, 294**SW**844; **Tex CommnA** 23**SW(2d)**333; **TexCivA** 290 **SW**841; **TexCivA** 27**SW(2d)**294. But see **TexCivA** 277**SW**401. [d] (1) **Tex CivA** 1**SW(2d)**686; **TexCivA** 15**SW(2d)** 25. (6) Case tried on unauthorized interplea presumed tried by consent of parties. **MoA** 24**SW(2d)**671. (7) Appellate court will presume in support of trial court there were pleadings orally made in addition to written pleadings in absence of record to contrary. **Tex CivA** 24**SW(2d)**735. (8) Where record showed plaintiff's demands exceeded limit of justice court's jurisdiction, reviewing court cannot presume additional oral pleadings to support judgment. **TexCivA** 23**SW(2d)**759. (9) Oral pleadings are presumed sufficient in justice court. **TexCivA** 28**SW(2d)** 233. (10) Other instances. **TexCivA** 28 **SW(2d)**233. [g] **As to parties.–MoA** 24 **SW(2d)**671 (that plaintiff consented to one filing interplea being made party defendant and only party defendant in cause). [h] **Intervention.–MoA** 24**SW (2d)**671 (that court gave necessary permission). [i] **Reasons.–86Mont**396, 284 **P**537. [j] **No presumption** that finding of no evidence includes lesser finding of insufficiency of evidence. **TexCommnA** 28**SSW**413.

1083–22 244 **IllA**427; **MoA** 278**SW** 1056; 222**MoA**389, 5**SW(2d)**681.

1083–23 **MoA** 24**SW(2d)**671.

1083–24 119 **Oh**360, 164**NE**345; 149**SC** 19, 146**NE**609.

1083–25 113 **OhSt**50, 148**NE**347; **Tex CommnA** 299**SW**848. [a] (1) 239**NY**279, 148**NE**727; 241**NY**514, 150**NE**535 (Const. art 6, § 9).

1084–26 119 **Oh**575, 165**NE**93.

1084–28½–New. In New York unanimous affirmance by the appellate division manifests that it believed that the trial court kept within his discretion. 241**NY**340, 150**NE**137.

1084–28½–New. and that the parties were not prejudiced by the conduct of the judge and attorneys. 241**NY**340, 150**NE**137.

1084–30 272**US**1, 47**SCt**1, 71**L ed**131; 273**US**220, 47**SCt**348, 71**L ed**618; 274**US** 188, 47**SCt**563, 71**L ed**992; 6**F(2d)**106; 23**F(2d)**636; 213**Ala**642, 106**S**57; 175 **Ark**1107, 1**SW(2d)**558; 36**GaA**610, 137 **SE**402; 321 **Ill** 518, 152**NE**580; 322 **Ill** 133, 152**NE**572; 323 **Ill** 143, 153**NE**744; 324 **Ill** 346, 155**NE**343; 328 **Ill** 368, 159 **NE**815; 329 **Ill** 75, 160**NE**155; 329 **Ill** 445, 160**NE**752; 339 **Ill** 94, 170**NE**845; **Ill** 173**NE**390; **Ill** 173**NE**479; **MoA** 293 **SW**466; **NJ** 148**A**894; **NJSup** 150**A**572 (where two intermediate courts heard case); 240**NY**268, 148**NE**518; 241**NY** 550, 150**NE**550; 242**NY**481, 152**NE**268; 244**NY**168, 155**NE**88; 244**NY**251, 155 **NE**416; 198**NC**757, 153**SE**313; 118 **Oh St**412, 161**NE**208; 119 **Oh**514, 164**NE** 751(1stcase); **Oh** 171**NE**853; 121 **Oh** 544, 170**NE**358; 121 **Oh**603, 172**NE**308 (1stcase); 135**SC**335, 133**SE**822; 136**SC** 90, 134**SE**224; 155**SC**54, 151**SE**904; 158**Tenn**437, 14**SW(2d)**745; 155**Tenn** 155, 294**SW**509; 117**Tex**1, 295**SW**913; **TexCommnA** 277**SW**374; **TexCommnA** 277**SW**1053; **TexCommnA** 288**SW**413; **TexCommnA** 293**SW**811; **TexCommnA** 294**SW**519; **TexCommnA** 296**SW**877; **TexCommnA** 299**SW**848; **TexCommnA** 1**SW(2d)**857; **TexCommnA** 9**SW(2d)** 1030; **TexCommnA** 10**SW(2d)**534(2d case); **TexCommnA** 17**SW(2d)**786(2d case); **TexCommnA** 22**SW(2d)**1061(2d case); **TexCommnA** 24**SW(2d)**370; **Tex CommnA** 25**SW(2d)**588; **TexCommnA** 29**SW(2d)**944; **TexCommnA** 13**SW(2d)** 351; **TexCivA** 24**SW(2d)**465; 200**Wis** 367, 228**NW**503; **Can** 8**DomLR**724, 2 **WestWkly**923 (reducing recovery); **Can** [1927] 3**DomLR**97 (affirmed judgment upon questions of credibility, held not reversible unless error is manifest). See also **TexCommnA** 277**SW**84. [b] (1) **Tex** 15**SW(2d)**1010; **TexCommnA** 272**SW**1105; **TexCommnA** 276**SW**191; **TexCommnA** 276**SW**222; **TexCommnA** 276**SW**895 (rule applies to commission of appeals); **TexCommnA** 289 **SW**994; **TexCommnA** 289**SW**996; **Tex CommnA** 12**SW(2d)**991; **TexCommnA** 23**SW(2d)**673 (where no objection made to findings of trial court or to admissibility of evidence). (3) **TexCommnA** 10**SW(2d)**977. (4) **Tex CommnA** 15**SW(2d)**210; **TexCivA** 297 **SW**628. (10) Where circumstances justified conclusion of trial court on question of fact, and no circumstances would support contrary conclusion, commission of appeals must uphold finding of trial court, though court of civil appeals reached contrary conclusion. **TexCommnA** 10**SW(2d)**534(2d case). (15) Where trial court on report of special master based holding upon its view of law rather than on findings of fact, supreme court will review decision of court of civil appeals. **Tex CommnA** 276**SW**680. (16) Supreme court is without authority to review finding of fact by court of civil appeals unless it is so palpably and flagrantly wrong as to amount to refusal to apply established law. **TexCommnA** 280**SW** 742. (17) Commission of appeal is without authority to disturb finding of fact. **TexCommnA** 279**SW**805. (18) Finding of court of civil appeals that finding of jury was against weight of evidence is finding of fact binding on supreme court. **TexCommnA** 279**SW** 805 (not conclusion of law). (19) Finding of court of civil appeals that improper argument was harmless is not finding of fact conclusive on supreme court. **TexCommnA** 283**SW**765. (20) Sufficiency of evidence to support implied finding cannot be attacked in supreme court. **TexCommnA** 290**SW**529. (21) Ruling on facts by Court of Civil Appeals is not reviewable in Supreme Court. **TexCommnA** 23**SW(2d)**304. (22) Duty of supreme court to relegate question to court of civil appeals. **Tex CommnA** 29**SW(2d)**987. [g] **In Alabama.–213Ala**642, 106**S**57. [h] **In Canada.–Can** [1929] 4**DomLR**590.

1085–31 240**NY**323, 148**NE**537.

1035–32 **TexCommnA** 296**SW**877. But see 252**NY**422, 169**NE**632.

1085–34 333 **Ill** 90, 164**NE**224. [b] (1) 157**Tenn**173, 7**SW(2d)**38. (2) Where there was no concurrence of lower courts, question of damages held fairly before supreme court. 156**Tenn**7, 299 **SW**789.

1086–35 242**NY**99, 151**NE**144; 244**NY** 168, 155**NE**88; **TexCommnA** 280**SW** 740; **TexCommnA** 29**SW(2d)**944. [c] **Finding that there is no evidence** to sustain verdict is one of law. **Tex CommnA** 288**SW**413. [d] **Whether special issue should have been submitted** is a question of law subject to review. **TexCommnA** 27**SW(2d)**129.

1086–36 253**NY**410, 171**NE**690; **Tex CommnA** 291**SW**529; **TexCommnA** 23 **SW(2d)**713; **TexCommnA** 29**SW(2d)** 944.

1086–37 **TexCommnA** 284**SW**942; **Tex CommnA** 29**SW(2d)**987.

1086–38 36**GaA**610, 137**SE**402; **Tex CommnA** 6**SW(2d)**92; **TexCommnA** 7 **SW(2d)**872 (on writ of error to supreme court); **TexCommnA** 25**SW(2d)**597.

1086–38½–New. Court of civil appeals must make up and file conclusions of fact and law. **TexCommnA** 296**SW**486.

1086–40 318 **Ill** 139, 149**NE**2; 318 **Ill** 369, 149**NE**243; 318 **Ill** 570, 149**NE**469 (statute held valid); 324 **Ill** 238, 154**NE** 904; 330 **Ill** 172, 161**NE**493. [g] **Constitutionality of statute** has been upheld. 200 **Ill** 220, 65**NE**661.

1087–41 317 **Ill** 165, 147**NE**785; 318 **Ill** 402, 149**NE**422 (rule applied to question of contributory negligence); 318 **Ill** 570, 149**NE**469; 319 **Ill** 311, 150**NE** 256; 331 **Ill** 49, 162**NE**123 (on certiorari); 332 **Ill** 70, 163**NE**361; 333 **Ill** 78, 164**NE**162, 60**ALR**353; **Ill** 173**NE**270. [a] 319 **Ill** 311, 150**NE**256; 321 **Ill** 168, 151**NE**573; 327 **Ill** 207, 158**NE**380.

1087–42 321 **Ill** 168, 151**NE**573.

1087–43 334 **Ill** 281, 165**NE**793.

1087–44 200 **Ill** 220, 65**NE**661; 336 **Ill** 175, 168**NE**315(2dcase).

1087–45 200 **Ill** 220, 65**NE**661 (statute constitutional).

1088–47 338 **Ill** 270, 170**NE**247; 339 **Ill** 384, 171**NE**531.

1088–50 **Ill** 173**NE**270. [d] (2) supreme court must examine evidence, where motion to direct verdict for defendant was made and denied. 336 **Ill** 11, 167**NE**807.

1089–51 338 **Ill** 270, 170**NE**247.

1089–53 42 **OklACR**279 [reh pending].

1089–54 240**NY**268, 148**NE**518; 240**NY** 323, 148**NE**537; 240**NY**533, 148**NE**668, 48**ALR**1119; 241**NY**197, 149**NE**830; 241**NY**550, 150**NE**550; 242**NY**54, 150**NE** 599; 242**NY**99, 151**NE**144; 242**NY**134, 151**NE**155; 242**NY**202, 151**NE**207; 242 **NY**277, 151**NE**452; 242**NY**475, 152**NE** 266; 243**NY**490, 154**NE**535; 243**NY**499, 154**NE**538; 246**NY**174, 158**NE**64; 248 **NY**276, 161**NE**425. But see 245**NY**611, 157**NE**879. [g] **Facts found and unanimously affirmed by appellate division tending to alter effect of unambiguous contract** held not binding on court of appeals. 242**NY**125, 151**NE**152, 45**ALR** 751.

1089–54½–New. This restriction may be removed by legislature, where appellate division on reversal makes new findings of fact and renders final judgment thereon. 242**NY**99, 151**NE**144.

1039–54½–New. But facts found and unanimously affirmed by the appellate division if they alter a contract which is clear and unambiguous do not bind the court of appeals. 242**NY**125, 151**NE** 152.

1090–56 242**NY**134, 151**NE**155 (record may not be examined on question); 243 **NY**490, 154**NE**535; 243**NY**499, 154**NE** 538; 245**NY**17, 156**NE**81; 247**NY**170, 159**NE**899.

1090–57 242**NY**134, 151**NE**155; 242**NY** 475, 152**NE**266. [b] (2) Court will look into evidence to determine whether errors in charge are prejudicial or harmless. 240**NY**241, 148**NE**333. [c] 245**NY** 611, 157**NE**879. [g] (2) Record may be examined to review rulings and exceptions on admission of evidence. 242**NY** 134, 151**NE**155. (3) Rulings on admission of evidence and exceptions thereto are subject to review in court of appeals after unanimous affirmance by appellate division. 242**NY**134, 151**NE**155. [h] **Construction of writings** uncontradicted except by incompetent evidence

is question of law which survives unanimous affirmance by appellate division. 242NY134, 151NE155. [i] **Construction of writings** is subject to review by court of appeals after unanimous affirmance by appellate division. 242NY134, 151NE155.

1090–57½–New. On unanimous affirmance by appellate division whether or not nonsuit should have been granted in an action on an insurance policy because of breach of warranty appearing on the face of the policy may not be considered by court of appeals, 242NY54, 150NE599.

1090–57⅓–New. although it may consider interpretation and effect of terms of contract included in findings. 242NY54, 150NE599.

1090–57¼–New. Action by the lessor to recover stipulated damages for breach of oil and gas lease is not such election of remedies as to preclude the lessor from maintaining suit to cancel the lease and thus remove cloud from his title. 42 **OklACR**279 [reh pending].

1090–58 244NY22, 154NE652.

1091–61 252NY7, 168NE444; 253NY356, 171NE568; 224**AppDiv**616, 231NYS564. [d] **Modification of order** of Special Term by Appellate Division is assumed to be on error of law. 253NY356, 171NE568.

1091–63 See also 248NY415, 162NE471, 59**ALR**649 (under civil practice act, court of appeals now has jurisdiction to review facts found by appellate division on which final order was based).

1091–64 244NY14, 154NE649.

1092–66 246NY51, 158NE16; 246NY85, 158NE29.

1092–66½–New. Court of appeals, where the appellate division substituted new findings for special term findings, will determine whether the substituted findings are sustained by evidence. 245NY260, 157NE130.

1092–66⅓–New. Under Civ. Pract. Act § 589, the court of appeals can review only questions of fact where the appellate division on reversal makes new findings of fact and renders final judgment thereon. 242NY99, 151NE144.

1092–66¼–New. Plaintiff, appealing from the appellate division's judgment ordering a new trial and giving a stipulation for judgment absolute, has the burden of showing that there was no question of fact justifying reversal, and that as matter of law plaintiff was entitled to judgment. 248NY272, 162NE76.

1092–66⅕–New. When Appellate Division makes new findings and renders final judgment or order, Court of Appeals may review facts so found and decision thereon. 254NY128, 172NE265.

1092–69 242NY99, 151NE144; 121**Oh**257, 167NE889; **TexCommnA** 286SW176. [a] (1) 97**Tenn**649, 37SW560; 152**Tenn**367, 278SW68, 42**ALR**1052; 154**Tenn**444, 289SW496.

1092–70 330**Ill**172, 161NE493.

1092–72 270US378, 47SCt236, 70L**ed**641; 18F(2d)519; 23F(2d)839.

1092–73 269US82, 46SCt57, 70L**ed**172; 281US548, 50SCt427, 74L**ed**1034. [b] **Where concurrent findings of fact are conflicting,** rule that supreme court will accept finding is not strictly applied. 280US30, 50SCt9, 74L**ed**147.

1093–75 287Pa580, 135A655. But see 330**Ill**172, 161NE493 (rule otherwise where probate court is called on to exercise its chancery powers).

1093–77 8F(2d)570; 15F(2d)794; 18F(2d)281; 18F(2d)883, 887 [citCyc]; 23F(2d)287; 31F(2d)111; 32F(2d)512; 34F(2d)270; 215**Ala**179, 110S291; 22**AlaA**20, 111S898; **Ariz** 291P1003; 169**Ark**96, 272SW845; 169**Ark**473, 275SW741; 170**Ark**366, 280SW641; 170**Ark**552, 280SW364; 172**Ark**711, 290SW58; 173**Ark**1181, 295SW395; 175**Ark**362, 299SW389; 177**Ark**195, 5SW(2d)939; 178**Ark**159, 10SW(2d)10; 179**Ark**138, 15SW(2d)979; 180**Ark**765, 22SW(2d)556; 180**Ark**735, 22SW(2d)558; 180**Ark**1116, 24SW(2d)321; **Ark** 32SW(2d)167; 199**Cal**203, 248P672; **Cal** 265P929; 208**Cal**705, 284P922; 74**CalA**655, 241P565; **Fla** 129S865; 160**Ga**620, 128SE891; 161**Ga**110, 129SE783; 162**Ga**388, 134SE100; 163**Ga**604, 136SE914; 165**Ga**185, 140SE359; 165**Ga**146, 140SE369; 168**Ga**705, 149SE32; 36**GaA**230, 136SE180; 36**GaA**679, 137SE855; 36**GaA**683, 137SE906; 37**GaA**351, 140SE640; 39**GaA**74, 146SE793; 42 **Ida**821, 248P468; 46 **Ida**544, 269P96; 47 **Ida**272, 274P1069; 236 **IllA**75; 252 **IllA**298; 255 **IllA**216; 200 **Iowa**1343, 206NW112; 203 **Iowa**443, 212NW888; 204 **Iowa**363, 213NW779; 204 **Iowa**1108, 216NW702; 206 **Iowa**182, 220NW331; **Iowa** 231NW323; **Iowa** 232NW804; 118**Kan**340, 235P93; 124 **Kan**705, 261P831; 210**Ky**792, 276SW800; 212**Ky**491, 279SW958; 216**Ky**712, 288SW665; 216**Ky**764, 288SW687; 218 **Ky**84, 290SW1064; 221**Ky**127, 297SW1106; 221**Ky**186, 298SW378; 225**Ky**618, 9SW(2d)714; 227**Ky**490, 13SW(2d)496; 227**Ky**841, 14SW(2d)174; 228 **Ky**734, 16SW(2d)175; 231**Ky**163, 21SW(2d)254(1stcase); 232**Ky**503, 23SW(2d)945, 68**ALR**1481; 234**Ky**50, 27SW(2d)408; 234**Ky**637, 28SW(2d)970; 235**Ky**419, 31SW(2d)625; 235**Ky**699, 32SW(2d)25; 235**Ky**806, 32SW(2d)403; 145 **Md**71, 125A440; 265**Mass**549, 163NE711; **Mass** 172NE209; 233**Mich**440, 207NW10; **Mich** 233NW410; 165**Minn**136, 205NW945; 165**Minn**237, 206NW392; 169**Minn**516, 211NW478; 171**Minn**384, 214NW276; 170**Minn**488, 214NW278; 172**Minn**223, 214NW781; 173**Minn**436, 217NW483; 174**Minn**281, 219NW96; **Miss** 107S563; 149**Miss**395, 115S724; 317**Mo** 1021, 297SW366; 319**Mo** 1105, 8SW(2d)905; **MoA** 17SW(2d)369; **MoA** 21SW(2d)635; **MoA** 30SW(2d)638; **Mo** 31SW(2d)1041; **Mont** 285P174; 118**Nebr**792, 226NW444; 48**Nev**175, 228P306; 82**NH**105, 129A873 (where, on new trial, parties agree to limit it to certain newly discovered evidence, they were not entitled to reconsider findings prior to last trial); 82**NH**405, 134A719; **NH** 146A865; 31**NM**344, 245P543, 46**ALR**952; 229**AppDiv**809, 242NYS394; 189**NC**775, 128SE349; 190**NC**873, 130SE156; 192**NC**577, 135SE466; 192**NC**624, 135SE626; 194**NC**822, 140SE715; 195**NC**92, 141SE484; 195**NC**869, 142SE493; 51**ND**673, 200NW780; 57**ND**934, 224NW303; 113 **Okl**106, 239P463; 122 **Okl**10, 250P76; 122 **Okl**78, 251P46; 127 **Okl**173, 260P3; 134 **Okl**164, 272P461; 142 **Okl**82, 285P5; 143 **Okl**127, 287P385; 143 **Okl**249, 289P343; **Okl** 293P188; 121 **Or**1, 252P962; 120 **Or**613, 253P536; 123 **Or**469, 259P1064, 123 **Or**469, 260P1099; 126 **Or**358, 268P988; 128 **Or**292, 274P318; 130 **Or**375, 280P329; 132 **Or**332, 285P823; 86**PaSuper**462; **SC** 133SE709; 48**SD**39, 206NW477; 49**SD**524, 207NW543; 49**SD**592, 207NW972, 45**ALR**1126; 50**SD**159, 208NW774; 52**SD**168, 216NW949; **SD** 226NW265; **TexCivA** 271SW139; **TexCivA** 282SW319; **TexCivA** 4SW(2d)1008; **TexCivA** 21SW(2d)372(2dcase); **Tex CivA** 23SW(2d)860; **Utah** 275P772; **Utah** 286P620; **Va** 155SE714; 151**Wash**430, 276P89; 141**Wash**399, 252P157, 58**ALR**1482; 142**Wash**342, 253P464; 143 **Wash**651, 255P929; 144**Wash**291, 257P840; 151**Wash**447, 276P297(2dcase); **Wash** 289P27; 101**WVa**230, 133SE140; 106**WVa**280, 145SE440; 108**WVa**1, 150SE371; 193**Wis**522, 213NW888; 194 **Wis**289, 215NW575; 198**Wis**127, 223NW558. See also 219**Ala**631, 122S881 (1stcase). But see 218**Ala**379, 118S549. [g] **Where cases are interrelated but not the same,** doctrine is inapplicable. 31 **NM**344, 245P543, 46**ALR**952. [h] **Where no appeal lies, prior to judgment affirming decision, it is nullity, and need not be considered.**–220**MoA**78, 278SW1091. [i] **Waiver of right to establish defense** and election to rely solely on different defense prevents assertion on second appeal of right waived. 137 **Wash**268, 242P38. [j] **Where there were two prior appeals,** decision of Supreme Court is governed by what in its opinion is law at time of appeal. 220**Ala**505, 126S169.

1095–73 9F(2d)593 (on record substantially the same rulings on former appeal may not be disregarded); 28F(2d)851 (evidence held substantially the same); 22**AlaA**20, 111S898; 172**Ark**346, 289SW10; 199**Cal**203, 248P672; 74**CalA**621, 241P565; 163**Ga**604, 136SE914; 165 **Ga**146, 140SE369; 207 **Iowa**959, 221NW451; 210**Ky**792, 276SW800; 212**Ky**491, 279SW958; 216**Ky**108, 287SW362; 232 **Ky**188, 22SW(2d)567; 234**Ky**252, 27SW(2d)973; 234**Ky**307, 28SW(2d)6; 127**Me**190, 142A585; 165**Minn**237, 206NW392; 149**Miss**512, 115S591; **MoA** 282SW105; **MoA** 300SW1048; **MoA** 25SW(2d)138; 114**Nebr**764, 209NW609; 189**NC**775, 128SE349; 127 **Okl**173, 260P3; 133 **Okl**193, 271P948; 136 **Okl**123, 276P723; 140 **Okl**145, 282P301; 113 **Or**398, 233P547; **TexCivA** 282SW319; **TexCivA** 10SW(2d)412; 141**Wash**399, 252P157; 58**ALR**1482; 142**Wash**342, 253P464; **Wash** 288P1062; 101**WVa**230, 133SE140; 107**WVa**275, 148SE78; 194**Wis**289, 215NW575. [a] 168**Ga**772, 149SE189.

1095–79 28**Ariz**440, 237P382; 129 **Okl**191, 263P1102; 130 **Okl**263, 266P253; **TexCivA** 29SW(2d)430(1stcase). [g] **When first appeal was reversed for failure of defendant in error to file brief** same questions may be presented on second appeal as were presented in brief of plaintiff in error on former appeal. 113 **Okl**106, 239P463; 129 **Okl**191, 263P1102.

1096–81 165**Ga**146, 140SE369.

1096–82 [a] (5) Questions of law decided on former consideration are no longer open to controversy except as parties might ask that decision rendered be overruled because wrong in law. **Mass** 167NE641.

1096–84 180**Ark**634, 22SW(2d)30; 141 **Wash**399, 252P157, 58**ALR**1482; 142 **Wash**342, 253P464; 194**Wis**289, 215NW575.

1096–85 **NC** 154SE18.

1096–92 [a] 169**Ark**473, 275SW741; 223**Ky**633, 48SW(2d)731.

1097–94 194**Wis**289, 215NW575.

1097–98 165**Ga**146, 140SE369.

1097–99½–New. The principle of stare decisis is subordinate to the rule which declares that, a case having been once determined in the supreme court, each proposition of law then decided is binding on the supreme court as res judicata whenever that case again comes before it for adjudication. 152**Va**572, 147SE234.

1097–1 34**Ariz**175, 269P77, 78 [citCJ]; 338**Ill**537, 170NE772; 224**IllA**474; 158**La**648, 651, 104S486 [citCJ]; 164**La**112, 113S785; 255**Mass**352, 151NE379; 155**Miss**554, 125S79; 317**Mo** 1021, 297SW366; 136 **Okl**274, 277P579; **Tex CivA** 283SW696, 698 [citCJ, but holding rule in Texas to be otherwise]; 148**Wash**495, 269P807. See also 115**Nebr**633, 214NW66. [g] **Original respondents appealing directly from lower court's order** after remand need not specify errors where original errors present question involved. 36**Wyo** 100, 251P955.

1098–2 162**Ga**620, 134SE616; 2**LaA**163; 131 **Okl**113, 267P1052; 143**Wash**651, 255P929. [d] **Case will be affirmed** if mandate substantially complied with. 318 **Ill**60, 148NE867. [e] **Judgment or decree** entered in accordance with mandate is final and conclusive on all parties as if entered in supreme court. 318 **Ill**60, 148NE867.

1098–3 204 **Iowa**363, 213NW779; 113 **Or**398, 233P547.

1099–4 115**Nebr**633, 214NW66.

1099–6 31F(2d)111; 35**Ariz**73, 274P632; 169**Ark**473, 275SW741; 41**GaA**769, 154SE722; **GaA** 155SE342(1stcase); **IndA** 153NE179; **IndA** 169NE333; 227 **Ky**458, 13SW(2d)500; 311**Mo** 49, 277SW562; **Wash** 288P1062. [b] **TexCivA** 13SW(2d)184. [c] **Existence of contrary decisions in courts of other states** does not prevent application of rule of stare decisis. 316**Mo**1058, 293SW770.

1099–7 319**Mo** 1105, 8SW(2d)905; 311 **Mo** 49, 277SW562.

1099–8 217**Ala**244, 115S176; 31**NM**344, 245P543, 46**ALR**952; 48**SD**39, 206NW477; **TexCivA** 283SW696 [citCJ, but holding rule in Texas to be otherwise]; **TexCivA** 28SW(2d)578. [c] **TexCivA** 283SW696.

1099–11 34F(2d)270; 39F(2d)601; 41F(2d)745; 124**Kan**705, 261P831 (dictum); 322**Mo** 1103, 19SW(2d)707, 65**ALR**129; **MoA** 300SW1048; **NC** 154SE18; **Okl** 293P188; 148**Wash**195, 268P177 (where court was wholly without

jurisdiction); 200Wis64, 227NW300, 67 ALR1381 [citCJ] (where supreme court expressly departed from and overruled its line of previous decisions following "right or wrong" rule).

1100–13 [a] (1) 219Ala265, 122So29.

1100–14 41F(2d)745.

1100–15 But see Oh 172NE151.

1100–16 145Wash691, 261P642 (whether later decision conflicts held immaterial).

1100–17 34F(2d)869 (where court on prior appeal declined to pass on question because of faulty transcript, plaintiff's failure to review order does not require dismissal of subsequent appeal); 171Minn384, 214NW276.

1101–18 23F(2d)287; 216Ala275, 113So300, 303 [quotCJ]; 338 Ill 537, 170NE772; 217Ky430, 289SW1100; 223Ky633, 4SW(2d)731; 128 Okl 245, 262P658; TexCivA 274SW255; TexCivA 26SW(2d)299; 141Wash399, 252P157, 58ALR1482; 146Wash90, 261P790. But see 153Wash99, 279P102.

1101–21 274US208, 47SCt578, 71L ed1002; 12F(2d)701; Ala 128So215; 170Ark426, 280SW383; 172Ark346, 289SW10; 199Cal 203, 248P672; 206Cal 389, 274P536(2dcase); Fla 129So865; 229Ky696, 17SW(2d)1002; Mass 171NE721; 241Mich266, 217NW43; 179Minn284, 229NW130 (no effect on questions not raised); MoA 272SW1076; 114Nebr764, 209NW609; 31NM564, 249P108; 127Misc33, 215NYS145; 142 Okl 74, 285P84; 143 Okl 147, 288P285; 144 Okl 264, 291P124; 113 Or398, 233P547; 139SC377, 137SE347; TexCivA 28SW(2d)578; Utah 275P582; Utah 280P1053. [e] **Where appellant on second appeal was appellee on first appeal,** and question whether on second trial incompetent evidence was admitted against defendant was not and could not have been properly presented on first appeal, it will be considered on second appeal. 209Ky338, 272SW886.

1102–23 9LaA539, 121S238(1stcase).

1102–24 205 Iowa633, 216NW719; 32 OhA316, 168NE661; 119 Or292, 247P145, 146, 248P1095 [citCJ]; 53SD600, 221NW700.

1102–25 TexCivA 25SW(2d)271.

1103–31 MoA 31SW(2d)117; TexCivA 274SW255; TexCivA 289SW134; TexCivA 19SW(2d)203; TexCivA 31SW(2d)154.

1103–33 274US208, 47SCt578, 71L ed1002.

1103–35 97CalA398, 275P861; 229App Div167, 241NYS123; 111 OhSt726, 146NE291, 41ALR1057.

1104–37 333 Ill 83, 164NE148; 237 Ill A190; Utah 280P1053.

1104–39 9F(2d)213; 26F(2d)636; 171Minn384, 214NW276; 192Wis523, 213NW285. [c] 171Minn384, 214NW276. [d] 192Wis523, 213NW285.

1104–40½–New. After appeal from judgment non obstante on appeal from order denying new trial, propriety and amount of verdict may be considered, 171Minn384, 214NW276.

1104–40½–New. as well as question whether refusing second trial was abuse of discretion. 171Minn384, 214NW276.

1104–41 144Miss877, 110So686; 145Va578, 134SE701.

1105–42 [c] **Obiter dicta** does not prevent such matter from being the law of case on subsequent appeal. TexCivA 271SW139.

1105–43 82CalA330, 255P516; 36GaA230, 136SE180; 46 Ida544, 269P96; 218Ky84, 290SW1064; 221Ky127, 297SW1106; 171Minn384, 214NW276; TexCivA 13SW(2d)126; 145Va653, 134SE675; 147Va522, 137SE614; 141Wash399, 252P157, 58ALR1482; 142Wash342, 253P464. [b] **Final opinion in equitable action** is conclusive as to all inhering subject matters except such as court may and does specifically except therefrom. 205 Iowa1085, 217NW268, 56ALR463.

1105–44 218Ky84, 290SW1064; 141Wash399, 252P157, 58ALR1482.

1105–45 219Ky293, 293SW151.

1106–55 215Ala571, 112S189; 113 Or398, 233P547.

1106–58 18F(2d)883; 34F(2d)270; 39F(2d)601; 177Ark757, 9SW(2d)8; 179Ark834, 18SW(2d)370; 96CalA637, 274P612; 70CalA351, 233P350; CalA 290P630; 36GaA230, 136SE180; 47 Ida497, 277P550; 236 IllA75; Iowa 229NW853; 228Ky780, 15SW(2d)528; 219Ky786, 294SW483; 223Ky633, 4SW(2d)731 (question for jury); 164La397, 113S889; Mass 169NE512 (malice or ill will); 136Miss726, 101S553; 155Miss554, 125S79; 117Nebr154, 219NW896; 122 Okl 10, 250P76; Okl 293P206; 49SD592, 207NW972, 45ALR1126; SD 231NW539; TexCivA 282SW319; TexCivA 19SW(2d)203; 152Va747, 148SE799 (holding that land not conveyed in fraud of creditors was not res judicata as to liability of land for part payment of deed of trust); 40Wyo393, 277P807. [b] (2) 165Minn237, 206NW392.

1107–59 151Md133, 134A37.

1107–60 87CalA87, 261P754; 236 IllA75; 151Md133, 134A37, 39 [quotCJ]; 153Miss327, 121S144; NC 154SE18.

1107–61 38F(2d)721; 170Ark1194, 278SW644; 176Ark731, 4SW(2d)505; Ark 31SW(2d)407; 228Ky850, 16SW(2d)477; Mass 171NE721; 118Nebr792, 226NW444; 122 Okl 10, 250P76; 49SD592, 207NW972, 45ALR1126; TexCivA 23SW(2d)860; 193Wis118, 213NW885. [b] **Appellate decision that corporation had right to sue on stock subscription** may become law of case and unreviewable on appeal from further proceedings below. 170Ark1194, 278SW644. [c] **Decision on appeal affirming disallowance of tax claims** held not to prevent court from deciding appeal from later decree disallowing penalties. 41F(2d)213.

1107–62 21AlaA587, 111S199; 35Ariz73, 274P632; 219Ky786, 294SW483; Pa 147A903; 141Wash399, 252P157, 58ALR1482; 144Wash33, 256P74.

1107–63 176Ark613, 4SW(2d)7 (statute); 178Ark454, 12SW(2d)10; 179Ark138, 15SW(2d)979; Iowa 228NW111; 227Ky583, 13SW(2d)766; 229Ky660, 17SW(2d)743; 230Ky485, 20SW(2d)76; 321Mo1052, 15SW(2d)329; MoA 291SW161; MoA 297SW435; TexCivA 282SW319; TexCivA 28SW(2d)578. [b] See also 82CalA5, 254P919. [g] **Where appellant relied on validity of agreement** on first appeal, he cannot attack it on second appeal. 287Pa478, 135A109.

1108–64 143Va439, 130SE385 (decision that joint action in detinue could be maintained). [c] **Suggestions as to parties** made on prior appeal followed. TexCivA 279SW865. [d] **Indispensable parties.**–Determination on former appeal as to who are indispensable parties is conclusive as law of case. 35F(2d)475.

1108–66 171Minn384, 214NW276.

1108–68 170Ark180, 279SW359.

1108–69 20F(2d)830; 338 Ill 537, 170NE772; MoA 291SW161.

1108–70½–New. That certain issues be submitted is law of case where evidence on each trial was substantially the same. 9F(2d)593.

1108–71 SD 227NW79.

1108–73 23F(2d)287; 176Ark613, 4SW(2d)7; 142 Okl 82, 285P5; 145Va653, 134SE675.

1108–74 34F(2d)748; 165Ga228, 140SE497; 242 IllA145; IndA 162NE249; 158La648, 104S486; 234Ky276, 27SW(2d)980; MoA 19SW(2d)531; 225App Div332, 233NYS206; 53SD596, 221NW699; SD 226NW341; TexCivA 296SW985; TexCivA 22SW(2d)973; 147Va522, 137SE614; 155Wash147, 283P691. See also 76CalA192, 244P94, 99 [citCJ]. But see 126 Okl 241, 259P249; 150Wash20, 272P22. [b] 35GaA460, 133SE351. [h] **Decision on appeal sustaining demurrer** is conclusive of same point raised by plea. 144Miss704, 111S143.

1109–75 See also 76CalA192, 244P94, 99 [citCJ]. But see 218Ala100, 117S643.

1109–76 221AppDiv253, 223NYS110.

1109–77 165Ga652, 141SE651; 221Ky186, 298SW378.

1109–77½–New. 113 Or398, 233P547.

1110–78 40F(2d)831; CalA 290P630; 224 IllA574; 123 Or469, 259P1064, 123Or469, 260P1099; 49SD181, 207NW77; TexCivA 12SW(2d)1077; TexCommnA 29SW(2d)1038; 153Va14, 149SE517.

1110–79½–New. A decision on a former appeal against a contention that, because a witness had not properly qualified, his testimony was of no probative value, and that therefore the court, in passing on a motion for a directed verdict, may have been justified in disregarding it, does not preclude presentation of the questions whether the witness was incompetent because he was not qualified, and whether the court erred in admitting testimony and refusing to strike it. Utah 275P582.

1110–80 180Ark684, 22SW(2d)408; 198Cal 490, 246P324; 71CalA752, 236P365; 81Colo 69, 255P449; 34GaA192, 129SE19; 39GaA74, 146SE793; 39GaA272, 146SE799; 47 Ida772, 278P1016; 256 IllA569; IndA 162NE247; 225Ky117, 7SW(2d)823; 225Ky688, 9SW(2d)1013; 232Ky539, 23SW(2d)942; Mass 166NE752; 232Mich271, 205NW122; 165Minn136, 205NW945; 166Minn65, 207NW189; 179Minn351, 229NW319; 321Mo405, 11SW(2d)8; MoA 20SW(2d)968; MoA 30SW(2d)1101; 113Nebr745, 204NW791; 50ND397, 196NW100; 51ND113, 199NW191; 143 Okl 84, 287P713; 143 Okl 84, 287P713; TexCivA 296SW950; TexCivA 296SW985; 99Vt244, 131A10; 141Wash700, 251P1119; 141Wash399, 252P157, 58ALR1482; 142Wash342, 253P464. But see CalA 251P338.

1111–81 36GaA230, 136SE180; 125Kan611, 265P743.

1111–82 70CalA351, 233P350; 36GaA230, 136SE180.

1111–83 87CalA87, 261P754; 37GaA667, 141SE320; 203 Iowa974, 213NW569; 125Kan611, 265P743; 210Ky108, 275SW363; 219Ky786, 294SW483; 235Ky204, 30SW(2d)900; 235Ky699, 32SW(2d)25; Mass 167NE746; Mass 168NE792; 167Minn132, 208NW541; MoA 3SW(2d)1031; MoA 25SW(2d)499; 86Mont78, 281P913; 129Misc216, 220NYS680; 196NC14, 144SE375(1stcase); 50ND397, 196NW100; 126 Okl 161, 259P211; TexCivA 12SW(2d)1077; Utah 272P207; Utah 280P327. See also 236IllA75.

1111–84 219Ky768, 294SW481; 234Ky243, 27SW(2d)952; 19 OhA41; TexCivA 288SW614. But see 171Minn384, 214NW276.

1111–85 209Ky338, 272SW886; 216Ky712, 288SW665; 218Ky84, 290SW1064; 219Ky768, 294SW481; 49ND96, 190NW177.

1112–92½–New. Supreme Court is entitled to aid of lower court in deciding sufficiency of certain evidence. Pa 149A494.

1112–94 See also TexCommnA 12SW(2d)175.

1112–96 117 Oh400, 159NE475 (on remand to intermediate appellate court); 87PaSuper15; 29PortoRico 874; 39Wyo84, 271P875, 61ALR199.

1112–2 Mass 168NE809.

1112–3 TexCommnA 296SW490.

1113–6 223Ky561, 4SW(2d)380. [a] **Appellate court should decide case** before it regardless of consequences. 220Ky728, 295SW1055. [b] **Remission of interest on judgment.**–Appellate court is without power to order remission of interest on judgment based on jury's verdict notwithstanding delay in rendering final decision. 45SC196, 143SE31.

1113–9 152Wash257, 277P695.

1113–13½–New. Where the evidence sustains plaintiff's claim which the intermediate court disallows as a matter of law, the appellate court will reinstate recovery for such claim. 241NY598, 150NE570.

1113–13½–New. The supreme court cannot reverse or affirm a judgment which is a nullity. 82Colo 313, 260P105.

1113–13¼–New. Remandment under statute must be based on record exclusively. 160Tenn285, 24SW(2d)897.

1113–13½–New. Appellate court cannot on motion reverse judgment and dismiss action because other actions pending might afford more relief. SD 231NW897.

1113–14 TexCommnA 23SW(2d)333.

1113–15 125 Okl 114, 256P748; 125 Okl

254, 257P372; 41 OklACR85.

1113–17 5AltaL245, 7DomLR45, 22 WestLR91, 2WestWkly1036.

1113–19 36GaA548, 137SE302; MoA 293SW65. [a] In Texas.–TexCivA 278 SW858.

1113–25 82Colo 313, 260P105; 217Ky 150, 289SW228; 228Ky639, 15SW(2d) 513; 229Ky604, 17SW(2d)706(1stcase); 164La15, 113S748; 165La83, 115S376; 11LaA314, 123S433; LaA 125S518; Tex CivA 281SW642; 151Va270, 144SE422.

1114–26 161La889, 109S538; 241Mich 629, 217NW765; 123 Or667, 263P914.

1114–27 215Ala307, 110S468; 204 Iowa 497, 215NW728.

1114–28 164La463, 114S98.

1114–29 80Mont49, 257P1020.

1114–30 98Fla1026, 125S237.

1114–34 100WVa247, 130SE435.

1115–37½–New. Where defendant not only appealed from the judgment, but moved for judgment on the findings under the statute, the reviewing court is obliged to modify judgment as the findings require, although modification is in plaintiff's favor. 206Cal 363, 274P340.

1115–37⅓–New. Relief cannot be granted which would affect the rights of persons not parties who are interested in the subject matter. TexCommnA 280 SW571; 221MoA1033, 295SW515.

1115–37¼–New. Mortgagor is entitled to extension of time for tendering account due in proceedings to redeem where defendant was cause of delay. 125Me509, 131A574.

1115–37⅓–New. In absence of prayer for particular relief, appellate court is powerless to grant it. 159La231, 105S 300.

1115–37⅙–New. The appellate court cannot make an order correcting error of the trial court in rendering judgment against a deceased person in an action of ejectment, where death was not suggested until more than one year after death and the rendition of the judgment, and there has been no consent to revivor against the heirs and they are not before the court. 121Kan591, 249P 672.

1115–37½–New. An appellate court will not determine title to property as between parties all of whom are not brought before the court. 208 Iowa179, 225NW361.

1115–37¼–New. The supreme court cannot adjudicate the rights of a stranger to a mortgage foreclosure suit sua sponte or on appeal of one from whom he purchased mortgaged property. 243 Mich495, 220NW769.

1115–39 22F(2d)627; 1LaA98; 5LaA 344(1stcase); 150Md119, 132A585; 83NH 23, 136A751; 191NC775, 133SE1; 120 Oh613, 169NE299(1stcase).

1116–43 166La70, 116S673; 141SC407, 139SE842.

1116–43½–New. Where the verdict does not conform to the issues, the cause will not be remanded for entry of judgment thereon to be reviewed, but appeal will be dismissed. 304Mo 674, 264SW810.

1116–45 6LaA601; 7LaA575; 192NC 652, 135SE781; 198NC825, 153SE259 (2dcase).

1116–48 106Conn698, 138A787; 98Vt 405, 130A137.

1116–49 220MoA19, 273SW233.

1116–54 106Conn698, 138A787.

1116–56½–New. On appeal from a decree dismissing a bill for multifariousness and misjoinder of parties defendant, the appellate court may remand the cause to give plaintiff an opportunity to correct the bill. 237Mich252, 211NW 623.

1116–57 147Miss885, 113S552.

1116–59 39F(2d)52; 106Conn698, 138A 787; 95Fla85, 116S813; 204 Iowa782, 216NW27; 162La859, 111SE259; 165 La490, 115S667; 6LaA631; 6LaA718; 7LaA701; 8LaA43; 189NC737, 128SE 149 (reversed and remanded for additional facts required by appellate court to adjudge right to injunction); 51ND 309, 199NW872; SD 226NW945. [a] (5) Other instances. SD 226NW945.

1117–62 See also 8LaA759.

1117–63½–New. Where the appellate court fully approves the action of the trial court, it cannot remand to enable plaintiffs to supply the necessary evidence. TexCivA 10SW(2d)791.

1117–66 163La594, 112S497; 164La 225, 113S825; 164La233, 113S828; 167 La83, 118S700; 11LaA110, 120S779; 1 LaA21; 143Miss596, 108S811 (value); 100Vt425, 138A780 (remand because of inadequate findings); Va 155SE714. [a] (5) Where final decision was based on wrong theory of law and decision itself may be wrong, appellate court will usually remit record so that point at issue may be passed on by trial court. 285Pa273, 132A364. (6) Under Equity Rules, rule 68 in bill in equity for partition proceedings on failure of prothonotary to enter decree nisi on filing of adjudication, superior court will remit record for reconsideration. 85PaSuper 421.

1117–66½–New. Where it is made to appear on appeal that extrinsic fraud was practiced to obtain the judgment appealed from, the appellate court may direct inquiry to be made concerning the truth of the charge and direct the trial court to grant a new trial if the charge is sustained. 121Kan591, 249P 672.

1117–69½–New. An application for remand of the record, for the purpose of a motion for a new trial made after the expiration of the time for appealing from the judgment, will be denied where the statute forbids an extension of time for such motion beyond such time. 50 SD481, 210NW675.

1117–70 281US82, 50SCt228, 74L ed717 (1stcase); 121Kan488, 247P441; 194 NC799, 139SE774; NH 152A272; Pa 146A709; 137Wash261, 242P36; 192Wis 214, 212NW266.

1118–71 194NC799, 139SE774. [a] Where affirmance may be required in any event, because of absence of cause of action, appellant's motion to remand to correct record will not be first determined. 169La101, 124S186.

1118–72 222AppDiv479, 226NYS611; 131Misc401, 227NYS163; 223AppDiv 701, 226NYS523.

1118–74½–New. That intermediate court may consider assignment not passed on, where questions of fact are involved peculiarly within its jurisdictions. Tex CommnA 270SW1002.

1118–75 4LaA29; 13LaA139, 127S403. [a] Appellant must be free from negligence.–MoA 9SW(2d)643.

1118–76 193NC401, 137SE926; Tex CommnA 295SW577.

1118–77½–New. No comment on evidence will be made on appeal from interlocutory order where case will later be tried on merits. TexCivA 279SW892.

1118–79 TexCommnA 278SW182.

1118–82 TexCommnA 265SW124; Tex CommnA 278SW182 (judgment below affirmed in part and reversed in part by agreement).

1118–85 TexCivA 276SW770.

1118–87½–New. Stipulations incorporated in judgment of supreme court become integral parts of judgment. Mo 28SW(2d)670.

1118–88 258Mass53, 154NE557. See also 246 Ill A196.

1118–91 29PortoRico 897 (appeal from judgment and from order refusing new trial).

1119–97 34GaA77, 128SE238.

1119–98 34GaA77, 128SE238 (where case reversed on cross bill of exceptions main bill dismissed). [a] Upon reversal and remand of judgment for plaintiff no consideration necessary of defendant's appeal from ruling refusing to grant new trial. 29PortoRico 897.

1119–5 198NC92, 150SE808; 55ND745, 214NW906; TexCivA 23SW(2d)405.

1119–6 208Cal 649, 284P217.

1119–10 270US426, 46SCt331, 70L ed 664; 100CalA195, 279P1064; CalA 287 P110; 203 Iowa721, 211NW430; 240NY 379, 148NE556, 40ALR792; TexCivA 3SW(2d)894; TexCivA 25SW(2d)247.

1120–11 275US56, 48SCt23; 331 Ill 193, 162NE859; 82NH426, 135A159; 243NY 173, 153NE39; 198NC51, 150SE810; TexCivA 14SW(2d)360.

1120–12 243NY173, 153NE39. [c] (2) Appellate court will order new trial, where, pending appeal, judgment of state court, which was sole basis for judgment below, was reversed. 28F(2d) 863.

1120–13 97Fla839, 122S249; 129 Okl 194, 264P142.

1120–15 31F(2d)556; 157Md309, 145A 876; 248Mich450, 227NW811. See also Mo 20SW(2d)502.

1120–16 20F(2d)336; 163La227, 111S 686; 258Mass53, 154NE557; MoA 299 SW70.

1121–22½–New. Where question of public nature is involved, court may dispose of appeal immediately without discussing facts. 85PaSuper122.

1121–22⅓–New. Some statutes, requiring the appellate court to decide certain appeals within a stated time, are directory, and the court does not lose jurisdiction to determine the case and render judgment by lapse of the statutory period. 119 Okl 216, 249P401.

1122–35 70CalA245, 233P381; 83Colo 546, 266P1116; 92Fla327, 109S435; 92 Fla401, 109S465; 92Fla1107, 111S110; 93Fla935, 113S894; 93Fla1044, 113S382; 95Fla344, 115S825; Fla 121S886(1st case); Fla 129S868; 161Ga192, 129SE 528; 161Ga374, 131SE54; 161Ga358, 131SE910; 162Ga718, 134SE781; 163 Ga561, 136SE459; 163Ga642, 136SE794; 163Ga835, 136SE892; 163Ga662, 136SE 911; 164Ga310, 138SE671; 165Ga158, 140SE357; 165Ga650, 141SE811; 165 Ga654, 141SE815; 166Ga632, 144SE18; 166Ga849, 144SE650; 166Ga897, 144SE 651(1stcase); 166Ga849, 144SE652(1st case); 166Ga850, 144SE663(1stcase); 167Ga90, 144SE897; 167Ga379, 145SE 455(1stcase); 167Ga416, 145SE875(1st case); 168Ga129, 146SE830(1stcase); 168Ga121, 146SE830(2dcase); 168Ga 121, 146SE855; 168Ga259, 147SE61(1st case); 168Ga492, 148SE275; 169Ga246, 149SE786(1stcase); 169Ga264, 149SE 869; 169Ga166, 149SE905; 169Ga366, 150SE84; 169Ga435, 150SE542; 169 Ga641, 151SE481(1stcase); Ga 154SE 895; 170Ga905, 154SE352(1stcase); 170Ga846, 154SE355(1stcase); Ga 155 SE27(1stcase); 221Ky509, 299SW177; 231Mich328, 204NW107 (certiorari); 235 Mich521, 209NW667; 235Mich542, 209 NW827; 238Mich497, 213NW699; 238 Mich443, 213NW866; 239Mich421, 214 NW413; 239Mich646, 215NW26; Minn 230NW634; 103NJL703, 137A425; 103 NJL700, 137A437(1stcase); 103NJL 713, 137A437(2dcase); 104NJL175, 139 A718; 104NJL647, 141A461; 105NJL 486, 144A584; NJ 146A198(1stcase); 102NJL216, 131A289; 102NJL220, 131A 289; 191NC828, 132SE657; 192NC819, 135SE321; 193NC385, 137SE137; 193 NC841, 137SE427; 112 OhSt564, 147NE 912; 113 OhSt369, 149NE389; 115 Oh 731, 156NE214; 119 OhSt24, 162NE106; 120 Oh58, 165NE534; 120 Oh616, 169NE 297(2dcase); 85PaSuper427; 86PaSuper 477; 94PaSuper585; 45SC196, 143SE 31; Va 136SE927; 145Wash696, 260P 1073; 195Wis660, 219NW270(1stcase); 196Wis570, 219NW270(2dcase); 197 Wis303, 222NW221; 197Wis538, 222 NW821; Wis 231NW628(1stcase); NS [1930] 2DomLR617; Ont [1929] 1Dom LR933.

1122–36 170Ga265, 152SE229.

1122–39 90Fla234, 107S178, 181 [cit CJ]; 92Fla327, 109S435; 92Fla401, 109 S465; 93Fla934, 112S891; 97Fla915, 117S697(1stcase); 96Fla17, 117S697(2d case); 96Fla612, 118S684(1stcase); Fla 122S565(2dcase); 98Fla265, 123S 767(2dcase); Fla 126S753; Fla 126S 776(1stcase); Fla 127S863; Fla 128S 839(1stcase); Fla 128S840; Fla 129S 743(2dcase); Fla 130S35(2dcase).

1123–40 Iowa 229NW853.

1123–41 90Fla234, 107S178, 181 [cit CJ].

1123–42 90Fla234, 107S178, 181 [cit CJ].

1123–45 197Cal 751, 242P926, 42ALR 1165; 77CalA727, 247P594. See also 216Ala519, 113S535.

1123–46 196Cal 768, 239P309; 198Cal 490, 246P324; 201Cal 486, 258P77; 208 Cal 256, 280P970 (notwithstanding constitutional and statutory provisions, findings of fact are unauthorized where cause is remanded after reversal); 68 CalA248, 228P715; 70CalA245, 233P381; 73CalA124, 238P126; 77CalA727, 247P 594; 79CalA595, 250P574; 108Conn285, 142A737; 48 Ida254, 282P273(2dcase); MoA 17SW(2d)675; 251NY224, 167NE 424 (original finding); 8PaDist&Co 73; 51SD357, 213NW943, 51ALR287; 153

Tenn323, 283**SW**987 (supreme court precluded by statute from passing on any question of fact chancellor was not requested to find or that he did not in fact find); **TexCommnA** 291**SW**528; **Tex CivA** 32**SW(2d)**699; 100**Vt**376, 138**A**778; 100**Vt**425, 138**A**780; 101**Vt**42, 140**A**160 (cannot refer to instrument in record to supply finding). But see **Cal** 289**P** 844; **CalA** 286**P**428; **CalA** 290**P**468.

1123–47 122 **Or**360, 257**P**685; **Utah** 271 **P**31; **Utah** 280**P**239; **Utah** 290**P**937. [a] **In jury cases** courts are without power to make findings of fact other than to affirm that which is common knowledge. **MoA** 17**SW(2d)**549.

1123–48 **Cal** 293**P**40; 262**Mass**165, 159 **NE**624; 214**AppDiv**807, 210**NYS**742.

1123–49½–New. Supreme court may make finding on question squarely presented in proper case. 133**SC**395, 131**SE** 18.

1123–49⅓–New. The appellate court, in the absence of the evidence, cannot make a finding not made by the trial court. 90**CalA**41, 265**P**844.

1123–49¼–New. Where the record contains a stipulation of facts agreed on by the parties, such statement of facts in itself will suffice as findings of fact so as to make unnecessary new fact findings by the reviewing court. 86**CalA**631, 261 **P**311.

1123–53 319 **Ill** 201, 149**NE**740; 251**NY** 207, 167**NE**223(1stcase); 254**NY**128, 172 **NE**265; 214**AppDiv**807, 210**NYS**742.

1123–53½–New. The appellate division may strike out findings of fact where such findings are not within the issue. 241**NY**446, 150**NE**511.

1124–57 **TexCommnA** 28**W(2d)**422.

1124–58 **TexCivA** 11**SW(2d)**209.

1124–62½–New. Mistake in finding of Court of civil appeals on material issue authorizes changed finding. **Tex CommnA** 276**SW**887.

1124–63 321 **Ill** 431, 151**NE**884; 330 **Ill** 640, 162**NE**139; 185 **IllA**171.

1124–63½–New. **In Illinois.**–318 **Ill** 24, 148**NE**858.

1124–63⅓–New. In Utah duty to make findings of fact rests primarily on the trial court. 70**Utah**1, 257**P**673.

1124–63¼–New. In North Carolina, the supreme court may find facts in equitable matters even if they have not been found by the lower court. 194**NC**799, 139**SE**774.

1124–63½–New. In California the supreme court may make modified findings upon which judgment of the trial court may stand. 202**Cal** 511, 261**P**998.

1124–63⅔–New. The supreme court and district court of appeals may make findings of fact contrary to or in addition to those of the trial court in cases where jury trial is waived or does not exist as matter of right. 202**Cal** 501, 261**P** 994.

1124–63½–New. In Missouri, in proceeding to cancel a deed, the supreme court makes its own findings. **Mo** 281**SW**431.

1124–63¼–New. Under the California constitution and code of civil procedure, the appellate court is empowered to strike the trial court's findings and substitute others. **CalA** 265**P**957.

1124–63⅕–New. The appellate court may make proper findings from the evidence where the trial court's findings are contrary to the evidence. 86**CalA** 689, 261**P**717.

1124–63 1/10–New. Failure of the court to make a finding does not require a new trial, but the appellate court could make a finding. 93**CalA**411, 269**P**672.

1124–63 1/11–New. Where the trial court fails to make findings according to the evidence which was not conflicting, the appellate court is authorized to make findings contrary or in addition to those made by the trial court. 95**CalA**772, 273 **P**613.

1124–63 1/12–New. The appellate court may adopt adequate findings based on the evidence in order to support judgment. 99**CalA**473, 278**P**902.

1124–63 1/13–New. In Pennsylvania the supreme court may make a finding in the absence of a finding by the referee. 294**Pa**47, 143**A**474.

1124–63 1/14–New. **In California,** where evidentiary facts from which inference might be drawn are set forth in stipulation, and the trial court did not make a finding, the appellate court could make a finding on the issue. 99**CalA**723, 279**P** 464.

1124–63 1/15–New. In California where jury is waived court of appeal may make findings contrary or in addition to those of trial court. **CalA** 290**P**311.

1124–63 1/16–New. In California court has power to make supplementary findings in aid of judgment in non-jury cases. **Cal** 291**P**835.

1124–64 **TexCommnA** 1**SW(2d)**568.

1124–66 **TexCivA** 26**SW(2d)**405.

1124–68 33 **OhA**303, 169**NE**314.

1124–70 See also **TexCivA** 30**SW(2d)** 362.

1125–76½–New. **Striking findings** which are not within issues is proper. 241**NY** 446, 150**NE**511.

1125–77 **TexCivA** 278**SW**224 (court has no jurisdiction, on motion, to affirm on certificate, where record fails to show perfection of appeal by filing of bond or otherwise). [a] (2) **TexCivA** 278**SW** 224. [b] (1) **TexCommnA** 265**SW**140.

1125–80 164**La**1009, 115**S**127; 4**LaA** 451; 5**LaA**162(2dcase); 7**LaA**737; 7 **LaA**751; 8**LaA**326; 8**LaA**518; 116 **Or** 136, 240**P**890; **TexCivA** 276**SW**955; **Tex CivA** 286**SW**543.

1125–81 195**Cal** 582, 234**P**370; 208**Cal** 645, 283**P**943; 161**La**728, 109**S**403. See also 174**Minn**401, 219**NW**457 [citCJ].

1126–82 161**La**728, 109**S**403.

1126–86 22**AlaA**44, 111**S**896; 33**NM**184, 262**P**225; **TexCivA** 276**SW**955; **TexCivA** 286**SW**543; **TexCivA** 293**SW**664; **Tex CivA** 1**SW(2d)**917; **TexCivA** 13**SW(2d)** 390; **TexCivA** 29**SW(2d)**817. [a] **Court** is not authorized to reform judgment where right to appeal was forfeited. **TexCivA** 1**SW(2d)**917.

1126–87 67**CalA**420, 227**P**938.

1126–93 **TexCivA** 286**SW**543.

1127–6½–New. Parties who perfected an appeal by giving an appeal bond could not defeat appellee's right to have judgment of the trial court affirmed on a certificate because of appellants' failure to file the record, under the statute, by attempted abandonment of the appeal and presentation of the record for review on writ of error. **TexCivA** 13**SW(2d)**390.

1127–6⅓–New. A motion to reform and, as reformed, to affirm a judgment is not a motion to affirm on certificate. 115**Tex** 205, 281**SW**837.

1127–6¼–New. Where alteration of transcript of record was made by counsel with apparently no intent to injure adversary, and without conscious wrongdoing, a motion to strike the transcript, and a motion to affirm on certificates based thereon, may be overruled. **Tex CivA** 19**SW(2d)**156.

1127–7 **TexCivA** 11**SW(2d)**209.

1127–8 **MoA** 8**SW(2d)**1021. But see 245**Mich**240, 222**NW**154.

1127–9 **Nev** 292**P**620 (motion too general).

1127–12 206 **Iowa**766, 221**NW**449.

1127–14½–New. A complaint by appellant of an error in the record proper, first made in the brief filed in opposition to motion to affirm, is too late. **MoA** 256**SW**1100.

1127–14⅓–New. Such complaint "that the answer is not sufficient" is not specific enough for consideration. **MoA** 256**SW**1100.

1127–14¼–New. Mistake of appellant's counsel in construing statute is not sufficient showing of good cause to defeat application to affirm judgment. 118**Tex**650, 23**SW(2d)**695.

1127–15 [a] **MoA** 8**SW(2d)**1021.

1127–20 **MoA** 8**SW(2d)**1021.

1127–21½–New. Appellate court acquires no jurisdiction of motion for affirmance of judgment until citation in error has been served. **TexCivA** 24**SW (2d)**444.

1127–23 **TexCivA** 278**SW**927; **TexCivA** 297**SW**309.

1127–25 206 **Iowa**766, 221**NW**449.

1127–29 **MoA** 8**SW(2d)**1021.

1127–30 206 **Iowa**766, 221**NW**449 (reasonable promptness is required); **Tex CivA** 276**SW**308; **TexCivA** 278**SW**927. [a] **Appeal dismissed** where belated motion showed abandonment of appeal and appellant joined in motion to affirm. **TexCivA** 297**SW**309.

1128–37 105**Tex**511, 152**SW**166 (certificate need not show jurisdiction of trial court).

1128–38 See also 117**Tex**155, 299**SW** 228.

1128–39 **MoA** 8**SW(2d)**1021.

1128–40 [a] (8) Failure to file transcript in time. **TexCivA** 29**SW(2d)**823.

1128–44½–New. Where, at the time the court of civil appeals rendered judgment of affirmance pursuant to an agreed motion of the parties, it had before it certified copies of plaintiff's petition, judgment of the court below, notice of appeal, and an appeal bond, it was held that, under the statute, judgment of affirmance was not premature, but was authorized, notwithstanding the regular transcript and record on appeal had not been filed. **TexCivA** 11**SW(2d)**209.

1128–47 **MoA** 8**SW(2d)**1021 (cause for default must be shown).

1129–50 115 **Okl** 195, 241**P**740.

1129–55 See also **MoA** 8**SW(2d)**1021.

1129–55½–New. But ordinarily the court will deny the motion where it involves a consideration of the merits resulting in advancement of hearing over other appeal. 200**Cal** 739, 255**P**178.

1129–57½–New. On a motion to affirm on certificate under the Texas statute for failure to complete the appeal the only inquiry is whether a judgment has been rendered and appealed from and whether the appeal has not been completed. **TexCivA** 274**SW**196.

1129–57⅓–New. On such motion the jurisdiction of the trial court to render the judgment is not in issue. **TexCivA** 274**SW**196.

1129–57¼–New. On a motion under such statute the court has no jurisdiction to reform the judgment. **TexCivA** 274**SW**196.

1129–57⅕–New. A prayer for such relief contained in a motion under the statute will be treated as surplusage and disregarded. **TexCivA** 274**SW**196.

1129–57⅙–New. Where consideration of the questions presented by the motion would involve a determination of the merits of the appeal and effect an unwarranted advancement of the case, the motion to affirm will be denied. 196 **Cal** 401, 238**P**87.

1129–58 96**Fla**795, 119**S**153; 163**Ga**493, 136**SE**459; 165**Ga**890, 142**SE**277; 34**GaA** 184, 128**SE**923; 37**GaA**146, 139**SE**134; 37 **GaA**390, 140**SE**426; 37**GaA**821, 142**SE** 565; 119**Kan**518, 240**P**947; 6**LaA**816; 8**LaA**27; 8**LaA**150; 8**LaA**155; 8**LaA** 475; 235**Mich**217, 209**NW**129 (though case is hard one, it will be affirmed); 175**Minn**153, 220**NW**418; **Miss** 107**S**384; **Miss** 107**S**385; 218**AppDiv**341, 218**NYS** 317; 193**NC**834, 136**SE**926; 105 **Okl** 66, 231**P**247 (no error in instructions and evidence reasonably tends to support verdict); 111 **Okl** 251, 239**P**572; 113 **Okl** 280, 241**P**752; 113 **Okl** 285, 241**P** 758; 114 **Okl** 101, 243**P**728; 115 **Okl** 44, 241**P**480; 115 **Okl** 176, 241**P**781; 116 **Okl** 63, 243**P**216; 116 **Okl** 243, 244**P**429; 116 **Okl** 297, 244**P**739; 118 **Okl** 161, 247 **P**110; 119 **Okl** 62, 248**P**315; 123 **Okl** 216, 252**P**1099; 130 **Okl** 156, 265**P**1059; 130 **Okl** 182, 266**P**439; 43 **OklACR**208 [reh pending]; 123 **Or**215, 261**P**691; 99 **Vt**421, 133**A**247. See also **TexCivA** 14 **SW(2d)**300. [a] **Error in refusing special charges and directed verdict not shown.** 5**F(2d)**22.

1129–59 220**Ky**451, 295**SW**467; 114 **Okl** 87, 243**P**722.

1129–60 39**F(2d)**40; **Ark** 30**SW(2d)** 223; 207**Cal** 39, 276**P**993; 94**Fla**90, 113 **S**640(1stcase); 94**Fla**118, 113**S**640(2d case); 94**Fla**196, 113**S**640(3dcase); 94 **Fla**204, 113**S**640(4thcase); 96**Fla**795, 119**S**153; 119**Kan**372, 239**P**759; 119 **Kan**834, 241**P**118; 125**Kan**751, 266**P**81; 127**Kan**378, 273**P**442; **Kan** 289**P**446; 220 **Ky**451, 295**SW**467; 1**LaA**82; 1**LaA**219; 4**LaA**478; 5**LaA**164; 6**LaA**17; 8**LaA** 475; 8**LaA**481; 242**Mich**33, 217**NW**800 (appeal from decree entered on stipulation); 173**Minn**485, 217**NW**681; 117 **Nebr**344, 220**NW**573; **NJ** 147**A**117; 193 **NC**839, 137**SE**927; 198**NC**779, 153**SE** 398; 112 **Okl** 86, 240**P**110; 112 **Okl** 210, 239**P**246; 113 **Okl** 252, 241**P**1094; 114 **Okl** 35, 243**P**165; 114 **Okl** 181, 245**P**603; 114 **Okl** 299, 246**P**240; 115 **Okl** 6, 240**P** 1040; 115 **Okl** 70, 241**P**495; 115 **Okl** 71, 241**P**747; 115 **Okl** 81, 241**P**742; 115 **Okl** 95, 241**P**1102; 115 **Okl** 97, 241**P**1097;

116 Okl 53, 243P514; 116 Okl 62, 243P 172; 116 Okl 104, 243P188; 116 Okl 159, 243P950; 116 Okl 180, 244P813, 36 Okl A636; 117 Okl 53, 244P760; 117 Okl 194, 245P997; 117 Okl 233, 245P850; 117 Okl 288, 246P388; 117 Okl 297, 246 P451; 117 Okl 303, 246P425; 118 Okl 111, 246P851; 119 Okl 4, 244P166; 119 Okl 122, 249P286; 119 Okl 244, 249P 961; 119 Okl 303, 249P730; 119 Okl 360, 249P723; 120 Okl 3, 249P724; 120 Okl 11, 249P916; 120 Okl 46, 249P506; 120 Okl 66, 249P739; 120 Okl 108, 250P892; 120 Okl 126, 250P914; 120 Okl 228, 251 P89; 121 Okl 5, 247P58; 121 Okl 10, 247 P69; 121 Okl 59, 247P366; 122 Okl 156, 252P829; 123 Okl 206, 251P1012; 123 Okl 213, 252P1095; 123 Okl 284, 253P 75; 129 Okl 11, 263P111; 129 Okl 228, 264P200; 132 Okl 4, 268P1110; 132 Okl 100, 269P357; 118 Okl 129, 247P31; 118 Okl 142, 247P85; 120 Okl 210, 251P73; 120 Okl 243, 251P481; 123 Okl 53, 251P 1017; 123 Okl 89, 252P15; 123 Okl 245, 253P92; 123 Okl 228, 253P95; 124 Okl 63, 253P1014; 124 Okl 123, 254P79; 123 Okl 186, 254P496; 123 Okl 149, 256P32; 125 Okl 114, 256P748; 125 Okl 224, 257 P322; 125 Okl 254, 257P372; 126 Okl 133, 258P891; 126 Okl 150, 259P125; 127 Okl 30, 259P559; 128 Okl 247, 262P 654; 128 Okl 282, 262P675; 131 Okl 79, 267P661; 131 Okl 249, 268P276; 131 Okl 258, 268P729; Okl 269P509; 132 Okl 169, 270P17; 132 Okl 237, 270P28; Okl 271P263; 133 Okl 283, 271P1033; 40 OklACR218 [reh pending]; 40 Okl ACR358 [reh pending]; 40 OklACR465 [reh pending]; 117 Or278, 243P785; 117 Or286, 243P778; 291Pa591, 140A530; 86PaSuper471; 86PaSuper492; 86PaSuper548; TexCommnA 298SW540; Tex CivA 293SW1119; TexCivA 2SW(2d) 499; TexCivA 22SW(2d)720; 146Va 225, 135SE672; 187Wis227, 201NW986.

1130–61 36GaA166, 136SE100; 44 Ida 402, 257P1118; 125Kan386, 265P46; 125Kan518, 264P1078; 126Kan39, 267 P19; 126Kan677, 271P270; 152Miss201, 119S299; 193NC830, 136SE926(1stcase); 193NC832, 136SE926(3dcase); 193NC 835, 136SE926(4thcase); 114 Okl 48, 242P772; 115 Okl 121, 242P214; 116 Okl 29, 243P731; 116 Okl 30, 243P721; 117 Okl 51, 244P772; 117 Okl 92, 244P 774; 117 Okl 93, 245P555; 117 Okl 255, 245P990; 117 Okl 285, 246P441; 118 Okl 96, 246P842; 118 Okl 97, 246P830; 118 Okl 159, 247P413; 119 Okl 49, 247P 986; 119 Okl 185, 249P391; 120 Okl 57, 249P508; 123 Okl 17, 253P40; 123 Okl 198, 251P480; 123 Okl 289, 253P287; 124 Okl 34, 254P703; 128 Okl 299, 263P 107; 128 Or83, 262P939; 126 Or525, 270P491; TexCivA 16SW(2d)941.

1130–62 224 IllA597 (on conflicting evidence); TexCivA 30SW(2d)388.

1130–63 164Ga550; 139SE2; 120Kan 423, 243P1016; 73Mont385, 236P545; 124 Okl 213, 258P160; 129 Okl 195, 264 P151. See also TexCivA 279SW928 (fundamental error).

1130–64 170Minn60, 212NW5; Nebr 226NW958(1stcase); Nebr 226NW958 (2dcase); Nebr 226NW959(1stcase); Nebr 226NW959(2dcase); 193NC830, 136SE926(1stcase); 193NC832, 136SE 926(3dcase); 193NC835, 136SE926(4th case); 28 OhA208, 162NE610; 115 Okl 227, 242P770; 123 Okl 231, 253P53.

1130–66 208Cal 645, 283P943; 29 Hawaii434.

1130–71 224 IllA117; 35BC119 [1925] 3DomLR467, [1925] 1WestWkly673.

1130–75 165Ga826, 142SE164 (trial by auditor); 224 IllA474; Ind 171NE5; 28 OhA208, 162NE610; 115 Okl 176, 241P 781.

1131–78 125Kan108, 263P1073.

1131–80 120Kan130, 242P481.

1131–81½–New. , or where the contentions of error are decided against appellant. 110 Okl 30, 235P1070.

1131–85 117 Okl 133, 245P615.

1131–86 218Ky575, 291SW768; 85 Mont604, 281P540 (judgment for defendant on pleadings under statute for failure of plaintiff to plead to new matter); 124 Or542, 264P1119.

1131–93 CalA 285P734; 93Fla1104, 113 S563; 199 Ind290, 157NE433; 2LaA 701; 5LaA64; 6LaA687; 112 Okl 293, 240P1039; 115 Okl 109, 241P809; 138 Okl 40, 280P271; 97PaSuper200; Tex CivA 273SW609; TexCivA 284SW315; TexCivA 296SW979; TexCivA 27SW (2d)574; TexCivA 27SW(2d)643. [a] (3) Where statute prescribed a written notice by one of two codefendants before judgment could be given to him, error is cured where appellant failed to raise objection at trial and substantial justice was done. 127Misc496, 216NYS 561. (4) In Indiana, under code, the rule is specifically applicable to overruling demurrers. 199 Ind290, 157NE 433. [b] **Affirmance on ground of substantial justice not warranted.** OhA 173NE245.

1131–94 161Ga543, 132SE99; 221Ky 439, 298SW1089; NJ 139A319; 33NM 128, 262P226; NC 134SE463; 127 Or 276, 263P907; 125 Or389, 266P900; TexCivA 292SW953; NS [1927] 3 DomLR30. [a] **In action to quiet title to irrigation ditch,** judgment for defendant should be affirmed, where all evidence was before court, if defendant established right to ditch under either federal statutes or adverse possession, though rights were incompatible. 84 Mont68, 274P151.

1132–96 108Ala357, 19S386; 114Ala 630, 21S534; 155Ala474, 46S763; 92Ga 670, 19SE37; 43 Ida64, 249P254, 258 [citCJ]; 224 IllA77, 83 [citCJ]; 224 IllA367; 126Kan291, 267P998; 50ND 309, 195NW659; 137SC396, 135SE367. [b] 209Ky829, 273SW549.

1132–1½–New. On appeal by both parties where defendant concedes that he does not ask for a reversal and a new trial but insists that he was entitled to directed verdict and asks the appellate court to enter judgment in his favor, and the appellate court decides against defendant's claim, the judgment should be affirmed unless plaintiff is entitled to a new trial on his assignments of error. 231Mich585, 204NW776.

1132–2 43 Ida64, 249P254, 258 [citCJ]; 218Ky575, 291SW768; 125Me526, 134A 801; Minn 230NW269; 146Miss672, 113S175; MoA 12SW(2d)761; TexCivA 280SW621; TexCivA 282SW669; Tex CivA 287SW1118; TexCivA 26SW(2d) 432.

1132–3 224 IllA291 (as to payment of receiver's fees).

1132–4 246 IllA361; 33NM128, 262P 226.

1133–10 97PaSuper113 (no assignment worthy of discussion).

1133–11 Ariz 291P993.

1133–14 202Cal 295, 260P290; 162La 595, 110S768(2dcase); 162La595, 110S 768(3dcase); 146Miss672, 113S175; 88 PaSuper158. [b] (17) For failure to include evidence of proceedings on appeal from decision of justice below. 146 Miss672, 113S175.

1134–18 92Fla503, 109S433, 434 [quot CJ]; 164Ga391, 138SE774; 41GaA206, 152SE587; 43 Ida64, 249P254, 258 [cit CJ]; Iowa 231NW488; 164La204, 113 S818; TexCivA 275SW285. But see 220 Ky234, 294SW1070.

1134–19 98CalA415, 277P190; 43 Ida 64, 249P254, 258 [citCJ]; 317Mo 484, 297SW374 (where defendant wrongfully deprived of jury trial); 240NY268, 148 NE518. See also 81Colo 254, 254P990.

1135–20 TexCivA 275SW285.

1135–23 34Wyo 378, 244P216, 44ALR 1255.

1135–25½–New. The appellate court will not reverse the trial court and render judgment on the pleadings, where the whole record is before it and the same result may be obtained by affirming the judgment of the trial court on the merits. 9LaA403, 120S496.

1135–26 85Colo 289, 275P896. [a] **Decree may not be affirmed on ground of bar of limitations** where it is impossible to apply the statute to some of the issues, without evidence, of which there was none, and the decree erroneously dismissed complaint on ground of res judicata without taking plaintiff's testimony. 42 Ida158, 243P655.

1135–28 274US106, 47SCt499, 71L ed 949; 16F(2d)782; 34F(2d)3; 92Fla503, 109S433, 434 [quotCJ]; 93Fla1115, 113 S563; 201 Iowa476, 205NW847; 202 Iowa577, 210NW754, 755 [citCJ]; 98 NJEq692, 130A519; 145Wash25, 258P 836; 36Wyo 522, 257P7. [a] (4) 161Ga 895, 132SE74. (11) Whether court erred in refusing injunction against enforcing resolution of school board is moot where time during which resolution effective had expired. 201 Iowa625, 207NW755.

1136–33½–New. Supreme court need not examine contentions of error in moot cases because of possibility of injunction bond liability, but may affirm without prejudice. NM 291P293.

1136–35 78Colo 421, 242P638.

1136–36 78Mont532, 255P1052; 82 Mont150, 266P369. [a] **In Montana.**–75 Mont99, 242P425.

1136–37 See also 80Mont453, 260P1051.

1136–38 159Tenn254, 17SW(2d)917, 65 ALR357; TexCivA 8SW(2d)206.

1136–41½–New. , or does not order new trial where there is evidence to support judgment. 241NY598, 150NE570.

1136–41¼–New. Where complaint is improperly dismissed and intermediate court reversed on facts and law, new trial must be granted when there is some evidence to sustain the cause. 241 NY598, 150NE570.

1136–46½–New. Error in overruling demurrer no ground for affirmance of erroneously directed verdict. TexCivA 271SW158.

1136–46¼–New. Dismissal will be affirmed where the court below had no jurisdiction of the cause but was without prejudice to proceed properly. 284 Pa528, 131A536.

1136–46¼–New. The appellate court cannot affirm a judgment rendered notwithstanding the verdict which the trial court was powerless to render. Tex CivA 298SW666.

1136–47 93Fla611, 112S768.

1137–48 93Fla611, 112S768; 40Wyo 350, 277P968.

1137–52 7F(2d)3; 214Ala15, 106S239; 91Fla1032, 109S219; 93Fla354, 114S 444; 36GaA767, 138SE336; 83 IndA 626, 149NE655; 170Minn347, 212NW 528; 315Mo 987, 288SW777; NJ 131A 87; 136Wash410, 240P355, 44ALR681. [a] **Court cannot reduce damages** without consent of prevailing party. 7F (2d)3.

1138–63 214Ala15, 106S239; 218Ala 260, 118S276; Ala 129S5; 168Ark1168, 271SW452; 169Ark1008, 277SW533 (error cured by reduction of amount); 201 Cal 105, 255P750; 80CalA1, 251P830; CalA 289P950; 111Conn575, 150A692; 164Ga474, 139SE18; 36GaA767, 133SE 336; 37GaA254, 139SE573; 37GaA734, 141SE672; 233 IllA522; 235 IllA299; 244 IllA218; 244 IllA330; 256 IllA420; 256 IllA480; IndA 167NE535; Iowa 223NW882; 121Kan254, 246P674; 170 Minn347, 212NW528; Miss 116S888; 311Mo 604, 279SW115; Mo 23SW(2d) 1045; MoA 275SW572; MoA 293SW 432; NJ 131A87; 212AppDiv326, 209 NYS16; 224AppDiv199, 229NYS719; 53 ND291, 205NW722; 31 OhA118, 166NE 588; 125 Okl 202, 257P298; 143 Okl 290, 288P981; 133SC23, 130SE552 (dictum); 116Tex253, 288SW425; Tex CommnA 24SW(2d)9; TexCivA 283SW 877; 101Vt285, 143A394; 195Wis5, 216 NW491; 24QueKB294, 24DomLR687 [rev 20DomLR247]. [a] **In Texas.**–CivA 276SW298.

1138–64 214Ala15, 106S239; 91Fla 1032, 109S219. [b] **Statute is mandatory.**–TexCivA 276SW298.

1138–67 91Fla1032, 109S219.

1138–69½–New. Where plaintiff, before the taking of an appeal by defendant, remitted the amount improperly included in the judgment and requested the clerk to credit the amount as of the date of entry of judgment, the judgment will be affirmed with directions to enter partial satisfaction. 201Cal 105, 255P 750.

1138–69¼–New. The conclusion of the reviewing court that a new trial should be ordered unless remittitur was filed has been held not to deprive plaintiff of the privilege of remitting excess, because it was identical with the conclusion of the lower court. RI 145A19.

1139–70 235 IllA299; 241Mich279, 217 NW26; MoA 18SW(2d)545; 120 Oh273, 166NE186; TexCivA 10SW(2d)441.

1139–71 91Fla375, 108S560.

1139-78 214Ala15, 106S239; 35Ariz60, 271P639. 90Fla168, 105S315; 90Fla168, 105S315. 256 IIIA461; 128Kan32, 276P63; 235Mich687, 209NW813; 237 Mich612, 213NW128; 315Mo987, 288 SW777 Mo 88SW(2d)624; 219MoA234, 271SW1023; Nev 269P1008 (punitive damages); 120 Ok273, 166NE186; 19 OhAD4; 20 OhA12, 151NE805; 115 Okl 166, 242P164; 47Okl 29, 129A594; Tex CivA 276SW298; 151Va964, 145SE732. But see Va 153SE832. [b] (3) No power to enter remittitur. 315Mo 1165, 289SW 609

1140-81 72 IIIA22; 99 IIIA563; 254 III A192; 242Mich163, 218NW677; 120 Ok 273, 166NE186. See also 120 Ok273, 166 NE186

1140-82 Mo 300SW465; 140 Okl 185, 232P346

1140-83 56ND607, 218NW862; 132 Okl 107, 269P368.

1141-86 94Fla586, 114S366; 44 Ida 249, 256P523; 6DamaAbrMass279; 4 PickMass497; 221MoA881, 238SW109; NJ 131A87.

1141-87 243 IIIA163.

1141-89 41GaA716, 154SE706.

1142-90 173Ark350, 118SW(2d)774, 61 ALR1348

1142-91 34GaA33, 123SE69.

1142-96 101NJLq127, 139A16

1142-1 233 IIIA522; 85 IndA428, 151 NE500; 120 Okl 202, 267P298, 151SE 637, 119SE241; TexCivA 297SW258.

1143-3 163Ga841, 136SE914; 165Ga 170, 141SE203; 36GaA538, 137SE286; 36GaA167, 133SE336; Miss 120S190(2d case) (remission of part of sum awarded); TexCivA 284SW301; TexCivA 297 SW255

1143-8 122Kan657, 253P242.

1143-10 34F(2d)616; 105Conn533, 136 A90. 106GaA36, 138SE700; 3GaA320, 110SE598. 92 IIIA273; 113 IIIA123; 196 IIIA618 (interest); 21 IndA110, 51 NE733, 85IndA629, 156NE265; 203 Mass273, 89NE615 Mo 30SW(2d)1018; 150MoA530, 131SW122, 214MoA615, 271SW923; MoA 297SW199; 85Mont 37, 277P417; 31NM453, 247P548; Tex CommnA 284SW(2d)9; TexCivA 284SW 301. TexCivA 291SW602; TexCivA 297 SW258; TexCivA 248SW(2d)465. See also TexCivA 277SW1116

1143-11 MoA 278SW(2d)497; Tex CommnA 18SW(2d)577; TexCivA 118SW (2d)550.

1143-11½-New. or appellate court will reverse and remand with directions to ascertain proper amount; 235 IIIA299.

1144-13 57ND43, 220NW630 (new trial granted unless plaintiff consents to reduce verdict by certain amount, evidence of which was excluded).

1144-16 TexCivA 22SW(2d)514.

1144-17 178Minn177, 226NW411 (prevailing party should be allowed to remit erroneous excess); MoA 282SW414; 117 Okl 120, 245P638.

1145-18 107Conn568, 141A652; MoA 288SW113; Nebr 229NW901; 21 OhA 282, 152NE757; 50SD502, 210NW739; 35CanSC68.

1145-18½-New. prospective damages, 231Mich152, 204NW126.

1145-19 114 OhSt560, 151NE667.

1145-20 99VQ219, 131A21, 49ALR1382.

1145-21 MoA 284SW161; 114 OhSt 560, 151NE667.

1145-22 234Mich656, 209NW49 (failure in personal injury case to instruct to find present worth of future earnings, pain, and suffering); 237Mich 274, 211NW625; 242Mich217, 218NW 803

1145-24 192 IIIA187; TexCivA 108W (2d)441; TexCivA 108W(2d)1030.

1145-25½-New. Error in submitting an item not warranted by the evidence is not cured by remittitur where judgment must be reversed and the cause remanded because of an erroneous instruction. MoA 158W(2d)884.

1145-27 233 IIIA522 (remittitur of item of six hundred twenty five dollars representing difference between plaintiff's real loss and amount of judgment).

1145-28 231Mich152, 204NW126; Tex CivA 297SW638.

1146-46½-New. A remittitur filed by the appellee may be withdrawn on a motion supported by a proper showing. TexCivA 298SW631.

1146-48 272US400, 478Ct144, 71Led 316; 215Ala17, 109S102; 215Ala107, 110S30; 215Ala123, 110S39, 48ALR 1437; 169Ark1065, 278SW353 (affirmed judgment becomes final after time for filing motion for rehearing expires); 318 Ill 60, 148NE867; 316Mo278, 290 SW429; TexCivA 285SW930; TexCivA 296SW927; 149Va618, 140SE664.

1146-49 169Ark1065, 278SW353 (upon affirmance, process may issue out of supreme court for enforcement of judgment); 86PaSuper283.

1147-52 152Miss305, 120S174.

1147-54 316Mo278, 290SW429; 241 NY489, 150NE525.

1147-56 [a] **Remand to equity court.**-234Mich317, 207NW828.

1147-57 Mo 300SW469 (to ascertain and assess rents and profits); MoA 277 SW575; TexCivA 288SW264; 68Utah 585, 251P374.

1147-59 120Kan406, 243P1035 (amount of recovery); 70Utah57, 257P1060. [a] **Motion for leave to file supplemental bill to cover intervening damages** in an action to enjoin maintaining of a dam is a matter for the chancellor to consider on remand. 98Vt405, 130A137.

1147-60 154Md697, 140A840. But see 162Ga471, 134SE85; 35GaA443, 133SE 303.

1147-63 68Utah585, 251P374.

1148-66 TexCivA 297SW339.

1148-67½-New. Whether to remand equitable case for new trial where the court of equity does not give equitable relief not demanded and is unable to give relief sought is largely discretionary. 241NY489, 150NE525.

1148-67¼-New. Where the trial court erroneously directed a verdict for defendant instead of ordering a nonsuit in a case in which plaintiff failed to make a prima facie case and defendant offered no proof and there are no other errors, the appellate court may affirm with direction that plaintiff be permitted to vacate the judgment and enter one of nonsuit. 37GaA664, 141SE422.

1148-67¼-New. In some jurisdictions the Supreme Court on remand cannot give direction guiding the chancellor in exercise of discretion in enforcing his orders and decrees. 160Tenn500, 26 SW(2d)152.

1148-68 Mo 278SW382 (equity case); TexCommnA 296SW877.

1148-73½-New. **Imposition of terms.** Where plaintiff appellant has died pending appeal, court may, in affirming a judgment granting a new trial impose as a condition that no exception be taken at hearing on ground of appellant's death. [1925]AC819, [1925] 3DomLR 1009, [1925] 3WestWkly49.

1148-75 CalA 290P512; 164Ga7, 137 SE567, 568 [citCJ]. See also Iowa 231 NW487. [a] **Judgment affirming order sustaining general demurrer** is as final disposition of case as affirmance of judgment upon verdict. 162Ga471, 134SE 85. [b] **Judgment of affirmance is determination that judgment appealed from is affirmed.**-87CalA20, 261P714.

1148-76 164Ga7, 137SE567, 568 [cit CJ].

1148-77 164Ga7, 137SE567, 568 [cit CJ]; NC 154SE318.

1148-78 164Ga7, 137SE567, 568 [cit CJ]; 318 Ill 174, 149NE614; 212Ky816, 280SW131; 319Mo 337, 4SW(2d)776; 154Wash150, 281P333. [a] **Affirmance of void judgment** adds nothing to its validity. 43OklACR119. [reh pending].

1149-95 [a] **Case stands as if no trial had taken place.**-Wash 291P709.

1149-95½-New. Affirmance does not inure to benefit of other parties conveying land. 170Ark180, 279SW359 (where decree against one inheriting land affirmed).

1149-95¼-New. Effect merely denies appellant's right in land and does not vest right in appellee. 170Ark180, 279 SW359 (original action having adjudged rights against appellee in favor of other defendants).

1149-95¼-New. The necessary effect of a holding of the appellate court that appellant was not entitled to an injunction and of an order affirming an order of the trial court refusing to grant an injunction is a dissolution of a temporary injunction. 307Mo 417, 270SW691.

1149-95½-New. A judgment of affirmance is not an independent judgment of recovery but is a pronouncement that the judgment of the lower court is right and should remain in force. 322Mo 450, 17SW(2d)505.

1149-95¼-New. Affirmance of judgment granting a new trial renders a decree nugatory and makes it unnecessary to rule on assignments of error relating to provisions of the decree. 169Ga7, 149 SE564.

1149-97 42F(2d)353; 216Ala534, 113S 613; 170Ark1116, 282SW970; 91CalA 176, 266P849; 81Colo 276, 255P610; 82Colo 333, 259P514; 124Kan604, 261P 840; 74Mont293, 240P384; 135Misc 724, 238NYS310; 50ND813, 198NW115; 35 OhA239, 172NE422; 118 Okl 31, 248 P645; 121 Okl 108, 247P996; 127 Okl 166, 260P6, 55ALR796; Pa 150A622; TexCivA 16SW(2d)338; TexCivA 16SW (2d)553; TexCivA 26SW(2d)353; 69 Utah413, 255P668; 104WVa156, 139SE 648; Wyo 288P12[citCJ]. See also Cal 291P835. [c] **Under federal statute** improper inclusion of mandamus in decree is held not to require anything more than amendment on appeal. 23F(2d) 371.

1150-98 127Kan106, 272P123; 223Ky 603, 4SW(2d)388 (small item erroneously included in judgment); 116 Okl 241, 244P424; 129 Okl 103, 263P669; 69Utah 413, 255P668; Vt 151A507; Wyo 288P 12 [citCJ] (notwithstanding imperfections in findings).

1150-99 238Mich221, 213NW96; Tex CommnA 276SW887; 69Utah413, 255P 668.

1150-1 121 Okl 294, 249P1115.

1150-4 81Colo 254, 254P990; LaA 124 S636; 254Mass488, 150NE323; 258Mass 185, 154NE843; 308Mo 201, 271SW431; TexCommnA 276SW887; TexCivA 275 SW279; TexCivA 108W(2d)1043.

1150-5 124Kan604, 261P840; 239Mich 270, 214NW84; 240Mich697, 216NW374.

1151-10 125 Okl 114, 256P748.

1151-13 Wash 292P403.

1151-15 TexCivA 20SW(2d)104.

1151-19 169La731, 125S871.

1151-24 See also 116 Oh744, 158NE8.

1151-25 But see Wyo 288P12.

1151-27 69CalA159, 230P976; 70CalA 245, 233P381.

1152-32½-New. Judgment for plaintiff in claim and delivery following a verdict which is silent as to the part of the property claimed cannot be modified on appeal by awarding a return of such property to defendant, where the answer does not demand its return. 83Mont 185, 271P452.

1152-35 170Ark1116, 282SW970; 98 CalA610, 277P347; 102CalA606, 283P 80; 98Fla623, 124S736; MoA 295SW 474; 46Philippine63; 48SD523, 205NW 242; TexCivA 291SW262. [e] (1) 47 Ida32, 272P257.

1152-36 219Ala68, 121S55; 34NM277, 280P398.

1153-41 200 Iowa1363, 206NW268; 204 Iowa950, 216NW77; 210Ky718, 276SW 815; 158La489, 104S218; 164La175, 113S808; 164La185, 113S812; 12LaA 335, 125S165. [a] **Cause remanded to lower court** with directions that by supplemental order language of judgment be made more definite as to whether finding was one of actual or merely constructive fraud in relation to fraudulent conveyances. 121Kan159, 246P971.

1153-44 34GaA217, 129SE8; 217App Div193, 216NYS500; TexCivA 295SW 939.

1153-46 201Cal 70, 255P499 (reversal of decree not required); 81CalA 387, 253 P752.

1153-48 201Cal 70, 255P499 (judgment in specific performance of contract for exchange of properties modified by adding direction as to delivery of deeds).

1153-50 Okl 261P962.

1153-55 317 Ill 356, 148NE64; 124Kan 604, 261P840; 212Ky379, 279SW654 (judgment modified to confine to adjudication of matters in pleadings); 6LaA 532; 6LaA598; 243Mich209, 220NW

301; 33PortoRico 558; TexCivA 10SW (2d)733. See also 33NM284, 265P717.
1154–60 124Kan604, 261P840; 243NY 545, 154NE598; TexCivA 299SW466.
1154–61 84Colo 445, 271P177; 212App Div502, 209NYS380 (order modified by providing that issue raised by one clause of answer alone to be tried); 138 Okl 163, 280P609.
1154–62 124Kan604, 261P840.
1154–63 93CalA695, 270P394; 124Kan 604, 261P840; 141Va757, 127SE89. [a] (4) Judgment modified to refer to denial of interlocutory injunction only. Ga 154SE788. [b] **Relief unnecessary.** –159La957, 106S455.
1154–64 242Mich198, 218NW761; 244 Mich653, 222NW110; 308Mo 201, 271SW 481; 292Pa556, 141A484; TexCivA 281 SW883; Utah 274P454. [a] **Service of notice by appellants** as to nature of modification required under some statutes. Wis 228NW746.
1154–65 118 Or135, 246P348.
1155–70 22AlaA600, 118S494; 67CalA 575, 228P62; MoA 286SW832.
1155–72 3LaA532.
1155–75 216Ala534, 113S613; 200 Iowa 974, 205NW777.
1155–75½–New. , or a dismissal for want of equity to a dismissal at the cost of defendant. 22F(2d)241 (relief unnecessary).
1155–82½–New. Judgment in action for tort of wife in which husband was joined will be changed from general judgment against him to one which holds him liable only to extent of his interest in community property. TexCivA 275SW310.
1155–85 44 Ida719, 260P158.
1156–86 104WVa156, 139SE648.
1156–89½–New. Where no verdict was rendered against a partnership in an action on a partnership obligation, the appellate court cannot reform a judgment entered on a verdict against the partners as individuals. 123 Okl 265, 253P72.
1156–90 TexCivA 48SW(2d)289. [a] (10) Judgment limited to extent of husband's interest in community property. TexCivA 275SW310.
1156–91 TexCivA 10SW(2d)394. But see 34PortoRico 599.
1156–92½–New. Judgment which without authority directs payment out of particular assets and property of corporation may be corrected by modification. 68CalA72, 228P553.
1157–96 124Kan604, 261P840; 159La 1019, 106S550.
1157–98 219Ala652, 123S18; TexCivA 291SW262; TexCivA 297SW888 (judgment giving appellants land reformed so as to partition land among them); TexCivA 298SW(2d)816.
1157–7 166Ga700, 144SE251; 167Ga 181, 145SE47; 1LaA215; 20BC8, 18 DomLR464, 28WestLR754, 6WestWkly 1202 (though precise damage problematical).
1157–8 132NYS778; 49ND312, 193NW 602, 27ALR1392; 49SD394, 207NW166.
1157–9 132NYS778; 49ND312, 193NW 602, 27ALR1392, 292Pa122, 140A774 (not corrected where requisite data not given); 98Vt433, 129A157.
1157–10 Mont 286P415.
1158–19 163Ga547, 136SE423; 37GaA 229, 139SE822; 147Miss296, 111S874; Mo 98SW(2d)918; NJ 131A87; 226App Div174, 235NYS86; 52ND786, 204NW 828; 127 Okl 166, 260P6, 55ALR796; Or 288P1003; Pa 149A488 (correcting judgment without reversing); 133SC 395, 131SE18; 135Wash406, 237P1002 (interest held properly allowable on reduced judgment); 6AltaL187, 12DomLR 368, 24WestLR742, 4WestWkly879.
1158–20 163Ga547, 136SE423; 37GaA 229, 139SE822; 204 Iowa555, 215NW 664; 205 Iowa612, 218NW282 (modification to avoid possible double liability); 220Ky330, 295SW164; 1LaA756; 6LaA 636; 7LaA28; 7LaA313; 7LaA552; 7 LaA645; 8LaA239; 8LaA723; 236Mich 540, 211NW64; 242Mich130, 218NW671; 154Miss523, 122S752(2dcase); 52ND 786, 204NW828; 118 Okl 23, 246P478; 127 Okl 166, 260P6, 55ALR796; 141 Okl 183, 284P288; 123 Or469, 259P1064, 123 Or469, 260P1099; 129 Or224, 277P 101; Can 8DomLR724, 2WestWkly923; 16BC420, 1DomLR384, 19WestLR851, 1 WestWkly486; Can 8DomLR724, 2West Wkly923. [a] **Instances where reduction of recovery not authorized.**–13LaA 667, 128S698.
1158–21 175Ark101, 298SW1023; 163 Ga547, 136SE423; 37GaA229, 139SE822; 204 Iowa555, 215NW664; 208 Iowa336, 223NW381; 228Ky656, 158W(2d)515; 147Miss296, 111S874; 40 OklACR233 [reh pending]; Pa 145A81; TexCivA 1 SW(2d)743. But see 198NC389, 151SE 877.
1158–22 171Ark994, 287SW185; 201 Cal 105, 255P750 (where respondent confesses error and consents to modification); 37GaA229, 139SE822; Iowa 229 NW239; 52ND786, 204NW828; 55ND 284, 213NW23; 127 Okl 166, 260P6, 55 ALR796; 136 Okl 237, 277P233; Utah 273P298; 105WVa197, 141SE789. [b] (1) 89PaSuper30; 49SD524, 207NW 543.
1158–23 43 Ida405, 252P675; 73Mont 321, 236P550; 118 Okl 23, 246P478.
1158–24 78CalA785, 248P1031; 11LaA 116, 119S445(1stcase); NJ 131A87; 160 Tenn294, 23SW(2d)669 (amount of judgments in actions by husband and wife prosecuted jointly reduced pro rata).
1158–25 32 OhA482, 168NE384 (where verdict was for stipulated sum against principal and like sum against surety and judgment is rendered against both for total amount, judgment should be modified by limiting recovery to sum specified).
1159–28 207 Iowa800, 218NW533; 4 LaA293; 127 Or450, 271P741; Pa 149A 163; TexCivA 8SW(2d)194; TexCivA 30SW(2d)518.
1159–29 101CalA58, 281P407 (interest before judgment on attorney's fees); 53ND564, 207NW438; 123 Or469, 259 P1064, 123 Or469, 260P1099; 124 Or 569, 265P1117.
1159–30 201Cal 105, 255P750; 35GaA 619, 134SE195; TexCivA 28W(2d)505. See also 116Nebr60, 215NW814.
1159–31 MoA 287SW657.
1159–32 123 Or469, 259P1064, 123 Or 469, 260P1099.
1159–35 104NJL102, 140A298; Tex CommnA 28W(2d)833.
1159–39 35Ariz60, 274P639; Pa 151A 362 (where amount was reduced by lower court).
1159–40 121Kan758, 250P299; 295Pa 131, 144A909.
1160–46 RI 133A345.
1160–50 118Kan302, 235P123 (in Kansas the supreme court has no power to increase verdict in personal injury cases). [a] **Most appellate court can do is to order new trial nisi giving defendant option of consenting to increase** or submitting to new trial. 133SC23, 130SE552.
1160–51 173Ark1160, 293SW1037; 229 Ky574, 17SW(2d)717; 223AppDiv567, 229NYS425; 154Wash201, 281P731(2d case); 3 OntWN1567, 22 OntWR860, 4 DomLR624; Que 12DomLR647. But see 28 OhA309, 162NE701. [a] (1) NJ 146A202.
1160–57½–New. An appellate court will not increase the amount of a judgment merely because the evidence would have sustained a judgment from the increased amount. TexCivA 281SW622.
1160–58 164La185, 113S812; 167La28, 118S597 (to provide for interest); LaA 129S226(2dcase). See also 3LaA439; 8 LaA582.
1161–59 See also 4LaA37; 4LaA497.
1161–63½–New. Where defendant buyer wrongfully cut and removed timber other than cypress and tupelo gum which he bought, and did not act in good faith in doing so, the appellate court cannot change judgment against defendant for part of the sum demanded by plaintiff, where there was no evidence showing the quantity of timber wrongfully cut and removed by defendant. 11LaA82, 120S221.
1161–72½–New. **In Saskatchewan** a court of appeal will not increase the award of damages assessed by a trial judge unless it appears that he failed to take into consideration some element of damage which he should have considered. Sask [1929] 3DomLR376.
1161–81 128 Okl 100, 261P553.
1161–83 32Ariz119, 256P114; 119 Okl 120, 249P317; 121 Okl 25; 246P1100; 121 Okl 40, 246P1117; 126 Okl 71, 258 P732; 128 Okl 100, 261P553.
1161–87 168La251, 121S760.
1161–88½–New. Dereliction of attorney in failing to attend trial held not ground for reversal. NJ 137A415.
1161–88½–New. Where no motion to affirm was made because of a defective bill of exceptions, the court will grant a reversal pro forma on exception to a lower court's action in rendering judgment for defendant, 100Vt376, 138A 778.
1161–88¼–New. Where a judgment was rendered for plaintiff by default, and defendant did everything possible, under statute, to get a statement of facts for the appellate court for a complete record, judgment must be reversed, and the cause remanded for new trial, that record of testimony and evidence may be made and preserved, under the statute, providing for appeal from all final judgments. 10LaA55, 120 S427(2dcase).
1161–88⅓–New. Failure of trial court to set out findings and conclusions on which judgment is based is not ground for reversal. 34PortoRico 59.
1162–91 95Fla754, 116S632, 633 [cit CJ]; 96Fla389, 118S423(2dcase) (without giving views as to extent of error); 212Ky762, 280SW103; 248Mich443, 227 NW751 (decree vacated and case remanded); 315Mo 906, 287SW1118; 132 Okl 295, 270P564(1stcase); 132 Okl 297, 270P564(2dcase); 132 Okl 298, 270 P561; 133 Okl 92, 271P240(1stcase); 144 Okl 8, 289P350(2dcase); Okl 291P 966; TexCommnA 6SW(2d)83; Tex CivA 275SW257; TexCivA 12SW(2d) 1072(2dcase).
1162–94½–New. Settlement of appeal by payment of agreed sum is not a confession of error. 130Misc730, 225 NYS7.
1162–98 See also 168La251, 121S760.
1162–1 161Ga842, 132SE76; 161Ga849, 133SE260; 328 Ill 365, 159NE774; 10 La240, 120S399(2dcase); TexCommnA 272SW1105. [a] **Judgment of intermediate court** reversing lower court for immaterial errors will be reversed and lower court judgment affirmed. 116 Oh 28, 155NE386.
1162–1½–New. Where intermediate court found verdict against the weight of evidence, it was without authority to render judgment, and higher court must reverse such judgment and remand for new trial as intermediate court should have done. TexCommnA 279SW805.
1162–3 91Fla709, 109S677; 209Ky343, 272SW878; TexCivA 283SW177.
1162–4 91Fla709, 109S677.
1163–9 86NYS104; 143NYS1058; Tex CivA 283SW177; TexCivA 31SW(2d) 1098(1stcase).
1163–10 93Fla611, 112S768.
1163–13 30Hawaii445.
1163–16½–New. Under the constitution a decree of the chancery court will not be reversed solely because the cause in which it was rendered is properly cognizable in a court of law only. 140 Miss461, 106S5.
1163–16⅓–New. In Mississippi the appellate courts are held without power to inquire into the chancery court's alleged want of jurisdiction. 147Miss186, 113S433.
1163–17 [a] **Decree rendered before ruling on demurrer to bill.–Ala** 130S381.
1163–17½–New. Where a case came to the supreme court before it was finished, judgment would be reversed. 86Colo 54, 278P592.
1163–19½–New. A decree will be reversed where the cause was not at issue at the time of entry of the decree. 219Ala652, 123S18.
1163–20 168Ark64, 269SW57; 125Kan 680, 265P743; TexCivA 27SW(2d)354.
1163–23 87 IndA594, 162NE59 (before appellate tribunal will reverse judgment

on evidence, it must appear that substantial justice has not been done); 190 NC867, 129SE727.

1164-26 116 Okl 68, 243P497; 127 Or 22, 270P905.

1164-27 [b] 118 Or602, 247P766, 47 ALR394 (breach of marriage promise during marriage of party). [c] **Decree for litigant who knew of prior employment of his attorney by his adversary,** where subjects are same or inseparably related, will be reversed and remanded without considering other errors. 117 Nebr504, 221NW17.

1164-28 27 OhA47, 160NE734.

1164-30 162 IllA384; 218AppDiv377, 218NYS339; 112 Okl 81, 239P622; 116 Okl 65, 243P516.

1164-31 37GaA774, 141SE923; 162 Ill A384; 116 Okl 245, 244P191; 117 Okl 52, 244P769; 118 Okl 57, 246P432; 119 Okl 64, 248P557; 120 Okl 150, 250P776; 120 Okl 226, 253P273; 41 OklACR59.

1164-31½-New. contrary to law; 119 Okl 64, 248P557.

1164-32 116 Okl 74, 243P512; 118 Okl 80, 246P835.

1164-34 118 Okl 59, 246P462; 120 Okl 3, 249P917; 120 Okl 8, 249P907; 123 Okl 170, 252P404; 122 Okl 175, 253P 52; 124 Okl 13, 253P496; 122 Okl 244, 254P741; 124 Okl 181, 254P972; 133 Okl 175, 271P843; 40 OklACR169 [reh granted]; 40 OklACR690; 40 OklACR 699 [reh pending].

1164-35 120 Okl 226, 253P273.

1164-36 See also NJ 132A550.

1164-38 43 Ida64, 249P254, 258 [quot CJ].

1164-40½-New. Error in sustaining a demurrer to the evidence is ground for reversal. 112 Okl 251, 240P612.

1164-41 Sask 7DomLR656, 3 West Wkly223.

1164-42 120 Okl 182, 250P926; RI 133 A440.

1164-43 214Ky21, 282SW550; 116 Nebr835, 219NW235; [14 OklR185, 245 P44; 118 Or602, 247P766, 47ALR394. [a] **Direction of verdict.**-140Miss307, 105S518.

1165-44½-New. Reversal of dismissal held not adjudication that plaintiff is entitled to recover at law. 164Ga450, 139SE27.

1165-45 84Mont52, 274P145; TexCivA 281SW324; Ont [1928] 4DomLR774 (1stcase).

1165-47 215Ala528; 215Ala552, 112S 138; 37GaA530, 140SE918; 196NC514, 146SE144(1stcase).

1165-48 216Ala558, 114S46; Ida 291 P1060.

1165-50 37GaA530, 140SE918; 52ND 617, 204NW683; 131 Okl 23, 267P626; 35PortoRico 380.

1165-50½-New. or failed in its duty to suggest a defect in pleading before denying relief and to give the party an opportunity to amend, 102WVa638, 135SE903.

1165-51 113 Okl 150, 240P104.

1165-52½-New. where defects might have been supplied by amendment in lower court; 200Okl 716, 255P180.

1165-57½-New. , or instruction and verdict violating right to unanimous decision by jury. 53ND256, 205NW624.

1165-58½-New. Where the attorney improperly referred to excluded evidence, the judgment should be reversed. 224 IllA574.

1165-58½-New. That the jury learns that defendant in an automobile injury case carries insurance against liability on judgment is not reversible error, unless made use of by counsel to increase the verdict by inflaming the passions of the jury. 239Mich53, 214NW85.

1165-59 22AlaA231, 115S80; 23AlaA 328, 125S64; 35GaA769, 134SE808; 130 Okl 15, 264P881; TexCivA 275SW198 (hearsay); TexCivA 281SW324; Tex CivA 281SW328; 146Wash645, 264P425 (error held not reversible).

1165-60 70CalA408, 233P391; 161Ga 849, 133SE260; 36GaA537, 137SE119; 120Kan403, 243P1047 (erroneous striking out of evidence properly admitted); 121Kan281, 246P673; 118 Okl 264, 247 P408; 120 Okl 228, 251P89.

1165-65 35PortoRico 245.

1166-72½-New. An improper question on cross-examination is not ground for reversal where the error is not serious. 224 IllA597.

1166-72¾-New. It is error to allow a witness to answer leading questions, but not necessarily serious enough to require reversal. 224 IllA597.

1166-73 274US277, 47SCt613, 71L ed 1045; 171Ark1122, 287SW396; 160Ga 697, 128SE801; 35GaA769, 134SE808; 220Ky248, 294SW1045 (where trial court gives prejudicial instructions on new trial, not following directions of mandate); MoA 285SW127 (no reversible error); 124 Okl 286, 255P1015; 94 PaSuper199 (measure of damages in trespass). [c] **In Mississippi.**-141Miss 655, 107S195. [d] **On appeal court will not substitute verdict in first trial of case for verdict on second trial where same erroneous instruction was given at first trial.** 219Ky595, 294SW135. [e] **Instructions defining "larceny" and "malice" held not prejudicial error,** requiring reversal. 220Ky248, 294SW 1045.

1166-76 74Mont385, 240P391; 77Mont 110, 250P819; 128 Okl 165, 261P913.

1166-77 120Kan423, 243P1016 (verdict held not given under influence of passion or prejudice); 128 Okl 165, 261P 913. [a] **Where verdict was lower than lowest valuation of any witness,** it should not be allowed to stand. 224 Ill A35.

1166-78 174Ark274, 294SW999.

1166-79 141Wash451, 252P123. See also TexCivA 26SW(2d)368. [a] **Verdict will not be set aside** for inconsistency with another verdict, if there is substantial evidence to support the particular verdict. 42 Ida738, 248P456, 49 ALR1057.

1166-79½-New. A verdict cannot be set aside because seemingly inconsistent with another verdict or because the latter is wrong. 46 Ida551, 269P412.

1166-79¾-New. Where it is impossible to determine which of two theories of recovery jury accepted, and one of causes of action fails for lack of evidence, judgment will be reversed. CalA 291P 907.

1166-82 70CalA245, 233P381; 123Kan 393, 254P366; 112 Okl 38, 239P447.

1166-83 80CalA520, 252P334. [a] **Findings not required.**-48Nev181, 228P 588, 232P782. [b] **That it was impossible for trial judge properly to decide** case after having delayed ten months, because of voluminousness of testimony, pleading, and exhibits, is not ground for reversal. 82CalA710, 256P279.

1167-85 70CalA98, 232P763 (findings not inconsistent); 80CalA284, 251P810.

1167-86½-New. Unless conflict in findings is clear and the findings are incapable of being harmoniously construed, the judgment will not be reversed. 68CalA218, 228P715.

1167-86¾-New. Failure of appellate division rendering different judgment on appeal to set out in judgment ultimate facts found is ground for reversal, even though facts stated in opinion. 319 Ill 201, 149NE740.

1167-88½-New. Complaint that findings of fact were not supported by evidence will not cause reversal, if such findings were not made. 119Kan788, 241P467.

1167-91 117 Okl 239, 246P464.

1167-92 [a] **Refusal of new trial for newly discovered evidence** will not be reversed where motion for new trial is void of all equitable considerations. 160 La936, 107S702.

1167-93½-New. Where correct judgment set aside and erroneous one entered, correct judgment will not be set aside and similar one reëntered, although entered by mistake. 212Ky373, 279SW 645.

1167-94 2F(2d)807; 13F(2d)704; 13 F(2d)747; 16F(2d)261; 29F(2d)228 [certiorari den 279US838, 49SCt252, 73L ed985(8thcase)]; 23AlaA93, 121S 448(2dcase); 93Fla520, 112S558; Fla 122S565(2dcase); Fla 130S6(2dcase); 164Ga628, 139SE339; 165Ga799, 142SE 134; 37GaA275, 139SE826; 120Kan90, 242P124; 120Kan574, 245P114; 124 Kan152, 257P742; 128Kan330, 278P21; 220Ky388, 295SW445; 165Minn349, 206 NW457; 172Minn591, 216NW537; 143 Miss620, 109S20; Nev 286P417; 116 Okl 194, 244P785; 128 Okl 23, 261P174; 123 Or72, 260P999; 123 Or370, 261P 69; 88PaSuper84; 145Va694, 134SE 728; 192Wis160, 212NW301; 198Wis 492, 224NW475.

1167-95 13F(2d)747; 71CalA34, 234P 860; 83CalA585, 257P152; 164Ga628, 139SE339; 242Mich217, 218NW803; 121 Or492, 256P197; 122 Or24, 256P770.

1167-96 122Kan339, 252P468; 215Ky 632, 285SW956.

1168-93 13F(2d)704; 16F(2d)261; 17 F(2d)758; 21F(2d)683; 23AlaA187, 122S297; AlaA 130S162(2dcase); 29 Ariz198, 240P341; 74CalA 681, 242P 100; 76CalA767, 246P74; 79CalA662, 251P814; 82CalA369, 255P760; 82CalA 542, 255P858; 87CalA99, 261P1049; 88 CalA354, 263P578; 98CalA738, 277P 867; 101CalA652, 281P1108 (where evidence was insufficient to support judgment for plaintiff, judgment for defendant will not be reversed for erroneous ruling at trial); CalA 287P119; 84Colo 362, 270P553; 92Fla789, 110S349; 94 Fla1218, 115S516; 96Fla304, 118S476 (1stcase); Fla 127S338; 36GaA631, 137 SE907; 157 IllA345; 162 IllA600; IndA 151NE433; 121Kan405, 247P637; 210 Ky508, 276SW133; 215Ky401, 285SW 245; 227Ky841, 14SW(2d)174; 232Ky 33, 22SW(2d)428; 233Ky276, 25SW (2d)398; 233Ky686, 26SW(2d)525; 229 Mich190, 200NW987; 165Minn349, 206 NW457; 152Miss390, 119S320; 307Mo 307, 270SW318; 217MoA645, 274SW923; 218MoA352, 275SW51; 71Mont165, 227 P811 (provision held mandatory); 76 Mont1, 245P532; 49Nev326, 245P700; 103NJL351, 135A786; 105NJL336, 146 A372; NJ 135A65; 229AppDiv16, 240 NYS623; 118 Okl 239, 247P28; 119 Okl 84, 248P598; 130 Okl 21, 264P877; 130 Okl 164, 265P1071; 131 Okl 132, 268P 221; 122 Or579, 260P444; 152Tenn614, 279SW1043; TexCivA 28SW(2d)505; TexCivA 78W(2d)661; 197Wis16, 221 NW418; Wis 229NW860. [a] **Statute to be liberally construed.**-220AppDiv 195, 221NYS189. [b] **Want of jurisdiction cannot be cured by application of such provisions in constitution.** 77CalA 599, 247P249.

1168-99 223Ky444, 38W(2d)1073; 223 Ky564, 48W(2d)367.

1168-1 204 Iowa678, 216NW41; 189NC 693, 127SE833.

1168-4 339 Ill 393, 171NE537; 254Mass 132, 149NE686.

1168-10 [a] **Assignment of error in respect of immaterial issue need not be** considered. 49Nev326, 245P700.

1168-12 118 Oh131, 160NE610.

1168-13 CalA 267P750; TexCommnA 294SW536.

1169-14 277US19, 48SCt417, 72L ed 761; 168Ark64, 269SW57; 83Colo 430, 266P217 (combined errors); 116 Okl 194, 244P785; TexCommnA 294SW536.

1169-17 101CalA482, 281P1036 (failure of trial court to direct correction of uncertain verdict is not reversible error where modification of judgment will secure substantial justice).

1169-24 135Miss865, 101S345.

1169-25 155Miss818, 125S411 (provision held applicable to county courts established under Const. [1890] § 172); 156Miss597, 126S388. [a] **Where circuit court affirmed county court, thereby holding that case was in equity,** supreme court cannot reverse on ground that case was at law. 155Miss818, 125S 411.

1169-27½-New. Where a proceeding in a probate court for the purpose of litigating the ownership of property listed as part of an estate was tried under the belief that the superior court sitting in probate had jurisdiction to determine the whole matter, the appellate court will not, in order to sustain judgment, disregard the form, and declare the suit to be an equitable suit to quiet title. 35Ariz39, 274P173.

1169-27¾-New. Where plaintiff, suing in equity, is entitled to damages for breach of contract, the appellate court,

on reversal, will direct transfer to the law side of the court. 35F(2d)117.

1169-28 Contra 259Mass365, 157NE159.

1169-29 CalA 288P684; 121Kan405, 247P637; MoA 15SW(2d)945.

1169-30 83CalA204, 256P848; 148Miss278, 114S482.

1169-30½-New. although there was a misjoinder of parties defendant, 207Cal8, 276P1017(2dcase) (unless it appears that substantial prejudice has resulted); 95CalA307, 272P1068; 331 Ill 160, 162NE877.

1170-31 But see 32PortoRico278.

1170-31½-New. Permitting the state compensation insurance fund to intervene as plaintiff in an injured employee's action against a tort-feasor after impaneling of the jury is not prejudicial error. 88CalA354, 263P578.

1170-33 216Ala479, 113S507; 22AlaA226, 114S285; 29Ariz198, 240P341; 33Ariz220, 263P626 (failure of corporation to allege its existence); 202Cal251, 259P752; 68CalA111, 228P544; 76CalA767, 246P74; 79CalA662, 251P814; 82CalA269, 255P877; 84CalA206, 257P907; CalA 258P435 (appellant must show miscarriage of justice upon examination by court of entire case including evidence); 87CalA92, 261P763; 89CalA423, 264P794; 94CalA498, 272P309; 96CalA674, 274P766; CalA 277P909; 99CalA631, 279P159 (court's overruling demurrer to complaint not alleging performance of contract by plaintiff held not prejudicial where issues were tried out as though complaint contained such allegation); CalA 285P734; CalA 289P231; CalA 292P179; 81Colo254, 254P990; Fla 129S769; 233 IllA56 (where there was variance between declaration and attacked statement of account as to amount of plaintiff's salary); IndA 148NE335; 315Mo166, 285SW729; 321Mo1190, 18SW(2d)433; 51Nev1, 266P916; 117 Okl 46, 245P641; TexCivA 278SW478 (overruling defendant's exception to supplemental petition not reversible of error, so injury to defendant being shown); 68Utah334, 250P1045; 152Wash89, 277P389.

1170-34 69CalA416, 231P355; 72CalA367, 237P550; 72CalA748, 238P127; 76CalA767, 246P74; 48CalA448, 258P418; 85CalA607, 259P976; 87CalA92, 261P763; 94CalA498, 272P309; 101CalA652, 281P1108; CalA 285P709; 81Colo254, 254P990; 87 IndA649, 154NE772; 235Ky419, 31SW(2d)625; 50Nev352, 259P632; Okl 293P235; 126 Or487, 266P634 (allowing amendment after jury was impaneled bringing in additional plaintiff); TexCivA 294SW647.

1170-35 92CalA570, 268P699 (cross complaint).

1170-39 TexCommnA 272SW771 (court rule cannot be invoked to deprive defendant of right to plead and prove defense given by statute).

1171-43 207Cal8, 276P1017(2dcase); 101CalA122, 281P419; 84 IndA202, 149NE734.

1171-46 Utah 290P367 (bill of particulars).

1171-50 207Cal485, 279P800 (element of surprise and being mislead by court's remarks not considered where party was afforded opportunity to protect himself); 83CalA542, 257P140; 98CalA75, 276P383; CalA 292P132; 85Colo409, 277P299; MoA 18SW(2d)535; 81Mont351, 263P101; NJ 135A65.

1171-52 318Mo1190, 3SW(2d)241.

1171-53½-New. Where an appeal is on the judgment roll alone and the record shows that the court found all facts sufficient to support the judgment, although some of the facts were not sufficiently pleaded, the judgment will not be reversed in the absence of a showing of prejudice. 79CalA662, 251P814.

1171-53½-New. Judgment rendered on a cause of action not set out in the complaint and not warranted by its averments cannot be sustained. 207Cal485, 279P800.

1171-56½-New. or refusing to direct a verdict. 105NJL504, 146A52.

1172-62 7F(2d)428; 16F(2d)261; 215Ala407, 110S818; 71CalA393, 235P461; 72CalA545, 237P791; 84CalA448, 258P418; 97CalA77, 275P257; 82Colo98, 257P351; 97Fla350, 121S895(2dcase); Fla 127S338; 200 Iowa948, 205NW770; 130Kan743, 288P766; 254Mass118, 149NE693; Mass 165NE36; MoA 272SW117 (inevitable conclusion); MoA 26SW(2d)859(2dcase); 104NJL209, 141A14; 227AppDiv610, 235NYS185; 117 Okl185, 245P858; 122 Or579, 260P444; TexCivA 275SW224; TexCivA 291SW279; TexCivA 291SW337; 34Wyo415, 244P637; 36Wyo12, 252P790.

1172-63 16F(2d)261; 28F(2d)340; 41F(2d)914; 218Ala616, 119S635; 21AlaA27, 104S873; 203Cal634, 265P487; 77CalA66, 246P113; 78CalA108, 248P274; 97CalA77, 275P257; CalA 283P970; 84Colo433, 271P187 (on cross-examination); 44 Ida729, 262P152; 122Kan339, 252P468; 233Ky142, 25SW(2d)51; 254Mass118, 149NE693; 168Minn347, 210NW78; MoA 276SW81; MoA 297SW189; MoA 26SW(2d)859(2dcase); 83Mont452, 272P998; NJ 151A877; 30OhA118, 164NE370; 40 OklaCR83; 35PortoRico224; TexCivA 287SW87. [a] (24) Allowing shorthand statement of contents and purpose of converted books. 215Ala407, 110S818. (25) Certificate of weather record. 262Mass104, 159NE606. (26) Admitting certified copy of deed. TexCivA 5SW(2d)624. (27) Refusal to order mistrial because of evidence showing defendant was insured against liability is held not ground for reversal. 104WVa636, 141SE614.

1173-64 214Ala510, 108S604; 202Cal205, 259P755; 74CalA359, 240P293; CalA 283P970; CalA 286P487; 207Iowa605, 223NW480; 233Ky1, 24SW(2d)942; 254Mass132, 149NE686; 168Minn347, 210NW78; Mo 24SW(2d)116; MoA 18SW(2d)247; MoA 8SW(2d)1043; 118 Or421, 247P139; TexCivA 275SW224 (refusal to require plaintiff to demonstrate before jury manner in which he was injured); TexCivA 18SW(2d)692 (cumulative evidence); TexCivA 28SW(2d)282; 197Wis59, 221NW399.

1173-65 CalA 291P444.

1173-67 335 Ill 432, 167NE10; IndA 163NE515.

1173-68 204Cal136, 266P954; 72CalA132, 236P966; 88CalA627, 264P564; 99CalA66, 277P902; TexCommnA 294SW536.

1173-69 221AppDiv524, 224NYS689 (sharp conflict on main issue); TexCivA 21SW(2d)41.

1173-69½-New. The constitutional provision does not apply where, eliminating evidence erroneously admitted, there is an entire absence of evidence to support a material issue in the case. 80CalA415, 252P752.

1173-70 32F(2d)995; 20AlaA582, 104S343; 69CalA669, 232P169; 78CalA617, 248P741; 81CalA86, 253P178; 82CalA542, 255P858; 85CalA455, 259P455; 85CalA535, 259P958; 87CalA44, 261P1107; 87CalA669, 262P770; 88CalA740, 264P270; 89CalA702, 265P496; 91CalA460, 267P132; 92CalA20, 267P754; CalA 273P155; 101CalA503, 282P10(2dcase) (instruction unduly favorable to one of negligent codefendants); 102CalA477, 283P132; CalA 284P1083; 95Fla991, 117S391; Fla 127S338; 164Ga628, 139SE339; 246 IllA271; 252 IllA586 (where successive juries have found same way); 210Ky508, 276SW133; 211Ky158, 277SW313; 229Ky444, 17SW(2d)231; 242Mich413, 218NW688; 313Mo246, 281SW690; 315Mo166, 285SW729; Mo 31SW(2d)81; MoA 293SW66; 220MoA1142, 297SW430; MoA 14SW(2d)701; NJ 137A528; 114 Okl21, 242P1027; 132 Okl29, 269P299; 121 Or492, 256P197; 122 Or24, 256P770; TexCommnA 298SW528; TexCivA 291SW317; TexCivA 22SW(2d)720; 144Va523, 132SE307; 147Va252, 137SE374; 195Wis572, 217NW723.

1173-71 8F(2d)321; 118Nebr395, 225NW36; 102NJL161, 130A539; NJ 140A437 (refusal of request to charge).

1173-72 102CalA260, 282P961; 172Minn591, 216NW537; MoA 296SW851; 220MoA1142, 297SW430.

1173-75 85CalA419, 259P496.

1174-77 NJ 137A528; 127 Or490, 272P670.

1174-78½-New. Denial of requested instruction is not ground for reversal where not prejudicial. 8F(2d)321.

1174-83 95CalA704, 273P95; 102CalA260, 282P961; 239Mich440, 214NW419; 316Mo728, 293SW105; 121 Or492, 256P197.

1174-84 RI 131A693 (misstatement of testimony followed by instruction to disregard misstatement of fact).

1174-89 33F(2d)675; 93CalA337, 269P705; 232Ky169, 22SW(2d)596; 158Tenn333, 13SW(2d)322; TexCivA 287SW1101.

1174-99 274US277, 47SCt613, 71Led1045; 37F(2d)271; 22AlaA195, 114S21; 96CalA161, 273P875; 220MoA1175, 299SW110.

1174-1 22F(2d)22.

1174-3 29 OhA340, 163NE581; 115 Okl76, 241P794; TexCommnA 272SW1105.

1175-9 CalA 284P462 (dismissal of action against principal defendant and continuance against others).

1175-13 94CalA463, 271P509; Mo 31SW(2d)81; MoA 14SW(2d)478; MoA 31SW(2d)596; 103NJL351, 135A786; 136 Okl226, 277P219; 130 Or440, 279P631; TexCivA 7SW(2d)661; 36Wyo12, 252P790.

1175-14 But see TexCommnA 6SW(2d)105.

1175-28 94CalA463, 271P509.

1175-35½-New. granting jury trial of claim against estate; 234Ky448, 28SW law court or vice versa is not ground for reversal where no substantial right has been denied. 148Miss562, 114S347.

1175-36¼-New. Refusal to permit counsel for defendant to argue case to jury because plaintiff waived argument is reversible error. TexCivA 30SW(2d)509.

1175-37 75CalA205, 242P746; 316Mo1094, 295SW563; 218MoA352, 275SW51. [a] **Failure to find on contributory negligence** is not ground for reversal where defendant's negligence was found to be proximate cause of injury. 48Nev181, 228P588, 232P782.

1175-38 214Ala370, 108S13.

1175-40½-New. because a verdict for plaintiff in an action for personal in-(2d)494.

1175-36½-New. Where the trial court did not pass on written propositions submitted by a party, the appellate court must reverse the decision. 224IllA559.

1175-38½-New. Improper transfer of a cause from the chancery court to the juries in a stated sum contained a recommendation that the damages be divided equally between defendants; 19OhA370.

1175-41½-New. , or because jury without authority added interest into verdict which trial court disregarded. 188Wis200, 205NW798.

1176-43½-New. Act of clerk receiving verdict in stating that, if jury found for plaintiff, they must give an amount is reversible error. 103NJL628, 139A12.

1176-43¼-New. Where case was tried twice and two juries returned verdicts for plaintiff, judgment should not be reversed unless defendant's substantial rights were prejudiced. 232Ky539, 23SW(2d)942.

1176-45 97CalA27, 274P1030.

1176-46 22F(2d)939; 70CalA137, 232P982; 41 Ida756, 242P798 (judgment based on sufficient findings not reversed because findings on immaterial issues are not supported by evidence); 120Kan90, 242P124; 317Mo1336, 298SW34; 115Nebr493, 213NW587; 221AppDiv831, 224NYS674. [a] (14) Other instances. 82CalA660, 256P457.

1176-53 248Mich221, 226NW873; 219MoA195, 270SW427 (setting aside judgment against surety on appeal bond).

1176-56 167Minn32, 208NW526.

1176-61 91Fla375, 108S560.

1177-62 91Fla375, 108S560; 179Minn411, 229NW566.

1177-64 TexCivA 14SW(2d)877(2dcase).

1177-80 TexCivA 18SW(2d)441 (judgment contrary to statute).

1177-82½-New. The appeal court, upon reversing a compensation judgment,

cannot assess compensation; the trial court only can assess compensation. 18BCR57, 9DomLR392, 23WestLR10, 3 WestWkly722.

1177-83 178Ark911, 12SW(2d)901; CalA 292P192; 107Conn532, 141A651; 121Kan279, 246P1004; 216Ky119, 287 SW353; 232Ky519, 23SW(2d)917; 151 Md375, 135A584; 30NM566, 240P469; TexCivA 272SW611; 136Wash312, 239 P1011. [b] **In controversies over real estate** maxim is not applied. 211Ky739, 277SW1026 (judgment affirmed nevertheless).

1178-84 121Kan279, 246P1004.

1178-91 215Ky647, 286SW351. [a] (15) Thirteen dollars, where only error was in date used for computation of interest. 136Wash312, 239P1011.

1179-92 94CalA424, 271P379.

1179-95 213Ala695, 106S37 (rulings on motion for retaxing costs); 23 QueKB517, 20DomLR982.

1179-99 222Ky329, 300SW871.

1179-3 175Ark823, 1SW(2d)14; 181 Afk1110, 29SW(2d)280; 120Kan427, 243P1050; 79Mont91, 254P1070, 1074 [quotCyc]; 213AppDiv92, 209NYS572; 231NYS250; 230AppDiv389, 244NYS 663; 27 OhNPNS116; 127 Or500, 272P 895; 289Pa369, 137A612; 8PaDist&Co 27; 135Wash595, 238P905; 36Wyo 166, 253P862; 36Wyo 166, 255P3, 5, 52ALR 91 [citCJ]; 39Wyo 58, 270P154.

1180-5 79Mont91, 254P1070.

1180-6 79Mont91, 254P1070.

1180-11 27 OhNPNS116.

1180-21 70CalA336, 233P374; 78CalA 145, 248P283; 88CalA192, 263P325; 101CalA195, 281P533; 98Fla889, 124S 443; 36GaA540, 137SE403; Ind 168NE 868; 304Mo 685, 264SW775; 116Nebr 230, 216NW668; 33NM593, 273P12; 136Misc656, 241NYS445; 117 Okl 179, 245P881; 123 Okl 151, 254P706; 131 Okl 235, 269P286; TexCommnA 292SW 198; TexCivA 275SW96; TexCivA 293 SW199; TexCivA 293SW577; 39Wyo 84, 270P167. [b] **Account stated in accordance with lower court decree** will be affirmed as to parts rightly decreed below and reversed as to matters improperly decreed. 152Md289, 136A269.

1181-22 208Cal 114, 280P535; 213Ky 658, 281SW796; 225Ky105, 7SW(2d) 855; 219AppDiv578, 220NYS401; 222 AppDiv350, 225NYS722; 288Pa11, 135 A740; TexCommnA 272SW1105; Tex CivA 10SW(2d)597; TexCivA 26SW(2d) 732. See also TexCivA 32SW(2d)500. [a] (5) Where competent evidence fails to extend to entire judgment, entire judgment must be reversed. 126Me254, 137A692.

1181-23½-New. Cross action. Where error relates only to defendant's cross action, judgment for plaintiff should be affirmed and judgment on cross action reversed and remanded. TexCivA 279 SW603.

1181-24 161Ga780, 132SE436; 337 Ill 469, 169NE265; 230Ky465, 19SW(2d) 1078; 225AppDiv605, 233NYS519; 114 Okl 279, 246P599; 43 OklACR155 [reh pending]; TexCivA 294SW633; Tex CivA 2SW(2d)477.

1182-27 TexCivA 23SW(2d)414.

1182-28 70CalA336, 233P394; 96Fla 143, 118S545(1stcase); 118Nebr297, 224 NW316; TexCivA 27SW(2d)357; 143 Va133, 129SE341.

1182-30 136SC34, 134SE220.

1182-31 125 Or587, 267P812, 58ALR 1556.

1182-33 TexCivA 279SW493.

1182-35 273US119, 47SCt308, 71L ed 569; TexCivA 21SW(2d)92 (where cotenant, seeking reversal of lien foreclosure for excess over purchase money, had neither paid nor tendered any part of purchase money, judgment should not be reversed).

1182-36 220Ala448, 126S110; 233 IllA 196; 244 IllA104; MoA 14SW(2d)9 (mechanic's lien case); 190NC364, 129 SE801; TexCivA 284SW258; TexCivA 295SW245; TexCivA 13SW(2d)152.

1183-37 273US119, 47SCt308, 71L ed 569; 216Ala330, 113S223; 216Ala577, 114S185; 171Ark51, 283SW7; 70CalA 137, 232P982; 104Conn107, 132A395; 37GaA242, 139SE577; 43 Ida529, 253P 625; 237 IllA416; Md 149A4; 171Minn 455, 214NW507, 53ALR382; 311Mo 49, 277SW562; Mo 29SW(2d)714; MoA 22 SW(2d)84; 104NJL24, 138A695; 35 PortoRico 459; TexCommnA 1SW(2d) 878; TexCivA 299SW676; TexCivA 299 SW930; TexCivA 15SW(2d)36. See also Ga 155SE513. [a] (5) On appeal in action against husband and wife on contract of guaranty on which wife is not liable, order dropping her as party may be entered. 247Mich551, 226NW 250. [b] **Statute providing for contribution between joint defendants** does not prevent reversal of judgments as to some defendants. Md 149A565.

1183-38 233 IllA106.

1184-41 233 IllA196; 242 IllA93.

1184-42 171Ark51, 283SW7; 311Mo 49, 277SW562 (tort); NJ 148A175; 119 Okl 28, 246P826; Or 292P93; TexCivA 275SW81 (plaintiff allowed to elect between agent and undisclosed principal against both of whom judgment ran where not required to elect in lower court); TexCivA 286SW276; TexCivA 18SW(2d)231; 66Utah208, 241P309, 313 [quotCJ]; 105WVa209, 141SE782; WVa 153SE245. See also 33PortoRico 105. [a] **Where injustice would result** from partial reversal as to one of two alleged joint tort-feasors, case will be reversed as to both. 66Utah208, 241P 309.

1184-43 77Colo 60, 234P1059 (may not affirm as to one defendant where no joint liability shown); 82 Mont467, 267 P805; TexCivA 4SW(2d)336 (issues remaining undetermined).

1184-45 180Ark355, 22SW(2d)12; Cal A 274P995; 104Conn107, 132A395; 48 Ida771, 284P1030; 198 Ind79, 151NE 385; IndA 170NE616; 169La914, 126 S422; 13LaA277, 125S171; 124 Or460, 264P844; 50Philippine679; TexCommnA 1SW(2d)878; TexCivA 271SW401; Tex CivA 277SW207; TexCivA 281SW580; TexCivA 300SW123; TexCivA 4SW(2d) 1016; TexCivA 13SW(2d)123; TexCivA 19SW(2d)120; TexCivA 28SW(2d) 223; TexCivA 30SW(2d)911. [a] **Bill of review to open** cases not appealed. TexCivA 295SW308.

1185-47 TexCivA 9SW(2d)198. But see TexCivA 271SW401.

1185-54 38GaA303, 143SE909; 236 Mich164, 210NW215.

1185-56 Ala 128S215; 169Ark1154, 278SW32; 202Cal 501, 261P994; 202 Cal 511, 261P998 (on making additional findings); 167 IllA264; 237 IllA587; 247 IllA475; 125Kan53, 262P1022; 166 La618, 117S738; 10LaA341, 119S575; 260Mass417, 157NE527; Mass 173NE 495; 143Miss14, 108S291; 316Mo 278, 290SW429; 135Misc269, 238NYS21; 122 Okl 188, 253P88; 138 Okl 89, 280P 433; 157Tenn606, 12SW(2d)529; Tex CommnA 285SW295; TexCivA 278SW 899; TexCivA 280SW238; TexCivA 282 SW670; TexCivA 19SW(2d)120; 146 Va475, 131SE827; 147Va415, 137SE 496; 151Va686, 144SE708; WVa 155SE 115; 5AltaL245, 7DomLR45, 22WestLR 91, 2WestWkly1036. [a] **Power to render final judgment** by supreme court is not affected by expiration of term of trial court. 199Wis76, 225NW751. [b] **Absence of motion to direct verdict at close of testimony** prevents supreme court from ordering judgment notwithstanding verdict. Minn 232NW522.

1185-57 198Cal 490, 246P324; 202Cal 501, 261P994 (on making of additional findings by appellate court); 86CalA 689, 261P717; 93CalA411, 269P672; 85 Colo 304, 275P928; 91Fla1053, 109S311; Fla 126S307 (remand for proper decree); 44 Ida187, 255P642, 643 [citCJ]; 318 Ill 60, 148NE867; 199 Iowa1136, 199NW 1011; 204 Iowa737, 215NW943; 125 Kan53, 262P1022; 127Kan267, 273P 437 (judgment directed to be entered for definite amount shown by evidence to be due); 316Mo 278, 290SW429; NJ 132 A655; 138 Okl 89, 280P433; 48RI 285, 137A696.

1185-57½-New. The appellate court cannot enter order or judgment which, for lack of request, the lower court could not make. Mo 287SW600.

1186-58 CalA 260P572; 125Kan53, 262P1022; 167Minn379, 209NW265; Tex CivA 24SW(2d)775 (judgment totally without facts to sustain it).

1186-59 208Cal 256, 280P970.

1186-61 49ND92, 189NW837; TexCivA 278SW899. But see 70CalA245, 233P 381; TexCivA 272SW291.

1186-62 125Kan53, 262P1022; 11LaA 119, 119S706; 260Mass417, 157NE527; 292Pa327, 141A152; TexCommnA 285SW 295; TexCivA 277SW776; TexCivA 278 SW899 (appellate court, by statute, may render judgment trial court should have made). [a] **Statute is not invalid** which permits appellate court to direct entry of judgment for appellant where his motion for direct verdict was denied by trial court. 264Mass337, 162NE689.

1186-63 250NY262, 165NE285; 124 Or 598, 265P408; 124 Or618, 265P786.

1186-66 315Mo 318, 286SW100. [a] **Statute requiring court in reversing** to render judgment is to save time and expense of hearings and to secure full benefit of judgment improperly denied. 117Tex1, 295SW913.

1186-67 TexCivA 27SW(2d)909.

1186-68 264Mass337, 162NE689.

1186-69 [a] **Final judgment should not be rendered on reversal** where plaintiff would be deprived of appealing from final judgment on merits entered in appellate court for first time. CalA 284P 701.

1186-72 274US188, 47SCt563, 71L ed 992; 204Cal 258, 268P364; CalA 280P 392 (appellate court will not render final judgment against respondent where to do so would deprive respondent of right to appeal from final judgment on merits entered in appellate court for first time); 160Tenn208, 22SW(2d)356; TexCivA 290SW909; TexCivA 8SW(2d)206; 36 Wyo 132, 253P658.

1186-73 208Cal 256, 280P970; 121 Oh 544, 170NE358 (insufficiency of evidence to support judgment); TexCommnA 277 SW1043; TexCivA 272SW508; 36Wyo 132, 253P658.

1186-74 274US188, 47SCt563, 71L ed 992; 208Cal 256, 280P970; 164Minn 300, 204NW965; MoA 275SW585; Mo A 299SW72; TexCommnA 276SW209; TexCivA 288SW625; TexCivA 290SW 909; 36Wyo 132, 253P658.

1187-80½-New. Appellate division may restore verdict where it was erroneously set aside by trial court and only question raised at trial was passed on the appeal. 214AppDiv537, 212NYS 318.

1187-80⅓-New. On appeal from refusal of circuit court to vacate its order appointing receiver where only purpose of case was appointment of receiver, supreme court may, where appointment not justified, reverse order and remand cause with directions to discharge receiver and restore property. 309Mo 433, 274SW789.

1187-80¼-New. In some jurisdictions, where appellant did not ask for a peremptory instruction, the appellate court, although determining that appellee's request for a peremptory instruction should not have been granted and that appellant was entitled to recover, is without authority to render judgment. 152Miss319, 120S182(1stcase).

1187-80⅙-New. The court of civil appeals has no power to render judgment for appellant, where the trial court had no power to render such judgment, notwithstanding the verdict. TexCivA 19 SW(2d)850.

1187-82 251 IllA414; 252 IllA203. See also 255 IllA209.

1187-83 See also 327 Ill 249, 158NE 477.

1187-84 152 IllA66; 162 IllA384; 237 IllA587; 247 IllA48.

1187-84½-New. and on reversal may remand with directions for entry of particular judgment; 318 Ill 215, 149NE 227.

1187-84⅓-New. or, on reversal of judgment for defendant, render judgment for plaintiff; 251 IllA119 (plaintiff waiving unliquidated item).

1187-85 321 Ill 431, 151NE884; 152 Ill A50; 152 IllA238; 167 IllA264; 224 Ill A13; 233 IllA99; 253 IllA551.

1187–85½–New. On reversing judgment on ground that undisputed facts entitle plaintiff to recover, court may direct trial court to proceed in accordance with principles announced. 253 **Ill** A551.

1187–87½ New. Where it was proved defendant was liable in a certain amount if at all, the appellate court could enter final judgment on reversal. 224 **IllA**13.

1187–87½. New. The appellate court cannot reverse judgment and direct judgment for appellant unless there is no evidence sustaining the verdict. 329 **Ill** 75, 160**NE**155.

1187–87¼ New. Where order appealed from is void, it will be reversed without remanding. 254 **IllA**213.

1187–88 168**Ark**555, 270**SW**965 (action involving title to realty); 169**Ark**1154, 278**SW**32; 175**Ark**883, 300**SW**453; 205 **Iowa**408, 216**NW**71; 130**Kan**766, 288**P** 595; **Mass** 168**NE**78 (though defendant's exception is sustained as to one phase, the supreme court can direct judgment where all necessary facts were found by jury); **Mass** 169**NE**157; 153**Miss**53, 120 **S**180; **MoA** 29**SW(2d)**743; **NJ** 132**A**655; 114 **Okl** 153, 244**P**744; 117 **Or** 637, 244 **P**531; 132 **Or** 545, 286**P**553; 29**Porto Rico** 874; **TexCommnA** 18**SW(2d)**591; **TexCivA** 264**SW**524; **TexCivA** 272**SW** 343; **TexCivA** 275**SW**211; **TexCivA** 278 **SW**899; **TexCivA** 285**SW**331; **TexCivA** 286**SW**345; **TexCivA** 290**SW**251; **Tex CivA** 295**SW**913; **TexCivA** 299**SW**342; **TexCivA** 1**SW(2d)**385; **TexCivA** 3**SW (2d)**462; **TexCivA** 6**SW(2d)**380; **Tex CivA** 19**SW(2d)**329; **TexCivA** 22**SW(2d)** 765; **TexCivA** 29**SW(2d)**513; **TexCivA** 30**SW(2d)**381; 65**Utah**1, 233**P**569.

1187–89 169**Ark**1154, 278**SW**32 (where, if trial court had instructed jury in accordance with evidence, verdict would have been for appellant); 85**CalA**542, 259**P**1108; 232 **IllA**589; 233 **IllA**229; 251 **IllA**188; 255 **IllA**489; 80**Mont**414, 260**P**1047; 23**OhA**271, 155**NE**145; 29 **OhA**390, 162**NE**776; 114 **Okl** 153, 244**P** 744; 135 **Okl** 253, 275**P**285; **TexCivA** 272**SW**217; 117**Tex**502, 3**SW(2d)**408.

1188–90 233 **IllA**229; 23 **OhA**271, 155 **NE**145; 122 **Okl** 10, 250**P**76; 142 **Okl** 121, 285**P**957.

1188–91 43**F(2d)**673; 95**Fla**72, 115**S** 828; 102**NJL**616, 133**A**479; 101**NJL**511, 130**A**564; 296**Pa**10, 145**A**591.

1188–92 70**CalA**245, 233**P**381; 233**IllA** 229; **Mass** 166**NE**843 (may order such decree entered as justice may require); 117**Tex**1, 295**SW**913.

1188–93 117 **Or**165, 243**P**101 (suit brought at law disposed of as one in equity); 131 **Or**57, 279**P**534 (for nominal damages). [a] **Entry of judgment in appellate court** may be made where record discloses error of law and evidence is reported in its entirety. 118 **Or**568, 247**P**815.

1188–95 204**Cal** 231, 267**P**1081 (where all of trial court's findings are for plaintiff); 335 **Ill** 342, 167**NE**100; 141**Miss** 38, 106**S**209, 44**ALR**393; **Utah** 290**P** 937; **Wis** 228**NW**475; 36**Wyo** 132, 253 **P**658.

1188–96 [a] **Circuit court reversing judgment on directed verdict** is not authorized to direct verdict for adverse party. 10**F(2d)**669 (in lieu of possible development of new evidence of second trial).

1188–97 **TexCivA** 281**SW**629; **TexCivA** 290**SW**909; **TexCivA** 291**SW**922; **Tex CivA** 294**SW**1113; **TexCivA** 297**SW**588. See also **TexCivA** 272**SW**291.

1188–98 **TexCivA** 290**SW**909; 117**Tex** 377, 5**SW(2d)**965, 60**ALR**665 (evidence conflicting). But see **TexCivA** 270**SW** 1037.

1189–1 **TexCivA** 20**SW(2d)**263 (where jurisdictional defect incurable). But see **TexCivA** 29**SW(2d)**815.

1189–2½–New. But where the trial court had no original jurisdiction, but only a derivative jurisdiction, the appellate court will remand the cause with directions to dismiss, so that unsuccessful plaintiff may pursue remedy in the court having original jurisdiction. 307 **Mo** 10, 269**SW**395.

1189–3½–New. Where judgment was rendered against certain of several parties against whom the lower court was without jurisdiction to render the same, the cause will be reversed with directions to the lower court to dismiss the action as to the persons and matters over which it had no jurisdiction. 113 **Okl** 277, 242**P**246.

1189–4 38**F(2d)**577; 32**Ariz**70, 255**P** 595; 170**Ark**1160, 282**SW**971; 244 **IllA** 345; 255 **IllA**239; 255**Mass**121, 150**NE** 878; **Mass** 169**NE**142; 33**PortoRico** 3; 144**Va**774, 130**SE**899. [a] **Statute giving supreme court power to render judgment** held inapplicable. 255**Mass**64, 150 **NE**908.

1189–5 32**Ariz**70, 255**P**595; **TexCivA** 16**SW(2d)**544.

1189–6 170**Ark**86, 279**SW**357; 45 **Ida** 313, 262**P**873; 73**Mont**312, 237**P**492; 134**Misc**39, 234**NYS**398; **TexCivA** 19**SW (2d)**120; **TexCivA** 28**SW(2d)**899; 149 **Va**789, 141**SE**764. See also 33**NM**605, 273**P**925. But see 70**CalA**245, 233**P**381; 47**RI** 88, 129**A**825.

1189–6½–New. or judgment is against clear weight of evidence, 142 **Okl** 168, 285**P**968.

1189–7 32**F(2d)**453; 32**Ariz**70, 255**P** 595.

1189–9 247 **IllA**156; 205 **Iowa**408, 216 **NW**71; 255**Mass**121, 150**NE**878; 114 **OhSt**40, 150**NE**422; 114 **Okl** 185, 245**P** 44; 39**Wyo** 84, 271**P**875, 61**ALR**199.

1189–9½–New. or should have entered judgment non obstante veredicto. 241 **Mich**370, 217**NW**51.

1190–12 160**La**449, 107**S**302; 168**La** 1085, 123**S**721; 3**LaA**389; 263**Mass**51, 160**NE**335; 143 **Okl** 5, 286**P**872 (where action is commenced and prosecuted by unauthorized attorney without plaintiff's knowledge or consent).

1190–13 195**Cal** 59, 231**P**744; 338 **Ill** 245, 170**NE**285(2dcase); 241**Mich**370, 217**NW**51; 114 **Okl** 13, 242**P**760.

1190–14 198**Cal** 490, 246**P**324, 331 [cit CJ]. See also 156**SC**99, 152**SE**13.

1190–15 6**LaA**195.

1190–22½–New. Where the case has become moot, the court will not only dismiss appeal but will order dismissal in both trial and appellate court. **TexCivA** 279**SW**874.

1190–23 **TexCivA** 279**SW**874.

1191–27 167 **IllA**264; **MoA** 25**SW(2d)** 138; 116 **Or**641, 242**P**613; **TexCommnA** 285**SW**307. See also 220**Ky**230, 294**SW** 1088.

1191–28 43 **Ida**489, 253**P**847; 129**Kan** 470, 283**P**644; 77**Mont**477, 251**P**517; 137**Wash**353, 242**P**27.

1191–32 43 **Ida**265, 251**P**621.

1191–38 But see 50**Philippine**198.

1191–39 See also 83**NH**200, 140**A**169.

1191–44 80**CalA**91, 251**P**654; 161**La**24, 108**S**112. But see 151**Wash**457, 276**P** 904.

1192–45 322 **Ill** 250, 153**NE**355; 211**Ky** 97, 279**SW**1083. But see 153**Miss**559, 121**S**153.

1192–47 91**Fla**589, 110**S**252.

1192–48 239**Mich**380, 214**NW**128; 145 **Wash**455, 260**P**995 (appellant held not entitled to reversal).

1192–50 **TexCivA** 271**SW**263.

1192–51 See also **TexCivA** 277**SW**229.

1192–54 57**ND**356, 222**NW**36.

1192–56½–New. On appeal judgment will not be entered on a verdict not complying with the statute where the record is not in such condition as to attain ends of justice. 144**Va**523, 132 **SE**307.

1192–58 42**F(2d)**646; 43**F(2d)**53; 246 **IllA**22; **Ind** 169**NE**843; 221**Ky**576, 299 **SW**196; 233**Ky**808, 27**SW(2d)**416; 221 **MoA**917, 222**MoA**540, 288**SW**785; **MoA** 29**SW(2d)**193; 104**NJL**248, 139**A**900; 227**AppDiv**452, 238**NYS**230; 125 **Okl** 114, 256**P**748; 127 **Okl** 141, 259**P**838; 128 **Okl** 147, 262**P**199; 130 **Okl** 5, 264**P** 887; 143 **Okl** 38, 287**P**390; **Okl** 291**P**26; 144 **Okl** 264, 291**P**124; 41 **OklACR**85; 123 **Or**651, 262**P**263; 296**Pa**1, 145**A**587; **TexCivA** 19**SW(2d)**572; 65**Utah**424, 237 **P**945; **Vt** 151**A**642; 105**Wva**536, 143**SE** 345. But see 69**CalA**384, 231**P**567; **Mass** 171**NE**724. [b] **In injunction suit** where all facts are before it, supreme judicial court may order such decree entered as justice requires. 256**Mass** 258, 152**NE**233.

1192–59 13**F(2d)**702; 17**F(2d)**739; **Cal** 292**P**647; 339 **Ill** 628, 171**NE**629; 233 **Ky**673, 26**SW(2d)**551; 241**Mich**209, 217 **NW**36, 60**ALR**276; 320**Mo** 754, 9**SW (2d)**880; **MoA** 21**SW(2d)**937; 77**Mont** 594, 251**P**1061; 81**Mont**185, 262**P**887; **Nebr** 231**NW**781; 224**AppDiv**568, 232 **NYS**26 (direct judgment warranted by facts); 111 **Okl** 231, 239**P**141; 127 **Okl** 141, 259**P**838; 128 **Okl** 147, 262**P**199; 131 **Okl** 144, 268**P**245; 135 **Okl** 198, 274 **P**886; 142 **Okl** 265, 286**P**799; 40 **OklA CR**317 [reh pending]; 43 **OklACR**221; 158**Tenn**554, 13**SW(2d)**795; 65**Utah** 424, 237**P**945; 196**Wis**171, 218**NW**842. But see **MoA** 25**SW(2d)**566.

1192–60½–New. The supreme court cannot direct judgment when existing findings of the trial court will not support judgment so directed. 201**Cal** 486, 258**P**77.

1192–60½–New. In some jurisdictions the supreme court is not required to render final judgment in all cases where a trial de novo is demanded, but may remand the case for a retrial in the lower court where it is deemed necessary to the accomplishment of justice. 55**ND** 603, 215**NW**77.

1192–60¼–New. In a suit by the grand lodge of colored masons to enjoin the use by another organization of a similar name and masonic emblems and insignia, where a nonsuit was granted, the supreme court, on reversal, will remand for further action not inconsistent with its opinion instead of ordering injunction. 85**Colo** 17, 273**P**648.

1192–61 48**RI** 285, 137**A**696; 52**SD**167, 216**NW**951.

1193–62 **Ala** 128**S**215; 168**Ark**1033, 275**SW**653; 128 **Okl** 118, 261**P**216, 221 [quotCJ]. [b] **Discretion on reversing** to render judgment, or remand for new trial, is judicial, and not arbitrary. 117 **Tex**1, 295**SW**913.

1193–65 33**Ariz**496, 266**P**13; 168**Ark** 1033, 275**SW**653; 203 **Iowa**1355, 214**NW** 536; 120**Kan**434, 243**P**1014; 1**LaA**216; 1**LaA**287; 3**LaA**187; 3**LaA**648; 4**LaA** 421; 5**LaA**326; 5**LaA**359; 5**LaA**450; 5**LaA**546; 6**LaA**163; 6**LaA**177; 238 **Mich**464, 213**NW**859; 164**Minn**384, 205 **NW**434; 137**Miss**55, 101**S**787; **MoA** 296 **SW**214; **MoA** 27**SW(2d)**492; 241**NY** 598, 150**NE**570; 245**NY**91, 156**NE**625; 213**AppDiv**264, 211**NYS**35; 227**AppDiv** 269, 237**NYS**297; 195**NC**231, 141**SE**586; 58**ND**148, 225**NW**129; 58**ND**396, 226 **NW**533 (though trial de novo demanded in appellate court); 125 **Okl** 208, 257**P** 303; 51**Philippine**259; **TexCommnA** 276**SW**218; **TexCommnA** 288**SW**127; **TexCommnA** 288**SW**132; **TexCommnA** 291**SW**1088; **TexCommnA** 298**SW**268; **TexCommnA** 29**SW(2d)**1075; **TexCivA** 281**SW**277; **TexCivA** 281**SW**607; **Tex CivA** 285**SW**331; **TexCivA** 287**SW**279; **TexCivA** 288**SW**271; **TexCivA** 296**SW** 990; **TexCivA** 17**SW(2d)**467; **Vt** 151**A** 642; 198**Wis**89, 223**NW**429; **Can** [1929] 2**DomLR**208; **Sask** 7**DomLR**656, 3**West Wkly**223. [a] **In Texas.–CommnA** 293 **SW**811. [b] **Power to order new trial** is not affected by Rev. St. (1919) § 1424, prohibiting more than one new trial to any party on same issue. **Mo** 287**SW** 600.

1193–66 **Ind** 173**NE**181; 120**Kan**427, 243**P**1050; 222**MoA**941, 300**SW**540; 240 **NY**268, 148**NE**518; 136**Misc**167, 238 **NYS**702 (no material issue of fact and evidence of misrepresentation is undisputed); **NC** 154**SE**742; 20**BC**8, 18**Dom LR**464, 28**WestLR**754, 6**WestWkly** 1202; 3 **OntWN**1567, 22 **OntWR**860, 4 **DomLR**624.

1193–66½–New. where the district court has no jurisdiction of the subject matter, **Utah** 264**P**968.

1193–67 196**Wis**319, 220**NW**186.

1193–68 196**Wis**319, 220**NW**186 (where appellant had elected not to make trial amendment because of terms imposed by court).

1193–69 176**Ark**1166, 5**SW(2d)**735; 200**Wis**357, 228**NW**475.

1194–73 144**Va**253, 132**SE**479; **Can** [1928] 4**DomLR**529. [a] **Reversal of finding of judge or referee** leads to new trial, unless accompanied by express or implied contrary findings. 254**NY**128, 172**NE**265.

1194–74 See also **TexCivA** 16**SW(2d)** 154.

1194–74½–New. Where no statement of facts is in the record, and the court did not permit the defense fully to develop the case on reversal, the cause will be remanded. **TexCivA** 285SW331.

1194–74½–New. Under some circumstances the appellate court will refuse new trial on reversal, and remand the cause with a direction to render judgment on fact findings as amended by the appellate court. **CalA** 266P307.

1194–77 219Ala121, 121S419.

1194–81 [a] **In equity case** supreme court will rarely remand case with directions. 207 Iowa191, 217NW75.

1194–85 28Hawaii310; 235 IllA299 (direction to enter judgment on ascertainment of proper damages); 247 IllA358; 168Minn319, 212NW20; **MoA** 8 SW(2d)1038; **TexCivA** 282SW841; **TexCivA** 290SW270.

1194–85½–New. Ordinarily, when the amount of recovery is in excess of the amount justified by the conclusions of law, error may be remedied by a reversal with direction to restate the conclusions of law. **IndA** 167NE535.

1194–86 15F(2d)41; 24F(2d)195; 29 Ariz325, 241P515; 32 Ariz130, 256P365; 171Ark61, 283SW4; 176Ark108, 2 SW(2d)58; 201Cal518, 258P55; 69 CalA159, 230P976; 73CalA704, 239P67; CalA 276P583; 81Colo125, 254P156; 107Conn68, 139A649; 120Kan424, 243P1014; 129Kan475, 283P620; Kan 289P476; 165La151, 115S441; 259Mass113, 156NE30; Mass 167NE641 (supreme judicial court, on consideration of case, has power to confine trial on remand to specific issues); 241Mich209, 217NW36, 60ALR276; 241Mich608, 217NW919; **MoA** 274SW520; **MoA** 27SW(2d)492; 249NY588, 164NE594(2dcase); 49ND 741, 193NW327; 52ND113, 204NW849; **TexCommnA** 285SW295; 140Wash650, 250P59; 152Wash184, 277P465; 153 Wash679, 280P78 (reasonable value of goods); **Ont** [1929] 2**DomLR**821. But see 52SD182, 216NW948. [c] **Court, reversing decree and quieting title against defendants, may remand cause for trial of issues between defendants. TexCivA** 297SW482. [d] **Case not remanded for proceedings respecting cross complaint** where plaintiff disclaims interest and consents to modification of judgment. 204Cal 424, 268P631.

1195–87 120Kan434, 243P1014; 52ND 112, 202NW280; 55ND433, 214NW42. See also 214AppDiv232, 212NYS165.

1195–90 24F(2d)933; 30Ariz491, 249P 66; 171Ark61, 283SW4; 73CalA704, 239P67; 100CalA126, 279P1036; **CalA** 288P805; 125Kan760, 266P73; 13LaA 57, 127S51; 167Minn232, 208NW808; **NJ** 141A590; 49ND741, 193NW327; 52 ND11, 202NW280; 47RI153, 130A593; **RI** 133A439; **SD** 227NW79; 153Tenn 283, 282SW382; 196Wis334, 220NW 375; **Sask** [1929] 2**DomLR**627. But see 285Pa116, 131A665.

1195–92 180Ark298, 218SW(2d)430; 87 CalA87, 261P754; **Mass** 172NE858; **Mo** 287SW600; 51ND1, 198NW546; **Can** [1930] 1**DomLR**176. [a] **Illustration.**–81NH451, 130A145. [b] **Appellate court, dissolving injunction on refusal to vacate,** can only remand case for trial on merits. **TexCivA** 292SW263.

1195–94 204 Iowa15, 214NW562; 81 NH522, 129A768, 42ALR176 (where error is relative to one separable phase of case only, enough of case must be retried to afford parties fair trial and question of how much shall be retried is for lower court); **NM** 290P739(2d case); 128 Okl 118, 261P216; **Tex CommnA** 272SW1105.

1195–96 273US571, 47SCt515, 71Led 781; 199Cal 386, 249P513; 79CalA322, 249P217; 43 Ida64, 249P254; 229Ky 222, 168SW(2d)1022; 13LaA97, 126S 715; 165Minn379, 206NW721; **Mo** 20 SW(2d)502; 220MoA493, 274SW501; **MoA** 238SW(2d)215; 252NY178, 169NE 130 (variance); 195NC273, 141NE891; 121 Oh544, 170NE358; 125 Okl 208, 257 P303; **TexCommnA** 285SW264; **Tex CommnA** 285SW295; **TexCivA** 277SW 229; **TexCivA** 278SW307 (where defendant's right to redeem mortgaged property was preserved by leave to amend in reversal and remand of judgment); **TexCivA** 288SW843; **TexCivA** 188SW(2d)838. [b] **Generally cause should not be remanded** if amendments of pleading are necessary. **TexCivA** 300SW247.

1196–97 273US571, 47SCt515, 71Led 781; 169Ga595, 151SE5; 10LaA409, 121S372; 5LaA174; 220MoA19, 273SW 233; **MoA** 285SW771; **MoA** 287SW877; 240NY618, 148NE729; 50Ri 140, 145A 874; 123SC202, 130SE758 (leave to amend complaint in accordance with evidence received without objection); **TexCivA** 289SW1045; **TexCivA** 295SW 223; **TexCivA** 295SW292.

1196–98 Nebr 228NW367; **TexCivA** 274SW660 (verification of plea); **Tex CivA** 278SW307; **TexCivA** 15SW(2d) 155; **TexCivA** 16SW(2d)433.

1196–99 See also 34GaA362, 129SE302.

1196–1 98Fla576, 124S24 (for defect of parties); 68Utah41, 249P125.

1196–2 222Ky705, 28W(2d)376.

1196–3 **TexCivA** 19SW(2d)120.

1196–4 [a] **After dismissal of bill** for want of jurisdiction refusal to remand to enable filing of supplemental bill has been held proper. 46SCt402, 70Led 743.

1197–6 **ND** 224NW668; **TexCivA** 300 SW247.

1197–7 10LaA193, 120S694(1stcase); 258Mass185, 154NE843; **TexCommnA** 288SW264.

1197–8 28Hawaii 310.

1197–8½–New. Motion to remand for additional parties, interposed after decision on appeal, will be denied where the parties are not necessary or indispensable. 31F(2d)553.

1197–9 11F(2d)854; 79CalA685, 250P 705 (retrial only of issues raised affecting liability of additional parties); 86Colo 493, 283P1042; 43 Ida20, 248P 446; **Iowa** 230NW413; 232Ky415, 23 SW(2d)596; 4LaA647; 136 Okl 233, 277P242, 65ALR1186; 143 Okl 297, 288 P949; **TexCivA** 24SW(2d)796; 108 WVa665, 152SE533.

1197–13½–New. In Alberta, on reversal of judgment denying injunction, court will not add as party and enjoin one to whom defendant has transferred his business. **Alta** [1929] 4**DomLR**1025.

1197–14 234Mich102, 207NW919.

1197–15 See also 86PaSuper537.

1197–16 98Fla151, 123S570; **TexCivA** 275SW725; 66Utah1, 239P29.

1197–17 30F(2d)278; 11LaA496, 124S 167 (where lower court overlooked plaintiff's amended petition in passing on exception for failure to state cause of action in original petition, reversal and remand are warranted); 28 OhA 464, 162NE705 (sufficiency of pleadings not passed on in trial court); 125 Okl 208, 257P303; **SD** 229NW522.

1198–18 See also **TexCivA** 290SW909 (judgment erroneously entered against administrator as such). [c] **New trial will not be ordered for error in dismissing interventions,** where judgment of lower court dismisses suit at plaintiff's cost. 159La627, 105S794.

1198–19 166Ga717, 142SE86; 335 Ill 342, 167NE100. [a] (4) New trial ordered where evidence was excluded as matter of law rather than of discretion. **RI** 129A604. (5) Exclusion of certain portions of deposition is reversible error. **TexCivA** 271SW649.

1198–20 107Conn728, 142A403; 193NC 830, 136SE722; **Pa** 151A680; **Tex CommnA** 298SW268. [a] **Error held to preclude judgment on verdict** notwithstanding error in requiring excessive remittitur as condition to letting verdict stand. 106Conn302, 138A147.

1198–21 28Hawaii310; 206 Iowa794, 221NW455 (where cross petition in equity suit was erroneously transferred to law docket); 120Kan594, 244P1046; 219AppDiv261, 219NY809; 128Misc 677, 219NY854; 197NC189, 148SE36; **NC** 154SE625; 127 Okl 141, 259P838; **TexCivA** 58SW(2d)606; **BC** [1928] 2 **DomLR**13.

1199–24 218Ala448, 118S760; 165Ga 374, 140SE753; 3LaA654; 4LaA564; 164Minn367, 205NW262; 171Minn11, 213NW44; 146Miss775, 112S164; 193 NC829, 136SE927; 50ND949, 198NW 673; 128 Okl 118, 261P216, 221 [quot CJ]; 287Pa216, 134A397; **TexCommnA** 280SW740; **TexCommnA** 287SW47; **TexCommnA** 288SW127; **TexCivA** 278 SW288; **TexCivA** 286SW298; **TexCivA** 298SW313; **TexCivA** 18SW(2d)481; **Tex CivA** 12SW(2d)662; 100WVa515, 131 SE449; 101WVa546, 133SE141; 102 WVa151, 135SE16; WVa 154SE870.

1199–25 **TexCommnA** 292SW195.

1199–26 101WVa546, 133SE142.

1199–27 **Ariz** 283P924; 162Ga839, 134 SE923; 238Mich206, 213NW455; 50ND 858, 198NW472; 128 Okl 118, 261P 216, 221 [quotCJ]; 287Pa216, 134A 397; **TexCommnA** 289SW993; **Tex CivA** 271SW641; **TexCivA** 275SW401; **TexCivA** 285SW905; **TexCivA** 48W(2d) 316; **TexCivA** 28SW(2d)899. See also 320Mo 500, 8SW(2d)912. [a] 217Pa7, 66A78.

1199–29 **MoA** 29SW(2d)730.

1200–30 34F(2d)786 (where jury was waived and court's finding was not justified by evidence); 70CalA245, 233P 381; 213Ky668, 281SW796; 3LaA752; **MoA** 279SW177; **MoA** 279SW202; **Mo A** 14SW(2d)9; **MoA** 16SW(2d)719; **Mont** 292P714; 220AppDiv514, 221NYS 609; 221AppDiv122, 223NYS118; 225 AppDiv397, 233NYS362; 128 Okl 118, 261P216; **TexCommnA** 283SW161; **TexCivA** 8SW(2d)206; **TexCivA** 10SW (2d)799; **TexCivA** 26SW(2d)722; 100 Vt112, 135A715; 155Wash443, 284P 744. See also **TexCommnA** 286SW200. But see **TexCivA** 30SW(2d)676.

1200–31 212US414, 29SCt357, 53Led 577; 176Ark682, 4SW(2d)533; 330 Ill 640, 162NE139; 236Ky33, 32SW(2d) 538; **LaA** 127S408; 156Md346, 144A 510, 62ALR1497; 140Miss307, 105S518 (where defendant did not request directed verdict); **MoA** 4SW(2d)843; **Mo A** 13SW(2d)573; **MoA** 24SW(2d)191; **Mont** 290P244; 250NY56, 164NE741; 50ND484, 196NW553 (where there is some evidence tending to establish plaintiff's case); 52ND112, 202NW280; **TexCommnA** 283SW161; **TexCommnA** 288SW815; **TexCommnA** 12SW(2d) 983; **TexCivA** 291SW306; **TexCivA** 6 SW(2d)418; **TexCivA** 18SW(2d)697; **TexCivA** 31SW(2d)501; 144Wash268, 257P625; 100WVa585, 131SE449. See also **LaA** 130S883.

1200–32 50ND437, 196NW505; 31 Oh A375, 166NE691; 49SD466, 207NW471.

1200–33 128 Okl 118, 261P216, 221 [quotCJ].

1200–34 116Nebr241, 217NW94; 219 AppDiv240, 219NYS646; 121 Oh544, 170NE358; 105WVa536, 143SE345.

1200–35 330 Ill 640, 162NE139; 9LaA 519, 119S435; **MoA** 4SW(2d)843; 157 Tenn465, 9SW(2d)1026; **TexCivA** 283 SW862; **TexCivA** 290SW237; **TexCivA** 13SW(2d)579; 100WVa707, 131SE545; 108WVa302, 150SE733.

1200–35½–New. Although the evidence on a retrial after reversal of a judgment against appellant and codefendants on the theory of joint liability on contract as not supported by the evidence and findings is the same as at the first trial, the case must be remanded for retrial for clear and specific findings as to the relationship between defendants and judgment exonerating appellant from liability if plaintiff maintained and the court accepted the theory that the relationship of principal and agent existed between appellant and his codefendant. 70CalA245, 233P381.

1200–36 6LaA195; 62 OntL399, [1928] 3DomLR738. See also **MoA** 30SW(2d) 167. [a] **New trial will not be ordered for want of proper parties** where it is clear that plaintiff has no cause of action. 77Mont594, 251P1061.

1200–38 38F(2d)45; 209Ky330, 272 SW751 (remand with permission to take proof where apparently case was submitted on issue other than failure of proof).

1200–39 **Mo** 30SW(2d)22 (where practically identical evidence had been held insufficient on former appeal); **MoA** 28SSW997.

1201–42 13F(2d)999; 16F(2d)121; **Ala** 130S893; 171Ark1122, 287SW396; 172Ark386, 289SW1; 76CalA58, 243P 869; 103Conn21, 130A81; 165Ga374, 140SE753; 199 Iowa722, 202NW499; 120Kan434, 243P1014; 2LaA530; 245 Mich593, 223NW228; 164Minn367, 205

NW262; 164Minn384, 205NW434; 173 Minn242, 217NW339; 141Miss38, 106S 209, 44ALR393; 220MoA67, 279SW774; MoA 318SW(2d)232; 81Mont248, 263P 693; 251NY237, 167NE428; 217App Div253, 217NYS762; 221AppDiv174, 222NYS650; 129Misc674, 223NYS524; 229AppDiv176, 241NYS107; 190NC229, 129SE449; 52ND112, 202NW280; 30 OhA545, 165NE855; 27OhA355, 161NE 288; 128 Okl 118, 261P216, 221 [quot CJ]; Or 291P387; 294Pa412, 144A 420; 296Pa441, 146A98(2dcase); Tex CivA 278SW288; TexCivA 280SW276; TexCivA 282SW841; TexCivA 288SW 840; TexCivA 290SW909; TexCivA 293 SW249; TexCivA 297SW588; TexCivA 298SW309; TexCivA 9SW(2d)472; Tex CivA 9SW(2d)1047; TexCivA 10SW (2d)391; TexCivA 15SW(2d)168; Tex CivA 32SW(2d)696; Vt 147A270; W Va 153SE493 (failure of trial court to decide motion for change of venue); 193Wis63, 213NW667; NS [1928] 2 DomLR241. But see 136Misc167, 238 NYS702. [b] **Where court should have disposed of issue,** between defendant and another brought in as defendant by former, case will be sent back for disposition of such issue. 126Misc559, 214 NYS76.

1201–44 74CalA674, 241P900; 79CalA 595, 250P574; 83CalA276, 256P582; 83 CalA604, 257P180; CalA 263P532; 91 Fla375, 108S560; Ida 288P897; 335 Ill 368, 167NE40, 64ALR760; 213AppDiv 264, 211NYS35; 226AppDiv343, 234 NYS357; 226AppDiv113, 234NYS476; 58ND396, 226NW533; TexCivA 297SW 601; Utah 290P937; 101Vt322, 143A 299; BC [1929] 4DomLR465.

1202–45 91Fla375, 108S560.

1202–47 120Kan594, 244P1046.

1202–48 207 Iowa576, 223NW375 (where exemplary damages erroneously awarded).

1202–49½–New. A buyer, maintaining an action on an implied warranty of title on the sale of personal property, has been held not entitled to have judgment rendered in his favor on appeal on reversal of judgment for defendant, where judgment of the federal court, adjudicating the interest of a bankrupt third party in the property sold, was not clearly shown to be binding on defendant; but the case should be remanded for new trial. 206Cal 246, 274 P65(2dcase).

1202–52 32 OhA537, 168NE547 (where trial court had denied motion because it had granted judgment notwithstanding verdict).

1202–53 32 OhA537, 168NE547; 146 Wash377, 262P975, 264P714.

1202–55½–New. The supreme court can grant a new trial only when the trial court has erroneously refused to do so. 143Miss14, 108S291.

1202–55¾–New. On reversal of judgment for defendant notwithstanding verdict for plaintiff on motion in alternative for such judgment or for a new trial, the appellate court cannot pass on the reserved motion for a new trial. 99CalA671, 279P168.

1202–55¼–New. Where the lower court denied the motion as a matter of form following judgment non obstante veredicto, the appellate court, on reversal, will reinstate the rule for new trial on merits under the statutes. 94PaSuper 362.

1202–56 162La620, 110S880; 164La920, 114S836; 246NY244, 158NE508 (case remitted for consideration of question of discretion); TexCommnA 285SW295; TexCommnA 289SW994; TexCommnA 289SW1003.

1202–58½–New. In New York, where the appellate division of the supreme court reverses case on facts as well as on law, the appellate court, on reversing the cause, must grant a new trial, as it cannot review the determination of facts. 245NY91, 156NE625.

1202–58¾–New. In New York, where the intermediate court reverses the trial court on both law and facts, the court of appeals in reversing the appellate division must send the cause back for new trial. 240NY486, 148NE654.

1202–62 230Ky586, 20SW(2d)451; 5 LaA5; 13LaA193, 127S21; 82NH193, 132A12; TexCommnA 286SW173; BC [1928] 2DomLR13. [a] (2) 138 Okl 244, 280P811. (3) Okl 282P609.

1203–65 But see 148Md165, 129A21.

1203–69½–New. New trial, in view of previous trials, should not be permitted by the appellate court on reversal, where the trial court set aside the verdict, if the verdict can be reinstated without doing violence to settled principles of law. 194NC231, 139SE381.

1204–76 54ND686, 210NW657.

1204–78 271US536, 46SCt613, 70Led 1074.

1204–95 201Cal438, 257P521; 318 Ill 174, 149NE14; 322 Ill 185, 152NE601; 325 Ill 570, 156NE796; 206 Iowa179, 215NW606; MoA 280SW66, 69 [quot CJ]; Mont 285P174; Nebr 229NW121; 34 OhA335, 171NE319; 133 Okl 140, 271 P852; TexCivA 284SW258; TexCivA 288SW281; TexCivA 295SW281.

1204–97 97PaSuper450; TexCivA 273 SW894 (necessary effect of reversal was that all similar orders antecedent thereto were inoperative). See also Tex CommnA 9SW(2d)1105.

1204–2 142 Okl 74, 285P84; 29Porto Rico 954.

1205–10 41 Ida718, 241P1020 [citCJ]; 134Misc491, 235NYS281.

1205–11 94Fla203, 113S716; 212Ky36, 278SW168; 159La892, 106S371; 222 AppDiv561, 227NYS40 (judgment entered on order granting judgment on pleadings); 126 Okl 21, 258P266, 268 [citCJ]; TexCommnA 284SW215. [f] (2) 126 Okl 21, 258P266; TexCivA 14SW (2d)916(2dcase). (3) Where auxiliary action in garnishment in aid of execution of judgment in principal case is pending on appeal, reversal of judgment in principal action and remandment with directions to trial court to dismiss action has effect of like disposal of appeal in auxiliary action. 126 Okl 21, 258P266. [i] **On partition action,** reversal of judgment voids deed executed in pursuance of erroneous judgment below, it being immaterial whether such deed was executed and approved by lower court before or after issue of supersedeas bond. 212Ky36, 278SW168. [j] **Sale and proceedings under premature judgment** are set aside by reversal of original decree. 170Ark 212, 279SW382. [k] **Deficiency judgment.**–94Fla203, 113S716.

1205–12 84 IndA144, 149NE647; Iowa 228NW83; 88PaSuper568. [e] **Reversal on grounds judgment rendered** was contrary to jury's findings does not set aside portion of judgment sustaining motion for retrial. TexCivA 25SW(2d) 636.

1206–19 205Cal 496, 271P898; 252 IllA 468; 86 IndA653, 159NE469; 153Miss 51, 120S821; 80Mont49, 257P1020; 50 Philippine679.

1206–20 288Pa11, 135A740, 742 [quot CJ]; 50Philippine679; RI 147A425(2d case).

1206–23 [a] Mass 169NE410.

1206–24 252NY345, 169NE408(1stcase).

1207–40 CalA 288P1092 (judgment on appeal has force and effect from time of entry).

1207–47 See also 1LaA552.

1207–49 120 Oh621, 169NE295 (correcting records); TexCivA 289SW187.

1208–50 214Ala309, 107S812; MoA 299 SW70; MoA 24SW(2d)200.

1208–62 338 Ill 158, 170NE320; 205 Iowa826, 218NW572, 574 [citCJ].

1208–65 318 Ill 174, 149NE14; 338 Ill 158, 170NE320; 141 Okl 143, 285P132. [a] **Trial court must presume, on receipt of mandate,** that case is no longer pending in supreme court on motion for rehearing or otherwise. 317Mo 687, 297 SW43. [b] **Where appeal is from state appellate court to the United States supreme court,** upon latter court's decision and mandate, state appellate court is revested with jurisdiction over parties and subject matter. 131 Okl 32, 267P625.

1208–67 169Ark1065, 278SW353 (mandate is necessary only in case of reversal); 318 Ill 174, 149NE14 (on reversal in replevin action judgment for return of property cannot be entered without order of remand); 338 Ill 158, 170NE320; 77Mont214, 250P609; Tex CivA 32SW(2d)209.

1208–67½–New. Upon affirmance, there being nothing for the lower court to do, mandate is not necessary. 169Ark1065, 278SW353.

1209–68 205 Iowa826, 218NW572, 574 [citCJ].

1209–70 166Ga246, 142SE890.

1209–75 [b] **Statutes governing issuance of mandate are mandatory.**–Tex CivA 32SW(2d)209.

1209–80½–New. Where a defendant, against whom judgments have been procured in two actions in favor of the same plaintiff, in one of which proceedings have been stayed until determination of appeal in the other, requests the clerk of the appellate court to issue a remittitur pursuant to a dismissal of such appeal, plaintiff, by causing the same to be entered by the clerk of the trial court, waives any irregularities in the issuance of the remittitur. 68CalA239, 228P731.

1209–80¼–New. , especially where plaintiff takes advantage of such entry by requesting entry of judgment in the other action on the ground that the appeal had been determined and the judgment in the action in which the appeal was taken had become final. 68CalA 239, 228P731.

1210–81 TexCommnA 29SW(2d)988.

1210–87 TexCivA 282SW667.

1210–88 [a] (2) Constitutional and statutory provisions and rules of court for lapse of time and stay of proceedings after rendition of opinion in appellate court are designed for benefit of losing party. 68CalA239, 228P731.

1210–91 TexCivA 32SW(2d)209. See also TexCivA 290SW209.

1210–93 338 Ill 158, 170NE320.

1210–97 27F(2d)321.

1210–2½–New. An appellant who requests the clerk of the appellate court to issue a remittitur forthwith pursuant to a dismissal of the appeal waives the right to any lapse of time or stay on appeal after rendition of judgment in the appellate court. 68CalA 239, 228P731.

1210–5 [a] **Mandate need not give specific directions** as to action to be taken by lower court. 77Mont594, 251 P1061.

1210–6 33F(2d)899(1stcase).

1210–12½–New. It is unnecessary to include in mandate statement of liability for nonconformity with the mandate. 98Vt405, 130A137.

1210–12¾–New. A mandate prescribing the duty of defendant in a particular situation is sufficient without defining what may be a breach of such duty under another situation that may subsequently arise. 98Vt405, 130A137.

1210–12¼–New. Where statutes regulating procedure in lower court are plain and unambiguous, appellate court will not give directions on how to proceed. 255 IllA395.

1210–13 81CalA427, 254P606 (judgment becomes final by filing of remittitur).

1210–14 141 Okl 143, 285P132.

1211–15 9F(2d)515 (before execution may issue); 164Ga7, 137SE567; 318 Ill 174, 149NE14; 159La498, 105S598 (holding that statute applies only where something remains to be done to execute mandate); 122 Okl 56, 250P802. [a] **Where nothing remains to be done in lower court** to execute mandate, as where court reinstates, by reversal, order of executory process, no appeal having been taken from order of seizure and sale, sheriff may proceed with seizure and sale, though mandate was not recorded. 159La498, 105S598.

1211–17 159La498, 105S598.

1211–18 144 Okl 213, 291P80.

1211–24 318 Ill 174, 149NE14.

1211–25 166Ga246, 142SE890.

1211–29 [a] **Till final determination of case in appellate court** mandate cannot be properly transmitted to lower court. 317Mo 687, 297SW43 (while motion for rehearing pending).

1211–34 TexCivA 12SW(2d)1045.

1211–38 226Ky397, 11SW(2d)96.

1211–39 [a] **Effect of failure to give notice.**–235Ky784, 32SW(2d)340.

1212–45½–New. The trial judge is charged with knowledge of the certificate of reversal and opinion of the supreme court on file with the clerk as

part of the file of the case. 20AlaA531, 104S895.

1212-46 16F(2d)66; TexCivA 283SW189.

1212-47 269US125, 46SC52, 70Led 123; 16F(2d)66; 105Conn242, 135A38; 114Nebr764, 209NW609; 121 Ok25, 166NE818(1stcase); 121 Okl 75, 247P695; TexCivA 283SW189; 137Wash268, 242P35.

1212-48 172Ark1084, 291SW801.

1212-49 24F(2d)206.

1212-51 98CalA517, 277P183.

1212-53 See also Utah 286P620.

1212-54 179Ark470, 168SW(2d)575; 81 Mont300, 263P97 (exercise of no other jurisdiction than necessary to carry mandate into effect is contemplated); 123 Or108, 261P75.

1212-55 16F(2d)66; 175Ark67, 299SW 374; LnA 1298244 (matter mentioned in opinion but not in pleadings or decree is not res judicata); Mass 166NE752; 114Nebr764, 209NW609; 57ND14, 219 NW948; 120 Ok515, 166NE580; Okl 291P968(2dcase).

1212-56 36F(2d)831; 33PortoRico 147.

1212-57 169Ga511, 150SE843(2dcase).

1212-58 See also 166Ga246, 142SE890.

1212-61 48 Ida808, 285P675 (dismissal of cross-complaint not reversed held properly incorporated in new decree).

1212-70 IndA 169NE695 (but does not establish validity of avermentS).

1212-71 21F(2d)692. [a] **Reversal and remitting cause for further proceedings** is not final disposition upon merits or direction for dismissal against plaintiff. Wash 290P806.

1212-72 162La123, 1108172; 128Misc 108, 217NYS686 [rev on other grounds 218NYS103].

1212-72½-New. A decision by the supreme court that assignment of error to the overruling of defendant's demurrer to pleadings will be treated as abandoned, since not insisted on, adjudicated questions raised by demurrers, and hence the trial court did not err in overruling the demurrers filed after the case was returned to that court. 168Ga105, 147SE110.

1212-76½-New. In case motion was made in the trial court in the alternative for judgment notwithstanding the verdict or a new trial, and on appeal an order for judgment was reversed, upon the going down of the remittitur the motion for judgment stands as denied, and the motion for new trial is before the court for disposition. 165Minn41, 205NW433.

1212-76¾-New. Reversal of judgment notwithstanding the verdict, upon motion in alternative for such judgment or a new trial, leaves motion for new trial undetermined. 50ND642, 197NW596.

1212-76¼-New. A ruling by an appellate court that plaintiff should reply to affirmative defenses can have no application to issues raised by the reply served according to court's order. 243 NY295, 153NE79.

1212-76½-New. Affirmance by the court of appeals of an order granting a new trial without stating the grounds because the trial court "may" have sustained a motion on the ground set out therein that the verdict was against weight of evidence is not the same as finding that the trial court granted a new trial on such ground. 315Mo 318, 286SW100.

1212-76¾-New. A mandate requiring reinstatement of a writ of prohibition merely permits such further proceedings as are necessary to prevent the justice's court from taking further steps under the original summons declared by the supreme court not to confer jurisdiction. 81Mont300, 263P97.

1212-76½-New. Decision of supreme court is effective as of date of decree from which appeal was taken unless decision shows the contrary. 141 Okl 143, 285P132 (opinion held not to show contrary).

1212-82½-New. Remand with directions of supreme court to intermediate appellate court construed. 255 IllA21.

1212-83 5F(2d)731; 20F(2d)949 (rule applied on question of costs below); 28 F(2d)851; 32F(2d)195; 35F(2d)865 (1stcase); 22AlaA231, 115S80; 180Ark 765, 228SW(2d)556 (lower court); 180 Ark735, 228SW(2d)558; 181Ark1147, 26 SW(2d)591; 207Cal 515, 279P134; 208 Cal 705, 284P922; 75CalA111, 241P917; 81Colo 483, 256P660; 161Ga638, 131SE 475; 162Ga620, 134SE616; 163Ga440, 136SE436; 166Ga871, 144SE657; 170 Ga757, 154SE262; 35GaA19, 132SE125; 36GaA505, 137SE304; 37GaA686, 141 SE326; 44 Ida403, 258P370; 44 Ida530, 258P545; 47 Ida272, 274P1069; 332 Ill 126, 163NE319; 198 Ind207, 151NE610; IndA 162NE247; 204 Iowa363, 213NW 779; 217Ky11, 288SW1022; 231Ky461, 21SW(2d)824; 235Ky699, 32SW(2d)25; 11LaA609; 2LnA147; Me 152A55; 233 Mich440, 207NW10; 167Minn525, 209 NW632; 310Mo 287, 275SW540; 321 Mo 1052, 15SW(2d)329; 321Mo 1080, 15 SW(2d)762; Mo 26SW(2d)957; Mont 285P174; 105NJL242, 143A428; NJ 149A829; 131Misc318, 227NYS13; 131 Misc907, 228NYS736; 135Misc851, 241 NYS579; 230AppDiv99, 243NYS414; 192NC577, 135SE466; 194NC583, 140 SE193; 195NC869, 142SE493; 196 NC14, 144SE375(1stcase); 133 Okl 193, 271P948; 134 Okl 164, 272P 461; 136 Okl 274, 277P579; 140 Okl 145, 282P301; 121 Orl, 252P962; 121 Or232, 253P529; 48SD39, 206NW477; TexCivA 280SW892; TexCivA 282SW 319; TexCivA 48SW(2d)1008; TexCivA 24SW(2d)728; Utah 275P772; Utah 286P620; 108WVal, 150SE371; 196Wis 178, 218NW830. [b] (2) 42F(2d)152; 73 CalA304, 238P822; 75CalA111, 241P917; 162Ga620, 134SE616; 165Ga228, 140 SE497; 211Ky6, 276SW833; 158La648, 1048486. (4) 24OhA66, 156NE616; 121 Orl, 252P962. (11) 219Ky768, 294SW 481. (12) Ida 258P545. (14) 153Miss 49, 120S760 (nominal damages). [c] **Thus court on second trial may not disregard rulings of supreme court on record substantially the same.** 9F(2d) 593.

1214-84 178Ark329, 118SW(2d)761; 178Ark1065, 13SW(2d)616; 179Ark138, 15SW(2d)979; 163Ga440, 136SE436; 34GaA180, 129SE5; 204 Iowa363, 213 NW779; 227Ky458, 13SW(2d)500; 228 Ky780, 15SW(2d)628; 152Md289, 136A 269; Miss 115S400; 310Mo 287, 275SW 540; MoA 3SW(2d)1031; 86Mont78, 281P913; 133Misc686, 233NYS273. [a] (1) 15F(2d)794.

1215-85 36GaA505, 137SE304; 44 Ida 403, 258P370.

1215-86 CalA 290P630; 214Ky594, 283 SW953; 227Ky458, 13SW(2d)500; 169 LnA825, 126S205(5thcase).

1215-87 5F(2d)731 (that decision of appellate court reversed decision of lower court does not affect its finality as to questions actually decided).

1215-88 48SD39, 206NW477; TexCivA 24SW(2d)728. But see 178Ark1065, 13 SW(2d)616.

1215-89 81Colo 483, 256P660; 44 Ida 530, 258P545; 318 Ill 215, 149NE227; 121 Orl, 252P962; TexCivA 284SW852.

1215-90 320Mo 500, 8SW(2d)912.

1215-91 37GaA737, 141SE914; 217Ky 11, 288SW1022; NJ 150A344(2dcase).

1215-92 26F(2d)248; 175Ark614, 18W (2d)49; 72CalA433, 237P758; CalA 290 P630; 170Ga784, 154SE451; 231Ky163, 21SW(2d)254(1stcase); 170La245, 127 S615; 233Mich440, 207NW10.

1216-96 316Mo 626, 291SW488.

1216-99 242 IllA574; 204 Iowa363, 213 NW779; 221Ky248, 298SW714; 147 Miss831, 112S786; MoA 283SW732; 118 Ob257, 160NE710; Okl 293P206; 33 PortoRico 147.

1216-1 33PortoRico 147; RI 147A425 (2dcase) (mere reference to receiver's and counsel's compensation as direction to trial judge when he considers compensation).

1216-2 147Miss831, 112S786; 321Mo 35, 10SW(2d)918; Okl 291P968(2d case); 52ND349, 217NW510.

1216-3 52ND349, 217NW510 (whether issue contested at trial held immaterial).

1217-4 147Va522, 137SE614.

1217-7 217Ky430, 289SW1100.

1217-10 79CalA185, 249P1092; Ga 155 SE484; Iowa 228NW83; Me 152A55; 76Mont254, 246P168; 135Misc151, 238 NYS197; 138 Okl 171, 280P842; Tex CivA 282SW319; TexCivA 292SW263 [citCyc].

1217-11 93CalA202, 269P682.

1218-13 198Cal 490, 246P324; 213Ky 98, 280SW474; 214Ky594, 283SW953; 219Ky619, 294SW186; 321Mo 405, 11 SW(2d)8.

1218-14 221AppDiv569, 224NYS510; 196NC33, 144SE375(2dcase); Utah 275 P582; Utah 280P327.

1218-17 [a] **Reversal of nonsuit, holding that plaintiff made prima facie case,** is not conclusive on merits that facts were as claimed by plaintiff. 75CalA 44, 242P109.

1218-19 6F(2d)878; 213Ky98, 280SW 474; 227Ky458, 13SW(2d)500; 127 Me547, 142A865; Me 152A55.

1218-22 221AppDiv569, 224NYS510.

1218-26 117 Or482, 244P528.

1219-27 79CalA485, 249P1092; 93CalA 202, 269P682; 83Colo 225, 263P728; 115Nebr81, 211NW201; 132SC394, 129 SE159 (where case was remanded to lower court to submit question to jury, it did not preclude other issues on trial de novo).

1219-28 83Colo 225, 263P728.

1219-32 See also 98CalA517, 277P183.

1219-39 See also 75CalA111, 241P917.

1220-43 45SC161, 143SE13.

1220-46 175Ark614, 18W(2d)49; 229 Ky660, 17SW(2d)743. [a] **In Tennessee.**-160Tenn500, 26SW(2d)152. [b] **On return of mandate directing disposition in accordance with stipulation** trial court may determine authority of attorneys signing stipulation. Mo 28SW (2d)662.

1221-52 [a] **Where court of civil appeals renders judgment which court below should have rendered** under statutory authority, such judgment is final and beyond control of lower court. Tex CivA 275SW279. [b] **Reversal and remand with directions to dismiss action** is final disposition of case by appellate court. 126 Okl 21, 258P266. [c] **Trial court is without jurisdiction to revitalize auxiliary action in garnishment** after reversal of judgment in main action and remand with directions to dismiss action. 126 Okl 21, 258P266.

1221-53 200 Iowa847, 205NW504; 52 ND315, 202NW472.

1221-57½-New. Where the appellate court affirms an order of the trial court dismissing a bill on the ground that plaintiff's remedy was an action at law, and remands the case for transfer to the law side of the court, jurisdiction is thereby restored to the trial court. 240 Mich156, 215NW350.

1221-57¾-New. In Oklahoma transfer of case from superior court to district court by court clerk after reversal of judgment of superior court confers jurisdiction on district court. 143 Okl 128, 287P411.

1221-58 3F(2d)577; 20F(2d)932; 25 F(2d)106; 34F(2d)585 (where decree for plaintiff is affirmed, lower court should enforce decree unless defendant by leave files legally sufficient supplemental bill); 215Ala247, 110S394; 218 Ala379, 118S549; 28Ariz440, 237P382; 175Ark614, 18W(2d)49; Fla 128S837; 36GaA505, 137SE304; 318 Ill 60, 148NE 867; 318 Ill 215, 149NE227; 338 Ill 537, 170NE772; 252 IllA468; 206 Iowa179, 215NW606; 209Ky368, 272SW920; 221 Ky186, 298SW378; 128Me344, 147A426; Mass 167NE258; 309Mo 433, 274SW 789; 317Mo 687, 297SW43; MoA 19SW (2d)23; 81Mont300, 263P97; 135Misc 895, 238NYS692; 229AppDiv167, 241 NYS123; 49ND902, 193NW662; 50ND 776, 198NW121; 51ND329, 199NW766; 121 Okl 75, 247P695 (continuance of receivership); 127 Okl 7, 259P548; 130 Okl 293, 267P258; 141 Okl 143, 285P 132; 41 OklACR59; 44Philippine182; 49Philippine828; TexCivA 274SW255; TexCivA 283SW189; TexCivA 294SW 963; TexCivA 26SW(2d)657; Utah 275 P772 (mandate construed); 192Wis26, 211NW759. [a] 115Nebr134, 212NW46. [b] **Denial of allowance to coauthor for work in completing play after death of other coauthor held erroneous in view of decision of appellate division permitting such allowance.** 214AppDiv455, 212NYS690 (on reference for accounting). [c] **Particular directions.**-MoA 19

SW(2d)23 (to ascertain percentage of actual value of other lands in action to enjoin collection of part of tax).

1222–59 127 Okl 7, 259P548; 44Philippine182; 51Philippine624; 50SD186, 208NW828 (court cannot impose terms as condition for vacating judgment when appellate court has ordered it to be vacated without mention of terms).

1222–60 318 Ill 60, 148NE867; 44 Philippine182. But see Mo 28SW(2d) 662.

1222–60½–New. , or facts on which mandate is based are claimed not to exist. 309Mo 433, 274SW789.

1222–60¾–New. The trial court cannot err in following the directions of the mandate. 318 Ill 60, 148NE867.

1222–61 3F(2d)577.

1222–62 23F(2d)139; 318 Ill 60, 148 NE867.

1222–63 279US553, 49SCt423, 73Led 838.

1223–72 137 Okl 41, 277P921.

1223–73 281US1, 50SCt194, 74Led659; 23F(2d)139; 169Ark997, 278SW658; 208Cal 705, 284P922; 41GaA602, 154SE 157; 179Minn589, 229NW882; 229 AppDiv167, 241NYS123; 300Pa181, 150 A593; 44Philippine182; TexCivA 27SW (2d)643; 147Va1084, 133SE580, 45ALR 280. See also 137Misc337, 243NYS743. But see TexCivA 18SW(2d)515 (judgment reversing denial of temporary injunction and ordering temporary injunction becomes judgment of trial court, and is subject to modification or dissolution by it). [a] **Another court** of jurisdiction, coördinate with court to which mandate is sent, cannot by injunction interfere with execution ordered by latter pursuant to mandate. 44 Philippine182.

1223–74 206Cal 436, 274P534; 245Mich 292, 222NW730; 249Mich347, 228NW 761; 169Minn116, 210NW868; 228 AppDiv646, 238NYS177.

1223–76 93Fla29, 111S516.

1223–77 100CalA416, 280P181(2dcase); 164Ga642, 139SE212 (new party cannot be added); 174Minn153, 218NW550 [citCJ]; 49ND902, 193NW662; Tex CommnA 25SW(2d)295; TexCivA 286 SW577. See also 169Minn116, 210NW 868.

1223–80 169Ark997, 278SW658.

1223–85 [a] **Affirmance of injunction is not bar to its modification** so as to limit its operation as affected by later rulings of appellate courts in similar cases. 132 Misc356, 229NYS531.

1223–86 123Kan393, 254P366; 169 Minn116, 210NW868.

1223–87 150Md271, 132A627; 154Wash 150, 281P333 (where order of sale contained in affirmed judgment was set aside and corrected in matters of detail, there was no error).

1223–88 141Wash11, 250P348.

1224–90 [a] **Lower court may correct** erroneous descriptions of homestead in mortgage foreclosure on return of mandate. 191Wis602, 211NW795.

1224–92 105Conn242, 135A38; 147Va 1084, 133SE580, 45ALR280.

1224–93 TexCivA 275SW279.

1224–93½–New. The appellate court may direct entry of judgment from which an appeal may be taken. 222 AppDiv65, 225NYS354.

1224–95 Me 150A609; 174Minn153, 218 NW550 [citCJ]; 122 Okl 78, 251P 46.

1224–96 198Cal 490, 246P324; 166Ga 246, 142SE890 (extraordinary motion not based on grounds within statute); 44 Ida187, 255P642; NJ 150A194(1st case); 122 Okl 78, 251P46; 140 Okl 184, 282P342.

1224–97 200 Iowa847, 205NW504 (trial court after remand may adjust equities arising since entry of judgment); Tex CivA 11SW(2d)523.

1224–98 50ND776, 198NW121; 137 Okl 62, 277P935. But see TexCivA 11SW (2d)523.

1224–99 115Nebr58, 211NW208.

1224–1 See also 208Cal 256, 280P970.

1224–2 202 Iowa1389, 212NW127. [a] **Where case is remanded without direction as to final disposition,** trial court may grant new trial. 240Mich549, 215 NW364.

1224–3 165Minn374, 206NW716 (on reversal of order granting judgment notwithstanding verdict); 171Minn130, 213 NW536; 141Wash23, 250P467.

1224–4½–New. Where verdict was directed for defendant in two cases tried together but writ of error was prosecuted in one case only and a new trial was granted on motion of appellant on the ground that the stenographer had lost his notes, the trial judge may grant a new trial in the other case of his own motion. 240Mich549, 215NW364.

1224–6 36GaA505, 137SE304; 148Miss 97, 114S145; 155SC370, 152SE512.

1224–7 15F(2d)473; 37GaA312, 140SE 522; 122 Okl 78, 251P46; 143 Okl 127, 287P385.

1224–9 208 Iowa1083, 226NW768; Mass 168NE919; 50Nev35Z, 259P632; 121 Or432 254P1021.

1225–10 71CalA517, 235P660; 121 Or 432, 254P1021.

1225–11 121 Or432, 254P1021.

1225–17 [a] **Failure to renew motion to amend** after remand is election to stand on pleadings as they then were. 137 Wash177, 242P2.

1225–18 176Ark1166, 5SW(2d)735.

1225–26 148Miss97, 114S145 (amendment within time allowed by mandate, though filing of mandate is delayed, is sufficient); 137Wash177, 242P2.

1225–31 121 Or432, 254P1021.

1225–32 121 Or432, 254P1021; 293Pa 364, 143A10; 48RI 350, 138A50.

1226–33 175Ark67, 299SW374; 143 Okl 71, 287P719.

1226–35 127Me298, 143A54; 197NC253, 148SE253; 121 Or432, 254P1021; 48RI 350, 138A50.

1226–40 50Vt14.

1226–42 166Ga246, 142SE890; 37GaA 312, 140SE522.

1226–43 37GaA312, 140SE522; 318 Ill 215, 149NE227; 122 Okl 78, 251P46.

1226–44 218AppDiv190, 218NYS229.

1226–49 225Ky346, 8SW(2d)425.

1227–53 204 Iowa363, 213NW779.

1227–54 115Nebr81, 211NW201; 151 Wash363, 275P721.

1227–55 176Ark430, 3SW(2d)42; 179 Ark409, 16SW(2d)569(2dcase); 199Cal 203, 248P672; 78CalA751, 248P934 (motion denied for laches); Ga 155SE484; 217MoA592, 274SW941; 142 Okl 74, 285 P84. See also 191NC422, 131SE765.

1227–59 [a] **On remand for decision on merits,** defendant may not file amended answer. 159La431, 105S421 (decision of supreme court in such case is law of case).

1227–60 169Minn39, 209NW308, 211 NW822.

1227–61 204 Iowa520, 215NW707 (defendant on reversal of dismissal and general remand may not resume trial on ground he had not rested his case).

1228–64 136SC34, 134SE220.

1228–68 129Misc234, 221NYS266; 133 Okl 41, 270P1095.

1228–69 144 Okl 264, 291P124; Tex CivA 280SW318.

1228–70 TexCivA 280SW318.

1228–72 MoA 287SW832, 834 [citCJ].

1228–74 83Colo 95, 262P923; 221Ky 114, 298SW182 (clerical errors in petition may be amended); 144 Okl 264, 291 P124.

1228–77 83Colo 95, 262P923 (conforming petition for specific performance to contract introduced in evidence); Mass 168NE919 (make pleadings conform to issue tried).

1228–81 33GaA713, 128SE684; 135 Okl 181, 274P866; Wis 231NW641.

1229–84 220Ky800, 295SW1040; 133 Okl 41, 270P1095.

1229–86 220Ky800, 295SW1040.

1229–93 [a] **After reversal of decree** cancelling oil lease for nondevelopment, amendment of petition to plead abandonment has been held improper. 220 Ky800, 295SW1040.

1229–99½–New. Pleadings may be amended and issues formed where plea of res adjudicata is not inconsistent with defendant's former position. 9F (2d)498 (res adjudicata may be insisted upon as additional defense).

1229–99¾–New. On a case remanded from the supreme court, respondent may set up controverted settlement to be determined on proofs. 143Wash582, 255P 932.

1229–1 83Colo 95, 262P923; 109Conn 329, 146A724; 159La627, 105S794; 32 OhA343, 168NE67 (substitution of defendants after remand is not error where by service of process new party was before court). Contra 164Ga642, 139SE 212.

1229–1½–New. or to strike parties, 36 GaA505, 137SE304.

1230–3 214Ky505, 283SW954.

1230–5 220AppDiv780, 222NYS219.

1230–10½–New. Where trial court overrules demurrer to petition in accordance with mandate, issues presented by petition can be met by answer. 144 Okl 286, 290P1104.

1230–22 [a] **Hearing in intermediate appellate court** on remand for further proceedings. 33PortoRico 147. [b] **That witness testifies to facts on second trial** not testified to on former trial goes to weight of testimony, and not to competency. 204 Iowa1108, 216NW702.

1230–24½–New. Where the appellate court has determined the merits, the only proceeding in conformity with its opinion is the entry of a decree in accordance with it. 119 Okl 298, 249P729.

1231–25 94CalA795, 271P1100.

1231–27 Ga 155SE484; 51ND329, 199 NW766; 55ND540, 214NW871. [a] **What constitutes "proceedings" under statute** means any step taken, and required to be taken, to bring case on for trial. 55ND540, 214NW871.

1231–28 83Colo 235, 263P717 (showing insufficient to excuse laches of eight years).

1231–31½–New. Acceptance of costs under resettled order is acquiescence in provisions permitting answer, despite judgment and denial of motion to open default. 222AppDiv693, 224NYS730.

1231–31¾–New. Defendant who failed to obtain a stay in an appeal from an order overruling a demurrer and fixing the time to answer, which order was affirmed, is not entitled to time after remittitur to answer. 51SD527, 215NW 692.

1231–31¼–New. Where the amount paid into court by defendant as the amount due under a contract sought to be reformed and enforced was not paid over to plaintiff when his petition was dismissed the matter may be corrected after affirmance by motion on notice to the opposite party or his attorney. 222Ky 198, 300SW592.

1231–31⅝–New. The lower court has jurisdiction to enjoin defendant in ejectment from going on the premises pending retrial. 320Mo 1140, 10SW(2d)953.

1231–31⅞–New. Where the court's denial of motions for summary judgment or to strike out parts of answers is affirmed on appeal, subsequent similar motions cannot be entertained. 132Misc 756, 230NYS286.

1231–31⅞–New. A supreme court order reversing an order awarding fees for services as receiver has been held final so as to preclude the lower court from allowing fees on a second application. 249Mich119, 227NW753.

1231–31⅛–New. Where judgment overruling demurrer is affirmed on appeal to the supreme court, the demurring party has a statutory right to file an answer within ten days after the lower court receives the certificate of the supreme court. 198NC5, 150SE618(2d case).

1231–32 3F(2d)577; 168Ga105, 147SE 110; 201 Iowa1283, 207NW238 (retrial follows reversal on ground of failure to establish proximate cause of injury, unless as matter of law retrial will necessarily be limited to testimony produced on former trial). [a] **Production of record of former trial** on motion to dismiss after reversal will not be deemed to be a retrial of case solely on former record. 201 Iowa1283, 207NW238. [b] **Dismissal held error.–Wash** 290P806.

1231–36 See also 216Ala519, 113S535.

1231–38 55ND540, 214NW871 (where proceedings are taken, defendant cannot demand dismissal); 32PortoRico 621 (dismissal for want of prosecution under Code Civ. Proc. subd 3 § 192). [a] **Dismissal against one of two or more defendants** does not necessarily require dismissal against other defendant or

defendants where each is jointly and severally liable. 55ND540, 214NW871.

1231-40½-New. Where the appellate court reverses a judgment and directs the trial court to grant a new trial, further proceedings to be in conformity with the opinion, and the opinion does not indicate that the cause should be dismissed, it is proper for the trial court to deny a motion for a dismissal. 127 Okl 128, 260P16.

1231-40½-New. Motion to dismiss in nature of general demurrer has been held properly overruled as founded on matter not appearing in petition. Ga 155SE484.

1231-42 51Philippine894.

1231-43 [a] **Evidence on accounting.**-41 OklACR59 (on remand with directions to have accounting of rental value of premises and ascertain amount due defendants).

1231-45½-New. Where a mandate is for entry of judgment for reasonable cost and compensation, the other party against whom judgment is to be entered is entitled to notice and hearing. 27F (2d)852 [certiorari den 278US651, 49 SCt176, 73L ed562(4thcase)].

1231-45½-New. Under an agreement at the original trial that following determination of a primary question of liability further testimony should be taken as to the amount of recovery, such testimony may be taken within a mandate requiring entry of judgment for reasonable costs and compensation. 27F (2d)852 [certiorari den 278US651, 49SCt 176, 73L ed562(4thcase)] (both parties may introduce evidence).

1231-47 NC 154SE318. [a] **Acquiescence** by city, in order granting its motion for stay on condition that it pay defendant all damages sustained if city's appeal from dismissal of injunction was overruled, rendered city liable upon affirmance of dismissal. 249NY26, 162NE 573.

1231-51 Fla 128S19; 226AppDiv168, 234NYS544.

1231-52 161GaA638, 131SE475 (motion to recommit properly denied).

1232-63 123Kan393, 254P366; 174Minn 153, 218NW550 [citCJ]; TexCivA 274SW255; TexCivA 283SW189.

1232-65 But see 51Philippine624.

1232-71 158La489, 104S218 (where in boundary case appellate court had ordered survey, but deed was so indefinite as to make survey impossible, rule in lower court to show cause was held to be proper method of raising issue as to description of land).

1232-81 [a] **On affirmance of judgment of intermediate court.**-Judgment of supreme court, affirming judgment of circuit court affirming county court judgment awarding claimant in garnishment proceeding sum of money, need not direct circuit court to remand case to county court for enforcement by execution or other process. 149Miss814, 116S739.

1233-82½-New. Supreme court can do all that is necessary to give effect to its judgment. Fla 128S837.

1233-84 24F(2d)206; 4HawaiiFed332; 224 IllA529; Iowa 226NW49; 209Ky 368, 272SW920; 258Mass568, 155NE 599; MoA 178SW(2d)675; 77Mont594, 251P1061; 81Mont300, 263P97; 219App Div369, 220NYS6; 51ND329, 199NW 766; 121 Okl 75, 247P695; 144 Okl 286, 290P1104; Wash 289P18. [e] **Entry of order of dismissal in accordance with directions** is ministerial act. 126 Okl 21, 258P266. [f] **Compliance held insufficient.**-MoA 16SW(2d)683(1stcase).

1233-85 198Wis401, 224NW110(2d case).

1233-86 51ND329, 199NW766.

1233-87 316Mo 626, 291SW488 (entry of judgment after appeal held final judgment); 154Wash568, 283P192. [a] **Compliance with mandate held sufficient.**-179Ark470, 16SW(2d)575.

1233-90 18F(2d)471; 21F(2d)692; 128 Okl 237, 262P649. [a] **Under mandate requiring entry of judgment "on the record as it stands,"** entire record in lower court was to be considered. 27F (2d)852 [certiorari den 278US651, 49 SCt176, 73L ed562(4thcase)].

1234-91 77Mont594, 251P1061. But see SD 227NW79.

1234-4 [a] **Construction of judgment.**-29Hawaii514.

1234-5 318 Ill 215, 149NE227.

1234-5½-New. Such judgment is final and conclusive on the parties. 318 Ill 215, 149NE227.

1234-5½-New. Whether the judgment is entered in accordance with the mandate is the only question on subsequent appeal. 318 Ill 215, 149NE227.

1234-5¼-New. A decree of the district court after remand must speak from the date on which entered of record and be read in the light of existing conditions in determining whether it substantially complies with the supreme court opinion. Iowa 226NW49.

1234-6 105Conn242, 135A38; 4Hawaii Fed325.

1235-13 MoA 286SW842.

1235-15 43F(2d)280. See also 43F(2d) 280. [a] **Decree has been held not assessment of damages** as required by mandate on appeal. 43F(2d)280.

1235-17 38F(2d)605; Man [1929] 1 DomLR996 (set-off of other costs not permissible). [a] **Thus** trial court rendering judgment for costs on former appeal in favor of appellee erred, where appellate court adjudged costs against him. TexCivA 279SW493. [b] **Entry of judgment for costs is ministerial act** required to be done by officer of trial court. Ida 290P402.

1235-18 208Cal 303, 281P55.

1235-20 200Cal 307, 252P1052; 100 CalA416, 280P181(2dcase).

1235-22 116 Oh261, 155NE798.

1235-27 279US781, 49SCt492, 73L ed 954. See also 278US228, 49SCt106, 73 L ed282.

1235-28 228AppDiv529, 240NYS550.

1236-32 279US781, 49SCt492, 73L ed 954.

1236-33 30F(2d)454(2dcase).

1236-42 168La406, 122S126.

1237-49 119Kan411, 239P961, 962 [quotCJ].

1237-50 119Kan411, 239P961, 962 [quotCJ].

1237-51 119Kan411, 239P961, 962 [quotCJ]; 216Ky618, 287SW985.

1237-52 119Kan411, 239P961, 962 [quotCJ].

1237-53 119Kan411, 239P961, 962 [quotCJ]; 228AppDiv529, 240NYS550.

1237-54 119Kan411, 239P961, 962 [cit CJ].

1237-59 168La406, 122S126.

1238-63½-New. Pending appeal from interlocutory injunction, restoration will not be required before final determination. 30F(2d)454(2dcase).

1239-93 155Md693, 142A590; TexCivA 282SW841, 842 [quotCJ].

1239-95 29PortoRico 954; 149SC89, 146SE663.

1239-96 201Cal 438, 257P521 (opinion of appellate court must be followed where applicable); 208Cal 256, 280P 970; 142Miss435, 107S658 (equity case); MoA 178SW(2d)675; 52SD349, 217NW 510; Wash 290P806. [a] **Trial de novo** follows under mandate, which sends case back to trial court, when mandate reads "exceptions sustained." 128Me 382, 147A816.

1239-4 TexCivA 282SW841, 842 [quot CJ].

1239-6 198Cal 490, 246P324; TexCivA 282SW841, 842 [quotCJ].

1240-12 But see 29PortoRico 954.

1240-13 41GaA455, 153SE443; 29PortoRico 954. [b] **Judgment entered without new trial** is null and void. 29 PortoRico 954.

1240-14 But see 320Mo 1140, 10SW(2d) 953.

1240-21 CalA 290P630; 114Nebr404, 207NW682; 116Nebr463, 217NW946; 195NC10, 141SE284; TexCivA 294SW 963; 147Va522, 137SE614. See also 9 F(2d)593. [a] (1) TexCivA 299SW 687.

1240-22 190NC476, 130SE115 (error to render judgment on pleadings without disposing of issuable questions of fact); 113 Or398, 233P547; 140Wash650, 250 P59.

1240-23 26F(2d)248; 175Ark67, 299 SW374; 177Ark638, 7SW(2d)332; 180 Ark1116, 24SW(2d)321; 93CalA202, 269 P682; 105Conn249, 135A37; 142Miss 435, 107S658 (equity case); 219AppDiv 434, 220NYS238; 228AppDiv168, 239 NYS461; 191NC257, 131SE653; 140 Wash650, 250P59. [a] **Trial not confined to issue of false representations set up** in false complaint where case was reversed and remanded on ground that evidence was sufficient to go to jury. 140Wash650, 250P59.

1241-24 15F(2d)473.

1241-25 81Colo 483, 256P660; 113 Or 398, 233P547.

1241-28 176Ark1166, 5SW(2d)735 (where no direction was specifically made for new trial of any issues and case was reversed because judgment was not in accordance with views expressed).

1241-31 180Ark1116, 24SW(2d)321; 215Ky128, 284SW91.

1241-37 [a] **Granting defendant's motion for judgment** on plaintiff's opening statement held prejudicial error where mandate indicated that question of fact involved should be submitted to jury. 22 OhA104, 153NE525.

1241-40 151Miss131, 117S536, 61ALR 1073.

1241-41 See also 41F(2d)177.

1242-42½-New. On trial de novo after remand, the lower court is not bound by rulings on a former hearing. 233 IllA 216.

1242-42½-New. After trial de novo had upon reversal of a decree in equity, such judgment or decree should be rendered as the pleadings and evidence then introduced require. 142Miss435, 107S658.

1242-42¼-New. Where evidence introduced on new trial is the same as that on the former trial and no further evidence is introduced and no objection is made to the procedure adopted, defendant is not entitled to have the formalities of a trial with issues submitted to the court or jury. 317Mo 1021, 297SW 366.

1242-44 338 Ill 537, 170NE772; 227 AppDiv290, 237NYS537; TexCivA 294 SW963.

1242-46 Utah 275P772.

1242-47 2F(2d)936 (where appellate court held evidence made question for jury, on new trial court must submit question to jury on substantially same evidence); 83Colo 225, 263P728 (where, after decision against joint liability, plaintiff proceeded against one defendant only); 233 IllA216 (testimony of witness at first trial who had since died); Mo 276SW12. But see CalA 290 P630. [b] 27 OhA345, 161NE353.

1242-49 232Ky503, 23SW(2d)945, 68 ALR1481; 147Miss831, 112S786; 114 Nebr404, 207NW682. But see 29Hawaii 560.

1242-53 105NJL212, 143A428. See also 199Cal 203, 248P672.

1243-61 220Ky248, 294SW1045; 223Ky 633, 4SW(2d)731; 216Ky108, 287SW 362; 227Ky841, 14SW(2d)174; 234Ky 243, 27SW(2d)952; MoA 291SW161. [a] **Verbatim instructions** directed to be given on former appeal are proper. 211Ky735, 277SW1028.

1243-63 231Ky788, 22SW(2d)281.

1243-69 51ND329, 199NW766. But see 81Mont300, 263P97.

1243-70 51ND329, 199NW766; 141 Okl 143, 285P132; 123 Or108, 261P75.

1243-71 43 Ida529, 253P625.

1243-72 [a] See also 279US781, 49SCt 492, 73L ed954.

1243-73 86 IndA499, 158NE925; 51ND 329, 199NW766.

1243-74 43 Ida529, 253P625.

1244-80½-New. A suit should be treated as pending in the appellate court until again sent down to a lower court. 171Ark285, 284SW770.

1244-81 200Cal 307, 252P1052; 317Mo 687, 297SW43; 194NC303, 139SE613; 136 Okl 29, 275P1036; 10YergTenn48. Contra TexCivA 284SW231.

1244-83 316Mo 626, 291SW488; 118 Nebr734, 226NW318(1stcase).

1244-87 31F(2d)288.

1244-89½-New. Jurisdiction of the appellate court does not terminate until the case has been returned to the trial court. 29Ariz23, 239P290.

1244-89½-New. Where petition to vacate judgment is filed prior to adverse party's appeal, supreme court treats petition for prohibition as application for leave to proceed as if after remand. **Wash** 290P430.

1245-90 29**Ariz**23, 239P290; 200**Cal** 307, 252P1052; 207**Cal** 7, 276P1002; 125 **Or**299, 265P1116 (for purpose of retaxing costs); 35**PortoRico** 164 (for purpose of rehearing motion for recall of mandate necessary).

1245-92 68**CalA**752, 230P196 (in absence of mistake, fraud, or imposition); 92**Fla**740, 110S259, 262 [citCJ].

1245-93 15**F(2d)**52.

1245-95 123 **Or**352, 262P222.

1245-95½-New. for the purpose of correcting an alleged error of the trial court in permitting amendment of a complaint on return of mandate to it, 123 **Or**352, 262P222.

1245-98 92**Fla**740, 110S259; 146**Wash** 679, 264P988.

1245-99 197**Cal** 67, 239P718 (to strike provision for costs inadvertently inserted in mandate).

1245-8 See also 317**Mo** 687, 297**SW**43.

1246-8 37**F(2d)**98.

1246-12½-New. The appellate court will not grant a petition to recall a mandate in order to amend a decree determining water rights by incorporating therein a description of all of the lands entitled to water where there are tracts entitled to such use, the owners of which are not parties to the proceeding, and where the court cannot accurately describe all of the land. 119 **Or**155, 236P 487, 763, 237P682, 239P123.

1246-12½-New. After remand to a chancery court, further relief must be sought in such court. 99**NJEq**707, 134 **A**189.

1246-14 169**Ark**997, 278**SW**658 (adjudication on appeal in equity case, tried de novo, is final, and errors cannot be corrected by means of rehearing); 170 **Ga**912, 154**SE**881; 122 **Okl** 160, 252**P** 410, 412 [quotCJ].

1246-15 122 **Okl** 160, 252P410, 412 [quotCJ].

1246-16 122 **Okl** 160, 252P410, 412 [quotCJ].

1246-18 **TexCivA** 32**SW(2d)**485(1st case).

1246-19 163**La**734, 112S667; 8**LaA**46. [a] **Such correction may be made on basis of records** and does not require hearing on oral evidence. 104**Conn**107, 132**A**395. [b] **Changes held not correction of mere clerical errors.**-169**La** 766, 126S54.

1247-24 9**LaA**647, 10**LaA**278; 119S720; 4**LaA**642; 155**Miss**157, 124S268; 224 **AppDiv**523, 231**NYS**520.

1247-27½-New. or where error in the judgment is immaterial, **TexCivA** 274 **SW**642.

1247-28 **TexCivA** 284**SW**310. See also 117**Tex**288, 1**SW(2d)**1088.

1247-32 **Miss** 1148829 (by consent).

1247-33 32**NM**250, 255P391. [a] (4) Where appellant was in no way misled by appellee, nor in any way prevented from obtaining extension of time to perfect his appeal, there was no good cause for affirmance. 32**NM**250, 255P391.

1247-33½-New. Upon reversal by the United States supreme court of judgment of the state supreme court affirming the intermediate court of appeals, the latter court will vacate its judgment and reverse the judgment of the trial court overruling defendant's motion for new trial. 35**GaA**81, 132**SE**144.

1247-33½-New. Where the supreme court reverses the judgment of the court of appeals which had reversed judgment of the trial court, the court of appeals will vacate its own judgment. 35**GaA** 259, 132**SE**784.

1247-33¼-New. A judge of an appellate court cannot vacate and set aside a judgment of the court in vacation. 122 **Okl** 160, 252P410.

1247-33½-New. Where the supreme court on certiorari reverses the judgment of a court of appeals affirming judgment of a trial court, the court of appeals will vacate its judgment and reverse judgment of the lower court. 36**GaA**41, 135**SE**224 (judgment refusing to strike petition on demurrer).

1247-34 [a] **Amendment as to costs.**-140**Miss**120, 104S696, 105S739. [b] **Motion to correct judgment is premature** till suggestion of error is disposed of. 150**Miss**766, 117S365.

1247-35 25**F(2d)**863; **TexCivA** 275**SW** 279; 147**Va**1084, 133**SE**580, 45**ALR**280. But see **Miss** 130S152; 7**Va**122.

1248-36 147**Va**1084, 133**SE**580, 45**ALR** 280.

1248-37 **Ga** 154**SE**881.

1248-45 25**F(2d)**863.

1248-46 92**Fla**740, 110S259, 261 [cit CJ].

1248-48½-New. Where a former judgment of the intermediate appellate court reversing the judgment of the trial court has been reversed by a higher court, the intermediate appellate court will reverse its former judgment and affirm the judgment of the trial court. 35**GaA** 586, 134**SE**201; 36**GaA**746, 138**SE**282.

1248-56 32**F(2d)**725.

1249-60½-New. Where the appellate division rendered an order reversing findings on the ground that holding as a matter of law that the proceeding in the municipal court was res judicata in the appellate division imported a finding of facts necessary to sustain a proceeding in the municipal court, and in addition made new findings of fact, the court of appeals was thereby enabled to review the record both on law and facts without the necessity for resettling of the order. 226**AppDiv**652, 233**NYS**329.

1249-62 275**US**156, 48**SCt**96, 72**L ed** 214; 15**F(2d)**735; **TexCivA** 48**SW(2d)** 1016. [a] **Amendment of mandate held unwarranted.**-15**F(2d)**735.

1249-66 275**US**156, 48**SCt**96, 72**L ed** 214.

1249-74½-New. The failure to insert in a remittitur a judgment for recovery of respondent's costs on appeal is not such a fatal omission as to demand a recall of the remittitur where the statute allows costs to respondent and appellant stands ready to pay the maximum amount thereof. 68**CalA**239, 228**P** 731.

1249-74½-New. Motion to correct mandate by fixing amount of damages denied where the lower court had not passed on the question. 212**Ky**286, 278 **SW**833.

1249-74¼-New. Where mandate directed judgment for the amount of a claim against the state, including interest, an amendment further mentioning items of interest was held unnecessary. 243**NY** 593, 154**NE**619.

1250-97½-New. In jurisdictions where the statutes provide that the amount of the bond shall be fixed by the clerk, if the chancellor fixes the amount which is approved by the clerk, the validity of the appeal is not affected. 224 **IllA**151.

1252-13 149**Md**374, 131**A**766; 249**Mich** 518, 229**NW**506.

1253-28 149**Md**374, 131**A**766; 30**NM** 331, 233P520, 522 [citCJ]; **Okl** 292P 68, 71 [quotCJ].

1253-29 30**NM**331, 233P520, 522 [cit CJ].

1253-31 30**NM**331, 233P520, 522 [cit CJ].

1258-1 **MoA** 258**SW(2d)**520.

1262-64 146**Va**680, 132**SE**848.

1262-66 **Ala** 127S829.

1263-72 [c] 200 **Ind**350, 160**NE**43.

1263-73 **Ala** 127S829; 200 **Ind**350, 160 **NE**43; 226**Ky**162, 10**SW(2d)**485; **Tex CivA** 9**SW(2d)**413.

1264-74 **Ala** 127S829; 226**Ky**62, 10 **SW(2d)**485.

1265-87 146**Va**680, 132**SE**848.

1265-88 146**Va**680, 132**SE**848.

1266-99 146**Va**680, 132**SE**848.

1266-1 146**Va**680, 132**SE**848.

1267-10 29**F(2d)**92; 226**Ky**62, 10 **SW(2d)**485.

1268-11 146**Va**680, 132**SE**848.

1268-17½-New. Where the appellate court took jurisdiction of an appeal, the action will thereafter lie on an appeal bond, even though the appeal is improperly taken and improperly allowed. 29 **F(2d)**92.

1268-17½-New. A bond given for stay of proceedings for moving for new trial or settling a bill of exceptions, has been held not unenforceable, because at the time it was filed defendants had lost the right to have the bill of exceptions settled, where the sureties agreed to pay the judgment, if it was not reversed or set aside. 244**Mich**262, 221**NW**301.

1269-28 23 **OhA**370, 155**NE**558.

1269-29 200 **Ind**350, 160**NE**43.

1269-35 [b] **LaA** 130S663.

1270-40. **TexCommnA** 16**SW(2d)**535.

1270-42 125 **Okl** 272, 257P788, 53**ALR** 800.

1272-66½-New. Conditions of a statutory supersedeas bond are breached by failure to file petition in error within the time allowed. 106 **Okl** 29, 232P849.

1273-71 See also **Ark** 32**SW(2d)**614.

1274-82 30**NM**331, 233P520; 132**SC**1, 128**SE**57.

1274-92 149**Md**374, 131**A**766 (wife and sureties liable on appeal bond of husband and wife). [d] **Thus** sureties on bond to "prosecute appeal with effect" are liable where judgment is affirmed as to one and reversed as to the other. 149 **Md**374, 131**A**766.

1275-4 30**NM**331, 233P520.

1275-6 30**NM**331, 233P520.

1276-15 235 **IllA**167; **Miss** 126S842 (4thcase).

1276-16 28**Hawaii**308. [a] **Motion to cancel bond** on ground of filing of second bond will be denied. 28**Hawaii**308.

1277-25 9**F(2d)**795.

1277-26 9**F(2d)**795.

1278-31 But see 226**Ky**62, 10**SW(2d)** 485.

1278-35 250 **IllA**598.

1278-37 [g] **Successful party ejected from premises** on attempt to obtain possession after dismissal of appeal, can resort to bond. **Wash** 289P1008.

1280-65 205 **Iowa**707, 216**NW**17, 19 [citCJ].

1280-69 128**Kan**91, 276P67.

1281-73 19**F(2d)**253. But see 243 **IllA** 447.

1281-74 202 **Iowa**198, 207**NW**532.

1281-75 [b] **Release of part of obligees on joint bond** without notice to or knowledge of surety releases surety. 202 **Iowa**198, 207**NW**532.

1281-92½-New. Payment of money by husband on affirmance of alimony order without direction as to application does not apply to the credit of the surety. 91 **CalA**606, 267P392.

1281-92½-New. Voluntary surrender of defendant for jail commitment is not satisfaction of appeal bond conditioned "to pay judgment." 235 **IllA**308.

1285-47 9**F(2d)**795 (dismissal for consideration); 161**La**150, 108S318.

1287-64 248 **IllA**39.

1287-72 **MoA** 78**W(2d)**1025. [c] **Sureties on supersedeas bond** conditioned that obligor shall pay judgment and costs in case judgment is affirmed in whole or in part are not discharged where judgment is affirmed by reason of fact that, pending appeal and before affirmance, appellant filed voluntary petition in bankruptcy and secured discharge of his obligations, including judgment appealed from. 121 **Okl** 271, 249P740.

1288-73 248 **IllA**39.

1289-92 322**Mo** 450, 17**SW(2d)**505.

1289-98 13**LaA**702, 128S43; 140 **Okl** 36, 282P129 (recovery on bond conditioned to pay condemnation money in action involving possession of real property); **Okl** 292P68. [a] **Surety as favorite of law entitled to stand on strict letter of bond** and cannot be held liable by implication, intendment, or inference. **MoA** 25**SW(2d)**520.

1289-99 169**Minn**15, 208**NW**952, 210 **NW**856; 115**Tex**405, 283**SW**135; **Tex CivA** 27**SW(2d)**373.

1290-1½-New. Liability of a surety is coextensive with that of the principal. **TexCivA** 283**SW**189.

1290-1½-New. As respects the right to a summary judgment on a supersedeas bond, the character of judgment as "money judgment" does not depend on whether it is enforceable by execution. 22**F(2d)**369.

1290-1¼-New. A judgment that moneys unlawfully deposited in an insolvent bank constituted a trust fund has been held a "money judgment" within a statute authorizing a summary judg-

ment on a supersedeas bond. 22F(2d) 369.

1290–1½–New. On affirmance of judgment liability of sureties on a supersedeas bond is fixed, and a summary judgment may be rendered on the bond. 22F(2d)369.

1290–1½–New. A surety filing a supersedeas bond stipulating for judgment against it became a party and submitted himself to the court's jurisdiction. 22F(2d)369.

1290–1½–New. A surety on a supersedeas bond has been held not entitled to notice of a proceeding for a summary judgment on a bond after affirmance of judgment. 22F(2d)369.

1290–1½–New. A judgment should merely fix liability and remand to ascertain the amount where all disbursements of the receiver are not shown. 176Ark1140, 5SW(2d)299.

1290–1½–New. The bond given by a county treasurer on appeal from a judgment against him in favor of the county is a resource in addition to his official bond for collection of money due county. 13PaDist&Co 141.

1290–5 TexCivA 9SW(2d)413 (sureties are entitled to credit for sum paid as costs of appeal in former suit).

1290–9 ND 217NW516; 50SD380, 210NW190; TexCivA 283SW189; TexCivA 23SW(2d)804 (any part of judgment sustained by appellate court).

1291–13 127 Okl 33, 259P541; 115Tex 405, 283SW135.

1291–18½–New. Where, on appeal from a decree rendering a personal judgment, canceling a deed, and subjecting the land to payment of the judgment, the bond supersedes only the part of the decree canceling the deed and subjecting the land to payment of the judgment, the appellate court, on affirming the personal judgment but reversing the decree canceling the deed, will not enter judgment against the sureties for the amount of the personal judgment. 141Miss370, 106S528, 107S279.

1293–44 115Tex405, 283SW135.

1294–52 172Ark579, 289SW757; Miss 130S152 (penalty of five per cent on judgment affirmed not part of costs for which surety on cost bond is liable).

1294–58 178Ark486, 12SW(2d)13.

1295–67 [a] **After time for appeal** from decree has expired, prevailing party should minimize damages for which sureties on supersedeas bond are liable by enforcing lien decree. 173Ark382, 292SW403.

1295–68 TexCivA 9SW(2d)413 (profits lost not too speculative to support recovery).

1295–71 173Ark382, 292SW403.

1295–72½–New. Discretion of court. The trial court has no discretion to withhold recovery for actual damages suffered by the prevailing party whose hands were tied by the supersedeas. 169Minn15, 208NW952, 210NW856.

1295–72½–New. Damages recoverable on a supersedeas bond should be based on a writ of supersedeas, not an order appealed from. 200Ind350, 160NE43.

1295–74 250Mich113, 229NW592 (liable from time of commissioner's judgment).

1295–77 100WVa42, 129SE764 (stay bond given by defendant in unlawful entry and detainer action to suspend judgment pending application for writ of error and supersedeas held to cover all damages, special or otherwise, sustained as proximate result of suspension).

1295–78 172Ark579, 289SW757.

1296–89 172Ark579, 289SW757.

1296–95 92Fla215, 109S456; 1KyOp 347.

1296–96 92Fla215, 109S456.

1296–97 92Fla215, 109S456.

1296–97½–New. Sureties on defendant's appeal bond are held liable to insolvent plaintiff's attorney, where parties satisfied judgment pending appeal without the attorney's knowledge. 128Misc385, 219NYS560.

1297–12½–New. The owner of premises sued for injuries caused by the lessee's negligence has been held entitled to recourse against the lessee, who was primarily liable for the injuries, and who agreed to save the owner of the property harmless, and also had the right of action against the lessee's surety on its undertaking to pay judgments. 224App Div553, 231NYS494.

1297–12½–New. An action on a supersedeas bond may not be maintained where the supersedeas was invalid. 225 Ky100, 7SW(2d)849.

1297–13 Fla 128S422.

1297–17 94PaSuper84 (stay of proceedings).

1298–32 Ark 32SW(2d)614.

1298–33 [a] **As between surety on appeal bond in action against county treasurer and surety on treasurer's official bond** former is primarily liable for payment in default of payment by treasurer. 13PaDist&Co 141.

1299–45 13LaA365, 125S896.

1299–48 128Kan91, 276P67.

1299–48½–New. Surety on suspensive appeal bond can only claim release to extent of injury by failure first to exhaust property of judgment debtor. 13LaA365, 125S896.

1299–57 307Mo 417, 270SW691 (surety held entitled to set up defense which principal could have set up if made party). [a] **Offer of defendant in error** to bid sufficient to pay judgment, alleged to work estoppel against suit on appeal bond, held not conditional on sale on day advertised. TexCivA 297SW1070. [b] **Matters held not sufficient to release** from liability on bond. 178Ark486, 12SW(2d)13. [c] **In action against surety on appeal bond filed by county treasurer on appeal from judgment against him** it is not defense that county solicitor stated that, if judgment should be affirmed, he would collect from surety on treasurer's official bond. 13PaDist&Co 141. [d] **When judgment creditors are insolvent,** delay in issuing execution does not relieve surety on appeal bond. 135Misc359, 238NYS209.

1299–57½–New. As to damages coming within the terms of the undertaking, only defenses are such equitable defenses as are ordinarily available on contractual obligations. 169Minn15, 208NW952, 210NW856.

1299–58 169Minn15, 208NW952, 210NW856; 307Mo 417, 270SW691 (judgment not conclusive as to matters which might have been but were not litigated and decided).

1299–63½–New. , or attack validity of bond. 10F(2d)311.

1299–70½–New. In an action on a bond substituted for an appeal bond defenses are limited to those which could have been set up in an action on the appeal bond where the substituted bond so stipulates. 307Mo 417, 270SW691.

1299–70½–New. Where a judgment in a definite amount has been rendered in an action for conversion of securities pledged by defendant as collateral to notes, defendant is not required to pay the judgment before he can set up setoffs and counterclaims to the judgment creditor's suit on his appeal bond for money received or that should have been realized by the creditor upon other securities pledged by the maker of the notes to secure their payment. 307Mo 417, 270SW691.

1299–70¼–New. Where the judgment appealed from is merely collateral security for payment of notes and suit is brought on the appeal bond against the surety only, the surety is entitled to plead that the notes have been paid by money received or that should have been realized from other collateral securities pledged for their payment. 307Mo 417, 270SW691.

1299–70½–New. In an action on a supersedeas bond a defense based on the ground that no appeal had been granted from the judgment cannot be maintained where the appellate court had determined, the contrary on an appeal in the action in which the bond was given. 213Ky243, 280SW920.

1299–70½–New. Where a party has obtained an injunction staying his adversary's proceedings and has appealed from an order dissolving the injunction and given bond to stay further proceedings, thereby causing his adversary to suffer damages, he cannot set up as a defense to an action on the supersedeas bond a want of jurisdiction to entertain the appeal. 123 Okl 43, 251P985.

1299–70½–New. Consent of attachment defendants to attachment in the action is not available as a defense to the obligors on an appeal bond. 76CalA338, 244P955.

1299–70½–New. Tender of return of property pending did not relieve bondsman of obligation under bond. Wash 289P1008. In an action on a supersedeas bond by plaintiffs in whom title was quieted but who did not claim damages, defendants cannot set off the value of permanent improvements. 206 Iowa884, 221NW661.

1299–70½–New. In such action defendant who did not assert a claim for improvements until after he relinquished possession of the land cannot set off a claim for improvements. 206 Iowa884, 221NW661.

1300–76 [a] **Receiver of corporation held proper plaintiff.**–200 Ind350, 160NE43.

1300–77½–New. In an action on a supersedeas bond by plaintiffs in whom title to certain land was quieted to recover rentals, it is not error for the court to refuse to strike all plaintiffs but one or to require an election as to which of them shall proceed. 206 Iowa884, 221NW661.

1300–97½–New. The right to bring suit on a supersedeas bond, on appeal from an order dissolving a restraining order in a replevin action, which is conditional to pay any judgment rendered on appeal or in further proceedings in the cause, and to pay all costs and damages, passes as incident to an assignment of the judgment in the replevin action. 123 Okl 43, 251P985.

1301–6 50SD380, 210NW190.

1301–13½–New. In an action against a surety on an appeal bond it is error to refuse to permit the principal to be made a party on his own application or on the application of the surety. 307Mo 417, 270SW691.

1301–15 [a] 143Wash582, 255P932. [b] **Petition held insufficient.**–232Ky333, 23SW(2d)545.

1304–66 235 IllA308.

1304–85 [a] **Defendant in error,** relieved from executing certain land, on promise to bid full amount of judgment, held to have burden of proving that he was not estopped to sue on supersedeas bond. TexCivA 297SW1070.

1304–85½–New. Presumptions. Strong presumption arises, where sheriff is permitted to release seizure of bank box without realizing anything of value, that bank box contained nothing of value. 13LaA365, 125S896.

1305–95 Ala 127S829. But see 248 IllA 39.

1305–1 [a] **Evidence held sufficient** to show creditor made every reasonable effort to find something of value which defendant owned before proceeding against surety. 13LaA365, 125S896.

1305–12 172Ark579, 289SW757; 173 Ark382, 292SW403.

1305–17 278US228, 49SCt106, 73Led 282; Fla 128S422; 151Miss211, 117S 534, 536 [citCJ]; 152Miss353, 118S417 [quotCJ].

1306–19 242Mich198, 218NW761; 116 Okl 82, 243P211 (supersedeas bond); 117 Okl 81, 244P791; 117 Okl 235, 245P 828; 117 Okl 239, 245P829; 120 Okl 302, 251P743; 125 Okl 260, 257P797; 128 Okl 239, 262P660; 130 Okl 180, 266P448; 115Tex405, 283SW135; TexCivA 283 SW189; TexCivA 297SW1070. See also Ark 32SW(2d)614. [c] **In Texas.**–CivA 297SW1070. [d] **In Mississippi.**–152 Miss353, 118S417, 121S858.

1307–25 91CalA606, 267P392.

1307–26 91CalA606, 267P392.

1307–31½–New. Where the decision appealed from is for a recovery other than a fixed sum of money and no damages have been adjudged against appellant, it is improper upon affirmance of the decision, for the mandate to direct entry of judgment against the sureties on the supersedeas bond. 31NM105, 240P999.

1308–36 136 Okl 289, 277P917.

1308–36½–New. In Oklahoma, on noncompliance by plaintiff in error with

rules requiring filing of briefs, court will affirm judgment and render judgment on supersedeas bond. 143 Okl 296, 288P953.

1308-41 125 Okl 272, 257P788, 791, 53 ALR800 [quotCJ].

1308-43 125 Okl 272, 257P788, 791, 53 ALR800 [quotCJ].

1308-48 130 Okl 180, 266P448. [a] **Preliminary acts held sufficient.**–167La578, 120S13.

1308-49 130 Okl 180, 266P448.

1308-52 91CalA606, 267P392; 94CalA 747, 271P1110; Mont 293P313. [a] **In Washington.**–140Wash393, 249P788 (rule excludes procedure by order to show cause).

1308-53 167Ga136, 144SE741 [reh den 167Ga143, 144SE745]; TexCivA 297SW 1070.

1308-58 167Ga136, 144SE741 [reh den 167Ga143, 144SE745].

1308-59 130 Okl 180, 266P448; Tex CivA 283SW189.

1308-59½-New. The district court after affirmance of judgment as modified by the circuit court is not without jurisdiction to enter judgment against the surety on a supersedeas bond. 10F(2d) 311.

1308-59½-New. Supreme court may correct its own erroneous judgment against surety on cost bond at any time. Miss 130S152.

1309-63½-New. Summary judgment rendered by the appellate court on an appeal bond is a final judgment, 130 Okl 180, 266P448.

1309-63½-New. and, upon remand, the trial court is without power to render a second judgment thereon in addition to the amount of the appellate judgment. 130 Okl 180, 266P448.

1309-63¼-New. Summary judgment on an appeal bond operates as a merger of whatever cause of action plaintiff may have on the bond, 130 Okl 180, 266P448.

1309-63½-New. and such judgment carries with it the principle of res judicata. 130 Okl 180, 266P448.

APPEARANCES

1314-1 [a] (2) TexCivA 286SW584, 589 [quotCJ].

1314-2 TexCivA 286SW584, 589 [cit CJ]; 187Wis633, 205NW557. [a] (1) 213Ala614, 105S689.

1315-4 187Wis633, 205NW557.

1315-18 [a] **Appearances held not voluntary.**–32F(2d)350. [b] **Voluntary appearance** is overt act by which, or as result of which, person against whom suit has been commenced submits himself to jurisdiction of court in particular suit. 154Miss307, 122S368.

1316-19 TexCivA 286SW584, 589 [cit CJ].

1316-22 329 Ill 82, 160NE193; 235Ky 518, 31SW(2d)895; 221MoA974, 296SW 193; 137Misc1, 242NYS408; 139 Okl 39, 280P1080; 144 Okl 1, 288P975; Tex CivA 285SW646.

1316-23 17F(2d)841, 843 [citCJ]; 340 Ill 118, 172NE1.

1316-26 329 Ill 82, 160NE193; NJ 139 A897; 247NY428, 160NE775; 117 Okl 244, 246P423; 151Va568, 144SE616; 134 Wash40, 234P1039.

1316-27 NJ 139A897.

1316-28 204Iowa958, 216NW10; NJ 139A897.

1317-31 82Colo 602, 262P925; 203 Iowa 1152, 211NW423.

1317-32 144 Okl 1, 288P975; 139 Okl 39, 280P1080; 107WVa594, 149SE675; 191Wis580, 211NW798.

1317-33 82Colo 550, 262P89; 82Colo 602, 262P925; 203 Iowa1152, 211NW 423; 123Kan409, 255P1105. [a] See also 123Kan409, 255P1105. [c] 38Wyo 223, 266P128.

1318-35 67Utah371, 248P83.

1318-37 82Colo 602, 262P925 (appearance through counsel); 158La383, 104 S123 [quotCJ].

1318-38 158La383, 104S123.

1318-39 158La383, 104S123 [quotCJ].

1318-42 117 Okl 244, 246P423.

1318-43 176Ark463, 3SW(2d)295, 297 [quotCJ]. [i] **That motion or plea attacking jurisdiction contains no valid ground of objection** does not convert special appearance into general one. MoA 286SW420. [j] **Taking depositions.**–Nonresident defendant held not to have waived jurisdictional question by proceedings following notice to take deposition necessary to established want of jurisdiction. 128Kan461, 278P705.

1319-44 MoA 23SW(2d)1092; 247NY 428, 160NE775; Utah 269P147, 156 [quotCJperStraup,J]; 191Wis580, 211 NW798. [d] **Introduction of relevant testimony at hearing of motion** to quash service of original notice does not render special appearance general. 204 Iowa958, 216NW10.

1320-45 271US195, 46SCt479, 70L ed 900; LaA 129S185; 123 Or326, 262P 220, 222 [citCJ].

1320-49 313Mo 1, 281SW768. [a] Iowa 229NW673.

1321-53 See also 177Minn182, 225NW9.

1321-56 13PaDist&Co 187 (paper raising question of jurisdiction and praying to set aside service by publication not treated as general appearance).

1322-64 203 Iowa1152, 211NW423; 316 Mo 665, 291SW481; 247NY428, 160NE 775. See also 242 IllA375. [b] (2) If process is defective, appearance by unauthorized attorney does not amount to waiver of defect. 151Va143, 144SE606. [c] 123 Or406, 262P833. [l] 123 Or406, 262P833. [n] **Defendant's attorney may announce general appearance in open court.**–247NY428, 160NE775. [o] (2) But, in Surrogate's Court, failure to file power of attorney, under which attorney in fact authorizes attorney at law to appear, render appearance ineffective. 135Misc296, 238NYS117. [p] **Insane party should be permitted to appear by attorney of her own selection** where she alleges that order adjudging her insane was invalid. 179Ark975, 18SW(2d)1020 (2dcase).

1322-66 [e] **To question authority of agent** who entered appearance, some kind of pleading raising issue must be filed. TexCivA 20SW(2d)413.

1323-69½-New. **An appearance for receiver to petition in intervention** is not an appearance by plaintiff to such petition. 103WVa120, 136SE695.

1323-71½-New. Unauthorized appearance by attorney at law may be ratified. 123 Or406, 262P833.

1324-88 TexCivA 11SW(2d)611.

1325-95 204 Iowa958, 216NW10; 78 Mont357, 254P174.

1325-98 [a] (2) Special appearance of nonresident filed without leave amounts to "general appearance." NJCh 149A 50.

1325-2½-New. Garnishee may appear specially for purpose of quashing writ of attachment. 296Pa265, 145A846.

1326-5 247NY428, 160NE775 (in absence of objection). See also 11PaDist& Co 617.

1326-11 74Mont509, 241P227.

1326-12½-New. Time may be extended by stipulation under some statutes. 74 Mont509, 241P227.

1326-12¼-New. Failure of plaintiff to have default entered may amount to implied extension of time for appearance. 74Mont509, 241P227.

1327-20 169Minn234, 211NW5.

1327-25 [a] **Evidence held not to show formal appearance.**–233 IllA346.

1327-28 TexCivA 20SW(2d)849 (recitals in judgment and admissions of record held to show that plaintiff in action appeared in cross action in another proceeding).

1328-39 16F(2d)130.

1329-52 [a] 12PaDist&Co 758.

1329-55 CalA 259P363.

1329-56 81CalA367, 253P954.

1330-57 IndA 154NE780.

1330-58½-New. Where defendant's papers are stricken from the files and he is denied standing as a party to the record, there is no general appearance. 10F(2d)995.

1330-58¼-New. Special appearance, without mention of the ground for it, was equivalent to a general appearance. 252Mass423, 147NE899.

1330-58¼-New. Any appearance save that for challenging jurisdiction of a person is a general appearance. 78Mont 357, 254P174.

1330-58½-New. Where the only authority of counsel representing plaintiff's attorney of record was to appear for the purpose of a continuance and to pay certain fees, his statements concerning the presence of jurors does not constitute a general appearance binding on plaintiff. 90CalA337, 265P867.

1330-61 99NJEq696, 133A774; TexCivA 24SW(2d)757. [b] (2) Wife's motion for alimony and counsel fees in divorce cases. 81CalA367, 253P954 (presence of attorney who afterward represented husband).

1330-62 193Wis145, 211NW916. But see 309Mo 224, 274SW758.

1330-63 340 Ill 118, 172NE1.

1331-65½-New. Waiver by appearance is always a matter of intention. 21F (2d)139.

1331-65¼-New. Whether participation in suit constitutes general appearance is not a question of intention, but one of law. 248Mich465, 227NW769.

1331-65¼-New. A mistake of law by an attorney that a general appearance is a special appearance is binding on defendants. 248Mich465, 227NW769.

1331-72 161La984, 109S785; 195NC 484, 142SE706.

1332-75 215Ala66, 109S358; 12PaDist &Co 758 (counter bond).

1332-78 149Miss164, 115S201.

1332-84 Va 154SE492.

1332-85 Va 154SE492.

1332-86 Va 154SE492.

1333-1 17F(2d)841, 843 [citCJ]; 37F (2d)695; 173Ark496, 292SW686, 689 [citCJ]; 180Ark214, 20SW(2d)874; 37 GaA433, 140SE408; 329 Ill 82, 160NE 193; 203 Iowa1152, 211NW423; 203 Iowa 726, 213NW435, 441 [citCJperMorling, J]; 164Minn363, 205NW264 (mere objection to jurisdiction not appearance); 309 Mo 224, 236, 235 [quotCJ] 274SW758; MoA 23SW(2d)1092; 77Mont260, 250P 823, 826 [citCJ]; 247NY428, 160NE775; Va 154SE492; 193Wis145, 211NW916. But see 29F(2d)712. [d] **Defendant specially objecting to jurisdiction and invoking judgment on other matters** makes general appearance. Nebr 231NW305.

1333-2 82Colo 550, 262P89, 96 [quot CJ]; 117 Oh521, 160NE90, 93 [citCJ]; 38Wyo 223, 266P128, 131 [citCJ] (filing objections in nature of pleas of limitation and estoppel). But see 79CalA618, 250P587. [a] **Rule that special appearance** to raise question of jurisdiction dehors record is general appearance does not obtain in federal courts. 7F(2d)620.

1334-9 340 Ill 118, 172NE1; 203 Iowa 1152, 211NW423; 83NH585, 141A307 (presence of defendant at trial and cross-examination of witnesses by his counsel); 104NJL240, 141A668; 101NJL151, 127A158; 115 Okl 153, 241P342.

1334-10 194NC712, 140SE617.

1334-15 218Ala179, 118S328(1stcase); TexCivA 27SW(2d)849 (objection to hearing of motion).

1335-24 [a] 104NJL387, 140A397 (prior to motion to quash summons).

1335-25½-New. filing claim with receiver; 199 Iowa1156, 200NW581.

1335-27½-New. Writing a letter relative to the case, which is filed on record, is not sufficient appearance. 233 IllA346.

1335-32 But see 95CalA476, 273P37.

1335-46½-New. or by a request without defendant's knowledge, by an attorney not admitted to practice in the court, for an extension of time to plead; 24F(2d)598.

1335-47½-New. A plea, reciting special appearance, attacking jurisdiction of the court, is special appearance. 10F(2d) 772.

1335-47¼-New. A written acceptance of notice of filing of brief does not constitute entry of appearance. 117 Oh 521, 160NE90.

1335-47¼-New. A nonresident creditor, by filing a claim with a court appointing a receiver, does not enter a general appearance, MoA 23SW(2d)231.

1335-47½-New. nor enter an appearance for the purpose of having a lien adjudicated on property in his control. MoA 23SW(2d)231.

1335-49 16F(2d)130; 171 Ark464, 284 SW533; 171Ark978, 287SW187; 78Colo 320, 241P543; 82Colo 81, 257P260; 35 GaA411, 133SE265; 37GaA433, 140 SE408; 332 Ill 370, 163NE825; 120 Kan21, 121Kan10, 245P734; 207 Iowa 191, 217NW75; 169Minn504, 212NW 194; 247Mich52, 225NW542; 218Mo A516, 279SW232 (answer by defendants generally is not appearance for de-

fendants whose plea in abatement has been sustained); **MoA** 25SW(2d)118; 20 **OhA**1, 151NE784; 115 **Okl** 153, 241P 342; 121 **Okl** 38, 248P869; 126 **Okl** 108, 258P866; 132 **Okl** 210, 270P45; 144 **Okl** 1, 288P975; 139 **Okl** 39, 280P1080 (plea of want of jurisdiction of subject matter); **TexCivA** 285SW647; 187Wis633, 205NW557. [n] **Surety**, by alleging part tendered by principal and refusal thereof by plaintiff, and by praying for judgment, subjects itself to court's jurisdiction. 11**LaA**450, 123S474. [o] **Answer admitting and tendering sum due** subjects defendant to court's jurisdiction. 11**LaA**450, 123S474.

1337-53 115Nebr136, 211NW998.

1337-54 **TexCivA** 24SW(2d)474.

1337-64 21F(2d)562, 564 [citCJ]; 35F (2d)779; 213Ala614, 105S689, 690 [quot CJ]; 70**CalA**372, 233P70; 93**CalA**445, 269P727; 86**Colo** 330, 282P193 (special demurrer to petition to intervene); 55 **AppDC**323, 5F(2d)538; 165Ga520, 141SE412; 41**GaA**736, 154SE651; 214 **Ky**70, 282SW785; 80**Mont**97, 257P1014; 50Nev46, 249P865; 195NC273, 141SE 891; 20 **OhA**1, 151NE784; 121 **Okl** 38, 248P869; 132 **Okl** 234, 270P52; 32**Porto Rico** 44 (demurrer for lack of jursidiction and answer); 67**Utah**371, 248P83; **Utah** 268P1029. [i] **Demurrer to bill of complaint** attacking it in three particulars, but not on ground of no jurisdiction of person, is general appearance. 213 **Ala**614, 105S689.

1338-65 229Ky640, 17SW(2d)741; 318 **Mo** 1206, 5SW(2d)46. But see 219**Ala** 181, 121S548.

1338-66 85**CalA**273, 259P341.

1338-71 14F(2d)475. See also 32**Porto Rico** 44 (demurrer coupled with answer).

1338-75½-New. A motion to quash service of a summons alleging that the petition of plaintiff fails to state any cause of action is in substance a demurrer. 121**Kan**790, 250P306.

1339-78 [a] 139 **Okl** 199, 281P798.

1339-80 147Miss737, 113S346.

1339-85 **Fla** 107S443, 446 [citCJ]; 147 Miss737, 113S346; 67**Utah**371, 248P83, 106 [quotCJ].

1339-92 313**Mo** 1, 281SW768.

1340-93 278US492, 49SCt207, 73**L ed** 470; 82**Colo** 550, 262P89, 96 [citCJ]; **Fla** 107S443, 445 [quotCJ]; 204 **Iowa** 958, 216NW10; **MoA** 286SW420; 22 **Oh A**165, 153NE316 (motion to quash service challenging jurisdiction); 124**Okl** 89, 254P16. See also 29F(2d)712. But see 178**Ark**760, 12SW(2d)400.

1340-94 82**Colo** 81, 257P260; 82**Colo** 550, 262P89; 107S443, 445 [quotCJ]; 93**Fla**182, 111S521; 94**Fla**1237, 115S 540; 203 **Iowa**1152, 211NW423; 121 **Kan**790, 250P306; **Nebr** 231NW506; 50SD216, 208NW984; **TexCivA** 298SW 610.

1340-95 17F(2d)841, 843 [citCJ]; 43 **Ida**089, 254P515, 517 [citCJ]; 201 **Iowa** 781, 208NW210; 208 **Iowa**882, 226NW 178; **TexCommnA** 284SW210.

1340-95½-New. for transfer of the cause to another department, 77**Mont** 260, 250P823.

1340-96 13F(2d)478; 308**Mo** 201, 271 SW481.

1340-98½-New. Reference by defendants in a motion to dismiss for want of jurisdiction relative to liability of principal under statute and denial that the statute applies to them is not a general appearance. 154**Tenn**134, 289SW 533.

1340-99½-New. to dissolve an attachment, 199**Cal** 569, 250P666.

1340-1 321 **Ill** 318, 151NE888; **Tex CommnA** 15SW(2d)594; **Utah** 268P 1029; **Utah** 269P147, 156 [quotCJper Straup,J]. But see **TexCivA** 24SW(2d) 757.

1340-3 204 **Iowa**958, 216NW10; 40F (2d)357. See also **MoA** 23SW(2d)1092 (motion to quash summons).

1340-7 220**AppDiv**211, 221NYS10.

1341-10 80**Mont**97, 257P1014.

1341-14 176**Ark**463, 3SW(2d)295; 20 **OhA**1, 151NE784. See also **Oh** 172NE 157.

1341-29 80**Mont**293, 260P727.

1341-33½-New. A motion in an action to foreclose a mortgage on real estate, situated in a county other than that in which the action was brought for leave to make a receiver appointed therein a party to an action to foreclose a mechanic's lien on the property in the county in which it is situated, is not a general appearance in the mortgage foreclosure action and does not bind applicant beyond the terms and purpose of the application. 115 **Okl** 259, 242P 773.

1341-32⅓-New. A motion to vacate an attachment on the ground that the allegations in the affidavit on which it was based are false constitutes a general appearance. 50**SD**216, 208NW984.

1341-32¼-New. , or for extensions of time for pleading. 43 **Ida**589, 254P 515.

1341-32½-New. A motion to quash service by publication on the ground that there was no property within the jurisdiction does not constitute a general appearance. 129**Kan**723, 284P375.

1341-32⅔-New. Order quashing return of summons is not same as order dismissing action so as to preclude subsequent entry of voluntary general appearance. **MoA** 23SW(2d)1092.

1341-34½-New. Appearance on motion to vacate summons and complaint is a special appearance. 126**Misc**582, 214 **NYS**82.

1341-38 203 **Iowa**1152, 211NW423.

1341-39 122**Kan**762, 253P424.

1342-40 203 **Iowa**726, 213NW435, 442 [citCJperMorling,J]; 31**NM**639, 249 P1013; 24 **OhA**366, 156NE618; 39 **OklACR**328. Contra 36**GaA**815, 138SE 244.

1342-41 31**NM**639, 249P1013; 24 **OhA** 366, 156NE618; 122 **Okl** 205, 253P494; 123 **Okl** 156, 252P397; 124 **Okl** 89, 254 P16; **Okl** 292P353; 43 **OklACR**50 [reh pending]. See also 138 **Okl** 91, 280P 436.

1342-45 276US128, 48SCt264, 72**L ed** 497; 15F(2d)610; 31NM639, 249P1013; 134**Misc**491, 235NYS281; 195NC203, 141SE587; 39 **OklACR**328; **TexCivA** 10SW(2d)394 (as bearing on four-year limitation).

1343-49 271US195, 46SCt479, 70**L ed** 900; 278US492, 49SCt207, 73**L ed**470; 7F(2d)618.

1343-50 27F(2d)329; **TexCivA** 285SW 646. [a] 153**Miss**416, 121S116. [c] **In Mississippi.**-154**Miss**307, 122S368.

1344-53 147Miss737, 113S346.

1344-57 147Miss737, 113S346.

1345-59 **TexCivA** 286SW584.

1345-60 135**Misc**165, 237NYS267; 124 **Okl** 273, 255P704; 54SD170, 222NW 665.

1345-60½-New. And stipulation at foot of summons giving defendant until certain time to appear is not appearance. 187**Wis**633, 205NW557.

1345-61¼-New. for transfer of case to circuit court of same county at another city therein, **MoA** 23SW(2d)1092.

1345-62 4**HawaiiFed**605, 606 [citCyc].

1345-67½-New. or for a special judge to try the case, **TexCivA** 291SW261.

1345-67½-New. or as to the facts for submission of cause to the court, 116 **Nebr**397, 217NW577 (participation in trial by filing brief).

1345-68 115 **Okl** 153, 241P342.

1345-70 207 **Iowa**121, 222NW351.

1345-71 247**Mich**380, 225NW483(2d case); 221**MoA**974, 296SW193; **Tex CivA** 286SW584; **TexCivA** 298SW610.

1345-73 242 **IllA**375, 377 [quotCJ].

1345-74½-New. A stipulation by a nonresident defendant agreeing to application of certain claims against moneys attached and to deferring of further proceedings for a stated time is sufficient to give the court jurisdiction to enter a subsequent judgment for the balance of the amount alleged to be due. 51**Nev**162, 271P691.

1345-75 But see 187**Wis**633, 205NW 557.

1346-82 **Fla** 107S443, 445 [citCJ]; 247 **Mich**380, 225NW483(2dcase); 123 **Or** 406, 262P833.

1346-83 176**Ark**1023, 5SW(2d)330; 177 **Ark**694, 8SW(2d)448; 178**Ark**995, 13 SW(2d)13; 180**Ark**214, 20SW(2d)874; **Fla** 107S443, 446 [citCJ]; 214**Ky**400, 283SW410.

1347-84 171**Ark**397, 284SW15; 177 **Ark**694, 8SW(2d)448.

1347-85 209**Ky**119, 272SW404. [d] **In Arkansas.**-180**Ark**214, 20SW(2d)874.

1347-86 **Fla** 107S443, 446 [citCJ].

1348-91½-New. No appearance when a person representing defendant wrote that defendant could not appear. 25 **OhA**16, 157NE316.

1348-91⅓-New. Filing of replevin bond in garnishment proceeding constitutes appearance by surety for whatever common-law liability may have arisen against it, whether or not the bond is so defective as a statutory bond as not to authorize summary judgment thereon. **TexCivA** 10SW(2d)235.

1348-91¼-New. Defendant, filing an answer in an equitable garnishment proceeding, entered appearance for all purposes. 178**Ark**778, 13SW(2d)312.

1348-92 13**LaA**612, 128S688; 147**Miss** 747, 113S340; 33 **OhA**118, 168NE562.

1348-94½-New. A motion to sell property pendente lite involved no jurisdiction of the court, but only judicial action, and there could be no special appearance in opposition thereto, appearance in opposition to motion constituting general appearance. 248**Mich**465, 227NW769.

1348-94⅓-New. Where, in foreign attachment, defendant dissolved attachment before trial, action thereafter proceeded as if commenced by summons. **Pa** 151A674.

1348-97 **NJ** 130A814; 220**AppDiv**211, 221NYS10; 160**Tenn**403, 23SW(2d)897.

1348-8½-New. Voluntary appearance precludes and estops defendant from traversing ownership of property, but not the truth of allegations on which the attachment is based. 195**NC**484, 142SE706.

1348-9 199 **Iowa**1156, 200NW581; **Tex CommnA** 284SW210; **TexCivA** 286SW 584; **TexCivA** 20SW(2d)383.

1349-11 **TexCivA** 286SW584.

1349-12 236**Mich**604, 211NW52.

1349-13 236**Mich**604, 211NW52.

1349-14 236**Mich**604, 211NW52.

1349-23 36F(2d)504; 87 **IndA**509, 162 **NE**71; 22 **OhA**165, 153NE316; 155SC 436, 152SE658; 160**Tenn**329, 24SW(2d) 881; **TexCivA** 293SW675. [e] **Voluntary appearance of alleged bankrupt** does not obviate necessity of issuance and service of process. 5F(2d)752. [f] **Objections that cause would burden interstate commerce** and arose outside of state between non-residents is not waived by general appearance. 36F(2d) 504.

1350-24 308**Mo** 201, 271SW481; **SD** 232NW45; 137**Wash**317, 242P367; 38 **Wyo** 28, 264P699, 702 [quotCJ]. See also 32F(2d)350.

1350-25 78**Mont**357, 254P174.

1350-25½-New. The effect of general appearance is limited to the subject matter to which defendant appears. 21F (2d)139.

1350-26 18F(2d)599; 19F(2d)960; 31 F(2d)265; 213**Ala**614, 105S689; 7**Alaska** 476; 173**Ark**496, 292SW686; 175**Ark** 926, 1SW(2d)65; 167**Ga**389, 145SE460; 35**GaA**411, 133SE265; 39**GaA**741, 148SE 358(1stcase); 44 **Ida**697, 258P555; 321 **Ill** 318, 151NE888; 329 **Ill** 82, 160NE 193; 201 **Iowa**516, 207NW778; **Iowa** 232NW118; 308**Mo** 201, 271SW481; 316 **Mo** 665, 291SW481; 78**Mont**357, 254P 174; 80**Mont**97, 257P1014; 81**Mont**442, 264P108; 116**Nebr**397, 217NW577; **NJ** 137A561; 247NY428, 160NE775; 55**ND** 253, 212NW931; 126 **Okl** 121, 258P749; 33**PortoRico** 13; **SD** 232NW45; **Tex CivA** 283SW283; **TexCivA** 289SW714; **Utah** 268P1029; 137**Wash**317, 242P367. [c] **In proceedings to remove trustee** jurisdiction of court is complete on appearance of trustee to have proceedings dismissed. 169**Ark**838, 277SW35 (of subject matter).

1351-27 28F(2d)980; 167**Ga**389, 145 SE460; **Ind** 166NE2; 149**Miss**334, 115 S561; 78**Mont**357, 254P174; **NJ** 137A 561; 33**PortoRico** 13; 151**Va**143, 144SE 606. [a] **Intervenor's objection to jurisdiction** of person of defendant is waived by joining objection to jurisdic-

tion of subject matter. 115Nebr41, 211 NW203.

1352–30 But see 137Misc1, 242NYS408.

1352–33 173Ark496, 292SW686. But see 99NJEq473, 134A615.

1352–42 32F(2d)350; 19F(2d)960; 176 Ark463, 3SW(2d)295; CalA 289P169; 78Colo 320, 241P543; 53 IndA630, 100 NE584, 860; 94NJEq108, 118A347; 163 La505, 112S397; LaA 130S234(4thcase); Md 151A21; 235Mich57, 209NW144; 309Mo 224, 274SW758; NJPrerog 148 A744; 130Misc168, 223NYS401; Oh 172NE157; 115 Okl 153, 241P342.

1353–48 171Ark464, 284SW533; 85 CalA273, 259P341; CalA 259P363; 78 Colo 320, 241P543; 165Ga520, 141SE 412; 41GaA736, 154SE651; 333 Ill 382, 164NE835; 340 Ill 118, 172NE1; 207 Iowa191, 217NW75; 13LaA612, 128S 688; 247Mich580, 226NW225; 149Miss 334, 115S561; Miss 116S743; 309Mo 224; 274SW758; MoA 21SW(2d)930; 50Nev46, 249P865; 99NJEq696, 133A 774; 195NC203, 141SE587; 115 Okl 153, 241P342; 142 Okl 243, 286P347; TexCivA 15SW(2d)719(2dcase); Tex CivA 275SW683; TexCivA 298SW610; Utah 269P1017; 145Va429, 134SE677. [a] **Voluntary appearance.**–Where one in whose home minor child was placed was not served with process in proceedings involving custody of child, failure of minutes to note waiver of service was not prejudicial. 99CalA134, 277P1049.

1354–50 TexCivA 286SW584; Tex CivA 20SW(2d)383; TexCivA 20SW(2d) 849.

1354–51 77CalA254, 246P340; 101CalA 561, 281P1101; 336 Ill 267, 168NE 283; 158LaA383, 104S123; NJ 145A737 (1stcase); 53ND200, 220NW527. [e] **Notice of filing claim of exemption of** bank deposit garnisheed is waived by plaintiff appearing in person and filing written contest. 213Ala547, 105S691.

1354–53 21F(2d)562, 564 [citCJ]; 37 F(2d)695; 169Ark1212, 277SW21; 178 Ark383, 10SW(2d)852; 88CalA528, 264 P516; 101CalA561, 281P1101; 340 Ill 118, 172NE1; 37GaA433, 140SE408; 41GaA736, 154SE651; 333 Ill 382, 164 NE835; 13LaA594, 128S700; LaA 129S 185; LaA 130S234(4thcase); 246Mich 419, 224NW416(1stcase); Minn 231NW 209; 33NM620, 274P44; 138 Okl 98, 280P439; TexCivA 283SW283; 142Va 31, 128SE599; 151Va845, 145SE321; WVa 153SE250. [c] **Appearing and excepting to libel as not stating cause of action.**–5F(2d)68. [d] **Filing of general demurrer** waives irregularities as to process. 41GaA736, 154SE651.

1356–54 13LaA390, 128S310; 132 Okl 234, 270P52.

1356–55 21F(2d)562, 564 [citCJ]; 37 F(2d)695; 43F(2d)593; 37GaA433, 140 SE408; 214Ky70, 282SW785; 246Mich 487, 224NW610; Minn 231NW209; Mo A 286SW410; 195NC273, 141SE891; 198NC269, 151SE249 (by demurring to complaint, defective service is waived); 124 Okl 89, 254P16; 138 Okl 91, 280P 436; Okl 292P353; 142Va31, 128SE 599; 57NS188, [1924] 2DomLR900. [a] 19 OhA149.

1357–56 225AppDiv628, 234NYS137; Okl 292P353.

1357–57 246Mich487, 224NW610.

1357–59 Contra. 178Ark383, 10SW(2d) 852.

1358–64 82Colo 81, 257P260; 163La 505, 112S397; 169Minn504, 212NW194. [a] 44Philippine834.

1358–69 13LaA612, 128S688. But see 125Me4, 130A504.

1358–73 31F(2d)488.

1358–78 Sask [1929] 2DomLR205(2d case).

1359–84 160Tenn403, 23SW(2d)897.

1359–87 142Va31, 128SE599.

1359–88 122Kan215, 252P459; 239 Mich362, 214NW212.

1359–96 43 Ida589, 254P515; 44 Ida 697, 258P555; 233Mich305, 206NW503; 235Mich57, 209NW144; 80Mont97, 257 P1014; TexCivA 285SW858. [c] **Appearance of nonresident defendant** held not general where it was made prior to dismissal of resident joint defendant. 36GaA815, 138SE244. [d] **Filing of affidavit by foreign corporation denying agency of person served with process** does not constitute appearance waiving right to change of venue. TexCivA 298SW612. [e] **Challenge to sufficiency of service of process** is not such appearances as waives right to change of venue. TexCivA 298SW612.

1360–97 140 Okl 45, 282P157 (right of city to be sued in county of situs); TexCivA 238SW(2d)806. [a] 35F(2d) 235.

1361–20 172Ark496, 292SW686; 102 NJEq107, 140A241.

1362–26 [b] **Discontinuance of motion for rehearing in equity** by lapse of statutory period is waived by appearance. 218Ala145, 117S655.

1362–38½–New. Appearance and return by claimant to rule to show cause in supplementary proceedings, after execution, is not consent to an unauthorized mode of trial of the issue of ownership. 143SC98, 141SE155.

1362–40 TexCivA 8SW(2d)310.

1362–41 TexCivA 283SW283.

1362–43 213Ky174, 280SW943.

1362–45 80Mont97, 257P1014 (appearance by demurrer waives objections to defects attackable only by motion to strike); 250Mich5, 229NW425.

1363–47 173Minn198, 217NW119.

1363–49 But see 214AppDiv671, 212 NYS707.

1364–67 TexCivA 286SW584.

1364–70 15F(2d)610; 215Ala557, 112S 145 [quotCJ]; NJ 132A87; TexCivA 299SW699, 701 [citCJ].

1365–71 215Ala557, 112S145 [quotCJ]; NJ 132A87.

1365–76 215Ala557, 112S145 [quotCJ].

1365–78 51Nev206, 273P659.

1365–80 107S443, 446 [citCJ]; Miss 116S743; 20 OhA1, 151NE784; 121 Okl 38, 248P869.

1366–83 18F(2d)599; 104Conn206, 132 A390; Fla 107S443, 446 [citCJ]; 41 OklACR31.

1367–84 Ela 107S443, 446 [citCJ]; 41 OklACR31. [a] 120Kan21, 121Kan10, 245P734.

1367–85 41 OklACR31.

1367–86 104Conn206, 132A390.

1367–86½–New. Where defendant files an answer and participates in the trial without his motion to quash the summons or service having been disposed of, such procedure constitutes a general appearance. 126 Okl 108, 258P866.

1367–86¾–New. An objection by counsel for an original defendant to adding a new defendant does not preserve for such added defendant the question of jurisdiction waived by his subsequent general appearance. 36F(2d)224.

1368–87 15F(2d)462; 170La958, 129S 543; MoA 286SW420; 80Mont97, 257 P1014; 9PaDist&Co 613 [quotCJ]. [c] **Special appearance** and motion to quash service is not waived by answering to merits. 135Wash368, 237P987.

1368–88 MoA 26SW(2d)1011.

1368–90 36F(2d)781.

1368–91½–New. Challenge to jurisdiction by special appearance is direct attack thereon. Iowa 233NW47.

1369–92 [e] **In Mississippi.**–154Miss 307, 122S368.

1369–93 TexCivA 285SW646.

1370–1 207 Iowa191, 217NW75; 135 Okl 84, 274P29. [a] **All proceedings are not suspended** until disposition of special appearance challenging jurisdiction. Iowa 231NW440.

1370–1½–New. Special appearance to contest jurisdiction of the court is not a waiver of right to ask dismissal on the merits. 26F(2d)860.

1370–2 53ND238, 205NW674. [d] **Insisting on affirmance of judgment in his favor on appeal** is not waiver of defendant's rights to object to jurisdiction of court. TexCivA 285SW646.

1370–3 53ND238, 205NW674 (appearance on application to vacate judgment).

1370–5 53ND238, 205NW674 (leave to file answer should be given, appearance being voluntary from date of application).

1370–6 54ND14, 208NW234.

1371–12 37F(2d)320; 130Misc269, 224 NYS17.

1371–16 32F(2d)350.

1371–17 130Misc269, 224NYS17.

1372–20 [a] **After judgment for defendant** court is without jurisdiction to permit defendant's attorney to withdraw his appearance. 133 Okl 64, 271P 167.

1372–22½–New. Defendants may not substitute special appearance for general because of attorney's inadvertent service without knowledge of limited authority. 133Misc678, 234NYS837.

1372–24 129Misc382, 221NYS241, 243 [citCJ].

1373–43½–New. Failure to appear in interpleader suit is waiver of all interest in the subject matter thereof, and makes further notice unnecessary. 82 NH321, 133A447.

1373–43¾–New. That one primarily liable for mortgage debt did not appear in foreclosure action does not invalidate judgment. Wis 232NW877.

APPLIANCE

1379–58 4HawaiiFed113.

APPOINTMENT

1404–56 [g] **Other definitions.**–235Ky 692, 32SW(2d)26.

APPORTIONMENT

1406–83 [a] (2) Difference between apportionment and appropriation is that to make appropriation there must be added to dividing and assigning of funds which constitutes apportionment specific authority to spend. 32Ariz235, 257P648.

1407–84½–New. act of dividing and assigning in just proportion; 32Ariz 235, 257P648.

APPRAISAL OR APPRAISEMENT

1408–91 231Mich200, 203NW845, 846 [quotCJ]; 40 OklACR90, 92 [quotCJ]. See also 11CustAUS38.

1408–92 231Mich200, 203NW845; 237 Mich665, 213NW70, 71 [quotCJ]. [e] **Validity of proceedings.**–231Mich200, 203NW845. [f] **Delay in completing of appraisal occasioned by injunction** obtained by one party will not defeat other party's right to completion, though time fixed in contract for completion had expired. 231Mich200, 203 NW845.

APPRAISE

1408–94½–New. to value property at what it is worth; 20 OhA166, 151NE 780.

APPRAISER

1408–98 TexCivA 273SW619, 621 [cit CJ].

APPREHEND

1410–19½–New. Conscious or sensible of. 67Utah242, 247P476.

APPRENTICES

1416–1 See also 1LaA341.

APPROACH

1455–10 320 Ill 608, 151NE542.

APPROPRIATE

1457–28 308Mo 265, 271SW786.

1457–30 13F(2d)887.

1457–39 308Mo 265, 271SW786.

1457–41 13F(2d)887.

1457–42 13F(2d)887.

1457–42½–New. to use an article of property as an exclusive and preëminent right; 13F(2d)887.

APPROPRIATION

1459–63 [a] **Destruction of property is appropriation, requiring compensation** in eminent domain proceedings. 127 Misc834, 217NYS534.

1460–67 175Ark585, 299SW1000; 33 OklCr5, 242P290 [citCJ]. [d] **In Oklahoma.**–33 OklCr5, 242P290.

1460–69 32Ariz235, 257P648.

1460–71 [a] **Where a contract leaves liability of state uncertain,** then auditor is justified in refusing to certify that there is available unexpended appro-

priation to cover such contract. 27 Hawaii221.

APPROVAL

1462-82 133SC85, 130SE340.
1462-82½-New. 133SC85, 130SE340 (approval implies knowledge).

APPROVE

1462-84 84Mont539, 276P954.

APPROXIMATELY

1465-19 [a] (1) 21AlaA395, 108S651. (2) See also 21AlaA395, 108S651. (3) Instruction using word "approximately" instead of "proximately" in relation to negligence of plaintiff contributing to cause of his death is erroneous. 74 CalA10, 239P429. [b] But see 104NJL 212, 141A13.
1466-21 331 Ill 261, 162NE843.

APPURTENANCE

1467-32 322Mo 94, 14SW(2d)554.
1467-34 17F(2d)55; 223AppDiv281, 228NYS265.
1468-36 249 IllA532.
1469-41 223AppDiv281, 228NYS265.

APPURTENANT

1471-56 137 Okl 86, 278P292.

ARBITRARILY

1475-30 117 Oh114, 157NE488, 490, 54 ALR1220 (quotCJ].
1476-31 117 Oh114, 157NE488, 490, 54 ALR1220 [quotCJ].

ARBITRARY

1476-34 82Mont264, 266P640, 643 [citCJ].
1476-37 125 Okl 137, 256P883.
1476-38 125 Okl 137, 256P883.

ARBITRATION AND AWARD

5 C. J.—16-1 231Mich200, 203NW845, 846 [quotCJ]; 217AppDiv219, 216NYS 552.
16-2 231Mich200, 203NW845, 846 [quotCJ]; 240Mich167, 215NW401.
16-3 231Mich200, 203NW845, 846 [quotCJ].
16-4 231Mich200, 203NW845, 846 [quotCJ].
16-5 231Mich200, 203NW845, 846 [quotCJ]; 135Misc715, 238NYS331 (discourage litigation); 52SD72, 216 NW850. [b] **Arbitration statute** relates to remedy. 14F(2d)861.
16-5½-New. An arbitration proceeding is a contract in itself. 199Wis230, 225NW331, 63ALR1165.
17-8 [b] (3) Act is not exclusive and does not repeal common law arbitration. Pa 152A95. [d] **Under Alberta Arbitration Act** disputes between members and officers of coöperative association must be submitted to arbitration and decision so made is conclusive. Can [1929] 3DomLR858 (dispute with respect to contract between member and coöperative wheat producers' association held within statute).
17-9 37GaA788, 141SE924.
17-13 35GaA606, 134SE336; 20 OhA 317, 151NE808 (arbitration to determine terms of new contract between street railway company and its employees for coming year not an appraisal).
18-15 215Ky230, 284SW994; 231Mich 200, 203NW845 (holding agreement was one for appraisal and not arbitration and could not be set aside or revoked at will of plaintiff); 240Mich167, 215NW 401; 149Wash328, 270P1032.
19-17 240Mich167, 215NW401.
19-18 240Mich167, 215NW401.
19-20 17F(2d)232 (statutory remedy held exclusive). [d] **Statute held entirely to supplant common law on subject.**-17F(2d)232.
20-21½-New. Under some statutes there is no common-law arbitration, and the rights of parties to arbitration proceedings are governed and controlled by statute. 142Wash166, 252P546.
20-24 225Ky784, 10SW(2d)305; 217 MoA187, 274NW901; 20 OhA317, 151 NE808, 815 [citCJ&CycperRoberts,J]. [a] **Statutes liberally construed.**-12Pa Dist&Co 693.
20-24½-New. Courts should be reluctant to limit scope of arbitration. 217 AppDiv219, 216NYS552.
20-25 [a] **The principle that courts favor arbitration** generally limited to those resulting in award. CalA 286P 498.
20-25½-New. Arbitration should be encouraged rather than discouraged. 199Wis230, 225NW331, 63ALR1165.
20-30 144Wash592, 258P486, 487 [cit CJ].
21-34 200 Iowa245, 202NW565.
22-43 52SD72, 216NW850.
22-44½-New. Under the New York statute the court has no power to compel arbitration, or trial before a foreign tribunal but may stay the local action until this is done. 125Misc728, 210NYS 10.
23-47 77CalA268, 246P566, 569 [quot CJ]; 12PaDist&Co 693.
23-51 200 Iowa245, 202NW565. [b] **Submission to arbitration implied agreement** to be bound thereby. 7F(2d)335.
23-52½-New. An owner, terminating a contractor's employment and completing the work, is not entitled to compel arbitration, default being denied. 129 Misc645, 222NYS377.
23-54 200 Iowa245, 202NW565.
23-55 199Wis230, 225NW331, 63ALR 1165 (corporations, public or private, are not prohibited by law).
25-71 26F(2d)413; 250NY275, 165NE 291; 252NY284, 169NE386. See also 32 PortoRico 73.
26-74 But see 254Mass4, 149NE547, 42 ALR725.
26-79 [d] **Where contract has terminated,** court cannot compel arbitration under agreement covering only matters as to rescission. 241NY148, 149NE333. [e] **Statute** declaring validity of arbitration awards has been held not to deny due process. 253NY382, 171NE 579.
27-81 217AppDiv219, 216NYS552; 144 Wash592, 258P486. [b] **In New York.**-217AppDiv219, 216NYS552.
27-82 CalA 287P556.
27-83 77CalA268, 246P566.
27-85 77CalA268, 246P566, 569 [quot CJ]; 217AppDiv219, 216NYS552 (controversy).
27-89½-New. or of a contract, 25 F(2d)930.
27-90 [a] **Instrument purporting to be revocation of will but failing to comply with statutory requirements** cannot be subject of arbitration, being void. 169Ark282, 273SW1026.
28-95 25F(2d)930, 932 [quotCJ].
30-17 187Wis558, 204NW585.
31-26 20 OhA317, 151NE808.
32-33 77CalA268, 246P566, 569 [quot CJ].
32-34 [k] **Agreement to submit question to courts of foreign jurisdiction** is agreement to arbitrate under New York statute, and is valid. 125Misc728, 210 NYS10.
33-36 199Wis230, 225NW331, 63ALR 1165 (order of court is unnecessary). [b] (2) Other illustrations of sufficient submissions. Ida 288P641. [d] **Validity as agreement for common-law arbitration.**-Provision in contract for arbitration in case differences might arise, though not in conformity with statutory requirements, may constitute valid agreement for common-law arbitration. 236Mich425, 210NW488.
33-38 252NY284, 169NE386.
33-39 77CalA268, 246P566, 569 [quot CJ]; 108Conn478, 144A41.
34-45 215Ala87, 109S377; 77CalA268, 246P566, 569 [quotCJ].
35-46 77CalA268, 246P566, 569 [quot CJ].
35-52 201 Iowa538, 207NW596; 11Pa Dist&Co 705.
36-54 217AppDiv219, 216NYS552 (reasonable precision).
36-55 77CalA268, 246P566, 569 [quot CJ]; Ida 288P641.
37-60½-New. In Manitoba it has been held nonprejudicial that party suggested any one of three named persons as arbitrator instead of naming one as provided by arbitration act. Man [1930] 3 DomLR672.
38-67 201 Iowa538, 207NW596; 223 AppDiv644, 229NYS155; 225App Div99, 232NYS232 (arbitrator, not requested by party to arbitration agreement to act as subscribing witness for purpose of taking his acknowledgment, could not acknowledge arbitration agreement as subscribing witness to arbitrator's signature); 228AppDiv150, 239NYS281. [a] (2) Failure of notary to attach notarial seal to certificate of acknowledgment is fatal defect. 201 Iowa538, 207NW596.
39-77 [a] See also Man [1926] 4DomLR1188 (objection to notice held cured by ratification and waiver).
39-86 [b] In Idaho.-288P641.
40-90 But see 128Misc49, 217NYS231.
40-94 77CalA268, 246P566, 569 [quot CJ]; 157Miss462, 128S354; 252NY284, 169NE386; 226AppDiv397, 235NYS370; Sask [1926] 4DomLR912. See also 135 Misc305, 237NYS171. [d] (5) Agreement construed not to be stipulation to dismiss under code provisions but agreement to arbitrate and dismissal following as result of court's loss of jurisdiction upon settlement by arbitrators. 67CalA533, 227P953. [e] **Whether it was intended to authorize assessment of damages** by arbitrators is ascertainable by same tests generally applicable to contracts. 252NY284, 169 NE386.
41-95 295Pa560, 145A678. [a] **Parties are presumed to have acted in good faith** and assented to what would make submission valid. 157Miss462, 128S 354.
41-98½-New. Intent of parties must be construed so that it is possible for arbitrators to act justly within terms of submission. 157Miss462, 128S354.
41-99 252NY284, 169NE386 (phrases must be construed together).
41-1 Ida 288P641.
41-3½-New. Where arbitration is under agreement for conclusiveness of findings of arbitrator, it is common-law arbitration and not statutory. 146 Wash283, 263P190.
41-3½-New. An agreement for common-law arbitration cannot be transformed into statutory arbitration by subsequent conduct of the parties. 146 Wash283, 263P190.
41-7 254Mass4, 149NE547, 42ALR725. [b] **Under United States Arbitration Act** agreement relating to neither commerce nor maritime transaction is not enforceable. 44F(2d)184.
42-10 144Wash592, 258P486, 487 [cit CJ].
42-12 77CalA268, 246P566; 84CalA 567, 258P453, 456 [quotCJ]; 89CalA 271, 265P271; 51Philippine908. See also 8LaA98.
43-14 [b] **Where attempted arbitration and award is held void,** parties are remitted to status fixed by previous contract. TexCivA 22SW(2d)325.
43-15 CalA 286P498; 170Minn215, 212 NW449.
43-21 84CalA567, 258P453, 456 [quot CJ].
45-26 89CalA271, 265P271.
46-30 170Minn53, 212NW9; 117 Or22, 242P600.
46-31 170Minn53, 212NW9.
46-32 89CalA361, 265P271 (where agreement to arbitrate is incident to main agreement). [a] **Question for jury.**-236Mich425, 210NW488.
48-51 [c] **Stay constituting statutory submission requiring dismissal of action.**-Alta [1929] 1DomLR949. [d] In Nova Scotia.-[1929] 2DomLR360.
48-54 236 IllA350; 117 Or370, 244P 319, 320 [citCyc].
49-70½-New. Where court's jurisdiction is not ousted by submission, judgment may be entered in case before filing of award. 254Mass4, 149NE547, 42 ALR725.
49-72 67CalA533, 227P953.
49-73½-New. , or that in case of settlement by arbitrators the action shall thereupon be dismissed. 67CalA533, 227P953.
50-82½-New. An action will not be stayed on the ground of an agreement for submission where matters of law or mixed fact and law are involved. 62 OntL160, [1928] 3DomLR43.
50-82½-New. Where the right of an insurer to stay is dependent on election

by insurer to take advantage of a reinstatement clause, stay and order for appointment of an arbitrator cannot be granted until the issue of election or nonelection has been tried. Can [1929] 1DomLR47.

53–10 229Ky71, 16SW(2d)503(2dcase); 240NY338, 148NE559; 20 OhA317, 151 NE808; OhA 172NE689; 149Wash328, 270P1032. But see 144Wash592, 258P 486. [b] **Where question as to submission agreement arises,** party may withdraw from arbitration. 240NY388, 148 NE559.

53–11 240NY388, 148NE559.

53–11½–New. In New York remedy of party aggrieved by withdrawal is by application to court to determine whether withdrawing party was in default in refusing to proceed to arbitrate. 240NY388, 148NE559.

54–26 18F(2d)833. [a] (2) Action of court on written stipulation in open court waiving jury trial and submitting all matters of fact and law for arbitration to trial judge whose decision should be final is adoption of stipulation as special rule of court. 18F(2d) 833.

56–49 170Minn215, 212NW449, 450 [quotCJ].

56–51 [b] (5) Arbitration Law deprives parties of power to revoke submission prior to time of final submission to arbitrators. 135Misc305, 237 NYS171. (6) Arbitration Law providing arbitration agreements shall be valid and irrevocable applies to agreement to arbitrate in foreign jurisdiction. 135Misc305, 237NYS171. [d] **In California.**–88CalA523, 263P842.

58–68 229Ky71, 16SW(2d)503(2dcase).

60–89 21F(2d)4 (in absence of provision for filling vacancies).

61–4 240NY388, 148NE559.

61–5 42 Ida624, 248P22, 24 [quotCJ].

63–31½–New. Party desiring to repudiate submission must do so before result is known and he is defeated. 12Pa Dist&Co 693.

63–33 4HawaiiFed166, 183 [citCyc]. [a] **Agreement to submit all differences to foreign court** is agreement to arbitrate and a New York suit on a contract containing such a clause will be stayed. 125Misc728, 210NYS10.

63–33½–New. Corporation cannot act as arbitrator, even by consent. 220App Div487, 221NYS666.

63–45½–New. Further acts of disqualified arbitrator are absolutely void regardless of good faith. 215AppDiv130, 213NYS369.

64–51 318Mo1089, 2SW(2d)593; PEI [1927] 2DomLR251. [h] (6) Arbitrator not disqualified because of being in similar business. 228AppDiv526, 240 NYS436. [k] **Where no provision against such appointment** and no protest, such appointment is valid. PEI [1927] 2DomLR251.

65–52 228AppDiv526, 240NYS436.

65–56 [g] **Arbitrator borrowing money from one of parties is disqualified.**–215AppDiv130, 213NYS369.

66–61 4HawaiiFed166, 183 [citCyc]; MoA 2SW(2d)161; 8PaDist&Co 357; Man [1926] 4DomLR318, 320, [1926] 2 WestWkly868 [citCJ].

67–62 228AppDiv526, 240NYS436.

67–72 252NY284, 169NE386; NS [1929] 2DomLR799. [c] **Where insurer gives notice of arbitration** and insured fails to appoint arbitrator, court must appoint one for him. BC [1927] 2Dom LR585. [d] **Whether parties contracted to arbitrate** must be determined by court before appointment of arbitrators. 227AppDiv766, 237NYS366.

67–75 86Colo 458, 283P539.

67–76 250NY275, 165NE291.

68–81 [g] **Appointment of substitute arbitrator** when one resigns before all proofs are heard is a prerequisite to further proceedings. 240NY388, 148 NE559.

68–82 36GaA497, 137SE277.

69–85 But see 222AppDiv543, 226NYS 562.

69–86½–New. Substitute arbitrator, to take the place of one resigning, need not be appointed, where case has been fully heard and practically decided, even though arbitrator agreement called for substitution of arbitrator where one ceased to act. 240NY398, 148NE562.

69–86¼–New. On the original appointee's refusal to act, a substitute could be appointed by the person empowered to appoint a third arbitrator, 249NY84, 162NE592.

69–86¼–New. but not by the supreme court. 249NY84, 162NE592.

69–87 36GaA497, 137SE277.

70–93 [d] (3) Civ. Pract. Act § 1452, requiring oath, applies to all arbitrators, whether statutory or at common law. 225AppDiv99, 232NYS232.

71–3 225AppDiv99, 232NYS232.

71–5 243 IllA460.

71–9 215AppDiv130, 213NYS369.

71–11½–New. A state may take away common-law powers of arbitrators. 17 F(2d)232.

72–14 146Wash283, 263P190.

75–38 37GaA788, 141SE924.

76–46 26F(2d)413 [citCJ].

76–47 26F(2d)413, 428 [citCJ].

76–48 88CalA523, 263P842. [f] 88 CalA523, 263P842. [h] **Filing of submission agreement after revocation and subsequent to time limited for making award** cannot validate award. 88CalA 523, 263P842.

81–93½–New. Arbitrators who have made a common-law award are without power to rescind or annul the award. 37GaA788, 141SE924.

82–98 But see 240NY398, 148NE562.

82–5 [b] **Stipulations** in agreement of submission must be conformed to by arbitrator in arriving at award or award will be invalid. 217MoA187, 274SW901.

82–7 142Wash166, 252P546; 101WVa 683, 133SE381 (view of premises discretionary).

82–8 237Mich314, 211NW631; 127 Misc452, 217NYS233; 128Misc49, 217 NYS231. [e] **Failure of arbitrators to adhere strictly** to agreement in reaching conclusion does not justify setting aside award. 299Pa503, 149A702.

83–10½–New. The law forbids an arbitrator, although he acts in good faith, so to conduct himself as to defeat the purpose of the arbitration by acting in his own interests or in the interest of the party who named him. 240NY398, 148NE562.

83–10⅓–New. A common-law award is not invalid by reason of failure to pursue statutory provisions required in proceedings for statutory awards. 37 GaA788, 141SE924.

83–10¼–New Arbitrator should so conduct himself that arbitration shall be free from suspicion. Iowa 229NW221.

83–15 Alta [1930] 4DomLR58.

84–22½–New. Courts may not indirectly interject their rules of procedure or evidence into an arbitration, except so far as clearly warranted by statute or necessity. 127Misc452, 217NYS233.

84–23 215Ky230, 284SW994.

84–24 See also 236 IllA350.

84–26 [a] **Statute denying right to hearing** as condition of litigating jurisdiction of arbitrators held unconstitutional. 227AppDiv90, 237NYS110.

84–30½–New. Where party before appellate arbitration tribunal has, under arbitration rules of exchange, right to explain his side of case by reference to testimony before lower arbitration tribunal, a repetition by him of such testimony is not improper. 217MoA187, 274 SW901.

84–31 250 IllA136.

84–32 217MoA187, 274SW901 (denial of representation by counsel not prejudicial where other party is not represented).

85–39 215Ky230, 284SW994.

85–41 240NY388, 148NE559.

86–55 215Ky230, 284SW994; 237Mich 314, 211NW631.

87–58 237Mich314, 211NW631.

87–60 See also 237Mich314, 211NW631.

88–75½–New. Sufficiency of notice by foreign arbitration tribunal on New York residents so as to confer jurisdiction for award in personam. 135Misc 305, 237NYS171.

88–75⅓–New. Notice by mail is insufficient to confirm an arbitration award of a foreign state or enter judgment thereon where the resident did not own or hold property in the foreign state. 135 Misc92, 236NYS623.

88–81½–New. Arbitrators may determine whether a party's records should be opened for inspection and what should be implied from his failure to afford inspection. 127Misc452, 217NYS 233.

89–95 250 IllA136.

92–16 [b] 101WVa683, 133SE381.

92–17 See also 215Ky230, 284SW994.

92–18 127Misc452, 217NYS233; 226App Div397, 235NYS370.

93–27½–New. Rule of exchange prohibiting arbitration appeals committee from taking testimony, and confining it to that taken by arbitration committee which heard case, is not violated where it receives only testimony received by latter committee as shown by books of exchange. 217MoA187, 274SW901.

93–31½–New. But new evidence in hearing before appellate arbitration committee of exchange is properly excluded under exchange rule limiting appellate committee to consideration of evidence received by lower committee. 217 MoA187, 274SW901.

94–35 MoA 2SW(2d)161.

94–41 127Misc452, 217NYS233 (dictum).

96–54 TexCivA 31SW(2d)1102.

98–73 26F(2d)413 (majority).

98–75½–New. One or a minority of arbitrators cannot defeat an award by withdrawing, resigning, or otherwise. 26F(2d)413.

98–79½–New. On withdrawal of arbitrator before all proofs are heard substitute arbitrator must be appointed as prerequisite to further proceedings. 240 NY388, 148NE559.

98–79⅓–New. Substitute arbitrator to take place of one resigning need not be appointed, where case has been heard and practically decided. 240NY398, 148 NE562.

99–83 240NY388, 148NE559.

99–85 240NY388, 148NE559 (on withdrawal of arbitrator from proceedings before all proofs are heard substitute arbitrator must be appointed as prerequisite to further proceedings).

99–87 101WVa683, 133SE381 (award by two of three arbitrators held valid under agreement where it did not appear that absent arbitrator had no notice).

100–90½–New. Withdrawal of an arbitrator in the threshhold of an award will not invalidate an award by the remaining arbitrators. 240NY398, 148NE 562.

100–91 240NY398, 148NE562; 20 OhA 317, 151NE808, 814 [quotCJperRoberts, J].

101–98½–New. Basis of valuation. Alta [1925] 3DomLR1165, [1925] 3West Wkly225.

101–1 Mass 172NE232; 217MoA187, 274SW901; 101WVa683, 133SE381 (bill of particulars and evidence).

102–2 253NY382, 171NE579.

102–5½–New. Change of one member of arbitration appeals committee between making of award and time of overruling motion for rehearing is not prejudicial where complaining party at hearing declined to proceed further and filed statement attacking whole procedure. 217MoA187, 274SW901.

104–29 9PaDist&Co 303.

108–81 222AppDiv543, 226NYS562.

109–95 36GaA497, 137SE277.

114–44 [a] **Award to be valid must be final and responsive to all matters of difference** included in submission. 157 Miss462, 128S354.

114–47½–New. In a proceeding to determine the amount due to a contractor for filling lots with earth, an arbitrator is justified in determining the quantity of fill at the time of completion of the contract without allowance for shrinkage. 142Wash166, 252P546.

114–48 108Conn478, 144A41 (partly in writing and partly oral); Md 149A290.

114–52 217Ala276, 116S132.

115–58 108Conn478, 144A41.

115–61 53Miss587.

116–73 77CalA268, 246P566; Ida 288 P641. [d] **Award not making finding of fact** may be equivalent to statutory arbitration. OhA 172NE689.

116–81 But see 142Wash166, 252P546.

117-87 77Cal 268, 246P566.
117-89 Ida 288P641.
117-95 See also Man [1928] 3DomLR 522.
118-8 See also 48Miss90.
120-37½-New. No particular form of publication is necessary where form not designated in submission. 101WVa683, 133SE381.
120-44 101WVa683, 133SE381.
122-58 [a] **Neither party can take advantage of arbitrators' failure to file award.**-205 Iowa956, 218NW941 (failure to file assumed to be with parties' acquiescence).
122-66½-New. Confirmation of award by court. Matters court may consider on motion to confirm. 12PaDist&Co 693.
122-66⅛-New. Statute giving courts power to confirm award except upon arbitration relating to personal services is proper legislation. 12PaDist&Co 693.
122-66¼-New. Contract of "collective bargaining" is not one relating to personal services within statute. 12PaDist&Co 693.
122-70 205 Iowa956, 218NW941. But see Mich 233NW415(2dcase).
123-75½-New. Confirmation by court. An award is not binding as adjudication until ratified by the court. 215AppDiv 130, 213NYS369.
123-75⅛-New. In some jurisdictions statutes provide for confirmation of the award upon motion. 315Mo 338, 286SW 76 (what constitutes compliance with statute).
123-76 217MoA187, 274SW901.
123-77 77CalA268, 246P566, 569 [quot CJ]; 41GaA738, 154SE649; 217MoA 187, 274SW901; Va 153SE731.
124-79½-New. Validity and effect of an award are fixed by the place of agreement for arbitration. 17F(2d)232.
124-80 See also 127Misc73, 215NYS250.
124-81 77CalA268, 246P566, 569 [quot CJ]; Ida 288P641; TexCivA 11SW(2d) 355.
124-82 88CalA523, 263P842; 217Ky 702, 290SW477.
124-83 217Ky702, 290SW477; Pa 152A 95. [b] **Award is not binding** without substantial compliance with agreement of submission. 198Cal685, 247P207.
124-84 Mich 233NW391; 252NY284, 169NE386; 215AppDiv130, 213NYS369 (acts beyond authority are void); Ont [1928] 4DomLR781. [d] (6) 252NY284, 169NE386. (7) Where submission provided that no money be paid except undoubted obligations to persons not connected with parties, payment to one of parties exceeds authority. 215AppDiv 130, 213NYS369.
124-84 [e] (3) 77CalA268, 246P566. [e] (4) Other instances. 157Miss462, 128S354.
126-90 217Ala276, 116S132.
126-92 Sask [1926] 4DomLR912 (methods of valuation with reference to depreciation and obsolescence applied).
127-9 77CalA268, 246P566; 243 IllA 460.
135-73 12PaDist&Co 693.
135-75 247Mich538, 226NW218; 253 NY382, 171NE579.
138-1½-New. In an action by a water district and certain land owners in such district which was dismissed after award under arbitration agreement it cannot be contended by individual plaintiffs that they were not parties to the arbitration agreement. 67CalA533, 227P953.
139-11 55ND463, 214NW273.
139-12 77CalA268, 246P566.
139-13 215Ala87, 109S377; 77CalA 268, 246P566. [c] Where arbitrators have done everything they could to make award final it is sufficient. 157Miss462, 128S354.
143-40 215Ala87, 109S377; 55ND463, 214NW273; 101WVa683, 133SE381.
148-89 35GaA710, 134SE625; MoA 2 SW(2d)161 [citCJ]; 222AppDiv62, 225 NYS294; 55ND463, 214NW273.
150-1 Ida 288P641.
151-12 [g] **Award held certain as to amount.**-35GaA710, 134SE625.
154-27 35GaA710, 134SE625; 315Mo 338, 286SW76.
155-40 108Conn478, 144A41.
156-41 12PaDist&Co 693.
157-42 217Ky702, 290SW477.
157-46 217Ky702, 290SW477.
160-61 108Conn478, 144A41.
160-66 77CalA268, 246P566; 236 IllA 350; 200 Iowa245, 202NW565; 299Pa 503, 149A702 (where award was not objected to until filing defense affidavit in action based on award).
160-66½-New. An award has the effect of a verdict of a jury in a civil action. 136Wash490, 240P673.
161-67 77CalA268, 246P566; 236 IllA 350; 217MoA187, 274SW901; 299Pa 503, 149A702 (award not subject to collateral attack); Pa 152A95; TexCivA 5 SW(2d)856; 199Wis230, 225NW331, 63 ALR1165.
162-68 236IllA350; 49Philippine42, 50 [quotCJ]; 146Wash283, 263P190.
162-78 136Wash490, 240P673.
163-87 200 Iowa245, 202NW565; MoA 2SW(2d)161; 197NC689, 150SE334; 49 Philippine 42, 50 [quotCJ]; 149Va755, 141SE759; Va 153SE731. See also 77 CalA268, 246P566.
164-93 77CalA268, 246P566.
164-95 117 Or370, 244P319, 320 [cit CJ].
168-33 200Iowa245, 202NW565.
168-36 217AppDiv219, 216NYS552.
169-49½-New. A common-law award partitioning land made by arbitrators agreed upon by tenants in common is a defense against a proceeding brought by one of the tenants to partition the land. 37GaA788, 141SE924.
169-61 [a] **Accepting benefits** of void award does not deprive party of right to move to vacate. 215AppDiv130, 213 NYS369.
170-65 22AlaA336, 115S689.
171-77 36GaA798, 138SE241.
171-80½-New. Accepting benefits without knowledge of legal effect thereof does not waive right of party to object to confirmation of award. 215App Div130, 213NYS369.
172-86 205 Iowa1351, 219NW530, 534, 60ALR1204 [citCJ].
174-9 Man [1927] 2DomLR735. [e] **Where there is no statute,** statutes of other provinces may be taken as guides in fixing rates. Man [1927] 2DomLR 735. [f] **Barrister acting as arbitrator** is entitled to remuneration only as arbitrator. Man [1927] 2DomLR735.
179-65 187Wis558, 204NW585.
180-71 Man [1928] 3DomLR522 (where objection was not taken at hearing).
181-75 12PaDist&Co 693.
181-76 232Mich204, 205NW163; 235 Mich446, 209NW569.
182-83 299Pa503, 149A702; 49Philippine42, 50 [quotCJ]; 187Wis558, 204 NW585.
183-89 299Pa503, 149A702. [a] (2) Award should be set aside, where arbitrators have ignored waiver of forfeiture and as result have rejected just claim since such action is legal fraud. 235 Mich446, 209NW569.
183-92 252NY284, 169NE386.
184-93 101WVa683, 133SE381.
184-97 146Wash283, 263P190, 193 [quotCJ].
185-3 146Wash283, 263P190, 193 [quotCJ].
186-15 82Mont264, 266P640, 643 [cit CJ]; Va 153SE731; 101WVa683, 133 SE381.
187-23 Va 153SE731.
187-24 49Philippine42, 50 [quotCJ].
187-27 36GaA798, 138SE241.
188-33 [d] **Evidence insufficient** to warrant vacating award. Mich 233NW 415(2dcase).
189-39 127Kan877, 275P190 (evidence held to sustain finding of misconduct); 235Mich446, 209NW569; 299Pa503, 149 A702; TexCivA 11SW(2d)355; Va 153 SE731; 187Wis558, 204NW585. See also 245NY600, 157NE874 (where award was upheld). [j] **Statement of member** of arbitration committee that witness for party was crook held not such evidence of prejudice as rendered award fraudulent. 217MoA187, 274SW901.
189-41 49Philippine42, 50 [quotCJ].
190-42½-New. Fraud, corruption, partiality, and misconduct imply wrongful interest and not mere error of judgment. 217MoA187, 274SW901.
190-43 251NY87, 167NE181(1stcase); 101WVa683, 133SE381.
190-44 217MoA187, 274SW901.
190-46 [d] **Bias not shown.**-230AppDiv 419, 245NYS125.
190-49 See also 245NY599, 157NE873.
191-50 See also 224AppDiv83, 229NYS 500.
191-52½-New. Reinspection of disputed merchandise by one arbitrator with consent of others is not sufficient to invalidate an award. 221AppDiv567, 224 NYS498.
191-55 101WVa683, 699, 133SE381 [citCJ].
191-61½-New. But failure to inspect premises in question is not misconduct where agreement for arbitration does not provide therefor. 101WVa683, 133 SE381.
191-61¼-New. , or imperfectly executed the arbitration and failed to make a mutual, final, and definite award, as required by law. 127Misc759, 217NYS2.
195-88 Va 154SE473.
197-8 67CalA533, 227P953.
199-23 220Ky239, 294SW1095.
199-25 32F(2d)481.
199-33 135Misc92, 236NYS623 (where court has no power to confirm award, it has no power to disturb award); 146Wash283, 263P190.
200-36 Man [1926] 4DomLR318, [1926] 2WestWkly868.
200-40 146Wash283, 263P190 (statutory grounds).
200-41 315Mo 338, 286SW76. [g] **That award is against weight of evidence or is not supported by any evidence** is not ground for vacating it under statute authorizing court to confirm it. 12PaDist &Co 693.
201-47 [b] **One entitled to receive certain moneys from arbitrators** is not required to tender it back as condition to right to move to vacate award. 215App Div130, 213NYS369.
202-53½-New. Complainant suing to set aside awards of arbitrators in ejectment actions held chargeable with both his and his father's laches, through whom he claimed title. 32F(2d)481.
203-55 35GaA710, 134SE625.
203-56 35GaA710, 134SE625.
203-60 35GaA710, 134SE625.
203-60½-New. or accident; 35GaA710, 134SE625.
204-69 [e] (5) When order is made confirming, modifying, or correcting arbitration award, appeal lies from judgment entered thereon, not from order. 250NY355, 165NE809.
205-75 230AppDiv419, 245NYS125.
205-75½-New. A party is precluded from objecting on review that the arbitrators did not consider certain documentary evidence which was delivered to them where he made no request for its production and failed to point out any irregularities. 237Mich314, 211NW 631.
205-76 211Mich314, 211NW631; 142 Wash166, 252P546. [b] 243 IllA460.
206-77 243 IllA460.
206-78½-New. It will not be presumed that appellant was prejudiced by the temporary absence of one of the arbitrators where it appears that he was present at all meetings at which evidence was taken. 237Mich314, 211NW 631.
207-88½-New. Findings sustaining award will be approved in the absence of fraud or mistake. 199Wis230, 225 NW331, 63ALR1165.
207-93 226AppDiv397, 235NYS370.
207-97 127Misc759, 217NYS2; 136 Wash490, 240P673; Ont [1928] 4DomLR728.
208-99 See also 127Misc759, 217NYS2.
208-2½-New. When the award of arbitrators is set aside because of misbehavior, it is improper to refer the matter to the same arbitrators. 127Kan877, 275P190.
209-17 136Wash490, 240P673.
210-50 62 OntL410, [1928] 3DomLR 710 (previously chosen arbitrators to whom subsequent litigation referred held not referees).
211-54 9PaDist&Co 605.
211-59 See also [1930] 4DomLR994.
211-61½-New. Upon an appeal from award, the court should not interfere with arbitrators' findings of fact. Man [1927] 2DomLR606.

211-61½-New. In Canada, where arbitrators have followed the proper principles and there is evidence to support their findings, their award cannot be set aside. **Can** [1928] 2**DomLR**1.
211-61¼-New. Under the Canada Railway Act, where an arbitrator has made an award on an erroneous principle and it appears that injustice has been done, the award may be rectified on appeal. **BC** [1929] 2**DomLR**150.
215-3 52**SD**72, 216**NW**850.
217-26 299**Pa**503, 149**A**702.
218-40½-New. Action to enforce foreign judgment based on arbitration award under agreement to submit differences under foreign arbitration law is not maintainable in local courts without service of process on defendants in this country. 229**AppDiv**170, 241**NYS**54.
219-50 [a] **Arbitration award made under English statute** could not be enforced in state where English laws were not pleaded. 41**GaA**738, 154**SE**649.
221-84 220**Ky**239, 294**SW**1095. [a] **Fraud** held insufficiently pleaded. 220 **Ky**239, 294**SW**1095.
221-85 220**Ky**239, 294**SW**1095.
225-51 **Iowa** 231**NW**366.
225-53 **TexCivA** 17**SW(2d)**1095.
225-55 176**Minn**622, 224**NW**248.
226-66 See also 117 **Or**370, 244**P**319.
226-69 [d] **Sufficient replication.**–22 **AlaA**336, 115**S**689.
227-86 But see 33**PortoRico** 165.
233-62 33**PortoRico**165.
233-63 [g] **Failure to enter judgment on award** held to bar use of award in evidence. 17**F(2d)**232. [h] **In Porto Rico.**–33**PortoRico** 165. [i] **Entry of judgment** is in nature of specific performance of contract. 227**AppDiv**90, 237**NYS**110.
234-66½-New. There is no award upon which final judgment may be entered unless requirements of the statute shall have been substantially complied with. 90**Fla**900, 107**S**241 (record must show compliance with statute).
234-73 224**AppDiv**26, 229**NYS**338.
235-78½-New. That an arbitration agreement provided for entry of judgment did not give the judge the right to enter judgment and did not affect the validity of the agreement. **Mass** 164 **NE**820.
237-86½-New. Where an action was brought on an award, refusal of the judge to enter judgment and sustaining plea in abatement did not impair the arbitration agreement. **Mass** 164**NE** 820.
240-18½-New. Under general denial, in an action by a withdrawing partner, defendant could show that the award was on an oral condition that plaintiff should not compete. 108**Conn**478, 144**A** 41.
241-19 117 **Or**370, 244**P**319, 320 [cit CJ].
241-25 117 **Or**370, 244**P**319, 320 [cit CJ].
241-26 **TexCivA** 11**SW(2d)**355.
241-28 77**CalA**268, 246**P**566.
243-49 But see **Mich** 233**NW**391.
244-59 7**F(2d)**335; 222**Ky**298, 300**SW** 900; **Md** 149**A**290; 82**Mont**264, 266**P** 640; 82**Mont**312, 267**P**207, 212 [citCJ].
245-60 7**F(2d)**335.
247-78 [a] 20 **OhA**317, 151**NE**808 (to show legal fraud in selection of key arbitrator in proceedings between employee's union and street railway company). [b] 232**Mich**204, 205**NW**163; 176**Minn**622, 224**NW**248.
248-81 [a] **Evidence held sufficient** to show agreement to arbitrate. 77**CalA** 268, 246**P**566.

ARCHITECTS

255-1 77**CalA**399, 246**P**1069.
255-5 77**CalA**399, 246**P**1069; 240 **IllA** 448; 157**Tenn**157, 7**SW(2d)**47 (architecture and engineering). [a] (1) 201 **Cal** 428, 257**P**511. (2) Principle preventing corporations from practicing law is not applicable to practice of architecture. 201**Cal** 428, 257**P**511. (3) Statute allows any person to make plans for his own buildings or furnish them to others if he informs them that he is not a certified architect. 201**Cal** 428, 257**P**511. (4) Individuals may associate through corporation for practice of architecture. 201**Cal** 428, 257**P**511. (5) Corporation engaging uncertificated persons to perform architectural services, without informing patrons of fact, is subject to prosecution and avoidance of its contracts, but not to loss of right to practice architecture further. 201**Cal** 428, 257**P**511. [d] 136**Misc**307, 240**NYS** 784. [g] 5**PaDist&Co** 393. [h] **In Pennsylvania.**–90**PaSuper**395. [i] **In New York.**–136**Misc**307, 240**NYS**784. [j]**Person using title "consulting interior architect"** must register as an architect as required by statute. 12**PaDist&Co** 780.
256-6 Contra 317**Mo** 736, 296**SW**415.
256-9 77**CalA**399, 246**P**1069.
256-10 20 **OhA**236, 153**NE**135. Contra 77**CalA**399, 246**P**1069; 5**PaDist&Co** 393. [a] **In Michigan.**–232**Mich**658, 206**NW** 495. [b] **Contract held invalid** despite claim that plaintiff was not principal architect, where latter was not party to contract. 77**CalA**399, 246**P**1069.
256-14 218**Ky**422, 291**SW**356; 124 **Or** 585, 265**P**417; **Pa** 152**A**98.
256-16 **TexCivA** 4**SW(2d)**169.
256-17 288**Pa**207, 135**A**613, 614 [cit CJ]. [a] **Knowledge of architect,** supervising church construction, of priest's acts is not knowledge of or notice to archbishop. **Pa** 152**A**98.
256-18 288**Pa**207, 135**A**613, 614 [cit CJ]; **Pa** 152**A**98.
257-22 **TexCivA** 4**SW(2d)**169.
258-33 124 **Or**585, 265**P**417.
260-47 15 **OhA**400. See also 86**PaSuper**98 (corporation).
260-52 But see **Ont** [1928] 4**DomLR** 872.
260-53 [a] See also **Man** [1928] 3**Dom LR**679.
260-54½-New. **Contract is illegal** where promisor is not registered as an architect pursuant to statute. 240 **IllA** 448.
261-61 52**ND**113, 204**NW**849.
261-64 85**PaSuper**236 (where commissions were dependent on architect's securing bid for definite sum, he could not recover on bid for greater sum).
262-67 125**Misc**589, 593, 211**NYS**788 [CitCJ].
262-68 125**Misc**589, 593, 211**NYS**788 [citCJ].
262-69 125**Misc**589, 593, 211**NYS**788 [citCJ].
264-89 See also 258**Mass**551, 155**NE**604. But see 208**Ky**542, 271**SW**568; 293**Pa** 97, 141**A**638.
265-94 10**LaA**618, 119**S**754 (fee of five per cent for preparing plans and specifications held reasonable).
265-97 149**Wash**663, 271**P**893.
265-98½-New. **Contract superseding statutory rate.** Where a special contract provides amount of compensation rate provided by statute, it is not applicable, but contract will control. **Can** [1925] 3**DomLR**631.
266-1 [b] (3) Where building was originally intended to cover entire lot but owner decided to erect it in units, architect is entitled to lien on unit constructed for value of services in drawing original plans and for value of services in superintendence of construction of unit. 195**Wis**610, 219**NW**348.
266-4 [c] See also 244 **IllA**228.
268-21½-New. An architect who fails to deliver plans, specifications, and drawings in time for successful continuation and completion of the work is accountable for damages caused by the delay. 293**Pa**97, 141**A**638.
268-21⅓-New. An owner, by accepting and using plans after delay without complaint, does not lose his claim for the resultant damage. 293**Pa**97, 141**A** 638.
270-33 119 **Or**97, 247**P**316, 317 [quot CJ].
271-40 [d] **Effect of permitting architect to continue in charge.**–284**Pa**397, 131**A**250.
272-55 9**LaA**373, 120**S**522.
272-55½-New. **Partial set-off.** Where an architect was obliged to audit certain accounts, the owner is entitled to set-off for the amount allowed a builder for amounts paid therefor. 284**Pa**397, 131**A**250.
272-57 **TexCivA** 5**SW(2d)**862 (complaint held sufficient without allegation that, by reason of fraud, plaintiff was entitled to subject consideration received under new contract to payment of fees). [a] (3) Pleading insufficient. 12**PaDist &Co** 382. [b] **Unnecessary allegations.**–8**PaDist&Co** 772.
273-63 248 **IllA**361.
273-64 [a] **RI** 129**A**342 (may not recoup for unskillfully drawn plans).
273-67 **TexCivA** 5**SW(2d)**862 (matters not constituting variance).
274-68 9**LaA**13, 118**S**772 (variance held immaterial).
274-71 151**Wash**187, 275**P**543.
274-72½-New. In an action by an architect on a contract to draw plans and specifications, where the owner abandoned contemplated constructions, the architect had burden of proving his readiness, ability, and willingness to perform contract on his part. 200 **Iowa** 1094, 205**NW**966.
274-72½-New. An architect has the burden to show a license or that he is within statutory exception. 77**CalA**399, 246**P**1069.
274-73 192**NC**166, 134**SE**419; 293**Pa** 97, 141**A**638; 149**Wash**663, 271**P**893.
275-84 [a] (4) To show exercise of due care and skill in preparation of plans and specifications. 119 **Or**97, 247**P**316. (5) To support verdict that defendant hired plaintiff to draw plans and that pay did not depend upon awarding of contract. 144**Va**371, 132**SE**322. (6) In architect's action for compensation, to sustain finding that compensation was to be ascertained by computing certain per cent of certain amount, and not by such per cent of actual cost of building constructed. 97**CalA**325, 275**P**472. (7) Other instances. **MoA** 27**SW(2d)**438. (8) To warrant finding that plans prepared by plaintiff were not impractical and changes required not due to his fault. 95**PaSuper** 531. [b] (4) To show compliance with part omitted from contract. 192**NC**166, 134**SE**419. (5) To show negligence. **Can** [1928] 2**DomLR**878.
275-85 151**Wash**187, 275**P**543. [a] **RI** 129**A**342.
275-91 96**PaSuper**193.
275-91½-New. whether plaintiff had been wrongfully discharged, 96**PaSuper** 193.
276-96 54**SD**50, 222**NW**494 (instruction held proper).
276-3 200 **Iowa**1094, 205**NW**966 (instruction not prejudicial as to interpretation of contract).
277-10 But see 96**PaSuper**193.

ARISE

281-44 274**US**304, 47**SCt**635, 71**L ed** 1060. [a] (5) "Arise" held not synonymous with "accrue." 14**F(2d)**284.
281-45 14**F(2d)**284.
282-52 14**F(2d)**284, 295 [quotCyc].
282-55 14**F(2d)**284, 295 [quotCyc].
282-57 14**F(2d)**284, 295 [quotCyc].

ARMY AND NAVY

296-10½-New. "Presidios" are purely military foundations to be occupied by soldiers for establishment of order and protection of pueblo and mission foundations. **Cal** 287**P**475.
302-13½-New. Mailing of a notice addressed to the registrant at his last known address by an unregistered post card is sufficient. 4**F(2d)**823.
302-13⅓-New. Congress may exact enforced military duty at home and abroad by citizens. 42**F(2d)**842.
303-21½-New. **Evidence held insufficient** to sustain conviction for failure to register under **Selection Draft Act.** 7 **F(2d)**357.
303-21⅓-New. The burden is on the government to show that the county named was the actual legal residence of defendant on June 5, 1917. 10**F(2d)**751.
303-22½-New. An order for a certificate of materiality and necessity will not be granted for the inspection and production of the examination of an applicant before a local draft board, unless it appears that applicant has expressly or impliedly consented and the court is further satisfied that the federal

authorities should permit it. 132Misc 886, 230NYS757.

314-14 19F(2d)712.

317-35½-New. The president's act in discharging a naval officer is final and conclusive determination of his status. 33F(2d)214.

319-87 [g] **Recovery of allowance for dependent mother** could not be defeated on ground there was no appropriation available for refund. DC 38F(2d)943.

321-1 [h] **Withholding portion of officer's pay.**-Comptroller has no authority to withhold any part of officer's pay. 2 F(2d)895. [i] **Machinist's mate first class** was not officer of "United States" within statute respecting compensation claim. 40F(2d)286.

322-16 278US60, 49SCt42, 73L ed182.

324-39 [a] **Filing petition for retirement pay** under Retirement Act has been held election to take under that act to exclusion of benefits under former statute. DC 39F(2d)517. [b] **Duty of Veterans' Bureau Director** to cause retired pay to be paid officer placed on emergency officers' retired list for permanent disability. DC 39F(2d)517.

325-43½-New. Veterans' Bureau has right under law relating to retirement of officers for disabilities of World War, to rerate claimant in determining benefits. DC 42F(2d)347.

328-86½-New. A marine officer retired in 1911 has been held not entitled to have years spent by him in inactive service on the retired list counted in determining the amount of his base or period pay. 279US40, 49SCt232, 73L ed 604.

332-42½ [c] **Officer of air service** while detailed as student teacher to General Staff War College and not required to participate regularly and frequently in aërial flights was held not entitled to additional pay. 271US315, 46SCt490, 70L ed964.

332-46 [c] **Naval officer in view of dependency of mother** has been held entitled to recovery of additional rental and subsistence allowance, though she owned small amount of property. 38 F(2d)714. [d] **Comptroller General is vested with jurisdiction** to determine whether pay of navy officer, withheld prior to July 1, 1923, on account of allowances for dependent mother should be refunded. DC 38F(2d)942.

332-51 [a] **Overpayment of allowances.** -8F(2d)669.

337-28 [e] **Petty naval officer discharged as undesirable without court-martial** was entitled to compensation. 40F(2d)286.

337-31 5F(2d)964 (withholding pay on unadjudicated claim of previous overpayment for support of dependents held unauthorized).

338-41 But see 18F(2d)809; 24F(2d) 897.

338-52½-New. **"Retainer pay"** is compensation paid to an enlisted man retained in service but not rendering actual service. 10F(2d)416 (though liable to be called into actual service).

338-52⅓-New. "Allowance" or "gratuity" is not synonymous with "retainer pay." 10F(2d)416.

338-52¼-New. When called, an enlisted man receives regular pay. 10F(2d) 416 (not retainer pay).

340-91½-New. "Allowance" means "gift" or "gratuity." 10F(2d)416.

343-53 [c] **Supreme court will not presume** that final board of classification on putting army officer in class B considered charges not presented against him. 270US154, 46SCt275, 70L ed520.

343-65 270US154, 46SCt275, 70L ed520 (proceedings as to classification of army officer are presumed to be regular).

343-70 [c] **Furnishing officer reduced to class B** under Reorganization Act of 1920 with copy of adverse record and opportunity to consult entire record was held sufficient compliance with statute. 270US154, 46SCt275, 70L ed520. [d] **Supreme court must assume** that counsel for army officer would have insisted at hearing in production of any material evidence. 270US154, 46SCt275, 70L ed 520.

343-71 270US154, 46SCt275, 70L ed520 (failure to incorporate colloquy as to discontinuing hearing before all witnesses were heard was held not to alter effect of report). [a] **Supreme court cannot assume** record of court, if inquiry on reducing army officer to class B was defective where finding of court of claims showed that it contained all that was put in way of records and evidence. 270US154, 46SCt275, 70L ed 520.

348-57 13F(2d)347.

348-57½-New. A court martial has no jurisdiction beyond that given by statute. 33F(2d)214.

348-64 13F(2d)347.

349-81 4F(2d)823; 33F(2d)214.

350-91 [c] **Draft registrant's failure to report** for service does not make him deserter unless done with intent to evade military service. 4F(2d)823.

352-32 [a] **Coast guard court** has no jurisdiction to try and punish member of coast guard for perjury. 41F(2d)44.

353-41½-New. **Questions of procedure** are for court-martial and its reviewing authorities exclusively. 42F(2d)239.

359-62½-New. Court-martial can impose only a single sentence which is not vitiated by a reviewing court's disapproval of one of the specifications. 13 F(2d)347.

360-90 [b] **Imprisonment at hard labor** is not confined to cases where death penalty might be imposed. 4F(2d)897.

362-35 8F(2d)386.

362-35½-New. Upon disapproval of findings of court-martial secretary of navy may not on his own motion return the record for further action, after the dissolution of the court. 8F(2d)386.

362-35⅓-New. But he may order a new trial on accused's motion. 8F(2d)386.

362-35¼-New. In which case his disapproval is not an acquittal barring second trial. 8F(2d)386.

363-44 4F(2d)823; 13F(2d)347.

363-45 4F(2d)897; 13F(2d)347. [b] **Habeas corpus.**-8F(2d)386. [c] **Relief from arrest and trial by court martial** may be sought in civil courts where naval officer proceeded against had been dropped from rolls by president's order more than one year previously. 33 F(2d)214.

364-55-56½-New. A soldier injured when riding in a truck which ran into a train blocking a crossing is entitled to sue in his own name as against the contention that the United States is a real party in interest under a statute providing for compensation to injured employees. 151SC459, 149SE257.

365-66½-New. Michigan moratorium statute applicable to men in service applies only to processes designated in the statute. 237Mich367, 211NW636.

365-66⅓-New. The federal Soldiers' and Sailors' Civil Relief Act is applicable to proceedings in state courts. 55 ND445, 214NW249.

365-66¼-New. Under such statute, where plaintiff was absent from the state in the military service of the United States during the World War at the time that a cause of action accrued to him and thereafter, the period of his absence in such service is to be deducted in determining when the statute of limitations becomes effective. 55ND445, 214 NW249.

365-66⅙-New. A state moratorium statute, providing for suspending actions against soldiers, does not apply to actions brought by them. 55ND445, 214 NW249.

365-66⅙-New. Protection of Manitoba War Relief Amendment Act extends to personal covenants to pay interest and taxes. Man [1929] 4DomLR902.

367-2 214Ala2, 106S617. [b] **Fact that offender is member of army** does not change rules of evidence in prosecution. 214Ala2, 106S617.

368-19½-New. In some jurisdictions trustees of a military memorial building have no power to lease the whole or any part thereof. 123Kan766, 256P799.

368-19½-New. Memorial buildings. The board of supervisors is permitted to lease the use of a building or rooms therein by organizations of persons other than veterans where a charge is exacted and the building is not at the time necessary for the use of veterans' organizations. 98CalA585, 277P500.

368-19¼-New. The board of supervisors may adopt such reasonable rules for its occupation as will provide equal facilities and opportunities to all organizations entitled to use the building. 98 CalA585, 277P500.

368-19⅓-New. The statute giving the board of supervisors power to provide proper maintenance for a memorial building for veterans held mandatory where the building was constructed. 98 CalA585, 277P500.

368-19⅙-New. Veterans' organizations are entitled to use a memorial building or any part of it without compensation, under statute. 98CalA585, 277P500.

368-19½-New. County's purchase of hall for honorably discharged soldiers, sailors, and marines has been held authorized. CalA 288P450.

368-19⅞-New. Under statutes in some states power is given boards of county commissioners to determine the character of a war memorial to be erected consistent with the purposes underlying the statutes. 58ND407, 226NW536 (building proposed by board held suitable and appropriate).

368-22½-New. Under a statute giving the board of county commissioners power to determine whether a memorial shall be erected and the place of its location, the board's judgment is not subject to review because contrary to that of the majority of citizens and electors of the county. 58ND407, 226NW536 (members of board held not actuated by prejudice or malice).

368-30 83Colo 360, 265P94 (board may prohibit sales of merchandise on grounds). [a] **Compliance with rules by members.**-83Colo 360, 265P94 (implied agreement to comply on admission to home).

369-36 83Colo 360, 265P94.

369-38 [b] **Powers of boards of state homes.**-83Colo 360, 265P94.

369-40½-New. Temporary appointment of plaintiff as commander of the Soldiers' and Sailors' Home terminates on the date set by a civil service commission, and he is thereafter a de facto officer until permanent appointment of another. 81Colo 338, 255P461.

369-40⅓-New. A commander of the Soldiers' and Sailors' Home can be appointed only by the home commission on the basis of a test by a civil service commission. 81Colo 338, 255P461.

370-48½-New. War risk insurance. Definition. 31F(2d)243.

370-48⅓-New. Nature and purpose. 13F(2d)908; 312Mo 581, 280SW37; 128 Misc168, 218NYS394.

370-48¼-New. Construction of statutes. 24F(2d)981; 29F(2d)213; 29F (2d)951; 31F(2d)332; 31F(2d)735; 40 F(2d)199; 41F(2d)663; 44F(2d)5; 215 Ala268, 110S403; Mo 271SW992; 312 Mo 581, 280SW37; 315Mo 713, 290SW 135; 161Tenn88, 28SW(2d)642.

370-48½-New. Regulations relating to. 10F(2d)416; 18F(2d)795; 26F(2d)484; 31F(2d)332; 40F(2d)313; 42F(2d)879.

370-48⅙-New. Power of director of war risk insurance or of director of veterans' bureau. 281US271, 50SCt279, 74 L ed852; 10F(2d)416; 23F(2d)979; 24 F(2d)766; 25F(2d)544; 31F(2d)332; 32F(2d)807; 36F(2d)395; Md 149A446.

370-48⅐-New. Construction of contract. 5F(2d)673; 7F(2d)137; 7F(2d) 393; 13F(2d)212; 13F(2d)908; 15F (2d)52; 20F(2d)821 (liberal construction); 21F(2d)622; 24F(2d)944; 24F (2d)981; 29F(2d)847; 29F(2d)856; 29 F(2d)1018; 32F(2d)789; 32F(2d)807; 33F(2d)936; 36F(2d)43; 36F(2d)804; 39F(2d)142; 40F(2d)199; 43F(2d)456; 128Misc168, 218NYS394; 131Misc451, 227NYS120; OhA 162NE298.

370-48⅛-New. Premiums. 13F(2d)908; 19F(2d)876; 23F(2d)477; 29F(2d)847; 34F(2d)367; 41F(2d)521(1stcase).

370-48⅑-New. Lapse, forfeiture, or rescission of policy. 10F(2d)416; 18F (2d)585 (facts held to constitute estoppel); 18F(2d)795; 24F(2d)452; 24F (2d)766; 28F(2d)828; 32F(2d)313; 32 F(2d)789; 32F(2d)807; 33F(2d)822; 33F(2d)888; 36F(2d)556; 42F(2d)879; 43F(2d)457.

370-48⅒-New. Reinstatement. 281US 271, 50SCt279, 74L ed852; 7F(2d)137; 29F(2d)856; 32F(2d)440; 38F(2d)595;

39F(2d)142; 40F(2d)313; 42F(2d)879; 43F(2d)80.

370–48½–New. Death or disability. 7 F(2d)137; 7F(2d)393; 13F(2d)212; 15 F(2d)196; 20F(2d)821; 23F(2d)979; 24F(2d)944; 24F(2d)981; 28F(2d)771; 28F(2d)828; 28F(2d)904; 29F(2d)847; 29F(2d)951; 31F(2d)243; 31F(2d)735; 33F(2d)554; 33F(2d)564; 33F(2d)883; 34F(2d)241; 34F(2d)367; 35F(2d)181; 35F(2d)452; 35F(2d)646; 36F(2d)45; 36F(2d)556; 37F(2d)918; 40F(2d)199; 40F(2d)739; 41F(2d)614; 41F(2d)734; 42F(2d)197(2dcase); 42F(2d)755; 42 F(2d)804; 43F(2d)80; 43F(2d)457; 43 F(2d)719(1stcase); 43F(2d)974.

370–48½–New. Beneficiaries. 270US 175, 46SCt274, 70L ed530; 300Fed764; 6F(2d)4; 6F(2d)143; 10F(2d)617; 12 F(2d)921; 13F(2d)19; 13F(2d)406; 13 F(2d)763; 13F(2d)908; 14F(2d)228; 15F(2d)8; 15F(2d)52; 15F(2d)949; 17 F(2d)61; 21F(2d)141; 22F(2d)619; 24F(2d)247; 24F(2d)420; 25F(2d)670; 25F(2d)673; 26F(2d)484; 27F(2d)45; 28F(2d)350; 28F(2d)602; 29F(2d)213; 30F(2d)995; 31F(2d)735; 31F(2d)756; 33F(2d)545; 34F(2d)284(2dcase); 36 F(2d)201; 36F(2d)386; 36F(2d)395; 37F(2d)925; 39F(2d)225 (designation and change of beneficiary); 39F(2d) 793; 40F(2d)14; 42F(2d)197(2dcase); 215Ala268, 110S403; 178Ark1031, 13 SW(2d)8; DelCh 147A306; 168Ga859, 149SE141; 168Ga868, 149SE145(1st case); Ga 154SE887; 36GaA787, 138SE 262; 41GaA737, 154SE655; 254 IllA 219; 202 Iowa855, 211NW246; 55ALR 570; 219Ky543, 293SW1075; 222Ky 713, 28SW(2d)395; 228Ky790, 15SW (2d)1005; 235Ky435, 31SW(2d)695; 235Ky747, 32SW(2d)330; 126Me555, 140A366; 247Mich459, 226NW243; 179Minn402, 229NW344; 179Minn450, 229NW781; 148Miss446, 114S338, 55 ALR574; 220AppDiv472, 221NYS771; 129Misc248, 222NYS253; 130Misc436, 224NYS305; 131Misc451, 227NYS120; 131Misc125, 225NYS543; 137Misc627, 244NYS255; 196NC40, 144SE530(2d case); NC 154SE7; NC 155SE565; 58 ND416, 226NW595; 58ND422, 226NW 598; 117 Oh87, 158NE187, 55ALR566; 27 OhA516, 162NE398; 121 Oh46, 166 NE896; 27 OhNPNS244; 291Pa326, 139 A826; 297Pa292, 146A900; 96PaSuper 514; 13PaDist&Co 387; 13PaDist&Co 691; 14PaDist&Co 89; 141SC168, 139 SE403; 148SC30, 145SE549; 152SC328, 149SE841; 154SC359, 151SE573 (illegitimate brothers and sisters held sole distributees); SC 155SE597; 156Tenn 222, 300SW572; 157Tenn686, 118W (2d)894; 161Tenn88, 28SW(2d)642; TexCivA 290SW296; TexCivA 30SW (2d)558; 153Va567, 149SE515; 147 Wash441, 266P711; 152Wash459, 278 P414; 192Wis524, 213NW479; 195Wis 332, 218NW437.

370–48⅓–New. Action on claim, 281 US339, 50SCt291, 74L ed887; 8F(2d) 476; 13F(2d)19; 14F(2d)475; 15F(2d) 52; 17F(2d)84; 17F(2d)856; 19F(2d) 656; 19F(2d)876; 20F(2d)821; 21F (2d)141; 22F(2d)568; 23F(2d)477; 23 F(2d)792; 24F(2d)636; 24F(2d)981; 25F(2d)447; 25F(2d)673; 28F(2d)350; 28F(2d)570; 28F(2d)602; 28F(2d)828; 29F(2d)213; 29F(2d)847; 29F(2d)856; 31F(2d)243; 33F(2d)883; 33F(2d)936; 34F(2d)241; 34F(2d)367; 35F(2d)355; 36F(2d)395; 37F(2d)584; 37F(2d)918; 37F(2d)925; 37F(2d)946; 38F(2d)624; 40F(2d)14; 40F(2d)967; 41F(2d)521 (1stcase); 41F(2d)614; 41F(2d)663; 41F(2d)734; 42F(2d)197(2dcase); 42 F(2d)202(1stcase); 42F(2d)353; 42F (2d)736; 42F(2d)804; 43F(2d)80; 43 F(2d)457; 43F(2d)975; 43F(2d)999; 44F(2d)5; Ga 154SE887; 41GaA737, 154SE655; 231Ky127, 21SW(2d)151; Mo 271SW992.

370–48¼–New. Limitation of attorney's fee for procuring compensation. 266US226, 45SCt64, 69L ed259; 17F(2d) 462; 22F(2d)619; 30F(2d)584.

370–55½–New. Funds of estate of incompetent United States veteran in hands of guardian consisting entirely of payments received from United States veterans' bureau is not within authority of state courts to direct disposal of. 27 OhNPNS350.

371–58 See also 12PaDist&Co 102.

AROSE

372–2 TexCivA 32SW(2d)227.

ARREST

385–2 [a] (1) 120 Okl 105, 250P519. [g] **"Warrant of arrest"** defined. 210 Ky764, 276SW809.

385–4 [a] **Evidence held sufficient** to warrant finding that defendant was not under arrest. 255Mass510, 152NE377.

385–5 148Miss673, 114S748 (holding order to return and pay fine not arrest); BC [1928] 4DomLR241.

386–17 217MoA548, 269SW415.

387–25 215Ala116, 110S28, 29 [citCJ].

387–30½–New. Warrant of arrest issued in one state may not be executed in another state. 91Fla522, 107S689.

388–54 Mo 298SW769 (nonresident voluntarily appearing). But see 35F (2d)941.

389–63½–New. State practice as to procedure for making an arrest applies to crimes against the United States. 9 F(2d)621.

389–64½–New. Warrant may be executed on Sunday under some statutes. 36Man386, [1927] 2DomLR982, 47Can CrCas345, [1927] 1WestWkly734.

389–65 40F(2d)593 (arresting officer is not precluded from justifying arrest on another ground).

391–78 [i] **Warrant directing search for liquor and arrest of persons on premises** does not authorize arrest of persons on premises when no liquor or other contraband is found. 108WVa709, 152SE748.

391–79 158La874, 104S747, 750 [citCJ]. [a] (1) 233Mich452, 206NW982.

391–80 158La874, 104S747, 750 [cit CJ].

391–81 233Mich452, 206NW982.

393–4 145Va883, 134SE544, 47ALR 1084.

395–28 38F(2d)431; 77CalA472, 246P 1085; 316Mo 179, 289SW954 (facts of each case determine legality of such arrest); MoA 6SW(2d)638 ("an offense"); 115 Or187, 231P965, 237P373, 374 [cit CJ]; 199Wis63, 225NW191.

395–29 197 Ind360, 151NE97. [c] **In West Virginia.**–101WVa160, 132SE366. [d] **Authority to arrest without warrant** for indictable offense, given by statute, to officers or private persons whether or not offense is committed in their presence. 139Miss579, 104S449. [e] 197 Ind360, 151NE97.

396–30 OklCr 282P180(2dcase); 112 TexCr429, 17SW(2d)42(1stcase) (unlawful entry and search).

396–32 91PaSuper544.

396–33½–New. An officer authorized to make an arrest with a warrant needs none where the person he takes charge of surrenders himself. 116 Or509, 241P 983.

396–33⅓–New. Wholesale arrest of all occupants of club or place of amusement under mere suspicion and without warrant or real cause cannot meet with approval of the court. 126Misc698, 214 NYS99 (where persons are later discharged after expense of procuring bondsmen, and inconvenience and disgrace of arrest).

396–33¼–New. Information obtained by unlawful search is not a foundation for a lawful arrest. 197 Ind374, 151NE 98.

396–33½–New. Search without a warrant not incidental to arrest for possession of unregistered still and therefore inadmissible. 15F(2d)598.

396–33⅔–New. United States penal code authorizes search as incidental to arrest by federal agents. 15F(2d)598.

396–36 [b] **Commissioner of game and fisheries,** deputies, wardens, or agents have no more authority than private persons to arrest without warrant. Ala 128S447.

397–41 [c] **In West Virginia.**–107WVa 357, 148SE205.

397–45 But see 215Ala22, 109S165.

397–57 Wis 232NW593.

398–60½–New. Special officer employed in theater could not, without warrant, arrest patron who was not guilty of breach of peace in his presence. 126Me 469, 139A671, 55ALR1191.

398–62 145Va883, 134SE544, 47ALR 1084.

398–63 145Va883, 134SE544, 47ALR 1084.

398–67 233 IllA373 (dictum); 133 Okl 162, 271P672; 115 Or187, 231P965, 237 P373; 119 Or554, 249P637.

398–68 28F(2d)800; 29F(2d)172 [certiorari den 49SCt346(3dcase)]; 33F(2d) 485; DC 32F(2d)963; 162Ga208, 132SE 911; 233 IllA373 (dictum); 197 Ind 360, 151NE97; Ind 156NE560; 200 Ind 496, 163NE596; IndA 168NE494; 234 Ky695, 28SW(2d)976; 206Mich449, 206 NW988; 234Mich361, 208NW457; 244 Mich346, 221NW302; 139Miss579, 104S 449, 450 [quotCJ]; Miss 105S640; 312 Mo 425, 279SW102; 316Mo 179, 289SW 954; 133 Okl 162, 271P672; OklCr 281 P820; 115 Or187, 231P965, 237P373; 119 Or554, 249P637; 120 Or643, 253P 533; TexCivA 12SW(2d)563(2dcase); TexCr 291SW231; 106TexCr468, 293SW 168; 107TexCr24, 294SW550; 107 TexCr214, 296SW512; 107TexCr579, 298SW573; 107TexCr663, 298SW598; 108TexCr600, 602, 28W(2d)263; 110 TexCr478, 9SW(2d)352; 110TexCr439, 10SW(2d)384; 111TexCr226, 13SW(2d) 87; 113TexCr596, 21SW(2d)1057(1st case); 113TexCr597, 21SW(2d)1061(2d case); TexCr 28SW(2d)134; TexCr 28 SW(2d)556; 40Wyo 508, 281P17. But see 200 Ind405, 164NE276. [a] **Evidence justifying arrest without warrant.** –110TexCr290, 8SW(2d)119. [b] **Where federal officers entered building without warrant,** after observing still in operation, entry and arrest of persons on premises for commission of crime in presence of officers was lawful. 26F(2d) 769.

398–69 139Miss579, 104S449.

399–75 35GaA302, 133SE42, 43 [quot CJ]; 120 Or643, 253P533.

399–77 38F(2d)830; 40F(2d)593; 339 Ill 258, 171NE128; 148Miss739, 114S 825 (going on premises); OklCr 281P 820.

399–78 9F(2d)621; 16F(2d)754; 22F (2d)1001; 29F(2d)279; 29F(2d)294; 33F(2d)193; 33F(2d)485; 37F(2d)80; 43F(2d)911; 216Ala235, 113S49; 217 Ala66, 114S801; 218Ala468, 118S794; 171Ark882, 286SW1013; 47 Ida328, 274 P805, 62ALR195; 319 Ill 359, 150NE 263; 329 Ill 117, 160NE135; 336 Ill 421, 168NE344; 233 IllA373 (dictum); 197 Ind8, 149NE442; 197 Ind360, 151NE97; 197 Ind374, 151NE98; 198 Ind55, 152 NE278; 199 Ind49, 155NE209; Ind 156 NE560; 199 Ind546, 158NE902; 199 Ind727, 160NE449; 89 IndA496, 167NE 140; 211Ky118, 276SW1057; 218Ky 147, 291SW15; 255Mass340, 151NE317; 261Mass255, 158NE771; 238Mich543, 213NW683; 239Mich329, 214NW88; 243Mich688, 220NW714 (facts held to justify arrest without warrant); 248 Mich499, 227NW763; 139Miss579, 104S 449; 142Miss602, 107S667; 149Miss639, 115S778 (may go on premises where crime committed, without warrant to arrest); 152Miss298, 120S170; 154Miss 493, 122S539; Mo 274SW17; 312Mo 99, 279SW144; 316Mo 243, 289SW852; 317 Mo 304, 295SW737; 320Mo 271, 8SW (2d)57; Mo 14SW(2d)434; Mo 22SW (2d)1050; Mo 23SW(2d)11; 221MoA 292, 3SW(2d)266; 101NJEq540, 138A 369; 195NC747, 143SE538; 121 Oh280, 168NE135; 120 Okl 105, 250P519; 133 Okl 162, 271P672; 28 OklCr353, 230P 946; 115 Or187, 231P965, 237P373; 116 Or509, 241P983; 119 Or554, 249P637; 120 Or444, 250P220; 120 Or643, 253P 533; 121 Or297, 254P798; 110TexCr 416, 10SW(2d)113; 111TexCr218, 12SW (2d)1015; 111TexCr300, 12SW(2d) 1018; 137Wash360, 242P377, 378, 247P 9 [citCJ]; 151Wash114, 275P75; 155 Wash80, 283P671 [citCJ]; 155Wash486, 284P1016; 155Wash644, 285P665; 199 Wis115, 225NW738; 39Wyo 181, 270P 665. [c] **In California.**–83CalA12, 256P 299. [d] **Transporting liquor.**–Mo 14 SW(2d)434 (in automobile).

399–79 [a] **Discovery on search of accused's connection with crime cures any irregularity in mode of arrest.** 137 Wash360, 242P377, 247P9.

400–80 312Mo 99, 279SW144; Mo 14 SW(2d)434.

400–81 37F(2d)134; 197 Ind144, 149 NE891; 217MoA548, 269SW415.

400–82 37F(2d)124; 198 Ind55, 152NE 278; OklCr 283P264.

400–83 233Mich452, 206NW982. But see 142Miss602, 107S667.

400–84 40F(2d)593; 41F(2d)294 (holding arrest unauthorized); 197 Ind8, 149 NE442; 233Mich452, 206NW982; 139 Miss579, 104S449; 217MoA548, 269SW 415; Utah 279P501; Wash 291P1098. See also 155Tenn102, 291SW839. [a] Search.–155Tenn102, 291SW839.

400–84½–New. Where it is possible to obtain a warrant in advance of arrest, the officer should do so, 148Miss739, 114 S825.

400–84¼–New. although he may not be compelled to in all cases. 148Miss 739, 114S825.

400–85 TexCommnA 24SW(2d)378; 109 TexCr573, 6SW(2d)115 (arrest held justified); TexCr 24SW(2d)41; TexCr 25 SW(2d)837. But see 107TexCr101, 294 SW1110. [b] (1) 110TexCr52, 7SW(2d) 532.

401–89 16F(2d)652; 33F(2d)193; 37F (2d)124; 37F(2d)134; 197 Ind144, 149 NE891; 207Ky53, 268SW840; 208Ky 587, 271SW674, 675 [quotCJ]; 210Ky 385, 275SW819; 211Ky118, 276SW1057; Md 150A447; 233Mich452, 206NW982; 140Miss184, 105S465, 41ALR1129 (construing Const. § 23); 156Miss365, 126S 38; Miss 130S741 (arrest held illegal); 312Mo 425, 279SW102; 217MoA548, 269 SW415; 242NY13, 150NE585 (arrest for petit larceny illegal); 118 Okl 262, 247P 377; 35 OklCr196, 249P432; 28 OklCr 353, 230P946; 152SC17, 149SE348; 159 Tenn422, 19SW(2d)231; 68Utah507, 251 P23; 155Wash80, 283P671. See also 154Miss493, 122S539; WVa 155SE127. But see 134Misc228, 235NYS173. [d] **Arrest without warrant** does not of itself indicate that arrest is unlawful. Wash 291P1098.

401–90 104TexCr127, 283SW512; 103 WVa19, 136SE510. But see 68Utah507, 251P23.

402–91 37F(2d)124 (prohibition agents).

402–93 275US192, 48SCt74; 72L ed231; 4F(2d)881; 7F(2d)370; 16F(2d)652; 20 F(2d)470 (possession of opium); 23F (2d)696 (offense against United States); 42F(2d)742(1stcase); 23AlaA533, 128S 465; 210Ky764, 276SW809; 216Ky182, 286SW1042; 223Ky381, 3SW(2d)770; 231Ky838, 22SW(2d)295 (driving automobile without lights); 140Miss841, 105 S479; 146Miss517, 112S686; 316Mo 179, 289SW954; MoA 272SW982; 222MoA 499, 280SW718; MoA 289SW29; Okl Cr 279P690; OklCr 279P707; OklCr 281 P824; 9PaDist&Co 497; 113TexCr597, 21SW(2d)1061(2dcase); 68Utah507, 251 P23; 136Wash228, 239P386; 136Wash 374, 240P360; 104WVa118, 139SE474. [g] 211Ky723, 277SW1021. [h] **Federal statute** forbidding search of dwelling without warrant held not to change law as to arrest for committing offense in presence of officer. 7F(2d)247. [i] **Defendant engaged in manufacturing liquor** may be arrested, although entry by officer made through premises not occupied by defendant. 10F(2d)916.

403–97 239Mich123, 214NW231; 240 Mich35, 214NW944; 240Mich98, 215NW 62; 316Mo 179, 289SW954; 37 OklCr 377, 258P816; 115 Or187, 231P965, 237 P373; 107TexCr261, 296SW536. [f] **That defendant was thereafter charged with offense of which search showed him guilty** rather than offense for which he was arrested did not render his arrest and search unlawful. 115 Or187, 231P965, 237P373.

404–98 6F(2d)224; 16F(2d)652; 210 Ky764, 276SW809; 216Ky451, 287SW 951. [c] **In Missouri.**–321Mo 1237, 14SW (2d)624.

404–98½–New. for violation of the prohibitory liquor law, OklCr 277P950(1st case); OklCr 287P812.

404–8½–New. , or for violation of automobile laws. 136Wash228, 239P386.

404–10 [a] (2) 221MoA292, 3SW(2d) 266. [b] **Constitutionality of statutes.**–108TexCr381, 1SW(2d)314.

405–11 4F(2d)881; 198 Ind170, 152NE 721; 210Ky385, 275SW819; 211Ky118, 276SW1057; 235Ky429, 31SW(2d)709; 142Miss92, 108S442; 217MoA548, 269 SW415. But see 22F(2d)1001; 253 IllA 116.

405–13 169Ark662, 276SW591, 42ALR 1194. [b] 324 Ill 131, 154NE715.

405–14 169Ark662, 276SW591, 42ALR 1194.

405–16 208Mo 560, 274SW70, 72 [cit CJ].

406–22 251Mich265, 231NW579; 68 Utah507, 251P23, 25 [quotCJ].

406–23 68Utah507, 251P23, 25 [quot CJ]. [d] **What constitutes reasonable time depends on circumstances of particular case.**–68Utah507, 251P23. [e] **Officer must act promptly** and before transacting other business. 68Utah507, 251P23.

407–24 68Utah507, 251P23, 25 [quot CJ].

407–25 68Utah507, 251P23, 25 [quot CJ].

407–26 215Ky766, 286SW1038; 229Ky 522, 17SW(2d)453 (subsequent search and discovery of evidence of other crime held authorized); 14PaDist&Co 4 (disobedience of police order for disorderly assembly to disperse); TexCr 291SW 231; 129Wash605, 225P633.

403–30 113TexCr169, 18SW(2d)628.

408–34½–New. Statutes authorizing municipal officers to arrest on view and without process are strictly construed as in derogation of liberty, 220MoA575, 287SW861.

408–34½–New. and the power of such officers to arrest for quasi criminal offenses arising from violation of ordinances sought not to be enlarged by judicial construction beyond ex-grant of power or necessary implication in the statute. 220MoA575, 287SW861.

409–36 35GaA302, 133SE42, 43 [quot CJ].

410–44 143Miss92, 108S442; 129 Or224, 277P101.

410–50 [a] (3) Other instances. 136 Misc637, 241NYS225.

410–51 316Mo 243, 289SW852; 142SC 667, 128SE572. [a] 136Misc637, 241NYS 225.

410–52 [b] **Statement of facts by person arrested** showing that he is engaged in committing public offense gives private right to arrest him. 52ND94, 202 NW128.

410–54 38F(2d)862. [b] 203 Iowa155, 212NW382.

411–56 35GaA302, 133SE42, 44 [quot CJ].

411–57 35GaA302, 133SE42, 44 [quot CJ].

411–58 [b] (1) TexCivA 293SW339, 341 [citCJ]. (6) Owner or lawful custodian of property may arrest without warrant, if done openly without delay. Tex CommnA 298SW404.

411–59 40F(2d)593; TexCommnA 298 SW404.

411–60 38F(2d)862; Cal 290P881; Tex CommnA 10SW(2d)534(2dcase).

413–66 TexCommnA 10SW(2d)534(2d case).

414–71 But see 3LaA720; 31 OhA340, 167NE469.

414–75 242NY13, 150NE585.

415–76 242NY13, 150NE585.

415–79 242NY13, 150NE585.

415–84 113 OhSt450, 149NE551.

416–89 179Ark776, 18SW(2d)343 (hearing woman scream and seeing her run from house followed by defendant); 162 Ga208, 132SE911; 146Miss517, 112S686; 115 Or187, 231P965, 237P373, 375 [quot CJ]; WVa 155SE127. See also 8F(2d) 478; 177Minn307, 225NW148. [a] **Finding person drunk in his own room** does not authorize arrest for offense committed in officer's presence, entry being illegal. 219Ky482, 293SW984.

416–90 22F(2d)976 (destruction of bottle of gin taken from pocket); 162Ga 208, 132SE911; 37GaA9, 138SE524; 115 Or187, 231P965, 237P373, 375 [quotCJ]; 103WVa19, 136SE510; 108WVa709, 152 SE748.

416–93 43 OklACR313.

416–94 2F(2d)886; 111TexCr486, 16 SW(2d)228(2dcase) (officer seeing bottles and being advised that car contained liquor held justified in arresting occupant); 103WVa19, 136SE510. [a] (8) Detecting fumes from cooking mash does not justify search of dwelling house, as being offense committed in officer's presence. 5F(2d)312.

416–97½–New. Where liquor is discovered by an officer in a person's possession upon search of him, the offense is regarded as being committed in the officer's presence. 8F(2d)251 (search under warrant).

417–99 208Ky587, 271SW674, 675 [quot CJ]; 221MoA292, 3SW(2d)266, 269 [cit CJ]. [b] **"Probable cause"** is belief reasonably arising out of circumstances. 33F(2d)485 (evidence sufficient to show probable cause). [c] **Reasonable and probable cause do not depend** on establishing of crime. Ind 168NE22.

417–1 16F(2d)754; 17F(2d)373; 18F (2d)522, 527 [quotCJ dis op]; 218Ala 468, 118S794; 74CalA726, 241P938; Ind 165NE757 (officers are under duty to arrest without warrant on admission by defendant that he had still then in operation); 89 IndA103, 165NE772(2d case) (where defendant admitted that he had whisky in his pockets, officers had authority to make arrest); 208Ky 587, 271SW674, 675 [quotCJ]; 233Mich 505, 207NW141; 121 Or297, 254P798, 799 [citCJ]; 107TexCr24, 294SW550; 112TexCr291, 16SW(2d)238 (officer observing broken glass and liquid pouring from automobile detecting smell of whisky has probable cause). [a] (1) 102NJL 134, 130A642. (2) That officer saw defendant exchange packages with negro held not to show probable cause. 198 Ind55. 152NE278. [i] (1) 197 Ind360, 151NE97. [k] **Evidence held insufficient** to show justification for arrest without warrant. 197 Ind374, 151NE98. [l] **Presumption from unexplained possession of recently stolen property** may supply element of probable cause justifying arrest by officer without warrant. 217 Ala66, 114S801. [m] **Circumstances and information held sufficient** to render arrest for unlawful possession of liquor legal. 155Wash80, 283P671 [citCJ]. [n] **Other definitions.**–37F(2d)80.

417–2 208Ky587, 271SW674.

417–4 8F(2d)478; 8F(2d)978; 16F(2d) 754; 18F(2d)522, 527 [quotCJ dis op]; 22F(2d)934 (arrival of defendant with missing parts of newly installed still); 22F(2d)1001 (arrest held justified); 89 IndA496, 167NE140; 233Mich505, 207 NW141; 240Mich491, 215NW419; 151 Miss361, 118S137; 316Mo 571, 292SW 78; MoA 285SW777; 115 Or187, 231P 965, 237P373 (personal observation authorizing arrest and search of drunken person); 121 Or297, 254P798, 799 [cit CJ]; 146Wash509, 263P951. [a] **Visible evidence of crime is sufficient** to authorize arrest without valid warrant. 9F (2d)382.

417–5 18F(2d)522, 527 [quotCJ dis op]; 40F(2d)593; 41F(2d)945; 169Ark662, 276SW591, 42ALR1194; 197 Ind8, 149 NE442; 199 Ind546, 158NE902; 208Ky 587, 271SW674, 675 [quotCJ]; 240Mich 491, 215NW419; Mich 233NW383; 139 Miss579, 104S449; 142Miss602, 107S667; 146Miss303, 111S362; 320Mo 271, 8SW (2d)57; 82Mont515, 268P501 (sheriff informed by federal officer); 120 Okl 105, 250P519; OklCr 283P1023(2dcase); 116 Or509, 241P983; 121 Or297, 254P798, 799 [citCJ]; 161Tenn290, 30SW(2d)247 (1stcase); 109TexCr573, 6SW(2d)115. [d] (5) Arrest without warrant of person wearing stolen overcoat, at instance of owner, held proper. 112TexCr491, 17 SW(2d)829(2dcase). [h] (5) Telegram from police officer in another state stated that warrant has been issued for certain person for stated offense and requesting his arrest justifies officer addressed in making arrest. 233Mich452, 206NW982. [l] **Information from neighboring sheriff** to look for and arrest woman escaping with car she had stolen justified arrest of woman without warrant. 9F(2d)275.

418–6 18F(2d)522, 527 [quotCJ dis op]; 82Mont515, 268P501. [c] **Knowledge gained from arrest** or seizure cannot be used to support finding of probable cause for arrest. 40F(2d)593.

418–7 18F(2d)522, 527 [quotCJ dis op].

418–8 17F(2d)373; 18F(2d)522, 527 [quotCJ dis op]; 19F(2d)161; 22F (2d)1001; 42F(2d)567; 243 IllA348; 197 Ind144, 149NE891; 208Ky587, 271 SW674, 675 [quotCJ]; 232Mich670, 206 NW337; 221MoA292, 3SW(2d)266; OklCr 282P180(2dcase); 188Wis275, 205NW825. [a] (2) Officers cannot as-

sume that quiet peaceable orderly person is guilty of carrying concealed weapons. 2F(2d)922. (3) Where police squad attempted to arrest defendants without reasonable grounds for suspicion of guilt and defendants were neither vagrants nor nightwalkers, act was unlawful. 324 Ill 131, 154NE715. [b] **Facts held mere suspicion.**–17F(2d)373. [c] **Information obtained by unlawful search** cannot alone furnish basis for lawful search. 198 Ind55, 152NE278. [d] **Mere "tip" to officers** that liquor would be delivered would not alone justify defendant's arrest without warrant. 155Wash80, 283P671 [citCJ]. [e] **Ease in fabricating justification for arrest** without warrant goes to credibility of officer's testimony, not to right to make arrest. 40F(2d)593.

418–8½–New. Accused's refusal to submit to search is not admission of guilt as would justify arrest without warrant and search. 9F(2d)927.

418–8¾–New. But arrest and search by military picket of person attempting to pass is not unreasonable. 9F(2d)927.

418–8¾–New. Accused's companion's discharge or acquittal, on a charge of speeding, would not invalidate accused's arrest for lack of probable cause. Ind 168NE22.

419–13 16F(2d)830, 831 [quotCJ]; 324 Ill 131, 154NE715.

419–14 16F(2d)830, 831 [quotCJ].

419–14½–New. An officer must have such information as convinces the court that it amounts to probable cause. 147 Miss31, 113S173.

419–14¾–New. The probable cause is a judicial question for the decision of the court when the evidence is offered in a trial of felony of one arrested by an officer without a warrant, 148Miss739, 114S825.

419–14¼–New. and the officer's opinion of whether it is the probable cause is not sufficient of itself to justify admission of the evidence. 148Miss739, 114S825.

419–14⅛–New. The facts upon which the officer acts must be sufficient to satisfy the judicial mind of the court in such case. 148Miss739, 114S825.

419–14⅛–New. Defendant has the right to interrogate the officer in open court as to the source and nature of the information obtained, 148Miss739, 114S825.

419–14½–New. including the name of the person or persons from whom it was received. 148Miss739, 114S825.

419–19 234Ky751, 29SW(2d)17.

420–21 OklCr 283P264; 119 Or522, 250P216. [a] **Failure to give notice in express terms** does not invalidate arrest for felony where person about to be arrested knew officer and that he was officer and acting as such. OklCr 283P264.

420–30 217Ala219, 115S308.

422–52 [a] **In Pennsylvania.**–14PaDist&Co 4.

422–54 126Me384, 138A625 (arrest week after date of warrant held not unreasonably delayed); 196Wis113, 219 NW380.

422–62 220MoA575, 287SW861; 7 PaDist&Co 464. See also 148Wash265, 268P871. Contra Mo 298SW769.

423–64 142Wash243, 252P913.

423–66 308Mo 538, 272SW922. [b] **Invalidity of arrest made without such indorsement** is not cured by commitment issued by justice before arrest. 308Mo 538, 272SW922.

423–67 23AlaA197, 122S702(2dcase); 308Mo 538, 272SW922 (county clerk's certificate of county where issued).

423–71½–New. Arresting officer may enter store to make arrest. 42F(2d)742 (1stcase).

424–74 9F(2d)275; 105Conn528, 136A 76; 30Hawaii487; 41 Ida616, 243P359; 233 IllA373; 234Ky37, 27SW(2d)397.

424–76 41 Ida616, 243P359 (use of excessive force places parties in same relation as private individuals); 199 Ind 617, 159NE465.

425–78 218Ala468, 118S794.

425–81 107TexCr297, 296SW570.

425–82 203 Iowa155, 212NW382.

425–88 324 Ill 131, 154NE715; 210Ky 385, 275SW819.

425–90 218Ala468, 118S794. [a] 218 Ala468, 118S794.

425–93 220Ky484, 295SW431.

426–95 161Ga166, 129SE772, 775 [quot CJ]; 36GaA817, 138SE267; 41 Ida616, 243P359.

426–96 161Ga166, 129SE772, 775 [quot CJ]; 324 Ill 131, 154NE715.

426–98 106WVa216, 145SE275, 277 [citCJ].

427–11 121 Or297, 254P798.

427–12 121 Or297, 254P798.

427–13 142Miss602, 107S667; 121 Or 297, 254P798.

428–22 145Va883, 134SE544, 47ALR 1084.

430–41 334 Ill 324, 166NE129 (confinement in police stations for several days held unauthorized).

430–42 234Ky751, 29SW(2d)17.

430–42½–New. unless prisoner waives requirement. 261Mass255, 158NE771.

431–59 [b] **Police sergeant** who released one legally arrested without bail being properly fixed commits positive breach of duty. 28Ariz278, 237P380, 44 ALR1495.

431–62½–New. Under some statutes, a person arrested without a warrant must be discharged within twenty hours, unless he is charged with a criminal offense by oath of a credible person and held by warrant to answer such offense. 316Mo 372, 289SW898.

431–65 30Ariz591, 249P758.

432–68 TexCivA 289SW741.

432–70 219AppDiv291, 219NYS724.

433–78 NJCh 152A17.

434–84 269US20, 46SCt4, 70Led145, 51ALR409; 8F(2d)251; 8F(2d)478; 9 F(2d)746; 16F(2d)202; 18F(2d)507; 19F(2d)161; 22F(2d)1001; 23F(2d) 141 (person and property); 37F(2d)80; 41F(2d)294 (holding search after illegal arrest unauthorized); 329 Ill 117, 160NE135; 336 Ill 421, 168NE344 (without search warrant); 339 Ill 258, 171NE128; Ill 173NE383; 196 Ind483, 149NE51; 197 Ind360, 151NE97; 89 IndA103, 165NE772(2dcase); 211Ky 118, 276SW1057 (only if arrest is rightful and proper); 224Ky117, 5SW(2d) 887; 240Mich35, 214NW944; 251Mich 89, 231NW130 (search of automobile without warrant); 139Miss579, 104S 449; 153Miss593, 121S275 (may search person and automobile); 312Mo 425, 279SW102; 316Mo 243, 289SW852; 316 Mo 179, 289SW954 (searching auto for liquor, after arrest, held proper); Mo 14SW(2d)434 (may search person and premises); Mo 22SW(2d)1050; MoA 285SW777; 37 OklCr377, 258P816; OklCr 281P599 (may search person, automobile, and surroundings); OklCr 281P987(1stcase); OklCr 282P180(1st case); OklCr 283P1032(1stcase); 43 OklACR312; 119 Or554, 249P637; 155 Tenn102, 291SW839; 107TexCr214, 296 SW512, 513 [citCJ]; 107TexCr243, 296 SW556; 107TexCr579, 298SW573; 108 TexCr664, 2SW(2d)274; 109TexCr331, 4SW(2d)553; 111TexCr300, 12SW(2d) 1018; 111TexCr425, 14SW(2d)847; 112 TexCr491, 17SW(2d)829(2dcase); 113 TexCr421, 21SW(2d)509; 113TexCr596, 21SW(2d)1057(1stcase) (search without warrant where felony was being committed in officer's view); 113TexCr597, 21SW(2d)1061(2dcase); TexCr 28SW (2d)134 (place of arrest); TexCr 28SW (2d)556 (scene of arrest); 137Wash360, 242P377, 247P9; 145Wash4, 258P845; 148Wash310, 268P874. But see 155 Wash80, 283P671. [b] 2F(2d)886; 46 RI 485, 129A596. [c] But see 115 Or 187, 231P965, 237P373. [g] 223Ky 381, 3SW(2d)770; 240Mich491, 215NW 419; 107TexCr24, 294SW550. [i] 223 Ky381, 3SW(2d)770; 240Mich491, 215 NW419; 312Mo 425, 279SW102; 107 TexCr663, 298SW598. [j] 115 Or187, 231P965, 237P373. [k] 242NY13, 150 NE585. [m] 143Miss92, 108S442; 103 WVa19, 136SE510. [o] **Arrest must be lawful** and unlawful arrest is not validated by discovery of evidence of crime upon search. 32Wyo 223, 231P683. [p] **Search of premises.**–8F(2d)251; 8F(2d) 302; 18F(2d)507; (5) 24F(2d)665; 224 Ky117, 5SW(2d)887; 147Miss31, 113S 173; OklCr 279P693(2dcase) (dwelling of defendant prosecuted for burglary); OklCr 280P476; OklCr 283P1023(2d case); 43 OklACR312; 103WVa77, 136 SE703, 51ALR407. [q] **Suit case carried by person arrested** is in his possession so as to be immune from search without warrant on illegal arrest although he claimed to be carrying it for another. 143Miss92, 108S442. [r] **Time when arrest deemed made.**–217MoA548, 269SW415. [s] **Officer acting on credible information** and going on land without warrant may seize still, parts thereof, or mash and give evidence in relation thereto. 146Miss303, 111S362(2d case); 149Miss639, 115S778 (though flight prevented arrest). [t] **Legal arrest** only justified search. 9F(2d)621; 197 Ind374, 151NE98. [u] **Forced entry without warrant after arrest** is illegal. 19F(2d)161. [v] **Place of arrest** may be searched without warrant. 9F (2d)746; 199 Ind727, 160NE449 (automobile); 119 Or554, 249P637; 145Wash 4, 258P845. [w] **Search subsequent to but not incident to arrest** is unauthorized. 37 OklCr396, 258P812. [x] **Conveyance of person lawfully arrested** may be searched. US 47SCt746 (motor boat); Ind 158NE902; 37 OklCr377, 258P816; 107TexCr663, 298SW598. [y] **Officer arresting without warrant** may search defendant where he has probable grounds to believe him guilty. 22F(2d) 1001. [z] **Right to hold pending arrival of search warrant.**–195NC747, 143SE 538. [aa] **Search of dwelling without warrant** is unauthorized where arrest is not made therein, and commission of crime for which arrest is made is not connected therewith. OklCr 275P354 (2dcase). [bb] **Automobile in which defendant was riding** at time of arrest may be searched. 29F(2d)172 [certiorari den 49SCt346(3dcase)]; 200 Ind 583, 164NE315; 111TexCr367, 12SW (2d)102(2dcase). [cc] **Search of automobile after legal arrest of defendant** is proper though made several hours after arrest. OklCr 276P494. [dd] **Garage where liquor was found** may be searched where arrest is legal. 151 Wash51, 274P1053. [ee] **Truck in which liquor was found** may be searched where driver was arrested. 245Mich 310, 222NW698. [ff] **Search is permissible** to recover stolen goods. 111 TexCr300, 12SW(2d)1018. [gg] **Statute permitting arrest and seizure of stolen property** if reasonable grounds exist was not repealed by statute penalizing searches without warrants. 111 TexCr300, 12SW(2d)1018. [hh] **Where defendant was arrested outside his apartment,** and at his request was taken to it, any search thereof was lawful, rendering evidence obtained thereby admissible. 149Wash675, 272P26. [ii] **Automobile** of one suspected of committing crime may be searched. 35 F(2d)663; 248Mich499, 227NW763; Mo 22SW(2d)1050; TexCr 20SW(2d)1051. [jj] **Search of dwelling.**–Conn 151A526. [kk] **Officer entering dwelling by permission** and observing violation of law therein should arrest participants and make seizure. Conn 151A526.

434–84½–New. or place where arrested. 18F(2d)507; 39Wyo 181, 270P665.

434–86 5F(2d)364; 40F(2d)593 (papers); 37 OklCr377, 258P816; 289Pa 225, 137A223; 136Wash228, 239P386; 137Wash360, 242P377, 247P9; 101WVa 160, 132SE366. [b] **Seizure of property** within control of accused. 40F(2d) 593 (office of defendants). [c] **Where arrest was made without probable cause,** it was no justification for seizure of narcotics. 42F(2d)567.

434–88 7F(2d)818; 9F(2d)382; 43F (2d)911; 319 Ill 359, 150NE263, 265 [citCJ]; Ind 156NE560; 312Mo 425, 279SW102; OklCr 277P950(1stcase); OklCr 279P693(2dcase) (tools that may be used to commit crime for which person was arrested); OklCr 287P812; 289 Pa225, 137A223; 46RI 485, 129A596; (2d)769. But see 36F(2d)316. [a] Sei-100Vt228, 136A385; 136Wash228, 239 P386. See 28F(2d)150. See also 26F

zure of truck on which defendant was arrested held not unlawful. 243Mich688, 220NW714. [b] **Seizure of boat and liquor** held not lawful where person was arrested in act of transporting liquor in boat. 243Mich498, 220NW785.

434-89 8F(2d)251 (evidence found on previous controller by defendant); 8F(2d)302 (liquor found by narcotic officer in search for narcotics); 9F(2d)382; 18F(2d)507; 22F(2d)1001; 41F(2d)851; **Ind** 156NE560; 224Ky117, 5SW(2d)887; 229Ky522, 17SW(2d)453 (evidence held competent); 240Mich35, 214NW944; 139Miss579, 104S449; 154Miss493, 122S539; 312Mo425, 279SW102; 82Mont515, 268P501 (package containing morphine); 37 OklCr377, 258P816; OklCr 278P665(2dcase); OklCr 279P690; OklCr 279P707 (intoxicating liquor); OklCr 281P824 (intoxicating liquor); OklCr 283P262; OklCr 292P882; 43 OklACR312; 119 Or554, 249P637; 289Pa225, 137A223; 107TexCr330, 298SW573; 100Vt228, 136A385; 136Wash228, 239P386; 136Wash374, 240P360; 146Wash509, 263P951; 148Wash310, 268P874; 155Wash80, 283P671; 155Wash644, 285P665. [a] **District attorney may impound criminatory property to use for evidence.**–289Pa225, 137A223. [b] **Fermenting of wine seized on arrest** for evidence held not to entitle owner to recover possession. 289Pa225, 137A223. [c] **Officer arresting without warrant** may seize property where he has probable cause to believe defendants guilty. 22F(2d)1001.

434-90 8F(2d)251 (ledger showing to whom bribe money paid in prosecuting for liquor conspiracy).

434-91 154Miss493, 122S539; 110TexCrA52, 7SW(2d)532; 110TexCr439, 10SW(2d)384.

434-91½-New. An officer making an arrest without a warrant for an offense committed in his view is authorized to search the premises upon which the offense was committed. 107TexCr579, 298SW573.

434-91⅓-New. Search of the person is unlawful where the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation. 2F(2d)922; 24F(2d)512.

434-91¼-New. An officer without a warrant has no right to detain a citizen and search his person or effects except where a felony has been committed and there is reasonable cause to believe that the person arrested is guilty thereof. 217MoA548, 269SW415.

434-91½-New. An automobile in which intoxicants are carried may be searched. 111TexCr486, 16SW(2d)228(2dcase).

434-91⅙-New. Search of premises must be incidental to arrest. 37F(2d)134; TexCr 22SW(2d)935.

434-91⅐-New. Incidental search without warrant of premises in which arrest took place is lawful if arrest is lawful. 37F(2d)134.

434-91⅛-New. Search of fourth floor of loft building could not be considered incident of arrest on second floor. 40F(2d)295.

434-91⅑-New. Search of premises cannot be incident to arrest of others, if made before arrest or if attempted arrest was not made. 40F(2d)295.

434-91 1/10-New. When chief object of entering premises is for search, search without warrant cannot be justified as incident of arrest. 40F(2d)296.

434-91 1/11-New. If defendant's arrest was legal, search of garage where he worked was rightful. TexCr 29SW(2d)364.

435-94 110TexCr52, 7SW(2d)532. [b] **Marked bill** given in payment for liquor properly taken by arresting officer. 10F(2d)492.

435-96½-New. An automobile may be searched. 112TexCr291, 16SW(2d)238.

435-2 43F(2d)911.

435-4 100Vt228, 136A385.

436-6 [c] **Ex parte motion** is demurrable. 320Mo20, 6SW(2d)597.

436-7½-New. The jurisdiction of a magistrate over money or property taken by an officer from a person arrested and jurisdiction over the officer in respect thereto arises on concurrent facts that a criminal cause has been instituted and that the party charged has been taken into custody. 316Mo372, 289SW898.

436-7⅓-New. Where a person accused of being a fugitive from justice in another state is arrested and money found in his possession is taken into the custody of the officer, and the prisoner is released on bail and leaves the state before a complaint is filed, the committing magistrate has no jurisdiction over the money or the officer in relation thereto, 316Mo372, 289SW898.

436-7¼-New. especially where another court has acquired jurisdiction of the money by issuance of writs of attachment and service thereof on the officer. 316Mo372, 289SW898.

436-7⅕-New. In such case the filing of a complaint after accused had left the jurisdiction does not relate back to the day of arrest so as to give the committing magistrate jurisdiction of the money. 316Mo372, 289SW898.

436-7⅙-New. The responsibility of an officer taking possession of property found on an arrested person is to be determined by the court acquiring jurisdiction over him in reference to such property. 316Mo372, 289SW898.

437-21 110TexCr474, 9SW(2d)355.

437-25 169Ark410, 275SW737; 151Md553, 135A367, 49ALR1303.

437-26 NS [1929] 1DomLR666 (where prisoner was freed by jailer to assist at fire as member of local fire force).

438-38 34Wyo288, 243P123, 124 [cit CJ].

439-57 126Or253, 269P878.

441-85 34Wyo288, 243P123, 124 [citCJ].

441-88 247Mich201, 225NW531. [d] (2) Action to recover price under contract rescinded for fraud does not authorize arrest within Civ. Pract. Act § 826 subd 10. 126Misc597, 214NYS202. [f] (1) 298Pa146, 148A75.

444-6 105NJL521, 146A591 (mayhem not shown).

445-39 [e] (2) In replevin, defendant, in presence of court on original copies, may be retained in custody until compliance with order commanding delivery of bonds to plaintiff. 168Ark700, 271SW710.

446-44 But see 298Pa146, 148A75.

447-55 [a] (2) One partner may not in action for accounting have another arrested for alleged wrongful conversion of partnership funds. 193NC258, 136SE707.

448-56 [c] **Action to rescind purchase of stock and cancel notes given in payment** based on fraud is equitable in its nature not authorizing arrest within Civ. Pract. Act, § 826. 126Misc597, 214NYS202.

448-60 NJ 136A807.

448-62 216AppDiv392, 215NYS241.

450-76 [b] 168Ark700, 271SW710.

451-82 101Vt152, 141A686 (failure to deposit money of plaintiff, and conversion thereof).

454-11 [t] **Noncompliance with Bulk Sales Act** is not alone evidence of fraud justifying an order to hold to bail or attachment. 102NJL144, 130A632.

456-26 Or 289P372; 12PaDist&Co577. [m] **Broken promise not fraud** so as to authorize arrest in tort action. 101Vt152, 141A686.

458-49 [a] **False representation that money would be used as loan** to third person, whereas defendants appropriated it for themselves. 133Misc710, 233NYS340.

461-89 Or 289P372.

463-13 2PaCo310.

463-16½-New. **In California** women are subject to civil arrest in a superior court action. 101CalA365, 281P1051.

465-41 But see Or 289P372.

466-55 100NJEq64, 135A150.

467-59 Or 289P372.

470-93 124Me391, 130A233.

471-98 [a] (5) When benefit is not applied for seasonably and properly. 124Me391, 130A233. [c] **Equitable estoppel.**–124Me391, 130A233.

471-2½-New. or by pleading the general issue. 124Me391, 130A233.

471-4 124Me391, 130A233.

472-19 58NS96, [1925] 3DomLR101 (stipendiary magistrate). [i] (4) Additional stipendiary magistrate has same jurisdiction over civil arrest procedure as is given to two justices of the peace within their territorial jurisdiction. 58NS96, [1925] 3DomLR101. [k] **Capias issued by justice of peace** on affidavit failing to show statutory requirements held void. 86IndA462, 158NE583.

473-33 NJ 134A621.

475-48½-New. Proof and order to hold defendant to bail should issue before capias ad respondendum. NJ 136A430.

476-70½-New. The validity of an affidavit is to be determined from the original affidavit and not from the copy served on defendant. 35GaA414, 133SE294.

476-70⅓-New. The affidavit must be of the same legal quality of evidence as would be required at a trial to establish facts set up or relied on for cause of arrest. 241Mich490, 217NW401.

478-89 241Mich490, 217NW401; NJ 136A430.

479-93 241Mich490, 217NW401.

479-96 233Mich529, 207NW13.

479-97 But see 236Mich601, 211NW31.

481-10 NJ 136A430; NJ 136A431.

482-12 230AppDiv465, 245NYS278.

483-23 NJ 136A431.

484-24 230AppDiv465, 245NYS278.

484-29 NJ 147A841(1stcase).

484-31 [a] **Affidavit held insufficient** to show want of probable cause. 230AppDiv465, 245NYS278.

489-52 NJ 136A430.

492-71 129Misc236, 221NYS185.

493-79 156SC137, 152SE763 (allegation held not to support action).

494-94½-New. An affidavit, the basis of an order to hold to bail, entitled in an action when no cause was pending, is fatally defective. NJ 133A187.

496-18 226AppDiv263, 235NYS74 (complaint and affidavits held to sustain warrant).

499-46 129Misc226, 220NYS320.

499-48 129Misc226, 220NYS320.

501-70 84CalA434, 258P405.

502-80 [a] **Capias ad respondendum** cannot be issued merely that it may act as attachment when defendant is already in court. 86IndA462, 158NE583.

503-97½-New. Where writ shows action on mortgage note, it is void on its face, whether declaration is on contract alone or on contract and tort. 99Vt219, 131A21, 49ALR1382.

506-26 6PaDist&Co543.

507-50 131Misc401, 227NYS163.

508-61½-New. Under some statutes a copy of the declaration must be served with the writ. 236Mich601, 211NW31.

509-76 Or 289P372.

510-80 101Vt152, 141A686 (question on motion is whether allegations authorized remedy by arrest).

510-87 NJ 133A187.

510-88 86CalA623, 261P484.

511-90 NJ 133A187.

513-21½-New. , or where an allegation that plaintiff could not succeed was unfounded on facts. 216AppDiv392, 215NYS241.

513-25½-New. failure to serve a copy of the declaration with the writ; 236Mich601, 211NW31.

514-48 [a] (2) Evidence that petitioner has in his custody and can produce the property sued for justifies refusal of discharge. 35GaA414, 133SE294.

515-53 PrEdwIsl [1928] 3DomLR38 (also showing ownership of sufficient property to satisfy debt).

515-59 7PaDist&Co753.

520-18½-New. Where the petitioner for discharge recites the institution of suit, failure to show the sheriff's entry of service on petitioner as defendant in bail trover is immaterial. 35GaA414, 133SE294.

520-24 NJ 134A621.

521-34½-New. Respondent may introduce evidence in rebuttal of that of petitioner, although he failed to file an answer to the petition. 35GaA414, 133SE294.

522-35 [b] **Evidence held sufficient.**–216AppDiv392, 251NYS241.

522-40½-New. Trial court's order setting aside order of arrest held erroneous where plaintiff, the maker of the affidavit on which the arrest was made, had not been convicted of perjury, as defendant charged, but was worthy of belief. 226AppDiv263, 235NYS74.

529-39½-New. or where plaintiff consented to defendant's release. 158Ga 377, 123SE710.

530-42 98PaSuper217.

ARSON

539-4 264Mass378, 162NE733.

539-13 219Ky789, 294SW491.

541-37 See also 55ND120, 212NW832, 833 [citCJ]. [b] **Word "willfully," as** used in statute, means purposely and intentionally. **Kan** 289P409.

541-42½-New. Some statutes are construed as applying only to acts willfully or maliciously done, although not expressly so limited. 237Mich247, 211 NW650.

541-43 [a] **In Philippines.-44Philippine** 170.

542-46 Mo 298SW(2d)150.

542-50 219Ky28, 292NW484.

543-54 102TexCr331, 277SW664.

543-57 112TexCr439, 178W(2d)50(1st case).

543-58 107Conn630, 141A660 (charring of threshold sufficient).

543-61 102TexCr331, 277SW664.

545-90 [b] (2) 45Philippine89. (3) Under art 549 knowledge of human occupancy is an essential element of offense, but not under art 551 imposing lesser punishment. 44Philippine170. (4) Where information fails to allege ignorance of human occupancy at time of burning, Pen. Code art 557 subs 4, and not Pen. Code art 550 is applicable. 45Philippine89.

546-5 199Cal 235, 248P906.

546-6 See also 78CalA380, 248P975.

551-78 [a] 224Ky259, 68W(2d)233.

551-81 102TexCr331, 277SW664.

551-86 See also 46Philippine745.

552-95 Or 290P1096.

552-98 NJ 146A351(1stcase). [a] 124 Kan340, 259P802. [b] **Statute denouncing crime as arson** is not invalid because offense is not arson. 234Ky 147, 27SW(2d)689.

552-98½-New. In Kentucky, prior to amendment of 1928, it was not an offense for owner to burn his own insured personal property. 232Ky542, 24SW(2d)273.

553-3 203Cal 587, 265P230; **TexCr** 24 SW(2d)39; 135Wash295, 237P730.

553-12 124Kan340, 259P802.

554-15 124Kan216, 217 [citCJ], 257P 944.

554-17 124Kan216, 257P944.

554-23 307Mo 487, 271SW477.

555-30½-New. Malicious mischief cannot be regarded as a lesser degree of or embraced within the crime of arson. 168Minn401, 210NW402.

555-32 78CalA380, 248P975; 307Mo 487; 271SW477.

555-33 307Mo 487, 271SW477.

555-39 307Mo 487, 271SW477.

556-48 307Mo 487, 271SW477.

557-65 [b] **Elements of crime of attempting to burn personal property with intent to injure insurers.-264Mass** 368, 162NE729.

557-73 80CalA685, 252P758 (conspiracy); 109Conn394, 146A837 (evidence that defendant was owner or tenant is not necessary).

557-78 109TexCr428, 58W(2d)155.

558-83 [c] (1) 98CalA733, 277P896. [d] **Indictment held not demurrable.-** 41GaA300, 152SE609.

559-97 78CalA380, 248P975.

559-98 CalA 258P975.

559-99 78CalA380, 248P975.

559-2 Or 290P1096.

559-3 55ND120, 212NW832. [b] **"Willfully, unlawfully, and feloniously"** is insufficient to charge malice required by statute. 55ND120, 212NW832.

560-4 55ND120, 212NW832. [a] (1) 35PortoRico 951. (2) 35PortoRico 951.

560-5½-New. Under statutes in some jurisdictions the intent must be an "intent to destroy" a building. 55ND120, 212NW832.

560-5½-New. In some jurisdictions an information which fails to allege malice, either in the language of the statute or otherwise, does not charge the crime of arson in any degree. 58ND27, 224NW 898.

560-15 Contra. 35PortoRico 951.

562-45 23AlaA213, 123S104(2dcase).

562-48 78CalA380, 248P975; 44Philippine170. [d] (1) 78CalA380, 248P 975. [e] **In Philippines.-44Philippine** 170.

562-49 219Ky789, 294SW491.

563-62 96Fla723, 119S118, 119 [citC J]; 152Miss82, 118S372.

563-63 Or 290P1096.

564-70 214Ky422, 283SW420. [a] **Allegation of ownership in defendant and another** is proper where ownership is uncertain. 113TexCr335, 218W(2d)675 (3dcase).

564-76 334 Ill 218, 165NE619.

564-81 23AlaA213, 123S104(2dcase).

567-24 78CalA380, 248P975.

567-27 [a] 219Ky789, 294SW491.

568-43½-New. Omission of the words "willfully and maliciously" renders the indictment insufficient. 264Mass378, 162NE733.

569-61 153Tenn189, 281SW460.

569-62 153Tenn189, 281SW460.

570-70 152Miss82, 118S372.

570-73 307Mo 487, 271SW477 (variance in name of insurance companies); **Mo** 298W(2d)150; 113TexCr429, 178W(2d) 42(2dcase); **TexCr** 24SW(2d)39.

570-78 IndA 169NE698.

571-79 IndA 169NE698.

571-81 264Mass368, 162NE729 (attempt to burn personal property to injure insurers).

571-82 90Fla719, 107S246.

571-83 142Wash57, 252P530.

571-89 107Conn630, 141A660.

571-90 107Conn630, 141A660.

572-92 [a] **Where there is no direct evidence that defendant was present** at time or place of fire, state must establish agreement or conspiracy to set fire and burn merchandise. **Utah** 269 P515.

572-99 23AlaA123, 122S465 [certiorari den 122S466(1stcase)] (value of house burned).

572-1 113TexCr335, 218W(2d)675(3d case).

572-3 23AlaA213, 123S104(2dcase).

572-9 334 Ill 218, 165NE619.

572-12½-New. Evidence of conferences between defendant and another relative to burning of the premises in question is admissible in a prosecution for arson with intent to defraud insurance companies although they occurred seven months before the fire. 109Conn394, 146A837.

572-16 109Conn394, 146A837; 168La 487, 122S591; 93PaSuper365; 113Tex Cr335, 218W(2d)675(3dcase).

573-22 Mass 172NE343.

573-23 Mass 172NE343; **Mich** 233NW 192(2dcase). [a] **Evidence admissible.-** 168Minn401, 210NW402.

573-26 321Mo 352, 108W(2d)928.

573-35 334 Ill 218, 165NE619.

574-45 Mass 172NE343; **Mich** 233NW 192(2dcase); **Mo** 298W(2d)150. [d] **Testimony that insurer was existing insurance company** licensed to do business in state is admissible. 90CalA27, 265P366. [e] **Though expecting insurer to pay to others than himself,** intent to injure insurance company by burning building may be established. **Mass** 171NE458.

574-46 221AppDiv500, 224NYS667 (policies in names of defendant's wife, brother, and consignor of goods to wife, in store rented by wife, held admissible).

574-47 260Mass288, 157NE350; **Mass** 172NE343. [h] **Evidence of attempt to procure additional insurance** is admissible. 109Conn394, 146A837.

575-48 105Conn115, 134A228.

575-49½-New. Whether a claim on the policy had been made is inadmissible when it was not in defendant's name. 221AppDiv500, 224NYS667.

575-51 169Ark348, 275SW669; 177 Ark938, 9SW(2d)583; 94CalA7, 270P 398; 80CalA77, 251P219.

575-52 165La270, 115S484.

575-53 Mo 298W(2d)150.

576-57 IndA 169NE698.

576-61 80CalA77, 251P219; 219Ky28, 292SW484; 307Mo 487, 271SW477 (admission of insurance).

577-72 165La270, 115S484.

577-83 [a] **Experienced fire chief** may testify that cause of fire was oil or gasoline. 104TexCr244, 283SW846.

577-83½-New. Testimony of expert painters that a certain mixture near a candle would not cause an explosion as claimed by defendant is admissible. 168 Minn401, 210NW402.

578-1 217Ky513, 289SW1087.

579-9 But see 203Cal 587, 265P230.

579-10 [b] (3) Evidence of cost of store fixtures involved when new some months before fire held properly excluded. 264Mass368, 162NE729. [d] (3) Direct evidence is required to show defendant's pecuniary condition. 264 Mass368, 162NE729. (4) Exclusion of evidence concerning money on defendant's person at time of his arrest as being receipts of trade at his store was not error. 264Mass368, 162NE729. (5) Evidence as to value of property owned by defendant based wholly on cost prices is inadmissible. 264Mass368, 162 NE729.

580-16 Mo 298W(2d)150. [a] 168Ark 1167, 271SW461; 75CalA565, 243P25; 94CalA85, 270P706. [b] 170Ark1191, 283SW372; 203Cal587, 265P230; 94 CalA7, 270P398; 75CalA565, 243P25; 80CalA77, 251P219; CalA 256P132; 85 CalA648, 259P961 (arson in first degree); 105Conn115, 134A228; 109Conn 29, 145A24; 109Conn394, 146A837; 37 GaA627, 141SE221; 214Ky544, 283SW 385; 214Ky422, 283SW420; 219Ky28, 292SW484; 224Ky124, 5SW(2d)884; 251Mass154, 150NE197; 260Mass288, 157NE350; 237Mich247, 211NW650; 164Minn110, 204NW564; 168Minn354, 210NW10 (arson in third degree); 168 Minn401, 210NW402 (third degree); 170Minn400, 212NW598 (third degree); 173Minn368, 217NW378; 307Mo 487, 271SW477; **Mo** 298W(2d)150; 112Nebr 851, 205NW572; 115Nebr838, 215NW 107, 53ALR1057; **NJ** 139A249; 247NY 351, 160NE395; 217AppDiv424, 216NYS 723; 223AppDiv529, 229NYS265 (third degree); 197NC376, 148SE450; 153 Tenn189, 281SW460; 109TexCr124, 3 SW(2d)88; 112TexCr429, 178W(2d)42 (2dcase); 143Wash221, 255P89; 146 Wash391, 263P180 (second degree arson); 152Wash488, 278P173; **Wis** 231 NW266. [c] 199Cal 235, 248P906; **Ill** 173NE278; 151Miss202, 117S532; **Okl Cr** 278P393 (second degree); 9PaDist &Co 252; 104TexCr244, 283SW846.

580-17 78CalA380, 248P975; 214Ky 544, 283SW385; 166Minn292, 207NW 627; **Mo** 298W(2d)150; 143Wash221, 255P89. [a] 143Wash221, 255P89. [b] 78CalA380, 248P975; 214Ky544, 283SW385; 264Mass368, 162NE729; 166Minn292, 207NW627; 167Minn74, 208NW528; 167Minn234, 208NW653. [c] **IndA** 169NE698; 46Philippine395.

580-21 IndA 169NE698; 231Mich607, 204NW742 (proof that building was burned does not establish corpus delicti); **Mo** 298W(2d)150. [a] 166Minn 292, 207NW627. [b] (1) **CalA** 256P 132; 334 Ill 218, 165NE619; 254Mass 454, 150NE197; 167Minn74, 208NW528 (incendiary origin of fire). (2) 166 Minn292, 207NW627. [c] **Evidence insufficient** to prove corpus delicti. 153 Tenn189, 281SW460.

580-22 334 Ill 218, 165NE619.

581-23 167Minn74, 208NW528; 173 Minn420, 217NW489 (evidence sufficient). [c] 254Mass454, 150NE197; 264 Mass368, 162NE729; 307Mo 487, 271SW 477. [e] 307Mo 487, 271SW477.

581-30 264Mass368, 162NE729 (intent may be inferred from circumstances).

581-34 IndA 169NE698 (evidence insufficient to show motive).

582-39 [c] **Though property is not overinsured,** intent to injure insurer by burning building may be found. **Mass** 171NE458.

582-42 67CalA631, 228P405 (proof ownership insufficient); 100TexCr172, 272SW490 (certified copy of deed acknowledged by husband only, sufficient). [b] **Evidence held insufficient.-** 152Miss82, 118S372.

582–45 115Nebr838, 215NW107, 53ALR 1057.
582–46 153Tenn189, 281SW460.
582–47 224Ky259, 6SW(2d)233 (evidence sufficient to support conviction).
583–50 217AppDiv424, 216NYS723.
583–51 36GaA650, 137SE862. [c] **Evidence of corroboration held sufficient.**–217AppDiv424, 216NYS723.
583–60 321Mo 352, 10SW(2d)928. [a] (1) 214Ky544, 283SW385; 216Ky813, 288SW752; 224Ky259, 6SW(2d)233; 229Ky499, 17SW(2d)403; 237Mich247, 211NW650; 167Minn74, 208NW528; 193NC253, 136SE723; Or 290P1096. (6) Where discovery of fire at store was made more than one hour and a half after defendants were seen coming out of store, it was held question for jury whether defendants set the fire. 254Mass454, 150NE197.
583–61 94CalA85, 270P706; 214Ky544, 283SW385; Mass 171NE458 (guilt of defendants); Mass 172NE343; Mo 29 SW(2d)150; 192NC704, 135SE775; 104 TexCr244, 283SW846.
583–62½–New. whether fire was of incendiary origin, 167Minn74, 208NW528.
583–63½–New. whereabouts of accused at time of fire; 135Wash295, 237P730.
583–63½–New. and whether or not accused set fire to building unlawfully; 135Wash295, 237P730.
584–69 [b] **Whether principal knew of insurance and intended to injure insurer** by having it pay accessory for loss is for jury. Mass 171NE458.
584–71½–New. , and degree of crime. 78CalA380, 248P975.
584–76 251Mich542, 232NW384. [b] **Instructions held sufficient.**–86PaSuper 488.
584–80 260Mass288, 157NE350.
584–81 113TexCr335, 21SW(2d)675(3d case); TexCr 22SW(2d)461 (instruction held proper under statute).
584–82 229Ky499, 17SW(2d)403.
584–86½–New. Defendant is not entitled to an instruction on malicious mischief. 168Minn401, 210NW402.
585–89 [b] **Refusing requested instruction** that jury must believe beyond reasonable doubt that building was burned to obtain insurance thereon held not error. 113TexCr335, 21SW(2d)675(3d case).
585–90 142Wash57, 252P530.
585–91 112TexCr439, 17SW(2d)50(1st case).
585–95 [d] **Instructions held not to assume facts.**–307Mo 487, 271SW477.
585–98 NJ 136A206.
586–2½–New. On counts for setting fire and for conspiracy, a conviction for conspiracy may be sustained although defendants were acquitted of the actual burning. 89PaSuper82.
587–17 [a] **In Philippines.**–44Philippine170.
587–19 Mo 26SW(2d)956; 44Philippine170 (sentence based upon wrong article of code modified and reduced so as to conform to another article prescribing lesser punishment). [a] **Sentence held excessive.**–Mo 26SW(2d)956 (twenty years for third degree arson).
587–36 [a] **In Philippines.**–44Philippine170.

ARTICLE

591–56½–New. "article imported," 14 CustA92; 14CustA94.

ARTIFICIAL

595–59 24F(2d)722.

AS

597–82½–New. since; 126Mc177, 136A 817.
597–82½–New. it being the case that; 126Mc177, 136A817.
598–95 126Mc177, 136A817.
599–19 11PaDist&Co 734.
601–32½–New. "as to" 313Mo 114, 280 SW697.
603–49½–New. "as necessary for preservation of mother's life;" 126Mc177, 136A817.

ASCERTAIN

604–57 155Md86, 141A518, 523 [citCJ dis op].
605–64 155Md86, 141A518, 523 [citCJ dis op].

ASPERIN

607–10½–New. Asperin is a coal tar product commonly kept in drug stores and is used and sold for medicinal purposes. It is not a proprietary or patent medicine. 172Minn132, 214NW766.

ASSAULT AND BATTERY

615–5 [a] (12) Assault is attempt or demonstration or effort in striking distance to strike another, though person threatened may not be actually stricken. 208Ky15, 272SW24 [Caldwell Jud D].
616–6 156La891, 1018255. [a] (8) Any unlawful beating or other wrongful physical violence or constraint inflicted on a human being without his or her consent. 196NC710, 146SE806(2dcase).
616–8 [a] See also 91CalA44, 266P581.
616–9 153Miss559, 121S153. [a] 167 Minn203, 208NW814, 46ALR772.
616–10 213Ala284, 104S548.
616–10½–New. **"Wound"** is a breach of the skin, or of the skin and flesh, and there need be no effusion of blood. 156 La891, 101S255.
616–11 22AlaA105, 113S87.
617–18 TexCr 20SW(2d)1047.
617–25 167Minn203, 208NW814, 46ALR 772.
618–34 22AlaA105, 113S87; 23AlaA67, 120S577(2dcase).
618–40 248Mich545, 227NW688 (acts and declarations showing intent).
619–43 22AlaA105, 113S87.
622–72 256 IllA557.
622–73 Conn 135A76.
623–76 129 Or224, 277P101.
624–79 [1] **Where golf ball was driven at right angles to direction of play,** no notice could be inferred. 224 IllA195. [m] **Statements held not to show injury was willful.**–224 IllA195.
626–93 178Ark917, 13SW(2d)26; 229 Ky830, 18SW(2d)280 (husband aiding wife); 219MoA673, 284SW828; NJ 135 A64; 192NC749, 136SE6; TexCivA 20 SW(2d)328; Wash 287P36. [n] **Joint and several liability** exists where several participate in assault or aid and abet therein. NJ 135A64.
627–96 TexCivA 286SW276.
627–2 But see 219MoA673, 284SW828.
628–8 1LaA230. [a] **Aggressor cannot recover** for physical injuries. La 128S665.
628–18 8LaA783.
629–27 174Minn107, 218NW461.
630–31 69Utah323, 255P172.
630–32 Okl 292P356; 69Utah323, 255 P172; 100WVa694, 131SE556.
630–33 69Utah323, 255P172.
631–38 TexCr 20SW(2d)1049.
631–39½–New. One may use such force as is necessary to prevent injury to his property. 100CalA188, 279P840.
632–48 208Cal 315, 281P70; TexCivA 25SW(2d)639. [f] **Defense of home** is limited to cases of attempted forcible entry, or attack with firearms for purpose of committing felony or inflicting bodily harm. 234Ky321, 28SW(2d)7.
632–49 NJ 135A698; 152SC88, 149SE 331; 136Wash645, 241P19. [g] **Former employee refusing to leave premises after discharge** cannot be forcibly evicted therefrom but resort must be had to distress proceedings or sequestration. TexCivA 20SW(2d)328.
633–50 89CalA6, 264P336.
633–52 200 Iowa1355, 206NW631; 136 Wash645, 241P19.
633–53 152SC88, 149SE331.
634–61 200 Iowa1355, 206NW631.
635–68 TexCommnA 295SW592.
635–70 170Ark1014, 282SW354; 100 CalA188, 279P840; 105Conn342, 135A 397, 53ALR481; 212Ky310, 278SW1095; 3LaA465; 6LaA14; 6LaA648; 143Miss 551, 108S729; TexCommnA 292SW855; TexCommnA 295SW592; TexCivA 289 SW1077. [b] **Not justified without imminent danger** of bodily harm or reasonable cause so to believe. Mo 31SW(2d) 769.
635–71 TexCivA 289SW1077. [a] 219 MoA374, 271SW847.
635–72 212Ky310, 278SW1095. [a] **Knowledge of belligerent character** must exist at time of assault to justify. Vt 152A41.
635–73 Mo 31SW(2d)769 (reasonable cause to believe is necessary); TexCivA 289SW1077; TexCivA 8SW(2d)288.
636–75 229Ky840, 18SW(2d)275; 219 MoA374, 271SW847.
636–77 See also TexCivA 289SW1077.
636–78 201 Iowa311, 207NW386.
636–78½–New. Excitement and confusion which would result from surrounding circumstances may be considered. TexCivA 289SW1077.
636–81 219MoA374, 271SW847 (drawing pistol by plaintiff after defendant had knocked him down does not entitle him to damages on his counterclaim). [a] **Before right to self-defense will revive,** where one is at fault in entering into difficulty, he must retreat in good faith, intending to abandon it. MoA 23SW(2d)190(2dcase).
636–82 But see 105Conn374, 135A396.
636–83 170Ark1014, 282SW354; 213 Ky623, 281SW804; Sask [1929] 2Dom LR296. [c] 219MoA374, 271SW847; MoA 23SW(2d)190(2dcase).
638–96 TexCommnA 295SW592.
638–3 [a] **Duty of accused to submit to officer.**–Though accused may have believed that he was being illegally arrested, it is his duty to submit to officer. 169Ark662, 276SW591, 42ALR 1194.
639–5 111TexCr85, 10SW(2d)383.
639–6 219Ala228, 121S521, 64ALR 1022; 105Conn528, 136A76.
639–7 Wis 232NW593.
639–8 But see TexCivA 286SW276.
640–12 169Ark662, 276SW591, 42ALR 1194 (cannot take life of accused or inflict great bodily harm except to save own life or prevent injury to himself).
640–14 159Tenn241, 18SW(2d)381. [b] **Firing pistol shots at automobile to intimidate driver** and cause his surrender where officer had been informed of his intoxicated condition is not act for which officer is punishable for assault and battery. 169Ark662, 276SW591, 42 ALR1194. [c] **Regardless of intention** not to hit anyone, marshal had no right to shoot person to arrest for misdemeanor. 181Ark816, 27SW(2d)999.
640–14½–New. Where a police officer acts under statute to arrest without a warrant, one who afterward proves not to have committed a felony, 74CalA 726, 241P938.
640–14¼–New. or when in attempting to make such an arrest he causes injury to party arrested, 74CalA726, 241 P938.
640–14¼–New. his liability therefor for damages depends on whether he acted in good faith and had reasonable grounds for believing that such person had committed the felony. 74CalA726, 241P938.
641–31 Contra 111Tenn388, 77SW664, 102AmSR787, 64LRA991, 1AnnCas130.
641–39 [e] **Superintendent of training institute.**–LaA 130S857.
644–68 170Ark1014, 282SW354; 180 Ark695, 22SW(2d)562; 2LaA189; 8 LaA652; 222MoA758, 78SW(2d)734(2d case); MoA 23SW(2d)190(2dcase); 79 Mont91, 254P1070. But see 8LaA22; 148Miss637, 114S736.
645–69 170Ark1014, 282SW354.
646–85 Wash 287P36. [b] **Carrying shot gun** when going on land of another to ask for cattle wrongfully detained may not be unreasonable precaution. 105Conn374, 135A396.
647–92 Wash 287P36.
647–95½–New. In Saskatchewan forcible recaption of a chattel is not justified unless there is a right of possession enforcible by judicial proceedings. Sask [1929] 3DomLR770.
649–15 Wash 287P36.
650–26 10PaDist&Co433.
650–35 [a] **On general allegation of assault** qualified by specifications, specific acts determine sufficiency of complaint. 167Minn203, 208NW814, 46AL R772.
651–49 34Wyo 465, 244P1002, 1004 [citCJ].
652–59 34Wyo 465, 244P1002, 1004 [cit CJ].
652–62 34Wyo 465, 244P1002.
654–78 34Wyo 465, 244P1002, 1004

[citCJ]. But see 89CalA6, 264P336.
654–79 34Wyo465, 244P1002, 1004 [citCJ]. [b] (5) Petition alleging that defendant committed violent assault and inflicted grievous blows upon plaintiff's head and jumped upon him and kicked him in chest and abdomen, breaking three ribs and injuring plaintiff so that his life was despaired of is sufficient to justify award of punitive damages. 34 Wyo465, 244P1002.
656–11 34Wyo465, 244P1002, 1004 [citCJ]. But see MoA 12SW(2d)759.
657–21 TexCivA 283SW285, 287 [cit CJ].
657–23 221MoA807, 287SW1079, 1082 [quotCJ]; MoA 24SW(2d)187; Tex CivA 283SW285, 287 [quotCJ]; Tex CivA 286SW276.
657–25 TexCivA 8SW(2d)288.
657–26 [c] (4) Plea that defendant shot to mark fleeing automobile to discover who had attacked his home does not plead self-defense against passer-by. MoA 24SW(2d)187.
658–40 229Ky840, 18SW(2d)275.
658–49 214Ala351, 352 [citCJ], 108S16.
661–96 3LaA455; MoA 24SW(2d)187.
661–99 224IllA195 (holding that negligence is inadmissible when allegations of bill are on assault and battery vi et armis).
661–2½–New. Where a declaration charges assault only, evidence of battery is inadmissible. 153Miss559, 121S153.
662–22 213Ala284, 286, 104S548 [cit CJ].
662–22½–New. Defendant cannot be held liable for damages for battery where only assault was charged in the declaration. 153Miss559, 121S153.
662–24 224IllA195.
663–27 34Wyo465, 244P1002.
663–28 54ND336, 209NW547.
663–29½–New. Court cannot presume that defendant knew that plaintiff had a bad character for turbulence, etc., where defendant did not know plaintiff. 219Ala228, 121S521, 64ALR1022.
663–33½–New. It has been held that all assaults are presumed unlawful. TexCivA 283SW285.
663–37 LaA 130S862.
663–38 197Wis16, 221NW418. [a] (2) TexCommnA 292SW855.
664–45 MoA 24SW(2d)187; TexCivA 283SW285, 287 [citCJ].
664–46 69CalA770, 232P491; 233IllA373 (dictum); TexCivA 283SW285, 287 [citCJ].
664–50 CalA 292P287; 54ND336, 209NW547, 549 [citCJ]; TexCivA 286SW276.
664–51 54ND336, 209NW547, 549 [cit CJ].
664–52 54ND336, 209NW547, 549 [quot CJ].
665–54 214Ky729, 283SW1052.
665–58 105Conn528, 136A76. [m] **In action against sheriff and deputy** testimony of sheriff's wife that she received word at jail that plaintiff driving automobile was drunk and might kill some one and communicated same to defendants is admissible. 169Ark662, 276SW591, 42ALR1194. [n] **Evidence to show that defendant was at place** when witness was hit is admissible. NJ 144A310.
666–61½–New. Evidence of telephone conversation relevant to issue is admissible. 75CalA537, 242P1089.
666–63 84IndA192, 149NE651; 214Ky729, 283SW1052; 99Vt340, 132A39; 155Wash147, 283P691.
667–64 201Iowa1083, 205NW972; 213Ky623, 281SW804; 99Vt340, 132A39.
668–66 Vt 152A41.
668–82 233Ky563, 26SW(2d)495.
669–2 242IllA145.
673–54 [b] **Photographs** of plaintiff's face and leg showing condition two days after assault are admissible. 87PaSuper260.
673–61 CalA 292P192. [e] (2) That defendant sheriff imprisoned plaintiff in another county without opportunity to furnish bond may be shown. TexCivA 16SW(2d)900.
674–63 89CalA6, 264P336.
674–73 180Ark695, 22SW(2d)562; 34GaA276, 129SE125 [citCJ] (evidence failing to sustain plea of justification may be considered in mitigation of damages); 48RI316, 138A45; 199Wis24, 225NW195, 63ALR886 (circumstances leading to assault). [a] (2) See also 34GaA276, 129SE125 [citCJ].
676–87 234Ky321, 28SW(2d)7; 199Wis24, 225NW195, 63ALR886.
676–88 199Wis24, 225NW195, 63ALR886.
677–91 34GaA276, 129SE125 [citCJ] (not limited to opprobrious language).
677–94 151Miss395, 118S197; 100WVa694, 696 [citCJ], 131SE556, 49ALR1089.
678–97 100WVa694, 131SE556. [a] 197Wis16, 221NW418.
678–7 38Wyo151, 265P446 (inadmissible as too remote).
678–13 MoA 12SW(2d)759; 100WVa694, 131SE556.
679–14 219MoA374, 271SW847.
679–16 100WVa694, 696 [citCJ], 131SE556, 49ALR1089.
680–26 See also 35GaA45, 132SE228.
681–29 219Ala228, 121S521, 64ALR1022.
682–46 35GaA45, 132SE228.
682–49 MoA 12SW(2d)759.
683–53 54ND336, 209NW547, 550 [cit CJ].
683–62 87CalA218, 261P1020, 1021 [citCJ]; Vt 152A41 (application for police protection after assault).
685–78 See also 89CalA6, 264P336.
685–80 215Ala489, 111S210.
685–86 234IllA556, 561 [citCJ]; 87PaSuper260. [a] **Overruling demurrer to plaintiff's replication** which sets up conviction in criminal proceedings in same cause is reversible error. 234IllA556.
687–1 97CalA764, 276P359. [a] 208Cal315, 281P70; 75CalA539, 242P1089; 75CalA664, 243P71; 89CalA6, 264P336; CalA 292P192; CalA 292P287; 89Fla490, 104S857; 242IllA145; 218Ky26, 290SW1034; 229Ky840, 18SW(2d)275; 235Ky835, 32SW(2d)411; LaA 130S857; NJ 135A64; NJ 135A698; RI 150A612(1stcase). [b] 163La1083, 113S463; LaA 130S862. [c] See also 206Iowa129, 220NW116. [d] 212Ky310, 278SW1095; NJ 144A116. [e] (1) La 128S665; TexCivA 6SW(2d)231 (self-defense). (2) Evidence held insufficient. 212Ky310, 278SW1095. [g] (1) 54ND336, 209NW547. (2) 29OhA438, 163NE633. [j] 114Nebr745, 209NW617. [k] **Assault by deputy sheriff in making arrest.**–169Ark662, 276SW591, 42ALR1194. [l] **Time.**–106Conn506, 138A442. [m] **No legal justification** for assault. NJ 144A116. [n] **Plaintiff not being trespasser.**–208Cal315, 281P70.
688–8 [a] **Evidence held sufficient** to show self-defense. 159Tenn241, 18SW(2d)381. [b] **Evidence held insufficient** to show self-defense. 87CalA218, 261P1020.
688–9 201Iowa1083, 205NW972 (evidence sufficient); 34Wyo465, 244P1002.
688–17 243IllA251; 205Iowa752, 218NW499; SD 230NW226.
688–18 MoA 284SW815. [h] **Question of necessity and propriety of laying hands on licensee** is for jury. 152SC88, 149SE331.
689–19 TexCommnA 295SW592; Wash 287P36.
689–20 MoA 284SW815.
689–21 206Iowa129, 220NW116.
689–23 MoA 287SW827; 159Tenn241, 18SW(2d)381 (whether officer acted reasonably in shooting felon in flight). [a] Me 149A147(1stcase). [b] (2) Instruction submitting justification for assault with fists, on being called insulting name, held proper. 148Miss637, 114S736.
689–24 [a] (3) Evidence held insufficient to require submission to jury. MoA 23SW(2d)190(2dcase).
689–25 TexCivA 289SW1077.
689–27 69Utah323, 255P172.
690–31 180Ark695, 22SW(2d)562; 100WVa694, 131SE556, 47ALR1089.
690–34 82Colo316, 259P509; 233Ky563, 26SW(2d)495; 48RI316, 138A45.
690–35 69Utah323, 255P172.
690–36 205Iowa752, 218NW499; NJ 140A8.
690–39 [d] **Charge that jury should find for plaintiff** if it believed defendant, not in his own necessary or apparent defense, associated and cut plaintiff, with deadly weapon and injured him, concisely states law. 212Ky310, 278SW1095.
690–40 TexCommnA 295SW592. [a] **Instructions held erroneous.**–79Mont91, 254P1070.
691–49 CalA 292P192; 201Iowa311, 207NW386; 29Hawaii564; 156La891, 101S255; 79Mont91, 254P1070. But see MoA 298SW254.
691–53½–New. Court should instruct jury as to definition of terms. Tex CommnA 295SW592.
691–53½–New. Instructions are not ground for reversal where, taken as a whole, they properly and fairly enlighten the jury as to the law. 242IllA145.
691–63½–New. Instruction as to use or purpose of evidence. It was misleading to instruct that, in considering whether defendant was justified in doing what he did, the jury might consider evidence relative to his good character, since such evidence should have been limited to issue of truth or falsity of acts in question. 35GaA45, 132SE228.
691–64 79Mont91, 254P1070. [b] **Conformity to evidence.**–165Minn233, 206NW171. [c] **Instructions held proper.**–209Ky619, 273SW439.
692–65 180Ark695, 22SW(2d)562; CalA 292P192. [h] 121Okl288, 249P905.
692–66 130Or15, 278P954. [c] **Future pain and future medical services.**–170Ark1014, 282SW354. [d] **Instruction permitting consideration of any pain or suffering** that plaintiff "may undergo" held not misleading. 152SC88, 149SE331.
692–67 165Minn233, 206NW171.
692–74 69Utah323, 255P172.
693–83 35GaA45, 132SE228; 114OhSt73, 150NE620. [b] (3) Other instructions held erroneous. 213Ky623, 281SW804. [h] **Repelling attack by several.**–201Iowa311, 207NW386. [i] **Requested instructions held properly modified.**–221MoA807, 287SW1079.
694–84 221MoA807, 287SW1079.
694–90 [a] **Defining "malice"** in words other than those used in statute held erroneous. 79Mont91, 254P1070.
694–91 248Mich545, 227NW688 (charge held warranted by evidence).
694–98 233Ky238, 25SW(2d)381.
695–3 212Ky310, 278SW1095 (instructions as to self-defense sufficient and proper); Mo 31SW(2d)769 (erroneous instructions); 118Nebr200, 224NW11; 159Tenn241, 18SW(2d)381; Tex CommnA 295SW592. [a] **Instructions held not prejudicial.**–209Ky619, 273SW439. [b] **Instructions held proper or not erroneous.**–MoA 287SW827. [c] **Instruction that provocative language does not justify assault** is proper where right to recover punitive damages is not submitted. 233Ky563, 26SW(2d)495. [d] **Instruction held properly qualified.**–233Ky563, 26SW(2d)495.
695–4 308Mo560, 274SW70. But see 219Ala228, 121S521, 64ALR1022.
695–7 MoA 287SW1079.
696–11 79Mont91, 254P1070.
696–18 NJ 135A698.
696–26 TexCivA 25SW(2d)966.
697–28 168Minn105, 209NW624.
697–42 151Miss594, 118S434 (conflicting evidence).
697–43 209Ky619, 273SW439; 52ND48, 203NW192.
697–45 82Colo316, 259P509.
697–46 82Colo316, 259P509.
698–60 201Iowa1083, 205NW972.
698–62 233Ky238, 25SW(2d)381.
699–73½–New. Apportionment of recovery is not necessary where damages are community property of plaintiffs. TexCivA 8SW(2d)288.
701–6 143Miss638, 109S605.
701–6½–New. Repetition of the assault does not justify increasing the actual damages sustained by reason of the two assaults. 165Minn233, 206NW171.
701–9 79Mont91, 254P1070, 1072 [citCJ]; BC [1929] 1DomLR367.
702–10 120Or588, 253P363, 365 [citCJ], 53ALR1052.
702–11 143Miss638, 109S605; 120Or588, 253P363, 365 [citCJ], 53ALR1052.
702–16 214Ky729, 283SW1052; 234Ky

321, 28SW(2d)7 (hospital bills paid for by father of plaintiff are recoverable); 120 Or588, 253P363, 365 [citCJ], 53ALR 1052. See also 120 Or588, 253P363, 365, 53ALR1052 [citCJ]. [e] **Where there are no after effects** of whipping, six hundred dollars award may be reasonable. LaA 130S857.

703-17 CalA 292P287. [a] (3) Under declaration alleging physical injuries from assault and battery and false imprisonment, damages for mental suffering could be recovered, though proof failed to show actual laceration of body. 153Va348, 149SE453.

705-35 130 Or15, 278P954. [a] **Temporary impairment of earning capacity** alone is recoverable without evidence of permanent impairment. 234Ky321, 28 SW(2d)7.

705-37 120 Or588, 253P363, 365 [cit CJ], 53ALR1052.

705-40 201 Iowa1083, 205NW972; 179 Minn490, 229NW869; MoA 284SW815; 221MoA1173, 300SW997 (against all of several defendants); 79Mont91, 254P 1070; 54ND336, 209NW547; 121 Okl 288, 249P905; TexCivA 6SW(2d)180 (intention to kill); 34Wyo 465, 244P 1002. [f] (4) Unreasonable assault upon girl of eighteen years by irascible grown man justifies imposition of exemplary damages. NJ 147A226(1st case).

707-41 NJ 144A116.

707-45 107Conn122, 139A634; 54ND 336, 209NW547, 550 [citCJ].

707-46 54ND336, 209NW547.

707-48 34Wyo 465, 244P1002.

708-49 107Conn122, 139A634.

708-50 [a] (2) Rule only applies where plaintiff is actually trespasser. 208Cal 315, 281P70.

708-52 79Mont91, 254P1070.

708-61 165Minn233, 206NW171.

709-62 165Minn233, 206NW171.

709-71 [a] (2) Reduction from five hundred dollars to two hundred dollars held justified. 47RI 144, 131A385.

709-72½-New. Plaintiff need not follow advice of defendant's doctor or suffer reduction of damages. 48RI 316, 138A45.

709-75 214Ky729, 283SW1052; 235Ky 835, 32SW(2d)411 (eighteen hundred dollars not excessive); 114Nebr745, 209 NW617 (fourteen thousand nine hundred dollars for indecent assault not excessive). [c] (7) 43F(2d)443. (11) 229Ky830, 18SW(2d)280 (assault committed on woman). (15) 226Ky739, 11 SW(2d)930; 231Ky232, 21SW(2d)269 (1stcase) (knife wounds in chest and back); 153Va348, 149SE453. (21) 206 Iowa129, 220NW116; 168Minn105, 209 NW624. (22) 201 Iowa1083, 205NW 972; MoA 298SW254 (five hundred dollars compensatory and one thousand dollars punitive); 54ND336, 209NW 547; 34Wyo 465, 244P1002 (one thousand dollars as punitive damages and five hundred dollars as compensatory damages). (23) 235Ky640, 32SW(2d) 18. (25) NJ 135A698. (29) 97CalA764, 276P359. (36) 206Cal 504, 274P971; 89 CalA6, 264P336; 233Ky563, 26SW(2d) 495; 52ND48, 203NW192 ($1,750 in case of indecent assault); 48RI 316, 138A45 ($2,500); RI 150A612(1stcase); TexCivA 6SW(2d)180 ($500 actual and $1,250 exemplary). (37) Where arrested to force payment of damages from collision. 217Ala295, 116S145. (38) Eight hundred and twenty dollars, where plaintiff lost thumb, and suffered gash exposing brain. 212Ky310, 278 SW1095. (39) One thousand two hundred and thirty-seven dollars and fifty cents. Me 149A147(1stcase). (40) Six thousand dollars. CalA 292P192.

711-76 34Wyo 465, 244P1002.

711-77 155Wash147, 283P691. [b] (1) 84 IndA192, 149NE651. [c] **Punitive damages of over thirty-three thousand dollars** for wounds received from bird shot held excessive and reduced to ten thousand dollars. 208Cal 315, 281P70.

712-79 [d] **Damages held not inadequate.**-151Miss395, 118S197.

712-80 [e] **Verdicts held sufficient.**-12 LaA399, 126S259 (assault on caddy).

712-82 31Ariz522, 255P165, 53ALR 231; Miss 113S353 (assault is attempt to commit battery); Mo 23SW(2d)7 (general malevolence or recklessness sufficient). [a] (1) 319 Ill 221, 149NE 815; 133SC167, 130SE747. (9) See also Del 143A47.

714-84 31Ariz522, 255P165, 53ALR 231; 164Ga59, 137SE762.

714-85 [f] (1) TexCr 22SW(2d)309.

715-89 [b] (5) "Battery" is consummation of unlawful assault. Del 143A 47.

715-92 133SC167, 130SE747 (successful accomplishment of assault).

716-94 [c] (1) TexCr 22SW(2d)309.

716-2 199 Ind630, 158NE593.

716-5 [a] **In South Carolina.**-133SC 167, 130SE747. [b] **In Texas.**-106TexCr 37, 289SW1072.

716-6 164Ga59, 137SE762. See also TexCivA 278SW347.

718-14 127 Or565, 273P338.

720-32 21AlaA19, 104S872 (advance or importunity, however urgent without physical contact is not assault).

720-32½-New. Assault usually implies force by assailant and resistance by the one assailed. 180Ark267, 21SW(2d)172.

720-33 179Ark776, 18SW(2d)343 (laying hands on officer held sufficient).

721-36 [a] **Proposal to have intercourse, even accompanied by permissive caresses,** does not constitute an unlawful assault. 21AlaA19, 104S872.

721-48½-New. What would be a caress or mere assault as between persons of the same social standing would become of much graver moment as between persons of different social status and of different races. 23AlaA260, 123S283(2d case).

721-49 214Ala117, 106S620. [a] **Whether abandonment of infant** is simple or felonious assault is for jury. 214 Ala117, 106S620.

722-55 150Va611, 143SE641. But see 157Tenn635, 11SW(2d)904.

723-64½-New. Under some statutes defining as crime an act endangering life, one may be convicted without proof of malice. Mo 23SW(2d)7.

725-85 129Misc650, 222NYS432; SD 216NW866.

726-98 [b] **In California.**-199Cal 78, 248P250.

727-13 [a] **Suspected robbery accompanied by violence** lacking felonious intent requisite for robbery is assault and battery. 217Ky94, 288SW1051.

728-35 197 Ind200, 150NE97 (dictum). **Erratum.**-Strike out "Moore v. State, 149 Ala. 66, 42 S 996," and insert "Moore v. State, 154 Ala. 48, 45 S 656."

728-36 197 Ind200, 150NE97.

728-37 [b] **In Minnesota.**-178Minn589, 228NW164.

728-43 [a] **In California.**-199Cal 78, 248P250.

729-45 See also 133SC167, 130SE747.

729-46 [a] (1) See also 133SC167, 130 SE747.

729-47 TexCr 21SW(2d)301. [a] (9) In Arizona any assault or battery by adult male upon female is aggravated. 27Ariz491, 232P398.

729-49 [a] **In Texas.**-CivA 278SW347.

730-53 218Ky217, 291SW47.

730-57½-New. Reckless operation of automobile causing injury is held aggravated assault regardless of specific intent. 31Ariz522, 255P165, 53ALR231.

730-57⅞-New. Aggravated assault is an unlawful assault, not in self-defense, with a deadly weapon. 106TexCr387, 292SW887.

730-58 See also 133SC167, 130SE747.

730-59 34Ariz430, 272P97.

730-62 30Hawaii832.

731-73 See also 133SC167, 130SE747.

731-79 97PaSuper181.

731-81 See also 133SC167, 130SE747.

732-83 [b] 324 Ill 224, 154NE909.

732-91 See also 133SC167, 130SE747.

733-92 44Philippine684.

733-93 See also 133SC167, 130SE747. [a] (1) 44Philippine684.

733-93½-New. Assault on a de facto officer to prevent lawful arrest is second degree assault, the same as if he were an officer de jure. 174Minn565, 219NW 877.

733-94 127 Or565, 273P338.

733-95 [a] (3) Difference between malicious shooting and shooting in sudden affray is based on difference between murder and voluntary manslaughter. 218Ky802, 292SW498. (4) Word "at" in statute requires shot to be aimed, pointed, or directed towards prosecuting witness. 235Ky366, 31SW (2d)603.

734-15 31Ariz522, 255P165, 53ALR231. See also 133SC167, 130SE747.

735-34 See also 133SC167, 130SE747; 133SC230, 130SE752.

736-42 [e] **Pistol concealed in sock.**-71 CalA315, 235P67.

736-43 71CalA315, 235P67.

736-45½-New. Prior threats to do bodily harm are not an essential element of assault with a deadly weapon. 78CalA 302, 248P263.

736-49 238Mich485, 213NW717; 113 Nebr790, 205NW252 (intentional pointing of loaded pistol is assault).

736-51 238Mich485, 213NW717.

736-54 81CalA199, 253P169.

737-63 92Fla980, 111S124, 126 [citCJ], 53ALR250.

737-63½-New. A deadly weapon within such statutes necessarily includes a dangerous weapon. 55ND761, 215NW 277.

738-80½-New. piano stool, 110TexCr 81, 8SW(2d)152.

738-84 103TexCr82, 279SW819 (pistol used as bludgeon is not per se deadly weapon). [a] **Conviction for aggravated assault** not sustained where pistol used as bludgeon in view of injury inflicted. 103TexCr82, 279SW819.

738-91 TexCr 26SW(2d)1069.

738-93 126 Or238, 269P225.

739-8 [a] (2) Assault to do great bodily injury is not circumscribed or limited per se by fact that accused at time of assault used simply his fists. 206 Iowa1178, 221NW804.

739-9 206 Iowa1178, 221NW804.

739-12 [a] **Quantum of injury is not conclusive as to intent.**-206 Iowa1178, 221NW804.

739-13 44Philippine796.

739-14 206 Iowa1178, 221NW804; 44 Philippine796.

739-15 175Minn409, 221NW533 (conduct toward one other than one actually assaulted).

740-20 178Minn589, 228NW164.

740-33 [c] **Hands and knees** may constitute such means. 90CalA186, 265P 525.

740-34 194Cal 1, 227P156. [b] **Automobile** may be used so as to constitute deadly weapon. 92Fla980, 111S124, 53 ALR250.

741-40 312Mo 15, 278SW743. [c] **As injury.**-312Mo 15, 278SW743.

741-50 See also 105WVa298, 142SE254.

742-60 But see 100TexCr361, 272SW 193.

743-80 OklCr 272P483; 122 Or444, 259 P893.

744-81 243Mich527, 220NW716 (no right to inflict great bodily harm).

746-10 84Mont130, 276P427.

746-11 But see 84Mont130, 276P427.

746-19 225AppDiv517, 234NYS32 (fear of grievous bodily harm held not necessary); 194NC34, 138SE441.

747-22 34PortoRico 102.

747-30 141Wash104, 250P645.

747-31 141Wash104, 250P645.

747-32 TexCr 24SW(2d)52.

748-38½-New. Even if prosecuting witness made first assault, defendant's assault after prosecuting witness' withdrawal from affray is not justifiable. 29Ariz523, 243P601.

748-39 98PaSuper347; 133SC167, 130 SE747 (where it appears that defendant used more force than reasonably necessary, plea of self-defense fails, and he is aggressor from beginning of his attack).

748-41 [a] Alta [1928] 3DomLR676.

749-45 34PortoRico 332.

749-51 23AlaA321, 124S744; 194Cal 1, 227P156; 229Ky25, 16SW(2d)471 (provoking acts need not be such as to give attacking party such right); 84Mont 474, 276P436.

750-72 119 Or522, 250P216.

750-73 119 Or522, 250P216.

750-74 83CalA12, 256P299.

750-83½-New. One knowing the official character of an officer has no right to resist arrest. Mo 274SW17.

750-84 308Mo 560, 274SW70, 73 [cit CJ].

751-91 194NC34, 138SE441.

752-7 194NC34, 138SE441.

752-3 RI 134A852.
752-14 204Cal 582, 269P427, 59ALR 1480 (duty to retreat); CalA 260P946 (not required to retreat); 225AppDiv 517, 234NYS32.
752-15 127 Or565, 273P338 (though officer searching automobile is trespasser).
753-27 39Wyo 309, 270P1064, 64ALR 289.
754-31 39Wyo 309, 270P1064, 64ALR 289.
755-54 152Miss250, 119S172 (injured party guilty of flirting with accused's wife).
756-66 312Mo 635, 281SW29.
757-68 [b] **Improper familiarities** with daughter and niece of defendant is not justification. 215Ala489, 111S210.
758-99 Mo 3SW(2d)235; 161Tenn310, 30SW(2d)231; TexCr 20SW(2d)1067.
759-2 161Tenn310, 30SW(2d)231.
759-11 [a] (1) 146Miss538, 111S586. [b] **Complaint need not be denominated as accusation** to be sufficient. 121 Or 451, 255P897.
760-13 91CalA44, 266P581 (conforming to statute); 156Miss666, 126S470 (2dcase); 121 Or451, 255P897. [a] **Information held sufficient.**-OklCr 293P 278.
760-34 [c] **Sufficient** to charge commission of offense "on the premises of P. R. in the municipal judicial district of M.," to give jurisdiction to municipal court as well as district court on appeal. 32PortoRico 207. [d] **Defendant desiring fuller information** as to locality must ask for bill of particulars. 32 PortoRico 207.
761-51 94Fla286, 115S143.
762-54 141Wash132, 250P951. [a] (5) Mistake in name of person assaulted does not affect sufficiency of identification of criminal act. 194Cal 1, 227P156.
763-79 31Ariz522, 255P165, 53ALR231.
764-83 31Ariz522, 255P165, 166 [cit CJ], 53ALR231; 34Ariz139, 268P615; 35GaA591, 134SE335 (not ground for arrest of judgment that accusation in city court charged assault without specifying any act or acts constituting same); 144Miss380, 109S871 [quotCJ].
765-84 [b] **Charge that defendant did discharge pistol against complainant** is charge of attempt to do bodily harm. 29Hawaii520.
765-87 35PortoRico 788 (assault with revolver).
765-98 101TexCr217, 275SW714.
766-3 235Ky683, 32SW(2d)34.
766-9 121 Or451, 255P897.
766-11 See also Mo 274SW17.
767-16 144Miss380, 109S871 [quotCJ].
767-17 144Miss380, 109S871 [quotCJ].
767-20 But see 101TexCr217, 275SW 714.
768-26 [a] (2) Allegations, that assault was made with fists and hands upon head and face, and that result was fractured jaw and other grievous injuries sufficiently describe means employed and force used. 194Cal 1, 227P156.
768-26½-New. , and that the facts necessary to show likelihood that great bodily harm would ensue shall be alleged. 199Cal 78, 248P250.
768-29 127 Or565, 273P338 (held sufficient as to electric flash light).
768-31 108TexCr474, 1SW(2d)635.
768-38 34Ariz139, 268P615; Or 289P 1053 (indictment charging assault with hardwood loaded cane or walking stick described as deadly weapon held sufficient).
769-39 46 Ida456, 268P1, 3 [citCJ].
769-43 106TexCr250, 291SW899.
769-50 35PortoRico 788 (sufficient). [a] (4) Allegations of assault with prohibited weapon held sufficient. 34Porto Rico 332. [b] (1) 35PortoRico 393 (sufficient).
771-58 31Ariz522, 255P165, 53ALR 231; 34Ariz139, 268P615. [d] **Aggravated assault** by automobile held sufficiently charged without express averment of intent. 31Ariz522, 255P165, 53 ALR231.
772-62 200 Iowa313, 202NW212 (specific facts tending to establish intent need not be alleged).
773-76 TexCr 22SW(2d)309.
773-81 194Cal 1, 227P156.
773-82 194Cal 1, 227P156.
774-92½-New. In a prosecution for assault to do great bodily harm in which accused claimed to have acted in defense of a way or easement, the court properly refused to permit a trial of the issue as to rights in, and location of, the way. 243Mich527, 220NW716.
774-94 See also Mo 3SW(2d)235.
774-99 148Miss718, 114S815 [quotCJ].
775-1 148Miss718, 114S815 [quotCJ].
775-3 See also 160La79, 106S701.
775-4 29Hawaii90; 29Hawaii441; 145 Miss832, 111S301; 83NH536, 145A262; TexCr 29SW(2d)394(1stcase) (catching by throat for striking with fist).
775-5½-New. Under indictment for assault whereby person or health of assaulted party shall be injured or likely to be injured, proof of assault with a strap, lacerating and bruising the skin, is sufficient. 312Mo 15, 278SW743.
775-10 39Wyo 309, 270P1064, 64ALR 289.
775-16 94Fla286, 115S143.
776-20 101TexCr31, 274SW135 (charge of assault on Mrs. Joe Connor and testimony as to assault on Susue Connor held not to constitute variance as matter of law).
776-26 Del 143A47; 197 Ind200, 150NE 97.
777-30 197 Ind200, 150NE97.
778-33 197 Ind200, 150NE97.
778-43 200 Iowa335, 204NW271.
778-47 [a] 103TexCr373, 5SW(2d)159.
778-48 126 Or238, 269P225. Contra 123 Or521, 262P954.
779-49 126 Or238, 269P225.
779-49½-New. In a prosecution for assault with intent to inflict great bodily injury, the state does not have the burden of proving that defendant used a club, billy, or other means or instrument whereby a more grievous injury could have been accomplished. 206 Iowa 1178, 221NW804.
779-53 165La622, 115S802; 103TexCr 318, 280SW202.
779-56½-New. Testimony as to the odor of liquor on defendant's breath is admissible as part of the prosecution. 106TexCr455, 292SW891.
779-63 22AlaA289, 115S66; 250NY185, 164NE900 (fact that defendant local union was expelled from national organization because of violence is inadmissible); 101TexCr106, 274SW603 (evidence admissible); 103TexCr318, 280 SW202. [c] (10) Contract between employer and union, in prosecution of union striker for assaulting nonunion worker. 113TexCr265, 20SW(2d)426. (11) Evidence as to merits of strike and attitude of employer as to unions, in prosecution of striker for assaulting worker. 113TexCr265, 20SW(2d)426. (12) Other instances. 91CalA44, 266P 581.
780-64 200 Iowa335, 204NW271.
780-66 311Mo 476, 278SW755.
780-67 Mo 289SW570; 106TexCr455, 292SW891; 109TexCr224, 4SW(2d)69 (where defense shows that prosecuting witness tied defendant's hands and brought him to sheriff, prosecution may show that it was at sheriff's order).
780-75 206 Iowa1178, 221NW804; 101 TexCr106, 274SW603.
781-78½ New. Testimony that accused spent the night with the husband of the prosecutrix after the assault charged is immaterial. 101TexCr31, 274SW135.
781-80 71CalA315, 235P67 (may show that wife jumped out of window to escape accused).
781-81 23AlaA321, 124S744; 169La 1002, 126S507. [a] See also 92CalA534, 268P701.
782-2 84Mont474, 276P436.
783-13 312Mo 15, 278SW743; 30Porto Rico113 (condition at time of trial); 48SD430, 205NW31, 32 [citCJ]; 103 TexCr318, 280SW202.
783-14 48SD430, 205NW31, 32[citCJ]; 103TexCr318, 280SW202.
784-15 48SD430, 205NW31, 32 [citCJ].
784-16 48SD430, 205NW31, 32[citCJ].
784-17 [b] **Difference in weight of parties** may be considered. 206 Iowa 1178, 221NW804.
784-19 71CalA315, 235P67.
784-22½-New. To show the weapon used was in fact a dangerous weapon, evidence is admissible of the nature, character, and extent of the injuries sustained. OklCr 279P363.
784-29 164Minn497, 205NW449; 84 Mont255, 274P1060 (prior ill feeling). [b] **Part relations of parties** held inadmissible. CalA 286P476.
785-37 194Cal 1, 227P156.
785-38 [a] (4) Hostile declarations of accused concerning complaining witness before assault are admissible as showing state of mind. 195Cal 174, 231P 996. [b] **Rebuttal of testimony of ill-will.**-83NH536, 145A262.
785-40 92CalA470, 268P473.
785-44 46 Ida456, 268P1 (four months previous to assault); 103TexCr318, 280 SW202.
785-46 86CalA100, 260P327 (indefiniteness as to time held only to affect weight of testimony).
785-47 But see 86CalA100, 260P327.
785-52 See also 324 Ill 224, 154NE909.
786-56 48SD430, 205NW31 (rule not limited to cases of assault with intent to kill).
786-57 48SD430, 205NW31; 102TexCr 241, 277SW382 (admission of evidence that witness' leg broken not error).
786-58 48SD430, 205NW31.
786-59 48SD430, 205NW31.
787-73 101TexCr31, 274SW135 (evidence that prosecutrix had money belonging to defendant which she had received from her husband held inadmissible).
787-77½-New. , but must not be too remote in time. 311Mo 476, 278SW755.
788-92 110TexCr337, 8SW(2d)174 (it may be shown that complaining witness was a de facto peace officer).
788-94 [a] **Evidence held admissible.**-102TexCr241, 277SW382.
788-95 110TexCr337, 8SW(2d)174.
788-98 22AlaA286, 115S65.
788-2 [a] 37GaA32, 138SE528 (beating infant); MoA 274SW88. [b] (1) 22AlaA 126, 114S130; 22AlaA286, 115S65; 23 AlaA197, 122S703; 73CalA330, 238P 372; 78CalA302, 248P263; 85CalA 269, 259P123; 92CalA534, 268P701; 37GaA379, 140SE640; 38GaA238, 143 SE793; 39GaA662, 148SE290; 41 GaA256, 152SE623 (1st case); 41GaA 311, 152SE907(2dcase); 29Hawaii441; 199Ind630, 158NE593; 89 IndA578, 166 NE618; 127Kan166, 272P132; 219Ky 475, 293SW974; 220Ky311, 295SW153; 124Mo378, 130A129; 168Minn105, 209 NW624; 173Minn305, 217NW120 (indecent assault); 178Minn589, 228NW164; 146Miss540, 112S681; 156Miss666, 126 S470(2dcase); Mo 278SW1009; Mo 296SW128; Mo 3SW(2d)235; MoA 256 SW523; 116Nebr600, 218NW401; 105 NJL398, 144A801; OklCr 273P380 (2d case); OklCr 288P995; RI 134A852; 52SD110, 216NW866; 103TexCr23, 279 SW456; TexCr 21SW(2d)301 (conviction of simple assault); TexCr 28SW (2d)537(2dcase); 39Wyo 309, 270P1064, 64ALR289. (4) To authorize inference that injuries were not temporary. 168 Minn105, 209NW624. (5) To support conviction for assault with intent to inflict great bodily injury. 114Nebr17, 205NW559. (6) To sustain verdict of assault in first degree. 164Minn497, 205 NW449. (7) To sustain conviction of assault in third degree. 135Wash240, 237P502. (8) To sustain conviction for maliciously cutting and wounding another, in which testimony was in conflict as to whether defendant acted in self-defense. 225Ky210, 7SW(2d)1038. (9) To identify accused. 242 IllA221. (10) First degree. Minn 231NW411. [c] 86Colo 110, 278P604; 36GaA651, 137 SE792; 197 Ind200, 150NE97; 84Mont 255, 274P1060; 116Nebr666, 218NW588; OklCr 272P483; OklCr 273P282(2d case); TexCr 20SW(2d)1047.
789-3 84Mont474, 276P436 (notwithstanding his previous good character).
790-4 221Ky700, 299SW568.
790-6 71CalA315, 235P67 (taking concealed revolver from sock, pointing at wife or pulling trigger each constitute overt act toward commission of crime).
790-7 104WVa427, 140SE147 (evidence held sufficient).
790-8 71CalA315, 235P67 (evidence sufficient to show attempt).
790-13½-New. Plaintiff must prove

the assault and battery by a clear preponderance of the evidence. 199Wis115, 225NW738.

790-14 [b] 21AlaA19, 104S872 (taken in connection with other facts); 146 Miss540, 112S681.

791-17 [a] **Lack of evidence** that revolver was loaded held immaterial. 71 CalA315, 235P67.

791-18 **Del** 143A47. [b] **In prosecution for malicious shooting** without wounding, malice may be shown by threats or inferred from defendant's actions and from circumstances. 218Ky 802, 292SW498.

791-19 109TexCr355, 4SW(2d)559 (unlawful purpose). [c] **Evidence sufficient** to show intention and present ability to kill. 217CalA187, 235P67. [d] **Intent to do bodily harm shown.**–OklCr 292P 896.

791-20 22AlaA107, 114S71.

791-21 [a] 31Ariz522, 255P165, 53 ALR231; 90CalA657, 266P558; 89Fla 493, 104S782; 97Fla908, 122S525; 218 Ky802, 292SW498; 105NJL266, 144A 875; 105TexCr648; 290SW178; 107 TexCr614, 298SW426; 109TexCr224, 4 SW(2d)69; 110TexCr573, 9SW(2d) 1033; 113TexCr265, 20SW(2d)426; 113TexCr619, 21SW(2d)1043; TexCr 26 SW(2d)652; TexCr 29SW(2d)750; 103 WVa355, 137SE751. Fla 126S281. [b] 39GaA498, 147SE403(2dcase) (cutting and stabbing with razor). [d] 230Ky 593, 20SW(2d)454; 235Ky366, 31SW (2d)603; NJ 147A727. [e] (1) 200 Iowa 17, 202NW225; 196Wis446, 220NW190. (2) 318Mo596, 300SW702. [f] **Assaulting, maiming, and wounding.**–119Kan 564, 240P416. [g] **Accessory to aggravated assault.**–180Ark363, 21SW(2d)850.

791-24 [a] 217CalA187, 235P67; 76 CalA188, 244P114; 77CalA375, 246P 815; 81CalA309, 253P940; 92CalA470, 268P473; 97CalA537, 275P1017; 99 CalA147, 277P870; 318 Ill 179, 149NE 9; 329 Ill 536, 161NE76; 230Ky680, 20 SW(2d)710; 234Ky417, 28SW(2d)473; 215Ky799, 287SW4; Mo 274SW17; 194 NC206, 139SE230; ND 229NW7; Okl Cr 267P680; OklCr 270P335; OklCr 277P595; OklCr 285P989; OklCr 292P 896; 106TexCr387, 292SW887; TexCr 32SW(2d)472; 99WVa689, 129SE705; 104WVa427, 140SE147. [b] 37GaA31, 138SE527; 109TexCr373, 5SW(2d)159. [c] (1) 217CalA187, 235P67. (2) Inference that weapon was loaded is not required to be overcome beyond reasonable doubt. 123 Or521, 262P954.

791-26 311Mo476, 278SW755. [a] 311 Mo476, 278SW755; TexCr 20SW(2d) 1049.

791-27 [a] (2) Serious bodily injury not shown. 103TexCr82, 279SW819.

792-31 [b] **Where evidence shows that defendant is adult male,** defect in complaint alleging that assailant was man is cured by proof in absence of objection. 35PortoRico 393.

792-40 214Ala117, 106S620; 22AlaA 286, 115S65; 22AlaA289, 115S66; 179 Ark776, 18SW(2d)343; 192NC749, 136 SE6 (evidence sufficient for jury); 196 NC710, 146SE806(2dcase).

792-41 214Ala117, 106S620.

793-43 206 Iowa1178, 221NW804.

793-46 200 Iowa17, 202NW225; 178 Minn589, 228NW164.

793-49 99WVa689, 129SE705, 706 [cit CJ].

793-52 164Minn497, 205NW449; NJ 144A310.

793-52½-New. , and guilt of defendant in general. 219Ky834, 294SW790.

793-52½-New. Whether defendant ran from the scene of the shooting to escape danger or to escape arrest is for the jury. NJ 147A727.

793-55 194Cal1, 227P156; 194NC34, 138SE441; 195NC747, 143SE538.

794-56 23AlaA314, 124S667(1stcase); 34Ariz139, 268P615; 179Ark776, 18SW (2d)343; 97CalA537, 275P1017; 195NC 747, 143SE538.

794-57 229Ky25, 16SW(2d)471.

794-58 22AlaA579, 118S49.

794-58½-New. whether accused struck another for using abusive language in the presence of the wife and children of accused; 194NC34, 138SE441.

794-63 9F(2d)275.

794-65 194NC34, 138SE441.

795-70 Mo 295SW786. [a] (3) Peremptory instruction for acquittal was properly refused where evidence made case of common assault. 318Mo 596, 300 SW702. (4) Other instances. 84Mont 130, 276P427.

795-73 116Nebr600, 218NW401; 100 TexCr28, 271SW622.

795-73½-New. or where the law requested to be instructed is embodied in other instructions given. 312Mo15, 278 SW743.

795-74 100TexCr28, 271SW622.

795-76½-New. Where weapon is not deadly per se, the court should charge on aggravated assault. 108TexCr317, 300SW79.

795-77 179Minn516, 229NW789 (sufficient instruction); 312Mo 15, 278SW 743; 84Mont130, 276P427 (held sufficient); OklCr 279P915 (issues of law sufficiently submitted).

795-78 113TexCr300, 21SW(2d)506.

795-79 194Cal1, 227P156; 90CalA657, 266P558 (instruction held not erroneous); TexCr 28SW(2d)140.

796-80 194Cal1, 227P156; 91CalA189, 266P972; 174Minn565, 219NW877; 109 TexCr224, 4SW(2d)69 (instruction held properly to restrict issue); 110TexCr 109, 7SW(2d)566; 112TexCr125, 13SW (2d)865 (aggravated assault); TexCr 26SW(2d)915. [b] 100TexCr361, 272 SW193 (instruction unnecessary). [d] (9) Instruction on malice in prosecution for malicious shooting without wounding. 218Ky802, 292SW498. [e] (5) Assault in third degree. 174Minn565, 219NW877. (6) Assault by putting witness in fear. 197NC350, 148SE546.

796-83 102TexCr253, 277SW150; Tex Cr 20SW(2d)1067 (requested instruction properly refused).

796-84 194Cal1, 227P156. [a] (4) That self-defense is not available as plea to defendant who had sought quarrel with design to force deadly issue, and this through his fraud, contrivance, or fault, to create real or apparent necessity for making felonious assault. 194 Cal1, 227P156.

797-98 Mo 296SW128 (instruction held sufficient). [c] (4) Assault with weapon. 216Ky376, 287SW933. [d] (3) Offense of feloniously wounding another. 311 Mo 476, 278SW755. [e] **In prosecution for assault by means and force likely to do great bodily injury** instruction to acquit if defendant did not use deadly weapons nor intend to commit murder is erroneous and properly refused. 194Cal1, 227P156.

798-3 52SD110, 216NW866 (instruction held correct).

798-4 105WVa298, 142SE254 (sufficient).

798-7 [c] 100TexCr572, 272SW179. [e] **"Improper liberties with female."**–Instruction not defining term held not error. 69Utah340, 255P416.

799-8 [e] **In prosecution for aggravated assault,** defendant is entitled to instruction that he was not guilty, unless pistol used as bludgeon was deadly weapon. 108TexCr474, 1SW(2d)635.

799-9 [a] **Thus** in prosecution for aggravated assault with club and bottle, instruction should have required conviction if injury inflicted with either bottle or club. 102TexCr253, 277SW 150.

799-9½-New. A charge as to unlawfulness of conduct amounting to reckless driving causing injury has been held a proper statement of law. 31Ariz522, 255P165, 53ALR231.

799-11 238Mich485, 213NW717.

799-13 103TexCr318, 280SW202. [a] **Refusal to instruct erroneous.**–103Tex Cr23, 279SW456 (under evidence).

799-14 210Ky385, 275SW819; 225Ky 158, 7SW(2d)1061; 226Ky831, 11SW (2d)925; 318Mo 596, 300SW702; 318 Mo 751, 300SW748; 100TexCr28, 271 SW622; 108TexCr159, 300SW51; 108 TexCr474, 1SW(2d)635; 108TexCr643, 2SW(2d)254; 112TexCr55, 14SW(2d) 69. [b] Mo 23SW(2d)7 (on common assault); 141Wash132, 250P951. [c] **Instructions held erroneous.**–84Mont130, 276P427.

800-15 100TexCr28, 271SW622; 113 TexCr300, 21SW(2d)506; TexCr 28SW (2d) 146(2dcase); 141Wash132, 250P 951.

800-17 CalA 286P476; 39GaA20, 145 SE901(1stcase); 312Mo 15, 278SW743; Mo 295SW786; 103NJL275, 136A345.

800-18 112TexCr233, 16SW(2d)123(2d case) (omission of instruction on aggravated assault held error).

800-19½-New. In a prosecution for assault with intent to do great bodily harm the court should not submit the included offenses of assault and battery where the record shows that, prior to the return of the indictment, accused was formally charged with assault and battery and such charge was dismissed by the state. 200 Iowa17, 202NW225.

800-20 151SC150, 148SE701(1stcase).

801-23 108TexCr474, 1SW(2d)635 (no showing that accused was acting as officer). [b] (1) 23AlaA321, 124S744; 58ND700, 227NW224. (2) 97CalA537, 275P1017. (7) Threat of victim to take defendant's life or communication thereof. 101TexCr106, 274SW603. (8) Right of defendant to defend life of his son. 101TexCr106, 274SW602.

801-24 210Ky670, 276SW571.

801-25 308Mo 560, 274SW70.

801-26 97CalA537, 275P1017; 219Ky 834, 294SW790; 231Ky232, 21SW(2d) 269(1stcase) (failure to define "self-defense" is erroneous); 311Mo 476, 278 SW755; 127 Or565, 273P338; 149SC 232, 146SE875; 104TexCr346, 283SW 835; TexCr 24SW(2d)46. [e] (3) Qualifying right of self-defense under law of imperfect self-defense where victim wounded in attempt to assist third person who was in combat with defendant. 101TexCr106, 274SW603. (4) That accused could defend himself against unlawful attack, using necessary force. 106TexCr539, 293SW822. (5) Other instructions held sufficient. 97CalA537, 275 P1017; Ind 166NE304. [f] **Instructions held unduly to limit right of self-defense.**–102TexCr253, 277SW150. [g] **Instruction making accused sole judge of emergency** is erroneous. 103WVa30, 136SE503. [h] **Instructions held erroneous or properly refused.**–141Wash 104, 250P645.

801-27 37GaA84, 139SE94.

801-28 127Kan166, 272P132.

802-31 204Cal 582, 269P427, 59ALR 1480 (retreat); CalA 260P946; 308Mo 560, 274SW70 (instruction to acquit defendant resisting arrest if he was not violating any law of the state held faulty as leaving to the jury to determine the law); 225AppDiv517, 234NYS 32. [a] **Right to shoot** and kill in perfecting arrest, instruction erroneous as not within the evidence. 208Ky775, 271 SW1084.

802-32 192NC749, 136SE6 (instructions not erroneous); 107TexCr10, 294SW 586; TexCr 24SW(2d)46. [a] **Instructions held erroneous.**–195NC747, 143SE 538.

802-35 [a] **Instruction allowing verdict for all defendants** if conduct of one of them was justifiable held error. 178 Ark917, 13SW(2d)26.

802-35½-New. But an instruction that it is the same offense to assault a bad man as a good man and that the fact that the person assaulted was a person of questionable morals would not justify the assault should not be given. 311 Mo 476, 278SW755.

802-37 108TexCr474, 1SW(2d)635 (instruction held too restrictive). [b] **Defense of brother.**–208Ky775, 271SW1084.

802-40 [a] **Instruction as to excessive force in defense of property** held not erroneous. 243Mich527, 220NW716.

802-41 100TexCr572, 272SW179 (refusal of spear charge error).

802-43 108TexCr258, 1SW(2d)298; 112TexCr59, 14SW(2d)276.

802-47 105TexCr648, 290SW178.

803-54 97CalA537, 275P1017; 28 Hawaii187; 108TexCr258, 1SW(2d)298.

803-59 97CalA537, 275P1017; 144Miss 380, 109S871.

804-66 [a] (2) In prosecution for assault with deadly weapon, an automobile, verdict of "guilty of assault, but not guilty of reckless driving" dispels

idea of criminal negligence and intent. 191NC265, 131SE632.

805-71 [a] (6) Weapon need not be described. CalA 286P176.

805-73 Contra CalA 286P176.

807-6 CalA 286P176 (assault with deadly weapon).

808-19½-New. Sentence held not to show prejudice. TexCr 26SW(2d)652.

808-22 22AlaA286, 115S65.

809-32 90CalA186, 265P525; OklCr 287P1073 (twenty-five dollars fine and thirty days in county jail).

809-33 Mo 289SW570.

809-34 OklCr 273P380(2dcase); OklCr 277P595.

809-44 [b] **Prejudicial error to permit wife, over husband's objection, to testify in proceedings against husband for assault and battery on third person.** 32PortoRico 140.

810-45 22AlaA579, 118S49; 200 Iowa 335, 204NW271 (whether modification of instruction as to burden of negativing self-defense was prejudicial quære).

ASSESS

812-55 318Mo 192, 300SW1088.

813-63 318Mo 192, 300SW1088.

ASSESSED

814-93 164La1020, 115S131.

ASSESSMENT

816-96 316 Ill 345, 147NE248 (assessment for bettering lands is not tax but encumbrance).

816-4 Iowa 232NW445; 21 OhA292, 153NE167.

817-5 317Mo 1216, 298SW747, 749, 55 ALR773 [quotCJ].

817-12 128Misc875, 220NYS281.

817-13 Iowa 232NW445.

820-52 192NC258, 134SE653.

820-58 [a] 232Mich255, 205NW86.

ASSESSMENT POLICY

821-74 [a] (1) 126Me7, 135A357.

ASSETS

824-29 58 OntL255, [1926] 1DomLR 666.

ASSIGNMENT OF ERRORS

829-85 TexCivA 283SW611.

ASSIGNMENTS

836-1 224 IllA158; 287Pa205, 134A 422, 425 [quotCJ]. [a] (3) 287Pa205, 134A422. (7) 76Mont332, 247P166. [c] (1) TexCivA 23SW(2d)494. [h] **Rights, but not liabilities, may be assigned.** MoA 21SW(2d)919.

837-3½-New. It may express proportion as well as quality. 120Kan133, 242P454.

837-4 76Mont332, 247P166.

837-8 58NS69, [1925] 3DomLR65.

842-67 323 Ill 232, 154NE139.

846-3 58NS69, [1925] 3DomLR65.

848-15 202 Iowa899, 211NW506, 514, 50ALR388 [quotCJperAlbert,J.].

848-16 202 Iowa899, 211NW506, 514, 50ALR388 [quotCJperAlbert,J].

848-16 58NS69, [1925] 3DomLR65.

848-17 202 Iowa899, 211NW506, 514, 50ALR388 [quotCJperAlbert,J.].

849-19 58NS69, [1925] 3DomLR65 (suit by assignee in name of assignor).

849-21 [a] **Statute is in derogation of common law and needs strict construction.** 236 IllA442.

849-22 236 IllA442.

849-22 204 Iowa746, 216NW78.

850-24 47RI 466, 134A4.

850-26 204 Iowa746, 216NW78, 80 [quotCJ]; 118 Or182, 245P729, 732 [cit CJ].

851-27 118 Or182, 245P729, 731 [quot CJ]. [a] (17) Equitable life estate held assignable. 144Va375, 132SE347, 45 ALR738.

851-28 30F(2d)604; 28Hawaii590; 118 Or182, 245P729, 731 [quotCJ]; 144Va 375, 132SE347, 45ALR738.

851-29 125Kan312, 316, 264P41 [cit CJ]; 125Me305, 133A689; 118 Or182, 245P729, 731 [quotCJ].

851-31 [c] 11F(2d)948.

852-35 118 Or182, 245P729, 731 [cit CJ].

852-36 200Cal 434, 253P718, 725 [cit CJ]; 118 Or182, 245P729, 731 [citCJ].

852-37 200Cal 434, 253P718, 725 [cit CJ]; 118 Or182, 245P729, 732 [citCJ].

852-45 79CalA139, 249P56; Iowa 233 NW115; 125Kan312, 316, 264P41 [cit CJ]; 148Md397, 129A504; 222MoA439, 7SW(2d)434; 14PaDist&CoS9.

854-46 79CalA139, 249P56; 265Mass 403, 164NE613, 63ALR231.

854-47 120Kan81, 242P140, 141 [cit CJ]; 148Md397, 129A504. [g] **Assignment of royalties, rents, and bonuses accruing under oil and gas leases, executed and which may be executed, by assignor on certain land is valid under above rule.** 120Kan81, 242P140.

854-48 121Kan291, 246P1017; Mo 30 SW(2d)607; 161Tenn187, 30SW(2d)227 (reversionary interest).

854-50 41F(2d)700; 125Kan312, 316, 264P41 [citCJ]; 148Md397, 129A504; 222MoA439, 7SW(2d)434; 14PaDist&Co S9.

855-51 11F(2d)948; 125Kan312, 316, 264P41 [citCJ].

856-56 41F(2d)700; 148Md397, 129A 504; 222MoA439, 7SW(2d)434 (assignment gives only equitable title and not legal title).

857-61 129Misc506, 221NYS692.

858-74 121Kan291, 246P1017; 233Ky 372, 25SW(2d)1030; 120 Oh253, 166NE 193; 49SD575, 207NW654, 44ALR1462.

858-75 94CalA453, 271P542; 42 Ida 614, 247P10, 11, 49ALR598 [quotCJ]; 207 Iowa882, 223NW888; Iowa 231NW 675; 222MoA862, 5SW(2d)1113; 129 Misc106, 221NYS598; 31 OhA199, 165 NE542; 156SC248, 153SE168(2dcase); TexCivA 286SW315; TexCivA 8SW(2d) 236; TexCivA 16SW(2d)844.

859-76 42 Ida614, 247P10, 49ALR598.

859-78 42 Ida614, 247P10, 11, [quotCJ] 49ALR598.

859-79 42 Ida614, 247P10, 11, [quotCJ] 49ALR598.

859-80 120 Oh253, 166NE193.

859-81 121Kan291, 246P1017.

859-82 120 Oh253, 166NE193.

859-83 42 Ida614, 247P10, 49ALR598; 121Kan291, 246P1017.

859-87 42 Ida614, 247P10, 11, [quotCJ] 49ALR598.

860-88 208Ky524, 271SW564; TexCivA 278SW243, 246 [citCyc]. [b] **But executory devises** have been held valid and subject of alienation and conveyance whether created by will or decd. 214Ky320, 283SW103.

864-18 155Md514, 142A710. See also 172Minn390, 215NW784. [g] **Nonnegotiable commission certificates** assignable. 209Ky93, 272SW22.

865-20 49ND304, 191NW780.

865-20½-New. That one of several debtors knew that defendant wrongfully received money from the clerk of court belonging to the debtors and applied it on indebtedness to defendant will not deprive the debtors of the right to assign to plaintiff the sum so wrongfully received by defendant. SD 226NW341.

865-27 178Ark451, 13SW(2d)6.

866-35 Ont [1930] 4DomLR805 (defective assignment). But see 175Ark107, 299SW6.

866-38 46 Ida97, 266P677, 680 [citCJ]; 124 Or618, 265P786.

866-39 74CalA68, 239P341; CalA 291P 629; 224 IllA89; Md 148A236; 191NC 664, 132SE804; TexCivA 31SW(2d)876. [v] **Provision that moneys due might be assigned** prevents assignment before due. CalA 291P629.

867-40 224 IllA89.

868-42 191NC664, 132SE804.

868-45 TexCivA 295SW337.

868-48 79CalA139, 249P56; Me 150A 382; 118 Oh331, 160NE897; 146SC520, 144SE231.

869-55 79CalA139, 249P56 (intermittent employment).

870-60 247 IllA118. [c] (5) Assignment of salary even to secure usurious debt is not invalid as to principals. 35 GaA266, 133SE660. [m] **In Colorado.**—279P875.

871-61 152Va1041, 148SE774, 776 [quotCJ].

871-63 120Kan81, 242P140, 141 [quot CJ].

871-64 79CalA139, 249P56; 120Kan81, 242P140, 141 [quotCJ]; Me 150A382; Md 148A236.

871-65 120Kan81, 242P140, 141 [quot CJ].

872-66 120Kan81, 242P140, 141 [quot CJ].

872-67 120Kan81, 242P140, 141 [quot CJ]; Me 150A382.

872-70 79CalA139, 249P56; 124 Or618, 265P786, 787 [citCJ&Cyc].

873-72½-New. Where the assignor is not a public officer, although performing work as a laborer or contractor for the state or a municipality, the rule against assignment does not apply. 79 CalA139, 249P56.

873-73 79CalA139, 249P56.

874-92 46 Ida97, 266P677, 680 [citCJ].

874-94 18F(2d)444; 21F(2d)916; 29 F(2d)193; 93CalA516, 269P751; 328 Ill 571, 160NE145; 101NJEq383, 139A518 (not to engage in competing business); 128Misc794, 220NYS1; 26 OhNPNS513; 118 Or182, 245P729, 731 [citCJ]; 32 PortoRico 688; TexCommnA 271SW75; TexCivA 295SW337; TexCivA 299SW 692. [d] (2) Contract whereby defendant guaranteed payment of deficiencies remaining after mortgage foreclosure sales held assignable. 30F(2d)790. [e] **Logging contract** held assignable. 21 F(2d)916.

875-95 34F(2d)653; 39F(2d)777.

875-96 128Misc794, 220NYS1.

875-97 [b] **Assignments not authorized.**—120Kan101, 242P145.

875-98 34F(2d)653; 74CalA68, 239P 341; 128Misc794, 220NYS1. [c] (5) Where mortgagor assigned its contract for purchase of oil which provided that buyer's rights could not be assigned, as soon as mortgagee entered upon default buyer could not demand oil. 34F(2d) 653.

876-4 128Misc794, 220NYS1.

877-6 [a] (5) Statute has no application to personal executory contract, such as lease of land prohibiting an assignment by tenant. 201 Iowa931, 208 NW503.

877-7½-New. A provision in between an automobile distributor and a dealer that the dealer will not assign the contract or any rights thereunder without the consent of the distributor does not invalidate an assignment of money due under the contract after performance by the dealer and cancellation of the contract. 49ND304, 191NW780.

877-9 74CalA68, 239P341.

877-10 32F(2d)442; TexCommnA 271 SW75. See also 39F(2d)777.

878-15 [t] **Contract providing that promisor will effect redemption of stock** purchased by promisee at end of specified time or purchase stock himself is assignable. 196Wis275, 220NW538. [u] **Contract to build houses** is assignable without consent of owner of lots who had sole right as to kind of residences to be constructed. 152Miss825, 119S308. [v] **Credit memorandum.**—**Tex CivA** 24SW(2d)67.

879-18 204 Iowa746, 216NW78, 81 [cit CJ]; 92PaSuper202; TexCommnA 299 SW637, 639 [citCJ]; TexCivA 278SW 471, 473 [citCJ].

880-20 36F(2d)94; 204 Iowa746, 216 NW78, 80 [citCJ].

880-21½-New. Conditional sales contract requiring seller to repair defects has been held assignable by seller. 102 NJEq79, 139A438.

880-22 322 Ill 126, 152NE481; 92Pa Super202; TexCivA 299SW692.

881-23 74CalA68, 239P341; 32 OhA183, 161NE362 (whether personal depends on intention of parties); TexCivA 300 SW107.

881-24 [c] **Contract to deliver ice up to maximum amount per week was held not assignable.** 147Md588, 128A280.

881-25 [a] (2) 83NH374, 142A702. (3) 81Mont382, 263P967.

881-30 36F(2d)94 (composer and publisher).

882-34 [i] **Contracts for furnishing talent for entertainment.**—120Kan101, 242P145. [j] **Tire agency contract is** IndA 168NE506.

not assignable without consent of agent.
882–35 18F(2d)444, 446 [citCJ]; 328 Ill 571, 160NE145; 128Misc794, 220NYS 1. But see TexCivA 22SW(2d)484; 147 Wash394, 266P138. [m] **Contention that contract with copartners was nonassignable** is unavailable where copartners incorporate and perform contract. Wash 290P984.
883–36 129AppDiv427, 221NYS506.
883–38 32 OhA183, 161NE362 (contract for sign board space held assignable by advertising company where it provided for advertiser's payment to company or its successors or assigns).
883–39 49ND304, 191NW780.
883–40 39F(2d)777.
884–44 328 Ill 571, 160NE145.
884–47 DelSuper 143A410 (choses in action); MoA 27SW(2d)772; MoA 29 SW(2d)743; 74Mont355, 240P667; 34 OhA169, 170NE377. See also 136Miss 467, 101S577; 74Mont355, 240P667.
884–49 201Cal 715, 258P933; ND 229 NW282 (meaning of term "obligation" discussed); TexCommnA 284SW540.
885–56 200Cal 210, 252P605; 82CalA5, 254P919 (contract for exchange of advertising space); CalA 286P714; Fla 128S254; 150Miss245, 116S593; 309Mo 638, 274SW815; 118 Or182, 245P729, 731 [citCJ]; 45SC166, 143SE27; Tex CommnA 12SW(2d)114, 63ALR435. [c] **Suit on notary's bond** is ex contractu as regards assignment. MoA 29SW(2d) 743.
885–57 9LaA696, 120S74; 127 Or386, 272P260 (unliquidated claim). [d] 150 Miss245, 116S593. [cc] **Assignment to sublessee** of lessor's right of action against owner for breach of obligation to keep premises in repair. 32PortoRico 688. [dd] **Right of action against bank** for refusal on lessee's default to pay over security deposited by him see CalA 260P372. [ee] **Violation of personal contract.**–132Misc629, 230NYS406.
886–59 [d] **Cause of action for notary's negligence** in falsely certifying acknowledgment of trust deed is assignable by company guaranteeing policy in reliance thereon. MoA 29SW(2d)743.
887–63 62 OntL25, [1928]. 2DomLR 412; Sask [1928] 1DomLR591. But see Alta [1930] 2DomLR421.
887–64 200Cal 210, 252P605; GaA 140 SE386 (dictum); 330 Ill 571, 162NE170; 254Mass599, 150NE874. [c] **Cause of action for reimbursement of employer or its subrogated insurance carrier** for amount of disability indemnity paid to employee does not arise out of injuries but out of obligation imposed by Workmen's Compensation Act on party causing injury, and is property injury. 200 Cal 210, 252P605. [d] **Corporation's cause of action against directors** for creating debts in excess of capital stock is not assignable. Cal 289P834.
888–68½–New. for malicious abuse of process; 254Mass599, 150NE874.
888–71 150Miss245, 116S593.
889–74 37GaA439, 140SE386.
889–75 14F(2d)299; 29F(2d)597; 194 Cal 114, 228P11 (under statute); 200Cal 210, 252P605; 37GaA439, 140SE386; 39 GaA292, 147SE128; 41GaA221, 152SE 308; 150Miss245, 116S593; 221MoA420, 279SW764; Utah 273P515; 101WVa 619, 133SE315. But see 330 Ill 571, 162 NE170. [a] 11F(2d)906.
890–78 [e] **Right of action against bailee,** for destruction of automobile by employee, is assignable to insurer of car. 85 IndA674, 155NE533.
890–84 14F(2d)299; 179Ark1116, 20 SW(2d)179 (damages for laying out public road across land). [a] But see 14F(2d)299.
891–85 150Miss245, 116S593.
891–90 ND 229NW282.
891–92 126Misc597, 214NYS202.
891–95 43 Ida64, 249P254; 252Mass 379, 148NE132 (holding that right to rescind contract for fraud is not assignable at law or in equity); 263Mass321, 160NE816; ND 229NW282.
891–96 43 Ida64, 249P254; MoA 27SW (2d)772. [a] **Rule based on statute** permitting survival of causes from injury to property. 43 Ida64, 249P254.
892–97 MoA 27SW(2d)772. [b] 137 Misc263, 241NYS727.
892–1 205Cal 207, 270P366; CalA 265 P493.
892–2 39Wyo 379, 272P12.
893–7 MoA 27SW(2d)772. But see MoA 29SW(2d)743.
893–8 207Cal 570, 279P423 (right of original maker of note to recover treble damages for usury); MoA 27SW(2d) 772. [a] **Statutory liability of bank directors for deposits received with knowledge of bank's insolvency** is not penal within rule. MoA 27SW(2d)772.
893–10 [i] **Cause of action against bank directors for deposits received with knowledge of bank's insolvency** is assignable where assignee accepts transfer of accounts. MoA 27SW(2d) 772.
894–13 218Ky68, 70, 290SW1047 [quot CJ]; 7PaDist&Co 113.
894–14 124Kan127, 257P729; 218Ky 68, 70, 290SW1047 [quotCJ]; 75Montl, 241P631; 52ND324, 202NW657, 660 [cit CJ]; 27 OhA378, 161NE349; TexCivA 14SW(2d)132; 187Wis416, 204NW471 (though good in equity as between assignor and assignee). [c] **In Mississippi.**–144Miss319, 109S853.
895–15 15F(2d)993; 35GaA444, 133SE 304; 40GaA291, 149SE438; 218Ky68, 70, 290SW1047 [quotCJ]; 230Ky99, 18 SW(2d)968; 242Mich676, 219NW734; 82Mont574, 268P787; 27 OhA103, 160 NE867; 136SC111, 134SE275, 282 [quot CJ]; 136SC179, 134SE285, 289 [quot CJ]. [a] 114Nebr173, 206NW760, 764 [citCJ]. [e] **In Ohio.**–27 OhA103, 160 NE867.
895–16 15F(2d)993; 40GaA291, 149SE 438; 218Ky68, 70, 290SW1047 [quot CJ]; 172Minn379, 215NW674; 82Mont 574, 268P787; 136SC111, 134SE275, 282 [quotCJ]; 136SC179, 134SE285, 289 [quotCJ].
896–17 35GaA444, 133SE304.
896–19 83Colo 505, 266P1116; 136SC 111, 134SE275; 136SC179, 134SE285.
896–20 35GaA444, 133SE304; 187Wis 416, 204NW471.
896–21 104WVa561, 140SE537.
896–22 See also 104WVa561, 140SE 537. [d] **As against subsequent assignment of debtor.**–172Minn379, 215NW 674.
897–29 181Ark1121, 29SW(2d)682 (holding statute in derogation of common law and requiring strict compliance).
897–31 39F(2d)777; 163La332, 111S 776; 198Wis416, 224NW720.
897–32 29F(2d)208; 39F(2d)777; 96 Cal 248, 274P78. See also 227Ky764, 14 SW(2d)168.
898–36 136Miss467, 101S577 (arrangement by seller with third person, and by him with fourth person for goods to meet contract of sale not assignment). [c] **Possession and claim of title to personal property** will prima facie support transfer thereof. 100CalA756, 281P89.
898–37 214AppDiv14, 210NYS629; TexCommnA 283SW481. [c] **One test of assignment** is whether debtor is justified in paying to assignee sum assigned. TexCommnA 283SW481.
898–37½–New. Contract, by defendant with purchaser from plaintiff with substantially same terms and conditions as plaintiff's contract, taking over purchaser's right, title, and interest therein, constitutes defendant assignee. Tex CivA 279SW546 (with knowledge of plaintiff's contract).
898–37⅓–New. Transfer by assignment of securities in daily life, and especially in "street," is based upon consideration and actual delivery. 130 Misc865, 226NYS81.
899–48½–New. The statute as to loans requiring the signature of a wife to an assignment is not applicable to an assignment by a married man of wages to secure the purchase of merchandise. 32 OhA279, 167NE908.
899–49 TexCivA 14SW(2d)916(2dcase).
899–54 73CalA678, 239P92.
899–56 8F(2d)667; 36F(2d)732.
900–64 218Ala221, 118S404; 84CalA 337, 258P141; 91CalA75, 266P811; DelSuper 143A410; 160Ga472, 128SE 674; 82 IndA187, 145NE514; 209Ky93, 272SW22; MoA 273SW237, 239 [cit CJ]; NJ 151A839; TexCommnA 283 SW481; TexCommnA 284SW540; 68 Utah470, 251P10 [citCJ].
901–65 TexCommnA 284SW540.
901–66½–New. Failure to use the term assignment or some related word or to employ other language suggesting the immediate passing of title litigates strongly against the alleged assignee's claim. 120Kan109, 242P475.
902–68 Wash 289P1010 [quotCJ].
902–73 86PaSuper545.
902–77 11F(2d)906.
903–79 See also 146Va73, 135SE714.
905–90 88GaA614, 144SE819; 222App Div502, 226NYS582 (signature of party is sufficient).
906–95 92CalA400, 268P457; 166Ga49, 142SE279. [f] (2) **If accepted** in writing or orally, or acted upon by parties, it has same force and effect as if signed. 214Ky206, 282SW1095.
906–96 166Ark570, 266SW679, 682 [quotCJ].
906–97 166Ga49, 142SE279; 38GaA 764, 145SE528; 220MoA401, 286SW736. [k] **Assignments held insufficient.**–166 Ga49, 142SE279. [l] **Definiteness.**–222 MoA862, 5SW(2d)1113.
907–98 MoA 26SW(2d)800 (assignment of wages has been held sufficient).
907–8 82Mont574, 268P787. [c] (2) Proof of possession of written assignment by assignee from time of its execution is presumptive proof of delivery. 205 Iowa1379, 219NW492. (3) Production and profert of assignment is proof of possession. 205 Iowa1379, 219NW 492.
908–9 42 Ida411, 245P936.
908–12 215Ala39, 109S106.
908–14 [h] **Affidavit of execution held sufficiency.**–57 OntL374, [1925] 3DomLR 1058.
909–19 96Fla568, 120S4; 48Nev373, 233P41; TexCivA 10SW(2d)786; Tex CivA 14SW(2d)890; TexCivA 22SW (2d)765.
910–20 8F(2d)443; 24F(2d)644; 99 CalA390, 278P507; MoA 273SW237, 239 [quotCJ]; 222AppDiv45, 225NYS231; 118Tex91, 11SW(2d)496. [b] (2) Property need not be in existence when contract is made provided it is in existence during time assignment may operate. 36F(2d)732.
910–21 167Ga470, 146SE22.
910–23 8F(2d)443; 180Ark643, 22SW (2d)381; 96Fla568, 120S4; MoA 296 SW201; 53SD213, 220NW512. [h] **Statements of insured before his death** of his intention to change beneficiary is insufficient to constitute equitable assignment of policy. 181Ark350, 25SW (2d)758.
911–25 DelSuper 143A410. See also 96 Fla568, 120S4.
912–26 [k] **Agreement of mortgagor and mortgagee** for sale of mortgaged property and application of proceeds to mortgage debt is assignment of proceeds. 51SD13, 211NW976.
912–29 8F(2d)443; 135Misc774, 238 NYS533; 136SC111, 134SE275, 281 [quotCJ]; 136SC179, 134SE285, 288 [quotCJ]; TexCivA 295SW337. [a] (6) One receiving and filing order to pay amount due to bank was acceptance to constitute assignment of funds in his hands. 169Ark1084, 277SW871.
913–30 136SC111, 134SE275; 136SC 179, 134SE285.
913–31 136SC111, 134SE275; 136SC 179, 134SE285.
913–34 TexCivA 295SW337.
913–35 23F(2d)842; 24F(2d)644; 35 Ariz130, 274P1043; 116Nebr610, 218 NW584; 48Nev373, 233P41, 44 [citCJ]; 32NM537, 260P673; 219AppDiv604, 220 NYS423; 30 OhA1, 164NE62; 136SC 111, 134SE275; 136SC179, 134SE285; TexCommnA 283SW481, 483 [citCJ]; TexCommnA 24SW(2d)14; TexCivA 292SW557, 559 [quotCJ]; TexCivA 22 SW(2d)765. [b] TexCommnA 283SW 481, 483 [citCJ].
914–36 32NM537, 260P673; 136SC111, 134SE275; 136SC179, 134SE285. [a] (2) Turning over claims for overcharges by railroads for collection on basis of certain percentage thereof as collection fee is not equitable assignment of such percentage. TexCivA 22SW(2d) 765.
914–37 32NM537, 260P673.
915–38 48Nev373, 233P41; Tex CommnA 283SW481.
915–40 82Mont574, 268P787.

915-41 167Ga470, 146SE22; 51Philippine494; 118Tex180, 12SW(2d)973; 109TexCr96, 3SW(2d)439, 441 [quot CJ] (retention of funds from wages).
916-44 275US359, 48SCt167 (where bank requested "protection" of drafts to debit of its account); 28F(2d)42; 207Cal 96, 276P995(2dcase) (bills of exchange); 202 Iowa899, 211NW506, 50ALR388; 202 Iowa894, 211NW517; 203 Iowa507, 211NW520; 203 Iowa782, 211NW522; 203 Iowa235, 212NW485; 203 Iowa398, 212NW746; 120Kan706, 244P 1039, 1041 [quotCJ]; 156Miss893, 127S 570, 69ALR1068; 222MoA426, 7SW(2d) 290; 117Tex174, 299SW635; WVa 153 SE300. [f] **Draft given by defendant bank** to plaintiff bank on third bank is not equitable assignment of funds against which drafts were drawn as between plaintiff and defendant banks. 192Wis28, 211NW931. [g] **Execution and delivery of draft to correspondent bank** by collecting bank in same town just prior to insolvency creates no assignment for former nor preference. 202 Iowa894, 211NW517.
917-48 166Minn481, 208NW413; 222 MoA882, 5SW(2d)1110; TexCommnA 276SW664. [g] TexCommnA 276SW 664.
918-49 TexCommnA 276SW664.
918-50 222MoA839, 6SW(2d)970, 972 [quotCJ].
918-54 See also TexCommnA 276SW 664.
919-60 202 Iowa899, 211NW506, 508, 50ALR388 [citCJ] (dictum); 204 Iowa 565, 215NW742. [e] (2) Notwithstanding provisions of statute, giving of a check may amount to assignment of funds in bank under surrounding circumstances. 173Minn289, 217NW365.
920-62 13F(2d)732; 19F(2d)524; 33 F(2d)673 (borrowing bank's financial embarrassment not made known to lending bank). 36F(2d)732; 36F(2d)736; 32Ariz318, 257P985; 93Fla67, 111S541; 236 IllA111; 202 Iowa899, 211NW506, 50ALR388; 205 Iowa888, 219NW53; 120Kan109, 242P475; 148Md449, 129A 688; 150Md687, 133A847; 218AppDiv 154, 218NYS17; 115 Or366, 237P361; 91PaSuper207; 117Tex174, 299SW635; TexCivA 28SW(2d)463; TexCivA 28SW (2d)939. [d] (7) Drawing check for all of special account, with specific personal instructions to bank to pay, held equitable assignment of such account. Tex CivA 22SW(2d)701. [e] **Transactions held to constitute equitable assignments.**–145Va356, 133SE568. [f] **Cashier's check to depositor.**–96Fla181, 117S789.
921-63 236 IllA111; 120Kan109, 242P 475; 172Minn24, 214NW750; 116Nebr 456, 218NW92; 218AppDiv154, 218NYS 17; TexCommnA 284SW540; TexCivA 272SW571; 146Wash520, 264P8. See also 78CalA362, 248P947. [a] (2) Statute was designed to protect bank rather than to affect relation between drawer of check and payee, and as against drawer check should be regarded as assignment pro tanto. 108WVa12, 105SE137. [c] **In California.**–78CalA362, 248P947. [d] 202 Iowa899, 211NW506, 50ALR388; 202 Iowa894, 211NW517. [e] **Certification of check by drawer** before delivery does not operate as assignment. GaA 155SE799.
921-64 13F(2d)732; 202 Iowa899, 211 NW506, 50ALR388; 172Minn24, 214NW 750; TexCommnA 284SW540; TexCivA 28SW(2d)463; TexCivA 28SW(2d)939; TexCivA 18SW(2d)754. [b] **Circumstances held not to create assignment.**–202 Iowa899, 211NW506, 50ALR388.
922-65 [a] (2) Two simultaneous checks exhausting account, under circumstances showing intention of all parties, held equitable assignment. Tex CivA 22SW(2d)701.
922-67 13F(2d)732; TexCivA 22SW (2d)701. [a] (1) TexCommnA 284SW 540.
922-68 13F(2d)732. [b] 146Wash520, 264P8 (act of bank in stamping check as paid is not acceptance).
922-68½-New. A usage and rules of law merchant cannot be invoked to show assignment by the drawer of a draft. 202 Iowa899, 211NW506, 50ALR388.
922-68¾-New. A check need not itself order payment out of a particular fund to operate as an assignment. Tex CommnA 284SW540.
922-69 36F(2d)732; 36F(2d)736; 99 CalA390, 278P507; 168Ga876, 149SE 213; 214Ky206, 282SW1095, 1096 [quot Cyc]; 166Minn481, 208NW413; 314Mo 1, 282SW706; 52SD283, 217NW221; TexCommnA 284SW540; TexCivA 5SW (2d)570. [j] **Written assignment as security of moneys to become due under highway construction contract.**–123 Okl 170, 252P404 (operation).
923-70 TexCommnA 284SW540.
924-74 33F(2d)673 (intention cannot be inferred from knowledge of one party).
924-75 TexCivA 14SW(2d)916(2dcase).
924-79 NJCh 148A199.
925-80 194Wis29, 215NW433.
925-81 TexCivA 5SW(2d)570.
925-85 120Kan109, 242P475; 124Kan 127, 130, 257P729 [citCJ]; 218Ky68, 290SW1047, 1048 [quotCJ]; 229Ky634, 17SW(2d)745, 67ALR175; 222MoA839, 6SW(2d)970; 27 OhA378, 161NE349; TexCommnA 284SW540.
925-85½-New. Promissory statements amounting to mere assurances that a draft given by a bank to its creditor bank on the debtor's correspondent bank will be paid are not sufficient to constitute an agreement that the draft should operate as a pro rata assignment of the fund on which the draft is drawn. 120Kan109, 242P475.
926-86 TexCivA 5SW(2d)836.
927-87 82Mont574, 268P787. [i] **Draft of school trustees upon county tax collector for illegal loan for current school expenses** is treated as equitable assignment of funds. 160Ga556, 128SE766.
927-88 76CalA726, 245P800, 802 [cit CJ]; 124Kan127, 257P729; 167Minn 511, 210NW37; TexCivA 5SW(2d)836; 194Wis29, 215NW433. [k] **Statute permitting assignment of funds without acceptance** by drawee does not prevent assignment by agreement of parties. Tex CivA 32SW(2d)494.
928-89 115 Or366, 237P361. [b] **After certification procured by drawer** bank becomes primarily and the drawer secondarily liable. GaA 155SE799.
928-90 76CalA726, 245P800, 802 [cit CJ]. [b] **Acceptance of order for part of fund** is binding only according to its tenor. 124Kan127, 257P729.
928-90½-New. Notice to bank of a claimed lien by broker on funds in bank representing check of purchaser payable to vendor held by broker does not constitute assignment of check where broker was not transferee thereof by indorsement. 200 Iowa1086, 205NW853, 42LRA622.
929-99 104NJL218, 141A92.
930-2 10PaDist&Co 475.
930-3 114 OhSt241, 151NE373, 375, 48 ALR182 [citCJ]; 127 Or34, 270P907; 99WVa498, 129SE472, 474 [quotCJ].
930-4 99WVa498, 129SE472. [b] (1) 163La332, 111S776.
930-5 99WVa498, 129SE472, 474 [quot CJ].
931-7 201 Iowa697, 207NW741 (wife's assignment of proceeds of life policy to bank to discharge husband's indebtedness).
931-11 Iowa 231NW675; 27 OhA378, 161NE349 (sufficient).
931-13 145Wash91, 258P1029 (assignment of rights under sales contract in return for attorney's services).
932-17 CalA 292P529; 38GaA614, 144 SE819.
932-18 96PaSuper530.
932-19 6F(2d)960 (sub-contractor's loss of lien held sufficient consideration for contractor's order in railroad to pay money earned by contractor); 172Minn 24, 214NW750; 121 Okl 157, 249P292; 145Va207, 133SE812 (deduction of freight charges by purchaser from debt to vendor is consideration for assignment of claim for overcharges). [b] **Where oral assignment is made to plaintiff for collection** of claim for damages in tort, no other consideration may be alleged or proved. 48 Ida550, 283P606.
932-23 [b] (2) Assignment reciting receipt of valuable consideration imports consideration. 205 Iowa1379, 219NW 492.
932-25½-New. Where assignment states it is for valuable consideration, such is the legal presumption. 96 PaSuper530.
932-26 75Mont1, 241P631; TexCivA 14 SW(2d)916(2dcase).
933-29 169Ark1084, 277SW871 [citCyc]. [b] **Affirmative proof of acceptance** need not be shown by assignee. 169Ark1084, 277SW871.
933-32 191NC664, 132SE804; 35 OhA 266, 172NE297; 114 Or336, 233P860, 37 ALR1531; TexCivA 28SW(2d)1087. [d] **Guarantor of account** for merchandise sold and delivered can protect himself by buying account without notice to debtor. TexCivA 28SW(2d)1087.
933-34 297Pa115, 146A595(1stcase); 35PortoRico 512.
934-35 57ND123, 220NW621; 297Pa 115, 146A595(1stcase); 59 OntL252, [1926] 4DomLR360.
934-36 25F(2d)290; MoA 5SW(2d)682, 686 [citCJ].
934-38 NJ 151A839.
935-39 58NS96, [1925] 3DomLR65. See also NS [1928] 1DomLR642.
935-41 55ND159, 212NW820; 47RI 466, 134A4; TexCivA 272SW564, 567 [citCJ].
936-48 Alta [1930] 4DomLR291.
936-52 TexCivA 22SW(2d)346.
937-64 81Colo 546, 256P640; 214Ky 206, 282SW1095; 123 Okl 37, 251P733 [quotCJ]; 47RI 466, 134A4; TexCivA 31SW(2d)876. [c] **Acceptance of assignment by debtor** who was general contractor from subcontractor has been held to contemplate completion of contract by subcontractor. 254Mass218, 150NE160. [d] **Assignments of assignors' interests in deceased person's estate were good** as against subsequent judgment creditors of assignors, where administratrix made no objection and impliedly accepted assignments. 199Wis 147, 225NW695.
937-65 41GaA432, 153SE230; 172Minn 379, 215NW674.
937-66 187Wis416, 204NW471. See also CalA 291P629. [a] 87CalA482, 262 P361 (may waive breach and hold assignee).
937-69½-New. Effect of consent. Mass 173NE433.
937-70 27 OhA378, 161NE349 (retention of order held not acceptance); Tex CivA 5SW(2d)836.
937-71 NC 154SE621.
937-71½-New. Where an order of a contractor authorized the school board to pay a bank a certain sum and apply it on his account, and the board's acceptance thereof was conditioned that the sum be allowed it as credit by the court in litigation with the contractor which terminated so as to show that nothing was due the contractor, no liability is attached to the board by such qualified acceptance. 231Mich504, 204 NW81.
938-77½-New. Acceptance by the debtor of an order to pay is not an unconditional promise to pay. TexCommnA 16SW(2d)517.
938-78 219Ky103, 292SW742.
938-79 99CalA390, 278P507; LaA 122S 137; 195NC873, 142SE589.
938-82½-New. Where a contract for the sale of receivables provides for reassignment of uncollected items, reasonable effort to collect is a condition precedent to the enforcement of the obligation to repurchase. 36F(2d)213.
939-84 [b] **Assignment of contract especially made unassignable** is ineffective. 215AppDiv225, 213NYS555.
939-85 [c] **Evidence insufficient** to show assignor of unsound mind. 72 CalA773, 238P171. [d] **Temporary delusions** do not invalidate assignment where assignment was not directly influenced thereby. 72CalA773, 238P171. [e] **Weakness in mind and body** does not necessarily show mental incompetency generally. 72CalA773, 238P171. [f] **Old age and infirmity,** inability to recognize friends or transact regular business, irritability and ill-temper do not necessarily show incompetency to make valid assignment of property. 72 CalA773, 238P171. [g] **Senile dementia** does not necessarily make assignor incompetent to execute valid assignment. 72CalA773, 238P171.

939-98 309Mo 638, 274SW815 (voidable but not void); 131Misc478, 227NYS158; 9PaDist&Co 479. [d] (2) Nor for alleged fraudulent representation that instrument was only evidence of indebtedness, where there was no fraud and assignor could read. 38GaA614, 144SE 819.

940-1 [b] 72CalA773, 238P171. [d] **Where mind is not overpowered and will overcome,** pressure brought to bear on assignor is not undue influence fatal to validity of assignment. 72CalA 773, 238P171. [e] **Evidence insufficient** to show undue influence. 72CalA773, 238P171.

940-2 101NJEq818, 138A898.

940-12 121Kan312, 246P982. [e] **Tex CivA** 300SW107. [g] **Circumstances amounting to waiver.**–94CalA343, 271P 377.

940-15 23F(2d)391, 395 [citCJ]. [b] **In promisor's action on contract against assignees** who contended that assignor promisee's skill made contract unassignable, only person who could so object was promisor as party benefiting by such skill. 147Wash394, 266P 138.

941-16½-New. Assignment is not invalid as to assignor's garnisher because of failure to comply with statute. 181 Ark1121, 29SW(2d)682.

941-20 245NY136, 156NE660.

941-21 But see 75Mont460, 243P106.

941-22 19F(2d)781.

942-32 146SC520, 144SE231; **Tex CommnA** 29SW(2d)1052.

943-34 236Mich536, 211NW85.

943-35 74Mont398, 240P825. [a] **Contractor accepting partial assignment of subcontractors' earnings** cannot thereafter assign all his earnings under contract. **Minn** 231NW798.

943-38½-New. Written assignment of all right, title, and interest in money due the assignor for a recited consideration transfers title on delivery. 207 Iowa692, 223NW395.

943-43 29PortoRico 984. [a] **"Inheritance"** construed to include devise in light of intention. TexCivA 277SW197.

943-46 22F(2d)450; 82Mont574, 268P 787.

943-47 29PortoRico 984. [g] **Unambiguous granting clause controls** despite doubts arising from recitals in instruments. 22F(2d)450.

944-48 252 IllA82.

944-53 82Mont574, 268P787, 792 [cit CJ].

944-54 102Conn425, 129A221; 125 Kan312, 316, 264P41 [citCJ]. [p] **Transfer of rights and interests which assignors "had, have or may have"** in particular property held not to stop him from enforcing adverse claim assigned to him after transfer. 29 PortoRico 984, 990. [q] **Property coming to assignor "from inheritance"** held to pass all property whether obtained by devise or descent. TexCivA 277SW 197 (in view of intention, inheritance has been construed to include property devised to assignor). [r] **Assignment of "all proceeds"** of tobacco crop has been held to include stock of warehousing corporation, substituted for proceeds, dividends thereon, and unused portion of percentage deducted for commercial purposes. 221Ky67, 297SW695. [s] **Assignment by beneficiary under will** of all his "right, title and interest in all money and property due and coming" to him passes future interest in property under will. 125Kan312, 264P 41. [t] **Assignee of expectancy.**–Iowa 231NW675.

945-56 29PortoRico 984. See also Sask [1928] 1DomLR521. [a] (8) Where assignors transferred all rights and interests "which they had, have or may have" in certain property, it was held this did not include adverse interest subsequently acquired by one of assignors in property. 29PortoRico 984, 987. [l] **Assignment as heir of ancestor** does not pass interest derived by inheritance from sister. 32PortoRico 849.

946-57 Md 152A261; 220MoA736, 275 SW779 (all his interest of whatever kind or character); 29PortoRico 984.

946-58 120Okl 96, 250P508; 29Porto Rico 984 (assignment held not to pass interest of coheir); TexCivA 286SW990.

946-65½-New. Assignment by a contractor does not entitle assignee to money which became due to the contractor's surety who completed the contract on default of the contractor. 194NC430, 140SE31.

946-66 [a] **Assignment of moneys due and to become due "for service rendered or to be performed"** up to and including certain date include all moneys earned up to that date. 165Minn 446, 206NW723 (percentages reserved under construction contract but not due).

947-74 11LaA203 123S180.

947-76 165Minn446, 206NW723.

947-81 235Mich304, 209NW46.

948-90 [a] **Release of security in instrument of assignment.**–Assignee acquires no right to security which is released to debtor in instrument in which assignment is made. 42 Ida134, 243P 825.

948-91 25F(2d)817; Iowa 230NW349; 3LaA153, 156 [citCJandquotCyc]; 5 LaA501; 221MoA420, 279SW764; 191 NC672, 132SE806; 196Wis391, 220NW 177; 196Wis305, 220NW179 [citCJ].

949-92 3LaA153, 156 [citCJandquot Cyc].

949-98 Mont 290P255. [a] **Assignee and mortgagee of rents** is not estopped to set up claim against garnishment creditor because lessor obtained judgment for same in his own name. Tex CivA 291SW944.

949-1½-New. Restrictive covenant between employer and employee as to future employment passes when the business is sold. 101NJEq644, 139A408.

950-2 82Mont574, 268P787, 792 [cit CJ]; 29PortoRico 984.

951-14 136Miss476, 101S571, 573 [cit CJ].

951-19 118Kan656, 236P447, 448 [cit CJ].

952-22 137Misc263, 241NYS727.

952-28 [e] **Attempted assignment of contract expressly made unassignable** is ineffective to pass any rights. 215App Div225, 213NYS555.

953-30 [a] **Priority between assignment and conditional assignment.**–150 Wash114, 272P34.

953-35 28F(2d)791.

953-36 CalA 291P629; 144Miss579, 109 S1; MoA 23SW(2d)205; 101NJEq78, 137A713; 55ND159, 212NW820. [b] **Assignee first giving notice** held to have priority over assignment prior in date. 144Miss579, 109S1. [c] **Service of notice to county** by surety of proposal for bond containing purported assignment from contractor does not give priority over later assignment to bank. 144 Miss579, 109S1.

954-37 206 Iowa577, 218NW920; 214 AppDiv525, 212NYS473; 114 Or336, 233 P860, 37ALR1531; 139SC411, 138SE 184; TexCivA 295SW337; TexCivA 299 SW943; TexCivA 4SW(2d)169.

955-40 142 Okl 227, 286P311; TexCivA 275SW436. See also 167Ga470, 146SE 22.

955-42 142 Okl 227, 286P311 (successive assignees of fund deposited for purchase of stock taking assignments as security for loans without notice); 297 Pa115, 146A595(1stcase); TexCivA 300 SW148.

955-46 Me 150A382. [b] **In equity assignee first in time has better right** under recording statute. Me 150A382. [c] **Assignment of wages, recorded when town took another assignment,** is constructive notice that another owned prior superior equitable lien. Me 150A 382.

955-48½-New. Assignment of future interest in the estate of a living person need not be recorded in order to be valid as against a subsequent assignee with notice. 222MoA862, 5SW (2d)1113.

955-49 [d] **Contractor's assignment of estimates to bank** to finance building contract held senior to assignment to contractor's surety under implied consent in application for bond. 157SC221, 154SE167.

955-51½-New. In some jurisdictions the unqualified acceptance by the debtor of an assignment of part of the debt gives the assignee precedence over earlier assignments of parts of the debt accepted later by acceptances restricted and qualified so as to protect the debtor on his unqualified acceptance. 124Kan 127, 257P729.

956-54½-New. Delivery of assigned contracts by a prior assignee to the assignor, for temporary purpose, in such condition that they could not be reassigned without the commission of a crime, is not negligence depriving such assignee of priority. 114 Or336, 233P 860, 37ALR1531.

956-54½-New. Principle that assignor of chose of action can transfer no better title than he possesses does not operate in favor of assignee as security as against subsequent bona fide assignee. 114 Or336, 233P860, 37ALR 1531.

956-56 [a] **Purchaser in good faith but not for value** cannot acquire priority by notice. 101NJEq78, 137A713.

956-57 222MoA862, 5SW(2d)1113.

956-61 42 Ida411, 245P936; 118Kan 444, 235P856, 857 [quotCJ].

957-62 118Kan444, 235P856, 857 [quot CJ]. [a] (4) Assignment held to entitle assignee to cash settlement with debtor's committee and to entitle assignee to turn over participation certificate to assignor as excess. 218App Div578, 219NYS6.

957-63 43F(2d)724; 43F(2d)730; 203 Iowa685, 213NW229; 118Kan444, 235 P856, 857 [quotCJ]; 92PaSuper463, 466 [quotCJ]. [f] **Assignee may treat transfer as mere option** and sue upon debt whenever it is due. 203 Iowa685, 213 NW229.

957-64 BC [1929] 1DomLR782.

957-68 83Colo 193, 265P682 (assignments do not operate retroactively); 118Kan444, 235P856, 857 [quotCJ]. [b] (2) Assignee of earnings of subcontractors, who pledged assignments and subcontractors' conditional sales contracts on trucks as collateral cannot defeat his assignee's rights by taking possession of trucks. Minn 231NW798.

958-69 118Kan444, 235P856, 857 [quot CJ].

958-77 118Kan444, 235P856, 857 [quot CJ].

958-78 118Kan444, 235P856, 857 [quot CJ].

958-79 118Kan444, 235P856, 857 [quot CJ].

958-89 206Cal 428, 270P931; Cal 284P 905; 77CalA120, 245P1104; 77CalA201, 246P163; Fla 128S622; 233 IllA428; 124Kan127, 130, 257P729 [citCJ]; 12 LaA305, 125S465; 245Mich369, 222NW 771; 144Miss579, 109S1; TexCivA 270 SW1050; TexCivA 31SW(2d)876 (nonnegotiable instrument).

959-90 116Nebr331, 217NW91, 58ALR 758; 300Pa60, 150A103.

959-91 77CalA120, 245P1104.

959-93 87CalA297, 261P1115; 38GaA 614, 144SE819; 5LaA439; TexCommnA 283SW481.

960-96 94CalA88, 270P688.

960-97 TexCommnA 283SW481.

960-1 57ND123, 220NW621.

960-3 57ND123, 220NW621; TexCivA 272SW564, 567 [citCJ].

960-4 74Mont398, 240P825, 828 [cit CJ]; NJ 151A839; 47RI 466, 134A4; TexCivA 272SW564, 568 [citCyc]. [b] **Evidence held to sustain finding** that money paid to assignor after acceptance of assignment was advancement on contract. 74Mont398, 240P825.

961-5 74Mont398, 240P825, 828 [cit CJ].

961-5½-New. A debtor accepting an assignment by a partnership creditor to an individual but paying to the surviving partner is liable to the extent of the claim. MoA 2SW(2d)147.

961-6 16F(2d)288; 23F(2d)378; Ark 32SW(2d)427; 81Colo 546, 256P640; 11 LaA306, 123S399(2dcase); MoA 5SW (2d)682, 684 [citCJ]; 127 Or34, 270P 907, 910 [citCJ]; 297Pa115, 146A595 (1stcase); 47RI 466, 134A4. [b] **That insurance agent acted for both insured and insurers** does not bar his recovery of premiums under assignment to him. 104NJL218, 141A92. [c] **Debtor becomes trustee for assignee on notice of assignment.**–NJ 151A839.

962-8 81Colo 546, 256P640. [d] **Accounting.**–81Colo 546, 256P640.

962-12 Iowa 232NW169.

962-14 40GaA291, 149SE438.
963-20 15F(2d)317; 16F(2d)288; **Fla** 130S453; 42 Ida338, 245P389, 391 [cit CJ]; 252 IllA82; 5LaA379; **Mass** 170 NE400; 248Mich104, 226NW838; 176 **Minn**267, 223NW288; **MoA** 5SW(2d) 682, 684 [citCJ]; 50Nev325, 258P1024, 58ALR902; 99NJEq614, 133A719; 120 **Okl** 164, 251P97, 98 [citCJ]; **Tex CommnA** 291SW209; **TexCivA** 284SW 694; **TexCivA** 284SW717; 98WVa706, 128SE925; 188Wis530, 205NW816; 37 **Wyo** 237, 260P678, 683 [citCJ]; **Wyo** 292P1091. [d] **That account for which debt was assigned was enforceable against bond** cannot be urged by subcontractor's assignee suing contractor who had satisfied his own claim against subcontractor out of assigned debt. 12 LaA305, 125S465.
963-21 119Kan630, 240P398, 400 [cit CJ]; **Mass** 171NE470; **TexCommnA** 16 SW(2d)517; **TexCivA** 31SW(2d)876. [c] 149Wash184, 270P434.
963-23 50Nev325, 258P1024, 58ALR 902.
963-24 But see 50Nev325, 258P1024, 58 ALR902.
963-25 99NJEq614, 133A719.
963-26 188Wis530, 205NW816.
963-27 98WVa706, 128SE925.
963-28 22AlaA68, 112S543; 84CalA 448, 258P418; 96Fla704, 119S123; 42 Ida338, 245P389, 391 [citCJ]; 252 IllA 82; 12LaA305, 125S465; 167Minn389, 209NW263 (construing statute); 157 Miss132, 126S898 (all defenses existed prior to passage of Negotiable Instruments Law); 99NJEq614, 133A719; 127Misc26, 215NYS168; 130Misc710, 225NYS70; 136Misc594, 240NYS372; 25 OhA138, 157NE414; 12PaDist&Co 38; 132SC171, 129SE81 (equitable assignment); 139SC411, 138SE184; **TexCivA** 284SW717; 193Wis531, 214NW332; 37Wyo 237, 260P678; **Sask** [1925] 3 DomLR1090, [1925] 3WestWkly136. [c] But see 167Minn389, 209NW263. [m] **Person to whom defense available.**–167Minn389, 209NW263. [n] **Effect of stipulation between original parties; fraud.**–**Sask** [1925] 3DomLR1090, [1925] 3WestWkly136.
965-30 37Wyo 237, 250P678 (dictum).
965-30½-New. The bona fide purchaser of an instrument in the nature of a chose in action takes free from collateral equities. 25 OhA138, 157NE414.
966-31-32½-New. Striking out defective assignment without indicating assent of the holder thereon does not vitiate the instrument. **NJ** 137A837.
966-33 1LaA118; **TexCommnA** 291SW 209; 155Wash564, 285P433. But see **MoA** 5SW(2d)682.
966-35 70CalA41, 232P489.
966-40 245Mich369, 222NW771; 214 AppDiv525, 212NYS473, 476 [quotCJ].
966-40½-New. An assignor is not liable to the assignee because of a change in plans in the construction contract where the latter agreed to perform all conditions of the contract which provided for such change. **TexCivA** 284 SW1098.
967-41 214AppDiv525, 212NYS473, 476 [quotCJ].
967-42 214AppDiv525, 212NYS473, 476 [quotCJ].
967-43 214AppDiv525, 212NYS473, 476 [quotCJ].
967-44 214AppDiv525, 212NYS473, 476 [quotCJ].
967-45 165Ga187, 140SE500; 214App Div525, 212NYS473, 476 [quotCJ].
968-50 214AppDiv395, 212NYS216, 217 [citCJ].
968-54 166La593, 117S729; 167La255, 119S40; 9LaA143, 119S487; 214AppDiv 395, 212NYS216, 217 [citCJ].
968-55½-New. The assignee may yield his rights to the original obligor without resorting to legal action, thus minimizing damages. 214AppDiv395, 212 NYS216.
968-55½-New. In such case, in suing the assignor for breach of covenant, he bears the burdens of establishing sufficiency of the original obligor's defense. 214AppDiv595, 212NYS216.
969-60 111Conn65, 149A234.
970-62 111Conn65, 149A234.
970-63 111Conn65, 149A234.
971-72 214AppDiv395, 212NYS216.
971-74 79CalA139, 249P56. See also 285Pa131, 131A710.
972-76 155Md514, 142A710.
972-76½-New. or, according to some cases, regardless of the fact that the debtor has not had notice of the assignment. 155Md514, 142A710.
972-77 155Md514, 142A710 (committee of creditors); 27 OhNPNS535 (assignment of wages to be earned enforceable after assignor's discharge in bankruptcy where creditor's claim listed but not proved).
974-89½-New. Where unaccepted draft not drawn on specific fund does not operate as assignment, it does not operate to prejudice drawer's attaching creditors. **WVa** 153SE300.
974-90 125Misc346, 209NYS753.
974-91 251Mich195, 231NW560.
975-97 30F(2d)665; 129Kan35, 281P 907. [a] **Bank advancing money to highway contractor** under assignments could not recover from surety without knowledge of assignments. 23F(2d)378.
975-97½-New. , but does not acquire any higher right. 108Conn173, 143A 51.
975-98 102CalA230, 282P819 (transferee charged with notice of prior assignment).
976-2 23F(2d)378.
976-8 146SC520, 144SE231.
976-10 [d] **Assignment of arbitration award as security without agreement as to bringing action thereon** does not entitle assignor to recover of assignee for failure to sue within statutory time. **Mass** 170NE621. [e] **Failure to prove damages** from assignee's failure to sue on award within statutory time prevents recovery by assignor. **Mass** 170NE621.
976-10½-New. That an assignment of wages is void because of defective acknowledgment does not entitle the assignor to recover from the assignee amounts collected by him thereunder. **Iowa** 228NW281.
976-11 24F(2d)494, 495 [citCJ]; 30 OhA156, 164NE435; 132 Or453, 285P 244; 147Wash394, 266P138, 140 [quot CJ].
977-14 234Mich52, 207NW886; **Tex CivA** 279SW546, 549 [citCJ].
977-16 52SD292, 217NW397, 59ALR 947; 149Wash184, 270P434. [e] **Assignee is not liable for performance of contract without express assumption.**–**TexCivA** 278SW471. [f] **Assignee who has not assumed performance of contract** does not remain liable after he has transferred it. **TexCivA** 278SW471.
977-16½-New. But an assignee who has not assumed performance may be held liable for acts performed by him. **TexCivA** 278SW471.
977-16½-New. Surety on building contractor's bond taking assignment of contract does not thereby become liable for debts of contractor for material furnished prior to assignment. 130Kan388, 286P231.
977-24 **TexCivA** 278SW471, 473 [cit CJ]; **TexCivA** 292SW640. [c] **Contract of sale.**–**TexCivA** 278SW471. [d] **Agreements of parties that contract may be assigned** will not release assignor without agreement that such release was intended. **TexCivA** 278SW471. [e] **Assignee may not increase burden of assignor** by new promise. 285Pa131, 131A710 (without consent). [f] **Construction company is only secondarily liable** for performance of contract which it assigns to another with consent of builder with bond made directly to latter. **TexCivA** 284SW1098.
978-28 214Ky206, 282SW1095.
978-33 127Misc26, 215NYS168.
978-34 42 Ida338, 245P389, 391 [cit CJ]; 157Miss132, 126S898.
979-40 231Ky298, 21SW(2d)457.
979-41 36GaA538, 137SE286.
981-52 253Mass19, 148NE227.
981-53 CalA 285P1081.
981-54 88PaSuper123 (evidence held sufficient to sustain recovery).
981-56½-New. A complaint against the assignor for breach of warranty of title is sufficient even though not alleging that the assignee had sued the original obligor on the claim and was defeated. 214AppDiv395, 212NYS216.
981-56½-New. An assignee suing the assignor for breach of covenant, in order to recover, must establish the invalidity of the obligation, in whole or in part, as between himself and the original obligor, as condition precedent to his suit. 214AppDiv395, 212NYS216.
981-57 36GaA538, 137SE286.
981-60 83 IndA514, 149NE89.
981-60½-New. Assignment of contract procured by fraud being only voidable takes away the assignor's right of action for a previous breach of the contract as long as the assignment is not rescinded. 309Mo 638, 274SW815 (statute authorizing plaintiff to set up in reply fraud in procuring release pleaded in bar does not affect validity of assignment, but merely affords remedy).
981-60½-New. Assignor being liable to owners under contract illegally assigned may recover amount found due thereunder from owners. **CalA** 285P 1081.
981-61 215Ala621, 112S245; 30Hawaii 959, 962 [quotCJ]; 264Mass588, 163NE 172; 47RI 466, 134A4; **Vt** 150A148 (statute does not deprive assignee of right to use assignor's name). But see 41GaA221, 152SE308; 244 IllA466.
983-64 30Hawaii959, 963 [quotCJ].
983-64½-New. Failure of use plaintiff to prove formal assignment of contract is no bar to recovery. 85PaSuper3.
983-66 30Hawaii959, 963 [quotCJ].
985-90 30Hawaii959, 963 [quotCJ].
985-94 [a] **During assignee's life** assignee may prosecute in assignor's name or be substituted as plaintiff. 7F(2d) 117.
985-96 **TexCivA** 286SW633.
985-99 33Ariz147, 264P468; **Mass** 169 NE783; 123 **Okl** 269, 253P63.
985-99½-New. An assignee cannot maintain an action upon an assigned chose in action where his assignor did not have such right. 50Nev325, 258P 1024, 58ALR902.
986-1 264Mass588, 163NE172.
987-11 275US431, 48SCt144; 13F(2d) 36; 255 IllA15; 5PaDist&Co 69; 101 WVa619, 133SE315.
987-12 163La332, 111S776.
988-17 82 IndA187, 145NE514.
989-20 [a] (2) Order to pay plaintiffs specified sum, indorsed "O. K." by defendant, is unambiguous and binding on defendant. **TexCivA** 10SW(2d)794.
989-26 33Ariz147, 264P468; 43 Ida64, 249P254; 214Ky24, 282SW555; 233Ky 476, 26SW(2d)26; **TexCivA** 292SW574.
991-27 [a] **In West Virginia.**–101WVa 619, 133SE315.
991-28 **Utah** 273P515.
992-33 49SD235, 207NW53.
993-40 43 Ida64, 249P254.
994-43 14F(2d)920.
994-49 181Ark694, 27SW(2d)93; **CalA** 286P714; 121Kan279, 246P1004.
995-54 227AppDiv733, 236NYS503; 101WVa457, 132SE882, 885 [citCJ].
995-56 **Utah** 273P515.
996-59 35GaA444, 133SE304; 232Mich 59, 204NW745.
996-62 **IndA** 165NE255.
997-63 83 IndA514, 149NE89.
999-73 35GaA444, 133SE304; 114Nebr 173, 206NW760, 764 [citCJ].
999-74 27 OhA378, 161NE349.
999-75 [b] **Partial assignment of wages is enforceable in equity** if all parties at interest are before the court. 160 Ga842, 129SE86.
999-78 242Mich676, 219NW734 (joinder of assignor and assignee held improper).
999-79 165Ga187, 140SE500; 35GaA 444, 133SE304.
1000-88 165Ga187, 140SE500; 35GaA 444, 133SE304.
1000-89 35GaA444, 133SE304; 232 Mich345, 205NW140.
1000-91½-New. On evidence showing that money out of which a partial assignee was to be paid went into the hands of one of defendants, the bill should be dismissed with costs as to the other defendants. 232Mich345, 205 NW140.
1001-4½-New. or to prevent removal to a federal court; 176Minn315, 223NW614.
1001-11 213Ala567, 105S585 (nonnegotiable paper).

1002-12 213Ala567, 105S585 (nonnegotiable paper); 58ND708, 227NW215 (no balance due from debtor to assignor).

1002-14½-New. Under statute authorizing assignee of nonnegotiable legal chose in action to sue in his own name, defendant may plead any defense in abatement or to the merits. 264Mass 588, 163NE172.

1002-14½-New. Payment under conditionally accepted order does not waive defenses as to balance. Mass 173NE433.

1002-16 TexCivA 298SW614; TexCivA 328W(2d)494. See also 51Nev420, 279 P27.

1004-32 Mass 170NE621.

1005-34 But see 82CalA307, 255P541.

1007-63 TexCivA 328W(2d)494. [a] (1) 122Kan302, 252P228; TexCivA 300SW107.

1007-65 213Ala119, 104S412; 256 IllA 251.

1008-82 90CalA447, 265P1038; 68CalA 40, 228P662; 123 Okl 269, 253P63, 65 [quotCJ].

1009-88 215Ala179, 110S291, 293 [cit CJ].

1009-92 TexCivA 299SW692 (allegations as to assignment of contract held sufficient).

1009-93 236 IllA442.

1009-95 255 IllA15.

1010-96 41GaA446, 153SE436(1stcase).

1010-99 But see 248 IllA108.

1010-9 215Ala179, 110S291; 99WVa 498, 129SE472.

1011-10 TexCivA 273SW703. But see TexCivA 10SW(2d)794.

1011-12 [c] **Effect of not pleading notice.**–214Ky206, 282SW1095.

1011-13½-New. In some jurisdictions failure to allege formal notice of assignment is not fatal to action. 35PortoRico 512.

1017-18½-New. Where defendant has informed assignee that demand will not be recognized, it is unnecessary to allege demand. TexCivA 299SW692.

1012-33 [a] See also 82CalA307, 255 P541.

1013-43 See also 224AppDiv706, 229 NYS504.

1014-65 [a] 89CalA542, 265P369.

1015-68 See also 5PaDist&Co 69.

1015-84½-New. Where defendant's answer denies assignment, he may take advantage of obvious defects in plaintiff's title first appearing in his proof. 215AppDiv225, 213NYS555.

1015-86 Ariz 283P924. See also 85 IndA674, 155NE533.

1016-87 Ariz 283P924; 68CalA40, 228 P662; 123 Okl 269, 253P63.

1016-91½-New. Assignee of contract of sale need not prove ability to pay the purchase price. TexCivA 299SW692.

1016-91½-New. Where failure to allege notice of assignment to debtor is not fatal to action, notice need not be proved. 35PortoRico 512.

1016-99½-New. Fact that order on bank is entirely in payee's handwriting, with exception of cross mark by deceased, creates presumption of fraud. 137Misc564, 241NYS759.

1016-2½-New. Transaction whereby person obtained large part of decedent's property at time she was aged and ill will be presumed void. 137Misc564, 241 NYS759.

1017-4 [c] **Assignee need not prove** that assignor's obligation to it was unpaid. CalA 292P529.

1017-5½-New. Assignor suing assignee has burden of proving damages from assignee's failure to bring action on award within statutory time. Mass 170 NE621.

1017-6 CalA 288P434; CalA 288P795; 83Colo 464, 266P209, 211 [citCJ]; 44 Ida435, 258P179; 1LaA28; 101NJEq 275, 137A565; TexCommnA 280SW574; TexCivA 271SW401 (must show execution by one authorized to make it).

1017-9 Wash 290P834.

1017-10 224Ky346, 6SW(2d)274; 299 Pa140, 149A728; 150Wash529, 273P752.

1018-18 See also MoA 284SW191.

1018-19 TexCommnA 284SW540; Wash 290P984.

1018-20 [a] **Evidence of conduct of buyer's assignee** unauthorized by buyer is not admissible in seller's action against buyer. 293Pa422, 143A103.

1018-24 TexCivA 28SW(2d)939 (check as assignment of funds pro tanto).

1018-26 49RI 53, 139A916; TexCommnA 284SW540.

1019-30 171Ark817, 286SW971; 49RI 53, 139A916; TexCivA 14SW(2d)890.

1019-39 10LaA304, 121S677; 137Misc 564, 241NYS759; TexCommnA 283SW 481. [a] Ariz 283P924; 82CalA94, 254P 919 (to show breach of contract before assignment); 90CalA447, 265P1038; 95 CalA101, 272P789; 98CalA686, 277P749; 172Minn24, 214NW750; NJ 151A839; TexCommnA 283SW481; TexCivA 18SW (2d)754; 68Utah470, 251P10. [b] 12F (2d)895; 208 Iowa322, 223NW164; MoA 296SW201; NJCh 148A199; 196NC450, 146SE74; TexCivA 292SW557; 149Va 267, 136SE573. [c] 165Minn446, 206NW 723. [j]. **Introducing contract and assignment thereof** establishes apparent title to claim sued on. TexCivA 22SW (2d)504. [k] **Assignable interest shown.** –Wash 290P984.

1020-43 35PortoRico 512; TexCommnA 28SSW540.

1020-48 [b] **Consideration not sufficiently proved.**–137Misc564, 241NYS759. [c] **Undue influence** shown, justifying verdict. Me 150A378.

1020-50½-New. Evidence has been held sufficient to show that at the time of the assignment of moneys to become due under a contract the assignor had an assignable interest in the contract. 74 Mont398, 240P825.

1020-50¼-New. Evidence has been held sufficient to show that an acceptance of an order for payment of part of the money to become due under a contract was general and not conditional. 240 Mich462, 215NW314.

1020-50¼-New. Plaintiff in action to set aside assignment cannot prevail because of weakness of opponent's case. Wash 290P834.

1020-50½-New. Evidence held insufficient to show fraud and want of consideration. Wash 290P834.

1020-52 [b] 167Minn389, 209NW263. [c] **Evidence held insufficient to show notice.**–TexCivA 22SW(2d)346.

1021-56 [a] **Evidence held to show that assignor's order was not accepted** by obligor. 12LaA305, 125S465.

1021-64 TexCivA 10SW(2d)794.

1021-65 171Ark482, 284SW779; TexCivA 273SW703.

1021-66 201Iowa148, 205NW833 (whether oral assignment was made as evidenced by later written assignment); 254Mass411, 150NE216; MoA 58SW(2d) 682; 196NC620, 146SE533; 147Wash 394, 266P138 (assumption of contract by assignee); 150Wash529, 273P752.

1021-71½-New. Whether conditions precedent for a reassignment are fulfilled is for the jury. 36F(2d)213.

1021-71½-New. Whether assignee of contract was misled by mill owners' failure to inform it of assignor's indebtedness to them is for jury. 155Wash564, 285P433.

1022-76½-New. Where, in pending suit, plaintiff assigns full claim sued on to another as security for a lesser debt of plaintiff to such other without the debtor's consent, plaintiff's right of recovery should not be restricted to the value of his equity of redemption in an assigned cause of action. 35GaA444, 133SE304.

1022-76¼-New. Judgment denying recovery on the claim of a married assignor for wages because his wife did not join in the assignment as required by statute is improper where a proper assignment was executed before judgment. 89CalA542, 265P369.

ASSIGNMENTS FOR BENEFIT OF CREDITORS

1036-10 163Ga604, 136SE914.

1036-19½-New. Benefit of creditors is an essential element of an assignment for the benefit of creditors. 18F(2d)231.

1036-20 241Mich312, 216NW914.

1036-22 241Mich312, 216NW914.

1036-23 23F(2d)803, 809 [citCJ]; 241 Mich312, 216NW914.

1036-25 41F(2d)547.

1136-34 137Misc872, 244NYS110.

1038-37 204 Iowa188, 215NW236.

1038-39 196Cal 380, 238P81.

1038-40 196Cal 380, 238P81.

1038-43 196Cal 380, 238P81.

1038-46 204 Iowa188, 215NW236. [b] (11) 172Minn149, 214NW787; 154Miss 812, 123S825; 52ND115, 204NW985. [c] (10) TexCivA 276SW308.

1040-47 204 Iowa188, 215NW236; 224 Ky29, 5SW(2d)473. [a] 204 Iowa188, 215NW236.

1041-53 TexCivA 276SW308.

1042-61 204 Iowa188, 215NW236.

1042-62 TexCivA 276SW308.

1042-65 TexCivA 276SW308.

1043-66 TexCivA 276SW308.

1043-71½-New. Chief distinction is an element of mutual agreement. 204 Iowa 188, 215NW236.

1043-72½-New. Distinguishing feature of an assignment for creditors is its statutory basis. 204 Iowa188, 215NW 236.

1044-87 163Ga604, 136SE914.

1045-95 43F(2d)539; 163Ga604, 136SE 914.

1045-96 163Ga604, 136SE914.

1046-98 163Ga604, 136SE914.

1046-99 163Ga604, 136SE914.

1046-3 Transaction held to be assignment.–CalA 288P135.

1047-12 235 IllA75; 77Mont153, 250P 596.

1047-15 77Mont153, 250P596.

1047-16 [b] **Statutes relating to voluntary assignments** held not applicable to trusts created by deed. 224Ky29, 5SW (2d)473.

1047-17 [b] **Statute does not create right,** but merely modifies existing right. 235 IllA75.

1047-19 196Cal 86, 236P138; 204 Iowa 188, 215NW236.

1048-22 196Cal 380, 238P81. [i] **In Maine.**–127Me172, 142A580.

1048-25½-New. Illinois statute in reference to voluntary assignments for benefit of creditors was suspended by the National Bankruptcy Act. 232Mich505, 205NW583 (construing law of Illinois).

1048-26 196Cal 86, 236P138.

1052-56 287Pa205, 134A422.

1052-58 [a] (2) Transfer for benefit of named creditor only held to raise presumption of fraud, as to nonconsenting creditors. 196Cal 86, 236P138.

1053-79 235 IllA75; 287Pa205, 134A 422.

1054-86 287Pa205, 134A422.

1054-88½-New. Equity will liberally construe intent and manner of executing it in considering whether agreement constitutes assignment. 287Pa205, 134 A422.

1055-92 But see 130Kan660, 288P545.

1057-4 36F(2d)643.

1057-11 204 Iowa188, 215NW236; 299 Pa200, 149A179 (creation of trust for certain favored creditors inures to benefit of all).

1060-49 235 IllA75.

1060-54 218Ky575, 291SW768.

1061-71 196Cal 86, 236P138; 204 Iowa 188, 215NW236. But see 25F(2d)518.

1062-80½-New. Assent is essential where the transfer makes creditors beneficiaries of a security contract. 204Iowa 188, 215NW236.

1066-36 252 IllA366.

1066-40 172Ark156, 292SW117.

1067-49 127Me398, 143A788(2dcase) (provision requiring creditors to assent within sixty days and to release their claims in order to share in distribution did not render assignment voidable).

1067-55 127Me398, 143A788(2dcase).

1068-60 151Va93, 144SE474; 153Va143, 149SE501.

1068-67 Kan 289P417.

1069-85 7F(2d)682.

1070-89 152Wash653, 278P693.

1079-68 [b] (10) Assignment to one authorized to continue partnership business and giving inadequate bonds in violation of statute is fraudulent. 36F(2d) 643.

1090-54½-New. Failure of assignee to give public notice and the giving of a personal notice by mail did not necessarily constitute fraud to render the assignment voidable. 127Me398, 143A 788(2dcase).

1091-67 239 IllA16.

1095-6 [g] 130Kan660, 288P545.

1098-29 299Pa200, 149A179.

1099-38 208Ky387, 271SW73; 229Ky 738, 17SW(2d)1024.

1101-56 287Pa205, 134A422.
1101-57 [b] **Failure to attack for six months** prevents transfer from being treated as assignment. 211Ky57, 276SW 1091.
1102-81 [d] (4) Chattel mortgage to indorsers of notes given in payment of goods constituting part of one continuous transaction. 189NC684, 128SE155. [e] **To apply the doctrine** it is necessary to show that grantor was insolvent, secured debts were preëxistent, and that there were other creditors. 189NC684, 128SE155. [f] **Promise to execute** mortgage at future time does not bring mortgage within saving clause of statute relating to preferences. 234Ky580, 28SW (2d)783.
1105-17 7F(2d)352.
1106-38 136 Okl 278, 277P585 (stating Arkansas law).
1113-17½-New. Trusteeship for creditors cannot be disguised under the name of agent or attorney. 287Pa205, 134A 422.
1117-91½-New. A provision for distribution among such creditors only as consent to terms and for return to assignor of share of nonconsenting creditors is void. 304Mo 679, 264SW802.
1118-10 196Cal 86, 236P138.
1118-13 287Pa205, 134A422.
1119-14 287Pa205, 134A422.
1119-15 [a] **Validity of trust for benefit of creditors** held not affected by absence of formal conveyance to trustees. 20F (2d)625.
1119-16½-New. a conveyance, 196Cal 380, 238P81.
1119-16½-New. a deed of trust, 241 Mich312, 216NW914.
1119-22½-New. and the contract of the debtor itself. 9F(2d)650.
1119-23 287Pa205, 134A422.
1120-24 287Pa205, 134A422.
1120-25 287Pa205, 134A422.
1120-26 287Pa205, 134A422.
1120-27 287Pa205, 134A422.
1120-28 Iowa 227NW112 (insufficient); 287Pa205, 134A422.
1127-3 196Cal 86, 236P138.
1130-45 115 Okl 275, 242P861.
1133-99 196Cal 86, 236P138.
1136-34 35F(2d)952 (holding that Texas statute is directory only).
1136-40 196Cal 86, 236P138 (nonconsenting creditors).
1136-41 29 OntWN13 [1925] 3DomLR 1159.
1136-42 29 OntWN13 [1925] 3DomLR 1159.
1137-46½-New. In some jurisdictions assignments of real property for benefit of creditors are as much within the provisions of the code relating to transfers of real property as any other transfer of such property. 196Cal 380, 238P 81.
1137-46½-New. In some jurisdictions an assignee for the benefit of creditors has no authority to dispose of the estate until the assignment has been recorded. 115 Okl 275, 242P861.
1137-47 29 OntWN13, [1925] 3DomLR 1159. [a] (2) Mere indexing of debtor's name and of note of Gazette notice published by trustee in registrar's book is insufficient to give actual notice when instrument itself is not registered. 29 Ont WN13, [1925] 3DomLR1159.
1140-6 [a] **Where assignment has been made and recorded in county of assignor's residence,** court of another county in which his place of business is located cannot require assignee to pay over proceeds of sale of real estate in such second county. 9PaDist&Co 45.
1140-8 See also 127Me172, 142A580.
1140-8½-New. Where there is no provision requiring or providing for a record of assignment, a record thereof has no such effect on the rights, liabilities, or protection of third persons as in the case of a record under recording acts. 127Me172, 142A580.
1140-9½-New. Where there is no provision for a record, a record of the assignment does not constitute constructive notice. 127Me172, 142A580.
1142-51 Iowa 227NW112. [a] **Evidence held not to show debtor waived** requirement that agreement be signed by all creditors. Va 153SE696. [b] **Evidence held not to show acceptance** of creditor's agreement by nonsigners. Va 153SE696.
1144-69 [a] **Under Canadian Bankruptcy Act** voluntary assignment by insolvent debtor of particular property for benefit of his creditors is not void but, when assented to by creditors, vests property in trustee. Man [1929] 3DomLR356.
1146-93½-New. Residuary interest in assignors need not be expressly reserved. 287Pa205, 134A422.
1153-62 52ND115, 204NW985.
1153-63 52ND115, 204NW985.
1057-11 43F(2d)539.
1159-12½-New. If made to creditors generally, a transfer is valid although made to secure certain obligations. 196 Cal 86, 236P138.
1163-70 But see 299Pa200, 149A179.
1165-90 [a] **Evidence held to support finding** that agreement giving trust deed to secure fraudulent debt was consummated. 180Ark432, 21SW(2d)604.
1166-1 23F(2d)803.
1167-11½-New. The law of the domicile of a corporation assignor is controlling. 232Mich505, 205NW583.
1172-59 But see 152Wash653, 278P693.
1172-61 13F(2d)394. See also Me 151A 555.
1173-64 Me 151A555.
1174-76 235 IllA75; 253Mass340, 148 NE807. [a] **It is special jurisdiction** of equity courts to protect such trusts. 235 IllA75.
1174-87 87 IndA301, 159NE467 (trustee is not entitled to possession under contract for conveyance).
1175-98 137Misc872, 244NYS110.
1175-9 Md 150A873.
1176-22 Cal 289P834.
1177-34 87Colo 275, 288P408.
1179-52 219MoA397, 271SW844.
1180-60 Cal 289P834.
1180-62 [d] **Assignee, under corporation's voluntary assignment,** does not represent creditors so as to enforce statutory liability of directors. Cal 289P 834.
1182-91 105Conn584, 136A468; Iowa 232NW67.
1182-95 105Conn584, 136A468.
1183-5 219MoA397, 271SW844.
1184-15 196Cal 380, 238P81.
1184-16 218Ky575, 291SW768.
1187-39 196Cal 380, 238P81.
1187-47 105WVa638, 144SE576, 577 [citCJ]. [a] **Assignor must take notice of statute** where rights of voluntary assignee are regulated by statute. 234 Ky558, 28SW(2d)737.
1188-50½-New. An assignment containing void provisions attempting to coerce creditors to consent nevertheless transfers property to the assignee in trust for creditors and stockholders of the assignor. 304Mo 679, 264SW802.
1188-50½-New. Right of assignee of stock to control corporation cannot be attacked by one having no legal interest. 16F(2d)886.
1188-52 145Va669, 134SE707.
1188-53 105Conn584, 136A468, 470 [quotCJ]; Iowa 232NW67; 244Mich 302, 221NW146; 115 Okl 275, 242P861; 124 Or276, 261P432; 105WVa638, 144 SE576, 577 [citCJ].
1189-54 105Conn584, 136A468, 470 [quotCJ].
1189-55 19F(2d)947; 196Cal 380, 238P 81; 105Conn584, 136A468; 115 Okl 275, 242P861; 124 Or276, 261P432; 105WVa 638, 144SE576, 577 [citCJ].
1189-56 Me 151A555; 322Mo 29, 14 SW(2d)597; 26 OhNPNS552; 115 Okl 275, 242P861; 121 Or482, 256P190; 124 Or276, 261P432; 155Tenn342, 293SW 996.
1190-57 124 Or276, 261P432.
1190-58 121 Or482, 256P190.
1190-60 196Cal 380, 238P81.
1191-85 But see 252 IllA366.
1195-41 129Misc751, 222NYS565. [a] **Running of statutory period held not suspended** by order directing assignee to retain certain sums for expenses of litigation. 129Misc751, 222NYS565.
1196-51½-New. **Abandonment** held not established. 9F(2d)650.
1196-59 196Cal 86, 236P138 (after transfer to sheriff).
1197-73 [a] (1) 196Cal 86, 236P138. (2) Under statute assignment must be made in first instance to sheriff who is required to assign all of the property assigned to him to assignee elected by creditors. 196Cal 380, 238P81.
1198-97 [b] 35F(2d)952.
1199-16 35F(2d)952 (holding Texas statute merely directory); 137Misc872, 244NYS110.
1199-22 115 Okl 275, 242P861.
1200-26 [a] (3) Failure to file bond does not render assignment void. 137 Misc872, 244NYS110.
1202-45 TexCivA 15SW(2d)717.
1203-59 129Misc751, 222NYS565.
1203-64 129Misc377, 221NYS404.
1207-37 [a] **Assignee for benefit of creditors having died,** trust vested in supreme court which had no jurisdiction to direct payment of such deposit to administrator. 134Misc86, 234NYS 557.
1207-40 TexCivA 15SW(2d)717.
1208-60 See also 247 IllA31.
1208-61 128 Or248, 275P28.
1203-62 41F(2d)547.
1209-66 41F(2d)547.
1209-81 330 Ill 42, 161NE62 (cannot create lien on trust estate); 152Md71, 136A274, 277 [citCJ], 50ALR308; NJCh 151A208.
1209-85½-New. An assignee under a nonstatutory assignment has no greater powers than are possessed by one selected under statutes relating to assignment for benefit of creditors. 196Cal 380, 238P81.
1209-85½-New. Law casts on assignee duty of notifying debtor in order to prevent extinguishment of debt. 300Pa 9, 149A881.
1211-13 41F(2d)547; 77Mont153, 250 P596.
1211-14 77Mont153, 250P596.
1211-16 77Mont153, 250P596.
1212-30½-New. Question whether assets are to be considered as in the custody of assignee or in custodia legis is determined mainly from the extent of laws, supervision, and control over the assets. 77Mont153, 250P596.
1213-39 218Ky575, 291SW768.
1215-60½-New. An assignee has the status of an officer of the court analagous to that of a receiver. 208 Iowa596, 226NW140.
1215-61½-New. The trustee does not breach the terms of the trust by borrowing money to pay creditors pushing claims during the first year of the trust. 228Ky794, 15SW(2d)1003.
1215-71½-New. Letters sent to assignor under a trust deed for creditors are held not notice to quit the premises involved as regards the right to replevy crops. 36Wyo 392, 256P80, 57 ALR578.
1215-71½-New. Trustee for creditors, to take crops raised by the assignor, should show a clear right. 36Wyo 392, 256P80, 57ALR578.
1215-71¼-New. The assignor in possession of and raising crop is entitled to a portion harvested as against the trustee for creditors prior to the sale. 36Wyo 392, 256P80, 57ALR578.
1215-73 [d] **Assignee entering into possession** is not liable personally for rent during his occupancy in absence of promise to pay. 126Misc734, 214 NYS561.
1216-75 247 IllA31.
1216-77 See also 199Wis428, 224NW 98.
1216-80 199Wis428, 224NW98.
1217-88½-New. On breach of contract by assignees, the lessor could pursue the original lessee, assignees, or both. 199Wis428, 224NW98.
1217-95 253Mass340, 148NE807 (assignee is liable for goods purchased by him though taken from his possession by receiver for assignor).
1218-7 125 Or598, 268P63, 72 [citCJ].
1218-18 125 Or598, 268P63, 72 [citCJ].
1218-31 [b] **Decree giving no specific directions** as to mode of sale has been construed to authorize trustee to sell free from encumbrances. 309Mo 669, 274SW745.
1221-86½-New. Where defendant creditors bought insolvent debtor's assets openly, every creditor receiving his pro rata share of the total purchase price,

the fact that thereafter defendants secretly agreed to share profits of transaction with other creditors does not render the contract void, as giving plaintiffs a secret preference. 132Misc755, 230NYS596.

1223-22½-New. Where assignee named in an assignment in trust for the benefit of creditors gives no bond, files no inventory, and sells the property at private sale without any attempt to conduct the proceedings as required by law, the purchaser acquires no title as against creditors who refuse to participate in the proceedings and refuse to accept any of the benefits. 115 **Okl** 275, 242P861.

1223-22½-New. Bank taking conveyance from its cashier assignee without consideration and with notice of trust provision is not innocent purchaser for value. **Iowa** 229NW819.

1226-63 330 Ill 42, 161NE62. [b] **Trustee not personally liable** on note signed in assignor's name per himself where trust agreement was shown to lender. 330 Ill 42, 161NE62.

1226-64 244 IllA345.

1227-89 See also 228Ky794, 15SW(2d) 1003.

1227-95 330 Ill 42, 161NE62.

1227-97 228Ky794, 15SW(2d)1003. See also **NJCh** 151A208.

1228-2 228Ky794, 15SW(2d)1003.

1229-16 **Me** 151A555 (sale of mortgaged property without mortgagee's consent).

1229-25 218Ky575, 291SW768.

1229-27 218Ky575, 291SW768. [a] **Unpaid creditors cannot complain** that assets were used to pay other creditors proper pro rata share. 218Ky575, 291 SW768.

1230-35 268US111, 45SCt456, 69**L ed** 870.

1230-42 208**Cal** 417, 281P616 (recovery of moneys and stock returned by assignor's president prior to assignment).

1232-65½-New. The assignee cannot maintain an action to recover title to property transferred by his assignor in fraud of creditors. 196**Cal** 380, 238P 81.

1232-65½-New. An assignee who became such under nonstatutory voluntary assignment by an insolvent assignor who had theretofore transferred the realty in fraud of creditors may bring action under statute to quiet title as against one claiming adversely. 196**Cal** 380, 238P81.

1232-71 [a] **In New York.**-129Misc126, 220NYS525 (leave may be obtained nunc pro tunc).

1233-94 77**Mont**153, 250P596, 599 [cit CJ].

1235-34 196**Cal** 380, 238P81.

1237-68½-New. Evidence offered for purpose of showing that debtor without knowledge of assignment paid assignor has been held admissible in support of contention of payment to assignor. 300**Pa**9, 149A881.

1237-69 [a] 36**Wyo** 392, 256P80, 57 **ALR**578.

1237-78 232**Mich**420, 205NW177 (in suit for wrongful selling of plaintiff's business by defendants, as assignees for creditors, evidence as to value of business which had for several years run at loss warranted directed verdict for defendants).

1237-81½-New. The court may, in a proper case, direct a verdict for defendant. 105**NJL**183, 143A375.

1239-9 287**Pa**416, 135A252. [a] **Creditor's executor may compel accounting for benefit of creditors.**-287**Pa**416, 135A 252.

1239-21½-New. Debtor's agreement with creditors held not to preclude suit. 287**Pa**416, 135A252.

1243-6 But see 211**Ky**259, 277SW276.

1245-61 120 **Or**579, 253P10. See also 228**Ky**794, 15**SW(2d)**1003 (trustee is not chargeable with fees of auctioneer and premiums awarded at auction).

1248-92½-New. Counsel violating state law not entitled to compensation. 41**F (2d)**547.

1248-94 120 **Or**579, 253P10.

1248-94½-New. rent, 120 **Or**579, 253P 10.

1248-94¼-New. stenographers, 120 **Or** 519, 253P10.

1248-94¼-New. postage, 120 **Or**579, 253P10.

1248-94½-New. general office expenses, 120 **Or**579, 253P10.

1248-4 235 **IllA**75.

1252-55 120 **Or**579, 253P10.

1252-62½-New. An assignee taking over the management of an insolvent corporation under an agreement ratified by creditors that his compensation shall be only one half of the assets after paying debts from profits cannot, as against creditors, retain compensation from profits for sale of the product. 108 **WVa**160, 150SE527.

1253-76 [a] (4) Other instances. **41F (2d)**547.

1254-32 120 **Or**579, 253P10.

1256-4 99**NJEq**523, 133A520.

1256-12 224**Ky**29, 5**SW(2d)**473.

1257-39 121 **Or**482, 256P190.

1258-58 [a] **Judgment which insolvent debtor preferentially assigned** should be paid to receiver for benefit of all creditors. 218**Ky**575, 291SW768.

1258-65 235 **IllA**75; 241**Mich**312, 216 NW914; **TexCommnA** 293SW563.

1258-66½-New. where a trust mortgage embodies conditions adverse to creditors, 241**Mich**312, 216NW914.

1259-81 See also 235 **IllA**75.

1261-1½-New. Where the members of a partnership, in executing a trust mortgage of all of its assets, voluntarily created a trust containing conditions adverse to creditors, the court has jurisdiction to appoint a receiver to enforce the trust. 241**Mich**312, 216NW914.

1261-5 See also 144**Wash**202, 257P392.

1263-53 [b] **Creditor filing itemized list of goods** for full value against assignor is not estopped from claiming difference between goods repossessed and entire bill. 181**Ark**1106, 29**SW(2d)** 288.

1264-56 [a] **Creditor identifying only part of goods** fraudulently obtained by assignor can become general creditor as to balance. 181**Ark**1106, 29**SW(2d)** 288.

1264-67 260**Mass**466, 157NE353.

1265-80 53**SD**253, 220NW483. But see 260**Mass**466, 157NE353.

1266-84½-New. A lessor need not proceed against unsecured guarantors before filing a claim with the assignee. 53**SD**253, 220NW483.

1267-6½-New. The question of vendor's lien does not arise against an assignee where the purchaser assignor had received all the money for transfer prior to assignment. 203 **Iowa**174, 210NW 747.

1267-12 **MoA** 283SW745. [b] **Discharge of debtor has been held not shown** by creditor's filing claim with trustee for creditors without agreement to accept dividends in full settlement. 181**Ark**587, 26**SW(2d)**1110.

1268-26 74**Mont**34, 237P523. [c] **In Montana.**-74**Mont**34, 237P523.

1269-31½-New. But a claim by the federal government for freight while operating a railroad need not be presented in the time limited or an extension obtained where notice of the claim is given the assignee. 200 **Iowa**1160, 206NW251.

1270-41 [a] **Where claim is improperly filed with clerk instead of assignee,** it is duty of assignee to appear and resist application of bank for allowance of claim. 208 **Iowa**596, 226NW140.

1270-43 208 **Iowa**596, 226NW140.

1270-47½-New. An assignee is not an agent or representative of creditors for the purpose of objections filed by them to allowance of a claim of one creditor whose claim was filed with the clerk instead of the assignee. 208 **Iowa**596, 226NW140.

1271-65½-New. Under some statutes a claimant may secure an allowance of his claim on a show cause order. 53**SD** 253, 220NW483.

1271-67 But see **MoA** 294SW734.

1272-70½-New. Where the creditor filed an application for allowance of claim with the clerk instead of the assignee as provided by statute, and other creditors objected to the allowance of the claim, the court denying such application and refusing to extend the time to file it is not in error. 208 **Iowa** 596, 226NW140.

1272-70½-New. Judgment sustaining objections by both creditors and the assignee is a pro tanto judgment in favor of the objecting creditors. 208 **Iowa** 596, 226NW140.

1272-79½-New. Service of notice of appeal must be made on creditors whose rights would be adversely affected by reversal of judgment. 208 **Iowa**596, 226 NW140 (notice not addressed to objectors to claim except debtor's assignee held fatally defective).

1272-79½-New. Notice of appeal to the assignee only by a creditor whose claim was disallowed is sufficient if other creditors did not appear and file objections in their own behalf to allowance of claim filed with the clerk instead of the assignee. 208 **Iowa**596, 226 NW140.

1272-80 110**Conn**379, 148A132 (creditors' committee acting as trustee has same duty).

1272-86½-New. Creditors of a corporation having a personal indorsement of the owners who conveyed the property for the benefit of the creditors had the right to share equally in the estate. 13 **F(2d)**394.

1272-87 [b] **Such proceeding is properly instituted in equity,** and reviewing court is not precluded from considering sufficiency of evidence to support findings or judgment. 33**F(2d)**816.

1273-93 110**Conn**379, 148A132 (unless right waived). [c] **Statutory preferences** authorized in receivership proceedings do not apply to assignments for benefit of creditors. 200 **Iowa**1039, 205NW968.

1273-96 [a] (8) Where statute gives preference for six months rent, balance due over that must be distributed as other open accounts. **Va** 149SE615.

1273-97½-New. A creditor's agreement to withdraw his claim for a reasonable time but stating that he would expect the percentage due him is not a waiver of his right to an equal share. 110**Conn** 379, 148A132.

1274-8 200 **Iowa**1160, 206NW251 (claim for freight charge by federal government while operating railroad).

1274-14 [c] **In Iowa.**-200 **Iowa**1039, 205NW968.

1274-15 [d] **Statute giving preferences** to claims for taxes and personal services impliedly excludes all other claims from preference. 200 **Iowa**1039, 205NW 968.

1277-40½-New. A wife has a statutory preference for six months' rent due her from premises leased to her husband, where her husband made an assignment. **Va** 149SE615.

1277-42 [c] **Cost of crude oil** furnished refining company, operating under assignment for creditors, held preferred claim at expense of administration. 20 **F(2d)**625. [d] **On appointment of receiver** court should require unpaid expenses of trusteeship to be paid by receiver before distribution. 20**F(2d)**625.

1279-55 [d] **Existence of trust is negatived** where deposit with insolvent is shown to be in nature of loan by agreement to pay interest thereon. 131**Misc** 622, 227NYS102.

1279-61 See also 181**Ark**1106, 29SW (2d)288.

1282-83½-New. Credit of dividends accruing to creditors under an assignment by one partner to open an account instead of to a joint and several note is not material where both are partnership debts. **TexCivA** 278SW246.

1282-86 **CalA** 288P135.

1283-98 209**Ky**595, 273SW433. [a] **Where creditors' committee violates its duty** of ratable distribution, it is personally liable to unpaid creditor. 110 **Conn**379, 148A132.

1284-16 77**Mont**153, 250P596, 599 [quotCJ].

1284-29 [a] **Evidence of custom to accept pro rata share** as satisfaction held admissible in creditors suit for the bal-

ance of the account. 172Ark1156, 292 SW117.
1285-46 251 IllA529 (writing construed not to release insolvent).
1285-57½-New. Release of one partner in return for making statutory assignment is not operative as to either partner when creditors received less than requisite dividend. TexCivA 278SW246.
1286-67 [b] **Priority between laborers' liens and warehouse receipts.**-IndA 168 NE595.
1287-72 [a] (9) 145Wash664, 261P 381, 55ALR989.
1289-3 19F(2d)947; 244Mich302, 227 NW146. [a] **Mortgage not released by** creditor becoming party to assignment. Me 151A555.
1291-32 219AppDiv193, 219NYS541.
1293-49 [a] **Preferred creditor should invoke equitable remedies** and is not entitled to maintain assumpsit against assignees. Ala 130S219.
1293-66 But see 127Me398, 143A788 (2dcase).
1294-70 See also 127Me398, 143A738(2d case).
1295-88 130Kan660, 288P545. [c] **Execution creditors without notice** of debtor's representations of creditors' agreement are not estopped to assert invalidity of such agreement. Va 153SE696.
1295-89 121 Or482, 256P190.
1296-90 121 Or482, 256P190.
1296-13 228AppDiv174, 239NYS513.
1298-38 [a] **Allegations in petition for appointment of receiver** held insufficient. 224Ky29, 58SW(2d)473.
1298-42½-New. Heirs of the original mortgagor of land conveyed by subsequent grantee to a creditors' committee could not have a receiver appointed for the debtor. 224Ky29, 58SW(2d)473.
1305-71 143Va79, 129SE269. [d] **Deposited proceeds of sale of assignor's property in bank for benefit of creditors** under assignment where both assignee and assignor died without appointment of successor reverted by statute after twenty-five years from assignment to assignor or assignor's heirs. 226AppDiv343, 234NYS557.
1305-71½-New. Where the trust has expired by the running of the statutory period, the assignor is held entitled to a fund as against the creditors. 129 Misc751, 222NYS565.
1305-72½-New. A solvent debtor who has made a trust deed for the benefit of creditors, reserving the surplus, has an alienable interest which his purchaser can protect in equity. 143Va79, 129SE269.
1305-72½-New. An assignor who has conveyed interest in surplus is estopped, after debts have been paid, to assert lack of authority to sell, to the injury of a third person who contracted with him in good faith. 143Va79, 129SE269.
1306-95½-New. A surety on a bond conditioned on faithful performance of the assignee's duties in full compliance with the law is liable for the sum found due to the debtor's subsequently appointed trustee in bankruptcy as found by the bankruptcy court. 37Wyo 11, 258P576 (reason for rule).
1307-17 152Md71, 136A274, 50ALR308.
1307-18 [d] **Notwithstanding rule requiring creditor to accept assignment,** assignee of mortgagee may recover amount thereof from surety of trustee, who misappropriated payment. 152Md 71, 136A274, 50ALR308.
1308-45 [b] **Bond, though payable to state,** is for benefit of person interested. 152Md71, 136A274, 50ALR308.
1308-47 152Md71, 136A274, 50ALR308.
1308-49 37Wyo 11, 258P576.

ASSISTANCE

1314-67 115Nebr795, 215NW122.

ASSISTANCE, WRIT OF

1316-2 [c] **Search of private dwelling house** is not authorized by writ. Sask [1930] 1DomLR830.
1316-3 323 Ill 87, 153NE666; 334 Ill 406, 166NE52 (summary proceeding); 197NC476, 149SE679.
1316-5 IndA 154NE392, 394 [quotCJ].
1316-6 IndA 154NE392, 394 [quotCJ].
1317-14 309Mo 669, 274SW745.
1317-18 96Fla50, 117S849. But see NS [1930] 2DomLR499.
1317-19 96Fla50, 117S849.
1317-24½-New. Under Nova Scotia Temperance Act writ allowing officer to force way into any place to obtain evidence of offense not even suspected should be refused. NS [1930] 2DomLR 499.
1318-35 42Md378; 143Md339, 122A 255; 99Mich419, 58NW318. [c] **Demurrer to petition for writ of habere facias possession**—is not proper under some statutes. 143Md339, 122A255.
1319-45 Mo 28SW(2d)1017.
1320-49 334 Ill 406, 166NE52 (order reversed); 323 Ill 87, 153NE666.
1320-52 204Cal 370, 268P341; Mo 28 SW(2d)1017.
1322-74 IndA 154NE392, 394 [citCJ].
1322-75 IndA 154NE392, 394 [citCJ].
1322-77 IndA 154NE392, 394 [citCJ].
1325-20½-New. The allegations in an answer to a petition are matters of defense which are deemed to be denied. 197NC476, 149SE679.
1325-28½-New. Where an order does not recite facts sustaining it, and the evidence is not preserved, the order will be reversed. 334 Ill 406, 166NE52.
1325-30 323 Ill 87, 153NE666.
1325-34 152Wash269, 277P694.
1326-52 But see 204Cal 370, 268P341.

ASSISTANT

1327-2½-New. One who assists; 318 Ill 600, 149NE526.
1327-4½-New. a helper; 318 Ill 600, 149NE526.
1328-3 82Mont150, 266P869.
1328-5 But see 82Mont150, 266P869.
1328-6 145Miss867, 111S372.

ASSOCIATIONS

1333-3 [a] (5) "The act of a number of persons who unite or join together for some special purpose or business." Black L. D. [quot 21F(2d)501, 506]. [g] **Voluntary association** imports some element of coöperation. 253Mass351, 148NE895.
1333-3½-New. Express trusts and voluntary associations established by written instruments may in some instances run into each other and factors in common. 253Mass351, 148NE895.
1333-3½-New. Where entire beneficial interest of trust is divided into transferable shares, holders having no voice in affairs of trust, such trust is not an association. 253Mass351, 148NE895.
1333-5½-New. The law recognizes an association as a legal entity whether incorporated or not. 89CalA167, 264P 784.
1333-8 [a] 196 Ind213, 147NE766.
1334-11 196Cal 366, 237P1074.
1334-20 115 Or472, 239P96, 41ALR 750; 132SC498, 129SE830.
1334-29 222MoA51, 299SW604; 134 Okl 259, 273P235.
1334-33 222MoA51, 299SW604, 606 [quotCJ].
1335-34 214Ala666, 108S583.
1335-37 215Ky177, 284SW1045; 222 MoA51, 299SW604, 606 [quotCJ]; 134 Okl 259, 273P235; 132SC498, 129SE830.
1335-40 215Ky177, 284SW1045.
1335-41 100Vt99, 135A15.
1335-43 239Mich329, 214NW88.
1335-43½-New. It is only when a partnership has a president or treasurer that it is deemed an association within the meaning of Gen. Assoc. L. § 13. 213AppDiv1, 209NYS598.
1335-45 [a] **Statute requiring association to file documents** with secretary of state held not unreasonable and arbitrary. 241NY405, 150NE497, 43ALR 909.
1335-45½-New. Regulation. Statute requiring certain unincorporated associations to file a sworn copy of by-laws, regulations, membership oath, rostrum of membership, and list of officers with secretary of state is not palpably unreasonable and arbitrary. 241NY405, 150NE497.
1335-45½-New. Klu Klux Klan. The New York statute requiring certain associations having more than twenty members to file copies of their constitution, by-laws, oaths, list of officers and roster and making it a crime to attend a meeting of an association that has not done this, has been held valid. 213AppDiv414, 210NYS269.
1335-45¼-New. Declaration of trust held not to create a "voluntary association" under statute. 265Mass249, 163 NE848.
1336-63 264Mass343, 162NE691.
1336-69 208 Iowa921, 223NW899; 264 Mass343, 162NE691 (effect of incorporation on trust agreement); Mass 172 NE505. [a] **Officers of corporation claiming to have superseded association** cannot contend that they are still officers of association. Mass 172NE505.
1337-70 [a] **Members of association not having voted that corporation be formed,** association is not dissolved by incorporation under circumstances. Mass 172 NE505.
1337-73½-New. A complete cessation of an unincorporated society's action has a tendency to prove an acquiescence in a corporate merger. 264Mass343, 162NE691.
1338-94 214Ala666, 108S583, 584 [cit CJ].
1338-4 [a] (2) Corporation succeeds to property and rights of association. 216Ala549, 114S43. [b] 216Ala549, 114 S43.
1338-7½-New. Where a hospital association is not insolvent when the assets are purchased by a corporation, all debts having been paid, the corporation is not liable for negligent injury to a patient a year before the transfer where there is no basis for the theory that the corporation assumed the obligations of the corporation. 239Mich329, 214NW 88.
1338-12 216Ala549, 114S43.
1341-54 [a] **There is no presumption** that unincorporated association has written articles of association. 71CalA 367, 235P658.
1341-55 119 Oh94, 162NE386.
1341-57½-New. The constitution and by-laws are controlling in all internal matters of the society. 211Ky638, 277 SW500.
1341-58 245 IllA413; 204 Iowa1195, 213NW264; Mass 172NE790; Mass 172 NE796; MoA 16SW(2d)722.
1341-62 221AppDiv475, 224NYS193 (amendment held to relate merely to procedure or remedy, not to fixed rights of members).
1342-63 132 Or128, 283P755.
1342-65 221AppDiv475, 224NYS193.
1342-66 MoA 293SW435.
1342-67½-New. But where no provision was made for repeal of the constitution, but only a method for separate amendments, the adoption of a new constitution is not improper even though not in the method prescribed for the amendments. MoA 293SW435.
1342-72 161La81, 108S132.
1342-79 278US63, 49SCt61, 73L ed184, 62ALR785.
1343-84 [a] **Statute requiring filing** of membership list, constitution, and membership oath by certain associations does not abridge privileges and immunities of United States citizens. 278US 63, 49SCt61, 73L ed184, 62ALR785.
1343-88½-New. Equity will look through form of association to give effect to real purpose of organization. 9F(2d)650.
1343-88½-New. An association has power to adopt rules and regulations for the guidance of members, officers, and employees. ND 228NW830 (rules of order binding on assembly).
1343-90 [b] **Evidence held to show laches** of white fraternal order under such circumstances as to bar it from asserting exclusive right to its name, in suit for equitable relief by injunction against order using similar name. 279 US737, 49SCt485, 73L ed931.
1343-91 [a] (1) 128Misc699, 219NYS 257; 291Pa568, 140A530; TexCivA 273 SW874. [d] TexCivA 28SW(2d)212. [e] **Use of similar name enjoined.**-98NJ

Eq598, 131A219. [f] **Evidence sufficient** to support findings that continued use would constitute continuing and irreparable injury. TexCivA 273SW874. [g] **Injunctive relief not barred by estoppel,** abandonment, nor anything rendering it inequitable to arrest further invasion of plaintiff's rights. TexCivA 273SW874.

1343-92 291Pa568, 140A(3d)(dense) (seceding faction may adopt distinct name without losing right to use words "Orange" or "Orangemen").

1343-92½-New. A partnership association limited has been held not entitled to use the words "trust company" in its name. 246Mich456, 224NW624.

1343-95½-New. [§ 31½] 2½. **As to Emblems, Regalia, Passwords and By-Laws.** A court of equity has the power to prevent the appropriation and use of the by-laws, regalia, paraphernalia, emblems, pins, and passwords of one association by another for fraudulent purpose. TexCommA 273SW176.

1343-96 Ida 293P320; 315Mo602, 286SW86; 12PaDist&Co63; Can [1930] 3DomLR833; 62OntL303, [1928] 3DomLR411 (by lease).

1343-99 130Misc1, 223NYS321; 88PaSuper551.

1344-2 [a] **Ownership of property delivered by members to their association** vests in all members. 13PaDist&Co66.

1344-6 315Mo602, 286SW86.

1345-25 Sask [1926] 3DomLR916.

1345-31 115Or472, 239P96, 41ALR750; BC [1928] 4DomLR628 (lease).

1345-50½-New. A certificate of incorporation of a cooperative dairy association, limiting the member's liability for indebtedness to one dollar, is held not to relieve a member from statutory liability. 129Misc73, 221NYS133.

1346-63 But see 7LaA571 (definite number).

1347-7½-New. Where, because of long continued practice of voting for officers and directors through representatives, members took no part in annual election, such election was properly set aside and a new election justly required when by-laws are so ambiguous as to afford no basis for legality of this method of election. 215AppDiv45, 213NYS137 (notwithstanding small body of protesting members elected officers on same day).

1347-61½-New. No meeting can bind a subsequent one by irrepealable acts or rules of procedure. 167Ga635, 146SE173.

1348-27 222MoA51, 299SW604.

1349-31 132SC498, 129SE830, 832 [quotCJ]. [a] **Liability of members on principle of agency.**—Members of unincorporated association are bound as principals by contracts entered into by their agents in scope of authority where members expressly or impliedly assented to contract. 115Or472, 239P96, 41ALR750.

1349-42 132SC498, 129SE830, 832 [quotCJ].

1349-52½-New. **An approval** of the act of an officer in signing an instrument in behalf of the company takes place when the trustees and officers sign the same instrument after him. TexCivA 284SW305.

1351-46 161La83, 113S774, 53ALR1233.

1351-60½-New. Members of a nonprofit voluntary association cannot replevy the treasurer's books and records from him since he is entitled to possession thereof. 222MoA51, 299SW604.

1351-92 54ND891, 211NW984, 985 [quotCJ]; 115Or472, 239P96, 98, 41ALR750 [citCJ], 97PaSuper602; 11PaDist&Co11; 12PaDist&Co571; 132SC498, 129SE830, 832 [quotCJ].

1351-93 54ND891, 211NW984, 985 [quotCJ]; 134Okl259, 273P235, 238 [citCJ], 132SC498, 129SE830, 832 [quotCJ].

1351-94 54ND891, 211NW984, 985 [quotCJ], 132SC498, 129SE830, 832 [quotCJ].

1352-96 115Or472, 239P96, 98, 41ALR750 [citCJ].

1352-97 55ND707, 215NW147.

1352-98 55ND707, 215NW147.

1352-99 [a] **Evidence held sufficient to show existence of association,** thus relieving officer of liability. TexCivA 284SW305. [b] **Evidence held sufficient to show authority** to execute note for company. TexCivA 284SW305.

1352-2½-New. Members of a committee appointed by an association to determine persons entitled to a reward for apprehending bank robbers are not liable individually for wrong distribution of the reward by the association. 207Iowa1158, 224NW556.

1352-4 140Miss643, 106S433 (rule applied where association is incapable of contracting); 115Or472, 239P96, 41ALR750. [a] **Renewal notes.**—50SD461, 210NW674.

1352-8 [a] **Restricting membership to white persons** is not violative of legal rights of any person excluded. TexCommA 286SW176.

1352-15 245IllA413.

1352-17 171Ark399, 284SW755. See also 61LaA584.

1353-21 71CalA159, 233P823, 828 [quotCJ].

1353-21½-New. Athletic association's refusal to permit a foreign athlete to compete in certain games does not authorize injunctive relief. 230AppDiv416, 245NYS230.

1354-38 245IllA413.

1354-40½-New. The treasurer of a nonprofit voluntary association cannot be held to have withdrawn as a member as matter of law because of having assisted in organizing a rival society and denied rights of the association to property in his possession. 222MoA51, 299SW604.

1355-64 MoA 293SW435, 440 [citCJ].

1356-84 MoA 293SW435, 439 [citCJ].

1356-97½-New. **Presumption** is that the lodge would have done justice in passing on the expelled member's defenses. 221AppDiv475, 224NYS193.

1357-6 169La1090, 126S669 (exhausting remedies within society).

1358-29 [a] **Payment of fine imposed** for violation of rules held proper condition to reinstatement. 12LaA240, 125S188(2dcase).

1358-31 161La81, 108S132.

1358-33 71CalA159, 233P823.

1358-36 71CalA159, 233P823; IndA166NE668; Nev 288P170, 172 [quotCJ].

1358-38 71CalA159, 233P823.

1358-40 258Mass434, 155NE462.

1359-45 1LaA459, 460 [quotCJ]; MoA293SW135, 140 [citCJ]; 221AppDiv175, 221NYS193; 221AppDiv358, 221NYS507. See also Mass 169NE793.

1359-48 MoA 293SW435.

1359-57 Mass 171NE823. [b] (1) 222MoA51, 299SW604. (3) Member of nonprofit voluntary association cannot be sued for conversion of its funds and property. 222MoA51, 299SW604.

1359-58 253Mass351, 148NE895.

1359-58½-New. By adoption of constitution or other general rules societies may determine finally the property rights and interest of members. 211Ky638, 277SW500.

1360-65 222MoA51, 299SW604, 607 [citCJ]; 92PaSuper198.

1361-83 [c] **Members permitting one to sign instrument for all** without ascertaining its terms do so at their peril. MoA 168SW(2d)107.

1361-88 253Mass351, 148NE895.

1361-90 32PortoRico 298. [a] **Use of funds in emergency.**—32PortoRico 298 (trade union).

1362-3 83IndA294, 148NE203. [a] **Agricultural association members may sue directly** member defaulting in undertaking to pay pro rata part of expense. Ida 293P320.

1362-15 132SC498, 129SE830, 832 [quotCJ].

1362-16 98CalA331, 276P1047 (liability as general partners); 134Okl259, 273P235. [a] 132SC498, 129SE830, 832 [quotCJ]. [b] **Members instrumental in contracting debts in prosecution of association's business** are personally liable. MoA 168SW(2d)107. [c] **Local labor union,** being unincorporated association, is not legal entity and its members are jointly liable on its contracts. 133Misc899, 234NYS208.

1362-17 132SC498, 129SE830, 832 [quotCJ].

1362-19 214Ala666, 108S583, 584 [citCJ].

1362-20 214Ala666, 108S583, 584 [citCJ]. [a] 214Ala666, 108S583, 584 [citCJ].

1363-26 214Ala666, 108S583, 584 [quotCJ].

1363-27 214Ala666, 108S583, 584 [quotCJ]; 215Ky177, 284SW1045; TexCivA 48W(2d)140, 143 [quotCJ]. [i] **Signing subscription list and participating in the business** is sufficient to render one liable. 171Ark399, 284SW755.

1363-28 132SC498, 129SE830.

1363-29 215Ky177, 284SW1045; 54ND891, 211NW984, 985 [quotCJ]; 134Okl259, 273P235; 132SC498, 129SE830, 832 [quotCJ].

1364-30 241IllA35, 39 [citCJ].

1364-32 241IllA35, 39 [citCJ].

1364-34 241IllA35, 39 [citCJ].

1364-35 77CalA610, 247P254; 239Mich329, 214NW88; TexCivA 48W(2d)140, 143 [quotCJ].

1364-36½-New. Mere membership in a voluntary association does not make all members liable for acts of their associates done without their knowledge or approval. 263Mass349, 161NE272, 62ALR311.

1364-37 134Okl259, 273P235, 238 [quotCJ].

1365-40 211Ky638, 277SW500; 161La81, 108S132; 12LaA240, 125S188 (2d case); 101NJEq474, 138A532 [quotCJ]; 221AppDiv475, 224NYS193, 199 [citCJ]; 91PaSuper152; Man [1930] 3DomLR930. [b] (2) Decisions of tribunals having power to decide disputed questions are final and will not be reviewed by courts in absence of fraud or irregularity. 155Md265, 141A504. [c] **Law as to interference** by courts with labor unions as to membership and enforcement of rule is same as applied to other voluntary associations. 71CalA159, 233P823.

1365-41 221AppDiv475, 224NYS193, 199 [citCJ]; 91PaSuper152.

1365-42 [d] **Membership must be established** before court will interfere. 71CalA159, 233P823.

1365-43 221AppDiv475, 224NYS193, 199 [citCJ]. [a] **Where membership is wanting** there is no relation of trustee and cestui que trust between local building trades council and local union. 71CalA159, 233P823.

1365-46 71CalA159, 233P823; 98CalA331, 276P1047; Mass 172NE790; Mass 172NE796; 115Nebr375, 213NW366; 101NJEq474, 138A532. [c] **Suffering of hardship** while remedies provided are exhausted does not warrant court interference, unless manner and circumstances of taking appeal practically precludes all redress. 71CalA159, 233P823.

1365-46½-New. Courts of equity cannot undertake to regulate social obligations or morals of social organizations until there are legal rights affected, and courts of law can afford no adequate remedy. 197Wis595, 222NW806.

1365-46½-New. The statute requiring disputes between a society and a member to be decided by arbitration does not remit to the arbitration question whether or not the person is a member. BC [1928] 3DomLR175(2dcase).

1365-50 27HawaiI830; Mass 167NE254; Mo 318SW(2d)803; MoA 28SW(2d)125 [citCJ]; 115Or472, 239P96, 41ALR750; 5PaDist&Co169, 170 [citCyc&CJ]; TexCivA 23SW(2d)484.

1365-51 222MoA51, 299SW604, 608 [citCJ]. But see Mass 164NE393.

1367-63 214Ala584, 108S517; Mo 31SW(2d)803; 5PaDist&Co169.

1367-73 See also 136Okl123, 276P723.

1367-74 15DelCh401, 140A656; 5PaDist&Co169.

1368-75 164La83, 113S774, 776, 53ALR1233 [quotCJ].

1369-4 8F(2d)149; 169Ark796, 277SW546; 232IllA327; 232IllA427, 428 [citCJ]; 115Or472, 239P96, 41ALR750; 9PaDist&Co451; 103WVa417, 137

SE654. But see **MoA** 2SW(2d)125 [cit Cyc].

1369–6½–New. Association acting as de facto corporation may properly be sued. 232 **IllA**427.

1369–6¼–New. Instructions. 171**Ark** 399, 284SW755.

1369–6¼–New. In Manitoba trustees of an unincorporated voluntary association will not be made parties to an action for damages for wrongful expulsion where such joinder would be embarrassing. **Man** [1929] 2**DomLR**719.

1369–11 10F(2d)730.

1370–25 232 **IllA**427 (suits against fraternal beneficiary societies).

1371–34½–New. Jurisdiction of foreign association as affected by number of members. 137**Misc**546, 242**NYS**722.

1371–36 222**MoA**935, 118SW(2d)77.

1372–37 [a] **In Manitoba.**–[1929] 2 **DomLR**719.

1372–38½–New. Under a statute authorizing suit where a cause of action arises, a cause of action comprises every fact necessary to authorize judgment. **TexCivA** 3SW(2d)472.

1372–40 [a] **Labor unions** cannot be brought before the court save by service of process on direct representative. 7F(2d)481. [b] **Service on president** of subordinate local federation cannot give jurisdiction of principal federation. 7 F(2d)481.

1372–41 [a] **Service on president** of labor federation is sufficient to give jurisdiction of federation. 7F(2d)481.

1372–41½–New. Association acting as de facto corporation may properly be served with process. 232 **IllA**427.

1372–41¾–New. Where all member defendants are not served, the court has no power to appoint a receiver for them. 169**Ark**796, 277SW546.

1372–44½–New. Statute permitting service on members named defendants is constitutional as to the association. **CalA** 293P117.

1372–44¾–New. Statute providing for service is unconstitutional in so far as it permits judgment to go against members not named. **CalA** 293P117.

1372–46 [b] **Statute authorizing service of process** on public auditor for fraternal beneficiary society does not preclude valid service on president of such association. 232 **IllA**427. [c] **Service of process on assistant secretary** is insufficient where statute authorizes service upon president, secretary, treasurer, or local agent. **TexCivA** 278SW456.

1372–50 [a] **Service on local chairman** and member of international union does not give jurisdiction of union. 7F(2d) 481.

1372–50½–New. Statutory provision for service of process does not make such service an exclusive method of obtaining jurisdiction over societies. 232 **IllA**427.

1372–51 127**Misc**173, 215**NYS**332. But see 132**SC**498, 129**SE**830. [a] (2) Such statute is not unconstitutional. 10 F(2d)730. (3) Where action against unincorporated labor association was not brought against its president or treasurer as required by statute, but against association as such, service on individual holding office of president does not give jurisdiction of its members. 133**Misc**899, 234**NYS**208.

1373–64½–New. In an action against members of an association for services, a defense that plaintiff agreed to look to a fund to be raised for compensation and not to hold defendant personally liable raises a question as to whom credit was knowingly given according to the understanding of the parties. 115**Or**472, 239P96, 41**ALR**750.

1373–64¾–New. Pleadings and judgments in former actions against an unincorporated association are admissible on the issue whether it is estopped to deny its capacity to be sued because of having held itself out as having such capacity. 200 **Iowa**1151, 202NW505.

1373–64¾–New. In an action on the theory that an association approved purchases and is estopped to deny liability, plaintiff has the burden of proof. 94**CalA**427, 271P382.

1373–64⅞–New. Decisions as to the sufficiency or insufficiency of evidence are cited below. 94**CalA**427, 271P382. [a] **Evidence held insufficient.**–94**CalA** 427, 271P382.

1373–64¾–New. Sufficiency of pleadings. Complaint held to state a cause of action, under statute, against defendants as members of an unincorporated association. 102**CalA**716, 283P370(2d case).

1373–66 27**Hawaii**830.

1373–69 103**WVa**417, 137SE654.

1373–73½–New. A voluntary unincorporated association may not, after judgment against it, plead its incapacity to be sued. 200 **Iowa**1151, 202NW 505.

1374–95 [b] **Equitable accounting is unnecessary** in suit of association against a member for indebtedness. **Ida** 293P320.

1374–95½–New. In an action by an association against a member, an agreement is held not established by indefinite evidence as to understanding of executive committee and members. 110 **Vt**99, 135A15.

1374–95¾–New. Members must exhaust remedies within the association before resorting to the courts. 133 **Misc**899, 234**NYS**208.

1374–95¼–New. Until member has exhausted remedies within the association, no appeal lies to the courts. 230 **AppDiv**416, 245**NYS**230.

ASSUME

1375–5 Iowa 231NW1; 130**Kan**698, 288P574; 129**Misc**213, 221**NYS**127.

ASSUMPSIT, ACTION OF

1380–4 96**Fla**151, 117S853, 857 [cit CJ]; **RI** 132A134.

1380–5 16F(2d)322; 96**Fla**151, 117S 853; 97**Fla**640, 121S882.

1380–6 16F(2d)322.

1380–7 96**Fla**151, 117S853.

1380–8 96**Fla**151, 117S853.

1381–18 Ala 127S524.

1381–19 Ala 127S524.

1381–20 Ala 127S524.

1381–26 Me 151A667. See also **WVa** 155SE303.

1381–27 See also 220**Ala**455, 126S113.

1381–28 Md 148A536.

1382–33 220**Ala**455, 126S113 (contract held not made primarily for benefit of plaintiff entitling him to sue).

1383–36 RI 132A134.

1383–37½–New. Recovery may in some cases be had on common counts, although there is a special contract. 214 **Ala**22, 106S166.

1383–37¾–New. Assumpsit may be maintained to recover a charge on land. 294**Pa**221, 144A91.

1383–47 [c] **In Florida.**–98**Fla**792, 124 S275.

1385–62 94**CalA**124, 270P735; 194**NC** 352, 139SE593. But see 51**SD**548, 215 NW776.

1385–63 [c] **Express promise need not be proved.**–**CalA** 283P944.

1386–68 16F(2d)322; 96**Fla**151, 117 S853, 858 [citCJ]; 97**Fla**848, 122S513; **Iowa** 231NW350.

1386–69 96**Fla**151, 117S853.

1386–71 219**Ala**65, 121S59 (suit may be brought on common counts); 84**CalA** 448, 258P418, 421 [citCJ]; 96**CalA**306, 273P1114; 96**Fla**151, 117S853, 858 [cit CJ]; 97**Fla**848, 122S513; 220**MoA**1077, 279SW769; **MoA** 16SW(2d)107. [b] **Thus** one may recover in indebitatus assumpsit value of benefits conferred under express contract. 284**Pa**410, 131A 360.

1388–74 84**CalA**448, 258P418, 421 [cit CJ].

1388–81 253 **IllA**328; 212**Ky**273, 278 SW578.

1389–83 MoA 285SW1028, 1034 [cit CJ].

1389–87 215**Ala**355, 110S715; 101**WVa** 186, 132SE369.

1390–96½–New. To recover in assumpsit against a tort-feasor, he must have received some benefit from the wrongful act. 78**CalA**751, 248P934.

1390–96¾–New. It must appear that such benefit was taken from plaintiff. 78**CalA**751, 248P934.

1393–19 96**Fla**151, 117S853, 856 [cit CJ]; **Fla** 130S421; 104**WVa**284, 140SE 8.

1393–20 155**Md**410, 142A598.

1393–23 129 **Or**511, 277P823.

1393–25 284**Pa**410, 131A360 (contract must be alleged in indebitatus assumpsit under express contract).

1397–65 10**PaDist&Co**224.

1398–74 6**PaDist&Co** 555 (averment held not sufficient).

1398–77 284**Pa**410, 131A360 (indebitatus assumpsit under terms of express contract).

1399–86 29**Hawaii**376.

1399–88 205 **Iowa**809, 218NW566, 567 [citCJ].

1403–27 219**Ala**155, 121S510.

1404–52 [a] (1) 96**PaSuper**322. (2) Insufficient for want of clarity. 97**Pa Super**114. [b] 87**PaSuper**323; 89**Pa Super**400; 89**PaSuper**415; 89**PaSuper** 537; 89**PaSuper**576; 92**PaSuper**512; 93**PaSuper**227; 97**PaSuper**189; 9**Pa Dist&Co**730; 9**PaDist&Co** 739; 10**Pa Dist&Co** 81.

1404–53 93**PaSuper**147.

1406–77 81**CalA**360, 253P755.

1407–89½–New. ,or that defendant owes nothing due to plaintiff's breach of the contract. 142**Va**789, 128SE268.

1408–99 128**Me**133, 145A893(2dcase).

1408–4 128**Me**133, 145A893(2dcase).

1408–5 220**MoA**1077, 279SW769.

1408–7 50**RI** 140, 145A874.

1409–14 [a] 90**PaSuper**332.

1409–15 284**Pa**410, 131A360; 102**WVa** 103, 134SE592, 593 [citCJ].

1409–16 102**WVa**103, 134SE592.

1409–19½–New. Plaintiff must also prove full performance, 284**Pa**410, 131A 360.

1409–19¾–New. or excuse for failure to perform. 284**Pa**410, 131A360 (action for value of services rendered under express contract).

1409–20 TexCivA 283SW299, 300 [cit CJ].

1409–21 96**Fla**151, 117S853.

1410–25½–New. In assumpsit on a common count that defendants refused to give plaintiff a mortgage for money advanced in improving defendant's premises, an admission of evidence of agreement to give a mortgage is held not erroneous. **RI** 132A134.

1410–25¾–New. Under a plea of general issues evidence of indebtedness due defendants from plaintiff on another contract is not admissible. 48**RI**478, 139A302.

1410–28 90**PaSuper**23 (question as to guarantee).

1410–30 220**MoA**1077, 279SW769 (charge held proper).

1410–30½–New. Where there was proof of delivery and use of materials, demurrers to evidence are properly refused, plaintiff being entitled at least to nominal damages. 149**Md**134, 131A 31.

1410–33 [a] (2) In action of assumpsit to recover price of automobile tires, finding in favor of defendant as to whom they were sold will be sustained. 90**PaSuper**103.

1411–45 Ariz 283P924; 77**CalA**562, 247P264, 266 [citCJ]. [a] But see 220 **MoA**1077, 279SW769.

1412–46 164**Minn**207, 204NW929.

1412–47½–New. Where the jury find no contract basis for work, they must award reasonable compensation for work and for materials and supplies furnished. 125**Me**105, 131A136.

1412–47¾–New. In an action to enforce a quasi-contractual obligation, the measure of recovery is the value of the benefit received by defendant. 85 **IndA** 557, 155**NE**50.

ASSUMPTION OF RISK

1413–14 88**CalA**174, 263P255 (doctrine has its general application to relation of master and servant); **SD** 228NW407. But see **Mo** 26SW(2d)980; **TexCivA** 10 SW(2d)441.

ASSURED

1414–28 Md 148A252 (five insurance policy).

ASYLUMS

1416–2 [a] (4) An asylum is a hospi-

tal. 77Colo 177, 234P1068.
1417-7 94CalA382, 271P568.
1417-14 94CalA382, 271P568.
1418-28 [b] **Statute allowing board of health to license asylums** in its discretion is held reasonable. 82NH451, 135 A531.
1419-48½-New. Under some statutes the board of trustees of a state insane hospital is without power to execute an oil and gas lease on lands owned by the hospital. 149Miss435, 115S563.
1420-66½-New. A declaration against the superintendent of an insane asylum alleging that he placed an inmate in a cell where razor blades were present has been held to state a cause of action. 156Tenn298, 1SW(2d)528.

AT

1420-6 212Ky751, 280SW114, 116, 117 [citCJ&Cyc].
1421-3 212Ky751, 280SW114, 116, 117 [citCJ&Cyc].
1421-14 126 Or373, 270P488.
1421-16 189 Iowa678, 179NW203; 212 Ky751, 280SW114, 116, 117 [citCJ&Cyc]; 126 Or373, 270P488.
1422-19 212Ky751, 280SW114, 116, 117 [citCJ&Cyc].
1422-26 212Ky751, 280SW114, 116, 117 [citCJ&Cyc].
1423-56 164Ga204, 138SE206, 209 [cit CJ].
1424-57 164Ga204, 138SE206, 209 [cit CJ].
1424-62 164Ga204, 138SE206, 209 [cit CJ]; 323 Ill 617, 154NE435.
1425-64 164Ga204, 138SE206, 209 [cit CJ]; 323 Ill 617, 154NE435; 223Ky10, 28SW(2d)1039.
1425-66 164Ga204, 138SE206, 209 [cit CJ].
1425-67 164Ga204, 138SE206, 209 [cit CJ].
1426-79 215Ky222, 284SW1047, 48 ALR327.
1427-97½-New. "upon the stroke of," 323 Ill 617, 154NE435.
1428-14 244 IllA61.
1430-45 215Ky222, 284SW1047, 48 ALR327.
1430-57½-New. "at death," 323 Ill 617, 154NE435.
1433-6 141Miss788, 106S96.

AT LEAST

1438-81 [c] (6) 13PaDist&Co 82.

AT ONCE

1439-91 Sask [1929] 3DomLR153, 154 [quotCJ&Cyc]; Sask [1929] 4DomLR 103, 105 [citCJ].

ATTACHMENT

6 C. J.—28-1 [f] (2) 193NC251, 136SE 706. (3) See also 221AppDiv588, 224 NYS629.
80-9 193NC568, 137SE718.
30-10 116 Or570, 242P610; 33Wyo 326, 239P531, 533 [citCJ].
30-11 34Ariz217, 270P625; 233 IllA 64; 203 Iowa1083, 212NW317; 127Me 110, 141A699; 153Md394, 138A674; 222MoA1228, 3SW(2d)1046; Mont 289 P566; 195NC484, 142SE706; 5PaDist& Co 276; Va 153SE837. [d] (2) Statute authorizing general attachment without affidavit and bond is not violation of due process. 127Me110, 141A699. [c] **Court cannot proceed in attachment** without statutory authority. 203 Iowa 1083, 212NW317. [f] **Writ of attachment has only scope that Legislature has accorded it.**–Cal 291P167.
31-12 97CalA409, 275P849; 233 IllA 64; 127Me110, 141A699 (not absolute right); 153Md394, 138A674.
31-12½-New. An attachment partakes of the nature of an execution before judgment. 192NC31, 133SE399.
31-13 193NC568, 137SE718.
31-14 36F(2d)280; 88 IndA450, 164 NE501; 203 Iowa1083, 212NW317; 222 MoA1051, 6SW(2d)68; 51Nev162, 271 P691, 692 [citCJ]; 193NC568, 137SE 718, 720 [citCJ]; 195NC484, 142SE706; 197NC679, 150SE342; 29PortoRico904; TexCommnA 28SW(2d)834 (distinguishing between "auxiliary" and "judicial" attachment). [j] In Porto Rico.–29 PortoRico904. [k] **Attachment is part of remedy** provided for collection of debt. 127Me110, 141A699.
32-15 193NC568, 137SE718, 720 [cit CJ]; 195NC484, 142SE706.
32-20 203 Iowa1083, 212NW317.
32-21 13F(2d)370, 373 [citCJ]; 56ND 269, 217NW148; BC [1927] 1DomLR 1099.
33-25 Miss 130S302.
33-26 20Vt65.
33-28 72Minn143, 75NW122; 104WVa 561, 140SE537. See also 193NC568, 137 SE718. [a] In Porto Rico.–33Porto Rico31.
33-29 193NC568, 137SE718.
33-30 [b] 233 IllA293.
34-31 160La1089, 108S100.
34-32 NJCir 135A823; TexCommnA 28SW(2d)834 ("judicial attachment").
34-33 203 Iowa1083, 212NW317; 127 Me110, 141A699; NJCir 135A823; 192 NC31, 133SE399; 195NC484, 142SE706; 197NC679, 150SE342.
35-34 But see 33PortoRico31.
35-35 See also 33PortoRico110.
36-46 37F(2d)825; 44 Ida786, 260P 168; 233 IllA64; 13LaA679, 128S682; 153Md394, 138A674; 27 OhA116, 161 NE22; 132 Or63, 284P286; 5PaDist&Co 276; 100WVa449, 130SE662. [c] **Record and return of officer executing orders should show** compliance with requirements in attachment against absentee's property. 13LaA679, 128S682.
36-47 29PortoRico904, 908 [quotCJ].
37-48 29PortoRico904, 908 [quotCJ].
37-50 [b] **"Statutory provision for notice** of every step taken in the proceedings is mandatory and must be observed." 29PortoRico904, 908.
37-52 25 OhA149, 157NE496.
37-53 153Md394, 138A674; 78Mont 357, 254P174.
37-54 78Mont357, 254P174.
37-57 271US251, 46SCt509, 70L ed931.
39-70½-New. Where plaintiff, who sued out a writ of attachment for his sole benefit, was not the sole owner of the cause of action sued on, the writ must be vacated. TexCivA 14SW(2d) 313.
39-74 98CalA580, 277P337(2dcase).
39-80 147Miss374, 112S7; 31NM639, 249P1013; 245NY567, 157NE859.
39-81 [b] (4) Judgment obtained in Pennsylvania by resident thereof against New York corporation for negligence in this state is subject to attachment in New York in suit held by nonresident against such New York corporation and Pennsylvania resident as joint tort-feasors. 245NY567, 157NE 859(2dcase). (5) Attachment may not be granted where plaintiff and defendant are both foreign corporations, and cause of action did not arise in state and did not concern property in state. 245NY570, 157NE861.
40-86 [b] (2) Foreign corporation cannot be attached on ground of nonresidence when it is entitled to transact business within state. 224 IllA336. (3) Under New York Civil Practice Act authorizing attachment against foreign corporation, no exception is made of foreign municipal corporation when acting in proprietary or private capacity. 134Misc133, 234NYS196. [c] (1) 168 Ga182, 147SE494; 221MoA1243, 300SW 841.
41-93 41GaA807, 154SE728. [d] **Evidence of ownership of bull,** wrongfully on plaintiff's land, held insufficient to sustain warrant of attachment except as to one defendant. 240NY307, 148NE 532. [e] **Mere rumor and suspicion** connecting party with wrongful trespass does not justify issuance of warrant of attachment against him. 240NY 307, 148NE532.
41-93½-New. To justify issuance of warrant of attachment against alternative defendants, evidence must be sufficient to sustain warrant as to each. 240 NY307, 148NE532.
41-94½-New. When warrant of attachment against all defendants is not justified, it has been held not to vitiate warrant as against defendant as to which evidence justifies warrant. 240 NY307, 148NE532.
41-95½-New. To justify issuance of warrant of attachment against alternative defendant, there must be sufficient evidence to sustain warrant as to each. 240NY307, 148NE532.
41-3 103WVa200, 136SE860, 861 [quot CJ].
42-7 But see 13PaDist&Co432.
42-9 213Ala414, 104S817; 214Ala415, 108S235; 146Miss260, 111S293; NJ 145A107; 191Wis233, 212NW790, 791, 54ALR266 [citCJ]. [r] In Illinois.–255 IllA456.
43-10 123 Okl 95, 251P1015. [b] 123 Okl 95, 251P1015.
43-12 Utah 274P863. But see 226Ky 137, 10SW(2d)636.
45-34½-New. Concealment implies act designed to accomplish fraudulent purpose following accrual of indebtedness. 35 OhA233, 172NE381 (3dcase).
46-46 9LaA693, 120S248.
47-50 167Ga144, 145SE87; 218AppDiv 402, 218NYS423; 290Pa38, 137A815, 53ALR1020.
47-51 [e] (2) Limited to debts or demands arising upon contract, judgment, or decree. 25 OhA149, 157NE496.
49-65 178Ark6, 9SW(2d)778.
49-67 38GaA521, 144SE397 (effect of retaining legal citizenship in state).
50-73 178Ark6, 9SW(2d)778; 194NC 571, 140SE292.
51-82 142Miss428, 107S557.
51-83 194NC571, 140SE292.
51-84 163La505, 112S397. [a] **Defendant's statement that he owned farm** in state and lived there part of time does not preclude finding him nonresident. 198NC77, 150SE673.
52-88 [a] (4) That citizen moves wife and children and exempt property out of state does not constitute him nonresident where he remains in state without intention of abandoning residence. 144Miss106, 109S849.
52-90 8LaA490; 50SD216, 208NW984; 105WVa476, 144SE294. [b] 10PaDist &Co693.
52-91 50SD216, 208NW984.
52-92 50SD216, 208NW984. [h] **Evidence held not to show intention.**–50SD 216, 208NW984.
53-95 194NC571, 140SE292.
53-97 194NC571, 140SE292.
53-99 122Kan387, 252P226.
53-99½-New. Fact of insolvency of decedent's estate does not bar attachment by general creditor, 122Kan387, 252P 226.
53-99½-New. nor are rights of the attaching creditor affected by subsequent appearance in the action of a later appointed ancillary administrator claiming property for the benefit of unsecured general creditors. 122Kan 387, 252P226.
53-1 213Ky479, 281SW476; 220Ky 499, 295SW429; 226Ky137, 10SW(2d) 636.
54-7 213Ky479, 281SW476.
55-13 [a] (2) Fact that certain money was used for purpose other than payment of plaintiff's debt is not ground for attachment. 146SC290, 143SE879.
55-15 118 Okl 217, 246P1094 (failure to pay).
55-17 200 Iowa935, 205NW745; 315 Mo 966, 287SW432; 222MoA64, 300SW 554 (intent of grantee held immaterial); 118 Okl 45, 246P638; 6PaDist&Co231. [n] **Failure to comply with Bulk Sales Act** is not in itself evidence of fraud justifying attachment. 102NJL144, 130 A632. [o] **Moving on land to make statutory homestead** held not ground for attachment. 172Minn547, 216NW 231. [p] **Attempt to induce creditor to accept reconveyance** of land in satisfaction of debt held not fraudulent disposition of property. 172Minn547, 216 NW231.
57-39 221MoA311, 273SW148.
57-42 167La432, 119S417.
57-43 315Mo 966, 287SW432; 49SD 336, 207NW152. [a] **Motive of debtor immaterial.**–315Mo 966, 287SW432.
58-44 315Mo 966, 287SW432.
58-49 55ND616, 214NW913, 915 [cit CJ].
58-50 233Ky789, 26SW(2d)745.
58-53 177Ark1023, 8SW(2d)462 [quot CJ]. [a] 177Ark1023, 8SW(2d)462.
58-54 233Ky789, 26SW(2d)745.

59–79½–New. Fraudulent intent must be established as a matter of fact. 55 **ND**616, 214**NW**913, 915 [citCJ].
59–80 315**Mo** 966, 287**SW**432. **Erratum.**–"Roach v. Brannon, 57 Misc 490" should read "57 Miss 490."
59–81 118 **Okl** 45, 246**P**638.
60–82 6**LaA**244; 315**Mo** 966, 287**SW** 432; 55**ND**616, 214**NW**913.
60–85 226**Ky**137, 10**SW(2d)**636.
60–86 177**Ark**1023, 8**SW(2d)**462.
61–93 312**Mo** 373, 278**SW**1016, 1021 [citCJ].
62–4 164**Minn**130, 204**NW**633; 222**MoA** 128, 2**SW(2d)**824; 49**SD**336, 207**NW** 152. [j] **Where debt exceeds value of property transferred,** transfer to secure debt is not one with intent to defraud within attachment statute. 164**Minn** 130, 204**NW**633.
62–5 222**MoA**128, 2**SW(2d)**824.
63–6 312**Mo** 373, 278**SW**1016.
63–11 222**MoA**128, 2**SW(2d)**824 (conveyance by child to parent).
64–28 6**LaA**592. [d] **Evidence held not to show intent to defraud.**–**LaA** 128**S** 706.
66–59 [f] **Removal of exempt property** is not ground for attachment. 144**Miss** 106, 109**S**849.
66–60 [f] **Evidence held insufficient.**–41**GaA**740, 154**SE**455. [g] **Burden is on plaintiff** to prove defendant was removing property from state. 41**GaA**740. 154**SE**455.
67–63 118 **Okl** 71, 246**P**476. [c] 149**Va** 157, 140**SE**269.
69–91½–New. Concealment or attempted concealment is ground for attachment although not successful. 136**Miss** 886, 101**S**855.
69–91¼–New. There must be both a concealment and an unjust refusal to apply the property to the payment of debts in order to authorize an attachment. 146**Miss**260, 111**S**293.
69–92 248 **IllA**596 (fraudulent statements in routing); 6**PaDist&Co** 231.
70–96 9**LaA**471, 121**S**254; 146**Miss**260, 111**S**293, 295 [citCJ].
70–1 146**Miss**260, 111**S**293.
70–3 [d] **Collateral verbal agreement to pay interest.**–Fact that person agrees to pay interest on loan and afterward repudiates agreement does not necessarily show that borrowing was fraudulent in its inception. 44**Philippine**60.
72–23 5**PaDist&Co** 276.
74–49 [d] **Cause of action** consists in right in plaintiff, duty resting on defendant, and act by latter in violation of right. 152**SC**108, 149**SE**340, 65**ALR** 1427.
74–51 127**Mo**110, 141**A**699; 78**Mont**357, 254**P**174; 33**PortoRico** 31 ("obligation" defined). [n] **Action of filiation.**–Under Porto Rico statute attachment may be obtained in action of filiation. 33**Porto Rico** 31.
75–56 214**Ala**415, 108**S**235; 205**Cal** 670, 272**P**583; 124 **Okl** 7, 253**P**66.
75–58 But see **CalA** 287**P**569 (no liability existed by terms of contract and hence precluded right to attachment).
75–61½–New. In Oregon attachment is not available in an action for damages arising from breach of covenants to return leased property in the same condition as when leased. 117 **Or**271, 243**P** 559.
75–63 145**Wash**365, 260**P**243 (action on note and to foreclose mortgage securing same).
76–66 91**CalA**763, 267**P**733 (right not defeated because of application of equitable principle to reach property belonging to sole owner of corporation).
76–69 **CalA** 288**P**1088.
76–73 78**Mont**357, 254**P**174.
76–75 24**F(2d)**106 (assessment).
76–77 33**Ariz**310, 264**P**687 (action to enforce bank stockholder's double liability held within statute); **CalA** 288**P** 1088 (holding action for breach of contract for sale to be action for direct payment of money); 78**Mont**357, 254 **P**174. [c] **Repudiation of agreement to pay interest** does not necessarily show that borrowing was fraudulent. 44 **Philippine**60. [d] **Contract for direct payment of money** must be one for unconditional payment of specific sum, free from conditions. 78**Mont**357, 254 **P**174. [e] **Note fixed as to principal and interest but not as to attorney's fees provided for** constitutes claim on contract for direct payment of money. 44 **Ida**573, 258**P**526.
76–79½–New. a bond to secure deposits of county funds, 73**Mont**110, 236**P**1085.
76–79¼–New. , a bond to insure the safety and prompt payment of funds deposited by a county treasurer, 77 **Mont**1, 248**P**207.
77–86 200**Cal** 724, 255**P**183. [a] (3) Contract executed in another state held to contemplate weekly payments where show was operating. 200**Cal** 724, 255**P** 183.
77–87 200**Cal** 724, 255**P**183.
77–91 221**Ky**481, 298**SW**1100; 78**Mont** 357, 254**P**174; 145**Wash**365, 260**P**243. [a] (2) Cause of action against husband for necessaries furnished to wife while living with husband is within statute authorizing attachment. 86**Mont**535, 284**P**532.
78–96 33**Ariz**310, 264**P**687.
78–99 25 **OhA**149, 157**NE**496 (deed obtained).
79–17 71**CalA**42, 234**P**328; **CalA** 287**P** 569; 42 **Ida**421, 246**P**1. [b] (8) Attachment will not lie in slander action on ground that defendant has not sufficient property to satisfy claim. 220**Ky**576, 295**SW**890.
80–18 42 **Ida**479, 246**P**1, 4 [citCJ].
80–19 42 **Ida**479, 246**P**1.
80–21 233 **IllA**64; 224**AppDiv**761, 230 **NYS**32; 57**ND**630, 223**NW**702. [b] 233 **IllA**64. [h] **Libel or slander.**–119 **OhSt** 101, 162**NE**382. [i] **Fraud** in contracting debt. 105**NJL**542, 147**A**337. [j] **Injury to property in state.**–**Cal** 291**P**167.
81–25½–New. Where a statute expressly excepts actions for specified wrongs including libel and slander, such exception does not include slander of title. 178**Minn**27, 226**NW**191, 192 [quotCJ].
81–32 **Ala** 130**S**192 (negligence action); 205**Cal** 670, 272**P**583 (where damages ascertainable); 102**CalA**213, 283**P**107; 255 **IllA**294; 78**Mont**357, 254**P**174, 177 [quotCyc]; **TexCommnA** 276**SW**187.
82–33 205**Cal** 670, 272**P**583; **CalA** 288 **P**1088; 78**Mont**357, 254**P**174; **BC** [1930] 3**DomLR**145. [c] **NJSup** 130**A** 199 (where damages alleged were loss of prospective profits).
83–34 [a] (2) That plaintiff sued for damages for breach, as well as return of consideration, held not to affect right to attachment for part based on obligation to repay purchase price. 102**CalA**213, 283**P**107. [h] **Action for damages based upon simple negligence only** is not action "sounding in damages only." **Ala** 130**S**192. [i] **Phrase "sounding in damages merely" in attachment statute** includes class of demands where facts being ascertained, law is incapable of measuring damages by pecuniary standard. **Ala** 130**S**192.
83–35 78**Mont**357, 254**P**174. [d] (3) Compensation to sales agent as royalty under terms of contract held to have become matured after settlement with contractor authorizing attachment therefor. 147**Miss**374, 112**S**7.
83–38 168**Ga**182, 147**SE**494.
84–40 147**Miss**374, 112**S**7.
84–41 147**Miss**374, 112**S**7.
84–42 [i] **In Mississippi,** to authorize attachment on ground of nonresidence, debt must be due. 146**Miss**369, 112**S**1.
87–56 75**Mont**512, 244**P**488 (demand reduced to judgment); 75**Mont**213, 245 **P**956 (stockholder's liability to creditors of corporation is in nature of guaranty). [d] (3) Where plaintiff retained title till defendant complied with terms of sale, plaintiff had no lien, and in action on purchase-money note not secured by mortgage or lien was entitled to attachment. 72**Mont**535, 234**P**836. [h] **That security is located in another state** does not exclude creditor from operation of statute. 45 **Ida**354, 263**P**484.
88–66 [a] (2) Double liability to creditors of insolvent bank imposed by statute in some jurisdictions on stockholders being in nature of guaranty will not support attachment as upon contract for direct payment of money, in action by receiver to collect stock assessment. 75**Mont**213, 245**P**956.
89–72 34**Ariz**217, 270**P**625; 134**Misc** 275, 235**NYS**239. [e] **Attachment against nonresident who was not plaintiff's debtor** is not within court's jurisdiction. 169**Ga**555, 150**SE**820.
89–73 [b] **All necessary elements must be shown** before insurance. 5**PaDist&Co** 276.
90–83 111**Conn**124, 149**A**246; 247 **IllA** 541; 78**Mont**192, 253**P**254; 222**AppDiv** 694, 224**NYS**726; 151**Va**568, 144**SE**616; **Va** 153**SE**837 (statute construed). [b] (2) Defendant need not prove actual fraud but it is sufficient to show device. 151**Va**568, 144**SE**616. [g] **If principal has not appeared generally or been served** court must dismiss petition. **Va** 153**SE**837. [h] **Writ of provisional seizure** obtained by purchaser at sheriff's sale is properly perpetuated on part of crop seized on land sold. 13**LaA**612, 128 **S**688.
91–84 78**Mont**192, 253**P**254.
91–85½–New. Where defendant in attachment suit is nonresident of state, jurisdiction depends on validity of attachment. **Ida** 291**P**1048.
91–86 37**F(2d)**141. [c] **Stock of domestic corporation.**–Legislature has power to fix situs of shares of stock of domestic corporation at its domicile for purpose of attachment. 150**Miss**164, 116 **S**740.
92–87 **TexCivA** 20**SW(2d)**413.
92–89 150**Miss**164, 116**S**740.
92–91 116**Nebr**317, 217**NW**94, 56**ALR** 594(2dcase) (statute may fix situs at domicile of debtor); 219**AppDiv**312, 219 **NYS**628.
92–93 218**AppDiv**154, 218**NYS**17. [d] **Debt owed by foreign corporation doing business in state to foreign corporation not doing business in state** is not subject to attachment in action by resident against latter corporation. 214**AppDiv** 238, 212**NYS**39.
92–95 [a] **Jurisdiction for purpose of attachment** is to be found at domicile of debtor. 219**AppDiv**312, 219**NYS**628.
92–96½–New. The debt is subject also to control of courts in which its "situs" may be held to be for purpose of garnishment or other auxiliary processes. 219**AppDiv**312, 219**NYS**628.
93–99 43**F(2d)**651.
93–7 160**Tenn**329, 24**SW(2d)**881.
94–14 36**F(2d)**280.
95–19 **Miss** 130**S**302; **Va** 153**SE**837 (holding no conflict as to venue in general and special statutes).
96–25 [a] 22**AlaA**168, 113**S**641.
96–25½–New. Provisions as to actions maintainable elsewhere than at domicile of defendant have been held inapplicable. 168**La**326, 122**S**54.
96–26 7**LaA**91.
97–31½–New. Attachment suit instituted in county where property is found is not removable to county of defendant's residence for trial although defendant is freeholder or householder there. **Miss** 130**S**302.
98–37 21**AlaA**441, 109**S**179.
98–40 163**La**505, 112**S**397.
99–48 [b] (2) Where proper affidavit was not made, clerk has no authority to issue attachment. 158**Tenn**98, 11**SW (2d)**687.
102–77 152**SC**108, 149**SE**340, 65**ALR** 1427.
103–79 221**Ky**415, 298**SW**1097.
103–80 [a] 21**AlaA**441, 109**S**179.
103–85 See also 44**Philippine**60.
104–97 5**PaDist&Co** 71. [a] **Unverified complaint** cannot be used to augment affidavit for purpose of furnishing grounds for issuing warrant of attachment under statute. 152**SC**339, 150**SE** 67.
104–2 See also 127**Misc**810, 216**NYS**496.
105–5 170**La**779, 129**S**201.
105–11 [e] **Excusing failure of higher officer to sign.**–Affidavit of bank cashier without explanation of failure of higher officer to sign is insufficient. 218**Ky** 248, 291**SW**49.
106–12 **MoA** 278**SW**737.
106–13½–New. An affidavit signed by a corporation by its president is not affidavit of the president. **MoA** 278**SW** 737.
106–15 **TexCivA** 298**SW**443.
107–18 But see 34**Ariz**217, 270**P**625.
108–21 158**Tenn**98, 11**SW(2d)**687.

109-29 153Md394, 138A674 (declarations held sufficient); 221AppDiv742, 225NYS279; 132SC303, 128SE503 (must contain allegations of facts to withstand attack for irregularity). [j] (2) Other instances. 250Mich270, 230NW146.
111-46 21AlaA469, 109S373.
114-60 7PaDist&Co 414; 11PaDist&Co 291.
114-62 Mo 19SW(2d)654.
115-65 132SC303, 128SE503 (to withstand attack for irregularity). [i] **Term "informed" held not to indicate hearsay.**–127Misc51, 215NYS214.
118-81 Contra 100WVa449, 130SE662.
118-84½-New. Where exhibits annexed to, and incorporated in, complaint furnish some allegation of fact as to damage, the papers are not defective because the complaint of itself makes no such allegations. 126Misc306, 212NYS557.
118-89 153Md394, 138A674 (affidavit held not fatally defective).
119-2 [a] **Affidavit insufficient** to show parties to contract on which attachment based. 100WVa449, 130SE662.
119-6 41GaA231, 152SE611.
120-19 **Erratum.**–"20 Misc. 568" should read "20 Miss. 568."
121-31 See also 29 OhA336, 163NE504.
121-36½-New. Using "co" instead of "company" is sufficient designation of a corporation. 224 IllA336.
121-38 223Ky771, 4SW(2d)734; 250 Mich270, 230NW146; 104NJL87, 139A 419; 11PaDist&Co 291; 100WVa449, 130SE662. But see 5PaDist&Co 276.
123-39 [i] **Performance of conditions is sufficiently alleged** by averment that plaintiff performed all conditions of contract. 127Misc51, 215NYS214.
124-42 [a] 269US163, 46SCt50, 70Led 163. [b] **Affidavit held insufficient.**–9PaDist&Co 238.
125-46 [a] 160Tenn329, 24SW(2d)881.
125-55 82Colo108, 257P348; Tex CommnA 28W(2d)834.
126-56 See also TexCivA 298SW303. But see 34Ariz217, 270P625. [o] **Affidavit held defective** because unliquidated damages were included in lump sum. 102CalA213, 283P107.
127-57 Md 151A21. [e] **Affidavit alleging indebtedness in principal sum** is not vitiated by reference to interest but is sufficient to sustain attachment to extent of principal sum at least. 77Mont 1, 248P207.
127-58 47Ida519, 277P562.
129-71 221AppDiv742, 225NYS279.
131-95 219Ky827, 294SW792; 223Ky 771, 4SW(2d)734.
132-2 [d] **Object of requirement is to limit attachment to net amount due plaintiff.**–128Misc460, 219NYS92.
132-3 42Ida479, 246P1; 134Misc275, 235NYS239. [k] **Requirement is of allegation of counterclaim** which plaintiff is willing to concede as just. 128Misc 460, 219NYS92.
134-25 82Colo108, 257P348; 146Miss 260, 111S293; 58ND622, 226NW812 (sufficient); 160Tenn329, 24SW(2d)881. [j] **Grounds as to all defendants** must be shown by affidavit. 223Ky771, 4SW (2d)734.
135-32 NJ 145A107; 153SC362, 150SE 764 (in action based on negligence).
135-35 TexCivA 28SW(2d)267. [a] (5) Other instances. TexCivA 28SW (2d)267.
136-36 TexCivA 28SW(2d)267.
136-41 242Mich149, 218NW756; Tex CivA 28SW(2d)267.
140-72 225Ky529, 9SW(2d)302.
140-73 [e] **Moving papers held insufficient.**–44Philippine60. [f] **Moving papers held insufficient.**–106WVa252, 145 SE380.
140-74 [d] **Statement held insufficient.**–5PaDist&Co 276.
141-83 221MoA311, 273SW148; 152SC 108, 149SE340, 65ALR1427. [d] **Affidavit held insufficient.**–5PaDist&Co 276. [e] **Affidavit insufficient.**–Affidavit alleging that defendants were about to dispose of certain money with intent to defraud creditors. 146SC290, 143SE 879.
145-17 NJSup 134A756.
146-28 TexCivA 16SW(2d)567(1st case). [a] TexCivA 298SW443.
146-30 Utah 274P863 (affidavit held insufficient).
146-33 [g] **Affidavit not showing that debt not secured.**–Averment that debt is not secured does not satisfy requirement of recital that debt has not been secured. 73Mont110, 236P1085. [h] **Failure to allege facts, and mere use of statutory language,** renders attachment voidable. 78Mont192, 253P254.
146-34 [a] (2) When it appears from affidavit that debt was originally secured and that such security, without act of plaintiff, has become valueless, it need not be alleged that debt is not secured by any mortgage or lien upon real or personal property. 42Ida421, 246P10. [d] **Affidavit held insufficient.**–48Ida147, 279P1090 (merely irregular and not void). [e] **Affidavit held insufficient,** for failure to aver facts of worthlessness. 78Mont192, 253P254.
147-38 57ND630, 223NW702. [a] **Petition** for attachment held insufficient. Va 153SE837.
147-41 [e] **Where general order of attachment was issued** description of realty is not required. 235Ky487, 31SW (2d)723.
149-63 [e] **Provision in statute** that clerk of court must issue writ of attachment upon receiving affidavit has been held equivalent to provision for filing affidavit with clerk. 102CalA107, 282P418.
150-80 [d] **Evidence sufficient** to establish filing. GaA 155SE784(1stcase).
151-82 221MoA250, 2SW(2d)187; Tex CivA 282SW903. [k] **Proceeding instituted by affidavit in name of individual** will not support declaration brought in name of partnership. 34GaA298, 129SE 562.
151-83 TexCivA 293SW229.
151-91 164Minn130, 204NW633 (proof of transfer already made held not to establish charge in affidavit that defendant was about to assign).
152-92 78Mont192, 253P254.
152-93 [a] 269US163, 46SCt50, 70Led 163.
152-95 158Tenn98, 11SW(2d)687. [c] **If affidavit is sufficient on its face,** court has jurisdiction to issue writ. 42Ida 421, 246P10.
152-95½-New. **Supplementary affidavits** cannot cure defects. 5PaDist&Co 276.
152-98 78Mont192, 253P254.
153-99 78Mont192, 253P254. [j] **Subsequent attaching creditors** cannot question sufficiency of affidavit in prior attachment. 78Mont192, 253P254.
153-11½-New. Defendant cannot contest facts stated as ground for attachment by mere denial. Iowa 230NW516.
154-15 78Mont192, 253P254.
154-18 156SC546, 153SE566.
154-25 151SC97, 148SE718(2dcase) (complaint stated good cause of action for attachment). See also CalA 287P 569 (pleading not conclusive).
154-26 153SC362, 150SE764.
154-33 153Md394, 138A674; 73Mont 110, 236P1085; 127Misc810, 216NYS 496; 197NC193, 148SE28; 11PaDist& Co 691. [s] **Refusal held erroneous.**–153 Md394, 138A674.
155-34 MoA 278SW737; 160Tenn329, 24SW(2d)881. But see 7PaDist&Co 564.
156-36 197NC679, 150SE342.
156-36½-New. Where an affidavit for issuance of a warrant of attachment was insufficient because the grounds were not set out in the affidavit, the court properly refused to vacate attachment where it found, from the evidence, reasonable grounds for assertions in the affidavit, judgment being held in effect an amendment of the affidavit. 197NC193, 148SE28.
156-46 [b] **Allowing amendment by changing name of plaintiff from corporation to company** held not abuse of discretion. 3Del 604, 141A109.
156-47 [b] **Firm name cannot be substituted** in declaration for individual in whose name proceeding was instituted by affidavit. 34GaA298, 129SE562.
157-63 73Mont426, 236P1089.
158-75 220Ky576, 295SW890.
159-7 [d] **Omission of words "notary public"** after name of officer before whom affidavit was sworn to may be cured by amendment. TexCommnA 276 SW137.
159-14 220Ky576, 295SW890.
160-23 226Ky137, 10SW(2d)636.
161-38 [h] **To amplify proof of damages,** supplemental affidavits may be used by showing that terms of agreement sued upon have special and technical meaning in trade and thus make out prima facie case of damages. 126 Misc306, 212NYS557.
161-40½-New. [§ 282a] **F½. Examination of Third Person.** Under North Dakota statute providing for a proceeding to compel a third person, not making a certificate on demand, as provided therein, to appear and testify as to property of the judgment debtor in his possession or under his control, examination will not be compelled where moving papers fail to show that he had property of defendant in his possession or under his control. 50ND 839, 198NW123.
161-41 [k] **Undertaking on attachment** is not "undertaking for costs" within statute. 254NY107, 172NE143.
161-42 150Va473, 143SE750.
162-43 109Okl 254, 235P168.
162-47 34PortoRico 265 (where personal property is attached in possession of third persons). [c] **Requisites to attachment of personal property without bond.**–3Del 422, 138A638.
162-52 73Mont110, 236P1085.
162-58 5PaDist&Co 276.
163-62 [d] **Statute held repealed.**–30 Hawaii658.
163-64 215Ala66, 109S358.
164-68 CalA 285P908.
164-69 5PaDist&Co 276.
165-77 Ala 112S343.
165-79 TexCivA 13SW(2d)944.
166-97 37F(2d)825. [b] **Ratio must remain constant** throughout litigation. Md 151A21.
166-1 But see 209Ky95, 272SW381.
167-6 125Kan665, 266P31 (where penal sum is limited by statute not to exceed double amount of plaintiff's claim).
167-8 27F(2d)538; 27F(2d)542 (demand held not unliquidated so as to permit court under statute to fix amount). [a] **In Texas.**–37F(2d)825.
167-12 [a] **Allowing amendment increasing damages** without exacting double new amount is error. Md 151A21.
167-13 254NY107, 172NE143.
170-38½-New. An undertaking signed only by plaintiffs is insufficient. 91CalA 312, 266P993 (cannot be own sureties).
170-38½-New. An attachment undertaking constitutes an original, independent, and absolute contract on the part of the sureties. 101CalA675, 282 P386.
172-52½-New. That the bond was not signed in the office of the clerk of court does not render it invalid. 37Wyo 98, 259P520.
172-52½-New. **"Execute,"** as used in a statute, means to complete, sign, seal, or deliver to the clerk for approval. 37Wyo 98, 259P520.
173-70½-New. **Approval of common pleas before writ issued** required. 5PaDist&Co 279.
173-72 5PaDist&Co 276.
173-73 [b] (2) Code Pub. Gen. L. (1924) art 9 § 28, authorizing amendment of "all other papers in attachment proceedings," has been held sufficiently broad to include bonds. 153Md394, 138A674. (3) Refusal of leave to amend where parties were transposed has been held error. 153Md394, 138A674.
173-73½-New. and rules of court may permit such amendment, 49Nev145, 241 P317, 43ALR1331.
173-75 91CalA312, 266P993.
174-85 5LaA214.
174-89 209Ky95, 272SW381 (failure to object).
175-93 156SC546, 153SE566.
175-95 5LaA194.
175-97 See also 75CalA91, 242P32.
175-97½-New. **Substitution for defective bond** not permitted. 5PaDist&Co 279.
175-4 21AlaA441, 109S179.
175-4½-New. An order stating merely that a writ of attachment issue out of the supreme court of the state of New Jersey in the sum of one hundred thou-

sand dollars to be awarded to plaintiff has been held insufficient. NJ 145 A107.

175-6 128 Okl 85, 261P361.

175-7 128 Okl 85, 261P361; 132 Or63, 281P286.

176-9 88 IndA450, 164NE501; 75Mont 512, 244P488 (cannot issue on demand reduced to judgment); TexCivA 299SW 514. [h] **After final judgment** "there may be cases where . . . pronouncements are of such a nature that they cannot be executed immediately, certain previous proceedings that require time being necessary." 33PortoRico 110. [i] **In Porto Rico.**-33PortoRico 110, 111 [citCyc].

177-18 Minn 232NW512.

178-20 Minn 232NW512.

178-21 [g] **Service by publication against nonresident.**-In action against nonresident in which order for attachment is issued at time of filing of petition and real estate is attached, affidavit for service by publication must be filed and first publication must be made within sixty days from filing of petition. 128 Okl 85, 261P361.

179-22 128 Okl 85, 261P361.

179-31 158La303, 103S823.

185-96 [d] **Where complaint demands different amounts from different defendants,** warrant should follow complaint and direct attachment of so much property of respective defendants as will secure amount alleged to be due from each. 77Mont1, 248P207. [e] **Effect of filing of amended and supplemental complaint.**-77Mont1, 248P207.

187-13½-New. When required, the property must be described with reasonable accuracy. 81NH288, 125A434.

188-21 37GaA167, 139SE115.

188-28 [a] **In New York.**-133Misc151, 231NYS35.

190-45½-New. There is no variance between a complaint praying six per cent interest, a warrant simply praying interest, and a notice of levy not mentioning interest. ND 228NW420.

190-48 3LaA723. But see Minn 232 NW512.

190-52½-New. One not a party to an action may attack the validity of a warrant collaterally. 128Misc77, 217 NYS764.

190-54 127 Okl 56, 259P861. [c] 37 GaA167, 139SE115.

191-59 170La779, 129S201; NJCir 135 A823. [o] **Without new affidavit order or bond** second writ is invalid, where writ levied was lost. 13LaA679, 128S682.

192-60½-New. More than one writ may issue out of the same court against the same defendant at the suit of different plaintiffs. NJSup 143A733(2d case).

192-60¾-New. Where the writ was issued and levied but the sheriff lost it, a subsequent writ is in the nature of an alias supported by the old affidavit, bond and order. 13LaA437, 125S302.

193-68 222AppDiv645, 227NYS378, 382 [citCJ]. [d] (2) Under Civil Practice Act and Real Property Law income of trust fund exceeding twelve dollars per week may be levied on under execution on judgment but not under warrant of attachment before judgment. 218App Div402, 218NYS423. [k] **Certificates of indebtedness of foreign municipal corporation** held in proprietary capacity and deposited to guarantee obligation sued on are subject to seizure on attachment. 134Misc133, 234NYS196. [l] **In New York.**-Del 151A718.

193-69 204Cal 391, 268P637 (property standing in name of one person but owned by debtor); 13LaA380, 128S314 (sale of property of owner on which clerk has privilege for amount due for services is subject to attachment); 82 Mont574, 268P787; Wis 255NW751; BC [1927] 1DomLR1099. [h] (1) 121 Kan6, 245P742. But see 240Mich661, 216NW446. [t] **Claim for loss under insurance policy** is subject to attachment. 22F(2d)541. [u] **Life estate** is not subject to attachment to pay remainderman's debt. 118Nebr142, 223 NW794.

193-69½-New. No attachment arises against a dead man's estate. 315Mo 872, 288SW54(2dcase).

193-69¾-New. Property in possession of reclamation district may be attached before judgment. 151Wash542, 276P 891.

195-71 Wash 290P1005.

195-75½-New. Debt is subject to attachment as property of person to whom debt is due. 37F(2d)141.

196-77 [g] **In New York.**-130Misc366, 223NYS824.

196-78½-New. a debt, 73Mont139, 235 P767, 40ALR590.

196-83 But see 138Misc576, 245NYS 464.

196-85½-New. Where rents are levied on under a warrant of attachment, the attaching creditor acquired a lien on the rents. 134Misc692, 236NYS549.

196-86½-New. Under a statute authorizing attachment of a debt, cause of action, or demand, a money judgment rendered in the same state is attachable. 219AppDiv312, 219NYS628.

196-88 80Mont258, 260P116. [c] **Upon termination of contract of bailment,** bailee loses right of possession, as against attaching creditor of bailor. 80 Mont258, 260P116.

196-89 3LaA573. [d] **Public funds of school district** are not subject to attachment. 58ND934, 228NW435.

197-93 205 Iowa154, 217NW833 (rent notes payable to mortgagor for rental for current year of redemption after sale of land on foreclosure). See also 222MoA1228, 3SW(2d)1046. [c] See also 218AppDiv154, 218NYS17.

197-98 50Philippine512 (growing sugar cane).

197-99 130Kan415, 286P217.

198-6 93US355, 23Led903; 62 Ill 221, 14AmR86.

199-10 102Conn684, 129A721 (interest not so uncertain as to render property incapable of being attached).

199-12 258Mass402, 155NE429; Tex CivA 282SW832.

199-14 [a] TexCivA 25SW(2d)233 (right to possession because of removal of chattel from state).

201-30 37F(2d)141.

202-39 122Kan357, 252P249.

202-42 154Wash10, 280P350.

202-45 218AppDiv402, 218NYS423; 114 Tex516, 272SW1098 (instruments entitled to be recorded are not required to be recorded to protect equitable title evidenced thereby against attachment).

202-46 48Kl 120, 136A249.

203-48 36GaA188, 136SE90.

203-49 153Md50, 137A509; 78Mont395, 255P1049; 82Mont338, 267P292.

204-58 288Pa294, 135A637. But see 37 GaA395, 140SE417 [citCJperBell.J].

204-60½-New. Where land is conveyed by deed to the trustee for the use of the beneficiary during his life, to be kept free from encumbrances, and on the death of the beneficiary to be conveyed by the trustee to the life beneficiary's children, they took no interest in land subject to attachment prior to the death of the life beneficiary. 20 OhA 209, 151NE778.

204-61 53SD499, 221NW257.

204-66 292Pa556, 141A484.

205-69 121Kan6, 245P742; 112 Okl 35, 239P660; 118 Okl 45, 246P638. [a] (2) Sheriff seizing personal property sold by attachment defendant can attack sale only on theory that attachment plaintiff obtained a lien on the property as security for his debt and that thereby sheriff was brought into priority with property. 116 Or538, 241P69.

206-75 126Me49, 136A121; 263Mass61, 160NE403.

206-77 221AppDiv588, 224NYS629 (right to share in profits).

206-80 111Conn299, 149A668. But see 149Wash679, 272P75. Contra 226App Div343, 234NYS357.

206-82 [c] **Insured's option** to take surrender value is not evidence of debt capable of being attached, till option has been exercised. 222MoA1228, 3SW (2d)1046.

207-84 154Wash10, 280P350.

207-88 126Me49, 136A121.

207-90 [c] **Creditor of lessee** cannot, by levy of attachment, prevent lessor from terminating lease for breach of terms thereof. 70CalA70, 232P744.

208-94½-New. Attachment levied on an oil lease attaches lien to oil thereafter severed from realty. TexCivA 289SW 894.

208-99 70CalA70, 232P744.

208-3 70CalA70, 232P744 (attaching officer cannot make partition of property).

210-21 36F(2d)776; 7Alaska598; 128 Misc77, 217NYS764; 20 OhA356, 152NE 193. But see 37F(2d)141. [b] (9) Money on person of prisoner taken into custody of officer on arrest. 198Cal 713, 247P205, 48ALR580. (10) Fine in hands of sheriff. 97PaSuper141. [f] (2) 5PaDist&Co 687. (5) As title to exempt property never passes to trustee in bankruptcy but only qualified right of possession, it is not custodia legis. 14PaDist&Co 168. [h] See also 27 Oh NPNS494.

211-23 193NC814, 138SE169.

211-23½-New. Property attached in hands of bailee caring for it under contract on shares is in custodia legis although bailee has the right of possession which the sheriff cannot disturb under attachment of bailor's creditor. 80Mont258, 260P116.

211-23¾-New. Where an attaching creditor, who, on failure of the sheriff to take possession on termination of the bailment contract, requested bailee to keep possession until the conclusion of his action against the owner, bailor is not the owner of the property, 80Mont 258, 260P116.

211-23¼-New. and is without rights to deliver the property into the possession of such former bailee. 80Mont258, 260 P116.

211-28 128Misc77, 217NYS764. [e] **Public record made by filing of prior levy is constructive notice of levy.**-128 Misc77, 217NYS764.

211-29 32PortoRico 373. [a] **Custodian of attached personal property** may refuse surrender to third person on ground that property is in custodia legis. 32PortoRico 373.

211-30 [c] **Priority of first attachment extinguished** if officer allows property to leave his possession under subsequent attachment. 32PortoRico 373.

211-33½-New. Where only part of property is attached, a subsequent creditor may attach the remaining property. 105NJL557, 146A308.

212-34 71CalA779, 236P329.

212-37 10PaDist&Co 133, 134 [citCJ].

213-41 17F(2d)434; 213Ky317, 280SW 1090, 1092 [citCJ]; 4LaA238; 13LaA 437, 125S302.

213-42 213Ky317, 280SW1090, 1092 [citCJ].

213-43 233Ky749, 26SW(2d)1043; ND 229NW3. [a] See also 201 Iowa82, 206 NW241.

217-77½-New. Upon release of defendant's property from possession of a bailee, the sheriff, upon receiving notice thereof from the bailee, should take the property into his possession on behalf of bailor's attaching creditor. 80 Mont258, 260P116.

217-83 [d] **Levy before return term** is necessary for court to keep its jurisdiction, and, if lost by not so doing, cannot be acquired by any subsequent proceeding. 40GaA427, 149SE711.

217-84 254NY328, 172NE524.

219-6 [d] **Goods in possession of carrier** cannot be attached where negotiable bill issued for goods, unless bill first surrendered to carrier or its negotiation enjoined. 254 IllA115.

219-18 [e] **Shed and barn attached to dwelling house** held part thereof as bearing on right of entering for attachment. 127Me53, 141A99.

220-20 240NY185, 148NE185, 39ALR 1211 (safe deposit box).

220-22½-New. An officer may not be ordered to break into a safe deposit box leased jointly to defendant and a third person, with no showing that it contains any of defendant's property and on oath of colessee that it contains no such property. 127Misc83, 215NYS 169.

220-24 12LaA222, 125S765 (posting writ on courtroom door or bulletin board); 55ND132, 212NW817, 820 [cit CJ].

221-28 55ND132, 212NW817, 820 [cit CJ].

221-29½-New. In New York statute

requiring person holding defendant's property to furnish sheriff with certificate of defendant's interest is not mandatory to make valid levy. 126Misc802, 215NYS96 (may be waived by sheriff for whose protection statute was intended).

221-32 37GaA395, 140SE417; 55ND 132, 212NW817, 820 [citCJ]; 57ND17, 220NW130 (notice need only describe property levied on).

222-33 203 Iowa1083, 212NW317. [c] **Levy on non-resident's realty** held sufficient notice of issuance and execution of writ. TexCivA 23SW(2d)514.

222-34 ND 229NW3.

222-35½-New. Where defendant had actual notice by a duly served original notice and did not complain for two months, failure of officer to give notice of levy held waived. 203 Iowa1083, 212NW317.

222-35⅓-New. A clerk of court is held not in possession of a judgment as to require notice of levy. 203 Iowa1083, 212NW317.

222-36 37GaA395, 140SE417. [c] **Tenant in possession is not remainderman's agent** for receipt of notice. 37GaA395, 140SE417. [d] **Official notice is essential.**-37GaA395, 140SE417.

222-38 See also 4LaA24.

223-43 213Ala592, 105S679; 214Ala20, 106S223; Fla 128S483.

223-45 42F(2d)269; 214Ala20, 106S 223; 192NC31, 133SE399; 33Porto Rico 31; 34PortoRico 599; TexCivA 27 SW(2d)572. [f] (2) Seizure of personal property by officer charged with enforcement of writ constitutes levy. 27 OhA86, 160NE875. (3) Officer's delivery of writ to owner in presence of property with notice he was taking it, though officer failed to leave agent to represent him. Fla 128S483. [g] (6) Assertion by officer that levies on property under writ in his possession, where property is in view, and power to assert immediate dominion or take into custody if necessary, is actual taking. 213Ala592, 105S679. [n] **Levy implies seizure of possession.** 201 Iowa82, 206 NW241. [o] **Actual touching** of property not necessary. 213Ala592, 105S 679. [p] **Various articles are presumably attached and held together** when attached and under control of one keeper. 84CalA28, 257P540.

224-46 Fla 128S483; 203 Iowa1083, 212NW317.

225-47 44 Ida786, 260P168.

225-52 213Ala592, 105S679.

226-56 211Ky849, 278SW133. [c] **Retention of possession of restaurant equipment** after attachment is unnecessary, and officer's levy and putting of equipment in charge of restaurant manager is sufficient. 211Ky849, 278SW 133.

226-57½-New. Under some statutes property in the possession of a bailee cannot be taken from his possession. 84Mont494, 276P946.

226-58 39GaA41, 145SE919(1stcase); 44 Ida786, 260P168, 170 [citCJ]; 126 Misc802, 215NYS96. See also 55ND132, 212NW817, 820 [citCJ]. [d] **Buyer's equity in automobile in his possession under conditional sales contract** cannot be reached by serving seller with writ. Utah 287P175.

227-59 213Ala592, 105S679 (act of officer must put property out of control of debtor).

227-61 213Ala592, 105S679.

228-67 [a] **Warrant for payment of money by city** which had not reached and been signed by city treasurer need not be taken into actual custody. 126 Misc802, 215NYS96 (leaving certified copy of warrant of attachment with person holding it is sufficient).

228-70 214Ala20, 106S223; 84CalA28, 257P540 (heavy and unmanageable articles); 202 Iowa791, 211NW405; 128 Misc77, 217NYS764. [c] (9) Warrant for payment of money which had not reached and been signed by city treasurer. 126Misc802, 215NYS96 (warrant at this point not being negotiable). (10) Warehouse. 31F(2d)40. (11) Crops and animals. 202 Iowa791, 211 NW405. (12) Store. 128Misc77, 217 NYS764. (13) Steam shovel. 84CalA28, 257P540.

228-71 [a] **In California.**-84CalA28, 257P540.

228-72 127Me243, 142A775 (separation of portion attached as bulky personalty).

229-73 202 Iowa791, 211NW405; 126 Misc802, 215NYS96; 131Misc941, 229 NYS261.

230-78 17F(2d)434. [i] **Actual seizure of stock not essential.**-17F(2d)434. [j] **Actual seizure necessary in some jurisdictions.**-NJCh 150A346.

230-78½-New. A certificate required to be delivered to the sheriff, attaching corporate stock, is not essential to the validity of the attachment. 3Del 381, 138A600.

231-81 30F(2d)842.

231-82 112 Okl 35, 239P660. [h] **Sheriff need make no tender** where there is finding that property attached was not covered by mortgage. 69Utah194, 253P676. [i] **In Massachusetts.**-167NE 649.

232-84 See also 204 Iowa816, 215NW 956.

232-90 [i] **Service on defendant's debtor.**-220AppDiv237, 221NYS119.

233-95 37GaA395, 140SE417.

233-96 37GaA395, 140SE417 (covert act held essential). [b] **In Porto Rico.**-33PortoRico 31.

233-1½-New. Unless the officer levying attachment upon real property commits trespass, takes possession of lands for the purpose of gathering crops, or sells crops in an ungathered state, the levy is insufficient. TexCivA 12SW(2d)271.

234-9 123Kan447, 256P167.

235-12 123Kan447, 256P167.

235-16 ND 229NW3 (notice of attachment); 29PortoRico 904 (Comp. St. [1911] § 5241). [c] See also 123Kan 447, 256P167. [i] (4) Description reading "S. E. ¼ of section 8-91-38 in Buena Vista county, Iowa," held sufficient. 201 Iowa82, 206NW241. [p] **Entry on encumbrance book** signed by sheriff creates lien on property and gives notice to third parties. 201 Iowa 82, 206NW241. [q] **Contents of notice of attachment.**-ND 229NW3.

236-17 50SD618, 211NW599. [a] **In Idaho.**-291P1048.

236-18 50Philippine670.

236-22 154Wash163, 281P327 (interest of purchaser under executory contract).

237-29 145Wash81, 259P13.

237-33 33PortoRico 31.

233-48 But see 213Ala592, 105S679. [c] 126Misc802, 215NYS96 (does not invalidate levy).

239-53½-New. Omission to make inventory does not invalidate levy. 9F (2d)686.

240-63 [e] **Effect of failure to identify property.**-Where sheriff levied on two of six pool tables which were left in unrestricted possession of debtor and were not identified in inventory and appraisal, levy affords no protection to subsequent innocent purchasers. 240 Mich390, 215NW338, 54ALR1535.

240-77 170Minn313, 212NW593, 594 [citCJ]; 192NC31, 133SE399.

241-80 35 OhA499, 172NE631.

241-82 170Minn313, 212NW593, 594 [citCJ].

241-86 84Mont494, 276P946.

242-91 See also 32PortoRico 694.

242-92 NJCir 135A823.

242-93 168Ark850, 271SW948. [a] (2) Second attachment held void. 131 Okl 58, 268P208.

242-95 Del 151A718; Fla 128S483; 127Me110, 141A699; Mass 167NE649 (mortgagee cannot proceed under mortgage while attachment is in force); 126 Misc802, 215NYS96 (on debt due from city); Vt 151A507; 33Wyo 326, 239P 531, 533 [citCJ].

243-96 203Cal 748, 265P926; Cal 290 P290; 102CalA71, 282P801; 102Conn 425, 129A221; 326 Ill 602, 158NE422; 230Ky700, 20SW(2d)717; 232Ky662, 24 SW(2d)576; TexCivA 271SW293. [e] **Attaching creditor charged with constructive notice** of outstanding equities. 102CalA71, 282P801. [f] **Attaching creditors are not innocent lienholders** where pledgee did not have title to stock at time levied. TexCivA 19SW (2d)808.

243-97 111Conn299, 149A668; 205 Iowa1285, 217NW852; 86Mont331, 283 P420; 35 OhA59, 171NE613; TexCivA 300SW648. [a] 102CalA71, 282P801; 103Conn341, 130A379. [b] **Attaching creditor of land,** incumbered by lien securing notes, held estopped to assert notes were paid, where debtor was estopped. 218Ky846, 292SW513, 515 [cit CJ].

243-98 103Conn341, 130A379.

243-1 107Conn52, 139A700.

243-3 13LaA380, 128S314.

244-6 127Me110, 141A699; 32Porto Rico 502. [g] **Registration of attachment** in Porto Rico under mortgage law see 32PortoRico 502. [h] **Statutes invalidating sales or transfers by debtor.**-158Tenn53, 12SW(2d)711 (sale not invalidated where it was made hour after filing attachment but before service of process or notice).

244-7 32PortoRico 694. [b] **Record of attachment is of personal nature** and creates no real right in favor of creditor. 32PortoRico 694.

244-9 192NC31, 133SE399.

244-10 [b] (2) Attaching creditor cannot be deemed purchaser in good faith under Oregon statute where premises attached were in possession of debtor claiming homestead exemption. 129 Or 128, 276P680.

244-11 154Wash163, 281P327. [c] **Acquires no greater interest in land than debtor had** at date of levy unless registration laws abrogate common-law rules and expressly define effect of unrecorded conveyances against creditors without notice. 114Tex516, 272SW1098. [d] **Sheriff has no right or authority to make or permit to be made changes and alterations** in building while it is in his possession. 154Wash163, 281P327.

244-12 [a] **Rights and remedies of lessee and lessor** for wrongful or excessive levy. 154Wash163, 281P327.

245-17 131 Okl 58, 268P208.

245-21½-New. A deed erroneously stating the amount of attachment does not affect grantee's right as against an attaching creditor whose attachment referred to was obvious. 107Conn52, 139 A700.

245-26 131 Okl 58, 268P208, 209 [quot CJ].

246-30 51ND173, 199NW585. [f] **An appearance and motion to dissolve** is waiver of defects. 6PaDist&Co 231.

246-31 51ND173, 199NW585.

246-32 203 Iowa1083, 212NW317.

246-39 213Ky317, 280SW1090, 1092 [quotCJ].

246-40 213Ky317, 280SW1090, 1092 [quotCJ].

247-41 213Ky317, 280SW1090, 1092 [quotCJ].

247-42 213Ky317, 280SW1090, 1092 [quotCJ]. [c] **Loss of writ by sheriff** after issuance and levy will not deprive court of jurisdiction acquired. 13 LaA437, 125S302.

247-44½-New. **In New York** filing of sheriff's return required only in case attachment is vacated or annulled. 9F(2d) 686.

247-47 [a] **Deputy sheriff may make returns,** although without personal knowledge of facts. 73CalA441, 238P 1104.

247-52 [f] **In South Dakota.**-50SD618, 211NW599. [g] **In Texas** attachment may be returnable immediately. CivA 299SW514. [h] **In Vermont.**-99Vt50, 130A756.

253-1 [g] 235Ky487, 31SW(2d)723.

253-4 [a] (8) "S. E. ¼ of section 8-91-38 in Buena Vista county, Iowa" held sufficient. 201 Iowa82, 206NW241.

257-42 3Del 381, 138A600; 40GaA427, 149SE711; 51ND173, 199NW585, 588 [citCJ]. [j] **Right to amend is statutory** in some jurisdictions. 51ND173, 199NW585.

258-45 40GaA427, 149SE711 (amendment properly allowed). [a] (2) Purpose of amendment being in interest of justice and to make record speak truth, amendment should be allowed in exercise of enlightened discretion of court. 51ND173, 199NW585.

259-51 51ND173, 199NW585 (return of deputy).

259-56 262Mass284, 159NE620; 51ND 173, 199NW585, 588 [citCJ].

259–58 51ND173, 199NW585, 588 [citCJ].
259–60 [a] 51ND173, 199NW585. [b] **Motion to quash or vacate** (1) is proper method of challenging correctness of amended return. 51ND173, 199NW585. (2) Application should be made in action in which return was filed and to court that permitted amendment. 51 ND173, 199NW585.
259–64 25F(2d)509; 109Conn433, 146 A843.
260–67½–New. A statute providing for the levy and return of a warrant of attachment and record by the clerk of the superior court has been held in pari materia with a statute permitting the filing of a notice of the pendency of an action and must be construed together. 197NC679, 150SE342.
260–70 25F(2d)509.
261–85 197NC679, 150SE342.
261–87 109Conn433, 146A843.
262–93 214Ala20, 106S223; TexCivA 12SW(2d)271.
262–96 214Ala20, 106S223; 51ND173, 199NW585; TexCivA 12SW(2d)271 (or privies).
262–97 214Ala20, 106S223; 51ND173, 199NW585.
264–98 51ND173, 199NW585.
265–11 [c] Contra 34PortoRico 599.
266–13 214Ala20, 106S223; 44 Ida786, 260P168. [c] **It may be impeached** (1) by evidence outside of record. 44 Ida786, 260P168. (2) Proof of falsity must be clear and convincing. 44 Ida 786, 260P168. (3) Evidence held sufficient to impeach return. 44 Ida786, 260P168.
266–29 40F(2d)942; 104WVa561, 140 SE537; 33Wyo 326, 239P531. [k] **Scope, purpose, and effect of lien are only what statute prescribes.**–84Mont 276, 275P278.
267–30 200 Iowa935, 205NW745.
267–32 Mont 289P566.
267–33 12LaA365, 124S544.
269–40 34Wyo 378, 244P216, 221, 44 ALR1255 [citCJ].
269–43 75Mont512, 244P488; Mont 289 P566; 192NC31, 133SE399. See also 200 Iowa935, 205NW745.
271–53 153Md50, 137A509; 75Mont 512, 244P488.
271–54 197Cal 439, 241P86; 75Mont 512, 244P488; Mont 289P566.
271–55 93CalA640, 270P249. See also 214Ala20, 106S225.
272–60 [a] **Supersedeas bond** filed with appeal from judgment discharges attachment lien. 197Cal 439, 241P86.
273–70½–New. A statute providing for extension of attachment liens has reference only to existing liens and has no application to liens which have expired by operation of law or otherwise. 199Cal 569, 250P666.
273–70½–New. Continued possession by court of attached property is prerequisite to continuance of lien. 17 F(2d)434.
273–71 213Ky317, 280SW1090.
274–81 123Kan329, 254P1040; 123Kan 359, 255P37; 4LaA706; TexCommnA 2 SW(2d)834; TexCivA 15SW(2d)1095.
274–82 94CalA223, 270P999; 123Kan 329, 254P1040; 123Kan359, 255P37; 52 ND685, 204NW8.
274–83½–New. Attachment does not impress any lien on an interest in land under a contract to purchase. 205Cal 715, 272P1063.
275–91 17F(2d)434. [f] **Refusal to continue to pay keeper's fees for caring for heavy machinery** does not release attachment thereon. 84CalA28, 257P 540 (steam shovel).
276–1 17F(2d)434; 13LaA679, 128S 682. [g] **Failure to pay amount directed within time fixed.**–Mass 167NE649.
276–4 Mass 167NE649. [a] See also 33 PortoRico 581.
277–27 33PortoRico 581.
278–30 153Md50, 137A509.
279–46 [e] **Release by custodian.**–32 PortoRico 373.
280–51 94CalA31, 270P458; 229Mich 635, 201NW951, 952 [citCJ]. [d] **Effect of compromise of claim.**–Mont 289 P566.
280–53 232Ky442, 23SW(2d)551(2d case); 82Mont574, 268P787 (quære whether statute authorizes enforcement by execution).
283–78 76CalA338, 244P955; 43 Ida 618, 253P838; Mass 172NE347; 123 Okl 57, 251P1010; 50Philippine592; TexCommnA 28W(2d)834.
284–92 22F(2d)541.
285–5 But see 93CalA640, 270P249. [b] **Extension of term of lien pending appeal.**–Application under statute must be made to trial court. 205Cal 472, 271 P749.
286–18 24 OhNPNS433. [t] **Judgment creditors and attachment creditors** held to be on common-law footing, independent of recording law, as to estate covered by levy. 173Minn225, 217NW 136.
287–22 24 OhNPNS433. [g] **In Philippines.**–44Philippine261.
288–25 95CalA476, 273P37; 3Del 66, 130A392. But see 226AppDiv343, 234 NYS357.
288–28 [e] **Preference of seller of personal property.**–33PortoRico 66.
289–33 [g] **Proceeds of sale of crop.**–232Ky662, 24SW(2d)576.
289–41 CalA 289P169 (alimony and attorney's fees).
289–42 CalA 289P169 (wife's lien created by order in separate maintenance suit); 71 Iowa486, 32NW400.
289–43 169Ark529, 276SW1; 67 Iowa 113, 24NW747; 108SW856, 32KyL853, 1340, 107SW301; 234Ky613, 28SW(2d) 959; 141Mass489, 6NE737; Mass 169 NE431; 5NJEq43; 111 Okl 253, 239P 449; 116 Or570, 242P610; 46Philippine 753. [h] **In Philippines.**–44Philippine 261.
290–48 166Ark591, 266SW682; 53CalA 524, 200P752; 59 IndA227, 109NE227 (dictum); 201 Iowa82, 206NW241; 7 KyOp7; 6LaAnn758; 202Mass214, 88 NE1084; 141Tenn156, 207SW730; Tex CommnA 276SW211.
291–54 50Philippine670. [f] **Judgment lien created by nunc pro tunc order** takes priority over creditors attaching on same day order was granted with knowledge that judgment was rendered against owner of premises. 21 OhA282, 152NE757. [g] **Lien of attachment levied after judgment was obtained but before it was docketed** has priority over lien of judgment. Mont 289P566 (rule applied to lien of attachment perfected after defendant's death by compromise with administrator).
291–56 But see 221Ky415, 298SW1097.
292–58 Wash 290P221.
292–65 234Ky613, 28SW(2d)959; 27 OhA505, 161NE551 (assignment of interest in pending suit). [p] 152Md273, 136A640. [s] But see 82Mont574, 268 P787.
293–66 224Ky249, 5SW(2d)1076; Tex CivA 287SW117. [g] TexCivA 285SW 941. [l] **Purchaser of machinery without notice** of attachment lien acquired title where levy under statute was by affixing notices which sheriff failed to replace after their removal. TexCivA 10SW(2d)173.
293–67 83CalA707, 257P866.
294–75 200 Iowa935, 205NW745; 46 Philippine241.
297–82 173Minn225, 217NW136 (attachment against one without record title held not benefited by law); 178 Minn55, 226NW201; 44Philippine261; 33PortoRico 873. [h] (2) Similar rule applied. 44Philippine261. [q] **In absence of recorded deed to debtor,** attaching creditor is not entitled to benefits of registration statute but gets only such title as debtor actually has. TexCivA 274SW164.
298–84 10LaA571, 121S646.
298–85 Contra 114Tex516, 272SW1098.
298–87¼–New. , or unrecorded mortgage. 44Philippine261.
298–89 173Minn225, 217NW136 (creditor has no lien).
299–92 TexCivA 274SW164.
299–2 12LaA365, 124S544; 262Mass 284, 159NE620; NJCir 135A823; 105 NJL557, 146A308; 192NC31, 133SE 399.
300–3 192NC31, 133SE399.
302–22 254NY328, 172NE524.
303–28 44 Ida447, 258P365, 369 (citCJ perBudge,J). [g] **In North Carolina.**–192NC31, 133SE399.
304–29 44 Ida447, 258P365, 369 [citCJ perBudge,J].
309–92½–New. In Porto Rico an attaching creditor claiming to have a preferred claim for wages cannot maintain an action against a prior attaching creditor to enjoin a sale under the attachment, his remedy being in the court in which the prior attachment proceeding is pending. 33PortoRico 346.
309–95 29PortoRico 904.
309–96 29PortoRico 904.
309–97½–New. In Porto Rico an order directing administration of property attached is void where it is neither alleged nor proved that the property is subject to the risks referred to in Attachment Act § 12. 33PortoRico 31.
310–1 44 Ida786, 260P168; 32Porto Rico 373. [n] **"Physical possession"** under statute means control of property. 128Misc77, 217NYS764. [o] **Permitting use by plaintiff.**–193NC251, 136 SE706.
310–6 107Conn300, 140A354; 44 Ida 786, 260P168; 170Minn313, 212NW593, 594 [citCJ]; 32PortoRico 373; 33Porto Rico 581, 584 [citCyc]. [g] 66Vt513, 121A438.
312–14 211Ky849, 278SW133; 80Mont 258, 260P116 (order of court is required for sheriff to appoint keeper).
312–20 [a] **Evidence held sufficient** to sustain finding of ownership in defendant in attachment. 80CalA61, 251P338. [b] **Amount recoverable** for wrongful release held not limited by amount stipulated in writ. 80CalA61, 251P338.
312–22 33PortoRico 581.
313–23 84Mont494, 276P946.
313–25 254Mass599, 150NE874; Mass 172NE347 (property in storage).
313–27 Mass 172NE347.
313–28½–New. Sheriff may enforce special interest acquired in attached property for the protection of all concerned. 192NC31, 133SE399.
314–36 128Misc77, 217NYS764; 193NC 251, 136SE706. [k] **In New York.**–127 Misc420, 216NYS412.
314–39 TexCivA 289SW894.
314–43 Contra 128Misc77, 217NYS764.
315–60½–New. Double damages for willfully withholding personalty attached are held not applicable where the attachment defendant paid the debt to the judgment debtor out of the proceeds of a check not the property of the judgment debtor, on which the levy was attempted. 220AppDiv237, 221NYS119.
317–71½–New. Failure to take a receipt in writing does not dissolve the attachment. 254Mass599, 150NE874.
317–76 254Mass599, 150NE874.
317–78 51ND173, 199NW585.
319–97 51ND173, 199NW585.
322–23 See also 131 Okl 174, 268P204.
326–94 [a] **Evidence held not to show** conversion of attached goods by creditor as bailee thereof from constable. 254Mass599, 150NE874.
327–12 233 IllA293; 204 Iowa892, 216 NW6; 262Mass377, 160NE268; NJ 140 A787 (provision as to garnishment release bond held not applicable to attachment release bond); 195NC484, 142 SE706; 52ND47, 203NW197; 93 PaSuper104; 33PortoRico 31.
328–13 233 IllA293.
329–15 But see 29PortoRico 904.
329–20 See also 47RI 76, 129A811.
329–21 117 Or547, 244P879.
329–23½–New. Where an undertaking recites that it is given for a release and discharge of the attachment, the release of the property is a consideration for the undertaking, although it does not appear that an order for discharge was made. 78Mont516, 255P 1043.
329–24 132Misc193, 229NYS296.
329–25 37GaA226, 139SE587. [e] **Bond given after levy.**–37GaA226, 139SE587.
330–26 37GaA226, 139SE587.
330–29 13LaA612, 128S688 (holding

statute not restricted to nonresident defendants).

330-33 117 Or547, 244P879 (justification of sureties may be waived by plaintiff). [g] **In Porto Rico.**–32PortoRico 9 (construing § 6 attachment statute in connection with Code Civ. Proc. § 335 and Ins. L. § 159).

331-45 12LaA266, 125S502.

332-52 117 Or547, 244P879, 881 [cit CJ]. [a] 117 Or547, 244P879.

332-56 78Mont516, 255P1043, 1048 [cit Cyc]; 117 Or547, 244P879, 881 [quot CJ].

332-57 91CalA327, 267P138; 252Mass 376, 147NE903; 262Mass377, 160NE 268; 78Mont516, 255P1043, 1048 [cit Cyc]; 117 Or547, 244P879, 881 [quot CJ].

333-58 117 Or547, 244P879, 881 [quot CJ].

333-59 [c] **Appraisement is waived by** sureties' failure to request same before putting up bond. **NJ** 140A787.

333-60 **TexCivA** 286SW303.

333-61 [b] (2) Approval of bond to perform judgment by clerk after return of writ is mandatory condition precedent to discharge of attachment and restitution. 204 Iowa892, 216NW6.

334-62 29PortoRico 904. [l] **In Porto Rico.**–29PortoRico 904. [m] **Collateral attack on order.**–199Cal 569, 250P666.

334-65 117 Or547, 244P879, 881 [quot CJ].

334-66 132Misc193, 229NYS296; 117 Or547, 244P879, 881 [quotCJ].

334-67 132Misc193, 229NYS296; 117 Or547, 244P879, 881 [quotCJ].

334-68 13LaA612, 128S688 (holding stipulation that defendant will satisfy judgment implies he takes property subject to court's action).

335-69 130 Okl 284, 267P259, 260 [cit CJ].

335-69½-New. Words "actual value" mean the fair market value and not what the property would bring at execution sale. 102Conn684, 129A721.

335-69⅓-New. Recognizance bond not construed as strictly ordinary bonds. 233 IllA293.

335-70½-New. And the fact that the amount of the bond given for the release of the personal property is greater than the ad damnum in the suit is not ground for a release of the real estate. 47RI 76, 129A811.

335-71 104Conn285, 132A459; **Tex CivA** 271SW293.

335-73 [a] 78Mont516, 255P1043. [c] **Liability of property to subsequent levy.**–78Mont516, 255P1043.

336-75 104Conn280, 132A454; 204 Iowa892, 216NW6; 218Ky503, 291SW 715; 123 Or193, 261P422, 425 [citCJ]; 50Philippine759. But see 93PaSuper 104. [j] **On dissolution of attachment by order of court on giving bond** property is free from lien as if no attachment had been levied. 199Cal 569, 250 P666.

337-76 50Philippine759.

337-78 34GaA129, 128SE688; 204 Iowa 892, 216NW6. [j] **Bond is not appearance** where not approved by clerk after return of writ as required by statute. 204 Iowa892, 216NW6.

337-79 34GaA129, 128SE688; 160Tenn 329, 24SW(2d)881.

337-82 [b] 160Tenn329, 24SW(2d)881.

337-83 But see 197Wis43, 221NW415.

338-86 34GaA129, 128SE688 (defendant entitled to hearing on traverse); 195NC484, 142SE706.

338-87 195NC484, 142SE706, 709 [quot CJ].

338-87½-New. Surety on replevy bond has no right to attack validity of affidavit and bond in attachment. **Tex CivA** 25SW(2d)274.

338-91 195NC484, 142SE706, 709 [quot CJ]; 57ND286, 221NW38.

338-91⅓ 195NC484, 142SE706, 709 [quotCJ].

338-91⅓ 35PortoRico 159 (attachment issued on bond that has been annulled).

339-92 34GaA129, 128SE688 (suit still maintainable).

339-95 [f] **Recordation of release of attachment of real property in which defendant has no interest** is unnecessary where sheriff releases attachment **as to all property in which defendant** has interest and which has any value. 67CalA792, 228P363.

339-98 **TexCivA** 286SW303.

340-1½-New. The surety may plead that the property does not belong to defendant. 224 IllA351.

340-6 123 Or193, 261P422, 425 [citCJ].

340-6½-New. One who delivers to another cash to be used by that other in making a cash bond, in order to release property under seizure, has no standing in court as against the seizing creditor to claim ownership of the cash, and, where the property released is not produced, the seizing creditor may execute his judgment against the cash without any regard to any pretended claim by such third person. 9LaA 595, 121S685(1stcase).

340-10 **TexCivA** 13SW(2d)430; Wis 231NW600. [a] (4) Under bond conditioned that attachment defendant shall perform judgment and have property forthcoming and subject to orders of court for satisfaction of judgment, it is duty of sureties to return property to sheriff under judgment sustaining attachment and ordering sale. 175Ark 1005, 1SW(2d)86. [f] **Sureties may stand strictly on express terms of contract.**–88CalA549, 263P850. [g] **Where principal and surety are not at fault for destruction of automobile,** surety is not liable. 11LaA289, 123S416(2dcase).

341-13½-New. Surety on dissolution bond, signing under a mistaken belief as to the identity of the principal is held not liable on a judgment against defendant other than such principal. 258Mass35, 154NE523.

341-13⅓-New. The surety is not liable for insurance paid to the principal where the automobile was destroyed, as the insurance does not take the place of the automobile. 11LaA289, 123S416 (2dcase).

341-13¼-New. Sureties having used names of defendant interchangeably in bond are estopped to assert plaintiff had no right to so use names in attachment bond. **TexCivA** 25SW(2d)274.

341-18 71CalA204, 234P903; 36GaA 219, 136SE103. [e] **Question whether surety would be discharged** by adjudication of bankruptcy of principal debtor is immaterial on question of necessity for judgment against principal debtor. 36GaA219, 136SE103. [f] **Liability absolute after judgment.**–57ND 286, 221NW38.

342-22 **TexCivA** 13SW(2d)430.

342-23½-New. Where judgment did not accrue on causes of action alleged in complaint it was not in purview of bond filed to discharge attachment. 228 AppDiv778, 239NYS632.

342-23⅓-New. A judgment on the same cause of action in another suit instituted by the same plaintiff against the same principal debtor is not sufficient to authorize a judgment against the surety on the dissolution bond. 36 GaA219, 136SE103.

343-31½-New. When judgment is rendered against defendant, the security is liable although the interpleader is not determined. 224 IllA351.

343-32 261Mass496, 159NE532.

343-37 71CalA204, 234P903.

344-38 101CalA675, 282P386.

344-41 95CalA452, 273P63.

345-43½-New. Where a bond was joint and several, demand for payment on other sureties was not necessary to support judgment against a particular surety. 95CalA452, 273P63.

345-44 95CalA452, 273P63.

345-49 221Ky630, 299SW550.

345-55 [b] (2) Offer to return real property attached will not relieve sureties from liability on bond where mechanics' liens thereon, filed after giving bond, for work commenced before attachment, were already reduced to judgment, depriving plaintiff of right to attack their validity. 71CalA204, 234 P903.

346-59 See 49RI 375, 142A619 (distinguishing bail bond).

346-66 172Ark335, 288SW712; 104 Conn280, 132A454; 38GaA396, 144SE36 (even though plaintiff in attachment, after obtaining jurisdiction in personam over defendant, proceeded with suit and obtained common-law judgment); 195 NC484, 142SE706; **TexCivA** 18SW(2d) 704; 150Va473, 143SE750; Wis 230 NW69. [g] **Although plaintiff may succeed in original suit,** obligors are released if plaintiff is unsuccessful in attachment suit. 224 IllA351. [h] **Creditor recovering judgment against attachment debtor in another action.**–44 Ida447, 258P365.

347-68 197Wis43, 221NW415.

347-70 [c] **Second levy** must in fact have presented return of property taken and replevied under first levy, to discharge principal and sureties on bond. 213Ala592, 105S679.

347-71½-New. Sureties are not released by a subsequent levy and sale of a part of the released property at the instance of the attaching creditor under a prior judgment held by him where more than enough property remained to satisfy the judgment in the attachment suit. 78Mont516, 255P1043.

347-75 88CalA549, 263P850; 233 IllA 293; 258Mass35, 154NE523; 261Mass 496, 159NE532; 263Mass331, 160NE 830; 86Mont414, 284P131. [e] **Where there is no change in nature of claim or in character of surety's liability,** amendment is no bar to recovery on bond. 233 IllA293.

347-76 233 IllA293; 258Mass35, 154 NE523.

347-78½-New. Sureties are not released by plaintiff's consent to allow one defendant to amend his answer. 261Mass 496, 159NE532.

348-88 110Conn125, 147A366; 37GaA 450, 140SE636; Wis 231NW600. Contra 49RI 168, 141A334.

348-89 252Mass376, 147NE903.

348-90½-New. Bankruptcy will not discharge the surety on a dissolution bond. 259Mass419, 156NE674.

348-91 See also 49RI 168, 141A334.

348-94½-New. nor will a void order requiring a new bond release the sureties on the original bond; 72CalA539, 237 P775.

349-1 127Me167, 142A377.

349-1½-New. When the bond covers the debt and damages of plaintiff, his failure in the attachment suit does not discharge the surety. 224 IllA351.

349-1⅓-New. Where suit and attachment proceedings were instituted against a tenant for rent and the attachment is sustained and the property is ordered sold, the dismissal of the action against the tenant disclaiming interest in the property does not release the forthcoming bond although no personal judgment is taken against the tenant. 175Ark1005, 1SW(2d)86.

349-2 134Wash116, 234P1033 (where personal judgment was not demanded in amended complaint).

349-11½-New. Invalidity of mortgage does not diminish liability on bond. 102 Conn684, 129A721.

349-11⅓-New. Summary judgment cannot be rendered against the surety on a forthcoming bond where property attached is adjudged to belong to an intervener. 169Ark391, 275SW705.

349-11¼-New. Where attachment proceedings were not annulled by the debtor's adjudication in bankruptcy, an accepted offer by the attaching creditor of a perpetual stay of execution on condition that he should have the right to proceed against the sureties is not a defense in an action against the sureties. 78Mont516, 255P1043.

349-11⅓-New. Agreement between principal and creditor providing for installment payments releases surety. 88CalA755, 264P283.

349-11⅙-New. Sureties are not exonerated on the ground that the sheriff took the undertaking after making a return on the writ without order of court where he filed the writ with a certificate of his proceedings on the day after the undertaking was given, although the certificate bore an earlier date. 88CalA549, 263P850.

349-11½-New. Failure to inform surety of default violates no duty to him. Mass 172NE354.

349-11⅛-New. Promise of plaintiff's attorney to keep surety informed of proceedings would not relieve surety. Mass 172NE354.

349-11⅛-New. Where causes of action

merged in new agreement, containing reciprocal obligations prejudicial to surety, surety is discharged from obligation. 228AppDiv778, 239NYS632.

350-17 175Ark1005, 1SW(2d)86; 34GaA129, 128SE688. See also 37GaA450, 140SE636. [f] 195NC484, 142SE706. [g] **It is not incumbent on plaintiff to prove** truth of ground on which attachment issued before being entitled to judgment against defendant and surety on replevy bond. 34GaA129, 128SE688. [h] **Judgment against surety was properly denied** where defendant's traverse to affidavit for attachment was sustained. 38GaA396, 144SE36. [i] **Judgment entered before motion for new trial is final judgment** as regards liability on delivery bonds requiring satisfaction of judgment within twenty days. 208 Iowa 1252, 226NW114; TexCivA 286SW303.

350-19 208 Iowa1252, 226NW114.

350-21 [f] **Presence or representation of bondsman** is essential to validity of judgment on bond in summary proceeding. 224Ky345, 6SW(2d)273.

351-22 [b] **Equity will enforce lien on real estate of forthcoming bond** where remedy at law is inadequate. 50RI 260, 146A771, 772 [citCJ].

351-26½-New. An issuance of execution against the judgment debtor is not necessary where he has been discharged in bankruptcy, or is insolvent and has left state. 78Mont516, 255P1043.

351-27 71CalA204, 234P903.

351-27½-New. A suit on a bond brought before the return day of the execution is not premature. 50RI 260, 146A771.

351-30 71CalA204, 234P903 (it is no defense that sureties offered to return property, where mechanics' liens filed after giving of bond had been reduced to judgment).

351-31 Conn 152A280.

351-33 [a] **That sureties qualified as "residents and holders of real estate" instead of as "residents and freeholders"** does not constitute defense. 88CalA549, 263P850.

351-40½-New. A surety on a joint and several bond cannot take advantage of an abbreviation in the principal's name as signed to the bond. 49RI 446, 143A857.

351-40⅓-New. Failure of plaintiff to disclose matters respecting position of defendant in original action is no defense. Mass 172NE354.

351-41 67CalA792, 228P363.

352-43 Mass 171NE482; 86Mont414, 284P131; 51SD102, 212NW506. But see TexCivA 23SW(2d)770.

352-44 95Fla504, 116S498 [citCJ].

352-45 101CalA675, 282P386; 95Fla 504, 116S498 [citCJ].

352-46 101CalA675, 282P386.

352-49 213Ky467, 281SW478.

353-51 175Ark1005, 1SW(2d)86.

353-53 261Mass496, 159NE532 (it is no defense that sureties believed that defendants were partners where plaintiff, recovering judgment against one defendant only, made no representations).

353-55 86Mont414, 284P131.

354-62½-New. Construction of statutes relative to prorating a creditor who instituted an action within the statutory time after publication of notice of attachment in a prior action. 44 Ida 447, 258P365.

354-69 Mass 171NE482.

355-76 49RI 446, 143A857.

355-77½-New. Surviving heirs, receiving all of a parent's interest in an estate under will, and neither returning, nor offering to return, property attached before the parent's death, as authorized under a replevy bond sued on, were proper parties to the suit. TexCivA 13SW(2d)430.

355-79 [a] 101CalA675, 282P386, (2) other instances. 41GaA736, 154SE651. [b] **Sufficiency of complaint in action by judgment creditor on redelivery bond given in prior action.**—44 Ida447, 258P365.

355-88 101CalA675, 282P386 (where remedy by execution has been regularly returned unsatisfied in whole or in part).

357-10½-New. Statute limiting the time for bringing suit must be pleaded, if relied on. 264Mass481, 163NE62.

357-10½-New. Surety cannot plead until after adverse judgment in a waiver action. 37GaA450, 140SE636.

357-16½-New. In an action against a surety on a bond given to release property from attachment, where the answer, by failing to deny, admitted refusal to pay the judgment, denial of demand for payment raised no issue. 95CalA452, 273P63.

357-16½-New. A complaint in a mortgagee's action on a bond attachment alleging the amount due on the mortgage was sufficient to tender issue of the value of the property. 96CalA230, 274P90.

357-22½-New. Plaintiff's failure to prosecute an attachment suit is prima facie evidence that it is wrongful. 215Ala690, 112S344.

357-22½-New. A judgment for defendant on the merits is conclusive as to the wrongfulness of an attachment suit. 215Ala690, 112S344.

357-23½-New. It is assumed that the amount of an attachment replevy bond is the value of the replevied property. TexCivA 13SW(2d)430.

358-26 See also 102Conn684, 129A721.

358-27 But see 49RI 446, 143A857.

358-27½-New. To recover against a surety on an attachment replevy bond, it was not necessary to show that heirs got any part of decedent's estate. TexCivA 13SW(2d)430.

358-27½-New. The burden is on defendant to prove assertions in avoidance of liability on a bond because of change of plaintiff, by amendment, especially after a conditional forfeiture of bond. 233IllA293.

358-27¼-New. In an action on a bond given in substitution for an attachment, the burden was on defendant to prove that there were existing encumbrances on the property attached in an amount sufficient to reduce the owner's equity to a sum less than the amount of judgment. 109Conn362, 146A611.

358-34½-New. Testimony that a witness mailed a demand to one of the sureties in care of some one else has been held inadmissible. 98CalA30, 276P133.

358-34½-New. Testimony that a trustee in bankruptcy received nothing from a certain note and trade acceptance held by the bankrupt's estate is admissible as bearing on the value of such instrument at the time the attachment is made. 110Conn125, 147A366.

358-34¼-New. In action on bond given to dissolve attachment, evidence showing sureties' obligations had been discharged by accord and satisfaction and release of judgment against principal has been held admissible. Mass 170NE921.

358-34½-New. Evidence admissible to show use and abuse of attached car while in possession of sheriff. 133Wash664, 234P657.

358-34½-New. Evidence of an offer to permit a public sale is not admissible as the debtor was not obligated to proceed in mitigation of damages after levy. 133Wash664, 234P657.

358-34½-New. Evidence to show real party in interest is admissible in action of release bond. 254Mass35, 149NE677, 41ALR1488.

358-44½-New. Expert testimony is sufficient to sustain a finding as to the value of ore from which the gold had been extracted after the attachment was released. 67CalA792, 228P363.

358-44½-New. Testimony of the attachment plaintiff that he was the owner of the attachment is sufficient proof of ownership of the judgment where his use of the word attachment was intended to mean judgment. 78Mont516, 255P1043.

358-44¼-New. Where a bond for the release of property required that the signers pay to plaintiff the full value of the property released, it was held that, in the absence of evidence as to the value of the property released, judgment for plaintiff against such sureties could not stand. 98CalA30, 276P133.

358-44½-New. In an action on a bond given in substitution for attachment, the evidence was held not to establish that there were existing encumbrances on the property attached in an amount sufficient to reduce the owner's equity to a sum less than the amount of judgment. 109Conn362, 146A611.

358-44⅓-New. In an action on a bond given in substitution for attachment, the testimony was held too indefinite to warrant a correction of a finding that the owner's equity in the property attached was of no value. 109Conn362, 146A611.

358-44½-New. In an action on an undertaking given to release an attachment issued under statute, evidence has been held to support a finding that an affidavit for the writ of attachment was filed. 102CalA107, 282P418.

358-44⅓-New. A court order charging a bonding company generally, but in no specific amount, has been held not to show conclusively that neglect to pay the judgment was a breach of the bond. Mass 167NE646.

358-45½-New. Evidence held to show judgment in main action remained unpaid for period within which by bond sureties were required to pay it. Mass 172NE354.

359-51½-New. Where the facts are not undisputed, want of reasonable cause is a question of fact for the jury. 133 Wash664, 234P657.

359-51⅓-New. Whether there was a breach of the bond rendering the bonding company liable is for the jury to determine. Mass 167NE646.

359-58 86Mont414, 284P131.

359-59½-New. **In Alabama** attorney's fees in defending an action are recoverable. 215Ala690, 112S344 (amount of fees).

359-61 67CalA792, 228P363; 86Mont 414, 284P131; TexCivA 286SW303.

359-63 172Ark788, 290SW357; 67CalA 792, 228P363; 208 Iowa1252, 226NW 114 (estimated value of property not exceeding amount of judgment).

360-65 NJ 140A787.

360-67 52ND47, 203NW197.

361-74 See also 218AppDiv656, 219NYS 69.

361-76½-New. In Porto Rico injunction is the proper remedy of an intervener who claims ownership of an attached condominium. 33PortoRico 489.

361-77 248Mich465, 227NW769.

362-82 49RI 392, 143A602.

362-87 See also TexCivA 277SW207.

363-97 [b] **Application of statutes.**—As to county court's power to foreclose lien on land. TexCivA 23SW(2d)514.

363-12 99Vt45, 130A580. [c] (2) Notice to defendant, not owner of attached property, where defendant other than one served with notice was owner, held not sufficient to authorize sale under statute. 93CalA189, 269P746.

364-13½-New. Sale after improper notice held conversion by officer. 99Vt 45, 130A580.

364-13½-New. Notice given after appraisal is insufficient, especially where defendant resides out of the state. 99 Vt45, 130A580.

364-22½-New. In the absence of statute the officer conducting the sale has considerable discretion in the actual conduct of the sale. 221Ky415, 298SW 1097.

364-22⅓-New. Waiver or consent by defendant may prevent claim that sale is invalid. 40GaA808, 151SE556(1st case).

364-22¼-New. **Waiver of defects.** Where a short order sale fails to comply with the statute but the defendant fails to object and bids on the property, he consents to the sale as made. 40GaA 808, 151SE556(1stcase).

365-28 141Miss888, 106S751.

365-29 141Miss888, 106S751.

365-34½-New. Exceptions to confirmation of sale filed after the time allowed but before confirmation are filed in time, 221Ky415, 298SW1097.

365-34⅓-New. and the purchaser is entitled to introduce proof as to the nature of the statements made by the officer making the sale as to selling the property subject to lien. 221Ky415, 298 SW1097.

365-35 39GaA41, 145SE919(1stcase).

365-37 TexCommnA 28SW(2d)834.

365-38 TexCommnA 28SW(2d)834; 151 Va65, 144SE464; 34Wyo 119, 241P1068, 1071 [citCJ]. [d] **Purchaser of attached**

property other than debtors' acquires no title. **TexCommnA** 28**W(2d)**834.

366–39 34**Wyo** 119, 241**P**1068.

367–62 See also 33**PortoRico** 66.

370–91 45 **Ida**499, 263**P**481, 483 [cit CJ].

370–99 See also 97**CalA**412, 275**P**850.

371–5 69**Utah**194, 253**P**676, 680 [cit CJ].

371–6 69**Utah**194, 253**P**676, 680 [cit CJ].

371–7 80**Mont**258, 260**P**116. [f] **Where sheriff does not obtain order of court to appoint keeper,** one given custody of property cannot rely upon implied contract with sheriff for its keep. 80**Mont** 258, 260**P**116.

372–12½–New. The question between a keeper of attached property appointed by the court and the debtor relating to payment of the keeper's board cannot be adjudicated in the main action where the keeper is not a party. 84**Mont**494, 276**P**946.

372–14 111**Conn**299, 149**A**668.

372–20 181**Ark**334, 258**SW(2d)**754.

372–21 See also 97**CalA**412, 275**P**850.

373–26 32**PortoRico** 184 [quotCJ].

373–27 39 **OklACR**246; 32**PortoRico** 184.

373–28 3**Del** 331, 138**A**361, 362 [citCJ]; 44 **Ida**447, 258**P**365; 192**NC**31, 133**SE** 399; 123 **Okl** 237, 253**P**42; 32**Porto Rico** 184; **Wis** 224**NW**713(1case). [j] **In Porto Rico.**–32**PortoRico** 184, 186. [k] **Intervener is limited to assertion of own rights** and cannot make defenses personal to defendant on appeal. 13 **LaA**594, 128**S**700. [l] **Waiver of claimant's failure to obtain leave to become defendant** is effected by trying his right of property. **OhA** 172**NE**699.

374–31 46**Philippine**753.

374–32½–New. Attachment valid as between original parties to action may be invalid as to intervener. **Iowa** 230**NW** 516.

374–32¼–New. Under statutory right to dispute validity of attachment, intervener cannot traverse grounds of attachment petition. **Iowa** 230**NW**516.

374–32¼–New. Where intervener sold property after obtaining possession not according to statute, he could not return balance and pay for part sold after judgment for plaintiff. 198**NC**355, 151 **SE**731.

374–37 But see 192**NC**31, 133**SE**399.

375–39 203**Cal** 109, 264**P**747(1stcase); 226**Ky**785, 11**SW(2d)**937; 138**Misc**576, 245**NYS**464; 192**NC**31, 133**SE**399; 198 **NC**734, 153**SE**317; 123 **Okl** 237, 253**P** 12; 34**PortoRico** 713; **TexCivA** 271**SW** 293 (claimant's possessory rights given him in advance of judgment are interlocutory in their character till time of final judgment). But see 127**Mc**380, 143 **A**599. [o] **Statute providing for intervention by any person other than defendant** refers to defendants who are sought to be subjected to money judgment prayed for, and not to those colitigantly interested. 208 **Iowa**1100, 222 **NW**428. [p] **Under statutes** claimant may state his right to property or interest in or lien on it, and otherwise has no standing in the attachment proceeding. **Iowa** 230**NW**516.

376–41½–New. Where defendant bought a truck attached from claimant, but resold the truck to claimant who rented or hired the truck to defendant, claimant is entitled to the truck. 220 **Ala**193, 124**S**426.

376–44 3**Del** 331, 138**A**361, 362 [cit CJ]; **Iowa** 230**NW**516; 34**PortoRico** 652.

377–51 226**Ky**785, 11**SW(2d)**937.

377–51½–New. Innocent vendee in a security deed may not be affected by fraud of seller. 164**Ga**541, 139**SE**68.

377–52 192**NC**31, 133**SE**399.

377–56 29**Ariz**293, 241**P**305 (held not estopped); 34**Wyo** 119, 241**P**1068, 1071 [citCJ].

378–61½–New. Where a purchaser of mortgaged property moved to dissolve an attachment in an equitable action by a second mortgagee claiming property, and did not appeal from a decision overruling his motion, he is not precluded from bringing a petition of intervention under a claim that he was the absolute owner of the property. 208 **Iowa**1100, 222**NW**428.

379–66 125**Kan**730, 266**P**53.

379–73½–New. It must prevail upon the strength of its own title. 172**Ark**82, 287**SW**750.

379–76 87 **IndA**253, 157**NE**460.

379–77 **Iowa** 231**NW**482.

380–88 165**Minn**282, 206**NW**446. [d] 165**Minn**282, 206**NW**446.

381–94 [a] **Statute held to be sufficiently complied with** by mortgagee delivering letter to attaching officer. 255**Mass** 270, 151**NE**70.

381–98 253**Mass**472, 149**NE**110.

381–99 [g] (1) 253**Mass**472, 149**NE**110 (where facts found by court are admitted). (2) 253**Mass**472, 149**NE**110 (where facts are in dispute). [h] **Demand made three months** after knowledge by mortgagee of attachment is too late. 253 **Mass**472, 149**NE**110.

382–9 [a] 126**Kan**215, 268**P**122.

382–10 **CalA** 284**P**977 (technical niceties used in verifying pleadings). [a] (2) Claim affidavit valid without jurat containing name of officer who administered oath. 34**GaA**389, 129**SE**793.

384–32 255**Mass**270, 151**NE**70.

384–40 [c] **Validity of attachment is recognized by filing claim.–MoA** 286**SW** 407.

386–72 **CalA** 284**P**977 (liability of sheriff and his surety for release of property after refusal of creditor to furnish bond); 57**ND**286, 221**NW**38. [b] **Statute not applicable** to action to recover on discharge bond given on application to dissolve writ and release levy. 57 **ND**286, 221**NW**38.

386–73½–New. [§ 863a] 8½. **Delivery Bond.** A bond to procure the delivery of property to the intervener is good although not authorized by statute. **SD** 227**NW**78.

386–73¼–New. Sureties on a delivery bond are not discharged by the execution of a supersedeas bond on appeal. **SD** 227**NW**78.

386–77 [e] **In Texas.–CivA 18W(2d)** 441.

387–79½–New. If claimant is entitled to possession at the date of the levy of attachment and that is the only issue involved, then he and not the attacking creditor is entitled to a judgment in his favor at the trial of the issues. **Tex CivA** 271**SW**293.

387–79¼–New. The lien of the attacking creditor is fixed at the time of the levy of attachment and he is entitled or not entitled to immediate possession through the officer at that time. **Tex CivA** 271**SW**293.

387–79¼–New. The proceedings in a trial of the right of personal property are merely a possessory action and the issue joined and the fact to be tried is whether the attacking creditor or claimant is entitled to the possession of the property at the time the officer shall levy a writ of execution. **TexCivA** 271 **SW**293.

387–80 **TexCommnA** 18**W(2d)**1090 (right must be asserted under statute invoked).

387–86 See also **TexCommnA** 18**W(2d)** 1090.

387–87 See also 32**PortoRico** 184.

387–89 32**PortoRico** 184; 33**PortoRico** 876. [b] **Transcript of record.**–Evidence not considered in intervention proceeding cannot be included in transcript on appeal, though introduced in trial of main action. 32**PortoRico** 184.

387–90½–New. Where in aid of a claim claimant files an amendment in which he seeks affirmative equitable relief, the original proceeding at law becomes one both at law and in equity. 164**Ga**541, 139**SE**68.

388–4½–New. In Illinois a claimant may interplead without giving bond. 224 **IllA**351.

388–10½–New. Intervener's claim to proceeds of auction sale is defeated if at time of filing his complaint sale had already been made to judgment creditor in payment of his credit. 34**PortoRico** 652.

389–15¼–New. Jurisdiction of statutory claim suits once properly instituted and set for hearing will not be displaced by a second claimant merely executing an affidavit and bond, and thus attempting to oust the jurisdiction of the court first to hear and determine the claim suit originally before the court. 218**Ala**21, 117**S**464.

390–36 [a] (2) Allegation that property seized was property of intervener and that he was entitled to immediate possession held sufficient. 69**Utah**401, 255 **P**439.

390–38½–New. The complaint must allege that an attempt to replevy the goods would be useless. 255**Mass**270, 151**NE**70 (necessity of amendment).

390–42 3**Del** 422, 138**A**638.

390–44 3**Del** 422, 138**A**638.

391–48 251 **IllA**397 (allegations insufficient to show valid chattel mortgage lien prior to plaintiff's lien).

391–56 [a] (2) Defense that sale of automobile attached by judgment creditor was made with intent to defraud attachment creditor must be pleaded in answer to be available. 132 **Or**92, 284 **P**832. [f] **Failure to make issue** does not constitute default as to plaintiff in proceedings. 146**Miss**581, 111**S**836.

391–61 See also 254 **IllA**115.

391–62 8**PaDist&Co** 113 (petition to frame issue granted and issue framed, though irregular practice had been followed of permitting claimant to discharge attachment by filing bond which was allowed to stand as security to plaintiff for value of property if it should be determined that claimant did not own property). [a] **TexCivA** 271 **SW**293.

392–63 198**NC**355, 151**SE**731.

393–67 **MoA** 286**SW**407.

393–72½–New. Whether defendant in attachment or interpleader asserting exemption was about to leave the state with intent to change his domicile is to be determined from the evidence on the trial of the interplea, although such intent is alleged in the affidavit in the attachment suit. **MoA** 286**SW**407.

394–83½–New. In Illinois the issue under the interpleading is not connected with the issues in the attachment suit. 224 **IllA**351.

394–89½–New. Levy evidenced by return followed by judgment of condemnation for sale raises presumption against abandonment of levy. 214**Ala** 20, 106**S**223.

394–89¼–New. The law presumes continuation of a lien. 214**Ala**20, 106**S**225.

394–90 163**La**505, 112**S**397; **MoA** 277 **SW**958; 138**Misc**576, 245**NYS**464; 194 **NC**674, 140**SE**442; **TexCivA** 271**SW**293; 69**Utah**194, 253**P**676. [o] **Intervener has burden of showing property** attached was covered by mortgage. 69**Utah**194, 253**P**676.

395–92 131 **Okl** 249, 268**P**276, 279 [quot Cyc].

395–93 220**Ala**193, 124**S**426.

395–94 131 **Okl** 249, 268**P**276, 279 [quotCyc].

395–1 214**Ala**20, 106**S**225; 220**Ala**193, 124**S**426; 164**Ga**591, 138**SE**913.

396–2 **MoA** 277**SW**958; 39 **OklACR**246.

396–5 164**Ga**591, 138**SE**913.

396–7 133 **Okl** 160, 271**P**649.

397–23 133 **Okl** 160, 271**P**649.

397–28 See also 214**Ala**20, 106**S**225.

398–45 [a] **MoA** 277**SW**958; 151**ND** 173, 199**NW**585; 33**PortoRico** 193.

399–52 [a] (1) **Miss** 118**S**894(2dcase); **NJSup** 142**A**421; 35**PortoRico** 622. (2) To support finding that intervener was not in possession of property. 119 **Kan**788, 241**P**467. [b] 204**Cal** 391, 268 **P**637 (that conveyance was prior to levy); 264**Mass**519, 163**NE**156, 63**ALR** 572.

400–68 249**NY**272, 164**NE**49. [b] 50 **SD**516, 210**NW**737.

400–68½–New. Testimony as to plaintiff's purchase of property, if believed, held to establish title and right to possession in plaintiff. 216**Ala**542, 113**S** 910.

400–68¼–New. Evidence held to show that the property attached and sold as plaintiff's father's was not bought for the father by plaintiff. 216**Ala**542, 113 **S**910.

400–68¼–New. Evidence held to show that the purchaser's agent issued in-

structions to issue a certificate in the purchaser's name. **TexCivA** 198**SW(2d)** 808.

400–68½–New. Evidence held to show that instructions to issue stock in the pledgee's name was the result of a mistake of the purchaser's agent. **TexCivA** 198**SW(2d)**808.

400–68¼–New. A finding that the creditors had no notice of the purchaser's claim prior to attachment held contrary to evidence. **TexCivA** 198**SW(2d)**808.

400–80 [a] **Order of trial of issues.–TexCivA** 18**SW(2d)**441.

401–89 164**Ga**591, 138**SE**913.

401–89½–New. Where real estate is attached and issues joined by pleadings between the attachment creditor and the third party claimant, neither party is entitled to jury trial as a matter of right. 123**Kan**405, 256**P**147.

401–94 39 **OklACR**246; **TexCivA** 285 **SW**922. See also 214**Ala**20, 106**S**223.

401–95 172**Ark**1088, 291**SW**795; 230 **Ky**49, 18**SW(2d)**873; **MoA** 277**SW**958; 39 **OklACR**246. See also 132 **Or**92, 284**P** 832.

401–96 164**Ga**541, 139**SE**68.

402–3 152**Miss**382, 119**S**800.

402–7 **MoA** 277**SW**958 (proper instruction). [b] **Instructions held sufficient.–** 164**Ga**541, 139**SE**68.

403–11 172**Ark**821, 290**SW**603.

403–16 172**Ark**821, 290**SW**603.

403–16½–New. Under evidence showing title and right to possession in plaintiff, a charge allowing recovery by plaintiff if the jury believed the evidence is proper. 216**Ala**542, 113**S**910.

403–16¾–New. A charge that plaintiff is entitled to recover in trover if he purchased the property, regardless of payment therefor or the amount of consideration, held proper. 216**Ala**542, 113 **S**910.

403–17 39 **OklACR**246.

404–27 214**Ala**615, 108**S**591.

405–35½–New. The judgment under the interpleader is entered independently of the attachment suit. 224 **Ill**A351.

405–35¼–New. Where the prayer of a petition of a party intervening in proceedings for the sale of attached property makes no mention of a chattel mortgage, relief allowed under the chattel mortgage would be beyond the prayer of the petition. 11**LaA**676, 124**S**775.

405–40 119**Kan**788, 241**P**467.

406–49 224**Ky**181, 5**SW(2d)**1039 (in absence of cross petition or facts showing intervener answerable for defendant's debt).

406–51½–New. Ordinarily the order entered is in the nature of a nonsuit or dismissal of plaintiff's action; and an order of dismissal is in effect an adjudication of the failure on claimant's part to establish his right to the property as against an attacking creditor, placing the duty on claimant to make return of the property. **TexCivA** 271**SW**293.

408–71 See also 32**PortoRico** 780.

408–78 33**PortoRico** 193.

408–81½–New. Where the trial court failed to assess the value of property claimed, the appellate court is authorized to complete judgment by so assessing the value in view of an existing statute. 214**Ala**615, 108**S**591.

408–83 **TexCivA** 13**SW(2d)**944.

410–3 147**Miss**717, 112**S**872.

411–20½–New. The giving of a bond does not estop claimant from demanding adjudication of ownership. 122 **Okl** 175, 253**P**52.

411–20¾–New. An intervening claimant who sets up his claim in his petition for intervention is not estopped to deny defendant's ownership by reason of having executed a forthcoming bond and having taken possession under the same. 122 **Okl** 175, 253**P**52.

411–28 But see 218**Ala**21, 117**S**464.

411–29 147**Miss**717, 112**S**872; **TexCivA** 271**SW**293.

412–31½–New. In order to avoid liability on his bond claimant must establish his right to such property. **TexCivA** 271**SW**293.

412–35 101**CalA**675, 282**P**386; 147**Miss** 717, 112**S**872.

412–37½–New. Obligor on a release bond to perform judgment is held liable for judgment where defendant failed to pay it. 217**Ky**384, 289**SW**280.

412–41 259**Mass**419, 156**NE**674.

414–80½–New. An attachment and replevin bond need not be introduced to recover against the sureties since it is part of the record in the case. 32**Ariz** 80, 255**P**996, 57**ALR**196.

414–83 See also 147**Miss**717, 112**S**872.

414–88 96**CalA**230, 274**P**90.

417–12 152**Miss**382, 119**S**800.

417–14 **Miss** 119**S**800.

417–17 210**Ky**104, 275**SW**25.

418–47 [c] **Evidence held insufficient** to sustain finding denying claim of property. 203**Cal** 748, 265**P**926.

420–79 210**Ky**104, 275**SW**25; 138 **Okl** 190, 280**P**305, 66**ALR**894 (with damages for taking and withholding same).

421–90 22**F(2d)**541 (order of court).

421–90½–New. Where a creditor discontinues the action against a trustee or the trustee is discharged by the court, the attachment is dissolved. **Mass** 167 **NE**649.

421–93 [a] **Failure of plaintiff's attachment to comply strictly with terms of statute** necessitates quashing his attachment and release and restoration of defendant's property. **TexCivA** 18**SW(2d)** 704.

421–94 83**NH**115, 139**A**184; 134**Misc** 133, 234**NYS**196 (merits of main action not considered). [e] (2) Attachment dissolved where judgment was rendered for defendant on summarizing damages under complaint and cross complaint. 83**Colo** 413, 265**P**906.

422–95½–New. 147**Va**960, 133**SE**685.

422–96½–New. Attachment in an action on a note held not invalidated as to grantee with notice of pleading of substituted cause of action on another note. 107**Conn**52, 139**A**700.

422–99 [a] (2) Court has jurisdiction to issue writ, if affidavit is sufficient on its face. 42 **Ida**421, 246**P**10.

422–8½–New. Defendant may have attachment discharged on account of the falsity of the affidavit. 42 **Ida**421, 246 **P**10.

423–10 [e] 86**CalA**623, 261**P**484.

423–11 [b] **General appearance** in action where writ of attachment will lie does not estop defendant to move to strike complaint when on subsequent filing of complaint it is shown that attachment will not lie. **NJSup** 130**A**199.

423–14 214**AppDiv**14, 210**NYS**629; 152 **SC**108, 149**SE**340, 65**ALR**1427.

423–15 214**AppDiv**14, 210**NYS**629 (warrant vacated when complaint and affidavits indicate that plaintiff must ultimately fail).

423–15½–New. Where the affidavit for attachment is valid but the pleadings do not state a cause of action, then such pleadings will be stricken but the writ of attachment will not be quashed, but defendant will be held in court for all claims for which the attachment will lie. **NJSup** 130**A**199.

424–19 40 **Ida**76, 238**P**294; 166**La**883, 118**S**70 [reh den 166**La**891, 118**S**73]; 2 **LaA**580; 6**LaA**865; 7**LaA**409; 132**SC** 303, 128**SE**503.

425–22 See also 4**LaA**364.

425–22½–New. Under some statutes the fact that creditor's security is located in another state does not prevent discharge of attachment on the ground that the debt is secured. 45 **Ida**354, 263 **P**484.

425–22¾–New. In action for alienating wife's affections statutory attachment based on allegation of adulterous relations is not dissolved by finding denying such relations; attachment being unchallenged before judgment. **Wash** 291 **P**323.

425–25 33**NM**388, 268**P**566, 567, 59**ALR** 522 [quotCJ].

425–29 136**Misc**727, 240**NYS**417; 132 **SC**303, 128**SE**503.

425–30 205**Cal** 670, 272**P**583 (if defect can be cured by amendment).

426–32 [c] **Annulment of bond dissolves attachment.–**35**PortoRico** 159.

426–34 132**SC**303, 128**SE**503.

426–35 52**ND**39, 203**NW**189; 32**Porto Rico** 347.

427–40 [a] **Failure of sheriff** within twenty days to file inventory and make return authorizes judgment creditor, having lien, to procure dissolution. 50 **SD**618, 211**NW**599.

427–41 73**Mont**110, 236**P**1085. [f] (4) Affidavit alleging delivery is not so fatally variant with petition alleging tender as to warrant dissolution of attachment. 221**MoA**250, 28**SW(2d)**187.

428–44 86**Mont**535, 284**P**532.

428–62 86**Mont**535, 284**P**532.

429–71 78**Mont**357, 254**P**174; **TexCivA** 298**SW**303; 108**WVa**648, 152**SE**325, 68 **ALR**851.

430–79 See also 51**SD**102, 212**NW**506.

430–82½–New. Under some statutes attachment may be dissolved upon filing of the proper bond. 254**Mass**14, 149 **NE**604.

430–85 **NJSup** 143**A**804; 54**ND**633, 210 **NW**341.

431–86 37**F(2d)**141; 12**LaA**512, 126**S** 577; **SC** 155**SE**273.

431–87½–New. In determination of motion to discharge writ on the ground that the property included is not subject to attachment, it is immaterial what may be the intention of plaintiff or the sheriff, or that the property has been seized by the sheriff. 73**Mont**110, 236 **P**1085.

431–90 52**ND**39, 203**NW**190 [citCJ].

432–91 **Iowa** 230**NW**516 (for insufficiency of statement of cause). [e] **Debtor alone may assail attachment** on ground allegations upon which writ issued are untrue. **Iowa** 230**NW**516.

433–96½–New. Whether defendants are owners of property in their own right or as trustees, they are proper parties to move for dissolution of writ of attachment. 52**ND**39, 203**NW**189.

433–2 118 **Okl** 217, 246**P**1094 [foll 40 **Okl** 275, 137**P**179].

435–17 Contra 8**PaDist&Co**113. But see **Iowa** 230**NW**516 (cannot move for discharge for insufficiency of statement of cause).

436–18 195**NC**484, 142**SE**706 (surety may come in and have validity of grounds of attachment determined).

437–23 7**PaDist&Co**463.

437–29 32**PortoRico** 347.

437–30 42 **Ida**421, 246**P**10; 138**SC**478, 137**SE**141.

438–41 **Iowa** 220**NW**338 (oral motion to dismiss attachment properly overruled where no motion to discharge). See also **CalA** 287**P**569 (plaintiff's verified complaint stands as an affidavit).

438–41½–New. An issue of vacating attachment must be tried in the ordinary way. **BC** [1927] 2**DomLR**679.

438–41¾–New. The right of plaintiff to attachment may be questioned by motion or exception. 11**LaA**438, 123 **S**514.

438–43 5**PaDist&Co**276.

439–48 5**PaDist&Co**276.

440–54 154**Md**595, 141**A**342 (after special appearance); 147**Va**960, 133**SE**685.

440–55 [c] (7) Vacation of unwarranted attachment held not error though no motion to vacate was made before replevy bond was given. 195**NC**484, 142 **SE**706. [o] 52**ND**39, 203**NW**189.

442–62 42 **Ida**421, 246**P**10.

442–62½–New. Neither defendant, nor one occupying the position of judgment creditor of defendant, may have an attachment lien set aside, after judgment, for any irregularity of impropriety that did not divest the court of jurisdiction to issue the writ. 42 **Ida**421, 246**P**10.

444–77 153**Md**394, 138**A**674, 676 [citCJ]. [b] (4) Objection that "no sufficient affidavit filed" has been held too general. 153**Md**394, 138**A**674.

445–87 40 **Ida**76, 238**P**294 (affidavits held sufficient). [b] 172**Ark**335, 288 **SW**712.

448–3 221**AppDiv**742, 225**NYS**279.

448–10 [a] **General provisions for amendment** in discretion of court do not authorize amendment, where statute provides that, if attachment appears to have been irregularly issued, it must be discharged. 52**ND**39, 203**NW**189.

448–11 213**AppDiv**629, 210**NYS**705.

448–13 145**Wash**365, 260**P**243.

449–14 **NJ** 135**A**89; 20 **OhA**123, 153 **NE**150.

449–15 **NJ** 135**A**89.

451-23 247NY211, 160NE13.
451-28 167Minn23, 208NW192; 167 Minn181, 208NW759; 55ND616, 214 NW913; 35 OhA233, 172NE381(3d case); 118 Okl 71, 246P476 (intent); 123 Okl 95, 251P1015; 7PaDist&Co401; 49SD336, 207NW152; Utah 274P863. [e] **Transfer of property with intent to defraud.**–Where attachment is issued on ground of debtor's transfer of property with intent to defraud creditors, and existence of ground is denied, plaintiff has burden of proving statutory intent as matter of fact. 55ND 616, 214NW913, 915 [citCJ].
452-29 123 Okl 95, 251P1015.
452-30 123 Okl 95, 251P1015. [c] **Where defendant introduces counter testimony** and plaintiff relies solely on affidavit attachment fails. OhA 172NE 699.
453-41 [a] (7) Nonresident defendant may testify that he owned property in state of his residence. 213Ala414, 104 S817.
454-43 [d] **Proof of matters transpiring since attachment was issued** may not be considered. 123 Okl 95, 251P 1015.
454-44 TexCivA 13SW(2d)944. [a] 168Ark1168, 273SW18 (nonresidence of defendant); 175Ark401, 299SW384 (evidence showing inability to pay debts and purpose of hindering, defrauding, and delaying creditors); TexCivA 282 SW871. [b] 172Ark335, 288SW712; 220Ky576, 295SW890 (intention to sell property to cheat creditors). [b] 167 Minn23, 208NW192; 167Minn181, 208 NW759; 35 OhA233, 172NE381(3d case); 131 Okl 249, 268P276; 50SD216, 208NW984; Utah 274P863. [c] **Evidence insufficient.**–(1) To show fraud upon creditors. 49SD336, 207NW152. (2) To charge all defendants with liability for purposes of attachment. 240NY307, 148NE532 (ownership of property causing trespass). [d] **Evidence held to show** that holder of chattel mortgage paid money to release attachment on condition. 136Wash7, 238 P990. [e] **Allegations of fraud not sustained.**–5PaDist&Co276.
454-52½-New. The rule that the truth of plaintiff's allegations is sustained by defendant's declarations showing cause for attachment is inapplicable where attachment creditor ignored claimant's affidavit and proceeded to sell the property. 222MoA503, 281SW78.
455-55 [b] See also 87 IndA253, 157 NE460.
455-63½-New. On a motion going only to complaint the court may consider the nature of the contract, its sufficiency as stating a cause of action, and the possibility of an amendment. 78Mont343, 254P169.
455-63⅓-New. The validity of the ground of attachment may be tried, if demanded, before trial on the merits or with the main issue. 195NC484, 142 SE706.
455-64 37F(2d)141 (requirement that affiants be present for cross-examination is matter of discretion). [a] **Order of proof.**–35 OhA233, 172NE381(3d case).
456-66 143Va1, 129SE371.
457-85½-New. In case each of defendants elects to move to discharge writ in toto, motion is properly overruled, if the writ is sufficient as to any one of defendants. 73Mont110, 236P1085.
457-92 100WVa93, 130SE96 (suit for equitable accounting and discovery).
457-98½-New. Entry by mistake, stricken at the same term, where no innocent party acquired interest in the meantime, does not vacate attachment. 126Mc314, 138A470.
457-1½-New. But it is not res judicata as to a second warrant issued on affidavit, supplying additional facts to remedy a defect of a statement in the first affidavit. 146SC290, 143SE879.
458-8 SC 155SE273.
458-12 213Ala414, 104S817.
462-39 34GaA151, 128SE781 (evidence as to defendant's residence two and one half years after alleged removal from county properly excluded). [b] (5) Evidence of defendant's declarations that he had no intention of removing from county is admissible when made before he knew that attachment had been issued. 34GaA151, 128SE781. (6) Defendant properly allowed to testify that he was only temporarily absent from state on business and intended to return, evidence being competent on issue of nonresidence formed by traverse. 34GaA151, 128SE781. [c] (2) Evidence of defendant's statement of intention of leaving state on business held admissible on showing that he was absent when attachment sued out. 34GaA151, 128SE781.
463-46 34GaA151, 128SE781 (not error to order trial to proceed on traverse alone). [b] **Statute construed** to mean that mothing that works continuance of traverse only shall postpone main case. 34GaA151, 128SE781.
463-47 195NC484, 142SE706, 709 [quotCJ].
463-50 But see 172Ark335, 288SW712; 177Ark1023, 8SW(2d)462.
463-51 See also 178Ark6, 9SW(2d)778 (defendant's residence mixed question of law and fact).
464-62 [e] **Bond required of attaching creditor** may continue after attachment is dissolved. Md 151A21.
464-65½-New. Where an attachment bond unconditionally promised to pay the judgment on its merits, and effected a release, defendant was estopped from questioning the regularity of the affidavit therefor. 32Ariz80, 255P996, 57ALR196.
464-66 41GaA721, 154SE386; 203 Iowa1083, 212NW317.
465-67 213Ala414, 104S817; 117 ObSt 298, 158NE541, 542, 55ALR1118 [quotCJ]; 156Tenn383, 1SW(2d)1013; 100WVa93, 130SE96.
465-68 100WVa93, 130SE96.
465-71 35GaA644, 134SE183.
466-77 [e] **Effect on right to sue on chose in action attached.**–That writ of attachment has been sued out against holder of note, and garnishment process has been issued therein against maker of note, does not deprive holder of note of right to sue thereon when attachment is dismissed. 51Nev403, 277P980.
466-80 216Ky421, 287SW944; 254 Mass599, 150NE874.
468-97 Contra TexCivA 286SW303.
470-17 [g] **Nonsuiting instead of rejecting** defendant's claim for attorney's fees, for dissolving attachment because of lack of oath is erroneous. 170La779, 129S201. [h] **Defendant's attorney's fees** cannot be taxed as costs. MoA 30 SW(2d)793. [i] **Ordinary costs** should be taxed against plaintiff. MoA 30SW (2d)793. [j] **Defendant's remedy for recovery of attorney's fees** is by separate suit or suit on bond for special damages. MoA 30SW(2d)793.
470-22 [a] **Where case was dismissed for want of service** and there was no appearance and no order for service was made at return term, court cannot restore case at subsequent term, so as to enable plaintiff to take judgment on bond. 127Me167, 142A377.
470-22½-New. , and an order of reinstatement made more than three years after attachment and lien has expired is void. 72CalA539, 237P775.
470-22⅓-New. Where an attachment was discharged on failure to move to reinstate within the time allowed by order of discharge, the court had no jurisdiction. 216Ky421, 287SW944.
471-28½-New. An alleged falsehood in an affidavit in support of a motion to dissolve an attachment does not justify an order setting aside an order dissolving the attachment where plaintiff fails to meet the burden cast upon him by the absolute denial in defendant's affidavit. 164Minn130, 204NW633.
471-32 TexCommnA 1SW(2d)607. But see 168Ga182, 147SE494.
471-33 [a] **Seizure of property any time before judgment is sufficient.**–34 Ariz217, 270P625.
472-39 127 Okl 195, 260P44.
472-40 40GaA427, 149SE711.
473-47 [d] **Service by posting of notices is not warranted** in absence of allegations bringing case within statute permitting such service. 255 IllA 456.
473-53 Minn 232NW512.
474-60 [a] **Certificate of clerk pursuant to statute** as to full compliance with statutes is sufficient prima facie to give court jurisdiction to render judgment. 22AlaA595, 118S229.
474-62 [c] **In Michigan.**–242Mich591, 219NW678.
475-72½-New. Order for publication may be made before the sheriff's return on the writ of attachment is before the court. 34Ariz217, 270P625.
475-72⅓-New. The sheriff's return on the writ of attachment shows jurisdiction to order publication as of the date it is shown that attachment was made, and not as of the date of the return. 34Ariz217, 270P625.
475-74 [a] (2) Allegations that defendant is nonresident and that plaintiff is unable to obtain service on him in state are sufficient without allegation that plaintiff exercised diligence to obtain personal service. 127 Okl 56, 259 P861.
475-75 [a] (2) Other instances. ND 228NW420.
476-89 But see 22AlaA595, 118S229.
476-89½-New. Mailing of notice to particular address is not warranted in absence of averment that defendant ever lived there. 255 IllA456.
476-91 [b] **Summons under such statute is not invalid** for failure to contain writ of attachment, statement of summons to answer petition in suit begun by attachment being sufficient notice. MoA 293SW524. [c] **Summons held sufficient.**–MoA 293SW524.
477-9 235Ky518, 31SW(2d)895; 160 La763, 107S566.
477-10 147Miss747, 113S340, 341 [citCJ]; 156Tenn383, 1SW(2d)1013 [citCJ] (plea in abatement and motion to dismiss held to operate only as special appearance).
479-20½-New. To maintain attachment suit against nonresident, resident having property of nonresident in his possession must be made party. Miss 130 S302.
479-25½-New. Statute, requiring plaintiff attaching property to furnish a copy of the declaration within three days after written demand is valid. Mass 165NE18.
479-26 [a] 21AlaA441, 109S179. [b] (3) In attachment based on nonresidence declaration must be filed at term succeeding levy. 168Ga182, 147SE494.
479-27 [a] 21AlaA441, 109S179.
480-31 168Ga182, 147SE494; Mass 165 NE18; 225AppDiv577, 233NYS16.
480-32 Mass 165NE18.
480-36 Cal 292P632 (defect cured by amendment); TexCivA 299SW514 (where suit commenced and thereafter attachment issued, it is unnecessary to refer to attachment in petition or to file any pleading in reference thereto). Contra TexCivA 287SW117.
481-47 Md 151A21 (holding amendments may not nullify statute or afford party undue advantage); Mass 165NE 18. [m] **Grant or refusal of amendments** is within court's discretion. Md 151A21.
482-53 But see Md 151A21.
482-58 Md 151A21 (defendant may plead any available defense).
482-61½-New. Where property attached is separate property of a wife sued with her husband, and the wife is not indebted to plaintiff, the wife's appearance and denial of indebtedness is all that is required of her, TexCommnA 2 SW(2d)834.
482-61⅓-New. and there is no duty on the wife to plead that the property was her separate property and not that of her husband, where such issue is foreign to the court's jurisdiction. Tex CommnA 2SW(2d)834.
483-65 119Kan788, 241P467 (that title to attached property was held in trust for defendant held established). See also TexCommnA 2SW(2d)834.

483-66 223Ky771, 4SW(2d)734; 146 Miss260, 111S293; 7PaDist&Co585. See also 136Miss886, 101S855. [a] **Evidence insufficient to sustain attachment.**-146 Miss260, 111S293. [b] **Where defendant admits allegations as to grounds by not denying them,** plaintiff need not prove them. 235Ky487, 31SW(2d)723.

483-73½-New. Question of fraudulent conveyance of property to hinder or delay creditors is for the jury under the evidence. 221MoA311, 273SW148.

483-73½-New. Whether defendant fraudulently concealed property to hinder or delay creditors is for the juty. 221MoA311, 273SW148.

483-74 [a] **Instructions held proper** under evidence. 221MoA311, 273SW148.

483-81½-New. Appointment of auditor in a circuit court suit should be set aside where the supreme court appointed an auditor in a prior suit. NJSup 143A 733(2dcase).

483-81½-New. A single auditor appointed by the court issuing the first writ should administer the property where there are several writs. NJCir 135A823.

483-81¼-New. Appointment of auditor on an order of attachment held justified. 105NJL542, 147A337.

483-83 168Ga182, 147SE494; 42 Ida 479, 246P1.

484-84 168Ga182, 147SE494 (proceedings may lie by attachment or bill in equity to confer jurisdiction); 255 IllA 456 (judgment void in absence of service on principal defendant).

485-91 42 Ida479, 246P1.

485-92 34GaA33, 128SE211 (plaintiff may be entitled to general judgment in addition to judgment on attachment); 157Miss810, 128S877(2dcase); TexCivA 299SW514 (judgment may be granted and lien foreclosed before return day of writ if time to plead has expired).

485-93 119Kan788, 241P467 (upholding judgment, ordering sale to satisfy plaintiff's claim subject to rights of mortgagee, and ordering proceeds to be applied first to mortgage debt). [h] **In Oklahoma.**-117 Okl 21, 244P773.

485-93½-New. A court may take evidence after verdict and in the absence of a jury to determine whether the judgment should order the sale of the property. 87 IndA253, 157NE460.

488-13½-New. Judgment sustaining attachment on half interest, reserving for future order questions affecting other half, held proper. 235Ky487, 31SW(2d)723.

491-40 [j] **Judgment before action.**-22F(2d)541.

491-44 168Ga182, 147SE494; 130Misc 752, 225NYS171. [c] (2) Lien enforceable at equity. 94CalA31, 270P458.

492-45 126Me49, 136A121; 130Misc 752, 225NYS171.

493-58 143 Okl 131, 288P281.

494-60 174Ark825, 296SW717.

496-87 34NM516, 285P502 (action in tort disregarding bond).

496-88 32PortoRico 824; TexCivA 32 SW(2d)674.

496-89 34NM516, 285P502.

496-90 32Porto Rico824.

497-93 125Kan665, 666, 266P31 [cit CJ].

497-97 152Miss382, 119S800.

498-4 214Ala415, 108S235; 79CalA190, 249P39; 32PortoRico 824; TexCommnA 18W(2d)607.

498-6 214Ala415, 108S235; 262Mass 345, 159NE751; TexCivA 278SW350. [i] **Attachment is wrongful** where it is made on ground that defendant is about to remove his property with intent to defraud creditors, if defendant was not in fact about to do so. TexCivA 278SW 350. [j] **Where grounds upon which attachment is sued out** do not in fact exist, plaintiff in attachment cannot justify his action because he was informed of defendant's intention and believed such information. TexCivA 278 SW350.

499-10 79CalA190, 249P39 (dictum).

499-11 79CalA190, 249P39.

499-13 [d] **Filing claim in bankruptcy** is not abandonment. 36F(2d)468.

499-18 Contra 51SD102, 212NW506. [d] **Actual provision** must be taken to constitute conversion by wrongful levy on personal property in owner's hands. TexCivA 297SW667.

500-19 [b] **Failure to tender amount of mortgage to mortgagee** by attaching officer does not bar action for wrongful attachment. 51SD102, 212NW506.

500-20 TexCivA 27SW(2d)572. [b] **Levy on drilling equipment** held not conversion against owner's lessee where operation was not disturbed. TexCivA 297SW667. [c] **Wrongful levy of attachment writ** on drilling equipment does not give rise to damages in absence of disturbance of possession. TexCivA 297SW667.

500-22½-New. Sureties are liable to the amount of the bond for receiver's compensation and expenses where the receivership was rendered necessary by attachment. 155Tenn530, 296SW356.

500-22½-New. Where there is a premature attachment and levy on personalty and sale of property under a short-order sale as perishable, 37GaA205, 139SE429.

500-22¼-New. or where defendant waives an order for short-order sale consenting to the sale without prejudice, a forced premature sale of property, if damaging, furnishes basis for recovery under an attachment bond. 37GaA205, 139SE429.

500-22½-New. But damages are not recoverable as a result of a premature short-order sale where attachment plaintiff neither threatened nor sought such sale and defendant voluntarily agreed to it. 37GaA205, 139SE429.

501-32 262Mass345, 159NE751.

501-34 [a] **Intervener has no rights under bond** in attachment suit which is for benefit of defendant therein. Iowa 230NW516.

501-38 [b] (5) Agreement to deposit money in lieu of land attached if plaintiff in attachment would release land therefrom. 76CalA338, 244P955. (6) Agreement that sheriff may sell property and hold proceeds will not preclude suit. 37GaA205, 139SE429. [c] **If agreement that sheriff may sell property is waiver of damages and consent to judgment on attachment,** it should be given effect in attachment proceedings but not in suit on bond. 37GaA 205, 139SE429.

502-40 [b] **Attachment by lessor's creditor** of drilling equipment is not conversion against receiver of syndicate for whom lessee of equipment was drilling well, where lessee's operation was not disturbed. TexCivA 297SW 667.

502-43½-New. The fact that the attachment bond was not conditioned to indemnify plaintiff in an action on the bond will not prevent his recovery therein. 244 IllA204.

503-56½-New. A levying officer may be liable in time for the wrongful seizure of property of one person under a legal process directed against another person. 145Wash81, 259P13.

503-58 Mont 277P414. [h] See also 244 IllA204.

504-61 [b] (2) Surety on attachment bond held not liable to owner for wrongful conversion by sheriff of attached automobile not property of attachment defendant. 84 IndA30, 148 NE202.

504-64 84 IndA30, 148NE202.

504-64½-New. Attachment undertaking constitutes an original, independent, and absolute contract on the part of the sureties. 76CalA338, 244P955.

504-70 [a] **Adjudication of bankruptcy** does not release surety. 143SC422, 141SE683.

504-72 83Mont231, 272P540.

504-75½-New. The adjudication of an attachment defendant in bankruptcy does not release the surety on the attachment bond. 36F(2d)468.

504-75½-New. Where the attachment is originally wrongful, the surety on the attachment bond is not released by the discharge of the attachment or the termination of the litigation. 36F(2d) 468.

504-77 145Wash81, 259P13 (instigator may be sued alone without joining levying officer, though both are liable for conversion).

505-82½-New. Trial of right of property is not only remedy of owner. TexCivA 32SW(2d)674.

505-83 51Philippine240.

505-85 Mass 167NE649.

505-85½-New. Some statutes providing for recovery of damages in main action are permissive and remedy is not exclusive. 143Okl131, 288P281.

506-89 Iowa 230NW516; 146Miss260, 111S293.

507-6 Iowa 230NW516.

511-58½-New. Judgment in tort for defendant in an action brought by plaintiff for wrongfully suing out attachment does not preclude recovery in an action on a bond. 244 IllA204.

511-58¼-New. A debtor, after recovering exempt property sold under attachment, cannot recover the value thereof on a creditor's attachment bond. 221KyS13, 299SW981.

511-70 [d] **It is not consent to attachment** for defendant to agree that if plaintiff would release attachment on real property defendant would deposit money which plaintiff might attach in its stead. 76CalA338, 244P955.

512-83½-New. Where an undertaking provides without qualification that the sureties would become liable in the event of recovery of the judgment by defendant in attachment, the sureties are estopped to deny the validity of the undertaking in the absence of fraud. 76CalA338, 244P955.

512-89 32PortoRico 824 (defense that defendant in attachment had not paid for merchandise wrongfully attached and sold is unavailable).

512-91 TexCivA 15SW(2d)46(1stcase) (justness of claim).

512-96 262Mass345, 159NE751.

516-48 [d] **Homestead exemption sufficiently pleaded.**-92CalA337, 268P428. [e] **Allegations in complaint held sufficient.**-CalA 288P111.

517-61½-New. In the Philippines an allegation that attachment was issued without just cause or justification is sufficient in counterclaim. 51Philippine 240.

517-62 [a] (3) See also 214Ala415, 108 S235 [foll 59Ala203]. (10) Count averring that attachment was wrongfully sued out and that no statutory ground therefor existed is held sufficient. 214 Ala415, 108S235. (11) Count averring that rent not due when attachment was sued out was paid before due, that there were no legal grounds for attachment, that landlord had no probable cause for belief grounds existed, is held sufficient. 214Ala415, 108S235.

518-80 154Wash163, 281P327. [b] **Nonpayment as breach of bond** must be alleged. MoA 22SW(2d)185.

519-1 125Kan563, 264P1075 [foll and app 53Kan628, 36P977].

521-25 [a] **Where mortgagee repossesses** property under mortgage after it had been wrongfully attached, such defense must be specifically pleaded in action on attachment bond. MoA 22SW(2d) 185.

522-34½-New. Judgment dissolving a writ of attachment is res judicata on the right to damages; the sole question being the quantum. 167La432, 119 S417.

523-51 TexCommnA 18W(2d)607 (as ownership of property attached).

523-52 200 Iowa176, 204NW416 (in action for malicious and wrongful suing out of attachment secured on admitted ground of attachment defendant's nonresidence, plaintiff in suit on bond must show that attachment plaintiff had no cause of action and no reasonable cause to believe that allegations of his petition were true).

523-56½-New. In an action for wrongful attachment defendant has the burden of showing that the attachment defendant had an interest in the property attached. TexCommnA 18W(2d)607.

524-64½-New. In action for wrongful attachment, a letter from plaintiff to sheriff giving notice that the property attached is exempt is admissible. TexCivA 286SW1001.

525-77½-New. Testimony of declaration of defendant in attachment is competent to show intent to remove prop-

erty from county or defeat creditors. **TexCivA** 278SW350.

525-77½-New. However, testimony of plaintiff in attachment as to declarations made by defendant to third persons as to intent to remove property or defeat creditors is hearsay, immaterial and incompetent. **TexCivA** 278SW350.

528-38 [a] (2) It is error to refuse to admit evidence of loss of value of use of property wrongfully attacked. 212Ky243, 278SW569.

528-50½-New. To show inability to minimize damages, attachment defendant, in an action on an attachment bond, may show that he was financially unable to replevy property. 37GaA205, 139SE429.

529-55 212Ky243, 278SW569.

529-59 [a] (2) To support finding that plaintiff did not notify attaching officer that she owned property. 34Wyo 119, 241P1068. (3) To support finding that plaintiff owned property. 34Wyo 119, 241P1068. (4) To show that property belonged to plaintiff in conversion suit at time of attachment against third party. 114 OhSt491, 151NE377. (5) To support finding that there was no settlement. 125Kan778, 265P1108. (6) To show that damages were sustained as result of seizure under attachment and not from filing of the main suit. 167La432, 119S417. (7) To show that commingling of automobile parts did not destroy their value. 169La1145, 126S687. (8) To warrant finding that sheriff acted in all matters under directions of attaching creditors. 154Wash163, 281P327.

529-68 18Philippine563

530-89 96CalA650, 274P557. [c] **Evidence held sufficient** to show value of converted merchandise. **TexCivA** 22SW(2d)533. [d] **Owner of secondhand automobile cannot recover in absence of clear and satisfactory proof** as to diminution in value caused by commingling of parts when seized under writ. 169La1145, 126S687.

530-92 [a] 125Kan778, 265P1108.

531-95½-New. To prove damages to personalty in possession of the sheriff under attachment, there must be evidence of the value of the whole when taken and what was returned. 154Wash163, 281P327.

531-1 37GaA205, 139SE429 (nonsuit is error where there is some evidence tending to establish actual damages); **TexCivA** 29SW667.

531-2 [c] **Evidence held insufficient for jury.**–154Wash163, 281P327. [d] **Evidence held sufficient for jury.**–154Wash163, 281P327.

531-6 **TexCivA** 278SW(2d)533.

531-6½-New. But the question whether property attached was in possession of plaintiff in a conversion action where attachment issued is for the jury. 114 OhSt491, 151NE377.

531-7 [f] **Charge improperly stated law,** where court charged that defendant in attachment must show by preponderance of evidence that grounds stated in affidavit are untrue in order to recover for wrongful attachment, and that attachment is lawful if plaintiff believes defendant intended to remove property to defraud creditors. **TexCivA** 278SW350.

532-8 [a] (2) Instruction allowing jury to return damages up to amount sued for held not erroneous. **MoA** 228SW(2d)185. [d] (2) "Fair market value" instead of "reasonable market value" as measure of damages held not error. **MoA** 228SW(2d)185. (3) Failure to instruct when market value should be ascertained held not error where evidence was as to value at time of taking. **MoA** 228SW(2d)185. [f] (2) As disregarding effect of partial return of property on amount of interest allowable. **MoA** 228SW(2d)185. [g] **Instructions held erroneous.**–**MoA** 228SW(2d)185. [h] **Instruction properly limited to necessary expenses as damages.**–**MoA** 228SW(2d)185. [i] **Attorney's fees** in various courts as element of damages properly covered by instruction. **MoA** 228SW(2d)185.

532-10 145Wash81, 259P13 (instruction held proper).

532-13 [c] **Instruction held not misleading** as to difference in dates for calculating interest and for ascertaining value. **MoA** 228SW(2d)185.

534-35 116Miss260, 1118293; 51SD 102, 212NW506.

534-37 82CalA572, 255P886; 152Tenn 367, 278SW68, 42ALR1052; **TexCivA** 286SW1001. **TexCivA** 278SW(2d)825. [c] (6) Generally wrongful attachment of realty affords no ground for recovery of actual damages. **TexCivA** 278SW(2d) 825. [d] **Recovery limited** to proximate damages up to time of defendant's voluntary bankruptcy, but not thereafter. 36F(2d)168.

534-39 **TexCivA** 158SW(2d)46(1stcase).

535-40 **GaA** 139SE429; 130 Okl 284, 267P259.

535-41 [b] **Ala** 130S192.

535-45 **Ala** 130S192.

536-46 11LaA445.

536-47 167La432, 119S417; 9LaA693, 120S218; 9LaA471, 121S254; 152Tenn 367, 278SW68, 42ALR1052.

537-49 **TexCivA** 278SW(2d)825.

537-64 210Ky104, 275SW25 (conversion). [i] (1) See also 37GaA205, 139SE429. [m] **Rule only applies where property cannot be returned.**–**TexCivA** 228SW(2d)753.

538-68 130 Okl 284, 267P259; 51SD 102, 212NW506; **TexCivA** 228SW(2d)753; **TexCivA** 278SW(2d)825; 145Wash 95, 258P1032, 54ALR148.

539-69½-New. Loss sustained by reason of a landowner's mistaken belief that levy prevented him from gathering crops cannot be recovered. **TexCivA** 12SW(2d)271.

539-69⅞-New. In suit by owner of secondhand automobile for commingling parts when seized under writ of provisional seizure, cost of reassortment has been held proper measure of damages. 169La1145, 126S687.

539-70 76CalA338, 244P955.

539-71 See also 76CalA338, 244P955, 958 [cit CJ].

539-72 212Ky243, 278SW569.

539-73 210Ky104, 275SW25; **MoA** 22SW(2d)185; **TexCivA** 278SW(2d)825; 145Wash95, 258P1032, 54ALR148. [e] (2) Instruction not to allow any damages for attached horses afterward repossessed by mortgagee is properly refused. **MoA** 228SW(2d)185.

540-74 167La432, 119S417; 51Philippine1

540-75 212Ky243, 278SW569 (decrease of business due to wrongful attachment is incidental, and cannot be proved). [b] **Damages for voluntary bankruptcy** allegedly due to wrongful attachment are not recoverable. 36F(2d)468.

540-77 37GaA205, 139SE429; 51 Philippine1.

541-79 214Ala415, 108S235; 167La432, 119S417 (difficulty of ascertaining no bar).

541-80 145Wash95, 258P1032, 54ALR 148.

541-81 **TexCivA** 128SW(2d)271.

541-84 167La432, 119S417; 4LaA588.

541-85 See also 214Ala415, 108S235.

541-86 167La432, 119S417.

541-88 **TexCivA** 278SW(2d)825. But see 130 Okl 284, 267P259; 51SD102, 212 NW506.

542-93 15F(2d)389.

542-95 130 Okl 284, 267P259.

542-96 130 Okl 284, 267P259. [c] See also 214Ala415, 108S235. [g] 152Tenn 367, 278SW68, 42ALR1052.

543-97 82CalA572, 255P886 (transcribing testimony of witness in attachment suit).

543-99 91CalA64, 266P576; **TexCivA** 128SW(2d)271. **TexCivA** 278SW(2d)825.

543-1 214Ala415, 108S235; 82CalA572, 255P886; 203 Iowa190, 210NW749; 212Ky243, 278SW569 (lawyer's fees in getting attachment discharged); 147 Miss169, 113S326; 51SD102, 212NW 506. See also 130 Okl 284, 267P259. [d] (5) Where issue of fees is submitted to jury as item of damages, court cannot allow such fees in addition as part of costs. 203 Iowa190, 210NW749.

544-6 15F(2d)389 (California bond); 82CalA572, 255P886; 152Tenn367, 278 SW68, 42ALR1052.

545-13 57Miss490. But see 37GaA205, 139SE429.

545-17 **TexCivA** 286SW1001.

545-19 **TexCivA** 286SW1001.

545-26½-New. ; or that goods attached were perishable and had to be sold at public auction. 32PortoRico 824.

545-28 See also **TexCivA** 158SW(2d)46 (1stcase).

545-29 167La432, 119S417; 9LaA471, 121S254.

ATTEMPT

548-19 22AlaA74, 112S177, 178 [quot CJ].

548-21 22AlaA74, 112S177, 178 [quot CJ].

548-22 22AlaA74, 112S177, 178 [quot CJ].

548-23 22AlaA74, 112S177, 178 [quot CJ].

548-25 22AlaA74, 112S177, 178 [quot CJ].

548-27 22AlaA74, 112S177, 178 [quot CJ].

548-28 22AlaA74, 112S177, 178 [quot CJ].

549-31 22AlaA74, 112S177, 178 [quot CJ].

549-33 22AlaA74, 112S177, 178 [quot CJ].

549-35 22AlaA74, 112S177, 178 [quot CJ].

549-36 22AlaA74, 112S177, 178 [quot CJ].

549-37 22AlaA74, 112S177, 178 [quot CJ].

ATTENDANT

550-64½-New. "Attendant" means accompanying or connected with. 160La 261, 107S103.

ATTESTATION

553-90 161Ga690, 131SE885.

ATTORN

555-22 220MoA1057, 279SW720.

555-23 220MoA1057, 279SW720.

555-24 220MoA1057, 279SW720.

555-25 220MoA1057, 279SW720.

ATTORNEY AND CLIENT

567-15½ [a] (6) In New Jersey attorney who is not counselor at law cannot prosecute rule to show cause why certiorari should not issue. **NJ** 141A 561.

568-21 **Okl** 256P680.

568-22 19F(2d)722; 215Ala660, 111S 913; 197Cal765, 242P918; 79Cal149, 248P1057; 79CalA721, 250P880; **CalA** 273P617; **Fla** 127S309; 28Hawaii47; 225Ky334, 8SW(2d)397; 169Minn287, 211NW463; 76Mont222, 246P250; 77 Mont332, 250P957; 220AppDiv600, 223 NYS355; 223AppDiv149, 227NYS666; 220AppDiv107, 220NYS473; 136Misc 743, 241NYS721; 191NC235, 131SE661; 85PaSuper177; 145SC364, 142SE805. See also 248NY465, 162NE487.

568-22½-New. , and are charged with responsibilities but little less in character than those resting on the judge himself. 76Mont222, 246P250.

568-23 77CalA495, 247P231; 100NJEq 238, 134A866; **Wis** 232NW553.

569-25 79CalA149, 248P1057; **CalA** 273P617. See also 248NY465, 162NE 487.

569-26 79CalA149, 248P1057; 28 Hawaii47; 200 Ind424, 164NE261; 76 Mont222, 246P250. [a] **Attorneys owe to the judicial tribunals before which they practice** the duty of good faith and honorable dealing. 28Hawaii47. [b] **Record on appeal.**–225Ky334, 8SW (2d)397.

569-27 76Mont222, 246P250.

569-27½-New. It is the function of an attorney to advise his client on questions of law. 101NJEq9, 137A151.

569-28½-New. Although attorneys must not defy the authority of the court lawfully exercised, by exhibitions of mere willfulness, or obstinacy, 76Mont 222, 246P250.

569-28¾-New. they are not called upon to truckle to the capricious whims of impatient judges, 76Mont222, 246P250.

569-28¼-New. being under the obligation to support with dignity the high tenets of their profession. 76Mont222, 246P250.

569-28⅛-New. Attorney is entitled to protect his record to secure rights of

client in both trial and appellate courts. 76Mont222, 246P250.

569-28¼-New. He has no supreme right to make his record in his own way, 76Mont222, 246P250.

569-28½-New. though he is not compelled in any event to submit to the court's idea of what the record should contain. 76Mont222, 246P250.

569-28⅝-New. Attorneys owe duty to uphold honor of profession and aid court in rooting out corruption. 229 AppDiv62, 241NYS369.

569-29 19F(2d)722; 23AlaA5, 120S 140; 35Ariz346, 278P371; 45 Ida676, 266P665, 671 [citCJ]; 200 Ind424, 164 NE261; 220AppDiv107, 220NYS473.

569-30 Cal 291P837; 76CalA354, 244 P1089; 45 Ida676, 266P665, 671 [cit CJ]; 220AppDiv107, 220NYS473; 52 SD394, 218NW1.

569-31 29Ariz582, 244P376; 200 Ind 424, 164NE261; Nev 292P291; 157Tenn 68, 6SW(2d)332 [citCJ]. [b] **Statute prohibiting practice of law by one not licensed** must be observed. 319 Ill 596, 150NE280. [c] **Legislature has power to impose reasonable restrictions** on practice of law. 208Cal 439, 281P1018. [d] **State Bar Act providing for compulsory membership of attorneys** held not void. Nev 292P291.

569-33 But see Cal 291P164.

569-37 76CalA354, 244P1089; NJ 151 A630. [b] (8) Bank's agreement to sue payee to whom it negligently paid check after payment stopped, not practice of law. 220AppDiv443, 221NYS638. [c] **Action to exclude corporation from practice of law.**-76CalA354, 244P1089 (sufficiency of complaint). [d] **Preparation and argument of appeal** from order of fire department to board of standards and appeals is not practice of law, and recovery of compensation by corporation for services may be had. 132Misc 687, 230NYS670.

569-37½-New. It has been held that a letter of authority issued by state insurance commissioner would not of itself entitle holder to practice law. Cal 291P837.

569-38 [c] **Conditions attached to right of foreign attorneys to practice.**-202 Iowa462, 210NW540.

569-39 71CalA129, 234P906; 319 Ill 596, 150NE280; NJ 151A630. [g] **Probate court.**-Minn 232NW318.

570-41½-New. A person assuming to be a practicing attorney, although his name does not appear on the roll of attorneys, will be held to the duties and burdens which the law imposes on an attorney in dealing with his client and to the same degree of accountability as though he were legally admitted. 198Cal 46, 243P657.

570-44 CalA 290P484; 202 Iowa462, 210NW540. [b] **Allowing association of counsel with defendant** who originally appeared in person, with plaintiff's knowledge, is not error. 98CalA738, 277 P867. [c] **Part owner** could prepare and procure signatures to conveyance. Ala 129S88. [d] **In New Jersey.**-151A 630.

570-47 54SD170, 222NW665.

570-52 87Colo547, 290P283. [b] **Trust company holding itself out as qualified to draft wills and trust declarations** illegally represents itself as qualified to practice law. Ida 288P157 (2dcase).

570-53 [c] **Evidence held admissible.**-245 IllA197.

571-57 [a] **In North Dakota.**-51ND792, 200NW898.

571-61 208Cal 439, 281P1018 (inherent powers of court); 71CalA129, 234P906; CalA 273P617; 292Pa96, 140A634. [c] **Motion for admission to practice as attorney is sufficient** to bring before supreme court for consideration application of any person who has submitted himself to board of examiners prior to such application. 208Cal 439, 281P1018.

572-62 220AppDiv107, 220NYS473.

572-63 29Ariz582, 244P376; 30Ariz 407, 248P29; 208Cal 439, 281P1018; 71CalA129, 234P906, 907 [citCJ]. [c] **Legislature may bestow or empower judicial department to bestow** right to practice on terms deemed consistent with nature and purpose of right or privilege. 92CalA646, 268P971.

572-64 29Ariz582, 244P376; 30Ariz 407, 248P29; 71CalA129, 234P906; 178 Minn331, 227NW179; 178Minn335, 227 NW180 (last two cases holding statute violative of equality provisions of constitution and void); 292Pa96, 140A634. [a] **Provisions of California code of civil procedure** as to admission of attorneys held reasonable. 71CalA129, 234P906. [b] **United States board of tax appeals** may make rules as to person who may practice before it. 270US117, 46SCt215, 70LEd494. [c] **Legislative power does not deprive courts of inherent power** to permit attorney from sister state to appear in particular case. Ida 289P85 (without obtaining general license).

572-65 71CalA129, 234P906, 907 [cit CJ].

572-66½-New. Where a petitioner filed an application with the supreme court for admission to practice as an attorney prior to the effective date of an amendment of the statute, such amendment does not control. 208Cal 439, 281P1018.

572-70 200 Ind424, 164NE261.

572-71 92CalA646, 268P971 (under statute impliedly repealing code provision under which district courts of appeal exercised like function); 45 Ida 676, 266P665 (power of supreme court is inherent).

572-72 252NY316, 169NE397; 220 AppDiv107, 220NYS473. [a] 220AppDiv 107, 220NYS473. [b] **In California.**-293 P17.

573-73 [a] **In Pennsylvania.**-292Pa96, 140A634.

573-76 208Cal604, 283P820.

573-79 87Colo547, 290P283.

573-80 87Colo547, 290P283.

573-83 208Cal740, 284P909; 28Hawaii 47; 220AppDiv107, 220NYS473; 191NC 235, 131SE661; 292Pa96, 140A634. [b] **Question of character is directly presented** when applicant has successfully passed examination. 191NC235, 131SE 661. [c] **Evidence held to show** that applicant was of good moral character. Cal 293P47.

573-83½-New. Before a member will be admitted to practice in a new state he must show sufficient residence in the new state to comply with the statute. Ind 148NE413.

574-84 [c] **Words "upright character"** include all elements to make up such character. 191NC235, 131SE661. [d] **Practice before federal court,** though applicant for admission to state bar was not previously licensed in state, does not warrant refusal of admission. Cal 293P47. [e] **Appearance of attorney,** unlicensed to practice, before officer taking depositions, while improper, does not sufficiently involve his moral character. Cal 293P47.

574-86 [a] **Mere opinion of other attorneys as to reformation** of rejected applicant is insufficient, in absence of recital of facts on which opinion is based. 32PortoRico 607. [b] **On review of action of county bar in refusing admission,** issue before trial court is whether committee acted fairly and reasonably. 111Conn47, 149A415.

574-87½-New. An attorney, while recorded as disbarred in a sister state, will not be admitted to practice. 221 AppDiv607, 225NYS144.

574-87½-New. An examination and certification by the bar examiners of applicant does not preclude the court from exercising its judgment as to character and fitness. 221AppDiv607, 225NYS144.

574-87¼-New. Committee on character is not called on to examine into his academic or legal learning. 230AppDiv 218, 243NYS705.

575-2½-New. State statutes regulating practice of law are inapplicable to federal courts. Cal 293P47.

576-4 71CalA129, 234P906. [b] (2) Applicant may move to dismiss petition and make new application, where judgment admitting him to bar was reversed with direction to grant new trial. 199 Ind140, 155NE705. [e] **In Porto Rico.**-33PortoRico 788.

576-6 NJSup 130A526; NJSup 130A 534.

576-8 [c] **Admission to examination on presentation of university diploma** will not bind court in future to admit persons holding such diplomas after it has decided such university is not accredited under statute. 35PortoRico 149.

576-9 [a] **In California.**-70CalA23, 232 P473.

576-10½-New. In Kansas, one admitted to practice until the next bar examination is held regularly admitted. 125Kan22, 262P1035.

576-10⅝-New. In Porto Rico supreme court may admit person to bar without examination if satisfied by evidence that he has practiced as lawyer in offices of attorneys authorized to practice law. 34PortoRico 709 (sufficiency of evidence).

577-12 [a] **Attorney licensed to practice in federal courts** and courts of foreign state is privileged to appear in state court to secure removal of action. Cal 293P47.

577-13 70CalA716, 234P128 (applicant held not to have been in "actual practice" in another state for requisite time). [d] **Petitioner held entitled to admission.** Cal 293P156.

577-19 But see NJSup 129A183. [e] **In New Jersey.**-Sup 130A520.

578-21½-New. Where certificate of clerkship has to be filed, it may be filed nunc pro tunc. NJSup 130A522. But see NJSup 130A525.

578-21⅝-New. Application for leave to file certificate of commencement of clerkship nunc pro tunc should be made by counsellor at law and not by applicant. NJSup 130A[illegible].

578-21¾-New. Requirement of year's continuous clerkship may be complied with though applicant worked in hotel during allowable vacation. 252NY316, 169NE397.

578-28½-New. In some jurisdictions an applicant's oath requires him at all times to demean himself toward the courts and judges thereof in such manner as not to bring the courts or judges thereof into disrepute before the public. 126 Okl 86, 258P744, 53ALR1239.

579-33 157Tenn68, 6SW(2d)332

579-42 CalA 284P492; 167Minn350, 209NW31 (misrepresentation of true name).

579-43½-New. Where no charge of irregularity, fraud, or error of law is alleged, a refusal to permit filing of a motion is proper. 199 Ind140, 155NE705.

579-43⅝-New. A person not party to a proceeding cannot move to vacate or set aside or appeal from a judgment admitting an applicant. 199 Ind140, 155 NE705.

579-45½-New. The officer making levy must retain his control and power of taking immediate possession of the goods, and if he fails to do this, the attachment will be regarded as abandoned. 33PortoRico 373.

579-46 [b] **Transcript of testimony in disbarment proceeding,** certified to supreme court on review of order denying application, is before such court for all purposes. Cal 293P47.

579-47 199 Ind140, 155NE705. [a] **Evidence held not of such serious character** as to warrant denial of admission to practice. Cal 293P47.

580-50½-New. The appellate division may direct a general inquiry into the conduct of members of the bar. 248NY 465, 162NE487.

580-50¼-New. It may compel one of them to testify as to his professional acts, subject to constitutional privilege. 248NY465, 163NE487.

580-50¼-New. Power to inquire into professional conduct of attorneys will not be denied the court, as putting in its hands a weapon whereby an innocent lawyer's reputation is at the mercy of the tongue of ignorance or malice, the remedy being to make inquisition a secret. 248NY465, 162NE487.

580-50½-New. This power imports power to inquire by appropriate and adequate methods, including compulsory process, if necessary. 248NY465, 162 NE487.

580-50⅝-New. Inquisition by the court with a view to the discipline of attorneys is not a mere duplication of grand jury inquisition with a view to the

punishment of criminals. 248NY465, 162NE487.

580-50½-New. A legal requirement as to the formulation of a charge in a disbarment proceeding is inapplicable to inquisition before preferment. 248 NY465, 162NE487.

580-50¼-New. Preliminary inquisition into professional conduct is not "sitting of court." 248NY465, 162NE487.

580-52 19F(2d)722; 194Wis207, 216 NW513.

580-54½-New. A court will not act on a resolution of a bar association requesting a general investigation concerning unethical practices in the absence of a petition, affidavit, or statement of facts. 226AppDiv233, 236NYS76.

580-55 19F(2d)722; 36F(2d)272; Ariz 284P521; CalA 273P617; Conn 152A 292; Fla 127S309; 45 Ida676, 266P665, 670 [citCJ]; 208Ky452, 271SW555 (attorney may be disbarred in common-law proceeding); 160La483, 107S314; 161La125, 108S309; Mass 167NE749 (courts of each jurisdiction must decide who is or who is not member of its bar, and no other court can); 127 Okl 85, 260P454; 288Pa331, 135A732; 51SD464, 214NW850; 67Utah118, 246 P188; 193Wis602, 214NW379; 193Wis 132, 214NW396; 194Wis207, 216NW 513; 196Wis534, 221NW603; 199Wis 401, 226NW385. [d] **Due process clause not violated** by giving board of governors power to disbar. Nev 292P291.

581-56 45 Ida676, 266P665, 670 [citCJ]; 161La125, 108S309; 77Mont 332, 250P957; 127 Okl 85, 260P454.

581-56½-New. The court will use its authority whenever necessary to the maintenance of respect due from members of the bar to courts and the judges thereof. 126 Okl 86, 258P744, 53ALR 1239.

581-58 208Cal 240, 280P964 (statute providing for creation of state bar and defining its powers held constitutional). [c] **Washington statute** as to procedure for disbarment held constitutional. 6 F(2d)33. [d] **Nondefinition of misconduct held not to effect jurisdiction to disbar.**–160La483, 107S314. [e] **Statutes conferring powers on board of commissioners of state bar.**–45 Ida676, 266P665.

581-59 19F(2d)722; 73Mont284, 235P 772; 127 Okl 85, 260P454; 51SD451, 214NW808; Wis 232NW553.

581-60 Fla 127S309; 261Mass484, 159 NE495, 55ALR1309 (to conserve public interests); 73Mont284, 235P772; 127 Okl 85, 260P454; 51SD451, 214NW 808; 52SD394, 218NW1. [a] (2) Disbarment is justifiable not only as punishment, but also as protection of possible litigants and their property. Tex CivA 30SW(2d)545. [b] **Judicial inquiry into corrupt practices.**–223AppDiv 149, 227NYS666.

581-61 CalA 273P617; 33NM386, 268 P570 (cannot be exercised by board of commissioners of state bar); 127 Okl 85, 260P454.

581-62 127 Okl 85, 260P454.

581-63 19F(2d)722; 127 Okl 85, 260 P454.

581-64 19F(2d)722; Ark 32SW(2d) 308; 126 Okl 86, 258P744, 53ALR 1239; 127 Okl 85, 260P454; 51SD464, 214NW850.

582-65 127 Okl 85, 260P454.

582-66½-New. A constitutional provision for the removal of judges of the supreme or circuit court is held inapplicable in determining the power to disbar a judge of the superior court. 193Wis602, 214NW379.

582-66⅓-New. General investigation into unprofessional practices of attorneys may be undertaken by the court in its inherent as well as constitutional and statutory power, sua sponte, as well as on petition of bar associations, where warranted in the interests of the administration of justice. 22App Div580, 227NYS1.

582-70 103WVa7, 136SE402.

582-75 67Utah118, 246P188.

583-76 45 Ida676, 266P665; 261Mass 484, 159NE495, 55ALR1309; 34NM554, 286P156; 51SD464, 214NW850. [a] **Rules of conduct** by governors of bar, approved by supreme court, become its rules within its power to discipline attorneys. Cal 289P818.

583-83½-New. A federal court for the district of Massachusetts may disbar an attorney admitted by a federal circuit court of Maine before abolition of circuit courts who had practiced in the district of Massachusetts up to the time of disbarment. Mass 167NE749.

583-85 Conn 152A292; 322 Ill 210, 153 NE349; 288Pa331, 135A732.

583-87 208Cal 555, 282P952; 30Hawaii 588, 593 [citCJ]; 161La125, 108S309; 261Mass484, 159NE495, 55ALR1309 (effect of rules of court and codes of legal ethics); Mass 167NE749; 156Miss439, 125S833; 77Mont47, 248P187; Nev 292 P291; 227AppDiv496, 238NYS596 (court's approval of contingent agreement for settlement of infant's case); Or 260P783; 51SD393, 216NW355, 55 ALR1346 (inducing person to pay exorbitant fee to another attorney in proceeding coming before defendant as county judge). [b] **Where civil code provided grounds for disbarment,** state bar has jurisdiction though acts were committed before State Bar Act came in force. 208Cal 35, 280P113. [c] **Attorney cannot ignore law** requiring order fixing fees in infants' cases, but he is not liable for court's failure to do so. 227AppDiv502, 238NYS273. [d] **Court has authority to revoke certificate to practice** for misconduct prior to obtaining it. Fla 127S309. [e] **That no one suffered injury** is not controlling in considering attorney's misconduct. 229AppDiv100, 241NYS50.

583-87½-New. Court of criminal appeals of Texas has no way of punishing lawyers who do not properly take care of the business of their clients. TexCr 31SW(2d)1072.

584-88 120 Or465, 252P711; Or 260P 783.

584-89 Conn 152A292.

584-98 See also 67Utah118, 246P188.

584-94 [c] **Statute providing for organization, regulation, and government of state bar** held not to have repealed prior act authorizing prosecution of disbarment proceedings. 220Ala466, 126 S873.

584-96 30Ariz407, 248P29.

584-1 Conn 152A292; 46 Ida195, 267 P452, 456 [quotCJ]; 208Ky452, 271SW 555; Mass 167NE749; 80Mont537, 261 P341; 229AppDiv490, 243NYS334; Or 260P783; 193Wis602, 214NW379.

585-2 46 Ida464, 268P17 (offense must be one involving moral turpitude); 170 Minn408, 212NW535; 73Mont284, 235 P772; 210AppDiv627, 210NYS469; 222 AppDiv829, 226NYS391; 223AppDiv 149, 227NYS666; 218AppDiv141, 218 NYS56; 224AppDiv222, 230NYS73; 122 Okl 180, 253P103; 141 Okl 78, 284P 33; Wash 287P677(2dcase) (conspiracy to violate Federal Prohibition Act). [a] (1) 13F(2d)138; 73Mont284, 235P 772. (3) 199Cal 538, 250P390, 48ALR 1232. (5) Person pleading guilty to indictment charging violation of Federal Conspiracy Statute by conspiring to cause to be executed and presented fraudulent appearance bond to secure release of person in custody. 122 Okl 180, 253P103. (6) Manufacture in one's own home of intoxicating liquor for sole purpose of serving it to family and guests does not involve moral turpitude but may constitute misconduct as officer of court. 19F(2d)722. (7) Offense must involve moral turpitude under laws of state where attorney practices rather than under laws of another jurisdiction, including United States laws. 46 Ida195, 267P452. (8) That attorney was convicted of violating federal statute by sending obscene and unmailable letters through mail is not conclusive that conviction was of offense involving moral turpitude within state disbarment laws. 46 Ida195, 267P452. (9) Such conviction is not ground for disbarment in some jurisdictions. 46 Ida 195, 267P452. [d] **Suspension for six months.**–NJSup 140A253. [e] **Adultery** is conduct involving "moral turpitude," and is "infamous crime." Conn 152A292. [f] **Constitutional and statutory privileges** as an elector lost through conviction should be considered by court. Conn 152A292.

585-4 166La617, 117S738; 222AppDiv 269, 226NYS158; 12PaDist&Co 741.

585-5 73Mont284, 235P772 (making false reports as to condition of bank of which he was director).

585-6 Colo 249P1093.

585-6½-New. false and fraudulent proof of claim of loss on contract of insurance, 52SD394, 218NW1.

586-7 167La546, 119S868(3dcase); 170 Minn408, 212NW535; 225AppDiv5, 232 NYS336.

586-8 210AppDiv627, 210NYS469; 223 AppDiv233, 227NYS745; 225AppDiv653, 231NYS187; 218AppDiv141, 218NYS56. [a] **Petty larceny** in obtaining money by issuing worthless check on bank in which he had no account. 216AppDiv 173, 213NYS751.

586-11 Minn 231NW241(1stcase) (conviction in federal court of receiving bribe).

586-20½-New. willful and fraudulent concealment and disposition of assets in bankruptcy, 52SD394, 218NW1.

586-22½-New. seduction under promise of marriage, Mo 19SW(2d)625 (as criminal offense involving moral turpitude).

586-23 [a] **In Kansas.**–121Kan536, 247 P875, 48ALR252.

586-23½-New. manufacture of beer in violation of the National Prohibition Act, 13F(2d)138.

586-23⅓-New. attempt to evade Federal Income Tax Law, 173Minn297, 217 NW356.

586-23¼-New. conspiracy to prevent prosecution of violator of health regulations, 222AppDiv272, 226NYS248.

586-24½-New. , or felonies, under federal laws, in use of mails to defraud. 218AppDiv388, 218NYS654.

586-26 [a] (1) 218AppDiv388, 218 NYS654. (4) Statute is mandatory and regularity of conviction cannot be looked into. 218AppDiv388, 218NYS 654.

586-27 [a] 216AppDiv173, 213NYS751; 218AppDiv388, 218NYS654. [c] **Conviction of felony under federal law is cause for disbarment** even if act is misdemeanor under state law. 218AppDiv 388, 218NYS654. [d] **Whether offense of which attorney was convicted in federal court involves moral turpitude** is question for state supreme court to determine. 46 Ida195, 267P452. [e] **Where conviction of crime is "ground for disbarment,"** mere showing of conviction of assault with intent to murder is insufficient. Fla 128S487.

587-30 204 Iowa123, 214NW874; 175 Minn626, 221NW724 (bribery of public officers); 77Mont332, 250P957; Or 288 P507(2dcase) (repeatedly issuing worthless checks); 51SD393, 216NW355, 55 ALR1346 (extortion). See also 50SD428, 210NW507. [b] **In Oklahoma.**–136 Okl 268, 277P930(1stcase). No jurisdictional question is presented where court decides to act after investigation by attorney-general and report made by him is sufficient to move its discretion. 77 Mont332, 250P957.

587-32 45 Ida676, 266P665.

587-35½-New. A prosecution by a city in a police court must be deemed abandoned and the conviction of little probative force where an appeal was taken and remained dormant for six years. 204 Iowa123, 214NW874.

587-36 288Pa331, 135A732, 734 [cit CJ]; Pa 152A33; 7PaDist&Co 71.

588-39 See also 202Cal 289, 260P294.

588-41 102CalA733, 283P965; Pa 152A 33.

588-43 226AppDiv460, 235NYS601 (fraud shown).

588-44 167Minn350, 209NW31.

588-46 96CalA655, 274P559.

588-47 CalA 287P131; CalA 291P431; 200 Ind424, 164NE261.

588-47½-New. or resignation under charges, 226AppDiv460, 235NYS601.

588-48 19F(2d)722; 80Colo 448, 251P 597; 320 Ill 344, 151NE241; 122Kan 394, 251P1088; 122Kan796, 253P400;

161La125, 108S309; 120 Or465, 252P711; 10PaDist&Co 25; 11PaDist&Co 521(2dcase); 51SD459, 214NW848. [a] **Attorney assisting another attorney** in preparing pleadings acts in professional capacity within disbarment statute. 41F(2d)302. [b] **Excuse that act was not unlawful** will not prevent suspension for unethical conduct. 300Pa465, 150A748. [c] **Conduct must be viewed in light of facts** as they appeared at time of act. Wis 229NW36.

589-49 19F(2d)722; 122Kan796, 253P400; 164Minn408, 205NW266.

589-50 19F(2d)722; 102CalA733, 283P965; 122Kan796, 253P400; 223Ky90, 28W(2d)1038; Mass 167NE749; 168Minn224, 209NW870 (taking judgment for divorce by default after inducing wife, by fraud, not to defend); 227AppDiv522, 238NYS622; 114 Okl 115, 243P933.

589-51 Cal 292P450 (affirmance on appeal held not to terminate relation); 122Kan796, 253P400; 168Minn224, 209NW870 (taking judgment for divorce by default after inducing wife, by fraud, not to defend); 51SD459, 214NW848. [b] **Duty to adverse party unrepresented by counsel.**–218AppDiv134, 218NYS6. [c] **Violating escrow agreement** to pay money to third party, secretly paying to client instead, is ground for disbarment. 230AppDiv166, 243NYS9.

589-52 19F(2d)722, 729 [quotCJ]; 320 Ill 344, 151NE241; 122Kan796, 253P400; 161La125, 108S309; 164Minn408, 205NW266; 84Mont221, 275P1098. [b] (2) Attorney bringing case into court in which he has been corruptly or unfairly retained by own acts violates oath of office. 223AppDiv149, 227NYS666. [j] **Inducing sheriff to allow prisoner to be taken out of state** to point in neighboring state which could not be reached till late at night was act casting doubt on good faith of attorney and improper and unprofessional conduct. 49SD78, 206NW427. [k] **Interposing defense in proceedings for disbarment** that prisoner, whom attorney had requested sheriff to be allowed to be taken to another state, himself transporting such prisoner, who there escaped, was not held under a legal commitment, is unethical and unprofessional conduct. 49SD78, 206NW427. [l] **Agreement between lawyer and layman for division of fees.**–320 Ill 344, 151NE241. [m] **Division with mayor of city of fees earned as city attorney.**–320 Ill 344, 151NE241. [n] **Giving worthless checks** with expectation that they will be put in circulation is ground for disbarment. 77Mont47, 248P187. [o] **Advertisement stating name, address, and words "free advice"** violates rule against advertisement, requiring reprimand. Cal 289P818. [p] **Failure to have fee in infants' cases fixed by court** is not unprofessional conduct where court in erroneous interpretation of law refused to fix fee. 228AppDiv123, 239NYS304. [q] **Attorney's participation in friendly suit** to procure authorization to settle claims for personal injuries to infants is not censurable offense. 228AppDiv197, 239NYS483. [r] **Rule of principal's responsibility** for conduct of agent has greater applicability to attorney's responsibility for conduct of his office. 229AppDiv323, 242NYS18. [s] **Use of threats of criminal prosecution** as means of forcing settlement is unprofessional conduct. 230AppDiv524, 245NYS416. [t] **Rule prohibiting attorneys from soliciting employment** by advertising is reasonable. Cal 289P818.

589-53 80Colo 443, 251P597; 30Hawaii 405; 322 Ill 210, 153NE349; 223AppDiv539, 229NYS385; 230AppDiv185, 243NYS1 (trading releases for sum to be distributed by attorney); Or 260P783; 11PaDist&Co 563; 11PaDist&Co 566. [d] **His relation to client is not limited to trial** of cases or court work. Ark 32SW(2d)423.

590-55 80Colo 443, 251P597; 46 Ida 578, 269P416 (attorney receiving money under false representations that he had started suit and incurred expenses); 322 Ill 210, 153NE349; 167Minn350, 209NW31; Or 260P783.

590-56 Minn 230NW582; 230AppDiv318, 244NYS201; 13PaDist&Co 313; 14PaDist&Co 164; 13PortoRicoFed342.

590-57 222AppDiv282, 226NYS250 (signing release to obtain secret settlement); 225AppDiv90, 232NYS175 (obtaining money by false promise of marriage); Or 260P783.

590-60½-New. Abandonment of client after receiving retainer and failure to take further steps in litigation or negotiations is ground for disbarment. 217AppDiv441, 217NYS237.

590-60¾-New. Courts condemn practice of attorneys accepting retainers and delivering to client sum less than that due under retainer. 228AppDiv470, 240NYS481.

590-62½-New. Carelessness and neglect in practice as violation of oath faithfully to discharge duties of attorney warranting suspension. Cal 291P583.

590-63 238Mich151, 213NW110, 51ALR1303 (dictum); 165Minn449, 206NW710, 711 [citCJ]; 176Minn519, 223NW921; NJCh 145A627(1stcase).

591-64 238Mich151, 213NW110, 51ALR1303 (dictum); 165Minn449, 206NW710, 711 [citCJ].

591-69 30Ariz407, 248P29; 31Ariz407, 254P481; 33Ariz299, 264P473; 80Colo 443, 251P597; 87Colo 115, 285P758 (secret profits); 322 Ill 210, 153NE349; Ill 173NE398; 202 Iowa157, 209NW417; 121Kan596, 249P606, 607 [quot CJ]; 122Kan796, 253P400; 208Ky452, 271SW555, 556 [quotCJ]; 165La625, 115S809; 164Minn408, 205NW266; 166Minn448, 208NW197; 169Minn194, 210NW865; 171Minn111, 213NW556; 172Minn158, 215NW191; 172Minn347, 215NW425; 178Minn547, 227NW892; Minn 230NW582; Minn 231NW233(1st case); Minn 231NW396; Minn 232NW108; 77Mont47, 248P187; 80Mont537, 261P341; 118Nebr47, 223NW635; NJ 136A183; 32NM442, 259P613; 34NM554, 286P156; 216AppDiv159, 213NYS664; 217AppDiv437, 217NYS253; 217AppDiv441, 217NYS237; 220AppDiv523, 221NYS708; 221AppDiv51, 222NYS636; 221AppDiv60, 222NYS656; 222AppDiv270, 226NYS65; 222AppDiv275, 226NYS188; 222AppDiv282, 226NYS250; 224AppDiv207, 230NYS1; 225AppDiv90, 232NYS175; 232NYS641; 226AppDiv467, 235NYS667; 226AppDiv470, 235NYS718; 226AppDiv600, 236NYS25; 229AppDiv471, 242NYS566; 230AppDiv323, 243NYS489 (holds as trustee); 52ND673, 204NW9; 114 Okl 115, 243P933; 120 Or465, 252P711; Or 260P783; 284Pa121, 130A307; 11PaDist&Co 453; 12PaDist&Co 716; 12PaDist&Co 741; 14PaDist&Co 296; 49Philippine962; RI 147A889; 51SD451, 214NW808, 809 [citCJ]; 148Wash282, 268P1119. [a] (9) Where attorney furnished cash bond to release client from jail, and client paid him amount of bond under agreement for attorney to keep balance after payment of fine, facts do not warrant suspension under rule as to collections. 212Ky238, 278SW604. (10) Delay of year in remitting money collected is cause for disbarment, even if partial remittance is made after disbarment proceedings were begun. 169Minn194, 210NW865. [g] **Retaining money till forced to pay** by summary proceedings held to require disbarment. 213AppDiv546, 211NYS36. [h] **Misuse of funds and negligence** in loaning money on property without searching title and recording mortgages calls for suspension. 216AppDiv168, 213NYS611. [i] **Attorney must not use client's money for his own purposes.**–216AppDiv176, 213NYS707. [j] **Collection, under rule,** is receipt of money from third person. 212Ky238, 278SW604. [k] **Rule does not apply** to payments to attorney under contract for legal service. 212Ky238, 278SW604. [l] **Extenuating circumstances do not excuse** reprehensible conduct in failing to disclose receipt of client's money. 221AppDiv60, 222NYS656 (may be considered in connection with punishment). [m] **It is duty of attorney to keep proper books of account** and papers to prove his honesty and fair dealing when actions are questioned. 228AppDiv518, 240NYS183. [n] **Attorney has no right to money as his own** though justified in refusing to turn over to client money collected till amount of retaining lien was determined. 230AppDiv323, 243NYS489. [o] **Claiming lien on money** shortly before trial will not excuse misconduct. Wyo 290P1013.

592-70 121Kan596, 249P606, 607 [quot CJ]; 208Ky452, 271SW555, 556 [quot CJ]; 169Minn194, 210NW865; 114 Okl 115, 243P933; 284Pa121, 130A307 (holding unauthorized investment of client's money no excuse for failure to pay it over); 51SD451, 214NW808, 809 [citCJ].

592-71 208Ky452, 271SW555, 556 [quotCJ]; 212Ky238, 278SW604 (wrongful neglect or refusal to pay over client's money essential for suspension under rule); 80Mont537, 261P341; 51SD451, 214NW808, 809 [citCJ]. [c] Contra. 12PaDist&Co 741.

593-72 Ill 173NE398; 213AppDiv551, 211NYS144; 221AppDiv60, 222NYS656.

593-72½-New. Attorney has duty to remit to client within reasonable time and no demand is necessary. 80Mont537, 261P341.

593-75½-New. Repayment under pressure of disciplinary proceedings held not mitigation of offense. 221AppDiv15, 222NYS551.

593-75¼-New. Retention of entire fund collected is not justified because the fees are not settled. NJ 136A183.

593-77 284Pa121, 130A307.

593-85 [a] (2) In connection with other conduct incompatible with professional standards, it has been held ground for disciplining attorney, that he, while judge, wrote letter for purpose of inducing litigant in his court to dismiss his counsel and withdraw affidavits for change of judge. 67Utah118, 246P188.

593-87 See also 50SD428, 210NW507.

594-88 228AppDiv129, 239NYS297 (indemnity company settling direct with claimant after retention of counsel).

594-89 114 Okl 115, 243P933; 127 Okl 85, 260P454; Pa 152A33; 13PortoRicoFed342 (false statement to judge). [a] **Attorney should bring actions in proper venue** and have them promptly removed from calendar when settled or discontinued. 230AppDiv185, 243NYS1.

594-89½-New. An attorney must be fair and open with the court and act to command the confidence of the community. 226AppDiv460, 235NYS601.

594-91 87Colo 115, 285P758; 333 Ill 361, 164NE844; 127 Okl 85, 260P454. See also 225AppDiv427, 233NYS439. [c] **Attorneys applying for revocation of judge's license to practice as attorney** which they charged was obtained by fraud violates respect due court in not withdrawing charge on receiving information which if followed up would have satisfied them of falsity of charge. 80CalA672, 252P745.

594-93 225AppDiv427, 233NYS439; 126 Okl 86, 258P744, 53ALR1239. [a] 126 Okl 86, 258P744, 53ALR1239. [b] 126 Okl 86, 258P744, 53ALR1239. [c] See also Pa 152A33. [d] (3) Criticism of court held misleading and unfair and in violation of attorney's oath. 126 Okl 86, 258P744, 53ALR1239.

595-95 225AppDiv427, 233NYS439.

595-1 225AppDiv427, 233NYS439.

595-2 [b] (2) Attorney's retention of fees in excess of amount allowed by court in infants' cases together with solicitation warrants disbarment. 228AppDiv232, 239NYS516.

596-6 28Hawaii47; Mass 167NE749; Or 288P507(2dcase) (deceiving court held fundamental wrong). [c] **Attorney knowingly placing on calendar cause which is without merit or which could have been placed on calendar of inferior court** is guilty of gross deception. 223AppDiv149, 227NYS666.

596-7 10PaDist&Co 781.

597-8 87Colo 387, 287P858; 229AppDiv691, 242NYS641.

597-9 OhA 173NE312.

597-10 Hawaii 28Hawaii47.

597-11 41F(2d)302. See also 28Hawaii47; 52ND673, 204NW9.

597-12 169**Minn**431, 211**NW**678.

597-12½-New. In some jurisdictions the contrary rule prevails. 77**Mont**47, 248**P**187.

597-13 161**La**125, 108**S**309; **OhA** 173 **NE**312.

597-14 28**Hawaii**47.

597-14½-New. fraudulent and collusive attempt to procure dismissal of appeal from judgment of federal court discharging him from custody on habeas corpus; 52**SD**394, 218**NW**1.

597-15 28**Hawaii**47; 52**ND**673, 204**NW** 9.

597-18 230**AppDiv**172, 243**NYS**96 (fraudulent claim); 114 **Okl** 115, 243**P** 933.

597-20 229**AppDiv**490, 243**NYS**334 (attorney disobeying stay order).

597-24 230**AppDiv**172, 243**NYS**96 (attorney feigning ignorance of systematic office practice cannot escape disbarment for false addresses on pleadings); 52**ND**673, 204**NW**9.

598-28½-New. It is professional misconduct for attorney to make public addresses which tend to prejudice consideration of pending litigation. **Pa** 152 **A**33.

598-29 **Ariz** 284**P**521; 114 **Okl** 115, 243 **P**933; 148**Wash**282, 268**P**1119. [f] **Counseling another to falsify documents.** –223**AppDiv**593, 229**NYS**145 (language used immaterial if it suggests fraudulent conduct). [g] **Reprimand.**–225**Ky** 334, 8**SW(2d)**397.

598-33 [a] **That there was no legal fraud** behind false affidavit does not prevent suspension. 300**Pa**465, 150**A** 748.

598-34 [c] **Participating in practice by bank.–Minn** 232**NW**318 (matters constituting practicing law).

598-37 30**Hawaii**736; 202 **Iowa**157, 209 **NW**417; 122**Kan**394, 251**P**1088; 228**App Div**470, 240**NYS**481 (alliance between doctors and lawyers disapproved); 229 **AppDiv**88, 241**NYS**263 (carrying on wholesale negligence practice through solicitation); 229**AppDiv**62, 241**NYS** 369; 135**Wash**135, 237**P**3 (offering to furnish cash bail for prisoners in jail and to represent them at trial for cash consideration). But see **Wis** 229**NW**36. [a] **Attorney is chargeable with knowledge** that employees equipped with photostatic copies of checks, clippings, etc., were actively soliciting cases. 228**App Div**470, 240**NYS**481. [b] **Solicitation in his behalf, without his knowledge, and for which he paid no commission,** should not be punished. 228**AppDiv**515, 240 **NYS**592. [c] **Acting as gratuitous collection agency for, or rendering free legal services to, physicians** recommending patients for legal advice is improper. 229**AppDiv**119, 241**NYS**296.

598-38 225**AppDiv**250, 232**NYS**575 ("ambulance chasing"); 225**AppDiv**252, 232**NYS**578; 225**AppDiv**266, 232**NYS**582 (practice of "ambulance chasing" is not justified by fact that poor persons might be deprived of rights because of overreaching representatives of persons about to be sued); 225**AppDiv**462, 233 **NYS**343.

599-40 261**Mass**484, 159**NE**495, 55**ALR** 1309. See also 87**Colo** 115, 285**P**758.

599-42 168**Minn**6, 209**NW**627 (suspension ordered).

599-44 51**SD**459, 214**NW**848.

599-47 49**SD**78, 206**NW**427.

599-56 176**Minn**519, 223**NW**921 (receiving from bankrupt and concealing large sum of money).

599-59 28**Hawaii**47.

599-64½-New. committing repeated and palpable perjury in attempting to explain conversion in disbarment proceedings; 222**AppDiv**275, 226**NYS**188.

599-64½-New. obtaining claims against corporation for purpose of filing petition in bankruptcy against it; 87**Colo** 115, 285**P**758.

599-64¼-New. taking possession of personal property involved in dispute by force; 87**Colo** 88, 285**P**767.

599-65½-New. Under the Arizona statute, an attorney specializing in land office practice may be disbarred for advertising in such manner as to call attention to his professional character. 35**Ariz**346, 278**P**371 (petition for disbarment dismissed with leave to renew on attorney's statement he would desist from advertising).

599-65⅓-New. Asking prejudicial questions of a witness in expectation that unfavorable answers will be excluded on objection is unethical and deserving of the severest censure. 322**Mo** 469, 17 **SW(2d)**337.

599-65¼-New. Although an attorney was not charged with failure to keep books or records, or with destruction of, or failure to produce, those he probably kept, either indicated that he violated the Penal Law. 225**AppDiv**252, 232**NYS** 578 (indicating intention to hide conditions).

599-65⅙-New. The filing of a bond purported to have been executed by a certain person, who in truth did not execute it, is reprehensible. 148**Wash** 282, 268**P**1119.

599-65⅛-New. The failure of respondent to appear before board of censors and answer charges justifies disbarment. 14**PaDist&Co** 164.

599-74½-New. withdrawing part of bail money upon reduction of bail and retaining it as fee in criminal case; 172 **Minn**248, 215**NW**175.

599-75½-New. single instance of failing to secure court order to settle infant's case; 228**AppDiv**497, 240**NYS**274.

599-76½-New. Changing name of grantee after execution of deed may not be sufficiently serious to justify disbarment. 68**Utah**213, 249**P**803.

599-76½-New. Laziness or inattention to business and prevarication to excuse it does not justify disbarment. **Fla** 127 **S**309.

599-76¼-New. Attorney, being superintendent of claims for insurance company, and maintaining injured claimants with knowledge and consent of superiors has been held not subject to censure. 228**AppDiv**458, 240**NYS**282.

600-78 19**F(2d)**722; 208**Cal** 6, 279**P**998 (refusal to turn over residue of estate after removal as executrix); 317 **Ill** 390, 148**NE**299; 171**Minn**437, 214**NW**652; 220**AppDiv**107, 220**NYS**473; **Or** 288**P**507 (2dcase); 288**Pa**331, 135**A**732; 44**Philippine**567; 49**SD**78, 206**NW**427; 67**Utah** 118, 246**P**188; 193**Wis**602, 214**NW**379. [e] **Attorney acting as judge.**–193**Wis** 602, 214**NW**379. [f] **In South Dakota.**– 51**SD**464, 214**NW**850. [g] **Borrowing money from notorious bootleggers** is held to require disbarment. 193**Wis**602, 214 **NW**379. [h] **State bar commission** cannot disbar attorney for conviction of crime not involving matter of litigation nor any duty to, or relation with, client. 46 **Ida**195, 267**P**452. [i] **Attorney who was superintendent of claims** for employers' liability company is subject to censure in securing certain attorney to represent injured claimants. 228**App Div**458, 240**NYS**282.

600-79 156**Miss**439, 125**S**833. But see 228**AppDiv**129, 239**NYS**297.

600-80 19**F(2d)**722, 726 [quotCJ]; **Fla** 127**S**309 (bad faith amounting to criminal act or so disgraceful as to be reprehensible in high degree); 68**Utah**213, 249**P**803, 805 [citCJ]. [d] **Traffic in intoxicating liquors.**–204 **Iowa**123, 214 **NW**874. [e] **Quarrels and assaults.**– 204 **Iowa**123, 214**NW**874.

600-83 49**SD**78, 206**NW**427 (accepting share of reward for recovering stolen property and assisting deputy sheriff prohibited by statute from receiving reward for performance of official duty in securing recovery of reward). [b] 55 **ND**876, 215**NW**682, 55**ALR**220 (acceptance of bribe held ground for suspension, use to which money was put being immaterial).

601-84 See also 207**Cal** 323, 278**P**432. But see **Ariz** 284**P**521; 86**Colo** 458, 283 **P**539. [a] **Judicial or nonjudicial functions.**–67**Utah**118, 246**P**188. [b] **Falsification of records by judge** for purpose of illegally benefiting former client justifies disbarment. **Ariz** 284**P**521.

601-84½-New. The offense of writing a letter to injure an attorney in his standing at the bar is aggravated by the fact that the writer is judge of the court, even though the letter is not written in exercise of judicial function. 67**Utah**118, 246**P**188.

601-85½-New. Misconduct as referee may be ground for suspension. 276**US** 294, 48**SCt**309, 72**Led**580.

601-85⅓-New. Official conduct of public officers is not subject to review in disbarment proceedings. 166**La**855, 118 **S**45.

601-86 30**Ariz**407, 248**P**29; 120 **Or**465, 252**P**711; **Or** 260**P**783; **Or** 288**P**507(2d case). [a] **In Minnesota.**–171**Minn**352, 214**NW**662.

601-87 120 **Or**465, 252**P**711.

601-87½-New. In some jurisdictions, however, there are statutes limiting the time within which proceedings may be brought. 166**Minn**448, 208**NW**197.

601-87⅓-New. The statute is no bar to disbarment for keeping money of client received by attorney more than the statutory period prior to institution of the proceeding where continuous unsuccessful attempts have been made to collect money from him. 166**Minn**448, 208**NW** 197.

601-88 120 **Or**465, 252**P**711. But see **Mass** 167**NE**749.

601-88½-New. An attorney may be disbarred, although he holds at the time a judicial or other official position. 67 **Utah**118, 246**P**188.

601-89 318 **Ill** 44, 148**NE**860; 51**SD**451, 214**NW**808. See also 230**AppDiv**323, 243 **NYS**489.

601-91 80**Mont**537, 261**P**341; 217**App Div**437, 217**NYS**253; 226**AppDiv**600, 236 **NYS**25; 230**AppDiv**318, 244**NYS**201. But see 212**Ky**238, 278**SW**604.

602-97 [a] **Good conduct** between time of offense and commencement of proceedings years later is no defense. 300**Pa** 465, 150**A**748.

602-98½-New. Great financial need and adverse circumstances of attorney does not justify the conversion of client's property. 318 **Ill** 44, 148**NE**860.

602-98⅓-New. If the attorney has regained good moral character and the court is satisfied that he is fit to practice profession, disbarment may be denied. 318 **Ill** 44, 148**NE**860.

602-98¼-New. But repentance and restitution and full confession of guilt has been held not to justify refusal to disbar. 318 **Ill** 44, 148**NE**860.

602-98⅕-New. Financial embarrassment of attorney due to illness in family is no excuse. 230**AppDiv**318, 244**NYS** 201.

602-99½-New. , or that a creditor makes use of law examiners to collect his debt. 178**Minn**547, 227**NW**892.

602-6 322 **Ill** 618, 153**NE**621.

602-9 199**Wis**608, 227**NW**396.

602-9½-New. Long and intimate friendship with client cannot justify professional misconduct in divorce case. 161**La**125, 108**S**309.

602-9½-New. That an attorney was in a state of voluntary intoxication when he committed the acts of misconduct charged does not constitute a defense. 127 **Okl** 85, 260**P**454.

602-9¼-New. Failure to interpose that respondent was not a member of the bar of the court or amenable to its disciplinary action is waived when not interposed. **Mass** 167**NE**749.

602-9⅓-New. Attorney of record participating in proceedings cannot escape responsibility on plea that counsel retained was to blame. 229**AppDiv**194, 243**NYS**149.

602-11 220**Ala**466, 126**S**873.

602-12 Contra 160**La**483, 107**S**314.

602-13 208**Cal** 35, 280**P**113; 202 **Iowa** 157, 209**NW**417; 204 **Iowa**123, 214**NW** 874; 194**Wis**207, 216**NW**513.

602-13½-New. unlike proceedings in ordinary or equitable actions, 202 **Iowa** 157, 209**NW**417.

602-15 **Ark** 32**SW(2d)**423; **Fla** 127**S** 309; **TexCommnA** 29**SW(2d)**1031.

602-15½-New. The ultimate question in such proceedings is always the fitness of accused to retain his license and to practice the profession. 202 **Iowa**157, 209 **NW**417.

603-19 30**Ariz**407, 248**P**29; 208**Ky**452, 271**SW**555; **Mass** 167**NE**749. [a] **Proceeding to review unauthorized disbarment by state bar commission for con-**

viction of crime may be treated as disbarment proceeding on certificate of conviction. 46 **Idal**95, 267**P**452.

603-19½-New. The court has no authority to suspend attorneys without a hearing for an offense not committed in its presence. 67**Utah**118, 246**P**188.

603-20 45 **Ida**676, 266**P**665; **Mass** 167 **NE**749 (proceedings held not to deprive one of his inalienable rights).

603-20½-New. A proceeding to vacate an order admitting an attorney to the bar has been held not adversary in the sense that attorneys filing information at the bar association's instance may be regarded as adverse parties without standing as plaintiffs. 200 **Ind**424, 164 **NE**261.

603-20¼-New. Trial judge cannot require proceedings for disbarment of substituted attorney to be tried with proceedings for discharge of former attorney. 37**F(2d)**289.

603-20¼-New. Board of governors of state bar, in performance of statutory powers relating to disbarment, acts merely as intermediary agency. **Nev** 292**P**291.

603-20½-New "Investigation" within meaning of State Bar Act means systematic inquiry into matters therein designated. **Cal** 291**P**164.

603-24 73**Mont**284, 235**P**772; 152**Tenn** 233, 276**SW**639. See also **DelCh** 146**A** 296. [b] **Proceedings should not be commenced or forced to conclusion while criminal charges for same transaction are pending** notwithstanding their pendency does not bar proceedings. **Pa** 152 **A**33. [c] **Court may initiate proceedings without sworn information.-Pa** 152**A**33 (for acts done in or out of court).

603-25 [b] **Petitioners "aggrieved."-** 152**Tenn**233, 276**SW**639.

604-26 [a] **Committee appointed by judge** may investigate charges of professional misconduct, even though not submitted by judge. **OhA** 173**NE**312.

604-28 152**Tenn**233, 276**SW**639, 640 [quotCJ].

604-29 152**Tenn**233, 276**SW**639, 640 [quotCJ].

604-30 152**Tenn**233, 276**SW**639. [b] **In Iowa.-**201 **Iowa**181, 205**NW**321. [c] **Recommendation of disbarment by board of state bar** is not final. 208**Cal** 42, 280**P**124. [d] **Presence of bar members at meeting** which resolved to prefer charges is immaterial since they are not witnesses. 220**Ala**466, 126**S**873.

604-34 **TexCommnA** 29**SW(2d)**1031 (holding state is plaintiff).

604-39 37**F(2d)**289; 96**CalA**655, 274**P** 559; 208**Ky**452, 271**SW**555; 169**La**555, 125**S**591 (attorney cannot be brought into court by appointment of curator ad hoc, or attorney at law, to represent him); **Mass** 167**NE**749. [b] **Omission to annex exhibit attached to petition** is not fatal defect, though order for notice required copy of petition to be served with notice, where exhibit was copy of findings of judge of federal court in disbarment proceedings against respondent. **Mass** 167**NE**749. [c] **Form of notice is not essential** if in matter of substanee attorney has notice and reasonable opportunity to prepare and present case. **Mass** 167**NE**749. [d] **Continuance** till determination on appeal of criminal action for subornation of perjury is properly refused, disbarment involving charges other than perjury. **OhA** 173 **NE**312.

604-41 [b] **Constructive service** was held sufficient in Louisiana. 169**La**555, 125**S**591.

605-46 [a] **Attorney appearing without objecting to notice and testifying** waives defect in notice. **Cal** 289**P**818.

605-47 220**Ala**466, 126**S**873; **Ariz** 284**P** 521. [e] **Accusation held sufficient.-**88 **CalA**272, 263**P**339.

605-48 37**F(2d)**289; **Fla** 127**S**309; 160 **La**483, 107**S**314; 51**SD**464, 214**NW**850. [c] **Sufficiency of specification in capacity of attorney.-**220**Ala**466, 126**S**873. [d] **Petition held sufficient.-Mass** 167**NE**749.

605-51 45 **Ida**676, 266**P**665, 671 [cit CJ]; 80**Mont**537, 261**P**341. But see 228 **AppDiv**256, 239**NYS**316.

605-52 325 **Ill** 149, 156**NE**328.

605-53½-New. Other charges may be filed pending the hearing. 135**Wash**135, 237**P**3 (at time of hearing).

605-53½-New. In some jurisdictions the state board of law examiners may receive and act upon a complaint against an attorney at any time to the extent and for the purposes provided by law. 135**Wash**135, 237**P**3.

605-53¼-New. A complaint that the committee believes and so alleges certain facts is sufficient as charging the facts upon information and belief. 166 **La**855, 118**S**45.

605-53½-New. Charge involving professional misconduct is inappropriate where attorney is not required to meet such charge. **Cal** 291**P**837.

605-53¾-New. Act permitting board of governors to prefer charges against attorney and then to sit for consideration of charges so preferred held not void. **Nev** 292**P**291.

606-57 89**Fla**388, 104**S**598. [a] **Verification held sufficient.-**88**CalA**272, 263**P** 339.

606-61 **Cal** 291**P**164.

606-62 **Cal** 291**P**164 (accusation by organized bar association).

606-66½-New. After sustaining demurrer pleadings may be amended. 89**Fla** 388, 104**S**598.

606-67½-New. In some states he must enter a plea of guilty or not guilty and file an answer on the return day. 164 **Minn**408, 205**NW**266.

606-67¼-New. Where the attorney neither pleads nor files an answer on the return day, the court will treat the case as if he had entered a plea of not guilty. 164**Minn**408, 205**NW**266.

606-68½-New. Failure to answer within given time causes disbarment on charges. 170**Minn**408, 212**NW**535.

606-68¼-New. Failure to deny charges admits charges to be true. 87**Colo** 387, 287**P**858.

606-70 [a] **Answer, failing to deny** specific charges, admits such charges. 227 **AppDiv**502, 238**NYS**273.

606-70½-New. In some states the answer must be in writing. 164**Minn**408, 205**NW**266.

606-74½-New. Failure of attorney to appear and answer is equivalent to plea pro confesso. 216**AppDiv**162, 214**NYS** 50 (attorney already under suspension).

607-78 172**Minn**248, 215**NW**175; 156 **Miss**439, 125**S**833. See also 208**Cal** 42, 280**P**124.

607-79 86**Colo** 458, 283**P**539.

607-82 228**AppDiv**484, 240**NYS**343.

607-82½-New. A licensed attorney is presumed to intend the natural result of his act. 50**SD**428, 210**NW**507.

607-82½-New. Presumption exists that court admitting an attorney was without knowledge of his conviction of crime in foreign state, in absence of evidence to contrary. **CalA** 284**P**492.

607-82¼-New. Where it is claimed that attorney failed to procure order allowing compromise of infant's claim, burden is on him to prove order. 228**App Div**470, 240**NYS**481.

607-83 220**Ala**466, 126**S**873; **CalA** 291 **P**431; **Nev** 292**P**291; 222**AppDiv**701, 225 **NYS**273; 227**AppDiv**477, 238**NYS**482. [a] (2) That conviction was pending on appeal did not preclude cross-examination of whether attorney had been convicted. **OhA** 173**NE**312. [e] **Prior disbarments in other states** are admissible on issue of fitness to practice. 31**Ariz** 407, 254**P**481. [f] **Fraud in securing admission to bar may be considered** on issue of fitness to practice. 31**Ariz**407, 254 **P**481. [g] **Judgment of suspension from practice admissible** notwithstanding appeal. 95**CalA**35, 271**P**1107. [h] **Evidence properly excluded.-**220**Ala**466, 126 **S**873. [i] **Refusal to admit testimony to show motive** is not erroneous. 220**Ala** 466, 126**S**873. [j] **Admitting hearsay** and irrelevant testimony is improper. **Cal** 288**P**669. [k] **Evidence admissible.-** 102**CalA**733, 283**P**965. [l] **Pleadings and findings of federal court which disbarred attorney** are admissible. **Mass** 167**NE** 749. [m] **Evidence offered to control findings of fact in federal court which disbarred attorney** is properly excluded. **Mass** 167**NE**749. [n] **Rules applicable to civil trials** apply. **Mass** 167**NE**749.

607-84 [a] (1) 332 **Ill** 84, 163**NE**326; 49 **SD**78, 206**NW**427.

607-85 **OhA** 173**NE**312.

607-87 334 **Ill** 264, 165**NE**798.

607-88 220**Ala**466, 126**S**873.

607-89 **Ark** 328**SW(2d)**423; **Fla** 127**S** 309.

607-90 322 **Ill** 618, 153**NE**621; 325 **Ill** 149, 156**NE**328; 332 **Ill** 84, 163**NE**326; 156**Miss**439, 125**S**833 (clear and convincing); 127 **Okl** 85, 260**P**454; **Or** 288**P**507 (2dcase) (clear and convincing). [c] (1) 173**Ark**686, 293**SW**353; 208**Cal** 57, 280**P** 115; 208**Cal** 240, 280**P**964; 208**Cal** 738, 284**P**670; **Cal** 288**P**669; **Cal** 290**P**41; **Cal** 291**P**583; **Cal** 291**P**837; 88**CalA**272, 263**P**339; 102**CalA**733, 283**P**965; 317 **Ill** 390, 148**NE**299; 322 **Ill** 618, 153**NE**621; **Ill** 173**NE**398; 202 **Iowa**157, 209**NW** 417; 121**Kan**596, 249**P**606; 128**Kan**657, 280**P**748; 161**La**125, 108**S**309; 164**Minn** 408, 205**NW**266; 169**Minn**431, 211**NW** 678; 169**Minn**490, 211**NW**686; 170**Minn** 21, 212**NW**13; 171**Minn**434, 214**NW**663; 171**Minn**490, 214**NW**666; 177**Minn**352, 225**NW**274(1stcase); 77**Mont**47, 248**P** 187; 77**Mont**332, 250**P**957; 216**AppDiv** 164, 213**NYS**728 (conversion of client's money); 217**AppDiv**437, 217**NYS**253; 217**AppDiv**441, 217**NYS**237; 223**AppDiv** 277, 228**NYS**340; 223**AppDiv**593, 229 **NYS**145; 220**AppDiv**133, 221**NYS**243; 225**AppDiv**246, 232**NYS**571; 225**AppDiv** 266, 232**NYS**582 (to require disbarment); 226**AppDiv**470, 235**NYS**718; 227**AppDiv**748, 237**NYS**49; 227**AppDiv** 480, 238**NYS**627; 227**AppDiv**506, 238 **NYS**656; 228**AppDiv**226, 239**NYS**454; 228**AppDiv**232, 239**NYS**516; 228**AppDiv** 497, 240**NYS**274; 228**AppDiv**484, 240 **NYS**343; 228**AppDiv**470, 240**NYS**481; 229**AppDiv**77, 241**NYS**112; 229**AppDiv** 111, 241**NYS**171; 229**AppDiv**88, 241 **NYS**263; 229**AppDiv**103, 241**NYS**317(2d case); 229**AppDiv**62, 241**NYS**369; 229 **AppDiv**323, 242**NYS**18; 229**AppDiv**501, 242**NYS**660; 229**AppDiv**478, 243**NYS**75; 229**AppDiv**664, 243**NYS**295; 230**AppDiv** 323, 243**NYS**489; 57**ND**367, 222**NW**266; **Or** 288**P**507(2dcase) (deceiving courts); 284**Pa**121, 130**A**307; **Wis** 229**NW**36; 193**Wis**602, 214**NW**379; **Wis** 232**NW** 553. (2) To show that accused, who was judge, wrote letter, while he was not on bench, designed to prejudice litigant in his court against counsel representing litigant. 67**Utah**118, 246**P**188. (3) To show that one of purposes of accused in writing letter to be presented to litigant for his signature was to injure counsel in their standing and influence as members of bar. 67**Utah**118, 246**P** 188. (4) To show that accused, while county attorney, failed to prosecute, and hindered prosecution of, a charge of felony. 67**Utah**118, 246**P**188. (5) To show that accused, while county attorney, refused to institute proceedings against persons charged with crime or aid district attorney in prosecuting them. 67 **Utah**118, 246**P**188. [d] (1) 208**Cal** 42, 280**P**124; 80**CalA**672, 252**P**745; 325 **Ill** 149, 156**NE**328; 334 **Ill** 264, 165**NE**798; 204 **Iowa**123, 214**NW**874; 208**Ky**452, 271 **SW**555; 166**La**855, 118**S**45; 170**Minn**170, 211**NW**652; 170**Minn**21, 212**NW**13; 172 **Minn**248, 215**NW**175; 172**Minn**532, 216 **NW**219; 173**Minn**274, 217**NW**142; **Minn** 232**NW**318; 156**Miss**439, 125**S**833; **Mo** 264**SW**363 (not guilty of intentional wrongdoing); 80**Mont**537, 261**P**341 (issuing worthless checks, conversion, and perjury); 225**AppDiv**297, 233**NYS**33; 227**AppDiv**540, 238**NYS**409; 227**AppDiv** 468, 238**NYS**498; 228**AppDiv**129, 239 **NYS**297; 228**AppDiv**221, 239**NYS**311; 228**AppDiv**226, 239**NYS**454; 228**AppDiv** 263, 239**NYS**465; 228**AppDiv**518, 240 **NYS**183; 228**AppDiv**497, 240**NYS**274; 228**AppDiv**458, 240**NYS**282; 228**AppDiv** 484, 240**NYS**343; 228**AppDiv**405, 240 **NYS**350; 228**AppDiv**470, 240**NYS**481; 228**AppDiv**515, 240**NYS**592; 229**AppDiv** 119, 241**NYS**296; 229**AppDiv**189, 241 **NYS**703; 229**AppDiv**471, 242**NYS**566; 68**Utah**213, 249**P**803. (2) To show that employee of attorney was a "runner." 230**AppDiv**185, 243**NYS**1. [e] **Evidence held to show:** (1) Conversion of client's funds given for specific purpose. 216 **AppDiv**159, 213**NYS**664. (2) Application to own use of money given by client for specific purposes. 216**App Div**168, 213**NYS**611. [f] **Evidence held to sustain** recommendation of board of governors of state bar. **Cal** 288**P**433. [g] **Attorney's destruction of his books**

and records is suspicious circumstance though not, standing alone, sufficient basis for charges in disciplinary proceedings. 228**AppDiv**518, 240**NYS**183. [h] **Evidence held to justify referee's finding** as to fraud of attorney. 229**App Div**490, 243**NYS**334. [i] **Prima facie case.–Mass** 167**NE**749.

608–91 [a] (1) 129**Kan**853, 284**P**611 (conviction final whether appealed or not); 73**Mont**284, 235**P**772. (2) Supreme court must accept record as conclusive under statute. **Wash** 287**P**677 (2dcase). [b] **Where record of conviction discloses** crime involving moral turpitude, actual guilt is immaterial. 73 **Mont**284, 235**P**772.

608–92 [a] **Final judgment in suit for accounting by client against attorney** is conclusive as to rights to fund in question. 118**Nebr**47, 223**NW**635.

608–92½–New. Attorney's testimony in disbarment proceeding that he had no knowledge that persons from whom he borrowed money, while judge, were bootleggers, must be accepted unless outweighed. 193**Wis**602, 214**NW**379.

608–92⅓–New. To justify disbarment the case must be free from doubt as to the act charged and the motive therefor. 325 **Ill** 149, 156**NE**328.

608–92¼–New. Testimonials regarding attorney's good character do not excuse proved intentional wrongdoing. 228 **AppDiv**256, 239**NYS**316.

608–92⅙–New. Proof of attorney's payment to solicitor for services is not essential to charge of solicitation. 228 **AppDiv**232, 239**NYS**516.

608–93 227**AppDiv**477, 238**NYS**482.

608–94 88**CalA**272, 263**P**339.

608–97 220**Ala**466, 126**S**873; 33**Ariz** 299, 264**P**473 (proceedings held in accordance with statute); **Cal** 290**P**41.

609–98 208**Ky**452, 271**SW**555 (fair hearing).

609–99 [a] **Instructions not erroneous.–** 220**Ala**466, 126**S**873 (duty of defendant to request instruction). [b] **Each question submitted to jury need not cover all issues in case.–**220**Ala**466, 126**S**873. [c] **Instructions properly refused.–**220**Ala** 466, 126**S**873.

609–99½–New. On failure of attorney to appear or answer petition charging repeated conversions of moneys received in fiduciary capacity, disbarment is authorized. 216**AppDiv**162, 214**NYS**50 (failure being equivalent to plea pro confesso).

609–99⅓–New. Where defendant interposed exceptions by way of preliminary defense, he was entitled to decision on merits of his plea. 160**La**483, 107**S**314.

609–99¼–New. Accused is not denied a constitutional right to be confronted with witnesses against him because the person who verified the accusation is not called as a witness. 88**CalA**272, 263 **P**339.

609–99⅙–New. Argument as to evil consequences of practice charged other than one on which attorney disbarred is not ground of reversal. 220**Ala**466, 126 **S**873.

609–99⅛–New. Cross-examination of defendant as to discussion involving his contributing to moral delinquency of girl is not reversible error. 220**Ala**466, 126**S**873.

609–99⅛–New. Denial of public trial cannot be urged where no demand was made therefor. 208**Cal** 240, 280**P**964.

609–99⅛–New. Attorney's intention not to practice law in future is no reason for declining to proceed to final determination. 87**Colo** 387, 287**P**858.

609–99½–New. It is not the duty of the trial judge to review what took place in a federal court where the attorney was disbarred. **Mass** 167**NE**749.

609–1 [a] **Findings implied** by recommendation for suspension. **Cal** 291**P** 583.

609–4½–New. A finding of a referee that respondent is not guilty will be upheld when sustained by the evidence. 167**Minn**467, 209**NW**316.

609–6 118**Nebr**47, 223**NW**635.

609–9 [c] **Trial by referee.–**84**Mont**221, 275**P**1098; 228**AppDiv**484, 240**NYS**343. [d] 80**Mont**537, 261**P**341.

609–10½–New. Respondent sought to be disbarred upon conviction of misdemeanor upon a plea of guilty is held entitled to the opportunity of proving that moral turpitude was not involved in the offense and other extenuating circumstances. 173**Minn**297, 215**NW**427.

609–10⅓–New. The attorney sought to be disbarred may be called for cross-examination under some statutes. 175 **Minn**520, 221**NW**907.

609–13 But see **Cal** 292**P**638. [a] **Continuance proper** till there shall be determination of attorney's appeal from judgment of suspension. 95**CalA**35, 271 **P**1107.

610–16 229**AppDiv**500, 242**NYS**653 (dismissed on referee's recommendation); 50**SD**413, 210**NW**196. [b] **Where referee in report** does not mention particular charge, and it is not stressed before court, it is considered as abandoned. 229**AppDiv**478, 243**NYS**75.

610–16½–New. On motion to dismiss, the question of venue cannot be considered, since it raises a question of fact not appearing on record. **Mass** 167**NE** 749.

610–19½–New. New evidence held insufficient to warrant remand to referee. **Or** 288**P**507(2dcase).

610–28½–New. The court has the discretion to remove an attorney accused or suspend him from practice. 173**Ark** 686, 293**SW**353.

610–28⅓–New. In California an order of the supreme court works final disbarment and a decision of the bar board is merely recommendatory. 208**Cal** 6, 279**P**998.

610–28¼–New. In California final order must be made by supreme court. **Cal** 291**P**164.

610–28½–New. It has been held erroneous to make final order in disbarment proceedings during pendency of criminal charges for same offense. **Pa** 152**A**33.

611–37 173**Ark**686, 293**SW**353; 220 **AppDiv**107, 220**NYS**473; 5**PaDist&Co** 580; **Tex** 27**SW(2d)**795 [citCJ]; **Tex CommnA** 29**SW(2d)**1031. [a] (2) Petitioner seeking review is not prejudiced by failure formally to serve him with copy of findings of commissioners. 46 **Ida**578, 269**P**416. [c] **Dismissal of appeal.–**92**CalA**653, 268**P**970 (motion by bar association denied). [d] **Transcript.–**92**CalA**653, 268**P**970. [e] **In California.–Cal** 288**P**669; 300**Pa**465, 150 **A**748. [f] **Supreme court will gather bad faith from allegations** by construing petition liberally where no objection was made below to omission of bad faith allegation. **Wyo** 290**P**1013.

611–38 173**Ark**686, 293**SW**353; **Ark** 32 **SW(2d)**423; 88**CalA**272, 263**P**339; **Fla** 127**S**309; 220**AppDiv**107, 220**NYS**473; 135**Wash**135, 237**P**3 (receipt of additional charges at hearing held not prejudicial). [a] (1) 220**AppDiv**107, 220 **NYS**473. (2) Reviewing court will not disturb disbarment supported by evidence. 284**Pa**121, 130**A**307. (3) Supreme court on review of disbarment decision is not bound by findings of local committee adopted by board of governors. 208**Cal** 738, 284**P**670. [d] **Appellate court must indulge presumptions** in favor of trial court's rulings and its fair intent. 220**Ala**466, 126**S**873. [e] **Weighty presumptions** of justice and propriety are given on review to recommendations of board of governors. 300**Pa**465, 150**A**748. [f] **Test on appeal** is whether or not trial court exercised reasonable discretion. **Conn** 152**A**292. [g] **Proceedings on review.–Cal** 290**P**41. [h] **Appellate court cannot presume that error is shown** in judgment disbarring attorney. **TexCivA** 30**SW(2d)**545.

611–38½–New. Sole question for appellate court is whether evidence sustains finding and judgment. 202 **Iowa**157, 209**NW**417.

611–40 173**Ark**686, 293**SW**353; **Conn** 152**A**292.

611–40½–New. Accused cannot, by appeal from only part of the record, limit the right of the state to present the whole record. 202 **Iowa**157, 209**NW**417.

611–40⅓–New. although it embraces testimony relative to charges on which accused was acquitted. 202 **Iowa**157, 209**NW**417.

611–41½–New. Whether an attorney should have been disbarred or only suspended, pending an appeal from conviction, is a moot question after affirmance and denial of certiorari by the supreme court. 10**F(2d)**1013 (appeal dismissed).

611–41⅓–New. On appeal from an order disbarring an attorney on the ground of his conviction of a felony, the appellate court may take judicial notices that such conviction has been reversed by it subsequently to the entry of the order of disbarment. 204 **Iowa** 123, 214**NW**874.

611–41¼–New. Exceptions to order not proper remedy. 5**PaDist&Co** 580.

611–41½–New. Inadvertently permitting word "explain" to remain on written charge delivered to jury held not to require reversal. 220**Ala**466, 126**S**873.

611–42 **Nev** 292**P**291 (entire record examined anew).

611–45 33**NM**6, 261**P**816 (certiorari held authorized).

611–45½–New. Under California statute, "review" of an order of the board of governors of the state bar means reexamination of the entire record. 208 **Cal** 6, 279**P**998.

612–46 95**CalA**35, 271**P**1107.

612–49 **Ark** 32**SW(2d)**423; **Conn** 152**A** 292; 34**NM**329, 281**P**24 (attorney disbarred); 227**AppDiv**747, 237**NYS**46; 227**AppDiv**746, 237**NYS**53; **Or** 260**P**783, 784 [quotCJ]; 51**SD**464, 214**NW**850. [a] **Professional misconduct in relations with court calls** for disbarment. 127 **Okl** 85, 260**P**454. [b] **Disbarment is not "punishment for crime"** within criminal law. 248**NY**465, 162**NE**487. [c] **Disbarment.–**228**AppDiv**256, 239**NYS**316. [d] **Repeated deception of court** held to justify permanent disbarment. **Or** 288 **P**507(2dcase). [e] **Reasonable discretion held to require** disbarment of one convicted of adultery. **Conn** 152**A**292.

612–49½–New. Where an attorney is guilty of dishonest practices and unprofessional conduct, he should be disbarred notwithstanding the serious consequences of such judgment to him. 77 **Mont**332, 250**P**957.

612–50 **Or** 260**P**783, 784 [quotCJ]; 151 **Wash**424, 276**P**294. [c] **Upon evidence establishing accused's lack of honesty, probity, and good moral character,** court may disbar him. 208**Ky**452, 271**SW** 555. [d] **Disbarment held warranted.–** 228**AppDiv**479, 240**NYS**242. [e] **Attorney converting client's money** to own use, without mitigating circumstances, should be disbarred. 229**AppDiv**199, 242**NYS**15.

612–50½–New. Where the acts complained of are of such character as to involve moral turpitude, and to require evidence of reformation before respondent should be permitted to engage again in the practice of his profession, disbarment rather than suspension is the proper punishment. **Or** 260**P**783.

612–51 37**F(2d)**289; 173**Minn**274, 217 **NW**142 (retention of client's bonds to pay fee held only to merit censure); 225**AppDiv**297, 233**NYS**33; 120 **Or**465, 252**P**711; **Or** 260**P**783, 784 [quotCJ]; 49**SD**78, 206**NW**427 (conduct requiring more than reprimand); **Wis** 229**NW**36. [b] **In case accused attorney is judge,** detrimental effect which disbarment would have upon public interests forbids penalty of disbarment, if there is any alternative. 67**Utah**118, 246**P**188. [c] **Censure decreed,** where attorney induced holder of legal title to give client checks to settle unrecorded mortgage and afterward refused to perform, he never intending performance, unless balance due on mortgage was paid. 218 **AppDiv**134, 218**NYS**6. [d] **Censure** is warranted where attorney makes gratuitous payments to those recommending him in personal injury cases. 229 **AppDiv**189, 241**NYS**703.

612–52 18**F(2d)**803; 220**AppDiv**107, 220 **NYS**473; 230**AppDiv**323, 243**NYS**489; **Or** 260**P**783, 784 [quotCJ]; 197**Wis**524, 222**NW**795. [a] 51**SD**451, 214**NW**808. [b] 49**SD**78, 206**NW**427. [c] 208**Cal** 555, 282**P**952; 228**AppDiv**241, 239**NYS** 392; 228**AppDiv**217, 239**NYS**414; 55**ND** 876, 215**NW**682, 55**ALR**220; 51**SD**459, 214**NW**848. [e] **Ark** 32**SW(2d)**423; 208 **Cal** 42, 280**P**124; 208**Cal** 240, 280**P**964; **Cal** 291**P**583; 171**Minn**352, 214**NW**662; 175**Minn**520, 221**NW**907; **Nev** 292**P**291; 223**AppDiv**277, 228**NYS**340; 220**AppDiv**

107, 220NYS473; 220AppDiv183, 221 NYS243; 225AppDiv427, 233NYS439; 227AppDiv502, 238NYS273; 227AppDiv 527, 238NYS514; 227AppDiv490, 238 NYS591; 227AppDiv532, 238NYS601; 228AppDiv221, 239NYS311; 229AppDiv 100, 241NYS50; 229AppDiv117, 241NYS 146; 229AppDiv142, 241NYS276; 52ND 673, 204NW9; 120 Or465, 252P711; 50 SD428, 210NW507 (second offense of similar kind meriting severe punishment). [f] Cal 292P638; 121Kan596, 249P606; 170Minn21, 212NW13; 177 Minn203, 225NW97; 216AppDiv176, 213 NYS707 (second offender); 222AppDiv 624, 227NYS187; 225AppDiv250, 232NYS 575; 227AppDiv468, 238NYS498; 227 AppDiv512, 238NYS647; 228AppDiv 249, 239NYS377; 228AppDiv210, 239 NYS404; 228AppDiv497, 240NYS274; 228AppDiv458, 240NYS282; 228AppDiv 470, 240NYS481; 199Wis401, 226NW 385. [g] (1) 202 Iowa157, 209NW417; Wyo 290P1013. (2) Suspension for three years held abuse of discretion. 19 F(2d)722 (making beer for use of family and guests). [l] **Eighteen months.**–18F(2d)803. [m] **Fourteen months.**–13 PortoRicoFed342. [n] **Four years.**–Ark 32SW(2d)308. [o] **Indefinitely.**–87Colo 88, 285P767.

612-52½-New. or for an indefinite period, 193Wis602, 214NW379.

612-53 Or 260P783, 784 [quotCJ].

613-54 18F(2d)803; 87Colo 384, 287P 864 (indefinite suspension).

613-55 87Colo 115, 285P758 (acts in heat of anger); 51SD459, 214NW848; 154Wash153, 282P221 (age and financial condition). [d] **Voluntary intoxication at time of acts of misconduct charged** will not be considered in mitigation. 127 Okl 85, 260P454.

613-55½-New. Conduct of others provoking misconduct of accused attorney may be considered in mitigation of punishment. 67Utah118, 246P188.

613-56 80CalA672, 252P745; 86Colo 189, 279P565; 170Minn409, 212NW605; Minn 232NW318; 213AppDiv551, 211 NYS144; 223AppDiv593, 229NYS145; 218AppDiv134, 218NYS6; 226AppDiv 468, 235NYS622; 227AppDiv496, 238 NYS596; 228AppDiv246, 239NYS382; 228AppDiv209, 239NYS388; 228AppDiv 263, 239NYS465; 228AppDiv253, 239 NYS526; 228AppDiv490, 240NYS314; 228AppDiv405, 240NYS350; 228AppDiv 492, 240NYS604; 230AppDiv185, 243 NYS1; 229AppDiv194, 243NYS149; 67 Utah118, 246P188.

613-58½-New. A statute prohibiting disbarred attorney from appearing in court in his own behalf has been declared unconstitutional. 71CalA386, 235 P664.

613-58⅓-New. Although the conduct of an attorney may not of itself be sufficient ground for disbarment, it may, in connection with other conduct, showing moral turpitude, require some judgment less severe than disbarment to be pronounced against accused. 67Utah118, 246P188.

613-58¼-New. Where an attorney has been previously suspended on a similar charge, he is entitled to no clemency and should be disbarred. 217AppDiv437, 217NYS253.

614-66 166Minn507, 208NW408. [c] **Right of disbarred attorney** to appear per se does not entitle him to appear for corporation, even though he owns all its stock. 166Minn507, 208NW408.

614-67 [d] **Statute forbidding disbarred attorney** from appearing in person to prosecute or defend actions for protection or preservation of his own property is unconstitutional. 71CalA 386, 235P664. Contra 84CalA137, 257P 590.

614-72½-New. A disbarred attorney who remains silent with knowledge that his name appears in city and state directories as a lawyer has been held guilty of contempt. 86Colo 426, 282P263.

614-72⅓-New. An attorney, having put in circulation continuing advertisements in a directory representing himself as an attorney, or having become cognizant of their circulation, is, on disbarment, obliged to discontinue them. 86Colo 426, 282P263.

614-72¼-New. A decision of the federal court disbarring an attorney necessarily implies that he was considered a member of its bar. Mass 167NE749.

615-79 75CalA497, 243P32; CalA 270P 968; 77CalA260, 246P120; 77CalA495, 247P231; 82CalA16, 254P931; RI 152A 254(1stcase); NS [1927] 2DomLR380. [b] (1) 52SD394, 218NW1 (does not restore disbarred attorney to his office as attorney). (2) Pardon by president will not prevent court from looking into nature of offense committed by attorney seeking reinstatement. 213AppDiv555, 211NYS256. (3) After pardon, judgment of conviction is not conclusive. 245NY423, 157NE730. [c] **On showing of good conduct for seven years** after disbarment, attorney may be reinstated. 75CalA497, 243P32. [d] **Reinstatement should be difficult.**–75CalA497, 243P32. [e] **Where order admitting petitioner to bar was set aside for fraud** in procuring it, there could be no "reinstatement" as petitioner had never been an attorney. 81CalA719, 254P913. [f] **Courts have inherent power to reinstate.**–CalA 270P 968.

615-81 208Cal740, 284P909; 75CalA 497, 243P32; 77CalA260, 246P120; 77 CalA495, 247P231; 77CalA733, 247P 524; 82CalA426, 255P834; 34PortoRico 301; 52SD394, 218NW1; 103WVa7, 136SE402 [citCJ]. [b] **Mere sentimental belief** that punishment of disbarment has been sufficient is not enough to warrant reinstatement. 75CalA497, 243P32.

615-81½-New. Reinstatement may depend on the degree of learning in law. 77CalA495, 247P231.

615-82 [a] **Present apparent good character** is not sufficient to justify reinstatement. 199Cal538, 250P390, 48ALR 1232.

615-83 See also 52SD394, 218NW1. [a] **Members of bar petitioning for reinstatement of applicant** owe duty to court not resting to same degree on other citizens. 52SD394, 218NW1. [b] **Petitions held insufficient to warrant reinstatement.**–52SD394, 218NW1.

615-84 77CalA495, 247P231; 52SD394, 218NW1 (former record must be considered with conduct subsequent to disbarment); NS [1927] 2DomLR380. [a] (3) Restoration should only be granted when applicant has lived long enough after disbarment in honorable intercourse with fellow citizens to demonstrate that he is both tried and true. 199Cal538, 250P390, 48ALR1232. [b] 34PortoRico 301. [d] 77CalA260, 246P 120; 77CalA733, 247P524; 82CalA426, 255P834; 83CalA745, 257P218 (moral qualifications); 83Mont315, 271P694; 228AppDiv299, 228NYS349. [e] 79CalA 639, 250P701; 213AppDiv555, 211NYS 256; 213AppDiv560, 211NYS261. [f] **Clear and convincing evidence of reform** is required. 85CalA113, 259P90. [g] **Attorney's conviction of felony** in federal court and affirmed by United States supreme court has been held binding on him in his application for reinstatement. 213AppDiv555, 211NYS256. [h] **Evidence held insufficient** to justify reinstatement. 199Cal538, 250P390, 48ALR 1232. [i] **Admissions of misconduct, apologies, and regrets insufficient.**–52SD 394, 218NW1. [j] **False statement in petition for reinstatement** is sufficient to require denial of reinstatement. 79CalA 639, 250P701. [k] **Where applicant has been evading legal effect of his disbarment** by practicing law indirectly, application for reinstatement should be denied. 82CalA426, 255P834. [l] **Attorney's conviction in federal court affirmed by United States circuit court of appeals** is not binding on application for reinstatement after pardon. 228AppDiv 299, 228NYS349.

615-84½-New. It is the duty of the court to seek not only through hearings in court but through every legitimate channel open to it such information as it may obtain as to the moral fitness of the petitioner. 52SD394, 218NW1.

615-84⅓-New. An attorney disbarred after conviction of the felony of conspiring against the United States in time of war will not be reinstated after pardon by the president. 213AppDiv555, 211 NYS256.

615-84¼-New. The reinstatement of an attorney is a matter largely within the discretion of the court passing upon the application. 103WVa7, 136SE402.

615-84½-New. Reinstatement will be denied where the petitioner is shown to have practised law and held himself out as an attorney after disbarment, in violation of a disbarment order. 141Wash 523, 251P773.

615-84⅓-New. Physician's affidavits annexed to petition as to ailments from which petitioner suffers are immaterial on question of his moral fitness. 52SD 394, 218NW1.

615-84½-New. Question whether disbarment of attorney was warranted was settled by appeal to supreme court and cannot be considered on subsequent application for reinstatement. 208Cal 740, 284P909.

615-85 77CalA495, 247P231. [a] **In California.**–197Cal 408, 241P88. [b] **Reference of issues.**–83CalA745, 257P 218. [c] **Application by one whose licence was revoked** since filing application presents moot question requiring dismissal. Cal 289P159.

615-87½-New. , or treated as an application to vacate an order of disbarment. 52SD394, 218NW1.

615-90 77CalA495, 247P231; CalA 270 P968. [a] **In California.**–197Cal 408, 241P88.

615-90½-New. The appellate court, being satisfied as to the applicant's mental qualification, will refer the application to the state board of bar examiners to take such evidence as to his moral qualifications. 78CalA66, 247P1114.

615-90⅓-New. as may be submitted by the applicant and by the local bar association. 78CalA66, 247P1114.

615-90¼-New. and directing the board of examiners to report such evidence by filing a transcript or copy of it with its findings. 78CalA66, 247P1114.

615-90½-New. upon the question whether or not applicant is possessed of such moral qualifications as to entitle him to reinstatement. 78CalA66, 247P 1114.

615-90⅙-New. If letters and affidavits on file with the application are presented as evidence before the board, the originals should be referred to in the report. 78CalA66, 247P1114.

615-90⅐-New. but copies thereof need not be incorporated in the transcript of evidence. 78CalA66, 247P1114.

615-90⅛-New. Upon the filing of the report, either the petitioner or respondent may take exceptions to any or all of the findings of the board. 78CalA66, 247P1114.

616-94 77CalA733, 247P524; 245NY 423, 157NE730; 52SD394, 218NW1; 103 WVa7, 136SE402 [citCJ]. [a] **Sufficiency of evidence of mental attainments.**–85CalA113, 259P90. [b] **Sufficiency of evidence to show legal and educational qualifications** is to be tested by considering question as to where preponderance of evidence lies. 85CalA209, 259P 67 (evidence held sufficient to show qualifications).

616-94½-New. Whether the applicant is to be examined may depend on the test of mental qualification therefor. 77 CalA495, 247P231.

616-94⅓-New. The burden is on the applicant to show mental and moral fitness. 77CalA733, 247P524.

616-94¼-New. In Maine a law court has no jurisdiction over an attorney's petition for reinstatement. 125Me521, 134A564.

616-94½-New. Reinstatement of a disbarred attorney rests in the sound discretion of the trial judge. 125Me521, 134A564.

616-94⅙-New. The court will not consider whether the crime committed was a felony where the order of disbarment was not appealed from. 245NY423, 157 NE730.

616-94⅐-New. On appeal from an order denying reinstatement, the court of appeals will not consider the fitness of the petitioner. 245NY423, 157NE730.

616-94⅛-New. Where a disbarred attorney appears and is examined on the hearing of his application for reinstatement and it appears that he has not the moral qualifications entitling him to reinstatement, the application may be denied without reference to the board of bar examiners. 79CalA639, 250P701.

616–94⅛–New. An attack upon the findings cannot be made by means of a motion for additional findings. 80CalA66, 251P650.

616–94⅛–New. A motion for a new trial is essential to attack the findings of the referee. 80CalA66, 251P650.

616–94⅛–New. Findings of the referee cannot be amended to add matters not in issue under pleadings. 80CalA66, 251P650.

616–94½–New. Evidence need not be confined to matters brought out in disbarment proceedings. 80CalA66, 251P650.

616–94⅓–New. In California, under recent statute, hearing of application for reinstatement is by the board of governors of the state bar. 270P968.

616–94¼–New. Power conferred on the board of governors must be exercised in the mode and with the limitation prescribed by the act relative to admission to practice law within the state. CalA 270P968.

616–94⅕–New. A California statute giving the board of governors of the state bar power to pass on petitions for reinstatement applies only to proceedings subsequently initiated. 207Cal443, 279P131.

616–94⅙–New. Such statute does not divest the court of jurisdiction of a pending application. 207Cal 443, 279P 131.

616–94⅐–New. In California a finding of the bar examiners touching the moral and social rehabilitation of a petitioner, supported by evidence, should be affirmed. 207Cal 443, 279P131.

616–95 [b] **Privileges may not be delegated to unlicensed person.–Cal** 291P 837.

616–99 [a] **One acts as attorney** only when he represents another, not when he acts for himself. 71CalA386, 235P 664.

617–19 129Kan537, 283P634.

617–20 See also 43F(2d)770.

617–22 43F(2d)770.

617–23½–New. [§ 102a] E½. **Professional Courtesy between Attorneys.** Such courtesy demands that an attorney should not ask for default judgment unless he is satisfied after communicating with his opponent that default is willful or intentional. 135Misc228, 237NYS 509.

617–23½–New. [§ 102b] E⅓. **Duty to Court.** Intentional neglect to inform the court of the infancy of the litigant as soon as is required is a breach of the attorney's duty to the court. 50KI321, 147A617.

619–43 See also 4LaA145, 146 [citCJ].

619–45 CalA 288P824; CalA 291P668; 199 Iowa1163, 199NW294; 241Mich534, 217NW909; 165Minn449, 206NW710; Nebr 221NW17; NJCh 151A760; 221 AppDiv722, 225NYS332; 13PortoRico Fed32; 49SD268, 207NW94; TexCivA 296SW916; Utah 282P776; 199Wis608, 227NW396; Wis 231NW580; Sask [1929] 2DomLR362. [d] (1) See also 146Wash154, 262P235. [h] Sask [1929] 2DomLR362. [m] 199 Iowa1163, 199 NW294. [n] **Prosecution of action should be stayed** where answer sets up facts, till another attorney is employed, and first attorney should not be allowed to take part in trial. 165Minn449, 206 NW710. [o] **New client not permitted to secure fruits of decree.**–117Nebr504, 221NW17. [p] **Injunction from appearing in particular case.**–51Nev264, 274P 7. [q] **Attorney and court have duty to raise point** of attorney's misconduct in bringing action against former client. Wis 231NW580. [r] **Counsel's associates have no greater duty** to raise his misconduct than have opposing attorneys or court. Wis 231NW580. [s] **Party could waive right to complain** by failing to make timely objection. 199 Wis608, 227NW396.

620–46 [a] (3) Attorney who has been retained by one party will not be permitted, even with client's consent, to withdraw and represent adverse party. 13PortoRicoFed32. (4) Payment of cash fee is not necessary in order to preclude attorney retained by party from withdrawing and representing adverse party with original client's consent. 13 PortoRicoFed47. [b] **Waiver.**–Wis 231 NW580.

620–47 30Hawaii533, 559 [quotCJ]; 165Minn449, 206NW710.

620–47½–New. Solicitor should never engage to serve client whose interests conflict with solicitor's personal interests. NJCh 151A760.

620–49 OklCr 271P170; 199Wis608, 227NW396.

620–51 238Mich151, 213NW110, 51ALR 1303; 117Nebr504, 221NW17. [a] **Attorney bringing action against former clients** of whom he was confidential adviser on the same matters is guilty of unprofessional act. Wis 231NW580.

621–52 238Mich151, 213NW110, 51ALR 1303. [a] See also 93PaSuper277. [j] (6) In will contest, attorney for contestant husband may represent husband as guardian ad litem for minor daughter. 94CalA782, 271P923. (7) Assistant in case, not party to misconduct in bringing action against former client. Wis 231NW580. (8) Other instances. CalA 288P824.

621–55 125 Okl 282, 257P793, 795 [quot CJ]. [c] (1) 205 Iowa639, 216NW99. (5) Participation of attorney in trial after having testified as witness rests in discretion of court. 92PaSuper110. [e] **District attorney practicing law.**–33PortoRico 802.

623–76 See also 246 IllA467. But see Ariz 283P287. [a] (4) Order for transcript construed and held to show that defendant contracted only in representative capacity. TexCivA 273SW663.

624–78 TexCivA 273SW663.

625–89 135 Okl 105, 274P471 (complaint alleging conspiracy between attorney and client to convert automobile by fraudulent attachment held not demurrable).

627–4 [a] **Duty of attorney appointed to defend absent party served by publication.**–TexCivA 281SW324.

627–5½–New. Appointment of an attorney to represent defendant sought to be punished for contempt does not constitute a denial of the constitutional right of defendant to present his case in person where counsel appointed rendered valuable services without objection by defendant, and defendant was not adjudged guilty of contempt. Utah 273P512.

627–7 [a] **Firm of practitioners as such** are regarded as single entity. 101 NJEq347, 139A406.

627–10 101NJEq347, 139A406.

627–13 [a] **Contra** 126 Or309, 269P865.

628–14 126 Or309, 269P865.

628–14½–New. A retiring partner's statement to another partner that the latter should receive a part of the fees in a case if the retiring partner argued it is without consideration and is not binding on the other partners. 66Utah 418, 243P377.

628–15½–New. Termination. Relation of law partners continues after dissolution as to cases pending at dissolution. Mo 30SW(2d)1.

628–19 See also 146Wash358, 262P 980. [b] **Finding that dissolution agreement so provided** held sustained by evidence. 66Utah418, 243P377. [c] **Member of firm conducting cases on contingent fee** has equitable claim to share of fees realized on judgments collected after partner's death. Mo 30SW(2d)1.

628–23½–New. A partner concluding services in which the partnership was engaged when dissolved by mutual consent is entitled to collect and retain what the services were worth to the client and not merely their worth to the firm. 81Colo 100, 253P1057.

629–28 98CalA430, 277P149.

629–28½–New. An attorney cannot claim an extra allowance for drawing account he had before dissolution. 146 Wash358, 262P980.

629–29 98CalA430, 277P149 (burden is on one suing to set aside settlement to prove right to accounting); 160La1054, 108S87; 220AppDiv415, 221NYS630 (evidence insufficient for action to set aside accounting for fraud); Utah 286P 620.

629–29½–New. Under a dissolution agreement providing for a division of fees received in pending business in accordance with interests as disclosed by partnership articles, a partner is not entitled to share in fees received by the others, under a new employment, in obtaining reversal of a judgment recovered in an action in which the firm was employed before dissolution. 66Utah418, 243P377; 66Utah453, 243P391.

629–29⅓–New. but he is entitled to share in fees received for whatever part of the services in procuring such reversal were rendered by them before dissolution of the partnership. 66Utah418, 243P377.

629–29¼–New. In an attorney's action against a former partner for an accounting, plaintiff has the burden of proving that disputed fees for work outside of the limits of law partnership were included in the joint property of the firm by agreement. 81Colo 100, 253P1057.

629–29⅕–New. A partner in a law firm is held entitled to two thirds of certain contingent fees, as agreed by members of firm, without dividing special fees paid under a compromise action. 160 La1054, 108S87.

629–29⅙–New. If after dissolution he joins the opposite side and testifies against the firm's right to recover, he is estopped to claim his share of the fees. 220AppDiv415, 221NYS630.

629–29⅐–New. And if, after dissolution, he joins the opposite side and testifies against the firm's right to recover, he is estopped to claim his share of fees. 220AppDiv415, 221NYS630.

629–29⅛–New. A partner has no right to funds because of the other partner's wrongful investments before accounting. 194Wis275, 215NW584.

629–29⅛–New. Evidence in action for accounting held to show that plaintiff did not abandon cases. Mo 30SW(2d)1.

629–29⅑–New. Partner entitled to interest on refund of liquidated sum under agreement. Mass 172NE858.

629–29⅒–New. Evidence properly excluded in suit for accounting. Mass 172 NE858.

629–29½–New. Obligation of partner to firm for legal services treated as asset to be accounted for by him. Mass 172NE858.

629–29⅓–New. Partner's liability to firm contingent on pending suit cannot be treated as distributable asset but copartner's right should not be prejudiced by decree. Mass 172NE858.

629–29¼–New. Partner has right to share in profits after payment of debts. Mass 172NE858 (right held not waived by new agreement).

629–31 See also TexCivA 25SW(2d)889.

629–34 [a] **Where account is against one,** conversations with others are res inter alios. 215Ala420, 110S895.

629–49½–New. It is the duty of an attorney to know the contents of documents presented for action of the court. 9F(2d)990.

629–49⅓–New. The conduct of an administrator's attorney in persuading the administrator to pay a doubtful claim, of which the attorney expected to receive one fourth from claimant, held unethical. 99NJEq631, 134A358.

629–49¼–New. In a suit for specific performance of a sale contract, an action of defendant's attorney in taking a conveyance of realty before trial and after lis pendens was filed is improper. 99NJ Eq634, 134A353.

629–49⅕–New. Evidence to convict lawyer charged with criminal offense must be beyond reasonable doubt, although subject to discipline by court. 34 OhA13, 170NE188.

630–54 [b] **That client and attorney are son and father** is immaterial. McA 294SW736. [c] **Person has right to employ his own attorney.**–CalA 263P252.

630–55 155Miss242, 124S344.

630–56 [a] **That attorney assumed to conduct case for all defendants** does not defeat right of one defendant to be represented by his own attorney. TexCivA 8SW(2d)298.

630–60 200 Iowa1265, 206NW657. [c] 200 Iowa1265, 206NW657. [e] **Evidence held to show that contract for legal services was not procured by fraud.**–Tex CivA 19SW(2d)404.

631–62 [a] **Correspondence between firms of attorneys,** representing different

insurance companies, held not to show employment of one by the other. 240NY 323, 148NE537.

631-64½-New. That the same counsel appeared for the corporation as appeared for its president does not show that appearance by the president is appearance by the corporation. Tex 285 SW637.

631-65 [a] 130Misc269, 224NYS17.

631-69 118 Okl 66, 246P619, 622 [quot CJ].

631-70 118 Okl 66, 246P619, 622 [quot CJ].

631-73½-New. Acts of unauthorized attorney in attempting to appeal are ineffectual. 198Cal 183, 244P343.

631-73½-New. A corporation counsel of the city of New York is not permitted to appear as attorney for judge of court of general session, but his authorized appearance is not void. 244NY406, 155 NE688.

631-76 214Ala1, 106S228, 229 [citCJ]; 215Ala667, 112S134; 198Cal 183, 244P 343; 198Cal 333, 244P1081; 78CalA 751, 248P934; CalA 274P997; 82Colo 550, 262P839; 337 Ill 141, 168NE647; 129Kan709, 284P614; 126Me550, 140A 182; 126Me537, 140A382, 389 [citCJ]; 260Mass19, 156NE745; 155Miss242, 124 S344; 308Mo 309, 272SW691; 309Mo 224, 274SW758; 315Mo 209, 286SW25; 322Mo 1017, 18SW(2d)13; 222MoA1176, 15SW(2d)946; 123 Or406, 262P833; 29PortoRico 768, 775 [citCJ]; 151Va 143, 144SE606; 151Wash413, 276P98; 196Wis426, 220NW194 (on substitution of administratrix for intestate on revival of action). [b] 203Cal 379, 264P 240; 123 Or406, 262P833. [e] **Appearance of attorney of another state as counsel for foreign corporation at taking of depositions in such state** will be presumed to have been authorized when question arises in collateral proceeding. 309Mo 224, 274SW758. [f] **Attorney setting out specific cause of action or defense** is presumably acting under special authorization of his client. Mass 168NE 806(2dcase).

631-76½-New. , although he was subsequently disbarred. 78CalA751, 248P 934.

633-80 198Cal 183, 244P343.

633-81½-New. There is no presumption that authority of an attorney appointed by the court to conduct disbarment proceedings ceased until judgment was recorded. 197 Ind1, 149NE434.

633-82 155Miss242, 124S344 (burden is on party attacking judgment to show want of authority); 29PortoRico 768.

633-83 126Me537, 140A382; 137Misc1, 242NYS408.

633-88 126Me537, 140A382, 389 [cit CJ]; 309Mo 224, 274SW758.

633-91½-New. No presumption of authority of attorney to satisfy judgment by discharge of judgment debtor. 249 Mich567, 229NW590.

634-96 273US315, 47SCt361, 71L ed 658.

634-98 See also 98CalA84, 275P865.

635-10 315Mo 209, 286SW25.

635-12 43F(2d)969 (authority to represent may be questioned at any stage of case); 219Ala322, 122S341.

635-14 See also 94Fla60, 113S736, 743 [citCJ].

635-15½-New. The court may demand authority at any time. 273US315, 47 SCt361, 71L ed658.

635-18 215Ala526, 112S111.

636-24 126Me537, 140A382, 389 [cit CJ].

636-25 But see 219Ala322, 122S341.

636-29 215Ala667, 112S134; 29Porto Rico 768, 775 [citCJ]; 36Wyo 53, 252P 1028, 1029 [citCJ]. But see 221AppDiv 732, 224NYS522. [b] **Attorney is presumed** to have authority to appeal from judgment adverse to his client. 36Wyo 53, 252P1028.

636-30 240NY323, 148NE537.

636-33 [b] **Testimony of conversations between attorney and others** has been held admissible. 255Mass104, 151NE84. [c] **Evidence showing authority for special purpose** is admissible. Ala 130S211.

636-33½-New. Evidence that an attorney waived notice as to taking depositions in behalf of a company authorizes a finding that the attorney was acting for the company. 192NC700, 135SE788.

636-35 But see TexCivA 290SW858.

636-35½-New. A conversation between an attorney ordering printing and the printer long after the work was delivered will not be considered where the original contract was clear. 129Misc 197, 221NYS89.

637-38 [a] 15F(2d)451. [b] CalA 293 P108. [c] 198Cal 333, 244P1081; 29 PortoRico 768.

637-39 89 IndA163, 166NE9; 117 Okl 43, 246P873 (preponderance of evidence necessary). [g] 10F(2d)269; 217Ala 432, 116S520; 171Ark187, 283SW354; 74CalA310, 240P43; IndA 159NE693; 255Mass104, 151NE84; 173Minn207, 217NW109; TexCivA 290SW858. [h] 339 Ill 504, 171NE494; 240NY323, 148 NE537; 129Misc197, 221NYS89. [i] **Proof of authority to represent client in one case** does not show authority to act in another. 198Cal 183, 244P343.

637-42 198Cal 183, 244P343.

637-43 NJ 145A105.

637-44½-New. However, the court may postpone a decision until a hearing on the merits. 273US315, 47SCt361, 71L ed 658.

637-49½-New. [§ 142a] B½. **Compelling Disclosure of Client's Name.** 140 Wash625, 250P52.

637-50 Ariz 284P159; 198Cal 183, 244 P343; 92Fla503, 109S433; 252 IllA612; 124Kan278, 259P687, 690 [citCJ]; 235 Ky328, 31SW(2d)377(2dcase); 316Mo 384, 289SW332; 102NJEq66, 139A716.

638-51 127Misc907, 217NYS645 (notice). [a] **Attorney has duty to communicate** information in relation to transactions to client, and he is conclusively presumed to have done so. 127Misc907, 217NYS645.

638-54 32F(2d)1010; 92Fla503, 109S 433.

638-56 40GaA781, 151SE525.

638-57 169Ark363, 275SW748; 124 Kan278, 259P687, 690 [citCJ]; 32Porto Rico 774 (unauthorized stipulation). But see 226AppDiv62, 234NYS614.

638-58 13F(2d)552; 324 Ill 615, 155 NE762; 237 IllA1, 23 [citCJ]; 234Ky 199, 27SW(2d)959 (holding notice to attorney sufficient to warrant default judgment); 243Mich570, 220NW795; 147Miss551, 113S189; 99NJEq634, 134 A353; 127Misc907, 217NYS645, 647 [quotCJ]; 128Misc299, 218NYS401; 218AppDiv516, 218NYS568; Tex CommnA 10SW(2d)692; TexCivA 283 SW653; TexCivA 293SW291, 294 [cit CJ]; TexCivA 4SW(2d)1008. But see 240Mich406, 215NW360. [e] **Vendee is not charged with knowledge** of attorney for vendor. 240Mich406, 215NW360(1st case).

639-59 29F(2d)167; 34F(2d)377; 87 CalA359, 262P339; 322 Ill 589, 153NE 679; 237 IllA1, 23 [citCJ]; 199 Ind129, 154NE802; 209Ky325, 272SW753; 165 La319, 115S576; 147Miss551, 113S189; 127Misc907, 217NYS645, 647 [quotCJ]; 133SC431, 131SE598; TexCivA 293SW 291, 294 [citCJ]; Wash 288P916; 59 OntL471, [1926] 4DomLR866.

639-62 237 IllA1; 209Ky325, 272SW 753, 755 [quotCJ]; 127Misc907, 217 NYS645.

639-63 237 IllA1, 23 [citCJ]; 130Misc 705, 225NYS41; TexCivA 283SW653.

640-64 337 Ill 141, 168NE647.

640-65 237 IllA1.

640-66 207 Iowa343, 223NW102. [a] **Knowledge of written assignment of contract for deed by vendee** cannot be imputed to vendors from the fact that their attorney drew the assignment. 175Minn502, 221NW871.

640-68 322 Ill 589, 153NE679.

640-69 134Misc491, 235NYS281.

640-74 321 Ill 462, 152NE210 (notice acquired by attorney, while acting for seller is not attributable to purchaser whom he later represents, as their interests were antagonistic).

641-79 137Misc420, 242NYS308.

641-81 76Mont549, 248P169.

641-84 41F(2d)648; 92Fla503, 109S 433; 27Hawaii60, 63 [quotCJ]; 209Ky 325, 272SW753 (client bound by acts of attorney in course of litigation); MoA 21SW(2d)937; 76Mont549, 248P169; 14PaDist&Co 209; 32PortoRico 774. [d] **Attorney is agent of his client** in so far as his acts come within scope of his employment. 158La1093, 105S76. [e] **Vendor is bound by his attorney's report** of telephone conversation at purchaser's request as to particular covenant. Md 150A28. [f] **Whether attorney acted within authority** is question of fact. 41F(2d)648. [g] **Uncommunicated instructions** cannot limit authority. 235Ky518, 31SW(2d)895.

641-85 32PortoRico 774.

641-86 316Mo 384, 289SW332.

641-88 94Fla318, 113S689, 697 [citCJ].

641-89 94Fla318, 113S689, 697 [citCJ] (proceedings in court).

642-94 Conn 152A145; Iowa 231NW 376; 102NJEq133, 140A15. [a] (3) Other instances. Iowa 231NW376.

642-96 But see 147Wash251, 265P727.

642-98 27Hawaii60.

642-99½-New. Authority of attorney to act for principal is in many respects greater than that of general agent. 48 RI 473, 139A212.

642-99½-New. Conduct of suit belongs to parties who only have right to apply for order or direction therein. 102NJEq 66, 139A716.

642-99¼-New. Liability of client under law cannot be changed by mere statement of counsel. 32F(2d)333.

642-1 Conn 152A145; 150Md585, 133A 314; MoA 19SW(2d)776 (conduct of attorney in one case cannot bind client in another case, where attorney represented different parties in different cases); TexCommnA 12SW(2d)983. [f] **Employment of attorney to advise on legal matters** does not authorize him to transact client's general business. 324 Ill 367, 155NE296.

642-3 [d] **Attorneys for nonresident** appearing specially to dissolve attachment are not authorized to take action relating to merits. 213Ala414, 104S817. [e] **Purchaser is not warranted in believing that attorney of vendor had authority to make representations** regarding condition of property. Md 150A28. [f] **Legal adviser of owner is not authorized to accept offer** to purchase realty. 169La1120, 126S679.

643-4 [b] **Plaintiff in action to quiet title** permitted to testify as to statements made by defendant's attorney to whom she was referred by defendant. 42 Ida567, 248P447.

643-5 33Ariz128, 262P995 (attorney may not amend answer to conflict with client's contention as to nature of property involved); 51Philippine613.

643-6 35Ariz528, 281P213; 95CalA390, 272P1080; 94Fla318, 113S689, 697 [cit CJ]; 170La302, 127S731 (to oppose homologation of procès verbal); 264 Mass592, 163NE178; Mass 170NE110; 76Mont549, 248P169; 129Misc218, 221 NYS105; 51Philippine613; 151Va143, 144SE606. [c] **Party must inform counsel fully of facts** constituting cause of action or defense and be personally active in preparing for trial. 235Ky328, 31SW(2d)377(2dcase).

643-7 213AppDiv324, 210NYS589.

643-12½-New. A client is chargeable with acts of omission of his attorney, as well as acts of commission. 92Fla 781, 110S271.

643-12½-New. Ordinarily defendant in a criminal prosecution is bound by any course of action that is followed as to his defense by his counsel. 57ND645, 64ALR434, 223NW698.

643-12¼-New. An attorney is not a party to a case in which he acts purely in a professional capacity. Mass 165 NE382.

643-12½-New. Agreement of defendant's counsel to mistrial of criminal prosecution is beyond his authority. 160Tenn366, 24SW(2d)886.

643-13 117 Okl 58, 245P48 [citCJ]; 44Philippine62.

644-14 117 Okl 58, 245P48 [citCJ].

644-17 55ND253, 212NW931, 932 [quotCJ].

645-19 See also 7Alaska565.

645-22 70CalA458, 233P415 (notice of trial).

645-29 202 Iowa804, 211NW366; 51 Philippine613.

645-30 169Ga243, 150SE76 (consenting to taking of compromise verdict and judgment); 331 Ill 83, 162NE214 [foll 73 Ill 415]; 255 IllA97 (no implied authority); Iowa 226NW49 (consent to form of judgment); 214Ky400, 283SW 410; TexCivA 198W(2d)421 (attorney appointed by court to confess judgment on notes pursuant to authority therein).

646-34½-New. An attorney's approval of a default judgment is not binding on defendants whom he did not represent. 191NC373, 131SE740.

646-37 51Philippine613.

646-41 [a] **Conversely,** attorney cannot proceed with action where client desires termination thereof. NJSup 151A 366.

646-42 CalA 292P179; 88 IndA503, 164NE639 (client bound); TexCivA 19 SW(2d)421.

647-44 119 Or636, 250P840, 841 [quot CJ].

647-45 97CalA193, 275P503(2dcase) (common-law rule, but under statute authority deemed conferred); 119 Or 636, 250P840, 841 [quotCJ]. [b] **In California.**-287P149.

647-47½-New. Solicitor cannot file petition in his own name. 102NJEq66, 139A716.

647-57 221AppDiv180, 222NYS671; 290Pa74, 138A79, 80 [citCJ]; 149Wash 328, 270P1032.

647-58 170Ga515, 153SE209 (regardless of client's consent); 335 Ill 322, 167 NE80; IndA 168NE41; 234Ky199, 27 SW(2d)959; NJSup 147A47; 130Misc 192, 223NYS710; 119 OhSt494, 164NE 510; 144 Okl 190, 290P338; 51Philippine613. But see SD 227NW567. [b] **Creditors not parties to suit** held not bound by pledge to court of attorney for debtor in securing continuance. 13 F(2d)617.

648-59 93CalA497, 269P702; 105NJL 415, 144A604; TexCommnA 11SW(2d) 778.

648-60 76Mont549, 248P169.

648-62 See also 51SD282, 213NW509.

648-62½-New. General authority to codefendant's counsel to do anything necessary on call of calendar authorizes a stipulation for reference. 130Misc 192, 223NYS710.

648-62½-New. Counsel having charge of proceeding has the same authority as an attorney of record to make any stipulation relating to the procedure. 130Misc192, 223NYS710.

648-73 76Mont549, 248P169; 77Mont 54, 249P1114. [b] **Attorney who represented all defendants** in stipulation for continuance cannot contradict record by statement that he represented only two defendants. 217MoA630, 274 SW503.

648-74 [a] (7) Attorney duly authorized by adults may stipulate that evidence taken should be considered as taken after his appearance. 132Misc 749, 230NYS330.

649-96 LaA 130S228; 141Miss72, 106 S83 (county is bound by admissions same as individual litigant); MoA 30 SW(2d)794; 137SC319, 135SE473; Tex CivA 289SW1064. But see MoA 30SW (2d)794; 295Pa183, 145A65. [e] **Admissions in argument on demurrer** held not binding on client. 77CalA548, 247 P520.

650-98 30F(2d)12; 99CalA159, 278P 247; 9LaA664, 120S79; TexCommnA 11SW(2d)778.

650-99½-New. Admissions by defendant's counsel must be within scope of plaintiff's declaration. 141Miss72, 106 S83.

650-1 TexCivA 289SW1064.

650-2 [c] **Impulsive statement of counsel against interest** made in turmoil of trial, apparently not intended, will not bind client. 101CalA153, 281P 415.

650-4½-New. Counsel's admission in open court that complaint is based solely on theory of subrogation binds plaintiff. SC 155SE429.

651-7 117 Or406, 244P317, 318 [cit CJ].

652-21 [a] **Attorney representing only two** of three defendants should specify on papers filed his limited representative capacity. 217MoA630, 274SW503. [b] **Signature.**-89CalA396, 265P306.

652-29 101NJEq500, 138A655; 221 AppDiv180, 222NYS671.

652-35½-New. Orders to which a party is entitled as of course as on default are taken and entered by the solicitor at the client's risk. 102NJEq66, 139A 716.

653-40 219Ala216, 121S517; 289Pa 207, 137A232.

653-43 See also 219Ala216, 121S517.

653-43½-New. But ratification cannot be inferred or presumed where the assignment is reported as collection. 219 Ala216, 121S517.

653-43½-New. Where an unauthorized assignment is wholly in interest of the owner, equity often presumes acceptance. 219Ala216, 121S517.

653-44 Wis 231NW170. [e] **In criminal case** attorney for accused is under no legal duty to appeal, unless he is satisfied that there is probable error in trial. 143Miss199, 108S719.

653-45 Ariz 283P287.

653-46 CalA 293P108 (to take appeal).

653-47 CalA 293P108. [b] **Respondent** may question attorney's authority. CalA 293P108.

654-51 See also 102NJEq133, 140A15.

654-53½-New. An appeal by an attorney without authority, being void, may be dismissed on motion. 198Cal 195, 244P347.

654-53½-New. A statement of defendant's attorney as to justification of sureties on appeal bond is not binding on an intervener or the intervener's attorneys in the absence of express authorization. 51SD282, 213NW509.

654-61 214Ala534, 108S333; 239 IllA 30; 124Kan15, 257P953.

655-62 214Ala534, 108S333; 158La 1093, 105S76 (payment of heir's succession funds to attorney of record in partition proceedings is valid payment).

655-65 249Mich567, 229NW590.

655-72 136SC458, 134SE428.

656-86 136SC458, 134SE428.

656-89 [b] **Attorney can bid in at sheriff's sale** to protect his client's interest. 136SC458, 134SE428.

657-94 325 Ill 402, 156NE385; NJ Sup 146A786(1stcase); 32PortoRico 774; 149Wash328, 270P1032. [a] (5) Other instances. SD 226NW739. [c] (2) Attorney employed only to determine whether title is merchantable has no authority to waive stipulation of contract that merchantable title shall be tendered on or before stated date. 165 Ga799, 142SE134.

657-96 [a] **Solicitor** has no implied authority to extend time for closing transaction for purchase of real property. 102NJEq207, 140A244.

657-97 177Ark384, 7SW(2d)1; 298Pa 208, 148A109.

657-99 129Misc197, 221NYS89; Tex CivA 291SW293, 294 [citCJ].

657-3 40GaA781, 151SE525. [a] **Right of expert to sue client** as affected by retention by attorney of proceeds of settlement of prior litigation. 40GaA 781, 151SE525.

658-10½-New. An attorney employed to purchase at a foreclosure sale has no implied authority to bind his client to hold property in trust for the mortgagor. DelCh 146A296 (evidence insufficient to show client's ratification of attorney's agreement).

658-10½-New. An attorney directed to redeem or purchase a lot sold for drainage taxes is held to have authority to contract for the purchase thereof from the drainage district without written authorization. 176Ark315, 3SW(2d) 964.

658-14 36Wyo 53, 252P1028.

658-16 30F(2d)610.

658-29 205Kyl, 265SW429; 289Pa207, 137A232.

659-33 205 Iowa801, 218NW529, 530 [citCJ].

659-38 177Ark1114, 9SW(2d)571; Miss 167NE915. But see 169La642, 125S743.

659-40 15F(2d)451; 220Ala6, 1238 271; CalA 290P623; 35GaA195, 132SE 260; 331 Ill 83, 162NE214; Iowa 226 NW49; 216Ky736, 288SW733; 13LaA 675, 127S46; Mass 170NE110; MoA 9 SW(2d)248; MoA 11SW(2d)1063; 228 AppDiv1, 238NYS351; 119 Or636, 250 P840, 290Pa74, 138A79; 51Philippine 613; 32PortoRico 774; TexCivA 289 SW195; 144Va395, 132SE312; 107 WVa192, 147SE877, 66ALR102.

660-42 209Ky672, 273SW488.

660-43 Mont 277P414; 213AppDiv140, 210NYS100; 228AppDiv1, 238NYS351.

661-48 213AppDiv140, 210NYS100 (where defendant's attorney without authority agreed to pay sum in compromise); 105WVa111, 141SE518. [b] **Implied assent not shown.**-CalA 290P 623.

661-50 Mass 170NE110 (judgment set aside). [d] **Judgment pursuant to compromise of attorneys** will not be vacated in absence of fraud. 331 Ill 88, 162NE214.

661-51 88 IndA150, 163NE540 (immaterial whether such authority is given prior to, or contemporaneously with, contract of employment); TexCivA 289 SW1064; TexCivA 158W(2d)44; 144 Va395, 132SE312. [c] **Evidence held sufficient** to show authority to compromise claim. 144Va395, 132SE312. [d] **There is no presumption of authority** where client notifies court and adversary of attorney's lack of authority. CalA 290P623. [e] **Attorney for government** agreeing to consent decree under attorney-general's instructions has authority to settle case. 42F(2d) 304.

662-52 But see CalA 290P623.

662-55 See also 34GaA313, 129SE306.

662-55½-New. But a general agency conferred to conduct negotiations imports all power of principal trucking transaction. 253Mass451, 149NE156.

662-58 220Ala6, 123S271; 35GaA195, 132SE260; 36GaA372, 136SE822; 254 Mass35, 149NE677; 249Mich99, 227NW 778; 170Minn191, 212NW530, 532 [cit CJ]. [a] (2) Evidence of attorney's previous settlements showed authority to settle claim for less than full amount. 41GaA94, 151SE818.

662-59 170Minn191, 212NW530, 532 [citCJ].

663-62 [a] **Burden of showing special authority** rests on debtor. 35GaA195, 132SE260 (especially where debtor assumes burden).

663-63½-New. Vacating an order authorizing payment of an amount tendered, improvidently requested by the attorney beyond his authority, is within the court's authority. 105NJL415, 144A604.

663-66 Iowa 231NW376; 290Pa74, 138 A79.

664-69 91CalA327, 267P138 (bond releasing attachment).

664-75 41GaA94, 151SE818; Miss 130 S294; 289Pa207, 137A232. [d] **That counsel was compensated by purchaser** has been held no bar to his receipt of payment for vendor. 289Pa207, 137A 232.

665-78 12PaDist&Co 266.

665-80 214Ala534, 108S333, 334 [quot CJ].

665-81 214Ala534, 108S333, 334 [quot CJ].

665-84 [b] (1) See also Agency §§ 260-263.

666-90 141Wash297, 251P578, 579 [quotCJ].

666-92 [a] 289Pa207, 137A232.

666-97 35GaA195, 132SE260.

668-21 170Minn191, 212NW530 (dictum).

668-25 35Man521, [1926] 2DomLR466, [1926] 2WestWkly37. [b] **Where solicitor has not power to do work** in province where case comes up, and he delegates power to solicitor who can, latter is held to be the solicitor of client. 35 Man521, [1926] 2DomLR466, [1926] 2 WestWkly37.

669-33 Mont 277P414; 129Misc218, 221 NYS105; 289Pa207, 137A232; 290Pa74, 138A79; 136SC458, 134SE428.

669-35 91CalA327, 267P138.

669-37 219Ala216, 121S517.

670-38 Mont 277P414 (slight evidence of acquiescence deemed ratification).

[a] 41GaA94, 151SE818; 226Ky97, 10 SW(2d)608; TexCivA 15SW(2d)722. [c] (3) By attorney filing answer held ratified under evidence. 169Ark1212, 277SW21.

670–39 Mont 277P414; 136SC458, 134 SE428. [c] **Failure of dissent** by intervening creditors of acts of their counsel implies approval. 9F(2d)97.

670–40 151Miss602, 118S444; 136SC 458, 134SE428; TexCivA 18SW(2d)715.

671–42 231Ky788, 22SW(2d)281 (improper conduct in argument).

672–51 97Fla240, 121S883(2dcase); Ind A 156NE578; 128 Okl 97, 261P209; 152 Va27, 146SE193; 34Wyo 509, 245P295. But see TexCivA 23SW(2d)405.

672–57 316Mo 517, 291SW459; Sask [1929] 2DomLR372.

672–58 117 Okl 43, 246P873.

672–59½–New. On withdrawal of attorney's authority delivery by him of sheriff's resignation is not effective. 96 CalA292, 273P1101.

672–59½–New. An attorney who ceases to represent his client should secure withdrawal of his name from the record, and the client must secure appearance of some other attorney to proceed with the litigation. MoA 13SW(2d)659.

672–60 MoA 285SW549; 136SC458, 134 SE428; TexCivA 299SW474, 475 [quot CJ]; 66Utah418, 243P377, 381 [quot CJ].

673–61 133 Okl 64, 271P167, 169 [quot CJ]; 66Utah418, 243P377, 381 [quot CJ].

673–63 169Ark363, 275SW748.

673–64 214Ala573, 108S375, 45ALR935.

673–65 216Ala581, 113S447, 59ALR348.

673–69 [a] **Client's letter to attorney** denying existence of attorney and client relationship does not terminate relationship. CalA 290P916.

673–70 9F(2d)560; TexCivA 271SW 266 (notice of termination insufficient). [a] **Appeal taken thereafter** is unauthorized. 162La123, 110S172.

673–71 9F(2d)560; 16F(2d)35; 24F (2d)145; 202Cal501, 261P994; 68CalA 134, 228P720; 13LaA88, 126S244 (on payment of value of services rendered up to date of discharge); 131Misc613, 228 NYS335; 132Misc1, 229NYS430. [a] **Implied dismissal** accomplished by party's personal appearance and motion to dismiss suit. 44Philippine62. [b] **Effect of dissolution** is that attorney is without authority further to prosecute suit. 214Ala573, 108S375, 45ALR935. [c] **Relation is not kept alive after discharge** because client uses expert witness employed by attorney and attorney attends hearings in his own interest. 131 Misc613, 228NYS335. [d] **Attorney employed to secure transfer of stock in claimant's name for percentage of recovery** had revocable agency only. 39F (2d)834. [e] **Absent notice to adverse party of revocation** of attorney's authority to represent party it continues. 198NC659, 153SE112(2dcase).

674–76 215Ala251, 110S296, 297 [quot CJ]; 85PaSuper177, 179 [citCJ].

674–76½–New. An attorney should not be permitted to withdraw if it will work an injustice on a third party. 79CalA 721, 250P880.

674–77 136Misc365, 240NYS829.

674–78 130Misc269, 224NYS17.

674–78½–New. A client's repudiation of an agreement made by an attorney in good faith with the opposing side is a just cause for the counsel's withdrawal. 215Ala465, 111S22.

674–86½–New. An attorney should not withdraw from the cause without giving his client reasonable notice. 85PaSuper 177, 179 [citCJ].

674–87 79CalA721, 250P880 (order denying withdrawal not abuse of discretion); 337 Ill 141, 168NE647; 85PaSuper177, 179 [citCJ] (leave of court necessary). [a] **Attorney not entitled to order permitting withdrawal.**–136Misc 365, 240NYS829.

674–88½–New. Hearing and determination. 85PaSuper177.

675–95 110Conn646, 149A250; 90Fla 441, 106S470; Ind 169NE46(1stcase); IndA 172NE128; 228AppDiv704, 239 NYS59.

675–2 214Ala309, 107S812.

675–4 99CalA96, 278P488; TexCivA 20 SW(2d)208 (express contract).

676–6 Contra 69Utah130, 252P891, 50 ALR641.

676–16 198Cal183, 244P343, 346 [cit CJ].

676–24 9F(2d)560; 24F(2d)145; 98Fla 970, 124S729; 3LaA402; 106 Okl 166, 233P426; 44Philippine62; 32PortoRico 774 (entering in unauthorized stipulation agreement); 66Utah418, 243P377, 388 [citCJperCherry,J].

677–25 9F(2d)560; 15F(2d)292; 37F (2d)749; CalA 290P916; 2LaA364; 106 Okl 166, 233P426; 44Philippine62; 32 PortoRico 774; 66Utah418, 243P377, 388 [citCJperCherry,J]. [a] **Right to change attorney is absolutely unquestionable** by other party and is subject only to protection of attorney's interest. 127 Misc183, 215NYS437.

677–27 [a] **Agreement to employ attorney exclusively** is unenforceable. 132 Misc1, 229NYS430.

677–28 32PortoRico 774.

677–29 205Cal 525, 271P906; 93CalA 256, 269P774.

677–31 93CalA256, 269P774.

677–32 205Cal 525, 271P906; 44Philippine62.

677–33 17F(2d)155, 159 [citCJ].

678–35 205Cal 525, 271P906; Wis 231 NW170.

678–36 CalA 290P916.

678–37 [d] **Substitution of attorney, made without client's consent,** is nullity. 337 Ill 141, 168NE647. [e] **Bankrupt's consent to attorney acting for him** and recognition as bankrupt's attorney by referee and trustee is equivalent to substitution of attorneys on record. 43F(2d)698.

678–37½–New. Clerk's delivery of decision to old attorney is justified where the latter has not filed withdrawal and new attorney has not entered appearance. 47RI 122, 130A861.

678–39 127Misc183, 215NYS437. [b] (1) 127Misc183, 215NYS437. (2) Rule held for protection of attorney and opposite party. 127Misc183, 215NYS437.

678–40 24F(2d)145 (attorney of record entitled to entry of order).

678–44½–New. Where a corporation counsel appeared for the judge of court of general session in the mistaken belief that the judge was a city officer, his appearance, although improper, was not void, and the court should order substitution of attorneys without striking out the notice of appearance. 244NY406, 155NE688.

678–45 See also 32PortoRico 774.

679–46 133 Okl 64, 271P167 [citCJ].

679–49 Wis 231NW170 (holding that to avoid uncertainty order of substitution should be made). [a] **Parties to perfected appeal** may move for substitution of attorneys only in appellate court. 208Cal 562, 282P796.

679–51½–New. An order of substitution is unnecessary in an action in which judgment was entered for plaintiff, and affirmed. 225AppDiv897, 233NYS179.

680–60 24F(2d)145 (discretionary); 127 Misc183, 215NYS437.

680–61 24F(2d)145; 37F(2d)749.

680–63 246Mich231, 224NW365; 136 Misc682, 244NYS17.

680–68 246Mich231, 224NW365.

681–71½–New. In determining original attorney's compensation, court should consider subsequent settlement and contingent fee agreement. 230AppDiv790, 244NYS701 (allowance held unreasonable).

681–72 127Misc183, 215NYS437.

681–74 70CalA458, 233P415.

681–82 [a] **Party cannot relieve himself of duty** under agreement made by former counsel by changing counsel. 144 Okl190, 290P338.

681–83½–New. An order for substitution of attorneys, with provision for a lien on plaintiff's recovery for the undetermined value of attorney's services, was not subject to attack where no appeal was taken from it. 246Mich231, 224 NW365.

682–84 105Conn436, 135A570; 122Kan 796, 253P400; 128Me379, 147A761; 238 Mich151, 213NW110, 51ALR1303; 102 NJL381, 43ALR928; 51SD393, 216NW 355, 55ALR1346; 158Tenn383, 13SW (2d)800, 62ALR904. See also 218App Div134, 218NYS86. [a] **Relation of attorney and client is one of trust and confidence.** 78Colo 6, 238P29. [b] **Attorney must be present in court to represent client** when he has undertaken to do so. 195NC268, 142SE10. [c] **Fiduciary relationship exists between attorney and client,** and such confidence leads to utmost good faith. 180Ark161, 20SW (2d)868. [d] **Mere employment of counsel** does not excuse party from giving case his personal attention. 235Ky328, 31SW(2d)377(2dcase).

682–85 105Conn436, 135A570. [a] **Attorney is not disqualified by his associate** disqualifying himself. TexCivA 27SW(2d)604.

682–86 Ala 127S527; 130Ark161, 20SW (2d)868; 148SC140, 145SE697; 147Wash 434, 266P179 (facts not showing failure to perform duty). [a] **Attorney may represent adverse interests if not conflicting,** with knowledge and consent of both parties. TexCivA 27SW(2d)604 (violation of duty).

682–87 Conn 135A573; 122Kan796, 253 P400; 230AppDiv323, 243NYS489 (keeping client truthfully informed of progress of case); 51SD393, 216NW355, 55 ALR1346. [a] **Gratuitous agency** assumed by attorney in representing client involves exercise of professional skill. 215Ala131, 110S135. [b] **Consideration for court or benefit of counsel** does not justify waiver of error to prejudice of client. 25F(2d)357. [c] **Attorney, who in handling client's property communicates with third person** as to sale should advise client as to value of property. Ala 127S527. [d] **Duty to secure highest price** at sale of property. 300Pa68, 150 A90.

682–88 Conn 135A573; 230AppDiv323, 243NYS489. [d] **Duty to client to see that only competent evidence is introduced** against him. TexCivA 8SW(2d) 554. Keeping proper books of account. 228AppDiv518, 240NYS183.

682–88½–New. An attorney cannot allow personal interest to be antagonistic to interests of his client. 49Nev161, 241P213.

682–88½–New. Where duty to client and duty to court conflict, latter prevails. Wis 232NW553.

682–89 49ND394, 191NW622.

682–90 49Nev161, 241P213.

682–91 49Nev161, 241P213; 49ND394, 191NW622; Okl 291P538. [d] **Effect of termination of relation.**–49Nev161, 241P213. [e] **No right to reimbursement for purchase price** where property was purchased in effort to overreach and defraud client. 49Nev161, 241P213. [f] **Proof of actual fraud is not necessary** to entitle client to compel transfer to himself of stock which was subject to litigation and was purchased by attorney for his own advantage. 49Nev 161, 241P213.

683–2 206Cal 689, 275P941.

684–7 119 Okl 32, 247P662, 663 [quot CJ]. [c] 119 Okl 32, 247P662.

685–10 206Cal 689, 275P941.

685–13 [b] **Attorney's fraud in buying bill of costs against client** and acquiring his property thereunder may be basis for suit for conversion. TexCivA 29SW(2d)805.

686–19 17F(2d)501; 21AlaA65, 106S54 (fiduciary relation); 218Ala515, 119S 224; 169Ark840, 277SW29; 197Cal 765, 242P918; 206Cal 689, 275P941; Mass 166NE833; Mass 172NE257; 238Mich 151, 213NW110, 51ALR1303; 117Nebr 168, 220NW251 (inherent duty of court to impress on members of bar duty of holding confidence sacred); 99NJEq 638, 133A712; 128 Okl 188, 261P941; TexCivA 271SW266.

686–20 35Ariz496, 281P202 (attorney should not be permitted to take advantage of defects in contracts drafted by him); 178Ark788, 13SW(2d)18; Cal 291P583; 83CalA735, 257P168; 70CalA 351, 233P350; Fla 127S309; Mass 172 NE257; Miss 126S18; 99NJEq638, 133 A712; 248NY480, 162NE493; 223App Div539, 229NYS385; RI 147A889 (fact that client is violating law immaterial); TexCivA 271SW266; TexCivA 27SW (2d)604. [c] **Client has right to rely on representations** made by attorney. 136Misc15, 240NYS375.

686–21 107Conn229, 140A116; Mass

172NE257 (holding that law discourages business dealings between them); 99 NJEq638, 133A712; 100NJEq448, 136 A320; 128 Okl188, 261P941; 120 Or 840, 250P749; TexCivA 27SW(2d)604; TexCivA 29SW(2d)805.

686-22 197Cal765, 242P918; 198Cal 407, 245P197; Miss 126S18; 99NJEq 638, 133A712; 128 Okl188, 261P941; 300Pa513, 150A882; Utah 271P797.

687-23 29Ariz96, 239P787, 788 [quot CJ]; 35Ariz496, 281P202 (attorney held not entitled to recover damages under circumstances); 197Cal765, 242P918; 316Mo517, 291SW459, 461 [quotCJ entire section]; 99NJEq638, 133A712; 148 SC140, 145SE697; Utah 271P797. [a] **Effect of advice of third persons.**–Utah 271P797.

687-23½-New. , and that the client fully understood the transaction. 99NJEq 638, 133A712.

687-25 [a] **Remedy of client** is to repudiate contract and place parties in status quo or affirm contract and recover damages. 29Ariz96, 239P787.

687-26 218Ala515, 119S224; CalA 269 P944.

688-28½-New. Attorney should avoid positions where he must choose between conflicting duties or attempt to reconcile conflicting interests. TexCivA 27 SW(2d)604.

688-29 Miss 126S18.

688-31 [a] (7) Attorney's preparation of lease to himself without compensation does not establish relation of attorney and client between him and lessor. 154Md462, 140A593.

688-32 128 Okl183, 261P935, 936 [cit CJ].

688-35 128 Okl183, 261P935, 936 [cit CJ]; TexCivA 19SW(2d)404.

688-36 128 Okl183, 261P935, 936 [cit CJ].

688-37 300Pa513, 150A882 (holding client entitled to have fraudulent conveyance set aside).

689-40 49Nev161, 241P213, 216 [cit CJ].

689-41 316Mo517, 291SW459, 462 [quotCJ entire section].

689-44 49Nev161, 241P213. [b] **Evidence sufficient to warrant finding** that price paid grantor by attorney was inadequate. Ala 127S527.

689-45 107Conn229, 140A116 (evidence sufficient to show undue influence); 99 NJEq638, 133A712. See also 202 Iowa 799, 211NW373. [d] **Conveyance as compensation for services.**–124 Okl282, 255P1103.

689-46 83 IndA380, 148NE497; 99NJ Eq638, 133A712. [a] **Advice of third party** to whom, along with client's attorney, property of client was sold will not relieve attorney of imputation of undue influence. Ala 127S527. [b] **Evidence held to sustain finding** that defendant had not sustained burden of proving transaction fair and equitable. Ala 127S527.

689-47 29Ariz96, 239P787 (verdict for client reversed as not justified by evidence of damages).

689-48 316Mo517, 291SW459, 462 [quotCJ entire section].

689-49 178Ark788, 13SW(2d)18. But see NJCh 145A468.

689-50 140 Okl155, 282P313.

690-57 TexCommnA 15SW(2d)230.

691-59 [a] **Client not barred by laches.**–Ala 127S527.

691-60 [b] **Finding of no ratification justified.**–Ala 127S527.

691-64 197Cal765, 242P918.

692-69 142SC531, 141SE156.

692-74½-New. A client may orally transfer an interest in judgment as security for attorney's fees and advances. 72CalA197, 236P941.

692-74¼-New. Antecedent services of attorney to client and advances made by attorney to him are sufficient consideration for transfer of interest in judgment after recovery. 72CalA197, 236P941.

692-74¼-New. Where a client assigns interest in judgment to an attorney to secure advances and fees, and the judgment debtor by actions assents thereto, neither he nor the client may destroy the attorney's right so acquired. 72CalA 197, 236P941.

692-74⅓-New. Attorney to whom an interest in judgment has been transferred by client to secure former's advances and fees may have execution thereon to extent of amount due him. 72CalA197, 236P941.

692-74⅓-New. Client's transfer to attorney of interest in judgment to secure the latter for advances and fees does not make the judgment a joint obligation extinguishable by performance rendered to either within Civ. Code § 1475. 72 CalA197, 236P941.

692-74½-New. Power of attorney given to an attorney by grantor to recover land and providing that the attorney retain interest in the land if recovered as compensation does not give the attorney vested interest in the land without performance on his part, TexCivA 6SW(2d) 197.

692-74⅓-New. and the attorney has the burden of showing performance under power and notice thereof to grantees in a subsequent deed from the grantor in order to be prior in equity to such grantees. TexCivA 6SW(2d)197.

692-74½-New. Parties to a suit wherein the costs were equally apportioned had the right to assign their interest in such judgment apportioning costs to their attorneys, where the attorneys, pursuant to agreement, had advanced the costs of litigation. 168La81, 121S 581.

693-82 197Cal765, 242P918; 83CalA 735, 257P168 (evidence of indebtedness in certain amount); 6LaA101; 80Mont 537, 261P341; RI 147A889. [b] **Actions to recover balance of money deposited.**–129 Or321, 276P687.

693-83 49Philippine962, 964 [citCJ].

693-84 [a] **Claim for services rendered corporation** in which client is interested does not justify retention of client's money. RI 147A889.

693-85 227AppDiv468, 238NYS498.

693-95½-New. Jurisdiction. Mere relationship does not present case for equitable jurisdiction. 21AlaA65, 106S54 (except as to complicated account).

693-95⅓-New. An attorney who, with designs to encompass his client, has enmeshed himself will not be relieved from the peril of his position by a court of equity at the expense of or with disadvantage to, the client. 197Cal765, 242 P918.

693-95¼-New. An attorney is entitled to credit for proper expenditures, 158 Tenn383, 13SW(2d)800, 62ALR904.

693-95⅓-New. but for unauthorized expenditures no credit should be allowed. 158Tenn383, 13SW(2d)800, 62ALR904.

693-95⅙-New. Client's authorization to retain money for any length of time should be in writing. 227AppDiv468, 238NYS498.

693-95⅐-New. Attorney should deposit client's money in trust account, and not in a safe deposit vault. 227AppDiv468, 238NYS498.

693-95⅛-New. Balance found due attorney for services in action against him to compel accounting. Iowa 233NW32.

693-99 MoA 274SW112. [a] **Actual fraud involving moral turpitude** on part of attorney in transaction with client is not indispensable element of fraud. Miss 126S18.

694-2 TexCommnA 25SW(2d)313; 147 Wash434, 266P179 (facts not showing fraud).

694-3 180Ark161, 20SW(2d)868.

694-3½-New. Joining a party in a suit without authority to represent him is fraud in law for which equity will relieve by injunction, or by other appropriate remedy, after judgment. 155 Miss242, 124S344.

694-3⅓-New. Mere failure of attorney to carry out his employment does not constitute constructive fraud entitling clients to relief. 235Ky328, 31SW(2d) 377(2dcase).

694-4 [d] See also 197Cal765, 242P 918. [j] **After purposes of deposit are satisfied,** deposit can be recovered from attorney. Wis 233NW98.

695-12 217AppDiv437, 217NYS253.

695-14 But see 139 Okl24, 280P1103.

695-20 See also 99CalA534, 278P932.

696-28 169Ark840, 277SW29 [quotCJ]; 208Ky452, 271SW555; 102NJL381, 132 A102, 43ALR928; 158Tenn383, 13 SW(2d)800, 62ALR904. See also 133 Misc792, 233NYS512 (plaintiff should not be prejudiced because of neglect or incompetency of counsel). [f] **Payment of infant client's money into court.**–158 Tenn383, 13SW(2d)800, 62ALR904.

696-29 169Ark840, 277SW29 [quotCJ].

696-32 Conn 135A573, 574 [citCJ]; 118Kan723, 236P853, 854 [citCJ]; 226AppDiv3, 234NYS49 (attorney authorized to lend clients money on mortgage is not insurer).

697-35 85CalA558, 259P995.

698-41 169Ark840, 277SW29.

698-42 169Ark840, 277SW29, 33 [cit CJ].

698-43 158Tenn383, 13SW(2d)800, 62 ALR904.

700-62½-New. An attorney retained by an improvement district has been held not chargeable with delinquent collections of taxes on a mere showing that there were outstanding tax receipts without corresponding credits on the tax books. 170Ark1194, 282SW20.

702-76 169Ark840, 277SW29 [quotCJ].

702-77 169Ark840, 277SW29 [quotCJ].

702-78 169Ark840, 277SW29 [quotCJ].

702-79 39GaA724, 148SE345(3dcase). [a] (4) attorney's failure to amend complaint in action begun by another, where dismissal was ordered before his employment 83Colo 116, 262P1018. [b] **Agreement to sue immediately** means within reasonable time up to date after which suit could not have been brought. 39 GaA724, 148SE345(3dcase).

702-81½-New. Where his client had no meritorious defense to an action, an attorney is not liable in damages for failure to exercise diligence in representing him resulting in embarrassment and inconvenience. 198Cal 500, 246P53.

702-82 102CalA677, 283P871 (fact that judge adopted findings prepared by attorney immaterial on question of negligence).

703-84½-New. Unless plaintiff really has a cause of action against another whom he accuses of fraud, he has no cause of action against his attorneys for gross negligence in failing to appear in a suit to foreclose a mortgage on exchanged property. 130 Or590, 280 P511.

703-84½-New. Plaintiff cannot recover for negligence in failing to appear in a suit where a default decree was vacated and the case reopened, but plaintiff refused to appear and defend. 130 Or 590, 280P511.

703-84¼-New. If a client appears in a suit and loses as the result of not having appeared in the trial because of neglect of the attorney, he has a good cause of action against the attorney although the decree was subsequently opened to give opportunity to make a defense. 130 Or590, 280P511.

703-85 [b] **Defects in verified complaint have been held not waived** by filing verified answer. 152SC339, 150SE 67.

703-94 RI 147A889.

704-3 143SC135, 141SE174, 177 [cit CJ] 56ALR953.

705-19 150Md397, 133A134.

707-51 See also 17F(2d)501.

707-60 [b] **Complaint has been held not demurrable.**–Minn 231NW410.

707-65 [a] **Fraud in procuring contract fixing fee** need not be alleged eo nomine. TexCivA 18SW(2d)363.

707-66½-New. A petition alleging that an attorney retained to sue for the recovery of stock retained an amount in excess of a reasonable fee after making a cash settlement states a cause of action on contract. 221MoA1046, 295SW 844.

707-69 [a] **Evidence held sufficient to show partnership.**–180Ark161, 20SW (2d)868.

707-71 [b] **Evidence held to show** that attorney dealt unfairly with client in procuring conveyance. 316Mo 517, 291 SW459.

708-73½-New. Judgment requiring at-

torney to account is warranted by evidence. 148SC140, 145SE697.

708-74 142Wash563, 253P800.

708-83 Minn 232NW515.

708-88½-New. Where an attorney contracted to prosecute actions on behalf of several parties, one of such parties may sue for breach of contract without joining the others. TexCivA 277SW 175.

708-88½-New. Equity cannot relieve a client against unethical conduct by an attorney in soliciting employment against a former client. 238Mich151, 213NW110, 51ALR1303.

708-90½-New. Instructions. 102NJL 381, 132A102, 43ALR928.

709-95½-New. Liability of an attorney for negligently permitting a client to buy a lease without warranty of marketability and for representing that the seller had good title is not affected by the fact that the client resold the lease at a higher price, since damages recoverable have no connection with the value of the lease; 217AppDiv498, 217 NYS123.

709-95½-New. nor is such liability affected by subsequent transactions and subleases resulting in profit to the client since the lease does not thereby become valid. 217AppDiv498, 217NYS123.

709-1 84CalA519, 258P683 (two years after negligent act).

709-6 [c] 215Ala251, 110S296; 136 Misc369 240NYS83.

709-9 313Mo 182, 281SW411; 221MoA 1046, 295SW844 (petition held to state cause of action for conversion). [a] **Complaint insufficient.**-203Cal 351, 264P 478. [b] **Client held to state cause of action** entitling him to go to jury. Tex CivA 29SW(2d)805.

709-10 203Cal 351, 264P478 (complaint insufficient); 102CalA677, 283P871 (allegation of loss of accrued interest on judgment held sufficient).

710-16½-New. Evidence that defendant had been the attorney for a husband continuously for twenty years, and that he insisted on a deed before proceeding with the defense of the husband on an accusation of murder, required a finding that defendant was the husband's attorney. 218Ala515, 119S224.

710-17 218Ala515, 119S224 (decree setting aside conveyance to attorney justified); 180Ark161, 20SW(2d)868 (though attorney acts in good faith); TexCivA 299SW655 (evidence held insufficient to overcome presumption of fraud); Utah 271P797.

710-17½-New. Where an attorney purchased stock which was the subject of litigation, he has the burden, in an action by his client to compel a transfer of the stock, of showing that the fiduciary relation had terminated at the time of the purchase. 49Nev161, 241P 213.

710-26½-New. Evidence has been held relevant. 169Ark840, 277SW29.

710-26½-New. Orders of a referee in bankruptcy are admissible to show negligence. 102NJL381, 132A102, 43ALR 928.

710-30½-New. [§ 261a] (c) **Weight and Sufficiency.**-74CalA310, 240P43. See Evidence § 1730 et seq. [a] **Evidence sufficient.**-Utah 271P797.

710-30½-New. Evidence held sufficient to entitle client to recover money paid to attorney in reliance on false representation. 136Misc15, 240NYS375.

710-30¼-New. Evidence held sufficient to support a verdict for defendant in a client's action against an attorney for negligence in accepting a forged attachment release bond from a financially irresponsible surety. RI 147A620.

710-31 30F(2d)776; 169Ark840, 277 SW29; 102NJL381, 132A102, 43ALR 928; TexCivA 29SW(2d)805 (holding jury question of fraud presented). [a] **Thus** it is error to state particular acts as negligence as matter of law, where question is for jury. 169Ark840, 277 SW29. [b] **Issue in case held to be negligent preparation** of mortgage and not its validity vel non. 102NJL381, 132A102, 43ALR928. [c] **Jury question of fraud and damages held shown** in improper advice to client and collusion with opposing attorney. TexCivA 29 SW(2d)805.

711-34½-New. Instructions. Instructions to find for client if attorney undertook to file mortgage but was negligent therein are proper. 169Ark840, 277SW 29.

711-34½-New. But instruction to find for attorney if he gratuitously inserted provision in mortgage, although negligent, is error. 169Ark840, 277SW29.

711-35 217AppDiv498, 217NYS123; Wash 288P265. [d] **Cost and expenses** not caused by alleged negligence cannot be recovered by client. 83Colo 116, 262P1018. [e] **Amount of draft is prima facie its value** in computing damages in respect of collection of draft. 135 Misc808, 239NYS682(2dcase).

711-37½-New. Damages to client ratifying contract with attorney for purchase of land is reference between the contract price and the value of land at the time of purchase, not the difference between the contract price and the amount paid attorney. 29Ariz96, 239P 787.

711-39 83Colo 116, 262P1018.

712-44 242NY220, 151NE213.

712-48 129Misc793, 222NYS622. [a] **In absence of showing of misconduct,** order summarily directing attorneys to return payment for future services will be denied. 129Misc793, 222NYS622.

712-49 129Misc793, 222NYS622.

712-50 129Misc793, 222NYS622.

712-51 129Misc793, 222NYS622.

712-51½-New. An attorney should not be subjected to a drastic remedy except where there has been a plain violation of his professional duty. 129Misc793, 222NYS622.

712-52 172Ark527, 290SW43; 242NY 220, 151NE213; 226AppDiv176, 234NYS 711 (conflicting claims).

713-53 OhA 173NE246. [b] **Remedy rests on misconduct clearly established in retaining money of client.**-242NY220, 151NE213.

713-54 242NY220, 151NE213.

713-54½-New. An attorney is not accountable in summary proceeding for a fee retained by another attorney engaged in a foreign state to collect judgment under the client's authority. 242 NY220, 151NE215.

713-55 169Ga13, 149SE565; 35GaA 158, 132SE245; 231NYS641; 228App Div174, 239NYS513. [f] **Receiver for whose benefit fund was received.**-Receiver approved in action cannot proceed by rule against plaintiff's attorney for payment of balance of proceeds of check given by defendant to plaintiff's attorney to pay defendant's share of receiver's fee. 169Ga13, 149SE565.

713-60 98NJEq11, 130A279, 280 [cit CJ].

716-93 35GaA158, 132SE245 (petition held insufficient to show relation of attorney and client).

717-17½-New. Whether a client's money on a mortgage was advanced with due care and skill is not determined summarily. 226AppDiv3, 234NYS49.

718-33 100NJEq238, 134A866. [a] **Court of equity** may cancel contract between attorney and client to protect latter against undue influence of former. TexCommnA 291SW876.

719-49 35GaA792, 134SE814; Ida 289 P85; IndA 166NE779; 136Misc715, 242 NYS100. [a] **In matter of fees,** attorney must deal fairly with client. 16 F(2d)363.

719-50 [e] **Fact that judgment uncollectable** because of refusal of wife to join in conveyance does not affect attorney's right to compensation. NC 154 SE313(1stcase).

719-51 37BC161, [1926] 3DomLR113, [1926] 3WestWkly63 (effect of contract).

719-53 35GaA792, 134SE814; 150Md 585, 133A314.

719-54½-New. Fees are not limited to law services for they may also be collected for business matters appropriate to the lawyer's employment. Conn 135A 573.

720-68 Mass 172NE340; 34PortoRico 73 (costs and attorney's fees). [b] **Allowance of costs taxable** as between solicitor and client requires payment of item from fund to be ascertained by relationship between party entitled to costs. Mass 172NE340.

721-72 116 Okl 166, 243P940.

721-77 42 Ida624, 248P22, 25 [citCJ]; 35PortoRico 496.

721-78 87CalA684, 263P353; 5LaA375, 378 [citCJ]; 136Misc715, 242NYS100.

722-80 235 IllA63.

722-87 208Cal 303, 281P55; TexCivA 27SW(2d)604 (right to fee not lost by disqualification of associate).

722-89 MoA 18SW(2d)115. [b] **Acting for adverse party in another suit** is no bar to recovery for substantial services. 169Ark1145, 278SW355.

722-91 217AppDiv656, 217NYS239.

722-92 100WVa612, 131SE455, 459 [cit Cyc].

723-93 197Cal 765, 242P918, 926 [quot CJ]; 171Minn352, 214NW662, 663 [cit CJ]; Minn 231NW410.

723-94 197Cal 765, 242P918, 926 [quot CJ].

723-95 197Cal 765, 242P918, 926 [quot CJ]; 287Pa348, 135A204. [a] 235 IllA 401.

723-96½-New. The fact that misconduct of an attorney occurred in a court other than the one in which he sued to recover fees cannot be taken advantage of by him. 287Pa348, 135A204.

723-97 286Pa263, 133A374, 375 [cit CJ].

724-8 9F(2d)560. [b] **Apportionment of fees between original and substituted attorneys.**-Where personal injury action was settled shortly after substitution of attorneys, court should fix just fee and apportion it between attorneys. 223 AppDiv385, 228NYS279. [c] **Future costs in action not tried** cannot be recovered by attorney sought to be displaced. 136Misc682, 244NYS17.

724-10 202Cal 501, 261P994; 169La620, 125S735 (heir not breaching contract liable only on quantum meruit); 115 OhSt502, 154NE740; 106 Okl 166, 233P 426, 427 [citCJ]; TexCivA 279SW609 (defense of nonperformance ineffectual).

724-11 115 OhSt502, 154NE740; 106 Okl 166, 233P426, 427 [citCJ]. See also 164Minn217, 204NW947.

724-12½-New. An attorney cannot, by wrongful discharge, be deprived of contract interest in property as to which quieting of title was sought in a suit conducted by him, regardless of his client's insolvency. 204Cal 496, 268P 1057.

724-13 CalA 280P559; SC 141SE107 [citCyc].

724-14 CalA 290P916.

724-14½-New. Recovery for breach is denied in some jurisdictions. 131Misc 613, 228NYS335. [a] **That attorney incurred expenses before discharge** does not give cause of action for breach of contract. 131Misc613, 228NYS335.

724-14½-New. A client has the right to terminate, without cause, the relationship of attorney and client at any time before complete performance, 125Misc 354, 211NYS626.

724-14¼-New. even where employment of attorney is covered by written contract. 125Misc354, 211NYS626.

724-15 87Colo 580, 290P269; 106 Okl 166, 233P426, 427 [quotCJ]; TexCivA 19SW(2d)404. [b] **In New York.**-131 Misc613, 228NYS335.

725-16 106 Okl 166, 233P426, 427 [quot CJ].

725-17 106 Okl 166, 233P426, 427 [quot CJ].

725-17½-New. And where after discharge an attorney was reëmployed under an agreement to pay a specified sum, recovery is for the reasonable value of the services actually rendered. 125Misc 354, 211NYS626.

725-18 208Cal 546, 282P791. See Ont [1926] 4DomLR1182.

725-19 68CalA134, 228P720; 108WVa 571, 151SE855.

725-23 9F(2d)560.

725-24 9F(2d)560.

725-26 12LaA551, 126S270; Ont [1928] 4DomLR433.

726-28 TexCivA 289SW195.

728-53 IndA 166NE779.

728-58 [c] (3) IndA 166NE779. (4) IndA 166NE779. [i] (8) 245Ky532, 157NE846. (10) 227AppDiv395, 237 NYS594 (expenses held not "personal and incidental"). (13) That defendant was represented on arraignment does not prevent allowance to attorney as assigned counsel. 250NY452, 166NE163

(2dcase). (14) Counsel assigned on proper application subsequent to arraignment, who takes part in defense, is entitled to allowance. 250NY452, 166NE163(2dcase). (15) Where defendant made affidavit of financial inability and requested counsel, attorney assigned is entitled to compensation. 250NY452, 166NE163(2dcase). (16) Detective's fees to investigate character of witness are not "personal and incidental expense." 250NY456, 166NE165. (17) "Personal and incidental expenses" allowed to assigned counsel are those incurred on his personal account. 250NY456, 166NE165. (18) Allowance of fees to experts employed by assigned counsel is error where court did not direct employment and state had no experts. 250NY456, 166NE165. (19) Direction to employ experts for defendant must be entered in court minutes or embodied in written order. 250NY456, 166NE165. (20) Rights of attorneys appointed under Code Cr. Proc. § 308 depend on validity of order assigning them as counsel. 224AppDiv426, 231NYS267. (21) City comptroller, not party to action in which order assigning counsel to accused was made, could not move to vacate order on ground that court was without jurisdiction, but was justified in treating as nullity subsequent order requiring payment of fees based on prior order. 224AppDiv426, 231NYS267. (22) Code Cr. Proc. § 308 is inapplicable unless accused appeared for arraignment without counsel. 224AppDiv426, 231NYS267. [l] **In Pennsylvania.**–294Pa495, 144A428. [m] 80Mont 20, 257P1041.

730-63 3LaA641; 176Minn498, 223NW786.

730-64 204 Iowa346, 213NW240.

730-66 8PaDist&Co 75.

730-67 78CalA127, 248P301, 302 [quot CJ].

730-68 78CalA127, 248P301, 302 [quot CJ].

730-69 78CalA127, 248P301.

731-72 204 Iowa739, 212NW573.

732-77 See also 172Ark485, 289SW321. [a] See also 8PaDist&Co 75.

732-79½-New. A property owner signing a subscription agreement providing for retaining an attorney to prosecute an injunction suit after an attorney has been actually employed ratifies the contract and accepts its terms. MoA 299SW55.

732-83½-New. Each party in an adversary litigation is required to pay his own counsel fees. 286Pa493, 134A103.

732-83¾-New. A common fund for administration under direction of the court is liable for costs and expenses including counsel fees of an adversary litigation required to protect it. 286Pa493, 134A103.

732-83¾-New. Property of school has been held not chargeable with counsel fees in an adversary litigation. 286Pa493, 134A103.

732-83½-New. A contract with a parent is not binding after his death upon his infant children substituted as plaintiffs in an action instituted by him. 50 Philippine178.

732-85½-New. Property owners employing an attorney to bring suit for injunction restraining the operation of a funeral parlor are jointly and severally liable for fees and costs notwithstanding an agreement between them for distribution of costs according to frontage. MoA 299SW55.

732-87 Can [1928] 3DomLR497. See also 264Mass253, 162NE319.

733-88 123 Or406, 262P833.

733-88½-New. In British Columbia, where a solicitor has been paid for his services by his client's principal, he cannot recover any further sum from his client for services in the same proceeding. BC [1929] 3DomLR321.

733-90 31Ariz280, 252P187, 188 [quot CJ].

733-94 31Ariz280, 252P187, 188 [quot CJ].

734-2 80CalA377, 252P647, 650 [cit CJ].

734-5 13PaDist&Co 582.

734-7½-New. A trustee may by agreement require attorneys to look solely to the trust estate. 80CalA377, 252P647.

734-9 94CalA361, 271P503; 10LaA639, 120S520; 244Mich237, 221NW185; TexCivA 291SW293, 294 [citCJ].

734-15 170Minn191, 212NW530. [a] **No recovery can be had for personal** and traveling expenses. 94CalA361, 271P503.

735-25 See also Alta [1927] 3DomLR468.

735-28 96CalA219, 274P93; 87CalA549, 262P73 (contract may fix amount); 98CalA738, 277P867; 243NY123, 152NE696; TexCivA 18SW(2d)363. [d] 46 Philippine1. [e] **Court** will not disturb contract. 102NJEq198, 140A236. [f] **Attorney's subsequent appointment as prosecutor** in same case does not void contract employing him to assist in prosecution. IndA 172NE128.

735-29½-New. A contract is generally conclusive as to the amount of compensation. TexCivA 18SW(2d)363.

735-30 48 Ida263, 281P378. See also 5PaDist&Co 34.

735-35½-New. An attorney may make an enforceable contract for past or future services unless procured by fraud, deceit, overreaching, undue influence, or other means requiring modification or setting aside. 248NY480, 162NE493.

735-35¼-New. A valid contract cannot be avoided by a prior agreement. 29 OhA88, 163NE53.

735-35¼-New. A valid contract cannot be avoided by a claim that, although the president of the client company signed the contract, he was unaware of its contents. 29 OhA88, 163NE53.

735-35½-New. A contract between an attorney and a client to prosecute a claim for injuries, signed by the attorney in connection with a law student who was not licensed to practice law, was not null and void. 178Ark475, 11SW(2d)763.

735-35¼-New. A contract of employment under a subscription agreement between property owners desiring to restrain the operation of an undertaking establishment is not without consideration as to one who signed after employment of the attorney but before rendition of services. MoA 299SW55.

735-35¼-New. Fact of attorney holding public office is immaterial as affecting the right to compensation if he was not thereby disqualified to act. 219Ala623, 123S27.

735-35½-New. No contract results where acceptance of an attorney's offer to handle litigation omitted reference to the attorney's proposal for a larger fee if the litigation successful. MoA 18SW(2d)115 (qualified acceptance held not counter offer).

735-35¼-New. Promise of husband to help wife pay attorney's fees held too vague to be enforceable. 233Ky316, 25SW(2d)721.

735-39 78Colo 6, 238P29; 124 Okl 282, 255P1103; TexCivA 275SW481; 136Wash164, 239P210. [b] **Attorney must show agreement to be fair, reasonable, and free of undue influence.**–136Wash164, 239P210. [c] **Agreement entered into on discharge of attorney** to pay for services rendered. CalA 292P659.

736-40 99CalA96, 278P488; 136Wash164, 239P210. [b] **Agreement held reasonable.**–136Wash164, 239P210.

736-41 100NJEq448, 136A320.

736-42 [b] **Second contract superseding prior contract.**–116 Okl 166, 243P940.

736-43 193NC565, 137SE595; 124 Okl282, 255P1103.

736-45 243NY123, 152NE696.

736-46 136Wash164, 239P210.

737-49 94Fla550, 114S375, 376 [quot CJ]; TexCivA 284SW702, 703 [cit CJ].

737-50 180Ark161, 20SW(2d)868; 94Fla550, 114S375, 376 [quotCJ]; 214AppDiv622, 212NYS577 (and inequitable); TexCivA 275SW481; TexCivA 284SW702, 703 [citCJ].

737-52 TexCommnA 291SW876; TexCivA 275SW481; TexCivA 284SW702.

737-53 TexCivA 275SW481 (involving greater difficulties than originally represented).

737-54 98NJEq11, 130A279.

737-56 99NJEq638, 133A712; 248NY480, 162NE493.

737-57 243NY123, 152NE696. See also 96CalA219, 274P93.

737-59 [b] 51Philippine24; Wis 232NW553 (unfair contract will be set aside).

737-60½-New. If agreement is for reasonable fee subject to client's approval, client may in good faith pay what he believes reasonable, although less than reasonable fee in the locality. 254 IllA398.

737-63 278US160, 49SCt144, 73Led243; 127Mc201, 142A751 (contract with husband to prosecute divorce against himself); [1930] 4DomLR1023 (corrupting administration of justice).

738-68 Utah 282P776.

738-72 37F(2d)237; 87CalA549, 262P73; 167La262, 119S42; 247Mich274, 225NW522.

738-76 Cal 292P953. [a] 16F(2d)363; 170Ark758, 281SW17; 181Ark324, 25SW(2d)755; 202Cal333, 260P550, 55ALR423 (compensation to be paid when action "settled"); Cal 292P953 (contingent fee); 87CalA549, 262P73; 170Ga669, 153SE737; 234 IllA325 (contract to perform services may give client cause of action for damages for failure to perform; but failure to perform is not failure of consideration in action on notes given for such services); Md 150A856; 164Minn186, 204NW625; 44 Philippine489. [b] **Rights under contract of retainer** are determined by laws of state where made. 6F(2d)799. [c] **Contract for contingent fee** is one for personal services, is entire and not divisible, and is speculative. 49SD592, 207NW972.

739-77 Cal 292P953; 93CalA526, 269P709; 214AppDiv622, 212NYS577. [b] **Retainer contract as to compensation held not ambiguous** in view of other provisions. 214AppDiv622, 212NYS577.

739-78 220Ala529, 126S102 (though attorney's fee is contingent, client cannot destroy or impair attorney's rights).

739-84½-New. An attorney collecting delinquent taxes for an improvement district is held entitled to commission although failing to collect the penalty. 170Ark1194, 282SW20.

739-84½-New. Settlement by the giving of a note in consideration for dismissal of the suit for a fee is conclusive on the client. TexCivA 291SW602.

739-85 TexCivA 275SW481 (agreement for additional compensation supported by sufficient legal consideration). [a] **Presumption** is that attorneys undertaking litigation on contingent fee contracted to carry cases through to judgment and collection thereof. Mo 308SW(2d)1.

739-86 42 Ida624, 248P22. [c] **Agreement for contingent fee** necessarily includes all work to that end. Mo 308SW(2d)1.

739-88 TexCommnA 291SW876. But see 42 Ida624, 248P22.

740-89 42 Ida624, 248P22 (agreement to draw documents for monthly compensation held to cover amended or supplemental rolls to comply with order of court).

740-1 49SD592, 207NW972.

740-2 91CalA400, 267P130 (contract not preventing settlement by client); 169Ga631, 151SE372; 43 Ida382, 251P1054, 1056 [citCJ]; 11LaA526, 124S318 (1stcase); 171Minn384, 214NW276; 143Miss277, 107S868 (promise by third party of benefit to client for placing claim in attorney's hands, not known to attorney, will not deprive him of right under contract for contingent fee); 117Nebr219, 220NW238; 146Va594, 131SE850, 46ALR186; 136Wash164, 239P210; 142Wash60, 252P151; 153Wash85, 279P91. [a] 146Va594, 131SE850, 46ALR186.

740-4 [a] **Sufficiency of description of land.**–170Ark758, 281SW17.

741-6 [a] Man [1930] 4DomLR1005.

741-7 16F(2d)363; 107Conn380, 140A 724 (closely scrutinized); 244Mich685, 222NW106; 102NJEq198, 140A236; 243 NY123, 152NE696; 121 Okl 108, 247P 996; TexCivA 271SW266; 136Wash164, 239P210. [a] 43 Ida382, 251P1054; 244Mich685, 222NW106; 121 Okl 108, 247P996 (twenty-five per cent); Tex CivA 18W(2d)363; 136Wash164, 239P 210; 153Wash85, 279P91.

741-8 230AppDiv677, 245NYS554. [a] 107Conn380, 140A724 (sixty per cent. for attorney); TexCivA 271SW266. [b] (2) To be unconscionable, contract must be such as no man in his senses and not under delusion would make, on one hand, and no honest and fair man would accept, on the other. 121 Okl 108, 247P 996. (3) In absence of evidence that fee is unreasonable or excessive court has no authority to determine that fee is unconscionable. 121 Okl 108, 247P 996. [d] **Agreements held valid.**-243 NY123, 152NE696. [e] **Reasonableness** of amount is not regulated by amount of work done alone. Man [1930] 4Dom LR1005.

741-9 16F(2d)363.

741-10 243NY123, 152NE696.

741-13½-New. Where a different fee is provided for in the event of a successful contest of a will than in case of settlement before trial, the attorney is entitled to the latter fee where the contest is ended by stipulation after the jury is picked, but before the evidence is taken. 214AppDiv622, 212NYS577 (regardless of amount of work performed).

741-13⅓-New. The amount may be so disproportionate as to be unconscionable as a matter of law. 243NY123, 152 NE696.

741-13¼-New. A contract by a hotel company to pay an attorney a stated percentage of moneys paid on judgments or compromises by an elevator company to hotel guests injured in an elevator accident is void as contrary to public policy where it is possible that the hotel company may ultimately have to pay judgments. Utah 282P776.

741-14 See also 230AppDiv677, 245 NYS554.

742-20 6F(2d)799; 205Cal 525, 271P 906; 166La537, 117S583; TexCivA 7 SW(2d)124, 125 [citCJ]; 39Wyo 217, 271P6, 7, 8[quot&citCJ].

742-24 87CalA549, 262P73, 74 [citCJ]; 14PaDist&Co 153; TexCivA 272SW564.

742-25 14PaDist&Co 153.

743-30½-New. An attorney assigned interest in recovery as compensation has interest entitling him to recovery in action to try title. TexCivA 277SW760.

743-31 7F(2d)607; 44Philippine62, 65 [quotCyc].

743-32 121Kan820, 250P345.

743-35 37F(2d)237 (winning of suits as condition to compensation); 170Ga 669, 153SE737; 6LaA380; 170Minn191, 212NW530; TexCivA 25SW(2d)889. [c] **Where contract for contingent fee provides for different percentage in cases of settlement or litigation,** attorney must adopt method least burdensome to client. TexCivA 18W(2d)363.

743-36 16F(2d)363; 170Ga669, 153SE 737; 170Minn191, 212NW530, 531 [quot CJ]; TexCivA 25SW(2d)889 (probate of will). [f] **Attorney agreeing to collect money** for certain percentage cannot recover fees for obtaining judgment, but must collect money. 170Ga669, 153 SE737.

744-38 35 OhA266, 172NE297.

744-42 16F(2d)363.

744-43 151SC246, 148SE878 (attorney entitled to compensation notwithstanding withdrawal from case caused by client's conduct).

744-43½-New. An attorney is entitled to agreed contingent compensation where, after the parties agreed on a settlement, the client refuses to execute the agreement. NJSup 138A308.

745-55 68CalA134, 228P720; TexCivA 4SW(2d)296 (action between husband and wife for divorce and to determine property rights).

745-57 218Ala344, 118S590; 68CalA 134, 228P720, 721 [citCJ]; TexCivA 4 SW(2d)296; 39Wyo 217, 271P6.

745-58 TexCivA 4SW(2d)604 (though client not paid under compromise). [c] **Contingent fee contract** sustained in suit for cancellation where valuable services resulted in compromise accepted by client. 177Ark1195, 292SW365.

745-61 MoA 12SW(2d)941; 106 Okl 166, 233P426; 117 Okl 58, 245P48; Wash 288P927. [a] **Defendant settling for stipulated sum and agreeing to pay attorneys of plaintiff** must pay stipulated amount of contract. 181Ark497, 26 SW(2d)584.

745-62 106 Okl 166, 233P426; 117 Okl 58, 245P48.

745-65½-New. Subsequent rejection by client of an authorized settlement does not deprive attorney of compensation. Iowa 233NW63.

745-66 [f] **Contract may provide for deduction of expenses** before division of amount recovered. 170La302, 127S731. [g] **Under contract providing for fifty per cent contingent fee,** attorney is entitled to one half of money recovered from resaluary legatee under forged will. 170La302, 127S731. [h] **Inheritance tax may not be deducted** as expense to be shared by both under contract, since due from heirs alone. 170 La302, 127S731.

746-70 Md 150A856. [a] **Attorney could not participate** in interest accrued where he was to share in "refund." 93 CalA526, 269P709.

746-77½-New. A contract providing for a stated percentage of the net recovery entitles the attorney only to such percentage of the amount remaining after deducting all legitimate expenses incurred by him. TexCivA 291SW293.

746-77½-New. A stockholder agreeing to pay an attorney from the proceeds of the sale of the corporation's mine is liable only for the amount received after deducting stock assessments. 152Wash 469, 278P193.

746-77¼-New. Reimbursement for expenses. Under contingent fee contract an attorney is not entitled to be reimbursed for taxicab and railroad fare expense. 226AppDiv268, 235NYS508.

746-77½-New. An attorney contracting for half of land recovered for his client is entitled to only half of the interest of defendant executing a quitclaim deed. 179Ark1198, 17SW(2d)292.

747-89 168Ark77, 269SW41; 78CalA 127, 248P301 (promise to pay for services is implied from knowledge and consent to performance); 167Ga176, 145SE 71; 35GaA792, 134SE814; NJSup 145 A325(2dcase); 102WVa119, 135SE249, 49ALR668. See also 1LaA357. But see 13LaA318, 127S758.

747-89½-New. Where an attorney renders service in settlement of alimony in a divorce suit without any agreement as to the amount of compensation, his service in the suit or for the alimony is not on a contingent basis. 35GaA792, 134SE814.

747-89½-New. There is no law or public policy of the state making it illegal to represent a married woman in a divorce suit and in negotiations to obtain money as alimony under employment without any agreement as to terms or compensation. 35GaA792, 134SE814.

747-89¼-New. The attorney can look to his client to pay the value of his services. 35GaA792, 134SE814.

747-94 But see 252Mass523, 147NE887.

747-97½-New. Where full performance of a contract is prevented by inaction of the client, the attorney is entitled to reasonable value of his services performed notwithstanding an agreement for contingent fees. 22AlaA190, 114S12.

748-11 60Philippine178.

748-16 See also 32PortoRico 432.

748-17 6F(2d)799; 12F(2d)755; 36F (2d)330; 181Ark363, 26SW(2d)124; 208 Cal 546, 282P791; 78CalA127, 248P301; 94Fla550, 114S375, 378 [citCJ]; 35GaA 792, 134SE814; 231Ky219, 21SW(2d) 258; 235Ky372, 31SW(2d)610; 10LaA 639, 120S520; 223AppDiv457, 228NYS 489 (limited to value of entering nominal appearance and formally appearing for nominal defendants); 120 Okl 199, 250P1015; 48Philippine672; 32Porto Rico 432; TexCivA 282SW873; 146Va 594, 131SE850, 46ALR186; 142Wash 474, 253P646; 61 OntL480, [1928] 1 DomLR281. See also 214Ala243, 107S 218. [e] (1) 13F(2d)158; 245NY1, 156NE76. [k] 214Ala243, 107S210; 172Ark485, 289SW321; 87CalA538, 262 P68 (eleven thousand dollars); 247 IllA 466; 167La208, 118S890; 9LaA708, 120 S70; 10LaA639, 120S520; 170La763, 129S156 (three thousand seven hundred fifty dollars); 7LaA446; 8LaA754; 11 LaA61, 122S907(2dcase) (one hundred and fifty dollars); 217AppDiv620, 216 NYS400; 130Misc511, 224NYS263 (nine thousand dollars); 136Misc715, 242NYS 100 (forty dollars an hour, and twenty an hour for assistant); 9PaDist&Co 347; 12PaDist&Co 361 (five thousand dollars); 139SC411, 138SE184; Tex CivA 292SW563 (one hundred and seventy-five thousand dollars); 142Wash 474, 253P646. [l] 34F(2d)916. (one hundred and eighty-four thousand dollars); 176Ark1205, 4SW(2d)932; 107 Conn380, 140A724 (twenty five hundred dollars for obtaining verdict of five thousand dollars); 163La660, 112S521; 167La766, 120S289 (five thousand dollars); 245Mich162, 222NW115 (forty-five hundred dollars); 143Wash644, 255 P1039. [m] **Where client permitted attorney to act after discovery of his fraud,** she is estopped to deny reasonable value of services rendered. TexCivA 271SW 266. [n] **Where services relate to one subject matter,** it forms no just measure of value to separate transaction into parts. 87CalA684, 263P353. [o] **Place at which reasonableness determined.**-78 Colo 6, 238P29. [p] **Amount fixed by referee held reasonable.**-214AppDiv286, 212NYS16 (twenty-five hundred dollars, regardless of prior payments to attorney of sixty-nine hundred dollars and other great expenses incurred by client).

750-18 146Va594, 131SE850, 46ALR 186.

750-19 34F(2d)916 (suit to set aside incompetent's gift).

750-21 242Mich391, 218NW691; 118 Nebr568, 225NW705; 6PaDist&Co 793; 9PaDist&Co 465; TexCivA 292SW563; 146Va594, 131SE850, 46ALR186; 142 Wash474, 253P646. [d] **Services of other attorneys** must be considered, and judgment based on testimony not including consideration thereof is erroneous. 107Conn380, 140A724.

750-22 12F(2d)755; 214Ala243, 107S 210; 164La397, 113S889; 242Mich391, 218NW691; 248Mich672, 227NW666; 118Nebr568, 225NW705; 213AppDiv59, 209NYS655; 118 Or300, 246P718; 6Pa Dist&Co 793; TexCivA 292SW563; 146 Va594, 131SE850, 46ALR186; 142Wash 474, 253P646. [e] 94CalA361, 271P 503.

751-23 214Ala243, 107S210; 94Fla 550, 114S375, 379 [citCJ]; 248Mich672, 227NW666; 118Nebr568, 225NW705; 24 OhA169, 156NE418; 118 Or300, 246 P718; 146Va594, 131SE850, 46ALR186.

751-24 214Ala243, 107S210; 164La397, 113S889; 118Nebr568, 225NW705; 118 Or300, 246P718; 6PaDist&Co 793; 146 Va594, 131SE850, 46ALR186.

751-25 12F(2d)755; 214Ala243, 107S 210; 181Ark1096, 29SW(2d)304 (holding three hundred dollars fair compensation in action on policy of twenty-five hundred dollars in which trial court allowed attorney's fee of six hundred dollars); 235Ky372, 31SW(2d)610; 10LaA 52, 120S538; 242Mich391, 218NW691; 248Mich672, 227NW666; 118Nebr568, 225NW705; 213AppDiv59, 209NYS655; 118 Or300, 246P718; 6PaDist&Co 793; TexCivA 292SW563; 146Va594, 131SE 850, 46ALR186.

751-26 214Ala243, 107S210; 172Ark 144, 287SW752; 164La397, 113S889; 242Mich391, 218NW691; 118Nebr568, 225NW705; 118 Or300, 246P718; 146 Va594, 131SE850, 46ALR186.

751-27 214Ala243, 107S210; 248Mich 672, 227NW666; 118Nebr568, 225NW 705; 213AppDiv59, 209NYS655; 118 Or 300, 246P718; 6PaDist&Co 793; 146Va 594, 131SE850, 46ALR186.

752-28 37F(2d)749; 214Ala243, 107S 210; 172Ark144, 287SW752; 94Fla550, 114S375, 378 [citCJ]; 235Ky372, 31SW (2d)610; 5LaA375; 242Mich391, 218

NW691; 248Mich672, 227NW666; 213 AppDiv59, 209NYS655; 130Misc511, 224 NYS263; 118 Or300, 246P718; 6PaDist &Co 793; TexCivA 292SW563; 146Va 594, 131SE850, 46ALR186.

752-29 94Fla550, 114S375, 379 [citCJ]; TexCivA 292SW563; 146Va594, 131SE 850, 46ALR186.

752-30 223AppDiv276, 228NYS62.

752-34 9LaA708, 120S70.

752-36 78Colo 6, 238P29; Ind 169NE 529; 130Misc511, 224NYS263; Okl 282 P791.

752-36½-New. The schedule of minimum fees of the bar association is not conclusive as to the reasonable value of an attorney's services. 214Ala243, 107 S218.

752-37 But see 228AppDiv123, 239NYS 304.

753-45 But see 5PaDist&Co 639.

753-47 221Ky415, 298SW1097.

753-54 117 Okl 58, 245P48 [citCJ].

754-65 40GaA26, 148SE745 (where failure to continue with case was due to failure of other attorney to give agreed notice).

754-69 22F(2d)893 (held valid under statute and not against public policy); 131 Okl 132, 268P221 (fact that one party to agreement eligible but not admitted to bar until after employment does not affect right to enforce agreement). [b] **Waiver of contract for division of fees.**–262Mass247, 159NE909.

754-70 22F(2d)893 (held not vague and indefinite); 40GaA26, 148SE745 (contract construed to include fees earned in subsequent litigation). [b] **Quantum meruit.**–49SD592, 207NW972.

754-73½-New. Although attorney contracting with other attorneys for share of contingent fee is unable to perform because of disbarment before final settlement of case when nothing had been definitely won for plaintiff, he is not entitled to recover on contract. 49SD 592, 207NW972.

754-73½-New. Party to contract to divide fees cannot acquiesce in the acts of the other party and subsequently claim it was a breach of contract. 174 Ark1115, 299SW18.

754-73¼-New. The motive of the party waiving the breach of contract for division of fees is immaterial. 174Ark 1115, 299SW18.

754-73½-New. Notwithstanding waiver of breach of contract for division of fees, the party breaching the contract is not entitled to share the fees after discharge from proceedings. 174Ark 1115, 299SW18.

754-73¼-New. Where attorneys are engaged in the prosecution of litigation for a contingent fee without any agreement as to the proportions in which the fee shall be divided, they are entitled to share equally in the distribution of the fee. 118Nebr290, 224NW292, 63 ALR896.

754-73½-New. An attorney employed with another to represent a bankruptcy trustee is not barred from recovery of an agreed share of the fee because the referee's order of which he was not advised allowed the fee solely for the other attorney's services. 40GaA26, 148SE 745.

755-75 39Wyo 217, 271P6.

755-76 217AppDiv681, 216NYS256; 136Misc365, 240NYS829 (ordinarily recovery of attorney's fee is by action).

755-79 [a] **Summary relief can be resorted to only to quiet controversies** impeding progress of main stream of litigation. 136Misc365, 240NYS829.

755-80 See also 216AppDiv472, 215 NYS445.

755-80½-New. Generally in summary proceeding claims for allowance of counsel fees where proper are presented informally by petition or motion and without process. 100WVa612, 131SE 455.

755-80½-New. Whether discharge was without cause should be decided on the testimony with an opportunity for cross-examination. 9F(2d)560.

755-90½-New. Under statutes compensation of an attorney rendering service to a pauper defendant in a criminal case should be fixed by the judge and cannot be recovered on formal complaint against the county. IndA 166NE 779.

756-95 Ont [1928] 4DomLR433.

756-1 59 OntL209, [1926] 4DomLR123.

757-17 [a] **That instrument was signed by client** for himself and others does not show that another was necessary party. 170La763, 129S156.

757-19 30F(2d)560; 209Ky205, 272 SW428; 9LaA452, 121S313; 170La763, 129S156 (where attorneys sue client as sole employer, pleadings on face did not show want of necessary party defendant). [b] CalA 280P559 (cause of action on quantum meruit); 35GaA792, 134SE819; 132Miscl, 229NYS430; 32 PortoRico 432; 34PortoRico 422; TexCivA 24SW(2d)794. [f] **Contract should be set out.**–TexCivA 279SW609. [g] **Count upon express contract and one upon quantum meruit may be joined** in complaint where ground of recovery uncertain. 32PortoRico 432. [h] **Bill of particulars.**–32PortoRico 432. [i] **Complaint held not to state equitable** cause of action. NJ 150A410.

757-20 See also 32PortoRico 432.

757-22 77Colo 386, 236P1016. [b] **Facts as to performance** should be alleged or excused from performance. TexCivA 279SW609.

757-23 34PortoRico 422 (not necessary to itemize where payment promised to be made on certain date); TexCivA 288SW552.

757-24 [a] But see 87CalA684, 263P 353. [c] 32PortoRico 432.

757-29 See also TexCivA 23SW(2d) 755.

757-29½-New. Allegations are insufficient to show election to recover on quantum meruit so as to preclude judgment on express contract. TexCivA 275SW481.

757-30 [a] (3) Averment that plaintiff was not employed by defendant, coupled with admission that plaintiff was employed by defendant's son who was an attorney, is insufficient in absence of further averment that son was without authority to employ plaintiff. 91PaSuper268.

757-31 118Nebr290, 224NW292, 63 ALR896 (answer in action by one attorney against another for share of contingent fee held not to state defense). See also 209Ky205, 272SW428. [a] (2) That attorney also represented others while representing incompetents has been held no defense to claim for services to incompetents. 130Misc511, 224 NYS263. [c] **Answers held not demurrable.**–78Colo 6, 238P29 (alleging that contract was unfair and inequitable and that attorneys did not explain client's legal rights).

758-32½-New. An averment that services were not worth the amount asked is insufficient in the absence of averment as to the amount they were actually worth. 91PaSuper268.

758-32½-New. That client relied on judgment procured by attorney as link in chain of title does not preclude his assertion of subsequent vacation of judgment. Ariz 286P825.

758-34 22AlaA607, 118S668; 142Wash 486, 253P810.

758-35 202Cal 501, 261P994 (proof of contingent fee contract and happening of contingency not permissible); 141 Okl 210, 284P642.

758-43½-New. Under answer denying a contract, the defense that it was terminated by discharge of the attorney is not available. 206 Iowa780, 221NW 483.

758-51½-New. Issues. In an action by an attorney to recover for professional services in connection with foreclosing real estate mortgages and selling realty covered thereby, the rights of the mortgagor in such foreclosure and to any equities that may have resulted therefrom in execution of the court's decree are not litigable issues. 218Ala461, 118 S670.

759-57 117 Okl 58, 245P48 (evidence held sufficient); 105WVa29, 141SE444 (evidence held sufficient). See also 314 Mo 262, 284SW505. [a] **Evidence held insufficient** to sustain court's finding that there was no express or implied agreement for specific compensation. CalA 280P559. [b] **Evidence held sufficient to show agreement to pay stated compensation.** LaA 130S364.

759-59 78Colo 6, 238P29.

759-60 94Fla550, 114S375 (evidence held sufficient); 100NJEq448, 136A320; 137Misc42, 242NYS643; 13PaDist&Co 387. [b] **Evidence held insufficient** to sustain finding as to value of services of attorney discharged before commencement of condemnation proceedings. 131Misc613, 228NYS335.

759-61 7F(2d)266 (attorney has burden of proving authority of agent employing him).

759-63 43F(2d)1; 9LaA708, 120S70; 10LaA639, 120S520; La 129S673. [a] **Burden of proving that payment was to be made by third person** rests on defendant where performance of services under his retainer is shown. BC [1929] 4DomLR348.

759-64 105Conn436, 135A570.

759-66½-New. or undue influence, 99 CalA96, 278P488.

759-67 See also 248NY480, 162NE493.

759-69 98CalA50, 276P387(2dcase). [a] **Evidence held sufficient** to show that bonds were accepted in satisfaction of debt sued on. 158La832, 104S732.

759-71 TexCommnA 291SW876. See also 96CalA219, 274P93.

759-72 Iowa 233NW63.

759-72½-New. Where defendant claimed damages for lack of the attorney's skill or his negligence, he must affirmatively show the amount suffered. 105Conn436, 135A570.

759-72½-New. One who employs attorney is presumed to contemplate payment of fee. 12LaA551, 126S270.

759-73½-New. Evidence has been held insufficient to justify recovery of additional compensation. 94Fla550, 114S 375.

759-76 219Ala623, 123S27; 98CalA17, 276P354; 88 IndA176, 156NE594. [a] 248NY480, 162NE493 (contents of letter admissible in part). [b] 178Ark 475, 118SW(2d)763 (ratification by administratrix of deceased's contract); 181Ark497, 26SW(2d)584; 78CalA127, 248P301 (implied agreement to pay reasonable value); 37GaA407, 140SE638; La 129S673; MoA 8SW(2d)1020 (implied contract); SD 226NW766. [c] 235Ky372, 31SW(2d)610; 9LaA6, 118S 834; 150 Ind585, 133A314. [e] **Evidence as to validity of employment.**–252 Mass523, 147NE887. [f] **Evidence held sufficient to show promise to pay.**–252 IllA286. [g] **Evidence held not to show** that attorney solicited business. CalA 288P824. [h] **Evidence held insufficient to show special agreement.**–Man [1930] 4DomLR1021(2dcase).

759-76½-New. Evidence is admissible to show that services were to be gratuitous unless a certain result was obtained. 169Minn72, 210NW854, 49ALR 1115.

760-79 37GaA770, 141SE921.

760-81 TexCivA 288SW552. [b] **Evidence held sufficient to show that oral contract was not terminated.**–206 Iowa 780, 221NW483.

760-82 37GaA760, 142SE460 (payment in excess of contract shown).

760-83½-New. Correspondence between parties respecting subject matter is admissible. Ariz 286P825 (telegram of attorney accepting employment).

760-84 232Mich271, 205NW122 (verdict for defendant held not against weight of evidence).

760-88 218Ala461, 118S670; Iowa 233 NW63; 128 Or673, 275P670; TexCivA 275SW481 (letters of leading attorney admissible on question of bad faith). [a] **Service in criminal cases.**–118 Or 300, 246P718. [b] **Evidence as to client's reasons for dropping suit** is properly excluded. TexCivA 25SW(2d)642.

760-93 94Fla550, 114S375; 143 Okl 220, 289P315. See also 202Cal 501, 261 P994. [a] 154Miss765, 122S776. [c] **Where court has before it evidence of nature and extent of services,** it may use its own experience and judgment as to reasonable value without aid of testimony of witnesses as to value. CalA 280P559.

760–94 94Fla550, 114S375; 163La505, 112S397; 118 Or300, 246P718 (evidence of value of various items of service admissible, though plaintiff seeks to recover less than total). [b] **Agreed fee** is some evidence of value of services rendered where employment was prematurely terminated by client's dismissal of action. 68CalA134, 228P720. [c] **Evidence of value of services held sufficient**, though indirect. 76CalA264, 244P608. [d] **Proper method of establishing amount of fees** by showing what would have been reasonable compensation under circumstances. 155Md410, 142A598. [e] **Prima facie case** of reasonableness of charge is indicated by evidence of balance due attorney for payment of usual fees. 137Misc42, 242NYS643.

760–95 93CalA725, 270P262.

761–1 Conn 135A573.

761–3 TexCivA 286SW656.

761–6 TexCivA 23SW(2d)755.

761–9½–New. A resolution of the board of commissioners of an improvement district created to construct a sewer in fixing the fee of an attorney has been held not conclusive in determining the amount of the fee. 170Ark 1194, 282SW20.

761–9¼–New. A commission agreement to schedule fees is admissible if the charges are reasonable. TexCivA 288 SW552.

761–9¼–New. Claim not sustained by evidence. 205Cal 111, 270P201.

761–9⅛–New. Showing as to the time an amount in controversy fell due is admissible as affecting the recovery of interest. 219Ala623, 123S27.

762–15 Iowa 230NW314; 167La262, 119S42; 5PaDist&Co 34; 35PortoRico 496. [b] **Attorney can give testimony based on personal observation** rather than hypothetical inquiry. 154Md698, 141A498. [c] **Services rendered outside of state.**–252 IllA286.

763–23 [b] **That attorney never drew particular kind of instrument** does not disqualify him from testifying as to value of services in drawing one. Iowa 230NW314.

763–24 12F(2d)755; 202Cal 501, 261P 994; 78Colo 6, 238P29, 36 [citCJ]; 35 PortoRico 496. [a] 78Colo 6, 238P29.

763–25 12F(2d)755, 756 [citCJ]; NM 289P593.

763–27 88CalA481, 263P826.

763–28 [a] 76CalA264, 244P608; 37 GaA407, 140SE638; 125Kan66, 262P 587; MoA 16SW(2d)674 (as against contention of erroneous advice). See also 164Minn217, 204NW947. [b] TexCivA 10SW(2d)388; TexCivA 25SW (2d)889. [c] **Evidence held admissible.**–85CalA273, 259P341 (conversation between attorney and client); 206 Iowa 780, 221NW483. [d] **Evidence held insufficient** to show lack of good faith by attorney in accepting employment. TexCivA 27SW(2d)604.

763–28½–New. [§ 355a] (e) **As to Good Faith.** Mistaken expressions of opinion of an attorney, even though not false representations, may be admissible on the question of good faith. 88 IndA176, 156NE594.

763–28¼–New. [§ 355b] (3) **Weight and Sufficiency of Evidence.** The sufficiency of the evidence to sustain the findings of the trial court has been examined and determined in various cases. 169Ark1145, 278SW355 (to support findings of substantial service); 84CalA 750, 258P673 (as has its sufficiency to sustain verdict of jury); TexCivA 275 SW481 (to show attorney entitled to additional compensation in case involving greater difficulties).

764–33 16F(2d)120; 235Ky372, 31 SW(2d)610; 131Misc833, 228NYS281; 198NC734, 153SE317; RI 136A8; 102 WVa320, 135SE185.

764–35 84CalA750, 258P673; Mo 286 SW100, 105 [citCyc]; TexCivA 284SW 702.

764–35½–New. whether a contingent fee was unconscionable, 121 Okl 108, 247 P996.

764–36 101CalA453, 281P712; 315Mo 318, 286SW100, 105 [citCyc]; MoA 9 SW(2d)248; TexCivA 299SW505.

764–37 214Ala243, 107S210; 94CalA 361, 271P503; Iowa 230NW314; 247 Mich560, 226NW338 (client's action to recover alleged excessive fee); 315Mo 318, 286SW100, 105 [citCyc]; NM 289 P593 (though expert testimony as to value of services is uncontradicted); 243NY123, 152NE696; 127 Or320, 272 P273; TexCivA 299SW505; 148Wash 287, 268P881; 151Wash259, 275P545 (also whether extra work was within terms of contract); Wash 288P927. [c] **In action on note against attorney** to which legal service rendered is proper set-off, value of such services is for jury. 125Misc741, 211NYS593. [d] **That fee charged one attorney by another** is less than ordinarily charged is matter of defense for jury. Wash 288P 927.

764–38 315Mo 318, 286SW100, 105 [citCyc].

764–41 125Kan66, 262P587.

764–43 105Conn436, 135A570; 287Pa 348, 135A204. [a] But see Conn 135A 573.

764–44 130Misc511, 224NYS263.

764–45 [a] 36F(2d)330; 84CalA750, 258P673; 94CalA361, 271P503; 105 Conn436, 135A570; 94Fla550, 114S375; Iowa 230NW314; 125Kan66, 262P587; Wash 288P927. [b] 219Ala623, 123S 27; 94CalA361, 271P503; 94Fla550, 114 S375; 233Ky316, 25SW(2d)721.

765–47 219Ala623, 123S27 (properly refused).

765–48 [a] **Instructions held not violative of rule.**–Iowa 230NW314.

765–49 [a] **Instructions held not erroneous.**–206 Iowa780, 221NW483.

765–52 78Colo 6, 238P29. [a] **Instructions improperly refused.**–218Ala97, 117 S653.

765–55½–New. An instruction that great weight should be given a bill rendered by an attorney as evidence of the value of the services is proper. 49 RI 59, 139A790.

765–56 16F(2d)120.

765–59 TexCivA 28SW(2d)883 (recovery improper in absence of essential finding); 152Wash469, 278P193 (held not erroneous). [a] **Client is entitled to finding of value of services** of counsel not disqualified independent of services of disqualified associate. TexCivA 27SW(2d)604.

765–60 101CalA615, 281P1102 (finding and judgment held conclusive as to amount of recovery). [b] TexCivA 271 SW266. [c] **Finding that agreement for additional compensation** was fair and reasonable, sustained. TexCivA 275SW481.

765–61 See also 314Mo 262, 284SW505.

765–64 87CalA538, 262P68; 243NY 123, 152NE696. See also 32PortoRico 546. [a] **Appeal from judgment for plaintiff cannot be converted into trial de novo.**–87CalA538, 262P68. [b] **Evidence held to sustain finding** of reasonableness of fee. 181Ark1046, 29SW(2d) 268.

765–65 78Colo 6, 238P29; 242Mich391, 218NW691 (allowance of two thousand dollars not disturbed); TexCivA 9 SW(2d)752. [a] 78Colo 6, 238P29; 126 Misc588, 214NYS49 (One thousand six hundred seventy-five dollars and ninety five cents for preparing and prosecuting ordinary law action involving one thousand nine hundred dollars). [b] **Judgments held not excessive.**–12LaA551, 126S270.

765–65½–New. Evidence held insufficient to support a finding that a sum deposited with attorneys as indemnity for bonds was not for payment of legal services. TexCivA 298SW142.

765–67 126 Okl 260, 259P212, 215 [quot CJ]. [a] **As to enforcement,** difference is immaterial. 138Misc428, 245NYS27.

765–67½–New. An attorney's lien is a peculiar lien, unlike any other lien known to the law, to be enforced by peculiar methods. 131Misc119, 226NYS 211.

766–68 132Misc713, 230NYS543 (common-law distinction still remains); 126 Okl 260, 259P212, 215 [quotCJ].

766–69 126 Okl 260, 259P212, 215 [quotCJ].

766–70 126 Okl 260, 259P212, 215 [quotCJ].

766–72½–New. A retaining lien is based on possession. 9F(2d)560.

766–72¼–New. while a charging lien protects when the attorney may not have possession. 9F(2d)560.

766–74 32F(2d)876; 131Misc119, 226 NYS211; 132Misc713, 230NYS543; 230 AppDiv323, 243NYS489 (measured by value of services); 126 Okl 260, 259P 212, 215 [quotCJ].

766–79 17F(2d)501; 33F(2d)1001; 131Misc119, 226NYS211.

766–80 164Ga324, 138SE852; 204 Iowa 346, 213NW240; 153Miss276, 120S450, 62ALR999; 131Misc119, 226NYS211; 132Misc713, 230NYS543. [b] **Attorney's lien for services under contract** is in nature of security for claim. 136 Misc84, 240NYS440.

766–81 218Ala619, 119S833; 170Ark 139, 278SW961 (dictum); 204 Iowa346, 213NW240; 50ND828, 198NW349; 34 Wyo 332, 243P394, 398 [citCJ].

767–82 34Wyo 332, 243P394.

767–85 87CalA549, 262P73, 74 [citCJ].

767–86 131Misc119, 226NYS211 (at common law).

768–87 32F(2d)349; 164Ga324, 138SE 852; Ida 286P923; Sask [1930] 3 DomLR530 (extent of solicitor's lien). [a] 132Misc713, 230NYS543. [b] **Lien was recognized at common law.**–34Wyo 332, 243P394.

768–88 [d] 33 OhA331, 169NE577.

768–88½–New. In some cases defendant's attorney has no charging lien either at common law or under statute where the answer contains no counterclaim. 251NY173, 167NE211.

768–91 223AppDiv506, 228NYS660; 138 Misc428, 245NYS27. [a] **Such statute changes previous public policy** in so far as it deprives party of control over law suits. 214Ala573, 108S375, 45ALR 935.

769–92 42F(2d)901; 214Ala636, 108S 738; 247 IllA42.

769–93½–New. In Kentucky statute does not give lien in suit to be prosecuted in another state. 211Ky142, 277SW 311.

769–94 87CalA549, 262P73.

769–1 15F(2d)292.

770–9 126 Okl 260, 259P212, 215 [cit CJ].

770–14 234 IllA98; 235 IllA401; 132 Misc713, 230NYS543. See also 17F(2d) 501. [a] (3) Lien does not extend to services in undetermined and pending actions. 234 IllA98. [b] **Lien computed in negligence case** does not include award for doctor and hospital bills paid for by defendant before plaintiff engaged counsel. 235 IllA401. [c] **Where no funds in possession of attorney,** fee is charging fee. 128Misc856, 220NYS224.

770–15 225AppDiv897, 233NYS179.

771–22 [b] **Lien is admeasured by value of services** and is not confined merely to litigation which terminates in technical judgment. 131Misc119, 226 NYS211.

771–25 RI 140A777 (against opposition of attorney claiming lien).

771–26 131Misc119, 226NYS211 (attorneys substituted by order of court).

771–28½–New. Attorneys for a bank in voluntary liquidation are held entitled to a lien for services. 159La936, 106S 386.

771–29 249Mich22, 227NW710; 34Wyo 332, 243P394, 398 [citCJ].

771–31 153Miss276, 120S450, 62ALR 999; 131Misc119, 226NYS211; 34Wyo 332, 243P394. But see 17F(2d)501.

772–34½–New. A contract merely for a contingent fee gives rise to no lien or interest in judgment in an action for money damages in the absence of an express agreement therefor. 72CalA197, 236P941.

772–34¼–New. Attorney's fees stipulated in notes constituting a claim presented by the attorney against the bankrupt's estate are a lien on the dividend declared thereon. 16F(2d)35.

772–36 247 IllA42; 204 Iowa346, 213 NW240; 206 Iowa1308, 221NW920; 3 LaA667.

772–39 170Ark139, 278SW961 (defendant and persons claiming under him must take notice of lien in same court

in which action was brought or in which action is pending). [c] (1) 169 Minn266, 211NW462. (2) 169Minn266, 211NW462.

773-40½-New. Notice to the judgment debtor or another person dealing with the judgment is not requisite of an attorney's lien although want of notice may preclude its enforcement in some circumstances. 249Mich22, 227NW710.

773-44 34Wyo 332, 243P394, 399 [cit CJ].

773-48 245 IllA8; 247 IllA42.

774-51 206 Iowa1308, 221NW920 (statutory requirements must be complied with); 169Minn266, 211NW462. [b] 169Minn266, 211NW462.

774-54 247 IllA42.

774-57½-New. Notice given before judgment is sufficient to operate as a lien on a cause of action. 221MoA 428, 289SW349.

774-60 50ND828, 198NW349 (entry on docket is intended as substitute for personal notice).

775-64½-New. In Louisiana a lien against an immovable has been held properly denied where claim for fees had never been registered or recorded in the parish where the property was situated. 10LaA531, 119S570.

775-67 39F(2d)834.

775-68 170Ga669, 153SE737. [a] (1) 132Misc713, 230NYS543 (Judiciary L. § 475). (2) Changing lien, enlarged by statute, attaches to cause of action before judgment. 131Misc119, 226 NYS211.

775-72 43 Ida119, 249P897; 126 Okl 260, 259P212. [a] **Client's unperformed promise to credit fee on attorney's note held by client** does not extinguish lien. 43 Ida119, 249P897.

775-80½-New. An attorney's lien based on a contract made by the guardian does not attach where the infant reached majority. 13F(2d)356.

775-80½-New. Where an attorney renders services to a corporation in resisting an action by the state to annul its existence, he is entitled to a lien for services rendered prior to the appointment of a receiver. 127 Misc396, 216NYS302.

776-82½-New. **On substitution of attorneys** by order of court, the court may determine the value of services before, at the time of, and after commencement of the action. 131Misc119, 226NYS211.

776-83 RI 140A777.

776-86 136Misc682, 244NYS17. [a] (5) Attorney's consent to surrender of notes received by client in settlement of suit extinguishes his lien thereon. 43 Ida119, 249P897. [b] **Retaining lien on moneys received under voidable settlement** is not divested by order vacating settlement conditioned upon return of moneys. 173Minn141, 216NW793.

776-88 32F(2d)876; 170Ark139, 278 SW961. [b] **Where attorney for plaintiff in foreclosure proceedings failed to act to assert lien for fees,** he cannot later enforce such lien against subsequent encumbrances by intervention in suit by latter to foreclose. 170Ark139, 278SW961.

776-89 [b] **Delay without prejudice.**-43 Ida119, 249P897.

776-89½-New. An attorney having a lien for services on an entire tract of land and a mortgage for an additional consideration on a portion of the tract is estopped to assert his attorney's lien on the portion covered by the mortgage where a third person pays the mortgage and acquires a fee to the land by purchase under, an understanding with the attorney that by paying the mortgage he is discharging all liens. 121 Okl 36, 247P47.

776-89½-New. Where an attorney in whose hands a note has been placed for collection files it with a proof of claim in bankruptcy proceedings against the maker, his action in deducting from the amount of a dividend check an amount admittedly due to him and remitting the balance to his client does not constitute a conversion, discharging his lien. 126 Okl 260, 259P212.

776-89¼-New. The lien is not superseded by the subsequently enacted provision, giving to the person who has paid compensation to the employee under the act a right to collect the amount of the compensation paid. 39GaA319, 147SE144.

776-89½-New. Client cannot obtain his property from attorney contrary to attorney's lien rights. 220Ala529, 126S 162.

776-93 147Wash386, 266P187.

776-94 147Wash386, 266P187.

776-96 MoA 98SW(2d)248.

777-15½-New. Where an attorney retains a lien on a note placed in his hands for collection, such lien is not lost by attaching it to, and filing it with, a proof of claim in bankruptcy proceedings against the maker. 126 Okl 260, 259P212.

777-16 164Ga324, 138SE852; 170Ga 440, 153SE649; Mo 318SW(2d)978.

777-17 164Ga324, 138SE852.

778-18 164Ga324, 138SE852; 9LaA71, 119S96; 249Mich22, 227NW710.

778-19 131Misc119, 226NYS211.

778-23 225AppDiv423, 233NYS383. [a] (2) Attorneys employed to obtain cancellation of income and excess profits taxes, and refund, could not assert attorney's lien, under Judiciary L. § 475, against taxes refunded to others than respondent, since there can be no lien on property of third persons. 132Misc 713, 230NYS543, 549 [citCJ].

778-23½-New. An attorney employed by an executor or administrator to prosecute a suit to subject real estate of decedent to payment of debts of the estate has no charging lien on the real estate or proceeds of its sale. 100WVa 612, 131SE455.

778-23¼-New. Claim for fee as proctor for the owner of a vessel is not a lien on the vessel and gives no right to share in the proceeds of the sale of the vessel. 32F(2d)876.

778-23¼-New. Under British Columbia statute the charge on property given to a solicitor is confined to property recovered or protected through his services. BC [1929] 3DomLR348.

778-24 But see 164Ga324, 138SE852.

778-28 39Wyo 217, 271P6, 8 [citCJ].

778-29 9F(2d)560; 16F(2d)35; 19F (2d)529; 3KyOp648; Mo 318SW(2d)978; 251NY173, 167NE211; 225AppDiv897, 233NYS179; 225AppDiv423, 233NYS 383. See also 226Ky347, 10SW(2d)1112. [c] 223AppDiv506, 228NYS660.

779-31 But see 170Ark758, 281SW17.

779-38 [b] **Attorney employed to bring common-law action for injury to workman occurring in another state** has no lien for services under contract where workman and his employer had accepted terms of compensation act of state where injury occurred by failure to exclude themselves from its operation and common-law action instituted by attorney was dismissed and workman accepted compensation under compensation act. 216MoA599, 265SW881.

780-46 69Utah130, 252P891, 50ALR 641.

780-48 [a] **There is no fund to which lien can attach** when nothing is recovered, under contingent fee agreement. 6F(2d)799.

780-52 218Ala619, 119S833.

780-52½-New. Attorneys may in some instances be allowed to collect for two actions from the proceeds of a second judgment. 128Misc856, 220NYS224.

780-52½-New. No attorney's lien can be ordered by state courts on amount of income or excess profits taxes ordered refunded when and if paid to the taxpayer for whom services were rendered by attorneys, while the fund is beyond the control of the court and not subject to its jurisdiction. 225AppDiv423, 233 NYS383.

780-55 170Ark758, 281SW17; 39Wyo 217, 271P6 (land involved in action for cancellation of deed and reconveyance and possession of land covered thereby).

781-56 170Ark758, 281SW17.

781-57 170Ark758, 281SW17.

781-57½-New. , or on land partitioned. 65Ark84, 44SW1034; 68Ark80, 56SW 448.

781-58 [a] **In partition, lien is limited** to client's interest or share. 15Lea (Tenn)49.

781-62 218Ala344, 118S590; 234Ky164, 27SW(2d)688. See also 164Ga324, 138 SE852. [c] **Attorney's lien, under statute relating to suits for recovery of property,** attaches in suit for sale of lands for division, since client gets exclusive possession and complete title converted into money, which is "property recovered" within statute. 218Ala 344, 118S590. [d] **In suit for partition,** sale of client's land, pending trial to purchaser with notice, does not destroy attorney's lien. 218Ala344, 118S590.

781-63 225Ky155, 78W(2d)1057; 121 Okl 36, 247P47 (statute held not applicable to services in removing cloud from title).

781-63½-New. In an action for accounting for rents from jointly owned land, an attorney for a wife suing her husband has no lien on the property. 251NY173, 167NE211.

781-63½-New. Attorney recovering judgment for possession of property has no lien on rents therefrom accruing after client acquires title. Mo 318SW(2d)978.

781-66 17F(2d)559. [d] **"Adverse party."**-17F(2d)559.

782-67 See 132Misc713, 230NYS543.

782-70 DC 37F(2d)1007; 49RI 276, 142 A332.

782-71 31F(2d)702; 37F(2d)237; 245 Mich162, 222NW115; Man [1926] 4DomLR1155, [1926] 3WestWkly411.

782-72 31F(2d)702 (discretion of court).

782-73 [c] **In Saskatchewan.**-[1930] 2 DomLR30.

784-91½-New. An attorney's lien cannot attach to funds held by the clerk of court on interpleader in favor of the attorney of claimant to a fund prior to a judgment finding claimant entitled to funds. 20 OhA356, 152NE193.

784-92 9F(2d)560; 226Ky347, 10SW (2d)1112; 127Misc396, 216NYS302; 225 AppDiv897, 233NYS179; 136Misc682, 244NYS17; OhA 173NE246; 126 Okl 260, 259P212.

785-98 126 Okl 260, 259P212.

785-1 230AppDiv323, 243NYS489.

786-4½-New. An attorney has no lien on property involved in litigation in which he acts as attorney for defendant. 32F(2d)876.

786-5 227AppDiv754, 237NYS32.

786-14 3LaA352.

787-16½-New. An attorney employed by an executor or administrator to prosecute a suit to subject real estate of decedent to payment of debts of the estate has no retaining lien on the real estate or proceeds of its sale. 100WVa 612, 131SE455.

787-17 [c] **Agreement with disbarred attorney.**-Contingent fee which might be received has been held to forfeit any right to lien. 227AppDiv279, 237NYS 499.

787-19½-New. An attorney's lien claim for services on assets of a bank in liquidation have been held not divested on the ground that he is a stockholder. 159La936, 106S386.

787-19½-New. President of company taking title to lease in name of himself and another for advantageous handling cannot claim lien for services as attorney. 37F(2d)76.

787-21 [a] 219AppDiv604, 220NYS 423.

787-22 See 132Misc713, 230NYS543, 549 [citCJ]. But see 170Ga440, 153SE 49.

787-24 See also 164Ga324, 138SE852.

788-27 223AppDiv506, 228NYS660.

788-34 [a] Ida 286P923.

788-35 See also 223AppDiv506, 228NYS 660.

788-42 206 Iowa1308, 221NW920 (before notice of lien). [a] **Under terms of contract for lien** on cause of action and judgment, attorney may be entitled to lien on funds in hands of substituted attorney as proceeds of settlement of case. 87CalA549, 262P73.

789-43 117 Okl 58, 245P48 [citCJ]. [b] **Foreign settlement.**-317 Ill 580, 148NE 241.

789-44 117 Okl 58, 245P48 [citCJ]. [b] **Unreasonable contract for attorney's compensation** in case of settlement by client held void as against public poi-

icy. 125Misc407, 211NYS249.

789-46 332 Ill 177, 163NE343 (stipulation of dismissal); 79Mont542, 257P436; 125Misc407, 211NYS249; 117 Okl 58, 245P48 [citCJ].

790-47 43 Ida119, 249P897; 234Ky164, 27SW(2d)688; 143Miss277, 107S868; 79Mont542 257P436; 125Misc407, 211 NYS249; 117 Okl 58, 245P48 [citCJ].

790-48 79Mont542, 257P436; 117 Okl 58, 245P48. [a] **Payment of four thousand dollars held made in settlement of suit,** not precluding claim of attorneys for plaintiff. MoA 218W(2d)937. [b] **Defendant held estopped to deny lien** where he induced attorney to postpone filing suit on promise to make settlement. Okl 293P232.

790-49 79Mont542, 257P436. Contra 206 Iowa1308, 221NW920.

790-50 43 Ida119, 249P897.

790-52 [b] (2) Under statute of 1919 (Comp. St. [1921] §§ 4102, 4103), where attorney contracts for percentage of final recovery in suit or cause of action then pending, and cause goes to final judgment, amount of his recovery is good. 114 Okl 72, 243P501. (3) Under such statute where contract is made for percentage of recovery in suit to be brought and amount for which suit is to be filed is not specified and intended defendant settles with client before suit, recovery of attorney must be based on competent evidence as to amount he would have obtained but for settlement. 114 Okl 72, 243P501. (4) In such case, in absence of competent evidence as to amount which would have been obtained but for settlement, recovery should be limited to agreed percentage of amount of settlement. 114 Okl 72, 243P501. [c] **If amount of settlement is not disclosed,** attorneys are entitled to nominal damages. MoA 218W(2d)937.

790-54½-New. Where an attorney, who has perfected his lien for fees upon a cause of action and is prevented from performing the professional duties for which he was employed by a compromise of his client with the adverse party without notice to him or an opportunity to be present, the measure of his compensation in an action against his client on the contract is the compensation named therein. 117 Okl 58, 245P48.

790-54½-New. Where, at the time suit was filed, plaintiff had no legal right to maintain it, defendant is not liable to plaintiff's attorney by reason of an agreement for fees, although defendant paid plaintiff a small sum for dismissal of the suit. 148Miss148, 114S33.

791-57½-New. Intervention by an attorney in a client's suit to quiet title after defendant's default and the attorney's discharge is premature under an agreement for division of the overplus after payment back of the client's investment, where judgment only had been entered quieting title in plaintiff upon a compromise with the only lien claimant. 204Cal 496, 268P1057 (right of attorney to intervene).

791-58 138Misc428, 245NYS27.

791-61½-New. After notice is given debtor of assignment of cause of action to attorney, he has absolute title to proceeds as against collusive agreement between client and debtor. TexCivA 272 SW564.

791-61½-New. The debtor having paid to the client only his share of fund, client is not liable for part retained by debtor. TexCivA 272SW564.

791-61¼-New. Where an attorney had a written contract to receive one half of the land recovered as compensation for his services, he is entitled, on settlement between the parties without his consent by the execution of a deed to the property by his client, to recover at least the statutory proportion of the land as his fee. 123 Okl 118, 252P834.

791-61½-New. Question is whether client and adverse party without notice perfected arrangement depriving client of right against adverse party. 143 Okl 206, 288P964.

792-68 249NY168, 163NE244.

793-74 Ala 127S544; 50ND828, 198NW 349.

793-78 123 Okl 203, 254P494, 51ALR 1265.

794-82 123 Okl 203, 254P494, 51ALR 1265.

794-89 206Ky83, 266SW881; 320Mo 870, 8SW(2d)998. [b] **Intervention petition to enforce lien is premature,** where action is undetermined. 234 IllA 98. [c] **Where parties have made settlement,** petition to enforce lien becomes ordinary suit at law for fees. 234 IllA98.

794-91 218Ala344, 118S590.

795-94 9F(2d)560; 216AppDiv472, 215 NYS445.

795-95 22F(2d)832.

795-97 216AppDiv472, 215NYS445.

795-1 216AppDiv472, 215NYS445.

795-3½-New. An order declaring lien on fund for attorney who never represented successful claimants and who received no notice of claim or hearing held invalid. 204 Iowa346, 213NW240.

795-3⅓-New. A statute providing that the court may determine and enforce an attorney's lien inures to the benefit of both attorney and client. 131Misc119, 226NYS211.

795-3¼-New. In proceeding for substitution of attorneys, the court may fix a lien of the substituted attorney and provide for the payment thereof. 131 Misc119, 226NYS211.

795-3½-New. In such proceeding the value of attorney's services, as determined by lien, will be conclusive on the parties in a subsequent action. 131Misc 119, 226NYS211.

795-3⅙-New. Such proceeding being a special proceeding and determinable on entry of final order, no judgment can be entered in the attorney's favor. 131 Misc119, 226NYS211.

795-3⅐-New. If the petitioner for substitution of attorneys refuses to discharge the lien of the old attorney by payment, the attorney may enforce the lien by execution under statute. 131 Misc119, 226NYS211.

795-3⅛-New. On the attorney's refusing to accept payment of a lien fixed in such proceeding, the court may direct payment of the amount into court and thereby discharge the lien. 131Misc119, 226NYS211.

795-3⅑-New. On such proceeding stenographer's minutes need not be filed with papers in the event of appeal, as one copy of the minutes could be used by both parties. 131Misc119, 226NYS 211.

795-3 1/10-New. Certified copies of the order in such proceeding may be filed in the county clerk's office so as to give effect thereto. 131Misc119, 226NYS211.

795-3 1/11-New. In Missouri, in determining the appropriate method of enforcing a lien, the nature of a right as well as the particular facts must be considered. 320Mo 870, 8SW(2d)998 (statute does not provide method).

795-3½-New. In the Philippines, in absence of specific written contract, filing of lien does not within itself legally determine amount of lien. 51Philippine 707.

795-3 1/13-New. In such case lien cannot be enforced without notice to adverse party and opportunity to be heard as to amount of lien. 51Philippine707.

797-30 218Ala344, 118S590; 220Ala 529, 126S102. [a] **Attorney's lien should be enforced by regular proceedings inter partes,** not by summary proceedings. Ala 127S544.

798-37 169Minn266, 211NW462.

798-42 MoA 14SW(2d)464.

800-66½-New. Where complainants in suit for partition sold their interest, pending suit, without consent of their attorney, he cannot continue it for his own benefit. 218Ala344, 118S590.

800-67 164Ga324, 138SE852. [a] (3) Proceeding is special statutory proceeding in equity. 123 Okl 118, 252P834. (4) Attorneys employed to obtain cancellation of federal income and excess profits taxes, and refund, are not entitled to have amount of compensation determined in proceedings to enforce attorney's lien under Judiciary L. § 475, but must resort to an action at law. 132Misc713, 230NYS543. [b] **In Oklahoma.**-117 Okl 58, 245P48; 143 Okl 206, 288P964.

801-68 115 Okl 107, 241P742. [a] **Action is equitable one triable to court as equity suit.**-Okl 252P834.

801-69½-New. A lien on land has been held enforcible by foreclosure. 164Ga 324, 138SE852.

801-71 [c] **In Georgia.**-164Ga324, 138 SE852.

801-74 15F(2d)292.

802-78½-New. Fellow attorney may by creditors' bill obtain and enforce lien on judgment awarding compensation. 170Ga440, 153SE49.

802-80 [a] **Pledgee.-Ida** 286P923 (attorney's lien enforced against pledgee who had assigned interest in judgment on pledgee's lien).

802-83 218Ala344, 118S590.

802-86 235 IllA401 (soliciting).

802-88 213AppDiv268, 210NYS201.

802-89½-New. Any defense available in an equitable action may be interposed in proceeding to enforce attorney's lien. 136Misc84, 240NYS440.

802-92 [b] **Defendant in partition suit.**-218Ala344, 118S590.

802-93 8Miss162; 216NYS913; 61 OntL480, [1928] 1DomLR281.

802-98 216NYS913.

802-99½-New. Attorney in same action may sue client for fees and adverse party for settling with notice of lien. 143 Okl 206, 288P964.

802-1 53SD421, 220NW858, 859 [quot CJ] (contract between parties). [a] 164 Ga324, 138SE852; MoA 12SW(2d)941.

802-2 53SD421, 220NW858, 859 [quot CJ].

802-3 Okl 293P232.

802-4½-New. To enforce attorney's lien where pledgee sold stock subject thereto, value of stock must be alleged and proved. Ida 286P923.

803-5½-New. Amendments. Where an attorney seeking to enforce his lien for legal services under an alleged contract fails to establish his contract by evidence but introduces evidence showing rendition of services beneficial to his client, the court may permit him to amend his petition so as to show a cause of action on quantum meruit. 121 Okl 36, 247P47.

803-6 206 Iowa1308, 221NW920 (insufficient); 227Ky820, 14SW(2d)141; 213AppDiv268, 210NYS201 (holding that if attorney's representative testifies falsely, it vitiates his testimony that he obtained written retainer to represent plaintiff); 115 Okl 107, 241P742 (evidence held insufficient). See also MoA 12SW(2d)941. [a] **Evidence held sufficient** to establish lien. 221MoA428, 289SW349.

803-9 [a] **Evidence held insufficient to show misconduct in attorney** by soliciting to bar lien. 235 IllA401.

803-10½-New. Under some statutes, in an action against an adverse party on compromise of a claim, proof of settlement without consent of the attorney establishes prima facie that defendant was liable. 123 Okl 118, 252P834.

803-10½-New. and establishes prima facie liability for a contract fee not exceeding the proportion named in the statute of the amount recoverable. 123 Okl 118, 252P834.

803-11½-New. In intervention to enforce an attorney's lien against the proceeds of judgment, proof of plaintiff's ratification of a contract, signed by plaintiff and her husband before the husband's death, employing the attorney to prosecute a claim for the husband's injuries, was competent. 178Ark475, 11SW(2d)763.

803-11½-New. Question of plaintiff's discharge before settlement is a question for the jury. 227Ky820, 14SW(2d)141.

803-11¾-New. In an attorney's action for compensation against a tort-feasor making settlement with client without the attorney's consent, an instruction that undisputed evidence showed employment of plaintiff and refusal to submit such issue to the jury has been held not error. 227Ky820, 14SW(2d)141.

803-11½-New. Refusal to submit issue whether plaintiff had solicited employment by his client has been held not error. 227Ky820, 14SW(2d)141.

803-11½-New. Attorneys are not required to prove that client's claim was meritorious. MoA 21SW(2d)937.

803-11 1/7-New. Questions of law and

fact. Any competent evidence of arrangement between client and adverse party defeating client's right creates jury question as to compromise of suit. 143 Okl 206, 288P964.

803-11½-New. Evidence held sufficient to show compensation to which attorneys were entitled. Mo 318SW(2d)978.

803-12 173Ark359, 292SW139. But see 230AppDiv106, 234NYS661.

803-15½-New. Judgment on an attorney's intervening claim to a lien held supported on the record. 115Nebr236, 212NW536.

803-15½-New. In action for contingent fee against client and adverse party settling with notice of lien, attorney may recover what he would have been entitled to if client had prevailed. 143 Okl 206, 288P964.

803-17 126 Okl 260, 259P212, 215 [quot CJ].

803-20 230AppDiv323, 243NYS489.

803-21½-New. Upon the giving of a bond the court has power to compel the return of papers. 9F(2d)560.

ATTORNEY-GENERAL

805-10 116 OhSt428, 156NE457. See also 53ND789, 208NW380.

807-26 144Miss560, 108S907.

807-28 NJSup 135A280.

807-29½-New. Statute in Illinois authorizes appointment of necessary deputies or assistants. 318 Ill 600, 149NE526.

807-31½-New. A statute permitting attorney-general to appoint assistants without examination of any kind is unconstitutional. 210NY130, 148NE627 (where constitution provides for examination).

807-31½-New. A contract is construed in connection with a statute as contemplating services in active conduct of a litigation only. 216Ala526, 113S580.

807-31½-New. A county prosecutor of pleas may be appointed assistant of the attorney-general in a criminal proceeding. 103NJL246, 136A164(2dcase).

808-34½-New. Appointment as special assistant to the attorney-general is an appointment to a state office. 94Fla620, 113S913.

808-37 244 IIIA261 (validity of appointment).

808-40 [b] **Bill for accounting** and repayment of compensation illegally received by assistant held sufficient. 318 Ill 600, 149NE526.

808-41 [b] **Fifteen per cent of amount recovered** through his efforts in tax assessment appeals. 152Miss578, 120S572 (amount of commission on compromise).

808-46 [c] **In Mississippi.**–144Miss560, 108S907 (fee held excessive). [f] **Member of legislature** cannot recover compensation for acts amounting to exercise of power of executive department. 318 Ill 600, 149NE526. [g] **No compensation** can be allowed a member of legislature acting as deputy attorney-general. 318 Ill 600, 149NE526.

809-47 144Miss560, 108S907.

809-50½-New. Member of legislature acting as assistant to attorney-general must account for compensation received while acting as officer of executive department. 318 Ill 600, 149NE526.

809-50½-New. A special assistant has been held not entitled to salary for a year during which no steps were taken in court. 216Ala526, 113S580.

809-52 53ND789, 208NW380.

810-53 318 Ill 600, 149NE526; 157Miss576, 128S759; 115Tex205, 281SW837, 843 [citCJ]. [a] **Duty to enforce proper application of appropriated funds** includes duty to see to enforcement of act intended to provide funds for state institutions. 140Wash133, 249P996. [b] **In New Mexico.**–33NM664, 275P373.

810-56 128Kan665, 280P910, 66ALR1369 (subject only to direction of governor or either branch of legislature); 115Tex205, 281SW837, 843 [citCJ]. See also 29Hawaii820.

810-57 265Mass41, 163NE653. See also 244 IIIA261.

810-58 NJ 149A263.

812-31 Fla 126S374 (writ of prohibition).

812-32 157Miss576, 128S759; 33NM664, 275P373.

813-83 [a] (6) He is proper party to institute proceedings to compel state board of equalization to levy tax directed by statute. 140Wash433, 249P996. (7) That statute requires him to defend all actions against any state officers does not prevent him from prosecuting mandamus proceedings to compel state board of equalization to levy tax directed by statute. 140Wash433, 249P996. [e] (2) In injunction for violation of Fraudulent Securities Act, power to subpœna witnesses under General Business Law does not apply. 129Misc698, 223NYS351.

813-87 NJCh 145A462 (suit involving private trusts).

814-88½-New. Attorney-general is properly made a party in a suit brought under declaratory judgment statutes to have determined the validity of a legislative act. 152Tenn466, 278SW660.

814-88½-New. The statute was held to impose mandatory obligation upon village counsel to notify the attorney-general of an action to recover public money, but failure to do so did not nullify the judgment. 116 OhSt361, 156NE188.

814-88¼-New. United States attorney-general may bring suit in behalf of United States to restrain radio broadcasting without license under the Radio Act. 31F(2d)448.

814-88½-New. Where the duty of the attorney-general to represent a compensation claimant under the Workmen's Compensation Act conflicts with his duty to the state treasurer, the right of the state treasurer is paramount. Wyo 282P1055.

814-88¾-New. In Canada, where title of crown may be affected by judgment in pending suit, attorney-general may be added as party defendant. Man [1930] 1DomLR435 (necessity of petition of right).

814-89 See also NJ 149A263.

814-91½-New. Some statutes only require the attorney-general to represent the state or counties in suits in court by the state or a county, and not otherwise. 33NM664, 275P373.

814-91½-New. Attorney-general called on by the legislature to test the constitutionality of statute has no legal standing as plaintiff, where the judiciary has no power to render merely declaratory judgment. 207 Iowa923, 223NW737.

814-93 323 Ill 309, 154NE120; NJCh 145A162.

814-93½-New. The attorney-general is not a proper plaintiff in an action to enforce a private right. 259Mass86, 156NE4.

814-94 [b] **Contra.**–214Ala234, 107S76. [c] **To administer college endowment under cy pres doctrine,** state attorney-general should institute, or be made defendant in, such proceedings. 10F(2d)542.

814-95½-New. In a suit between heirs and trustees involving title to property embraced in a charitable trust, the attorney-general may bring proceedings necessary to have the purchaser's title determined where the property had been sold by the original trustees. 115 Or 281, 237P674.

814-96 See 59 OntL406 [1926] 4 DomLR531.

814-99 128Kan665, 280P910, 66ALR1369.

815-5½-New. Attorney-general's concession is not binding on the people where the case was opened later and further evidence taken and the court and attorneys recognized that concession was abandoned. 226AppDiv416, 235NYS655.

816-16½-New. In Manitoba attorney-general should be made party to action against University of Manitoba for specific performance of agreement relative to lands donated to it and province. Man [1930] 3DomLR250.

816-16½-New. In such case petition of right is not proper remedy, the crown not being directly affected. Man [1930] 3DomLR250.

816-27½-New. An assistant attorney-general may assist in a prosecution. 237 Mich481, 212NW105.

816-30 [a] **State prohibition enforcement.**–128Kan665, 280P910, 66ALR1369.

817-42 PEI [1926] 4DomLR1106.

ATTORNMENT

818-9 [b] (2) "A recognition by a tenant of a new landlord upon the alienation of land." 119Kan534, 240P960. (3) Act of feudatory, vassal, or tenant, by which he consents, upon alienation of an estate, to receive new lord or superior, and transfers to him his homage or service. 201 Iowa931, 208NW503 [quot WebsterNewInt.D.]. (4) Agreement or acknowledgment of tenant that he holds his tenement of new person as landlord. 201 Iowa931, 208NW503 [quotWebster NewInt.D.].

819-10 201 Iowa931, 208NW503, 504 [citCJ].

819-11 201 Iowa931, 208NW503, 504 [citCJ].

819-12 [a] (3) Consent of one in possession as caretaker is insufficient. 119 Kan534, 240P960.

AUCTIONS AND AUCTIONEERS

822-4½-New. Announcement that one will sell at public auction to the highest bidder is a mere declaration of the intention to hold an auction at which bids will be received. 82NH211, 131A598.

822-5 [a] (2) 323 Ill 258, 154NE100. (3) 323 Ill 258, 154NE100. (6) 323 Ill 258, 154NE100.

822-6 323 Ill 258, 154NE100.

822-7 323 Ill 258, 154NE100.

822-7½-New. "Public auctioneer" is a person who holds himself out to the public as being willing and ready to sell property at auction. 180Ark204, 21SW(2d)163.

822-8 49RI125, 140A779.

822-11 RI 141A179, 180 [citCJ]; 134SC314, 132SE591, 46ALR155.

823-12 251Mich77, 231NW107; Tex CivA 13SW(2d)401. [b] (4) Baltimore City Charter (1927) §§ 235-278. 157Md185, 145A492. (5) "Public," as used in statute providing that no person shall exercise trade of public auctioneer without license, is used as adjective and modifies and limits word "auctioneers." 180Ark204, 21SW(2d)163.

823-14 [b] (2) Indictment demurrable for not charging facts bringing accused within purview of ordinance. 157Md185, 145A492. [c] **Evidence.**–157Md185, 145A492.

823-16½-New. A statute authorizing municipal corporations to prohibit a sale at auction has been held unconstitutional. 134Ark575, 203SW14, 15 [cit CJ].

823-17 233 IIIA579; 102NJL492, 134A115; 14PaDist&Co 258; 134SC314, 132SE591, 46ALR155. [a] **In Illinois.**–323 Ill 261, 154NE100. [b] **Ordinance regulating any person who sells by auction** held valid. 323 Ill 258, 154NE100.

823-18 251Mich77, 231NW107.

823-19 97Fla468, 121S567. [d] (1) 97 Fla458, 121S565 (precious stones, glassware, etc.); 134SC314, 132SE591, 46 ALR155. See also 75CalA591, 243P55.

823-20 [a] **Particular ordinance held reasonable.**–102NJL492, 134A115.

823-20½-New. Ordinance licensing auction of jewelry and other articles held not invalid as class legislation. Tex CivA 31SW(2d)582.

824-23 180Ark204, 21SW(2d)163; 323 Ill 258, 154NE100.

824-24 323 Ill 258, 154NE100.

824-26½-New. Sale of particular articles at public auction must be under license in some jurisdictions. TexCivA 13SW(2d)401.

824-30 12LaA423, 126S88 (hospital fee).

824-33 223Ky549, 48SW(2d)370, 371 [quotCJ]; 158Tenn109, 11SW(2d)869.

825-34 [b] **Public auctioneer's authority, in selling, by virtue of writ of sale** issued in succession, land to city, was limited by terms of his writ. 166La512, 117S573.

825-39 166La1075, 118S224; 2LaA289. [b] **Onus was on plaintiff to produce written authority** in hands of auctioneer at time of sale as required by statute. 166La1075, 118S224.

826-45 224Ky56, 5SW(2d)271, 274 [citCJ].
827-54 99NJEq652, 134A191, 192 [quot CJ].
827-55 99NJEq652, 134A191, 192 [quot CJ].
827-56½-New. A party to a faked auction sale on a sham bid will be given no relief by the courts. CalA 260P569, 204 Cal 253, 268P365.
827-56¼-New. The forty-eight-hour period, allowed for the inspection of horses, mules, etc., purchased at auction sale, by statute, does not apply to cattle. 11LaA527, 124S318(2dcase).
827-56¼-New. When no specific directions are given in the statute the common-law rule requiring personal property sold at public auction to be physically at the place of sale applies. 226 AppDiv624, 236NYS559.
827-56½-New. Clerk of sale at public sale of debtor's property is not presumed to have right to deposit money. 42F(2d)735.
827-59 227Ky719, 13SW(2d)1031 [quot CJ]; 49RI 125, 140A779 (announcement of minimum price not necessary where not required).
827-63 227Ky719, 13SW(2d)1031; 49 RI 125, 140A779, 780 [citCJ]. [a] **Failure to announce upset price** does not invalidate sale where bid exceeding such price, is accepted. 49RI 125, 140A779.
827-64½-New. On sale at auction, personal property must be within view of bidders. 253NY455, 171NE705.
827-64¼-New. Where chattel is not present in auction room, and inspection will be of use, notice of sale must state where chattel is located. 253NY455, 171 NE705.
827-66 77CalA268, 246P566; 87IndA 103, 159NE19 (terms in public notice of sale held binding).
828-73 77CalA268, 246P566; 100NJEq 537, 136A179, 180 [citCJ].
829-94½-New. A member of a fraternal lodge is not prevented from bidding at an auction sale of land owned by the lodge. 213Ky533, 281SW500, 46ALR 117.
829-96 [c] **In Idaho.**–41Ida141, 238P 528. [d] **Holder of title retaining note** on sale after representation cannot bid, unless right is reserved in notice of sale. 41Ida141, 238P528.
830-97 223Ky549, 4SW(2d)370, 371 [quotCJ].
830-98 37F(2d)937.
830-4 224Ky56, 5SW(2d)271, 274 [cit CJ]. [b] **Fact that bid of successful bidder of amount in excess of ten thousand dollars was only twenty-five cents higher than the preceding bid** was held not to establish fraud of auctioneer. 227Ky719, 13SW(2d)1031. [c] **Evidence to sustain finding** that auctioneer did not fraudulently stifle bidding. 227Ky 719, 13SW(2d)1031.
831-10 151Miss111, 117S514.
832-12 213Ky533, 281SW500, 502 [cit CJ], 46ALR117; 224Ky56, 5SW(2d) 271, 274 [citCJ]. [a] (2) Purchaser having secret arrangement whereby he paid agreed price for lot though bidding more is not by-bidder so as to relieve purchaser of another lot at same sale from his purchase. 213Ky533, 281SW 500.
833-20 [b] **Subsequent arrangement with purchaser of lot** whereby he procured lot for less than amount of bid is not prejudicial to purchaser of another lot. 213Ky533, 281SW500.
833-23½-New. A purchaser at a sale of property owned by a fraternal lodge cannot complain that the price was run up by a bidder procured by a member of the lodge to bid for him where the bid was made in good faith. 213Ky533, 281SW500, 46ALR117.
833-23¼-New. Where the buyer does not complain, the seller cannot repudiate the sale. 49RI 125, 140A779.
833-25 See also 165La106, 115S403.
834-31½-New. Custom at conventional sales of movables is for auctioneer to exercise his discretion in exacting deposits. 12LaA423, 126S88.
835-39 49RI 125, 140A779; RI 141A 179, 180 [citCJ].
835-46 205 Iowa578, 218NW262; 49RI 125, 140A779. [b] **Cash deposit on sale.**–128Misc20, 217NYS480. [c] **Settlement by purchaser with auctioneer's clerk** by part payment in money and execution of note for balance conclusively establishes title in buyer. 205 Iowa578, 218 NW262. [d] **Matters not preventing passing of title.**–205 Iowa578, 218NW 262. [f] **In Ontario.**–[1930] 2DomLR14.
835-48½-New. A sale of a thing belonging to another and null under statute conveys no title to the purchaser. 9 LaA519, 119S435.
836-50 205 Iowa578, 218NW262.
836-53½-New. [§ 41a] A½. **Rule of Caveat Emptor.** General rule of caveat emptor at a public sale is, as respects the authority of the persons selling, particularly applicable to sales of public property. 8F(2d)542.
836-53¼-New. Purchaser of goods of federal government exhibited by auctioneer is bound by published terms, although he did not read them. 8F(2d) 542.
836-53¼-New. And is liable on his check given in part payment, although the goods proved on inspection to be practically worthless. 8F(2d)542.
836-53½-New. It is not necessary to put the purchaser in default where it would be useless because of his announcement not to comply with the bid. 165La106, 115S403.
836-53¼-New. On bidding off in fractions of large lots, a memorandum signed by the parties was not an executed sale, but only a contract of sale, and the purchaser need not accept goods not conforming to the description. 24 F(2d)840.
836-54 128Misc20, 217NYS480.
836-59 2LaA292; 11LaA527, 124S318 (2dcase). [d] **Recovery on call in warranty** not filed till over sixty days after auction sale of tubercular cows, sought to be rescinded, has been held barred under statute. 11LaA527, 124S318(2d case).
837-63½-New. In a suit by the highest bidder at an auction sale for specific performance of a contract for sale of land against the vendor and a third person to whom the vendor conveyed the property, evidence was held sufficient to sustain a finding that the vendor's grantee took with notice of plaintiff's prior purchase. 227Ky719, 13SW(2d) 1031.
838-69 224Ky56, 5SW(2d)271, 274 [cit CJ].
838-70 213AppDiv117, 210NYS83. [b] 213AppDiv117, 210NYS83.
838-72 27OhNPNS433 (application for return of deposit properly denied).
838-73½-New. Where a vendor deposits with a purchaser's escrow holder a deed conveying good title, and complies with the contract of sale, the money deposited with the auctioneer by the purchaser less the auctioneer's charges and commissions becomes the property of the vendor. 88CalA430, 263P846.
839-78 [a] 165La106, 115S403 (purchaser must set up and establish claimed defects or encumbrances in title). [f] **Action for amount of bid.**–204Cal 253, 268P365; CalA 260P569; 166Minn45, 207NW178.
839-78½-New. Where a buyer has title to goods struck down, and has duly tendered the purchase price, he may bring replevin where the goods are not in his possession. 128Misc20, 217NYS480.
840-88 [d] **Waiver of defenses.**–217Ky 284, 289SW233. [e] **Question of law or fact.**–217Ky284, 289SW233. [f] **Instructions held erroneous.**–217Ky284, 289SW233.
840-89½-New. or landowner cannot perform because of prior option of purchase granted to another, 189NC820, 128 SE321.
840-91. See also 216Ala472, 113S529.
840-94 103NJL238, 137A412. [a] **Auctioneer selling partnership farm to partner under modified payment terms** has been held not entitled to recover for services if not informing other partner of modification. 217Ky284, 289SW233.
840-95 223Ky549, 4SW(2d)370 (where sale is stopped by principal, auctioneer entitled only to reasonable value of services). [b] **Commission is due when sale is consummated.**–12LaA498, 126S462.
840-96 223Ky549, 4SW(2d)370 (contract not construed in favor of auctioneer beyond fair meaning of terms).
840-97 12LaA423, 126S88 (convention al sale). [c] **Commission held not excessive.**–12LaA423, 126S88. [d] **Commission is computed on articles sold, paid for, and delivered.**–12LaA423, 126S88.
841-99½-New. Under a contract providing for compensation on full and final performance of the sale of the land, the auctioneer is not entitled to expenses of plotting and subdividing land into lots until the land is sold. 189NC724, 128SE324.
841-2 [c] **Contra in North Carolina.**–189NC820, 128SE321.
842-8 89PaSuper431. But see 291Pa 448, 140A147.
842-11 223Ky619, 4SW(2d)748, 751 [citCJ].
842-12 223Ky619, 4SW(2d)748 (particular loss only, not speculative damage, is recoverable).
842-19 [b] **Evidence held to show ratification** of auctioneer's act in taking unsecured note in payment contrary to instructions. 34Wyo 61, 241P703.
843-25 But see 88CalA430, 263P846.
843-27 See also 128Misc384, 219NYS5.
843-30 13LaA651, 127S462. See also 128Misc384, 219NYS5. [a] (2) Auctioneer misrepresenting lot sold as containing more land than it does is liable to purchaser whether misrepresentation was made carelessly or with deliberate intention. 87CalA82, 261P766. [b] **Where catalogue provides that buyer assumes risk,** representation does not survive acceptance. 228AppDiv146, 239 NYS261.
843-30½-New. Where the promise of an auctioneer to procure the owner's written obligation to convey the premises is made after sale, it is without consideration. 103NJL400, 135A798.
843-30¼-New. The purchaser of land at auction sale paying ten per cent of the purchase price by check to the auctioneers in accordance with the terms of sale, which check was indorsed and transferred to the principal, could not, after the vendor's default, recover from the auctioneers, the amount so paid. 230Ky148, 18SW(2d)975.
843-31 214Ky569, 283SW975, 976 [cit CJ]; 230Ky148, 18SW(2d)975.
843-32 227AppDiv607, 235NYS211; 158Tenn109, 11SW(2d)869 (bill held sufficient).
844-33 [c] (2) Generally an auctioneer is not liable to third persons where his principal is disclosed. 13LaA651, 127S 462.
845-49 [d] **Weight and sufficiency of evidence.**–100CalA521, 280P387(2dcase).

AUDION

846-12½-New. As used in patent art, highly evacuated glass tube containing cathode, anode, and intervening grid or shutter, all capable of connections outside bulbs. 36F(2d)834.

AUDIT

846-16 205 Iowa104, 215NW611.
846-18 205 Iowa104, 215NW611.
846-19 205 Iowa104, 215NW611. [a] **"Balance sheet audit" distinguished** from "detailed audit." 13LaA350, 127S 467.
846-21 205 Iowa104, 215NW611.
846-24 205 Iowa104, 215NW611.
847-31 205 Iowa104, 215NW611.
847-32 205 Iowa104, 215NW611.
847-39 205 Iowa104, 215NW611.
847-40 146Wash513, 263P946, 948 [quotCyc].

AUDITA QUERELA

850-3 MoA 290SW624, 628 [citCJ].
855-66 322Mo 1118, 17SW(2d)935.

AUDITOR

861-5 16F(2d)92, 94 [citCJ]; 32Porto Rico 841. [b] (2) In Porto Rico under Organic Act § 20 insular creditor has "like authority as that conferred by the law upon the several auditors of the United States and the Comptroller of the United States Treasury." 32Porto Rico 841.

AUTHOR

863-62 14CustA376.

AUTHORIZE

865-99 121Kan109, 245P1019. [c] "Order" distinguished.-202 Iowa537, 210 NW555.
865-1 121Kan109, 245P1019.
865-2 174Ark420, 295SW378; 147 Wash86, 265P167, 171 [quotCJ].
865-3 174Ark420, 295SW378.
865-5 174Ark420, 295SW378.
865-7 174Ark420, 295SW378; 121Kan 109, 245P1019.

AUTHORSHIP

866-18 See also 14CustA376.

AUTOGRAPHIC

866-21½-New. Self-writing or self-recording. 39F(2d)718.

AUTOMOBILE

867-29 143Va187, 129SE379, 382 [quot CJ].
867-30 143Va187, 129SE379, 382 [quot CJ].
867-31 143Va187, 129SE379, 382 [quot CJ].

AUTOMOBILE INSURANCE

867-35 See also Motor Vehicles §§ 346-410.
867-38 7F(2d)522 (collision of elevator carrying automobile with bottom of shaft held within policy). [a] **Transportation clause** in automobile insurance held to contemplate collision of conveyance carrying automobile. 7F (2d)522.
867-38½-New. Capsizing or tipping over is not covered by collision clause in policy. 27Hawaii326.
867-38¼-New. There can be no recovery under collision clause of policy where automobile leaves the traveled road and falls to the bottom of a gulch. 27Hawaii333.
867-38¼-New. Where two causes of loss concur and only one is insured against, then insurer is liable proportionately for the loss insured against where both accidents can be separated. 27Hawaii333.

AUTOPSY

867-40 93Fla354, 114S444.
868-41 93Fla354, 114S444.

AUTREFOIS ACQUIT

870-77 156La891, 101S255; 156SC324, 153SE269.

AVER

873-15 10PaDist&Co 91 [quotCyc].

AVERAGE

873-29½-New. ; "average accidents." 40F(2d)410.

AVOCATION

874-41 239Mich663, 215NW8.

AWARD

876-68½-New. To adjudge; to give or assign by sentence or judicial determination. 69CalA60, 230P456.

AWE

876-71½-New. "Awe" is profound reverence and may be applied to things sublime. 21AlaA220, 107S35.

AWNING

876-73 144Miss749, 111S366.

BAIL

891-5 42F(2d)26.
891-10 [c] **"Admission to bail"** is order of competent court or magistrate that defendant be discharged from actual custody upon bail. 76Mont320, 246P 953, 48ALR1425. [d] **"Taking of bail"** consists in acceptance by competent court or magistrate or legally authorized officer, of undertaking of sufficient bail for appearance of defendant according to terms of undertaking, or that bail will pay to state a specified sum. 76 Mont320, 246P953, 48ALR1425.
891-16 [a] (4) Bail bond is process, to give assurance of prisoner's attendance in court, so that there may be submission to court's decree. 27F(2d)362.
891-18 339 Ill 146, 171NE122; 144Va 648, 131SE230 (recognizance is debt evidenced by record and is in first instance by parol).
892-25 3NJMisc772, 129A817.
892-26 3NJMisc772, 129A817.
893-44 3NJMisc772, 129A817.
894-47 16F(2d)422.
900-41 [c] **Double indemnity** is to cover case where verdict is in excess of bail requirement. 99NJEq213, 132A511.
900-43½-New. Ordinarily a constitutional provision prohibiting excessive bail is applicable only to criminal or quasi-criminal prosecutions. 316Mo 398, 289SW925.
901-54 103NJL542, 137A655.
901-58 85PaSuper238, 244 [citCJ].
904-89 But see 49RI 375, 142A619.
906-15 [b] **Sufficiency of original affidavit** as to form may not be assailed by motion to quash after appearance and judgment against defendant. 1NJMisc 169, 130A814.
906-16 1NJMisc169, 130A814.
908-33 247Mich566, 226NW237 (surety on bail bond is entitled to know, when he signs, extent of his responsibility).
908-46 6PaDist&Co 662.
913-15 [a] (3) Bond construed as appearance bond not bond to perform judgment of court. 168Ark700, 271SW 710 (under statute).
914-33 251Mich651, 232NW348 (sufficiency of deposit).
917-68 131Misc382, 225NYS735 (rearrest of defendant canceled bail bond).
918-85 NJCir 151A377(2dcase).
918-86 NJCir 151A377(2dcase).
920-1 7PaDist&Co 529, 530 [citCJ].
920-3½-New. Capias ad respondendum set aside where affidavit was entitled in a cause not pending. 3NJMisc1130, 130 A815.
920-3½-New. Capias ad respondendum set aside where the court did not adjudge plaintiff a nonresident or intending to depart the state. 3NJMisc1130, 130A815.
923-22 [c] **In absence of prejudice by plaintiff's delay,** summary judgment is authorized. 250Mich83, 229NW472.
924-34 247Mich566, 226NW237.
926-50½-New. A verdict, even where it is in favor of defendant, does not of itself discharge the sureties. 103NJL542, 137A655.
926-50¼-New. A verdict is under control of the court as regards liability for bail. 103NJL542, 137A655.
926-60 NJCir 151A377(2dcase).
926-60½-New. **Proceedings at common law.**-NJCir 151A377(2dcase).
928-84 168Ark700, 271SW710.
929-93 [b] **Liability of sureties does not mature** unless there is breach by defendant's failure to submit to judgment and until after return of execution showing he could be found. 168Ark 700, 271SW710.
930-16 168Ark700, 271SW710. [f] **Judgment with perpetual stay of execution** does not make surety liable on bond. 49RI 375, 142A619.
936-73½-New. [§ 125a] K½. **Amercement of Sureties.** A statute relating to bail in so far as it permits amercement of sureties to the amount of the bond in case of defendant's failure to appear has been held not to violate the Fourteenth Amendment of the federal constitution, as depriving sureties of their property without due process or to deny right to trial by jury. NJSup 142A818.
938-98 49RI 375, 142A619.
938-5 [b] **Surrender of principal** to exonerate surety must be before surety's liability is fixed. 66Utah282, 241P840.
941-40 3NJMisc772, 129A817.
941-41 3NJMisc772, 129A817.
941-43 3NJMisc772, 129A817.
944-85 [b] (2) Scire facias brought more than year after original judgment and subsequent to consent judgment may be barred. 82NH529, 136A355.
946-98 See also 3NJMisc772, 129A817.
951-81 [d] **Lost instrument** evidence sufficient to show "recognizance of bail" lost. 3NJMisc772, 129A817.
953-17 OklCr 287P429.
953-18 But see CalA 290P59.
953-18½-New. **The purpose of a recognizance is merely to insure** the presence for trial of a person accused of a bailable offense. 320 Ill 336, 150NE634, 43 ALR1230.
953-21 21AlaA537, 109S615; 180Ark 1160, 24SW(2d)859; 340 Ill 464, 173NE 8; 309Mo 397, 274SW423; 101TexCr 313, 276SW267; 104TexCr365, 284SW 552; 107TexCr648, 298SW575; 108Tex Cr400, 1SW(2d)886; 112TexCr124, 14 SW(2d)848(1stcase). [c] (2) Statute giving right to bail on appeal in misdemeanor cases held not repealed. 87CalA 393, 262P474.
954-22 21AlaA537, 109S615; 309Mo 397, 274SW423; 101TexCr313, 276SW 267; 104TexCr365, 284SW552; 107Tex Cr648, 298SW575.
954-23 21AlaA537, 109S615; 309Mo 397, 274SW423. [d] **In South Dakota.**-48SD378, 204NW999.
954-25 161Ga305, 130SE819.
954-26 [b] **Power to grant bail after conviction of felony** should be exercised only with greatest caution. Cal 291P 831.
954-28 3NJMisc636, 129A632; 106Tex Cr651, 294SW592; TexCr 28SW(2d)165 (depends on merits of particular record). [a] **Bail properly denied.**-TexCr 27SW(2d)167.
954-29 309Mo 397, 274SW423; 3NJMisc 876, 130A278; 108TexCr400, 1SW(2d) 886.
954-30 226AppDiv364, 235NYS112.
955-31 3NJMisc876, 130A278.
955-31½-New. The presumption that a charge of murder is for murder in the second degree not punishable capitally does not apply in applications for bail. 3NJMisc636, 129A632.
955-32 82CalA576, 255P887; 150Miss 680, 116S531; OklCr 269P785(2dcase); 101TexCr312, 276SW250 (evidence held not to warrant denying bail); 104Tex Cr365, 284SW552; 104TexCr364, 284 SW553. [b] (3) Prisoner should not be discharged on habeas corpus with or without bail where it cannot be said that evidence is so insufficient that verdict requiring capital sentence should not be permitted to stand. 82CalA576, 255P887. (4) Order refusing to admit to bail in capital case should be sustained if evidence points to accused and induces belief that he may have committed offense charged. 82CalA576, 255P 887. [c] 102TexCr590, 280SW771. [d] **Burden is on state** to make satisfactory showing that homicide would call for capital punishment to justify refusal of bail. 102TexCr542, 279SW471.
955-34 89Fla481, 104S855; 91Fla10, 107S921; 34NM422, 283P53(1stcase); OklCr 292P1060. [c] **What is meant by presence of proof evident or its alternative presumption great** has been explained in some cases. 309Mo 397, 274 SW423. [d] **Refusal of bail held not abuse of discretion.**-113TexCr294, 21SW (2d)512.
955-37 100TexCr134, 272SW458; 104 TexCr364, 284SW553; 104TexCr365, 284SW552; 110TexCr600, 9SW(2d) 1107; TexCr 9SW(2d)1109(2dcase).
956-38 104TexCr365, 284SW552; 105 TexCr37, 285SW327; 108TexCr400, 1 SW(2d)886. But see 111TexCr655, 13 SW(2d)835, 836(1stcase). [b] **In determining whether denial of bail in murder** prosecution was erroneous, source of evidence relating to self-defense will be considered. 111TexCr655, 13SW(2d) 835, 836(1stcase). [c] **Thus** uncontradicted evidence by accused that deceased was aggressor, and that accused shot while in dazed condition caused by blow by deceased, requires granting of bail. 102TexCr645, 279SW470; 105TexCr37, 285SW327.
956-39 307Mo 203, 270SW103; 309Mo 397, 274SW423; Tex 293SW1118; 101 TexCr175, 274SW610 (proof insufficient to deny bail where malice not shown); 109TexCr19, 2SW(2d)451; 110TexCr 629, 10SW(2d)543 (father instigating minor son to murder). [b] 309Mo 397, 274SW423.
956-39½-New. But where killing is unexplained, bail should be granted. 102 TexCr645, 279SW470; 107TexCr648, 298 SW575.
956-39¼-New. Bail should be allowed

except in case conviction for capital offense would likely result. 102TexCr 542, 279SW471.

956-40 82CalA576, 255P887, 888 [cit CJ]; 101TexCr313, 276SW267 (evidence insufficient to justify denial of bail). [a] 103TexCr229, 280SW580. [b] 101 TexCr312, 276SW250 (evidence insufficient); 101TexCr313, 276SW267; 107 TexCr648, 298SW575. [c] 102TexCr590, 280SW771. [d] **Evidence held insufficient.**–102TexCr271, 277SW1076 (in rape prosecution); 102TexCr542, 279SW471; 102TexCr541, 279SW472; 104TexCr364, 284SW553; 104TexCr365, 284SW552; 107TexCr648, 298SW575. [e] **Source of evidence** will be considered. 108TexCr 400, 1SW(2d)836.

956-41 21AlaA537, 109S615; 154Miss 230, 122S470; 101TexCr175, 274SW610.

956-42 93CalA575, 270P247; 107TexCr 640, 298SW583; 109TexCr467, 5SW(2d) 508; 110TexCr600, 9SW(2d)1107. [f] 105TexCr580, 290SW166.

957-43 OklCr 274P697; OklCr 290P 356.

957-45 91Fla10, 107S921; OklCr 274P 697; 104TexCr515, 284SW593. [a] 104 TexCr515, 284SW593. [b] **Effect of verdict of guilty** of murder in first degree should be considered in weighing probative force of evidence. 89Fla481, 104S 855. [c] **Evidence held sufficient** to justify refusal of bail. 82CalA576, 255P 887; 91Fla10, 107S921.

957-45½-New. Bail should be granted except in cases where evidence is such that fair jury would likely convict for capital offense. 102TexCr645, 279SW 470.

957-48 [c] (2) Identification sufficient to authorize denial of bail. 309Mo 397, 274SW423.

958-52 113TexCr96, 18SW(2d)1089(1st case) (where testimony raising issue of self-defense came from interested parties).

959-58 24F(2d)481 (bail authorized on arrest to determine whether suspension of sentence should be revoked); 166Ga 140, 142SE557.

959-71 229AppDiv511, 242NYS696. [c] But see 112TexCr229, 16SW(2d)123(1st case).

960-74 [a] **In Indiana.**–199 Ind658, 160 NE927.

961-80 98CalA784, 277P1050 (moral turpitude of offense and penalty considered).

961-80½-New. A statute denying bail until finger prints of the person charged as a felon have been taken is unconstitutional. 127Misc141, 215NYS412.

961-82 110TexCr629, 10SW(2d)543.

961-89 [a] (2) Denial of bail pending appeal has been held proper exercise of discretion where defendant's statement of condition was supported only by her own affidavit. 79CalA98, 248P1043.

961-91 100CalA352, 279P833(2dcase). [c] **Bail properly denied** on ground that confinement would injure health of defendant. 110TexCr237, 7SW(2d)1117.

961-91½-New. One accused of crime has a right to have bail determined despite the fact that he may be subject to restraint as insane. 93CalA575, 270P247.

962-92 307Mo 203, 270SW103 (defense based on expert testimony).

962-99½-New. Defendant may waive form of charge on oath, arrest, and information, and give valid bail. 134Misc 228, 235NYS173.

962-2 26F(2d)676.

963-4 98CalA784, 277P1050.

965-34 12F(2d)708; 69CalA143, 230P 669; 71CalA357, 235P60; 97CalA163, 275P510; CalA 290P59; 238Mich485, 213NW717.

966-35 [j] **In Virginia.**–146Va276, 135 SE713.

966-36 69CalA143, 230P669; 48SD378, 204NW999; 108TexCr618, 2SW(2d)267.

966-38 69CalA143, 230P669.

966-39 73CalA104, 237P801.

967-46 89Fla481, 104S855.

967-46½-New. , nor will the appellate court interfere after conviction of a felony except where circumstances of an extraordinary character have intervened since the conviction. 73CalA104, 237P 801.

967-53 22AlaA60, 112S96; 57ND508, 222NW651 (constitutional provision for bail before conviction is inapplicable). [a] (4) Statute governing supersedeas has no application to power to admit to bail pending review of conviction. 13F (2d)121. [h] 48SD395, 204NW1006 (no stronger showing by defendant required by Rev. Code [1919] § 5039 than previously required by § 4597); 48SD378, 204 NW999 (rule, that admittance to bail is matter of judicial discretion, restored by statute imposing condition that ends of justice demand admittance to bail). [i] **Bail granted where reasonable doubt of sufficiency of evidence** to sustain conviction appears from agreed statement of facts on application for bail. 50SD644, 211NW457.

968-54 Cal 291P831; 79CalA98, 248P 1043; 83CalA40, 256P440; CalA 286P 467 (where based on injury to health, it must be shown dangerously so); 48SD 378, 204NW999; 50SD303, 210NW50; 153Va954, 151SE286 (refusal to bail held not reversible error). [a] (2) 18F(2d) 689. (3) Bail is properly denied on appeal from conviction of causing poison to be delivered by mail to judge with intent to injure or kill him when there is danger of commission of similar offense. 18F(2d)689. (4) Pending appeal, convicted one is entitled to bail. 36F (2d)475. [k] 48SD378, 204NW999. [l] **Circumstances which warrant denial of application.**–48SD378, 204NW999. [m] **Circumstances warranting admittance to bail.**–48SD395, 204NW1006.

968-55 14F(2d)111; 71CalA357, 235P 60; 72CalA479, 237P801; 146Va276, 135 SE713.

968-56 89Fla481, 104S855. [c] **Sentence to life imprisonment** on verdict of murder in first degree does not change degree of offense as to granting bail. 89 Fla481, 104S855.

969-57 IndA 167NE154 (not granted where probability of reversal not shown).

969-58 14F(2d)111; 36F(2d)475.

969-59 72CalA479, 237P801; 95CalA42, 272P321.

969-60 [a] See also Ariz 281P944.

969-61 169La717, 125S865.

969-62 [a] (2) Under Constitution of 1921 person convicted of felony is bailable where minimum sentence of less than three years at hard labor is imposed, pending appeal. 164La163, 113S 803. [b] **In Missouri.**–310Mo 274, 275 SW536.

969-62½-New. After conviction of assault with deadly weapon and incarceration of defendant, court has no jurisdiction to admit him to bail, pending supersedeas on motion to quash judgment. 233 IllA53.

969-62¾-New. Applicant sentenced to forty-five years for murder is not entitled to bail under a statute applying to persons sentenced to fifteen years or less. 108TexCr618, 2SW(2d)267.

970-63 72CalA479, 237P801.

970-64 But see 57ND508, 222NW651.

970-65 Contra 104TexCr161, 283SW 795.

970-66 TexCr 28SW(2d)165.

970-68 [a] **Where conviction of manslaughter of defendant indicted for murder is reversed,** charge pending is manslaughter which is bailable. La 130S 348.

970-68½-New. Defendant, on reversal of conviction for first degree murder, may be released on bail pending new trial directed for failure to submit certain legal principles and reasonable doubt as to guilt. 27 OhNPNS1.

971-79 233Ky97, 25SW(2d)65.

971-80½-New. Where defendant accepts commutation of sentence after conviction, thereby waiving his right to appeal, his right to discharge on bail pending appeal is destroyed. 107TexCr 659, 298SW585.

971-81 [a] 156Miss355, 126S43.

971-83 91Fla236, 107S267.

971-84 74CalA178, 240P502; 85PaSuper238, 244[citCJ].

971-88 85PaSuper238, 244 [citCJ].

972-91 146Va276, 135SE713.

972-1 CalA 286P467 (pending appeal).

973-7 109Conn738, 147A670 (supreme court of errors). [k] **Court of quarter sessions.**–96PaSuper31.

973-10½-New. city courts, 70Utah219, 259P324.

973-14 [a] (2) Power of supreme court may be exercised in prosecution pending in court of general sessions which is then sitting, and without first applying to latter court. 226AppDiv364, 235NYS 112 (prosecution pending in court of general sessions then sitting). (3) Power of supreme court may be exercised by justice at special term. 226AppDiv 364, 235NYS112. [b] **In misdemeanor cases** Missouri constitution vests court of appeals with power to order bail. 310 Mo 274, 275SW536.

973-16 [b] **In Missouri.**–310Mo 274, 275 SW536.

973-20 CalA 289P231. [c] 33Wyo 374, 239P1045.

974-22 148Miss335, 114S744; 86Mont 297, 283P430 (local magistrates). [d] **Local magistrates are without power at common law** to take bail bond in case of violation of ordinance not constituting public offense. 86Mont297, 283P430. [e] **In Manitoba.**–[1929] 3DomLR799.

976-43 [b] **In California.**–74CalA178, 240P502.

978-60 10F(2d)504; 48SD378, 204NW 999. [b] (2) Where defendant has applied to trial court, he cannot make similar application to appellate court on same facts. IndA 169NE690.

978-61 10F(2d)504; 48SD378, 204NW 999. [a] (3) 48SD378, 204NW999. (4) Statement of trial judge to effect that he would never grant stay in such cases indicates that he did not exercise judicial discretion. 48SD378, 204NW 999.

978-61½-New. Judge of appellate court may consider application for bail in case of absence or disqualification of trial judge. 48SD378, 204NW999.

979-69 85PaSuper238, 244 [citCJ].

979-70 85PaSuper238, 244 [citCJ].

979-77 NJ 149A766.

981-93 NJ 149A766.

982-4 85PaSuper238, 244 [citCJ]. [b] (3) Police sergeant is without authority to fix bail for persons arrested. 28 Ariz278, 237P380, 44ALR1495.

982-5 [e] **Assistant prosecutor** in refusing to accept bail was acting as "quasi judicial officer." NJ 149A766.

983-20 111 Okl 240, 239P566.

983-32 22AlaA619, 118S675(2dcase); Mo 280SW702 (application first made to court of county where accused is held).

983-33 [c] **Proper diligence must be exercised** in making application. 12 F(2d)708.

983-34 [a] (3) Where appeal is pending in court of appeals and the trial court has denied bail, the court of appeals may admit defendant to bail without formal habeas corpus proceedings. 310Mo 274, 275SW536.

984-35½-New. Judge to whom application for bail pending appeal is made need not be satisfied that judgment will be reversed. 131Misc62, 226NYS689.

984-35¾-New. Application for bail pending appeal need not be made initially to appellate court. 36F(2d)475.

984-43½-New. County judge is without authority to deny bail without hearing. 212Ky351, 279SW330 (bailable offense).

984-46 CalA 288P708.

984-48 OklCr 274P697; OklCr 290P 356. [b] (1) OklCr 292P371(1stcase). [d] **Frankness on part of defendant** is expected in his application for bail as discretion of court is invoked. 3NJ Misc876, 130A278.

984-49 OklCr 269P785(2dcase).

984-51½-New. Courts act with decided caution in admitting to bail persons held under process of law on charges of murder. 3NJMisc876, 130A278.

984-52 106TexCr373, 292SW889.

985-53 Mo 280SW702; 101TexCr175, 274SW610; 104TexCr365, 284SW552; 105TexCr259, 288SW210; 107TexCr 648, 298SW575; 110TexCr604, 9SW (2d)1106; 110TexCr600, 9SW(2d)1107; 111TexCr655, 13SW(2d)835, 836(1st case); 112TexCr124, 14SW(2d)848(1st case); 111TexCr444, 15SW(2d)24; 112 TexCr493, 17SW(2d)820(1stcase) (burden on state to show malice in homicide case).

985-54 104TexCr365, 284SW552; 106 TexCr373, 292SW889; 107TexCr648, 298SW575; 111TexCr444, 15SW(2d)

24. [a] **Evidence held sufficient** to show express malice on issue whether accused was entitled to bail. TexCr 27 SW(2d)167.

985-54½-New. If the state shows proof evident or presumption great, the silence of accused or his failure to offer convincing proof in rebuttal will warrant denial of bail. 309Mo 397, 274 SW423.

985-57 Mo 280SW702 (refusal held erroneous); OklCr 290P356; 112TexCr 493, 17SW(2d)820(1stcase) (evidence insufficient to warrant denial of bail in homicide case). [c] **Evidence held sufficient** as proof evident or presumption great that petitioner was guilty authorizing denial of writ of habeas corpus. 309Mo 397, 274SW423.

985-58 CalA 286P467 (evidence held not to show confinement imminently dangerous to health of accused); 3NJ Misc636, 129A632; 3NJMisc876, 130A 278.

985-59 3NJMisc636, 129A632 (presumption of guilt is present, in all intermediate proceedings).

986-60 3NJMisc636, 129A632.

986-62 3NJMisc876, 130A278. See also 102TexCr490, 278SW433.

986-63 105TexCr303, 288SW234.

986-64 [a] 108TexCr251, 299SW901.

986-71½-New. An order granting bail, spread on the record, is res judicata and final as to the state on the question of the prisoner's right to release on bail. 114 Okl 228, 245P999.

986-71⅓-New. The court is without jurisdiction, on its own motion and without notice, to withdraw or set aside such order. 114 Okl 228, 245P999.

986-71¼-New. A sheriff is unauthorized to take bail in the absence of an order fixing the amount of the bond. 219 Ky132, 292SW746.

987-73½-New. St. § 1113 is not applicable, unless application for change of venue is made by the defendant. 210 Ky542, 276SW507.

987-76 [c] **But if already released,** prisoner has no right of review. 161La 625, 109S145.

987-77 102TexCr490, 278SW433.

987-78 22AlaA619, 118S675(2dcase).

987-80 72CalA479, 237P801; 48SD646, 205NW708.

987-81½-New. On denying the application some courts will not discuss the facts on law lest it prejudice defendant's rights. 114 Okl 228, 245P999.

987-82 215Ala1, 109S607.

988-87 See also 164La163, 113S803.

988-89 21AlaA537, 109S615.

988-89½-New. Reviewing court accepts statement of facts set up in petition for bail as true where uncontradicted. 36F(2d)475.

988-90 106TexCr651, 294SW592.

988-91 69CalA143, 230P669; 161Ga 305, 130SE819.

988-93 105TexCr303, 288SW234.

988-96 22AlaA619, 118S675(2dcase).

988-97 [d] **Denial of bail reversed.-TexCr** 9SW(2d)1109(2dcase).

988-1 229AppDiv603, 243NYS15.

988-2 36F(2d)475; 180Ark1160, 24 SW(2d)859; 87CalA393, 262P474 (court guided by extent of penalty imposed, in fixing bail on appeal in misdemeanor case); CalA 288P708; 233 Mich98, 206NW516; 229AppDiv603, 243 NYS15; 6PaDist&Co 162; 9PaDist& Co 812; 102TexCr50, 277SW146; 102 TexCr279, 277SW694; 105TexCr484, 289SW43. See also 98CalA784, 277P 1050. [a] (2) Judgment raising bond to ten thousand dollars is proper where petitioner for habeas corpus was armed with deadly weapon prepared to rob and kill if necessary. 113TexCr 416, 21SW(2d)297(2dcase). (3) Bail on vagrancy charge cannot be fixed with reference to procuring attendance to answer for other crimes. 340 Ill 464, 173NE3. [b] (1) 6PaDist&Co 162. (2) Where eighty thousand dollars is alleged to have been converted by defendant, bail of twenty thousand dollars is proper. 228AppDiv635, 238NYS61, [f] **Former convictions and acquittals** held not to warrant excessive bail. 164 La163, 113S803. [g] **Existence of doubt as to guilt** must be considered. 340 Ill 464, 173NE8. [h] **Character of accused** and whether he has criminal record may be considered. 340 Ill 464, 173NE8.

989-3 340 Ill 464, 173NE8.

989-5 40F(2d)503; 41F(2d)49; CalA 287P373; 150Miss680, 116S531 (bail fixed at five thousand dollars on charge of murder); 229AppDiv603, 243NYS15; 102TexCr50, 277SW146. [c] **Discretion not abused.-105TexCr484, 289SW43.** [d] **Court rule allowing deposit of cash bail with clerk** does not limit amount which may be fixed by court. 340 Ill 464, 173NE8.

989-5½-New. A person charged with a crime is not the one to determine whether he could give bail in a certain amount. 50Nev248, 256P512, 53ALR 395.

989-5⅓-New. Court has power in some jurisdictions to require proposed surety to pay into court specified sum, not in lieu of bail, but as collateral to surety's undertaking as bail if accepted. 96Pa Super31.

989-6 Mass 166NE855. [a] **Such prohibition necessarily includes denial** of all bail as well as its hedging in with conditions which are impracticable, unreasonable, or onerous of performance. 127Misc141, 215NYS412.

989-7 146Miss819, 112S170 [quotCJ entire paragraph].

989-7½-New. The provision of a state constitution forbidding excessive bail is held to be violated by a statute denying bail until finger prints of accused have been taken. 127Misc141, 215NYS 412.

989-8 340 Ill 464, 173NE8; 50Nev248, 256P512, 514 [quotCJ], 53ALR395; 107TexCr87, 296SW541.

989-9 340 Ill 464, 173NE8; 50Nev248, 256P512, 514 [quotCJ], 53ALR395; 107TexCr438, 296SW886; 107TexCr 638, 298SW589.

989-10 164La163, 113S803; 50Nev248, 256P512, 514 [quotCJ], 53ALR395; 105 TexCr484, 289SW43; 107TexCr638, 298 SW589.

989-11 340 Ill 464, 173NE8; 164La163, 113S803; 50Nev248, 256P512, 514 [quot CJ], 53ALR395; 102TexCr279, 277 SW694 (six thousand dollars excessive for liquor violation or assault to murder); 107TexCr30, 294SW544 (thirty five thousand and fifteen thousand dollars on charges of murder); 107TexCr 638, 298SW589.

989-12 26F(2d)676 (five thousand dollars bail for each of four defendants charged with a joint theft of twenty-seven thousand dollars in money); CalA 288P708; La 130S468(3dcase); 146Miss819, 112S170 [quotCJ entire paragraph]; 50Nev248, 256P512, 514 [quotCJ], 53ALR395; Okl 280P320 (twenty-five thousand dollars bail pending appeal from first degree manslaughter and sentence of twenty-five years); 103TexCr576, 281SW550; 105TexCr484, 289SW43; TexCr 298SW590; 110Tex Cr452, 10SW(2d)86; TexCr 22SW(2d) 937(1stcase) (five hundred dollars bail for theft of cattle held not excessive).

989-12½-New. Where defendant was convicted upon a number of charges of felony and sentenced to consecutive terms of imprisonment and bail was fixed as to each, the aggregate bail will not be held excessive where the several amounts are not separately excessive and no duplication of charges appears. 69CalA143, 230P669.

989-12⅓-New. Question of excessive bail involved one of mixed law and fact, requiring proper inquiry to determine matter correctly. 229AppDiv603, 243 NYS15.

990-13 41F(2d)49 (petition); 99NJ Eq213, 132A511.

990-14 166Ga140, 142SE557 (bail fixed by city court judge reduced by superior court); 229AppDiv603, 243NYS15; 105 TexCr484, 289SW43.

990-15 229AppDiv603, 243NYS15; 102 TexCr50, 277SW146 (bail reduced from fifteen hundred dollars to six hundred dollars in automobile theft).

990-16 102TexCr279, 277SW694 (six thousand dollars reduced in liquor law prosecution or assault to murder); 105 TexCr306, 288SW211; 110TexCr369, 8 SW(2d)679. [c] **Day laborer.-102Tex** Cr52, 277SW126.

990-18 CalA 287P373 (arbitrary and unauthorized when not based on showing of good cause); 107TexCr30, 294 SW544. [a] (2) Mere fear that further confinement pending appeal will impair prisoner's health or life does not justify reduction of bail. 69CalA143, 230P669. [b] **Reduction refused.-98** CalA784, 277P1050.

990-18½-New. Accused may not ordinarily be released from custody on reduced bail. 91Fla236, 107S267.

990-18⅓-New. Court on habeas corpus will not reduce bail fixed by examining magistrate unless amount fixed is excessive and clearly disproportionate to offense charged. OklCr 292P393(1st case).

990-19 229AppDiv603, 243NYS15. [a] (3) Other matters not considered. 98 CalA784, 277P1050. [b] **Accused applying for reduction of bail** has burden of proving that bail is excessive. 106 TexCr649, 294SW213.

991-21 50Nev248, 256P512, 53ALR395.

991-21½-New. On application to reduce bail refusal of court to preclude district attorney from questioning accused as to facts of case not error. 102 TexCr279, 277SW694 (where accused tendered as witness upon point of ability to make bond).

991-21⅓-New. It must clearly appear that the trial court abused its discretion before the higher court will reduce the bail. 98CalA784, 277P1050.

991-22 71CalA357, 235P60 (and without preliminary notice to defendant). [b] **Notice to defendant** of increase of bail after judgment is not a condition precedent to such increase. 71CalA357, 235P60. [c] **Increase on granting continuance** because of serious illness of defendant has been held arbitrary and excessive. 97CalA163, 275P510.

991-24 146Miss819, 112S170 [quotCJ].

991-25 69CalA143, 230P669 (increase of bail by trial court after conviction); CalA 287P373 (superior court has discretion to determine what constitutes good cause for altering bail fixed); TexCr 24SW(2d)434.

991-26 50Nev248, 256P512, 53ALR 395; 107TexCr1, 294SW587. [a] **Questions considered.-69CalA143, 230P** 669.

991-30 [a] **In Texas.-TexCr 31SW(2d)** 644.

991-31 CalA 289P231 (applicable to accused held for answer).

991-32 [b] **"Term "recognizance" includes bail bond.** 97PaSuper334.

991-34½-New. A recital that the sureties "are held and firmly bound, etc.," is sufficient promise to pay. 10F(2d) 455 (bail bond).

991-34⅓-New. A recognizance is not invalid because the sureties are severally bound, each for a part of the total. 19F(2d)375.

991-35 198NC490, 152SE400. See also 144Va648, 131SE230.

992-36 CalA 289P231. [e] 18F(2d) 856.

992-37 18F(2d)856.

992-38 136SC207, 134SE232.

992-39 100CalA252, 279P1059 (only those sections of statute in force when bail bond was executed formed part thereof).

992-43 But see 136SC207, 134SE232.

993-46 10F(2d)455.

993-51 But see 24F(2d)481.

993-52½-New. Where the undertaking specified the amount of bail required, it is not rendered invalid because the indorsement as to bail did not state the amount required and was made by the judge instead of by the clerk and was placed on the indictment instead of on the warrant. 115 Or466, 238P1112.

994-61 [c] See also 5F(2d)825.

994-62 164Ga419, 138SE897. [b] **Overruling of certiorari** held final order releasing sureties on bond. 164Ga419, 138SE897.

994-63 [c] **Continuances** are not covered by statutory requirement of provision that prisoner shall not depart

without leave of court. **MoA** 27SW(2d) 1045.

995-72 34GaA74, 128SE222 (condition for appearance before courthouse and from term to term not basis for scire facias to forfeit recognizance for failure to appear before superior court).

995-75 10F(2d)455.

996-77 [b] (1) 10F(2d)455. (2) Designation for appearance held sufficient. 102CalA566, 283P345(2dcase).

996-79 24F(2d)481 (specifying time and place sufficient, though term of court and nature of crime not stated).

996-81 339 Ill 146, 171NE122 (statute construed). [a] (1) But see 29F(2d)92.

996-82 See also 29F(2d)92.

997-87 24F(2d)481; **MoA** 27SW(2d) 1045.

997-89 [d] **Provision for appearance at terms to which cause may be continued** is not binding on sureties when not required by statute. **MoA** 27SW (2d)1045.

997-90 101TexCr595, 276SW710.

998-94 [e] **Description of offense held sufficient.**–36F(2d)252.

997-97 [b] (2) **TexCr** 13SW(2d)856 (2dcase); 112TexCr41, 13SW(2d)858 (1stcase).

999-98½-New. Bond showing accused charged by complaint for felony is insufficient as not showing accused legally charged with felony. 103TexCr61, 279SW817 (indictment necessary).

999-98¼-New. Reciting a violation of a federal statute, mentioning the section, is sufficient. 10F(2d)455.

999-99 84CalA403, 258P134.

1000-4 110TexCr238, 8SW(2d)123.

1000-5 [e] **Reference to indictment.**–216Ky276, 287SW724.

1000-6 108TexCr166, 300SW54.

1000-7 103TexCr61, 279SW817.

1001-16 [c] **Any question of variance between terms of bail bond and information** filed against defendant was waived by failure of surety to object to bond at time of its introduction in evidence. 29F(2d)92. [d] **Information held not to charge different crime** than bail bond. 29F(2d)92.

1002-18 **TexCr** 13SW(2d)856(2dcase); 112TexCr41, 13SW(2d)858(1stcase).

1003-28 84CalA403, 258P134, 137 [cit CJ]. [a] (4) or that demurrer to original indictment was sustained and the cause resubmitted to grand jury (84 CalA403, 258P134).

1004-31 103TexCr61, 279SW817.

1005-42½-New. Where defendant waives defect by appearance and execution of bond without objection, surety cannot object to sufficiency of warrant. 212Ky351, 279SW330.

1005-45 23F(2d)55.

1006-48 166Ga266, 142SE891; 103TexCr61, 279SW817.

1006-51½-New. Where prosecution is for felony and proof shows no indictment had, bond is without effect. 103 TexCr61, 279SW817.

1007-66½-New. A justice of the peace who has taken an illegal bond requiring accused to appear at the next term of the district court instead of at the present term may require a new bond for appearance at the present session. 33 Wyo 374, 239P1045.

1007-66¼-New. In such case the jurisdiction of the justice to require a new bond is at least concurrent with that of the district court until an indictment or information is filed. 33Wyo 374, 239 P1045.

1007-66¼-New. In such case no new affidavit, application, or other paper need be filed to give the justice jurisdiction to require a new bond. 33Wyo 374. 239P1045.

1007-66½-New. In such case, the mistake being mutual, accused cannot complain of the action of the justice in correcting it by requiring a new bond. 33Wyo 374, 239P1045.

1007-66¼-New. In such case the action of the justice in requiring a new bond will not be considered as an excess of jurisdiction except in a clear case. 33Wyo 374, 239P1045.

1007-67 7Alaska4.

1009-78 **Fla** 130S444(1stcase).

1009-83 109TexCr618, 6SW(2d)356 [quotCJ].

1010-96 **Mass** 166NE855.

1011-10 [a] (3) A United States commissioner has considerable discretion as to qualification of surety. 5F(2d)628.

1011-13 [b] (3) That property of surety is subject to liens does not disqualify him where his equity is sufficient. 105WVa8, 141SE403, 56ALR 1094. [e] **Residence and ownership of property within county** is not necessary unless required by statute. 105WVa8, 141SE403, 404 [citCJ], 56ALR1094.

1012-26 39F(2d)135 (United States commissioner).

1012-31 **TexCr** 23SW(2d)726(1stcase) (approval by sheriff only and not by trial judge).

1013-33 [a] (2) Sheriff's approval, without that of trial judge, is insufficient. **TexCr** 31SW(2d)811.

1013-34 [a] **Court commissioners** may approve bail bonds. 88CalA391, 263P 835. [b] **Approval of bond is not part of contract of sureties.**–88CalA391, 263 P835. [c] **Approval of bond twelve days after defendant was held to answer** and before an information is filed in superior court is valid. **CalA** 289P 896.

1013-43 318Mo 1134, 2SW(2d)750, 752 [quotCJ] (filing certified copy insufficient).

1014-48½-New. Amendment of record. Court of justice of the peace not being a court of record, a justice may amend the return of a recognizance so as to make it substantially sufficient if he can do so with aid of his memorandum. 144Va648, 131SE230.

1014-48¼-New. At what stage of proceeding such amendment should be permitted is in discretion of trial court in scire facias proceeding. 144Va648, 131 SE230.

1014-48¼-New. The amended return becomes a part of the records of the court permitting the amendment. 144 Va648, 131SE230.

1014-50 [a] **Clerk's mistake in stamping date of filing** does not invalidate bond. 29F(2d)92.

1015-58 **CalA** 289P231. [b] **Undertaking of bail is contract** between obligors and state. 204 Iowa1151, 216NW707.

1015-65 144Va648, 131SE230.

1015-66 13F(2d)949, 950 [citCJ].

1016-70 110TexCr285, 7SW(2d)578; **TexCr** 20SW(2d)423; **TexCr** 28SW(2d) 171 (incorporated in record). [a] (1) **TexCr** 298SW577; 108TexCr377, 300 SW937; 112TexCr142, 15SW(2d)617 (2dcase); 113TexCr120, 18SW(2d)623. (3) Where defendant has been enlarged on a void recognizance, appellate court is without jurisdiction to pass on the merits of defendant's appeal. 110TexCr 636, 10SW(2d)546. (4) Joint recognizance on appeal will not confer jurisdiction on court of criminal appeals. 113 TexCr427, 21SW(2d)298(1stcase). (5) Jurisdiction of court of criminal appeals is dependent on appeal bond. 113 TexCr646, 21SW(2d)1049; 113TexCr 462, 22SW(2d)922. (6) Only recognizance in statutory form gives appellate court jurisdiction. **TexCr** 27SW(2d) 183(2dcase); **TexCr** 27SW(2d)192 (recognizance defective). (7) Recognizance is essential to release during term. **TexCr** 32SW(2d)467. (8) Where defendant is enlarged on fatally defective recognizance in felony case, court is without jurisdiction. **TexCr** 32SW(2d) 197(2dcase).

1016-71 109TexCr473, 110TexCr57, 7 SW(2d)527; **TexCr** 17SW(2d)818(1st case) (nullity two days after court adjourned); **TexCr** 27SW(2d)542 (appeal dismissed in absence of recognizance within specified time). [b] **Recognizance entered into before notice of appeal** was given is insufficient to confer jurisdiction on appellate court. 113 TexCr100, 18SW(2d)652. [c] **Recognizance entered into after adjournment of term** confers no jurisdiction of appeal in misdemeanor case. **TexCr** 32SW(2d) 201. [d] **Recognizance entered into after adjournment of term** is nullity and confers no jurisdiction on appellate court. **TexCr** 32SW(2d)200.

1016-72 113TexCr288, 21SW(2d)508; **TexCr** 29SW(2d)349(1stcase); 110TexCr636. 10SW(2d)546.

1016-73½-New. Under some statutes an appeal bond must be approved by the court trying the cause or by its successor as well as by the sheriff. **TexCr** 298SW577.

1016-73¼-New. Under such statutes the court of criminal appeals is without jurisdiction to pass on the merits of the appeal in the absence of a recognizance or appeal bond so approved. **TexCr** 298SW577.

1016-73¼-New. Texas court of criminal appeals acquires no jurisdiction under an appeal bond given by defendant during the term at which he was tried. 108 TexCr227, 299SW898.

1016-73½-New. Bail bond and supersedeas may both be included in one bond. 42F(2d)26.

1016-74 102TexCr638, 279SW271; 106 TexCr261, 285SW317. [b] **Recognizance held insufficient.**–**TexCr** 20SW (2d)1064(2dcase). [c] **Circuit court of appeal may prescribe forms** by rule. 42 F(2d)26.

1016-75 111TexCr476, 14SW(2d)842. [c] **Bond approved by sheriff only** is without effect where statute requires trial judge also to approve it. 109TexCr473, 110TexCr57, 7SW(2d)527. [d] **Approval.**–**TexCr** 32SW(2d)182; **TexCr** 32SW(2d)184; **TexCr** 32SW(2d)185.

1016-76 **TexCr** 18SW(2d)676(1stcase) (defendant regarded as at large and court without jurisdiction where recognizance defective); **TexCr** 26SW(2d) 635; **TexCr** 32SW(2d)197(2dcase). [a] **Approval.**–113TexCr120, 18SW(2d) 623.

1016-77 102TexCr638, 279SW271; 104 TexCr273, 283SW794; 106TexCr261, 285SW317; **TexCr** 298SW577; 109TexCr24, 28SW(2d)461; 110TexCr116, 7SW (2d)958 (want of jurisdiction); 112 TexCr479, 17SW(2d)1064 (bond not approved by sheriff); **TexCr** 31SW(2d) 811(2dcase) (approval by sheriff only). [c] **Approval of bond** by district judge who presided at trial lacking appeal must be dismissed. **TexCr** 23SW(2d) 355.

1017-79 [b] **Absence of names of obligors from body of bond.**–127Kan700, 275P194. [c] **That all bonds prescribed by statute are not given** does not affect liability of person who signs bond on appeal to procure stay of execution and to procure release of defendant from custody if defendant is released from custody on bond and fails to comply with its conditions. 127Kan 194, 275P194.

1017-90 [a] **Recognizance held insufficient.**–**TexCr** 20SW(2d)1064.

1018-91 117Nebr549, 221NW708(1st case). [a] **Estoppel against dismissal** does not arise from county attorney's appearance to have recognizance forfeited for nonappearance on date named in recognizance. **Nebr** 229NW269.

1018-93 [d] **"Forthwith."**–117Nebr350, 220NW578. [e] **Nebr** 229NW269.

1018-96 117Nebr549, 221NW708; **Nebr** 229NW269.

1018-96½-New. A surety is bound by a bail bond properly executed although conditional delivery is not disclosed. 68Utah41, 249P125.

1019-2 113TexCr401, 22SW(2d)138(2dcase); **TexCr** 26SW(2d)246; **TexCr** 32 SW(2d)197(2dcase). [a] **TexCr** 31SW (2d)434(1stcase).

1019-4 101TexCr577, 276SW697; **TexCr** 298SW577; 109TexCr24, 28SW(2d) 461; 109TexCr314, 4SW(2d)547; **TexCr** 32SW(2d)197(2dcase). [a] (1) 100Tex Cr654, 274SW145; 101TexCr182, 274 SW153; 104TexCr325, 283SW792. (2) Appeal from felony conviction will not be dismissed because recognizance does not describe offense. **TexCr** 25SW(2d) 857(1stcase).

1019-5 **TexCr** 298SW577; 110TexCr 542, 9SW(2d)347; **TexCr** 24SW(2d) 439.

1019-7 But see **TexCr** 20**SW(2d)**1064 (2dcase).
1019-8 109**TexCr**24, 2**SW(2d)**461; **Tex Cr** 18**SW(2d)**676(1stcase). [a] (9) Other instances. 110**TexCr**285, 7**SW(2d)** 578; 112**TexCr**142, 15**SW(2d)**617(2d case). (10) Failure to state offense is felony. 113**TexCr**462, 22**SW(2d)**922. (11) Charging offense of driving car while intoxicated without stating car was driven in prohibited place. **TexCr** 23**SW(2d)**379.
1020-9 109**TexCr**508, 5**SW(2d)**513; 110**TexCr**112, 7**SW(2d)**1075.
1020-12 101**TexCr**122, 273**SW**862 (recognizance insufficient).
1020-15 110**TexCr**116, 7**SW(2d)**958; 110**TexCr**212, 8**SW(2d)**125; **TexCr** 28 **SW(2d)**550(1stcase); **TexCr** 32**SW(2d)** 465(1stcase).
1021-21 101**TexCr**633, 276**SW**923.
1022-34 110**TexCr**285, 7**SW(2d)**578. [a] (1) 104**TexCr**273, 283**SW**794; 109 **TexCr**508, 5**SW(2d)**513. (2) 101**TexCr** 63, 276**SW**923.
1022-35 112**TexCr**646, 18**SW(2d)**669; 112**TexCr**643, 18**SW(2d)**671.
1023-41 40**F(2d)**503 (order requiring surety company bond has been held abuse of discretion).
1023-44 192**Wis**151, 212**NW**263.
1023-45 76**Mont**320, 246**P**953, 48**ALR** 1425; 127 **Or**531, 273**P**326 (compliance with statute required). [d] **Cash bail required by statute.–Iowa** 227**NW**650.
1023-46 [a] **Purpose of cash bail given at preliminary examination** is to secure presence of accused in trial court. 50 **SD**276, 209**NW**539.
1023-46½-New. Irregularity of taking cash bail is waived by entry of a general plea of not guilty. 6**PaDist&Co** 593.
1023-47 38**F(2d)**517. See also **TexCivA** 7**SW(2d)**949.
1023-49½-New. In some jurisdictions money of a third person may be deposited by him as bail. 201 **Iowa**144, 206**NW**667.
1024-54 76**Mont**320, 246**P**953, 48**ALR** 1425 (rule applied to liberty bonds deposited under agreement that they were to remain as bail until written undertaking was furnished, and undertaking was furnished but not approved by judge); 192**Wis**151, 212**NW**263. [a] 11**PaDist&Co** 1 (deposit by minor); 192 **Wis**151, 212**NW**263.
1024-56 38**F(2d)**517; 192**Wis**151, 212 **NW**263. See also 7**PaDist&Co** 736. But see 50**SD**276, 209**NW**539; **TexCivA** 275 **SW**268.
1024-56½-New. In some jurisdictions statutes make no provision for defendant depositing cash in lieu of an appearance bond. **TexCivA** 275**SW**268.
1024-56¾-New. But in such jurisdictions if a justice of the peace in fact accepts such cash deposit in lieu of appearance bond, he cannot thereafter appropriate such deposit to payment of a fine and costs without the consent of defendant. **TexCivA** 275**SW**268.
1024-56¼-New. In such case, although defendant might be subject to a second arrest for failure to give an appearance bond he would not thereby be deprived of his right to have deposit returned to him if he should make his appearance on day required by the court. **TexCivA** 275**SW**268.
1024-56⅛-New. But cash accepted by a sheriff as additional security to a bail bond is held by him subject to the depositor's liability on the principal obligation. **TexCivA** 7**SW(2d)**949.
1024-56⅛-New. In such case the county, if charged with notice of the facts, cannot obtain, or assert, any greater right in the funds than can the sheriff. **TexCivA** 7**SW(2d)**949.
1024-60 [b] **In suit to recover money deposited by plaintiff to secure release of person arrested** burden of proof is not on defendant to show that arrest was not in violation of penal code. 28 **Ariz**278, 237**P**380, 44**ALR**1495.
1024-61 [c] (1) 151**Wash**403, 276**P**94. [e] **Notice to police officer illegally accepting deposit.**–85**PaSuper**238.
1024-62 38**F(2d)**517; 127 **Or**531, 273**P** 326 (compliance with statute required); 9**PaDist&Co** 39; 192**Wis**151, 212**NW** 263. [c] **Third person who deposited money with police sergeant** to secure release of prisoner is not entitled to recover money on forfeiture where police sergeant was unauthorized to receive such money as bail. 28**Ariz**278, 237**P** 380, 44**ALR**1495.
1025-64½-New. In suit to recover liberty bonds furnished as bail in place of cash, under stipulation at time of their deposit, that bonds were substantial equivalent of actual money or cash to amount of their value, plaintiff cannot deny equivalent of deposits. 76**Mont** 320, 246**P**953, 48**ALR**1425.
1025-64¼-New. Plaintiff in such suit who furnished such bonds for release of a prisoner in custody is estopped to assert court's lack of authority to receive bonds as bail. 76**Mont**320, 246**P** 953, 48**ALR**1425.
1025-64¾-New. Fact that sheriff did not receive statutory certificate of deposit before releasing prisoner does not entitle plaintiff in such suit to return of bonds where prisoner was in fact released. 76**Mont**320, 246**P**953, 48**ALR** 1425.
1025-64⅛-New. Evidence has been held insufficient to sustain the allegations of a petition for recovery of money deposited as bail after forfeiture noted. 36 **GaA**584, 137**SE**413.
1025-64⅛-New. Money given to a sheriff to release a prisoner from jail and subsequently forfeited for failure of the prisoner to appear for trial cannot be recovered back although the act of the officer in accepting the deposit was unlawful. **TexCivA** 289**SW**741.
1025-64⅞-New. But acceptance by a sheriff of a deposit as additional security to a bail bond is not wholly illegal in the sense that he could avail himself of it to the injury of one depositing money. **TexCivA** 7**SW(2d)**949.
1025-64⅛-New. Prosecuting witness is not entitled to compensation, for the wrong done him, out of cash bail. 9 **PaDist&Co** 39.
1025-67½-New. Proceedings to determine ownership. 192**Wis**151, 212**NW** 263.
1025-72 But see 128**Me**441, 148**A**563.
1026-75½-New. Both sureties on separate bonds are discharged on substitution of another surety for the surety surrendering defendant without associate's consent. 22**F(2d)**8.
1026-75⅛-New. Surety held not entitled to be exonerated because the principal was released without a date certain being specified for his appearance and because personal service of an order so to appear was necessary. 100**CalA** 99, 279**P**1029.
1026-80 36**F(2d)**682.
1026-80½-New. A surety bound only in part is not discharged by the substitution of cosureties without consent. 19**F(2d)**375.
1026-81 236**Ky**48, 32**SW(2d)**562. [a] **One surety cannot consent for others.**–236**Ky**48, 32**SW(2d)**562.
1026-87 145**Va**468, 134**SE**688.
1027-89 213**Ky**570, 281**SW**538, 539 [quotCJ entire section] 45**ALR**1034.
1027-92 33 **OklCr**364, 244**P**457.
1027-95 100**CalA**99, 279**P**1029 (where absconding principal is in custody of sheriff of foreign state awaiting extradition); 144 **Okl** 242, 291**P**90. [a] **Offer to surrender while temporarily in state on requisition to other state.**–144 **Okl** 242, 291**P**90.
1027-99 213**Ky**570, 281**SW**538, 45**ALR** 1034; 236**Ky**48, 32**SW(2d)**562. [c] **Sureties not discharged.**–112**TexCr**567, 18**SW(2d)**672 (where judgment nisi forfeiting bond entered prior to arrest).
1028-14½-New. Where principal under bond is released from jail to federal officers, escape from federal officers does not release securities. 41**GaA**779, 154**SE** 725.
1029-20 289**Pa**159, 137**A**131, 132 [quot CJ].
1029-23½-New. Condition precedent to liability on a bond is that an indictment has been returned. 111**TexCr**377, 12 **SW(2d)**1033(1stcase).
1031-33½-New. Where bail is reduced, the original bond is not exonerated until a new bond is furnished. 96**CalA** 412, 274**P**604.
1031-33¼-New. Court setting aside order exonerating bail should restore order previously existing fixing bail which was exonerated. **CalA** 287**P**373.
1031-36 106**Conn**114, 137**A**394, 395, [citCJ]; 221**AppDiv**776, 223**NYS**466, 467 [citCJ]. See also 49**Philippine**954. [d] **Where judgment is reversed without ordering new trial,** bail will be exonerated. 201**Cal** 601, 258**P**73.
1031-39 [a] (4) Where the condition of the bond is that accused shall "appear . . . and if convicted render himself in execution thereof," and he does appear and plead guilty but sentence is postponed, and accused fails to appear for sentence, the sureties are liable. 169**Ark**167, 273**SW**367.
1032-42 57**ND**619, 223**NW**697.
1032-43 [a] **Suspension of sentence** until definite date does not release sureties. 38**F(2d)**517.
1032-53½-New. Bail is not exonerated where a demurrer to the indictment is sustained without leave to amend, the case is resubmitted to the grand jury, a new indictment is found on the same facts, and both indictments are consolidated with defendant's consent but without knowledge of the sureties. 84 **CalA**403, 258**P**134.
1032-55 29**F(2d)**92 (in absence of motion for dismissal).
1033-63 221**AppDiv**776, 223**NYS**466.
1033-64½-New. In New York, where conviction is reversed without ordering a new trial, the appellate court must direct that bail be exonerated. 221**App Div**776, 223**NYS**466.
1033-66 154**Tenn**88, 290**SW**20 [quot CJ].
1033-67 207 **Iowa**1109, 224**NW**56 (must know of defendant's whereabouts).
1033-69 [b] **Abide by judgment.**–22 **AlaA**193, 114**S**15.
1034-70 289**Pa**159, 137**A**131; 154**Tenn** 88, 290**SW**20 [quotCJ].
1034-72 36**F(2d)**682; 41**F(2d)**520; **CalA** 289**P**231; **CalA** 290**P**59; **IndA** 170 **NE**343 (failure to quash indictment held immaterial); 232**Ky**166, 22**SW**(2d)576; 2**LaA**597; 289**Pa**159, 137**A**131.
1034-73 154**Tenn**88, 290**SW**20 [quot CJ].
1034-74 84**CalA**403, 258**P**134.
1034-77 **Wash** 286**P**846 (no liability for subsequent nonappearance).
1034-79½-New. that he had a good defense to the indictment; 159**Tenn**396, 19**SW(2d)**241.
1034-80½-New. that the accusation in a city court was not signed by the solicitor of the court; 161**Ga**551, 131**SE** 288.
1034-83½-New. Failure of the court to certify a copy of entry of judgment upon the minutes of court as required by statute does not excuse failure of the principal to surrender himself to the sheriff. 57**ND**619, 223**NW**697 (reason for rule stated).
1034-85 But see **IndA** 170**NE**343.
1035-89 102**CalA**566, 283**P**345(2dcase).
1036-1½-New. A bond on appeal has been held sufficiently complied with by appearance before the justice to whom the proceedings were remanded. 193 **NC**467, 137**SE**308.
1036-2 23**F(2d)**55.
1036-7 Contra 23**F(2d)**55.
1036-11 4**F(2d)**797.
1037-16 [f] **Surety cannot assume court will commit accused to custody** at any time after his appearance for trial. **CalA** 290**P**59.
1037-21 26**F(2d)**104; 88**CalA**385, 263 **P**833; 88**CalA**388, 263**P**834. [c] (4) 88**CalA**391, 263**P**835. [e] **Continuance of trial without notice to sureties** does not discharge them. 88**CalA**391, 263**P** 835.
1040-43½-New. After conviction has been affirmed and mandate has been spread in lower court accused should surrender and on his default, sureties must surrender him. **Okl** 286**P**783.
1040-52½-New. A surety on an appearance bond for a consideration paid must perform the obligation unless prevented by act of God, law, or principal. **TexCivA** 15**SW(2d)**692.

1040–52½–New. Sureties are liable for the appearance of accused, liberated on bail, unless prevented by God, obligee, or the law. 97**CalA**688, 276**P**352.

1041–61 [b] See also 87 **IndA**97, 155 **NE**217.

1041–64 205 **Iowa**707, 216**NW**17 (surety cannot lessen liability). [c] **Includes payment of fine.**–205 **Iowa**707, 216**NW** 17. [d] **Liability is determined by contract.**–**CalA** 290**P**59.

1041–65 22**F(2d)**8 (surety's liability cannot be extended by implication). [a] **Not liable for costs of proceedings.**–205 **Iowa**707, 216**NW**17.

1041–68 110**TexCr**238, 8**SW(2d)**123.

1042–75 210**Ky**418, 276**SW**113; 131 **Misc**401, 227**NYS**163.

1042–76 100**TexCr**73, 271**SW**918 (statute liberally and not literally construed).

1042–80 244 **IllA**484; 207 **Iowa**1109, 224**NW**56. [c] **At any time irrespective of agreement** with principal surety may surrender principal to sheriff. **TexCivA** 15**SW(2d)**692 (surety not released from agreement to remain surety till case called for trial).

1043–90 50**Philippine**209.

1043–90½–New. Surety telling officer he surrenders principal while latter is in jail is sufficient surrender. 102**Tex Cr**97, 277**SW**649.

1043–90½–New. A surety is not discharged by production and surrender of accused in open court until the court accepts surrender. 50**Philippine**209.

1044–97 164**Ga**419, 138**SE**897; 102**Tex Cr**97, 277**SW**649. But see 205 **Iowa**707, 216**NW**17. [c] **Supersedeas bond** given in a case where restitution and fine were imposed is not satisfied by surrender of body of principal. 114**Nebr**280, 207**NW** 29.

1044–5 102**TexCr**97, 277**SW**649 (relieves surety).

1044–6 [c] (2) 102**TexCr**97, 277**SW**649. (4) Code Cr. Proc. art. 333, providing that surety desiring to surrender principal may upon making affidavit obtain warrant for principal's arrest, should be liberally and not literally construed. 100**TexCr**73, 271**SW**918.

1045–15 289**Pa**159, 137**A**131.

1045–16 289**Pa**159, 137**A**131.

1045–18 [a] (4) Where bond required appearance at next term, attempted forfeiture of bond before expiration of first term is premature. **IndA** 168**NE**128.

1045–19 289**Pa**159, 137**A**131.

1045–21½–New. Penalizing of sureties unable by no fault of their principal to perform a condition of the bond, or the enriching of the public treasury, is no part of the object at which the proceeding to forfeit the recognizance is aimed. 320 **Ill** 336, 150**NE**634, 43**ALR**1230.

1045–21½–New. Response of a surety in proceedings to forfeit bail must be taken as true if not contradicted by the record or other evidence. 219**Ky**132, 292**SW**746.

1045–21¼–New. Where more than five months elapsed after release on bond before fugitive was called into court for a hearing upon the affidavit for arrest, the state has been held not entitled to forfeiture of the bond. 167**La**407, 119 **S**408.

1045–21½–New. Bail given to secure release of accused illegally arrested without a warrant cannot be estreated. **Man** [1928] 3**DomLR**222.

1045–21½–New. The state, offering a bond in forfeiture proceedings, must explain by averment and proof the variance in the signature of the principal to the bond and as set forth in the scire facias. 112**TexCr**643, 18**SW(2d)**671.

1045–21½–New. In proceedings to forfeit a recognizance bond, under statute, taken and approved by the sheriff, it must be shown that the amount of the bond is fixed by court order. **IndA** 168 **NE**128.

1045–21½–New. Forfeiture of bail bond given pending appeal from conviction held not erroneous on reversal and remand for further proceedings including new trial. 35**PortoRico** 438.

1045–22 [b] 35**PortoRico** 438. [d] **Recognizance bond must be forfeited by civil action** under requirements of civil procedure in absence of statute or inability to comply with its provisions. **IndA** 168**NE**128. [e] **Statute providing for forfeiture of recognizance bonds summarily** and without pleadings must be construed strictly. **IndA** 168**NE**128.

1045–26½–New. Amendment of accusation in forfeiture proceedings. Where sureties set up as a defense the absence of the signature of the solicitor of a city court from the accusation filed in such court, the court may properly permit such officer to sign the accusation and direct verdict against the sureties. 161 **Ga**551, 131**SE**288.

1046–28 [a] **Statute directing forfeiture is mandatory,** excluding judicial discretion. 339 **Ill** 146, 171**NE**122.

1046–29 117**Nebr**42, 219**NW**794. But see 7**Alaska**4.

1046–31½–New. Where bond for one accused of felony held by magistrate to answer to district court, it could not demand compliance until indictment returned. 103**TexCr**61, 279**SW**817.

1046–33 249 **IllA**205; 204 **Iowa**1151, 216**NW**707; 100**TexCr**577, 272**SW**194.

1046–34 339 **Ill** 146, 171**NE**122; 205 **Iowa**1055, 218**NW**918; 117**Nebr**42, 219 **NW**794 (personal notice to accused held unnecessary).

1046–35 339 **Ill** 146, 171**NE**122.

1046–35½–New. Where defendant is arraigned on a complaint in a prosecution required to be instituted by indictment or information and pleads not guilty and gives bond for his appearance to answer such complaint, and thereafter the county attorney files an information and the case is set and called for trial and the bond is forfeited without issuance of any warrant or any notice of filing of the information as setting of the case for trial, the forfeiture is void. 111 **Okl** 240, 239**P**566.

1046–35½–New. Although an accusation filed in a city court is not signed by the solicitor of the court, the court, during its pendency, may order a rule nisi calling upon the principal and his sureties in a recognizance and requiring appearance of defendant to answer the charge. 161**Ga**551, 131**SE**288.

1047–36 29**F(2d)**92.

1047–37 29**F(2d)**92; 339 **Ill** 146, 171**NE** 122; 117**Nebr**42, 219**NW**794. But see **Man** [1927] 1**DomLR**893, 47**CanCrCas** 251, [1927] 1**WestWkly**182.

1047–38 **IndA** 168**NE**128 (mailing of notices held insufficient).

1047–42 205**Cal** 476, 271**P**897; 112 **Okl** 298, 240**P**1069; 154**Tenn**88, 290**SW**20 [quotCJ]. [d] **Statute relating to docketing of action to forfeit is directory** and without injury by failure to enter case on civil docket reversal is unwarranted. **TexCr** 31**SW(2d)**1087(2dcase).

1047–43 [a] But see 254 **IllA**545. [b] 110**TexCr**238, 8**SW(2d)**123. [c] **In Illinois.**–254 **IllA**535; 254 **IllA**545.

1047–45 169**Ark**167, 273**SW**367; 154 **Tenn**88, 290**SW**20 [quotCJ]. But see 100**TexCr**577, 272**SW**194.

1047–46½–New. The essential requirement in declaring a forfeiture is that the court should find as a fact that the bond had been executed in a particular case, and that there has been default in some one of the conditions of the bond. 112 **Okl** 298, 240**P**1069.

1047–46½–New. That default is recorded on original return instead of amended return, which became part of records of court permitting it, is immaterial. 144**Va**648, 131**SE**230.

1047–46¼–New. Appearance of the principal in court after entry of conditional judgment of forfeiture does not prevent the court from entering final judgment on determining that former absence was without excuse. 154**Tenn** 88, 290**SW**20.

1047–46½–New. Bail forfeiture after nonappearance of accused or bondsman, at the term at which accused was bound over, has the force of judgment as of that term. 82**NH**258, 132**A**679.

1047–46½–New. While a valid nisi judgment declaring forfeiture exists, the state cannot take second forfeiture and enter a second nisi judgment. **TexCr** 4 **SW(2d)**49.

1047–46½–New. Under some statutes, an erroneous nisi judgment cannot be vacated and a new one entered at a subsequent term, but the original judgment may be amended. **TexCr** 4**SW(2d)** 49.

1047–46½–New. Entry of judgment is not prevented by dispute between use-plaintiffs and county as to amount due them. 12**PaDist&Co** 703.

1048–47 [a] (1) 29**F(2d)**92 (entry in clerk's docket held sufficient); 102**CalA** 566, 283**P**345(2dcase); 50**Philippine**209.

1048–48 23**AlaA**354, 128**S**901. [a] (2) Notice of conditional judgment should be served thirty days prior to day on which defendants are directed to appear. **Ala** 128**S**899(2dcase). (3) Literal and verbal compliance unnecessary. 23**AlaA** 354, 128**S**901. (4) "Next session" of court begins at expiration of thirty days from service of required notice. **Ala** 128 **S**899(2dcase). (5) Grounds and effect of declaring judgment nisi void. **TexCr** 31**SW(2d)**1087(2dcase) (order held not erroneous).

1048–49 [a] (4) Judgment including interest is fundamentally erroneous. 112**TexCr**646, 18**SW(2d)**669.

1049–58 29**F(2d)**92; 112 **Okl** 298, 240 **P**1069; 135**Wash**640, 238**P**639 (judgment valid on its face not subject to collateral attack in proceeding to prohibit court which declared forfeiture from entertaining supplemental proceedings).

1049–59 [c] **In Tennessee.**–158**Tenn** 246, 12**SW(2d)**717 (one false return of "executed" not equivalent to return "not found").

1049–59½–New. A valid judgment of forfeiture and judgment against the sureties in a bail bond cannot be set aside in a collateral proceeding. 214**Ky** 200, 282**SW**1085.

1049–59½–New. Until a judgment of forfeiture is modified or set aside, it is valid and binding on all the world. 320 **Ill** 336, 150**NE**634, 43**ALR**1230.

1049–63 154**Tenn**88, 290**SW**20 [quot CJ]. [c] 35**PortoRico** 438.

1049–64 154**Tenn**88, 290**SW**20 [quot CJ]. See also 244 **IllA**484.

1049–64½–New. The courts are not lenient in relieving bondsmen where the object of giving bail was to enable defendant to escape penalties. 145**Wash** 197, 259**P**382.

1049–65 4**F(2d)**797 (court cannot remit in case of willful default); 320 **Ill** 336, 150**NE**634, 43**ALR**1230; 82**NH**258, 132**A**679; 218**AppDiv**541, 218**NYS**420; 225**AppDiv**572, 233**NYS**643; 229**AppDiv** 515, 242**NYS**654 (surety cannot claim relief as of right). [e] **In United States.**–4**F(2d)**797. [f] **Exoneration from penalty** in bail bond in Illinois courts is governed by statute and not by common law. 4**F(2d)**797. [g] **In Illinois.**–4**F(2d)**797. [h] **In California.**–85**CalA**301, 259**P**353.

1050–66 107 **Okl** 251, 231**P**292 (order of forfeiture not subject to collateral attack).

1050–71 245**NY**419, 157**NE**515; 218**App Div**541, 218**NYS**420. But see 150**Miss** 545, 117**S**533.

1051–72 **IndA** 170**NE**343; 210**Ky**418, 276**SW**113; 82**NH**258, 132**A**679; 245**NY** 419, 157**NE**515; 219**AppDiv**80, 219**NYS** 328; 230**AppDiv**358, 244**NYS**731; 132 **Okl** 298, 270**P**567 [quotCJ] (abuse of discretion); 5**PaDist&Co** 59; 48**Philippine**139; 154**Tenn**88, 290**SW**20 [quot CJ]; 158**Tenn**246, 12**SW(2d)**717.

1051–73 230**AppDiv**358, 244**NYS**731 (after principal has been apprehended); 145**Wash**197, 259**P**382 (remission properly refused defendant who forfeited bail and attempted to escape). [b] **Remission of forfeitures of bail furnished for habitual criminals** used to defeat justice is not favored. 229**AppDiv**515, 242 **NYS**654. [c] **Refusal to vacate order of forfeiture held not abuse of discretion.**–**Okl** 290**P**1098.

1051–74 50**Philippine**209 (forfeiture of half amount of bond held proper where accused paid fine).

1051–75 154**Tenn**88, 290**SW**20 [quot CJ].

1051–79 See also 105 **Okl** 72, 231**P**505.

1051–82 218**AppDiv**541, 218**NYS**420. [a] **In New York.**–245**NY**419, 157**NE** 515.

1052–84 Contra 12**PaDist&Co** 76.
1052–87 6**F(2d)**897. [a] (11) or that judgment of forfeiture was entered on bonds without service of process on sureties (158**Tenn**246, 12**SW**(2d)717). (12) Failure of defendant to appear held inexcusable. 208**Cal** 596, 283**P**289.
1052–88 219**AppDiv**80, 219**NYS**328. [a] (3) Power to try defendant for misdemeanor in his absence will not relieve from forfeiture. 6**F(2d)**897. [b] (2) Infirmity of information is no defense to surety who failed to produce principal. 220**AppDiv**782, 222**NYS**162.
1052–89 219**AppDiv**80, 219**NYS**328. [a] 32**F(2d)**110.
1053–92 39**F(2d)**428; **IndA** 170**NE**343; 207 **Iowa**1109, 224**NW**56; 229**AppDiv** 515, 242**NYS**654. [b] (1) 97**CalA**688, 276**P**352 (where accused fled after issuance of deportation warrants); 12**Pa Dist&Co** 582. (3) Arrest on deportation proceedings will not exonerate sureties where accused was at liberty on bail when case was called in state court. 97 **CalA**688, 276**P**352. (4) Surety is not entitled to relief because of principal's incarceration in different jurisdiction for second and different offense against laws of that jurisdiction. 32**F(2d)**110.
1053–94 But see 112**TexCr**171. 15**SW (2d)**622. Contra 11**PaDist&Co** 107. [a] (2) Where defendant is arrested and tried in another county and sent to penitentiary for different offense, court will relieve from forfeiture on equitable grounds. 9**PaDist&Co** 39.
1053–95½–New. The courts are lenient in relieving bondsmen from forfeiture, where they are diligent in returning the person who has forfeited bail. 145**Wash** 197. 259**P**382.
1053–97 See also 150**Miss**545, 117**S**533.
1053–98 But see 210**Ky**418, 276**SW**113. [c] **Sufficiency of delivery to sheriff.**–205 **Iowa**1055, 218**NW**918.
1053–1 41**GaA**779, 154**SE**725; 82**NH** 258, 132**A**679; 154**Tenn**88, 290**SW**20.
1054–2 210**Ky**418, 276**SW**113; 82**NH** 258, 132**A**679; 219**AppDiv**80, 219**NYS** 328; 10**PaDist&Co** 380; 154**Tenn**88, 290 **SW**20.
1054–5 6**F(2d)**897.
1054–6 5**PaDist&Co** 59; 48**Philippine** 139, 143 [quotCJ].
1055–8½–New. One surrendered to sheriff by his surety on his appearance bonds, before his case was called for trial, is entitled to judgment against the surety for the amount paid the latter on the faith of his agreement to become and remain his surety. **TexCivA** 15**SW (2d)**692.
1055–8½–New. Before surrender will relieve the bail from further obligations on forfeited recognizance it must be shown that the bail, acting in good faith, actually surrendered the principal to the proper officer and that the officer accepted the surrender. **MoA** 20**SW(2d)** 960.
1055–12 205 **Iowa**1055, 218**NW**918.
1055–16½–New. Commissioner in district other than that of indictment has no jurisdiction to exonerate surety, and his attempt to do so is void. 23**F(2d)** 55.
1055–17 10**PaDist&Co** 380.
1056–20½–New. Proceedings provided for vacating judgment generally may be invoked to set aside a forfeiture where time for special proceeding has passed. 105 **Okl** 72, 231**P**505.
1056–20½–New. After cash bail is paid over to comptroller on judgment against surety and mingled with city funds, it cannot be summarily ordered paid back. 229**AppDiv**515, 242**NYS**654.
1056–20¼–New. A judicial order relieving sureties of liability is necessary. 50**Philippine**209.
1056–24 229**AppDiv**515, 242**NYS**654. [a] (4) That fugitive after being captured or surrendering is acquitted does not alone prove people lost nothing. 229 **AppDiv**515, 242**NYS**654.
1056–25½–New. One in default of bail bond cannot be heard by attorney as to any motion while default exists. 41**F (2d)**520.
1056–28 **Okl** 286**P**783; **Okl** 290**P**1098. [c] **Abuse of discretion in refusing to vacate forfeiture not shown.**–**Okl** 286**P** 783.
1057–30½–New. A former county attorney who was in office at the time of entry of judgment of forfeiture, and entitled to part of the sum recovered thereon, is an interested party, and can appeal from judgment vacating forfeiture. 214**Ky**200, 282**SW**1085.
1057–34½–New. Setting aside judgment of forfeiture of bail bond satisfied the bond and purged the security, deposited as collateral for the bond, of any illegality. **TexCivA** 7**SW(2d)**949.
1057–37 100**CalA**252, 279**P**1059 (bondsman under statute held entitled to have action commenced against it before judgment can be entered on bond); 159**Tenn** 396, 19**SW(2d)**241. [a] **Statute providing for bringing of action on forfeited recognizance bond** is still in force in Indiana. **IndA** 168**NE**128.
1057–40 125**Me**217, 132**A**518; 159**Tenn** 396, 19**SW(2d)**241; 144**Va**648, 131**SE**230 (award of execution may be had on recognizance in proceeding by writ of scire facias).
1058–41 19**F(2d)**378; 145**Va**468, 134**SE** 688. [c] **Scire facias for execution on a recognizance,** after reciting recognizance and default of appearance, is a mere rule against obligors to show why commonwealth may not have execution against them for amount stated in recognizance. 144**Va**648, 131**SE**230.
1058–42½–New. Proceeding by scire facias is within meaning of statute that no action or judgment on recognizance shall be defeated by defect in form of recognizance. 144**Va**648, 131**SE**230.
1058–44 125**Me**217, 132**A**518.
1059–47 117**Nebr**42, 219**NW**794.
1059–47½–New. Rights of parties in scire facias to enforce recognizance are same as in action on recognizance, although form of pleas may be different. 144**Va**648, 131**SE**230.
1059–57 [b] (26) Where accused pleaded guilty and was released on bond pending sentence, and clerk entered a judgment which (erroneously) showed that defendant had been turned over to custody of the sheriff, erroneous judgment is no defense to an action on bond. 169**Ark**167, 273**SW**367. (27) That court was without authority to accept bail after conviction, no appeal having been taken. 145**Va**468, 134**SE**688. [b] (28) That accused could have been tried in his own absence. 232**Ky**166, 22**SW (2d)**576.
1060–61 [a] **Failure of justice of peace to state in transcript public offense charged** does not constitute defense. 112 **Okl** 298, 240**P**1069.
1060–62 29**F(2d)**92.
1060–70 [a] (1) 144**Va**648, 131**SE**230. (2) Court in which amended return of recognizance is permitted may issue scire facias. 144**Va**648, 131**SE**230. [c] **Court where original bond filed.**–Circuit court is without jurisdiction where original bond filed in supreme court. 318 **Mo** 1134, 2**SW(2d)**750.
1061–82 19**F(2d)**375.
1061–87 36**F(2d)**252.
1062–99 19**F(2d)**375.
1062–1½–New. But return showing only one of sureties served does not support default judgment against sureties is unauthorized. 102**TexCr**137, 277**SW** 388.
1062–2 159**Tenn**396, 19**SW(2d)**241 (general appearance renders defects immaterial).
1062–8½–New. Motion to dismiss action of scire facias against surety lies only to defect apparent on inspection of writ. 128**Me**441, 148**A**563.
1063–16 **TexCr** 29**SW(2d)**757. See also 110**TexCr**238, 8**SW(2d)**123.
1063–19 [c] **Default judgment** where scire facias failed to allege valid cause is erroneous. 103**TexCr**61, 279**SW**817.
1063–20½–New. In looking to information given defendants by a scire facias reciting warrant of arrest and recognizance indorsed thereon, the warrant and indorsements should be read with the scire facias. 144**Va**648, 131**SE**230.
1064–30 [e] **Immaterial variance between scire facias on judgment nisi** and indictment will be treated as surplusage. 112**TexCr**567, 18**SW(2d)**672.
1064–32 [c] **Erroneous recitals as to date of bond and appearance of defendant** held fatal. 102**TexCr**137, 277**SW** 388.
1065–36 But see 144**Va**648, 131**SE**230.
1065–36½–New. A complaint should allege directly or by necessary implication that the prisoner in pursuance of a bond was released or discharged from custody. 68**Utah**41, 249**P**125.
1065–37 [c] **Allegations held sufficient.** –99**CalA**569, 279**P**187.
1065–38 [f] **Forfeiture as against surety** need not be alleged. 23**F(2d)**55.
1066–45 316**Mo** 372, 289**SW**898, 902 [cit CJ].
1066–51 200**Cal** 716, 255**P**180.
1066–53 200**Cal** 716, 255**P**180; 110**Tex Cr**238, 8**SW(2d)**123.
1068–82 144**Va**648, 131**SE**230.
1068–86 144**Va**648, 131**SE**230 (general issue is nul tiel record).
1068–89 144**Va**648, 131**SE**230. [b] **Fraud in procurement of record** of recognizance cannot be raised by plea of nul tiel record. 144**Va**648, 131**SE**230.
1068–90 29**F(2d)**92 (answer held sufficient). [f] **Absence of notice to appear after silence of over six years** held unavailable to surety not pleading statute of limitations but relying solely on plea of laches in bar of stale demand. 99**CalA**569, 279**P**187. [g] **Facts alleged held insufficient** to show bond was extorted colore officii by clerk. 42**F(2d)** 26.
1069–98½–New. Plea that defendant appeared for trial, was convicted and sentenced is insufficient where referring to crime other than one charged in bail bond. 232**Ky**166, 22**SW(2d)**576.
1069–8 103**TexCr**451, 281**SW**861; **TexCr** 29**SW(2d)**757 (holding in so far as scire facias has function of petition, allegations and proof must substantially conform). [c] **Date of bond.**–100 **TexCr**232, 272**SW**448.
1070–12 [a] (7) **TexCr** 29**SW(2d)**757.
1070–13 29**F(2d)**92. [a] (10) As to date of forfeiture. 36**F(2d)**252.
1070–16 [b] **Where question is raised in motion for new trial** for first time, contention that there was variance between indictment and bond, as to name of accused, comes too late. 110**TexCr** 238, 8**SW(2d)**123.
1070–17½–New. **Variance may be waived** by failure to raise question when a bond offered in evidence. 29**F(2d)**92.
1070–19 205**Cal** 476, 271**P**897.
1071–21 29**F(2d)**92; 101**TexCr**505, 276 **SW**274 (where sureties enter general denial state is not entitled to judgment without introducing recognizance in evidence); 144**Va**648, 131**SE**230; **Man** [1930] 1**DomLR**523.
1071–22 **Mo** 256**SW**768 (reason for failure to appeal).
1071–30 29**F(2d)**92.
1071–34½–New. On plea of nul tiel record raising only the question of the existence of the record, the record itself is the only evidence receivable to prove its contents. 144**Va**648, 131**SE** 230.
1071–36 112 **Okl** 298, 240**P**1069.
1072–37½–New. Trial court may examine justice of peace, to ascertain whether proposed amendment of his return of recognizance conforms to facts, subject to cross-examination. 144**Va**648, 131**SE**230.
1072–37½–New. Parol evidence is admissible to show that amended return of recognizance contained the facts and was tendered in good faith. 144**Va**648, 131**SE**230.
1072–37¼–New. Also to show that the state's officers to whom it was delivered had actual or constructive notice that it was signed conditionally. 68 **Utah**41, 249**P**125.
1072–49 **MoA** 20**SW(2d)**960 (evidence held insufficient to show surrender by bail); 107 **Okl** 251, 231**P**292 (where signature of alleged surety merely after justification not shown to have been misplaced, judgment against him not sustained); 33 **OklCr**364, 244**P**457 (evidence held insufficient); 289**Pa**159, 137 **A**131. [b] **Evidence held insufficient** to show government permitted defend-

ant to leave courtroom to look for counsel without sureties' consent. 36F(2d) 252.

1073–58 144Va648, 131SE230 (on plea of nul tiel, record issue is to be tried by court on inspection of record).

1073–63½–New. Defendants, who offered no evidence in rebuttal on hearing of motion for amendment of return of recognizance, cannot complain that they were not allowed to introduce evidence under plea of nul tiel record. 144Va 648, 131SE230.

1073–69 103TexCr451, 281SW861.

1073–70 68Utah41, 249P125. [a] **Question of surrender** for jury under instructions. 102TexCr97, 277SW649 (on disputed evidence).

1073–71 [b] **Default judgment** on scire facias not alleging valid cause is erroneous. 103TexCr61, 279SW817.

1074–72 [e] **To support default judgment** against sureties, they must each be served with copy of scire facias. 102 TexCr137, 277SW388.

1074–73 159Tenn396, 19SW(2d)241 (recitation of conditional judgment forfeiting appearance bond not essential).

1074–76½–New. A judgment changing a judgment nisi on a recognizance by entering it nunc pro tunc and making it final without notice to sureties is erroneous. 101TexCr512, 276SW295.

1074–76½–New. Final judgment based on unauthorized nisi judgment is void. 109TexCr293, 4SW(2d)50.

1074–84½–New. Judgment cannot be made to bear interest. 112TexCr567, 18SW(2d)672.

1074–85 [b] **Joint judgment against principal and sureties** held void where one of sureties was dead. 19F(2d)378.

1075–96 [f] **Where proceeding to show cause** why judgment should not be made final was quashed and case dismissed, second forfeiture and judgment were nullities, first forfeiture being in force. 100TexCr582, 272SW175.

1075–2½–New. A petition is addressed to the sound discretion of the judge, exercise of which will not be reviewed unless arbitrary. 159Tenn396, 19SW(2d) 241.

1075–9 158Tenn246, 12SW(2d)717.

1075–12½–New. Statute authorizing a compromise of judgment against surety has been held not unconstitutional as conferring judicial power on board. 340 Ill 188, 172NE3.

1075–16 TexCr 27SW(2d)805 (writ of error).

1076–17 99TexCr652, 271SW608; 101 TexCr505, 276SW274. [b] **Appeal dismissed** for defective and insufficient bond. 99TexCr588, 271SW612.

1076–19 50Philippine209. [c] **Appeal bond on appeal from final judgment of district court on forfeiture of bail bond** does not give court of criminal appeals jurisdiction where it is conditioned to abide judgment of supreme court or court of civil appeals. 104TexCr144, 282SW812.

1076–21½–New. nor to an appeal or new trial in respect of a decree setting aside judgment nisi forfeiting a bail bond; TexCivA 7SW(2d)949.

1076–27½–New. Where the trial court vacates judgment during term, after appeal taken, the appellate court loses jurisdiction. TexCr 4SW(2d)49.

1076–28 32F(2d)110; TexCivA 7SW (2d)949.

1077–30 112TexCr567, 18SW(2d)672.

1077–36 99TexCr652, 271SW608; 100 TexCr176, 272SW462; TexCr 29SW(2d) 757(3rdcase) (holding briefs must be filed in trial and appellate courts, or waiver thereof appear of record); TexCr 29SW(2d)758. [a] 101TexCr505, 276 SW274; 112TexCr41, 13SW(2d)858(2d case). [b] In Texas.–104TexCr273, 283 SW794; 109TexCr329, 4SW(2d)562. [c] **Where waiver of filing brief** in lower court is inadvertently omitted from record dismissal will be set aside and case considered on merits. TexCr 29SW(2d) 758.

1077–37 112TexCr567, 18SW(2d)672 (variance between scire facias and judgment nisi).

1077–39 159Tenn396, 19SW(2d)241.

1077–39½–New. The appellate court cannot reform erroneous judgment nisi where the latter is part of the state's pleading. 110TexCr238, 8SW(2d)123.

1077–41 100TexCr169, 272SW463 (defendant enlarged on recognizance not conforming to statute).

1078–43 [b] **Jury trial** is not prejudicial error requiring reversal where statute does not forbid jury trial. MoA 20SW(2d)960.

1078–44 200Cal716, 255P180.

1078–44½–New. That recognizance was void because not made returnable at next term not available error in view of statutes forbidding reversals where record shows fair trial on merits and substantial justice, and that judgment on recognizance shall not be defeated for defect in form of recognizance. 144 Va648, 131SE230.

1078–44½–New. Sureties are entitled to have evidence in record considered most favorably to them. 68Utah41, 249P125.

1078–46½–New. The law applicable to contracts determines the disposition of funds from a forfeited recognizance. 320Mo 332, 8SW(2d)887.

1078–47 70Utah219, 259P324.

1078–49 [a] (1) 320Mo 332, 8SW(2d) 887. (5) Statutes prescribing court wherein costs in change of venue cases are to be taxed and designating county which shall be liable is inapplicable when recognizance is forfeited after change of venue. 320Mo 332, 8SW(2d) 887.

BAILMENTS

1084–5 17F(2d)413; 17F(2d)417; 204 Iowa758, 216NW54; 320Mo 260, 7SW (2d)250, 261 [quotCJ]; 222MoA187, 297 SW100; 218AppDiv283, 218NYS189 [cit CJ]; 190NC209, 129SE585, 587, 42ALR 1299 [citCJ]. [a] (1) 8PaDist&Co 169. (2) MoA 292SW1066(2dcase). (9) Tex CivA 3SW(2d)849. [c] 8PaDist&Co 169. [h] (18) See also MoA 21SW(2d) 207. (21) Loan by trustee under assignment for benefit of creditors to assignor for temporary use of latter, of property received under assignment. 127Me172, 142A580. (22) Receipt by cleaning and dyeing company of rugs for cleaning. 254 IllA63. [k] **Transaction held not to constitute "voluntary deposit"** under Louisiana statute. 9LaA519, 119S435.

1085–7 [b] **Ship held not bailee of** barge discharging cargo from alongside, as affects liability for damage to barge. 19F(2d)286.

1085–8 LaA 130S851 (no bailment).

1086–15 320Mo 260, 7SW(2d)250, 251 [citCJ].

1086–18½–New. Relation is distinguished from that of landlord and tenant. 228Ky489, 15SW(2d)504; NJ 146 A585.

1087–20 TexCivA 275SW211.

1087–22 250 IllA67; 135Misc757, 239 NYS574.

1087–25 242Mich472, 219NW610.

1088–34 [a] **Held to constitute bailment.**–9PaDist&Co 386.

1088–36½–New. The giving and acceptance of a note for deferred payments would not convert a bailment into a conditional sale. 86PaSuper419.

1090–40½–New. And where a contract of leasing contains an option to the lessee to purchase at the end of the term by paying a stated sum additional, the contract was not changed to one of sale. 85PaSuper281.

1091–45 204 Iowa758, 216NW54.

1091–51 17F(2d)417.

1093–54 [b] 17F(2d)417.

1094–58 17F(2d)417.

1094–59 17F(2d)417.

1094–61 17F(2d)417.

1094–71 233Mich561, 207NW829, 830 [quotCJ].

1094–72 233Mich561, 207NW829, 830 [quotCJ].

1094–73 233Mich561, 207NW829, 830 [quotCJ].

1095–74 233Mich561, 207NW829, 830 [quotCJ].

1095–79 17F(2d)413; 245 IllA291, 293 [citCJ]; 320Mo 260, 7SW(2d)250, 251 [citCJ].

1096–84 [b] **Transaction held contract to build oven** not bailment. 9F(2d)281 (under Pennsylvania law).

1097–94 123Kan595, 256P806 [quot CJ]. [e] **Deposit of grain with right of election in depositor** to demand return of same or like grain held bailment. 123Kan595, 256P806. [f] **Storage receipt** issued pursuant to North Dakota statute evidences bailment and not sale. ND 231NW725.

1098–98 116Kan697, 229P366.

1098–3 39GaA646, 148SE288.

1098–4 142Va107, 128SE528 (bailee not technical trustee). [a] **Every bailment is a trust.**–203 Iowa345, 212NW745, 51 ALR906.

1099–8 215Ala460, 110S904, 907 [cit CJ].

1099–10 153Md333, 138A227, 228, 58 ALR1051 [quotCJ].

1099–11 153Md333, 138A227, 228, 58 ALR1051 [quotCJ].

1099–13 32PortoRico 58.

1099–14 [a] **In Spanish Law** "the fundamental ground of distinction between the two contracts consists in the principle of representation which is the essence of agency and which has no place in the contract for hire." 32Porto Rico 58, 63. [b] **"Locatio operis faciendi"** distinguished from "agency." 32 PortoRico 58.

1099–14½–New. Driver of owner's car to sell for owner is agent, 82NH556, 131A352.

1099–14½–New. but he is bailee if driving to sell for himself. 82NH556, 131 A352.

1099–16 32PortoRico 58. See also 6 LaA93.

1100–17 32PortoRico 58; 193Wis63, 213NW667 (dictum).

1100–18 32PortoRico 58.

1100–19 32PortoRico 58. [b] **"Bailee for hire" defined.**–33GaA795, 127SE797. [c] **In Porto Rico.**–32PortoRico 58.

1100–20 32PortoRico 58.

1100–21 234 IllA596; NJSup 137A558; 122 Or424, 251P900; 32PortoRico 58. [b] 234 IllA596.

1100–22 32PortoRico 58.

1100–24 32PortoRico 58. [a] (8) Dancing school proprietor checking patrons' wraps for fee is bailee for hire. MoA 292SW1066(2dcase).

1100–24½–New. A contract for the rental of a safe deposit box is bailment for hire and for mutual benefit of both parties. 287Pa398, 135A114.

1101–25 CalA 291P624.

1101–28 242NY481, 152NE268; 32 PortoRico 58.

1101–29 32PortoRico 58.

1101–31 7F(2d)949; 76Mont38, 245P 257, 258 [quotCJ]; 32PortoRico 58. [b] (3) Where ex-husband was in possession of furniture belonging to divorced wife. 77Mont554, 252P377. [d] (2) Statutory definition. 142 Okl 254, 286P771.

1102–35 21AlaA136, 106S220, 221 [cit CJ]; 172Ark198, 288SW4; 222MoA187, 297SW100. See also 218AppDiv283, 218 NYS189. [d] **Subject matter must be chattel.**–9F(2d)281.

1102–36 21AlaA136, 106S220, 221 [cit CJ]; 77Mont554, 252P377; 242NY440, 152NE254; 227AppDiv47, 237NYS242.

1102–37 But see 9F(2d)281.

1103–45 32F(2d)1003; 104Conn222, 132A414; 222MoA187, 297SW100.

1103–46 222MoA187, 297SW100.

1103–47 222MoA187, 297SW100, 103 [citCJ].

1103–49 [f] **Notice or consent of owner of chattel** is essential to creation of bailment. 23 OhA43, 154NE64.

1104–51 [a] (6) Where express company held itself out as forwarder of merchandise and it was general custom among merchants and others shipping merchandise in bond from points in Europe to points in United States to ship to it as consignee in a port in the United States and to deliver to it bill of lading for goods so shipped with instructions where to forward same, such procedure constitutes constructive delivery of goods. 216MoA561, 260SW129.

1104–52 MoA 292SW1066(2dcase).

1104–53 21AlaA136, 106S220, 221 [cit CJ]; Ariz 286P935.

1104–54 21AlaA136, 106S220, 221 [cit CJ].

1105–57 [a] **Law of the place of lending** was applicable to lending. NJ DistCt 149A637.

1105–58 314Mo585, 285SW97, 100, 47 ALR783 [citCJ].

1105–59 [a] **Retention of property after**

discovery of defects.–74CalA378, 240P523.

1105–59½–New. There must be an express or implied agreement for the redelivery of an article to bailor in same or altered form. 9F(2d)281.

1105–70 27F(2d)1009.

1105–73 216MoA561, 260SW129, 133 [quotCJ]; 76Mont38, 245P257, 258 [cit CJ]; 76Mont554, 252P377; 192Wis612, 212NW261, 50ALR291. [a] (1) 130Okl 104, 265P108. (8) Dentist held to have voluntarily undertaken custody of patient's coat left on chair in reception room. 125Misc868, 212NYS298 (where no other appropriate place for deposit was provided). [b] **Promise to return may be implied** from acceptance and use. 76Mont38, 245P257.

1106–76 17F(2d)413 (South Carolina statute); 17F(2d)417 (South Carolina statute). [c] **Construction of statute.**–17F(2d)417. [d] **Recording after statutory period.**–17F(2d)417. [e] **Reception of property before filing bankruptcy petition against bailee** is effective as against trustee of bailee, although contract was not recorded. 17F(2d)417.

1106–80½–New. Agreement to pay "whatever was right" for rental of boiler and engine is sufficiently definite to constitute a consideration. 169Ark774, 276SW603 (tantamount to agreement to pay reasonable price).

1106–80½–New. In Pennsylvania there must be an agreed rental. 9F(2d)281.

1106–82 314Mo585, 285SW97, 47ALR783.

1106–83 [b] **Options to purchase.**–TexCivA 58SW(2d)160. [c] **Consideration for modification.**–231Ky630, 218SW(2d)1006.

1106–83½–New. By a subsequent parol agreement additional goods may be added to the terms of the contract. 27F(2d)1009.

1106–84 190NC480, 130SE349.

1107–85 214Ala133, 107S218; 153Md333, 138A227, 38ALR1054.

1107–89½–New. The bailor may release his rights to part of the property without affecting his title to the balance. 284Pa41, 130A259.

1107–93 77Mont554, 252P377, 380 [cit CJ].

1107–94 77Mont554, 252P377, 380 [cit CJ].

1107–95 NJDistCt 119A637 (equivalent to ownership against all but bailor); 132Or479, 285P201 (bailee for hire); 160Tenn197, 22SW(2d)226.

1108–96 88CalA331, 263P365, 367 [cit CJ]. 232Ky5, 22SW(2d)261; 80Mont258, 260P116 (rights paramount to those of bailor or his creditors).

1108–97 195Cal27, 231P340. [a] **No right to transfer subject of bailment.**–Utah 280P1046.

1108–2 128Okl65, 261P175.

1108–5 123Kan708, 710, 256P808 [cit CJ]. 76Mont38, 245P257.

1109–7 214Ala202, 107S846 [cit CJ].

1109–8 123Kan708, 710, 256P808 [cit CJ].

1109–17 123Kan708, 256P808.

1110–18 214Ala202, 107S846.

1111–25 218AppDiv283, 218NYS189 [cit CJ]. [a] **One cannot be made a bailee without his consent.** 218AppDiv283, 218NYS189.

1111–26 218AppDiv283, 218NYS189 [cit CJ]; 218AppDiv285, 218NYS191, 192 [cit CJ]; 136Misc371, 240NYS88.

1111–27 128Kan753, 280P759 (where contract is in writing); 218AppDiv285, 218NYS191, 192 [cit CJ].

1111–28 218AppDiv283, 218NYS189 [cit CJ].

1111–30 249IllA28, 30 [cit Cyc].

1111–37 222MoA201, 297SW151, 156 [cit CJ] (contract construed as to what includes).

1111–38 250IllA282.

1112–49 240IllA518, 524 [cit CJ].

1112–52 61LaA67.

1112–53 BC [1928] 1DomLR688. [a] AlaA 130S313.

1112–56 TexCivA 276SW765, 766 [cit CJ]. [c] **In Ontario.**–[1929] 2DomLR561.

1113–57 117Tex130, 298SW536, 537 [cit CJ]; **Ont** [1929] 2DomLR561 (exemption from liability for negligence).

1113–58 117Tex130, 298SW536, 537 [cit CJ]; **Ont** [1929] 2DomLR561 (exemption from liability for negligence).

1113–58½–New. A bailment contract is a personal obligation from which the bailee cannot relieve himself without the bailor's consent. 232IllA439.

1113–58½–New. A provision exempting a bailee from liability for loss due to some particular cause does not exempt the bailee from implied obligation to use ordinary care to prevent such loss. 117Tex130, 298SW536.

1113–59 AlaA 130S313, 314 [cit CJ].

1113–60 50ND295, 195NW654, 655 [cit CJ].

1113–61½–New. In the absence of an express contract the bailee is not required to insure. 218AppDiv285, 218NYS191.

1113–61½–New. Where the lease of an automobile requires the lessee to procure insurance, he is bound to furnish such insurance. 102NJL130, 131A896.

1113–61¼–New. A provision in a contract that the owner would continue the present hull machinery and equipment insurance on a vessel during the period the vessel was in the contractor's yard was held for the benefit of the shipyard as well as for the benefit of the owner. 34F(2d)100.

1113–75 But see 124Me446, 129A298.

1114–80½–New. Ordinarily liability of bailee for safe return of thing bailed depends on presence or absence of negligence. 198NC777, 153SE397.

1114–82 53ND256, 220NW156.

1114–85 TexCivA 275SW285.

1114–86 TexCivA 275SW285.

1114–87 176Ark1204, 38SW(2d)682.

1114–90 215Ala407, 110S818.

1114–93½–New. A gratuitous bailee is not liable for damages caused by a fire while the subject of bailment was in use in the absence of negligence, although it voluntarily contributed to make up the loss. TexCivA 285SW905.

1115–94½–New. A gratuitous bailee with the right to use the article bailed is not liable for depreciation which is the result of ordinary wear and tear. 142Wash196, 252P689.

1115–96 But see Mass 167NE231.

1116–1 103Conn365, 146A611, 65ALR427.

1116–3 Mass 167NE231; 200Wis194, 227NW940.

1116–3 200Wis194, 227NW940.

1116–8½–New. Slight departures from terms of bailment do not amount to conversion. 200Wis194, 227NW940.

1117–14 136Me220, 137A218, 219 [cit CJ]; NJSup 147A233 (due care); 250NY110, 165NE829; 196Wis191, 218NW835. See also 103Conn685, 131A401, 402 [cit CJ].

1117–19½–New. nor for the cost of repairs, 74CalA378, 240P523.

1117–23½–New. There is no warranty of reasonable fitness where the bailee has opportunity to inspect the thing bailed. 136Me220, 137A218.

1117–23½–New. nor is the bailor liable where the bailee selects the thing hired. 136Me220, 137A218.

1117–24 [a] **Libelant, who insisted on** making voyage on fishing boat gratuitously loaned, assumed risks incident thereto. 7F(2d)949. [b] **Failure of gratuitous bailee** to ballast boat loaned is held not negligence in absence of contract, express or implied, to ballast. 7F(2d)949.

1117–26 84Mont52, 274P145.

1117–27 [a] **Respondent, facilitating gratuitous loan** of correspondent's fishing boat, is not liable for injuries to one on board, as joint tort-feasor. 7F(2d)949.

1117–28 [a] **Captain of fishing boat** gratuitously loaned is held not negligent in taking homeward course on insistence of occupants of boat. 7F(2d)949.

1117–29 254IllA63. [b] **Waiver of breach of contract.**–20F(2d)74.

1118–30½–New. A bailee agrees in bailment for the alteration or repair that the thing when altered will be reasonably fit or capable for the use intended. 103Conn685, 131A401 (of which use bailee shall know).

1118–35½–New. A bailee remodeling a fur coat is required to use the care and skill of a competent furrier. 103Conn685, 131A401, 402 [cit Cyc].

1118–36 See also 218AppDiv237, 218NYS204.

1118–37 193Wis63, 213NW667.

1118–39 245IllA291.

1119–44 287Pa398, 135A114.

1119–46 287Pa398, 135A114.

1119–48 287Pa398, 135A114.

1119–48½–New. , and the usages of such business. 287Pa398, 135A114.

1119–50 287Pa398, 135A114.

1120–53½–New. Slight care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of slight importance. 125Okl295, 244P1104.

1121–63 172Ark198, 288SW4; 206Cal94, 273P28; 71CalA571, 236P152; CalA291P624; 103Conn685, 131A401, 402 [cit CJ&Cyc]; 232IllA439 (dictum); 254IllA63; 144Md536, 125A449, 454 [cit CJ]; 320Mo623, 8SW(2d)858 (bailment for hire); 216MoA561, 260SW129 (forwarder's loss of bill of lading and failure to forward goods held negligence); 220MoA462, 274SW930; 103NJL156, 134A667; 127Misc855, 217NYS595; 287Pa398, 135A114; 90PaSuper517; 7PaDist&Co131; TexCivA 276SW347; 142Wash675, 254P248, 252 [cit CJ]; 147Wash76, 265P162; 193Wis63, 213NW667; Sask [1928] 3DomLR248.

1122–64 232IllA439 (dictum); 242IllA101; 5LaA226; 231Mich367, 204NW89; 127Misc855, 217NYS595.

1122–65 74CalA378, 240P523.

1122–68 256Mass53, 152NE78; 220MoA462, 274SW930.

1123–70 220MoA462, 274SW930.

1123–79 81CalA347, 253P947; 242IllA101. [c] **Bank not liable to owner for theft of securities placed in her father's safety deposit box,** in absence of contractual relationship between owner and bank. 218AppDiv283, 218NYS189.

1123–81½–New. A shipyard is liable for damage by fire to a vessel in its plant under contract for repairs. 21F(2d)112.

1123–81½–New. And a provision in the contract that the owner would continue its insurance does not relieve the shipyard from liability for failure to perform conditions of the contract or for negligence. 21F(2d)112.

1123–82 85IndA674, 155NE533; 116OhSt299, 156NE146, 52ALR705; TexCivA 26SW(2d)664 (license) (where contract exempted loss by fire, it did not exempt fire caused by servant's negligence). [b] (1) But see **Ont** [1929] 1DomLR94. Contra 232IllA439.

1124–94 Mass 167NE231; 134Misc349, 235NYS551; 192Wis249, 212NW796; **Ont** [1929] 2DomLR561. [a] **Repairs to vessel.**–43F(2d)750. [b] **Contributory negligence.**–43F(2d)750.

1124–95 22F(2d)64; 23Man832, 14DomLR158, 25WestLR475, 5WestWkly225.

1124–96½–New. A bailee remodeling a fur coat is required to use such care and skill as a competent furrier would use in doing the work. 103Conn685, 131A401.

1125–6 [b] **Delay in notifying of loss of key** held immaterial where proximate cause of loss was negligence in not requiring identification of person to whom property was delivered. 71CalA571, 236P152.

1125–10 [b] **Failure of occupant** of bathhouse to secure room with locked door held not contributory negligence. 71CalA571, 236P152.

1125–13 215Ala407, 110S818, 821 [cit CJ]; 21AlaA136, 106S220; 242NY481, 152NE268; 125Okl295, 244P1104; TexCivA 286SW925; Wash 292P412; 193Wis63, 213NW667. [d] **Stipulation relieving gratuitous bailee of liability for negligence** does not absolve him from liability for gross negligence. 242NY481, 152NE268.

1126–10 [b] **Agent intrusted with personal property for certain purpose.**

becomes bailee with duty of devoting it to such purpose and is liable for want of reasonable care. 74Mont170, 239P771.

1127-19 242NY481, 152NE268; 125 Okl295, 244P1104.

1127-28 22F(2d)665; 320Mo623, 8SW(2d)858; 193Wis63, 213NW667; Vt 152A87.

1128-30 Vt 152A87.

1128-35 204 Iowa758, 216NW54; 133 Okl252, 271P839; 8PaDist&Co615.

1128-36 190NC343, 130SE36; 122 Or424, 251P900.

1128-39 36GaA548, 137SE302.

1129-40 22AlaA211, 114S273.

1129-53 NM 288P1044, 1046 [quotCJ].

1130-58 [a] **Recovery limited to value of thing stored.**-3LaA254.

1130-63 [a] **Discount.**-219AppDiv326, 219NYS721.

1130-65 134Misc349, 235NYS551 (dresses stolen by plaintiff's employee hired without investigation).

1130-65½-New. An automobile repairman is not precluded from recovery by failure to notify the owner of damage by fire repaired without cost to the owner. 259Mass339, 156NE678.

1130-72 251Mich329, 232NW232; Tex CivA 188SW(2d)709 (rental to be paid till notice of completion of work). [f] **Bailee holding over under lease.**-Tex CivA 290SW887.

1131-77½-New. Contract whereby exhibitor assigned lease of picture film with consent of distributor held not to release exhibitor from primary liability to distributor. Utah 291P303.

1131-77½-New. Such liability cannot be released without consent of distributor. Utah 291P303.

1131-79½-New. The measure of compensation for the use of a truck hired under a void contract is the value of its use in the work contemplated and to which it was in fact put. 74CalA378, 240P523.

1132-94 [b] **Nature of lien.**-154Tenn631, 288SW725.

1132-96 122 Or424, 251P900.

1132-98 132Misc57, 229NYS45 (no lien for service in wrapping and mailing newspapers).

1133-99 NJSup 147A47 (notwithstanding plaintiff in replevin action claimed damages for previous defective dyeing). See also 22AlaA168, 113S641. [c] **Ginner to whom cotton is delivered by owner** and who gins and bales it for market has lien for his charges. 144Miss709, 111S107. [d] **In California.**-73CalA704, 239P67.

1133-2 134 Okl 40, 272P879 (person employed to guard oil well tools, lying idle on lease).

1133-4 3Del519, 140A154; 122 Or424, 251P900.

1133-5 122 Or424, 251P900.

1133-7 122 Or424, 251P900 (rule under Oregon statute).

1133-9 102Conn652, 129A780.

1133-13½-New. Under the Oregon statute work must be done at the request of the owner, reputed owner, or authorized agent of the owner, or lawful possessor of the chattel. 122 Or424, 251P900.

1133-13½-New. Bailor continues to be personally liable for charges although the bailee has a lien therefor. 37GaA278, 139SE920.

1134-17 20F(2d)74; 3Del519, 140A154.

1134-19 20F(2d)74.

1134-20 20F(2d)74, 76 [citCJ].

1134-27 51ND40, 199NW39; 130 Or159, 279P264(2dcase) (lien liberally construed in determining sufficiency of description to identify article on which lien claimed).

1134-28 See also 130 Or159, 279P264(2dcase).

1135-32 [c] **Accessories sold and attached to automobile** are not within statute giving lien for repairs and improvements on automobile, although small charge is made for attaching them. 123Kan99, 254P399.

1135-41 [a] **Course of dealing.**-144Miss709, 111S107 (facts held to show waiver).

1136-45 51ND40, 199NW39.

1136-49½-New. A lien is lost by a tender of an amount greater than the lien claim at the time bailor demands possession of the property. 73CalA704, 239P67.

1136-59 22AlaA21, 112S758; 122 Or424, 251P900; 86PaSuper198; 154Tenn631, 288SW725.

1136-64½-New. Repair by bailee without consent of conditional seller is held to preclude lien. 22AlaA21, 112S758.

1136-67 But see 22AlaA21, 112S758.

1137-68 82CalA749, 256P213.

1137-70½-New. Under some statutes a lien for repairs is given notwithstanding the surrender of possession to the owner. 122 Or424, 251P900.

1137-73 265Mass372, 164NE373.

1137-75 82CalA749, 256P213; 86Pa Super198.

1137-77½-New. Lien for repairs lost by failure to file in time is not revived by furnishing of other labor and materials for other property at later time for all of which charges are made in open running account. 51ND40, 199NW39.

1137-79 265Mass372, 164NE373.

1137-82½-New. A landowner may not imprison an automobile and deprive the owner of its use without his consent by padlocking the car to collect parking charges. 23 OhA43, 154NE64.

1137-84 78CalA141, 248P303.

1138-89 78CalA141, 248P303 (buyer at sale acquires no title where sale was made prior to expiration of time required to elapse after amount became due).

1138-96 78Colo384, 242P68; 197NC371, 148SE461; 154Tenn631, 288SW725.

1138-97 154Tenn631, 288SW725.

1138-98 78Colo384, 242P68; 53SD544, 221NW263, 264 [quotCJ]; 154Tenn631, 288SW725.

1138-99 154Tenn631, 288SW725; 155Tenn250, 292SW1.

1138-1 121Kan113, 245P1013 (statute giving prior lien for repairs held valid).

1139-2 103WVa270, 137SE13. But see 154Tenn631, 288SW725.

1139-2½-New. unless by the terms of the contract on the conduct of the vendor the vendee is given express or implied authority to keep the property in repair. 103WVa270, 137SE13.

1139-4½-New. The bailee's lien prevails over that of a bank to which the bailor has assigned receipts for the property as security. 209Ky178, 272SW424 (tanner's lien).

1139-7 254IllA63; 202 Iowa859, 211NW532, 51ALR910; 251Mich329, 232NW232.

1139-8 227Ky179, 12SW(2d)312; LaA129S399.

1139-10 6LaA99.

1139-13 209Ky600, 273SW434.

1139-13½-New. When the subject matter of several bailments with same bailee is identical in kind and has become interminged preventing identification, the entire series of bailments must be ratably distributed among the bailors in case of the bailee's insolvency. 202 Iowa859, 211NW532, 51ALR910.

1140-14 178Ark1199, 13SW(2d)7; 287Pa190, 134A455; 86PaSuper505; Tex CommnA 288SW127.

1140-17 209Ky600, 273SW434; 97Pa Super398; Ont [1929] 3DomLR907.

1140-21½-New. A shipyard receiving a vessel for repairs must redeliver it in accordance with the contract or show that failure to do so was not due to its negligence. 21F(2d)112.

1141-22 81CalA347, 253P947 (even where car is subsequently located).

1141-29½-New. In some jurisdictions a depositary for hire, failing to return the thing deposited, can escape liability only by showing that he was prevented by inevitable accident or irresistible force. 6LaA93.

1141-29½-New. In Philippines destruction of mill by fire after palay has been converted into rice and sold pursuant to custom does not affect liability of miller. 51Philippine1.

1142-45 123Kan708, 710, 256P808 [cit CJ]. But see 242NY440, 152NE254.

1142-49 123Kan708, 256P808.

1142-53 123Kan708, 256P808.

1142-57 123Kan708, 256P808.

1142-59 163La227, 111S686.

1143-62 6LaA99.

1143-63½-New. Under some statutes lender of personal property for use without compensation may at any time require its return subject to borrower's right to indemnity. 142 Okl254, 286P771.

1143-66 Contra 104Conn467, 133A667, 46ALR838. [a] **Rule criticized.**-104Conn467, 133A667, 46ALR838.

1143-68 261Mass153, 158NE328, 54ALR1328.

1143-69 CalA 290P146; 261Mass153, 158NE328, 54ALR1328.

1144-70 261Mass153, 158NE328, 54ALR1328. [a] 261Mass153, 158NE328, 54ALR1328.

1144-82½-New. **Delivery through parcel post insured** does not impose liability for loss. TexCivA 277SW708.

1144-82½-New. In such case negligence of post office employees not imputed to bank. TexCivA 277SW708.

1144-85 [b] **Lessor liable in damages for interruption in use** of drilling machinery. TexCivA 275SW285.

1145-88 [e] **Time for rescission.**-196 Wis191, 218NW835.

1145-91 245 IllA291. [a] **Assignment of right to use leased drilling equipment** does not give right to terminate contract where lease contained no covenant against subletting and no forfeiture clause. NM 288P1044.

1146-8 137 Okl35, 277P643.

1146-9½-New. Under some statutes seller's temporary loan of automobile to buyer pending repairs to automobile sold may be terminable on demand. 142 Okl254, 286P771.

1146-10 39GaA646, 148SE288.

1147-13½-New. The contract of bailment may give the bailor the right to terminate the bailment, declare payments due, and recover the property, as cumulative remedies on breach of agreement or upon a contingency provided for in the contract. 25F(2d)4.

1147-18 6PaDist&Co541.

1147-25 [d] **Breach by trustee of duty owing to his cestui** affords no ground for precluding trustee from denying authority of his bailee to sell property intrusted to him temporarily and for special purpose. 127Me172, 142A580.

1148-27 Md 150A866. [a] **Pledge by bailee of bonds loaned for use as collateral security.**-190NC343, 130SE37.

1148-29 127Me172, 142A580; 292Pa86, 140A766.

1149-38½-New. **Purchaser at bankruptcy sale.** The bailor may recover chattels, held by bankrupt under bailment lease, which had been sold to purchaser at bankruptcy sale. 284Pa41, 130A259.

1149-38½-New. **Bailor may retake from receiver** in the absence of injury to the creditors. 5PaDist&Co107.

1149-41 190NC480, 130SE319 (action for injury or for conversion); 97Pa Super93 (destruction of property).

1149-43 Me 149A618; NJSup 140A394; 32NM1, 249P1011; 190NC480, 130SE319, 321 [citCyc&CJ]; TexCivA 8SW(2d)256.

1149-44 80Mont258, 260P116; 32NM1, 249P1011; 190NC480, 130SE319 (for conversion).

1149-45 TexCivA 293SW613, 618 [cit CJ].

1150-46 190NC480, 130SE319, 321 [cit Cyc&CJ].

1150-52½-New. The bailee's use of an automobile loaned, other than as directed by the bailor, constituted trespass and fraud and terminated the bailment. 33F(2d)363.

1150-54 [b] **One who receives personal property from another who has no title** must answer to real owner. MoA 19SW(2d)565.

1151-59½-New. Contracts between the bailee and third persons as to bailed property are construed according to general rules. 23F(2d)567 (to hold property of bailor of given quality for buyer).

1151-60 82CalA749, 256P213; 49ND502, 191NW955.

1151–62 80Mont258, 260P116.

1151–64½–New. Garnishment. Property in the hands of the bailee may be attached by garnishment process subject to the bailee's rights under statutes in some jurisdictions. 80Mont258, 260P116.

1151–64½–New. Upon termination of a contract of bailment the property is subject to the right of attachment by the creditor of bailor. 80Mont258, 260P116.

1151–65 28Hawaii145; 234 IIIA596, 604 [citCyc&CJ]; 82NH556, 131A352; 132 Or479, 285P201; 32PortoRico 58; 146Va442, 131SE846, 44ALR1175; Va 153SE664. [a] **Owner of automobile not liable for injuries due to negligence** of boy who was hired to take car to his own garage for cleaning and services. 234 IIIA596. [b] **Incompetence of bailee driving automobile** is not necessary factor of liability of owner. 214Ala47, 106SE175.

1151–67 146Va442, 131SE846, 44ALR 1175.

1152–78 [a] 14PaDist&Co 103.

1152–88½–New. or sold it. 86PaSuper 198.

1153–90 86Mont150, 282P494.

1153–97 77Mont554, 252P377.

1153–98 127Misc855, 217NYS595.

1153–99 127Misc855, 217NYS595.

1154–6 76Mont38, 245P257, 259 [quot CJ]; 77Mont554, 252P377; Ont [1929] 3DomLR907.

1154–8 86Mont150, 282P494.

1155–21½–New. Where bailee returns wrong article bailor may sue for nondelivery without returning misdelivered article where he was never requested or refused to do so. 254 IIIA63.

1155–26½–New. Bailor's misrepresentation of value of property does not affect bailee's liability for conversion. 230 AppDiv470, 245NYS359.

1155–27 See also 103Conn685, 131A401.

1155–29½–New. Failure of bailor to whom bailee delivers wrong article to return it to bailee does not estop bailor from denying that article is not his. 254 IIIA63.

1155–34 [a] (5) Allegation that defendant received goods by mistake is held to aver naked bailment. 214AlaA136, 106SE220.

1156–35 [a] 23AlaA20, 122S467(2d case); 13LaA270, 127S455. [d] **Complaint held insufficient.**–142SC369, 140 SE698.

1156–43 33GaA795, 127SE797.

1156–44 IndA 169NE884.

1157–62 See also MoA 28SW(2d)433.

1157–66 But see MoA 28SW(2d)433.

1157–68½–New. Where an action is to recover for use of property negligence need not be proved. 125Misc833, 211 NYS612.

1157–69½–New. That post office employees were not negligent need not be proved, where bailee returns property through insured parcel post. TexCivA 277SW708.

1157–71 [c] **There is no variance** between allegation of implied promise to pay reasonable value of five dollars per day and proof of agreed price of five dollars. Ariz 286P935.

1157–75 98CalA297, 276P1043; 240 IIIA518; 228Ky489, 158SW(2d)504; 125 Misc253, 210NYS525 (plaintiff bailor makes out prima facie case for conversion by proving delivery to bailee, demand and failure to redeliver).

1157–80 125Misc253, 210NYS525.

1158–81 85 IndA674, 155NE533.

1158–81½–New. The bailee is presumed to be in possession and control of the article bailed. 86Mont150, 282P494.

1158–84 33F(2d)354 [aff 33F(2d)356]; 8PaDist&Co 559, 561 [quotCJ].

1158–85 127Misc855, 217NYS595, 598 [citCJ]; 198NC777, 153SE397; 8PaDist &Co 559, 561 [quotCJ].

1158–86 8PaDist&Co 559, 561 [quot CJ].

1158–87 103NJL579, 137A596, 597 [cit CJ]; 8PaDist&Co 559, 561 [quotCJ].

1158–88 33F(2d)352, 33GaA795, 127SE 797; 44 Ida320, 256P760, 761 [quotCJ]; 44 Ida724, 260P162, 163 [citCJ]; Ida 292P613; 85 IndA674, 155NE533; 242 IIIA101 (doctrine of res ipsa loquitur not applicable); 245 IIIA567; 254 IIIA 63; MoA 218SW(2d)207; NJSup 136A 413; NJSup 137A558; 103NJL579, 137 A596; 244NY105, 155NE663; 127Misc 855, 217NYS595, 598 [citCJ]; 198NC 777, 153SE397; 19 OhA68; 26 OhA298, 159NE369; 25 OhA538, 159NE374; 117 Okl 113, 245P600; 8PaDist&Co 559, 561 [quotCJ]; 53SD286, 220NW486; Alta [1930] 4DomL486; Ont [1929] 2DomLR561. [a] (3) 127Misc855, 217NYS 595. [b] Ont [1930] 4DomLR429. [c] **Where bailor's selling agents had partial custody and access,** bailees who guaranteed buyer's credit held not required to prove freedom from negligence. 127Misc855, 217NYS595.

1159–89 127Misc855, 217NYS595, 598 [citCJ].

1159–90 8PaDist&Co 559, 561 [quotCJ].

1160–91 34F(2d)100; 85 IndA674, 155 NE533.

1160–93 43F(2d)852; 44 Ida320, 256 P760, 761 [quotCJ]; Ida 292P613; 251 IIIA564; MoA 218SW(2d)207; 103NJL 579, 137A596, 597 [quotCJ]; 127Misc 855, 217NYS595; TexCommnA 265SW 133, 134 [quotCJ].

1160–94 44 Ida320, 256P760, 761 [quot CJ]; 251 IIIA564.

1160–95 103NJL579, 137A596, 597 [quotCJ]; 244NY105, 155NE665; 127 Misc855, 217NYS595; TexCommnA 265 SW133, 134 [quotCJ].

1160–96 Ida 292P613; 103NJL579, 137 A596, 597 [quotCJ]; TexCommnA 265 SW133, 134 [quotCJ].

1160–97 CalA 291P624; 43 Ida273, 251 P293, 294 [citCJ]; 242 IIIA101, 106 [cit CJ]; 248 IIIA467; 103NJL579, 137A 596.

1160–98 44 Ida724, 260P162; 231Mich 367, 204NW89; 103NJL579, 137A596, 597 [quotCJ]; TexCommnA 265SW133, 134 [quotCJ].

1161–99 103NJL579, 137A596.

1161–1 103NJL579, 137A596, 597[quot CJ]; TexCommnA 265SW133, 134 [quot CJ].

1161–2 43 Ida273, 251P293, 294 [cit CJ]; 103NJL579, 137A596, 597 [quot CJ]; TexCommnA 265SW133, 134 [quot CJ]. [a] 43 Ida273, 251P293.

1161–2½–New. Where it does not appear whether the damage was due to a cause for which the bailee might be liable or to one over which he had no control the doctrine of res ipsa loquitur is inapplicable. 68CalA252, 228P879 (damage to engine of automobile delivered to bailee to be washed).

1161–6 231Ky630, 218SW(2d)1006. [b] **Contract exempting from liability for negligence** must be clearly and affirmatively established by bailee including fact that bailor knew of exception. 27 F(2d)392.

1161–11 [a] (1) 19 OhA68 (robberies in city during four or five months preceding robbery of defendant's place). (11) Under general denial evidence that coat was stolen is admissible. 126Misc 566, 214NYS890. (12) In action against pawnbroker to recover for loss of pledge testimony as to amount of insurance carried by defendant is admissible on question of due care and good faith. 19 OhA 68. [b] **Evidence held inadmissible.**–232Ky5, 22SW(2d)261.

1162–13 But see Ariz 286P935.

1162–22 [b] **Evidence that in numerous instances** articles deposited in a bathhouse had been delivered without requiring identification of the person and without loss held inadmissible. 71 CalA571, 236P152.

1162–26 74CalA378, 240P523.

1162–32 107Conn99, 139A506; MoA 273SW780 (existence of bailment). [a] (1) 44 Ida724, 260P162. (5) 180Ark 885, 23SW(2d)986. (6) 170Minn370, 212NW584; 86Mont150, 282P494. (8) 43F(2d)750; 178Ark199, 13SW(2d)7; 206Cal 94, 273P28; 36GaA344, 136SE 471; 245 IIIA567; 10LaA1, 102S261. (11) 103NJL156, 131A667. (26) 242NY 481, 152NE268. (27) Hiring of automobile. 232MoA439, 273SW780. (28) Bailment of furniture between husband and wife. 76Mont38, 245P257. (29) Gross negligence of bailee. 71CalA571, 236P152. (30) That damaged condition of engine due to defendant's defective work. 117 Or613, 244P874. (31) As to cause of fire on tug being repaired. 22 F(2d)64. (32) 192Wis249, 212NW796. (33) Other findings. 13LaA251, 127S81 (1stcase). (34) Liability of bailee for damages to ship for failure to comply with contract terms. 34F(2d)100. [c] (3) 142Wash675, 254P248; 193Wis63, 213NW667. (b) To sustain verdict for defendant. 240 IIIA518. [f] **Facts from which negligence may be inferred** are sufficient. 228Ky489, 158SW(2d) 504.

1162–33 79CalA572, 250P575; 162La1, 110S68; 242NY481, 152NE268. [a] (2) 74CalA378, 240P523. (3) 33F(2d)354 [aff 33F(2d)356]; 74CalA378, 240P 523; 44 Ida724, 260P162; 242 IIIA101 (employment of servant by bailee); 147 Wash76, 265P162; 193Wis63, 213NW 667. (7) To show that damage to automobile delivered to defendant to be washed was due to defendant's negligence. 68CalA252, 228P879. (8) To support implied finding of nondelivery or redelivery. 79CalA572, 250P575. (9) Conversion. 86Mont150, 282P494.

1163–37 21AlaA136, 106S220; CalA 291P624; 228Ky489, 158SW(2d)504; MoA 28SW(2d)433; NJMisc 130A436; 19 OhA68; 287Pa398, 135A114; 90 PaSuper517; 147Wash76, 265P162. [b] **What constitutes ordinary care** is question for jury. 287Pa398, 135A114.

1163–38 CalA 291P624; 44 Ida724, 260 P162 (evidence held insufficient to go to jury on question of bailee's negligence causing fire); 103NJL156, 131A667.

1163–40 222MoA187, 297SW100.

1164–49 MoA 28SW(2d)433.

1164–54 MoA 28SW(2d)433; 287Pa 398, 135A114.

1164–56 23 OhA43, 154NE664. [a] **Instructions held erroneous.**–23 OhA43, 154NE664.

1164–57 [b] **Instructions held not erroneous.**–231Ky630, 218SW(2d)1006.

1164–60 251 IIIA564.

1164–64½–New. [§ 169a] d. **Judgment.** In a suit by the owner of an undivided interest in a chattel possessed and used by the purchaser of the whole title from the owner of the other undivided interest, judgment for rent cannot be rendered against the seller as warrantor where he derived no benefit from the use. 164La767, 1148647.

1164–64¼–New. In a suit for recovery of rental of a drilling outfit involving a demand for rent accruing before the date of judicial demand, the right of plaintiff to recover rentals accruing after judicial demand should be expressly reserved. 164La767, 1148647.

1164–64¼–New. In action for value of property bailee may, in proper case, be allowed to return property. LaA 1298399.

1164–65 204 Iowa758, 216NW54; 163 La227, 1118868.

1164–66 8LaA389.

1164–67 3LaA67.

1164–68 107Conn99, 139A506 [citCJ]; 204 Iowa758, 216NW54. [b] **Trial court is without right to compute interest** and include it in judgment entered. MoA 28SW(2d)433.

1164–69 107Conn99, 139A506; 107 Conn712, 142A458.

1164–70 209Ky600, 273SW434; 230Ky 538, 208SW(2d)173 (fair market value); 6LaA93. [c] **Statute preventing recovery** where bailor merely states property is "valuable." CalA 291P624.

1165–73 But see 89AppDiv200, 85NYS 916.

1165–76 See also 7LaA270.

1165–77 103Conn685, 131A401, 403 [cit CJ]. [a] **Damages held not excessive.**–103Conn685, 131A401.

1165–77½–New. But a bailor could not keep a remodeled coat an unreasonable length of time and then sue in trover for the total loss thereof. 103Conn685, 131A401.

1165–78 206Cal 94, 273P28.

1165–82 [b] **Agreement by bailee to pay for storage did not imply payment of insurance** or interest on loans to secure storage. 163La227, 1118686.

1165–83½–New. In Philippines mill owner converting palay into rice and selling it pursuant to custom is liable to owner for prevailing price at time of demand. 51Philippine1.

1166–85 [a] **Damages held excessive.**–232Ky5, 22SW(2d)261 (one thousand dollars for mental pain and humiliation caused to bailee).

1166-86 See also 153**Tenn**386, 284**SW** 363 [citCJ].
1166-88 32**NM**1, 249**P**1011, 1012 [quot CJ entire section]. See also 153**Tenn** 386, 284**SW**363, 364 [citCJ].
1167-7 **Md** 150**A**866.
1167-11 **Md** 150**A**866.
1168-23 168**Ark**440, 270**SW**519, 520 [citCJ]; 28**Hawaii**145.
1168-27 **NJDistCt** 149**A**637 (allegation held adequate); 32**NM**1, 249**P**1011, 1012 [citCJ]. [a] **Complaints held sufficient.**–88**CalA**331, 263**P**365.
1168-27½-New. Plea of not guilty is not denial of ownership in action on case by bailee for wrongful injury to chattel. 90**Fla**148, 105**S**319.
1168-27¾-New. To put in issue question of plaintiff's ownership special plea in denial thereof should be filed. 90 **Fla**148, 105**S**319.
1168-27¼-New. Failure so to deny admits allegation of ownership. 90**Fla** 148, 105**S**319.
1168-29½-New. Evidence in an action by the bailee against a purchaser of articles stolen by the bailee's employee has been held insufficient to sustain the findings. 88**CalA**331, 263**P**365.
1168-31 **NJDistCt** 149**A**637; 32**NM**1, 249**P**1011, 1012 [citCJ]; 190**NC**480, 130 **SE**319, 321 [citCyc&CJ].
1169-32 190**NC**480, 130**SE**319, 321 [cit Cyc&CJ]. [a] **Measure of bailor's damages** is actual value of his ownership in article destroyed. 97**PaSuper**93.
1169-33 190**NC**480, 130**SE**319, 321 [cit Cyc&CJ].
1169-38 [a] **Replevin is proper form of action** for possession in suit by mortgagee against one holding under claim of repairer's lien. 78**Colo** 384, 242**P**68.
1169-44 145**Va**199, 133**SE**881, 882 [quotCJ].

BANISHMENT

1178-10 45**Philippine**84. [d] **For killing adulterous wife** see 45**Philippine**84.

BANK DRAFT

1181-54½-New. Bank draft is bill of exchange drawn by bank on its correspondent bank issued at solicitation of stranger purchasing it. **Wash** 289**P**47.

BANKER'S CHECK

1181-58 80**Mont**174, 259**P**1060.

BANK NOTE

1186-21 9**F(2d)**928, 930 [citCJ].

BANKRUPTCY

7 C. J.—17-3½-New. Bankruptcy as the term is used in the insolvency provision of a policy of motor vehicle insurance must be held to have reference to the actual financial inability of insured to pay the judgment rendered against him, rather than to an adjudication of bankruptcy by a court of competent jurisdiction. 148**Md**289, 129**A**660.
18-15 24**F(2d)**522, 523 [citCJ].
19-19 [a] **"Uniformity"** requires application of statute to all bankruptcies. 27**F(2d)**361.
19-20 [b] **Special act,** authorizing certain district court to permit certain bankrupt to file petition for discharge, is unconstitutional. 27**F(2d)**361.
19-22½-New. A statute making a debtor's failure to dissolve an attachment an act of bankruptcy is not unconstitutional. 27**F(2d)**917.
19-23 15**F(2d)**153; 20**F(2d)**939; 34 **F(2d)**667; 215**Ky**668, 287**SW**364.
19-24 24**F(2d)**828; 34**F(2d)**667.
20-25½-New. Bankruptcy is essentially a commercial fraud of the law and its procedure ought to be kept as direct and informal as possible. 15**F(2d)**113.
20-30 22**F(2d)**571; 28**F(2d)**48; 29 **F(2d)**205 (as regards right to discharge); 32**F(2d)**805 (liberally); 155 **Tenn**296, 291**SW**835. [c] 23**F(2d)**912. [d] **Liberal construction** to end that unfortunate and insolvent debtor may be released from burden of debts should be had. 30**F(2d)**674. [e] **Act should be construed liberally in bankrupt's favor.**–41**F(2d)**208.
20-30½-New. The court's conception of the spirit of the act should not overthrow the direct letter of the act. 27 **F(2d)**999.
21-35½-New. The Bankruptcy Act supersedes conflicting general legal principles. 27**F(2d)**159.
21-36 14**F(2d)**955; 19**F(2d)**305. See also 15**F(2d)**692. [a] (5) Act of May 27, 1926, effective August 27, 1926, is held inapplicable to appeal and petition to revise filed in circuit court of appeals on May 15, 1926. 14**F(2d)**955.
21-37 19**F(2d)**305. [a] (2) Amendment eliminating "intent to conceal financial condition" contained in prior act as ground for refusing discharge is inapplicable to pending case. 23 **F(2d)**350.
22-38 278**US**261, 49**SCt**108, 73**L ed**318; 8**F(2d)**551; 19**F(2d)**18; 27**F(2d)**159; 33**F(2d)**649; 41**F(2d)**81; 201 **Iowa**1298, 205**NW**843; 127**Mei**72, 142**A**580; 300 **Pa**9, 149**A**881. [k] 175**Ark**599, 299**SW** 997.
23-39 278**US**261, 49**SCt**108, 73**L ed**318; 97**CalA**750, 276**P**382.
23-41 97**CalA**750, 276**P**382; 13**PaDist &Co** 125.
25-48½-New. Jurisdiction of the supreme court of Canada to hear an aged appeal in bankruptcy is governed solely by the Bankruptcy Act. [1927] **Can SC**275, [1927] 2**DomLR**1010, 8**CanBankr** 254.
26-51 [c] **Powers of court do not extend** beyond those expressly conferred and those necessary to give full effect to jurisdiction specifically conferred. 5 **F(2d)**307.
26-53 [a] (1) 16**F(2d)**142.
26-53½-New. Bankruptcy court may administer securities deposited with the superintendent of banks. 9**F(2d)**797.
26-53¾-New. The federal court of bankruptcy has not the right to act as a court of review over suits and proceedings of a state court. 20**F(2d)**939.
26-53¼-New. Consent of parties cannot confer jurisdiction of subject matter. 38**F(2d)**420.
26-57 27**F(2d)**368; 38**F(2d)**420.
26-58 19**F(2d)**959.
27-59 [a] **Discharge in bankruptcy** raises presumption of jurisdiction of federal court and regularity of proceedings. 81**Mont**408, 263**P**972.
27-59½-New. A bankruptcy court is a court of equity. 15**F(2d)**153.
27-63 7**F(2d)**885; 13**F(2d)**653; 14 **F(2d)**931; 20**F(2d)**939; 21**F(2d)**936; 34**F(2d)**964; 37**F(2d)**499; 38**F(2d)**745; 42**F(2d)**45; 170**Ga**180, 152**SE**234.
27-64 5**F(2d)**682; 21**F(2d)**936; 40 **F(2d)**270; 40**F(2d)**321.
27-65½-New. A bankruptcy proceeding is not a mere personal action, but is essentially a proceeding in rem. 5**Pa Dist&Co** 132.
27-65¾-New. The bankruptcy court is not a mere additional remedy, in the nature of supplementary proceedings, to execution in a state court. 20**F(2d)** 939.
27-65¼-New. Bankruptcy courts proceed upon equitable principles. 43 **F(2d)**666.
27-67 44**F(2d)**70(1stcase).
27-68 [a] But see 5**F(2d)**956. [b] **Order directing bankrupt** to deliver assets to trustee is conclusive in ancillary proceedings in another district. 5**F(2d)** 956.
27-69 126 **Or**10, 268**P**766, 767 [quot CJ]. See also 28**F(2d)**526. [a] (1) 7 **F(2d)**888.
27-69½-New. A bankruptcy court in any province has jurisdiction in personam over any person domiciled in Canada. 42**QueKB**277, [1927]. 2**Dom LR**866, 8**CanBankr**240.
27-69¾-New. An application to the Canadian bankruptcy court to act in aid of an English bankruptcy court, if authorized, must be made on notice to all the parties. **Sask** [1928] 4**DomLR**375.
27-69¼-New. In Quebec, a petition for a receiving order may be presented to the superior court in bankruptcy anywhere within the province, if it is the locality of the debtor. **Can** [1928] 1 **DomLR**926.
28-75 19**F(2d)**518; 37**F(2d)**11.
29-76 [b] (2) Domicile of bankrupt held at place of filing petition though removing temporarily. 7**F(2d)**19. [g] **Domicile should be determined** at commencement of proceedings. 7**F(2d)**19. [h] **Determination to acquire new domicile** alone, without party choosing definite place, leaves all domicile of alleged bankrupt unchanged. 10**F(2d)** 478.
29-77 42**F(2d)**276.
30-80 37**F(2d)**11.
30-84 16**F(2d)**330.
30-85 16**F(2d)**330.
30-86 16**F(2d)**330; 19**F(2d)**959; 30 **F(2d)**523(2dcase).
30-86½-New. **Although state court** has appointed receiver of partnership assets, the federal court may assume jurisdiction in bankruptcy of such partnership. 9**F(2d)**407.
30-87 41**F(2d)**399. [i] **Nonresident resisting creditors have been held** not entitled to adjudication in any specific division of district. 41**F(2d)**399.
31-92 13**F(2d)**754; 13**F(2d)**901; 144 **Wash**241, 257**P**622. [g] **Circuit court may dissolve** bankrupt corporation without obtaining consent of federal court or joining trustee in bankruptcy. 50**SD**627, 211**NW**602. [h] **Action on note assigned by bankrupt** before maturity and adjudication as collateral may be brought in state court, although note was scheduled as part of estate but was listed as security. **TexCivA** 285 **SW**1105.
31-93 13**F(2d)**754; 13**F(2d)**901; 15 **F(2d)**399; 21**F(2d)**999 (property covered by liens to full value); 28**F(2d)** 526 (bankruptcy court as distinguished from state court has jurisdiction over entire property of bankrupt wherever situated); 95**CalA**476, 273**P**37; 165**La** 995, 116**S**484 (accounting by receiver); 20**SaskLR**568, [1926] 3**DomLR**271, [1926] 2**WestWkly**355 (under Canadian act). [n] (2) Jurisdiction to determine proper compensation of attorneys for receiver appointed in state court rests primarily in bankruptcy court when assets have been transferred to it. 14**PaDist &Co** 19. [o] **Interpleader between trustee and another claimant.**–13**F(2d)**754.
32-95 13**F(2d)**754; 14**F(2d)**16; 15 **F(2d)**58; 16**F(2d)**142; 21**F(2d)**434 (federal jurisdiction respecting insolvents is exclusive). 4**LaA**455; 37**Wyo** 11, 258**P**576. [c] (2) 37**Wyo** 11, 258**P** 576. (3) State jurisdiction ends where petition is filed after assignment. 5 **PaDist&Co** 132. [j] **Replevin** action will not lie against receiver. 5**PaDist &Co** 186. [k] **Comity.**–42**F(2d)**475. [l] **Notice of bankruptcy proceedings.**–42 **F(2d)**475. [m] **Priority of right in bankruptcy court in matters of bankruptcy** prevails over jurisdiction of state court. 42**F(2d)**475.
33-96 16**F(2d)**142.
33-96½-New. The bankruptcy court enforces and administers the Bankruptcy Act, not concurrently with, but exclusive of, other courts. 27**F(2d)**52.
33-97 13**F(2d)**901; 16**F(2d)**800; 16 **F(2d)**942; 32**F(2d)**5; 42**F(2d)**475; 178 **Minn**20, 226**NW**198 (suit to dissolve corporation in which receiver was appointed); 219**AppDiv**825, 221**NYS**883. [c] (2) Where judgment creditor files petition in state court of competent jurisdiction seeking to vacate and set aside conveyances by judgment debtor and to subject land attempted to be conveyed to his judgment, and judgment debtor thereafter files petition in bankruptcy, state court does not lose jurisdiction of cause and may proceed to determination of issues. 123 **Okl** 15, 250**P**430. [e] (1) 2**F(2d)**853; 24**F(2d)** 38. But see 26**F(2d)**851. (2) 16**F(2d)** 142. (3) Fact that appeal from appointment of receiver by state court is pending does not give trustee in subsequent bankruptcy proceeding right to possess property since receivership subsists pending appeal. 13**F(2d)**901. (4) Where insolvent corporation was declared voluntary bankrupt over a year after its property was taken possession of and reduced to money by receivers appointed by United States equity court, jurisdiction of such court to determine and pay claims supported by liens and privileges is not divested. 18**F(2d)**617.

(5) In such case balance remaining after payment of such claims will be delivered to bankruptcy court for distribution among general creditors. 18 F(2d)617. [f] (2) Mortgagee or his assignee may foreclose in either bankruptcy court or state court. 120 Or687, 252P948. (3) Generally suit is brought in state court and plaintiff is not barred therein by filing claim as secured creditor in bankruptcy proceedings when his right to foreclose is not adjudicated therein. Or 252P948. (4) Where state court has acquired jurisdiction of parties and subject matter in action to foreclose mortgage, jurisdiction is not divested by filing of involuntary petition in bankruptcy against defendant. Mich 216NW442. (5) Where court in such action is not judicially advised of bankruptcy proceedings till there has been decree sale, report thereof, and confirmation, trustee is in no better position to attack decree than defendant would have been if there had been no bankruptcy. 240Mich646, 216NW442. [n] **This rule is abrogated** under recent amendment to Bankruptcy Act. 206 Iowa897, 221NW542 (trustee entitled to rents and profits of realty as against foreclosure receiver). [o] **Suit in state court to set aside conveyance as being in fraud of creditors,** where such suit is commenced before grantor was adjudicated bankrupt, and trustee in bankruptcy intervened in suit, court properly proceeded and determined right to property. 153Va392, 149SE624.

34-99 [c] (2) Bankruptcy court after filing of petition has exclusive jurisdiction to pass on account of assignee for benefit of creditors. 38F(2d)100. [e] (2) Possession by state court receiver is possession of state court, and receiver may not surrender property in his possession without authority from court. 28F(2d)760.

34-1 16F(2d)142; MoA 16SW(2d)665; MoA 19SW(2d)565. [b] (1) 37Wyo 11, 258P576. [f] (2) Trustee in bankruptcy in possession of bankrupt's property is vested with bankrupt's title to mortgaged property and no lien can be placed thereon in state court. 33F(2d) 561. (3) Actual or constructive possession by trustee in bankruptcy precludes right of any other court to interfere with possession. MoA 19SW(2d)565.

35-2 16F(2d)142; 39F(2d)632. [g] **All parties asserting interest or right in property under control of bankruptcy court** will be permitted to present their claims. 34F(2d)667. [h] **Proceedings to set aside sale of bankrupt's assets by state court in insolvency proceedings** may be had in bankruptcy court. 42 F(2d)475.

35-3½-New. State court has jurisdiction to order bankrupt partner to turn over partnership property in his possession to receiver. 9F(2d)36 (even though he filed voluntary petition and listed such property as owing him by partnership).

35-3¼-New. Bankruptcy court has no power to abandon or relinquish its jurisdiction. 16F(2d)142.

35-3¼-New. An order that the receiver in bankruptcy turn over assets to a state court receiver is not prejudicial to claimants having claims filed in a state court. 22F(2d)158.

35-3½-New. An order that cash deposited in the state court by a surety in lieu of a delinquent receiver's bond be delivered to the bankruptcy trustee is proper. Mass 166NE631.

35-3¾-New. In advance of adjudication trustee in bankruptcy may decline to prosecute receiver's motion for surrender of assets. 42F(2d)475.

36-14 20F(2d)425; 43F(2d)863.

36-15 81Mont408, 263P972.

36-16 10F(2d)351 (court proceeds on equitable principles; looks through form to substance). [a] 5F(2d)307; 40 F(2d)946 (correction of mistakes).

36-16½-New. Administration procedure is not governed by equity rules. 23F(2d)681 (time for exceptions to special master's report).

36-16¾-New. Administrative rules should be followed with care. 9F(2d) 883.

36-17 116Tex214, 288SW435.

37-24 15F(2d)206. [g] **Property of others** cannot be included so as to affect owner's interest therein. 72CalA 151, 236P373. [h] **Debts held not properly scheduled.**-TexCivA 279SW893. [i] **All insurance policies** should be listed. 33F(2d)769.

37-26 [a] **Schedule showing certain amount due on certain date** is no evidence of what was owed on earlier date. 19F(2d)769.

37-27 [a] (2) Tax collector's bond giving name and address of payee and describing bond. 116Tex214, 288SW435. [c] See also 4HawaiiFed145.

38-29½-New. Voluntary petitioner in bankruptcy who lists claim of a creditor does not thereby rescind contract with another for benefit of creditor. 51 ND66, 199NW138.

38-34 But see 14F(2d)490.

38-34½-New. Courts will judicially notice that schedules must be verified by person subscribing. 5F(2d)799.

38-35 [e] **Amendment relates back** to date of adjudication. 19F(2d)791.

38-36 Ont [1926] 3DomLR131, 7Can Bankr376 (ex parte order).

39-38½-New. General orders provided by the Bankruptcy Act have the force and effect of law. 14F(2d)843.

39-44 5F(2d)39.

39-45½-New. A bankruptcy proceeding is a litigation in which substantial rights and justice, rather than technical forms, should control. 34F(2d)344.

39-46 [a] **Street railroad** (1) is railroad within exception in statute. 24 F(2d)828. (2) That corporation had ceased to do business ten months previously does not prevent it from being railroad corporation. 24F(2d)828.

39-48 [a] **Court has refused to permit street railway corporation to declare itself bankrupt** (1) under act, and thus augment great financial loss to creditors and serious public inconvenience from summary discontinuance of railway service. 27F(2d)52. (2) Electric railway company operating suburban or interurban line is within meaning of "railroad" in amendment to act, and is so prohibited from becoming bankrupt. 27F(2d)52. (3) Discontinuance of transportation service prior to bankruptcy proceedings will not entitle street railway corporation to be adjudicated voluntary bankrupt. 27F(2d)52.

39-49½-New. Notice of director's meeting held sufficient to authorize resolution for filing of bankruptcy petition. 6F(2d)192.

39-49¼-New. Board of directors may authorize filing of voluntary petition. 5F(2d)192.

39-49¼-New. Resolution authorizing director and officer to file voluntary petitions held to delegate merely ministerial acts. 6F(2d)192.

39-49⅛-New. A seller, agreeing not to pledge or encumber a corporation's stock and to transfer it to the buyer on completion of payment, but not surrendering any other rights, may have the right to use the stock to elect a board of directors which would put the company into bankruptcy, there being no evidence of fraud on the buyer in making the contract or instituting the bankruptcy proceeding. 31F(2d)434.

39-50 18F(2d)311.

39-51 18F(2d)311.

39-52 But see 18F(2d)428. [b] (1) But see 22F(2d)300.

39-54½-New. A partnership may be adjudged a bankrupt as a distinct legal entity. 18F(2d)1001.

39-54⅛-New. In case of the bankruptcy of one or more members of a partnership the partnership property cannot be administered in bankruptcy except by the consent of the partners not adjudged bankrupt. TexCivA 284SW852.

40-57 But see 41F(2d)749.

41-68 22F(2d)9.

41-69 18F(2d)1001; 22F(2d)9; 35 F(2d)399.

42-70½-New. Jurisdiction to protect creditors under an earlier pending involuntary petition is not precluded by adjudication under a voluntary petition. 22F(2d)9.

42-70½-New. Denial of an order to show cause on a petition to set aside adjudication under a voluntary petition is proper, application being for an order directed only to receivers and not bringing in necessary parties. 22 F(2d)9.

42-70¼-New. A petition to vacate adjudication in a voluntary proceeding may not be maintained by a creditor. 22F(2d)9.

42-71½-New. Receivership proceedings of an insolvent corporation pending more than four months give custody and control of the property to state court and estops the officers from filing voluntary petition in bankruptcy. 13 F(2d)901.

42-76 See also 30F(2d)576.

42-78½-New. Officer cannot file a petition without authorization by directors. 10F(2d)616.

42-78¼-New. The president of a corporation may not of his own motion put the corporation in bankruptcy by filing a voluntary petition. 10F(2d)612.

43-81 [b] **Corporation's petition** alleging its "principal office" was in southern district of New York held sufficiently to allege its "principal place of business." 6F(2d)192.

43-82 [a] **Formal statement of board of directors** as to corporation's principal place of business creates a prima facie case. 6F(2d)192.

43-83 [a] **Petition by president** without authority by directors does not give court jurisdiction. 10F(2d)616 (not act of corporation).

43-85 10F(2d)616 [quot CJ].

43-85½-New. Officer cannot admit inability to pay debts and signify willingness of corporation to be adjudged bankrupt. 10F(2d)616 (unless authorized by resolution passed at meeting of stockholder or directors).

43-85⅓-New. Corporate directors not regularly elected are not authorized to file a voluntary petition in bankruptcy for a corporation. 13F(2d)78.

43-95½-New. A bankrupt may waive the right to proceed in the division of his residence and file a petition in another division of the proper district. 32F(2d)287.

44-97 6F(2d)192.

44-99 4HawaiiFed142.

44-6 Erratum.-In text, "involuntary" should read "voluntary."

45-12 [b] **Court without jurisdiction** to act where only claim presented was not dischargeable and was withdrawn by permission. 152Wash211, 277P843.

45-20½-New. The question of the right of a single partner to institute voluntary proceedings in bankruptcy cannot be raised in incidental proceeding. 14F(2d)641.

46-27 But see 31F(2d)945.

46-30½-New. Adjudication must be vacated where the bankruptcy court acquired no jurisdiction. 10F(2d)616.

46-30½-New. Adjudication may be vacated on seasonable petition where the petition was filed by the corporation president of his own motion. 10F(2d) 612.

46-30¼-New. Where rights of innocent purchasers have intervened, voluntary adjudication is not set aside on petition of stockholders. 10F(2d)612 (where petition is regular on its face and stockholders with knowledge of officer's unauthorized act stood by and did nothing).

46-30⅛-New. Filing of petition by minority to vacate adjudication, six months after adjudication, is too late. 10F(2d)612 (where rights of innocent purchasers intervened).

46-30⅛-New. Adjudication will not be set aside for fraud because the petition was filed to prevent state receivership on behalf of minority. 10F(2d)612.

46-30½-New. The debts of a bankrupt are never barred merely by the adjudication; only his discharge has that effect. 3Del 294, 136A280.

46-30¼-New. Intervening petition in bankruptcy proceedings by a receiver of a corporation is not a collateral attack on adjudication and is authorized by Bankruptcy Act § 2. 15F(2d)78.

46-30½-New. Adjudication pursuant to a voluntary petition in bankruptcy may be vacated for fraud, but a mere effort to substitute federal for state control does not constitute fraud. 30F(2d)576.
46-30½-New. Voluntary bankruptcy raises no inference of insolvency. 25 F(2d)295.
46-33 116Tex214, 288SW435; 37Wyo 11, 258P576.
46-36 41GaA51, 152SE148.
46-37 35PortoRico 150.
46-40 [c] **Allowance of deferred discount** as asset held proper. 9F(2d)97. [d] **Subscription to stock by person to whom corporation is indebted** considered collectable assets. 9F(2d)97 (items may be set off). [e] **Commissions due bond salesman** should be set off against advances to such salesman. 9F(2d)97.
46-41 [g] **Where comakers of paper are insolvent,** right of contribution should not be estimated as asset at face value but should not be entirely ignored. 41F(2d)660. [h] **Failure to include right of contribution as asset of comaker** is immaterial where total liabilities of comakers exceeded assets. 41 F(2d)660.
47-44 [h] **Bonds** are properly valued at par rather than market value. 9 F(2d)97 (on issue of insolvency). [i] **Value of improved real estate** is not determined solely on basis of its earning power. 9F(2d)97. [j] **Company held "going concern"** entitled to have assets valued as such in determining question of insolvency at time of appointment of receiver. 10F(2d)333. [k] **What constitutes failure to meet liabilities.**–NB [1928] 1DomLR350.
48-45 [a] (3) Payment of indebtedness of alleged bankrupt paid by one in managerial control. 27F(2d)229. (4) Full amount of paper should not be counted as liability of comaker without counting as asset right of contribution. 41F(2d)660. (5) Liabilities do not cease to be liabilities merely because represented by indorsed paper. 41 F(2d)660. [f] **Partnership not insolvent** unless separate and firm assets insufficient to pay firm debts. 9F(2d) 553. [g] **Test** is whether assets on date of appointment of receiver are in excess of liabilities. 9F(2d)97 (excluding liabilities to stockholders). [h] **Stock subscription** are not liabilities. 9F(2d)97. [i] **Claims against corporation** by purchasers of stock in violation of Blue Sky Law are considered on issue of solvency. 26F(2d)123. [j] **Corporation stockholders** are not creditors of corporation so as to make corporation liable to them on stock "debts." 30F(2d)325.
48-46 [a] **Value of property** determined from evidence of date of alleged act of insolvency. 9F(2d)97 (not subsequent history of property).
48-47½-New. As respects solvency, the verdict against alleged bankrupts in a suit for wrongful death is not a "debt" within the Bankruptcy Act. 17F(2d) 813.
48-47½-New. As respects solvency, a bankruptcy court will not give a judgment or verdict the effect given it in a state court if contrary to the Bankruptcy Act. 17F(2d)813.
48-49 20F(2d)939 (holding insolvency alone insufficient); 41GaA51, 152SE 148; 13PortoRicoFed97; 13PortoRico Fed329. [d] **Action of supervisor of banking in taking possession of assets** of insolvent bank may constitute act of bankruptcy. 24F(2d)907.
49-54½-New. An appointment of liquidators on a petition of a creditor agreed to by the debtor constitutes an act of bankruptcy. 13F(2d)335.
49-57 13F(2d)335.
49-61 36F(2d)865. [e] **Transfer to mortgagee of mortgaged premises** (1) for less than fair value constitutes act of bankruptcy. 17F(2d)350. (2) But if mortgaged property so conveyed is not worth more than mortgage debt, conveyance is not act of bankruptcy. 17 F(2d)350. [f] **Trust deed to selling agent** has been held not to disclose fraudulent purpose to place property beyond reach of general creditors. 32 F(2d)92 (deed held valid on being recorded).
50-64½-New. Change of title to property is necessary to constitute a fraudulent transfer. 8F(2d)469.
50-64½-New. A lease of property is not an act of bankruptcy. 8F(2d)469.
50-67 18F(2d)633; 20F(2d)939. [f] 18F(2d)633.
50-68 18F(2d)633.
50-70 18F(2d)633.
50-71½-New. That the result of a transfer is to hinder, delay, or defraud creditors is not alone sufficient to show an intent to do so. 18F(2d)633.
50-74 6F(2d)92. [f] (7) Substitution of securities. 12F(2d)654. (8) Payment by bank of check drawn while bank is going concern. 12F(2d)654.
51-75½-New. Whether transfers constitute act of bankruptcy must be determined from all the facts and circumstances. 8F(2d)839.
51-78 [b] 8F(2d)838.
51-79 8F(2d)838; 30F(2d)548(2dcase) [aff 30F(2d)550].
52-80 8F(2d)838.
52-86 [f] 8F(2d)838.
52-87 [a] 8F(2d)838.
53-93 16F(2d)177; 19F(2d)642; 36 F(2d)371; 38F(2d)72; 13PortoRicoFed 209.
53-93½-New. By recent amendment, an additional act of bankruptcy consists of an insolvent debtor having suffered or permitted any creditor to obtain through legal proceedings any levy, attachment, or judgment and not having the same vacated or discharged within thirty days thereafter. 20F(2d) 939 (Bankr. Act c 3 § 21a(4), effective May 27, 1926).
53-93⅓-New. The purpose of the law has not been changed by such amendment, as the object legislated against is still the likelihood of obtaining a preference. 20F(2d)939.
53-93¼-New. A judgment need not be conclusive as not the subject of review before other creditors could claim that a preference had been, or was about to be, obtained. 20F(2d)939.
53-93⅓-New. Pendency of appeal from a judgment obtained by a creditor against an insolvent debtor does not take away the final character of the judgment. 20F(2d)939.
53-94 31F(2d)930.
53-98½-New. Judgment must be one creating a lien on bankrupt's property. 25F(2d)773.
53-98¼-New. Where an alleged lien is not valid, no act of bankruptcy occurs. 25F(2d)646.
55-9 27F(2d)917; 13PortoRicoFed209.
55-13 7F(2d)329; 17F(2d)347; 34 F(2d)39 (it is not necessary that all creditors accept terms of instrument to make it general assignment for benefit of creditors); 51SD638, 216NW549; 37 Wyo 11, 258P576. [a] (3) Conveyance, absolute in form, to trustees of substantially all grantors' property for benefit of all parties to agreement, held general assignment for benefit of creditors and therefore act of bankruptcy. 34F(2d)39. [e] **Character of general assignment for benefit of creditors** is not in any way affected by conditions designed to safeguard, facilitate, or speed its execution. 34F(2d)39.
56-16 41F(2d)399.
56-17 18F(2d)231. [a] (3) Appointment of receiver, and consent thereto, to distribute assets of corporation. 24 F(2d)870.
57-28 9F(2d)624; 13F(2d)928; 16 F(2d)177; 36F(2d)371. [j] **State superintendent of banking** taking possession of bank's assets for liquidation is act of bankruptcy. 9F(2d)624. [k] **That property was not taken over by receiver or trustee** makes no difference. 9F(2d)624. [l] **That receiver, trustee, takes charge of property not at instance of insolvent** makes no difference. 9 F(2d)624. [m] **Procuring filing of petition** and answer joining in prayer for petition is "application" for receiver within act. 10F(2d)333. [n] **Allegation that receiver was appointed for partnership.**–13F(2d)928. [o] **Appointment of temporary receiver.**–20F(2d) 547 (petition held improperly dismissed on theory that appointment of temporary receiver with consent of corporation was act of bankruptcy occurring more than four months before filing of petition).
57-30½-New. The naming of a receiver with a requirement for bond is not an "appointment" under the terms of the amended Bankruptcy Act. 26 F(2d)257.
57-33 13F(2d)928; 20F(2d)547; 28 F(2d)343 [certiorari den 278US651, 49 SCt177, 73Led562(1stcase)] (appointment must be on ground of "insolvency" as defined in Bankruptcy Act). [a] (3) "Insolvency" in act is "insolvency" in bankruptcy sense at time of appointment of receiver. 10F(2d)333 (though appointment based solely on allegations of insolvency in equity sense).
58-34 8F(2d)859. [b] 8F(2d)469.
58-35½-New. Where insolvency is coupled with other grounds for the appointment of a receiver, the appointment is the act of bankruptcy. 13F(2d)928.
58-39 20F(2d)547.
60-63 12PortoRicoFed453; 12PortoRico Fed565.
60-65 [c] **Attachment.**–13PortoRicoFed 329.
61-78 6F(2d)854.
61-82½-New. Death of bankrupt before filing petition requires dismissal. 26F(2d)90.
61-82⅓-New. The status of those exempt under the act is of the date of the alleged act of bankruptcy. 26F(2d)398.
61-82¼-New. Whether a debtor is within the exempt class is a question of fact in each case. 26F(2d)398.
61-83½-New. [§ 84a] 2½. **Incompetents.** 13F(2d)653.
62-87 [b] **As member of partnership.**–18F(2d)961.
62-94 36F(2d)371 (reciprocal or inter-insurance exchange). [c] **Company organized under trust agreement** held properly adjudicated as unincorporated association and not partnership. 5F (2d)171. [d] **Common-law trust** may be adjudicated bankrupt. 4F(2d)793.
62-96 18F(2d)311; 18F(2d)1001. [a] 18F(2d)311. (2) Individual and partnership are separate and distinct entities in bankruptcy matters. 20F(2d) 939.
63-97 [b] **Partner withdrawing more than six months** before filing of petition cannot be made party respondent, though indebtedness was partnership indebtedness. Man [1924] 2DomLR703.
63-98 9F(2d)407. [b] (1) 9F(2d)407. (2) Death of partners gives court jurisdiction to entertain petition 28F(2d) 343.
63-1 276US215, 48SCt252, 72Led536; 18F(2d)1001; 250Mich495, 231NW71.
63-2 [b] **Burden of proving partnership carried on in corporate name** is on petitioning creditors. 6F(2d)854.
63-3 33F(2d)198 (one not partner cannot be adjudged member of bankrupt partnership). [a] **Partnership shown.**–26F(2d)382.
63-7 13PaDist&Co 125. [c] **Exclusive occupation as wage earner** is necessary for exemption from bankruptcy. 31F(2d)749. [d] **Test.**–31F(2d)749. [e] **Debtor held wage earner and exempt.**–31F(2d)749.
64-10 13PaDist&Co 125.
65-14 [b] **Debtor must be directly affected by gains or losses** of farm operations. 28F(2d)67. [c] **One operating farms through others** is within exemption. 28F(2d)67.
65-18 22F(2d)426.
65-19 15F(2d)693; 26F(2d)398; 38F (2d)627.
65-20 28F(2d)67 (stockholder and officer of farming corporation receiving salary therefrom irrespective of losses); 28F(2d)610; 12PortoRicoFed406.
65-20½-New. It is not necessary for person to operate farm on his own account in order to be "engaged in farming." 38F(2d)627.
65-23 15F(2d)693.
65-26 15F(2d)792; 28F(2d)610 [certiorari den 278US655, 49SCt179, 73Led 564(8thcase)].
66-30 [a] **Insurance organization operated under Lloyd's plan pursuant to statute** is "insurance corporation" not

subject to involuntary proceedings. 43F (2d)383.

66–31 8F(2d)626. [a] (1) 8F(2d)626. [i] **Nonprofiting coöperative marketing associations** are not within Bankruptcy Act. 8F(2d)626. [j] **Corporation taking over dissolved partnership's securities** for purpose of liquidation has been regarded as a "business corporation" and subject to bankruptcy. 27F(2d)917. [k] **Congress may denominate certain associations as corporations.**–43F(2d) 383.

67–38½–New. Trust company organized under Nebraska statute is not banking corporation within bankruptcy law and is subject to bankruptcy. 39F(2d)447.

67–38⅓–New. Necessary element of "banking business" within bankruptcy law is receipt of deposits for use in business. 39F(2d)447.

67–38¼–New. "Banking corporation" as used in such law means those corporations authorized by law of their creation to do banking business. 39F(2d) 447.

68–42 9F(2d)896.

68–43 36F(2d)595.

68–43½–New. General order in bankruptcy governing framing of petition cannot prevent bona fide creditors from petitioning to have debtor adjudged bankrupt. 43F(2d)813.

68–45 9F(2d)896 (one who owns claim or demand against bankrupt); 41F(2d) 399 (intervening creditors). [k] **Note issued by corporation in exchange for stock** when capital was impaired is valid debt giving holder right to file intervening petition. 9F(2d)97. [l] **Receiver in involuntary bankruptcy is not creditor** entitled to file petition against debtor. 32F(2d)386. [m] **Qualifications of creditors.**–41F(2d)403. [n] **Assignee under oral assignment** is creditor entitled to join in petition. 43F(2d)813.

69–48 9F(2d)896; 16F(2d)177; 18F (2d)609; 41F(2d)399 (acquire status of petitioning creditors as of date of original petition). [d] **Claim against director for misappropriating corporation funds.**–12F(2d)941. [e] **Stockholders induced by fraudulent representations to take stock in corporation** becoming insolvent and serving notice of intention to rescind have provable claims and may institute involuntary proceedings against corporation. 36F(2d)595.

69–53 36F(2d)595.

70–56 22F(2d)426; 28F(2d)299. [e] **Debtor's intent** in making alleged preferential payments controls on issue of creditor's disqualification to file involuntary petition. 22F(2d)426.

70–57 22F(2d)426; 28F(2d)299.

70–59 16F(2d)177; 25F(2d)78 (may waive preference or lien and join as petitioner).

70–64 18F(2d)311.

70–66 [b] **Stockholder's right to rescind subscription** may be shown as respects right to petition as creditor. 36F(2d) 595.

70–66½–New. Stockholders, claiming that their subscriptions were induced by fraud, are not creditors entitled to maintain an involuntary petition. 18F(2d) 609.

71–69 [a] (3) Other instances. 41F(2d) 399. [b] **Sole creditor obtaining judgment** against alleged bankrupt is estopped from seeking to have debtor adjudicated bankrupt. 20F(2d)939. [c] **Circumstances not raising estoppel** election of two stockholders seeking to rescind subscriptions, as directors does not amount to estoppel where neither took part in management of corporation. 36F(2d)595.

71–70 22F(2d)426.

71–71½–New. or by having attorneys of creditors as lawyers in proceedings elsewhere involving same claims. 16F (2d)177.

71–72 [a] **Creditors participating in receivership proceedings** to extent of furnishing temporary receiver with statement of claims held not estopped to maintain involuntary proceedings. 20F (2d)547.

71–73 9F(2d)313.

71–75 7F(2d)329; 9F(2d)313 (doctrine of election); 41F(2d)399. [g] **Creditors participating in receivership proceedings,** assigning claims to committee, cannot, on reassignment of claims, allege that payments by receiver, incidental to conduct of business agreed to, were preferential and act of bankruptcy. 9F(2d) 313.

72–78 9F(2d)869; 12F(2d)941. [a] (2) Where claims for supplies furnished contractor were merged in single claim, court is without jurisdiction of involuntary petition in bankruptcy. 43F(2d) 381. [b] **Receiver vested with assets of corporation** has right to institute involuntary proceeding in bankruptcy against corporation without joining other creditors where there are less than twelve creditors. 33F(2d)30.

72–79 33F(2d)1007(2dcase); 36F(2d) 454. [a] **Payment of some of petitioning creditors** cannot deprive bankruptcy court of jurisdiction. 43F(2d)813.

72–82 36F(2d)454.

72–86 12F(2d)941.

72–88 But see 27F(2d)999.

72–88½–New. One whose conduct is designed to create a new condition artificially for the purpose of defeating bankruptcy statutes by hindering the successful prosecution of an involuntary petition will not be permitted to take advantage of such condition as regards the requirement as to the number of petitioning creditors. 33F(2d)1007(2dcase).

72–88⅓–New. Claims assigned to beneficial owner of all of corporation's stock can be counted if at all, only as single claim in determining number of creditors. 36F(2d)454.

72–88¼–New. Purchase after filing of petition of single creditor, of small claims outstanding at time of filing of petition does not prevent such claims from being counted. 36F(2d)454.

72–88⅕–New. A corporation may be estopped to set up the fact that there were more than twelve creditors when a single creditor filed an involuntary petition against it by action of its president in subsequently buying up small claims against it. 33F(2d)1007(2dcase).

72–88⅙–New. The purchase of small claims against an insolvent corporation by its president, who owned all its stock, for the purpose of protecting it against bankruptcy proceedings, is attributable to the corporation. 33F(2d)1007(2d case).

72–89 9F(2d)896; 12F(2d)941.

73–92 6F(2d)773; 18F(2d)609; 29F (2d)148; 33F(2d)1007(2dcase).

73–94 12F(2d)941.

73–94½–New. Creditors may join in petition of single petitioning creditor where creditors are more than 12 but single petitioner cannot compel such joinder. 36F(2d)454.

73–95 27F(2d)917 (objection cured by joinder of other creditors).

73–2 4F(2d)793. [g] **Denying petition in intervention not in subordination to main proceeding** is not abuse of discretion. 43F(2d)485.

74–3 31F(2d)111.

74–8½–New. Dormant partner may be joined nunc pro tunc. 9F(2d)553 (even after statutory period).

74–8⅓–New. Plaintiff in an action for deceit against defendant, adjudicated a bankrupt, not having been either a petitioning or an intervening creditor, has been held not a party to a bankruptcy proceeding. 127Me286, 143A101.

74–8¼–New. If an original involuntary bankruptcy petition is valid on its face, and other creditors intervene, adjudication may be ordered on the petition, even though it devolves that the creditor initiating the proceedings could not qualify as a petitioning creditor, notwithstanding intervening petitions were filed more than four months after the alleged act of bankruptcy. 29F(2d)148.

74–8⅕–New. Two or more individuals or corporations or corporation and individual not related as partners cannot be proceeded against by single petition. 36F(2d)353.

74–8⅙–New. Bankruptcy court has no jurisdiction to allow third persons to intervene to litigate rights unless there is involved res in possession of bankruptcy court. 38F(2d)420.

74–15 [c] **As to requisites of petition.**–12F(2d)941; 14F(2d)464.

74–17½–New. A petition against two persons stated to be trading as a named company is insufficient to warrant an adjudication against a partnership. 18F (2d)1001.

74–17⅓–New. Allegations must comply with bankruptcy law and come within its provisions. 41F(2d)86.

74–18 [a] **Omission of word "District"** in name of court held not ground for dismissal. 13F(2d)945.

75–23 7F(2d)508; 30F(2d)325 (allegations insufficient).

75–25 7F(2d)508. But see 28F(2d)343 [certiorari den 49SCt177(1stcase)] (allegation that partnership was insolvent by necessary implication included partners).

75–26 25F(2d)644; 25F(2d)646; 13 PortoRicoFed97.

75–27 8F(2d)469; 28F(2d)343 [certiorari den 49SCt177(1stcase)] (ultimate facts alone necessary); 30F(2d)548(2d case) [aff 30F(2d)550]. [a] 10F(2d) 478. [c] (1) 28F(2d)293; 28F(2d)343 [certiorari den 278US651, 49SCt177, 73 L ed562(1stcase)] (giving of preference). (3) But allegations as to appointment of receiver in words of statute are sufficient. 28F(2d)343 [certiorari den 278US 651, 49SCt177, 73L ed562(1stcase)]. [g] But see 4F(2d)873. [i] 14F(2d) 464. [m] (2) Other instances. 41F (2d)86. (3) Petition following language of statute held insufficient. 41F (2d)778. [p] **Insufficient allegations as to transfer, concealment and removal.**–41F(2d)86. [q] **Sufficient allegation as to preference by judicial proceedings.**–Attachments. 13PortoRicoFed366. [r] **Allegation respecting unpaid judgment** does not state act of bankruptcy. 41F (2d)778.

77–34 [a] **Abbreviated statement** of amount of claims held sufficient. 13F (2d)945. [b] **Petition held insufficient** in not alleging claim amounts to five hundred dollars or over in excess of value of securities held by petitioner. 36F (2d)353.

77–36½–New. Existence of indebtedness must be alleged with particularity. 9F (2d)896.

77–37 15F(2d)792.

77–38½–New. Failure of a petition to negative occupations excepted from involuntary bankruptcy is waived by a motion by the bankrupt to dismiss because of being in excepted class. 15F (2d)792.

77–41 4F(2d)873 (petition held insufficient in failing to state dates or to show that debts were existing obligations); 9F(2d)896. [a] **Abbreviated statement** of nature of claims held sufficient. 13F (2d)945.

77–42 33F(2d)1007(2dcase) (petitioning creditor held not in fault in making allegation where it had no certain knowledge and was justified in viewing information of debtor with suspicion).

77–44½–New. Petition by individual and two partnerships each composed of same partners cannot be dismissed for failure to show filing of petition by more than two creditors. 36F(2d)103 (2dcase).

77–46 [d] **Form of verification has been held proper.**–41F(2d)403.

78–54½–New. Jurisdiction of bankruptcy court attaches from filing of petition signed by three creditors whose claims aggregate five hundred dollars. 43F(2d) 813.

78–54⅓–New. After petition is filed outside or extra-judicial administration should not continue. 41F(2d)548.

78–56 41F(2d)778.

78–58 12F(2d)941.

78–58½–New. a defective statement as to the amount of creditors' claims; 12 F(2d)941.

78–59 5F(2d)846.

79–66 30F(2d)158.

79–69 10F(2d)473; 28F(2d)293.

79–70 30F(2d)158. [a] (2) Amendment to involuntary petition sufficient on its face may be made after four-month period. 33F(2d)30. [b] **New acts of bankruptcy** cannot be set up by amendment more than four months after they were committed. 5F(2d)846.

79–71 33F(2d)30.

80–74 28F(2d)293; 33F(2d)30; 34 F(2d)118 (amendment supplying omitted allegation that bankrupt owed more

than one thousand dollars held not to state new cause of action).

80–75 10F(2d)478 (amendment held not to relate back); 28F(2d)293. See also 41F(2d)778.

80–76 15F(2d)601. [b] **Service on acting secretary** of corporation held insufficient under Florida statute. 15 F(2d)601. [c] **What constitutes return day.**–4HawaiiFed221.

80–77 [b] **Issuance and service of process** cannot be waived by voluntary appearance of alleged bankrupt. 5F(2d) 752.

80–78 [e] (2) Basis of service by publication is affidavit showing impracticability to serve personally. 4HawaiiFed 464.

80–80 116Tex214, 288SW435.

81–84½–New. Due scheduling of a debt imparts notice of the existence of bankruptcy proceedings. 116Tex214, 288SW 435.

81–84⅓–New. The state has been held to have had notice by scheduling of a tax collector's bond. 116Tex214, 288SW435.

81–84¼–New. Constructive notice given has been held proper. 116Tex214, 288SW435.

81–85 15F(2d)294.

81–90½–New. It may be an abuse of discretion to strike the answer to a petition and to refuse to allow an amendment. 30F(2d)489.

82–2 See also 30F(2d)489 (refusal to permit amendment held abuse of discretion).

82–2½–New. Refusal to permit bankrupt to amend answer at trial so as to deny indebtedness to creditors in excess of securities held by them held not abuse of discretion. 38F(2d)987.

82–8 5F(2d)846.

82–10½–New. Answer held insufficient to raise issue as to alleged acts of bankruptcy. 14F(2d)676.

82–13 16F(2d)177.

82–14½–New. Where incompetent bankrupt incurred debts prior to decree of incompetency, presumption is that they were incurred while he was sane. 41F (2d)749.

82–16 18F(2d)633; 13PortoRicoFed97; 13PortoRicoFed329.

82–17 15F(2d)693; 15F(2d)792; 22 F(2d)426; 31F(2d)749.

82–19 9F(2d)97 (to show value of assets less than face); 28F(2d)343 [certiorari den, 278US651, 49SCt177, 73L ed 562(1stcase) (where petition charges appointment of receiver as act of bankruptcy).

82–20 16F(2d)177.

83–21 15F(2d)787; 27F(2d)229; 4 HawaiiFed247. [a] **Rule inapplicable** where good excuse is shown for failure to produce books. 12F(2d)654.

83–22½–New. The burden is on the petitioner to show a member of the partnership to be jointly controlling the business and enjoying the fruits. 26 F(2d)382.

83–24 16F(2d)177; 19F(2d)342; 41 F(2d)660. [b] **Evidence that debtor still retained ownership of property conveyed** is inadmissible to prove debtor's solvency. 36F(2d)865.

83–27 [a] But see 5F(2d)846.

83–30½–New. Evidence as to the value of a bankrupt estate at the time it was taken over by a receiver has been held admissible for the purpose of determining whether or not payments theretofore made by the bankrupt to certain creditors constituted a preference as materially depleting the estate. 30F(2d)548 (2dcase) [aff 30F(2d)550].

83–32 [b] 15F(2d)792; 22F(2d)426.

83–34 [a] 15F(2d)787; 16F(2d)177; NB [1927] 2DomLR969, 8CanBankr235. [b] 12F(2d)654. [c] **Evidence held insufficient to rebut presumption** of insolvency for refusal to submit to examination. 16F(2d)177. [d] **Affidavit of interested person tending to show** that he had no claim against bankrupt for payment paid to discharge bankrupt's debt did not affect rights of petitioning creditors. 27F(2d)229.

84–39½–New. that president of corporation was engineering sale of assets for his own interest; 15F(2d)787.

84–44½–New. ;that petitioning creditors filed petition in good faith to secure ratable distribution of assets; 43 F(2d)813 (evidence held sufficient).

84–45 41F(2d)399.

84–47 [b] **Creditors are not estopped** to deny corporate character, where members of organization were unwarranted in holding out partnership as corporation. 6F(2d)854. [c] **Finding organization was not corporation** held not error. 6F(2d)854.

84–48½–New. Finding of domicile of alleged bankrupt at a particular place has been held supported by evidence. 10 F(2d)478.

84–50 24F(2d)93 (on application by petitioning creditors in involuntary proceeding).

84–52 24F(2d)93.

84–53 [b] **Defects on petition and annexed schedules** warrant dismissal on motion. 9F(2d)896. [c] **Requiring nonpetitioning creditor** and directors of alleged bankrupt to file guaranty of receivership expenses before dismissal is abuse of discretion. 9F(2d)896 (where petition defective on face).

84–55½–New. That creditor attorney furnished security for costs without creditor's approval does not justify dismissal of intervening petition. 9F(2d) 97.

84–55⅓–New. An order that a petition be dismissed on performance of conditions which were not performed is not effective to terminate the proceeding. 25 F(2d)290.

84–56 [a] **On bankrupt's motion to dismiss** he must file list of creditors and give notice. 9F(2d)896.

85–59 [a] **Dismissal on bankrupt's motion** may be had without notice to creditors not intervening. 9F(2d)896.

86–72½–New. Order by referee consolidating bankruptcy proceedings against firm and partners as individuals with proceedings against the corporation of which one of the partners was the real owner was properly affirmed by the court. 176Fed91, 99CCA611.

86–73½–New. Equity Rule, rule 58 does not apply to bankruptcy proceedings and does not entitle petitioning creditors to file interrogatories in aid of their petition. 15F(2d)728.

86–74 [e] **Applicable federal laws** determine right to submit matters to jury, except as otherwise provided in Bankruptcy Act. 42F(2d)109.

86–75 42F(2d)109. [a] 42F(2d)109.

87–88½–New. Where reference is without consent of the parties, the master's findings and conclusions are subject to review on exceptions. 26F(2d)123.

87–89½–New. Bankruptcy petition after grant of new trial on issue of insolvency is pending to every intent same as before first trial. 42F(2d)475.

87–96½–New. Petition of single creditor guilty of false and reckless allegations as to number of creditors, knowingly made, should be dismissed. 36 F(2d)454.

87–97 [b] 37Wyo11, 258P576.

88–98 7Alaska508; 37Wyo 11, 258P576.

88–1 320Mo 1208, 9SW(2d)925.

88–2 9F(2d)553 (sequesters assets for distribution).

88–3 [a] **Adjudication creates no presumption** that bankrupt was insolvent for four months before filing of petition. 174Ark351, 295SW717.

88–4 50SD627, 211NW602.

88–4¼–New. ,and it does not create debts of record, 9F(2d)553.

88–4⅓–New. and merges no debts in pais. 9F(2d)553.

88–5 13F(2d)653; 127Me286, 143A101 (res judicata as to bankrupt status); 175Minn115, 220NW551; 117 Or107, 241 P62, 65 [citCJ], 242P1112. See also 7 Alaska476; [b] (1) 117 Or107, 241P 62, 242P1112. (5) Adjudication in involuntary bankruptcy is not conclusive evidence of bankrupt's insolvency at any time prior thereto. 30F(2d)492. (6) Fact of insolvency cannot be destroyed by trustee's admission that alleged bankrupt was solvent. 35PortoRico 150. [c] (9) Question of fraud as against one not party to proceedings where no one out of bankruptcy is specified. 127Me286, 143A101. (10) Not res judicata as to facts or as to subsidiary questions of law on which it is based, except as between parties to proceedings. 7Alaska 508. (11) Trustee of bankrupt stockholder held not bound by adjudication of bankruptcy of corporation as to facts on which adjudication was based. 39 F(2d)361. [g] **Adjudication on petition** against business concern as composed of A personally and his executor and trustee under will affects only A individually and not trust estate. 6F(2d)196. [h] **Stranger to bankruptcy litigation** may not claim decree res judicata as to particular act of bankruptcy on which decree is based. 127Me286, 143A101. [i] **Adjudication is conclusive for purpose of administering estate.**–39F(2d) 361.

89–8 43F(2d)122(2dcase).

89–9 35PortoRico 150 (binding on all creditors). [b] (2) Order of adjudication prematurely made is not void, but voidable only as to bankrupt or creditors appearing and pleading within time allowed by law. 12F(2d)864.

89–10 4F(2d)793; 38F(2d)3; 39F(2d) 361; 7Alaska508 (as to jurisdiction of bankruptcy court). [b] **Fraud in initiation of bankruptcy proceedings,** not apparent on face of record, cannot be raised in foreign court. 7Alaska508.

89–12½–New. Dormant partner is not concluded by adjudication before brought in as party. 9F(2d)557 (new adjudication necessary).

89–12⅓–New. An adjudication in bankruptcy is not res judicata as to the fact of insolvency in an action by the trustee to recover a preferential payment as against a defendant who was not a party to the original proceedings. 220MoA 1099, 297SW108.

90–20 12F(2d)864; 31F(2d)921.

90–23½–New. Original adjudication is not set aside against partnership as condition to litigating issue of joining the alleged dormant partner as alleged bankrupt. 9F(2d)553.

90–24½–New. Leave to appeal to the supreme court of canada will be granted where the question involved is whether a petition for receiving an order may be presented and heard in Montreal in respect of an alleged debtor carrying on business in Quebec. [1927] CanSC275, [1927] 2DomLR1010, 8CanBankr254.

90–25 268US111, 45SCt456, 69L ed870; 13F(2d)754; 30F(2d)492; 36F(2d)823; 37Wyo 11, 258P576. [a] 15F(2d)399; 17F(2d)347; 44F(2d)159.

90–26 12F(2d)660; 220Ala394, 125S 637; 216Ala133, 112S911; 126Me369, 138A567; 259Mass181, 156NE1, 54ALR 745. [b] **Between filing of petition and appointment of receiver,** bankrupt may deal with property in ordinary course of business. 110Conn583, 148A669. [c] **Title remains in bankrupt until appointment of trustee.**–Tex 289SW679.

90–27 24F(2d)38; 36F(2d)823; 39 F(2d)489; 47 Ida263, 274P627; 229Ky 5, 16SW(2d)763; Minn 231NW248. [a] **In Porto Rico.**–(3) 13PortoRicoFed362. [c] **Bankrupt is trustee for creditors** in respect of former assets of which he keeps possession and is required to account for them as trustee ex maleficio. 34F(2d)209. [d] **Property in hands of third persons who hold for bankrupt** is in constructive possession of bankruptcy court. MoA 19SW(2d)565.

91–23 268US111, 45SCt456, 69L ed870; 13F(2d)754; 19F(2d)18; 256Mass496, 152NE886.

91–23½–New. Until the appointment of a trustee the bankrupt may bring such actions as are necessary to preserve the property. Tex 289SW679.

91–23⅓–New. and may maintain pending actions. Tex 289SW679.

91–23¼–New. Creditors cannot compel bankrupt's attorneys to pay funds to receiver where they have been equally guilty in accepting share distributed by attorneys after filing of petition. 40 F(2d)194.

91–23⅕–New. Only relief against bankrupt's attorneys who distributed his funds ratably among creditors after fil-

ing of petition is disciplinary by district court. 40F(2d)194.

91-31 TexCivA 12SW(2d)651.

91-32 126Me369, 138A567, 568 [cit CJ]; TexCivA 12SW(2d)651.

91-32 [d] 259Mass181, 156NE1, 54 ALR745.

92-38 43F(2d)122(2dcase).

93-42 18F(2d)792; 42F(2d)475.

93-43 16F(2d)853; 253 IllA315. [d] **State receiver is in contempt** where, after service of restraining order by bankruptcy court, he effects sale of property. 25F(2d)178.

93-44 13F(2d)754.

94-47 25F(2d)175 (may require receiver appointed within four months to surrender property).

94-55½-New. or for dissolution of an injunction. 26F(2d)102.

95-64½-New. **Facilities,** or marshal's office, may be made available for the purpose of economical custody of the property of an alleged bankrupt. 12F(2d)660.

95-64⅓-New. Where a custodian was previously appointed, an order confirming a special master's report that the sale was in fraud of creditors confirms the right of possession of the custodian previously appointed. 13F(2d)413.

95-65 [b] **Control by appointing court.**-22F(2d)571.

95-66 29F(2d)994.

95-68 42F(2d)475. [c] (2) Where property is in actual custody of court, appointment of receiver to sell property is properly refused although such right was preserved by creditor in decree setting aside fraudulent conveyance. 36F(2d)50.

96-73 12F(2d)660.

96-74 12F(2d)660.

97-78½-New. Receiver must be entirely without interest or embarrassing connections. 39F(2d)447.

97-79 But see 28F(2d)154; NJCh 150A183.

97-81½-New. Receivers may intervene on behalf of those whom they represent. 284Pa41, 130A259 (dictum).

97-81⅓-New. A receiver appointed after adjudication has the statutory duty to preserve the property until the selection of a trustee. 28F(2d)154.

97-82 36F(2d)823. See also 28F(2d)86. [b] (2) That bond of receiver does not strictly comply with order of court and has not been approved is not material, where it is good common-law bond. 13F(2d)945. [e] (2) Bankrupt's surreptitious removal of property after its delivery to receiver is contempt of court. 23F(2d)303.

98-83 SD 227NW438 (marshal appointed to take charge of property). [b] **Liability for marshal's wrongful seizure.**-Seizure by marshal of property sold by bankrupt to plaintiffs, who were in possession thereof, held illegal, and creditors who directed seizure held liable for damages. SD 227NW438.

98-89 7F(2d)528 (appointment of attorney for receiver by state court held not abuse of discretion). But see 26F(2d)91. [a] 43F(2d)863. (2) Attorney for petitioning creditors is disqualified to act for receiver unless court determines from affidavit filed that retention is proper. 43F(2d)863. [c] **Attorney for officers** charged with fraudulent misconduct cannot act as attorney for receiver. 7F(2d)528. [d] **Federal court will not review** state court's appointment of counsel for receiver in absence of abuse of discretion. 7F(2d)528. [e] **Bankruptcy rule regulating appointment** (1) is mandatory. 43F(2d)863. [f] **Compensation.**-43F(2d)863 (failure to file affidavit).

98-92 [b] **Liability of receiver for rent after bankrupt tenant's default.**-41F(2d)560. [c] **Receiver's occupancy not expense of preserving estate** where bankrupt tenant had right to possession. 41F(2d)560. [d] **Rate fixed by lease presumptively fair rental.**-41F(2d)498. [e] **Rental value for storage not test of rental value during occupancy by trustee.**-41F(2d)498.

99-95½-New. A receiver has no authority to lease save that given by the court. 123 Okl 7, 251P738.

99-95½-New. Receiverships cannot extend to matters in which a bankrupt acted as a trustee, such as money received by a bankrupt as a trustee under a mortgage loan. 12F(2d)889.

99-95¼-New. The receiver is a representative of a bankrupt as well as of creditors. 100NJEq143, 134A657.

99-95½-New. Before adjudication receivers are officers of the court. 15F(2d)562.

99-95½-New. Receiver's recognition of the seller's claim to a car held not to estop contest thereof by other creditors, since the receiver has no power to pass on such claims. 25F(2d)488.

99-95½-New. Acts of a receiver appointed under a petition showing lack of jurisdiction on its face are void ab initio. 26F(2d)90.

99-95⅛-New. Where the purchaser of a bankrupt's assets fails to comply with the contract of purchase, and the receiver neglects to take any steps to enforce liability, and the purchaser becomes financially irresponsible, the receiver may be surcharged with the amount of the purchase money uncollected. 33F(2d)200.

100-14 75CalA389, 242P872. [b] **Personal liabilities.**-Receiver is liable personally for transactions outside his authority. 253Mass60, 148NE217.

100-15 34F(2d)528. But see 253Mass60, 148NE217. [b] **Waiving consent.**-253Mass60, 148NE217.

101-16 34F(2d)528.

101-17½-New. Receiver or trustee seeking to establish claim in state court cannot prevent defense therein of receiver's personal liability for wrongful withholding of money. 253Mass60, 148NE217.

101-17½-New. Receiver is not permitted by Bankruptcy Act to encroach on right of strangers. 253Mass60, 148NE217.

101-19 NJCh 150A183. [f] **Expenses of continuing business** must be repaid to receiver before payment to assignee. 101NJEq78, 137A713.

101-25½-New. **Ancillary receivers** should account to the court appointing them rather than to the court of original jurisdiction. 22F(2d)571.

101-26 [a] **Creditor held not entitled** to recover from marshal money paid for expenses in caring for property. 6F(2d)872.

101-32 [a] **On dismissal of petition** for receiver costs and damages must be paid by obligors on bond. 7F(2d)512.

102-40½-New. A receiver representing the creditors of original holders of a note occupies no different ground than a seller in respect of part of notes secured by mortgage which had been sold and indorsed theretofore. 154Tenn538, 289SW500.

102-40⅛-New. Where right to trust fund in hands of bankrupt's attorney is disputed, court should direct attorney to hold fund until parties have opportunity to submit claims. 13PortoRico Fed253.

102-44½-New. **Consent order for return of property improperly taken from a bankrupt,** not appealed from and reserving lien on property to the receiver, prevents the petitioner from claiming that the receiver parted with the lien by delivering parts of the property. 5F(2d)52.

102-44⅛-New. Order directing return of property improperly taken from a bankrupt held sufficiently to identify property. 5F(2d)52 (where lien was preserved by order).

102-44¼-New. On petition to revise order of court requiring return of property improperly taken from bankrupt and providing for the trustee procuring assignments of certain judgments, it has been held that procuring assignments of all but one of such judgments, where the trustee was in position to obtain assignment of the remaining judgment if the petition intended to obey the order, was a sufficient showing of the trustee's compliance with the order. 5F(2d)52.

102-46 18F(2d)440; 28F(2d)7 (claim of state receiver where property is in actual or constructive possession of bankruptcy court); 39F(2d)447; 40F(2d)285; 48RI250, 137A7. [g] (2) **Stipulation between lien claimants** and trustee for sale of property and holding of proceeds by trustee removes doubt as to jurisdiction because of disputed possession. 41F(2d)249. [h] See also 40F(2d)353. [i] **Mere fact that there is res in bankruptcy court** does not necessarily entitle stranger to proceeding to litigate right thereto in bankruptcy court. 38F(2d)420. [j] **Relation of adverse claimant can only exist** where claim is asserted before bankruptcy proceedings or adjudication. 40F(2d)282. [k] **Where money has been paid by trustee to judgment creditor of bankrupt in settlement of lien** bankruptcy court is without jurisdiction of claim of strangers to fund. 38F(2d)420. [l] **Jurisdiction** as dependent on solvency. 42F(2d)269.

103-47 12F(2d)739; 18F(2d)440; 28F(2d)7; 48RI250, 137A7. [c] 43F(2d)57. [e] **Money paid to attorney in contemplation of bankruptcy** may be recovered summarily since attorney is not adverse claimant against whom plenary suit must be brought. 17F(2d)347. [f] **Where property is actually or constructively in possession of bankruptcy court,** summary jurisdiction may be exercised regardless of character of adverse claim. 24F(2d)626. [g] **Uncontroverted affidavit of adverse claimant** challenging court's summary jurisdiction held controlling. 40F(2d)328. [h] **Right to issue summary order to trustee** enjoining him from using certain trade marks is permissible in proceeding by stranger. 37F(2d)419. [i] **Court has power to determine** whether it has jurisdiction in summary determination of adverse claims. 42F(2d)269.

103-48 28F(2d)7; 48RI250, 137A7.

104-50 40F(2d)282; 40F(2d)285.

105-54 5F(2d)249; 13F(2d)701; 42F(2d)269; 43F(2d)57.

106-55 13F(2d)701; 42F(2d)475. See also 42F(2d)829. [c] **Plenary suit concerning property rightfully in possession of another court of competent jurisdiction** or its officers is not within concurrent jurisdiction of bankruptcy court. 28F(2d)7. [d] **In absence of diversity of citizenship,** claim to property which bankruptcy court cannot settle must be adjudicated in state court. 28F(2d)417. [e] **Property in state receiver's possession** under substantial adverse claim, acquired more than four months prior to filing of petition, is not within jurisdiction of bankruptcy court. 28F(2d)7.

106-56 5F(2d)249. [c] **Where adverse claimant waives right** to have summary proceedings dismissed and ancillary receiver relegated to plenary suit, bankruptcy court must retain jurisdiction and award fund to claimant if entitled thereto. 13F(2d)701.

106-56½-New. Determination of such court cannot be questioned collaterally in federal courts. 28F(2d)7.

106-57 271US191, 46SCt467, 70Led897; 25F(2d)341 (referee has power to determine whether claim is real and substantial). [a] 39F(2d)447. [e] **Claim is "substantial"** if it involves some fair doubt or reasonable ground for controversy in fact or in law. 271US191, 46SCt467, 70Led897. [f] **Adverse claim to property is substantial** (1) if it presents question of law or fact raising fair doubt as to its validity or invalidity (28F(2d)7), (2) or where it discloses contested matter of right involving some fair doubt and reasonable room for controversy (28F(2d)417). (3) Adverse claim has been held substantial. 28F(2d)417.

106-58 25F(2d)341. [e] **That grantee is creditor** of bankrupt does not put property beyond reach of summary proceeding. 25F(2d)341. [f] **Evidence held to sustain finding** that claim of brother of bankrupt to property conveyed to him was merely colorable. 25F(2d)341.

107-59 13F(2d)701; 25F(2d)313; 25F(2d)341; 40F(2d)328; 42F(2d)269. See also 28F(2d)417.

107-59½-New. Criterion of summary jurisdiction of bankruptcy court in case of dispute as to title or interest is possession of property at time bankruptcy

petition was filed. 39F(2d)447.

107-59⅓-New. Judge of bankruptcy court has power to direct trustee to surrender real estate attached more than four months prior to filing of bankruptcy petition. 13PortoRicoFed189.

107-61 [e] (2) Referee has jurisdiction of summary proceedings to compel purchaser to comply with contract of purchase of bankrupt's assets irrespective of receiver's long delay rendering him personally liable for amount or election of trustees. 33F(2d)200. [i] **Purchaser at sale by receiver in bankruptcy** is not required to complete contract till sale is confirmed by court. 253Mass60, 148NE217.

108-62 [b] **Purchaser's right to confirmation.**–Purchaser at receiver's sale has right to confirmation from time property was struck off to him. 253Mass60, 148NE217.

108-64½-New. Resale of property. Offer of property for sale third time by receiver released purchasers at former sales. 253Mass60, 148NE217.

108-64⅓-New. Receiver abandoning a sale cannot set up its validity after selling the same property to another buyer. 253Mass60, 148NE217.

108-64¼-New. In case of an unjustifiable refusal of a buyer to complete his contract to purchase property sold by a receiver at public sale, he cannot be held liable unless the resale of the property was by order of court on his account. 253Mass60, 148NE217.

108-64½-New. Deposit. Sale of property to third buyer has been held a binding contract, notwithstanding time was given to make deposit. 253Mass60, 148NE217.

108-64⅔-New. A purchaser at a sale demanding the return of a deposit after the same property was sold to another buyer has been held not to have refused to go on with the sale. 253Mass60, 148NE217.

108-67 33F(2d)200.

108-69½-New. A receiver has been held to hold money deposited on the sale price of the property, sold at auction, as trustee of the depositor. 253Mass60, 148NE217.

108-69⅓-New. A receiver had personal obligation to return deposit on sale price of property, independent of duty as receiver. 253Mass60, 148NE217.

108-73½-New. As officer of court trustee in administering trust is entitled to court's protection. 40F(2d)282.

108-76 221AppDiv599, 224NYS516 (trustee cannot properly be elected till after adjudication).

108-78½-New. In a case where a composition is offered, a trustee may be appointed where the circumstances justify it: 18F(2d)583.

109-84½-New. Under Bankruptcy Act in respect to trustees, word "competent" means qualified and fulfilling all requirements of case. 36F(2d)745.

109-92 8F(2d)146; 18F(2d)284. [a] **Manner and conduct of election.** 37F(2d)951.

109-93 18F(2d)284.

110-98 Ont [1926] 4DomLR1121.

111-4⅓-New. Assignment of claims to creditors' committee does not disenfranchise assigning creditors or representative of committee. 11F(2d)872.

111-4¼-New. Objection that a creditor participating in an election was not qualified to vote is waived where not made at the time. 16F(2d)119.

111-4⅙-New. A creditor conviving in bankrupt's retention of interest in property sold under power is held not entitled to vote. 16F(2d)433.

111-6 Ont [1926] 4DomLR1121.

111-14 8F(2d)146; 36F(2d)745.

111-16 8F(2d)146; 29F(2d)570; 37F(2d)951. [b] See also 8F(2d)146. [f] **Bankrupt's act in putting itself almost entirely in hands of committee of principal creditors** does not show collusion justifying referee in defeating creditors' right to vote. 11F(2d)872.

112-17 15F(2d)371.

112-19 18F(2d)347. [a] **In suit to set aside conveyance** court will not inquire whether order appointing trustee was justified. 41 Ida679, 241P609.

112-24 37F(2d)951.

112-25 18F(2d)284.

112-28 18F(2d)284.

112-29½-New. Power of referee to appoint a trustee on failure of creditors to elect is not exhausted by his appointment of one who declined to accept. 16F(2d)119.

112-30 30F(2d)725(2dcase); 31F(2d)405. [d] **Court cannot remove** of its own motion without complaint of creditors. 5F(2d)307. [e] **Failure to make report** is ground for removal. 7F(2d)680. [f] **Discord among trustees** is ground for removal. 18F(2d)682. [g] **Conduct causing loss of confidence of creditors** justifies removal. 13PortoRicoFed319. [h] **Personal dishonesty** is not necessary to justify removal. 13PortoRicoFed319.

113-33 79Mont246, 256P176, 179 [quot CJ], 57ALR1122.

113-34 9F(2d)477; 17F(2d)404; 214Ala670, 108S586; 219Ala571, 123S61; 170Minn230, 212NW196; 79Mont246, 256P176, 179 [quotCJ], 57ALR1122; 57ND890, 224NW299; 124Okl294, 256P29; TexCivA 286SW266; 192Wis558, 213NW332; 192Wis564, 213NW334 (succeeds to all rights). [k] **When trustees of bankrupt corporation** takes change, its officers and board of directors have no claim on or official concern with its assets, choses in action, business, or other affairs. 119Kan593, 240P409. [l] **"Bankrupt estate"** consists of property of bankrupt diminished by valid liens. 20F(2d)663.

113-35 79Mont246, 256P176, 179 [quot CJ], 57ALR1122.

113-36 172Minn529, 215NW850.

113-38 [f] 24F(2d)35 (goods held under consignment).

114-39½-New. A trustee steps into a bankrupt's shoes as to property and liens. 15F(2d)764.

114-39⅓-New. A trustee has no more power than is defined by the Bankruptcy Act. 27F(2d)328.

114-42 15F(2d)399; 18F(2d)444; 41F(2d)700; 142Miss691, 107S888; 11PaDist&Co638; 50RI506, 149A609; TexCivA 48SW(2d)331. But see 36F(2d)697. [a] 123Kan746, 256P997; Mo 30SW(2d)607. [a] (2) In determining property included within classes of property passing to trustee of bankrupt. 41F(2d)700. [k] **Right of redemption of real estate after judicial sale** does not pass to trustee. 123Kan746, 256P997. [l] **Deed from bankrupt after bankruptcy** cannot be made basis of suit against his trustee. 21F(2d)881. [m] **Underwriter of bankrupt's bonds cannot be compelled to pay over proceeds** where bankrupt failed to do things required under underwriting agreement. 38F(2d)10. [n] **Assignment of bankrupt's accounts receivable** does not preclude assignee's retention of moneys collected thereon before assignor's bankruptcy. 38F(2d)45. [o] **Federal court is not limited to law of state where land is located** in determining whether equitable assignment of contingent remainder is means of transfer. 41F(2d)700. [p] **Meaning of word "transfer"** will be construed by federal courts for themselves. 41F(2d)700.

115-43 142Miss691, 107S888.

115-44½-New. Account will not be taken of fractions of day to defeat bankrupt's title to property. 10F(2d)926.

115-44⅓-New. A trustee of a tenant has the same right as the tenant to fixtures installed on leased premises. 21F(2d)136.

115-45 [a] **Tenant under written lease from trustee in bankruptcy** is bound by terms requiring delivery of share of crop to trustee regardless of claims of bankrupt's widow or his mortgagee. 79Mont590, 257P475.

115-48 32F(2d)103 (though bankrupt sole stockholder, assets of corporation do not pass to trustee). See also 40F(2d)554.

115-52 126Or10, 268P766.

115-54 21F(2d)881; 36F(2d)50 (conveyance from bankrupt to mother set aside at time of adjudication). [e] **Ill** 173NE352. [i] **Future interests pass to trustee.**–76CalA655, 245P803. [j] **Lease** of bankrupt passes to trustee. **NH** 147A896(2dcase). [k] **Contingent remainder** passes to trustee where it is subject to seizure and sale under attachment or execution under state law. **Mo** 30SW(2d)607.

116-55½-New. Lessors of land reserving the right to take possession and retain the wood not paid for by the lessees is entitled, on the latter's default, to the wood unpaid for before the trustee has established his right to possession. 72CalA151, 236P373.

116-55⅓-New. After a sale of realty on execution the trustee cannot look to the debtor's right of redemption for assets with which to pay a claim of the debtors. 122Kan781, 253P210.

116-56 215Ky292, 284SW1084.

116-57 250Mich67, 229NW451. [a] **Matters considered in determining trustee's rights.**–35F(2d)431. [b] **Date of filing petition,** not date of discharge, determines trustee's rights. 35F(2d)431.

116-57½-New. After bankruptcy the bankrupt has no transferable interest in the property or present right to possession and he cannot give his grantee a standing which he himself does not have. 21F(2d)881.

116-57⅓-New. In Canada, when there is a severance of a joint tenancy, an undivided half interest passes to the trustee. **Ont** [1928] 1DomLR846.

116-58½-New. Rents collected on a bankrupt's real estate by a trustee or receiver, until confirmation of sale to the mortgagee, became a part of the assets of the estate, and subject to payment of all the debts of the bankrupt, in the order of priority as provided for in the Bankruptcy Act. 29F(2d)1003.

116-59 25F(2d)498.

116-61 271US176, 46SCt461, 70Led889 (wife on bankruptcy of husband is not regarded as widow vested with interest in realty adverse to trustee); 8F(2d)437; 22F(2d)171; 232Ky355, 23SW(2d)549; Mo 18SW(2d)388 (property held as tenants by entirety). [a] (2) Wife's interest in bankrupt's property is governed by local law unless Bankruptcy Act conflicts. 271US176, 46SCt461, 70Led889. [b] **Husband's** bankruptcy is "judicial sale" under statute making absolute married woman's inchoate interest on judicial sale of husband's realty. 271US176, 46SCt461, 70Led889. [c] **In Indiana.**–271US176, 46SCt461, 70Led889.

116-64 201Iowa1298, 205NW843. But see 136Misc163, 238NYS696. [i] **Where conveyance intended to be mortgage.**–Where conveyance to wife of bankrupt was intended to be mortgage, their trustee may convey property without wife's reconveying to him or husband. 214AppDiv127, 211NYS641. [j] **Trustee entitled to balance remaining** after sale of securities pledged as collateral. 35F(2d)851.

117-66 24F(2d)477.

117-67 79Mont246, 256P176, 57ALR1122. [a] **Trustee has no interest** in chattel mortgage foreclosed before his appointment, though mortgagee purchaser has not taken actual possession. 5F(2d)633.

117-68½-New. A trustee who does not exercise the right to redeem within the period fixed by statute loses such right. 27F(2d)609.

117-70 203Iowa654, 213NW422; 7PaDist&Co487.

117-72 [d] (5) On appointment of receiver by bankruptcy court, state court must surrender assets on demand without questioning propriety of appointment. 42F(2d)475. (6) In such case state court's refusal to surrender assets can be based only on finding that pending case is one that should proceed notwithstanding bankruptcy. 42F(2d)475. (7) Formal notice and demand by bankruptcy court to preserve and turn over assets is sufficient to require state court to proceed accordingly. 42F(2d)475. [f] (2) Assignee must turn property or proceeds over to trustee in bankruptcy or account for inability to do so by showing legal disposition or real adverse claim. 268US111, 45SCt456, 69Led870. (3) Where assignees apply assignor's bank deposit to payment of note in violation of trust within four

months, their credit with bank as their debtor was chose in action for which they are accountable to trustee in bankruptcy. 268**US**111, 45**SCt**456, 69**L ed** 870. [g] **Preservation of property.**–42**F(2d)**475. [h] **Recovery from purchaser.**–42**F(2d)**475.

118–73 [b] **Where cash is available.**–42**F(2d)**475. [c] **State court cannot sell property to procure funds to pay officers** for services in preserving it. 42 **F(2d)**475.

118–74½–New. A bankrupt's deposit attached after issuance and before presentment for payment of a check passes to the trustee on adjudication within four months. 19**F(2d)**524.

118–74¼–New. A school building contractor's bankruptcy trustee became unconditionally entitled to a fund withheld by the city until discharge of liabilities to laborers and materialmen, where the city waived this right by paying it into court. 33**F(2d)**709.

118–76 30**F(2d)**717.

118–77 7**F(2d)**118 (life interest under trust created by will); 16**F(2d)**700; 76**CalA**665, 245**P**803, 807 [quotCJ]; 318 **Ill** 585, 149**NE**489; 256**Mass**125, 152**NE** 328. [g] **Cash paid in consideration of lease,** and not as security, cannot be recovered by trustee. 4**F(2d)**843. [h] **Order compelling trustee of trust property** to sell it and pay proceeds to trustee in bankruptcy may be procured by latter. 318 **Ill** 585, 149**NE**489. [i] **Test determining whether trust property passes to trustee.**–37**F(2d)**304. [j] **Headright of Osage Indian** does not constitute asset to be administered by trustee in bankruptcy. 38**F(2d)**662.

118–78 16**F(2d)**700; 76**CalA**655, 245**P** 803, 807 [quotCJ].

118–79 16**F(2d)**700; 19**F(2d)**153; 22 **F(2d)**432; 161**Tenn**187, 30**SW(2d)**227 (reversionary interest). [d] But see 151**Md**216, 134**A**502, 48**ALR**778.

118–80 108**Conn**339, 143**A**236.

118–82 **Iowa** 231**NW**675; 24 **OhA**176, 156**NE**459. But see 41**F(2d)**700.

119–83 16**F(2d)**700.

119–84 6**F(2d)**139; 7**F(2d)**461.

119–84½–New. The interest of a trustee in bankruptcy in the bankrupt's share in a decedent's estate cannot be charged with a conversion of property belonging to the estate by the bankrupt while acting as administrator of the estate after he had been adjudicated a bankrupt. 144**Miss**233, 109**S**601.

119–84⅓–New. Interest in a remainder at the date of the adjudication is held assignable as a possibility coupled with an interest. 151**Md**216, 134**A**502, 48 **ALR**778.

119–84¼–New. Assignments of a bankrupt before insolvency of expectant interests in the estate of a living person do not create such property rights as pass to the trustee. 13**F(2d)**707.

119–84⅙–New. Whether property acquired by a bankrupt under a will was transferable interest at the date of adjudication is a matter of local law. 22 **F(2d)**432.

119–84⅛–New. The share of an insolvent distributee will be applied to a debt due the estate of decedent and will not pass to a trustee in bankruptcy. **SD** 227**NW**373.

119–86 42**F(2d)**987; 91**Fla**60, 107**S**345, 44**ALR**698. [d] **Trade-marks and trade names are held within doctrine of ejusdem generis** in construing Bankruptcy Act. 91**Fla**60, 107**S**345, 44**ALR**698.

119–94 40**F(2d)**282 (curb exchange).

120–95 [1930] 4**DomLR**1028(2dcase). [b] (2) Trustee's right of election to confirm sale and demand money received. 40**F(2d)**282.

120–97 But see 248 **IllA**602.

120–99 [a] **Cash surrender value** becomes asset for benefit of bankrupt's creditors. 35**F(2d)**936. [b] **Indemnity obligation of insurer under automobile liability policy** is not asset passing to trustee. **TexCivA** 26**SW(2d)**395.

120–1 [c] **Where deed to bankrupt required property to be kept insured against fire** and proceeds of policy to be used to rebuild, and policy was made payable to vendor as his interest might appear, vendor is entitled to proceeds for purpose of rebuilding as against trustee in bankruptcy of vendee. 155 **Tenn**25, 290**SW**8. [d] **Creditors of insured** had no interest in cash surrender value of life insurance policy until petition for bankruptcy was filed. **Tex CivA** 294**SW**237.

120–1½–New. Insurance by chattel mortgagee to protect interest is property of mortgagee as against trustee in bankruptcy although filing of chattel mortgage was delayed. 35**F(2d)**930.

120–2 21**F(2d)**88; 28**F(2d)**438 (payable to bankrupt, his estate, or personal representative, and not exempt by statute); 38**F(2d)**769. But see 38**F(2d)**117. [o] 170**Ark**890, 281**SW**675. [p] (1) 170 **Ark**890, 281**SW**675. [q] **Where insured was estopped to deny cancellation of policy before loss,** trustee had no interest therein. 193**Wis**16, 213**NW**649. [r] **Cash surrender value is diminished** by outstanding loans on policy. 28**F(2d)** 438. [s] **In Maryland.**–33**F(2d)**873.

120–2½–New. That the right to a mature claim for surrender value of a policy is personal with the bankrupt does not prevent its passing to the trustee. 21**F(2d)**88.

120–2⅓–New. A trustee is entitled to the cash surrender value. 28**F(2d)**438.

121–5 [a] **TexCivA** 294**SW**237.

121–6 [c] 16**F(2d)**20.

122–10 21**F(2d)**88. See also 28**F(2d)** 438.

123–12 5**F(2d)**879; 6**F(2d)**100; 21**F** **(2d)**88; 28**F(2d)**438.

123–15 2**F(2d)**647; 6**F(2d)**100; 43**F(2d)** 74; 156**Tenn**306, 300**SW**567. See also 28**F(2d)**438. But see 29**F(2d)**158 [certiorari den 49**SCt**351(1stcase)]. [b] See also 6**F(2d)**100.

123–16 34**F(2d)**598 (where insured has no right to change beneficiary); 119**Kan** 593, 240**P**409. [b] **Federal Bankruptcy Act (1918) § 70[a] as to conditional rights of trustee in insurance policies,** having cash surrender value and insuring life of bankrupt, does not apply to policies in which bankrupt is beneficiary on life of another. 119**Kan**593, 240 **P**409. [c] **Where substitution of creditor as beneficiary under policy on life of president of bankrupt corporation was void,** trustee in bankruptcy of corporation is entitled to proceeds of policy subject only to return to substituted beneficiary of premiums paid by him with interest. 34**F(2d)**598.

123–17 14**F(2d)**308; 26**F(2d)**369. [a] **Surrender value.**–Trustee held entitled to surrender value of life policies on which bankrupt corporation paid premiums as beneficiary. 14**F(2d)**308.

123–19 110**Conn**583, 148**A**669; 202 **Iowa**549, 210**NW**593, 58**ALR**646. [c] **Where bankrupt takes possession** after filing of petition and before appointment of receiver he takes as quasi trustee for trustee to be appointed. 110**Conn**583, 148**A**669.

124–20 17**F(2d)**153; **Ont** [1927] 1**Dom LR**882, 8**CanBankr**52. [c] **Priority over vendor's lien.**–146**Miss**225, 110**S**709.

124–21 1**F(2d)**445 (suit for unpaid balance affirmed ownership in lessee); 17 **F(2d)**276; 26**F(2d)**152 (rule applied where bankrupt later executed bailment lease without prior retransfer of title to seller); 26**F(2d)**294 (attempted rescission held not to affect trustee's title); 3**Del** 519, 140**A**154; 5**PaDist&Co** 68. But see 28**F(2d)**944. Contra 143 **Wash**660, 255**P**1041.

124–21½–New. Trustee of bankrupt buyer of goods in seller's possession and unpaid for is entitled to possession only on payment or tender. 143**Wash**660, 255 **P**1041.

124–21⅓–New. It is not material relative to right of seller of goods in his possession on bankruptcy of buyer that the insolvency arose within the four-months period relative to preferences. 143**Wash**660, 255**P**1041.

124–22 2**F(2d)**750; 22**F(2d)**745; 24**F** **(2d)**215; 39**F(2d)**613; **CalA** 284**P**235; 161**Ga**371, 131**SE**44. See also **Iowa** 232 **NW**67; 203 **Iowa**688, 213**NW**213. [b] 185 **Iowa**760, 171**NW**161. But see 32**F** **(2d)**285. [n] **Trustee is neither "purchaser" nor "creditor"** within statute requiring recordation of conditional sale contract. **Iowa** 232**NW**67.

125–23 300**Fed**881 (trustee not "personal representative" of bankrupt); 7 **F(2d)**11; 8**F(2d)**496; 9**F(2d)**54; 15**F** **(2d)**68 (construing penal statute); 17 **F(2d)**907; 19**F(2d)**965; 23**F(2d)**687; 24**F(2d)**593 (consignment held conditional sale, void against trustee for want of record); 25**F(2d)**342 (record before bankruptcy sufficient); 25**F(2d)**381 (trustee may assert invalidity of unrecorded conditional sales contract); 25 **F(2d)**488; 31**F(2d)**197; **Minn** 231**NW** 248; **TexCivA** 274**SW**1016. But see 30 **F(2d)**551. [a] (2) Purported lease of adding machine held conditional sale and void against trustee where not recorded. 9**F(2d)**54. [g] 24**F(2d)**991. [l] **Under trust receipt** seller has been held entitled to property. 2**F(2d)**750. [m] **Acknowledgment.**–17**F(2d)**377. [n] **Seller's notice to receiver** held not to affect rule, as property then is in custodia legis. 25**F(2d)**488. [o] **Listing of property in bankruptcy schedules as not belonging to bankrupt** does not affect rule. **Minn** 231**NW**248. [p] **Notwithstanding delay in recording,** trustee takes possession subject to seller's claim for balance due. 41**F(2d)**726.

126–24½–New. or where the property is a fixture which under the law of the state could not be reclaimed from the receiver in bankruptcy. 8**F(2d)**100.

126–24⅓–New. On a conditional seller's failure to file a contract, the rights under a chattel mortgage were subject after the buyer's bankruptcy to rights of judgment creditors. 20**F(2d)**404.

126–24¼–New. Unrecorded contract for sale of plows is held valid conditional sale contract. 19**F(2d)**965.

126–24⅛–New. In reclamation proceedings by a seller against a trustee, the latter may elect to pay the balance due. 19**F(2d)**965.

126–26 6**F(2d)**225.

126–28 6**F(2d)**225; 7**F(2d)**159; 13**F** **(2d)**121; 19**F(2d)**769; 21**F(2d)**979; 25 **F(2d)**384; 33**F(2d)**594. [e] (2) Seller is not chargeable with laches where delay was occasioned at instance of trustee. 33**F(2d)**594. (3) Seller is not chargeable with laches for failure to claim property during time he was unaware of purchaser's insolvency. 33**F** **(2d)**594. [f] **Fact that false statement made to commercial agency** and not directly to seller does not affect right to reclaim property. 19**F(2d)**769. [g] **Admissions in schedules** may make prima facie showing of fraud. 19**F(2d)**769. [h] **Seller must identify property.**–25 **F(2d)**384. [i] **Buyer's insolvency at time of purchase.**–25**F(2d)**384. [j] **Bankrupt's intent not to pay** need not be shown by petitioner for reclamation of personalty. 33**F(2d)**594. [k] **By statute,** trustee has title superior to defrauded vendor. 37**F(2d)**534.

127–29 19**F(2d)**408; 21**F(2d)**979. [c] 103**Conn**413, 130**A**481. [d] 7**F(2d)**410; 33**F(2d)**594. [e] 11**F(2d)**873; 13**F(2d)** 263; 21**F(2d)**979; 250**Mich**67, 229**NW** 451. [g] **Knowledge at time of purchase** of inability to pay is constructively fraudulent. 7**F(2d)**410. [h] **Creditors presumed to know** right to rescind sale of goods to bankrupt for his fraud. 7**F(2d)**159. [i] **No intention to waive** right to rescind sale of goods to bankrupt is to be presumed. 7**F(2d)**159. [j] **Agreement to accept return** of goods sold to bankrupt held not inconsistent with vendor's right to rescind for fraud. 7**F(2d)**159. [k] **Proof of insolvency is unnecessary** to support rescission of sale to bankrupt. 19**F(2d)**408. [l] **Buyer's insolvency at time of sale** does not always justify inference of intent not to pay for goods. 20**F(2d)**134. [m] **Invoices, by themselves, or attached to proofs of claim allowed** in bankruptcy proceedings would not be competent evidence to establish the bankrupt's indebtedness on certain date. 19 **F(2d)**769. [n] **Where there is no proof of fraudulent representations** and no evidence of intent not to pay, the goods cannot be reclaimed. 13**F(2d)**121. [o] **Material false representations** as to buyer's financial condition entitle seller to reclaim goods. 25**F(2d)**384. [p]

Knowledge of buyer's officers of buyer's insolvency held equivalent of "intent not to pay." 25F(2d)384. [q] **False financial statement to commercial agency**, relied on by seller, held sufficient to base reclaim by seller. 25F(2d)384. [r] **Failure to examine bankrupt's officers** on issue of false financial statements held to strengthen presumption that bankrupt did not intend to pay for goods. 25F(2d)384. [s] **Purchases on credit when purchaser was insolvent** are presumptively fraudulent. 28F(2d) 115. [t] **Duty of trustee.**–33F(2d)594.

127–29½–New. The evidence of fraud must be clear, unequivocal, and convincing. 25F(2d)384.

127–31 43F(2d)340. Contra 205 Iowa 1333, 219NW541; 200Wis64, 227NW 300, 67ALR1381.

128–33 14F(2d)876; 17F(2d)413; 21 F(2d)984; 23F(2d)681 (pledgee); 30 F(2d)820; 35F(2d)439 (assignee of lessor of refrigerating cabinet is entitled to recover cabinet as against creditors). But see 37F(2d)16. [a] (1) 22F(2d)408. [h] **Property in possession without ownership** does not become part of bankrupt estate. 10F(2d)561. [i] **Consignor** has superior rights to bankrupt's general creditors or trustee. 21 F(2d)984. [j] **Goods delivered subsequent to, but subject to, terms of original contract of bailment**, if not paid for, could be reclaimed by bailor. 27 F(2d)1009.

128–33½–New. Where bailor repossesses goods before filing of petition against bailee, the trustee does not acquire title to the bailed goods, although the contract of bailment is not recorded, 17F(2d)417.

128–33½–New. unless, under the state law, reservation of title in bailor is ineffective against creditors of bailee because of failure to record. 17F(2d)413.

128–34 29F(2d)593; 199Cal 90, 247P 1088, 48ALR797. (4) Water heaters in possession of sales company are not part of estate. 10F(2d)561. [c] (4) Manufacturer is entitled to recover from its representative, after latter's bankruptcy, samples of goods kept on hand by representative for purpose of display and sale. 30F(2d)820. (5) Consignor of goods left with bankrupt for sale has right to them superior to general creditors or bankruptcy trustee, agreement of consignment not being void as to trustee under state statute. 31F(2d) 799. [d] (6) Owner held entitled to reclaim furs found in specie in possession of bankrupt agent or of dyers, after paying their lien. 15F(2d)272. [e] (2) As between customer and trustee in bankruptcy of stockbroker, surviving securities belong to customer leaving them with broker to protect his margin, as legal owner thereof, rather than trustee of bankrupt broker. 29F(2d)593. (3) Satisfaction of claims of persons whose securities have been wrongfully rehypothecated may be prerequisite to right to share in assets. 29F(2d)593. (4) Facts showing that sales of claimant's stock were never delivered were nullities. 27F(2d)690. (5) One delivering stock to be sold could reclaim on stock being traced, where no purchase was made of other stock as directed. 27F(2d)690. (6) Claimants against estate of bankrupt brokers must identify or trace original assets transferred to bankrupt to acquire any standing except as general creditors. 32F(2d)189 (holding, also, that broker is not justified in allowing withdrawals by sons of their mother's securities delivered to broker). (7) Petitioners entitled to recovery of securities on payment to trustees of debts due bankrupt. 36F(2d) 13. [g] **Bankrupt making agreed disposition of money intrusted to him** takes depositor's right to original fund. 9F(2d)486. [h] **Where bankrupts are agents to collect checks**, principal can reclaim proceeds not collected at time of petition. 275US248, 48SCt58 ("for account of" in cashier's checks held not to make payee agent for collection). [i] **Foreign bankers, procuring credit with domestic bankers through deposit of cashier's check, "favor" such bankers and check "for account of" such bankers, are only general creditors.** 275US254, 48SCt60. [j] **Construction of transaction.**–Whether contract is sale or consignment does not depend on parties' designation thereof, and nature is determined from careful consideration of entire language. 25F(2d)381. [k] **Contract is not one of consignment** where bankrupt was required to pay invoice price in cash or make up difference in case of return of goods. 25 F(2d)381. [l] **Trustee in bankruptcy is not innocent purchaser for value** or holder of specific lien, within meaning of Factors Act in New York. 30F(2d) 555. [m] **Deposit of bonds as margin**, later converted by repledging before claimant began trading, does not entitle claimant to preference. 27F(2d)690.

129–35 15F(2d)61; 15F(2d)300; 17 F(2d)325; 58ND516, 226NW620; Wash 291P705 (naked legal title of vendor of realty). [a] (2) Claimant directing purchase of stock is entitled to preference where stock was purchased but not paid for. 27F(2d)690. [b] 2 F(2d)791. [e] (2) Cable by bankrupt directing bank to transfer money to claimant did not create trust fund in favor of claimant. 27F(2d)810. [l] **Special fund** raised by creditors to avoid bankruptcy is not part of bankrupt estate. 9F(2d)650 (distributed pro rata to contributors). [m] **Transition held not breach of trust** so as to prevent recovery by preference or reclamation. 9F(2d)486. [n] **Bankrupt bank fraudulently receiving deposits** holds as trustee ex maleficio. 10F(2d)926 (subject to depositor's right of reclamation). [o] **Property purchased from bankrupt and returned for exchange** cannot be reclaimed after being mingled with property of bankrupt. 18F(2d)314. [p] **Transactions in foreign exchange.**–27F(2d)810. [q] **Where mortgage is taken in name of bankrupt and purchased with money of another**, bankrupt's trustee is not entitled to retain proceeds of sale in foreclosure of such mortgage. 33F(2d)278 (mortgage taken in name of bankrupt attorney and purchased with client's funds).

129–35½–New. Where bankrupt stockholder who bought stock for a petitioner in a proceeding for reclamation, pledging it as collateral for his own indebtedness, refused petitioner's demand after it had been fully paid for, the petitioner became the creditor of the bankrupt with the right of action for breach of contract or for conversion. 8F(2d)111.

129–35⅓–New. but such petitioner had no claim on surplus from the proceeds of the stock which had been sold by pledgees. 8F(2d)111.

130–37 47 Ida263, 274P627; 170Minn 230, 212NW196, 197 [citCJ]. [f] 264 Mass386, 162NE770. [h] (1) 270US 560, 46SCt413, 70L ed733; 222Ky753, 2SW(2d)367; Mo 14SW(2d)633; 136 Misc290, 240NYS610 (note given for stock certificate); 50RI 506, 149A609; 194Wis107, 215NW827. (2) Trustee invested with right to prosecute such action by federal court has right to prosecute such action in state court. 125Misc521, 211NYS405. (3) Rights of parties date from adjudication, and failure of consideration of note subsequent to that date is no defense to suit by trustee. 78CalA305, 248P 525. [i] 213Ala137, 104S322. See also 291Pa543, 140A498. [l] **Claim for refund** of excess taxes paid by bankrupt vests in trustee. 6F(2d)725. [m] **Directors of corporation are not liable to its trustee in bankruptcy** for indebtedness of individuals to corporation in absence of fraud or negligence. 165La 1, 115S347. [n] **Employment contract, not broken when bankruptcy petition was filed**, or bankrupt employee's right of action for breach thereof, does not pass to trustee. 30F(2d)588.

130–38 See also 28F(2d)981. But see 218Ky323, 291SW391. [b] **Thus trustee in bankruptcy cannot recover amounts unpaid on subscription contract where neither trustee nor corporation cannot perform its side of contract.** 125Misc521, 211NYS405.

130–39½–New. But a trustee is not estopped from recovering corporate funds used to pay an officer's personal debt, by acquiescence of the directors or stockholders. 126Me74, 136A292.

131–40½–New. A corporation's trustee in bankruptcy may enforce a subscriber's liability on a subscription to stock. 219AppDiv634, 221NYS77.

131–40⅓–New. A trustee may recover from the payee proceeds of checks issued in payment of drawing officer's individual debts. 126Me74, 136A292.

131–41 81Colo 370, 256P1; TexCivA 4 SW(2d)668 (fraud perpetrated on corporation). See also 29F(2d)22. [c] (2) Other instances. 35 OhA76, 171NE 870. [g] **Where moneys of brokerage company were paid by secret owner** to another broker in personal speculation, no cause of action was vested in bankruptcy of such dummy company. 128 Misc654, 219NYS676. [h] **Where bankrupt was mere dummy for another, who ran bucket shop**, rights of specific creditors who lost by reason of bucketing held not to pass to trustee. 128Misc 654, 219NYS676.

131–42 Ont [1926] 3DomLR707. [a] (5). Wrongful issuance of distress warrant injuring tenant's good name, fame, and credit. 142Va197, 128SE644. [e] **Action personal to creditors of corporation** based on stockholders' fraudulent overvaluation of property transferred to corporation for stock does not pass to trustee of corporation. TexCivA 4SW (2d)668.

131–44½–New. Where trustee does not learn that particular property belongs to bankrupt until three years after adjudication this has been held no abandonment of title by the trustee. 9 F(2d)62 (under evidence).

131–45 But see TexCivA 12SW(2d)651. [f] **Estates of partnership** and of individual partners are kept separate. 20 F(2d)589.

131–46 [d] **Members of bankrupt partnership** are not necessarily bankrupt. 20F(2d)589.

132–48 9F(2d)36; 58ND516, 226NW 620. [h] **Trustee merely succeeds to rights of bankrupt** in tract of real estate belonging to partnership or joint adventure in which he was member. 58 ND516, 226NW620 (other members not estopped to assert their interests).

132–50 9F(2d)36; 97CalA442, 275P 870. [e] **Business of partnership** or rights of parties inter se not interfered with on bankruptcy of individual partner. 10F(2d)9. [f] **Trustee cannot administer partnership** without consent of other partner. 10F(2d)9.

132–50½–New. Land owned by partnership, but title to which was in partner, passes to trustee of partnership. 14F(2d)847.

132–51 13F(2d)707; 20F(2d)149.

132–52 226Ky347, 10SW(2d)1112 [c] **Claim for refund** of excess taxes after repeal of law under which they had been paid vests in trustee. 6F(2d)725.

133–55 But see [1930] 4DomLR1028 [2dcase].

133–56 19F(2d)965; 33F(2d)162 (trustee in bankruptcy succeeds to right of bankrupt with title superior to any and all persons other than prior lienholders); 33F(2d)945; 87Colo 498, 289P 599; MoA 256SW163.

133–57 14F(2d)647; 15F(2d)399; 17 F(2d)153; 19F(2d)965; 26F(2d)116; 28F(2d)981; 31F(2d)514; 33F(2d)881; 36F(2d)721 (trustee has status of attaching creditor); 38F(2d)10; 214Ala 670, 108S586; 83Colo 242, 263P719; 87 Colo 498, 289P599; 336 Ill 594, 168NE 666; 156Md420, 144A342; 320Mo 1208, 9SW(2d)925; 79Mont246, 256P176, 57 ALR1122; 219AppDiv193, 219NYS541; TexCivA 274SW1016 (succeeded to right of possession); TexCivA 29SW (2d)414; Vt 151A507; Wis 230NW135; Man [1930] 3DomLR930. [a] 87Colo 498, 289P599. [s] **Upon adjudication** trustee gets title subject to valid liens. 5F(2d)75. [t] **"Vested with all the**

rights, remedies, and powers of a judgment creditor" does not mean "rights, remedies, and powers" of judgment creditor but includes such creditor. 9 **F(2d)**650. [u] **That bankrupt's mortgage was not properly acknowledged precluding recording** does not invalidate it as against trustee. **Wis** 230**NW** 135. [v] **Undervalued property.**–Trustee has no beneficial interest in undivided property in which bankrupt owned undivided interest. **Mo** 30**SW(2d)** 608.

135–59 5**F(2d)**633; 39**F(2d)**625. [a] 19**F(2d)**604; 23**F(2d)**403. [b] (7) Trustee has additional rights. **Tex CivA** 274**SW**1016.

135–60 **Wash** 291**P**705.

135–62 14**F(2d)**847.

135–62½–New. The state law controls as respects bankruptcy trustee's rights as lien or execution creditor under the Bankruptcy Act § 47 as amended. 19 **F(2d)**604.

135–62⅓–New. A lien of trustee in bankruptcy without notice against the bankrupt's property is superior to all other liens. 146**Miss**369, 112**S**1.

135–63 14**F(2d)**847; 19**F(2d)**604; 23 **F(2d)**403; 28**F(2d)**981; 29**F(2d)**671; 31**F(2d)**321; 87**Colo** 498, 289**P**599; 130 **Kan**568, 287**P**251; 226**Ky**347, 10**SW (2d)**1112. [i] **Rights of claimants** are not lost by failure to have property sold distinct and separate from other goods of bankrupt. 29**F(2d)**431.

136–66 8**F(2d)**437; 12**F(2d)**660; 13 **F(2d)**667; 25**F(2d)**305; 28**F(2d)**438; 29**F(2d)**902; 220**Ala**394, 125**S**637; 42 **Ida**421, 246**P**10; 264**Mass**469, 162**NE** 905; 81**Mont**579, 264**P**940, 943 [citCJ]; **TexCivA** 12**SW(2d)**651; 37**Wyo** 11, 258 **P**576. See also 28**F(2d)**154. [c] **Right to possession of bankrupt's lands.**–81 **Mont**579, 264**P**940. [d] **Right to value of use of lands.**–81**Mont**579. 264**P**940.

136–67 13**F(2d)**116; 19**F(2d)**18; 19**F (2d)**269; 19**F(2d)**408; 24**F(2d)**305; 40 **F(2d)**328; **Iowa** 232**NW**67; 37**Wyo** 11, 258**P**576. [a] (2) 58**ND**516, 226**NW**620. [b] **In regard to property not in custody of bankruptcy court,** trustee is vested, as of date of petition in bankruptcy, with all rights, remedies and powers of judgment creditor holding execution duly returned unsatisfied. 42 **Ida**421, 246**P**10. [c] **Petition not filed** until lodged in clerk's office, within meaning of act. 10**F(2d)**926.

136–68 But see 259**Mass**181, 156**NE**1, 54**ALR**745.

136–70 19**F(2d)**526; 32**F(2d)**772; 111 **Conn**475, 150**A**693; 189**NC**465, 127**SE** 529. [c] (4) Trustee of pledgor maker of note may pay note and redeem collateral under Gen. Ord. No. 28. 21**F(2d)** 598. (5) Right to pay and redeem collateral includes right to use reasonable means for redemption. 21**F(2d)**598 (may be authorized by court to borrow from other creditor to redeem collateral). (6) Tender of payment by trustee to purchaser of demand note in order to redeem collateral pledged is made unnecessary by purchaser's absence from country. 21**F(2d)**598.

136–71 21**F(2d)**434. See also 31**F(2d)** 441.

136–72½–New. A mortgagee of bankrupt's property may be required to pay the legitimate expenses of preserving it and the cost of advertising the sale as conditions of abandonment by trustee. 19**F(2d)**526.

137–73 175**Ark**209, 298**SW**1035; 47 **Ida** 263, 274**P**627; **Mont** 286**P**402 (bankrupt mortgagor entitled to crop of wheat subject to right if any by mortgagee); 189 **NC**465, 127**SE**529 (title remains in bankrupt).

137–77 28**F(2d)**457; 35**F(2d)**539 (bankrupt cannot complain of close inquiry as to assets). See also 30**F(2d)** 523(2dcase). [c] **After petition is filed,** bankrupt holds all his property in trust to preserve it and turn it over to trustee. 5**F(2d)**578.

137–78 21**F(2d)**380; 32**F(2d)**329; 38 **F(2d)**672. [i] **It should not be presumed** that bankrupt will not obey order to turn over property to trustee. 5 **F(2d)**578. [j] **Nature of proceedings.**–17**F(2d)**588; 17**F(2d)**800. [k] **Ability to comply with turnover order.**–In order to authorize contempt proceeding, there must be specific thing which bankrupt is to do which he can do if willing. 34 **F(2d)**209. [l] **Motion to punish for contempt for failure to account is premature** where order requiring accounting did not appoint master. 38**F(2d)**672.

138–80 [b] See also 28**F(2d)**457 (disability to obey referee's order to turn over sum to trustee terminates propriety of coercive remedies).

139–82 14**F(2d)**469.

139–83½–New. The court has no power to compel a contractor or its trustee in bankruptcy to give written consent as required by contract to pay laborers and materialmen out of funds retained by the city due to the contractor. 33**F** (2d)709.

139–84 See also 21**F(2d)**380.

139–86 14**F(2d)**626; 21**F(2d)**380; 29 **F(2d)**510.

140–89 13**F(2d)**143.

140–90½–New. Defense that a judgment debtor's bankruptcy trustee had obtained title cannot be asserted collaterally by any other than the trustee. 219**AppDiv**825, 221**NYS**883.

140–93 [c] **Petition and order to show cause** are not in nature of criminal proceedings. 5**F(2d)**578.

140–95½–New. A trustee's petition may properly ask for delivery of goods or their proceeds where it is impossible for him to know which are in the possession of the bankrupt. 18**F(2d)**200.

140–97 5**F(2d)**578 (withholding of assets must be proved by clear preponderance of evidence).

140–98 28**F(2d)**457. See also 32**F(2d)** 329. But see 21**F(2d)**380. [a] (2) Property traced to bankrupt's possession presumed still to be in his possession or control. 10**F(2d)**91. (3) Presumption that bankrupt continues to hold back property on proceeds thereof weakens as time passes and finally ceases. 15**F(2d)**321.

141–3 17**F(2d)**588.

141–4 See also 10**F(2d)**91.

141–4½–New. In determining whether a bankrupt has the present ability to obey the referee's order to pay over a sum to the trustee, circumstances at such time may be so connected with conditions existing when the turnover order was made, or prior thereto, that the latter must be considered in arriving at a just conclusion. 28**F(2d)**457.

141–5 278**US**358, 49**SCt**173, 73**L ed**419; 14**F(2d)**469; 17**F(2d)**588; 21**F(2d)**380; 23**F(2d)**409 (clear preponderance of evidence held sufficient). But see 17**F(2d)** 925. [a] **Prima facie case for contempt** is established by showing failure to comply with turnover order. 23**F(2d)** 409.

141–6 10**F(2d)**91; 13**F(2d)**94; 14**F (2d)**626; 41**F(2d)**632. See also 17**F(2d)** 588. But see 18**F(2d)**288; 32**F(2d)**329. [a] 10**F(2d)**91; 14**F(2d)**626; 17**F(2d)** 588; 18**F(2d)**200; 32**F(2d)**329; 33**F (2d)**901; 33**F(2d)**902; 41**F(2d)**632. [b] (1) 14**F(2d)**703; 35**F(2d)**539 (referee's refusal to find concealment warranted by insufficiency of evidence). (2) To show inability to obey turnover order. 28**F(2d)**457. [c] **Concealment may be proved by direct evidence** or by proving facts from which concealment may be inferred. 41**F(2d)**632.

142–3 18**F(2d)**200.

142–8½–New. Adjudication of retention of assets held not conclusive in contempt case. 21**F(2d)**380.

142–8⅓–New. Adjudication of retention of assets may be established by preponderance of evidence. 21**F(2d)**380.

142–8¼–New. It is presumed that the bankrupt has possession of the proceeds of the merchandise sold by him. 18**F** (2d)200.

142–8⅙–New. Such presumption is rebuttable. 18**F(2d)**200.

142–8⅙–New. On motion to punish for contempt for disobeying a turnover order, the only evidence which the court can consider in behalf of the bankrupt is evidence of something that has happened since the time to which the turnover order relates, preventing the bankrupt's complying with the order. 34**F** (2d)78 [aff 34**F(2d)**79].

142–8½–New. An attack on a turnover order does not sustain the burden resting on the bankrupt to show inability to comply therewith. 34**F(2d)**78 [aff 34**F(2d)**79].

142–9 [a] **Proof beyond reasonable doubt** is not required. 23**F(2d)**409. [b] **Fundamental issue in turnover proceeding** (1) is whether bankrupt had property in his possession or control at date of bankruptcy which is not delivered to trustee. 27**F(2d)**196. (2) This issue must be raised and decided first. 27 **F(2d)**196.

142–12 8**F(2d)**878; 23**F(2d)**409. [a] 5**F(2d)**578; 14**F(2d)**469.

142–13½–New. Correctness of turnover order is not involved in contempt proceeding for bankrupt's failure to obey such order. 17**F(2d)**588; 23**F(2d)**409.

142–14 [a] **Order to turn over surety** is not conclusive in contempt proceedings of bankrupt's present ability to comply. 5**F(2d)**578.

142–15 See also 21**F(2d)**380. But see 35**F(2d)**539.

142–15½–New. A bankrupt has the burden of proving a charge that there was no evidence supporting a finding that he possessed money fraudulently withheld. 14**F(2d)**931.

142–15⅓–New. A finding of a referee in summary proceedings to require a bankrupt and his brother to turn over to a trustee certain real estate that the brother, to whom property was conveyed as security for a loan, had no substantial claim thereto, because there was no consideration for the transfer, and because the transaction was fraud on the creditors, was not justified under the evidence. 29**F(2d)**510.

142–15¼–New. A finding as to possession is not objectionable because relating to the date of a prior turnover order. 32**F(2d)**329.

142–16 278**US**358, 49**SCt**173, 73**L ed** 419; 43**F(2d)**258. [a] **Petition to adjudge bankrupt in contempt,** brought within six months after bankrupt is released from prison, is not barred by laches. 31**F(2d)**972. [b] **Failure to comply with turnover order** is civil contempt. 30**F(2d)**523(2dcase). [c] **Bankrupt if not controlling assets** may be liable to criminal law, but except for willful disobedience cannot be confined by civil process. 43**F(2d)**258. [d] **Alternative form of order** requiring merchandise or proceeds is valid. 41**F(2d)** 632. [e] **Collateral attack of order** is not allowed in contempt proceeding. 37 **F(2d)**339. [f] **Defense to contempt proceeding** on failure of bankrupt to appeal turnover order, only defense to contempt proceeding is subsequent occurrence making performance of order impossible. 37**F(2d)**339. [g] **Bankrupt physically unable to comply with turnover order** cannot be adjudged in contempt. 43**F** (2d)258.

142–17 34**F(2d)**209. [c] 23**F(2d)**413. [d] **Failure to comply with turnover order** held civil contempt. 23**F(2d)**409.

143–21½–New. A bankrupt in contempt proceedings will be given the benefit of the court's doubt whether he has the money that he was ordered to turn over, in view of lapse of time. 17**F(2d)**588.

143–21⅓–New. Presumption, where one disobeys a turnover order, is that the bankrupt acted willfully. 23**F(2d)**409; 23**F(2d)**413.

143–21¼–New. On motion to punish for contempt for disobeying a turnover order, the moving party must establish by fair preponderance of proof that the order was disobeyed. 23**F(2d)**413.

143–21⅙–New. A prima facie case of contempt is made by production of a turnover order. 18**F(2d)**579.

143–21⅙–New. An order nisi is the minimum notice that will suffice to justify a sentence of imprisonment as a punishment for failure to comply with a turnover order. 18**F(2d)**579.

143–21⅐–New. A sentence of a bankrupt to imprisonment until he complies with a turnover order should be conditioned until further order of court. 18 **F(2d)**579.

143–21⅛–New. A sentence of certain partners of a bankrupt firm to imprisonment until a turnover order is complied

with is not supported by evidence where their inclusion in the order was pro forma and it appears that they had no part in the general management and control of the business. 18F(2d)579.

143-21⅛-New. In proceedings to punish a bankrupt for contempt for failure to obey an order to pay over money made by a referee and confirmed by the court, testimony that the bankrupt did not have the money when the order was made is inadmissible. 18F(2d)244.

143-21⅛-New. In such a proceeding the burden is on the bankrupt to show that he lost the money under conditions which he could not prevent. 18F(2d)244.

143-21⅛-New. In such a proceeding the bankrupt's mere denial under oath is insufficient to overcome the presumption that he still has the money. 18F(2d)244.

143-21⅛-New. Failure to obey a turnover order will not be punished as a civil contempt unless the court is satisfied that the bankrupt has the ability to comply with the order. 18F(2d)288.

143-21⅛-New. In proceedings to punish a bankrupt for contempt for failure to obey a turnover order, such order is prima facie proof of possession by the bankrupt. 18F(2d)288.

143-21⅛-New. Such presumption may not be rebutted by mere denials. 18F(2d)288.

143-21⅛-New. Such presumption may be rebutted by testimony as to the bankrupt's present financial condition. 18F(2d)288.

143-21⅛-New. When such presumption is met, the burden is on the trustee to show the bankrupt's possession and ability to comply. 18F(2d)288.

143-21⅛-New. Such possession may be shown by circumstantial evidence alone. 18F(2d)288.

143-21⅛-New. In such proceedings it devolves on the bankrupt to show how and when property previously adjudged in his possession or control has passed out of his possession or control. 27F(2d)196.

143-21⅛-New. A referee's turnover order must be assumed to have been correct, and a presumption of continuing ability to comply therewith prevails until the bankrupt shows otherwise. 28F(2d)457.

143-21⅛-New. A finally established order may not be collaterally attacked. 27F(2d)196.

143-21⅛-New. A turnover order is conclusive of the fact of possession or control and concealment by the bankrupt. 27F(2d)196.

143-21⅛-New. In a contempt proceeding against a bankrupt for failure to comply with a turnover order, the sole questions are whether the bankrupt is presently able to comply with such order and whether he is disobeying it. 27F(2d)196.

143-21⅛-New. In such case the bankrupt makes sufficient answer by showing that, wholly without his fault, he is unable to obey the order. 27F(2d)196.

143-21⅛-New. A record, showing a referee's order, not challenged by any proceedings for review, and the bankrupt's admission that she had not complied with the order, made a prima facie case of contempt. 28F(2d)457.

143-21⅛-New. To sustain an order committing a bankrupt for contempt in refusing to comply with a referee's order to turn over the assets or cost price thereof to the trustee, there must be title to the money in the bankrupt's estate and possession thereof in the bankrupt. 29F(2d)65 [certiorari den 49SCt345(9th case)].

143-21⅛-New. The degree of proof required is clear and convincing proof, such as is necessary to establish fraud, not proof beyond a reasonable doubt. 30F(2d)523(2dcase).

143-21⅛-New. In the absence of proof or pretense of proof of inability arising since a turnover order in bankruptcy to obey that order, it follows almost as a matter of course that the order adjudging the bankrupts in civil contempt for failure to obey the order must be granted. 30F(2d)523(2dcase).

143-21⅛-New. A prima facie case of contempt is made by production of a turnover order. 29F(2d)65 [certiorari den 49SCt345(9thcase)].

143-21⅛-New. A bankrupt has the burden of explaining his failure to obey a turnover order so as to satisfy the court that the failure was due to circumstances for which he should not be held to answer. 31F(2d)972 (inability to comply held not shown).

143-21⅛-New. A mere assertion of inability is no excuse. 30F(2d)190.

143-21⅛-New. A turnover order in bankruptcy having conclusively established that the bankrupts then had possession of a specified sum belonging to the bankrupt estate, such state of facts is presumed to continue until the contrary is shown. 30F(2d)523(2dcase).

143-21⅛-New. Substantial testimony tending to sustain an inference of the bankrupt's present ability to pay the cost price of the assets, which the referee ordered him to turn over to the trustee, has been held to warrant an adjudication of contempt in willfully refusing to comply with such order. 29F(2d)65 [certiorari den 49SCt345(9th case)].

143-21⅛-New. The rule that the court should proceed cautiously in punishing by indefinite imprisonment disobedience of orders in civil actions, especially turnover orders in bankruptcy, which are usually made without direct evidence of physical possession by the bankrupts, applies more to the granting of a turnover order than to a contempt order. 30F(2d)523(2dcase).

143-21⅛-New. On appeal from an order committing a bankrupt for contempt in refusing to comply with the referee's order, confirmed by the court, to turn over the assets to the trustee, the latter order is not finally an adjudication as respects even appellant's rights. 29F(2d)65 [certiorari den 49SCt345(9th case)].

143-21⅛-New. Failure to review turnover order determined bankrupt's control at time of bankruptcy of assets described. 43F(2d)258.

143-21⅛-New. Service of turnover order on attorney recognized as bankrupt's attorney without substitution order is proper. 43F(2d)698.

143-22⅛-New. A turnover order in bankruptcy is not subject to collateral attack in a subsequent proceeding to punish bankrupts for contempt for failing to comply therewith, but the only inquiry that can be made therein is whether something has happened since the turnover order was made establishing a new inability on the part of the bankrupts to comply therewith. US 49SCt173; 30F(2d)523(2dcase); 30F(2d)685; 31F(2d)972.

143-22¼-New. That a judgment committing a bankrupt for contempt in refusing to comply with an order to turn over the assets to a trustee gave the date of the court's order as that of the referee's order, which was later approved and confirmed by the court, has been held not reversible error. 29F(2d)65 [certiorari den 49SCt345(9thcase)].

143-22¼-New. [§ 237b] j. **Ancillary Proceedings.** A bankruptcy court has jurisdiction to aid in the enforcement of an order of a bankruptcy court of another district, committing the bankrupt for civil contempt, by making such order its own. 14F(2d)471.

143-22½-New. The court must assume that other court making order had jurisdiction and recognize as res judicata the facts found. 14F(2d)471.

143-23 31F(2d)95; **Mass** 166NE843 (right is not affected by fact that book account of debt was not made by creditor till after adjudication). **SD** 227NW373; **TexCivA** 297SW918; **TexCivA** 29SW(2d)489. [a] (2) Attorney for bankrupt may set off fees due him as general counsel, against dividends received by him on stock purchased with client's money. 17F(2d)501. (3) Deficiency judgment on foreclosure of mortgage executed by bankrupt may be set off against recovery for fraud. 34OhA339, 171NE248. [c] 27F(2d)659. [l] (2) Right may be exercised any time within four months prior to bankruptcy. **TexCivA** 29SW(2d)489. [m] **Refusal of referee to open up proceedings** held not abuse of discretion. 17F(2d)588. [n] **Amendment to Bankruptcy Act** of June 25, 1910 § 8 does not limit general rule that trustee takes subject to equities. **TexCivA** 297SW918. [o] **Judgment for tort** may be set-off. **TexCivA** 297SW918. [p] **Statutory double liability** of bankrupt stockholder of insolvent state bank may be set off against bank's secured debt to him. 30F(2d)339. [q] **Provision of Bankruptcy Act liberally construed.**–**TexCivA** 29SW(2d)489. [r] **Third party order against bank in proceedings supplementary to execution** does not preclude bank from offsetting indebtedness to it against deposit. 43F(2d)870.

143-26 SD 227NW373; **TexCivA** 297SW918 (it is immaterial that time allowed for proving has expired).

143-27 8F(2d)790; **TexCivA** 297SW918. [a] **Bankruptcy Act as to set-offs** authorizes court to determine right thereto on legal and equitable principles. **TexCivA** 297SW918. [b] **Creditor entitled under contract to collect money owing to bankrupt and retain portion thereof** cannot make such fund basis of set-off. 18F(2d)433.

144-29 151Wash35, 274P719.

144-30½-New. A claim arising after bankruptcy cannot be used as a set-off. 31F(2d)95; 133Misc598, 233NYS32.

144-31 151Wash35, 274P719.

144-32 231Ky354, 21SW(2d)438.

144-33 [a] 21F(2d)529.

144-34½-New. Under such provision a stockholder cannot set off payments made by him on his guaranty of a corporate debt in an action by the trustee to set aside a fraudulent transfer to him. 34F(2d)252.

144-36½-New. Bank going in trust plan on failure of plan and bankruptcy of debtor is not entitled to set off deposits against indebtedness of a bankrupt. 9F(2d)650.

144-36⅓-New. Liability of a bankrupt as a stockholder in an insolvent state bank cannot be set off against the liability of his estate on a note where, under statute, his liability as a stockholder is to the superintendent of banks for depositors' benefit only. 21F(2d)529.

144-37 8F(2d)668; 16F(2d)845; 18F(2d)460; 20F(2d)124; 29F(2d)86. See also 27F(2d)659. [f] **Deposit by judgment debtor bank of amount of judgment to credit of bankrupt's estate satisfies** judgment, precluding set-off of claim by judgment debtor. 43F(2d)435.

144-38 8F(2d)668.

145-40 See also 15F(2d)300.

145-41 32F(2d)234 (though debt not due). [a] See also 32F(2d)234 (deposits not permitted to be applied on note).

145-42 14F(2d)116.

145-42½-New. , or where a bank, knowing that others than the bankrupt were beneficial owners, collects, in payment in part of mortgage loan in bankrupt's name. 25F(2d)934.

145-42⅓-New. A bank may be estopped to assert the right of set-off of deposit against a debt due at the time of the depositor's bankruptcy. 20F(2d)124.

145-44 170Minn230, 212NW196, 197 [citCJ]; **TexCivA** 286SW633. See also 220Ala394, 125S637. [a] (1) **TexCivA** 286SW633. [f] **Stockholder's suit to set aside license agreements of corporation** is in favor of corporation making trustee thereof proper party plaintiff. 135Misc424, 237NYS591.

145-45 219Ala571, 123S61.

145-46½ In Pennsylvania it is held that a trustee may without leave defend an action pending against a bankrupt. 288Pa320, 136A212.

145-46⅓-New. and that a state court may allow the trustee to intervene in an appeal by a bankrupt without permission by a bankruptcy court affirmatively appearing. 288Pa320, 136A212.

145-46¼-New. An application of a trustee intervening in a suit for the dissolution of a partnership for an order to the receiver to turn over the assets is

proper. 256Mass496, 152NE886.

145-47 136Misc848, 241NYS345; 155 Tenn296, 291SW835, 836 [quotCJ]. [c] (4) Denial of timely motion to open judgment is abuse of discretion. 198 Wis624, 225NW140. [k] (1) 155Tenn 296, 291SW835, 836 [citCJ]. [m] **State court cannot eliminate bankrupt** as party on motion of trustee declining to intervene or defend. 219Ala140, 121S 402.

146-48 155Tenn296, 291SW835, 836 [quotCJ].

146-49 155Tenn296, 291SW835, 836 [quotCJ]. [a] **Dismissal of trustee's intervention** in garnishment proceedings cannot be made cause for complaint by wife of bankrupt judgment debtor claiming property garnished and damages. 177Ark177, 6SW(2d)10.

146-49½-New. Trustees may intervene on behalf of those whom they represent. 284Pa41, 130A259 (dictum).

146-49½-New. Under the Bankruptcy Act, a trustee may not intervene in a suit against the bankrupt in estate court without first obtaining the bankruptcy court's approval. 34F(2d)528.

146-49¼-New. Debtor having sold farm bona fide, trustee in bankruptcy cannot intervene in state's suit to fix lien thereon. 160Tenn85, 21SW(2d)1036.

146-53 261Mass426, 158NE891 (trustee permitted to intervene); 320Mo 605, 8 SW(2d)592.

146-54½-New. Trustee can join with creditors in suit to set aside bankrupt's conveyance instituted more than a year before adjudication in bankruptcy. 220 Ala584, 127S151.

147-56 155Tenn296, 291SW835, 836 [quotCJ].

147-57 95CalA476, 273P37; 47 Ida263, 274P627.

147-58 155Tenn296, 291SW835, 836 [quotCJ]. [d] (1) 155Tenn296, 291SW 835, 836 [citCJ].

147-59 155Tenn296, 291SW835, 836 [quotCJ].

147-60 155Tenn296, 291SW835, 836 [quotCJ].

147-61½-New. On finding that intervening trustee was not entitled to property covered by chattel mortgage given by the bankrupt or its proceeds, dismissal of the complaint in intervention is proper. 166Minn396, 208NW26.

147-63 28F(2d)713.

148-64 280US224, 50SCt142, 74Led382 (provision of lease providing for preference in event of bankruptcy); 6F(2d) 506; 7F(2d)381; 15F(2d)559; 25F(2d) 584; 338 Ill 428, 170NE428; 255 IllA 558; 203 Iowa239, 212NW469; 198NC 494, 152SE393(2dcase); 124 Or276, 261 P432. See also 127Me286, 143A101. [h] (5) Agreement to accept return of goods which bankrupt obtained by fraud has been held not preference. 7F(2d)159. (6) Trustee cannot recover as illegal preference payment received by mortgagee for milk sold after taking possession of cows when mortgage is valid and mortgagee is caring for stock. 255 IllA558. (7) Other circumstances. 30 F(2d)77 [certiorari granted 279US830, 49SCt348. 73Led980(10thcase)]; MoA 8 SW(2d)1046. [m] 44Philippine216. [n] **Canadian Bankruptcy Act** also forbids preferences. NV [1927] 2DomLR450. [o] **Unlawful preferences.**-151Wash237, 275 P567. [p] **Voidable preference** is valid till avoided. 21F(2d)936.

148-65 213Ky286, 280SW1110; 57 Ont L505, [1925] 3DomLR927 [app allowed on other ground 58 OntL130, [1926] 1 DomLR199]. [d] 31F(2d)334; 39F (2d)100. [g] **Creditor taking subject to rights of trustee.**-6F(2d)506. [h] **Surrender of interest and vendor's deed** by insolvent purchaser to indorsers of his notes gave his bankruptcy trustee no equity as against indorsers. 28F(2d) 944.

149-66 4F(2d)770; 6F(2d)506; 110 Conn583, 148A669. But see 110Conn 583, 148A669. [b] 160Ga341, 127SE 754 (right of action in trustee and not in creditor suing for himself and all other creditors). [n] (3) Defense of estoppel is ineffective. 224AppDiv96, 229 NYS507; [p] **Trustee must show,** in order to recover property transferred or mortgaged by bankrupt as preference, that debtor was insolvent and that transfer operated to give one creditor advantage over another. 26F(2d)937.

150-69 21F(2d)294; 28F(2d)523; 37 F(2d)328; 255 IllA558; 203 Iowa239, 212NW469; 220MoA1099, 297SW108, 110 [citCJ]; 128Misc25, 217NYS611; 117 Or107, 241P62, 242P1112; 88Pa Super542. [f] **Time of insolvency.**-220 MoA1099, 297SW108, 110 [citCJ]. [g] **When person deemed insolvent.**-220MoA 1099, 297SW108, 110 [citCJ].

150-72 87PaSuper114.

150-73 37F(2d)328 (assets of bankrupt must be valued at what they were reasonably worth at time of payment).

150-74 87PaSuper114. [e] 220MoA 1099, 297SW108.

150-75 7F(2d)381; 16F(2d)986; 17 F(2d)291; 21F(2d)294; 30F(2d)256; 33F(2d)81; 173Ark1021, 293SW1009; 203 Iowa239, 212NW469; 4LaA654; 253 Mass19, 148NE227; 315Mo883, 289SW 540; 295Pa62, 144A824; TexCivA 26 SW(2d)925. See also La 129S671. [a] 39F(2d)397. [b] 33F(2d)957; 92Fla 219, 109S302; Mass 166NE843. [c] But see Mass 166NE843. [f] 36 F(2d)507; Mass 166NE843. [h] **In Ontario.**-Ont [1928] 1DomLR805.

151-78 315Mo 883, 289SW540; 221MoA 1250, 300SW321.

151-79 17F(2d)291; 92Fla219, 109S 302.

151-79½-New. Knowledge of insolvency does not defeat a bank's right to set off against a deposit made in the regular course of business in good faith. 9 F(2d)650.

151-80 [c] (2) Transfer by bankrupt to bank of equity in certain stock is preference where president knew of their condition. 34F(2d)334. [d] **Knowledge of del credere agent** held chargeable to principal, although latter was not creditor of bankrupt. 15F(2d) 272.

152-86 9F(2d)650; 20F(2d)124; NB [1927] 2DomLR450. [b] (3) Denial of set-off against indebtedness of bankrupt cannot be based on ground of unlawful preference where no consent to set-off. 9F(2d)650. [c] **Insolvent debtor may give security** for past indebtedness, intending preference without recipient knowing or believing he is receiving preference. 20F(2d)565. [d] **In Ontario.**-Ont [1928] 1DomLR805.

152-87 NB [1927] 2DomLR450.

152-88½-New. In Canada it is held that there must be a concurrent intent of the debtor and creditor. [1926] Can SC621, [1926] 3DomLR684.

152-89 9F(2d)650; 16F(2d)427; 21 F(2d)294; 26F(2d)937; 29F(2d)210; 203 Iowa239, 212NW469; 220MoA1099, 297 SW108, 111 [citCJ]; 218AppDiv243, 218 NYS74; 198NC494, 152SE393(2dcase). [e] 97CalA442, 275P870. [j] **Mere suspicion of insolvency** held insufficient. 16 F(2d)427. [k] **Bank holding notes of bankrupt prior to bankruptcy** has lien and right of set-off against deposits in regular course of business, effect of which is not lost by receiving depositor's voluntary checks in payment. 18 F(2d)460.

153-90 220MoA1099, 297SW108, 111 [cit CJ]; 198Wis335, 224NW114; [b] **Good faith.**-2F(2d)758.

153-91 16F(2d)427; 17F(2d)691; 18 F(2d)460 (payment to bank on large overdraft); 21F(2d)294; 36F(2d)482; 220MoA1099, 297SW108, 111 [citCJ]; Tex 290SW925, 927 [citCJ]; 198Wis 335, 224NW114. [e] 13F(2d)466; 28 F(2d)523; 295Pa62, 144A824. [g] **Assignment of overdue accounts to cover unpaid trade acceptance** held not, standing alone, sufficient to warrant holding that assignee had reasonable cause to believe that it was receiving preference. 13F(2d)466. [h] **Where circumstances incite to inquiry,** creditor is chargeable with notice of all facts which reasonably diligent inquiry would disclose. 87PaSuper114.

153-92 29F(2d)210; 29F(2d)907. [a] 13F(2d)466.

153-93 17F(2d)691; TexCivA 290SW 925, 927 [citCJ]. [a] 2F(2d)856; 16 F(2d)427; 21F(2d)294; 218AppDiv243, 218NYS74. [b] 2F(2d)130; 13F(2d) 466; 37F(2d)328.

154-94 14F(2d)53.

154-97 220MoA1099, 297SW108, 111 [citCJ]; 117 Or107, 241P62, 242P1112; 295Pa62, 144A824; 88PaSuper542; Tex CivA 283SW177; TexCivA 290SW925, 927 [quotCJ]. [a] 220MoA1099, 297 SW 108. [d] 220MoA1099, 297SW108. [e] **Circumstances held insufficient** to show that creditor had reasonable cause to believe that transfer would effect preference. 117 Or107. 241P62. 242P1112; 195Wis527, 218NW807. [f] **Statute requires belief that preference will result,** not merely that it may result, and a mere suspicion is insufficient. 315Mo 883, 289SW540. [g] **Mere suspicion** that preference would be effected is insufficient. 220MoA1099, 297SW108. [h] **Actual knowledge or belief** need not be shown. 220MoA1099, 297SW108.

154-98 16F(2d)427; 31F(2d)416; 242 IllA268; 54ND459, 209NW969; Tex 290 SW925, 927 [quotCJ].

154-99 See also Tex 290SW925, 927 [quotCJ].

154-99½-New. Provision is not applicable where at the time there is no reason to believe that the transfer will effect a preference over other creditors. 160Ga387, 128SE190.

154-99⅛-New. The credit manager of a creditor is chargeable with knowledge which he might easily have acquired in the debtor's town which would disclose that he was accepting a preference over other creditors. 213Ky286, 280SW1110.

154-99½-New. Knowledge that petition has been filed immaterial. 6F(2d)506.

154-99⅛-New. A mortgage by an insolvent debtor effecting preference cannot be impeached unless the intent to prefer and be preferred is shown. Ont [1927] 3DomLR748.

154-99⅛-New. Transfer of city funds from an insolvent bank through agents of both parties held voidable preference in favor of the city. 20F(2d)961.

155-2 203 Iowa239, 212NW469. See also 127Me286, 143A101.

155-3 25F(2d)592 (pledge); 79CalA 443, 249P886. [c] **Transfer of goods** in recoupment for similar goods consigned to bankrupt agent for sale held preference. 15F(2d)272. [d] **Assignment of accounts.**-18F(2d)776.

155-5 202 Iowa549, 210NW593, 58ALR 646.

155-6 16F(2d)986; 22F(2d)609 (assignment of valid bills receivable in place of forged bills); 238Mich248, 213 NW100.

155-8 Nebr 230NW665; Nebr 230NW 668.

156-9 [a] **Resales held valid.**-32F(2d) 897.

156-12½-New. The transfer of a lease to a purchaser as part of the business, with an agreement to deduct the rent due, paid by the purchaser, from the price, is held a preference. 218AppDiv 243, 218NYS74.

156-12⅛-New. Where a bankrupt assigned accounts receivable, the validity of assignment depends on whether he was allowed unfettered control over the accounts and proceeds. 13F(2d)152.

156-13 18F(2d)460. [d] **Special collateral deposit account.**-40F(2d)955.

157-18½-New. A bank may set off a depositor's indebtedness against his deposits in the usual course of business, and such transaction does not constitute preference by the depositor. 161 Minn534, 201NW932.

157-18⅛-New. Repayment of a loan made by a stockholder of a bankrupt corporation for a legitimate purpose and in accordance with agreement does not create a preference. 15F(2d)743.

157-19 21F(2d)294; Mass 164NE813. [d] (3) 18F(2d)460. (4) Bank receiving payment held agent not owner or creditor. 254NY218, 172NE475(2dcase). [l] 18F(2d)460. [m] **Renewal of notes to bank** is not preferential payment of old notes. 37F(2d)663. [n] **Federal Reserve Bank** receiving checks for collection not creditor of drawee bank so as to make remittances unlawful preference. 42F(2d)925.

158-24 293Pa33, 141A647.

158-25 [b] 34F(2d)979.

158-26 But see 31F(2d)373 [aff 31F (2d)375(1stcase)].

158-27 12F(2d)652; 14F(2d)170; 40F

(2d)282; 40F(2d)955; 87CalA707, 262 P463; 219AppDiv193, 219NYS541; 116 Or650, 242P351; 88PaSuper542; Wash 291P705. [f] (2) Assignment within four months of bankruptcy, of valid accounts to take place of fictitious accounts, has been held not to be a preference. 21F(2d)834 [dist 228US534, 33 SCt587, 57Led953]. [i] **Mortgage on crop to be grown,** executed and recorded more than four months prior to the mortgagor's adjudication in bankruptcy, is valid against trustee in bankruptcy where seed was planted during four-month period. 81Mont579, 264P940.

159-28 276US10, 48SCt209, 72Led443; 24F(2d)481; 35F(2d)840; 106Conn159, 137A756; 217Ky56, 288SW1030. But see 29F(2d)758. [a] (15) Repossession by conditional vendor with due record of sale. 276US10, 48SCt209, 72Led443. [f] **Date of preference** is time of deposit of articles in warehouse with receipt to creditor; not time of assignment of account. 29F(2d)643.

159-29 28F(2d)944; 31F(2d)334.

159-29½-New. or conveyance of property secured. 28F(2d)944.

159-30 7F(2d)228; 28F(2d)944; 217 Ky56, 288SW1030. [c] **Division of profits under joint venture** is not payment of debt to wife within four months of husband's bankruptcy. NJCh 146A 463(1stcase).

160-32½-New. A mortgage executed within four months is preferential as to money advanced to, and used by, a bankrupt several days before the execution of the mortgage. 8F(2d)96.

160-32⅓-New. Where a bankrupt in collusion with secured creditors deferred filing of a voluntary petition until after expiration of four months, it was held that the court would regard the proceedings as begun within four months after preference. 13F(2d)645.

160-32¼-New. In determining whether payment by check to a creditor was within four months of bankruptcy, payment must be considered complete when the creditor accepted the check. 29F (2d)210.

160-33 42F(2d)756; TexCivA 26SW (2d)925. [e] 44Philippine216.

160-34 25F(2d)817; 31F(2d)416; 32F (2d)1011; 35F(2d)152; 40F(2d)558; 56ND581, 218NW644; 57ND849, 224 NW308. See also TexCivA 29SW(2d) 414.

160-35 [b] **Registration, within four months** of filing of bankruptcy petition, of conditional sale contract, may be void as against trustee, on ground that effect would be to give preference. 28 F(2d)713.

161-36 22F(2d)268; 24F(2d)305 (second mortgage covering same property as first); 29F(2d) 510 [certiorari den 49SCt346(1stcase)]; 29F(2d)643; 32F (2d)896; 39F(2d)625; Nebr 232NW 581. [f] **Deed intended as mortgage,** which is executed and recorded within four-month period pursuant to promise made prior thereto, is ineffective as of day of promise, since record is not retroactive. 22F(2d)268.

161-37 22F(2d)611 (equitable lien); 23F(2d)506; 25F(2d)817; 28F(2d)944. [c] **Under Virginia Trader's Act,** making property constituting stock of goods of person transacting business in his own name liable for his debts, taking possession within four months of bankruptcy of automobiles, sold under conditional sale, effected voidable preference. 5F(2d)486. [d] **Equitable lien arising from agreement to make mortgage** is enforceable as against trustee in bankruptcy if agreement confines security to specific res and gives absolute present right. 22F(2d)268.

161-38 [a] **Taking of possession by pledgee during four-month period** pursuant to agreement made prior thereto does not constitute voidable preference. 18F(2d)314.

161-38½-New. Where an indorser of a note held an assignment of a land contract as security more than the four-month period prior to bankruptcy, an absolute transfer of such contract to him within such period is voidable only as to the extent that the value of the property transferred exceeds the amount due. 18F(2d)987.

162-46 18F(2d)987.

162-47 18F(2d)987; 203 Iowa239, 212 NW469 (dictum).

162-48 203 Iowa239, 212NW469 (dictum).

162-49 203 Iowa239, 212NW469; 223 Ky458, 3SW(2d)1065.

162-51 [a] **Payments to bank held not preferences.**-291Pa463, 140A517.

162-53 254NY218, 172NE475(2dcase). [a] (6) President of insolvent corporation bringing about payment of obligations on which he was surety was held to have received unlawful preference. 3F(2d)867.

163-54 34F(2d)238; 146Wash634, 264 P417.

163-54½-New. A owner of goods sent to del credere agent for sale is equally liable with such agent for preferential payments made by the bankrupt in satisfaction of liability for conversion of proceeds of sale. 15F(2d)272.

163-54¼-New. A transfer to a creditor more than four months prior to bankruptcy is not voidable by the trustee merely because the creditor was an officer of the bankrupt corporation. 18F (2d)971.

163-54¾-New. The federal reserve bank, as agent for the collection of checks on a nonmember bank, is not a creditor so as to make a cash payment by such nonmember bank to it to take up dishonored drafts a voidable preference. 226AppDiv225, 235NYS197.

163-56 17F(2d)325; 21F(2d)294; 38 F(2d)614; Mass 167NE321; 315Mo883, 289SW540; 117 Or107, 241P62, 242P 1112; 88PaSuper542; TexCivA 283SW 177. [f] **Although liabilities only twice assets, creditor receiving forty-eight per cent of claim** shortly before bankruptcy receives preference, since if payment were upheld, creditor could claim and share in distribution as to balance. 6 F(2d)518. [g] **Actual value of property transferred** and not agreed value, is to be considered in determining whether creditor obtained greater percentage than others. 38F(2d)614 (court held justified in adopting sale value). [h] **Payment to subcontractor of money due contractor held preference.**-Mass 172NE 508.

163-59 Mass 167NE321.

164-60 259Mass83, 156NE40; 315Mo 883, 289SW540; 88PaSuper542. [a] **Actual knowledge** or belief on part of creditor need not be shown. 54ND459, 209NW969.

164-62 54ND459, 209NW969.

164-64 13F(2d)152; 17F(2d)325; 22 F(2d)611; 27F(2d)247; 31F(2d)416; CalA 284P235; Mass 169NE667; Tex CivA 283SW177; 146Wash634, 264P 417, 418 [citCJ]; 195Wis527, 218NW 807 (execution of mortgage within four-month period as substitute for deed executed without such period). [a] (1) 11F(2d)931. [f] **Payment on policy loan with no surrender value to trustee** held not preference. 17F(2d)325.

165-68 Mass 164NE813.

165-71 18F(2d)836 (payment of rent by third person in order to obtain renewal of lease); 255 IllA558; 144Wash 241, 257P622. [o] **Community property.**-144Wash241, 257P622. [p] **Surrender of land contract to vendor in full settlement within four-month period** is voidable preference where bankrupt's equity in land had substantial value. 18F(2d)987. [q] **Bankrupt's bill of sale** given payee of dishonored check to prevent criminal proceedings is transfer to secure antecedent debt so as to be voidable preference. 31F(2d)799. [r] **Peaceful possession of mortgaged property** by mortgagee before filing of petition is not voidable preference or transfer. 31F(2d)317. [s] **Payment by purchaser of bankrupt's business.**-Mass 169NE667.

166-72 25F(2d)21. [b] (1) 39F(2d) 100. (2) Nebr 230NW665; Nebr 230 NW668. (3) Bankrupt's mortgage or transfer within four months' period of property exempt from execution under state laws cannot be declared preference. 30F(2d)816. (4) Voluntary conveyance of exempt with nonexempt property to creditor without fraud, creating preference is invalid only as to nonexempt property. 39F(2d)100.

166-74 31F(2d)388.

166-75 20F(2d)124; 28F(2d)402. [g] **Agreement not to attach not valid consideration.**-224AppDiv96, 229NYS507. [h] **Cash transactions.**-34F(2d)238.

166-76 34F(2d)238; Mass 169NE667; 144Wash93, 256P1025.

166-77 16F(2d)986; 144Wash93, 256 P1025; 198Wis416, 224NW720.

167-81 7F(2d)475.

167-86 17F(2d)347; 32F(2d)762. [a] 17F(2d)347; 32F(2d)762 (mortgages to attorneys held void).

167-87 17F(2d)347; 32F(2d)762.

168-88 17F(2d)347; 20F(2d)239. [c] (2) Reëxamination of amount paid attorney in contemplation of bankruptcy is by summary proceedings or order to show cause, not by plenary suit. 17F (2d)347. [d] 17F(2d)347. [g] **Money paid to attorney in contemplation of bankruptcy is trust estate** from time debtor contemplates bankruptcy by or against him. 17F(2d)347.

168-89 [a] **Compensation for services in unsuccessful effort to keep debtor's business out of bankruptcy** is properly allowable as "in contemplation of bankruptcy." 27F(2d)444.

168-90 27F(2d)444; 30F(2d)607.

168-91 31F(2d)373 [aff 31F(2d)375(1st case)].

169-94½-New. Payments by a bankrupt to its president to reimburse him for expenses not preferences. 14F(2d) 240.

169-95 331 Ill 508, 163NE340. [b] **Assignment of accounts receivable** made within four months of bankruptcy as security for a loan set aside as invalid under the law of Massachusetts. 11F (2d)979.

169-97 8F(2d)353; 28F(2d)791; 215 Ky668, 287SW364; 154Miss812, 123S 825; 187Wis649, 205NW391. See 26F (2d)937; 27F(2d)247. [n] **Foreclosure sale is not invalidated** by filing of involuntary petition between date of publishing notice of foreclosure and date of sale. 7F(2d)576. [o] **Purchase by mortgagee** at valid foreclosure sale to protect himself does not make sale invalid as against mortgagor's trustee in bankruptcy. 7F(2d)576. [p] **Mortgagee purchasing at valid foreclosure** sale is entitled to profits on resale. 7 F(2d)576.

169-98 39F(2d)625; 215Ala674, 112S 251.

170-1 39F(2d)100; 51SD638, 216NW 549; 37Wyo 11, 258P576. [c] (2) Assignee under assignment made within four months prior to adjudication in bankruptcy must account to bankruptcy court for assets in his hands at date of such adjudication or subsequently acquired. 37Wyo 11, 258P576. [e] **Jurisdiction of accounting by assignee.**-37 Wyo 11, 258P576. [f] **Assignee is custodian without title** after adjudication of bankruptcy. 37Wyo 11, 258P576. [g] **Jurisdiction of state court over property terminates** at least an adjudication of bankruptcy without notice of adjudication to state court and without request by bankruptcy court that assets be turned over. 37Wyo 11, 258P576. [h] **Bankruptcy adjudication** annulled state receivership and deed from bankrupt and wife in nature of general assignment, and wife's dower right was not affected thereby. 20F(2d)665.

170-4 25F(2d)518.

170-5½-New. Assignment for benefit of creditors under state law is not null and void within Bankruptcy Act. 231 Ky767, 22SW(2d)256(2dcase).

170-8 13F(2d)413; 14F(2d)53; 26F (2d)193; 32F(2d)719; 79CalA443, 249 P886; 83Colo 242, 263P719; 261Mass 426, 158NE891; 51SD638, 216NW549; 151Va434, 145SE421. [h] **Retention of possession by bankrupt** after transfer is held prima facie fraudulent transfer. 16F(2d)269. [i] **Rescission of contract of purchase of real estate** is voidable by trustee when done in fraud of creditors. 202 Iowa549, 210 Iowa593, 58ALR 646. [j] **Lease provision** for liquidated damages on termination of lease by les-

see's bankruptcy is not invalid as fraud on creditors. 30F(2d)77 [certiorari granted 279US830, 49SCt348, 73L ed980 (10thcase)]. [k] **Corporation without creditors.**–299Pa97, 149A103.

171–9 51SD638, 216NW549. [j] **Mortgagee's taking possession under valid mortgage** was not "transfer in fraud of creditors," under Idaho statute. 31F (2d)317. [k] **Assignment of accounts and proceeds** is fraudulent only if assignor retains unfettered dominion over them. 37F(2d)556. [l] **Assignment of leases to accommodation indorser of** bankrupt's note held not fraudulent. 37 F(2d)556. [m] **Deed executed by husband to wife** few months before bankruptcy may be set aside at suit of trustee. 338Ill428, 170NE428. [n] **Accounting to another having joint interest with bankrupt in land** is not fraudulent. **Iowa** 227NW512. [o] **Allowance to brother jointly interested** in transactions of difference in amounts drawn from common fund for living expenses by respective brothers is not fraudulent. **Iowa** 227NW512.

171–10 **TexCivA** 3SW(2d)112.

172–13 15F(2d)350; 312Mo373, 278SW 1016.

172–14 13F(2d)86.

172–15 25F(2d)592.

172–19 8F(2d)353; 22F(2d)999 (bankrupt retaining control).

172–21½–New. Conveyance to wife pursuant to valid contract made while husband is solvent is not in fraud of creditors. 10F(2d)322.

172–21½–New. But a transfer to wife amounting to a gift may be recovered by the trustee in bankruptcy. 10F(2d) 322 (homestead exempted).

172–21¼–New. Where there is an attempt to defeat a bankruptcy petition, the parties involved in the transactions, including the deputy sheriff making the sale, were liable. 30F(2d)188.

172–33½–New. A wife who accepted a transfer of her husband's bank account with knowledge that her husband intended thereby to hinder and delay his creditors is not personally liable to his subsequently appointed trustee in bankruptcy for that part of the account subsequently expended by him in carrying on his ordinary business in good faith. 201 **Iowa**308, 207NW329.

172–33½–New. A trustee cannot reach the bankrupt's interest in his mother's estate, conveyed to his father to give effect to an understanding between the parents as to the disposition of the property. **Mass** 166NE709.

172–34 [a] 13F(2d)413; 16F(2d)269; 173Ark1021, 293SW1009. [b] 8F(2d) 353; 14F(2d)1020; 41F(2d)8; 116 **Or** 650, 242P351; **Ont** [1925] 3**DomLR**446.

172–34½–New. Foreign law governs construction of trust receipts on question of preference. 26F(2d)193.

173–38 31 **OntWN**183, [1927] 1**DomLR** 24.

173–41½–New. A transfer of property of an individual partner to secure loans to the partnership is not a voidable preference on bankruptcy of the partnership where the petition did not seek adjudication of the partners as individuals and they are not adjudicated bankrupt. 25F(2d)817.

173–41¼–New. Payment of interest on bona fide advances made by one partner to pay obligations of the firm is not fraudulent. **Iowa** 227NW512.

173–41¼–New. Payment by a bankrupt partner to another partner in settlement not greatly in excess of the indebtedness owed him is not fraudulent. **Iowa** 227NW512.

173–43 45 **Ida**628, 264P231; 128**Misc** 105, 217**NYS**683; **TexCivA** 293SW264; **Va** 152SE376. [a] 14F(2d)490. [b] 11 F(2d)979.

174–46 36F(2d)643; 45 **Ida**628, 264P 231 (without showing that creditors had taken judgment or held lien against property). 208 **Iowa**776, 226NW133; 319**Mo** 672, 48W(2d)769; **Mo** 18SW(2d) 388. But see 128**Misc**105, 217**NYS**683.

174–48 **Mo** 18SW(2d)388.

174–49 38F(2d)40; 208 **Iowa**776, 226 NW133 (indebtedness to creditors at time of voluntary conveyance sufficiently shown); 299**Pa**97, 149A103; 208 **Iowa**776, 226NW133. [d] **Knowledge of lender of borrower's insolvency** is irrevelant in determining whether assignment of accounts receivable constituted fraudulent transfer. 38F(2d)40.

174–50 41 **Ida**679, 241P609.

174–50½–New. Where transfer by a bankrupt corporation of its assets was without consideration, and there was an existing creditor, the corporation's insolvency at the time of the transfer is unnecessary to set aside the fraudulent transfer. 34F(2d)252.

174–51 13F(2d)152; 117 **Or**107, 241P 62, 242P1112; 295**Pa**62, 144A824; 151 **Va**434, 145SE421. [d] (2) Bankrupt conveying bank stock to other banks advancing stated amount. 36F(2d)680. (3) Agreement that lien shall stand as security for future advances is valid where advances are thereafter made in good faith. 38F(2d)40. [m] (1) 2F(2d) 774. (2) Creditor's rights against indorser of note of bankrupt are not lost or given up so as to render creditor purchaser for value in respect of bankrupt's payment of note, where indorser participated in preference. 27F(2d)659. [n] **NJCh** 147A509. [o] **Mere nominal consideration** is insufficient. 319**Mo** 672, 4SW(2d)769.

175–52 15F(2d)392. But see 10F(2d) 301.

175–52 [d] **Advance of eighty per cent of appraised value of accounts assigned** as security is sufficient present consideration. 38F(2d)40.

175–53 173**Ark**1021, 293SW1009.

175–56½–New. A grantor's indorsement of a purchase-money mortgage as satisfied, and delivery to his vendee's grantee, is void as a gift where made within four months of bankruptcy. 297 **Pa**1, 146A157.

175–57 38F(2d)40; 173**Ark**1021, 293 SW1009; 58ND200, 225NW310; 117 **Or** 107, 241P62, 242P1112; 295**Pa**62, 144A 824; 151**Va**434, 145SE421.

176–58 295**Pa**62, 144A824.

176–58½–New. Intent to hinder or delay creditors is proof of actual fraud. 10F(2d)301 (is within statute as much as intent not to pay creditors at all).

176–60 [a] 208 **Iowa**776, 226NW133; 261**Mass**426, 158NE891. See also 27F (2d)898. [b] 173**Ark**1021, 293SW1009; 117 **Or**107, 241P62, 242P1112.

176–63 168**Ga**209, 147SE58; 261**Mass** 426, 158NE891; 117 **Or**107, 241P62, 242 P1112. Contra 151**Va**434, 145SE421. [c] **Payments within four months by trustees** of bankrupt company, organized under trust agreement to attorneys for services to be rendered to trustees personally, may be recovered. 5F(2d) 171.

176–64 36F(2d)680.

177–66 [b] See also 27F(2d)898. [d] **Speculation by third person with funds of bankrupt.**–128**Misc**654, 219**NYS**676.

177–70 15F(2d)119; **Wis** 230NW135. But see 164**Ga**869, 139SE799. [e] **Ability of one creditor** to set aside conveyance as fraudulent is sufficient to sustain decree for trustee. 41 **Ida**679, 241 P609.

178–71½–New. **In Massachusetts** conveyance defrauding existing or future creditors may be impeached by either class, or by the assignee in bankruptcy representing both. 9F(2d)209.

178–74 15F(2d)300; 17F(2d)904; 20F (2d)157; 21F(2d)984; 26F(2d)294; 38 F(2d)45; 142**Miss**691, 107S888. [e] (2) Trustee has no right to attack a mortgage given to secure replevin bond for judgment not void as preference. 215 **Ky**668, 287SW364. [f] **Unrecorded agreement by assignor** of mortgage that it should be security for future advances does not give lien against creditors. 7F(2d)475. [g] **Insolvency.**–40F (2d)955.

178–75 23F(2d)403 (assignment).

178–76 27F(2d)328. See also 31F(2d) 442. But see 2F(2d)750. [a] **Void acknowledgment.**–27F(2d)328.

178–77 26F(2d)10; 142**Miss**691, 107S 888.

178–78 19F(2d)269; 25F(2d)979.

178–79 2F(2d)699; 13F(2d)65; 19F (2d)18; 20F(2d)157; 20F(2d)410; 21F (2d)984; 23F(2d)609 (contract held void chattel mortgage, not valid conditional sale); 25F(2d)378; 30F(2d)510; 35F(2d) 18; 35F(2d)729; 39F(2d)625; 214**Ala** 670, 108S586; 206**Cal** 266, 274P68; **MoA** 14SW(2d)537. [a] (2) Agreement to hold returned merchandise in trust for assignees is void where there was no delivery of merchandise or recording of notes. 38F(2d)40. [f] (1) 31F(2d) 317. [g] **Chattel mortgage permitting mortgagor to remain in possession and sell without accounting for proceeds** is void as against trustee in bankruptcy where it is void under state law. 24F (2d)734. [h] **Transfer of property by individual to corporation** covered by chattel mortgage held not to render registration thereof unnecessary. 25F (2d)378. [i] **"Established place of business"** (1) within statute relating to place of record means principal established place of business. 24F(2d) 514. (2) Designation of location in return made to secretary of state is not conclusive. 24F(2d)514. (3) Evidence held to show principal place of business where chattel mortgage was filed. 24F (2d)514. [j] **Mortgage of realty and personalty,** recorded only in deed registry, not valid as to personalty as against trustee in bankruptcy. 24F(2d)514. [k] **Settled law of state in which transaction occurred** is followed in determining validity of chattel mortgage. 24F (2d)734. [l] **Mortgage not recorded till few days prior** to bankruptcy held of no effect against trustees. 25F(2d)378. [m] **Estoppel.**–25F(2d)378. [n] **Where chattel mortgage acknowledgment** was certified to in absence of mortgagor, thus being ineffective as to third persons under statute, it is void as to mortgagor's trustee in bankruptcy. 26F(2d) 672. [o] **Recorded instrument retaining title** with insufficient description to designate it as bankrupt's property is void as to trustee for buyer. 42F(2d)293.

179–80 [a] **Mortgage defectively acknowledged** by omitting element of corporate authorization held invalid as against trustee. 35F(2d)321.

179–80½–New. ; unrecorded mortgage of real estate; 43F(2d)703 (equitable mortgage).

179–81 17F(2d)555; 26F(2d)294; 32 F(2d)718; 291**Pa**236, 139A847.

179–82 37F(2d)301; 38F(2d)40. [a] **In California.**–6F(2d)177.

179–85 8F(2d)667; 124 **Okl** 294, 256P 29; **TexCivA** 290SW925. [d] **Mortgage covering accounts,** as well as stock held too vague in description of accounts to subject them to mortgage, and disallowance of mortgage held proper. 8 F(2d)667.

179–86 18F(2d)588. [b] 18F(2d)588. [c] **Validity of mortgage is determined by law of state** where property is located and mortgage executed and recorded. 28F(2d)154 [certiorari den 278US 648, 49SCt83, 73L ed561(5thcase)].

180–91 37F(2d)301; 124 **Okl** 294, 256 P29. [a] **Bank, whose cashier knew and approved** of sale of stock of merchandise, cannot set up noncompliance with Bulk Sales Law. 7F(2d)473.

180–99½–New. Whether a chattel mortgagee waived lien by surrendering possession to receiver depends on the agreement. 9F(2d)299.

180–99½–New. Lien of mortgagee under a valid mortgage executed more than four months prior to the filing of the petition under which possession was taken by the mortgagee within the four months' period is not avoided by bankruptcy. 10F(2d)116.

180–99¼–New. A receiver in bankruptcy is entitled to the proceeds of personal property transferred to one assuming unfiled chattel mortgage. 9 F(2d)861 (as against claimants under mortgage).

180–99½–New. Assignments of accounts are fraudulent and void where the assignee acquiesced in the bankrupt's use of the money assigned. 18 F(2d)963.

180–99½–New. Payment by officers of a corporation to themselves of excessive salaries, royalties, and commissions is void under state statutes. 21F(2d)593.

180–99½–New. And upon bankruptcy of the corporation such officers are liable for indebtedness and reasonable administration expenses amounting to less than

they received from such illegal transactions. 21F(2d)593.

180–99⅛–New. A deposit by an insolvent corporation with intent to give the bank a set-off, in order to effect a preference, is invalid under the New York Stock Corporation Law. 27F(2d)659.

180–99½–New. Notice of an incumbrance at any time after an adjudication of insolvency is unavailing. 25 F(2d)305.

180–99 1/10–New. A trustee as a general creditor may not assert the invalidity of a recorded chattel mortgage on the ground that it was not acknowledged, where the mortgagee is in possession. CalA 259P60.

180–99 1/11–New. Act of mortgagee in taking possession of mortgaged chattels before mortgagor's bankruptcy cures defects in mortgage where title thereby becomes absolute. 41F(2d)253.

180–1 See also 232Mich22, 204NW766 (right of creditors under Michigan statute, to reach property covered by unfiled chattel mortgage, lost, if proceeding is not taken before bankruptcy).

180–2 6F(2d)518; 9F(2d)650; 23 F(2d)34; 26F(2d)10; 29F(2d)902; 34F(2d)962; 37F(2d)1 (pledges); 37 F(2d)326 (chattel mortgages); 331 Ill 508, 163NE340. But see 36F(2d)667. [a] (2) 10F(2d)793 (properly disallowed and expunged from record). [c] (2) Recording of second trust deed within four-month period renders it valid lien where it was executed to replace prior defective trust deed executed before such period. 24F(2d)156. [d] But see 13F(2d)852. [h] (2) But under Illinois statute chattel mortgage maturing within ninety days before filing petition is valid, though extension affidavit is not filed. 24F(2d)305. [j] **As to credit extended between date of execution and of filing of chattel mortgage,** trustee is not entitled to recover where creditors had taken no action and had no lien prior to that of mortgage. 240Mich458, 215NW242.

181–3 24F(2d)156. [a] 6F(2d)1015 (holding that conditional sales contract not filed till day after filing of schedules is not void, where disclosed by schedules, and there were no judgment or lien creditors). [d] **In Kentucky.**–9F(2d)135.

182–6½–New. Delay in filing a chattel mortgage does not render it void as to creditors whose claims arose subsequent to filing, but only as to those whose claims arose prior thereto. 19F(2d)600.

182–7 13F(2d)852; 30F(2d)406 (conditional sales contract); 32F(2d)388 (agreements held not mortgages requiring recording). [e] (2) Trustee in bankruptcy may be entitled to retain possession of bankrupt tenant's crops and proceeds thereof as to one-third interest in crop claimed by landlord under agreement in lease for delivery of one third of crop to apply on preëxisting debt, where contract had not been filed for record. 29F(2d)902. [f] **Bill of sale given as security** may be void as against debtor's trustee in bankruptcy where not filed or accompanied by change of possession, as required by state law. 30F(2d)256.

[g] **Conditional sales contract.**–29F(2d) 916; 31F(2d)514.

182–8 169Ga608, 151SE31. [f] **Extent to which trustee may invoke estoppel.**–Trustee can invoke estoppel on account of mortgage being withheld from record only to extent that such withholding prejudiced creditors whom he represents. 56ND581, 218NW644.

182–10 12F(2d)981; 23F(2d)229; 34 F(2d)252; 37F(2d)1; 125Misc511, 211 NYS375; 128Misc105, 217NYS683; 123 Okl 297, 253P281. [c] Contra 128Misc 105, 217NYS683. [d] **Trustee cannot set aside bulk sale where it took place more than four months prior to adjudication.**–128Misc105, 217NYS683.

182–11 32F(2d)737; 36F(2d)643; 83 Colo 242, 263P719; 92Fla87, 109S320; 39GaA383, 147SE183; 201 Iowa257, 207 NW230; 205 Iowa1333, 219NW541; MoA 14SW(2d)537; NJCh 147A509; TexCivA 286SW266; TexCivA 4SW(2d) 331; 146Wash651, 264P423. [b] (1) 2F(2d)699. [c] (1) 206Cal 266, 274P 68. (2) As such he may challenge mortgage with his lien. 300Fed397. [d] 15F(2d)119. [l] Wis 230NW135. [n] **Trustee adopting sale of bankrupt's business** held without right to maintain suit to cancel mortgage. 19F(2d) 947.

183–12 12F(2d)652; 30F(2d)95; CalA 259P60; Or 287P224 (avoidance of transfer is for estate). [f] **Bankruptcy court has no jurisdiction** in suit to recover property fraudulently conveyed to grant recovery from defendant in excess of value of property conveyed on theory that he is liable as joint tortfeasor for value of all property fraudulently conveyed. 5F(2d)249. [g] **Mortgage by bankrupt as owner of all shares of nonexistent corporation,** under which name he was doing business, and properly recorded under state law, is valid as between mortgagee and mortgagor's trustee in bankruptcy. 35F(2d) 729.

183–12½–New. Trustee gets no greater title to mortgaged property than a bankrupt mortgagor has. 9F(2d)706.

183–13 CalA 275P529; TexCivA 4SW (2d)331. [c] **Bank's collection and deposit in contractor's general account** of moneys received under road construction contract, under void assignment, discharged bank as to amount so deposited, in proceedings by contractor's trustee in bankruptcy. 30F(2d)256.

183–14 30F(2d)256. [a] 2F(2d)774. [b] (2) In action to recover value of property preferentially transferred interest should be computed from demand or commencement of action. 42F(2d) 460. [c] **Creditor receiving preference** in form of merchandise as excessive collateral for debt held liable for full amount of proceeds of such merchandise, though sale price had not all been paid. 20F(2d)565.

184–16½–New. One holding property under a fraudulent conveyance may recover for expenditures made while acting as the court's appointee pending a title suit. 31F(2d)678.

184–17 30F(2d)256. [b] **In accounting** (1) grantee should not be surcharged with rent before tenant took possession. 31F(2d)678. (2) Court may inquire into performance of trust. 31F(2d)678. (3) Allowance may not be made for items deducted from merely adequate rental. 31F(2d)678.

184–18 25F(2d)211 (otherwise where fraud of grantee is constructive). But see 17F(2d)492. [a] 2F(2d)774.

184–26½–New. Purchase in violation of "Bulk Sales Act" makes buyer liable to seller's trustee in bankruptcy. 125Misc 511, 211NYS375.

184–26⅓–New. A trustee in bankruptcy may recover interest on a preferential payment from the time of the commencement of an action to recover the interest. 18F(2d)460.

184–26¼–New. Although corporation bonds sold below par are void, a broker negotiating the sale is not liable to the trustee for his profits or compensation. 23F(2d)256.

184–26⅙–New. After satisfying creditors of bankrupt, grantee under fraudulent conveyance is ordinarily entitled to surplus of property transferred. 43 F(2d)746.

184–27 51SD638, 216NW549; TexCivA 286SW266; TexCivA 4SW(2d)331. See also 331 Ill 508, 163NE340. [c] **One who takes from transferee** with knowledge of bankruptcy is not protected. 51SD638, 216NW549.

184–27½–New. , but where fraudulent conveyance was procured by undue influence surplus should go to bankrupt or his estate. 43F(2d)746.

185–33 42 Ida421, 246P10. [c] **Chattel mortgage** invalid as to creditors is invalid against bankrupt estate, even though valid as between parties. 28 F(2d)154.

185–35 9F(2d)488 (lien not invalidated by act); 17F(2d)434; 21F(2d)834; 22F(2d)920; 164Ga49, 137SE771; 37 GaA245, 139SE578; 217Ky56, 288SW 1030; 136Misc163, 238NYS696 (lien of chattel mortgage). [a] (1) 15F(2d) 743; 33F(2d)81. (3) Other instances. 30F(2d)979; 149Wash21, 270P130, 63 ALR351. [b] 30F(2d)510. [d] 40 F(2d)823. [g] 198Wis416, 224NW720. [p] (2) Pledge of fire insurance policy accompanied by actual and good faith delivery more than four months prior to bankruptcy creates valid lien under state law and is protected. 217Ky56, 288SW1030. [r] 36F(2d)203; 178Minn 20, 226NW198. [s] (1) 22F(2d)757; 33F(2d)81; Mass 172NE508. (2) Existence of equitable lien on property of bankrupt by pledgee. 37F(2d)1. [v] **Corporation mortgage to officer as security for his agreement** to assume corporation's liability on indorsement is valid as to trustee of corporation, both as to consideration and as to Stock Corporation Law of New York, though security was delivered after insolvency of corporation. 26F(2d)937. [w] **Mortgage to trustee as security for debt to third person in larger amount** is valid. 41F(2d)253.

186–36 15F(2d)764; 16F(2d)171; 16 F(2d)986; 23F(2d)391; 34F(2d)681; Ark 32SW(2d)627; 201 Iowa1298, 205 NW843; 217Ky56, 288SW1030; 219 AppDiv193, 219NYS541. [b] (3) Partnership creditor loaning money to continuing partner after knowledge of dissolution by withdrawal of one partner is not entitled on bankruptcy of continuing partner to equitable lien on property of old partnership. 5F(2d)915. (4) Other instances. 26F(2d)893; 28F(2d) 402; 31F(2d)914.

186–37 24F(2d)780; 25F(2d)21; 25 F(2d)817; 217Ky56, 288SW1030; Tex CivA 289SW417. [e] (2) Insolvency established by assignment for benefit of creditors does not make equity in pledged collateral trust fund for creditors. 33F(2d)649. [g] (2) Mortgagees of hotel property under chattel mortgage covering after-acquired furnishings had no lien on furnishings as against trustee in bankruptcy, where mortgagor at no time took possession. 33F(2d)162. [s] (2) Bankrupt, having possession of tobacco belonging to creditor as security for notes of third person assigned to creditor, cannot defeat creditor's title by intermingling bankrupt's tobacco with that of creditor. 25F(2d)817. (3) That creditor agreed or offered to release portion of his security to facilitate composition agreement with general creditors does not constitute fraud depriving him of his lien. 25F(2d)817. (4) Mortgage within four months of bankruptcy is not waiver by mortgagor of rights to equitable liens. 31F(2d)914. (5) Agreement as to transfer of deposits is waiver of equitable lien on deposits. 29F(2d)400.

188–38 25F(2d)967 (right to lien for one month's rent, under lease). [m] See also 16F(2d)171. [n] **Lien of laborers and materialmen on proceeds of bond issue** (1) must be paid out of proceeds of bonds turned over to trustee by underwriter of bonds. 33F(2d)162. (2) Such lien cannot be divested to pay mortgagee by agreement between bankrupt and underwriter. 33F(2d)162.

188–39 TexCivA 289SW417. [i] **Lien created by assignment of money** to be received in future is valid as against trustee in bankruptcy, although first money received not applied to lien. 15F (2d)743.

189–41 See 28F(2d)154. [b] (2) Lease giving landlord lien on chattels brought on premises by lessee, recorded as lease and not as chattel mortgage or lien, in Ohio, is void as against lessee's trustee in bankruptcy. 21F(2d)251.

189–43 21F(2d)433.

189–43½–New. Creditors of a bankrupt are entitled to preferred payment in full of checks, on a special fund created to avoid bankruptcy, issued by the trustee before bankruptcy. 9F(2d)650 (constitutes equitable assignment).

189–43⅓–New. A lien is not destroyed because it is not provable under the act. 9F(2d)488.

189–43¼–New. A loan to a bankrupt un-

der an agreement for a second mortgage is not entitled to recognition as an equitable lien where the mortgage was never delivered. 21F(2d)433.

189–43½–New. A bill of sale in a mortgage of leaseholds conveys no right against the mortgagor's trustee. 26F(2d)121.

189–43⅓–New. A trustee cannot administer property fully covered by liens without the consent of the lienholders. 34F(2d)681.

189–44 15F(2d)46; 15F(2d)360; 20F(2d)157; 21F(2d)251; 23F(2d)680; 23F(2d)687; 27F(2d)247; 30F(2d)979; 203 Iowa654, 213NW422; Mass 172NE508; 219AppDiv193, 219NYS541. [a] **Right of priority between trustee in bankruptcy and mortgagee on chattels,** having no existence at time of execution of mortgage, depends on state law. 33F(2d)162.

190–48 37F(2d)499; 203 Iowa688, 213NW213. But see 28F(2d)713.

190–49 8F(2d)493; 203 Iowa688, 213NW213.

190–50 23F(2d)680; GaA 144SE802(1st case); 203 Iowa688, 213NW213; 9F(2d)488 (for period after filing of petition). [d] (3) Under Texas Rev. St. (1925) art 5238, lessor acquired no lien on assets of bankrupt where lease automatically terminated on bankruptcy. 29F(2d)346. [n] **In Georgia.**–160Ga215, 127SE847. [o] **Filing statement of claim** entitles landlord to lien for entire period of unpaid rent. 10F(2d)810 (not required to file statement for each six-month period; Texas statute). [p] **Distraint for rent,** without notice required by statute, does not create lien as against trustee in bankruptcy. 24F(2d)445. [q] **After contributing amount equal to cost of enforcing lien** (1) to general fund, landlord has been held entitled to full proceeds of property, except prior lien. 24F(2d)780. (2) Lienholders' contribution should not be fixed in proportion to share of proceeds, since they might thereby pay cost greater than if there had been no bankruptcy. 24F(2d)780. [r] **In Louisiana.**–24F(2d)780. [s] **Where trustee in bankruptcy refused to take over tenant's lease,** landlord was within her right in asking for statutory lien for rent for balance of year, and then resuming possession of building at expiration of that time. 27F(2d)191. [t] **Landlord is entitled to lien for taxes** under lease, on tenant's bankruptcy. 42F(2d)33.

190–53 13F(2d)667; SD 227NW483 (lien of materialman on unpaid balance in hands of school district). [l] **Lien filed after adjudication** but within time required by Lien Law held to take precedence over interest of trustee. 13F(2d)667.

191–54 5F(2d)769 (tanner held entitled to lien on leather in his possession for all balances due from bankrupt).

191–55 203 Iowa688, 213NW213.

191–57 21F(2d)834; 33F(2d)1001; Iowa 228NW74.

191–58 [c] **Amount due city for water furnished** constitutes tax under some statutes. 38F(2d)786.

192–60 4F(2d)770.

192–62 9LaA71, 119S96.

192–66 15F(2d)529; 220Ala584, 127S151 (lien acquired by creditor's bill filed more than four months before petition in bankruptcy); Ariz 290P155; 164Ga49, 137SE771; 37GaA245, 139SE578; 203 Iowa654, 213NW422; 219AppDiv193, 219NYS541; 143SC422, 141SE683. [e] **Where chancery court obtains jurisdiction** in foreclosure suit more than four months before bankruptcy petition, its jurisdiction is not affected. Ark 32SW(2d)627.

192–67 17F(2d)434; 25F(2d)509; 164Ga49, 137SE771; 13PortoRicoFed189; 143SC422, 141SE683; Vt 151A507. [b] (1) 17F(2d)434. (2) Where defendant in attachment was adjudicated bankrupt within four months after levy of attachment, he can plead his discharge and prevent any judgment, general or formal, from being rendered against him and his sureties. 35GaA184, 133SE750. [g] **Sheriff's costs and fees.**–3LaA651.

193–68 [c] But see 95Fla99, 116S19.

193–69 37GaA245, 139SE578; 83IndA415, 148NE435, 928. [i] **Judgments not attaching to bankrupt's realty** creates no lien against amount received by trustee in settling litigation. 43F(2d)340. [h] **Bankrupt's equitable interest** in land conveyed to his attorney is subject to judgment lien. 5F(2d)484.

193–70 37GaA245, 139SE578; 219AppDiv193, 219NYS541. [a] 24F(2d)38 (bankruptcy court entitled to administer property not needed to satisfy execution lien).

194–71½–New. A statutory lien is not dissolved because not filed until after institution of bankruptcy proceedings. 15F(2d)529.

194–71⅓–New. Amendment to Bankruptcy Act of 1910, vesting in trustee the rights and powers of a creditor with a lien acquired by legal or equitable proceedings was passed for purpose of protecting against the evil of secret liens. 37F(2d)326.

194–72 7F(2d)9 (receiver in supplementary proceedings).

195–74 25F(2d)509; 203 Iowa654, 213NW422; Vt 151A507.

195–77 But see 19F(2d)642.

195–79 216Ala539, 113S617, 619 [cit CJ]; 37GaA450, 140SE636; 42 Ida421, 246P10; Me 139A461; 128Me519, 149A142; 78Mont516, 255P1043; SD 229 NW2(2dcase); 160Tenn85, 21SW(2d)1036; TexCivA[8] 278SW292. But see 39F(2d)916. [a] 21F(2d)254. [f] **Landlord's lien acquired by distraint** is not within rule. 18F(2d)658. [g] **Exempt property.**–(1) Lien against exempt homestead is not included (21F(2d)254), (2) even though lien attached before property was appropriated as homestead (21F(2d)254). [h] **Statute applied** (1) to lien acquired under state law by filing of supplemental bill in state court by bankrupt's creditors, who joined as complainants, within four months before bankruptcy, in bill filed by stockholder before four-month period. 26F(2d)851. (2) Neither such supplemental bill nor any lien thereunder could have retroactive effect so as to give creditors lien from date of original bill. 26F(2d)851. [i] **Where surrender of lien obtained more than four months prior to bankruptcy** (1) is consideration of second lien, first lien continues in second lien in so far as date of origin is concerned. 35F(2d)817. (2) Date of such agreement for surrender determines date of possession thereunder. 35F(2d)817.

195–80 215Ala632, 112S209; 7Alaska476, 485 [citCJ]; 78Mont516, 255P1043.

196–81 4F(2d)770; 31F(2d)416; 37GaA450, 140SE636; 78Mont516, 255P1043; TexCivA 278SW292; 151Wash237, 275P567; Wis 230NW69. [e] (2) Lien of attachment, prior to four months' period, is not avoided, because judgment in suit was within four months' period. 42 Ida421, 246P10; 5PaDist&Co 415. [g] **Rule applies notwithstanding no actual notice** by pleading or otherwise was given of bankruptcy proceedings. TexCivA 278SW292. [h] **Appointment of trustee necessary** before lien is divested. 128Me519, 149A142.

196–82 34F(2d)832 (garnishing creditor has no priority where bankruptcy petition is filed before judgment in garnishment proceedings); 181Ark288, 25SW(2d)425; MoA 272SW1087; 151Wash237, 275P567.

196–83 7F(2d)898; 23F(2d)229; 34F(2d)528; 164Ga49, 137SE771 (dictum); Iowa 233NW129; NJCh 145A232(2d case); 293Pa33, 141A647. But see 276US215, 48SCt252, 72L ed536. [f] But see Iowa 233NW129.

197–84 18F(2d)591; 34F(2d)667; 215Ala632, 112S209; 293Pa33, 141A647. [g] **Proceeds of sale should be retained by sheriff** to answer demand of trustee in bankruptcy. 293Pa33, 141A647.

197–88½–New. A lien or claim acquired judicial seizure, and sale under a distress warrant a few day's before adjudication is void. TexCivA 274SW1016.

197–89 216Ala539, 113S617, 619 [quot CJ]; 164Ga49, 137SE771; 36GaA746, 138SE282; 128Me519, 149A142; 166Minn405, 208NW21; Wis 231NW600.

197–90 216Ala539, 113S617, 619 [quot CJ]; 164Ga49, 137SE771. [c] **Where trustee had never been appointed,** judgment lien is not dissolved by adjudication in bankruptcy. 81Colo244, 254P989.

197–90½–New. An owner's bankruptcy does not prevent enforcement of mechanics' liens on property not listed or scheduled. 253IIIA274.

197–92 10F(2d)116; 18F(2d)455; 30F(2d)492; 7Alaska476; 7Alaska508; 110Conn125, 147A366 (attachment); 37GaA450, 140SE636; 78Mont516, 255P1043, 1046 [citCJ]; Wis 230NW69. [b] 7Alaska508 (burden on trustee). [e] **"Fair valuation" of assets** to determine insolvency under Bankruptcy Act means fair cash or market value thereof as between one wishing to sell and one wishing to buy. 110Conn125, 147A366.

198–96 TexCivA 278SW292. [b] **Note containing waiver of homestead right.**–35GaA184, 133SE750.

199–97½–New. After exempted property has been set aside by a trustee, a sale thereof with consent of bankrupt transfers liens, acquired therein, to proceeds of the sale. 160Ga717, 128SE785.

199–97⅓–New. Liens in exempted property, created by waiver and transfer of homestead exemptions in notes, executed more than four months before filing of petition in bankruptcy, and unrecorded, are prior to a duly recorded mortgage executed on the day of, but after, filing of the petition. 160Ga717, 128SE785.

199–98 164Minn416, 205NW274.

199–2 Contra 37GaA450, 140SE636.

200–4½–New. In some jurisdictions sureties on undertaking for the release of attached property seeking to avoid liability on the ground of the debtor's adjudication in bankruptcy must allege and prove that the bankrupt was insolvent at the time of the attachment. 78Mont516, 255P1043.

200–5½–New. Bankruptcy of the mortgagor annuls preference to a creditor who secured the setting aside of a fraudulent conveyance when bankruptcy occurs within four months from adjudication. 12F(2d)981.

200–6 216Ala539, 113S617, 619 [citCJ].

200–10 15F(2d)399; 7Alaska508. [d] **Words "notice or reasonable cause for inquiry"** refer to notice of pending or impending bankruptcy. 42F(2d)475. [e] **Purchaser at receiver's sale in state court** is bound to examine proceedings under which court is selling bankrupt's assets. 42F(2d)475.

201–15 See also 30F(2d)492.

201–19 TexCivA 12SW(2d)651.

201–19½–New. Interest of act in property subject to lien is to secure for general creditors any value above lien, 9F(2d)488.

201–19⅓–New. and to reduce claim of lien claimant by value of lien. 9F(2d)488.

201–19¼–New. That the secured's debt is not provable does not affect the trustee's right to realize on equity for the benefit of general creditors. 9F(2d)488.

201–19⅙–New. Wife's trustee in bankruptcy cannot recover property transferred to the wife after being mortgaged by the community after consenting to sale under mortgage. 144Wash241, 257P622.

201–19⅛–New. The right of a trustee to redeem under the bankrupt's equity of redemption is lost, if not exercised within the statutory period. 27F(2d)609.

201–19½–New. A trustee is entitled to rents and profits to which the bankrupt was entitled under the equity of redemption during the period covered by the bankruptcy. 27F(2d)609.

201–24 29F(2d)914; 31F(2d)416; 34F(2d)962; 168Ga209, 147SE58; TexCivA 297SW869. [f] (2) Other circumstances. 28F(2d)713. [l] **Order to trustee to intervene** in attachment proceedings held to confer on trustee all rights growing out of attachment. TexCivA 297SW869. [m] **Order and pleading by trustees** must appear of record in attachment proceedings, and, in their absence, admitting evidence of order by bankruptcy court has been held error. TexCivA 297SW869. [n] **Voluntary surrender to trustee in bankruptcy of property attached** by sheriff, with consent of attaching creditor, before attachment lien had been perfected in state

court, dissolved attachment lien, and bankruptcy court thereafter could not preserve lien. 31F(2d)416.

202-26½-New. A trustee is not entitled to recover from the buyer expenses incurred in preserving property pending trial of right in the property, where he could not be liable therefor, not having asked the bankruptcy court to preserve a lien of the execution creditor for the benefit of the estate. 34F(2d)528.

202-27 TexCivA 297SW869. But see 28F(2d)713.

203-32 9F(2d)488 (trustee has possession); 253IllA315; 320Mo1208, 9SW(2d)925. [a] 15F(2d)25. [b] (2) Transaction held not equitable assignment but to make claimant only general creditor. 8F(2d)267. [c] **Vendor of unrecorded conditional sale contract** has burden of proving that no creditor was without notice. 7F(2d)11. [d] **On remand proceedings** testimony of trustee has been held insufficient to rebut prima facie case of falsity of statement made out by reclaiming petitioner. 37F(2d)585.

203-33½-New. Court has jurisdiction where the lienor voluntarily submits. 9F(2d)488.

203-34 35GaA790, 134SE806. [e] (2) Evidence held to sustain finding that sale to bankrupt was absolute, and not conditional. 22F(2d)254. (3) Relevancy and sufficiency of evidence. 30F(2d)10. [f] **Petition.**-250NY370, 165NE814.

203-35 203Iowa654, 213NW422.

203-38 7F(2d)576; 9F(2d)488; 19F(2d)243; 22F(2d)832 (administrator's claim can be enforced only in bankruptcy court); 36F(2d)50. [e] **Vendor not authorized** to do business in state may bring reclamation proceedings against trustee of vendee. 7F(2d)115. [f] **Foreign corporation** not permitted to do business in state may require vendee's trustee to pay sum representing vendor's interest in fund received from sale of goods. 7F(2d)115. [g] **State court** may entertain foreclosure suit after filing petition in bankruptcy, though title to one of junior lienors made party arose out of assignment of bankrupt. 14F(2d)16. [h] **Evidence held not to sustain burden** on prior attaching creditor to show knowledge of his unrecorded lien by subsequent attachment creditor with record lien. 25F(2d)509. [i] **Rents.**-29F(2d)1003. [j] **Taxes.**-29F(2d)1003. [k] **Judgment creditor filing claims of judgments in bankruptcy court** and taking part in consideration of their validity without challenging jurisdiction of court is without right, pending adjudication, to have validity of judgment determined by state court. 33F(2d)291(1stcase). [l] **Evidence of lien.**-Finding that factor was entitled to lien on proceeds of shipment held warranted by evidence. 36F(2d)203.

204-39 16F(2d)171; 21F(2d)598; 23F(2d)500.

204-40 133US296, 33Led623, 10SCt304 (where property subject to lien had been sold by assignee); 28F(2d)760; 152Miss390, 119SE320; Vt 151A507. See also 31F(2d)416. [q] **Priority of jurisdiction.**-42F(2d)475.

204-41 See also 226Ky347, 10SW(2d)1112. [e] **Plenary jurisdiction.**-26F(2d)825. [f] **Effect of consent.**-28F(2d)86. [g] **Test for determination of question.**-26F(2d)825 (facts warranted federal court's taking jurisdiction).

204-41½-New. Landlord entitled to interest from dates when rent and taxes became due. 9F(2d)488 (not only from date of filing of petition).

204-41⅓-New. Under a Missouri statute a conditional seller must tender to the trustee of the purchaser the amount paid on the property before reclamation. 19F(2d)269.

204-41¼-New. Trustee's right to enforce attachment lien under recorded attachment held not affected by his knowledge of prior unrecorded attachment lien. 25F(2d)509.

204-41⅙-New. Equity may enjoin private sale of collateral, constituting practically entire bankruptcy estate, greatly exceeding holder's claims, for probably inadequate price. TexCivA 26SW(2d)925.

205-44 But see TexCivA 13SW(2d)949.

205-47 14F(2d)16; 18F(2d)792.

205-49 38F(2d)283 (foreclosure suit commenced more than four months before filing of petition). See also 31F(2d)317.

205-51 18F(2d)687; 18F(2d)792; 21F(2d)598 (sale of note and collateral); 26F(2d)798. [h] (2) Sale under foreclosure may be stayed to permit intervention of trustee where there is doubt as to validity of mortgage's being foreclosed, and more favorable sale of property can be made in connection with other property. 18F(2d)682.

206-52 [c] **Where title to bankrupt land vested in trustee,** court properly enjoined grantee from relitigating title in state court. 21F(2d)881.

206-55 See also 27F(2d)520.

206-56 7F(2d)79 (action against trustee for conversion). [b] See also 15F(2d)193.

206-58 23F(2d)500 (commencement of suit).

207-60 10F(2d)153; 20F(2d)1016; 38F(2d)283; Va 152SE376. [d] **Execution sale of property of corporation in which bankrupt has stock.**-6F(2d)672.

207-60½-New. except in a plenary suit challenging the validity of the lien as against the bankrupt's creditors. 10F(2d)153.

207-61 5F(2d)484 (order restraining suit in state court held mere restraining order and not conclusive as to whether judgment was lien on real estate); 17F(2d)434; 36F(2d)697; 220Ala584, 127S151; 88PaSuper349; 153Va410, 149SE636 (suit to set aside fraudulent conveyance). [c] **Delivery to state court of proceeds of attached property.**-17F(2d)434. [d] **Transfer to bankruptcy court of fund uncovered in state court** in action to set aside fraudulent conveyance cannot be compelled at instance of one who is not creditor. 153Va410, 149SE630.

207-62 18F(2d)591 (proceedings to enforce judgment disallowed by referee).

207-63 28F(2d)1002.

207-64½-New. A bankrupt's mere failure to schedule his property gives his landlord no right to levy thereon as against creditors represented by the receiver. 32F(2d)718.

208-72 [b] (4) Referee, when adverse claim is made before him, has jurisdiction to determine whether it is in good faith or merely colorable. 24F(2d)626. (5) Mere colorable claim is within summary jurisdiction of referee. 43F(2d)558 (claim held not colorable) [j] (2) Other instances. 43F(2d)661.

209-73 40F(2d)282. [c] (4) Other instances. 40F(2d)282. [k] **Not money decree.**-28F(2d)171.

209-74½-New. Objection that the referee is without jurisdiction of the proceedings in the name of the bankrupt to reclaim the proceeds of the property held by the mortgagee comes too late where the issue has been joined in the proceeding as instituted. 10F(2d)116 (and defendant has asked for specific relief against trustee).

209-74⅓-New. The referee is merely an officer of the court of bankruptcy having no power except as conferred by the order of reference. 5F(2d)37.

209-74¼-New. A referee may enter an order authorizing the trustee to obtain funds for the preservation of a bankrupt estate. 20F(2d)78.

209-74½-New. A referee has jurisdiction to determine, in summary proceedings, any controversy raised by an adverse claimant setting up title to, or lien on, property in the custody of the bankruptcy court. 18F(2d)440.

209-74¼-New. In Porto Rico, if the proceedings before a referee require an action against an official of an insular court, the referee should proceed by a certificate addressed to the district judge. 12PortoRicoFed527.

209-74½-New. A referee is a mere officer of the bankruptcy court without any independent judicial authority. 32F(2d)654.

209-74⅙-New. Referee has jurisdiction to determine distribution of surplus in trustee's hands from proceeds of bankrupt's property fraudulently conveyed. 43F(2d)746.

209-77½-New. A referee cannot make an order requiring a collector of internal revenue to file a government's claim for taxes within a stated time, 8F(2d)424.

209-77¼-New. nor refuse to allow claims for an additional income tax filed after expiration of such time. 8F(2d)424.

209-79½-New. a controversy between bankrupt's creditor and bankrupt's former partner, 24F(2d)482.

209-82½-New. The referee has no jurisdiction over a plenary suit brought by the trustee in bankruptcy against a third person when the property is not in the custody or control of the bankruptcy court. 5F(2d)37.

209-82¼-New. A referee is without jurisdiction, by summary order, to determine the ownership of property which was in the possession of a sheriff under writ of replevin, in an action against the bankrupt at the time the petition in bankruptcy was filed. 18F(2d)440.

209-82¼-New. In Porto Rico, a referee in bankruptcy has no power to issue orders to the marshal of an insular court. 12PortoRicoFed529.

209-82⅓-New. A referee has no power to restrain prosecution of proceedings in local court. 13PortoRicoFed189.

209-83 [a] **Reference to another division of district than that in which petition is filed,** by clerk in absence of judge, and proceedings before referee who made adjudication, is not void. 32F(2d)287.

211-1½-New. Credibility of witnesses testifying in proceedings for confirmation of sale is for referee. 37F(2d)937.

211-9½-New. In certifying questions, the referee need certify only so much as is necessary. 19F(2d)795.

211-9¼-New. Where referee in bankruptcy dies after taking testimony, but before rendering decision, court may determine issues on testimony taken by referee. 33F(2d)957.

211-12 20F(2d)136. [e] **Judicial functions of referee.**-5F(2d)37.

211-13 32F(2d)654. [c] **Single creditor** has been held not to have absolute right to petition for review from order made by referee in bankruptcy. 30F(2d)359.

211-14 36F(2d)776.

211-16½-New. Upon a mere order by the referee allowing additional testimony to be taken the appeal is prematurely filed. 25F(2d)518.

211-16⅓-New. A general order in bankruptcy, relating to the procedure in obtaining a review by a judge of the order made by the referee in bankruptcy is as obligatory on officers of the court as the act itself. 29F(2d)571.

212-17 29F(2d)571. [b] (1) 16F(2d)20.

212-18 16F(2d)20. [e] **Referee's findings are conclusive** where no transcript was furnished to referee and certified to district court. 8F(2d)146. [f] **Return of evidence.**-16F(2d)20. [g] **Requirement of certification of questions presented is substantially complied with** where certificate contains summary of evidence. 18F(2d)546.

212-18½-New. A petition to review an order of the referee is in substance an appeal from the court of bankruptcy to a district court. 16F(2d)20.

212-18⅓-New. When a petition for review is lodged with the referee, it is then his duty to prepare and certify his return. 16F(2d)20.

212-18¼-New. The inclusion in the return of any part of the colloquy of counsel of the proceeding to require surrender of property is unjustifiable unless it is a concession, or stipulation in open court. 16F(2d)20.

212-19 15F(2d)206; 20F(2d)136; 28F(2d)253 (Cir. Ct. of App. Rules, rule 15 § 8 not applicable); 36F(2d)643; 43F(2d)698. [a] (1) 20F(2d)136; 44F(2d)159 (over ten days without good cause for delay). (5) One year. 36F(2d)643. (6) Petition to review turn-

over order filed seven months after service of order held too late. 43F(2d)698. [d] **Extension of time.**–26F(2d)748. [e] **Time required by bankruptcy rules.** –32F(2d)1010 (petition to review order approving compromise, not filed in time, properly denied). [f] **District court may fix time for filing petition,** provided time is reasonable. 33F(2d)748. [g] **Application of rules.**–13PortoRicoFed 111. [h] **Date of service of turnover order** determines time for serving petition for review. 43F(2d)698.

212–19½–New. A rule of court fixing the time should be strictly followed. 28 F(2d)253.

212–19½–New. Where the time for petitioning for review is regulated by a court rule, one failing to file a petition within such time cannot thereafter obtain a review by certiorari, appeal, or other indirect process. 33F(2d)748.

212–21 29F(2d)571.

212–26 7F(2d)806, 807 [citCJ]; 16F (2d)20.

213–28½–New. A referee's allowance of a bankruptcy trustee's commissions on recommending the confirmation of a composition with creditors is only tentative, and not reviewable on exceptions thereto as exceeding the amount allowable. 30F(2d)819.

213–30 [c] 5F(2d)578. [e] **Evidence has been held not to show** that endowment policy issued more than five years before bankruptcy was obtained, or premiums paid thereon, with intent to defraud bankrupt's creditors. 29F(2d) 795.

213–31 [b] 4HawaiiFed514.

213–32 32F(2d)717. But see 29F(2d) 431.

213–33 7F(2d)169 (referee's opportunity to observe witness has great weight); 7F(2d)704; 8F(2d)724; 13F(2d)235; 21F(2d)380; 22F(2d)805; 29F(2d)571; 32F(2d)329; 32F(2d)1010; 33F(2d) 937; 33F(2d)1001; 37F(2d)937; 39 F(2d)919; 41F(2d)169. [b] (4) Finding that persons in charge of bankrupt's affairs acted in good faith in making purchases while bankrupt was insolvent. 28F(2d)115. [e] **In absence of transcript of testimony** referee's findings on conflicting evidence are assumed to be supported by evidence. 4F(2d) 871.

214–34 11F(2d)873; 30F(2d)359. [g] **Where evidence is not reported,** findings of referee are final unless error is apparent on face of report. 33F(2d) 1007(2dcase).

214–34½–New. On petition for review by a bankrupt of an order of the referee, a motion to recommit the certificate of the referee for amendment is addressed to the discretion of the district judge. 15F(2d)3.

214–34½–New. Refusal by the district judge to recommit the referee's certificate for reporting of additional matter has been held not abuse of discretion. 15F(2d)3.

214–34¼–New. Allegations of petition unanswered by trustee are taken as true. 25F(2d)756.

214–34½–New. On review of a turnover order the amount will be reduced to the extent of a reasonable sum where it is shown that the bankrupt expended a part of the money for the support of the family. 32F(2d)329.

214–34¼–New. A decision of the referee that certain property is an asset of the bankrupt estate, acquiesced in by the bankrupt who suffers it to be sold by the trustee, extinguishes her interest therein. 129Kan24, 281P888.

214–35 41F(2d)405.

214–37 8F(2d)629. [e] **Where terms of sale** require trustee to discharge liens other than those listed in agreement, referee is entitled to commission on amount which trustee paid to purchaser to discharge liens on land sold. 29F(2d)436.

214–38 8F(2d)629; 14F(2d)843. [b] (1) 12F(2d)660. (3) 14F(2d)534. [d] **Referee is entitled to fair construction** of provisions relating to compensation. 5F(2d)682.

215–40½–New. A referee is entitled to three fares where, in connection with partnership proceedings, a petition was filed for an adjudication of the estates of two individual members. 30F(2d) 705.

215–40½–New. Referee may be required to refund amount improperly received by him. 13PortoRicoFed354.

215–43 See also 8F(2d)629. [d] **Referee is allowed commission** on attorney's fees paid by trustee. 5F(2d)682. [f] Contra 14F(2d)534. [g] **Property accepted by creditor** in payment of lien for expenses in oil operations held not administered and referee not entitled to commissions. 14F(2d)534.

216–46 See also 8F(2d)629.

216–46½–New. The referee is not entitled to commissions on a sum paid by the trustee to the attorneys. 22F(2d) 155.

216–46½–New. A referee's compensation is based on payments made to the creditors who were such at the time of filing the petition. 22F(2d)155.

216–46¼–New. A referee is not entitled to commission on the proceeds of a foreclosure sale of property surrendered to the receiver by the trustee. 22F(2d) 155.

216–46½–New. nor is he entitled to commission based on quantum meruit. 22F(2d)155.

217–63 But see 41F(2d)379.

217–65 7F(2d)169.

219–72 41F(2d)379 (criminal proceeding).

220–81½–New. Bankrupt must render reasonable assistance in determining financial condition. 15F(2d)787.

220–84 15F(2d)562. [f] (2) Pendency of suit between trustee and witness does not deprive trustee of right to examination. 38F(2d)669. [h] **Order for examination of witness** has been held not invalid because made ex parte. 15F(2d) 562.

221–89½–New. Jurisdiction to order an examination involves the exercise of wise judicial discretion. 27F(2d)597.

221–89½–New. Creditors petitioning for debtor's involuntary bankruptcy are not entitled to preliminary inspection of bankrupt's physical properties and bills and accounts receivable to determine question of solvency. 43F(2d) 1000.

221–95 38F(2d)669.

221–98½–New. A special commissioner may be appointed to conduct the examination of a bankrupt. 24F(2d)325.

221–98½–New. Such examination is not superseded by general order of reference subsequently made. 24F(2d)325.

221–98¼–New. Such special commissioner is not required to take oath in order to qualify for such examination, 24F(2d)325.

221–98½–New. but if oath is taken it may be administered by notary public. 24F(2d)325.

222–7 But see 8F(2d)791.

222–10½–New. In Porto Rico, where many creditors are scattered through different towns, the court will be guided by the convenience of the parties and of itself in arranging a hearing, either in its own presence or that of the referee. 12PortoRicoFed358.

222–11 See also 27F(2d)597.

222–13 7F(2d)228.

222–13½–New. An order for examination of a bankrupt will not be made after application for discharge where he has submitted to examination and reason for further examination is not shown. 8F(2d)112.

222–14 19F(2d)935.

222–16 [a] 22F(2d)282.

223–18 22F(2d)282 (wide latitude).

223–18½–New. On examination of a witness, the referee may advise him of his constitutional rights. 19F(2d)935.

223–18½–New. An adverse claimant of property may be required to testify before a referee. 19F(2d)935.

223–18¼–New. In absence of anything indicating intention of trustee to conduct improper examination referee should not order trustee to refrain from examination. 38F(2d)669.

223–19 8F(2d)9. [a] (2) False testimony given by bankrupt may be intendment in prosecution for perjury. 6F (2d)786. (3) Provision refers to oral testimony. 8F(2d)9. (4) Does not render schedules inadmissible. 8F(2d)9.

223–20 [b] **Where statute of limitations has run against criminal prosecution,** bankrupt may be required to testify in reference to unlawful liquor transaction. 18F(2d)965. [c] **Statements made by bankrupt to auditor** examining him are not privileged. 38 F(2d)3.

223–21 [k] **Circumstantial evidence** is sufficient for order for turnover of books and papers. 15F(2d)614. [l] **Defenses.**–15F(2d)614. [m] **Evidence held to show** that bankrupt's officer could produce journal of bankrupt. 26 F(2d)268. [n] **Evidence held sufficient** to justify order for production of books and records. 37F(2d)94.

224–23 14F(2d)1018.

224–23½–New. Proceedings for contempt for failure to produce a book is an interlocutory proceeding in the case and notice thereof to the bankrupt's counsel is sufficient under general order No. 4. 15F(2d)3.

224–23½–New. An order directing the president of a bankrupt corporation to produce its books is prima facie evidence of the bankrupt's possession thereof. 18F(2d)688.

224–23¼–New. On an application to punish for contempt in failing to comply with an order for the production of books, affidavits held unworthy of belief on the original application are insufficient. 18F(2d)688.

224–23½–New. An order of the referee that two individuals produce a book constitutes a conclusive adjudication that both had control of the book. 34 F(2d)264.

224–30 See also 28F(2d)87. [b] **Refusal to be examined** is civil contempt, not criminal. 9F(2d) 68 (punishment for criminal contempt unwarranted).

224–34½–New. A president and treasurer of a corporation have been held guilty of contempt by withholding records after subpœna to produce them. 14F(2d)1018.

224–34½–New. A finding by a referee that a bankrupt, in reply to some questions, answered that he did not know, or did not remember, has been held not a sufficient finding of contumacious conduct. 28F(2d)87.

224–34¼–New. Under a provision that contempt proceedings shall come before the court on a certificate of the referee, proceedings cannot be brought on petition by a trustee, alleging examination of the bankrupt not in accordance with law. 28F(2d)87.

224–34½–New. In contempt proceedings against two parties for disobeying an order to turn over books, one of them is permitted to appear to purge himself of contempt by showing nonpossession. 34F(2d)264.

224–36 8F(2d)146; 79Mont246, 256P 176, 57ALR1122. But see 9F(2d)359; 192Wis564, 213NW334. [c] **Trustee should never occupy dual position** in respect of bankrupt's estate. 42F(2d) 45.

225–37 8F(2d)146; 9F(2d)359; 9F(2d) 477 (rights of execution creditor); 42 F(2d)45; 44F(2d)159 (holding creditor has no right to assume trustee's duties); 198Cal 652, 246P1049, 46ALR1156; 79 Mont246, 256P176, 57ALR1122; Mo 30 SW(2d)608; 135Misc424, 237NYS591; 124 Okl 294, 256P29; 192Wis564, 213 NW334. [a] 2F(2d)699. [c] 124 Okl 294, 256P29. [d] **Mechanic's lien claimant** cannot question validity of mortgage. 98NJEq545, 131A523 (trustee in bankruptcy only one properly to issue such issue).

225–40 26F(2d)146; 30F(2d)406; 31 F(2d)317; 43F(2d)746; 57ND890, 224 NW299; 198Wis624, 225NW140.

225–41½–New. Trustee occupies position of creditor acquiring lien when petition was filed. 9F(2d)54.

225–41½–New. 146Miss225, 110S709.

225–41½–New. Something must be done by the trustee before his conduct can

be overborne by a general creditor. 153 Va392, 149SE624.

225-42 [a] **It is duty of bankruptcy trustee** to protect estate against excessive charges for administrative expenses, and where estate is sufficient to pay all claims and charges against it, and there is likely to be surplus, it is his duty to protect bankrupt's interest in surplus. 28F(2d)521.

225-44 128Misc105, 217NYS683; 124 Okl 294, 256P29 (trustee has primary power to reach property available as assets). 151Va434, 145SE421. [e] (2) Creditor of bankrupt corporation cannot maintain independent action for benefit of bankrupt to recover assets of corporation on theory that its officers were delinquent in failing to prevent loss or to institute action for recovery. 119 Kan593, 240P409. [f] **Bankruptcy court has no jurisdiction** to fix personal liability of stockholder by assessment on stock. 270US560, 46SCt413, 70Led 733. [g] **In suit to enforce stock assessment** made by bankruptcy court, stockholder cannot attach administrative order making assessment. 270US 560, 46SCt413, 70Led733.

225-45 124 Okl 294, 256P29.

225-53 Ont [1926] 4DomLR440. [c] **Trustee is within his rights** in asking for appointment of designated person as his attorney. 41F(2d)850.

226-56 [b] **Only where trustee is actively adverse to one of parties** is his employment of a party's attorney as counsel improper. 22F(2d)893.

226-58 33F(2d)963; 230AppDiv714, 243NYS248. [c] **Trustee cannot perform** corporation's contract for sale of stock where it has become bankrupt. 166Minn346, 207NW737.

226-59 25F(2d)890; 160La694, 107S493.

227-61 15F(2d)90 [aff 16F(2d)554]. [h] **Sale of lease is election to assume.**–101WVa643, 133SE375. [i] **Intention to elect may be presumed** from acts of trustee. 101WVa643, 133SE375.

227-62 [a] See also 15F(2d)90 [aff 16 F(2d)554]. [b] **Corporation assignee of lease** with forfeiture clause on bankruptcy of tenant is not bound by such clause, lease becoming asset of bankrupt estate. 10F(2d)540 (corporation).

227-63 25F(2d)498.

227-64 16F(2d)780.

227-66 13F(2d)208; 16F(2d)780; 25 F(2d)756 (during time receiver was in possession). [d] 24F(2d)760 (presumptively rent reserved in lease). [f] **Where bankrupt occupied part of wife's building, rent free,** and agreed that trustee might store his stock therein until sold, wife cannot hold trustee for rent in absence of notice to trustee that rent would be charged. 23F(2d) 967. [g] **Stockholder of bankrupt corporation** taking over lease forfeited by company is held entitled only to rent for period normally required for sale of bankrupt's assets where his interference delayed sale. 25F(2d)584. [h] **Liability of bankruptcy trustee,** assuming lease, is same as to landlord as was tenant's. 27F(2d)191. [i] **Rental value for storage not test of rental value during occupancy by trustee.**–41F(2d) 498. [j] **Rate fixed by lease presumptively fair rental.**–41F(2d)498.

228-67 13F(2d)116; 24F(2d)481; 24 F(2d)780.

228-67½-New. A receiver not allowed to accept less where it will delay settlement of the estate included. 15F(2d) 90 [aff 16F(2d)554].

228-67⅓-New. A lessor cannot enforce a claim for the use of the premises against the proceeds of the sale of the mortgaged personalty on premises as against mortgagee. 24F(2d)481.

228-67¼-New. Where the bankrupt had no right to assign the lease without the landlord's consent, the trustee has no greater right. 37GaA596, 141 SE82.

228-70 16F(2d)780.

228-76 [a] (3) Decision of referee affirmed by court holding compromise offer acceptable in suit against persons who entered into agreement for reorganization of corporation insolvent at time of such agreement held not abuse of discretion as to objecting preferred stockholders. 35F(2d)800. [c] (2) Compromise held to settle entire claim. Mass 168NE174(2dcase). [e] (2) Where compromise agreement with claimant does not reserve his rights against individual partners, claimant is precluded from showing intention to compromise only claim against partnership. Mass 168NE174(2dcase). (3) Claimant will be precluded from bringing proceedings against individual partners, under state statute, to reach and apply property to part of claim unsatisfied. Mass 168 NE174(2dcase). [f] **Matters considered in determining acceptability of compromise.**–35F(2d)800. [g] **Referee's findings** that certain agreements and transactions in unsuccessful reorganization of corporation subsequently becoming bankrupt were not fraudulent as to preferred stockholders held justified. 35F(2d)800. [h] **Uncertainty of result, delay and expense** of litigation are considerations in determining advisability of compromise. 42F(2d)174. [i] **Approval of court** is presumptively right, and unless clearly wrong will not be disturbed. 42F(2d)174. [j] **Court's approval** held proper exercise of discretion. 42F(2d)174.

228-76½-New. The trustee may not accept an offer of compromise over objection of creditors seeking to hold defendants in particular claims individually liable in the state court. 10F(2d) 275 (where district court has no acquired jurisdiction of parties).

228-76⅓-New. An offer of compromise must be accepted exactly as made or not at all. 10F(2d)275.

229-77 34F(2d)778.

229-79½-New. Creditors acquiescing in a compromise by the trustee are not estopped to assert interest in the proceeds of the trustee's suit. 35F(2d)800.

229-80 34F(2d)27; 221AppDiv599, 224 NYS516; 50RI 506, 149A609.

229-85 2F(2d)778 (formal inventory not required).

230-87 [a] (2) Where referee's orders, fixing fees of appraisers and authorizing payment thereof, were made after notice to bankruptcy trustee and without objection by him, trustee has been held to be protected in making payments thereunder. 28F(2d)521.

230-93½-New. The trustee has the right to transfer his interest in personal property, although it is not in possession of the bankruptcy court. TexCivA 271SW1016.

230-93⅓-New. Discretionary power of a referee to determine whether a sale will add to the assets may not be interfered with unless improvidently exercised. 9F(2d)802.

231-99 [b] **Attempted sale by trustee of nontransferrable interest** of bankrupt in trust estate created by will which could not be levied on or sold under judicial process has been held invalid. 37F(2d)304.

231-99½-New. , or the bankrupt's interest as heir, subject to right of administrator. 22F(2d)860.

231-6½-New. Where a bankrupt court released certain property from the bankrupt's estate, a subsequent sale thereof under order of such court has been held void. TexCivA 282SW286.

231-9 8F(2d)376; 9F(2d)802; 16F (2d)171; 33F(2d)561; 34F(2d)681; 220Ala276, 124S858(2dcase); 336 Ill450, 168NE266; 201 Iowa1298, 205NW843; 229Ky5, 16SW(2d)763; 320Mo1208, 9 SW(2d)925. [a] 16F(2d)853; 32F(2d) 322. [d] (2) In Massachusetts sale of mortgaged property free from encumbrances, where wife has released dower in the mortgage, bars dower rights. 7F (2d)888. [g] (1) 102Conn574, 129A546. (2) 8F(2d)376. [h] (2) Mortgagee's consent to decree for sale of property free from his lien does not prejudice mortgagor's tenant. 336 Ill 450, 168NE 266. [k] (1) 215Ky292, 284SW1084. (2) But estate cannot be sold free of dower without consent of wife. 28F (2d)417. [n] **Court cannot order sale** free of encumbrances in which adverse claimant has interest determinable by plenary suit in equity. 6F(2d)196. [o] **Only after liens have been ascertained** can property be intelligently sold clear of all liens, and processes of bankruptcy court are most expeditious to do this. 16F(2d)171. [p] **Where wife joined in mortgage,** purchaser takes good title though wife did not join in sale. 215Ky292, 284SW1084. [q] **It will be presumed:** (1) That court's judgment in decreeing sale free from liens was properly exercised. 336 Ill 450, 168NE266. (2) That sale was for full value of premises. 336Ill 450, 168 NE266.

232-10 34F(2d)681. [a] **Court may determine in summary proceeding** questions as to lien, where mortgage was valid and lienholder was not adverse claimant. 229Ky5, 16SW(2d)763.

232-12 16F(2d)171; 26F(2d)825. [c] **Referee's order held proper.**–9F(2d)802. [d] **Administration should not be assumed** where probable selling price would be insufficient to cover liens, nor in such case, merely, because trustee's sale might be with less incidental expense than sale in another court. 27 F(2d)138. [e] **Burden rests on trustee** to show that property will bring more than amount of liens. 34F(2d)681.

232-13 34F(2d)681; 37F(2d)11; 201 Iowa1298, 205NW843; 229Ky5, 16SW (2d)763. [c] **Sale should be ordered free of encumbrances** where there may be equity. 9F(2d)802.

232-13½-New. The holder of a junior mortgage on both homestead and nonhomestead property of a bankrupt whose lien is not satisfied out of the proceeds of a free-from-lien sale of the nonhomestead property does not lose his lien on the homestead property by failing to redeem from the senior mortgages which are satisfied out of such proceeds. 201 Iowa1298, 205NW843.

232-13⅓-New. An order to the trustee to sell the mortgaged property free and clear will be denied on condition that the trustee be made a party to the foreclosure proceedings. 10F(2d)374.

233-17 9F(2d)802; 21F(2d)434.

233-18½-New. In absence of stipulation against strict foreclosure in favor of sale, an order reversing the referee's order for a sale free of liens is improper. 9F(2d)802.

233-20 201 Iowa1298, 205NW843.

234-36½-New. Objection by lienholder to trustee's petition to sell did not constitute litigation within the clause of the Bankruptcy Act giving the right to prove a claim within sixty days after final action. 2F(2d)785.

234-40 17F(2d)379.

234-42½-New. An order for the sale of a lease made to a bankrupt and a corporation, all of the stock of which was held by him, has been construed as enjoining the landlord from questioning the purchaser's title only to the extent of the interest of the bankrupt as lessee. 18F(2d)777.

235-49 20F(2d)425; 229Ky5, 16SW (2d)763; 160La694, 107S493. [a] 229 Ky5, 16SW(2d)763. [b] **Sale of good will and trade name of bankrupt's business to purchaser of physical assets thereof** held within notice of sale. 91 Fla60, 107S345, 44ALR698.

235-51½-New. Notice to a bankrupt's creditors of a meeting to consider the sale of property has been held insufficient as a notice of sale. 20F(2d)425.

235-51⅓-New. A defective and inadequate description of property is fatal. 20F(2d)425.

235-56 But see 20F(2d)425.

235-65½-New. An agreement of a trustee with lien claimants purchasing property, requiring them to pay fees and commissions, does not constitute extortion under the Bankruptcy Act. 14 F(2d)829.

235-65⅓-New. Sale otherwise than as directed by statute is invalid. 20F(2d) 425.

235-65¼-New. An order for disposition of stock held by trustees of separate bankruptcy estates has been held not erroneous in view of a more advantageous sale of the entire stock and of an agreement of the original holders not to sell separately. 34F(2d)344.

236-79 See also 30F(2d)725(2dcase). [e] **Sale to trustee under mortgage securing bondholders** is not invalid be-

cause bankruptcy trustee is small bondholder. 18F(2d)540.

237-86 102Conn574, 129A546 (void for want of confirmation).

237-89 18F(2d)546.

237-90½-New. Confirmation of sale of a bankrupt's property constitutes adjudication that the sale was made only of property covered by the notice of sale. 29F(2d)982.

237-90½-New. Estoppel. Purchaser, failing to receive amount of goods inventoried, cannot assert breach of contract where he asked for confirmation of sale on partial basis. 37F(2d)854.

237-90¼-New. Evidence sustained finding that bidder had not withdrawn bid before acceptance in proceedings to confirm sale. 37F(2d)937.

238-1 16F(2d)939.

238-6 [a] **Deed of trustee conveys land as completely** as by bankrupt when he had power to convey. III 173NE352.

238-10 166Ga689, 144SE313, 315 [cit CJ].

238-12½-New. The conveyance of a chose in action belonging to a bankrupt's estate must be listed as such in an account of a private sale, and a general statement that the sale is intended to convey all assets of the bankrupt estate is insufficient to show such conveyance. 100CalA621, 280P1029.

239-17½-New. A purchaser of land at a sale made by a trustee in bankruptcy, pursuant to an order of court dividing the sale into two parts, one covering the land and the other machinery, has been held not entitled to release from obligation to pay for the land and buildings, on the ground that the machinery was not included in the sale. 31F(2d)197.

239-17⅓-New. A purchaser at a sale of a bankrupt's property, who through neglect bid in the property under the belief that automobiles belonging to the estate were being sold, could not avoid the consequences of the bid in equity. 29F(2d)982.

239-17¼-New. Computation of shortage in inventoried goods, in summary proceeding to collect balance of unpaid purchase money from purchaser of bankrupt property. 37F(2d)854.

239-17⅙-New. Bankruptcy court on default of purchaser, has jurisdiction to enforce compliance with bid. 198NC635, 152SE888.

239-17⅙-New. On failure of purchaser to comply with bid, trustee cannot maintain action in state court, independent of bankruptcy proceeding, based on bidder's default. 198NC635, 152SE888.

240-25½-New. Where a lease is sold, the amount of the rent payments made by the bankrupt is properly deducted from the proceeds of sale before the coöwner is entitled to anything. 26F(2d)970.

240-26½-New. A mortgagee who failed to except to the return of a sale is entitled to determination of a proportion attributable to the mortgaged property, and despite an ineffectual bill of sale in the mortgage. 26F(2d)121.

240-28 33F(2d)162. [h] **Apportionment of costs** among claimants is to be determined by referee. 33F(2d)162.

240-29 33F(2d)561. [j] (2) 33F(2d)561 (till payment of purchase price by purchaser).

241-30 37F(2d)11; 38F(2d)10; 220Ala276, 124S858(2dcase). [e] **Estoppel.**–33F(2d)162.

241-32 But see 33F(2d)162.

242-34½-New. A corporation without a bank account which was coöwner of a lease, had no real interest in the leasehold, so as to be entitled to an interest in the proceeds of sale. 26F(2d)970.

242-35 Ark 30SW(2d)860; 76CalA655, 245P803; 41GaA402, 153SE86; MoA 9SW(2d)245 (good title to purchaser, notwithstanding pledgee's unauthorized sale of collateral after filing of petition); TexCivA 283SW177. [a] (2) Purchaser of bankrupt husband's interest by entirety is held chargeable with half amount of note secured by mortgage of both husband and wife. 176Ark582, 3SW(2d)961. [d] **Assignee of trustee's right to possession** of automobile has right to possession, unless claimant shows superior title. TexCivA 274SW1016. [e] **When title passes.**–81Mont579, 264P940. [f] **Possession of property** may be acquired by writ of assistance. 36F(2d)580.

242-36 28F(2d)417; 68CalA83, 228P717; 76CalA655, 245P803; 81Mont579, 264P940, 943 [citCJ]; TexCivA 283SW177. See also TexCivA 13SW(2d)440. [c] 36F(2d)282(1stcase). [f] (2) Purchaser held to have right to remove property claimed as fixtures. 36F(2d)580. [g] **Right to recover for value of use and occupation.**–81Mont579, 264P940. [h] **Right to set aside preferential transfer** cannot be assigned. 39F(2d)461.

242-37 28F(2d)417; 28F(2d)760. [e] **Right to possession as against mortgagee of crops.**–81Mont579, 264P940.

242-39½-New. Rule of caveat emptor applies at an auction sale by the trustee in bankruptcy. 19F(2d)517.

242-46½-New. In some jurisdictions the purchaser of land at a trustee's sale acquires only the title to the land and right to rents, issues, and profits after the date of purchase. 163Ga276, 136SE62.

242-46⅓-New. Where one purchases from the trustee all accounts of the bankrupt, he acquires all rights and obligations of a trustee, pertaining to suits on such accounts, and nothing more. TexCivA 283SW177.

242-46¼-New. The sale of a bankrupt's estate at a private sale on petition of the trustee, describing the property on which the offer was based, does not include life insurance policies not scheduled nor mentioned in the petition for sale nor known to the trustee or creditors. 8F(2d)312.

242-46⅓-New. A purchaser on the sale of bankrupt's lands may waive right to obtain immediate possession and sue for possession in a state court. 160La694, 107S493.

242-46⅙-New. The purchaser is not liable for rent during the time the landlord refuses to permit removal of the property. TexCivA 15SW(2d)1089.

242-46⅐-New. The purchaser of property from a bankruptcy trustee with knowledge that the property belonged to a syndicate is not an innocent purchaser. 35F(2d)462.

242-46⅛-New. The purchaser of property conveyed to the trustee pursuant to an order which was ineffective to vest title in the trustee derives no title to the property. 35F(2d)462.

242-46⅑-New. Purchaser who leaves property in building after sale, agreeing to pay for storage has been held liable for rent. TexCommnA 27SW(2d)132.

243-48½-New. In an action for the purchase price of goods on account purchased by plaintiff at a sale of the bankrupt's assets, plaintiff has the burden of proving his ownership of the account where denied by defendant. 221AppDiv492, 224NYS660.

243-48⅓-New. If a bill of sale was given by a trustee, its receipt in evidence is error where no evidence of the genuiness of the signature of the trustee in bankruptcy thereto is offered. 221AppDiv492, 224NYS660.

243-48¼-New. And such bill of sale does not establish prima facie plaintiff's title to the claim in question. 221AppDiv492, 224NYS660.

243-48⅕-New. The purchaser of a claim from a trustee in bankruptcy acquires a right of action only against the debtors named, and not against another alleged to be the real debtor. 38GaA401, 144SE39.

243-48⅙-New. The assignee of a purchaser of a claim must prove his title in an action for breach of contract. 100CalA621, 280P1029.

243-52½-New. Purchase of property held by bankrupt as bailee.–The bailor is entitled to recover property, held under a bailment lease, that had been sold in bankruptcy sale after the bankrupt had defaulted in payment. 284Pa41, 130A259.

243-55 20F(2d)425.

243-57 28F(2d)417; 31F(2d)197.

244-59½-New. A sale in violation of statute cannot be made valid by the consent of creditors. 20F(2d)425.

244-59⅓-New. The court may and should set aside a sale for such a material mistake as would result in injustice to the purchaser. 28F(2d)417.

244-59¼-New. Failure of an advertisement to notify the purchasers that a sale was subject to dower is not ground for setting it aside in the absence of fraud, anything misleading, or any evidence as to the value of the dower interest. 28F(2d)417.

244-61 But see 23F(2d)657.

244-63 160La694, 107S493; 320Mo1208, 9SW(2d)925; TexCivA 3SW(2d)959 (what constitutes collateral attack).

244-66 14F(2d)534; 177Ark970, 9SW(2d)73; 4HawaiiFed392. [d] (2) Allowance of from five to ten per cent where assets are between five and ten thousand dollars is proper. 41F(2d)850. [e] (3) Allowance held reasonable in view of fees paid by other clients. 14F(2d)534. (4) In general. 41F(2d)845. [f] (2) That two firms of attorneys were employed is not to be considered where either firm could have performed all services. 14F(2d)534. (3) Allowances to trustees' attorneys should not be as liberal as to attorneys of receivers in some other proceedings. 41F(2d)850. (4) Allowance depends on amount of work actually done and amount realized from bankrupt's assets. 41F(2d)850. [g] (2) Compensation for services of attorneys leading up to receivership should be included in allowance of fees for service to petitioning creditors. 41F(2d)845. [l] 22F(2d)893. [m] **Allowance held excessive.**–18F(2d)583. [n] **Services resulting only in increase of composition offer** should not be charged against bankrupt where composition offer was accepted. 18F(2d)583. [o] **Agreement of attorneys for trustee to divide fees** with attorney for creditors assisting them is not void. 22F(2d)893. [p] **Order fixing attorney's fees** is one peculiarly for referee. 41F(2d)845.

245-67 14F(2d)534. [a] **Court may refer matter to referee** as special master to report findings. 14F(2d)534.

245-74 7F(2d)617 (expenses of storage and desk room incurred in accounting from state receiver held properly allowable).

245-75½-New. Expenses incurred by a trustee in preserving perishable property are a proper charge against the purchase price. 20F(2d)78.

245-75⅓-New. Foreclosure and administration expenses are chargeable against mortgaged property where there was no general fund. 20F(2d)78.

245-75¼-New. A bill for water rent accruing after bankruptcy will be paid by the receiver or trustee as part of the expenses of administration. 12PortoRicoFed213.

245-75⅕-New. A trustee in bankruptcy, taking possession of property subject to a mortgage lien and paying the taxes thereon, was not entitled, after the sale thereof, to deduct the amount of taxes and pay the balance to the mortgagee in partial satisfaction of his lien. 29F(2d)261.

245-75⅙-New. Trustee, upon receiving illegal and improper orders from referee for expenditures, should report same to judge of bankruptcy court before complying therewith. 13PortoRicoFed319.

245-75⅐-New. Trustee may be required to refund improper items of expense included in report. 13PortoRicoFed354.

246-80½-New. United States may sue on depository's bond without naming the beneficiaries. 26F(2d)4.

246-80⅓-New. An action on a depository's bond may be at law in absence of circumstances requiring equitable jurisdiction. 26F(2d)4.

246-80¼-New. Equity has no jurisdiction of suit to recover on bond where single claim was less than penal amount of bond and without occasion for accounting. 35F(2d)940.

246-80⅕-New. Money deposited by bankrupt as result of offer of composition is within bond executed as surety for depositary. 35F(2d)940.

246-86½-New. Accountant employed by bankruptcy trustee paid agreed compensation, could not recover additional compensation from fund recovered by bankrupt estate for accounting work. 43F(2d)71.

246-87 2F(2d)778 (separate accounts kept of individual partners and individual estates not yet administered).

246-87½-New. [§ 385a] N. **Stranger's Participation in Trustee's Misappropriation.** 168Minn479, 210NW630.

246-88 198Cal652, 246P1049, 46ALR 1156; 3Del 519, 140A154 (title sufficient to sustain replevin); 207 Iowa711, 223 NW541 (title to cause of action necessarily derivative); Mass 167NE314 (proper party to recover dividends paid stockholders while corporation was insolvent); 36Wyo 522, 257P7. [a] (14) for conversion by mortgagee of bankrupt's property by violation of law in method of foreclosure (48 Ida424, 282P 943). [e] 165La995, 116S484, 486 [cit CJ]. [l] (5) Trustee will not be permitted by Bankruptcy Act to encroach on rights of strangers. 253Mass60, 148 NE217. (6) Trustee cannot exempt himself from action in state court for his wrongful acts. 253Mass60, 148NE 217. (7) Trustee in bankruptcy of corporation cannot recover for alleged wrongs against former directors and officers who owned all stock where there are no stockholders or creditors who have right to complain. 232 IllA500. [m] **In action by trustee to recover value of property,** action, if not brought to recover asset owned by bankrupt, is brought under act vesting trustee with rights of creditor holding lien on bankrupt property. 207 Iowa711, 223NW 541. [n] **Consent of court** is not necessary to authorize suit by or against trustee. 226Ky347, 10SW(2d)1112. [o] **Admission or waiver by bankrupt** cannot operate to bind trustee. 48 Ida424, 282P943. [p] **Bond for rent.**-43F(2d) 746.

247-89 205 Iowa1333, 219NW541. [a] **Where claim has been already paid in full** trustee may be enjoined from pressing such claim. NJ 149A55.

247-95½-New. A trustee's suit to recover dividends paid to a stockholder while the corporation was insolvent is not governed by the local law existing at the place of the corporation's creation. Mass 167NE314.

247-96 135Misc424, 237NYS591 (immaterial whether they were creditors at time of division of property). [a] 124 Okl 294, 256P29. [c] Mass 167NE 314.

248-97 Cal 286P1017; 95CalA633, 273 P119; 92Fla87, 109S320; 255Mass359, 151NE744; Mass 167NE314 (though creditor not shown to be in position to attack transfer); 57ND890, 224NW299. [k] (2) Where bankrupt transferred to wife stock purchased from joint bank account in which wife's funds were sufficient to pay for stock, no rights of his creditor were violated thereby. 28 F(2d)866. [n] **In action for conversion by trustee of foreign corporation** of property as unlawfully taken from ancillary receiver, nonpayment of fee by corporation as condition for maintaining actions held no defense. 5F(2d) 289. [o] **Trustee has same right to set aside conveyance** as creditor would have in state court under same facts. 11 F(2d)984. [p] **If fraud was on bankrupt** perpetrated by transferees, cause of action, if any, was in bankrupt, and trustee succeeds to no greater right. 207 Iowa711, 223NW541 (rule same where bankrupt participated in fraud). [q] **Trustee is proper party** to sue in state court to set aside illegal sale. 44 F(2d)159.

248-98 39F(2d)916. [j] **Trustee in bankruptcy has right to follow trust fund** through creditor into creditor's bank. 253Mass19, 148NE227.

249-99 [b] **Right of trustee to avoid preferential payment** held superior to equitable right of creditor's assignee. 253Mass19, 148NE227.

249-2 [b] **Where court has lost jurisdiction** by withdrawal of sole claim presented, which was not dischargeable claim, trustee cannot sue to set aside fraudulent transfer. 152Wash211, 277 P843.

249-3 11F(2d)984.

249-5 36F(2d)953.

249-6½-New. Where a bankrupt insured its stock in trade and fixtures with loss-payable clause in favor of representative of a group of creditors, the trustee is entitled to an accounting, as to the proceeds delivered to such representative, in excess of liens. 26F(2d) 591.

249-8 200 Iowa1272, 206NW613; 50 RI 506, 149A609 (right is supplemental to corporation's right); 194Wis107, 215 NW827 (trustee alone can enforce rights, and creditor is not permitted to maintain action in state court). [a] (2) Creditors can enforce rights solely through trustee. 50RI 506, 149A609.

250-18 See also 242 IllA69.

250-20½-New. Though no action is stated against trustee, he may be joined as party defendant in action to set aside license agreements of corporation. 135Misc424, 237NYS591.

250-25 See also 24F(2d)475.

250-26½-New. A mortgagor's trustee in bankruptcy cannot bring an action of replevin against the mortgagee, not in possession of the mortgaged chattels or proceeds of sale thereof. MoA 14SW (2d)537.

250-27 See also MoA 14SW(2d)537.

250-35½-New. Where a person has taken possession of property of the bankrupt and sold it under an invalid chattel mortgage, the trustee may treat the mortgage as if it did not exist or allege facts showing its invalidity and recover damages in an action for conversion. 124 Okl 294, 256P29.

250-35½-New. The Bulk Sales Law does not prevent an action in conversion by a trustee to recover damages for the taking and selling of property of the bankrupt under an invalid chattel mortgage. 124 Okl 294, 256P29.

250-36 13F(2d)370; 19F(2d)824. See also 24F(2d)475.

250-36½-New. or to quiet title on bankrupt's estate, 215Ala632, 112S209.

250-37 19F(2d)824; 24F(2d)1002.

251-38 24F(2d)1002.

251-39½-New. An injunction to restrain the sale by the trustee of property of claimant failing to comply with an order to surrender unlawful preferences is properly refused although claimant is alleged to hold large provable claims against bankrupt. 8F(2d)510.

251-40½-New. A trustee in bankruptcy of stockholders of a national bank may sue for an accounting against the bank and its liquidating directors. 125Misc 247, 211NYS366 (where to bring representative suit would serve no purpose, there being no outstanding creditors).

251-42 268US111, 45SCt456, 69L ed 870; 15F(2d)278; 17F(2d)721; 23 F(2d)542; 23F(2d)556; 30F(2d)607; 30F(2d)717; 34F(2d)27; 40F(2d)194; 48RI 250, 137A7. See also 12PaDist &Co 177. But see 19F(2d)243. [a] (1) 42F(2d)829. [b] 40F(2d)328. [d] (4) 268US111, 45SCt456, 69L ed870. (5) It is no answer to summary proceeding against assignee that assets which were in his possession and have been diverted in breach of his trust are no longer under his control. 268US111, 45SCt456, 69 L ed870. (6) In such case assignee may be compelled to account for property's worth and, if he has sold it or mingled it with his own, he may by summary order be compelled to restore to bankrupt estate value of property thus wrongfully diverted. 268US111, 45SCt 456, 69L ed870. (7) In absence of affirmative showing that assignee is insolvent or otherwise unable to comply with summary order, there is no presumption that any order will be groundless, and rule as to bankrupt who is in such situation does not apply. 268US111, 45SCt456, 69L ed870. (8) Claim of right to apply funds to payment of expenses incurred is not colorable where statute not complied with. 35F(2d)952. [j] (1) 268US111, 45SCt456, 69L ed870; 18F(2d)440. (2) Rule that claim of assignee for benefit of creditors of right to charge in his account expenses incurred or expenditures made prior to filing of bankruptcy petition is adverse claim which cannot be adjudicated summarily does not extend to expenditures or collusive application of moneys which would divert funds to favored creditor. 268US 111, 45SCt456, 69L ed870. [p] **Mere assertion of adverse claim does not oust bankruptcy court of jurisdiction,** and, where such claim is merely colorable, it may inquire into it to ascertain if summary remedy is appropriate and, if indisputably only colorable, may disregard adverse claim. 268US111, 45SCt 456, 69L ed870. [q] **"Adverse claimant"** is one having substantial claim to lien on property in his possession. 19F(2d) 243. [r] **Only bankruptcy court may make summary orders** incidental to bankruptcy. 48RI 250, 137A7. [s] **Rights of adverse claimants.**-8F(2d) 724. [t] **Property fraudulently conveyed.**-24F(2d)626. [u] **Refusal to obey order** must be shown by clear and convincing evidence. 26F(2d)268. [v] **Findings which are basis of order** are prima facie evidence that bankrupt then had possession or control of property. 26F(2d)268. [w] **Trustee held not guilty of laches** in delaying to collect bankrupt's stock which is believed worthless. 23F(2d)542. [x] **Commitment for disobeying order should be denied** where evidence leaves substantial doubt of respondent's contumacy. 26F(2d)268. [y] **Fair preponderance of evidence** warrants order. 26F(2d)268. [z] **If bankruptcy court has actual or constructive possession of property** (1) it has summary jurisdiction to try and determine merits of adverse claims, asserting title to, or interest in, such property. 29F(2d)510 [certiorari den 279US848, 49SCt346, 73L ed992(1st case)]. (2) But where court never had possession of property, it cannot, by turnover order, divest attaching judgment creditor's claim of title. 30F(2d) 492. [aa] **Receiver appointed by state court** is not adverse claimant, even as to fees, so as to defeat bankruptcy court's jurisdiction. 26F(2d)851. [bb] **Where warehouse company holds property as bailee for pledgee of receipt and not for bankrupt** (1) possession does not pass to officer of bankruptcy court so as to authorize summary proceeding. MoA 19SW(2d)565. (2) In such case warehouse company holds under hostile claim to bankrupt and has beneficial title in itself as against bankrupt though holding for another. MoA 19SW(2d) 565. [cc] **Claim of adverse title** to money divests court of jurisdiction to dispose of matter summarily. 35F(2d)952. [dd] **Liquidating agent of bankrupt trust company is not adverse holder** and can be required by summary order to turn over property to bankruptcy receiver. 39F(2d)447. [ee] **Where person in possession makes adverse claim in good faith,** application for recovery of property will be dismissed. MoA 19 SW(2d)565. [ff] **Expenditures made or expenses incurred by assignee prior to filing of bankruptcy petition** may be adverse claim. 39F(2d)447. [gg] **Whether claim to property is merely colorable** is question within power of federal bankruptcy court to determine. MoA 19SW(2d)565. [hh] **Claim of adverse possession of state officer in respect to property sufficient to cover administration expenses** must show facts as predicate for ascertaining property affected. 39F(2d)447. [ii] **Order upon fiduciary of syndicate** to convey property as individual has no force upon him as such trustee. 35F(2d)462. [jj] **May compel assignment of stock certificate.**-111Conn475, 150A693. [kk] **Court must have possession of property claimed** before it can make summary adjudication. 43F(2d)57.

251-42½-New. The court may not, by summary proceedings, determine the rights of adverse claimants in possession. 18F(2d)440.

252-43 18F(2d)797.

252-45 TexCivA 11SW(2d)825. [b] **Stockholders' bill in state court prior to bankruptcy,** asking for winding up of corporation because of insufficient assets to pay them, does not defeat bankruptcy court's summary and paramount

jurisdiction over property. 26F(2d)851.

252-48½-New. In a summary proceeding to require the state court receiver to deliver assets to the bankruptcy receiver, consent of the adverse claimant is necessary. [illegible]

252-49 [illegible] 1.56 Cal 158, 291 Pac 570.

252-49½-New. But where money is paid to an attorney in contemplation of bankruptcy, he may be proceeded against summarily or by order to show cause. [illegible]

252-49½-New. Nor will the court compel a syndicate to pay an agreed sum in settlement of a bankrupt's claim of interest in the corporation. 23F(2d)846.

252-51 [a] **Facts held to require direct suit rather than plenary order.**–13F(2d)[illegible]

252-51½-New. Where trustees are not in possession of property, then right thereto may not be summarily determined. 9F(2d)200.

252-51½-New. The court has no jurisdiction in summary proceedings to order an individual bankrupt's wife to turn over her interest in land purchased with money of a bankrupt corporation. 9F(2d)200.

252-51¼-New. Any person acquiring the possession of the property of a bankrupt after the filing of the petition with notice of it may be directed by summary order of the bankruptcy court to surrender it. 13F(2d)285.

252-51½-New. Where property is in the possession of an adverse claimant under a contract or conveyance made more than four months prior to the institution of bankruptcy proceedings, a plenary suit is necessary to set aside the contract or conveyance and subject the property to administration. 18F(2d)140.

252-51½-New. A referee has no power to avoid preferences in summary proceedings on a petition filed by the receiver before adjudication. [illegible]

252-51½-New. The rights of claimants in bankrupt's property need not be submitted by summary proceedings, but they may resort to plenary suits. 67 [illegible]

252-51½-New. A summary proceeding can be used only where there is actual or constructive possession of property by the bankrupt or trustee, or where a third party's claim is merely colorable. [illegible]

252-51½-New. Jurisdiction of the bankruptcy court in summary proceedings to determine title and right to possession of property in the possession of claimants in a replevin suit, commenced after bankruptcy adjudication, is not ousted by intervention of the trustee. 34F(2d)27.

252-51½-New. The wife of a bankrupt undertaking to act for her son in receiving payment of money due him did not make her his representative in summary proceedings against herself and her bankrupt husband. 33F(2d)800.

252-51½-New. The right of the bankruptcy court to enjoin a summary proceeding does not preclude third persons, not parties to the proceeding, from litigating claims against each other elsewhere. **MoA** 198SW(2d)565.

252-51½-New. Bankruptcy court has jurisdiction to entertain motion to require trustee to pay certain expenses in foreclosure. 30F(2d)239.

252-51½-New. Bankruptcy court may by summary order require custody of property to be turned over to receiver pending determination of title. 30F(2d)[illegible]

252-51½-New. An adverse claimant, by appearing specially and denying jurisdiction of the bankruptcy court in summary proceedings, does not submit to jurisdiction. **MoA** 198SW(2d)565.

252-51½-New. Purchaser of assets from state court receiver, after filing of bankruptcy petition and attorneys receiving proceeds as compensation are liable to summarily account in bankruptcy court. 17F(2d)[illegible]

252-53½-New. A suit by the trustee to recover property from the state court is not a summary proceeding. 16F(2d)942.

252-53½-New. **Where a contempt proceeding was opened,** after a report finding the officers of the bankrupt corporation guilty, by stipulation, the parties were bound by their interpretation of the proceedings expressed in the stipulation. 27F(2d)131.

252-53¼-New. In such case, the officers are not estopped by the former report from denying possession of the goods. 27F(2d)131.

252-53½-New. Evidence has been held insufficient to sustain a finding that the officers had assets of the corporation in their possession enabling them to carry out the court's order. 25F(2d)131.

252-59½-New. Trustees' action for conversion against sheriff need not be preceded by demand for return of goods where it would be futile. 102CalA719, 283P351.

252-60 216Ala500, 114So[illegible]; 91CalA689, [illegible]; 156Mo[illegible], 136A[illegible]; 11PaDistCo 638.

253-61 36F(2d)776; 156Tenn306, 300SW[illegible]; But see 8F(2d)376, 31F(2d)528.

253-64 28F(2d)740 [certiorari den 278US[illegible] 49SC179, 73L ed565(11theaso)].

[a] **Action barred by state statute.**–217Ky[illegible] 288SW1030.

253-65 [c] **Not applicable to cause of action fraudulently concealed.**–242IllA[illegible].

253-70½-New. A suit by a trustee is not subject to dismissal for laches where the position of defendants is not changed. 15F(2d)119.

253-70½-New. Bills by trustees in bankruptcy were improperly dismissed, without hearing the evidence, on the ground of laches, where there was a prolonged controversy over the appointment of trustees, and the bills as amended alleged that the delay caused no injury or prejudice to defendants. 11F(2d)167.

254-75½-New. That proceeds of sale were paid to bankrupt's creditors is no defense. 21F(2d)15.

254-77 See also 38F(2d)104.

254-83½-New. Irregularity of issue of corporate stock is no defense to an action by a trustee for payment thereon. 9F(2d)159.

254-83½-New. Trustees in bankruptcy of a purchaser of land in an action to recover the proceeds of a fire insurance policy payable to the vendor as his interest may appear are subject to any defense which the vendor might have urged against the purchaser. 155Tenn 95, 290SW8.

254-83¼-New. In a suit by a trustee to recover for a breach of contract because of which the bankrupt incurred liability to another, the fact that such other may not realize the claim in full is not a defense pro tanto. 22F(2d)321.

254-83½-New. A mortgagee was not estopped from maintaining an action in conversion for mortgaged automobiles against a trustee in bankruptcy for the mortgagor by reason of the fact that it had previously sought to foreclose its mortgages, which suit was enjoined by the federal court. 246Mich334, 224NW612.

254-83½-New. A mortgagor's trustee in bankruptcy cannot proceed against the mortgagee as for conversion of mortgaged chattels, disposed of with the trustee's consent. **MoA** 148SW(2d)537.

254-83½-New. The maker of a note for certain chattels is not so in part delicto with the payee, because of failure to enter the consideration of the note in red ink as required by statute, so as to bar an action by the maker's trustee in bankruptcy. 200Wis64, 227NW906, 67AlR881.

254-83½-New. Sale of fixtures remaining in bankrupt's premises by trustee does not defeat his action for conversion against sheriff. 102CalA719, 283P351.

254-83½-New. Mortgagee not entitled to set off excess amount of claim over value of security against trustee's claim for recovery of preference. **Mass** 169NE667.

254-83½-New. Clerk of sale of debtor's property sued by debtor's trustee in bankruptcy to recover assets held not relieved of liability because receiving no benefit. 42F(2d)735.

254-85½-New. A trustee may be permitted to sue in a foreign court. **Man** [1926] 3DomLR225, [1926] 2WestWkly 192.

254-97 [a] **In suit by trustee against third person** not connected with bankruptcy proceeding, court has no jurisdiction as bankruptcy court. 25F(2d)326.

255-99 40F(2d)328 (trustee entitled to same remedies as in court of original jurisdiction).

255-1½-New. A federal court is a "court of competent jurisdiction," within the meaning of a state banking law, authorized to direct the state superintendent of banks to turn over to the trustee in bankruptcy securities deposited by bankrupt private bankers pursuant to such law. 8F(2d)551.

255-1½-New. A district court is without jurisdiction of a suit of a trustee to cancel a mortgage, in effect a collateral attack on a prior order of a referee refusing to cancel the mortgage. 19F(2d)947.

255-1¼-New. The determination of expenses, disbursements, and compensation of the partnership receiver appointed by the state court and counsel, after an adjudication in bankruptcy, lies within the exclusive jurisdiction of the bankruptcy court. 264Mass469, 162NE905.

255-1½-New. Jurisdiction cannot be conferred on a federal court of a suit by a trustee by a false allegation that it is a suit to set aside a fraudulent transfer. 32F(2d)100.

255-3 32F(2d)100.

255-6½-New. In case of suit against the estate of a stockholder, based on the return of a subscription note to the stockholder after reduction of the capital stock, the bankruptcy court has no jurisdiction. 28F(2d)692.

256-9 But see 28F(2d)7.

256-12 [b] 32F(2d)100 (means consent to local jurisdiction only).

256-16 19F(2d)824. [b] **Administration of solvent partnership** is within jurisdiction of such court where one of partners is bankrupt and solvent partners consent by appearance and demand for relief. 10F(2d)9.

257-19½-New. The mortgagee waives the right to have his title to property, claimed by trustee, adjudicated in a plenary action by joining issue and participating in the hearing before a referee. 10F(2d)116 (in summary proceeding by trustee to reclaim property).

257-20 8F(2d)13; 24F(2d)475; 34F(2d)252. [d] **Restitution of trust fund** is within equity jurisdiction of bankruptcy court, though it demands money judgment. 27F(2d)898. [e] **Suit by trustee to recover trust funds received by defendant from bankrupt estate for his stock in bankrupt corporation** is within equity jurisdiction. 34F(2d)252.

257-21 24F(2d)177.

257-22 42F(2d)906.

257-25 43F(2d)748.

257-26 34F(2d)268; 48RI250, 137A7. [1] **Trespass and ejectment against bankrupt and wife** may be maintained in state court to oust them from possession of property in wife's name alleged to have been fraudulently conveyed to her. 48RI250, 137A7.

258-27 24F(2d)1002. [d] 257Mass503, 154NE187.

258-28 48RI250, 137A7. [e] **Compelling suit in state court.**–177Ark177, 6SW(2d)10.

258-29 TexCivA 285SW1105. [b] **District court of county** owing money to bankrupt has jurisdiction to determine defense of set-off based on judgment against bankrupt. TexCivA 297SW918.

258-30½-New. State court has no jurisdiction to make a summary order in bankruptcy proceedings. 48RI250, 137A7.

258-30½-New. Nor has the state court jurisdiction of the trustee's suit for an accounting for the good will of an as-

signed business. 26 OhA248, 163NE509.

250-40½ New. A state court is authorized to adjudicate the right of a bankrupt's wife to the homestead, where she was the owner of the property, as against any claim of the bankrupt. 34 F(2d)268.

250-41 29F(2d)737.

250-41½ New. The bankruptcy court is the only court to settle claims against an estate after an adjudication. Ind Mass489, 162NE905 (refusal to delay action on petition of trustee to intervene till decision on writ of error to set aside judgment for partnership receiver has been held not erroneous).

250-42½ New. or of an action against a trustee for damages for conversion, 18F(2d)792.

250-34 199Cal90, 24P1088, 18ALR 79.

250-41 TexCivA 298SW(Cd)671.

250-42½ New. Where the trustee voluntarily became a party to an action to foreclose a mechanic's lien against a fund due the bankrupt, a state court had the right to declare rights and interest of the parties. 13F(2d)607.

250-42½ New. A state court has been held to have jurisdiction to determine the question whether land conveyed by the bankrupt before adjudication was a homestead. TexCivA 293SW264.

250-42½ New. An action against a trustee in a state court for damages for conversion cannot be enjoined by a bankruptcy court. 18F(2d)792.

250-42½ New. A trustee who has appeared and joined issue in an action against him in a state court must exhaust his remedies in the state court before he applies to the bankruptcy court for an injunction. 18F(2d)792.

250-42½ New. In an action in a state court for an accounting for moneys received by defendant as profits from the sale of assets under the jurisdiction of the federal court in a bankruptcy proceeding judgment for plaintiff has been sustained. 97CalA244, 275P498.

250-46 42F(2d)906; 205 Iowa1333, 219 NW31. 161Ga255, 134SE[illegible]; 155Md 139, 141A102 (effect against fraudulent conveyances). [a] (2) Plenary suit embodying controversy over property in possession of third party contemplated by Bankruptcy Act § 70e (USCA tit. 11 § 110(e)). 28F(2d)7.

250-47 42F(2d)57; 205 Iowa1333, 219 NW31. 161Ga288, 108SE185.

250-51½ New. Under the amendments to the Bankruptcy Act in 1910, suits by trustee to recover preferences may be brought in the federal district court of the district where the real and personal property is located, although the bankruptcy proceedings were instituted, and defendant resides, in another district in the same state. 13F(2d)942.

250-52 [c] Creditor is not proper party plaintiff in suit by debtor or his trustee in bankruptcy. 32F(2d)650. [d] Where petition to set aside preferences was presented by creditors while trustee was under charges court may authorize new trustee to permit use of his name. 13PortoRicoFed[illegible].

250-63½ New. Where the trustee succeeds to all rights of the bankrupt, the latter has no interest in property so as to make him a necessary or proper party defendant in trustee's causes of action. 159Wis64, 213NW354.

250-63½ New. In a claim and delivery action by an assignee of a conditional sales contract against the sheriff taking property under an attachment against the purchaser, no personal judgment being sought against the purchaser's trustee in bankruptcy, his presence was not necessary to complete determination. 95CalA476, 273P37.

251-64½ New. Resident stockholders of a bankrupt corporation cannot force the trustee to sue foreign stockholders first. TexCivA 198SW(2d)445.

261-71½ New. A trustee in bankruptcy of a stockholder of a national bank in suing for an account in respect of liquidation may bring in the stockholders if necessary to a complete determination. 12Misc247, 211NY8366.

261-71½ New. The trustee in bankruptcy of a member of a partnership which had thereofore gone into liquidation is not a necessary or proper party to a suit by such member as agent to enforce a claim for damages for fraud in a partnership transaction. TexCivA 281SW944.

261-71½ New. A receiver is not a necessary party where the trustee is suing to set aside a conveyance. 14F(2d)225.

261-71½ New. Trustee alone has the right to maintain an action to set aside mortgage bonds of bankrupt, and joinder of creditor with him is error. 15 F(2d)119.

261-71½ New. Where money lender participated with directors in the wrongful appropriation of corporation funds, the trustee in bankruptcy of a corporation could recover from him [illegible] 131NE[illegible].

261-71½ New. In a suit to enforce a corporation stockholders' liability for unpaid subscriptions all delinquent stockholders within the jurisdiction are necessary parties. TexCivA 19SW(2d)[illegible].

261-71½ New. In a suit by the father's trustee in bankruptcy to cancel the father's deed to his son the mother should be made a party, where notes were claimed by the son to have been given to his mother in part consideration for the conveyance. 28F(2d)975.

261-71½ New. A trustee for an insolvent corporation, directed to sue subscribers for the amount of unpaid subscriptions, had the right to sue all of such subscribers jointly in an equitable action. [illegible]Ky265, 123W(2d)120.

261-71½ New. Corporation and stockholder can bring action to set aside transfer of corporate rights and join trustee as party entitled to receive proceeds. [illegible]Mo[illegible]NW[illegible].

261-71½ New. Alleged fraudulent grantee is necessary party to action to set aside conveyance. 28F(2d)672.

261-71½ New. Alleged fraudulent mortgagee is necessary party to action to determine validity of mortgage. 28 F(2d)673.

261-73½ New. An owner of property which the bankrupt was directed to turn over to the trustee cannot intervene where the order was not binding on him. MoA 168SW(2d)665.

261-73½ New. A creditor's petition to intervene in a suit to set aside the debtor's settlement, constituting an independent claim arising through alleged fraud, will be denied as working a misjoinder of the causes of action. 32F(2d) 630.

262-78 [a] (2) Improper use of equipment by surety on contractor's bond in completing work, resulting largely in destruction of property, was held to make appointment of receiver proper. 5F(2d)183.

262-82 213Ala137, 104SS323; 219Ala 405, 122SS623; 200 Iowa56, 202NW557 (In trustee's action to recover homestead property transferred by deed absolute, but as security for debt, he must allege that deed was waiver of homestead right); MoA 148SW(2d)537; 197NC204, 148SE255 (in case); TexCivA 248SW(2d) 743 (petition held sufficient without pleading tender of consideration). [a] (4) Allegation not sufficient to show deposit of check. 10F(2d)920. [c] Allegations held insufficient.—131Misc774, 227NY8351. [d] Complaints, declarations, or petitions held insufficient.—178 Ark619, 118SW(2d)441; 207 Iowa711, 223NW541; MoA 287SW877. [e] Complaints, declarations, or petitions held sufficient.—26F(2d)501; 354mA383, 147 SE[illegible]; 261Mass[illegible], 162NE[illegible]; Mass 167NE314. [f] Petitions held sufficient.—35 OhA76, 171NE870. [g] Complaint held sufficient.—200Wis64, 227NW300, 67 ALR1381.

263-93 213Ala137, 104SS322 (bill against directors of corporations for misconduct held demurrable for vagueness).

263-94 Contra 41 Ida679, 241P609.

263-94 174Ark351, 295SW717. [a] (2) Other allegations held sufficient. MoA 272SW1087. [b] Allegation of insolvency in master's report, made by reference part of complaint, has been held sufficient as inferential allegation of insolvency. 174Ark351, 295SW717.

264-99 But see 36F(2d)953.

264-1 [a] (6) Bill to recover collaterals, or their value, transferred by bankrupt within four months of filing petition. 24F(2d)477. (7) In general. 38 F(2d)104. [c] (2) Action to set aside chattel mortgage given within four months before bankruptcy. [illegible]F(2d) [illegible].

264-5 5F(2d)501 (bill to recover preference held sufficient to allow recovery also on ground of fraudulent conveyance).

265-9½ New. It is proper to allege the filing of an involuntary petition in bankruptcy, the adjudication thereon, and the appointment and qualification of the trustee. [illegible]MoA[illegible]SW[illegible].

265-10 [illegible]Fla[illegible], 102SS[illegible]; [illegible]Misc220, 223NY8737. [b] (1) 11F(2d)984. (4) Allegations that payment sought to be recovered were made by trustees of bankrupt business trust and not by bankrupt held sufficient. 5F(2d)171. (5) To charge fraudulent conveyance to bankrupt's wife. 216Ala530, 114SS[illegible]. (6) Other complaints held sufficient. 166 Ga48, 142SE155. [e] Complaint must contain allegations of substantial case within jurisdiction of Bankruptcy Act to give jurisdiction to federal court. 5 F(2d)171. [f] Complaint held insufficient. [illegible]Wash[illegible], [illegible]P[illegible].

265-11 [a] (2) Allegation that at time of transfer bankrupt was insolvent is sufficient as against general demurrer without alleging that property of bankrupt was not sufficient to pay creditors in full. 166Ga280, 127SE782.

265-13 [illegible]Ala[illegible], 116SS[illegible].

265-13 192Wis558, 213NW332.

265-14 213Ala515, 105SS808 (bill held sufficient against demurrer); 46 Ida628, 264P231 (sufficient in absence of demurrer or motion to make more specific). [a] 219Ala105, 122SS623 (should aver names of creditors, amounts of claims, and that they have been duly proved and allowed). [d] Who creditors were must be stated.—219Ala105, 122SS623.

265-15 [illegible]Ala[illegible], 116SS[illegible]. [c] Allegations of bill held sufficient as basis for recovery.—92Fla87, 109SS320.

265-19 105Conn[illegible], 142A[illegible].

266-24½ New. In a bill to avoid an execution sale of bankrupt's land, it is not essential to allege that there were unsecured creditors. 215Ala632, 112SS 209.

266-24½ New. Prayer to remove a cloud from the title to property that the bankrupt holds as exempt has been held not to deprive a bill of equity. 215Ala 632, 112SS200.

266-24½ New. The petition must describe the indebtedness due from the bankrupt and show that the debt was due and payable when the bill was filed. 219Ala105, 122SS623.

266-24½ New. Allegation as to bankruptcy court's order directing suit by trustee to set aside conveyance held not within statute requiring allegation that judgment was "duly given or made." Or 287P234.

267-36½ New. Where plaintiff joins causes for conversion and replevin against the trustee, a motion for election is the proper remedy, and the action is improperly dismissed for lack of jurisdiction of replevin. MoA 168SW(2d)665.

268-49½ New. In an action by a trustee against a bank to recover the amount of a cashier's check, issued by it, payable to a former trustee, and paid by defendant on trustee's indorsement as such and individually, based on defendant's participation in the misapplication of the proceeds by such former trustee, an answer has been held to state a defense. 168Minn434, 210NW630.

268-49½ New. A plea that the trustee's remedy to compel restitution is at law does not raise a jurisdictional question. 27F(2d)858.

268-49½ New. In an action to compel restitution of funds, a plea that the remedy should be in a court of law is not defense matter, but should be availed of by a motion to transfer to

the law side of the calendar. 27F(2d) 898.

268-49½-New. Answer held sufficient as against demurrer in action alleging agent's misrepresentations that credit policy would include certain customers. 35OhA76, 171NE870.

268-52½-New. A cross bill by a trustee alleging fraudulent transfer by bankrupt as a bar to partition has been held sufficient as to an allegation of fraud. 216Ala156, 112S752.

268-53 218Ala2, 117S688.

268-59½-New. In a trustee's suit to recover property fraudulently transferred, it is not necessary to prove the exact date of adjudication of bankruptcy in connection with showing the time of the transfer, where it is otherwise shown that the transfer was within the period designated by the Bankruptcy Act. 108 Conn58, 142A572.

269-66½-New. In a bill to set aside fraudulent conveyances, a trustee cannot have such transactions declared unlawful preferences under the Bankruptcy Law. 219Ala405, 122S623.

269-66¾-New. Good faith of debt not challenged in pleading is not issue, notwithstanding prayer for general relief. 39F(2d)903(2dcase).

269-67 218Ala2, 117S688; 92Fla87, 109 S320.

269-68 218Ala2, 117S688; 92Fla87, 109 S320.

269-70 17F(2d)291; 117Or107, 241P 62, 242P1112 (deeds and mortgages executed within four months of filing petition are not prima facie fraudulent). But see 17F(2d)492.

269-71½-New. But waiver of homestead is not presumed. 200 Iowa56, 202 NW557.

269-76 35Man9, [1925] 3DomLR670, [1925] 1WestWkly1121.

269-77½-New. In proceeding to establish trust in funds held by the trustee, there is no presumption against the trustee as to the contents of account books lost without the trustee's fault. 2F(2d)791.

269-77¾-New. In determining the value of a wife's estate, the husband's distributive share in which was claimed by his trustee, debts are presumed to have been paid. 215Ala674, 112S251.

269-77¼-New. Under a contract calling for the bankrupt's manufacture of ironing boards, as modified by an agreement which permitted the bankrupt to deliver stands alone at a specified rate, in case of the buyers' failure to deliver tops, the presumption was that the title did not pass until delivery at the buyers' warehouse. 29F(2d)671.

269-77⅛-New. The presumption that purchases during insolvency on credit are fraudulent may be overcome by evidence showing the transactions in good faith with the expectation of making payment. 28F(2d)115.

269-77¼-New. Insolvency is considered as extending back beyond the time of a voluntary conveyance made during indebtedness unless solvency at the time of the conveyance is shown. 208 Iowa776, 226NW133.

269-79 TexCivA 24SW(2d)69. [b] **Equity rules,** requiring plaintiff to prove title and interest in subject matter and right to sue, requiring establishment by evidence of every averment of bill essential to relief and not admitted, are applicable to proceedings by trustees in bankruptcy. 218Ala2, 117S688.

270-80 39F(2d)903(2dcase); 220MoA 1099, 297SW108, 110 [citCJ].

270-81 5F(2d)918; 17F(2d)291; 231 Ky767, 22SW(2d)256(2dcase); 220MoA 1099, 297SW108, 110 [citCJ]; 198NC 494, 152SE393(2dcase). [a] 7F(2d)381; 28F(2d)523. [b] **Where prima facie case of preference** arises from facts, onus is on creditor to rebut presumption of preference. 35Man9, [1925] 3DomLR670, [1925] 1WestWkly1121.

270-82 17F(2d)291; 38F(2d)614; 315 Mo883, 289SW540; 220MoA1099, 297 SW108, 110 [citCJ].

270-83 10F(2d)116 (at time judgment lien was obtained); 14F(2d)273; 17F (2d)291; 19F(2d)947; 38F(2d)614; 315Mo883, 289SW540; 220MoA1099, 297SW108, 110 [citCJ]; TexCivA 283 SW177; TexCivA 24SW(2d)69.

270-84 19F(2d)947.

270-84½-New. , or had reasonable grounds to believe that the bankrupt was insolvent at the time he received the transfer, 315Mo883, 289SW540.

270-84¾-New. or had reasonable grounds to believe that the bankrupt was insolvent, 220MoA1099, 297SW108.

270-84¼-New. or had reasonable cause to believe that the bankrupt was insolvent, Mass 166NE843.

270-85 14F(2d)273; 17F(2d)291; 92 Fla219, 109S302; 54ND459, 209NW969; 87PaSuper114.

270-86 23F(2d)919; 38F(2d)614; 220 MoA1099, 297SW108, 110 [citCJ]; Tex CivA 283SW177.

270-87 17F(2d)291; 38F(2d)614; 315 Mo883, 289SW540; 220MoA1099, 297 SW108, 110 [citCJ]; TexCivA 283SW 177. [a] **Expense item paid appraisers is properly allowed** where record shows appointment of appraisers and services rendered. 13F(2d)266. [b] **True value of property** must be proved. 38F(2d) 614.

270-89 16F(2d)268; 16F(2d)269; 38F (2d)45; 39F(2d)969; 175Ark1148, 28W (2d)1 (and insolvency of bankrupt); 97 CalA442, 275P870; 201 Iowa257, 207NW 230; 58ND200, 225NW310; 117Or107, 241P62, 242P1112; 295Pa62, 144A824; 187Wis649, 205NW391. [a] **Trustee has burden to show** that bankrupt remained in possession and was insolvent. 16F (2d)269. [b] **Proof that conveyance left bankrupt solvent** does not shift burden. 16F(2d)269.

270-90 213Ala515, 105S808 (burden on purchaser to show sale not fraudulent, that consideration was adequate, and that sale was fair and made in good faith).

270-91½-New. The burden of proof is on the president of a bankrupt corporation where he claims that moneys used in the purchase of another company in which he was interested were charged to his salary account. 81Colo 389, 255P 628.

270-91¾-New. A trustee is not required to prove that any claims had been allowed against the bankrupt estate. Mo 18SW(2d)388.

270-91¼-New. Deficiency of assets need not be proved in an action to recover property fraudulently transferred. 108 Conn58, 142A572.

270-91⅛-New. The burden is on the grantee to rebut constructive fraud arising from a voluntary conveyance. 208 Iowa776, 226NW133.

270-92 26F(2d)591. See also 27F(2d) 898.

271-93½-New. The trustee claiming deed absolute, giving as security waived homestead exemption, must prove waiver. 200 Iowa56, 202NW557.

271-94½-New. In an action by a trustee against a bankrupt's wife to recover a share of a crop grown on land owned jointly by the spouses, the burden rests on the trustee to prove that the crops involved were owned by the bankrupt. 167Minn152, 208NW649.

271-94⅛-New. On motion to commit for contempt in failing to pay one money, the trustee has the burden of proving respondent's present ability to pay. 13F (2d)143.

271-94¼-New. In a suit by a trustee to recover the amount credited to a bankrupt for returned merchandise, the creditor must show that the amount credited was not the reasonable value of the goods returned. 221MoA1250, 300SW 321.

271-95 7F(2d)704; 26F(2d)193; 38F (2d)45; 146Miss225, 110S709. [a] **Proof in reclamation proceedings** must be sufficient to sustain action of replevin. 6F (2d)115.

271-97 [b] **To establish constructive trust** as to funds held by trustee for lire purchased, claimant must trace specific dollars used in purchase and show which of several contracts of purchase remained unperformed by bankrupt. 27F(2d)810.

271-98½-New. One asserting trustee's abandonment or disclaimer of property without permission of court has burden of proof. 9F(2d)62.

271-98⅓-New. Depositors have the burden of proving alleged fraudulent receipt of deposits. 10F(2d)926.

271-1 [a] 21F(2d)317; TexCivA 19 SW(2d)445 (petition in bankruptcy and creditors' reply thereto).

271-2 [a] 38GaA274, 143SE781.

271-4 297Pa1, 146A157. [a] 14F(2d) 273; 17F(2d)691; 220MoA1099, 297 SW108. [b] 17F(2d)603; 220MoA1099, 297SW108; 151SC309, 149SE14.

271-9 [a] 151SC309, 149SE14. [b] 206 Cal266, 274P68.

271-12 [a] (9) In suit by trustee to set aside fraudulent conveyance trustee's bond showing filing and approval is material evidence. 41Ida679, 241P 609. (10) In action for conversion by trustee in which defendant interposes chattel mortgage as defense, evidence to impeach validity of chattel mortgage is admissible. 124Okl294, 256P29. (11) In reclamation proceedings against trustee to recover securities pledged with broker, evidence of bucket shop operations is admissible. 36F(2d)13. (12) Letter showing financial condition of bankrupt in endeavor to obtain merchandise. 169Ga608, 151SE31. (13) Other evidence held admissible. 108 Conn58, 142A572. [b] (5) Testimony of referee that more suits to recover property fraudulently transferred had been necessary than in any case in his experience. 151SC309, 149SE14.

272-14 See also 296Pa568, 146A153.

272-15½-New. In summary proceedings to recover money paid to an attorney in contemplation of bankruptcy, evidence of the bankrupt and attorney given on general examination is admissible both for impeachment and substantive proof. 17F(2d)347.

272-16 [a] That deed of insolvent corporation to treasurer was fraudulent as to creditors. 126Me443, 139A461.

272-17 [a] **Evidence held sufficient** to show that transfer of property by bankrupt was within four months' period fixed in Bankruptcy Act. 108Conn58, 142 A572.

272-18 [a] 6F(2d)506; 18F(2d)1004; Cal 292P448; DC 41F(2d)426; SD 229 NW2(2dcase) (cash bail). [b] 18F(2d) 362; 130Kan568, 287P251.

272-19 [a] 13F(2d)370. [b] **Evidence held insufficient.**-7F(2d)768.

272-21 [a] 69CalA756, 232P748; Iowa 232NW67.

273-24½-New. that a mortgagee taking possession within four months of the mortgagor's bankruptcy was not chargeable with notice of his insolvency; Tex CivA 290SW925.

273-24⅛-New. that the bank was the agent for collection of funds deposited by the trustee and not liable for the latter's embezzlement; 207 Iowa910, 223NW865.

273-25½-New. that assignment bearing prior date was executed within four months of bankruptcy; Wash 291P705.

273-26 Nebr 230NW665. [a] 15F(2d) 618; 16F(2d)427; 17F(2d)691; 18 F(2d)729; 21F(2d)294; 23F(2d)919; 26F(2d)193; 32F(2d)999; 33F(2d)511; 36F(2d)482; 39F(2d)397; 40F(2d)88; 213Ky286, 280SW1110; 218AppDiv243, 218NYS74; 88PaSuper542; 198Wis335, 224NW114. [b] (1) 5F(2d)918; 6 F(2d)93; 7F(2d)766; 14F(2d)53; 14 F(2d)273; 17F(2d)291; 17F(2d)603; 18F(2d)460; 19F(2d)947; 22F(2d)611; 28F(2d)523; 32F(2d)691; 34F(2d)978 (to show that bank accepting payment had reasonable cause to believe that such acceptance effected preference); 36 F(2d)507; 37F(2d)328; 38F(2d)45; 38 F(2d)614; 39F(2d)625; Iowa 230NW 407; 231Ky767, 22SW(2d)256(2dcase); 117Or107, 241P62, 242P1112 (evidence insufficient to show that transferee had reasonable cause to believe that transfer would effect preference); 146Wash 634, 264P417. (2) To show creditor had reasonable cause to believe payment of his debt would effect preference. 36F(2d)507. [d] 8F(2d)702; 16F(2d) 427. [e] **Where equal inferences may be drawn,** inference against preference prevails. 17F(2d)291. [f] **Evidence**

held to show that creditor taking excessive collateral for loan under agreement permitting excess to be applied on preëxisting debt believed that preference would be effected. 20F(2d)565. [g] **Evidence held to show** that mortgage which was foreclosed in name of officer of bank, and which ripened into title, was property of bank. 57ND 849, 224NW308.

273-27 [a] 1F(2d)971; 16F(2d)269; 22 F(2d)211; 24F(2d)475; 24F(2d)626; 25 F(2d)211 (equity worth sixty-nine hundred and forty-six dollars and eleven cents sold for three hundred dollars); 33F(2d)800. 40F(2d)88; 87CalA707, 262P463; CalA 275P529; 242 IllA268; 205 Iowa1333, 219NW541; 169Minn409, 211NW473; 319Mo 672, 4SW(2d)769; 320Mo 605, 8SW(2d)592; Mo 18SW(2d) 388; 99NJEq450, 132A205; 57ND890, 224NW299; 151Va434, 145SE421. [b] 24F(2d)35; 24F(2d)508 (conveyance to wife); 36F(2d)680; 97CalA442, 275P 870; 201 Iowa257, 207NW230; Iowa 230NW407; 217Ky810, 290SW669; 232 Ky27, 22SW(2d)293; 165Lal, 115S347 (to show conspiracy); Mo 18SW(2d) 388; 56ND581, 218NW644; 58ND200, 225NW310; 199Wis458, 225NW693. [c] **Evidence held to show** lien given or accepted in contemplation of bankruptcy. 10F(2d)301. [d] **Disclaimer by defendant** precludes entry of decree. 7F(2d) 79.

273-28 [a] 18F(2d)729; 38F(2d)614; 39F(2d)397; 215Ala632, 112S209; 175 Ark1148, 2SW(2d)1; 242 IllA268; 220 MoA1099, 297SW108. [b] 5F(2d)918; 7F(2d)381; 10F(2d)116; 25F(2d)295; 37F(2d)328; 40F(2d)558; 40F(2d)955; 174Ark351, 295SW717; 296Pa568, 146 A153; TexCivA 24SW(2d)69. [c] **Evidence held to show** judgment creditor's knowledge of bankrupt's insolvency at time of entry and levy of execution on judgment against bankrupt. 9F(2d)43. [d] **Evidence held sufficient** to warrant finding that bankrupt's conveyance to son was supported by fair consideration and was valid irrespective of grantor's insolvency. 296Pa568, 146 A153.

273-31½-New. that funds of a bankrupt corporation were used in the purchase of property for another company in which the president was interested: 81Colo 389, 255P628.

274-42½-New. that trustee had elected to surrender property as onerous and burdensome: 189NC465, 127SE529.

274-42¾-New. that note evidencing claim was not executed after adjudication in bankruptcy; TexCivA 298SW(2d) 489.

274-43½-New. that a broker had notice of any relationship between a customer and a bankrupt company; 128 Misc654, 219NYS676.

274-43¼-New. that stockholder had not paid subscription to bankrupt corporation; 222Ky753, 2SW(2d)367.

274-43¼-New. or that bankrupt agreed to take or pay for any stock. Mo 276 SW611.

274-43½-New. , or that money of the bankrupt corporation was received and held by the corporate manager and another. 91CalA689, 267P558.

274-45½-New. A finding of the trial court that missing boards delivered by the petitioners to the bankrupt for repainting were not among those sold by the bankrupt's receiver has been held proper under evidence, and not reviewable, in proceedings against the trustee to recover the proceeds of sale of ironing boards made for petitioners. 29 F(2d)671.

274-45¾-New. A finding that the bankrupt's transfer of property to a partner was followed by actual and continued change of possession. 97CalA 442, 275P870.

274-46½-New. Evidence is held sufficient to show that the bankrupt held stock under parol trust for the owner. 18F(2d)362.

274-46¾-New. Evidence is held sufficient to show that the transaction between promoter and corporation was a fair one. 326 Ill 528, 158NE101.

274-46¼-New. Evidence is insufficient to show conspiracy between the officers of a bankrupt corporation so as to render them jointly liable for their several indebtednesses. 18F(2d)971.

274-46½-New. Evidence insufficient to identify funds in trustee's hands. 2 F(2d)791.

274-46¾-New. Evidence insufficient to sustain finding that person was not beneficiary as required for record to constitute notice is defeating lien of mortgagor's trustee. 146Miss369, 112 S1.

274-46½-New. Evidence has been held insufficient to show an express trust in favor of claimant in funds in the hands of the bankrupt. 27F(2d)810.

274-46¾-New. Evidence has been held to show that the defendant manager of the bankrupt corporation received the proceeds of corporation sales and retained them. 28F(2d)171.

274-46⅛-New. Evidence has been held to show performance of the later of several transactions between claimant and the bankrupt rather than the prior, in the purchase of foreign exchange. 27F(2d)810.

274-46 1/10-New. Evidence has been held to show that a resolution authorizing the retirement of stock owned by the president of the bankrupt corporation out of proceeds of the corporate property was a subterfuge to transfer the proceeds. 27F(2d)898.

274-46 1/11-New. To succeed in the trial court, a bankruptcy trustee, suing stockholders for the amount of the defunct corporation's indebtedness to a bankrupt copartnership, was required to establish such indebtedness by a preponderance of the evidence. 97CalA414, 275P500(2dcase).

274-46 1/12-New. Evidence held insufficient to show sheriff sued for conversion by trustee had equivalent quantity of goods of like character which he could have turned over to trustee had demand been made. 102CalA719, 283P 351.

274-46 1/13-New. Evidence held insufficient to support sheriff's contention that he took possession of property with consent of bankrupt and creditor. 102 CalA719, 283P351.

274-46 1/14-New. Evidence held sufficient to sustain conclusion that bankrupt's cotenant joined in executing mortgage as his surety. 336 Ill 594, 168NE666.

274-46 1/15-New. Other illustrations of sufficiency of evidence. 251Mich413, 232 NW197.

274-47 42F(2d)735; 126Me443, 139A 461; Mass 166NE843; 240Mich458, 215 NW242; 246Mich334, 224NW643; 167 Minn152, 208NW649; 198NC494, 152 SE393(2dcase) (whether depletion of bankrupt's estate resulted from payments made); 88PaSuper542. [a] (4) Whether reversionary interest of bankrupt has such present value that it can be sold is question for court to determine. 161Tenn187, 30SW(2d)227. [b] **Where facts are undisputed,** question is one of law. 29F(2d)671.

274-48 174Ark351, 295SW717; 175Ark 1148, 2SW(2d)1; 240Mich458, 215NW 242; 220MoA1099, 297SW108; 295Pa 62, 144A824; 296Pa568, 146A153; 151 SC309, 149SE14.

274-49 Mass 166NE843; 240Mich458, 215NW242; 315Mo 883, 289SW540; 221 MoA1250, 300SW321; 198NC494, 152 SE393(2dcase); 151SC309, 149SE14.

274-51 54ND459, 209NW969.

274-51½-New. whether payment to a creditor would effect preferences; 315 Mo 883.

274-51⅓-New. whether the recipient had reasonable cause to suspect that the payment would effect a preference over other creditors; 220MoA1099, 297 SW108.

275-53 [b] **Nonsuit improperly granted.**-170Ga892, 154SE449.

275-56½-New. Whether there was secret agreement between bankrupt and vendee not to record conditional bill of sale is for jury. 169Ga608, 151SE 31.

275-56⅓-New. Issues of fact relating to actual possession of property and solvency at time petition in bankruptcy was filed are judicial questions. 42 F(2d)269.

275-58 [a] (8) In suit by trustee for conversion instruction as to value of property held proper. 5F(2d)289. (9) Statement in charge that question of insolvency was disputed is not erroneous where evidence made issue for jury. 151 SC309, 149SE14.

276-66½-New. A master's finding as to a creditor's knowledge warrants the court's conclusion that payment constituted preference. 257Mass503, 154NE 187.

276-66⅓-New. The jury's verdict is not binding on the chancellor. 223Ky 458, 3SW(2d)1065.

276-66¼-New. In a suit to recover property fraudulently transferred, the court's conclusion that the transferee took an active part in the fraud, although not founded on any allegation, was not objectionable, it merely negativing the transferee's good faith. 108 Conn58, 142A572.

276-67½-New. Facts not authorizing direction of verdict. 167Ga820, 146SE 897(2dcase).

276-68 MoA 287SW877.

276-69 See also 97CalA442, 275P870.

277-70½-New. The equity rule that plaintiff can have a decree only on the title set forth is applicable to proceedings by trustees in bankruptcy. 218 Ala2, 117S688.

277-71 205 Iowa1333, 219NW541.

277-72 [b] **Ordering sale of land** on foreclosure of vendor's lien without securing repayment of purchaser's initial payment held not error. TexCivA 294 SW317.

277-80½-New. Involuntary bankruptcy proceedings brought in an effort to obtain settlement of petitioner's claims against third parties is fraud on the court. 9F(2d)896.

278-81½-New. An actual, nonfraudulent voluntary conveyance should not be wholly set aside and title vested in the trustee. 201 Iowa257, 207NW 230.

278-81⅓-New. In such case a lien on the land may be decreed in favor of antecedent creditors. 201 Iowa257, 207 NW230.

278-81¼-New. Trustee is entitled to accounting for lands wrongfully in possession of bankrupt's wife. 36Wyo 522, 257P7.

278-81⅙-New. The court may order a marshal to turn over to the trustee in bankruptcy an amount arising from the sale of attached property. 13F(2d) 370.

278-81⅛-New. In an action between a trustee and a transferee to cancel a conveyance of realty, the rights of all parties may be determined and adjusted. 28F(2d)975. [a] **Expenditures of transferee.**-28F(2d)975. [b] **Rents and profits.**-28F(2d)975. [c] **Restoration of consideration.**-28F(2d)975. [d] **Dower.**-28F(2d)975.

278-81 1/7-New. Assignee of purchase money under real estate contract entitled to decree quieting title in trustee's action. Wash 291P705.

278-87½-New. Trustee can recover from one of several conspiring with the bankrupt the value not only of the property he received, but also of that received by his fellow conspirators. 8 F(2d)13.

278-87⅓-New. Interest is allowable on the amount recovered by a trustee for money illegally appropriated by the officers of a bankrupt corporation. 18 F(2d)971.

278-87¼-New. In a suit by a trustee to recover for a breach of contract because of which the bankrupt incurred liability to another, the full damages are recoverable, although such other may not realize its claim in full. 22 F(2d)321.

278-87⅕-New. A pledgee, buying in pledged collaterals for the amount of the debt, is liable to the pledgor's trustee in bankruptcy, for the value of col-

laterals less the debt. 24F(2d)477.

278-87⅛-New. In an action by a trustee in bankruptcy to recover the value of property, including notes, transferred to a creditor, defendant is not chargeable with the face value of notes uncollected, but recovery is limited to moneys received thereon in excess of the amount due defendant. 240Mich458, 215 NW242.

278-87½-New. A wife's inchoate right of dower is not considered as a lien on land in determining its value in equity. 25F(2d)211.

278-87¼-New. In a suit by a trustee to recover the value of the property of a bankrupt estate converted by judgment sale by defendant, the remedy of the trustee would be confined to the sale price only if the property was bought in good faith without notice. 7 Alaska508.

278-90 16F(2d)205. [a] **Summary order to surrender or pay over** held to make prima facie contempt case. 16 F(2d)205. [b] **Court should preserve substance of evidence and exhibits** in proceedings for contempt. 16F(2d)205. [c] **Mere denial of ability to pay under order** has been held insufficient answer to contempt rule. 16F(2d)205.

279-6½-New. A finding supported by the evidence is not reviewable. 29F(2d) 671.

279-12½-New. Trustee is not only one entitled to appeal from decree adverse to plaintiffs in suit to set aside deeds of grantor bankrupt as fraudulent. Va 152SE376.

280-21½-New. A claim of a dissolved corporation against a bankrupt may be made only by the trustee to whom the claim was assigned. 20F(2d)330. [a] **Claim presented by former treasurer** has been held not allowable. 20F(2d)330.

280-21⅓-New. All the parties have the right to a determination of their claims, regardless of their place of abode. 12 PortoRicoFed565.

280-21¼-New. Company held not identical with subsidiary on latter's bankruptcy, so as to defeat claim for advances to subsidiary. 41F(2d)676.

280-23 30F(2d)59.

282-37 8F(2d)53.

282-38 8F(2d)53.

282-39 276US299, 48SCt308, 72Led582; 14F(2d)260; 17F(2d)706; 20F(2d)84.

283-44 15F(2d)1006.

283-46 15F(2d)1006. [c] **Bankrupt owning all stock of guaranteed corporation.**-15F(2d)1006.

283-47 23F(2d)867; GaA 139SE578. [e] **Owner of claim secured by mortgage** on property purchased by bankrupt held entitled to honor claim of mortgage obtained by fraud set aside to prove his claim. 5F(2d)902. [f] **Right of assignee.**-8F(2d)96.

284-49 37GaA245, 139SE578. [1] **Mortgagee obtaining judgment for debt** did not waive mortgage lien. 23F(2d) 398.

284-50 37GaA245, 139SE578.

284-51 [a] **Creditor attempting to foreclose deed of trust fraudulently altered** is without right to allowance of claim on original unaltered deed of trust. 37 F(2d)950.

285-54½-New. **The validity of the security** is to be adjudged as of date of bankruptcy, so that a chattel mortgage then valid is not invalidated by failure to file a renewal statement. Alta [1925] 3DomLR323, [1925] 2WestWkly122.

285-54¼-New. Mortgage creditor may disregard bankruptcy and rely on security, or prove the entire debt as unsecured, or be admitted as a creditor for the balance over the security and prove the debt. 21F(2d)434.

285-56 8F(2d)667.

285-60 23F(2d)867.

286-64 See also GaA 139SE578.

288-78 43F(2d)435.

288-81½-New. Claimant holding voidable preferences does not surrender them by his filing a voluntary petition in bankruptcy. 8F(2d)510.

289-84 15F(2d)153; 18F(2d)776.

289-87 20F(2d)330; 21F(2d)936. [a] **Order requiring return of preferential payment** held not to require absolute payment of preference received. 20 F(2d)330.

289-89½-New. Omission in the present act of penalties imposed by prior acts upon creditors receiving property in fraud of such acts must be construed as a legislative intent that none should be imposed. 15F(2d)153.

291-12½-New. Secured creditor who mistakenly proves claim as unsecured is not estopped to withdraw it and rely on security. 17F(2d)603.

291-12⅛-New. Director may be estopped to rescind stock purchase and claim status of creditor on bankruptcy of corporation because the corporation was not authorized to sell stock. 19 F(2d)350.

291-12¼-New. Claimant who made a loan to enable a corporate bankrupt to take over the promoter's assets under composition is not estopped from asserting that the corporation adopted the promoter's contract merely because claimant signed the minutes authorizing the purchase. 22F(2d)480.

291-12⅕-New. **Facts not constituting estoppel.** 29F(2d)202; 30F(2d)52.

291-12⅙-New. Where creditor files claim for reclamation of goods or in alternative for money due for goods, there is no inconsistency in claims under doctrine of election. 39F(2d)242.

291-12⅐-New. Agreement to purchase excess lumber from bankrupt held not ground for disallowing claim by purchaser. 41F(2d)8.

291-12⅛-New. Statement by claimant of intention to pay bankrupt's indebtedness not relied on does not work estoppel. 41F(2d)8.

291-12⅑-New. Creditors' committee agreeing to provision avoiding agreement to defer collection by claimant if bankruptcy proceedings should be brought held estopped from denying knowledge thereof. 41F(2d)8.

291-12⅒-New. Provision that bankruptcy proceedings would avoid agreement to defer collection of claim agreed to by creditors' committee held properly inserted in original agreement though not brought to notice of all creditors. 41F(2d)8.

291-12⅓-New. That claimant agreed to keep secret existence of bankrupt's note does not require disallowance of claim. 41F(2d)169.

291-13½-New. Where a secured creditor disposes of pledged collateral security for a nominal sum, he cannot prove the balance as an unsecured claim. 8F(2d)757.

291-16 See also 26F(2d)40.

291-18 [a] (7) Holder of storage receipts for cotton fraudulently issued by general manager cannot prove same against bankrupt corporation. 6F(2d) 7. (8) Claim of underwriter of bonds for payment to one superintending work of construction of hotel is not allowable against proceeds of sale of hotel, where agreement merely gave underwriter of bonds privilege of employing consulting engineer. 33F(2d)162. [f] **Lender of money to corporation, taking note of individual** owning most of stock cannot be allowed claim against bankrupt corporation. 38F(2d)232.

293-27½-New. Corporation taking over partnership assets in exchange for capital stock is presumed to have assumed partnership debts which may be proved in bankruptcy against corporation. 9 F(2d)683.

293-27⅓-New. Purchaser of stock in bankrupt corporation is not entitled to prove claim as creditor. 9F(2d)359.

293-27¼-New. Firm debts are provable against the estate of a bankrupt partner. TexCivA 279SW893.

293-27⅕-New. One who borrowed money from a bank on his own note and had it credited to the bankrupt who used it in his business may prove a claim for money lent whether notes have been paid or not. 8F(2d)109.

293-27⅙-New. Under Bankruptcy Act §§ 57g, 67e, a bankrupt's agent selling in good faith worthless securities and investing his commissions in such securities has no claim against the bankrupt estate of the principal. 15F(2d) 113.

293-27⅐-New. A loan consisting of financial juggling whereby claimant refunded as loan moneys received held not bona fide. Ont [1927] 3DomLR700.

293-27⅛-New. In bankruptcy proceeding by Maryland corporations in the district of Maryland, the Maryland law governs claimant's right to compensation. 22F(2d)419.

293-27⅑-New. A corporate officer or director can recover for services within the scope of his duties only if there is an express contract of employment. 22F(2d)419.

293-27⅒-New. He may recover under an implied promise for services beyond the scope of official duties only if such services are accepted. 22F(2d)419.

293-27⅓-New. Judgment for damages in a malpractice action against a chiropractor for injuries sustained in negligently giving treatments is a provable debt. 133Misc306, 231NYS429.

293-27½-New. Where by-laws deny an officer's salary except by unanimous vote of the directors, the president of the corporation cannot prove a claim for services as general manager. 29 F(2d)202.

293-27⅓-New. The action of a bank officer and county treasurer in crediting to his personal account at the bank funds which he had misappropriated from the county, and for which the county's claim against the officer's estate in bankruptcy was properly allowed, which funds were transferred to the officer's account as treasurer, and charged back against his personal account when defalcations were discovered, does not create an "overdraft," authorizing the bank's claim therefor against the officer's estate in bankruptcy. 30F(2d)52.

293-27¼-New. Since stockholder is not corporation's creditor, claim based on shares of preferred stock is without merit. 35F(2d)966.

293-27⅕-New. Holder of mortgage is not entitled to prove claim for expenses in foreclosure without receiver and order segregating rents. 39F(2d)239.

293-27⅙-New. Stockholders of bankrupt held entitled to have claims allowed for sums deducted from them as wage-earners to bolster up financial status of corporation. 40F(2d)298.

293-28 6F(2d)581.

293-32 39F(2d)632; 263Mass57, 160 NE437; 128Misc338, 218NYS678 (dictum). [b] (2) Claim for attorney's fees on bankrupt's note, where petition for bankruptcy was filed before any action was taken on note. 34F(2d)334. [c] (2) Notes held in escrow for delivery only after certain credits held not payment of old notes. 14F(2d)385. [f] **Bankruptcy creating fixed liability.**-41 F(2d)237.

293-33 22F(2d)557 (guaranty of installments not due); 128Misc338, 218 NYS678; 12PortoRicoFed213 (part of water bill accruing before bankruptcy is claim against estate). See also 30 F(2d)52.

293-35 39F(2d)18. But see 40F(2d)17.

294-40 22F(2d)419; 25F(2d)651. [q] **Agreement under which secured loan** was advanced held so oppressive as to justify disallowance of that part, representing so-called commission. 7F(2d) 885. [r] **Contract whereby bankrupt corporation agreed to employ manager** till he received one third of outstanding stock under contract with third person does not create provable debt for stock. 9F(2d)896. [s] **Claim based on option of buyer to give notice to seller to repurchase** is not provable contract claim where notice had not been given at time of bankruptcy. 128Misc338, 218 NYS678. [t] **Statutory liability of director for misappropriating corporate funds** resulting in loss to creditors is contractual in its nature and provable. 12F(2d)941. [u] **Third party beneficiary.**-13F(2d)730. [v] **Agreement for payment in installments** does not affect provability of debt as fixed liability. 41 F(2d)237.

295-41½-New. In Maryland a contract for sale of land is executed and not executory, and a claim for the commission is not preferred on the theory that the bankrupt vendor's trustee assumed

the contract with all burdens. 15F(2d) 885.

295-41½-New. Rights of holders of participating certificates issued by a bankrupt corporation held subordinate to those of general creditors. 19F(2d) 151.

295-43 6F(2d)581; 9F(2d)488; 25F (2d)498; 39F(2d)632; 135Misc822, 238 NYS524. But see 39F(2d)632. [a] (2) Because not fixed at time of filing petition nor capable of liquidation. 9F(2d) 488.

295-44 IndA 168NE703. [e] **Lease contracted for but never executed.**-IndA 168NE703.

295-44½-New. Landlord can prove claim for rent to date of filing petition only. 13F(2d)208.

296-49 26F(2d)40; 43F(2d)625; 56 OntL625, [1925] 2DomLR1007. [d] **That damages recoverable by lessor from lessee** did not accrue till filing of petition in bankruptcy did not prevent claim to such damages from becoming "provable claim." 30F(2d)77 [certiorari granted 279US830, 49SCt348, 73Led980 (10th case)].

296-54 But see 22F(2d)558.

296-54½-New. A claim based on a contract for improvements to be made on the bankrupt's property is not provable where, on account of certain requirements of claimant, it was not delivered. 35F(2d)818.

296-55 32F(2d)304 (lessee becoming bankrupt); 35F(2d)818 (bankruptcy as anticipatory breach); 128Misc338, 218 NYS678. See also 43F(2d)625. [b] See also 128Misc338, 218NYS678.

297-57 39F(2d)632. See also 39F(2d) 632. [b] (2) Lessor's claim for damages for failure to restore premises to original condition under agreement requiring such restoration held provable. 34F(2d)517.

297-58½-New. A claim of a landlord based on the tenant's failure to pay the rent under a lease is a fixed liability for damages provable in bankruptcy, where the lease was terminated by the tenant's surrender. 32F(2d)304.

297-59 [c] **Claim for preference is provable in bankruptcy** against creditor's estate. 6F(2d)92. [d] **Proceeding in bankruptcy, after disaffirmance** of contract for fraud, to recover money paid thereunder is on open account or on express or implied contract. Mass 168 NE174(2dcase).

297-60 [a] **Foreclosure of mortgage on default after bankruptcy** is held unnecessary and mortgagee is not entitled to attorney's fee therefor. 21F(2d)965.

297-61 32F(2d)147; 39F(2d)489; 116 Tex214, 288SW435. [e] **Rights of surety to prove claim against bankrupt principal** are unaffected by special judgment on bonds filed nunc pro tunc. 260 Mass184, 157NE44.

298-62 32F(2d)147; TexCivA 30SW (2d)360. [b] See also 263Mass57, 160 NE437. [f] **Receiver of corporation** is entitled to allowance of note claims against bankrupt corporation for money loaned. 10F(2d)351. [g] **Where note contains provision for attorney's fee,** and where no action was taken on note before filing petition, attorney's fee is not proper claim. 34F(2d)334.

298-63½-New. A creditor procuring annulment of a fraudulent conveyance is not entitled to be subrogated to the position of mortgagee nor entitled to secure a claim. 12F(2d)981.

298-63⅓-New. Where the holder of a note made the bankrupt its agent to sell property held as security and to apply the proceeds on the note, and the bankrupt sold the property for sufficient to pay the note, but retained the proceeds, the note cannot be proved against the estate. 18F(2d)363.

298-64 17F(2d)38; 219Ala42, 121S37 (if originating prior to bankruptcy); 116Tex214, 288SW435. [e] (1) Contra Alta [1925] 3DomLR377, [1925] 2 WestWkly415.

299-65 Contra TexCivA 30SW(2d)360. [c] **In Alberta the rule is contra.**-Alta [1925] 3DomLR377, [1925] 2WestWkly 415.

299-67½-New. A contract to indemnify the surety on a bond against liability gives the right to prove a claim in bankruptcy. 19F(2d)95.

299-67⅓-New. Under a contract of indemnity against liability of the surety with agreement to furnish funds to meet the liability before payment, the surety is held entitled to prove damages for breach. 17F(2d)38.

299-67¼-New. An indemnity company, guaranteeing bonds issued by a bankrupt trust company, has a provable claim under its indemnity contract where its liability has become fixed at the time of the bankruptcy. 35F(2d) 531.

299-69 13F(2d)147; 15F(2d)1006; 34 F(2d)310. [d] **Guaranteed bonds not in default.**-35F(2d)531. [c] **Not provable where note not matured prior to adjudication.**-40F(2d)17.

299-70½-New. Installments due from the principal at the time the petition of guarantor is filed are provable, 22 F(2d)557.

299-70⅓-New. but installments falling due thereafter are not provable. 22 F(2d)557.

299-71½-New. A claim for money loaned to a sole stockholder of a bankrupt corporation is provable only where it is the debt of the corporation, 22 F(2d)480.

299-71⅓-New. as where a loan is made to such stockholder as promoter, before the organization of the corporation, pursuant to the terms of composition in bankruptcy proceedings against the stockholder, under which such corporation was to be formed to take over the assets. 22F(2d)480.

299-72 34F(2d)183 (where corporation takes over partnership business, assuming its debts).

299-74 [f] **Appeal from judgment** does not render it nonprovable. 14F(2d)675.

300-76 267US467, 45SCt357, 69Led 739, 37ALR1440; TexCivA 297SW918. [a] (3) Judgment for personal injuries caused by negligence. 267US467, 45SCt357, 69Led739, 37ALR1440.

300-76½-New. **Confession of judgment for unmatured installments** guaranteed by bankrupt which do not fall due until after the petition is filed does not make them provable claims. 22F(2d) 557.

300-79 12F(2d)938.

300-80 NJSup 150A232(1stcase); 155 Tenn296, 291SW835, 836 [citCJ]. But see 27F(2d)159; 39F(2d)632. [d] **Trustee is bound only by provable debts** reduced to judgment after filing of petition in bankruptcy, when not made party to suit nor directed to defend it. 27F(2d)159. [e] **Trustee is not bound** by money judgment against bankrupt pending bankruptcy, when he is not party to suit nor directed by bankruptcy court to defend it. 27F(2d)159.

300-83 27F(2d)159.

301-85 [e] **Assignee for creditors** is allowed compensation where he was diligent in selling assets. 38F(2d)100. [f] **Auctioneer's charge** for conducting sale for assignee for creditors allowed. 38 F(2d)100. [g] **Attorney for assignee for creditors** allowed fee. 38F(2d)100.

301-86½-New. Receivers appointed by the state court are not entitled to compensation for operating an insolvent company where they received salary as employees during receivership. 15F(2d) 58.

301-89 [a] **Trustee may offset** deposit by bankrupts to guarantee lease. 7 F(2d)322.

301-90 32F(2d)304 (bankruptcy of tenant automatically annulled lease and tenant's liability became fixed).

301-92½-New. A claim rising out of an anticipatory breach of a lease due to bankruptcy proceedings is provable. 5 F(2d)106; 24F(2d)481.

301-92⅓-New. Rent due by bankrupt before adjudication is provable as a general claim. 24F(2d)481.

301-92¼-New. Landlord under lease containing acceleration clause held to have provable claim for rent for whole unexpired term. 39F(2d)18.

301-92⅕-New. Sublessee's claim for increased rent under new lease from owner is provable where original lease was breached by lessee's bankruptcy. 41F(2d)237.

302-96 4F(2d)806 (bankrupt acting as receiver under appointment of state court held entitled to allowance for services before filing of petition).

302-97½-New. Creditor's committee appointed to aid business is not entitled to prove claim for services as assignee. 23F(2d)110.

302-98 2F(2d)822.

302-1 [a] (2) Attorney's fees were denied for services in unsuccessful attempt to have special partners declared general partners. 4F(2d)814.

302-2½-New. Claim for services after filing of petition is not provable. 10F (2d)790.

302-3 See also 24F(2d)780.

303-5 [a] (2) Only reasonable value of attorney's services prior to filing of bankruptcy petition is provable regardless of stipulation in note. 40F(2d) 21. [c] **Court not required to accept stipulation** of parties but may pass on reasonableness of the services. 2F(2d) 822. [d] **Provision in mortgage for attorney's fees** included fees for services necessary to protect mortgagee's rights in bankruptcy proceedings. 2F(2d) 822.

303-5½-New. The construction of a mortgage contract affecting the bankrupt's property, in which there was provision for attorney's fees on foreclosure, presents a question of local law. 278US149, 49SCt84, 73Led236.

303-5⅓-New. In a bankruptcy proceeding, the validity of a lien for attorney's fees claimed by the mortgagee of the property of a bankrupt, after foreclosure, must be determined by the law of the state where the contract was made, and where the real estate involved was situated. 278US149, 49SCt 84, 73Led236 (considerations affecting allowance of attorney's fees).

303-6 See also MoA 78SW(2d)484. [j] **Tennessee Bulk Sales Act** is held not to preclude seller not complying with act from proving claim for price against estate of purchaser in bankruptcy. 23 F(2d)491. [k] **Judgment recovered by state as penalty** for law violation is not provable, except as to costs and disbursements. 138Misc241, 245NYS 442.

304-12 33F(2d)987. [e] **Obligation to support not provable debt.**-13PaDistCo 673.

304-16 33F(2d)987 (express agreement to pay for services).

305-24 Va 155SE707.

305-25 8F(2d)96.

306-30 19F(2d)426; 128Misc338, 218 NYS678. [b] (2) Liability on guaranty of installments not due at time petition is filed is contingent liability and not provable, 22F(2d)557.

306-31½-New. Where one is contingently liable to a creditor of a bankrupt on account of the creditor's claim, he can prove such contingent claim against the bankrupt's estate only on failure of the creditor to prove it. 51 ND66, 199NW138.

306-31⅓-New. If such claim is proved either by a creditor or a person contingently liable and the latter pays the claim to the creditor, he becomes subrogated to the rights of the creditor in the bankrupt's estate. 51ND66, 199 NW138.

306-32 [a] **Statutory liability of director of corporation** for misappropriating corporate funds resulting in loss to creditors is provable in bankruptcy proceeding against director. 12F(2d) 941.

306-34½-New. The bankruptcy court has authority to determine the question of the legality and amount of a tax imposed against a bankrupt by the state taxing authorities. 26F(2d)716.

307-35½-New. Taxes are provable claims. 16F(2d)233; 16F(2d)779.

307-35⅓-New. **Taxes against exempt property** need not be paid by trustee. 23F(2d)90.

307-35¼-New. County treasurer can collect taxes due on bankrupt's realty with interest. 41F(2d)228.

307-37 41F(2d)228.

307-43 37F(2d)482. [c] **New promise after adjudication** does not render debt

provable. 221MoA1051, 295SW520.

307-44½-New. As respects limitations, proof of debt in bankruptcy can be regarded as equitable proceeding only where purely equitable title or right of action is involved. 37F(2d)482.

307-49 [a] (2) Attorney's claim improperly including uncertain sum not provable must be liquidated before being proved. 10F(2d)790.

308-50 [a] **Under Bankruptcy Act § 63a(1)** unliquidated claims are provable. 32F(2d)304.

308-52 21F(2d)589 (before referee). [a] **Unliquidated claim rising out of anticipatory breach of lease** may be liquidated by bankruptcy court. 5F(2d)106. [b] **Time for liquidation.**-36F(2d)595.

308-53 21F(2d)589 (referee).

308-54 263Mass57, 160NE437.

308-58 35GaA339, 132SE925; Mass 168NE174(2dcase).

308-61 [a] (2) Director of corporation hired for ten years under valid employment contract may prove claim for present worth of future payments less present earnings. 22F(2d)558. [f] **Damages for failure of bankrupt to deliver under sales contract** as based on difference between contract price for quantity remaining undelivered under first contract and market price of equivalent amount at point of origin. 32F(2d)825.

308-62 See also 32F(2d)147.

309-68 [a] **Preliminary valuation held not payment.**-Alta [1925] 3DomLR744, [1925] 2WestWkly586 [disappr BC [1924] 1WestWkly92.

309-69 8F(2d)757.

309-70 [c] **Attorney's services are presumed not necessary** for mortgagee proving debt in bankruptcy proceedings. 21F(2d)434.

309-71 8F(2d)757; 13F(2d)887 (dictum); 16F(2d)845; 41F(2d)856; 250 Mich221, 229NW503; 95PaSuper29; TexCivA 289SW417. [f] **Rents and profits.**-2F(2d)822. [g] **Expense of proceeding in state court** is chargeable against mortgaged property, and not against general fund. 2F(2d)822. [h] **Mortgagee's right to interest and attorney's fees.**-21F(2d)434.

309-71½-New. Mortgagees of property held by bankrupt and wife as tenants by entireties held "secured creditors" within the Bankruptcy Act. 33F(2d)223.

309-74 [a] **Where bankrupt trust company guaranteed bonds secured by realty,** though its liability was secondary, bondholder can prove claim in full, regardless of security, till satisfaction is had from some source. 35F(2d)531.

309-75 [d] **Corporate contract to pay excessive interest** should not be disturbed in absence of fraud or duress. 22F(2d)920.

310-76 34F(2d)127 (secured claim). [c] **Interest on unsecured claim** ordinarily stops at time petition is filed. 34F(2d)127.

310-77 15F(2d)206. But see 34F(2d)127; 318 Ill 105, 148NE849, 41ALR560.

310-80 See also 24F(2d)780.

310-80½-New. Interest on a secured claim stops at the time the petition in bankruptcy is filed. 34F(2d)127.

310-81½-New. Where a creditor inadvertently omitted from schedules continues to give credit to bankrupt, a payment to him should first be credited on indebtedness arising after adjudication. 19F(2d)791.

310-81⅓-New. Wage payments made during the three months' period prior to bankruptcy are properly credited against the total indebtedness due each claimant and not against his accrued wages for the current period. 32F(2d)805.

310-85 13F(2d)895. [b] (4) Balance in regular bank account may be set off and claim proved for balance. 43F(2d)748. [j] **Running account** between bankrupt and creditor held to make case of preferences followed by good-faith extensions of further credit, calling for set-off of amount of such new credit in reduction of preferential payments. 29F(2d)643.

311-88½-New. Imputation of payments where debts of unequal rank. 13F(2d)895.

311-88⅓-New. A member's claim against a bankrupt association is not decreased by the amounts paid over by an association two years before the bankruptcy. 22F(2d)725.

312-95 [d] **Proof of claim** is assertion of debt in court, which may be defended, and results in binding judgment. 9F(2d)683. [e] **United States,** like other creditors, must file claim for taxes. 7F(2d)777.

312-96 23F(2d)398. [a] (3) Government is not obliged to file claim for taxes. 17F(2d)998. (4) Formal proof of taxes not required. 36F(2d)218. [d] **Lien depending on possession** may be waived and lienor given right as general creditor. 9F(2d)299. [e] **Burden of proof** is on trustee to show that assets burdened with tax lien are not in his hands. 9F(2d)683. [f] **Waiver not implied** by mere surrender of property to receiver. 9F(2d)299.

312-96½-New. Proof of claim, reciting that partners, individually and as copartners, were liable, held primarily a claim against the partnership estate. 17F(2d)706.

312-97 14F(2d)385; 43F(2d)446. But see 39F(2d)972. [i] 8F(2d)424; 27F(2d)850. [k] **Claim of United States for taxes** is not within rule. 18F(2d)409. [l] **Provision that claims shall not be proved** subsequent to six months after adjudication is mandatory. 31F(2d)314. [m] **Bankruptcy Act § 57(n),** giving right to prove claims within six months after adjudication, deals only with proof where bankrupt estate actually exists. 32F(2d)676.

312-98 43F(2d)446. But see 21F(2d)253.

313-99 38F(2d)887(1stcase); 43F(2d)446.

313-1½-New. Orders barring claims from participation are never enforced where full distribution has not been made, unless injustice would otherwise be done. 33F(2d)1004. [a] **Under Bankruptcy Act amendment** providing for six-months' period of limitation, shorter period applies only to proceedings unadjudicated prior to effective date of amendment. 33F(2d)875.

313-1⅓-New. Claims held not barred before completion of distribution merely because of failure to file proof within the time fixed by court order. 33F(2d)1004.

313-2 See also 32F(2d)336; 32F(2d)676.

313-5 36F(2d)779(2dcase).

313-6 28F(2d)975 (reasonable time). [j] **Mortgagee's claims** against bankrupt mortgagor are secured, unliquidated claims, but are liquidated by judgment confirming foreclosure sale. 31F(2d)609. [k] **Creditor may file claim** unliquidated at time of adjudication within sixty days after final judgment liquidating the claim, subsequent to expiration of six months' period. 31F(2d)609.

315-11 43F(2d)435.

315-15 [c] **Finality of valuation by creditor.**-Alta [1925] 3DomLR744, [1925] 2WestWkly586. [d] **Valuation held not payment.**-Alta [1925] 3DomLR744, [1925] 2WestWkly586. [e] **Mortgagees of property held by bankrupt and wife** as tenants by entireties held "secured creditors" within Bankruptcy Act. 33F(2d)223.

316-19 2F(2d)785 (objection to sale on ground of lien not proof of claim as required under statute).

316-21 2F(2d)785 (nothing to amend where formal proof under statute was not made).

316-22½-New. A claim against a bankrupt's estate is governed by practice in equity cases, subject to bankruptcy statutes. 19F(2d)350.

316-30 9F(2d)883.

316-30½-New. A claim filed against a bankrupt partnership by a partnership creditor is not, and cannot be treated as, a claim filed against the estate of any individual partner. 31F(2d)314.

316-31 [a] **Alta** [1930] 3DomLR990. [b] **Failure to do so does not invalidate claim.**-43F(2d)435.

316-34 31F(2d)314; 43F(2d)435 (within discretion of referee). [a] 2F(2d)785.

316-36 See also 26F(2d)751. [f] **Discretion of court.**-Allowance of amendment addresses itself largely to discretion of court, provided there is sufficient basis for amendment. 21F(2d)182.

317-37 [b] (2) Other instances. 39F(2d)632.

317-38½-New. Conversely, where security of one filing claim as secured creditor is set aside as preferential, he may under some circumstances amend his proof of claim so as to claim as unsecured creditor. 15F(2d)153.

317-39 17F(2d)706; 20F(2d)84. But see 25F(2d)168.

317-40 15F(2d)153; 17F(2d)706; 20F(2d)84; 21F(2d)182; 26F(2d)751. [c] **Evidence has been held sufficient** to justify permission to claimant to file amended claim after expiration of six months from adjudication in bankruptcy. 37F(2d)227.

317-41 21F(2d)182. See also 26F(2d)751.

317-42 21F(2d)182 (involuntary petition setting up claim is amendable into formal claim after expiration of one year).

317-43 31F(2d)314; 35F(2d)966.

318-49 41F(2d)8. [b] **Filing objections** is proper procedure to contest claim for taxes. 7F(2d)777.

318-51½-New. The bankrupt is not a party legally interested in the distribution of his estate, who may contest the allowance of claims. But see 24F(2d)289.

318-56½-New. The trustee of a bankrupt corporation may attack the corporation's mortgage on the ground of lack of consideration and as a violation of the New York Stock Corporation Law, if no adverse claim is asserted. 26F(2d)937.

318-59 36F(2d)979.

318-59½-New. Judgment entered by default by probate judge after timely oral answers by defendant not entered in the docket is premature and void and not enforceable against estate in bankruptcy. 36F(2d)979.

318-59⅓-New. Statutes relative to relief from default judgments do not apply where bankrupt resists allowance of such judgment as claims because of their premature entry. 36F(2d)979.

319-63½-New. Estoppel need not be specially pleaded. 19F(2d)350.

319-67½-New. Filing by city of verified claim for taxes held prima facie proof of claim. 16F(2d)301.

319-68 22F(2d)419; 29F(2d)737; 39F(2d)632.

319-69 7F(2d)228; 22F(2d)230.

319-71 20F(2d)330.

320-73½-New. Taxpayer's trustee in bankruptcy had the burden to show a right to deduction for stock loss. 34F(2d)677.

320-75½-New. Where a bankrupt bought merchandise from claimant, the latter had the burden to show that his check to the bankrupt was payment for the bankrupt's advances. 33F(2d)122(1stcase).

320-84½-New. On the issue of damages in liquidation of a claim before a referee, the estimate of the cost of completing the building contracted to be built by the bankrupt is evidence of the fair market value of the completed work. 21F(2d)589.

320-84⅓-New. Evidence tending to discharge, rather than collaterally attack, judgment on which the claim is based is admissible. 24F(2d)289.

320-84¼-New. A referee's exclusion of the report of acts of bankruptcy by a special master, who took proofs on an involuntary petition against the corporation, when offered as evidence of fraud in a transaction with claimant's deceased husband, has been held properly approved by the court. 28F(2d)762.

320-86 36F(2d)979. [a] 16F(2d)301; 22F(2d)419; 22F(2d)558 (validity of employment contract between director and bankrupt corporation); 23F(2d)7 (money lent to bankrupt corporation, not its treasurer); 23F(2d)250 (to disallow claim because consideration was compounding felony); 23F(2d)586; 24

F(2d)289; 31F(2d)896; 32F(2d)147; [1930] 4DomLR1026(1stcase). [b] 15 F(2d)560; 17F(2d)128; 22F(2d)419; 24F(2d)909; 32F(2d)176; 32F(2d)825; 38F(2d)73.

320-87 13F(2d)86; 13F(2d)90. [a] **Evidence held insufficient to show fraud** against creditors or stockholders in sale of notes secured by bonds of bankrupt corporation, which purchaser had attempted to reorganize. 32F(2d)147.

321-2 [a] 20F(2d)330; 31F(2d)896.

321-10 [b] **Finding that subscription was voluntary contribution** has been held sustained by evidence. 28F(2d) 514.

321-12½-New. that landlord abandoned distress warrant; 38F(2d)523.

321-13½-New. Government's claim for income tax on theory that patents bought were worthless and represented no invested capital has been held unsupported by evidence. 7F(2d)777.

321-13¼-New. Evidence held sufficient to show that chattel mortgagee purchased bankrupt's fixtures subject to its mortgage. 19F(2d)517.

321-13¼-New. Evidence held sufficient to show that notes in bankrupt's name were not genuine. 22F(2d)230.

321-13½-New. Such conflict between the testimony of bankrupt and others, as to weaken her credibility, relative to the genuineness of signatures, is held not to exist. 22F(2d)230.

321-13¼-New. That the bankrupts had never refused to sign notes for another is insufficient to affect the determination of the genuineness of their signatures. 22F(2d)230.

321-13½-New. Formal proof of a claim filed against a bankrupt estate constitutes a prima facie showing of its validity. 31F(2d)896.

321-13⅛-New. The conclusion of a referee that delivery of bonds by a bankrupt corporation to the mortgagee who had canceled the mortgage securing the bankrupt's obligation to return collaterals loaned by him was issuance thereof as security for a preëxisting unsecured debt was unwarranted. 26 F(2d)961.

321-13⅙-New. In order to make out a prima facie case where a relative is claiming in a bankrupt's estate, there should be some corroborative evidence. **Alta** [1930] 3DomLR990.

321-14 See also 21F(2d)317.

321-17½-New. In passing on a claim the referee is required to go into question of transfers to claimant in fraud of creditors if it is raised. 15F(2d)113.

322-26 9F(2d)883 (only where proof of claim conforms with act is it entitled to allowance).

322-32 See also 21F(2d)317.

322-34 See also 36F(2d)218.

322-35 21F(2d)317.

322-38½-New. A claimant presenting a claim and appearing submits to the jurisdiction of the referee. 18F(2d)591.

322-38⅓-New. The referee has full authority to inquire into defenses of claims based upon preferences or transfers. 5 F(2d)37.

322-38¼-New. A claimant consents to the jurisdiction of the court to decide any defenses that may be lawfully interposed, by presenting proof of the claim. 5F(2d)37.

322-38⅕-New. The referee has jurisdiction to determine the question of preference to a creditor whose proof of claim has been objected to by the trustee in bankruptcy. 5F(2d)37.

322-38⅙-New. Claim of priority requires determination of mortgagee's right to lien. 9F(2d)299 (notwithstanding surrender of possession).

322-38½-New. Limitation for enforcing judgment is held inapplicable on allowance in bankruptcy of claim based on state judgment. 21F(2d)881.

322-38⅛-New. Claimant has the burden of tracing assets transferred to a bankrupt into the hands of the trustee. 32F(2d)189.

322-38⅙-New. Claimant by presenting proof of debt consents to jurisdiction of court to decide any defense lawfully interposed. 40F(2d)353.

322-38 1/10-New. Whether bankrupt's property in hands of bankruptcy court has been properly valued for taxation is matter for determination of bankruptcy court as involving amount of tax to be paid. 43F(2d)670.

322-38 1/11-New. Bankruptcy court in determining such question is not concluded by findings of municipal and county taxing authorities. 43F(2d)670.

322-39 21F(2d)317.

322-40 [c] **Judgment as conclusive.**-27 F(2d)159.

323-41 318 Ill 105, 148NE849, 41ALR 560.

323-42 [b] **Allowance of claim specifically showing set-off** is res adjudicata of right of set-off unless referee demands reconsideration of claim. 43 F(2d)748.

323-43 41 Ida679, 241P609.

323-43½-New. A plea in an action on a claim that sets up that plaintiff proved claims in bankruptcy and accepted dividends thereon is insufficient where it does not show that the claim in suit was included. 214AppDiv793, 210NYS 521.

323-44 43F(2d)748.

323-48½-New. Where a referee disallows a claims proved by one claiming to be a creditor, claimant may not proceed to enforce his claim in a state court so long as such decision remains unreversed. 18F(2d)591.

323-48⅓-New. A state statute of limitations ceases to operate after allowance in bankruptcy of a claim based on state judgment. 21F(2d)881.

323-48¼-New. Allowance of claim is determination of right to share in fund. 23F(2d)107.

323-48⅕-New. but is not a determination of the personal liability of the bankrupt. 23F(2d)107.

323-48⅙-New. nor an estoppel of a trustee or other creditors from thereafter denying the validity of the claim. 23F(2d)107.

323-48½-New. Disallowance of a claim of a receiver is a conclusive determination binding on the surety on an attachment bond. 36F(2d)468.

323-49 9F(2d)683 (judgment may be reopened for cause); 15F(2d)845; 23 F(2d)491. [c] **Statute held merely procedural** and not to authorize allowance of claims on equitable grounds. 22 F(2d)480.

323-53½-New. A claim based on an assigned note may be disallowed, where the same note was the basis of a previously allowed claim, and assignment is not made prior to bankruptcy and consideration is not shown. 22F(2d) 104.

323-53⅓-New. A bankruptcy court can reconsider an allowed claim based on a note, which was also the basis of a previously allowed claim. 22F(2d)104.

323-53¼-New. A trustee, having secured an order fixing a tax, is not entitled after expiration of nearly a year to open such matter and require the government to pay back part of the amount paid, in the absence of an allegation of fraud, accident, or mistake. 28F(2d)253.

323-53⅕-New. Where allowed claim disclosed mutual set-off, referee should determine creditor's right to set-off on reconsideration of claim before suing to recover set-off. 43F(2d)748.

323-54 13F(2d)1004. [b] **Not estopped by payment of dividend on claim.**-40 F(2d)17. [c] **Debtors of bankrupt** cannot, even indirectly, prosecute motion to reconsider and strike out claim previously proven without objection. 42 F(2d)45.

323-55 13F(2d)1004.

323-56 13F(2d)1004.

323-56½-New. Claimant in a bankruptcy proceeding cannot complain because the proceeding to set aside the allowance of a claim was not brought by a trustee in bankruptcy. 22F(2d) 104.

323-57 22F(2d)104.

324-58 [b] **Trustee and creditors have been held estopped** to contest allowance of claim after one year. 21F(2d)936.

324-59 But see 15F(2d)206; 33F(2d) 79.

324-60 42F(2d)45. [a] **Delay held not to constitute laches.**-43F(2d)748.

325-72½-New. But the obligation of the bank continues until the relation is concluded. 43 Ida214, 250P648, 50 ALR1418.

325-73 16F(2d)301; 32F(2d)654; 39 F(2d)632.

325-81 23F(2d)398; 28F(2d)521; 36 F(2d)218.

325-83½-New. Presumption is that bankrupt's chattels, which referee ordered released from state court attachment, were surrendered to trustees. 39 F(2d)632.

325-85 22F(2d)230; 22F(2d)805 (disallowance of claim on conflicting evidence); 39F(2d)632.

326-90 22F(2d)611, 613 [citCJ].

326-91½-New. Creditor's claim to preference is not defeated because of taking note evidencing plurality of debts, some of which were entitled to preference. 19F(2d)275.

326-91⅓-New. On petition for review, it will be accepted that the witness would have answered in accordance with avowal, if allowed to answer proper question. 22F(2d)230.

326-91¼-New. Referee's rejection of amended claim on merits precluded trustees from raising question whether it was filed too late. 39F(2d)632.

326-92 28F(2d)526; 28F(2d)981; 38 F(2d)523. [c] **State law held largely to govern priorities.**-203 Iowa654, 213 NW422. [d] **Status of creditors fixed** when petition is filed. 21F(2d)977.

326-93 15F(2d)153; 50RI506, 149A 609. [a] 8F(2d)522; 26F(2d)795; 29 F(2d)235. [b] **Wife's unrecorded claim** for use of paraphernal funds is such that wife should be recognized as general creditor. 31F(2d)795.

326-94½-New. Rights of preferred stockholders in corporate assets are subject to all debts of corporation including general creditors. 9F(2d)492.

326-94⅓-New. A creditor may contract to give an ordinary creditor preference. 9F(2d)492 (finding that claimant was creditor junior to general creditors does not mean that former is stockholder).

326-94¼-New. Instrument having attribute of preferred stock is construed as such unless the contrary clearly appears. 9F(2d)492.

326-94⅕-New. Certificate issued by a corporation held to give the holder the status of a stockholder. 9F(2d)492.

326-94⅙-New. Articles of incorporation are competent to prove the meaning and legal effect of certificate issued thereunder. 9F(2d)492.

326-94½-New. Claims of innocent creditors of a bankrupt corporation are preferred over those of a stockholder deceived by officers of the corporation. 13F(2d)90.

326-94⅓-New. A provision giving priority to claims of the workmen's compensation board held valid. **Ont** [1927] 3DomLR802.

326-94⅙-New. In Quebec, a receiving order or authorized assignment takes priority over a judicial hypothec. **Que** [1928] 1DomLR945.

326-94 1/10-New. Customers of a stockbroker, leaving securities for safe-keeping or delivering them for sale or on the express understanding that they were not to be repledged, have, on the broker's bankruptcy, equities superior to those whose securities were rightfully rehypothecated. 29F(2d)593.

326-94 1/11-New. Transaction whereby stockholders were charged with sum on corporation's books to bolster up financial status held not to affect bona fide innocent creditors so as to make them participate with stockholders in latter's claim for sum so charged. 40F(2d)298 (general creditors required to be paid in full).

326-95 37F(2d)499. [a] (4) Money paid to, but not used by bankrupt, for purchase of stock can be recovered, if traceable into specific fund or property. 5F(2d)143. (5) Owner of securities wrongfully pledged by bankrupt broker has preference over owner of those

pledged rightfully in trust fund realized. 20F(2d)591.

327-97½-New. Equitable assignment. 13F(2d)732.

327-97⅓-New. The holder of a draft dishonored by the drawee after transfer of credit from the drawer's account to drafts payable account held entitled to preferred claim against the drawer. 14F(2d)527.

327-97¼-New. Where the facts show no trust relationship as to claimant, of paid bank's trustee in bankruptcy, there can be no priority as to him. 275 US359, 48SCt167.

327-97⅕-New. Nor can there be such priority on the theory of subrogation where claimant cannot be held to be the equitable assignee of such funds. 275US359, 48SCt167.

327-99 31F(2d)416. [d] **Taxes do not have priority** (1) over mortgage with prior lien. 7F(2d)777. (2) Liens are not subordinate to taxes unless such taxes are themselves prior liens. 13 F(2d)667. [e] **Mortgagee is unsecured creditor** as to deficit between amount of debt secured and value of security. Mass 169NE667.

327-4½-New. Where a landlord had perfected a lien for rent before bankruptcy proceedings, he was entitled to a preferred claim. 34F(2d)594.

328-5 268US1, 45SCt386, 69Led817 (entitled to payment ahead of preferred claim for wages in absence of state or federal law subordinating taxes to such claim); 5F(2d)259; 5F(2d)509; 5 F(2d)511; 5F(2d)668; 18F(2d)409; 36F(2d)1003; 37F(2d)705; NS [1930] 4DomLR320; 57 OntL272, [1925] 3 DomLR809 (prior to claim of landlord); Ont [1927] 2DomLR359. [g] **Tax claim against partnership whose assets taken over by corporation** has priority over other debts of bankrupt corporation. 9F(2d)683. [h] **Rights of holder of specific lien** are not affected by statute giving priority to taxes due United States. 18F(2d)658. [i] **Rent owing prior to bankruptcy** is general claim subject to priority given to taxes owing to United States. 18F(2d)658.

328-5½-New. Under Rev. St. § 3466 the provision applies only to assets in bankruptcy, and the priority referred to therein does not come into existence until adjudication. 18F(2d)658.

328-6 [d] Mechanic's lien held not subordinate to later assessed federal income tax. 13F(2d)667. [e] **Priority of record held controlling.**-Lien for taxes due United States, notice of which was filed prior to recording of trust deed, is prior to lien of trust deed. 24F(2d) 156.

328-7 But see 36F(2d)1003. [a] **In Iowa.**-9F(2d)477.

328-8½-New. Priority of claim of landlord over claim of crown for taxes in Alberta see Alta [1925] 3DomLR154, [1925] 2WestWkly68.

328-8¼-New. In Ontario the crown is entitled to rank for arrears of a sales tax in priority to other creditors. 61 OntL434, [1928] 1DomLR383 (statute not affecting priority).

328-8¼-New. Priority of payment of tax is available only to municipality, state, or United States. 39F(2d)239.

328-8⅕-New. Purchaser of land sold for taxes is subrogated to municipality's right to priority of payment. 39 F(2d)239.

328-9 18F(2d)731 (franchise taxes). [a] **Taxes, made a lien by state law,** have priority over claims for wages. 20F(2d)663. [b] **Federal income tax.**-43F(2d)997.

329-10 29F(2d)738.

329-11 32F(2d)825 (tax not accruing till after state receivership).

329-14 38F(2d)786.

329-19 [b] **State's claim for license tax** against corporation whose assets were fraudulently taken over by bankrupt are not allowable as claim for taxes. 42F(2d)120.

329-21½-New. Bankruptcy court is not concluded by finding of taxing authorities in matter of validity of tax. 14F (2d)323.

329-21⅓-New. The bankrupt's fraudulent valuation in reports to the taxing authorities prior to bankruptcy is not binding as the basis of a tax claim. 12 PortoRicoFed424; 12PortoRicoFed426.

329-23 5F(2d)259. But see 5F(2d)553. [c] (2) Holders of mortgages paying taxes and water rents are not entitled to recover amount from trustee. 39F (2d)239. [d] **State court in action for taxes** has no power to subrogate person paying taxes to rights of state so as to give right of priority. 5F(2d)259. [e] **One who pays taxes** at request of bankrupt is entitled to file claim as general creditor. 5F(2d)259.

329-23½-New. Neither referee, purchasers, nor holders of mortgages are subrogated to rights of municipality, state or United States by payment of taxes. 39F(2d)239.

330-24 57 OntL272, [1925] 3DomLR 809. [a] **Statute giving priority to taxes over all claims except trustee's fees and expenses** establishes, in cases where fund exists out of which tax is payable, a waiver by crown of its rights in favor of trustee. 57 OntL272, [1925] 3DomLR809. [b] **Rest of property occupied by receiver and trustee** is payable before taxes due United States. 18F(2d)658.

330-24½-New. Under the Canadian Bankruptcy Act, the landlord is given priority to the extent of value of goods distrained, not exceeding three months' rent, over claim of the crown for income tax, except as to property on which the crown has a specific lien. Alta [1925] 3DomLR154, [1925] 2West Wkly68.

330-26 2F(2d)783 (insurance premium for period between general assignment and petition in bankruptcy declared preferred claim).

330-27 16F(2d)289; 25F(2d)518 (services and expenses of assignee for benefit of creditors).

330-28 23F(2d)110 (services of creditors' committee). [a] 2F(2d)783.

330-32 24F(2d)780 (determination is within discretion of court); 39F(2d) 931; NB [1927] 2DomLR363.

330-36 See also 27F(2d)444.

330-38 [c] **Priority over fees of trustee.**-57 OntL272, [1925] 3DomLR809. [d] **Trustee who takes over and sells property** for bankrupt is not entitled to take out his share first where property taken over is insufficient to satisfy landlord. NB [1927] 2DomLR242.

331-40½-New. Where expenses of administration exceed gross amount received in bankruptcy, amount paid to referee as indemnity should be returned to receiver. 39F(2d)931.

331-40⅓-New. Landlord's claim for rent accruing before filing of bankruptcy petition is not entitled to priority over costs of administration. 38F(2d) 523.

331-43 22F(2d)571 (liberally construed).

331-44 17F(2d)404. [d] **Liberal construction** must be placed upon provisions of Bankruptcy Act giving priority to claims for wages. 37F(2d)212.

331-46 31F(2d)750 (mining employees); 4HawaiiFed516. [d] **Sole test of priority** of claim for salary is nature of claimant's work. 32F(2d)264 [aff 32F(2d)265]. [e] **If foreman or superintendent does same kind of work as men under him,** his power to hire and discharge, it has been held, does not defeat priority of salary claim. 32 F(2d)264 [aff 32F(2d)265].

331-47½-New. sales manager, 8F(2d) 928.

331-48½-New. yard supervisor, 8F(2d) 928.

332-50 37F(2d)212. [b] 32F(2d)805. [e] (1) Man [1927] 1DomLR907, 8Can Bankr82, [1927] 1WestWkly131. [f] **Wages earned within three months of state receivership proceedings,** which ultimately resulted in bankruptcy, are preferred. 22F(2d)571.

332-51 8F(2d)928. [a] **Increased to six hundred dollars** by amendment of 1926, 22F(2d)571. [b] **State statute putting no limitation on amount** of wages preferred is controlled by limitation in Bankruptcy Act. 22F(2d)571.

332-52½-New. Amendment giving priority to wages over taxes applies to case pending in which no order of distribution has been made. 24F(2d)522.

332-60½-New. the foreman of pressmen doing no mechanical work, 32F(2d)264 [aff 32F(2d)265].

333-65½-New. An officer and stockholder of a bankrupt corporation, under no contract of employment, held not entitled to priority in a claim for salary. 34F(2d)138.

333-68 6F(2d)581; 13F(2d)955; 22F (2d)571 (liberally construed).

333-68½-New. Bankruptcy Act controls state laws as to priorities in case of conflict. 22F(2d)571.

333-71 18F(2d)409 (taxes); 7Alaska 97. [a] **Taxes due United States** have priority over claim for wages. 7F(2d) 512.

333-71½-New. The provision of the federal statute giving priority to debts due the United States in case of insolvency does not create a lien, and priority does not attach while the debtor continues to own the property and is in possession. 18F(2d)658.

333-71⅓-New. Law granting priority does not operate retroactively as to claims already filed. 25F(2d)642.

333-72½-New. The claim of the workmen's relief commission created by the legislature of Porto Rico is entitled to preference in such sum for premiums as may lawfully be claimed. 12PortoRico Fed426.

333-73 13F(2d)578. [e] **Law of state** where debt was incurred determines priority. 4F(2d)813. [f] **State law** determines status of bankruptcy estate after questions of title are settled. 20F (2d)663.

333-74 24F(2d)780; 26F(2d)455 (claim for liability of bank stockholder); 28F (2d)526.

333-74½-New. State statute giving particular claim priority is unavailing unless priority is also given by Bankruptcy Act. 9F(2d)207.

333-74⅓-New. In Oregon debt due state Industrial Fund is not entitled to priority. 9F(2d)207 (not "any person" within Bankruptcy Act).

333-80 4F(2d)813 (unpaid contributions of employers to accident fund under Oregon Workmen's Compensation Act); 6F(2d)581; 13F(2d)578; 13F(2d) 955; 19F(2d)275; 23F(2d)586 (conditional sales contract); 24F(2d)156 (trust deed); 26F(2d)472 (rent accrued); 34F(2d)594 (claim for rent); 42F(2d)120.

334-81 16F(2d)109.

334-82½-New. Crown in same position as any other creditor and loses right to preference by failing to appeal from denial of it. 59 OntL195, [1926] 3DomLR 333.

334-83 TexCivA 285SW852.

334-84 See Ont [1926] 4DomLR1029.

334-84½-New. Whether obligation resulting from purchase of deceased partner's interest is individual or a partnership obligation depends on the contract intent. 9F(2d)792.

334-84⅓-New. Where surviving partners contract for purchase of deceased partner's share, the obligation is individual and not a partnership obligation. 9F(2d)792.

335-87 21F(2d)301; TexCivA 285SW 852.

335-88 See also 21F(2d)301.

335-91 TexCivA 285SW852.

335-92 43F(2d)746. [e] **Parties.**-43F (2d)746.

336-93½-New. A trustee must exercise due diligence in distributing estate and is liable for loss resulting from his negligence. 17F(2d)404.

336-94 43F(2d)340. [a] **Money misappropriated** and recovered by trustee is fund for benefit of all creditors. 198 Cal652, 246P1049, 46ALR1156. [b] **Misappropriated money** recovered by trustee passes into custody of court, as in case of creditor's bill. 198Cal652, 246P1049, 46ALR1156. [c] **Creditors becoming such** after misappropriation are entitled to share in any recovery by trustee. 198Cal652, 246P1049, 46ALR 1156.

336-94½-New. A trustee must distribute the assets in accordance with the provisions of the Bankruptcy Law. 151 Va434, 145SE421.

336-97½-New. A claim based on the liability of a bankrupt as a stockholder in a corporation is entitled to share equally with claims based on individual liability. 19F(2d)318.

336-97⅓-New. Distribution of funds subject to lien is determined by the Bankruptcy Act, not by the state laws. 23F(2d)687.

336-97¼-New. Creditor to whom federal court sets over note payable to bankrupt is not bona fide holder for value, 87Colo 498, 289P599 (decree setting over note held not adjudication of validity and binding effect).

336-97⅙-New. but takes subject to defenses which maker had against bankrupt. 87Colo 498, 289P599 (failure of consideration).

336-97⅛-New. Benefits of bond for rent should, after payment of creditors, accrue to bankrupt's administrator as to rents accruing before bankrupt's death and to heirs as to rents thereafter accruing. 43F(2d)746.

337-21½-New. Under the Canadian Act it is held that direct action to recover back dividends erroneously paid is not maintainable, but remedy is by application to bankruptcy court. 59NS64, [1927] 1DomLR475, 8CanBankr56.

337-21½-New. A trustee in bankruptcy, having on his own motion secured an order fixing the amount of tax payable, cannot, after nearly a year, require repayment of a part in the absence of fraud, accident, or mistake. 25F(2d)168.

337-24 37GaA245, 139SE578; 250NY370, 165NE814 (nondischargeable debt); 47RI25, 129A611; 147Wash497, 266P688.

337-25 217Ala399, 116S420; 250Mich652, 231NW65 (surety on note); MoA31SW(2d)86; 222AppDiv40, 225NYS394; 51ND66, 199NW138; Pa 138A80; 47RI25, 129A611; 152Wash205, 277P447. [g] **Proving claim against estate of assignee of lease** and receipt of part of rent from assignee's trustee does not release liability of lessee for rent under express covenant. TexCivA 275SW855.

338-26 37GaA245, 139SE578.

338-27 154SC48, 151SE109; TexCivA58SW(2d)1015 (no waiver or estoppel). But see 250Mich221, 229NW503.

338-31 But see 250Mich221, 229NW503.

339-39½-New. A state court in a trustee's suit against the purchaser of bankrupt's assets at foreclosure cannot consider defendant's claims filed in the bankruptcy court for taxes paid and payments on the mortgage. 83Colo242, 263P719.

339-39½-New. The filing of a claim in bankruptcy based on a purchased obligation precludes rescission of the purchase. 221MoA814, 288SW95.

339-39¼-New. **A claim withdrawn** by permission of the court is the same as if it never had been presented. 152Wash211, 277P843.

339-41½-New. The return day under notice to creditors of a hearing on a trustee's final report and account should be at least fifteen days after the filing of such report. 18F(2d)366.

339-42 See also 4HawaiiFed460.

339-45½-New. Interest is not chargeable in view of an agreement to waive commissions approved by the majority of creditors. 2F(2d)778.

339-45⅓-New. A trustee is bound to exercise due diligence in the administration of the estate and is chargeable with loss due to his negligence. 17F(2d)404.

340-54 See also 36GaA396, 137SE85.

340-56 [a] **Bank is in "contemplation of insolvency"** where approaching inability to meet obligations is reasonably apparent. 7F(2d)685. [b] **The surety is chargeable with interest** on defalcation only from time principal was cited for contempt. 44F(2d)62.

340-56½-New. False rent claim by receiver and trustee is within surety bond. 44F(2d)62.

340-56⅓-New. Amount expended to audit account as result of failure to perform official duties was within surety bond. 44F(2d)62.

340-56¼-New. Receiver's and trustee's failure to restore commissions when ordered was a breach of duty within conditions of bond. 44F(2d)62.

340-66 TexCivA 286SW633.

340-67 86PaSuper15; TexCivA 286SW633.

340-68 23F(2d)428. [a] 23F(2d)428.

341-69 23F(2d)428.

341-70 [a] TexCivA 286SW633.

341-73 [a] **After closing of estate** and discharge of trustee, he cannot by summary order be required to pay claims. 4F(2d)895.

341-75 23F(2d)428 (order may be made ex parte); 24F(2d)473.

341-77 30F(2d)814.

341-78½-New. A reasonable time to prove claims may be granted on reopening an estate after the discovery of assets. 30F(2d)814.

341-79 273US380, 47SCt372, 71Led692; 26F(2d)146. [b] **Partnership may offer terms** of composition to partnership creditors alone. 276US215, 48SCt252, 72Led536. [c] **Object of composition** is to get business back into control of business managers. 23F(2d)7.

341-80 250Mich495, 231NW71. [c] **Sufficient examination** must be had, but examination need not necessarily be completed. 15F(2d)131.

341-82 273US380, 47SCt372, 71Led692; 39F(2d)765.

342-86 228AppDiv2, 238NYS485. See also 226AppDiv274, 235NYS105.

342-89½-New. The holder of a bankrupt's note indorsed by accommodation parties who signed composition taking new notes from each of accommodation indorsers for half of balance due is not fraud on the creditors. 216AppDiv120, 214NYS715.

342-89⅓-New. Such notes are supported by sufficient consideration since the holder surrendered joint and several liability of indorsers on the original note for individual liability on new notes. 216AppDiv120, 214NYS715.

342-89¼-New. A creditor lending money to a debtor to pay other debtors, in accordance with composition in bankruptcy theretofore agreed to, held not guilty of fraud or collusion to the injury of other creditors, although preexisting indebtedness was included in a note given therefor. 135SC298, 133SE545.

342-89⅕-New. A composition offering twenty per cent in cash opposed by less than two per cent of creditors in number and ten per cent in amount held not unfair. 20F(2d)370.

342-89⅙-New. In what cases a contingent fund to pay unscheduled claims should be required must be left to the sound discretion of the referee, whose demand will be disapproved only when unreasonableness is manifest. 30F(2d)819.

342-89⅐-New. A six-hundred-dollar contingent fund, required by the referee to pay unscheduled claims of creditors who were entitled to share in the bankrupt's proposed composition for little over sixty thousand dollars, has been held not so unreasonably large as to justify setting aside the requirement. 30F(2d)819.

342-89⅛-New. Bond given to secure performance of composition offer by bankrupt contemplates as prerequisite to liability thereon, making of formal offer, although in same terms as previously proposed. Mass 169NE671.

342-89⅛-New. Composition offered is not complete unless offer includes payment of government's prior claim covering income tax. 43F(2d)997.

342-93 [b] **Testimony to raise contest as to acts barring discharge** held not admissible at meeting of creditors to consider acceptance of composition. 7F(2d)780.

343-94 29F(2d)507; 39F(2d)765 (benefit applicable to creditors not proving claims before confirmation). [e] **Provision is regulated** in respect of consent of majority, being condition precedent to application for confiscation. 9F(2d)883.

343-94½-New. Disregard of rule requiring filing consent of creditors with offer is not jurisdictional defect. 9F(2d)883.

343-96 15F(2d)132; 22F(2d)845.

343-96½-New. **After acceptance composition cannot be withdrawn** against protest of creditors. 22F(2d)845.

343-97 39F(2d)765.

343-98 32F(2d)676; 39F(2d)765. [a] 22F(2d)910 (claims scheduled, though not proved and allowed).

343-3½-New. Where the facts do not warrant a request, a motion to return deposits is premature. 22F(2d)845.

343-3⅓-New. Bankruptcy court may require bankrupt to deposit money for composition dividends after confirmation of composition. 43F(2d)997.

344-4 13PortoRicoFed381.

344-6 [b] **Continuance.** 15F(2d)131.

344-8 15F(2d)131; 13PortoRicoFed381.

344-10 [a] (8) 15F(2d)131. (9) Objecting creditors receiving benefits under composition and retaining them are estopped to question validity of composition agreement. 34F(2d)400.

344-13½-New. [§ 594a] 1½. **Hearing.** Upon the objections and their specifications the objecting creditors, as well as the proponents of the composition offer, are entitled to a hearing, and to the judgment of the judge upon the merits. 18F(2d)364.

344-13½-New. An objecting creditor does not lose his right to a hearing before the judge by failure to except to the master's report. 18F(2d)364.

345-14 [a] **Composition, to be binding on all creditors,** requires confirmation by court. 174Ark749, 297SW1015. [b] **Referee should have schedules not showing amount due certain creditors amended** before recommending confirmation. 39F(2d)765.

345-15 22F(2d)845; 32F(2d)676 (may determine disputed claims). [b] **Petition to review referee's order denying petition for deposit of composition dividends** should be retained by court as original proceeding after dismissal by referee. 39F(2d)765.

345-16 39F(2d)765 (retention of jurisdiction); 44F(2d)56; 13PortoRicoFed381 (composition recommended by referee). [d] 13PortoRicoFed305; 13PortoRicoFed381. [f] **Creditors' consent** to the composition is not conclusive evidence that it is for their best interest. 44F(2d)56.

345-17 33F(2d)259 (negligence in preparation of false financial statement will lead to denial of confirmation). [a] (2) 18F(2d)361. (3) 14F(2d)558.

345-19 22F(2d)845. [a] **Discretion** of the court confirming a composition will not be disturbed on appeal except for abuse. 44F(2d)56.

345-20½-New. The court's refusal to confirm a composition offered to creditors by a bankrupt, on the ground that the condition of the bankrupt's books cast doubt on the bona fides of the bankrupt's conduct of his business, has been held not necessarily res judicata on bankrupt's subsequent application for discharge. 28F(2d)881.

345-21½-New. Approval by overwhelming majority of creditors will not be overridden, unless it is manifest that the bankrupt has been guilty of violations of the Bankruptcy Act. 14F(2d)558.

345-21⅓-New. Disapproval of composition agreement on ground of concealment of assets held unwarranted. 20F(2d)370.

345-21¼-New. False financial statement held insufficient to warrant disapproval of composition agreement in absence of showing of objecting creditor's reliance thereon. 20F(2d)370.

345-21⅕-New. Loss of bankrupt's general ledger, some inventory sheets, and trial balances held not to warrant disapproval of composition agreement. 20F(2d)370.

345-21⅙-New. Defect in failure to obtain consent of majority to composition within time too trivial to subject confirmation to collateral attack. 9F(2d)883.

345-21⅐-New. Bankrupt applying for confirmation must allege deposit of notes forming part of consideration. 22F(2d)906.

345-21⅛-New. Pending confirmation, referee should suspend further proceedings, 23F(2d)7.

345-21⅕-New. and creditors ordinarily have no interest in allowance or disallowance of claims of others, 23F(2d)7.
345-21 1/10-New. and trustee has no standing to contest claims at the expense of the estate. 23F(2d)7.
345-21 1/11-New. The court with the signing of the order loses jurisdiction, except that it may set aside the composition within six months on the grounds set forth in the statute. 27F(2d)368.
345-21 1/12-New. A composition agreement between a bankrupt and his creditors is fixed by an order of confirmation. 32F(2d)676.
345-22 250Mich495, 231NW71. [a] **Waiver of irregularity.**-250Mich495, 231NW71 (failure to object).
345-24 32F(2d)676. [f] **Where creditor has received amount in excess of dividends paid other composition creditors,** trustee may recover such excess and creditor may not set off such amount against general indebtedness. **Ont** [1925] 2DomLR997. [g] **Claim filed and put into basket in referee's office** does not show allowance of claim before offer of compromise. 9F(2d)883. [h] **Unscheduled creditor** may share in composition by filing claim prior to confirmation. 32F(2d)676. [i] **Allowance of disputed claim filed after confirmation** of composition is within court's jurisdiction where claim was scheduled and bond given to insure dividend. 32F(2d)676 (referee's power to allow is implied by deposit of bonds as part of composition agreement).
345-24½-New. Referee. In issuing checks under composition agreement, a referee in bankruptcy acts in several capacities, one of which is an agent for the bankrupt in distributing the agreed amount among creditors. 125Misc113, 210NYS239.
345-24⅓-New. A bankrupt has been held liable on a check issued by the referee in bankruptcy under a composition agreement, where surplus moneys in deposit account with referee were returned to the bankrupt. 125Misc113, 210NYS239.
345-24¼-New. After composition the United States is entitled to apply the fund remaining to an additional tax claim asserted after approval of the composition, to the exclusion of persons advancing composition funds. 26F(2d)146.
345-24⅕-New. A bankruptcy court, after confirmation of a composition, is without jurisdiction to determine conflicting claims of the right to participate in the composition fund, 27F(2d)368.
345-24⅙-New. and to determine the rights of one to be subrogated to rights in the composition fund. 27F(2d)368.
345-24 1/7-New. Allowance of a claim is not necessary for the purpose of establishing it against a debtor, if he has already included it in his schedule. 27F(2d)850.
345-24⅛-New. The claim may be proved and allowed if not included in the schedules. 27F(2d)850.
345-24⅛-New. Failure to file a claim within a year of adjudication in bankruptcy does not exclude a creditor from sharing in the composition fund where the offer is made before adjudication. 27F(2d)850.
345-24 1/10-New. A bankrupt securing confirmation of a composition by giving a bond for payment of a disputed claim cannot defeat the claim because claimant did not consent to the bond. 32F(2d)676.
345-24 1/11-New. A scheduled creditor need not move for liquidation of a disputed debt prior to confirmation of the composition, in order to avoid forfeiture. 32F(2d)676.
345-24 1/12-New. Creditor leading referee in bankruptcy to believe that claim was secured for full amount is estopped subsequently to claim part of fund set aside for payment of priority claims. 43F(2d)997.
346-25½-New. To secure priority of payment out of a composition fund the government must file a claim in court. 27F(2d)850.
346-25⅓-New. A claim of the government for taxes, filed before the composition fund exhausted, although after offer and acceptance thereof, may be paid out of the fund to the extent of the undistributed balance to the exclusion of a person who advanced the composition moneys. 27F(2d)850.
346-25¼-New. The United States is not bound by the failure of a bankrupt in a composition proceeding to file a proper schedule setting forth the claims of priority to secured creditors, and not including the government's full claim in its schedule. 27F(2d)850.
346-27½-New. Guarantor of debts of a corporation is not discharged by a composition accepted by the corporation's creditors. 130Misc291, 223NYS822.
346-28 26F(2d)146; 27F(2d)368. [b] **Cause of action for conversion** of bankrupt corporation's property reverts to corporation and not to receiver. 111Conn475, 150A693.
346-29½-New. Assent of holder of note to composition does not relieve accommodation indorser for bankrupt maker of liability. 216AppDiv120, 214NYS715.
346-29⅓-New. Claimant accepting composition benefits is not entitled to participate in distribution of funds due contractor. 98NJEq589, 131A223.
346-29¼-New. Compositions out of court and those approved of by the court are alike in effect, although the former exists by agreement and the latter binds dissentients. 26F(2d)146.
346-29⅕-New. Composition is contractual in nature and must be viewed in setting in which it is made. 250Mich495, 231NW71.
346-32 250Mich495, 231NW71 (partnership and individual partners).
346-33 [b] (1) See also 250Mich495, 231NW71. (2) Ordinarily settlement includes all liabilities of partnership and of individual partnership. 250Mich495, 231NW71. [d] 289Fed732, 30ALR435. [e] **Breach of such composition agreement** does not revive original debt. 126Misc213, 212NYS129 (dictum).
346-34½-New. The promise of a bankrupt to pay certain claims in full after discharge by composition is valid. 205Iowa1233, 219NW266.
346-35 273US380, 47SCt372, 71L ed692.
346-38 [a] **Composition not confirmed by court** is binding only on creditors accepting it. 174Ark749, 297SW1015. [b] **Where creditor proves greater amount after confirmation,** person furnishing consideration to pay creditors under composition cannot be required to pay increased amount. 22F(2d)910.
346-39 39F(2d)765; 125Me211, 132A388.
347-41 9PaDist&Co 626.
347-42½-New. Where bankrupt's schedules show excess of indebtedness over security he must be deemed to include secured creditor to extent of excess in composition offer. 43F(2d)997.
347-43 See also 273US380, 47SCt372, 71L ed692. But see 34PortoRico 38.
347-44½-New. However, mere scheduling of secured creditor in order does not release security. 273US380, 47SCt372, 71L ed692.
347-44⅓-New. Bankrupt whose schedules show excess of indebtedness over security, must be deemed to include secured creditor to extent of excess. 39F(2d)765.
347-48½-New. Where bankrupt innocently misrepresents that he deposited consideration, the court may compel such deposit after confirmation. 22F(2d)906.
347-48⅓-New. Such action is proper where the petition, although insufficient to set aside an order of confirmation, shows failure to deposit consideration without adequate excuse. 22F(2d)906.
347-48¼-New. Bankrupt not proving excuse for failure to deposit consideration prior to confirmation is subject to direct order and attachment thereafter. 22F(2d)906.
347-48⅕-New. The district court has jurisdiction to determine a bankrupt's petition for an order requiring the bank to credit the account with interest becoming due after the trustees transferred the account to the name of the district court clerk. 30F(2d)389.
347-50 22F(2d)906.
347-51 22F(2d)906.
347-52 22F(2d)906. [a] 22F(2d)906.
348-60 22F(2d)906 (must allege knowledge of fraud since confirmation).
348-64½-New. Specific averments of fact are required. 22F(2d)906.
348-64⅓-New. Particular petitions have been held insufficient. 22F(2d)906.
348-64¼-New. Demurrer. Where bankrupt's demurrer to a petition is overruled, he should generally be allowed leave to answer. 22F(2d)906.
348-65 [a] **Evidence held sufficient** to show no fraud or collusion on part of one creditor as against other creditors. 135SC298, 133SE545.
348-65½-New. Admission of fraud does not dispense with proof that the petitioner acquired knowledge of fraud subsequent to confirmation. 22F(2d)906.
348-65⅓-New. Bankrupt is entitled to trial on the issue of whether confirmation should be set aside. 22F(2d)906.
348-67 [d] **On trustee's abandonment of action,** bankrupt is entitled to maintain such action and make trustee party. 223AppDiv101, 227NYS489.
348-69 But see 247Mich493, 226NW239. [b] **Defendants anticipating danger of double payment** may petition bankruptcy court to determine to whom debt is payable. 247Mich493, 226NW239.
348-69½-New. Where mortgagor's referee in bankruptcy renounced right to assert claim for damages against mortgagee for fraud, state court has jurisdiction to determine right of parties. 34OhA339, 171NE248.
348-71 276US542, 48SCt344, 72L ed691; 220Ala394, 125S637; 126Me369, 138A567. [d] **In case recovery is had by bankrupt in such action,** question as to whether he holds judgment for benefit of his creditors of assignees of claim on which judgment founded may be determined in appropriate proceedings. 276US542, 48SCt344, 72L ed691.
348-72 221AppDiv599, 224NYS516.
349-72½-New. Bankruptcy trustee's right to take over bankrupt's claims merely changes ownership thereof and the bankrupt may continue the action begun before adjudication. 221AppDiv599, 224NYS516.
349-72⅓-New. Allegations showing that the trustee released a claim to a burglary policy to a bankrupt entitles the bankrupt to continue the action. 221AppDiv599, 224NYS516.
349-73½-New. After an adjudication and before a trustee is appointed the bankrupt may sue to regain the property for the benefit of the trustee. 126Me369, 138A567.
349-74 170Ark971, 281SW906; 254IllA163; 47RI25, 129A611. See also 50RI140, 145A874. But see 221MoA1051, 295SW520.
349-76½-New. A creditor pleading the debtor's petition in bankruptcy, showing that the bankruptcy court acquired jurisdiction is not entitled to judgment. TexCivA 277SW213 (in state court).
349-76⅓-New. It is presumed that the jurisdiction of the bankruptcy court continues in the absence of proof of termination of the proceedings. TexCivA 277SW213.
349-76¼-New. The state court cannot render judgment for debt where the bankruptcy court acquires jurisdiction. TexCivA 277SW213.
349-76⅕-New. Appellant in a state court does not waive rights to carry on appeal and make the case moot by filing a voluntary petition in bankruptcy and listing judgment appealed from as debt. 288Pa320, 136A212.
349-76⅙-New. An order nunc pro tunc for filing bonds to dissolve attachment without prejudice to surety held not to stay operation of order or special judgment against bankrupt principal. 260Mass184, 157NE44.
349-76 1/7-New. Where sureties were not parties, their rights were not affected by an order for leave to file bonds nunc pro tunc. 260Mass184, 157NE44.

349-76⅕-New. A person who, having notice of bankruptcy proceedings, begins an action against the bankrupt, continues his action at his own peril. 7 **Alaska**508.

349-76⅕-New. It is optional with the trustee whether he shall appear in suits against a bankrupt in other courts involving the bankrupt's property. 7 **Alaska**508.

349-76 1/10-New. The state court cannot render judgment for a debt where the bankruptcy court acquires jurisdiction. 221**MoA**1051, 295**SW**520.

349-76 1/11-New. Demurrer to bankrupt's plea in abatement to attachment proceedings in state court is improperly overruled and writ improperly quashed where no stay is issued by bankruptcy court. 254 **IllA**163.

349-78 **TexCivA** 285**SW**852.

349-79 57**ND**143, 220**NW**644.

349-80 [e] **Mortgage** is not claim which discharge in bankruptcy would release so as to stay foreclosure thereof. 37**F(2d)**690.

349-82 17**F(2d)**584; 27**F(2d)**159; 37 **GaA**307, 140**SE**41; 146**Miss**217, 111**S** 291, 292 [citCJ]; 147**Miss**885, 113**S**552, 555 [citCJ]; 57**ND**143, 220**NW**644 (bankrupt may waive right); 5**PaDist&Co** 132. [c] **Discharge or adjudication must be pleaded** to secure stay. 37**GaA** 307, 140**SE**41. [d] **Stay held erroneous** where mortgage and lien indebtedness exceeded value of land, leaving no equity for bankrupt's estate. 37**F(2d)**690.

349-83 146**Miss**217, 111**S**291, 292 [cit CJ].

349-84½-New. Continuance is properly refused where defendant fails to make proof of exact situation of bankruptcy proceedings against it. 215**Ala**225, 109**S** 873.

349-84⅓-New. A bankruptcy court will not stay state court proceedings unless the debt on which the proceedings are based is dischargeable. 22**F(2d)**163.

349-84¼-New. The state court's decision that a corporate officer misappropriated cash in his possession when a receiver was appointed is binding on the bankruptcy court. 22**F(2d)**163.

349-84⅕-New. A bankruptcy court will not stay the state court proceedings requiring a bankrupt to turn over cash to the receiver, based on a finding of misappropriation as a corporate officer. 22 **F(2d)**163.

349-84⅙-New. Upon bar of the judgment by final discharge, execution may be perpetually stayed. 57**ND**143, 220 **NW**644.

349-84½-New. Stay of proceedings in suits pending against a bankrupt on claims dischargeable in bankruptcy is primarily for the benefit of the bankrupt, who may waive such right. 219**Ala**140, 121**S**402.

349-85 170**Ark**971, 281**SW**906; 146 **Miss**217, 111**S**291, 292 [citCJ].

350-87 [a] 146**Miss**217, 111**S**291.

350-88½-New. Referee has no power to stay suit against a bankrupt in another district. 15**F(2d)**860.

350-88⅓-New. General order of bankruptcy court made as suggestion to local judge of pendency of bankruptcy proceedings is insufficient where it contains no reference to pending case and no direction. 35**PortoRico** 125.

350-89 146**Miss**217, 111**S**291, 292 [cit CJ].

350-90 146**Miss**217, 111**S**291, 292 [cit CJ]; 149**Miss**21, 115**S**116; 155**Tenn**296, 291**SW**835. [b] 2**F(2d)**664.

350-94 [b] **In proceedings to stay contempt proceedings** in state court findings of state court of fraudulent conduct of bankrupt accepted by federal court. 6**F(2d)**962. [c] **Bankruptcy court should determine** whether debt is dischargeable before staying contempt proceedings in state court. 6**F(2d)**962.

350-95½-New. Execution on the judgment may be stayed. 50**RI**140, 145**A** 874.

351-98 [c] **Foreclosure of real estate mortgage will not be stayed** where mortgagees do not ask personal judgment. **Iowa** 227**NW**328.

351-2 See also 35**PortoRico** 125.

352-6 17**F(2d)**153; 240**Mich**646, 216 **NW**442; 146**Miss**217, 111**S**291.

352-7 146**Miss**217, 111**S**291.

352-10 240**Mich**646, 216**NW**442; **Tex CivA** 258**SW(2d)**627.

352-11½-New. Mere suggestion in record of defendant's bankruptcy does not operate as stay. **Vt** 151**A**507.

352-13½-New. Petition for stay may be withdrawn if there is no resulting prejudice. 5**PaDist&Co** 132.

352-13⅓-New. Injunction against prosecution of suit against bankrupt. A court of bankruptcy may enjoin the prosecution of a suit in a state court to relitigate title which has been vested in bankrupt's trustee by decisions of the state and federal courts. 21**F(2d)** 881.

352-13¼-New. An order staying the proceedings is not dissolved ipso facto by an order vacating an adjudication in bankruptcy from which appeal is taken. 25**F(2d)**329.

352-13⅕-New. The district court may in its discretion continue a stay order pending such appeal. 25**F(2d)**329.

352-13⅙-New. On vacation of an order adjudicating a traction company bankrupt, the city and state have been held entitled to dissolution of the order staying mandamus to require operation of a street car system. 25**F(2d)**329.

352-15 31**F(2d)**93.

352-17 31**F(2d)**93.

353-22 See also Habeas Corpus 29 **C. J.** § 617 p 103 text and notes 16-19.

353-27 8**F(2d)**451; 21**F(2d)**254; 219 **Ala**571, 123**S**61 (right held absolute).

353-29 26**F(2d)**460 (artisan's necessary tools); 32**F(2d)**322; 200 **Iowa**56, 202**NW**557; 201 **Iowa**1298, 205**NW**843; 79**Mont**246, 256**P**176, 57**ALR**1122. [g] **Homestead rights are superior to mortgage lien** to extent of one-half proceeds on sale. 10**F(2d)**240 (where owner of undivided half purchased remaining half giving mortgage on whole). [h] **Crops growing on exempt homestead** are not exempt. 10**F(2d)**747 (Minnesota). [i] **Homestead claims not filed till after adjudication** are ineffective to create homestead exemption. 24**F(2d)**292. [j] **Where homestead tract is divided by county road and store,** and filling station and cabins for travelers are maintained on part of tract, right to homestead exemption is not defeated. 28**F(2d)**353. [k] **Judgment on laborer's lien against homestead** may be collected by order directing issue of special execution. 179 **Minn**6, 228**NW**168(2dcase).

354-31 [d] **Sums due to original contractor for construction of building** are not exempt under Texas constitution or statutes. **TexCivA** 1**SW(2d)**339. [e] **Land entirely separate from tract on which bankrupt lived** is not part of homestead. 28**F(2d)**388. [f] **After sale on foreclosure of homestead of bankrupt** for over two thousand dollars and use of proceeds to pay mortgage containing homestead waiver, there is no claim for additional homestead in property not covered by mortgage. 28**F(2d)** 388.

354-31½-New. Court of bankruptcy cannot enforce a claim of particular creditors against generally exempt property. 19**F(2d)**305.

354-32 8**F(2d)**363; 8**F(2d)**735; 10**F (2d)**747; 14**F(2d)**672; 15**F(2d)**700; 28 **F(2d)**353; 35**F(2d)**251 (as against mechanic's lien under Kentucky statute); 40**F(2d)**560; 215**Ala**632, 112**S**209; 200 **Iowa**56, 202**NW**557; 203 **Iowa**654, 213**NW**422; 319**Mo** 672, 4**SW(2d)**769, 772 [citCJ]. [d] **Though claimed homestead included small rental houses,** it should be set off to bankrupt, in accordance with California code, where main dwelling and gardens extended over lots properly claimed. 34**F(2d)** 970.

354-33 5**F(2d)**326.

354-34 10**F(2d)**747 (highest state court); 41**F(2d)**559.

354-35 [a] **In Arizona.**-5**F(2d)**879.

355-43 219**Ala**571, 123**S**61.

355-47 [a] (2) Cash surrender value of bankrupt's life insurance policies is subject to exemption of one hundred dollars under statute exempting one hundred dollars in property. 28**F(2d)**438.

355-54½-New. Where state law exempts life insurance policy, it does not pass to trustee. 15**F(2d)**700.

355-54⅓-New. In the notes will be found cases determining right to exemption as to particular property. 14 **F(2d)**974; 15**F(2d)**700; 19**F(2d)**305; 20**F(2d)**136; 20**F(2d)**236.

355-54¼-New. Under statute a bankrupt could retain life policies having a cash surrender value payable to his wife. 28**F(2d)**999.

355-54½-New. Law books and bookcases of a bankrupt attorney held not exempt under state statute for the wages of a clerk and stenographer. 34 **F(2d)**667.

355-55 [a] **In Florida.**-4**F(2d)**807.

355-55½-New. Under the Bankruptcy Act and some state statutes proceeds of life insurance are exempt. 8**F(2d)** 363; 24**F(2d)**253 (where wife is beneficiary, though bankrupt has right to change beneficiary).

355-55⅓-New. and the term includes the cash surrender value of policies. 8 **F(2d)**363.

355-55¼-New. Occupancy of homestead is sufficient, under some statutes, notwithstanding intent to prevent levy by creditors. 24**F(2d)**482.

355-55⅕-New. Executory contract of sale does not affect homestead right. 24 **F(2d)**482.

355-55⅙-New. A bankrupt's equity of redemption in nonexempt property, constitutes a valuable property right, which is not exempt. 27**F(2d)**609.

355-55½-New. The cash surrender value is not "money payable in nature of insurance," within the meaning of the Maryland code relating to exemptions. 28**F(2d)**438.

355-55⅓-New. A Maryland code provision exempting the proceeds of a policy for the sole benefit of a wife does not apply to the cash surrender value, where the right to change the beneficiary is reserved. 28**F(2d)**438.

355-55½-New. Cash surrender value of life policy of bankrupt payable to wife is exempt. 38**F(2d)**117.

356-56 41**F(2d)**257.

356-57½-New. Right of bankrupt Osage Indian in proportionate share of tribal fund derived from sale of minerals is not assets subject to claims of creditors. 41**F(2d)**257.

356-57⅓-New. That Indian bankrupt is citizen is immaterial as regards government control over Indian property. 41**F(2d)**257.

356-58 14**F(2d)**974.

356-60 35**F(2d)**950; 42**F(2d)**212.

356-61 21**F(2d)**1006 (on eve of bankruptcy).

357-64½-New. Under California statute, maximum homestead exemption in property of greater value bought with funds of wife and community should be apportioned ratably to the two estates. 20**F(2d)**95.

357-64½-New. Under Minnesota act, bankrupt is entitled to exempt food for animals specified, even though he owns no such animals. 17**F(2d)**495.

357-64¼-New. Cash exemption from proceeds of property must be reduced to share in shrinkage from present market value. 24**F(2d)**422 (ascertainment of fair value).

357-68 43**F(2d)**159.

357-69 200 **Iowa**56, 202**NW**557.

358-75 17**F(2d)**495.

358-76 5**F(2d)**326; 215**Ala**632, 112**S** 209; **TexCivA** 278**SW**292.

358-77 215**Ala**632, 112**S**209; **TexCivA** 278**SW**292.

358-77½-New. When right to exemption is determined, it cannot be questioned in collateral proceedings. **Tex CivA** 278**SW**292.

358-80 5**F(2d)**326. [a] **After discharge in bankruptcy,** bankrupt may sue for possession and title to homestead not scheduled as exempt. 219**Ala**571, 123**S**61.

358-82½-New. Right is determined as of date of filing petition. 100**Vt**314, 137 **A**194.

358-83 16**F(2d)**233.

359-88 16**F(2d)**233; 21**F(2d)**254.

359-89 21**F(2d)**254 (Sup. Ct. Gen. Ord. 17 is mandatory).

359-92 4F(2d)807; 5F(2d)326; 100Vt 314, 137A194.

359-93½-New. Evidence held not to show claimed exemption. 100Vt314, 137 A194.

359-93½-New. Where an exemption of a business homestead is claimed, the bankrupt must affirmatively show that at the time of bankruptcy the property was being actually used for business purposes. 32F(2d)717.

359-95 34F(2d)970 (property on which homestead claimed must be reduced by cutting off excess, if any). [a] **Held not divisible** where principal and incidental buildings covered all parts of property. 34F(2d)970.

359-96½-New. Omitted or defective claims for exemption may be inserted or corrected by amendment of schedule, but only by order or leave of court. 14 F(2d)672.

360-98 5F(2d)326; 14F(2d)672; 215 Ala632, 112S209; 170Ga180, 152SE234. [f] (2) Bankruptcy Act, and not state law, governs manner of setting exemption apart. 14F(2d)672. (3) Trustee must follow as nearly as practicable state procedure in making allotment of bankrupt's exemption. 15F(2d)700. [g] **Where no trustee is appointed,** referee may set aside exemption claimed by bankrupt. 170Ga180, 152SE234.

360-99 14F(2d)672; 170Ga180, 152SE 234.

360-2 TexCivA 287SW77.

360-4 43F(2d)100.

360-4½-New. After inventory and appraisal of his property, bankrupt may select from inventory specific property for exception. 14F(2d)672.

360-5 170Ga180, 152SE234; 14PaDist &Co 168.

360-8 [d] **Where claimed homestead exceeds limit of value, but is indivisible,** property must be sold and maximum homestead allowed from proceeds. 34F (2d)970.

361-10 [a] **On sale of mortgaged land free from homestead and dower claims,** proceeds in excess of mortgage debt should be applied to payment of homestead and dower claims before application to unsecured claims. 32F(2d)322.

361-12½-New. Where bankrupt elected to have property set aside to him in kind to be sold as a whole, he may recover only proportionate share when appraised value was not realized. 15F (2d)700.

361-12½-New. If bankrupt is willing to pay to trustee value of her nonexempt interest in homestead, it should not be sold. 20F(2d)95.

361-16 [a] 140SC114, 138SE626. [e] **Attachment after discharge in bankruptcy** cannot subject to lien property of bankrupt set aside as exempt. 55 ND776, 215NW549.

361-17 10PaDist&Co 179.

361-18 19F(2d)305; 22F(2d)689; 200 Iowa1308, 206NW291.

362-19½-New. An order setting aside homestead of bankrupt as exempt has no binding effect until approved by court. TexCivA 287SW77.

362-19½-New. A referee's order setting aside a homestead based on fraud of the bankrupt is not res judicata. 28 F(2d)388.

362-20 79Mont246, 256P176, 57ALR 1122; 8F(2d)451; 15F(2d)700; 21F (2d)254; 215Ala632, 112S209; 204 Iowa 1273, 214NW491, 55ALR644; 55ND 776, 215NW549; 14PaDist&Co 168; 156 Tenn306, 300SW567 (holding trustee personally liable for conversion).

362-21 15F(2d)700; 55ND776, 215NW 549.

362-22 8F(2d)451; 15F(2d)700.

362-22½-New. A bankrupt is not required to list in schedules in voluntary proceedings property claimed as exempt as a condition precedent to perfecting the title thereto. 219Ala571, 123S61.

362-23 21F(2d)254; 158La678, 104S 614; TexCivA 278SW292.

363-24 21F(2d)254; 215Ala632, 112S 209; 200 Iowa56, 202NW557; 200 Iowa 1308, 206NW291; TexCivA 278SW292.

363-25 97PaSuper606 (right of execution creditor).

363-28 21F(2d)254; 200 Iowa1308, 206 NW291 (right to exempt property as between owner and chattel mortgagee).

363-30 21F(2d)254; 34F(2d)667; 200 Iowa1308, 206NW291. [e] **Allegations of bankrupt in state court that exempt property was set off** by bankruptcy court is insufficient as plea of res adjudicata to chattel mortgagee's claim against exempt property. 200 Iowa 1308, 206NW291.

364-31½-New. A court of bankruptcy cannot order the sale of exempt property after setting it aside. TexCivA 278SW292.

364-33½-New. Inherited undivided interest of minors impressed as trust on proceeds of stock sold in bankruptcy is not enforceable against exempted homestead belonging to guardian and minors to permit marshaling assets. 15 F(2d)940.

364-34 168Ga38, 147SE61(3dcase).

364-35 168Ga38, 147SE61(3dcase); 170 Ga180, 152SE234; 235Mich258, 209NW 66.

364-35½-New. Notes containing waiver and assignment of homestead and bankruptcy exemptions of a debtor thereafter adjudicated a bankrupt were held to obtain priority over a mortgage and notes executed after the filing of the petition in bankruptcy. 160Ga808, 128 SE91.

364-36 43F(2d)100. [f] (2) Scheduling property as subject to his debts ordinarily constitutes waiver of exemption claim, including claim of homestead by bankrupt. 27F(2d)146. (3) But erroneous listing of former home as asset for general creditors by bankrupt did not constitute waiver of homestead rights. 27F(2d)146.

365-37 27F(2d)146.

365-37½-New. A bankrupt, having mortgaged exempt property within the four months' period preceding adjudication, cannot thereafter waive his exemption as against the mortgagee in good faith. 30F(2d)816.

365-38 [b] **Though mortgage contains waiver of exemptions** (1) bankrupt is entitled to homestead from proceeds of sale of property exceeding amount of mortgage. 35F(2d)520. (2) Bankrupt is entitled to homestead from proceeds of sale of property after satisfaction of mortgage. 35F(2d)522.

365-42 43F(2d)159. But see 319Mo 672, 4SW(2d)769.

365-43 43F(2d)666 (concealment of property in excess of amount of personal property exemptions). [b] (2) Referee's order allowing exemption is not sustained. 35F(2d)539. [i] 35F(2d) 539. [k] **Question is largely determined by law of state of bankrupt's residence.** -43F(2d)666.

366-45 [d] (2) Other instances. 219 Ala571, 123S61.

366-45½-New. A creditor holding notes with waivers of homestead of debtor who has been adjudicated a bankrupt and applied for homestead and exemption of personalty may enjoin the debtor from receiving homestead and exemption, and may have a receiver appointed to take charge thereof before they have been set aside by the bankruptcy court. 163Ga355, 136SE71.

366-45½-New. Bankrupt not redeeming property attached more than four months before bankruptcy petition from execution sale cannot have it set aside by bankruptcy court as exempt. Ida 289P995.

366-47 20F(2d)665; 26F(2d)450.

367-51 215Ky292, 284SW1084.

367-52 215Ky292, 284SW1084.

367-53 20F(2d)665; 26F(2d)450 (rule applied where widow's deeds, within four months before bankruptcy, were void).

367-54½-New. The claim is not barred by the widow's failure to produce evidence of facts conditioning allowance for support while the question was pending under appeal. 26F(2d)450.

367-57 35F(2d)539; 40F(2d)946. [c] **Law governing discharge of bankrupt is for benefit of honest debtors** and should be liberally construed. 43F(2d) 463. [d] **Act should be liberally construed in favor of bankrupt.**-43F(2d) 378.

368-59 26F(2d)585; 37F(2d)97; 41F (2d)275.

368-61 34 OhA339, 171NE248.

368-62 TexCivA 285SW852.

368-68 269US121, 46SCt41, 70L ed193; 8F(2d)544.

368-69 269US121, 46SCt41, 70L ed193.

369-70 8F(2d)544. [g] **Pendency of application** for discharge in prior proceeding precludes discharge in second proceeding as to debts listed in first proceeding. 269US121, 46SCt41, 70L ed 193. [h] **Court of its own motion** may refuse discharge because of pendency application in prior proceeding. 269US 121, 46SCt41, 70L ed193.

369-72½-New. Under Bankruptcy Act bankrupt cannot file application for discharge within six years after previous discharge. 40F(2d)429.

369-74 [b] 6F(2d)320. [c] (2) Referee's order authorizing trustee to file objections to discharge wherein creditor appeared at the meeting called to authorize trustee to file objections and all proceedings thereunder were held void. 6F(2d)320. [e] **Only creditors personally present,** or represented by proxy or agent with proper power of attorney filed with referee, may vote at meeting to authorize trustee to oppose discharge. 9F(2d)90.

369-75 15F(2d)64; 26F(2d)585.

369-76 250NY370, 165NE814 (one having claim against bankrupt not dischargeable may oppose discharge where claim is provable). [h] (2) Where bankruptcy trustee, without creditors' knowledge, settles suit to set aside fraudulent conveyance by agreeing not to oppose discharge, creditors, by accepting dividends from proceeds of settlement, are not estopped to oppose discharge. 34F(2d)778. [i] Contra 4F (2d)892. [j] (2) Creditors covenanting to release bankrupt from all claims under agreement, are estopped to oppose discharge, where they breached covenant. 10F(2d)119. (3) Creditor authorizing execution of deed of trust in their names is bound thereby. 10F (2d)119 (as respects estoppel to oppose discharge). [k] **Restoring dividends received is unnecessary.**-Where creditors did not consent to settlement agreement by trustee not to object to bankrupt's discharge, they need not restore dividends received from proceeds of such settlement before opposing his discharge. 34F(2d)778.

370-81 23F(2d)245.

370-83 9F(2d)139. [b] **Statutes applicable.**-Amendment in force at time court passes on question of discharge controls though it took effect after filing of petition. 23F(2d)912.

370-84 23F(2d)912; 34F(2d)964 (misconduct wholly unrelated to matter before bankruptcy court should not bar discharge).

370-84½-New. Statutory grounds for denying discharge are not to be extended by construction. 22F(2d)131.

371-85 16F(2d)285.

371-90½-New. that bankrupt failed to file schedule in time specified. 14F(2d) 674.

371-91 4HawaiiFed395.

371-94 20F(2d)206.

371-95½-New. That the bankrupt gave his wife a reasonable sum for living expenses is not ground for refusal of discharge. 18F(2d)365.

371-97½-New. Various matters held not ground for refusing discharge. 14 F(2d)849; 15F(2d)64; 15F(2d)499, 49 ALR913.

371-97¼-New. Under the Act of May 27, 1926, amending the Bankruptcy Act, a bankrupt's failure satisfactorily to explain loss or deficiency of assets to meet his liabilities is a ground of refusal to discharge. 32F(2d)186 (loss of apparent indebtedness for salary).

371-97¼-New. Discharge is properly denied where the bankrupt had obtained an extension of credit on a false property statement. 32F(2d)982.

371-97½-New. Under Bankruptcy Act as amended refusal of discharge on

ground bankrupt obtained credit by making materially false statement respecting financial condition is proper. 40F(2d)268.

371-99 20F(2d)206.

371-99½-New. Where bankruptcy is due to misconduct of debtor, the court must suspend discharge for two years. Ont [1927] 2DomLR492.

371-3 8F(2d)665; 22F(2d)282 (on examination at first meeting of creditors); 37F(2d)97. [b] 22F(2d)282 (intentional untruth in material matter). [c] 8 F(2d)665; 28F(2d)1012(4thcase). [d] **Materiality of false oath** (1) does not depend on whether falsehood has been detrimental to creditors. 22F(2d)282. (2) False oath as to purchase of stock four years before adjudication has been held material warranting denial of discharge. 22F(2d)282. [e] **Materiality of false testimony** concerning property is not dependent on extent or even fact of its being harmful to creditors. 37F(2d) 97.

372-5 34F(2d)25.

372-8 8F(2d)665.

372-10 18F(2d)958; 18F(2d)1003; 30 F(2d)102(2dcase). [f] 18F(2d)958.

373-18 10F(2d)119 (both elements must appear); 15F(2d)557; 29F(2d)796; 36 F(2d)392; 36F(2d)803. [m] **Partner** whose connection with false financial statement not shown entitled to discharge. 15F(2d)557.

374-20½-New. Bankruptcy court has reasonably wide discretion in respect to denial of discharge for failure to keep books. 38F(2d)611.

374-21 [a] 16F(2d)769.

374-23 5F(2d)512; 10F(2d)119; 16 F(2d)501; 21F(2d)161; 22F(2d)971; 36 F(2d)803; 41F(2d)275.

374-25 41F(2d)275.

374-27½-New. or from facts and circumstances. 10F(2d)119.

375-31 29F(2d)397.

375-32 28F(2d)881.

375-33 28F(2d)882. [a] 21F(2d)161 (mere carelessness or stupidity).

375-34 21F(2d)161.

375-35 21F(2d)161.

376-39 16F(2d)769. [a] See also 14 F(2d)523. [b] 11F(2d)897 (surrender of notes).

376-40 9F(2d)520; 16F(2d)769.

376-41 9F(2d)520.

376-42 2F(2d)759; 2F(2d)799; 9F (2d)520; 16F(2d)769; 20F(2d)469 (renewal of notes on false sworn financial statement).

376-43 16F(2d)769; 18F(2d)606; 26 F(2d)585; 29F(2d)796; 36F(2d)392. [a] (2) Falsity alone is not sufficient without purpose of obtaining credit. 21F(2d)161. [b] (1) 34F(2d)964. (4) Omission of contingent liabilities from approximately correct statement is not ground for refusal of discharge in absence of intent to defraud. 18F(2d)337. [p] 23F(2d)912 (statement held one as to financial condition).

376-44 2F(2d)759; 16F(2d)769; 28 F(2d)729. But see 36F(2d)803. [e] **Written statement necessary.**-22F(2d) 131. [f] **Fraudulently inducing creditor to renew note** more than year before bankruptcy is not ground for refusing discharge where there was no written statement, though claim might not be affected by discharge. 34F(2d)831.

377-47 21F(2d)161; 30F(2d)102(2d case). [b] But see 18F(2d)337. [g] **False written statements** held not for purpose of obtaining credit. 36F(2d) 41.

377-47½-New. Statement must have been relied on. 13F(2d)67.

377-47⅓-New. That creditor made other inquiries does not change effect of false statement by bankrupt. 18F(2d) 606.

377-47¼-New. Test of effect of false statement as bar to discharge is whether statement was binding on bankrupt when acted on. 22F(2d)131.

377-47½-New. **Omission to schedule** a person to whom a false statement was made is immaterial. 23F(2d)245.

377-47⅔-New. Obtaining extension of credit by material false financial statement precludes discharge. 41F(2d)208.

377-48 23F(2d)245 (payment of claim of person defrauded is immaterial).

377-49 16F(2d)769; 26F(2d)585 (under amendment of 1926).

377-50 9F(2d)520; 41F(2d)208. [e] **False statement must have been relied** on to prevent discharge. 9F(2d)520. [f] **Error and inaccuracy in financial statement** made to procure extension of credit held not to constitute materially false statement. 41F(2d)208.

378-51 11F(2d)897; 38F(2d)259 (reckless indifference to actual facts and without examination of available sources of information).

378-53 18F(2d)606.

378-53½-New. A materially false statement made to a commercial agency is presumed to have been intended to deceive. 18F(2d)606.

378-56 But see 2F(2d)759.

378-60½-New. Mere lapse of three years from the issuance of a financial statement does not alone determine whether it was in force when credit was extended. 22F(2d)131.

378-60⅓-New. Whether financial statement is to be given continuing effect for any given period depends on parties' intent. 22F(2d)131.

378-60¼-New. Where financial statement recites that statements should be made once a year, bankrupt is justified in believing the statement in effect for the ensuing year only. 22F(2d)131.

378-61 See also 276US281, 48SCt298, 72 Led572.

378-63 18F(2d)606.

378-67 But see 11F(2d)897.

378-67½-New. Exemption from discharge is allowed in favor of provable debts. 17F(2d)110.

378-68 [a] 13F(2d)473.

379-69 29F(2d)397; 39F(2d)12; 43F (2d)378. But see 28F(2d)883. [b] (1) 28 F(2d)1012. (4) 14F(2d)490. (5) Bankrupt married woman surrendering cash value of policies to husband is entitled to discharge although husband transferred to third party funds so received. 35F(2d)936.

379-70½-New. Fraudulent transfer more than four months before filing of petition is not a ground for denial of discharge. 13F(2d)117.

379-74 18F(2d)365 (payments of debts due).

379-76 16F(2d)693; 19F(2d)518; 36 F(2d)41; 4HawaiiFed252. [g] 16F(2d) 693; 28F(2d)883. [i] 14F(2d)490; 36 F(2d)41; 41F(2d)208. [j] **Concealing by transfer but retransferring immediately before filing voluntary petition** is sufficient to prevent discharge. 9F(2d) 139.

380-77 18F(2d)1003; 30F(2d)102(2d case).

380-81 38F(2d)769. [a] (2) See also 28F(2d)679. (4) Wages earned and payable. 18F(2d)444. (5) Growing crops belonging to bankrupt. 18F(2d)444. [d] **Discharge not barred.**-32F(2d)186 (by failure to schedule office furniture stored and largely taken by storage company for charges).

381-82 30F(2d)102(2dcase) (failure to schedule leases and grazing right, which bankrupt thought were of no value, did not constitute concealment, of property).

381-85 28F(2d)679.

381-86 18F(2d)444 (failure to schedule unperformed contract of employment for specific wages or share of crop at bankrupt's option); 18F(2d)1003; 19F(2d) 796.

381-87 18F(2d)1003.

381-88 30F(2d)102(2dcase).

381-94 13F(2d)473; 30F(2d)102(2d case).

383-8½-New. Petition for extension of time of discharge because of insufficient funds to pay expenses and absence from jurisdiction held insufficient on its face. 15F(2d)471.

383-8⅓-New. Under amendment of 1926 transfer of property more than one year before bankruptcy will not preclude discharge unless concealment was continued into such period. 41F (2d)208.

383-13 29F(2d)397.

383-14 14F(2d)674. [a] 14F(2d)674.

383-18 But see 34F(2d)831 (discharge should be granted even if only debt scheduled is not dischargeable).

383-19 8F(2d)544. [c] 8F(2d)544.

384-22 40F(2d)539 (construing word "prevented" in statute). [a] (1) 9F(2d) 534; 15F(2d)373. See also 40F(2d)539. (2) This means "judicial discretion" governed by well established principles, not by humor. 35F(2d)187. [c] (2) Illness and inability to pay expense of application held to justify extension, though bankrupt did not become ill till shortly before expiration of time. 15F (2d)373. [e] (3) Illness of bankrupt's attorney and litigation with trustee. 9 F(2d)534. (4) In general. 36F(2d)429. (5) Other instances. 40F(2d)539. [j] **"Unavoidably prevented"** requires same external compulsion or compelling outside force. 9F(2d)534. [k] **Negligence of attorney** in failing to file petition for discharge is not sufficient to warrant extension. 22F(2d)499. [l] **Bankrupts' disinclination to act** as cause for deferring application is not sufficient reason to entitle them to extension. 35F(2d) 187. [m] **Reasonably unavoidable.**-Delay must be shown to be reasonably unavoidable rather than due to bankrupt's choice. 35F(2d)187.

384-23 [c] 8F(2d)544.

384-24 But see 29F(2d)205; 32F(2d) 533. [a] 36F(2d)429.

385-25 7F(2d)614 (motion to dismiss appeal because trustee not authorized by creditors not sustained where trustee was also objecting creditor); 37F(2d) 18 (as to authorization of trustee to oppose discharge); 39F(2d)919; 40F(2d) 637 (effect of defective authority). See also 30F(2d)980.

385-25½-New. An attorney, to vote on question authorizing trustee to oppose discharge, need not produce power of attorney from clients. 10F(2d)119 (trustee's power not unauthorized because directed only by attorney's votes).

385-25⅓-New. Authorization of trustee to oppose discharge of bankrupt by attorney acting for creditor present at meeting was sufficient. 37F(2d)18.

385-25¼-New. Where attorney was without authority to represent creditors at meeting called to oppose discharge of bankrupt, such creditors were not present in the sense that they should be counted in determining majority. 37F (2d)18.

385-27½-New. A bankrupt has no vested right to have an application for discharge passed on as the law was at the time the suit in bankruptcy was started, or at the time application for discharge was made. 26F(2d)585.

385-27⅓-New. Proceedings on objections to a bankrupt's discharge are civil in their nature. 28F(2d)883.

385-27¼-New. Court is without jurisdiction to grant discharge where no petition has been filed after court's withdrawal of permission to file petition. 38F(2d)629.

385-28 14F(2d)490; 13PortoRicoFed 335. [a] 14F(2d)490.

385-28½-New. Verification on information is sufficient. 15F(2d)64.

385-28⅓-New. Denial of application for discharge because of absence of verification does not affect right of bankrupt to present proper verified petition. 13PortoRicoFed335.

385-29 But see 32F(2d)533.

385-38 36F(2d)1004.

385-40 28F(2d)607.

385-41 14F(2d)607; 28F(2d)607.

386-42 8F(2d)112; 39F(2d)919.

386-43 8F(2d)112; 14F(2d)607; 36F (2d)191. [a] 28F(2d)611. See also 40 F(2d)637.

386-43½-New. **Place.** Filing in the referee's office is sufficient. 31F(2d)789.

386-46 13F(2d)473. [b] (4) Specification of objection because of concealment from trustee of existence of debt is not insufficient in failing to state place of concealment. 4F(2d)892.

387-58 16F(2d)285.

387-59 4F(2d)892 (specification sufficient); 16F(2d)285.

387-60 4F(2d)892; 8F(2d)665.

387-63 14F(2d)674.

387-66 16F(2d)693. [c] **Fraudulent intent and knowledge** held not essential.

of express averment. 16F(2d)693.

387-67 4F(2d)892 (specification alleging destruction or concealment of books of account held not sufficiently specific).

387-67½-New. [§ 681a] (5). **Failure to Enter Appearance.** This ground of opposition to discharge is not sustained where the record showed orders of the court allowing specification of objection to discharge of bankrupt to be filed as well as appearance. 8F(2d)665.

387-68 13F(2d)567, 47ALR636; 16F(2d)285.

387-69 16F(2d)285.

387-70 8F(2d)665; 13F(2d)567, 47ALR636; 29F(2d)732.

387-71 16F(2d)285.

387-72½-New. Verification by person whose sole authority was telegrams from creditors authorizing him to vote at creditor's meeting was not made by person authorized to do so by Bankruptcy Act. 9F(2d)90.

388-75 18F(2d)606; 19F(2d)796; 28F(2d)611; 31F(2d)789. [e] 28F(2d)611.

388-79½-New. A bankrupt may question the right to file amended specifications by an informal petition to the court. 31F(2d)789.

388-79⅓-New. The referee may pass on the right to file amended specifications in an advisory way, the matter standing before the court as though originally presented to it. 31F(2d)789.

388-83 [a] **Seasonable objections are required.**-18F(2d)606.

388-84 [b] **Objections by bankrupt** that specifications and pleadings failed to show trustee's authority to oppose discharge held not waived. 6F(2d)320.

389-88 22F(2d)676. [c] **Failure to explain loss of assets** may be considered under specification raising question of failure to schedule salary indebtedness. 32F(2d)186.

389-93½-New. Domicile of bankrupt, going to jurisdiction, held not in issue. 16F(2d)285.

389-93⅓-New. Fraud in filing a voluntary petition in bankruptcy is immaterial to the rights of a creditor who did not present such ground in opposition to an application for discharge. MoA 15SW(2d)860.

389-95 9F(2d)520; 28F(2d)679; 30F(2d)674; 41F(2d)208.

389-96 9F(2d)520; 16F(2d)501; 17F(2d)149; 22F(2d)301; 35F(2d)936 (transfer to bankrupt regarded as valid in absence of showing to contrary). [c] **Fraudulent intent** in making false statement must be proved. 9F(2d)520.

389-97 13F(2d)473; 36F(2d)392. [a] (1) 13F(2d)473.

390-3 [c] **Refusal to admit** examination of bankrupt held reversible error. 6F(2d)1014.

390-5½-New. Finding of court in prior suit by trustee to set aside transfer as to bankrupt's fraudulent intent may not be considered by referee in determining such issue. 15F(2d)952.

390-5⅓-New. False oath of bankrupt made during hearing of specifications of objections is strong circumstance which can be considered in weighing testimony. 13F(2d)567, 47ALR636.

390-5¼-New. Specifications may be proved by circumstantial evidence. 13F(2d)473.

390-6 28F(2d)881; 35F(2d)497 (ruling requiring proof beyond reasonable doubt is erroneous).

390-7 22F(2d)282; 28F(2d)679; 30F(2d)674. [a] 10F(2d)119 (failure to keep proper books; denial of discharge warranted); 22F(2d)971 (evidence held insufficient). [b] (1) 279US24, 49SCt212, 73Led586; 20F(2d)93; 28F(2d)606; 28F(2d)679; 28F(2d)881; 31F(2d)789; 33F(2d)259 (reckless indifference to facts); 37F(2d)403 (improper payments with unsatisfactory accounting for assets); 38F(2d)611 (failure to keep proper books); 42F(2d)218. (2) To show credit not extended on faith of financial statement. 9F(2d)520. (3) To show bankrupt financial statement materially false. 9F(2d)253 (which was sent for purpose of obtaining credit). (4) To sustain finding of fraudulent concealment. 13F(2d)567, 47ALR636. [c] 17F(2d)149; 22F(2d)971 (concealment or destruction of records); 23F(2d)350; 24F(2d)408; Man [1926] 4DomLR210; Ont [1927] 3DomLR828. [d] **Evidence sufficient to justify denial of discharge.**-28F(2d)729. [e] **That one advancing credit knew financial statement was false** is strong proof that no weight was given thereto. 9F(2d)520. [f] **False oath.**-22F(2d)282. [g] **Evidence held insufficient** to bar discharge for failure to explain losses or deficiency in assets. 36F(2d)41. [h] **Strict proof of existence of bar** set up by statute is necessary for denial of discharge. 36F(2d)41. [i] **Evidence held insufficient** to warrant denial of discharge for failure to keep books or records. 43F(2d)463.

391-8 5F(2d)512 (greater degree of proof required where ground is offense for which bankrupt may be punished criminally).

391-9 21F(2d)161 (intent may be gathered from books, conduct of business, and bankrupt's conduct on witness stand); 22F(2d)282 (fraudulent intent); 42F(2d)218.

391-10 [b] 41F(2d)208. [c] 5F(2d)512 (failure to keep books of account); 7F(2d)614 (concealment of assets); 14F(2d)490; 21F(2d)161 (failure to keep books); 22F(2d)676; 30F(2d)102(2d case); 34F(2d)831 (concealment of assets shown not to exist); 36F(2d)803 (failure to keep books); 41F(2d)208.

391-11 [a] **Referee's inability to find what property was withheld** where considerable property was traced to him and unaccounted for does not support referee's order allowing discharge. 35F(2d)539.

391-16 39F(2d)919.

391-18 28F(2d)679.

391-19 29F(2d)915; 31F(2d)299.

392-21 15F(2d)692.

392-26½-New. Denial of discharge on ground not covered by specifications filed by objecting creditors is erroneous. 24F(2d)408.

392-26⅓-New. That creditor who has filed specifications in opposition to discharge abandons opposition or desires to withdraw objections does not deprive court of power to deny discharge. 38F(2d)621.

392-26¼-New. Petitions for discharge should be considered in light of law existing when court enters order. 41F(2d)208.

392-26⅕-New. Where party abandons prosecution of specifications duly filed by him or fails to produce evidence, any other party in interest may produce such evidence. 38F(2d)621.

392-26⅙-New. In such case attorney for objecting creditor who is also attorney for trustee can offer such proof although trustee has been discharged. 38F(2d)621.

392-29 24F(2d)473.

392-30 14F(2d)490.

392-31½-New. When parties agreed that a special master in bankruptcy might, in passing an application for discharge, consider all testimony before him as referee, no one can complain that he did so. 13F(2d)235.

392-31⅓-New. Findings that a bankrupt was entitled to discharge held sustained by evidence as against objection of concealing claim and secreting and destroying records. 13F(2d)235.

392-33 [a] **Law requiring order and payment of expenses** to require bankrupt to attend meeting for examination is not applicable on hearing on application for discharge. 42F(2d)276.

392-34 [d] **Fact of concealment of assets** held found by referee. 20F(2d)93.

392-35 37F(2d)499; 41F(2d)275. See also 36F(2d)803.

392-36 16F(2d)769; 28F(2d)679; 28F(2d)753; 31F(2d)789; 35F(2d)497.

393-38½-New. Master, ordered to ascertain and report facts, need not take and report testimony or have testimony taken by a stenographer. 23F(2d)245.

393-38⅓-New. Where evidence is not reported in a bankruptcy proceeding, the facts must be taken by the court as stated by the referee in his report. 28F(2d)883.

393-42½-New. Exceptions to the report of a referee in bankruptcy as special master, recommending against the discharge of the bankrupt, must be sustained, where it does not appear that any actual testimony was taken before him on the issue submitted. 29F(2d)432(2dcase).

393-49½-New. Discharge is valid following notices, sent by the referee for a final hearing before the court. 31F(2d)299.

393-49⅓-New. Where a creditor before discharge does not ask leave to sue a bankrupt and his wife to subject an estate by the entirety to the satisfaction of a joint debt and for a stay, he loses his right to have satisfaction of the debt out of such estate. MoA 15SW(2d)860.

393-49¼-New. Suspension of bankrupt's discharge may be ordered to enable holder of bankrupt's note containing waiver of exemption of personalty to sue thereon. 220Ala638, 127S226.

394-53 36F(2d)345. [a] 146Wash597, 264P406. [d] **Express provisions** of act on discharges precludes any other method. 7F(2d)135. [e] **Delay of five months** held undue laches. 20F(2d)206.

394-54½-New. Delay in moving to vacate an order extending time for bankrupt's discharge only until locating bankrupt after learning thereof held not laches. 15F(2d)471.

394-54⅓-New. Where discharge is vacated under court's equity powers no trial on right to discharge is had but case is merely reopened to permit later trial of that issue. 40F(2d)946.

394-54¼-New. Bankruptcy law affords no remedy to bankrupt to vacate discharge so as to amend schedules to include omitted deficiency judgments. 40F(2d)946.

394-54⅕-New. Revocation of discharge is result of trial on merits and denial of application ends case. 40F(2d)946.

394-57½-New. Discharge may be vacated at bankrupt's request under court's general equity power. 40F(2d)946.

394-58 15F(2d)471.

394-59 31F(2d)299. [a] (3) Provision in act for revocation for fraud limits general authority to revoke discharge. 7F(2d)135.

394-60 15F(2d)471.

394-63 [b] **Discharge will not be revoked** to enable creditor to file objections which trustee inadvertently failed to file. 7F(2d)135. [c] **Notices to creditors given by referee** instead of judge does not warrant vacation of discharge. 36F(2d)345.

394-63½-New. But the court has power to revoke a discharge for lack of notice to creditors. 31F(2d)424.

394-63⅓-New. A court sitting in bankruptcy may, under general equity powers, vacate a discharge, where equitable grounds other than fraud are shown. 31F(2d)424.

394-63¼-New. Court may set aside discharge where permission to file petition had been withdrawn and there was no petition filed at time discharge was granted. 38F(2d)629.

394-63⅕-New. Bankruptcy court in exercise of equity power may set aside discharge obtained by mistake, surprise or excusable neglect. 40F(2d)946 (bankrupt entitled to have discharge vacated to amend schedules).

395-64 126Or10, 268P766.

395-74 143Wash22, 254P254. [b] 126Or10, 268P766. [c] (1) 50ND804, 197NW868. Contra 3Del294, 136A280. (2) 50ND804, 197NW868.

395-77 253Mass157, 148NE379; 118Or280, 246P726; TexCivA 30SW(2d)395. [c] **Does not affect existence of debt** but only remedy for its collection. 253Mass157, 148NE379.

396-79½-New. The discharge does not transfer to a bankrupt the assets of his estate in bankruptcy. 86PaSuper15.

396-84 13F(2d)473.

396-85½-New. A discharged debt is assignable. 172Minn390, 215NW784.

396-85⅓-New. Creditors seeking to reach property held by a bankrupt not subject to action by the trustee must act before a discharge of bankruptcy.

Mo 18SW(2d)388 (property of individual bankrupt husband and wife held by entirety).

396–85¼–New. Discharge from all provable debts except such as are not dischargeable in bankruptcy is not final. 152**Wash**211, 277**P**843.

396–85½–New. Discharge in bankruptcy relates back to date of adjudication. 43**F(2d)**122(2dcase).

396–86 15**F(2d)**90 [aff 16**F(2d)**554].

396–90 35**GaA**184, 133**SE**750.

396–91½–New. An injunction against enforcement of a judgment of the municipal court because of discharge is not barred by the existence of a legal remedy, where such court has no authority to issue an injunction. 256**Mass**153, 152**NE**92.

396–91¼–New. The state court may, but is not bound to, grant continuance of an action on filing of a petition in bankruptcy, and may proceed to judgment. 256**Mass**153, 152**NE**92.

396–91¼–New. Defendant, filing a petition in bankruptcy, is not under duty to apply for a stay of proceedings. 256 **Mass**153, 152**NE**92.

397–96 43**F(2d)**122(2dcase); **Ga** 139**SE** 223; **IndA** 168**NE**703 (for rent owing when petition filed); 204 **Iowa**1273, 214 **NW**491, 55**ALR**644; **Iowa** 231**NW**675; 253**Mass**157, 148**NE**379; 263**Mass**57, 160**NE**437; 174**Minn**89, 218**NW**244, 57 **ALR**148; 133**Misc**306, 231**NYS**429; 55 **ND**776, 215**NW**549, 55**ALR**298; 126 **Or** 10, 268**P**766; 116**Tex**214, 288**SW**435. [a] (1) 30**F(2d)**588; 128**Me**519, 149**A** 142; 253**Mass**157, 148**NE**379 (note waiving all benefits of laws given for advantage or protection of maker). (8) Written promise to give new note if old note was not paid. 263**Mass**57, 160**NE** 437. (9) Note given in accord and satisfaction of liability in tort. 174**Minn** 264, 219**NW**155. (10) Claim for preference. 6**F(2d)**92. (11) Suretyship contract on unmatured note. 34**F(2d)**310. (12) Claim for use and occupancy of premises under lease, contracted for but never executed. **IndA** 168**NE**703.

397–97 [d] **Exceptions not enumerated in statute** cannot be read into operation of judgment discharging bank upt. by court of equity. **MoA** 15**SW(2d)**860.

397–99 See also 172**Minn**198, 215**NW** 197.

397–1 140**Miss**307, 105**S**518.

397–1½–New. Discharge in bankruptcy cannot be set up as defense in trover action, even though plaintiff elects to take money verdict. 35**GaA**34, 132**SE** 123.

397–1¼–New. However, a vendor may enforce rights where an attachment levy was within four months of adjudication in bankruptcy. 164**Ga**49, 137**SE**771.

397–1¼–New. A creditor could recover part of account arising after filing of debtor's petition in bankruptcy. 220 **Ky**430, 295**SW**415.

397–3 35**GaA**339, 132**SE**925; 128**Misc** 338, 218**NYS**678. See also 165**Ga**470, 141**SE**203.

398–5 14**F(2d)**675; 21**F(2d)**565; 256 **Mass**153, 152**NE**92. [f] **Judgment in unlawful detainer action** to recover property purchased on execution sale under judgment for alienation of affection is dischargeable. 14**F(2d)**675. [g] **Judgment in action for death from which appeal is pending** is unliquidated claim and not dischargeable. **TexCivA** 26**SW(2d)**395. [h] **Rule permitting collection of judgment pending appeal** does not affect lack of finality in judgment pending appeal on cost bond rendering it undischargeable as unliquidated claim. **TexCivA** 26**SW(2d)**395. [i] **Judgment for plaintiff in trover** though rendered for money, adjudicates title to property, and debt is not discharged. 41**GaA**713, 154**SE**388(1stcase).

398–8 256**Mass**153, 152**NE**92; 152**Miss** 390, 119**S**320.

398–9½–New. Confession of judgment for unmatured installments guaranteed by bankrupt which did not fall due until after petition was filed does not make them dischargeable. 22**F(2d)**557.

399–10 125**Me**211, 132**A**388; 250**Mich** 315, 230**NW**186; 138**Misc**241, 245**NYS** 442; 126 **Or**10, 268**P**766, 767 [quotCJ]; **TexCivA** 279**SW**893.

399–15 [a] **Surety on bond to release garnishment** of bank account, garnished over four months before petition in bankruptcy, is not discharged by defendant's discharge during pendency of law action. **Mich** 233**NW**431.

399–19 22**F(2d)**557 (guaranty of installments falling due after petition is filed); 128**Misc**338, 218**NYS**678.

399–19½–New. A spouse's adjudication as a bankrupt before a joint note became due is no objection to full recognition of discharge as a final judgment. **MoA** 15**SW(2d)**860.

399–20 12**F(2d)**938; 83 **IndA**415, 148 **NE**435, 928. See also 151**Wash**675, 276 **P**868. [b] 25**F(2d)**640. [c] **Alimony** does not include contract obligation to pay wife annuity. 25**F(2d)**640.

399–21½–New. Merger of judgment for alimony in subsequent judgment held not to make it provable in bankruptcy. 83 **IndA**415, 148**NE**435, 928.

400–22 8**F(2d)**424.

400–23 22**F(2d)**239; 40**F(2d)**563; 37 **GaA**530, 140**SE**918; 39**GaA**53, 146**SE** 42(2dcase); 205 **Iowa**306, 218**NW**74; 223**Ky**661, 4**SW(2d)**681; 227**Ky**323, 12 **SW(2d)**852; 127**Me**286, 143**A**101; 250 **Mich**221, 229**NW**503; 222**AppDiv**107, 225**NYS**284; 154**SC**48, 151**SE**109; 152 **Tenn**512, 279**SW**385; **TexCivA** 293**SW** 632; **TexCivA** 5**SW(2d)**1015 (securing materials under false promise to lien building as security); 151**Wash**318, 275 **P**724. But see 40**GaA**302, 149**SE**422 (where plaintiff elects to sue on contractual liability). [e] 152**Tenn**512, 279**SW**385. [f] (3) False promise to secure debt by mortgage and personal indorsement. 35**GaA**287, 133**SE**67. [l] 152**Tenn**512, 279**SW**385; **TexCivA** 274 **SW**1023 (holding actual fraud could not be predicated upon representation made for years before sale, simply because stipulation made it continuing in nature). [n] 152**Tenn**512, 279**SW**385. [o] **Inducing by false pretenses acceptance of note or duebill for money previously obtained** does not constitute obtaining property by false pretenses. 35**GaA**287, 133**SE**67. [p] **Deceit in knowingly and fraudulently misrepresenting value** of diamond ring is actual fraud. 152**Tenn**512, 279**SW**385. [q] **Omission of debts known to creditor** will not make statement false. **Tex CivA** 296**SW**964. [r] **Financial statement within bankruptcy statute** must have been false, made with intent to deceive, and relied on by creditor, and debtor's omission of debt he did not think he owed does not render it false. **TexCivA** 296**SW**964. [s] **Finding that debtor acted in good faith,** in omitting debts from financial statement, precludes creditor after debtor's discharge in bankruptcy. **TexCivA** 296**SW**964. [t] **But claimant may be precluded** from enforcing such liability after discharge where he proved claim for money obtained by fraud, received dividends, and obtained substantial sums in settlements from trustee and one partner of bankrupt partnership. **Mass** 168**NE**174(2dcase). [u] **Where defrauded party waives contract and sues in tort,** discharge in bankruptcy, does not release bankrupt from liability. 40 **GaA**302, 149**SE**422.

400–24 136 **Okl**166, 276**P**750.

400–25 11**F(2d)**897.

400–25½–New. A petition alleging that plaintiff sold defendant goods relying on a false financial statement states a cause of action for fraud within the Bankruptcy Act. **TexCivA** 299**SW**695.

400–25⅓–New. Accepting dividends from the bankruptcy court on a claim for the price of merchandise is not a waiver of the right to sue for fraud of the bankrupt in procuring goods. **Tex CivA** 299**SW**695.

400–25¼–New. Payer's financial statement with an agreement to inform the seller of any change is a continuing representation of the buyer's financial standing. **TexCivA** 299**SW**695.

400–25½–New. and acceptance of merchandise without informing the seller of an unfavorable change in financial condition is actual fraud precluding discharge of the debt. **TexCivA** 299**SW** 695.

400–25⅙–New. In a suit on a contract, induced by fraud to recover interest and attorney's fees, a plea of discharge in bankruptcy should have been sustained. 39**GaA**204, 146**SE**655(1stcase).

400–27 21**F(2d)**565 (judgment based on official negligence of bank officer without fraud is released by discharge); 21**F(2d)**590 (fraudulently obtaining conveyance of property); 92**Fla** 789, 110**S**349. But see **IndA** 169**NE**889 (where fraud is but incident thereof judgment founded on debt is dischargeable in bankruptcy). [c] **TexCivA** 19 **SW(2d)**412.

401–28 146**Wash**597, 264**P**406.

401–29 176**Ark**826, 4**SW(2d)**519; 146 **Wash**597, 264**P**406. [a] 152**Tenn**512, 279**SW**385.

401–30 **TexCivA** 299**SW**695. But see 39**GaA**53, 146**SE**42(2dcase); 39**GaA**204, 146**SE**655(1stcase).

401–31 146**Wash**597, 264**P**406.

401–34 But see 161**Ga**371, 131**SE**44.

402–35 250**NY**370, 165**NE**814.

402–36 But see 250**NY**370, 165**NE**814.

402–37 14**F(2d)**675 [citCJ]; 168**Ga** 175, 147**SE**558(2dcase); 38**GaA**614, 144 **SE**819; 174**Minn**89, 218**NW**244, 57**ALR** 148 (claim held not within exception); **Minn** 233**NW**314. [b] "Willful" does not necessarily mean deliberate act, and covers acts done wantonly and in reckless disregard for safety of others. 235 **Mich**383, 209**NW**89. [c] **Wrongful act intentionally done without just excuse** is within act. 27**F(2d)**334.

402–38 27**F(2d)**334; 31**F(2d)**118; 98 **Vt**429, 129**A**302. [b] (1) 147**Wash**497, 266**P**688. (10) Recovery of money damages in replevin suit. 161**Ga**371, 131**SE**44.

402–39 98**Vt**429, 129**A**302.

402–40 235**Mich**383, 209**NW**89. [a] 146**Wash**667, 264**P**715, 57**ALR**151.

402–41 235**Mich**383, 209**NW**89.

403–46 219**Ala**42, 121**S**37; 10**LaA**199, 120**S**433; 260**Mass**102, 156**NE**735; 147 **Miss**489, 112**S**697; 81**Mont**408, 263**P** 972 (provision of Bankruptcy Law is for benefit of creditors); 55**ND**776, 215 **NW**549, 55**ALR**298; 85**PaSuper**175; 54 **SD**347, 223**NW**307, 62**ALR**986. See also 228**Ky**604, 15**SW(2d)**477; **Tex CivA** 7**SW(2d)**686.

404–48 87**Colo** 67, 285**P**165 (residence of creditors); 260**Mass**102, 156**NE**735.

404–49 [b] **Bankrupt need not schedule** unknown holders of negotiable paper issued by him. 233 **IllA**378. [c] **Bankrupt has no duty to investigate if his** negotiable paper has been discounted. 233 **IllA**378.

404–50 30**F(2d)**588; 219**Ala**42, 121**S** 37; 39**GaA**706, 148**SE**302; 10**LaA**199, 120**S**433; 221**MoA**1051, 295**SW**520; 81 **Mont**408, 263**P**972; 55**ND**776, 215**NW** 549, 55**ALR**298; **TexCivA** 279**SW**893. See also 85**PaSuper**175. But see 54**SD** 347, 223**NW**307, 62**ALR**986. [b] (2) Constructive notice to agent is not sufficient to charge principal with knowledge of bankruptcy proceedings. 81 **Mont**408, 263**P**972. [e] 81**Mont**408, 263 **P**972. [g] **Knowledge of officers of creditor bank** is notice to bank. **Tex CivA** 279**SW**893.

404–51½–New. Schedule under general account does not vitiate discharge as bar to action on two trade acceptances not scheduled, and discounted by creditor to plaintiff, where creditor had no notice of proceedings until after order confirming composition with creditors. 233 **IllA**378.

405–53 **CalA** 289**P**648 (knowledge three weeks before expiration of time for filing claims held insufficient). [a] (2) Other instances. **TexCivA** 30**SW** (2d)360. [c] **Right to equal opportunity to participate will not be disregarded** on surmise that participation would have made no difference. **CalA** 289**P** 648.

405–54 **TexCivA** 7**SW(2d)**686. See also 228**Ky**604, 15**SW(2d)**477.

405–57 6**F(2d)**962; 31**F(2d)**93; 85 **CalA**15, 258**P**985 (new note for unpaid portion of old note given in part for sum embezzled); **Pa** 138**A**80; 151**Wash** 318, 275**P**724.

406–60 31**F(2d)**93; 35**GaA**287, 133**SE** 67; **Pa** 138**A**80; **TexCommnA** 299**SW** 846 (conversion by trustee of unincor-

porated association not discharged); TexCivA 294SW647.

406-61 TexCivA 294SW647, 651 [citC J]. [a] (1) 35GaA287, 133SE67.

406-62 TexCivA 294SW647, 651 [citC J].

407-63 TexCivA 294SW647, 651 [citC J].

407-64 TexCivA 294SW647, 651 [citC J].

407-65 TexCivA 294SW647, 651 [citC J].

407-66 TexCivA 294SW647, 651 [citC J].

407-67 22F(2d)163; TexCivA 294SW 647, 651 [citCJ].

408-72 151Wash318, 275P724.

408-74 TexCivA 279SW893.

408-75 [a] **Debts properly scheduled.**–TexCivA 279SW893. [b] **Knowledge of proceedings by creditor.**–TexCivA 279 SW893.

408-79½-New. Member of bankrupt partnership after discharge may be held liable in suit based on fraudulent representation by another partner if former reaped profit. TexCivA 26SW(2d) 430.

409-85 219Ala42, 121S37 (if originating prior to bankruptcy); 164Ga49, 137 SE771; 36GaA746, 138SE282 (replevy bond); 38GaA612, 144SE802(1stcase); Mass 170NE621; 250Mich652, 231NW 65; MoA 31SW(2d)234; 6PaDist&Co 149. But see Mass 169NE548. [a] (9) Sureties on attachment bond. 47RI 25, 129A611. (10) Liability of accommodation indorser is not relieved by maker's discharge in bankruptcy. 216AppDiv 120, 214NYS715. (11) Surety on foreign attachment bond where defendant became bankrupt within four months of commencement of action. 6PaDist&Co 149. [b] (3) Husband's discharge in bankruptcy is not bar to joint judgment against husband and wife on note signed by both. 250Mich315, 230NW186.

409-86½-New. Surety on bond to pay judgment held discharged by defendant's discharge in bankruptcy. 155 Tenn189, 291SW1064.

409-87 146Miss217, 111S291.

410-95 But see Mich 233NW431.

410-98½-New. In an action of the case in assumpsit, commenced by a writ of arrest, defended on the ground that defendant was granted a discharge in bankruptcy in which plaintiff's claim was listed, a demurrer to defendant's plea, on the ground that plaintiff was entitled to judgment against defendant with a perpetual stay of execution, so that plaintiff might proceed against the surety who became bail to release defendant from arrest, was properly overruled. 49RI 375, 142A619.

410-1 43F(2d)122; 35GaA790, 134SE 806; 37GaA245, 139SE578, 579 [citCJ]; 164Ga869, 139SE799; 51ND241, 199NW 863. [c] **Lien must be in existence at time of adjudication.**–Iowa 231NW675. [d] **Assignment of expectancy in estate** does not create lien in assignee's favor saved from discharge in bankruptcy. Iowa 231NW675.

410-3 37GaA245, 139SE578, 579 [cit CJ].

410-7 83IndA415, 148NE435, 928.

411-8½-New. Where a tenant replevied property levied under distress warrant and gave bond, and more than four months after such levy was adjudicated bankrupt, plaintiff could upon proof of indebtedness take judgment against the bankrupt as a basis of judgment against the surety on bond on condition of stay of execution against the bankrupt. 33GaA619, 127SE620.

411-8½-New. A creditor having a debt secured, not proving the debt in bankruptcy, can institute trover and obtain a money judgment for the value of the property. 168Ga307, 147SE529.

411-8¼-New. Insurer under automobile liability policy sued by insured for damages for failure to pay judgment cannot plead insured's discharge against intervening judgment creditors. Tex CivA 26SW(2d)395.

411-8½-New. Security, whether mortgage, pledge, assignment, or other form, is merely incident to debt, which is primary obligation. 43F(2d)122(2d case).

411-9 41F(2d)81.

411-10 43F(2d)122(2dcase).

411-11 216Ala539, 113SE617, 619 [cit CJ]; 165Ga470, 141SE203 (rule applied to mortgage of equitable estate); 204 Iowa1273, 214NW491, 55ALR644; 205 Iowa612, 218NW282; 250Mich672, 230NW921; 51ND241, 199NW863 (chattel mortgage on unplanted crop); 54ND 262, 209NW350; TexCivA 288SW235; TexCivA 289SW417. [e] **Pledgee cannot foreclose mortgage securing note,** where pledgor's debt to pledgee existed when bankruptcy petition was filed and pledgor discharged. 87Colo 445, 290P 784.

411-12 216Ala539, 113S617, 619 [cit CJ]; 250Mich672, 230NW921.

411-12½-New. A decree foreclosing a mortgage on real property and ordering a sale thereof is not affected by the discharge in bankruptcy of the mortgagor. 115Nebr199, 212NW210.

411-12⅓-New. The same is true of the right of redemption from such sale. 115Nebr199, 212NW210.

411-12¼-New. Pledgee of note secured by real estate mortgage could not foreclose mortgage where pledgor while debt existed filed bankruptcy petition and was discharged without pledgee having filed claim. Colo 288P629.

411-17 36GaA746, 138SE282.

411-19 152Miss390, 119S320. [a] **In proceeding by tenant to enjoin execution,** where landlord's lien had been released by forthcoming bond in distress proceeding, landlord was not deprived of lien by permitting tenant to set up discharge in bankruptcy in satisfaction of judgment on forthcoming bond. 152 Miss390, 119S320.

411-20½-New. Where the necessary procedural steps have been regularly taken, and it appears that the petitioner has been discharged from payment of the judgment, it is mandatory on the court to grant a motion to cancel the judgment. 133Misc306, 231NYS429.

412-21 37GaA245, 139SE578, 579 [cit CJ]. But see 153Va392, 149SE624. [e] **Judgment on provable claim existing at time of debtor's adjudication** as bankrupt is barred by final discharge. 57 ND143, 220NW644.

412-21½-New. Judgment docketed over four months before bankruptcy does not become lien on nonexempt realty inherited between adjudication and final discharge. ND 232NW891.

412-22 81Colo 244, 254P989; 37GaA 245, 139SE578, 579 [citCJ].

412-26 77Colo 574, 238P58, 59 [citCJ]; Iowa 231NW675; 122Kan62, 250P1069; 172Minn390, 215NW784; 118 Or280, 246 P726.

412-27 216Ala189, 113S16; 205 Iowa 1281, 217NW806 (oral promise); 122 Kan62, 250P1069; 253Mass157, 148NE 379; 172Minn390, 215NW784; 157Miss 187, 127S296; 138Misc278, 245NYS381; 50ND804, 197NW868; 118 Or280, 246 P726, 730 [citCJ]; 7PaDist&Co 369; TexCommnA 26SW(2d)166; TexCivA 16SW(2d)954. [a] **Discharge of joint maker.**–157Miss187, 127S296.

412-28 77Colo 574, 238P58, 59 [citCJ]; 122Kan62, 250P1069; 222Ky749, 2SW (2d)366; 253Mass157, 148NE379; 172 Minn390, 215NW784; 250NY370, 165 NE814. [c] 122Kan62, 250P1069. [d] **Burden of proof** of new promise to pay note is on plaintiff alleging such promise. 140Miss307, 105S518. [e] **Instructions held proper.** 122Kan62, 250P1069. [f] **Complaint** based on discharge held sufficient. 138Misc278, 245NYS381.

412-28½-New. Oral promise revives old obligation as a whole. 144Wash24, 255 P1026.

412-29 3LaA635; 152Miss390, 119S320; 118 Or280, 246P726; TexCommnA 26 SW(2d)166; TexCivA 19SW(2d)362; 144Wash24, 255P1026; 148Wash263, 268P1118. But see 104Conn311, 132A 898. [a] 131Misc490, 227NYS690; 118 Or280, 246P726. [f] (1) 131Misc490, 227NYS690; TexCivA 19SW(2d)362. (2) 118 Or280, 246P726, 730 [citCJ]. (9) Letter stating "You can count on getting part of the money I owe you this fall. I cannot yet say how much, but you are on the list to be paid first." TexCivA 19SW(2d)362. (10) Promise to pay part of debt does not revive entire debt. TexCivA 19SW(2d)362. (11) Other instances. 152Miss390, 119S320. [g] (4) Other instances. 136Misc892, 242NYS393 (reviving debt but not judgment obtained before bankruptcy). [i] **Promise must be made to creditor** or his agent or attorney. 243 IllA479. [j] **Evidence held admissible.**–243 IllA479. [k] **Mere acknowledgment of debt** is insufficient to revive debt. TexCommnA 26SW(2d)166. [l] **Mere expression of hope, desire, or intention to pay** is insufficient to revive debt. TexCommnA 26SW(2d)166 (letter expressing intention held insufficient).

413-30 104Conn311, 132A898; 118 Or 280, 246P726; 144Wash24, 255P1026.

413-31 118 Or280, 246P726; 144Wash 24, 255P1026.

413-31½-New. New promise must be express, and cannot be inferred. 104 Conn311, 132A898.

413-33 253Mass157, 148NE379; 221 MoA1051, 295SW520, 522 [quotCJ]. But see NJSup 149A345(2dcase) (promise ineffectual to revive debt).

413-33½-New. New promise made after discharge waives bar of discharge. 253Mass157, 148NE379.

413-33⅓-New. But waiver of discharge made as part of promise on which debt is based does not bind promisor after adjudication and discharge. 253Mass 157, 148NE379 (waiver part of debt established by note).

413-34 118 Or280, 246P726.

413-36 104Conn311, 132A898; 118 Or 280, 246P726, 730 [citCJ]; TexCivA 19 SW(2d)362. [a] (2) TexCivA 19SW (2d)362.

413-36½-New. Acceptance of contingent or conditional new promise may be implied if it is beneficial to the promisee. 104Conn311, 132A898. [a] **Promise to pay when debtor got back into business** held beneficial to promisee, justifying implication of acceptance. 104 Conn311, 132A898.

413-37 104Conn311, 132A898; 118 Or 280, 246P726.

413-37½-New. Where a discharged bankrupt makes conditional promise to pay a debt barred in bankruptcy, he may waive the condition and make an unconditional express promise to pay the debt. 118 Or280, 246P726.

413-38 50ND804, 197NW868; 118 Or 280, 246P726, 731 [quotCJ]; 144Wash 24, 255P1026.

413-39 172Minn390, 215NW784; 118 Or280, 246P726, 731 [quotCJ].

413-40 118 Or280, 246P726.

414-41 But see TexCivA 19SW(2d)362.

414-43 170Ark971, 281SW906; CalA 290P458; 160Ga591, 128SE906; 34GaA 283, 129SE294; 37GaA307, 140SE41; 205 Iowa1281, 217NW806; Iowa 229NW 672; 228Ky604, 15SW(2d)477; Mass 169NE548 (right of surety of debtor to plead); 156Miss84, 125S547; 156Miss 165, 125S727 (amendment of pleadings setting up discharge in bankruptcy); 119 Okl 55, 248P319, 321 [citCJ]; 136 Okl 166, 276P750; TexCivA 294SW647.

414-44 243 IllA358.

414-45 170Ark971, 281SW906; 34GaA 283, 129SE294 (cannot except to verdict and judgment); 37GaA307, 140SE41.

414-50 168Ga175, 147SE558(2dcase).

415-51 See also 12LaA341, 125S138.

415-53½-New. Where plaintiff's petition alleges a discharge in bankruptcy but claims exception of debt sued on, a general demurrer raises the defense of discharge. TexCivA 294SW647.

415-53⅓-New. In an action on an original cause of action a plea of discharge need not set up that the debt was scheduled. 216Ala189, 113S16.

415-53¼-New. An answer pleading no indebtedness and discharge held demurrable. 220Ky430, 295SW415.

415-53⅕-New. An answer pleading a discharge and scheduling debts claimed held not demurrable. 220Ky430, 295 SW415.

415-58 39GaA53, 146SE42(2dcase). [b] **Plaintiff relying on new promise** need not allege, but may prove same at trial. 50ND804, 197NW868.

415-61½-New. Exception of original causes of action from effects of discharge in bankruptcy must be set up by replication if not shown in complaint. 216 Ala189, 113S16.

415–62 131Misc490, 227NYS690. See also 172Minn390, 215NW784.

415–62½–New. Order of discharge in bankruptcy is prima facie evidence of discharge of the debt. 81Mont408, 263P972.

415–62⅓–New. There is no presumption that note executed prior to maker's discharge is included in discharge where evidence showed that claim was not scheduled. 87Colo 67, 285P165.

415–63 223Ky661, 4SW(2d)681; 260Mass102, 156NE735; 81Mont408, 263P972; 250NY370, 165NE814; 131Misc490, 227NYS690; 95PaSuper148; 98Vt429, 129A302. See also 219Ala42, 121S37.

416–65 260Mass102, 156NE735; 81Mont408, 263P972; 116Tex214, 288SW435; TexCivA 30SW(2d)360. But see 87Colo 67, 285P165. [a] (1) 233 IllA378.

416–66 116Tex214, 288SW435. [a] (1) CalA 289P648 (where bankrupt knew residence of creditor and did not state it in schedule); 39GaA706, 148SE302; 81Mont408, 263P972. (2) In absence of proper schedule. TexCivA 279SW893. (3) Burden is on bankrupt, as to claim not duly scheduled, to show that plaintiff had actual notice or knowledge of proceeding. 228Ky604, 15SW(2d)477.

416–67 250NY370, 165NE814 (report of special master on proof of claim and order of court thereon were receivable in evidence in suit by claimant on bankrupt's agreement to revive claim, in so far as they adjudicated property to be returned to plaintiff).

416–69 31F(2d)118.

416–74½–New. On the issue of condition in a new promise, a written agreement, providing that the bankrupt would give the creditors new notes, to mature five years from date, is admissible, 118 Or280, 246P726.

416–74⅓–New. as well as a note to mature in five years in which the amount was left blank and which was given to a creditor. 118 Or280, 246P726.

416–74¼–New. Evidence of improper dealings is admissible where right of recovery is based on new promise. 104 Conn311, 132A898.

416–74½–New. The bankrupt's dealings with unredeemed pledges in his partnership relations are inadmissible to show his credit and probability of new promise. 104Conn311, 132A898.

416–74¾–New. In a suit against a bankrupt stockbroker by a customer on the bankrupt's agreement to revive customer's claim for the bankrupt's failure to purchase stock, a master's report in reclamation proceedings, stating the value of the securities converted, has been held not admissible in evidence as showing that stock was converted, in order to prove the claim was nondischargeable. 250NY370, 165NE814.

416–76 122Kan62, 250P1069.

416–78½–New. Debtor's failure to say that he would not pay debt tends to support evidence that he did orally promise to pay. 144Wash24, 255P1026.

416–79 TexCivA 27SW(2d)590.

416–83 233 IllA378 (evidence of schedule filed and verifying affidavit is prima facie proof that creditor's general account scheduled included items of trade acceptances); 81Mont408, 263P972.

416–84 TexCivA 279SW893.

416–85 50ND804, 197NW868 (evidence sufficient); 144Wash24, 255P1026.

416–86½–New. Debtor's discharge in bankruptcy is prima facie defense in suit against him on debt. TexCivA 30SW(2d)360.

417–88 37GaA530, 140SE918.

417–89½–New. whether promise to pay barred debt was conditional, and, if so, whether condition was observed, 118 Or280, 246P726.

417–90 118 Or280, 246P726. [a] 118 Or280, 246P726, 730 [citCJ].

417–90½–New. Direction of verdict in favor of defendant pleading bankruptcy held error where the only evidence was stipulation not joined in by the appealing defendant. 86 IndA581, 159NE15.

417–91 31F(2d)299.

417–92 126 Or10, 268P766.

417–95 215Ala632, 112S209; 23AlaA458, 126S889; 198Cal652, 246P1049, 46 ALR1156.

417–97½–New. The discharge of the trustee does not operate to pass title to unconverted property to the bankrupt as long as creditors remain unpaid. 86 PaSuper15.

417–98 [g] **Power of circuit court of appeals to review bankruptcy proceeding is limited** to power to revise in matter of law given by Bankruptcy Act § 24b. 23F(2d)920.

418–99 5F(2d)143.

418–1 18F(2d)692. [a] (3) Whether deposit by bankrupt after banking hours of checks given for purchase of stock should be included in balance of his account for that day to determine whether fund was depleted is reviewable by petition to revise. 5F(2d)143.

418–2 5F(2d)52; 16F(2d)433; 18F(2d)692. [c] 5F(2d)143.

419–4 [c] **Order of referee** allowing claim for attorney's services is subject to review at any time before closing of estate. 5F(2d)899.

419–6 But see 31F(2d)563. [d] **Application for allowance of fees for services of attorneys for creditors in filing involuntary petition** is proceeding in bankruptcy. 18F(2d)692.

419–8 5F(2d)63; 7F(2d)447.

420–10 9F(2d)488; 17F(2d)706; 19F(2d)305. [a] (23) 6F(2d)192. (29) Order denying creditor's claim to priority of undisputed debt. 5F(2d)553. (30) Order requiring bidder to fulfill his bid under penalty of contempt. 5F(2d)63. (31) Order holding transfer to creditor by bankrupt invalid under state laws is reviewable only on petition to revise. 6F(2d)177. (32) Decision on petition of trustees to secure stock and title to lands by summary proceedings. 9F(2d)209. (33) Order of district court confirming turnover order of referee. 9F(2d)797. (34) Order discharging rule to vacate confirmation of composition. 9F(2d)883. (35) Order allowing exemption. 16F(2d)268.

420–11 16F(2d)986; 17F(2d)706; 18F(2d)692. [a] (14) Order of judge on involuntary petition is not reviewable by petition to revise by pointing out inconsistency between order and particular special finding of master. 6F(2d)146. (15) Decree dismissing trustee's petition to sequester bankrupt's interest in trust estate for benefit of creditors. 7F(2d)461. (16) Order requiring attorney to return money paid him by bankrupt in contemplation of bankruptcy. 17F(2d)347. (17) Order awarding proceeds of property to encumbrancers. 16F(2d)767. (18) An order denying discharge. 16F(2d)769. (19) Decree disallowing claim of petitioner in reclamation proceedings against involuntary bankrupt. 19F(2d)769. (20) Order denying plenary petition of trustee in bankruptcy for possession of certain real estate. 18F(2d)455. (21) Decision as to reasonableness of attorney's fees for services to petitioning creditors. 18F(2d)692. [b] **Order approving offer of compromise** need not be presented for review within thirty days as petition by petition to revise. 10F(2d)275.

421–13½–New. Order of district court based on agreed statement of facts may be reviewed by petition to revise. 9F(2d)928.

421–13⅓–New. In determining whether proceeding is "proceeding in bankruptcy" or "controversy arising in bankruptcy proceedings," whether claimant or trustee instituted proceedings is not materially important. 15F(2d)751.

421–15 [a] **Decision of "controversy"** where facts are not in dispute, may be reviewed by petition to reverse, but not when resorted to after time for appeal has expired. 271US176, 46SCt461, 70 Led889.

421–16 271US176, 46SCt461, 70Led 889; 15F(2d)371. [a] 18F(2d)692.

421–17 [c] **Neither attorney-general nor state can petition** where not made party to order. 9F(2d)797.

421–18½–New. Petition to revise will be regarded as brought by superintendent of banks where neither attorney-general nor state was made party to motion directing superintendent to turn over proceeds. 9F(2d)797.

421–18⅓–New. Attorney cannot petition for revision in his own name. 15F(2d)51.

421–19 9F(2d)488.

422–21 [a] (2) Petition held filed in time in view of exceptional state of case. 9F(2d)128.

422–22 [a] (2) Where, pursuant to rule of circuit court of appeals, order enlarging time for filing petition to revise was timely made, but was not filed with clerk of district court within time limited by rule, district court could direct that it be filed nunc pro tunc. 5F(2d)65.

422–23 16F(2d)268 (thirty days).

422–24 15F(2d)3.

422–25 12F(2d)864.

422–26½–New. Law abolishing distinction between appeal and revision is inapplicable where petition is filed more than thirty days from date of order. 16F(2d)268.

422–27 7F(2d)417.

422–29½–New. A petition should be prosecuted formally in the name of the creditor. 9F(2d)534.

422–29⅓–New. Parties against whom joint judgment is rendered must unite in appeal. 8F(2d)469.

423–32 7F(2d)417.

423–34½–New. An attorney may verify a petition to reverse if cause therefor is shown in his affidavit. 5F(2d)63.

423–34⅓–New. A petition to revise must be verified. 5F(2d)63.

423–42 5F(2d)63; 5F(2d)578; 7F(2d)19; 7F(2d)417; 9F(2d)43; 9F(2d)802; 10F(2d)91; 10F(2d)747 (burden is on petitioner to show error of law); 13F(2d)94; 14F(2d)955; 15F(2d)1012; 17F(2d)925; 2F(2d)853. [e] 5F(2d)63 (appellate court is bound by facts found by court below); 5F(2d)232; 10F(2d)747; 14F(2d)955; 16F(2d)113. [f] **Court has power** to review and revise entire ruling of referee. 5F(2d)259. [g] **Finding that bidder had no just cause for repudiating bid** raises no question of law. 5F(2d)63. [h] **Abuse of discretion may constitute error of law.**–9F(2d)534. [i] **That moot question** is presented cannot be considered. 9F(2d)802. [j] **Error alleged in requiring too high a degree of proof** to sustain turnover order cannot be reviewed where evidence is not presented. 15F(2d)321.

424–43 6F(2d)147; 15F(2d)278.

424–46½–New. Question of authority to enter order is not considered on petition of one not adversely affected. 10F(2d)285.

424–46⅓–New. Findings of fact and of mixed facts and law are not reviewable in absence of evidence on which they were made. 14F(2d)931.

424–46¼–New. If decree leaves outstanding rights not adjudicated it is matter of which petitioners as adverse claimants cannot take advantage. 8F(2d)724.

424–47 12F(2d)739; 13F(2d)94.

424–51½–New. On petition to revise an order of court, it will be presumed that the petitioner will obey the order about to be affirmed. 5F(2d)52.

424–51⅓–New. An alleged error in ordering the superintendent of banks to turn over securities goes to the propriety of the decision. 9F(2d)797.

424–51¼–New. On reversal of the order of a referee requiring a bankrupt to surrender life insurance policies to a trustee confirmed by the district court, the trustee will be given an opportunity to retry the case on proper issues where there was no answer, issue, report, findings, or opinion by the referee. 16F(2d)20.

424–51⅕–New. It will not be assumed that the referee's statement and decision alone was considered by the district court, in the absence of a certification of record. 17F(2d)721.

425–59 [c] **Circuit court of appeals does not have jurisdiction.**–40F(2d)474.

425–61 14F(2d)955; 25F(2d)288. [b] **Jurisdictional Act of 1916** as to appeals and writs of error is no warrant for treating petition for revision as appeal

where matter involved is reviewable only by appeal. 271US176, 46SCt461, 70L ed 889. [c] **Moot questions.**–Appeal from dismissal of bankruptcy proceedings becomes moot where defendant was meanwhile adjudged bankrupt in other proceedings. 22F(2d)806. [d] **Since abolition of petitions to revise,** only review in bankruptcy proceedings is by special appeal allowed by circuit court of appeals instead of in usual manner. 23 F(2d)920. [e]**Petition to revise and review order in bankruptcy** treated as appeal. 43F(2d)340. [f] **Appeals may be taken as of right from controversy in bankruptcy** without order therefor. 43 F(2d)340.

426–62 271US176, 46SCt461, 70L ed 889; 40F(2d)474. [a] **Matters held controversy arising in bankruptcy proceeding.**–Chattel mortgagee's claim to ownership of property in bankrupt receiver's hands. 28F(2d)154.

426–63 271US176, 46SCt461, 70L ed 889; 25F(2d)288; 28F(2d)154; 28 F(2d)270; 39F(2d)581; 40F(2d)474. [b] **Court's order rejecting claim of holder of bonds** of bankrupt corporation was reviewable by appeal as "controversy arising in bankruptcy." 33F(2d) 861.

426–63½–New. Whether an appeal from the district court order of Febr. 2, 1928 was in proper form depends on the act of Jan. 31, 1928. 25F(2d)329 (28USCA §§ 861a, 861b).

426–64 9F(2d)883; 14F(2d)955; 15 F(2d)751; 16F(2d)767; 36F(2d)655 (proceedings to set aside bankruptcy trustee's sale of bankrupt's assets). [c] (2) Order of district court confirming turnover order of referee. 9F(2d)797.

426–65 31F(2d)434. [b] **Statute inapplicable** where jury trial is demanded on issue of insolvency. 42F(2d)109.

426–66 9F(2d)883; 13F(2d)117; 16 F(2d)769. [e] **Proceedings confirming composition settlement** are not involved in such judgments. 9F(2d)883.

426–67 15F(2d)751; 39F(2d)581. See also 22F(2d)725. [n] (1) But see 36BC 81, [1925] 3DomLR1050, [1925] 3West Wkly360. (2) Under Canadian Act appeal lies from order allowing filing claim as secured or preferred debt since appeal "involves" amount in excess of five hundred dollars. 36BC81, [1925] 3DomLR 1050, [1925] 3WestWkly360.

427–68 31F(2d)563. [a] (2) Other instances. 40F(2d)353. [c] (1) 271US 191, 46SCt467, 70L ed897. (5) 5F(2d) 316. (19) Claim by testamentary trustee of deceased wife of bankrupt to interest in bankrupt's realty. 271US176, 46SCt461, 70L ed889. (20) Order approving offer of compromise is appealable. 10F(2d)275 (proceeding need not be taken within thirty days as by petition to revise). (21) Controversy over distribution of funds. 7F(2d)447. (22) Order determining amount of taxes to be paid by trustee. 15F(2d) 751. (23) Order affirming or denying composition settlement. 9F(2d)883 (must). (24) Order after reargument as to notice to vacate order enjoining state court action. 25F(2d)640. [d] **Master's failure to make findings of fact** is not reviewable. 10F(2d)786 (order of reference being interlocutory). [e] **Judgment under act does not include proceedings** confirming composition and discharging rule to vacate order of confirmation. 9F(2d)883 (in respect of appeals). [f] **Appeals from purely intermediate and preliminary orders** should be allowed only in exceptional cases if at all. 40F(2d)353.

427–68½–New. In the absence of a disputed question of fact, an appeal from an order involving purely questions of law will be dismissed. 9F(2d)488.

428–72 See also 24F(2d)481.

428–78½–New. A bankrupt may appeal from an order to turn over his books. 15F(2d)603.

428–78⅓–New. The right to appeal from an order of a referee if once lost cannot be revived by petition for rehearing. 15F(2d)751.

428–79½–New. Writ of error is proper method to review a punitive and remedial judgment for contempt for failure to comply with a turnover order where the punitive part of the judgment is dominating. 18F(2d)579.

428–82 24F(2d)305 (contention not decided by referee or judge); 28F(2d) 343; 34F(2d)284(1stcase); 38F(2d)611.

429–84½–New. Court acting sua sponte. Jurisdiction of referee to order payment under composition may be raised by court sua sponte. 22F(2d)910.

429–85 15F(2d)751. [f] (4) Judge of supreme court of Canada has no jurisdiction to extend time for applying for special leave to appeal. [1925]CanSC 275, [1925] 3DomLR311.

429–86 15F(2d)751; 31F(2d)379; 31 F(2d)563.

429–86½–New. An order allowing an appeal relates back to the date the petition therefor was filed. 15F(2d)765.

429–86⅓–New. Application for an appeal from an order in bankruptcy must be made to the appellate court within thirty days. 25F(2d)288.

429–86¼–New. Jurisdiction of the district court to dissolve a stay order is not defeated by an attempted appeal, where no notice was served on opposing counsel in the required time. 25F(2d)329.

430–88 [a] **Only district court** may allow appeal from order declaring mortgaged property burdensome and disclaiming title, as controversy arising out of bankruptcy is involved. 28F(2d)270.

430–89 18F(2d)956 (statute held not to preclude allowance of appeal by district judge); 25F(2d)458 (appeal from order affirming referee's refusal to appoint trustee); 29F(2d)515; 30F(2d) 489; 31F(2d)563; 31F(2d)921; 39 F(2d)581. See also 28F(2d)753. But see 29F(2d)510 [certiorari den 49SCt346 (1stcase)]; 29F(2d)984. But see 35 F(2d)18. [a] **Appeal to circuit court of appeals under 11 U. S. C. A. § 47** will be dismissed when not allowed by circuit court of appeals though allowed by district court. 23F(2d)920. [b] **Necessity of allowance by appellate court.**–Circuit court of appeals is without jurisdiction to review order of district court affirming referee's decision where appeal was not allowed in discretion of circuit court of appeals. 25F(2d)865. [c] **Application to circuit court of appeals to allow appeal** under Bankruptcy Act § 24(b) need be made only where it is sought to review proceedings in bankruptcy not included within provisions of § 25. 33F(2d)861. [d] **Where strangers apply for appropriation of money paid by trustee to third person** for release of judgment lien allowance of appeal by reviewing court is unnecessary. 38F(2d) 420. [e] **Matter requiring allowance by circuit court of appeals.**–40F(2d)353.

430–97½–New. A petitioning creditor will not be permitted to withdraw an appeal from a decree dismissing an involuntary petition, to the prejudice of other petitioning creditors. 25F(2d)78.

431–11½–New. District court will not stay proceedings pending appeal from an order directing a bankrupt to turn over books. 15F(2d)603.

431–11⅓–New. Where the trial court in bankruptcy held mortgages valid, they may be foreclosed pending appeal by the trustee without supersedeas. 32 F(2d)772.

431–11¼–New. A bankrupt's appeal from an order vacating an adjudication in bankruptcy does not deprive the district court of jurisdiction to dissolve an order staying proceedings in the state court. 25F(2d)329.

431–12 7F(2d)447. [b] (3) Where all evidence before referee and court is not presented, questions of evidence must be resolved against appellants. 5F(2d)902. (4) Where statement on appeal affirmatively showed that it did not contain all evidence taken before master and did not purport to be evidence reported to judge by master or used before district court at time of discharge, order for discharge must be affirmed. 35F(2d) 497. [h] (4) Appellate court cannot review finding that respondent had purged himself of contempt where evidence upon which findings were made are not in record. 34F(2d)264. [k] **Where bill of exception was stricken out,** case will be heard on judgment roll only and court will examine complaint, answer, findings, and judgment. 22F(2d)893. [l] **Record must show it contains all evidence.**–Failure of statement contained in record to show that it contains all evidence will alone require affirmance of order discharging bankrupt. 35F(2d) 497.

431–13 32F(2d)92 (held sufficient).

431–18½–New. The record should be purged of all irrelevant matter before remission to the appellate court. 25 F(2d)646.

432–19 27F(2d)229 (alleged error in failure to establish act of bankruptcy not considered).

432–23 15F(2d)751.

432–24 5F(2d)143; 5F(2d)171; 10 F(2d)926. But see 31F(2d)921 (review brings up only questions of law); 31 F(2d)945 (only questions of law will be considered on appeal from order denying vacation of adjudication). [a] **Where no jury trial is had** facts and law are reëxamined, otherwise verdict is conclusive. 42F(2d)109.

432–25 36F(2d)655. But see 30F(2d) 59.

432–27 31F(2d)921.

432–33 6F(2d)773 (allowance of attorney's fee to petitioning creditors). See also 30F(2d)489.

432–33½–New. The circuit court is not bound by findings of the referee not passed on by the district court. 9F(2d) 43.

432–33⅓–New. Master's failure to make findings of fact are not reviewable on appeal from a concededly valid order setting aside the order of discharge. 10 F(2d)786.

432–33¼–New. The circuit court of appeals, where authority to make an order in bankruptcy proceedings has been ruled on and appeal dismissed, will not consider the question of lack of jurisdiction to make such order raised in a proceeding under another order to punish a person for violation of the original order. 11F(2d)970.

432–33⅗–New. The decision of a referee as common-law arbitrator between a creditor and a former partner of the bankrupt is beyond the jurisdiction of the circuit court of appeals in reviewing an order in bankruptcy. 24F(2d)482.

432–33⅙–New. Issues raising the propriety of appointment of a receiver became moot on the trustee's appointment, and will not be reviewed on appeal. 29F(2d)994.

432–33⅐–New. Objections to discharge not pressed in brief or oral argument on appeal will be deemed abandoned. 41 F(2d)208.

432–34 29F(2d)65 [certiorari den 49SCt 345(9thcase)]; 33F(2d)122(1stcase); [b] 8F(2d)702; 8F(2d)724; 15F(2d)25; 35F(2d)800; 40F(2d)21; 41F(2d)660; 43F(2d)670. [d] **Denial of discharge because of extraordinary unexplained losses** is question for district court's discretion under evidence. 35F(2d)497.

432–35 18F(2d)546; 28F(2d)679 (gross abuse); 29F(2d)732; 31F(2d)921; 31 F(2d)972; 32F(2d)772 (general orders); 35F(2d)497. [h] **Discretion abused.**–32 F(2d)772 (by requiring trustee to disclaim title to mortgaged property as burdensome). [i] **Upholding trustee's compromise settlement** by referee's decision affirmed by court will not be disturbed unless clearly unreasonable. 35 F(2d)800.

433–36 6F(2d)126; 8F(2d)702; 15 F(2d)848; 17F(2d)691; 22F(2d)282 (finding of master or referee); 22F(2d) 805; 24F(2d)909; 26F(2d)10 (concurrent findings of referee and judge); 27 F(2d)196 (appellate court will not disturb finding of referee and district court, in contempt proceeding, except on clear showing of mistake). See also 29 F(2d)65 [certiorari den 279US848, 49 SCt345, 73L ed992(9thcase)]; 31F(2d) 388. But see 38F(2d)232. [a] (2) Whether bankrupt, who destroyed canceled checks and bank statements, should be denied discharge is fact question for district court. 35F(2d)497. [c] **Findings of referee,** affirmed by district court, are conclusive. 7F(2d)322. [d] **Findings of judge based on sufficient evidence** will not be disturbed in application for discharge. 23F(2d)54.

[e] **Inconsistent and incomplete findings,** not supporting decree denying, on ground of fraud, petition that trustee be ordered to pay money received on accounts assigned to petitioner, will necessitate vacating decree and remanding of case for determination of rights of parties. 26F(2d)764.

433-37 6F(2d)518; 13F(2d)370; 17F(2d)347; 17F(2d)925; 29F(2d)65 [certiorari den 279US848, 49SCt345, 73 L ed992(9thcase)]; 32F(2d)147; 32F(2d)982; 34F(2d)118; DC 41F(2d)426. See also 29F(2d)569.

433-37½-New. Referee's finding supported by evidence and approved by the trial judge has utmost controlling weight on appeal. 22F(2d)104.

433-41½-New. Findings of a referee, approved by the district court, will be approved by the appellate court on petition to revise, unless without evidence to support them or induced by error of law. 18F(2d)200.

433-41¼-New. Referee's finding, concurred in by district court, will not be set aside except for plain mistake. 39F(2d)397.

434-46½-New. Appeal in bankruptcy proceeding is de novo, 10 F(2d)119.

434-46½-New. and if record is sufficiently full, the case will be disposed of in the appellate court. 10F(2d)119 (except cases involving peculiar facts).

434-46¼-New. An appeal is dismissed on the same matter coming before the court on petition to revise. 10F(2d)285.

434-46⅓-New. On bankrupt's appeal from adjudication on ground that creditor's allegation of preference was on information and belief, court may permit amendment of petition to cure defect. 39F(2d)346.

434-46¼-New. Bankrupt's petition for modification of order of affirmance held insufficient. 39F(2d)346.

434-49½-New. A reversal leaves the case the same as though judgment had not been rendered. 32F(2d)772 (as to validity of mortgages).

435-60 43F(2d)462; 101NJEq78, 137 A713. [e] (3) Court may award costs to bankrupt. 36F(2d)282(2dcase). [f] **Creditors are entitled to notice** of claim for expenses of administration. 5F(2d)899. [g] **Referee may tax costs.**-19F(2d)795.

436-64 33F(2d)162 (recovering assets of estate for benefit of materialmen).

436-70 [a] **Mortgagee prevailing on only one of two petitions** to revise and who appeals from two orders for sale of property and disposition of proceeds held entitled to no costs. 5F(2d)633.

436-72 28F(2d)554. [i] (2) Bankrupt is entitled to extra allowance for expense due to acts of creditors. 14F(2d)490. (3) Costs not imposed on creditors opposing discharge where having acted in good faith. 43F(2d)462. [l] **Bankrupt estate is charged with costs** in unsuccessful suit by trustee to recover property alleged to belong to estate. 10F(2d)561. [m] **Creditor who unsuccessfully contests validity of claim** may be taxed with costs. 19F(2d)795.

437-73 34F(2d)183.

437-74 [b] **On reference to special master,** cost is apportioned in proportion, as alleged bankrupt and creditors failed to sustain their respective burdens of proof. 9F(2d)97.

437-75 14F(2d)876; 34F(2d)681 (where property is retained for benefit of general creditors); 43F(2d)462.

437-76 10F(2d)396 (against creditor securing appointment of receiver).

437-78 23F(2d)889. See also 36F(2d)147 (mortgaged property sold for more than enough to pay mortgage debt and interest is liable for costs and expenses of administration).

438-81 But see 13F(2d)266.

438-83 23F(2d)889, 890 [citCJ].

438-84½-New. On dismissal of involuntary proceedings because of defective petition, the petitioning creditor must bear expenses of the proceedings. 9F(2d)896.

438-84⅓-New. Commissions are payable out of the general estate where the bankrupt's mortgaged property is retained for the benefit of general creditors. 21F(2d)434.

438-84¼-New. If mortgaged property is sold free from liens for less than the amount due, mortgagee must contribute to the general fund an amount equal to the cost of sale in the state court. 21F(2d)434.

438-84⅙-New. Mortgagee's share of the lien is chargeable only with a ratable proportion of the expenses of sale and of so much else as helped to preserve the property or proceeds. 24F(2d)349.

438-84¼-New. On the sale of mortgaged property free from liens, the mortgagee should be assessed with costs only to the amount of the cost of foreclosure in state courts. 34F(2d)581.

438-88 19F(2d)795.

439-99½-New. Evidence held insufficient to show that profitable business was conducted by alleged bankrupts so as to allow them damages for good will and loss of prospective profits. 10F(2d)396 (on dismissal of petition).

439-99½-New. Claim held prima facie items of damage to alleged bankrupt on dismissal of petition. 10F(2d)396.

439-1 [a] **On dismissal of involuntary petition because of filing of voluntary petition,** attorneys for petitioning creditors may be allowed to file claim for services. 18F(2d)1001.

439-8 [b] **Procedure.**-For services rendered to bankrupt after filing of petition, compensation may be allowed only on sworn petition filed with referee after notice to creditors. 27F(2d)444.

439-10 [a] 13PortoRicoFed121.

439-11 18F(2d)692; 4HawaiiFed509. [d] **Decision of fees** between attorneys for petitioning creditors and for intervening creditors held error. 6F(2d)773. [e] **Services of attorney** in preserving estate prior to bankruptcy held not allowable. 6F(2d)1019.

439-14 6F(2d)773; 16F(2d)113. [b] **Fee disallowed** where petition for allowance by attorney is not accompanied by affidavit required by statute. 36F(2d)105(1stcase).

439-14½-New. Proper practice requires that claims for fees and expenses of counsel should first be presented to the referee. 8F(2d)312.

439-14⅓-New. Disallowance of a claim for attorney's fees is not an abuse of discretion where the claim therefor was filed after notice of hearing on the trustee's report had been mailed to the creditors. 18F(2d)366.

440-25 29F(2d)790.

440-26 19F(2d)253.

441-41 21F(2d)434.

441-43½-New. Fees of an attorney not employed by the trustee and who acted for a creditor will not be allowed. 16F(2d)113.

441-43⅓-New. Services rendered before the filing of the petition in an endeavor to bring about a satisfactory settlement to avoid bankruptcy are not chargeable against the bankrupt estate. 18F(2d)692.

441-43¼-New. Allowance must be confined to services actually rendered in filing the petition and prosecuting it to adjudication. 18F(2d)692.

441-43⅙-New. Allowance cannot be made for services in procuring the appointment of a receiver to hold the property pending adjudication, or for services rendered to him after his appointment. 18F(2d)692.

441-44½-New. The construction of a mortgage provision for fees to the mortgagee's attorney presents a question of state law. 33F(2d)561.

441-44⅓-New. On the sale of mortgaged property free of liens, attorneys for the mortgagee are entitled to fees from the proceeds of the sale. 34F(2d)581.

441-44¼-New. A provision accelerating the due date of a mortgage in the event of bankruptcy did not create liability for attorney's fee when the mortgagor was adjudged bankrupt. 33F(2d)563.

441-44½-New. The mortgagee is entitled to attorney's fees only on the amount of interest which the court disallowed, where the fee was fixed at five per cent. of the "amount sued on." 33F(2d)561.

441-44⅙-New. Where the fee was payable only in case of suit, the mortgagee's application for a prior allowance of its debt was not equivalent to a suit. 33F(2d)563.

441-45½-New. But an allowance against the bankrupt and creditors resisting the proceedings is improper. 9F(2d)896

441-48 [b] (2) Where payment of excessive fees was made by order of referee to bankrupt's attorney creditor who had no knowledge of action may petition district court for relief. 13PortoRicoFed205; 13PortoRicoFed253. [d] (1) 18F(2d)692 (recitals of order held to show that court did not arbitrarily refuse to consider record). (2) Bankruptcy court may review action of referee only after matter is properly presented. 27F(2d)444.

441-49 18F(2d)686. [a] 18F(2d)692; 27F(2d)444; 35F(2d)522 (prosecuting mortgage claim in bankruptcy not based on full amount of mortgage); 4HawaiiFed86. [b] 18F(2d)686; 13PortoRicoFed150; 13PortoRicoFed205; 13PortoRicoFed217; 13PortoRicoFed253. [c] **Court of bankruptcy** may set aside allowance made in administration expense where grossly excessive. 5F(2d)899. [d] **Reasonableness of allowance** is question of fact. 18F(2d)692.

441-50 18F(2d)686.

441-51 13PortoRicoFed150; 13PortoRicoFed205. [b] **In Ontario.**-28OntWN437, [1925] 3DomLR964.

441-55 13PortoRicoFed121.

442-60½-New. Compelling refund. Attorney may be required to refund excess of fee allowed by referee over proper fee. 13PortoRicoFed111; 13PortoRicoFed150; 13PortoRicoFed205; 13PortoRicoFed217.

442-60⅓-New. Where defense of laches to petition to compel attorney to refund excessive fees depends on question of fact, evidence should be received. 13PortoRicoFed186.

442-62 See also 4HawaiiFed661.

442-63½-New, On filing a petition for a partnership and its members, the clerk should collect a fee for the referee and trustee for each estate to be administered. 17F(2d)601.

442-63⅓-New. The clerk is entitled to three fees where, in connection with partnership proceedings, a petition was filed for adjudication of the estates of two individual partners. 30F(2d)705.

442-64 12F(2d)889; 38F(2d)745. [e] (1) 12F(2d)889. (2) Though corporation's right to do business in state has been canceled, its receiver in bankruptcy is entitled to extra compensation for continuing business. 12F(2d)889. [g] (2) That corporation receiver has department which performs service for which it might have employed third person does not entitle it to extra compensation. 12F(2d)889. [h] **Though petition is dismissed,** compensation is governed by statute limiting amount allowable by court. 12F(2d)889. [i] **Referee can recommend allowance of fees in receivership** only for services during time receivers conducted business. 41F(2d)845.

443-65 30F(2d)114; 101NJEq78, 137 A713.

443-65½-New. Allowance against a bankrupt and creditors resisting the proceedings is improper where the petition is dismissed. 9F(2d)896.

443-66½-New. A sheriff may not claim commission, where no sale was had, although the sale was pending at the institution of bankruptcy proceedings. 2F(2d)889.

443-66⅓-New. Under statute a sheriff is not entitled to priority for fees. 2F(2d)889.

443-66¼-New. The business of a bankrupt is conducted by a receiver when he carries on, at least substantially, the usual, customary, and normal

activities of a bankrupt as a going concern. 15F(2d)92.

443-66½-New. Fee disallowed where petition for allowance by receiver is not accompanied by affidavit required by statute. 36F(2d)105(1stcase).

443-67 But see 41F(2d)845.

443-69 8F(2d)629; 14F(2d)534.

443-69½-New. The amount of additional compensation to a trustee, conducting the business, by way of commissions on money disbursed, is within the sound discretion of the court. 8 F(2d)629.

443-69⅓-New. The court need not allow full commission on the total disbursed. 8F(2d)629.

443-69¼-New. It should inquire into the facts and make fair and just allowance within statutory limitation. 8 F(2d)629.

443-71 14F(2d)534. [a] **In petition for statutory fees,** detailed statement such as required in petition for compensation for services is not necessary. 5F(2d)931.

443-72 8F(2d)629. [f] **That denial of commissions** on property delivered to claimants will work hardship in some cases is no reason why statute should not be observed. 8F(2d)629. [g] **Prerequisites and conditions** for payment of unliquidated compensation stated. 30F(2d)725(2dcase).

443-73 7F(2d)959.

443-74 33F(2d)162.

443-75½-New. A provision of the Bankruptcy Act that the trustee shall receive compensation after rendering services must be strictly complied with. 14F(2d)534.

444-76½-New. Trustee or receiver who is unfaithful to trust forfeits his right to compensation. 44F(2d)62.

444-77 See also 30F(2d)705.

444-77½-New. But it has been held, where separate trustees are appointed for respective partnership and individual estates, that all are entitled to compensation in respect of receipts and disbursements in connection with the respective estates. 28F(2d)48.

444-78 [a] **Mere delay in accounting** is not ground for reducing compensation. 7F(2d)616.

444-82 43F(2d)878. [a] **Accused absent from United States when involuntary bankruptcy proceedings were commenced by constructive service** and not served with notice nor appearing cannot be convicted of knowingly concealing assets. 43F(2d)878.

444-87½-New. That the property was in the constructive possession of the receiver does not prevent concealment while in the actual physical possession of defendant. 20F(2d)454.

444-87⅓-New. The amount of the property concealed is immaterial. 21 F(2d)285.

444-88 33F(2d)582(1stcase) (there must be proof of concealment during bankruptcy).

444-91 10F(2d)778.

444-91½-New. Offense of concealing property from trustee cannot be committed before institution of bankruptcy proceedings and appointment of trustee. 43F(2d)878.

444-93 5F(2d)943 (failure to list and declare assets in schedules).

445-99 [a] **Receiving money** from member of bankrupt partnership authorizes conviction. 20F(2d)589. [b] **Intent to defeat Bankruptcy Act** relative to compositions held within law forbidding receiving property from bankrupt with intent to defeat act. 20F(2d) 589.

445-3 16F(2d)1001.

445-6 5F(2d)799.

445-8 5F(2d)799.

445-10 [a] **Those aiding and abetting bankrupt** to conceal assets may be indicted as principals. 5F(2d)799.

445-11 [a] **Indictment for aiding and abetting** bankrupt to conceal property need not allege where offense was committed. 5F(2d)799.

445-14 16F(2d)1001. [a] **Held sufficient.**–Unnecessary to set out entire bankruptcy proceedings. 35F(2d)483.

445-16 [a] **Indictment charging aiding and abetting bankrupt** to conceal property need not allege time of such aiding and abetting. 5F(2d)799.

446-17½-New. If the property is so identified as to enable accused to prepare his defense, an indictment for concealing assets is sufficient. 12F(2d)767.

446-17⅓-New. An indictment for conspiracy to conceal assets need not name the bankrupt as conspirator. 23F(2d) 884.

446-17¼-New. The amount need not be stated in the charge of the crime. 21F(2d)285.

446-17⅙-New. The particulars need not be stated in the charge of the crime. 21F(2d)285.

446-17⅛-New. A statement of concealment of property and assets belonging to the estate held sufficient. 21F(2d) 285.

446-22 5F(2d)799 (indictment charging making of false oath to schedules need not allege that they were subscribed by defendant).

446-23½-New. An allegation as to the appointment of a special commissioner before whom defendant is charged with having testified falsely, which is formally defective merely, is sufficient. 24 F(2d)325.

446-24 5F(2d)556 (evidence sufficient). [a] 10F(2d)778 (to go to jury). [b] **Evidence held insufficient.**–20F(2d)36. [c] **Prima facie case.**–39QueKB1, [1925] 3DomLR1055. [d] **Evidence held sufficient.**–21F(2d)285; 33F(2d)582(1st case).

446-25 Contra 13F(2d)11.

446-31 [a] **In prosecution for aiding and abetting to conceal** acts of defendant's employee, who removed property, held admissible on issue whether he had stolen goods and secreted them. 5 F(2d)799.

446-32 5F(2d)799 (in prosecution for aiding and abetting bankrupt to conceal property, evidence of corporation creditor's difficulty in collecting note is admissible); 33F(2d)582(1stcase) (not necessary that goods be discovered in possession of accused); 38F(2d) 3.

446-35½-New. Secondary evidence of the contents of lost books is admissible. 21F(2d)285.

446-35⅓-New. Evidence of bankrupt sending a false statement through the mails is competent on the issue of intent to conceal assets. 9F(2d)531.

446-35¼-New. as is evidence of the bankrupt's actions and conversations with aiders and abetters in concealment before the filing of the petition. 9F(2d) 531.

446-35⅕-New. Fictitious entries in bankrupt's books are admissible against the president. 9F(2d)531.

446-35⅙-New. as well as against the bankrupt codefendant. 9F(2d)531.

446-35⅐-New. Concealment before bankruptcy is admissible. 10F(2d)778.

446-35⅛-New. Memorandum book kept by bankrupt is admissible. 10F(2d) 778.

446-35⅑-New. Invoices found on bankrupt's premises are admissible. 10 F(2d)778.

446-35 1/10-New. Refusal of bankrupt to give financial statement is admissible. 10F(2d)778.

446-35 1/11-New. The fact of accused's bankruptcy may be proved by secondary evidence. 39QueKB5 [1925] 3DomLR1013.

446-35 1/12-New. In a prosecution for aiding and abetting a bankrupt in concealing assets from the trustee in bankruptcy, admitting testimony of codefendant bankrupt before the referee in bankruptcy at a hearing on the adjudication, which included statements made and questions by defendant while he was acting in such examination as counsel for the bankrupt, has been held not error. 30F(2d)590.

446-35 1/13-New. Previous testimony of a bankrupt, voluntarily given in a reclamation proceeding, is admissible against him in a prosecution for concealing assets. 34F(2d)282.

447-40½-New. Evidence held sufficient to sustain conviction for testifying falsely. 24F(2d)325.

447-41 5F(2d)799 (in prosecution for aiding and abetting bankrupt to conceal property, requested instructions held unwarranted by evidence). [a] **In prosecution of corporation's president** for aiding and abetting in concealment of assets, instruction that he was under no obligation to disclose to trustee whereabouts of assets held properly refused. 5F(2d)799.

447-41½-New. Instructions held erroneous. 9F(2d)496.

447-41⅓-New. Whether defendant knowingly aided and abetted in concealment is for jury. 9F(2d)531.

447-41¼-New. The jury's consideration of checks drawn by the bankrupt before bankruptcy held proper under the evidence. 21F(2d)285.

447-41⅙-New. Whether the bankrupt made false oaths and concealed property is for the jury. 22F(2d)153.

BANKS AND BANKING

473-1 [a] 202 Iowa739, 210NW901; 308Mo 253, 271SW770. (2) Word "bank" is used in sense of institution which is doing banking business as generally understood, the words "bank" and "institutions doing a banking business" are identical in meaning as used in statute. 308Mo 253, 271SW770.

474-6 202 Iowa739, 210NW901.

474-10 131Misc188, 226NYS415.

474-10½-New. A private bank, conducted by copartnership, must be treated as separate entity. 75Mont567, 244P 489.

475-15 163La1005, 113S355. See also 255 IllA362.

475-17 207 Iowa41, 217NW477, 480 [citCJ].

476-21 [h] **Banker is in a just sense trustee of fiscal affairs** of people of state. 200Cal 1, 251P784.

477-29 145Wash193, 259P9; 97WVa 621, 125SE706, 708 [citCJ].

477-29½-New. Banking is affected with a public interest. 114Nebr567, 208NW662; 126Misc753, 214NYS643.

477-29⅓-New. The business of banking has peculiar obligations and correlative restrictions upon its management. 126Misc753, 214NYS643.

478-30 But see 255 IllA362. [c] **Christmas clubs,** by whomsoever conducted, receiving deposits for repayment at Christmas are subject to provisions of Pennsylvania Private Banking Act requiring license. 13PaDist&Co 325.

478-30½-New. **Street car conductors who collect premiums from war veterans** for reinstatement of lapsed insurance and to pay over the same to a bank for deposit are not engaged in receiving money for safe-keeping or for the purpose of transmission to another and require no license. 9PaDist&Co 221.

478-32 226AppDiv21, 234NYS260.

478-33½-New. Having a place of business where deposits are received and paid out on checks and where money is loaned on security is the substance of banking. 218Ky135, 291SW17, 50ALR 1337.

478-35 [c] 114Nebr567, 208NW662.

478-36 55ND45, 212NW236, 51ALR 296.

479-39 [b] **In Kansas.**–121Kan564, 247 P646.

479-41½-New. Under a statute not expressly requiring a formal hearing on an application for incorporation of a bank, a sufficient opportunity should be afforded applicants and the public to support or oppose the application. 155 Md86, 141A518.

479-41⅓-New. Under some statutes the bank commissioner must make full inquiry into the facts before approving or refusing the incorporation of a bank. 155Md86, 141A518.

479-41¼-New. Where it is admitted that the bank commissioner acted arbitrarily in rejecting a charter for a bank in not considering available evidence, it

cannot be presumed that his duty to ascertain statutory conditions for approval or rejection was duly performed. 155Md86, 141A518.

479–42½–New. A bank charter is a contract between the corporation and the state which cannot be changed except by mutual consent. 34Ariz445, 272P643.

479–44 235 IllA518. [a] (4) Foreign corporation accepting money for deposit though issuing annuity income contract instead of certificate of deposit, money being sent to another state for deposit, is exercising banking powers. 235 IllA518. [b] **Entire business of alleged banking company** is looked into to determine if banking orders are being exercised. 235 IllA518.

479–53 But see 135Misc628, 238NYS158.

480–54½–New. A stock corporation discounting notes in violation of the Banking Law cannot recover on a note sued on. 133Misc512, 231NYS656.

480–54⅓–New. The purchase of promissory notes by a rediscount corporation is not prohibited by the Banking Law as an encroachment on the powers of the bank. 133Misc517, 232NYS197.

480–54¼–New. In New York, parts of the General Corporation Law and Banking Law are complementary and are intended to prevent business corporations from exercising banking powers. 226AppDiv21, 234NYS260.

480–54⅕–New. A restriction against business corporations discounting bills, notes, or other evidences of indebtedness applies only when the discounting is part of the business of banking. 226AppDiv21, 234NYS260.

480–55 178Ark361, 12SW(2d)1; 200Cal1, 251P784; 97CalA138, 275P453; 98Fla891, 124S461; 200Iowa1322, 206NW617; 207Iowa41, 217NW477, 480[citCJ]; 125Kan44, 262P583; Kan 289P483 (rules for determining solvency of state banks); 155Md86, 141A518; 174Minn36, 218NW238 (state banking corporations properly placed by themselves for purposes of legislation); 75Mont567, 244P489; 114Nebr567, 208NW662; Nebr 227NW922; 247NY290, 160NE374; 52ND231, 202NW391; 55ND45, 212NW236, 51ALR296; 8PaDist&Co27; 50SD6, 208NW222; 101WVa127, 132SE372. [h] See also 55ND45, 212NW236, 51ALR296. [j] (2) Statute regulating incorporation of banks and trust companies is not invalid because it does not apply to private bankers or to establishment of branches by existing corporations. 155Md86, 141A518. (3) other instances. 281US643, 50SCt434, 74Led1088. (4) In general. CalA290P637. [k] **Statutes regulating banks are paramount to general laws** inconsistent with them. 50SD44, 208NW228. [l] **Regulations must be reasonable.**–200Cal1, 251P784. [m] **Separation of voting power from beneficial ownership of banking corporation stock** held matter for regulation by police power. 247NY290, 160NE374. [n] **Application.**–Voting trust agreements. 247NY290, 160NE374.

480–56 125Kan44, 262P583; 128Misc123, 217NYS833; 225AppDiv366, 233NYS896; 55ND45, 212NW236, 51ALR296; 101WVa127, 132SE372.

480–56½–New. and to the end that banks may freely contract debts with depositors. 50SD6, 208NW222.

480–56⅓–New. and affects so intimately the commercial welfare and business of the people; 200Cal1, 251P784.

480–57 52ND26, 202NW391 [citCJ]; 55ND45, 212NW236, 51ALR296. [f] 55ND45, 212NW236, 51ALR296.

481–59½–New. A statute authorizing the state banking board to fix the form of a bond with personal security has been held not unconstitutional as conferring legislative powers upon the banking board. TexCivA 9SW(2d)446.

481–61 200Cal1, 251P784. [c] **Constitution** did not create banking department but authorized legislature to do so. 41OklACR131. [d] **Statute conferring powers on bank commission** has been held constitutional. 163Ga849, 137SE264. [e] **Board or officer may make reasonable rules** and regulations necessary to exercise of his powers. 200Cal1, 251P784. [f] **Eligibility of special deputy.**–Stockholder of insolvent bank is not ineligible to appointment by state commissioner of finance to position of special deputy. 316Mo754, 291SW454. [g] **Supervisory powers** of banking commissioner do not prevent bank from contracting without first obtaining his consent. 222Ky126, 300SW339. [h] **Bank may not escape liability** on contract because of supervisory powers of banking commissioner. 222Ky126, 300SW339. [i] **Implied powers.**–319Mo474, 5SW(2d)50, 57ALR881. [j] **Superintendent of banks as bank examiner.**–168Ga723, 149SE37. [k] **Courts should interfere** with supervision only in perfectly clear case. 42F(2d)209.

481–62 101WVa127, 132SE372. [e] **Powers of board.**–114Nebr664, 209NW249. [f] **Exercise of power presumed to intend improvement** without fraud on public. 192Wis442, 213NW653. [g] **Court cannot allow examiner's claim** for living expenses, where superintendent employed him at fixed salary. Iowa231NW342. [h] **Initial power to employ examiner** and fix expenses is in superintendent. Iowa231NW342.

482–63 79Mont385, 256P1071; 101WVa127, 132SE372. [b] (2) State comptroller may require financial statements and reports of state banks to show what amount of assets of banks is pledged as security for deposits. 96Fla247, 117S900, 65ALR1398. [e] (1) See also 296Pa120, 145A794. (2) Superintendent of banks did not exceed his authority in taking bond to secure notes held by bank. 164Minn265, 204NW938. [f] MoA 17SW(2d)986 (failure to discover insolvency or close bank). [h] **Banking board's cancellation of bond given by private banker** to secure proper sale of steamship tickets releases sureties in absence of fraud. 296Pa120, 145A794. [i] **Knowledge of national bank examiner as knowledge of bank.**–34F(2d)377.

482–64 233Ky801, 26SW(2d)1045; 174Minn36, 218NW238 (represents bank, stockholders, and all creditors); 114Nebr567, 208NW662; 121Okl180, 249P153; 50SD44, 208NW228; 142Wash474, 253P646; 101WVa127, 132SE372. [a] 233Ky801, 26SW(2d)1045. [b] (3) In permitting bank to continue business after bond was given to secure assets of doubtful value, superintendent did not offend public policy, nor violate statute, relating to connivance, in acceptance of deposits. 164Minn265, 204NW938. (4) State banking department may close bank for insolvency. 115Nebr776, 214NW933. [f] **Rights and liabilities of state banking officials.**–9F(2d)797. [g] **Policy of expediting liquidation.**–125Kan818, 266P85. [h] **Proceedings for leave to proceed with levy on property of bank.**–52SD466, 218NW630. [i] **Effect of judgment liens.**–52SD466, 218NW630. [j] **Authority to bind bank.**–MoA 290SW1022. [k] **As party to action.**–MoA 290SW1022. [l] **Time allowed for determination as to whether to close bank.**–117Nebr381, 220NW683. [m] **Bank is not dissolved** by taking over of its assets by department of trade and commerce for purpose of managing or liquidating bank. 117Nebr431, 220NW566. [n] **Actions against bank.**–117Nebr431, 220NW566. [o] **Assets of bank are immune from seizure on execution** for reasonable time during which guaranty fund commission is in possession, determining whether bank may be turned back to officers or must be closed. 117Nebr381, 220NW683. [p] **Banking commissioner may act on his own initiative** when he deems bank insolvent. 233Ky801, 26SW(2d)1045.

482–64½–New. A banking commissioner in possession and control of the property and affairs of a suspended bank stands in its place. MoA 279SW435; TexCommnA 276SW197.

482–64⅓–New. In such case the commissioner is chargeable with, and responsible for, its president's fraud in making an unfulfilled promise to reconvey land purchased on foreclosure of a vendor's lien in consideration of a defendant's refraining from setting up homestead rights. TexCommnA 276SW197.

482–64¼–New. After a bank commissioner has taken charge of an insolvent bank, purchased, and had indorsed to him a note secured by first mortgage on real estate on which the bank held a second mortgage, and the state has brought suit on the note and mortgage, securing it, the makers of the note and mortgage will not be permitted in the suit to question the authority of the bank commissioner to purchase the note, or the right of the state to maintain action. 108Okl76, 232P800.

482–64⅕–New. State bank commissioner in charge of the assets of a failed bank, acts in the capacity of receiver. 114Okl105, 243P718.

482–64⅙–New. A statute requiring officers to make and publish a statement of deposits not changed for a stated number of years does not apply to the superintendent of banks in charge of an insolvent bank. 117Or208, 243P86.

482–64⅐–New. Assets are subject to liens, priorities, and equities existing at the time of failure of the bank. 114Okl105, 243P718.

482–64⅛–New. The liquidating officer of an insolvent bank is its legal representative within a power conferred in a deed of trust giving the bank authority to substitute a trustee. 143Miss189, 108S431.

482–64⅛–New. Assets are taken subject to any trust impressed upon them. 123Okl179, 250P483.

482–64 1/10–New. A state bank commissioner has exclusive jurisdiction to wind up the affairs of an insolvent state bank. 121Okl180, 249P153 (allegations insufficient to authorize appointment of receiver on ground of fraud).

482–64 1/11–New. Where the stockholders of a state bank, under advice and order of the bank commissioner, pay into the bank a debtor's overdue obligation to repair the assets of the bank and such payment serves such purpose to the same extent as if payment had been made by the debtor such stockholders are entitled to be subrogated to the rights of the bank in the indebtedness and against the debtor for reimbursement. 123Okl43, 251P985.

482–64 1/12–New. Real estate of a failed bank being administered by the state bank commissioner for the benefit of depositors and stockholders is not "public lands of state." 122Okl271, 254P963.

482–64 1/13–New. The bank commissioner has authority to transfer by deed of conveyance title to real estate coming into his hands as assets of an insolvent state bank. 122Okl271, 254P963.

482–64 1/14–New. State examiner may not sell real estate of an insolvent bank. 79Mont184, 255P744.

482–64 1/15–New. Phrases in a statute to the effect that on a bank's insolvency, the receiver is under supervision of the state examiner, has been held to relate only to administration detail and not to matters requiring judicial action. 79Mont184, 255P744.

482–64 1/16–New. A contract, by which an officer of a bank, in consideration of the bank's being permitted to continue in business for a stated time, obligated himself to the superintendent of banks to make good any loss to depositors or creditors by reason of such continuance, is not invalid as requiring suspension of official duties of the superintendent. 18F(2d)252.

482–64 1/17–New. An officer making such contract is liable thereon where the bank remains insolvent at the end of such period and is taken over for liquidation, and in the meantime some depositors and creditors have been paid in full while others remain unpaid. 18F(2d)252.

482–64 1/18–New. The appointment of a receiver by the state bank comptroller operates as a suspension of the rights,

privileges, and franchises theretofore exercised by the bank or trust company. 94Fla411, 114S364.

482-64½9-New. The authority of such receiver is not limited merely to taking custody of such trust assets. 94Fla 411, 114S364.

482-64½0-New. Such appointment gives the state comptroller complete discretionary power over the assets and affairs of the bank or trust company. 94 Fla411, 114S364.

482-64½1-New. A receiver so appointed takes title to assets and "affairs" of the bank, "affairs" being construed as including all business interests of the bank, including trust estates. 94Fla 411, 114S364.

482-64½2-New. He is charged with handling trust estates held by the bank or trust company in the same manner in which the original trustee was charged with handling them until a substitute trustee is appointed by a court of chancery. 94Fla411, 114S364.

482-64½3-New. It is the duty of the state bank comptroller through such receiver to execute the trust according to the terms under which the trust was created. 94Fla411, 114S364.

482-64½4-New. In such case the right to exercise the franchise of the bank or trust company ceases to exist unless and until it is revived or reinstated under direction of the comptroller or in pursuance of a judgment of a court of competent jurisdiction. 94Fla411, 114S 364.

482-64½5-New. Moneys received from trust estates by such receiver as acting trustee are not within a provision requiring deposit of funds with the state treasurer. 94Fla411, 114S364.

482-64½6-New. Where a bank makes excessive loans to officers or carries fictitious assets or past-due paper, the comptroller may, in his discretion, take possession until affairs are in safe condition, or appoint receiver. 94Fla1023, 114S760.

482-64½7-New. Indictment of the comptroller for corrupt failure to wind up the state bank's business, knowing the bank's legal reserve was less than required, and forfeit the franchise, was held not to charge a criminal offense. 94Fla1023, 114S760.

482-64½8-New. Indictment of the comptroller for failure to forfeit the state bank's franchise was held not to charge a criminal offense. 94Fla1023, 114S760.

482-64½9-New. The amount of an assessment to be made by the superintendent of banks against stockholders of a bank which has been taken over by him rests in his discretion so long as it does not exceed the liability of each stockholder. 37GaA246, 139SE570.

482-64½0-New. The exercise of such discretion is conclusive on the stockholders. 37GaA246, 139SE570.

482-64½1-New. The commissioner of finance in charge of the assets of an insolvent bank takes them subject to all set-offs and equities existing when he takes charge of the bank. **MoA** 279 SW435.

482-64½2-New. A banking commissioner paying a note pledged by an insolvent bank to which it was payable has no greater right than the pledgee could assert in foreclosure of its lien thereon. **TexCivA** 298SW620.

482-64½3-New. In an action on such note the banking commissioner has the burden of pleading and proving necessity for resort to the note to secure reimbursement for the amount paid to the pledgee. **TexCivA** 298SW620.

482-64½4-New. A statute authorizing the banking board to fix a standard form for the bond of a bank to secure depositors has been held not to confer upon the banking board authority to determine what kind of security banks shall give. **TexCivA** 9SW(2d)446.

483-66 73Mont210, 236P1090 (state bank). [i] **Bank leasing surplus portion of its office building** is not subject to license tax for operating office building under omnibus clause of Louisiana statute. 170La426, 127S890.

483-68½-New. Under South Dakota statute it is unlawful for a bank to issue certificates of deposit for the purpose of borrowing money. 48SD417, 204NW901.

483-68½-New. Sinking fund. Under statutes, embezzlement of school funds by one who was cashier of bank and treasurer of school district shows liability of bank rendering claim of school district payable out of sinking fund. Iowa 230NW418.

483-71 8F(2d)551.

484-74 120Kan620, 244P852; 117Nebr 478, 221NW107 (fund solely creature of statute); 41 OklACR131; **Tex CommnA** 272SW775; **TexCivA** 283SW 213; **TexCivA** 297SW341 (petition held not subject to general demurrer); **Tex CivA** 27SW(2d)319. [a] (5) **Tex CommnA** 276SW654. (6) Tax collector's balance after payment of taxes due state, county, and all subdivisions thereof held individual deposit, secured by guaranty fund. **TexCivA** 297SW 1097. [g] 203 Iowa1089, 213NW232. [k] 114Nebr646, 209NW333; 116Nebr 223, 216NW803. [m] 41 OklACR131. [n] **Rights and liabilities are statutory** rather than contractual, and controversies are governed by statute in force when they arise. 120Kan620, 244P852. [o] **Evidence held to show** that certificates of deposit were not protected by guaranty fund. 113Nebr843, 205NW 563. [p] **In Kansas.**–121Kan545, 247P 432. [q] **In North Dakota.**–50ND229, 195NW432. [r] **Deposits protected by guaranty fund.**–203 Iowa349, 212NW 742; 121Kan768, 250P276; 123Kan4, 254P394; 147Miss183, 113S335; 114 Nebr826, 211NW18; 114Nebr867, 211 NW164; 115Nebr396, 213NW582; 115 Nebr574, 214NW4; 115Nebr611, 214 NW10; 115Nebr648, 214NW253; 115 Nebr667, 214NW293; 115Nebr702, 214 NW640; 115Nebr890, 215NW128; 116 Nebr223, 216NW803; 50SD633, 211NW 448; 115Tex167, 278SW1101; **Tex CommnA** 290SW1090; **TexCivA** 281SW 264; **TexCivA** 283SW213; **TexCivA** 283 SW638; **TexCivA** 284SW688; **TexCivA** 285SW930; **TexCivA** 294SW310. [s] **Oklahoma constitution did not create fund for protection of depositors** but authorized legislature to do so. 41 OklACR131. [t] **How raised and maintained.**–41 OklACR131. [u] **Right to interest.**–115Nebr396, 213NW582; **Tex CivA** 283SW213; **TexCivA** 284SW688. [v] **Obligation of guaranty fund** is fixed by statute. 115Nebr648, 214NW253. [w] **Purpose of statute.**–203 Iowa1089, 213NW232; 115Nebr890, 215NW128; 116Nebr223, 216NW803. [x] **Such statutes are constitutional.**–55ND163, 212 NW822. [y] **Liquidation and distribution of insolvent guaranty fund.**–125 Kan818, 266P85. [z] **Agent in charge of insolvent bank** held to have authority to approve depositor's claim for checking account balance as payable out of guaranty fund. **TexCivA** 297SW626. [aa] **Guaranty Depositors Act** must be construed by its own language and that of constitution. **TexCivA** 297SW341. [bb] **In action to recover unsecured,** noninterest-bearing deposit, joinder of insolvent bank with banking commissioner held not misjoinder. **TexCivA** 297SW648. [cc] **Real fact,** not form of transaction, determines whether bona fide deposit, secured by guaranty fund, was made. **TexCivA** 297SW1097. [dd] **Guaranty Depositors Act** should be liberally construed to protect bona fide depositors. **TexCivA** 297SW341. [ee] **Petition by depositor** of insolvent bank for payment of claim from guaranty fund held good as against general demurrer. **TexCivA** 297SW648. [ff] **Temporary deposit of tax moneys in bank,** not county depositary, does not deprive deposit of protection by guaranty fund. **TexCivA** 297SW1097. [gg] **In action for deposit,** proof that bank was guaranty fund bank is admissible under pleadings. **TexCivA** 297SW648. [hh] **Interest held not recoverable** against banking commissioner on claim payable out of guaranty fund. **TexCivA** 297SW648. [ii] **Decree ordering bank commissioner to pay plaintiff's claim** held necessary to be modified to avoid construction giving plaintiff preference. **TexCivA** 297SW648. [jj] **Evidence that insolvent bank** was guaranty fund bank and claim was unsecured, noninterest-bearing deposit was held to cure omissions on pleadings as to such matters. **TexCivA** 297SW648. [kk] **Banking commissioner** cannot be ordered to make payment through banking board out of guaranty fund, when banking board is not party. **TexCivA** 297SW648. [ll] **Where banking board is not party,** court can only classify plaintiff's deposit as unsecured and noninterest-bearing, and direct payment from assets and of balance in due administration of guaranty fund. **TexCivA** 297 SW648. [mm] **Certificate of deposit representing money obtained by stockholder for purpose of making loan to bank** is not allowable as claim against guaranty fund. 117Nebr358, 220NW 593. [nn] **In determining liability of guaranty fund,** transaction will be considered as appearing to parties at time. 117Nebr370, 220NW579. [oo] **Only to extent and in manner provided by statute** can fund be augmented, replenished, or reimbursed and drawn upon for payment of claims or disbursed. 117Nebr 478, 221NW107. [pp] **That transaction resulted in loss to bank** will not relieve depositor's guaranty fund from liability for deposit or bill of exchange. 117 Nebr370, 220NW579. [qq] **Certificate of deposit for funds collected for customer** is allowable as claim against guaranty fund, though customer is officer. 117Nebr358, 220NW593. [rr] **Drafts.**–117Nebr370, 220NW579. [ss] **Renewal of certificate of deposit** is deposit within protection of guaranty where transaction was not in effect loan to bank. 117Nebr358, 220NW593. [tt] **Repeal of statute.**–118Tex91, 11SW(2d) 496 (construction of repealing act). [uu] **Assessment upon bank for benefit of guaranty fund** does not constitute taking of private property without due process of law. **Nebr** 227NW922. [vv] **Depositors receiving amount from proceeds of securities deposited by bank** under bank security system as they would be entitled to cannot recover balance from depositor's guaranty fund. **TexCommnA** 23SW(2d)716. [ww] **Depositors proving claims against bank as bond security bank** have been held precluded by election of remedy from recovering balance from guaranty fund. **TexCommnA** 23SW(2d)716.

484-75 120Kan620, 244P852; 120Kan 673, 245P123; 122Kan195, 251P178; 141Miss523, 106S772; 116Nebr170, 216 NW182; 51ND603, 200NW524. [b] **Statute is constitutional.**–49SD518, 207 NW467. [c] **Interest.**–Statute providing that certificates on bank guaranty fund issued to depositors shall cease to bear interest after passage of act has been held void. 122Kan195, 251P178. [d] **Provision that officer in charge of insolvent bank shall realize on assets and exhaust double liability of stockholders** is satisfied when such assets and liabilities have been realized upon so far as it is reasonably possible to collect. 122 Kan195, 251P178. [e] **If guaranty fund is insufficient** to pay certificates to depositors in full, they should be paid pro rata and balance paid as fund is restored by assessments on member banks or otherwise. 122Kan195, 251P 178. [f] **Agreement of bank for redeposit unknown to depositor.**–116Nebr 852, 219NW188.

484-76 [a] **Nature of assessment.**–49 SD518, 207NW467.

484-77½-New. Each member bank has an interest in the proper administration of the fund. 120Kan620, 244P852.

484-77¼-New. Any member bank may maintain a proper action to inquire into waste or illegality in the administration of the fund. 120Kan620, 244P852.

484-77¼-New. Mandamus is not a proper proceeding to inquire into details as to proper administration of the fund. 120Kan620, 244P852.

484–77½–New. A proceeding under the Declaratory Judgment Act is not an appropriate proceeding to inquire into the details of the administration of the fund. 120Kan620, 244P852.

484–77¼–New. A bank's liability to assessment is not what is usually termed a personal one. 120Kan620, 244P852.

484–77⅓–New. A bank's liability is limited to its bonds or money pledged, and assessments to create or replenish the fund, as provided by statute. 120 Kan620, 244P852.

484–77½–New. Bonds, or money, pledged by a bank, are guaranty that the bank will pay assessments necessary to replenish the fund to enable it to pay the amount due depositors holding the bank commissioner's certificates issued while the pledging bank is operating under the Guaranty Law. 120Kan 620, 244P852.

484–77¾–New. When a solvent member bank is put out from under operation of the Guaranty Law by the bank commissioner, under statute, its bonds or money pledged are forfeited to the fund, its deposits cease to be guaranteed, and it is not liable to the fund for assessments to be made after that time. 120 Kan620, 244P852.

484–77 1/10–New. When a solvent member of a bank voluntarily withdraws, under statute, or voluntarily liquidates and ceases to do business, as many of its bonds pledged may be sold as are necessary to pay assessments to replenish the fund sufficiently to pay the amount due on the bank commissioner's certificates issued to depositors of the failed bank in liquidation at the time of such withdrawal, or liquidation and cessation of business, and the balance should be returned to the bank. 120 Kan620, 244P852.

484–77 1/11–New. Sale of bonds pledged under the Guaranty Law for payment of assessments to replenish the fund should be made as of any property pledged for a specific purpose. 120Kan 620, 244P852.

484–77 1/12–New. When money has been pledged in lieu of bonds, the amount of assessments to replenish the fund to pay the depositors may be charged against, or drawn directly from, the money pledged. 120Kan620, 244P852.

484–77 1/13–New. A bank commissioner's certificates, issued under statute, to depositors of a failed bank are not "negotiable instruments" as the term is used in the Negotiable Instruments Act, but simply evidence statutory rights and obligations. 120Kan620, 244P852.

484–77 1/14–New. A member bank pays assessments to the fund and not to depositors of the failed member bank. 120Kan620, 244P852.

484–77 1/15–New. Participating bank's noncompliance with the General Banking Law does not ipso facto cancel or nullify. 120Kan673, 245P123.

484–77 1/16–New. It is only for noncompliance with some provision of the Guaranty Act that the right of a participating bank to have its deposits guaranteed may be canceled. 120Kan673, 245P123.

484–77 1/17–New. Although a surety signs, without authority, a bank's bond as depository of public funds, he is estopped to deny liability, and the bank is not liable to assessment on such funds for the state bank guaranty fund. 140Miss585, 105S484.

484–77 1/18–New. Under some statutes, when a bank which has been operating under the Guaranty Law fails, a stockholder is liable for the par value of his stock if the assets of the bank are insufficient to pay depositors. 141Miss 523, 106S772.

484–77 1/19–New. A stockholder of a bank coming regularly and legally on resolution of a majority of the stockholders under such statute, although without his knowledge, is subject to the liability prescribed by the statute on the bank's becoming insolvent. 141 Miss523, 106S772.

484–77 1/20–New. A stockholder in a bank under the Guaranteed Deposit Law is liable for interest from the time demand is made on him on account of his double liability, the insufficiency of the assets to pay depositors being then determined. 141Miss523, 106S772.

484–77 1/21–New. Such statutes are not unconstitutional as violation of due process or equal protection of laws or impairing obligation of contracts. 51 ND603, 200NW524.

484–77 1/22–New. Assessment against bank is not insurance premium but lost payment. 50SD250, 209NW358.

484–77 1/23–New. Certificate of indebtedness issued by guaranty fund cannot be set off against assessment against bank. 50SD250, 209NW358.

484–77 1/24–New. Although the fund commission is authorized to issue certificates of indebtedness, the fund is not the debtor in the true sense, banks being the debtors. 50SD250, 209NW 358.

484–77 1/25–New. The fund need pay certificates issued by the commission only when funds have accrued from banks. 50SD250, 209NW358.

484–77 1/26–New. A promise of the fund to pay a certificate of indebtedness issued under Code [1919] § 9020, as amended, is qualified and restricted to a certain time and place and subject to priorities, and not of the same character and quality as an assessment under § 9018, for maintenance of funds and certificate cannot be set off against assessment. 50SD250, 209NW358.

484–77 1/27–New. Assessed bank is under duty to pay assessment as soon as made. 50SD250, 209NW358.

484–77 1/28–New. From the time a bank is assessed it becomes the trustee of the assessment until it is delivered to the commission. 50SD250, 209NW358.

484–77 1/29–New. A bank cannot offset a certificate issued by the fund under Code [1919] § 9020, as amended, against assessments for such fund under § 9018 until prior certificates have been paid in full. 50SD250, 209NW358.

484–77 1/30–New. A bank which has operated for years under benefits of Depositors' Guaranty Law cannot claim that it did not consent thereto. 49SD 518, 207NW467.

484–77 1/31–New. The phrase "otherwise secured" means secured by a bank issuing a certificate of deposit otherwise than by the depositor's guaranty fund, and where the certificate of deposit is indorsed to another merely for the purpose of transferring ownership, such indorsement is not such security as will release the deposit from the protection of the guarantee fund. **TexCivA** 271 SW169.

484–77 1/32–New. Under the Texas statute a state bank and trust company is entitled to change its system of guaranteeing deposits from guaranty to bond security system by tendering to the banking commissioner a duly authorized application for such change and its United States bonds, approved by a county judge of the company's domicile and by the banking commissioner, in an amount equal to the bank's capital stock. 115Tex201, 280SW161.

484–77 1/33–New. Liability of a fund is purely statutory and limits such liability to payment of the remainder of unsecured noninterest-bearing deposits after application of available funds of a failed bank. **TexCommnA** 278SW425.

484–77 1/34–New. Under some statutes a state bank desiring to reorganize as a national bank may require the state superintendent to consent to nationalization on payment of assessments for past years levied by the depositors' guaranty fund commission and tender of the assessment for the current year. 50SD579, 210NW990 (liability for future assessments).

484–77 1/35–New. A state bank officer cannot take from, nor add to, a statute regulating the guaranty of deposits. 115Nebr702, 214NW640.

484–77 1/36–New. The custodian of depositors' guaranty fund may order payments to depositors of a failed bank only pursuant to statute. 115Nebr702, 214NW640.

484–77 1/37–New. In some jurisdictions the administration of the depositors' guaranty fund is not subject to judicial control. 220MoA474, 274SW945.

484–77 1/38–New. Assignment by bank commissioner of certificate against guaranty fund does not carry right to proceed against officers of bank under their statutory liability. 124Kan679, 261P835.

484–77 1/39–New. Where a state bank, operating under the provisions of the Depositors' Guaranty Fund Act, converts into a national bank pursuant to the provisions of the federal statute, its liability on account of obligations against the guaranty fund ceases, and it is no longer subject to the authority and requirements of the guaranty fund commission, and cannot be required to make and file statements with the commission showing its average daily deposits. 57ND574, 224NW161.

484–77 1/40–New. Although a statute authorizing the board to fix the form of bond for personal security is invalid as delegating legislative powers to the board, the bond executed was not a nullity. **TexCivA** 9SW(2d)446.

484–77 1/41–New. A state bank which has accepted benefits arising from deposits pursuant to Depositors' Guaranty Law cannot complain of a special assessment upon such deposits levied for the benefit of the guaranty fund. **Nebr** 227NW 922.

484–77 1/42–New. Legislative appropriation to reimburse depositors for losses sustained in banks operated by guaranty fund commission held unconstitutional as violative of due process. **Nebr** 231NW703.

485–78 But see 41 **OklACR**131. Contra 50SD126, 208NW584.

485–79 Contra. **TexCivA** 284SW308.

485–79½–New. The guaranty fund commission is but an agency created by the legislature to execute the policy adopted by it in dealing with insolvent banking corporations. 51ND603, 200NW524; 55ND163, 212NW822.

485–79¼–New. The assessment to create the guaranty fund is somewhat analogous to a special assessment, and must be referred to the sovereign power to levy a tax. 51ND603, 200NW524.

485–79¼–New. The assessment is levied for a public purpose and the fund is created through the exercise of the taxing power. 51ND603, 200NW524.

485–79⅓–New. Discretion vested by the legislature in the commission cannot be directed or controlled by the courts. 51ND603, 200NW524; 55ND163, 212 NW822.

485–79⅓–New. The legislature had power to modify the plan of the original act and to prorate payments on the claims of depositors. 51ND603, 200NW 524.

485–79½–New. In South Dakota mandamus is available to protect interests of owners of fund and compel payment thereof to those lawfully entitled thereto, such as holders of certificates of deposit. 50SD126, 208NW584.

485–80 48SD529, 205NW221 (payment of depositors in full sum guaranty fund does not relieve assets of bank from liability to depositors). But see 118Nebr 337, 224NW868.

485–80½–New. Guaranty fund paying depositors becomes creditor of bank entitled to reimbursement out of assessments collected from stockholders. **TexCivA** 2SW(2d)1015.

485–81 See also **TexCommnA** 27SW(2d) 121. [a] **In Kansas.**–122Kan835, 253P 906. [b] **In Nebraska.**–232NW578.

485–82 [a] **Depositor within statute** is one who delivers to or leaves with bank money subject to his order, which act passes title to bank. **TexCivA** 277SW 409; **TexCivA** 277SW411.

485–82½–New. A certificate of deposit otherwise secured is not entitled to the protection of the guaranty fund. **Tex CivA** 276SW731.

485–82⅓–New. Mistaken statement of bank commissioner to the effect that a certificate of deposit is protected by the guaranty fund does not preclude him from challenging the validity of such

certificate as a claim against the fund. **TexCivA** 276SW731.

485-82½-New. A holder of a certificate of a deposit is not entitled to reimbursement out of the guaranty fund because the money paid to the bank for the certificate was used to pay claims against the bank chargeable against the guaranty fund. 115Nebr606, 214NW2.

485-82½-New. Essentials of deposit within Bank Guaranty Law. Under a section of Bank Guaranty Law, providing that all deposits not otherwise secured shall be guaranteed, it is necessary, in order to create a deposit, that money, or the equivalent of money, shall in intention and effect be placed in or at the command of the bank. 49SD558, 207NW979; **TexCivA** 276SW731.

485-82¼-New. Status of certificates of deposit with respect to guaranty fund is fixed when certificates are issued and where at such time they do not become liabilities of the guaranty fund, no subsequent action can make them such. **TexCivA** 276SW731. [a] **Rights of innocent purchasers.**-Where certificates of deposit are not within the protection of the guaranty fund in the hands of the payee, negotiation of such certificates to innocent purchasers does not change their status. 115Nebr574, 214NW4.

485-82½-New. A depositor protected by the guaranty fund is one who puts money or its equivalent in a bank and leaves it there for safe-keeping. **Tex CivA** 276SW731.

485-82¾-New. To be entitled to protection as a depositor a person must deliver to, and leave with, a bank money, or checks or drafts, the commercial equivalent of money, subject to his order, by virtue of which action title to the money passes to the bank. **Tex CommnA** 272SW775; **TexCivA** 276SW731; **TexCivA** 290SW835.

485-82⅛-New. Where there has not been a bona fide deposit, the depositors' guaranty fund does not protect a transaction, no matter how it is evidenced. 121Kan768, 250P276; **TexCommnA** 272SW775; **TexCivA** 276SW731; **TexCivA** 290SW835.

485-82⅛-New. The depositors' guaranty fund does not guarantee the integrity of evidences of a deposit such as a certificate of deposit, but only the deposit itself. **TexCommnA** 272SW775.

485-82¼-New. A deposit, to come within the guaranty fund, must create the relation of debtor and creditor. **Tex CivA** 276SW731.

485-82½-New. Where a county treasurer deposits public funds in a state bank in excess of fifty per cent of the paid-up capital stock of such bank, the entire deposit is within the protection of the depositors' guaranty fund. 114Nebr213, 206NW758.

485-82¼-New. In order to create a deposit which will be protected by the Guaranty Law, it is necessary that money or its equivalent shall in intention and effect be placed in, or at the command of, the bank under circumstances which do not transgress specific limitations of the Bank Guaranty Law. 114Nebr650, 209NW334; 116Nebr223, 216NW803.

485-82¼-New. The equitable owner of deposit is entitled to payment out of guaranty fund. 115Nebr574, 214NW4; 115Nebr593, 214NW6.

485-82½-New. Where money placed in a bank does not draw interest in excess of five per cent, it is a deposit entitled to protection and is not a loan. 114Nebr168, 206NW755 (evidence insufficient to show secret agreement for more than five per cent); 114Nebr781, 210NW152.

485-82¼-New. The owner of an interest-bearing time deposit cannot participate in the fund. **TexCivA** 276SW731.

485-82¼-New. Changing the deposit to noninterest-bearing after insolvency is a fraud on the guaranty fund. **Tex CivA** 276SW731.

485-82⅛-New. The deposit must be such as to make the depositor creditor of the bank. **TexCivA** 276SW731; **Tex CivA** 290SW835.

485-82½-New. In the notes will be found cases in which the evidence has been held sufficient to sustain a decree recommending payment of claims out of the depositors' guaranty fund. 115 Nebr611, 214NW10.

485-82½-New. The law will look through all semblances and forms to ascertain the actual facts as to whether there has been a bona fide deposit, and, if not, the guaranty fund will not protect the transaction, no matter how it may be evidenced. 121Kan768, 250P 276; 115Nebr574, 214NW4; 115Nebr 593, 214NW6; **TexCivA** 276SW731.

485-82½-New. The statute does not prevent a stockholder of a bank from becoming a depositor entitled as such to the protection of the guaranty fund. 115Nebr890, 215NW128.

485-82½-New. A bank's solicitation, receipt, and retention of funds belonging to others is not conclusive as to whether the transaction is a loan or a deposit within the Bank Guaranty Law. 114Nebr389, 207NW683; 115Nebr606, 214NW2.

485-82½-New. Claimant is not entitled to protection as an innocent purchaser within the Negotiable Instruments Law, but must show deposit within provisions of law. **TexCivA** 276 SW731.

485-82½-New. A depositor, not within the protection of the guaranty fund because his loan bears an excessive rate of interest, may generally change the loan to a deposit entitled to the protection of the fund. 115Nebr606, 214NW2.

485-82½-New. Where a time certificate of deposit bearing on its face five per cent interest is issued for money actually deposited, a secret oral agreement for additional interest may be abandoned by surrender of the certificate and issuance of a new one with interest at five per cent from the date of its issuance, and the new certificate may be within protection of the Guaranty Law. 114Nebr626, 209NW217; 114Nebr781, 210NW152.

485-82½-New. Where a certificate of deposit bearing six per cent interest is issued to a depositor who is ignorant of the fact that such rate of interest deprives him of the protection of the fund, and subsequently on learning of such facts, he surrenders the certificate and procures a new one bearing five per cent interest, the deposit is entitled to the protection of the guaranty fund. 115Nebr606, 214NW2.

485-82½-New. Any scheme or subterfuge to procure any part of the guaranty fund by evading or cheating the law is ineffective for such purpose. **Tex CivA** 276SW731.

485-82½-New. Whether a transaction is a loan or a deposit within the Bank Guaranty Law is determined by the facts and circumstances surrounding each particular case. 121Kan768, 250P 276; 115Nebr574, 214NW4; **TexCivA** 276SW731.

485-82½-New. An agreement by an officer of the bank to pay interest in addition to five per cent allowed by statute does not withdraw from the protection of Bank Guaranty Law certificate of deposit bearing interest at the rate of five per cent only issued to person intrusting money to the bank in good faith. 114Nebr626, 209NW217.

485-82½-New. Where a time certificate of deposit bearing on its face five per cent interest is issued for money actually deposited, a secret oral agreement for additional interest may be abandoned by surrender of the certificate and issuance of a new one with interest at five per cent from the date of its issuance, and the new certificate may be within protection of the Guaranty Law. 114Nebr626, 209NW217; 114 Nebr781, 210NW152.

485-82½-New. When the commissioner of banks takes charge of a failed bank, certificates on the bank depositors' guaranty fund for the amount of their respective deposits are required by statute to be issued to depositors at the earliest moment, 120Kan673, 245P 123.

485-82½-New. subject to such delay as may be necessitated by required investigation of each claim for a certificate and possible litigation. 120Kan 673, 245P123.

485-82½-New. But, when issued, it is proper that the date of the issue of such certificates should be that of the bank's failure. 120Kan673, 245P123.

485-82½-New. If a member bank, pending issuance of such certificates, withdraws or ceases by liquidation to be a member bank, it is liable for assessments necessary to replenish the guaranty fund, 120Kan673, 245P123.

485-82½-New. to the extent of its bonds, or money pledged, for the payment of certificates drawn on that fund issued or issuable to depositors of member banks which had failed prior to date of such withdrawal or liquidation. 120Kan673, 245P123.

485-82½-New. Such liability becomes effective whether or not such certificates had been actually issued, the date of actual issuance thereof being immaterial. 120Kan673, 245P123.

485-82½-New. The right of a depositor to certificates drawn on the guaranty fund depends on whether the failed bank was a certified participant in the guaranty system and had complied with provisions of the Guaranty Act, but not in whether the bank had been conducted in compliance with all the provisions of the General Banking Law. 120Kan 673, 245P123.

485-82½-New. A depositor's right to a certificate drawn on the fund is not affected where action taken by the bank commissioner to exclude the bank from benefits of the guaranty system are not in compliance with the statute. 120Kan 673, 245P123.

485-82½-New. A depositor's right to participate in the guaranty fund is not affected by subsequent cancellation of the bank's right to participate in the guaranty system. 120Kan673, 245P123.

485-82½-New. In Kansas the fact that security of a deposit is inadequate does not entitle it to the protection of the guaranty fund. 121Kan545, 247P432.

485-82½-New. Evidence has been held insufficient to show such collateral agreement between a depositor and a bank as to bring it within the inhibition of a statute regulating such agreements and deprive it of the benefit of the depositors' guaranty fund. 113Nebr679, 204NW795.

485-82½-New. Certificates of deposit in an insolvent bank entitled to the protection of the depositors' guaranty fund draw interest at the rate found in its certificate from its date until date of payment if paid before maturity, and, if not paid until after maturity, draw interest until maturity only, but if the count, upon a hearing, determines that the claim is valid, interest runs on the judgment at seven per cent from the date of the hearing. 113Nebr679, 204 NW795; 116Nebr825, 219NW241.

485-82½-New. Irrespective of its form or recitals, a purchaser of a certificate of deposit unlawfully issued is not an innocent holder thereof so as to entitle him to a share in the guaranty fund. 113Nebr679, 205NW297.

485-82½-New. Both the depositor and the bank must come within the provisions of the Guaranty Law to make the fund liable for payment of deposit. 113Nebr772, 205NW297.

485-82½-New. Money or its equivalent must constitute a deposit to bring the depositor within the Guaranty Law. 113Nebr772, 205NW297.

485-82½-New. Money or its equivalent must be placed in or at the command of a bank under circumstances which do not transgress specific limitations of the Guaranty Law. 113Nebr772, 205NW 297.

485-82½-New. An innocent holder of a certificate of deposit not within the Guaranty Law cannot claim benefit of the fund. 113Nebr772, 205NW297.

485-82½-New. Evidence held to sustain judgment that the holder of a cer-

ticate of deposit was not entitled to the protection of the guaranty fund. 113Nebr772, 205NW297.

485–82½9–New. Where a depositor upon learning of misappropriation of his deposit complained and requested that his deposit be converted into a time deposit drawing interest, and the cashier stated that the deposit would draw interest but no rate was agreed upon, failure of the depositor to sue to recover the amount of the deposit does not constitute a ratification of the misappropriation so as to estop him from claiming the benefit of the guaranty fund. 114Nebr82, 206NW158; 113Nebr778, 205NW300.

485–82½0–New. In such case the depositor is not entitled to interest from the date of the misappropriation, 114Nebr82, 206NW158.

485–82½1–New. but only from the date of the allowance of his claim by the district court. 114Nebr82, 206NW158.

485–82½2–New. A surety on a bond of a state bank to secure the return of public funds deposited therein by the county treasurer in excess of fifty per cent of paid-up capital stock of the bank is subrogated to the right of the county treasurer to preference and payment out of the guaranty fund where the surety on demand of the county treasurer pays liability on the bond and takes an assignment of the rights and remedies of the county treasurer. 114Nebr213, 206NW758.

485–82½3–New. Commercial paper received and credited by a bank as a deposit may be the equivalent of money for commercial banking purposes within the meaning of the Bank Guaranty Law. 114Nebr389, 207NW683.

485–82½4–New. A performed and closed transaction between a state bank and a depositor for the payment of excessive interest on deposits may be abandoned in good faith so as not to taint future deposits. 114Nebr389, 207NW683.

485–82½5–New. The fact that renewals include accumulations of excess interest on prior certificates will not prevent their allowance against the guaranty fund. 114Nebr626, 209NW217; 115Nebr611, 214NW10.

485–82½6–New. False entries upon books of a bank will not deprive claimant of rights, as a depositor, in the guaranty fund. 114Nebr664, 209NW249.

485–82½7–New. A corporation may make a deposit which will be within the protection of the guaranty fund, although some of its officers and stockholders are officers and stockholders of the bank, and although it has knowledge that the bank is in need of money. 114Nebr664, 209NW249.

485–82½8–New. A deposit by an officer of a bank, as trustee for a corporation, is protected by the guaranty fund, where the bank has knowledge of the character of the fund, although it is not properly entered on the books of the bank to show that it is a trust fund. 114Nebr664, 209NW249.

485–82½9–New. Whether a transaction constitutes a guaranty law must depend upon the facts and circumstances surrounding the particular transaction. 114Nebr646, 209NW333; 115Nebr574, 214NW4.

485–82½0–New. Ordinarily, where a stockholder, with knowledge of the bank's insolvency, or unsafe condition, at the request of the bank's officials, places money in or to the bank's credit to meet a pressing obligation and not for safe-keeping or the convenience of the stockholder, the transaction does not constitute a deposit within the protection of the Depositors' Guaranty Law. 114Nebr646, 209NW333; 115Nebr574, 214NW4; 116Nebr521, 218NW405; 116Nebr530, 218NW408.

485–82½1–New. Where a stockholder in a bank whose bonds on deposit with the bank for a specific purpose have been sold by the bank in violation of instructions, accepts in settlement of his claim a certificate of deposit knowing that the bank has become insolvent or in an unsafe condition, the transaction does not constitute a deposit within the protection of the Bank Guaranty Law. 114Nebr650, 209NW334; 116Nebr482, 218NW95 (bonds purchased by bank for customer).

485–82½2–New. A drawee bank paying a check amounting to overdraft, believing funds in transit from drawer bank, may participate in guarantee fund as subrogated to rights of original holder of check where drawee bank at time of payment did not know of insolvency of drawer. 114Nebr719, 209NW510.

485–82½3–New. A receiver may be ordered to pay taxes out of the guaranty fund where assets insufficient after payments have been made to depositors sufficient to have paid taxes. 114Nebr740, 209NW621.

485–82½4–New. A holder of a certificate, bearing interest in excess of the legal rate, was not entitled to payment from the guaranty fund, under a statute providing for payment therefrom to depositors in good faith. 48SD417, 204NW901.

485–82½5–New. Under a statute providing a guaranty fund for payment of depositors, a check is deemed equivalent of money, where accepted as consideration for a certificate of deposit, and amounts to deposit, if paid. 48SD417, 204NW901.

485–82½6–New. In South Dakota depositors and holders of exchange in good faith only are protected. 48SD417, 204NW901.

485–82½7–New. One who loans money to a bank with knowledge that the bank is unsafe, to enable the bank to increase depleted reserve, and not for his own use as a depositor, is not a depositor in good faith. 48SD417, 204NW901.

485–82½8–New. Where a customer forwarded a deed to a bank with instructions to deliver it when cash was paid and the bank accepted the check which was not made good, the customer is not an unsecured depositor entitled to protection of the guaranty fund. 48SD445, 205NW36.

485–82½9–New. The holder of a draft dishonored by the drawee because of the insolvency of the drawer bank is entitled to participate in the guaranty fund of the insolvent bank although his claim may not be allowable as one against the general assets of the bank because of failure to file it until after the time fixed in the notice to creditors. 49SD102, 206NW231.

485–82½70–New. The security of the guaranty fund afforded to holders of exchange in good faith is not dependent upon notice on formal claim. 49SD102, 206NW231.

485–82½71–New. In some jurisdictions the circuit court has jurisdiction to direct the superintendent of banks to arrange with the mandatory provisions of statute for payment of outstanding exchange in the hands of holders in good faith out of the guaranty fund. 49SD102, 206NW231.

485–82½72–New. Money withdrawn from the depositor's guaranty fund and deposited in banks remains a part of such fund. 49SD106, 206NW233.

485–82½73–New. Certificates of indebtedness issued by the depositor's guaranty fund commission have no priority over certificates maturing on the same date subsequently issued to depositors and holders of exchange in banks subsequently failing. 49SD106, 206NW233.

485–82½74–New. Banks holding depositor's guaranty fund certificates cannot offset such certificate against assessments for the guaranty fund until certificates payable on March 1 of the year preceding maturity of their certificates have been paid in full. 49SD106, 206NW233.

485–82½75–New. Liability of guaranty fund is purely statutory. 49SD558, 207NW979.

485–82½76–New. The original transaction with a bank must have been a deposit within the statute to entitle the holder of the exchange in good faith to payment from the fund. 115Nebr574, 214NW4; 49SD558, 207NW979.

485–82½77–New. The payee of a certificate of deposit, given by a bank as a loan, is not the holder of exchange in good faith entitled to payment from the fund on the bank's insolvency, and his transferee is in the same position regardless of whether the certificates were negotiable. 49SD558, 207NW979.

485–82½78–New. Liability of fund is separate and distinct from law of negotiable paper. 49SD558, 207NW979.

485–82½79–New. Certificate of deposit not issued for deposit but as a loan is not a deposit in good faith within statute. 49SD558, 207NW979.

485–82½80–New. A purchaser of a certificate of deposit issued by a bank merely as a loan without any deposit being made therefor is not entitled to payment from the fund. 49SD558, 207NW979.

485–82½81–New. The paramount purpose of the Bank Deposit Guaranty Law is to secure depositors and secure prompt payment of noninterest bearing and unsecured deposits. **TexCommnA** 267SW690.

485–82½82–New. It must be liberally construed to accomplish such purpose. **TexCommnA** 267SW690.

485–82½83–New. Change of an interest bearing loan to a noninterest bearing loan which is not collected does not make a creditor bank a depositor entitled to payment out of the depositor's guaranty fund. **TexCommnA** 272SW775.

485–82½84–New. Where a bank holding for collection a check drawn on another bank accepts a check from the drawee bank in payment, the collecting bank is not relieved from liability to the owner of the check received for collection on the theory that his claim was maintainable against the bank guaranty fund. **TexCommnA** 276SW209.

485–82½85–New. To be protected by the fund the depositor must have been an unsecured noninterest bearing depositor in the bank failing when the commissioner took it over. **TexCommnA** 276SW654; **TexCommnA** 290SW1090.

485–82½86–New. Secured or interest bearing depositor may, by agreement with bank, transfer his deposit to unsecured interest bearing class without repayment and redeposit if bank is solvent. **TexCommnA** 276SW654.

485–82½87–New. County is not entitled to protection of guaranty fund where attempt to transfer deposit from secured account to unsecured account was ineffectual because of bank's insolvency and inability to pay the county the amount of its indebtedness. **TexCommnA** 276SW654.

485–82½88–New. Such attempt will not be treated as having been effected by any fiction to do equity where, to treat transaction as equitable, payment and redeposit would be fraud on contributors to guaranty fund. **TexCommnA** 276SW654.

485–82½89–New. The liability of the guaranty fund in any case is not a matter of contract between a depositor or bank and the commissioner of banking. **TexCommnA** 276SW654.

485–82½90–New. Such liability is fixed by law and depends on status of deposit for which indemnity is sought. **TexCommnA** 276SW654.

485–82½91–New. Some statutes protect depositors at the time the commission takes possession of the failed bank regardless of when the deposit was made. **TexCommnA** 276SW654.

485–82½92–New. and insolvency of the bank at the time the deposit was made does not alter the fact nor affect the law that the county was an actual depositor on a noninterest bearing unsecured account on the date of the bank's failure. **TexCommnA** 276SW654.

485–82½93–New. Insolvency of the bank operates to prevent the court, treating an agreement for transfer of deposit, as an actual deposit. **TexCommnA** 276SW654.

485–82½94–New. But insolvency cannot have effect to deprive the county of the benefit of protection of the fund to the extent of the amount actually deposited,

not under the original depository agreement, but as on an unsecured noninterest bearing deposit. **TexCommnA** 276 **SW**654.

485-82½5-New. At one time or another statutes in some jurisdictions have included deposits of public moneys as within the protection of the guaranty fund, **TexCommnA** 276**SW**654.

485-82½6-New. although in some jurisdictions more recent amendments of the statutes provide that deposits of public funds shall not be insured thereunder. **TexCommnA** 276**SW**654.

485-82½7-New. The different articles of the statute are to be construed in pari materia. **TexCommnA** 276**SW**654.

485-82½8-New. Adoption of one of the statutory systems being presumed, the depositor is required only to show which system the bank adopted. **TexCivA** 267 **SW**996.

485-82½9-New. Evidence sufficient to show deposit not interest bearing or secured. **TexCivA** 275**SW**193; **TexCivA** 284**SW**688.

485-82½100-New. Evidence held sufficient to support finding that the bank was closed by the banking commissioner for the purpose of liquidation. **Tex CivA** 275**SW**193.

485-82½101-New. A bank cannot become a "depositor" in another bank under the guaranty fund statute by giving it credit on an overdrawn account. **Tex CivA** 276**SW**731.

485-82½102-New. Commissions of collector deposited with public funds are not protected by fund before approval of collector's reports, **TexCivA** 277**SW** 411.

485-82½103-New. nor are commissions of tax collector intermingled with public funds in depositary's hands so protected. **TexCivA** 277**SW**411.

485-82½104-New. Only obligation secured by fund is noninterest bearing and otherwise unsecured deposits. **TexCivA** 277**SW**411.

485-82½105-New. But private funds of collector improperly mingled with public funds by depositing are protected by the fund. **TexCivA** 277**SW**411.

485-82½106-New. A bank commissioner is not an agent of depositors so as to charge them with notice that the bank's certificate as a participating bank has been revoked. 120**Kan**673, 245**P**123.

485-82½107-New. Certificates on the depositors' guaranty fund should be issued as of the date of the failure of the bank, and the right of precedence over later demands is affected by reason of resistance of valid claims in litigation. 123**Kan**4, 254**P**394.

485-82½108-New. In a suit to compel payment of a claim against a defunct bank out of the guaranty fund as an unsecured noninterest-bearing deposit, judgment against the bank and members of the banking board in their official capacity is proper. **TexCivA** 284 **SW**688.

485-82½109-New. Where a certificate of deposit provides that the deposit will bear interest only if left in the bank for twelve months, the issuing of the certificate fixes the obligation of the bank at once contingent on the deposit being left in the bank for twelve months. **Tex CommnA** 290**SW**1090.

485-82½110-New. A receiver of a bank has been held not estopped to assert as a defense against a claim on the guaranty fund that only a part of the deposit was bona fide. 115**Nebr**648, 214**NW** 253.

485-82½111-New. The fact that a city elected to sue its treasurer and surety on an official bond and recover judgment for an unsecured deposit in an insolvent state bank does not preclude it from also recovering such deposit under the Guaranty Depository Law. **TexCivA** 283**SW**213.

485-82½112-New. In a suit by a city to recover an unsecured deposit in an insolvent guaranty fund bank, the city treasurer, bondsmen, bank, and banking commissioner are proper parties. **TexCivA** 283**SW**213.

485-82½113-New. A bank selling travelers' checks through an agent has been held not to be doing business in another state so as to support an action by service on an agent. 143**Wash**518, 255**P** 934.

485-82½114-New. Under statutes the guaranty fund commission has power to pass upon and finally allow or reject claims of alleged depositors against the fund. 55**ND**163, 212**NW**822.

485-82½115-New. Certiorari will not lie to review an action of the guaranty fund commission in passing on the merits of claims of alleged depositors against the fund. 55**ND**178, 212**NW**828; 55**ND**182, 212**NW**829.

485-82½116-New. A state bank operated as a going concern by the state guaranty fund commission is not immune from a suit in an action to recover on a certificate of deposit. 20**F(2d)**775.

485-82½117-New. The statute providing for the operation of a bank by the guaranty fund commission has been held not to forbid maintenance of a suit against the bank operated as a going concern. 20**F(2d)**775.

485-82½118-New. In a suit to establish a claim of a depositor on the fund, a letter signed by a subordinate for the commissioner, informing claimant of the commissioner's action, was admissible. **TexCivA** 48**W(2d)**201.

485-82½119-New. Notice addressed to claimant, who could not fully understand English, and received by her son as agent, was notice to claimant. **Tex CivA** 48**W(2d)**201.

485-82½120-New. A suit more than six months after notice of rejection of claim was barred. **TexCivA** 48**W(2d)**201.

485-82½121-New. Certificates of deposit tendered to a bank within ninety days of the closing of the bank did not entitle the holder to participate in the fund. **TexCivA** 48**W(2d)**201.

485-82½122-New. The caption of a statute has been held to disclose the purpose of including a provision excluding from the guaranty fund certificates changed to noninterest-bearing and unsecured deposits within ninety days before the closing of the bank. **TexCivA** 48**W(2d)**201.

485-82½123-New. Evidence held insufficient to show ownership of noninterest-bearing unsecured deposit. **Tex CommnA** 28**W(2d)**831.

485-82½124-New. One claiming to be the owner of noninterest-bearing, unsecured deposit has the burden of proof. **Tex CommnA** 28**W(2d)**831.

485-82½125-New. Where drafts were deposited by an administrator as money and credit taken on the bank's books, the estate is a "depositor" within the statute, **TexCivA** 28**W(2d)**876.

485-82½126-New. and the estate is not precluded from recovering on the ground that the deposit was interest-bearing and secured. **TexCivA** 28**W(2d)** 876.

485-82½127-New. Guaranty Depositors Act does not permit transformation of public funds into private or personal funds. **TexCivA** 297**SW**341.

485-82½128-New. Tax money deposited by collector, after settling with the state and county, has been held not "public funds," but a private deposit payable from the guaranty fund. **TexCivA** 297 **SW**341.

485-82½129-New. Interest should not be allowed for the time before judgment. **TexCivA** 297**SW**341.

485-82½130-New. In Texas tax money deposited in the name of the collector who settled with the state and county is entitled to protection under the guaranty fund as nonpublic funds. **Tex CommnA** 1**SW(2d)**601.

485-82½131-New. Where a deposit was made on terms complying with the order of the bank commissioner, relating to the rate of interest permissible on guaranteed deposits, but, through mutual mistake, the certificate therefor was so framed as to violate such order, the certificate may be reformed so as to express the terms of deposit and the depositor will be entitled to the certificate on the guaranty fund. 125**Kan**182, 264 **P**55.

485-82½132-New. Deposit evidenced by certificates bearing interest in excess of the statutory rate has been held not within the protection of the guaranty fund. 116**Nebr**165, 216**NW**169.

485-82½133-New. Evidence has been held to sustain judgment disallowing payment out of the guaranty fund. 116 **Nebr**223, 216**NW**803.

485-82½134-New. A certificate of deposit drawing legal interest, given for a bill drawing legal interest, which had been given for a certificate drawing excessive interest, is within the guaranty fund. 116**Nebr**445, 217**NW**950.

485-82½135-New. Sale by bank officers of bonds left for safe-keeping does not constitute a deposit. 116**Nebr**510, 218 **NW**389.

485-82½136-New. Taxes may be ordered paid out of the depositors' guaranty fund under some circumstances. 117 **Nebr**189, 220**NW**265.

485-82½137-New. It is the duty of the guaranty fund commission in control of the bank to pay a lawful tax levy on the bank's intangible property as having priority to rights of depositors and creditors. 116**Nebr**541, 218**NW**393.

485-82½138-New. Deposit or claim of a depositor against the guaranty fund is not affected by a charge against his account made by remittance of a forged paper. 116**Nebr**825, 219**NW**241.

485-82½139-New. Unsecured noninterest deposit of proceeds from interest-bearing certificate cashed within ninety days of the bank's failure held not protected by the guaranty fund. **TexCivA** 1**SW (2d)**943.

485-82½140-New. Deposit of stockholder in an insolvent bank is protected by fund only as to excess over par value of stock. **TexCivA** 2**SW(2d)**1015.

485-82½141-New. Public funds within protection of guaranty fund. The entire deposit by a county treasurer in a state bank is protected where in excess of fifty per cent of the paid-up capital stock of the bank. 117**Nebr**478, 221**NW** 107.

485-82½142-New. Liability on an official bond of the county treasurer is secondary to that of guaranty fund. 117 **Nebr**478, 221**NW**107.

485-82½143-New. A deposit by the guardian of his ward's funds under an arrangement for interest without an order of the probate court is not allowable as a claim against the guaranty fund. **TexCivA** 18**SW(2d)**215.

485-82½144-New. A county judge's personal direction to file a claim against the guaranty fund is immaterial in a suit against the bank commissioner and not equivalent to a judicial order where not recorded in the minutes. **TexCivA** 18**SW(2d)**215.

485-82½145-New. Failure of the city treasurer to effect a reduction of deposit as required by a resolution of the city council does not affect the city's right to claim against a state sinking fund in an insolvent bank. 206 **Iowa**464, 221 **NW**342.

485-82½146-New. The fact that money delivered to a bank draws interest or is payable after thirty days does not destroy its character as a "deposit," entitled to protection under a bond security system. **TexCivA** 9**SW(2d)**410.

485-82½147-New. An ordinary commercial "loan" to a bank implies a definite time of repayment, when the bank is obliged to seek the lender and pay the amount due or become liable for interest as damages, whereas in the case of a "deposit" the bank may retain the money until repayment is demanded. **TexCivA** 9**SW(2d)**410.

485-82½148-New. A deposit has been held not converted to an ordinary loan, so as to lose the protection of the bond security system, by the fact that the contract was reduced to writing in the form of a certificate. **TexCivA** 9**SW(2d)** 410.

485-82½149-New. Promise to pay a deposit is express or implied, and the fact that the promise is reduced to writing in the form of a certificate of deposit does not transform the deposit into a commercial loan. **TexCivA** 9**SW(2d)**410.

485-82½150-New. The fact that a deposit

under the terms of a certificate of deposit was not payable at the time of the bank's failure did not require that the deposit should be treated as a loan and excluded from the benefit of the bond security system. **TexCivA** 9**SW**(2d)410.

485–82½151–New. Whether money is a loan or a deposit must be determined by the contract entered into when the bank receives the money. **TexCivA** 9 **SW**(2d)410.

485–82½152–New. In a suit by a joint-stock association to establish its claim against an insolvent bank as a noninterest-bearing deposit, evidence has been held sufficient to support a finding that the transfer of the company's deposit, prior to the closing of the bank, from the company's account to the account of its president and principal stockholder, was unauthorized. **TexCivA** 10**SW**(2d) 144.

485–82½153–New. Even where a certificate of deposit is fair on its face and provides for legal interest rate, courts will examine into all the actual facts of the transaction, and the status of depositor in good faith will be lost if the court finds any device or evasion which in fact results in the depositor's receiving an interest rate exceeding the legal maximum. 54**SD**618, 224**NW**225.

485–82½154–New. Evidence has been held sufficient to support findings that the holder of a certificate of deposit had a valid claim, as against the contention that he was not a depositor in good faith and was not receiving interest in excess of the legal rate. 54**SD**618, 224**NW**225.

485–82½155–New. An arrangement between banks for payment of checks without exchange is not a consideration in addition to an interest agreement depriving a deposit of the benefit of the depositors' guaranty fund. 118**Nebr** 660, 225**NW**778.

485–82½156–New. Where a fund is insolvent and the law is repealed, the commissioner is not required to pay the depositors of the bank first failing in full, to the loss of depositors of other failing banks. 118**Tex**91, 11**SW**(2d)496.

485–82½157–New. An unauthorized noninterest-bearing certificate issued by a bank cannot share in the dividend on the fund on the bank's insolvency. **Tex CivA** 11**SW**(2d)547.

485–82½158–New. Guaranty fund statute does not create preference by way of assignment or lien on any particular part of fund but merely indicates priority of right. 118**Tex**91, 11**SW**(2d)496.

485–82½159–New. Law will imply into deposit guaranty statute the intention that remnant of an insolvent fund will be dispensed equitably where contingency of insufficiency of fund to pay depositors was not provided for by statute. 118**Tex**91, 11**SW**(2d)496.

485–82½160–New. The statute creating a guaranty fund is primarily intended to protect all unsecured deposits in failing banks coming under operation of the statutes. 118**Tex**91, 11**SW**(2d)496.

485–82½161–New. Claims against the fund of a bank doing business when another claim became payable are not entitled to preference over a latter claim. 118**Tex**168, 12**SW**(2d)954.

485–82½162–New. That a claim against a fund accrued when the fund was solvent does not entitle it to preference. 118**Tex**168, 12**SW**(2d)954.

485–82½163–New. Holders of secured deposits have no vested right in the entire guaranty fund. 118**Tex**297, 14**SW**(2d) 821.

485–82½164–New. Insolvency of a bank prior to the effective date of the statute authorizing a change from the guaranty fund system to the bond security system did not give secured depositors a vested right in the fund. 118**Tex**297, 14 **SW**(2d)821.

485–82½165–New. A tax collector is protected as unsecured depositor where he has settled with the state and county for taxes collected and deposited. **Tex CivA** 15**SW**(2d)82.

485–82½166–New. Evidence has been held not to establish that excess interest was paid or credited on a deposit so as to deprive it of the benefit of the depositors' guaranty fund. 118**Nebr**660, 225 **NW**778.

485–82½167–New. Deposits subject to check and made in the ordinary course of business will not be held loans because the depositor knew that the bank needed funds where there was no agreement that the deposit should be made or remain to bolster up the reserve fund or for another unlawful purpose. 118 **Nebr**660, 225**NW**778.

485–82½168–New. That the president and principal stockholder of a corporation is a stockholder in the bank will not constitute the making of deposits by the corporation obtaining of money for the purpose of effecting a loan to the bank. 118**Nebr**660, 225**NW**778.

485–82½169–New. Interest on daily balances, lawfully contracted for, may be within the protection of the depositors' guaranty fund. 118**Nebr**660, 225**NW** 778.

485–82½170–New. Interest accruing on a deposit is a mere incident to the principal sum and part of it, within the meaning of the Bank Guaranty Act. 118**Nebr**660, 225**NW**778.

485–82½171–New. A valid police regulation providing for the safety of bank deposits includes interest thereon lawfully contracted for. 118**Nebr**660, 225 **NW**778.

485–82½172–New. A claim allowed against the depositors' guaranty fund draws interest at seven per cent per annum. 118**Nebr**660, 225**NW**778.

485–82½173–New. The steps necessary to create a deposit which will be protected by the Guaranty Law. 117**Nebr**448, 220 **NW**569.

485–82½174–New. Money placed in an insolvent bank by a stockholder to assist it in meeting obligations is not a deposit within the meaning of the law. 117**Nebr**448, 220**NW**569.

485–82½175–New. Bonds pledged by a member bank under the Depositors' Guaranty Law operate as a guaranty of payment of sufficient assessments by the depositing bank to replenish the fund to pay depositors of failed members in liquidation. 128**Kan**805, 280**P** 767.

485–82½176–New. A deposit induced by a collateral agreement between the bank and the depositor for his benefit is not allowable as a claim against the guaranty fund. 118**Nebr**743, 226**NW**332.

485–82½177–New. An unsecured noninterest-bearing deposit, not subject to check until a specified event, is protected under the guaranty fund. **TexCivA** 19**SW**(2d)789.

485–82½178–New. An unsecured noninterest-bearing deposit, not payable in identical money, is a general deposit protected under the depositors' guaranty fund. **TexCivA** 19**SW**(2d)792.

485–82½179–New. Evidence held sufficient to show that the deposit was changed from an interest-bearing to a checking deposit so as to be secured by the guaranty fund. **TexCivA** 19**SW**(2d) 107.

485–82½180–New. When a solvent member bank withdraws from membership under Guaranty Act, its bonds constitute a trust fund for the benefit of certificate holders of failed banks in liquidation. 128**Kan**805, 280**P**767.

485–82½181–New. The renewal of a certificate of deposit by a special agent in charge of the bank does not make the guaranty fund liable therefor. 118**Nebr** 743, 226**NW**332.

485–82½182–New. Any bank may withdraw from membership in the guaranty fund by giving notice to the bank commissioner and displaying a card to that effect. 128**Kan**805, 280**P**767.

485–82½183–New. The statute repealing the Depositors' Guaranty Act is valid. 128**Kan**805, 280**P**767 (portion of statute authorizing return of member's deposit of bonds needed to pay claims against failed banks held invalid).

485–82½184–New. Where a county treasurer deposits public funds in a bank in excess of fifty per cent of the paid-up capital, the entire deposit is within the protection of the guaranty fund. **Nebr** 228**NW**868.

485–82½185–New. A bond given by a bank to secure deposits by a county treasurer, but not applying to deposits by his successor, is not, as to such deposits other security, and funds deposited by such successor are not deposited by virtue of collateral agreement. **Nebr** 228**NW**868.

485–82½186–New. Proceeds of forged notes indorsed and fraudulently negotiated at other banks may be traced into payee's bank as deposit so that claim of party defrauded may become charge on guaranty fund. **Nebr** 230**NW**99.

485–82½187–New. Purchaser of certificates of deposit from agent who accepted in payment securities at more than market value held not entitled to protection of guaranty fund. **SD** 229**NW** 299.

485–82½188–New. Conversion of bonds left with bank for safe-keeping and substitution of certificates of deposit without owner's knowledge does not create deposit within guaranty fund. **Nebr** 230 **NW**687.

486–83 48**SD**529, 205**NW**221 (creditors not depositors are given no additional rights by Bank Guaranty Law). [a] **Right of subrogation.**–116**Nebr**170, 216 **NW**182.

486–84 114**Nebr**567, 208**NW**662. [d] **In Nebraska.**–114**Nebr**567, 208**NW**662. [e] **Statute construed.**–10**PaDist&Co** 73 (opinion of attorney-general). [f] **Executive officer of state bank** is not under duty to supply funds to keep surplus accounts intact, such duty being chargeable against bank. **CalA** 284**P** 958.

486–87 [b] **What constitutes doing business.**–43 **Ida**310, 251**P**627; **Mich** 210 **NW**811; 22 **OhA**487, 153**NE**909.

486–88½–New. Where a national bank to secure a loan made in a state other than the state of forum took notes of a third party secured by mortgage on land in the latter state with assignment of mortgage to it, foreclosure will not be denied on the ground that the bank was a foreign corporation and that the notes and assignment were void. 50**SD** 40, 208**NW**221.

486–88⅓–New. A foreign bank need not have a license to foreclose a mortgage. 143**Wash**24, 254**P**464.

486–88¼–New. The statute providing that no foreign bank shall advertise in the state a greater capital than it maintains at a branch in the state is valid. 150**Wash**568, 274**P**99.

486–88½–New. Construction of the statute limiting bank loans as not applicable to a foreign bank's loans through a branch in the state does not violate the constitution by permitting a foreign bank to do business in the state on more favorable terms than a domestic bank. 150**Wash**568, 274**P**99.

486–88½–New. Russian bank merged in state bank by decree of Soviet government, and, although its assets are confiscated, remained a juristic person with capacity to sue. 253**NY**23, 170**NE**479.

487–91 See also 21 **OhA**182, 152**NE**763.

487–93 [a] **Unincorporated bank,** complying with provisions of Banking Act, need not file certificate required from partners doing business under fictitious name. 21 **OhA**182, 152**NE**763.

487–94 101**WVa**127, 132**SE**372 (so authorized by constitution).

487–95 120 **Okl** 163, 250**P**1011; **Tex CivA** 27**SW**(2d)275. [d] **Evidence has been held sufficient** to support finding that bank had never been legally incorporated. **TexCivA** 27**SW**(2d)275.

487–99½–New. In Montana special partnership may not be formed for transaction of banking business. 75 **Mont**567, 244**P**489.

487–1 [b] **Existence of foreign bank.**–133**Misc**527, 233**NY**8255.

488–3 **Iowa** 228**NW**308.

488–4½–New. Burden is on defendant to show variance, if any, between corporate concept known to Russian law and that known to Anglo-American law, where defense was that bank had ceased to be juristic person. 253**NY**23, 170**NE** 479.

488–11 But see 137**Misc**388, 244**NYS** 328.

490-30 200**Cal** 1, 251**P**784 (powers and duties of superintendent of banks); 218 **Ky**135, 291**SW**17, 50**ALR**1337. [c] **Branch cannot be located in county other than that** in which principal place of business is located under some statutes. 289**Pa**96, 137**A**129; 152**Tenn**67, 274**SW**539.

490-31 164**Ga**351, 138**SE**898. [b] **Bank cashing check drawn on branch** is separate entity as regards right to recover against drawer stopping payment. **Md** 150**A**797.

490-32½-New. Transaction with branch bank between the time the head office suspends payment and notice thereof cannot be impeached on the ground of insolvency of bank. 60 **OntL** 8, [1927] 1**DomLR**1091.

490-36½-New. The circuit court has jurisdiction of the subject matter of a proceeding to reinstate an insolvent bank as a solvent corporation under statutes. **SD** 225**NW**305.

490-36¼-New. The statute permitting reorganization of insolvent banks is not invalid as to nonconsenting depositors whose claims did not exist when the act became effective. **SD** 225**NW**307(2d case).

490-36¼-New. The statutes relating to reorganization of insolvent banks are not unconstitutional as impairing obligation of contracts or as depriving depositors of the liberty of contract. **SD** 225**NW**305.

490-36⅛-New. A superintendent of banks acting in good faith under a reorganization agreement may release stockholders and directors from liability. **SD** 225**NW**307(2dcase).

490-36⅛-New. The court must sustain an agreement to reorganize a bank unless the court, on evidence, finds the agreement arbitrary, unjust, or fraudulent. **SD** 225**NW**307(2dcase).

490-36½-New. Minority depositors of an insolvent bank cannot be permitted to defeat a reorganization plan because they believe the plan is unjust. **SD** 225 **NW**307(2dcase).

490-36½-New. Statute relating to reorganization of insolvent banks held constitutional as to subsequent depositors and inapplicable to those who were depositors before its enactment. **Minn** 230 **NW**267.

490-36½-New. Action by organizer of new bank for breach of contract by stockholders of merged bank. **TexCivA** 308**SW(2d)**665.

490-37 26**F(2d)**237 (as to certificate not included in assumption of debts); **TexCivA** 32**SW(2d)**194 [c] **Bank purchasing assets** of another bank held to have succeeded to its liabilities. 7**F(2d)** 535.

491-38 But see 128**Kan**681, 280**P**782.

491-39 See also 174**Minn**36, 218**NW**238. [a] **Nonresident corporation creditor not consenting** to, or participating in, reorganization proceedings of suspended bank is not bound by terms and conditions of reorganization. **SD** 227**NW**375.

491-41½-New. Under Minnesota L. [1925] c 38 provision is made for the approval by the superintendent of banks of reorganization plan for restoration of solvency of bank of which he has taken charge. 166**Minn**433, 208**NW**185.

491-41¼-New. where the plan has been adopted by depositors and unsecured creditors representing ninety per cent of the amount of claims against the bank. 166**Minn**433, 208**NW**185.

491-41¼-New. and thereupon the statute makes all other depositors and unsecured creditors subject to the terms of the agreement the same as if they had executed the agreement. 166**Minn**433, 208**NW**185.

491-41⅛-New. The statute is not retroactive. 166**Minn**433, 208**NW**185.

491-41⅛-New. and has no application to a nonconsenting depositor whose deposit was made prior to the enactment of the statute. 166**Minn**433, 208**NW**185.

491-41½-New. Whether a reorganized bank is new as distinct from the original corporation is a matter of intention. **TexCivA** 294**SW**883.

491-41⅛-New. On reorganization, stockholders' rights in assets are limited to those specifically enumerated and described in reorganization agreement. 52**SD**364, 217**NW**637 (burden of proof is on plaintiff in action to recover property).

491-41⅛-New. Upon organization of a state bank as a liquidating agent of a private bank, in which plaintiff owned certain shares but received a less number of state bank shares, he may recover of the state bank in assumpsit for the price of the balance of shares sold by the state bank and which should have been issued to him. 89 **IndA**157, 165**NE** 914.

491-41¼-New. A reorganized bank is not a new bank because there are some new stockholders and new capital provided. **SD** 225**NW**307(2dcase).

491-41¼-New. On sale to a new bank of an old bank's assets sanctioned by the state official, the right of action to recover illegal dividends on watered bank stock was assigned to the new bank. 219**Ala**638, 123**S**71.

491-41½-New. Finding that no prejudice to creditors would result from cancellation of plaintiff's shares of stock in a reorganized bank held not sustained by the evidence. 179**Minn**161, 228**NW** 603.

491-41½-New. Depositors surrendering certificates and taking new certificates after enactment of law relating to reorganization of insolvent banks are bound by reorganization plan. **Minn** 230**NW**267.

491-41¼-New. New bank cannot hold guarantor on continuing offer of guaranty addressed to old bank. **MoA** 25 **SW(2d)**512.

491-41½-New. Where officials of old corporation become officials of reorganized corporation, corporation cannot contend that they are innocent purchasers of note conditionally delivered to old corporation. **TexCivA** 23**SW(2d)**447.

491-41½-New. Where officers of new bank are same after reorganization, new bank has been held to have knowledge of delivery of note precluding contention that it was innocent purchaser. **TexCivA** 23**SW(2d)**445.

491-41½-New. Person agreeing to pay depositor in consideration of purchase by another of designated amount of notes of bank held entitled to include note representing only balance after exhausting security. 181**Ark**1147, 27**SW** **(2d)**1007.

491-42 See also 133 **Okl** 123; 271**P**641.

491-44 **Minn** 231**NW**407; **TexCivA** 285 **SW**862. But see **TexCommnA** 29**SW** **(2d)**1073.

491-44½-New. A bank purchasing assets of another bank is not liable for liberty bonds deposited with the latter bank under a previous reorganization contract. **TexCivA** 285**SW**862.

491-49½-New. Consolidation agreement has been held to require a bank taking over assets of an insolvent bank to assume only book debts. 203 **Iowa** 276, 211**NW**386.

491-49½-New. Where a banking corporation takes over the assets of another and assumes enumerated liabilities of such other, and such other discontinues business, and the assets taken over greatly exceed the liabilities assumed, a creditor whose property was converted by the selling bank prior to such sale of assets may prosecute his remedy against both banks. 126 **Okl** 202, 259**P** 572.

491-49¼-New. A contract to purchase a bank's assets assumes liabilities of selling bank only to extent specified. 165**Ga**351, 140**SE**755.

491-49⅛-New. Purchase of assets held not consolidation as regards liability to selling bank's depositor. 165**Ga**351, 140**SE**755.

491-49⅛-New. Purchasing bank held not liable to depositor for claimed duress by selling bank. 165**Ga**351, 140**SE** 755.

491-49½-New. Where a bank takes over the affairs of another bank, purchasing its business and assets, it is not liable for a claim against the selling bank which it did not assume to pay. 164**La**443, 114**S**90.

491-49⅛-New. Statute governing merger of banks and trust companies is constitutionally imposed on existing banks and includes all trust companies, however organized. 101**NJEq**413, 138**A** 659.

491-49⅛-New. Purchaser bank has been held not liable for a claim against the seller in the absence of assumption of payment. 164**La**443, 114**S**90.

491-49⅒-New. especially where claimant was a party to the sale contract and therefore bound by it. 164**La**443, 114**S** 90.

491-49 1/11-New. A director of the seller has been held estopped to deny the contents of a sales agreement. 164**La**443, 114**S**90.

491-49 1/12-New. In such case, where claimant signed such contract as director and stockholder of the seller bank, and individually, he is estopped to deny the contents or legal effect thereof. 164 **La**443, 114**S**90.

491-49 1/13-New. A director of the seller, active in the sale, has been held to have waived the benefit of a statute obligating the purchaser for debts of the seller bank. 164**La**443, 114**S**90.

491-49 1/14-New. So, also, such claimant waives the benefit of a statute obligating the purchaser bank to pay debts of the seller bank. 164**La**443, 114**S**90.

491-49 1/15-New. A contract by the stockholders of a bank, as a condition precedent to merger with another bank, to pay loss, if any, on notes due the bank, has been held a contract of indemnity obligating the stockholders for loss although the notes were renewed. 38**GaA**591, 144**SE**815.

491-49 1/16-New. Under settlement by a bank of indebtedness on notes by acceptance of property from the makers of the notes, although fraudulent, the guarantors indemnifying the bank against loss on the notes could set up settlement in discharge of the obligation under a contract of indemnity. 38 **GaA**591, 144**SE**815.

491-49 1/17-New. If a bank in settling indebtedness on notes by accepting property from the makers of the notes acted bona fide and received full value, the directors consenting thereto who were parties to a contract of indemnity against loss on the notes are not estopped from setting up settlement as a release of liability under the contract of indemnity. 38**GaA**591, 144**SE**815.

491-49 1/18-New. If property received by a bank in settlement of indebtedness represented by notes was not reasonably worth the amount of the indebtedness, acceptance of property by the officers of the bank in full settlement of indebtedness if not done bona fide amounted to fraud on the bank, and the directors would be estopped from setting up settlement in discharge of the obligation on a contract of indemnity. 38**GaA**591, 144**SE**815.

491-49 1/19-New. Settlement of notes by acceptance of property from the maker amounts to settlement and discharge of the indebtedness and releases the obligors under a contract of indemnity against loss on the notes. 38**GaA**591, 144**SE**815.

491-49 1/20-New. A contract by a bank assuming the liabilities of an insolvent trust company does not substitute the new bank as surety on a county treasurer's bond issued by the trust company. 178**Ark**361, 12**SW(2d)**1.

491-49 1/21-New. A contract of a bank taking over assets and assuming liabilities of an insolvent trust company includes only existing liabilities. 178**Ark** 361, 12**SW(2d)**1.

491-49 1/22-New. Purchase by a bank of another bank's assets under an agreement to assume all liabilities amounts to merger. 168**Ga**385, 147**SE**890.

491-49 1/23-New. A bank purchasing assets of another bank and assuming liabilities is liable for the debt of a judgment creditor not listed in the contract of purchase. 168**Ga**385, 147**SE**890.

491-49 1/24-New. On consolidation of two banking corporations resulting in a single corporation as successor of the two, the new corporation ipso facto suc-

ceeds to, and becomes owner of, the combined capital stocks, properties, trusts, and contracts of the former corporations. 89CalA558, 265P583.

491-49½5-New. A statute authorizing the consolidation of banking corporations, in so far as it provides a scheme for the transfer of their property, rights, and obligations, becomes part of every agreement or obligation entered into by the merging corporations before merger. 89CalA558, 265P583.

491-49½6-New. A bank taking over assets of another bank and selling cattle converted by transferror bank as mortgagee cannot defend an action for conversion on the ground that the original bank's tort was committed by a department not taken over. 90CalA436, 266P300.

491-49½7-New. A bank issuing a circular letter to its stockholders, outlining a tentative plan of merger with another bank, is not liable to a subsequent purchaser of stock for the difference between its value and the amount paid because of failure to consummate such plan. 159Tenn659, 21SW(2d)393, 66 ALR1447.

491-49½8-New. Contract whereby national bank took over customers and business of state bank construed as making national bank liable for judgment against state bank not listed as liability. Ida 286P360(2dcase).

491-49½9-New. Duty of bank in taking over closed bank to keep account of liabilities assumed and assets collected. 337 Ill 173, 169NE1.

491-49½30-New. Bank which took over another bank whose cashier promised plaintiff bank to obtain guaranty for notes made payable to his bank and transferred to plaintiff bank without recourse is not bound by such promise. Wyo 285P790.

491-49½31-New. Bank accepting transfer of insolvent bank's assets and assuming liability for its debts with knowledge of bank examiner's unauthorized reduction of tutor's account is liable therefor. 13LaA41, 127S14.

491-49½32-New. Stipulation of insolvent bank's stockholders to pay to bank accepting its assets and assuming liabilities all debts not shown on books does not include amount of such unauthorized reduction. 13LaA41, 127S14.

491-49½33-New. Assignment by insolvent bank of assets for assignee's assumption of liabilities shown by books has been held valid as to unprotected creditor. Minn 231NW407.

491-49½34-New. Statute requiring authorization by directors for sale of note held inapplicable to note transferred as collateral for note of bank merged with another. TexCivA 28SW(2d)1104.

491-49½35-New. Assumption of liability for back taxes. MoA 31SW(2d)94.

491-49½36-New. Bank assuming unpaid taxes is liable to its grantee therefor. MoA 31SW(2d)94.

491-49½37-New. That statutes do not provide for consolidation will not defeat assumption of liabilities of one bank by another. MoA 31SW(2d)94.

491-49½38-New. At expiration of three years from transfer of bank's assets to another bank, existence of transferring bank ceases, as regards creditors. NC 155SE445.

492-57 See also 38GaA313, 143SE915. [d] **Strict compliance with statute required.**-83Mont581, 273P1055. [e] **Under statute authorizing reduction** when necessary, bank is restricted to time when no detriment will result to depositors and creditors. TexCivA 13SW(2d) 443. [f] **Where reduction made conforms to statute,** inference is that it is legal. TexCivA 13SW(2d)443 (held effectual to extinguish stockholder's relation to bank). [g] **Sufficiency of proceedings.**-83Mont581, 273P1055 (necessity and sufficiency of contents, acknowledgment, filing, and effect of certificate of reduction).

492-60½-New. Rights and liabilities of bank stockholders and creditors on the reduction of capital stock may be considered in an action to assess the difference between the original and the reduced stock. TexCivA 13SW(2d)443.

492-60½-New. Authorized reduction of bank stock regularly made is binding on shareholders and creditors of the bank. TexCivA 13SW(2d)443.

492-61 120Kan523, 244P7; 114Nebr 567, 208NW662.

492-62 124Kan233, 257P949; TexCivA 289SW730; TexCivA 13SW(2d)133. [f] 114Nebr567, 208NW662. [g] **In Nebraska.**-114Nebr567, 208NW662; 115 Nebr767, 214NW931; 115Nebr776, 214 NW933. [h] **Double liability distinguished.**-120Kan523, 244P7. [i] **Double liability is not affected by payments** made by stockholders to make good impairment of capital or to keep bank going. 120Kan523, 244P7. [j] **Payments on such assessments are deemed voluntary.**-120Kan523, 244P7. [k] **In Kansas.**-120Kan523, 244P7. [l] **Coercion by bank commissioner,** threatened or exercised to make assessment, is lawful coercion, and is not duress, because lawful. 120Kan523, 244P7. [m] **Duty of bank commissioner** stated. 120Kan 523, 244P7. [n] **Stock of stockholder may be sold** on his failure to pay assessment. 120Kan523, 244P7. [o] **Nature of liability.**-120Kan523, 244P7. [p] **Sale of stock** to pay assessment precludes double liability. 120Kan523, 244P7. [q] **Representations by bank commissioner or subordinate,** that payment of assessment would discharge double liability, do not have that effect where contrary to statute. 120Kan523, 244P7. [r] **There is no duress** in paying assessment. TexCivA 284SW326. [s] **Statutory power to assess stock should not be extended** by judicial interpretation. 115Nebr776, 214NW933. [t] **Fund voluntarily raised by stockholders to aid bank** held not assessment on stock. 115Nebr776, 214NW933. [u] **Statutes requiring directors to levy assessment** for deficiency in capital found by bank superintendent does not change requirements for valid directors' meeting. 73CalA321, 238P754. [v] **Acceptance from some stockholders of notes for assessments payable in cash** does not render assessment invalid. 170 Minn454, 212NW801. [w] **That bank subsequently went into liquidation** does not release delinquent stockholders from liability for assessments previously made. 170Minn454, 212NW801. [x] **Liability for deficiency on sale of stock.**-170Minn454, 212NW801. [y] **Election of stockholders between assessment and liquidation.**-166Ga195, 143SE116. [z] **Levy of assessment not improvident.**-Levy by stockholders representing majority, after bank superintendent withdrew assessments, is not improvident where it restores capital of bank. 169 Ga115, 149SE645. [aa] **Statute authorizing assessment is read into charter** granted subsequent to its enactment. 169Ga115, 149SE645. [ab] **Constitutionality of statutes.**-169Ga115, 149SE 645. [ac] **Liability of purchaser of stock** for assessment to restore impaired capital is not affected by fact that purchase was induced by fraud of seller and failure of commissioner to charge off certain items. 87Colo 331, 288P174.

492-62½-New. The superintendent of banking must correct impaired capital. 204 Iowa243, 213NW925, 56ALR521.

492-62½-New. A pledgee of stock is chargeable with knowledge of the commissioner's duty to close the bank upon failure of the bank to make good impairment of its capital. TexCivA 13SW (2d)133.

493-63 116 Oh243, 156NE131. But see CalA 284P958.

493-75½-New. Purchaser of stock from bank can have notes given in payment canceled where bank retained and canceled certificates and resold stock at higher price. SD 230NW847.

493-76 See also 202 Iowa961, 211NW 215. [b] **Alleged rescission of contract for fraud** is no defense to action on renewal note given for stock purchased. 202 Iowa961, 211NW215.

493-77½-New. Statements by bank's officers, made to induce subscription, that loans of bank were good and collectable and that stock was worth certain amount are representations of fact. TexCivA 275SW75.

493-78 240 IllA198. [h] **Effect of agreements.**-SC 155SE149.

494-79 See also 214Ala483, 109S359, 45ALR1026.

494-84½-New. A petition against a bank carrying on business before the minimum capital was subscribed, to make good the capital, has been held demurrable. 38GaA382, 144SE151.

494-85 120Kan523, 244P7.

494-86 180Ark753, 22SW(2d)561 (sale of stock for notes held invalid). [a] **Purchasers have been held not to ratify sale** where stocks were never delivered to them, no meetings attended by them, and they did not know that dividends had been paid. 180Ark753, 22SW(2d) 561.

494-87 TexCivA 22SW(2d)471 (estoppel). [b] **Under Texas constitution** note given for capital stock of bank is void. TexCivA 274SW249 (evidence held to support finding that note was not given for stock). [c] **Note given for stock in state bank in consideration of stock at time of purchase** has been held not void. TexCivA 22SW(2d)471.

494-91½-New. Under the Georgia statute, where a stockholder has paid his pro rata share of the minimum amount required to be paid in before filing of the application for the charter, and the subscription contract does not provide otherwise, the remainder of his subscription is not due until the directors call for payment. 35GaA415, 133SE278.

494-93½-New. Purchaser of bank stock who receives benefits without claiming fraud for six years is liable for the price. SD 233NW289(2dcase).

495-96 But see TexCivA 283SW243; TexCivA 283SW337. [b] **Stock issue in new bank** held impliedly authorized by resolution authorizing surrender of old charter and incorporation of new bank. 192NC720, 135SE864.

495-1½-New. It has been held that, as respects stockholders' liability, a bank cannot, in the absence of an agreement, make persons stockholders without delivery of shares. TexCivA 283SW337.

495-2 TexCivA 283SW601. [c] See also 128Me34, 145A391, 65ALR1154; MoA 274SW951. [f] **Complaint to rescind sale of bank stock** has been held sufficient, if it in effect alleges mistake of seller and fraud of buyer. 212Ky 231, 278SW541. [g] **Stock, indorsed in blank and delivered by debtor to mother-in-law,** has been held to belong to her against transferor's creditors. TexCivA 283SW601. [h] **Restrictions on alienation imposed by by-law.**-128Me34, 145A 391, 65ALR1154. [i] **Action for price.**-197NC424, 149SE374(2dcase).

495-3½-New. Covenants in sale of stock construed.-36Wyo 221, 254P134.

495-3½-New. Reservation of real estate in sale of stock construed.-317Mo 951, 298SW39.

495-3¼-New. A contract to purchase stock in a consolidated bank has been held terminated where both parties contracted with reference to a plan for which a different plan was substituted which required the purchase of shares of a speculative corporation also. 34F(2d) 624.

495-3½-New. Where the vice president of a bank, at the time of contract to transfer bank stock, had knowledge that the bank was in imminent danger of being closed, he cannot defend, in an action for breach of contract, on the ground of impossibility of performance by reason of the bank's closing before the transfer. TexCivA 19SW(2d)87.

495-5 168Ga339, 147SE766 (instrument reciting sale to secure payment of notes held sufficient to pass title to assignee); Kan 291P766; 36Wyo 210, 254P137, 140 [citCJ].

496-6 36Wyo 210, 254P137, 140 [cit CJ].

496-6½-New. Purchaser must ascertain whether it is subject to bank's lien in order to acquire good title thereto. 213Ala236, 104S760.

496-6½-New. A contract by which parties agreed that, when either of them

died, shares of bank stock of deceased should become the property of the survivor upon a par basis has been held supported by valuable consideration. 191NC679. 132SE796.

496–6¼–New. In a suit for cancellation of the transfer of bank stock to defendant on the ground of fraud, evidence has been held to sustain a finding for defendant. 321Mo 330, 11SW(2d) 41.

496–6⅛–New. Order of bank commissioner prohibiting transfer without his consent. Kan 291P739.

496–6⅛–New. Agreement to purchase bank stock, with attached agreement to pay buyer depreciation if bank loses pending suits, is single agreement of sale for conditional purchase price, not indemnity agreement. CalA 292P658.

496–6½–New. Waiver by deputy bank commissioner of order of commissioner prohibiting transfer of stock without his consent. Kan 291P739.

496–8 TexCivA 7SW(2d)671. [d] **Sufficiency of record.–SD** 229NW308.

496–9 [d] **Instructions to bank to transfer** held sufficient. 36Wyo 210, 254 P137.

496–10 TexCivA 13SW(2d)925 (by-law adopted by order of banking commissioner has force of statute).

496–15 [a] **Pledgee has legal title.–GaA** 155SE778.

496–16½–New. No specific penalty is imposed for failure to comply with such statute. 123Kan403, 256P161.

496–16½–New. In some jurisdictions all transfers of stock are required by statute to be certified to the bank commissioner immediately. 123Kan403, 256P 161.

496–16¼–New. Failure formally to certify transfer of stock does not render such transfer invalid, 123Kan403, 256P 161.

496–16⅛–New. and the fact that the commissioner was informed of a transfer may be shown by correspondence. 123Kan403, 256P161.

496–16⅙–New. Sale of stock is not rendered invalid as to third persons because transfer was not made on bank's books. TexCommnA 29SW(2d)965.

497–24 [a] 44Philippine705.

497–25 213Ala236, 104S760; 56ND136, 216NW341 (statute making transfer invalid, where registered holder indebted to bank, creates lien enforceable by foreclosure in equity). [f] **Enforcement of lien against stockholder's administrator.–**131 Okl 106, 267P836.

498–26 251NY439, 167NE580 (application of General Corporation Law to banking corporation).

498–27½–New. Under a statute prohibiting any lien upon stock to secure debts due from the stockholder to the bank, no lien can be reserved in the certificate of stock to defeat the lien of an assignee of the stock. 136Miss409, 101S 561.

498–28 206 Iowa201, 220NW36 (burden is on bank to prove adoption by minutes or usage).

500–48 [b] **Waiver may be express or implied** from acts and conduct. 213Ala 236, 104S760.

500–49 [a] **Notice to bank on transfer by managing officer.–**213Ala215, 104S 758; 213Ala236, 104S760. [b] **Usury is immaterial on issue of estoppel or waiver** of bank's lien. 213Ala215, 104S758.

501–63 128Me34, 145A391, 65ALR1154.

501–66 34Ariz445, 272P643; TexCivA 283SW337; TexCivA 24SW(2d)536.

502–67 TexCommnA 281SW198. [b] (3) Conclusive under statute but not as against one who was ignorant of issue of stock to him and of record and who refused to accept stock. SD 226 NW729.

502–69 203 Iowa1335, 214NW559.

502–69½–New. Meetings. Under statute no officer, clerk, teller, or bookkeeper shall act as party for any stockholder at meetings of corporation under Banking Law. 126Misc753, 214NYS643 (directors are embraced within word "officer").

502–69⅛–New. Thus issuance of mere proxy of bank stock to bank officers for one meeting is forbidden. 126Misc753, 214NYS643.

502–69¼–New. A fortiori irrevocable authority to bank officers to vote stock over period of time under naked trust must be contra to legislative declaration of policy. 126Misc753, 214NYS643.

502–69⅕–New. Voting trust giving voting power to bank officers and directors to which any director may become party, prescribing no policy, securing no debt not coupled with interest, and not part of pool is invalid, irrespective of whether properly used. 126Misc753, 214NYS643. Contra 217NYS67 [rev 126 Misc753, 214NYS643].

502–69⅙–New. Agreement authorizing trustees to consent to merger or consolidation on any terms, and to dissolution of bank, is invalid as destructive of stockholders' right to become parties thereto. 126Misc753, 214NYS643. Contra 217NYS67 [rev 126Misc753, 214NYS 643].

502–69⅐–New. Agreement permitting trustees to exchange stockholders' certificates in names of their nominees is invalid as negativing statutory requirement that new certificates be issued to trustees with indorsement showing nature of agreement. 126Misc753, 214NYS 643. Contra 217NYS67 [rev 126Misc753, 214NYS643].

502–69⅛–New. Agreement authorizing trustees to transfer sufficient shares to qualify any person as director, such person to agree to return stock at end of term, is invalid as attempt to destroy statutory requirement that bank directors must be stockholders in their own names and own stock in good faith in his own right. 126Misc753, 214NYS647. Contra 217NYS67 [rev 126Misc753, 214 NYS643].

502–69⅑–New. Under statute providing that authority to form voting trust shall not apply to banking corporations, deposit of stock in such trust after statute went into effect is invalid. 126Misc 753, 214NYS643 (even though trust was dated prior thereto). Contra 217NYS67 [rev 126Misc753, 214NYS643].

502–69⅒–New. Agreement invalid because trustees were officers and directors of bank is not validated by substitution as trustees of alternates who were not directors or officers. 126Misc753, 214NYS643 (alternates being permitted to act only in case of inability of named trustees to act, "inability" not contemplating legal inability known when agreement was executed). Contra 217 NYS67 [rev 126Misc753, 214NYS643].

502–69⅓–New. Desire to defeat plan for purchase of bank stock and consolidation does not justify creation of illegal voting trust agreement. 126Misc 753, 214NYS643. Contra 217NYS67 [rev 126Misc753, 214NYS643].

502–69½–New. Where a statute permitting a voting trust is amended to make it inapplicable to banking corporations, the statute is prospective only and is not effective to annul an existing valid voting trust. 217AppDiv691, 217 NYS67.

502–69⅔–New. A stockholder in a bank which consolidates with another bank by accepting stock in the latter bank in lieu of his former stock becomes subject to the liabilities imposed upon holders of stock by the law then in force although enacted after he acquired his original stock. 170Minn454, 212NW 801.

502–70 114Nebr567, 208NW662.

502–70½–New. One who buys stock in a bank and has it entered on the books of the bank in his own name as guardian for his minor child is himself, as between him and the bank, the owner of the stock. 35GaA86, 132SE119.

502–76 29F(2d)288(2dcase); 84Colo 365, 270P551; 167Ga811, 146SE702 (statute not repealed or modified by subsequent legislation); 40GaA378, 149 SE810(2dcase) (statute held not repealed); 331 Ill 622, 163NE448 (liability is several and distinct on each stockholder); 205 Iowa42, 217NW431, 57 ALR767 (statute imposes liability on owners of stock); 118Nebr337, 224 NW868; 54ND614, 210NW342, 48 ALR660; TexCivA 283SW179; Tex CivA 283SW337 (recognizing rule); TexCivA 283SW338; TexCivA 13SW (2d)443; TexCivA 24SW(2d)536 (liability is same whether as individual or that of member of partnership). See also Mo 10SW(2d)655. [a] Ga 154SE775; 200 Iowa1322, 206 NW617. [b] (1) 170Ga265, 152SE229 (as to additional liability). But see 229Ky178, 16SW(2d)1030. (2) Amendment as to venue is inapplicable to pending suit. TexCivA 3SW(2d)555. [c] 277US29, 48SCt422, 72L ed768; 77Colo 186, 235P346; 54ND614, 210NW342, 48 ALR660. Contra 174Ark66, 294SW368. [d] 117Nebr569, 221NW702; 118Nebr 337, 224NW868; TexCivA 13SW(2d) 443. [h] But see 205 Iowa42, 217NW 431, 57ALR767. [k] (4) Other statutes. 170Ga265, 152SE229. [o] (2) Act of 1893 was not repealed by General Banking Act of 1919. 169Ga115, 149SE645. [r] See also 54SD156, 222NW685. [t] 37GaA246, 139SE570. [bb] (1) Tex CommnA 281SW198. (2) 37GaA246, 139SE570; TexCommnA 281SW198. [cc] TexCommnA 281SW198. [dd] **All stockholders are liable.–**37GaA246, 139 SE570, 153Tenn97, 282SW379. [ee] **Constitutional provision refers only to banks of issue.–**203 Iowa1052, 213NW 772; TexCivA 284SW326. [ff] **Who are stockholders** subject to liability. TexCivA 283SW179. [gg] **Notwithstanding charter provision exempting stockholders from liability for debts of bank,** bank is bound by statute imposing double liability on stockholders where constitution provides that corporation laws may be repealed or amended at any time. 33Ariz310, 264P 687. [hh] **Applicability of statutes incorporating particular banks.–**37GaA 246, 139SE570. [ii] **Constitutional provision imposing double liability must be construed** with provision requiring prior exhaustion of corporate property. 117 Nebr569, 221NW702. [jj] **Constitutional provision becomes part of contract of subscription.–**117Nebr569, 221NW702. [kk] **Effect of prior law exempting from liability.–**34Ariz445, 272P643. [ll] **Minor stockholder's disaffirmance of purchase** relieves him from statutory liability in absence of fraud or conduct equivalent thereto. 152Miss860, 119S 913, 64ALR968. [mm] **Where reduction of capital stock is made to prejudice of existing creditors,** they may proceed to enforce stockholders' statutory liability as though no reduction had been made. 83Mont581, 273P1055. [nn] **What law governs.–**207 Iowa664, 223NW 514. [oo] **Actual or record holders.–SD** 225NW657. [pp] **Statute making stock book conclusive evidence of facts stated therein** applies only to banks within state and has no extra territorial force. SD 225NW657. [qq] **Bank as stockholder.–SD** 225NW657. [rr] **Assessment by directors on notice from bank commissioner** to make good impairment of capital does not subject stockholder to personal liability. 198Wis306, 223 NW858. [ss] **Sale of bank stock for delinquent assessments** held not void. 102CalA71, 282P801. [tt] **Statutory double liability of stockholders is not part of assets of bank.–**144 Okl 172, 289 P726. [uu] **Actual or record holders.–TexCivA** 29SW(2d)818 (individual members of partnership owning stock). [vv] **Attaching creditor's action to set aside sale of president's bank stock** for delinquent assessment held not barred under six months' statute. 102CalA71, 282P801. [ww] **Statutory double liability of stockholders is not assignable** as ordinary chose in action though assessed by state bank commissioner. 144 Okl 172, 289P726. [xx] **Liability as affected by manner of acquisition of stock.–**40GaA305, 149SE293. [yy] **Change in substance of prior law not effected** by codification and revision of banking laws. 85Mont532, 281P341 (as to method of distribution of stockholders' liability fund ratably by receiver of insolvent bank). [zz] **In New Mexico.–**34NM443, 283P900. [aaa] **In Iowa.–**Iowa 229NW905. [bbb] **Both real owner and one appearing on books as such** are liable. TexCommnA 29SW(2d)319. [ccc] **Who are "stockholders."–SC** 155SE 619. [ddd] **Trust estate** is not liable to assessment on stock illegally invested in by trustee. GaA 155SE73.

503–77 54ND614, 210NW342, 48ALR

660. [a] 152Miss860, 119S913, 64ALR 968.

503-78½-New. Liability is for the benefit of all creditors, not depositors alone. 164Ga790, 139SE566.

503-78⅓-New. A person who voluntarily assumes the status of a stockholder is estopped to deny it upon enforcement of constitutional liability. 118Nebr579, 225NW683.

503-78¼-New. An alleged arrangement with a banking department to hold stock without liability is void. 118Nebr 579, 225NW683.

504-79 TexCivA 297SW648.

504-80 174Ark66, 294SW368; 35GaA 86, 132SE119. [d] **One who has stock he has bought entered on books of bank in his own name as guardian** is himself, as between him and bank, owner, and statutes excepting from personal liability as stockholders those holding as guardian do not apply. 35GaA 86, 132SE119.

504-82 31NM404, 247P275 (construing statutes).

504-84 192NC720, 135SE864 (stockholder knowing of exchange of stock has been held, after lapse of two years, estopped to deny he is stockholder of new corporation, after its insolvency). [a] **Stockholder of insolvent bank** not participating in consolidation with solvent bank is not liable to stock assessment to discharge personal obligations of other stockholders contracted in effecting consolidation. 202 Iowa364, 210NW 425. [b] **Validity of resolution** authorizing incorporation of new bank cannot be collaterally attacked by stockholder knowing of bank's operations for over two years. 192NC720, 135SE864. [c] **Actual exchange of stock** and consent to liquidation of old bank are not decisive of stockholder's liability. 192NC720, 135SE864.

504-85½-New. The necessity of an assessment is within the discretion of the commissioner of banking. TexCivA 283 SW179. [a] **Determination conclusive.**–TexCivA 283SW179.

504-85¼-New. and if one knowingly permits his name to appear on the stock book of a bank as a stockholder he will be estopped from denying liability in an action brought to collect the double liability. 122 Okl 226, 253P985.

504-85¼-New. Partnership owning stock is liable to assessment. 29SW(2d) 818.

504-86 162Ga718, 134SE781; GaA 155 SE778; TexCivA 285SW1118. [b] 115 Okl 71, 241P747. But see TexCommnA 281SW198.

504-86½-New. Attempted hypothecation by bank's officers of stock issued in stockholder's name and authorized by him to be held as security by them to secure his note is not binding on him where he did not expressly or impliedly authorize it or indorse the certificate, and purpose of hypothecation was to secure obligation other than appellee's note. TexCivA 275SW75.

504-86¼-New. Such attempted hypothecation was merely an unwarranted exercise of authority over his certificate by such officer and in no way affected his status as a stockholder. TexCivA 275SW75.

504-87 NC 138SE139; 37GaA259, 139 SE732; TexCivA 275SW75 (unauthorized hypothecation of certificate of stock did not affect subscriber's status as stockholder); TexCivA 283SW338; TexCivA 299SW935 (stockholder not liable where bank solvent at time of transfer); TexCivA 24SW(2d)536; 36Wyo 202, 254 P117, 119 [citCJ]. [a] 168Ga133, 147 SE380 (whether owner of stock as individual acted in good faith is to be considered entirely apart from his duty as official in bank). [b] (2) Stockholder selling stock sixty days prior to bank's insolvency, without transfer on books of bank, is not relieved of statutory liability. 193NC761, 138SE139. [f] (1) 167Ga811, 146SE762; 37GaA246, 139SE 570; 37GaA259, 139SE732; 39GaA89, 146SE324; 31NM180, 241P1025; SC 147 SE671; TexCommnA 29SW(2d)319; TexCivA 294SW681;, TexCivA 29SW(2d) 818. But see Kan 291P766. (2) 31NM 180, 241P1025; TexCivA 13SW(2d)925. (3) Such statute is constitutional as to banks existing at time of its passage. 37GaA259, 139SE732. (4) Under Georgia statute, where stockholder individually liable under charter transfers his stock but fails to have transfer entered on books of bank and fails to give written notice of transfer, he is not exempt from liability. 37GaA259, 139SE732. (5) Record owner is estopped as against banking commissioner from disclaiming ownership at time of closing though previously selling stock. TexCommnA 29SW(2d)965. (6) Delivery of stock to transferee with directions to have transfer made on books does not relieve transferror where nothing further is done. SD 229NW308. (7) In such case transferee is transferror's agent for purpose of transfer, and transferee's failure to have transfer entered is attributable to transferror. SD 229NW308. [i] **Joint liability of transferror and transferee.**–117 Okl 10, 242P522. [j] **Approval of transfer by bank commissioner.**–129 Okl 198, 250P506. [k] **In Oklahoma.**–127 Okl 267, 260P761. [l] **Transfer must be to one legally bound** to meet assessments to relieve stockholder from liability. TexCivA 297SW648. [m] **Transferror held not liable** unless debts existing at date of transfer rendered bank insolvent. TexCivA 13SW(2d)925. [n] **Where transfer on books of bank is not required,** transferror is liable only from date of actual sale. TexCivA 13 SW(2d)925. [o] **Dissolution of partnership owning shares** terminates responsibility of partner for assessment on shares. TexCivA 29SW(2d)818. [p] **Estoppel to deny ownership not shown.**–CalA 292P280.

505-88 26F(2d)28 (directors who placed money in escrow to purchase stock of other stockholders held liable for subsequent assessment); TexCivA 18SW (2d)728 (liability falls on real owners of stock at time bank fails). [c] See also TexCivA 13SW(2d)443. [f] **Present owner cannot defeat liability for assessment** made against him by superintendent of banks on ground that under statute his transferror within six months prior to failure of bank may be liable for assessment. 35GaA86, 132SE119. [g] **Purchaser refusing to complete sale because condition not satisfied.**–TexCivA 274SW187. [h] **Effect of fraudulent representations by seller.**–TexCivA 274 SW187. [i] **Consent of purchaser to transfer** is necessary to impose on him liabilities of registered holder. TexCivA 274SW187. [j] **Purchaser from stockholder holds more advantageous position than subscriber** in suits for assessments on insolvency of bank. TexCivA 274SW 187. [k] **Persons holding stock as trustees** are not liable as stockholders under statute. 205 Iowa42, 217NW431, 57ALR 767. [l] **Purchasers of shares voluntarily surrendered by owners unable to pay one hundred per cent assessment according to reorganization plan** held liable for one hundred per cent assessment. Iowa 229NW905. [m] **Consent of bank commissioner.**–Kan 291P739.

505-89 125Kan44, 262P583 (statute held valid); 118Nebr579, 225NW683; 193NC761, 138SE139; TexCivA 294SW 681; TexCivA 24SW(2d)536.

505-90 37GaA259, 139SE732 (six months); 121 Okl 34, 247P688; TexCivA 283SW179; TexCivA 283SW338 (twelve months); TexCivA 13SW(2d)925. [a] (2) Liability of partner for assessment on shares in name of partnership is only secondary where sale of interest was theretofore actually consummated. TexCivA 29SW(2d)818. [b] **Stockholder transferring stock** within twelve months from insolvency is not liable unless bank had debts at time of transfer. TexCommnA 283SW762; TexCivA 29SW (2d)818; TexCommnA 29SW(2d)965. [i] **After expiration of three years from transfer of assets and liabilities** creditors and privies are barred from proceeding against stockholders. NC 155SE445 (proceeding by corporation commissioner held barred).

505-90½-New. To entitle superintendent of banks to recover assessment against stockholder of insolvent bank, where he had transferred his stock in good faith within year prior to superintendent taking charge, it must appear that debts for which assessment was made existed at time of transfer of stock and still exist. 166Minn438, 208NW 129; TexCivA 294SW681.

505-90¼-New. Where stock in a state bank is transferred to trustees who hold it for the benefit of stockholders of a national bank, the latter, after accepting certificates with indorsements defining by express reference to trust agreement their interest in state bank, are subject to assessment by receiver of state bank. 31NM404, 247P275.

505-90¼-New. Where statute voids transfers, it is not limited to voluntary acts by stockholder. 26F(2d)455.

506-95 37GaA259, 139SE732.

506-1 49SD46, 206NW471; TexCivA 283SW179; 198Wis306, 223NW858; 198 Wis306, 225NW208 (cannot transfer as against creditors relying on officers' statement that impairment of capital has been made good); 36Wyo 202, 254P 117, 119 [citCJ]; 36Wyo 210, 254P137. [a] **Necessity of showing fraud.**–36Wyo 202, 254P117. [b] **Transaction held not invalid** so as to continue transferor's liability. 36Wyo 210, 254P137.

506-1½-New. A stockholder transferring stock before insolvency cannot be held liable for debts of the bank unless the bank was insolvent to his knowledge and transfer was to evade liability. 141 SC145, 139SE393, 55ALR677.

506-1½-New. A stockholder induced to become such by deceit, whether of bank officers or others, cannot avoid his statutory liability on that account. 54SD 158, 222NW683.

506-2 TexCivA 283SW338; TexCivA 13 SW(2d)925; TexCivA 18SW(2d)728; 36 Wyo 202, 254P117, 119 [citCJ]; 36Wyo 210, 254P137, 140 [citCJ].

506-3 178Ark223, 10SW(2d)360; 38GaA 508, 144SE385; TexCivA 283SW338; TexCivA 7SW(2d)671; 134Wash66, 234 P1025; 36Wyo 202, 254P117, 119 [cit CJ].

506-4½-New. Ordinarily, and aside from the question of neglect of a bank, a stockholder's statutory liability is determined as of the date of formal transfer of stock on the books of the bank. TexCivA 283SW338.

507-5 Kan 291P766; 53ND257, 205NW 682, 41ALR177; TexCivA 26SW(2d)351 (evidence held to show that note sued on was not accommodation note). See also 123Kan638, 256P961. [b] 174Ark 66, 294SW368; 54SD339, 223NW214. [c] **Personal representative not having available funds in his hands** is not liable for assessment. 174Ark66, 294SW368. [d] **Widow not assenting** to become stockholder in bank did not become such within double assessment statute. 117 Tex263, 18SW(2d)872.

507-6½-New. Surviving wife's separate property is not liable for assessment on half interest in stock purchased by husband on behalf of community estate. 117 Tex263, 38SW(2d)425.

507-7 32Ariz407, 259P670, 55ALR1059; 75Mont213, 245P956. But see 77Colo 186, 235P346; SD 232NW47.

507-8½-New. , or guaranty. 32Ariz 407, 259P670, 55ALR1059; 75Mont213, 245P956 (in nature of guaranty).

507-8⅛-New. The liability of the stockholders is not a joint but a several liability. 81Mont459, 264P127.

507-8¼-New. The liability is personal in some states. 50SD1, 207NW977.

507-8⅓-New. The liability is a "statutory liability." 203 Iowa1052, 213NW 772; TexCivA 282SW262.

507-8⅓-New. Stockholders' liability to depositors is not an asset of the bank. 138SC409, 136SE885.

507-8⅙-New. Liability is prior to other claims on stockholder's assets by his own creditors. 26F(2d)455.

507-8⅛-New. Assessments collected from stockholders become trust fund for use and benefit of all creditors of bank. TexCivA 2SW(2d)1015.

507-8⅕-New. Some statutes providing for double liability of stockholders do not create a lien on a stockholder's property. 127Kan443, 273P474.

507-8 1/10-New. Approval of purported assignment of stockholder's liability by the district court is void for want of jurisdiction. 141 Okl 36, 284P65.

507-8 1/11-New. Under some statutes

stockholder's hypothecation of personal assets after bank's failure to secure indebtedness to another is void if made before payment of double liability. 130 Kan856, 288P543.

507–8½–New. Stockholder's double liability is not asset of bank, but liability created solely for creditors. SD 232NW 47.

507–11 204 Iowa243, 213NW925, 56ALR 521; 116Nebr610, 218NW584. [b] **"Stockholder"** in statute providing for double assessment, having acquired definite meaning, must be so construed. 117 Tex263, 18W(2d)872.

507–11½–New. Stockholders are individually liable for an amount equal to one hundred per cent. on each share of stock held by them to be distributed to creditors. 203 Iowa1052, 213NW772.

507–14½–New. On consolidation, a stockholder's rights and liabilities are determined by the relation to the new corporation. 214Ala483, 108S359, 45 ALR1026.

507–14½–New. An assessment on stockholders, made to permit it to continue as a going concern, where followed by transaction of business, is an assessment to restore impaired capital, and not one for merely liquidation purposes. 206 Iowa869, 221NW668.

507–14¼–New. Such assessment does not prevent a second assessment for the purpose of liquidating the bank's assets on insolvency. 206 Iowa869, 221 NW668.

507–14½–New. Liability as fixed by the bank commissioner is conclusive upon a stockholder. 132 Okl 266, 270P327(2d case).

507–14¼–New. Where there was an ineffectual attempt to diminish stock of stockholders, they remain subject to assessment, under statute, on the basis of the original stock. 38GaA313, 143SE915.

507–15 See also 245 IllA59.

507–17 TexCivA 12SW(2d)611. [c] (2) Term "depositor" means any person who deposits money or commercial paper in bank either on open account subject to check or to be withdrawn otherwise than by check. 162Ga718, 134SE781. [d] **Transaction held not deposit.**–170Ga175, 152SE101 (funds given trust company to be placed with other banks on call). [e] **Money paid by stockholders inures to benefit of all depositors** of insolvent bank. 156Miss293, 125S839(5thcase).

508–19 See also 56ND74, 215NW924.

508–19½–New. A trust company's deposit on call with one bank to the credit of another bank of money transmitted by a third bank was not a "deposit" with such other bank authorizing an assessment for paying depositors. 166Ga 243, 144SE119, 58ALR1383.

508–24½–New. Liabilities existing while a stockholder was such are obligations accruing while he was a stockholder within a statute making stockholders liable for such obligations. 206 Iowa1070, 221NW809.

508–24½–New. Where a national bank agreed to take over the assets of a state bank as the regulations of the comptroller of currency would permit, and to assume all liabilities of a state bank, it was held that the national bank was not a "creditor" of the state bank entitling it to enforce constitutional liability of shareholders of the state bank. 331 Ill 622, 163NE448.

508–24¼–New. Sum collected from stockholders of bank, if it constituted assessment, could not be legally applied to settle obligations of guarantors of note held by bank. Iowa 232NW79.

508–31 132 Okl 266, 270P327(2dcase).

508–32 [a] **In Texas.**–CivA 282SW 262.

509–35½–New. Under some statutes the bank commissioner cannot recover interest on an assessment from the time it was made to the time of the judgment. TexCivA 294SW681.

509–37 Ida 288P162. [g] **Stockholder is liable for amount equal to par value of shares of stock** where unable to pay note given for purchase price of stock. 197NC613, 150SE118.

509–38 164Ga790, 139SE566; 31NM 180, 241P1025; 126Misc753, 214NYS 643 (stockholders under double liability; Banking L. § 124). [c] **In addition** stockholder is liable for unpaid stock subscription. 164Ga790, 139SE566. [d] **Reason for double liability.**–126Misc 753, 214NYS643.

510–39 123Kan638, 256P961; 75Mont 213, 245P956. [c] **Act of taking bank stock after passing of double liability** statute constituted implied assent to statute. SD 232NW47.

510–41 164Ga790, 139SE566. [a] **Determination as to amount of deficiency of assets** of insolvent bank fixes stockholders' liability. Ariz 287P444.

510–42½–New. For a stockholder to be liable on the difference between the original and reduced stock, the bank must be insolvent at the time of reduction. TexCivA 13SW(2d)443.

510–46 41GaA693, 154SE289; ND 230 NW721(2dcase); 50SD1, 207NW977 (payment of stock assessment levied by directors of superintendent of banks to eliminate bad bank assets does not relieve stockholder from liability to bank creditors); TexCivA 292SW613. But see 147SC167, 145SE34. [a] **Stockholder consenting to use of funds** to strengthen bank cannot after failure allege payment of stock assessment. TexCivA 292SW 613. [b] **That stockholders paid one hundred per cent. assessments** for purpose of reopening bank did not constitute defense to stockholders' double liability. SD 232NW47.

510–47 [a] **Assessment before closing of bank** not distributed ratably among creditors has been held no defense to banking commissioner's suit on stockholder's liability. TexCivA 292SW613.

510–47½–New. A depositor, who accepted and retained the dividend made possible by carrying out a plan for liquidation, was estopped from objecting to the validity of the order. 147SC 167, 145SE34.

510–48 204 Iowa243, 213NW925, 928 [citCJ], 56ALR521.

511–50 50SD1, 207NW977.

511–50½–New. nor can directors release such liability. 50SD1, 207NW977.

511–50½–New. An agreement between a bank and banking commissioners that stockholders paying one hundred per cent. assessment would not be required to pay any further assessment is valid and unenforceable. TexCivA 290SW835.

511–52 But see 331 Ill 622, 163NE448.

511–54½–New. Unpaid stock of one original bank in a consolidation with another bank, has been held uncollectable for the benefit of creditors of the consolidated bank. 214Ala483, 108S359, 45 ALR1026.

511–54½–New. Stockholders of an insolvent bank were not released from liability for assessment because defendant bank which took over the assets of the insolvent bank assumed the stockholders' obligation to depositors, on the condition that a deficit in the assets be made up by an assessment on stockholders. 243Mich362, 220NW704.

511–54¼–New. Where a bank's capital stock was reduced in good faith and the bank subsequently went into liquidation, a stockholder was not liable upon the bank's insolvency on the difference between the original and the reduced amount of stock. TexCivA 13SW(2d) 443.

511–54½–New. The banking commissioner cannot enforce an assessment against stockholders of the old bank who have acted on an agreement that a subscription to stock in a new bank would relieve them from liability. TexCivA 17SW(2d)190.

511–55 204 Iowa851, 214NW702; 117 Nebr569, 221NW702; 117Nebr652, 222 NW55; SC 155SE619.

512–57 204 Iowa243, 213NW925, 56 ALR521. [a] **Statutory remedy by summary execution** without leave to contest held not unconstitutional. 164Ga350, 138SE670. [b] **By execution.**–40GaA305, 149SE293.

512–58 50SD81, 208NW585; 54SD158, 222NW683. See also, 38GaA508, 144SE 385. [b] **In Tennessee.**–153Tenn97, 282 SW379.

512–60 204 Iowa851, 214NW702.

512–65½–New. A statute providing for an assessment and execution by a superintendent of banks without notice or opportunity to be heard is invalid. 162 Ga718, 134SE781.

512–65½–New. Attachment in action by receiver to collect assessment is not permissible under statutes imposing double liability upon stockholders to creditors of insolvent bank. 75Mont213, 245P956.

512–65¼–New. A creditor's suit against bank stockholders has been held an independent action, maintainable notwithstanding prohibition against actions affecting assets of a bank. 138SC426, 136 SE888.

512–65⅛–New. Under some statutes the superintendent of banks may bring suit against stockholders of an insolvent bank upon their statutory liability to depositors. 162Ga718, 134SE781.

512–65⅛–New. In Georgia the superintendent of banks enforces members' liability. 164Ga790, 139SE566.

512–65⅛–New. Existence of necessity for levy of stockholders' liability is in discretion of banking commissioner. TexCivA 300SW129.

512–65⅛–New. When collected, such funds become assets of the bank. 164 Ga790, 139SE566.

512–65⅙–New. A statute providing for assessment and execution by a superintendent of banks is applicable to a bank not incorporated under the statute held applicable to stockholders of the Washington Exchange Bank. 37GaA246, 139 SE570.

512–65⅒–New. The superintendent of banks may appoint an agent to assist him in liquidating and distributing the assets of a bank and to that end may empower the agent to issue executions for the enforcement of the liability of the stockholders where they have failed to pay the same after due assessment and notice. 38GaA313, 143SE915.

512–65¼–New. Where an agent has been authorized by the superintendent to issue executions to enforce stockholders' statutory liability, it is proper for him, in doing so, to sign them in the name of the superintendent by himself as agent. 38GaA313, 143SE915.

512–65½–New. A power of attorney executed by the superintendent of banks, conferring upon a named person authority, is sufficient to empower such agent to issue executions to enforce the statutory liability of stockholders of a bank. 38GaA313, 143SE915.

512–65⅓–New. The superintendent of banks may enforce a stockholder's liability upon failure to pay an assessment by summary execution. 167Ga843, 146 SE835 (execution dependent on existence of liability).

512–65¼–New. An assessment by a corporation commissioner under statute authorizing an appeal to the superior court is valid. 197NC42, 147SE667.

512–65⅕–New. In an action to recover an assessment on the difference between the original and the reduced amount of stock, a stockholder's liability may not be predicated on an independent equitable ground of fraud on the creditors by a reduction of the capital stock. TexCivA 13SW(2d)443 (stockholder held not liable where surplus capital remained in bank for liquidation).

512–65⅙–New. Under Georgia statute a stockholder notified of an assessment is entitled to thirty days exclusive of the date of notice within which to pay the assessment before the superintendent of banks may issue execution. 39GaA 645, 148SE306 (execution issued within thirty days is premature and illegal).

512–65⅐–New. The statute changing the procedure for enforcing statutory liability of bank stockholders applies where stock is purchased prior to its enactment. 197NC613, 150SE118.

512–65⅛–New. Proceedings to enforce double liability under laws of sister state are governed by laws of South Dakota. SD 232NW47.

512–67 TexCommnA 283SW762. [d] Contra 54ND614, 210NW342, 48ALR660.

513–68½–New. Status of defendant as

stockholder.–TexCivA 283SW338.

513–69 [a] 54ND614, 210NW342, 48 ALR660.

513–74 [e] (2) To authorize suit by superintendent of banks to enforce double liability of stockholders, judicial determination of amount of deficit is necessary. 34Ariz445, 272P643. [h] **Motion is proper method** of determining amount of bank's insolvency. Ariz 287P444.

514–75 TexCivA 300SW129. [d] (1) TexCivA 283SW338. (2) Determination by commissioner as to solvency of failed bank is conclusive. TexCivA 283SW338. [e] **Determination of banking officer of state** that assessment is necessary is conclusive in courts. 5F(2d)952. [f] **Where insolvent bank is shown not to have any assets,** creditor may proceed against stockholders without first suing bank to determine that it is without assets to satisfy claim. 78Mont301, 254P 419.

514–78 206Iowa1070, 221NW809; 78 Mont295, 253P895; 31NM404, 247P275. [b] TexCivA 283SW338. [c] **Where assets of bank are insufficient to pay creditors,** exhaustion of assets need not be shown to sue upon stockholders' statutory liability. 78Mont295, 253P895.

514–79 78Mont494, 254P869.

514–80½–New. In some jurisdictions the double liability imposed by the constitution cannot be enforced until the property of the bank has been exhausted and the amount justly due judicially determined. 113Nebr497, 203NW629; 116Nebr610, 218NW584. [a] **Waiver of requirement.**–116Nebr610, 218NW584.

514–80⅓–New. Liquidation of bank must first begin before enforcing liability. TexCivA 2SW(2d)1015.

514–80¼–New. Double liability cannot be enforced until property of the bank has been exhausted and the amount justly due judicially determined. 117Nebr 569, 221NW702.

515–82½–New. Failure of the first receiver to sue the directors, as required by law, does not bar judgment against stockholders where the second receiver promptly commenced suit, which was held barred by statute. 152Va800, 148 SE831.

515–83 But see 229Ky178, 16SW(2d) 1030.

515–83½–New. Under some statutes the superintendent of banks need not secure special permission from the court before bringing an action to enforce such liability. 34Ariz445, 272P643.

515–84 [c] TexCivA 283SW338.

515–84½–New. Under statutes requiring a board of directors, upon notice from the superintendent of banks of impairment of the bank's capital stock, to make good such impairment, the board is required to convene and adopt a resolution calling a special meeting of stockholders in a manner provided by the bank's by-laws. 77Mont566, 252P 366 (statute construed).

515–84⅓–New. Process from one state is sufficient to give notice to a stockholder in another state of a proposed action regarding an assessment. 152Va800, 148 SE831.

515–85 See also TexCivA 276SW475.

515–85½–New. Notice of assessment is not a condition precedent to the right of the superintendent of banks to maintain a common-law suit to recover the assessment. 38GaA508, 144SE385.

515–85⅓–New. Notice of an assessment to a stockholder is a demand for proportional payment under a statute requiring the superintendent of banks to mail notice of assessments. 167Ga843, 146SE835.

515–97½–New. A constitutional provision that a stockholder's liability shall continue for one year after any transfer of stock is not a special statute of limitations barring action after the expiration of such period, but refers to the accruing of a cause of action. 49SD46, 206 NW471.

515–97⅓–New. A statute authorizing the receiver of an insolvent bank to sue for assessment against a stockholder within ten years thereafter held not repealed by revision of banking laws. 192NC202, 134SE651.

515–97¼–New. A statute providing that no limitations shall run against actions to recover deposits of money or property does not apply to a depositor's action against stockholders of an insolvent bank to enforce statutory liability. 78 Mont301, 254P419.

515–97½–New. Limitation of one year on an action upon liability created by statute is applicable to an action to recover on double liability imposed both by constitution and charter. 32Ariz407, 259P670, 55ALR1059.

515–97⅙–New. **What law governs.** The special statute of limitation of the state where the bank is located governs in an action in a foreign state to recover statutory liability. 152Va800, 148SE831.

515–97⅐–New. The statute extending the statute of limitations for statutory liability is not invalid as applied in actions against a stockholder of a bank whose liability is not extended beyond the period fixed at the time the debt was incurred. 152Va800, 148SE331.

515–97⅛–New. Limitations against enforcement by bank's receiver has been held inapplicable where no receiver was appointed and corporation commission proceeded directly. NC 155SE445.

515–98 See also 56ND74, 215NW924.

515–1 83Mont581, 273P1055; 53ND257, 205NW682, 41ALR177.

515–3 32Ariz407, 259P670, 55ALR1059; 229Ky1030, 16SW(2d)1030; 118Nebr 776, 226NW446.

515–3½–New. The statute provides for assessment if it appears that the available assets or such amount as may be realized therefrom within reasonable time will be insufficient to pay expenses and indebtedness in full and without delay. 170Minn445, 213NW36.

515–3⅓–New. A claim that an assessment proceeding is premature is not available where it is not shown that recoverable assets were dissipated by the bank. 170Minn445, 213NW36.

516–10½–New. In suit by commissioner representing creditors of the bank, it is no defense that stock issued to defendant stockholder represented stock held in another bank upon which he had paid a full assessment of one hundred per cent. TexCivA 276SW475.

516–10⅓–New. Defense to liability on stock, that defendant purchased and held stock as trustee for minor son to reimburse him for debt owed to him by defendant, cannot be maintained, in absence of showing that defendant was appointed guardian of the minor. TexCivA 276SW475.

516–10¼–New. An order of court for suit by a receiver against stockholders cannot be collaterally attacked in an action against them. 78Mont295, 253P 895.

516–10⅕–New. That a bank made excessive loans in violation of statute so as to create assets which might be bad, although valid, does not relieve stockholders of double liability on the ground of ultra vires. 170Minn445, 213NW36.

516–10⅙–New. It is no defense that a previous assessment paid under an agreement with the banking commissioner had been appropriated to payment of indebtedness for which guaranty fund was liable. TexCivA 290SW835.

516–10⅐–New. An agreement that stockholders will not be called upon to pay assessment if the bank becomes insolvent, made by the bank commissioner and stockholders, is void. TexCivA 284SW326.

516–10⅛–New. In a suit by a bank's receiver to establish stockholders' liability and recover a stock assessment on the bank's insolvency for the purpose of paying a receiver's certificates, a stockholder who received no notice of their issuance or of validation thereof is entitled to try the question of their necessity, validity, effect, and amount in the assessment proceeding. 206 Iowa 869, 221NW668.

516–10⅑–New. That a stockholder was not a party to, nor served with notice of, proceedings for assessment of statutory liability is no defense to an action by a nonresident receiver of the bank to enforce the stockholder's liability. 207 Iowa664, 223NW514.

516–10⅒–New. Payment by stockholders making good impairment of bank stock does not exempt another stockholder from assessment. 170Ga 487, 153SE184.

516–11 Ont [1926] 3DomLR388.

516–13½–New. As to creditors who are presumed to have dealt with bank on credit of the stockholder, it is no defense that his stock was illegally issued. TexCivA 276SW475.

516–13⅓–New. Issuance of stock in reorganized bank for shares of an insolvent bank in a less amount than agreed upon does not bind the persons to whom issued so as to make them stockholders subject to liability as such. TexCivA 283SW337.

516–14 TexCivA 275SW75, 79 [quot CJ].

517–15 54SD350, 223NW308 (facts showing no rescission relieving stockholder from liability); TexCivA 275SW 75, 79 [quotCJ].

517–18 [a] **Judgment of bank commissioner that bank insolvent** is conclusive. TexCommnA 283SW762; TexCivA 284 SW326.

517–21 See also 168Ark174, 269SW567.

517–23 170Ga65, 152SE74; Ga 154SE 775; 203 Iowa1052, 213NW772; 204 Iowa243, 213NW925, 927 [citCJ] 56 ALR521; 52ND31, 202NW653; 54SD 345, 223NW306; 54SD350, 223NW308; TexCivA 284SW326; TexCivA 2SW(2d) 1015, 1016 [citCJ]. But see 197NC613, 150SE118. [a] (1) TexCivA 17SW(2d) 190. (3) Stockholder of insolvent bank cannot offset claim for deposit against statutory liability for stock assessment. 34NM443, 283P900. [d] **Partnership deposit,** not assigned to partner sued on bank stockholder's liability, cannot be set off. TexCivA 2SW(2d)1017. [e] **Deposit allowed as set-off.**–27 OhNP NS262.

518–24 Mo 10SW(2d)655. Contra 54 SD345, 223NW306.

518–26 204 Iowa851, 214NW702 (nonresident stockholders held not entitled to change of venue).

518–30 [b] **Individual corporation defendant** cannot complain that it is sued in county where it was neither located nor had office or agent, where bill is not multifarious. 153Tenn97, 282SW 379.

518–30½–New. A bank stockholder, personally served with notice of hearing to make assessment, may not object to jurisdiction for a defect in the notice of publication. 171Minn133, 213 NW560.

518–30⅓–New. Filing of a claim by a receiver with the county court for double stock liability against the estate of a deceased stockholder does not vest such court with exclusive jurisdiction. 117Nebr652, 222NW55.

518–30¼–New. A receiver is not deprived of the right to proceed in the district court because of filing of a claim against the estate of a deceased stockholder. 117Nebr562, 222NW55.

518–32 Contra 54ND614, 210NW342, 48ALR660.

518–33 32Ariz407, 259P670, 55ALR 1059; 207 Iowa664, 223NW514 (nonresident receiver may sue); 53ND257, 205NW682, 41ALR177. [f] **In South Carolina.**–140SC14, 138SE401. [g] **Depositors cannot sue separately** till receiver has refused to sue on demand of depositors. SC 155SE428. [h] **Statutes abrogating right of depositors.**–SC 155SE277.

519–34 117Nebr569, 221NW702; 117 Nebr652, 222NW55. [c] **"Creditor,"** as used in statute, means holder of or person entitled to enforce any contract, debt, or engagement of bank. 50SD81, 208NW585. [d] **In South Dakota.**–50 SD81, 208NW585. [e] 117Nebr569, 221 NW702.

519–35 54ND614, 210NW342, 48ALR 660; 54SD339, 223NW214 (suit by su-

perintendent of banks in name of bank held proper).

519-36 54ND614, 210NW342, 48ALR 660. See also 229Ky178, 16SW(2d)1030. [d] **In Kentucky.**-229Ky178, 16SW(2d) 1030.

519-36½-New. Neither bank nor directors can collect personal liability of stockholders to bank creditors. 50SD 1, 207NW977.

519-37 142SC70, 140SE234 (holding that all depositors should share, whether or not parties).

520-40 [a] **In Oklahoma.**-141 Okl 36, 284P65.

520-40½-New. In South Dakota creditor can bring action only after superintendent of banks has refused to do so. 50SD81, 208NW585.

520-41 [a] **It is not only within his authority,** but is also the duty of commissioner of insurance and banking, after determining that assessment is necessary to pay debts of defunct bank, to sue stockholders to recover assessment. TexCivA 276SW475.

520-43½-New. South Dakota statute makes it the duty of the superintendent of banks to prosecute actions against stockholders of an insolvent bank to enforce their statutory individual liability. 49SD46, 206NW471.

520-43½-New. In Minnesota the superintendent of banks is authorized by statute to maintain an action to enforce the liability of stockholders. 172Minn 83, 214NW771.

520-43¼-New. Stockholders must be sued for an assessment by the superintendent of banks. 167Ga60, 144SE738.

520-43½-New. In Oklahoma bank commissioner cannot maintain action on double liability of stockholders for benefit of his assignee to whom he has attempted to sell it, 144 Okl 172, 289P726.

520-43½-New. nor can such assignee maintain action thereon. 144 Okl 172, 289P726.

520-43½-New. Under some statutes a holder of a certificate of deposit in an insolvent bank taken over by state superintendent of banks can maintain action against stockholder on refusal of such superintendent to do so. SD 228 NW372.

520-43½-New. Expiration of the North Dakota statute providing for centralized administration of closed banks did not affect the right of the receiver to prosecute pending actions. ND 229NW370.

520-44½-New. In South Dakota primary liability of any stockholder may be enforced by creditor before closing of bank by the superintendent of banks. 50SD81, 208NW585.

520-45 But see 31NM404, 247P275.

520-49 117Nebr652, 222NW55. [b] **Executor of estate of deceased stockholder** is proper party defendant. 117Nebr 652, 222NW55.

520-50 [a] 117Nebr569, 221NW702.

520-51 81Mont459, 264P127. See also 177Ark1194, 10SW(2d)500. [e] **All stockholders may be joined in equity,** though liability is several and not joint or joint and several. 81Mont459, 264P 127.

521-54 206 Iowa1070, 221NW809 (action in equity by superintendent of banks).

521-56½-New. Statutory liability of stockholder and former stockholder appearing on books as owner may be enforced against both jointly. Tex CommnA 29SW(2d)319.

521-58½-New. In an action by the state bank commissioner against a stockholder to recover the par value of stock standing in his name on the books of the bank, the court, on motion of defendant or on its own motion, may properly require an unregistered transferee to be brought in as party defendant. 117 Okl 10, 242P522.

521-59 TexCivA 13SW(2d)925 (that debts existing at date of transfer rendered bank insolvent). [a] (4) 207 Iowa664, 223NW514. (5) 162Ga718, 134SE781. (6) Complaint not demurrable for failure to show exhaustion of remedies against bank. 153Tenn97, 282 SW379. (7) Other complaints held sufficient. 78Mont494, 254P869. (8) Other petitions held sufficient. 206 Iowa 1070, 221NW809. (9) Other instances. NC 155SE560.

521-66 But see 153Tenn97, 282SW379.

522-69½-New. the insolvency of the bank, where appointment of receiver is pleaded; 31NM404, 247P275.

522-70 31NM404, 247P275.

522-70½-New. or to set out the names of the unpaid depositors and the amount due each respectively; 160Ga 517, 128SE660.

522-75 [a] **Defense of transfer to infant female** and ratification after marriage held not admissible under general denial. TexCivA 297SW648.

522-75½-New. A complaint in an action to recover the double liability of stockholders need not negative any exception thereto. 34Ariz445, 272P643.

522-75½-New. A stockholder's answer, alleging payments by stockholders to the commissioner in trust to replace bad paper, is a sufficient pleading of the fund to satisfy the stockholder's liability. Mo 10SW(2d)655.

522-75¼-New. A stockholder in an insolvent bank seeking to rescind the purchase of stock on the ground of fraud in order to escape statutory liability has the burden of alleging and proving that there are no creditors of the bank who became such while he was a stockholder. 54SD158, 222NW683.

522-75½-New. Complaint in action by foreign receiver of foreign bank to recover double liability held sufficient. SD 230NW22.

522-76 [a] **In suit to enforce statutory liability** against former stockholder, there is no presumption of insolvency of bank at time of transfer of stock where debts not shown to exceed assets. TexCommnA 283SW762.

522-76½-New. A bank creditor in an action against a stockholder must show that he is the holder of a debt against the bank and entitled to collect it, that defendant is a stockholder or was such within the year preceding accrual of liability, the amount of liability, and the par value of defendant's stock. 50 SD81, 208NW585.

522-76½-New. A bank creditor suing a stockholder of a bank need not show the insolvency of the bank or exhaustion of remedies against it. 50SD81, 208NW585.

522-77 TexCivA 275SW75. [a] **Stockholder transferring to infant female** subsequently married, to escape liability, must show ratification after marriage. TexCivA 297SW648.

522-78 [a] **Letter of commissioner of banking,** declaring necessity to enforce individual liability of stockholders, held no evidence that bank had debts when defendant stockholder transferred his stock. TexCommnA 283SW762. [b] **Statement of bank's liabilities** at time of transfer of certain stock held no evidence that liabilities were in excess of assets. TexCommnA 283SW762.

522-79½-New. Determination of insufficiency of closed bank's assets to meet liabilities by superintendent of banks is admissible in action by him to enforce stockholder's liability for bank's debts to show right to bring action and cannot be controverted by defendant. 50 SD81. 208NW585.

522-80 SD 226NW729; TexCivA 283 SW243.

522-81 123Kan39, 254P383; Kan 289P 479; 170Minn445, 213NW36; Mo 10 SW(2d)655; 118Nebr579, 225NW683; Nebr 227NW451 (evidence held insufficient); TexCommnA 286SW171; Tex CivA 276SW475 (evidence sufficient to show that loan was made to bank upon credit of defendant stockholder); Tex CivA 24SW(2d)536; TexCivA 27SW(2d) 275; 36Wyo 202, 254P117. [a] (4) TexCivA 275SW75. (5) To show that purchase of stock was conditional on purchaser's inspection of books and investigation of affairs of bank and finding that bank was in satisfactory condition. TexCivA 274SW187. (6) To show that fraudulent representations by bank's officers as to its financial condition were made in their official capacity. Tex CivA 275SW75. (7) To show transfer of ownership of stock. 36Wyo 202, 254 P117. (8) To prove fraud in transfer of stock. 36Wyo 202, 254P117. [b] **Burden of proof.**-129 Okl 83, 263P453; TexCivA 275SW75; TexCivA 283SW338. [c] **Admissibility of evidence.**-TexCivA 275SW75.

522-81½-New. The burden is on the stockholder to prove the rights of creditors accrued before he became such stockholder. TexCivA 275SW75.

522-81½-New. Evidence admissible alleged fraudulent representations as to bank's financial condition as against contention that such representations were made on individual capacity. TexCivA 275SW75.

522-81¼-New. A stockholder may show that items doubtful at the time of subscription were subsequently lost. Tex CivA 275SW75.

522-81½-New. Evidence sufficient to show that defendant was stockholder. TexCivA 275SW75.

522-81½-New. Evidence sufficient to show that fraudulent representations as to bank's financial condition was made by officers, in official capacity, in a suit to recover assessment. TexCivA 275SW 75.

522-81½-New. Facts sufficient to show that defendant was the owner of the stock. 77Colo 186, 235P346.

522-81½-New. In an action against a stockholder who had transferred stock before liquidation, evidence as a matter of law was held not to establish insolvency or defendant's knowledge or that the purpose of transfer was to avoid liability. 141SC145, 139SE393, 55ALR677.

522-81½-New. Admissibility of testimony of liquidation agents as to insolvency of bank is determined by rules applicable to testimony generally. Tex CivA 299SW935.

522-81½₀-New. Evidence was held insufficient to show indebtedness of bank at the time that the transfer of stock had been paid. TexCivA 299SW935.

522-81½₁-New. Ledger of bank at the time of failure held not admissible to show insolvency nine months before. TexCivA 299SW935.

522-81½₂-New. Burden of proof of proving fraud in a subscription contract is on the party making the allegation. TexCivA 275SW75.

522-81½₃-New. A stock certificate stub book of an insolvent bank is not sufficient proof as to who were stockholders. 34Ariz445, 272P643.

522-81½₄-New. Evidence that the director did not know of the bank's insolvency is admissible where the director's transfer is attacked for fraud. 168Ga 133, 147SE380.

522-81½₅-New. In an action to recover the double liability of a defunct bank as stockholder in a defunct bank of another state, parol evidence is admissible to show that defendant and not its cashier was the owner of stock in the foreign bank issued in his name. SD 225NW 657.

522-81½₆-New. A bank is not presumed insolvent at the time of stock reduction where the parties to the action agree that insolvency is not in issue. Tex CivA 13SW(2d)443.

523-84½-New. Question for jury whether fraudulent representations were statements of fact or opinion. TexCivA 275SW75.

523-84½-New. In an action by the banking commissioner to recover assessments on shares of stock, defended on ground of fraud inducing purchase of stock, the question whether the alleged fraudulent representations were statements of fact or expressions of opinion is for the jury. TexCivA 275SW75.

523-84¼-New. Questions for jury. In an action to enforce the double liability of a former stockholder on the ground that he had transferred his stock when the bank was insolvent, plaintiff is not entitled to have the case taken from the jury where there is evidence tending to show that the bank was not insolvent and that its capital was not impaired at the time of the transfer. 123Kan39, 254 P383.

523-84½-New. Instructions. A re-

quested instruction substituting the judgment of the court for that of the jury in determining whether a bank was in a failing condition or whether its capital was impaired at the time of a transfer of stock is properly refused. 123Kan39, 254P383.

523–84⅛–New. The court's findings on assets and liabilities are not conclusive for all purposes. 170Minn445, 213NW36.

523–84⅛–New. In some jurisdictions statutes provide that, if from petition necessity for resorting to stockholder's double liability appears, the court shall appoint the time for hearing within a certain period after filing of petition. 170Minn445, 213NW36.

523–84⅛–New. In a suit against the executor of an estate and distributees to enforce statutory liability, where property has passed to distributees, their equities as between one another may be adjusted upon proper pleading and proof. 54SD339, 223NW214.

523–84⅛–New. In an attack for fraudulent transfer by the director of stock as an individual, an instruction to find for him if he did not know of the bank's insolvency at the time is proper. 168Ga 133, 147SE380.

523–84⅛–New. In an attack for fraudulent transfer by the director of stock as an individual, an instruction eliminating consideration of duty as director to the bank is proper. 168Ga133, 147SE 380.

523–84⅛–New. Misleading instructions are properly refused. 148SC392, 146SE245.

523–86 77Colo 186, 235P346.

523–89 [a] **Directors making good impairment of capital stock** have been held authorized to sell at public auction stock of defaulting stockholder sufficient to cover assessments. 170Ga487, 153SE 184.

523–90½–New. Executions. Defense to execution alleging that estimate of assets was not carefully made and not within time is insufficient. 39GaA64, 146SE28(3dcase).

523–90½–New. Execution need not be furnished within any specified time from assessment and notice in the absence of a statute requiring it. 39GaA64, 146SE 28(3dcase); 39GaA70, 146SE31(1st case)

523–90¼–New. A stockholder of an insolvent bank can, by affidavit of illegality, contest liability on the assessment or the amount thereof. 167Ga811, 146 SE762.

523–90⅛–New. Some statutes authorize entry of a personal default judgment against a stockholder in an action in equity by the superintendent of banks. 206 Iowa1070, 221NW809.

523–90⅛–New. Invalidity of assessment may be urged in affidavit of illegality based on void execution. 170Ga65, 152 SE74.

523–90⅛–New. Under some statutes assignment of bank stock after suit by bank's receiver on stockholder's double liability is void as against execution to enforce receiver's judgment. 130Kan 856, 288P543.

523–92 [a] 126Misc753, 214NYS643.

523–94 9PaDist&Co 429.

524–4½–New. A by-law providing that the president and first and second vice presidents shall actually reside in the city where the bank is located has been construed as not making residence a prerequisite to election but only a condition for discharge of duties of office. 33PortoRico 607.

524–12 52ND752, 204NW818, 827, [cit CJ] 40ALR1021.

524–22½–New. It is the duty of the board of directors of a bank to procure and file with the banking department a satisfactory surety bond insuring its own fidelity as officers and employees. 52ND752, 204NW818, 407ALR1021.

524–22⅛–New. A bank may give information in the name of the bank as to the record of the employee in the existing employment. 52ND752, 204NW818, 40 ALR1021.

525–34½–New. Sureties on bond are not liable for violation of banking law by cashier when acts complained of took place prior to time when cashier became cashier and executed bond. 111 Okl 282, 239P671.

525–35½–New. Under statute in some jurisdictions sureties on bond of cashier may become liable where the cashier cashes worthless checks. 116 Okl 186, 243P936.

525–35½–New. "Willful misapplication" in cashier's bond covers knowingly paying out money on worthless check. 116 Okl 186, 243P936.

525–36½–New. In New York directors must take oath of office as sacred as that of public officer. 126Misc753, 214 NYS643 (Banking L. § 124).

525–36½–New. Director must also make oath that he owns, beneficially, in good faith, and in his own right, stock of the value of one thousand dollars. 126 Misc753, 214NYS643.

526–50 16F(2d)248; 16F(2d)576; 214 Ala458, 108S853; 22AlaA504, 117S490; 200Cal 760, 255P188, 52ALR569; Ind 167NE527; IndA 161NE573; IndA 169 NE470 (president); 200 Iowa37, 204NW 259 (bank cashier acting as clerk at public sale held not agent of seller in sale of purchase note to bank where cashier fraudulently represented to him that he must indorse note to bank because taken in seller's name by mistake); 215Ky338, 285SW239; MoA 282SW466; 191NC500, 132SE468; 52ND752, 204NW 818, 40ALR1021; TexCivA 276SW941. [q] **Bank is liable on vice president's promise to indorsee** to pay note though indorsement was "without recourse." TexCivA 276SW941. [r] **Implied authority.**–42 OklACR107. [s] **Payment in bank to one behind counter** with permission of managing officer and with apparent authority to receive money is payment to bank. 204 Iowa456, 215NW767.

527–51 22AlaA504, 117S490; 198NC 169, 151SE102; 296Pa541, 146A126; TexCivA 19SW(2d)372. But see 222MoA 483, 280SW720.

528–52 52ND752, 204NW818, 40ALR 1021. See also 22AlaA504, 117S490.

528–53 46 Ida614, 269P586 (bear fiduciary relation to bank as trustees and must act with utmost good faith); 142 Va43, 128SE615.

528–54 [b] (1) 23F(2d)803. [c] **Vice president and director** of bank occupy trust relation as regards bank and depositors, and are held to utmost good faith in discharge of their duties. 84 Colo 207, 269P9.

528–55 See also 22AlaA504, 117S490.

528–55½–New. The inference of actual authority arising from the conduct of a banking corporation toward its officers is one of fact. 52ND752, 204NW 818, 40ALR1021.

528–55½–New. That person prefers to transact his business with particular officer does not make officer his agent. 181Ark198, 25SW(2d)772(2dcase).

528–56 205 Iowa695, 216NW96; 170 Minn161, 212NW177. [f] **Recovery of funds misapplied.**–300Pa522, 150A885.

529–58 248 IllA379.

529–61 16F(2d)248; 52ND752, 204NW 818, 40ALR1021. [a] (5) Bank is bound by assurance of cashier that person executing note will never be called on to pay it. 198Cal 252, 244P368. [d] **Bank relying upon note** obtained by cashier from maker to cover overdraft of third person must take it on terms with which cashier took it. 198Cal 252, 244P368.

529–66 118Kan251, 240P395; 294Pa 176, 144A84. [a] (8) Bank is not bound by representations constituting matters of opinion. 294Pa176, 144A84.

530–68 [b] **Bank is not estopped** from enforcing promissory note by statement of cashier to maker upon latter's informal inquiry that bank had none of his paper, even though maker acted to his detriment on assumption of truth of information. 166Minn472, 208NW186.

530–69 16F(2d)248; 127Me306, 143A 173; 52ND752, 204NW818, 40ALR1021.

530–69½–New. A surety on the bond of an officer or employee may establish the authority of officers to execute the employer's statement concerning the employee's record by showing that it was customary for such officers to exercise the identical authority. 52ND752, 204 NW818, 40ALR1021.

530–71 23F(2d)803; 34F(2d)377; 198 Cal 252, 244P368; 45 Ida451, 262P1057; 46 Ida492, 269P100, 101 [citCJ]; 331 Ill 563, 163NE333; 334 Ill 494, 166NE 123; 255 IllA578; 206 Iowa265, 217NW 865; 121Kan784, 250P335; 125Me480, 135A95; 127Me65, 141A102; 316Mo 129, 289SW814; Mo 20SW(2d)502; 115Nebr 255, 212NW540; 118Nebr624, 225NW 753; 248NY313, 162NE91; 52ND752, 204NW818, 824 [citCJ], 40ALR1021; 126 Okl 265, 259P523; 135SC190, 133SE 709; 154SC267, 151SE579 (subordinate officers); 155SC414, 152SE640; TexCivA 279SW893; TexCivA 296SW678; 103WVa646, 138SE370; 36Wyo 132, 253 P658. [a] (3) Cashier's knowledge that sinking fund collected by taxation was trust fund for retiring municipal bonds was imputable to bank. 169Ga 53, 149SE575. [c] (3) Notice not imputed to attorney who was inactive vice president of facts acquired in his professional capacity in course of consultation with client. 50ND583, 197NW150. [g] (3) Knowledge by employees of fraudulent acts of vice president is not knowledge of plaintiff bank suing on vice president's bond. 27F(2d)496. [h] (4) Bookkeeper authorized to accept and cash sight draft for bank's customer may bind bank to knowledge acquired in transaction. SD 226NW579. [j] See also 170Ga185, 152SE215.

531–72 MoA 276SW93; 221AppDiv122, 223NYS118; 126 Okl 265, 259P523; 135 SC190, 133SE709; TexCivA 296SW678; TexCivA 3SW(2d)503; 36Wyo 132, 253 P658. [a] (22) Of partner in bank of trust character of insurance premiums received by him as agent and deposited in bank. 251Mich163, 231NW38.

532–74 125Kan751, 266P81; TexCivA 19SW(2d)372.

532–76 MoA 276SW93.

533–78 See also 36Wyo 132, 253P658.

533–82½–New. A bank purchasing note at one fourth its face by credit of preëxisting debt is not a bona fide holder where its president and director were associated in proceedings against an insolvent corporation which obtained the note through fraud. TexCivA 279SW 500.

533–85 86 IndA392, 156NE568; 321Mo 1104, 14SW(2d)425; 248NY313, 162NE 91; 52ND752, 204NW818, 40ALR1021. But see 31F(2d)25.

533–86 29Ariz44, 239P297; 52ND752, 204NW818, 40ALR1021; TexCivA 28 SW(2d)297; 103WVa646, 138SE370. See also 121Kan784, 250P335.

534–90 169Ga846, 151SE803; 116Nebr 99, 216NW186, 56ALR186; 145SC91, 142SE811; TexCommnA 27SW(2d)125; TexCivA 7SW(2d)915; TexCivA 28SW (2d)297.

534–91 41 Ida561, 240P446; 201 Iowa 657, 208NW74; MoA 14SW(2d)48; 54 ND534, 210NW26.

534–92½–New. Bank is not chargeable with knowledge of president acting for another in offering note for discount. 13PaDist&Co 470.

534–93 18F(2d)957; 213Ala215, 104S 758; 213Ala236, 104S761 (both cases dictum); 32Ariz423, 259P676; 181Ark 38, 25SW(2d)410; 242 IllA579; 200 Iowa 954, 205NW790; 201 Iowa657, 208NW 74; 213Ky417, 281SW152; 216Ky467, 287SW960; 226Ky229, 10SW(2d)836; 158La796, 104S719 (president coöwner of property sold for which note transferred to plaintiff bank was given); 125Me480, 135A95; MoA 22SW(2d)52 (payment of bank's note); 77Mont134, 251P157; 40Nebr123, 58NW734; 52ND752, 204 NW818, 40ALR1021; TexCivA 290SW 187; 103WVa650, 138SE317. But see 118Nebr297, 224NW316. [a] (3) 29Ariz 44, 239P297. [g] **Where officer is general manager and only officer who has knowledge of transaction,** and he pledges stock he owns upon which bank has lien,

as security for personal loan, knowledge thereof is imputed to bank which thereby waives its lien. 213Ala215, 104S758 (vice president); 213Ala236, 104S760 (cashier); 213Ala236, 104S761.

535-94 51SD447, 214NW844; **Tex CommnA** 2SW(2d)426; 36Wyo132, 253P658. [a] (1) 125Me480, 135A95. (2) Bank is liable to plaintiff corporation for deposit of latter on which checks are drawn in favor of bank, by person who is treasurer of corporation and cashier of bank, for purpose of paying overdrafts in accounts of cashier and his brother. 99WVa438, 129SE474. (3) Where vice president and cashier of bank are only persons acting for bank in transaction with depositor and they have knowledge of facts, question of their ostensible authority to act for depositor does not arise. 53SD113, 220NW479. (4) Where bank cashier, being sole managing officer, purchased notes from himself for bank, and bank ratifies transaction and sues on notes, bank is chargeable with officer's knowledge of defects in notes. 117Nebr407, 220NW588. (5) Bank is chargeable with knowledge of cashier in matters in which he is personally interested where he is in sole charge and represents it in matter. **ND** 230NW18. (6) Other instances. 179Minn423, 229NW568. **Erratum.**–Strike out: "**Nebr.**—Buffalo County Nat. Bank v. Sharpe, 40Nebr. 123, 58NW734."

536-97 52ND568, 204NW188, 194 [cit CJ].

536-98 52ND568, 204NW188, 194 [cit CJ].

536-1 32Ariz70, 255P595.

537-7 296Pa541, 146A126.

537-9 215Ky338, 285SW239; **MoA** 287SW835; 104WVa471, 140SE330, 333 [citCJ]. [b] (17) Leasing property. 215Ky338, 285SW239. (18) President's use of bank funds in paying personal obligations. 20F(2d)678.

537-10 42 **OklACR**107.

537-11 54SD233, 222NW932, 63**ALR** 984 (spurious certificate of deposit issued by cashier).

537-11½-New. Nor can directors ratify certificates of deposit forged by the cashier. 99WVa544, 130SE142.

538-14 162La12, 110S71.

538-16 **Iowa** 232NW282.

538-17 36F(2d)646; 104WVa471, 140SE330. [d] Reconcilement with correspondent bank, signed by officers who were also nominal makers of note included in such reconcilement, held binding on bank for which money was borrowed on note. 20F(2d)678.

538-18 **Iowa** 232NW282; 215Ky338, 285SW239; 4LaA266; **MoA** 20SW(2d)290; 34NM387, 281P461; **Utah** 269P144, 145 [citCJ]; 104WVa471, 140SE330; 40Wyo312, 276P926. [c] (2) Where bank accepts proceeds of individual note of officer, it cannot complain of payment of note from its own money. 114Nebr382, 207NW503.

538-19 **TexCivA** 23SW(2d)447.

538-20 **TexCivA** 281SW632.

539-21 **IndA** 169NE678; 150Miss386, 116S605.

539-22½-New. Intent to ratify is necessary. 99WVa544, 130SE142.

539-26½-New. The act of a cashier in negotiating a loan for a depositor in the name of the bank and taking a note and mortgage therefor is not ratified where the bank, immediately upon learning the facts, disclaimed any interest in the note and assigned the mortgage to the depositor. 74Mont549, 241P613.

539-27 245NY116, 156NE634; **Tex CivA** 281SW632.

539-28 **Ariz** 288P7; 181Ark243, 25SW(2d)440; 202Iowa594, 210NW815; 202Iowa1263, 211NW864; 126Kan441, 268P735; 226Ky179, 10SW(2d)846 (bank selling past-due note through cashier); 165Minn285, 206NW459; 220AppDiv541, 221NYS661; 130Okl149, 265P1051; **TexCommnA** 2SW(2d)419; **Tex CivA** 288SW639.

539-29 52ND752, 204NW818, 824 [cit CJ], 40**ALR**1021.

540-30 122Kan101, 250P1077; 165Minn278, 206NW453; 52ND752, 204NW818, 824 [citCJ], 40**ALR**1021.

540-33½-New. There is no estoppel where the officer was not acting or appearing to act for the bank in the matters as to which estoppel is claimed. 170Minn83, 212NW25.

540-33⅓-New. Bank suing promptly on discovery of defalcation is not guilty of negligence barring recovery for drafts drawn by officer for personal debt. 300Pa522, 150A885.

540-35 84CalA787, 258P709. [d] **President's act in procuring plaintiff bank to sell cotton company's drafts and credit proceeds to his bank** held to bind bank. 214Ala458, 108S53. [e] **Assignment by vice president and cashier for collection only of bank's claims against corporation for loans** held authorized. 14F(2d)920.

540-37 198NC169, 151SE102. [a] (2) Cashier given authority to make agreement for loan held authorized to execute collateral agreement pledging bank to secure antecedent indebtedness to bank which made loan and another bank. 206Iowa265, 217NW865.

541-41½-New. Individual officers of a bank have no implied authority to make special arrangements as to discounting paper. 286Pa29, 132A716.

541-41⅓-New. A bank is not bound by a promise of the cashier to accommodation indorsers to secure security for their benefit. 286Pa29, 132A716.

541-41¼-New. Scope of duty of bank's executive officer does not include acting as broker for others. **Or** 290P236.

541-45 See also 52SD243, 216NW945.

541-54 200Iowa954, 205NW790; 206Iowa947, 221NW507; 220MoA963, 272SW711; 196NC327, 145SE619; **TexCivA** 290SW187; **TexCivA** 295SW311; 152Va814, 148SE328. See also 80Mont468, 260P1055. But see 29F(2d)236 (general rule held inapplicable); 94CalA254, 271P107; 220AppDiv541, 221NYS661. [a] (4) Where agreement was made between several persons, including depositor and president of bank, for purchase of land and division of profits between parties, bank was not responsible for breach of agreement by its president to use amount of deposit for which depositor gave receipt to bank in paying mortgage on land. 200Iowa954, 205NW790. [j] **Application of depositor's deposit to debt to officer.**–223Ky386, 3SW(2d)786.

542-55 See also 92CalA86, 267P711.

542-58 16F(2d)576.

543-60 31F(2d)25.

543-62½-New. Officers and directors putting up cash as substitute for notes which bank examiner rejected under bank's agreement to collect notes for their benefit are entitled to share of proceeds. 157Miss149, 127S265.

543-63 14F(2d)940; 16F(2d)576; 31F(2d)25; 181Ark198, 25SW(2d)772(2d case); 90CalA436, 266P300; 38GaA591, 144SE815; **IndA** 169NE77; 130Kan681, 288P587; 118Nebr495, 225NW669 (president diverting deposit in his name as executor); 220AppDiv541, 221NYS661; 54SD233, 222NW932, 63ALR984; 54SD228, 222NW936; 54SD223, 222NW938; 54SD217, 222NW941; 54SD211, 222NW943; **SD** 226NW583; **SD** 226NW584 (forgery of certificates of deposit by cashier); **TexCivA** 293SW859; 197Wis268, 221NW753. [f] **Ratification by depositor** of cashier's act in lending to himself depositor's money precludes recovery against bank. 92CalA86, 267P711 (constituting payment). [g] **Where plaintiffs conveyed their land in consideration for fictitious certificates of deposit** bank cashier had issued and which purchasers transferred to plaintiffs, and plaintiffs had commenced action to rescind transaction and set aside transfer, they could not recover from bank on ground of estoppel till damages were ascertained. 54SD217, 222NW941. [h] **Recovery on certificates of deposit forged by cashier.**–**SD** 226NW584 (right of buyer as assignee of seller to recover amount of certificate with interest).

544-64 **IndA** 169NE77; 205Iowa695, 216NW96 (misappropriation of proceeds of draft, though payable to officer in his official capacity); 210Ky222, 275SW694; 320Mo623, 8SW(2d)858; 248NY313, 162NE91. But see 197Wis268, 221NW753.

544-67 **SD** 226NW766 (presumption as to president's authority to employ attorney).

544-67½-New. and that there is no restriction upon his inherent power of attending to, and disposing of, ordinary and active business functions of the bank; 148Miss109, 114S26.

544-74½-New. Bank officers are presumed to have acted with authority until the contrary appears. 245NY116, 156NE634; **TexCivA** 281SW632.

544-74⅓-New. Directors are presumed to have known of a custom of the bank to keep securities of customers therein for safe-keeping, where the bank's records would have disclosed such fact. 197Wis268, 221NW753.

544-74¼-New. Officer making the bank the payee in a note for his own benefit cannot be presumed to have communicated to the bank an accommodation agreement with the maker. 196NC327, 145SE619.

544-74½-New. There is a presumption that an agent borrowing money acts within authority. 318Mo1120, 2SW(2d)607.

544-76 222MoA483, 280SW720; 284Pa355, 131A239; 299Pa236, 149A190; **Tex CivA** 4SW(2d)253. See also **Iowa** 228NW670.

544-79 181Ark38, 25SW(2d)410 (declarations of officers); 204Iowa456, 215NW767 (conversation relative to subject matter of payment over counter); 205Iowa695, 216NW96 (testimony of president whose authority was in question); **Mass** 169NE920; 174Minn471, 219NW757; 284Pa260, 131A181. [a] **Contract of foreign bank** to pay deposit of American depositor on demand at its banking house held governed by law of place of performance. 7F(2d)443.

544-80 22AlaA504, 117S490; 181Ark198, 25SW(2d)772(2dcase); 252Mass523, 147NE887 (evidence sufficient to show action of president, in employment of counsel, ratified by board of directors, and by stockholders so far as such action related to certain work preliminary to consolidation); **Mass** 169NE920; 164Minn401, 205NW282 (evidence sufficient to justify plaintiff in believing that officers were acting for bank selling mortgage); 165Minn278, 206NW453; 56ND103, 216NW201 (authority of cashier to waive priority of chattel mortgage); 57ND916, 224NW909; 145SC91, 142SE811; **TexCivA** 281SW632; **TexCivA** 1SW(2d)1097; 69Utah557, 257P658; 197Wis268, 221NW753. [e] (3) To show that certain man was acting for bank in conversion of goods. 21AlaA363, 108S402. [f] **Defense** in suit on note held insufficient. 284Pa355, 131A239. [g] **Evidence held not to show** that agency was special and not general. **Ind** 167NE527. [h] **Contract for sale of realty.**–299Pa236, 149A190 (evidence insufficient to show authority). [i] **Ratification.**–299Pa236, 149A190 (evidence insufficient).

545-81 192NC216, 134SE492. See also **MoA** 278SW826. [a] Contra 142Va43, 128SE615. [f] **Obligation to serve bank's interests.**–Director of assignee bank executing guaranty agreement to it as vice president of assignor bank on sale of its assets is obliged to insist upon enforcement of his personal obligation. 84Colo207, 269P9.

545-82 [a] **Directors must use care** of ordinary prudent diligent men in similar circumstances. 42F(2d)94.

545-85½-New. Directors have serious responsibility. 126Misc753, 214NYS643.

545-85⅓-New. **In New York** directors must make independent audit of banks' affairs at least annually. 126Misc753, 214NYS653 (Banking L. § 131).

545-85¼-New. This duty cannot be discharged through their officers. 126Misc753, 214NYS643.

545-85½-New. Responsibility is placed upon directors per se. 126Misc753, 214NYS643.

545-85⅙-New. The executive committee of a bank is creative solely of directors with no inherent powers but only those vested in it by the board. 148Miss109, 114S26.

545-85⅐-New. **Directors of a Russian**

bank cannot sue for a deposit where they failed to show power under the Imperial Russian law and their terms of office had expired. 133Misc527, 233NYS255.

545-85½-New. Bank directors as trustees of bank property owe to other directors, proposing to buy notes owned by another bank of which the former were also directors, the duty of disclosing information affecting the former bank's interest. 46 Ida614, 269P586 (concealment of worthlessness of notes held violation of official duty).

545-85½-New. Action taken elsewhere by unanimous consent of exiled directors of Russian bank was valid, at least to same extent as action of de facto managers under stress of vis major. 253NY 23, 170NE479.

546-87 See also 154SC267, 151SE579.

546-88 [c] **Conversely,** if four directors are not notified, action taken is void. 316Mo129, 289SW814. [d] **Special meeting called by two directors without notice to third** is void though third director is absconded president. 102CalA71, 282P801.

546-93 286Pa29, 132A716; 288Pa478, 136A773. [a] 286Pa29, 132A716.

546-98 TexCivA 289SW1018.

546-11½-New. appropriate the bank's money to payment of a stockholder's individual debt; Mo 22SW(2d)821.

546-11½-New. ratify the action of another bank in applying their bank's deposit on a stockholder's individual debt; Mo 22SW(2d)821.

547-14½-New. The director of an assignee bank could not successfully claim release from liability as guarantor of notes sold by assignor bank of which he was vice president and director by reason of substitution of a worthless note through his instrumentality. 84Colo 207, 269P9.

547-14½-New. Directors of state bank are charged with duty of maintaining sufficient sum of money in bank to meet its obligation. CalA 284P958.

547-15 37GaA141, 139SE113 (cannot bind bank except in discharge of ordinary duties); 148Miss109, 114S26. [a] **Particular powers and duties.**-102NJL5, 131A105; 192Wis442, 213NW653.

547-18 181Ark38, 25SW(2d)410; 189NC647, 127SE693; 283Pa406, 129A333; 299Pa236, 149A190.

547-20 See also 165Ga44, 139SE812.

547-20½-New. The president of a bank occupies a fiduciary relationship to the bank, and for all practical purposes is a trustee. 201 Iowa651, 207NW764.

547-20½-New. As such he is legally obligated to care for the property of the bank and manage its assets in good faith. 201 Iowa651, 207NW764.

547-20¼-New. The president and active managing officer of a bank has authority to transact dealings in commercial paper. 128Kan107, 275P1081, 67 ALR966 (sale with agreement for repurchase).

547-20½-New. Those who have business with an officer of a bank are deemed to know that he cannot use funds of the bank for his own benefit. 196NC327, 145SE619 (president).

547-24 [f] **Payment of individual debt.**-114Nebr534, 208NW627.

547-24½-New. A deed executed by the president of a bank, conveying the bank's land to himself without consideration, is in violation of common honesty and legitimate banking and void. 50SD 6, 208NW222.

547-24½-New. being in violation of the statute requiring a deed to be signed by the cashier as well as the president. 50 SD6, 208NW222.

548-25 SD 226NW766.

548-26 30Ariz581, 249P755.

548-27 126Kan719, 271P394; Mo 19SW (2d)740 (statute prohibiting indorsement or pledge without authority of board of directors held inapplicable to indorsement for sale of note); MoA 22 SW(2d)1052; MoA 25SW(2d)523 (without recourse); 54SD630, 224NW189.

548-38½-New. to act for the bank in the business of collecting its assets; 37 GaA141, 139SE113.

548-38½-New. and, in furtherance of such purpose, to enter into an agreement with a third person for waiver or release of the bank's lien on mortgaged property for a valid consideration; 37 GaA141, 139SE113.

549-48½-New. A bank president indorsing notes for loans by the bank acted in his official capacity in procuring an assignment of contract and mortgages to secure indorsements. 28F(2d) 944.

549-52 22AlaA504, 117S490; 133 Okl 14, 270P838. See also 179Minn246, 228 NW757(2dcase).

549-54 221MoA887, 289SW34.

549-55 299Pa236, 149A190; TexCivA 31SW(2d)483 (necessity for authorization by directors).

549-67½-New. The president or other executive officer cannot bind the bank by gratuitous waiver or release to a third person of a lien on property mortgaged to it. 37GaA141, 139SE113.

549-68½-New. The president of a bank has no implied authority to bind the bank by the execution of a note of a development company by himself as its president and by indorsement thereof individually and for the bank. 189NC647, 127SE693.

549-70 Ariz 288P7; 148Miss109, 114S 26.

549-71 219Ala81, 121S66; Ariz 288P7; 161Ga898, 132SE422; 148Miss109, 114 S26; 219MoA34, 269SW955; 126 Or651, 269P869; 288Pa478, 136A773. [f] **Allegation that cashier is executive officer** is equivalent to assertion that he is discharging duties of president. 221MoA 887, 289SW34.

550-73 Ariz 288P7; 179Ark584, 17SW (2d)302; 96CalA478, 274P568; 255 IllA 578; 222MoA1200, 4SW(2d)861 (issuance of certificates of deposit without authorization of board of directors); MoA 21SW(2d)637 (can sell note for face value); 190NC277, 129SE619; 156Tenn 649, 4SW(2d)341. [k] **Where cashier taking notes to bank promised maker he would not be required to pay notes,** maker could not be held liable where rights of innocent parties were not involved. 96CalA478, 274P568.

551-74 288Pa478, 136A773; 198Wis 476, 224NW707.

551-75 190NC277, 129SE619; 296Pa 291, 145A831.

551-79 96CalA478, 274P568; 206 Iowa 265, 217NW865 (bank is bound by cashier's acts done in usual and ordinary course of business); 118Kan251, 240P 395; 210Ky222, 275SW694; MoA 272 SW1040 (statement of assistant cashier); 100NJEq448, 136A320; 190NC 277, 129SE619 (cashier's authority confined to transactions for benefit of bank); 131 Okl 66, 267P631; 42 OklACR 107; 288Pa478, 136A773; 198Wis476, 224NW707.

551-82½-New. Officers giving cashier apparent authority to pledge collateral with power of sale, misleading pledgee to his prejudice, cannot complain that they must bear loss from sale. Ariz 288 P7.

551-83 165Minn278, 206NW453. [e] **After insolvency and before appointment of receiver,** cashier and general manager of private bank has power to make agreement to return dishonored check to customer who purchased draft from bank in exchange for check. 205 Iowa 845, 216NW737. [f] **Contracts of rescission.**-205 Iowa845, 216NW737.

552-84 170Minn161, 212NW177, 178 [citCJ]. [g] **Cashier could not lend bank's credit** to guarantee account of building contractor. 190NC277, 129SE 619.

552-85 190NC277, 129SE619.

552-88 [e] **Contracts necessary to ordinary business** usually performed by cashier are not within application of statute requiring authorization of board of directors for issuance of bills payable. 219MoA34, 269SW955. [f] **Letter of cashier** stating sum had been placed in escrow to be paid only to party addressed held binding on bank. 173Ark 368, 292SW126.

552-89 173Ark368, 292SW126; 148 Miss109, 114S26, 29 [citCJ].

552-91 Ariz 288P7.

552-93 271P394, 126Kan719, 721 [cit CJ]; 167Minn394, 209NW311; 174Minn 471, 219NW757; 106WVa134, 145SE39, 40 [citCJ] (exchange held collateral). [g] **See also MoA** 284SW177. [j] **Indorsement on note payable to bank, made by cashier of bank,** could only be proved by showing that board of directors of bank authorized cashier to do so by proceedings of board reduced to writing, under statute. MoA 9SW(2d) 852.

552-93½-New. in the ordinary course of business; 217Ky40, 288SW1011.

553-95 Ariz 288P7. [a] **Reasonable and customary terms of pledge** may be agreed to by cashier. Ariz 288P7.

553-97 161Ga898, 132SE422.

553-2 180Ark600, 22SW(2d)398(2d case); 181Ark243, 25SW(2d)440. [a] **Sufficiency of authorization by directors.**-222MoA122, 2SW(2d)151. [b] **Authority to rediscount is authority to sell.** -222MoA122, 2SW(2d)151. [c] **Right to recover on note sold by cashier** depends on cashier's authority to sell. 222MoA 122, 2SW(2d)151.

555-17 Nebr 230NW487(2dcase).

555-18 219MoA34, 269SW955 (may issue certificates of deposit).

556-25 161Ga898, 132SE422.

556-29½-New. The act of a cashier has been held binding on the bank, where he invested funds of a depositor in worthless notes held by the bank. 226Ky179, 10SW(2d)846.

556-34 217Ky40, 288SW1011. [a] **After bank has closed,** cashier is without authority to dispose of or deliver any note of bank. 217Ky40, 288SW1011.

557-44½-New. to bind the bank by representations as to credit of third parties; 221MoA887, 289SW34.

557-45 221MoA887, 289SW34. [a] **Cashier has no implied authority to make guaranty binding bank.**-190NC277, 129SE619.

557-48 32Ariz423, 259P676 (accommodation party); MoA 275SW560; 126 Okl 188, 259P545; TexCivA 4SW(2d) 253 (on payment other than in money).

558-52½-New. to agree with persons executing notes to a third person that the maker will not be required to pay them; 114 Okl 147, 244P793. [a] **Cashier's representation to accommodation makers of note** that bank would lend money to payee and that makers would not be called upon to pay it is not binding on bank and does not constitute defense to action by it on note in absence of showing of specific authority vested in cashier to make representations. 114 Okl 147, 244P793.

558-60 198NC169, 151SE102.

558-65 [a] **Issuing of bills payable** (1) by cashier without consent of board of directors is prohibited by statute in some jurisdictions. 219MoA34, 269SW 955. (2) Promissory note is bill payable within statute. 219MoA34, 269SW 955.

558-69 198NC169, 151SE102 (cashier's debts). [a] **Payee of note becomes liable to bank for full amount thereof,** notwithstanding cashier's agreement to pay note. 198NC169, 151SE102.

558-71½-New. A cashier has no implied power to make a contract binding on the bank which, under the statute, the bank could make only under special circumstances. 190NC277, 129SE619.

558-72½-New. Vice president and cashier are authorized to give bond to secure deposit and assign notes to secure sureties thereon without action by directors. 192NC673, 134SE795.

558-72½-New. Officer's authority is not affected by becoming surety on bond of bank. 192NC673, 134SE795.

558-75½-New. Giving security for deposit of public money has been held valid without express authority by directors. 148Miss109, 114S26.

559-81½-New. Under by-laws of a banking corporation providing that the board of directors shall have management and control of the business, authority of the president and cashier of the bank to make contracts of settlement for indebtedness due the bank and to agree to extension of time to debtors is authority of the board of directors. 38GaA591, 144SE815.

559-81½-New. President and cashier of creditor bank can act for it without

special authorization in agreement to hold proceeds of land in lieu of attachment if attachment is released. **Mass** 172**NE**76.

559–83 [b] (2) Where one not officer or director of bank is employed for purpose of checking up and renewing collateral security held by bank and to ascertain general condition of borrower, contract for loan or for additional credit between such person and borrower is not within scope of authority of former. 57**ND**916, 224**NW**909.

559–84 248**NY**313, 162**NE**91 (authority of employees to collect debt due bank is limited to power such as is usual and ordinary among minor bank officials and employees).

559–88 226**Ky**179, 10**SW(2d)**846; 126 **Okl** 265, 259**P**523; 284**Pa**260, 131**A**181; 145**SC**91, 142**SE**811; 54**SD**630, 224**NW** 189; **TexCivA** 4**SW(2d)**331; 197**Wis** 268, 221**NW**753. [a] (2) Authority of clerk empowered to sell foreign currency extends to representations as to time that delivery will be made. 253**Mass** 160, 148**NE**138. [b] (2) Officer of bank with authority to collect notes urging third party seeking investment to loan money to maker, enabling him to pay bank, is acting within such authority, and bank is liable for fraudulent representation by which it benefited. 220 **AppDiv**541, 221**NYS**661. [e] **Authority in alleged agent for bank** is immaterial where it has not been exercised. **Tex CommnA** 278**SW**188. [f] **Bank president is constituted officer and agent** and binds bank in all matters within scope of his official duties. **MoA** 287**SW**835.

559–89 25**F(2d)**684 (president).

560–91 23**F(2d)**757 (lender to officer held not entitled to stock offered as collateral as against bank); 94**CalA**254, 271**P**107; 125**Kan**751, 266**P**81 (finding that cashier acted in individual capacity and not as cashier in entering into trust agreement and in handling trust funds); 6**LaA**287; 220**MoA**474, 274**SW** 945, 951 [citCJ]; **TexCivA** 284**SW**265. [e] **In absence of ratification by bank,** it may repudiate act by officer done outside of authority. 214**AppDiv**232, 212 **NYS**165. [f] **Acts of officers held outside of authority** under evidence. 214 **AppDiv**232, 212**NYS**165 (agreement that no liability was to run against indorser).

560–92 220**MoA**474, 274**SW**945, 951 [citCJ]; 320**Mo** 623, 8**SW(2d)**858.

560–93 284**Pa**260, 131**A**181.

560–94 [a] **Cashier's knowledge of nature of deposit** will not be imputed to bank. **TexCivA** 284**SW**265.

560–96 Or 290**P**236 (president investing funds for depositor). [a] **Officer may act in individual capacity** in dealing with customers. **Iowa** 230**NW**557.

561–2½–New. Contract between president and an unqualified indorser on a note that the indorser would not be liable if the maker failed to pay the loan held unenforceable. 102**NJL**5, 131**A** 105.

561–3 17**F(2d)**867; **Ind** 167**NE**527; 118**Kan**251, 240**P**395, 397 [citCJ]; 164 **Minn**401, 205**NW**282; 220**AppDiv**541, 221**NYS**661; 7**PaDist&Co** 333. [a] (1) 126**Misc**7, 211**NYS**828. [b] 121**Kan**163, 246**P**973. [c] (2) Bank is not liable for cashier's misstatements as to its financial condition to one contemplating purchase of its stock from third person. 159**Tenn**659, 21**SW(2d)**393, 66**ALR**1447.

561–4½–New. nor is the bank precluded from setting up forgery by the cashier of certificates of deposit as against the holder unless in some way estopped to do so. 99**WVa**544, 130**SE**142.

562–6 118**Kan**251, 240**P**395, 397 [cit CJ]; 118**Kan**269, 234**P**982; 117 **Or**83, 243**P**78; 284**Pa**260, 131**A**181.

562–6½–New. Fraudulent representations by an officer of a bank in obtaining a promissory note while acting for himself as stated to the person to whom the representations were made are not imputable to the bank. 29**Ariz**44, 239**P** 297.

562–6⅓–New. A bank acting as gratuitous bailee of securities which were unlawfully taken by the assistant cashier without the bank's consent is not liable as principal for the act of the assistant cashier as agent. 320**Mo** 623, 8**SW(2d)** 858.

562–6¼–New. Where a bank gratuitously kept securities placed in a strong box by plaintiff, and the securities were allegedly pilfered by the assistant cashier, it was held that, if the bank did not know that the cashier was untrustworthy, it was not guilty of negligence. 320**Mo** 623, 8**SW(2d)**858.

562–6½–New. Where securities kept by a bank as gratuitous bailee were allegedly pilfered by its assistant cashier without knowledge or consent of the bank, the bank should not be held liable on the theory that the burden should fall on him who made the wrong possible. 320**Mo** 623, 8**SW(2d)**858.

562–7 13**F(2d)**213, 222 [citCJ]; 160**La** 425, 107**S**292; 126**Misc**7, 211**NYS**828 (agents of bank). [a] (1) 117 **Or**83, 243**P**78. (2) Officer is liable for loss of deposit which he induced depositor, to allow to remain by false representations as to solvency of bank. 117 **Or**583, 245 **P**510. [b] **Officers and directors of bank held not liable for losses sustained by depositors** through bank failure. 160**La**425, 107**S**292.

562–8 176**Ark**843, 4**SW(2d)**938.

562–12 [c] **Bank's officers are liable** for converting trust fund on deposit to benefit of bank. 173**Ark**197, 292**SW**140.

562–17½–New. Receipt of deposits while bank insolvent.–Statutes imposing personal liability upon officers where deposits are received while the bank is insolvent or in a failing condition have been held constitutional. 119**Kan**844, 241**P**433.

562–17⅓–New. No contractual relation exists between officers and directors and bank's creditors. 160**La**425, 107**S** 292.

562–17¼–New. Statute held not to make bank directors quasi-public officials subject to civil action for delinquency in performing duties. 160**La** 425, 107**S**292.

562–17½–New. In such action interest is recoverable from the date of the bank's failure. 124**Kan**679, 261**P**835.

562–17⅔–New. Officers are liable for the receipt of deposits after insolvency or failing circumstances. 124**Kan**679, 261**P**835.

562–17½–New. Officers held liable for paying overdrafts with knowledge of lack of deposits by drawer. 52**SD**243, 216**NW**945.

562–17⅚–New. Under a statute making officers individually liable for deposits where they assented to their reception with knowledge of the bank's insolvency, an officer cannot be held liable without proof that he had actual knowledge or that lack of knowledge was the result of negligence amounting to fraud. **MoA** 20**SW(2d)**920 (evidence held insufficient to show knowledge of insolvency).

562–17⅙–New. The fact that notes held by the bank were past due is not evidence of insolvency. **MoA** 20**SW(2d)** 920.

563–23 176**Ark**843, 4**SW(2d)**938; 179 **Ark**448, 17**SW(2d)**286 (must exercise diligence and good faith of ordinarily prudent man); 168**Ga**133, 147**SE**380 (knowledge of insolvency of bank imputed to director); **Mass** 171**NE**42; 148 **SC**446, 146**SE**420; **TexCivA** 295**SW**311. [c] **Mass** 171**NE**42. [e] 179**Ark**448, 17 **SW(2d)**286. [j] **Test of liability** is whether directors have exercised good faith and diligence. 169**Ark**480, 275 **SW**750. [k] **Loss must be due to directors' negligence** to entitle depositors to recover. 23**F(2d)**803. [l] **Foresight required.–Mass** 171**NE**42. [m] **Directors are not bound to give continuous attention to bank's affairs.–Mass** 171**NE** 42. [n] **Reliance on information and advice given by executive officers** (1) is justified where probity and competency of such officers are not under just suspicion. **Mass** 171**NE**42. (2) Directors are not liable for approving loan which upon report of officers, appears to be good. **Mass** 171**NE**42. [o] **Good faith** will not relieve directors from liability for negligence in performance of responsibilities. **Mass** 171**NE**42. [p] **Duty to heed warnings from responsible sources.–Mass** 171**NE**42. [q] **Failure to remedy conditions disclosed by report of bank commissioner's audit** (1) renders directors liable for resulting loss. **Mass** 171**NE**42. (2) Directors must be allowed reasonable time for investigation after receiving report. **Mass** 171 **NE**42. [r] **Limit of liability.–Mass** 171 **NE**42. [s] **Interest.–Mass** 171**NE**42. [t] **Duty respecting investments.–Mass** 171**NE**42. [u] **Directors should employ competent persons to superintend loans and investments** where they are unable to exercise efficient personal supervision. **Mass** 171**NE**42.

563–24 169**Ark**480, 275**SW**750; 217**Ky** 471, 290**SW**346. [a] **Exercise of poor judgment** does not render directors liable to stockholders. 169**Ark**480, 275**SW** 750.

563–24½–New. Failure to know is not intentional, unless it arises from deliberate or reckless conduct. 35**Wyo** 398, 250**P**1.

564–26 But see 231**Ky**577, 21**SW(2d)** 994.

564–28 But see **MoA** 274**SW**478.

564–30 38**GaA**798, 145**NE**894; 126**Kan** 39, 267**P**19; 126**Kan**484, 269**P**23 (constitutionality of statute); 319**Mo** 474, 5**SW(2d)**50, 57**ALR**881; 222**MoA**1022, 9 **SW(2d)**688; **MoA** 16**SW(2d)**739; 144 **Okl** 172, 289**P**276 (independent of statute). [a] 220**MoA**973, 272**SW**1021. [b] (1) **MoA** 274**SW**478. See also 220**MoA** 973, 272**SW**1021. (2) Knowledge of insolvency may be inferred from facts and circumstances. 220**MoA**973, 272**SW**1021. (3) Actual knowledge of insolvency is necessary to hold directors liable under statute. 148**SC**446, 146**SE**420. [f] (2) Evidence has been held sufficient to show insolvency of bank at time deposit was made, and director's knowledge thereof. 220**MoA**973, 272**SW**1021. (3) Direct proof of director's knowledge of insolvency is not required. 177**Minn**60, 224**NW**466 (evidence held sufficient to show actual knowledge). (4) Other evidence held sufficient. 126**Kan**39, 267 **P**19. [g] **Director ceasing to hold office** before deposits were made held not liable, though his name was wrongfully carried in reports as director. 122**Kan** 675, 253**P**416 [h] **By whom action brought.**–220**MoA**973, 272**SW**1021. [i] **Under common law** director who negligently allows deposit in insolvent bank where he knows or should have known of insolvency is not liable to depositor. 148**SC**446, 146**SE**420. [j] **Constitutionality of statutes.**–319**Mo** 474, 5**SW(2d)** 50, 57**ALR**881. [k] **Concurrent remedies.**–319**Mo** 474, 5**SW(2d)**50, 57**ALR** 881. [l] **Depositor's statutory right** to sue directors of insolvent bank for damages is unaffected by liquidation of bank. 144 **Okl** 172, 289**P**276. [m] **Complaint held sufficient.–Minn** 232**NW** 324.

564–31 But see 231**Ky**577, 21**SW(2d)** 994.

564–32 **Mass** 171**NE**42.

565–34 But see 231**Ky**577, 21**SW(2d)** 994.

565–35 But see 231**Ky**577, 21**SW(2d)** 994. [a] **Liability is contractual** rather than tortious. 53**SD**250, 220**NW**485.

565–36½–New. of making improvident loans; **Mass** 171**NE**42.

565–37 **Mass** 171**NE**42.

565–39 See also 231**Ky**577, 21**SW(2d)** 994.

565–40½–New. failure to discover fraud of employees; 23**F(2d)**803.

565–43½–New. The mere fact that at the time of insolvency of bank there was not on hand a sufficient reserve is not sufficient to show that the directors intentionally violated the statute by keeping a reserve fund less than the required amount. 35**Wyo** 398, 250**P**1.

565–43⅓–New. Excessive loans to preserve banks security are not intentionally made in violation of statute so as to render directors personally liable. 35**Wyo** 398, 250**P**1.

565–44 **IndA** 169**NE**678 (director's promoting own financial interest to detri-

ment of bank); 160La425, 107S292, 294 [quotCJ].
565-45 160La425, 107S292, 294 [quot CJ].
566-47½-New. In determining whether a bank made excessive loans so as to make directors personally liable under statute, the practice of state banks in making excessive loans by paper guaranteed by directors and forwarded to its correspondent will not be considered, although sent back to the bank when not paid at maturity, where there is no proof that the practice was adopted to evade the statute requiring a reserve fund. 35Wyo 398, 250P1.
566-47⅓-New. Directors of a bank have the right to assume that the cashier is performing his duties in a lawful manner. 158Tenn356, 13SW(2d)326.
566-47¼-New. Directors not authorizing the cashier to qualify the bank as guardian, or knowing that he has done so, are not guilty of willful misconduct in not determining that the bank has qualified as guardian and may have converted funds of ward within a statute making directors personally liable for loss from willful misconduct. 158 Tenn356, 13SW(2d)326.
566-47⅓-New. Director's presentation of resignation to president before closing of bank does not relieve him from liability as director where resignation was not presented to or acted upon by board. Mass 171NE42.
566-47⅙-New. Director held not liable under circumstances for losses and expenses of liquidation. Mass 171NE42.
566-53 98Fla502, 123S913(2dcase) (inducing deposits while bank is insolvent); 201 Iowa651, 207NW764, 765 [citCJ].
566-54 23F(2d)803; 201 Iowa651, 207 NW764, 765 [citCJ].
566-56½-New. for loaning bank funds to persons known at the time to be financially irresponsible. 201 Iowa651, 207NW764.
566-56⅓-New. especially where he secures the approval of the directors to such loans on repeated assurance of being back of the loans and of seeing them paid. 201 Iowa651, 207NW764.
567-73½-New. President is not liable for permitting personal checks of depositor's agent, clothed with apparent ownership of business, to be charged to depositor's account. 23F(2d)803.
567-73⅓-New. Vice president acting solely on behalf of the bank is not liable for services of plaintiff in preparing land leased by the bank for sugar beets. 206Cal 571, 275P430.
567-73¼-New. He is not personally liable for the bank's failure to account for property transferred to the bank in payment of a note. MoA 28W(2d)159.
567-74 180Ark753, 22SW(2d)561; 289 Pa252, 137A257, 259 [citCJ]. [a] **Where bank is insolvent at time cashier wrongfully used bank's funds** he and others participating must bear statutory liability. 180Ark753, 22SW(2d)561.
567-75 [b] **Cashier held not negligent** in extending credit to his tenants. 231 Ky577, 21SW(2d)994.
568-2 IndA 167NE625; 78Mont22, 252 P316.
568-3½-New. A transaction between a bank and one of its officers will not be sustained, unless the fairness of the transaction and the good faith of the officer is clearly evident. 78Mont22, 252 P316. [a] **Sufficiency of evidence of fraud.**-78Mont22, 252P316.
568-3⅓-New. A bank is not prevented from recovering for fraud committed by its director in the sale of property because the party committing the fraud was a stockholder. IndA 167NE625.
569-4 35Wyo 398, 250P1. [a] (3) Where officers and directors did not profit from illegal transactions with bank's funds, they are not liable. 231 Ky577, 21SW(2d)994. [d] (4) Individual director is liable only for results of his own misconduct. Mass 171NE42. (5) Individual directors unable to influence others in proper conduct of affairs should resign to avoid individual liability where they know of impairment of capital. Mass 171NE42. (6) Directors may commit conduct of main business to officers and subordinates and, in absence of grounds for distrust, to assume that they will be upright. Mass 171NE42.
569-5 [b] **Directors held not negligent** in failing to have complete audit of books which would have disclosed defalcations. 231Ky577, 21SW(2d)994.
569-5½-New. , or the active participancy in a positively wrongful act intended to operate injuriously to plaintiff. 35Wyo 398, 250P1.
569-7 190NC458, 464 [citCJ], 130SE 195. See also 234Ky61, 27SW(2d)409. [a] (1) 194NC310, 139SE449 (bank or receiver only may maintain action); NC 155SE558. [b] **If bank is insolvent when deposit is made,** it is wrong done to depositor for which he alone may sue. 194NC310, 139SE449. [i] **Depositor of insolvent bank** may not institute action in favor of bank without application to bank or receiver. 140SC60, 136SE482, 483 [citCJ].
570-8 See also 35Wyo 398, 250P1, 8 [citCJ].
570-13½-New. A creditor can sue the directors for negligent management only in the right of the bank after taking the necessary steps to induce action by its officers. 150SC15, 147SE632.
570-16½-New. Liability of a director to stockholders for negligent acts is barred after the affairs of the bank have been fully administered and creditors and costs of administration fully paid. 29F(2d)288(2dcase).
570-16⅓-New. Where a bank was wholly in power of the director committing fraud in the sale of property to the bank, laches does not prevail in an action to rescind the sale. IndA 167 NE625.
571-21 122Kan675, 253P416.
571-26½-New. Directors sued for deposits, received when the bank was insolvent, from depositors having deposits prior to insolvency, cannot offset withdrawal when it would prevent recovery to the extent of the amount deposited during insolvency. 220MoA973, 272SW1021.
571-28½-New. Directors and other officers of a bank may properly be joined in an action by a receiver for mismanagement resulting in insolvency where the complaint alleges conspiracy and a general scheme leading to a single end. 195NC717, 143SE524.
571-31 See also 148SC125, 145SE702. But see 41GaA13, 151SE831.
571-37½-New. A bank examiner is not the proper party to bring an action against directors for mismanagement. 133SC446, 131SE612.
571-37⅓-New. If sums for which officers and directors of a bank in the hands of a receiver are liable as assets of the bank, the action must be prosecuted by and in the name of the receiver. 192NC387, 135SE118.
571-37¼-New. The power conferred on the superintendent of banks under some statutes does not include power to sue for torts committed upon depositors by officers of banks. 164GaS88, 139SE802.
571-37⅙-New. A depositor may maintain an action against directors for knowingly receiving his deposit while the bank was insolvent, and the action need not be brought by the commissioner of finance. 220MoA973, 272SW 1021.
571-37⅛-New. Depositors and not the receiver of a bank are proper persons to sue officers for improper receipt of deposits when the bank was insolvent. 195NC717, 143SE524.
571-37⅐-New. Single depositor cannot sue directors, where he shows no legal capacity to do so. MoA 274SW478.
571-37⅛-New. Nor can he sue, since he does not show that he is a proper party to sue. MoA 274SW478.
571-37⅑-New. The superintendent of banks must sue directors for misconduct causing insolvency. 167Ga60, 144 SE738.
571-37⅒-New. A creditor of a bank may sue the directors in his own right for a personal wrong without suing in the right of the bank. 150SC15, 147SE 632.
571-37⅓-New. Depositors have no right of action against directors which can be founded on breach of the directors' duty to the bank. 148SC446, 146 SE420.
571-37½-New. Trustees may sue in their own right directors of the bank for negligently authorizing a loan of the trust fund. 150SC15, 147SE632.
571-37⅓-New. Depositors are not proper parties where failing to allege refusal of superintendent of banks to sue officers. 169Ga176, 149SE902.
571-38 See also 192NC246, 134SE656.
572-52 [a] **Complaints held sufficient** in action by depositors and creditors of bank for wrongful acts causing insolvency. 196NC762, 147SE291.
572-52½-New. In an action by the superintendent of banks to recover of officers of an insolvent bank for making excessive loans, a complaint merely alleging that the maker of a note for value made and delivered his promissory note in writing is insufficient to show that the note was given for money loaned to the maker. 49SD614, 207NW 661.
572-52⅓-New. In such action a complaint merely alleging that one defendant received consideration for a note in a certain sum is insufficient to show that such note was given for money loaned to the maker thereof. 49SD614, 207NW661.
572-52¼-New. Complaint insufficient to sustain recovery against codefendants as individuals. 190NC277, 129SE 619.
572-52⅙-New. Sufficiency of particular complaints. 164Ga31, 137SE547; 192NC387, 135SE118; 133SC446, 131SE 612.
572-52⅐-New. Depositor's petition against directors merely alleging negligence shows no cause of action. MoA 274SW478.
572-52⅛-New. In a depositor's action against directors to recover a deposit on the ground of the bank's insolvency when the deposit was made, the bank's insolvency at such time must be specifically alleged, 194NC310, 139SE449.
572-52⅑-New. and an allegation that defendants knew that it was insolvent or that it would become so is not sufficient. 194NC310, 139SE449.
572-52⅒-New. A bill merely charging negligence is not sufficient, within a statute making directors individually liable for loss by fraud or "willful" mismanagement. 158Tenn356, 13SW (2d)326.
572-52⅒-New. Stockholders suing directors for fraudulent declaration of dividends are not required to allege how or from whom they purchased stock. 219Ala638, 123S71.
572-52⅒-New. A petition against officers of a bank for fraud and deceit held not to state cause of action for deceit. 169Ga176, 149SE902.
572-52½-New. Petition alleging that defendants as bank directors received deposits of plaintiff's assignors with knowledge of bank's insolvency held sufficient. MoA 27SW(2d)772.
572-52⅓-New. Complaint by stockholder not alleging refusal of liquidator to sue or damages peculiar to plaintiff is insufficient. NC 155SE558.
572-52¼-New. Petition by bank stockholders to recover damages against officers for misconduct causing insolvency held demurrable. Ga 154SE882.
572-52⅕-New. Such petition held not cured by adding state superintendent as plaintiff for use of stockholders. Ga 154SE882.
573-57½-New. In separate actions against the president and cashier of a bank in which they are separately charged with embezzlement of the funds of the bank, evidence showing that they acted together is competent, although the complaint does not charge them with conniving together. 54ND91, 209NW 204.

573–58½–New. Burden of proving misconduct relied upon rests on plaintiff. **Mass** 171**NE**42.

573–59 [a] **Presumption** is that dividends were legally declared out of surplus. 219**Ala**638, 123**S**71.

573–60 118**Kan**269, 234**P**982 (evidence admissible to show mismanagement and knowledge of and consent thereto); 126 **Kan**484, 269**P**23 (receiving deposits while bank insolvent); **MoA** 30**SW(2d)** 1101.

573–61 179**Ark**448, 17**SW(2d)**286; **CalA** 284**P**953; **IndA** 167**NE**625; 201 **Iowa**651, 207**NW**764; 126**Kan**484, 269**P** 23 (receiving deposits while bank insolvent); 220**MoA**973, 272**SW**1021; 222 **MoA**1022, 9**SW(2d)**688. [a] (3) To sustain finding that directors gave reasonable amount of attention to bank's affairs and were not negligent therein. 169**Ark**480, 275**SW**750. (4) To show liability for receiving deposits in insolvent bank. 122**Kan**675, 253**P**416. (5) To show good faith. 217**Ky**471, 290**SW** 346. [b] (1) 118**Kan**269, 234**P**982. (4) To warrant inference that directors were negligent in failing to collect shortage from defaulting cashier. 169 **Ark**480, 275**SW**750. (5) To sustain defense that director was incapacitated from attending to business. 122**Kan** 675, 253**P**416. [d] **Conclusive as to amount of attention** given by directors to business of bank. 169**Ark**480, 275 **SW**750. [e] **Evidence held sufficient:** (1) To show director's good faith and confidence in solvency of bank. 231**Ky** 577, 21**SW(2d)**994. (2) To show nonliability of directors in employing cashier. 231**Ky**577, 21**SW(2d)**994. [f] **Facts as found by master** held to support ultimate facts as to nonliability of directors. 42**F(2d)**94.

573–61½–New. Burden was on director, conveying property to bank for excessive price, as matter of defense to show that transaction was fair and that he made full disclosure. **IndA** 169**NE**678.

573–61¾–New. Director of bank sued by it to set aside conveyance has been held to have burden to plead and prove ratification if relying thereon. **IndA** 169**NE**678.

573–64½–New. A stockholder suing officers and directors for illegally declared dividends could be required to refund the share he received. 231**Ky** 577, 21**SW(2d)**994.

573–64¾–New. Generally question whether director conformed to required standard of duty in given instance is one of fact. **Mass** 171**NE**42.

573–65½–New. Evidence held insufficient to submit to jury issue of cashier's liability for unauthorized promises as to loans. 176**Ark**511, 3**SW(2d)** 337.

574–74 [c] **Borrowing by officers and directors.**–118**Nebr**419, 225**NW**51. [d] **Fraudulent breach of trust.**–159**Tenn** 314, 18**SW(2d)**1 (evidence held insufficient). [e] **Renewing certificate of deposit when bank insolvent.**–**Iowa** 228**NW** 308.

574–75½–New. In some jurisdictions the bank commissioner's approval of a sale of stock is not necessary to relieve the seller from further criminal liability in connection with operation of the bank. **OklCr** 277**P**598.

574–76 [e] But see 56**ND**875, 219**NW** 574. [f] **Intent to deceive** need not be alleged or proved. 41 **Ida**598, 242**P**787.

574–77 39**F(2d)**870; 179**Minn**217, 228 **NW**926; 79**Mont**385, 256**P**1071; 79 **Mont**417, 256**P**1082. [j] **Instructions as to proof required** for conviction in prosecution for false report of bank's condition to state examiner held proper. 74**Mont**217, 239**P**775. [k] **Mailing of false report,** after signing, to superintendent of banks or permitting it to be done constitutes exhibiting of false papers under statute. 79**Mont**385, 256**P** 1071. [l] **Indictments held sufficient.**–149**SC**195, 146**SE**657. [m] **Indictments held insufficient.**–149**SC**195, 146**SE**657. [n] **Offense of "withholding information" defined.**–179**Minn**217, 228**NW**926.

575–78 [a] 79**Mont**385, 256**P**1071; 79 **Mont**417, 256**P**1082.

575–79 [a] (3) Other indictments and informations held sufficient. 79**Mont** 385, 256**P**1071.

575–82 179**Minn**217, 228**NW**926. [a] **Evidence for state properly received.**–179**Minn**217, 228**NW**926 (that notes included in assets as reported were forgeries).

576–83 **Minn** 228**NW**926 (evidence sufficient to make prima facie case). 74**Mont**217, 239**P**775 (evidence held insufficient); 79**Mont**385, 256**P**1071; 79 **Mont**417, 256**P**1082. [a] 79**Mont**385, 256**P**1071. [b] **Evidence held insufficient** to sustain conviction. 79**Mont**417, 256**P**1082. [c] **Knowledge of falsity.**–79**Mont**385, 256**P**1071; 79**Mont**417, 256 **P**1082. [d] **Issues, proof, and variance.**–79**Mont**385, 256**P**1071.

576–84 [a] **Evidence admissible or improperly excluded.**–79**Mont**385, 256**P** 1071.

576–84½–New. Where there is a discrepancy between the amount reported to be due from correspondent bank and the amount actually due, it is no defense that the sum total due from the banks remained the same. 79**Mont**385, 256**P**1071.

576–84¾–New. A cashier is not responsible for acts of others, unless such acts are shown to have been done in his presence or with his knowledge, approval, or consent. 79**Mont**385, 256**P** 1071.

576–85½–New. Whether false instrument filed with bank was filed with intent to deceive bank examiner is fact question. 39**F(2d)**870.

577–86 159**Tenn**314, 18**SW(2d)**1 (statute not impliedly repealed). [d] **Entry must be made willfully, feloniously, and fraudulently.**–216**Ky**718, 288**SW**671. [e] **Minute book** is "book" under statute. 22**F(2d)**760. [f] **Minutes of meeting** are "entry" under statute. 22**F(2d)** 760. [g] **President of bank held liable** under statute, if in control of management. 22**F(2d)**760. [h] **Vice president of bank,** aiding in management, held liable under statute. 22**F(2d)**760.

577–88 [a] **Indictments held sufficient.**–77**CalA**44, 246**P**97.

577–92½–New. Indictment specifying false entries by a number of notes held sufficiently explicit. 22**F(2d)**760.

578–99½–New. Evidence showing execution of a note for accommodation of defendants under an agreement that the maker was not to be liable held admissible. 22**F(2d)**760.

578–99¾–New. A witness is not permitted to state his opinion, based on inferences from other facts, that the entry was false. 113**TexCr**130, 19**SW(2d)** 52.

578–2 181**Ark**398, 26**SW(2d)**78; 216 **Ky**718, 288**SW**671; 96**PaSuper**270 (evidence sufficient to sustain conviction); 143**SC**63, 141**SE**165 (evidence held insufficient to make issue for jury or sustain conviction); 148**SC**196, 145**SE**799 (as to fraudulent intent); 159**Tenn**314, 18**SW(2d)**1 (insufficient).

578–2½–New. Evidence held to justify the conclusion that a bank book offered in evidence was an individual ledger of the bank. **TexCr** 21**SW(2d)**733.

578–2¾–New. In prosecution for making false entry state may show relation of defendant to account as bearing on good faith. 181**Ark**398, 26**SW(2d)**78.

578–5½–New. A charge that causing another to make an entry is equivalent to making an entry in person held proper. **TexCr** 21**SW(2d)**733.

578–5¾–New. Refusal of an instruction as to acquittal if a draft was deposited on the belief that it would be paid held proper. **TexCr** 21**SW(2d)**733.

578–5¼–New. Questions of fact. In prosecution for making false entry question whether purpose was to deceive bank commissioner or examiner is one of fact for jury. 181**Ark**398, 26**SW(2d)** 78.

578–6 84**Colo** 254, 269**P**907; 166**Ga**755, 144**SE**283; 38**GaA**616, 144**SE**685. [i] (2) To show actual shortage of assets due to defendant's manipulations and not mere book shortage. 77**CalA**44, 246**P**97. [j] **Bank president selling stock of bank** and charged with embezzling proceeds will not be heard to deny that he acted as agent of bank in selling. 30**Ariz**466, 248**P**39. [k] **Admissibility of evidence.**–77**CalA**44, 246**P**97. [l] **Conversion of funds by use of accommodation paper or credits.**–50**SD**394, 210**NW**353. [m] **Willful misapplication of funds** of bank and intent to injure and defraud bank are essential. 126 **Or**651, 269**P**869. [n] **Indictments.**–195**NC**537, 143**SE**3. [o] **Indictment held sufficient.**–126 **Or**651, 269**P**869.

579–10 84**Colo** 254, 269**P**907.

579–11 148**SC**196, 145**SE**799. [a] **Instructions held not erroneous.**–37**GaA** 129, 139**SE**118. [b] **Directed verdict properly refused.**–148**SC**196, 145**SE**799.

579–11½–New. Under some statutes an officer of a bank is guilty of grand larceny, where he feloniously appropriates a special deposit in his possession and under his control to the use of another than the depositor. 169**Minn**298, 211 **NW**334. [a] **Indictment held sufficient.**–169**Minn**298, 211**NW**334. [b] **Evidence sufficient to support conviction.**–169**Minn** 298, 211**NW**334.

579–11¾–New. Under Massachusetts statute making it an offense willfully to misapply money, funds, credit, or other property of a bank, intent to defraud is not gravamen of the offense. 257**Mass** 289, 153**NE**787.

579–11¼–New. Nor is it material whether loss results. 257**Mass**289, 153 **NE**787.

579–11½–New. Instruction defining "willful misapplication" under statute as intentional misuse of bank property in a way unauthorized by law held proper. 257**Mass**289, 153**NE**787.

579–11¾–New. Negotiation of a check of a bank, based upon receipt of a check known to be worthless, has been held misapplication of bank property under statute. 257**Mass**289, 153**NE**787.

579–11⅞–New. Under an indictment charging defendant with embezzlement of "moneys and funds," an instruction which authorized conviction for embezzlement of notes, securities, or credits is error. 166**Ga**755, 144**SE**283; 38**GaA**616, 144**SE**685.

579–11⅞–New. An instruction that fraudulent conversion may be effected by the exercise of right of ownership inconsistent with the owner's right, and may be actual or constructive, but must be effected with the intent to defraud the owner, held not objectionable. 84**Colo** 254, 269**P**907.

579–11⅞–New. Testimony with reference to a shortage resulting to the bank occurring years before and not connected with the transaction involved in the case has been held properly excluded. 84 **Colo** 254, 269**P**907.

579–12 72**Mont**270, 233**P**615.

579–13 256 **Ill**A553 (overdraft not an offense).

579–18 320**Mo** 236, 7**SW(2d)**344 (excessive loan to director without consent of majority of directors held not felony); 190**NC**528, 130**SE**180. [d] **Statutes strictly construed.**–320**Mo** 236, 7**SW(2d)** 344.

579–21½–New. The intent of an officer, borrowing from the bank, to defraud, is not a necessary element of the statutory offense of borrowing except upon proper approval. 133**SC**85, 130**SE**340.

579–21¼–New. Under a statute making it an offense for an officer to borrow from the bank except upon the "approval" of the board of directors, a blanket approval not showing knowledge of the particular loan is insufficient, although a recognized and established form. 133**SC**85, 130**SE**340.

579–21¾–New. An officer making a loan in violation of the statute is personally liable. 190**NC**528, 130**SE**180.

579–21⅞–New. An indictment for excessive loans under the statute is not required to allege or prove intent, the willful doing of the act constitutes the offense regardless of intent. 190**NC** 528, 130**SE**180.

579–21⅞–New. Loans, in excess of the maximum percentage of capital stock and permanent surplus or when the legal reserve is below the legal limit,

constitute misdemeanors, under the statute. 190NC528, 130SE180.

579-21½-New. Indictments for making loans when the reserve is below the statutory requirement, and for an excessive loan, properly consolidated. 190NC528, 130SE180.

579-21¼-New. Evidence sufficient to support conviction for excessive loans. 190NC528, 130SE180.

579-21⅛-New. An indictment under a statute making it an offense knowingly to permit stockholders to become indebted to the bank in a total sum exceeding fifty per cent of the bank's paid-up capital need not allege that indebtedness was created by loaning or advancing funds. 50SD564, 210NW988.

579-21 1/10-New. The question whether one of the notes evidencing the indebtedness of the stockholder, which was executed by a corporation, was a valid obligation of the corporation is immaterial. 50SD564, 210NW988.

579-21 1/11-New. [§ 202a] 7½. **"Special Larceny" Defined by Oklahoma Statute.** An information should not charge the elements of the offense of larceny defined by the general statute. 35 **OklCr** 204, 249P968.

579-21 1/12-New. A director of a bank organized under the state banking law is not by reason of being a director merely an active managing officer of the bank within a statute denouncing the offense of unlawful borrowing by a managing officer. 35 **OklCr**204, 249P 968.

579-21 1/13-New. An officer is not liable under a statute forbidding excessive indebtedness of a stockholder, where the note evidencing indebtedness is invalid. 52SD321, 217NW391.

579-22 165Ga44, 139SE812. [d] **Sufficiency of evidence.**-165Ga55, 139SE877.

580-23 165Ga44, 139SE812 (application to criminal case of res ipsa loquitur); 166Ga563, 144SE170. [a] 165Ga44, 139SE812. [b] (1) 165Ga14, 139SE812; 166Ga563, 144SE170. [c] **Rebutting presumption.**-165Ga44, 139SE812.

580-25½-New. Prima facie case is established by proof of bank's insolvency and fact that accused alone or with associates was in control of direction and management of the bank. 165Ga44, 139SE812.

580-25¼-New. Presentment need not state acts committed or omitted by banking officer which may have contributed to or caused the insolvency. 165Ga44, 139SE812.

580-25¼-New. Burden of showing that acts of accused were not cause of insolvency is cast on defendant, who may rebut the presumption of guilt. 165Ga 44, 139SE812.

580-25⅛-New. In rebutting such presumption he may prove that the insolvency was not due to any act of his. 165Ga44, 139SE812.

580-25⅛-New. Presentment is not demurrable because the president of the bank only is indicted. 165Ga44, 139SE 812.

580-25⅛-New. If the president acts with other officers associated with him each of such officials may be severally indicted. 165Ga44, 139SE812.

580-25⅛-New. Presentment is not demurrable for failure to allege that defendant was charged with the same care that agents receiving commissions for services are bound by law to observe. 165Ga44, 139SE812.

580-25⅛-New. Testimony is admissible to show fraudulent mismanagement while accused was in charge of the bank. 165Ga55, 139SE877.

580-25 1/10-New. To show solvency or insolvency of a bank, testimony of nonpayment of dividends is admissible. 165Ga55, 139SE877.

580-25 1/11-New. It is proper for the court to instruct the jury as to the acts denounced in the code as illegal and to inform the jury in language of the code that certain acts to which some of the testimony adduced related were unlawful. 165Ga55, 139SE877.

580-25 1/12-New. The court did not err in admitting documents referred to for the purpose of informing the jury what notes the state claimed to be good, what notes doubtful, and what notes worthless. 166Ga563, 144SE170.

580-25 1/13-New. Verdict convicting for fraudulent insolvency supported by evidence. 166Ga563, 144SE170.

580-25 1/14-New. Exclusion of testimony whether clearing house banks differed as to making a loan to an insolvent bank held proper. 166Ga563, 144SE170.

580-25 1/15-New. The capital stock of a bank is not a liability that should be taken into account in determining the question of solvency. 166Ga563, 144SE 170.

580-25 1/16-New. Conviction held not contrary to evidence. 166Ga563, 144SE 170.

580-25 1/17-New. A verdict finding defendant guilty of the fraudulent insolvency of the bank was required by the evidence. 166Ga563, 144SE170.

580-25 1/18-New. Admission of testimony that certain notes were worthless and doubtful held proper. 166Ga563, 144SE 170.

580-25 1/19-New. That if the state has the burden of showing that the bank is insolvent, defendant has the burden of showing proper management is a proper instruction. 166Ga563, 144SE170.

580-25 1/20-New. Insolvency of a bank can be established by the opinion of a witness, provided he gives the facts upon which his opinion is founded. 166Ga 563, 144SE170.

580-25 1/21-New. Excluding cross-examination as to practice of banks to exchange call money held proper. 166Ga 563, 114SE170.

580-25 1/22-New. Liability of a bank to its stockholders is not an asset that the jury should take into consideration in determining whether the bank is insolvent. 166Ga563, 144SE170.

580-26 [c] (2) Active officers in charge of affairs of bank directing members to receive deposits cannot avoid liability on ground that they did not manually receive same. **OklCr** 287P419. [d] (3) But see **OklCr** 287P419. (5) Conviction for assenting to receipt of deposit is proper though indictment charged that defendant received and assented. 312 **Mo** 525, 290SW999. (6) Under statute prohibiting officers or managers of insolvent bank from permitting, conniving at, assenting to, or being accessory to receiving or accepting deposits, they may be convicted as principals though they did not manually receive deposit or were not present when deposit was made. 33 **OklCr**125, 243P251. [f] **Officer must be actor** and must personally conduct or supervise transaction with depositor to be liable. 120**Kan**731, 244 P1053. [g] **Actual, as distinguished from constructive, receipt** is essential element of offense of receiving deposits knowing bank to be insolvent. 141**SC** 207, 139SE386.

580-27 312**Mo**525, 290SW999. [a] (3) Transaction held to create relation of depositor and depositary. 312**Mo** 525, 290SW999. [c] (2) Deposit of check in insolvent drawee bank for credit to payee's account in same bank held "deposit" under statute. 203 **Iowa**333, 210 NW934, 212NW550. [d] **Separate offenses.**-**OklCr** 287P419.

580-28 37GaA41, 138SE590; 204 **Iowa** 837, 216NW43 (knowledge of depositor held no defense); 312**Mo** 525, 290SW 999; 32NM158, 252P1002; 33 **OklCr**125, 243P251. [b] (1) 202 **Iowa**1377, 212 NW63; **Mo** 20SW(2d)529(1stcase); 57 **ND**230, 221NW25. (4) Bank is insolvent, within meaning of statute defining "offense," when actual cash market value of its assets is not equal to its debts and liabilities, or when it is unable, by pledging its assets and credit, to raise, within reasonable time, money to meet debts, obligations, and liabilities, and pay depositors in ordinary course of business. (4) 329 **Ill** 104, 160NE233; 33 **OklCr**125, 243P251. (5) Provision of Oklahoma Banking Law defining conditions when bank shall be deemed insolvent applies only for civil purposes and has no application to insolvency of banks in criminal prosecutions against its officers. 33 **OklCr**125, 243P251. (6) Capital, surplus, and undivided profits are not to be counted as liabilities in striking balance between assets and liabilities. 120**Kan**731, 244P1053. [j] (2) Loss of whole deposit is not necessary to complete crime. 329 **Ill** 104, 160NE 233. [k] (2) Statute held sufficiently to define offense. 312**Mo** 525, 290SW999. [l] (2) Cashier employing and supervising work of tellers is responsible for act of teller receiving deposit. 312**Mo** 525, 290SW999. [q] (2) Cashier required to manage business and equally in control with president is required to know value of bank's assets. 159**Tenn** 112, 17SW(2d)30. [s] **Prima facie evidence of knowledge of insolvency.**-Statute may provide that failure of bank shall be prima facie evidence of such knowledge. 311**Mo** 414, 279SW76. [t] **What officer knew or should have known at time of acceptance of deposit** measures his liability. 317**Mo** 865, 297SW 73. [u] **Double liability of stockholder not considered** in determining question of insolvency. **OklCr** 275P1067. [v] **Ownership of stock in bank by bank's debtor** cannot be considered asset of debtor in determining whether debt could be collected. 159**Tenn**112, 17SW (2d)30. [w] **Validity of statute.**-**Iowa** 230NW865.

580-28 [x] **Statute condemns only one offense.**-**Mo** 31SW(2d)39.

582-31 311**Mo** 414, 279SW76.

582-38 320**Mo** 189, 6SW(2d)883 (it is immaterial that no depositor suffered loss).

582-43 [a] 311**Mo** 414, 279SW76.

582-44 [a] 37GaA41, 138SE590.

582-45 122**Kan**174, 251P423, 424 [quot CJ]; **OklCr** 275P1067 (manner bank became insolvent need not be alleged). [a] **Direct allegation** of insolvency is not necessary. 120**Kan**731, 244P1053.

582-47½-New. or the name of the owner of money received on deposit, 159 **Tenn**112, 17SW(2d)30.

582-49 32NM158, 252P1002 [citCJ]; 160**Tenn**567, 27SW(2d)1091.

582-50 37GaA41, 138SE590; 161**La**827, 109S505. [a] **Indictment held sufficient.**-312**Mo** 525, 290SW999.

582-50½-New. Information containing several counts relating to deposits by as many different depositors is not bad for duplicity. 120**Kan**731, 244P1053.

582-50⅛-New. Counts charging, permitting, and conniving at receiving and accepting the deposit of a named depositor are not bad for duplicity. 120 **Kan**731, 244P1053.

583-62½-New. But it need not be alleged whether the bank was incorporated under laws of the state or was doing banking business in another state as a private bank or trust company without any charter. 311**Mo** 414, 279SW76.

583-66½-New. Indictment may be amended where only change is in form of charge. 202 **Iowa**1377, 212NW63.

583-66⅛-New. Under statute making it crime to assent to receipt of deposit after knowledge of bank's insolvency, indictment is sufficient where it charges receiving deposit after such knowledge. 161**La**827, 109S505.

583-66¼-New. **Failure of indictment to state that owner was personally insolvent,** where this was required, is good ground for quashing the indictment. 105**TexCr**55, 284SW322.

583-66⅕-New. Indictment not naming depositors nor describing deposits except by amounts is fatally defective. 160**Tenn**567, 27SW(2d)1091.

583-66⅙-New. Indictment need not enumerate deposits as checks or currency. 160**Tenn**567, 27SW(2d)1091.

583-66 1/7-New. Indictment charging that defendant permitted reception of deposits sufficiently charges that he assented thereto. 160**Tenn**567, 27SW(2d) 1091.

583-66⅛-New. Indictment need not name depositor. **Mo** 31SW(2d)39.

583-66⅛-New. Indictment is not demurrable because not alleging officers participated in receiving deposit. 41 **GaA**655, 154SE197.

583-66 1/10-New. Indictment showing defendant assented to receiving deposit. **Mo** 31SW(2d)39.

583-68 320**Mo** 189, 6SW(2d)883.

584-69 See also **Mo** 31SW(2d)39.

584-71½-New. Variance between in-

dictment charging assent to reception of deposit and conviction for receiving deposit immaterial. **Mo** 31**SW(2d)**39.

584–72 15**F(2d)**503; 329 **Ill** 104, 160**NE** 233; 202 **Iowa**1377, 212**NW**63; 317**Mo** 865, 297**SW**73 (officer's knowledge of insolvency). **Mo** 29**SW(2d)**67. [a] 106 **TexCr**269, 291**SW**910. [c] (2) State need not prove insolvency of various partners conducting banking business in prosecuting managing officer, as partnership is entity. 202 **Iowa**1377, 212 **NW**63. [d] (2) Market value of assets need not be shown where state accepts valuation by defendant cashier. 312**Mo** 525, 290**SW**999. [f] **Insolvency and knowledge.**–226**Ky**732, 11**SW(2d)**921. [g] **That defendant knew or had good reason to believe that bank was insolvent** must be proved. **Miss** 130**S**295.

584–73 15**F(2d)**503; 202 **Iowa**1377, 212 **NW**63; **Kan** 289**P**483; **Mo** 29**SW(2d)** 67 (limiting testimony); **Mo** 31**SW(2d)** 39; 106**TexCr**269, 291**SW**910. [a] (2) To show lack of knowledge of insolvency of bank. 120**Kan**731, 244**P**1053. (3) Other evidence held competent. 15**F (2d)**503; 203 **Iowa**333, 210**NW**934, 212 **NW**550; 202 **Iowa**1377, 212**NW**63; 161 **La**827, 109**S**505. (4) Evidence as to amount realized for payment of debts on property of bank's debtors who were thrown into bankruptcy after bank's failure is admissible to support opinions of witnesses that paper held by bank was worthless. 159**Tenn**112, 17**SW(2d)** 30. (5) Other evidence held admissible. **Iowa** 230**NW**865. (6) It was error to exclude evidence that defendant had given direction to keep funds deposited on date in question. **Kan** 289**P**483. (7) Other instances. 226**Ky**732, 11**SW(2d)** 921. (8) Value of bank's property. **Mo** 31**SW(2d)**39. [b] 33 **OklCr**125, 243**P**251, [h] (1) But see 33 **OklCr**125, 243**P**251. (2) Books and records kept under general supervision of managing officers, when properly identified, are admissible to show receipt of deposit. 33 **Okl Cr**125, 243**P**251. (3) Deposit record admissible. **Iowa** 230**NW**865. [j] (3) It is proper to ask bank examiner on cross-examination whether at time of his last examination he believed bank to be insolvent. 33 **OklCr**125, 243**P**251. (4) That witness was unable to realize on bank's notes after due diligence. **Mo** 18 **SW(2d)**423. (5) Evidence of financial condition of bank is admissible in prosecution against cashier. 226**Ky**732, 11 **SW(2d)**921. (6) Other instances. **Iowa** 230**NW**865. [m] **Evidence tending to show officer's belief that bank was solvent** is admissible in his behalf. 33 **Okl Cr**125, 243**P**251. [n] **Defendant should be given liberal right of cross-examination.**–33 **OklCr**125, 243**P**251. [o] **Reports to state bank examiner** by his deputies, not verified or signed, are not admissible as "public writings" in prosecution for receiving deposits when bank was insolvent, and are further inadmissible as confidential. 74**Mont**126, 238**P** 603. [p] **Opinion evidence** (1) as to insolvency of bank is not admissible where statute declares bank insolvent when actual cash market value of assets is insufficient to pay its liabilities. 120 **Kan**731, 244**P**1053. (2) That bank was insolvent held not prejudicial. 120 **Kan**731, 244**P**1053. [q] **Evidence held inadmissible.**–(1) 120**Kan**731, 244**P**1053; **Mo** 18**SW(2d)**423. (2) Details of refinancing of bank's debtor after bankruptcy. 159**Tenn**112, 17**SW(2d)**30. [r] **Evidence of diversion of bank's funds is admissible** only if to insolvent parties. 226**Ky**732, 11**SW(2d)**921. [s] **On issue of knowledge of insolvency** defendant may show that, shortly before bank closed, directors agreed that bank was solvent. 318**Mo** 833, 1**SW(2d)**147. [t] **Evidence inadmissible on issue of insolvency.**–(1) Testimony that certain notes held by bank had not been collected is inadmissible to show that notes were valueless in absence of showing of sufficient effort to collect them. 318**Mo** 833, 1**SW(2d)**147. (2) Evidence as to bankruptcy of maker of notes held by bank is inadmissible without considering value of collateral. 318**Mo** 833, 1**SW(2d)** 147. (3) Evidence that checks drawn on bank were protested for nonpayment is inadmissible in absence of showing that depositors had sufficient funds. 318**Mo** 833, 1**SW(2d)**147. [u] **Evidence as to solvency of bank** must relate to time when deposit was received. **Miss** 130 **S**295.

584–74 **Iowa** 232**NW**172. [a] (1) 320 **Mo** 189, 6**SW(2d)**883. See also **Mo** 29 **SW(2d)**67. (4) To show that bank was incorporated under laws of state. 311 **Mo** 414, 279**SW**76. (5) To show that company was banking institution. 311 **Mo** 414, 279**SW**76. (6) To show that defendant received "deposit." 311**Mo** 414, 279**SW**76. (7) To sustain conviction. 215**Ky**498, 285**SW**232; 311**Mo** 414, 279 **SW**76; 312**Mo** 525, 290**SW**999. (8) To sustain verdict of conviction. 57**ND** 230, 221**NW**25. (9) For jury on question of defendant's guilt. **Mo** 18**SW(2d)** 423. (10) To sustain conviction of bank cashier for receiving deposits when he had good reason to believe that bank was insolvent. 159**Tenn**112, 17**SW(2d)** 30. (11) To show that assets were not worth amount set out in daily statement book. 312**Mo** 525, 290**SW**999. (12) Other instances. **Mo** 20**SW(2d)**529 (1stcase). (13) Other matters. **Mo** 29 **SW(2d)**67. [b] 311**Mo** 414, 279**SW**76. [d] (2) To establish bank was insolvent when defendants accepted deposit. 329 **Ill** 104, 160**NE**233. (3) To take case to jury on question of defendant's knowledge of bank's insolvency. 226 **Ky**732, 11**SW(2d)**921. (4) Other evidence held insufficient. **OklCr** 277**P** 598. (5) Other matters. **Mo** 29**SW(2d)** 120. [e] (3) Bank's failure alone is insufficient to overcome presumption of innocence as to knowledge of insolvency. 312**Mo** 525, 290**SW**999.

585–82½–New. The presumption is permissible that resort to law was found necessary to collect the bank's assets where more than two and one half years had elapsed since the bank was placed in the hands of the state finance department and its affairs had not yet been settled. **Mo** 20**SW(2d)**529(1stcase).

585–82½–New. Statements of banking department officers to stockholders that bank was solvent are competent to show good faith of defendant. **Miss** 130**S** 295.

585–82¼–New. In prosecution for knowingly accepting deposit for insolvent bank, records of bankruptcy proceedings are admissible to show worthlessness of bankrupt's bills receivable. **Iowa** 232**NW**172.

585–83 **Iowa** 230**NW**865 (value of land involving value of assets). [a] **Evidence held sufficient for jury** on question of knowledge of insolvency. 215**Ky**498, 285**SW**232; 317**Mo** 865, 297**SW**73.

585–84 120**Kan**731, 244**P**1053; 312**Mo** 525, 290**SW**999; 318**Mo**833, 1**SW(2d)** 147; 320**Mo** 189, 6**SW(2d)**883; **Mo** 20 **SW(2d)**529(1stcase); **Mo** 29**SW(2d)**120; **Mo** 31**SW(2d)**39; 74**Mont**126, 238**P**603; 57**ND**230, 221**NW**25 (properly refused); 33 **OklCr**125, 243**P**251 (instruction defining "insolvent" held erroneous); 159 **Tenn**112, 17**SW(2d)**30. [a] **Assuming facts.**–311**Mo** 414, 279**SW**76. [b] **Knowledge of insolvency.**–311**Mo** 414, 279**SW** 76. [c] **Instruction defining "demands" of bank** held proper. 311**Mo** 414, 279**SW** 76. [d] **Instructions held consistent.**–311**Mo** 414, 279**SW**76. [e] **Instructions held erroneous or properly refused.**–312 **Mo**525, 290**SW**999. [f] **Instructions held correct.**–**Iowa** 230**NW**865.

585–86½–New. Verdict held not too vague and indefinite. **Mo** 290**SW**1007.

585–87½–New. Statute providing for punishment by both fine and imprisonment held not qualified by the statute providing that the imposition of a fine is not authorized when the offender is sentenced to confinement and hard labor. 120**Kan**731, 244**P**1053.

585–87½–New. Instruction as to sentence in a prosecution against an unincorporated bank for receiving deposits when insolvent held proper. 74**Mont**126, 238**P**603.

586–91 51**ND**300, 199**NW**941, 944 [cit CJ]. [b] **Bank organized under Oklahoma laws** has all powers of ordinary corporation except those expressly limited. 22**F(2d)**645.

586–92 45 **Ida**522, 263**P**632 (hypothecation of assets to depositor as security for deposit void under statute). **Iowa** 221**NW**801; 54**ND**858, 211**NW**810, 50 **ALR**243; 55**ND**45, 212**NW**236, 51**ALR** 296. See also 321**Mo** 749, 12**SW(2d)**751; 11**PaDist&Co** 127. [e] **Custodian of will.**–54**ND**858, 211**NW**810, 50**ALR**243. [f] **Pledging of its assets to secure a general deposit** cannot be sustained as exercise of incidental power necessary to carry on banking business. 55**ND**45, 212**NW**236, 51**ALR**296. [g] **Assignment of notes to secure certificate of deposit** is valid in some jurisdictions. 195**NC** 545, 142**SE**786. [h] **Right of one bank to become depositor in another bank.**–206 **Iowa**265, 217**NW**865. [i] **Pledge of assets.**–**TexCommnA** 26**SW(2d)**1062.

586–93 55**ND**45, 212**NW**236, 51**ALR** 296. See also 151**Va**195, 144**SE**501. [a] **Security for deposits.**–174**Minn**286, 219 **NW**163, 65**ALR**1407.

586–93½–New. The banking corporation is the grantee of the exclusive privilege to do a specified business in a manner circumscribed by definite restrictions. 55**ND**45, 212**NW**236, 51**ALR** 296.

586–93½–New. In some jurisdictions a state bank is forbidden by statute to pledge its assets to secure one of its depositors, unless the pledge comes within one of the exceptions made by special statute. 40 **OklACR**690.

586–93¼–New. One dealing with bank has notice of limits of its charter powers. **TexCivA** 293**SW**859.

586–93½–New. Under a fully executed contract the bank commissioner may not avoid an ultra vires act. 22**F(2d)** 645.

587–8 [g] **Deposit held general** in view of custom. 125**Me**150, 131**A**863 (proceeds of draft collected).

588–21 84**CalA**787, 258**P**709 (guaranty of note); 51**ND**300, 199**NW**941, 944 [cit CJ]. [b] **Contract necessarily involving violation of banking law** is ipso facto illegal and void as against public policy. 34**Ariz**160, 269**P**68. [c] **Agreement subordinating bank's vendor's lien** on sugar plantations for continued cultivation was not ultra vires. 170**La**969, 129**S** 547.

588–23 [a] **Where cashier sold cotton for solvent owners,** bank held not estopped to claim that it neither owned nor had authority to sell and bind itself primarily on contract. **TexCivA** 294**SW** 256.

588–26½–New. Where a bank agreed to deliver to plaintiff a pass-book with credit to him of a certain amount in a foreign bank within three months or return his money to him, he is entitled to the return of the money with interest from the day of the bank's default. 234 **Mich**356, 208**NW**437.

588–26½–New. A bank's agreement to take up a note, is supported by consideration, where the bank receives the proceeds of the note. **TexCivA** 276**SW** 941.

588–26¼–New. On a bank's agreement to take up a note at any time that indorsee needed money, although the note was indorsed without recourse, indorsee may recover ten per cent interest after maturity and counsel fees provided for in the note. **TexCivA** 276**SW**941.

588–26½–New. In North Carolina a state bank has authority by statute to secure county deposits by bond and pay reasonable premium therefor. 192**NC** 673, 135**SE**795.

588–26½–New. Verdict for plaintiff in a suit to recover for breach of contract as to the method of honoring drafts against a letter of credit is equivalent to a finding that the contract was entered into. 27**F(2d)**791.

588–26½–New. A purchaser, on rejecting goods, could hold the bank for damages for paying draft against a letter of credit without checking invoices against orders as required by contract. 27**F (2d)**791.

588–26½–New. A purchaser, accepting goods not conforming to orders, purchased at invoice prices, and payment by the bank of drafts for the goods, al-

though constituting breach of contract of such bank to check invoices against signed orders, caused the purchaser no damage. 27F(2d)791.

588-26½-New. Facts held to show acceptance of goods not conforming to order which acceptance defeated the right of the purchaser to recover damages from the bank honoring the draft against a letter of credit without checking orders. 27F(2d)791.

588-26½-New. An agreement prepared by the agent of a bank should be construed most strongly against the bank. 177Ark66, 7SW(2d)758.

588-26½-New. Creditor bank authorized to receive deposits can agree, in return for release of attachment, to hold proceeds of property as deposit in lieu of attachment. Mass 172NE76.

588-27 226Ky179, 10SW(2d)846.

589-28 35GaA222, 132SE648. 203 Iowa 411, 212NW722. See also 209Ky451, 272 SW917; 226Ky179, 10SW(2d)846. [a] **Duty of bank to follow instructions.**-203 Iowa411, 212NW722. [b] **Bank must exercise good faith and due care** in making loan. 203 Iowa411, 212NW 722. [c] **Ratification of unauthorized loan.**-203 Iowa411, 212NW722 (evidence held to show ratification).

589-29 See also MoA 275SW970.

589-30½-New. The delivery by an individual to a bank of liberty bonds with instructions to exchange them for a subsequent issue creates the relation of principal and agent. 114Nebr650, 209 NW334.

589-30½-New. Bank may be agent for the sale of draft for foreign exchange. 203 Iowa701, 213NW398.

589-30½-New. Where the release of prior mortgages by a bank was intended to deceive a trust company with which the bank as agent of the mortgagor was negotiating a loan, knowledge of such fraud by the bank cannot be imputed to trust company, although bank acted as agent for trust company. 202 Iowa265, 209NW422.

589-30½-New. Where the Italian government gave directions to a bank to pay coupons on government bonds on the surrender of the coupons, it was unauthorized to part with funds in payment of lost coupons. 243NY45, 152NE 460.

589-30½-New. A bank has implied authority on payment of taxes due to deliver tax receipts sent to it by the county treasurer with a statement sent at the bank's request of taxes due from certain persons. 202 Iowa881, 211NW 536.

589-30½-New. Where the grantor of an oil lease sends the instrument to a bank with directions to secure the signature of the grantee and a sum of money to complete the contract, the bank is the grantor's agent. 79Mont550, 257P 1016.

589-30½-New. A bank transmitting a loan application and receiving proceeds for the purpose of paying an existing mortgage held proceeds for mortgagor and not for loan company. 52SD342, 217NW512.

589-30½-New. A bank given power of attorney to handle defendant's business and sign his checks must give an accurate accounting to defendant who was ignorant of business methods. 38Wyo 346, 266P1058.

589-30½-New. Where plaintiff assumed payment of a note without knowledge that anyone other than the bank was the owner, a new loan by the bank to plaintiff, part of which went toward payment of the note, did not make the bank the agent of plaintiff as against defendant purchasing the note and leaving it with the bank for collection. 82Colo 423, 260P519.

589-30½-New. Where plaintiff selling bonds of county requested the bank at which interest coupons were payable to pay coupons when presented, and, if it did not have funds from the county with which to make payment, to charge plaintiff's account therewith, plaintiff thereby purchased coupons from holders through the bank as agent for that purpose only. 84Mont285, 275P743.

589-30½-New. Where commercial paper is made payable at a particular bank, such bank is agent of the maker and not the holder. 84Mont285, 275P 743.

589-30½-New. The mere fact that a bank acted as agent for the collection of interest and delivery of interest coupons does not show authority to collect the principal and discharge a mortgage. 84Mont373, 275P761.

589-30½-New. Where interest coupons on county bonds were payable to bearer at a certain bank, presentation at the bank was not for collection but for payment so that the bank was agent of the county for collection of money to pay coupons. 84Mont285, 275P743.

589-30½-New. A bank to which the county sent a check to pay interest coupons on county bonds is an agent of the county so that the county is not absolved from liability to holders of coupons by the fact of indorsement to, and acceptance of, check by federal reserve bank and other acts operating as payment of the county's check. 84Mont285, 275P743.

589-30½-New. Where a wife permits the bank to pay her money to her husband and to rest for years in the belief that the money was properly paid to the bank's injury, she cannot recover. 97CalA643, 275P998.

589-30½-New. A bank's letter advising the district of the disposition of certain funds requires the district to notice what deposits are secured. 179Ark 805, 18SW(2d)372 (school board's withdrawal of funds held to ratify action of bank in making deposit without security).

589-30½-New. Where agreement made in form by bank as principal is valid on its face, bank is liable even if acting as agent. Mass 172NE76.

589-30½-New. Bank designated by seller as place for payment of installments, by collecting and notifying vendor of such payments has been held agent of vendor. CalA 284P692.

589-30½-New. Subagent employed by bank by authority of principal is agent of principal. Minn 230NW280.

589-30½-New. Bank authorized to receive rent and to pay telegraphic money orders is telegraph company's agent and lessee's subagent as to money orders for rent. 86Mont478, 284P525.

589-30½-New. Acts of depositary bank in authorizing payee to make collection on note without instruction from indorsee has been held not binding on indorsee. 136Misc355, 239NYS655.

589-30½-New. Bank consummating final details of transaction with full knowledge of all parties is agent of various parties respectively. SD 230 NW233.

589-30½-New. Bank is authorized as agent of mortgagee to receive money and surrender release which he sends to bank with instructions to hold papers until it receives draft for specified amount. SD 230NW233.

589-30½-New. Where rural credit board forwards checks to bank for amounts loaned to pay mortgage, bank's knowledge that satisfaction was procured without payment to mortgagee or bank as his agent is imputed to state. SD 230NW233.

589-30½-New. Purchase by commercial state bank of shares of stock on its own order as agent for undisclosed principal is not ultra vires. 253NY227, 170 NE900.

589-30½-New. Acceptance by bank for insurer of assessments against insured contrary to direction of insurer is not binding on insurer. TexCivA 29SW(2d) 813.

589-30½-New. Acceptance by bank as insurer's depositary of moneys not due insurer or which might be refused by it does not estop insurer. TexCivA 29 SW(2d)813.

589-30½-New. Mortgagee is charged with knowledge of bank as agent. SD 233NW279.

589-32 51ND300, 199NW941; TexCivA 293SW317. [c] 49ND980, 194NW388.

589-35 53ND470, 206NW773. [d] **Contract of bank to pay mortgage on land** conveyed to it is unenforceable. 52ND 938, 204NW843.

589-36 [b] **Board of directors** may determine necessity of investment in realty for banking purposes. 222Ky139, 300 SW339.

589-39½-New. Property conveyed to a bank to improve its assets is conveyed for consideration. 50SD6, 208NW222 (conveyance by stockholder).

589-39½-New. That a conveyance to a bank by the principal stockholder enabled the bank to keep open is a consideration for conveyance, 50SD6, 208 NW222.

589-39¼-New. and the property becomes property of the bank whether actual credit for the deed passed from the bank to the stockholder or not. 50SD 6, 208NW222.

589-39⅕-New. A bank as grantee in a deed of conveyance may validly assume and agree to pay an existing mortgage, 204 Iowa1283, 213NW617.

589-39⅙-New. where it appears that the board of directors had, with full knowledge of the facts, formally authorized receipt of the deed. 204 Iowa1283, 213NW617.

589-39⅐-New. Authorization by the directors of receipt of a deed "as additional security" does not overcome the effect of the assumption clause inserted as a result of a valid agreement between the bank and a mortgagor of which the directors had knowledge. 204 Iowa1283, 213NW617.

589-39⅛-New. A bank cannot escape liability for breach of contract in erecting a banking house because unnecessary for the bank's business. 222Ky126, 300SW339.

589-39⅛-New. The erection of a banking house is held not "investment in drafts, or other securities" within the statute. 222Ky126, 300SW339.

589-39⅒-New. Although a building contract is unwise, the bank is liable for breach. 222Ky126, 300SW339.

589-39⅑-New. Bank held not required to sell property held in trust and in which it has no beneficial interest. 101 CalA330, 281P531(2dcase).

589-43½-New. Bank's sale of its securities is not ultra vires. 284Pa260, 131A 181.

589-44 114Nebr389, 207NW683; 69 Utah557, 257P658, 667 [citCJ]. [a] **Contract to repurchase notes** construed not to include notes already discounted. 114 Nebr600, 209NW254.

590-45 69Utah557, 257P658, 667 [cit CJ].

590-47 22F(2d)735; 225AppDiv366, 233 NYS96.

590-48 22F(2d)735 (to prevent loss).

590-50 22F(2d)735 (bank becomes subject to assessment).

591-53 194NC305, 139SE598.

591-54 Contra 194NC305, 139SE598.

591-60 TexCivA 294SW256. But see 129Kan812, 284P391. [b] **Statute forbidding banks to subscribe for or purchase stock of other banks.**-162Ga718, 134SE781.

591-61 38F(2d)462.

592-66 30Ariz581, 249P755; 203 Iowa 1335, 214NW559; 53ND797, 208NW82, 87 [citCJ]; 37Wyo 50, 259P181, 184 [citCJ]. [c] (1) See also 318Mo 341, 300 SW475. (2) Bank receiving and issuing proceeds of discount of its president's personal note is justified in paying same from its own funds. 300Fed897. [d] **Borrowing beyond statutory limit** does not void such excess debts. 203 Iowa276, 211NW386. [e] **Directors may by resolution authorize officers** to rediscount papers to cover loans and discounts during period of one year. 176Ark1, 1SW (2d)818. [f] **Pledges of collateral for loans and discounts** of bank's paper are void without prior act of bank authorizing them. 176Ark1, 1SW(2d)818. [g] **Correspondent bank discounting paper of state bank** under arrangement with its cashier authorized to affect rediscounts held innocent purchaser thereof. 176Ark1, 1SW(2d)818. [h] **Testimony respecting copy of resolution** is held admissible to show directors regarded resolution as authorizing officers to borrow money. 176Ark1, 1SW(2d) 818. [i] **Relation of debtor and creditor** may arise between borrowing bank and

bank whose funds are deposited to credit of borrowing bank. 169Ga846, 151SE 803.

592–68½–New. A statutory provision against a bank's borrowing of money without permission of the commissioner does not apply to a loan to an individual and the pledge of a deposit book. 252 Mass574, 147NE847.

592–68⅓–New. Legislatures preserve the distinction between a loan and a deposit. 55ND45, 212NW236, 51ALR 296.

592–68¼–New. A bank borrowing money and using it may not claim that the lender was without authority to make the loan. 318Mo 1120, 2SW(2d)607.

592–69 162La12, 110S71; 53ND797, 208 NW82, 87 [citCJ].

592–70 30Ariz581, 249P755; 318Mo 1120, 2SW(2d)607; 53ND797, 208NW82, 87 [citCJ]; 55ND45, 212NW236, 51ALR 296; 286Pa405, 133A551; 158Tenn182, 11SW(2d)673; TexCivA 11SW(2d)217; Utah 269P144, 145 [citCJ]. [a] 192NC 673, 135SE795. [c] (1) See also 128Kan 681, 280P782. (2) Bank may transfer notes to county to secure county's deposits. 203Iowa1335, 214NW559. [d] (2) May use bills receivable to raise money to pay county deposits. 203Iowa 1335, 214NW559. [e] **Pledge by borrowing bank to lending bank held valid** where latter made loan in good faith on basis of resolution of board of directors of former. 159La214, 105S294 (even though resolution did not specify maximum amount to be borrowed or collateral to be pledged). [f] **State bank** may give bond to protect checking account of depositor. 168Minn28, 209NW 631. [g] **Bank may pledge its assets to** secure repayment of moneys deposited. 286Pa405, 133A551. [h] **Bank may pledge its securities** (1) to indemnify surety on public deposit bond. 80Mont 468, 260P1055. (2) Statute relating to county officers held inapplicable to right to make such pledge. 80Mont468, 260P 1055. [i] **Bank has power to pledge its assets** as security for deposit of public moneys. 148Miss109, 114S26. [j] **Security for deposits.–Ind** 172NE181.

593–71½–New. In South Dakota, banks are without power to put up collateral securing rediscounted notes. 21F(2d) 128; 21F(2d)135.

593–72 See also 22F(2d)727; 6LaA410 (liability). But see 128Misc123, 217NYS 833. [b] **Direction to remit money "today"** has been held to require remittance within reasonable time. 24F(2d)463. [c] **Contract to remit by wireless** may be reached if remittance not made within ten days. 24F(2d)463. [e] 24F(2d)103. [p] **Contract for sale of foreign currency.–Cal** 252P587; 253Mass160, 148NE138; 252Mass563, 148NE136; 257Mass449, 154 NE74, 48ALR1214; 238Mich25, 213NW 118; 241NY163, 149NE338; 242NY346, 152NE110, 45ALR1041; 214AppDiv279, 212NYS141; 127Misc33, 215NYS145; 216 NYS5; 142Wash73, 252P535 (nature of agreement and liability thereon). [q] **Delay in transmission** (1) may nullify contract and permit recovery of amount paid to establish credits. 225AppDiv634, 234NYS177. (2) Acceptance of delay with reservation of right to damages will not defeat recovery for loss through depreciation of money. 225AppDiv634, 234NYS177. (3) Allegations held insufficient in action to recover money paid to establish credit. 225AppDiv634, 234NYS177. [r] **Contracts to establish credits in foreign countries.–**225AppDiv 634, 234NYS177. [s] **Rescission of contract.–**133Misc536, 233NYS219. [t] **Purchase of foreign money by bank** is separate contract from that with depositor. 133Misc201, 232NYS339. [u] **Recovery of deposit in foreign branch.–**133Misc201, 232NYS339. [v] **Actions to recover deposit.–**250NY69, 164NE745; 133Misc201, 232NYS339. [w] **Contracts construed.–** 133Misc201, 232NYS339. [x] **Excuse for nonperformance.–**250NY69, 164NE745. [y] **Measure of damages for breach of contract.–**250NY69, 164NE745. [z] **Performance of contract.–**250NY69, 164NE 745. [aa] **Breach of contract.–**133Misc 536, 233NYS219.

593–72½–New. Agreements have been construed as requiring deposit of money in a foreign bank. 235Mich648, 209 NW819.

593–72⅓–New. Such an agreement made as part of an exchange agreement is based on sufficient consideration. 235 Mich648, 209NW819.

593–72¼–New. Deposit of money with a bank for deposit in a foreign bank upon the bank's promise to give the depositor a savings book of the foreign bank within three months or return his money is not a sale of foreign exchange. 234Mich 356, 208NW437.

593–72⅕–New. That a bank paid money to a legal claimant is immaterial as to the liability of a telegraph company paying money remitted by the bank to an impostor. TexCivA 277SW226.

593–72⅙–New. A bank is not entitled to recover of a telegraph company for paying money, remitted by the bank in response to a telegram, to an impostor, where the latter was a party intended to be paid even though he was not a legal claimant. TexCivA 277SW226.

593–72⅐–New. Money is a commodity in countries other than where it is current. 253NY166, 170NE532.

593–72⅛–New. Where a buyer and a seller contract for foreign money as a commodity and the seller delays performance until fluctuations cause loss to the buyer he is liable to the buyer for the damages therefrom. 253NY166, 170NE 532.

593–73 246NY383, 159NE178.

593–74½–New. The mere purchase of marks by a bank and placing them to its credit in a German bank is not compliance with a contract to make marks available to plaintiff's use. 126Misc13, 211NYS852.

593–74⅓–New. The duty to make marks available to plaintiff's use is not discharged by an instruction to a German bank to pay plaintiff's correspondent sums demanded, where the instruction never reached the German bank because of the war. 126Misc13, 211NYS852.

593–74¼–New. A purchaser of marks is entitled to rescind without offer to put back in statu quo, where the bank breached its contract to keep marks to the purchaser's use in a foreign bank. 126Misc13, 211NYS852.

593–74⅕–New. A contract for dealing in foreign currency is not illegal because the bank does not at all times have enough of such currency to cover outstanding contracts. 253Mass5, 147NE 868.

593–74⅙–New. A bank undertaking to forward credit is liable for its correspondent's failure to obey instructions. 10F(2d)632.

593–74⅐–New. One suing for a bank's failure to follow directions in transmitting credit is not chargeable with negligence in not calling for credit in the name in which it was forwarded, other than as directed. 10F(2d)632.

593–74⅛–New. A bank receiving a cablegram and money to be forwarded to the sender of the cablegram is held to have entered into contractual relation with him. 10F(2d)632.

593–74⅑–New. The right to recover for a bank's failure to follow directions in forwarding credit is not affected by the fact that one furnishing the money heard the bank's letter to correspondent dictated and later learned that the directions were not followed. 10F(2d)632.

593–74 1/10–New. Delivery of dollars to bank which issued pass book permitting withdrawal on demand at prevailing rate of exchange for kronen is purchase of foreign exchange. 221AppDiv94, 222 NYS359.

593–74 1/11–New. Plaintiff delivering dollars to bank for opening of kronen account is not entitled to withdraw its equivalent in gold Austrian specie. 221 AppDiv94, 222NYS359.

593–74 1/12–New. Plaintiff, depositing money with a national bank to open an account with a Russian branch, contracted only with the parent bank, to be carried out in part by the branch, and the relation became that of debtor and creditor, with Russian currency payable on demand at the branch, demand must be made where the bank is impliedly obligated to maintain the branch. 130 Misc66, 224NYS102.

593–74 1/13–New. The relation between parent and branch bank is not altered by a regulation in Russia for the privilege of conducting a Russian branch, and the parent bank became liable under a New York contract on closing the Russian branch. 130Misc66, 224NYS102.

593–74 1/14–New. Transfer of depositor's account by a foreign branch bank remains executory until money is available at the place where transferred, and could be revoked prior thereto. 130 Misc66, 224NYS102.

593–74 1/15–New. Depositor, telegraphing the bank to hold funds immediately on discovering the transfer had not been made, has been held promptly to have rescinded the order for transfer. 130 Misc66, 224NYS102.

593–74 1/16–New. Depositor, directing general depositary to transfer credit through another bank, made the general depositary his agent, and the bank through whom the depositor instructed depositary to transfer credit became the agent of the transmitting bank. 130 Misc66, 224NYS102.

593–74 1/17–New. Direction by the branch bank to another bank to transfer an account canceled prior to actual transfer of credit is not payment of the debt to the depositor. 130Misc66, 224NYS102.

593–74 1/18–New. Presentation of a check to the bank for payment is not a condition for depositor's action against the bank, refusing payment to depositor's sister as directed; 130Misc66, 224NYS 102.

593–74 1/19–New. neither was a demand by the depositors during the time the Russian branch of defendant's bank was in control of Soviet authorities. 130Misc 66, 224NYS102.

593–74 1/20–New. Recovery of a deposit in a Russian branch of defendant's bank could not be defeated under the Russian law, where damages were not claimed, and inability of the depositor to recover the debt in Russia is not a defense but an element of the supreme court's jurisdiction. 130Misc66, 224NYS102.

593–74 1/21–New. Depositor's statement electing to recover rubles transferred to the Russian branch of a national bank was election to affirm, not rescind, contract. 130Misc66, 224NYS102.

593–74 1/22–New. National bank is liable for the value in dollars of rubles on deposit in a Russian branch at the date of removing the branch after refusing payment. 130Misc66, 224NYS102.

593–74 1/23–New. Plaintiff may rescind a contract for the transmission of money by defendant where the impossibility of performance was excusable. 262Mass 299, 159NE629.

593–74 1/24–New. Russian bank, not having accepted a deposit credited to it by an American bank before its seizure by the Soviet government, the American bank could rescind the transaction. 222 AppDiv645, 227NYS378.

593–74 1/25–New. Where a transmitting company did not make a deposit in the bank, consideration of contract to transmit money failed. 262Mass299, 159NE 629.

593–74 1/26–New. Bank payment in cash or credit of checks drawn on it to collecting bank is not remittance warranting charging fee. 194NC720, 140SE705.

593–74 1/27–New. Where a seller, issuing foreign bills of exchange, did not receive money from the purchaser in any trust capacity, there was no fiduciary relationship created between the parties. 265Mass182, 163NE740, 62ALR 506.

593–74 1/28–New. The purchaser of checks drawn on a foreign bank cannot recover on the contract without showing mistake or failure of consideration. 265Mass182, 163NE740, 62ALR506.

593–74 1/29–New. In the absence of deceit on the part of the seller, issuing checks on a foreign bank, the purchaser was bound by the terms of the contract. 265Mass182, 163NE740, 62ALR 506.

593–74 1/30–New. To charge the seller, issuing foreign bills of exchange, it was necessary to show presentment to the drawee, protest, and notice of nonpay-

ment. 265Mass182, 163NE740, 62ALR 506.

593-74½1-New. The attaching creditor of a Russian bank has no right to the amount collected by an American bank and credited to the Russian bank without acceptance of credit. 250NY288, 165NE452.

593-74½2-New. Correspondence held agreement by foreign bank to sell American bank at stated price Polish marks to be made available to another bank at another bank on stated date. 40F(2d) 446.

593-74½3-New. There can be no recovery of money paid to defendant bank to establish credit in foreign bank where foreign bank, after credit was established is confiscated. 249Mich342, 228 NW720.

593-74½4-New. Bank agreeing to purchase and remit Russian rubles to person in Russia acts merely as agent. Minn 230NW280.

593-74½5-New. In such case bank is not liable for nondelivery due to negligence of responsible subagent. Minn 230NW280.

593-74½6-New. Foreign bank does not perform such agreement merely by placing funds with correspondent to establish credit for bank to which marks were to be available. 40F(2d)446.

593-74½7-New. nor where marks are not transmitted nor notice that they are held for it given to bank where they are to be available until after time for performance. 40F(2d)446.

593-74½8-New. Bank at which marks were to be available under such contract held not agent of purchasing bank. 40F(2d)446.

593-74½9-New. Law of state where money was paid under such contract governs in determining time for performance in purchaser's action for restitution. 40F(2d)446.

593-74½0-New. Telegraph company's contract to wire money should be construed only with reference to rules and regulations of company. CalA 291P 445.

593-74½1-New. Under contract of which company's rule was a part telegraph company has been held to have breached contract by forwarding money without written request of payee. CalA 291P445.

593-74½2-New. In construction of telegraph rules regarding transfers of money, all parts are to be construed with reference to each other. CalA 291 P445.

593-74½3-New. When conflict appears between provisions of rules of telegraph company respecting transfers of money, general provisions yield to specific provisions. CalA 291P445.

593-76 80Mont174, 259P1060. See also 175Ark929, 1SW(2d)1008. [c] **Bank issuing draft** on another bank represents that it is solvent and has sufficient funds with drawee. 192Wis28, 211NW931. [d] **Issuance of draft by insolvent bank** constitutes fraud on purchaser. 205 Iowa845, 216NW737. [e] **Rescission of transaction.**-205 Iowa845, 216NW737. [f] **Right to proceeds of check given for dishonored draft.**-205 Iowa845, 216NW737. [g] **There is no legal difference between draft and cashier's check.**-80Mont174, 259P1060.

593-76½-New. A draft drawn by a bank upon another bank has the same status in law as a check drawn upon a bank by an individual. 120Kan706, 244 P1039.

594-87 168Ark141, 269SW569 (where bank issued draft on correspondent in favor of plaintiff, alleged creditors of depositor, upon mistaken assumption that depositor had directed claim paid, there was no consideration for draft and bank may stop payment thereon, it not having been certified or passed to innocent purchaser).

594-87½-New. An action for money had and received will not lie in favor of a commission merchant against a bank which, while acting for the shipper, draws drafts on the merchant in excess of the value of the shipment, in absence of fraud, as title to the fund from payment is in the shipper. 49SD 125, 206NW693.

594-87½-New. A bank's authority from the shipper to draw drafts on a commission merchant consignee for payment for the shipment cannot be questioned by the consignee in an action against the bank for money had and received as to the excess of amount of drafts over the value of the shipment. 49SD125, 206NW693.

594-87¼-New. An act of a bank in drawing drafts for shipper on consignee for value of the shipment may be ratified by the shipper by acquiescence and receipt of proceeds. 49SD125, 206NW 693.

594-87½-New. Where a bank issues a draft, the relation thereafter existing between the bank and the payee is that of debtor and creditor. 203 Iowa507, 211NW520; 203 Iowa398, 212NW746.

594-87¼-New. Banks are liable for unauthorized payment of drafts. 285Pa 337, 132A189.

594-87½-New. Purchase from the bank of a check or draft is an executed transaction. 130Misc66, 224NYS102.

594-87½-New. The relation between a bank issuing a cashier's check and the holder of the check is that of debtor and creditor. 80Mont174, 259P1060.

594-87½9-New. Bank's request to "protect" drafts means merely to see that they are paid. 275US359, 48SCt167, 72 L ed313.

594-87½10-New. A wife has no right of an action against a bank on drafts paid for by check against the husband's account which he refused to honor. MoA 280SW62.

594-87½11-New. A bank has the right to stop payment on such drafts. MoA 280SW62.

594-87½12-New. That a bank selling a draft was overdrawn in its account with the drawee bank does not change the legal relation of debtor and creditor between the bank and the purchaser of the draft. 206 Iowa65, 218NW957.

594-87½13-New. Where a bank issues a foreign draft for foreign money in an amount greater than that for which it should have been issued and thereafter prevents payment of the draft on presentation, it is liable for the loss incident to declining exchange. 51Nev134, 271P465.

594-87½14-New. The issuance of drafts with knowledge on the part of bank officials that the drafts will not be paid constitutes a fraud on the purchaser. 206 Iowa65, 218NW957.

594-87½15-New. A bank's telegram has been held an agreement by the bank to pay for shipment, provided the shipment was made on an order bill of lading to be attached to the draft. 244 Mich204, 221NW148.

594-87½16-New. Where a bank agreed to pay a draft provided the shipment was made on an order bill of lading attached, but the shipper shipped strawberries on a straight bill of lading, the bank refusing to pay the draft was not liable. 244Mich204, 221NW148.

594-87½17-New. Bank is not liable to holder of stolen cashier's check with forged indorsement of payee where holder advanced money to prior holder after inquiry at bank not directed to genuineness of forged indorsement. 255 IllA451.

594-87½18-New. Payment cannot be stopped on bank draft. Wash 289P47.

594-88 126Kan719, 721, 271P394 [cit CJ].

594-88½-New. Transactions between banks have been construed as sales with agreement to repurchase. 165Minn285, 206NW459.

594-89 7F(2d)494; MoA 278SW826; 195NC545, 142SE786. [a] **Title acquired by assignee of notes as security for certificate of deposit** is superior to title acquired by sureties on county depositary bond under subsequent assignment and to equity of county under such assignment. 195NC545, 142SE786.

594-92½-New. Under an agreement whereby bills receivable were transferred from one bank to another and credit given the transferor with the understanding that the bills should be returned on maturity and that the transferee bank "would then be entitled to credit for the amount of the same plus 6 per cent. interest," the transferee's bank return of notes created the debtor and creditor relation in its favor to the face amount of the paper plus six per cent interest. 28F(2d)857.

594-92½-New. The court properly found that the renewal note was governed by the provisions of the oral agreement between the banks under which the transferor bank was to pay the amount of notes and interest on their return at maturity. 28F(2d)857 (under evidence).

594-93 [a] **State banks have no authority** to invest in bonds of kind not named in statute. 122Kan493, 503, 252 P250 [citCJ].

594-93½-New. Investment by vice president for customer is without scope of bank's charter powers and ultra vires. TexCivA 293SW859.

594-94 12F(2d)963, 966 [citCJ]; 23F (2d)430. [g] 49ND999, 194NW387. [r] **Documents required by law and usages** of place of use of letter of credit to be attached to drafts may be accepted by bank issuing letter of credit at request of another bank. 6F(2d)762. [s] **Insurance policies** required to be attached to drafts on letter of credit payable in dollars may be payable in foreign money. 6F(2d)762. [t] **Letter held irrevocable letter of credit.**-217 AppDiv282, 216NYS225. [u] **Transaction under letter of credit** is purchase of documents required to be delivered thereby. 23F(2d)1. [v] **Bank cashier's letter using term "guarantee"** held not guaranty but to constitute in legal effect letter of credit. MoA 297SW1079.

594-95 6F(2d)762 (agreement by bank to reimburse another bank for amount paid on letter of credit issued by latter at former's request is not ultra vires); 40F(2d)2. [b] **Bank procuring issuance** of letter of credit by another bank is bound to reimburse latter for amounts paid thereon. 6F(2d)762. [e] **Bank is not affected by litigation arising from breach of contract between buyer and seller** where letter of credit did not incorporate contract. 242Mich171, 218NW 793. [d] **Equities in favor of beneficiary of letter of credit** afford no defense to issuer against addressee paying money on faith of letter. 40F (2d)2.

595-3 [a] **Letter of credit after notice** to person for whose use it was issued is irrevocable without his consent. 6F (2d)762.

595-3½-New. Letters of credit do not usually contain a direct promise to pay. 240NY520, 148NE664.

595-3½-New. Such a promise is inferred or implied from statement that credit has been established, 240NY520, 148NE664.

595-3¼-New. and is irrevocable, 240 NY520, 148NE664.

595-3½-New. A confirmed irrevocable letter of credit, 240NY520, 148NE664.

595-3½-New. an irrevocable letter, 240 NY520, 148NE664.

595-3½-New. or a confirmed credit is a contract to pay upon compliance with its terms, 240NY520, 148NE664.

595-3½-New. and needs no formal acknowledgment 240NY520, 148NE664.

595-3½-New. or acceptance, other than is therein stated. 240NY520, 148NE 664.

595-3½0-New. Where no time is mentioned when sight drafts are to be presented against a letter of credit, provision of presentment within a reasonable time will be inferred. 240NY520, 148NE664 (letter of credit setting no expiration date).

595-3½1-New. Presenting a sight draft against a letter of credit in December, covering shipments in August and September, is presentment within a reasonable time, satisfying an implied provision. 240NY520, 148NE664.

595-3½2-New. Mere request to set ex-

piration date on confirmed letter of credit containing no such date does not modify the letter of credit in that respect. 240NY520, 148NE664.

595-3½3-New. Contract to establish credit is executory, 241NY163, 149NE338.

595-3½4-New. and is to be performed at the place where established. 241NY163, 149NE338.

595-3½5-New. The breach of such executory contract is allocated to the place of performance. 241NY163, 149NE338.

595-3½6-New. Damages for breach of such contract are measured by values which prevail where the breach occurs. 241NY163, 149NE338.

595-3½7-New. Complaint held not to state cause of action. 241NY163, 149NE338.

595-3½8-New. Refusal to pay a draft against a letter of credit held warranted. 9F(2d)230 (conditional on shipment in June, whereas shipment was actually in February).

595-3½9-New. Nature of obligation. 12F(2d)963; 20F(2d)307; 245NY377, 157NE272; 216AppDiv495, 215NYS525; 218AppDiv624, 218NYS616; 285Pa337, 132A189; 140Wash603, 249P1060.

595-3½0-New. Termination and cancellation. 10F(2d)679; 244NY516, 155NE878; 217AppDiv282, 216NYS225; 217AppDiv300, 216NYS240; 218AppDiv624, 218NYS616.

595-3½1-New. A bank's statement of grounds for refusing to pay a draft on a letter of credit waives all other objections. 23F(2d)118.

595-3½2-New. Literal compliance with the terms as to documents accompanying the draft is not required. 23F(2d)118.

595-3½3-New. A bank is not justified in rejecting a draft if all the accompanying documents, read together, comply with the requirements. 23F(2d)118.

595-3½4-New. The measure of damages for an unjustified refusal to pay a draft is the difference between the net amount of sale and the amount of the draft. 23F(2d)118.

595-3½5-New. The bank's written statement, on refusing to pay a draft against a letter of credit, that the documents were not in accordance therewith, is sufficient. 23F(2d)1.

595-3½6-New. A bank is justified in refusing payment of a draft against a letter of credit requiring delivery of invoice, where the invoice showed another's interest in the merchandise. 23F(2d)1.

595-3½7-New. Defendant guaranteeing a letter of credit cannot avoid liability for mistake in the date inserted by a forger of a bill of lading. 226AppDiv117, 234NYS442.

595-3½8-New. Failure to attach to the draft a certificate that the documents were sent as required by a letter of credit did not prevent recovery for payment of the draft to which the documents were attached. 226AppDiv117, 234NYS442.

595-3½9-New. Payment of drafts drawn "A. James Brown" pursuant to a letter of credit in favor of "Arthur James Brown" will not prevent recovery where the persons were identical. 226AppDiv117, 234NYS442.

595-3½3-New. Acceptance of shipping documents covering "unground casein" under a letter of credit covering "casein" will not prevent recovery for drafts paid under letter. 226AppDiv117, 234NYS442 (defendant estopped by examination made by its officer).

595-3½1-New. A bank issuing a letter of credit, and agreeing to accept drafts against a shipment of goods accompanied by certain documents, is not required to look beyond the accompanying documents to ascertain whether the goods complied with the contract of sale. 27F(2d)462.

595-3½2-New. A bank, buying or discounting a draft relating to a letter of credit issued by another bank, owes no contractual duty to the drawee or the latter's customer, nor to the person for whose benefit the letter is written, to discount or purchase any draft drawn against credit, and may buy the draft after the expiry date of the letter. 249NY9, 162NE567.

595-3½3-New. A bank, certifying the check of a purchaser of goods before delivery of a bill of lading, required before a letter of credit issued by another bank for the account of a purchaser from the purchaser first mentioned became effective, is such original purchaser's creditor. 249NY9, 162NE567.

595-3½4-New. In such case the bank is not bound to inform the original purchaser of the expiration date of the letter received by such bank. 249NY9, 162NE567.

595-3½5-New. In such case, where the original purchaser had made his purchases and resold the goods before the letter of credit was received by defendant bank, the failure of such bank to give notice of the date of expiration is not the proximate cause of loss and is not a ground for recovery by such original purchaser. 249NY9, 162NE567.

595-3½6-New. A bank paying drafts against an irrevocable letter of credit cannot recover from the seller on rejection of sugar by the buyer's vendee. 134Misc18, 233NYS486.

595-3½7-New. A bank issuing a letter cannot refuse payment of drafts upon presentation of the proper documents regardless of the quality of the goods involved. 134Misc18, 233NYS486.

595-3½8-New. A bank issuing a letter to plaintiff is estopped from claiming variance in shipping documents accompanying drafts where a different reason was previously assigned for nonpayment. 29F(2d)46.

595-3½9-New. That a bank received no benefit from its promise is no defense to liability on a letter of credit. 222MoA586, 292SW1079.

595-3½0-New. Addressee cashing drafts on faith of letter of credit but making no representations to issuer held not estopped as against issuer to deny payment. 40F(2d)2.

595-3½1-New. Contract between bank and buyer of goods for issuance of irrevocable letter of credit is distinct and separate from contract between buyer and seller to furnish such letter. 135Misc697, 238NYS245.

595-3½2-New. Where irrevocable letter of credit issued by bank is accepted by sellers, bank becomes obligated to pay sight draft on presentation of documents specified in letter. 135Misc697, 238NYS245.

595-3½8-New. Foreign addressee cashing drafts payable in dollars on basis of letter of credit and not agreeing to accept kronen tendered held not estopped to deny payment. 40F(2d)2.

595-3½4-New. although it refused to return kronen tendered. 40F(2d)2.

595-4½-New. A bank is entitled to refuse to pay a draft issued against a letter of credit covering certain shipments in the absence of proof that goods were properly tendered. 276US469, 48SCt378, 72Led657.

595-4½-New. Statement that credit has been established and is irrevocable held to imply a promise to pay the letter of credit. 240NY520, 148NE664.

595-4¼-New. A confirmed irrevocable letter of credit, an irrevocable letter, or a confirmed credit is a contract to pay on compliance with its terms, and needs no formal acknowledgment or acceptance other than is therein stated. 240NY520, 148NE664.

595-4½-New. Implied provision that sight drafts were to be presented within a reasonable time was not changed by plaintiff's request to set expiration date and defendant presenting drafts before that time complied with conditions entitling them to payment. 240NY520, 148NE664.

595-4¼-New. The law reads into a letter of credit that sight drafts are to be presented within a reasonable time, when there is not a time fixed for presentment. 240NY520, 148NE664.

595-4½-New. Government control of coal exports under executive order during coal strike is an extending letter of credit until after lifting of embargo. 217AppDiv282, 216NYS225.

595-4½-New. Letter of credit covering shipment by steamer "sailing during first half of November" requires that steamer break ground during that period. 16F(2d)979.

595-4½-New. Letter of credit is construed according to the rules governing ordinary commercial contracts. 23F(2d)118.

595-4½0-New. Phrase "fine sugar" in documents accompanying a draft is sufficient to answer call in letter of credit for "fine granulated sugar." 23F(2d)118.

595-4½1-New. Documents accompanying drafts calling for "white Java granulated sugar No. 24" and "white Java fine sugar No. 24" are fatally defective where the letter of credit called for "white Java refined granulated sugar" and "white Java refined fine granulated sugar." 27F(2d)462.

595-7 190NC277, 129SE619, 622 [quot CJ]. [b] **Matters not constituting loan of credit.**-Mo 22SW(2d)821. [c] **In New York.**-253NY227, 170NE900.

595-8 190NC277, 129SE619, 622 [quot CJ]; 197Wis20, 221NW379; 40Wyo 312, 276P926.

595-9 172Ark1023, 291SW439; Iowa 221NW801; 169Minn249, 210NW998; 190NC277, 129SE619, 622 [quotCJ]; 8PaDist&Co 599; 195Wis294, 218NW179 (contract held not one of guaranty); 40Wyo 312, 276P926. [a] (4) Bank not liable on cashier's guaranty to pay for stone shipped to individual. 190NC277, 129SE619. [b] **Where bank agreed to honor drafts presented with bills of lading,** seller not shipping goods to buyer and not presenting drafts to bank with bills of lading cannot sue bank on agreement. 195Wis294, 218NW179. [c] **Bank cannot become surety** on bond of public officer. 178Ark361, 12SW(2d)1.

596-10 7F(2d)535; 172Ark1023, 291SW439; 177Ark1085, 9SW(2d)569; 160La963, 970, 107S711 [citCJ]; 190NC277, 129SE619, 622 [quotCJ]; 40Wyo 312, 276P926. But see 38GaA591, 144SE815.

596-11 172Ark1023, 291SW439; 181Ark38, 25SW(2d)410; 226Ky179, 10SW(2d)846, 848 [citCJ]; 169Minn249, 210NW998; 190NC277, 129SE619, 622 [quotCJ]; 199Wis350, 226NW313; 40Wyo 312, 276P926.

596-12 190NC277, 129SE619, 622 [quot CJ].

596-15½-New. Bank forwarding note secured by warehouse receipt of cotton can be held liable as on warranty that warehouse receipt was good only in so far as warranting that paper was obligation of the warehouse company. 135SC417, 133SE901.

596-15½-New. An agreement by a bank submitting farm mortgage loans to a lender and receiving a commission from the borrower that it will take the mortgages if it is found that the application is not correct is ultra vires. 169Minn249, 210NW998.

596-15¼-New. A subsequent guaranty of the notes secured given by such bank on complaint of the lender that the land was not as represented is also ultra vires. 169Minn249, 210NW998.

596-15½-New. Acting as surety permissible in few instances. 5PaDist&Co 372.

596-15½-New. A transaction wherein the president stated that the bank would protect his indorsement has been held not a guaranty. 33NM46, 261P818.

596-15½-New. A cashier's guaranty of his own note securing a loan to the bank is not void. 40Wyo 312, 276P926.

596-15½-New. Neither bank nor trust company may act as surety except where qualified to engage in fiduciary business. 14PaDist&Co 268.

596-16 197Wis20, 221NW379. [a] **Bank purchasing draft,** after forged indorsement of payee, and guaranteeing indorsements, is liable to drawee to whom it was forwarded for collection and by whom it was paid. 143Miss454, 109S274.

596-17 181Ark38, 25SW(2d)410; 76 CalA438, 244P934; 129Kan812, 284P 391; 226Ky179, 10SW(2d)846; 321Mo 815, 12SW(2d)755; MoA 287SW835; 220MoA889, 296SW1052; MoA 8SW(2d) 1030; 80Mont468, 260P1055; 245NY 116, 156NE634; 130Misc842, 225NYS 525; 198NC477, 152SE403; 286Pa405, 133A551; TexCommnA 2SW(2d)426; TexCivA 293SW859; 40Wyo 312, 276P 926. [b] **Acceptance and use of proceeds of unauthorized note.**–TexCivA 281 SW632.

596-18 318Mo 1120, 2SW(2d)607; 321 Mo 815, 12SW(2d)755; MoA 7SW(2d) 415; MoA 14SW(2d)23; 245NY116, 156 NE634; 191NC500, 132SE468; 198NC 477, 152SE403; 53ND797, 208NW82, 88 [citCJ]. [c] **Letters of credit** issued by bank's cashier are not affected by ultra vires rule. MoA 297SW1079.

596-20 220MoA152, 281SW110; 33Wyo 474, 240P683.

596-22½-New. The maker of a promissory note payable to a bank of which he is a stockholder cannot defeat an action on the note by another bank holding the note as indorsee of the payee on the ground that the transfer was made pursuant to an ultra vires contract for consolidation of the two banks. 165Minn121, 205NW951.

596-22⅓-New. By accepting a commission from a borrower a bank is not estopped to assert the invalidity of an agreement between itself and the lender to take over the loan under certain contingencies. 169Minn249, 210NW998.

596-22¼-New. General creditors of bank have equities superior to those of a county seeking to enforce bank's ultra vires pledge of assets to secure public deposit. 55ND45, 212NW236, 51 ALR296.

596-22½-New. If a bank held no lien on cotton, but the cashier sold it as an accommodation to the owner, the bank receiving no benefit, a plea of ultra vires was a valid defense on sales contract. TexCommnA 2SW(2d)419.

596-22¾-New. Transfer of bank's assets and execution of note to another bank, if illegal, can be attacked only by state or bank's creditor. TexCivA 28SW(2d)1104.

597-23 161La38, 108S117. [b] 176Ark 278, 2SW(2d)1096, 57ALR296 (ultra vires no defense). [c] **Libel.**–161La38, 108S117. [d] **Liable for negligent acts.**–Utah 263P928. [e] **Bank not negligent** for failure to assume contractual duty which would be ultra vires. Utah 263P928.

597-24½-New. Bank acting as agent in accepting warehouse receipts as collateral, if put on guard respecting their validity, is bound to notify principal before acceptance. 245NY245, 157NE 125.

597-24⅓-New. Bank acting as agent is not negligent in accepting invalid receipts for cotton where customer offered reasonable explanation and disinterested audit was had. 245NY245, 157NE125.

597-25 123Kan304, 255P68, 69 [quot CJ].

597-26 123Kan304, 255P68, 69 [quot CJ].

597-27 142SC231, 140SE593 (stipulation not void as against public policy).

597-28 299Pa527, 149A887. [a] **Sufficiency of acceptance.**–199 Ind290, 157 NE433.

597-29 202 Iowa70, 209NW525; 299Pa 527, 149A887.

597-30½-New. The mere fact that the payee of a note received from a bank or its officer payment on the note of a third party raises no presumption that the payee had expressly or impliedly authorized the bank or officer to receive such payment on the payee's behalf. 202 Iowa70, 209NW525.

597-31 43 Ida214, 250P648, 50ALR 1418; 142SC231, 140SE593.

597-32 10F(2d)926; 25F(2d)599, 601 [citCJ]; Ariz 288P7; 81CalA317, 253P 757; 203 Iowa701, 213NW398; 204 Iowa565, 215NW742; 125Me150, 131A 863; 169Minn281, 211NW332, 210MoA 805, 278SW810; Mo 30SW(2d)46 (drawee bank); 74Mont491, 241P 626; 80Mont374, 260P734; 194NC712, 140SE617; 51ND646, 200NW888; Or 260P227; 85PaSuper52; 149SC277, 147 SE362; TexCivA 299SW649; TexCivA 11SW(2d)644; 37Wyo 216, 260P534 (cash warrant on state). [i] **Crediting depositor** with amount of check does not make bank owner as it may be charged off again if not paid. 85PaSuper52. [j] **Deposit for collection and credit or for collection and remittance.**–169Minn 281, 211NW332. [k] **In absence of agreement to contrary** collecting bank is impliedly authorized to mingle proceeds. 15F(2d)585.

598-33 13F(2d)330; 34F(2d)348; 216 Ala591, 114S188; 81CalA317, 253P757; 82Colo 423, 260P519; 111Conn709, 151 A177; 98Fla956, 124S746; GaA 155SE 57; Ga 155SE2; 43 Ida214, 250P648, 50 ALR1418; 202 Iowa875, 211NW527; 203 Iowa701, 213NW398; 204 Iowa565, 215NW742; 207 Iowa1254, 219NW496; 207 Iowa403, 223NW176; 207 Iowa910, 223NW865 (relation not one of debtor and creditor); 252Mass366, 148NE220; 74Mont491, 241P626; 113Nebr711, 204 NW796; 33NM498, 270P792; 194NC 712, 140SE617; 51ND646, 200NW888; 55ND370, 213NW353; 58ND715, 227 NW218; 144 Okl 156, 289P1105; 43 OklACR218; 123 Or95, 260P227; 286Pa 191, 133A220; 292Pa114, 140A768; 89 PaSuper537; 87PaSuper94; 136SC511, 134SE510; 151Va1040, 145SE725; 133 Wash643, 234P662 (that note is payable at designated bank does not make bank holder's agent to receive payment); 143 Wash9, 254P238; 147Wash42, 264P 1000; 199Wis560, 227NW27; 36Wyo 279, 254P123. [e] 207 Iowa948, 222NW 8. [g] **Relationship continues until completion of transaction.**–144 Okl 156, 289P1105.

599-34 140Miss816, 105S462.

599-35 38F(2d)772; GaA 155SE57; 89 PaSuper537.

599-37 Mo 30SW(2d)46.

599-37½-New. The relation of principal and agent continued after collection of a cash warrant had been made. 37Wyo 216, 260P534.

599-37½-New. Relationship of bank to draft or check turned over to it by customer depends on their contract. 38 F(2d)772.

599-37¾-New. Such contract may be influenced or controlled by statute and local and general banking customs. 38 F(2d)772.

599-38 199 Ind290, 157NE433; 204 Iowa1317, 217NW438; 169Minn281, 211 NW332, 333 [quotCJ]; Minn 230NW 467 (sight draft with bill of lading attached mailed by seller to bank).

599-38½-New. A bank receiving in due course a draft for collection against a depositor and accepting his check on another bank in payment is the agent of the forwarding creditor throughout the transaction of presenting and collecting the check. 117 Okl 120, 245P638.

599-38⅓-New. For the reason that it cannot act in dual capacity as agent for both debtor and creditor in the same transaction. 117 Okl 120, 245P638.

599-39½-New. That drawee of a sight draft attached to bills of lading requested the drawer to draw through a certain bank did not make the bank the agent of the drawee, when the drawee's check drawn in payment of the draft was dishonored due to failure of the payee bank. 54SD136, 222NW694.

599-40 207 Iowa910, 223NW865; 254 NY218, 172NE475(2dcase); 199Wis560, 227NW27. [a] **Where paper indorsed without restriction** and placed to depositor's credit, inference is that bank has become purchaser. 275US248, 48 SCt58.

599-40½-New. Course of dealing sufficient to justify belief that bank was holder's agent. 133Wash643, 234P662.

599-40⅓-New. Agreement of parties is determining factor. 51SD325, 213NW 854.

599-42 10F(2d)926, 932 [quotCJ].

599-43 10F(2d)926, 932 [quotCJ]; 74 Mont491, 241P626 (rule not absolute but only prima facie; question whether title passes depends on intention of parties); 123 Or95, 260P227; 51SD325, 213NW854. But see 85PaSuper52.

600-44 123 Or95, 260P227.

600-46 34F(2d)348 (under Minnesota statute); 242 IllA16; Or 281P834; 85 PaSuper52; 14PaDist&Co 188; TexCivA 299SW649. But see 123 Or95, 260P227.

600-46½-New. The fact that for several years the right of a bank to draw upon remittances before collection has been denied by its correspondent is persuasive evidence, in an action to establish title to checks not collected before the closing of the correspondent bank, that the intention of the parties was that title should not pass before collection and that the relation between the banks was that of principal and agent. 74Mont 491, 241P626.

601-47 226AppDiv225, 235NYS197; TexCivA 299SW649; 36Wyo 279, 254P 123.

602-52 51SD325, 213NW854; TexCivA 299SW649.

602-55 MoA 287SW839.

602-55½-New. A bank is entitled to judgment against a depositor for an amount advanced on uncollectable bond interest coupons deposited for collection only. 95CalA347, 272P767.

602-55¼-New. A bank advancing an amount of drafts to a depositor before collection becomes the holder for value although merely an agent for collection. 249NY391, 164NE327.

602-56 247 IllA419; ND 232NW602 (right of sending bank to cancel request for collection and credit before payment).

603-57 320Mo 436, 7SW(2d)997; MoA 287SW839.

603-63 TexCivA 299SW649.

604-68 205 Iowa845, 216NW737, 738 [citCJ].

604-69½-New. Where to knowledge of officers bank was insolvent, the depositor may repudiate transaction and recover proceeds if he can identify them. 15F(2d)585.

604-70 47 Ida646, 277P575 (right to charge back preserved by terms of deposit slip); 120 Okl 243, 251P481. [d] (2) Bank crediting depositor with amount of check on another bank and surrendering check to drawee bank and receiving drawee's draft in payment, cannot, on nonpayment of draft, charge back any part of check to depositor. 205 Iowa392, 218NW58, 59 [citCJ]. [g] **That depositor is public officer authorized to make general deposit only** does not affect right of bank to charge back uncollected check. 47 Ida646, 277P575.

605-72 28Hawaii35.

605-76 202 Iowa875, 211NW527; 169 Minn281, 211NW332; 43 OklACR218; TexCommnA 278SW188.

605-77½-New. And if, before collection is made, the right of the remitting bank is denied, it is persuasive evidence that title was not to pass until collection made. 74Mont491, 241P626.

605-81½-New. A bank authorized to use particular means for collecting draft, on learning that such method is impossible, must notify the drawer of such fact, 214AppDiv693, 213NYS146.

605-81⅓-New. or use other means of collection. 214AppDiv693, 213NYS146.

605-81¼-New. Failure of a bank to do so is negligence. 214AppDiv693, 213 NYS146.

605-81⅙-New. Where, strictly in accordance with directions of holder of draft, the bank to which a note is forwarded for collection issues and forwards to holder its draft for proceeds of such collection, the relation of principal and agent ipso facto terminates and that of debtor and creditor is substituted. 202 Iowa875, 211NW527.

605-81⅛-New. Whether commercial paper was deposited for collection and credit or for collection and remittance may be implied from the circumstances in the absence of express agreement. 169Minn281, 211NW332.

606-83 [a] **That paper is payable at bank to which it is forwarded** is not sufficient to make it agent for collection. 299Pa527, 149A887.

606-84 36Wyo 279, 254P123.

606-85 314Mo 1, 282SW706. [a] **Relation of principal and agent is created** where bills are forwarded by one bank to another, indorsed for collection and remittance with direction to collect and forward proceeds to sender. MoA 284 SW164.

606-85½-New. Test of relationship between forwarding bank and collecting bank. 314Mo 1, 282SW706.

606-85¼-New. Fact that funds collected by bank as agent and held in trust for owner are mingled with funds of bank does not change relationship between bank and owner. 314Mo 1, 282 SW706.

606-85¼-New. The relation created by such transaction is one of principal and agent, not of creditor and debtor. MoA 287SW839.

606-86½-New. Deposit for collection authorizes the bank to employ a subagent to collect. 75Mont582, 244P883.

606-86½-New. A bank accepting a check forwarded by another bank for collection is an agent of the depositing payee. 75Mont582, 244P883.

606-86¼-New The depositing payee becomes bound by the subagency contract to the same extent as the collecting bank is bound. 75Mont582, 244P 883.

606-86½-New. Agreement of bank to whom check was forwarded for deposit with its agent bank limiting agent bank's liability in forwarding bank held to destroy ground of relationship of principal and agent between forwarding bank and agent bank. 135SC339, 133SE 910.

606-86½-New. Relation of agency existing between the two banks is not affected by the mere act of remitting by cashier's check instead of sending cash. 45 Ida530, 263P993.

606-86½-New. "Subagent" or correspondent may receive title superior to title possessed. 123 Or95, 260P227.

606-86¼-New. In Florida mere deposit for collection is authorization to employ subagents. 98Fla956, 124S746.

606-89 15F(2d)913; 214AppDiv693, 212NYS146; 135SC339, 133SE910; 142 SC231, 140SE592. See also 5LaA142. [a] But see 9LaA166, 119S372. [i] **Insolvency of correspondent bank.**–135SC 339, 133SE910. [j] **Collecting bank is liable for negligence** in selecting correspondent known to be irresponsible. 129Kan38, 281P899.

607-91 142SC231, 140SE593.

607-92 29Ariz89, 239P785; 170Ark 293, 280SW984; 75CalA488, 242P1085; 23CalA570, 237P651; 207 Iowa786, 223 NW517; 116Nebr321, 217NW91, 58ALR 758; 34NM656, 288P17; 197NC438, 149 SE546; 299Pa527, 149A887; 87PaSuper 94; 85PaSuper52 (in absence of instructions or agreement to contrary); 51SD 325, 213NW854; TexCivA 11SW(2d) 644; TexCivA 30SW(2d)577. See also 157Tenn497, 10SW(2d)683, 61ALR954. [b] 196NC730, 147SE5. [e] (2) Bank in collecting check held not negligent because transmitting check through nearest correspondent. 51SD325, 213NW854. [g] **Bank is not payee's subagent** where it credits check to account of forwarding bank for collection and credit. 207 Iowa786, 223NW517. [h] **Correspondent bank is not agent of bank forwarding paper for collection** but is agent of drawer. TexCivA 30SW(2d)577.

608-94 149Miss274, 115S202 (drawer's liability discharged).

608-96½-New. Credit by reason of a fund collected for a bank in order to create the relation of debtor and creditor must be accepted. 250NY288, 165 NE452.

608-98 MoA 275SW579.

608-2 149Miss274, 115S202.

608-3½-New. Relation of agency is created between two banks where one receiving draft on another for collection and deposit sends it to latter for remittance. 313Mo 412, 281SW733, 47 ALR754.

608-3½-New. There is no relation of principal and agent as to checks drawn on a collecting bank. 207 Iowa1254, 219 NW496.

608-4 25F(2d)841. But see 58ND20, 224NW913 (rule is now abrogated by statute).

609-6 140Miss816, 105S462. [a] (1) See also 8F(2d)922. [c] **Facts sufficient to give notice to collecting bank that forwarding bank was not owner of draft.**–140Miss816, 105S462.

609-8 80CalA733, 252P743.

609-9 80CalA733, 252P743 (banks making rent collections without compensation and taking crop mortgage as security for its own prior debt).

609-9½-New. Where a cotton buyer gave his draft on a payee bank in payment of cotton, and the bank had notice that passing of title was conditioned on payment of the draft, it became trustee for the seller for the proceeds of the buyer's subsequent sale, collected by it. TexCivA 10SW(2d)408.

609-10 42 Ida48, 246P12; 55ND370, 213NW353. [b] **Bank may indorse** income of collection notes payable to it. 7F(2d)494. [c] **Posted rule as to collection** is not binding on depositor in absence of express or implied agreement to be bound thereby. 205 Iowa392, 218 NW58.

609-11 199 Ind290, 157NE433.

609-12 42 Ida48, 246P12, 16 [citCJ]. See also 157Tenn497, 10SW(2d)683, 61 ALR954.

610-13 142SC199, 140SE478 (holder of paper may refuse cashier's check and demand payment in money); 137Wash 335, 242P356. [a] **Fraudulent conversion of note or proceeds by officer of** bank renders bank liable for conversion. 204 Iowa1317, 217NW438.

610-16 15F(2d)913; 105Conn33, 134A 223; 247 IllA419 (bank's negligence not waived); 199 Ind290, 157NE433; 200 Iowa347, 202NW523 (due care and diligence); 172Minn204, 214NW922; 222 MoA935, 11SW(2d)77; 243NY366, 153 NE493; 194NC371, 139SE689; 55ND 406, 213NW963, 52ALR988; 51SD331, 213NW857; TexCivA 287SW1110. See also Fla 129S604; 202 Iowa1244, 211 NW891, 893 [citCJ]. [e] (2) Collecting bank sending check to drawee for collection and failing to do anything thereafter for ten days, though it had previously sent check to drawee and had been informed that it had not been received, is negligent. 25F(2d)841. [n] **Knowledge of agent of facts making collection difficult** is knowledge of collecting bank. 214AppDiv693, 213NYS146. [o] **Nonexistence of bank where note was made payable** (1) does not impose greater duty or liability on collecting bank. 137 Misc153, 241NYS639. (2) In such case collecting bank attempting to make presentment at nonexistent bank satisfies statute. 137Misc153, 241NYS639.

610-16½-New. A bank presenting checks to another bank for payment is not required to present each check separately. 222MoA935, 11SW(2d)77.

611-17½-New. Under state statute a bank may send a check deposited with it for collection directly to the bank upon which it is drawn. 75Mont582, 244P883.

611-18½-New. A bank agreeing to collect drafts acts as agent, 214AppDiv 693, 213NYS146.

611-18½-New. and is charged with duties of fiduciary nature. 214AppDiv693, 213NYS146.

611-18¼-New. It is bound to exercise a high degree of fidelity in performance of those duties. 214AppDiv693, 213NYS 146.

611-18⅙-New. It must exercise such high degree of care in selecting subagents, 214AppDiv693, 213NYS146.

611-18⅙-New. and giving them proper instructions. 214AppDiv693, 213NYS 146.

611-18⅙-New. If a bank knows that its method of collection is not feasible, it fails in its duty. 214AppDiv693, 213 NYS146.

611-18⅙-New. If a collecting bank later discovers its method not feasible, it must immediately adopt some more appropriate course, giving full notice of the difficulty to plaintiff. 214AppDiv693, 213NYS146.

611-18⅙-New. Bank may act in manner usual to custom of banking. 203 Iowa701, 213NW398.

611-18 1/10-New. Where note payable at maker's bank is sent to such bank for collection, it is bank's duty to collect note or give transaction proper attention within twenty-four hours. Tex CivA 26SW(2d)1077.

611-20 199 Ind290, 157NE433; 243NY 366, 153NE493. [a] **Where bank failed to notify depositor of dishonor of deposited check,** it is held liable for amount of check. 128Misc762, 219NYS 479.

611-20½-New. But failure to notify the payee that the drawee bank had stated over the telephone that a check would not be paid because of lack of funds on deposit by the drawer, has been held not to make the bank liable although shown that the check would have been paid if presented later in the day. 200 Iowa 347, 202NW523.

611-21 137Misc153, 241NYS639.

612-24½-New. Depositor cannot recover against collecting bank because recourse against indorsers was lost where he had additional day to notify indorsers after receiving notice of nonpayment. 137Misc153, 241NYS639.

612-27 242 IllA16 (bank not holder in due course); 289Pa252, 137A257, 258 [quotCJ].

612-29 [a] **Where bank is authorized to accept specified bonds as collateral** in substitution for that left with note deposited with bank for collection, it is not called upon to exercise any discretion. 147Wash525, 266P199.

612-30 177Ark1138, 9SW(2d)1064; 75 CalA488, 242P1085; 105Conn33, 134A 223; 111Conn709, 151A177; 47 Ida646, 277P575; 120 Oh120, 165NE715; 199 Wis560, 227NW27; 59 OntL268, [1926] 4DomLR182. [c] (2) Where check is forwarded on day of deposit according to custom, fact that it could have been collected by more expeditious method will not render bank negligent in absence of knowledge of circumstances making customary method imprudent. 80Mont374, 260P734. [e] **Knowledge of custom is conclusively presumed.**–75CalA 488, 242P1085. [f] **Custom of presenting for acceptance draft accompanied by bill of lading before arrival of goods.**–105 Conn33, 134A223. [g] **Custom of presenting draft upon arrival** held not inconsistent with instruction to surrender shipping documents upon acceptance of draft. 105Conn43, 134A226. [h] **Clearing house rules and custom** are evidence of bank's good faith. 120 Oh120, 165 NE715. [i] **Where check deposited for collection was marked "paid" under misapprehension** of drawer's account, but returned when final clearance could be made, bank is not liable on check deposited. 120 Oh120, 165NE715. [j] **Custom of banks in dealing with clearing house** held erroneously excluded. 120 Oh120, 165NE715.

613-32 172Minn58, 214NW918, 61ALR 474. [b] **Custom to remit collection by draft** does not excuse negligence in sending checks direct to drawee bank and accepting its worthless draft in payment. 87Colo 158, 286P116.

613-35 But see 70Utah310, 260P262, 61 ALR456.

613-35½-New. Where a custom goes in the face of plain written instructions to the contrary, the collecting bank is not authorized to follow the custom. TexCommnA 278SW188.

613-35½-New. Person dealing with bank is presumed to assent to conduct of business in accordance with usage of bank. 105Conn33, 134A223.

613-36 70Utah310, 260P262, 61ALR 456.

613-37½-New. Special instructions are necessary if party transmitting bill of exchange wishes laws and customs prevailing at place of sending to govern presentment, acceptance, and collection. 105Conn33, 134A223.

613-37½-New. Bad custom that would permit bank to commit fraud will not be enforced. 292Pa114, 140A768.

613-39 123Kan304, 255P68, 69 [quot CJ]. See also 105Conn33, 134A223.

613-41 [c] **Where attached invoice** contained notation "due on or before 60 days from date of shipment" and no instructions were given to hold bill of lading till payment made, bank did not lose right to recover on draft given as evidence of advance to shipper, by delivering bill without payment. 135Wash 575, 288P644.

614-43 [a] **Designation of due date as** "30 days after arrival" held on facts to refer to arrival of draft rather than goods. 105**Conn**43, 134**A**226.

614-43½-New. The intent of drawer is immaterial except as it is expressed by draft and accompanying papers. 105 **Conn**43, 134**A**226.

614-46 77**Mont**134, 251**P**151; 55**ND** 370, 213**NW**353, 354 [citCJ]. [a] **Authority to accept draft** of drawee cannot be conferred by implication. 137**Wash** 335, 242**P**356.

614-47 15**F(2d)**913; 29**Ariz**89, 239**P** 785; 170**Ark**201, 279**SW**374; 202 **Iowa** 875, 211**NW**527; 126**Kan**107, 111 [quot CJ], 267**P**14; 314**Mo** 1, 282**SW**706; 77 **Mont**134, 251**P**151; 113**Nebr**711, 204**NW** 796; 194**NC**371, 139**SE**689; 197**NC**229, 148**SE**236; 55**ND**370, 213**NW**353, 354 [citCJ]; 58**ND**715, 227**NW**218; 45**SC** 166, 143**SE**27; 148**SC**381, 146**SE**219; **TexCommnA** 276**SW**209; **TexCivA** 273 **SW**650; 137**Wash**335, 242**P**356; 199 **Wis**560, 227**NW**27. See also 172**Ark**631, 290**SW**69. [d] **Bank has no authority** to collect draft by credit account of payee and charging account of drawer. 170**Ark**201, 279**SW**374. [e] **Collecting bank sending check to drawee and receiving credit on its account** is liable to its principal for amount notwithstanding agreement with principal for acceptance of either cash or drafts. 45 **SC**166, 143**SE**27.

614-48 29**Ariz**89, 239**P**785.

614-49½-New. When not expressly forbidden to receive anything but money in payment, collecting bank may make collection in usual manner. **Ida** 288**P**164.

614-50 18**F(2d)**711 (where statute required acceptance of exchange draft); 47 **Ida**646, 277**P**575; **Ida** 288**P**164; 77 **Mont**134, 251**P**151; 197**NC**438, 149**SE** 546; 142**SC**231, 140**SE**593 (bank may accept check of subagent); 70**Utah**310, 260**P**262, 61**ALR**456; 137**Wash**335, 242 **P**356; 199**Wis**560, 227**NW**27. But see 148**SC**381, 146**SE**219.

614-51 **Fla** 129**S**604; 150**SC**220, 147**SE** 863 (remittance of check to collecting bank held payment where remitting bank closed on day collecting bank received check).

614-52 15**F(2d)**913; 87**Colo** 158, 286**P** 116; 205 **Iowa**392, 218**NW**58, 59 [cit CJ]; 170**Minn**15, 212**NW**16; 313**Mo** 412, 281**SW**733, 47**ALR**754; 113**Nebr** 711, 204**NW**796; 195**NC**307, 142**SE**22; 117 **Okl** 120, 245**P**638; 148**SC**381, 146 **SE**219; 149**SC**363, 147**SE**312; **Tex CommnA** 276**SW**209; **TexCivA** 273**SW** 650. [d] **Rule is not affected by statute** permitting bank to send check received for collection directly to drawee bank without becoming liable for loss on insolvency of latter bank. 170**Minn**15, 212**NW**16.

614-53 15**F(2d)**913.

614-53½-New. Where drawee bank has sufficient funds of debtor and accepts his check, given collecting bank, in payment of draft when presented, marks it paid, and charges it to his account, such drawee bank's insolvent condition and the fact that its draft given to the collecting bank is clearance of the check as dishonored does not authorize the collecting bank to charge the amount of such dishonored draft to the original debtor's deposit in the collecting bank. 117 **Okl** 120, 245**P**638.

615-54 124 **Okl** 185, 256**P**43. [a] **Effect of insolvency.**-126**Kan**107, 267**P**14.

615-55½-New. Where a collecting bank accepts a check drawn on another bank without specific agreement that it is accepted in payment of the instrument held for collection, it is presumed that the acceptance is on condition that the check is good. 113**Nebr**711, 204**NW** 796.

615-55⅓-New. In such case, where the collecting bank stamps the instrument held for collection as paid and mails its own check to the sender of the instrument and the debtor's check is promptly presented and dishonored, the collecting bank may stop payment on its own check without liability thereon and may return the instrument sent to it for collection. 113**Nebr**711, 204**NW**796.

615-55¼-New. A bank's act in accepting a check in payment of a draft is ratified by plaintiff's act of seeking possession of the check and asking the bank to sue thereon. 10**F(2d)**669.

615-55⅕-New. If a bank takes a check or draft and becomes insolvent before the money on it is actually received, the owner can claim in preference to general creditors. 77**Mont**134, 251**P**151.

615-55⅙-New. Under statutes the owner of a check, depositing it in a bank for collection from an out of town state bank, must be held to have authorized the collecting bank to accept a draft in payment. 197**NC**229, 148**SE** 236.

615-55½-New. Bank reserving right in customer's pass book to accept exchange draft in collection of check is not relieved of diligence in collecting paper received in collection. **GaA** 155**SE**62.

615-60 126**Kan**107, 111, 267**P**14 [quot CJ].

615-61 126**Kan**107, 111, 267**P**14 [quot CJ]; 36**Wyo** 279, 254**P**123. [b] **Check deposited for collection** held paid when correspondent bank accepted from drawee bank check on another bank in payment. 271**US**489, 46**SCt**554, 70**Led** 1051. [c] **Check of bank drawn on itself** when charged to debtor's account has been held collection of money. 36 **Wyo** 279, 254**P**123.

615-61½-New. Return of notes marked "paid" and sending draft amounts to payment. 204 **Iowa**493, 215**NW**617.

615-65 203 **Iowa**782, 211**NW**522, 524 [citCJ]; 129**Kan**38, 281**P**899; **MoA** 279 **SW**774; 157**Tenn**497, 10**SW(2d)**683, 61 **ALR**954; **TexCivA** 30**SW(2d)**577. But see 172**Ark**631, 290**SW**69; 47 **Ida**646, 277**P**575; 157**Tenn**497, 10**SW(2d)**683, 61**ALR**954. [a] (1) 57**ND**52, 220**NW** 636; **TexCivA** 9**SW(2d)**1110. [c] (1) 149**Miss**274, 115**S**202. [d] **Effect of statutes.**-25**F(2d)**841. [e] **Sending draft to bank at which it was payable** but which was not drawee of draft, for collection, is not negligence. 151**Miss** 521, 118**S**540. [f] **In North Carolina.**-197**NC**438, 149**SE**546. [g] **In Louisiana.**-129**S**808.

616-66 57**ND**52, 220**NW**636 (agreement not void as contrary to public policy).

616-66½-New. , or in accordance with the custom of banks as to locality. 70 **Utah**310, 260**P**262, 61**ALR**456.

616-67 78**Cal**A673, 248**P**770.

616-67½-New. A bank receiving a check for collection may send it for payment direct to the bank on which it is drawn without being chargeable with negligence on its part or that of its customer. 80**Mont**374, 260**P**734.

616-68 15**F(2d)**585; 124**Kan**48, 52, 257**P**743 [quotCJ]; 169**Minn**281, 211 **NW**332; 320**Mo** 436, 7**SW(2d)**997 (where bank gave customer's account unrestricted credit for full amount of draft); 74**Mont**491, 241**P**626; 58**ND** 715, 227**NW**218; 136**SC**511, 134**SE**510; 51**SD**331, 213**NW**857; 143**Wash**9, 254**P** 238. [b] (2) Where collecting bank receives check payable to it in payment of check deposited for collection and credited to designated person it becomes debtor of such person and not trustee. 180**Ark**994, 23**SW(2d)**624. [h] **Instruction to return proceeds** of collection according to banking custom authorizes bank on remitting draft to appropriate money collected as its own. 32**NM**147, 252**P**980. [i] **Bank which made collection and credited** owner of draft with amount of check received in payment has been held entitled to cancel such credit where check was not of face value. 203 **Iowa**701, 213**NW**398.

616-69 124**Kan**48, 52, 257**P**743 [quot CJ].

616-70 122**Kan**483, 252**P**247; 124**Kan** 48, 52 [quotCJ] 257**P**743; 157**Miss**77, 127**S**720; 32**NM**147, 252**P**980. [c] **Collecting bank's first payments to forwarding banks appropriated to first receipts.**-254**NY**218, 172**NE**475(2dcase).

617-71 210**MoA**805, 278**SW**810. [c] **Where collection of county warrant is paid by check,** it is substitute for warrant, and owner of warrant could follow it as such. 58**ND**715, 227**NW**218.

617-72 202 **Iowa**875, 211**NW**527; 164 **La**33, 113**S**754; 314**Mo** 1, 282**SW**706; **MoA** 275**SW**579; 210**MoA**805, 278**SW** 810; 115**Nebr**444, 216**NW**302; 289**Pa** 252, 137**A**257, 258 [quotCJ]; 145**Va** 356, 133**SE**568. See also 45 **Ida**530, 263 **P**993. [a] **Whether collecting bank is debtor or trustee** of proceeds of collection depends on agreement as to disposition of proceeds. 32**NM**147, 252**P**980.

617-72½-New. , and title thereto is not lost by the collecting bank intermingling the proceeds with its own funds. 314**Mo** 1, 282**SW**706.

617-74½-New. Where bank sends drafts indorsed in blank to correspondent for collection first and for credit after collection, relation of debtor and creditor does not arise before collection. 38**F(2d)**772.

618-81 147**Wash**42, 264**P**1000 (subagent may remit by cashier's check on another bank and forwarding bank's acceptance of check ratifies such remittance).

618-88½-New. Where a bank, with which money had been deposited to the credit of a person who was a depositor in a bank in another city, forwards a draft for the amount to the latter bank to be credited to the account of its depositor pursuant to a forged telegram purporting to have been sent by him, and the bank receiving such draft pays the amount to a stranger who forged its depositor's name to the draft, the bank which forwarded the draft is entitled to recover the amount from the bank so paying it. **TexCivA** 274**SW**208.

618-88¼-New. Where a bank accepts a drawee's check on another bank for the amount of a draft received for collection and stops payment of its own draft it is in the position of an agent who receives money for his principal and refuses to turn it over. 176**Minn**538, 224**NW**147.

618-88¼-New. A bank accepting a check mistakenly issued in payment of a draft is not liable to the drawer for the amount thereof. 176**Minn**538, 224 **NW**147.

618-88⅓-New. A payee bank must credit a depositor's account, on collecting proceeds, and payment to the depositor's general manager who signed a check in the depositor's name is a diversion making the bank liable. 151**Va** 1040, 145**SE**725.

618-88¼-New. Notice to bank before collection of check deposited for collection to remit proceeds is notice of revocation of authority to place proceeds to depositor's credit. **GaA** 155**SE**57.

618-88½-New. Depositor depositing check for collection may revoke bank's agency to deposit proceeds to his credit by notice before collection. **GaA** 155**SE** 57.

618-94 81**Colo** 214, 254**P**771, 58**ALR** 250.

619-95 81**Colo** 214, 254**P**771, 58**ALR** 250.

619-97 216**Ala**591, 114**S**188; **TexCivA** 296**SW**674. [d] **Bank** to which defendant bank sent check for collection is held to have exercised due diligence. 216**Ala**591, 114**S**188.

619-98 15**F(2d)**913; 48 **Ida**279, 281**P** 472 (delay of fourteen days held unreasonable); 172**Minn**204, 214**NW**922; 130 **Okl** 23, 264**P**912. [b] **After loss of check,** failure of collecting bank to present it to bank where payable as lost instrument is negligence. 43 **Ida**214, 250 **P**648, 50**ALR**1418.

619-1 87**Colo** 158, 286**P**116; 220**MoA** 67, 279**SW**774. Contra 10**LaA**658, 121**S** 378.

619-2 87**Colo** 158, 286**P**116; 199 **Ind** 290, 157**NE**433. [d] **Collecting bank is liable** for any neglect of duty in process of collection whereby any of the parties are discharged. 137**Wash**335, 242**P**356.

619-3 199 **Ind**290, 157**NE**433.

620-4 199 **Ind**290, 157**NE**433; **Tex CivA** 13**SW(2d)**954. See also 222**MoA** 577, 284**SW**156.

620-5 199 **Ind**290, 157**NE**433; 123 **Kan**304, 255**P**68, 69 [quotCJ]; **Tex CommnA** 278**SW**188 (where draft, on its face, bore explicit direction).

620-6 199 **Ind**290, 157**NE**433.

620-8 9LaA166, 119S372; 130 Okl 23, 264P912 [quotCJ].
620-10 171Ark859, 286SW1032; 98Fla 956, 124S746; Fla 129S604; 9LaA166, 119S372; 196NC142, 144SE692; 106 WVa458, 146SE393; 199Wis560, 227 NW27. [a] **Bank accepting out of town drafts** for collection need not dispatch special messenger to obtain payment. 216Ala591, 114S188. [b] **Sending cashier's checks directly to payee bank and directing remittance by draft** has been held not negligence. 172Minn58, 214 NW918, 61ALR474.
620-11 181Ark140, 25SW(2d)26.
620-14½-New. Where custom requires collecting banks to take drafts at their own peril, a collecting bank is responsible to a forwarding bank for items collected and included within the draft given to the collecting bank and dishonored. 143Wash9, 254P238.
620-14¾-New. The payee of a check is not entitled to recover for negligence of a collecting bank where full recovery was had against the debtor and he suffered no damage. 18F(2d)711.
620-14¼-New. In the absence of contract, custom, or statute to the contrary, nothing but payment in money will relieve a collecting bank from the duty it owes to the holder of a check for whom it acts as agent. 47 Ida646, 277P575.
620-15 43 Ida214, 250P648, 50ALR 1418.
620-16 151Miss373, 118S198. [a] **Depositor of check** credited "subject to final payment" cannot sue correspondent bank for negligence in accepting another check, later dishonored. 271US 489, 46SCt554, 70Led1051.
620-17 See also 86PaSuper296.
620-18½-New. A drawer's action against the drawee bank and the collecting bank which paid on a forged indorsement is properly triable in county where check was presented to drawee bank despite plea of privilege. Tex CivA 23SW(2d)814.
620-19 157Tenn497, 10SW(2d)683, 61 ALR954.
620-20 [b] See 216Ala591, 114S188 (holding common counts and counts in trover not sustainable against bank for loss in failing to collect check).
621-21 157Tenn497, 10SW(2d)683, 61 ALR954.
621-21½-New. An action by a drawee bank against a collecting bank based on the latter's clearing house indorsement is not one by a depositor against the bank for payment of a forged or raised check. 98CalA523, 277P354.
621-22½-New. Where cashier sold notes to plaintiff but retained them for collection and new cashier and other officers claimed they had no knowledge of transaction and denied liability demand for delivery of notes was unnecessary. 181Ark243, 25SW(2d)440.
621-23 TexCivA 296SW674, 677 [quot CJ].
621-24 TexCivA 296SW674, 677 [quot CJ].
621-30 [f] 221MoA577, 284SW156; 58 ND20, 224NW913. [g] 151Miss521, 118 S540 (failure to show negligence).
621-31 151Miss373, 118S198; 157Tenn 497, 10SW(2d)683, 61ALR954.
621-33 [e] (1) 194NC371, 139SE689. (2) Ratification. TexCivA 10SW(2d) 739. [f] (2) Pass proofs held insufficient on demurrer. 199 Ind290, 157NE 433. [g] **Custom to accept drafts in payment held sufficiently pleaded.**-47 Ida646, 277P575.
622-35 199 Ind290, 157NE433.
622-37 43 Ida214, 250P648, 50ALR 1418.
622-38½-New. And the burden of proof is on the bank to show due diligence in forwarding a lost check for collection. 43 Ida214, 250P648, 50ALR 1418.
622-40½-New. Knowledge of foreign law affecting method of collection is presumed to be in correspondent of collecting bank. 214AppDiv693, 213NYS 146.
622-41 18F(2d)711; 173Ark1008, 294 SW49, 51 [quotCJ]; 199 Ind290, 157 NE433; 151Miss373, 118S198. See also 181Ark140, 25SW(2d)26. [a] **Bank guilty of wrongdoing** in failing to present promptly bill of exchange taken for collection has burden of showing no injury resulted. 173Ark1008, 294SW49.
622-42 181Ark243, 25SW(2d)440 (that notes were not collected or not collectable); 165Minn417, 206NW725.
622-42½-New. The burden of proof is on plaintiff to show that the negligence of the subagent in routing check was the proximate cause of the loss. 116 Nebr331, 217NW91, 58ALR758.
622-43½-New. In the absence of evidence, it is inferred that the party depositing a paper for collection was notified of default in payment. 197NC438, 149SE546.
622-45½-New. Where defendant bank fails to explain facts as to collection of a note, return of which had been requested, no presumption against conversion of proceeds will be indulged in. TexCivA 289SW1044.
622-45½-New. The drawer of a check seeking to recover on a forged indorsement has the burden of proving that he gave notice immediately on discovery of the fraud. 296Pa230, 145A848.
622-45¼-New. Where plaintiff sustains the burden of proving bank's acceptance of a check for collection, the burden is on the bank to explain its default in failing to pay the proceeds or return the check. TexCivA 13SW (2d)954.
623-47 171Ark379, 284SW781; 236 IllA464; 247 IllA419; 165Minn417, 206 NW725. [a] (2) Other instances. 221 MoA577, 284SW156.
623-48 28F(2d)933; 171Ark859, 286 SW1032; 75CalA488, 242P1085; 98 CalA523, 277P354; 43 Ida214, 250P648, 50ALR1418; 48 Ida279, 281P472; 199 Ind290, 157NE433; 162La906, 111S 323; LaA 130S127; 165Minn417, 206 NW725; TexCommnA 276SW209; Tex CivA 287SW1110; 59 OntL268, [1926] 4DomLR182. [a] **Evidence held sufficient** to show that county warrants were received by bank for collection only, and that bank accounted to agent of plaintiff for money received on warrants before it had any knowledge of ownership of plaintiff. 165Minn25, 205NW 453. [b] **To show relationship of principal and agent** between plaintiff and bank receiving check for collection. 51 SD325, 213NW854; 51SD331, 213NW 857.
623-49 181Ark243, 25SW(2d)440 (evidence sufficient to take case to jury); 83CalA670, 257P454; GaA 155SE62; 43 Ida214, 250P648, 50ALR1418; 47 Ida646, 277P575; Mass 169NE508; 221 MoA577, 284SW156; 51SD331, 213NW 857; TexCivA 32SW(2d)386 (whether bank collection agent or purchaser of check).
623-49½-New. Failure to submit to jury the question of authority of a collecting bank to deliver a note to a third person is not reversible error where such authority from the payee was undisputed. TexCommnA 278SW188.
623-50 170Ark293, 280SW984 (instruction as to liability of collecting bank for negligence of correspondent held erroneous); 181Ark243, 25SW(2d) 440 (instructions held properly refused); 142SC231, 140SE593.
623-51 173Ark1008, 294SW49; 199 Ind290, 157NE433; Mass 169NE508; 151Miss373, 118S198, 199 [citCJ]; Tex CivA 296SW674, 677 [citCJ]. See also 86PaSuper293.
624-52 247 IllA419; TexCivA 289SW 1044.
624-53 Mass 169NE508.
624-54 151Miss373, 118S198.
624-55 Mass 169NE508.
624-56½-New. A directed verdict against a bank for more than nominal damages, for having accepted a check rather than coin, is erroneous. 10F(2d) 669 (in abuse of evidence that insistence would have resulted in payment in currency).
624-56½-New. A directed verdict for more than nominal damages for surrendering a draft delivered for collection on payment by check is erroneous. 10F(2d)669 (check at least as valuable as draft).
624-58 [b] **Payee may sue direct** against subagent for negligence. 207 Iowa786, 223NW517.
624-60 But see 87Colo 158, 286P116.
624-60½-New. Correspondent bank is not the agent of payee depositing a check with a local bank and receiving credit therefor as cash, and is not liable to him for negligence in making collection. 116Nebr331, 217NW91, 58ALR 758.
624-60½-New. Bank to which notes were mailed for collection is not liable for failure to collect where notes were not received in time. 299Pa527, 149A 887.
624-60¼-New. Correspondent bank which has undertaken obligation to collect notes deposited with collecting bank is liable to depositor for its negligence. 299Pa527, 149A887.
624-61 74CalA734, 241P945. But see 246 IllA92. [d] **Negligence of drawee bank.**-74CalA734, 241P945. [e] **Negligence of collecting bank.**-74CalA734, 241P945. [f] **Where drawee and collecting bank are equally at fault,** burden will be left where it is found and drawee cannot recover. 74CalA734, 241 P945. [g] **Liability of collecting bank is not that of holder** within statute authorizing recovery of money paid by mistake on forged check where collecting bank received paper for collection only. 74CalA734, 241P945. [h] **Where indorsement of check is made by one having no authority** to indorse checks belonging to corporation, bank receiving checks for deposit and collecting proceeds from banks on which drawn stands in position of person originally cashing checks. 148Wash341, 268P891 (corporation may recover from bank, and corporation's negligence is no defense).
625-63 74CalA734, 241P945.
624-64 Contra 148Wash341, 268P891.
625-66½-New. A bank's indorsement guaranteeing prior indorsements will not render it liable as for forgery of an indorsement by one to whom the drawer erroneously sent a check. 296Pa230, 145A848.
625-66½-New. A drawer mailing a check to the wrong person and discovering his error some weeks later cannot recover from the bank accepting the check for collection, properly indorsed, and collecting the same in the usual course. 296Pa230, 145A848.
625-67½-New. Long delay of the drawer in discovering that a check had been mailed to a person of the same name as the payee precludes recovery from the bank as on a forged instrument. 296Pa230, 145A848.
625-70 43 Ida214, 250P648, 650 [cit CJ], 50ALR1418.
625-71 43 Ida214, 250P648, 650 [cit CJ], 50ALR1418.
625-72½-New. Agency of a bank is not concluded on discovery of the loss of a check, where the forwarder was assured that the bank would look further into the matter of collection. 43 Ida214, 250 P648, 50ALR1418.
625-75 15F(2d)585; 21F(2d)993; 25 F(2d)599; 44F(2d)111.
625-76 15F(2d)582, 584 [citCJ]; 15 F(2d)585, 586 [citCJ]; 21F(2d)993; 25F(2d)599; 172Ark631, 290SW69; 98 Fla956, 124S746; Ga 155SE2; 45 Ida 530, 263P993; 204 Iowa565, 215NW 742; 207 Iowa1254, 219NW496; 164La 33, 113S754; 314Mo1, 282SW706; MoA 275SW579; MoA 284SW164; 222MoA 839, 6SW(2d)970; 222MoA923, 11SW (2d)73; 222AppDiv645, 227NYS378; 130 Okl 206, 266P472; 144 Okl 156, 289 P1105; 131 Or350, 281P172 (bank officials held to have had knowledge of its insolvency); 50SD625, 211NW461; 145 Va356, 133SE568. See also 95Fla822, 116S635. But see 170Ga173, 152SE473. [a] (1) 75Mont72, 241P1077 (relation of creditor and debtor is created where draft is sent to bank with instructions to make collection and remit proceeds by draft to named bank for sender's account); 147Wash42, 264P1000. (2) 75Mont72, 241P1077 (relation of principal and agent is required to establish preference). (3) Where check was sent

to drawee bank for collection and remittance and such bank issued its draft on another but became insolvent before draft was paid, payee is not entitled to preference for amount of draft. 205 **Iowa**973, 219**NW**43. [b] See also **8D** 227**NW**375. [c] (2) Where paper deposited for collection and remittance was collected before insolvency and augmented assets of bank, depositor may recover proceeds as property belonging to him. 169**Minn**281, 211**NW** 332. (3) Claimant of proceeds of collection of drafts collected by bank before insolvency is not entitled to preference as debt due by it as trustee unless proceeds are shown to have come into hands of receiver or estate in his hands has been augmented thereby. 44 **Ida** 514, 258**P**544. (4) Forwarding bank is entitled to preference in payment by receiver of collecting bank for collections made. 98**Fla**956, 124**S**746. (5) Where contrary to provisions on draft, bank collecting it commingled proceeds therefrom with its general funds, drawer's claim to proceeds was no better than that of general creditor. 36**F(2d)** 732. [e] (1) See also 203 **Iowa**1014, 212**NW**124. See also 207 **Iowa**407, 219 **NW**929(2dcase); 75**Mont**72, 241**P**1077. (2) Owner is not entitled to have trust declared or to preferential payment unless assets in hands of receiver are augmented. 21**F(2d)**993. [f] **Necessity of tracing funds into hands of receiver.**–21**F(2d)**993; **Ark** 289**SW**488. [g] **Where check intrusted for deposit helps to increase assets of bank,** whole may be held in trust pending equitable separation. 15**F(2d)**585. [h] **Bank's use in clearance of check received in collection of draft** has been held not to place cash in bank so as to create trust fund for amount of draft. 15**F(2d)**585. [i] **Right of preference not affected** by refusal of payment of draft sent by collecting bank. **MoA** 275**SW**579. [j] **Bank collecting through another bank** is not entitled to preference where it cannot trace any funds belonging to it in assets of other bank which is insolvent. 53**SD**641, 222**NW**143. [k] **Payee of draft representing proceeds of sight draft** sent to bank for collection is not entitled to preference where draft was not paid before bank closed. 207 **Iowa** 1254, 219**NW**496. [l] **Trust or agency held not established** as between forwarding bank and drawee bank so as to give forwarding bank preference. 207 **Iowa**471, 220**NW**10. [m] **Claimant held not entitled to preference** in absence of proof that draft received for proceeds of collection was paid. 207 **Iowa**1254, 219**NW**496. [n] **Identity of proceeds and augmentation of assets of bank.**–53**SD**467, 221**NW**82.

626–77 15**F(2d)**585; 15**F(2d)**874; 36 **F(2d)**732; 313**Mo** 412, 281**SW**733, 47 **ALR**754; 314**Mo** 1, 282**SW**706; 131 **Or** 350, 281**P**172 (relation of bank to payee that of trustee); 141**SC**318, 139**SE**783, 788 [quotCJperCothran,Jconcurring]. [b] 141**SC**318, 139**SE**783, 788 [quotCJ perCothran,Jconcurring]. [c] **Where collecting bank remits by draft** after payment by check of depositor with ample funds, amount of remittance is preferred claim on insolvency of bank. 131 **Okl** 100, 267**P**833. [d] **Identification of funds.**–38**F(2d)**772; 117**Nebr** 358, 220**NW**593. [e] **Where proceeds of checks were used in payment of debts** of collecting bank, adjusting difference in clearance, and no funds came into receiver's hands as result of transaction, forwarding bank has no preferred claim. 28**F(2d)**40. [f] **Where collections on drafts were not made available to collecting bank** at time of insolvency although made through correspondent customer has right to preference. 38 **F(2d)**772. [g] **Where proceeds of drafts were credited by correspondent and subject to collecting bank's check before its failure** customer was general depositor not entitled to preference. 38 **F(2d)**772.

626–78 **NC** 161**SE**217.

627–80 15**F(2d)**874.

627–81½–New. If collection is made in cash and remittances made by cashier's checks, a trust is created which the holder of the checks may enforce against the receiver or the bank commissioner. 123 **Okl** 233, 253**P**45.

627–81⅓–New. Where collection items consist of checks drawn on a collecting bank which the bank collects by charging them to an individual deposit of drawer, no actual addition to funds of the bank being made, no trust relation is created in the absence of allegations in petition showing that at the time the collections were made the actual cash on hand in the insolvent bank was at least equal to the collections handled. 123 **Okl** 233, 253**P**45.

627–81¼–New. Rights of bank sending paper to collecting bank which becomes insolvent. 202 **Iowa**871, 211**NW**519; 203 **Iowa**1014, 212**NW**124; 204 **Iowa** 870, 216**NW**553.

627–81⅕–New. Where bank sends proceeds of collection to owner by draft as directed, trust relation terminates and that of debtor and creditor is established. 204 **Iowa**870, 216**NW**553.

627–81⅙–New. Authority to remit proceeds to the owner by draft may not be inferred from the fact that the owner expected a remittance in that manner where no direction had been given as to the manner of the remittance. 204 **Iowa**870, 216**NW**553.

627–81⅐–New. Maker's payment to an insolvent bank is held not to entitle indorsee bank to preference. 204 **Iowa** 493, 215**NW**617.

627–81⅛–New. The deposit of a check does not create a trust relationship so as to render the holder preferred claimant. 26**F(2d)**411.

627–81⅛–New. Where claimant bank sent checks drawn on its correspondent bank to the latter for collection and the correspondent charged the checks against deposits of the drawers, on the correspondent's insolvency, claimant is entitled in equity to draw dividends which the receiver of the bank would have paid the depositors on amounts had they remained to the credit of the depositors in their accounts. **Iowa** 224 **NW**583(1stcase).

627–81⅒–New. A bank forwarding a note for collection to another bank, which remitted amount by draft on the bank in which it had funds on deposit, had no equity to the extent of such amount in the account of the collecting bank, superior to that of the bank on which the draft was drawn for the collecting bank's indebtedness to it. 150 **Va**423, 143**SE**697.

627–81 1/11–New. Where a bank received a sight draft for collection, with a bill of lading, and took the drawee's check in payment of the draft, charging the drawee's account, the drawer of the draft occupied position of mere general creditor as to the proceeds of the check, and had no right to priority on the bank's insolvency. 28**F(2d)**42.

627–81 1/12–New. Plaintiff, who shipped peanuts to a dealer and forwarded to a bank a draft therefor with a bill of lading attached, is entitled to a decree for the amount of its claim, without interest, against the bank's receiver and lien. 28**F(2d)**672.

627–81 1/13–New. A bank, forwarding checks to a drawee bank for payment, was not entitled to preference therefor, on the drawee bank's insolvency, by the fact that the bank was credited on its books, and the drawers charged, with the amount of the checks. 28**F(2d)**40.

627–81 1/14–New. The fact that a bank holding a draft for collection failed to debit the drawee's account on taking the drawee's check did not have the effect of augmenting the assets of the bank coming into the hands of the receiver of such bank so as to entitle the drawer of the draft to priority. 28 **F(2d)**42.

627–81 1/15–New. A bank forwarding a check to a drawee bank for collection, is not entitled to preference on the drawee bank's insolvency, because of the receiver's collection of the overdraft from the drawer, where the drawer's account was sufficient to meet the check at the time it was charged, and the overdraft was in connection with subsequent transactions. 28**F(2d)**40

627–81 1/16–New. A collecting bank's acceptance of a check of a correspondent bank in payment will preclude a depositor from making a preferential claim against the insolvent correspondent bank. 149**SC**363, 147**SE**312.

627–81 1/17–New. A bank with which a draft was deposited and which forwarded it to another bank therein named was not liable upon such last named bank closing its doors. **TexCivA** 118**SW(2d)** 644.

627–81 1/18–New. Where a correspondent bank has charged checks sent by another bank for collection against the drawers' accounts, the sending bank is entitled to be subrogated to the rights of the drawers to the amount of the checks. 207 **Iowa**1254, 219**NW**496.

627–81 1/19–New. Funds received by a collecting bank as agent of the sender of a collection item are impressed with a trust in favor of the owner of such item, although the collection was made by check drawn on the collecting bank or by charging the drawer's account. 33 **NM**498, 270**P**792.

627–81 1/20–New. Where a bank, acting as collecting agent only, accepts in payment of a check, held by it for collection, checks on itself drawn by its depositors, which are good and are debited to their accounts, it stands in the same position as if it had received payment in cash. 178**Minn**64, 225**NW**916.

627–81 1/21–New. As between the negligence of a depositor who held a check several days before depositing it and that of a corresponding bank which accepted a draft in payment, which later was worthless, the act of the bank was the intervening cause of the loss. 129 **Ken**38, 281**P**899.

627–81 1/22–New. Where bank receiving depositor's check for collection charges it against his account and sends cashier's check to forwarding bank, amount collected is held in trust for forwarding bank. **WVa** 153**SE**145.

627–81 1/23–New. Where bank placed proceeds of check to depositor's credit contrary to instruction, depositor has lien on bank's assets in liquidation. **GaA** 155**SE**[illegible].

627–82 206 **Iowa**1010, 221**NW**547, 65 **ALR**1145; 74**Mont**104, 239**P**773; 54**ND** 363, 209**NW**792, 55**ALR**1162; 124 **Okl** 247, 255**P**696; 142**SC**199, 140**SE**478. See also 54**SD**136, 222**NW**694.

627–84 196**NC**730, 147**SE**5.

628–87 [e] **Bank has no right to receive other than United States money on deposit,** deposit in foreign money being against public policy. 128**Misc**23, 217 **NYS**833.

628–89 132**SC**158, 128**SE**872, 875 [quot CJperCothran,J].

628–90½–New. As long as a bank is solvent as defined by law, the officers and directors are authorized to receive deposits and permit the bank to receive them. 194**NC**310, 139**SE**449.

628–91 96**Fla**181, 117**S**789; 75**Mont**173, 243**P**569; 36**Wyo** 361, 255**P**593. 53**ALR** 554.

628–92 232 **IIIA**456; 220**MoA**165, 281 **SW**130, 131 [citCJ]; **MoA** 300**SW**529; 120 **Okl** 194, 195 [citCJ], 250**P**1018. [b] **"Depositor"** is one who delivers to, or leaves with, a bank money subject to his order, either upon time deposit or subject to check. 498**D**658, 207**NW**979.

628–93 120**Kan**387, 243**P**1026, 1028 [citCJ].

628–94 5**F(2d)**529; 30**F(2d)**52; 39**F (2d)**14; **Ariz** 292**P**1025; 96**Fla**834, 119 **S**140; **Fla** 129**S**328; 232 **IIIA**456; 338 **Ill** 134, 170**NE**236; **IndA** 172**NE**549; 203 **Iowa**174, 210**NW**747; 205 **Iowa**872, 219**NW**62; 120**Kan**387, 243**P**1026, 1028 [citCJ]; 125**Me**150, 131**A**863; 150**Md** 687, 133**A**847; 169**Minn**173, 210**NW**891; 174**Minn**500, 219**NW**863; **MoA** 300**SW** 529; 222**MoA**990, 6**SW(2d)**655; **MoA** 278**SW(2d)**1063 (deposit in name of city of money obtained on bond of treasurer failing to account); 75**Mont**173, 243**P** 569; 114**Nebr**378, 207**NW**666; 127**Misc**

132, 215NYS222; 128Misc123, 217NYS 833; 227AppDiv283, 237NYS577; 194 NC310, 139SE449; 197NC526, 150SE 34; 114 OhSt241, 151NE373, 375 [cit CJ]; 110 Okl 39, 235P1104; 150Va423, 143SE697; 200Wis175, 227NW866; 200 Wis200, 227NW945. [a] 203 Iowa174, 210NW747. [c] **Money deposited subject to check** becomes property of bank. 125Me150, 131A863 (relation of debtor-creditor created). [d] **Deposit in dollars to open account in kronen** has been held general deposit. 128Misc123, 217NYS 833. [e] **General deposit is deposit to credit of depositor** to be drawn upon in usual course of banking business. 338 Ill 179, 170NE205.

630–95 13F(2d)829; 169Minn173, 210 NW891; 36Wyo 361, 255P593, 53ALR 554. See also 205 Iowa888, 219NW53.

630–96 96Fla247, 117S900, 65ALR1398 (payable on demand); 220MoA165, 281 SW130, 131 [citCJ].

630–98 9F(2d)966; 96Fla181, 117S789; 41 Ida432, 242P297, 310 [citCJ]; 338 Ill 179, 170NE205; 338 Ill 134, 170NE236 (whenever bank becomes trustee deposit is "special"); 202 Iowa859, 211 NW532, 51ALR910; 205 Iowa872, 219 NW62, 65 [citCJ]; 221Ky55, 297SW938; 169Minn173, 210NW891; 314Mo 585, 285 SW97, 47ALR783; 220MoA1256, 290SW 100 (trust relation); MoA 300SW529; 74Mont152, 240P812; 75Mont173, 243P 569; 116Nebr510, 218NW389; 252NY 430, 169NE635; 120 Okl 194, 195 [cit CJ], 250P1018; 283Pa212, 129A56. [b] (1) 202 Iowa887, 211NW529. (3) That bonds deposited were carried as part of bank's assets and liabilities is immaterial. 202 Iowa887, 211NW529. (4) Only things within lines of regular banking business may become subjects of special deposits. 54ND858, 211NW810, 50 ALR243. (5) Deposit of money in escrow pending delivery of abstract showing good title is not special deposit. 9 F(2d)966. [d] **Bank is not authorized to sell and replace** in kind or cash bonds deposited to be returned on fulfillment of condition. 232Ky445, 23SW(2d)926.

630–98½–New. Pledging as security a bond deposited under agreement for its return to the depositor on his order was wrongful. 28F(2d)37.

630–99 41 Ida432, 242P297, 310 [cit CJ]; 241 IllA328; 202 Iowa859, 211NW 532, 51ALR910; 227Ky179, 12SW(2d) 312 (bank liable for sale of bonds and use of proceeds); 314Mo 585, 285SW97, 47ALR783; 320Mo 623, 8SW(2d)858 (duty of reasonable effort to preserve); 222AppDiv645, 227NYS378. But see Wis 221NW253. [a] **Bank receiving bonds of customer for safe-keeping** becomes bailee thereof. 203 Iowa401, 212 NW694, 51ALR900.

630–1 5F(2d)529; 9F(2d)966; 39F(2d) 14; 31Ariz478, 254P485; 41 Ida432, 242 P297, 310 [citCJ]; 241 IllA328; 202 Iowa859, 211NW532, 51ALR910; 206 Iowa675, 220NW113 (government bonds); 221Ky55, 297SW938; 221Ky 55, 297SW938, 939 [citCJ]; 227Ky179, 12SW(2d)312; 125Me150, 131A863; 169 Minn89, 210NW865; 169Minn173, 210 NW891; 314Mo 585, 285SW97, 47ALR 783; 222MoA307, 297SW129 (special deposit or special account); 222AppDiv 645, 227NYS378; 283Pa212, 129A56; 36Wyo 361, 255P593, 53ALR554. See 96 Fla181, 117S789. [d] **Unauthorized pledge by bank** does not authorize pledgee to exact payment of value before surrender to owner. 90CalA83, 265P 835.

630–2 120 Okl 194, 250P1018.

630–2½–New. Bank accepting a special deposit is chargeable as a trustee. 247 NY52, 159NE720.

630–2⅔–New. Checks drawn on special deposits amount to equitable assignments of so much of such deposits as is necessary to pay them. 168Ga876, 149 SE213.

630–2¾–New. Where deposit is special, relationship between bank and depositor is trust relationship. 39F(2d)14.

630–3 13F(2d)829, 832 [citCJ]. See also 220MoA1256, 290SW100. [c] 168 Ga876, 149SE213. Banks and Banking § 153. Deposits in bank to pay checks for cotton held "special deposits"; checks on special deposits constituted equitable assignments pro tanto of deposits; buyers of cotton from bank to which cotton buyer pledged planters' warehouse receipts held in no position to enforce payment of checks as equitable assignments of cotton buyers' special deposits; purchasers of cotton from bank to which cotton buyer pledged planters' warehouse receipts held entitled to maintain equitable suit against planters' bank and cotton buyer to have rights determined (Civ. Code 1910, § 5821).

When under the above arrangement the cotton buyer made deposits in the bank, the same being expressly made for the purpose of payment of his checks given in payment for cotton bought by him from planters and merchants, such deposits were special deposits; and checks drawn on such deposits by him for such purposes amounted to an equitable assignment of so much of these deposits as was necessary to pay them.

(a) But, as the plaintiffs in this suit have not by payment or otherwise become the owners of these checks, they are not in a position to enforce their payment upon the ground that they were equitable assignments of the deposits made by the cotton buyer. The right to proceed in the present action depends upon the principles announced above.

(b) When in these circumstances the planters bring suits in trover for the recovery of their cotton sold by the bank to third parties, and succeed in such suits, the bank would be liable over to such purchasers for the value of the cotton so sold by the bank to them.

(c) When the planters brought suits in the city court of Newman to recover their cotton, the defendants therein could vouch the bank in to defend them; but this remedy at law would not afford to the defendants a full, complete, and adequate remedy, as they would be thus subjected to the defenses of the various suits, and could not set up in that court the trust in their favor dealt with above. 202 Iowa887, 211NW 529; 202 Iowa859, 211NW532, 51ALR 910. [d] 13F(2d)829; 39F(2d)14 (bondholders' assessments deposited to retire notes at maturity); 338 Ill 179, 170NE 205 (description of fiduciary character of depositor); 338 Ill 134, 170NE236 (affixing indication of depositor's fiduciary character); 204 Iowa1190, 216NW 723; 205 Iowa171, 217NW831; 205 Iowa 888, 219NW53; 169Minn173, 210NW 891; 177Minn51, 224NW258; 220 MoA1256, 290SW100 (deposit to credit of beneficiary fund of insurance corporation for purpose of obtaining charter); MoA 300SW529; 75Mont 173, 243P569; 75Mont184, 243P573; Or 290P236; 36Wyo 361, 255P593, 53ALR 554. [f] **Agreement for interest.**–75Mont 173, 243P569. [g] **Custom held to make deposit general.**–125Me150, 131A863 (proceeds of draft collected). [h] **General deposit by fiduciary** with bank's knowledge does not make deposit "special." 338 Ill 179, 170NE205. [i] **Relation of depositor to third party** does not control but whether trust exists between bank and depositor. 338 Ill 134, 170NE236.

631–4 13F(2d)829; 30Ariz431, 247P 1097; 125Me150, 131A863 (deposit general in absence of agreement); 169Minn 173, 210NW891, 892 [citCJ]; 128Misc 123, 217NYS833; 110 Okl 39, 235P1104; 283Pa212, 129A56 (mere use of word "special" after depositor's name did not make deposit "a special deposit or a special account"). See also 116Nebr456, 218NW92. [a] (1) 205 Iowa872, 219 NW62 (presumed general). (2) Deposit is presumed general when made in ordinary course of business. 13F(2d)829. (3) All deposits are presumed to be general deposits, in absence of proof to contrary. 220MoA1256, 290SW100. (4) Absent contrary agreement, deposit is presumed general. 338 Ill 179, 170NE 205. [b] 13F(2d)829; 205 Iowa872, 219 NW62; 220MoA1256, 290SW100; MoA 300SW529. [d] 13F(2d)829. [e] 13F (2d)829; 30Ariz431, 247P1097.

631–4½–New. The understanding of the bank and its officers will not make a deposit a special one without the depositor's consent. 30Ariz431, 247P1097.

631–4¾–New. Deposit of current money is assumed to be general unless contra is directly stated. 125Me150, 131A863 (as implied).

631–4¾–New. Deposit is not made special by the fact that checks must be countersigned by a third party. MoA 295SW100.

631–4⅞–New. Where bonds are deposited with the agreement that the bank might treat them as its own property, the relation of debtor and creditor, and not that of trustee and beneficiary, arises between the bank and the depositor. 28F(2d)36.

631–4⅞–New. Whether a deposit is special or general depends upon the mutual intention and understanding of the parties. TexCivA 19SW(2d)789.

631–5 14F(2d)116; 247NY52, 159NE 720 (special deposit of money may exist where duty is to hold not identical bills but an equivalent sum to be kept intact). [a] 75Mont173, 243P569.

631–6½–New. Deposit without consideration. A bank is not liable for conversion of securities kept without consideration for the tortious act of an officer. 284Pa260, 131A181 (unless directors acquiesced in deposit or retained officer knowing of his dishonesty).

632–7 13F(2d)829, 832[citCJ]; 338 Ill 179, 170NE205; 203 Iowa546, 213NW 245, 246 [citCJ]; 169Minn89, 210NW 865; 169Minn173, 210NW891; 45 Okl ACR404, 407 [quotCJ]; TexCivA 14SW (2d)114. [a] 205 Iowa872, 219NW62, 65 [citCJ]. [g] **Agreement of bank,** to hold money deposited in escrow, is held not ultra vires. 173Ark368, 292SW126. [h] **Intent not to create debtor and creditor relation may be shown** by circumstances. 127Misc132, 215NYS222. [i] **Deposit of checks for safe-keeping.**–48 Ida57, 279P414 (bank returning checks is absolved from further liability).

632–8 96Fla181, 117S789; 45 Ida451, 262P1057 (deposit to pay third person); 208 Iowa322, 223NW164; 169Minn89, 210NW865; 45 OklACR404, 407 [quot CJ].

632–9 13F(2d)829, 832 [citCJ]; 46 Ida 481, 269P86, 88 [citCJperRudge,J, dis op], 59ALR443; 169Minn89, 210NW865; 169Minn173, 210NW891; 117 Okl 167, 245P550; 45 OklACR404, 407 [quotCJ]; 52SD342, 217NW512; TexCivA 288SW 870, 873 [citCJ]. [a] 203 Iowa546, 213 NW245. See also 206 Iowa957, 221NW 543.

632–10 13F(2d)829, 832 [citCJ]; 169 Minn89, 210NW865; 169Minn173, 210 NW891; 117 Okl 167, 245P550; 286Pa 483, 133A793, 794 [citCJ]; 6PaDist&Co 286, 287 [quotCJ]; 8PaDist&Co 321, 323 [citCJ]; 52SD342, 217NW512; Tex CivA 28W(2d)876 (for safekeeping); TexCivA 18SW(2d)200. [a] (1) 203 Iowa546, 213NW245. (3) Legal effect of deposit for investment is to be determined from facts. 203 Iowa546, 213NW 245. [h] **Mere fact that corporate depositor has several accounts** in bank does not show that they are special deposits for specific purposes. 13F(2d) 829.

633–11 6PaDist&Co 286, 288 [quotCJ].

633–14½–New. Where a bank is instructed by a depositor to set aside a fund to be paid to another upon delivery of goods ordered, and so advises the seller, it is bound to hold such deposit in accordance with the agreement, and has no right to allow the depositor to withdraw the funds. 191NC500, 132SE468.

633–14½–New. Deposit does not become sale of exchange by the bank's acts when the parties did not so intend. Tex CivA 284SW308.

633–14¾–New. If money deposited by a municipal officer is intended to be an earmarked fund for a designated municipal use, the bank should be notified. 293Pa364, 143A10.

633–14½–New. Knowledge that a public fund deposited in a bank is intended for a specific purpose is not chargeable to the bank in the absence of specific separation or appropriation thereof. 293Pa364, 143A10.

633–14⅞–New. That the statute sets forth the purposes of taxes does not charge the bank with notice that a deposit of public funds is intended for a

particular use. 293Pa364, 143A10.

633-15 165Ga245, 140SE376; 338Ill 134, 170NE236; 204Iowa378, 216NW1; 127Me65, 141A102; 220MoA1256, 290SW100; 220MoA1081, 279SW746, 748 [citCJ]; 75Mont173, 243P569; 75Mont 184, 243P573; 110Okl 39, 235P1104; 36Wyo 361, 255P593, 594 [citCJ], 53ALR554; 37Wyo 4, 257P345, 53ALR560. See also 293Pa364, 143A10. [a] (2) Deposit by treasurer of drainage district with knowledge of bank but no understanding of particular purpose to meet certain indebtedness is not trust fund. 220MoA1081, 279SW746. [c] **Trust relation** which will impress upon deposit character of special deposit is not relation existing between depositor of trust moneys and his cestui que trust, but that existing between bank and depositor. 75Mont173, 243P569. [d] **Bank's knowledge** has been held not to render it trustee ex maleficio. 165Ga 245, 140SE376.

633-16 29Ariz36, 243P919; 96Fla834, 119S140; 138Okl 19, 280P273; TexCivA 295SW665; 136Wash256, 239P393. Contra 165Ga245, 140SE376. [a] (3) Bank knowingly accepting guardian's deposit of ward's funds as unsecured deposit holds money in trust. Ariz 287 P292. [d] **Where bank actively participates** in deposit of trust funds unlawfully made, it becomes involuntary trustee and may be made to place trust estate in statu quo. 75Mont173, 243P 569. [e] **In absence of notice to bank** of trial character, deposit is general. 9F(2d)650 (as respects set-off). [f] **Notice by bank of trust character of deposit is immaterial** where no credit is extended on account of deposit. 138Okl 19, 280P273. [g] **Deposit of trust funds in trustee's name** does not deprive funds of trust character. 179Minn191, 229NW102.

633-16½-New. Trust company held not liable for executor's withdrawals where delay in acting to vacate probate of forged will was unexplained, the burden not being on the trust company to explain such matters. 213AppDiv345, 210NYS613.

633-16⅓-New. On the drawing of a draft by a bank for depositor, such funds become the debt of the bank and lose their special character. 203Iowa 343, 212NW744.

633-16¼-New. Bank must ascertain at its peril whether the president of a corporation had authority to indorse a check drawn to the order of the corporation and transfer by such indorsement proceeds of the check to the president's personal account. 221AppDiv 595, 224NYS555.

633-16⅕-New. A bank, receiving checks payable to a bankrupt from one operating a bucket shop under the bankrupt's name for deposit, is held not liable for diversion thereof. 219AppDiv597, 220NYS480.

633-16⅙-New. A bank, crediting, without benefit to itself, the personal account of a fiduciary with checks drawn by him without the bank's notice of his fraud is not liable for misappropriation of the trust deposit. 151Va1040, 145SE725.

633-16⅐-New. A bank, paying unauthorized notes, is not liable where it had no knowledge of infirmity in the notes and derived no benefit therefrom. 35F(2d)6.

633-16⅛-New. In some jurisdictions bank receives property of cestui que trust in fiduciary character only and must keep it separate from general funds. Fla 129S328.

633-16⅑-New. A bank, not designated as township depositary, at its peril must know whether the trustee was acting within his authority, and is bound to take notice of limitations on the powers of the trustee, in cashing warrants for him. IndA 168NE488.

633-16⅒-New. Bank giving county treasurer check payable to him officially for county funds deposited by him to his official credit is not liable for having aided his defalcation. 144Okl 180, 289P749.

633-16 1/11-New. A bank, knowing, or having reasonable means to know, that the trustee desired to appropriate proceeds of warrants to his own personal use, is liable to the township for resulting loss. IndA 168NE488.

634-17 But see 14PaDist&Co 363.

634-19 220MoA1081, 279SW746.

634-20 29Ariz36, 243P919. [a] **Effect of check against fund.**-29Ariz36, 243P919.

634-20½-New. Public funds received by a bank with knowledge that the deposit or part thereof is in violation of an order of the board of supervisors and of the statute are impressed with trust ex maleficio, recoverable by beneficial owners as against general creditors of the bank. 220MoA1081, 279SW746.

634-21½-New. A bank may be liable to the school district for misappropriation where the bank received from another bank money for the use of the treasurer of the school district where such money came from sale of district bonds issued to build schoolhouse. 121Kan163, 246P973 (where bank deposited the money to individual credit of such treasurer who in turn misappropriated the money with bank's knowledge and consent).

634-21⅓-New. A bank, charging to a sheriff's tax account checks drawn against his personal account, with full knowledge that he was withdrawing public money in payment of his personal debts, is liable for the amount of such checks. 28F(2d)676.

634-21¼-New. A surety who pays a county trustee's shortage may sue a bank for funds traced to its possession or for wrongfully aiding in misappropriation without seeking to surcharge settlements. 29F(2d)662 [certiorari den 49SCt345(4thcase)].

634-21⅕-New. In the absence of a bond to the county, deposits by the county treasurer are without authority and the bank or its receiver acquires no title to the deposits. Iowa 228NW32.

634-21⅙-New. Deposit of school funds by school district treasurer in certain bank is deposit of school district creating relationship of debtor and creditor between bank and district. Iowa 230NW418.

634-24 115Nebr444, 216NW302; TexCivA 276SW951. [b] TexCivA 293SW 935. [c] **Evidence held sufficient** to show draft deposited for collection only. TexCivA 276SW951.

635-26 115Nebr444, 216NW302.

635-27 5F(2d)143 (construing law of New York); 10F(2d)926; 15F(2d)913; 29F(2d)430; 171Ark1187, 287SW369; 172Ark1177, 289SW472; 69CalA370, 231P380; 40GaA791, 151SE546; 201Iowa 129, 206NW672; 203Iowa701, 213NW 398 (dictum); 205Iowa388, 219NW53; 125Me150, 131A863; 151Md514, 135A 383, 49ALR1366; 252Mass366, 148NE 220; 164Minn484, 206NW394 (deposit of check "to the credit of" designated bank for account of one of its depositors); MoA 291SW170; 74Mont491, 241P626; 127Misc132, 215NYS222; 226AppDiv225, 235NYS197; ND 231NW 876; 131Or123, 282P99; 135SC339, 133SE910; TexCivA 276SW951; TexCivA 282SW888, 890 [citCJ]; TexCivA 28W(2d)876; TexCivA 8SW(2d)683; 137Wash224, 242P29. See also 11PaDist&Co 178. [a] See also 218Ala491, 119S 1. [e] 16F(2d)159. [f] (2) Where bank payee of draft credited drawer's creditor with amount on its books, treating it as cash item, and as such forwarded it to another bank for collection, but charged it back to creditor immediately upon being notified that drawee had refused to accept draft, purchase of draft by bank was rescinded and drawer was then owner of draft constituting debt against drawee, and bank was not entitled to set up claim as against garnishment plaintiff. 27Ariz 539, 234P820. [h] **That drawer of draft on his consignee deposited with bank with bill of lading attached later requested bank to make reduction** on the draft in recognition of right of the consignee-drawee to such reduction and bank complied does not affect bank's ownership of draft and proceeds. TexCivA 276SW951. [i] **Proceeds of draft cannot be reached by garnishment** on indebtedness owing by depositor to third person. 201Iowa129, 206NW672. [j] **Bank is conclusively presumed to have become unqualified owner of draft** payable or unrestrictedly indorsed to it where depositor requests that amount be credited to his checking account and bank complied with request. 201Iowa 129, 206NW672. [k] **Entry of deposit of checks,** made after banking hours, and checking by depositor of amount in excess of balance, if deposit was not treated as cash, showed that parties regarded deposit as cash. 5F(2d)143. [l] **Title to checks** deposited after banking hours vested in bank on day of receipt. 5F(2d)143. [m] **Check not indicating by indorsement that it was for collection** prima facie passes title to bank subject to showing of other intention of parties. TexCivA 276SW951. [n] **Purchase of drafts or taking for collection not conclusively shown** by acceptance, crediting amount and forwarding for collection. TexCivA 293SW 935. [o] **In Iowa.**-204Iowa1190, 216NW 723 (evidence insufficient to overcome presumption). [p] **When check on another bank is deposited by payee without special agreement,** presumption will be indulged that it was deposited for collection only and that title remained in depositor. 80Mont374, 260P734. [q] **Whether title passes to bank** depends on intention of parties which may be determined from course of conduct. 29F(2d)430. [r] **Where credit is made provisional under agreement,** unrestricted indorsement on check deposited does not necessarily pass title. 226AppDiv 225, 235NYS197. [s] **In Georgia.**-GaA 155SE62.

635-28 5F(2d)143; 10F(2d)926; 26F(2d)36; 26F(2d)411; 40GaA791, 151SE 546; GaA 155SE62; 48Ida57, 279P414; 125Me150, 131A863; 151Md514, 135A 383, 49ALR1366; MoA 296SW425; 74Mont491, 241P626; 116Nebr331, 217NW 91, 58ALR758; 34NM50, 277P31 (though bank fails to credit account before insolvency); 127Misc132, 215NYS 222; 55ND946, 215NW779; TexCivA 28W(2d)876. But see MoA 27SW(2d) 492. [b] (1) 9LaA166, 119S372. (2) Where bank credits amount thereof to seller on its books, bank does not become owner of amount or proceeds. MoA 277SW958. [c] **Bank crediting customer's deposit account** with check must thereafter present check to drawee bank. 138SC381, 136SE637, 53ALR798.

635-28½-New. with added obligation to pay on demand, 10F(2d)926.

635-29 15F(2d)913; 16F(2d)159; 151Md514, 135A383, 49ALR1366; 220MoA 265, 286SW425; 55ND946, 215NW779; ND 231NW876; 137Wash224, 242P29. [d] **Provisional credit.**-165Minn417, 206NW725. [e] **Relation of bank to maker of check.**-148Wash106, 267P1058.

635-29½-New. But the rule does not apply to checks deposited as checks. TexCivA 276SW951.

635-30 203Iowa333, 210NW934, 212NW550; 115Nebr273, 212NW617; 127Misc132, 215NYS222. See also 244IllA 286. [h] **Immediate credit of check is evidence** of creation of debt, presupposing purchase of check. 10F(2d)935. [i] **As payment to, and redeposit by, depositor.**-127Misc132, 215NYS222. [j] **Receipt of check drawn on itself and crediting same to account of payee** creates debtor creditor relationship and closes transaction between bank and depositor. 127Misc132, 215NYS222. [k] **Crediting is equivalent to payment and redeposit of cash.**-91PaSuper207 (result not affected by financial condition of bank as shown on later settlement of affairs).

636-31 122Kan672, 253P574; 6LaA 721; 115Nebr273, 212NW617; 192Wis 28, 211NW931.

636-32 115Nebr273, 212NW617; 127Misc132, 215NYS222. See also 3LaA 547. But see 172Ark624, 290SW48; 213Ky34, 280SW461.

636-33 106WVa458, 146SE393.

636-36½-New. But deposit of a check or draft for collection does not pass ti-

tle to the bank, 125Me150, 131A863 (acts as agent).

636–36⅓–New. and the relation is that of debtor or creditor. 125Me150, 131A863.

636–36¼–New. When proceeds of a draft collected are to be credited to depositor's general account, title of the proceeds passes to the bank. 125Me150, 131A863.

636–36½–New. Intent not to create debtor creditor relationship. 127Misc132, 215NYS222.

636–36⅔–New. Depositee bank is not liable to father whose son misappropriated funds under power, made deposits, and withdrew such funds. 274US473, 47SCt661, 71Led1158, 57ALR921.

636–36½–New. Retention of a check, forwarded to a bank for collection, for over twenty-four hours, does not render it liable as acceptor. TexCommnA 299SW856.

636–36⅔–New. Deposit of check indorsed in blank does not create debtor and creditor relation unless so intended where deposit book provides checks are received for collection only. GaA 155SE62.

637–43 But see 130Misc66, 224NYS102.

637–43½–New. Where a depositor has been given credit in his pass-book for the deposit of checks in the bank on which they were drawn, the credit is fixed and irrevocable in favor of the depositor. 30Ariz431, 247P1097.

637–43⅓–New. Where payee deposits a check, when he knows or should know the custom of accepting checks conditionally, credit may be charged back where the drawer had not sufficient funds to pay the check. 108 Okl 89, 234P574.

637–53½–New. Right to deposit is not forfeited because the bank negotiated therefor away from its building. 69 Utah557, 257P658.

637–54 [a] **Rule that banks close at 3 P. M.** does not prevent receipt or payment after that hour or affect relations of parties though transaction does not appear upon books until next day. 5F(2d)143.

638–57 321Mo815, 12SW(2d)755 (bank must keep account of money received). See also 202Iowa265, 209NW422.

638–61 [c] 213Ky34, 280SW461. [d] **Depositor is under no obligation** to call for his pass book to determine whether a wrongful payment has been made. 202 Iowa594, 210NW815.

638–62 148Va381, 138SE477; 152Va572, 147SE234.

638–63 97CalA643, 275P998; 148Va381, 138SE477.

638–64 MoA 14SW(2d)23; 148Va381, 138SE477.

639–65 167La153, 118S871.

639–67 TexCivA 286SW901, 903 [cit CJ].

639–70½–New. False entries by a bank president indicating withdrawals of money deposited by him as executor, which were in reality diverted for the bank's benefit, do not terminate the relationship of depositor and banker. 118 Nebr495, 225NW669.

639–71 NJ 146A34(2dcase).

639–72 [a] **Bank clerk** whose duty is to enter deposit is not agent of depositor. 5F(2d)143.

639–73 5F(2d)143

639–74 [a] **Issuance of deposit slip** creates relation of debtor and creditor, and not entry on books by bank's agent. 5F(2d)143. [b] **Practical construction by parties** before controversy may be considered in construing deposit slips. 5F(2d)143.

639–78 170Ark939, 281SW905. See also 117 Okl 142, 245P626. [c] 117 Okl 142, 245P626. [g] **Deposit held by depositor as trustee** becomes fund of bank in absence of bank's knowledge of its true ownership. 221MoA329, 273SW772.

640–79 126Misc462, 213NYS678 (apart from remedy allowed by Banking Law); TexCivA 22SW(2d)520.

640–81 TexCivA 22SW(2d)520.

640–83 149Miss808, 115S888. [a] **Real owner of bank deposit who did not know of assignment of her** deposit to bank by nominal depositor is not estopped to assert her title against assignee bank. 233 IllA428.

640–87½–New. An account is not that of a corporation as a matter of law where it stands in name of the individual, "President of" such corporation. IndA 151NE336.

640–87⅓–New. It has been held that a money deposit is the property of the bank, depositor having right of ownership in intangible chose in action. OhA 172NE674.

640–88 232 IllA20; 242 IllA390 (power to terminate); 217AppDiv229, 216NYS673. [a] (2) Statute affects deposits made before and after its passage. 217AppDiv229, 216NYS673. [c] See also 223AppDiv186, 228NYS63. [i] 220MoA1165, 297SW415; 116Nebr686, 218NW739. [j] 220MoA1165, 297SW415. [k] **Statute relating to joint ownership of deposit** is not applicable where deposit is made substantially in statutory form. 126Misc155, 213NYS230. [l] **Joint deposit in statutory form** fixes respective rights of depositors, if unexplained by other evidence. 126Misc155, 213NYS230. [m] **Proof of actual agreement** may rebut joint tenancy of deposit made in statutory form. 126Misc155, 213NYS230 (as between parties). [n] **In New York.**–126Misc155, 213NYS230. [o] **Ownership of joint deposit not opened in statutory form** is determined under common-law principles. 126Misc155, 213NYS230. [p] **Agreement for joint deposit construed** not to authorize either party to draw any sum not deposited to credit of account, nor to authorize bank to permit either party to overdraw account and charge overdraft to other party, nor to constitute guaranty of either party to pay overdraft. 69CalA370, 231P380. [q] **On death of husband,** wife succeeds to deposit where made jointly, "either or survivor to draw." 217AppDiv229, 216NYS673. [r] **Recitals in certificate of deposit.**–83Colo 216, 263P409. [s] **Certificate of deposit payable to order of depositor or her daughter** may be treated as gift to daughter where mother dies without change in certificate and contrary intention is not shown. 205 Iowa237, 216NW12. [t] **Purpose of statutes** relating to joint deposits is to protect depositary and not to pass title to deposit. 27 OhA284, 161NE222. [u] **Presumption of intent to make immediate** gift is raised by statute relative to joint deposits, where deposit is in statutory form. 220MoA1165, 297SW415. [v] **Husband and wife, signing agreement, at time of depositing money** in joint bank account, that all deposits therein may be paid to either depositor on receipt of either, are bound thereby as between themselves and between them and bank. 333 Ill 442, 164NE836.

640–89 CalA 290P637; 83Colo 518, 266P1110; 232 IllA20; 217AppDiv229, 216NYS673; 86PaSuper322. [a] **Bank deposit changed to name of original depositor and another,** either or survivor to draw, is presumed to be under joint ownership with right of survivorship. 126Misc155, 213NYS230. [b] **Presumption of joint ownership** must be rebutted by adverse party. MoA 297SW415; 126Misc155, 213NYS230. [c] **Evidence held to show** intent to create joint tenancy with right of survivorship. 126Misc155, 213NYS230. [d] **Joint deposit, payable only to husband,** does not pass to wife by survivorship. 232 IllA20. [e] **Where such deposit is made,** neither surviving depositor nor bank can show deposit was created by mistake of one depositor. CalA 290P637.

640–90 See also 12LaA15, 123S430.

640–90½–New. Depositor's direction to transfer a savings account to a joint account of himself and another is sufficient to consummate transfer to parties as joint tenants. 129Misc780, 223NYS588.

640–90¼–New. The words "this book is payable to" decedent's wife, also decedent, are substantial compliance with the statute. 129Misc780, 223NYS588.

640–90¼–New. Evidence held sufficient to show the creation of joint tenancy in a bank account. 129Misc780, 223NYS588.

641–91 See also 8PaDist&Co727.

641–91½–New. Where a bank receives the proceeds of sale of a wheat crop knowing that they belong one half to each of two persons, and agrees with one of them to deposit his share to his account but pays to the other party more than his share, it is liable for the portion of the share so erroneously paid as for money had and received. 115 Or456, 239P98.

641–91⅓–New. In such case the bank's refusal to pay to the owner with whom it made such agreement until the other owner had been consulted is not notice that the bank would not make the credit as agreed so as to relieve it from liability. 115 Or456, 239P98.

641–94½–New. Where a partner indorses the firm name on checks payable to the firm and deposits them to the credit of his personal account, the bank is chargeable for wrongful appropriation. 247Mich10, 225NW628.

641–95 170Ark597, 280SW650; 102 WVa128, 135SE257.

641–96 130Misc99, 223NYS508; 153SC14, 149SE262.

641–97½–New. Under a letter of deposit covering a deposit in defendant bank of a specified sum "in accordance instructions Foreign Section Ministry Finance," to be applied at the "disposal" of a certain foreign bank "by order of" a named individual, it was held that the deposit belonged to an individual named. 248NY365, 162NE284.

641–99 165Ga245, 140SE376; 160La425, 107S292; TexCivA 298SW318; 151Va1040, 145SE725. [a] 127Misc132, 215NYS222; 151Wash55, 275P62, 65ALR794. Contra 30Ariz581, 249P755; 141Miss66, 105S854; 110 Okl 39, 235P1104. [c] 145Va356, 133SE568. [d] **Bank cannot change the relation** without depositor's consent. TexCivA 284SW308. [e] **Deposit of check** on bank creates relation of debtor and creditor. 145Va356, 133SE568. [f] **When debtor creditor relationship arises.**–145Va356, 133SE568. [g] **"Loan" and "deposit" distinguished.**–96Fla247, 117S900, 65ALR1398. [h] **Contract with corporation depositor** is governed by depositor's rules regulating disbursement of deposit after copy thereof delivered to bank. 119 Oh439, 164NE530 (bank's obligation is not voidable by forming new corporation). [i] **Necessity of contract.**–117Nebr358, 220NW593.

641–99½–New. and relation is that of debtor and creditor, 130Misc66, 224NYS102.

641–1 165Ga245, 140SE376, 378 [cit CJ]; 206 Iowa252, 220NW318; 80Mont174, 259P1060; 7PaDist&Co143; 192 Wis28, 211NW931; 36Wyo361, 255P593, 53ALR554. [a] **Paper indorsed in blank** and immediately credited to depositor is property of bank. 271US489, 46SCt554, 70Led1051.

642–2 23F(2d)803; 27F(2d)930 (debtor and creditor); 29F(2d)411; 32F(2d)166; 37F(2d)715; 218Ala339, 118S588; 218Ala549, 119S678; 23AlaA190, 122S701(2dcase) [certiorari den 219Ala435, 122S702(1stcase)]; 170Ark597, 280SW650; 170Ark939, 281SW905; 172Ark538, 289SW471; 78CalA362, 248P947; 79CalA612, 250P585 (relationship between bank and general depositor is that of debtor and creditor); 98CalA523, 277P354; 110Conn397, 148A374; 169Ga53, 149SE575 (relationship of debtor and creditor); 169Ga846, 151SE803 (debtor creditor relation and not "deposit" created); 39GaA687, 148SE311(2dcase); GaA 155SE62; 338 Ill 134, 170NE236; 242 IllA579; 201 Iowa337, 207NW374 (relation of debtor and creditor rather than borrower and lender); 206 Iowa265, 217NW865; 205 Iowa872, 219NW62 (relationship one of debtor and creditor); 206 Iowa706, 219NW401; Iowa230NW418; 218Ky128, 290SW1028; 125Me150, 131A863; Mich 233NW185; 320Mo702, 8SW(2d)1057, 59ALR1026 (debtor and creditor); 320Mo 901, 9SW(2d)621, 59ALR1041; 221MoA329, 273

SW772; 72Mont270, 233P615; 74Mont 491, 241P626 (when credit extended); 77Mont134, 251P151; 80Mont174, 259P 1060; 116Nebr456, 218NW92 (becomes money of bank and depositor creditor); 105NJL206, 144A30; 34NM50, 277P31; 243NY45, 151NE460; 131Misc188, 226 NYS415; 138Misc10, 245NYS305 (bank as agent); 133Misc750, 233NYS126; 226 AppDiv225, 235NYS197; 189NC533, 127 SE540 (relation that of debtor and creditor); 192NC673, 135SE795; 193NC745, 138SE124; 194NC310, 139SE449; 197 NC253, 148SE253; 51ND399, 200NW 505, 37ALR1186 (relation of debtor and creditor merely); OhA 172NE674; 283 Pa212, 129A56; 158Tenn182, 11SW(2d) 673 (whether deposit is on demand or time); TexCivA 284SW694; TexCivA 295SW253; TexCivA 9SW(2d)410; Tex CivA 11SW(2d)217; 148Va381, 138SE 477; 150Va423, 143SE697; 150Va336, 143SE881; 36Wyo 361, 255P593, 53ALR 554. See also 164Minn484, 205NW447, 206NW394 (title of money, drafts, or other paper deposited held property of bank, which becomes debtor to depositor for amount, unless different understanding affirmatively appears). [b] **Deposit by trustee** becomes fund of bank in absence of knowledge of true ownership of deposit. 221MoA329, 273SW 772. [c] **Money placed on general deposit is property of bank.**–79CalA612, 250P585. [d] **Bank may go beyond debtor-creditor relation** and submit controversy over ownership of deposit to court. 131Misc188, 226NYS415. [e] **Relation of debtor and creditor.**–228Ky410, 15SW(2d)256; 151Va1040, 145SE725. [f] **Checks deposited in bank indorsed "for deposit only"** do not create debtor and creditor relation between indorser and correspondent bank till proceeds are collected and transmitted. 53SD496, 221NW95, 60ALR863. [g] **Depositors' relation to bank is not identical with that of ordinary creditors.**–TexCommnA 26SW(2d)1059. [h] **Relation of debtor and creditor** exists between bank and general depositor. 39F(2d)14. [i] **Termination of status as depositor** requires some act by bank at request of customer, prejudicing rights of former. 39F (2d)578.

642-2½-New. A depositor has no proprietary interest in a bank's records, and can claim at most, in a suit to enjoin production thereof, that information they contain shall not be disclosed for the purpose of inflicting injury on him. 27 F(2d)930.

642-4½-New. As affecting liability of a bank for wrongfully crediting a corporate check to the president's personal account, the law of the place where the check was transferred applies. 221App Div595, 224NYS555.

642-4½-New. That moneys of a bank may have been loaned contrary to law, or that liability therefor might be shifted on the directors individually, does not affect the duty of a bank to depositors to recover funds. 94CalA254, 271P 107.

642-5 242 IllA579; 201 Iowa1325, 207 NW781, 784 [citCJ]; 213Ky34, 280SW 461, 462 [citCJ]; 321Mo 815, 12SW(2d) 755; 74Mont491, 241P626, 630 [citCJ]; 251NY152, 167NE203 (bank's common-law liability may be limited with depositor's consent); 115 Okl 218, 242P 528, 529 [citCJ]; 120 Okl 194, 250P 1018; 130 Okl 23, 264P912.

642-5½-New. Payment of a deposit in foreign money is against public policy. 128Misc123, 217NYS833.

642-5½-New. A depositor who opened an account in kronen is entitled to return of the amount deposited in dollars. 128Misc123, 217NYS833.

642-5¼-New. A state banking corporation may secure a depositor by assigning a part of its assets. 192NC673, 135 SE795.

642-5½-New. An agreement by an insolvent bank depositor to leave an unstated percent of his deposit in the new bank for a stated period is not binding on the depositor. MoA 297SW975.

642-5⅙-New. Where a depositor consents to the use of a deposit as collateral for a loan to the bank, the rights of the parties depend on the later contract, whether the deposit was general or special being immaterial. MoA 3SW (2d)1043.

642-5½-New. In Florida the question as to the authority of a state banking institution to guarantee deposits of public funds by pledging collateral security is controlled by a legislatively established public policy. 96Fla247, 117S900, 65ALR1398.

642-5⅛-New. A depositor's leaving on deposit a sum over twenty thousand dollars has been held sufficient consideration to support a contract for the bank's delivery of thirty thousand dollars collateral security for such deposit. 147SC 103, 144SE841.

642-5½-New. Statutes requiring state officials to deposit state moneys in banks offering the best interest and security are a recognition of the authority of state banks to pledge collateral security to protect deposits of public money, and establish a public policy which should be given weight by the courts. 96Fla247, 117S900, 65ALR1398.

642-5 1/10-New. State banks may lawfully pledge securities to protect deposits of public funds. 96Fla247, 117S 900, 65ALR1398.

642-5 1/11-New. A collateral bond, delivered by a bank to a depositor pursuant to a contract wherein the depositor expressed willingness to make an additional deposit, has been held to have been given to secure the entire deposit. 147SC103, 144SE841.

642-6 213Ky34, 280SW461. [a] **Draft drawn on deposit does not transfer deposit,** and bank, without notice thereof, is not made liable because it pays deposit on another demand. 133Misc 201, 232NYS339.

643-9 TexCivA 298SW620. See also 152Md654, 137A378.

643-11½-New. The delivery of a check drawn against a special fund payable to one holding the equitable title passes the title to the fund. 9PaDist&Co 611.

643-17 320Mo 623, 8SW(2d)858; 197 Wis268, 221NW753.

643-18 203 Iowa897, 209NW432; Miss 111S436; 157Miss149, 127S265 (no liability in absence of negligence). See also 197Wis268, 221NW753. [c] (2) See also 121Kan193, 246P517. [f] (5) 200 Iowa40, 203NW569. (6) Bank liable for value of bond regardless of negligence in employing absconding cashier sole person in charge of bank who transacted all the business and ran bank as if he was owner. 121Kan193, 246P517 (evidence of negligence sufficient, assuming proof thereof necessary). (7) In such case bank is liable not because of cashier's crime of theft of bond, but because he failed in duty which as representative of bank he owed plaintiff. 121Kan193, 246P517. (8) Under same circumstances bank is liable for funds of depositor who gave cashier checks against it with which to purchase bonds for which he never received any return. 121Kan193, 246P 517. [g] **Evidence.**–200 Iowa40, 203NW 569. [h] **Relation** of bailor and bailee is created by special deposit. 283Pa212, 129A56. [i] **Withdrawal by depositor's agent.**–90CalA165, 265P500. [j] **Misapplication.**–ND 230NW18.

644-19 See also 8LaA514.

644-20½-New. A bank renting a safe deposit box must exercise the degree of care and diligence generally given by banks similarly situated. 287Pa398, 135A114.

644-20½-New. Recovery for conversion is precluded by consent of depositors to a bank taking over deposited securities. 320Mo 623, 8SW(2d)858.

644-21 52ND8, 201NW839, 843 [citCJ], 40ALR889; Alta [1928] 3DomLR157 (customer is entitled to credit for face value of note though bank attempted, but failed, to collect it, and though statute of limitations has run). [c] (1) 52 ND8, 201NW839. (2) 52ND8, 201NW 839. (3) 52ND8, 201NW839. (4) 52 ND8, 201NW839.

644-23 Fla 129S328.

644-24 242 IllA362; 203Ky770, 263SW 15; Mass 165NE119; 191MoA287, 177 SW1092; 223AppDiv585, 229NYS181; 115 Or456, 239P98, 101 [citCJ]; Tex CivA 22SW(2d)520. [a] (4) Description of payee of check as trustee, together with his indorsement as trustee, charges bank with notice that check constituted trust fund, though cestui que trust was not named. 179Minn197, 229 NW90. [i] But see 48 Ida100, 279P621; 129 Or663, 278P963, 64ALR1396. [j] **Memorandum on check, "Bal. % to Trustee,"** does not characterize check deposited as trust funds. 179Minn197, 229NW90. [k] **Bank not township depository** must take notice of statutory limitation of township trustee's powers where it cashes warrants for him. IndA 170NE346(2dcase).

645-25 173Ark197, 292SW140; 134 Okl 286, 273P269, 270 [citCJ]; 129 Or663, 278P963, 64ALR1396; TexCivA 295SW 665; TexCivA 16SW(2d)309. [g] **Bank is not required to ascertain** whether warrant had been drawn on school clerk as required by law, before honoring clerk's check on school district funds. 129 Or663, 278P963, 64ALR1396. [h] **Where, under express authority of school district, its funds are deposited in general deposit** by treasurer of district, bank is not legally chargeable for any withdrawals he might see fit to make. Iowa 226NW714.

645-26 167La153, 118S871; 179Minn 197, 229NW90; 179Minn423, 229NW 568; 134 Okl 286, 273P269, 270 [citCJ]; 115 Or456, 239P98, 101 [citCJ]; 129 Or 663, 278P963, 64ALR1396, TexCivA 295 SW665; 150Va336, 143S881. [a] **Use of principal's funds to pay agent's debt.**–Bank cannot knowingly permit agent to use principal's funds to pay agent's debt to it. 120 Or470, 247P151. [b] **Bank may not divert trust funds** from beneficiaries for private debts or otherwise. 334 Ill 494, 166NE123. [c] **Agent's deposit of principal's funds.**–134 Okl 286, 273P269, 270 [citCJ].

645-26½-New. or unless it was negligent in the performance of some duty imposed by law. 152Va572, 147SE234.

645-27 28F(2d)676; 48 Ida100, 279P 621; 334 Ill 494, 166NE123; 179Minn 197, 229NW90; 118Nebr495, 225NW 669; 134 Okl 286, 273P269, 270 [cit CJ]; 152Va572, 147SE234. [a] (2) Bank is liable if it receives and retains trust funds without notice or knowledge of their true character, unless it has so changed its position that it has acquired equities superior to rights of owner. 179Minn197, 229NW90. (3) Indorsements on checks deposited may charge bank with knowledge that checks are funds held as trustee of bankrupt estate. 179Minn197, 229NW90. [d] (2) Deposit of city funds by treasurer in own name does not charge bank with notice of conversion where it received no benefit. 173Ark197, 292SW140. (3) Bank was not liable where executor deposited checks drawn by him in defendant banks, which collected them and credited him with proceeds, which executor subsequently withdrew and misappropriated, though checks deposited were signed by executor as such. 150Va336, 143SE881. [e] **Bank is not impressed with notice** of unlawful purpose by trustee drawing check on trust fund and depositing it in same bank to trustee's personal credit. 29F(2d)662 [certiorari den 279US847, 49SCt345, 73 L ed991(4thcase)]. [f] **Bank may presume that receiver lawfully performed duty** where checks on receivership account were drawn in proper form in absence of facts indicating contrary. 334 Ill 494, 166NE123. [g] **Statute and bankruptcy order relative to designation of depositaries of funds of bankrupt estates** do not define liabilities of banks having business relations with trustees in bankruptcy. 179Minn197, 229NW90.

645-27½-New. Where a bank credits a fund to corporations, the treasurer opening the account with checks payable to it, the bank is not liable for his misappropriation. TexCivA 295SW665.

645-27½-New. A bank making a loan to one coexecutor as his individual note secured by a certificate issued by it to all coexecutors for funds of the estate can be held liable to the other executors only on the theory that the borrower intended to misappropriate the money and that he did so. 37GaA782, 142SE178.

645-27¼-New. The bank is not charged

with such knowledge as matter of law merely by reason of the making of the note and depositing of the proceeds to the individual credit of the maker where the proceeds were nevertheless paid to legatees of the estate on checks drawn on the fund. 37GaA182, 142SE178.

646-29 221MoA329, 273SW772; 120 Okl46, 249P506.

646-31 115Or456, 239P98, 101 [citCJ]. [b] **To determine amount of trust money in joint account** on given date, minimum balance between such date and date of deposit is amount identifiable as trust fund. 29F(2d)662 [certiorari den 279US847, 49SCt345, 73Led991(4th case)].

646-32 16F(2d)911, 914 [citCJ].

646-36 41Ida432, 242P297; 206Iowa706, 219NW401; 311Mo414, 279SW76, 79 [quotCJ]; 318Mo1120, 2SW(2d)607, 611 [quotCJ]. [c] **Sufficiency of evidence** to show ownership of certificate. 126Kan114, 266P933. [d] **"Negotiable certificate of deposit" defined.**–Iowa 230NW565.

647-39 30F(2d)46 [certiorari den 279US858, 49SCt352, 73Led999(11thcase)]; 215Ala685, 112S222, 52ALR1095; 165Ga245, 140SE376, 378 [citCJ]; 203Iowa174, 210NW747; 203Iowa463, 212NW674, 675 [citCJ]; 125Kan182, 183, 264P55 [citCJ]; 321Mo815, 12SW(2d)755; 219MoA34, 269SW955; 151Wash55, 275P62, 65ALR794. [f] **Considered equivalent of money.**–50SD65, 208NW163.

647-40 318Mo1120, 2SW(2d)607, 611 [quotCJ].

647-40½-New. The bank's responsibility is back of a certificate of deposit. 50SD65, 208NW163.

648-43½-New. Authorization of board of directors is not required to issue certificates of deposit under statutes requiring such authorization for issuance of bills payable. 219MoA34, 269SW955.

648-45½-New. Certificate carries presumption that it was issued on full consideration. 37GaA268, 140SE767.

648-45⅓-New. Some statutes prohibit the issuance of certificates of deposit except for lawful money of the United States or for checks, drafts, or bills of exchange which are the actual equivalent of such money. 37GaA268, 140SE767 (issuance of certificate of deposit for note discounted held violative of statute). [a] **Purpose of statute** is to prevent bank from pledging its credit and increasing its liability to depositors by trading in certificate of deposit for instrument not equivalent to cash. 37GaA268, 140SE767.

648-45¼-New. and make violation of such prohibition a misdemeanor. 37GaA268, 140SE767.

648-45⅕-New. A violation of such statute will not be presumed from the mere fact that a certificate of deposit was issued in an amount representing the net proceeds of a note discounted for the depositor on the same day. 37GaA268, 140SE767.

648-45⅙-New. but it will be presumed that the transactions were independent. 37GaA268, 140SE767.

648-45⅐-New. Certificate carries presumption that it was issued on full consideration. 115OhSt279, 152NE670.

648-48 21F(2d)661 (word "or" supplied where omitted in phrase "to himself order"); 25F(2d)403; 37GaA268, 140SE767; Iowa230NW565; Mass166NE837; 175Minn453, 221NW873, 60ALR605; 307Mo57, 269SW959 (payable "in current funds"); TexCivA275SW721; 99WVa544, 130SE142. [a] (1) TexCivA275SW721 (return properly indorsed). (2) or by a provision for thirty days' notice before payment, on bank's option (25F(2d)403). (3) Negotiable, though stipulating, bank may require thirty days' notice of time when payment will be required to meet requirement of federal statute. 21F(2d)661. [f] 37GaA268, 140SE767 (except defense of immoral and illegal consideration). [g] **That certificate does not bear interest** does not render it nonnegotiable. TexCivA275SW721. [h] **Third party may become holder** of negotiable certificate of deposit in due course. Iowa230NW565.

649-49 214Ky24, 282SW555; 221MoA442, 281SW965.

649-51 221MoA442, 281SW965 (certificate not payable to order or bearer). [a] (3) Certificate payable only to depositor named "nonnegotiable" under Negotiable Instruments Law. 248NY428, 162NE475, 59ALR1473.

649-52 [a] **In New York.**–223AppDiv324, 228NYS49 (effect of violation of law is not to make certificate negotiable). [b] **Certificate "payable only" to depositor** is not negotiable. 223AppDiv324, 228NYS49.

649-53 248NY428, 162NE475, 59ALR1473. But see 223AppDiv324, 228NYS49. [c] **Indorser of nonnegotiable certificate of deposit is not discharged** by transferee extending time for payment and acceptance of part payment from liquidating agent of bank. 221MoA442, 281SW965.

649-54½-New. An indorsement on a certificate of deposit will pass title. 214Ky24, 282SW555.

650-55 165Ga245, 140SE376.

650-56 165Ga245, 140SE376; 46Ida224, 267P225, 226 [citCJ]; 203Iowa463, 212NW674; Iowa231NW293.

650-57 But see 176Minn449, 223NW780, 62ALR799(2dcase). [d] 176Minn449, 223NW780, 62ALR799(2dcase). [e] **Where depositor intrusts certificate to another,** he cannot recover amount from bank paying it in good faith, although such person misappropriated proceeds. IndA170NE788.

650-58½-New. Neither depositor nor her administrator may question the payment of properly indorsed certificates of deposit. 214Ky24, 282SW555.

650-58⅓-New. Renewal certificate of deposit, nothing else appearing, is not payment of original deposit. 174Minn56, 218NW444.

650-58¼-New. A certificate of deposit payable in "six or twelve months" is payable at the expiration of six months at the election of the depositor. 176Minn355, 223NW298(1stcase).

650-58⅕-New. In such case, if the depositor does not elect to take payment at the expiration of six months, the certificate becomes a twelve months' certificate. 176Minn355, 223NW298(1st case).

650-58⅙-New. That it is the custom for banks to pay certificates of deposit before they become due does not change the contract made by the certificate. 176Minn355, 223NW298(1stcase).

650-58⅐-New. Action to enforce payment. There can be no cause of action on a certificate of deposit which is a forgery and void. SD226NW584.

650-60 254IllA55.

650-60½-New. Bank's obligation is only to payee on nonnegotiable certificate of deposit. Iowa230NW565.

650-60⅓-New. Bank's obligation on negotiable certificate of deposit, is to pay whoever may be rightful holder when due. Iowa230NW565.

650-62 86Colo136, 278P606.

651-67 153Miss793, 121S826(1stcase); 222AppDiv74, 225NYS309. See also 149SC34, 146SE693(2dcase).

651-68 248NY365, 162NE284.

651-72½-New. A claimant has burden of proving that interest was to be paid and cannot recover the interest on the failure to show agreement or practice. 170Minn296, 212NW416.

651-72⅓-New. Commencement of suit is sufficient demand to set interest running. 222AppDiv74, 225NYS309.

651-72¼-New. Where relation of debtor and creditor under contract for interest existed at time of depositor's death, bank cannot discontinue interest payments without notice. Ariz285P266.

651-72⅕-New. In such case fact that no one was in charge of estate to whom notice could be given does not justify discontinuance of interest without notice. Ariz285P266.

651-73 202Iowa524, 210NW612. [b] **Interest-bearing certificate retains its character** as such, although interest on deposit ceases to run at maturity. 115Tex167, 278SW1101. [c] **No interest after maturity.**–86Colo136, 278P606.

651-76 TexCivA275SW721. [a] **Bringing of suit** to recover amount of certificate constitutes sufficient demand to start running of interest. TexCivA275SW721.

651-78½-New. An act, prescribing that a bank should pay no interest higher than four per cent, did not violate the right of contract between the bank and the customer for four and one-half per cent interest, parties knowing that regulation and control of banks came under the power of the state. 177Ark920, 9SW(2d)307, 62ALR484.

651-78⅓-New. An act, providing that bank paid no interest in excess of four per cent, has been held a valid exercise of the police power. 177Ark920, 9SW(2d)307, 62ALR484.

651-78¼-New. Interest from the time of a bank's breach of contract with a depositor is properly determined according to the legal rate in the place where the depositor sought recovery. 250NY69, 164NE745.

651-78⅕-New. An attaching creditor recovering a deposit in a bank is entitled to interest thereon only at the current rate. 250NY288, 165NE452.

652-79 21F(2d)993; 40GaA583, 150SE567 (set-off deposit made by third person and orally assigned to defendant); 42Ida295, 245P398, 399 [citCJ]; MoA31SW(2d)96; 194NC368, 139SE596, 55ALR819; TexCivA277SW405. [h] 16F(2d)159. [j] (2) Where bank issues certificates of deposit in return for depositor's notes, rights of alleged cestui que trust were no greater than trustees. Iowa231NW293. [o] **County treasurer, personally liable for deposit of public funds,** may have deposit set off for personal debt to bank. 194NC368, 139SE596, 55ALR819. [p] **Set-off against note pledged by bank** is allowed, where, though note is in possession of pledgee when bank becomes insolvent, it is thereafter redeemed by receiver. 21F(2d)993. [q] **Bank which by contract treated another bank and its investment company as one institution** cannot deny right to set off such bank's deposit against investment company's notes for lack of privity. 36F(2d)646. [r] **Sufficient privity held shown** in three cornered agreement. 36F(2d)646.

652-80 21F(2d)993; 30Ariz274, 246P759; 166Ga163, 142SE678; 39GaA380, 147SE124; 207Iowa1254, 219NW496 (right against notes rediscounted or held as collateral lost on payment); MoA279SW435; MoA8SW(2d)1030; MoA31SW(2d)96; 189NC533, 127SE540; 194NC368, 139SE596, 55ALR819; 145SC1, 142SE788; 149SC185, 146SE815(1st case); 50SD524, 210NW730; TexCivA277SW405, 406 [citCJ] (assets in hands of receiver); 147Wash482, 266P707. But see 45Ida541, 263P1002; Kan289P396. Contra 46Ida150, 266P1098. [d] TexCivA277SW405. [g] 147Wash482, 266P707. [h] **In Idaho.**–42Ida295, 245P398. [i] **Demand** for deposit not necessary to right to set-off. TexCivA277SW405. [j] **Portion of note given under agreement** that certificate of deposit issued by lender should be used to cancel note held not to come within statute as to off-set of deposits in insolvent bank. 42Ida720, 248P9. [k] **Depositor cannot set off deposit against debt** due bank where bank is insolvent. 42Ida720, 248P9. [l] **There can be no set-off** against note where president of solvent bank used proceeds of note signed by him as maker on which loan was made by insolvent bank. 50SD524, 210NW730. [m] **Where bank is taken over by commissioner of finance** depositors retain right of set-off which they had against bank. MoA279SW435. [n] **That city warrants held by bank were not due when bank failed** is not fatal to right of city to set off deposit against indebtedness on warrants. 147Wash482, 266P707. [o] **Mutuality of demands.**–147Wash482, 266P707. [p] **Bond of insolvent city depositary bank** does not prevent set-off of city's deposit against city warrants held by bank. 147Wash482, 266P707.

653-81 207Iowa1254, 219NW496; 194NC368, 139SE596, 597 [citCJ], 55ALR819. [b] **Maker of note, when sued by receiver** is entitled to set off his credit, even without express agreement but one's deposit cannot be set off on an-

other's note without express agreement. 36F(2d)646.

653–84 6F(2d)841; 16F(2d)845; 21 F(2d)135; 29F(2d)411; 36F(2d)646; 37 F(2d)715; 215Ala526, 112S111; Ariz 292P1025; 178Ark989, 13SW(2d)595; 95CalA347, 272P767; 170Ga332, 153SE4 (2dcase); 45 Ida746, 265P699, 700 [cit CJ]; 224 IllA26 (checks deposited generally); 126Kan441, 268P735; 234Ky 591, 28SW(2d)787; 221MoA329, 273SW 772; 78Mont389, 254P417; 114Nebr378, 207NW666; 116Nebr456, 218NW92; NJ 150A402; 189NC533, 127SE540; 193NC 745, 138SE124; 194NC368, 139SE596, 597 [citCJ], 55ALR819; 126 Okl 182, 259 P141; 135SC417, 133SE901, 909 [citCJ perCothran,J]; 145SC1, 142SE788; 50 SD191, 208NW825; 52SD528, 219NW 206, 207 [citCJ]; 53SD499, 221NW257 (debt of administrator and sole distributee of estate); TexCommnA 280SW573; TexCivA 282SW888; TexCivA 284SW 694, 697 [citCJ]; TexCivA 3SW(2d) 552; TexCivA 12SW(2d)1037 (insolvent depositor). But see 56ND81 215NW 918, 61ALR1454. [c] (1) 81Mont248, 263P693; TexCivA 18SW(2d)679(1st case). (2) Note authorizing application of deposit transfers deposit as collateral and gives bank priority over garnishing creditor. 41GaA438, 153SE446. [g] (2) One, giving note to bank to represent loan and leaving amount on time deposit to secure bank against its guaranty of another's claim for advances to depositor against superior lien of landlord for rent, is held to have no right of action against bank for damages for refusal to pay over deposit. 160La829, 1078590. [r] **Amount of dishonored check** may be charged back by bank to account of customer. 69CalA370, 231P380. [s] **Collateral to secure debt of depositor** and any other liabilities cannot be applied to preexisting and unmatured debt due bank absorbing creditor bank. 6F(2d)841. [t] **Where cashier of bank has promised plaintiff** that certain checks would be paid, bank cannot use deposits to offset debts due from depositor who drew checks. TexCivA 278SW459. [u] **Bank's knowledge that deposit is proceeds of sale of mortgaged property** is held not to preclude set-off in absence of instructions. 78Mont389, 254P417. [v] **Insolvent bank** may apply its indebtedness to holder of certificate of deposit in reduction of claim of bank of equal rank against holder of certificate. 291Pa463, 140A517. [w] **Notes executed by bank officers** to correspondent bank held "bank transactions" authorizing correspondent bank to charge account of other bank on maturity. 20F(2d)678. [x] **Debts barred by limitations.**–208 Iowa 672, 222NW853(2dcase).

655–85 215Ala526, 112S111; 231Ky670, 22SW(2d)94; 131Misc188, 226NYS415. [b] **In Oklahoma.**–116 Okl 13, 243P135. [c] **Statute giving bank lien on property of customer in its hands** does not entitle bank to use proceeds of resale of cattle transferred to it under void sale. CalA 286P1064.

655–86 13F(2d)887; 51ND399, 200NW 505, 511, 37ALR1186 [citCJ]. [b] 51ND 399, 200NW505, 37ALR1186.

655–87 13F(2d)887; 221MoA329, 273 SW772; 194NC368, 139SE596, 55ALR 819; 51ND399, 200NW505, 511, 37ALR 1186 [citCJ].

655–88½–New. And failing to make such application the bank may follow the proceeds into the hands of one receiving the check therefor not for value and in due course. 215Ala526, 112S111.

655–88¾–New. Law of place of payment determines whether the drawee banks can refuse payment of a check on account of holding unmatured notes of drawer who became insolvent. 173Ark 489, 292SW659.

655–89 194NC368, 139SE596, 55ALR 819.

655–90 45 Ida746, 265P699.

655–93 But see TexCivA 282SW888.

655–94 283Pa212, 129A56. But see 180 Ark600, 22SW(2d)398(2dcase).

655–94½–New. A collecting bank paying a check by crediting the amount to the bank from which it received the check may plead such payment as a complete defense to an action for the amount thereof by the drawee bank which failed to return it within twenty-four hours after receiving it for acceptance and payment. 78Mont48, 252P 373.

655–94¼–New. A contract giving a bank holding a note as a lien on all funds, securities, and other property, enforceable by sale of the property on which the lien rested, does not give a lien on deposits. 226AppDiv412, 235NYS392.

655–98 23AlaA23, 122S311(2dcase) [certiorari den 219Ala366, 122S312]; 124Kan333, 259P698; 10LaA401, 119S 779; NJCh 151A834; 126 Okl 182, 259P 141.

656–2½–New. Where a bank receives money as agent and the relation of bank and depositor does not exist, its act in retaining the money to apply on a debt of its principal not yet due constitutes a conversion. 188Wis24, 205NW404.

656–3 6F(2d)841; 173Ark489, 292SW 659; 101CalA675, 282P386; 103NJEq 119, 142A364; 193NC745, 138SE124; 25 OhNPNS203, 205 [citCJ]; 98PaSuper 213; 188Wis24, 205NW404. Contra 288 Pa472, 136A789. [a] 193NC745, 138SE 124. [b] But see 251 IllA523. [e] **Bank must allege and prove insolvency of depositor** in order to avail itself of privilege of setting off unmatured note against deposit. 124Kan333, 259P698.

656–4 25 OhNPNS203, 205 [citCJ]. Contra 25 OhNPNS203.

657–5 98PaSuper207.

657–5½–New. A bank which has loaned money to a depositor on a secured note and taken a renewal of the note cannot charge such note to the depositor's account after being served with a writ of garnishment by one having a claim against the depositor by reason of an unauthorized sale of the garnisher's property and a deposit of the proceeds in the bank. 127Kan534, 274P231.

657–8 126 Okl 182, 259P141. But see TexCivA 38SW(2d)552. Contra 150SC 125, 147SE646.

657–16 Mass 170NE621; 154Tenn672, 294SW513.

657–18 16F(2d)159, 162 [citCJ]; Nebr 227NW148; 194NC368, 139SE596, 55 ALR819; 283Pa212, 129A56. But see 234Ky591, 28SW(2d)787.

658–19 16F(2d)159, 162 [citCJ]; 131 Or 123, 282P99.

658–20 234Ky591, 28SW(2d)787; 283Pa 212, 129A56.

658–22½–New. The duty extends only to the maker's account, not to that of a guarantor or indorser. 283Pa212, 129 A56.

658–22⅓–New. It applies only to deposits not appropriated for a specific purpose by the maker. 283Pa212, 129A 56.

658–22¼–New. A mere notice forbidding the payment of a note from a deposit will not relieve the bank of its duty. 283Pa212, 129A56.

658–22⅕–New. Where a bank fails to perform its duty, the indorser is relieved. 283Pa212, 129A56.

658–22⅙–New. Where checks were deposited for collection on the day the note became due, the bank had in its hands property of the maker, in fact reduced to possession, and should have been applied to liquidation of the note. 283Pa 212, 129A56.

658–22⅐–New. A bank paying a check drawn against a deposit for collection, before notice of payment thereof, treats such deposit as cash and is liable to the indorser on the note for its failure to apply credits of the maker in liquidation of the note. 283Pa212, 129A56.

658–22⅛–New. Holder bank having on maturity of note deposits of maker immediately reducible to cash owes duty to indorser to apply same to liquidation of note. 283Pa212, 129A56.

658–22⅑–New. A bank may protest for nonpayment, but must apply to the note money received from collection of a check deposited on the day of maturity of the note. 283Pa212, 129A56.

658–23 126 Okl 182, 259P141. [a] (2) Where seller's draft was delivered by agent to bank for collection only, bank held not entitled to offset debt of agent. 219AppDiv272, 219NYS651.

658–24 13F(2d)887; 249 IllA44; 179 Minn191, 229NW102; 194NC368, 139SE 596, 597 [citCJ], 55ALR819; 120 Okl 159, 250P1006; 126 Okl 182, 259P141; 120 Or470, 247P151. [a] **Knowledge before appropriation.**–13F(2d)887. [b] **Action by bank held not "appropriation" before knowledge.**–13F(2d)887.

659–26 219AppDiv272, 219NYS651; 120 Or470, 247P151; 50SD154, 208NW780.

659–27 8F(2d)101; 16F(2d)911; 221 MoA329, 273SW772; 120 Okl 159, 250P 1006; 127 Okl 226, 260P491. See also 90PaSuper341. But see 179Minn191, 229 NW102; 50SD134, 208NW779. [d] **Where bank has knowledge of circumstances sufficient to require inquiry,** it cannot, as against true owner, set off deposit against individual indebtedness of depositor. 127 Okl 226, 260P491.

659–28½–New. A bank's unauthorized transfer from an unsecured deposit account of a joint-stock association to the checking account of the association's president and principal stockholder was ineffectual to serve as a basis of the bank's claim to a lien for the balance due from the president to the bank. Tex CivA 10SW(2d)144.

659–29 168La691, 123S126, 65ALR1308. Contra 204 Iowa435, 215NW597, 55ALR 562.

660–30 MoA 18SW(2d)112(1stcase); TexCivA 10SW(2d)144. But see 21F (2d)102.

660–34 203 Iowa203, 212NW547.

660–35 222AppDiv74, 225NYS309.

660–36 30F(2d)892; CalA 260P372; 224 IllA26; 119Kan84, 237P921; 121Kan 51, 245P740; 232Ky844, 24SW(2d)912; 162La906, 111S323; 164La57, 113S763; 246Mich158, 224NW761; 173Minn289, 217NW365; 115 Okl 218, 242P528; 126 Okl 182, 259P141; 45 OklACR404; Tex CivA 32SW(2d)494.

660–36½–New. Where, under an escrow agreement, bank acted as depository of the transfer of a certificate of purchase of state lands and of payments by assignee for credit of assignor thereof, and assignor transferred his interest to the bank, payments thereafter made by the assignee became money of the bank, 74 Mont602, 241P237.

660–36¼–New. and the bank had a right to apply such moneys to indebtedness due it from the assignor in the absence of any provision in escrow agreement that it should be applied to debt owing the state for the land by the assignor. 74Mont602, 241P237.

660–36¼–New. Any custom or habit of banks to credit a deposit to a particular indebtedness will not be considered where the bank previously applied the deposit as the individual directed. 222 AppDiv74, 225NYS309.

660–36½–New. Where the president of a bank and another gave their note to another bank under an agreement between the presidents of the two banks that the proceeds of the notes should remain on deposit in the bank to which the note was given to the credit of the other bank as a dead balance so long as it carried the note, the deposit is restricted and may be applied in payment of the note. 130 Okl 164, 265P1071.

660–36¼–New. In such case the right of the lending bank to treat such deposit as pledge for payment of the loan is not defeated by the action of the other bank in entering the account on its books as a general credit and transferring it to a third person. 130 Okl 164, 265P 1071.

661–38 6F(2d)841; 13F(2d)887; 14F (2d)116; 15F(2d)582; 17F(2d)228; 21 F2d)998 (no new credit extended); 22 F(2d)166; 164La57, 113S763, 764; 197 NC562, 150SE16 (surety subrogated to rights of county is entitled to depositor's dividend, though depositor indebted to bank); 138 Okl 19, 280P273 (no lien on trust fund); TexCivA 26SW(2d)420. See also 20F(2d)746. But see MoA 31 SW(2d)96; 150Va423, 143SE697. [a] **In absence of notice to bank of trust character,** deposit is general in respect to right of set-off. 9F(2d)650. [b] **Application of trust deposit to debt of creator of trust.**–135 Okl 201, 274P873. [c] **Bank may charge against receiver's general deposit** receiver's certificate held by it at maturity thereof. 29F(2d)411.

661-38½-New. But a bank has no lien where it does not extend credit on account of such deposit, and in no way changes its position by reason thereof. 120 **Okl** 159, 250**P**1006.

661-38½-New. Where bank is without notice of trust character of deposit it may have lien for credit extended to trustee on faith of such deposit. 120 **Okl** 159, 250**P**1006.

661-38¼-New. Administrator depositing in his name money of estate not indebted is only trustee for sole beneficiary. **MoA** 31**SW(2d)**96.

661-40 221**MoA**329, 273**SW**772 (deposit not applicable to note bank did not own at time of death of depositor).

661-42 108**Conn**497, 144**A**34.

661-43 221**MoA**329, 273**SW**772.

661-44½-New. A deposit of a deceased person is not applicable to a note which the bank did not own at the time of the death of the depositor. 221**MoA**329, 273 **SW**772.

661-45 **TexCivA** 284**SW**694. But see 294**Pa**1, 143**A**206.

661-46 95**PaSuper**167 (right of set off or application of payment may be exercised at opening of business of day note matures).

662-52 222**MoA**393, 58**SW(2d)**669 (equivalent to check drawn on bank). But see 283**Pa**212, 129**A**56. [c] **Note of depositor payable at bank is equivalent to check.**-222**MoA**393, 58**SW(2d)**669.

663-53½-New. Although a bank holds notes of a person for collection, it has no authority to apply to their payment money deposited for other specific purposes. 42 **Ida**48, 246**P**12.

663-53¼-New. A bank may treat a general deposit of municipal funds like any other fund, and charge it with a municipal order in its possession for collection. 293**Pa**364, 143**A**10.

663-54 36**GaA**415, 136**SE**816; 220**MoA** 165, 281**SW**130; 243**NY**45, 152**NE**460.

663-56 [a] **One for whose benefit money is deposited** in bank may maintain action to recover it against bank or receiver. 120**Kan**400, 243**P**1058. [b] **Where true owner's right to deposit is shown** he may recover. 12**LaA**143, 125 **S**477.

663-56½-New. Proceeds of a forged note, indorsed by the payee to a bank and by the bank knowingly and fraudulently uttered and negotiated at its face value, may be traced into the bank and treated as a deposit in a suit in equity by the party defrauded. 118**Nebr**624, 225**NW**753.

663-57 **TexCivA** 295**SW**253.

663-61½-New. Where a depositor seeks to withdraw by check the entire deposit in the bank, which check is protested because of reduction of the amount of his deposit by wrongful debit, his action to recover the amount as wrongfully charged to his deposit is one for conversion. 117 **Okl** 120, 245**P**638.

663-62½-New. An action against a bank to recover the amount of a deposit is in contract and not in tort. 218**Ky** 128, 290**SW**1028.

664-63 7**F(2d)**443; 8**F(2d)**801; 213**Ala** 314, 104**S**793; 133**Misc**201, 232**NYS** 339. [c] (1) 33**Ariz**499, 266**P**14, 62**ALR** 183. [h] **Request of American depositor to foreign alien enemy bank** construed not demand for payment of deposit. 7 **F(2d)**443. [i] **Facts held not to constitute demand and refusal.**-133**Misc**201, 232**NYS**339.

664-64 **Mich** 233**NW**185; 130**Misc**66, 224**NYS**102.

664-65 220**MoA**924, 296**SW**452; 250**NY** 69, 164**NE**745; 133**Misc**201, 232**NYS**339.

665-71½-New. In an action for security deposited for performance of a lease, rent need not be established by judgment before bringing action. **CalA** 260 **P**372.

665-76½-New. One-year limitation applies to an action for payment of a forged check, although the complaint is in form of one for deposits. 95**CalA**338, 272**P**799.

665-76⅓-New. Limitation on an action for payment of a forged check does not apply to an action for payment on a forged indorsement. 95**CalA**338, 272**P** 799.

665-76¼-New. A check bearing a forged indorsement is not a forged **or** a raised check within the statute of limitation as to an action for payment thereof. 98**CalA**523, 277**P**354.

665-76⅕-New. The holder of a check may be estopped by laches to collect the amount of the check from the bank. 89 **IndA**692, 168**NE**30(2dcase).

665-76⅙-New. In some jurisdictions there is no limitation to an action to recover money or other property deposited with a bank. **Utah** 283**P**729.

665-76⅐-New. A depositor, delaying fifteen years before demanding payment of a certificate of deposit after another had cashed it and for three years after he knew or should have known such fact, is not estopped to demand payment from the bank where there is no showing as to the amount of property owned by such person at the time the depositor learned of the withdrawal. **Utah** 283**P** 729.

665-78 45 **Ida**451, 262**P**1057, 1058 [cit CJ]; **Utah** 283**P**729. See also 221**MoA** 683, 285**SW**161.

665-78½-New. Demand is necessary to start statute running on general deposits evidenced by pass books as distinguished from certificates of deposits. 35**GaA**315, 132**SE**914.

666-85½-New. In an action on a time certificate of deposit, negligence of the bank in collecting on depositor's check is not a defense. 116 **Okl** 113, 243**P**749.

666-85⅓-New. It is no defense to an action for a deposit that the bank applied it to payment of a debt of depositor assigned to the bank where the assignment was ineffectual because made without the depositor's consent. 187**Wis** 416, 204**NW**471.

666-85¼-New. In the notes will be found other cases determining the availability of particular defenses. 191**NC** 500, 132**SE**468; 24 **OhA**129, 156**NE**62; 69**Utah**557, 257**P**658.

666-85⅕-New. Where a bank has paid over the amount of a deposit to a United States internal revenue collector under a distraint warrant, and the depositor has accepted the money from the United States, the depositor cannot recover from the bank although the warrant was not regular on its face. **Utah** 264**P**724.

666-85⅙-New. Bank's answer held sufficient to plead estoppel to recover from it for acts of the cashier. 86 **IndA**473, 158**NE**579.

666-85⅐-New. A bank president, turning over stock to a bank commissioner to be sold and the proceeds thereof deposited in a bank to a profit and loss account, was estopped to claim pay therefor, in view of evidence that none of parties to the agreement intended or understood that he was to be paid. 177 **Ark**66, 7**SW(2d)**758.

666-85⅛-New. The question of a cashier's ownership or right to transfer a note for which he gave a receipt to a depositor who surrendered the certificate of deposit on a promise that the money would be returned in time is immaterial, relative to the right to recover of a bank as for money had and received. 221**MoA**683, 285**SW**161.

666-85⅛-New. A depositor is not barred from recovery of money left with a bank under its agreement to handle the money and in the meantime turn over to the depositor a solvent note, by the fact that the note later was found to be worthless. 221**MoA**683, 285**SW**161.

666-86 See also 148**Md**449, 129**A**688.

666-93½-New. No one but depositor can sue to recover money deposited in bank. 243**NY**45, 152**NE**460.

666-93⅓-New. In an action by a receiver of a trust company against a bank for recovery of proceeds of drafts of the trust company given by the treasurer in settlement of his private checks given to a depositor of the bank, the depositor is a necessary party. 221**App Div**837, 224**NYS**449.

666-93¼-New. To maintain an action against a bank for moneys on deposit in a joint account, plaintiff must make joint depositors parties. 28**F(2d)**468.

666-94 [b] **Petition need not state plaintiff made deposit.**-220**MoA**165, 281 **SW**130.

666-97 213**Ala**314, 104**S**793; 23**AlaA** 190, 122**S**701(2dcase) [certiorari den 219 **Ala**435, 122**S**702(1stcase)]. See also 27 **F(2d)**674. [b] (2) Complaint should allege demand on banking days and within banking hours. 213**Ala**314, 104**S** 793. [c] **Place of demand.**-213**Ala**314, 104**S**793.

667-99 27**F(2d)**674. [c] (2) That refusal to honor check was malicious or without probable cause. 220**MoA**165, 281**SW**130. [d] 78**CalA**362, 248**P**947; (without alleging damage in action for paying check on which payment was stopped); 36**GaA**415, 136**SE**816; **IndA** 170**NE**346(2dcase); 221**MoA**683, 285**SW** 161. [f] **Bill held technically defective** though sufficient to warrant inference that checks had been collected. 148**Md** 449, 129**A**688. [g] **Complaint for balance due** where plaintiff's account was mingled with his partnership account held sufficient. 213**Ala**314, 104**S**793. [h] **Complaint should allege** due presentation of check when there were sufficient available funds. 213**Ala**314, 104 **S**793. [i] **Knowledge of corporate officers** must be alleged to be theirs within scope of employment. 138**Misc**122, 245**NYS**39.

667-3½-New. General demurrer should be overruled in action based on facts and circumstances justifying plaintiff's admitted negligence in not notifying bank that checks paid by it on his account were forgeries, where the jury would be authorized from facts alleged to infer justification for negligence although not bound to do so. 35**GaA**460, 133**SE**351.

667-3½-New. Petition by payee to recover from nondrawee bank crediting check with forged indorsement to forger's account and collecting thereon held not to state cause of action for conversion. **MoA** 27**SW(2d)**768.

667-3¼-New. Such petition held to state cause of action for money had and received. **MoA** 27**SW(2d)**768.

667-9½-New. An answer, denying deposits in a claimed amount and justifying refusal to pay because of insufficiency of funds, does not plead payment. 24 **OhA**129, 156**NE**462.

667-9⅓-New. Where a payee's indorsement was forged, that it should be treated as payable to a fictitious person is held a special defense when pleaded by the bank when sued for the amount of the check. **TexCivA** 295**SW**665.

667-9¼-New. Answer in action to recover amount of certificate of deposit paid to third person held to allege estoppel even if depositor's signature was forged. **IndA** 170**NE**788.

667-9⅕-New. Counterclaim for surplus collateral voluntarily returned held insufficient. 137**Misc**67, 241**NYS**467.

667-9⅙-New. Counterclaims for loans and money advanced on notes rediscounted held insufficient. 137**Misc**67, 241**NYS**467.

667-9⅐-New. Negligence of drawer predicated on failure to discover forged indorsements and freedom from contributory negligence must be alleged as counterclaim. 138**Misc**122, 245**NYS**39.

667-10½-New. An affidavit of merit of defense in an action to recover the amount paid on forged indorsements was held sufficient. 252 **IlA**107.

668-11½-New. , and in an action by a depositor for negligently paying a check, the answer that plaintiff had agreed not to press the claim raised a trial issue whether such agreement was made. 220**AppDiv**443, 221**NYS**638.

668-20 125**Me**150, 131**A**863; 114**Nebr** 378, 207**NW**666. [b] **Burden is on depositor** to show demand on bank was of kind it was bound to honor. 33**Ariz** 499, 266**P**14, 62**ALR**183.

668-20½-New. A reception of deposit raises a presumption of solvency. 162 **La**12, 110**S**71.

668-20⅓-New. One depositing check drawn on another bank is presumed, in absence of special agreement, to deposit it for collection. 34**NM**656, 288**P**17.

668-21 **TexCivA** 22**SW(2d)**520; 145**Va** 614, 134**SE**568. See also 170**Minn**296, 212**NW**416.

669-23½-New. A check drawn on one

bank and deposited by payee in another bank is presumed to be for collection. 170Minn15, 212NW16.

669-24 [a] **Burden is not on depositor** to show when deposit was entered on books. 5F(2d)143.

669-26 23AlaA190, 122S701(2dcase) [certiorari den 219Ala435, 122S702(1st case)].

669-29 24 OhA129, 156NE462; **Tex CivA** 22SW(2d)520 (restitution of funds); **Can** [1930] 4DomLR694. But see 150Md142, 132A598. [b] 190NC863, 129SE583.

669-29½-New. or that it was not indebted to, or liable for, payment to plaintiff; 177Ark66, 7SW(2d)758.

669-31 227AppDiv545, 238NYS362; 298Pa503, 148A706. [a] **Bank paying checks bearing forged indorsement of payee** has burden of proving depositor's negligence and its freedom from negligence. MoA 25SW(2d)545.

669-32½-New. Where payment was made on a fraudulent check of one authorized to draw checks, the burden is on plaintiff to show the bank was a privy to the fraud. 260Mass485, 157 NE520.

669-32⅓-New. The burden of justifying payment of forged checks is on defendant. 24 OhA129, 156NE462.

669-33½-New. That the drawer's signature was a forgery does not place the burden on the collecting bank, which indorsed the check "previous indorsements guaranteed," to show that previous indorsements were not forgeries. TexCivA 19SW(2d)388.

669-34 203 Iowa897, 209NW432. But see 320Mo 623, 8SW(2d)858.

669-36½-New. In an action to recover a special deposit of shares of stock, the depositor has the burden of identifying the shares as the identical ones deposited. 31Ariz478, 254P485.

669-36⅓-New. Where a holder drew a draft on the buyer in favor of the bank, the burden is on the garnishing creditor to prove that title to the proceeds was not transferred to the bank. 170Ark86, 279SW357.

669-36¼-New. The principal must prove ownership of the money deposited by the agent and applied to the agent's indebtedness to the bank's knowledge, or that the bank did not change its position. 22F(2d)166.

669-36⅕-New. Where a bank issuing a certificate of deposit refused payment thereof on the ground that the money was advanced to the bank under a contract for feeding cattle, it had the burden of establishing such affirmative defense by showing the existence of a fact situation, which would justify it in refusing to pay certificates according to their tenor. 54SD14, 222NW500.

669-36⅙-New. In a suit against a bank by the drawer of a check spuriously indorsed to the bank to recover the amount of the check deducted from the drawer's checking account, the bank pleading payment to the drawer by the spurious indorser is required to prove such payment. 207 Iowa274, 222NW851.

669-36⅐-New. In such case the bank is not entitled to the presumption that the drawer held funds of the spurious indorser as unapplied credits in favor of the indorser. 207 Iowa274, 222NW 851.

669-36⅛-New. In an action by a county against the receiver of a bank, the county so claiming has the burden of proving that funds were unlawfully deposited. Iowa 228NW32.

669-36⅑-New. Bank accepting time deposit from wife and crediting it to her account has burden of showing that money belonged to husband's estate. 234Ky518, 28SW(2d)777.

669-36⅒-New. The drawee bank has the burden of alleging and proving that the collecting bank had not paid out the money to indorsers before it received notice of forgery. TexCivA 19SW(2d)388.

669-36 1/11-New. Depositor suing bank for cashing check with forged indorsement need not prove negligence in failing to discover forgeries. Iowa 230NW 342.

669-36 1/12-New. Burden of establishing damages resulting from negligence of depositor in failing to make prompt disclosure of forgeries is on the bank. 252NY247, 169NE372.

669-36 1/13-New. Burden is on bank to show how much of funds, so traced by plaintiff into agent's personal account, belongs to agent individually. TexCivA 22SW(2d)520.

669-37 [a] **Burden of proof.**-CalA 293P 98.

669-38 Ala 128S130; 200 Iowa40, 203 NW569; 120Kan139, 242P120; Mass 169NE518; Mo 22SW(2d)821; 248NY 365, 162NE284; 223AppDiv585, 229NYS 181; 127Misc27, 215NYS269; 24 OhA 129, 156NE462; 54SD575, 223NW831; TexCivA 22SW(2d)520; Can [1930] 4 DomLR694. [a] 213Ala314, 104S793; 179Ark352, 15SW(2d)977; 235Mich217, 209NW129 (negotiations preliminary to oral contract); 190NC863, 129SE583; 127 Okl 226, 260P491; TexCivA 295SW 665. (2) Plaintiff allowed to testify that neither he nor his firm owed bank's codefendant anything held admissible. 213Ala314, 104S793. (3) Evidence of stamp of satisfaction on margin of record of mortgage pleaded in set-off held admissible. 213Ala314, 104S793. [b] (1) 78CalA362, 248P947 (to show want of consideration for check in action against bank for paying check on which payment was stopped). (2) Evidence that plaintiff, while witness was connected with bank, never objected to any item in pass book properly excluded. 213Ala314, 104S793. (3) That on day plaintiff's check to defendant bank drawn on another bank in insolvent condition was payable to latter bank, which paid check by draft on third bank, bank on which check was drawn did not have sufficient funds to pay it and that when it drew its draft in clearance of such check its balance in same bank or only small amount, insufficient to cover its draft. 117 Okl 120, 245P638. (4) Other evidence properly excluded. TexCivA 286SW901. [c] **Evidence as to failure to complain** of inaccuracies should be confined to reasonable time after pass book is made up and checks returned. 213Ala314, 104S793. [d] **Admission of evidence held error.**-127Misc27, 215NYS 269.

669-39 17F(2d)228; 31Ariz478, 254P 485; 170Ark86, 279SW357; 172Ark 1177, 289SW472; 177Ark1138, 9SW(2d) 1064; 73CalA136, 238P108; 78CalA362, 248P947 (mistake of fact); CalA 263 P316; CalA 293P98; 246 IllA216; 84 IndA334, 150NE62; 202 Iowa594, 210 NW815; 208 Iowa322, 223NW164; 120 Kan139, 242P120 (sufficient to go to jury); 121Kan163, 246P973; 162La235, 110S334; 260Mass485, 157NE520; 247 Mich164, 225NW566; Mich 233NW185; Mo 22SW(2d)821; 220MoA924, 296SW 452; MoA 27SW(2d)768; 114Nebr378, 207NW666; 117Nebr280, 220NW283; 118Nebr489, 225NW471; 127Misc447, 216NYS362; 133Misc48, 231NYS389; 226AppDiv225, 235NYS197; 196NC134, 144SE833; 127 Okl 45, 259P644; 127 Okl 226, 260P491; 130 Okl 164, 265P 1071; 120 Or470, 247P151; 129 Or663, 278P963, 64ALR1396; 298Pa503, 148A 706; 54SD325, 223NW208; TexCivA 275SW721; TexCivA 275SW726; Tex CivA 286SW901; Utah 283P729; 188 Wis24, 205NW404; Can [1930] 4Dom LR694. [a] (2) To support finding that deposit was applied in discharging prior encumbrance pursuant to authority given by depositor. 52ND98, 201NW851. (3) To sustain finding that drawer had not made special deposit. 224 IllA 26. (4) To support finding that maker intended indorser to deposit check to personal account. 285Pa23, 131A495 (treasurer of corporation). (5) To support finding that surviving depositor was not guilty of fraud in procuring joint deposit with right of survivorship. CalA 290P637. [b] (11) To show conversion or fraud by bank as to money deposited by agent. 235Mich318, 209 NW44. (12) To support verdict on counterclaim for difference between special deposit and encumbrance on land discharged by bank. 52ND98, 201NW 851. (13) To show knowledge by company of special account or its conduct by district manager. 127Me65, 141A 102. [c] **Evidence held insufficient.**-To establish defense that amount of defalcations had been restored. 135Misc 793, 239NYS595(2dcase).

670-42 173Ark1181, 295SW395; 179 Ark352, 15SW(2d)977; CalA 289P863; CalA 293P98; 33GaA358, 126SE728; 35GaA460, 133SE351 (whether facts pleaded and proved in exculpation of plaintiff's failure of statutory duty of notifying bank that checks paid on his accounts were forgeries were such as to excuse him is for jury); GaA 155SE 62; 252 IllA107 (in action by depositor to recover amount paid on forged indorsements, evidence held to make question of depositor's negligence one for jury); 200 Iowa40, 203NW569; 203 Iowa897, 209NW432; 107 Iowa274, 222 NW851; Iowa 230NW342; 120Kan139, 242P120 (plaintiff's laches); 213Ky34, 280SW461; 234Ky518, 28SW(2d)777; 234Mich610, 208NW690 (plaintiff's admission held not to justify direction of verdict); Mich 233NW185; 179Minn 191, 229NW102; 320Mo 623, 8SW(2d) 858 (whether depositor pledged securities); 221MoA683, 285SW161 (whether bank actually received money); 219AppDiv272, 219NYS651; 223 AppDiv585, 229NYS181; 127Misc27, 215NYS269; 133Misc527, 233NYS255 (existence of bank); 228AppDiv572, 240NYS164 (estoppel of bank issuing drafts to imposter); 191NC500, 132SE 468; 196NC233, 145SE241; 126 Okl 182, 259P141 (as to knowledge of bank of trust character of funds); 127 Okl 226, 260P491; 293Pa364, 143A10; Tex CivA 22SW(2d)520; 148Va381, 138SE 477. But see 298Pa503, 148A706. [a] **Evidence held to raise jury question.**-207 Iowa274, 222NW851. [b] **Particular questions of fact.**-33F(2d)437; CalA 290P637.

670-43 24 OhA129, 156NE462. [a] 213 Ala314, 104S793; 120Kan139, 242P120; MoA 20SW(2d)971; MoA 27SW(2d) 1066; 191NC500, 132SE468; 117 Okl 120, 245P638. [b] 179Ark352, 15SW (2d)977; Kan 293P407; 320Mo 623, 8 SW(2d)858 (not within pleading); 127 Misc27, 215NYS269; 117 Okl 120, 245P 638.

670-44 [a] **Special findings held not inconsistent with general findings.**-54 SD14, 222NW500.

670-45 [a] **In payee's action for amount of certificate of deposit,** finding that payer's signature is forgery justifies judgment for payee. IndA 169NE 64.

671-46½-New. In an action by a depositor against a bank for an accounting, a failure of finding to show a deposit of the identical amounts was held not to overthrow another finding that the depositor was given credit for such sums. 84 IndA334, 150NE62.

671-46⅓-New. The findings are held sufficient to show that the entire amount deposited in the checking account had been drawn out. 84 IndA334, 150NE 62.

671-46¼-New. A bank, not pleading a depositor's estoppel to assert that checks paid by it were forgeries, may not claim that instructions excluding this defense were error. 220MoA924, 296SW452.

671-46⅕-New. In a suit on a certified check, plaintiff appeared to hold under valid indorsements, and to be entitled to recover, and it was therefore error to grant a nonsuit. 38GaA768, 145SE 521.

671-46⅙-New. Finding for plaintiff on counts alleging wrongful payment of checks by defendant bank after stop-payment order amounts to finding that such order had not been countermanded. CalA 288P1086.

671-48 117 Okl 120, 245P638. [a] **Bank is liable for all actual damages alleged and proved,** on wrongful failure to honor check. 220MoA165, 281SW 130. [b] **Bank is not liable to drawer for false imprisonment** on statutory charge because of bank's failure to honor check. 220MoA165, 281SW130.

671–48½–New. Where a bank wrongfully appropriates the amount of plaintiff's deposit to its own use to recoup a loss it had sustained by accepting a worthless draft in payment of the depositor's check on another bank, there is a conversion subjecting defendant in some jurisdictions to statutory damages of fair compensation for time and money properly expended in pursuit of the property. 117 **Okl** 120, 245**P**638.

671–49½–New. The court is not required to limit the amount of judgment to an amount of a school district's funds remaining in a bank to the individual credit of the school district treasurer at the time other officers of the school district directed the bank to cease paying checks of the treasurer. 121**Kan**163, 246**P**973.

671–49½–New. Interest allowed in a suit for money paid out on a forged check. **TexCivA** 295**SW**253.

671–49¼–New. In a suit to recover a special deposit where the checks were returned unpaid, rendering of judgment for the full deposit was proper less the check to the bank. 168**La**691, 123**S**126, 65**ALR**1308.

671–49½–New. Bank wrongfully appropriating time deposit to its use is liable for legal interest from date of misappropriation. 234**Ky**518, 28**SW (2d)**777.

672–58 218**Ky**128, 290**SW**1028.

672–59 [c] **Contract is breached** where bank ceases to do business so that depositor desiring to withdraw his money cannot make demand and cannot draw upon his account. 250**NY**69, 164 **NE**745.

673–66 40**GaA**791, 151**SE**546; 202 **Iowa** 594, 210**NW**815; **Mich** 233**NW**185; 253 **NY**359, 171**NE**569.

673–70 46 **Ida**50, 266**P**419.

673–72 8**F(2d)**801.

673–74 **CalA** 289**P**929; **TexCivA** 26 **SW(2d)**1077.

673–75 8**F(2d)**801; 80**Mont**174, 259**P** 1060; 131**Misc**188, 226**NYS**415. See also 120**Kan**109, 242**P**475 [citCJ].

673–76 See also 152**SC**135, 149**SE**330.

673–77 131**Misc**188, 226**NYS**415.

673–79 [a] **Maker of check guarantees solvency of bank.**–80**Mont**374, 260**P**734.

674–89½–New. Correspondence of signature with model deposited with bank and not the legibility of a signature determines the duty of the bank to honor the check. 147**Miss**530, 113**S**205.

674–89½–New. Where the maker of a check neglected to sign his name, failure of the drawee bank to act more promptly in securing signature, after the check was received by it, is waived by the maker when he signs it knowing that until then it was not complete, has not been properly presented, collected, or paid, or remittance made to the payee. 47 **Ida**405, 276**P**43, 68**ALR** 856.

674–92 94**Fla**1165, 115**S**505, 507 [cit CJ]; 99**Vt**255, 133**A**742.

674–96 **Erratum.**–Strike out "Schepp v. Carpenter, 51 N. Y. 602."

675–2 260**Mass**485, 157**NE**520; 173 **Minn**383, 217**NW**366, 56**ALR**1369.

675–4 202 **Iowa**899, 211**NW**506, 511 [citCJ] 50**ALR**388; 202 **Iowa**894, 211 **NW**517; 222**MoA**119, 300**SW**1018 (not transfer of money nor creation of lien on money).

675–6 202 **Iowa**954, 211**NW**252; 230**Ky** 37, 18**SW (2d)**880(2dcase); **NJSup** 131**A** 675; 9**PaDist&Co** 721; 99**Vt**259, 133**A** 744. [a] (2) Where maker of check makes known to payee that he has no funds in bank, there is no deception or intent to defraud. 67**CalA**758, 228**P**367; 83**CalA**779, 257**P**458. (3) In such case failure of maker to have funds in bank on certain date in accordance with promise does not constitute evidence of intent to defraud. 67**CalA**758, 228**P**367. [b] (2) Information drawn in accordance with Texas Penal Code (1925) art 1546 subd 4 is sufficient. **TexCr** 290 **SW**534. [c] **Actual financial or property loss** need not be shown. 30**Ariz** 436, 247**P**1099. [d] **Evidence on preliminary examination held insufficient.**–83**CalA**779, 257**P**458. [e] **Information held insufficient.**–**OklCr** 269**P**326 (for failure to allege wherein check was false and bogus). [f] **Essential elements of crime** are knowledge of insufficiency of funds and credit and intent to defraud. 85**CalA**170, 259**P**101. [g] **Where drawer of post-dated check had sufficient funds when check was drawn** and was arrested and held to answer before date of check, he cannot be found guilty of violation of statute. 85**CalA** 170, 259**P**101.

675–7 22**AlaA**220, 114**S**280; **MoA** 284 **SW**842 (no offense prior to amendment of 1925 where check in payment of past-due account); **NJSup** 131**A**675; 99**Vt**255, 133**A**742. [a] 96**CalA**1, 274**P** 361. [b] (2) Information held sufficient. 205 **Iowa**936, 218**NW**905. [c] (2) Issuance of check when drawer had no funds to meet it is prima facie evidence of intent to defraud under some statutes. 164**Minn**260, 204**NW**885. (3) Evidence of nonpayment of check held admissible on question of intent. 22 **AlaA**220, 114**S**280. (4) Evidence that other checks were given to payee with understanding that they would be held till future date is inadmissible. 224**Ky** 131, 5**SW(2d)**882. (5) Prosecution need not establish as part of its case that bank was legally organized. 224**Ky**131, 5**SW(2d)**882. (6) Evidence held sufficient to sustain conviction. 118**Nebr** 184, 223**NW**951. [d] 224**Ky**131, 5**SW (2d)**882. [h] 190**NC**322, 130**SE**10. [k] **Giving of check for antecedent debt** may constitute offense. 30**Ariz**436, 247**P**1099. [l] **That person to whom check was delivered suffered no disadvantage** does not affect question of guilt. 69**CalA**169, 230**P**667. [m] **Prima facie evidence of intent to defraud** is declared by statute in New Jersey to be shown as against maker or drawer when payment is refused by drawee provided payment by maker or drawee is not made five days after notice of nonpayment. **NJSup** 131**A**675. [n] **Instructions held proper.**–120 **Or**508, 252**P**951. [o] **In Kentucky.**–224**Ky**131, 5**SW(2d)**882. [p] **Instructions on defenses.**–224**Ky**131, 5**SW(2d)** 882. [q] **Statute punishing offense, without regard to intent** to defraud or knowledge of insufficiency of funds, has been held to violate constitutional provision, forbidding imprisonment for debt. 228**Ky**468, 15**SW(2d)**276. [r] **In North Dakota.**–58**ND**340, 226**NW**525.

675–8 99**Vt**255, 133**A**742.

675–9½–New. The act does not sanction imprisonment for the debt. 30**Ariz** 436, 247**P**1099.

675–9½–New. Where a statute creating a body action covers checks and drafts, it is immaterial in which classification the instrument sued on falls. 99**Vt**262, 133**A**745.

675–9¼–New. The payee is the proper party to bring such action. 99**Vt**259, 133**A**744.

675–10 37**GaA**819, 142**SE**464 (indictment is fatally defective which fails to charge intent to defraud). [b] (5) 74 **CalA**556, 241**P**279. (7) Evidence held sufficient to sustain conviction. 74**CalA** 556, 241**P**279. (8) Memorandum attached to check when returned from bank unpaid is admissible. 100**CalA** 464, 280**P**184. [c] (2) Accuser's intent to defraud and his knowledge of fictitious character of check are for jury under evidence. 74**CalA**556, 241**P**279. [f] **Essence of offense.**–74**CalA**556, 241**P** 279.

675–11 23**F(2d)**803; 255 **IllA**250 (bank accepting check to its order in payment of debt of depositor's employee to bank is charged with notice and accepts check at its peril); **IndA** 170**NE** 108; 127**Me**65, 141**A**102, 104 [citCJ]; 132**Misc**322, 229**NYS**459; 115 **Or**456, 239 **P**98, 101 [citCJ]; 148**Va**381, 138**SE**477. [b] 23**F(2d)**803; 148**Md**620, 129**A**898. [d] **Authority to pay checks of agent** does not include authority to turn over funds without check, or to transfer funds to take up debts of agent. 242 **IllA**111. [e] **Depositor may recover from bank** sums paid without authority to agent, or applied to agent's bank. 242 **IllA**111.

676–14 28**F(2d)**468. But see 11**PaDist &Co** 143. [c] **Payment to survivor.**–27 **OhA**284, 161**NE**222. [d] **Right to draw and duty to pay checks on joint account** rests on contract, and does not depend on ownership of fund. 333 **Ill** 442, 164 **NE**836.

676–14½–New. A bank is obligated to pay the survivor, and is thereby discharged from liability. 26 **OhNPNS**499.

676–15 [d] (3) Bank paying out deposit on fraudulent order of one who by terms of deposit had right to draw it out is not liable unless it was privy to fraud. 260**Mass**485, 157**NE**520. [h] **Bank put on notice of misappropriation where check** to officer signing it, or if bank knows proceeds are for personal use. 127**Misc**515, 216**NYS**713. [i] **Check payable to cash** signed by authorized corporate officer entitles bank to assume funds will be used for corporate purposes. 127**Misc**515, 216**NYS** 713.

676–16 **NJCh** 151**A**834.

676–18 [a] **Bank notified by partner not to honor check of another partner** seeking to withdraw funds cannot assume risk of paying one partner or determining rights of partners. 167**La** 421, 119**S**413.

677–24½–New. One who deposits money as a trustee has the right to withdraw in the same capacity. 28**F(2d)**676.

677–26½–New. Summary judgment should not be entered against a bank for the amount of township notes, charged against the township when its account was balanced, because of failure to produce an order on the treasurer for payment of the money for which the notes were given, where the township authorities recognized the notes as a sufficient order and accepted, approved, and ratified them. 293**Pa**364, 143**A**10.

677–28 203 **Iowa**833, 211**NW**542, 52 **ALR**1297; **MoA** 25**SW(2d)**545; 118 **Nebr**489, 225**NW**471; 10**PaDist&Co** 211; **Imp** [1930] 4**DomLR**689. [a] 200 **Iowa** 1086, 205**NW**853, 42**ALR**622 (certified check unindorsed by payee). [g] **CalA** 263**P**316. [l] (4) Liability to payee for unauthorized indorsement does not extend to bank or drawee unless they or either of them actually participated with knowledge of fraud. 146**Wash**520, 264 **P**8. (5) Corporation may recover from bank cashing checks indorsed by employees contrary to unequivocal directions. 135**Misc**793, 239**NYS**595(2dcase). [o] (2) Officer of corporation depositing check, of which corporation is payee, to his own account, puts bank on notice so that, when officer withdraws proceeds by his own check, bank is bound to investigate on which failure it is chargeable with knowledge investigation would have disclosed. 126**Misc** 642, 213**NYS**678. [p] **In Ontario.**–62 **OntL**186, [1928] 2**DomLR**898.

678–31 203 **Iowa**833, 211**NW**542, 52 **ALR**1297. [c] **Where agent of assumed payee** cashed check, payment held not to person intended by drawer. 203 **Iowa**833, 211**NW**542, 52**ALR**1297. [d] **Execution of note by corporation to one of its officers** does not show breach of trust, as regards bank's liability. 35 **F(2d)**6.

678–31½–New. Bank is not liable, if the intended payee does not later live up to the description. 151**Md**26, 133**A** 840.

678–32 203 **Iowa**877, 211**NW**561. [a] **Drawer having no knowledge of fraud who makes check payable to fictitious person** is held not to have intended payment to supposed agent of such payee. 203 **Iowa**877, 211**NW**561. [b] **Payment to one impersonating payee to drawee alone** held not payment to person intended by drawer, where check was given by drawer to ostensible agent of such payee. 203 **Iowa**877, 211**NW**561.

679–34½–New. Bank receiving check from third person drawn by depositor to bank's order can credit proceeds to third person's account where ignorant of fraud in obtaining check. 137**Misc** 133, 241**NYS**488.

679–36 35**F(2d)**6; 47 **Ida**405, 276**P**43, 68 **ALR**856; 224 **IllA**26; 321**Mo** 815, 12**SW (2d)**755; 220**MoA**165, 281**SW**130; 222 **MoA**307, 297**SW**129; 115 **Or**456, 239**P** 98, 101 [citCJ]; 8**PaDist&Co** 27; 156 **SC**397, 153**SE**473. [i] **Bank is not in**

default till it refuses to pay account on demand. 250NY69, 164NE745. [j] **Banks declining to recognize checks of local union after its suspension** are not liable to local union's creditors. 137 Misc653, 244NYS90.

679–37 227AppDiv283, 237NYS577.

679–38 131Misc188, 226NYS415; 115 Or456, 239P98, 101 [citCJ].

679–39 See also 150Va336, 143SE881.

679–40 [a] **Draft, drawn to order,** is not payable till properly indorsed by payee. 33F(2d)437.

680–43½–New. A bank may refuse to pay a check when the deposit against which it is drawn is a check which the bank has reason to believe will not be honored. 224 IllA26.

680–43½–New. Trust fund deposit. The bank is under no duty to look after appropriation of trust funds when withdrawn, or to protect the trust by setting up the right of a third party against a demand. 110 Okl 39, 235P 1104.

680–43¼–New. But if the bank has notice of breach of trust by improper withdrawal of funds, it is liable. 110 Okl 39, 235P1104.

680–43½–New. Upon special deposit, to be paid out under certain stipulated conditions, the bank owes no duty to pay until evidence of meeting the condition is presented, and is not liable for interest prior to such time. 25F(2d) 397.

680–43⅓–New. A check is of right presentable only for payment, and the bank is not obligated to certify it, although it may do so. 249NY386, 164NE326.

680–43½–New. Depositors cannot be allowed to exact performance of its full duty by their bank, and not render performance of their own full duty. 133 Misc48, 231NYS389.

680–45 227AppDiv457, 238NYS169.

680–47½–New. An instrument whereby a customer delivered notes to a bank to guarantee the bank against any loss accruing from overdraft on a customer's account did not bind the bank to grant to the customer the overdraft to the amount of the notes, nor bind the bank to honor any checks of the customer and permit him to create an overdraft thereby. 207 Iowa597, 223 NW400.

680–47½–New. Where an instrument provided that, if a bank allowed a customer to create an overdraft, it could use notes executed by the customer to meet the same, the mere fact that the bank permitted an overdraft and resorted to one of the customer's notes to meet the same is not such practical construction of the instrument as bound the bank to recognize that the customer had a right to continue to make overdrafts. 207 Iowa597, 223NW400.

680–47¼–New. Bank declining payment because of insufficiency of funds must return check without unnecessary delay, with explanation. 156SC397, 153 SE473.

680–52 [a] **Under statutes,** if bank fails to return check within twenty-four hours as "nonaccepted," it will be deemed to have accepted it. 80Mont374, 260P734 (gives payee right of action).

681–58 18F(2d)711; 197NC253, 148SE 253; 55ND406, 213NW963, 52ALR988. [d] **When bank issues certificate of deposit** at request of payee of check, this constitutes payment though such certificate of deposit is not paid. 205 Iowa 660, 216NW15.

681–62½–New. Where bank accepting check purports to pay it by draft on another bank which was not paid because of drawing bank's insolvency, the bank accepting the check is still indebted to the depositor, 189NC533, 127 SE540.

681–62½–New. although the statute allows the bank the option of paying the check by draft. 189NC533, 127SE 540.

681–62¼–New. A statute making checks payable in exchange drawn on reserve deposits of a drawee bank at its option should be construed strictly. 197NC253, 148SE253 (does not alter rule making checks payable in money).

681–63 157Tenn497, 10SW(2d)683, 61 ALR954.

681–63½–New. Ordinary rule is that as checks are paid the amount is to be charged against the oldest item of deposit or credit of the customer. 28 Hawaii35.

681–63¼–New. A bundle of checks presented through the clearing house must be paid fully or not at all. 157Tenn497, 10SW(2d)683, 61ALR954.

681–64 218Ala549, 119S678; 115Nebr 273, 212NW617; 34NM50, 277P31 (acceptance of check for city tax moneys deposited by city treasurer). See also 207 Iowa407, 219NW929(2dcase). But see 250NY69, 164NE745. [d] **Payment of forged check** is not an "acceptance." TexCivA 294SW324.

681–64½–New. Entry of payment of check on books of bank is mere evidence of payment and not conclusive. 189NC533, 127SE540.

681–66½–New. Mere marking check "paid" and charging same to Federal Reserve Bank which refuses to honor such charge is held not payment of check. 143Wash372, 255P119.

681–67 39GaA687, 148SE311(2dcase) (bank is not liable to drawer for payment to person procuring check by fraud but intended by drawer to receive money). [a] **Recipient of money paid out by bank** on depositor's order gets, for purpose of criminal indictment, possession and ownership. 150 Md687, 133A847.

681–68 205Cal 338, 270P943, 61ALR 267; 224 IllA457; 200Wis304, 227NW 387 (discharges liability of all parties thereto). [e] **Stop payment order received after payment of check** entitles bank to charge depositor's account with that amount. 126Misc559, 214NYS76. [f] **Drawers of check, authorizing payment without indorsement of payees,** are estopped from contending that bank is liable to them for payment without payee's indorsement. 197NC499, 150SE 38.

681–68½–New. The acceptance of a check presented through a forwarding bank, the payment of the money to the forwarding bank, and the entry of the transaction on the books of the depositary bank constitute a segregation of the amount, and title to funds so segregated passes for at least an instant of time to the depositor. 79CalA612, 250 P585.

682–69 197NC526, 150SE34 (payment without valid indorsement of payees); Can [1930] 1DomLR328 (payment to customer's agent in excess of known authority). [a] (3) Where authority to represent payee had been withdrawn, bank was liable to maker for funds deposited by alleged agent. 224 IllA457.

682–69½–New. The bank is liable in trover when it fails to prove the authority of the party who wrongfully indorses the check. 224 IllA457.

682–69⅓–New. The maker of the check may not recover from the bank for payment of an improperly indorsed check in the absence of damage. 285Pa23, 131 A495.

682–69¼–New. A bank which pays the amount of a check wrongfully indorsed is not an innocent party where the maker owes the bank no duty to stop payment. 224 IllA457.

682–69½–New. A bank, cashing check for payee void as given for gambling debt, can recover from the payee, 216 Ky703, 288SW702.

682–69⅙–New. but may not recover from payor and depositor. 216Ky703, 288SW702.

682–69⅐–New. Bank, when genuine check is presented, is under no duty to call up depositor and inquire whether it should be paid. 253NY359, 171NE 569.

682–69⅛–New. Nonnegotiable check must have had valid inception in order to justify payment and deduction from depositor's account. 253NY359, 171NE 569.

682–69⅑–New. Maker cannot recover amount of check paid without inquiry as to fulfillment of condition embodied in check if check was valid instrument between maker and bank. 253NY359, 171NE569.

682–71 69CalA370, 231P380; 136Misc 328, 240NYS36.

682–73 35PortoRico 155 (where account secured by collateral). [b] Tex CivA 22SW(2d)957. [c] TexCivA 22 SW(2d)957.

682–74½–New. Where deposit tickets were used in checking over depositors' account by bank officials, their misplacement was chargeable to the bank, which was suing to recover the overdraft. 225Ky629, 9SW(2d)1008.

682–75 [b] **Bank may recover from payee** where payee knew drawer's account had passed to receiver. 200 Iowa 1014, 205NW838.

682–76 126Misc559, 214NYS76. [a] **Payment to one not holder under indorsement of payee** is at risk of drawee bank. 197NC499, 150SE38.

682–77 126Misc559, 214NYS76.

683–80 126Misc559, 214NYS76. But see 131SC430, 128SE10.

683–80½–New. Where a bank pays the holder under mistake of fact as to the status of the check, it may recover it especially where the holder is protected and sustains no damage. 85PaSuper159.

683–80⅓–New. Negligence of a bank in paying a check after receipt of a stop order is not available to the holder as defense on an action by the bank to recover back the amount paid. 131SC 430, 128SE10.

683–80¼–New. Where a bank accepts a check and charges the amount to the account of the drawers, it impliedly undertakes to pay the proceeds to the true owner. 197NC499, 150SE38.

683–82 74CalA734, 241P945; 132Misc 322, 229NYS459; 200Wis304, 227NW 387 (drawee bank has burden of discovering forgery).

683–83 CalA 293P98; 39GaA687, 148SE 311(2dcase); Iowa 226NW119, 120 [cit CJ]; Mich 233NW185; 222MoA 1022, 9 SW(2d)668; NJCir 144A599; 24 OhA 129, 156NE462; 300Pa39, 150A96; Tex CivA 294SW324; TexCivA 27SW(2d)279 (though drawer's negligence is proximate cause). [j] **Where depositor has no duty or opportunity to speak** and bank does not rely on his silence nor suffer injury therefrom, depositor is not estopped. 24 OhA129, 156NE462. [k] **Ratification by depositor not shown.**–CalA 293P98. [l] **Facts putting on inquiry.**–Iowa 232NW124.

684–84 24 OhA129, 156NE462; Tex 295 SW253. [b] 148Md449, 129A688. [e] **Mere negligence of depositor** does not justify bank in paying forged checks where there is no element of estoppel present. 24 OhA129, 156NE462. [f] **In absence of negligence** drawee bank cannot charge forged check against depositor's. TexCivA 294SW324.

684–85½–New. Depositor is entitled to receipt or security on surrendering forged check to bank. 300Pa39, 150A 96.

685–88 251NY58, 167NE171, 64ALR 1103.

686–93 252Mass366, 148NE220 (implied contract exists that trust company will continue ordinary banking business according to custom); MoA 25SW(2d) 545. [a] (2) Depositor need not examine indorsements, in absence of suspicious circumstances. 228AppDiv337, 239NYS598.

686–94 CalA 289P863; 39GaA687, 148 SE311(2dcase); 232 IllA186; 251 IllA 279 (depositor entitled to interest on amount charged against his account because of payment on forged indorsements); Mich 233NW185; 222MoA 918, 9SW(2d)668; MoA 25SW(2d)545; MoA 27SW(2d)1066; 118Nebr489, 225NW 471; 105NJL206, 144A30; 125Misc260, 210NYS378 (certified check); 227App Div545, 238NYS362 (depositor owes bank no duty to keep proper set of books); OhA 173NE216; 283Pa200, 129 A52. [r] **Bank guilty of gross negligence** in paying check on rubber stamp indorsement. 135SC107, 133SE210. [s] **Statutory notice held not necessary** in case of payment on forged indorsement. 203 Iowa833, 211NW542, 52ALR1297.

[t] **Bank must exercise due care** in payment of checks bearing genuine signature of depositor. 251NY58, 167NE171, 64ALR1103. [u] **Duty to pay only to holder under genuine indorsement is absolute.**–Iowa 230NW342.

686–95 252 IllA107; Iowa 230NW342; 251NY58, 167NE171, 64ALR1103; 252 NY247, 169NE372 (depositor has been held not estopped by his negligence); 133Misc48, 231NYS389; 227AppDiv545, 238NYS362 (depositor has been held not negligent in failing to examine indorsements on check); 228AppDiv572, 240 NYS164; 87PaSuper564; 10PaDist&Co 211. [c] 251NY58, 167NE171, 64ALR 1103 (where bank not misled); 252NY 247, 169NE372. [k] **Contributory negligence** is not defense in actions against banks for conversion for payment of fraudulently indorsed checks. 224IllA 457. [l] **Depositor held not negligent.**– 251 IllA279. [m] **Depositor may be estopped** to enforce liability where his own failure of duty misled bank to its injury. Iowa 230NW342. [n] **Depositor is not negligent in employing employee** who forged indorsement on check where he relied principally on his honesty. 227 AppDiv545, 238NYS362.

687–96 180Ark464, 22SW(2d)15; 118 Nebr489, 225NW471; 131Misc370, 226 NYS653, 655 [citCJ]; 226AppDiv530, 234NYS603; 227AppDiv545, 238NYS 362. [a] **Indorsement of check is not forgery** where made by payee to whom it was given in payment for land, deeds which he fraudulently executed. CalA 289P863.

687–97½–New. Where two parties in the handling of commercial paper are equally at fault, a necessary loss must fall upon both. 176Minn449, 223NW 780, 62ALR799(2dcase).

687–97¼–New. The drawer of a check on which the payee's name was forged can recover from the bank which paid it and collected from the drawee bank. TexCivA 23SW(2d)814.

687–99 237 IllA419; Iowa 226NW119; Mich 233NW185; MoA 27SW(2d)1066 (statute predicating bank's liability on notice to bank within year does not affect duty of depositor to notify bank); 252NY247, 169NE372; 132Misc322, 229 NYS459 (sufficient compliance with duty); TexCivA 295SW253. See also 133Misc48, 231NYS389. [a] (1) 213Ky 305, 280SW1106. (3) Depositor's negligence must be proximate cause of loss. CalA 293P98. [b] CalA 293P98; MoA 25SW(2d)545; TexCivA 295SW253. [c] 283Pa200, 129A52. [d] 84Colo 563, 272P470. [l] In Georgia.–35GaA460, 133SE351. [m] In Illinois.–237 IllA419. [n] **Depositor held not guilty of laches.**– 95CalA338, 272P799. [o] **Where discrepancies are reported immediately,** depositor is not chargeable with bank's payment on forged check. NJCir 144A 599. [p] **Bank receiving notice of forgery of payee's name on depositor's check within statutory time** cannot assert estoppel by reason of delay. MoA 20SW(2d)971. [q] **Depositor's delay of nine months** in giving notice to bank of forgery of payees' indorsement has been held negligent. 252NY247, 169NE 372. [r] **Any circumstance suggesting irregularities** in use of depositor's checks places on him duty to investigate. 228 AppDiv337, 239NYS598. [s] **Forged indorsement is not "forged check"** under statute. Mich 233NW185. [t] **Depositor must be given notice** of provision in bank statement. CalA 293P98. [u] **Comparison need be made only** with check book or register. Mich 233NW 185.

688–1 84Colo 563, 272P470. [a] **Fraud of agent** in hostility to depositor will not excuse depositor from performing duty. Iowa 230NW342.

688–2 95CalA338, 272P799; 203Iowa 833, 211NW542, 52ALR1297; Mich 233 NW185; 222MoA918, 9SW(2d)668 (bank cannot charge to depositor's account money paid on forged indorsements, and such money is regarded as depositor's property); MoA 25SW(2d) 545 (examination and verification of monthly statements and checks held to constitute due care as matter of law); 252NY247, 169NE372; 133Misc48, 231 NYS389; 138Misc122, 245NYS39. See also 133Misc48, 231NYS389.

688–3 203Iowa833, 211NW542, 52ALR 1297; 252NY247, 169NE372; 133Misc 48, 231NYS389. See also 237 IllA419.

688–3½–New. Depositors, intending to make a claim against a bank for restatement of an account, must make a specific claim on definite items. 133Misc48, 231 NYS389.

688–4 See also 132Misc138. 229NYS615.

688–4½–New. Payee cannot recover against a drawee bank the amount of a check paid on a forged indorsement. 148 Md449, 129A688.

688–4⅓–New. A collecting bank acquires no title and holds proceeds when collected for payee who, electing to ratify collection, may recover from collecting bank although it has paid on forged indorsement. 148Md449, 129A 688.

688–5 74CalA734, 241P945; 234 IllA39 (dictum); TexCivA 294SW324; 200Wis 304, 227NW387. [d] (3) 296Pa230, 145 A848. [g] **In case of partial payment,** purchaser is bona fide holder only to extent of payment made by him before notice. 235 IllA39.

691–7 234 IllA39; 242Mich581, 219NW 689. [a] **Bank receiving proceeds of forged check from drawee bank** is not bona fide holder where it credited account of payee with amount and credit was not used or drawn below face of check. 242Mich581, 219NW689.

691–9 74CalA734, 241P945.

691–10 234 IllA39.

691–10½–New. Any indication that a customer is using for his own benefit a document prima facie for the benefit of another should put the bank on inquiry as to the customer's right. 148Md449, 129A688.

692–13 203Iowa833, 211NW542, 557 [quotCJperEvans,J] 52ALR1297; TexCivA 23SW(2d)814 (recovery by drawee bank against collecting bank). See also 87PaSuper564. [d] **Right of action accrues on payment,** though drawee bank marked check "paid," charged it against drawer's account, and never thereafter credited it in that account. 87PaSuper 564.

692–14 203Iowa833, 211NW542, 557 [quotCJperEvans,J] 52ALR1297.

692–15 203Iowa833, 211NW542, 557 [quotCJperEvans,J] 52ALR1297.

692–16 203Iowa833, 211NW542, 557 [quotCJperEvans,J] 52ALR1297.

693–19 172Ark775, 290P370; 91CalA 708, 267P560; 132Misc128, 229NYS110 (prima facie case); 200Wis175, 227NW 866 (bank paying on unauthorized indorsement of attorney is liable to payee). See also 196NC134, 144SE833. [a] (2) Payee of check can recover amount thereof from nondrawee bank crediting payee's clerk's account with check bearing forged indorsement of payee and receiving amount from drawee. MoA 27SW(2d)768. (3) In such case it is immaterial that payee did not credit maker's account with amount of check so cashed. MoA 27SW(2d)768. (4) In such case failure of payee to demand money from defaulting clerk does not preclude recovery. MoA 27SW(2d)768. (5) Equitable principles applicable in action for money had and received do not prevent recovery of money received on such checks. MoA 27SW(2d)768. (6) Where bank collects checks with forged indorsements, money received on them belongs to owner of checks. MoA 27SW (2d)768. [d] 134Misc351, 235NYS634 (payee's delay in giving bank or intermediate indorsers notice of forgery held not to defeat payee's right of recovery). See also 132Misc128, 229NYS 110. [o] (3) Bank is liable to principal for loss of funds resulting from honoring check payable to principal and indorsed by agent without authority. 150 Md470, 133A319. [q] **Notice to owner.**– 150Md470, 133A319. [r] **Contributory negligence.**–150Md470, 133A319. [s] **No laches short of statute of limitations** can defeat recovery against bank paying on unauthorized indorsement. 200Wis 175, 227NW866. [t] **United States held not entitled to recover** proceeds of tax refund check from bank with which it was deposited after payee's indorsement had been forged, payee being entitled to recover subject to any equitable defenses of bank. 36F(2d)829. [u] **It is duty of bank crediting check to depositor's account,** to ascertain genuineness of indorsement. MoA 27SW(2d) 768.

693–22 236Mich271, 210NW263; 146 Wash520, 264P8, 10 [citCJ]. [a] 236 Mich271, 210NW263. [c] **Bank is not liable on theory of conversion** because it did not convert funds of payee. 236 Mich271, 210NW263.

695–26 234 IllA39; TexCivA 19SW(2d) 388. [a] (1) 228AppDiv572, 240NYS 164 (payment held made on forged indorsement as regards liability of bank issuing drafts). (4) That drawer bank issued drafts to payee's agent for agent's worthless checks does not defeat right to recover from drawee bank for paying drafts on unauthorized indorsements of agent. 33F(2d)437. (5) Other instances. 248NY252, 162NE23. [b] (2) That holder bank indorsed forged check "previous indorsements guaranteed" for purpose of collection does not of itself relieve drawee bank of duty to discover genuineness of customer's signature. TexCivA 19SW(2d)388. [d] **As between two negligent banks,** check presumed genuine. 234 IllA39. [e] **Drawer bank owes drawee bank no duty** with reference to indorsements. 33F (2d)437.

695–29 69CalA319, 231P44; 74CalA 734, 241P945; Iowa 226NW119; TexCivA 294SW324. [a] **Drawee bank's action against bank cashing forged check** is not action on check. Iowa 226NW 119.

696–30½–New. Where a bank paid a check bearing a forged indorsement of payee's name, it is liable to the drawee bank for this sum. 232 IllA186.

696–30⅓–New. A bank issuing its check on a forged letter and withdrawal receipt is estopped as against a bank making payment thereon after inquiry. 245Mich179, 222NW157.

696–30¼–New. A bank, paying the amount of a certificate of deposit to another bank, which accepted the certificate from the depositor's lawyer indorsing it without authority, can recover from the latter bank on obligation assumed by it when it expressly guaranteed all prior indorsements. 200Wis175, 227NW866.

696–30⅕–New. Complaint held sufficient to allow introduction of evidence to rebut presumption of negligence arising from delay. 11PaDist&Co343.

696–31 227AppDiv283, 237NYS577 (where conditions precedent to payment of check had been fulfilled, bank is not liable for payment of stolen check).

696–31½–New. Where law does not protect holders in due course, inquiry before payment is necessary precaution for protection against imposition by thief. 253NY359, 171NE569.

696–31⅓–New. Bank paying without inquiry conditional nonnegotiable check stolen from maker cannot deduct amount from depositor's account. 253NY359, 171NE569.

696–32 124Kan333, 259P698, 700 [quot CJ].

696–33 Ala 129S74; 124Kan333, 259P 698, 700 [quotCJ] (intentional refusal to pay check); 168La691, 123S126, 65 ALR1308; [f] 124Kan333, 259P698; 197NC253, 148SE253 (amendment). [g] 124Kan333, 259P698. [h] 178Ark989, 13SW(2d)595; 40GaA791, 151SE546; 119Kan321, 239P769 (evidence of refusal of other banks to loan plaintiff money or to cash his checks is inadmissible where it is not shown that refusal was caused or influenced by defendant's nonpayment of check); 124 Kan333, 259P698; 117 Okl 142, 245P 626. [i] Ala 129S74; 40GaA791, 151 SE546; 117 Okl 142, 245P626; 45SC 141, 143SE19. [j] 124Kan333, 259P698. [k]**Ground of action.**–Ala 129S74.

696–33½–New. Depositor may sue for breach of contract or in tort for breach of duty arising out of contract. Ala 129S74.

696–34 See also 147SC538, 145SE417.

696–35 40GaA791, 151SE546; 124Kan

333, 259P698; 150Va336, 143SE881. But see 119Kan321, 239P769. [j] **Only actual damage** may be recovered by depositor. 8PaDist&Co 27. [k] **Excessive damages.**–168La691, 123S126, 65 ALR1308 ($1,500 reduced to $500). [l] **Measure of damages as affected by whether depositor is trader or nontrader.**–Ala 129S74. [m] **Bank's failure to pay particular check,** when deposit is sufficient, is not relieved because of application of funds to payment of later checks. 40GaA791, 151SE546.

698–40 57CalA377, 207P270.

698–42½–New. Bank refusing payment on ground of insufficient funds cannot question authority of depositor's manager to draw check. Ala 129S74.

698–44 SD 226NW579 (check payable from special deposit). [h] SD 226NW 579.

698–45 44F(2d)111; 172Ark775, 290 SW370; 78CalA362, 248P947; 37GaA 813, 142SE194; 45 Ida746, 265P699 (cannot ground right to recovery on misrepresentation regarding sufficiency of deposit where drawer owed bank more than amount of deposit); 47 Ida 405, 276P43, 68ALR856; 120Kan572, 245P114 (in absence of agreement); 159La752, 106S292; 116Nebr456, 218 NW92; 127Misc132, 215NYS222; 196 NC134, 144SE833; 91PaSuper207; SD 232NW913 (complaint held not to state cause of action); TexCivA 272SW571; TexCivA 10SW(2d)753; 150Va236, 142 SE356. [c](1) 120Kan572, 245P114 (agreement not shown). [g] (1) 119 Kan84, 237P921; 122Kan101, 250P 1077; 173Minn289, 217NW365. (2) Where bank, having knowledge that its customer was purchasing live stock for cash and reselling it, refused to pay check given in payment for live stock, though draft constituting proceeds thereof was deposited, seller may recover for money had and received. 316 Mo354, 289SW796. [k] **Payee of unaccepted check** may not sue thereon against drawee. 169Ark1084, 277SW 871. [l] **Bank's payment to third person on unauthorized indorsement** does not entitle payee to sue bank. 156Miss 893, 127S570, 69ALR1068.

698–45½–New. On acceptance the payee may sue the drawee thereon. 169 Ark1084, 277SW871.

698–45⅓–New. Negligence of a forwarding bank in guaranteeing an unauthorized indorsement of payee on a check does not give payee a cause of action. 159La752, 106S292.

698–45¼–New. A drawee bank's negligence in paying a check without ascertaining the authority of payee's agent to indorse does not give the payee a cause of action against the bank. 159 La752, 106S292.

698–45½–New. Where it does not appear who has possession of the check, the bank is not liable to the payee in an action to recover possession of the check. 159La752, 106SW292.

700–47 177Ark328, 6SW(2d)308 (bank agreeing to pay amount not exceeding specified sum); 93Fla67, 111S541; 159 La752, 106S292; 127Misc132, 215NYS 222; TexCivA 278SW459. [c] 156Miss 893, 127S570, 69ALR1068; 196NC134, 144SE833; TexCivA 278SW459. [d] See also 179Ark53, 14SW(2d)238. [e] 179Ark53, 14SW(2d)238. [i] **Bank's placing on back of instrument** phrase "Through New Orleans clearing house, indorsement guaranteed" does not constitute acceptance so as to give holder a cause of action against bank under Negotiable Instruments Law. 159La 752, 106S293. [j] **Written acceptance as required by statute** applies only to instruments presented for future acceptance. TexCivA 278SW459.

701–52 78CalA362, 248P947, 950 [cit CJ]; 92CalA443, 268P425; 251NY152, 167NE203; 127Misc27, 215NYS269; 132Misc130, 229NYS108 (stop payment order held sufficiently to describe check); TexCivA 10SW(2d)753, 755 [citCJ]; 102WVa128, 135SE257. [b] (2) 233 IllA99; Md 150A797. Contra 78CalA362, 248P947. [c] 78CalA362, 248P947. [i] 78CalA362, 248P947. But see 251NY152, 167NE203. [u] **Notice must be positive and unqualified.**–251NY152, 167NE203. [cc] **Payment cannot be stopped** where bank has given depositor credit for drafts on consignees of live stock and has received money on such drafts under agreement between bank and depositor to honor checks drawn by him in payment of live stock, upon his depositing with it drafts on such consignees when live stock was shipped. 119Kan84, 237P921. [dd] **Bank paying note signed by former corporation officer has perfect defense** where it received copy of director's resolution authorizing new officer's signature, but no oral order to stop payment. 127Misc27, 215NYS269.

702–53 78CalA362, 248P947. See also 5PaDist&Co 363. But see 34F(2d)348. [a] **Drawer stopping payment cannot take advantage of rule of payee's bank** that checks were received only for collection. 296Pa54, 145A689.

702–55 93Fla67, 111S541, 551 [quot CJ]; 115 Or366, 237P361 (where check directed bank to pay certificate of deposit after death).

704–56 132Misc910, 231NYS16.

704–57 93Fla67, 111S541, 551 [quot CJ].

705–58 IndA 170NE108 (appointment of receiver for insolvent).

705–59½–New. [§ 431a] d. **By Indorser of Check to Bank for Deposit.** One indorsing checks to a bank "for deposit only" and stopping payment on the bank's insolvency is not liable to a correspondent bank to which the checks were returned dishonored. 53SD496, 221NW95, 60ALR863.

705–64 227AppDiv413, 237NYS200 (certification imports promise to pay lawful owner of note, and not one procuring certification).

705–65 [a] (3) Letters "O. K.," with initials of bank cashier written on face of check, are not sufficient certification. 50Philippine105.

705–69 224 IllA26; TexCivA 278SW 459.

705–70 MoA 27SW(2d)65; 284Pa561, 131A471, 472 [citCJ], 42ALR1133. [b] **In Pennsylvania.**–284Pa561, 131A471, 42 ALR1133.

705–71 See also 42SD585, 176NW646.

705–72 224 IllA26.

706–81 CalA 292P281; 174Minn500, 219NW863. [a] 122Kan835, 253P906. See also 90PaSuper505.

707–82 175Ark929, 1SW(2d)1008; 122 Kan835, 253P906, 908 [quotCJ]; 254 Mass173, 149NE883; 134Misc863, 237 NYS230; 227AppDiv457, 238NYS169.

707–83 32Ariz318, 257P985; Fla 128 S491; GaA 155SE799; 159La752, 106S 292; 254Mass173, 149NE883; 134Misc 863, 237NYS230. But see 227AppDiv 413, 237NYS200. [f] 227AppDiv413, 237 NYS200. [k] **Only payee named in check or indorsee** is entitled to such payment upon presentation. 200 Iowa 1086, 205NW853, 42ALR622. [l] **Defenses which drawer could have made** not available to bank certifying check. 284Pa561, 131A471, 42ALR1133. [m] **Certified check is substantially different** from check drawn by bank on itself, which binds itself alone. TexCivA 289 SW451. [n] **New obligation is created** and drawer's and indorser's liability is discharged. 249NY386, 164NE326.

708–84 [b] **Demand** may be made any time within statute of limitations. 284 Pa561, 131A471, 42ALR1133. [c] **Rule requiring presentment within reasonable time** does not apply to certified checks at instance of holder. 284Pa561, 131A 471, 42ALR1133.

708–85 Fla 128S491; MoA 27SW(2d) 65.

708–85½–New. Certification of check whereon name of payee has been changed admits existence of payee then named and capacity to indorse. CalA 292P281.

708–86 But see 227AppDiv457, 238NYS 169.

708–87 Fla 128S491; GaA 155SE799.

708–89 197NC208, 148SE42. See also GaA 155SE799.

709–91 [a] **Drawer, securing certification, may surrender check for cancellation.** GaA 155SE799.

709–92 196NC134, 144SE833.

709–93 134Misc863, 237NYS230 (where indorser's liability would be changed to indorser of uncertified check, cancellation is ineffective).

711–4 But see 177Ark328, 6SW(2d)308.

711–8 223AppDiv416, 228NYS476.

711–9½–New. A certified check is not actual money. 151Md181, 135A139.

711–9¼–New. Certified check is ordinary bill of exchange on which bank's liability becomes absolute by certification or unqualified acceptance. Wash 289P 47.

711–10 [b] **Certification of check or note** discharges drawer or maker. 227 AppDiv413, 237NYS200 (maker discharged).

712–14 [a] IndA 170NE351 (loan and not bailment); 126Misc638, 214NYS378; 50SD191, 208NW825. [e] **Deposit distinguished.**–126Misc638, 214NYS378. [f] **Note for five thousand dollars** certificate of deposit for four thousand dollars in compliance with borrower's request for loan of one thousand dollars is construed as forming one contract. 42 Ida720, 248P9.

712–15 44Philippine126 ("loan" and "discount" distinguished). [b] **Other definitions.**–150Miss738, 117S124; 226 AppDiv21, 234NYS260.

712–19 253NY130, 170NE519.

712–22 [a] **Failure of bank to comply** with agreement on making five thousand dollar loan to give borrower certificate of deposit for four thousand dollars and cancel four thousand dollars of note with certificate terminates borrower's liability as to four thousand dollars. 42 Ida720, 248P9.

712–22½–New. Loan and irregular deposit both create relation of debtor and creditor in bank, although the contracts are not the same. 126Misc638, 214NYS 378.

712–22¼–New. A loan is usually made at the request and for the benefit of the other party. 126Misc638, 214NYS378.

712–22¼–New. Uncollected accrued interest on a loan, added to the principal and included in the renewal note, is not money loaned. SD 227NW371.

712–23 37GaA268, 140SE767; 114Nebr 389, 207NW683.

712–24 124Kan502, 260P639 (instrument held bond within meaning of statute relating to discount of notes).

712–26 [d] **Liability of borrower or accommodation party is not affected by illegal loan.**–39GaA753, 148SE341(2d case).

712–28 226Ky236, 10SW(2d)819; 54 SD291, 223NW193 (loan held not excessive). [h] **Bond taken as security** is not within operation of statute. 164 Minn265, 204NW938. [i] **Branch of Canadian bank in state is not limited** to twenty per cent of branch's working capital. 150Wash568, 274P99. [j] **Purpose of statute** is to protect stockholders, depositors, and customers. 150 Wash568, 274P99. [k] **Officers and directors personally liable for excessive loans.**–SD 227NW371 (accrued interest unpaid, included in renewal notes, held not to constitute loan).

713–29½–New. A transaction whereby the note of a third person is substituted for loans made by a bank in excess of the amount permitted by law for the purpose of concealing the making of such excess loans is illegal. 203 Iowa 524, 211NW219.

713–29⅓–New. The person whose note is so substituted is entitled to surrender of his note and collateral when such excess loans have been paid by the borrower. 203 Iowa524, 211NW219.

713–31 175Ark153, 298SW863; 33Wyo 326, 239P531, 533 [citCJ]; 33Wyo 474, 240P683. [c] (2) Loan to officer of bank in violation of statute. 152SC317, 149 SE840.

713–33 Sask [1927] 3DomLR713. [i] **Excess voluntarily paid not recoverable.**–Man [1930] 1DomLR590.

715–46 SD 231NW601 (oral agreement for bank to take title to judgment debtor's business was for purpose of security). [a] (2) Bank, having voluntarily surrendered collateral note to indorsee before judgment in suit by indorsee against indorser, is estopped

from bringing suit itself thereon. 128 Me280, 147A205, 65ALR1316. [c] **Whether debtor's estate is solvent or not**, bank may take additional collateral to secure his note. 177Ark1193, 6SW(2d)284. [d] **Mere ownership of draft covering goods shipped** would not of itself transfer title thereto. MoA 27SW(2d)492. [e] **Right to collect on collateral security.**–98PaSuper270.

716–47 See also Can [1928] 1DomLR 493. [b] **What law governs.**–175Minn 555, 222NW274.

716–52½–New. Resolution of board of directors authorizing acceptance, pursuant to Gen. St. [1923] § 7678, is not necessary in respect to bond to secure notes previously given to bank. 164Minn 265, 204NW938.

716–52⅓–New. A claim by a bank as pledgee of the right to hold securities for a debt not covered by pledge does not amount to conversion. 13F(2d)40.

716–52¼–New. Knowledge of bank president as to ownership by estate of collateral several years previous will not invalidate a transfer by a widow of decedent of stock collateral for a note where there was nothing to show that she was not the legal owner. 206Iowa 252, 220NW318.

716–52⅓–New. A bank holding a matured note with collateral may sue on the note or sell the collateral, or do both if necessary. 226AppDiv412, 235 NYS392.

716–52⅙–New. The balance of proceeds of security does not amount to a deposit account subject to check. 152SC 135, 149SE330 (at most, refusal to cash check drawn on such proceeds amounts to failure to honor draft).

716–52⅐–New. Securities offered to a bank by its president as pledge for value of bonds taken by him are not accepted without the physical receipt of the securities with the bank examiner's approval and the bank's assent to the terms of the offer. 154SC267, 151SE579.

716–52⅛–New. Maker of accommodation note transferred as collateral for note given by one bank to another cannot object to validity of principal note without showing execution without stockholders' consent. TexCivA 28SW(2d) 1104.

716–53 252NY430, 169NE635 (certificates of stock). But see Can [1929] 4 DomLR1028.

716–54 135Misc697, 238NYS245 (merchandise); 196Wis391, 220NW177 (notes and land contract).

716–57 28OntWN440, [1925] 3DomLR 1205. See also 38F(2d)254.

717–60½–New. Under Canadian statute bank may take obligations of fire insurance companies to pay indemnities as security for loans. Can [1929] 4DomLR1028.

717–61 208Iowa1179, 226NW3 (evidence insufficient to show that deed to bank officer was pledged as security for indebtedness to bank).

717–67 220MoA223, 282SW729.

717–69 140Okl282, 283P242, 68ALR 900. [c] **Interest** on debt secured is covered by collateral applicable to such debt. 215Ala538, 112S105.

717–69½–New. or against the maker of the collateral note indebted to the bank; 213Ala125, 104S403. [a] **Holding by bank of both notes after payment of secured note**, as security for debt to bank of maker of collateral note is illegal user or misuser and wrongful detention from owner of collateral note. 213Ala 125, 104S403.

717–70 206Iowa265, 217NW865; 135 Misc697, 238NYS245; TexCivA 286SW 347. [c] **Contract that security for debt** may be held for any other indebtedness is valid. 6F(2d)203. [d] **Agreement to pay legal expenses incurred by bank in enforcing lien** against security is legal. 22F(2d)920. [e] **Notes pledged for loan and all other liabilities** of borrowing bank could be held as security for time certificate issued to customer of borrowing bank, and indorsed to lending bank without borrowing bank's knowledge. 39GaA633, 147SE909(4thcase).

718–74½–New. Where the party cannot deny that the bank rightly holds the note, he cannot claim that the other party is under obligation to get it from the bank and return it to him. 77Colo 122, 235P570.

718–74⅓–New. Under general denial plaintiff could show that property in the note was deposited as collateral. 77Colo 122, 235P570.

718–74¼–New. Defendant had the burden of proof to show the amount still due from the payee of a collateral note alleged to have been converted. 77Colo 122, 235P570.

718–74⅕–New. Evidence admissible to show plaintiff's property in note alleged to have been converted. 77Colo 122, 235 P570.

718–74⅙–New. In action for conversion plaintiff may show property in note held as collateral on the question of damages. 77Colo 122, 235P570.

718–74⅐–New. Evidence erroneously rejected to show suit, judgment, and foreclosure of pledge alleged to have been converted. 77Colo 122, 235P570.

718–74⅛–New. Evidence sufficient to show conversion of note given as collateral to a loan. 77Colo 122, 235P570.

718–74⅑–New. Evidence sufficient to show damage. 77Colo 122, 235P570.

718–74 1/10–New. Instructions on burden of proof held erroneous. 77Colo 122, 235 P570.

718–74 1/11–New. A pledgee bank may, under an agreement, apply collateral in the discharge of amounts of its customers' drafts collected by the pledgor bank and not paid, although the pledgee bank charged back credits against the customers. 175Minn555, 222NW274.

718–74 1/12–New. A bank holding a note as collateral need not await definite determination of the amount due on a bond secured before collecting the collateral. 222MoA633, 300SW834.

718–74 1/13–New. A bank suing on a note pledged to it by a third person who had received it as security may collect the entire note and hold the balance for such creditor. 294Pa197, 144A88.

718–74 1/14–New. A change in form of indebtedness will not affect the lien of a bank on security pledged to secure the original notes. 226Ky361, 10SW(2d) 1076.

718–74 1/15–New. A letter of hypothecation, pledging bills of lading "now or hereafter received" by the bank, from or for a depositor as security for all of the latter's obligations, affects all future transactions made in reliance thereon. 33F(2d)81.

718–75½–New. On customer's payment to bank of money advanced to purchase merchandise, it is bank's duty to deliver to customer or his assignee the merchandise given as security. 135Misc697, 238 NYS245.

718–76 [c] **Priority of lien.**–31F(2d) 612.

718–76½–New. Banker's lien on collateral as security for notes obtained subsequent to original transaction in which collateral was deposited is joined to that of person holding title to collateral subject to bank's original claim. 13F(2d) 40.

718–77 [a] 16F(2d)159. [b] **Letter forwarding note to another bank for discount** and advising its return at maturity for collection and remittance is outright sale without pledge or warranty. 150Miss738, 117S124.

718–83½–New. Where transaction between two banks amounts to a discount and sale of notes and not a loan, the bank acquiring the notes cannot recover from the other bank which indorsed the notes without recourse giving unconditional guaranties of payment executed by its directors individually. 165Minn428, 206NW708.

718–83⅓–New. A bank has the duty to exercise reasonable care as to a bond pledged as security. NJ 134A188.

719–88½–New. A bank holding bills of exchange payable to its debtor as security may apply proceeds thereof upon the debt, notwithstanding the debtor is liable to sales tax on the goods for which the bills were given, even after bankruptcy of the debtor. 57OntL 109, [1925] 3DomLR99.

719–90 MoA 287SW835.

719–91 Iowa 230NW557 (bank acts as agent in investing money for customer); MoA 287SW835, 838 [quotCJ]. See also 173Minn625, 217NW597. [d] **Where money is delivered to bank to be loaned to named persons** and bank makes loans in accordance with directions, bank is not liable for fraud or negligence in making loans to persons not financially responsible or on insufficient security. 87CalA224, 261P1064.

719–92 85Colo 46, 272P1116 (failure to obtain release of outstanding mortgage before making mortgage loan is not excused); Iowa 230NW557. [d] **Loan by president**, unauthorized by directors, is not ultra vires, under some statutes. MoA 287SW835.

719–95½–New. Where plaintiff director paid money to a bank for the purpose of loaning it on a mortgage which was executed to the bank, and vested the bank with apparent ownership of the mortgage, plaintiff could not claim that payment to the bank through an agent was not payment of the mortgage. Iowa 224NW531.

719–95⅓–New. Customer claiming that bank acted as agent in investment of funds under agreement with officer has burden of proof. Iowa 230NW557.

720–96 114Nebr389, 207NW683; 197 Wis20, 221NW379. [a] **Guaranty of notes by directors** has been held supported by sufficient consideration. 207 Iowa1375, 221NW916 (failure to apply funds to payment of rediscounted notes on failure of correspondent bank is held not to release directors from liability).

720–96½–New. [§ 463a] 1½. **Repayment of Loans.** A receipt reciting receipt of a deed in payment of a loan is a contract to be construed as such. MoA 2SW(2d)159.

720–96⅓–New. A bank receiving property in payment of a note cannot hold the property and profit by the difference if the value exceeds the amount of the note. MoA 2SW(2d)159.

720–96¼–New. A bank receiving property to pay a note must show that it accounted to plaintiff for the value thereof. MoA 2SW(2d)159.

720–96⅕–New. It is the duty of a rediscounting bank, after notice, to apply the account of the forwarding bank to payment of a rediscounted note. 53 SD213, 220NW512 (effect of insolvency of forwarding bank before receipt of notice by rediscounting bank).

720–4½–New. Evidence held to sustain finding that sum paid in excess of legal interest was for additional consideration furnished borrower by bank's sale of bonds at loss to enable it to extend loan, and not usurious. 132SC107, 128SE168.

720–4⅓–New. Evidence held to sustain finding that money was advanced. CalA 286P733.

721–15 180Ark668, 22SW(2d)162.

721–16½–New. Insolvency is not prerequisite to voluntary liquidation supervised by superintendent of banks. 76 Mont248, 245P947.

721–16⅓–New. On an order being obtained authorizing a bank to liquidate its affairs, it need not designate the directors as liquidating agents, since they become so by operation of law, and not as agents of the bank examiner. 146SC309, 144SE57.

721–16¼–New. Since in such case the directors become ipso facto liquidating trustees, with exclusive powers it has been held that an ex parte order purporting to authorize the state bank examiner to appoint a liquidating agent was without legal validity, and the liquidating agent so appointed is liable to a strict accounting of his conduct of the trust which he has assumed. 146SC309, 144SE57.

721–17 [b] **Voluntary dissolution proper under verified petition of directors, officers or stockholders.**–220MoA78, 278 SW1091.

722–26½–New. Under some statutes, the stockholders of a bank whose capital is impaired or reserve depleted are vested with the right to determine whether they will repair the capital and restore the reserve to legal requirements and continue in business or suf-

fer the business of the bank to be voluntarily liquidated or liquidated at the hands of the state in the manner provided by law. 114Nebr567, 208NW662.

722-26½-New. A bank may voluntarily dissolve under a general corporation law upon paying depositors and creditors. 220MoA78, 278SW1091.

722-27 NC 155SE560 (liquidation by corporation commission inapplicable). See 243 IllA122. [b] **Transfer of assets to new bank with bank commissioner's approval** has been held not void as attempted liquidation in violation of statute. 222MoA633, 300SW834.

722-30½-New. Where a bank transfers its assets to another bank to pay stated claims and to return the balance to the transferor, the transferor's creditors cannot follow the assets in the hands of the transferee. 152Va814, 148SE828.

722-30½-New. A bank which is the transferee of assets of another bank is not liable personally for the transferor's debts where there was no general assumption of debts, no consolidation, and no fraud. 152Va814, 148SE828.

722-32 TexCivA 24SW(2d)480. [a] **Sale of assets of bank whose charter expired** by trustees to another bank of which they are principal stockholders has been held voidable for fraud or unfairness. **TexCivA** 24SW(2d)480. [b] **Evidence has been held sufficient** to support conclusion that sale of assets of bank whose charter expired by trustees to another bank was fair and free from fraud. **TexCivA** 24SW(2d)480.

722-40 178Ark361, 12SW(2d)1; 101WVa127, 132SE372. [a] **State bank commissioner** winding up affairs of insolvent bank acts as officer of court. 23F(2d)381.

723-56 253NY23, 170NE479.

723-64 94Fla1023, 114S760.

724-67½-New. Proceedings to wind up the affairs of an insolvent bank are summary in nature. 170Ark77, 278SW636.

724-70½-New. The procedure set out in the banking laws is exclusive in some jurisdictions, 101WVa127, 132SE372.

724-70½-New. and where the commissioner of banking and his receiver have taken charge and are proceeding in proper performance of their statutory duties, a suit by a creditor or stockholder for the same purpose will be prohibited. 101WVa127, 132SE372.

724-71 52ND155, 201NW997, 38ALR807 (statute designating judge to hear actions for liquidation of insolvent banking corporations held valid); **Tex CivA** 288SW590. [c] **In Iowa.**-207 Iowa 41, 217NW477.

724-71½-New. The circuit court has no jurisdiction to entertain a general creditor's suit by a creditor or stockholder where the commissioner and his receiver have taken charge of the insolvent bank. 101WVa127, 132SE372.

724-71½-New. In the absence of charges of fraud or other improper conduct by the commissioner and receiver in performance of their duties to complainant's prejudice in the process of liquidation. 101WVa127, 132SE372.

724-72 [c] **Attorney-general** may be empowered to institute proceeding. 52ND26, 202NW391.

724-81½-New. Where statute requiring that on dissolution creditors shall be given published notice to present claims was not complied with, dissolution was not effected as to creditors who failed to receive notice. 37F(2d)907.

725-85 38GaA598, 144SE686(2dcase); 38GaA591, 144SE815; 41GaA13, 151SE831 (superintendent of banks has right to collect moneys due insolvent bank); 232Ky844, 24SW(2d)912; 234Ky61, 27SW(2d)409; MoA 282SW757. [d] (4) Directors have right and power under statute to deliver bank to commissioner of insurance and banking whether he wishes it or not. **TexCivA** 290SW835 [g] (1) 32F(2d)368; **TexCivA** 13SW(2d)391. (2) Banking commissioner has status of court receiver and bank's property is in custodia legis. **TexCivA** 31SW(2d)488. [o] **State superintendent of banks** taking possession of assets of bank is mere receiver in nature of liquidator. 219AppDiv256, 219NYS732. [p] **Commissioner of department of finance stands as trustee** in charge of insolvent closed bank to protect rights of all claimants particularly those of depositors and general creditors. 45 Ida522, 263P632. [q] **Superintendent of banks** taking over insolvent bank represents and acts for bank, and its stockholders and creditors as well. **SD** 225NW307(2dcase). [r] **District court has jurisdiction** over matters relating to liquidation of insolvent bank by banking commissioner. **TexCivA** 13SW(2d)391. [s] **Bank continues as legal entity till finally liquidated,** though it has been taken over by state superintendent of banks. 117Nebr562, 221NW691 (construing South Dakota statutes). [t] **Contract between superintendent of banks and trustees delegating to trustees personal trust** of superintendent is void, and indemnity bond based on such unlawful contract is therefore void. 40GaA598, 151SE48(2dcase). [u] **Officers and depositors cannot maintain suit against commissioner** to protect bank's property where they could not show that bank was unable to protect itself. **Tex CivA** 24SW(2d)1106. [v] **Presumption** that bank came voluntarily into hands of commissioner was not overthrown by general allegations in officers' plea that bank and its officers did not voluntarily surrender bank. **TexCivA** 24SW(2d)1106. [w] **Comptroller restoring affairs of bank without receivership** should surrender possession of bank to its officers for resumption of business. **Fla** 126S283. [x] **Comptroller was without statutory authority** to surrender for reopening bank restored to sound condition where receiver was appointed. **Fla** 126S283. [y] **Statute** was passed to facilitate surrender and reopening of banks taken over by comptroller. **Fla** 126S283. [z] **Where pleadings clearly show that freezing order made by comptroller** is not reasonable or just or practicable, it will not be enforced by court. **Fla** 126S283. [aa] **Question on application for order confirming freezing order** is whether conditions existing warrant confirmation. **Fla** 126S283. [bb] **Where terms and conditions of freezing order are not reasonable** or indicate that bank cannot be placed in sound condition, court should decline to confirm it. **Fla** 126S283. [cc] **Prima facie effect of order of administrative officer** may be overcome by admissions in pleading clearly showing invalidity or its unreasonableness. **Fla** 126S283. [dd] **Comptroller's freezing order** is not conclusive but subject to review and confirmation. **Fla** 126S283. [ee] **Speedy adjustment of delinquent banks is necessary** to efficiency and utility of law. **Fla** 126S283. [ff] **Statute providing for liquidation by banking commissioner** held exclusive and to supersede former legislation. 233Ky801, 26SW(2d)1045. [gg] **Insolvent bank ceases to function under its charter** on being taken over by banking commissioner: **TexCivA** 31SW(2d)488. [hh] **Where state comptroller** has taken over insolvent bank under statute, order appointing receiver to control its assets is unwarranted. 42F(2d)209.

725-86 See also **Ala** 129S92.

725-86½-New. In Alabama a comptroller, through receiver, has the power to administer assets and affairs of banks of which he takes control. 93Fla1030, 113S280.

725-87 [a] **Due process would be denied** if statute gives superintendent of banks exclusive right to litigate insolvent bank's claims without remedy to stockholder or creditors on his refusal. 219Ala638, 123S71.

726-88 38GaA508, 144SE385 (in name of superintendent of banks); 119 Oh66, 162NE277; 147SC461, 145SE288; 52SD594, 219NW477 (complaint held sufficient to state cause of action). [c] **Possession of note by superintendent not necessary** to suit on note pledged by bank to which it was entitled before commencement of action thereon. 52SD594, 219NW477.

726-90½-New. Transaction by former holder of certificate of deposit, incompetent against assignee on question whether certificate was collateral to note. 77Colo168, 234P1074.

726-90½-New. Banking commissioner has the burden of proof in an action to cancel certificate of deposit. 77Colo168, 234P1074.

726-90¼-New. Construction of a petition to recover the purchase money of property sold under order of court. 40GaA468, 150SE169.

726-90½-New. Evidence held not to support recovery by the superintendent of banks of money paid to defendant before its suspension, on the ground that it constituted a preference. 40GaA451, 150SE102.

726-93½-New. In Texas, the banking superintendent, in matters not pertaining to liquidation of a bank, is not subject to the orders of any court except the state supreme court. **TexCivA** 13SW(2d)391.

727-96 [a] **Suit in name of bank.**-117Nebr562, 221NW691 (construing South Dakota statutes).

727-97 222MoA839, 6SW(2d)970; **MoA** 31SW(2d)96; **TexCivA** 2SW(2d)463 (commissioner is estopped under circumstances where bank and its officers would have been estopped); **TexCivA** 31SW(2d)329; 196Wis391, 220NW177. See also 318Mo1120, 2SW(2d)607; **MoA** 8SW(2d)1030.

727-2½-New. Under statutes in some jurisdictions the assets of an insolvent bank are sequestered and placed in the hands of a commissioner to be administered for the benefit of all claimants. 44 Ida708, 260P157.

727-2½-New. Commissioners to receive claims against a bank may be reappointed to hear additional claims after once reporting. 125Me150, 131A863.

727-2¼-New. This method of liquidation is exclusive. 44 Ida708, 260P157.

727-2½-New. Jurisdiction of superintendent of banks and the circuit court of affairs of an insolvent bank under statutes and rules prescribed thereunder. **Mont** 252P373; 50SD639, 211NW460.

727-2⅓-New. Complaint against superintendent of banks of foreign state which alleges only the acts authorized by statute does not state a cause of action in conversion. 170Minn120, 212NW3.

727-2⅓-New. The commissioner cannot, as such, be sued on a claim against the bank. 44 Ida708, 260P157.

727-2½-New. and the bank can be sued only on permission by the commissioner. 44 Ida708, 260P157.

727-2½-New. or upon his rejecting a claim presented against the bank. 44 Ida708, 260P157.

727-2 1/10-New. The complaint in such suit against the bank must allege either permission from the commissioner to sue or the presentation to, and rejection by him of the claim. 44 Ida708, 260P157.

727-2 1/11-New. Actions. Sustaining a demurrer to the evidence is error where the question of whether the bank presenting a certificate of deposit for allowance is plaintiff's agent is for the jury. **MoA** 2SW(2d)123 (as was directing verdict where there is jury question).

727-2 1/12-New. A receiver appointed under laws in force at the time of his appointment is not ousted ipso facto, without the necessity of resignation, or court proceedings, by a subsequent statute providing that the superintendent of banks shall be the sole receiver. 206Iowa869, 221NW668 (application of statute).

727-2 1/13-New. In a suit by the superintendent of banks to recover on a contract by directors, a requested charge that the guarantors, if directors of the bank, could not by act in settling notes

be relieved of liability if the bank sustained loss, although other guarantors not directors might be released, was erroneously refused. 38GaA591, 144SE815.

727-2¼-New. Where the superintendent of banks, after taking a bond from the officers and directors of a bank to secure liabilities of the institution, thereafter took the bank into custody for liquidation by reason of "failure" to furnish an additional bond, the consideration for the original bond failed, and the obligors were relieved from liability thereon. 157Tenn575, 11SW(2d)682.

727-2½-New. The superintendent of banks has authority under statutes to permit a bank's resumption of business if safe and prudent. 54SD158, 222NW683.

727-2¼-New. A judgment against a state bank rendered while it is in the hands of the department of trade and commerce, the guaranty fund commission, or the receiver appointed to liquidate the bank under the statutes of the state, creates no lien upon the real estate of the bank, as against those in possession. 118Nebr76, 223NW641.

727-2½-New. Assessment and execution against the owner of capital stock of a bank were not void because made by an agent for the superintendent of banks. 28F(2d)691.

727-2½-New. The superintendent of banks is in effect a statutory receiver. 166Ga820, 144SE747.

727-2½-New. Duties imposed to collect debts and sell assets are nondelegable to anyone not expressly named as a liquidating agent. 166Ga820, 144SE747.

727-2½-New. Powers of the superintendent of banks are nondelegable. 166Ga820, 144SE747.

727-2½-New. The superintendent of banks, may, under his hand and official seal, appoint an agent to assist him in liquidating and distributing the assets of any bank whose assets are subject to liquidation by him, and to that end may empower an agent to issue executions for the enforcement of the liability of stockholders, where they have failed to pay the same after due assessment and notice. 39GaA64, 146SE28(3dcase).

727-2½-New. On the refusal of the superintendent to proceed for the recovery of alleged illegal dividends, a stockholder could proceed in equity to protect and recover trust property. 219Ala638, 123S71.

727-2½-New. A stockholder or creditor suing to protect bank property for the benefit of all creditors and stockholders is entitled to attorney's fees, if successful. 219Ala638, 123S71.

727-2½-New. Execution issued against a stockholder of a defunct bank is not void because signed in the name of the superintendent by the assistant superintendent. 40GaA378, 149SE810(2d case).

727-2½-New. Missouri statute authorizing the circuit court to make orders relative to the finance commissioner's actions did not, prior to its amendment, authorize a circuit judge to make an order in vacation directing him to place a note of the insolvent bank with its correspondent as collateral. MoA 20SW(2d)939.

727-2½-New. An insolvent bank's correspondent bank is not required to file a claim against the finance commissioner instead of collecting by sale of collateral. MoA 20SW(2d)939.

727-2½-New. The superintendent of banks may recover from the director of a bank who received cash on the bank's certificate of deposit given him in payment of the cashier's personal note. SD 227NW881(1stcase).

727-2½-New. Execution issued by the superintendent to enforce liability of stockholders is not unassignable. 40GaA378, 149SE810(2dcase).

727-2½-New. Plaintiff held not to have a lien for labor and materials, furnished in improving a bank, on assets in the hands of the superintendent of banks. 169Ga285, 150SE162.

727-2½-New. The statute relating to profit corporations did not confer additional power on a "liquidator." 98Fla891, 124S461.

727-2½-New. In an action against banking commissioner for the rejection of a claim on the ground of payment, the burden of proving such defense is on the commissioner. 200Wis200, 227NW945.

727-2½-New. Some statutes authorize the deputy finance commissioner to place notes held by an insolvent bank with its correspondent bank as collateral in order to avert sale of other collateral. MoA 20SW(2d)939.

727-2½-New. Purchaser of stock in bank who did not take effective steps to rescind for fraud cannot, after failure of bank, rescind or recover from commissioner out of assets in his hands money paid for stock. 179Minn284, 229NW130.

727-2½-New. In West Virginia commissioner of banking and receiver appointed by him, with approval of governor, have exclusive jurisdiction to collect and distribute assets. WVa 152SE780.

727-2½-New. That banking commissioner's recovery of notes wrongfully pledged by bank would benefit ordinary creditors besides injured depositors cannot prevent recovery. TexCommnA 26SW(2d)1062.

727-2½-New. County's possession when bank failed of notes wrongfully pledged is injurious to depositors authorizing recovery against county by banking commissioner. TexCommnA 26SW(2d)1062.

727-2½-New. Statement by superintendent of banks in open court relevant to receivership should not prejudice him in discharge of his official duties as statutory receiver. Ala 129S72.

727-2½-New. Court may afford appropriate relief where state comptroller violates law in statutory administration of property of insolvent banks. Fla 128S860.

727-2½-New. Florida statute gives comptroller discretionary power over assets of insolvent bank. Fla 129S328.

727-2½-New. In some jurisdictions court may not authorize corporation commission to transfer bank's assets without provision for payment to commission or chief bank examiner. 198NC783, 153SE452.

727-2½-New. Statutory administration of insolvent banks cannot be superseded by equity unless statutory administration is clearly inadequate. Fla 128S860.

727-2½-New. Such commission cannot sell such assets in return for new bank's agreement to pay percentage of claims. 198NC783, 153SE452.

727-2½-New. Equity will enjoin unauthorized interference with superintendent of banks' possession of insolvent bank's assets. Ga 155SE334.

727-2½-New. Tax collector and sheriff are only necessary parties to action by superintendent of banks to enjoin levy and sale of insolvent bank's property under tax fieri facias. Ga 155SE334.

727-2½-New. Superintendent of banks liquidating insolvent bank acts as statutory receiver. Ga 155SE334.

727-2½-New. One contracting to purchase warrants owned by insolvent bank in charge of banking commissioner is chargeable with knowledge that president was without power to bind bank. TexCivA 31SW(2d)488.

727-7 8F(2d)922; 202Iowa1377, 212NW63; 205Iowa845, 216NW737; 233Ky801, 26SW(2d)1045; TexCommnA 272SW775; TexCivA 10SW(2d)408. [e] (2) In suit against bank directors for deposits received with knowledge that bank was insolvent, or in failing condition, mere showing of past-due paper was no evidence of insolvency. 222MoA1022, 9SW(2d)688. [g] 8F(2d)922 [citCJ]; 207Iowa386, 221NW954. [i] TexCommnA 272SW775. [l] 52ND26, 202NW391. [m] **Question of fact.**-207Iowa386, 221NW954. [n] **One test of "solvency"** as applied to banks, is excess of assets over liabilities. 222MoA1022, 9SW(2d)688. [o] **Insolvency is question of fact.**-38F(2d)748. [p] **Controlling factor in determining solvency** is payment of depositors and creditors in usual and ordinary course of business. 38F(2d)748.

728-8 126Kan302, 307, 267P970 [quot CJ].

728-9 143SC516, 141SE705 (transfer held void); 156SC203, 152SE878; 52SD534, 219NW121 (facts held to show preference by transfer of notes); 53SD396, 220NW859 (equities held insufficient to defeat recovery from depositors); 54SD427, 223NW341 (assignment of mortgage canceled). [a] (2) 201Iowa337, 207NW374. [c] 40GaA451, 150SE102. [d] (2) Knowledge of bank's insolvency has been imputed to directors and managing officers regardless of actual knowledge where bank had been in distress for period of months. 201Iowa337, 207NW374. [h] (5) Delivery of note and mortgage as security for loan made when bank was solvent and pursuant to oral agreement then made does not constitute unlawful preference, although bank was insolvent at time of delivery. 123Kan94, 254P329. (6) Deposit by depositary bank before its insolvency in another bank to credit of depositor is trust fund not recoverable by banking commissioner. Tex CivA 4SW(2d)608. (7) Bank's investment of depositor's funds in bond and mortgage three days prior to closing, at depositor's request, but before insolvency, is no preference of depositor. 152SC242, 149SE401. (8) Other instances. 148SC100, 145SE706; 54SD28, 222NW485. [p] **Exchange of bank officer's deposits for bank assets.**-201Iowa337, 207NW374. [q] **Necessity of bank's insolvency.**-49SD496, 207NW462. [r] **Assets of insolvent banks** are trust funds for creditors. 48SD529, 205NW221. [s] **Existence of guaranty fund** does not preclude depositors of insolvent bank from recovering notes assigned as preferences. 48SD529, 205NW221. [t] **Loan agreement with creditor banks.**-173Ark147, 293SW50. [u] **Bank commissioner can recover from depositary bank** transfer of deposit of insolvent bank. 172Ark284, 288SW388. [v] **Statutes making transfers void.**-39GaA306, 147SE129 (various transactions held void). [w] **Officers obtain ng security for loans.**-207Iowa386, 221NW954. [x] **Who may sue.**-156SC203, 152SE878. [y] **Relief.**-156SC203, 152SE878.

729-10 TexCivA 10SW(2d)408. [a] (1) 25F(2d)841. [d] **Application of insolvent bank's deposit on note** is held not to charge depositary with notice. 172Ark284, 288SW388. [e] **When custom was to transfer funds by telephone,** withdrawals of insolvent bank's funds on verbal orders of its director did not put depositary on notice. 172Ark284, 288SW388. [f] **Evidence held sufficient to show knowledge.**-52SD1, 216NW597. [g] **Evidence held sufficient to show knowledge of insolvency.**-207Iowa386, 221NW954 (on part of president). [h] **Intent of one receiving preference is immaterial.**-40GaA451, 150SE102.

729-15½-New. Transfer of all the assets by an insolvent bank is not subject to collateral attack on the ground that there was no formal authorization by all the stockholders. 321Mo1104, 14SW(2d)425.

729-15½-New. Where, following the closing of a bank upon its insolvency, other banks and the depositors in the failed bank enter into an arrangement whereby a part of the deposit liability is assumed by a going bank, in consideration of the transfer to it of certain assets, and the transfer of the remaining assets to trustees, to be administered as a trust for the depositors waiving rights, and the other banks make contributions of cash to the trust estate, a transfer of assets in pursuance of the trust agreement is a transfer for value 57ND849, 224NW308.

729-15¼-New. Transfer of all the as-

sets to the bank assuming the liabilities is not contrary to the Banking Law. 321 Mo 1104, 148SW(2d)425.

730–17 203 Iowa333, 210NW934; 212 NW550. [b] **What is deposit under rule.**–203 Iowa333, 210NW934; 212NW 550. [c] **Keeping open doors of bank** amounts to representation of solvency. 8PaDist&Co 321. [d] **One making deposit before insolvency in reliance on agreement** of bank and examiner to give security has lien on notes turned over to examiner as security, though securities were not delivered prior to time bank was credited with check given for deposit. 140SC100, 145SE706.

730–18 8F(2d)922; 20F(2d)746; Ga 154SE789; IndA 169NE872 (preferred claim); 54ND122, 208NW831; ND 231 NW876; 8PaDist&Co 321. [a] See also 220MoA265, 286SW425. [f] (3) Evidence sufficient to show knowledge of insolvency of forwarding bank by managing officers of both forwarding and discounting banks when drafts were received. 8F(2d)922. (4) Where officials are aware of bank's insolvency when deposit is received, depositor may recover deposit not mingled with assets of bank. 167La555, 119S872. (5) Evidence held sufficient to show knowledge of insolvency on part of bank's officers. 38F(2d)748. [g] 8PaDist &Co 321. [j] (2) Evidence held sufficient to show that insolvency was known to officers. 8PaDist&Co 321. (3) Plaintiff in action against directors must prove that bank was in failing condition when deposit was made and that defendants knew it. MoA 277SW962. (4) Evidence is held sufficient to show knowledge of insolvency by officers. 242 IllA579. (5) Evidence held to sustain finding that bank was insolvent when deposit was received. 38F(2d)748. [l] (2) Fact that credit was given in pass book for amount of paper is immaterial. 8PaDist&Co 321. [m] MoA 291SW170. [n] **Other instances** where depositor of paper was entitled to collection of proceeds. 8PaDist&Co 321. [o] **Facts showing perpetration of fraud on owners of draft** by insolvent forwarding bank to which discounting bank became party. 8F(2d)922. [p] **What constitutes bad faith.**–MoA 291SW170. [q] **Where depositor's account was overdrawn when deposit was made,** it will be presumed in absence of contrary showing that deposit was made primarily to cover overdrafts. 167La555, 119S872. [r] **Depositor must have been ignorant of bank's insolvency** in order to convert bank into trustee. Ariz 287P297. [s] **Deposit received with knowledge of insolvency becomes trust fund.**–Ariz 287 P296.

731–19 8F(2d)922; 29F(2d)430; 242 IllA579; 220MoA265, 286SW425; 8Pa Dist&Co 321; 150SC374, 148SE214.

731–20 205 Iowa171, 217NW831; 120 Kan400, 243P1058; 8PaDist&Co 321. [c] **Transfer of lodge funds from personal account to lodge account** does not constitute deposit augmenting bank's funds. Ariz 287P297. [d] **Deposit used to pay indebtedness in clearance transaction** does not augment bank's assets so as to give depositor preference. ND 231NW876.

731–21 8F(2d)922; 20F(2d)746; 29 F(2d)430; 242 IllA579; ND 231NW 876; 8PaDist&Co 321. [e] **Depositor failing to show what became of cash deposited** or that any cash came into receiver's hands fails to trace deposit. Ariz 287P296. [f] **Where fund in bank at time of closing is proceeds of another transaction,** depositor is not entitled to preference. ND 231NW876.

731–22 242 IllA579. [a] **Where money is deposited in trust company** known to be insolvent, to secure company in guaranteeing contract, and is not special deposit and was actually mingled with general funds of company, customer is not entitled to preference. 8 PaDist&Co 321.

732–23½–New. Whether the bank's officers had knowledge of its insolvency when they credited a depositor's account with certain draft is a question of fact. 220MoA265, 286SW425.

732–25 77Mont134, 251P151, 154 [cit CJ].

732–26 215Ala538, 112S105; 233Ky 801, 26SW(2d)1045 (statute providing for liquidation by banking commissioner held exclusive); 116Nebr858, 219NW 392 (jurisdiction of judge of district court to act in chambers in insolvency proceeding); TexCivA 24SW(2d)1106. [d] **Authority of bank examiner** is less than that of receiver in reference to assets of bank. 141SC370, 139SE793. [e] **Duty of bank examiner,** on closing bank, is to collect and conserve all assets for equal and pro rata benefit of creditors. 141SC370, 139SE793.

733–31½–New. A petition for instructions is a well-established method of settling disputed claims against a bank in the process of liquidation. 82NH 396, 134A347.

733–31½–New. A court of equity has power to determine the rights of parties under a petition for instructions. 82NH396, 134A347.

733–32 41GaA20, 151SE827. [d] 122 Or519, 259P1063. [e] **Appointment by commissioner of banking.**–101WVa127, 132SE372. [f] **No fiduciary relation exists** between deputy superintendent of banks in charge of liquidating insolvent bank and one claiming value of bonds deposited with bank for safekeeping. 142Wash111, 252P686. [g] **Appointment of receiver held erroneous** where petition fails to allege insolvency or impending loss of assets. TexCivA 300SW129. [h] **Sufficient legal grounds for dissolution** of bank and appointment of receiver must exist. 334 Ill 83, 165 NE191.

733–32½–New. Stockholders' liability to depositors is individual liability, not asset of bank, as respects receiver. 138 SC426, 136SE888.

733–32⅓–New. A court has no jurisdiction to appoint a bank receiver as a receiver of stockholders' liability to depositors. 138SC409, 136SE885.

733–32¼–New. Application for a receiver is addressed to the court's discretion. Ind 165NE546.

733–33½–New. The superintendent of banks must administer the affairs of an insolvent bank through the court and subject to its orders. 49SD102, 206NW 231.

733–33⅓–New. The bank commissioner's approval of a claim held not necessary for claims filed before the bank was taken over. 316Mo 129, 289SW814.

733–33¼–New. On the commissioner's waiver of the right to dismiss a claim, the creditor need not repeat the statutory procedure to sue. 316Mo 129, 289 SW814.

733–33⅕–New. The commissioner may waive statutory provision for dismissal of suits. 316Mo 129, 289SW814.

733–35½–New. The appointment of a receiver and the administration of affairs of an insolvent bank are the prerogatives of a court of equity. 54ND 614, 210NW342, 48ALR660.

734–41½–New. One in possession of bank's assets as liquidator under state comptroller has been held necessary party. 43F(2d)214.

734–45 [d] **Evidence that bank was solvent when suit was brought** and failure to show that payment to bank was loan, and not donation by stockholder, is insufficient to sustain judgment refusing to appoint receiver. Ind 165NE546. [e] **Plaintiff must show** reasonable probability that he will recover in action. Ind 165NE546. [f] **There is no presumption** that stockholder's payment to bank for purpose of making it solvent was loan and not donation. Ind 165 NE546.

734–46 207 Iowa41, 217NW477.

734–49 [a] **In Iowa.**–207 Iowa41, 217 NW477 (applicability of statute).

734–49½–New. Under Bank Deposit Guaranty Law, when a bank commissioner takes possession of an insolvent bank, he is statutory receiver. Tex CommnA 267SW690; TexCivA 284SW 694.

734–49¼–New. Statement of superintendent of banks that creditors can file bill for receivership does not warrant appointment of another receiver. Ala 129S92.

734–49¼–New. Appointment of another as receiver of insolvent bank is not warranted under some statutes where there is no charge that superintendent of banks neglected official duties. Ala 129 S92.

734–51 [b] **Application for change of receiver** should be made in proceeding in which he was appointed. 140SC60, 136SE482.

734–52 [a] **Removal for interest not permitted** where person making it had consented to appointment, under statute. 36Wyo 125, 253P665. [b] **Grounds for removal.**–36Wyo 125, 253P665. [c] **Discretion of court.**–36Wyo 125, 253P 665. [d] **Evidence held insufficient** to show improper investments of savings funds by receiver. 36Wyo 125, 253P 665.

735–59 [a] **Where insolvent bank is in hands of bank commissioner,** depositor cannot maintain independent action against stockholder. 121 Okl 217, 248 P1005.

735–60 37F(2d)715.

735–60½–New. The appointment of a receiver does not change the existing trust relationship between a bank and depositor. 203 Iowa345, 212NW745, 51 ALR906.

735–60⅓–New. Appointing a receiver for a state bank does not ipso facto dissolve a corporation. 94Fla1023, 114S 760.

735–66 192NC387, 135SE118, 120 [cit CJ].

735–66½–New. Test, to determine whether cause of action is vested in receiver or creditors, depositors, or stockholders, is ownership of sum recovered. 190NC458, 130SE195.

735–66⅓–New. Where the wrong was not peculiar to particular depositor, the cause of action belonged to corporation, and was recoverable by receiver. 190NC 458, 130SE195.

735–66¼–New. Right of action by individual creditor, depositor, or stockholder against officers or directors is not affected by receivership occasioned by insolvency. 190NC458, 130SE195.

735–67 Fla 129S328; 25 OhNPNS203; SD 232NW47. [f] **Receiver of bank in suing on notes running to bank** does so, not as purchaser, but as assignee and it is immaterial that he took without consideration and after maturity. 77 Mont406, 251P157.

735–68 114Nebr378, 207NW666; 116 Nebr223, 216NW803; 25 OhNPNS203. See also 286Pa405, 133A551.

735–69 20F(2d)678 (receiver held estopped to assert claim against correspondent bank, charging notes, executed for use of bank by its officers, to bank's account); 37F(2d)715; 38F(2d)462; 42F(2d)953; 34Ariz565, 273P728; 202 Iowa899, 211NW506, 50ALR388; 203 Iowa345, 212NW745, 51ALR906; MoA 8SW(2d)92; 74Mont491, 241P626; 114 Nebr378, 207NW666; 114Nebr826, 211 NW18; 116Nebr223, 216NW803; 116 Nebr521, 218NW405; 116Nebr526, 218 NW407; 116Nebr530, 218NW408; 34 NM387, 281P461; 53ND797, 208NW82; 56ND786, 219NW472; 58ND867, 228 NW226(2dcase) (held no equity in favor of depositors or creditors); 155SC222, 152SE425; TexCivA 284SW694; Tex CivA 289SW705. See also 215Ala538, 112S105, 106 [citCJ]; 144Va516, 132SE 175. But see 122 Or519, 259P1063. [d] **Receiver cannot recover** against correspondent bank on notes executed by bank officers and charged to bank on maturity on theory of conspiracy to conceal liabilities. 20F(2d)678. [e] **Bank commissioner** takes assets subject to any trust imposed on them. 127 Okl 209, 260 P472. [f] **Receiver suing to recover deposit in another bank** is bound by conditions attached to such deposit. 36F (2d)166. [g] **Subject to right of subrogation in bank's collateral.**–155SC222,

152SE425. [h] **Accommodation paper.**–38F(2d)462.

736–70 53ND797, 208NW82; 56ND 398, 217NW538, 56ALR1257 (rights in action on fidelity bond). [a] **Invalidity of pledge of collateral to secure deposit of public money** cannot be asserted by receiver in action against state officers to recover collateral. 34Ariz565, 273P 728.

736–71 55ND45, 212NW236, 243 [cit CJ] 51ALR296. [b] **Assets illegally pledged.**–174Minn286, 219NW163, 65 ALR1407.

736–73 [b] **Banking officer of state** in charge of assets of insolvent state banks may enforce assessment of stockholders in every state. 5F(2d) 952. [c] **Preference in payment.**–127Kan443, 273P474.

736–75½–New. Transfer of notes in contemplation of insolvency established relation of trustee and cestui que trust between banks entitling receiver to recover. TexCivA 275SW498.

736–75⅓–New. A receiver may foreclose in the chancery court a trust deed of which the bank was the equitable owner. 332 Ill 620, 164NE186.

736–77 Fla 129S328.

736–79 [e] **Under statute authorizing bank commissioner** to "wind up" affairs of insolvent state bank, term "wind up" involves entire process of settling accounts and liquidating assets for distribution among creditors. 121 Okl 217, 248P1005. [f] **Bank superintendent in charge of insolvent bank** has duty to preserve fund, and disburse same according to law. 215Ala538, 112S105. [g] **Preventing withdrawal of stockholder's deposit.**–Receiver may invoke equity to prevent payment of funds deposited by stockholder till double liability is determined. 116Nebr610, 218 NW584.

736–82 196NC762, 147SE291. [a] **Receiver must reduce to money** cause of action in favor of bank against officers and directors. 196NC762, 147SE291.

736–83 [a] **Bank commissioner, as statutory receiver,** must use all legal means to enforce collection of indebtedness of bank. TexCivA 284SW694. [b] **Bank stockholder's double liability** is not generally enforceable by receiver unless specially authorized by statute. SD 232 NW47.

736–86 But see Fla 129S328.

737–89½–New. A receiver cannot, generally, in the absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent. 114Nebr389, 207NW683.

737–89⅓–New. Under some statutes, sale of assets in process of liquidation by banking commissioner as statutory receiver has effect of judicial sale. Tex CommnA 267SW690.

737–89¼–New. and cannot be rescinded or annulled except by direct proceeding or motion filed in the particular insolvency proceeding. TexCommnA 267SW 690.

737–89⅕–New. nor can it be collaterally attacked. TexCommnA 267SW690.

737–89⅙–New. An action to rescind a contract with banking commissioner is not a direct attack on orders of judge under which contract was made, Tex CommnA 267SW690.

737–89⅐–New. nor an original suit to vacate proceedings in original cause. TexCommnA 267SW690.

737–89⅛–New. Fraud of the banking commissioner in sale of assets creates no liability payable out of guaranty fund, although such fund is incidentally benefited. TexCommnA 267SW690.

737–89⅑–New. Liability of deputy supervisor of banks in charge of liquidating the affairs of an insolvent bank to one claiming the value of bonds deposited with the bank for safe-keeping by reason of a false statement, made in good faith. 142Wash111, 252P686.

737–89⅒–New. A validating judgment gives the same effect to certificates issued by a receiver as if the receiver had procured an original order authorizing their execution and delivery without notice. 206 Iowa869, 221NW668.

737–89⅓–New. Liquidating trustee of a bank cannot keep back a dividend from the assignee of stock certificates in order to appropriate it to claim it held against assignor. 33 Oh276, 168NE856.

737–89½–New. Receiver is not liable for tort committed by bank prior to his appointment. Fla 129S334.

737–89⅓–New. Receiver stands in relation to deposit of trust funds in same position as did bank. 251Mich163, 231 NW38.

737–89¼–New. Bank receiver is charged with handling trust matters in same manner as original trustee until substitute is appointed. Fla 129S328.

737–89⅕–New. Such receiver can be compelled to execute trust by same legal procedure that could be resorted to as to original trustee. Fla 129S328.

737–90½–New. A banking commissioner, becoming statutory receiver, must act as to sale of assets under orders of court or judge thereof. TexCommnA 267SW690.

737–90⅓–New. Property in his possession is in possession of the court, and his possession is that of the court. Tex CommnA 267SW690.

737–90¼–New. In Alabama superintendent of banks in charge of insolvent bank is more than mere receiver. 215 Ala538, 112S105 (does not require court's consent to appeal).

737–91 205 Iowa712, 218NW520, 524 [citCJ]. See also 204 Iowa532, 215NW 501. [b] **Approval of receiver's settlement in suit against director of bank** is held not abuse of discretion, although offer was made to buy claim at slightly greater sum. 214Ky385, 283SW389. [c] **Necessity for approval of court.**–204 Iowa1321, 217NW231.

737–92½–New. The court appointing a receiver has power to authorize him to compromise claims of the bank. 205 Iowa712, 218NW520 (claims against directors on guaranty of doubtful assets).

737–92⅓–New. The court's approval of such compromise will not be set aside in the absence of showing that such approval is not in the interest of depositors, 205 Iowa712, 218NW520.

737–92¼–New. especially where an element of uncertainty exists as to the extent to which a recovery on the claim could be made. 205 Iowa712, 218NW 520 (evidence held not to show liability of directors on guaranty of doubtful assets).

737–92⅕–New. Depositors attacking such settlement have the burden of showing that renunciation of settlement would benefit depositors. 205 Iowa712, 218NW520 (evidence insufficient to sustain burden).

737–92¼–New. Evidence has been held insufficient to show fraud in a settlement of a bank's claim against directors on guaranty of uncertain assets. 205 Iowa 712, 218NW520.

737–92⅐–New. An order approving a receiver's settlement with bank directors on their guaranty of doubtful assets but authorizing suit on officers' and stockholders' liabilities sufficiently protects depositors' rights outside of the guaranty. 205 Iowa712, 218NW520.

737–96 [a] (9) Contract for reconstruction of building, providing for remodeling existing sprinkler system, held to mean that pipes of subsisting system were to be used, and obligation to supply all new pipe is not implied. 157 Md652, 147A790, 65ALR1285.

737–98½–New. The circuit court has no jurisdiction to fix the compensation, in the first instance, of a special deputy in charge of an insolvent bank, but under Rev. St. (1919) § 11707, compensation in the first instance must be fixed by the commissioner of finance. MoA 9 SW(2d)549(1stcase).

737–99 See also 41GaA20, 151SE827.

737–1 [a] **He stands in shoes of indorsee bank** in action against note indorser. Iowa 233NW118.

737–5 16F(2d)159; 36F(2d)166 (findings); 39F(2d)406 (petition in action on certificate of deposit held sufficient); 36GaA757, 138SE260; 200 Iowa954, 205 NW790 (evidence held sufficient to show that former depositor was not creditor of bank when receiver was appointed); 208 Iowa1214, 227NW151 (service of notice of garnishment on assistant examiner is not service on receiver); Iowa 228NW32 (presumptions); Iowa 231NW293; 122Kan474, 251P1101; 129 Kan256, 282P595 (action by receiver held not to lie); 74Mont491, 241P626 (in receiver's action to recover moneys from Federal Reserve Bank, another bank may set up, when interpleaded, any defense which would have been available in action between it and insolvent bank before its insolvency, and correspondence between such banks is admissible); 81Mont543, 264P675; 116 Nebr858, 219NW392 (evidence held sufficient to sustain judgment in action by receiver); 58ND867, 228NW226(2d case) (evidence); TexCivA 297SW545. See also 82Colo 421, 260P688. [b] **In North Dakota.**–52ND155, 201NW997, 38 ALR807; 52ND26, 202NW391; 52ND 31, 202NW653. [c] **Pleading.**–51SD124, 212NW498. [d] **Evidence held sufficient.**–172Ark1177, 289SW467. [e] **Evidence held insufficient.**–172Ark1177, 289SW467. [f] **Consolidation of actions.**–36GaA757, 138SE260.

738–6 [a] **Surety on cashier's bond** cannot set off claim against bank acquired after insolvency. 7F(2d)44. [b] **Surety company cannot offset** liabilities incurred by it against claim by receiver after insolvency on bond to indemnify bank against loss by dishonesty of employees. 7F(2d)371.

738–6½–New. The receiver of an insolvent bank which drew checks on another for the account of its depositor may recover the amount of the checks from the depositor where they were drawn before, but were not paid until after, the drawer bank was closed. 141SC370, 139SE793.

738–6⅓–New. Evidence held to show that a deposit made by an insolvent bank was a special deposit of state funds disentitling depositary bank from setting off a claim against the depositing bank. 141SC370, 139SE793.

738–6¼–New. An instruction in a receiver's action against depositors that a bank statement showing a balance was binding is properly refused. 22 F(2d)33.

738–6⅕–New. Evidence as to statements furnished a bank depositor being erroneous was held sufficient to make the question of effect one for the jury. 22F(2d)33.

738–6⅙–New. Superintendent of banks has legal capacity to sue. 50SD97, 208 NW582.

738–6⅐–New. In an action by the superintendent of banks on notes owned by a bank, complaint was held to show superintendent was proper party to sue. 50SD97, 208NW582.

738–6⅛–New. Superintendent of banks acquires right to sue on debts due bank when he takes possession for purpose of liquidation. 50SD97, 208NW582.

738–6⅑–New. The right of superintendent of banks to sue on notes owned by a bank in his possession for liquidation may not be raised by general demurrer to the whole complaint. 50SD97, 208NW582.

738–6⅒–New. In an action by a receiver against a guaranty company, on its bond to indemnify a bank against default of its president which had as surety on bank's bond given to guarantee deposit of railroad paid the railroad its claim and become subrogated to railroad's rights against bank, guaranty company cannot set off such claim against its liability on bond. 268US 234, 45SCt489, 69Led932, 40ALR1094.

738–6⅓–New. Intervention by foreign bank in receivership of state bank seeking disposition of trust fund is proper. 202 Iowa265, 209NW422.

738–6½–New. A receiver, marshaling assets of a bank for the benefit of creditors is, in law, an innocent holder for value of a trust deed found among the assets running to the bank as trustee, and may foreclose the same, although the bank could not because of equitable defenses. 251 Ill A262.

738–6⅓–New. In action to recover

from depositor funds of bank credited by officers to his account, jury should consider prior withdrawals from account by such officers. 130**Kan**349, 286 **P**211.

738–6¼–New. Evidence held to sustain finding that note of cashier of insolvent bank was liability of bank which could be set off against deposit with holder. 130**Kan**379, 286**P**214.

738–6½–New. Receiver held not entitled to judgment in such action on pleadings and opening statement. 130 **Kan**349, 286**P**211.

738–6½–New. Where preferred claim filed by guardian for deposit of ward's funds was allowed, no right of action accrued against receiver against which statute of limitations could run. **Ariz** 287**P**292.

738–6½–New. Debtor, without filing sworn claim, can sue receivers to enjoin sale of pledged property and for accounting for lost pledged property. **Fla** 129**S**334.

738–6½–New. Statute authorizing receiver to sue to enforce double liability of stockholder held not repealed or modified. **SD** 232**NW**47.

738–6½–New. Bank receiver of sister state had authority under statutes of that state to bring suit either within or without state against stockholders on their double liability. **SD** 232**NW**47.

738–12 [c] **Attempted assignment** construed to be only a determination to discontinue. 3**F(2d)**57.

738–15 55**ND**856, 215**NW**810, 56**ALR** 200.

738–16 But see 203 **Iowa**276, 211**NW** 386.

739–24 [a] **Assignment of all credits, indebtedness, and claims against other banks** includes all deposits in other banks notwithstanding checks and drafts are outstanding which have not been presented for payment. **TexCivA** 284**SW**610.

740–33½–New. An assignee for the benefit of creditors stands in the shoes of his assignor and can assert any rights which could have been asserted by the assignor. 208 **Iowa**785, 225**NW** 848.

741–37½–New. The property of an insolvent bank being liquidated by the commissioner of banking is in the custody of the law. 50**SD**44, 208**NW**228.

741–37½–New. Exclusive possession and control of property of an insolvent bank are in superintendent of banks subject to the authority of the circuit court of county of bank's domicile. 50**SD**44, 208**NW**228.

741–40 178**Ark**361, 12**SW(2d)**1.

741–42 **TexCivA** 283**SW**189. [d] **Suit against state bank examiner.**–40**Wyo** 312, 276**P**926. [e] **Execution to collect assessment.**–170**Ga**265, 152**SE**229. [f] **Presumptions.**–170**Ga**265, 152**SE**229. [g] **Suit by commissioner.**–**TexCivA** 25**SW (2d)**651(1stcase).

741–43 253**NY**23, 170**NE**479. [a] **After bank's insolvency, no one has right to waive or discharge any rights** which bank has under fidelity bonds of employees. 154**SC**267, 151**SE**579.

741–45 54**SD**175, 222**NW**670 (on contract to repurchase stock).

741–49 See also 135**SC**417, 133**SE**901.

742–55 See also 132 **Okl** 230, 270**P**41.

742–55½–New. Insolvency and taking over of bank by commissioners is not necessarily dissolution of corporation. 122**Kan**77, 251**P**188.

742–55½–New. Stockholders' committee taking over assets of a bank, after settlement by assignee, for benefit of creditors is held bound to use only ordinary care in attempting to rehabilitate bank. 214**Ky**385, 283**SW**389.

742–55¼–New. Transactions with branch bank before actual notice of suspensions of bank held not vitiated. 37 **BC**401, [1926] 4**DomLR**78, [1926] 3 **WestWkly**305.

742–55½–New. Insolvency of a state bank is not tantamount to dissolution of the corporation. 137 **Okl** 67, 277**P** 1029.

742–55½–New. Closing of a bank by the banking department fixes the rights of the bank's creditors as of that time. 10**LaA**401, 119**S**779.

742–55½–New. The only power by directors of a foreign bank no longer in existence is to sue for the appointment of a receiver to conserve the property, and they cannot sue to recover a deposit. 133**Misc**527, 233**NYS**255.

742–55¼–New. Writing off by certain depositors of a part of claims against the bank to leave impairment of capital equal to capital stock and to enable it to continue business is not illegal. 169**Ga**115, 149**SE**645.

742–55½–New. Commissioner indorsing new certificates of stock for old certificates pledged by bank before insolvency is not liable to holder of attorney's lien on stock where his act had not affected rights of parties. **Ida** 286 **P**923.

742–57 [c] **Proceeds of notes transferred by bank without consideration and collected by one not bona fide holder** are assets of bank collectable by its receiver. 81**Mont**543, 264**P**675.

742–61 144 **Okl** 172, 289**P**726. But see 206 **Iowa**869, 221**NW**668.

742–66½–New. Assets are valued as of the date of transfer. 224 **IIIA**474.

742–66½–New. Subsequent payments should be credited where the receiver sues for a deficiency due to a difference between the authorized amount and the actual value at the date of transfer of the assets of a trust company to the now insolvent bank. 224 **IIIA**474.

742–66¼–New. A trust company cannot be held liable for funds loaned to enable a bank to obtain its charter and which were subsequently paid back. 224 **IIIA**474.

742–66½–New. A trust company held liable for money loaned and paid back by a now insolvent bank cannot set off worthless credits that would have passed the scrutiny of bankers. 224 **IIIA**474.

742–66½–New. The fact that the bank examiners did not believe the bank insolvent before assets were transferred is immaterial. 224 **IIIA**474.

742–66½–New. Renewal notes cannot be credited in place of notes at the date of transfer. 224 **IIIA**474.

742–66½–New. Commercial paper received by a bank for collection only does not constitute assets in the hands of a receiver. 201 **Iowa**349, 207**NW**332 (evidence held to show that paper was received for collection only).

742–69 [a] **Statutes held unconstitutional.**–207**Cal** 79, 277**P**113, 63**ALR**861 (permitting superintendent of banks to make assessments).

742–69½–New. Under statutes in some jurisdictions the superintendent of banks may levy an assessment upon stockholders under such circumstances. 121 **Or**92, 254**P**800, 51**ALR**1200.

742–69½–New. In some jurisdictions the superintendent of banks is given authority to determine stockholders' liability to depositors. 21**F(2d)**536.

742–69¼–New. In an action by a superintendent of banks to collect an assessment against a stockholder the latter cannot claim purchase of stock was induced through fraud of bank's officers, 121 **Or**98, 254**P**802.

742–69½–New. and also to determine as to the assessment of stockholders and the collection thereof. 21**F(2d)**536.

742–69½–New. Under statutes, it is the duty of the superintendent of banks taking charge of an insolvent bank to assess the stockholders, and upon their refusal to pay within a prescribed time to issue an execution for the amount of the assessment. 167**Ga**802, 146**SE**830 (3dcase).

742–69½–New. An execution against stockholders refusing to pay an assessment may be signed by the superintendent in his official capacity or by an agent affixing the superintendent's signature. 167**Ga**802, 146**SE**830(3dcase).

742–69½–New. An execution against a stockholder of an insolvent bank, based on statutory liability to creditors, may be signed by the assistant superintendent. 167**Ga**843, 146**SE**835.

742–69½–New. An assessment, signed by the superintendent of banks, by the assistant superintendent is properly made. 39**GaA**109, 147**SE**153.

742–69½–New. Stockholders' liability fund collected by a receiver is not an asset of the bank but a trust fund to be ratably distributed among the creditors when the bank failed. 85**Mont**532, 281**P**341.

743–73 See also 131 **Okl** 289, 269**P**292. [a] **Banking commissioner's statements** as to insolvent bank's assets, inducing purchase, held unauthorized warranties, of which purchasers were chargeable. **TexCivA** 297**SW**545.

743–74½–New. Doubtful assets, on transfer, are not presumed worth amount stipulated in transfer. 31**Ariz** 284, 252**P**190.

743–74½–New. An accountant's report may be considered in determining the book value of realty sold by an insolvent bank to a new bank. 31**Ariz**284, 252**P**190.

743–74¼–New. Confirmation of sale by court is held not an abuse of discretion. 79**Mont**184, 255**P**744.

743–74½–New. A sale by the bank commissioner of the assets of an insolvent bank to another bank with a provision that the buyer pay the depositors of the insolvent bank is not a delegation of authority but merely the appointment of an agent for the state. 220 **MoA**474, 274**SW**945.

743–74½–New. Sale by the superintendent of banks is authorized by statute under the direction of the court in some jurisdictions. 37**GaA**202, 139 **SE**428.

743–74½–New. In authorizing such sale, the court does not administer assets of the bank or adjudicate the rights of the parties, 37**GaA**202, 139 **SE**428.

743–74½–New. but merely directs a state officer in the discharge of his statutory duty, 37**GaA**202, 139**SE**428.

743–74½–New. such officer not being an officer or receiver of the court. 37 **GaA**202, 139**SE**428.

743–74½–New. Such an order of sale is not judicial but is purely administrative or ministerial. 37**GaA**202, 139 **SE**428 (not reviewable by writ of error).

743–74½–New. A sale of assets by the superintendent of banks to trustees for the benefit of creditors and depositors is void. 166**Ga**820, 144**SE**747 (merely affects change of trustees).

743–74½–New. A superintendent's contract of sale imposing on trustees for creditors and depositors duties required of the superintendent is unauthorized. 166**Ga**820, 144**SE**747 (with or without court's approval).

743–74½–New. A purchaser of assets of an insolvent bank from the state bank commissioner has been held entitled to an order requiring the commissioner one year after settlement and discharge to deliver the records. 84**Colo** 272, 269 **P**906.

743–74½–New. An order requiring the state bank commissioner to deliver books, records, files, documents, correspondence, receipts, and other papers to the purchaser of assets of an insolvent before his discharge has been held not in violation of Comp. L. § 2739, requiring the commissioner after liquidation to deliver all the property to the stockholders except the records. 84 **Colo** 272, 269**P**906.

743–74½–New. A purchaser of an insolvent bank's notes may recover the amount collected thereon before a sale by the liquidating agent of the superintendent without the latter's knowledge or the knowledge of the purchaser. 168 **Ga**438, 148**SE**95.

743–74½–New. A bank purchasing the assets of an insolvent bank takes them subject to the trust impressed on a fund appropriated from a trust estate. **Mo** 208**SW(2d)**502.

743–74½–New. Assignee receiving assets of insolvent bank with notice of their character takes them under stat-

ute subject to trust for satisfaction of claims of stockholders and creditors. 37 **F(2d)**907.

743-74½8-New. All parties are bound by terms of consent order directing sale by bank receiver of all assets of special fund. 154**SC**445, 151**SE**792.

743-74½9-New. Receiver's sale of assets held properly confirmed where property brought all it was worth. 154 **SC**445, 151**SE**792.

743-74½0-New. Listing of notes by receiver as assets held not to impose liability on maker giving notice before sale of his nonliability. **Wyo** 292**P**1091.

743-75 But see 166**Ga**820, 144**SE**747. [a] **Confirmation by court** of sale of insolvent bank's assets, without hearing evidence, held not fraud in court. **TexCivA** 297**SW**545.

743-75½-New. Previous approval by the court of a sale of assets may be revoked within three years when all the parties are before the court. 166 **Ga**820, 144**SE**747.

743-78 TexCivA 283**SW**189.

743-81 222**MoA**957, 11**SW(2d)**56; 50 **SD**16, 208**NW**227. [b] **Claims for taxes need not be filed** as ordinary claims of creditors. 117**Nebr**189, 220**NW**265. [c] **Burden of proving mailing of notice to present claims** rests on receiver although depositor alleges that no notice was mailed. **MoA** 30**SW(2d)**631 (2dcase). [d] **Evidence held insufficient to show mailing of notice.**-**MoA** 30**SW (2d)**631(2dcase). [e] **Statute requiring notice to file claims** must be followed strictly. **MoA** 30**SW(2d)**631(2dcase).

743-81½-New. A motion by a receiver to dismiss an application for a preference is to be treated, in legal effect, as a demurrer. 201 **Iowa**316, 207**NW** 348.

743-81⅓-New. A claim for conversion of personalty is within the jurisdiction of equity under statute. 213**Ala**369, 104**S**662.

743-81¼-New. Under statute a bank need not be joined in an action on a claim rejected by the superintendent. 213**Ala**369, 104**S**662.

743-81⅕-New. An amendment to claim properly allowed after judgment to assert priority as depositor. 35**GaA**254, 133**SE**269.

743-81⅙-New. Statutes in some jurisdictions provide that the superintendent of banks may reject any claim the justice and validity of which he doubts, 117 **Or1**, 242**P**823.

743-81⅐-New. and serve notice of such rejection on claimant, 117 **Or1**, 242**P**823.

743-81⅛-New. and that an action upon a claim so rejected must be brought within six months after such service of notice. 117 **Or1**, 242**P**823.

743-81⅙-New. Such statute has no application to the claim of the state, 117 **Or1**, 242**P**823. (as a depositor).

743-81⅒-New. nor to a surety who has paid the state's claim and thereby become entitled to be substituted to the state's rights and remedies. 117 **Or1**, 242**P**823.

743-81⅑-New. Notice of rejection of a claim is held to start statutory period of limitations thereon. 51**SD**308, 213 **NW**723.

743-81⅒-New. The holder of rediscount notes from an insolvent bank has a separate and distinct claim on each rediscount. 21**F(2d)**128.

743-81⅓-New. Where a bank mingled its own and trust funds, it was presumed that trust funds were retained, constituting an integral part of the assets. 79**Mont**233, 255**P**733.

743-81¼-New. An action seeking classification and payment of a claim against a bank in process of liquidation has been held brought in time. 222**MoA**957, 11 **SW(2d)**56.

743-81⅕-New. A published notice by the commissioner liquidating a bank, notifying the persons having claims to present them, has been held insufficient, because the paper was not published during one week of the "three consecutive months." 222**MoA**957, 11**SW(2d)** 56.

743-81⅙-New. Under the Missouri statute, claims against a bank in liquidation may be filed with the commissioner of finance or his deputy in charge. 322**Mo** 29, 14**SW(2d)**597.

743-81⅐-New. An action may be brought on a claim disallowed by the commissioner without presenting it to the circuit court. **MoA** 11**SW(2d)**1090.

743-81⅛-New. A claim against a bank in liquidation, filed with the commissioner of finance under statute, must tend to show its general nature. 322 **Mo** 29, 14**SW(2d)**597.

743-81⅑-New. The burden of proof to establish a claim is on the intervener presenting it. 85**Mont**256, 278**P**828 (evidence supporting disallowance of claim).

743-81⅒-New. The intervener must establish by a preponderance of evidence that the bank received money belonging to him. 85**Mont**256, 278**P**828.

743-81⅓1-New. Where no notice was filed as provided by a statute requiring presentation of claims, a trustee without knowledge was not estopped from suing the bank for claims of a trust estate in the hands of the bank. **Mo** 20 **SW(2d)**502.

743-82 127**Kan**804, 275**P**133; 249**Mich** 410, 228**NW**737 (assignee of depositors); 113**Nebr**778, 205**NW**300 (evidence held to sustain judgment disallowing claim of holder of certificate of deposit). [c] **Return of check to depositor** where it had not been paid by drawee. 190**NC** 364, 129**SE**801.

743-83¼-New. Expense in trying to collect a preferred claim is not entitled to preference. 222**MoA**839, 6**SW(2d)** 970.

743-84 MoA 19**SW(2d)**312.

743-85½-New. a claim for the amount of a note purchased from a bank with the understanding that it should be held by the bank for collection and credited to claimant's account, where the note was not found by the receiver, 85**Mont** 265, 278**P**520.

744-87½-New. A contingent liability of a bank as indorser on notes becoming absolute on maturity of the notes prior to the date set for closing the estate against claims is a provable claim and should be allowed, although not matured when the receiver was appointed. 239**Mich**670, 214**NW**971.

744-87⅓-New. Where a contingent liability becomes absolute while the estate is being administered and can be definitely determined, it should be allowed if early distribution of the estate will not be interfered with. 239**Mich**670, 214 **NW**971.

744-87¼-New. A surety guaranteeing public deposits in a bank has a claim against the bank. 17**F(2d)**913; 17**F(2d)** 918; 157**Tenn**87, 6**SW(2d)**328 (attorney's fees charged against sureties).

744-87⅕-New. A claim for money collected on a check deposited by an agent for collection is allowable. 26**F(2d)**208.

744-87⅙-New. Where a bank agreeing to act as the agent of the stockholders for the purpose of paying their taxes becomes insolvent, and there are no assets distributable to the stockholders, such taxes cannot be enforced against the receiver or out of the assets in his hands. 55**ND**670, 215**NW**163.

744-87⅐-New. The surety for an insolvent bank, after paying a claim for state funds under a bond, is entitled to share pro rata with other creditors under an indemnity agreement, even though the claim of the state has been allowed. 27**F(2d)**423.

744-87⅛-New. A surety on a bond securing county deposits, which has discharged its liability, is entitled to the allowance of a claim as general creditor on the bank's indemnity agreement, even though the claim of the county has been allowed. 26**F(2d)**944.

744-87⅑-New. That tax collector may proceed against bank shareholder for capital stock tax does not preclude assertion of claim against assets of insolvent bank. **Mo** 26**SW(2d)**976.

744-87⅒-New. Claim must be for amount due and unpaid at time claim is filed. **Fla** 126**S**745.

744-90 MoA 282**SW**757 (claim for preference); 222**MoA**990, 6**SW(2d)**655; **MoA** 18**SW(2d)**111. See also **Nebr** 229**NW** 892. [a] 203 **Iowa**546, 213**NW**245. [b] See also **Iowa** 227**NW**899. [c] **In Massachusetts.**-252**Mass**348, 148**NE**130. [f] **Court of equity may fix reasonable time** for presentation of claims, though less than maximum period of statute of limitations. 122**Kan**195, 251**P**178. [g] **In Arkansas.**-176**Ark**1119, 5**SW(2d)**311. [h] **Statutes fixing time for filing claim** against insolvent bank show legislative intent to have litigation completed within year, and are valid exercise of police power. **MoA** 298**SW**1049. [i] **In Florida.**-98**Fla**731, 124**S**279. [j] **Statute fixing time for filing claims** is inapplicable to claims previously accruing. 130 **Kan**417, 286**P**200. [k] **Claims are barred by statutory special time limit only** where compliance with statutory procedure and conditions is shown. **Nebr** 232**NW**585.

744-91½-New. **In Maine,** court has power to extend time for hearing of claims by commissioners. 125**Me**150, 131**A**863.

744-91⅕-New. A claim of a bank commissioner of another state, against a defunct local bank for double liability as a stockholder in a bank of his state, is not barred by the commissioner's failure to present it within the time allowed for filing claims, where his claim could not be asserted before the expiration of such time because the bank issuing the stock continued to be a going concern. **SD** 225**NW**657.

744-91¼-New. The statute requiring the bank commissioner upon taking possession of a bank to notify persons having claims to present them within four months must be strictly complied with to start the limitation running. **Mo** 20 **SW(2d)**502.

744-91⅓-New. In some jurisdictions, where state banking superintendent, as receiver, has taken over bank, district court may fix maximum time for presenting claims. **Iowa** 229**NW**826.

744-91⅙-New. Statute requiring filing of claims within time fixed and forbidding acceptance of claims not timely filed is inapplicable to state's claim for capital stock taxes. **Mo** 26**SW(2d)**976.

744-91⅐-New. Such court may permit claim to be presented and allowed after time so fixed in absence of showing of prejudice. **Iowa** 229**NW**826.

744-91⅛-New. Claim secured by mortgage not filed during period so allowed cannot be filed after transfer of assets to trustees approved by court and termination of receivership. **Iowa** 229**NW** 826.

744-91⅑-New. Failure to file such claim is not excused by oral promise of bank examiner, not authorized by court, that interest would be paid. **Iowa** 229**NW** 826.

744-92½-New. Where claim against insolvent bank rests solely on relation of debtor and creditor claim should be presented to commissioners appointed in first instance. 125**Me**150, 131**A**863.

744-92⅓-New. Plaintiff, who petitioned a bank commissioner for allowance of a preferred claim, and not having petitioned for review of an order rejecting a claim as preferred, is held to have elected to stand on order. 81**Colo** 214, 254**P**771, 58**ALR**250.

744-92¼-New. United States in proceeding to recover public funds from the receiver of a state bank is not required to follow the procedure required by state law. 19**F(2d)**541.

744-92⅕-New. Where a petition by a surety on the bond of certain fiduciaries who are not parties of record claims preferences for their benefit but does not show the nature of the interest of the surety, payment in accordance with the petition should not be ordered. 194 **NC**239, 139**SE**244.

744-92⅙-New. A petition must allege claimed trust funds to have reached the receiver to support the presumption that the trustee preserved the fund. 204 **Iowa**431, 215**NW**623.

744-92⅐-New. Allegations of trust need some proof. 204 **Iowa**431, 215**NW**623.

744-92⅛-New. Statute did not require one having a claim against the bank, being liquidated, to make a declaration in writing stating the amount of his claim and that the bank was not enti-

tled to a set-off against the same. 222 MoA957, 11SW(2d)56.

744-93 175Minn88, 220NW168, 60ALR 330 (evidence held inadmissible); 81 Mont489, 264P106 (it is not abuse of discretion to deny petition to reopen case after failure to appeal from disallowance of claim); Nebr 230NW451 (order allowing claims and payment of dividends held not erroneous). See also 222MoA 957, 11SW(2d)56. [b] **Court** has power to determine priorities. 23F(2d)381. [c] **State statute** authorizing suit by creditor of insolvent bank after rejection of claim merely permits suit in state court in nature of appeal. 23F (2d)381. [d] **Appeal lies** from allowance or disallowance of claim. 142 Okl 126, 285P967.

744-94½-New. The extent of preference of a creditor leaving an item with the bank for collection is limited to the amount of trust funds coming into the receiver's hands. 79Mont233, 255P733.

744-94¼-New. A receiver's failure to object to the allowance of a claim does not entitle the claim to allowance. 207 Iowa471, 220NW10.

744-95½-New. An insolvent bank has the burden of showing disposal of money proved collected on a check deposited. 26F(2d)208.

744-95⅛-New. The statute providing preliminary examination as to trust funds during liquidation proceedings applies only to technical and continuing trusts 292Pa114, 140A768.

744-95¼-New. and excludes the idea of examination as to other funds. 292Pa 114, 140A768.

744-95½-New. Disputed claims may be adjudicated. 76Mont248, 245P947.

744-95⅝-New. Presumption that assets of bank coming into hands of receiver contain trust funds applies only to cash in bank when doors closed. Iowa 231 NW311.

744-95⅞-New. Evidence held insufficient to trace trust funds into bills receivable and deposits in correspondent bank. Iowa 231NW311.

744-96 [a] **Court may set aside approval of receiver's classification of claims** in its discretion and permit establishment of claimant's right to preference. 207 Iowa1254, 219NW496.

744-96½-New. Creditors whose claims are recognized may not sue thereon. 76 Mont248, 245P947.

744-96⅛-New. Especially where liquidator has carried forward liquidation as trustee. 76Mont248, 245P947.

744-97½-New. Statute fixing time for action on claims not approved by banking commissioner does not apply to approved claims. Mo 29SW(2d)1096.

744-98 See also 26F(2d)208. But see 253Mass160, 148NE138.

745-99 TexCivA 29SW(2d)301.

745-99½-New. No interest allowable to successful claimant of fund consisting of moneys collected on checks and drafts received for collection after close of bank where the court directed the receiver to hold such moneys in a special fund pending determination of ownership. 74Mont 491, 241P626.

745-2 156SC181, 153SE133, 69ALR443.

745-3½-New. A creditor with a preferred claim is entitled to interest from the date of closing to judgment. 79Mont 233, 255P733.

745-3⅛-New. That a receiver withheld payment of a preferred claim did not prevent the recovery of interest where the receiver was justified in litigating the claim. 79Mont233, 255P733.

745-3¼-New. Interest on a trust fund as a preferred claim, if allowed at all, should be paid from the general assets of the bank. 125Kan383, 265P38.

745-3⅛-New. Interest is properly allowed on a judgment for the amount paid the commissioner on the sale of land on failure of title and allowed as a preferential claim. TexCivA 14SW(2d) 953.

745-3¼-New. A depositor of credit for a special purpose, entitled to a preference on the trust theory, should not be awarded interest. TexCivA 18SW (2d)200.

745-7 208 Iowa1374, 227NW339; Kan 289P396. See also 28F(2d)857. [a] **Amount paid by surety** on bond of bank executed by it as principal to school district to secure deposits may be set off by debtor of insolvent bank. 208 Iowa1374, 227NW339.

745-8 142SC1, 140SE262, 57ALR775. [b] Contra 146SC167, 143SE646, 60ALR 580.

745-8½-New. When a bank goes into liquidation, a debtor of the bank who has a then due claim against the bank has a right of legal set-off. 170Minn 502, 212NW895 (right to set off rent due against indebtedness on note).

745-8⅓-New. Such a right is not affected by a statute referring to claims against a bank after possession is taken for the purpose of liquidation, the right of the examiner to reject claims, and suits thereon. 170Minn502, 212NW 895.

746-16½-New. Set-off arising in connection with a cause of failure or subsequent thereto cannot be allowed as against a claim admittedly due. 288Pa 300, 135A748.

746-16⅛-New. In a suit by the state bank commissioner against individuals on their note and to foreclose a real estate mortgage given to secure the same and for taxes paid in protection of such security, a defendant may offset a debt on implied contract owing by the bank to a partnership of which such defendant was the sole owner and for the benefit of which the note was given to the bank's knowledge. 129 Okl 136, 263P 1098.

746-16¼-New. Set-off in a proper case is a statutory right. 33NM473, 270P 881.

746-16½-New. The indemnitor of a surety in a depository bond, after paying the depositor, may set off his claim against his indebtedness to the bank on notes. 33NM473, 270P881.

746-16⅞-New. Commissioner takes charge of bank subject to set-offs and counterclaims against bank. MoA 31SW (2d)96.

746-17 30Ariz480, 248P1086; 168Minn 408, 210NW162; 190NC368, 129SE818, 819 [quotCJ]; 146SC167, 143SE646, 647 [citCJ], 60ALR580.

746-18 146SC167, 143SE646, 647 [cit CJ], 60ALR580.

746-22 37GaA490, 140SE795 (demurrer to answer claiming set-off of half of deposit in names of defendant and another held properly overruled); 194NC368, 139SE596, 55ALR819; 145SC1, 142SE 788; 50SD524, 210NW730; TexCivA 298 SW620. [a] **State bank commissioner** may apply deposit in discharge of overdue note of depositor in his possession. TexCivA 284SW694.

746-24 194NC368, 139SE596, 55ALR 819. [a] **Offset of deposit made by receiver against dividends to be paid to bank.**—Receiver of insolvent bank depositing funds in another bank which is entitled to dividends cannot, after latter bank's failure, offset deposit against dividends to be paid to full amount of deposit. 145SC1, 142SE788.

746-25½-New. Where, in pursuance of agreement, payee had sufficient funds on deposit to cover discounted note at maturity, and note not being paid it was proper to charge note against deposit on bank becoming insolvent. 190NC368, 129SE818.

746-25⅓-New. Where at maturity of note bank held sufficient deposits to cover debt and failed to apply same, upon insolvency receiver is not entitled to recover. 190NC368, 129SE818.

746-25¼-New. The superintendent of banks may be allowed to set off the liability of a depositor as a stockholder against a judgment directing allowance of a claim. 51SD591, 215NW878.

746-27 [b] **Double liability of stockholder.**—116Nebr610, 218NW584.

747-28 But see 190NC368, 129SE818.

747-28½-New. A bank deposit cannot be pleaded as an offset against an indebtedness arising after the dissolution of the bank. 118 Okl 29, 246P445 (rent due from depositor).

747-28⅓-New. The fact that an indebtedness of a depositor to a bank was assigned to the bank does not prevent its being set off against the debtor's deposit where the indebtedness was fixed when the bank closed and was due at the date of suit. 32Ariz124, 256P362.

747-28¼-New. The banking commissioner's payment of a note pledged by the insolvent payee bank as collateral for a loan by another bank will not defeat the maker's right to offset his interest in a deposit in the payee bank in the absence of a showing of the necessity for resorting to the note for reimbursement. TexCivA 298SW620.

747-28⅕-New. A stockholder presenting a claim to the banking commissioner in the name of his corporation as depositor and obtaining a dividend is not estopped to set off his interest in the deposit against his liability on notes payable to the bank, where the commissioner has not been prejudiced. Tex CivA 298SW620.

747-28⅙-New. In such case the banking commissioner is entitled to credit for the portion of the dividend received by such stockholder. TexCivA 298SW 620.

747-28½-New. An agent's debt cannot be set off against a deposit by the agent for the principal. 26F(2d)208.

747-29 16F(2d)159, 162 [quotCJ].

747-30 30Ariz480, 248P1086; 39GaA 272, 146SE799.

747-33½-New. And the rule permitting set-off does not apply so as to allow a surety either as subrogee or assignee to offset its claim as creditor of insolvent bank against its liability on fidelity bond of cashier where it did not pay its principals, the county, and state until after superintendent of bank had taken charge of the insolvent bank. 30 Ariz480, 248P1086.

747-33⅓-New. An insurer is held not entitled to set off a bank's covenant to indemnify it on the bond insuring repayment of the state deposit against recovery on fidelity bond. 288Pa300, 135A748.

747-33¼-New. A debtor of an insolvent bank when sued by its receiver cannot set off his liability as surety for the bank on a depository bond. 172Minn80, 214NW792; 174Minn102, 218NW456.

747-34½-New. Purchaser of cashier's check is entitled to credit for the amount thereof on his note held by an insolvent bank. 136SC511, 134SE510.

747-37 58ND715, 227NW218; 137Wash 224, 242P29. See also 28F(2d)587; 36 F(2d)166; 151Wash266, 275P697.

747-37½-New. Special deposit. Depositary bank cannot set off a claim against another insolvent bank making a special deposit of state funds. 141SC370, 139 SE793.

747-37⅓-New. Where plaintiff bank and insolvent bank each had credit with the other, the supervisor in charge could not deduct the credit when paying plaintiff cash for warrants as agent. 151 Wash266, 275P697 (plaintiff's acquiescence in deduction not shown).

747-38 190NC458, 465, 130SE195 [cit CJ].

747-39 164Ga790, 139SE566; Mont 279 P253.

747-40 164Ga790, 139SE566; 166Ga 820, 144SE747; 203 Iowa276, 211NW 386; 75Mont567, 244P489; 76Mont248, 245P947 (rule applied to voluntary liquidation of bank); 190NC458, 465 [cit CJ], 130SE195; 145SC1, 142SE788. [b] **Property conveyed by insolvent bank** to new bank is not impressed with trust in favor of old bank's creditor whose debt was not assumed. 31Ariz60, 250P 363.

747-41 169Ga846, 151SE803; Iowa 220 NW63 (no preference allowed except under statute or fixed common-law principle); 207 Iowa394, 223NW249; 117Nebr 860, 223NW282 (attorneys collecting debts owing bank are not entitled to preference for fee after guaranty fund commission takes charge). See also 203 Iowa276, 211NW386. [a] (2) Cashier and assistant cashier are not employees within meaning of statute. 155Tenn519, 296SW12, 54ALR564. (3) Nor are managing officers of bank entitled to such preference. 155Tenn519, 296SW12, 54 ALR564. [d] **Claim for conversion of collateral** must, under some statutes, await payment of expense attending liq-

uidation and payment of depositors. 200 **Iowa**1147, 206**NW**126. [e] **Marshaling assets.**–75**Mont**567, 244**P**489. [f] **Private banks.**–**Iowa** 216**NW**737; 75**Mont**67, 244 **P**489. [g] **Claim for services of attorney to bank prior to closing** is not entitled to preference in payment as expense of liquidation. 43 **Ida**119, 249**P**897. [h] **Preferential lien for salaries** to employees where earned within ninety days of appointment of receiver is allowed under some statutes. 155**Tenn**519, 296**SW** 12, 54**ALR**564. [i] **Order of claim** given priority under federal law is not determined by state statute as to priorities. 23**F(2d)**381. [j] **Right to preference is based on interest in particular fund** rather than relation of debtor and creditor. 205 **Iowa**1064, 217**NW**250. [k] **Preferred claims will be prorated amongst cash on hand at time bank closed,** where common funds were insufficient, rather than allowed in inverse order of times of respective deposits. 205 **Iowa**1064, 217**NW**250. [l] **Validity of order allowing preference** is not affected by contrary recommendation by receiver. 205 **Iowa**353, 218**NW**78. [m] **Taxes.**–205 **Iowa**723, 218**NW**526. [n] **Burden of establishing right to preference** rests on claimant. 207 **Iowa**948, 222**NW**8. [o] **Claimants entitled to preference.**–206 **Iowa**675, 220**NW**113 (shipper of live stock). [p] **Surety paying claim of United States against failed bank is entitled to priority** as to assets transferred to another bank assuming liabilities to unsecured depositors. 32**F(2d)**368. [q] **Determination of priorities.**–In Missouri, priorities of claims against bank in liquidation determinable by circuit court include priorities of equitable nature. 322**Mo** 29, 14**SW(2d)**597. [r] **Double liability of stockholders is for benefit of all creditors without preference.**–118**Nebr** 337, 224**NW**868. [s] **Surety company as subrogee of United States is not entitled to priority** given by statute to United States as creditor in certain cases. 85 **Mont**532, 281**P**341. [t] **Priority of United States.**–40**F(2d)**935. [u] **Time for claiming priority.**–**Mo** 29**SW(2d)**1096. [v] **Governed by statute in force when bank taken over by superintendent.**–170 **Ga**185, 152**SE**484.

747–41½–New. Assets are distributed ratably among creditors. 76**Mont**248, 245**P**947.

747–41¾–New. Creditor cannot obtain preference by attachment, execution, or otherwise. 76**Mont**248, 245**P**947.

747–42 [d] **Bank placing funds on call** through trust company with other banks its claim against insolvent bank receiving part of funds held entitled under statute to participate in general assets but not in assessments against stockholders. 170**Ga**175, 152**SE**101.

748–43 [a] **There is an equitable distribution of any surplus** remaining after stockholders have been assessed and debts paid on liquidation of bank under direction of commissioner of banks. 170 **Minn**445, 213**NW**36.

748–44 [a] **Classification of claims.**–46 **Ida**50, 266**P**419. [b] **Allowance of claimant's costs on appeal** from classification of claim, as part of cost and expenses of liquidation under statute, is improper. 46 **Ida**50, 266**P**419.

748–45½–New. Giving a lien on collateral to cover previous notes rediscounted to the lender is an unlawful preference and void. 21**F(2d)**128.

748–48½–New. Statute, giving preference to insolvent debts due United States, applies to state banks. 9**F(2d)** 624 (not to national banks).

748–48½–New. An insolvent state bank in charge of the state superintendent of banks is held to have made a voluntary assignment giving priority to debts due the United States. 14**F(2d)**543.

748–48¼–New. A claim based upon indorsement creates no preference. 204 **Iowa**493, 215**NW**617.

748–48⅛–New. Credit belonging to an insolvent bank with a correspondent bank, from which it borrowed money, will be applied to a primary obligation. 21**F(2d)**128.

748–48⅙–New. The surety, in an indemnity agreement executed by the bank as security for a deposit of county funds, having paid the amount of the bond after insolvency of the bank, is not entitled to allowance of claim and payment of dividends pro rata with other general creditors. 277**US**258, 48 **SCt**445, 72**L ed**874.

748–48⅙–New. In some jurisdictions the distribution of the assets of an insolvent bank is governed by general incorporation laws. 33**NM**473, 270**P**881.

748–48⅛–New. Turning over to another bank as security a certificate of deposit received from the insolvent bank's liquidating officer alone did not amount to assignment of its claim against the insolvent bank so as to bar maintenance of a suit for preference. **MoA** 8**SW(2d)** 1030.

748–48⅙–New. Complainant bank, claiming an oral contract for sale and discount of notes, has been held not entitled to enforce a preferred claim. 26**F(2d)**696.

748–48⅒–New. A surety on a bank's bond to pay the state treasurer's deposits is not entitled to payment of a dividend by the bank's receiver equal in percentage to that paid other creditors. 30**F(2d)**357 [certiorari den 279 **US**852, 49**SCt**348, 73**L ed**995(3dcase)].

748–48 1/11–New. The law requires a pro rata distribution of dividends only on debts existing when the insolvent bank was suspended. 30**F(2d)**357 [certiorari den 279**US**852, 49**SCt**348, 73**L ed**995(3d case)].

748–48 1/12–New. Payment to the banking commissioner under contract for the sale of land was properly decreed a preferential claim on the commissioner's failure to furnish a merchantable title. **TexCivA** 14**SW(2d)**953.

748–48 1/13–New. A claim for the proceeds of a note sold by a bank is entitled to preference although the secretary of the directors failed to copy the note into the minutes. 222**MoA**923, 11**SW(2d)** 77(1stcase).

748–48 1/14–New. Preferred claims are limited to cash in the bank when closed, in the absence of an attempt to trace trust moneys on which such claims were based. 208 **Iowa**392, 226**NW**73. [a] **Proceedings to compel payment of claims.**–Petition held sufficient in action for judgment and not barred by limitations. **MoA** 21**SW(2d)**222.

748–48 1/15–New. A vendor establishing a claim against an insolvent bank for the purchase price of land sold to the bank is entitled to a lien. **MoA** 21**SW(2d)** 222.

748–48 1/16–New. Under Kentucky statute action for mandatory injunction to compel banking commissioner is premature where commissioner has not made report to circuit court. 233**Ky**696, 26 **SW(2d)**514.

748–48 1/17–New. Hardship to holder of insolvent bank's check does not justify departure from procedure provided by such statute. 233**Ky**696, 26**SW(2d)**514.

748–50 26**F(2d)**411; 26**F(2d)**440; 165 **Ga**245, 140**SE**376; 45 **Ida**522, 263**P**632 (rule is not affected by depositor's acceptance of security from bank in violation of statute); 232 **Ill**456; 202 **Iowa**97, 209**NW**421; 204 **Iowa**1106, 216 **NW**760 (private bank); 205 **Iowa**872, 219**NW**62 (depositor of federal pension money is not entitled to preference on ground of exemption under statute or as specific or special deposit); **Iowa** 228**NW**55; 125**Me**150, 131**A**863 (proceeds of draft collected and credited to depositor's account); 169**Minn**173, 210 **NW**891; 220**MoA**265, 286**SW**425; **MoA** 291**SW**170; 76**Mont**248, 245**P**947; 53 **SD**541, 221**NW**262. [e] **No preference for amount of unpaid checks** received by bank before closing but later protected and returned unpaid. 125**Me**150, 131**A**863. [f] **General deposits are not preferred** in payment of bank's debts unless there is equitable basis for lien or trust and definite property can be segregated to impose lien or trust. 232 **Ill**456. [g] **Before any payments to depositors,** receiver must pay all valid taxes on assets of bank. 117**Nebr**189, 220**NW**265. [h] **Insufficient grounds for allowance of preference.**–179**Ark**463, 16 **SW(2d)**573; **MoA** 282**SW**757. [i] **Trust or agency relation necessary.**–In order to entitle depositor of check to preference, there must be either mere agency for collection or element of trust. **MoA** 291**SW**170. [j] **In absence of allegations of fraud,** depositor is not entitled to preferred claim against receiver on account of deposit made thirty minutes before bank closed. **IndA** 172**NE**549.

748–51 **CalA** 292**P**665; 200 **Iowa**1147, 206**NW**126; 206 **Iowa**1006, 221**NW**572 (evidence held to warrant finding that trustee's claim against insolvent bank should be allowed as that of general depositor rather than as general creditor only); **Nebr** 229**NW**121. [a] (3) Money judgment against liquidator held unauthorized in absence of showing of collection by him of draft for which special deposit was made. **TexCivA** 18 **SW(2d)**200. [c] (1) 95**PaSuper**199 (relationship one of bailor and bailee). (2) Other instances. 291**Pa**463, 140 **A**517. [m] **In Iowa.**–203 **Iowa**174, 210 **NW**747. [n] **Execution of pledge** enabling insolvent bank to remain open did not estop depositor from asserting priority. 156**SC**181, 153**SE**133, 69**ALR** 443. [o] **Claim of priority has been held not to have been barred by limitation.**–156**SC**181, 153**SE**133, 69**ALR**443 (laches). [p] **Acceptance of dividends from stockholders' liability fund** does not estop one from asserting priority. 156 **SC**181, 153**SE**133, 69**ALR**443.

749–53 338 **Ill** 134, 170**NE**236; 249**Mich** 410, 228**NW**737 (partners of insolvent bank as depositors).

749–53½–New. The fact that a banker falsely states to an administrator that deceased had no deposit in bank furnishes no ground for decreeing the administrator a preference in settlement of the affairs of an insolvent bank. 202 **Iowa**859, 211**NW**532, 51**ALR**910.

749–53⅓–New. In some jurisdictions surety companies are by statute given equal preference right with the depositors in an insolvent bank. 22**F(2d)**645.

749–53¼–New. Where the United States, through its agents, deposits money of individual Indians in a state bank, taking the bond required by the federal statute, the deposit is entitled to priority against all of the assets of the bank. 22**F(2d)**645.

749–53½–New. Where a bank defrauds a depositor by receiving a deposit with knowledge of fraud, the depositor may rescind and reclaim the deposit or affirm and pursue other remedies. **Tex CivA** 28**SW(2d)**876.

749–53⅙–New. **In actions to establish preference,** the record has been held to show that the property of decedent's estate deposited with the bank was not entitled to preference. **TexCivA** 28**SW (2d)**876.

749–53⅐–New. As regards the right to claim a preference, a deposit of money and checks after banking hours for which an entry of credit is made in the depositor's pass book is a general deposit. 204 **Iowa**1190, 216**NW**723.

749–53⅛–New. Such deposit constitutes a transaction of the day on which it was actually made although the bank records show it as the business of the following day. 204 **Iowa**1190, 216**NW** 723.

749–53⅑–New. A depositor is entitled to preference for the amount of a check presented before insolvency, on which payment was wrongfully refused by the bank. **MoA** 297**SW**975.

749–53 1/10–New. On payment of a note to the pledgee holding it as collateral for a loan to the insolvent bank because of an erroneous statement of the liquidating officer that the notes had been sold, a depositor is entitled to preference. **MoA** 8**SW(2d)**1030.

749–53 1/11–New. A depositor of bonds which the bank is authorized to treat as its own is not entitled to preference where the bonds were pledged and disposed of by the pledgee. 28**F(2d)**36.

749–53 1/12–New. Depositors have a lien only on the assets of the bank. 118 **Nebr**337, 224**NW**868.

749–53 1/13–New. Granting of preference to a depositor in respect of the deposit of certain bonds is subject to payments received as general creditor and does not affect the right to a claim as gen-

eral creditor for the interest and unpaid balance after the application of a special fund. 28F(2d)37.

749-53¼-New. The right of a depositor to assert preference because of fraud requires the ability to trace money into the hands of the bank commissioner. TexCivA 11SW(2d)217.

749-55½-New. Where a state bank negotiated a loan as agent on its customer's land and received a check from the trust company for proceeds and placed it to the customer's credit, the customer's status as depositor is not lost by subsequent receivership. 202 Iowa265, 209NW422.

749-56 164Ga790, 139SE566; 169Ga 534, 150SE841 (right of priority of county of payment not divested by subsequent statute); 313Mo 307, 281SW 702; 77Mont134, 251P151; 157Tenn87, 68SW(2d)328 (funds of state university). See also 203 Iowa71, 212NW337; 205 Iowa987, 213NW528. [e] (1) See also 295Pa433, 145A520; 107WVa679, 150 SE221. (2) Sureties on bond securing state deposits cannot compel preference to state seeking recovery from sureties and only deficiency from bank's funds. 174Minn583, 219NW916. [g] **Money deposited by county** as its share of cost of building road with state is not entitled to preference. 152Tenn555, 280SW24. [h] **What statute governs.**-202 Iowa281, 208NW212; 77Mont498, 251P548. [i] **Bank making assignment for creditors** held to have committed act of bankruptcy so as to give priority to debts due United States. 269US483, 46 SCt176, 70L ed368. [j] **"Act of bankruptcy"** (1) giving priority to debts due United States is determined by Bankruptcy Act. 269US483, 46SCt176, 70 L ed368. (2) That state officer is in possession administering affairs of bank by virtue of affirmative action on part of governing body of institution or with acquiescence of board of directors and stockholders is sufficient to entitle United States to priority. 24F(2d)709. [k] **Deposit of trust funds** by Indian agent is a debt due United States within priority statute. 269US483, 46SCt176, 70 L ed368. [l] **Surety on depository bonds protecting deposits by state** is entitled upon payment of deposits to be subrogated to state's preference. 77Mont134, 251P151. [m] **Waiver of priority.**-313 Mo 307, 281SW702. [n] **Claims for deposit of funds belonging to bankrupt estates** are not entitled to priority as debts due United States. 208 Iowa1248, 224NW499. [o] **Surety on bond of bank to secure United States deposits** is entitled to priority against assets of insolvent bank in amount paid by it on such bond. 33F(2d)221. [p] **State.**-340 Ill 124, 172NE50; TexCivA 28SW (2d)184.

749-56½-New. , which in some jurisdictions are applicable instead of general statutes merely declaratory of the common law. 313Mo 307, 281SW702.

749-57 31F(2d)612; 335 Ill 617, 167 NE804, 65ALR1327; 117Nebr478, 221 NW107; 25 OhA165, 157NE903; 8 PaDist&Co 93. Contra 97Fla174, 120S 316. [b] (1) 205 Iowa971, 219NW59; 220MoA1081, 279SW746. (4) Deposit of municipal funds in state bank by city treasurer without execution and delivery of indemnifying bond required by statute brings into existence constructive trust enforceable against receiver of bank where it is made to appear by presumption or proof that fund passed into his hands to augmentation of assets of bank. 201 Iowa316, 207 NW348. (5) Deposits by school district treasurer in excess of amount of indemnity bond create trust relation to extent of excess. 205 Iowa971, 219NW 59. (6) Municipality is not estopped from insisting on trust relationship in respect of funds wrongfully deposited on assumption that it received statutory interest on deposit. 205 Iowa971, 219 NW59. (7) Bank must be shown to have had notice or knowledge of illegality of deposit before it can be held to be trustee ex maleficio of public funds illegally deposited by custodian. 81Mont322, 263P689. (8) Bank which received deposits of county funds from treasurer within limits of amount it was qualified to receive, without notice that its deposits were in excess of its pro rata share under statute, is not chargeable as trustee ex maleficio as to excess which should have been deposited in other banks, and county is not entitled to preference as to excess. 81 Mont322, 263P689. (9) It is only necessary to trace funds to find preference. 25 OhA165, 157NE903. [c] **Lack of authority of city to accept from bank certain form of security** cannot be invoked by banking commissioner where city acted in good faith and performed its part of contract. TexCivA 11SW(2d) 217. [d] **County is not entitled to preferred claim against insolvent** bank for draft drawn on depositary bank which applied county deposit credited to insolvent bank to offset insolvent bank's indebtedness. TexCivA 12SW(2d)607. [e] **State and county collector are properly joined** to enforce priority of taxes collected by bank as county agent. 335 Ill 617, 167NE804, 65ALR1327. [f] **State may sue** to recover taxes collected by bank as county agent. 335 Ill 617, 167NE804, 65ALR1327. [g] **Bill in equity** may be maintained to enforce priority though there is adequate remedy at law. 335 Ill 617, 167NE804, 65 ALR1327.

749-58 22F(2d)645; 24F(2d)768 (where relation of debtor and creditor exists); 30Ariz480, 248P1086 (county and state deposits); Ariz 283P926 (state and county have no greater rights than general creditors); 173Ark103, 291 SW1003, 51ALR1332; 338 Ill 179, 170 NE205; 338 Ill 134, 170NE236; 201 Iowa346, 207NW331 (county funds deposited in excess of amount secured by bond); 202 Iowa97, 209NW421; 221 Ky55, 297SW938; Minn 232NW917; Mo 8SW(2d)944 (no preference); 220 MoA1081, 279SW746; MoA 30SW(2d) 782; 77Mont498, 251P548; 193NC513, 137SE587; 55ND45, 212NW236, 51ALR 296; 119 Oh124, 162NE420; 29 OhA 154, 163NE221. See also 32F(2d)368. [a] (2) No preference allowed for overdeposit in excess of collateral given by depositary. 172Minn324, 215NW174. [b] **County has no preference** as depositor over other depositors and general creditors. 99WVa483, 129SE399. [c] **Sovereignty of state** does nob rest on county so as to give it preference over other depositors of insolvent bank. 99WVa483, 129SE399. [d] **Deposit of official funds by court clerk in his name as clerk** does not make bank trustee for county or county treasurer. 204 Iowa 878, 216NW1. [e] **Deposits of county funds with designated depositary after approval of depositary's bond** are general deposits, and county is not entitled to preference regardless of whether designation of depositary and approval of bond were proper. 83Mont308, 271P710. [f] **Counties.**-340 Ill 124, 172NE50. [g] **Interest is not allowable** on claim of county when assets are insufficient to pay general depositors. Iowa 231NW 497. [h] **Village depositing sewer fund moneys in general deposit** is not entitled to preference. Minn 232NW917.

749-59½-New. On appointment of receiver for bank, any priority which state may have for its deposit is lost. 34Wyo 134, 241P1063.

749-59½-New. State waives its right to priority by making other detailed and systematic provisions for protection of its deposits. 34Wyo 134, 241P 1063.

749-59¼-New. There is no priority in favor of state, if it exacts interest on its deposits. 34Wyo 134, 241P1063.

749-59⅛-New. In proceeding by county against receiver to establish claim of preference claimant has burden to establish right thereto. 202 Iowa97, 209 NW421.

749-59⅛-New. Public deposits protected by pledge of securities are held not illegal preference. 286Pa405, 133A 551.

749-59½-New. As between lawful creditors and depositors of an insolvent bank and depositor of public funds whose contract of pledge was ultra vires of the bank, the former must be preferred. 55ND45, 212NW236, 51ALR 296.

749-59⅛-New. Where public funds are illegally deposited in a bank having knowledge of their public character, a claim therefor is entitled to preference, provided the fund can be traced or the assets of the bank have thereby been increased. Mo 8SW(2d)944.

749-59⅛-New. If the state has a preference in the assets of a bank before title passes to a receiver, such preference does not extend to a county as a political subdivision of the state. 34 NM166, 279P60.

749-59¹⁄₁₀-New. Burden is on bank to satisfactorily account for deposit of school funds shown by school district to have been made in bank. Iowa 230 NW418.

750-60 37GaA421, 140SE399; 47Ida89, 272P699 (county funds are special deposit); 338 Ill 134, 170NE236 (such deposit does not become asset of insolvent bank); 202 Iowa887, 211NW529; 202 Iowa885, 211NW535; 203 Iowa345, 212 NW745, 51ALR906; 205 Iowa171, 217 NW831; Iowa 220NW63 (term "preference" is inaccurate as applied to recovery of special deposit); 127Kan139, 272P164; 169Minn89, 210NW865; 176 Minn384, 223NW622 (acceptance of depositor's check for remittance of money to designated person held equivalent to cash payment); MoA 5SW(2d)708 (money accepted for purchasing of specified bonds); 222MoA990, 6SW(2d)655; 115Nebr444, 216NW302; 131 Or350, 281 P172 (bank issuing certificate of deposit for proceeds of collection of note); 53ND 378, 220NW869; TexCivA 281SW264. See also 28F(2d)37 (trust is established as to bond wrongfully pledged by bank); 89 IndA611, 167NE564. But see 221Ky55, 297SW938; Minn 230NW817. [b] (1) But see 176Minn384, 223NW 622. (3) Claim for loss of special deposit not entitled to preference for want of evidence showing money lost by claimant augmented assets in hands of receiver. 121Kan193, 246P57. [c] (1) 38F(2d)772. But see 38F(2d)455. (2) Where fund is commingled with general funds of bank and there are enough assets when insolvency takes place to pay fund, preference will be granted regardless of state of bank's cash between time of special deposit and insolvency. 176Minn384, 223NW622. [d] (5) One depositing money for certain time and taking certificate of deposit therefor is general depositor not entitled to preference. 75Mont184, 243P 573. (6) Trust funds deposited with bank's knowledge that they are such are not special deposit. 75Mont184, 243 P573. (7) Mere deposit of trust funds by guardian, although character of funds shown without agreement for return of identical money or other special circumstances, is not special deposit on which preferred claim may be based. 75Mont173, 243P569. (8) Where depositor was given credit in pass book for deposit of checks in bank on which they were drawn, deposit cannot be regarded as special deposit. 30Ariz431, 247P1097. (9) Proceeds of note and mortgage delivered to bank by administrator for collection with understanding that proceeds should be credited to his individual account. 36Wyo 361, 255 P593, 53ALR554. (10) Account against which only "beet pay roll" checks are drawn and in which only sufficient money to meet such checks is deposited is not special deposit for specific purpose entitling depositor to preferred claim. 13F(2d)829. (11) Arrangement between bank and incorporators of insurance company for loan to be deposited to credit of beneficiary fund subject to check countersigned by state superintendent. 220MoA1256, 290SW100. (12) Where sufficient amount remains in bank to cover fund presumption is that bank first made payments which it had right to make from other funds. 38 F(2d)455. (13) Other instances. 46 Ida481, 269P86, 59ALR443; 205 Iowa 1248, 218NW24; 205 Iowa872, 219NW 62; 126Kan782, 271P301; MoA 291SW 170. (14) In general. Nebr 231NW 691. [f] 232 IllA456. [g] **Deposit is**

presumed general and not special, where made in ordinary course of business, as respects priorities. 13F(2d)829. [h] **Whether deposit is general or special depends** on contract resulting from mutual understanding and intention of parties, as respects priorities. 13F(2d)829. [i] **Not necessary to trace identical money.**–221Ky55, 297SW938. [j] **Presumption is that bank used own funds** in purchasing bonds on hand when bank closed. 221Ky55, 297SW938. [k] **Special depositors of bonds,** converted by bank, to have preferred claim on bonds owned by bank when it closed, must trace proceeds of special deposits into such bonds. 221 Ky55, 297SW938. [l] **Proceedings to require segregation by superintendent of banks.**–53SD378, 220NW869. [m] **Depositors of government bonds,** not subject to identification, are not entitled to preference for proceeds which could not be identified in hands of receiver. 206 Iowa675, 220NW113. [n] **Effect of taking security.**–MoA 58W(2d)708. [o] **Unconditional deposit subject to creditor's absolute control** made by debtor after tender and refusal of creditor to accept same. SD 228NW404(1stcase). [p] **Where checks were left with bank in escrow,** plaintiff claiming preference had burden to show that checks were accepted by bank for collection and that proceeds and not checks themselves were to be held. 48 Ida57, 279P414. [q] **Bank selling customer's note and mortgage without his knowledge** is trustee owing duty to preserve fund intact and account therefor. 38F(2d)455. [r] **Fund must be traced into assets taken over by receiver** or specific property held by him. 38F(2d)455. [s] **Amount of money in bank from acquisition of fund until receivership** must be shown in order to establish right to preference. 38F(2d)455.

750–61½–New. Whether a deposit is special or not does not depend on the relation depositor or fund bears to third party. 36Wyo 361, 255P593, 53ALR554.

750–61¼–New. but whether a trust relation was created between depositor and bank. 36Wyo 361, 255P593, 53ALR 554.

750–61¼–New. One who permits the bank to use a deposit as collateral for a loan to it is not entitled to preferential treatment. MoA 38W(2d)1043.

750–61½–New. Where a bank, as bailee of bonds deposited for safe-keeping, wrongfully sold the bonds, used the proceeds, and became insolvent, the bailors were entitled to file a general claim for the amount the bank received, the bonds having been sold at par, and have it so allowed and have dividends paid thereon. 227Ky179, 12SW(2d)312.

750–61¼–New. If a deposit is made with an agreement to return it, not in specific currency deposited, but in an equal sum, it is not considered as a trust fund. TexCivA 19SW(2d)789.

750–62 17F(2d)918; 96Fla247, 117S 900, 65ALR1398; 50SD19, 208NW82 (city treasurer claimed to be holding collateral security held entitled to share in dividend on proof that securities had been returned to banking department). [c] **In Montana.**–75Mont43, 243P813. [d] **In Arkansas.**–181Ark356, 25SW(2d) 1048. [e] **In Florida.**–126S745.

750–63 17F(2d)913; Ala 128S394; CalA 292P665.

750–64½–New. Liens on any particular property of a bank being liquidated by the bank commissioner are, to the extent of the proceeds of the property subject to lien, to be paid without regard to declared preferences or priorities. 43 Ida119, 249P897.

750–64¼–New. Where a surety has paid part of the indebtedness the payment of pro rata dividend on the full amount is erroneous. 17F(2d)942.

750–64¼–New. State officers holding collateral pledged to secure a deposit of public money are not estopped from asserting priority over general creditors, for the reason that they participated in an attempt to create a secret lien and failed to disclose to creditors, when the bank reopened, the existence of such lien. 34Ariz565, 273P728.

751–65½–New. A surety cannot claim subrogation and compete with a secured creditor in the distribution until the creditor is paid. 30F(2d)753.

751–68 124Kan699, 261P567. See also 41F(2d)364; IndA 172NE316.

751–69 [c] **Director not entitled to priority** where he gave bank securities to deposit as collateral for loan to bank and creditor disposed of these securities but returned unexhausted the bank's securities. 192NC221, 134SE490.

751–73 Erratum.–"Nevitt v. Port Gibson, 14 Misc. 513" should read "14 Miss. 513."

751–74½–New. A director unlawfully purchasing stock for a bank cannot, as against innocent stockholders, recover from the remaining assets, after the creditors are paid, the amount he advanced for shares standing in his name after the insolvency of the bank. 29F (2d)288(2dcase).

751–75 13F(2d)330; 40F(2d)297 (cashier's check); 96Fla181, 117S789; 202 Iowa95, 209NW279; 202 Iowa899, 211 NW506, 511 [citCJ], 50ALR388; Iowa 211NW515; 203 Iowa790, 211NW516; 202 Iowa894, 211NW517; 203 Iowa507; 211NW520; 203 Iowa782, 211NW522; 202 Iowa879, 211NW526; 202 Iowa875, 211NW527 (purchase of draft from bank paying currency therefor); 203 Iowa235, 212NW485; 203 Iowa343, 212NW744; 203 Iowa398, 212NW746; 204 Iowa493, 215NW617; 204 Iowa497, 215NW728; 120Kan333, 243P321; 120Kan706, 244 P1039, 1041 [quotCJ]; 124Kan48, 257 P743; 233Ky257, 25SW(2d)386; 174 Minn500, 219NW863; 221MoA385, 277 SW613 (evidence held not to show fraud in issuance of draft entitling holder to preference); 222MoA119, 300SW1018; 136SC511, 134SE510; 141SC370, 139SE 793, 798 [citCJ]; 150SC25, 147SE653; 157Tenn497, 10SW(2d)683, 61ALR954 (including cashier's check); 102WVa 128, 135SE257. See also 44 Ida33, 255 P300. But see 207 Iowa948, 222NW8; 34 OhA6, 170NE186. [b] **Claim based on cashier's checks** purchased with government funds by postmistress and assigned to government is entitled to priority of payment. 5F(2d)265. [c] **Mortgagee retaining for twenty days** cashier's check for money paid to bank by mortgagor because general creditor of bank became insolvent. 170Minn66, 211NW954. [d] **Bank's use of collected funds after issuing draft** in payment to correspondent bank in same town creates no preference for payee bank. 202 Iowa894, 211NW517. [e] **Holder of bank's cashier's check in payment for collection,** paid by check, is held entitled to classification as owner of contractual claim on bank. 44 Ida33, 255 P300. [f] **Where holder of check drawn on bank accepts its draft on its correspondent in payment** and bank charges amount against depositor's account, relation of principal and agent exists between holders of draft and drawer, and he is entitled to preference on dishonor of draft because of insolvency of drawer. 222MoA882, 58W(2d)1110. [g] **Draft on correspondent of insolvent bank issued for balance due on daily clearance of checks** entitles holder to preference when manually delivered before insolvent's closing. MoA 24SW(2d)678. [h] **In Missouri.**–MoA 27SW(2d)1024 (evidence held not to justify conclusion that there were no funds for payment).

751–75½–New. and same rule applies to county warrant where proceeds cannot be traced into specific fund in hands of superintendent of banks; 50SD153, 208NW775.

751–75½–New. and although president of bank drawing draft knew of its insolvency at time of drawing draft his absence at that time precludes consideration of intentional fraud in issuing draft as basis of preferred claim; 120 Kan706, 244P1039.

751–75¼–New. even though officers of bank drawing draft did not know that their bank was insolvent; 120Kan706, 244P1039.

751–76 203 Iowa782, 211NW522; 204 Iowa497, 215NW728; 120Kan706, 244P 1039, 1041 [quotCJ]; 136SC511, 134SE 510. [b] **Holder of certified check** is not entitled to preference over ordinary creditors. 122Kan835, 253P906. [c] **Evidence held insufficient to show** issue of draft at time bank was insolvent, to knowledge of officers. 203 Iowa235, 212 NW485.

751–77 120Kan706, 244P1039, 1041 [quotCJ]; 220MoA110, 278SW786. But see 203 Iowa790, 211NW516; 206 Iowa 65, 218NW957; 124Kan48, 257P743. [a] **Preference not affected,** whether or not drawee bank had sufficient funds to pay draft. 220MoA110, 278SW786. [b] **Bank's obligation is that of trustee** on sale of drafts after insolvency. 220MoA 110, 278SW786.

751–77½–New. United States is entitled to preferential payment of dishonored draft purchased with part office funds. 9F(2d)473.

751–77½–New. Holder of certified check is held not depositor. 44 Ida33, 255P 300.

751–77¼–New. Holders of bank drafts, secured by check of issuing bank are held not depositors. 44 Ida33, 255P300.

751–77½–New. Where a bank in collecting a cash warrant on the state takes a check on itself, the owner of the check is entitled to preference where the bank was authorized to collect the warrant in cash only and there were sufficient funds in the state treasurer's account. 37Wyo 216, 260P534.

751–77¼–New. The act of a bank in taking a check on itself under such circumstances is equivalent to collection in money in relation to the right to such preference. 37Wyo 216, 260P534.

751–77½–New. Where a cestui que trust accepts from the trustee bank its certificate of deposit in lieu of the trust funds and later accepts a draft in exchange for such certificate, the trust relation is canceled and the relation of debtor and creditor is established. 204 Iowa954, 216NW267.

751–77¼–New. Where a check was presented for payment and payment was refused while the bank was still open, and the bank had sufficient money with which to pay it, the bank thereafter held the amount of the check as trustee as respected the right to preference in liquidation. MoA 118SW(2d)1090.

751–77¼–New. A draft given for surrendering a certificate of deposit received by the drawee bank for payment before notice of the issuing bank's insolvency has been held entitled to priority. 119 Oh142, 162NE423.

751–77 1/10–New. A bank, holding the draft of another bank issued for the balance due a holder in clearing checks, is entitled to a preferred claim. MoA 16 SW(2d)642.

751–77 1/11–New. Where a state bank sent drafts to a federal reserve bank payable out of funds in a depositary bank in payment of depositor's checks sent direct to it by the federal bank for collection and immediate remittance, and the depositary refused payment although having sufficient funds, and the state bank closed the next day, the federal bank had a prior right over general creditors. 108WVa12, 150SE137.

751–77½–New. Holder of check can recover from maker money received from liquidating officer on claim for funds with which check should have been paid. Ida 288P164.

751–78 15F(2d)582; 19F(2d)541; 21F (2d)993; 24F(2d)768 (deposit by city treasurer in violation of law); 30Ariz 36, 243P919; 32Ariz444, 259P886; Ariz 287P292; 98Fla1126, 125S360; 37GaA 421, 140SE399; 232 IlA456 (dictum); 201 Iowa316, 207NW348; 202 Iowa859, 211NW532, 51ALR910; 202 Iowa881, 211 NW536; 203 Iowa345, 212NW746, 51 ALR906; 205 Iowa114, 212NW414; 204 Iowa497, 215NW728; 204 Iowa565, 215 NW742; 205 Iowa1064, 217NW250; Iowa 220NW63 (term "preference" inaccurate as applied to recovery of trust fund); 208 Iowa392, 226NW73; Mo 108SW(2d) 655; 220MoA1019, 278SW793; 210MoA 805, 278SW810; 220MoA1081, 279SW 746; 79Mont233, 255P733; 123 Okl 179, 250P483, 484 [citCJ]; 130 Okl 206, 266 P472; 43 OklACR218; 141SC318, 139 SE783 (draft collected for forwarding bank by third bank and remitted to failing bank); 150SC181, 153SE133, 69ALR 443; TexCivA 28W(2d)876; 37Wyo 4,

257P345, 53ALR560. [a] (1) 220MoA 1019, 278SW793, 795 [citCJ]. [a] (2) County depositing in unqualified depositary bank is not precluded from asserting right as cestui que trust because, after failure, it credited bank with taxes illegally exacted and with dividend received along with general creditors. 54 ND315, 209NW782. [b] (1) 175Minn88, 220NW168, 60ALR330. (2) Giving of draft to plaintiff bank on third bank creates no trust entitling plaintiff bank to preference. 192Wis28, 211NW931. [c] (1) 24F(2d)139 (deposit entitled to preference as debt due United States under federal statute and is not governed by state laws); 24F(2d)768 (deposit of city funds in bank not furnishing bond); 26F(2d)440; 32F(2d)368; 42F(2d)925; 32Ariz444, 259P886 (public funds deposited by county treasurer in excess of lawful security); 172Ark631, 290SW69; 176Ark1119, 5SW(2d)311; 169Ga53, 149SE575; 37GaA421, 140SE399; 42 Ida 711, 248P16; 44 Ida33, 255P300; 45 Ida530, 263P993; 201 Iowa316, 207NW348 (deposit of municipal funds in state bank by city treasurer without execution and delivery of indemnifying bond required by statute); 202 Iowa265, 209NW422; 202 Iowa887, 211NW529; 203 Iowa401, 212NW694, 51ALR900; 203 Iowa546, 213NW245; 204 Iowa565, 215NW742; 204 Iowa1083, 216NW748; 204 Iowa1343, 217NW445; 205 Iowa1345, 219NW483; Iowa 220NW63; 206 Iowa957, 221NW543; 207 Iowa478, 223NW171; 207 Iowa394, 223NW249; Iowa 229NW907; 124Kan391, 260P610; 128Kan274, 277P39; 128Kan279, 277P42; 251Mich163, 231NW38; 175Minn336, 221NW236; 176Minn108, 222NW576; 176Minn594, 224NW159; 176Minn584, 224NW239(2d case); Minn 230NW889; 322Mo 29, 14SW(2d)597; 210MoA805, 278SW810; 220MoA1081, 279SW746; 222MoA990, 6SW(2d)655; MoA 21SW(2d)641 (funds wrongfully deposited); MoA 21SW(2d)643; MoA 21SW(2d)781; 77Mont134, 251P151; 115Nebr444, 216NW302; 33NM565, 273P764; 124 Okl 185, 256P43; 127 Okl 209, 260P472; 130 Okl 206, 266P472; 43 OklACR218; 131 Or350, 281P172; 52SD342, 217NW512; 52SD443, 218NW151; TexCivA 28SW(2d)297; 192Wis28, 211NW931. (2) On allowance of claim as trust fund, no interest will be allowed unless money on which claim is made has earned interest. 45 Ida530, 263P993. [d] 46 Ida43, 266P429, 430 [citCJ] (claim classified as contractual liability); 46 Ida150, 266P1098; 232 IllA456; 252 IllA323; 202 Iowa265, 209NW422; 203 Iowa507, 211NW520; 203 Iowa463, 212NW674; 204 Iowa878, 216NW1; 204 Iowa760, 216NW16; 204 Iowa1317, 217NW438; 205 Iowa888, 219NW53; Iowa 228NW12; Iowa 228NW55; 126Kan782, 271P301; 128Kan591, 278P763; 220MoA1081, 279SW746; MoA 285SW110; 75Mont173, 243P569; 76Mont502, 248P193; 291Pa463, 140A517; 141SC227, 139SE465; 152SC140, 149SE599; 50SD60, 208NW167; 52SD1, 216NW597; SD 227NW375; TexCivA 28SW(2d)876; TexCivA 18SW(2d)215; TexCivA 29SW(2d)301; 36Wyo 361, 255P593, 53ALR554; 37Wyo 4, 257P345, 53ALR560. [g] **Claim to be entitled to priority** must be shown to be trust fund and part of assets passing to commissioner. 124 Okl 185, 256P43. [h] **Even though officer of bank was treated as trustee** (1) on its books bank will be deemed trustee when such was understanding. 203 Iowa546, 213NW245. (2) Such funds cannot be used to pay debts of bank under statute so providing (205 Iowa114, 213NW414). (3) Even though account is run in name of estate (205 Iowa114, 213NW414). [i] **Want of authority of bank to assume trusteeship** does not change nature of trust nor give bank title to subject matter of trust. 203 Iowa546, 213NW245. [j] **Term "all property, real or personal" received in trust**, as used in statute exempting such property from payment of bank's debts, includes money. 205 Iowa114, 213NW414. [k] **Preference is precluded** where bank prior to failure used trust funds partly in payment of obligations of bank and of one of the officers. 204 Iowa870, 216NW553. [l] **Fund received by bank as administrator of decedent's estate** is trust fund within meaning of statute giving such fund preference. 205 Iowa114, 213NW414. [m] **Payment of interest on amount collected and not remitted** under instructions held impressed with trust. 210MoA805, 278SW810(2dcase). [n] **Plaintiff is not limited to cash on hand** to impress his trust. 210MoA805, 278SW810(2dcase). [o] **Extent of preference.**–Equitable preference in payment of cash trust funds may not be allowed against all assets of bank but only against cash balance which passed to receiver, and on pro rata basis only, if such balance is insufficient to pay all such established claims and trust funds were not preserved in noncash assets. 204 Iowa1343, 217NW445. [p] **Presumption that bank received proceeds of note given in renewal of note received for collection** arises where renewal note was taken in its name. 204 Iowa1317, 217NW438. [q] **Presumption that bank actually retained proceeds of collection** is not overcome by fact that it issued and retained in its own possession demand certificate of deposit payable to owner of proceeds. 204 Iowa870, 216NW553. [r] **Presumption that bank wholly misappropriated fund** is justified by act of bank's receipt thereof for several months and then remitting small amounts, especially where no effort was made to trace funds into hands of receiver subsequently appointed. 204 Iowa870, 216NW553. [s] **Right to preference may be established** by positive proof or presumption. 204 Iowa1317, 217NW438. [t] **Burden of proof** is on claimant to prove trust relation. 204 Iowa870, 216NW553. [u] **Where more than one trust is established in same fund**, different claimants must prorate fund. 205 Iowa1345, 219NW483. [v] **That funds are traceable into general balance of assets** over liabilities does not make it trust fund. 28F(2d)40. [w] **Action against receiver for decree directing repayment of trust fund** is held not proceeding to establish preference. Iowa 220NW63. [x] **Mere insolvency of bank at time of acceptance of deposit** does not create trust relationship entitling depositor to preference. MoA 291SW170. [y] **Extent of preference.**–322Mo 29, 14SW(2d)597. [z] **Trust fund claimant is held chargeable with overdraft** of account exclusive of trust fund. 206 Iowa957, 221NW543. [aa] **Where several beneficiaries contributed to trust fund in bank**, presumption is, if insufficient to pay all, that funds were paid out by bank in order in which they were paid into fund. 33NM565, 273P764. [bb] **Necessity for assumption of obligation as bailee or agent.**–Deposit by trustee and acceptance of bank's certificates of deposit do not constitute bank trustee as to deposit, in absence of assumption of obligation of bailee or agent for either depositor or cestui que trust. 206 Iowa1006, 221NW572. [cc] **Money deposited in insolvent bank by officers without authority of owner** is held by bank in trust for owner. 176Minn108, 222NW576. [dd] **Public funds** in hands of public treasurer, deposited in his private bank, are impressed with a trust. 247Mich638, 226NW686. [ee] **Method of bookkeeping adopted by bank** not assented to by claimant is immaterial. Iowa 229NW907. [ff] **That bank's books did not show deposit in name of estate or executors** is immaterial where money of estate was deposited by cashier who was independent executor. TexCivA 28SW(2d)297. [gg] **Trust impressed on sewer fund money in hands of village** does not follow it into possession of depository bank nor make bank trustee. Minn 232NW917.

751–79 21F(2d)993; 26F(2d)411; 32Ariz444, 259P886; Ariz 283P926; 84Colo157, 268P523 (evidence held insufficient); 42 Ida711, 248P16; 44 Ida514, 258P544; 232 IllA456 (dictum); 202 Iowa859, 211NW532, 51ALR910; 202 Iowa885, 211NW535; 203 Iowa345, 212NW745, 51ALR906; 205 Iowa114, 213NW414; 204Iowa431, 215NW623; 204 Iowa497, 215NW728; 204 Iowa760, 216NW16 (dictum); 204 Iowa1106, 216NW760; 205 Iowa1064, 217NW250 (evidence is necessary to trace fund in hands of receiver); 207 Iowa478, 223NW171; 207 Iowa403, 223NW176 (burden of tracing trust fund not sustained); 207 Iowa394, 223NW249; 124Kan391, 260P610; 247Mich638, 226NW686; 210MoA805, 278SW810(2dcase) (claimant must follow fund into hands of commissioner of finance); 77Mont134, 251P151; 115Nebr444, 216NW302; 123 Okl 179, 250P483, 484 [citCJ]; 130 Okl 206, 266P472; 291Pa463, 140A517 (fund held not traceable); 50SD60, 208NW167; 52SD443, 218NW151 (deposits held traceable); 192Wis28, 211NW931; 37Wyo 4, 257P345, 53ALR560. [e] **Burden is on cestui to identify fund.**–115Nebr444, 213NW745. [f] **Where identity still exists**, character of trust funds is not changed where state bank merged with national bank. 15F(2d)582. [g] **Fact that trust property paid or reduced indebtedness or liability of bank** justifies no lien on assets or preference in payment. 15F(2d)175. [h] **Fund must be traced in original form** or into specific assets. 52SD1, 216NW597. [i] **Fiction that money remaining in bank contains trust fund** may be indulged to aid in tracing trust fund into commingled fund. 52SD1, 216NW597. [j] **Claimant must show money to be trust fund.**–124Kan391, 260P610. [k] **Plaintiff held to have sustained burden to follow funds.**–210MoA805, 278SW810(2dcase). [l] **Proof that bank used cash trust funds in payment of its debts** necessarily proves that the bank did not preserve such funds in the noncash assets of bank. 205 Iowa1064, 217NW250. [m] **Certificates of stock.**–Customer entitled to one of two identical certificates of stock in hands of receiver may recover one without identifying particular certificate belonging to him. Ariz 286P193.

751–80 21F(2d)993; 32Ariz444, 259P886; 98Fla956, 124S746; 98Fla1126, 125S360; 201 Iowa316, 207NW348; 202 Iowa859, 211NW532, 51ALR910; 203 Iowa546, 213NW245; 205 Iowa114, 213NW414; Iowa 213NW417; 204 Iowa497, 215NW728; 204 Iowa760, 216NW16 (dictum); 220MoA1019, 278SW793; 210MoA805, 278SW810(2dcase); 222MoA990, 6SW(2d)655; 115Nebr444, 216NW302; 124 Okl 185, 256P43 (trustee commingling trust funds with his own is presumed to have used his own money first); 144SC147, 142SE239; TexCivA 28W(2d)876; 136Wash256, 239P393. [a] (1) 204 Iowa1083, 216NW748, 65ALR679; TexCivA 275SW498. (2) When cestui que trust fails to trace cash trust fund into assets of bank other than cash assets, order of preference must not exceed sum coming into hands of receiver in excess of lowest cash balance existing in bank after trust came into existence. 205 Iowa971, 219NW59. (3) Restitution may be had from particular property in which mingled fund was invested, but not other funds of bank. 169Ga53, 149SE575. (4) Trust would not attach to funds derived from assessments against stockholders for benefit of creditors. 169Ga53, 149SE575. (5) If preferred claimant has received dividends from funds belonging to general creditors, he cannot impress trust unless such dividends are returned. 169Ga53, 149SE575. [b] (1) 207 Iowa478, 223NW171; 207 Iowa394, 223NW249 (cash received by receiver on insolvency of bank presumed to contain bank's trust funds). See also 203 Iowa546, 213NW245. (2) Where bank had kept on hand and passed to receiver more than sufficient money to pay trust fund, it may be recovered as preference. 175Minn88, 220NW168, 60ALR330. [c] (2) Public fund is not entitled to preference. 221Ky55, 297SW938. (3) Where trust fund in insolvent bank in favor of school district as to deposit by treasurer in excess of bond was traced into hands of receiver to extent of minimum amount of cash on any date subsequent to deposits, preference should be limited to amount of cash on hand at opening of last day of bank. 205 Iowa971, 219NW59. [d] **County, depositing money** with unqualified de-

positary bank, may assert right to minimum of cash on hand between time of deposit and time right is so asserted. 54ND315, 209NW782. [e] **Deposit in insolvent bank,** known by its officers to be insolvent and time fixed for suspension, may be followed as trust. 32NM147, 252P980. [f] **Contractor who assigned warrants to bank for bank's convenience,** bank knowing he was to hold them for transfer for bonds, can impress trust in bank's funds after bank cashed warrants. 136Wash256, 239P393. [g] **Payments by bank** after accepting funds when known to be insolvent are presumed to have been made with moneys other than those received. 192Wis28, 211NW931. [h] **Trust funds lose that character** (1) upon bank's remittance of draft for such fund upon owner's authority. 204Iowa497, 215NW728. (2) Where draft is drawn upon trust fund without owner's authority, character thereof is not changed. 204Iowa497, 215NW728. (3) Unauthorized act of bank in drawing cashier's check in favor of owner of trust fund in its possession held not to change character of fund. 204Iowa497, 215NW728. [i] **Prorating.**–204Iowa497, 215NW728. [j] **Funds in possession of bank** are presumed to be its own, but may be shown as belonging to claimant's property. 204Iowa497, 215NW728. [k] **Replacement of funds may be shown** as restoration of trust funds. 204Iowa497, 215NW728. [l] **Cestui que trust** has lien on entire assets where trust fund is mingled with general deposits and is used in general business of bank. 220MoA1019, 278SW793. [m] **If trust fund consists of money,** no other identification is necessary than to show that at all times there has remained in bank's hands amount equal to trust fund. TexCivA 188SW(2d)200.

752–81 12F(2d)891; 21F(2d)993; 30Ariz36, 243P919; 32Ariz444, 259P886; Ariz 287P292 (assets held augmented); 44Ida33, 255P300; 44Ida514, 258P544; 142Iowa329, 121NW694; 201Iowa321, 207NW336; 201Iowa316, 207NW348; 202Iowa27, 209NW302; 202Iowa859, 211NW532, 51ALR910; 202Iowa885, 211NW535; 205Iowa114, 213NW414; Iowa 213NW417; 204Iowa431, 215NW623; 204Iowa497, 215NW728; 204Iowa565, 215NW742; 205Iowa1064, 217NW250; 205Iowa171, 217NW881; 207Iowa407, 219NW929(2d case); 206Iowa957, 221NW543; 207Iowa478, 223NW171; 120Kan400, 243P1058; 169Minn281, 211NW332; Minn 230NW889; Mo 88W(2d)944; 321Mo749, 128SW(2d)751 (county funds obtained as county depositary without giving security); MoA 275SW579; 220MoA1019, 278SW793, 795 [citCJ]; 210MoA805, 278SW810(2dcase); 79Mont233, 255P733; 124Okl185, 256P43; 43OklACR218; 131Or350, 281P172 (payment of note collected by insolvent bank by check held not to defeat trust as against contention assets were not augmented); SD 226NW747; TexCivA 28SW(2d)876 (held not augmented); TexCivA 118SW(2d)217; TexCivA 12SW(2d)607; 37Wyo216, 260P534 (facts showing increase in assets in receiver's hands). See also MoA 118SW(2d)1090. [a] (1) 32Ariz444, 259P886; 204Iowa760, 216NW16; 204Iowa870, 216NW553; 204Iowa1317, 217NW438; 206Iowa675, 220NW113; 207Iowa403, 223NW176; SD 226NW747; SD 227NW375; TexCivA 275SW498. (2) Receiver has burden of showing that assets were not augmented. 115Nebr444, 216NW302. (3) Receiver has burden of overcoming presumption that funds in his hands include trust fund. 205Iowa1064, 217NW250. (4) Burden is on receiver to show estate not augmented by proceeds of trust fund. 207Iowa403, 223NW176. (5) On proof that trust funds came to receiver, bank has burden of showing wrongful misappropriation or criminal use of funds. 24F(2d)768. (6) Burden of proof is on receiver to show that assets were not augmented by commingling of trust fund with money of bank before its insolvency. 175Minn336, 221NW236. (7) To establish preferred claim under trust fund theory, on ground of fraud of borrowing bank, it must be proved that borrowing bank was insolvent and that it was known to its officers. 33F(2d)673 (preferred claim disallowed). [d] **Principle of enhancement of assets not applicable** where proceeds of collections were used at clearing house to pay debts of bank's depositors and clearing house daily balances were against defendant bank showing no money actually went to bank on collections. 50SD60, 208NW167. [c] **Presumptions.**–201Iowa316, 207NW348 (city funds deposited in state bank without execution and delivery of security bond required by statute); 203Iowa401, 212NW694, 51ALR900; 203Iowa546, 213NW245; 205Iowa1064, 217NW250; 204Iowa1317, 217NW438; 220MoA1019, 278SW793. [f] **Evidence insufficient to show augmentation.**–202Iowa265, 209NW422; 204Iowa497, 215NW728; 204Iowa878, 216NW1; 204Iowa1317, 217NW438. [g] **Deposit in bank known to be insolvent** is entitled to preference, if bank's cash resources from time of deposit exceeded such amount. 32NM147, 252P980. [h] **Where fund dissipated by bank.**–142Iowa329, 121NW694. [i] **Effect of false bookkeeping.**–220MoA1019, 278SW793. [j] **Assets are augmented by trust fund** whenever trust owner can point out the trust property either by actual proof or by legal presumption of fact. 204Iowa565, 215NW742. [k] **That resources of bank never fell below amount of deposit of trust funds** does not entitle beneficiary to preference where it further appears that trust funds were immediately upon receipt used by bank in payment of its debts. 204Iowa878, 216NW1. [l] **Claimants are entitled to unidentified portion** not diminishing common fund below level existing without addition of trust item. 205Iowa1064, 217NW250. [m] **Mere bookkeeping transfer** does not augment assets so as to entitle depositor to preference. TexCivA 28SW(2d)876. [n] **Law presumes that bank spends own funds.**–204Iowa760, 216NW16. [o] **Check on bank as working augmentation of its assets.**–Act of bank in receiving and accepting amply protected check on itself in payment of collection for its principal works legal augmentation of its assets though account of drawer is not charged with amount. 204Iowa1343, 217NW445. [p] **It is presumed that city treasurer obeyed law** and deposited nothing but cash or equivalent of cash. 24F(2d)768. [q] **Evidence held sufficient** prima facie to show that property of trust estate went into and augmented assets of bank. Mo 208SW(2d)502. [r] **That credits can be traced into receiver's hands** is sufficient. 38F(2d)772. [s] **Under doctrine of augmentation,** claimants under trust deposits in insolvent bank are entitled to share pro rata in cash remaining. Iowa 231NW311.

752–81½–New. But it has been held that deposit of trust funds with bank's knowledge that they are such does not of itself entitle depositor to preference. 75Mont184, 243P573.

752–81⅓–New. A guardian, who makes a general deposit of trust funds in bank and after bank's failure enters into creditor's agreement for reorganization of bank without court's authority, does not become holder of preferred claim on bank's second failure. 75Mont173, 243P569.

752–82 15F(2d)589; Ariz 283P926; Ariz 287P296; 41Ida776, 242P785; 42Ida711, 248P16 (evidence insufficient to show trust funds came into hands of receiver); 44Ida514, 258P544; 201Iowa321, 207NW336; 202Iowa27, 209NW302; 203Iowa1014, 212NW124; 204Iowa431, 215NW623; 204Iowa497, 215NW728; 205Iowa237, 216NW12 (evidence held insufficient); 204Iowa1317, 217NW438; 205Iowa171, 217NW831; 205Iowa1345, 219NW483 (trust fund established presumed retained by trustee and to come into hands of receiver); 206Iowa675, 220NW113; 124Kan391, 260P610; MoA 279SW746; 222MoA990, 68SW(2d)655; MoA 11SW(2d)1090; 34NM166, 279P60 (mere proof of making deposits is insufficient without showing nature or disposition); 43OklACR218; 8PaDist&Co 321; TexCommnA 68SW(2d)108; 192Wis28, 211NW931. See also 32Ariz444, 259P886. [a] (2) Where circumstances warrant presumption that bank received proceeds of claimant's property, burden is on receiver to overcome presumption. 204Iowa1317, 217NW438. [b] **Where property has passed into hands of good faith purchaser,** it cannot be traced into hands of receiver for purpose of establishing preference. 205Iowa1064, 217NW250. [c] **If trust fund is established** it is presumed that it came into hands of receiver. 204Iowa1083, 216NW748, 65ALR679. [d] **Presumption that cash on hand included trust fund** will be indulged where cash on hand when bank closed exceeded amount of such fund. Iowa 229NW907.

752–82½–New. A trustee who deposits trust funds in his individual name is not entitled to preference in the settlement of the affairs of an insolvent depositary. 202Iowa859, 211NW532, 51ALR910.

752–82½–New. A receiver is without standing to trace funds alleged to have been impressed with trust. 202Iowa265, 209NW422.

752–82¼–New. A bank's wrongful refusal to pay a check when it was still open and functioning, and it had sufficient money to pay, increased the assets coming into the hands of the commissioner upon liquidation, as respected the right to preference. MoA 11SW(2d)1090.

752–84 165Ga245, 140SE376; 35GaA222, 132SE648 (money deposited for purpose of reloaning and loaned to cashier is not entitled to priority); 338Ill134, 170NE236; 201Iowa337, 207NW374 (deposits rightfully made by executor); 204Iowa431, 215NW623; 223Ky32, 2SW(2d)1048; 220MoA1081, 279SW746; 80Mont174, 259P1060; 36Wyo361, 255P593, 53ALR554; 37Wyo4, 257P345, 53ALR560. [a] **Bank not qualified** to act as depositary holds public moneys deposited therein in trust. 54ND315, 209NW782. [b] **Funds of referee in bankruptcy.**–80Mont174, 259P1060.

752–85 98Fla1126, 125S360; TexCivA 275SW498 (to fix trust upon assets of insolvent bank trust money must be traded to particular fund or property).

752–85½–New. If a deposit is in violation of law, there is a constructive trust, and, in case of insolvency of the bank, the beneficiary has a preferred claim if the fund can be traced. 37Wyo4, 257P345, 53ALR560.

752–85⅓–New. If a deposit is in violation of law, there is a constructive trust, and in case of insolvency of the bank the beneficiary has a preferred claim if the fund can be traced. 37Wyo4, 257P345, 53ALR560.

752–86 See also 28F(2d)37.

752–86½–New. The subject matter of a trust wrongfully converted is effectually reinstated by an act of the trustee while solvent in repurchasing with its own funds the subject matter of trust with the specific intent to effect such reinstatements. 202Iowa887, 211NW529.

752–86⅓–New. A bank or its receiver has the burden of proof of dissipation of funds representing the proceeds of a special deposit. 202Iowa887, 211NW529.

752–88½–New. In order to impress a trust upon a fund and assert a preferential claim therefor in the hands of a receiver the transaction must have involved a trust relation. 201Iowa316, 207NW348.

752–88⅓–New. No trust relation results from the act of one bank in cashing checks drawn upon another bank and presenting and having them accepted by the drawee bank and receiving in payment a draft on a third bank which is never paid. 201Iowa321, 207NW336.

752–88¼–New. In order to impress a trust upon a fund and assert a preferential claim therefor in the hands of a

receiver, the transaction out of which the claim arose must have involved a trust relation. 201 **Iowa**321, 207**NW**336.

752-88⅛-New. It will be presumed that bank used its own funds and did not use trust funds in the transaction of ordinary business. 117 **Okl** 167, 245**P**550.

752-88¼-New. It will be presumed that bank used its own funds and did not use trust funds in the transaction of ordinary business. 221**Ky**55, 297**SW** 938; 220**MoA**1019, 278**SW**793.

752-88½-New. The fact that a depositor in an insolvent but going bank causes a draft to be drawn on himself, and directs the bank to pay it upon presentation out of his general deposit and the bank fails to do so, does not create a trust relationship giving the depositor a preference to the amount of the draft. 202 **Iowa**27, 209**NW**302.

752-88¾-New. Bank draft drawn to settle balances does not create relation of trustee and cestui que trust, nor is sum payable a trust res. 120**Kan**706, 244**P**1039

752-88⅞-New. That a bank acquired notes and stock through an attorney's efforts and promised to credit his fee on his note held by it is not sufficient to raise a trust so as to make the bank's debt to him one due by it as trustee. 43 **Ida**119, 249**P**897.

752-88 1/10-New. Trust funds in a bank lose their trust character and become general assets when the bank, under authority of the owner of the funds, remits to such owner its draft against existing funds for the amount of such trust funds and no claim for preference thereafter exists. 203 **Iowa**398, 212**NW** 746

752-88 1/11-New. A deposit cannot be deemed a trust fund entitled to a preference merely because the books of the bank show that it was made after the bank had permanently closed its doors where in fact it was made before such closing. 204 **Iowa**1190, 216**NW**723.

752-88½-New. That a deposit was made only a few hours before the permanent closing of the bank does not necessarily show that the bank was insolvent at the time the deposit was made and knew of its insolvency at the time the deposit was made and that, therefore, the deposit should be decreed to be a trust fund. 204 **Iowa**1190, 216**NW** 723.

752-88 1/13-New. To impress a trust on funds on the ground that the bank was insolvent when the deposit was made, the depositor must show the bank's insolvency at such time and that the officers had actual or constructive notice thereof. 204 **Iowa**1190, 216**NW**723.

752-88¼-New. Whether a depositor is entitled to a preference in such case is usually a question of fact. 204 **Iowa** 1190, 216**NW**723.

752-88 1/15-New. Interest is not allowed on claims impressed as trust funds. 25 **F(2d)**699.

752-88 1/16-New. One given priority as a trust fund claimant is not entitled to allowance of the full claim, as both the secured and general creditor. 25**F(2d)** 599.

752-88 1/17-New. Trust ceases and the beneficiary's remedy becomes that of a common creditor where the rights of third parties intervene. **TexCivA** 28**SW (2d)**876.

752-88 1/18-New. Where a depositor has funds in a general account, there is no presumption that the bank used trust funds deposited by the same party. 124 **Kan**391, 260**P**610.

752-88 1/19-New. A bank in possession of assets of a decedent as administrator pursuant to its appointment under statute is controlled by the statute in its acts and conduct in reference to the estate. 208 **Iowa**252, 225**NW**379.

752-88 1/20-New. Under some statutes funds coming into the hands of a bank as administrator are held by it as such where it has never been discharged, notwithstanding a stipulation that they should be held in trust after the estate had been administered. 208 **Iowa**252, 225**NW**379.

752-88 1/21-New. Evidence has been held admissible to show that a bank, through its officers, knew that money received was a trust fund belonging to a school district. **MoA** 218**SW(2d)**781.

752-88 1/22-New. Guardian's acceptance of dividends as general creditor for deposit of ward's funds does not waive right to preferred claim. **Ariz** 287**P**292.

752-88 1/23-New. Recovery of trust funds which came into hands of receiver is not barred on ground that money has been paid out and only general assets remain. **Ariz** 287**P**292.

753-97 [a] **Failure to file one of two claims** as preferred does not preclude claims pleaded and treated as preferred from being considered as such. 192**Wis** 28, 211**NW**931.

753-97 1/2-New. Where a bank holding money in trust gave the cestui que trust a note as a memorandum of the transaction, the fact that the cestui que trust did not state his claim in technical language but presented the note does not destroy the right to preference. 220 **MoA**1019, 278**SW**793.

753-97½-New. A depositor's acceptance of a dividend as a general creditor after disallowance of a claim as a preferred creditor does not prevent him from asserting the right to preference, where it did not appear that the receiver had been injured. 28**F(2d)**37.

753-4 [a] **Action against bank for money had and received** will lie where note was given without authority of directors. **MoA** 108**W(2d)**971.

754-7½-New. If it appears that by mistake or fraud a depositor's certificate does not express the contract made by such depositor with the bank, he is entitled to equitable relief in a suit to have his claim properly classified. 254**Mass**141, 150**NE**194

754-7⅞-New. Notice of withdrawal. Requirement held not to make deposits invalid as savings deposits. 254**Mass** 444, 150**NE**193.

754-7¼-New. Venue. A bank may be sued outside of the county of the principal place of business only for acts of an agent in another county, providing it has an agency there. 164**Ga**351, 138 **SE**898.

754-7⅛-New. Under some statutes a suit against a bank incorporated under the laws of the state can be brought outside of the county of its principal place of business only upon a cause of action arising from acts of its agents in the county where suit is brought and where the bank has an agency there. 376**GaA** 77, 139**SE**155 (bank held not agent or agency of defendant).

754-7⅛-New. Under some statutes suits against bank, except those specifically designated must be brought in county of principal place of business unless based on transaction with agent. 234**Ky** 202, 27**SW(2d)**955.

754-9½-New. Where a bank denied all liability to a depositor for an alleged balance, no formal demand for payment thereof was necessary before bringing suit. **IndA** 168**NE**604.

754-9⅛-New. Where bank agreed to hold money for one ascertained to be entitled thereto, no demand on bank is necessary before suit. **TexCivA** 298**SW (2d)**896.

754-10 See also 91**aA**68, 118873(2d case).

754-14½-New. Suit by or against solvent bank owned by partnership must be brought by or against partners. 75 **Mont**567, 244**P**189.

754-14⅛-New. The drawer of a dishonored check is a proper party defendant in an action against the drawee bank by a bank which cashed the check where the drawer denies plaintiff's right to the proceeds of the check and claims to be the owner thereof. 112 **Okl** 8, 239**P**613.

754-14¼-New. The court has discretion to permit an action to be continued in the name of a bank after its insolvency or to allow substitution. 137 **Okl** 67, 277**P**1029.

754-15 [a] **Drawee of certified check,** returned to him by payee after insolvency of bank, upon drawer's payment of amount, may maintain action against assets of bank. 122**Kan**835, 253 **P**906.

754-16 220**MoA**152, 281**SW**110. [b] **Petition of parent bank need not allege** statute authorizing branch banks. 220 **MoA**152, 281**SW**110

755-20½-New. The maker is the proper party to bring an action against the bank for a check wrongfully indorsed. 224 **IIIA**457.

755-20¼-New. Upon insolvency of state bank court may make order substituting bank commissioner as legal representative of bank. 120 **Okl**103, 250**P** 1011.

755-20⅛-New. When a bank refuses to pay or pays to the wrong one only the drawer of the check can maintain action thereon against the drawee bank. 19 **NC**129, 140**SE**[illegible]

755-22½-New. Garnishment. Under a statute providing for the service of a writ of garnishment on the president of a bank, service on the vice president is ineffectual. **TexCivA** 283**SW**265

755-22½-New. A complaint and affidavit showing the nonresidence of plaintiff banking corporation is sufficient to authorize the issuance of a warning order. 178**Ark**78, 1[illegible]**SW(2d)**31[illegible]

755-22¼-New. Service of a garnishment writ on the vice president of a bank who sometimes performed the cashier's duties is not good under a statute requiring service on the treasurer, or on a local agent, or at the principal office of the bank. **TexCivA** 128**SW(2d)** 676.

755-22⅛-New. Execution of a replevy bond reciting service of a garnishment writ on the garnishee bank will not estop defendant and bondsmen from asserting that such service was not had. **TexCivA** 1[illegible]**SW(2d)**6[illegible]

755-24 Utah 263**P**928 (cashier's cross complaint against bank on indemnity contract insufficient). [a] 220**Ala**170, 124**SE**[illegible]. 1[illegible]**aA**412, 3[illegible]**Mo**1101, 1[illegible]**SW (2d)**[illegible] 1[illegible]**MiscL**[illegible], 2[illegible]**NYS**[illegible]. **Tex CivA** 2[illegible]**SW**211. **TexCivA** 2[illegible]**SW**1[illegible] 37**Wyo**50, 259**P**181 (in action against bank examiner). [k] **Counterclaims held sufficient.**—50**ND**614. 211**NW**454. [l] **Declarations, petitions, or complaints held insufficient.**—88**CalA**411, 263 **P**566; 225**AppDiv**366, 233**NYS**96. [m] **Petitions held insufficient.**—**TexCivA** 31 **SW(2d)**488.

755-25 BC [1927] 3**DomLR**180. [c] **Allegation sufficient** to show plaintiff was legal entity. 416**GaA**715, 1[illegible]**SE**408

755-31 37**Wyo**50, 259**P**181, 183 [illegible] **CJ**

755-31½-New. An allegation of the rejection of a claim is sufficient without pleading that proof of claim was offered before the examiner. 37**Wyo**50, 259**P**181

755-31⅛-New. and without attaching a copy of the claim filed with the examiner. 37**Wyo**50, 259**P**181.

756-34½-New. In an action against the buyer of bank stock for failure to pay certain notes buyer could counterclaim for seller's repudiation of agreement to guarantee assets. 36**Wyo**[illegible], [illegible]**P**1[illegible]

756-34⅛-New. A maker's plea that a payee bank converted collateral to its use was held insufficient against a demurrer in failing to allege that collateral belonged to the maker. 214**Ala**452, 108**SE**69

756-34¼-New. An allegation that a buyer presented bills of lading to a presentation bank as required in a letter of credit was held a mere legal conclusion. 218**AppDiv**624, 218**NYS**616

756-34⅛-New. Allegations as to waiver and prevention of performance of a contract in an action on a letter of credit are conclusions of law and fact must be pleaded. 218**AppDiv**624, 218**NYS** 616.

756-34⅛-New. A counterclaim in an action by a bank on a note alleging the bank's promise to give defendant credit for any amount he might pay on a third person's note to the bank does not state a cause of action. 51**ND**407, 211**NW**309

756-36½-New. Question of mismanagement of bank by officers cannot be made issue in suit by banks on note against stockholder. 21**AlaA**65, 106854

756-36⅛-New. Question of mismanagement of bank by officers cannot be made issue in action on note by bank against stockholder. 21**AlaA**65, 106854.

756-38⅛-New. One suing a bank for

negligence in loaning funds cannot recover on the theory of misapplication of funds. **Iowa** 228**NW**83.

756–38½–New. Plaintiff basing libel suit on allegation of publication by cashier as bank's agent cannot recover on proof of publication by third person not connected with bank. **TexCivA** 28 **SW(2d)**269.

756–43½–New. The books of a national bank whose assets were purchased by a now insolvent bank are prima facie evidence of such assets. 224 **IllA**474.

756–43½–New. Any presumption from the bank's receiving notes without the depositor's indorsement is that it was satisfied. 69**Utah**557, 257**P**658.

756–43½–New. A bank continuing as a going concern for several months after charging a depositor's account with the amount of a note will be presumed to have had sufficient funds to pay the note at the time. 53**SD**222, 220**NW**509.

756–43½–New. Bank accepting order to deliver bonds held as securities is presumed to have acted within its powers. 41**F(2d)**35.

756–44 242 **IllA**111; 204 **Iowa**1186, 216 **NW**769, 771 [citCJ]; 197**NC**526, 150**SE** 34; 197**NC**499, 150**SE**38; 24 **OhA**129, 156**NE**462, 464 [citCJ].

756–44½–New. But in a suit against a bank by a person procuring cashier's check to order of certain person, which bank paid on presentation thereof bearing indorsement of such person's name, plaintiff has burden of proving indorsement a forgery where that is basis of suit. 141**Miss**427, 106**S**629.

757–50½–New. In action by depositing bank for repayment from depositor of amount credited on deposit for collection bank had accepted as payment exchange which later proved worthless plaintiff must prove knowledge by depositor of regulation between the banks providing that collecting bank should be liable only for actual funds coming into its possession. 85**PaSuper**52.

757–50½–New. In an action against a bank for negligence in loaning plaintiff's money when defendant denied its agency, plaintiff has the burden of proving such agency. 204 **Iowa**70, 214**NW**486.

757–50¼–New. A bank has the burden of showing that the indorsement by one payee alone was either authorized by the other payee or ratified by him. 197 **NC**526, 150**SE**34.

757–52 218**Ala**90, 117**S**681, 61**ALR**938; 167**Ga**766, 146**SE**754; 203 **Iowa**310, 210 **NW**937; 225**Ky**629, 9**SW(2d)**1008; 253 **Mass**5, 147**NE**868 (evidence to show that it was recognized part of business of local banks to deal in foreign exchange held admissible); 252**Mass**383, 147**NE** 870 (evidence of conversation over telephone with person who purported to represent bank, but whose name witness could not state, is held inadmissible); 51**SD**170, 212**NW**914. [a] (20) 221**AppDiv**94, 222**NYS**359. (21) In depositor's action against bank on theory that its vice president participated in swindle, admission of vice president's reassuring statements, made immediately after consummation of swindle, held not error. 14**F(2d)**940. (22) Canceled check. 197**NC**526, 150**SE**34. [c] Evidence held inadmissible.–14**F(2d)**940; 240 **IllA**395; 204 **Iowa**70, 214**NW**486. **MoA** 297**SW**1079, 197**NC**499, 150**SE**38.

757–53 200**Cal**760, 255**P**188, 52**ALR** 569; 83**CalA**670, 257**P**454; 84**CalA**787, 258**P**709; 81**Colo**331, 255**P**624; 242 **IllA**111 (insufficient to show authority to apply depositor's funds to debts of agent); 200 **Iowa**147, 206**NW**126; 203 **Iowa**310, 210**NW**937; 204 **Iowa**70, 214 **NW**486; 204 **Iowa**1186, 216**NW**769; **Iowa** 226**NW**119; **Iowa** 232**NW**124; 123**Kan**457, 256**P**143; 225**Ky**629, 9**SW (2d)**1008; 170**La**969, 129**S**547; 125**Me** 480, 135**A**95; 172**Minn**223, 214**NW**781; 178**Minn**476, 227**NW**659 (evidence insufficient to show indorsement on check was forgery); 141**Miss**427, 106**S**629; 220**MoA**963, 272**SW**711; 49**ND**770, 193 **NW**934; 52**ND**49, 201**NW**696 (evidence held to show illegal loan by bank); 57**ND**916, 224**NW**909; 88**PaSuper**10; 48**SD**580, 205**NW**384 (evidence insufficient to establish liability of bank for money loaned in suit against it and its cashier); 51**SD**170, 212**NW**914; **Tex CivA** 276**SW**941; **TexCivA** 281**SW**632; **TexCivA** 19**SW(2d)**130. [a] (2) Evidence that officer of bank told purchaser of foreign currency that currency was not on hand to deliver held sufficient proof of waiver of formal tender of balance due on contract to purchase. 253**Mass**160, 148**NE**138. [b] (16) To support finding of issuance of irrevocable letter of credit for valuable consideration by defendant. 240**NY**520, 148**NE**664. (17) To support finding that plaintiff accepted irrevocable letter of credit. 240**NY**520, 148 **NE**664. (18) To support finding that acceptor of letter of credit acted on faith thereof. 240**NY**520, 148**NE**664. (19) To support finding that accepted irrevocable letter of credit contained no expiration date. 240**NY**520, 148**NE**664. (20) To show that deposit by officer of bank for cestui que trust was general deposit. 114**Nebr**664, 209**NW**249. (21) To show same results would not have obtained had bank followed directions in transmitting credit. 10**F(2d)**632. (22) To support finding that bank had not taken over from depositor note on which he had made loan to another. 69**Utah** 557, 257**P**658. [c] (12) To show that bank paid more than five per cent interest on deposit. 114**Nebr**664, 209**NW** 249. (13) To show conversion by bank of proceeds of sale of mortgaged property, which were deposited in bank. 42 **Ida**48, 246**P**12. (14) To show authority of clerk to make contract of guaranty. 252**Mass**383, 147**NE**870. (15) To show guaranty by bank. 33 **NM**46, 261**P**818. (16) To support finding that bank loaning money had no knowledge of borrower's insolvency. **TexCivA** 277**SW**403. [e] **Judgment against adjustment company** in creditor's action against it and new bank to which insolvent bank's assets were transferred on theory that it paid new bank less than property was worth held not supported by evidence. 31**Ariz**60, 250**P**362. [f] **Where bank receiving assets** of insolvent bank was not liable, adjustment company, which was merely arm of new bank, was held not liable to creditor of insolvent bank. 31 **Ariz**60, 250**P**363.

757–55 172**Ark**1023, 291**SW**439; 177 **Ark**1085, 9**SW(2d)**569; 69**CalA**325, 231 **P**366 (cross complaint for interest in fund held by bank improperly nonsuited); **CalA** 275**P**828; **Iowa** 232**NW**124; 120**Kan**572, 245**P**114; 226**Ky**179, 10 **SW(2d)**846; 235**Mich**648, 209**NW**819 (whether bank fulfilled agreement to transmit rubles to Russia, deposit them in certain bank and to return pass book showing deposit); 244**Mich**557, 222**NW** 185; 164**Minn**293, 204**NW**963; 318**Mo** 341, 300**SW**475; 222**MoA**122, 2**SW(2d)** 151; 105**NJL**621, 147**A**441 (whether bank used proper care in not insuring customer's bonds held for jury); 127 **Misc**515, 216**NYS**713; 219**AppDiv**447, 220**NYS**100; 198**NC**169, 151**SE**102; 131 **Okl**199, 268**P**261; 89**PaSuper**146; 50 **SD**159, 208**NW**774 (whether bank undertook to finance cattle buyer); **Tex CivA** 294**SW**331; **TexCivA** 13**SW(2d)** 384; **TexCivA** 28**SW(2d)**269. [c] **Evidence insufficient to submit issue of** bank's liability for officer's unauthorized promises and misrepresentations. 176**Ark**511, 3**SW(2d)**337.

757–56 14**F(2d)**940; 127 **Or**308, 271**P** 988. [a] **Instructions held erroneous.**–196**NC**327, 145**SE**619. [b] **Instruction held not erroneous.**–222**MoA**586, 292**SW** 1079. [c] **Instructions properly refused.**–**MoA** 297**SW**1079. [d] **Instructions held proper.**–**IndA** 168**NE**604. [e] **Instructions properly refused.**–**IndA** 168 **NE**604.

757–56½–New. Charge that a bank suing on a note is chargeable with knowledge obtained by its cashier has been held sufficient to cover requested instructions. 24 **OhA**48, 156**NE**157.

757–59 239**Mich**569, 215**NW**11. [a] **Verdict held properly directed.**–248 **Mich**568, 227**NW**543(2dcase).

757–59½–New. Jury's findings were held to be conflicting precluding judgment. **TexCommnA** 2**SW(2d)**419.

757–59½–New. An instruction assuming a fact clearly shown by the evidence is not erroneous. 242 **IllA**111 (misappropriation by unauthorized payments).

758–61 [a] 54**ND**268, 209**NW**348.

758–61½–New. A judgment rendered after the appointment of a receiver for a bank does not constitute a lien on the bank's assets. 205 **Iowa**1180, 219 **NW**326.

758–65 32**F(2d)**170; 172**Minn**310, 215 **NW**213, 60**ALR**814. But see 27**F(2d)** 224.

758–67 19**F(2d)**40; 110**Conn**13, 147**A** 22; 172**Minn**310, 215**NW**213, 60**ALR** 814; 78**Mont**62, 252**P**876; 116**Nebr**533, 218**NW**390; 22 **OhA**487, 153**NE**909; **Wash** 289**P**536.

758–70½–New. It is a public institution under the federal authorities in the administration of the laws, as by producing the records of an income taxpayer's deposits and withdrawals so far as compatible with its duties to its customers. 27**F(2d)**930.

758–71 81**CalA**128, 252**P**1057.

758–72 194**NC**475, 140**SE**208.

759–88 [a] **Consolidation of state and national banks.**–12**PaDist&Co** 626 (under federal act Feby 25, 1927). [b] **Merger of bank incorporated by state** with national bank may be effected without consent of state. 14**PaDist&Co** 352.

760–92 50**SD**579, 210**NW**990.

760–93 15**F(2d)**582, 583 [citCJ].

760–94 15**F(2d)**582, 583 [citCJ].

760–97 25**F(2d)**684.

760–97½–New. Absorption of, and consolidation with a state trust company does not result in the continuing of a national bank as trustee and conservator under the prior original appointment of the trust company by the state court as such fiduciary, 261**Mass**217, 158**NE**780.

760–97½–New. notwithstanding the federal statute requires the state courts to appoint national banks as fiduciaries under the same conditions as state trust companies, 261**Mass**217, 158**NE**780.

760–97¼–New. since a trust company has no such property interest in the appointment as trustee and conservator as passes to the bank as successor. 261 **Mass**217, 158**NE**780.

760–97½–New. Where a state bank, operating under the provisions of the Depositors' Guaranty Fund Act, converts into a national bank pursuant to the provisions of the federal statute, and the comptroller of the currency has issued his certificate approving the conversion, the regularity of such conversion cannot be challenged in a collateral proceeding, although the conversion was made without the state bank having received permission in writing from the depositors' guaranty fund commission, as required by statute. 57**ND**574, 224**NW**161.

760–98 263**Mass**444, 162**NE**217; 172 **Minn**310, 215**NW**213, 60**ALR**814; **Tex CivA** 282**SW**659.

760–99 274**US**256, 47**SCt**629, 71**L ed** 1036; **TexCommnA** 288**SW**171.

760–1 177**Ark**920, 9**SW(2d)**307, 62**ALR** 484; 110**Conn**13, 147**A**22; **Iowa** 220**NW** 63; 75**Mont**567, 244**P**489; 78**Mont**62, 252**P**876; 116**Nebr**533, 218**NW**390; 130 **Misc**352, 224**NYS**10; 22 **OhA**487, 153**NE** 909; 287**Pa**560, 135**A**295; 50**SD**40, 208 **NW**221; **TexCivA** 282**SW**659. [a] (17) Taxing national bank stock, where state bank stock is otherwise taxed. 78**Mont** 62, 252**P**876. [b] (5) Statute providing prerequisites to foreign corporations doing business within state. 44 **Ida**573, 258**P**526.

761–4 16**F(2d)**906.

762–18 110**Conn**13, 147**A**22.

762–18½–New. The name conferred upon a national bank cannot be altered by state; 110**Conn**13, 147**A**22.

762–18½–New. but the bank is not authorized to use the name unlawfully or tortiously. 110**Conn**13, 147**A**22 (use of adopted name similar to state bank,

confusing and misleading, joined by state courts).

764-40 TexCivA 282SW659.

765-58 TexCommnA 288SW171 (stockholder giving promissory notes in payment for shares, where he receives stock and enjoys privileges and benefits thereof, is estopped from claiming that stock was illegally issued).

766-68 82Mont603, 268P545, 60ALR 109.

767-72 82Mont603, 268P545, 60ALR 109.

767-73 82Mont603, 268P545, 60ALR 109.

768-95 32Ariz70, 255P595. [a] (6) Stockholders, by mere payment of assessments, have no interest in bad or doubtful items removed from assets, where they are not set apart and bank proceeds to realize upon them. 194Wis 20, 215NW438, 55ALR791.

769-99 30F(2d)195. [b] (2) 318Mo 341, 300SW475.

769-1 32F(2d)170; 30Ariz274, 246P 759.

769-2 194NC475, 140SE208. But see MoA 10SW(2d)68.

769-5 30Ariz287, 246P763. [c] **Nature of stock held.**–Liability applies to holders of original issue of stock as well as to stock taken by bank in payment of indebtedness. 30Ariz287, 246 P763. [d] **Right of purchaser of stock to terminate contract of purchase** within certain time does not relieve him from liability for assessment or render ownership conditional in absence of notice to creditors. 30Ariz287, 246P763. [e] **Length of time stock was owned** is immaterial if owned within sixty days of bank's failure. 30Ariz274, 246P759. [f] **Bank requiring stock to pay debt** is liable to assessment. 22F(2d)735.

769-6 20F(2d)688; 40F(2d)25; TexCommnA 281SW198, 200 [citCJ]. [a] 280US496, 50SCt176, 74L ed575, 69 ALR658.

769-7½-New. Holder of stock not part of original issue but stock bank had taken as security for debt is liable for assessment. 30Ariz274, 246P759.

769-8 20F(2d)688; 30Ariz274, 246P 759; TexCommnA 281SW198, 199 [cit CJ]. [b] TexCommnA 281SW198, 199 [citCJ].

770-11 193NC761, 138SE139, 141 [quotCJ].

770-12 193NC761, 138SE139, 141 [quotCJ]. [a] 31F(2d)906.

770-13 193NC761, 138SE139, 141 [quotCJ].

770-14 193NC761, 138SE139, 141 [quotCJ]; TexCommnA 281SW198, 199 [citCJ].

770-16 [a] (1) 280US496, 50SCt176, 74 L ed575, 69ALR658.

771-19 [a] **Bank's purchase of cashier's stock** on his removal, though ultra vires, held not to vest title in directors or subject them to assessment. 20F(2d) 688.

771-20½-New. A national bank has been held to be the owner of stock of another bank, acquired by it as part of the assets of the bank which it took over, and hence liable for a stock assessment. 27F(2d)117.

771-21 [d] **Individual liability** continues for sixty days after transfer of stock. 14F(2d)204; 20F(2d)23. [e] **On receipt of endorsed certificates** buyer becomes liable. 280US496, 50SCt176, 74 L ed575, 69ALR658.

771-24½-New. If transferee of stock is not responsible, stockholder transferring stock within sixty days preceding failure of bank is in same position as to liability for assessments as if he had made no transfer. 30Ariz274, 246P759.

771-25½-New. But it has been held that return and redelivery of stock to bank for fraud in inducing its purchase is a transfer which if made within sixty days before bank's failure renders stockholder liable for assessment. 30 Ariz274, 246P759.

771-27 82Mont603, 268P545, 546 [cit CJ], 60ALR109.

771-28 But see 280US496, 50SCt176, 74L ed575, 69ALR658; 82Mont603, 268 P545, 60ALR109.

771-31 But see 35F(2d)493.

772-32 See also 29F(2d)236.

772-35 35F(2d)401.

772-36 20F(2d)688.

772-37 35F(2d)401.

773-41 40F(2d)25. [f] **Directors' taking cashier's stock** on his removal, though ultra vires, held not to vest title in directors or subject them to assessment. 20F(2d)688. [g] **That stock is carried in name of irresponsible third person** does not render pledgee liable. 40F(2d)25.

773-44 20F(2d)688.

774-52 36F(2d)183.

774-55 36F(2d)183.

774-57½-New. A widow acquiring stock under her husband's will is properly assessed as a stockholder, although it did not stand in her name. 29F(2d) 329.

774-61 30Ariz274, 246P759.

774-62 30Ariz274, 246P759; 30Ariz 287, 246P763.

774-62½-New. If stockholder's name appears on stock book of bank with his consent within sixty days of bank's failure he is liable to assessment irrespective of fraud by bank. 30Ariz274, 246P759.

775-70½-New. Surrender of a certificate for twenty shares held by two persons and issuance of a new certificate for ten shares in the name of one, absolves the other from subsequent assessment on the other ten shares. 35 F(2d)493.

775-72 [b] **Double liability of stockholder** is for purpose of raising fund to pay creditors equably and ratably. 7 F(2d)541.

776-76 30Ariz274, 246P759.

776-77½-New. Creditors held not estopped from asserting statutory liability because they left deposits in bank after it had resumed operations. 7F(2d)541.

776-77½-New. Waiver of depositors on acceptance of offer for assets construed not to affect liability of stockholders. 7F(2d)189.

777-80 7F(2d)489; 29F(2d)329; 30 F(2d)195; 171Minn329, 214NW664.

777-81 171Minn329, 214NW664.

777-85½-New. Bank has no authority to compel payment of assessment. 30 Ariz274, 246P759.

778-92 7F(2d)541. [b] **Receiver never acquired jurisdiction** to enforce statutory liability where no adjudication of insolvency and no order of assessment by comptroller. 7F(2d)541.

778-95½-New. Nor need nonresident stockholders have notice in order to be bound by a decree in a suit ascertaining the bank's liability. MoA 10SW(2d)68.

778-96½-New. A receiver need not exhaust the remedy against transferees before holding liable for assessment one transferring stock within sixty days before the bank's failure. 29F(2d)329.

779-10 25F(2d)831; 32F(2d)170. [b] **Stockholder is not relieved** from statutory liability because officers of bank fraudulently procured him to pay one hundred and ten per cent of stock value. 7F(2d)541.

779-10½-New. That stockholder never received certificate of stock does not constitute defense. 25F(2d)831.

779-11 [a] (2) 30Ariz274, 246P759. [c] **Stockholder voluntarily paying** one hundred ten per cent of value of stock cannot escape statutory double liability where there is no adjudication of insolvency or order of assessment. 7 F(2d)541.

779-15 MoA 10SW(2d)68; 194NC475, 140SE208.

779-15½-New. A suit to enforce the liability of nonresident stockholders, previously assessed in the original action, may be brought where service may be had, previous assessment action being shown. MoA 10SW(2d)68.

780-18½-New. Nonresident stockholders are not necessary parties to an action determining the bank's liabilities. MoA 10SW(2d)68.

780-26½-New. The receiver, suing the transferor of stock, need not allege that the transferees were insolvent. 35F(2d) 401.

780-26⅓-New. The receiver, suing the transferor for assessment, need not allege that one hundred per cent assessment was necessary. 35F(2d)401.

780-26¼-New. Allegations that executrix made application to close estate and order distribution before Comptroller could make assessment to prevent receiver from filing claim confers equity jurisdiction. 36F(2d)183.

780-28 25F(2d)831.

781-34½-New. Evidence held insufficient to show that defendant became a stockholder. 23F(2d)914.

781-34¼-New. The burden is on the receiver, suing the transferor for assessment, to show insolvency of the bank at the time of the transfer and defendant's knowledge thereof. 35 F(2d)401.

781-34¼-New. Evidence held to support finding that defendant was merely pledgee. 40F(2d)25.

781-34½-New. Evidence held inadmissible. 35F(2d)401.

781-36½-New. An individual stockholder may be assessed to the full extent of his liability and he in turn may collect from other stockholders. 14F(2d)129.

782-58 [a] **Contract employing plaintiff as vice president for three years** with provision for liquidated damages if contract is terminated before period has been held not ultra vires. 135Misc 695, 238NYS178.

782-59 [c] **Contract** employing vice president for fixed term and forbidding discharge without paying compensation for balance of term is void. 229AppDiv 311, 241NYS429.

783-75 [b] **Pledge of notes to secure county deposit** by vice president held authorized. 35F(2d)152.

783-77½-New. Acts of officers are ratified by accepting benefits thereof. 23 F(2d)567.

783-78 200Cal 760, 255P188, 52ALR 569.

783-78½-New. Authority to contract that proceeds of note discounted by another bank should remain on credit with it as collateral for the note may be established by usage which directors have permitted to be established. 130 Okl 164, 265P1071.

783-79 288Pa478, 136A773; 288Pa 491, 136A777.

784-82 200Cal 760, 255P188, 191 [quot CJ], 52ALR569; 205 Iowa465, 218NW 321. See also 192NC69, 133SE414.

784-88 200Cal 760, 255P188, 191 [quot CJ], 52ALR569.

784-89 200Cal 760, 255P188, 191 [quot CJ], 52ALR569.

785-94½-New. A national bank is under no obligation to a director who, in common with codirectors, borrowed money directly from its correspondent and with it purchased a note of its customer held by such correspondent as collateral for the bank's indebtedness. Ariz 283P273.

785-95 See also 215NW470.

785-98 35F(2d)753 (duty to be honest and diligent).

785-1 [c] **Directors are trustees of implied or resulting trust** created by operation of law on their official relation to bank. 35F(2d)780.

785-2½-New. A director may authorize or vote on a loan to a corporation of which he is a stockholder. 161La38, 108S117.

786-32 38Wyo 307, 267P77 (releasing bank's obligations).

786-35 35F(2d)152.

786-39 16F(2d)501.

786-39½-New. Vice president has no power to confer on an agent authority to speculate in hedging cotton. 32Ariz 135, 256P507.

786-39¼-New. A vice president expressly authorized to obtain a deposit of county funds had authority, by necessary implication, to give security to obtain the deposit. 35F(2d)152.

786-40 16F(2d)501; 126 Okl 265, 259 P523.

786-41 16F(2d)501. [c] **Presumption of authority.**–126 Okl 265, 259P523. [d] **Sale of stolen bonds.**–126 Okl 265, 259P 523.

787-42 16F(2d)501.

787-43 16F(2d)501.

787-53 288Pa478, 136A773; 159Tenn659, 218W(2d)393, 66ALR1447.

787-55 But see 28F(2d)290.

788-65½-New. Now can a cashier issue letters of credit without authority of the directors. 288Pa478, 136A773.

788-69 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986 (3dcase)]. [b] **Determination of liability.**-35F(2d)753.

788-70 38F(2d)568; 32Ariz70, 255P595. [b] **Director declining to qualify** and serve as such is not liable for board's negligence. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3d case)].

788-72½-New. In an action by a bank on a director's note given in payment for doubtful securities sold to directors and thereafter converted by the bank to its own use, such securities would be treated as worth face value in the absence of proof to the contrary. 32Ariz70, 255P595.

788-72¾-New. Statute making directors of national bank liable for damages by reason of violation of the banking laws is remedial and not penal. 36F(2d)367

788-73 33F(2d)589 (due diligence); 38F(2d)568.

788-74 35F(2d)930; 118Okl259, 248P617. [c] **Failure to appoint auditing committee.**-29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3d case)]. [d] **Failure to hold meeting** to ascertain whether notes were transferred to bank. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3d case)]. [e] **Violation of National Banking Act.**-It is not enough to show negligent violation, but intentional violation of act must be shown. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)]. [f] **Failure to use due diligence in verifying credits** transferred by trust company on purchase of its assets. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3d case)].

788-75 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3d case)]. 142Va43, 128SE615, 623, 45ALR661 [quotCJ in part].

788-76 38F(2d)568.

788-77 38F(2d)568.

789-80 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)]; 318Mo341, 300SW475 (director not liable under statute for president permitting indebtedness in excess of proscribed limit, where it was of class exempted by statute).

790-83 But see 32F(2d)315.

790-85 32F(2d)315. See also 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)]. [c] 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)]; 32F(2d)315 (directors not constructively chargeable with knowledge of cashier). [d] **Directors are not liable for loss on note irregularly discounted** but approved by board within thirty days after issuance of certificate of deposit therefor. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)]. [e] **Liable irrespective of supposed value of security.**-29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)]. [f] **Where loans to husband and wife together exceed limit,** but separately do not, directors are not liable. 32F(2d)315. [g] **"Money borrowed,"** within meaning of statute, includes any rediscount purchased by bank upon which borrower was primarily liable. 32F(2d)315. [h] **Subsequent "renewals" of paper with interest added are not new loans** for borrowed money, but merely extensions of time for payment. 32F(2d)315 (where money in bank misapplied without knowledge of directors). [i] **Controlling consideration upon question of improvident loans** is not what some one else might think, but what directors think in making loans, and method and motive by which they were guided in their actions. 32F(2d)315. [j] **Director purchasing borrower's note for bank,** when loans to him exceeded statutory limit, is personally liable to receiver. 32F(2d)315. [k] **Collections inapplicable to excess.**-Directors making excessive loans cannot require receiver to apply collections made thereon to excess. 22F(2d)957. [l] **Necessity of knowledge or failure to investigate.**-In order to hold director liable for excess loan he must have assented to it knowingly and intentionally or must have deliberately refrained from investigating what it was his duty to investigate. Ariz 283P273. [m] Finding that **directors assented to excessive loans** supports decree holding director personally liable. 37F(2d)452.

790-87½-New. A director who was liable to the bank for the full amount of the bank's excessive loan on a note cannot, on being adjudged liable for his pro rata share to codirectors who paid the note, recover the amount so paid. Ariz 283P273.

791-94 [a] (2) Rule prescribed by National Bank Act is exclusive test of liability in respect of making and publication of official reports of bank's condition as required by act. 159Tenn659, 218W(2d)393, 66ALR1447.

792-4½-New. The release of one or more directors pending suit against them and others for misappropriation of assets does not ipso facto release such others. 108WVa318, 150SE605.

792-4¾-New. That one of the directors resided at some distance from the bank and was not active in its affairs does not relieve him from liability. 35F(2d)753.

792-6 162La1085, 1118464.

792-9½-New. Proceedings before auditor are subject to supervision by court in action at law for making false reports. 21F(2d)657.

792-9 22F(2d)957 (numerous defendants).

793-14 But see 35F(2d)780 (statute does not run while directors are in control).

793-15½-New. Limitation against action to charge directors with liability for making excessive loans does not begin to run so long as they remain in control 22F(2d)957.

793-15⅛-New. Where a petition does not charge willful violation of any duty under the National Banking Act, state limitation will be applied. 23F(2d)331.

793-15¼-New. A suit against directors as to continuing negligence in failing to sell the bank's stock is not barred so long as the stock was salable without committing fraud on a purchaser. 33F(2d)589.

793-15⅛-New. A right of action for making excessive loans accrues as to each loan when made. 33F(2d)589.

793-15⅛-New. Acts of clear misconduct on the part of directors give rise immediately to a cause of action. 33F(2d)589.

793-15¼-New. As to acts of misconduct of directors, limitation generally runs in their favor during their continuance in office. 33F(2d)589.

793-15½-New. A suit against directors for misconduct in making excessive loans in violation of statute and in negligently handling loans does not involve a cause of action for actual fraud so as to postpone running of limitations until discovery of fraud. 33F(2d)589.

793-15¾-New. That directors making excessive loans constituted a majority of the board and were in control does not prevent limitations from running in their favor where there was no fraudulent concealment of the cause of action and it was not for fraud. 33F(2d)589 (facts held not to constitute fraudulent concealment).

793-21 162La1085, 1118464.

793-22 See also 33F(2d)589. [a] 162La1085, 1118464. [c] **Single stockholder cannot sue as individual** for conspiracy and fraud after rights of stockholders have been lost. 118Okl259, 248P617.

793-24 118Okl259, 248P617, 619 [cit CJ]; 35Wyo398, 250P1, 8 [citCJ]. [b] **Where no receiver has been appointed,** stockholder's remedy is by application for appointment of receiver. 162La1085, 1118464.

793-25 162La1085, 1118464, 465 [cit CJ].

793-26½-New. Various persons who were directors of a bank at different times alleged are properly joined in an action by stockholders as defendants. 21F(2d)657.

794-34½-New. One who sold goods relying on ultra vires guaranty of national bank may set forth two causes of action, one upon the guaranty and one upon the implied obligation of bank to restore benefits received, and upon failure of defendant to force election, recover upon either. 133SC202, 130SE758.

794-34¼-New. One who sold goods relying on ultra vires guaranty of national bank may plead all facts and recover upon implied obligation of bank to restore benefits received. 133SC202, 130SE758.

794-34¼-New. In a bank's suit on a note of a director defended on the ground of conversion by the bank and other directors of securities in payment for which the note was given, the bank must make the value of the securities and issue an order to introduce proof that they were worth less than the face value. 32Ariz70, 255P595.

794-34½-New. Charges against the directors of a defunct national bank, involving statutory liability and commonlaw liability, may be united in one bill. 35F(2d)753.

794-37 [a] **Evidence held sufficient.**-To sustain finding that directors assented to excessive loans. 37F(2d)452.

794-38½-New. To recover on implied obligation of national bank to restore benefits received under ultra vires contract of guaranty, value of benefit received by bank must be shown. 133SC202, 130SE758.

794-38¼-New. and the issue of value which bank received is to be determined by tangible evidence of value of property or money which came into possession of bank as a consequence of the guaranty, and not by evidence of uncertain, intangible speculative benefit. 133SC202, 130SE758.

794-38¼-New. Evidence has been held sufficient to show that a director deliberately refrained from investigating what it was his duty to investigate in regard to excess loans. Ariz 283P273.

794-38½-New. The liability of the directors should be established by a fair preponderance of evidence. 35F(2d)753.

794-38⅛-New. Intentional violation of statute must be shown to enforce liability of the directors. 35F(2d)753.

794-38½-New. Evidence has been held sufficient to sustain finding that directors assented to excessive loans. 35F(2d)930.

794-38¼-New. Evidence held insufficient to support bill for adjudication of liability of directors for losses sustained by stockholders. 38F(2d)566.

795-44½-New. Under some circumstances, interest is allowed from the date of institution of the suit against the directors by the receiver. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)].

795-44¼-New. In an action for damages for making false reports of the resources of a bank, recovery depends on the existence of the damages proved. 21F(2d)659 (no fixed penalty).

795-44¼-New. Directors may be entitled to proportionate credit for certain amounts paid by other directors under an agreement with the receiver. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73L ed986(3dcase)].

795-44½-New. Directors making excessive loans are liable for interest on each item from the date the loans were made. 32F(2d)315.

795-45½-New. Where stockholders sued directors for fraudulent diversion of assets of the bank, the decree must compel the directors to make good the losses to the bank. 162La1085, 1118464.

795-46 [b] **Offenses may be punishable both under federal and state law.**-274US256, 47SCt629, 71L ed1036.

795-47 116Nebr533, 218NW390 (state statute not void as to national bank officer as contravening federal laws). [a] (4) Receiving public money unless security has been furnished. 116Nebr533, 218NW390.

796-54 [g] **Conspiracy is not necessary incident** to offense of unlawfully abstracting moneys from federal reserve member bank. 20F(2d)604.

796-57 [a] (2) Proceeds of checks sent to bank for collection are funds of such bank, misapplication of which by collection teller constitutes offense denounced. 18F(2d)532.

797-60 [b] **Authority of directors not presumed.**-29F(2d)239.

797-69 [g] **One participating in deposit and payment or collection of certificate of deposit** issued to deceive examiner is held guilty of abstracting funds of bank with interest to injure bank and deceive examiner. 20F(2d)604.

799-83 16F(2d)410; 42F(2d)636.

799-92 28F(2d)552.

799-93 16F(2d)406.

800-99 See 44Philippine126. [b] **In Philippines.**-44Philippine126, 127. [c] **Granting loans to directors and agents,** under Philippine Act No. 2747 see 44 Philippine126. [d] **Absence of loss to the bank** in loan to copartnership in which director's wife interested held no defense under local statute. 44 Philippine126.

800-99½-New. It is not a misapplication of funds to discount a worthless note and use proceeds to pay a note equally unsecured. 13F(2d)16.

800-3 [c] **Transfer of special account** in name of bank officer to his general account and applying same to overdraft is not a willful misapplication of funds of the bank. 5F(2d)275.

801-14 [b] **That false statement was not made to deceive bank examiners** but merely for advertising purposes held no defense. 36F(2d)738.

801-21 15F(2d)816; 56ND875, 219NW574, 579 [citCJ].

801-25 15F(2d)816.

803-64 16F(2d)406.

803-74 56ND875, 219NW574, 579 [cit CJ].

804-82 [a] 20F(2d)325.

804-84 [a] 16F(2d)406; 29F(2d)239 [certiorari den 279US849, 49SCt346, 73 L ed993(5thcase)]; 171Minn466, 214NW 279.

805-88 See also 29F(2d)239 [certiorari den 279US849, 49SCt346, 73L ed993(5th case)].

805-88½-New. An indictment, charging misapplication of a national bank's funds by its president, having control of its business, need not charge the manner in which he came into control. 29F(2d) 239 [certiorari den 279US849, 49SCt346, 73L ed993(5thcase)].

805-90½-New. An indictment for making false entries under Act Sept. 26, 1918 § 7 must allege the bank was a federal reserve bank or a member bank. 24 F(2d)696.

806-6 [c] (3) No variance. 29F(2d) 239 [certiorari den 279US849, 49SCt346, 73L ed993(5thcase)].

806-7 See also 29F(2d)239 [certiorari den 279US849, 49SCt346, 73L ed993(5th case)].

806-17 [b] **Evidence held competent.**-To show false entries. 36F(2d)743.

807-18 16F(2d)410; 28F(2d)552 (evidence held to warrant conviction for making false entries and misapplication of funds); 29F(2d)239 [certiorari den 279US849, 49SCt346, 73L ed993 (5thcase)]; 36F(2d)444; 42F(2d)636. [b] (2) To sustain conviction of employee for misapplication of funds. 17 F(2d)770. [c] **Evidence held sufficient.** -To sustain conviction for making or directing making of false entries. 36 F(2d)738.

807-18½-New. In determining whether loans to a borrower exceeded ten per cent of its capital, "customer's paper" will not be considered. 15F(2d)816.

807-18⅓-New. Evidence held insufficient under Comp. St. § 9772 to convict bank officer of intent to deceive. 15 F(2d)816.

807-19 29F(2d)239 [certiorari den 279 US849, 49SCt346, 73L ed993(5thcase)]. [b] **Evidence held insufficient to go to jury.**-19F(2d)224.

807-20 29F(2d)239 [certiorari den 279 US849, 49SCt346, 73L ed993(5thcase)].

807-20½-New. An instruction authorizing a verdict of guilty if defendant authorized discount of an accommodation note has been held erroneous. 13F(2d) 16.

807-20⅓-New. The trial court is held without power to impose a fine on courts for violating the National Banking Act. 20F(2d)325.

807-24 172Minn310, 215NW213, 60 ALR814; 229AppDiv311, 241NYS429; 192NC69, 133SE415; 126 Okl 265, 259P 523; 42F(2d)243. See also 196NC198, 145SE227. [a] (4) National bank selling real estate mortgage cannot contract to repurchase it. 172Minn310, 215NW 213, 60ALR814.

807-25 273US548, 47SCt462, 71L ed 767; 200Cal 760, 255P188, 52ALR569; 192NC69, 133SE415; 126 Okl 265, 259P 523; 151Va195, 144SE501.

807-26½-New. Charging a liquidating company $400 to withdraw $8,300 part of collateral security is not ultra vires. LaA 130SS818.

808-28 29Ariz468, 242P1009, 1012 [cit CJ]; 123Kan304, 255P68, 69[quotCJ]. But see 16F(2d)728.

808-29 29Ariz468, 242P1009, 1012 [cit CJ]; 123Kan304, 255P68, 69 [quotCJ].

808-30 123Kan304, 255P68, 69 [quot CJ].

808-30½-New. National banks are liable for loss of property held by them merely for the accommodation of their customers without any consideration for the keeping of it other than the profit derived from their customers doing with them their banking business. 123 Kan304, 255P68.

808-30⅓-New. Where a national bank through its officers undertakes to act as agent of a person who transmits to it a bill of sale of property with instructions to deliver it only on receipt of a chattel mortgage executed by the person to whom the property is sold, it is liable to its principal where it delivers the bill of sale without receiving the chattel mortgage. 123Kan304, 255P68.

808-31 But see 23F(2d)567.

808-32 126 Okl 265, 259P523.

808-38 16F(2d)728.

808-39 But see 16F(2d)728.

808-40 [a] (2) Acceptance by national bank of pledge of its own stock as collateral to prevent loss of debt previously contracted is not invalid. 300Pa280, 150A599.

809-41 TexCivA 285SW1118.

809-43 42F(2d)243; TexCivA 285SW 1118.

809-43½-New. A contract is not void by which trustees hold stock in a state bank for the benefit of stockholders of a national bank, although the effect of the transaction is to place the national bank in a position to exercise complete control of the state bank. 31NM404, 247P275.

809-43⅓-New. A national bank may make or buy a loan secured by stock of another national bank, pledged as collateral, and purchase such stock, when sold to satisfy the loan. 27F(2d)117.

811-56 200Cal 760, 255P188, 52ALR 569. [a] (1) **Erratum.**-"88 Ill 532" should read "88 Ill 352." (4) Take assignment of contract of sale of realty to secure preëxisting unsecured debt. 200Cal 760, 255P188, 52ALR569 (bank estopped to deny power to release makers of notes from personal liability). [b] (2) It may purchase outstanding titles and interests and pay off incumbrances. 42F(2d)243. [f] **National bank acting as executor** may contract with broker to procure purchaser of property of testator though bank was required to take mortgage in excess of fifty per cent of value. Mass 169NE920.

812-57 [c] **Contract of national bank as executor,** where authorized under statute to do so, in employing broker for sale of property is not ultra vires. Mass 169NE920. [d] **Exchange of land** taken for debt for equity in other lands with assumption of mortgage is ultra vires. 42F(2d)243.

813-65 [a] **Real estate must be disposed of for cash or equivalent.**-42F(2d) 243.

813-70½-New. A national bank has no power to engage in the business of furnishing information as to solvency, condition, or reputation, financial or otherwise, of persons, firms, or corporations. 192NC69, 133SE415.

813-75 [b] 318Mo 341, 300SW475.

814-88 34Ariz160, 269P68; Ariz 283P 273; 192NC69, 133SE415; 133SC 202, 130SE758, 759 [citCJ]. See also 151Va195, 144SE501, 503. [c] **Fact of solvency held immaterial.**-33F(2d)841. [d] **While insolvent.**-33F(2d)841.

815-91 192NC69, 133SE415; 197Wis 20, 221NW379.

815-93 239 IllA376; 192NC69, 133SE 415. [b] **Guaranty of president of national bank** for merchandise rent to clothing company held ultra vires. 133 SC202, 130SE758.

815-95 34Ariz160, 269P68; 37GaA612, 141SE323; 239 IllA376; 192NC69, 133 SE415; 137Wash280, 242P42. See also 151Va195, 144SE501. But see 196NC 198, 145SE227. [a] (2) National bank's written guaranty of another's notes transferred without indorsement in consideration of charging such notes out of bank's account and carrying them for twelve months is void, where original oral guaranty thereof was void. 34 Ariz160, 269P68. [b] **Evidence held to show guaranty for sole benefit of maker of notes.**-34Ariz160, 269P68.

815-96 But see Utah 263P928 (bank's contract to indemnify its cashier as surety on executor's bond is ultra vires).

815-2 34Ariz160, 269P68; 173Minn 325, 217NW381; 192NC69, 133SE415; 197Wis20, 221NW379 (rediscount). [a] **Where bank sold and guaranteed** note payable to itself, it may not deny ownership. 28F(2d)290.

815-4½-New. An agreement by a national bank to assume all the liabilities of a state bank, except liabilities to stockholders, constituted an agreement to pay the liabilities mentioned, and excludes any agreement by the state bank, transferring its assets, to repay the national bank for payments made under the agreement. 331 Ill 622, 163 NE448.

817-12 [a] **National bank may receive money** to be loaned on real estate security. 122Kan1, 252P242.

817-16½-New. National banks may become depositaries under state statutes in some jurisdictions. 813Mo 307, 281 SW702.

817-19 [d] **Deposit not considered trust fund.**-33F(2d)841.

818-27 273US548, 47SCt462, 71L ed 767; 68Utah421, 250P1033; 151Va195, 144SE501.

818-28 [a] **Bank's funds must be loaned and paid out openly** in accordance with banking practice, and not under cover of misleading subterfuge. 29F(2d)239.

819-29 27F(2d)224; 68Utah421, 250P 1033.

819-31½-New. A national bank is without authority to exchange a negotiable paper owned by it for the negotiable paper of another national bank. Contra Utah 250P1033 [disappr and mod 65 Utah57, 234P231].

819-32 See also 33F(2d)589.

819-34 22F(2d)957; 288Pa478, 136A 773. [c] **In determining total liability of borrower to bank,** liabilities incurred as surety or indorser for money borrowed cannot be included. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73 L ed986(3dcase)].

819-36½-New. A national bank has no right to receive paper given for excess loans in violation of statute. 33F(2d) 589 (such paper considered in nature of salvage).

819-37 See also 27F(2d)224.

819-43 16F(2d)728.

819-44 151Va195, 144SE501. [a] Mass 170NE621. [d] **Under Act Sept. 7, 1916** prohibition against loans on real estate is partially withdrawn. 269US341, 46 SCt135, 70L ed295.

820-45 29F(2d)366 [certiorari den 279

US839, 49SCt253, 73Led986(3dcase)]; 50SD40, 208NW221.

820-47 151Va195, 144SE501.

820-51 273US548, 47SCt462, 71Led767.

821-59½-New. Where a bank in a six per cent interest state agrees to borrow money to make a loan to a borrower who agrees to pay the rate the bank has to pay, and the bank borrows in another state at seven per cent, which is legal there, the transaction is not within a usury law. 10F(2d)688.

823-73½-New. Loan by bank partly in consideration of borrower's promise to pay monthly installments on other notes in addition to payments on loan and interest is not usurious where such installments were not paid for use of money borrowed. Mass 170NE621.

831-58 176Ark381, 3SW(2d)34; Vt 146A252.

831-63 264Mass181, 162NE356. [a] **Bank may charge any rate of interest** in case not within exceptions stated in state statutes. Mass 170NE621.

832-66½-New. If bank agrees to give a satisfaction of a debt without special benefit of any kind to itself, the legal consequence is the ultra vires act of making a gift of its capital assets without benefit to itself. 200Cal 760, 255P 188, 52ALR569.

832-67 Utah 263P928.

833-78½-New. Where cause of action is on implied obligation of national bank to restore benefits under ultra vires contract of guaranty, interest on account runs only from date of demand and denial. 133SC202, 130SE758.

833-78⅓-New. Ultra vires contracts do not render a bank liable beyond what it has received. 16F(2d)728.

833-78¼-New. Party to ultra vires act cannot plead it against bank. LaA 130 S818.

833-80 200Cal 760, 255P188, 52ALR 569; 205 Iowa465, 218NW321; 172 Minn310, 215NW213, 60ALR814; 133 SC202, 130SE758 (cannot be estopped from setting up); TexCivA 285SW1118. [f] **Statutory liability as stockholder of state bank.**–TexCivA 285SW1118. [g] **Doctrine of estoppel** cannot apply to render ultra vires contracts enforceable. 172Minn310, 215NW213, 60ALR 814.

834-81 16F(2d)728; 200Cal 760, 255P 188, 52ALR569; 37GaA612, 141SE323; 133SC202, 130SE758; TexCivA 13SW(2d)384. See also 28F(2d)290. But see 172Minn310, 215NW213, 60ALR814.

834-82 81Colo 331, 255P624. [b] **Liability cannot be based on recognition of contract but is based on implied obligation** of national bank to restore what it had no right to receive or retain. 133 SC202, 130SE758. [c] **Recovery is limited to benefits received.**–34Ariz160, 269 P68.

835-87½-New. Unlawful loans held not to make bank and borrower in pari delicto so as to preclude the defense of ultra vires. 16F(2d)728.

835-89 27F(2d)224 (bank may sue on commercial paper purchased by it).

836-91 218Ala462, 119S2. See also 27 F(2d)224. [b] **National banks may be sued in county other than county of domicile** except in action for penalties arising from usury. TexCivA 22SW(2d) 336(2dcase).

836-93 133Misc630, 233NYS301.

836-96 147Miss747, 113S340; 73Mont 110, 236P1085. [l] **Receiver** may not be made party defendant. 73Mont110, 236P1085.

837-2 147Miss747, 113S340, 341 [cit CJ].

837-4 [a] **Affidavit for garnishment,** warning garnishee as "the First National Bank of Jacksonville, Texas," shows garnishee to be suable entity. TexCommnA 291SW206. [b] **Trial of contest of answer of garnished bank** must be had in county of garnishee's residence, and bank garnisheed in any other county cannot be adjudged in default for insufficient answer. TexCivA 148SW(2d)1043.

838-5 163Ga458, 136SE437; Ga 155SE 40.

838-7 163Ga458, 136SE437.

838-16½-New. Petition stating cause of action against bank for accounting is properly dismissed as against officers who are not necessary parties. Ga 155 SE40.

838-16⅓-New. State court's lack of jurisdiction to grant part of relief prayed is not ground for dismissing entire petition. Ga 155SE40.

838-18½-New. Evidence held sufficient to show that the bank was the owner of the note sold by it, that it indorsed the note, and that the purchaser had no notice of lack of ownership. 173 Minn325, 217NW381.

838-20 125Misc247, 211NYS366.

839-22½-New. Execution of a promissory note by the directors of an insolvent bank to a new bank taking over assets and assuming liability is not per se ultra vires where required by pressing needs of the old bank. 12F(2d)933.

839-23 125Misc247, 211NYS366 (merely suspends ordinary functions).

839-23½-New. Appointment of a liquidating committee is not a dissolution of the corporation. 125Misc247, 211NYS 366.

839-27½-New. The directors, however, are not ousted from office. 125Misc247, 211NYS366.

839-27⅓-New. A creditor of a national bank suing after insolvency and before appointment of receiver has been held not entitled to a lien under a state law creating a lien on lands of the judgment debtor. 19F(2d)40.

839-28 [a] **Committee is not substitute for receivership.**–43F(2d)640.

839-28½-New. The directors of a bank who are also the liquidating committee are under a duty in one capacity or the other, to liquidate the affairs of the corporation. 125Misc247, 211NYS366.

840-56 24F(2d)768; 29F(2d)547 [certiorari den 278US660, 49SCt250, 73Led 567(4thcase)]; SD 227NW477 (assignment of assets to secure surety on indemnity bond given to procure deposit of public funds). [d] **"Insolvency,"** within meaning of statute, consists in inability to meet obligations in ordinary course of business as they accrue. 33 F(2d)841. [e] **Agreements held void as preferences.**–34F(2d)989.

840-57 [b] **Statute** should be construed to effect its purpose of equality of distribution and to apply to a case within its spirit, though not within its literal language. 7F(2d)685.

840-57½-New. Conversely, transfers and payments not so made are not void under the statute. 129 Okl 67, 263P 142.

841-58 [b] **Transaction held not in violation of statute.**–207Cal 652, 279P765.

841-61 7F(2d)685 (payment to depositor in due course from his checking account is not unlawful preference).

841-64 [a] **Transfer of lands** acquired by foreclosing mortgages held void as preferences. 7F(2d)685.

841-65 14F(2d)306; 14F(2d)307.

841-66 [a] **Transfers held not void as preferences.**–35F(2d)152 (pledge of notes to secure county deposit).

841-72½-New. Where reliance is placed on an equitable lien in an insolvency case, the court should scrutinize the evidence with great care. 35F(2d)152.

841-73 12F(2d)933; 27F(2d)187. [c] **Due examination.**–27F(2d)187.

842-76 43F(2d)640. [e] (2) See also 43F(2d)640.

842-81 12F(2d)933. [d] **Regardless of wishes of stockholder, statute gives comptroller entire control** of insolvent bank, with purpose of speedily winding up its affairs. 12F(2d)933. [e] **Good faith of comptroller** in entering settlement agreement with directors of insolvent bank was shown and agreement upheld. 27F(2d)187. [f] **Transactions presumed to have been approved by comptroller.**–198NC477, 152SE403.

843-83 18F(2d)944. [b] (2) Receiver does not submit assets to control of court by asking for approval of sale of assets. 5F(2d)286. [c] **Circuit court of appeals** cannot review at instance of bank's creditors order of district court approving sale of national bank's assets **by receiver appointed by comptroller** of currency. 5F(2d)286.

843-84½-New. A receiver appointed by the comptroller of currency is not subject to supervision of the courts except as provided by statute. 18F(2d)944.

843-85 12F(2d)933. [c] **Ratification of consolidation by stockholders.**–12F(2d) 933.

843-85½-New. and the stockholders, 12F(2d)933.

843-86 12F(2d)933; 18F(2d)944 (not officer of court); 19F(2d)40.

843-86½-New. Receiver represents the comptroller. 18F(2d)944.

843-87 See also 32F(2d)170.

843-91 23F(2d)796; 29F(2d)776 [certiorari den 279US841, 49SCt254, 73Led 987(5thcase)]; 35F(2d)152.

843-95½-New. Assets of a national bank, while in the hands of a receiver appointed by the comptroller, are not in custodia legis. 18F(2d)944.

843-98½-New. A receiver cannot delegate his statutory duties and authority to collect what is owing to a bank. 12 F(2d)676.

843-98⅓-New. Comptroller of currency has exclusive authority in the matter of necessary expense in the administration of receivership. 20F(2d)226.

843-98¼-New. Receiver taking possession of assets of a national bank assumes control thereof as an officer of the United States. 16F(2d)906.

844-2 [d] **Receiver has discretion in compounding liabilities of directors.**–12 F(2d)933.

844-6½-New. A receiver of a national bank in a proceeding under the federal statute for compounding liability of directors is not subject to the court's supervision except as prescribed by statute. 18F(2d)944.

844-6⅓-New. After getting such consent, the receiver may do as he wills. 18F(2d)944.

844-6¼-New. Under such statute the receiver cannot have the court's consent to compound. 18F(2d)944.

844-6½-New. A proceeding under the federal statute to compound the liability of directors is not judicial but is administrative. 18F(2d)944.

844-6⅙-New. No appeal lies from an order made in such proceeding. 18 F(2d)944.

844-6⅐-New. An agreement between the receiver and certain directors of the bank not to sue such directors does not release other directors from liability for negligence. 29F(2d)366 [certiorari den 279US839, 49SCt253, 73Led986(3d case)].

844-9 6F(2d)905 (sale may include debts to bank); 9F(2d)928; 39F(2d) 663. [c] **No limitation** is placed on authority to sell personal property. 9 F(2d)928. [d] **Personal property includes** chattels, things in action, evidence of debt. 9F(2d)928. [e] **Bids for assets could not be reopened** for trifling advance of less than ½ of 1 per cent to creditors. 39F(2d)663.

844-9½-New. A receiver may sell both real and personal property. 9F(2d)928.

844-11 [a] **Statute providing for sale does not authorize disposition** of assets which is not sale. 12F(2d)676.

844-12 6F(2d)905 (court should refuse order to sell if objections of creditors are well-founded); 39F(2d)663.

844-13 [a] **Terms of sale** calling for payment in full of certain small claims held illegal. 6F(2d)905. [b] **Order of sale** requiring creditors to accept certificate of deposit of purchasing bank held illegal. 6F(2d)905. [c] **Proposed sale allowing purchaser** to collect and compound certain assets held illegal. 6 F(2d)905. [d] **Sale held not unauthorized barter.**–9F(2d)354.

844-15½-New. Sale need not be cash. 9F(2d)354.

844-15⅓-New. or for price definitely fixed at time of sale. 9F(2d)354 (if provision made for its determination).

844-15¼-New. **Receiver may sell collectable assets.**–9F(2d)354 (rather than make actual collection).

844-15⅕-New. **"Personal property" as**

used in statute relating to sale of assets by receiver associated with "real property" should be given broad construction. 9F(2d)354.

844-15¼-New. Cash collected is personal property within statute, 9F(2d) 354.

844-15½-New. thus receiver may sell cash collected and available for distribution. 9F(2d)354.

844-15¾-New. Sale of assets not invalid because of manner of distribution of proceeds to creditors. 9F(2d)354.

844-15⅞-New. nor is it invalid as relieving receiver and comptroller of statutory duties. 9F(2d)354.

844-15 1/10-New. A requirement that assets of an insolvent national bank be administered by trustees to report to the court does not authorize exercise of control over assets of the bank by the court. 9F(2d)928.

844-15 1/11-New. Judgment of receiver and comptroller that proposed transfer of assets will result advantageously to stockholders will be upheld where no fraud or collusive conduct is shown. 12 F(2d)983.

844-15 1/12-New. Transfer to another bank assuming liabilities.-TexCivA 286 SW581.

845-16 28F(2d)615.

845-17½-New. A receiver is charged with the duty of investigating and redressing maladministration and waste by directors and stockholders in the same manner as a creditor or stockholder on behalf of the bank might do. 12 F(2d)933.

845-17¾-New. A receiver is not amenable to an accounting unless exceptional situation justifies such relief. 20 F(2d)226.

845-18½-New. A creditor of an insolvent national bank may recover from the receiver on his official bond only on showing that the receiver has unlawfully disposed of assets which should have been applied to payment of such creditor's claim. **TexCivA** 286SW581.

845-20 23F(2d)914, 918 [citCJ].

845-25½-New. A receiver may be enjoined from making an illegal sale or wrongful disposition of assets. 12F(2d) 676.

845-28 215Ala526, 112S111.

846-32½-New. A surety company in a suit by the receiver of an insolvent bank on a fidelity bond of the cashier for losses accruing before insolvency cannot set off claims for discharge after insolvency of the bank's obligation to the depositor under a depositary bond. 53 ND502, 207NW42, 42ALR1353.

846-32¼-New. One guaranteeing payment of a bank's certificates of deposit was held not entitled to set-off on insolvency of the bank for amounts paid under the guaranty. 34F(2d)989.

846-32¼-New. Certificates of deposit issued by a national bank become due and payable on the date of suspension of the bank, as regards set-off. 34F(2d) 989.

846-32½-New. The right to set-off of a debtor against an insolvent national bank is governed by the conditions existing at the moment of insolvency. 34F (2d)989.

846-32¾-New. A receiver declining to pay proceeds of an investment company's notes under three cornered agreement could not recover on notes. 36F(2d) 646.

846-35½-New. Allegation, that receiver was appointed by comptroller of currency, and that he took possession of assets of bank, is in effect allegation that he was duly appointed and qualified. 73Mont385, 236P545.

846-40. 7F(2d)685 (transfer by insolvent bank held void as preference); 23 F(2d)914; 33F(2d)841. [a] **Intent to give preference** is presumed from payment of insolvent bank. 7F(2d)685. [b] **Evidence held to establish** ratification by comptroller lease executed between corporation having interlocking directorates. 10F(2d)299.

847-48½-New. A surety indemnifying the county against loss of funds deposited in a bank has no claim against the bank in case of insolvency until the county's claim is paid in full. 25F(2d) 18.

847-50 See also **Iowa** 232NW507. [a] **Delay in presenting claim.-Iowa** 232NW 507. [b] **Claims barred** where not presented until after discharge of receiver. **Iowa** 232NW507.

847-61 25F(2d)18.

848-67 28F(2d)615. [a] 29F(2d)776 [certiorari den 279US841, 49SCt254, 73 L ed987(5thcase)].

848-68 22F(2d)538; 29F(2d)770 [mod 29F(2d)776 (certiorari den 279US841, 49SCt254, 73L ed987(5thcase)]; 29F (2d)776 [certiorari den 279US841, 49 SCt254, 73L ed987(5thcase)]; **Iowa** 220 NW63; 118Nebr54, 223NW625. [c] (1) 29F(2d)776 [certiorari den 279US841, 49SCt254, 73L ed987(5thcase)]; **Iowa** 220NW63; 118Nebr54, 223NW625 (trust funds held only partially traced). See also 117Nebr161, 219NW894. (2) Showing that receiver has common fund in which trust fund is included makes prima facie case for claimant. 29F(2d) 776 [certiorari den 279US841, 49SCt254, 73L ed987(5thcase)] (entire fund becomes one for payment of trust). (3) Trust funds may be traced into accounts of correspondent banks and treated as separate accounts from general cash assets. 29F(2d)776 [certiorari den 279US841, 49SCt254, 73L ed987 (5thcase)]. [d] (1) 12F(2d)891; 29F (2d)776 [certiorari den 279US841, 49SCt 254, 73L ed987(5thcase)]; **Iowa** 220NW 63. (3) Where bonds left with bank for safe-keeping were delivered by bank with others to state treasurer, to secure his deposits, and he sold them and satisfied his claim from proceeds, owner of bonds is entitled to recover of receiver, on trust fund theory, only as to balance of proceeds delivered to him. 18F(2d) 876. (4) In such case, where some of the other pledged bonds belonged to other individuals and were also converted by bank, depositor can recover only pro rata share of such balance. 18 F(2d)876. [f] **Bank pledging bonds left with it for safe-keeping with other bonds** cannot be presumed to have owned all other bonds pledged. 18F(2d)876.

849-69 118Nebr54, 223NW625 (where deposit can be traced into specific assets of bank coming into hands of receiver).

849-69½-New. The National Bank Act is necessarily superior to the claimed right of a state to preference by a state which has adopted the common law of England. 29F(2d)776 [certiorari den 279US841, 49SCt254, 73L ed987(5th case)].

849-70 118Nebr54, 223NW625.

849-73½-New. Allowance of interest by decree against a bank is not equitable in the absence of formal adjudication requiring allowing preference of claim. 131 Or350, 283P17.

849-78 25F(2d)18.

850-84½-New. A surety may not offset his liability on a depositary bond against his notes to the bank. 54ND701, 210NW 653.

850-84¼-New. A surety on a bond for an employee cannot offset any claim arising from the fact that it was also surety on the depositary bond of the bank to insure repayment of deposits. 56ND14, 215NW875.

851-2 252Mass523, 147NE887; 160Tenn 72, 22SW(2d)245 (upon consolidation with state bank, national bank succeeds to state bank's rights and title as trustee under trust deed). See also 16F(2d) 410. [b] **Employment of attorney's services** in making plan for consolidation, before ratification by stockholders, is not beyond power of board of directors. 252Mass523, 147NE887. [c] **National bank held liable for obligations** of controlled subsidiary. 16F(2d)410.

851-3½-New. Plan of directors for consolidation of national banks is subject to approval by stockholders. 252Mass 523, 147NE887.

851-4½-New. A bank consolidating with another bank and acquiring its assets which equaled it liabilities, without consideration, is liable on an obligation of such bank. 13F(2d)213.

851-4⅓-New. Liquidating committee of a bank, purchased by another bank which agreed to pay "accruing taxes," could upon the purchaser's refusal to pay the federal income tax compromise with the government and sue the purchaser for the amount paid. 221Ky798, 299SW985.

851-4¼-New. "Accruing taxes" includes federal income tax including profits on sale of bank. 221Ky798, 299SW985.

851-4⅙-New. Purchasing bank's agreement to pay "accruing taxes" made purchaser liable for federal income taxes, although the rate was not determined at the time of the contract. 221Ky798, 299SW985.

851-4⅛-New. Consolidation of state banks with national banks does not transfer the franchise powers of the state bank to the national bank, where no provision therefor is made by state law. 263Mass444, 162NE217.

851-4½-New. Consolidation of a state trust company with a national banking association has been held valid, and not in contravention of state law. 263 Mass444, 162NE217.

851-4¼-New. But part of act providing for consolidation is unconstitutional as encroaching on the powers of the state in so far as it provides the right of succession of a national bank as trustee or executor without provision for any judicial determination as to fitness of the national bank. 263Mass444, 162NE 217.

851-4⅞-New. An act which provides for the consolidation of state and national banks, although void as to a provision permitting succession of the national bank to the state bank's position as executor or trustee without any judicial determination of fitness, is valid as to the remaining part. 263Mass444, 162 NE217.

851-4 1/10-New. Consolidation of a trust company with a national bank results in cessation of identity of the trust company except for discharging obligations and liabilities. 263Mass444, 162NE217.

851-4 1/11-New. A national bank taking assets and assuming liability of an insolvent state bank cannot collect on notes of the state bank's stockholders and directors without performing its obligations under agreement. 34F(2d)377.

851-4 1/12-New. State legislation is not essential to operation of federal act for consolidation of state and national banks. **Va** 153SE656.

851-4 1/13-New. The makers of notes, executed to replenish assets of an insolvent bank taken over by a national bank, by alleging breach of conditions under which the notes were taken and praying for a money judgment for breach of contract, abandoned any other claims. 34F(2d)377.

851-4 1/14-New. State statute governing change of state bank to national bank and consolidation held inapplicable to consolidation of state banks with national banks. **Va** 153SE656.

851-4 1/15-New. Where a national bank takes assets and assumes the liabilities of an insolvent state bank, failure of the national bank to perform conditions on which notes of the insolvent bank's directors and stockholders were delivered constitutes no defense. 34F(2d)377.

851-4 1/16-New. An agreement by a national bank modifying a prior agreement to take assets and assume the liabilities of an insolvent bank merges all prior agreements and fixes the rights of the parties. 34F(2d)377.

851-4 1/17-New. Stockholders participating in, or having an opportunity to be present at, meetings are estopped to deny the validity of a liquidation contract. 34F(2d)884.

851-4 1/18-New. Stockholders cannot repudiate a consolidation contract without tendering the benefits received thereunder. 34F(2d)884.

851-4 1/19-New. National bank on verge of insolvency may transfer assets to another bank in consideration of latter's assumption of specified obligations. **Iowa** 232NW507.

851-5 [e] **Savings bank is not agency of government** and performs no public function but is private undertaking. **NH** 150A737.

853-24½-New. A statute providing for an assessment to restore impaired capi-

tal, the sale of stock to satisfy an assessment, and personal liability of stockholders for deficiency, is within the reserved power of the legislature in some jurisdictions. **Iowa** 226**NW**374; **Iowa** 226**NW**378(1stcase); **Iowa** 226**NW**378 (2dcase); **Iowa** 226**NW**378(3dcase).

853–24⅓–New. The provision of such statute making stockholder personally liable for a deficiency on sale of stock cannot and does not affect a stockholder's liability as to any impairment of stock existing at the time the statute became effective. **Iowa** 226**NW**374; **Iowa** 226**NW**378(1stcase); **Iowa** 226**NW**378 (2dcase); **Iowa** 226**NW**378(3dcase).

853–24¼–New. Such provision is prospective and not retroactive and refers only to an assessment for impaired capital that is subsequently created. **Iowa** 226**NW**374; **Iowa** 226**NW**378(1stcase); **Iowa** 226**NW**378(2dcase); **Iowa** 226**NW** 378(3dcase).

853–24½–New. The question as to when impairment of capital stock occurred is one of fact to be determined on evidence. **Iowa** 226**NW**374; **Iowa** 226**NW**378(1st case); **Iowa** 226**NW**378(2dcase); **Iowa** 226**NW**378(3dcase).

853–24⅔–New. There is no presumption as to when such impairment occurred. **Iowa** 226**NW**374.

853–26½–New. Some statutes authorize the issuance of time certificates of deposits. 201 **Iowa**1325, 207**NW**781.

853–28½–New. The question whether a transaction is a loan or a deposit must be decided on the facts of each particular case. 201 **Iowa**1325, 207**NW**781.

853–28⅓–New. Generally a deposit is subject to withdrawal on demand whereas a loan is subject to call only on and after its maturity date. 201 **Iowa**1325, 207**NW**781.

853–28¼–New. An actual depositor under interest drawing time certificates does not cease to be a depositor and become a lender because of fact that, when he demands his existing deposit, he is induced, in good faith on his part, to accept new long time certificates at legal rate of interest desired by him, with oral understanding that he might have his money on demand by proportional refund of interest advanced. 201 **Iowa**1325, 207**NW**781.

853–28½–New. In such case it is immaterial that the bank officials, without the depositor's knowledge, were not acting in good faith. 201 **Iowa**1325, 207 **NW**781.

853–28⅔–New. Such transaction does not constitute a fraud on the part of the depositor. 201 **Iowa**1325, 207**NW** 781.

856–50½–New. A new cashier of a bank who is also the administrator of a decedent's estate to which a third party is a debtor acts solely as the administrator in arranging for a loan to pay the debt by transfer of a deposit to the estate. 203 **Iowa**988, 213**NW**601.

862–34 Oh 171**NE**595.

863–48 151**Md**571, 135**A**373; 131**Misc** 188, 226**NYS**415. [a] (2) Transaction held deposit and not loan. 202 **Iowa**524, 210**NW**612. (3) Act of depositor in accepting certificate of deposit tainted with usury does not destroy status as depositor. 202 **Iowa**524, 210**NW**612.

864–52 110**Conn**397, 148**A**374.

864–52½–New. On deposit of money in savings bank, the bank becomes agent of depositor. 110**Conn**397, 148**A**374.

864–53 151**Md**571, 135**A**373. [c] (2) Depositor has right to rely on rules and by-laws of bank as to mode in which deposit can be withdrawn. 151**Md**571, 135 **A**373. [d] **Rule prohibiting assignment of pass book without bank's consent** is reasonable and not against public policy. **Oh** 171**NE**595.

864–54 Oh 171**NE**595. [c] **Oh** 170**NE** 439 (unless contrary to law on public policy). [g] **Subsequent holder of passbook** is bound by rules printed in passbook. **Oh** 171**NE**595.

865–57½–New. By-law, that no money shall be received from, or paid to, a member unless pass book is presented, was not violated by pledge of book to trust company to secure loan. 252**Mass** 574, 147**NE**847.

865–61 229**AppDiv**286, 241**NYS**546 (minor in whose name aunt made deposit held to have only presumptive title).

865–63 114 **OhSt**241, 151**NE**373, 48**ALR** 182; 22 **OhA**213, 153**NE**758.

865–64 135**Misc**389, 237**NYS**715. [b] **Conclusiveness of presumption as to joint ownership.**–216**AppDiv**591, 216**NYS** 71. [c] **Presumption arising under such statute of intention to create joint tenancy** is rebuttable where both parties to account are living. 135**Misc**343, 238 **NYS**149.

865–64½–New. Under the California statute, when a written instrument is executed by husband and wife on opening an account whereby the parties agree that the deposit when made and all accumulations thereof shall be held by them as joint tenants with right of survivorship, each is seized of the whole estate from the creation of the tenancy and the whole vests in the survivor without regard to the prior ownership or title to the property. 70**CalA**180, 232**P** 755.

865–64⅓–New. Such instrument is conclusive in the absence of fraud or mistake. 70**CalA**180, 232**P**755.

865–64¼–New. The question whether a bank account is joint with right of survivorship is one of intention. 70**CalA** 180, 232**P**755.

865–68 Iowa 231**NW**311.

866–74 [f] **Consent of bank.–Oh** 171**NE** 595.

866–75 203 **Iowa**988, 213**NW**601.

866–76 70**CalA**180, 232**P**755.

866–76½–New. The transfer gives the assignee the status of a general depositor to the full amount of the assigned deposit. 203 **Iowa**988, 213**NW**601.

866–76⅓–New. Assignee of passbook cannot avail himself of part of contract and escape effect of balance thereof by disregarding it. **Oh** 171**NE**595.

867–84 151**Md**571, 135**A**373, 375 [cit CJ]; **Utah** 286**P**638. [c] **Payment to** either of joint debtors is not authorized. 151**Md**571, 135**A**373.

867–87 151**Md**571, 135**A**373.

867–92 Utah 286**P**638 (not waived by bank changing ledger account in compliance with depositor's order to add another's name to account). [a] **Waiver not binding on depositor or his representative.–Utah** 286**P**638.

867–94 But see 151**Md**571, 135**A**373.

868–6 151**Md**571, 135**A**373.

869–12½–New. A husband and a wife signing an agreement that deposits in a joint bank account may be paid to either are bound thereby as between themselves and between them and the bank. 333 **Ill** 442, 164**NE**836.

869–14½–New. An association was held not liable to a son for the father's savings account after the latter's death. 154**Wash**249, 282**P**60.

869–17 259**Mass**215, 156**NE**34, 52**ALR** 758. [b] (3) **CalA** 290**P**550. (5) Facts constituting constructive notice of depositor's death depends on circumstances. **CalA** 290**P**550. [e] **Duplicate pass books.–**151**Md**571, 135**A**373 (liability of bank).

869–17½–New. Giving a check to a person presenting a pass book constitutes money paid out under by-law exempting the bank from liability in case a person other than the owner presents the book. 259**Mass**215, 156**NE**34, 52**ALR**758.

870–18 124**Misc**38, 207**NYS**235; **Oh** 170 **NE**439. [d] (1) See also 151**Md**571, 135 **A**373.

871–20 96**CalA**259, 274**P**74; **CalA** 290 **P**550; 177**Minn**243, 225**NW**100; 124**Misc** 38, 207**NYS**235 (whether ordinary care exercised depends on circumstances of each case). But see 151**Md**571, 135**A**373. [a] 96**CalA**259, 274**P**74 (payment on writ of execution). [b] **Ordinary or reasonable care** does not mean utmost care and diligence, or great or extraordinary care, but care of man of ordinary foresight and prudence under similar circumstances. 124**Misc**38, 207**NYS**235.

871–21 124**Misc**38, 207**NYS**235. See also 96**CalA**259, 274**P**74.

871–22 124**Misc**38, 207**NYS**235.

873–42½–New. A certificate of deposit is not illegal because it draws a very high rate of interest where the directors have never fixed any rate of interest on such certificates. 201 **Iowa**1325, 207**NW**781.

873–42⅓–New. A certificate of deposit is not illegal because part of the interest is paid to the depositor in advance. 201 **Iowa**1325, 207**NW**781.

873–42¼–New. Certificate of deposit payable on return of this certificate properly indorsed "twelve months after date with interest at 5 per cent. or six months after date with interest at 5 per cent per annum" is payable on demand. 202 **Iowa**524, 210**NW**612.

874–50 [c] **Certificates of deposit** issued for promissory notes, when bank has no funds to pay for notes, are void in hands of any holder. 200 **Iowa**895, 205**NW**470.

874–55½–New. In New Hampshire savings banks are permitted to purchase bonds. 82**NH**392, 134**A**45.

874–55⅓–New. Where a savings bank has acquired real estate under authority of statute and retains possession beyond the time permitted, the court will not decree a forfeiture in the absence of a provision of the act providing therefor. 80**CalA**411, 251**P**938.

875–65 [d] **Priority of real estate mortgage** is not affected that loan is in excess of sixty per cent of market value of land in violation of statute. 67**CalA**769, 228**P**369.

876–83½–New. In an action against a bank and a surviving husband by heirs of a deceased wife to recover funds deposited by her under a joint tenancy agreement with her husband, the presumption of fraud arising from a transaction between husband and wife by which the husband benefits is not available where fraud is not pleaded or in issue. 70**CalA**180, 232**P**755.

876–83⅓–New. In such a case it is not necessary for the husband to prove absence of fraud, undue influence, or mistake. 70**CalA**180, 232**P**755.

876–89 103**NJL**478, 135**A**818; **Oh** 170 **NE**439. [a] **Care and caution** in payment are part of burden of proof of bank. 103**NJL**478, 135**A**818. [b] **Burden of showing good faith and reasonable care** in making payment to one presenting passbook and order is on bank. **Oh** 170**NE**439.

876–92 CalA 290**P**550.

876–92½–New. A savings bank claiming payment to a third person under such circumstances of care and diligence as to relieve it of liability has the burden of proof. 177**Minn**243, 225**NW** 100.

877–96 177**Minn**243, 225**NW**100; 103 **NJL**478, 135**A**818; 124**Misc**38, 207**NYS** 235 (negligence in payment of deposit slip where signature to withdrawal slip showed discrepancies from that of depositor).

877–97 [a] (2) Instruction denying joint depositor recovery if saving's bank used reasonable care in disbursing deposit on presentation of duplicate pass book. 151**Md**571, 135**A**373.

878–12½–New. Surety for an insolvent bank on guardian's bonds is entitled to enjoin the receiver from enforcing payment of surety's debt to bank until the extent of surety's liability on the bank's obligations is determined. 155**Tenn**342, 293**SW**996.

878–14½–New. The appointment of a receiver terminates the accrual of interest. 201 **Iowa**1325, 207**NW**781.

878–14⅓–New. Where interest has been paid to a depositor in advance, the deposit must be charged with the amount of interest unearned at the time of the appointment of the receiver. 201 **Iowa** 1325, 207**NW**781.

878–16 [a] **If funds are insufficient to pay all preferred claims** preferred creditors must share pro rata in funds. **Iowa** 213**NW**417.

881–46½–New. In some jurisdictions solvent guaranty savings banks may voluntarily liquidate. **NH** 150**A**737.

881–46⅓–New. Mere grant of perpetual charter to such bank creates no obligation to act. **NH** 150**A**737.

881–46¼–New. Right of such bank to cease business is not dependent on right to cease existence. **NH** 150**A**737.

881–49½–New. Reorganization. Assets of guaranty savings bank sold to another bank held to be trust fund for payment of savings bank's debts and

claims of its general depositors. **NH** 150A737.

881-50 142**Va**43, 128**SE**615, 45**ALR**664 (institution a loan company and not bank).

881-51 [b] (3) Statute held to fix general standard to which all foreign installment investment companies must conform to entitle them to a license to transact business in state. 113**Nebr**816, 205**NW**294. (4) Statute held to rest in department of trade and commerce quasi-judicial power to determine whether foreign installment investment company, applying for certificate to do business in state, conforms to standard prescribed by statute. 113**Nebr**816, 205 **NW**294. (5) Statute, authorizing corporate trustee to apportion funds held by it, was held not repealed by reënactment of statutes relating to investment of trust funds. 135**Misc**62, 237 **NYS**622. [g] 113**Nebr**816, 205**NW**294. [h] **Statute held constitutional.**–97**CalA** 1, 275**P**248. [i] **Laws should be rigidly enforced and strictly complied with.**–178**Minn**209, 224**NW**235.

882-53½-New. In some jurisdictions statutes regulate sale of corporate bonds, notes, or certificates of debt secured by pledge or deposit with trustee of mortgages or other evidence of indebtedness, 167**Minn**286, 209**NW**9.

882-53⅓-New. and make such corporations subject to supervision of superintendent of banks. 167**Minn**286, 209**NW** 9.

882-53¼-New. Such statutes are not impliedly repealed by enactment of Blue Sky Laws, 167**Minn**286, 209**NW**9.

882-53⅕-New. especially where Blue Sky Law declared that it shall not be construed to be amendatory of, nor as superseding any statute in force, but as supplementary thereto. 167**Minn** 286, 209**NW**9.

882-53⅙-New. Hence, although a corporation has complied with the requirements of the Blue Sky Law but not with those of the older statutes regulating sale of corporate securities, 167**Minn**286, 209**NW**9.

882-53⅐-New. it cannot enjoin the exercise by superintendent of banks of his supervisory powers under the latter statutes, 167**Minn**286, 209**NW**9.

882-53⅛-New. when he seeks to examine the plaintiff's books and records, inspect securities it has on deposit with the trustee, ascertain amount of its liabilities and value of its assets, and investigate its methods of operation. 167**Minn**286, 209**NW**9.

882-53⅑-New. These statutes provide that until it is complied with by the corporation no sales of securities can be made by it. 167**Minn**286, 209**NW**9.

882-53 1/10-New. Although tax certificates are not specifically mentioned in describing securities affected by the statute they are construed as included within the designation of "evidences of indebtedness" therein. 167**Minn**286, 209**NW**9.

882-53 1/11-New. Oral approval by commissioner of banks to increase capital stock cannot make that legal which is otherwise defective. 253**Mass**205, 148 **NE**609, 41**ALR**658.

882-53 1/12-New. In a suit against stockholders to enforce their liability, failure of bank commissioner formally to approve increase of capital stock is no defense where there was actual approval. 253**Mass**205, 148**NE**609, 41**ALR** 658.

882-54 [a] **Number of directors.**–14**Pa Dist&C**370.

882-55 [a] (2) Under Washington statute corporation filing amended articles omitting word "trust" from name cannot resume original name and trust business without compliance with statute. **Wash** 289**P**59.

882-57½-New. Name. The approval of superintendent of banks of name adopted by trust company is not conclusive in action by another trust company to restrain its use, 125**Misc**735, 211**NYS**785.

882-57⅓-New. and is subject to review by the courts. 125**Misc**735, 211**NYS**785.

882-57¼-New. But such approval is entitled to weight. 125**Misc**735, 211 **NYS**785.

882-57⅕-New. Injunction to restrain use of name by trust company will be denied where superintendent of banks has approved its use and an issue has arisen whether president of plaintiff has not acquiesced in use thereof by defendant and irreparable injury may result to defendant. 125**Misc**735, 211**NYS** 785.

882-58 101**NJEq**413, 138**A**659. [b] **Statutory merger occurred** when capital stock of two merging banks was converted into stock of consolidated bank. 214**Ala**483, 108**S**339, 45**ALR**1026. [c] **Merger of trust company with other banking corporations** is held valid. 102 **NJEq**302, 140**A**321.

882-59 101**NJEq**413, 138**A**659. [a] **Provision for transfer of trusteeships** on transfer of business of banking corporations under merger statutes has been held not void as depriving courts of equity jurisdiction. 97**CalA**138, 275**P** 453.

882-59½-New. Where a state trust company is absorbed by, and consolidated with, a national bank, prior appointment of the trust company as trustee and conservator under wills does not pass to the bank as property interest. 261**Mass**217, 158**NE**780.

882-60 259**Mass**162, 156**NE**7; 220**MoA** 686, 293**SW**517. [jj] **Petition by superintendent of banks** to enforce stockholder's liability held sufficient. 162**Ga** 139, 133**SE**855.

884-61½-New. Right to receive dividend of trust company held justifiable only on theory that he was a stockholder. 253**Mass**205, 148**NE**609, 41**ALR**658.

884-61⅓-New. Only a stockholder can execute proxies. 253**Mass**205, 148**NE** 609, 41**ALR**658.

884-61¼-New. Stockholders are estopped to assert invalidity of shares of increased capital stock for which they voted and which was issued to them. 253**Mass**205, 148**NE**609, 41**ALR**658.

884-61⅕-New. Stockholders in trust company cannot defeat liability on ground that shares were irregularly issued when they retained dividends. 253**Mass**205, 148**NE**609, 41**ALR**658.

884-61⅙-New. Stockholder's liability is expressly made secure for savings depositors by Gen. L. c. 172, § 62. 253 **Mass**205, 148**NE**609, 41**ALR**658.

884-61⅐-New. Stockholder cannot plead as a defense to liability that subscription to stock was procured by fraud. 253**Mass**205, 148**NE**609, 41**ALR** 658.

884-61⅛-New. Stockholder, delivering certificate to trust company but not for purpose of transfer, did not relieve him of liability. 253**Mass**205, 148**NE**609, 41 **ALR**658.

884-61⅑-New. Payment of higher price for stock than original stockholder did not relieve new stockholder of liability. 253**Mass**205, 148**NE**609, 41 **ALR**658.

884-61 1/10-New. It is no defense to liability that stock was paid for by note instead of cash. 253**Mass**205, 148**NE** 609, 41**ALR**658.

884-61 1/11-New. Party, although a stockholder of record, who never purchased or subscribed for stock, did not know of its existence and never received dividends, was held exonerated from liability as a stockholder. 253**Mass**205, 148**NE**609, 41**ALR**658.

884-61 1/12-New. Statute of limitation bars liability of deceased stockholder in an action against his estate. 253**Mass** 205, 148**NE**609, 41**ALR**658.

884-61 1/13-New. Holders of stock in a trust company are not exempt from liability because the stock was a gift. 253 **Mass**205, 148**NE**609, 41**ALR**658.

884-61 1/14-New. Interest on amount due from stockholders is computed from date of notice that liability would be enforced. 253**Mass**205, 148**NE**609, 41**ALR**658.

884-61 1/15-New. Stockholder of record at time when trust company becomes insolvent and is taken over by commissioner of banks cannot repudiate liability. 253**Mass**230, 148**NE**619.

884-61 1/16-New. Misrepresentation by official of trust company does not render stock void, but merely gives stockholder right to rescind subscription before liquidation of company. 253**Mass** 230, 148**NE**619.

884-61 1/17-New. Liability of stockholders in trust companies may be presumed to be part of basis on which deposits are made in both commercial and savings departments. 253**Mass**230, 148**NE** 619.

884-63 [a] **President or director of trust company owes no duty** to disclose to prospective buyer of stock what he knows affecting value of stock. **NJCh** 147**A**234 (president or director held not trustee of stockholders individually).

884-68½-New. The president has no implied authority to agree, on behalf of the company, that a real estate mortgage held by the company shall be considered as an absolute deed, and that the company will accept the equity of redemption as full payment of the mortgage debt. 206 **Iowa**83, 218**NW** 480.

885-70 See also **Pa** 146**A**595(1stcase) (knowledge acquired by officer acting individually for own interest is not imputable to company).

885-72 260**Mass**41, 156**NE**681; **Mich** 233**NW**428; 285**Pa**472, 132**A**579. [d] See also **Iowa** 227**NW**637. [f] **Scope of authority.**–164**Minn**323, 204**NW**961. [g] **Ostensible authority.**–260**Mass**41, 156**NE** 681. [h] **Ratification.**–260**Mass**41, 156 **NE**681. [i] **Indemnity agreement.**–26 **F(2d)**985. [j] **Acts held within apparent scope of officer's authority.**–232**Ky** 510, 23**SW(2d)**952.

885-73 285**Pa**472, 132**A**579.

885-75½-New. Director of loan institution is its agent and not a trustee. 142**Va**43, 128**SE**615, 45**ALR**664.

885-75⅓-New. In view of the insolvency of a trust company, demand on assistant secretary on execution issued on judgment against company was held sufficient. 253**Mass**205, 148**NE**609, 41 **ALR**658.

885-75¼-New. Acts of an officer may be ratified by the bank. 260**Mass**41, 156**NE**681.

885-75⅕-New. False statements of a company's manager, respecting the value of stock, made in his individual capacity, are inadmissible against the company. 89 **IndA**625, 167**NE**623.

885-76 156**SC**416, 153**SE**277. [b] 142 **Va**43, 128**SE**615, 45**ALR**664.

885-77 264**Mass**253, 162**NE**319. [e] **Evidence insufficient to show misconduct.**–142**Va**43, 128**SE**615, 45**ALR**664 (receiving compensation from borrowers from company).

885-80½-New. A director, aiding in carrying out, for his own benefit, the wishes of his co-conspirators in obtaining control of a majority of a loan corporation's stock by unlawful means, and making no proper investigation of loans, resulting in large losses to the corporation, has been held liable as a director. 264**Mass**253, 162**NE**319.

885-80⅓-New. Loans by directors, pursuant to a scheme to get control thereof for the purpose of personal gain only, were a breach of fiduciary duty. 264**Mass**253, 162**NE**319.

886-92 [h] **Acting as insurance agent.**–210**Ky**346, 275**SW**802. [i] **Power to make contracts** authorizes only contracts for proper corporate purposes. 27**F(2d)**912.

886-93 [a] **Trust company indorsing bonds guaranteeing payment** of principal and interest is not ultra vires. 35 **F(2d)**531.

886-94 IndA 169**NE**470 (bonds). [e] (3) Statute held not to authorize trust company to set off corporation's deposit against its unmatured notes where corporation had not been adjudged insolvent. **NJCh** 151**A**834. [p] (3) Money deposited as savings deposit constitutes such deposit regardless of disposition made of it by bank officials. 254**Mass** 444, 150**NE**193. (4) Savings deposits must be tested as such, although, by reason of error or fraud, they were entered in commercial department. 254 **Mass**444, 150**NE**193. [aa] Where pass-

book provides that checks are entered to depositor's account subject to payment, in depositing checks drawn on other banks, the relation between bank and depositor is that of principal and agent. 252Mass366, 148NE220. [bb] **False representations by bank's officers.**–254Mass451, 150NE178. [cc] **General depositor** cannot offset deposit against debt due him from bank on insolvency. 82NH396, 134A347. [dd] **Place of receipt.**–Mo 30SW(2d)100. [ee] **Payment of deposits.**–NJCh 151A 834. [ff] **Action for deposit.**–CalA 293 P93.

887–97½–New. deal in foreign exchange. 253Mass5, 147NE868.

887–99 253NY130, 170NE519.

887–99½–New. Acting as surety permissible in few instances. 5PaDist&Co 372.

888–5½–New. Petition in an action against a trust company undertaking to collect notes secured by cotton for damages for negligence of the company's agent must show that but for such negligence it could have made collection, or that there were other collaterals available to debtors to put up under their agreement to do do. 35GaA14, 132SE115.

888–5⅓–New. Acting as insurance agent is permitted by some statutes. 209Ky137, 272SW408.

888–5¼–New. On a maker's default in payment of an installment, and failure to perform conditions, the payee is entitled to sue on the note without first resorting to collateral. 265Mass98, 163 NE749.

888–5½–New. A trust company receiving the benefit of a loan obtained by its officers as individuals without its knowledge is not liable for the loan. Pa 146A595(1stcase).

888–5⅔–New. A bank president's declaration that "they" would accept a debtor's proposition made to him and the president of a loan company did not establish agency for the loan company. TexCivA 21SW(2d)26.

888–7 But see Md 148A234.

888–9½–New. Where president of a trust company purchases stock of another trust company the act is voidable only and subject to ratification by the corporation. 259Mass162, 156NE7.

888–10 256Mass58, 152NE104; Minn 230NW797 (under statute). But see 11 PaDist&Co 701. [b] **Contract of indorsement and guaranty,** is ultra vires, and void. 27F(2d)912. [c] **Estoppel does not operate** to enforce liability on ultra vires accommodation contract, especially as to person who has knowledge of its lack of power. 27F(2d)912. [d] **Estoppel.**–Trust company negotiating loan for federal land bank and guaranteeing mortgagor's note held not estopped from asserting ultra vires. Minn 230NW797.

888–12 8PaDist&Co 599. [a] **Chartered bank which by statute, has acquired right to act in same fiduciary capacities** as trust company and has added to its title words "and trust company" has no power to guarantee principal and interest of bonds secured by mortgages upon real estate which it sells to customers. 8PaDist&Co 599.

888–12½–New. Interest on loans.–6Pa Dist&Co 425.

888–13½–New. When acting as cotrustee or coexecutor with another of a trust estate, trust company must transfer the funds of estate to another depositary, 8PaDist&Co 225.

888–13½–New. and no agreement with its cotrustee or coexecutor can relieve it of such duty. 8PaDist&Co 225.

888–13¼–New. Where an investment company acts as an attorney to secure a loan from another the fund derived from the sale of a note and mortgage is held in trust and held by the company as agent for the owner although the note and mortgage are made out in the name of the company. 138 Okl 19, 280 P273.

888–14 97CalA1, 275P248.

889–24 [a] **Trust relation, and good faith and diligence** required of investment corporation. 137Misc208, 244NYS 487.

889–24½–New. A trust company may not hold as investments for trust funds in its custody bonds or certificates of a private corporation secured by first mortgage on real estate of such corporation. 8PaDist&Co 202.

889–24⅓–New. Investment of trust funds by trust companies.–14PaDist&Co 311.

889–27½–New. Liquidation and transfer of assets to a new company. The court, in approving a plan for transferring the company's assets in liquidation to a new company to be organized, must safeguard the creditors' interest. 133 Misc869, 234NYS550.

891–35 [a] **Preferences.**–287Pa326, 135 A133.

891–35½–New. Actual delivery of such bonds is none the less exclusive because the safe deposit box in which the bonds are deposited can be opened in the presence of the trust company's president. 287Pa326, 135A133.

892–42 [a] **Plan of state superintendent of banks to transfer property** of trust company in liquidation to new trust company has been held approved over objection of minority stockholders. 133Misc856, 234NYS363.

892–43½–New. A depositor in the commercial department in such case cannot set off his deposit against a debt for money loaned from the funds of the saving department. 247Mass530, 143NE 138.

892–45½–New. In a suit by the state bank commissioner to foreclose a pledge securing a debt to an insolvent trust company, intervention by the creditors of the corporations controlled by the debtors is demurrable. 178Ark619, 11 SW(2d)441.

892–46½–New. Statutes fixing the time for filing a claim against a trust company show legislative intent to have the litigation completed within a year, and are a valid exercise of the police power. MoA 298SW1049.

892–46⅓–New. Failure to file a claim within such statutory time bars recovery. MoA 298SW1049.

892–48 252Mass358, 148NE224; 252 Mass363, 148NE226; 252Mass366, 148 NE220.

892–48½–New. Commissioner of banks in collecting checks of customers for which bank acted as agent for collection only holds proceeds for benefit of true owner if traceable to any particular fund. 252Mass366, 148NE220.

892–48⅓–New. Where checks were deposited with a trust company for collection only to enable depositor, on company's insolvency to claim priority, it must show that money passed into a definite fund. 252Mass366, 148NE220.

893–49 252Mass358, 148NE224.

893–49½–New. Depositor of checks for collection held authorized to follow proceeds thereof in absence of superior right. 252Mass366, 148NE220.

893–49⅓–New. When fund is made up wholly of fruits of fraud against a myriad of victims, fiction that remainder of fund is trust for single depositor is inapplicable. 252Mass358, 148NE224.

893–49¼–New. Preference by one depositor, over other depositors of second class, is held inapplicable. 252Mass358, 148NE224.

893–49⅕–New. Facts held to establish no special equity in plaintiff over other depositors. 252Mass363, 148NE226.

893–49⅙–New. Where stockholder was without right to rescind subscription to stock, he could not establish a debt or gain priority as to funds in commissioners hands. 253Mass230, 148NE619.

893–49⅐–New. Court has power to enforce provision, that commissioner in possession of trust company for purpose of liquidation must give notices for proof of claims before specified time, since as practical matter time must be fixed after which no proceedings can be instituted against commissioner. 252Mass394, 147NE830.

893–49⅛–New. Limitation on suits to enforce claims more than two years from time commissioner took possession was reasonable. 252Mass394, 147 NE830.

893–49⅑–New. Claims should be presented when the account of the secretary of banking is before the court. 292Pa114, 140A768.

893–49 1/10–New. Banking secretary's plea of ignorance of the trust company's insolvency and knowledge thereof when it received note for collection is insufficient to place the burden of proof on claimant, 292Pa114, 140A768.

893–49 1/11–New. and since such plea is an insufficient denial the court must assume the trust company knew the acceptance of the note was fraud. 292Pa 114, 140A768.

893–49 1/12–New. Commissioner is liable for taxes on shares of stock where he has sufficient funds. Mo 31SW(2d)1069 (filing claim unnecessary).

894–59 IndA 169NE470. See also 30 Hawaii 343 (change of fiduciary obligation contemplated by statute).

894–60 [a] **Checks issued for drafts held preferred.**–167Ga852, 146SE898.

894–60½–New. An equitable preference may be enforced against a receiver holding proceeds of a draft of one who received in payment therefor a fraudulent draft of a trust company which it had no reasonable grounds to believe would be paid. 203 Iowa1060, 213NW 777, 57ALR1165.

895–71½–New. A debenture is a secured debt of the company under some statutes. 28Hawaii 232.

895–71⅓–New. Claim of United States for postal funds deposited with a trust company in the course of liquidation is entitled to preference. 17F(2d)437.

895–71¼–New. One claiming preference for funds converted must show that sufficient remained on deposit to pay claim and those of others similarly situated in whole or in part. IndA 170 NE792.

896–74 But see 292Pa114, 140A768. [a] **Trust cannot be imposed** on funds in possession of bank commissioner without proof that funds came into his possession. 83NH583, 145A670. [b] **Beneficiaries of trust held entitled to preference of general depositors.**–96Fla 834, 120S1(2dcase) (preference in securities).

896–78½–New. An antecedent debt of a trust company appointed executor of the estate of its creditor is not a fiduciary obligation under statutes providing for distribution of insolvent trust company's assets. 28Hawaii 232.

896–78⅓–New. Assets of separate department.–17F(2d)437.

896–78¼–New. A statute providing a preliminary examination as to trust funds during liquidation proceedings applies only to technical and continuing trusts. 292Pa114, 140A768.

896–78⅕–New. Where withdrawals from a mixed fund have never reduced the balance to less than the trust fund deposited, cestui que trust is entitled to the full payment. 292Pa114, 140A768.

896–78⅙–New. Purchaser of notes and mortgages left with trust company and for which certificate of deposit was issued held entitled to payments of principal and interest as owner. IndA 170 NE792.

896–79½–New. Counsel fees. 258Mass 196, 155NE7.

896–80 [c] **Other definitions.**–74CalA 734, 241P945.

897–86 [c] **Bank taking up and presenting draft for payment** at request of drawee held not holder and warrantor of genuineness of indorsements. 14 F(2d)131.

897–87 [e] **Member is charged with knowledge of usage** of banks taking paper drawn on other banks and passing it through clearing house. 74CalA734, 241P945.

897–88 74CalA734, 241P945; 98CalA 523, 277P354. [a] **Agreed interpretation of significance of clearing house stamp indorsement** is binding on member banks. 74CalA734, 241P945.

898–90 160Minn89, 199NW514. [b] **Question of payment of check is not ultimately determined** until drawee bank

has had opportunity to examine check. 44F(2d)111.

898-93 14F(2d)131.

898-93½-New. The stamp prescribed by a clearing house containing the word "paid" is used for clearing house purposes only and is not a general indorsement when placed on a check held by a member for collection but is merely a conditional receipt to become absolute when the drawee pays the check. 74CalA734, 241P945.

898-97½-New. Under a clearing house rule guaranteeing the validity of an indorsement, the collecting bank is liable to the drawee bank paying a check bearing a forged indorsement. 98CalA 523, 277P354.

898-97¾-New. A forged indorsement is not a missing indorsement within the rule that a clearing house indorsement shall not be construed to supply a missing indorsement. 98CalA523, 277P354.

899-4 [e] **Rules do not apply to forged checks.**-234 IllA39.

900-23 75Mont582, 244P883 (original act with amendatory and supplemental acts constitute charter of Federal Reserve System).

901-41 75Mont582, 244P883 (six members appointed by president).

902-57 75Mont582, 244P883.

902-58 75Mont582, 244P883.

902-59 [a] **Under this provision** board may make public, statements as to condition of affairs, such as money shortage and increased volume of collateral loans. 34F(2d)910.

903-69 See also 9PaDist&Co 401.

909-26 254NY218, 172NE475(2dcase). [a] **As to checks drawn on nonmember bank,** reserve bank is mere agent for sending member bank under contract between reserve and member banks. 226AppDiv225, 235NYS197 (reserve bank's status as owner or agent for collection depends on contract with member banks).

909-26½-New. An insolvent bank's deposit balance in a federal reserve bank may be applied on checks sent through the latter for collection and accepted by the former bank. 30F(2d)198.

909-34 34F(2d)910 (determination of reasonable discount).

909-35 34F(2d)910.

910-40 174Minn535, 219NW908; 75Mont582, 244P883. [b] **Act permissive and not mandatory** as to provision that board may require bank to act as clearing house. 75Mont582, 244P883.

910-40½-New. Federal reserve bank is not bound to receive checks for collection. 174Minn535, 219NW908 (checks on nonmember banks); 75Mont582, 244 P883.

910-40⅓-New. Such banks, however, are authorized to collect a check, although drawn on nonmember banks which have refused to assent to clearance at par. 174Minn535, 219NW908 (publishing par list not coercive).

910-40¼-New. Reserve bank may receive at its option paper for collection against nonmember bank, 75Mont582, 244P883.

910-40½-New. and may collect such paper if it can do so without payment of exchange which the act prohibits. 174Minn535, 219NW908.

910-40¾-New. But a nonmember bank cannot be coerced into relinquishing its right to charge reasonable exchange on remittances. 174Minn535, 219NW908.

910-40⅞-New. Circular issued by federal reserve bank with approval of federal reserve board constitutes continuing offer by bank to act as collecting agent for member banks under conditions stated. 75Mont582, 244P883.

910-40⅛-New. Depositor of a check with a member bank which sends it to a reserve branch bank for collection is bound by the rules and regulations of federal reserve board. 75Mont582, 244 P883.

910-40⅛-New. It is not against public policy for a federal reserve bank to attach to its acting as a collecting agent the condition giving it the right to accept drafts in payment of checks. 75 Mont582, 244P883.

910-40 1/10-New. Employment of a federal reserve branch bank by a member bank as a subagent for collection of a check is not shown to be under compulsion and therefore void as a contract, by the mere fact that member banks are required to maintain a certain minimum reserve with the reserve bank and are subject to penalties for impairment of such reserve. 75Mont582, 244P883.

910-40 1/11-New. Although a federal reserve bank accepting through a branch bank a draft from a nonmember bank in payment of check sent to latter bank for collection may be liable to owner of check if draft is accepted with knowledge that bank sending it is insolvent, 75Mont582, 244P883.

910-40 1/12-New. the suspension of the bank after the issuance of the draft and before it could be collected is not alone sufficient to fasten liability upon it, because the issuing bank may have been solvent at time draft was sent. 75Mont 582, 244P883.

912-63½-New. Such bank's officers, agents, and employees are by statute made liable to federal law, which statute is constitutional. 274US256, 47SCt 629, 71Led1036.

912-64½-New. [§ 1138a] 1½. **Actions against.** Bill or complaint held insufficient. 34F(2d)910.

912-65 [a] **National bank and its foreign branch** in business transactions deal as separate entities. 6F(2d)762. [b] **Discretion.-DC** 33F(2d)805.

914-84½-New. A federal reserve bank may charge the amount of a check to the reserve fund of a drawee bank which closes before the transit time expires. 281US84, 50SCt235, 74Led718.

915-99 273US548, 47SCt462, 71Led 767.

915-99½-New. The Federal Farm Loans Act requiring a thirty days' notice of default before foreclosing a mortgage is applicable only to loans made by federal land banks through farm loan associations under § 15 of the act. 170Ark778, 281SW385.

915-99⅓-New. A litigant, who derived through a party interested in a loan procured from a federal joint stock land bank, cannot object to the statutory redemption period from foreclosure sale on the ground that the size of the loan on security offered was in excess of the bank's powers. 129Kan159, 281P879.

915-1 [a] **Question for jury** whether agent for nonmember bank. 133Misc 277, 231NYS620.

915-1½-New. Federal reserve bank, acting merely as agent for collection, cannot set off the balance due on checks sent for collection against an insolvent bank's stock liability. 30F(2d)198.

915-2½-New. The federal reserve bank cannot claim preference against an insolvent nonmember bank for a draft covering checks forwarded to the drawee bank for collection, on the theory that it had no power to become creditor of the nonmember bank. 207 Iowa471, 220NW10.

915-2¼-New. Other transactions with nonmember banks. A federal reserve bank, in transactions with nonmember banks, may be charged with unlawful preference as the creditor of the nonmember. 133Misc277, 231NYS620.

915-2¼-New. In transactions with nonmember banks, a federal reserve bank is subject to rules applicable to any controversy, except as regulated by statute. 133Misc277, 231NYS620.

915-4½-New. [§ 1175a] 14. **Misapplication of Funds and Moneys of Member Bank.** Funds are misapplied where, on the substitution of new paper for matured paper held by the bank, valuable collateral is surrendered and nonequivalent security substituted. 30F(2d)25.

915-4⅓-New. Misapplication with intent to defraud must be shown. 24 F(2d)946 (evidence insufficient to take case to jury).

915-4¼-New. The word "funds" in the statute might include both money and "credits" if they were not specified. 30 F(2d)25.

915-4⅙-New. The intent to deceive responsible bank officers as to the character of paper carried as bank assets constitutes an intent to defraud, although pecuniary injury to the bank is not intended. 30F(2d)25.

915-4⅙-New. The transaction is not prevented from being a misapplication of the bank's funds by the fact that a loan on fictitious security might be collectible. 30F(2d)25.

915-4 1/7-New. There is an inference of intent from the fact of obtaining money out of a bank by any kind of false pretense. 30F(2d)25.

915-4⅛-New. Funds are misapplied where a bank officer makes a loan to an insolvent customer without the knowledge of his superiors, and without additional security. 30F(2d)25.

915-4 1/10-New. Whether the transaction constituted a willful misapplication of the bank's funds is a question for the jury. 30F(2d)25.

917-39½-New. [§ 1205a] N. **Federal Farm Loans.** A purchaser of farm loan bonds after the federal farm loan board has appointed a receiver for a joint-stock land bank cannot question such appointment, nor seek the appointment of a court receiver. 31F(2d)75.

917-39⅓-New. A receiver of a land bank appointed by the farm loan board has the power to assess stockholders. 31F(2d)75.

917-39¼-New. A receiver has the right to the possession of assets pledged for payment of bonds, although the debt has not been paid. 31F(2d)75.

917-39⅕-New. A receiver of a land bank may maintain an action against stockholders to enforce liability for an assessment made by the farm loan board. 29F(2d)468 [certiorari granted 279US829, 49SCt346, 73Led980(4th case)].

917-39⅙-New. The farm loan board is authorized to assess stockholders of an insolvent joint-stock land bank and enforce their personal liability. 29F(2d) 468 [certiorari granted 279US829, 49 SCt346, 73Led980(4thcase)].

917-39 1/7-New. Knowledge of a simulated sale by the secretary of a farm loan association through which application was made to a bank for a loan is not legally imputable to the bank. Tex CivA 17SW(2d)1079.

917-39⅛-New. Restrictions in the act of congress of July 17, 1916, on loans by a federal land bank are for the benefit and protection of the government, and it alone has power to redress the wrong done by violation thereof. 294 Pa86, 143A500.

917-39⅙-New. A bank has no power to levy an assessment against stockholders for liability created by statute. 280US 49, 50SCt21, 74Led160.

917-39 1/10-New. The receiver of a joint-stock land bank appointed by the federal farm loan board is without right to maintain suit for enforcing stockholders' liability. 280US49, 50SCt21, 74 Led160.

917-39 1/11-New. The Federal Land Bank, created by the Federal Farm Loan Act for the purpose of loaning money to farmers, and deriving its powers wholly therefrom, is not thereby affected as regards its liability on acquiring land subject to covenant, for failure to perform such covenant. 130Or148, 279P546.

917-39 1/12-New. Statute prohibiting land bank employee from receiving compensation other than salary or fees is inapplicable to transactions between employees and bank. 42F(2d)937.

917-39 1/13-New. Purchase from federal land bank of sheriff's certificate by bank employees, on which they made profit is not crime in absence of fraud or collusion. 42F(2d)937.

BAR

918-18 191NC535, 132SE563.

BARBERING

919-28 98NJEq194, 129A739, 740 [quotCJ] (hair bobbing is branch of barber business).

BARGAIN

920-35 197Cal 189, 240P21.

BARGAIN AND SALE

993 42 187Cal 190, 191P[2].

BARGAINER

926 4 270MoA[2]1, 206SW529.

997 30 270MoA[2]1, 206SW529. [b] **Indictments held insufficient** 270MoA[2]1, 206SW529.

998 42 Contra 270MoA[2]1, 206SW529.

BARITER

931 26 [c] 264Mass[2]79, 147N[2]884.

BARREL

944 68½ New. A vessel of varying capacity, made of flexible materials, 11 CuCl[2]465.

BASTARDS

939 1 21P(2d)[2]91. [a] **Child born out of wedlock presumed natural father than illegitimate** 11Philippine[2]11.

939 2 21P(2d)[2]91.

939 3 21P(2d)[2]91, 91CalA[2]76, 265P[2]6.

939 9 [d] (1) Child born out of wedlock presumed natural father than illegitimate 11Philippine[2]13.

939 10 [c] (2) Issue of marriage not according to class custom are bastards in absence of acknowledgement 1 LaA[2]34, 1 So[2]61. [1] **Children of scandalous wives are not legitimate** 201P(2d)[2]5.

940 20 21P(2d)[2]1, 216W(2d)[2]574, 161Ind[2]615, 109N[2]22, 31 Ignat[2]1, 16LaA[2]65, 11Ann[2]61, 116Mich[2]61, 135NW[2]101, 20 OhA[2]95, 151N[2]17, 115Okl[2]91, 21P[2]111, 120Okl[2]100, 150P[2]1025. [c] Okl[2]7, 25P[2]6, 91Pennsylv[2]15, 10Okl[2]11, Miss[2]91, 128NW[2]1, 120Okl[2]100, 150P[2]1025. (3) Presumption of legitimacy in one of stranger known to law and degree of proof needed to overthrow it be very convincing 20AppDi[2]42, 240NY[2]159. [b] **Reason for rule** 116Okl[2]91, 150P[2]1[2]. [c] **Presumption is rebuttable** 21Okl[2]7, 21P[2]6.

940 25 21Okl[2]1, 216W(2d)[2]1.

940 27 But see 27Mich[2]53, 211NW[2]76.

940 28 [a] **Declaration of alleged parents** raises no presumption of legitimacy 2 HuY[2]61.

940 30½ New. Law will not be construed to declare children illegitimate unless such construction is unavoidable 5 [illegible]

940 31 200Cal[2]10, 252P[2]16; 129Ill[2]152, 160SE[2]1; 230IllA[2]1; 81IndA[2]91, 16N[2]520 (both wife and husband are precluded from denying parentage of child born after marriage) 27Ky[2]6, 116W(2d)[2]5; 215Ky[2]; 108W(2d)[2]9; 161La[2]97, 1000 So[2]161(1015, 1009[2]); MoA[2]1000W[2]15, 231 [illegible] 7 Mont[2]168, 251P[2]103; NJ[2]1[2]150 (business of husband must be shown to overcome presumption) 200NY[2]202, 11[2]1[2]; 120Mich[2]1; 211NY[2]1[2]; 20AppDi[2]612; 150NY[2]1[2]; 30 OhA[2]1[2]; 151N[2]17; 115Okl[2]91, 21P[2]111, 215P[2]1[2]; 12Portoriko[2]0; 165Tenn[2]5, 200SW[2]5; TexCivA 200SW[2]61; Wash 201P[2]1039; 6 OrCl[2]97, [1923] [Dom R[2]1]. [d] **Testimony of illegitimate with regard to his parentage** has been held not admission or estoppel that would overthrow presumption of legitimacy 2 [illegible]

940 31½ New. The presumption of legitimacy is disputable 112 Okl[2]1, 237P[2]60, 251P[2]6.

941 32 7 Mont[2]168, 251P[2]103; TexCivA 223SW[2]664.

941 33 161La[2]707, 109N[2]895; 57 Ind[2]95, [1924] [Dom R[2]7].

941 34 27Mich[2]53, 211NW[2]76; 117 Okl[2]1, 237P[2]41, 150P[2]1; 165Tenn[2]38, 200SW[2]75.

941 34½ New. or unless intercourse be shown impossible 57 Ind[2]95, [1924] [Dom R[2]].

942 36 20CalA[2]91, 252P[2]67; 225Ky[2]651, 228W(2d)[2]1001, 227Mich[2]53, 211NW[2]76; Minn 223NW[2]1001(dissent); MoA[2]223SW[2]832, 834 [illegible]; 22 OhA[2]528, 154NE[2]; 30 OhA[2]42, 164NE[2]121; 165Tenn[2]5, 200SW[2]78; TexCivA 200SW[2]664. [c] **Where impotentability of husband is inferable,** presumption is rebutted 22 OhA[2]35, 151NE[2].

942 37 200Cal[2]10, 253P[2]15; 30Hawaii 274 (presumption rebuttable); 161La[2]707, 109N[2]895; 89AppDi[2]48, 86NY[2]150.

943 38 200NY[2], 170N[2]471.

943 40 1 Portoriko[2]0, Civil Code, Code 8 191. Legitimate children are those born 180 days after the marriage has been celebrated and before 300 days have passed after the marriage has been dissolved 165Tenn[2]5, 200SW[2]5.

943 41 [a] **In Porto Rico** 12Portoriko[2]78. [b] **Proof of wife's adultery during period of gestation** will not rebut presumption of legitimacy of child born ten after divorce suit begun during which time marital relations continued. 165Tenn[2]18, 200SW[2]5.

943 41½ New. There is no presumption of legitimacy of a child manifestly begotten after the parents became involved in a divorce litigation in which decree of divorce was rendered 165 Tenn[2]18, 200SW[2]5.

943 41¾ New. There is a presumption that after the filing of a divorce bill in Illinois relation between husband and wife ceased in the absence of proof to the contrary 165Tenn[2]18, 200SW[2]5.

943 41¾ New. A child born ten months and nineteen days after the beginning of divorce proceedings is not presumed to be the product of cohabitation of husband and wife prior to the separation 165Tenn[2]18, 200SW[2]5.

943 43 161La[2]615, 109N[2]22, 16LaA[2]65, 11Ann[2]61; 31Pennsylv[2]1. [b] **One born recognized as brother** is presumed to be legitimate brother 161La[2]615, 109N[2]22.

943 43 230Ky[2]1, 108W(2d)[2]17; illegitimacy will not be presumed after death of parties 91Pennsylv[2]1.

943 44 16LaA[2]65, 11Ann[2]61 (burden of proving illegitimacy) 230AppDi[2]631, 245NY[2]120 (christening, baptismal) 120AppDi[2]15, 240NY[2]159, 120Mich[2]63, 245NY[2]101; 30 OhA[2]35, 153NE[2]1; 30 OhA[2]42, 164NE[2]121. See also 18 Fiqui[2]119.

943 46 251IllA[2]10, 225Ky[2]119, 148SW[2]1[2]9, 225Ky[2]1, 1[2]9[2]1[2].

943 48 120Mich[2]61, 245NY[2]101 (affidavit and certificate held inadmissible) [1] **In Porto Rico** 1 Portoriko[2]0, [illegible] [c] **Evidence held admissible** 165Tenn[2]5, 200SW[2]5.

943 49 TexCivA 200SW[2]63.

943 51 CalA 250P[2]1[2]0 (circumstantial evidence) [a] **Evidence of association and opportunity** held sufficient to warrant admission of such evidence CalA 250P[2]1[2]0.

943 53 165Tenn[2]15, 200SW[2]5.

943 54 Bush [1869] 2Dom R[2]99. [b] **Testimony of woman as to nonaccess of her husband** is not competent over objection 230AppDi[2]51, 240NY[2]119.

943 55½ New. The opinion of a witness that the alleged father was fond of his son is admissible where the legitimacy of the son was raised on the question of heirship TexCivA 200SW[2]63.

943 56 But see 12Portoriko[2]99, 100.

943 58 [b] **Former marriage** 3 Portoriko[2]99.

944 60 120Kan[2]65, 241P[2]211, 242 [quot C]]; 225Ky[2]1, 148W(2d)[2]5, 161La[2]56, 109N[2]95; 117 Okl[2]1, 237P[2]41, 251P[2]1, 246P[2]1; TexCivA 200SW[2]63.

944 61 120Kan[2]56, 241P[2]211, 242 [quot C]].

944 62 120Kan[2]65, 241P[2]211, 242 [quot C]].

944 63 120Kan[2]60, 241P[2]211, 242 [quot C]].

944 64½ New. Declarations of the mother are admissible to impeach her testimony 112 Okl[2]1, 237P[2]60, 251P[2]6.

944 65 30Hawaii[2]1, 30 OhA[2]42, 164NE[2]121.

944 66½ New. Statement of plaintiff's deceased mother that plaintiff was legitimate is admissible in proceeding to establish her legitimacy for purpose of inheritance 30 OhA[2]42, 151NE[2]15.

944 72 119Kan[2]10, 241P[2]11.

945 75 11, Ore[2]1, 251P[2]11, 246P[2]1.

945 77 131CalA[2]10, 12P[2]10.

945 78 But see 5 Ind[2]95, [1924] [Dom R[2]7].

945 79 390 Ill 488, 160NE[2]847; 238App Di[2]75, 236NY[2]130 (evading), 148 Misc[2]90, 238NY[2]78; 187Misc[2]91, 248 Ky[2]65; 7 OhA[2]12, 151N[2]17; 11 Ore[2]1, 251P[2]11, 246P[2]1, 91Pennsylv[2]7, 107WVa[2]608. [1] **Proof of non access.** [a] 120Mich[2]63, 245NY[2]101, 21 OhA[2]24, 153NE[2]1. [b] 16LaA[2]61, 110Ann[2]608 (evidence held insufficient) [1] 4 **Portoriko** [illegible] **held sufficient** 1 Portoriko[2]0, [illegible] [c] 120Kan[2]60, 241P[2]211, 242 [quot C]], 200SW[2]5, 5 Ind[2]95, [1924] [Dom R[2]7], 225Ky[2]1, 148W(2d)[2]5, 161La[2]56, 109N[2]95, 11Ann[2]61, 110Ann[2]550, 1[illegible], evidence) NH 1[illegible] 220, 115Okl[2]91, 237P[2]7, 12Portoriko[2]76. [h] 200Mich[2]1, 1[illegible] (1920); 200Ill 145, 160NE[2]91, 1[illegible] 77[illegible], 245NY[2]101, 251Ky[2]19, 148W(2d)[2]1[illegible], 251Ky[2]19, 148W(2d)[2]974; 120Mich[2]1, 1[illegible], 1[illegible] 120, 1[illegible], 1[illegible], 1[illegible] 217Mich[2]60, 1[illegible]; 1[illegible] 242NY[2]184; 30 OhA[2]42, 164NE[2]121; Wash 201P[2]1039, 57 Ind[2]95, [1924] [Dom R[2]7]. [i] **Evidence held sufficient to show that plaintiffs were acknowledged natural children** 1 Portoriko[2]0. [l] **Evidence held sufficient to show that deceased was** not natural father of administrator 10, Wis[2]1[illegible], 1[illegible]. [m] **Evidence held insufficient to show legitimacy** 160La[2]169, 111[illegible]; 201Mass[2]1[illegible], 10 NE[2]5. [n] **Evidence held sufficient to show legitimacy** NJ 1[illegible]; 2.

940 34 17Mont[2]0, 251P[2]103; 117 Okl[2]1, 237P[2]41, 251P[2]1.

940 36 117 Okl[2]1, 237P[2]41, 251P[2]1. See also 57 Ind[2]95, [1924] [Dom R[2]7].

940 36½ New. In a guardianship proceeding it lies within the exclusive province of the trial court to believe affirmative testimony as to the paternity of a child as against the mother's denials 101CalA[2]110, 2[illegible]

937 37 21P(2d)[2]91.

937 38 21P(2d)[2]91, 115Nebr[2]83, 218NW[2]19, 120Ore[2]195, 208P[2]2. [b] **Legitimation at home of marriages recognized in Indian customs** 120Okl[2]13, 20[illegible]P[2]91. [c] **In Rhode Island** 51 [illegible] [d] **Legislature may legitimate children of illegitimate relations without marrying parents** 18 Ore[2]195, 208P[2]2[illegible].

940 1 151Mich[2]1, 1[illegible]4[illegible].

940 2 1,0Minn[2]17, 218NW[2]39, 51ALR[2]102, 120Okl[2]100, 250P[2]1004, 113Okl[2]0, 200P[2]40, 130Ore[2]98, 208P[2]200, 140Va[2]1[illegible]. [a] **Statute should be liberally construed** 106WVa[2]1[illegible]. [d] **Purpose of statutes** 1[illegible] Ore[2]2, 208P[2]2[illegible].

940 3 [g] 120Okl[2]100, 250P[2]1034.

940 3 120Okl[2]100, 250P[2]1034. [a] **Under statute** where man and woman cohabit in state as husband and wife for over one year and children are born to such illicit relationship children are made legitimate regardless of formal legitimation of parents 18 Ore[2]195, 208P[2]2[illegible].

940 3½ New. When it appears that an attempted marriage is void under the statute one who claims the protection must show that he was born of such marriage 120Okl[2]100, 250P[2]1004.

940 3½ New. The presumption given a child born during lawful wedlock does not apply to such marriage 120Okl[2]100, 250P[2]1004.

940 3½ New. and the law of probable access to mother has no application 120Okl[2]100, 250P[2]1004.

940 3½ New. and a judgment which shows that it rests on such presumption and probable access will not be upheld 120Okl[2]100, 250P[2]1004.

940 7 20Hawaii[2]5, 200 [quot 11], 195Ore[2]98, 208P[2]2, 201 [quot 7]].

940 8 21P(2d)[2]91, 120Okl[2]100, 250P[2]1034; 1[illegible] 120Okl[2]100, 250P[2]1034. [1] **In Nebraska** 218NW[2]19. 120Okl[2]19, 201P[2]920; 89Portoriko[2]0, 6 OrCl[2]97, 32Portoriko[2]18. See also 7 LaA[2]29. [1] (4) **Acknowledgment need not be as to** statements made to a child were legitimate ones 1 Portoriko[2]0. [1] **In Portoriko** 1 Portoriko[2]0 (consideration shown). [k] **Ward children** in relation of succession behind those legitimated under decree 120Okl[2]19, 201P[2]920. [l] **Legitimation and acknowledgment distinguished** 16LaA[2]1.

949 14 197Wis146, 221NW737.
949 16 80Ind556, 148N[illegible]643.
949 18 41F(2d)464.
949 20 206Iowa949, 221NW[illegible]. [b] **Negative testimony of nonrecognition held not conclusive.**—206Iowa[illegible], 221 NW[illegible].
949 21 51LaA371. [a] 206Iowa939, 221 NW[illegible]. 119Kan810, 244P844; [2] Okl [illegible]P813; 32PortoRico 548; 34PortoRico 648.
949 22 See also 32PortoRico 548.
949 26 121Okl254, 249P313.
950 29 But see 206Iowa939, 221NW [illegible], neighborhood report admissible though not controlling).
950 31 48Philippine401. [a] (1) 131LaA 696, 1298171 (statute construed). (2) Writing held insufficient. 131LaA696, 1298177.
950 32 115Nebr553, 213NW819; 125 Okl208, 257P303. [b] (1) See also 61LaA 360. [a] (3) Subsequent marriage of parents does not enable child to inherit under—due acknowledgment was made prior to marriage that she was their child or as prescribed for legitimation by father before or after marriage. 125 La[illegible]. 104N[illegible]315. [c] (1) 115Nebr553, 213NW819. [f] (1) 125Okl208, 257P 30[illegible]. [g] **Signature.**—115Nebr553, 213 NW819.
950 34 115Nebr[illegible], 213NW819; 125 Okl[illegible], 257P303.
950 35 **Minn** 230NW483 (agreement to pay lump sum for support in lieu of payments ordered by court held insufficient).
951 37 341(2d)690, 41F(2d)464, 1a1 Md321, 114A497. See also 34PortoRico [illegible]. [b] **In Porto Rico.**—32PortoRico 76.
951-37½-New. Law in force when child born governs legal status. 35PortoRico 158.
951-39 21F(2d)801; 101CalA110, 281P (issue of legitimation sufficiently pleaded); 91AppDiv344, 220NY242; 117Misc391, 243NYS638; 197Wis146, 221NW737 (child of natural parents who marry, being legitimated under statutory provision, must be deemed their son). See also 164La15, 1138718; TexCivA 1.8W(2d)66. [c] **Where marriage of parents legitimates child,** annulment of the marriage makes child illegitimate. 91AppDiv344, 220NY242. [d] **Word "reputed,"** in statute providing that marriage of mother and reputed father of bastard child renders it legitimate, means regarded, deemed, considered, or held in thought. 220Ala47, 124880 (dicta).
951-41 220Ala47, 124880 (dicta) (statutory method of inheriting from father); 254IlA334 (acknowledgment may be oral); 80IndA556, 148N[illegible]643; 210Ky24, 275SW782.
951 43 [illegible]Ala47, 124880 (dicta).
952 44 [illegible]Hawaii[illegible], 265 [quotCJ]; 1[illegible]Misc[illegible]6 [illegible]NYS629.
952 47 [illegible]Hawaii[illegible], 265 [quotCJ]; 19[illegible]NC[illegible]6, 1[illegible]SE[illegible].
952 50 245NY[illegible], 157N[illegible]877 [foll 245NY390, 159N[illegible]50]. [a] But see 227 Ky[illegible], 118W(2d)183.
952 53 21F(2d)801; [illegible]Ariz[illegible], 261P 10 (remedy cumulative and not exclusive). 151Md321, 134A497; 44 Philippine114; Ont [1930] 1DomLR856 (jurisdiction of certain court under statute). [b] **In Philippines.**—44 Philippine 311. [j] **Attachment of property to secure effectiveness of judgment** in action of filiation against heirs see 33PortoRico 31 [1]. **Parties.**—34PortoRico 170 (heirs of alleged father necessary parties defendant but not executor or administrator).
952 53½-New. Instructions on the question of legitimation must be limited to questions of marriage and birth and not to statements of other parties. 80 IndA[illegible]6, 148N[illegible]643.
952 53⅔-New. Action for acknowledgment held under evidence not barred by limitation. 34PortoRico 643.
952 55 [a] **Allegations held sufficient.**—34PortoRico 22.
952 55½-New. Proceeding held valid although petition was addressed to judge at term instead of to clerk. NC 15[illegible]SE[illegible].
952 56½-New. **Costs.**—In Porto Rico, costs, expenses, and attorney's fees in an action of filiation decided in favor of plaintiff should not be charged to the estate of the father, but to the heirs defending. 33PortoRico 268.
952-56⅔-New. Ordinarily appellate court does not reverse finding of lower court. 35PortoRico 388.
953 60 41F(2d)464; 220Ala47, 124880 (dicta); 80IndA[illegible], 148N[illegible]643; 1a1 Md321, 134A497; 132Misc[illegible]76, 230NYS [illegible]; 198NC[illegible], 149SE[illegible]77; 125Okl208, [illegible]P[illegible]; 128Okl149, 261P920; 150Va [illegible], 149SE[illegible]. [f] **In Porto Rico.**—20 PortoRico 836.
953 62 80IndA[illegible]6, 148N[illegible]643.
953 63½-New. This does not apply to a contingent remainder. 195Misc[illegible]76, 211 NYS[illegible].
953 66 41PortoRico[illegible].
953 68 But see 20PortoRico 954.
953 70 See also 136Misc[illegible]83, 242NYS 164.
953 70½-New. Court has no jurisdiction to determine legitimacy of child, where divorce action by husband was dismissed. 240NY[illegible]208, 148N[illegible]548.
953 70¾-New. Court has no jurisdiction to determine legitimacy of child involved in an action for divorce for wife's adultery, when divorce action is dismissed by court. 240NY[illegible]208, 148N[illegible]548.
953 72 MoA 292SW447; 46Philippine 843; 103WVa410, 137SE[illegible]51, 51ALR 1502.
953 73 [a] **That mother is in poor circumstances** is not ground for turning child over to custody of putative father. 1[illegible]PaDistCo[illegible].
953 79 151Va130, 144SE[illegible]432; 103WVa 410, 137SE[illegible]51, 51ALR1502.
953 82 See also 151Va130, 144SE[illegible]432, 431 [citCJ].
953-87½-New. Lack of affection of a father for an illegitimate child cannot be assumed in proceedings for the child's custody. 151Va130, 144SE[illegible].
953 91 151Va130, 144SE[illegible]432.
953 95 70CalA680, 234P412; 212Ky 646, 279SW1091, 1093 [quotCJ]. See also 84CalA775, 258P[illegible]53.
953-97 341(2d)690; 212Ky646, 279SW 1091, 1093 [quotCJ].
953-97½-New. The right to inherit from an illegitimate child is not determinative as to the question of a duty to support. 232MoA553, 292SW85.
953 98 1[illegible]Minn[illegible]4, 221NW911(2d case).
953 99 70CalA680, 234P412. [c] **Duty to support natural child.** 32Ariz[illegible]73, 261 P40. [f] **Under statute requiring "parent"** to support neglected child, father is not required to support illegitimate child. 232MoA553, 292SW85.
955-1 [b] **In Porto Rico.**—33PortoRico 673 (two hundred dollars held sufficient compensation).
955-1½-New. **Children of unmarried parents act.** Allowance can be made only in accordance with provisions of act and must be supported by evidence. 24 AlaA[illegible]303, [1925] 2DomLR912, [1926] 3 WestWkly435.
956 6 232MoA553, 292SW85, 87 [citCJ].
956-8 70CalA680, 234P412 (under civil code duty of father and mother is mutual); 232MoA553, 292SW85, 87 [citCJ].
956-15½-New. The child may sue on contract by father with mother for its support. 189NC503, 127SE[illegible]553. [a] **Judgment in action by child** directing payment into court or to guardian of stated sum for benefit of plaintiff to present time and from present time until further order of court of certain monthly sum is proper. 189NC503, 127SE[illegible]553.
956-16 189NC503, 127SE[illegible]553, 195NC 161, 150SE[illegible]812(dicta).
956-17 [b] **Measure of damages on breach of agreement.** 198NC298, 151SE[illegible]645.
956-19 But see 198NC298, 151SE[illegible]645.
957 24½-New. A complaint alleging that the father of a bastard was adjudged such and directed to pay certain sums to the child welfare board, and that the board agreed to pay such sums to plaintiff for boarding and caring for the child, and that the father paid such sums to the board but the board refused to pay plaintiff, states a cause of action. 1[illegible]Minn[illegible]4, 221NW911(2d case).
957 24¾-New. Partial performance by third person does not relieve purported father's duty thereunder. 198NC298, 151SE[illegible]645.
957 24¼-New. Effect of contract as to liability of father to third person for maintenance. Mask [1930] 4DomLR884.
957 27 189NC502, 127SE[illegible]553.
957-30 212Ky341, 279SW327 (mere promise).
957 32 189NC502, 127SE[illegible].
957 32½-New. Agreement by mother not to prosecute for reduction void. 212 Ky341, 279SW327 (contra to public policy).
957 34 212Ky341, 279SW327. [a] **Actions.** 212Ky[illegible], 279SW[illegible]. [illegible]Ala[illegible], 12[illegible]SE[illegible] (dicta). See also 70CalA680, 234P412. [a] 121 Okl[illegible], 163N[illegible]301(2dcase). [b] **Jurisdiction and venue of prosecution.**—Kan 292P790. [d] (1) 71CalA694, 236P208. (2) 71CalA694, 236P208. [e] 71CalA 694, 236P208. [f] 71CalA694, 236P208. [g] 71CalA694, 236P208. [h] **Not identical with offense of begetting same child, but it is assumed that acquittal of latter offense would bar prosecution for other.** 255Mass89, 154N[illegible]586. [i] **Former acquittal or conviction.**—PaSuper428. [j] **Judgment in bastardy proceeding and payment of money held not a bar to prosecution,** where defendant did not give a bond for support of child. 33OhA304, 169N[illegible]583.
957-39½-New. Such neglect or refusal to support illegitimate children is prima facie willful, without just cause, and unreasonable. 264Mass450, 162N[illegible]900.
957 41 175Minn533, 221NW911(2d case). Contra to WVa. [illegible]
957 41½-New. Inability to support must be proved by the father. 24OhA 161, 156N[illegible]805.
957 41¾-New. Evidence held sufficient to show ability of father to provide. 24 OhA461, 157N[illegible]805.
957 41¼-New. Charge held not erroneous. 24OhA461, 157N[illegible]805.
957-41½-New. The obligation of a natural parent to support his illegitimate child, which had ceased upon adoption of the child by another man, again arises when decree of adoption is revoked. 255Mass89, 154N[illegible]586.
958 43 41F(2d)464.
958-47½-New. Where the statute bestows a given status, it is to be liberally construed so that the child may be given the benefit of existing remedies. 232 MoA553, 292SW85.
958 48 341(2d)690. [a] **In Porto Rico.** 32PortoRico 76.
958 49 [a] **Succession statute of another state.**—34F(2d)690.
959 51 41F(2d)164; **DelCh** 139A464, 165 [quotCJ]; 232MoA553, 292SW85, 87 [citCJ]; 125Okl438, 259P299; 29 PortoRico 836, 840 [citCJ].
959-53 DelCh 139A464, 163La755, 112 8721; 308Mo314, 274SW77; 115Nebr 553, 213NW819.
959 54 143NC402, 141SE[illegible]726, 729 [quotCJ].
959 55 DelCh 139A464; 232MoA553, 292SW85, 87 [citCJ].
960 59 DelCh 139A464.
960 60 See also 20PortoRico 836.
960 61 [a] **Such a statute is remedial one.** DelCh 139A464.
960 67 DelCh 139A464. But see 308Mo 314, 274SW[illegible].
960 69 DelCh 139A464.
961 74 220Ala47, 124880 (dicta).
961-75 91LaA129, 1198494.
961-76 217Ky671, 290SW482; 166La 453, 117852; 168La542, 128844; 140 Miss726, 106S442; 308Mo314, 274SW 77; 125Okl208, 257P303; 48[illegible]459, 137A381. But see 7LaA407. [d] **In Louisiana.**—11LaA240, 123863. [e] **Legitimate children are not excluded** by statute providing that intestate mother's property shall pass to her illegitimate children. DelCh 115A306. [f] **Though paternity is satisfactorily shown,** bastard who is not legitimated can only inherit from mother or her descendants. 220Ala47, 124880(dicta).
961 79 91LaA129, 1198494.
961-79½-New. Under some statutes, making illegitimate children of the mother heirs at law of intestate such

children are entitled to a half interest in commuted installments of a war risk policy of intestate leaving no child or other lineal descendant. 148SC30, 145SE549.

961-80 [a] **Illegitimate child of daughter predeceasing father** cannot share in distribution of father's estate. 195NC188, 141SE577.

961-81 197NC334, 148SE456, 64ALR1121.

962-85½-New. Illegitimate children of deceased daughter of intestate are held not entitled to intestate's property as against lawful nephews and nieces. DelCh 139A454.

962-86 102NJEq393, 141A16.

962-87 80 IndA556, 148NE643; Minn 230NW483; 115Nebr553, 213NW819. But see 220Ala47, 124S80(4tcase). [a] (2) Child of bigamous union cannot inherit. 165La716, 115S911. [g] In Kentucky.-217Ky671, 290SW483. [h] In Wisconsin.-197Wis145, 221NW737. [i] In Philippines.-51Philippine480.

962-88 But see 10LaA52, 120S538 (estate cumulated during existence of putative community).

962-89½-New. Under the Porto Rico statute, where the heirs consist of one legitimate child and several natural children, the latter are entitled to the entire Falcidian portion, which is one half of the legitim belonging to the legitimate child. 33PortoRico 268.

963-12 [a] See also 12LaA224, 125S761.

964-17 143SC402, 141SE726 (not changed by statute).

964-19 [a] **Application of general statute of distribution** is limited in some jurisdictions to distributees who are legitimate lineal descendants. DelCh 147A306.

964-19½-New. Some statutes deprive only the putative father and his heirs at law from sharing the estate of an illegitimate, in case such father has not given legal recognition to his offspring, and do not deprive others who are legally entitled to the same. 135 Okl 263, 275P309.

964-21 32PortoRico 208. [a] In Porto Rico.-32PortoRico 208.

964-36 308Mo 314, 274SW77; 32PortoRico 208. [a] (2) 28F(2d)350; 4LaA10. [c] In Porto Rico.-32PortoRico 208.

965-39 231Ky233, 218SW(2d)274.

965-40 143SC402, 141SE726.

965-41 DelCh 147A306 (such heirs are determined as of date of illegitimate's death and not of predeceased mother's death); 135 Okl 263, 275P309 (maternal grandmother of bastard held to take entire estate of surviving husband of mother who was stepfather of deceased); 54SD184, 223NW41. [d] In Delaware.-Ch 147A306 ("heirs," in such statute, designates persons entitled to take).

965-42 163La362, 111S787.

966-48 178Ark692, 118SW(2d)479; 27 Hawaii8; 322 Ill189, 152NE575; 235 IllA308; 197 Ind80, 149NE886; 120Kan350, 243P288; 126Kan633; 213Ky415, 281SW162; 125Me438, 134A567; Mass 166NE742; 193NC467, 137SE308; 54ND801, 211NW435; 20 OhA191, 151NE802; 124 Okl 278, 255P697; 125 Okl 1, 256P31; 125 Okl 263, 257P1100; 144 Okl 7, 289P313; 125 Or389, 266P900; SD 229NW934; 70Utah224, 259P326. [d] In Florida bastardy proceeding is civil action, but statute and rules controlling service of process in other civil actions do not apply. 96Fla873, 119S866.

967-49 210Ky445, 276SW154, 44ALR386.

967-50 Fla 128S7.

967-51 112 ObSt691, 148NE90.

967-53 125 Okl 1, 256P31; 128 Okl 226, 262P203.

967-54 21AlaA321, 108S654; 70CalA680, 234P412 (proceedings are at law and not in equity); 120Kan350, 243P288; 120 Okl 102, 250P910; 128 Okl 226, 262P203. [c] Ont [1927] 3DomLR546. [d] That court exercises certain equitable powers after entry of judgment does not change purely statutory character of action. 70CalA680, 234P412. [e] Proceedings under South Dakota Bastardy Act of 1919 deprive defendant of no substantial right although birth occurred after passage of Uniform Illegitimacy Act. 49SD329, 207NW58. [f] Repeal of bastardy statute held not to affect existing right to bring proceedings although none were pending at time of repeal. 203 Iowa437, 210NW476. [g] Statutory procedure is exclusive.-131 Okl 104, 267P850. [h] Amended statute may apply to proceedings relating to child born before date of amendment. 178Ark692, 118SW(2d)479; 50RI 71, 145A102.

967-55 Utah 290P774.

967-55½-New. The proceeding is legal and not equitable in character. 70CalA680, 234P412.

967-55¼-New. Defendant's parentage must be undisputed. 104NJL51, 139A394.

967-56 70CalA680, 234P412 (in action to compel maintenance, fact of parentage and questions of necessity of support and ability to support may be determined); 80CalA704, 252P667; 235 IllA308; 167Minn263, 209NW4; 50ND723, 197NW866; 54ND801, 211NW435. See also 10PaDist&Co 504 (no term of imprisonment imposed). [b] Determination of overseer of poor that child likely to become a public charge is conclusive on court. NJ 148A180.

967-57 70CalA680, 234P412.

967-58 22 OhA340, 154NE745.

968-60 But see 10PaDist&Co 365.

968-62 [a] 85PaSuper396.

968-62½-New. In Pennsylvania where child was born in one county but begotten in another within state, father is prosecuted in county of birth and is sentenced as if both offenses were committed in same county. 85PaSuper396.

968-67 108Conn671, 144A297.

968-69 [h] Dismissal with consent of defendant.-258Mass89, 154NE586.

969-71 21AlaA321, 108S654.

969-74½-New. It is no defense that by reason of a former adjudication the act charged was legal during part of the time specified in a complaint. 258Mass89, 154NE586.

969-76 125 Or389, 266P900.

969-77 99WVa677, 129SE752. [c] Compromise with mother of illegitimate child before amendment of statute held no bar to prosecution of father for nonsupport subsequent to amendment. 22OhA255, 154NE342. [d] Release by minor plaintiff standing alone constitutes no bar to proceeding. 125Me438, 134A567.

970-79 [c] Payment of judgment in previous civil action for rape held not to have discharged defendant's obligation to support illegitimate child. 198Wis197, 223NW449. [d] Any payment made to mother of illegitimate child, which is not approved as provided by law, will not relieve father of obligation to support child. 198Wis197, 223NW449.

970-85 125Me438, 134A567.

971-95½-New. A contract of settlement must be founded upon a good and sufficient consideration. 99WVa677, 129SE752 (consideration of fifty dollars held insufficient).

971-99 99WVa677, 129SE752.

972-8 Miss 110S871.

972-13 70CalA680, 234P412. [a] 70CalA680, 234P412. [b] Statute giving boards of supervisors right to subject parent's estate to support of minor child when he is about to become public charge does not grant such right in bastardy proceedings. 70CalA680, 234P412.

972-15 70CalA680, 234P412 (common-law rule not changed).

972-25 80CalA704, 252P667.

973-27 Man [1930] 2DomLR571. [c] Woman in whose favor divorce has been entered may prosecute, although she did not pay costs in divorce suit until after offense had been committed. 6PaDist&Co 92.

973-28 122 Okl 263, 249P934. [b] In West Virginia.-107WVa563, 149SE669.

973-29 122 Okl 263, 249P934.

973-30 117Nebr167, 219NW837. [c] In North Dakota.-53ND333, 205NW877.

974-39 30Hawaii268; 151Md87, 133A899.

975-49 105Conn386, 135A290; 151Md87, 133A899.

975-50 [d] (3) County court of Cook County is excluded from jurisdiction in bastardy cases by statute. 224 IllA213. [r] In New York.-233NYS308; 231NYS58.

975-51 Ont [1930] 4DomLR651 (proceedings to determine paternity). [f] In Wisconsin.-198Wis197, 223NW449.

975-52 [b] (2) Venue may be laid where defendant lives. 151Md484, 135A591.

976-53 112 Okl 91, 240P107.

976-54 40GaA264, 149SE304(2dcase).

976-56 5PaDist&Co 19.

976-61 86 IndA662, 159NE473 (proceeding before birth held abandoned by death of constable to whom writ of arrest had been delivered).

977-62 86 IndA662, 159NE473.

977-64½-New. In Manitoba warrant issued more than twelve months after birth of child or payment of last money by putative father for maintenance is void. Man [1930] 2DomLR571.

977-65 13PaDist&Co 422.

977-74 But see 120Kan350, 243P288.

977-75 125Me438, 134A567.

977-76 [a] Issuance and service of summons not necessary. 124 Okl 278, 255P697.

977-76½-New. Support pending proceedings. The court cannot make an order for support pending the proceeding solely on the complaint and warrant and proof of nonsupport. 124 Okl 278, 255P697; 125 Okl 1, 256P31.

977-76½-New. The only valid service that can be had in a bastardy proceeding is by service of a warrant of arrest upon accused as provided by statute. 120 Okl 102, 250P910.

977-76¼-New. A motion to quash service in a bastardy proceeding should be sustained where the only service had was service of summons on the father of accused as provided in ordinary civil actions. 120 Okl 102, 250P910.

977-76½-New. Technical rules need not be followed in drawing affidavit and warrant. 21AlaA321, 108S654; 21AlaA381, 108S652.

977-76¼-New. Where defendant waives a preliminary examination, it is unnecessary to take the testimony of witnesses and reduce it to writing. 55ND417, 213NW961.

977-77 55ND417, 213NW961; 55ND580, 214NW855.

977-83 [b] Where mother is minor, some statutes do not require her to sue by her next friend. 99WVa677, 129SE752.

977-83½-New. Appointment of guardian ad litem of an infant defendant is not required. 124 Okl 278, 255P697.

977-84 21AlaA381, 108S652. [d] Death of mother of bastard before accusing alleged father in writing held not to deprive court of jurisdiction to try case. 151Md87, 133A899.

977-85 [c] 21AlaA381, 108S652; 130 Okl 221, 266P781.

978-87 [g] Evidence held sufficient to warrant finding that complainant was sworn. 40GaA264, 149SE304(2dcase).

978-89 117Nebr167, 219NW837 (complaint sufficient on demurrer).

978-91 122 Okl 263, 249P934.

978-92 122 Okl 263, 249P934.

979-93 Mass 166NE742.

979-94 112 Okl 91, 240P107; 122 Okl 263, 249P934.

979-97½-New. In some jurisdictions statute requires judge to sign written statement of applicant for warrant. 28 Hawaii496.

979-4 104Conn126, 132A404; 50RI 71, 145A102.

980-12 120Kan350, 243P288, 289 [cit CJ].

980-20 [a] 28Hawaii496.

980-24½-New. In Manitoba warrant issued after birth of child must direct apprehension of mother as well as father of child. Man [1930] 2DomLR571.

981-34 [a] In Ohio.-15 OhA292.

981-36 But see 152Miss180, 118S896.

981-43 [c] Certificate of county judge held sufficient.-92Fla970, 110S526.

982-57½-New. Obligation of a bond given for appearance before justice may be extended to proceeding on binding over. 105Conn386, 135A290.

982-57½-New. Mittimus before justice court is unnecessary for forfeiture of appearance bond extended to proceedings in common pleas court. 105Conn 386, 135A290.

986-24 239 IllA56; 53ND333, 205NW 877; 144 Okl 7, 289P313; 49SD329, 207 NW58 (reference to earlier statute held surplusage). [a] (4) That child was born within two years of filing of complaint need not be alleged where such fact must be specially pleaded as defense. 197 Ind80, 149NE886. (5) Complaint, alleging that affiant is mother of bastard child, that she is resident of county in which complaint is made, and that defendant is father of child, is sufficient. 128 Okl 226, 262P203. (6) Complaint held sufficient. Fla 128S7 (birth of child dead or subsequent death is immaterial as to complaint). (7) Other instances. 84CalA775, 258P 652. (8) Where one of two or more persons may be possible father. Sask [1930] 4DomLR584. [c] (2) Otherwise where accusation during travail is not essential part of plaintiff's case. 108Conn671, 144A297. [f] Misjoinder.-29PortoRico 975. [g] Date of birth of child must be alleged. 146Miss400, 111 S567. [h] Date when child was begotten need not be alleged. 146Miss400, 111S567. [i] In Florida.-128S7. [j] Motion to require complaint to be made more definite by alleging time and place of alleged sexual act has been held erroneously overruled. 144 Okl 7, 289P 313.

986-30 [d] Sex of child need not be stated. 11PaDist&Co 67.

986-41 84CalA775, 258P652 (amendment held not to state new cause of action); 126Kan633.

987-42 49SD329, 207NW58 (substituting name of prosecuting witness for state as plaintiff).

987-44 [c] Refusal to allow further time to plead or answer, and ordering trial as set, is not erroneous, though sufficiency of complaint is challenged by demurrer and overruled at opening of trial. 128 Okl 226, 262P203.

987-45 [b] Where defendant admitted intercourse with prosecutrix and that child was born, only question is whether defendant is father thereof. 21AlaA 462, 109S369.

987-47½-New. Issue of legitimacy held raised by denials of petition alleging relationship to deceased and right to share in estate. 44 Ida299, 256P535.

987-47½-New. Issue for determination is that of guilty or not guilty. 128 Okl 226, 262P203.

987-47¼-New. State must allege and prove bastard's mother resides in county where complaint is filed. Okl 293P 247.

987-49 Mass 166NE742.

987-53 21AlaA381, 108S652; 70CalA 680, 234P412; 27Hawaii8; 21 OhA222, 153NE113.

988-56 108Conn671, 144A297 (by evidence other than his own).

988-58½-New. Defendant is presumed to be innocent. 70Utah224, 259P326.

988-60 21AlaA462, 109S369; 125Me55, 130A858. [a] Mother may testify to nonmarriage.-136Misc863, 242NYS464.

988-63 120Kan565, 244P844.

988-64 120Kan565, 244P844.

989-75 151Md265, 134A148, 48ALR 342; 146Miss400, 111S567; 128 Okl 226, 262P203; 70Utah224, 259P326. [a] Declarations of mother as to paternity of child are inadmissible where mother is living. 146Miss400, 111S567.

989-78 [a] (5) Best evidence of letter held to be letter itself. 21AlaA462, 109 S369. (6) Immaterial evidence is not admissible. 21AlaA462, 109S369.

989-78½-New. Testimony of the grandmother of the child that she took the mother of the child to the house of accused is held admissible. 151Md87, 133A899.

989-78¼-New. Proof of prosecutrix's age is admissible as part of res gestæ. 22AlaA83, 112S461.

989-78¼-New. It is error to admit irrelevant evidence as to conduct of defendant. 173Minn158, 217NW146.

989-78⅛-New. Defendant may make profert of the body of a third person under some circumstances, to show that the child resembled him. 22AlaA535, 117S504.

989-78⅛-New. Application by a person not shown to be a public officer or charged with duty, for commitment as insane of the husband of a mother, is inadmissible in proceedings for nonsupport of her illegitimate children against the father, not the husband. 264Mass 485, 162NE900.

989-78½-New. Profert of the child was held admissible to show the facts of intercourse, pregnancy, and birth. 22AlaA 548, 117S609.

989-78⅛-New. Exhibiting great aunt of bastard child and questioning her as to changing of color of negroes, held improper. 23AlaA331, 125S200(1st case).

989-78½-New. Chart showing enlarged drawings of letters alleged to have been written by defendant held admissible under prima facie foundation laid by expert witness. SD 229NW302.

989-86 125 Or389, 266P900.

989-87 21AlaA381, 108S652; 99WVa 677, 129SE752. [b] See also 21AlaA 381, 108S652.

989-91 128 Okl 226, 262P203, 204 [cit CJ].

990-92 224 IllA210; 70Utah224, 259P 326 (statement against interest is admissible as original evidence).

990-94 8PaDist&Co 765 (under statutes).

990-99 21AlaA462, 109S369; 151Md 265, 134A148, 48ALR342.

990-1 65Utah512, 238P557. But see Wash 288P239.

990-2 ND 232NW475.

990-3 70Utah224, 259P326; Utah 290 P774 (telegram properly excluded).

990-4½-New. Actions of a third party susceptible of innocent construction cannot be introduced to show paternity. 151Md265, 134A148, 48ALR342.

990-4½-New. Testimony, that, on day child was born, prosecutrix's relative visited a married man with whom prosecutrix had associated is held properly excluded. 151Md265, 134A148, 48ALR 342.

990-5 167Minn263, 209NW4; 99WVa 677, 129SE752.

990-6 21AlaA321, 108S654; 178Ark 1052, 13SW(2d)304; 167Minn263, 209 NW4; 144 Okl 7, 289P313.

991-8 21AlaA381, 108S652; Cal 287P 336; 179Minn80, 228NW335 (indefinite time); 125 Okl 263, 257P1100; 144 Okl 7, 289P313; Wash 288P239.

991-10½-New. Inquiry as to whether the prosecutrix had formerly had miscarriage is inadmissible. 21AlaA381, 108S652.

991-11 151Md265, 134A148, 149 [cit CJ], 48ALR342. [a] Rule not applicable where declarant committed suicide and left letter stating that suicide was caused by responsibility for pregnant condition of prosecutrix. 151Md265, 134A148, 48ALR342.

991-14 22AlaA83, 112S461; 264Mass 485, 162NE900; 58ND721, 227NW220, 65ALR1304 (transfer of property showing consciousness of liability on learning of complaining witness' condition); 20 OhA191, 151NE802.

991-15 [a] Intercourse must have been within period of gestation in order that defendant's admissions may be received in evidence. 34 OklCr59, 244P817.

991-17 99WVa677, 129SE752.

991-18 21AlaA462, 109S369.

991-19 179Minn80, 228NW335; 128 Okl 96, 261P211, 212 [citCJ].

991-20 23AlaA331, 125S200(1stcase); 247Mich479, 226NW214(1stcase); 20 OhA191, 151NE802 (attempted compromise).

991-20½-New. Evidence that defendant has been convicted of rape is not admissible to establish his guilt in a bastardy proceeding unless the offense was committed on the prosecutrix within the period of gestation. 34 OklCr49, 244P817.

992-21 20 OhA191, 151NE802, 803 [quotCJ].

992-22 20 OhA191, 151NE802, 803 [quotCJ].

992-23 224 IllA210.

992-26 [b] But see 151Md87, 133A899. [c] Acts and declarations of parents where accused seventeen years of age and accusations not denied are admissible. 151Md87, 133A899.

992-28 128 Okl 226, 262P203.

992-29 [a] (1) 23AlaA331, 125S200 (1stcase); 178Ark1052, 13SW(2d)304.

992-30 128 Okl 226, 262P203. [a] That prosecutrix had formerly given birth to child of which defendant was father may be shown. 151Miss757, 118 S894(1stcase).

992-31 128 Okl 96, 261P211; 128 Okl 226, 262P203.

993-34 128 Okl 96, 261P211, 212 [cit CJ]. [a] Rape.-34 OklCr49, 244P817.

993-35 128 Okl 96, 261P211, 212 [cit CJ].

993-36 128 Okl 96, 261P211, 212 [cit CJ].

993-43 170Ark1143, 282SW984, 985 [quotCJ].

993-44 22AlaA297, 115S71; 22AlaA548, 117S609; 23AlaA335, 125S203; 178Ark 1052, 13SW(2d)304; 80CalA704, 252P 667; 20 OhA191, 151NE802; 99WVa 677, 129SE752. [d] Proper to require defendant to stand up before jury so jury can better compare features and appearance of child exhibited and defendant. 20 OhA191, 151NE802. [e] The purpose of exhibiting child to jury is to enable jury to compare its features and appearance with that of defendant. 20 OhA191, 151NE802.

994-51 50ND723, 197NW866, 868 [quot CJ]; 99WVa677, 129SE752, 755 [quot CJ].

994-52 168Minn516, 209NW887; NJ 148A180.

994-52½-New. Evidence sufficient to establish jurisdiction. Okl 293P247.

994-53 125 Or389, 266P900 (sufficient corroboration). [a] Corroboration held sufficient.-35Man200. [1925] 3DomLR 585, [1925] 2WestWkly669. [b] In Ontario.-61 OntL667, [1928] 2DomLR210.

994-54 23AlaA335, 125S203; 178Ark 1052, 13SW(2d)304; 108Conn671, 144 A297; 167Minn263, 209NW4.

995-58 21AlaA381, 108S652; 23AlaA 335, 125S203; 27Hawaii8; 50ND723, 197 NW866, 868 [citCJ]; 20 OhA191, 151NE 802; 21OhA222, 153NE113; 33 OhA125, 168NE568; 125 Okl 263, 257P1100; Utah 290P774; 99WVa677, 129SE752. [a] 178Ark1052, 13SW(2d)304; 108Conn671, 144A297; 37GaA377, 140SE427; 197 Ind80, 149NE886; 87 IndA175, 155NE 52; 162Minn39, 201NW938; 167Minn 263, 209NW4; 168Minn516, 209NW887; 179Minn436, 229NW564; 50ND723, 197 NW866; 54ND801, 211NW435; 56ND 316, 216NW576; 125 Okl 263, 257P 1100; 119 Or641, 250P744; 92PaSuper 53; 70Utah224, 259P326; 99WVa677, 129SE752. [b] 215Ky759, 286SW1061; 173Minn294, 217NW118; NJ 148A180.

995-60 21AlaA381, 108S652; 50ND723, 197NW866; 33 OhA125, 168NE568.

996-69½-New. Where proceedings have been instituted by complaint and warrant and defendant has been bound over and given security, the case is regularly on the next term of court without service of notice of trial and note of issue. 56ND561, 218NW214.

996-74½-New. Where information has been duly filed, a warrant has been issued, a bond has been given, and an infant defendant appears in court, the court has jurisdiction to appoint a guardian ad litem. 125 Okl 263, 257P 1100.

996-76½-New. Presence of child. The child may properly be allowed in the court room during the proceedings. 55 ND580, 214NW855.

996-76⅓-New. It is within the discretion of the trial court to determine whether the child shall be excluded from the court room during the trial. 55ND 580, 214NW855.

997-84½-New. Where guardian not appointed until day set for trial, it is error to try the case before the elapsed time provided by statute. 124 Okl 278, 255P697.

997-90½-New. [§ 134a] 4½. Scope of Hearing. All facts and circumstances necessary to support a decree for main-

tenance and support may be inquired into and determined in the proceeding. 70CalA680, 234P412.

997-90½-New. The issue of parentage may be determined in the proceeding and no previous judgment determining such fact is necessary. 70CalA680, 234P412.

997-90¼-New. Where a guardian is not appointed for an infant defendant until the day set for trial, it is error for the court to put the infant on trial prior to the tenth day thereafter where the statute provides that a case shall not be tried until ten days after issues are made up. 124 Okl 278, 255P697.

998-99 Wis 230NW628 (counsel's opinion in argument held not error in view of instructions). [c] **Counsel may not argue to jury** so as to secure reversal of judge's ruling on law. 151Md87, 133A899.

998-1 55ND580, 214NW855 (argument held proper comment on evidence).

998-3 197Ind80, 149NE886.

998-4 99WVa677, 129SE752.

998-6½-New. It is proper for counsel for defendant to argue that if the complaining witness had sexual intercourse with another man at or about the time the child was begotten, neither she nor the jury could say who was the father of the child. 168Minn516, 209NW887.

998-7 21AlaA381, 108S652; 22AlaA297, 115S71; 23AlaA335, 125S203; 73CalA492, 238P1051; 167Minn523, 209NW313; 168Minn516, 209NW887; 99WVa677, 129SE752; 192Wis224, 212NW260.

998-8 73CalA492, 238P1051; 84CalA775, 258P652; 197Ind80, 149NE886; 126 Okl 117, 258P902; 99WVa677, 129SE752. [a] 22AlaA297, 115S71. [b] 23AlaA335, 125S203.

998-12½-New. whether complainant remained constant in her accusation of paternity of child, 125Me55, 130A858.

998-15 [d] 55ND580, 214NW855; 119 Or641, 250P744.

998-17 119 Or641, 250P744. [a] **Instructions held correct.**-125 Or389, 266P900 (on corroboration).

998-18 21AlaA381, 108S652; 86 IndA449, 158NE520; 57ND316, 221NW885.

998-18½-New. Where the jury could not see the child it was not improper to refuse to charge that the jury should not compare its features with those of defendant. 197 Ind80, 149NE886.

999-22 22AlaA297, 115S71.

999-23 128 Okl 96, 261P211.

999-25 [a] **Instructions held not erroneous** as stating fact in dispute. 87 IndA175, 155NE52.

999-26 22AlaA535, 117S504; 99WVa677, 129SE752.

999-27 [d] **Instruction held not erroneous.**-Charge that verdict must be that of guilty or not guilty as in criminal action, and that state must establish guilt by preponderance of evidence, is proper. 128 Okl 226, 262P203.

999-28 55ND580, 214NW855. [b] **Erroneous instruction.**-22 OhA340, 154NE745.

999-34 21AlaA381, 108S652; 22AlaA297, 115S71; 87 IndA175, 155NE52; 20 OhA191, 151NE802; 128 Okl 96, 261P211; 119 Or641, 250P744; SD 229NW302; 70Utah224, 259P326; 99WVa677, 129SE752.

999-35 [a] **Refusal of specific instructions held not error** where jury was sufficiently instructed by court's charge. 87 IndA175, 155NE52.

999-36½-New. An instruction, that in order to find that defendant is the father of the child the jury must find as a fact that defendant had sexual intercourse with prosecutrix, and that the child was begotten as a result thereof, and that, if the jury is unable to determine whether defendant is the father of the child he cannot be found guilty, is sufficient without instructing that, if prosecutrix had sexual intercourse with another man at or about the time the child was begotten the jury cannot say who is the father of the child. 168Minn516, 209NW887.

999-37 Miss 130S154.

1000-38 [b] **In Utah.-Utah** 290P774.

1000-39 103NJL300, 136A736.

1000-39½-New. Concurrence of three fourths of the jury in the verdict is sufficient in some jurisdictions. 20 OhA191, 151NE802.

1000-39⅓-New. Order of successor to judge held not to overrule findings of predecessor. 103NJL300, 136A736.

1000-39¼-New. The court is held authorized to make an order nunc pro tunc molding the verdict, without notice to defendant. 103NJL300, 136A736.

1000-39⅕-New. The court may permit the jury to return a sealed verdict. 57 ND316, 221NW885.

1000-39⅙-New. Bastardy is a quasi-criminal proceeding, but is so far civil that, where the verdict of three fourths of the jurors is allowed in any civil case, it is also allowed in such proceeding. 33 OhA125, 168NE568.

1000-39⅐-New. Reopening case after announcement of decision adverse to defendant for taking of testimony as to expenses of confinement rests in discretion of court. SD 229NW934.

1000-39⅛-New. Statute permitting return of verdict by five sixths of jurors applies to bastardy proceedings. SD 229NW302.

1000-41 206 Iowa408, 220NW357 (misconduct of bailiff).

1000-42 [a] 49ND325, 191NW610.

1000-44½-New. Failure of defendant to answer complaint or of court to require issue to be made up should be presented by motion for new trial. 92 Fla970, 110S526.

1000-44⅓-New. Denial of new trial on ground of misconduct of a juror is not an abuse of discretion where the juror denies the misconduct. SD 229NW302.

1000-45 [b] **Showing held insufficient.**-167Minn523, 209NW313. [c] **Denial of motion discretionary.**-179Minn80, 228NW335 (held not error). [d] **New trial properly denied.**-179Minn436, 229NW564.

1000-48 167Minn523, 209NW313.

1000-54 22AlaA548, 117S609 (exclusion of evidence); 11PaDist&Co 380. [e] **Presence of alleged illegitimate child** in court room without objection held not prejudicial error. 53ND333, 205NW877.

1000-55 151Md484, 135A591.

1001-63½-New. A decree providing for support during minority is a continuing one and does not abate by death of the father upon whose estate such maintenance is made a charge. 70CalA680, 234P412.

1001-63⅓-New. Judgment entry reciting that the issue was submitted to the jury held to show that the court caused such issue to be made up. 21AlaA462, 109S369.

1001-66 125 Okl 263, 257P1100. [c] (7) Judgment for one thousand two hundred fifty dollars after failure to give bond, in order to produce one hundred dollars for support yearly, is proper. 22AlaA535, 117S504.

1001-69 80CalA704, 252P667 (time may properly run from commencement of action).

1002-87 92Fla970, 110S526.

1003-93 54ND801, 211NW435. [c] **Where defendant has obeyed original order** (1) statute, allowing change, in some jurisdictions, does not apply. 85PaSuper270. (2) In such case second petition praying for further support will be refused. 85PaSuper270.

1004-1 121 Oh393, 169NE301(2dcase).

1004-4 See also 141 Okl 75, 284P294.

1004-5½-New. Under Suspended Sentence Law it is better practice to impose a penalty prescribed and then suspend sentence if judged advisable. 151Md87, 133A899.

1004-14 235Mich408, 209NW80 (defendant discharged under prior debtor's act cannot be imprisoned under subsequent legislation). See also 9PaDist&Co 313. [a] See also 243 IllA514. [d] **Imprisonment does not relieve** defendant from obligation to pay amount ordered and fieri facias can be issued against his goods and chattels. 235Mich408, 209NW80.

1005-20 54ND801, 211NW435.

1005-24 198Wis197, 223NW449.

1006-39 14PaDist&Co 234.

1006-43 Contra 10PaDist&Co 99.

1007-59½-New. A bond is not discharged by the committal of the putative father to jail for failure to obey a filiation order. Man [1929] 1DomLR867.

1008-70½-New. The county attorney has no authority to dismiss an appeal over the objection of relatrix. 213Ky415, 281SW162.

1008-73 151Md87, 133A899. [c] **Dismissal** of case by justice of peace is not appealable as a final judgment. Wash 292P1104.

1008-75 166Minn497, 207NW631; 49 SD329, 207NW58.

1008-75½-New. A judgment of the county court dismissing a bastardy proceeding over the objection of the relatrix is appealable. 213Ky415, 281SW162.

1008-75⅓-New. No appeal in bastardy proceedings lies from an order denying new trial. 151Md484, 135A591.

1008-75¼-New. An appeal will not lie from an order of a circuit court refusing to dismiss an appeal. 213Ky415, 281SW162.

1009-77 107WVa563, 149SE669 (writ properly refused).

1009-78 [c] **Record showing that trial court found for defendant** is held not to permit assumption that ground of decision was that child would not become public charge. NJSup 140A561.

1009-79 128Me368, 147A703.

1009-80 119 Oh453, 164NE527. See also 128Me368, 147A703.

1009-81 [a] (2) Where record does not establish what if anything was said by county attorney, assignment of error for misconduct in argument is not reviewable. 167Minn263, 209NW4. [d] **In Alabama** errors must be assigned. 21AlaA645, 111S318.

1009-82 See also 128Me368, 147A703. [b] (2) Where defendant has given supersedeas bond on unsuccessful appeal from decree awarding flat sum to mother and maintenance for child, but has refused to give maintenance bond and has surrendered himself and been imprisoned in default thereof, complainant may recover on supersedeas bond conditioned to abide order and judgment of court penal sum therein named. 112 OhSt691, 148NE90. [c] **Surrender of defendant for jail commitment for bastardy** is no satisfaction of appeal bond conditioned to pay judgment, etc., on affirmance. 235 IllA308.

1009-86½-New. Motion to dismiss appeal from conviction of bastardy on the ground that suspension of sentence is not a final judgment held properly overruled. 151Md265, 134A148, 48ALR342.

1009-87 213Ky415, 281SW162.

1009-89½-New. Bond and stipulation printed in the record may be considered on appeal in connection with substituted complaints in which incorporated. 105Conn386, 135A290.

1009-90 168Minn516, 209NW887; 70 Utah224, 259P326.

1010-91 151Md87, 133A899; 151Md484, 135A591.

1010-95 197 Ind80, 149NE886; 55ND580, 214NW855; 125 Okl 263, 257P1100; Okl 293P247. [a] (2) Wording of judgment held harmless error. 84CalA775, 258P652.

1010-96 21AlaA462, 109S369; 22AlaA321, 115S385 (prejudicial error in admission of evidence); 23AlaA335, 125S203; Md 135A595; 54ND801, 211NW435; 55ND580, 214NW855; 125 Or389, 266P900; SD 229NW937; 70Utah224, 259P326; Utah 290P774. See also 23AlaA212, 123S102(2dcase). [c] (2) Where evidence of paternity is conflicting, erroneous admission of testimony as to living mother's declaration to midwife is reversible error. 146Miss400, 111S567. [d] **Prejudicial error.**-ND 232NW475.

1010-97 87 IndA175, 155NE52; 55ND580, 214NW855; 192Wis224, 212NW260.

1011-98 55ND580, 214NW855; 125 Or389, 266P900; 70Utah224, 259P326. [a] 55ND580, 214NW855. [b] **Misconduct held prejudicial.**-179Minn436, 229NW564.

1011-1 22AlaA297, 115871; 173Minn 627, 218NW110 (conviction sustained on conflicting evidence); 57ND316, 221NW 885; 58ND721, 227NW220, 65ALR1304 (on conflicting evidence); 20 OhA191, 151NE802; 126 Okl 117, 258P902; 99 WVa677, 129SE752. [a] **Where jury three times brought in verdict of guilty,** verdict will not be disturbed. 151Md 484, 135A591.

1011-1½-New. Failure of the record to disclose facts upon which the amount of the judgment was fixed is ground for a modification of the judgment and a remand with instructions to the court judicially to ascertain the facts. 22 OhA 340, 154NE745.

1011-1½-New. Court's findings supported by evidence are conclusive. 190 NC335, 129SE804.

1011-1½-New. The court's findings supported by the evidence are conclusive. 131 Okl 104, 267P850.

1011-1½-New. Where form of sentence is incorrect, the record will be remitted for correction. 151Md484, 135A591.

1011-1½-New. Error in rendering judgment under statute enacted after commission of the offense requires reversal and remand for resentence only and not for new trial. 21AlaA321, 108 S654.

1011-1½-New. In reviewing judgment and assessment of a certain amount of money against defendant in bastardy proceedings, error in including attorney's fees is not reversible, since judgment could be modified by the reviewing court. 33 OhA125, 168NE568.

1011-5 213Ky415, 281SW162 (mother).

1012-15 116 Oh377, 156NE214.

1012-21½-New. , nor upon defendant. 52 Ind330; 50 Ind149; 5Mass244; 44 Mich388, 6NW874; 15NH81; 15 OhSt 43.

BATTURE

1013-16 [a] 160La727, 107S506.

BAUME

1013-18½-New. Sixteen degree Baume is an oil resembling asphalt that does not flow at ordinary temperature through pipes but must be heated for such purpose. 159La471, 105S556.

BEADS

1017-67 See also 15CustA165.

BECAUSE

1020-6 25 OhNPNS572.

BEEF

1024-36 See also 13CustA542.

BEER

1025-59 104TexCr628, 286SW234.

BEGET

1030-26 IndA 158NE598.

BEGINNING

1030-34 81Colo 191, 254P444. [e] **Beginning signifies** initial state or entrance into existence. 81Colo 191, 254P 444.

BEGOTTEN

1031-37 [e] As including posthumous children. IndA 158NE598.

BEHALF

1032-42 [e] **Agency or authority to act is imported** in use of words "in behalf of" or "on behalf of" in statutes. 238 Mich576, 214NW315.

BEING

1033-59 CalA 262P815 (equivalent to "which is").

BELIEF

1034-97 See also 29F(2d)210 (respecting some subject of investigation or inquiry).

BELONGING

1040-61 [a] 8PaDist&Co 52. [b] (1) 8 PaDist&Co 52.

1042-63 8PaDist&Co 52.

1043-67 8PaDist&Co 52.

1043-69 8PaDist&Co 52.

BELT

1044-77 143SC196, 141SE366, 372 [quotCJ].

BENEFICIAL

1046-14 [a] 330 Ill 238, 161NE525.

BENEFICIAL ASSOCIATIONS

1051-2 [b] **"Fraternal beneficiary" construed.**-MoA 289SW672.

1051-5½-New. Lodge has been held not to be either a public or a quasi-public corporation. 88 IndA507, 164NE718.

1054-20 10PaDist&Co 30. [a] 194Pa6, 143A232.

1055-30 47 Ida360, 276P37; 194Pa6, 143A232. [d] **Whether lodge system essential to exemption.**-47 Ida360, 276 P37. [e] **Associations within exemption.**-47 Ida360, 276P37.

1056-31 Okl 291P513; 194Pa6, 143A 232.

1056-33½-New. The fact that the department of trade and commerce is vested by law with supervisory powers over insurance business conducted within the state, and that it approved a particular transaction, can afford no protection to wrongdoers. 117Nebr723, 223NW797 (2dcase).

1057-40 128 Or536, 275P43. [c] (3) Members estopped to raise question as to whether association was doing business in state without authority. 254 IllA264.

1057-41 [a] (3) Failure of foreign fraternal insurance society to conform to state insurance laws renders it subject to general insurance laws and prevents reception of benefits given to such societies. 152Wash78, 277P383.

1059-49 NH 149A506 (corporation held successor to original society and not duality). [d] **Where constitution provided that** society has right to enact such laws, resolutions, and rules which it might see fit, society has right to incorporate. NH 149A506. [e] **Evidence has been held insufficient** violation of law of society incorporating under statute. NH 149A506. [f] **Corporation succeeds and acquires equitable title to property of society** notwithstanding failure to complete legal transfer of title. NH 149A506.

1060-66 256 IllA8 (statute not extended to individual members in personal capacity). [a] (7) Liability under original certificate. 256 IllA8.

1061-69 [b] (2) Under Michigan statute commissioner of insurance is given no discretion to review proceedings for merger (235Mich459, 209NW581), (3) and when there is presented to him a contract with certificates of officers of two societies showing approval by each of them, he is bound to approve it, if he is satisfied that interests of certificate holders are protected, that contract is equitable and no reasonable objection exists thereto (235Mich459, 209NW581). (4) Under Michigan statute approval of merger by vote of two thirds of quorum is sufficient. 235Mich459, 209NW581.

1061-72 See also 177Ark875, 8SW(2d) 452. [b] **Provision in merger contract limiting liability** is no defense in absence of notice to insured. MoA 27SW (2d)1076.

1061-74½-New. The organization of a stock insurance company by a fraternal benefit association and its officers, and their subscribing for the entire capital stock of the insurance company, does not constitute a consolidation. 117Nebr 723, 223NW797(2dcase).

1062-81 [a] (2) Court has no jurisdiction in receivership proceedings where insurance commissioner, under statute, proceeds to protect business. Ark 32 SW(2d)430. (3) Attorney-general may proceed to liquidate affairs, on insurance commissioner's report, where association discontinues business. Ark 32 SW(2d)430. [b] **Where governmental department has duty** to examine and report on association, remedy so provided is exclusive of receivership. Ark 32SW (2d)430.

1062-83½-New. Dishonesty, faithlessness, fraud, incompetency, or inefficiency sufficiently averred justifies the transfer of the trust to the court. 219Ala293, 122S36.

1062-89 La 129S729; 142 Okl 187, 286 P294. [d] **Petition by members of fraternal benefit association for themselves and others similarly situated** for preservation of trust fund and appointment of receiver held sufficient. 142 Okl 187, 286P294.

1063-97½-New. Where the purpose of a receivership is to take charge of an endowment fund, an appointment to take charge of the entire endowment department is not justified. 219Ala293, 122S36.

1064-10 [b] **In Kansas.**-34F(2d)566.

1067-53 142Miss894, 108S298. [c] (6) Failure of ministers' protective society to restrict membership to a class is not in view of charter provision, such violation as authorizes dissolution. 194Pa6, 143 A232. (7) Issuance of christian workers' policy has been held not ground for dissolution. 194Pa6, 143A232.

1067-54 [a] (5) 194Pa6, 143A232; 10 PaDist&Co 30.

1070-83½-New. Where majority of local lodge voted to withdraw from order which had no authority to establish branches, and minority vote to accept return of surrendered charter and reorganized under new name, property of dissolved lodge is distributed per capita to the two new lodges. 10F(2d)623.

1072-98½-New. In New York a special statute creating a membership corporation and the Membership Corporation Law and General Corporation Law, so far as applicable, constitute the charter of the corporation. 132Misc109, 228 NYS248.

1072-5 245Mich548, 222NW744, 65ALR 1033.

1072-5½-New. Minority stockholders may be estopped to attack the validity of an amendment. 167Ga678, 146SE630.

1072-9 [b] **Notice of special meeting** held insufficient compliance with articles of society requiring notice to specify object of meeting. 132Misc817, 230NYS 460.

1075-59 49Hun171, 2NYS195.

1078-68 111Conn677, 151A162.

1078-72½-New. The laws of a voluntary fraternal association will be recognized by the courts, irrespective of their wisdom, 125Misc572, 211NYS548.

1078-72½-New. so long as they do not trespass on vested rights and privileges of its members under the laws of the land. 125Misc572, 211NYS548.

1078-73 Kan 292P928.

1079-74 254 IllA264; 86PaSuper409. [d] **By becoming members** and accepting constitution and by-laws members are forever bound thereby to extent of interest as members individually and collectively in funds of lodge. 211Ky 638, 277SW500. [e] **Draft on treasurer** held not binding because not issued in conformity with rule of association. 138 SC221, 136SE216. [f] **Customary manner of handling bills** against association held not to validate drafts on treasurer, not in conformity with association rules. 138SC221, 136SE216. [g] **Drafts against treasurer,** if construed as written acknowledgment of indebtedness barred by limitation, have been held insufficient to support recovery in action thereon. 138SC221, 136SE216. [h] **Contract cannot be abrogated** by construction because inconvenient or unfavorable to parties. 254 IllA264.

1079-76 111Conn677, 151A162; 338 Ill 441, 170NE735.

1080-83 [a] (2) Such general reservation of power applies to reasonable amendments which do not alter charter contract of subordinate branches. NJ Ch 146A886. [b] 86PaSuper402.

1080-87 34F(2d)305.

1081-92 NJCh 146A886.

1083-20 MoA 295SW811; 117Nebr723, 223NW797(2dcase).

1083-21 MoA 295SW811. [b] **Corporation cannot enlarge powers conferred by law creating it.**-132Misc106, 228NYS 256; 132Misc109, 228NYS248.

1083-24 88 IndA507, 164NE718.

1083-30 See also 246 IllA137.

1084–39 10PaDist&Co 589.

1084–41 [a] (8) Ministers' protective society may be authorized to issue benefit certificates. 294Pa6, 143A232.

1085–42½–New. Fraternal benefit insurance organizations are not exempt from the general principles of law which confine all corporations, societies, and associations to the objects and purposes of their existence. 117Nebr723, 223NW797(2dcase).

1085–42¼–New. In some jurisdictions no fraternal benefit corporation, organized under the laws of the state, has any power, directly or indirectly, to write insurance or issue membership certificates for profit, nor to use its funds to incorporate an old line insurance stock corporation and subscribe for its capital stock to be sold to members of the fraternal corporation, under the guise of having such stock company coöperate with the fraternal in writing a line of insurance not permitted to fraternals. 117Nebr723, 223NW797(2dcase).

1085–50 [d] **Method.–Nebr** 231NW18.

1086–59½–New. A fraternal benefit corporation, having surplus funds available for investment in securities prescribed by its constitution and laws, cannot organize and subscribe for the whole of the capital stock of a business corporation, under the pretext that such transaction constitutes an investment. 117Nebr723, 223NW797(2dcase).

1086–59⅓–New. A transaction whereby a fraternal benefit corporation, organized for the sole benefit of its members and beneficiaries, and not for profit, causes its officers to organize a stock insurance corporation, using the funds of the fraternal corporation to subscribe for the capital stock and surplus of the insurance corporation, is ultra vires and void. 117Nebr723, 223NW797(2dcase).

1086–59¼–New. A member of a fraternal benefit corporation may sue the corporation and its officers for himself and all others similarly situated, to recover corporate funds wrongfully misappropriated, when it appears that an appeal to such officers and the supreme governing body for redress would be ignored or denied. 117Nebr723, 223NW797(2dcase).

1086–59⅙–New. Members are not estopped, nor precluded by laches, to maintain such suit where the suit is commenced promptly after ascertainment of the facts. 117Nebr723, 223NW797(2dcase).

1086–59⅛–New. Where by-laws provide that association takes all property on dissolution of branch, members of a seceding branch lose all interest in any funds. 254 IllA264.

1086–61 338 Ill 441, 170NE735 (allocation of surplus).

1089–89½–New. Officers could not, by voluntarily absenting themselves from a duly called meeting and keeping possession of the original warrant or charter, prevent the lawmaking body of an order from holding a meeting. Mass 165NE479.

1089–89⅓–New. After the place for holding of a meeting of a lodge had been designated in a call for meeting, delegates to the meeting were entitled to reasonable official notification of change of place of the meeting. Mass 165NE479.

1089–89¼–New. Refusal or failure of the supreme grand master and supreme deputy grand master to attend and preside over a meeting at the place designated in a call for such meeting justified the conclusion that they were "unable" to function as such officers within the by-law. Mass 165NE479.

1089–91 129Misc521, 222NYS203. [k] **Where no officials were legally elected** at rival conventions, new convention should be called. 129Misc521, 222NYS203.

1091–12 See also 132Misc817, 230NYS460.

1091–13 [a] (2) Failure to give proper notice specifically stating, object of special meeting, as required by articles, prevents special meeting from trying officer. 132Misc817, 230NYS460.

1091–15 See also TexCivA 25SW(2d)160.

1091–24 125Misc572, 211NYS548 (jurisdiction of supreme arbitration committee to try offenses of officers of grand lodge must be obtained as per by-laws): TexCivA 25SW(2d)160.

1092–25 TexCivA 10SW(2d)568. [a] **Local officers of fraternal benefit society cannot waive provisions of constitution** though supreme officers may. Ala 127 S821.

1092–26 1LaA767; 196Wis397, 220NW180 (ratification not shown).

1092–28½–New. Convention of fraternal union may proceed by majority after minority has voluntarily departed notwithstanding resolution of convention requiring presence of three fourths of elected delegates. 223AppDiv158, 227NYS704.

1092–32 34F(2d)305 (holding that statutory remedy providing for bringing action for accounting against officers of fraternal insurance society by attorney-general is but cumulative).

1093–36 34F(2d)305 (officer of fraternal insurance society must account for misappropriations coming out of expense fund). [b] **It is unnecessary** that certificate holders suing officers should first make demand on directors to have corporation sue themselves. 34F(2d)305. [c] **In Kansas.**–34F(2d)305.

1095–70 Kan 292P928.

1097–94 See also 247 IllA532.

1097–98 134 Okl 303, 272P1023.

1098–25½–New. When membership in one association is a qualification to membership in another association, suspension in the former operates as suspension in the latter. 177Ark552, 7SW(2d)765.

1101–57 111Conn677, 151A162.

1104–99 79CalA383, 249P539. [b] **By-law authorizing suspension without hearing** is unreasonable and void. 79CalA383, 249P539.

1106–39 But see TexCivA 26SW(2d)453.

1106–40 [a] **Member's equity in funds of mutual benefit association** cannot exceed his equitable share of contributions from which such funds grow. 199Wis298, 226NW288.

1107–46 [a] **Member not entitled to retirement pension** after membership in brotherhood was severed. 157Md322, 146A284.

1107–47 152Va526, 147SE193.

1107–58 215Ky177, 284SW1045.

1108–63 [b] **Not individually liable for treasurer's negligence** in remitting proceeds to beneficiary where assessments due on member's death are paid. Oh 172NE155.

1108–67 [a] **Assessments.**–132Misc109, 228NYS248; 132Misc106, 228NYS256. [b] **Power to readjust rates.**–338 Ill 441, 170NE735. [c] **Power to increase rates and reasonableness thereof.–TexCivA** 26SW(2d)453.

1108–70 [a] (2) That member did not fully and at times for which assessment was sought to be collected realize all benefits he hoped and expected to receive from membership does not constitute failure of consideration. TexCivA 18SW(2d)438. (3) Failure of consideration occurring after assessments matured and became payable does not affect right to recover same where member received full benefit of membership up to such time. TexCivA 18SW(2d)438.

1108–73½–New. Warrants to grand lodge for transmission of local dues held not sight drafts. 203 Iowa235, 212NW485.

1108–73⅓–New. Dues must be paid to the officer authorized to receive payment. 204 Iowa103, 214NW877. [a] **Tender to officer not under bond** is insufficient, though he has been accustomed to receive payment. 204 Iowa103, 214NW877.

1109–75 101NJEq682, 139A333.

1109–85 [d] **Contract between parent organization and subordinate lodge** consists in constitution and by-laws of parent organization and charter of subordinate lodge. 79CalA1383, 249P539.

1110–88½–New. An inferior body continued by legislative enactment, which has been dealt with in its corporate capacity by the superior body, and whose delegates have been recognized and dues accepted, is an affiliated body of the superior body. 125Misc572, 211NYS548.

1110–92 79CalA383, 249P539; 129Misc521, 222NYS203. [a] **Power of state body to require payments by local bodies.**–132Misc106, 228NYS256.

1110–98½–New. The court is not deprived of jurisdiction where one faction of lodge refused to refer the matter for arbitration to council according to rules of lodge. 287Pa139, 134A514.

1110–98⅓–New. Purchase of new lots, under a deed reserving a vendor's lien for the purchase price and a loan for constructing the building, was authorized. TexCivA 13SW(2d)123 (subordinate lodge).

1110–98¼–New. Where a subordinate masonic lodge took a deed to land, reciting the consideration represented by the vendor's lien notes covering the purchase price of land and a loan for the erection of a building, and specifically reserving vendor's lien, the land was taken, subject to the vendor's lien, regardless of whether the grand lodge authorized the creation of the debt and lien. TexCivA 13SW(2d)123.

1112–10 211Ky638, 277SW500, 503 [quotCJ]; 137Misc281, 243NYS109 (right to injunction). See also 34F(2d)730. [b] (1) Mass 171NE823. [b] (3) Branch society, created with authority to acquire property, holds title thereto. 166Ga807, 144SE270. [c] **Decisive consideration** is whether group collected property for itself or as administrative organ of association. Mass 171NE823.

1112–10½–New. By constitution and other rules society may determine finally property rights and interests of members. 211Ky638, 277SW500.

1112–10⅓–New. or of subordinate lodge in and to property accumulated by local lodge. 211Ky638, 277SW500.

1112–10¼–New. All members of lodge as well as lodge itself are bound thereby. 211Ky638, 277SW500.

1113–19 [d] **Statute authorizing secession by intermediate lodge** held unconstitutional. 129Misc521, 222NYS203. [e] **Statute authorizing lodge to discontinue affiliation with supreme lodge** held not to authorize this except on affiliation with new body. 129Misc521, 222NYS203.

1113–24 129Misc521, 222NYS203.

1114–26 See also 211Ky638, 277SW500, 503 [quotCJ]. But see 93CalA126, 269P455; 152Va526, 147SE193. [c] **Supreme body may enforce laws,** properly enacted, to surrender property on voluntary dissolution. 211Ky638, 277SW500.

1114–30 152Va526, 147SE193.

1114–31 Mass 171NE823. See also 211Ky638, 277SW500, 503 [quotCJ]. [c] (2) 26 OhNPNS415. [e] **On dissolution of Klan,** court may order division of property between faction voting to disband and faction not participating in such proceeding. 26 OhNPNS415.

1114–33 254 IllA264 (revocation without hearing not void or against public policy if authorized by by-laws).

1115–38 See also Mass 165NE479.

1115–39½–New. National order expelling state organization can organize new lodges within state without interference. 137Misc281, 243NYS109.

1115–40 98PaSuper390.

1115–41½–New. The right of a subordinate lodge to organize, collect dues, and acquire and hold property through its contract with the parent organization is one of which it cannot be deprived without due process of law. 79CalA383, 249P539.

1115–42 93CalA126, 269P455; 233 IllA495. [a] (1) 79CalA383, 249P539.

1115–43 79CalA383, 249P539; 233 IllA495.

1116–48 211Ky638, 277SW500. But see 263Mass264, 160NE808. [b] **Especially** where right to recall charter is

questioned. 211Ky638, 277SW500.
1116-51 [a] **Local's sick benefit funds** constitute trust for members, and parent body cannot take funds on involuntary dissolution of local without special agreement. 93CalA126, 269P455.
1116-51½-New. Where the constitution of the parent organization provides that in the event of revocation or cancellation of the charter of a subordinate lodge all of its money shall automatically become the money of the parent organization and must be turned over to it, the parent organization is not entitled to possession of moneys of a subordinate lodge on suspension of its charter without notice or a hearing. 79 CalA383, 249P539.
1116-52½-New. Provision of charter providing for surrender of charter, seal, and "all other effects" on dissolution includes money, bonds, and other property of lodge. 211Ky638, 277SW500.
1116-54 142Miss894, 108S298; **Okl** 291P513; **TexCivA** 138SW(2d)902.
1117-60½-New. The state is not concerned with questions of whether the principles or degrees of lodges are regular and authorized by masonry or not, 142Miss894, 108S298.
1117-60½-New. nor with what the principles and degrees of free masonry are, 142Miss894, 108S298.
1117-60¼-New. nor with what differences there may be of organizations and principles, 142Miss894, 108S298.
1117-60⅓-New. so long as no fraud is used to deceive a person solicited to join or be received into these orders. 142Miss894, 108S298.
1117-60¼-New. Unless protected by the copyright laws or embracing property rights, these rituals, forms, and ceremonies will not be controlled or protected by the court. 142Miss894, 108S298.
1117-60½-New. Before the court will interfere in such case there must be an infringement of property rights, property damage or personal injury. 142Miss894, 108S298.
1117-61 [a] **Where it would be useless to have questions litigated otherwise than in judicial forum,** resort to courts is proper. 132Misc109, 228NYS248
1117-63 142Miss894, 108S298; **Okl** 291P513. [c] **Court had jurisdiction to compel payment of retirement pension** after member had exhausted his right within pension association, as required by provision of its statutes. 157Md322, 146A284.
1118-66½-New. Where fraternal organization is organized under a charter of state and state undertakes to forfeit charter because of fraudulent use thereof, court may restrain the receiving of new members through false and fraudulent representations, 142Miss894, 108S298.
1118-66¼-New. But will not restrain the members of such organization from meeting for transaction of business among themselves. 142Miss894, 108S298.
1120-77 254IllA264 (where local charter is revoked under by-laws, court will not determine reasonableness of by-laws).
1121-93 1LaA459; **Mass** 165NE118; **TexCivA** 138SW(2d)902; **TexCivA** 168SW(2d)371.
1122-94 125Misc572, 211NYS548.
1122-99 117Nebr723, 223NW797(2d case).
1122-2 **Wash** 291P328.
1123-10 **TexCivA** 289SW456; **Wash** 291P328.
1123-15 See also 125Misc572, 211NYS548.
1124-21 **TexCivA** 289SW456.
1125-34½-New. No demand on a corporation is necessary in a suit for an accounting charging fraud and misappropriation on the part of its officers and directors, if an accounting has been demanded of them and refused. 9Pa Dist&Co 167.
1125-36½-New. Right of members to sue concerning disputes over money or tangible property is waived only by express agreement to arbitrate. **Wash** 291P328.
1125-37½-New. Where a faction of a lodge sued to determine which was the true order but dismissed suit, it could not assert that another faction was guilty of laches because it failed to sue for determination until shortly after dismissal. 287Pa139, 134A514.
1125-39 [b] **Suit of lodge by its officers is same as suit by lodge in name of its officers** and joined by its officers in their individual capacity, where issues in both cases were identical. **TexCivA** 20SW(2d)135.
1126-41 [a] **Judgment held unauthorized** where officers did not appear as parties plaintiff. **LaA** 126S518(4thcase).
1126-41½-New. In an action based on fraud and misappropriation against the corporation and its officers for an accounting, discovery, and receivership, members who are creditors may be joined as parties plaintiff with creditors and bondholders who are not members. 9PaDist&Co 167.
1126-47 231Ky302, 21SW(2d)439(2d case) (treasurer).
1127-57 [a] **Rule held inapplicable as** to bill against corporation for preservation and administration of express trust. 219Ala293, 122S36.
1127-57½-New. Under statutes in some jurisdictions, no action to discontinue or enjoin the business or methods of an association can be entertained by the courts except on suit by the attorney-general of the state. 177Minn616, 224NW854.
1127-57⅓-New. Suit for preservation and administration of trust fund held by fraternal beneficial association and for appointment of receiver need not be instituted by attorney general, 142 **Okl** 187, 286P294.
1127-57¼-New. but may be brought by beneficiaries. 142 **Okl** 187, 286P294.
1127-57⅙-New. Individual member of fraternal benefit society cannot maintain action against society or officers for mismanagement or exceeding corporate powers or failure to comply with statutes. 130Kan562, 287P270.
1127-69 219Ala293, 122S36.
1128-72½-New. That defendant association is under the sovereign jurisdiction fraternally of the petitioner does not justify such petitioner's intervention. 219Ala293, 122S36.
1128-77½-New. Service on the grand lodge of a fraternal organization may be perfected by serving a subordinate lodge, its agent. 35GaA140, 132SE270.
1128-78 [g] **Foreign fraternal benefit society's power of attorney,** appointing insurance commissioner as its agent on whom process might be served, revoked former certificate, appointing another as such agent. 84Colo198, 269P584.
1129-79 **TexCivA** 298SW450.
1129-80 40GaA536, 150SE436(2dcase).
1130-3 See also 93CalA126, 269P455.
1130-5½-New. Where defendant by its answer puts in issue authority of trustees to execute note sued on, plaintiff has burden of showing such authority. 196Wis397, 220NW180.
1131-25½-New. Constitution and by-laws purported to be published by supreme council of order and furnished local lodge and used by it are admissible without further proof of their adoption. 192NC433, 135SE133.
1131-32 254IllA264; 258Mass581, 155NE450; **Mass** 165NE479; **Nebr** 231NW18; **TexCivA** 282SW949. [a] (2) To make prima facie case that constitution and by-laws of society had been adopted. 192NC433, 135SE133.
1132-40½-New. whether plaintiffs were members of lodge; 192NC433, 135SE133.
1132-40⅓-New. whether defendants were without authority to sell property of society; 192NC433, 135SE133.
1132-47 [c] See also **TexCivA** 282SW949.
1132-48½-New. The master's conclusion that there was no merger between the fraternal association and the fraternal corporation must stand. **Mass** 165NE479.
1132-48¼-New. The master's conclusion that the council did not acquire jurisdiction of a dispute has been held warranted where one of the factions denied the council's right to decide the matter. **Mass** 165NE479.
1132-52½-New. A petition for dissolution of a beneficial society not having been dismissed by the court, which merely discharged a rule to show cause, application may again be made, after affirmance of such order if the society fails to heed proper advice from the insurance commissioner to remedy the general high cost of conducting its business. 294Pa6, 143A232.

BENEFIT

1137-55½-New. some legal right or thing of value; 190NC423, 130SE49.

BENEVOLENCE

1140-87 [b] (5) 47Ida66, 272P696, 62ALR323 (frequently used synonymously).

BENEVOLENT

1140-96 216Ala549, 114S43 (association for purpose of amusement park, using property or playground as recreation ground, can incorporate as "benevolent society").
1141-1 44F(2d)172; 50SD355, 210NW200.

BETWEEN

1146-58 71CalA409, 235P670.
1147-59 71CalA409, 235P670.
1147-60 71CalA409, 235P670.
1148-62 71CalA409, 235P670.
1148-63 94Fla943, 114S521, 523 [cit CJ]. See also 11PaDist&Co 170.

BEVERAGE

1149-69 [m] **Especially pleasant or refreshing drink** or an habitual one. 133Wash581, 234P666. [n] **That which is drunk.**–133Wash581, 234P666.
1149-70 133Wash581, 234P666.
1149-70½-New. Capable of being used as a beverage means liquor capable of being drunk as words are used in the statute, "intoxicating liquor." 133Wash581, 234P666.
1149-70⅓-New. Capable of being drunk either for the pleasure of drinking or its after effect. 133Wash581, 234P666.
1149-70¼-New. Capable of being used as a beverage does not apply to liquid that it is possible to swallow, but is not reasonably fit or palatable. 133Wash581, 234P666.

BIDDING

1154-13 177Ark127, 6SW(2d)16.
1154-14 177Ark127, 6SW(2d)16.

BIGAMY

1157-2 43Ida180, 250P239 [quotMurrayEngD]. [b] (3) Idaho Act of 1905 defines "polygamy." 43Ida180, 250P239.
1158-5 140SC62, 134SE873.
1158-10 140SC62, 134SE873.
1158-13 43Ida180, 250P239. [i] **Validity and construction of statutes.**–204Cal39, 266P518.
1158-18 312Mo84, 278SW679, 680 [cit CJ]; 140SC62, 134SE873.
1159-19 312Mo84, 278SW679; 140SC62, 134SE873, 874 [quotCJ]; 107TexCr231, 296SW535.
1159-20 140SC62, 134SE873.
1159-30 217Ala4, 114S898, 56ALR1264; 95PaSuper261 (no marriage contract shown).
1159-38 [a] **Where statute prohibits remarriage within stated time,** marriage within such time outside of state is valid. 84CalA382, 258P447.
1159-41 140SC62, 134SE873, 874 [quot CJ].
1159-42 140SC62, 134SE873, 874 [quot CJperCothran,J].
1160-45 140SC62, 134SE873, 874 [quot CJperCothran,J].
1160-48 312Mo84, 278SW679, 680 [cit CJ]; 140SC62, 134SE873. [a] 312Mo84, 278SW679; 140SC62, 134SE873.
1160-50 [a] See also 204Cal39, 266P518.
1161-57 **TexCr** 29SW(2d)381(1stcase) (divorce is matter of defense).
1161-59 [b] **Annulment of first marriage after second marriage,** on grounds making first marriage voidable only, does not relieve second marriage of

bigamous character. 175Minn498, 221 NW867.
1161-67 156Tenn614, 3SW(2d)1061 (marriage by county judge held sufficient basis for prosecution under statute).
1162-75 TexCr 26SW(2d)271.
1162-82 TexCr 30SW(2d)311.
1164-92 [a] **Proper care to discover whether prior marriage was dissolved** depends on facts of each case. 110TexCr 20, 7SW(2d)528.
1164-95 Fla 129S339(1stcase).
1165-4 110TexCr20, 7SW(2d)528. [d] **Mere rumor that former wife had procured divorce** does not constitute defense to prosecution under Tennessee statute for marrying and cohabiting with second wife during lifetime of former wife. 157Tenn446, 9SW(2d)702. [e] **Want of proper care** renders defense unavailable. TexCr 28SW(2d)143.
1165-5 Fla 129S887; 67Utah15, 245P 375, 376 [quotCJ].
1165-6 67Utah15, 245P375, 376 [quot CJ].
1166-33 143Miss787, 109S799; 116Nebr 363, 217NW591 (matter of defense).
1167-34 [b] 143Miss787, 109S799.
1167-35 83Colo 295, 264P658, 659 [quot CJ].
1168-52½-New. Allegations may sufficiently show former marriage status without negativing divorce. TexCr 26 SW(2d)271 (allegations held sufficient).
1169-68 OklCr 288P352; TexCr 28SW (2d)143 (sufficient allegation). [b] **Indictment held sufficient.**-TexCr 26SW (2d)271.
1169-74 204Cal 39, 266P518.
1169-82 43 Ida180, 250P239.
1170-83 43 Ida180, 250P239.
1170-86 43 Ida180, 250P239.
1170-88 22AlaA243, 114S892.
1170-98 217Ala4, 114S898, 899, 56ALR 1264 [citCJ]; 22AlaA243, 114S892 (invalidity of second marriage); 312Mo 84, 278SW679; 140SC62, 134SE873.
1171-1 22AlaA572, 117S909.
1171-2 217Ala4, 114S898, 56ALR1264; 22AlaA243, 114S892; 22AlaA572, 117S 909; 174Ark357, 295SW368.
1171-4 [a] **Where state proves ceremonial marriage** performed by person introduced as minister of gospel by defendant, and ceremony is performed at parsonage or home of alleged preacher in presence of witnesses, it is sufficient proof of valid marriage. 143Miss787, 109S799.
1171-5 217Ala4, 114S898, 900, 56ALR 1264 [citCJ].
1171-6 217Ala4, 114S898, 900, 56ALR 1264 [citCJ].
1171-12 112TexCr470, 17SW(2d)1053.
1171-13 93CalA504, 269P750.
1173-30 43 Ida180, 250P239.
1173-40 [c] **Admission of license naming defendant differently than as charged** is not erroneous in view of proof of former marriage. TexCr 26SW(2d) 645. [d] **Marriage license is admissible despite slight variance** in license naming second wife as "Adel Stiffins" while proof showed "Adel Steffens." TexCr 26SW(2d)645.
1174-48 175Ark1170, 298SW1019.
1175-69 [a] 156Tenn614, 3SW(2d)1061 (first and second marriage). [c] 22AlaA 572, 117S909; 175Ark1170, 298SW1019; 83Colo 295, 264P658 (third marriage); 43 Ida180, 250P239; NJSup 140A429.
1175-71 217Ala4, 114S898, 56ALR1264.
1175-73 [c] (1) 22AlaA243, 114S892.
1175-74 217Ala4, 114S898, 56ALR1264 [22AlaA243, 114S892].
1176-79½-New. Evidence of justice of peace of another state as to performing marriage ceremony is prima facie showing of justice's authority. 43 Ida180, 250P239.
1176-88 110TexCr20, 7SW(2d)528.
1176-95 22AlaA243, 114S892 [r on other grounds 217Ala4, 114S898, 56ALR1264] (instruction as to presumptions held improperly refused); 43 Ida180, 250P239.

BILL

1179-21 14F(2d)852, 855 [quotCJ].
1179-22 14F(2d)852, 855 [quotCJ].

BILLIARDS

1179-30 27Hawaii587, 591 [quotCyc].

BILL OF RIGHTS

1181-58 231Mich409, 204NW140.
1181-58½-New. The Bill of Rights of 1688 was no grant of rights; it was a declaration of existing rights and exacted observance thereof. 231Mich409, 204NW140(perWiest,J,dissenting).

BILL OF SALE

1181-58½-New. A written agreement by which one transfers his title to goods or chattels to another person. Blacks L. D. [quot 80CalA284, 251P810].

BILLS AND NOTES

8 C. J.—32-7 51ND399, 200NW505, 37 ALR1186.
33-9 51ND399, 200NW505, 37ALR 1186.
33-16 120Kan706, 244P1039, 1041 [cit CJ]; 165Minn339, 206NW930; TexCivA 286SW914. [a] 102Conn558, 129A538.
34-24½-New. **"Trade acceptance"** is a draft or bill of exchange drawn by seller on purchases of goods sold, and accepted by such purchaser. 241NY231, 149NE841 (regulations of federal reserve board).
34-24¾-New. **"Banker's acceptance"** is a draft or bill of exchange of which the acceptor is a bank or banker engaged generally in the business of granting bankers' acceptance credits. 241NY231, 149NE841 (regulations of federal reserve board).
35-47½-New. Trade acceptances are considered as bills of exchange. 262 Mass242, 159NE625.
35-50 [a] (2) Check issued by express company to pay from its credit amount of rubles, addressed to bank in Russia, is foreign bill of exchange. 214AppDiv 279, 212NYS141.
36-67 120Kan706, 244P1039, 1041 [cit CJ]; 127Misc487, 216NYS509; TexCommnA 277SW625.
36-68 120Kan706, 244P1039, 1041 [cit CJ]; 127Misc487, 216NYS509; TexCommnA 277SW625. [a] (19) Other similar definitions, 223NYS481; TexCivA 278SW459, 460. [h] **Intention of drawer controls as to parties.** 203 Iowa 877, 211NW561.
37-69½-New. It is executory in its nature. TexCommnA 277SW625.
37-70 165Minn339, 206NW930; 78 Mont48, 252P373. [a] **Instrument payable at bank.**-129 Or36, 276P262, 63ALR 1133.
37-72 202 Iowa899, 211NW506, 50ALR 388; TexCommnA 277SW625 (cashier's check).
37-72½-New. It is executory just as ordinary check, TexCommnA 277SW625.
37-72¾-New. and revocable at any time before bank has paid it. TexCommnA 277SW625 (cashier's check).
37-73 202 Iowa899, 211NW506, 50ALR 388.
38-83 CalA 292P281; 165Minn339, 206 NW930; 253NY359, 171NE569.
38-84 173Minn504, 218NW99.
40-21 120Kan706, 244P1039, 1041 [cit CJ]. [e] **As commodity subject to title and ownership.**-TexCivA 28SW(2d)876. [f] **Sight draft** is bill of exchange for immediate collection of money. 111 Conn709, 151A177.
41-23 202 Iowa899, 211NW506, 50ALR 388; 99Vt262, 133A745.
41-23½-New. **Trade acceptance** is a draft or bill of exchange drawn by the seller on the purchaser of goods and accepted by the latter. 241NY231, 149 NE841.
41-30 130Misc394, 223NYS481; TexCivA 290SW769. [a] (14) Other definitions. Sask [1930] 4DomLR1014. [i] **Promissory note is contract** between parties to it. 51ND246, 199NW930. [j] **That note is secured** does not change its nature. CalA 290P131.
41-31½-New. "Notes" in common parlance do not include a certificate of deposit. 215Ala685, 112S222, 52ALR1095.
42-32 TexCivA 290SW769.
42-43 24 OhA246, 157NE717. [c] **Check** made due one month from date held in effect promissory note. Ida 292P219.
42-48½-New. In Saskatchewan, where instrument contains all requirements of note, it will be held to be such although not shown to have been so intended. Sask [1929] 4DomLR274.
42-48¾-New. In such case it will be presumed that parties intended to make promissory note. Sask [1929] 4DomLR 274.
43-51 TexCivA 286SW914.
43-67 32Ariz588, 261P45.
44-78 141 Okl 254, 284P854.
44-86 But see 192NC87, 133SE427.
44-87 31NM667, 250P18.
44-91 Tex 293SW800.
46-40 51ND399, 200NW505, 37ALR 1186.
46-48 TexCivA 288SW1090.
47-61 242NY38, 150NE594; 288Pa549, 137A113.
47-64 253 IllA128; 202 Iowa899, 211 NW506, 50ALR388; 122Kan616, 253P 238.
48-73 122Kan616, 253P238; 75Mont 516, 244P494 (applicable only so long as instruments are in hands of holders in due course); 100Vt112, 135A715; 37 Wyo 225, 260P674.
48-75 TexCivA 274SW166.
48-77 51ND399, 200NW505, 37ALR 1186. [a] **Gaps in statutory rules** may be filled by law merchant. 242NY38, 150NE594.
48-81 202 Iowa899, 211NW506, 50ALR 388; 52SD25, 216NW595.
48-82 CalA 288P845.
48-85 166Minn472, 208NW186; 116 Nebr380, 217NW612.
49-89 TexCivA 280SW238.
49-90 116Nebr380, 217NW612. [c] **Conflicting constructions.**-TexCivA 280 SW238.
49-94 116Nebr380, 217NW612; SD 226NW751.
49-96 99WVa544, 130SE142.
49-97½-New. Rights conferred by statute on holder of negotiable instrument are not lost under law merchant. 242 NY38, 150NE594.
50-1 51ND399, 200NW505, 37ALR 1186; TexCommnA 274SW127.
50-2 TexCommnA 274SW127.
50-9 116Nebr380, 217NW612; TexCivA 288SW1090.
51-14½-New. Parties to negotiable instruments will be presumed to have understood that rights and liabilities would be determined under the Negotiable Instruments Law. 153Md235, 138 A261, 53ALR1165.
51-16½-New. Instruments not otherwise negotiable may become so by estoppel. 242NY38, 150NE594.
51-16¾-New. Instruments not otherwise negotiable may become negotiable in effect by contract. 248NY428, 162 NE475.
51-16¼-New. Whether instrument is negotiable must be determined from face of instrument alone. 253 IllA475.
51-17 [a] TexCommnA 276SW664.
51-18 242NY38, 150NE594.
51-21½-New. Notes given for insurance premium may be acquired by innocent holders in due course after they become negotiable by delivery of policy. 175Ark1155, 2SW(2d)20.
51-22 201Cal 584, 258P47 (question of negotiability is immaterial where note was not transferred); CalA 283P949.
52-25 38GaA58, 143SE787.
52-28½-New. Law merchant must make instruments negotiable against express prohibition of state. 242NY38, 150NE594.
52-28¾-New. In cases not provided for by the Negotiable Instruments Law, the law merchant will govern. 242NY38, 150NE594.
52-28¼-New. In South Carolina the statute makes a law merchant regulating negotiable instruments applicable. 38GaA641, 144SE804.
52-29 221AppDiv595, 224NYS555.
52-32 119 Or460, 249P1054.
52-33 119 Or460, 249P1054, 1055 [quot CJ].
52-34 119 Or460, 249P1054, 1055 [quot CJ].
52-35 119 Or460, 249P1054, 1055 [quot CJ].
52-39 43 OklACR26.
52-44 MoA 9SW(2d)852.
53-74 TexCivA 12SW(2d)1037. [b] (2) MoA 256SW105; 192Wis528, 213NW

328. [c] **Trade acceptance** held negotiable instrument. 193NC1. 136SE259.
53-75 Md 150A797.
54-85½-New. trade acceptances, MoA 10SW(2d)334.
54-87 213AppDiv201, 210NYS460 (written contracts are not negotiable because payable to bearer).
54-88 133Ark247, 202SW235.
54-91½-New. conditional sales contract, 30F(2d)413.
54-94½-New. **Negotiable instruments** may fall within one of two classes; one representing interests in property, giving use to rights in rem; 242NY38, 150NE594.
54-94¼-New. or they may be promissory or executory, creating rights in personam. 242NY38, 150NE594.
54-94¼-New. The right to collect money due on a contract, a chose in action, is not governed by the Negotiable Instruments Law. 264Mass588, 163NE172.
54-94½-New. In Saskatchewan, in order that an instrument may be negotiable it must, by custom of trade, have become transferable like cash by delivery, and must be within the statutory requirements for such instruments. Sask [1929] 2DomLR698.
54-4 [a] 167La230, 119S31.
55-6½-New. Prior to statute, where a note and a mortgage were executed together as part of the same transaction, the assignee of the mortgage to whom the note was indorsed was not the holder in due course of the negotiable instrument. 48Ida538, 283P609.
55-7½-New. A note, not in any way indicating that it was secured by a lien, was negotiable. TexCivA 272SW323.
55-28 119Or460, 249P1054, 1055 [cit CJ].
55-29 85Colo546, 277P782; 119Or460, 249P1054, 1055 [citCJ].
56-44 155Miss328, 124S367. [a] (2) Indorsement and delivery transfers all right, title, and interest. 155Miss328, 124S367.
56-50 [a] (6) Equitable title only passes by indorsement and delivery. 5Pa Dist&Co 69.
57-60 80CalA768, 253P166, 167 [quot CJ].
57-61 255IllA15; 74Mont549, 241P613, 615 [citCJ].
57-63 But see 80CalA768, 253P166.
57-65 125Kan749, 750, 265P1112 [cit CJ].
58-94 80CalA768, 253P166, 167 [quot CJ]. [c] (2) Payee of nonnegotiable note assigning with words "guarantee payment of same at maturity" is liable thereon as a surety. 85PaSuper480. [d] **Effect of waiver of protest.**–74Mont549, 241P613.
58-95 80CalA768, 253P166, 167 [quot CJ].
58-95½-New. **Intent to become surety.** Payee of nonnegotiable note may assign same with words showing intent to become surety, and in such case his liability is not that of indorser. 85PaSuper480.
59-97 80CalA768, 253P166 (though intermediate indorser may have limited his liability by use of words "without recourse").
59-99 See also 11PaDist&Co 313, 315 [quotCJ].
59-1 100Vt112, 135A715.
59-12 11PaDist&Co 313, 315 [quotCJ].
60-15 85PaSuper480 (payee assigning with liability of surety). But see 11 PaDist&Co 313, 315 [quotCJ].
61-29 85PaSuper480.
61-60 41F(2d)584; Cal 288P69; 69 CalA370, 231P380; 114Nebr560, 210NW101. [e] **Forged note.**–118Nebr624, 225NW753.
62-66 203Iowa1060, 213NW777, 57ALR1165. [a] (3) When check postdated. 156SC397, 153SE473.
62-66½-New. Drawer of foreign bill of exchange is secondarily liable. 214AppDiv279, 212NYS141.
62-68 55ND406, 213NW963, 52ALR988.
62-70 MoA 287SW839; 55ND406, 213NW963, 52ALR988.
62-73 Md 150A797 (amount paid to payee); 165Minn417, 206NW725, 726 [citCJ]; 80Mont374, 260P734.
63-74 123Or95, 260P227 (draft).
63-79 218Ala491, 119S1.
63-84 228AppDiv456, 240NYS121.
63-86 170Ark10, 279SW377 (severally liable).
63-86½-New. Holder need not elect to sue one or the other, 170Ark10, 279SW377.
63-86½-New. nor is he bound by election to take judgment against acceptor, 170Ark10, 279SW377.
63-86¼-New. although there can be but one satisfaction. 170Ark10, 279SW377.
63-87 203Iowa833, 211NW542, 547, 52ALR1297 [citCJ]; 55ND406, 213NW963, 52ALR988.
63-88 203Iowa833, 211NW542, 547, 52ALR1297 [citCJ]; 55ND406, 213NW963, 52ALR988.
63-89 203Iowa833, 211NW542, 547, 52ALR1297 [citCJ].
64-5 78CalA362, 248P947.
64-16 120Kan706, 244P1039, 1041 [cit CJ].
65-28 NJSup 137A555; 197NC572, 150SE32(2dcase).
65-29 128Kan164, 276P807; 116Nebr380, 217NW612; TexCivA 274SW274, 275 [citCJ].
65-33 Mass 166NE879.
65-38 [a] **Holder in due course can recover of maker** regardless of rights between maker and others. 23AlaA471, 127S248.
65-38½-New. Where payee of a larger note given to him to procure money for the maker pledged it to the bank to secure a smaller note the proceeds of which he gave to the maker, the maker is liable to the bank for the unpaid balance of the amount received by him regardless of extensions granted the payee on his note to the bank. 50SD369, 210NW188.
65-38¼-New. In the absence of negotiation of a note, the liability of the maker is to be determined by what took place at the time the note was given. MoA 8SW(2d)92.
65-40 But see 128Kan164, 276P807.
65-41 148Md345, 129A506.
65-43 206Iowa328, 218NW568; 241Mich199, 217NW47.
65-44 241Mich199, 217NW47.
66-47 206Iowa328, 218NW568; 241Mich199, 217NW47.
66-56 241Mich199, 217NW47.
66-56½-New. Such provision applies where a note is given to a person doing business under an assumed or company name and the payer is designated by such name. 241Mich199, 217NW47.
66-56¼-New. Each purchaser giving a note for interest in a company is one of the joint makers. 219Ala176, 121S535.
66-59 197NC572, 150SE32(2dcase); NC 153SE597 (joint makers are primarily liable); NC 155SE263. [b] **One who signs note on face** is comaker, and not guarantor, and is liable to same extent as comaker who received consideration, unless released or discharged. 235IllA112. [c] **By statute, parties to joint note** are jointly and severally liable. 233IllA56.
66-62½-New. One signing name under that of maker, so that loan may be obtained, on note is joint maker. 50SD179, 208NW786.
66-64 TexCivA 274SW274, 275 [citCJ].
67-65 [a] **Liability of principals on note determinable inter se by statute.**–198NC190, 151SE255.
67-70 35GaA786, 134SE789; 7PaDist&Co 604. [b] **Negotiable Instruments Law** has not changed common-law presumption that it is only joint obligation. 126Misc467, 214NYS465. [c] **In Philippines.**–45Philippine107.
67-72 126Misc467, 214NYS465 (presumption that obligation is joint only is rebuttable).
67-75 166Ga163, 142SE678 (I, we, or either of us).
67-77½-New. A promissory note reciting, "I or we promise to pay," signed by the principal and indorsed on the back by the sureties, is a joint and several obligation as to the principal and sureties signing the note. 39GaA206, 146SE345.
68-79 118Or1, 245P503.
68-86½-New. **Party has been held not a comaker** where he signed as seller under conditional sales at the conclusion of a recital that the note evidenced an obligation. NJSup 138A111.
68-89 [b] **Payee receiving note for negotiation** and agreeing to pay part has been held coöbligor with makers. Tex CivA 297SW607.
69-6 122Or519, 259P1063; 32Porto Rico752; TexCivA 274SW274, 275 [cit CJ]. See also 141Okl254, 284P854.
69-7 NC 155SE263; TexCivA 274SW274, 275 [citCJ].
69-7½-New. One who signs as joint maker of a note under an agreement that he is to indorse the other's note for purchase by other is a surety. 34GaA310, 129SE296.
70-8 TexCivA 273SW1022 (discharged only in payment).
70-11 32PortoRico752. [b] **In Porto Rico.**–32PortoRico752.
70-15 197NC572, 150SE32(2dcase) (their respective liabilities to each other may be shown by parol).
71-25 MoA 20SW(2d)705 (one who signs note following guarantee clause). [a] **One who signs his name to waiver on back of note** may be both guarantor and indorser. 130Or375, 280P329.
71-30 321Ill612, 152NE539, 47ALR891.
71-34 CalA 289P934 (indorsement that this is a good, valid and subsisting promissory note).
71-35 125Or261, 266P624 (indorsement of guaranty before delivery or negotiation of note held not collateral undertaking).
72-47 222MoA1156, 14SW(2d)41.
72-48½-New. Payee on sale and transfer of note as such became liable thereon as guarantor. 155SC152, 152SE179.
72-62 [b] **By statute,** in some jurisdictions person, who by written indorsement guarantees payment of nonnegotiable note at maturity, is surety. 85Pa Super480. [c] **Negotiable Instruments Law** does not abolish relation of principal and surety between makers of note. 53SD268, 220NW515. [d] **Fact that money for note was paid to some, with consent of all obligors** does not show that those not receiving money were sureties. 41GaA221, 152SE305.
72-66 53SD268, 220NW515.
73-76 [a] **At common law** surety on note is primarily liable. 34F(2d)310. [b] **Where surety on note signs as principal,** liability of surety is not increased. TexCivA 25SW(2d)222.
73-82 119Kan760, 241P259, 263 [cit CJ]. [a] **Pro rata liability among sureties.**–45Philippine107.
73-85½-New. Fact that principal debtor signed note on back as surety does not change liability as principal. Tex CivA 25SW(2d)222.
73-89½-New. Suretyship is not established where payee does not know that ostensible maker signed as surety. 41GaA221, 152SE305.
74-90 34F(2d)310 (principal and surety are in effect comakers, primarily and jointly liable as far as their relation to holder is concerned, though as between themselves principal is primarily, and surety secondarily, liable).
74-93 119Kan760, 241P259.
74-96 35GaA5, 131SE524.
74-97 222MoA1156, 14SW(2d)41 (memoranda held not to constitute indorsement).
75-12 170Minn128, 212NW2.
75-13 31Ariz386, 253P899; 170Minn128, 212NW2. [a] (2) Fact that president indorsed note of corporation did not make him joint maker. 127Misc805, 217NYS471.
75-14 111Conn626, 151A168; 170Minn128, 212NW2. [a] SD 226NW757.
75-15 170Minn128, 212NW2.
75-19 46Ida744, 271P931. [a] **Irrespective of statute,** decedent, indorsing notes in blank before maturity under agreement for valuable consideration with intent to charge himself to payee, becomes liable as indorser under contract. 46Ida744, 271P931.
75-19½-New. Illinois, 253IllA128.
76-28 52ND43, 203NW182.
76-30 288Pa374, 136A238.
76-32½-New. Texas, TexCivA 276SW773.
76-32¼-New. Wyoming, 34Wyo405, 244P372.

77-42½-New. Oklahoma, 138 **Okl** 57, 280**P**434.
77-43 133**SC**304, 130**SE**890 (held indorser).
77-49 253 **IllA**128. [c] **Receipt for interest paid.**-323 **Ill** 594, 154**NE**701.
78-53 125 **Or**261, 264**P**852.
78-59 **Can** [1929] 2**DomLR**124.
78-61 253 **IllA**128.
79-70 35**GaA**5, 131**SE**524; 36**GaA**55, 135**SE**222.
80-71 35**GaA**5, 131**SE**524.
82-97 167**La**230, 119**S**31; 190**NC**225, 129**SE**598.
82-6 [d] **Contrary agreement.**-127**Misc** 805, 217**NYS**471.
82-9½-New. Where the indorser signed a draft to obtain goods for the drawer, and the goods were not shipped, the indorser is not liable. 87**CalA**500, 262**P** 351.
83-17 75**Mont**516, 244**P**494, 498 [cit CJ].
83-18 **CalA** 287**P**575. See also **MoA** 294 **SW**734.
83-20 75**Mont**516, 244**P**494, 498 [cit CJ].
85-49 [b] **Relation of parties** is to be determined from face of instrument in absence of special agreement. **Mass** 166 **NE**57.
85-50 **CalA** 284**P**1047; 9**PaDist&Co** 232. [a] **As between original parties** note is but a simple contract to pay money. 142**Wash**306, 252**P**934. [b] **Reference on guaranty to contract forming basis of note** would not render note, when construed with written guaranty for its payment, nonnegotiable. **Tex CivA** 21**SW(2d)**104. [c] **Relation of parties.-NC** 155**SE**263.
85-52 87 **IndA**318, 158**NE**919 (instrument construed to determine drawer); **TexCivA** 285**SW**694.
85-53 [a] **"We" promise to pay** does not indicate personal liability of directors signing below corporate name. 36**Wyo** 58, 252**P**1036, 51**ALR**315.
85-53½-New. Parties to a transfer of a note are conclusively presumed to have contracted with reference to the Negotiable Instruments Law. 174**Ark**274, 294**SW**999.
85-53½-New. Within the bounds of reason, liberality of construction must be exercised in favor of the negotiability of notes. 207 **Iowa**326, 222**NW** 878.
85-55 21**F(2d)**661; 25**F(2d)**403, 404 [quotCJ]; 141**Miss**38, 106**S**209, 44**ALR** 393; 126**Misc**638, 214**NYS**378; 188**Wis** 4, 205**NW**486.
85-56 21**F(2d)**661; 25**F(2d)**403, 404 [quotCJ]; 141**Miss**38, 106**S**209, 44**ALR** 393.
85-57½-New. Indorsement on back of note is as much note as though written upon face and body. **TexCivA** 277**SW** 773.
85-58 97**Fla**50, 119**S**788; 252 **IllA**366. [a] **Particular agreements construed.**-193**NC**470, 137**SE**320.
85-60 202**Cal** 279, 260**P**291 (construed most strongly against maker).
86-69½-New. Under Negotiable Instruments Law, instrument is construed negotiable whenever possible. 204 **Iowa** 555, 215**NW**664.
86-79 **Mass** 166**NE**837.
86-82 [a] **Contract for payment of penalty** contra policy of state not enforceable. 212**Ky**447, 279**SW**618.
87-2 40**F(2d)**260; 174**Ark**984, 298**SW** 878; 215**Ky**368, 285**SW**209; 9**LaA**664, 120**S**79; **MoA** 11**SW(2d)**1098; 103**NJL** 620, 137**A**534; 135**Misc**608, 238**NYS**154; 99**Vt**17, 130**A**701. [b] **In absence of proof of law of place where notes were executed,** law of forum governs rights and liabilities of parties despite Negotiable Instruments Act. **Me** 149**A**806.
88-13 202 **Iowa**1263, 211**NW**864.
88-14 202 **Iowa**1263, 211**NW**864.
88-24 137**Misc**396, 241**NYS**76.
88-24½-New. The place of payment does not determine the place of execution, and an advance of money to the maker is not an essential part of the execution of the obligation, in determining where execution took place. 27**F (2d)**224.
89-30 252 **IllA**536; 202 **Iowa**1263, 211 **NW**864.
89-33 202 **Iowa**681, 210**NW**952.
91-47 208 **Iowa**1261, 226**NW**137, 138 [citCJ].
91-51 137**Misc**396, 241**NYS**76.
92-63 14**F(2d)**50; 220**Ala**452, 125**S**903 (2dcase); 46 **Ida**544, 269**P**96; 252**Mass** 552, 148**NE**105; 174**Minn**68, 216**NW**778; 152**Miss**286, 119**S**829; 157**Miss**229, 127 **S**777; **MoA** 11**SW(2d)**1098; 115**Nebr** 327, 212**NW**762; 103**NJL**620, 137**A**534; 246**NY**194, 158**NE**70; 137**Misc**203, 242 **NYS**598; 52**ND**617, 204**NW**683, 688 [quotCJperChristianson,CJ].
92-64 115**Nebr**327, 212**NW**762; 103 **NJL**620, 137**A**534; 52**ND**617, 204**NW** 683, 688 [quotCJperChristianson,CJ].
92-65 52**ND**617, 204**NW**683, 688 [quot CJperChristianson,CJ].
92-66 115**Nebr**327, 212**NW**762; 137 **Misc**396, 241**NYS**76 (place of payment held not controlling); 52**ND**617, 204**NW** 683, 688 [quotCJperChristianson,CJ]. [b] (3) Where note is payable in Rhode Island, secured by property there, dated there, and all papers drawn by Rhode Island lawyer, loan made by check on book there has been held governed by that law even though terms may have been agreed upon in New York. 246**NY**194, 158**NE**70.
92-67 52**ND**617, 204**NW**683, 688 [quot CJperChristianson,CJ].
93-68 52**ND**617, 204**NW**683, 688 [quot CJperChristianson,CJ].
94-3 189**NC**549, 127**SE**629.
94-6 22**AlaA**518, 119**S**601(2dcase); 52 **ND**209, 202**NW**404.
95-24 53**SD**37, 219**NW**949, 60**ALR**1173.
95-28 249**Mich**403, 228**NW**796.
96-34½-New. Where negotiations for loan, settlement of terms, execution of collateral paper, and payment of money occurred in New York, its law governs, even though borrower signed papers in another state. 126**M'sc**534, 213**NYS**593.
96-39 189**NC**549, 127**SE**629; 106**WVa** 247, 145**SE**381.
96-40½-New. West Virginia, 106**WVa** 247, 145**SE**381 [disappr 99**WVa**399, 129 **SE**462, in so far as it holds to contrary].
97-55 244**Mich**159, 221**NW**114 (trust certificates).
97-56 46 **Ida**544, 269**P**96, 97 [citCJ]; 54**SD**581, 223**NW**826.
98-68 222**MoA**426, 7**SW(2d)**290, 294 [citCJ].
99-79 218**MoA**39, 264**SW**1000.
100-3 132**Misc**343, 229**NYS**791; 33**PortoRico** 944.
104-51 174**Ark**984, 298**SW**878.
105-62 91**Fla**224, 107**S**334; 51**ND**573, 200**NW**42.
106-34 99**Vt**255, 133**A**742.
106-3 91**Fla**224, 107**S**334; **Minn** 232 **NW**336; **TexCivA** 278**SW**916 (dictum). [b] **Intention to sign by cashier,** after bank directors had signed, but delivered without such signature, instrument is not negotiable. **TexCommnA** 288**SW** 438.
107-7 83**Mont**68, 271**P**695; 51**ND**374, 199**NW**757; 51**ND**573, 200**NW**42; 134 **Wash**94, 235**P**18.
107-11 22**AlaA**109, 113**S**490; 76**CalA** 288, 244**P**950; 200 **Iowa**961, 205**NW**838; 13**LaA**551, 128**S**193 (mark); **TexCivA** 293**SW**630.
107-12 51**ND**573, 200**NW**42. See also 76**CalA**288, 244**P**950.
107-12½-New. Payee or his agent cannot sign a payor's name or make his mark to a note. 21**AlaA**599, 110**S**480.
107-13 200 **Iowa**961, 205**NW**838. But see **Nebr** 231**NW**34.
107-20 22**AlaA**109, 113**S**490; 48**Nev**319, 232**P**206 (note need not disclose whether maker is corporation, partnership, or individual).
107-21 22**AlaA**109, 113**S**490.
107-22 But see 22**AlaA**109, 113**S**490.
108-26 192**Wis**566, 213**NW**290. [a] (1) See also 192**Wis**566, 213**NW**290, 291 [citCJ].
108-32 4**LaA**143, 144 [quotCJ]; 52**ND** 25, 201**NW**688. [a] **Fact that names of directors** follow corporate name creates no presumption that they acted in individual capacity. 36**Wyo** 58, 252**P** 1036, 51**ALR**315.
108-33 52**SD**25, 216**NW**595, 597 [cit Cyc].
109-36 4**LaA**143, 144 [quotCJ].
109-37 4**LaA**143, 144 [quotCJ&citCyc].
109-45½-New. One who makes mark for drawer may attest. 22**AlaA**109, 113 **S**490.
109-46 22**AlaA**109, 113**S**490, 491 [cit CJ].
109-49 [a] 22**AlaA**109, 113**S**490.
110-54 [d] (5) Note containing before signature words "Given under hand and seal of each party" followed by word "Seal" shows sealed instrument. 41**GaA** 740, 154**SE**465.
110-62 127**Me**383, 143**A**600. [a] 153 **Md**235, 138**A**261, 53**ALR**1165.
111-63 153**Md**235, 138**A**261, 53**ALR** 1165.
111-63½-New. So also a negotiable instrument need not be executed under seal whether executed by a corporation or an individual. 3**Del** 124, 131**A**566.
112-93 50**ND**455, 196**NW**307, 310 [cit CJ].
112-95 26 **OhNPNS**22.
112-96 50**ND**455, 196**NW**307.
112-6 100**Vt**86, 135**A**3; 101**WVa**535, 133**SE**131.
113-7½-New. That a note does not bear any federal revenue stamps does not constitute a defense in some jurisdictions. 231**Mich**343, 204**NW**87.
114-21 204**Cal** 673, 269**P**620, 61**ALR** 811; **TexCommnA** 291**SW**1084, 1085 [citCJ]; 145**Wash**66, 258**P**1035, 54**ALR** 1382 (instrument for purchase back of stock has been held simple contract and not negotiable instrument).
114-25 48**Nev**319, 232**P**206 (maker held sufficiently designated).
114-31½-New. Just as nonnegotiable instrument may be made negotiable by contract between parties, 242**NY**38, 150 **NE**594.
114-31½-New. it may also be made so by estoppel. 242**NY**38, 150**NE**594.
114-32 72**CalA**78, 236**P**956. [a] (1) 173**Ark**846, 293**SW**749. (2) 72**CalA**78, 236**P**956. (3) 72**CalA**78, 236**P**956.
114-33 122**Kan**616, 253**P**238.
114-35 38**GaA**764, 145**SE**528; 122**Kan** 616, 253**P**238, 239 [quotCJ]; 221**MoA** 442, 281**SW**965, 967 [quotCJ]. [a] **Instrument is either negotiable or nonnegotiable** depending on conformity to Negotiable Instruments Act. 141**Wash** 243, 251**P**561.
114-37 225**Ky**12, 7**SW(2d)**492.
114-44½-New. Place of "order" for payment held immaterial. 37**GaA**423, 140**SE**525.
115-48 126**Misc**638, 214**NYS**378; 136 **Misc**464, 240**NYS**161; 24 **OhA**246, 157 **NE**717.
115-72 126**Misc**638, 640, 214**NYS**378 [quotCJ].
115-74 126**Misc**638, 640, 214**NYS**378 [quotCJ].
115-75 126**Misc**638, 640, 214**NYS**378 [quotCJ].
116-38½-New. Statement that person has borrowed money "which is subject to and payable on demand" imports promise to pay. 126**Misc**638, 214**NYS** 378 (sufficient to make instrument promissory note).
116-92 136**M'sc**464, 240**NYS**161; 119 **Or**430, 249**P**1049, 1052 [citCJ].
117-94 [a] (3) "I owe you $4.683.34, money advanced on 'Shearer Cottage Camp' Colorado Springs, Colo." is not promissory note. 84**Colo** 234, 269**P**19, 20.
117-6½-New. Acknowledgment of loan and obligation to repay in instrument specifying amount, due date, and rate of interest are held to import promise. 24 **OhA**246, 157**NE**717.
117-7 [a] **Instrument certifying to receipt of money** as loan on property has been held not note. **LaA** 129**S**177(2d case).
117-22 213**Ala**567, 105**S**585; 91**Fla**224, 107**S**334; 244 **IllA**251; 255 **IllA**15; 253 **NY**359, 171**NE**569; 126**Misc**638, 214**NYS** 378; **TexCommnA** 16**SW(2d)**517; **Tex CivA** 296**SW**912; **TexCivA** 31**SW(2d)** 876; **Sask** [1929] 2**DomLR**698; **Sask** [1930] 4**DomLR**1014.
118-23 142**SC**531, 141**SE**156; **TexCivA** 19**SW(2d)**368.
118-24 91**Fla**224, 107**S**334; **TexCivA** 275**SW**721.
119-28 201**Cal** 17, 255**P**184; 244**Mich** 159, 221**NW**114.
119-31 **CalA** 293**P**102; **TexCivA** 12**SW (2d)**609. See also 168**La**260, 121**S**763.

119–32 CalA 293P102.
119–38 111Conn65, 149A234.
120–53 241Mich226, 217NW54 [citCJ] (not reciting that it is collateral to stock subscription).
120–55 173Ark1160, 293SW1037; 98 Fla304, 123S785; 172Minn126, 214NW 924; TexCivA 128SW(2d)609; 99WVa 544, 130SE142.
120–57 173Ark1160, 293SW1037; CalA 291P281; 227AppDiv119, 237NYS1; 58 ND239, 225NW794; 132 Or515, 284P 582; TexCivA 284SW980; TexCivA 10 SW(2d)1038; TexCivA 15SW663.
121–58 158Tenn1, 11SW(2d)865; Tex CivA 7SW(2d)595; TexCivA 8SW(2d) 565.
121–62 40GaA768, 151SE654.
121–67 204Cal 220, 267P311; 76CalA 726, 245P800; 244Mich159, 221NW114; TexCivA 273SW703.
123–85 169Ark43, 272SW834; CalA 288 P845; LaA 130S848; 99WVa544, 130 SE142. See also NB [1928] 1DomLR 716. [a] (3) Note issued by commissioners of road improvement district for necessary engineering work and payable out of the first funds that shall come into hands of district not required to meet payments on its outstanding bonds issue, whether funds shall be derived from taxation or from sale of further bonds of district. 169Ark43, 272SW834.
123–89 76CalA726, 245P800, 802 [cit CJ]; 35GaA431, 133SE300 [quotCJ].
124–90 173Ark846, 293SW749; 10LaA 22, 119S905; 99WVa544, 130SE142.
124–92 200Wis631, 229NW46.
124–93 214Ala550, 108S369 [citCJ]; 96CalA93, 273P871; 255 IllA15; 126 Misc375, 213NYS536 (reference clearly qualifying promise to pay destroys negotiability); 132 Or515, 284P582; TexCommnA 291SW1084, 1085 [citCJ]; TexCommnA 24SW(2d)383; TexCivA 284SW980; TexCivA 10SW(2d)1038; TexCivA 19SW(2d)368 (instrument held not note); [b] **"Maturity in conformity with terms of purchase,"** such provision renders note nonnegotiable. Iowa 233 NW103.
124–94 253 IllA262; 253 IllA475; 89 IndA545, 167NE136; Iowa 233NW103; 126Misc375, 213NYS536; 95PaSuper 238; TexCommnA 24SW(2d)383; Tex CivA 284SW980; TexCivA 10SW(2d) 1038; 200Wis631, 229NW46. See also TexCivA 12SW(2d)609. [a] **Recital of "value received as per terms of contract"** does not destroy negotiability. 126Misc375, 213NYS536, 537. [b] **Reference clause separate and distinct from rest of note** is not incorporated therein so as to destroy negotiability. 126Misc 375, 213NYS536. [c] **Recital that note is given in accordance with terms of conditional sales contract** does not impair negotiability. 126Misc375, 213 NYS536 (of itself). [d] **Recital on back of note** incorporates conditional sale terms in note. 126Misc375, 213 NYS536 (recital not being conditional indorsement). [e] **Statement in trade acceptances,** "maturity being in conformity with original terms of purchase," does not render them nonnegotiable. TexCivA 284SW980.
124–94½–New. A note stating that it was one of a series given under a contract for goods, with an agreement that the title remain until payment, has been held not negotiable. 258Mass124, 154 NE551.
125–8 127Kan50, 272P139, 61ALR687; 148Md345, 129A506; 121 Or277, 254P 806; TexCivA 296SW912, 914 [citCJ].
126–9 121 Or277, 254P806.
126–10 121 Or277, 254P806.
126–15 CalA 262P815; 252 IllA68 (reference to transaction in which note was given); 104NJL347, 140A331; Tex CivA 284SW980; TexCivA 290SW769.
126–16 MoA 29SW(2d)209; TexCivA 283SW596.
126–17 MoA 29SW(2d)209. [c] **Instrument containing statement of transaction** giving rise thereto may be negotiable. 126Misc638, 214NYS378.
127–23 Mass 168NE785. [b] **Reference to conditional sale involved** is held not to destroy negotiability. 173Ark 1160, 293SW1037.

127–27½–New. A provision requiring the giving of additional security under certain circumstances does not render a note nonnegotiable. 249NY322, 164 NE113.
127–28 233 IllA542; 248 IllA258; 249 IllA493; 223AppDiv155, 227NYS602; TexCivA 283SW596.
127–29 52SD223, 217NW211. [a] **In California.**–208Cal 453, 281P1022.
127–31 Cal 279P799; 207Cal 779, 279 P797; 233 IllA542; 204 Iowa555, 215 NW664; 160La1033, 107S896; Mich 232NW741; Minn 232NW336; 191NC 458, 132SE148.
127–32 173Ark1160, 293SW1037.
127–33 199 Iowa1277, 203NW802 (rule applied); Sask [1930] 4DomLR148.
127–33½–New. Negotiability is not defeated by the fact that the note accompanies the mortgage. 127Me383, 143A 600.
127–34 204Cal 673, 269P620, 61ALR 811; 91Fla224, 107S334; 128Kan541, 278P725.
127–35 52SD223, 217NW211.
127–36 But see Mass 168NE785.
128–42 252 IllA536; 249Mich403, 228 NW796; 9PaDist&Co 770 (note payable in installments); 10PaDist&Co 113.
128–44 85PaSuper480. [b] **In Maryland.**–149A270.
128–45 5PaDist&Co 342.
128–46 97PaSuper499; 5PaDist&Co 69; 5PaDist&Co 342; 9PaDist&Co 232; 12PaDist&Co 449.
129–50 NC 153SE597.
129–51 41 Ida151, 238P524 (detachment of note contained in conditional sales contract makes it nonnegotiable in hands of indorsee, not holder in due course); Man [1926] 4DomLR487, [1926] 2WestWkly813.
129–52 215Ala648, 112S237; 40GaA 768, 151SE654; Nebr 229NW334.
130–56½–New. The invalidity of a provision attempting to reserve title to goods sold does not invalidate the note as an evidence of indebtedness. 155 Tenn250, 292SW1.
130–60 221AppDiv228, 222NYS463. [b] **Certificate reciting holder as entitled to receive described bonds** held not negotiable. 242NY38, 150NE594.
130–67 202Cal 279, 260P291 (form of note sufficient); 242NY38, 150NE594.
131–71 51ND287, 199NW945, 948 [cit CJ].
131–73 219MoA34, 269SW955, 958 [cit CJ].
132–84 [a] 202Cal 279, 260P291, 292 [citCJ].
134–12 191NC458, 132SE148.
134–15½–New. A note executed by deceased for an equitable and preëxisting legal obligation, which he desired to perpetuate by written evidence for the benefit of the payee, may be a valid obligation, even if, through inadvertence or clerical error, it was made payable on a date preceding its execution. 9 LaA247, 119S268.
134–17½–New. A note is not invalid because no time of payment is mentioned. 88PaSuper177.
134–34 91Fla224, 107S334; Iowa 213 NW408; TexCivA 273SW703; Sask [1930] 4DomLR1014.
135–37 242NY38, 150NE594; 143Wash 456, 255P949.
135–40 143Wash456, 255P949.
135–43 262Mass242, 159NE625; 244 Mich159, 221NW114; 248Mich104, 226 NW838 (when elected treasurer of company); 242NYS38, 150NE594; Tex CivA 296SW912, 913 [citCJ].
135–43½–New. And the happening of the event does not cure the defect. 242 NY38, 150NE594.
136–48 200 Iowa1090, 205NW859.
136–51½–New. Indorsement on note conditioning payment on consummation of sale is nonnegotiable. TexCivA 277 SW773.
136–51½–New. A promise to pay some time after date and as fast as the maker is able is a definite obligation to pay within a reasonable time. 88PaSuper 177.
136–51¼–New. Where the happening of a future event is agreed on as a time convenient for payment and the event does not occur, the law will imply an agreement to pay within a reasonable time. 88PaSuper177 (six years held reasonable time).
136–52 Mass 165NE470; 188Wis4, 205 NW486.
136–53 188Wis4, 205NW486.
136–55 CalA 283P949 (payable one day after maker's death); 103NJL608, 137 A552, 553 [citCJ], 58ALR1137; 251NY 257, 167NE434; 188Wis4, 205NW486.
137–56 CalA 283P949.
138–74 81CalA653, 254P642; 249NY 322, 164NE113. [b] **Provisions of note authorizing confession of judgment at any time** for amount then owing did not deprive note of its negotiability by virtue of statute. 85Colo 546, 277P782.
138–77½–New. An "accelerated maturity clause" renders a note nonnegotiable. 76Mont537, 248P209.
138–78 169Ark43, 272SW834.
139–87 [a] **Provision of conditional sale accelerating maturity** at any time conditional seller feels himself insecure makes note nonnegotiable. 126Misc375, 213NYS536.
139–88 115Nebr327, 212NW762 (construing California law); 129 Okl 67, 263P142 (provision that payee bank, upon feeling insecure, may take any funds of maker on deposit and credit same on note).
139–88½–New. , or if maker should become insolvent. Mont 285P174.
139–93 88 IndA557, 163NE536; 220 MoA668, 293SW73; 195NC398, 142SE 487; 51SD507, 215NW490, 492 [citCJ]. [b] 253 IllA339. **Erratum.**–Strike out "German Mut. F. Ins. Co. v. Franck, 22 Ind. 364."
139–94 220MoA668, 293SW73.
140–97 81CalA653, 254P642, 644 [quot CJ]; 191NC458, 132SE148. [a] 191NC 458, 132SE148. [b] **Trade acceptances** are within rule. 81CalA653, 254P642.
140–98 [a] **Note held negotiable.**–23 OhA127, 155NE245.
140–1 Iowa 213NW408.
140–2½–New. A note providing that, should the holders deem themselves insecure, they may demand additional security, and that failure to comply with such demand shall cause note to become due and payable at once, is nonnegotiable. 206 Iowa1036, 220NW364.
140–3 [b] **Stipulation that sureties, indorsers, and guarantors consent** that time of payment may be extended without notice thereof does not destroy negotiability. 201Cal 17, 255P184. [c] **Stipulation that maker consents to extension of time of payment** does not render note nonnegotiable where it gives no one the right to demand of holder extension of time. 201Cal 17, 255P184.
140–4 Iowa 233NW108.
140–9 95CalA505, 273P39; 52SD25, 216NW595.
141–12 Kan 289P423.
141–14½–New. The clause that makers and indorsers severally waive protest, demand, notice of nonpayment, and consent to the renewal and extension of the note without notice does not destroy the negotiability of an otherwise negotiable note. 54SD581, 223NW826.
141–14½–New. A provision in a note for extension of time of payment without notice to the makers, indorsers, and guarantors does not render the note nonnegotiable. SD 225NW385.
141–14¼–New. A stipulation in a note that the time may be extended without notice to the sureties does not impair its negotiability, and is immaterial if there are no sureties. 38GaA58, 143SW 787.
141–14½–New. A note payable on a designated date, wherein the makers agree that, after the obligation shall become due, the time of payment may be extended without affecting the makers' liability, is negotiable as payable at a "fixed and determinable future time." 207 Iowa326, 222NW878.
141–14½–New. An instrument does not become nonnegotiable when it can be paid at maturity, even though thereafter the time may be extended. 207 Iowa 326, 222NW878.

141-14½-New. The negotiability of a note is not destroyed by a provision that it may be extended in whole or in part without the consent of the makers and indorsers. **Utah** 276P659.

141-15 143**Wash**596, 255P659.

141-16 126**Me**133, 136A696, 697 [cit CJ]; 127**Me**383, 143A600; 10**PaDist&Co** 113.

142-19 **TexCivA** 275SW721 (return properly indorsed).

142-23 See also **NJSup** 131A98.

143-48 But see 128**Me**428, 148A406(2d case).

144-56 132**SC**295, 128SE27.

144-60 **ND** 232NW307; 132**SC**295, 128SE27.

144-62 19**F(2d)**74; 213**Ala**567, 105S585; 111**Conn**568, 150A524 (under then existing statute).

145-64 [a] (6) Other instances. **Mass** 165NE170.

146-70 51**SD**477, 215NW533, 58**ALR** 1276.

146-76 201 **Iowa**1143, 208NW730.

146-77 104**Conn**696, 134A231, 232 [cit CJ]; 201 **Iowa**1143, 208NW730.

146-83½-New. Louisiana, 5**LaA**558.

146-91½-New. Maine, 128**Me**505, 149A 21.

147-94½-New. Indorsement of name on note for indefinite amount does not create liability of guaranty. 255 **IllA**15.

147-99 85**Mont**571, 281P348; 51**SD**477, 215NW533, 58**ALR**1276.

147-1 49**SD**303, 207NW61; 51**SD**424, 214NW816; 51**SD**477, 215NW533, 58 **ALR**1276.

147-4½-New. Where a promissory note was prepared by the use of a printed form, and the word "no" was inserted with pen and in ink in the space provided for the rate of interest, the note was not uncertain. 95**CalA**505, 273P39.

147-5½-New. Failure to specify the rate of interest does not render a note invalid. 232**Mich**112, 205NW142.

147-5¼-New. A note providing for payment of the principal sum and interest must clearly show that at any given time the two will aggregate a sum certain. 297**Pa**353, 147A74.

147-5¼-New. A note containing irreconcilable clauses as regards interest payable after maturity does not contain an unconditional promise to pay a sum certain. 297**Pa**353, 147A74 (note bearing eight per cent interest till fully paid, and deferred payments bearing ten per cent from maturity, construed).

148-24 But see 126**Misc**114, 212NYS 718, 719 [quotCJ].

148-25 **RI** 150A610. But see 126**Misc** 114, 212NYS718, 719 [quotCJ].

149-37 But see 126**Misc**114, 212NYS 718, 719 [citCJ].

149-39 **TexCivA** 295SW281.

149-43 But see 126**Misc**114, 212NYS 718, 719 [citCJ].

149-44 But see 126**Misc**114, 212NYS 718, 719 [citCJ].

149-45 But see 126**Misc**114, 212NYS 718, 719 [citCJ].

149-46 [a] **In North Dakota.**-52**ND**209, 202NW404.

150-56 41**F(2d)**584; 165**La**385, 115S 629; 79**Mont**542, 257P436; 49**SD**303, 207NW61.

150-57 110**Conn**438, 148A388.

150-64 201**Cal** 17, 255P184; 95**CalA** 505, 273P39. [a] **Phrase "charges for the collection thereof" in note** means no more than attorney's fees and costs of collection and does not destroy negotiability. 201**Cal** 17, 255P184.

150-64½-New. Agreement to pay attorney's fees "in any litigation arising from or in connection with" note may make it nonnegotiable. 110**Conn**438, 148A388.

152-8 80**CalA**768, 253P166; 91**Fla**224, 107S334; 207 **Iowa**786, 223NW517; 122 **Kan**616, 253P238; 157**Miss**132, 126S898 (automobile sales contract).

152-8½-New. Equity will enjoin transfer of an unmatured note subject to defense of usury, where defendant may negotiate to a bank which if it takes in good faith before maturity is freed of defense of usury. 125**Misc**647, 211NYS 740.

152-10 207**Cal** 96, 276P995(2dcase).

152-14 [a] **Instruments are not negotiable** merely because payable to bearer. 141**Wash**243, 251P561.

153-23 122**Kan**616, 253P238.

153-24 172**Ark**691, 290SW584; 122**Kan** 616, 253P238; 153**Md**235, 138A261, 53 **ALR**1165.

153-25 122**Kan**616, 253P238, 239 [quot CJ]; 153**Md**235, 138A261, 53**ALR**1165.

153-26 158**Tenn**1, 11SW(2d)865.

153-31 122**Kan**616, 253P238, 239 [cit CJ].

154-36 **TexCivA** 286SW914.

154-37 See also 35 **OhA**506, 172NE568.

154-44 121**Kan**425, 247P637; **Ont** [1928] 4**DomLR**618.

155-46 [d] **Notes for bank stock.**-129 **Kan**199, 282P591.

155-49 178**Ark**966, 12SW(2d)906. [a] (2) One who sells patented article for resale is a dealer or merchant in the usual course of business under Crawford & M. Dig. § 7959. 171**Ark**978, 287SW 187.

156-61 52**ND**25, 201NW688; **TexCivA** 218SW(2d)104 (person signing for another is not held to be accommodation party).

156-62 [a] **Statute construed.**-**MoA** 23 SW(2d)644.

156-64 39**F(2d)**621; **CalA** 288P845 (no liability irrespective of Negotiable Instruments Act).

156-65 249**NY**307, 164NE108; 52**ND** 25, 201NW688; **TexCivA** 28SW(2d)563.

156-67 105**WVa**405, 143SE102 (not personally liable if payee had knowledge of agency).

157-74 But see 157**Miss**157, 127S274.

157-75 51**ND**374, 199NW757, 760 [cit CJ]; 134**Wash**94, 235P18. [d] **Payee could recover from agent without reformation of note** executed for undisclosed principal. 157**Miss**157, 127S274.

159-85 170**Ga**296, 152SE834; **TexCivA** 28SW(2d)563.

161-94 105**WVa**405, 143SE102.

161-99½-New. Where a person engaged in business under a fictitious corporate name executes a note in such name by himself and there is no corporation of such name, he is personally liable on the note. 168**Minn**17, 209NW 892.

162-5 **WVa** 153SE908.

162-7½-New. Executors are not personally liable on notes given in representative capacity for legacy. 215**Ala** 474, 111S7.

163-10 170**Ga**296, 152SE834.

163-13 **TexCivA** 284SW305.

164-28 218**Ky**729, 292SW335; 143 **Wash**154, 254P1094. See also 54**ND**891, 211NW984. But see 220**Ala**350, 124S 904.

166-36½-New. Where a note reads "we promise to pay" and is signed in corporate name "by" individuals, the individuals as well as the corporation are liable. 253 **IllA**536.

166-36¼-New. That a street address following the signatures is the address of the corporation does not change the foregoing rule. 253 **IllA**536.

170-93½-New. A note is not void because, for convenience, it is made payable to a bank having no interest therein. **MoA** 300SW313

170-95 52**ND**504, 203NW673.

170-96 42**AppDiv**147, 59**NYS**51 (negotiable bond).

172-22 253 **IllA**123.

172-32½-New. A check payable to a person to whom the maker was not then indebted, and negotiated by forged indorsements, is not the equivalent of an instrument payable to bearer. 251 **IllA** 279.

172-35 But see 246 **IllA**92.

173-48 191**NC**176, 131SE587. See also **TexCivA** 8SW(2d)555.

173-58 191**NC**176, 131SE587.

173-62 50**RI** 60, 145A16.

175-86 40**GaA**386, 149SE721.

176-12 23**F(2d)**986, 988 [citCJ].

176-13 234 **IllA**448.

177-16 But see **CalA** 288P830.

177-18 200 **Iowa**585, 203NW303.

177-22 197**NC**499, 150SE33.

177-25 224**Ky**1, 5SW(2d)278.

179-49 241**Mich**199, 217NW47.

179-52 241**Mich**199, 217NW47.

179-54 206 **Iowa**328, 218NW568.

179-58½-New. Where fictitious person is unwittingly made payee, check is not payable to bearer. 203 **Iowa**833, 211NW 542, 52**ALR**1297

179-62 206 **Iowa**328, 218NW568; 157 **Tenn**211, 7SW(2d)812, 813 [quotCJ]; **TexCivA** 20SW(2d)212. [e] **Person whose intention controls** is person who actually drew instrument. **MoA** 25SW (2d)545 (intention of corporate officer signing pay roll checks held controlling).

180-63½-New. Instrument is drawn to fictitious payee whenever payee named has no right to it and maker does not intend that payee shall take anything by it. **MoA** 25SW(2d)545.

180-66 [a] **Whose intention prevails.**-33**F(2d)**437.

180-68 38**GaA**768, 145SE521.

180-70 38**GaA**768, 145SE521.

181-79 91**Fla**224, 107S334.

181-92 87 **IndA**318, 158NE919.

183-15 179**Ark**415, 16SW(2d)987; **CalA** 288P830; 200 **Iowa**220, 204NW456; 160 **La**712, 107S500; 8**PaDist&Co** 542 [cit CJ]. [a] **CalA** 288P830.

183-19 225**Ky**12, 7SW(2d)492; 102 **NJL**496, 133A181.

184-24 217**MoA**676, 274SW833, 835 [cit Cyc].

184-26 200 **Iowa**220, 204NW456; 8**Pa Dist&Co** 542.

184-27 200 **Iowa**220, 204NW456; 8**Pa Dist&Co** 542.

184-29½-New. the amount of attorney's commissions, if authorized; 8**Pa Dist&Co** 542.

184-30 200 **Iowa**220, 204NW456.

185-35 204 **Iowa**1378, 215NW754, 757 [citCJ]; 8**PaDist&Co** 542.

185-37 204 **Iowa**1378, 215NW754, 757 (dictum).

185-46 200 **Iowa**220, 204NW456; 118 **Or**280, 246P726; 8**PaDist&Co** 542. [e] **Where authority is reasonably exercised and without fraud,** maker, leaving amount blank and delivering note with instructions to complete, cannot question note. **TexCivA** 27SW(2d)309.

186-54 102**NJL**496, 133A181.

186-55 253 **IllA**206; 150**Md**347, 133A 114; 42**AppDiv**147, 59**NYS**51 (negotiable bond); 8**PaDist&Co** 542.

188-81 8**PaDist&Co** 542. [a] (4) Fourteen months held unreasonable time. 127 **Or**227, 271P607. (5) Matters considered in determining whether holder had authority as affected by lapse of time. **MoA** 21SW(2d)209. (6) Administrator is without authority to fill in payee's name where his decedent had waited six and one-half months before death without writing her name in as payee. **MoA** 21SW(2d)209.

188-82 **MoA** 21SW(2d)209; 102**NJL** 496, 133A181.

189-94 **CalA** 288P830.

190-9 102**NJL**496, 133A181.

190-13 **Ind** 168NE867(2dcase).

190-15 179**Ark**415, 16SW(2d)987.

190-17 [a] **Failure of signer to repudiate promptly** unauthorized filling in of blanks is essential to ratification. 200 **Iowa**816, 203NW252.

190-19 102**NJL**496, 133A181.

191-26 85**PaSuper**427, 432 [quotCJ].

191-27 85**PaSuper**427, 432 [quotCJ] (party to whom delivered may not fill in name as payee in violation of agreement).

191-32 **TexCommnA** 16SW(2d)287.

192-33 245NY592, 157NE870.

192-35 **CalA** 293P102. See also 32**PortoRico** 752.

193-47 83 **IndA**485, 147NE814, 815 [quotCJ].

193-50 245NY592, 157NE870.

194-53 [b] 186 **IllA**553.

194-59 214**Ala**550, 108S369.

194-60 217**Ala**259, 115S303; 134SC508, 133SE467. [b] **Recital that notes were given for shares in corporation, association, or syndicate or for units of common-law trust** renders note nonnegotiable. 125**Kan**749, 265P1112.

195-61 **Mass** 165NE470 (additional provisions for collateral).

195-65 **LaA** 130S848.

196-90 50**RI**163, 146A403.

196-91 14**F(2d)**912, 915 [citCJ]; 38 **F(2d)**791 (holding notes are uncollectable except in accordance with agreement); 35**GaA**784, 134SE841; 255 **IllA** 529; 256 **IllA**128; 200 **Iowa**608, 203NW 710; 122**Kan**127, 251P421, 422 [quot CJ]; 126**Kan**299, 267P1110; 220**MoA**205, 282SW91, 95 [citCJ]; **MoA** 295SW482; 123 **Okl** 105, 252P394; 122 **Or**170, 257P

812; 50SD162, 208NW783; TexCivA 21 SW(2d)104. But see 5F(2d)902 (holding note and collateral assessment to deposit mortgage bonds as security to be independent contracts).

197-92 14F(2d)912, 915 [citCJ]; 38 F(2d)791 (notes became unenforceable according to provisions of agreement); 35GaA784, 134SE841; 201 Iowa481, 207 NW562; 220MoA205, 282SW91, 95 [cit CJ].

197-97 253 IllA262. See also 141Miss 692, 105S485.

197-97½-New. Negotiability of note which had been attached to conditional sale contract is to be determined from note itself. 253 IllA262.

197-97⅓-New. A note and a conditional sale contract printed on same sheet of paper with perforated line between are each complete entity intended to be separated. 253 IllA262.

197-97¼-New. In such case, where note is negotiable in form, its negotiability is not destroyed because it was so printed. 253 IllA262.

197-1 But see 202 Iowa1352, 212NW 115.

197-2 205Cal 284, 270P958.

197-3 256 IllA128.

197-4 200 Iowa608, 203NW710. [c] **Agreements not affecting negotiability.**-50ND330, 196NW303.

198-5 [a] **To destroy negotiability,** reference in bill or note to extrinsic agreement must be such as to indicate that paper is to be burdened with conditions of agreement, 98Fla304, 123S785.

198-5½-New. or nonnegotiable, 72CalA 78, 236P956.

198-7 See also 256 IllA128.

198-8 TexCivA 276SW941, 943 [citCJ].

199-14 72CalA78, 236P956 (trust deed); 113 Okl 247, 241P152; 143Wash 342, 255P368. See also 134SC297, 131 SE432, 434 [citCJ].

199-15 Conn 152A134.

199-17 204 Iowa555, 215NW664; 121 Kan153, 246P968. [a] **That demand note is secured by mortgage** does not affect rules of law applicable thereto. Mass 166NE626.

199-21 143Wash342, 255P368, 369 [cit CJ].

199-22 72CalA78, 236P956; 41GaA406, 152SE909(2dcase); 135Misc341, 238NYS 1; 199Wis350, 226NW313.

199-23 197NC305, 148SE434; 143Wash 342, 255P368.

200-26 248 IllA35; 220MoA668, 293SW 73 (validity). But see 148Md345, 129A 506. [a] 84Mont393, 276P15.

200-27 83CalA621, 257P173 (note executed prior to statute making notes secured by mortgage negotiable).

200-29 See also 244Mich298, 221NW 142.

200-31 [a] MoA 298SW242.

201-33 115Nebr327, 212NW762 (construing California law).

201-34 [a] **In Kansas.**-121Kan66, 245P 1067.

201-37½-New. California, 72CalA78, 236P956 (under statute).

201-38 244Mich298, 221NW142.

201-44 206 Iowa134, 220NW80. But see 201 Iowa1143, 208NW730.

202-47 204 Iowa555, 215NW664, 666 [citCJ]; 200Wis631, 229NW46.

202-50 [b] **Place of payment** can be changed only by mutual agreement of parties. 201 Iowa202, 204NW427 (evidence held to show agreement).

202-52 See also 149Wash158, 270P425.

203-59 253 IllA1; 102NJEq281, 140A 445 (check); 253NY359, 171NE569; 52 ND617, 204NW683; TexCommnA 288 SW438. [c] **Execution and delivery of note ipso facto exposes one to liability.**-250Mich273, 230NW170.

203-60 220MoA1276, 290SW1009.

203-69 237 IllA587; Iowa 231NW426.

203-70 237 IllA587, 591 [quotCJ].

203-72 224 IllA457, 465 [quotCJ].

203-73 224 IllA457, 465 [quotCJ]; 50 ND330, 196NW303.

204-74 224 IllA457, 465 [quotCJ].

204-75 224 IllA457, 465 [quotCJ].

204-76 224 IllA457, 465 [quotCJ].

204-77 224 IllA457, 465 [quotCJ].

204-83 52ND617, 204NW683; Okl 292 P560.

205-90 TexCivA 286SW893.

205-9 151SC354, 149SE12; 148Va181, 138SE465, 54ALR699. [c] **Delivery held unconditional.**-50ND573, 196NW820; TexCivA 21SW(2d)1102. [d] **Delivery held to be on condition subsequent.**-225 AppDiv511, 233NYS638. [e] **Agreement that maker of note was to receive stock in exchange** was absolute delivery with conditional liability on promise contained in note. 264Mass208, 162NE368. [f] **Intention of parties controls** as to whether delivery is conditional or absolute. 151SC354, 149SE12.

206-11 220MoA1276, 290SW1009 (facts held to show deposit in escrow).

206-13 32Ariz436, 259P881; 237 IllA 587; 207 Iowa729, 223NW493; 153SC 251, 150SE765; 148Va181, 138SE465, 54ALR699.

206-15 67Utah60, 245P966 [citCJ].

206-16½-New. Essential element, distinguishing a full from a conditional delivery, is the present capacity of the holder to enforce. 255Mass558, 152NE 337.

206-17 38F(2d)791; 96CalA478, 274P 568; 36GaA229, 136SE106; 237 IllA587; 214Ky7, 282SW186; 248Mich68, 226NW 876; 220MoA1276, 290SW1009; 50ND 330, 196NW303; 296Pa541, 146A126; TexCivA 48W(2d)157. See also MoA 30SW(2d)768. [a] (3) In general. 41 GaA809, 154SE711. [d] **Rescission.**-126 Misc318, 213NYS33.

207-18 32Ariz423, 259P676, 680 [cit CJ]; 214Ky7, 282SW186; 127 Or302, 272P271; TexCivA 18W(2d)1097. [c] 49SD260, 207NW65.

207-21 50ND400, 196NW102, 104 [cit CJ].

208-22 219Ala203, 121S733; 117Nebr 29, 219NW580.

208-23 38GaA644, 145SE97 [quotCJ].

208-26 88PaSuper510, 515 [citCJ].

209-39 85PaSuper427, 430 [quotCJ].

209-40 85PaSuper427, 430 [quotCJ].

209-42 TexCommnA 288SW438 (must be delivered to person who takes it as holder).

209-43 83CalA87, 256P479.

210-53½-New. Where a maker's agent made a check payable to an attorney and sent it to him, although instructed to make it to the one who was to indorse it and forward it to the attorney, delivery is sufficient. 217Ky766, 290SW722.

210-54 TexCommnA 16SW(2d)278.

210-67 [a] **As against one indorsing** before delivery by maker to payee is sufficient. 165Minn82, 205NW699.

210-68 MoA 19SW(2d)541.

211-75 41F(2d)224; 215Ala474, 111S7; 100CalA706, 280P1017; 242 IllA480; 201 Iowa533, 207NW533; 129Kan203, 282P 741; 5LaA603; 249Mich573, 229NW 449; MoA 30SW(2d)629; 251NY257, 167NE434; 144Va263, 132SE337, 46ALR 485; Wis 223NW89(1stcase); Sask [1925] 3DomLR105.

211-76 197NC432, 149SE396.

211-79½-New. The consideration need not exist at the time of making the note. 173Ark846, 293SW749.

211-86 130Kan392, 286P197; 50Philippine241; 51SD507, 215NW490, 491 [quot Cyc].

211-87½-New. It is not necessary that parties jointly liable on note should have profited by the loan. 35PortoRico 260.

211-88 MoA 294SW734, 736 [citCJ]; TexCommnA 282SW570; 204 Iowa290, 214NW538.

212-95 26 OhNPNS483. [a] (2) 202 Iowa1085, 209NW293.

212-7 32Ariz436, 259P881; Cal 288P 69; 39GaA753, 148SE541(2dcase); 240 IllA230; 86 IndA392, 156NE568; IndA 171NE202 (agreement to do something or mutual promises); 204 Iowa1049, 216NW709; 208 Iowa682, 223NW489; 121Kan29, 245P1036; 122Kan127, 251P 421, 423 [quotCJ]; Mass 173NE522; 153Miss500, 121S148; MoA 296SW201; 73Mont339, 237P209 (waiver of right to rescind contract); 81Mont248, 263P693, 696 [citCJ]; 251NY257, 167NE434; 245 NYS527; 24 OhA324, 156NE913; 120 Okl177, 250P908; 128 Okl222, 262P 205; TexCivA 27SW(2d)255 (benefit to payor). [d] **Granting party what he wants** will be considered benefit to him in determining whether note is supported by consideration. 81Mont248, 263P 693.

213-8 219Ala395, 122S635; 236 IllA 549; 201 Iowa533, 207NW533; 208 Iowa 254, 225NW411; 128 Okl 222, 262P205.

213-11 36GaA156, 136SE98.

213-11½-New. A note whose proceeds were placed to the credit of a corporation in which the borrower was a stockholder is held supported by consideration. 163La957, 113S161.

213-12 125Misc722, 211NYS482; 24OhA 324, 156NE913.

213-14 181Ark511, 27SW(2d)789; 122 Kan127, 251P421; MoA 294SW734, 736 [citCJ].

214-15 217Ky766, 290SW722.

214-16 40F(2d)260 (accommodation paper); 32Ariz436, 259P881; 36GaA329, 136SE477; 41GaA221, 152SE305; 86 IndA392, 156NE568; 126 Okl 188, 259P 545, 546 [citCJ&Cyc]; 42 OklACR107, 109 [reh pending, and citCJ]. [a] 42 OklACR107, 109 [reh pending, and cit CJ].

214-17 253 IllA536; 86 IndA392, 156 NE568; 81Mont248, 263P693; 118 Okl 142, 247P85; 126 Okl 188, 259P545, 546 [citCJ&Cyc]; 42 OklACR107, 109 [reh pending, and citCJ]; 296Pa541, 146A 126.

214-18 38Wyo 276, 266P1059, 1062 [cit CJ].

214-19 10F(2d)298; 204 Iowa940, 216 NW281; 220AppDiv515, 221NYS703. [a] **Makers estopped** to deny consideration in view of facts funds derived from discount increased assets of bank. 10F (2d)298. [b] **Notes given bank by directors** to permit charging off doubtful assets and keep bank open are supported by consideration. Iowa 231NW651.

214-19½-New. Promissory notes executed and delivered by a director or stockholder to a bank for the purpose of preserving the bank as a going concern and of making good impaired assets are supported by adequate consideration. 204 Iowa940, 216NW281.

214-19⅓-New. Such notes are not accommodation notes. 204 Iowa940, 216 NW281.

214-19¼-New. Where no advantage accrues to a third party or debtor and no disadvantage to creditor, there is no consideration. 128 Okl 222, 262P205.

214-19⅕-New. Where a corporation is in financial difficulties, notes given by stockholders to strengthen its credit, and to guarantee the members of the corporation's board of directors against liability or loss through their individual obligations on behalf of the corporation, are based upon sufficient consideration. 127Kan16, 272P108.

214-21 10LaA346, 121S673 (note supported by adequate consideration); 155 Md173, 141A556; 40 OklACR136 [reh pending].

215-29 24F(2d)824 (capital advanced to copartner); 160La839, 107S593; 260 Mass449, 157NE530.

215-30 201 Iowa657, 208NW74; 11LaA 331, 123S480 (note by corporation to insurance agent who advanced premiums on insurance policies on lives of officers in favor of corporation on corporation's agreement to pay).

215-31 32Ariz436, 259P881.

215-34 Mo 198W(2d)290 (money borrowed by bank directors and placed to credit of, and used by, bank); SD 232 NW17.

215-34½-New. Where notes are mere memoranda of loans to a third person, the fact that defendant had been promised stock or office in the company of the third person is no consideration for signing the notes. 32Ariz436, 259P881.

215-36 41F(2d)169; 215Ala94, 109S 749 (code); 202Cal 326, 260P553; 79 CalA533, 250P205; 101CalA719, 282P 427; 236 IllA549; 168La679, 123S121; 125Me108, 131A138; 252Mass552, 148 NE105; 316Mo 1158, 295SW73; 24 OhA 324, 156NE913; SD 227NW576; TexCivA 48W(2d)639, 641 [citCJ]; 192Wis 566, 213NW290. [b] 122 Okl 58, 251P 69. [h] **Note made by indorser of past-due note of insolvent corporation,** given in lieu of latter, on which he is liable, is sufficiently supported. 168La824, 123 S587.

216-42½-New. or by an officer of the bank enabling it to reopen, 255Mass 558, 152NE337.

216-50 53SD560, 221NW371.

216-51 173Minn533, 217NW934 (by check where creditor took bank's draft instead of cash in payment of check).

217-57 32F(2d)691; 79CalA533, 250P205; 202 Iowa192, 209NW523; 24 OhA324, 156NE913; 122 Okl 58, 251P69; 144Va263, 132SE337, 46ALR485.

217-58 88CalA716, 264P265; MoA 293SW66; 76Mont537, 248P209; 53SD537, 221NW260.

217-59 321Mo 849, 128SW(2d)723.

217-60 [a] (1) MoA 9SW(2d)87.

217-62 207 Iowa954, 222NW442; 169La194, 124S825; 76Mont537, 248P209; TexCivA 28SW(2d)563.

218-63 225AppDiv300, 233NYS196; 52SD172, 217NW180. See also 321Mo 849, 128SW(2d)723.

219-70 IndA 169NE472(2dcase).

219-83 32F(2d)169 (accommodation paper); 179Ark615, 17SW(2d)324; 39GaA753, 148SE341(2dcase) (accommodation paper); Mass 172NE234; 168Minn70, 209NW484; 222MoA915, 7SW(2d)391; 83Mont68, 271P695; 131Misc854, 228NYS494. [b] **Insolvency of third person** will not prevent surrender of his note being good consideration for new note by another. 121Kan29, 245P1036.

220-84 [b] **Note given for amount of notes barred by statute of limitations** is void for want of consideration. 241Mich652, 217NW787.

220-85 110Conn174, 147A592; Mo 15SW(2d)935; MoA 296SW201; 198NC14, 150SE668. [a] (3) Note for part of loss from forgeries of another given after cause of action for forgeries had been released is without consideration. 166Minn392, 208NW15.

220-86 128Me495, 148A796.

220-92 206 Iowa297, 218NW71; 169La194, 124S825; 168Minn70, 209NW484; Mo 15SW(2d)935; 81Mont248, 263P693 (forbearance of bank to apply depositor's deposit on note); 130 Okl 146, 265P1049; 47RI 78, 129A812. [c] 82CalA342, 255P523. Contra MoA 9SW(2d)856. [i] 187Wis270, 202NW665 (note given as security to surety).

221-94 34GaA68, 128SE215; 249 IllA390.

221-95 187Wis270, 202NW665 (guaranteeing payment of note given as security to surety).

221-97 339 Ill 393, 171NE537. [a] (2) Note of trust company director to replace notes of resigning director is held not to lack consideration. 256Mass323, 152NE306.

221-1 245 IllA75.

222-3 121Kan29, 245P1036.

222-5 MoA 296SW201, 202 [citCJ].

222-11 121Kan29, 245P1036, 1037 [cit CJ]; 198NC14, 150SE668.

222-12 Nebr 231NW34 (agreement to renew note at maturity does not furnish additional consideration). [a] (3) Where notes signed by deceased could have been presented as claim against estate and payment could have been obtained, surrender of notes to widow and destruction of notes is consideration for widow's note to payee. 241Mich652, 217NW787.

222-16 168La500, 122S595; 33 OhA371, 169NE315.

224-31½-New. **Note given as security** for a previous note made by a bank officer to enable the bank to reopen is supported by a sufficient consideration. 255Mass558, 152NE337.

224-37 100CalA163, 280P174; 196NC51, 144SE545(2dcase).

224-38 42 Idal, 243P355, 357 [citCJ].

224-46½-New. A check given in payment of a lease is given for consideration. 10LaA233, 119S705.

225-69 205 Iowa1264, 216NW278; TexCivA 291SW296; TexCivA 3SW(2d)842. [c] (6) If contents of packages of fertilizer were not of analysis guaranteed thereon under statute note given as purchase price is without consideration. 190NC162, 129SE453.

226-76 [a] (1) MoA 272SW85.

227-83 234 IllA78; 131 Okl 66, 267P631. But see 243Mich331, 220NW665 (2dcase).

227-84 240 IllA222.

227-86 106WVa356, 145SE645, 647 [cit CJ].

228-94 106WVa356, 145SE645.

228-96½-New. A note executed to a widow for the surrender of a note payable to the husband in which the widow had a life interest only is held without consideration. 24 OhA324, 156NE913.

228-98 36GaA156, 136SE98; 36GaA157, 136SE99; 155Miss91, 124S69; 217MoA1, 272SW1010; 196Wis310, 220NW174.

229-21 214AppDiv689, 213NYS198 (promise for future delivery of goods); 127Misc487, 216NYS509; 116 Oh317, 156NE111.

229-22 253 IllA206; 35 OhA506, 172NE568.

229-23 173Ark846, 293SW749; 62OntL105, [1928] 2DomLR577.

230-24 127Misc487, 216NYS509.

230-38½-New. The promise of sureties on a note to pay the interest on mortgages and taxes on land is a sufficient consideration for the promise of a stranger to pay the note. 208 Iowa211, 225NW266.

230-41 But see 296Pa368, 145A912(2d case) 63ALR1180.

231-55 252 IllA68.

231-58 Ala 127S813; 259Mass596, 156NE749; Mo 19SW(2d)1043.

232-59 See also 219AppDiv65, 219NYS155.

232-61 259Mass596, 156NE749.

232-68½-New. The surrender of a legally unenforceable negotiable note cannot constitute a valuable consideration for the assumption by a third person of the debt for which he is not otherwise liable. 123 Okl 269, 253P63.

233-72 But see 202 Iowa802, 211NW429.

233-87 See also 176Minn254, 223NW142.

235-11 86PaSuper29; TexCivA 4SW(2d)639.

235-13 25F(2d)777.

236-22 202Cal 326, 260P553; 160Ga732, 129SE57; 44 Ida539, 258P540; 205Iowa408, 216NW71, 73 [citCJ]; 206Iowa297, 218NW71; 207 Iowa954, 222NW442; MoA 281SW98; 73Mont339, 237P209; 298Pa535, 148A707 (note for further extension); 153SC251, 150SE765; 149Wash500, 271P329 [reh den 149Wash500, 274P712(2dcase)]; Wyo 290P561.

237-23 117Nebr562, 221NW691.

237-32 54SD291, 223NW193; Utah 272P204.

238-47 223Ky668, 4SW(2d)686 (condemnation proceedings that would delay commencement of work). [c] **Note of defaulting guardian,** indorsed by others, for money misappropriated is supported by sufficient consideration. TexCivA 284SW977.

238-53 See also NB [1928] 1DomLR716.

238-55 16F(2d)578; 160Ga732, 129SE57; Wyo 290P561.

238-57½-New. The forbearance to pursue a valueless right of action against an insolvent corporation destitute of assets cannot constitute a consideration for the assumption of the debt by a third person. 123 Okl 269, 253P63.

238-59 25F(2d)777, 781 [quotCJ].

239-63 Alta [1926] 4DomLR248, [1926] 3WestWkly486.

240-78 198NC14, 150SE668 (though coupled with express promise).

240-89½-New. Where a note is made by one brother payable to another to indemnify for loss suffered by failure of a bank in which the maker induced the payee to make deposits, an agreement that the note shall also stand as indemnity for loss sustained by the payee in purchase of an oil lease negotiated by the maker is valid. 88PaSuper280.

241-99 103NJL166, 134A687, 48ALR234. [b] See also 36GaA156, 136SE98; 36GaA157, 136SE99.

241-5 35GaA39, 131SE922. [a] **Transfer not attached to note** passes no title where consideration is only love and affection. 35GaA39, 131SE922.

241-12 32F(2d)176; TexCivA 274SW168; TexCivA 9SW(2d)405; 22AltaL536, [1927] 1DomLR717, [1927] 1WestWkly188.

242-14½-New. **Unconscionable consideration.** Note, secured by remainderman's interest in trust, carrying ten per cent interest and same rate on unpaid interest until paid is unconscionable and unenforceable. 126Misc534, 213NYS593 (either under New York law or Rhode Island law where there is no usury statute).

242-14½-New. A note secured by a mortgage on cattle has been held without consideration, to the extent of the amount included for cattle stolen without the maker's knowledge or connivance. 150Wash512, 273P527(1stcase).

242-21 159Tenn520, 19SW(2d)251.

243-29 Que [1926] 4DomLR1071.

243-31 86 IndA392, 156NE568. [a] (5) Maker could not set up defense of failure of consideration where he loaned note to trust company with knowledge of its fraudulent purposes. 297Pa64, 146A545. [c] **Maker is not estopped** by stockholders' claim where they were also chargeable with fraud. TexCommnA 24SW(2d)359.

243-34 99CalA235, 278P494; NJSup 147A401; ND 232NW600 (Bankruptcy Act).

244-33½-New. Penal and criminal statutes on this subject are strictly construed. 176Ark812, 4SW(2d)5 (notes for patented articles).

244-46 But see 176Ark812, 4SW(2d)5.

244-49 200 Iowa895, 205NW470 (certificate of deposit issued by savings bank without authority is void). [f] **Directors individually signing note may be liable** though bank obtained proceeds for ultra vires purpose. Cal 288P69.

245-53½-New. Under Connecticut Small Loans Act a note is void as to comakers who owed the lender more than the amount allowed by statute at the time the note was executed, 109Conn110, 145A758.

245-53½-New. although the statute also provides a penalty of fine and imprisonment for violation of its provisions. 109Conn110, 145A758.

245-55 175Ark306, 299SW24; 197NC572, 150SE32(2dcase).

245-57 [a] (6) 214Ala414, 108S241.

246-61 TexCommnA 12SW(2d)154 (contract prohibiting sale of competitor's goods).

246-71 214Ala536, 108S358; 175Ark23, 298SW498; 85CalA360, 259P460; 194NC298, 139SE440; 128 Okl 222, 262P205; Alta [1927] 2DomLR1144 [1927] 2WestWkly32; 36Man458 [1927] 2DomLR781 [1927] 1WestWkly772.

247-74 [c] **Guardian's note, indorsed by others, given to protect estate and indemnify surety** for money misappropriated is not invalid. TexCivA 284SW977. [d] **Promise not to prosecute guardian** for misappropriation of funds does not invalidate note given to protect estate and surety. TexCivA 284SW977.

248-87 172Ark193, 287SW1017.

249-7 215Ala552, 112S138; 47 Ida780, 279P418.

249-11 207Cal 630, 280P101.

250-14 207 Iowa1310, 224NW512.

250-15 200 Iowa1213, 206NW256.

250-17 260Mass134, 156NE893. See also 26 OhNPNS483, 485 [quotCJ].

250-21 200 Iowa1059, 205NW863, 864 [citCJ]; 200 Iowa1213, 206NW256; 205Iowa95, 215NW506; 48RI 40, 134A851. Contra. 204 Iowa290, 214NW538.

251-22 200 Iowa1059, 205NW863; 48RI40, 134A851.

251-24 194NC244, 139SE376.

252-52 82CalA342, 255P523, 527 [quot CJ]; Iowa 213NW786, 790 [citCJ]; Md 149A270; 82NH299, 133A26; 57ND456, 222NW474 (note of bank directors); TexCivA 286SW481; TexCivA 29SW(2d)803; 70Utah145, 258P565, 569 [quotCJ]. [d] (3) Paper signed by stockholders to aid firm, in return for promise of shares. Iowa 213NW786. [e] (1) TexCivA 286SW481, 482 [cit CJ]. [f] **Notes payable to bank for sole purpose of deceiving bank examiner** without consideration are for accommodation of bank and bank as going concern cannot recover thereon. 56ND33, 216NW206.

253-55 124Kan827, 262P547; 51ND399, 200NW505, 37ALR1186; 69Utah

250, 253P900; 70Utah145, 258P565.

253-56½-New. An officer of a corporation borrowing money on personal note in aid of business of corporation is principal and sole debtor and not accommodation maker. 215Ala476, 111829.

253-57 [b] **Accommodation as applied to notes** has technical meaning and is not used in broadest popular sense. TexCivA 168SW(2d)965.

253-59 [b] **Determination of rights and liabilities of parties.**-Md 149A270.

253-63 43F(2d)507 (words "without receiving value" construed); 75Mont 516, 244P494; TexCivA 128SW(2d)230.

253-65 124Kan827, 262P547; Md 149 A270.

253-68 75Mont516, 244P494 (indorser of note which remained in hands of payee until maturity held accommodation indorser).

254-73 But see 315Mo 465, 287SW331.

254-74½-New. Accommodation maker is liable as maker to payee. 195Wis 131, 217NW645.

254-76 121Kan239, 242, 246P1013 [quotCJ]; 124Kan827, 262P547; 82NH 299, 133A26, 28[citCJ]; 126 Okl 188, 259 P545, 546 [quotCJ]; 42 OklACR107, 109 [rch pending, and quotCJ]; 133SC304, 130SE890, 892 [citCJ] (and the one who loans his credit); TexCivA 16SW(2d) 965 (payee).

254-77 121Kan239, 242, 246P1013 [quotCJ]; 124Kan827, 262P547; 126 Okl 188, 259P545, 546 [quotCJ]; 42 OklACR107, 109 [rch pending, and quotCJ].

254-78 121Kan239, 242, 246P1013 [quotCJ]; 126 Okl 188, 259P545, 546 [quotCJ]; 42OklACR107, 109 [rch pending, and quotCJ].

254-79 126 Okl 188, 259P545, 546[quotCJ]; 42 OklACR107, 109 [quotCJ]; 133SC304, 130SE890; TexCivA 16S W(2d)965. [a] (3) Stockholders indorsing notes of corporation made for its benefit and receiving no individual benefit are not accommodated indorsers. 34Wyo 405, 244P372. (4) Bank made payee in note given by maker to enable bank to make loan to borrower who had already borrowed to limit allowed by law is not party accommodated. 126 Okl 188, 259P545.

254-80 126 Okl 188, 259P545.

255-85 TexCivA 286SW481.

255-86 167Minn93, 208NW805.

255-88 221MoA951, 288SW957, 958 592, 286P424; 114 Okl 147, 244P793; [citCJ]; MoA 28SW(2d)368; 34NM 48Philippine207; 50Philippine241; TexCivA 24SW(2d)445. [a] Nonnegotiable paper.-85PaSuper480.

255-90 [b] Nebr 230NW673; 159Tenn 520, 198W(2d)251.

255-91 Ariz 283P273 (national bank director who with codirectors, executed note for bank's indebtedness, held not accommodation party); 82CalA342, 255 P523; 37GaA409, 140SE766; 204 Iowa 1049, 216NW709; 126Kan719, 271P 394; 168La939, 123SE633(2dcase); 137 Misc704, 244NYS242. See also 246Mich 493, 224NW601. [a] 82CalA342, 255P 523; 252 IllA508; 179Minn246, 228NW 757(2dcase); 50SD175, 208NW776; TexCivA 286SW481.

256-92 50SD175, 208NW776, 777 [quot CJ].

256-93 37GaA409, 140SE766, 767 [cit CJ].

256-95 13F(2d)147; 250 IllA144; 204 Iowa940, 216NW281; TexCivA 289SW 730.

256-97 37GaA409, 140SE766.

256-98½-New. There is consideration for indorsement by a guaranty company of note of ranch company given for money loaned it by a bank where guaranty company owned bank and two-thirds interest in ranch company. 34 Wyo 368, 243P596.

256-98¾-New. Where notes were made by corporation only to show transaction of execution by directors of notes to bank as accommodation and without expectation of being paid, corporation's notes were not consideration for notes to bank. MoA 25SW(2d)525.

256-98¼-New. Liability assumed by parties whose names appear above accommodation party is consideration for his signing note 300Pa468, 150A892.

256-99 37F(2d)72; 174Minn261, 219 NW93; 114 Okl 147, 244P793.

257-1 316Mo 1158, 295SW73.

257-11 154Md366, 141A121.

257-12 82CalA342, 255P523.

258-13 82NH299, 133A26, 28 [citCJ].

258-25 245Mich152, 222NW107.

258-26½-New. Corporation's putting up accommodation note as collateral on its obligation is equivalent to consent to president's agreement that accommodation maker would not be liable. CalA 291P20.

259-37 200 Iowa157, 204NW250.

259-38 200 Iowa157, 204NW250.

259-43 38F(2d)462; 43F(2d)507; 82 CalA342, 255P523; CalA 293P86; 42 Ida720, 248P9; 199 Iowa1277, 203NW 802; 200 Iowa938, 205NW767; 203 Iowa461, 212NW729, 730 [citCJ]; Iowa 231NW306, 120Kan712, 244P840; Md 149A270; 260Mass449, 157NE530; Mass 169NE504; 221MoA955, 288SW 954, 956 [quotCJ]; 221MoA951, 288SW 957, 958 [citCJ]; MoA 297SW156; 222 MoA153, 28W(2d)815, 820 [quotCJ]; MoA 68W(2d)633, 635 [quotCJ]; MoA 88W(2d)92 (note held accommodation); MoA 258W(2d)525; MoA 31SW(2d) 234; 113Nebr706, 204NW518; 117Nebr 1, 219NW581; 82NH299, 133A26, 28 [citCJ]; 51ND688, 200NW793; 57ND 456, 222NW474; 58ND846, 228NW214; 123 Okl 269, 253P63; 95PaSuper368; SD 233NW285; TexCommnA 278SW(2d) 125; TexCivA 283SW535 [citCJ]; Tex CivA 289SW705, 707 [citCJ]; TexCivA 291SW920; TexCivA 78W(2d)915 (name loaned to bank to satisfy bank examiner); TexCivA 24SW(2d)768; 70 Utah145, 258P565; 153Va36, 149SE462 (receiver's rights are not superior to accommodated bank's rights). See also 144Va516, 132SE175. [c] That note was executed for accommodation of payee bank to enable it to deceive bank examiner may be asserted as defense by one of several comakers. 221MoA955, 288SW954.

260-44 TexCivA 295SW929; TexCivA 24SW(2d)768; 153Va36, 149SE462.

260-47½-New. Nor may liquidating agent of accommodated party sue accommodating party. 120Kan712, 244P 840.

260-50 MoA 13SW(2d)1079; 82NH299, 133A26, 28 [citCJ].

260-51 22AlaA518, 119S601(2dcase); 35Ariz147, 274P1047(3dcase); 43 Ida 310, 251P627; 253 IllA469; 12LaA135, 125S463; Me 149A806; Mass 169NE 504; 173Minn14, 216NW314; 120 Or 493, 252P969; 122 Or519, 259P1063; 51SD507, 215NW490; TexCivA 29SW (2d)803; 70Utah145, 258P565; 144Va 36, 131SE221 (accommodation indorser of collateral note liable to holder in due course). See also 198Wis66, 223NW440.

261-53 173Ark1181, 292SW143; Kan 289P425; 2LaA617; Md 149A270; 262 Mass422, 160NE251; 173Minn14, 216 NW314; 179Minn77, 228NW348; 198 NC542, 152SE628; 130 Or493, 252P969; 122 Or519, 259P1063; 93PaSuper152; 96PaSuper447; 47RI 78, 129A812; TexCivA 293SW275; TexCivA 13SW(2d) 477; 69Utah250, 253P900; 70Utah145, 258P565; Utah 272P204. [b] 47RI 78, 129A812.

262-57 127Misc897, 217NYS224. [a] But see 127Misc897, 217NYS224.

263-58 102CalA756, 283P874 (conditional indorsement).

263-65 [a] **Nature of liability.**-138 Misc266, 245NYS872.

263-66 35Ariz143, 274P1047(2dcase); LaA 130SS848; 260Mass449, 157NE530; 173Minn14, 216NW314; 85Mont571, 281P348; 51ND508, 200NW44; 51ND 399, 200NW505, 37ALR1186; ND 232 NW310; 296Pa291, 145A831; RI 150A 258(2dcase); 49SD203, 207NW67 (holding that a holder for value taking after maturity can recover); TexCivA 298SW664.

263-67 120Kan434, 243P1014, 1016 [citCJ]; 173Minn14, 216NW314.

263-68 120Kan434, 243P1014, 1016 [citCJ].

263-69 43 Ida310, 251P627; 208 Iowa 1310, 227NW163; 120Kan434, 243P 1014, 1016 [citCJ]; 127Kan682, 275P 185; 221MoA951, 288SW957, 958 [quot CJ]; 51ND688, 200NW793; 296Pa291, 145A831.

264-77½-New. The maker of a note evidencing a loan procured for his own use and benefit and received by him has been held primarily liable to the payee under the Negotiable Instruments Act, notwithstanding an agreement he may have had with other makers as to getting other parties to sign the note as makers. TexCivA 128SW(2d)230.

264-79 93PaSuper152.

264-82 121Kan239, 246P1013; CalA 293P86; 56ND142, 216NW340 (in action by receiver of accommodated party).

265-94 26F(2d)51 [citCJentirecection].

266-10 [a] **Plaintiff, purchasing second lien note** at thirty per cent discount before maturity in good faith and with out notice of any infirmity in instrument, has been held "holder in due course." TexCivA 13SW(2d)477.

266-11 [a] (2) Liquidating agent of accommodated party is not necessarily holder for value. 120Kan712, 244P840.

266-12 Md 149A270.

267-21½-New. Where a pledgee bank, taking an accommodation paper as general security knows that it was executed with restriction to use as specific security, it is not the holder in due course and accommodation indorser is not liable. [1925]CanSC587, [1925] 3DomLR 975.

267-23 128Misc446, 218NYS293.

267-24 32F(2d)168.

269-39 219Ala203, 121S733; 246Mich 493, 224NW601; MoA 31SW(2d)234; 225AppDiv300, 233NYS196; 85PaSuper 480; SD 233NW285; TexCivA 4SW (2d)298.

269-40½-New. An accommodated party may not recover against an accommodating party in a suit on a note. TexCommnA 282SW570.

270-43 RI 152A44(2dcase).

270-44 RI 152A44(2dcase).

270-54 11PaDist&Co 78, 79 [quotCJ].

271-55 48Philippine207.

272-63 See also 98CalA514, 277P176.

272-69 226AppDiv412, 235NYS392.

274-83 51ND508, 200NW44.

274-86 85PaSuper480.

275-92 But see 135Misc608, 238NYS154 (that payee's failure to proceed seasonably against maker at request of accommodation comaker held good defense). [b] (2) Mississippi statute providing for discharge of accommodation indorser is not repealed by Negotiable Instruments Law. 146Miss520, 112S688. (3) Stipulation over signature of accommodation indorser waiving protest and agreeing to extension of time without notice is not waiver of right to rely on such statute providing for his discharge from liability. 146Miss520, 112S688.

275-95½-New. The question is a matter of intention, accommodation party not being discharged where the giving of a new note for security was not so intended. 315Mo 465, 287SW331.

275-95¾-New. The Negotiable Instruments Law is controlling on the question as to how an accommodation maker of a note may be discharged. 218Ky 47, 290SW1050.

275-95¼-New. Accommodation indorser is discharged when payee receives payment, from whatever source. 23 F(2d)518.

275-95⅞-New. The fact that the holder charged notes to the open account of the maker did not postpone the time of payment or constitute cancellation or renunciation of the notes discharging the accommodation indorser. 108Conn 149, 142A816.

275-99 [d] **In Porto Rico.**-32PortoRico 752.

276-4 See also MoA 78W(2d)723 (consideration for extension of time held sufficient).

276-5 See also 321Mo 849, 128W(2d) 723. [a] **Payee may not deny release of security** as against accommodation maker, where, by returning deed, given as security, in blank, he impliedly restored maker's authority to fill blank. 321Mo 849, 128W(2d)723.

276-7 Contra. Tex 293SW800.

276-8½-New. Taking a new note and post-dated check as collateral will not discharge the accommodation makers. MoA 78W(2d)723.

276-10 181Ark590, 278W(2d)507(1st case); 166Minn472, 208NW186; 120 Or 493, 252P969.

276-11 166Minn472, 208NW186; 120 Or493, 252P969; TexCivA 273SW1023, 1023 [citCJ]; 195Wis131, 217NW645.

277-15½-New. An accommodation maker, although primarily liable, may set up against an original party to the note his discharge from liability by an extension of time for payment without his consent. TexCivA 230SW238.

277-16 Mo 149A806.

278-22 166Minn472, 208NW186, 187 [citCJ].

278-26 146Miss520, 112S688. [c] (2) Accommodation indorser is bound by waiver in note consenting to any extension of time of payment or renewal thereof without notice. 51ND399, 200 NW505, 37ALR1186.

278-27 199 Iowa1337, 203NW787 (not discharged in absence of consideration for extension); 146Miss520, 112S688.

278-29 146Miss520, 112S688; 226App Div412, 235NY8392.

278-30 51ND399, 200NW505, 37ALR 1186 (not surety under statute so as to have right to require creditor to proceed against principal or pursue other remedies).

279-33½-New. Accommodation indorser is bound by waiver. 51ND399, 200 NW505, 37ALR1186.

279-45 173Minn554, 218NW106.

280-50 [b] 104NJL254, 140A273.

280-53½-New. Use of an accommodation note of a stockholder in favor of the corporation to retire worthless notes, which were not obligations of the corporation, has been held to be a fraudulent diversion. 246Mich493, 224NW601.

282-71 167Minn93, 208NW805; 176 Minn425, 223NW682; Nebr 230NW673.

283-79 196NC305, 144SE522(2dcase).

283-80 231Mich597, 204NW719.

284-94 133SC304, 130SE890.

285-96 See also 85PaSuper480 (payee assigning with liability of surety).

285-3 119Kan528, 240P587; 133SC304, 130SE890, 892 [citCJ].

285-5 133SC304, 130SE890; 103WVa 40, 136SE690; 34Wyo405, 244P372, [b] **Indorsement by antecedent creditor of debtor's note** is not within rule, although proceeds are used in payment of the debt. 133SC304, 130SE890. [c] **Stockholders indorsing notes of corporation** and receiving no individual benefit are not accommodated indorsers within rule. 34Wyo405, 244P372.

286-14 MoA 275SW560; 127Misc805, 217NYS471.

286-15½-New. Similarly, where defendant is an accommodation maker, it is a defense as against the payee that he agreed that defendant would not be liable thereon. 127Misc897, 217NYS224 (2dcase).

286-16½-New. Fact that holder of note held collateral security of debtor is no defense available to accommodation indorser. 85PaSuper480 (nonnegotiable note).

286-16¾-New. That the accommodated party agreed to pay is not a defense against a purchaser of accommodation payer. 70Utah145, 258P565.

286-16¼-New. In an action against indorsers only it is no defense that they were accommodation indorsers. 130 Misc904, 225NY8731.

286-16½-New. The defense of accommodation is only available against the party accommodated, the one to whom the credit is loaned. 32F(2d)168.

286-16¾-New. Accommodation maker's attempt to enforce collateral given to secure note is not estoppel precluding defense of nonliability. TexCommnA 27 SW(2d)125.

286-16½-New. Accommodation maker of note transferred in due course as collateral security for another note held not surety for principal note. TexCivA 28SW(2d)1104.

286-19 50ND487, 196NW550 (decision based on estoppel of accommodation party to take advantage of his own wrong).

286-20½-New. That maker executed note to payee for accommodation of third persons who defrauded maker is no defense against payee holder in due course. 300Pa317, 150A644.

287-26 TexCivA 318SW(2d)329.

287-28 [b] **Defense of failure of consideration not available** to accommodation indorser on substituted notes. 160 La371, 107S143. [c] **Breach of contract with maker.**—Where note was given under agreement between holder and maker for certain work to be done, and holder failed to fulfill, accommodation indorser is liable and may not plead defense of breach of agreement. 127Misc805, 217NYS471.

288-38 130Misc904, 225NY8731.

288-43 300Pa468, 150A892. [a] 125 Me485, 135A98. [b] **Accommodation indorsers are not liable** on note, drawn to maker's order but not indorsed by him, under law of conventional obligations. LaA 129S445.

289-49 See also 300Pa468, 150A892 (liability to accommodation payee-indorsee on second note jointly made by accommodation maker and accommodated party).

289-58 125Me485, 135A98; 172Minn 52, 214NW767; 75Mont516, 244P494; 92PaSuper352. See also 300Pa468, 150 A892.

290-64 But see 38GaA344, 144SE48.

290-66 199 Iowa1337, 203NW787 (have right of contribution).

291-74 125Me485, 135A98.

291-75 125Me485, 135A98; 172Minn 52, 214NW767. See also 315Mo465, 287 SW331; 75Mont516, 244P494 (agreement may be inferred from circumstances); TexCivA 274SW984, 985 (accommodation makers) [citCJ].

291-76 125Me485, 135A98; 172Minn52, 214NW767.

291-77 125Me485, 135A98; 172Minn52, 214NW767; 222MoA426, 78W(2d)290; TexCivA 274SW984, 985 [citCJ]. [a] TexCivA 274SW984.

291-78 TexCivA 274SW984, 985 [citCJ].

291-80 TexCivA 274SW984, 985 [citCJ].

291-82 125Me485, 135A98.

291-85 125Me485, 135A98; TexCivA 274SW984, 985 [citCJ].

291-86 172Minn52, 214NW767; TexCivA 274SW985, 985 [citCJ].

292-88½-New. An accommodation maker who signs under agreement as cosurety does not by signing a renewal note as indorser become entitled to recover full amount against a former cosurety upon payment of the note. TexCivA 274SW984.

292-91 115Tex591, 285SW612; TexCivA 294SW324.

292-95 118Kan755, 236P828; 115Tex 591, 289 SW612. But see 125Me108, 131 A138.

293-19 111Conn709, 151A177.

294-35 104WVa265, 139SE750, 753 [citCJ].

296-62 169Ark1084, 277SW871; 165 Minn339, 206NW930.

297-75½-New. Payment of a forged check by a drawee bank is not acceptance under the Negotiable Instruments Law. Iowa 226NW119.

297-77 33F(2d)81; 169Ark1084, 277 SW871; 138SC221, 136SE216.

297-78 222MoA426, 78W(2d)290.

297-79 But see 74CalA734, 241P945.

297-83 TexCivA 286SW914.

298-5 87IndA318, 158NE919 (bank held not to be drawer but to be liable in simple contract to pay note).

299-14 217MoA676, 274SW833, 835 [citCJ].

301-61 115Tex591, 285SW612, 614 [citCJ].

301-62 115Tex591, 285SW612, 614 [citCJ].

302-71 78Mont48, 252P373. [a] See also 78Mont48, 252P373.

302-75 179Ark53, 148W(2d)238.

302-79 222MoA426, 78W(2d)290; TexCivA 24SW(2d)463.

303-81 [a] **Acceptance not required of order in favor of person and lacking words of negotiability.** TexCommnA 276SW664.

303-89 55ND454, 214NW33.

303-90 TexCivA 108SW(2d)753. But see 74CalA734, 241P945.

303-96 TexCivA 72SW(2d)601.

303-97 254Mass395, 150NE176.

304-17 254Mass395, 150NE176 (reason for rule); 222MoA426, 78W(2d)290; TexCivA 24SW(2d)463.

305-21 284Pa561, 131A471, 42ALR 1133.

305-24 118Kan755, 236P828; 220MoA 1062, 282SW86.

306-57 102Conn558, 129A538 (sufficient acceptance); 119 Okl 149, 249P 424.

307-59 [a] **No implied acceptance** in statutory period unless instrument was presented for acceptance. TexCivA 24 SW(2d) 463.

307-61 156Md177, 143A793; 78Mont48, 252P373.

307-68½-New. Where a draft was drawn by the drawer on itself, the bank at which it was made payable could not claim that it retained the draft in order to present it to the drawer for acceptance, as the draft was equivalent to an order to the bank to pay the draft. 129 Or36, 276P262, 63ALR1133.

307-68¾-New. The conduct of a bank in holding a draft twenty-four days, contrary to instructions of the collecting bank, is equivalent to acceptance. 129 Or36, 276P262, 63ALR1133.

311-22½-New. The telegraphed promise of a bank to another bank that it would pay checks drawn on it by a produce company operated only in favor of the sendee bank and not as a general guaranty to other banks. ND 228NW 236.

318-8 55ND454, 214NW33; 119 Okl 149, 249P424; 129 Or36, 276P262, 63 ALR1133 (statute requiring acceptance in writing and signature of drawee must be considered in connection with Negotiable Instruments Law). [b] **Word "refusal" is to be construed** to cover failure to return draft. 119 Okl 149, 249 P424. [c] **In Montana** tortious refusal to accept is not necessary, but mere passive neglect to return instrument is all that is necessary. 78Mont48, 252P373.

319-18 [c] **In Minnesota** also rule applies to checks. 165Minn339, 206NW 930. [d] **In Montana** provision applies to checks. 78Mont48, 252P373.

321-41 118Kan755, 236P828 (drawer's instruction not to pay check does not relieve bank from liability to pay according to previous acceptance by telegram to payee).

321-53 [b] 172Ark624, 290SW48.

321-58 128Me163, 146A244.

323-84 CalA 262P815, 817 [citCJ].

325-21½-New. or on the shipment of pigs at a stated price per pound, 220 MoA1062, 282SW86.

327-48 110Conn564, 148A662 (order); 220MoA1062, 282SW86; 102NJL496, 133A181.

328-53½-New. A bank paying a draft in reliance on the drawer's false statement that conditions upon which the draft was accepted had been performed cannot recover the amount from the acceptor. 220MoA1062, 282SW86.

329-59 CalA 292P281; 97Fla862, 122S 105; 156Md177, 143A793; MoA 18SW (2d)93; 284Pa561, 131A471, 42ALR 1133; 44Philippine533; 46Philippine 716; 115Tex591, 285SW612.

329-60 8PaDist&Co 752. [a] 76CalA 726, 245P80.

329-61 144 Okl 169, 289P701; 44Philippine533.

330-63 144 Okl 169, 289P701.

330-68½-New. Drawee honoring and voluntarily paying draft drawn by drawee's agent can not thereafter claim that bank cashed drafts contrary to instruction. 251Mich658, 232NW185.

330-69 284Pa561, 131A471, 42ALR 1133; 46Philippine716; Wyo 291P809.

331-72 284Pa561, 131A471, 42ALR 1133.

331-82 284Pa561, 131A471, 42ALR 1133.

331-84 153Tenn113, 282SW194.

331-88 153Tenn113, 282SW194.

332-97 153Tenn113, 282SW194.

332-4 153Tenn113, 282SW194.
333-11 153Tenn113, 282SW194.
333-18½-New. Return of check unpaid because of attachment of deposit is refusal of payment. 19F(2d)524.
334-31 [a] **"Negotiated"** means transfer so as to constitute transferee the holder. 6F(2d)762.
334-33 NJ 148A717.
334-37 TexCivA 26SW(2d)361.
334-38 TexCivA 26SW(2d)361.
334-41 CalA 292P281.
335-44½-New. A person who, without indorsement, procures for another the cashing of a check bearing the forged indorsement of the payee does not negotiate it. 253 IllA185.
335-66 [b] But see GaA 155SE777(2d case). [g] **Payee has prima facie right to negotiate paper.**–Iowa 221NW791.
336-67 219MoA51, 266SW750, 753 [cit CJ]. See also GaA 155SE777(2dcase).
336-68 219MoA51, 266SW750, 753 [cit CJ]. [a] **Hence collateral attack cannot be made** on right to transfer. 219 MoA51, 266SW750.
336-73 89Fla242, 103S609; 173Minn 554, 218NW106; 219MoA645, 284SW 834; 153Tenn113, 282SW194; 148Wash 341, 268P891.
336-80½-New. Where a note was never executed to a certain company, on account of there being no delivery of the note to it at any time, it never had title and could pass none by its indorsement. Mo 19SW(2d)1043.
337-89½-New. Abbreviation "Co." in indorsement indicates there is more than one indorser. 249Mich403, 228NW 796.
337-91½-New. Indorsers of corporation note are not relieved of personal liability merely by adding the word "directors" before their signatures. Tex CivA 276SW773.
337-93 51ND573, 200NW42.
337-95 215Ala235, 110S34; 105WVa 523, 143SE305.
338-99½-New. One procuring for another as messenger, without indorsement, cashing of check bearing forged indorsement of payee and turning over money is not liable as agent. 253 IllA 185.
338-1 51ND573, 200NW42.
340-33 208 Iowa1379, 227NW410.
340-36 197NC526, 150SE34.
341-44 104NJL375, 140A463, 464 [quot CJ] 57ALR596.
341-50 114Nebr230, 206NW770; 160 Tenn229, 228W(2d)1041 (indorsement to one party "and/or" another).
342-70 200Cal 697, 254P573, 575 [cit CJ] 51ALR930.
342-73 200Cal 697, 254P573, 575 [cit CJ] 51ALR930.
343-76 217MoA382, 266SW737.
343-76½-New. When the maker has acquired a note and indorsed it, the person to whom it is indorsed occupies the position of original indorsee. 217MoA 737, 266SW737.
343-78 100CalA163, 280P174
344-2 222MoA1156, 14SW(2d)41. But see 170La598, 128S528.
344-3 219Ala382, 122S619; 108Conn26, 142A395; 36GaA570, 137SE104; 166 Ga889, 144SE772; 35GaA784, 134SE 841; 2LaA82; 122 Or225, 258P192; TexCivA 298SW617. [a] (2) Transferee is not subject to maker's defense arising after transfer. 36GaA570, 137SE 104.
344-5 222MoA1156, 14SW(2d)41. [a] See also 76Mont396, 247P326.
345-12 339 Ill 230, 171NE178.
345-12½-New. The date of the ownership of a note is the date of executing and delivering the deed to the property for which the note was conditionally delivered. TexCommnA 299SW848.
346-27 13F(2d)805, 806 [citCJ]; 32 Ariz588, 261P45; 37GaA253, 139SE577; 217Ky40, 288SW1011.
346-28 37GaA253, 139SE577.
347-44 133 Okl 255, 272P1020. [d] **Agreement to indorse.**–Promise of corporate officer to indorse corporation's note if another officer would indorse is supported by consideration. 149Va 798, 141SE776.
348-50 79CalA533, 250P205; 39GaA 226, 146SE644; 46 Ida744, 271P931 (taking over of bank and stock by other stockholders); 205 Iowa1264, 216NW 278, 219NW318 (nonnegotiable note held no consideration for agreement to purchase such note); 173Minn325, 217NW 381. See also 208 Iowa341, 223NW403. [a] (3) Transfer of note on consideration of agreement to indemnify on another note is sufficient consideration though delivered after agreement to indemnify. MoA 289SW977. [b] 125 Misc722, 211NYS482 (antecedent or preexisting debt). [i] **Where debtor deposited money in bank to pay creditor, who refused to accept,** held retention of such deposit was sufficient consideration for bank's transfer of creditor's notes to debtor. 44 Ida27, 255P303.
348-50½-New. Consideration for contract to purchase non-negotiable note necessarily fails when the vendor-holder of the note cancels the contract out of which the note arose and thereby renders the note worthless. 205 Iowa1264, 216NW278, 219NW318.
348-56 233 IllA240. [c] **One who places his name on back of note** before it is delivered is indorser. 233 IllA240.
349-60 140Miss625, 106S211 (under Hemingway's Code § 2641, one merely writing her name in blank on back of notes is "indorser"). [a] **Person placing name on back of note** is, nothing else appearing, indorser and liable on note as indorser. 197NC572, 150SE32 (2dcase).
349-73 326 Ill 285, 157NE243; 200 Iowa1086, 205NW853, 42ALR622; 6 LaA562; 7LaA385; TexCivA 20SW(2d) 212; TexCivA 26SW(2d)361.
350-74 MoA 27SW(2d)441.
350-78 [a] 200 Iowa1086, 205NW853, 42ALR622.
350-83 87CalA429, 262P41; 202 Iowa 328, 208NW374. [b] (2) LaA 129S445.
350-88½-New. or to transfer to a decedent's estate a note payable to the order of the personal representative but given in renewal of a note belonging to the estate. 236Mich221, 210NW 237.
350-93 51ND573, 200NW42.
350-94 219MoA51, 266SW750; 51ND 573, 200NW42.
351-2 Sask [1926] 4DomLR333, [1926] 2WestWkly637.
351-9 195Wis120, 217NW746, 56ALR 915.
352-16 151Md503, 135A369, 372 [cit CJ]; 167Minn394, 209NW311; 114Nebr 366, 207NW513.
352-18 CalA 291P281; 224Ky134, 5SW (2d)886.
352-20 214Ky24, 282SW555.
353-23½-New. One placing signature on note otherwise than as maker, without words showing another intention, is liable only as indorser. 192NC499, 135SE326.
353-24 [c] **In Porto Rico.**–33PortoRico 530. [d] **Effect of omitting date under code.**–33PortoRico 530.
353-32 210Ky788, 276SW839; 51ND 573, 200NW42.
354-42 Sask [1930] 4DomLR148.
354-54 [a] **Guaranty of prior indorsements.**–Bank, indorsing instrument with express guaranty of prior indorsements, and receiving payment thereon, is in no position to urge that it did not guarantee prior indorsements. 153Tenn 113, 282SW194.
355-55 233 IllA542.
355-56 233 IllA542; 125 Or261, 264P 852. [a] (1) 137 Okl 294, 279P338.
356-57 191NC797, 133SE196, 46ALR 1512.
356-66½-New. , and entitled the drawee bank to relief, although the instrument was forged. TexCommnA 299SW856.
356-68 215Ala398, 110S822; 73CalA 157, 238P371. [a] **Defendant held liable** where plaintiff accepted his offer to indorse with another and tendered new note so indorsed. 73CalA157, 238P371.
356-70 TexCivA 30SW(2d)668.
357-73 128 Okl 220, 262P201 (indorsement subject to prior written contract); TexCivA 299SW649, 651 [citCJ]. [d] **Oral agreement** that indorsement of last note in series should be considered indorsement of all held sufficient to base action on. 117Tex107, 298SW419.
357-74 CalA 291P621.
357-75 [a] (6) Blank indorsement may contain waiver of protest. 205 Iowa266, 215NW737.
357-76 205 Iowa266, 215NW737; 125 Or261, 264P852.
357-79 Ala 129S571; 96CalA604, 274P 607(2dcase); 241 IllA576; 163La976, 113S167; 151Md514, 135A383, 49ALR 1366; 114Nebr366, 207NW513; 23 OhA 359, 155NE655; 33PortoRico 944, 948 [citCJ]; TexCommnA 5SW(2d)972, 973 [citCJ]; TexCivA 274SW166; 69Utah 557, 257P658.
358-80 160La352, 107S135; 151Md514, 135A383, 49ALR1366.
358-81 38GaA58, 143SE787.
358-88½-New. A payee, transferring notes, secured by a real estate mortgage, by indorsements in blank, does not become an "indorser" thereof, and is not liable to the transferee for the amount of the notes, in the absence of a special agreement to that effect. 84Mont393, 276P15.
358-89 81CalA653, 254P642; 249 IllA 493; 151Md514, 135A383, 49ALR1366; MoA 277SW573; MoA 14SW(2d)966; 49SD466, 207NW471; 152Tenn486, 279 SW797; TexCivA 274SW166; TexCivA 284SW694. But see 253 IllA185.
359-95 199Cal 307, 249P11; ND 232 NW307; 115 Okl 283, 242P1044; 154 Tenn444, 289SW496.
359-96 199Cal 307, 249P11; CalA 293P 102.
359-98 203 Iowa35, 212NW333.
360-99 203 Iowa35, 212NW333.
360-4 243 IllA526.
360-11 203 Iowa35, 212NW333, 335 [cit CJ].
360-12 203 Iowa35, 212NW333, 335 [cit CJ].
361-15 203 Iowa35, 212NW333, 335 [cit CJ].
363-43 Mass 166NE837.
364-53 131 Or393, 283P415.
364-55½-New. Statutes providing that a holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser, any contract consistent with the character of the indorsement is confined to the contract upon which the indorsement is made. 80CalA768, 253P166.
364-55¼-New. If that contract is a negotiable instrument the holder may insert the necessary words above the blank indorsement to make it a special indorsement. 80CalA166, 253P166.
364-55¼-New. But if it is not consistent with the character of contract no such right is given by the statute. 80 CalA768, 253P166.
364-56 TexCivA 296SW674.
365-68½-New. A restrictive indorsement conveys no information to the drawee concerning the original payee. 74CalA734, 241P945.
366-71 170Ark583, 280SW372; 28 Hawaii35; 43 OklACR26. [a] **Indorsements held not restriction.**–28Hawaii35.
366-72 [b] (1) 288Pa374, 136A238.
366-79 53SD496, 221NW95, 60ALR863 (held restricted). [b] 53SD496, 221NW 95, 60ALR863.
366-79½-New. An indorsement to "any bank, banker, or trust company" is not restrictive. 170Ark583, 280SW372.
366-80 But see 248 IllA428 (under statute).
366-82 [a] (2) But see 275US248, 48 SCt58, 72L ed264.
367-83 MoA 287SW839, 840 [citCJ]; 55ND370, 213NW353.
367-86 136Misc838, 241NYS65.
367-86½-New. The indorsee of a demand note in good faith for value before maturity is not estopped to assert ownership by reason of having indorsed it to the bank which was the original payee for collection and remittance. 55ND370, 213NW353.
368-87 151Md514, 135A383, 49ALR 1366.
368-89 32Ariz588, 261P45; TexCivA 296SW674, 677 [citCJ].
368-90 [c] **Note is complete as contract** against indorsers in absence of agreement that it is not to take effect as contract till additional indorsers are secured. 41 Ida129, 238P308. [d] **Understanding of one party** does not constitute agreement to limit effect of indorsement. 41 Ida129, 238P308.
368-93 41 Ida129, 238P308. [a] 43 Ida 80, 251P295.
369-2 MoA 284SW177. [a] **Necessity.**–Indorser wishing to qualify or limit

his liability must so indicate, else contrary will be presumed. 23 OhA359, 155NE655.

369-6 66Utah394, 243P114.

369-10 191NC458, 132SE148; 66Utah 394, 243P114.

369-14 232 IllA230; 208 Iowa573, 221 NW486; 127Kan50, 272P139, 61ALR 687; 165Minn428, 206NW708.

369-15 208 Iowa573, 221NW486; 226 Ky179, 10SW(2d)846; 232Mich11, 204 NW692; 165Minn428, 206NW708; Mo 19SW(2d)740; 217MoA382, 266SW737; 191NC458, 132SE148; TexCivA 293SW 613. But see Mass 171NE820. [a] 168 Minn 308, 210NW84; 23 OhA359, 155 NE655. [h] (1) 196NC805, 144SE522 (2dcase). [i] **Effect as to other indorsers.**–23 OhA359, 155NE655. [j] **Rule of caveat emptor** applies in case of sale of instrument indorsed without recourse unless there is fraud or concealment by seller as to value of paper or maker's solvency. MoA 16SW(2d)702. [k] **Failure to disclose maker's financial condition.**–MoA 16SW(2d)702.

370-16 174Ark274, 294SW999; 191NC 458, 132SE148. [a] (4) That married woman, who was prior indorser, had capacity to indorse. TexCivA 299SW 917.

370-18 21AlaA515, 109S576; 168Minn 308, 210NW84; 43 OklACR26.

370-21 232 IllA230; 205 Iowa1126, 217 NW429; 191NC458, 132SE148.

370-24 66Utah394, 243P114. [a] **Illustrations of qualified indorsements.**–CalA 289P934.

371-33 66Utah394, 243P114, 116 [quot CJ].

371-40½-New. 66Utah394, 243P114, 116 [quotCJ].

371-46 326 Ill 285, 157NE243.

371-48 27Hawaii763.

372-59 219MoA51, 266SW750.

372-59½-New. The holder may also have his transferor substitute another and different indorsement although such transferor at the time had no title. 219 MoA51, 266SW750.

372-63 27Hawaii763, 768 [citCJ].

374-78½-New. Indorsers signing as sureties are not discharged from liability where the maker permits one indorser to strike out his name before delivery to the payee who knows nothing of the circumstances of striking out. 165Minn330, 206NW646.

375-96 215Ala256, 110S273; 227Ky 594, 13SW(2d)759; 10LaA433, 121S 319; 165Minn330, 206NW646, 649 [cit CJ]; 132Misc343, 229NYS791; 122 Or 170, 257P812; TexCivA 276SW773; 93 Wash344, 160P960.

375-97 But see TexCivA 8SW(2d)767.

375-2 [a] See also 208 Iowa341, 223 NW403.

376-3 116 Oh609, 157NE478, 54ALR 992.

376-3½-New. Indorser desiring to apply maker's property in payment of a note, or to compel contribution by coindorsers, should pay the note and be substituted to the rights of the holder. 146Va357, 131SE803.

376-3⅓-New. Liability of indorser on trade acceptance is same as on promissory note. 262Mass242, 159NE625.

376-3¼-New. That a note for the purchase price of an automobile was made on a form provided by the payee, payable at its office in another state, does not affect the indorsement to plaintiff. TexCivA 16SW(2d)141.

376-3½-New. Where a note was payable to order, and bore the indorsement of the indorsee of the payee to plaintiff, the indorsement was sufficient, under statute. 95CalA505, 273P39.

376-3⅝-New. A payee's indorsement and delivery of a negotiable note before maturity imports a promise to pay, unless qualified as provided by statute. SD 225NW713.

376-3½-New. Persons becoming accommodation indorsers of a corporation's notes before it became insolvent are entitled to the rights and immunities of indorsers, although they are directors of the corporation. 198NC89, 150SE676(2dcase).

376-4 77Mont539, 252P368.

376-5 339 Ill 230, 171NE178 (indorsers' liability is determined from indorsement and date of its execution). See also 103Conn503, 131A25.

376-11½-New. , nor is the indorser liable for interest if not liable for the principal. 140Miss625, 106S211.

376-12½-New. Liability of an indorser on a note is not reduced or modified by provisions of a deed of trust securing it. 25F(2d)214.

376-13 [a] (2) Indorser's contract under Negotiable Instruments Law is conditional and purely secondary. Tex CivA 276SW773.

376-18 165Minn330, 206NW646; 192 NC69, 133SE415; 52ND793, 204NW678.

377-19 235Mich638, 209NW848; 239 Mich670, 214Mich971; 192NC69, 133SE 415; 52ND793, 204NW678; 93Wash344, 160P960; 192Wis300, 212NW638, 51 ALR605.

377-21 Mass 169NE923; 214Mich971; 75Mont516, 244P494; NC 155SE263; 34Wyo 405, 244P372. [a] 283Pa212, 129A56.

377-21½-New. When notes are secured by collateral, recovery from the indorser is limited to the balance after application of such collateral. 300Fed 876.

377-32 85 IndA161, 152NE723; 89 IndA5, 165NE446.

377-32½-New. Brother of deceased maker of matured note, signing it in consideration of the payee's foregoing foreclosure of the collateral, held guarantor. 176Ark401, 4SW(2d)912.

377-32⅓-New. An indorsement guaranteeing payment and waiving protest does not make the indorser a guarantor. 205 Iowa266, 215NW737.

377-33 Ala 129S571; Mass 166NE840.

378-36 191NC340, 132SE21.

378-40 208 Iowa1379, 227NW410.

378-41 See also 273US380, 47SCt372, 71L ed692. [a] (3) Sufficient to bind syndicate. 19SaskL366, [1925] 2Dom LR737, [1925] 2WestWkly286.

378-44 [a] **Seller indorsing to bank installment notes received for automobile** under conditional sales contract is liable as indorser. 50RI 499, 149A611.

379-62 [b] **One signing after maturity when maker is dead** is not indorser. 176Ark401, 4SW(2d)912.

379-67 273US380, 47SCt372, 71L ed692. [d] **Person will not be liable as indorser** when note made payable by him to himself is indorsed by him, such indorsement not making him assume liability of indorser. 169La29, 124S135.

380-69 7F(2d)228 (intention of indorser to bind himself individually on partnership notes held to be shown); 205 Iowa266, 215NW737 (indorsement guaranteeing payment and waiving protest held not to constitute indorser maker).

380-70½-New. Under Negotiable Instruments Law one indorsing in blank for accommodation of maker a note with payee's name left blank is liable only as indorser and not as joint maker. 8 F(2d)795.

380-71 51ND399, 200NW505, 37ALR 1186.

380-72 Mass 165NE424. See also 2 LaA615.

380-75 155Miss91, 124S69; 132 Or368, 284P573; 57 OntL203, [1925] 3DomLR 488 (note executed to corporation not allotted). [a] **Liability of director of corporation payee.**–57 OntL203, [1925] 3DomLR488.

380-77 6LaA372; LaA 125S310; 315 Mo 465, 287SW331 (dictum); 82NH299, 133A26; 191NC340, 132SE21; 197NC 526, 150SE34 (check); 300Pa468, 150A 892; 92PaSuper352; 102WVa584, 135 SE665. See also 202 Iowa764, 211NW 257. [b] **Payee, being first indorser, cannot hold second indorser,** absent express agreement. 43F(2d)507.

381-81 125Me485, 135A98; NH 133A 26. [b] (1) 201 Iowa430, 205NW977 (payee primarily liable and surety secondarily liable to holder in due course).

381-83 125Me485, 135A98; 315Mo 465, 287SW331. See also 2LaA466.

381-84 125Me485, 135A98 (directors indorsing renewal rate).

381-85 191NC340, 132SE21.

381-87 92PaSuper352.

381-90½-New. Where an indorsement on a note by three indorsers was joint and several, the indorsers became bound as sureties for the maker, and as between themselves they were principals as to one third of the face of the note and the sureties as to the other two thirds. 22AlaA518, 119S601(2dcase).

381-90⅓-New. Where an indorsement on a note was joint and several, so that the indorsers became bound as sureties for the maker, and as between themselves were principals as to one third of the amount of the note and the sureties as to two thirds, and two of the indorsers paid the debt, no formal transfer of the note was needed in order for them to maintain suit against the third indorser. 22AlaA518, 119S601(2dcase).

381-92 125Me485, 135A98; 128Me447, 148A675; 263Mass327, 160NE794.

381-94 40GaA768, 151SE654; 168La 260, 121S763; 152Tenn486, 279SW797; 69Utah557, 257P658.

382-95 152Tenn486, 279SW797.

382-97 259Mass100, 156NE33.

382-98 23F(2d)986, 988 [citCJ] (under D. C. Code §§ 1313, 1334); 253 IllA320.

382-6 69Utah557, 257P658.

383-10 192NC87, 133SE427. But see TexCivA 26SW(2d)361.

383-12 30 OhA57, 164NE234. [e] **Consideration** for genuine good-faith assignment need not be shown by assignee. TexCivA 8SW(2d)569.

383-14 201Cal 715, 258P933; 196NC12, 144SE368.

384-16 40GaA768, 151SE654 (order indorsed on note).

384-23½-New. Attaching mark to note must be consciously performed to constitute valid assignment. 217Ky227, 289SW305.

384-23⅓-New. In case of sale of notes without mention of price, a reasonable price is implied. 69Utah557, 257P658.

384-23¼-New. Note may be assigned as gift or for purpose of bringing suit where creditor's rights and champerty not involved. 135Misc608, 238NYS154.

384-25½-New. An assignor, upon reassignment, reacquires its original powers and rights. 33F(2d)649.

384-28½-New. Express warranty of the quality of the article sold, not contained in the contract of sale but in an assignment of the purchase note by the seller, does not inure to the benefit of the buyer and maker of the note. 142 Miss536, 107S382.

384-29 127 Okl 215, 260P497. But see 213Ala567, 105S585 (where court said that as between assignee and debtor notice need not be given).

384-31 214Ala146, 107S88.

384-32½-New. Attachment of note at suit of creditor levied after he had notice of assignment does not bind assignee. 130Kan182, 285P637.

384-36 84CalA387, 258P141; 176Minn 18, 222NW509; 39Wyo 454, 273P679.

385-33 91Fla224, 107S334. [e] **Note payable to maker's order,** not indorsed by him, may be transferred, sold, and donated, accompanied by delivery and made object of contract. LaA 129S445.

385-40 165La694, 115S905; 168La262, 121S764; 176Minn246, 223NW287; MoA 278SW826; 131 Okl 235, 268P286. [k] **Title passes at time of sale** though seller has option to repurchase. 218MoA109, 262SW399.

386-42½-New. Assignment held to transfer interest of one of three sisters in note given by brother to parents to evidence indebtedness to sisters for interest in land. Minn 230NW260.

386-43 Fla 130S445; 40GaA376, 149 SE792; 40GaA679, 150SE860 (held inapplicable where transfer without value); 255 IllA484; 219MoA51, 266SW 750; SD 226NW751; TexCivA 30SW (2d)668. See also 4LaA606.

386-44 208 Iowa573, 221NW486.

386-46 Fla 130S445; MoA 17SW(2d) 591; TexCivA 30SW(2d)668. [e] **Unqualified indorsement.**–Fla 130S445.

387-50 TexCivA 30SW(2d)668.

387-57 40GaA376, 149SE792; 221MoA 495, 281SW968.

387-58 221MoA495, 281SW968; 191 NC458, 132SE148; 116 Okl 17, 243P178;

12PortoRicoFed323. [c] **Effect of priority of other notes in series.**–191NC 458, 132SE148. [d] **Where note of which that sued on is collateral was not legally indorsed,** plaintiff, basing its right to sue upon title by indorsement, must fail. MoA 284SW177.

387–59 215Ala648, 112S237, 238 [cit CJ&Cyc]; LaA 125S518; 221MoA495, 281SW968, 972 [citCJ]; NC 155SE606; 33PortoRico 876, 880 [quotCJ]. [d] **Generally** indorser of note is in no worse position than payee. Miss 154NE 557. [e] **Assignee's rights under payee's contract with maker.** 181Ark644, 27SW (2d)90 (assignee's suit not premature).

387–60 221MoA495, 281SW968.

388–63 31LaA153.

388–63½–New. A transfer of a note secured by a conveyance of the security does not prevent the transferee from taking judgment on the note. 35GaA 284, 134SE174.

388–64 NJSup 137A717; 242NY38, 150 NE594 (equities cut off by transfer to holder for value in good faith); 191NC 458, 132SE148; 5PaDist&Co 363.

388–67 256 IlIA251; 132Misc348, 229 NYS791; 130 Okl 54, 265P128; 290Pa 280, 138A768. [a] **Note payable to order may be transferred so as to confer title** by delivery without indorsement. MoA 278SW(2d)441.

388–68 218Ala221, 118S404; Ark 32 SW(2d)177; 205 Iowa1126, 217NW429; Minn 223NW287; 76Mont537, 248P209; 192NC87, 133SE427; 130 Okl 54, 265P 128; 288Pa549, 137A113; SD 226NW 751. See also 26F(2d)51. [e] **In absence of valid defense to note,** it is immaterial whether plaintiff became owner by indorsement so as to become holder in due course or whether transfer was by simple assignment. 39Wyo 454, 273P679.

389–69 But see TexCommnA 248W(2d) 359.

389–70 [a] 76Mont537, 248P209.

388–70½–New. Mortgage and note when assigned by fraudulent payee to innocent holder for value are segregated from fraud. 251Mich384, 232NW245.

389–73 131 Okl 235, 268P286; 288Pa 549, 137A113.

389–77 176Ark401, 48W(2d)912, 914 [quotCJ]; 30 OhA57, 164NE234; 130 Okl 7, 266P753; TexCivA 286SW914 [citCJperRandolph,J]; 143Va51, 129SE 220 (transfer as collateral security).

391–78 [a] **Rule does not apply,** under statute giving such right to defense, to defenses of incapacity of intermediate indorsers. 232 IlIA230.

391–81 213Ala567, 105S585; 215Ala 384, 110S809; 172Ark691, 290SW584; 91Fla224, 107S334; Iowa 213NW408; 262Mass242, 159NE625; 241Mich226, 217NW54; 74Mont549, 241P613; 117 Okl 199, 246P225; 119 Or460, 249P 1054, 1055 [citCJ]; 121 Or277, 254P 806; 300Pa267, 150A595; TexCivA 296 SW912. See also 73Mont219, 236P250. See also 248NY428, 162NE475, 59ALR 1473.

391–82 [b] **Doctrine of estoppel** applies in favor of holder of nonnegotiable paper. Iowa 213NW409. [c] **Estoppel not shown.**–Iowa 213NW409.

392–88 171Ark274, 284SW999.

392–93½–New. While a qualified indorsement on a promissory note relieves the indorser from the position of security for payment, it does not permit a transfer of worthless paper and still leaves the indorser liable as vendor with warranty that the instrument is genuine and that the indorser has good title thereto, without knowledge of any facts impairing the validity of the instrument or rendering it valueless. 95 CalA205, 272P761.

393–98½–New. No implied warranty arises on indorsement of a trust note, and transferee cannot recover of indorser full amount former was compelled to pay for conversion by trustee. 150Tenn375, 264SW641.

393–98½–New. Where the shipper's agent for collection indorses draft and bill of lading attached, there is no implied warranty of the genuineness of the bill of lading. 131Misc162, 225NYS 410.

393–4 CalA 292P381.

393–9 30F(2d)334 (liability of bank exchanging notes with forged indorsements for coupon bonds arose upon implied warranty of genuineness of notes, and was not conditioned upon either demand or giving notice after discovery of forgeries); 74CalA734, 241P945; 124 Okl 284, 255P1101; 153Tenn113, 282SW 194.

393–10 74CalA734, 241P945.

393–11 25F(2d)995 (rule applies to all who subsequently deal with paper); 26 F(2d)493 (warranty does not cover genuineness of claimed status of prior indorser); 69CalA319, 231P44; 74CalA 734, 241P945; CalA 291P621; MoA 23 SW(2d)644; 132Misc128, 229NYS110 (check).

394–14 153Tenn113, 282SW194.

394–20 219MoA645, 284SW834; 54ND 608, 210NW89; 120 Or508, 252P951. [b] **Previous indorsements** are warranted to be genuine. 153Tenn113, 282SW 194. [c] **Indorser's warranty relates to face of instrument** and not to indorsements upon back thereof. 176Minn449, 223NW780, 62ALR799(2dcase). [d] **Guaranty of indorsements.**–176Minn449, 223NW780, 62ALR799(2dcase).

394–21 But see 231 IlIA186.

395–23½–New. One, without indorsement, procuring for another cashing of check bearing forged indorsement of real payee does not warrant genuineness, title, and capacity of parties. 253 IlIA186.

395–24 74CalA734, 241P945; 259Mass 232, 156NE626; 219MoA645, 284SW834. See also 151Md514, 135A383, 49ALR 1366.

395–27 54ND608, 210NE89; 120 Or 508, 252P951.

395–28 21AlaA515, 109S576 [quotCJ]; 259Mass232, 156NE626; Mass 169NE 923.

395–34½–New. Indorser warranting regularity of agency where indorsement by alleged agent. CalA 291P621.

396–35 54ND608, 210NW89; 120 Or 508, 252P951.

396–36 259Mass232, 156NE626; NJSup 132A651; 124 Okl 284, 255P1101; WVa 155SE644.

397–48 219MoA645, 284SW834; NJ Sup 132A651. [d] **In Louisiana.**–LaA 125S518.

397–52 95CalA205, 272P761.

397–53 54ND608, 210NW89; 120 Or 508, 252P951.

397–56 10La419, 121S664.

397–56½–New. Indorser is liable to indorsee for breach of warranty where at the time of indorsement without recourse he knew of complete defense of failure of consideration. 54ND608, 210 NW89.

397–56⅞–New. The assignor's concealment of the fact that, instead of receiving payments on an installment note, he had taken an unsecured promissory note for unpaid installments and had written off the interest due, has been held to constitute fraud. 95CalA 205, 272P761.

397–56¼–New. The payee, transferring a mortgage note, knowing that the note is valueless but failing to disclose the fact, is guilty of fraud and is liable, as vendor, aside from obligation under the Negotiable Instruments Law, even though indorsing without recourse, for amount received. 9LaA540, 121S306.

400–5 TexCivA 290SW790 [citCJ].

401–7 56AppDC342, 13F(2d)313.

402–29 253Mass528, 149NE321; 43 OkiACR26, 30 [citCJ].

403–35 26F(2d)218, 222 [citCJ].

405–69 252 IlIA17; 146Miss649, 111S 133; 153Miss749, 121S490.

406–80 151Miss693, 118S414; Utah 276P659.

406–81 10LaA401, 119S779.

406–82 CalA 293P86.

406–83 CalA 293P114; 47 Ida179, 276 P315; 201 Iowa499, 207NW570; 224 Ky431, 6SW(2d)451; 166La101, 116S 714; 128Me495, 148A796; Mass 166NE 626; 245Mich152, 222NW107; 164Minn 57, 204NW546; 141Miss38, 106S209, 44ALR393; 126Misc634, 214NYS378 (even though nonnegotiable); 54ND 696, 210NW638, 48ALR1219. [f] **Statute of limitations** begins to run from date of instrument. 126Misc634, 214 NYS378.

407–85 141Miss38, 106S209, 44ALR393 (different provisions for interest before and after maturity).

408–88 See also 151Md514, 135A383, 49ALR1366.

408–90 146Miss498, 112S390, 392 [cit CJ]; 321Mo 199, 9SW(2d)901, 60ALR 639; 198NC374, 151SE723; 113 Okl 147, 240P79. But see CalA 293P86.

408–93 1LaA108, 111 [quotCJ]; 321 Mo 199, 9SW(2d)901, 60ALR639; 198 NC374, 151SE723. [b] (2) Miss 165 NE470; 153Miss749, 121S490. [c] (15) 78Miss87, 1[illegible]SE[illegible]

409–94 198NC374, 151SE723.

409–97 Mass 165NE470; 103NJL284, 135A688; 127Misc151, 215NYS353; 198 NC374, 151SE723; 113 Okl 147, 240P79.

409–98 113 Okl 147, 240P79; TexCivA 228W(2d)471 (acquired after maturity).

409–1 See also 205Cal284, 270P958.

410–11 126Me133, 136A696; Mass 166 NE626.

410–14 127Me383, 143A600; 55ND655, 215NW96.

411–19 NJSup 147A649(2dcase) (where contingency could never occur); Tex CivA 290SW790.

412–32 CalA 287P552.

413–51 211Ky185, 277SW292 (acceptor of check nine months after date is not holder in due course); 1LaA108, 111 [quotCJ]; 151Md514, 135A383, 49 ALR1366; 125Misc112, 210NYS224; 226AppDiv479, 235NYS529.

414–53 125Misc112, 210NYS224 (eleven days is not unreasonable time).

415–69 CalA 293P114. [a] **Facts on which acceleration of maturity is claimed** should generally arise after obligation is incurred. Nebr 231NW141.

415–70 36GaA51, 135SE112. [e] (2) Equity will scan very closely enforcement of provision of note for acceleration of payment of principal on failure to pay interest when due. TexCivA 13 SW(2d)174. [f] **Waiver of notice.**–TexCivA 13SW(2d)174. [g] **Facts on which accelerated maturity is claimed** should arise after obligation is incurred. Nebr 231NW141.

416–71 36GaA51, 135SE112; 143Wash 342, 255P368. [a] **Mere payment of delinquent taxes** before renewal notes and mortgages were taken did not accelerate mortgage debt. Nebr 231NW141.

416–72 55ND655, 215NW96, 98 [cit CJ]. [b] **Maturity of note is accelerated on default where security trust deed so provided** though note did not. Wis 230NW66

416–73 98CalA604, 277P538; 98CalA 796, 277P541; 195NC398, 142SE487, 489 [citCJ]; 143Wash596, 255P659.

416–74 TexCommnA 288SW405.

416–75 But see 101Vt308, 143A301.

416–75½–New. Indorsement providing for acceleration of payment of all notes on default in payment of one is governed by general law of contracts. 220 AppDiv667, 222NYS421.

416–75⅞–New. Holder not entitled to accelerate all notes of series for default on one without giving maker opportunity to pay. 220AppDiv667, 222 NYS421.

416–75¼–New. Repudiation of indebtedness on purchase-money note does not accelerate its maturity. 226Ky137, 108W(2d)636.

416–75⅞–New. Other acts accelerating maturity. CalA 288P137.

416–76 [d] **Once matured, principal cannot, by paying amount in arrears,** restore it to good standing. 220MoA 668, 293SW73.

416–78 136Wash538, 241P5. [b] **If payee accepts installments either before or after due date,** he cannot declare default at any time payments equaled or exceeded amount due. 143Wash596, 255P659.

416–78½–New. In an action on a note payable in installments brought under an acceleration clause upon failure to pay an installment is not premature

because of failure to present the note at the maker's specifying the place of payment, where the maker was furnished ample opportunity to make payment at the holder's place of business. 136Wash538, 241P5.

416-79 [a] (2) Facts held to disclose sufficient presentment and notice of dishonor. 111Conn568, 150A524.

417-82 85Colo318, 275P907; 97Fla50, 119S788 (both holding provision applicable); 55ND930, 215NW542, 56ALR175 (acceleration clause held not to mature note).

417-86 111Conn568, 150A524; 36GaA51, 135SE112. [b] (2) Provision for acceleration of maturity of notes in a series, upon default of maker, is not automatic. 191NC458, 132SE148, 150 [citCJ]. (3) Option may be exercised by holder only upon default by maker. 191NC458, 132SE148. [g] **Exercise of option** held essential to mature note. 220MoA668, 293SW73.

417-87½-New. In such case, action on a note accrues at its maturity, if acceleration is waived by the holder. 191NC458, 132SE148.

417-89½-New. Listing entire debt as due is an exercise of the option. 220MoA668, 293SW73.

417-90 220MoA668, 293SW73, 76 [cit CJ]; Utah264P975, 978 [citCJ].

417-91 36GaA51, 135SE112. [a] **After exercise of option,** maker cannot restore note to good standing. 220MoA668, 293SW73.

417-92 35GaA284, 134SE174; 136Wash538, 241P5, 6 [citCJ].

418-93 111Conn568, 150A524.

418-99 See also 191NC458, 132SE148.

418-3 35GaA284, 134SE174. [b] **Tender after exercise of option** does not affect holder's rights under option. 35GaA284, 134SE174.

418-4 36GaA51, 135SE112. But see CalA293P114.

418-5 36GaA51, 135SE112.

418-6½-New. If election to exercise option is declared prior to tender of arrearage, the rights of the parties are the same as if the note by terms came due on default without election. 36GaA51, 135SE112.

418-6¼-New. Where maturity is automatically accelerated by failure to pay installment of principal, acceptance of part payment after maturity so effected does not waive the right to claim the entire balance, 164La440, 114S89.

418-6¼-New. especially where, at the time suit is filed, other installments had become due and have not been paid. 164La440, 114S89.

419-16½-New. Payment of interest annually, taken in connection with reserved privilege of paying certain amount on interest-paying dates, shows intent that interest be payable annually. 55ND930, 215NW542, 56ALR175.

424-95 43OklACR26.

425-11 103Conn732, 132A20. [b] **Statutes construed.**-52ND617, 204NW683.

425-12 103Conn732, 132A20; 52ND172, 217NW180, 183 [quotCJ]. [b] **Note for unpaid balance.**-36GaA371, 136SE825.

426-15 Wyo290P561.

426-16 39GaA712, 148SE309(3dcase); 39GaA714, 148SE311(1stcase).

426-17 CalA292P670.

426-18 [b] **Provision in note.**-TexCivA272SW321.

426-19 CalA292P670.

426-20 [c] 103NJL240, 133A40.

426-21 CalA292P670.

426-22 198NC89, 150SE676(2dcase); 126Or400, 270P476, 477(2dcase) [citCJ].

426-23 198NC89, 150SE676(2dcase).

426-24 126Or400, 270P476, 477(2dcase) [citCJ].

426-25 Ark30SW(2d)858; 169Minn280, 212NW2; 54ND696, 210NW638, 48ALR1219. [f] **Indorser of first series of notes** is not discharged of liability by reason of execution and delivery of second series. 118Kan308, 235P104.

427-26 Mass165NE424; 54ND696, 210NW638, 639 [citCJ], 48ALR1219; 126Or400, 270P476, 477(2dcase) [citCJ].

427-26½-New. In some jurisdictions by statute it is declared illegal for any person or corporation or bank doing business in the state to take a renewal note without returning the note renewed, 52ND617, 204NW683.

427-26⅓-New. unless there is written or printed across the renewed note the words "renewed note," 52ND617, 204NW683.

427-26¼-New. and any promissory note given in renewal of a previous note is without force or effect unless given in conformity with the statute. 52ND617, 204NW683.

427-26⅙-New. Such statutes are for the protection of the public, 52ND617, 204NW683.

427-26⅛-New. and cover every renewal transaction consummated in the state. 52ND617, 204NW683.

427-26⅐-New. As used in the statute the term "doing business" means the completion of any transaction of the sort contemplated therein. 52ND617, 204NW683.

427-29 See also 169Minn280, 212NW2.

427-32 54ND696, 210NW638, 639 [citCJ], 48ALR1219.

428-33 54ND696, 210NW638, 639 [citCJ], 48ALR1219; 126Or400, 270P476, 477(2dcase) [citCJ]; 48Philippine466, 468 [citCJ]; TexCivA287SW115.

428-35 194NC244, 139SE376; 126Or400, 270P476, 477(2dcase) [citCJ].

428-36 198NC89, 150SE676(2dcase) (oral agreement).

428-38 103NJL240, 133A40.

429-44 [b] **In North Dakota.**-50ND813, 197NW854.

429-47 48RI470, 138A865, 866 [citCJ].

429-48 TexCivA138W(2d)472; TexCivA248W(2d)485.

429-53 TexCivA168W(2d)553.

430-66 169Minn280, 212NW2.

432-80 46Ida551, 269P412; 203Iowa35, 212NW333, 335 [citCJ]; 216Ky637, 287SW994; Mass170NE115; 171Minn53, 213NW375. [e] **Taking of demand note in place of another** does not constitute extension of time of payment releasing parties secondarily liable. 54ND696, 210NW638, 48ALR1219.

432-84 [a] **Question of fact.**-165Minn285, 206NW459.

432-87 40OklACR49, 51 [quotCJ].

432-88 171Minn53, 213NW375, 376 [citCJ]; 40OklACR49, 51 [quotCJ&citCyc]. [a] (4) 171Minn53, 213NW375.

433-89 40OklACR49, 51 [quotCJ&citCyc].

433-92 40OklACR49, 51 [quotCJ&citCyc].

434-7 32Ariz552, 261P33, 34 [quotCJ]; 82Colo323, 259P1031; 35GaA768, 134SE803; 199Iowa1337, 203NW787; 231Ky660, 218W(2d)1019; Mass165NE424; 198Wis525, 224NW742. [b] (4) Part payment held not sufficient. 27Hawaii763. (5) Language of letter from bank agreeing not to place notes with attorney till certain time, to effect that maker should pay for telegrams, did not show consideration. TexCommnA188SW(2d)599.

435-8 32Ariz552, 261P33, 34 [quotCJ].

435-9 32Ariz552, 261P33, 34 [quotCJ].

435-10 TexCivA273SW1022.

435-11 82Colo323, 259P1031.

436-12 199Iowa1337, 203NW787, 789 [citCJ]; TexCommnA188SW(2d)599.

436-15 TexCivA48W(2d)205, 208 [quotCJ].

436-19 GaA155SE43.

436-21 82Colo323, 259P1031; 169Minn280, 212NW2; TexCommnA248W(2d)351. [d] **Agreement to pay additional attorney's fees** has been held sufficient consideration for extension. TexCommnA298SW408.

437-26 82Colo323, 259P1031.

438-48 See also 132SC374, 129SE77, 78 [citCJ].

439-56 82Colo309, 259P513; 171Minn53, 213NW375, 376 [citCJ]; TexCommnA298SW408; TexCivA272SW283; TexCivA287SW115; TexCivA48W(2d)205.

439-59 But see 38GaA483, 144SE326.

439-60 TexCivA48W(2d)205.

441-71 231Ky660, 218W(2d)1019.

441-72 228Ky802, 168W(2d)452. [a] **Failure to surrender original note and filing it against estate of bankrupt maker** does not constitute failure of consideration as to surety consenting. 253IllA416.

441-72½-New. Compromise and settlement between the holder of a note and the accommodation indorser who gives a new note for a less amount than the original, is sufficient consideration for the new note although the indorser claims no notice of protest if the old note was given. 101WVa26, 131SE719.

441-72¼-New. That debtor was insolvent at the time of the execution of the renewal note does not render it without consideration. 207Iowa954, 222NW442.

441-74 See also 74CalA254, 240P298.

441-74½-New. Renewal note constitutes new promise to pay original debt where renewal note or original note was given to extinguish same. Wyo290P561.

442-85 162La281, 110S422.

443-94 36GaA371, 136SE825; 101WVa553, 133SE129, 130 [citCJ].

443-96 25OhA252, 157NE901.

443-3 10F(2d)298 (not novation); 170Ark555, 280SW659 (original note retained); 253IllA416; 203Iowa524, 211NW219; Kan292P935; Mass172NE82 (obligation to pay interest is not affected); 172Minn223, 214NW781; 118Okl136, 246P1088; SD225NW53; 101WVa553, 133SE129, 130 [citCJ]. But see 253IllA206. [a] (2) Where last of series of renewal notes is demand note cause of action on original note may be immediately enforced without formal demand for payment of demand note. Ont [1930] 2DomLR488. [b] **Renewal note** signed by one joint maker does not release other joint maker, unless accepted in satisfaction of original note. 39OklACR351.

443-4 17F(2d)44; 203Iowa524, 211NW219; MoA278SW784; NJSup149A120; 52SD172, 217NW180, 183 [quotCJ].

443-6 TexCivA287SW115; 199Wis592, 227NW294 (agreement construed to give privilege of extension to payee).

444-7 206Iowa1131, 221NW845 (where there is no new consideration); 121Kan425, 247P637; 236Mich221, 210NW237; 246Mich493, 224NW601; 117Nebr34, 219NW798; Nebr231NW34; Tex293SW800 (open to all defense available if non-negotiable). See also 248NY428, 162NE475, 59ALR1473. [b] **Defense by indorsers** that original and renewal note were both in condition that certain number of indorsers should be procured held not cured by giving of renewal note. 41Ida129, 238P308 [c] **Payment of original consideration** is defense to renewal note. 39OklACR343. [d] **Accommodation maker entitled to peremptory instruction** where extension was without his consent. Tex293SW800.

444-8 143Okl299, 288P960.

444-9 174Ark984, 298SW878; 322Mo955, 19SW(2d)721; MoA285SW538; 221MoA955, 288SW954; 296Pa462, 146A122; TexCivA20SW(2d)1090(2dcase).

444-10 23F(2d)796; 322Mo955, 19SW(2d)721. But see 246Mich553, 224NW755.

444-13 217Ala124, 115S13 (agreement not to prosecute); 121Kan425, 247P637.

444-15½-New. Unconditional delivery of a new note to the indorsee of the original note is abandonment of alleged conditional delivery of the original note. 204Iowa239, 213NW775.

444-15⅓-New. Where renewal note is given in payment, failure of one of signers of original note to sign renewal does not discharge cosigners who did sign. 253IllA206.

444-15¼-New. Maker may not be entitled to set up some defenses. Pa151A672.

444-16 205Iowa514, 218NW288; 215Ky695, 286SW984; 246Mich553, 224NW755; 142Miss617, 107S757 [citCJ]; 83Mont68, 271P695; 123Okl151, 254P706; 133Okl14, 270P838; Wyo290P561. But see 246Mich493, 224NW601. [b] **Condition against transfer.**-Agreement that original note should not be transferred is waived by maker by executing repeated renewals of note in hands of transferee. 200Iowa1165, 206NW122. [c] **But parties are not debarred from renewing and reaffirming contract** and attaching same conditions

as existed when original note was given. 94PaSuper357.

445-17 77Colo74, 234P1063; 41Ida146, 238P295; 200Iowa490, 203NW293; 200Iowa463, 203NW687; 200Iowa793, 205NW467; 201Iowa506, 207NW761; 202Iowa333, 208NW726; 215Ky695, 286SW984; 241Mich437, 216NW919; 168Minn199, 209NW869; 142Miss617, 107S757 [citCJ]; 194NC204, 139SE227; 56ND594, 218NW229, 232 [citCJ]; 58ND176, 225NW124; 111Okl225, 239P252; 131Okl66, 267P631; 54SD473, 223NW596; TexCivA272SW283; TexCivA293SW629, 630 [quotCJ]. But see 213Ky417, 281SW152; TexCivA20SW(2d)1090(2dcase). [b] (2) That maker renewing note knew that one inducing representation was false does not necessarily constitute waiver of other actionable fraud of which he was ignorant. 202Iowa333, 208NW726. [e] **Failure to make inquiry and investigation.**–Where person giving renewal note could have discovered facts by exercise of ordinary diligence and fails to make inquiry and investigation he is as much bound as if he had actual knowledge. 111Okl225, 239P252.

445-18 204Iowa887, 216NW274; 214Ky41, 281SW1022. But see Nebr231NW34.

445-19 86IndA392, 156NE568; 200Iowa793, 205NW467 (waiver of fraud by renewal note maker, bona fides of holder immaterial); 215Ky695, 286SW984, 985 [quotCJ]. [b] **Renewal note payable to original payee.**–56ND594, 218NW229.

445-23 But see 142SC247, 140SE581 (holding that extension given to bank, maker of note, does not discharge indorsers who are officers and stockholders).

445-25 But see 148Md345, 129A506.

446-32 Mass170NE115. Contra 221MoA442, 281SW965; 128Misc686, 219NYS697; 154Tenn672, 294SW513. [b] See also 203Iowa82, 212NW377.

447-37 TexCivA12SW(2d)230. See also 10F(2d)298; 32PortoRico752.

447-37½-New. Where holder of note accepts worthless check from maker and surrenders note, the indorser is not discharged, even though the maker states check cannot be paid until two days later. 145Va307, 133SE769.

447-37¼-New. Taking a renewal note signed by part only of those on the original note does not discharge the other makers of the original note, who did not sign the renewal. 54SD291, 223NW193.

447-37¼-New. Extension of time to makers of some of several collateral notes not release of liability of others. 256IllA226.

447-44 Mass165NE424; 226AppDiv412, 235NYS392; 300Pa507, 150A900; 144Va36, 131SE221. [a] **Accommodation indorsers of collateral note are not discharged** by extension of principal note where collateral note was indorsed for the express purpose of facilitating such extensions, especially in view of provisions of Negotiable Instruments Act likewise decisive. 144Va36, 131SE221.

447-45 Mass172NE207 (renewal); 154Tenn672, 294SW513. [a] **Where right of recourse against accommodation indorsers on collateral note expressly reserved,** they are not discharged by extension of principal note. 144Va36, 131SE221. [b] **Act refers only to identical instrument** on which indorser is liable, and cannot be extended to discharge accommodation indorsers on collateral note, upon extension of principal note to which they are not parties. 144Va36, 131SE221.

447-46 154Tenn672, 294SW513. [b] TexCivA273SW1022. [e] Contra 220MoA514, 275SW964. [f] **In Oklahoma.**–120Okl257, 250P784.

448-47 But see 165Minn285, 206NW459.

448-50 10LaA419, 121S664.

448-55 [d] **Former holder of note has no power** to reserve recourse against indorser. Mass172NE207.

449-60 199Iowa1337, 203NW787. [b] **Indorsers do not waive right** to demand foreclosure of mortgage under payee's agreement first to exhaust security by obtaining renewal of note and mortgage. 218MoA39, 264SW1000.

450-70 108Conn149, 142A816 (accommodation indorser). 143SC386, 141SE602.

450-75½-New. Delay in suing the indorser until after the maker had gone into the receiver's hands does not discharge the indorser to whom due notice of protest had been sent. 108Conn149, 142A816.

451-79 43Ida742, 254P796.

452-93 38GaA667, 145SE94 (actual notice). [f] **Notice in writing** is necessary. 40GaA138, 149SE70(2dcase).

452-94 38GaA667, 145SE94.

458-48 25F(2d)214, 215 [citCJ]; 192Wis300, 212NW638, 641 [citCJ], 51ALR605.

458-50 See also 116OhSt609, 157NE478, 480 [citCJ], 54ALR992.

458-51 237IllA284, 288 [quotCJ].

458-56 See also 202Iowa799, 211NW373.

460-79 237IllA284, 285 [citCJ].

462-85 149Va854, 141SE767, 56ALR1358.

464-12½-New. Whether a purchaser of notes is a holder in due course or not is immaterial where defendant proves no defense which could prevail against the original payee. 230Ky194, 18SW(2d)1006 (indorsee entitled to recover).

464-14 [a] **"Holder" and "holder in due course"** are not necessarily synonymous. 111Conn626, 151A168.

464-15 214Ala501, 108S335; 164Ga880, 139SE658; 214Ky436, 283SW396; 163La868, 113S129; 125Me480, 135A95; MoA272SW85; MoA288SW(2d)379; 116OhSt317, 156NE111; 51SD607, 216NW347; TexCivA21SW(2d)104. See also 125Misc722, 211NYS482. [a] (2) Bank which accepted and paid check to payee introduced by depositor, who indorsed check, is bona fide holder as against drawee bank, who refused payment because drawer ordered payment stopped. 233IllA99. [c] (5) Other instances. 175Minn287, 221NW10. [h] **Parties affected by rights of holder in due course.**–Incidents of commercial paper in hands of holder in due course relate to parties thereto and those similarly bound, but not to third person not knowing of existence of instrument or its assignment. 213Ala567, 105S585. [i] **Time of payment and not of possession** determines who is holder in due course. 122Kan82, 250P1079.

465-20½-New. Purchaser in good faith is a favorite of the law. 215Ala235, 110S34.

465-21 32Ariz588, 261P45; 41GaA398, 153SE205; 46Ida476, 269P85; 121Kan66, 245P1067; 215Ky368, 285SW209; 142Miss444, 107S669; 146Miss498, 112S390; 153Miss801, 121S814; MoA272SW85; 217MoA676, 274SW833; MoA290SW449; 223AppDiv306, 228NYS241; 57ND804, 224NW206, 61ALR1385; 117Okl65, 245P567; 43OklACR26; 117Or374, 243P554; 120Or493, 252P969; 124Or468, 263P71; 132Or515, 284P582; 288Pa549, 137A113. [a] **Drawee** is not "holder in due course." CalA292P281.

466-27 288Pa549, 137A113.

466-28½-New. An original party to a note is not a holder in due course. TexCivA280SW238.

466-29 26F(2d)51, 56 [quotCJ]; 26F(2d)218, 222 [citCJ]; 96CalA451, 274P358(2dcase); 35GaA627, 134SE200; 233IllA515, 519 [citCJ]; 86IndA392, 156NE568; 169La978, 126S444; 146Miss707, 111S844; 44Philippine713.

466-30 26F(2d)51, 56 [quotCJ]; 35GaA627, 134SE200; 39GaA120, 146SE506(1stcase); 233IllA515, 519 [citCJ]; 86IndA392, 156NE568; 9LaA463, 121S305; TexCivA18SW(2d)339, 343 [citCJ]. [b] (4) Indorsee who took note back from bona fide holder can recover of accommodation indorser, though knowing of accommodation indorsement at time of taking note. 26F(2d)51. [h] **Taking back note by indorsee** after maturity does not render note subject to same defense that accommodation maker could assert against original payee. 26F(2d)51.

467-31 26F(2d)51, 56 [quotCJ]; 81CalA653, 254P642; 40GaA802, 151SE562; 146Miss707, 111S844; 316Mo1118, 295SW763, 771 [citCyc]; 102NJL560, 134A296.

467-32 26F(2d)51, 56 [quotCJ]; 132Or368, 284P573.

468-34 26F(2d)51, 56 [quotCJ]; 136Misc838, 241NYS865.

468-34½-New. President of corporation transferring and indorsing note given to it for goods to be delivered is charged on repurchase with knowledge of failure of consideration. 132Or368, 284P573.

468-35 26F(2d)218, 222 [citCJ]; 146Miss707, 111S844; 154Tenn444, 289SW496.

468-38 Mass166NE840. [b] **In Alberta.**–[1928] 2DomLR531.

469-39 Mich232NW741; MoA31SW(2d)234; 53SD268, 220NW515; TexCivA48SW(2d)310 (note in renewal of collateral note to third person). [c] **Payee of note indorsed before delivery** with notice of oral agreement making delivery conditional is not holder in due course. 165Minn82, 205NW699.

469-40 [a] (1) 53SD262, 220NW506, 68ALR940. (2) Such note in hands of bank is subject to defense that seller subsequently canceled contract of sale and forfeited purchaser's interest in land. 53SD262, 220NW506, 68ALR940. (3) Such note is subject in bank's hands to infirmities in original consideration between maker and vendor in absence of equitable estoppel. 53SD262, 220NW506, 68ALR940.

469-44 [c] **Seller taking note for purchase price payable to third person** later securing transfer to himself is not holder in due course. 41GaA401, 153SE198.

469-46 200Iowa220, 204NW456. [a] (3) Payee cannot have standing of bona fide holder where he knew when he acquired note that it had not been executed by proper officers of corporation maker. 201Iowa240, 207NW121.

469-46½-New. New Jersey, 104NJL254, 140A273.

469-47 316Mo1338, 296SW375; MoA158SW(2d)935.

469-48½-New. Maine, 127Me306, 143A173.

469-48½-New. South Dakota, 53SD262, 220NW506, 68ALR940; SD231NW536.

469-49 But see Wash289P47.

469-49½-New. In Oklahoma payee is not a holder in due course. 128Okl222, 262P205.

469-49¼-New. In Texas, under the Negotiable Instruments Law, payee as an immediate party is not a holder in due course. TexCommnA288SW438.

469-50½-New. and in Illinois, 233IllA515; 244IllA16.

470-51½-New. New Jersey, 105NJL494; 145A316(1stcase).

470-52 But see 230AppDiv146, 243NYS682.

470-55 But see Alta [1928] 2DomLR912. Contra Ont [1928] 4DomLR619. [a] **Where check is made payable to person named or bearer, and delivered to another person who delivers it to person named,** latter is holder in due course. Alta [1928] 2DomLR912.

470-56 136Misc838, 241NYS865. [b] 44Philippine713, 717 [quotCJ]. [d] 143Va1, 129SE371. [f] **Nominal holder intervening for benefit of defendant** who, in its inception, fraudulently procured a draft, such defendant by guaranteeing draft to intervenor in effect repurchased such draft and therefore such intervenor could not recover fund against defrauded drawee. 143Va1, 129SE371.

470-59 217Ky40, 288SW1011; 30OhA545, 165NE855; 288Pa549, 137A113.

471-60 226Ky820, 11SW(2d)948; 138Okl57, 280P434 (status of indorser resolved in favor of holding his indorsement commercial and in due course in case of doubt); TexCivA15SW(2d)59; 198Wis66, 223NW440. [a] (1) TexCivA13SW(2d)477. [c] (3) Correspondent bank which took paper under certain instructions is not holder in due course of paper it acquired in substitution for former, and in violation of instructions. TexCommnA278SW188. (4) Delivery of note by bank nine days after it closed and long after it was indorsed does not make indorsee holder in due course. 217Ky40, 288SW1011.

471-61 288Pa549, 137A113.

472-70 But see 288Pa549, 137A113.

472-70½-New. A drawee bank that pays and discharges an instrument does not become a holder in due course within the Negotiable Instruments Law. Iowa 226NW119.

472-82 TexCommnA 248W(2d)359.

472-84½-New. Reorganization of bank holding stockholder's note did not entitle it to recover on a note as holder in due course or avoid stockholder's defense. MoA 8SW(2d)92.

473-89 7F(2d)399; Ark 32SW(2d)177; 205 Iowa1126, 217NW429; SD 226NW746 (form of indorsement held to constitute legal indorsement and not mere assignment of instrument). [c] (1) Ark 32SW(2d)177. [1] **Unauthorized indorsement.**–Ark 32SW(2d)177.

473-90 173Minn554, 218NW106; MoA 27SW(2d)441; 218NY111, 161NE449; SD 226NW754; TexCivA 15SW(2d)59.

474-92 248 IllA428; MoA 9SW(2d)852. [d] **Sufficiency of indorsement under statutes.**–192Wis566, 213NW290. [e] **Note indorsed by only one of several payees** is not complete and regular on its face, and transferee is not holder in due course. Utah 276P659.

474-93½-New. Delivery of certificate of deposit, unindorsed, as security for note, long after note was made, without transferee's parting with anything on the faith of the delivery, took the case out of the operation of the Negotiable Instruments Law. 136Wash137, 238P918.

474-96 TexCivA 299SW649.

475-2 215Ky368, 285SW209; 125Mo108, 131A138; 146Miss498, 112S390; 223AppDiv306, 228NYS211; 125Misc722, 211NYS482; 101WVa553, 133SE129.

475-4 123Or95, 260P227.

476-12½-New. Regularity cannot be predicated of note, where payee is, in trust or quasi-trust capacity, the maker. 125Mo108, 131A138.

476-14 170Ark530, 280SW677; 177Ark1194, 10SW(2d)500; 79CalA595, 250P574; 90CalA717, 266P550 (takes subject to all defenses between original parties); 166Ga889, 144SE772; 35GaA784, 134SE841; 36GaA159, 136SE171; 234 IllA492 (check); 214Ky436, 283SW396; 215Ky368, 285SW209; 151Md514, 135A383, 49ALR1366, 146Miss498, 112S390; 81Mont543, 264P675; 84Mont549, 276P918, 115Nebr190, 211NW415; 117Nebr31, 219NW798; 125Misc722, 211NYS482; 133Okl18, 270P840; 122Or225, 258P192; SD 231NW536; TexCivA 274SW220; TexCivA 283SW180; TexCivA 293SW941; TexCivA 7SW(2d)1095; WVa 153SE311. See also 120OhSt356, 166NE213. [h] **Where check shows on face it is overdue,** it puts purchaser on notice. 234 IllA492. [i] **Bank receiving for deposit demand checks indorsed in blank** by payee and depositor acquired title before maturity. 151Md514, 135A383, 49ALR1366. [j] **Holder in due course indorsing instrument to another** but subsequently acquiring title after maturity is holder in due course. 41GaA398, 158SE205. [k] **Holder held prima facie holder in due course** when he takes note before maturity and for value. Wis 230NWS1(2dcase)

477-15 50RI263, 146A774; 143SC505, 141SE732.

477-16 177Ark1194, 10SW(2d)500; 234 IllA492. [a] **Purchaser after maturity** takes subject to same defenses as payee. 234 IllA492.

477-16½-New. Where a creditor took a note in due course without notice before maturity as collateral for a debt evidenced by a note, the renewal of the principal note by execution of a new note for the unpaid balance and repledging of the collateral note after its maturity as security for the renewal note does not place the creditor in the position of a transferee of the collateral note after maturity. 36GaA371, 136SE825.

477-16⅛-New. Where the holder of a note and trust deed could not have recovered thereon as against the makers, since the note had been paid by the makers by giving a larger note, defendant purchasing the note after maturity had no greater rights than the holder had. MoA 15SW(2d)382.

477-20 79CalA595, 250P574; 121Kan66, 245P1067 (requirement not affected by amendment to law providing negotiability not affected by agreements in mortgages securing payment); 115Nebr490, 213NW515; 101WVa553, 133SE129.

477-23 43OklACR26.

477-26½-New. Where the holder acquires several of a series of notes secured by chattel mortgage after they mature by reason of an accelerating clause in the mortgage of which the holder had knowledge, he is not the holder in due course. 121Kan66, 245P1067.

478-35 120Kan668, 245P147, 148 [quot CJ]; 21OhA354, 153NE236.

478-36 170Minn259, 212NW457.

478-37 120Kan668, 245P147, 148 [quot CJ].

478-38 120Kan668, 245P147, 148 [quot CJ].

478-40 GaA 155SE67; 170Minn259, 212NW457; TexCivA 25SW(2d)1108.

479-45 88IndA674, 164NE294; TexCivA 288SW581.

479-51 149Miss523, 115S707; TexCivA 272SW248. [c] **Estoppel** applying against payee is available as against assignee after maturity. NJSup 151A367.

479-52 149Miss523, 115S707.

479-53 But see 99CalA728, 280P134(2d case).

479-56 [a] **Holder of demand note** altered after delivery takes subject to defenses available against original payee. 146Miss649, 111S133.

479-57 But see MoA 15SW(2d)382.

479-59½-New. A bank surrendering trade acceptance and reacquiring it after maturity as collateral for a note takes acceptance subject to all defenses. 10F(2d)141.

479-59⅛-New. The holder of an overdue note indorsing and transferring it cannot claim ownership of equities against a subsequent bona fide holder for value. Utah 276P659.

480-60 219Ky313, 292SW833.

480-62 40GaA629, 150SE859.

480-63 Ala 130S386; 30Ariz172, 245P360; Fla 129S759; 46Ida583, 269P991; 127Kan261, 273P417; 214Ky436, 283SW396; 215Ky368, 285SW209; 151Md514, 135A383, 49ALR1366; 240Mich642, 216NW416; MoA 272SW85; 221MoA1029, 295SW816; 152Tenn486, 279SW797; TexCivA 293SW941; TexCivA 12SW(2d)906. [a] (6) If indorsements of notes were made without consideration, indorsee got their title only. 219Ala382, 122S619. [g] **Transferee held entitled to recover.**–Ark 31SW(2d)956.

481-65 193NC1, 136SE259.

481-67½-New. Similarly one who receives a note to discount and to turn over proceeds to maker is not a holder in due course. 125Misc722, 211NYS482.

481-68 146Miss498, 112S390; 125Misc722, 211NYS482; 101WVa553, 133SE129; 35Wyo319, 249P795.

481-69 151Md514, 135A383, 49ALR1366; 125Misc722, 211NYS482; 35Wyo319, 249P795. [a] **"Value" means "valuable consideration."**–35Wyo319, 249P795.

481-70 [b] **Consideration held sufficient.**–MoA 30SW(2d)768.

481-71 23F(2d)986 (guaranty of payment of debts of transferor); 22AlaA485, 118S250; MoA 287SW839 (draft given by purchasing bank); 35Wyo319, 249P795. [a] **Money, property, or a liability incurred on credit of instrument** may constitute consideration. 35Wyo319, 249P795. [b] **Promise which holder of instrument has given for it** and which he must perform entitled him to same protection as one who pays money or property at time of transfer of instrument. 35Wyo319, 249P795.

481-72 37BC401, [1926] 4DomLR78, [1926] 3WestWkly305. [a] (6) Negotiable certificate of deposit. Iowa 230NW565.

481-72½-New. But surrender of a dishonored check has been held insufficient consideration. 72CalA143, 236P964.

481-73 [b] **Issuing negotiable draft** is parting with value within meaning of Negotiable Instruments Law. 50ND494, 196NW953.

481-73½-New. negotiable certificate of deposit, 35Wyo319, 249P795.

482-74 MoA 277SW573, 574 [citCJ]; 135Okl71, 273P994 (note and real estate mortgage). See also 152Tenn486, 279SW797. [a] 199Cal307, 249P11.

482-80 180Ark600, 22SW(2d)398(2d case); 151Md514, 135A383, 49ALR1366; 35Wyo319, 249P795.

482-80½-New. , but not surrender of dishonored checks to payee. 72CalA143, 236P964.

482-81 See also NJSup 146A690 [cit CJ].

482-84 174Ark447, 295SW357, 60ALR241; 72CalA143, 236P964; 86Colo486, 283P45, 68ALR722; Iowa 230NW565; 125Me480, 135A95; 151Md514, 135A383, 49ALR1366; MoA 9SW(2d)1070; NJCir 144A599; 249NY391, 164NE327; 55ND655, 215NW96, 98 [citCJ]; OhA 153NE856, 857 [citCJ]. But see MoA 287SW839.

483-85 218Ala339, 118S588; 72CalA143, 236P964; 13LaA498, 124S849; 54ND502, 209NW962.

483-86 132SC94, 128SE861. [b] **Maker of check has been held not entitled to invoke restriction making credit conditional.** 227AppDiv457, 238NYS169. [c] **Restriction on deposit slip making credit conditional on payment may be waived by bank.**–227AppDiv457, 238NYS169 (effect of certification of check).

483-87 30F(2d)936; 96CalA451, 274P358(2dcase); CalA 286P1105; CalA 291P621; 86Colo486, 283P45, 68ALR722 (despite deposit slip making bank agent for collection); 41Ida160, 238P314 (to extent credit has been exhausted before maturity or notice of defenses); Iowa 230NW565; 151Md514, 135A383, 49ALR1366; 145Miss627, 111S155; 249NY391, 164NE327; 54ND502, 209NW962; 55ND655, 215NW96 (to extent that credit has been exhausted before maturity or notice of defenses). But see 246Mich553, 224NW755. [a] (4) Other instances. 58ND715, 227NW218. [c] 175Ark929, 18W(2d)1008. [f] **Where bank receives cashier's check** with directions by depositor to credit part thereof on note due third party and balance to depositor's account, bank is liable to third party for amount directed to be paid. 175Ark929, 18W(2d)1008.

484-88 207Iowa1254, 219NW496 (rediscounted paper).

484-92 218Ala339, 118S588.

485-1½-New. Where a draft was made payable to the bank without any qualification, indorsement of the draft by a payee bank and its delivery to the indorsee bank conveyed legal title to the latter as a holder of the draft in due course, under the Negotiable Instruments Act. TexCivA 12SW(2d)1037.

485-2 227AppDiv457, 238NYS169.

485-4 But see NJCir 144A599.

486-7½-New. Bank crediting checks received from insolvent bank whose title was defective before knowledge of insolvency was not entitled to recover against indorsee unless plaintiff parted with value. 174Ark447, 295SW357, 60ALR241.

486-8 85CalA624, 260P347 (purchase of note as matter of speculation); 106Conn147, 137A759, 760 [citCJ]; 121Kan153, 246P968; 218MoA109, 262SW399; MoA 277SW573. [b] (1) 192Wis528, 213NW328.

487-11 TexCivA 275SW721.

487-12 219Ala396, 122S362; 244IllA251; 203Iowa82, 212NW377; 207Iowa1254, 219NW496; 207Iowa419, 223NW167; 230Ky651, 20SW(2d)482 (to extent of indebtedness); 5LaA283; Minn 230NW277; 218MoA109, 262SW399; MoA 279SW435; 194NC305, 139SE598; 132Or515, 284P582; TexCivA 287SW1105; TexCivA 18SW(2d)224; 144Va36, 131SE221 (one taking negotiable paper before maturity as collateral security is holder in due course within meaning of Negotiable Instrument Act, and fact that note is assigned as collateral security does not make transfer less effective); 108WVa342, 150SE904; 198Wis300, 224NW117. See also 127Misc37, 215NYS178. [a] (5) Bank's transferee has been held entitled to recover full amount of note from maker in absence of fraud or lack of consideration where note is given as collateral. 230Ky651, 20SW(2d)482. [c] (1) 101WVa553, 133SE129. (2) Pledgee may recover value of notes where debt se-

cured is more than aggregate of notes. 212Ky486, 279SW622. [h] 161Ga329, 130SE566. [i] **Giving of collateral for which payee of note parts with nothing** held to eliminate question under Negotiable Instrument Law. 136Wash137, 238P918. [j] **Altered note.**–Utah 276P 659.

488–13 Alta [1926] 4DomLR248, [1926] 3WestWkly486.

488–13½–New. to the extent of the debt for which pledged; 212Ky486, 279SW 622.

488–14 198Wis300, 224NW117.

488–15 See also TexCivA 4SW(2d)310; 198Wis300, 224NW117.

488–17 42 Ida720, 248P9.

488–21 CalA 292P547; 37GaA693, 141 SE668; 206 Iowa134, 220NW80; Miss 172NE234; MoA 290SW449; 222MoA 633, 300SW834; TexCivA 3SW(2d)552. [b] (1) 171Ark1023, 287SW203.

490–25 222MoA8, 300SW526; 103NJL 449, 135A880. [k] (1) 144Va36, 131SE 221. (3) This provision is applicable where note is transferred to bank as collateral security for another note discounted and renewed from time to time. 144Va36, 131SE221.

493–55 216Ala199, 112S819, 53ALR 173; 172Ark828, 290SW606; 246 IllA 538; 205 Iowa266, 215NW737; 125Mo 108, 131A138; 240Mich270, 215NW243; 118Nebr411, 225NW25, 63ALR493; 122 Okl 58, 251P69; 285Pa202, 131A731; TexCivA 30SW(2d)494.

493–55½–New. But, in such case, where the holder knows the use to which the note put was wrongful, he is not a holder in due course. 285Pa202, 131A 731.

494–57 240Mich270, 215NW243.

494–61 216Ala214, 112S822; 122 Okl 58, 251P69.

495–63 101CalA526, 281P1060.

495–66 128Misc446, 218NYS293.

495–67 Ala 130S386; 215Ky368, 285 SW209; 146Miss498, 112S390; 125Misc 722, 211NYS482 (bank is holder in due course even though it did not take precautions of ordinary prudent man); 288Pa549, 137A113; 102WVa643, 136 SE199.

495–68 28F(2d)830; 30Ariz172, 245P 360; 113 Okl 111, 239P461

495–69 30Ariz172, 245P360; 151Md 514, 135A383, 49ALR1366.

496–73½–New. The fact that a purchaser of notes before maturity, in good faith, and for value, had theretofore purchased for himself and for his clients other notes from the same concern, and found it necessary in some instances to bring suit in order to make collection, did not require the purchaser, before purchasing the notes, to go into all details of the sale of the merchandise for which the notes were given. 9LaA463, 121S305.

496–74 174Ark447, 295SW357, 60ALR 241; 224 IllA271 (where check was applied to payee's indebtedness instead of maker's); 214Ky436, 283SW396; 215 Ky368, 285SW209; 146Miss498, 112 S390.

496–75 28F(2d)830; 34F(2d)377; 216 Ala214, 112S822; 30Ariz172, 245P360; 178Ark966, 12SW(2d)906; 36GaA253, 136SE462; 224 IllA271 (where check was applied to payee's indebtedness instead of maker's); 214Ky436, 283SW 396; 215Ky368, 285SW209; 146Miss 498, 112S390; 48Nev319, 232P206; 288 Pa549, 137A113; SC 155SE736. See also 321Mo 849, 12SW(2d)723.

496–76 36GaA253, 136SE462.

496–78 Tex 293SW800. [c] Tex 293 SW800.

496–79 31NM344, 245P543.

496–82 223AppDiv306, 228NYS241; 217AppDiv546, 217NYS97.

496–83 [a] 240Mich419, 215NW362.

496–84 240Mich419, 215NW362.

497–90½–New. The doctrine of constructive notice has never been applied to commercial paper. 41 OklACR189.

497–92 28F(2d)830; 179Ark39, 148W (2d)255; 36GaA253, 136SE462; 215Ky 368, 285SW209; 156Miss297, 126S89; 220MoA1276, 290SW1009; MoA 308W (2d)638; Nebr 228NW866(2dcase); 217 AppDiv546, 217NYS97; 130Misc37, 239 NYS244; 193NC470, 137SE320; 132 Or 515, 284P582; 141SC397, 139SE853; 149NC277, 147SE362; 51SD357, 213NW 943, 51ALR287; TexCivA 293SW941; 68Utah421, 250P1033; Wyo 292P1091. [g] **Good-faith purchaser for valuable consideration before maturity** must have actual knowledge of facts rendering negotiable instrument noncollectable. TexCivA 12SW(2d)609.

498–93 TexCivA 23SW(2d)445.

498–97 But see 207 Iowa419, 223NW 167.

498–99 28F(2d)830; 200 Iowa157, 204 NW250 (accommodation paper).

499–1 36GaA253, 136SE462.

499–6 127Kan50, 272P139, 61ALR687.

499–8 207Cal652, 279P765; 207Cal 779, 279P797; 207Cal798, 279P799; CalA 291P281; 45 Ida270, 261P683; 46 Ida476, 269P85; 151Md503, 135A369; 151Md514, 135A383, 49ALR1366; Md 150A797; 175Minn287, 221NW10; 177 Minn491, 225NW443; 104NJL347, 140 A331; SD 226NW745; SD 231NW534; TexCivA 32SW(2d)372. [a] (1) 151Md 503, 135A369.

500–9 See also 23 OhA127, 155NE245.

500–10½–New. A statement in a circular that a portion of the proceeds of the sale of notes is to be used to pay the balance of the purchase price of lands of the corporation is sufficient to put the investor on inquiry as to the amount of the unpaid purchase moneys. 103NJ Eq227, 143A74.

500–14 Ont [1927] 3DomLR336.

501–15 51SD623, 216NW362.

501–18 216Ala214, 112S822; 179Ark 415, 16SW(2d)987; 199Cal307, 249P 11; 81CalA653, 254P642, 643 [cit CJ]; CalA 262P815; CalA 291P621; 41 Ida 642, 241P36; 46 Ida476, 269P85; 213 Ky689, 281SW823; 221MoA568, 282NW 1033; MoA 286SW443; MoA 298SW 242; 222MoA8, 300SW526; 222MoA 1194, 4SW(2d)864; 113Nebr718, 204 NW520; 118Nebr411, 225NW25, 63ALR 493; 244NY168, 155NE88; 219AppDiv 203, 219NYS321; 227AppDiv119, 237 NYS81; 137Misc163, 241NYS649; 117 Okl 65, 245P557; 127 Okl 257, 260P773; 128 Okl 233, 262P691; 135 Okl 71, 273 P994; 131 Or123, 282P99; 48RI 170, 136A445; 49SD277, 207NW69; 52SD 172, 217NW180, 184 [cit CJ]; SD 226 NW745; TexCivA 300SW123; TexCivA 32SW(2d)372; 68Utah421, 250P1033; Va 154SE515; 142Wash500, 253P802; 99WVa544, 130SE142; 192Wis566, 213 NW290.

502–19 117 Okl65, 245P557; 288Pa 549, 137A113.

502–20 244NY168, 155NE88; 219App Div203, 219NYS321; 116 Okl17, 243P 178; 117 Okl 65, 245P557; 41 OklACR 189; 116 Or119, 240P432, 434 [cit Cyc]; TexCivA 300SW123; 68Utah421, 250P 1033.

503–22 47 Ida572, 277P423; 131 Or123, 282P99; 99WVa544, 130SE142.

503–24 [b] **To establish indorsee's notice of infirmity** in note, under statute, such gross negligence must be shown as is evidence of bad faith. 219Ala396, 122S362.

504–25 160La352, 107S135; 175Minn 287, 221NW10; 113Nebr691, 204NW 793; 217AppDiv546, 217NYS97; 227 AppDiv119, 237NYS81; 130 Okl 51, 265 P141; 288Pa549, 137A113; 48RI 170, 136A445; 152Tenn486, 279SW797; 102 WVa643, 136SE199.

504–26 CalA 291P621; 244NY168, 155 NE88; 101Vt114, 141A598.

504–27 48RI 170, 136A445 [cit CJ].

504–29 101Vt114, 141A598.

505–31 152Tenn486, 279SW797.

505–33 85CalA624, 260P347; 242 IllA 362; 215Ky368, 285SW209; 217AppDiv 546, 217NYS97; 116 Or119, 240P432, 434 [cit CJ]; 288Pa549, 137A113; 300 Pa522, 150A885; Ont [1930] 1DomLR 339. [a] (3) Where prospective purchaser of negotiable paper has notice that seller is dealing with securities or property of another, he is bound at his peril to make investigation. 152Tenn 486, 279SW797. (4) Erasure of bank's name as original payee requires substituted payee to inquire into circumstances attending execution. 141Miss 660, 107S284. (5) Bank accepting from another bank deposits of checks, supposed sound, is not guilty of bad faith because of latter's insolvency shortly thereafter revealed. 151Md514, 135A 383, 49ALR1366.

505–34 Ala 113S838, 40 [quot CJ]; Nebr 230NW673; Nebr 231NW754; 116 Or 119, 242P432, 434 [cit CJ&Cyc]; 102W Va643, 136SE199.

506–39 51SD623, 216NW362; 141Wash 451, 252P123, 128 [cit CJ per Bridges, J.].

507–44½–New. Where a holder is put on inquiry by knowledge of the circumstances, he is chargeable with knowledge of all the facts that the inquiry would have revealed. 217AppDiv546, 217NYS 97.

507–45 CalA 291P621. See also 27F (2d)523.

507–48 127Misc282, 215NYS166

507–51 199Cal307, 249P11; 127Misc 37, 215NYS178

507–52 95CalA505, 273P39; CalA 286P 710; 127Misc37, 215NYS178; 35Wyo 319, 249P795.

507–54 51SD623, 216NW362.

507–54½–New. Payment of certificate of deposit, issued on discounting note, after notice of infirmity, does not make bank holder in due course. 132SC295, 128SE227.

507–54½–New. A bank, receiving notice of defects in a note after it issued certificates of deposit therefor, but before they were paid, is not a holder in good faith, unless the certificates have passed into the hands of bona fide purchasers for value. 232Mich352, 205NW 108.

508–58½–New. Where a bank, as part consideration for a note transferred to it, issued a certificate of deposit, and thereafter acquired knowledge of fraud tainting the note, it remained the holder in due course, but was not entitled to be deemed such, if it thereafter redeemed the certificate from one not a holder in due course. 54SD466, 223NW685.

508–59 235 IllA39; 240Mich319, 215 NW300; 118Nebr411, 225NW25, 63ALR 493; Nebr 231NW754; 49SD303, 207 NW61; 51SD623, 216NW362. [b] 132 SC295, 128SE227

508–69 [a] (2) Makers of note may show that at time of transfer to plaintiff interest was past due and payable, but such fact will not compel finding that plaintiff was not holder in due course. 71CalA15, 234P334.

508–69½–New. Knowledge that the seller of a note was in failing circumstances at the time the note was purchased does not place upon the purchasers any duty of inquiry. 41 Ida642, 241 P36.

508–69¾–New. The president and director of a bank was chargeable with constructive notice of infirmity of the bank's title to negotiable bonds which were deposited in a safety deposit box in the bank for safe keeping and which were stolen therefrom. 73Mont219, 236 P250

508–69¾–New. The fact that other notes were transferred to plaintiff by some payee does not alter his position as a bona fide holder. 177Ark164, 68W (2d)2.

508–69½–New. Requiring indorser to guarantee paper is no evidence of bad faith. 204 Iowa555, 215NW664.

508–71 106Conn147, 137A759, 760 [cit CJ]; 45 Ida270, 261P683; TexCivA 275 SW721. [a] (2) 85Mont571, 281P348.

509–72½–New. In order for a discount at which commercial paper is offered to excite suspicion and require inquiry on the part of the purchaser, the rate must be so great as to impel the inference that negotiation is fraudulent or in some way illegal or unauthorized. TexCivA 275SW721.

509–73 106Conn147, 137A759, 760 [cit CJ].

509–74 106Conn147, 137A759, 760 [cit CJ]; 253 IllA320.

510–79 31GaA329, 129SE560; 39GaA 287, 146SE645; 142Miss444, 107S669, 672 [cit CJ].

510–80 216Ala214, 112S822; 219Ala 396, 122S362; 173Ark846, 293SW749, 71CalA45, 234P334; 142Miss444, 107S 669, 672 [cit CJ]; 222MoA633, 300SW 834; 116 OhS317, 156NE111. See also 10LaA219, 120S672. But see 129 Okl

123, 263P658. [e] **Bank holding mortgage on automobile,** which it has consented mortgagor may sell on delivery to it of consideration, is holder in due course of purchase-money notes turned over to it. 74Mont245, 240P376.

510-80½-New. , or where the breach of the collateral agreement took place after the holder's acquisition of the instrument. 142Miss444, 107S669.

510-81 [a] **President of corporation negotiating note representing price of machine** is chargeable with knowledge that consideration was executory and would fail unless machine was delivered. 132 Or368, 284P573.

510-81½-New. Knowledge that a note was given for corporate stock does not charge a purchaser with the duty of investigating the origin of the note. 41 Ida642, 241P36.

510-81¼-New. Such knowledge does not charge the purchaser with notice that the stock was sold in violation of a blue sky law. 41 Ida642, 241P36.

510-81¼-New. Knowledge that a note was given for stock of a foreign corporation does not charge the purchaser with notice that the sale was in violation of a statute prescribing the conditions precedent to the right of a foreign corporation to do business within the state. 41 Ida642, 241P36.

510-81⅓-New. Knowledge that a plant was installed under a warranty puts the discounter of a note on inquiry to learn if the warranty had been complied with, and on failure to use due diligence is not an innocent purchaser. TexCivA 290SW861.

510-81⅓-New. Purchaser of a note based on consideration of executory contract is not a guaranty of performance of contract by the payee and is not under duty of seeing that proceeds of the note are properly applied to such performance. 116 OhSt317, 156NE111.

510-81½-New. Knowledge that the use of land for cemetery purposes required permission of the town, and that the permit was issued by selectmen, makes the purchaser of a note a holder in due course where he did not know that a town meeting was required to give a permit. 264Mass392, 162NE898, 59ALR1022.

511-82 81CalA653, 254P642 (recital in trade acceptance); 131Misc160, 226NYS273. See also 134SC508, 133SE467.

511-84 255 IllA1.

511-89 175Ark791, 300SW428; 145 Miss471, 110S840; 132 Or515, 284P582. See also TexCivA 128SW(2d)609; TexCivA 158SW(2d)663. But see 178Ark966, 128SW(2d)906.

511-90 175Ark791, 300SW428.

511-91 255 IllA250; 120Kan434, 243P1014; 9LaA594, 121S668; 141Wash581, 252P107.

512-92 132 Or515, 284P582.

512-93 Or 284P582.

512-4 215Ala235, 110S34; 200Cal697, 254P573, 51ALR930; 233 IllA302; 2 LaA794; 262Mass242, 159NE625; 221 MoA979, 295SW835; 127Misc282, 215NYS766 (dictum); TexCommnA 24SW(2d)359; TexCivA 294SW1113; Utah 276P659. But see TexCommnA 16SW(2d)278. [a] (7) Purchasers of note detached from conditional sales contract, taking with notice, is not holder in due course. 41 Ida151, 238P524. [i] (2) Alteration of due date not so apparent as to excite suspicion and prevent instrument from appearing complete and regular on its face. 135Wash340, 237P719. [k] **Indorsement in pencil** is not notice of irregularity in procurement, especially where this was payee's custom. 151Md503, 135A369.

513-5 [a] **Absence of revenue stamps** is insufficient to prevent one from being holder in due course under rule of text. 199Cal307, 249P11.

513-7 99WVa544, 130SE142.

514-10 See also Alta [1928] 1DomLR1134.

514-11 21F(2d)661 (omission of "or" from phrase payable "to himself order" does not affect negotiability). [h] (1) MoA 277SW573. [j] **That instrument shows that it was clipped from another paper** is not notice of contract on latter which, if incorporated in instrument, would make it nonnegotiable. 141Miss692, 105S485. [k] **In trade acceptance,** statement that obligation arises out of purchase of goods is not notice that there may be failure of consideration. TexCivA 48SW(2d)183.

515-14 127 Or227, 271P607.

515-14½-New. A statement on the face of a note, inquiry as to which would have shown a legitimate contract, does not require the purchaser to make inquiry as to such contract. 213Wis528, 213NW328.

515-14⅓-New. That the seller under such contract thereafter did not fully comply with conditions thereof does not affect validity at the time of making. 192Wis528, 213NW328.

515-14¼-New. That a trade acceptance has not been accepted does not render it incomplete or irregular on its face or prevent the holder from being a holder in due course. NJSup 146A654, 655 [quotCJ].

515-15 See also 125Me108, 131A138.

515-16 CalA 291P621.

515-17 But see 57ND804, 224NW206, 61ALR1385.

516-20 [a] (1) 334 Ill 96, 165NE165. (3) Does not charge purchaser of note with notice that payee had no right to note or that maker was not liable. Mo 30SW(2d)462.

516-21 Mo 30SW(2d)462; 222MoA1200, 4SW(2d)861.

516-24 219MoA34, 269SW955.

516-24½-New. That the purchaser of certificates of deposit knows that they belonged to a trust concern with offices in a distant city does not require him to inquire as to the nature of the fund for which the certificates were executed when agents presenting the certificates possess a power of attorney authorizing them to negotiate the certificate. Tex CivA 275SW721.

516-25 99Vt255, 133A742.

516-27 215Ala235, 110S34; 35Ariz302, 277P68 (indorsement held not to destroy negotiability by being notice of conditional promise to pay).

541-29 138Misc294, 245NYS351.

517-30 151Md514, 135A383, 49ALR1366.

517-31 229Mich619, 201NW949; 175 Minn293, 221NW12.

517-32 205 Iowa1126, 217NW429.

517-40 79CalA533, 250P205; 125Misc112, 210NYS224.

518-42 81CalA653, 254P642.

518-50 79CalA533, 250P205, 207 [citCJ]; 147Miss658, 112S577.

518-52 34GaA32, 128SE13 (insufficient to show notice).

518-57 MoA 298SW242; 113 Okl111, 239P461; 116 Okl17, 243P178.

518-58 116 Okl17, 243P178.

518-60 101CalA579, 281P1075; 252 IllA68 (though, from previous transactions, he knew that payee was engaged in negotiation of notes given in connection with advertising contracts); 121Kan153, 246P968; 153Miss801, 121S814; RI147A749. [b] **Bank receiving checks for deposit** indorsed in blank is not bound to make inquiry as to ownership. 151Md514, 135A383, 49ALR1366.

518-60½-New. nor do such agreements constitute any infirmity in note or any defect of title: 50SD162, 208NW783.

519-61 21F(2d)207; 38F(2d)772 (notice of contract only if it is in form of indorsement); 217Ala259, 115S303; CalA 262P515; 160Ga647, 128SE898 [citCJ]; 48 Ida376, 282P88 (notes detached from agency agreement); 200 Iowa608, 203NW710; 220MoA205, 282SW91; MoA 298SW(2d)209 (assumption of satisfactory demonstration); 225AppDiv541, 233NYS577; 132 Or515, 284P582; TexCivA 26SW(2d)348. But see 155Md384, 142A515. Contra 172Minn126, 214NW924. [a] (2) One seeking to foreclose mortgage chargeable with notice that mortgage is intrinsic part of original usurious contract is not innocent assignee without notice. 149Md223, 131A332, 43ALR1. (3) Manager and director purchasing notes given for purchase of corporate bonds is not innocent purchaser. 21F(2d)207.

519-62 160La1033, 107S896; 10LaA22, 119S905.

519-62½-New. The holder of notes is not precluded from recovering thereon by a request in a petition that a chattel mortgage securing the notes be recognized and enforced, there being no attempt to claim benefits of a contract without assuming its obligations. 10 LaA22, 119S905.

519-62⅓-New. Knowledge of the indorsee that a note was given for rent and that indebtedness on a deed of trust was due does not preclude his recovery. MoA 289SW977.

519-62¼-New. Knowledge that a negotiable instrument was given in consideration of an unperformed executory agreement does not deprive the indorsee of the character of a bona fide holder in the absence of notice of breach. CalA 262P815.

519-63 [a] (1) 222MoA1156, 14SW(2d)41.

520-65 80CalA501, 251P973; TexCivA 21SW(2d)104.

521-69 See also 199Cal307, 249P11.

521-71 129Misc322, 222NYS733.

521-74 125Me108, 131A138; 127Misc282, 215NYS766; 288Pa549, 137A113.

521-75 127Misc282, 215NYS766 (dictum); 152Tenn486, 279SW797, 799 [citCJ]; 149Va789, 141SE764. But see 260 Mass485, 157NE520.

522-84½-New. Indorser in blank is not liable to bank where bank takes with knowledge of intent to apply funds to pay indebtedness of party executing it on behalf of corporation. TexCivA 279SW581.

522-84⅓-New. Where a note payable to a corporation having the same corporate name as its president and principal stockholder was applied by the bank to his individual debts, an accommodation indorser was held liable upon proof that both names were used interchangeably, to the knowledge of the parties. 128 Misc446, 218NYS293.

522-86 Va 152SE562. [a] **Execution or indorsement of accommodation paper** unless specially authorized is beyond corporate authority, but holder without notice may recover. Va 152SE562.

522-88 35GaA209, 132SE268, 269 [citCJ].

523-3 200 Iowa608, 203NW710; 261 Mass116, 158NE344.

523-4 Mich 215NW300.

525-23½-New. Nothing is necessary toward collection except to fix liability of indorsers by demand, protest, and notice. 224AppDiv280, 229NYS687.

525-24 [a] **Statutory provisions must be read together.**-CalA 289P929.

525-31 CalA 288P819.

525-31½-New. Effect of failure to present on property pledged. Property pledged by indorser to secure payment on note is not released by failure of presentment. 125Misc778, 211NYS509.

525-32 Ala 129S571 (indorsement in blank); CalA 288P819; CalA 289P908; 111Conn568, 150A524 (liability on installment); 227Ky594, 138SW(2d)759; 152Md81, 136A58, 50ALR1196; 233 Mich646, 207NW877; 76Mont396, 247P326; 52ND43, 202NW182; 283Pa212, 129A56; TexCivA 8SW(2d)803; 152 Wash310, 277P827; 155Wash300, 284P102. See also 105NJL445, 144A574, 62 ALR113. [c] 52ND43, 203NW182.

526-34 76Mont396, 247P326.

526-48 119Kan528, 240P587; Tex CommnA 274SW127.

526-49½-New. An irregular indorser has the same rights as a regular indorser as to presentment, protest, and notice of protest. 52ND43, 203NW182.

526-50 216Ky801, 288SW771.

527-52 11LaA546.

527-62 32Ariz552, 261P33, 34 [citCJ]; 126Me423, 139A225; 213AppDiv54, 209 NYS522; 225AppDiv511, 233NYS638; 144 Okl169, 289P701; 151SC67, 148SE713; TexCivA 58SW(2d)777.

528-63 32Ariz552, 261P33.

528-64 164Minn57, 204NW546.

529-67 220AppDiv667, 222NYS421.

529-68 144 Okl169, 289P701; 151SC67, 148SE713; 151SC135, 148SE718(1st case).

529-75 83Mont501, 272P994. [a] **Note designating city at large as place of payment** is not payable at special place.

TexCivA 58SW(2d)777.

530-81 MoA 198SW(2d)541.

531-82 252 IllA17.

531-88 TexCivA 58SW(2d)803.

531-96 214AppDiv279, 212NYS141; TexCommnA 274SW127.

532-2 TexCommnA 274SW127.

532-9 125Mel08, 131A138, 144Okl169, 289P701.

532-10 211Ky131, 277SW307 (Negotiable Instruments Law).

532-10½-New. Delay short of limitations does not release drawer except to extent of loss and then only pro tanto. 211Ky134, 277SW307.

532-12½-New. The rule requiring presentment of a certified check within a reasonable time is not applied where certified at the holder's request. 281Pa561, 131A571, 42ALR1133.

534-26 119Kans278, 240P587.

534-28 See also 13PaDist&Co 632.

534-31 CalA 288P819.

535-32 132SC91, 128SE561.

535-36 Mass 166NE626. But see 23F(2d)646.

535-37 MoA 287SW839.

535-40 3NJMisc128, 130A736.

536-43 151Miss693, 118S414.

537-50 MoA 287SW839.

537-50½-New. Reasonable time is such time as a prudent man would exercise about his own affairs. 173Ark189, 292SW659.

537-52 223AppDiv161, 227NYS589.

537-53 103NJL284, 135A688, 689 [cit CJ].

539-17 173Ark489, 292SW659; 179Ark510, 168SW(2d)994, 180Ark33, 20SW(2d)314; 38GaA506, 144SE336; 41GaA395, 153SE104(2dcase), 44Ida505, 258P550; 202Iowa91, 209NW444, 211Ky185, 277SW292 [citCJ]; 220MoA67, 279SW774, 222MoA193, 297SW94; MoA 208SW(2d)956; 80Mont374, 260P734; 246NY385, 159NE178 (delay held unreasonable); 223AppDiv416, 228NYS476; 9PaDist&Co 643. [c] (2) Diligence shown by mailing cashier's check on day of its receipt in ordinary course of business. 51ND336, 199NW869, 36ALR465. [f] 51ND336, 199NW869, 36ALR465 (cashier's check). [m] **Failure to take or mail check to bank immediately** is held not negligence. 220MoA67, 279SW774. [n] **Sending check on long route for collection** has been held not negligence if customary. 220MoA67, 279SW774.

540-18 41GaA395, 153SE104(2dcase); 211Ky185, 277SW292.

540-20 222MoA935, 118SW(2d)77; 80Mont374, 260P734.

540-21 220MoA67, 279SW774; 80Mont374, 260P734; Or 281P834.

540-25½-New. Refusal of bank to certify check does not render presentment for payment unnecessary. 223AppDiv416, 228NYS476.

540-29 44Ida505, 258P550; 211Ky134, 277SW307.

541-29 255IllA578; 201Iowa701, 208NW72, 74 [citCJ]; 144Miss531, 106S762, 763 [citCyc]; 220MoA396, 286SW732, 733 [citCJ]. But see 48Ida214, 281P3; Or 281P834. [a] 201Iowa701, 208NW72; 220MoA396, 286SW732. [b] (1) 220MoA396, 286SW732. [c] **Five days held too late.** 46Ida278, 267P448.

541-30 173Ark489, 292SW659; 255IllA578 (where payee knows of drawee's insolvency).

542-36 [a] (2) Company collecting interest coupons for mortgagee performs its full duty to mortgagors sending cashier's check in payment when it promptly deposits check with reputable bank for collection. 34F(2d)112.

542-43 202Iowa91, 209NW444, 445 [citCJ]. [g] **Where payee has knowledge of drawee bank's insolvency or precarious condition check must be presented at once at first opportunity.** 80Mont374, 260P734.

543-50 201Iowa701, 208NW72, 74 [citCJ].

543-51 201Iowa701, 208NW72, 74 [citCJ].

543-52 220MoA67, 279SW774; 80Mont374, 260P734; Or 281P834.

544-56 220MoA67, 279SW774.

544-62 [a] Mont 285P181(2dcase).

545-64 152Md81, 136A58, 50ALR1196; 138Misc294, 245NYS351. See also 38GaA191, 141SE336.

545-65 202Iowa91, 209NW444; 208Iowa77, 224NW581; 173Minn83, 216NW331, 56ALR492, 12Misc330, 216NYS280; 55ND406, 213NW963, 52ALR988. But see 36F(2d)180.

546-66 40GaA363, 150SE572; 41GaA395, 153SE104(2dcase); 173Minn83, 216NW331, 56ALR492; 55ND406, 213NW963, 52ALR988. [a] 12Misc330, 216NYS280.

546-67 40GaA563, 150SE572; 80Mont374, 260P734; Mont 285P181(2dcase) (where loss not due to delay but to practice of drawee bank in honoring checks presented over counter only); 55ND78, 208NW402.

547-76½-New. Where a drawer places money to meet checks with a third party intermediary who directs the bank to charge its account, the drawer is liable on bankruptcy of the intermediary and resulting nonpayment of the check, although not presented within a reasonable time. 12Misc330, 116NYS280.

547-77 44Ida506, 258P550; 173Minn83, 216NW331, 56ALR492; 307Mo234, 270SW558, 12Misc330, 216NYS280.

547-79 6LaA819, 820 [quotCJ].

549-90 [c] **Abrogation of rule by repeal of statute.** 78Mont18, 252P333.

549-92½-New. A drawee is not excused from presenting a check to a bank before it failed, although there were insufficient funds to pay it where the drawee had arranged with the bank for payment in full. 202Iowa91, 209NW444.

549-99 120La640, 45S533.

550-5 147Miss603, 111S578, 580 [citCJ].

551-17 214AppDiv279, 212NYS141.

551-20 TexCivA 288SW337.

552-24 [a] **Insolvency of bank where note is payable** does not excuse presentment for payment as affects liability of indorser. 205Iowa399, 218NW51.

553-42½-New. On failure of a holder to elect, the maker may make his own election and give notice to the holder. 128Tenn103, 158SW994, 1LRANS980.

553-43 52ND13, 203NW182 [citCJ].

553-45 [b] 52ND13, 203NW182.

553-46 TexCivA 275SW242 (exercise by holder of option in acceleration clause requires presentation at payor's known place of business).

557-71 205Iowa399, 218NW51; 129Misc719, 221NYS710.

557-73 205Iowa399, 218NW51.

558-81 52ND13, 203NW182.

558-82 128Mel17, 148A675; 200Wis6, 227NW231.

559-91 107Conn269, 140A482; 205Iowa399, 218NW51; 152Md81, 136A58, 50ALR1196; 217AppDiv779, 216NYS729; 52ND43, 203NW182.

559-92 TexCivA 293SW939.

560-4 119Kans28, 240P587. [c] **Visit to maker's office** and statement that party "had note here" held sufficient. 26F(2d)51.

560-5 107Conn269, 140A482.

560-6 152Md81, 136A58, 50ALR1196.

561-9 Mont 285P181(2dcase).

561-16 200Iowa562, 203NW702 (where no tender made or attempted, presentation of overdue note under acceleration clause in mortgage at place of payment held unnecessary), 214AppDiv279, 212NYS141.

562-18 214AppDiv279, 212NYS141.

562-36 CalA 289P929.

563-47 148Md345, 129A506 (since his obligation to pay was primary, joint maker is not entitled to notice as indorser).

564-59 286Pa57, 133A220.

564-61 286Pa57, 133A220, 222 [citCJ].

564-67 13Misc194, 237NYS378.

564-68 286Pa57, 133A220. [c] **Where place of payment is specified,** presentment to personal representatives is not necessary. 135Misc194, 237NYS378.

564-70 26F(2d)51 (notary public, assistant teller of holder bank); 214AppDiv279, 212NYS141.

565-73 CalA 289P929 [quotCJ].

565-78½-New. An assignee who is in default cannot demand payment. TexCivA 293SW939.

565-83 CalA 289P929 [quotCJ].

566-92 6LaA491.

566-99 51ND508, 200NW44; TexCivA 298SW36.

566-1 134Okl215, 273P349.

567-15 31Ariz116, 250P770.

567-24½-New. Naming a bank as the place of payment has been held an order to such bank to pay unless the bank refuses to make such payment. 203Iowa310, 210NW937.

568-34 18F(2d)711; 81Colo467, 271P192. TexCivA 128SW(2d)467.

568-36 161La653, 108S142.

568-38 115Va199, 133SE881. See also 5LaA525. [a] **Parties held not to have intended payment to be in full settlement of obligation.** 115Va199, 133SE881.

568-39½-New. The payment of an account which a note secures discharges the obligation of the maker on the note. 257Mass559, 154NE70.

568-39¾-New. A payee's assurance to the beneficiary and accommodation maker that proceeds of cotton were applied to payment of a note constituted payment thereof. 14Miss[illegible], 112S95.

568-39¾-New. In making a loan evidenced by note, the parties by verbal agreement at the time of execution of the note or subsequently thereto could contract as to the manner of payment, the kind of property in which payment should be made, and the agreement, when executed by the parties or their assigns with notice, would be binding. 88IndA674, 164NE294.

568-43 Ida 288P164 (check drawn against sufficient funds). 29PortoRico820, TexCivA 98SW(2d)1110. See also 85Mont293, 279P236. [b] (2) Statement in court that plaintiff did not accept check of assignee for defendant's creditors held notice that checks would not be accepted in settlement. 78Colo377, 242P74. [d] (2) Where bank failed, unpaid check was held not payment of note. 124Okl247, 255P696. (3) Where plaintiff drew sight draft with bill of lading attached on defendant's bank and defendant gave his check to bank against his account there and bank gave plaintiff draft sight draft was paid though bank closed before its draft was cleared. Minn 230NW167. [h] **Effect of acceptance of check for interest on rights under acceleration clause.** 116Or433, 240P549. [i] **Retention of check** from assignee for defendant's creditors after notice that it would not be accepted until trial of suit on notes held not ground for reversal of judgment for plaintiff. 78Colo377, 242P74. [j] **Where holder accepts payment from bank to which he had given note for collection,** he cannot recover thereon though check received by bank was never paid because bank on which it was drawn failed before it was presented for payment. 202Iowa1244, 211NW891.

569-44 17F(2d)44; 226Ky361, 108SW(2d)1076; 132Misc343, 229NYS791; 197NC253, 148SE253; 136Okl172, 276P733. [c] **Surrender of note** does not show that check was received in absolute payment. 17F(2d)44; 51ND336, 199NW869, 36ALR465.

569-45 51ND336, 199NW869, 870, 36ALR465 [citCJ] (cashier's check).

569-48 18F(2d)711.

569-49½-New. Where the holder of a check accepts the draft of the drawee bank in payment, the drawer is discharged. 55ND406, 213NW963, 52ALR988.

569-51½-New. Where a note sued on was assigned by the debtor to plaintiff's transferor as security on an unpaid note given to the transferor, the obligation on the unpaid note was not discharged, and plaintiff was entitled to recover on the note assigned as security. 294Pa197, 144A88.

569-54 172Ark193, 287SW1017; 174Ark398, 295SW961; 8CalA716, 264P265; CalA 288P819; 340Ill81, 172NE7; 88IndA222, 162NE277; 219Ky579, 293SW1064; 172Minn223, 214NW781; 76Mont537, 248P209, 211 [citCJ]; 117Nebr1, 219NW351; 225AppDiv300, 233NYS196; 296Pa291, 145A831; 155Tenn430, 294SW1101, 1103 [quotCJ], 52ALR1411; 101WVa553, 133SE129. [b] 155Tenn430, 294SW1101, 1103 [quotCJ] 52ALR1411. [c] 155Tenn430, 294SW1101, 1103 [quotCJ] 52ALR1411. [e] 155Tenn430, 294SW1101, 1103 [quotCJ] 52ALR1411.

1411. [f] (1) But see 250 **IIIA**258.

571-55 **CalA** 286P1105; 172**Minn**223, 214NW781; **MoA** 2[illegible]8SW371 76**Mont** 537 213P269 [citCJ]; 114**Nebr**600, 209 NW254 222**AppDiv**363, 222NYS184; 298**Pa**535, 148A707; 154**Tenn**430, 294 SW1101, 1103 [quotCJ] 52**ALR**1411; **TexCivA** 8SW(2d)222 (intent); 101**WVa** 55[illegible], 133SE129.

571-56 248 **IIIA**23; **Md** 150A723; **Mass** 172NE207; 76**Mont**537, 248P209, 211 [citCJ] **TexCivA** 4SW(2d)253 (original note remains in effect till new note is indorsed as agreed); **Wyo** 290P561.

571-57 340 **Ill** 81 172NE87; 253 **IIIA** 206; **Mass** 172NE82; 165**Minn**285, 206 NW459; 172**Minn**223, 214NW781; 76 **Mont**537 248P209, 211 [citCJ], 135**Misc** 599, 216NYS753; 191NC340, 132SE21. [e] 127**Misc**599 216NYS753.

573-58 50**ND**813, 197NW854.

573-66 **TexCivA** 294SW343; 39**Wyo** 331, 271P217, 218 [citCJ] 69**ALR**840.

573-68 [a] **Tearing maker's signature from original note** and surrendering note given for its extension on receiving third person's note is not payment. 298**Pa** 533, 148A707

573-69 247**Mich**365, 225NW512

573-70 **TexCommA** 276SW222.

573-72 86 **IndA** 236, 156NE592

573-73 235 **IIIA**112; 86 **IndA**236, 156 NE592; **Mass** 170NE115; 87**PaSuper** 181, 195**Wis**131, 217NW646.

574-75 39**Wyo** 331, 271P217, 218 [citCJ] 69 **ALR**840.

574-80½-New. Acceptance by the holder of a certificate of land sale by state, as payment, is not binding, because of failure to make payments previously due thereon. 42 **Ida**443, 246P6.

574-91 147**Miss**835, 112S795.

575-92 **MoA** 272SW83; 51**ND**508, 200 NW44, 47 [quotCJ]

576-15 83 **IndA**485, 147NE814.

577-22½-New. If indorsements give maker option to pay notes by conveyance of land to take effect at her death, and maker does not exercise the option, her estate is liable for payment in money. 83 **IndA**485, 147NE814.

577-26 83 **IndA**485, 147NE814.

577-29 35**GaA**271, 133SE293 (payments by maker in extinguishment of payee's debts properly allowed as credits though made after maker received notice of transfer to agreed assignee).

578-31 55**ND**468, 214NW275; 150**SC** 374, 148SE124 (preferential) claim held immaterial)

578-38½-New. Under the Negotiable Instruments Law, where an instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for an account of the principal debtor therein. 154**Tenn**672, 294SW513.

578-38½-New. Where a seller makes the buyer's bank its agent for the collection of a draft, the buyer having ample funds in the bank to pay it and directing the bank to apply its deposits in payment, the seller must bear the loss from the bank's failure to do so. 179**Ark** 9[illegible] 198SW(2d)1077

578-39 **MoA** 198SW(2d)626.

579-44 **Mo** 30SW(2d)46; 127**Misc**27, 215NYS269

579-45½-New. Where a check is received by the drawee bank as collecting agent of the holder and as drawee, and is retained without charging it to the depositor's account, there was no payment. 47 **Ida**405, 276P48, 68**ALR** 356.

579-51 [d] **Executory parol agreement with person not party to instrument** to discharge past-due note by accepting property instead of money is no defense in suit against party primarily liable. 51**ND**508, 200NW44. [e] **Unexecuted agreement of payee of note to accept in part payment outstanding note in which he was maker** does not constitute payment of such smaller note. 205 **Iowa** 774, 218NW486.

580-61 164**La**440, 114889. [a] (3) Payment on account after maturity has been held not to preclude acceleration by nonpayment of other installments overdue. 164**La**440, 114889.

581-75½-New. Holding that if holder's acceptance of part payment is a satisfaction as to the indorser, it is a satisfaction as to the maker. **TexCivA** 284SW314.

581-75½-New. Dividends received by holder of note in bankruptcy proceedings of one indorser should be credited on note in suit against another indorser. **Ida** 286P610.

581-78 **Mass** 165NE470. [d] **Maker of note against whom holder obtains judgment** has been held entitled to decree compelling holder to surrender note to court. 251**Mich**701, 232NW373.

581-79 206 **Iowa**1198, 221NW791; 101 **WVa**553, 133SE129. [c] **Payment to payee without requiring production and surrender of draft** is insufficient against holder in due course. **CalA** 291P281.

582-84 **TexCivA** 31SW(2d)355.

582-87 20P(2d)78.

582-88 127**Misc**27, 215NYS269; 51**ND** 508, 200NW44.

582-90 **Ark** 32SW(2d)315.

583-91 [d] **Payment of judgment by maker.**–12**PaDist&Co** 706.

583-95 75**Mont**516, 244P494 (president of corporation maker).

583-5 **Ark** 32SW(2d)315; **NC** 155SE 263.

584-8 **TexCivA** 297SW607.

584-9 242 **IIIA**289.

584-10 **TexCivA** 297SW607.

585-33 8P(2d)790.

585-38½-New. The indorsee's right to sue the drawee is not destroyed by payment by the drawer. 132**Misc**840, 230 NYS762.

585-44 132**Misc**840, 230NYS762 (drawee). [e] **Right to contribution from coindorser.**–**Ala** 130S791.

586-46 **NC** 155SE263.

587-56 199 **Iowa**1337, 203NW787 (loss arising from insolvency of one indorser must be borne by others); 102**WVa**584, 135SE665. [b] **Defenses available.**–22 **AlaA**518, 119S601(2dcase).

587-59 264**Mass**414, 163NE63 (foreign judgment).

587-67 **TexCivA** 285SW1115. [b] **Payment by guarantor will be deemed purchase** as regards maker. 204 **Iowa** 1178, 216NW625.

588-74½-New. Drawee paying instrument is not transferee of title. **CalA** 292P281.

588-76 [c] **Remedy is on implied promise to pay or for contribution** not on original note. **MoA** 290SW105.

588-83 172**Ark**1177, 288SW892, 894 [quotCyc]; 176**Ark**401, 4SW(2d)912; 220**MoA**535, 279SW184, 185 [quotCJ]; **MoA** 290SW105. [c] (1) 176**Ark**401, 4 SW(2d)912; 9**LaA**540, 121S306. (2) Presumption is rebuttable. 176**Ark**401, 4SW(2d)912. [e] **Purchaser pro tanto** is entitled to enforce notes to that extent. **MoA** 290SW105.

589-84 172**Ark**1177, 288SW892, 894 [quotCyc]; 176**Ark**401, 4SW(2d)912; 9**LaA**540, 121S306; **MoA** 26SW(2d)856; 127**Misc**27, 215NYS269. [a] (5) 172 **Ark**1177, 288SW892. [i] **Payment of interest and other notes** by corporation does not release director from liability on note given to reduce corporation's indebtedness. **MoA** 297SW156.

590-88 6**LaA**290, 294 [quotCJ].

590-96 **TexCivA** 279SW887.

592-13 But see 49**ND**770, 193NW934.

593-24 213**Ala**567, 105S585; 180**Ark** 470, 21SW(2d)853; 180**Ark**600, 22SW (2d)398(2dcase); 251 **IIIA**442; 202 **Iowa** 942, 211NW563; 202 **Iowa**947, 211NW 564; 202 **Iowa**945, 211NW567; 170**La** 712, 129S139(1stcase) (payment to married woman suing whether she was owner or agent of husband); 5**LaA**402; 9 **LaA**98, 119880; 236**Mass**308, 152NE80; **Mass** 165NE474; 120 **Okl** 174, 252P56; 127 **Okl** 152, 260P47; 127 **Okl** 212, 260P 479; 127 **Okl** 215, 260P497; 137 **Okl** 163, 278P645(1stcase); 141 **Okl** 207, 284P 895. See also 218**Ala**352, 118S666; 218 **Ky**302, 291SW393; 7**LaA**194, 197 [citCJ] (perChalborne,J). [a] (1) 213**Ala** 567, 105S585; 202 **Iowa**942, 211NW 563; 202 **Iowa**947, 211NW564; 202 **Iowa**945, 211NW567. [b] (3) Payment of promissory note to supposed transferee holding it by virtue of forged indorsement will not protect maker against payment to true owner. 168**Ga** 547, 148SE396.

593-25 128 **Okl** 292, 262P663. [a] 120 **Kan**303, 243P278.

594-26½-New. An agreement by a payee bank to charge the maker's account with the amount of a note not then due and in the possession of indorsee not bound to accept payment and not agreeing to do so is not legal payment of the note. 50**SD**524, 210NW730.

594-27 179**Ark**584, 17SW(2d)302; **CalA** 291P281; 46 **Ida**686, 270P1054; 251 **IIIA**442; 9**LaA**98, 119880; 141 **Okl** 14, 283P549, 67**ALR**1410; **TexCivA** 10 SW(2d)227 (indorser); 133**Wash**643, 234P662. See also **Kan** 292P805. [a] (4) Delivery of produce to factory, as provided in agreement contemporaneous with note, factory to make payment to holder, is not payment. 167**La**230, 119 S31 (recipient held not holder's agent).

594-31 **CalA** 291P281.

594-32 115 **Okl** 283, 242P1044. [a] **Term "holder"** means person who is legally in possession of paper, either by indorsement or delivery or both, and who is entitled to receive payment from drawer or acceptor or maker of note, and does not include person in actual possession of note, who has no right to possession. 152**Miss**312, 119S914.

594-34 216**Ala**415, 114S75; 207 **Iowa** 419, 223NW167; 9**LaA**98, 119880; 74 **Mont**104, 239P773; 53**SD**222, 220NW 509.

595-35 200 **Iowa**170, 202NW774; 207 **Iowa**147, 217NW459. See also 216**Ala** 415, 114S75.

596-46½-New. The assignor of notes secured by warehouse receipts as collateral security is not the agent of the assignee to receive on its behalf payments which might be made on the notes. 249**NY**322, 164NE113.

596-49 [b] **Indorsee's acceptance of interest on balance after maker's payment to payee** does not constitute ratification of payment to payee where interest was returned and subsequently accepted without prejudice. 46 **Ida**686, 270P1054.

596-52 202 **Iowa**947, 211NW564; 114 **Okl** 231, 246P222; 141 **Okl** 14, 283P549, 67**ALR**1410; 54**SD**10, 222NW594. [d] **That note secured by mortgage is payable at office of payee** does not make payee agent of assignee to receive payment of principal and interest. 114 **Okl** 231, 246P222.

596-54 251 **IIIA**442.

597-56 37**GaA**770, 141SE921.

597-57 256**Mass**308, 152NE80.

597-66 153**Tenn**113, 282SW194.

597-70 **TexCivA** 20SW(2d)811.

598-78 213**Ala**567, 105S585; 214**Ala** 146, 107S88; 216**Ala**415, 114S75; 172 **Ark**828, 290SW606; 38**GaA**758, 145SE 535; 46 **Ida**686, 270P1054; 202 **Iowa** 942, 211NW563; 202 **Iowa**947, 211NW 564; 202 **Iowa**945, 211NW567; **Mass** 165NE474; 214**AppDiv**689, 213NYS198 (holder in due course not bound by payment to prior holder); 122 **Okl** 216, 253P982; 125 **Okl** 276, 257P759 (note secured by real estate mortgage); 127 **Okl** 215, 260P497; 128 **Okl** 292, 262P 663; 33**PortoRico** 944; 101**WVa**553, 133SE129, 130 [citCJ]. [j] But see 122 **Okl** 216, 253P982.

599-79 **Mass** 165NE470; 101**WVa**553, 133SE129, 130 [citCJ].

599-80 216**Ala**415, 114S75.

599-81 216**Ala**415, 114S75; 73**Mont** 473, 237P490 (it is immaterial that holder in ignorance that money received was intended as payment of note applied it on existing indebtedness of payee).

599-82 46 **Ida**686, 270P1054. [b] **Evidence held insufficient to establish agency.**–214**AppDiv**689, 213NYS198. [c] **Evidence held sufficient to establish agency.**–46 **Ida**711, 270P1057.

599-84 46 **Ida**686, 270P1054.

599-85 See also 141 **Okl** 14, 283P549, 67**ALR**1410.

600-87 202 **Iowa**942, 211NW563; 202 **Iowa**947, 211NW564; 202 **Iowa**945, 211 NW567.

600-88 76**Mont**537, 248P209.

600-90½-New. And where the maker pays the payee without possession, the burden is on him to show the payee's

authority to accept for transferee. 216 Ala415, 114S875.

600-90½-New. or that the payment reached the transferee. 216Ala415, 114 S7..

600-91 214Ala146, 107S88; 76Mont 537, 248P209, 211 [citCJ]. [c] **Payments and set-offs.**-213Ala567. 105S585.

601-92 But see **MoA** 291SW512.

601-93 101WVa553, 133SE129.

601-2 46 Ida686, 270P1054. See also 214AppDiv689, 213NYS198.

603-12 152Miss312, 119S914.

603-14 6PaDist&Co 311 [citCJ]; 136 SC267, 134SE252, 258 [quotCJ]; 53SD 213, 220NW512. [a] 6PaDist&Co 311 [citCJ]. [c] **Matters constituting consent.**-53SD213, 220NW512.

603-17 120 Okl 250, 252P64; 125 Okl 276, 257P759 (note secured by real estate mortgage); 127 Okl 212, 260P479; 127 Okl 215, 260P497.

603-27½-New. Action to enforce payment of attorney's fees in case of default survives payment of principal sum. 79Mont542, 257P436.

604-38½-New. Under the Uniform Negotiable Instruments Act, an instrument is discharged by intentional, but not by mistaken, cancellation. 155Tenn430, 294 SW1101, 52ALR1411.

605-48½-New. Pleading alleging agreement to accept less sum than paid must show consideration therefor. **TexCivA** 272SW568.

605-52 MoA 286SW150. [g] **Facts held not to constitute negligence** in writing warrants. 153Tenn113, 282SW194.

606-54 134Misc863, 237NYS230. [a] **Bank cannot acquire from holder cause of action** against holder's indorser by payment to holder. 134Misc863, 237 NYS230.

606-54½-New. Failure of consideration or benefit to the maker must be shown to recover payment made through his agent's mistake. 12LaA15, 123S430 (some benefit derived defeats recovery).

606-56 200Wis304, 227NW387.

607-57 270US527, 46SCt388, 70Led 717.

607-58 See also 95CalA505, 273P39.

607-61 235 IllA39; 153Tenn113, 282 SW194; 200Wis304, 227NW387.

608-69 25F(2d)995; 232 IllA186; 153 Tenn113, 282SW194. [h] 153Tenn113, 282SW194.

609-71½-New. Recovery of payment by state to person, holding one of its warrants through forged indorsement, is not precluded by reason of issuance of the warrant in favor of a person who had no claim against the state. 153 Tenn113, 282SW194.

609-71½-New. In an action by the state to recover payments to a person to whom warrants were indorsed by forged indorsements, defendant has no right to insist that plaintiff proceed upon the bond of the forger, an officer of the state. 153Tenn113, 282SW194.

609-72 30F(2d)334. [b] (1) 213Ky 305, 280SW1106.

611-83 207 Iowa1254, 219NW496 (payment by maker to one not bona fide holder without interposing set-off or counterclaim). [b] **Indorsee held not entitled** to recover from payee indorser interest refunded to maker on cancellation of note. 192NC771, 136SE129. [c] **Money in hands of collecting bank.-Wyo** 291P809.

611-85½-New. Payment under protest of judgment, to secure release of land from lien, defenses not having been presented in action, does not show duress. **TexCivA** 272SW568.

611-92 [a] **Burden of proof on plaintiff** showing that defendant agreed to pay note after petition in bankruptcy was filed. 140Miss307, 105S518.

611-94 TexCivA 29SW(2d)898 (discharge of interest note by payment of principal absent provision for payment). [c] **Where transferee sent note to payee bank for collection,** and maker had sufficient deposit and ordered payment of note before bank's failure, maker was thereby discharged. **TexCivA** 26SW (2d)1077.

611-97½-New. Mere failure of the federal reserve bank to notify a drawee bank at once of nonacceptance of an attempt to charge it with a check has been held not "payment" where no one was injured. 143Wash372, 255P119.

611-97½-New. Negligence in sending a check to a drawee bank is held not actionable where drawee had not sufficient cash to pay the check. 143Wash 372, 255P119.

611-97¼-New. Second assignment to the assignee of note and mortgage without recourse will not release the assignor on the note where the second assignment conveyed the assignor's subsequently acquired interest and the note was a valid outstanding claim. 263Mass 462, 161NE601.

611-97⅛-New. Payment of a debt to a bank, incurred for the maker's benefit, and indorsement of the note to the person paying, does not discharge the note as between the maker and such person. **TexCivA** 8SW(2d)569.

611-2 197NC253, 148SE253 (drawer).

611-3 197NC253, 148SE253.

611-4½-New. That payee who assigned notes was granted time extension did not discharge maker. 198NC542, 152SE 628.

611-9 TexCivA 31SW(2d)355.

612-10 116Nebr380, 217NW612; 120 Or493, 252P969. [a] **Payment by one secondarily liable** constitutes no defense to party primarily liable. 131 Misc276, 226NYS721.

612-11½-New. Where worthless checks or drafts are used as instrumentalities in a "kiting" process for the purpose of swelling the apparent assets of a bank, payment of the drawee bank through remittance to a correspondent does not discharge the liability of the bank of origin. 49ND770, 193NW934.

612-13 161La253, 108S472; 161La 261, 108S475; 169Minn164, 210NW892.

612-14 169Minn164, 210NW892; 103 NJL124, 134A859; 230AppDiv146, 243 NYS682; 103WVa689, 138SE369 [cit CJ].

612-24½-New. Indorser is not discharged by failure of the holder to give him notice of the sale of stock pledged except as to the value of the stock sold. 161La261, 108S475.

612-24⅛-New. Indorser on notes substituted for notes theretofore executed by indorser and held as collateral to another note, is not discharged by extension granted to maker of original note. 143 Okl 49, 287P399.

612-25 144Va36, 131SE221.

612-27 131Misc872, 229NYS283 (by discharge of prior party).

612-28 103WVa689, 138SE369 [citCJ].

612-30 144Va36, 131SE221. [a] **Accommodation indorser of collateral note** is not discharged by maturity of collateral note. 144Va36, 131SE221.

613-32 145Va307, 133SE769.

613-37 198NC263, 151SE252.

613-38 89CalA250, 264P519.

613-42 NJSup 144A450; 122 Or170, 257P812. [c] (3) Where renewal note is given on condition and original note surrendered before condition performed, surrender is also conditional upon failure of which creditor has right of action on original note. 50ND549, 197NW 143. [e] **Indorser's liability ends** with voluntary surrender and destruction. 300Pa507, 150A900 (substituted note not indorsed).

614-45 222MoA1003, 78W(2d)470. But see **TexCivA** 20SW(2d)813.

614-46 4LaA93.

614-48 See also **TexCivA** 20SW(2d) 813.

614-49½-New. Comaker remains liable on cancelled note where cancellation made in exchange for note in which comaker's name was forged. **TexCivA** 25 SW(2d)304 (accepting new note in exchange for cancellation without telephoning to inquire if new note forgery is not negligence).

614-50 223AppDiv303, 228NYS184.

614-52 215Ala476, 111S29.

614-54 Fla 129S597. [a] **Fla** 130S 577.

615-56 233Mich174, 206NW348 (element of gift immaterial); 51ND508, 200 NW44.

615-58 Fla 129S597.

615-60 MoA 29SW(2d)726; 131Misc 377, 226NYS603 (release of accommodated payee held not to release accommodation maker); 190NC659, 130SE633, 634 [citCJ]; 144Wash150, 257P241. See also 169Minn164, 210NW892. [b] **Writing not necessary** where release is by acceptance of primary obligation of persons secondarily liable. 144Wash 150, 257P241. [c] **Quitclaim deed held sufficient consideration** for release. 144 Wash150, 257P241.

615-65 169Minn164, 210NW892.

616-66 169Minn164, 210NW892; **MoA** 29SW(2d)726. But see 221MoA211, 299 SW1111; **TexCivA** 19SW(2d)386.

616-67 MoA 29SW(2d)726 (effect statute of frauds). [c] **Statute does not apply** to discharge of note by novation, accord and satisfaction, and other methods known to law merchant in which discharge is based on valid consideration. 39Wyo 331, 271P217, 69ALR840.

616-68 MoA 29SW(2d)726 (necessity of steps to invoke statute of frauds); 190NC659, 130SE633 (statute relative to discharge not applicable to release). But see 169Minn164, 210NW892.

616-71½-New. Mere retention of possession of a note by the payee after release on consideration gives him no right to sue. 76CalA29, 243P877.

616-73 134Misc863, 237NYS230 (certification of check); 192NC771, 136SE 129 (answer of indorsee admitting want of consideration for note and transfer to himself after maturity discharges maker); 13PaDist&Co 632.

616-74 192NC771, 136SE129, 131 [cit CJ]; 103WVa689, 138SE369.

617-75 192NC771, 136SE129.

617-90 13PaDist&Co 632; 103WVa 689, 138SE369. See also 169Minn164, 210NW892.

618-99 36GaA682, 137SE841; 9LaA97, 118S842. [a] **On holder's sale of collateral,** maker may counterclaim for damages in holder's action on note, or may sue for conversion. 36GaA682, 137 SE841.

619-3 85PaSuper480.

620-12 150Miss105, 116S441.

620-14 9LaA633, 119S561; 69Utah284, 254P781.

620-16 167La230, 119S31; 225AppDiv 300, 233NYS196.

620-17 69Utah284, 254P781.

620-20 147Miss885, 113S552, 555 [cit CJ]. See also 116 OhSt609, 157NE478. 480 [quotCJ] 54ALR992.

621-26 127Misc20, 215NYS761.

621-27 Mass 172NE207.

621-37½-New. In an action on a note against the maker and indorsers, the taking of a default judgment against indorsers, without entry of an order of severance, does not release the maker from liability. 246Mich125, 224NW442.

622-48 [b] **Refusal to certify check** is not tantamount to dishonor making presentment for payment unnecessary. 129Misc749, 221NYS710.

622-50½-New. Notice of dishonor is not necessary to recover on check where drawer countermands payment. 211Ky 134, 277SW307.

622-51 108Conn489, 143A849, 62ALR 293.

622-58 148Wash572, 269P815.

623-64 233Mich428, 206NW992.

624-69½-New. To hold a surety on a nonnegotiable note, protest is not necessary. 85PaSuper480.

624-70 214AppDiv279, 212NYS141.

624-79 10LaA419, 121S664; **TexCivA** 238SW1090.

625-85 CalA 289P929; 35GaA768, 134 SE803; 128Me447, 148A675.

626-2 25F(2d)214 [citCyc] (stockholder and president of bank).

630-58 286Pa191, 133A220, 222 [cit CJ].

632-78 87 IndA318, 158NE919.

632-85 87 IndA318, 158NE919.

634-31 240NY317, 148NE535; **Tex CommnA** 274SW127.

635-35 NJ 148A717.

635-37½-New. Where note gives right, without notice, to accelerate maturity

for nonpayment of interest, indorser is not released by absence of notice of nonpayment of interest. 253 IllA339.

635–39 231Mich597, 204NW719; 80 Mont374, 260P734; 103NJL560, 138A 105.

635–44 TexCivA 290SW769.

636–53 2LaA793; 240NY317, 148NE 535; 214AppDiv279, 212NYS141; Tex CommnA 274SW127.

637–76 TexCommnA 274SW127.

637–80 14F(2d)593; Ala 129S571 (indorsement in blank); CalA 288P819; 111Conn568, 150A524 (liability on installment); 40GaA644, 150SE917(1st case); 233 IllA240; 246 IllA169; 252 Ill A508; 6LaA579; Me 151A890; 233Mich 646, 207NW877; 242Mich369, 218NW 709; 140Miss625, 106S211; 76Mont396, 247P326; 128Misc686, 219NYS697; 44 Philippine777; 132NC94, 128SE861; 133 SC315, 131 SE41; TexCivA 8SW(2d)803; TexCivA 30SW(2d)668; 152Wash310, 277P827; 34Wyo 405, 244P372. See also 105NJL445, 144A574, 62ALR113. [b] (4) Failure to notify indorser of nonpayment of certain installments discharges indorser as to those installments only. 25F(2d)214. [c] (3) To charge indorser of installment note notice of dishonor is necessary after exercise of option. 155 Wash300, 284P102.

639–92 107Conn269, 140A482 (mere demand on maker insufficient); 233 IllA 240; 119Kan528, 240P587; 235Mich638, 209NW848; 192NC499, 135SE326; Tex CivA 275SW222; 155Wash300, 284P 102; 34Wyo 405, 244P372.

639–94 TexCivA 290SW769. [a] Tex CivA 275SW222; 34Wyo 405, 244P372. [b] **That indorser is stockholder or officer of corporate maker of note** does not ordinarily affect his right to notice of dishonor. 34Wyo 405, 244P372.

639–95½–New. A notice cannot be dispensed with in the absence of competent evidence that indorsers were primarily liable. 192NC499, 135SE326.

639–96 216Ky801, 288SW771.

641–17 227Ky594, 13SW(2d)759; NJ 141A584, 585 [citCJ]; NJSup 131A677 (question of notice immaterial between maker and payee).

641–19 Sask [1928] 4DomLR919; Sask [1929] 4DomLR978(1stcase).

641–20 NJSup 131A677 (where one apparently payee but really is maker).

641–22 NJ 141A584, 585 [citCJ].

642–25 232Ky844, 24SW(2d)912.

642–33 CalA 288P819; 242Mich369, 218 NW709.

642–35½–New. The payee and indorser of a note made by a corporation of which he was president may not complain of failure to show notice of dishonor where, as president of the maker, he had full knowledge of presentment, demand, and nonpayment, and that the holder looked to him for payment. 66 Utah394, 243P114.

643–44½–New. A joint maker who signs as surety for his comaker is not entitled to notice of dishonor but will be discharged if notice is not given within a reasonable time and he is prejudiced thereby. Alta [1927] 2DomLR370.

644–46 231Mich597, 204NW719. [e] **Joint accommodation indorsers** are each entitled to notice of dishonor. 231Mich 597, 204NW719.

644–48 231Mich597, 204NW719.

644–52 But see 231Mich597, 204NW719.

644–53 233 IllA240 (dictum).

646–73 3NJMisc779, 130A435.

647–79 [b] **Reasonable diligence required by Negotiable Instruments Act** is that upon notary public giving notice and upon that holder of note may rely. 3NJMisc779, 130A435.

650–18 242Mich369, 218NW709 (notice must come from one entitled to look to indorser for payment).

650–29 CalA 293P102; 80Mont374, 260 P734 (must use due diligence in notifying drawer of check of its nonpayment); 127Misc40, 215NYS243.

652–36 108Conn489, 143A849, 62ALR 293; 119Kan528, 240P587.

652–38 242Mich369, 218NW709.

653–47 [1] Mass 166NE626.

653–48 256Mass23, 152NE70.

654–55 40GaA644, 150SE917(1stcase) (notice too late); 150Md385, 133A121.

655–62 [a] 155Wash300, 284P102 (notice too late).

661–24 286Pa191, 133A220, 222 [cit CJ].

664–68 286Pa57, 133A220.

666–85½–New. Where an indorser's correct address is in the city directory, notice mailed to him at the address of the makers and not received by him is insufficient. 235Mich638, 209NW848.

668–16 But see 208 Iowa545, 223NW 891.

668–17 286Pa57, 133A220; TexCivA 4 SW(2d)253.

668–18 119Kan528, 240P587.

668–22 121 Or28, 253P879.

668–26 CalA 289P929.

669–27 108Conn149, 142A816 (notice of protest to indorser); NJ 150A422.

669–29 [b] **Notice of protest wrongly addressed held invalid.–NJSup** 149A629 (2dcase).

672–51 8F(2d)795.

674–71 242Mich369, 218NW709.

675–82 128Me447, 148A675 (oral notice sufficient).

676–6 But see 147Miss603, 111S578.

677–13 242Mich369, 218NW709.

680–41 255Mass569, 152NE54.

682–65 12F(2d)963, 965 [quotCJ].

682–66 12F(2d)963, 965 [quotCJ].

682–71 12F(2d)963, 965 [quotCJ].

682–72 12F(2d)963, 965 [quotCJ].

682–73 12F(2d)963, 965 [quotCJ].

682–78½–New. The bank commissioner is not relieved of the duty to present for payment notes held by the bank and to give notice of dishonor because the bank is in course of liquidation under him. 120 Okl 126, 250P914.

682–78¼–New. Delay in presenting a check on a distant bank due to the conduct of the drawer and the drawee bank does not release the drawer. 173Minn 389, 217NW506.

682–78¾–New. Refusal of the drawee bank to certify a check when the holder thereof presented it to the bank for certification did not amount to dishonoring the check so as to give the holder the right to sue the drawer as if payment had been refused, under the Negotiable Instruments Law. 249NY 386, 164NE326.

683–79 137Misc153, 241NYS639. [d] **If maker is solvent** and there is nothing to indicate nonpayment, if presented at maturity contention that presentment would have been idle ceremony has no merit. 233Mich646, 207NW877.

683–84 Contra 142SC247, 140SE581.

684–95½–New. Worthlessness of checks and drafts is an excuse. 49ND770, 193 NW934.

684–96 236 IllA269; 119Kan528, 240P 587.

684–97 119Kan528, 240P587.

685–19 127Me91, 141A321; TexCommnA 285SW307.

686–22 TexCommnA 285SW307. [a] (1) TexCommnA 285SW307. See also 173Minn504, 218NW99.

686–24½–New. A bank in whose interest worthless checks are used as instrumentalities in a "kiting" process with a view to swelling its apparent assets is not entitled to presentment and notice of dishonor. 49ND770, 193NW 934.

689–57 CalA 289P934; 149Md474, 132A 70; 152Md81, 136A58, 50ALR1196.

689–62 151Miss693, 118S414.

690–68 48 Ida214, 281P3.

692–4 NJSup 149A629(2dcase).

692–6½–New. The holder of a note cannot excuse default in giving notice of protest to indorsers because of ignorance of the notary who actually protests. 286Pa57, 133A220.

695–35 127 Okl 212, 260P479.

696–55 212AppDiv553, 209NYS603; 121 Or28, 253P879; 144Va782, 130SE 773.

696–62 233Mich646, 207NW877; 192 Wis539, 213NW313, 314 [citCJ].

696–63 152Md81, 136A58, 50ALR1196; 50ND850, 198NW467 (waiver by drawer of note does not include indorser); TexCommnA 7SW(2d)61.

697–83 242Mich369, 218NW709, 710 [quotCJ].

698–85 Fla 130S725; 172Minn405, 215 NW785; 315Mo 465, 287SW331.

698–93 212AppDiv553, 209NYS603.

698–95 See also 192Wis539, 213NW 313, 314 [citCJ].

699–6 192Wis539, 213NW313.

699–7 14F(2d)593; CalA 288P819; 33 GaA659, 127SE656, 657 [citCJ]; 315Mo 465, 287SW331; NJSup 147A459(1st case); TexCommnA 7SW(2d)61. [e] **Giving of covering check** may not constitute waiver of negligence in presenting original check. 255 IllA578.

700–8 215Ala256, 110S273; 123Kan 21, 254P364; Mass 169NE508; 242Mich 369, 218NW709; 121 Or28, 253P879; 152Wash310, 277P827. [b] (19) Where indorser, upon false representations of maker that payment had been made to indorsee and notes were lost, signed authorization to cancel mortgage. 11LaA219, 123S428.

701–9 But see 233Mich646, 207NW877.

701–11 [a] (2) See also 121 Or28, 253P 879.

701–18½–New. Payment, to amount to waiver of presentment, demand, and notice of nonpayment, as respects an indorser's liability, must have been made with full knowledge of the facts. 195 Wis120, 217NW746, 56ALR915.

701–19 4LaA219; 172Minn405, 215NW 785; MoA 28SW(2d)368; NJSup 138A 111; 154Tenn672, 294SW513; TexCivA 290SW769; 105WVa14, 141SE394.

701–20 TexCommnA 5SW(2d)972, 973 [citCJ].

702–22 172Minn405, 215NW785.

702–23 243Mich598, 220NW664(1st case).

702–38 NJSup 148A183; 50RI 432, 148 A414. See also 210Ky788, 276SW839.

702–40 Mass 171NE460.

703–41½–New. Waiver of demand and notice of payment printed on the back does not bind the indorser signing at the opposite end of the note. 26 OhA 388, 158NE556.

703–43 197Wis250, 221NW743.

703–48 192Wis539, 213NW313.

704–55½–New. But indorser obtaining extension of time on first of series of notes does not thereby waive notice of nonpayment on whole series declared due under acceleration clause in trust deed securing notes on nonpayment of second of series. 140Miss625, 106S211.

704–63 149Va854, 141SE767, 56ALR 1358. But see 233 IllA240.

709–7 76Mont396, 247P326 (payment of interest); 212AppDiv553, 209NYS 603.

709–12 81CalA556, 254P275; 202 Iowa 1263, 211NW864; 208 Iowa545, 223NW 891; 172Minn574, 216NW237; 147Miss 603, 111S578, 580 [citCJ].

713–27 [c] But see 231Mich597, 204 NW719.

715–50 [a] **Waiver of presentation at insolvent bank** does not waive presentation on maker in order to charge indorser. 205 Iowa399, 218NW51.

715–50½–New. Where person is both guarantor and indorser waiver contained in his indorsement applies to him in both capacities. 96PaSuper447.

715–52 154Tenn672, 294SW513.

715–55 192NC69, 133SE415; 154Tenn 672, 294SW513.

715–56 241 IllA576; 192NC69, 133SE 415; 121 Or173, 254P815, 816 [citCJ]. But see 239Mich670, 214NW971.

715–57 154Tenn672, 294SW513.

715–57½–New. It does not increase the original liability of the indorser, but merely renders unnecessary the performance of these acts to fix liability. 239Mich670, 214NW971.

715–57¾–New. Indorser of a note payable at a bank who waived presentment is not released from liability because the maker was able to pay at such bank at maturity under the Negotiable Instruments Law. 154Tenn672, 294SW513.

715–58½–New. Indorser of a note, waiving demand, protest, and notice waives the right to require the holder to use diligence required in ordinary cases to hold an indorser. TexCivA 287 SW683.

715–58½–New. Waiver of presentment for payment of a note dispenses with presentment for payment of interest as well as principal. TexCivA 13SW(2d) 174.

716–70½–New. That the transferee is not a bona fide purchaser cannot be contended by the maker not establish-

ing a defense to a purchase-money note. 39GaA309, 147SE156.

716-72½-New. Acquirement of trade acceptance by indorsements made as preference within four months of the indorser's bankruptcy is no defense as against the acceptor. 38GaA601, 144SE 806.

716-79½-New. Set-off is not "defense" or "infirmity" under the Negotiable Instruments Law. 51SD607, 216NW347.

716-79½-New. No colorable device or shift to shape legal aspect of transaction will avoid defenses to note. Ala 130S 386.

716-80 221AppDiv420, 223NYS184.

716-87 86 IndA581, 159NE15.

716-91 50ND494, 196NW953, 959 [cit CJ]; TexCivA 293SW613.

717-98½-New. But an agreement with a company is not available against the payee, although an officer of the company. 291Pa433, 140A141.

717-1 200 Iowa1000, 205NW776; 228 Ky436, 158SW(2d)263; 124 Or468, 263 P71.

717-2 165La247, 115S475.

717-3 219Ala395, 122S635; 180Ark616, 22SW(2d)19; Fla 129S759; 40GaA291, 149SE438; 46 Ida583, 269P991; 240 Ill A85; 253 IllA475; 255 IllA127; 215 Ky368, 285SW209; 223Ky510, 4SW(2d) 403; 125Me108, 131A138; 240Mich642, 216NW416; 316Mo 1338, 296SW375; MoA 158SW(2d)935 (payee); MoA 272SW 85; 117Nebr34, 219NW798; 225AppDiv 511, 233NYS638; 122 Or225, 258P192; 288Pa549, 137A113; TexCivA 274SW 220; TexCivA 298SW617; TexCivA 15 SW(2d)59; TexCivA 23SW(2d)445; 143 Va51, 129SE220. [a] 321Mo 199, 9SW (2d)901, 60ALR639. [g] **Payments on debt, to original payee,** made before execution of note, but after its date, disregarded when note was executed, were required to be credited to maker in action on note by transferee not holder in due course. 127Me383, 143A600.

717-4 36GaA570, 137SE104.

718-7 DC 26F(2d)975 (promissory note is subject to any defenses available against enforcement of written contracts).

718-7½-New. Drawee's defense to trade acceptance may be available against indorsee where instrument is nonnegotiable. Iowa 233NW103.

718-12 216Ala214, 112S822; 30Ariz505, 249P71; 177Ark164, 6SW(2d)2; 153 Miss801, 121S814; 154Miss501, 122S 541; 217MoA326, 272SW1037; 190NC 867, 129SE727; 43 OklACR26; 288Pa 549, 137A113. See also 38GaA271, 143 SE774. [d] (3) 161Ga329, 130SE566. [s] **Incidents of commercial paper** in hands of holder in due course relate to parties thereto and those similarly bound. 213Ala567, 105S585.

720-17 26F(2d)51 (rule applied to accommodation indorser as against indorsee who took note back from holder after maturity); 164Ga880, 139SE658; 35GaA627, 134SE200; 41GaA398, 153 SE205; 240 IllA85; 165La385, 115S629; 262Mass362, 160NE184; 262Mass422, 160NE251; NJ 148A773; 223AppDiv 306, 228NYS241; 190NC867, 129SE727; 123 Or95, 260P227; 124 Or468, 263P71; 132SC94, 128SE861; TexCivA 283SW 596; TexCivA 299SW649. [e] **Generally one who has no title to personal property can convey none** to third party, but exception exists with regard to transfers of negotiable instruments. TexCivA 11SW(2d)217.

720-18 [a] **In Georgia,** 35GaA366, 133 SE284.

720-19½-New. Where a payee could not question the transfer, the maker cannot do so where he was fully protected in regard to payment to the proper person. 35Wyo 319, 249P795.

720-19½-New. In an action by banks to recover indebtedness by reason of defendant's failure to pay drafts, in which they claimed that funds in defendant's possession belonged to them by virtue of equitable assignment of produce sold defendant, defendant is not entitled to have money in its possession applied to notes of drawer of drafts held by it. 88 IndA327, 163NE 842.

720-20 Iowa 213NW409; 129 Okl 67, 263P142; 200Wis631, 229NW46.

720-25 30F(2d)46 [certiorari den 279 US858, 49SCt352, 73Led999(11thcase)]; CalA 290P478; 207 Iowa1083, 224NW 76; 213Ky689, 281SW823; 179Minn 246, 228NW757(2dcase); 225AppDiv 171, 232NYS373; 95PaSuper191 (defenses waived by signing note). See also 177Ark832, 9SW(2d)310. [b] (5) Maker of note cannot defend on ground that it was executed without benefit to him under agreement exempting him from liability in order to enable bank, which was payee, to make additional loan to one who had borrowed to limit allowed by law, thereby deceiving bank examiner. 126 Okl 188, 259P545. (6) Receiver of insolvent bank representing creditors can maintain action on notes executed to bank for purpose of making appearance of assets to deceive bank examiner, and makers are estopped to set up fraudulent agreement. 177Minn529, 225NW891, 64ALR 582. (7) Other instances. Cal 290P15. [k] (9) Where there was express warranty that well would give lasting water, using well did not estop defendant from showing breach of warranty. 171Ark1010, 287SW370. (10) Other instances. Iowa 213NW409; 53SD37, 219NW949, 60ALR1173.

722-30 245 IllA75; 86 IndA392, 156 NE568; 49ND1107, 194NW903; 42 OklACR107. But see Kan 289P423. [e] (7) Maker of promissory note is not estopped to plead failure of consideration for note as to him because he subsequently was party to contract under which there was novation of security. 201 Iowa533, 207NW533. (8) Wife executing note secured by mortgage without consideration is not estopped to claim want of consideration by reason of subsequently becoming party to agreement whereby new mortgage was given without consideration for extension of note. 201Iowa533, 207NW533. (9) Other instances. 256 IllA141; IndA 173NE289.

723-31 49ND1107, 194NW903. [c] (8) Indorser of note given for purchase price of truck held not estopped to defend on ground of fraud in procurement of execution of contract of sale. 168Ark1116, 272SW644. (9) No estoppel where record fails to show that maker's conduct ever came to knowledge of transferee or controlled his conduct. 202 Iowa192, 209NW523. (10) Makers of note given for stock and simultaneous written authorization for discount by bank is not estopped to assert fraud in procurement thereof. SD 231NW536.

723-32 [b] **Drawer placing blank travelers' checks** in bank for issuance is not estopped to deny delivery as against purchaser from bank robbers who signed without authority. TexCommnA 16SW(2d)278.

723-33 116Kan320, 226P995.

723-34 155Md384, 142A515. [c] (4) Where company, before purchasing certificate of deposit, was informed by cashier of issuing bank, that certificate was valid and would be paid at maturity, bank was estopped to assert defense of forgery. 27F(2d)523. [e] (7) Delegation of authority to agent to secure loan does not operate as estoppel against showing forgery of indorsement by agent. 171Ark359, 284SW50. (8) Other instances. TexCivA 28SW (2d)214.

724-36 See also 220AppDiv515, 221 NYS703.

724-41½-New. The words "without claim of set-off or deduction" written on the face of a note do not preclude the maker, in an action by the payee, from pleading failure of consideration. 128 Okl 39, 260P1060.

724-42 201 Iowa733, 206NW283; 259 Mass596, 156NE749.

725-44 286Pa483, 133A793.

726-56½-New. A recital in a note, negotiable in form, that consideration was a commercial fertilizer sold to the maker does not deprive the maker of defenses available under statute. 192NC 330, 135SE141.

726-56⅓-New. That the maker was a stockholder in the payee bank does not preclude the defense that the note was given for an accommodation. MoA 8SW (2d)92.

726-56¼-New. A bank is not estopped to assert fraud as a defense to a certificate of deposit by stating that the certificate would be paid, where the statement was made without knowledge of the fraud. 118Nebr678, 225NW758.

726-56½-New. That a stockholder, as accommodation maker of a note to the bank, surrendered his stock in the bank when it closed, and permitted the bank to be reorganized, without demanding a return of his note, did not estop him from asserting that the note was given for accommodation only, in a suit by the reorganized bank. MoA 8SW(2d)92.

726-56⅙-New. Conduct of the bank examiner does not preclude a stockholder's defense as accommodation maker. MoA 8SW(2d)92.

726-56⅙-New. Maker of negotiable instrument cannot object to identity of owner seeking to enforce it. Mass 170 NE621.

726-59 121Kan860, 862, 250P273 [cit CJ]; 213AppDiv272, 210NYS64.

727-62 121Kan860, 862, 250P273 [cit CJ].

727-66 [a] **Effect of Joinder.**-127Misc 805, 217NYS471.

727-69½-New. Where a bank paid for a note purchased from a corporation by crediting its open checking account, the maker may not defend on the ground that an officer of the corporation in withdrawing such credit misappropriated the money. 49SD466, 207 NW471.

727-69½-New. In an action by the indorsee and holder of a note given to a corporation, the maker cannot set up the defense that the note was misappropriated by being used to pay a note of the corporation before incorporation, where such note had been renewed in the name of the corporation. 49SD466, 207 NW471.

727-72 237 IllA217; 200 Iowa220, 204 NW456; 259Mass570, 156NE723. See also MoA 290SW635 (alteration after due date discharging makers and indorsers).

728-79 237 IllA217. [a] **Where contract provided that notes could be detached** there was no alteration by detaching them. TexCivA 25SW(2d)949.

729-83 202Iowa778, 211NW228, 229 [citCJperAlbert,J]; 146Miss498, 112S 390. [c] **Extension agreement noted on back of note** is not alteration. 202 Iowa 778, 211NW228.

729-83½-New. place of payment, 200 Iowa220, 204NW456.

729-84 237 IllA217.

729-86 201 Iowa202, 204NW427 (change of place of payment can be made only with consent of parties).

730-92 13F(2d)585; 118 Okl 118, 247 P42; 50SD54, 208NW219; Utah 276P 659. [c] **It is not material alteration** within statute for holder to erase indorsement of payment on back of note without intent to defraud. 50SD54, 208 NW219.

730-93 215Ala648, 112S237; 218Ala 240, 118S252; 218Ala375, 118S561; 179 Ark415, 16SW(2d)937; 252 IllA68; 214 Ky41, 281SW1022; 146Miss498, 112S 390; 153Miss749, 121S490; 217MoA676, 274SW833, 835 [citCJ]; NJSup 131A 98; 118 Okl 118, 247P42; 130 Okl 229, 266P778; TexCivA 277SW773; TexCivA 284SW337; 135Wash340, 237P 719; 104WVa106, 139 SE475. See also TexCivA 8SW(2d)803. [a] (4) Change making note payable to order of former maker, who was indorser, and changing maker to corporation of which former maker was president. 104WVa106, 139 SE475.

731-6 47 Ida572, 277P423; 225Ky12, 7SW(2d)492; TexCommnA 16SW(2d) 278. [b] (3) Makers of nonnegotiable note, by executing it in blank and delivering it to officer of bank, is estopped, as against subsequent holder, to assert that note was given as accommodation to bank and that insertion of officer's name therein constituted diversion. 206 Iowa1036, 220NW364.

732-10 [e] (1) 47 Ida572, 277P423.

733-19 47 **Ida**572, 277**P**423.
733-24 295**Pa**146, 144**A**904.
735-41 22**AlaA**485, 118**S**250(4thcase).
737-76½-New. But the maker is not negligent in circulating a note without indorsement making the note conditional written on paper securely attached to the note which was lost some nine months later. **TexCivA** 277**SW**773.
738-82 DC 40**F(2d)**815(2dcase); 36 **GaA**229, 136**SE**106, 107 [citCJ]; 121 **Kan**239, 246**P**1013; 167**Minn**93, 208**NW** 805; **MoA** 9**SW(2d)**87; 85**PaSuper**427; **TexCivA** 278**SW**924; **TexCivA** 23**SW (2d)**445.
739-84 32**Ariz**436, 259**P**881; 36**GaA** 229, 136**SE**106, 107 [citCJ]; 234 **IllA** 78; 121**Kan**239, 246**P**1013; 124**Kan**132, 257**P**746; 240**Mich**642, 216**NW**416 (agreement that maker could repudiate note by losing payments made); **MoA** 295**SW**482; **Nebr** 228**NW**866(2dcase); 35 **OhA**514, 172**NE**621; 128 **Okl** 220, 262 **P**201; 123 **Or**111, 261**P**72. [k] **Where indorsement is made expressly subject to contract**, indorsee takes subject to conditions thereof. 128 **Okl** 220, 262**P** 201.
740-85 35**GaA**790, 134**SE**809.
740-86 179**Ark**264, 158**SW(2d)**404; **IndA** 152**NE**854; 120**Kan**434, 243**P** 1014; 258**Mass**525, 155**NE**635. [a] (2) Indorser of negotiable note in due course cannot set up parol agreement that indorsement was merely to transfer title and that no liability should be incurred thereby. 117 **Okl** 81, 244**P**791.
741-88 172**Ark**813, 290**SW**377. But see 202 **Iowa**1352, 212**NW**115.
741-90 177**Ark**832, 9**SW(2d)**310.
741-93 **Utah** 272**P**204.
741-98 118 **Okl** 142, 247**P**85. [b] 118 **Okl** 142, 247**P**85.
742-7½-New. Where a bank becomes owner for value of bills of exchange growing out of an executory bill of exchange arrangement entered into by the drawer and acceptor of which the bank has knowledge, it is not a guarantor that the agreement will be carried out. 120 **Okl** 46, 249**P**506.
742-7½-New. A person giving his note to a bank for money advanced to another cannot defend on the ground that the note was executed without benefit to him under an agreement that he would not be held liable where the arrangment was made for the purpose of deceiving the bank examiner. 128 **Okl** 264, 263**P**150.
742-13 180**Ark**600, 22**SW(2d)**398(2d case); 83**Colo** 118, 263**P**18; 121**Kan**153, 246**P**968; 240**Mich**270, 215**NW**243; 146 **Miss**707, 111**S**844; 83**Mont**573, 273**P** 635; 223**AppDiv**306, 228**NYS**241; 117 **Okl** 156, 246**P**833; 192**Wis**566, 213**NW** 290. [k] **Rule applied to purchaser from bona fide holder** who takes after maturity. 146**Miss**707, 111**S**844.
742-13½-New. A collateral agreement giving the maker of a trade acceptance the privilege of purchasing a stated amount of goods for half price and providing for the return of the amount paid in a stated contingency is not binding on a third person holding a trade acceptance. 120**Kan**303, 243**P**278.
743-14 120**Kan**434, 243**P**1014.
744-17 83**Colo** 118, 263**P**18.
744-18½-New. The maker is not bound by the act of a payee in carelessly permitting a blank note on which indorsement was written to come off a pad with the original, where the blank was later lost. **TexCivA** 277**SW**773 (where payee was acting for himself).
744-21 87 **IndA**318, 158**NE**919 (may be set up against payee by one not liable as acceptor but on simple contract to pay note); 50**RI** 163, 146**A**403.
744-23 **TexCommnA** 18**SW(2d)**588(2d case) (subsequent failure of consideration).
744-25½-New. Failure of obligee to perform is no defense when ready and willing to perform and performance is presented by obligor. 200 **Iowa**608, 203 **NW**710.
744-29½-New. In an action on a note given for bonds, where defendant did not plead failure to deliver or tender the bonds as a defense, an offer at the trial is sufficient where it appears that tender would have been futile. 54**SD** 99, 222**NW**661.
744-30 **Iowa** 231**NW**306 (in action on instrument or indorsement); 77**Mont** 477, 251**P**517; 50**ND**494, 196**NW**953; 132 **Okl** 189, 270**P**31; 43 **OklACR**47 [reh pending].
744-33 74**Mont**549, 241**P**613.
744-35 29**PortoRico** 788, 792 [quotCJ].
744-36 171**Ark**1010, 287**SW**370; 236 **IllA**111; 123**Kan**174, 254**P**329; 7**LaA** 749; 240**Mich**549, 215**NW**364; **MoA** 8 **SW(2d)**92; 212**AppDiv**630, 209**NYS**324 (transfer by payee, in violation of agreement, of liquor license for which note was given); 230**AppDiv**146, 243**NYS**682; 190**NC**162, 129**SE**453; 49**ND**993, 194**NW** 689; 55**ND**946, 215**NW**779; 114 **Okl** 147, 149, 244**P**793 [citCyc]; 128 **Okl** 222, 262 **P**205; 131 **Okl** 279, 269**P**286; 139 **Okl** 246, 281**P**771; 43 **OklACR**47 [reh pending]; 123 **Or**111, 261**P**72; 29**PortoRico** 788, 792 [quotCJ]; 158**Tenn**546, 14**SW (2d)**963; **TexCivA** 3**SW(2d)**879; **Sask** [1925] 3**DomLR**105. [a] (3) Other instances of failure of consideration. 52 **SD**594, 219**NW**477. [bb] **Breach of independent contract by payee** not failure of consideration. 234 **IllA**325. [cc] **No failure of consideration from nonperformance of promise** where promise to perform and not performance was real consideration. 256 **IllA**29.
746-37 29**PortoRico** 788, 792 [quotCJ].
746-38 29**PortoRico** 788, 792 [quotCJ].
746-39 236 **IllA**111; 150**Miss**762, 116**S** 885; 29**PortoRico** 788, 792 [quotCJ]; **TexCivA** 27**SW(2d)**255.
747-40 [a] (2) But otherwise when indorser and maker are joined as defendants. 127**Misc**805, 217**NYS**471.
747-42 284**Pa**561, 131**A**471, 474, 42**ALR** 1133 [quotCJ].
747-43½-New. The defense of failure of consideration will not stand, where the note sued on is absolute on its face and there is no proof of any limitation. 9**LaA**710, 121**S**381.
747-48 79**CalA**595, 250**P**574; 90**CalA** 759, 266**P**373; 201 **Iowa**533, 207**NW**533; 204 **Iowa**290, 214**NW**538; 240**Mich**549, 215**NW**364; 192**NC**330, 135**SE**141; 114 **Okl** 147, 244**P**793; 128 **Okl** 222, 262**P** 205; 129 **Okl** 123, 263**P**658; 143 **Okl** 299, 288**P**960; 43 **OklACR**47 [reh pending]; 123 **Or**111, 261**P**72; 132 **Or**368, 284**P** 573; **TexCivA** 284**SW**989; **TexCivA** 26 **SW(2d)**348; 104**WVa**235, 139**SE**703.
748-49 79**CalA**595, 250**P**574; 99**CalA** 728, 279**P**222 (accommodation note); 219**Ky**313, 292**SW**833; 130 **Okl** 7, 266**P** 753 (accommodation note); 123 **Or**111, 261**P**72; **TexCivA** 298**SW**617; 104**WVa** 235, 139**SE**703.
748-50 **MoA** 290**SW**449; 98**PaSuper** 257.
748-54 216**Ala**214, 112**S**822; 21**AlaA**643, 111**S**316; 175**Ark**1155, 28**W(2d)**20 (note for premium on insurance policy); 176 **Ark**812, 4**SW(2d)**5; 177**Ark**243, 6**SW (2d)**305; 71**CalA**45, 234**P**334; 86**CalA** 697, 261**P**496; 101**CalA**579, 281**P**1075; **CalA** 284**P**466; 46 **Ida**476, 269**P**85; 253 **IllA**123; 88 **IndA**557, 163**NE**535; 214 **Ky**41, 281**SW**1022; 2**LaA**669; 6**LaA**71 (2dcase); 6**LaA**120; **Md** 148**A**270; 252 **Mass**552, 148**NE**105; 262**Mass**362, 160 **NE**184; 264**Mass**392, 162**NE**898, 59**ALR** 1022; 240**Mich**319, 215**NW**300; 154 **Miss**501, 122**S**541; 219**MoA**34, 269**SW** 955; **MoA** 294**SW**456; 48**Nev**319, 232**P** 206 (subsequent attempted rescission of contract from which note arose is not defense); 197**NC**432, 149**SE**396; 127 **Okl** 257, 260**P**773; 128 **Okl** 233, 262**P**691; 39 **OklACR**326; 283**Pa**406, 129**A**333; **Tex CivA** 4**SW(2d)**309; **TexCivA** 8**SW(2d)** 785 (held no failure of consideration); 187**Wis**39, 203**NW**915; 198**Wis**300, 224 **NW**117. [a] (4) 121**Kan**153, 246**P**968. (6) As against purchaser in good faith and for value of draft given for stock, it is no defense that stock has no value. 101**CalA**579, 281**P**1075. [b] (3) Failure to issue stock certificates if breach of stock subscription agreement does not affect holder in due course of notes given under subscription. 68**Utah**421, 250 **P**1033.
750-56 264**Mass**208, 162**NE**368; 85 **Mont**571, 281**P**348. [a] (4) In view of Neg. Instr. L. § 91 trade acceptance in hands of bona fide purchaser without notice cannot be defeated by claim of acceptor bank that as between drawer and acceptor it was without consideration. 241**NY**231, 149**NE**841.
750-57 252 **IllA**508.
751-60 [a] **Md** 149**A**270; 34**NM**592, 286**P**424.
751-61 23**AlaA**56, 120**S**472.
751-65½-New. Lack of consideration for the indorsement of a nonnegotiable promissory note is a defense to an action by the holder against the indorser. 74 **Mont**549, 241**P**613.
751-67 286**Pa**483, 133**A**793.
752-75 120**Kan**594, 244**P**1046; **Sask** [1928] 1**DomLR**1132. [a] **Maker is estopped from asserting** holder at time of renewing note had notice of partial failure of consideration. 137**Misc**265, 241 **NYS**735.
752-79 41 **Ida**146, 238**P**295. [a] **Ala** 129**S**43 (where no fraud shown). [b] **On partial failure** worker must either rescind and return consideration received or seek some other remedy. 41 **Ida**146, 238**P**295.
752-80 82**Colo** 572, 261**P**664; 121**Kan** 82, 245**P**745; **MoA** 289**SW**977, 982 [citCJ]; 131 **Okl** 279, 269**P**286; 43 **OklACR** 47 [reh pending]. See also 29 **OhA**272, 162**NE**711. [l] **Notwithstanding knowledge of partial failure of consideration of original note** holder of renewal note may recover absent showing of payee's breach. 137**Misc**265, 241**NYS**735.
754-81 121**Kan**82, 245**P**745; 132 **Okl** 189, 270**P**31; 43 **OklACR**47 [reh pending].
754-82 192**NC**330, 135**SE**141, 145 [citCJ]; **OhA** 153**NE**856.
754-84 **MoA** 289**SW**977, 982 [citCJ]; 81**Mont**248, 263**P**693.
755-88 [a] (7) Note of infant for property not delivered is deprived of all consideration by his disaffirmance of note prior to any delivery of property and acquiescence of payee in disaffirmance. 201 **Iowa**430, 205**NW**977. (8) Failure to discharge lien at once as agreed amounts to failure of consideration for note given in consideration of agreement. 100**CalA** 706, 280**P**1017.
756-94 48 **Ida**405, 283**P**519; 120 **Okl** 178, 250**P**908; 129 **Okl** 123, 263**P**658 (failure to convey substantial part of block of land in consideration of agreement to convey which note was given).
757-3½-New. That a note does not bear any federal revenue stamps does not constitute a defense in some jurisdictions. 231**Mich**343, 204**NW**87.
759-21 135 **Okl** 253, 275**P**285.
759-23 [b] **Blank travelers' checks stolen before delivery.-TexCivA** 7**SW (2d)**886.
759-25 96**CalA**451, 274**P**358(2dcase); 151**Md**514, 135**A**383, 49**ALR**1366; 240 **Mich**270, 215**NW**243.
760-29 58**ND**693, 227**NW**433.
760-30 121**Kan**239, 246**P**1013; **MoA** 15 **SW(2d)**935 (diversion by accommodated party); 85**PaSuper**427.
760-31 216**Ala**214, 112**S**822; 121**Kan** 239, 246**P**1013.
761-35 **TexCivA** 284**SW**989.
761-36 [d] **Checks for collection.**-Although bank has no authority to transfer check except for collection, yet if it indorses same in blank to holder in due course, principal cannot recover from such holder. 151**Md**514, 135**A**383, 49**ALR**1366.
761-41 101**WVa**669, 133**SE**370, 371 [citCJ]. See also 196**NC**51, 144**SE**545(2dcase).
762-42 196**NC**51, 144**SE**545(2dcase). But see **TexCivA** 284**SW**977. [b] **TexCivA** 294**SW**226.
762-44½-New. A trust company, purchasing notes with knowledge of duress, could not avoid a defense by proof of the maker's statements that the notes would be paid. 19**F(2d)**186.
762-44½-New. Where the maker pays interest on the note and procures an extension of time to pay the principal, he ratifies the contract and is estopped to plead duress as a defense. 121 **Okl** 7, 246**P**1091.
762-47 121 **Okl** 7, 246**P**1091.
762-49 [a] **Execution not under duress.** -98**CalA**297, 276**P**1043. [b] **Execution under duress.**-88 **Ind**543, 164**NE**709.
762-51 **CalA** 291**P**621; 35**GaA**209, 132 **SE**268; 229**Mich**619, 201**NW**949; 133

Misc373, 231NYS485. But see 235 IllA 112. [f] **Subsequent notice of forgery has no effect** on rights of payee not subject to defense. 235 IllA112.

763-56 13LaA385, 128S307 (notice within reasonable time).

763-59 124 Okl 74, 254P37.

763-62 89Fla242, 103S609, 611 [citCJ]; 168Ga547, 148SE396.

763-64 171Ark359, 284SW50.

763-66 153Tenn113, 282SW194.

763-69 128Misc116, 217NYS673, 674 [citCJ].

764-73½-New. Loss resulting from forgery of indorsement on check falls on him whose claim to instrument depends on indorsement. 13LaA385, 128 S307.

764-74 128Misc116, 217NYS673, 674 [citCJ].

764-81 69CalA319, 231P44; 153Tenn 113, 282SW194. [b] **Signing of travelers' checks** by alleged purchaser after such checks were stolen is within statute. TexCivA 7SW(2d)886.

765-84½-New. nor against one who indorses cashier's check bearing forged indorsement, 69CalA319, 231P44.

765-85½-New. The law of commercial paper is not applicable to forged bank certificates of deposit. 54SD217, 222 NW941.

765-88 197 Ind222, 150NE312.

765-89½-New. Nebraska. 231NW34.

765-90 27 OhA93, 160NE860.

765-91 294Pa226, 143A908.

765-91½-New. Tennessee, 154Tenn241, 290SW39, 50ALR1369.

765-93 197 Ind222, 150NE312; 154 Tenn241, 290SW39, 50ALR1369.

765-94 197 Ind222, 150NE312; 154 Tenn241, 290SW39, 50ALR1369.

766-7 43F(2d)549; CalA 291P621; 154Tenn241, 290SW39, 50ALR1369.

766-8 27 OhA93, 160NE860; 154Tenn 241, 290SW39, 50ALR1369. But see 294 Pa226, 143A908.

766-10 215Ky368, 285SW209, 211 [quotCJ]; 240Mich549, 215NW364; MoA 298SW242, 246 [citCJ].

766-14 See also 215Ala552, 112S138.

767-16 215Ky368, 285SW209, 211 [quotCJ]. [a] (1) 164Ga880, 139SE 658. (2) Note given for price of intoxicating liquors prior to enactment of Negotiable Instruments Law is unenforceable even in hands of bona fide holder. 37GaA668, 141SE419.

767-17 15F(2d)894; 24F(2d)199; 22 AlaA518, 119S601(2dcase); 174Ark547, 297SW1035; Cal 292P1069; CalA 284 P466; 215Ky368, 285SW209, 211 [quot CJ]; 155Miss91, 124S69; MoA 298SW 242, 246 [citCJ]; NJSup 146A690 [citCJ]; 31NM344, 245P543; 283Pa 406, 129A333; Alta [1928] 3DomLR93. [d] 37GaA698, 141SE502. [k] **Payee doing business under assumed name.**–241Mich199, 217NW47.

768-18 IndA 169NE865; 215Ky368, 285SW209, 211 [quotCJ].

768-19 215Ky368, 285SW209, 211 [quotCJ].

768-24½-New. That an individual drawer of a trade acceptance conducted transactions under an assumed corporate name in violation of statute does not make the instrument void nor affect the rights of a bona fide holder of acceptance. 192Wis528, 213NW328.

768-26 174Ark547, 297SW1035; 175 Ark1155, 2SW(2d)20; 215Ky368, 285 SW209, 211 [quotCJ]; 48Nev319, 232 P206; 31NM344, 245P543, 545 [quot CJ]; 127Misc19, 215NYS279; TexCivA 299SW506 (rule stated but facts of case not within statute). But see 49SD554, 207NW662.

769-27 31NM344, 245P543, 545 [quot CJ].

769-33 [e] **Negotiable instrument dated on Sunday** (1) and signed on that day is not invalid in absence of proof that it was delivered on Sunday. 252 Mass552, 148NE105. (2) It will be presumed in absence of proof to contrary that it was delivered on secular day. 252Mass552, 148NE105.

769-34 9PaDist&Co 643.

769-36 132Misc343, 229NYS791; 49 SD554, 207NW662. But see NJSup 147 A380(1stcase).

770-39 164Ga880, 139SE658; MoA 16 SW(2d)104; 31NM344, 245P543. [d] **Bona fide holder of cashier's check transferred in gambling transaction** is not in position to complain that payment has been stopped. MoA 16SW(2d) 104.

770-40 MoA 16SW(2d)104; 31NM344, 245P543.

770-43 155Miss91, 124S69 (makers liable regardless of usury).

770-44 See also 133Misc512, 231NYS 656. [a] 127Misc19, 215NYS279.

770-45 [b] **Note usurious at inception** is unenforceable even by holder without knowledge. 216AppDiv734, 214NYS 252.

770-45½-New. An exception to the rule has been made by statute in the case where a bank purchased such note before maturity, 125Misc647, 211NYS 740.

770-45¼-New. and in good faith. 125 Misc647, 211NYS740.

772-54 234Ky469, 28SW(2d)507. [b] 196Wis178, 218NW830.

772-56 121Kan425, 247P637. But see TexCivA 22SW(2d)484.

772-57 121Kan425, 247P637.

772-58½-New. **In Arkansas** it is held that while a note not complying with the statute is void, an action may be maintained on the contract. 171Ark 978, 287SW187.

773-69 41 Ida642, 241P36; 134Misc 566, 236NYS265 [citCJ]; TexCivA 290 SW861; TexCivA 18SW(2d)914.

773-69½-New. The maker cannot defend that an intermediate indorser was a foreign corporation not lawfully doing business in the state; 232 IllA230.

773-69¼-New. a memorandum on the face of a note bearing an indorsement by an unlicensed foreign corporation that the suit had been brought on a note is immaterial as to the maker's liability, if the action was nonsuited; 232 IllA230.

773-72½-New. The rule applies to the failure of a foreign corporation to comply with a statute requiring such corporations to have authorized resident agents upon whom process can be served. 41 Ida642, 241P36.

773-72¼-New. **Ultra vires.** Trade acceptance regular on its face cannot be defeated in the hands of a bona fide purchaser without notice by a claim of the bank who accepted it that it was ultra vires as between drawer and acceptor. 241NY231, 149NE841.

773-72¾-New. A note given for stock sold in violation of the Blue Sky Law is not void in the hands of a bona fide purchaser. 46 Ida544, 269P96.

773-77 51SD502, 215NW529.

774-79 Contra 40GaA23, 148SE749.

774-86 But see 152SC199, 149SE593, 65ALR1334.

774-90 CalA 263P688 (indorser); 178 Minn545, 227NW654; 51SD502, 215NW 529.

774-91 51SD502, 215NW529.

775-94 97Tenn120, 36SW716, 56AmSR 788, 34LRA274.

775-98 See also 218Ala375, 118S561.

775-3 218Ala375, 118S561.

775-6 53SD37, 219NW949, 60ALR 1173. But see 123 Or95, 260P227.

776-10 125Me480, 135A95.

777-14 125Me480, 135A95.

777-16 125Me480, 135A95.

773-17 125Me480, 135A95.

778-23½-New. A bank cannot set up as against a holder in due course that the acceptance of a trade acceptance was ultra vires for lack of consideration therefor. 241NY231, 149NE841.

778-24 129Misc822, 222NYS733.

779-25 129Misc822, 222NYS733.

780-30 129Misc822, 222NYS733.

780-34 77CalA18, 246P126; 105Conn 434, 135A553; 201 Iowa1017, 206NW 134 (as against payee, fraud as defense must be brought home to him); 206 Iowa328, 218NW568; 206 Iowa507, 220 NW74; 121Kan784, 250P335; 121Kan 860, 862, 250P273 [citCJ]; 228Ky436, 15SW(2d)263; 228Ky802, 18SW(2d) 452; 249Mich573, 229NW449; 321Mo1, 9SW(2d)967; 99NJEq492; 133A703; 217AppDiv546, 217NYS97; 226AppDiv 82, 234NYS392; 123 Or111, 261P72; 98 PaSuper257; 53SD268, 220NW515; TexCommnA 24SW(2d)359. [a] 139 Okl 246, 281P771. [l] **Subsequent consideration** is immaterial, if note was procured by fraud. 43 Ida279, 251P 615. [m] **Where defense is conspiracy fraudulently to secure wife's signature,** immaterial if false representations were made before or after acts relied on to prove conspiracy. TexCivA 278SW503.

781-35 172Minn126, 214NW924. [b] **Giving renewal note with knowledge of fraud** waives defense. 202 Iowa961, 211 NW215.

782-36 56ND786, 219NW472.

782-42 199 Iowa1277, 203NW802.

782-43 MoA 274SW861. But see 199 Iowa1277, 203NW802.

782-47½-New. The fact that the payee or holder of a note became insolvent and went into the hands of a receiver does not preclude a defense on the ground that the note was procured by fraudulent representations as to its character. 178Minn15, 225NW913(2dcase).

782-47¼-New. Fraudulent promise by payee that note would not be transferred does not constitute defense to transferee's action whether or not he is holder in due course. Ala 130S405.

782-49½-New. Fraud of one maker against a joint maker entitled the latter to cancellation of the note in bonds of the one taking with knowledge of fraud. 200 Iowa157, 204NW250.

782-51 199 Iowa1277, 203NW802.

783-52 201 Iowa657, 208NW74; 50SD 179, 208NW786; TexCivA 289SW730.

783-54 168Minn70, 209NW484; 172 Minn126, 214NW924.

784-61 121Kan784, 250P335. [a] (4) Note executed in consideration of funds used by maker to purchase bank stock is not affected by fraudulent representations by third persons as to value of stock. 44 Ida599, 258P522. [b] Tex CivA 297SW875.

785-74 206 Iowa252, 220NW318 (statements must have been false when made). [a] **When not representations of existing fact** they do not vitiate notes. Iowa 231NW651.

785-75 Contra 121Kan784, 250P335.

785-77 13LaA661, 128S730.

786-79 [b] **False representation that homestead patent** could be obtained free from mineral reservation is held defense to action on note for relinquishment of homestead entry. 170Minn29, 211NW 964.

786-81 See also 127Me306, 143A173. [a] (5) TexCivA 291SW920.

786-83 43 Ida279, 251P615; 200 Iowa 967, 205NW781.

787-85 30F(2d)353; 177Ark544, 7 SW(2d)8; 105Conn434, 135A553; 46 Ida476, 269P85, 87 IndA69, 158NE646; 215Ky368, 285SW209; 224Ky134, 5 SW(2d)886; NJSup 149A41; NJCirCt 135A885; 249NY322, 164NE113; 217 AppDiv546, 217NYS97; 221AppDiv814, 223NYS439; 57ND804, 224NW206, 61 ALR1385; 128 Okl 233, 262P691; 39 OklACR326; TexCivA 21SW(2d)104; TexCivA 32SW(2d)372; 143Va1, 129SE 371; 187Wis39, 203NW915. [f] **Where renewal note was given for one induced by fraud,** there is no issue of plaintiff being bona fide holder. 202 Iowa961, 211NW215.

788-86 177Ark243, 6SW(2d)305; 179 Ark910, 18SW(2d)903; 38GaA668, 145 SE101; 48Nev319, 232P206; 217App Div546, 217NYS97.

788-87 [a] 143Va1, 129SE371.

788-88 221AppDiv814, 223NYS439; 283Pa406, 129A333.

789-93 164Ga880, 139SE658; 166Ga 889, 144SE772.

789-94 35GaA366, 133SE284; 39GaA 287, 146SE645.

790-95 252 IllA68.

790-98 252 IllA68; 203 Iowa82, 212NW 377. [a] **Exclusion of evidence of fraud.**–95CalA505, 273P39.

790-99 TexCivA 294SW1113, 1114 [cit CJ].

791-3 229Mich619, 201NW949; 316Mo 1338, 296SW375; 192NC798, 136SE118; 119 Or460, 249P1054, 1056 [quotCJ]; 124 Or468, 263P71; TexCivA 294SW

1113, 1114 [citCJ]; **Ont** [1929] 4**Dom LR**999.

792–9 252 **IllA**68.

792–10 224 **IllA**271; 229**Mich**619, 201 **NW**949; **TexCivA** 294**SW**1113.

792–12 116 **OhSt**230, 156**NE**205, 208 [quotCJ].

793–13 119 **Or**460, 249**P**1054, 1056 [quotCJ].

793–14 119 **Or**460, 249**P**1054, 1056 [quotCJ].

793–16 119 **Or**460, 249**P**1054, 1056 [quotCJ].

793–17 119 **Or**460, 249**P**1054, 1056 [quotCJ].

793–18 252 **IllA**68; **TexCivA** 294**SW** 1113.

794–20 226**AppDiv**82, 234**NYS**392.

796–27 192**NC**69, 133**SE**415; 138**SC** 295, 136**SE**222. See also 16**F(2d)**248.

796–34½–New. Fraud of the indorser in negotiating a note does not render transfer void, but at the most voidable at the instance of those defrauded. 246 **Mich**674, 225**NW**613, 66**ALR**797.

796–38 30**F(2d)**353; 244 **IllA**171; 244 **IllA**251, 255 [citCJ]; 227**AppDiv**283, 237**NYS**577.

797–39 **ND** 232**NW**307.

797–41 244 **IllA**251, 255 [citCJ]; **Tex CommA** 16**SW(2d)**278. See also 73 **Mont**219, 236**P**250; 253**NY**359, 171**NE** 569.

797–48 151**SC**274, 148**SE**887.

798–57 246**Mich**674, 225**NW**613, 66 **ALR**797.

798–59 68**CalA**40, 228**P**662; 321**Mo** 199, 9**SW(2d)**901, 60**ALR**639.

799–64 229**Ky**383, 17**SW(2d)**253.

799–72 [d] **Transfer for consideration of love and affection** is no defense to action by payee's personal representative. 35**GaA**39, 131**SE**922.

801–84 165**Minn**121, 205**NW**951; **Utah** 273**P**760.

801–86 246**Mich**674, 225**NW**613, 66**ALR** 797.

801–99 6**LaA**624. [d] (3) Averment that defendant is informed, believes, and expects to be able to prove that amount of note was paid after maturity to plaintiff by payee is insufficient. 6**PaDist &Co** 346.

802–2 251 **IllA**234; **Mass** 165**NE**474; 101**WVa**553, 133**SE**129; **Alta** [1928] 3 **DomLR**93.

802–3 See also 101**WVa**553, 133**SE**129.

802–7½–New. Acceptance is not subject to defense of payment against holder in due course for value, before maturity. 10**F(2d)**141.

802–7½–New. Remittance payable to the estate of the payee of a note is not payment where the note had been assigned. 85 **IndA**624, 155**NE**261.

802–12 195**Wis**131, 217**NW**645.

803–17 Contra 36**GaA**682, 137**SE**841.

803–18½–New. Maker of nonnegotiable note who, after its execution and before knowledge of transfer, deposited the amount of the note with the payee banker subject to check may plead claim against the transferee where the maker under an arrangement with the bank to apply the deposit on the note did not withdraw any part thereof. 202 **Iowa** 15, 209**NW**516.

803–18½–New. An allegation by the maker that he never withdrew any part of such deposit from the bank is a sufficient averment of his continued ownership of the deposit. 202 **Iowa**15, 209 **NW**516.

803–18¼–New. Where a shipment of goods given as security for payment of draft is accepted with a bill of lading by the bank, the bank is not precluded by its sale of shipment from collecting on the draft from the drawee who had refused to accept the shipment because not up to grade. 135**Wash**389, 237**P** 729.

803–18½–New. It is no defense available to an accommodation maker that the principal maker has been adjudicated a bankrupt and that his estate has not been finally administered. 50**SD** 338, 210**NW**103.

803–18½–New. A creditor's refusal to deliver corporate stock deposited by a coindorser as collateral security for payment of a note to defendant indorser tendering payment on condition that the creditor would deliver such collateral to him, where the right to have the stock delivered to defendant was at issue between defendant and coindorser, not a party to the suit, was no defense to a suit on the note. 156**Md**200, 144**A**249, 62**ALR**546.

803–18½–New. Indorsement of a trade acceptance by the payee without transferring security is not a defense to a suit by the indorsee against the maker. 38**GaA**601, 144**SE**806.

803–22 253 **IllA**475; 115 **Okl** 227, 242**P** 770 (recoupment). [b] 43 **OklACR**263.

804–24 51**SD**607, 216**NW**347.

804–28 180**Ark**616, 22**SW(2d)**19 (damages from fraud of assignor). [a] (2) Such defense may not be set up as counterclaim. 131**Misc**471, 227**NYS**289. [b] **Legal services** rendered to one through whom plaintiff holds notes is proper offset to action on note. 125**Misc**741, 211 **NYS**593.

804–32 85**CalA**173, 259**P**97; 207 **Iowa** 1254, 219**NW**496; 49**RI** 18, 139**A**466; 51**SD**607, 216**NW**347.

805–33 51**SD**607, 216**NW**347 (where transferee took with notice of payee bank's insolvency).

805–36 93**PaSuper**392; **SD** 226**NW**751. [a] (2) Other instances. **SD** 226**NW** 751.

806–44½–New. The fact that duly authorized officers of a corporation in indorsing in the name of the corporation a promissory note payable to it were not in good faith furthering the interest of the corporation will not affect the rights of an indorsee in good faith who is not chargeable with knowledge of the bad faith of such officers. 203 **Iowa**792, 206**NW**586.

806–57½–New. statement of payee of note to the maker at the time of execution that he would never be called upon to pay it; 81**Mont**248, 263**P**693, 697 [citCJ].

806–60 205 **Iowa**1185, 219**NW**315; 108 **WVa**342, 150**SE**904.

806–61½–New. An indorsement after maturity gives no defense to the maker against the holder as to incapacity of prior indorsers, as the statute giving the right to defenses on transfer after maturity does not include such defense. 232**IllA**230.

807–67½–New. That payee secured indorser without consent of maker is no defense in an action against the maker. 211**Ky**126, 277**SW**310.

807–67½–New. A discharge in bankruptcy is no defense where the debt was not scheduled and the creditor had no notice or knowledge of bankruptcy proceedings. 85**PaSuper**175.

807–67¼–New. Deficiency in a guaranty fund does not relieve a stockholder of liability on a note where not conditional on raising the full amount. 259 **Mass**596, 156**NE**749.

807–67½–New. Where the payee of a note agreed that it would, on obtaining title to certain land through foreclosure of mortgages, escrow such land as security for payment of the note subject to any interest it might have therein on account of mortgages and costs and expenses of foreclosures, its failure to fulfill such agreement did not raise "estoppel," but was at most a breach of contract which would not relieve the makers from liability on the notes. 31 **F(2d)**27.

807–67½–New. Bank discounting note has been held not required, on maker's default, to charge note against payee carrying line of credit with bank. **NJ** 151**A**72.

807–67½–New. Where the transferee has obtained judgment and tried to collect payment against the payee, his delay therefrom in suing the maker is not laches. 153**Va**190, 149**SE**537.

807–18½ 217**MoA**131, 273**SW**197; 37 **Wyo** 50, 259**P**181, 183 [quotCJ].

807–18½–New. Intervenor's right of action to recover fund can stand on no higher footing than if the action had been on a draft. 143**Va**1, 129**SE**371.

807–18¼–New. The payee is entitled to recover against the maker, in the absence of showing of any defense between the latter and the equitable owner. **Tex CivA** 293**SW**884.

807–19 37**Wyo** 50, 259**P**181, 183 [quot CJ].

807–20 172**Ark**747, 290**SW**586; 37**Wyo** 50, 259**P**181, 183 [quotCJ].

807–21 **CalA** 285**P**734.

807–22 **Ala** 127**S**813 (suit lies on unpaid check as on promissory note); 217 **Ky**766, 290**SW**722; 89**CalA**250, 264**P** 519. [a] (3) Right to sue on original claim revives when payment refuses. **Sask** [1930] 1**DomLR**888.

808–25 [a] Suit should be on oral agreement, on new consideration. **Tex CivA** 24**SW(2d)**485.

808–36 50**ND**549, 197**NW**143 (conditional renewal note and surrender of original note where condition not performed); 50**ND**583, 197**NW**150, 152 [cit CJ] (where payee retains possession).

808–39 6 **Ind**23. But see 13**BarbNY** 230. Contra 164**Cal** 419, 129**P**462.

808–40 But see 1**Thomps&C**143 [aff 59 **NY**228] (holding that 26**NY**406, is overruled in principle by 49**NY**183, 187). Contra 21**NY**490.

808–41 1**Thomps&C**143 [aff 59**NY**228].

809–45 See also 330 **Ill** 589, 162**NE**209.

809–56 200 **Iowa**585, 203**NW**303.

810–64 **WVa** 155**SE**644.

811–65 96**CalA**248, 274**P**78; 126**Me**133, 136**A**696; 225**AppDiv**171, 232**NYS**373.

812–70½–New. or to one without title holding under a forged indorsement, 153**Tenn**113, 282**SW**194.

812–72½–New. A common count for money had and received will not support an action against an officer of a corporation as indorser of a check to the corporation. 85**CalA**43, 258**P**651.

815–7 95**PaSuper**280 (defenses preventing summary judgment).

815–12 [c] **Indorser may be sued for breach of warranty** of capacity of maker to contract without first suing maker. 21**AlaA**515, 109**S**576.

815–15 86**Colo** 169, 279**P**42.

815–16 See also 8**LaA**483.

815–17½–New. Demand for payment made six weeks after notice that securities for cancellation were forged is sufficient. 215**Ala**476, 111**S**29.

815–18 **MoA** 272**SW**83.

815–19 214**Ala**452, 108**S**69.

815–23½–New. Before recovery on an original note, the renewal note must be returned, or it must be shown to have been destroyed and not negotiated. **Tex CivA** 4**SW(2d)**253.

815–25 44**Ida**27, 255**P**303.

816–26½–New. Statute authorizing suit against the maker within a given time to fix liability of the indorser provides an additional method of fixing liability, and does not apply where liability is fixed by notice. **TexCivA** 4**SW(2d)**253.

816–26½–New. Indorsement waiving grace and protest waives notice, so that suit against the maker is not essential to fix liability. **TexCivA** 4**SW(2d)**253.

816–26¼–New. Where the cashier of a bank holding a note is the indorser, he is conclusively presumed to have notice, dispensing with suit against the maker. **TexCivA** 4**SW(2d)**253.

816–29 [h] **Effect of maturity at time of amended complaint.–TexCivA** 30 **SW(2d)** 419.

816–31 253**Mass**528, 149**NE**321.

816–31½–New. An action commenced on the day following maturity is not premature. 149**Wash**158, 270**P**425.

817–35 226**Ky**137, 10**SW(2d)**636.

817–38½–New. Liability of maker on notes given bank to secure depositors is not postponed until determination of whether insolvent bank can pay them. 233**Ky**648, 26**SW(2d)**556.

817–41 136**Wash**538, 241**P**5. [b] **Option to declare instrument due and payable** requires manifest act. 34**F(2d)** 334 (secret intention not sufficient). [c] **Where note becomes entirely due on failure of payment of any installment,** acceptance of belated first installment because of delay in executing arrangements does not constitute waiver of holder's right to exercise his right to sue upon later breach. **TexCivA** 19 **SW(2d)** 572 (holder's relinquishing rights under old contract held not to waive rights under one substituted).

817-45 111Conn568, 150A524 (exercise of option in acceleration clause).
819-67 35GaA5, 131SE524.
819-68 119 Okl 149, 249P424. [a] Tex CivA 11SW(2d)242.
819-69 121 Okl 103, 247P402; TexCivA 11SW(2d)242.
820-70½-New. In Kansas action may be brought where either of proper parties defendant can be summoned. 119 Kan796, 241P462.
820-70½-New. In some jurisdictions an action against the maker of a note must be prosecuted in a court of jurisdiction in the county of his residence or in some county where he may properly be served with summons. 121 Okl 103, 247P402.
820-71 [a] (2) Cause of action in favor of holder of bill against drawer accrues within state where bill was drawn, and not at place in which it was drawn. 222MoA426, 7SW(2d)290.
820-77 115 Okl 283, 242P1044 (holder may sue in own name); TexCivA 273 SW1022; 192Wis300, 212NW638, 641 [citCJ] 51ALR 605.
820-78 223Ky510, 4SW(2d)403 (assignee after maturity for collection only).
820-80 120Kan303, 243P278; 130 Okl 54, 265P128.
820-83 323 Ill 594, 154NE701; 125Kan 85, 262P561.
821-84 Ala 130S551; 37GaA523, 140 SE793; 40GaA679, 150SE860; 247 IllA 429; 215Ky368, 285SW209, 211 [citCJ]; 169Minn321, 211NW163; 51SD477, 215 NW533, 58ALR1276; TexCivA 30SW (2d)419.
821-85 228AppDiv302, 239NYS511.
822-88 243 IllA159; 243 IllA526; 125 Kan85, 262P561; 146Miss837, 112S 465 [citCJ].
822-91 123Kan211, 255P77; 125Kan 85, 262P561; 146Miss837, 112S465 [citCJ]; 104NJL347, 140A331; 104NJL 375, 140A463, 464 [quotCJ]; 134 Okl 215, 273P349.
822-92 123Kan211, 255P77; 125Kan 85, 262P561.
823-93 TexCivA 7SW(2d)644.
823-94 [a] 104NJL375, 140A463, 464 [quotCJ].
824-5 236Mich221, 210NW237; 193NC 660, 137SE865; 155SC436, 152SE658.
824-7 [b] In North Carolina.-193NC1, 136SE259.
825-13 200 Iowa366, 202NW568 (assignee of account evidenced by note indorsed to him may sue thereon).
825-14 Minn 230NW260; 221MoA577, 284SW156.
825-18 49SD466, 207NW471.
829-51 38GaA286, 144SE33.
829-56 86CalA507, 261P747; 123Kan 211, 255P77; 127Kan16, 272P108; TexCivA 2SW(2d)961.
830-69½-New. A drawee suing as nominal plaintiff is only subject to defenses valid against the drawer who is the real party in interest. 232 IllA186.
830-70 163La919, 113S147.
831-72 45 Ida451, 262P1057; 248 IllA 35; 202 Iowa799, 211NW373.
831-75 42 Ida1, 243P355.
833-97 29F(2d)555; Ala 130S405; 96 CalA451, 274P358(2dcase); 248 IllA428.
833-3 100CalA163, 280P174; CalA 288 P830; Fla 129S865; 225Ky12, 7SW (2d)492; 176Minn246, 223NW287; Mo 19SW(2d)740; MoA 25SW(2d)523; 137 Misc396, 241NYS76; 130 Okl 54, 265P 128; 131 Okl 235, 268P286; 122 Or675, 260P235.
834-7 200 Iowa366, 202NW568 (account evidenced by indorsed note).
835-10 TexCivA 2SW(2d)961.
838-49 93CalA509, 269P749; 29Hawaii 434. [f] In North Carolina.-193NC1, 136SE259.
839-63 38GaA764, 145SE528, 119Kan 630, 240P398. See also 225Ky12, 7SW (2d)492.
840-66 202 Iowa1371, 212NW133.
843-95 224AppDiv376, 231NYS201.
843-5 56ND21, 215NW870, 873 [cit CJ].
844-17 192Wis300, 212NW638, 641 [cit CJ], 51ALR605. [a] (2) Where transfer was executed by pledgee and pledgor, and consideration credited upon debt of latter, transferee has prima facie right of recovery. TexCivA 289SW1018.
844-21 37GaA693, 141SE668 (payment pending suit).
844-25 52SD594, 219NW477, 478 [cit CJ]; 192Wis300, 212NW638, 641 [cit CJ], 51ALR605. [a] General property and title remain in one indorsing note and delivering it to bank as collateral. 128Me280, 147A205, 65ALR1316 (special rights of bank waived by consent to suit by its indorser).
845-27 128Me280, 147A205, 65ALR 1316 (note delivered to owner before trial).
845-37 128 Or542, 274P914.
845-41 But see TexCivA 20SW(2d)811.
846-45 173Ark1160, 293SW1037; 35 PortoRico 879 (payee); TexCivA 20SW (2d)811.
846-56 LaA 130S672; 193NC660, 137 SE865, 866 [quotCJ].
847-62 104NJL375, 140A463.
848-76 169Minn392, 211NW470; TexCivA 19SW(2d)329 (one having interest in note held proper party defendant); 105WVa405, 143SE102 (agent not necessary party on note signed by him).
849-78 112 Okl 77, 239P617 (action on due bill given by one of joint debtors); TexCivA 284SW289; 37Wyo 365, 261P 905. See also TexCivA 10SW(2d)227.
849-79 [a] Payee's rights are not affected by his not knowing real obligors at time of accepting note. 142Wash306, 252P934.
849-79½-New. In a suit affecting notes payable to the bearer, the holder of the notes is a necessary party. 107WVa 605, 149SE837.
849-81 174Ark194, 295SW38.
849-83 35GaA786, 134SE789; 20 OhA 493, 152NE731.
850-90 WVa 154SE877(1stcase).
850-92 126Me423, 139A225, 226 [quot CJ].
851-93 126Me423, 139A225.
852-9 249 IllA390; 119 Okl 149, 249P 424; 121 Okl 38, 248P869; TexCivA 10 SW(2d)408; 146Va357, 131SE803.
853-13 98Fla792, 124S275; Fla 130S 725; 290Pa454, 139A159.
853-18½-New. Ordinarily an indorser cannot compel the holder of a note to sue the maker first. 192Wis300, 212NW 638, 51ALR605.
853-20 37GaA32, 138SE592; 205 Iowa 514, 218NW288; 121 Or173, 254P815, 816 [citCJ]; TexCivA 294SW687.
854-24 [a] (3) Statute held not to authorize joinder of maker and one becoming indorser after original delivery of negotiable instrument. 93Fla177, 111S 516.
854-28 205 Iowa514, 218NW288.
855-40 NJCir 140A583.
855-42½-New. Drawer of draft who deposits it for collection and receives the amount in cash or its equivalent, the draft not being paid, although legally accepted, is a proper and necessary party in an action to determine rights of the collecting bank. 119 Okl 149, 249P 424.
855-44 174Ark194, 295SW38.
856-48 195Wis120, 217NW746, 56ALR 915.
856-49 121 Okl 38, 248P869.
856-59 195Wis120, 217NW746, 56ALR 915.
857-63 [a] (3) Special counts charging jointly maker and assignor held bad on demurrer. 108WVa539, 151SE849 (former adjudications overruled).
857-85 220Ala683, 127S500(2dcase); 31Ariz201, 251P445; 37GaA63, 139SE 123; 37GaA523, 140SE793; 40GaA517, 150SE439; 4LaA255; 4LaA447; 75 Mont516, 244P494; 50SD97, 208NW 582; TexCivA 279SW881. [a] (2) Complaint sufficient to state cause of action against defendant as maker. 52ND25, 201NW688.
860-3 36GaA682, 137SE841.
860-5 But see 36GaA682, 137SE841.
860-10 12LaA135, 125S463; 50SD97, 208NW582.
861-29 220Ala683. 127S500(2dcase) (unless plea demands showing of negotiability).
865-79 38F(2d)457. [b] In Montana.-75Mont52, 243P1082.
866-87 86Colo 169, 279P42 (complaint held demurrable).
867-98 51ND246, 199NW930, 931, 934, 936, 938 [citCJ].
867-8 MoA 15SW(2d)912.
868-9 217AppDiv59, 216NYS437; 198 NC14, 150SE668.
869-27 36GaA156, 136SE98.
869-30 48 Ida405, 283P519.
869-33 TexCivA 24SW(2d)485 (oral agreement sufficiently pleaded).
870-46½-New. Checks. Failure to allege drawer not injured by delay in presentment is bad on demurrer where petition shows that the drawer countermanded payment. 211Ky134, 277SW 307.
871-56 88 IndA557, 163NE535.
871-57 215Ky368, 285SW209.
872-69 186 IllA553.
872-72 34PortoRico 292.
872-73 34PortoRico 292.
873-74½-New. Where a debt represented by a forged note has become binding by reason of a new promise, the creditor, to recover, must allege such promise and the consideration by which it is supported. 197 Ind222, 150NE312.
873-75 TexCivA 12SW(2d)601; TexCivA 13SW(2d)947; 36Wyo 245, 254P 127, 128 [citCJ].
873-76 [a] Allegation that note signed by corporation and directors was "executed" by directors does not indicate that directors bound themselves personally. 36Wyo 58, 252P1036, 51ALR315.
873-78 See also 215Ky368, 285SW209.
873-79 36Wyo 58, 252P1036, 51ALR 315; 36Wyo 245, 254P127, 128 [citCJ].
873-84 97Fla50, 119S788.
874-93 36Wyo 245, 254P127, 128 [cit CJ].
875-5 37GaA433, 140SE408.
875-8½-New. Where it appears that the instrument in question contains words indicating that an impersonal principal is a maker and that its name was affixed by a person purporting to act for it, it is ambiguous as to whether he was "duly authorized" under the statute, 52ND25, 201NW688.
875-8½-New. and a complaint seeking to hold individually the person so purporting to act for the impersonal principal is deficient which fails to allege absence of authority to sign for such principal. 52ND25, 201NW688.
876-17 [a] See also 52ND25, 201NW 688 [citCJperBronson,CJ]. [c] See also 52ND25, 201NW688, 690 [citCJperBronson,CJ].
877-27 111Conn65, 149A234; TexCivA 275SW858 (allegation that makers were insolvent held not nullified by allegation that plaintiff held liens on their property).
879-57 [c] Prayer for interest not specifying rate is deemed prayer for legal interest. 203Cal 219, 263P1007.
879-58 37GaA563, 140SE902.
879-60 164Ga880, 139SE658 (allegations held to show notice); 119Kan796, 241P462 (allegations held sufficient to charge liability of indorser whether instrument was negotiable or not).
880-78 215Ky368, 285SW209.
881-82½-New. Maturity need not be alleged where notes as pleaded show their maturity prior to action. 50SD97, 208NW582.
881-89 37GaA63, 139SE123.
882-97 136Wash538, 241P5.
882-2 215Ky368, 285SW209.
882-2½-New. Under statute, nonpayment of a debt evidenced by an instrument need not be alleged. 215Ala72, 109S361.
885-31 37GaA523, 140SE793; Minn 230NW260 (sufficient); 228AppDiv302, 239NYS511. [g] One suing in representative capacity must allege facts showing his authority to sue. 34F(2d)491.
885-33 72CalA757, 238P143, 145 [cit CJ].
886-40 125 Okl 181, 256P352. See also 48 Ida217, 281P4.
886-47 76CalA572, 245P777.
886-48 326 Ill 226, 157NE245; 75Mont 516, 244P494 (complaint held sufficient); 51SD151, 212NW866.
887-49 51SD151, 212NW866, 867 [cit CJ].
887-50 51SD151, 212NW866, 867 [quot CJ].
887-51 68CalA40, 228P662 (must allege valid assignment if claiming as as-

signee); 51SD151, 212NW866, 867 [quotCJ].

887-53 51SD151, 212NW866. [k] **Allegations of pro tanto ownership held sufficient.**–MoA 290SW105.

888-54 32Ariz588, 261P45.

888-55 51SD151, 212NW866. See also 98PaSuper257.

888-59 [a] (4) Averments held sufficient. 85Colo 544, 277P298.

889-70 51SD151, 212NW866, 868 [cit CJ].

889-71 51SD151, 212NW866, 868 [cit CJ].

889-72 117 Or374, 243P554.

889-73 117 Or374, 243P554.

890-84 34F(2d)491 (legal capacity not shown).

890-85 111Conn626, 151A168; 240NY 618, 148NE729; 122 Or675, 260P235; TexCivA 300SW648.

890-88 MoA 22SW(2d)1052; MoA 25 SW(2d)523. [a] **Holder of note indorsed without recourse** is not required to rely on indorsement where he alleges ownership and possession. MoA 22SW (2d)1052.

891-94 218AppDiv475, 218NYS465.

891-96 See also 127Misc177, 215NYS 436.

891-97 [e] (2) In action by payee, copy of note showing no indorsement thereon attached to petition is good as against general demurrer. 125 Okl 181, 256P 352.

892-5 [d] **Allegations held insufficient.**–215Ky368, 285SW209.

892-16 32Ariz588, 261P45.

892-22 [h] **Plaintiff's title held not sufficiently shown.**–40GaA679, 150SE860.

893-26 51SD477, 215NW533, 58ALR 1276.

894-39 [e] **Allegations held insufficient.**–215Ky368, 285SW209.

894-41 TexCivA 30SW(2d)494.

896-61 127Misc177, 215NYS436.

896-62 127Misc177, 215NYS436.

897-73 37GaA523, 140SE793.

900-13 32Ariz552, 261P33.

901-19 133SC315, 131SE41 (notice to indorser must be both alleged and proved); TexCommnA 274SW127; Tex CivA 276SW773; 195Wis120, 217NW 746, 56ALR915; 200Wis379, 228NW 488. [e] **Allegations held insufficient.**–TexCommnA 274SW127.

902-31½-New. But in a suit against anomalous indorsers, whose indorsement is not necessary to pass title, such allegation is unnecessary. 35GaA5, 131 SE524.

902-32 See also 30 OhA132, 163NE506.

902-35 [b] (2) Other instances. 111 Conn626, 151A168 (where indorser was dead).

903-46 223AppDiv161, 227NYS589.

903-57½-New. An allegation that at the time and place a note became due plaintiff demanded payment of indorsers is a sufficient allegation of notice to them of dishonor and nonpayment. TexCivA 290SW769.

904-63 205 Iowa399, 218NW51 (presentment on due date must be alleged).

905-72 205 Iowa399, 218NW51 (notice within time required by statute must be alleged).

906-83 236 IllA307; 133SC315, 131SE 41, 42 [quotCJ]. [c] **Waiver by drawer of duty to present check promptly** must be specifically pleaded. 255 IllA578.

907-84 133SC315, 131SE41 [quotCJ] (necessity of alleging waiver or substitute is imperative); TexCommnA 274 SW127; TexCivA 276SW773; 195Wis 120, 217NW746, 748 [citCJ] 56ALR915.

908-93 [1] (1) 222Ky708, 2SW(2d)401.

908-1 222Ky708, 2SW(2d)401.

909-11½-New. [§ 1193a] 28. **Payment of Tax.** A petition for recovery on promissory notes of more than eight months' duration is not subject to demurrer for failure to allege that the tax provided by statute on such notes has been paid. 138 Okl 40, 280P271.

909-24½-New. Affidavit of merits. 28 Hawaii 255.

910-27 166Ga889, 144SE772; 38GaA 504, 144SE340(2dcase); 179Minn586, 229NW565 (insufficient to show note connected with matters alleged); 225 AppDiv612, 234NYS73 (held insufficient); 191NC422, 131SE765. [b] **Estoppel to deny forgery of note** held insufficiently pleaded. 197 Ind222, 150 NE312. [c] **Allegations held sufficient.**–86PaSuper492. [d] **Counterclaim held to state cause of action** to recover money paid under mistake of fact. MoA 290SW1022.

910-31 [a] **Plea that note given in representative capacity.**–Averment of knowledge and notice on part of payee of facts alleged is material. 92Fla210, 109S632.

910-31½-New. An answer attempting to change the effect of a written general indorsement, and alleging indorsement without recourse, is insufficient in the absence of allegations of fraud, artifice, surprise, or mistake. 126 Okl 251, 259P268.

910-31½-New. Plea held to admit only execution of notes, maturity dates and interest but not attorney's fees. 40GaA 289, 149SE323.

910-36 [a] **Parol agreement.**–35GaA 784, 134SE841. [b] **Answer alleging agreement with payee through payee's agent.**–35GaA784, 134SE841.

910-38½-New. An answer which fails to deny, admits every allegation contained in the complaint, 125Misc876, 212NYS393.

910-38½-New. except nonpayment. 125Misc876, 212NYS393.

910-41½-New. Such pleas are inappropriate in an action of debt on a nonnegotiable specialty bearing seal, and are demurrable. 153Md235, 138A261, 53 ALR1165.

910-42 228Ky144, 14SW(2d)416; 217 MoA131, 273SW197.

910-44 85Colo 251, 274P928.

910-46½-New. Denial of knowledge or information sufficient to form a belief, by an individual defendant in a suit on a promissory note, is insufficient. 127 Misc373, 216NYS273.

910-46½-New. The defense that acceptance of a draft was conditional is raised by a general denial where the petition alleges presentment and demand in accordance with acceptance. 220 MoA1062, 282SW86.

910-46¼-New. In an action on a note, an answer, constituting in effect a general denial, admitted defendant's signature on the note. 10LaA240, 120S399 (2dcase).

911-50 234 IllA325; 86 IndA75, 156 NE176; 50ND455, 196NW307. [d] **Demurrer** cannot raise such defense. 211 Ky134, 277SW307. [e] **Allegations held sufficient.**–GaA 155SE71.

911-51 50SD162, 208NW783 (want of fair consideration).

911-53 50SD162, 208NW783.

911-55 202 Iowa15, 209NW516. [c] **Such allegation is not justified** by additional allegation of fact that transferee took note as "donation or gift." 202 Iowa15, 209NW516.

912-61 102Conn620, 129A788 (in action by payee against maker, plea that note was accommodation paper and without consideration held equivalent to denial that holder (payee) was "holder in due course").

914-73 9LaA664, 120S79.

914-74 WVa 155SE117.

915-83 229AppDiv466, 242NYS583; TexCivA 9SW(2d)468 (notice to agent).

915-86 34GaA32, 128SE13 (allegation of publication in newspaper insufficient to withstand special demurrer).

915-88½-New. A plea of non est factum by a partner is demurrable where it fails to allege that plaintiff took with notice that executory partner was without authority to bind the answering partner. 35GaA209, 132SE268.

916-7 54ND122, 208NW831; 50SD162, 208NW783.

916-8 11LaA159, 123S171.

916-9 82CalA240, 255P254.

916-10 36GaA788, 138SE256; 128Kan 553, 278P741(1stcase); 216Ky509, 287 SW974; 49ND585, 192NW491; 54SD 401, 223NW330(1stcase).

917-15 [a] **Third party beneficiary** is not precluded. 215Ala598, 111S641.

918-18 35GaA509, 134SE115; 74Mont 549, 241P613; 49ND585, 192NW491; 43 OklACR47 [reh pending]; TexCivA 31SW(2d)329.

918-19 55AppDC267, 4F(2d)879; 299 Pa225, 149A471; TexCommnA 280SW 194.

918-21 See also 90CalA759, 266P373.

919-24 33NM28, 262P182, 184 [quot CJ].

919-31 215Ala598, 111S641. [e] **If facts stated in answer** show failure of consideration, they must be treated as plea in bar to suit. TexCivA 27SW(2d) 255 (answer held plea in bar).

920-32 92Fla763, 110S265; 9LaA664, 120S79; TexCommnA 272SW771; Tex CivA 19SW(2d)800.

920-33 37GaA792, 141SE925; 124 Or 157, 264P368.

921-42 [b] (2) 90Fla448, 106S401; 11 PaDist&Co 277.

922-49 130 Okl 40, 265P110.

922-56 33NM28, 262P182, 185 [quot CJ].

922-57 217AppDiv59, 216NYS437.

923-53 217AppDiv59, 216NYS437.

923-67 77Mont477, 251P517.

924-68 Ida 286P364.

924-71 217MoA131, 273SW197.

924-75 TexCommnA 276SW647 (plea of forgery by raising of amount).

924-86 165La694, 115S905.

925-94 4LaA634.

926-1 [i] **Necessary import of plea of non est factum may be such as to restrict it** to alterations after signing, so that authenticity of signature is admitted or proves itself. TexCommnA 276 SW647 (authenticity of signature admitted by plea of forgery by raising amount of note).

926-5 226Ky412, 11SW(2d)107.

926-11½-New. Delivery of check is put in issue by allegation of theft. 253NY 359, 171NE569.

926-12 234 IllA552. [c] See also 165 La694, 115S905.

927-19½-New. A plea alleging an agreement to secure additional signers of a note before it was to become binding must state the name of such parties to be good. TexCivA 286SW481.

927-20 See also TexCivA 286SW481.

927-20½-New. Absence of valid delivery is an affirmative defense and must be pleaded. 43 Ida80, 251P295 (conditional delivery).

927-22 [b] **Even though answer merely denying indebtedness constitutes general denial,** where not under oath, it cannot act as denial of execution of note. 217MoA131, 273SW197.

928-23 Minn 230NW785.

928-31 [b] (3) In action on trade acceptance by holder against acceptor, allegations in answer that assistant manager of drawer had no authority to indorse paper and no ratification of his act were insufficient. 38GaA601, 144SE 806.

929-35 35GaA209, 132SE268.

930-56 220MoA514, 275SW964.

930-61 128Kan553, 278P741; 54SD 401, 223NW330(1stcase).

930-62 35GaA509, 134SE115; 216Ky 509, 287SW974; 231Ky660, 21SW(2d) 1019 (misrepresentation based on facts known to both parties alike); 127Me 383, 143A600; 53ND1, 204NW847 (answer held insufficient); 124 Or157, 264 P368; 92PaSuper146; TexCommnA 288 SW826; 102WVa484, 135SE606. [h] **Identity of persons who made representations.**–214Ala452, 108S69. [i] **Estoppel.**–214Ala452, 108S69. [j] **Pleas held insufficient.**–214Ala452, 108S69.

931-63 90CalA717, 266P550 (answer held sufficient to raise issue of constructive fraud); 321Mo 1 9SW(2d)967; MoA 274SW112; 49ND585, 192NW491; 124 Or468, 263P71; TexCommnA 68SW (2d)105 (promise with no present intention to perform); TexCivA 19SW(2d) 800.

931-64 234 IllA325; 239 IllA256; 86 IndA392, 156NE568 (answer held not to allege fraud). [c] **Maker's plea of fraud held good.**–213Ala675, 106S171.

931-67 89 IndA545, 167NE136; MoA 274SW112.

931-70 MoA 9SW(2d)856.

931-70½-New. The maker of a renewal note defending on the ground that he was induced to sign it by false representations of the indorsee of the original note that he was a holder without

notice or knowledge of fraud in the original note, must plead that he returned or tendered everything of value received by him for the original note. 200 **Iowa**568, 203**NW**9.

931-70½-New. Fraud is an affirmative defense and must be pleaded. 206 **Iowa** 328, 218**NW**568.

932-81 **MoA** 218**W(2d)**200.

933-85 39**Wyo** 454, 273**P**679 (admission of transfer to plaintiff).

933-92½-New. Where a contractor gives a check to one of his subcontractors, with the understanding that the subcontractor would expedite his work, and, upon failure of the subcontractor so to expedite the work, the contractor stopped payment upon the check after it had been cashed by the payee, but not before it had been cleared by the drawee bank, it is no defense to a suit by the bona fide holder of the check against the maker, to allege that he is not a holder in due course, without further alleging that the signature of the payee was forged or added without authority. 30 **OhA**27, 164**NE**58.

937-37½-New. A defense that the payee of notes by sale thereof had put it beyond his power to waive the notes and sue on the original obligation must be made by special plea setting up the facts. **Or** 284**P**179.

937-38 203**Cal** 190, 263**P**530.

938-40 220**AppDiv**667, 222**NYS**421.

940-66 36**GaA**682, 137**SE**841; 130**Misc** 904, 225**NYS**731 (that agreement between maker and holder discharging indorser was for valuable consideration and that indorser was ignorant thereof). [m] **Noncompliance with conditions.**-215**Ala**384, 110**S**809.

940-70½-New. An answer setting up foreclosure of mortgage on realty securing note and acceptance of proceeds as satisfaction need not expressly allege that effect of foreclosure was governed by law of the state where the property was situate. 103**Conn**503, 131 **A**25.

940-73 130**Misc**168, 223**NYS**401.

940-76 168**La**383, 122**S**118.

941-77 160**La**839, 107**S**593; 95**PaSuper** 280 (rule not too strictly applied).

941-81 130**Misc**168, 223**NYS**401.

942-3 160**La**839, 107**S**593. [b] **Plea insufficient.**-**TexCivA** 258**W(2d)**913. [c] **Plea construed as one of part payment.**-**GaA** 155**SE**71.

942-8 39**GaA**330, 147**SE**130. [a] (2) Allegation held sufficient as against general demurrer. **TexCivA** 228**W(2d)**338.

942-9 214**Ala**452, 108**S**69; **TexCivA** 10 **SW(2d)**227.

942-12 See also 39**GaA**330, 147**SE**130.

943-19 **TexCivA** 296**SW**631.

943-21 **TexCivA** 168**W(2d)**141. [b] (1) 41**GaA**601, 154**SE**158. (5) Verification is essential where denial is of part of claim for interest and principal. 36**GaA** 561, 137**SE**296.

943-26½-New. An affidavit that indorsee failed to receive notice of dishonor is unnecessary where notice was given one year from maturity of the note. 127**Misc**40, 215**NYS**243.

943-28 106**WVa**254, 145**SE**390, 391 [cit CJ].

943-29 **Ark** 318**W(2d)**956; **IndA** 169 **NE**865; 226**Ky**412, 118**W(2d)**107; 167 **Minn**394, 209**NW**311; **MoA** 272**SW**701; 220**MoA**447, 276**SW**415; 43 **OklACR**26; **TexCivA** 258**W(2d)**304.

945-55 167**Minn**394, 209**NW**311.

946-65 But see **TexCivA** 288**SW**1100.

946-68 See also **TexCivA** 288**SW**1100.

946-69 220**MoA**447, 276**SW**415.

946-72 220**MoA**447, 276**SW**415.

946-73 167**Minn**394, 209**NW**311.

947-78 150**Miss**138, 116**S**542.

947-79 35**GaA**284, 134**SE**174; **TexCivA** 285**SW**335.

948-86 **TexCivA** 273**SW**634.

948-92 256 **IllA**128. [c] **Verified plea held not required.**-**TexCivA** 198**W(2d)** 368 (note and written contract construed together).

948-93 **TexCivA** 48**W(2d)**183; **Tex CivA** 148**W(2d)**865.

949-94 24**F(2d)**896. [e] **Under Negotiable Instruments Law, denial of indorsement must be specific** as to its genuineness, or it must aver forgery. **TexCivA** 278**SW**330.

949-95 180**Ark**293, 218**W(2d)**171 (admitting signing note, but denying correctness of amount, held insufficient); 167**Minn**394, 209**NW**311 (verification in common form used to verify pleading held insufficient).

949-11 **TexCivA** 288**SW**1100.

950-18 43 **OklACR**26.

950-19 **TexCivA** 285**SW**335.

950-19½-New. In such states the burden is on defendant to prove that his signature as a maker was a forgery where he fails to deny its genuineness under oath before trial. 175**Ark**1010, 1 **SW(2d)**75.

950-22 29**PortoRico** 788, 792 [quotCJ]; 35**PortoRico** 112 (error to strike out answer); **TexCivA** 285**SW**335.

950-26½-New. Unverified general denial which expressly admits execution raises no defense to plaintiff's cause of action on the notes where it is the only cause of action stated, 116 **Okl** 81, 243**P** 171.

950-26½-New. and it is not sufficient to join issues on the question of ownership, placing of revenue stamps on, or listing the notes for taxes. 116 **Okl** 81, 243**P**171.

950-26¼-New. Failure to verify subjects unverified allegations to motion to strike. 36**GaA**561, 137**SE**296.

950-26⅛-New. An unverified answer places the instrument, with all its contents, terms, conditions, and stipulations, together with their legal consequences, before the court. 43 **OklACR**26.

950-26¼-New. Failure of defendants in an action on a note to swear to their plea denying notice of dishonor relieves plaintiff of proving that such note was given. 152**Miss**293, 120**S**178.

951-31 [a] **Plea in short by consent,** allowing plaintiff to give in evidence matter admissible, if properly pleaded, presented issue as if by special replication. 220**Ala**683, 127**S**500(2dcase).

952-62 216**Ala**21, 112**S**428; 22**AlaA**485, 118**S**250.

953-66½-New. An allegation in a reply by the payee of a note that the renewal note sued on was executed and delivered with full knowledge on the part of the maker of all facts concerning an alleged breach of a condition annexed to the delivery of the original note is sufficient to show waiver of the defense of conditional delivery although pleaded as constituting an estoppel. 201 **Iowa**506, 207**NW**761.

953-73½-New. A payee against which the maker interposes a plea of fraud cannot allege that it was bona fide holder. 213**Ala**675, 106**S**171.

953-74 220**Ala**683, 127**S**500(2dcase) (rights of holder in due course are presented in replication on defense of failure of consideration).

954-86½-New. **Where defendant pleads payment to person designated** by payee, denial that plaintiff had assigned, delivered, or indorsed the note to such person is insufficient. 218**Ky**302, 291 **SW**393.

954-99 76**CalA**288, 244**P**950.

954-2 **MoA** 148**W(2d)**467. [a] (10) Amendment curing defect by setting forth names of individuals as being indorsed on notes. 35**GaA**5, 131**SE**524.

956-13 164**La**612, 114**S**354.

956-17 246**Mich**125, 224**NW**442. [b] **Amendment properly refused.**-51**ND**215, 199**NW**868.

956-19 151**Md**358, 137**A**702; 53**ND**537, 206**NW**1002.

956-22½-New. In a suit on a note against defendant as maker and indorser it is error to allow an amendment of the answer so as to allege that the amount sued for as attorney's fees could not be recovered because plaintiffs had contracted with attorneys for a less amount than that named in the note. 35**GaA**340, 133**SE**307.

957-29 39**GaA**51, 146**SE**127(2dcase); 127**Kan**383, 273**P**464; 9**LaA**712, 120**S** 75(2dcase); 83**Mont**501, 272**P**994; 225 **AppDiv**612, 234**NYS**73; **TexCivA** 138**W (2d)**121. [a] (3) In action against several defendants, individual defendant held entitled to avail himself only of such defenses as he had pleaded. 86 **IndA**581, 159**NE**15. [e] **Denial that note sued on was delivered "as evidence of any obligation"** held insufficient to raise issue of delivery. **CalA** 285**P**734.

957-31 **GaA** 155**SE**777(2dcase); **Tex CivA** 238**W(2d)**436.

957-42½-New. or where there is no allegation in the petition of nonnegotiability; 162**La**281, 110**S**422.

957-46 **LaA** 130**S**883. [b] **In action on collateral note** plaintiff, in order to hold proceeds as against owner, must show taking in good faith, innocent purchase, valuable consideration, and that he is likely to lose debt unless permitted to retain proceeds. **TexCivA** 280 **SW**877.

958-51 10**F(2d)**315 (failure of consideration); **MoA** 288**W(2d)**379. [d] **Assignment.**-217**Ky**22, 288**SW**306.

958-51½-New. Plaintiff is not required to controvert contentions not alleged as to defects in foreclosure proceedings set up by defendant. 103**Conn**503, 131**A**25.

958-51⅛-New. Obligation of the maker and indorser on the face of the note being unconditional, any parol modification of the agreement must be pleaded and fixed with certainty. **LaA** 122**S**139.

958-52 217**MoA**131, 273**SW**197.

958-56 See also 217**AppDiv**59, 216**NYS** 437.

958-56½-New. An allegation that a note contained the words "value received," not being an allegation that it was given for value received, it need not be proved that it was so given. 217**MoA** 131, 273**SW**197.

958-60 219**Ky**624, 294**SW**179.

958-61 **Colo** 288**P**629; 87**Colo** 445, 290 **P**784; 217**MoA**326, 272**SW**1037; **MoA** 284**SW**177 (must prove constituent elements of title pleaded).

958-63 [a] **Plaintiff payee, specially indorsing,** where subsequent indorsements appear, need not prove retransfer to himself. 50**ND**157, 195**NW**12, 30**ALR** 325.

958-64½-New. One claiming as assignee must both allege and prove valid assignment. 68**CalA**10, 228**P**662.

958-65 111**Conn**626, 151**A**168; **Ont** [1930] 2**DomLR**545.

958-65½-New. But such proof is not required as to anomalous indorsers whose indorsement is not necessary to pass title. 35**GaA**5, 131**SE**524.

958-68½-New. To authorize recovery of attorney's fees, the holder must allege and prove that he has paid or incurred valid liability for attorney's services. 98**Fla**1071, 124**S**812.

959-70 128 **Or**643, 275**P**680.

959-75 165**La**694, 115**S**905.

959-79 39**Wyo** 454, 273**P**679.

960-82 12**LaA**162, 125**S**194(1stcase); 153**Md**235, 138**A**261, 53**ALR**1165; 74 **Mont**549, 241**P**613.

960-83 150**Md**347, 133**A**114; 11**PaDist &Co** 343.

960-88½-New. Where plaintiff pleads chattel mortgage by which note sued on is secured, and also alleges that defendant has disposed of the chattels, he may introduce evidence in chief that the mortgage had become valueless without any fault on his part. 75**Mont**52, 243**P**1082.

960-88¼-New. Ambiguity in pleading held not to prevent admission of note in evidence. **TexCivA** 288**W(2d)**941.

960-97 206 **Iowa**664, 221**NW**210.

960-98½-New. Evidence of acceptance of drafts sued on is admissible under a petition alleging that drafts had been made, executed, and delivered by defendants. **TexCivA** 128**W(2d)**601.

960-98¼-New. A note is not subject to exclusion because of a variance as to the amount. 22**AlaA**633; 118**S**766(2dcase).

961-11½-New. Collateral agreements as to consideration are not admissible where the only issues are ownership and plaintiff's status as a bona fide purchaser. 21**AlaA**643, 111**S**316.

961-17½-New. An allegation of protest entitles the purchaser to prove execution of a certificate of protest and mailing of the protest to the indorser. 148 **Wash**572, 269**P**815.

961-20½-New. Allegation of due notice of protest does not preclude plaintiff from showing that notice was waived. 212**AppDiv**553, 209**NYS**603.

961-20¼-New. In the absence of an allegation of notice or waiver, evidence of waiver should not be received. 133**SC** 315, 131**SE**41.

961–20¼–New. Allegation of due notice of nonpayment will not authorize evidence of a waiver thereof. 133SC315, 131SE41.

961–29½–New. The written notice required by statute in some jurisdictions as basis of claim for attorney's fees need not be introduced in evidence, nor need further proof be made of service thereof within prescribed time than is alleged in the petition to which a copy of the notice is attached where the answer admitted timely receipt of the notice and merely denied that notice on its face conformed to law. 33GaA729, 127SE672.

961–30 MoA 22SW(2d)860; 212AppDiv 630, 209NYS324; TexCommnA 272SW 771.

962–31 [a] (1) TexCivA 272SW321. (9) Where not pleaded, defendant could not show agreement for security and surrender thereof without his knowledge or consent. TexCivA 272SW321.

962–35½–New. absence of valid delivery, 43 Ida80, 251P295.

962–36 111Conn626, 151A168.

962–40½–New. When defendant admitted that plaintiff was actual holder, she was not therefore estopped to prove that possession was in fact illegal and wrongful. 34GaA314, 129SE445.

962–40½–New. Where plaintiff avers that demand was made and defendant denies the allegation, evidence that no demand was made is admissible. 253 IllA514.

963–48 [a] **Conditional delivery.**–50ND 330, 196NW303.

963–63 316Mo 1338, 296SW375.

963–67 36GaA788, 138SE256; 43 Ida 623, 253P621. See also 218Ala196, 118 S377. [a] (5) Where promise to perform service is consideration for note, evidence of failure to perform such service is admissible under plea of failure of consideration. 90Fla448, 106S401. (6) Under plea that note was without consideration with understanding maker would not incur liability, defendant may show he was accommodation maker. TexCivA 291SW920. [b] **Evidence held admissible.**–212AppDiv630, 209NYS324; 1LaA419.

964–70 Contra NJSup 138A696. [a] (2) Proof of partial failure of consideration is admissible under allegation of failure of consideration. 121Kan82, 245P745. (3) Proof of partial failure may be shown under plea of total failure. TexCivA 297SW1094.

964–71 5LaA276.

964–76 [d] **In action on note, written agreement dissolving partnership** between parties, and acknowledging settlement and payment of all accounts between them is admissible under answer in which payment was pleaded, as against contention that exhibit was not pleaded in answer. 96CalA128, 273P604 (1stcase).

964–79 134SC541, 133SE436.

964–83 84Mont549, 276P948.

964–89 58ND346, 228NW214 (estoppel).

964–91½–New. Replication alleging the bank's notice to the maker within a reasonable time that the security was a forgery raised the issue of reasonable notice. 215Ala476, 111S29.

965–94 [c] **Immaturity of note** is put in issue by general denial. Nebr 231NW 141.

965–97 99WVa544, 130SE142.

965–1 See also MoA 7SW(2d)723.

965–1½–New. , or the want of authority of the party signing the note. 99 WVa544, 130SE142.

965–3½–New. In an action to recover indebtedness on account of drafts drawn on defendant which it refused to pay, business dealings between defendant and the drawer of the drafts resulting in indebtedness to defendant may be shown under general denial. 88 IndA 327, 163NE842.

965–5 77Mont477, 251P517.

965–5½–New. Nonpresentment or excuse therefor is available under a general issue. 125Me108, 131A138.

965–5½–New. The defense that failure to sue the maker releases the principal will not be considered where the answer is, in effect, a general denial. 9 La630, 121S687(1stcase).

965–8 Ala 130S398.

965–9 216Ala642, 114S298; 102WVa 205, 135SE7.

965–11 [b] **Rule otherwise under Negotiable Instruments Law.**–153Md235, 138A261, 53ALR1165 (where instrument was under seal).

966–12 214Ala452, 108S69; 208Cal 723, 284P671; 94CalA1, 270P378; 217MoA 131, 273SW197; 77Mont422, 251P155; 77Mont477, 251P517; 217AppDiv59, 216 NYS437. [d] **Instruction held properly refused** where defendant surety on note did not plead defense and caused allegation of consideration in complaint to be stricken. 205 Iowa95, 215NW506.

966–16 TexCivA 16SW(2d)141. See also 21AlaA252, 107S228.

967–20 122 Or675, 260P235.

967–27 124 Or157, 264P368.

967–28 193NC1, 136SE259. See also 39Wyo 266, 270P1072, 1075 [citCJ].

967–33 Ida 291P1071.

968–35 203 Iowa1256, 212NW719; 204 Iowa265, 213NW761; 217MoA131, 273 SW197; 130Misc541, 224NYS59. See also 127Me383, 143A600. [c] **Defense that plaintiff** on being notified of fraud sued and obtained security from payee held not available where not pleaded. 48Nev319, 232P206.

968–38 217MoA131, 273SW197 (proof of indebtedness is fatal variance from allegation of execution); 220MoA1062, 282SW86; TexCivA 31SW(2d)196.

968–39 123Kan275, 255P44; TexCivA 48SW(2d)654 (pleadings in cross action held sufficient to support recovery).

969–45 TexCivA 11SW(2d)826.

970–55 Contra 153Md235, 138A261, 53 ALR1165.

970–59 [d] **Variance as to whether note executed before or after money advanced** held immaterial. CalA 286P733.

970–60 MoA 15SW(2d)912.

972–72½–New. Where note set out in complaint showed individual defendants did not execute note, allegations that they did may be disregarded. CalA 285 P734.

973–80 TexCivA 297SW1093.

974–9 But see TexCivA 28SW(2d)941.

974–10 TexCivA 11SW(2d)826.

975–17 TexCivA 293SW884.

975–24 IndA 158NE629. [c] **Variance not shown.**–298Pa535, 148A707.

976–29 See also 36GaA682, 137SE841.

976–37 See also 127Me290, 143A61.

977–44 111Conn261, 149A772.

977–48 147Miss603, 111S578, 580 [cit CJ].

978–80 213Ky752, 281SW1034.

978–80½–New. But variance which is not misleading is not fatal. 121Kan18, 245P1041.

978–87 234 IllA78.

978–88 234 IllA78.

979–4 36GaA541, 137SE102; Iowa 231 NW306 (general denial); 260Mass449, 157NE530; 192NC499, 135SE326; TexCivA 198SW(2d)386.

979–5 21AlaA44, 104S887 (introduction of notes makes prima facie case and shifts burden to prove special pleas); 175Ark23, 298SW498; Ark 32SW(2d) 439; 1LaA698; 192NC87, 133SE427; 50ND583, 197NW150, 153 [citCJ]; TexCivA 12SW(2d)1037. See also 38GaA 736, 145SE464(1stcase).

979–6 160Ga732, 129SE57 (by preponderance of evidence); TexCivA 294 SW226; TexCivA 15SW(2d)116. See also 36GaA541, 137SE102.

979–8 174Ark1179, 297SW1012; Fla 129S865; 86 IndA581, 159NE15; 204 Iowa322, 213NW798; 130Kan743, 288P 766; 8LaA68; 155Md173, 141A556; Mo 30SW(2d)1015; MoA 286SW443; 192 NC69 133SE415; 192NC87, 133SE427; 29 OhA67, 162NE777; 40 OklACR136 [reh pending]; TexCivA 294SW687; 106WVa254, 145SE390.

980–11 172Ark813, 290SW377; 1LaA 153; 8LaA519.

980–12 339 Ill 384, 171NE531. See also 153Miss81, 118S429.

980–13½–New. Where execution is not denied that plaintiff is in possession, it is presumed that the note was negotiable. 217MoA131, 273SW197.

980–13½–New. The burden is upon the maker of a note to show ability and willingness to pay at the time and place specified. 125Me108, 131A138.

980–13¼–New. It is not necessary for plaintiff to negative all possible defenses in order to make a prima facie case. 241Mich652, 217NW787.

980–13½–New. Commercial character of note is presumed. 35PortoRico 237.

980–13¼–New. Indorsers have the burden of proving alleged extension of time. 153Va156, 149SE473.

980–14 159La1, 105S79 (notes sued on are prima facie evidence of amount due).

980–19½–New. Presumptions and burden of proof where note stipulates for attorney's fees, if dishonored, see TexCivA 31SW(2d)196.

980–21 34GaA253, 129SE115 (code provision); 38GaA58, 143SE787; 45 Ida 270, 261P683; 86 IndA75, 156NE176; 206 Iowa45, 218NW40; 126Me423, 139A 225; 260Mass449, 157NE530; MoA 256 SW105; MoA 28SW(2d)117; NJ 148A 717; NJSup 151A382; 217AppDiv546, 217NYS97; 222AppDiv56, 225NYS290; 137Misc163, 241NYS549; 193NC1, 136 SE259; 50ND455, 196NW307; 54ND 534, 210NW26; 124 Or157, 264P368; 300Pa522, 150A885; 96PaSuper447; TexCommnA 29SW(2d)978; TexCivA 274SW166; TexCivA 16SW(2d)141; WVa 153SE109. See also 134SC297, 131 SE432, 434 [citCJ].

981–22 38GaA58, 143SE787; 40GaA23, 148SE749 (instrument given by wife for debt of husband); IndA 168NE196; 120Kan594, 244P1046; Mo 30SW(2d) 462; MoA 286SW443; 135Misc546, 239 NYS437; 50ND455, 196NW307; 109 Okl 85, 234P590; 296Pa54, 145A689. See also 134SC297, 131SE432, 434 [cit CJ]. But see 249Mich403, 228NW796; Wis 230NW81(2dcase).

982–23 32Ariz588, 261P45; CalA 291 P281; 161Ga329, 130SE566; 37GaA698, 141SE502; 252 IllA329; 120Kan594, 244P1046; 215Ky368, 285SW209; 3 LaA713; 125Me392, 134A449; 232Mich 352, 205NW108; 103NJL449, 135A880; 31NM667, 250P18; 126Misc35, 212NYS 204; 217AppDiv546, 217NYS97; 191NC 176, 131SE587; 192NC87, 133SE427; 196NC327, 145SE619; ND 232NW307; 124 Or468, 263P71; 154Tenn444, 289SW 496; TexCivA 278SW330 (in absence of showing that indorsement was not genuine or forged, plaintiff is entitled to recover on basis of prima facie case under Negotiable Instruments Law); Va 154SE515. See 264Mass208, 162NE 368. See also 125Misc843, 211NYS491.

982–24 But see TexCivA 4SW(2d)310.

982–34 105Conn73, 134A240; MoA 294 SW456 (instrument held defective); NJSup 151A382; 126Misc35, 212NYS 204; 192NC87, 133SE427; 51SD477, 215NW533, 58ALR1276. [a] (5) Where payee is refining company and note was indorsed to its officer who indorsed note to bank of which he was also officer. IndA 168NE461.

983–40½–New. or that the drawer and accommodation indorsers had an understanding as to the order of liability, 224AppDiv280, 229NYS687.

983–41½–New. In an action by the pledgee of a vendor's lien note in which defendant proves payment to the pledgor, the burden rests on plaintiff to prove that he was a bona fide holder before maturity. TexCivA 280SW232.

983–41½–New. The burden is shifted to the bona fide holder to prove bona fides only where evidence is admitted of defenses good as to such holder. 51SD 477, 215NW533, 58ALR1276.

983–43 334 Ill 96, 165NE165; 215Ky 368, 285SW209; 11LaA398, 122S894(2d case); 175Minn287, 221NW10; 125Misc 722, 211NYS482; 125Misc843, 211NYS 491; 217AppDiv546, 217NYS97; 191 NC176, 131SE587; 196NC624, 146SE 584; 124 Or468, 263P71; 124 Or157, 264P368; SC 155SE736; 51SD477, 215 NW533, 58ALR1276; 51SD623, 216NW 362; TexCivA 16SW(2d)341; 198Wis 66, 223NW440.

983–43½–New. Presumption is not rebutted so as to put plaintiff upon proof that he is bona fide holder by allegations of equities in answer, there must be both allegation of them and proof. 50ND330, 196NW303.

983–44 215Ky368, 285SW209; 191NC 176, 131SE587; ND 232NW307; 51SD 477, 215NW533, 58ALR1276; WVa 153 SE109.

983-45 72CalA143, 236P964; 106Conn 147, 137A759; 111Conn178, 149A774 (statute applies only to action on negotiable instrument); 37GaA698, 141 SE502; 47 Ida780, 279P418; 242 IllA 480; 249 IllA116; 254 IllA126; 255 IllA1; 204 Iowa322, 213NW798; 213Ky 417, 281SW152; 13LaA498, 124SS849; 254Mass261, 150NE11; 264Mass208, 162 NE368; 232Mich352, 205NW108; MoA 14SW(2d)966; 73Mont219, 236P250; Nebr 231NW754; 218AppDiv418, 218 NYS500; 137Misc163, 241NYS549; 230 AppDiv708, 243NYS155; 192NC87, 133 SE427; 117 Okl 65, 245P557; 119 Okl 278, 249P715; 135 Okl 253, 275P285; 124 Or468, 263P71; 288P549, 137A113; 51SD623, 216NW362; Utah 276P659; 101Vt114, 141A598; 103WVa597, 138 SE745; 104WVa67, 138SE748; WVa 153SE109. [a] **Recital of value in draft** held not to relieve holder of burden of showing value. 13LaA498, 124SS849.

983-47 151Md514, 135A383, 49ALR 1366. Contra Mo 30SW(2d)1015.

984-49 142Miss444, 107S669; MoA 14 SW(2d)966 (title attempted to be passed by pledgee held defective); 217AppDiv 546, 217NYS97; 51ND287, 199NW945; 117 Okl 65, 245P557; 135 Okl 253, 275P 285 (unauthorized delivery); 124 Or 468, 263P71; 124 Or157, 264P368; 153 Va190, 149SE537 (breach of faith by payee). See also 50SD6, 208NW222, 224 [citCJ].

984-50 51SD477, 215NW533, 58ALR 1276.

984-50½-New. theft, 73Mont219, 236P 250.

984-51 IndA 168NE196; 244Mich306, 221NW161; MoA 28SW(2d)117; 112 Nebr375, 199NW845; Nebr 231NW754; 217AppDiv546, 217NYS97; 227AppDiv 119, 237NYS1; 192NC87, 133SE427; 288Pa549, 137A113; 51SD477, 215NW 533, 58ALR1276; 51SD623, 216NW362; 101Vt114, 141A598.

984-53 117 Okl 65, 245P557; 51SD477, 215NW533, 58ALR1276.

984-56 But see 125Misc843, 211NYS 491.

984-57½-New. The holder has the burden of proving that he is the holder in due course, where the note was executed for the express purpose for which the payee failed to use it. 285Pa202, 131A 731.

984-57¾-New. The statute applies where there is proof of diversion of a note from the purpose for which it was made. 217AppDiv546, 217NYS97.

984-57¼-New. Where defendant proves fraud and failure of consideration, a bank which discounted the note sued on and gave its depositor credit for the amount has the burden of showing how much was actually checked out. 55ND 655, 215NW96.

984-57½-New. In the absence of title beyond that of bare pledgee as justification for the sale of a note, title which the transferee attempted to pass to plaintiff was defective. MoA 14SW(2d) 966.

984-58 See also 159La627, 105S794, 799 [citCJ].

984-60 23F(2d)796; Ark 295SW357; 199Cal 307, 249P11; 72CalA143, 236P 964; 37GaA698, 141SE502; 44 Ida599, 258P522; 255 IllA127; 256 IllA159; 83 IndA385, 148NE486; 86 IndA23, 149NE 458; 87 IndA69, 158NE646; IndA 168 NE697; 199 Iowa1277, 203NW802; 200 Iowa895, 205NW470; 200 Iowa1281, 206 NW606; 130Kan743, 288P266; 212Ky 486, 278SW622; 228Ky436, 15SW(2d) 263; 127Me306, 143A173; 127Me383, 143A600; 151Md508, 135A369; 155Md 384, 142A515; 263Mass76, 160NE408; Mass 168NE785; 166Minn400, 208NW 24; 150Miss193, 117S540 (indorsee presumed privy to indorser's fraud); Mo 30SW(2d)1015; MoA 256SW105; 218 MoA109, 262SW399; 222MoA450, 282SW 102; MoA 282SW466; 221MoA568, 282 SW1033; MoA 286SW443; MoA 294 SW456; 222MoA1200, 48SW(2d)861; 222MoA1194, 48W(2d)864; MoA 9SW (2d)1070; MoA 28SW(2d)117; 114Nebr 318, 207NW500; 114Nebr681, 209NW 246; 83NH518, 144A845; 126Misc35, 212NYS204 (assignee of holder); 217 AppDiv546, 217NYS97; 191NC176, 131 SE587; 192NC87, 133SE427; 192NC 229, 134SE485; 50ND494, 196NW953; 52ND876, 204NW665; 53ND583, 207 NW149; 288Pa549, 137A113; 87PaSuper133; 49SD277, 207NW69; 51SD477, 215NW533, 58ALR1276; 51SD623, 216 NW362; 54SD446, 223NW585; 54SD 581, 223NW826; SD 226NW343; SD 231NW534; 152Tenn486, 279SW797; TexCommnA 29SW(2d)978; TexCivA 16SW(2d)341; 68Utah530, 251P354; Vt 147A285; 144Va220, 132SE326; 148Va 479, 139SE295 (usury); 198Wis300, 224 NW117; 35Wyo 319, 249P795. See also 216AppDiv113, 214NYS776; TexCivA 7 SW(2d)595. [c] (2) Verified plea charging fraud and failure of consideration is insufficient to shift burden to plaintiff. TexCivA 274SW166. [d] **In absence of proof** the defense of bona fide holder for value is not available to assignee of notes given to a creditor under secret agreement creating preference in composition with creditors. 126Misc 213, 212NYS129. [e] **If holder fails to sustain burden** of proving himself holder in due course of notes secured by payee's fraud, notes are subject to same defenses as if nonnegotiable, and holder has no better title than payee. 192NC 87, 133SE427. [f] **Burden of evidence, not burden of proof,** shifts. MoA 286 SW443.

986-62 99CalA136, 278P249.

986-64 203 Iowa20, 212NW359.

986-70½-New. Fraud in execution of notes transferred to plaintiff for certificates of deposit does not destroy the presumption that the bank to whom the certificates were transferred was the holder thereof in due course. 35Wyo 319, 249P795.

986-70¼-New. As between the maker and payee, the burden of proving fraud is on defendant. 51SD288, 213NW507.

986-72 51SD477, 215NW533, 58ALR 1276.

986-75 246 IllA511.

986-77 151Md503, 135A369; 114Nebr 681, 209NW246; 125Misc722, 211NYS 482; 217AppDiv546, 217NYS97; 192NC 87, 133SE427; 52ND876, 204NW665; 144Va220, 132SE326.

987-84 37GaA698, 141SE502; 239Mich 404, 214NW195; 114Nebr681, 209NW 246; 226AppDiv479, 235NYS529.

988-91 86 IndA23, 149NE458; 218MoA 109, 262SW399; 135Misc546, 239NYS 437; 35Wyo 319, 249P795.

988-92 51SD507, 215NW490. Contra 90CalA759, 266P373.

988-93 MoA 28SW(2d)379.

988-94 TexCivA 280SW848.

988-95 124 Or157, 264P368; 35Wyo 319, 249P795. But see TexCivA 30SW (2d)494.

988-96 169Minn132, 210NW869; 117 Okl 65, 245P557; 7PaDist&Co 330.

989-97 106Conn147, 137A759; 169 Minn132, 210NW869.

989-98 199Cal 307, 249P11.

989-99 199Cal 307, 249P11. [b] **Rebuttal of presumption.**—Mo 30SW(2d) 462.

989-99½-New. Innocent holder of paid collateral notes must prove debt secured, that other collateral is insufficient, and unless he recovers he will lose the debt. TexCivA 293SW941.

989-1 117 Okl 65, 245P557.

989-2 216Ala214, 112S822; 199Cal 307, 249P11; CalA 291P281; 37GaA 693, 141SE668; Ida 253P621, 622 [cit CJ]; IndA 169NE865; 151Md503, 135 A369; 169Minn132, 210NW869; 176 Minn52, 222NW340; Mo 30SW(2d)462; Mo 30SW(2d)1015; 218MoA109, 262SW 399; 221MoA568, 282SW1033; MoA 286SW443; MoA 294SW456; MoA 298 SW242; 222MoA8, 300SW526; MoA 20SW(2d)963; NJ 148A717; 39 Okl ACR326; 141SC397, 139SE853; 54SD 446, 223NW585; TexCivA 16SW(2d) 341.

990-3 169Minn132, 210NW869; Mo 30SW(2d)1015.

990-5 37GaA698, 141SE502.

990-9 95CalA505, 273P39; 83Colo 118, 263P18; 211Ky396, 277SW461; 2LaA 443; 3LaA559; Me 148A406(2dcase); 254Mass10, 149NE691; 241Mich652, 217NW787; 168Minn308, 210NW84; 153Miss314, 120S732; Mo 19SW(2d) 290; 217MoA131, 273SW197 (where execution is not denied, execution and delivery import that note was given for valuable consideration); 77Mont 477, 251P517; 196NC327, 145SE619; 51ND246, 199NW930; 122 Or225, 258 P192; 125 Or515, 266P1067; 86Pa Super29; TexCivA 275SW841; Tex CivA 293SW916; 192Wis124, 212NW 280. [b] **Rule is not affected by order of proof.**—155Md173, 141A556.

991-10 75CalA462, 242P1075. See also 132Misc910, 231NYS16. [a] (1) 290Pa 43, 138A217. (2) Rule not applicable where ordinary course of business does not lead to such conclusion. 290Pa43, 138A217.

992-17 225Ky529, 9SW(2d)302.

992-18½-New. Where the jury found that the note was not made for the purpose of a mere discount for accommodation of the payee as defendant maker claimed, the presumption remains in full force that the note was given for some definite purpose. NJSup 145A461.

992-19 121Kan29, 245P1036; 153Md 235, 138A261, 53ALR1165; 217MoA131, 273SW197; NJSup 147A741(1stcase); 190NC162, 129SE453; 51ND246, 199 NW930; 132 Okl 189, 270P31.

992-21 36GaA156, 136SE98; 261Mass 221, 158NE757; 217MoA131, 273SW 197. [a] 36GaA156, 136SE98.

992-23 221AppDiv228, 222NYS463.

993-27 204 Iowa290, 214NW538; 168 Minn308, 210NW84, 85 [citCJ]; 217 MoA131, 273SW197; 122 Or225, 258P 192; TexCivA 48W(2d)253; 101Vt1, 139A776. [a] (2) Presumption that renewal note was genuine as to liability of indorser on original note. Mass 170NE115.

993-28 But see NJ 148A717.

993-36 259Mass232, 156NE26.

993-37 168Minn308, 210NW84, 85 [citCJ].

993-38 See also 82Colo 448, 261P6, 9 [citCJ].

994-53½-New. Louisiana, 8LaA609.

994-55 198NC14, 150SE668.

994-57 142SC531, 141SE156.

994-60 136Misc464, 240NYS161; Tex CivA 19SW(2d)368 (instrument rendered ordinary contract).

994-64 73CalA68, 238P169; 82Colo 448, 261P6, 9 [citCJ]; 153Md235, 138A 261, 53ALR1165.

994-66 221AppDiv228, 222NYS463; 48 SD547, 205NW317 (defendant's evidence held sufficient).

995-70 175Ark23, 298SW498; 102 Conn620, 129A788; 46 Ida744, 271P931; 234 IllA78; 244 IllA451; 86 IndA23, 149 NE458; IndA 168NE196; 121Kan29, 245P1036; 233Ky540, 26SW(2d)32 (maker); 1LaA356; 7LaA570; 8LaA 664; MoA 15SW(2d)912; 217MoA131, 273SW197 (burden not on plaintiff to prove value received where note was alleged to contain words "value received"); 222MoA8, 300SW526; MoA 25SW(2d)525; 77Mont477, 251P517; 81Mont248, 263P693; 125Misc876, 212 NYS393; 190NC162, 129SE453; 52ND 530, 203NW898; 58ND846, 228NW214; 123 Okl 78, 254P724; 40 OklACR136 [reh pending]; 121 Or326, 252P400; 128 Or 643, 275P680; TexCivA 293SW916; TexCivA 8SW(2d)569; TexCivA 22 SW(2d)343; Sask [1928] 2DomLR27. [b] **In action against maker who alleges want of consideration** burden is on him under statute to prove such defense by preponderance of evidence. 51ND246, 199NW930. [c] **Burden of proof and burden of evidence distinguished.**—241Mich652, 217NW787.

995-71 97Fla861, 122S217(1stcase); 252 IllA395 (partial failure of consideration); 121Kan82, 245P745; 9LaA 567, 119S289; LaA 130S672; MoA 276 SW93; MoA 289SW977; MoA 28SW (2d)379; Nev 290P413; 125Misc876, 212NYS393; 225AppDiv171, 232NYS 373; 190NC162, 129SE453; 29 OhA272, 162NE711 (partial or entire failure); 128 Or643, 275P680; 44Philippine675; SD 229NW938; 192Wis124, 212NW280.

996-72 175Ark23, 298SW498; 48 Ida 364, 282P79; 3LaA329; 34NM317, 281

P25; Alta [1926] 4DomLR248, [1926] 3WestWkly486.

996-73 RI 148A597.

996-74 CalA 292P281 (obligation to reimburse); 97Fla489, 121S805; 160Ga 732, 129SE57; 255 IllA127; Iowa 231 NW306; 254Mass10, 149NE691; 51ND 246, 199NW930, 931, 934, 936, 938 [quot CJ]; TexCivA 275SW498.

997-75 [a] **Words for "value received" did not put burden of proving consideration on pleader** but tended only to strengthen presumption of consideration. 233Ky540, 26SW(2d)32.

997-77 255 IllA127 (production of original contract not required).

997-78 See also 217AppDiv59, 216NYS 437.

997-78½-New. In an action by the pledgee of a vendor's lien note in which defendant proves payment to the pledgor after maturity, the burden is on plaintiff to show the amount due on the debt for which the note was pledged. TexCivA 280SW232.

997-78¾-New. The burden of proving the amount received by the joint maker of a note held upon the joint makers' assignee suing the payee, and in which action the payee claimed the amount thereof as a set-off against the assignee's claim. 220Ala293, 124S866.

997-78¼-New. Where consideration has failed between maker and payee, indorsee holding note as collateral must prove amount of indebtedness. 155 Wash127, 283P665.

997-83 Iowa 228NW268.

997-84 255Mass486, 152NE332. But see 225AppDiv300, 233NYS196.

997-85½-New. The burden of proving a new promise to pay a note after the filing of the petition in bankruptcy is on plaintiff alleging such promise. 140 Miss307, 105S518.

998-7 201 Iowa73, 204NW404, 405 [cit CJ]; 204 Iowa322, 213NW798, 799 [cit CJ].

998-8 174Ark1179, 297SW1012; 247 IllA233; 204 Iowa322, 213NW798, 799 [citCJ]; 206 Iowa664, 221NW210; Iowa 233NW28; 221MoA733, 285SW 779; 196NC712, 146SE804; 50ND446, 196NW750. But see TexCivA 285SW 1103.

999-9 21AlaA643, 111S316; 204 Iowa 322, 213NW798; TexCivA 9SW(2d)277; TexCivA 12SW(2d)247. [e] **Where indorsement by rubber stamp purports to have been made by authority of payee** and denial of execution of indorsement is not properly verified, there is no presumption of want of such authority. 167Minn394, 209NW311.

999-11 201 Iowa253, 207NW119; 1LaA 547; 13LaA551, 128S193. [c] **On proving signature to be defendant's** burden is on him to show fraud and misrepresentation as to amount. 13LaA551, 128 S193.

1000-17½-New. Plaintiff asserting that an apparent maker is precluded from setting up forgery must show damage resulting to him from the conduct of such maker. 154Tenn241, 290SW39, 50 ALR1369.

1000-17¾-New. A check merely signed by the drawer is presumed to have been properly filled out to the party intended by the drawer for the amount and purpose intended. 290Pa43, 138A217.

1000-17¼-New. In action on note by payee burden is on indorser to show that he signed under mistake of fact. SD 230NW759.

1000-18 Minn 230NW785. See also 160Ga732, 129SE57.

1000-22½-New. Where a note is signed in the customary place by the number of persons apparently contemplated, there is a presumption that a signature appearing on the left side of the note was that of a mere witness. 9PaDist &Co 143.

1000-23½-New. Signature of a witness in the place usual for attestation is presumed for that purpose. 22AlaA109, 113S490.

1000-23¾-New. Where note is written in several inks and different hands, presumption of regularity does not prevail. 185MoA582, 172SW628.

1000-23¼-New. Note read in evidence is prima facie evidence of execution. Ark 318SW(2d)956.

1000-25 27F(2d)224; 124 Okl 7, 253P 66.

1000-27 138Misc266, 245NYS372.

1001-38 201 Iowa253, 207NW119.

1001-40 [b] 167Minn394, 209NW311.

1001-41 TexCivA 288SW(2d)214.

1001-42 [a] **Presumption is that credit was given to agent,** rebuttable by proof of payee's knowledge of undisclosed principal. 108WVa85, 150SE235.

1001-42½-New. Where a person signs a note in blank and delivers it to his agent with specified authority to fill in blanks, the burden rests on him to show that the blanks were filled contrary to the authority granted. 200 Iowa816, 203 NW252.

1001-44 Me 148A406(2dcase); 217MoA 131, 273SW197 (where execution not denied); MoA 274SW107; 9PaDist&Co 643; 188Wis4, 205NW486. [c] **Burden of proving conditional delivery** is on party setting up defense. 41 Ida129, 238P308; 54ND805, 211NW587; 51SD 288, 213NW507.

1001-46 87 IndA69, 158NE646.

1001-53 CalA 289P236; 226AppDiv 313, 235NYS143; 54ND805, 211NW587; 188Wis4, 205NW486 (rule applies to nonnegotiable paper).

1002-55 9PaDist&Co 643.

1002-65 114Nebr366, 207NW513; 197 NC572, 150SE32(2dcase). [b] **Person signing as maker** has burden of proving liability only as accommodation indorser. NC 155SE263.

1002-66 Ala 129S276; NC 155SE263.

1002-68 220Ala350, 124S904.

1002-69 22AlaA68, 112S543.

1003-71 22AlaA68, 112S543.

1003-73 41GaA221, 152SE305.

1003-76½-New. Check is presumed payment of prior indebtedness rather than loan. 291Pa223, 139A865.

1003-77 123 Okl 98, 252P45.

1003-78 CalA 286P1062; 197NC572, 150SE32(2dcase); 32PortoRico 752.

1003-86 87CalA429, 262P41; 95CalA 505, 273P39; 34GaA314, 129SE445; 27 Hawaii763, 768 [citCJ]; 42 Ida1, 243P 355; 120Kan303, 243P278; 123Kan155, 254P345; 172Minn390, 215NW784; 125 Misc838, 211NYS486; 130Misc168, 223 NYS401; 140 Okl 212, 282P279; 296Pa 291, 145A831. [h] **Indorsements on note are presumed genuine** under Negotiable Instruments Law. 125 Or122, 266P236. [i] **Payee presumed owner,** as against claim that payee's husband was owner. MoA 138W(2d)555.

1004-87 38GaA58, 143SE787; 27 Hawaii763; 243 IllA159; 200 Iowa608, 203NW710; 204 Iowa322, 213NW798; 172Minn390, 215NW784; MoA 274SW 107; Mont 288P1023.

1004-88 95CalA505, 273P39; 123Kan 155, 254P345.

1004-89 36GaA788, 138SE256; 37GaA 563, 140SE902; 200 Iowa608, 203NW 710; 123Kan155, 254P345.

1004-91 130Misc168, 223NYS401.

1005-1 MoA 118W(2d)759; Mont 288 P1023; TexCivA 274SW166; TexCivA 284SW694.

1005-1½-New. or of a detached coupon payable to bearer, 117 Or374, 243P554 (presumption of ownership as bona fide holder).

1006-3 Iowa 233NW118.

1006-4 323 Ill 594, 154NE701.

1006-5 36GaA788, 138SE256; 254NY 218, 172NE475(2dcase).

1006-6 239 IllA159.

1006-7½-New. , or payable to a third person, 125Misc838, 211NYS486.

1006-7¾-New. or followed by subsequent indorsements. 125Misc838, 211 NYS486.

1006-13 323 Ill 594, 154NE701; 150 Miss138, 116S542 (action by liquidating agent of bank on note payable to bank); 154SC435, 151SE738; TexCivA 8SW (2d)555; TexCivA 88W(2d)556; 105 WVa523, 143SE305.

1007-21 123Kan155, 254P345; 122 Or 675, 260P235, 236 [citCJ].

1007-22 TexCivA 284SW977.

1007-23 TexCivA 284SW977.

1007-23½-New. But there is a presumption of rightful ownership where the payee has possession. 188Wis4, 205 NW486.

1007-24 Mont 288P1023.

1007-24½-New. Possession of a nonnegotiable certificate of deposit and its introduction in evidence constitutes prima facie evidence of title in and to the instrument. 201 Iowa73, 204NW 404.

1007-25 105Conn73, 134A240; 321Mo 199, 98W(2d)901, 60ALR639; MoA 274 SW107 (substantial evidence is essential); 188Wis4, 205NW486.

1008-27½-New. A prima facie case made out by production of notes payable to a corporation and indorsed by the secretary thereof is overcome by uncontradicted evidence that the secretary had no authority to make the indorsement. 68CalA40, 228P662.

1008-28 323 Ill 594, 154NE701; Tex CivA 98W(2d)465.

1008-29 124 Or468, 263P71.

1008-31 26F(2d)51; 105Conn73, 134A 240; 339 Ill 230, 171NE178; TexCivA 274SW166; TexCivA 280SW848.

1009-39 252 IllA329; 191NC176, 131 SE587; 35Wyo 319, 249P795.

1009-47 TexCivA 16SW(2d)141.

1010-52 TexCivA 8SW(2d)555.

1010-53 201 Iowa73, 204NW404 (certificate of deposit); 114Nebr318, 207 NW500; Nebr 232NW732; 192NC87, 133SE427; 49ND777, 193NW481; 52 ND876, 204NW665.

1010-54 203Cal 190, 263P530; 111Conn 661, 151A161; 219Ky624, 294SW179; MoA 98W(2d)852.

1011-57 192NC87, 133SE427; 51ND 573, 200NW42; 140 Okl 212, 282P279; 44Philippine511; TexCommnA 128W (2d)167. [a] **Holder of note payable to one who has specially indorsed it** has burden of proof to prove execution of indorsement by last named indorsee. 323 Ill 594, 154NE701. [b] **Burden is on plaintiff** to prove purchase in the course of trade acceptance sued on. 193 NC1, 136SE259.

1011-58 114Nebr318, 207NW500; 49 ND777, 193NW481; 51ND573, 200NW 42.

1011-60½-New. Where defendant admitted that he executed a note and plaintiff was the actual holder, the admission authorized judgment, unless defendant proved a defense. 34GaA314, 129SE445.

1011-60¾-New. Time of indorsement. Burden of proof is on plaintiff. 192NC 87, 133SE427.

1011-60¼-New. Where defendant denies delivery and nonpayment and alleges nonexistence of any indebtedness, burden is on plaintiff to prove possession of note. 35PortoRico 559.

1011-61 117 Or374, 243P554 (where possession by plaintiff established prima facie case of ownership).

1011-67 [a] **Burden of proving release** is on joint maker of note alleging it as defense. 39 OklACR351.

1011-68 41F(2d)181; 213Ala665, 106 S170; Iowa 229NW846; 209Ky696, 273 SW464; 10LaA6, 119S444(2dcase); 9 LaA235, 120S111; 10LaA660, 120S547; 10LaA226, 120S711(1stcase); 170La660, 129S121; 1LaA791; 11LaA221, 123S423; LaA 130S126(1stcase); Mass 165NE 421; 186Minn472, 208NW186; 155Miss 719, 125S120; MoA 296SW269, 272 [cit CJ]; MoA 98W(2d)852; Mont 285P 181(2dcase) (by acceptance of check by bank); NJ 150A373; 196NC654, 146SE 705; 124 Okl 247, 255P696; 92PaSuper 505; 32PortoRico 674; 38Wyo 346, 266 P1058; Alta [1926] 4DomLR1179, [1926] 3WestWkly613. See also 125Misc 876, 212NYS393. [e] (3) Where authenticity, and execution are not denied and instrument declared on is proved, burden of proving payment is on defendant. 32PortoRico 674. [f] **Error to grant nonsuit** after proof of note by plaintiff because defendants had alleged payment in their answer, and plaintiff is bound to prove nonpayment. 32PortoRico 674. [g] **Notes in payee's hands** are held prima facie unpaid. 220Ky 54, 294SW783.

1012-69 178Ark1200, 128W(2d)402(2dcase); 3LaA531. See also 159La1, 105 S79.

1012-70 MoA 296SW269, 272 [citCJ]; 35PortoRico 207 (where allegation of nonpayment denied).
1012-72 MoA 296SW269, 272 [citCJ].
1012-73 MoA 296SW269, 272 [citCJ].
1012-74 209Ky696, 273SW464.
1012-77 222MoA1003, 78SW(2d)470 (where plaintiff had ordered bank to deliver note to defendant who destroyed it).
1012-77½-New. The delivery by the debtor to the creditor of notes is presumed as collateral and not as payment of a note held by the creditor, which had been made out for the accommodation of the debtor. 51ND508, 200NW44.
1012-77¾-New. The burden is on defendant to prove an allegation of payment of interest in a cross petition. 206 Iowa794, 221NW455.
1012-77¼-New. The relation of a stranger to commercial paper who puts up his money and acquires possession of the paper is one of intention, and the transaction is presumptively a purchase and not a payment or discharge of the instrument. 32F(2d)147.
1012-82 199 Ind738, 160NE450, 452 [citCJ].
1013-90 340 Ill 81, 172NE7; 255 IllA 549. [a] **Burden of proof.**–223AppDiv 303, 228NYS184.
1013-91 47 Ida658, 277P814 (burden of proof on defendant); 296Pa291, 145 A831; TexCommnA 18SW(2d)609. See also TexCivA 48W(2d)253.
1013-93½-New. The burden of proof is on defendant to prove a later note was given in satisfaction of the note sued on. 213Ala665, 106S170.
1014-3 MoA 30SW(2d)781 (note marked "paid").
1014-5 204Cal 504, 269P173.
1014-6 205 Iowa302, 217NW851, 852 [citCJ].
1014-10 See also 191NC468, 132SE151.
1014-13 211Ky294, 277SW262; 134 Wash249, 235P14, 15 [quotCJ].
1014-14 211Ky294, 277SW262; MoA 296SW269, 272 [citCJ]; 134Wash249, 235P14, 15 [quotCJ].
1015-15 34GaA314, 129SE445; MoA 296SW269, 272 [citCJ]; 134Wash249, 235P14, 15 [quotCJ]; 39Wyo 454, 273 P679. But see Mont 285P174.
1015-16 134Wash249, 235P14, 15 [quot CJ].
1015-19½-New. No presumption of payment of the original note arises from plaintiff's possession of the original note and the renewal note. Tex CivA 48W(2d)253.
1015-32 158Tenn251, 12SW(2d)709.
1016-33 46 Ida686, 270P1054; 200 Iowa170, 202NW774; 141 Okl 14, 283 P549, 67ALR1410; 33PortoRico 944.
1016-35 33PortoRico 944.
1016-39½-New. Surrender of a note to the maker on receipt of a cashier's check does not overcome the presumption that the check was taken as a conditional and not an absolute payment. 51ND336, 199NW869, 36ALR465.
1016-40 [a] (3) Where possession of note by administrator was illegal and wrongful. 34GaA314, 129SE445.
1016-42 133SC315, 131SE41 (notice must be both alleged and proved).
1016-43 CalA 288P819; 52ND43, 203 NW182.
1016-45 CalA 288P819.
1016-45½-New. One suing an indorser on a note has the burden of proving special circumstances set forth in the Negotiable Instruments Act, relieving the holder of giving the required notice of dishonor to the indorser. 133SC304, 130SE890.
1017-47 136 Okl 172, 276P733. [a] **If drawer consents to sending check to out of town bank,** it is implied that he intended presentment within reasonable time in usual and ordinary course of business. Or 281P834.
1017-48½-New. Where a check is presented for payment in a customary manner and within the time it is due to be presented, the burden of showing want of proper diligence in the manner of presentment for payment is on the drawer. 218Ala491, 119S1.
1017-54½-New. A notary's seal attached to a certificate of protest is prima facie proof of its authenticity. 26F (2d)51.
1017-55 Mass 156NE26.
1017-57 136Misc212, 239NYS331.
1018-62 200 Iowa37, 204NW259.
1018-63 200 Iowa37, 204NW259 (rebuttable in Iowa).
1018-75 CalA 288P819; 255 IllA578.
1019-91 CalA 288P819; 34Wyo 405, 244P372.
1020-94 207 Iowa1198, 224NW500.
1020-4 [a] **Burden is on defendant to show that funds are available to meet check.**–40GaA517, 150SE439.
1020-5½-New. Lack of funds will be presumed in the absence of a showing that there were adequate funds on deposit at the time the check was given. 44 Ida505, 258P550.
1020-7 Ala 129S276; 199Cal 307, 249P 11; 202Cal 279, 260P291; 29Hawaii763; 251Mich343, 204NW87; 164Minn425, 205NW286 (immaterial evidence properly excluded); 174Minn115, 218NW 464; 174Minn471, 219NW757; 219MoA 519, 282SW535; 221MoA380, 283SW 741 (rumor as to insanity of maker of note inadmissible); 86PaSuper481; TexCivA 275SW858; TexCivA 32SW (2d)255(2dcase). [g] 77CalA78, 246P 130. [h] **Evidence admissible.**–262Mass 362, 160NE184. [i] **Where court has excluded note sued on,** it may later receive note in evidence upon its own volition. CalA 288P830.
1021-8 48RI 470, 138A865; TexCivA 48W(2d)603 (offer to secure plaintiff to obtain extension inadmissible).
1021-9 38GaA617, 144SE921(2dcase) (defendant's liability on other note is inadmissible under plea); 219MoA519, 282SW535; 123 Okl 105, 252P394; Wash 287P50. See also MoA 148W(2d) 966. [b] **Evidence inadmissible.**–121 OhSt503, 169NE574.
1021-10 121Kan18, 245P1041.
1021-14½-New. In a suit to cancel a note on the ground of the maker's mental incapacity, evidence as to the mental condition of the maker prior to execution of the contract is admissible. TexCivA 128W(2d)625.
1021-15 TexCivA 158W(2d)36. [b] **Testimony of previous dealings between pledgee and pledgor** held admissible on issue of acceptance. 151Md503, 135A 369.
1022-35 93CalA560, 269P959 (as against defense of fraud); 123Kan603, 256P986; 195NC418, 142SE325; 130 Okl 51, 265P141.
1022-38 169Minn132, 210NW869.
1022-38½-New. Defendant may show defects in title of parties prior to plaintiff, who had negotiated the instrument, without showing what knowledge plaintiff had when the note was bought. 264 Mass208, 162NE368.
1022-41½-New. , or that transfer was after maturity 169Minn132, 210NW 869.
1023-45 215Ala235, 110S34; 35Ariz 302, 277P68; 179Ark39, 148W(2d)255; 86Colo 326, 281P358; 87 IndA69, 158NE 646; 151Md503, 135A369; 262Mass362, 160NE184; 217AppDiv546, 217NYS97; SD 226NW343 (long delay in filing mortgage security); TexCivA 168W(2d) 143. [a] (1) 119Kan508, 240P395.
1023-50 155Md384, 142A515 (testimony as to distribution of proceeds); 75Mont516, 244P494; 217AppDiv546, 217NYS97; TexCivA 270SW1099.
1023-51 155Md384, 142A515; 194NC 692, 140SE610.
1023-52 But see Vt 147A285.
1023-55 300Pa522, 150A885.
1023-56 151Md503, 135A369; 217App Div546, 217NYS97.
1023-60 217AppDiv546, 217NYS97.
1023-61½-New. In an action by a bank to recover a draft indorsed for collection and claimed by defendant bank as an innocent purchaser, evidence of the custom of banks to charge back unpaid checks is admissible. 170Ark583, 280 SW372.
1023-61½-New. On an issue of an indorsee's holdership in due course testimony is material which tends to show that he was in doubt whether he took the note as a direct purchase or as collateral security; 200 Iowa86, 204NW233.
1023-61¼-New. that he had knowledge of the insolvent condition of the payee; 200 Iowa86, 204NW233.
1023-61½-New. that he knew the note was to be held in escrow with corporate stock for which the note was given; 200 Iowa86, 204NW233.
1023-61¾-New. that the payee was a stranger in the community. 200 Iowa 86, 204NW233.
1023-62 214Ala501, 108S335; 170Ark 583, 280SW372; 199Cal 307, 249P11; 262Mass422, 160NE251; 264Mass208, 162NE368 (exclusion of question as to whether witness told plaintiff that note had not been paid held not error); 131 Or123, 282P99.
1024-65 199Cal 307, 249P11.
1024-69 207Cal 798, 279P799, 207Cal 779, 279P797 (knowledge of maker's solvency, without inquiry as to original consideration, held circumstance to be considered); TexCivA 270SW1099.
1024-72 23AlaA145, 122S802 [certiorari den 219Ala503, 122S804(1stcase)].
1024-74 38F(2d)462; Ala 130S398; 48 Ida405, 283P519; 236 IllA412; 253 IllA416; 167La753, 120S284; 150Md 347, 133A114; 178Minn556, 228NW150 (2dcase); 147Miss835, 112S795; 116 Nebr436, 217NW942 (that witness defendant signed as accommodation to plaintiff bank); 141 Okl 169, 284P5.
1025-75 MoA 276SW93; 40 OklACR136 [reh pending].
1025-76 169Minn132, 210NW869; 221 MoA955, 288SW954.
1025-78 Cal 290P14; 153Md235, 138A 261, 53ALR1165; 121 Or326, 252P400.
1026-79 MoA 282SW749 (accommodation maker).
1026-80 RI 141A330 (financial relations.
1026-88 128 Or643, 275P680; SD 226 NW757.
1026-91 155Md173, 141A556.
1026-92 MoA 23SW(2d)644; 132 Or368, 284P573.
1026-94 253 IllA262.
1026-95 226Ky367, 10SW(2d)1115.
1026-97 See also 217Ala259, 115S303. [a] **Oral agreement not to reënter business** is not a defense to action on notes given pursuant to written agreement for sale of hardware stock. 122Kan416, 251 P1116.
1026-2 172Ark711, 290SW58. But see 221MoA955, 288SW954; RI 141A330.
1026-6 [a] **Where defendant claimed to be accommodation indorser,** evidence to show financial condition of defendant is admissible. 125Me471, 134A801.
1026-7½-New. Defendant in an action on a nonnegotiable note may be permitted to testify that he did not authorize insertion of due date. 215Ala 693, 112S305.
1027-11 202Cal 326, 260P553 (evidence of state of mind of accommodation indorser who pleaded duress held immaterial to any issue). See also 51SD477, 215NW533, 58ALR1276. [a] (2) Testimony as to threats to bring civil action which would disclose commission of felony by close relative of defendant indorsers is admissible in support of their defense of duress, though threats were made to maker of note and his attorney where they were communicated to indorsers. 310Mo 287, 275SW540. (3) Evidence of threats of criminal prosecution are competent to show state of defendant's mind, though not relied upon to support plea of duress. 310Mo 287, 275SW540.
1027-13 But see TexCivA 19SW(2d)127.
1027-15 [a] (3) Note sued on is properly admitted where mistake in indorsing is testified to. 151SC274, 148SE887.
1027-20½-New. In the absence of a plea of non est factum, there need not be proof of execution of the note; nor is it subject to general objections. 22 AlaA633, 118S766(2dcase).
1027-20¾-New. Failure of the makers to call for proof of signatures before trial dispenses with the necessity of proof. RI 143A611.
1027-21½-New. Exclusion of testimony as to consideration paid for note by payee, offered on issue of genuineness of note, is held error. 15F(2d)729.
1028-23 3LaA92.
1028-24 27Hawaii537.

1028-25½-New. Where an individual personally executes a note, the want of any necessity that it should be signed by another as agent is a circumstance the jury may consider. 33GaA748, 127 SE888.

1028-28 255 IllA127; 153Md235, 138A 261, 53ALR1165.

1028-33 101WVa535, 133SE131, 133 [citCJ].

1029-36 101WVa535, 133SE131, 133 [citCJ].

1029-54 [a] (2) Evidence that defendant had overdrawn his account with plaintiff, a banking corporation. 27Hawaii537.

1030-64½-New. Evidence that a joint maker had on prévious occasions forged other notes is inadmissible. 175Ark1010, 1SW(2d)75.

1030-74 See also MoA 283SW741 (rumor as to maker's insanity is inadmissible).

1030-78 237 IllA587; 52SD324, 217NW 393.

1030-79 [a] **Parol evidence** of conditional delivery cannot be shown where it changes written agreement. 165Minn 87, 205NW696.

1030-80 253 IllA346; 205 Iowa948, 218 NW946.

1030-82 86 IndA23, 149NE458; 121 Kan461, 247P628; 120 Okl 85, 250P 1012; Vt 146A72.

1030-83 219Ala396, 122S362; CalA 286 P710; 327 Ill455, 159NE35; 121Kan 461, 247P628; Mass 168NE785; 217 AppDiv546, 217NYS897; 226AppDiv82, 234NYS392; 56ND297, 217NW172; 51 SD477, 215NW533, 58ALR1276; 101Vt 114, 141A598. [d] **In action by payee against surety,** evidence is admissible to show that payee withheld information which would probably have led defendant to withhold his signature. 53SD 268, 220NW515.

1031-85 201Cal 456, 257P505 (other transactions to show unsound business practices not admissible as circumstance to show conspiracy to defraud); 222 MoA1194, 4SW(2d)864 (statements to maker after execution of note); 120 Okl 85, 250P1012.

1031-86 217AppDiv546, 217NYS97.

1031-87 264Mass208, 162NE368; Mass 168NE785.

1031-94½-New. On proof of knowledge of plaintiff, suing on trade acceptance, of similar claims of fraudulent sales before taking acceptance, admitting evidence of fraud was held proper. 48RI 170, 136A445.

1031-96 [a] **In action against seller of notes,** testimony of agreement that indorsement of one should be considered indorsement of all has been held admissible. 117Tex107, 298SW419. [b] **After admission of testimony** of agreement that indorsement of one note should be considered indorsement of all, exclusion of testimony of different agreement has been held erroneously excluded. 117 Tex107, 298SW419.

1031-5½-New. Evidence that defendant had agreed not to indorse notes is not competent. 26F(2d)51.

1031-7 169Ark73, 272SW843 (prima facie evidence of execution in absence of purported maker's affidavit denying genuineness of his signature); 3LaA 158; 126Me133, 136A696; 177Minn477, 225NW388; Tex 274SW166; TexCivA 5SW(2d)255.

1032-10 50ND455, 196NW307.

1032-14 TexCivA 274SW166.

1032-15 192NC87, 133SE427.

1032-16 21AlaA599, 110S480.

1032-18½-New. Under statutes in some jurisdictions instruments upon which a tax is not paid as required by statute are inadmissible in evidence in any court of state. 40 OklACR508 [reh pending].

1032-18⅓-New. In jurisdictions where promissory notes are taxable, they are inadmissible in evidence until the tax is paid. 40 OklACR508 [reh pending].

1033-21 96CalA478, 274P568. See also 334 Ill 96, 165NE165.

1033-23 See also 205 Iowa948, 218NW 946.

1033-30 144Va516, 132SE175.

1033-31½-New. Where a note was discounted with a bank by the president of a corporation, and the proceeds applied to the payment of loans carried in his name, but actually for the benefit of the corporation, parol testimony was competent to establish the nature of the loan. 128Misc446, 218NYS293.

1033-31⅓-New. In an action against an indorser of a note, evidence as to whether defendant ever indorsed more than one note at plaintiff bank was held irrelevant. 145Va307, 133SE769.

1033-31¼-New. The nominal payee of a negotiable instrument may in fact and in law be shown to be really an indorsee and stand in that relation to the paper. 44 Ida599, 258P522.

1033-31½-New. Where the note sued on was held by the transferee as a pledge, the terms of the contract are admissible. MoA 14SW(2d)966.

1033-32 100Vt112, 135A715.

1033-35 116 OhSt609, 157NE478, 54 ALR992.

1033-38 93CalA560, 269P959 (as against defense of fraud); CalA 293P86; 116 Nebr112, 216NW191.

1034-40 MoA 6SW(2d)633.

1034-40½-New. Evidence is admissible to show that defendant signed a note for accommodation only and owed plaintiff no money at the time thereof. 254Mass 10, 149NE691.

1034-46½-New. As against a transferee of an accommodation paper after maturity parol evidence is admissible to show that one other than the payee was the party accommodated. 121Kan239, 246P1013.

1034-46⅓-New. Evidence of contemporaneous agreements between the parties to a note is admissible in an action against its accommodation maker by a purchaser for value after maturity. 99 CalA728, 279P222.

1034-46¼-New. Exclusion of evidence to show a note was merely for accommodation is not error. 85Mont571, 281P 348.

1034-50½-New. On issue as to whether defendant signing as agent for a sheep company was really liable as principal, evidence showing subsequent ownership of sheep is admissible, 22F(2d)530.

1034-50⅓-New. as is also evidence that defendant executed redelivery bond to recover mortgaged sheep. 22F(2d)530.

1034-54 36GaA570, 137SE104; 202 Iowa 1371, 212NW133; 130Kan392, 286P197; 262Mass362, 160NE184; MoA 9SW(2d) 1070; MoA 22SW(2d)52 (judgment adjudicating title). [d] **One in possession of note unindorsed and payable to order** must prove ownership by evidence dehors the note. 154SC435, 151SE738.

1034-55 Ala 130S405.

1035-78½-New. Transfer of note payable to order without indorsement may be proved by parol. 165La694, 115S 905.

1035-79 200 Iowa37, 204NW259.

1035-81½-New. The admission of testimony of the giving of notice of maturity and demand for payment is not error, although no notice was required. TexCivA 280SW251.

1035-81⅓-New. In an action on a renewal note given by an accommodation indorser who gave a new note for a lesser amount than the original, after compromise and settlement with the holder, evidence that defendant received no notice of protest of the original note is inadmissible. 101WVa26, 131SE719.

1036-92 50ND400, 196NW102.

1037-94 286Pa57, 133A220.

1038-96 150Md385, 133A121.

1038-99 150Md385, 133A121.

1039-6 Mass 172NE94; 50ND400, 196 NW102.

1040-17 150Md385, 133A121.

1040-18 50ND400, 196NW102.

1041-31 133SC304, 130SE890 (letter to agent of maker showing attitude of "indorser" with respect to renewal held relevant).

1041-33 119Kan333, 239P1103; 127 Or 302, 272P271.

1041-34 105Conn73, 134A240; 130Kan 392, 286P197; 221Ky498, 299SW207 (unsigned writings held inadmissible); 147Miss835, 112S795; 222MoA1003, 7 SW(2d)470; 48RI 493, 139A300; Tex CivA 295SW929; TexCivA 31SW(2d) 355. [a] (10) Testimony on behalf of plaintiff that cashier's check was accepted conditionally and not as absolute payment is competent and relevant in connection with statement as to receipt of check and disposition of it. 51ND336, 199NW869, 36ALR465. [h] **Evidence held inadmissible** as immaterial. 69 Utah284, 254P781.

1042-38½-New. Evidence to prove parol release is not admissible. 190NC659, 130 SE633.

1042-38⅓-New. Testimony of an indorser's president relating to a conversation with drawer about handling drafts and payment of other drafts is held admissible in an action on a draft by an indorser against the drawer. 171 Ark469, 284SW724.

1042-38¼-New. Where a bill of exchange sued on is given in payment for a note secured by mortgage, it is immaterial whether the mortgaged property was in existence at the date of the trial, and evidence that plaintiff had it in his possession is properly excluded. 96 CalA130, 273P598.

1042-38⅓-New. Where money passes between the maker and the payee of a negotiable note, and the note is not produced or exhibited, evidence of the passing of money is not admissible against a holder subsequent to the payee. Mass 165NE474.

1042-40 29PortoRico 820 (indorsed checks bearing dates contemporaneous with notes held admissible to show extinction of obligation).

1043-44 88 IndA674, 164NE294.

1043-51 233Mich174, 206NW348 (statements by testator held to show intentional cancellation of note). But see 119 Kan333, 239P1103.

1043-52 27Hawaii537.

1043-56 27Hawaii537.

1043-59½-New. In a payee's action on a note, refusal to receive evidence offered by the accommodation indorser as to the value and quality of machines covered by a chattel mortgage securing the note, which chattel mortgage the payee had released without the indorser's consent, is error. 225AppDiv300, 233NYS 196.

1044-75 255Mass569, 152NE54; 50RI 163, 146A403.

1044-76 9LaA567, 119S289.

1045-78 220Ala137, 124S302; 21AlaA 643, 111S316; 37GaA564, 141SE59; 204 Iowa322, 213NW798; MoA 276SW93; 81 Mont408, 263P972; NJ 150A373; 50 ND583, 197NW150 (proof of note and nonpayment). See also 212Ky447, 279 SW618.

1045-79 See also Iowa 233NW28.

1045-81 21AlaA44, 104S887 (makes prima facie case); 21AlaA643, 111S316; 175Ark23, 298SW498; 41 Ida756, 242P 798; 243 IllA129; 252 IllA17; 252 IllA 329; 85 IndA624, 155NE261; 201 Iowa 240, 207NW121 (action by payee against maker); Iowa 233NW126 (introduction of note with signatures admitted); Me 151A138; 170Minn341, 212NW599; Minn 230NW785; Mo 271SW535; RI 148A 597 (introducing note and testifying as to amount due); RI 150A258(2dcase) (where validity of signatures uncontested); 52SD594, 219NW477; TexCivA 9 SW(2d)405; TexCivA 30SW(2d)494; 101 Vt114, 141A598; 39Wyo 454, 273P679. See also 124 Or157, 264P368.

1045-84 264Mass208, 162NE368 (in connection with notary's letter of protest and admission of execution and delivery).

1045-89 97Fla648, 122S2(1stcase); 40 GaA291, 149SE438 (defendant's admissions held to establish prima facie case for plaintiff); 130Kan35, 285P602 (evidence sufficient); 177Minn388, 225NW 283(2dcase) (insufficient); Tex CommnA 299SW848. [b] **Evidence insufficient to show estoppel.**-130Kan392, 286P197.

1045-90 16F(2d)578; 82Colo 309, 259 P513; 35GaA784, 134SE841; 37GaA 625, 141SE224; 38GaA389, 144SE41; 240 IllA85; 121Kan18, 245P1041; 123 Kan275, 255P44; 123Kan606, 256P994; 225Ky150, 7SW(2d)1069; 229Ky383, 17SW(2d)253; 171Minn216, 213NW 902; 115Nebr101, 211NW608; 115Nebr 327, 212NW762; Nebr 228NW866(2d case); 192NC69, 133SE415; 51ND215, 199NW868 (sufficient to support verdict

for plaintiff); **TexCivA** 4SW(2d)1016; **TexCivA** 18SW(2d)709; **TexCivA** 31 SW(2d)329; 66Utah290, 241P1055 (evidence held to show that plaintiff had sufficient interest in notes to maintain action). [a] (4) To support finding that note was executed for accommodation of bank for thirty days and was transferred by it after maturity in violation of agreement. 121Kan239, 246P 1013. (5) To sustain finding that maker of note was mentally incompetent to transact business. 169Minn386, 211NW 306. (6) To support findings of court. 43 Ida742, 254P796. (7) To show that renewal note was executed without knowledge that note renewed was forgery. 204 Iowa887, 216NW274. [b] (2) To support judgment against accommodation indorsers in action by assignee of note after maturity. 75Mont516, 244 P494. [c] **Evidence held to sustain finding** that nonnegotiable note represented advance rather than loan. Iowa 233NW108.

1045-92 220MoA1062, 282SW86; **MoA** 18SW(2d)93 (evidence sufficient).

1046-93 120Kan256, 243P317 (evidence held sufficient to sustain defense of alteration); 130Kan360, 286P269 (evidence held to show note was renewal of note assigned to plaintiff).

1046-94 CalA 293P114. [b] **Evidence sufficient** to show that event fixed for payment of note was merely for convenience. CalA 287P552.

1046-95 GaA 155SE43; 48RI 470, 138 A865. [a] **Evidence held to show** extension of time for payment of note. **TexCivA** 292SW262. [b] **Evidence insufficient** to sustain finding that accommodation maker knew of extensions of time for payments. Me 149A806.

1046-96 33GaA729, 127SE672 (where aggregate amount of principal and interest was testified to without their being stated separately).

1046-96½-New. , or to the fact that its payment was secured by a chattel mortgage, 158La796, 104S719 (evidence held sufficient).

1046-96⅓-New. or the existence of an agreement that a note should be paid out of a particular fund. 120 Or493, 252P969.

1046-97½-New. Evidence is held sufficient to show attorney's services were unnecessary in collecting note. **Tex CommnA** 299SW405.

1046-97⅓-New. Evidence held to show assignment not forgery in maker's action to cancel note. **TexCivA** 23SW(2d) 436.

1046-99 [a] (1) 37GaA693, 141SE668; 127Me383, 143A600; **RI** 143A611; 99 WVa544, 130SE142. (2) Where validity of defendant maker's signature to note is admitted to support action, this is sufficient in first instance to support burden of proof. 264Mass208, 162NE 368.

1046-1 153Va190, 149SE537.

1046-2 99WVa544, 130SE142. [a] **Prima facie case is made out** by introduction of instrument and proof of purchase before maturity where defendant pleaded conditional delivery and negotiation in breach of faith or violation of written agreement to return note on demand of maker within stated time. 51 ND104, 201NW687.

1046-3 99WVa544, 130SE142.

1046-4 IndA 158NE646. [a] **Inadequacy of price paid** does not raise inference or suspicion of tainted instrument. 207Cal 798, 279P799; 207Cal 779, 279P797.

1046-4½-New. Evidence that the indorsee gave the payee credit on his checking account without knowledge that the amount of credit had been checked out is insufficient to show purchase for value. 200 Iowa86, 204NW 233.

1046-5 151Md514, 135A383, 49ALR 1366; MoA 273SW764.

1046-7 49SD248, 207NW66 (direct proof is not necessary). See also 204 Iowa555, 215NW664. [a] **Evidence insufficient** to justify finding for defendant. **TexCivA** 25SW(2d)949.

1046-8 119Kan508, 240P395 (proof of fraud does not establish, prima facie, notice in holder); 240Mich270, 215NW 243; 127 Okl 257, 260P773; 128 Okl 233, 262P691.

1046-9 26F(2d)51; 28F(2d)755; 28 F(2d)830; 214Ala501, 108S335; 23 AlaA454, 126S886; 168Ark6, 269SW370 (evidence held sufficient to establish that appellant, defendant in suit to cancel deeds and notes, was innocent purchaser for value); 172Ark137, 287SW 740; 173Ark856, 293SW728; 174Ark 1179, 297SW1038; 177Ark1193, 6SW (2d)284; 181Ark1086, 29SW(2d)297; 199CaI 307, 249P11; 207Cal 652, 279P 765; 72CalA143, 236P964; 77CalA265, 246P344; 80CalA501, 251P973; 95CalA 505, 273P39; 98CalA604, 277P538; 98 CalA796, 277P541; CalA 293P86; 81 Colo 214, 254P771, 58ALR250; 85Colo 546, 277P782; 106Conn147, 137A759; 37GaA423, 140SE525; 28Hawaii35; 41 Ida642, 241P36; 44 Ida419, 258P361; 251 IllA234; Ill 173NE390; IndA 168 NE461; 200 Iowa967, 205NW781; 201 Iowa888, 208NW371; 206 Iowa664, 221 NW210 (may be shown by facts and circumstances); 119Kan539, 240P840 (evidence sufficient); 120Kan303, 243P 278; 120Kan668, 245P147; 121Kan 414, 247P851; 122Kan429, 252P235; 123Kan603, 256P986; 127Kan807, 275 P167; 211Ky284, 277SW280 (evidence sufficient); 168La939, 123S633(2dcase) (note originally given as collateral to third person not shown); 8LaA546; 9 LaA525, 119S729; 9LaA664, 120S79; 11LaA398, 122S894(2dcase); 12LaA 134, 125S480; LaA 130S267; 151Md 503, 135A369; 258Mass306, 154NE835; 259Mass232, 156NE26; 262Mass152, 159NE615; Mass 166NE857; 251Mich 384, 232NW245; 174Minn115, 218NW 464; 177Minn477, 225NW388; 153Miss 749, 121S490; MoA 256SW105; MoA 272SW85; 217MoA326, 272SW1037 (evidence held insufficient to warrant admission of evidence of contract between defendant and plaintiff's transferor); MoA 282SW466; MoA 9SW(2d) 852; MoA 28SW(2d)117; MoA 31SW (2d)234; 118Nebr411, 225NW25, 63 ALR493; Nebr 231NW754; NJ 131A 98; 223AppDiv306, 228NYS241; 192 NC87, 133SE427; 193NC814, 138SE 169; 49ND343, 191NW491; 50ND494, 196NW953 (sufficient); 53ND583, 207 NW149; 58ND693, 227NW433; 58ND 805, 228NW209; OhA 153NE856; 27 OhA353, 161NE291; 118 Or514, 247P 318; 124 Or157, 264P368; 300Pa522, 150A885; 49SD277, 207NW69; **Tex CommnA** 29SW(2d)978; **TexCivA** 278 SW300 (evidence sufficient to sustain finding that plaintiff is not bona fide holder in due course); **TexCivA** 292 SW556; **TexCivA** 16SW(2d)341; **Tex CivA** 22SW(2d)1105; 68Utah530, 251P 354; Utah 276P659; 153Va190, 149SE 537; Va 153SE841; Va 154SE515; 154 Wash201, 281P731(2dcase); 103WVa 597, 138SE745; 104WVa67, 138SE748; 192Wis528, 213NW328; 35Wyo 319, 249P795. [d] 158La796, 104S719. [e] **Evidence held insufficient** to show that plaintiff is holder in due course. MoA 27SW(2d)441; 125Misc722, 211NYS482; **TexCivA** 30SW(2d)494.

1047-10 26F(2d)51; 220Ala683, 127S 500(2dcase); 172Ark562, 289SW761; 174Ark852, 298SW12; 177Ark1193, 6 SW(2d)284; 178Ark1200, 10SW(2d)358 (1stcase); 201Cal 456, 257P505 (insufficient to show knowledge of, or participation in, fraud); 72CalA143, 236P 964; 85CalA173, 259P97; CalA 262P 815; 95CalA505, 273P39; 102CalA756, 283P874; CalA 284P466; CalA 289P 236; 81Colo 214, 254P771, 58ALR250; 35GaA595, 134SE355 (drunken condition of defendant at time note was procured); 41 Ida642, 241P36; 44 Ida419, 258P361; 242 IllA22; 200 Iowa967, 205 NW781; 201 Iowa888, 208NW371; 120 Kan668, 245P147; 129Kan79, 281P854; 211Ky284, 277SW280 (evidence sufficient); LaA 126S457; 264Mass208, 162 NE368; Mass 166NE840; Mass 168NE 785; 240Mich270, 215NW243; 142Miss 444, 107S669; 153Miss749, 121S490; Mo 19SW(2d)290 (duress); 221MoA568, 282SW1033; 221MoA979, 295SW835; MoA 20SW(2d)963; 48Nev319, 232P 206; NJ 131A98; 219AppDiv203, 219 NYS321; 49ND343, 191NW491; 50ND 494, 196NW953 (insufficient to show knowledge of fraud); 51ND287, 199NW 945; ND 232NW307; 116 Or119, 240P 432; 124 Or157, 264P368; 86PaSuper 354; **TexCivA** 275SW721; **TexCivA** 278 SW300 (evidence sufficient to show notice of defenses); **TexCivA** 280SW848; **TexCivA** 291SW265; **TexCivA** 4SW(2d) 309; 148Va479, 139SE295; 99WVa544, 130SE142. [a] 118Kan283, 234P965. [c] (1) 300Pa522, 150A885. [e] (3) Testimony of bank cashier, not shown to have handled transaction, that he had no knowledge of infirmities is insufficient as against defense of fraud, full value not having been paid. MoA 294 SW456. [g] (3) To show lack of knowledge of defenses. 158La796, 104S 719. [h] 216Ky364, 287SW933. [i] **Inquiry not revealing** condition is not evidence of bad faith. 212Ky486, 279 SW622. [j] **Bad faith not shown.**–212 Ky486, 279SW622. [k] **Evidence held sufficient** to show assignee had no notice of infirmity. 214Ky436, 283SW 396. [l] **Insufficient evidence of knowledge.**–MoA 298SW242. [m] **Inquiry as to other notes executed by same maker** is not indicative of knowledge or notice of infirmity in notes in suit. SD 231NW534.

1048-11 90CalA717, 266P550; 105 Conn73, 134A240; 211Ky284, 277SW 280 (evidence sufficient); Mass 166NE 840; 83Mont573, 273P635; NJ 131A 98; 109 Okl 85, 234P590 (mere proof of demand one day after maturity is insufficient to sustain burden of showing that plaintiff was not holder in due course); **TexCivA** 15SW(2d)36.

1048-12 207Cal 798, 279P799; 207Cal 779, 279P797 (innocent purchaser for value); 83Colo 118, 263P18 (evidence of value held sufficient); 106Conn147, 137A759; 44 Ida419, 258P361; 211Ky 284, 277SW280 (evidence sufficient); **TexCivA** 278SW300 (evidence sufficient to show lack of valuable consideration).

1048-13 175Minn287, 221NW10.

1048-13½-New. The fact that the wife of the payee presented a check for certification after it is claimed to have been transferred to a third person, and also to plaintiff, is a circumstance tending to show that plaintiff was not a holder in due course. 125Misc838, 211NYS 486.

1048-13⅓-New. In an action to cancel a note given pursuant to exchange of property a finding that the receiver of the note had knowledge of fraud inducing trade has been held not against preponderance of evidence; 168Ark1, 268SW356.

1048-13¼-New. so, too, a finding that the father of the receiver of such note was not an innocent purchaser has been held not against preponderance of evidence. 168Ark1, 268SW356.

1048-13⅕-New. In action for cancellation of note evidence held to support finding that defendant was not a holder in due course. SC 155SE736.

1048-15 215Ala474, 111S7; 261Mass 221, 158NE757. [a] (2) Admission of consideration by words "value received" held prima facie sufficient to sustain burden of proof. 128Me428, 148A406 (2dcase).

1048-19 79CalA229, 249P37; 97Fla861, 122S217; 235Ky283, 30SW(2d)958; Nev 290P413; NJSup 150A50 (evidence of want of consideration held insufficient); **TexCivA** 275SW498.

1048-21 220Ala293, 124S866 (evidence as to amount paid as consideration); 208Cal 723, 284P671; 74CalA396, 240 P1025; 77CalA93, 246P81; 79CalA533, 250P205; 83CalA621, 257P173; 85CalA 360, 259P460; CalA 288P830; CalA 291 P220; CalA 293P86; 160Ga732, 129SE 57; 37GaA423, 140SE525; 236 IllA412; 242 IllA289; 253 IllA514; 201 Iowa961, 208NW273; 205 Iowa1185, 219NW315; 206 Iowa947, 221NW507; 208 Iowa682, 223NW489; 119Kan807, 241P431, 120 Kan256, 243P317; 121Kan29, 245P 1036; 123Kan174, 254P329; 128Kan 180, 276P808; 235Ky283, 30SW(2d) 958; 158La796, 104S719; 1LaA464; 11 LaA234, 121S623; LaA 130S267; 127 Me301, 143A55; 258Mass343, 155NE22;

Mass 164NE916; 241Mich652, 217NW787; 168Minn70, 209NW484 (evidence sufficient); 178Minn556, 228NW150(2d case); MoA 272SW1049; MoA 278SW826; MoA 198W(2d)541; 245NY611, 157NE879; 49ND1022, 194NW669; 55ND348, 213NW733; 131 Okl 235, 268P286; 120 Or306, 252P85, 56ALR392; 121 Or309, 252P87; 33PortoRico861; 48SD547, 205NW317 (sufficient to overcome presumption of consideration); 53SD560, 221NW371; SD 225NW299; SD 227NW437; TexCivA 283SW180; Tex CivA 289SW70a; TexCivA 294SW687; TexCivA 298SW664; TexCivA 23SW(2d)445; TexCivA 29SW(2d)480; 70 Utah432, 260P1082; 106WVa356, 145SE645 (mutual agreement for exchange of checks); 34Wyo 363, 243P595; NS [1930] [DomLR]713. [b] 52ND530, 203NW898. [d] (1) See also 51ND 246, 199NW930. (2) Evidence held insufficient to show agreement to forbear. 201 Iowa961, 208NW273.

1049-22 31Ariz386, 253P899; 79CalA 533, 250P205; 242 IlA50; 200 Iowa 1213, 206NW256 (insufficient); 232 Mich194, 205NW49; 165Minn330, 206N W646; 168Minn271, 209NW899; 177 Minn325, 225NW113; 118 Okl 286, 248 P611; 48Kt 40, 134A851.

1049-23 32F(2d)168; IndA 173NE289; Iowa 213NW408; 206 Iowa950, 221NW 505; 208 Iowa1310, 227NW163; 121 Kan239, 246P1013; 128Kan238, 276P 815(2dcase); 129Kan203, 282P741; LaA 130SS48; Mass 164NE916; 176 Minn425, 223NW682; 177Minn477, 225 NW388; MoA 30SW(2d)768; 116Nebr 113, 216NW191; NJSup 145A161; 53 ND583, 207NW149; 57ND456, 222NW 474; 143 Okl 299, 288P960; 283Pa406, 129A333; TexCivA 280SW877; TexCiv A 108W(2d)965 (accommodation maker); 106WVa356, 145SE645; 34Wyo 363, 243P595.

1049-24 175Ark23, 298SW498; 85CalA 360, 259P460; 37GaA668, 141SE419; 37 GaA698, 141SE502; 8LaA354; LaA 130 S120; 102NJL560, 134A296.

1049-25 79CalA229, 249P37; 100CalA 706, 280P1017 (part failure not found); CalA 292P281; 82Colo 572, 261P664; 160Ga732, 129SE57 (evidence held sufficient); 252 IlA395; IndA 171NE202; 203 Iowa461, 212NW729; 206 Iowa664, 221NW240; 119Kan806, 241P431; 122 Kan416, 252P212; 243Mich331, 220NW 665(2dcase); MoA 98W(2d)87; Nev 290P413; 50ND494, 196NW953; 121 Or 309, 252P87; 88PaSuper592; TexCivA 282SW926; 198Wis66, 223NW440. [b] (2) Other evidence held insufficient to show partial failure of consideration. 252 IlA395. [c] **Fair preponderance required.**–47 Ida661, 279P416, 65ALR 900.

1050-26 [a] **Evidence held sufficient to** show that notes were memoranda for money advanced to president of plaintiff bank and were not made for purpose of transferring property in instrument under statutes. 32Ariz136, 256P881(4th case).

1050-27½-New. Evidence has been held insufficient to show that consideration for a note was dated and payable in another state for goods sold in that state to a party then living therein or that it grew out of contract made in that state. TexCivA 283SW21.

1050-27¾-New. That consideration for a note secured by a mortgage is other than that expressed therein need only be established by a preponderance of evidence. 241Mich46, 216NW448.

1050-31 170Minn516, 212NW30; 50ND 583, 197NW150; TexCivA 28SSW1103; 39Wyo 454, 273P679.

1050-36½-New. In an action on a note against an accommodation indorser who set up the defense that he was discharged from liability by the payee's release of security, evidence may establish that a new note was given as a renewal note. 178Ark1200, 128SW(2d)402(2d case); 225AppDiv300, 233NYS196.

1050-37 169Ark73, 272SW843 (sufficient); 174Ark1179, 297SW1012; 247 IlA233; 220Ky730, 294SW1088; 11 LaA42, 122SS894(1stcase); 11LaA340, 123SS37 (execution held mere formality); 170Minn516, 212NW30; Minn 230 NW785; NJSup 147A451(1stcase); 50 ND446, 196NW750; Tex 285SW1103; TexCivA 283SW180; TexCivA 14SW (2d) 1054; 70Utah432, 260P1082.

1051-38 151Md26, 133A840; MoA 24 SW(2d)235 (held not to show that defendants were accommodation parties); TexCivA 24SW(2d)768.

1051-39 95CalA336, 272P613(2dcase); 35GaA111, 132SE114; 40GaA290, 149 SE307 (verdict for plaintiff warranted); 206 Iowa664, 221NW210; 160La387, 107S234; 170La41, 127S358 (evidence held insufficient); 6LaA366; 6LaA387; 252Mass552, 148NE105; 170Minn516, 212NW30; MoA 98W(2d)856; Nebr 231 NW34; 88PaSuper272; 91PaSuper252; 153Va190, 149SE537 (note held not forgery). [c] **Evidence held insufficient.**–13LaA551, 128S193 (to show that mark was signature of defendant).

1051-41 203 Iowa792, 206NW586.

1051-42 200 Iowa613, 203NW809 (evidence showed mental incompetency of maker); 201 Iowa888, 208NW371. [b] **Evidence held sufficient** to show who was intended as payee. 151Md26, 133A 840.

1052-45 31F(2d)396; 226AppDiv313, 235NYS143; 138 Okl 272, 281P251. [c] **Evidence held to show conclusively** that there was constructive delivery of assignment of notes. 233Ky648, 268W (2d)556. [d] **Possession and production of nonnegotiable instrument** are insufficient as against allegation of nondelivery. 253NY359, 171NE569.

1052-47 82Colo 540, 261P1116mem; 253 IlA206; 201 Iowa657, 208NW74; 204 Iowa239, 213NW775; 206 Iowa1258, 222NW10; 129Kan203, 282P741; Me 139A475 (evidence held sufficient to show conditional delivery); MoA 272SW85 (condition on which notes were intended to pass); 54ND805, 211NW587; 127 Or 227, 271P607; 51ND288, 213NW507; TexCivA 18SW(2d)1097. [c] **Evidence held sufficient** to show that notes were not intended to pass till merchantable title was furnished. MoA 272SW85. [d] **Evidence held insufficient** to warrant finding of conditional delivery. 255Mass 558, 152NE337.

1052-47½-New. Evidence held to show that note and papers assigning maker's interest in trust as collateral were signed and delivered in New York. 126Misc 534, 213NYS593 (thus transaction is governed by New York law).

1052-49 127Kan807, 275P167; 153Va 190, 149SE537 (neither business relationship nor close friendship constitutes badge of fraud).

1052-50 215Ala476, 111S29; Ala 129S 43; 172Ark1176, 290SW590; 173Ark 741, 293SW22; 208Cal 82, 280P368 (misrepresentation in inducement found); 71CalA474, 235P662; 83CalA 670, 257P454; 84CalA387, 258P141; 101CalA186, 281P514 (defendant must prove by preponderance of evidence); 35GaA595, 134SE355 (insufficient); 253 IlA206; IndA 158NE629 (evidence held insufficient); IndA 168NE196; IndA 168NE697; 200 Iowa613, 203NW809 (fraud shown); 201 Iowa657, 208NW 74; 201 Iowa888, 208NW371; 203 Iowa20, 212NW359, 204 Iowa328, 213 NW417; 206 Iowa664, 221NW210; 119 Kan807, 241P431; 121Kan18, 245P 1041; 121Kan414, 247P851; 121Kan 421, 247P627; 122Kan429, 252P235; Kan 289P421; 214Ky604, 283SW964; 163La957, 113S161; 3LaA259; 11LaA 439, 123S456 (fraud not shown by preponderance); LaA 130S267; 126Me413, 139A231 (evidence sufficient to warrant finding that payee's representations to indorser were false); 127Me306, 143A 173; 232Mich194, 205NW49 (conspiracy to defraud held not established by preponderance of evidence); 168Minn70, 209NW484 (evidence insufficient); 169 Minn98, 210NW625; 174Minn115, 218 NW464; 174Minn277, 219NW92 (evidence sufficient to support finding of no fraud); 178Minn15, 225NW913(2dcase); 153Miss314, 120S732 (insufficient); 321 Mo 1, 98W(2d)967; MoA 272SW85; MoA 274SW112; 192NC69, 133SE414; 50ND 494, 196NW953 (insufficient); 58ND 176, 225NW124; 107 Okl 275, 232P26 (evidence sufficient to sustain judgment for defendants); 139Okl 246, 281P771; 50SD179, 208NW786; 102 WVa484, 135SE606; 106WVa254, 145 SE390; 198Wis66, 223NW440. [a] (1) 153Miss314, 120S732. (3) That misrepresentations were material and were relied on by plaintiff. 131Wash314, 230 P160. (4) Proof must be clear and convincing. 127Me306, 143A173. [b] (3) Existence of fraud may be proved by circumstances. 166Ga889, 144SE772. [g] 71CalA474, 235P662; 200 Iowa967, 205NW781. [h] 120 Okl 85, 250P1012. [i] **Preponderance of evidence must be sufficient to overcome opposing presumptions.**–120 Okl 85, 250P1012. [j] **Plaintiff need not testify directly** that he was induced to act in reliance upon false representations. MoA 272SW85.

1052-50½-New. due diligence of one seeking to rescind for fraud, 164Minn 507, 205NW436.

1053-51 19F(2d)186; 201Cal 584, 258 P47; 79CalA533, 250P205 (threat of suit held not menace); 160Ga732, 129 SE57 (evidence held insufficient); 36 GaA541, 137SE102; 253 IlA475; 204 Iowa635, 215NW634; 126Kan460, 268P 803; 168LaS24, 123S587 (duress and misrepresentation not established); 240 Mich360, 215NW341; 179Minn17, 228 NW167; Mo 198W(2d)290; 121 Okl 7, 246P1091; TexCivA 284SW977; Tex CivA 198W(2d)127 (duress found); 104 WVa174, 139SE654.

1053-52 154Wash201, 281P731(2d case). See also 205 Iowa252, 220NW 318.

1053-53 173Ark741, 293SW22; 200 Iowa695, 205NW339; TexCivA 287SW 145.

1053-53½-New. conspiracy, 200 Iowa 613, 203NW809.

1053-55 MoA 98W(2d)856.

1053-55½-New. In some jurisdictions the defense that signatures to a note were obtained by fraud may be established by the greater weight of evidence. 20 OhA385, 153NE238.

1053-56 253 IlA206. [a] **Preponderance sufficient.**–25 OhA116, 157NE500.

1053-57 28F(2d)755; CalA 293P102 (joint makers); 11LaA234, 121S623; LaA 130S848; 231Mich597, 204NW719; 153Miss500, 121S148; 133SC304, 130SE 890 (parol evidence insufficient to show that indorser intended to assume position of maker).

1053-58 300Fed876; 174Ark274, 294 SW999; 111Conn661, 151A161; 37GaA 139, 139SE110; 38GaA344, 144SE48; Iowa 233NW118; 124Kan742, 262P556; 216Ky801, 288SW771; 10LaA433, 121 S319; 12LaA135, 125S463; 172Minn 405, 215NW785; 142SC247, 140SE581; TexCivA 12SW(2d)1037.

1053-59 37GaA139, 139SE110 (indorsers not shown to be sureties); 203 Iowa1, 212NW320; TexCommnA 276SW 664 (that third person indebted to plaintiff gave order on defendant to pay plaintiff sum of money and that defendant made acceptance of and agreed to order of transfer).

1053-61 220Ala350, 124S904; 41 Ida 511, 239P1049 (officers of corporation). [a] **Evidence insufficient** to warrant conclusion that name of signer was trade name of principal. 134Wash94, 235P18.

1053-62 141 Okl 254, 284P854.

1053-63 100Vt112, 135A715.

1053-64 240Mich270, 215NW243.

1053-65½-New. Evidence held sufficient to show plaintiff accommodated party. 200 Iowa938, 205NW767.

1053-65¾-New. Evidence held insufficient to overcome presumption that check was in payment of prior indebtedness rather than loan. 291Pa223, 139 A865.

1054-67 Ark 138W(2d)600; 84CalA 387, 258P141; 84CalA430, 258P407; 95 CalA505, 273P39; 111Conn661, 151A 161; 41 Ida756, 242P798 (finding that possessor of note is not owner is not disturbed on review); 122Kan803, 253 P210; 165La694, 115S905 (evidence sufficient to establish plaintiff's ownership of unindorsed notes); 11LaA234, 121S 623; Mass 169NE154 (indorsement on note held not proof of lack of title); 176Minn246, 223NW287; 150Miss138.

116S542; 321Mo199, 9SW(2d)901, 60 ALR639; 84Mont549, 276P948; NJSup 147A459(1stcase); 132Misc840, 230NYS 762; 118 Okl 23, 246P478; 151SC274, 148SE887 (ownership not disproved); TexCivA 278SW330 (possession with proof of purchase and delivery for value before maturity sufficient to prove ownership);* 149Wash158, 270P425; 105WVa332, 142SE438; 106WVa134, 145SE39; 199Wis224, 225NW699.

1054–68 105Conn73, 134A240; 36GaA 570, 137SE104.

1054–69 71CalA474, 235P662; 122 Or 225, 258P192.

1054–70 58ND239, 225NW794. [c] **On proof of indorsement** and ownership it is error to submit issue of absolute and unconditional ownership at time of suit to jury. 218MoA109, 262SW399.

1054–71 MoA 14SW(2d)966; MoA 28 SW(2d)379; 192NC87, 133SE427; 52 ND876, 204NW665.

1055–72 217Ky825, 290SW664; MoA 14SW(2d)966 (sufficient). [a] **Evidence held sufficient** to show that payee parted with title of note by indorsement and delivery. 211Ky427, 277SW497. [b] **Evidence held insufficient to establish indorsement.**–118Nebr678, 225NW758.

1055–75½–New. Possession by payee or indorser of a commercial paper is evidence that debt is existing and that possessor is legal owner. 326 Ill285, 157NE 243.

1055–77 TexCivA 299SW921 (evidence of demand held insufficient). [b] 50ND 400, 196NW102. [d] 50ND400, 196NW 102. [e] **Evidence held insufficient to show exhibition or possession of paper at demand.**–217AppDiv779, 216NYS729.

1055–78 CalA 289P908; CalA 289P934; 105Conn73, 134A240; 217Ky758, 290SW 700; 152Md81, 136A58, 50ALR1196; Minn 231NW928. [a] **Evidence held sufficient.**–111Conn261, 149A772; Mass 170 NE619; 147Miss603, 111S578.

1055–79 101CalA672, 281P1090; CalA 291P281; 262Mass152, 159NE615; Mass 166NE879; 121 Or28, 253P879. [a] 148 Wash572, 269P815. [d] **Notice held sufficient.**–128Me447, 148A675.

1055–80 207 Iowa1198, 224NW500.

1056–81 CalA 288P819; 38GaA521, 144 SE397; 216Ky801, 288SW771; 76Mont 396, 247P326 (insufficient); 121 Or28, 253P879; 144Va782, 130SE773 (evidence sufficient to establish waiver of notice of dishonor); 192Wis539, 213NW313. See also 172Minn405, 215NW785. [d] 205 Iowa399, 218NW51.

1056–82 81CalA556, 254P275, (evidence sufficient); 172Minn574, 216NW237 (finding of promise held warranted).

1056–83 Mont 285P181(2dcase) (sufficient); 34Wyo 405, 244P372.

1056–86 256Mass23, 152NE70.

1056–87½–New. Evidence held to authorize inference that extension of time on note was granted with knowledge of defendant. 40GaA802, 151SE562.

1056–91 Iowa 229NW846; 106WVa134, 145SE39, 40 [citCJ].

1056–94 40F(2d)260 (note is prima facie evidence of debt); 41F(2d)181.

1056–97½–New. Receipt and acceptance of a renewal note and surrender of the original are evidence of payment. 296Pa 291, 145A831.

1056–98 172Minn126, 214NW924. See also 47 Ida658, 277P814. See also 29 PortoRico 820.

1057–99 172Ark828, 290SW606; 178 Ark807, 13SW(2d)1; 87CalA429, 262P 41; CalA 289P178; 35GaA525, 133SE 926; 42 Ida443, 246P5 (evidence held sufficient to show that defendant received note from plaintiff in exchange for worthless piece of paper); 46 Ida 686, 270P1054; 199 Iowa1277, 203NW 802; 200 Iowa170, 202NW774; 204 Iowa328, 213NW417; 204 Iowa265, 213 NW761; 209Ky696, 273SW464; 218Ky 846, 292SW513; 225Ky173, 7SW(2d) 1065; 235Ky795, 32SW(2d)346; 167La 753, 120S284; 170La660, 129S121; 11 LaA221, 123S423; LaA 130S142; 127Me 85, 141A185; Mass 169NE154; 172Minn 223, 214NW781; Minn 231NW928; MoA 275SW560; 217AppDiv249, 216NYS582; 51ND508, 200NW44; 127 Okl 212, 260P 479; 137 Okl 218, 278P1111; 92PaSuper 505; 50SD543, 210NW984; TexCivA 286SW899; Va 147SE473; 150Wash 294, 272P731; Alta [1926] 4DomLR 1179, [1926] 3WestWkly613; PrEdwIsl [1927] 2DomLR67.

1057–1 31F(2d)408; 168Ark1167, 273 SW363; 176Ark1204, 5SW(2d)913; 230 Ky201, 18SW(2d)966; 6LaA621; LaA 121S160; 12LaA514, 126S564; LaA 130 S126(1stcase); Mass 172NE207; 165 Minn71, 205NW637; 172Minn126, 214 NW924; MoA 278SW784; 54ND434, 209NW790; 127 Okl 220, 260P502; 128 Okl 141, 261P921; 134 Okl 1, 272P436; 29PortoRico820 (payment by checks); TexCivA 284SW705; TexCivA 289SW 736; TexCivA 1SW(2d)648; 151Va333, 143SE884; 106WVa134, 145SE39.

1058–2 178Ark1200, 12SW(2d)402(2d case) (evidence insufficient); 206 Iowa 794, 221NW455 (as to payment of interest); LaA 122S81; 38Wyo 346, 266P 1058.

1058–4 263Mass514, 161NE611; 132SC 94, 128SE861; 153Va156, 149SE473 (release not proved).

1058–4½–New. payment by transfer of corporate stock, TexCivA 11SW(2d)559.

1058–5 30Ariz144, 245P274; CalA 288P 819; 253 IllA206; MoA 287SW871; 223 AppDiv303, 228NYS184 (evidence held not to show payment); 51ND508, 200 NW44; 97PaSuper575; 52SD172, 217 NW180. See also 127Misc20, 215NYS 761. [a] **Evidence held to show** intention to accept note in satisfaction and discharge of rights accruing on taking of trade acceptance. 10F(2d)141. [b] **That notes were surrendered to makers marked "Paid"** does not establish unconditional payment by cashier's check which was unpaid due to bank's closing. 85Mont293, 279P236.

1058–5½–New. Payment of interest in advance for a period beyond the date of maturity of a note is prima facie evidence of an agreement to extend the time of payment. 153Va156, 149SE473.

1058–8½–New. Where plaintiff makes a prima facie case on an original note, it will not be dismissed because the renewal note is not labeled "renewed note" to comply with the statute so requiring, which was not in force at the time the note in the suit was given. 50ND583, 197NW150.

1059–12 131 Or653, 284P163.

1059–13 Okl 291P546.

1060–26½–New. Where defendant failed to overcome plaintiff's evidence of being holder in due course and announced he had no further evidence thereon, the court properly refused defendant's offer of evidence immediately prior to close of the evidence to prove alleged infirmity of instrument sued on. 199Cal 307, 249 P11.

1060–31 32F(2d)168 (loan of maker's credit); 33F(2d)437; 216Ala642, 114S 298; 219Ala396, 122S362; 201 Iowa506, 207NW761; 201 Iowa961, 208NW273; 202 Iowa681, 210NW952; 204 Iowa322, 213NW798; 244Mich159, 221NW114; MoA 300SW1000; MoA 68SW(2d)60; 135 Okl 96, 274P480; 143SC505, 141SE 732; 101Vt308, 143A301; 145Va334, 133SE657; 153Va156, 149SE473 (whether there has been extension of time of payment); 143Wash401, 255P134; 144 Wash150, 257P241. [a] **Only question for jury where plaintiff stands in original payee's shoes** is whether affirmative defense has been established. 40GaA 291, 149SE438.

1060–32 201 Iowa961, 208NW273; 119 Kan786, 241P113 (oral evidence as to duress held to make question one for jury); 123Kan21, 254P364; 214Ky7, 282SW186; 225Ky399, 9SW(2d)123; 259Mass100, 156NE33; Mass 165NE 492; Mass 169NE154; MoA 23SW(2d) 644; 136 Okl 298, 277P658; 53SD369, 220NW878 (evidence sufficient); 154 Tenn241, 290SW39, 50ALR1369.

1060–33 36GaA788, 138SE256; 200 Iowa1281, 206NW606; 217AppDiv546, 217NYS97; 196NC71, 144SE530(1st case); 121 Or326, 252P400; 48SD547, 205NW317.

1060–34 174Ark194, 295SW38.

1060–35½–New. It is error for the court to sustain a demurrer to defendant's evidence in an action against the maker of a note where the evidence supports a defense set up in the answer that defendant was an incompetent Indian and that there was a partial failure of consideration. 119 Okl 278, 249P715.

1060–35¼–New. Where the facts were not disputed, the question of when the dishonor occurred as regards the liability of the indorser of the note was one of law for the court. 108Conn489, 143 A849, 62ALR293.

1060–35¼–New. Whether the purchaser of a drawee's business and assets assumed payment of a draft for purchase of the lease, where the draft was drawn five days subsequent to the date when, according to some of defendant's witnesses, the contract of purchase of the business was executed, is for jury, where the evidence is conflicting. TexCivA 15SW(2d)36.

1060–35½–New. Whether a note was an accommodation paper is a question for the jury under pleadings and evidence. MoA 20SW(2d)290.

1060–36 165La694, 115S905 (nonsuit properly directed); 75Mont516, 244P 494; 296Pa541, 146A126; 300Pa468, 150A892; TexCommnA 7SW(2d)61; TexCivA 11SW(2d)343; 153Va156, 149 SE473.

1060–38 176Ark671, 3SW(2d)973; 201 Cal 456, 257P505; 161Ga329, 130SE566; 34GaA329, 129SE560; 35GaA412, 133SE 285; 35GaA595, 134SE355; 37GaA63, 139SE123; 39GaA452, 147SE410; 39 GaA609, 147SE793(2dcase); 201Iowa 657, 208NW74; 204 Iowa635, 215NW 634; 208 Iowa1310, 227NW163; 123 Kan275, 255P44; 124Kan742, 262P556; Mass 165NE127; 176Minn52, 222NW 340; 146Miss607, 111S575; 103NJL449, 135A880; NJ 150A373; 190NC468, 130 SE113; 53ND537, 206NW1002; 130 Okl 146, 265P1049; 40 OklACR136 [reh pending]; 96PaSuper447; 51SD407, 214NW809.

1060–39 201 Iowa657, 208NW74 (no defense disclosed by pleading); 86Pa Super481; 115SC274, 148SE887; 54SD 473, 223NW596.

1060–40 172Ark747, 290SW586; 35GaA 114, 132SE396; 253 IllA514; 255 IllA 127; 205 Iowa948, 218NW946; 255Mass 486, 152NE332; 141Miss110, 106S82; MoA 293SW66; MoA 28SW(2d)379; 198NC627, 152SE801; 51ND287, 199 NW945; 125 Or261, 264P852; 48RI 170, 136A445; 54SD521, 223NW726; SD 230NW26.

1061–42½–New. Verdict is properly directed for plaintiff where prima facie case established by producing notes is not overcome by valid proof of lack of consideration. RI 150A258(2dcase).

1061–42½–New. Peremptory instruction for makers, who signed a note on behalf of others held not error under statute. TexCivA 21SW(2d)104.

1061–43 TexCivA 294SW226; TexCivA 15SW(2d)116; 143Wash401, 255P134. But see 204 Iowa635, 215NW634.

1061–45 AlaA 130S516.

1061–48 [a] **Facts held to raise no issue for jury of nonacceptance.** Iowa 231NW651.

1061–50 Contra NJSup 140A247.

1061–52 200 Iowa1059, 205NW863; 265 Mass513, 164NE382; MoA 273SW764; TexCivA 11SW(2d)652. [a] **Evidence held insufficient** to go to jury on defense of signature as accommodation surety on agreement by principal to procure signature of another surety. 212 Ky361, 279SW342.

1061–53 214Ky7, 282SW186; MoA 15 SW(2d)935; NJSup 129A126; 224App Div492, 231NYS417; 218AppDiv418, 218NYS500; 50ND400, 196NW102; 52 SD324, 217NW393. But see 131 Okl 268, 268P708.

1061–54 118Kan283, 234P965.

1061–56 69Utah250, 253P900; 145 Wash403, 260P258.

1061–57 146Miss607, 111S575; 146Va 357, 131SE803.

1061–60 220Ala601, 127S173; 156Miss 330, 126S4.

1061–61 18F(2d)875; 19F(2d)186; 23 F(2d)796; 216Ala642, 114S298; 217 Ala259, 115S303; 219Ala396, 122S362; 35Ariz302, 277P68; 177Ark190, 5SW

(2d)937; 79CalA533, 250P205, 207 [citCJ]; 40GaA746, 151SE657; 327 Ill 455, 159NE35; Ill 173NE390; 246 IllA 511; 87 IndA69, 158NE646; 200 Iowa 86, 204NW233; 202 Iowa192, 209NW 523; 202 Iowa412, 210NW455; Iowa 213NW786; 204 Iowa322, 213NW798; 121Kan414, 247P851; 121Kan421, 247 P627; 121Kan461, 247P628; 222Ky 731, 2SW(2d)381; 254Mass261, 150NE 11; Mass 168NE785; 244Mich306, 221 NW161; 248Mich221, 226NW873; 174 Minn258, 219NW95; 156Miss330, 126S 4 (peremptory instructions erroneous); 322Mo 955, 19SW(2d)721; MoA 273SW 764; 220MoA450, 282SW102; 219MoA 519, 282SW535; MoA 285SW538; MoA 286SW443; 222MoA8, 300SW526; 222 MoA633, 300SW834; MoA 14SW(2d) 966; MoA 28SW(2d)379; 73Mont219, 236P250; 114Nebr681, 209NW246; 83 NH518, 144A845; 103NJL284, 135A 688; NJSup 151A382; 217AppDiv546, 217NYS97; 218AppDiv418, 218NYS500; 227AppDiv119, 237NYS1; 194NC203, 139SE224; 196NC624, 146SE584; 51 ND893, 201NW690; 23 OhA445, 155NE 700; 33 OhA265, 169NE308; 288Pa549, 137A113; 296Pa54, 145A689; 48RI 170, 136A445; 134SC218, 132SE617; 49SD 248, 207NW66; 51SD623, 216NW362; TexCivA 285SW859; TexCivA 12SW (2d)592; TexCivA 16SW(2d)143; 101 Vt114, 141A598; Vt 147A285; 143Va 1, 129SE371; 102WVa643, 136SE199. [f] **Whether demand note was negotiated unreasonable time after issue** is question for jury. 113 Okl 147, 240P79.

1062–62 18F(2d)875; Ala 130S386; 47 Ida730, 279P418; 327 Ill 455, 159 NE35; Iowa 213NW786; 121Kan421, 247P627 (sufficient); 174Minn558, 219 NW905 (sufficient); 156Miss633, 126 S386(2dcase) (evidence insufficient); MoA 28SW(2d)117; 244NY168, 155NE 88; 119 OhSt516, 164NE751(2dcase); 139 Okl 210, 281P780(2dcase); 288Pa 549, 137A113; 51SD623, 216NW362; SD 227NW81 (insufficient); TexCivA 16SW(2d)143. [b] (2) Although plaintiff has burden of proving bona fide transfer, testimony to that effect by witness who was officer of use plaintiff, a bank, and who conducted negotiations with transferor, is sufficient to entitle plaintiff to go to jury on the question, though no other officer of bank was called to deny notice of defenses. 200 Iowa1281, 206NW606. [c] **Peremptory instruction properly refused.**–212 Ky486, 279SW622.

1062–63 43Ida623, 253P621; 44 Ida 419, 258P361; 227Ky828, 14SW(2d) 149; 228Ky182, 14SW(2d)752; 240 Mich270, 215NW243; 246Mich125, 224 NW442; MoA 282SW466; MoA 9SW (2d)1070; 113Nebr691, 204NW793; 192NC87, 133SE427; 135 Okl 71, 273P 994; 41 OklACR189; 124 Or157, 264P 368; 288Pa549, 137A113; 86PaSuper 354; SD 231NW534; TexCivA 298SW 309; TexCivA 13SW(2d)956. [c] 152 Miss286, 119S829 (evidence held insufficient to require submission to jury).

1063–64 18F(2d)574; 43 Ida623, 253P 621; 251 IllA234; 255 IllA1; 203 Iowa 20, 212NW359; 216Ky364, 287SW938; 152Miss286, 119S829; MoA 286SW443; 85Mont571, 281P348; 128 Okl 233, 262 P691; 39 OklACR326; SD 227NW81; TexCivA 10SW(2d)438. See also 68 Utah421, 250P1033.

1063–65 Mo 30SW(2d)462.

1063–66 See also 264Mass208, 162NE 368.

1063–67 52ND876, 204NW665 (failure to call participant in transaction).

1063–69 51SD623, 216NW362; 54SD 446, 223NW585 (submission of good faith to jury is not required where only testimony thereon was that of interested witness).

1063–70 35GaA55, 132SE249; 219 MoA34, 269SW955; 102WVa643, 136 SE199. [a] (2) Extraordinary discount may create jury question as to good faith of holder. 200 Iowa895, 205NW 470.

1063–72 MoA 298SW242 (evidence insufficient to take question to jury); TexCivA 4SW(2d)309.

1063–75 233Mich174, 206NW348.

1064–76 144Wash150, 257P241.

1064–78½–New. Where the facts are undisputed, question of whether indorser was released by extension is one of law for the court. 145Va307, 133 SE769.

1064–79 CalA 282P435; 201 Iowa961, 208NW273; Iowa 231NW643 (whether note grew out of another); 155Md 173, 141A556; 254Mass10, 149NE691; 231Mich343, 204NW87; 178Minn556, 228NW150(2dcase); MoA 20SW(2d) 561(1stcase); 221AppDiv312, 223NYS 512; 121 Or326, 252P400; TexCivA 7 SW(2d)915; TexCivA 22SW(2d)947; 143Wash401, 255P134; 102WVa205, 135SE7.

1064–80 Iowa 231NW643; 125Kan189, 263P1058; 258Mass306, 154NE835; 221 MoA955, 288SW954; MoA 297SW156; 113Nebr706, 204NW518; 116Nebr112, 216NW191; 56ND33, 216NW206; 95 PaSuper368; TexCommnA 289SW995; TexCommnA 27SW(2d)125.

1064–81 217Ala259, 115S303; 48 Ida 405, 283P519; 205 Iowa948, 218NW946; 121Kan82, 245P745; 226Ky367, 10 SW(2d)1115; 322Mo 955, 19SW(2d) 721; 219MoA34, 269SW955; 220MoA 450, 282SW102; MoA 3SW(2d)400; MoA 25SW(2d)525; MoA 28SW(2d) 379; 88PaSuper592; 138SC328, 136SE 481; SD 227NW885; TexCivA 297SW 1094; 143Wash401, 255P134. [b] **Estoppel to plead failure of consideration** may be question of fact for jury. Tex CommnA 272SW771.

1064–83 171Ark1010, 287SW370; 48 Ida364, 282P79; 205 Iowa948, 218NW 946; 212AppDiv630, 209NYS324.

1064–85½–New. or where the undisputed evidence shows that defendant executed the note without consideration: TexCivA 283SW535.

1064–86½–New. On a plea of want of consideration and failure to offer evidence, failure to submit the question to the jury is proper. 234 IllA78.

1064–87 121Kan82, 245P745 (proof insufficient as against demurrer); 226 Ky109, 9SW(2d)1091; 169Minn401, 211 NW820; 48SD534, 205NW379; SD 229 NW938.

1064–89½–New. But even if purchaser was not one in due course, the question of the value of credit given in consideration for note should not be submitted to the jury when the uncontroverted testimony shows that the payee was solvent, although the jury found the credit had no value. 202 Iowa192, 209NW523.

1065–90 121 Or326, 252P400.

1065–92 Iowa 204NW253 (whether renewal note was executed with knowledge of facts held for jury); 204 Iowa 239, 213NW775; 214Ky7, 282SW186; Me 139A475 (whether delivery was conditional is question for jury); 170Minn 341, 212NW599; MoA 274SW107; 226 AppDiv313, 235NYS143; 51ND893, 201 NW690 (conditional delivery of note); 151SC354, 149SE12; TexCivA 286SW 893. But see MoA 293SW66. [c] **Evidence held insufficient.**–(1) For jury on defense that signer executed note as president of company. 128Kan159, 277P37. (2) To raise issue of conditional delivery. Iowa 231NW651. (3) To justify conclusion as matter of law that delivery of note to bank was conditional. MoA 30SW(2d)768.

1065–92½–New. Negligence of making in executing a note is for the jury. 22 AlaA 485, 118S250.

1065–93 200 Iowa961, 205NW838; 202 Iowa328, 208NW374; 208 Iowa222, 225 NW369; 91PaSuper252.

1065–93½–New. Whether a note was executed under duress is a question for the jury. 101WVa669, 133SE370.

1065–93¾–New. Evidence of the incapacity of the maker of a note and trust deed to understand business transactions and of her peculiar traits and feeble-mindedness is sufficient to make issue for jury of want of mental capacity. TexCivA 12SW(2d)625.

1065–94 200 Iowa961, 205NW838.

1065–1 85Colo 243, 274P930; 226Ky 109, 9SW(2d)1091. See also 228Ky 182, 14SW(2d)752.

1065–2½–New. The question as to whether apparent makers of a note by failing to notify the payee that their signatures were forged caused him injury is one for the jury where it does not appear that the forger, who was also a maker, was solvent at the time of discovery of the forgery. 154Tenn 241, 290SW39, 50ALR1369.

1065–2¾–New. Where there is sufficient evidence, forgery of indorsement is jury question. 26F(2d)51.

1065–2¼–New. Evidence of an understanding that others were to sign a note delivered to an undertaker is insufficient to make the defense of conditional delivery a question for the jury. 219Ala203, 121S733.

1065–7 213Ala675, 106S171; 166Ga 889, 144SE772; 43 Ida279, 251P615; IndA 168NE196; 200 Iowa895, 205NW 470; 228Ky436, 15SW(2d)263; 228Ky 802, 16SW(2d)452; 126Me413, 139A 231; Mass 168NE785; 164Minn425, 205NW286; 322Mo 955, 19SW(2d)721; 218MoA679, 267SW70; MoA 272SW85; MoA 3SW(2d)400; RI 143A358; 144 Va220, 132SE326. [a] **Question of conspiracy fraudulently to induce** wife of maker to sign is for jury. TexCivA 278SW503.

1065–8 173Ark741, 293SW22; 177Ark 544, 7SW(2d)8; 200 Iowa86, 204NW233 (evidence sufficient); 121Kan18, 245P 1041; 151Md503, 135A369; 192NC798, 136SE118 (evidence sufficient for jury); 195NC685, 143SE525; 143 Okl 140, 287 P1003 (insufficient); 51SD424, 214NW 816; TexCivA 278SW503. [b] **Where no evidence of knowledge of fraud** by plaintiff, court may so instruct. 151 Md503, 135A369.

1066–9 TexCivA 21SW(2d)104. See also 151Md503, 135A369.

1066–10½–New. Whether the maker knew of the fraud, or was estopped to rely on such a fraud as a defense, is a question for the jury. 202 Iowa333, 208 NW726.

1066–11 164Minn425, 205NW286; 187 Wis39, 203NW915. See also 816Mo 1338, 296SW375.

1066–18 22F(2d)530 (whether agent liable as principal).

1066–20 205 Iowa95, 215NW506 (whether surety signed note); Mass 170 NE470; 220MoA450, 282SW102; NJ 148A735; 122 Or225, 258P192; Tex CommnA 282SW570; TexCivA 30SW (2d)668.

1066–24½–New. Weight of testimony as to indorsement of note held for trial court under evidence. CalA 287P559.

1066–26½–New. Where date from which interest is payable is uncertain, question is for the jury. 174Ark194, 295SW 88.

1067–32 82NH299, 133A26. [b] **Where answer admits execution** as set forth in complaint, it presents question of law for court. 190NC225, 129SE598.

1067–34½–New. Where facts are admitted, the question of liability of the parties in case of irregular indorsement is for the court. 75Mont516, 244P494.

1067–36 286Pa57, 133A220.

1067–37 286Pa57, 133A220.

1068–39 MoA 20SW(2d)561(1stcase); NJ 148A735; 135SC298, 133SE545.

1068–40 202 Iowa671, 210NW898.

1068–48 243Mich622, 220NW668.

1068–51 174Ark194, 295SW38; 176Ark 1204, 5SW(2d)913 (for chancellor trying case); 177Ark1193, 5SW(2d)922; 87Colo 479, 288P1050; 47 Ida405, 276P 43, 68ALR856; Iowa 229NW846; Kan 292P805; 220Ky54, 294SW783; Mass 165NE421; MoA 22SW(2d)860; 51Nev 53, 268P46 (knowledge of application of money to payment); 103NJL284, 135A 688; 134 Okl 1, 272P436; 294Pa197, 144 A88; 296Pa291, 145A831; 86PaSuper 477; TexCivA 275SW858; TexCivA 4 SW(2d)315 (payment of note given as collateral); 69Utah284, 254P781; 104 WVa265, 139SE750 (whether payment is to be made from balance against check in bank or from account of drawer's agent); 38Wyo 346, 266P1058.

1069–52 168Ark1167, 273SW363; Iowa 226NW103 (sufficient); 130Kan333, 286

P219; 221Ky498, 299SW207; 225Ky 399, 9SW(2d)123; 113Nebr672, 204NW 522; 127 Okl 220, 260P502; 134 Okl 1, 272P436 (sufficient); RI 143A611. See also TexCivA 11SW(2d)343.

1069–53 217Ala124, 115S13; 340 Ill 81, 172NE7; 128Me376, 147A759(2dcase); Mass 172NE207; 169Minn434, 211NW 838; MoA 278SW784; 118 Okl 136, 246 P1088; 296Pa291, 145A831.

1069–55 17F(2d)44.

1069–56 31F(2d)408.

1069–57 41F(2d)181; 167Ga867, 147SE 44; 46 Ida278, 267P458 (reasonable diligence of holder of check in presenting it for payment held question for court).

1069–57½–New. Where the evidence shows no payment, a verdict may be directed. 31F(2d)396.

1069–60½–New. Whether renewal note is intended as payment or extension of original note is a question of fact. 127 Misc599, 216NYS753.

1069–62 21AlaA515, 109S576; 50ND 400, 196NW102. [c] **Whether check was presented for payment within reasonable time** is for jury, hence directed verdict is erroneous. 41GaA395, 153SE 104(2dcase) (Thursday to Monday).

1069–63½–New. Notarial certificates of protest are sufficient evidence to go to jury on question of demand and notice to indorsers. 259Mass232, 156NE26.

1069–64 220MoA67, 279SW774.

1070–65 108Conn489, 143A849, 62ALR 293; 136 Okl 172, 276P733 (evidence held sufficient to go to jury); 104WVa 265, 139SE750.

1070–67 202 Iowa91, 209NW444, 445 [citCJ]. But see Minn 231NW789.

1070–70 CalA 293P86.

1070–71 321Mo 199, 9SW(2d)901, 60 ALR639; MoA 287SW839; 104NJL112, 139A25; 223AppDiv161, 227NYS589 (holding it is question for court if facts are undisputed, but for jury if facts are disputed); Or 281P834; TexCivA 22SW(2d)471 (as to transfer after maturity).

1071–72 321Mo 199, 9SW(2d)901, 60 ALR639; 103NJL284, 135A688; RI 133 A437.

1071–74 222MoA122, 2SW(2d)151; MoA 9SW(2d)1070; 122 Or225, 258P192; 122 Or675, 260P235; 149SC277, 147SE 362. See also 165La694, 115S905.

1071–80 CalA 288P819; 33GaA659, 127 SE656 (upon prima facie case); 50ND 850, 198NW467; 133SC304, 130SE590 (evidence of waiver or estoppel not so conclusive as to warrant direction of verdict); TexCommnA 7SW(2d)61.

1071–83 MoA 31SW(2d)232; 115Nebr 101, 211NW608.

1072–84 38GaA655, 145SE103; 29 Hawaii763; 43 Ida327, 251P757; 119 Kan796, 241P462; 121Kan18, 245P 1041; 227Ky369, 13SW(2d)271; 221 MoA380, 283SW741; 125 Or261, 264P 852 (defining liability of makers and indorsers).

1072–85 252 IllA68; 121Kan18, 245P 1041; 125Kan3, 262P573; 213Ky752, 281SW1034; 227Ky203, 12SW(2d)287; 228Ky201, 14SW(2d)755; MoA 13SW (2d)1079; MoA 20SW(2d)290 (sufficient); 74Mont549, 241P613; 51ND688, 200NW793; 131 Or123, 282P99; 134SC 541, 133SE436. [a] (3) 218MoA625, 267 SW73. [c] 37GaA325, 140SE392. [d] 122 Okl 194, 253P481. [e] **Instructions held authorized by evidence.**–35GaA784, 134SE841. [f] **Instructions held proper.**–MoA 293SW66.

1072–88 200 Iowa1059, 205NW863; 225 AppDiv300, 233NYS196.

1072–88½–New. Instruction setting out facts necessary for defendant's recovery need not describe the note in full. MoA 293SW66.

1072–89 178Ark90, 10SW(2d)39; 75 CalA462, 242P1075; 160Ga720, 129SE 36; 43 Ida327, 251P757; 119Kan333, 239P1103 (not misleading); 126Kan 538, 268P801 (instruction held not objectionable); MoA 279SW230; MoA 13 SW(2d)1079 (instructions held not misleading). [a] 50ND400, 196NW102.

1073–90 75CalA462, 242P1075; 202 Iowa328, 208NW374; MoA 7SW(2d) 723 (instructions held not conflicting).

1073–91 28Ariz336, 237P198 (instruction on consideration not erroneous); 143SC386, 141SE602 (instruction held not violative of rule).

1073–93 41 Ida129, 238P308; 121Kan 18, 245P1041.

1073–94 51ND215, 199NW868 (sufficient).

1073–3 75CalA462, 242P1075; 37GaA 698, 141SE502.

1073–4 37GaA698, 141SE502.

1073–4½–New. An instruction, in an action in counts on the original note and on the renewal note, that if the jury found for defendant on one count they should find for plaintiff on the other is not erroneous in the absence of objection and motion to elect. MoA 293SW66.

1073–5 Ala 130S405; 123Kan603, 256 P986; 164Minn425, 205NW286 (fraud as defense); 322Mo 199, 9SW(2d)901, 60ALR639; 192NC87, 133SE427. [h] **Instructions not materially erroneous.**–119Kan333, 239P1103. [i] **Instructions held proper.**–NJSup 149A120.

1073–6 40GaA802, 151SE562; MoA 290SW449; NJSup 151A382; 225App Div300, 233NYS196; Va 154SE515.

1074–9 316Mo 1338, 296SW375.

1075–18 151Md503, 135A369.

1075–19½–New. Instructions eliminating want of notice as a defense are proper under evidence of waiver of notice. 38GaA521, 144SE397.

1075–21½–New. An instruction that bad faith and fraud are synonymous is not erroneous. 131 Or123, 282P99.

1075–22 171Ark469, 284SW724; 35 GaA784, 134SE841 (instruction placing burden of proof on plaintiff held proper); 165Minn82, 205NW699 (instruction correct); MoA 28SW(2d)117 (instruction held proper); 52ND530, 203 NW898.

1076–30 75CalA462, 242P1075; 102 Conn620, 129A788 (instruction that in action by payee against maker burden is on defendant to show want of consideration held proper); 244 IllA451; 255 IllA127; 155Md173, 141A556 (instruction held proper).

1076–31 [a] (4) Instruction held not erroneous. 131 Or123, 282P99.

1077–35 155Miss719, 125S120.

1077–41 129Kan203, 282P741; MoA 6 SW(2d)633. [d] 75CalA462, 242P1075.

1077–42 36GaA276, 136SE469.

1077–43 96CalA478, 274P568; 104 Conn703, 134A246; 199 Iowa1277, 203 NW802 (instruction correct as to accommodation paper); MoA 158SW(2d) 912; MoA 282SW749 (instruction that note was without consideration held proper); 51ND688, 200NW793 (instruction held inconsistent with evidence). See also 153Md235, 138A261, 53ALR 1165. [a] (6) Instruction that adequacy or sufficiency of consideration is not test whether note had value is proper. 127Me301, 143A55. [c] **Instruction held properly refused.**–MoA 289SW977.

1078–45 MoA 6SW(2d)633. [b] 130 Kan392, 286P197; MoA 278SW826.

1078–46½–New. Where a corporation was authorized by charter to indorse notes for accommodation, an instruction that if the payee knew that the indorsement was for accommodation he cannot recover is error. 258Mass306, 154NE835.

1078–51 [a] **Instructions held erroneous.**–322Mo 955, 19SW(2d)721.

1078–54 MoA 6SW(2d)633.

1078–57½–New. It is reversible error to give an instruction placing the burden of proof on defendant to show want of consideration as a matter of law. 189NC482, 127SE593.

1078–57⅓–New. Where the only issue is that raised by the defense of illegal consideration, instructions are properly limited to such issue. 48 Ida364, 282P 79.

1078–59 Mass 170NE115; 170Minn341, 212NW599; 221MoA380, 283SW741 (capacity of maker). [d] (2) Me 139A 475.

1079–61 170Minn341, 212NW599.

1079–69½–New. Where the only issue is genuineness of signature of defendant, the court may instruct that the date of execution is immaterial. 205 Iowa 95, 215NW506.

1079–71 252 Ill 68. [c] (4) Instruction properly refused. 121Kan860, 250P273.

1080–73 252 IllA68; 121Kan18, 245P 1041.

1080–76½–New. Instruction held improperly modified by requiring defendant to be legally injured. 86 IndA581, 159NE15.

1080–78 172Minn574, 216NW237; 54 ND867, 211NW595.

1081–90 41GaA24, 152SE122; 103NJL 284, 135A688; 119 Or682, 250P1098 (payment in property). [c] **Instructions held proper.**–214Ala501, 108S335. [d] **Instructions held not erroneous.**–Iowa 226NW103.

1081–92 MoA 293SW66.

1081–95 149Md474, 132A70. [c] **Presentment.**–199 Iowa848, 200NW615.

1081–97 123Kan21, 254P364.

1082–10 Mass 165NE424.

1082–11 85CalA624, 260P347 (facts found insufficient to support conclusion of law); 100CalA706, 280P1017 (judgment reversed for error in finding, there being consideration); 101CalA579, 281 P1075; 107Conn269, 140A482 (insufficient to support judgment); 205 Iowa 266, 215NW737 (findings held to establish that plaintiff was holder in due course); 121Kan860, 250P273; MoA 272SW85; 124 Or272, 264P438 (that there was no intent to take usurious interest); TexCommnA 276SW647 (signature admitted throughout case and assumed without objection in language of special issue held established as fact by verdict answering issue in affirmative); TexCivA 275SW498; TexCivA 282 SW926; TexCivA 284SW337; TexCivA 290SW790; TexCivA 4SW(2d)639 (finding that note not accommodation paper constitutes finding of consideration); TexCivA 9SW(2d)468; TexCivA 31SW (2d)329; Utah 276P659; 141Wash451, 252P123.

1083–12 IndA 16SNE697. [b] (4) Verdict in action on note held sufficiently definite. MoA 31SW(2d)568.

1083–13 CalA 293P102; 39GaA705, 148 SE354; 99WVa544, 130SE142.

1083–14 85CalA624, 260P347.

1083–15 101CalA186, 281P514; 141 Wash451, 252P123.

1084–16 120Kan594, 244P1046 (findings and verdict inconsistent); 130Kan 392, 286P197 (findings held not inconsistent with general verdict). [b] **General verdict for defendant held consistent** with special verdict. 141Wash 451, 252P123.

1084–23 43 OklACR26. [c] **Judgment on pleadings.**–138 Okl 142, 280P584.

1084–24 43 OklACR26. See also 226 Ky179, 10SW(2d)846 (judgment held not error).

1084–26 [a] (2) Judgment by confession before maturity may be taken where notes contain provision that attorney may confess judgment thereon at any time without process. 224 IllA249.

1085–28 38Wyo 182, 265P453.

1085–35½–New. Finding that the note was not given for accommodation and was supported by consideration supports judgment allowing recovery. TexCivA 4SW(2d)654.

1085–35⅓–New. Where the court finds for defendants without construing an ambiguous contract and determining its effect, such finding is insufficient to support judgment that plaintiff released the note. SD 226NW760.

1086–48½–New. It is irregular to render judgment against only one of the makers of a note which is joint, and not joint and several, where suit was not brought against all. 20 OhA493, 152 NE731.

1086–54 34GaA129, 128SE691 (proper).

1088–75 36GaA788, 138SE256; 48SD 547, 205NW317; 102WVa484, 135SE 606. [a] (4) In case note was acquired by one of two makers and transferred by him by indorsement without recourse, finding of jury against makers on issue of notice of agreement when note was reissued was final as to maker who did not indorse it, but reversible error as to maker who indorsed it without recourse. 217MoA382, 266SW737.

1088–77 10F(2d)447 (exclusion of evidence held not erroneous); 214Ala501, 108S335; 35GaA39, 131SE922; 88 IndA 327, 163NE842; 204 Iowa456, 215NW

767 (instruction as to acquiring note by assignment instead of by indorsement); 119Kan796, 241P462 (immaterial whether note was nonnegotiable, where maker was permitted to plead and prove any defenses available against original payee); 189NC482, 127SE593 (reversible error to instruct jury that burden of proof is on defendant to show want of consideration); 50ND487, 196NW550 (instructions on burden of proof devolving on holder in due course); 141SC397, 139SE853; TexCivA 288SW337.

1089–93 TexCivA 11SW(2d)343.

1089–94 156Miss269, 125S837; 191NC458, 132SE148. [d] **Relieving indorser from part of obligation on note on theory of holder's fraud held improper** where fraud not in issue. 102CalA756, 283P874.

1090–3½–New. Where, after maturity, note is indorsed in favor of surety who pays his principal's obligation, he may recover entire amount of note from his principal or heirs. 35PortoRico341.

1090–6 205Iowa266, 215NW737 (statute declaring contrary rule repealed).

1091–7 192NC798, 136SE118. See also 125Misc722, 211NYS482.

1091–7½–New. In such case the holder is not entitled to recover for contemplated credit on antecedent debt, where credit was never given. 125Misc722, 211NYS482.

1091–10 But see 155Wash127, 283P665.

1091–10½–New. Assignee is not limited to amount paid. 258Mass53, 154NE557.

1091–13½–New. Holder of collateral note unenforceable between original parties can recover only sufficient to pay original debt. TexCivA 4SW(2d)310.

1091–13½–New. Holder cannot collect any sum on collateral note which was added to original debt after notice of infirmity in collateral. TexCivA 4SW(2d)310.

1092–22 See also 13LaA573, 128S732.

1093–39 See also 33PortoRico102.

1093–40 [c] 129Kan269, 282P573.

1094–45½–New. Unpaid debt, made due by acceleration clause of notes, held not to include unearned interest. 94Fla614, 114S254.

1094–45½–New. Where plaintiff was entitled to partial recovery on notes sued on, and defendants failed to make tender of the amount actually due, plaintiff could recover interest at the legal rate to the date of final judgment. Ind 168NE863.

1094–47 151SC67, 148SE713; 151SC135, 148SE718(1stcase).

1094–56 35PortoRico123. [e] **Indorsement allowing extension** does not affect interest from maturity on face of note. CalA 284P1047. [f] **Agreement to surrender note** held not to prevent recovery of interest during period between agreement and rescission of note. CalA 285P371.

1095–59½–New. Where pleadings do not show how part payments were imputed on several notes, interest cannot be allowed on the balance except from judicial demand. 164LaA440, 114S89.

1095–63 172Ark209, 287SW1010; 203Cal219, 263P1007; 15DelCh9, 130A39 (where words "with interest" were canceled).

1095–66½–New. Where ten months' interest is deducted in advance from a note sued on, and the note matures on failure to pay the installment of the principal before expiration of the ten months' period, interest will be allowed from the expiration of the ten months' period to the date of judgment, and not from the date of default. 85Colo243, 274P930.

1095–68 But see 203Cal219, 263P1007.

1095–71 3NJMisc1128, 130A736. But see 231Ky202, 21SW(2d)254(2dcase).

1096–78 48Ida419, 282P862; 32OhA414, 168NE218; TexCommnA 285SW305; TexCivA 6SW(2d)186; TexCivA 8SW(2d)569.

1096–80 203Cal219, 263P1007; 102CalA756, 283P874.

1096–81 203Cal219, 263P1007.

1096–85 See also CalA 290P892.

1096–88 127Me383, 143A600.

1097–97 16F(2d)578; 202Cal279, 260P291; 34GaA129, 128SE691; 48Ida419, 282P862; 34PortoRico401; TexCivA 8SW(2d)569; TexCivA 30SW(2d)419; 146Va357, 131SE803; 144Va220, 132SE326; 148Va686, 139SE257. [b] (5) **Provision for attorney's fees if note placed in hands of attorney for collection** does not authorize them in case of defense of injunction suit by maker. 136Miss395, 101S558. [j] **Provision is not penalty** but is for indemnity. 16F(2d)578. [k] **Nature of provision.**–84Mont116, 274P497.

1098–99 160La371, 107S143.

1098–1 Iowa 227NW584(1stcase); 283Pa313, 129A105.

1098–5 213Ala551, 106S136, 137 [quot CJ].

1098–6 213Ala551, 106S136, 137 [quot CJ].

1098–6½–New. Where judgment is rendered for a balance after the deduction of an amount allowed as recoupment, an allowance of attorney's fees computed on such balance at the rate specified in the note is proper. 30NM566, 240P469.

1098–6¼–New. In action on notes not providing for attorney's fees, plaintiff is not entitled to such fees under provision in a collateral mortgage not foreclosed. TexCivA 2SW(2d)363.

1098–6¼–New. An action by the purchaser of a note to recover the sum paid therefor is not a suit on a promissory note in which attorney's fees would be allowed. 9LaA540, 121S306.

1098–11 But see 96Cal248, 274P78.

1098–17 16F(2d)578, 580 [citCJ].

1098–22 85Colo462, 277P786; TexCivA 178SW(2d)180.

1098–23 98Fla775, 124S41; 132Okl43, 269P319 (attorney's fees not allowed where note placed in hands of attorney without knowledge of maker who, by agreement with holder, paid note by monthly installments made directly to him).

1099–25½–New. Proof of reasonableness of attorney's fees is essential to recover under note providing for reasonable fees. TexCivA 27SW(2d)846.

1099–26 84Mont116, 274P497; 124Okl120, 254P45.

1099–33 36GaA731, 137SE905.

1099–39 36GaA561, 137SE296; 33GaA729, 127SE672 (notice sufficient); 40GaA757, 151SE558.

1100–41 40GaA685, 151SE236.

1100–43 38GaA584, 144SE671(2dcase). [a] **On allegation of notice, without denial,** direction of verdict for fees held proper, without proof. 36GaA731, 137SE905. [b] **After proper direction of verdict for fees,** it is held error to amend judgment by omitting them. 36GaA73, 137SE905. [c] **Evidence held sufficient.**–38GaA584, 144SE671(2dcase). [d] **Evidence held insufficient.**–38GaA584, 144SE671(2dcase).

1100–47 But see TexCivA 6SW(2d)186.

1100–47½–New. Under statute an agreement between a superintendent of banks and the maker of a promissory note, to the effect that the superintendent will not enforce a stipulation in the note for attorney's fees, is not binding, where entirely executory, and not supported by valuable consideration, and where no element of estoppel enters, and hence the court properly disallowed an amendment to the answer setting forth such agreement. 38GaA532, 144SE338(2dcase).

1100–48 TexCivA 6SW(2d)181.

1100–49 TexCivA 6SW(2d)186.

1100–51½–New. The mere fact of the debtor's insolvency does not prohibit rendering of judgment for attorney's fees, where the note provides for such attorney's fees if the obligation is collected by law or through an attorney. 278US149, 49SC84, 73Led236.

1100–51½–New. That prior holders were accustomed to give notice of past-due payments or that plaintiff bought note maliciously to sue is no defense. TexCommnA 23SW(2d)287.

1100–52 4LaA702; TexCommnA 288SW405. But see TexCivA 288SW(2d)941.

1101–59 16F(2d)578; 88IndA222, 162NE27 (amount held supported by evidence); 77Mont422, 251P155; 99WVa399, 129SE462 (construing law of Indiana). [c] **Amount necessarily expended or for which holder necessarily became liable** may be recovered. 84Mont116, 274P497. [d] **Failure to deny allegation** that one thousand dollars was reasonable fee admits some liability, but not for one thousand dollars. CalA 287P116. [e] **No more than amount claimed in complaint** as reasonable attorney's fees may be recovered. 220Ala601, 127S173.

1101–60 16F(2d)578; 75CalA189, 242P881; CalA 287P116 (one thousand dollars held excessive by five hundred dollars for three-day trial on note of three thousand two hundred and twenty seven dollars); MoA 287SW657 (ten per cent of amount due held proper).

1101–62 98Fla775, 124S41.

1101–65½–New. Where a note is silent as to attorney's fees, evidence must be introduced to sustain an allegation that plaintiff is entitled to recover attorney's fees. 144Va220, 132SE326.

1101–66 75CalA189, 242P881, 885 [quot CJ]; 96CalA604, 274P607(2dcase); 42Ida121, 244P407, 410 [citCJ]; 146Va357, 131SE803.

1101–67 75CalA189, 242P881, 885 [quot CJ]; 146Va357, 131SE803.

1102–68 75CalA189, 242P881, 885 [quot CJ]; 146Va357, 131SE803.

1102–69 75CalA189, 242P881, 885 [quot CJ].

1102–69½–New. A payee agreeing to cancel a note for corporate stock is entitled to recover attorney's fees only to date when stock was tendered. 59TexCivA1, 285SW667.

1102–70 TexCivA 282SW871.

1102–71 117Tex539, 8SW(2d)666; TexCommnA 23SW(2d)287; TexCivA 290SW264; TexCivA 31SW(2d)196. [a] **It is now settled law in Texas** that usual stipulation for attorneys' fees in note evidences contract of indemnity. TexCivA 31SW(2d)196.

1102–72 But see 120Okl240, 251P472.

1102–75 164LaA440, 114S89.

1102–76 164LaA440, 114S89.

1102–77½–New. Where a note provides for attorney's fees, based on the amount due, allowing fees on the whole amount of the original debt on which there have been payments on account is error. 164LaA440, 114S89.

1102–77½–New. Where the note provides for an attorney's fee of a stated percentage, the attorney's fee should be at least such percentage of the amount due and owing on the note. 127Okl203, 260P481.

1103–81 CalA 287P116 (discretion of court); 77Mont477, 251P517; 145Wash403, 260P258.

1103–86 75CalA189, 242P881.

1103–87 16F(2d)578, 580 [citCJ]; 146Va357, 131SE803.

1103–88 16F(2d)578, 580 [citCJ]; 146Va357, 131SE803.

1103–89 94Fla887, 114S506; TexCivA 293SW939.

1103–93 See also 156Miss269, 125S837.

1104–3 34PortoRico401.

1104–4 228Ky144, 14SW(2d)416.

1104–13 57OntL203, [1925] 3DomLR488.

BITTERS

1112–71 See also 13CustA63.

BLACK LIST

1114–98 128Or121, 270P772.

BLANKET

1116–26 See also 15CustA198.

BLUE SKY LAW

1130–81 128Misc84, 218NYS57; 127Misc683, 217NYS565, 570 [citCJ].

1130–82 127Misc683, 217NYS565, 570 [citCJ].

BOARD

1130–92 79Mont323, 256P386. [c] 79Mont323, 256P386.

BODILY INJURY

1135–54 TexCivA 283SW621.

BOILER INSURANCE

1140–5 114OhS549, 151NE671 (defined by policy as sudden rupture or collapse

of boiler caused by steam pressure).

1141-15 [c] **Rupture of boiler head by** breaking apart, directly causing damage, renders insured liable under policy defining "explosion." 114 **OhSt**549, 151**NE** 671. [d] **Repairs to bag formed under boiler head** injured by rupture of boiler head are not within liability under policy defining "explosion," where no sudden rupture or collapse appeared. 114 **OhSt**549, 151**NE**671.

1141-15½-New. Fire box and chimney are not covered, within the meaning of "boiler." **TexCivA** 293**SW**894.

BONA FIDE PURCHASER

1143-1 [1925]**CanSC**302, [1925] 2**Dom LR**928.

1149-5 169**Ark**299, 274**SW**6, 10 [citCJ].

1149-6 169**Ark**299, 274**SW**6, 10 [citCJ].

1149-7½-New. Bona fide purchaser means a real purchaser and not merely a donee taking under the guise of a purchase. [1925]**CanSC**302, [1925] 2**Dom LR**928.

BONDS

9 C. J.—7-1 122**Kan**493, 252**P**250; 220 **MoA**657, 291**SW**515. [c] 75**Mont**369, 243**P**1093; 51**Philippine**529.

7-5 220**MoA**657, 291**SW**515, 518 [cit CJ].

8-20 17**F(2d)**87; 17**F(2d)**242. [c] **Liability for interest** is governed by law of place where bond was made and was to be performed. 33**F(2d)**767.

9-21 201 **Iowa**1063, 206**NW**808.

9-22 201 **Iowa**1063, 206**NW**808.

9-23 84**Colo** 353, 270**P**867.

9-28½-New. A statutory bond executed and delivered in a foreign state for the performance of a contract in another state will be construed in accordance with the laws of the latter state when such was the intention of the parties as shown by the nature of the transaction, the subject matter, and the attending circumstances. 201 **Iowa**1063, 206**NW**808.

9-29 201 **Iowa**1063, 206**NW**808.

10-46 220**MoA**657, 291**SW**515, 518 [cit CJ]; 131**Misc**541, 227**NYS**266; **Tex CivA** 318**SW(2d)**508.

10-55 9**La**137, 119**S**483; 4**LaA**312, 317 [citCJ].

12-75½-New. Bond must name obligor. 220**MoA**840, 295**SW**487.

12-76 220**MoA**840, 295**SW**487. But see 131**Misc**541, 227**NYS**266.

12-80 136**SC**207, 134**SE**232, 234 [quot CJ].

12-85 214**Ala**649, 108**S**749, 750 [quot CJ].

12-86 See also **Man** [1928] 1**DomLR**263.

13-4 [b] **Bond not signed by sureties** is nevertheless binding on principal signing same. **TexCivA** 48**W(2d)**661.

14-26 253**Mass**234, 148**NE**454.

14-26½-New. , but the absence of a seal will not alone determine the nature of the proposed obligation. 141 **SC**92, 139**SE**178.

14-27 29**Hawaii**548, 551 [quotCJ]; 11 **PaDist&Co** 194 [citCJ].

15-33 See also 29**Hawaii**548.

15-35 287**Pa**441, 135**A**214, 215 [citCJ].

18-84 See also 75**Mont**369, 243**P**1093.

19-93 52**ND**752, 204**NW**818, 827, 40 **ALR**1021 [citCJ].

19-94 52**ND**752, 204**NW**818, 827, 40 **ALR**1021 [citCJ].

19-1 **TexCivA** 283**SW**645.

20-8 32**Ariz**33, 255**P**488.

20-9 [d] **Official bond exacted of one without authority** is void for want of consideration. 203 **Iowa**207, 212**NW**476.

21-20 **TexCivA** 283**SW**645.

22-36 193**NC**769, 138**SE**143.

22-37 19**SaskL**450, [1925] 3**DomLR**341, [1925] 2**WestWkly**334 (fidelity bond).

22-38 21**F(2d)**818.

24-56 [a] **Bond by plaintiff in forcible detainer suit** is not invalid because it is payable to justice where statute is silent as to whom it shall be made payable. **TexCivA** 274**SW**277. [b] **In Kansas** statute does not fix term of abstractor's bond. 122**Kan**149, 251**P**182.

24-62½-New. Where bond is executed with intention of complying with statute, terms of statute become part of bond by incorporation. **TexCommnA** 288**SW**121.

25-64 92**Fla**662, 109**S**644, 646 [citCJ].

26-75 240 **IllA**295, 302 [citCJ]; 164**La** 315, 113**S**860, 54**ALR**383 (peace bond); 117**Nebr**6, 219**NW**583, 589 [quotCJ]; 142**Va**435, 129**SE**263, 130**SE**235 (dictum).

26-79 121**Kan**299, 246**P**503.

27-81 174**Minn**56, 218**NW**444, 445 [cit CJ]; 264**Mass**481, 163**NE**62; 219**MoA** 568, 282**SW**164; **MoA** 26**SW(2d)**1018; 132**Misc**193, 229**NYS**296; 136**SC**207, 134 **SE**232; 51**SD**221, 213**NW**17, 18 [citCJ]; **TexCivA** 17**SW(2d)**478; 153**Va**362, 149 **SE**531. But see 205 **Iowa**37, 215**NW**801.

28-87 37**Wyo** 11, 258**P**576, 582 [quot CJ].

28-88 37**Wyo** 11, 258**P**576, 582 [quot CJ].

28-94 **TexCivA** 283**SW**645

28-95 53**ND**249, 205**NW**684, 685 [cit CJ]; **TexCommnA** 276**SW**203; **TexCivA** 283**SW**645.

28-96 **TexCivA** 283**SW**645; **TexCivA** 284**SW**310.

28-97 **TexCommnA** 276**SW**203; **Tex CivA** 283**SW**645.

28-98 53**ND**249, 205**NW**684; **Tex CommnA** 276**SW**203; **TexCivA** 283**SW** 645.

29-1 [a] **Bond to secure performance of invalid agreement** is unenforceable. 106**Conn**34, 137**A**13.

29-7 51**SD**221, 213**NW**17, 18 [citCJ]; **SD** 227**NW**78; **TexCivA** 283**SW**645.

31-26 205 **Iowa**1119, 215**NW**803.

31-32 42**F(2d)**278; 174**Ark**988, 298**SW** 501; 173**Minn**255, 217**NW**133; 48**Philippine**756; **TexCommnA** 294**SW**531, 532 [citCJ].

32-39 [a] **Variation of statutory bond** by legislature may be considered to determine intention of legislature and meaning of statute, but cannot operate to extend scope of statute. 114 **OhSt**58, 150**NE**426, 44**ALR**374.

32-45 128 **Okl** 215, 262**P**208.

32-48 [a] **Where fact that bond is statutory is expressly negatived** conditions of statute cannot be read into bond. 181**Ark**161, 25**SW(2d)**417.

32-50 41**F(2d)**515.

32-51½-New. Provisions of the statute must be read into the bond. 165**La**478, 115**S**662.

32-52 36**F(2d)**468; 173**Minn**255, 217 **NW**133, 135 [quotCJ]; 101**NJL**511, 130 **A**564, 565 [citCJ].

33-53 128 **Okl** 215, 262**P**208.

33-55 174**Ark**988, 298**SW**501; 240**Mich** 333, 215**NW**381; **MoA** 26**SW(2d)**1018; 79**Mont**111, 255**P**722; 231**NYS**571; 128 **Okl** 215, 262**P**208; 49**Philippine**843; 138 **SC**295, 136**SE**222.

33-55½-New. and in the light of the evident purpose of the statutes requiring the bond; 55**ND**154, 212**NW**836.

33-56 79**Mont**111, 255**P**722, 726 [quot CJ]; 128 **Okl** 215, 262**P**208.

33-60 240**Mich**333, 215**NW**381.

33-61 92**Fla**662, 109**S**644, 646 [citCJ]; 240**Mich**333, 215**NW**381.

33-61½-New. The doctrine of last antecedent, sometimes resorted to in finding the meaning of relative words, does not operate to defeat the intention otherwise manifested. **TexCommnA** 298**SW** 520.

33-65 174**Ark**988, 298**SW**501; 128 **Okl** 215, 262**P**208; **TexCommnA** 298**SW**520.

34-67 126 **Okl** 1, 257**P**772; 128 **Okl** 215, 262**P**208; **TexCommnA** 298**SW**520.

34-69 205**Cal** 354, 270**P**965.

34-73 240 **IllA**295, 302 [citCJ].

34-75 46 **Ida**224, 267**P**225, 227 [citCJ]; 201 **Iowa**1063, 206**NW**808; 34**Wyo** 189, 242**P**319, 321 [citCJ]; 38**Wyo** 244, 266**P** 109.

35-76 240 **IllA**295, 302 [quotCJ]; **Tex CivA** 277**SW**790, 793 [citCJ]. [a] 216 **Ala**367, 113**S**592, 595 [citCJ].

35-77 68**CalA**372, 229**P**891; 240 **IllA** 295, 302 [quotCJ]; 1**LaA**731; 86**Mont** 340, 283**P**761; 86**Mont**584, 284**P**1011; 191**NC**653, 132**SE**808; **TexCivA** 277**SW** 790, 793 [citCJ]; 106**WVa**109, 144**SE** 887, 889 [quotCJ]; 107**WVa**210, 148**SE** 6; 107**WVa**482, 148**SE**850; 34**Wyo** 189, 242**P**319, 321 [citCJ]; 35**Wyo** 15, 246 **P**30; 38**Wyo** 244, 266**P**109. See also 115 **OhSt**434, 154**NE**786.

35-78 240 **IllA**295, 302 [quotCJ].

35-79 240 **IllA**295, 302 [quotCJ].

35-79½-New. A bond executed in pursuance of a city ordinance must be construed together with the ordinance in determining the meaning thereof. 322 **Mo** 1050, 17**SW(2d)**977.

35-80 216**Ala**367, 113**S**592, 595 [cit Cyc]; 68**CalA**372, 229**P**891; 240 **IllA** 295, 302 [quotCJ]; 201 **Iowa**1063, 206 **NW**808; 206 **Iowa**111, 219**NW**49(2d case); 163**La**332, 111**S**776, 779 [citCJ]; 10**LaA**326, 121**S**201; 169**La**163, 124**S** 768.

35-81 201 **Iowa**1063, 206**NW**808; 107 **WVa**210, 148**SE**6.

35-82½-New. Contractor's bonds. In the absence of a statutory provision that a bond given under statute shall protect claims, whether such provision be incorporated in the bond or not, the courts will not read into the bond an obligation not contained therein. 20**F (2d)**803.

36-93 196**Cal** 557, 238**P**673; 235 **IllA** 35; 121**Kan**223, 246**P**524, 525 [quotCJ]; 128**Misc**695, 220**NYS**294; 133**Misc**404, 231**NYS**568; 224**AppDiv**475, 231**NYS** 571; 226**AppDiv**137, 234**NYS**522 (interest coupons and resolution); 192**NC**407, 135**SE**136; 120 **Okl** 226, 253**P**273, 274 [quotCJ]; 128 **Okl** 215, 262**P**208; 107 **WVa**482, 148**SE**850. [f] **Interest coupons attached to bond remained mere incidents to bond** and had no greater effect than stipulations for interest contained in bond itself. 226**AppDiv**137, 234**NYS**522.

36-94 226**AppDiv**137, 234**NYS**522.

36-95 120 **Okl** 226, 253**P**273, 274 [quot CJ].

36-97 196**Cal** 557, 238**P**673; 192**NC**407, 135**SE**136; **NC** 155**SE**731; **TexCommnA** 298**SW**520.

36-98 128**Misc**695, 220**NYS**294. See also 132**Misc**462, 230**NYS**421.

36-2 But see 133**Misc**408, 231**NYS**567.

36-2½-New. Order of court pursuant to which a bond was given must be considered in the construction of the bond. 174**Ark**988, 298**SW**501.

37-5 [c] **Bond in form prescribed by legislature** comprehends as beneficial obligees those designated in statute under which it is given. 114 **OhSt**58, 150 **NE**426, 44**ALR**374. [d] **Designation of obligees.**–34**F(2d)**353.

39-40 [a] **Conditions of bonds and coupons, if inconsistent with resolution pursuant to which bonds were issued,** prevail over provisions of resolution. 226**AppDiv**137, 234**NYS**522.

39-45 35**F(2d)**919; 240**Mich**333, 215 **NW**381 (bond construed as making obligors liable for interest on portion of mortgage indebtedness unpaid); 164 **Minn**265, 204**NW**938; 86**Mont**584, 284**P** 1011 (bond of trackbuyer); 133**Misc** 408, 231**NYS**567; 133**Misc**404, 231**NYS** 568; 51**Philippine**529. But see 205 **Iowa** 1119, 215**NW**803.

40-46 See also **Ont** [1928] 4**DomLR**542.

40-49 205 **Iowa**707, 216**NW**17; 205 **Iowa**672, 216**NW**119; 146**Va**680, 132**SE** 848. [a] **Independent void surplus stipulation** will be disregarded and not enforced merely because it is incorporated into statutory bond under seal. 146 **Va**680, 132**SE**848.

40-51½-New. Where bond is given to comply with statute, surety may not restrict its liability to suit contrary to statute. 191**NC**636, 132**SE**800.

40-60 133**Misc**404, 231**NYS**568.

40-61 93**Fla**983, 113**S**117.

40-62 53**ND**249, 205**NW**684.

40-64 173**Minn**255, 217**NW**133.

41-70 [a] 160**Tenn**603, 28**SW(2d)**346.

41-78 224**AppDiv**475, 231**NYS**571.

41-82 31**NM**7, 240**P**482, 492 [citCJ].

42-94 22**F(2d)**388.

42-1 120 **Okl** 226, 253**P**273. [d] **Erratum.**–Strike out citation and insert "133 **MoA**671, 114**SW**57."

43-8 2**LaA**373.

44-21 120 **Okl** 226, 253**P**273, 274 [cit CJ].

44-23 120 **Okl** 226, 253**P**273, 274 [cit CJ].

47-59 117 **Or**374, 243**P**554.

47-61 73**CalA**147, 238**P**748.

48-67 249**NY**263, 164**NE**45.

48-68 249**NY**263, 164**NE**45.

48-71 [b] **Certificate agreeing to deliver described bond to holder** held not negotiable instrument. 242**NY**38, 150**NE** 594.

49-75 See also 249**NY**263, 164**NE**45.

49-78½-New. A trust deed empowering

seventy-five per cent of bondholders to release mortgaged premises from mortgage debt held not to affect negotiability of bonds secured thereby. 128Misc 695, 220NYS294.

49-79½-New. Temporary certificates. Certificate agreeing to deliver described bond to holder has been held not a negotiable instrument even where such certificate contained a clause that the holder will be treated as an absolute owner. 213AppDiv201, 210NYS460.

49-80½-New. A clause providing that interest be paid out of proceeds from sale of lots and profits does not make the bond nonnegotiable. 96NJEq399, 130A373.

49-80¼-New. A certificate, issued by bankers, reciting that the holder was entitled to receive a described bond of Belgium on the surrender of the certificate, and further stating that the bankers may treat the holder as an absolute owner, is not a negotiable instrument. 242NY38, 150NE594 (Negotiable Instr. L. §§ 20, 23, 24).

49-81 156Miss22, 125S429; 84Mont285, 275P743; 117Or374, 243P554. [b] **While in hands of holders of bonds** interest coupons have no greater force than stipulation for payment of interest. 156Miss22, 125S429.

51-98 See also 240NY256, 148NE514.

54-46 TexCivA 23SW(2d)835 (indorsement without recourse).

55-66 [a] **Oral agreement by bank to redeem bonds taken over at face value** is part of main transaction, being supported by consideration. Miss 130S507.

55-73 See also **TexCommnA** 25SW(2d) 330.

55-73½-New. One purchasing bond of third person does not become creditor of vendor. 35F(2d)966.

55-73¼-New. Investment company accepting agent's check for bond held to have waived provision in purchaser's application requiring payment by check. 130Kan516, 287P249.

60-59 124Kan776, 777, 262P1037 [cit CJ].

61-61 124Kan776, 262P1037.

61-63 But see 124Kan776, 262P1037.

61-73 166Minn195, 207NW305. See also **TexCivA** 14SW(2d)81. [b] **Evidence held sufficient** to sustain finding that representations were substantially true. 170Minn366, 212NW892.

61-75½-New. In a suit for rescission for misrepresentation it is not necessary that an intent to deceive existed. 170Minn366, 212NW892.

61-77 30F(2d)353. See also 244NY168, 155NE88.

63-96 [b] **Stockholders who substitute bonds bought in open market for stolen bonds previously sold by them in good faith,** acquire title by subrogation to rights of purchasers of stolen bonds. 228AppDiv191, 239NYS562.

63-98 221AppDiv122, 223NYS118.

63-99 244 IllA251, 255 [citCJ].

63-1 128Misc695, 220NYS294; 228App Div191, 239NYS562; 249NY263, 164NE 45.

64-6 244 IllA251, 255 [citCJ].

64-9 244NY168, 155NE88.

64-12 219Ala50, 121S54.

64-15 30F(2d)353; Iowa 227NW97.

64-18 127 Okl 101, 260P12.

65-19 127 Okl 101, 260P12, 14 [citCJ].

65-22 127 Okl 101, 260P12, 14 [citCJ].

65-30 156Miss22, 125S429 (notice as to negotiability of coupons). See also 244 NY168, 155NE88.

66-49 127 Okl 101, 260P12.

67-52 127 Okl 101, 260P12.

67-56 127 Okl 101, 260P12.

67-61 Can [1928] 4DomLR881; Can [1928] 4DomLR965.

68-70 133 Okl 214, 271P1017.

72-55 20F(2d)78.

73-73 4LaA8.

75-8 131Misc541, 227NYS266.

75-9 CalA 285P396.

78-48 264Mass481, 163NE62.

78-50½-New. Where a bond is conditioned to do a certain act, a cause of action accrues as soon as there is a breach irrespective of whether the obligee has suffered damage. 174Ark988, 298SW501 (bond by party to suit conditioned on return of property taken from custody of court).

79-62 117Or374, 243P554 (holder in due course). [a] **Holder of detached coupons was without right** to bring action in his own name against trustee named in bonds, but who was not party thereto. Mass 166NE553.

79-66 See also 8LaA262.

79-70 102NJL616, 133A479.

81-86½-New. Where a bond contains no covenant or condition which the obligee is bound to perform before bringing action, laches or nonperformance on the part of the obligee will not discharge the obligor. 131Misc541, 227 NYS266.

81-93 [a] **TexCivA** 293SW234, 235 [cit CJ].

82-96 55ND245, 212NW928.

84-31 118 Okl 21, 246P392. [b] **Surety against future violation of liquor law** (1) not concluded by second conviction for possessing liquor left on premises by officers (219Ky453, 293SW970), (2) and he may raise issue as to guilt or innocence of principal (219Ky453, 293 SW970).

84-32 35F(2d)919; 181Ark161, 25SW (2d)417 (that amount stolen by third party); 35GaA418, 133SE267 (that parents of unwed mother contributed to her support and to support of child does not constitute defense to action against father on bond for support); 247Mich36, 225NW572. [a] **That plaintiff paid less than par for detached negotiable coupons** payable to bearer is not valid defense against him as holder in due course in action to recover amount thereof. 117Or374, 243P554.

84-33 53ND249, 205NW684.

85-40 See also 300Pa60, 150A103.

85-42½-New. Equitable defenses.–169 Minn15, 208NW952.

85-54 30F(2d)244; 31F(2d)117; 98Pa Super221.

86-56 Fla 129S602.

86-59 [b] Contra **TexCivA** 288SW518.

86-62 174Ark988, 298SW501; 131Misc 541, 227NYS266; Wis 232NW525; 37 Wyo 11, 258P576.

86-63 136SC207, 134SE232, 234 [citCJ].

87-69½-New. A recovery on a statutory bond by one beneficiary constitutes no bar to an action by another beneficiary to the extent of the unexhausted penalty of the bond. 201Iowa1063, 206 NW808.

87-72 121Kan299, 246P503, 504 [citCJ].

87-73 121Kan299, 246P503, 504 [cit CJ]; 55ND811, 215NW468; 115 OhSt 524, 155NE127; 14PaDist&Co 93.

87-74 117Or616, 244P872 (use plaintiff not within protection of bond); 117 Or633, 244P870.

87-78 TexCivA 275SW179, 180 [citCJ].

88-79 TexCivA 275SW179, 180 [citCJ].

88-85 TexCivA 275SW179, 180 [citCJ].

91-34 83 IndA694, 149NE735; 167Minn 494, 210NW66.

92-64 6PaDist&Co 524.

93-65 26 OhNPNS513 (allegations held sufficient against demurrer).

94-8 127Me58, 141A99, 100 [citCJ].

95-12 TexCivA 275SW179.

98-64½-New. Although statute requires that the court's leave to sue on an official bond must be obtained, the complaint need not allege that such leave has been obtained. 167Minn32, 208 NW526.

102-11 Del 143A34.

112-33 197NC10, 147SE681 (reply held sufficient).

115-4½-New. Where answer consists only of general denial, question of leave to sue on official bond cannot be raised. 168Minn423, 210NW161.

115-5 219Ala155, 121S510.

119-8 240 IllA281; Md 149A275.

120-40 52ND752, 204NW818, 827, 40 ALR1021 [citCJ]; 193Wis403, 214NW 342, 343 [citCJ].

121-66 30F(2d)353. [c] **Registered bonds found in safe deposit box of defendant's decedent** with power of attorney for transfer to plaintiff's decedent are presumed to be property of plaintiff's decedent where transferred to him by person in whose name bonds were registered. 290Pa43, 138A217.

122-67 See also 30F(2d) 353.

122-69 253NY555, 171NE780(2dcase).

122-72 155Wash14, 283P470.

122-74 [a] (8) Cross examination of collector of separate bridge district having office with defendant relative to amount collected by him to ascertain amount stolen has been held not erroneous. 181Ark161, 25SW(2d)417. [c] (2) Other instances. 111Conn178, 149A774.

123-78 111Conn178, 149A774. [a] That former bookkeeper of broker's firm knew that firm was insolvent and was in habit of converting customer's securities is relevant on issue as to whether loan secured by bonds was step in scheme to steal securities, of which he had knowledge. 215AppDiv491, 214 NYS33. [b] **In action on real estate broker's bond,** given under statute to recover earnest money deposit, hearsay letter and telegram held improperly admitted to prove broker's fraudulent representations. 153Wash127, 279P 581.

123-79 [a] (2) Books showing broker's conversion of securities is admissible to show former employee's bad faith in purchasing plaintiff's bonds. 215 AppDiv491, 214NYS33.

123-90 46Philippine713. [d] **Evidence held to show** that defendant received plaintiff's bond as collateral for loan to plaintiff's brokers with knowledge that brokers had converted bonds, making defendant's title defective. 215 AppDiv491, 214NYS33. [e] **Broker's bond.**–153Wash127, 279P581.

123-91 [b] 166Minn195, 207NW305 (action to rescind sale of bonds).

124-99 [c] **Evidence held sufficient** to support finding that bonds were transferred and delivered to holder in due course. 119Kan811, 241P446.

124-13 See also 119Kan811, 241P44.

124-17 111Conn178, 149A774.

125-30 NJSup 136A185.

125-53 TexCommnA 272SW445, 447 [citCJ] (confirmed by statute).

129-17 154Md414, 141A348; 44 Philippine168; **TexCommnA** 294SW531.

129-20½-New. Holder of a bond, forced to sue before receiving payment, is entitled to attorney's fees as provided in the bond. **TexCivA** 279SW862.

129-22 35F(2d)919.

130-28½-New. Where a bond is conditioned on performance of affirmative acts the measure of recovery is the amount of the bond. **MoA** 272SW1032.

130-31 106Conn34, 137A13.

130-34 See also 44Philippine168.

130-37 36GaA396, 137SE85, 92 [citCJ].

131-39 36GaA396, 137SE85.

131-49 TexCivA 300SW973.

132-59 36GaA396, 137SE85; 27 OhNPNS544.

134-87 35GaA418, 133SE267 (bond for support of unwedded mother and bastard child).

BONUS

136-29 73CalA44, 238P177.

136-30 217AppDiv10, 215NYS755.

136-31 217AppDiv10, 215NYS755.

136-33 217AppDiv10, 215NYS755. [b] 15F(2d)672.

136-34 217AppDiv10, 215NYS755.

136-35 15F(2d)672; 195Cal 88, 231P 560 [citCJ] (bonus is something given in addition to what is ordinarily received by, or strictly due to, the recipient); 73CalA44, 238P177; 217App Div10, 215NYS755.

BOOK

137-52 22F(2d)760 (minute book).

BOOK VALUE

138-77 Me 151A725; 249Mich489, 229 NW462 (basis of book value of business). [a] (2) Market value increases in corporate stock should be deducted from capital and surplus. 135Misc899, 241NYS500. [c] **Other definitions.**–Iowa 230NW359.

BOOTLEGGER

139-88 200Iowa1239, 206NW247. [a] (7) Person who violates laws against sale of liquor. 131Misc640, 227NYS 641.

139-88½-New. Mere possession of prohibited liquors does not constitute pos-

sessor a "bootlegger." 23AlaA511, 12S S120.

BORROW

141-42½-New. The mere use of the word "borrow" does not in itself necessarily carry the implication that the master surrendered all control over the servant during the period for which he had been borrowed. 148Md417, 129A 672.

BOULEVARD

143-97 209Ky218, 272SW755. See also 248Mich590, 227NW714.
143-98 209Ky218, 272SW755.
143-1 209Ky218, 272SW755.
143-2 209Ky218, 272SW755.
143-3 209Ky218, 272SW755.
143-4 209Ky218, 272SW755.

BOUNDARIES

152-5 [a] **The construction most against party** claiming under uncertain survey should be adopted in doubtful case. 236Ky11, 32SW(2d)546.
152-6 39F(2d)55; 216AppDiv334, 214 NYS540 (where there is conflict in terms, or between terms and maps); 121 Or270, 254P827; TexCivA 286SW 322; TexCivA 13SW(2d)152; 197Wis 461, 222NW804. [a] **All facts and circumstances indicating parties' intent** must be considered in determining intent of parties in locating patent. 39 F(2d)55.
153-8 See also TexCivA 13SW(2d)152.
153-14 [b] **Words of caution,** denoting some uncertainty; desire not to misrepresent; words of safety and precaution; intended to cover some unimportant inaccuracy: 102Conn663, 129A849. [c] **"28 feet more or less"** includes lot of thirty feet. 149Md318, 131A444.
153-15 102Conn663, 129A849; Conn 151A357; Or 293P425 (area computed by estimation rather than survey).
153-17 203Cal 724, 265P933, 935 [citCJ].
154-19 [b] **"Line running up the ridge"** means to follow meandering of ridge crest. 236Ky11, 32SW(2d)546.
154-25 [b] (1) 254NY152, 172NE452. [c] 254NY152, 172NE452.
155-40½-New. , by, 254NY152, 172NE 452.
155-41½-New. "center of sections," 172 Minn338, 215NW426.
158-4½-New. The phrase "80 acres out of N. W. corner" means that part of a larger tract embraced within four lines forming a rectangle. TexCommnA 12 SW(2d)994.
158-7 [a] **Point is tapering end of** mountain or knoll. 236Ky11, 32SW(2d) 546.
160-55½-New. "Up a run," may mean "in the same direction," depending on the circumstances. 151Va1005, 145SE 718.
160-57 [b] **"Up a run"** does not necessarily mean following meanders of water course. 102WVa240, 135SE230.
160-69 22AlaA150, 113S475, 477 [citCJ]. [d] Mass 169NE509. [h] **Central point of monument** is legal terminus of boundary by monument. 152Tenn664, 280SW689. [i] **Cave and drill hole** is regarded as combination of natural and artificial monument. 199 Wis178, 225NW825.
161-72 199Wis178, 225NW825.
161-74 [e] 212Ky411, 279SW651. [h] (5) Evaporating water hole. 137Misc 141, 229AppDiv739, 242NYS128.
161-76 212Ky836, 280SW150.
162-78 199Wis178, 225NW825. [b] (2) Old fences are very unreliable as starting points or checking points in city survey and should be adopted with great caution. 160La52, 106S672. [g] **Existence of stake is unimportant** where boundary is sufficiently complete and definite. Conn 151A309.
162-82 11LaA147, 119S763. [d] **Unknown corner** held properly located. 19F(2d)820.
162-85 48Nev1, 226P309, 232P1080 (road in ravine held accessory or call from which original location of quarter corner could be established).
162-85½-New. It is permissible to begin at any definite corner in locating boundaries. 92Fla563, 109S473.
163-86 22AlaA150, 113S475, 477 [citCJ].
163-88 200Wis405, 228NW499.
163-90½-New. Size and prominence alone do not establish one of several natural objects as a corner. 221Ky588, 299SW186.
163-91 22AlaA150, 113S475; 214Ky 254, 283SW74; TexCivA 28W(2d)288. [f] **Corner should not be regarded** as lost until all means of fixing original location have been exhausted. 48Nev1, 226P309, 232P1080. [g] **"Lost corner" is one restoration of which can be accomplished only** by survey with reference to interdependent corners. 48 Nev1, 226P309, 232P1080. [h] **Courses and distances are the most unreliable evidence,** in fixing location of old survey, and distances are more uncertain than courses. 160La52, 106S672.
164-92 22AlaA150, 113S475.
164-93 143Va150, 129SE333, 336 [quotCJ].
164-93½-New. The general rule as to variation in magnetic needle cannot be followed where to follow such rule would locate the corner thirty poles from river where description requires it to be located. 214Ky254, 283SW74.
164-93¼-New. Monuments within given subdivision should be accepted in preference to monuments in subsequent survey thereof, or in subdivision of adjoining tract. 160La52, 106S672.
164-93¼-New. Where a surveyor in making a subdivision called for the original objects which subsequently disappeared and established new corners on the original lines, such corners assumed the dignity of original calls in locating the original owners, if the surveyor was dead. TexCivA 28W(2d) 288.
164-96 13F(2d)26; TexCivA 275SW 300; TexCivA 287SW60; TexCivA 22 SW(2d)729. [d] **Beginning at corner in designated grant.**–TexCommnA 290 SW530.
164-98 TexCivA 274SW243.
164-1 22AlaA150, 113S475, 477 [citCJ]; 44 Ida686, 258P536; 200 Iowa711, 205 NW454; 50SD555, 210NW979.
165-2 22AlaA150, 113S475; 50SD555, 210NW979.
165-3 22AlaA150, 113S475; 50SD555, 210NW979.
166-11 44 Ida686, 258P536.
166-14 Ida 286P362; 50SD555, 210 NW979.
166-20 CalA 288P146.
167-22 [c] **Running along.**–Description of grant as running along Smith's line declared to have made tracts contiguous to full length of named tract leaving no vacancy between them. 148 Md438, 129A650.
167-23 Conn 151A309. [a] (9) Connecting lines between corners marked by monuments are presumed to be straight. 226AppDiv423, 235NYS396.
168-26 229Ky1, 16SW(2d)754.
168-30 229Ky1, 16SW(2d)754.
169-38 92Fla563, 109S473; 93Fla378, 112S59.
170-47 221Ky529, 299SW173.
172-71 Conn 151A357; 212Ky836, 280 SW150; TexCivA 274SW314; 102WVa 75, 135SE164, 165 [quotCJ]. [a] **Line of another tract may constitute monument or boundary.** 253NY395, 171NE 583.
172-75½-New. Where a call is for an adjoining survey, it can make no difference that such survey is for any one reason invalid, since it is not a question of the validity of the survey, but the position of the corner or line of such survey, whether legal or illegal. TexCommnA 14SW(2d)1013.
172-76 TexCivA 286SW322; Vt 133A 355.
174-91 220Ala511, 125S655(2dcase).
174-94½-New. Under Dominion Lands Surveys Act adopted in Saskatchewan, boundaries of lands that were originally Dominion lands must be ascertained by recourse first to monuments. Sask [1929] 4DomLR252.
175-4 TexCivA 28W(2d)895 (parallelogram).
175-7 Del 150A20.
176-10 See also 10LaA506, 121S341.
176-11 Del 150A20; 233Ky403, 25 SW(2d)1028; TexCommnA 276SW211.
176-18 160La52, 106S672, 674 [citCJ].
177-24 143Va150, 129SE333, 336 [quotCJ]. [b] **General practice** is to begin at established corner and to locate lines according to courses and distances mentioned in survey. 108WVa553, 152 SE197.
177-25 143Va150, 129SE333, 336 [quotCJ].
177-26 143Va150, 129SE333; 108WVa 553, 152SE197.
177-28 TexCivA 286SW857.
177-29½-New. The east and west quarter line of a section should be placed equidistant between the north and south lines of the section. 196Wis313, 220 NW532.
179-41 125Me249, 132A742.
179-41½-New. Where tracts are divided by 60-foot strip, each grantee took to center of strip subject to grantor's reserved right to use it as right of way. TexCivA 295SW653.
180-45 269US152, 46SCt31, 70Led206 (map locating lines or objects need not be absolutely accurate, if reasonably practical); 87Colo 584, 290P277; 340Ill 477, 172NE805; 159La610, 105S731; TexCivA 290SW560; Utah 263P485. [h] **Recorded plot referred to for description** is open to construction as to errors. 159La610, 105S731. [i] **Where half of lot,** as shown by recorded plot, is conveyed, fact that lot is divided by fence, which is not in the middle of lot is of no consequence in determining amount conveyed. 308Mo9, 271SW743. [j] **Plot showing dimensions of lots,** with no indicia that lots overlap into street imports that lots extend only to street boundary. 215Ala297, 110S391. [k] **Construction of plot filed by landowner.**–120 Okl 211, 251P84. [l] **Government plat may be shown to be erroneous** where made from erroneous survey. 13LaA671, 128S696. [m] **Parties taking title under and by reference to same plat** are ordinarily bound thereby. Mo 28SW(2d)652. [n] **Map and notes** should be departed from only where boundary line and measurements are inconsistent. 137Misc141, 229App Div739, 242NYS128. [o] **Field notes of junior survey** cannot establish boundary of senior survey. TexCivA 27SW(2d) 612. [p] **Stone mound not called for in field notes** cannot be used in locating survey on ground. TexCivA 29SW(2d) 877.
181-47½-New. A survey cannot be located by artificial objects not called for in field notes. TexCivA 274SW314.
181-47⅓-New. A surveyor's field notes rather than those erroneously inserted in a patent determine the location of land. TexCivA 274SW314.
181-47¼-New. The location of a survey calling for a line of another tract will be determined by the survey of such other tract as evidenced by the field notes rather than by the patent. TexCivA 274SW314.
181-47⅙-New. Where a surveyor, after making field notes calling for corner of one survey on the line of another, discovered that such line had been moved, and that the corner called for was not on the line called for, and corrected his field notes so as to eliminate the call for the line and certified the correction to the commissioner of the land office, the location of the corner called for controls. TexCivA 274SW314.
181-52 24 OhNPNS209, 218 [quotCJ].
181-52½-New. It may be assumed that the purpose of the original survey and plat representing water boundary was to vary as little from, and conform as nearly as practicable with, established standards. 197Wis461, 222NW804.
181-53 24 OhNPNS209, 218 [quotCJ].
182-54 24 OhNPNS209, 218 [quotCJ]. [b] (2) Islands in creek west of main channel held to be within boundaries of owner of land lying on west side of creek. 211Ky91, 276SW1081.
182-56½-New. Courts in locating patents describing river as boundary will give effect to parties' intentions. 212Ky 581, 279SW982.

182-56½-New. Where a river has two branches, a call thereto is presumed to be to first branch. 286Pa273, 133A377.

182-57 230AppDiv299, 243NYS625.

182-59½-New. The owner of land having less actual water frontage than shown by the original government survey and plat is not entitled to a resulting narrow strip beyond the west line of a lot north of the bay, erroneously shown on the original plat as cutting off the northwest corner of the lot, in order to give him as much actual water frontage as first indicated. 197Wis461, 222NW804.

182-59½-New. Conveyance of land projecting into Jamaica Bay includes Cornaga Bay, inlets, creeks, and coves indenting its shores, islands, hassocks, and, where specifying marshes and creeks, salt marshes. 248NY491, 162NE497.

183-61 94Fla502, 113S708, 711 [citCJ]. [a] (1) But see **Mich** 233NW159. [b] **Under federal law** purchaser from government of public land on Great Lakes took title to water's edge. **Mich** 233NW159.

183-63 24 OhNPNS209.

183-64 254NY152, 172NE452. But see 88PaSuper71.

184-70 131 Or554, 284P172.

184-72 148SC428, 146SE434.

185-73 231Ky606, 21SW(2d)1010.

185-78 61 OntL502, [1928] 1DomLR723.

185-81 20F(2d)845; 20F(2d)873; 231 Ky606, 21SW(2d)1010 (applies also to boundaries of municipal corporations); 121 Or270, 254P827 (dictum). [e] **Owner of lands on both sides of river** has title to bed of stream, with all water rights appertaining. 126Me299, 138A170. [f] **Alleged contemporaneous construction** cannot be invoked to alter operation of constructive and presumptive rule extending line to thread of stream. 231Ky606, 21SW(2d)1010.

186-82 121 Or270, 254P827 (dictum).

186-94 181Ark574, 26SW(2d)892(2d case).

187-95 102WVa519, 135SE589.

187-98 218Ala397, 118S556; CalA 258 P96; 163Ga867, 137SE56; 124Kan38, 257P966; 254NY152, 172NE452; 121 Or270, 254P827 (dictum); 130 Or687, 280P340(2dcase); 148SC428, 146SE434; 108WVa53, 150SE513.

189-9 121 Or270, 254P827.

189-16 119Kan478, 240P400; 236Mich 655, 211NW261; 248Mich410, 227NW741; 82Mont250, 266P646, 648 [citCJ]; 197Wis461, 219NW100.

191-20 98CalA45, 276P414 (where one of deeds in chain of title described property as to point on United States meander line, definite intention was manifested to use meander line and not river as boundary).

191-21 46 Ida25, 266P1099; 197Wis461, 219NW100.

191-23 165La511, 115S733.

191-24 197Wis461, 219NW100.

192-41 94Fla502, 113S708, 711 [citCJ].

193-42 94Fla502, 113S708, 711 [citCJ].

193-43 94Fla502, 113S708, 711 [citCJ]. [b] (2) 153SC179, 150SE683.

193-43½-New. 130Misc103, 224NYS207. ("mean high-water line" is boundary between private uplands and public lands under water.)

193-48½-New. "Main" channel of river may depend on which of two channels contains the main flow. Or 293P425.

193-51 175Minn172, 220NW413. [b] (3) Other descriptions. 203Cal724, 265P933. [g] **Statutory presumptions** are controlled by express intent shown in deed. 203Cal724, 265P933. [h] **Meaning of side of lake** in description in deed depends entirely on context. 254NY152, 172NE452.

194-53 [a] **Description in deed running to and along side of lake** conveys land under water to center of lake. 254NY152, 172NE452.

194-56½-New. Common corner of patent is held located on plaintiff's side of slough separating disputed island from main channel of river. 212Ky581, 279SW982.

195-60 163Ga867, 137SE56; 217Ky231, 289SW257, 258 [citCJ]; 286Pa273, 133A377.

195-61 Ga 137SE56; 217Ky231, 289SW257, 258 [citCJ]. But see 101NJEq572, 138A99.

195-65 78CalA74, 248P256; 169Ga678, 151SE349; 231Ky606, 21SW(2d)1010; 150Md235, 133A723; 157Md229, 145A546; 241Mich452, 217NW34; NH 146A90; 130Misc599, 224NYS153; 152Tenn664, 280SW689; TexCommnA 293SW160; TexCivA 28SW(2d)603; 105WVa395, 142SE841, 58ALR231; 195Wis69, 217NW700. See 264Mass436, 163NE70.

197-68½-New. **Sidewalks** are not recognized as monuments for determining location of boundaries. 70Utah175, 259P196.

197-69 152Tenn664, 280SW689; TexCivA 295SW653, 659 [quotCJ].

197-70 152Tenn664, 280SW689; TexCivA 295SW653, 659 [quotCJ].

197-71 TexCivA 295SW653, 659 [quot CJ].

197-72 TexCivA 295SW653, 659 [quot CJ].

197-73 TexCivA 295SW653, 659 [quot CJ].

197-74 TexCivA 295SW653, 659 [quot CJ].

197-75 TexCommnA 293SW160, 162 [quotCJ]; TexCivA 295SW653, 659 [quotCJ]; 105WVa395, 142SE841, 843 [citCJ] 58ALR231.

197-75½-New. The rule of interpretation appears to rest also partly on the principle that the legal terminus of a boundary by a monument is at the central point of the monument. 152Tenn664, 280SW689.

198-82½-New. A deed conveying to a point near a road and along a line just below the road does not make the road a boundary. 217Ky673, 290SW474.

198-83 152Tenn664, 280SW689.

198-84 255Mass583, 152NE40.

198-85 224AppDiv63, 229NYS201.

199-90 Me 133A723.

199-94 121 Or270, 254P827, 828 [quotCJ]; TexCivA 295SW653, 659 [quotCJ].

200-95 121 Or270, 254P827, 828 [quotCJ]; TexCivA 295SW653, 659 [quotCJ].

200-96 121 Or270, 254P827, 828 [quotCJ].

200-97 121 Or270, 254P827, 828 [quotCJ].

200-98 248NY145, 161NE450; 121 Or270, 254P827, 828 [quotCJ]; TexCivA 295SW653, 659 [quotCJ]. See also MoA 297SW460. But see 224AppDiv63, 229NYS201.

200-99 121 Or270, 254P827, 828 [quotCJ]; TexCommnA 293SW160, 162 [quotCJ]; TexCivA 295SW653, 659 [quotCJ].

200-2 179Ark705, 17SW(2d)869; 241 Mich452, 217NW34; 148Miss306, 114S625.

201-3 241Mich452, 217NW34.

201-4 But see 179Ark705, 17SW(2d)869.

201-8 253NY320, 171NE390; 130Misc599, 224NYS153. But see 105WVa395, 142SE841, 843 [citCJ], 58ALR231.

202-14 265Mass555, 164NE622.

202-14½-New. **Government monuments control** as to location of street lines, in the absence of a showing of user, instead of measurement from the center of a railroad which is subject to shiftings through long course of years. 236Mich249, 210NW226.

202-16 [a] **Half of lot.**-208Mo9, 271SW743.

202-18 TexCivA 22SW(2d)980.

202-21 See also 82Mont250, 266P646.

203-24 Contra 241Mich452, 217NW34.

203-26 241Mich452, 217NW34.

204-38½-New. A conveyance by lot and block numbers of property abutting on a recently vacated street extends to the center of the abandoned street. 129Kan679, 284P359.

205-44 See also 152Tenn664, 280SW689.

205-45 See also 152Tenn664, 280SW689.

205-49 152Tenn664, 280SW689; 105WVa395, 142SE841, 844 [citCJ], 58ALR231.

205-51 152Tenn664, 280SW689.

206-63 28F(2d)159; 127Kan365, 273P661(2dcase) (deed held to convey grantors' interest in right of way tract).

206-64 218Ala180, 118S332; Mich 233NW179.

206-68½-New. Deeds of a quarter section of land, in which the numerical descriptions were followed by the expressions "less railroad right of way" and "excepting railroad right of way" of a named railroad have been interpreted to convey the interest of the grantors in the right of way tract. 127Kan365, 273P661(2dcase).

207-74 125Me249, 132A742; TexCivA 287SW66; TexCivA 28SW(2d)872.

207-75 13F(2d)712; TexCivA 13SW(2d)152.

208-76 [b] (2) Object of rules is to ascertain actual location of boundary as made at the time. 216Ky214, 287SW725.

208-77 13F(2d)712; TexCivA 2SW(2d)288.

208-80 227Ky785, 14SW(2d)200; 159La610, 105S731 (monuments over distances); 196NC107, 144SE547; 297Pa442, 147A96. [a] (1) TexCivA 2SW(2d)288.

209-82 13LaA332, 126S529.

209-83½-New. Survey stakes, and natural objects referenced thereto, courses as shown by field notes, structures shown to have been built with reference to surveys, monuments then standing, and distances, are entitled to weight in order named. 159La610, 105S731.

209-83⅓-New. Inconsistencies are harmonized by eliminating feature of lower rank and giving effect to that of higher rank. 159La610, 105S731.

209-83¼-New. Reference to the bay shore contained within lot lines may be regarded as a call to the bay shore overriding the metes and bounds given for the lot. 156Md469, 144A489.

209-84 192NC595, 135SE533.

209-85 19F(2d)820; 228Ky266, 14SW(2d)1090; 8LaA769; 13LaA571, 128S675; 148Md438, 129A650 (line called for is quite as controlling as any natural or artificial boundary); TexCivA 286SW857; 146Va695, 132SE853; 197Wis461, 219NW100 (control meander line). But see 231Ky404, 21SW(2d)659.

209-86 204 Iowa1046, 216NW952; 216Ky593, 288SW332; TexCivA 286SW857.

210-95 19F(2d)820.

210-97 160La52, 106S672, 674 [citCJ]; 13LaA671, 128S696; TexCivA 12SW(2d)1074. But see 197Wis461, 222NW804.

211-4 215Ala640, 112S243; 130Misc599, 224NYS153; TexCivA 286SW322; TexCivA 13SW(2d)997; TexCivA 22SW(2d)729; BC [1928] 3DomLR242. See also TexCivA 7SW(2d)630.

212-7 135Wash539, 238P576.

212-11 19F(2d)820; 162Ga508, 133SE622; 143Va117, 129SE347 (quantity controlled by known visible and definite objects); 146Va695, 132SE853.

212-13 162Ga620, 134SE616; 163Ga645, 136SE907; 216Ky648, 288SW289; 159La610, 105S731 (ancient monuments); 160La72, 106S698; 10LaA608, 120S235; 167La833, 120S384; 168La226, 121S752; 130Misc599, 224NYS153; 245NY515, 157NE839; 49Philippine328; 199Wis178, 225NW825.

212-14 101CalA167, 281P428; 124Me347, 129A4.

212-15 216Ky648, 288SW289; TexCivA 25SW(2d)1001.

212-19 217Ky113, 288SW1053.

212-20 286Pa273, 133A377, 378 [cit Cyc].

212-21 163Ga645, 136SE907; 29Hawaii130, 134 [quotCJ]; 286Pa273, 133A377.

212-22 101CalA244, 281P711; TexCivA 286SW857.

212-22½-New. Rule is not applied where the object did not exist in the place indicated on the plot and the survey was incomplete. 160La72, 106S698.

213-25 TexCivA 22SW(2d)729; 236Ky11, 32SW(2d)546.

213-27 137Misc141, 229AppDiv739, 242NYS128.

213-28 108WVa53, 150SE513.

213-31½-New. **Actual physical conditions control,** as to location of line

between lots, over direction and measurement as disclosed by map. 125Misc 793, 211NYS710.

213–33 19F(2d)820; 213Ala466, 105S562; CalA 25SP96; 96CalA390, 274P386; 102CalA42, 282P438; Conn 152A152; Del 150A20; 162Ga620, 134SE616; 163Ga645, 136SE907; 29Hawaii130; 46 Ida25, 266P1099; 212Ky411, 279SW651; 214Ky514, 283SW1059; 216Ky280, 287SW715; 231Ky253, 21SW(2d)279; 232Ky767, 24SW(2d)609; 167La199, 118S887; 9LaA162, 119S275; 265Mass56, 163NE761; 251Mich67, 231NW70; 175Minn172, 220NW413 [cit CJ]; 48Nev1, 226P309, 232P1080; 130Or687, 280P340(2dcase); TexCivA 287SW60, 66 [quotCJ]; 188Wis82, 204NW582 (dictum).

214–34 102Conn663, 129A849; Tex CivA 287SW60; 152Va533, 147SE196.

214–37 156Md123, 142A910. See also 162Ga620, 134SE616.

214–38 102Conn663, 129A849.

215–41 [c] (2) Controlling influence must be given to river as boundary over course and distance. 268US252, 45SCt 497, 69L ed937. [e] (5) Ancient or genuine landmarks, as corner station or marked trees control over courses and distances. 162Ga620, 134SE616.

215–42 214Ky514, 283SW1059; 221Ky588, 299SW186; TexCivA 3SW(2d)498 (trees not found); 188Wis82, 204NW582. [c] (2) If evidence relating to location of monuments is substantially conflicting, courses, distances, and quantity are to be considered in determining such conflict. 100CalA629, 280P713.

216–51 217Ky113, 288SW1053.

216–52 217Ky113, 288SW1053.

216–56 286Pa273, 133A377.

216–59 13F(2d)712. See also 188Wis82, 204NW582 (dictum).

216–60½–New. , or a smaller area. 13F(2d)712.

217–61 29Hawaii130, 134 [quotCJ].

217–62 29Hawaii130, 134 [quotCJ].

217–66 216Ky280, 287SW715; 286Pa273, 133A377.

217–68 22AlaA150, 113S475 (government survey): 96CalA66, 273P590; 44 Ida686, 258P536; 167LaS33, 120S384.

217–69 TexCivA 286SW857.

217–70 126Me462, 139A593.

218–74 227Ky785, 14SW(2d)200; 169 La577, 125S623.

218–78 213Ala466, 105S562; 219Ala 344, 122S404; 174Ark807, 298SW1; 175 Ark846, 1SW(2d)6; 102CalA42, 282P 438; Conn 152A152; 216Ky593, 288SW 332; 160La52, 106S672, 674 [citCJ]; Mass 166NE922; Mass 169NE509; 83 Mont100, 269P408; 101NJEq786, 135A 506; 18 OhA506; 22 OhA13, 153NE279; 121 Or332, 254P355; 85PaSuper555; TexCivA 288SW268; TexCivA 22SW (2d)729; TexCivA 31SW(2d)172; Va 153SE667; 188Wis82, 204NW582 (dictum).

219–81 18 OhA506 (well-recognized line referred to in description of deeds to lots adjacent thereto held controlling as monument).

219–82 Mass 169NE509; 188Wis82, 204NW582.

220–92 Mass 169NE509; 152Tenn664, 280SW689 (distances short and extremely accurate manifesting intention that distances control).

220–93 13F(2d)712. See also 188Wis 82, 204NW582.

221–95 216Ala202, 112S914; 163Ga645, 136SE907.

221–96 94PaSuper62.

221–97 163Ga645, 136SE907; 217Ky 113, 288SW1053. See also 3LaA505; Miss 119S505 (government plats control marginal drawing on one plat). [b] (1) 217Ky113, 288SW1053. [d] **Objects referred to in field notes as being nearest to disputed corner** were properly considered in determining location of corner at place which would correspond precisely with calls and distances of survey. 99CalA482, 278P894. [e] **Where call seems to have been inserted by mistake,** and is irreconcilable with other calls of field notes or grant, it may be disregarded. 97Fla869, 122S 270.

221–98 97Fla869, 122S270; 13LaA332, 126S529.

221–99 13LaA671, 128S696.

221–1 217Ky113, 288SW1053.

221–4 202 Iowa262, 208NW321 (recorded plot); TexCivA 300SW171.

221–6 13LaA332, 126S529.

222–10 See also MoA 274SW835 (plat not conclusive as to quantity).

222–11 101WVa711, 133SE695 (even points of compass must yield).

222–15 101WVa711, 133SE695 (rule applied in action of ejectment).

222–18 217Ky113, 288SW1053.

222–19 195NC363, 142SE229; 291Pa 145, 139A731; TexCommnA 14SW(2d) 1013; TexCivA 286SW322.

223–23 TexCivA 275SW300.

223–24 TexCivA 275SW300.

223–30 217Ky113, 288SW1053; Tex CivA 2SW(2d)288; TexCivA 3SW(2d) 498 (surveyor's mistake).

224–31 217Ky113, 288SW1053.

224–32 291Pa145, 139A731; 102WVa 75, 135SE164, 165 [quotCJ].

224–34 TexCivA 281SW321; 135Wash 539, 238P576.

224–40 13F(2d)712; 198Cal 579, 246P 43; 167La199, 118S887; 10LaA506, 121 S341; 149Miss105, 115S196; TexCivA 281SW321; NB [1927] 1DomLR1200.

225–41 13F(2d)712.

225–42 13F(2d)712.

225–43 TexCivA 274SW314; TexCivA 274SW319; TexCivA 2SW(2d)288; Tex CivA 29SW(2d)877. See also 228Ky 266, 14SW(2d)1090. [f] **Where position of natural object is mistakenly described,** courses and distances control over it. 217Ky113, 288SW1053.

226–45 TexCivA 275SW300.

226–49 29Hawaii130.

226–52 13F(2d)712; 217Ky113, 288SW 1053.

226–54 159La610, 105S731.

227–64 13F(2d)712; Mass 169NE509; 240Mich475, 215NW302.

227–65 13F(2d)712; 146Va695, 132 SE853; 102WVa75, 135SE164. [a] **Absence of words "more or less"** does not alter rule. 13F(2d)712.

227–66 13F(2d)712; 200Cal 425, 253P 733; Or 293P425.

228–67 13F(2d)712; 102WVa75, 135 SE164.

228–68 217Ky113, 288SW1053; 240 Mich475, 215NW302.

228–69 29Hawaii130.

229–71 149Miss354, 115S40 (where boundaries not definitely described).

229–72 [c] 13F(2d)712.

229–73½–New. The rule that description by acreage is secondary to description by boundaries is held inapplicable to conveyance of quarter section, less lot deeded to school district. 200Cal 425, 253P733.

229–74 See also TexCivA 12SW(2d) 1074.

229–75 232Ky767, 24SW(2d)609.

230–78½–New. A patent from a state, if in conflict with a grant from the United States as shown by a United States survey, must yield to such survey. 10LaA608, 120S235.

230–79 207Cal 643, 279P772; 47 Ida253, 274P112 (survey and monuments erected thereunder); TexCivA 274SW314; TexCivA 274SW319. [d] (2) Under Texas statute survey made by surveyors of county other than that in which lands are situated is void. TexCivA 3 SW(2d)819. (3) Under such statute seniority between surveys is determinable by dates of issuance of patents, where patents were issued on surveys which were void because not made by surveyors of county where land was situated. TexCivA 3SW(2d)819. [f] **Where field notes of surveys conflict,** field notes of senior survey control. TexCivA 274SW314. [g] **Necessity of validity of survey.**–Senior survey is entitled to full quota over adjoining overlapping survey only if senior survey is valid in being made according to law by some one authorized to make it. TexCivA 3SW(2d)819.

230–80 TexCivA 274SW319; TexCivA 286SW322.

230–83½–New. A junior survey using an erroneous starting point and disregarding established corners is properly rejected. 160La52, 106S672.

230–85 123Kan269, 254P1030; 231Ky 258, 21SW(2d)285; 126Me462, 139A593; TexCommnA 3SW(2d)75. [i] **Validity of agreements rests on belief of parties** that they are establishing true boundary. 87CalA127, 261P1029.

231–86 123Kan269, 254P1030.

231–91½–New. A mere acquiescence in the existence of a fence and the occupancy of land up to it does not amount to an agreement as to boundary line. 73 CalA244, 238P767.

231–94 TexCivA 4SW(2d)610, 612 [quotCJ].

231–95 TexCivA 4SW(2d)610, 612 [quotCJ].

232–99 214Ala150, 107S94; 73CalA244, 238P767; 206Cal 635, 275P803.

232–3 46 Ida137, 266P797, 798 [citCJ &Cyc]. [a] 308Mo 9, 271SW743 (mere possession without claim of ownership). [b] **Mere acquiescence in existence of fence** and occupancy on either side does not amount to agreement. 198Cal 586, 246P319, 48ALR1244. [c] **Presumption from erection and acquiescence in fence or other monument.**–Presumption that agreement was made as to location of line may arise from erection of fence or other monument treated as fixed boundary for such length of time that neither party ought to be allowed to deny correctness of boundary. 46 Ida 137, 266P797.

232–4 87CalA127, 261P1029.

232–5 135Wash384, 237P704 (deed required where parties admitting location of true line seek to relocate it by method necessitating conveyance of real property).

232–6 215Ala78, 109S362, 363 [citCJ]; 164Ga673, 139SE410; 169Ga410, 150SE 556; 254 IllA498; 212Ky7, 278SW172; 215Ky551, 286SW773; TexCivA 20SW (2d)409. But see 205 Iowa474, 218NW 332; 196Wis625, 220NW651.

233–9 212Ky7, 278SW172.

233–10 198Cal 586, 246P319, 48ALR 1244; 73CalA244, 238P767; 90CalA201, 265P982; 235Mich227, 209NW169; Mo 9SW(2d)947; TexCivA 287SW60; Utah 276P912.

234–11 196Wis625, 220NW651.

234–17 228Ky762, 15SW(2d)505; 232 Ky293, 22SW(2d)1034; 235Mich227, 209NW169; TexCivA 287SW60, 66 [quotCJ]. **Erratum.**–"14NYS312" should read "14NYSt312."

234–19 235Mich227, 209NW169; Tex CivA 287SW60, 66 [quotCJ]; 135Wash 384, 237P704. [c] **No title passes** unless followed by adverse occupation, under claim of right for twenty years. 256Mass331, 152NE319.

235–20 41GaA24, 152SE222.

235–22 122Kan637, 253P212; 212Ky 92, 278SW602; 170Minn495, 213NW40; 151SC145, 148SE697; TexCivA 22SW (2d)729. [i] **Award of surveyor, after compromise agreement,** is binding on parties to agreement. 212Ky92, 278 SW603. [j] **Agreement between grantor and grantee does not affect** subsequent grantee's rights since disclaimer of freehold can be made only by deed or in court of record. 145Va605, 134SE573.

236–32½–New. If the boundary is fixed by agreement and possession is taken under it by both sides, mere removal or shifting of a fence does not affect the title. Mo 8SW(2d)975.

236–33 206Cal 635, 275P803; 254 IllA 498; IndA 171NE492; 212Ky315, 278 SW834; 232Mich468, 205NW580.

237–37 Ala 129S55; 73CalA244, 238P 767; 39GaA265, 147SE160; 126Me462, 139A593.

237–38 38GaA496, 144SE340(1stcase); 235Mich227, 209NW169.

237–39 41GaA24, 152SE222; 220Ky81, 294SW813.

237–40 127Kan401, 273P445; 222App Div164, 225NYS415.

238–51 [b] **Agreement** acted upon by county cannot later be rescinded by another agreement. TexCommnA 3SW (2d)75.

238–53 126Me462, 139A593.

239–55 220Ala338, 124S898; 254 IllA 498; 170Minn495, 213NW40.

239–56 TexCivA 290SW560. [a] (1) TexCivA 287SW66. (4) Where defendants laid concrete drive, and asked adjoining owner's permission to half of

tree to permit entrance to such drive, recognizing center of tree as their boundary, they were estopped from claiming line beyond such drive. 226 AppDiv423, 235NYS396.

239-57 135Misc233, 237NYS361 (long continued acquiescence). See also 152 Va533, 147SE196.

239-58 TexCivA 31SW(2d)686. [f] 160La52, 106S672; 10LaA506, 121S341; TexCivA 2SW(2d)288.

239-59 160La52, 106S672.

239-60 268US252, 45SCt497, 69L ed 937; Utah 276P912. [a] **Naked oral agreement to resurvey established boundary** does not work estoppel to insist on established boundary. 206 Iowa 419, 218NW332.

239-62 205 Iowa474, 218NW329.

239-63 268US252, 45SCt497, 69L ed 937.

240-70 NJCh 149A630.

241-76 149Miss188, 115S211.

241-79 205 Iowa474, 218NW329.

242-92 220Ky81, 294SW813; 246Mich 300, 224NW391; 130 Okl 79, 262P1067, 1069 [quotCJ].

243-93 212Ky836, 280SW150; 308Mo 9, 271SW743 (building fence merely to keep cattle out).

243-94½-New. That the owners of lots in a subdivision, who procured no survey of their lots, made valuable improvements did not constitute a practical location of the boundary lines, as against another owner, who did nothing to induce them to rely on the lines claimed. 198Wis489, 224NW711.

243-95 130 Okl 79, 262P1067, 1069 [quotCJ].

243-96 272US21, 47SCt9, 71L ed145 (dictum); 220Ky81, 294SW813; 130 Okl 79, 262P1067.

243-97 272US21, 47SCt9, 71L ed145 (dictum); 130 Okl 79, 262P1067, 1069 [quotCJ].

244-2 272US21, 47SCt9, 71L ed145 (rule applied to state boundaries); 164 Ga673, 139SE410; 203 Iowa317, 211NW 417; 206 Iowa419, 218NW332; Iowa 231NW339; 129Kan543, 283P500; 216 Ky214, 287SW725; 218Ky779, 292SW 303; 160La52, 106S672 (court justified in accepting corners long acquiesced in, where original markers were lost); 130 Misc599, 224NYS153; 130 Okl 79, 262 P1067; Or 293P425; TexCivA 274SW 314; TexCivA 290SW556; Utah 276P 912; NS [1928] 2DomLR954. See also 165Ga437, 141SE201. [e] 36GaA738, 138SE251. [g] **Location of boundary by acquiescence** rests on ratification or equitable estoppel. 128Misc539, 220 NYS83. [h] **Mere passive acquiescence does not establish new line** where boundary was definitely established. 128Misc539, 220NYS82. [i] **Acquiescence for fifteen years is not shown** where period was broken by ownership of one who was not shown to have known anything about lines or fences, since knowledge is essential. 247Mich 180, 225NW583. [j] **Mere passive acquiescence does not establish new line** where boundary was definitely established. 87CalA127, 261P1029.

245-3 130 Okl 79, 262P1067.

245-4½-New. Claim that boundary fence was only provisionally, or conditionally, permitted to remain in certain location with understanding that it was later to be moved, cannot be maintained, where person in possession of land did not know of the alleged understanding. 67Utah283, 247P294.

245-4⅓-New. Acquiescence in boundary line, standing alone, is not sufficient defense to action in ejectment. 235Mich227, 209NW169.

245-5 87CalA127, 261P1029; 144Miss 96, 109S674.

245-6 See also 1LaA3.

245-7 164Ga673, 139SE410 (seven years); 203 Iowa317, 211NW417; TexCivA 290SW556. [c] **Where adjoining owners took conveyances from common grantor** with reference to boundary line he had located, location was irrespective of lapse of time, binding on them. 247Mich180, 225NW583. [d] **Acquiescence in boundary line for statutory period** fixes it. 247Mich150, 225NW535. [e] **Inducing adjoining owner to act on erroneous boundary** precludes inducing owner and his successors from disputing such erroneous boundary though acquiescence was for less than statutory period. NJSup 146A786(2dcase). [f] **Acquiescence in road as true boundary for thirty or thirty-five years** after survey was prima facie evidence of its verity. 220Ala111, 124S228.

245-8 165Ga437, 141SE201; 41GaA24, 152SE222; Vt 150A70.

245-9 165Ga437, 141SE201 (seven years); 169Ga410, 150SE556; 36GaA 738, 138SE251; 39GaA265, 147SE160; 47 Ida740, 278P366; 201 Iowa760, 206 NW88; Iowa 231NW339; 220Ky661, 295SW987; 225Ky722, 9SW(2d)1076; 231Ky258, 21SW(2d)285; 232Ky293, 22 SW(2d)1034; 168La819, 123S585; 235 Mich227, 209NW169.

246-10 TexCivA 23SW(2d)396.

246-11 165Ga437, 141SE201. But see 235Mich227, 209NW169.

246-11 [a] **Where agreement is reached in controversy contemplating fixed line,** and such line is fixed by monuments, line so established is boundary line. 247 Mich150, 225NW535.

246-13 165Ga437, 141SE201.

246-15 165Ga437, 141SE201; 187Wis 558, 204NW585 (acceptance of reconveyance in accordance with terms of submission to arbitrator and lapse of nearly twenty years without challenging award held acquiescence).

246-16 41GaA24, 152SE222 (actual possession is not indispensable to show acquiescence in line); 47 Ida740, 278P 366; 160La52, 106S672; TexCivA 290 SW556.

246-17½-New. Acquiescence and adverse possession are materially different defenses and are not so interwoven that a failure to establish one necessarily constitutes failure to establish the other. 233Mich400, 206NW309.

246-18 90CalA201, 265P982; 11LaA74, 123S371. [b] **Where owners claim only to true line,** a fence erroneously supposed to be on true line does not constitute boundary. 308Mo 9, 271SW743. [c] **Where boundary line was never in dispute,** title to strip inclosed by fence must rest on prescription and not on establishment by acquiescence. 242Mich167, 218NW703.

246-20 198Cal 645, 246P1043; 204 Iowa1006, 216NW731; 242Mich167, 218 NW703; 72Mont606, 234P477; 130 Okl 79, 262P1067; 49RI 155, 141A180; 99 Vt304, 131A610; 134Wash690, 236P288. [c] **Where there is no uncertainty as to dividing line,** acquiescence in fence does not constitute agreement as to boundary line. 90CalA582, 266P334.

247-21 232Ky293, 22SW(2d)1034; 72 Mont606, 234P477.

247-22 200 Iowa715, 205NW354; 204 Iowa1006, 216NW731; 235Mich227, 209 NW169; 235Mich234, 209NW171; 49 RI 155, 141A180; 67Utah283, 247P294. Contra 92CalA393, 268P465 (in absence of agreement).

247-23 235Mich227, 209NW169.

247-23½-New. or where original monuments cannot be found. 235Mich227, 209NW169.

247-25½-New. After fifteen years acquiescence defendant cannot hold land except under the conditions of the grant providing that a certain strip should be the right of way. TexCivA 295SW653.

247-26 46 Ida137, 266P797; 203 Iowa 317, 211NW417; 232Ky293, 22SW(2d) 1034.

247-26½-New. Where the parties acquiesced in the boundary line, grantees paying taxes on property as described in a conveyance to them paid taxes on land in their possession. 47 Ida740, 278P366.

247-27 89CalA787, 265P394; 36GaA 738, 138SE251; 39GaA265, 147SE160, (grantee); 41GaA380, 153SE94(2dcase) (grantees); 232Ky293, 22SW(2d)1034; TexCivA 287SW104; 99Vt304, 131A610.

247-28 47 Ida740, 278P366 (binding on successors in interest); 143SC429, 141 SE721. [c] But see TexCivA 18SW(2d) 950 (holding what former owners of plaintiff's and defendant's lots regarded as to fence being boundary line did not bind plaintiff in absence of agreement). [e] **As against state.**–TexCivA 274SW 319.

247-29½-New. One occupying public lands and agreeing on the boundary line is bound by the agreement after acquiring title from the United States. 47 Ida 740, 278P366.

248-32½-New. Mere description of land by governmental boundaries in an action to enjoin a violation of the boundary established by acquiescence is held no abandonment of latter. 203 Iowa317, 211NW417.

248-35 [b] **Controversy held submissible.**–187Wis558, 204NW585. [c] **Private survey as arbitrator's award.**–187 Wis558, 204NW585.

248-40 187Wis558, 204NW585 (holding that mistaken survey, treated as award, based on honest and deliberate judgment and not resulting from unconscious mistake may not be impeached).

249-42 But see 212Ky7, 278SW172. [b] **As arbitration award.**–Establishment of boundaries by surveyor as agreed to by parties has been held to be in effect an award of arbitrators. 187Wis558, 204NW585.

249-43½-New. Suit to enforce survey made pursuant to agreement of parties is an appropriate proceeding to determine disputed title to one of the tracts surveyed. 12F(2d)649.

249-43⅓-New. Where surveys were not made by the same parties nor made contemporaneously, they are res inter alios acta, and one cannot be used as evidence to fix the line of the other. 152 Va533, 147SE196.

249-44½-New. but in jurisdictions where establishment of boundaries by survey as agreed to by parties is given effect of award of arbitrators, it is entitled to same weight, 187Wis558, 204 NW585.

249-46 See also 122Kan637, 253P212.

249-47 But see 243Mich595, 220NW663.

249-48 212Ky7, 278SW172.

249-50 77Colo 333, 236P992 (writ of error is not proper method to review decree in special statutory proceeding outside code). [a] **In Minnesota.**–165 Minn415, 206NW654. [b] **In Porto Rico.**–29PortoRico 782. [c] **Statutory means are not sole means** for fixing boundary between contiguous properties, where dispute is between one owner and his vendors. 11LaA181, 123S139.

249-50½-New. Notice for survey under Porto Rico statute held sufficient. 29 PortoRico 782.

249-51½-New. Principles of law in ejectment action are applicable in a proceeding under a statute to establish a boundary where the title and right of possession of coterminous owners are disputed under the pleadings. 146Va 695, 132SE853.

249-51⅓-New. A statute providing the procedure for the establishment of the true boundary is not intended to give the parties litigating thereunder any advantages over those proceeding by ejectment. 153Va52, 149SE470.

250-67 37GaA197, 139SE129.

250-73½-New. All tenants in common need not be parties plaintiff where there was no showing of omission of the parties in interest. 36GaA543, 137SE299.

251-76-77 [a] **Line established by seven years' acquiescence** held to be established land line which processioners may mark. 41GaA88, 151SE834(1st case).

251-79½-New. In a dispute over the dividing line, other boundaries need not be surveyed. 36GaA543, 137SE299.

251-79⅓-New. Where there is no county surveyor, processioners may engage a competent citizen of the county duly sworn to perform his duties, or the surveyor of an adjoining county may officiate. 37GaA391, 140SE522.

251-80 [a] **Judgment has been held not contrary to law** where defeated party was not conclusively shown in continuous possession for over seven years of land affected. 41GaA585, 154SE156.

251-88 37GaA197, 139SE129.

251-88½-New. Return after close of case and verdict for plaintiff is a nullity as to plaintiff. 38GaA506, 144SE 356.

252-3 37GaA197, 139SE129. [a] **Evidence of record and return of processioners** is not objectionable as exceeding authority. 41GaA712, 154SE464.
252-8 [a] (3) Where on all evidence verdict was not demanded for either party as matter of law. 34GaA105, 128SE198.
252-9 [b] (1) 36GaA738, 138SE251. (2) Charge not warranted by evidence together with charge excluding from jury consideration of other evidence held to render new trial necessary. 34GaA105, 128SE198.
252-10½-New. Charge not warranted by evidence is erroneous where losing party probably prejudiced. 34GaA105, 128SE198.
252-10⅓-New. Charge, improperly confining jury to existing landmarks to the exclusion of evidence of genuine landmarks that formerly existed, was held error. 34GaA105, 128SE198.
252-10¼-New. Admissibility of evidence. 36GaA543, 137SE299.
252-10½-New. Sufficiency of evidence. 36GaA543, 137SE299.
252-10¼-New. Verdict will be sustained when warranted by evidence. 37GaA212, 139SE734.
253-14 37GaA197, 139SE129.
254-41 [a] **Who is "disinterested" person.**-204 Iowa15, 214NW562.
256-70½-New. A proceeding to fix the true line and determine the rights of parties not only determines the location of a government corner but also lines as established by adverse possession or by acquiescence of parties. 204 Iowa 15, 214NW562.
256-72 204 Iowa15, 214NW562.
258-25 195NC185, 141SE559 (proceedings held properly dismissed where no question of boundary was presented by pleadings).
259-28½-New. In Philippines. Commission to establish boundaries is an ancient equity jurisdiction and still resides in the courts and is analogous to the old action of "deslinde y amojonamiento." 44Philippine221.
259-28⅓-New. [§ 250a] k½. **In Porto Rico** an order granting a survey under Code Civ. Proc. § 286 is void where defendant adjoining owner was not given the statutory notice and did not appear at the hearing. 33PortoRico 968.
259-38½-New. In Porto Rico. 29Porto Rico 782.
259-41 154Wash42, 280P935 (corners of government subdivisions established by government surveyors are conclusive as to section boundaries).
260-49 125Kan319, 263P1066.
260-50½-New. A surveyor has no jurisdiction to construe ambiguous deed to determine the intention of the parties thereto. 125Kan319, 263P1066.
260-50⅓-New. A report of a survey will not be set aside on the ground that it was filed too late where it does not appear when the survey was completed and the report was prepared. 125Kan 319, 263P1066.
260-53 85 Ind483, 154NE391.
260-54 Contra 85 Ind483, 154NE391.
260-55½-New. A survey of a boundary line is not binding upon an interested party who was not given notice of the survey and did not appear and participate in it. 119Kan731, 241P248.
260-55¼-New. An attempted appeal after expiration of the statutory time therefor does not constitute waiver of lack of notice of a survey. 119Kan731, 241P248.
260-56 Del 150A20; 125Kan319, 322, 263P1066 [citCJ].
261-60½-New. An official survey is paramount to any other and prima facie correct. 221MoA121, 293SW789.
261-61 85 Ind483, 154NE391.
261-61½-New. Where the lines are in fact run by the surveyor, his real location will always be followed; 210 Ky 121, 275SW513.
261-61⅓-New. but where the surveyor does not in fact run a line, there is no location by him to be followed. 210Ky 121, 275SW513.
261-75 [b] **Appeal taken after expiration of statutory time** is nullity. 119 Kan731, 241P248.
262-90 119Kan731, 241P248.
262-91 [a] 125Kan319, 263P1066.
262-93½-New. Under the Kansas statute the court may set aside the action and report of the surveyor and direct that another survey be made. 119Kan 731, 241P248.
263-16½-New. In Alabama the court may, in a proper case, order a survey to establish the boundary by permanent landmarks. 217Ala276, 116SI32.
263-16⅓-New. In Arkansas it has been held that if the parties themselves cannot agree upon the definite and actual location of the division line from the decree, the court should appoint a surveyor to locate and establish the line on the land with fixed monuments in accordance with the decree. 177Ark781, 98SW(2d)80.
263-18 161La91, 108SI36.
263-23 160La52, 106SI672.
263-24 See also 7LaA567. [e] **Plea of prescription, did not permit trial on merits,** on rule for homologated procès verbal of survey. 12LaA376, 125SI497. [f] **Where defendant is absent,** held improper, on rule to homologate procès verbal of survey, to enter judgment establishing boundary. 12LaA376, 125SI 497.
263-27 See also 44Philippine221.
264-37 10LaA506, 121SI341; 7LaA180.
264-38½-New. That the first survey was illegal has been held no ground for complaint where another survey was made in accordance with the law. 161 La91, 108SI136.
264-38⅓-New. Where lines have been originally fixed and adopted by government surveys, a resurvey must be confined to reestablishing them as originally fixed. 9LaA162, 119SI275.
265-63 99WVa349, 128SE737 (remedy by action at law).
265-64 [e] **Unless complainant owns land adjoining defendant's at disputed boundary** court has no jurisdiction. Ala 128SI143(2dcase).
266-66 44Philippine221. [a] **In Philippines.**-44Philippine221. [b] **Where plea of prescription is established by preponderance of evidence,** court is not required to determine location of boundary. 11LaA472, 123SI904(2dcase).
266-70 215Ala78, 109SI362; 218Ala334, 118SI559 (even though defendant asserted claim of adverse possession); Ala 129SI55; 44Philippine221.
266-71 220Ala338, 124SI898; 248Mich 330, 227NW801 (suit to restrain prosecution of action of ejectment); 148SC 403, 146SE243.
266-73 [a] (2) The statute (Acts [1923] p 764) does not enlarge equity power but brings all cases within that power. 218Ala235, 118SI271. (3) In suit under statute to establish boundary, ordinarily, if court finds disputed boundary, decree should be granted rather than to deny all relief. 220Ala 338, 124SI898.
267-74 243Mich595, 220NW663; 103 NJEq284, 143A358; 135SC26, 133SE 461; 148SC403, 146SE243.
267-80½-New. Jurisdiction of equity is limited to establishing boundary, and does not extend to trying questions of title or possession. 148SC403, 146SE 243.
268-87 148SC403, 146SE243.
269-93 167La833, 120SI384.
269-95 192NC50, 133SE184.
269-96½-New. When the issue is reduced by disclaimer to only one boundary, and there is a common interest between all parties on one side as against adverse parties, there is no misjoinder of parties. TexCivA 290SW560.
269-97 220Ala338, 124SI898. [a] (4) While bill should point out true boundary, such averment is not jurisdictional. 220Ala338, 124SI898. [j] **Allegations held sufficient.**-1LaA187.
269-98 218Ala235, 118SI271(2dcase); 135SC26, 133SE461.
269-1½-New. Bill need not allege facts showing independent equity. 214Ala 443, 108SI47.
269-2 [f] **Issues presented by pleading.**-146Va695, 132SE853.
269-2½-New. Refusal of amendment of plea to allege no possession of land held error. 97Fla591, 121SI793(2dcase).
270-6½-New. Evidence tending to establish dividing line by particular method inadmissible where pleading alleged another by agreement of parties. 211 Ky739, 277SW1026.
270-6⅓-New. In the absence of allegations of fraud or mistake, a line established by commissioners or by agreement and acquiescence cannot be changed. TexCivA 287SW104.
270-7 Conn 152A152; Iowa 230NW 656; 219Ky522, 293SW1074; 126Me 462, 139A596; 239Mich77, 214NW124; 191NC194, 132SE12; 192NC212, 133SE 462; 102WVa240, 135SE230.
270-8 202 Iowa1366, 212NW61.
270-9 219Ky522, 293SW1074.
271-13 151Va1005, 145SE718.
271-15 239Mich77, 214NW124; Tex CivA 318SW(2d)501.
271-19 225Ky580, 98SW(2d)711.
272-20 [a] 317Mo 1235, 298SW363. [b] **In absence of express words to contrary** presumption is that grantor conveyed to center of highway to which he had title. 83 IndA574, 148NE621. [c] **Evidence not sufficient to overcome presumption.**-Description in deed held grantor did convey to center of highway. 83 IndA 574, 148NE621.
272-24½-New. that grantor does not intend to retain a long narrow strip next to one of his lines; 104WVa279, 139SE856.
272-25½-New. that a line described as running due west runs due west according to the true meridian; Utah 273 P968.
272-36½-New. There is presumption against intention to exclude from conveyance long narrow outlying strip caused by failure of lines to follow road because of curve in road. 108WVa520, 151SE847.
272-36⅓-New. It has been held that parties purchasing land described within boundaries of their deeds inferentially acquire title only to land within such boundaries. TexCommnA 298SW(2d) 1041.
272-43 TexCivA 275SW300. [a] (2) In absence of evidence to contrary, it will be presumed that maps and plats made by deputy surveyors were made from field notes of actual surveys on ground. TexCivA 289SW718.
273-49 MoA 274SW835.
273-51½-New. There is a presumption that a stake placed at the corner of a tract by the original surveyor was found by one making a survey nineteen years later. TexCivA 28W(2d)288.
273-51⅓-New. Where a surveyor made no reference to the corner called for in the original survey, no presumption arises that he found it. TexCivA 28W (2d)288.
273-51¼-New. The general reputation of the location of a line is presumed to arise from knowledge of the location of the original surveyor's footsteps. Tex CivA 28W(2d)288.
273-51⅙-New. Where government corner has been lost and method of relocating is prescribed by statute and land office rules it will be presumed that resurvey followed original lines. Ida 286 P362.
273-53 Ala 130SI537; 148Md391, 129A 354 (not error to permit testimony that field had been cultivated as long as witness could remember); Mass 169NE 509; TexCivA 28W(2d)288 (best evidence of which case is susceptible); 99 Vt249, 131A14 (boundaries pointed out by former owner). [c] (1) 216Ala202, 112SI914. (3) Where it was undisputed from pleadings and evidence that tract in controversy lay in either one of two tracts, evidence as to plaintiff's attempt to establish vacancy on tract as lying between tracts was inadmissible. TexCivA 198W(2d)926. [j] **Expert testimony of civil engineers** to assist court in deciding controversy between adjacent lot owners is not rendered incompetent by statute providing that no resurvey by any person except county surveyor or his deputy shall be considered as legal testimony. 114 OhSt

291, 151NE174. [k] **Source of information** must be shown to render admissible testimony that stone and line constitute boundary. 154Md213, 140A95. [l] **Intention of parties to deed**, relative to boundary, cannot be interpreted by acts of respective successors in title sixty-three years later. 126Me462, 139A593.

274–55 220Ala111, 124S228 (claim of former owner of land); 44 Ida686, 258P536. [c] (2) And to declarations made ante litem motam. 191NC137, 131SE629.

274–57½–New. Declarations as to boundaries are admissible when shown to have been made ante litem motam by one disinterested at the time, and dead, when declarations are offered in evidence. 196NC395, 145SE781.

275–62 219Ala15, 121S34; 44 Ida686, 258P536.

276–66 44 Ida686, 258P536.

276–66½–New. When a line was once shown to which defendant claimed, the extent and length of time it was generally regarded as such goes to the notoriety of defendant's claim. 219Ala15, 121S34.

276–67 44 Ida686, 258P536.

276–68 154Md213, 140A95.

276–71 44 Ida686, 258P536. See also 196NC395, 145SE781.

276–74 196NC395, 145SE781.

276–77½–New. Reputation as to the location of a line originating from a survey by a surveyor not shown to have known the location of the line is inadmissible unless it is the best evidence available. TexCivA 28SW(2d)288.

276–78 41GaA585, 154SE156; 146Va695, 132SE853. [a] TexCivA 19SW(2d)926.

276–79 154Md213, 140A95.

277–86 216Ala202, 112S914; 146Va695, 132SE853.

277–88 TexCivA 286SW322.

277–1 126Me462, 139A593; 189NC790, 128SE404 (dower allotment and possession by widow); 145Va749, 134SE548.

278–6 220Ala111, 124S228.

279–11 154Md213, 140A95.

279–14 [b] **In establishment of ancient boundaries** judgments are admissible notwithstanding parties are not same. TexCivA 31SW(2d)172.

279–19 164Ga200, 137SE924; 160La 52, 106S672; Mass 169NE509. [d] **Conflicting landmarks.**–191NC137, 131SE629.

280–21 TexCivA 20SW(2d)409.

281–32 44 Ida686, 258P536; 135Misc 233, 237NYS361. [a] 47 Ida253, 274P112.

281–34½–New. Evidence as to defendant's tearing down plaintiff's fence and building another is inadmissible. Ala 130S537.

281–35 See also 228Ky266, 14SW(2d) 1090. But see 154Md213, 140A95.

281–37 Ala 130S537. [e] (2) Upon issue as to location of section line, evidence as to location of section line in another township and not direct continuation of section line involved, is properly excluded. 52SD380, 217NW640.

282–42 NJSup 146A786(2dcase).

282–44 41GaA585, 154SE156; TexCivA 28SW(2d)936.

282–46 154Md213, 140A95 (may be used only for illustration).

282–48 166Ga89, 142SE271 (correctness must be shown).

282–49 38GaA506, 144SE356. See also 154Md213, 140A95.

283–53½–New. Under some statutes, location shown in plat may be controverted without showing counter location. 154Md213, 140A95.

283–53½–New. A map compiled by plaintiff from field notes left by another surveyor held erroneously admitted where there was no showing that the survey was correct. TexCivA 19SW(2d)926.

283–57½–New. A general land office map of a county is admissible as throwing light on or corroborating the location of land in suit although made after the controversy arose. TexCivA 291SW279.

283–57⅓–New. Record of city clerk's office, describing boundaries of street on which fronted lots of parties, was held not binding on defendant, since he was not party thereto. 135Misc233, 237NYS361.

283–60 Ala 130S537; 11LaA181, 123S139; 148Md391, 129A354; 307Mo 172, 270SW105 (survey by county surveyor extending outside of county). [f] **Custom among surveyors to mark for "certain lines"** is properly admitted. 213Ala563, 105S652. [g] **Necessity for testimony of surveyor.**–196Wis313, 220NW532.

284–69½–New. In some jurisdictions it has been held not error to exclude testimony of a surveyor, whose survey was in evidence, that he had been appointed by the court. TexCivA 289SW718.

284–70 34PortoRico 65.

284–74 152Va533, 147SE196. But see 249Mich360, 228NW721.

285–81½–New. In ascertaining boundary lines, a surveyor's notes are not competent to contradict patents as issued. 152Va533, 147SE196.

286–91 [a] 121Kan632, 249P669; TexCivA 274SW314. [b] **Ancient boundaries long recognized** should not be destroyed except on compelling evidence. TexCivA 31SW(2d)172.

286–92 95CalA745, 273P142; 109Conn 693, 145A573; Iowa 230NW333; 10 LaA506, 121S341; 128Misc539, 220NYS 82; TexCommnA 14SW(2d)1013. [a] 20 F(2d)826; 162Ga616, 134SE616; 37GaA 212, 139SE734; 38GaA496, 144SE340 (1st case); 41GaA380, 153SE94(2dcase); 212Ky315, 278SW834; 218Ky448, 291 SW727; 9LaA32, 118S776; 13LaA332, 126S529; 126Me462, 139A593; 232Mich 468, 205NW580; 236Mich192, 210NW 216; NJSup 137A842; 146Va695, 132SE 853. [b] 216Ala113, 112S640; 220Ala 338, 124S898; 216Ky~~260~~, 287SW715; 137 Misc141, 229AppDiv739, 242NYS128; TexCivA 289SW460. [c] 207Cal 643, 279 P772; 101CalA167, 281P428; 168Ga248, 147SE574; 169Ga410, 150SE556; 84 IndA552, 151NE704; 214Ky254, 283SW 74; 232Ky767, 24SW(2d)609; 239Mich 77, 214NW124. [d] 231Ky253, 21 SW(2d)279; 69Utah261, 253P904; 146 Va695, 132SE853. [e] Ala 129S55; 73 CalA244, 238P767; IndA 171NE492; 202 Iowa1373, 212NW61; Mo 287SW471; TexCivA 5SW(2d)788. [f] 165Ga362, 141SE55; 215Ky551, 286SW773; 231 Ky258, 21SW(2d)285; TexCivA 287SW 60; TexCivA 290SW556; 148Wash161, 268P150. [g] 92CalA393, 268P465 (fence); 146Va695, 132SE853. [i] 217 Ala128, 115S21; 169Ga410, 150SE556; 39GaA265, 147SE160; 203 Iowa317, 211 NW417; 206 Iowa419, 218NW332; Iowa 231NW339; TexCivA 16SW(2d) 556; 67Utah283, 247P294. [j] 272US21, 47SCt9, 71Led145; 37GaA212, 139SE 734; 202 Iowa262, 208NW321; 215Ky 551, 286SW773; 1LaA449; 233Mich400, 206NW309; TexCivA 287SW104; TexCivA 290SW556. [m] (1) 272US21, 47SCt9, 71Led145; 148Md589, 129A 900. [n] 218Ky617, 291SW1042; 50SD 555, 210NW979; 187Wis558, 204NW 585. [o] 166Ga248, 142SE869; TexCivA 24SW(2d)520. [p] 216Ky593, 288SW 332; 187Wis558, 204NW585. [q] 177 Ark781, 9SW(2d)80; TexCivA 19SW(2d) 926. [u] TexCivA 275SW300. [v] 83 Mont100, 269P408. [x] 44 Ida686, 258 P536. [z] 268US252, 45SCt497, 69Led 937 (that survey fronted on river); 19 F(2d)820; 39F(2d)55; 41F(2d)709; 174Ark807, 298SW1; 206Cal 653, 275P 733; 87CalA127, 261P1029; 109Conn 693, 145A573; Conn 151A357; Conn 151A512; Ida 286P362; 202 Iowa262, 208NW321; 202 Iowa1373, 212NW61; 206 Iowa419, 218NW332; Iowa 230NW 333; Iowa 230NW656; 206Ky125, 266 SW1055; 211Ky75, 276SW1075; 212Ky 411, 279SW651; 216Ky214, 287SW 725; 225Ky580, 9SW(2d)711; 229 Ky273, 17SW(2d)263; 230Ky586, 20SW(2d)451; 233Ky414, 25SW(2d) 1009; 234Ky817, 29SW(2d)573; 157 La265, 102S330; 160La52, 106S672; 160La72, 106S698; 160La1046, 107S 901; 167LaS33, 120S384; 9LaA162, 119 S275; 10LaA608, 120S235; 11LaA181, 123S139; 13LaA136, 127S421; 13LaA 671, 128S696; 149Md318, 131A444; 172Minn338, 215NW426; 176Minn512, 223NW767(2dcase); 101NJEq572, 138 A99; 224AppDiv63, 229NYS201; 30 OhA268, 164NE779; 52SD380, 217NW 640 (location of section line); TexCivA 274SW243; TexCivA 275SW300 (that surveyor ascertained position of unmarked lines and corners); TexCivA 287 SW60; TexCivA 287SW66; TexCivA 287SW104; TexCivA 290SW556; TexCivA 290SW560; TexCivA 3SW(2d) 498 (mistake of surveyor in calling for line and corner of other surveys); TexCivA 5SW(2d)788; TexCivA 24SW (2d)520; TexCivA 27SW(2d)612 (disappearance of object identifying corner does not alter controlling effect of actual location; TexCivA 31SW(2d)172; TexCivA 31SW(2d)501; 143Va150, 129 SE333 (evidence sufficient to show allowance by survey or for variation of magnetic needle); 147Va342, 135SE886 (identification of mountain range); 151 Va287, 144SE450; 151Va1005, 145SE 718; Wash 292P109; 199Wis178, 225 NW825. [aa] **Evidence sufficient to show court erred in establishing former location** of starting point of lost line. 143Va150, 129SE333. [bb] **Evidence held sufficient to show correct line** to be one claimed by defendant. 211Ky 458, 277SW820. [cc] **Evidence insufficient to show preservation of corner.**–188Wis82, 204NW582. [dd] **Evidence sufficient to establish boundaries describing land by metes and bounds.**–198Cal 579, 246P43. [ee] **Evidence held sufficient to locate lost corner** as claimed by defendant. 214Ky254, 283SW74. [ff] **Evidence held sufficient to show vacancy.**–TexCivA 3SW(2d)498.

287–93 73CalA244, 238P767; 228Ky 762, 15SW(2d)505; Mo 287SW471. [a] **Circumstances** held to have established remains of stake as ancient monument marking corner of survey. 159La610, 105S731.

287–93½–New. A survey by a county surveyor whose primary purpose was to make a survey of lands within his county is prima facie correct, although it encroaches on an adjoining county. 307 Mo 172, 270SW105. [a] **Such survey is not conclusive.**–307Mo 172, 270SW105.

287–94 [a] 148Md391, 129A354 (son of former owner who for thirty years knew the line).

287–97 154Wash42, 280P935. [b] 124 Me347, 129A4.

287–1 108WVa553, 152SE197.

287–2 320Mo 746, 8SW(2d)824.

288–4 154Md213, 140A95.

288–5 [f] **Question held to call for fact.**–213Ala563, 105S652.

288–6 [a] **Question held to involve both law and fact.**–191NC137, 131SE629.

288–7 320Mo 746, 8SW(2d)824; 221 MoA121, 293SW789. See also 2LaA605. [a] (2) Question of how far certain corner located in survey was from river and answer "right on bank" held proper. 213Ala563, 105S652. (3) Testimony of witness helping to make survey as to evidence of previous surveys was held competent as indicating he knew where survey was and showed whereabouts by surveyor's marks. 213Ala563, 105S652. (4) Question put to witness as to whether defendants agreed corners of survey were correct should have been allowed. 213Ala563, 105S652.

288–8 213Ala563, 105S652.

288–10 [d] **Methods and results held proper.**–Mo 287SW471. [e] **Court may order a survey** where evidence is insufficient. 232Ky791, 24SW(2d)619.

289–11 [b] **Motion for resurvey.**–103 WVa614, 138SE371.

289–11½–New. Title of grantors by prescription to part of alley has been held not triable in grantees' suit to recover title and possession, without encroaching on alley. TexCivA 22SW(2d)980.

289–12 29Hawaii130; 192NC595, 135 SE533; 195NC363, 142SE229; 102WVa 240, 135SE230.

289–13 29Hawaii130; 220Ky828, 295 SW1028; 228Ky266, 14SW(2d)1090; 153Md449, 138A331; 154Md213, 140A 95; 192NC595, 135SE533; 195NC363, 142SE229; 148SC187, 145SE869; TexCivA 286SW857; 100Vt26, 134A608; 100Vt334, 137A199; 146Va695, 132SE 853; 151Va287, 144SE450; 142Wash

648, 253P1076; 192Wis456, 212NW257; 200Wis405, 228NW499. See also 204 Iowa1046, 216NW952. [d] (1) 153Md 449, 138A331. (3) Issue as to beginning point of land in dispute held for jury under conflicting evidence. 220Ky828, 295SW1028. [h] 143SC429, 141SE721. [i] **Accuracy of surveyor's testimony,** when he is properly qualified, is question of fact for jury. NJSup 137A842. [j] **Location of survey** is question for jury. 97Fla869, 122S270.

290–14 44 Ida686, 258P536; 220Ky828, 295SW1028; TexCivA 28W(2d)288.

290–15 228Ky266, 14SW(2d)1090; 196 NC107, 144SE547; 103WVa614, 138SE 371.

290–15½–New. Court could not arbitrarily change county or municipal boundary lines, recognized and forming the basis of taxation for many years. 101NJEq572, 138A99.

290–16 97Fla869, 122S270; 29Hawaii 130, 134 [quotCJ]; 221MoA121, 293SW 789; NC 154SE35; 103WVa614, 138SE 371.

290–17 Mo 287SW471; 151SC145, 148 SE697; Vt 150A70. See also 38GaA506, 144SE356. [a] (6) In ejectment regarding boundary, whether there was evidence that plaintiffs' predecessors induced defendants and their predecessors to act upon erroneous location of boundary is for jury. NJSup 146A786 (2dcase).

291–18 100Vt334, 137A199.

291–19 [b] 216Ala113, 112S640.

291–21 TexCivA 28SSW268; TexCivA 28W(2d)288.

291–22 162Ga616, 134SE616; 49RI 155, 141A180; 151Va287, 144SE450.

291–24 170Ga123, 152SE222. [a] **Requested instruction** held erroneously refused. 170Ga123, 152SE222.

292–26 161Ga414, 131SE158 (instructions held not misleading); 169Ga665, 151SE343; 144Miss398, 109S860.

292–27 145Va749, 134SE548.

292–28 151SC145, 148SE697 (instruction that plaintiff had apparently good paper title held error where deed relied on by plaintiff ran to her father and there was no showing that she had inherited from him).

292–29 165Ga437, 141SE201.

292–32 162Ga616, 134SE616; 154Md 213, 140A95 (evidence sufficient to support instruction).

292–33 165Ga437, 141SE201; 144Miss 398, 109S860; TexCivA 289SW718.

292–34 165GaA437, 141SE201; 37GaA 74, 139SE83. [b] 161Ga414, 131SE158.

293–35 161Ga414, 131SE158 (instruction held not violative of rule).

293–43 220Ala338, 124S898; 192Wis 456, 212NW257. [b] (5) 161Ga594, 131 SE478; 146Va695, 132SE853. [d] (4) Judgment held not uncertain in not fixing more definitely easterly meander line, where judgment follows field notes of original survey. 99CalA482, 278P894. [e] (2) Judgments have been sustained, though survey of entire tract would be required to determine exact boundary line decided. TexCivA 269SW1093. [i] (2) In general. Conn 151A357. [j] **Judgment using removed fence line as basis** is sufficiently definite if location of line can be fixed from testimony. TexCivA 284SW318. [k] **Judgment has been held not objectionable.**–233Ky403, 25SW(2d)1028.

294–48 214Ala443, 108S47; 106Conn 665, 138A790 (facts supporting conclusion); TexCivA 287SW66. See also 151 Va287, 144SE450.

294–49½–New. A judgment which does not describe the dividing lines in accordance with the description in the deeds to the property is erroneous. 135 Wash539, 238P576.

294–50 161Ga594, 131SE478.

294–50½–New. Judgment against defendant whose boundary line was not in dispute and who was not implicated in alleged trespass has been held error. 85 Ind483, 154NE391.

294–57 Ala 130S537.

294–56½–New. A decree appointing commissioners to fix a disputed boundary line and make a written report to the court for confirmation or rejection was held authorized. 214Ala443, 108S47.

294–56⅓–New. Defendant was held not prejudiced by the jury's establishment of survey as the boundary because the survey showed less acreage in plaintiff's tract than called for in the deed. 146 Va695, 132SE853.

294–56¼–New. Although plaintiff is not entitled to recover all the land described in his petition, this does not prevent a recovery of part thereof. TexCivA 284 SW318.

294–58½–New. Costs are limited to surveyors' fees, procès verbal, and incidental expense of surveys. 163La555, 112 S415.

294–58⅓–New. Where two surveyors appointed were ordered to make the survey jointly, refusal to tax as costs the expense incurred by plaintiff's surveyor proceeding without his associate was proper. LaA 122S130.

294–58¼–New. Where there is no proof of demand on one side and refusal on the other to settle the boundary amicably, costs should be equally divided between the parties. LaA 122S130.

294–58⅕–New. Plaintiff succeeding on appeal can tax all costs subsequent to filing an answer where defendant did not object to the survey until the procès-verbal and plat were returned into court. 10LaA506, 121S341.

294–61 168Ga248, 147SE574. [a] **Remand.**–1LaA719.

295–62 But see 77Colo 333, 236P992.

295–63 TexCivA 290SW781.

295–66 204 Iowa1046, 216NW952; 240 Mich349, 215NW522; TexCivA 274SW 319; TexCivA 281SW876; 146Va695, 132SE853; 103WVa614, 138SE371. See also Mo 287SW471.

295–69½–New. Where evidence as to boundary in injunction suit so conflicting that trial court should have submitted issue to jury, appellate court will reverse and remand with directions to take such action. Va 129SE215.

295–69⅓–New. A statute effective after conclusion of pleadings cannot be considered on subsequent appeal. 214Ala 443, 108S47.

295–70 IndA 165NE248; Mich 233NW 179; Mo 296SW372; TexCivA 23SW (2d)472; Utah 263P485, 487 [quotCJ]. [d] **Reduction of area of survey** cannot be upheld by additions to adjacent surveys. TexCivA 31SW(2d)172.

296–71 126Kan95, 266P929 [quotCJ]. See also Mo 296SW372.

297–79½–New. Obliteration of the monument made in a survey does not destroy the survey, nor justify the court in disregarding it or adopting a proportionate method of locating the common lost corner, where field notes refer to natural objects, which can be found along the line mentioned. 96CalA390, 274P386 (evidence held sufficient to permit approximate location).

297–79⅓–New. Where office surveys are made at same time and there is insufficient land to satisfy both, diminution must be borne in same proportion. Tex CivA 29SW(2d)877.

297–81 175Ark846, 1SW(2d)6, 8 [quot Cyc].

297–89 22AlaA150, 113S475.

297–90 [a] 157Tenn485, 9SW(2d)699. [b] (2) Other illustrations. 22AlaA150, 113S475. [d] **Resort to criminal prosecution is not favored** where civil courts provide ample remedies. 157Tenn485, 9SW(2d)699.

298–93 [b] **Terms "monument," "post," and "tree"** have been held used synonymously in statute. 22AlaA150, 113S475.

BOUNTIES

300–1 [b] (3) Appropriation of county funds as reward to officers for arrest and conviction of persons violating liquor laws is bounty. 159Tenn290, 17SW (2d)908.

300–2 159Tenn290, 17SW(2d)908.

300–3 159Tenn290, 17SW(2d)908.

300–6 [b] **Reward for service** during World War is based on both legal and moral obligation. 193NC496, 137SE669.

301–11 193NC496, 137SE669 (state's duty is based on both legal and moral obligation).

301–11½–New. An army field clerk, assigned to duty in the department of the adjutant general in the headquarters of the first army was in military service within Bonus Law. 303Mo 684, 263SW 834.

301–11⅓–New. In Kansas statutes grant compensation only to soldiers who were bona fide residents of that state at the time they entered the service. 121Kan 681, 249P588 (evidence sufficient to support judgment for plaintiff).

306–68 [a] **Under act granting bonus to soldiers who were citizens or residents** at time of enlistment, minor whose parents resided elsewhere at time of his enlistment is not entitled to grant. 53 ND228, 205NW622.

307–83½–New. Under Const. art 7 § 13, L. (1924) c 19; L. (1925) c 26, providing for bonus to "honorably discharged" soldiers, a soldier discharged as an enemy alien for the good of the service is not entitled to payment. 220 AppDiv345, 221NYS548.

308–94 [a] **Right to compensation to World War veterans** under state statutes is based on residence at time of entering service and not at outbreak of war. 121Kan858, 250P332.

309–19½–New. Decision of the director of the veterans' bureau, refusing payment, is final, unless wholly without evidential support, or wholly dependent on question of law, or clearly arbitrary or capricious. 278US255, 49SCt97, 73L ed 314.

310–31 TexCivA 16SW(2d)561 (petition held demurrable).

311–43½–New. [§ 32a] H. **Bonus for World War Veterans.** The administrator of a veteran may not divert to his creditors the sum payable to his dependents under act of congress. 107WVa55, 146 SE890(1stcase).

311–43⅓–New. Congress may surround payments which are in the nature of gratuities with such conditions as it deems proper to impose. 107WVa55, 146 SE890(1stcase).

311–43¼–New. Under a statute requiring notice of appeal from an order disallowing a veteran's claim for compensation to be filed within ninety days after entry of the order of disallowance, the filing of such notice more than six months after the making of the order is ineffective at least where there is no showing that an entry of the order had not been promptly made. 121Kan404, 247P632.

311–43⅕–New. Under Kansas statute a soldier must have received a desirable or honorable discharge in order to be entitled to compensation. 121Kan360, 246P521; 123Kan390, 254P1025.

311–43⅙–New. Under state constitutions in some jurisdictions any resident, male or female, who was enlisted, inducted, warranted, or commissioned and served honorably in active duty in the army, navy, or marine service of the United States, at any time during period of World War, and has been honorably discharged, is entitled to benefit of bonus fund. 118 Or533, 247P812.

311–43⅐–New. Under such provisions there are no discriminations, distinctions, or restrictions as to the branch or department of service. 118 Or533, 247 P812.

311–43⅛–New. and the amendment includes every person who served in the army, navy, or marine service of United States during period named. 118 Or 533, 247P812.

311–43⅑–New. The Student's Army Training Corps was organized by authority of act of congress, making all male persons between ages of eighteen and forty-five subject to registration and when registered liable to service in army, navy, or marine corps. 118 Or533, 247 P812.

311–43 1/10–New. The status of a member of students' army training corps in army is similar to the enlisted soldier under training in the regular established army camps, 118 Or533, 247P812.

311–43 1/11–New. and such status was fixed by the constituted authority. 118 Or533, 247P812.

311–43 1/12–New. The state constitutional provisions authorizing loan benefits to service men were adopted in the light of the act of congress and regulations thereunder. 118 Or533, 247P812.

311–43 1/13–New. Men regularly enlisted in the students' army training corps are

in active army service of the United States. 118 Or533, 247P812.

311-43½-New. Statutes excluding persons whose only service was in the students' army training corps as a student, from operation of provisions entitling service men to loan or cash bonus thereunder, are in conflict with constitutional provisions in some jurisdictions, 118 Or533, 247P812.

311-43½-New. and are inoperative unless restricted to students' army training corps not constituting part of the United States Army. 118 Or533, 247P 812.

311-43½-New. Soldiers' Compensation Law, providing appeal within ninety days from board's decision, cannot be held invalid by court on ground that period is unreasonably short. 118Kan 367, 234P949.

311-43½-New. Although delay is caused by accident or excusable mistake, court cannot extend the time for taking appeal from decision of soldiers' compensation board. 118Kan367, 234P 949.

311-43½-New. Ninety days allowed for taking appeal from decision of district court in compensation cases. 118Kan 367, 234P980.

311-43½-New. Evidence held sufficient to show applicant for soldier's compensation was not resident of state when he enlisted and not entitled to compensation. 119Kan367, 239P764.

311-43½-New. Evidence sufficient to sustain decision of district court. 118 Kan589, 235P850.

311-43½-New. In Kansas statutes grant compensation only to soldiers who were bona fide residents of that state at the time they entered the service. 121 Kan681, 249P588 (evidence insufficient to support judgment for plaintiff).

311-43½-New. Claimant has the burden of showing that he has an honorable discharge, or its equivalent, from the army, navy, or marine corps of the United States. 123Kan390, 254P1025.

311-43½-New. On an appeal to a district court from a ruling of the soldiers' compensation board denying a widow's claim for compensation for the death of her soldier husband, the proceedings are the same as on appeals from justice courts. 123Kan308, 255P 76.

311-43½-New. Evidence held insufficient to show honorable discharge. 123 Kan390, 254P1025.

311-43½-New. On such appeal pleadings are not indispensable. 123Kan308, 255P76.

311-43½-New. On such appeal the necessity for pleadings is left to the discretion of the court. 123Kan308, 255 P76.

311-43½-New. Appellant is not entitled to judgment by default because the compensation board did not file a pleading raising some issue of law or fact against the recitals of her appeal. 123Kan308, 255P76.

311-43½-New. North Dakota statute vests adjutant general with power to pass upon all claims for compensation out of the returned soldier's fund. 53 ND909, 208NW397 (statute construed).

BOWIE KNIFE

315-10½-New. A knife with a strong blade from ten to fifteen inches long double edged near the point. Webster Int. D. [quot 103TexCr443, 281SW567].

BREACH OF MARRIAGE PROMISE

322-1 202 Iowa1396, 212NW142, 143 [quotCJ]. [c] **Parents** have right recognized by law. 5PaDist&Co 5.

322-2 [a] **State has interest** to see that contract when consummated by marriage will result in union fitting into general social scheme. NJ 143A512.

323-7 130Misc840, 225NYS442.

323-16 49RI 300, 142A328 [citCJ].

323-21 See also 121Kan797, 250P308.

324-28 118 Or602, 247P766.

324-29 118 Or602, 247P766.

325-31 204Cal 485, 268P905; 120Kan 518, 243P1018; 118 Or602, 247P766 (agreement contrary to public policy).

325-32 204Cal 485, 268P905, 906 [cit CJ]; 120Kan518, 243P1018. [b] **Subsequent doubt** as to defendant's ability to marry does not defeat right to recover. 204Cal 485, 268P905.

325-34 204Cal 485, 268P905, 906 [quot CJ].

327-59 125 Okl 134, 256P916.

327-60 125 Okl 134, 256P916.

327-61 125 Okl 134, 256P916.

329-75 120Kan518, 243P1018.

330-81 [c] **Repudiation of promise** by conduct irrespective of fulfillment or waiver of condition authorizes action for damages. Can [1924] 2DomLR 968. [d] **Request as condition precedent.**—If plaintiff promises to marry defendant on latter's request, breach is committed if request is not made in reasonable time. 187Wis633, 205NW557.

330-83 95CalA228, 272P810.

335-18 Ida 289P74; 202 Iowa1396, 212 NW142, 143 [quotCJ]; 187Wis633, 205 NW557.

335-19 202 Iowa1396, 212NW142, 143 [quotCJ]; 187Wis633, 205NW557.

337-30 202 Iowa1396, 212NW142, 143 [citCJ]; NJSup 134A898.

337-31 202 Iowa1396, 212NW142, 143 [citCJ].

337-40 But see 247Mich593, 226NW246.

337-43 But see 322Mo 218, 14SW(2d) 590, 62ALR835 (that plaintiff did not love defendant and detested thought of living with him held to constitute complete defense).

337-46 **Erratum.**—Strike out text and note.

337-49½-New. **Dishonesty of plaintiff** of a grave nature, discovered after the promise was made, may be basis of defense. 72Misc343, 130NYS315.

338-52 Alta [1927] 1DomLR461, [1926] 3WestWkly795.

339-58 MoA 293SW797.

340-62 322Mo 218, 14SW(2d)590, 62 ALR835.

340-66½-New. Honest belief of defendant that plaintiff was physically unfit for marriage is not a valid defense. Eng [1916] 1KB57.

343-3 [c] 95CalA228, 272P810; 187 Wis633, 205NW557.

346-30 110Conn432, 148A365.

347-47 Sask [1928] 3DomLR613 (denial of plaintiff's willingness to marry).

348-52 49RI 300, 142A328 [citCJ].

351-10 MoA 293SW797.

351-23½-New. , evidence relating to likely defective condition of offspring of the marriage should be admitted. 322 Mo 218, 14SW(2d)590, 62ALR835.

353-40 [e] Mass 170NE454.

355-48 102WVa240, 135SE230.

357-73 [a] **Evidence of defendant's good reputation** for chastity and morality is inadmissible, though seduction is alleged. 72CalA545, 237P791.

357-81½-New. Admissions of defendant as to his wealth are not admissible where there is no testimony as to wealth at the time of the trial. 195Wis102, 217 NW689.

358-86 232 IllA93; 100WVa381, 130SE 465, 466 [citCJ].

358-89 232 IllA93.

358-90 95CalA228, 272P810.

359-12 [f] (1) 119Miss87, 119S157 (immodest conduct unknown to defendant).

360-18 322Mo 218, 14SW(2d)590, 62 ALR835.

360-33 [b] 234Mich195, 207NW807; NJSup 134A898; 50ND959, 198NW544. [c] 214AppDiv192, 211NYS883.

362-46 [a] **Evidence held sufficient** (1) to show defendant's conduct on trip made for purpose of procuring license and marrying plaintiff was in effect refusal to carry out contract. 168Ark 1167, 272SW656. (2) To show plaintiff's offer to marry after breach of previous promise was mere subterfuge. 168Ark 1167, 272SW656.

362-46½-New. , or subsequently marries another. 50ND959, 198NW544.

363-60 119Miss87, 119S157; 50ND959, 198NW544.

364-65 MoA 293SW797.

364-78 121Kan797, 250P308.

366-83 [a] **Instructions held erroneous.**—119Miss87, 119S157.

366-84 95CalA228, 272P810. [a] (3) See also 50ND959, 198NW544. (6) 95 CalA228, 272P810.

368-85 95CalA228, 272P810.

369-91 152Miss87, 119S157.

369-94 95CalA228, 272P810; 195Wis 102, 217NW689 (wealth of defendant).

369-96 152Miss87, 119S157.

370-97½-New. But failure to define the term "exemplary damages" has been held not important. 243Mich350, 220 NW762.

370-2 30Ariz485, 249P64.

370-4½-New. Instructions that promise of marriage based on consideration of sexual intercourse was not binding is properly refused where not within the issues. 30Ariz485, 249P64.

370-8½-New. Where there is overwhelming proof that promisor was insane at time of alleged promise, verdict and judgment for plaintiff is error. 214 AppDiv192, 211NYS883.

370-9 50ND959, 198NW544 [citCJ].

371-10 234Mich195, 207NW807.

371-13 187Wis633, 205NW557.

371-14 [d] **Breach by plaintiff and subsequent refusal by defendant** will entitle plaintiff to damages sustained at least up to time of subsequent refusal. 168Ark1167, 272SW656.

371-15 120Kan518, 243P1018; 10Pa Dist&Co 787, 788 [quotCJ].

372-26 120Kan518, 243P1018.

372-27½-New. or prospects in life. 120 Kan518, 243P1018.

372-33 120Kan518, 243P1018; 195Wis 102, 217NW689.

373-34 120Kan518, 243P1018.

375-61½-New. **Parents' persuasion of son not to marry plaintiff** is permissible and not an element of damages. 5PaDist &Co 5.

378-64 120Kan518, 243P1018.

381-75 95CalA228, 272P810.

381-76 120Kan518, 243P1018; 243Mich 350, 220NW762 (seduction and childbirth).

382-81 120Kan518, 243P1018; 50ND 959, 198NW544 [quotCJ].

382-82 120Kan518, 243P1018; 50ND 959, 198NW544 [quotCJ].

382-83 120Kan518, 243P1018; 50ND 959, 198NW544 [quotCJ].

383-86 50ND959, 198NW544 [quotCJ].

383-87 50ND959, 198NW544 [quotCJ].

383-89 120Kan518, 243P1018.

383-90 120Kan518, 243P1018.

383-90½-New. But remission will not cure excessive award where prejudice and passion shown on part of jury. 120 Kan518, 243P1018.

383-93 [h] 195Wis102, 217NW689 (reduced from fifteen thousand dollars). [k] Me 151A423(1stcase). [q] 243Mich 350, 220NW762. [v] 120Kan518, 243P 1018 (reduced from seventy-five thousand dollars). [y] NJSup 134A898. [cc] **Six thousand five hundred dollars.**—234Mich195, 207NW807. [dd] **One thousand two hundred and sixty-five dollars.**—10PaDist&Co 787.

BREACH OF THE PEACE

386-1 6PaDist&Co 444, 446 [quotCyc]; 108WVa31, 150SE142.

386-2 MoA 300SW316, 317 [citCJ]. [a] **Apartment of complainant and defendant was not "public place,"** within disorderly conduct law. 135Misc842, 241 NYS494.

387-3 14PaDist&Co 4.

387-4 MoA 300SW316. [a] 14PaDist& Co 4.

387-5 248NY182, 161NE463.

387-7 29PortoRico 826 (Pen. Code § 368).

387-9 [f] See also 160Tenn51, 22SW (2d)235. [i] **Leaving automobile on public highway at 2 A. M. without lights** and filled with thirteen cans of intoxicating liquor held breach of peace. 6Pa Dist&Co 444. [j] **As dependent on circumstances.**—MoA 300SW316. [k] **Shouting of negro preacher at religious meeting** is not within ordinance penalizing shouting and breach of peace in nighttime. MoA 300SW316. [l] **Carrying signs along street in front of complainant's building,** which signs stated that window cleaners were on strike, held not to constitute "disorderly conduct tending to breach of the peace," where defendants did not in any way molest anyone and were not directed to move on. 132Misc744, 230NYS772. [m] **Carrying placard in front of theater** announcing strike is not disorderly conduct, in and

of itself. 133Misc557, 232NYS302.

387-12 121Kan329, 246P507, 508, 48ALR81 [citCJ]; 248NY182, 161NE463. [f] **Handing pamphlets to employees leaving employer's building** held not disorderly conduct. 135Misc841, 241NYS756.

387-13 [c] **Noise.**–14PaDist&Co 4. [d] **Collection of voluntary contributions at amateur Sunday ball game** does not constitute breach of peace. 14PaDist&Co 4. [e] **Assembly.**–14PaDist&Co 4.

388-14 121Kan329, 246P507, 508, 48ALR81 [citCJ]; 13PaDist&Co 115 (illegally furnishing liquor on Sunday for beverage purposes held to constitute breach of peace).

388-16½-New. Strikers blocking sidewalks and refusing to move when ordered by police are guilty of conduct tending to breach of peace. 130Misc525, 224NYS596.

388-16¾-New. The peace of an individual cannot be disturbed unless the individual is within the peace. MoA 8SW(2d)1073(2dcase).

388-18 See also MoA 275SW565. [c] **Criticism of public official** not breach of peace. 29PortoRico 826. [d] **Imputations of lack of courtesy and respect** on part of public official held not to constitute vituperation or provocation. 29 PortoRico 826. [e] **Criticizing as "lack of shame"** act of mayor in allegedly ordering extinguishment of lights at rival political meeting held not breach of peace. 29PortoRico 826.

388-19 35PortoRico 161 (though words addressed to third person).

388-20 121Kan329, 246P507, 48ALR81.

388-23 29PortoRico 826.

389-24 [a] **Illegal acts.**–127Misc593, 217NYS486.

389-36 29PortoRico 826.

389-38 29PortoRico 826.

390-57 35PortoRico 104. [d] **Complaints held insufficient.**–SD 225NW60 (not alleging that language was used in presence of person referred to or in presence of member of his family).

390-58 34PortoRico 331.

390-61 33PortoRico 889 (allegations held sufficient). [a] **Failure of complaint to allege nature of conduct of one of two defendants** renders it insufficient as to such defendant. 35PortoRico 385.

390-62½-New. To charge that the peace of an individual is willfully disturbed, is equivalent to charging that the individual is within the peace. MoA 8SW(2d)1073(2dcase).

391-68 [a] **Indictments held insufficient** to charge breach of peace accompanied by trespass under common law. 160 Tenn51, 22SW(2d)235.

391-69½-New. A charge that defendant unlawfully disturbed the peace carries the implication that it was willfully done. 121Kan329, 246P507, 48ALR81.

391-71 Miss 130S111.

391-73 106TexCr248, 291SW899.

391-76 TexCr 32SW(2d)650(2dcase).

391-77 35PortoRico 161 (complaint held sufficient).

391-84 [a] (2) Allegation of entering dwelling and proof of going onto front porch of dwelling. 152Miss278, 119S202.

392-85 TexCr 26SW(2d)217(1stcase) (variance in name held fatal).

392-88 34PortoRico 331. [b] **Evidence held admissible.**–(1) Threats. 221MoA37, 297SW713. [b] (2) Words and conduct of wife of defendant under orders of defendant. 221MoA37, 297SW713.

392-92 34PortoRico 331.

392-93 221MoA37, 297SW713, 714 [cit CJ].

392-96 MoA 298SW1047. [a] 121Kan329, 246P507, 48ALR81; MoA 275SW565; MoA 298SW1047; 95PaSuper382; 34PortoRico 331. [b] 248NY182, 161NE463; 253NY301, 171NE63(2dcase); 132Misc18, 229NYS467.

392-2 133Misc557, 232NYS302. [b] MoA 300SW316.

392-4½-New. An act limiting the powers of a magistrate in disorderly conduct cases, although giving the magistrate discretion to find conduct not strictly within the Penal Law to be disorderly, is limited to an act which reasonably tends to breach of the peace. 133Misc557, 232NYS302.

393-16 146Miss819, 112S170.

393-17 MoA 278SW817 [citCJ]; 221MoA64, 290SW103.

394-26½-New. Under statutes, no prosecution for threats can be instituted by a person against whom the threats have not been directed. 8PaDist&Co 295.

394-26¾-New. And the only person who can institute such a prosecution is the person against whom the threats were made. 8PaDist&Co 295.

394-35 [b] **In Pennsylvania.**–8PaDist&Co 295.

394-36 [a] **In Mississippi.**–152Miss216, 119S174.

394-44½-New. Under some statutes, where a person is in the presence of the court and already in custody, justice may require a peace bond without charge or motion therefor or hearing evidence thereon. 223Ky291, 3SW(2d)616.

395-67 164La315, 113S860, 54ALR383.

395-71 See also 164La315, 113S860, 54 ALR383.

396-75½-New. Amount of bond must be reasonable for offenses less than felony. 146Miss819, 112S170.

396-75¾-New. Bond of two thousand five hundred dollars required of one sentenced to six months for possessing liquor held excessive. 146Miss819, 112S170.

397-7 MoA 278SW817, 818 [citCJ]. [a] **Evidence held insufficient** to support order of justice committing defendant to jail for inability to furnish bond. 113 TexCr73, 19SW(2d)58.

397-19 102TexCr336, 278SW426.

397-22 102TexCr336, 278SW426. [a] **Where facts do not support order requiring peace bond,** county court may grant relief from commitment by habeas corpus. 102TexCr336, 278SW426. [b] **On appeal from order denying habeas corpus,** sufficiency of evidence to support magistrate's findings for necessity of bond is open to review. 102TexCr336, 278SW426.

398-26 [b] **In Louisiana.**–164La315, 113S860, 54ALR383.

BRIBERY

402-1 [a] (1) 101WVa300, 132SE654.

402-5 [b] **Bribery act** held to exclude operation of common law bribery. NM 290P786.

402-11½-New. Common law denunciation of embracery is attempt to corrupt justice by corrupt means and of bribery is corrupt agreement induced by offer of reward. 160Tenn594, 28SW(2d)47.

402-12 17F(2d)339. [a] 8F(2d)360 [cit CJ].

402-13½-New. Bribery is to be distinguished from larceny and false pretenses. 257Mass590, 154NE326.

403-17 9F(2d)872. [a] (2) Agreement to take something is enough. 246NY106, 158NE38. (3) Accepting bribe and previously agreeing to accept it constitute but single crime. 246NY106, 158NE38.

403-18 31F(2d)42.

403-19 [c] **Failure to convict bribe giver** does not entitle defendant bribe receiver to acquittal. 248Mich678, 227NW748.

403-23½-New. That accused was under arrest at time of making offer to bribe sheriff in the selection of a jury to try a criminal charge against accused is immaterial. 200 Ind460, 164NE632.

403-23¾-New. It is no defense that the bribe was made jokingly. 100TexCr318, 272SW484.

403-23¼-New. Substantive offense of agreeing to receive and receiving bribe includes elements of conspiracy. CalA 293P72.

403-24 Me 151A427.

404-28 320Mo219, 6SW(2d)877.

404-31 8F(2d)841; 31F(2d)42; CalA 293P72; Me 151A427. [e] 103WVa662, 138SE330. [f] **Knowledge has been held implied.**–161Tenn320, 30SW(2d)247(2dcase).

404-35 32F(2d)505; 78CalA37, 247P601.

404-36 312Mo55, 278SW990, 991 [quot CJ]; 136Wash278, 239P834. Contra 246NY106, 158NE38. [h] (1) 17F(2d)339. (2) It is sufficient if action is governed by lawful requirement of department under whose authority officer is acting. 17F(2d)339. [i] 80CalA464, 252P633 (traffic officer accepting check for bail); 250NY336, 165NE518. [j] **Proof must be given** that crime had been committed to sustain conviction for bribery of officer to refrain from making arrest. 89Fla400, 104S858. [k] **Where executing certificate is not within official duty** of officer, procuring false certificate from him is not bribery. 312Mo55, 278SW990. [l] **Making false affidavit by officer in unofficial capacity** cannot be subject of bribery. 312Mo55, 278SW990. [m] **General clause in statute** held not to change rule requiring official act. 136Wash278, 239P834.

405-37 312Mo55, 278SW990, 991 [quot CJ].

405-38 75CalA365, 242P906; 80CalA464, 252P633; 100TexCr318, 272SW484 (search warrant of which accused is charged with bribing officer to make false return need not be legal in all respects).

405-40 17F(2d)339, 343 [citCJ]; 246NY106, 158NE38.

405-41 17F(2d)339, 343 [quotCJ].

406-44½-New. Persons liable. Aiding and abetting. 17F(2d)339.

406-45 246NY106, 158NE38; 113 OhSt187, 148NE834.

406-50 Fla 127S317 (citrus fruit inspector held "public appointee" under bribery statute); 246NY106, 158NE38; 136Wash278, 239P834. [a] **Clauses in bribery statute, stating facts constituting offense,** have been held limited to officers mentioned in that clause and not to other parts of statute. 136Wash278, 239P834. [b] **Equipment engineer** for state highway department is not state officer. NM 290P786. [c] **Act of county commissioner in soliciting bribe** held act of commissioner and not of member of building commission. OhA 173NE201.

406-53 41Ida14, 236P862 (prosecuting attorney is not "executive officer of this state" within statute). [b] 154 Wash575, 283P167.

407-55 246NY106, 158NE38 (secretary to New York City health commissioner).

407-57 130Misc207, 223NYS750.

407-58 Fla 127S317.

407-59 246NY106, 158NE38 (secretary to New York City health commissioner is not person "designated" in Pen. Code art 170).

407-65 246NY106, 158NE38 (all public functionaries from most exalted officer of state to humblest messenger in municipal bureau).

407-66½-New. A bribe offered, after proceedings were begun by arrest, to any officer or agent of the department of justice to stay or abort prosecution is within the statute. 9F(2d)872 (Pen. Code § 39).

407-67 [b] (14) 14F(2d)505. (15) Assistant to attorney-general. 9F(2d)872. (16) Attorney-general. 9F(2d)872. (17) Prohibition agent. 34F(2d)15.

408-68½-New. Bribery of prohibition agent is an offense. 9F(2d)41.

408-68¾-New. The federal statute punishing officers and persons acting for the United States for accepting a bribe is within the power of congress and not unconstitutional. 34F(2d)15.

408-76 200 Ind460, 164NE632.

408-77½-New. Knowledge that the person attempted to be bribed is an officer within the statute is essential to show crime. 15F(2d)970.

408-78½-New. Offer of bribe to person before commencement of office held not to sustain conviction. 228AppDiv433, 239NYS670.

408-80 [a] **In California.**–201Cal116, 255P792, 52ALR811.

409-81 75CalA365, 242P906.

409-82 75CalA365, 242P906.

409-83 [a] 19F(2d)739.

409-84 Fla 127S317; 136Wash278, 239P834. [b] 19F(2d)739; 26F(2d)993; 38F(2d)584; 200 Ind460, 164NE632.

409-85 136Wash278, 239P834.

409-86 178Minn437, 227NW497.

409-88 75CalA181, 242P503, 504 [quot CJ].

409-88½-New. Indictment of juror for voting to acquit pursuant to promise

of reward is sufficient without alleging payment of money. 160Tenn594, 28SW(2d)47.

410-90 [a] **Information charging accepting illegal compensation** is fatally defective if not charging want of reasonable belief that reward was authorized. Mo 127S817.

410-95 [a] 21F(2d)811; 33F(2d)713.

410-99 15F(2d)191.

411-1 [a] (6) Indictment charging that defendant accepted bribe while acting for and in behalf of the United States as prohibition agent held sufficient. 34 F(2d)15. (7) Indictment charging offer of bribe to "acting assistant prohibition director" is not objectionable for nonexistence of such officer. 33 F(2d)713.

411-4 34F(2d)84 (sufficiently charging knowledge); Mo 151A427; 103WVa662, 138SE330, 331 [cit CJ].

411-5 15Md107; 116A°18; 161Tenn 120, 30SW(2d)°1 [cit dicta].

411-6 136Wash278, 239P834.

411-7 136Wash°78, 239P834.

411-9 Mo 274SW24 (indictment held defective); 136Wash278, 239P834.

412-91½-New. Knowledge that the person attempted to be bribed is a juror may be necessarily implied from other allegations of indictment. 15 F(2d)9,0

412-99 108TexCr638, 28SW(2d)241. [a] **Matters not constituting variance.**—Minn 231NW226.

412-30 DC 26F(2d)993; Oh 171NE327; 100TexCr318, 272SW184 (offer if officer would "say nothing about it, or forget it" held to sustain charge of bribe to make false return); 101TexCr 210, 283SW850.

412-31 178Minn437, 227NW497; 104 TexCr210, 283SW850.

413-39 8F(2d)841; 17F(2d)339; 113 Oh8187, 148NE531.

413-42 177Ark1124, 98SW(2d)574.

413-43½-New. Evidence held inadmissible. Evidence of the value of a county safe, in a prosecution for the county judge's having accepted a bribe for sale. 3°Mo°19, 68SW(2d)°5.

413-44 101TexCr°10, 283SW850.

413-45 101TexCr°10, 283SW850.

413-46 17F(2d)°6.

414-47 Oh 171NE327; 85PaSuper305, 307 [cit CJ].

414-54½-New. Letters and memoranda having tendency to prove that defendant displayed special interest in claims of the person from whom the bribe was received are admissible. 12F(2d)739.

414-59 30IowaL°19. [a] 1°F(2d)339; 19F(2d)739, 11F(2d)1°, 38F(2d)°81, 177Ark1124, 98SW(2d)574, 75CalA365, 24°P906, CalA °90P81, 3°GaA613, 11°S895; 250Mich157, 229NW468; 178 Minn437, 227NW497; 246NY106, 158 NE838 (secretary to New York City health commissioner); 250NY336, 165 NE°18, 31OhA°36, 1°NE107, OhA 1°NE°01, 151Wash°°, 283P167. [b] 112TexCr416, 168SW(2d)1079. [c] **Evidence held insufficient to sustain defense of unlawful entrapment.**—31F(2d) 1°, 31F(2d)°11.

415-60 246NY106, 158NE838 (relationship between secretary and assistant secretary to New York City health commissioner, and other circumstances).

415-63 17F(2d)339; 24F(2d)22; CalA 281P733.

415-66 CalA 281P733. [c] **Instruction defining crime of attempt to bribe,** which did not specifically state that attempt to bribe means bribery not consummated, held not to require reversal. 24°Mich°29, 2°°NW119. [d] **Intent.** 33 F(2d)713. [e] **Instructions held proper.** 31OhA536, 171NE107. [f] **Instructions held sufficient.**—154Wash575, 283 P167.

415-70 75CalA181, 242P503, CalA 281 P733.

415-76 75CalA181, 242P503.

415-78½-New. Instruction in prosecution of juror for voting to acquit pursuant to promise of reward held not erroneous for failure to charge statute declaring promise to give verdict misdemeanor. 160Tenn°94, 28SW(2d)1.

415-79 78CalA37, 247P601.

415-81½-New. The conclusion of the jury that defendant, in offering the sheriff "fifty," meant fifty dollars in money, held not unwarranted. 200Ind460, 164NE°17.

415-84½-New. Money forfeited to state. 3°PaDistACo1°7.

415-84½-New. Where the statute imposes a fine not exceeding three times the amount offered, a fine of one thousand dollars is not excessive where the bribe offered is three hundred dollars per month for an indefinite period. 33 F(2d)713.

BRIDGES

420-1 Miss 130S°31.

420-2 [c] (7) Piping and water boxes and culverts for drainage purposes across public roads are not "bridges." 41 GaA°10, 152SE°61.

421-5 126Me°0°, 137A°67, Mo 297SW 47, 49 [quot CJ].

422-10 229Ky538, 17SW(2d)432.

422-12 261Ill477, Miss 130S°83 (bridge spanning stream held not drainage structure within highway department's acceptance of road excepting drainage structure); 35OhA246, 172NE 124, 117Or°66, °1°F°°9, 293Pa115, 112A°22, TexCivA 58SW(2d)°05, 134 Wash°68, 235P°20.

424-31 114Nebr734, 209NW497. [a] (1) 217NY9, 159NE°63. [c] **Repeal.** 176Ark674, 8SW(2d)991. [d] **State highway department** held authorized to construct bridge under act conferring discretionary authority to build bridges as part of state highway system. 176 Ark674, 8SW(2d)991. [e] **State highway commission,** in Arkansas, is authorized to take over certain bridge as state toll bridge whether general statute so provides where commission's action was ratified by special statute. 35F(2d)421.

424-32 [a] **Toll bridge may be authorized** in same locality as ferry though it interferes with business of ferry. 142 Wash°54, °5°P906.

424-34 TexCivA 288SW875. [a] (6) 71Ala311, 116S°53, 1°Ark615, 293 SW2; 176Ark139, 2SW(2d)44. (7) Statute authorizing contracts for toll bridges held not violative of constitution giving public service commission control of public utilities. 159Ia909, 1068377. (8) Statute giving highway commission right to select bridges for condemnation or to combine two bridges in one bond issue. 235Ky324, 8SW(2d) 392.

425-35 133Misc101, 231NY8350. [a] **Franchise to use portion of streets** for bridge purposes legally enacted and approved by public vote is viewed with favor. TexCivA 292SW606. [b] **Change of corporate limits,** leaving location of proposed bridge outside, has been held to obviate necessity of license from town. 112Wash°54, °5°P906.

425-36 [a] **River bridge commission** created by act of legislature is merely its agent and is subservient to law of its creation. 284Pa225, 130A491. [b] **Statute creating bridge commission** and defining its powers and duties has been held not unconstitutional as delegation of legislative power. WVa 1°3SE°10.

425-38 [b] (2) State highway commission held authorized to expend funds to construct bridge. TexCivA 288SW 875.

425-43½-New. Under some statutes the state highway commission has power to construct an intercounty bridge on a state highway. 117Or°°0, 243P°3.

425-43½-New. Construction of bridge only was held authorized by statute relating to construction and operation of bridge, tunnel, and tube. 143SC104, 141 SE180.

425-44 154Tenn494, 290SW387; TexCivA 288SW(2d)921. [a] **In Tennessee.**—154Tenn494, 290SW387.

425-48 Ont [1920] 1DomLR820. [a] (7) County authorities may construct bridge through municipality on consent of council. 116OhSt650, 157NE 330. [c] **In Oregon** under statutes county is authorized to use as approaches for bridge constructed across stream and partly within city such portions of street of city leading to bridge as is necessary. 117Or566, 245P308.

426-48 127Misc89, 216NY884. [c] **Exercise of statutory powers by ordering** construction of bridge is sufficient declaration of public necessity. 223Ky10, 28SW(2d)1039.

426-49 156Miss273, 125S828. [a] **Delegation by board to committee.**—127Misc 89, 216NY884.

426-50 223Ky10, 28SW(2d)1039.

426-50½-New. Act providing for construction of intercounty bridge is not rendered inoperative by the fact that the boundary line between the counties was the low water mark on one side of the river. 290Pa427, 139A136.

426-51 339Ill103, 170NE721.

426-53 175Ark314, 299SW15 (construing provision limiting cost to exclude interest on bonds); 339Ill103, 170NE 721 (duty is continuing one); 213App Div451, 210NY8676 (construction and maintenance of bridges is governmental function of city); Ont [1926] 3DomLR 352.

427-58 [a] (9) Mistake of commissioners in allowing first notice to contain declaration that petition contained majority of landowners, contrary to statute, held not to affect validity of proceedings, when they were otherwise regular. 181Ark547, 285SW2. [f] (1) 223Ky10, 28SW(2d)1039 (no power to delegate authority). (3) Authorizing commissioners to investigate situation relative to bridge on county line is not unauthorized delegation of authority of fiscal court. 223Ky10, 28SW(2d) 1039. (4) Failure of commissioners' report to disclose additional cost of road to bridge and grade percentage does not affect validity of proceedings. 223 Ky10, 28SW(2d)1039. (5) Commissioners' report as to location does not invalidate proceedings because state commissioner or his assistant did not join therein. 223Ky10, 28SW(2d)1039. (6) State highway commission is authorized to group projects for construction of interstate bridges as permitted under federal law. 235Ky86, 29SW(2d)583. [g] (3) In Michigan provision of Covert Act of 1919, being applicable only to Wayne County, cannot be construed generally as giving right of recovery to anyone damaged through construction of bridges over navigable streams. 237Mich202, 211NW626. [j] (2) Precinct special election of issue of bridge bonds held valid. Nebr 232NW570. [l] (5) Essentials of procedure outlined. 119Okl261, 250P123. [m] (18) Under statutes providing procedure for erecting bridges, duties of court are not merely ministerial or formal and approval of court is essential. 85PaSuper 371. (19) Under such statutes where facts warrant it court may disapprove petition, though no exceptions have been filed thereto (85PaSuper371); (20) and decision of court will not be reversed for abuse of discretion (85PaSuper371). [o] **In Iowa.**—228NW625; Iowa 230NW876 (petition held insufficient).

429-60 [a] (2) TexCivA 292SW606. [c] **Ratification of alleged irregularity.**—216NY840°

429-61 TexCivA 292SW606.

429-62½-New. County election on increase of indebtedness for building a county toll bridge is not invalid because of the alleged misleading nature of a question submitted where the proceeding is not attacked until after election. 290Pa427, 139A136

429-64 [b] **Additional levy cannot be made** where previous levy is still in effect. 232Ky139, 23SW(2d)276.

429-65 116GaA207, 152SE°61; 9PaDistACo139. [a] (6) County may expend road funds in constructing bridge, half of which is within limits of city. 172 Ark1145, 292SW153. [b] (4) Tax levy of county held not illegal because, under law, no county tax is authorized for "public works." 38GaA703, 145SE 668. [c] (2) Duty rests upon county board of supervisors to make all bridge fund levies, except that cities of first class may levy their own bridge fund. 200Iowa974, 205NW777. [e] **In Florida.**—Fla 125S308. [i] **In Oklahoma.**—142

Okl 19, 285**P**80; 142 **Okl** 8, 285**P**48; 142 **Okl** 29, 285**P**59.

431-69½-New. Preliminary injunction restraining collection of alleged illegal bridge tax will be granted where denial would deprive taxpayer of day in court and public interest will not suffer if statu quo is maintained. 216**NYS**402.

431-75 [a] **In Texas.**-**TexCivA** 28**SW (2d)**921.

431-76 326 **Ill** 535, 158**NE**116, 54**ALR** 777; 216**NYS**402; 49**RI** 324, 142**A**660 (statute, construed as imposing obligation on town, held valid). [a] (5) Straight line method mandatory in measuring bridge to determine apportionment. 326 **Ill** 535, 158**NE**116, 54 **ALR**777. [c] (8) Inability of one county to pay share of expense is no defense in action by it to compel other county to proceed with construction. 223**Ky**10, 2**SW(2d)**1039. [d] **Delegation to board of supervisors.**-127**Misc** 89, 216**NYS**84.

432-77 [b] **City may contract to pay** half cost of bridge across ditch constituting boundary where half of bridge would be outside city limits. 172**Ark** 1145, 292**SW**153.

433-83 232**Ky**218, 22**SW(2d)**607(2d case). [f] (2) Apportionment under Highway Law of one per cent of cost to county and ninety-nine per cent to town has been held not to indicate bad faith. 216**NYS**402.

435-94 [a] (7) Statute as to bridge necessitated by drainage ditch held applicable only in drainage proceedings. 175**Minn**243, 221**NW**3.

436-98 **CalA** 291**P**464. [b] (3) Locating bridge site three hundred and forty-one feet from ford is substantial compliance with order to select location "at" one of two fords. 223**Ky**10, 2**SW (2d)**1039.

437-4½-New. County cannot erect balustrade to shut off access from transverse highways in borough into which bridge and approaches project. 297 **Pa**140, 146**A**557.

438-10 37**GaA**222, 139**SE**682.

439-20 91**PaSuper**100.

439-24 40**F(2d)**184.

439-25½-New. Under some statutes a county board has power to employ engineering service for the construction of approaches to a bridge. 166**Minn**261, 207**NW**624.

439-25½-New. Only body having authority to make contract can accept contractor's assignment of payments thereunder. 134**Wash**673, 236**P**283.

439-25¼-New. The road commission is held authorized to contract with a power company for relocation of a bridge. 152**Md**566, 137**A**359.

439-26 85 **IndA**281, 151**NE**831; 172 **Minn**259, 214**NW**888; 246**NY**400, 159 **NE**184; 127**Misc**89, 216**NYS**84; 67 **Utah**567, 248**P**811 (clause under which state road commission claimed ownership of old county bridge as salvage held void); 134**Wash**673, 236**P**283 (contract provision withholding amount in excess of statutory fifteen per cent to pay claims for labor and material is valid). [a] (1) **TexCivA** 290**SW**875. (7) Under some statutes contract for price exceeding specified amount cannot be let unless plans and specifications have been on file for stated time before time for acting on bids. 172 **Minn**259, 214**NW**888. (8) Contract with third person on terms of accepted bid with successful bidder's consent is valid without readvertisement. **Tex CommnA** 68**SW(2d)**340. (9) Doing work without advertising for bids as required by statute disentitles contractor to recover. 85 **IndA**281, 151**NE**831. [c] (5) Doing work without plans and specifications as required by statute disentitles contractor to recover. 85 **IndA**281, 151**NE**831. [l] **Bonds.**-172**Minn**259, 214 **NW**888. [m] **Fraudulent representations of board,** being outside of its statutory authority, do not entitle contractor to recover for work done without compliance with statutory requirements. 85 **IndA**281, 151**NE**831. [n] **Knowledge of statute.**-85 **IndA**281, 151**NE**831. [o] **Unjust benefit.**-85 **IndA**281, 151**NE**831.

440-28 152**Md**566, 137**A**359. [b] (3) Power of board of supervisors to construct bridges at joint expense of towns and county cannot be delegated to committee of the board, but must be exercised by board acting as body, 127 **Misc**89, 216**NYS**84. (4) And where contracts were executed by committee of board, they were void and could not be ratified by board. 127**Misc**89, 216 **NYS**84.

441-29 **Mass** 167**NE**311.

441-30½-New. Board may contract up to limit of appropriation. 173**Ark**1121, 295**SW**1.

441-34½-New. A bond given by contractor is held good as a statutory bond and to obligate the surety for payment of claims of furnishers of labor and materials. 17**F(2d)**444.

441-35 154**Tenn**494, 290**SW**387 (dictum).

441-37 154**Tenn**494, 290**SW**387.

441-39 9**LaA**274, 119**S**883; 294**Pa**412, 144**A**420; **TexCivA** 290**SW**875. [b] (2) Contractor's measure of damages is compensation for expenses incurred in part performance before repudiation and profit which he would have realized. 35**F(2d)**301. (3) Contractor, being notified of repudiation and ordered to cease work, cannot recover contract price for breach nor increase damages by persisting in completing bridge. 35 **F(2d)**301. [f] **Breach of contract.**-36 **GaA**611, 137**SE**918. [g] **Implied warranty.**-165**Ga**742, 142**SE**73.

442-40½-New. Insufficient appropriation does not excuse liability. 173**Ark** 1121, 295**SW**1.

442-41 166**Minn**261, 207**NW**624 (irregularity in employment of engineer directly by county board instead of through office of surveyor held not available as defense after rendition of services). But see 172**Minn**259, 214**NW** 888.

442-42 **Mass** 167**NE**311.

442-43 **TexCivA** 290**SW**875.

442-44½-New. Under some statutes, failure of county to compel giving of bond required by statute protecting laborers and material men renders county liable to person furnishing material for loss because of contractor's insolvency. 34**GaA**305, 129**SE**290.

442-44⅛-New. Commissioners are not bound by agreement of clerk of board to send warrants to contractor's assignee. 134**Wash**673, 236**P**283.

442-44¼-New. A carrier transporting material used in the construction of a bridge is entitled to a municipal lien as for labor performed, notwithstanding it was delivered to a station a mile away. 100**NJEq**181, 135**A**74.

442-44⅜-New. There can be no recovery under a valid contract for work and material where the work was never completed and accepted and had no value. 172**Minn**259, 214**NW**888.

442-44⅙-New. Verbal authorization by single commissioner did not warrant contractor in assuming that additional cost would be paid as such authorization did not conform with statute. 299 **Pa**225, 149**A**171.

442-44⅞-New. That county commissioner prior to time he became commissioner had knowledge has been held not notice on part of county so as to make county liable for additional cost in removing piling. 299**Pa**225, 149**A**171.

442-44⅛-New. In contractor's action against county for unanticipated cost in removing foundation of old bridge county is under no duty to disclose existence of cribbing and piling. 299**Pa** 225, 149**A**171.

442-44⅛-New. In action by contractor for reimbursement for additional cost in making an excavation, boring plan presented by county to contractor did not constitute representation that nothing but soft earth would be encountered. 299**Pa**225, 149**A**171.

443-48 [a] **Assignee of subcontractor** held not entitled to recover for items not properly classified as labor and materials. **TexCivA** 297**SW**503.

443-48½-New. Misrepresentations by a town excuse a contractor from excavating to the solid ledge as required by contract. 9**F(2d)** 538.

443-48¼-New. Under bond to secure furnishing of material for construction of bridge surety was held liable for materials other than those going into permanent structure. 498**D**235, 207**NW**53.

443-48¼-New. An additional guaranty added on a bond by a highway commission to protect materialmen held binding on surety. 217**Ala**35, 114**S**415.

443-48½-New. Misrepresentations of a town in making a contract, upon which the contractor does not rely, do not excuse performance. 22**F(2d)**256.

443-48¾-New. Excavation to solid river bed not reaching a line specified is not compliance with a requirement to excavate to a solid ledge. 22**F(2d)**256.

443-48⅞-New. Alleged approval of an engineer does not excuse inadequate excavation where the contract requires approval of the board as a condition to payment. 22**F(2d)**256.

443-48⅛-New. Satisfaction of engineer with excavation does not of itself relieve the contractor from liability for failure to excavate as required by contract. 22**F(2d)**256.

443-48⅛-New. Extraordinary repairs have been held not within a bond to secure a lien for labor and materials. 218 **Ala**132, 118**S**148.

443-48 1/10-New. Groceries furnished a camp conducted by state bridge contractors for boarding workmen are supplies chargeable against the contractors' bond. 148**Wash**387, 269**P**4; 150 **Wash**386, 273**P**192.

443-48 1/11-New. Where bridge company agreed with contractor to build bridges and with contractor's surety to complete them company has been held to have right of action for payment against surety under special contract. 37**F(2d)**695.

443-48 1/12-New. A claim against a bridge contractor and his surety for rental of construction equipment and for loss of a mule is within a bond conditioned on the payment of laborers, subcontractors, and materialmen. 169 **La**90, 124**S**182.

443-48 1/13-New. A claim against a bridge contractor for materials forming the permanent part of a bridge is within a bond conditioned on payment for materials. 169**La**90, 124**S**182.

443-48 1/14-New. Claims for lumber and for wages paid to laborers by claimant are within a bond conditioned on the payment for labor and materials. 169 **La**90, 124**S**182.

443-48 1/15-New. Surety of general contractor has been held liable for lumber sold subcontractor for use in making repairs to pile driver. **La** 127**S**893.

443-48 1/16-New. General contractor's surety has been held not liable for lumber bought by subcontractor to prepare foundation for land pile driver to be used over water. **La** 127**S**893.

443-48 1/17-New. Whether obligation of bridge contractor and surety to pay for labor or material arose from promise to pay stipulated price or reasonable value is immaterial under Oregon statute. 132 **Or**587, 286**P**995.

443-48 1/18-New. Complaint showing contractor purchased material sued for held to state cause of action against contractor and surety whether contractor agreed to pay stipulated price or reasonable value. 132 **Or**587, 286**P**995.

443-53 [b] **Judgment allowing consulting bridge engineer** one per cent on estimated cost held warranted. 141 **Wash**372, 251**P**570.

443-54½-New. Contractor's assignee not entitled to recover in excess of statutory fifteen per cent reserved to pay claims for labor and material where contract provided for retention in excess of such fifteen per cent. 134**Wash** 673, 236**P**283.

443-54½-New. Transfer by a contractor to plaintiff of a road district warrant by simple indorsement without recourse and delivery where plaintiff is not named as indorsee does not transfer the right of the contractor to have adjudged to him title to bridges con-

structed upon disapproval of the contract by the road district and refusal to pay the warrant. **TexCivA** 290SW875.

443-54¼-New. Rights of a materialman against a bondsman for a contractor for material furnished for construction of a bridge held fixed by statute of limitations existing at the time. 204 **Iowa**268, 214**NW**481.

443-54½-New. Statute limiting time of bringing action on bond must be construed liberally. 204 **Iowa**268, 214**NW** 481.

443-54¼-New. As between materialman and bondsman, the statute begins to run when the public improvement is completed, although incidental matters contracted for had not been performed. 204 **Iowa**268, 214**NW**481. [a] **Evidence held sufficient** to show that bridge was completed within meaning of statute more than six months previous to materialman's suit against bondsman. 204 **Iowa**268, 214**NW**481.

443-54½-New. Where a subcontract requires the subcontractor promptly to begin and diligently prosecute the work, and the subcontractor's bond requires suit to be begun thereon within a stated time after the period fixed for completion, the time to sue begins to run not later than actual completion of the work. 108**WVa**317, 150**SE**718.

443-59 4**F(2d)**821 (complaint against county for extra material and work held sufficient).

443-59½-New. The presumption that a provision in a contract for the construction of a bridge, requiring plaintiff to construct and complete a concrete and steel bridge, includes the filling of approaches, cannot overcome an express provision. 294**Pa**412, 144**A**420.

444-76½-New. Evidence held sufficient to sustain a finding and judgment against defendant for one half of the total cost of a bridge. 30**F(2d)**33.

445-77 173**Ark**645, 293**SW**2. [b] **Notice of proceedings need not be given** to give county court jurisdiction to grant valid franchise. 176**Ark**530, 3**SW(2d)** 319.

445-81 But see 200**Ky**170, 275**SW**634.

445-82½-New. Initiative law is inapplicable to an application for a toll bridge. 205**Cal** 262, 270**P**676.

445-85 54**SD**128, 222**NW**680.

445-85½-New. The right to maintain and operate a toll bridge can exist only under a franchise legally created. 200 **Ky**170, 275**SW**634.

445-85½-New. The rule is especially applicable in case of bridges over navigable streams. 200**Ky**170, 275**SW**634.

445-85¼-New. A power company is held empowered to contract with the road commission to provide a highway bridge and approaches to replace the bridge about to be destroyed by a dam. 152**Md**566, 137**A**358.

445-85½-New. A charter of a bridge company is not void because it authorized a bridge over public domain where the federal government has not objected to use of the river bed. **TexCivA** 290**SW**866.

445-85½-New. A franchise for a toll bridge over a river between two counties is held valid so far as it covered that part of the structure without the town limits. 146**Wash**55, 261**P**640.

445-85½-New. Proceedings to cancel a franchise, alleged invalid, and not certiorari, should be instituted, where the invalidity does not appear from the face of the record. 176**Ark**530, 3**SW(2d)** 319.

445-90 **TexCivA** 2**SW(2d)**1012. (vested right).

445-90½-New. A franchise to build a bridge conditioned on approval of congress has been held lacking in mutuality. 173**Ark**645, 293**SW**2.

445-93 249**Mich**289, 228**NW**791.

446-96 [b] **Right to predecessor company's property.**–152**Va**851, 148**SE**865.

446-1 142**Wash**284, 252**P**906; 146**Wash** 55, 261**P**640. [b] **In Oklahoma.**–139 **Okl** 225, 282**P**462.

446-2 See also 133 **Okl** 115, 271**P**846.

446-2½-New. A statute declaring toll bridges to be public utilities will not necessarily result in the franchise of a toll bridge company becoming an indeterminate permit. 193**Wis**457, 214 **NW**435.

446-2½-New. A franchise for construction of a toll bridge held not to make impossible construction by the highway commission of roads and bridges authorized by constitutional amendment. 159**La**909, 106**S**377.

446-2¼-New. The right of a toll bridge company, organized in good faith as a corporation under state laws, to exercise corporate powers cannot be inquired into collaterally. 139 **Okl** 225, 282**P** 462.

447-3 133 **Okl** 115, 271**P**846.

447-4 205**Cal** 262, 270**P**676.

447-5 133 **Okl** 115, 271**P**846. [c] **Term of franchise is not extended,** by levy and payment of taxes. 133 **Okl** 115, 271**P**846.

447-10½-New. Bridges may be classified by legislature according to cost for the purpose of determining whether tolls should be collected. 290**Pa**427, 139 **A**136.

447-10½-New. Bridge tolls are not taxes, although used for reducing taxes. 290**Pa**427, 139**A**136.

447-10¼-New. Where the assignee of a toll bridge company's franchise has complied with all provisions of the franchise, injunction will not lie to enjoin the collection of toll charges during the franchise period. 139 **Okl** 225, 282**P** 462.

448-15 114**Nebr**734, 209**NW**497, 498 [quotCJ].

448-16 114**Nebr**734, 209**NW**497, 498 [quotCJ].

448-17 114**Nebr**734, 209**NW**497, 498 [quotCJ].

448-17½-New. Company may receive less rate than maximum prescribed by district court where uniform for all of a class. 114**Nebr**734, 209**NW**497.

448-24 **TexCivA** 2**SW(2d)**1012 (actual possession, and engaged in construction). [e] **Priority as between bridge companies** receiving successive permits belongs to company first securing permit and entering upon construction. **TexCivA** 2**SW(2d)**1012.

449-25 **TexCivA** 2**SW(2d)**1012.

449-28½-New. The regulation by the state of rate of tolls charged does not give a toll bridge company an exclusive right. 193**Wis**457, 214**NW**435.

449-34 142**Wash**284, 252**P**906.

450-36½-New. The state may build a free bridge beside a toll bridge when the toll bridge has operated for many years without competition under a franchise containing no engagement on the part of the state that another bridge should not be erected. 193**Wis**457, 214 **NW**435.

450-36½-New. The building of such free bridge does not constitute a confiscation of the property of the toll bridge company. 193**Wis**457, 214**NW** 435.

450-38 **TexCivA** 2**SW(2d)**1012 (priority only, not construction of federal statute, held involved).

450-40½-New. Party claiming superior and prior right to construct bridge has burden of proof. **TexCivA** 2**SW(2d)** 1012.

450-44 **Ala** 130**S**190.

451-49 [c] **In Kentucky.**–230**Ky**381, 19**SW(2d)**967.

451-51 133 **Okl** 115, 271**P**846, 848 [quotCJ&Cyc]. [b] **Injunction against collection of tolls after expiration of franchise.**–133 **Okl** 115, 271**P**846.

453-70 [a] **Replacement or repair.**–95 **PaSuper**555.

453-71½-New. A statute authorizing a commission to maintain a bridge connecting state highways was held not to prohibit abandonment thereof when deemed desirable to relocate the bridge and highway approaches. 152**Md**566, 137**A**359.

454-77 250 **IllA**204. [g] (4) Under acts of 1929 county must maintain and repair all county bridges except former county bridges over streams or state highway routes. 14**PaDist&Co**29. [m] **Michigan.**–County adopting county road system is not relieved of jurisdiction over county bridges and culverts and duty to maintain them. 231**Mich**681, 204**NW**756.

455-80 251 **IllA**475.

455-81 **Va** 154**SE**526.

456-85 229**Ky**538, 17**SW(2d)**422; 149 **Wash**109, 270**P**422. [a] **Under Greater New York Charter,** commissioner of plants and structures is without authority to contract for maintaining bridges without previous appropriation therefor and certificate of city comptroller. 221**AppDiv** 106, 222**NYS**277.

457-93 175**Minn**243, 221**NW**3 (evidence held insufficient to show agreement by town).

457-94½-New. **In New Jersey** disputes between counties as to the repair of bridges are referred to commissioners appointed by the chancellor. 103**NJL** 288, 136**A**194.

459-11 [a] **County's power to repair** includes right to contract for repair. 40**F(2d)**184 (measure of damages for breach of contract to elevate bridge).

460-20 83**NH**466, 143**A**903; 105**NJL** 455, 144**A**792; 136**Misc**239, 240**NYS**677; 9**PaDist&Co**467; 152**Va**264, 146**SE**277.

460-22 83**NH**466, 143**A**903; 136**Misc** 239, 240**NYS**677.

460-23½-New. General Railroad Act has been held not to authorize a contract. 105**NJL**455, 144**A**792.

461-28 130**Misc**217, 224**NYS**267.

461-31 35**Ariz**403, 279**P**257 (contract for excessive cost held ultra vires, and county held liable only on implied contract for amount specified in order of tax commission).

461-32 [c] **In Oklahoma.**–119 **Okl** 261, 250**P**123. [d] **Amount authorized to be expended.**–35**Ariz**403, 279**P**257.

464-68 294**Pa**451, 144**A**407(2dcase); 13 **PaDist&Co** 23 (county bridge taken over for state highway becomes property of state). But see 67**Utah**567, 248**P**811.

464-69 326 **Ill** 535, 158**NE**116, 54**ALR** 777.

464-69½-New. The lessor of a bridge may enjoin the lessee from making improper use thereof by switching railroad cars thereon where such use is improper and dangerous although not expressly prohibited by lease. 241**NY**85, 148 **NE**797.

464-70 [a] **County commission** has exclusive supervision and control of all bridges along and across public road. 192**NC**156, 134**SE**401.

464-71 326 **Ill** 535, 158**NE**116, 54**ALR** 777; 162**La**874, 111**S**265.

465-72 172**Ark**1027, 291**SW**445.

465-73½-New. A property owner in a village has only the right of the general public to use a bridge maintained for public travel. 133**Misc**101, 231**NYS** 350.

465-75 193**Wis**457, 214**NW**435. See 162**La**874, 111**S**265. [a] (2) Schedule of maximum bridge tolls held not grossly excessive. 159**La**909, 106**S**377. [b] **State may adopt Secretary of War as its agent to fix tolls.**–249**Mich**289, 228**NW** 791.

466-78 [b] **In Arkansas.**–174**Ark**1057, 298**SW**331.

466-79½-New. In some jurisdictions toll rates are fixed by the department of public works. 152**Wash**234, 277**P**995 (matters to be considered in fixing tolls).

466-79½-New. In New York, cities are authorized to build bridges and to defray cost of construction and maintenance by imposing tolls. 136**Misc**358, 239**NYS**659.

466-89 [a] **In Pennsylvania.**–91**PaSuper**100.

467-2½-New. Where a town had nothing to do with the work of constructing a bridge except to make appropriation, it is not liable for damage to an owner of property overflowed, if caused by faulty construction. **Mass** 167**NE**311.

468-11 224**Ky**592, 6**SW(2d)**1050; 82 **NH**246, 132**A**570. But see 176**Minn**252, 223**NW**152. [f] **Railroad leasing part of bridge** to county as public highway with obligation to repair not liable for injury due to want of repair. 168**Minn** 118, 209**NW**646. [g] **Company in possession for purpose of making repairs** is liable to one injured by collapse of bridge, for damages proximately result-

ing from its negligence. **TexCivA** 294 **SW**625. [h] **Validity of statute.**–229**Ky** 538, 17**SW(2d)**422.

469–16 82**NH**246, 132**A**570.

469–17½–New. A state may be liable for the highway department's negligent construction and maintenance of a bridge, which was partly within and partly without an Indian reservation. 133**Misc**215, 231**NYS**486.

469–19 140 **Okl** 216, 282**P**455.

469–21 See also 152**Tenn**141, 273**SW** 557. [a] **County engineer** present at slough from which bridge had been removed and observing absence of barrier and taking no steps to have anything done for protection of public is liable for injuries sustained by occupant of automobile which ran into slough. 156**Tenn**389, 2**SW(2d)**94, 57**ALR**1029. [b] **County commissioners** (1) placing experienced engineer in charge of road and bridge work with proper instructions is not liable for injuries resulting from absence of barriers or warning signals at place where bridge had been removed from slough. 156**Tenn**389, 2 **SW(2d)**94, 57**ALR**1029. (2) County commissioners must exercise ordinary care to see that such engineer takes proper precautions for protection of public after removal of bridge from slough. 156**Tenn**389, 2**SW(2d)**94, 57 **ALR**1029. (3) County commissioners are not bound to see that more effectual barriers than lumber piles are used after removal of bridge in absence of notice, actual or constructive, of necessity. 156**Tenn**389, 2**SW(2d)**94, 57**ALR**1029. (4) Determination and order of commissioners for removal and replacement of bridge does not set in motion dangerous agency rendering them liable for injuries resulting from absence of barriers. 156**Tenn**389, 2**SW(2d)**94, 57**ALR** 1029.

469–23 152**Tenn**141, 273**SW**557.

470–24 152**Tenn**141, 273**SW**557.

470–25 **Ala** 128**S**145 (statute making county liable); 152**Tenn**141, 273**SW**557 (failure to place light or barrier where bridge removed).

471–29 [a] (2) Statutory modification limits liability to life of bridge, though repaired from time to time, and does not apply to new bridge at same place not erected under contract. 217**Ala**415, 116**S**119. (3) Bridge must be public bridge constructed by independent contractor. 217**Ala**415, 116**S**119. [b] (10) Under Civ. Code (1910) § 748, counties are liable for injuries resulting from defects in bridges on highways. 38**GaA** 515, 144 **SE**348. [l] **In Alabama.**–218 **Ala**104, 117**S**621.

471–30 293**Pa**315, 142**A**322.

472–31 92**CalA**656, 268**P**1083.

473–35 225**Ky**542, 9**SW(2d)**517; **Tex CivA** 5**SW(2d)**205.

474–49 245 **Ill**338; 82**NH**246, 132**A** 570; 289**Pa**512, 137**A**668.

474–51 289**Pa**512, 137**A**668. See also 38**GaA**515, 144**SE**348.

474–52 289**Pa**512, 137**A**668; 298**Pa**174, 148**A**67, 68**ALR**600.

474–53 217**Ala**439, 116**S**526; 289**Pa**512, 137**A**668; 292**Pa**237, 140**A**903; 298**Pa** 93, 147**A**851, 68**ALR**596; 298**Pa**174, 148 **A**67, 68**ALR**600. [b] **Work of independent contractor.**–292**Pa**237, 140**A**903.

475–57 289**Pa**512, 137**A**668.

475–62 215**Ky**452, 284**SW**1097, 47**ALR** 347.

475–63 215**Ky**452, 284**SW**1097, 47**ALR** 347.

475–64 215**Ky**452, 284**SW**1097, 47**ALR** 347.

475–65 224**Ky**592, 6**SW(2d)**1050; 83 **NH**466, 143**A**903.

475–66 215**Ky**452, 284**SW**1097, 47**ALR** 347.

476–68 245 **Ill**338; 82**NH**246, 132**A** 570. [d] **Every test known to experts** need not be adopted to ascertain safe condition, where careful and adequate inspection discloses no defect. 298**Pa** 93, 147**A**851, 68**ALR**596.

476–70 [a] **Latent defects.**–298**Pa**93, 147**A**851, 68**ALR**596.

476–72 245 **Ill**338. But see 37**GaA** 222, 139**SE**682 (no duty rests in county to warn of defects).

477–74 41**GaA**196, 152**SE**583.

477–76 82**NH**246, 132**A**570.

477–78 82**NH**246, 132**A**570.

477–79 217**Ala**439, 116**S**526, 527 [cit CJ]; 151**Md**68, 134**A**33; 223**AppDiv**520, 228**NYS**593 (duty of state); 194**NC**256, 139**SE**372.

478–85½–New. The city is under the duty of exercising reasonable foresight as to probable causes of injury to travelers. 82**NH**246, 132**A**570.

478–86 223**AppDiv**520, 228**NYS**593.

478–88½–New. The duty to maintain a suitable railing does not require such a railing as would withstand an extraordinary strain caused by a negligent attempt of a driver to turn around a wagon in too limited space. 140**Miss** 439, 106**S**5.

478–89 215**Ky**452, 284**SW**1097, 47**ALR** 347.

478–93 37**GaA**222, 139**SE**682 (narrowness of bridge does not render county liable for collisions thereon); 213**App Div**451, 210**NYS**676, 678 [citCJ].

479–94 213**AppDiv**451, 210**NYS**676, 678 [citCJ].

479–95 213**AppDiv**451, 210**NYS**676, 678 [citCJ]; 298**Pa**174, 148**A**67, 68**ALR**600.

479–95½–New. City is not required to build its bridges as wide as street. 213 **AppDiv**451, 210**NYS**676.

479–96 120**Kan**598, 245**P**100, 101 [cit Cyc]; 298**Pa**174, 148**A**67, 68**ALR**600.

480–11 217**Ala**439, 116**S**526.

480–13½–New. A person attempting to turn his wagon in a space so limited as to render it practically impossible for him to do so in safety is guilty of contributory negligence precluding recovery to injuries resulting from collapse of the railing of the bridge. 140**Miss** 439, 106**S**5.

480–16 120**Kan**598, 245**P**100, 101 [cit Cyc]; 298**Pa**174, 148**A**67, 68**ALR**600.

480–17 [a] (5) Under Highway Law § 331 town will be liable for collapse of bridge, if only front wheels of truck passed on it and subjected it to strain of less than forbidden tonnage. 125 **Misc**450, 211**NYS**1.

480–18 125**Misc**450, 211**NYS**1. [b] **Town not liable for collapse of bridge** when truck weighing more than prohibited tonnage crossed and front wheels are on opposite bank, as bridge had been subjected to prohibited strain. 125**Misc**450, 211**NYS**1.

481–21 120**Kan**598, 245**P**100. [c] **Statute held valid.**–120**Kan**598, 245**P**100. [d] **Statute applicable to bridges in cities** as well as in counties and townships. 120**Kan**598, 245**P**100.

481–30 **Ala** 128**S**145.

481–31 120**Kan**598, 245**P**100, 101 [cit Cyc]. [a] (3) Other instances. **Ala** 128 **S**145. [b] **Without notice of defect** traveler owes no duty to use due care. **Ala** 128**S**145.

482–32 **Mo** 26**SW(2d)**592.

482–33 150**Md**511, 133**A**322; 151**Md**68, 134**A**33.

482–36½–New. That the user of a bridge is a carpenter does not charge him with special knowledge of defects. **Mo** 23**SW(2d)**174.

484–51 292**Pa**237, 140**A**903. [a] **Knowledge of employees of independent contractor** repairing bridge is not chargeable to county. 292**Pa**237, 140**A** 903.

486–73 126**Kan**319, 267**P**1096 (action against county).

486–82 [a] 120**Kan**598, 245**P**100.

487–84 35 **OhA**246, 172**NE**423.

487–90 217**Ala**439, 116**S**526; 37**GaA**98, 139**SE**158 (petition not showing defendant's negligence).

487–92 [a] (5) Other allegations of proximate cause held sufficient. 217**Ala** 439, 116**S**526.

488–94 [a] (3) Petition for damages to automobile held to show contributory negligence. 37**GaA**98, 139**SE**158.

488–96 [a] (3) Other instances. **Ala** 128**S**145.

489–3 [b] **Pleas held insufficient.**–**Ala** 128**S**145. [c] **Requiring substitution of words** in plea held not reversible error. **Ala** 128**S**145.

489–8 298**Pa**174, 148**A**67, 68**ALR**600. [d] **Res ipsa loquitur** doctrine inapplicable. 32 **OhA**333, 168**NE**543.

489–10 [b] (2) In Kansas, in action for damages for wrongful death, caused by defective bridge maintained by county, statute does not compel plaintiff to prove that deceased person was not guilty of contributory negligence. 128 **Kan**127, 276**P**74.

489–10½–New. **Plaintiff has burden** to show liability of landowners. 192**NC** 156, 134**SE**401.

489–10⅓–New. In an action by an employee of a subcontractor, doctrine of res ipsa loquitur did not apply, where defendant, at the time of the accident, was not in control and possession of the bridge causing the injury. 225**AppDiv** 54, 232**NYS**160.

489–10¼–New. A large hole in the concrete pavement of a bridge constructed and maintained by the highway department creates the presumption that resulting injuries to persons in an automobile were due to negligence of the state, and the fact that the hole did not exist on the night before the day of the accident does not overcome such presumption. 133**Misc**215, 231**NYS**486.

490–13 92**CalA**656, 268**P**1083; **TexCivA** 294**SW**625.

490–13½–New. Evidence of the condition of a railing for the protection of pedestrians is inadmissible where an automobile skidded off the bridge. 23 **OhA**442, 157**NE**120.

490–14 82**NH**246, 132**A**570.

491–15 82**NH**246, 132**A**570.

491–17 92**CalA**656, 268**P**1083.

491–21 225**AppDiv**54, 232**NYS**160.

491–25 [b] 298**Pa**174, 148**A**67, 68**ALR** 600. [c] **Evidence sufficient to go to jury.**–215**Ky**452, 284**SW**1097, 47**ALR**347.

491–26 [a] 213**AppDiv**451, 210**NYS**676; 298**Pa**174, 148**A**67, 68**ALR**600.

491–30 [a] **Mass** 171**NE**443; 298**Pa**174, 148**A**67, 68**ALR**600.

492–38 [a] **TexCivA** 5**SW(2d)**205.

492–39 [a] 83**NH**466, 143**A**903. [c] **Evidence held insufficient to go to jury on question of county's negligence.**–292 **Pa**237, 140**A**903 (incompetence of engineer and failure to discover defect). [d] **Evidence held insufficient to go to jury on question of negligence.**–298**Pa** 93, 147**A**851, 68**ALR**596.

492–41 152**Va**264, 146**SE**277.

492–42 136**Misc**239, 240**NYS**677.

492–43 194**NC**256, 139**SE**372; 32 **OhA** 333, 168**NE**543 (for what purposes bridge remained open where city had limited traffic thereon by partially fencing approaches); 156**Tenn**389, 2**SW(2d)** 94, 57**ALR**1029 (existence of barrier); **TexCivA** 294**SW**625. [a] **Evidence held insufficient** to make issue for jury of county's liability for negligence. 218 **Ala**104, 117**S**621.

492–44 **NJSup** 147**A**50.

492–45 23 **OhA**442, 157**NE**120.

493–47 156**Tenn**389, 2**SW(2d)**94, 57 **ALR**1029.

493–48 245 **Ill**338; 126**Kan**319, 267**P** 1096.

493–49 **Ala** 128**S**145; 215**Ky**452, 284 **SW**1097, 47**ALR**347; 150**Md**511, 133**A** 322; 194**NC**256, 139**SE**372.

496–60 [e] **Conversely,** where there is no evidence on proximate cause of death, it is error to refuse instructed verdict. 32 **OhA**333, 168**NE**543.

496–60½–New. Evidence held to warrant nonsuit. 289**Pa**512, 137**A**668.

496–61 [a] (2) Remark of judge, not on instruction that jury should not consider amount of traffic in measuring duty of county. 132**SC**420, 129**SE**160.

496–64 [a] **Instructions properly refused.**–**Ala** 128**S**145.

497–75½–New. The refusal to give instruction correctly embodying the law as to statutory liability of a county is error. 217**Ala**415, 116**S**119.

497–82½–New. The lessor of a bridge for the use of the owner of a building, not in control or possession at the time of the accident, is not liable for injuries to an employee of another contractor while using the bridge, in the absence of any proof that at the time the bailor gave up possession of the bridge it was unsafe. 225**AppDiv**54, 232**NYS**160.

497–84 42**F(2d)**298.

498–91½–New. **Pleading.** County's petition against contractor held to state cause of action. 223**Ky**456, 3**SW(2d)** 1083.

498–91⅓–New. **Question for jury.** Whether bridge piers were erected ac-

cording to contract held for jury. 223 Ky456, 3SW(2d)1083.

499-94½-New. County may waive damages. 40F(2d)184.

499-95 See also 27F(2d)686.

499-96½-New. The allowance of interest in a decree awarding damages to a bridge is governed by the same rules applicable to other forms of action, except that an award is always discretionary, and the fact that the bridge has been replaced is immaterial. 27 F(2d)686.

BROKERS

508-1 [a] (5) TexCivA 274SW648. (7) 142Wash630, 253P1074.

509-2 50Nev27, 249P566; 142Va342, 128SE604 (at common law).

509-6 MoA 290SW616, 618 [quotCJ].

509-7 142Va342, 128SE604.

509-16 120Kan415, 243P1023, 1024 [quotCJ]. [a] (1) TexCivA 274SW648. [e] 223AppDiv296, 228NYS226 (agent for clients in securing policies and not agent for insurer).

510-17 MoA 290SW616, 618 [quotCJ].

510-19 See 153 Ill 525, 526, 39NE124.

510-21 93Fla805, 113S419, 54ALR 1173; 164La46, 113S759; 144Wash88, 256P1030; 145Wash277, 259P878, 879 [quotCJ]. [b] **Other definitions.**–155SC 488, 152SE644.

510-22 145Wash277, 259P878, 879 [quotCJ]. [a] (1) See also 162La1048, 111S416. (3) Statute defining real estate broker and surety on broker's bond whose obligation is confined to damages caused by its principal while acting as real estate broker is therefore not liable for damages from broker's alleged misrepresentation in sale of note secured by trust deed. 99CalA742, 279P670.

510-23 145Wash277, 259P878, 879 [quotCJ].

510-24 145Wash277, 259P878, 879 [quotCJ].

510-25½-New. One who buys or sells leases is held not to be a real estate broker. 159La892, 106S371.

510-25¼-New. Statute defining "real estate salesman" as one employed by a licensed real estate broker to do certain things does not make the salesman an employee. 21F(2d)596.

510-29 [c] **Statutes define a stockbroker in some jurisdictions.**–142Va342, 128 SE604.

510-31 TexCivA 274SW652 (relation held that of agent and not merely broker).

511-32 93Fla805, 113S419, 54ALR1173.

511-33 MoA 290SW616, 618 [quotCJ].

511-35 235Mich502, 209NW660.

512-39 [c] **Contract to pay percentage of profits on realty sale** does not make one a broker or middleman. 41F(2d) 177.

512-40 238 Mich210, 213NW200, 51 ALR1225.

512-46 90Fla328, 105S821; 13Pa Dist&Co 439 (statute construed); 38 Wyo 244, 266P109 (statute construed in light of obvious purpose of protecting public). [a] **California Real Estate Brokers Act** is for protection of public. 72CalA249, 236P968. [b] **In Florida.**–90Fla328, 105S821. [c] **Beginning with year 1919 twenty-two states, including Oklahoma, have enacted real estate license laws** patterned largely upon a model prepared by the Real Estate Boards Association. 33 OklCr5, 242P 290. [d] **In Louisiana.**–164La46, 113 S759. [e] **Statutes relating to broker's license,** being in derogation of common law is strictly construed. 136Misc743, 241NYS721.

512-47 22AlaA537, 118S253; 196Cal 236, 237P38 (valid though applicable to single transaction when not conducted for oneself or under power of attorney from owner); 72CalA249, 236P968 (statute construed to be for protection of public); 243NY51, 152NE461; 33 OklCr5, 242P290. [b] **License may be limited to persons who are honest and of good repute** as ascertained by board of commissioners. 33 OklCr5, 242P290. [c] **Statute establishing system of licenses for real estate brokers with annual renewals and denying commissions to unlicensed brokers** held valid. 243 NY51, 152NE461.

512-48 197Wis622, 222NW807. [a] **Ordinances held not unreasonable.**–92 Fla267, 109S446; 92Fla267, 109S447.

512-48½-New. Officer assuming license has no authority to fix term of license to begin at future time other than beginning of year. 285Pa199, 131A700.

512-48⅓-New. Customer's acceptance of broker's note covering funds misappropriated with interest constitutes extension of time for payment discharging surety on statutory bond. CalA 292P 977.

512-49 217AppDiv333, 216NYS710; Wis 231NW626. But see 255 IllA350. [b] 13PaDist&Co 439. [k] **Where broker's license is issued** to corporation, it does not authorize its representative to act in his individual capacity, and when he enters into contract in his own name question of capacity in which he contracts depends upon his intention as disclosed by his acts. 125Misc108, 210 NYS131. [l] **Manufacturer's agent not general broker** within ordinance. 255 IllA350. [m] **Licensed foreign corporation has same right** as domestic corporation so licensed. Wis 231NW628(2d case). [n] **Person dealing with another for sale** of property is broker. Cal 293 P40. [o] **Agent merely furnishing names** of persons with whom he has dealt is not a broker, Cal 293P40, [p] **Offer to sell only to syndicate** does not alter status as broker. Cal 293P40.

513-51 Ala 127S841 (evidence held sufficient); 72CalA249, 236P968 (salesman of broker must have license); 217 AppDiv333, 216NYS710; 135Misc241, 237NYS450. [g] **Person must be engaged in brokerage business within state** in order to be subject to occupation tax. 141Miss849, 105S760. [h] **Broker employed to sell personal property** is not required to procure license under statute requiring real estate brokers to procure licenses. 68CalA145, 228P722. [i] **In Illinois.**–233 IllA116. [j] **Furnishing information regarding property for purchase** is not "negotiation of secured loan" requiring broker's license. 39F(2d)555. [k] **What name is assumed** does not determine whether one is real estate broker requiring license, but nature of services rendered is controlling. 135Misc241, 237NYS450. [l] **Liability of surety on bond of licensed broker.**–131 Or376, 282P554(2d case) (false representations of principal). [m] **Findings of real estate broker's board must support determination** to justify denial or revocation of license. Wis 231NW628(2dcase). [n] **Real estate board cannot deny broker's license** because investments offered by applicant are highly speculative. Wis 231NW628(2dcase).

514-53 15F(2d)942; 233 IllA116; 141 Miss849, 105S760 [citCJ]. But see 75 CalA765, 242P90. [a] (1) 141Miss849, 105S760 [citCJ]. (2) One outside jurisdiction arranging by telephone to have customer in jurisdiction come out and be introduced to owner in other jurisdiction whereby single sale is transacted is not broker within License Law. 15F(2d)942.

514-54 1LaA782.

514-55½-New. In New York selling and exchanging business as a going concern does not come under "real estate brokers" in an action for compensation. 243NY113, 152NE693.

514-55¼-New. Since failure of a real estate broker to procure a license is a crime, the section defining "real estate brokers" cannot be extended by implication. 243NY113, 152NE693.

514-55¼-New. The statutory liability of a surety on a real estate broker's bond does not attach where the transaction giving rise to the cause of action arose from the sale of the broker's own property. CalA 284P948(1stcase).

514-57 14PaDist&Co 372 (suspension or revocation of license). [c] **After proof that defendant personally carried on negotiations** for sale of property, receipt showing collections of purchase money held admissible. 74CalA109, 239 P413. [d] **Evidence held insufficient** to support conviction of stockholder for trading for his own account against customer. 243NY58, 152NE464.

514-58 22AlaA537, 118S253; 243NY 113, 152NE693. [c] **Dealer not entitled to notice** from commissioner. 5Pa Dist&Co 738. [d] **Prosecutions under municipal ordinance.**–255 IllA350 (whether defendant acted as broker question of law).

515-61 [b] (2) Whether stockbroker's indorsement of customer's stock was result of mistake or intent feloniously to appropriate is for jury. 216AppDiv 209, 215NYS56. [c] **In New York.**–216 AppDiv209, 215NYS56 (Pen. L. § 3956). [d] **Evidence.**–216AppDiv209, 215NYS 56. [e] **Instructions.**–216AppDiv209, 215NYS56.

515-61½-New. Broker cannot start unlawful method of transacting business and then escape responsibility by shutting his eyes as to subsequent method of conducting it. 216AppDiv209, 215 NYS56.

515-61⅓-New. , or for trading for his own account against an order of a customer. 243NY58, 152NE464; 243NY 584, 154NE615.

515-62 50Nev27, 249P566.

515-65½-New. In New York failure to furnish customer, within forty-eight hours after demand, information required by statute, as to person from whom securities were purchased or to whom they were sold, is prima facie evidence that purchase or sale was in violation of statute and a felony. 212 AppDiv572, 209NYS440.

515-65⅓-New. Statute of limitation does not run for five years against action on penal statute, requiring information to customer, on demand, as to person by whom or to whom securities were sold. 212AppDiv572, 209NYS440.

515-65¼-New. To convict a stockholder of trading for his own account against an order of a customer, it must be proved that shares had not been delivered to the broker on payment of the price so as to complete the transaction. 243NY58, 152 NE464.

515-67 93Fla805, 113S419, 429 [citCJ] 54ALR1173; 213Ky752, 281SW1034; 134Misc525, 235NYS546; TexCivA 20 SW(2d)388; Va 153SE688. But see 131 Misc689, 227NYS731. [e] **The laws of contract** govern the relation. TexCivA 284SW283. [f] **Trustee and cestui que trust.**–70Utah203, 259P318, 62ALR54. [g] **Finding as to agency held not erroneous under evidence.**–Wash 287P878.

515-68 213Ky752, 281SW1034; 98Pa Super246; BC [1930] 3DomLR145. But see 84Colo 398, 270P880.

516-69 132Misc520, 230NYS218.

516-69½-New. A contract listing property with a real estate broker for sale, containing an option provision for the purpose of facilitating a sale as an incident thereto, is a contract of agency rather than an option to sell. 238Mich 52, 213NW175.

516-73 18F(2d)883; 83CalA105, 256P 573; 330 Ill 160, 161NE515 (meeting of minds must be shown); 336 Ill 500, 168 NE362 (contract for services in syndication and sale of land trust certificates held brokerage contract not constituting person employed independent contractor); TexCivA 13SW(2d)936. [a] 197 Cal 269, 240P289; 209Ky387, 272SW 895; 219Ky374, 293SW150; 169Minn 394, 211NW474; MoA 290SW616; Tex CivA 274SW648. [b] (2) Evidence held sufficient to show that one signing, as agent of buyer, contract for sale of goods exceeding certain price had no authority to do so. 83CalA105, 256P 573. [e] (3) Where contract of employment is made outside jurisdiction and customer in jurisdiction is called by broker by telephone and is thereafter introduced to owner outside jurisdiction and sale of timber in jurisdiction is consummated, contract is not governed by laws of forum. 15F(2d)942. (4) Contract for commissions on loan from foreign corporation through local agent is governed by local law. Wis 231NW 626. [h] **Contract giving brokers option to purchase** does not make them brokers for sale of land. 213Ky752, 281 SW1034. [i] **If vendor prepares contract,** it should be construed most favorably to broker. 127Misc350, 216NYS 590. [j] **Acceptance.**–103NJL98, 134A 740. [k] **Contract held unambiguous.**–

TexCivA 4SW(2d)1038. [i] **Vendor held bound to furnish abstract** under contract to sell ranch to broker after he had found purchaser. 86Mont69, 281 P915.

517–74 12LaA186, 125S147(2dcase) (reference in printed form of bond to himself as agent shows employment).

517–75 174Ark1179, 296SW709; 174 Ark682, 297SW839; 177Ark663, 7SW (2d)336; 250 IllA577 [quotCJ]; 4LaA 662.

517–76 [a] (3) Commission to be received from seller is not consideration for broker's agreement with buyer to procure property at lowest price for which it can be obtained. 37GaA776, 142SE175. (4) Where such agreement is without consideration when made, buyer's subsequent offer through broker to owner to purchase does not constitute consideration for broker's promise. 37GaA776, 142SE175. (5) Consideration held sufficient. 87CalA406, 262 P396. [c] **Contracts held without consideration.**–33 OhA84, 168NE571.

517–79½–New. In owner's communication to broker regarding employment to sell, the word "option" does not necessarily import option to buy only, agency having elements of option. 216 Ala645, 114S308.

517–81 98PaSuper246; Wash 289P 1026.

517–82 94PaSuper95 (certificate filed under fictitious name act held sufficient compliance with statute of frauds). [c] **Construction of statute.**–145Wash277, 259P878.

517–83 170Ark908, 281SW671; 172Ark 1088, 291SW795. [a] 170Ark908, 281 SW671.

517–84 Ariz 292P1097; 103NJL394, 136A202; 25 OhA130, 157NE398; 27 OhA329, 161NE213 (purchaser discovered prior to statute but not procured till after enactment); 130 Okl 93, 265P 633 (lease for longer than one year); 94PaSuper175. [d] **Statute held retroactive.**–25 OhA130, 157NE398. [e] **Ratification of unauthorized acts** of alleged agent must also be in writing. 94Pa Super175.

518–86 Iowa 229NW199 (evidence held to show that broker was agent for seller). [c] (1) 339 Ill 340, 171NE263 (change of agency not shown). (5) Broker authorized to sell real estate and take commission out of deposit money is agent of vendor and not purchaser. NJSup 135A353. [d] TexCivA 274SW 648.

518–88 239 IllA623, 627 [citCJ]; 3 LaA289.

519–95 SD 224NW949.

519–2 217Ala27, 114S409; 77CalA193, 246P136; 295Pa396, 145A534. See also 246 IllA184.

519–3 108Conn534, 143A882; 198Wis 122, 223NW427.

519–5 196Wis182, 218NW839 (contract held to be one for definite time on valuable consideration).

519–5½–New. Right to revoke agency depends on nature of contract and status created by it. 216Ala645, 114S308.

520–8 85CalA355, 259P359.

520–9 217Ala27, 114S409.

520–10 217Ala27, 114S409; 120Kan 260, 242P1024; 259Mass437, 156NE711; 147Va1019, 133SE495.

520–11 217Ala27, 114S409; 23AlaA498, 127S786; 86CalA74, 260P298; 96CalA 512, 274P584; 98CalA53, 276P607; 120 Kan260, 242P1024 (rule applicable where property listed with two brokers); 123 Okl 222, 253P56. [c] (3) Where real estate broker's contract for sale was revoked before sale he cannot recover in absence of proof of value of services or of expenditures. 13PaDist &Co 311. [e] (2) In Louisiana principal may revoke mandate to sell realty at any time, though contract provides for thirty-day written notice. 159 La 668, 106S26.

521–13 216Ala645, 114S308. [c] **Mandate to sell** providing for thirty days' written notice of revocation is not irrevocable power of attorney coupled with an interest. 159 La668, 106S26. [d] **Employment of member of syndicate,** transferring option for interest in syndicate, as exclusive sales agent for sale of syndicate property, was not employment coupled with interest. 96CalA512, 274P584. [e] **Order to buy stock held by broker as security** does not confer agency coupled with interest. CalA 291 P606.

522–16 Cal 274P342; CalA 267P151.

522–17 Compare 132Misc520, 230NYS 218.

522–18½–New. Agency of broker, if any, or of partnership of which he was a member, was revoked by his death before sale was made. 200 Iowa983, 205NW742.

522–18¼–New. A broker's authority is not revoked by an attempt to induce the principal to accept a lesser price and an agreement to reduce the commission in that event. TexCivA 288SW 270.

522–18¼–New. Pending negotiations, if owner fraudulently revokes real estate agency and closes deal with agent's client, commissions are due. 216Ala645, 114S308.

522–21 104Conn744, 133A586; 35GaA 517, 134SE130 (petition insufficient); 127Kan296, 273P435; 252Mass291, 147 NE872 (no breach in failing to deliver stock where price was not paid as required by contract); 129Misc800, 222 NYS721. [g] **Facts not showing breach.**–210Ky75, 274SW1113 (contract authorizing sale of stock and service contract of wholesale concern not breached by principal's transactions claimed to render stock not dividend bearing). [h] **Sufficiency of evidence of employment.**–NJSup 148A636.

523–23 See also 38GaA613, 144SE830. [a] **Breach of contract for broker's services** is fully remediable at law. Fla 130 S38.

523–24 216AppDiv421, 215NYS346; 196Wis182, 218NW839. [b] **Entire contracts.**–196Wis182, 218NW839.

523–25½–New. The principle that renunciation before performance is due is such a breach as to enable the party not in default to maintain an action applies to contracts employing brokers. 143Wash17, 253P1078.

523–26 98CalA53, 276P607; 240 IllA 28, 34 [quotCJ]; 255Mass459, 152NE 351; 129Misc800, 222NYS721.

524–27 [b] (2) Where expenses of advertising alleged to have been incurred by broker in action for breach of oral contract for sale of lots on commission were not element of contract, no obligation therefor was imposed on defendant. 32 OhA59, 167NE598.

524–27½–New. **If there is no sale by owner,** broker may recover for value of his time, labor, and expenses. 255Mass 459, 152NE351.

524–29 70CalA415, 233P366 (that agent is not invested with discretion does not enlarge authority of agent nor rights of principal); 92CalA194, 267P901, 903 [citCJ]; 252Mass291, 147NE872; MoA 20SW(2d)605.

524–30 225Ky846, 10SW(2d)456, 60 ALR1374.

524–31 252Mass291, 147NE872. [b] **Powers not implied.**–238Mich210, 213 NW200, 51ALR1225.

524–33½–New. Authority to sell stock at best price obtainable, but for not less than specified price, does not authorize sale for future delivery. 252 Mass291, 147NE872.

525–42 17F(2d)971; 90Fla437, 105S 817 (broker empowered to bind principal by written contract is a special agent); 327 Ill 254, 158NE442 (authority to waive time elements of contract cannot be implied); NJCh 150A834; 189NC775, 128SE349 (authority is not to be readily inferred, but exists only where intention of owner to give such authority is plainly manifest); 144Va 126, 131SE209. [d] Mo 291SW131.

525–43 30Ariz134, 245P278; NJSup 139A326; TexCivA 25SW(2d)700; 193 Wis554, 214NW394.

525–44 CalA 290P1042; 12LaA186, 125S147(2dcase) (real estate agent is within scope of duties in accepting deposit of money so as to make sureties on bond liable).

525–45 [c] **Where offer to sell merely calls for note and mortgage,** broker may provide for three-year note and mortgage. CalA 263P532.

525–46 [d] **Letter agreeing to accept price reduced from that of original agreement** with commission to be obtained from purchaser authorized broker to offer property for sum covering net price plus reasonable commission to himself. 50RI 221, 146A639.

526–47 [a] (3) Authority to sell stock and service contracts of wholesale grocery corporation in units of three shares for price above par with first payment of certain amount does not authorize sale of large block of stock to concern not engaged in grocery business at less than par with small initial payment. 210Ky75, 274SW1113. [c] **Where broker's authority to sell is on terms requiring purchaser to pay stated sum in cash** and to pay off and discharge certain mortgages, contract of sale requiring purchaser to assume instead of discharge such mortgages is so substantially different from contract authorized as not to be binding on principal. 30 Ariz134, 245P278.

526–50 321Mo 287, 11SW(2d)26; Tex CivA 286SW343.

526–52 30Ariz134, 245P278; 95CalA 456, 273P50. [e] (2) Where contract of sale executed by broker with whom owner lists property for sale with authority to execute contract varies from such authority, contract made by broker is not binding on principal. 30Ariz 134, 245P278. (3) Contract requiring owner to furnish abstract showing good title and silent as to when possession should be rendered is departure from authorized contract requiring owner to furnish evidence of title either by abstract or title insurance and to give possession when abstract should be approved by buyer's attorney. 30Ariz134, 245P278. [g] **Right to pass upon integrity and financial responsibility of purchaser** is reserved to principal listing property with broker with authority to execute contract of sale providing for deferred payments unless such right is delegated to broker. 30Ariz 134, 245P278.

527–53 30Ariz134, 245P278; TexCivA 4SW(2d)627, 628 [citCJ]; 144Va126, 131SE209; 192Wis145, 212NW252.

527–54 30Ariz134, 245P278; 90Fla437, 105S817 (where broker signed in own name); 327 Ill 406, 158NE692; 237Mich 9, 211NW36; 189NC775, 128SE349; TexCivA 4SW(2d)627, 628 [quotCJ]; 144Va126, 131SE209; 192Wis145, 212 NW252. [b] 30Ariz134, 245P278; 139 Okl 53, 281P228; 133Wash613, 234P 449, 238P581. See also Va 153SE688.

528–55 30Ariz134, 245P278; 327 Ill 406, 158NE692; Va 153SE688.

528–55½–New. Inference of authority of real estate broker to bind principal by written contract of sale cannot be drawn from circumstances consistent with his employment as mere broker, nor without other circumstances clearly indicating such grant of greater authority. 90Fla437, 105S817.

528–56 [a] **In Virginia.**–144Va126, 131 SE209.

528–57 90Fla437, 105S817; 237Mich 9, 211NW36; TexCivA 4SW(2d)627.

529–63 222AppDiv514, 227NYS26; Can [1925] 2DomLR665 (broker does not commit breach of duty by failing to sell without instructions from his principal).

530–74 225Ky846, 10SW(2d)456, 60 ALR1374.

530–75 35F(2d)825; 80CalA571, 252P 662 (custom of exchange where securities were to be purchased permitting broker to hold all securities to secure general indebtedness of correspondent); Conn 152A66; 246 IllA545; 11PaDist &Co 293. [f] 80CalA571, 252P662. [k] **Fraud cannot be predicated** on fact that brokerage firm, in good faith, handled transactions of correspondent brokerage firm in accordance with rules, regulations, and customs which customers made part of their contracts of purchase. 80CalA571, 252P662.

531–77 35F(2d)825 (confirmation slips delivered by broker to customer after each trade is not part of original con-

tract unless customer was aware of terms as applicable to his transactions).
531-80 35F(2d)825 (broker expressly agreeing to terms inconsistent with rules).
531-81 136Misc301, 240NYS713.
532-83 [b] **Commission** need not be paid unless so confirmed by principal. BC [1927] 2DomLR395.
532-84 MoA 20SW(2d)605 (merchandise sold unconditionally where broker was authorized to sell goods only if they had not been shipped).
532-85 TexCivA 272SW803, 806 [quot CJ] (dictum).
532-86 6F(2d)797; TexCivA 272SW 803, 806 [quotCJ] (dictum).
532-87 TexCivA 272SW803, 806 [quot CJ] (dictum).
532-88 35F(2d)825 (delay in repudiating closing of account held acquiescence).
532-93 33Ariz101, 261P969, 57ALR 107; 246Mich96, 224NW420; 127Misc 461, 216NYS473; 218AppDiv809, 218 NYS276; 190NC700, 130SE728 (authorizing broker to sell goods purchased pursuant to telegram erroneously transmitted, with knowledge of facts, was held ratification of purchase); TexCivA 272SW803 (evidence held to warrant finding of contract by broker and ratification). [a] 294Pa518, 144A529, 63 ALR297.
533-94 127Misc461, 216NYS473.
533-98 83CalA470, 256P1109 (knowledge ratifying contract); TexCivA 287 SW117.
533-99 30Ariz134, 245P278.
534-1 TexCivA 272SW803, 806 [quot CJ] (holding that ratification relates back to time and place of transaction).
534-3 229AppDiv155, 241NYS255 (liability for failure to act). [a] (3) Where principal's attorney wrote to stockbroker to return deposit, broker was liable for balance due principal on day of notice. Mass 168NE91. [b] **Rescission.**–252Mass291, 147NE872.
534-11½-New. Broker is not authorized to retain and use money secured by him on client's mortgage notes under claim that irregularities of title shown on abstract required correction. 158La544, 104S362.
534-11½-New. Because of such breach by broker of his contract of employment client may refuse to accept any part of such money after being compelled to make other arrangements for meeting indebtedness. 158La544, 104S 362.
534-11¼-New. Under such circumstance client may refuse to pay broker's commission for securing loan. 158La544, 104S362.
534-11½-New. A contract providing that a real estate broker shall maintain certain offices has been construed as not requiring him to maintain such offices after all of the principal's property has been sold. 236Mich683, 211NW 48.
534-12 19F(2d)834; TexCivA 283SW 235; 140Wash407, 249P982; 143Wash 347, 255P132. See also 246 IllA545. [h] **Real estate broker** should turn over to principal entire payment by purchaser, if he has not already earned his commission. NJSup 135A352. [i] **Broker is liable to account for difference in minimum price agreed on and amount paid broker,** less what were reasonable commissions and expenses. 32F(2d)81. [j] **Broker need not account for amount received in excess** of maximum price agreed upon, except in case of deceit or fraud. 32F(2d)81. [k] **Surety is liable** for broker's failure to account. 13LaA162, 127S642 (under statute). [l] **Under contract for subdividing and selling of plaintiff's land** by defendant, plaintiff held entitled to be repaid entire cost of improvements in view of evidence. TexCivA 19SW(2d)171.
535-15½-New. A contract for sale on commission ordinarily carries with it the right of inspecting the agent's books relative to sales under contract. 19F (2d)834.
535-15½-New. Where the principal's general manager desired that payments on lots sold by agents should be made at his office, the agents should not be subjected to a charge in accounting because collections and bookkeeping were thus handled. 246Mich96, 224NW420.
535-16 97CalA171, 275P486; 225Ky 846, 10SW(2d)456, 60ALR1374; 252 Mass291, 147NE872; 218AppDiv90, 218 NYS241; 198NC44, 150SE618(1stcase); 159Tenn76, 16SW(2d)186 (must exercise ordinary care). [d] **It is broker's duty to exert his best efforts and exercise his best judgment** for principal's benefit. 227Ky120, 12SW(2d)276, 62 ALR1353. [e] **Not liable for bad judgment** in absence of fraud in land purchase. TexCivA 28SW(2d)219.
535-17 227Ky120, 12SW(2d)276, 62 ALR1353; 218AppDiv90, 218NYS241.
536-25 32F(2d)81; 215Ala650, 112S 232, 53ALR134; 170Ark258, 280SW 357; 70CalA415, 233P366 (agent not relieved from duty to act in good faith because no discretion given him to fix price); 83CalA105, 256P573; 90CalA 647, 266P565; 39GaA217, 146SE795; 40GaA808, 151SE531; 47 Ida542, 277P 554(2dcase); 255 IllA35; 121Kan758, 250P299; 122Kan420, 251P1105; 223 Ky549, 48SW(2d)370, 371 [quotCJ]; Mass 171NE445; 165Minn181, 206NW 390; 99NJEq390, 132A110; 102NJL 196, 130A665, 667 [citCJ]; 222AppDiv 475, 226NYS532; 218AppDiv90, 218NYS 241; 136Misc527, 241NYS495 (fiduciary relation exists between stockholder and customer); TexCivA 283SW319, 322 [citCJ]; TexCivA 7SW(2d)601; Alta [1930] 3DomLR999. See also 217 Ala27, 114S409. [b] **That broker is without discretion as to price** does not relieve him from responsibility of acting in good faith. 70CalA415, 233P 366. [c] **Real estate agent is trustee** with same obligation of undivided service and loyalty and subject to same punitory consequences for violation of his trust. 200Cal 192, 252P602.
536-26 170Ark258, 280SW357; 165 Minn181, 206NW390; 168Minn414, 210 NW149, 48ALR913.
536-27 215Ala650, 112S232, 53ALR 134; 170Ark258, 280SW357; 170Ark 519, 280SW5; 82CalA525, 255P861; 88 CalA418, 263P568; 88CalA664, 264P 256 (must disclose fact of increased price); 101CalA122, 281P419 (misrepresentation of amount of lien on property exchanged); 82Colo 156, 257P 1075; 339 Ill 184, 171NE169; 339 Ill 371, 171NE510; 227Ky130, 12SW(2d) 276, 62ALR1353; 168Minn414, 210NW 149, 48ALR913; MoA 10SW(2d)342; MoA 24SW(2d)708; 127 Or22, 270P 905; 47RI 441, 133A805; 49RI 128, 140 A916. See also Mo 298SW756. [a] (1) 144Va126, 131SE209 (where principal agreed to convey to any person designated). (3) Contract with one who will later convey to real purchaser held not to constitute bad faith or fraud. 144 Va126, 131SE209. [b] **Misrepresentation as to financial condition of assignee** justifies rescission of contract. 129Misc232, 220NYS214. [c] **Option to purchase given to agent is voidable,** where he failed to disclose another offer accompanied by earnest money. Wash 289P1026.
536-28 101CalA122, 281P419 (whether broker profited or not by fraudulent concealment and misrepresentation); 40GaA808, 151SE531 (inducing principal to accept lessee of poor financial standing); 198NC44, 150SE618(1st case); 51 SD190, 212NW869; TexCivA 283SW319, 322 [citCJ]. [b] (2) That owner paid commission after discovering fraud will not defeat right of recovery. Mass 171NE445.
537-30 90CalA647, 266P565, 567 [quot CJ]; 122Kan420, 251P1105; 47RI 441, 133A805 [citCJ]. [c] **Broker owes owner absolute fidelity in obtaining best possible terms** for him in selling his property. Mass 166NE623. [d] **Broker owes duty to obtain largest price possible** and to keep principal informed on all material facts. 50RI 221, 146A639.
537-32 195Wis99, 217NW650 (no fiduciary relationship requiring broker to account for full purchase price in absense of contract).
537-33 82CalA525, 255P861; 51SD190, 212NW869.
537-33½-New. A broker is under the duty to turn over the entire payment to the vendor unless he had already earned his commissions. NJSup 135A352.
537-33½-New. Where a broker misappropriated money intended for a mortgage, the executor of the assignor of the mortgage is entitled thereto as against one supplying the money. 225AppDiv 11, 232NYS268.
537-35 19F(2d)834; 200Cal 192, 252P 602; 313Mo 426, 285SW407; 243NY 439, 154NE303; TexCivA 10SW(2d) 201; 70Utah203, 259P318, 62ALR54. But see 97CalA43, 274P1006.
537-36 170Ark258, 280SW357; 200Cal 192, 252P602; 204 Iowa197, 215NW233; 12LaA186, 125S147(2dcase); 99NJEq 390, 132A110; 243NY439, 154NE303; 244NY168, 155NE88; 136Misc301, 240 NYS713; 120Or427, 251P299; 127Or22, 270P905; 88PaSuper57; 49RI 358, 142 A375; TexCivA 283SW319, 322 [citCJ]; 70Utah203, 259P318, 62ALR54; 143 Wash347, 255P132. [c] **All who are active in fraud on principal must account** to him for profits. 99NJEq390, 132A110. [d] **Broker who took quitclaim deed** from plaintiff is obliged to account for sum received for it by resale, in excess of agreed commission. 170Ark258, 280SW357. [e] **Broker cannot pledge property deposited for sale** to his own advantage. 244NY168, 155 NE88.
538-37 200Cal 92, 252P602.
538-38 22CalA525, 255P861; 51SD190, 212NW869. [b] **That principal was willing to pay greater price** does not justify fraud and retention of fruits thereof. 82CalA525, 255P861.
538-38½-New. Where a broker who had agreed to purchase a particular piece of property for his principal at the lowest price and on the best terms obtainable caused his wife to purchase the property and resell it to his principal at a greater price, concealing the price paid from his principal, the transaction constitutes a fraud on the principal and he is entitled to have his contract of purchase reformed and specifically enforced. 231Mich573, 204NW741.
538-38½-New. In such case the principal does not waive the fraud by accepting the contract of sale from the broker's wife where he acts with reasonable promptness on discovery of the fraud. 231Mich573, 204NW741.
538-39 93Fla805, 113S419, 429 [quot CJ] 54ALR1173; 313Mo 426, 285SW407.
538-40 97CalA43, 274P1006; 323 Ill 527, 154NE444; 329 Ill 21, 160NE130; 340 Ill 385, 172NE821; 158La537, 104 S318; 240Mich234, 215NW524; 313Mo 426, 285SW407; 322Mo 1064, 18SW(2d) 1043; 88PaSuper57; 46Philippine938; 47RI 441, 133A805 [citCJ]. See also 97 CalA171, 275P486. [j] **Customer was not precluded from repudiating direct** sale of his stock to broker by failure to offer price for, or to demand delivery of, other stock which broker had sold directly to customer, instead of as broker. Mass 167NE334. [k] **Customer's filing of bill ten days after acquiring knowledge** of broker's buying his stock directly was sufficient repudiation within reasonable time. Mass 167NE334.
539-41 329 Ill 21, 160NE130; 240Mich 234, 215NW524; 29 OhA281, 163NE51; 47RI 441, 133A805 [citCJ].
539-42 323 Ill 527, 154NE444; Mass 167NE334.
539-44 92CalA308, 268P404 (broker authorized to sell at fixed price net to owner); 340 Ill 385, 172NE621 (broker owes no further duty to principal); 143 Wash347, 255P132. [c] **Where principal consults attorney before accepting offer,** fiduciary relationship will not invalidate contract. 240Mich295, 215NW 311.
539-45 170Ark258, 280SW357; MoA 24SW(2d)708. See also 97CalA43, 274 P1006.
540-46 236 IllA607; 313Mo 426, 285SW 407; 99NJEq390, 132A110; 120 Or427,

251P299; 294Pa464, 144A404.

540-49½-New. An agent in such case is also accountable for rents and profits. 313Mo 426, 285SW407.

540-50 209Ky382, 272SW893 (broker not agent but buying for himself not liable for false representations as to price offered for property in absence of fraud preventing inquiry by owner); 209Ky387, 272SW895 (broker not agent so as to warrant recovery by purchaser from him of difference between amount paid, in reliance on fraudulent representations that property could not be bought for less, and amount received by owner); 127 Or22, 270P905 (plaintiff held broker and not purchaser).

540-51 121 Kan758, 250P299; NJ 147 A434 (evidence showed that agency had terminated).

540-53 168Minn414, 210NW149, 48 ALR913; Mo 29SW(2d)1112; 90 PaSuper386; Va 153SE722. [a] (2) That owner was informed that realty was being sold to broker's client is not notice that broker was representing both sides. 215AppDiv196, 213NYS351. [b] (3) Evidence held insufficient to show that broker acted for parties adversely interested. CalA 290P1042. [d] (4) Ordinarily one representing party in sale or exchange of property cannot be subagent for agent of adverse party. 221MoA1056, 296SW263. [e] **Where party to escrow agreement refused to employ broker to get other parties to reduce stipulated price,** it is not breach of duty for broker to make agreement with other parties to receive as commission all that could be obtained for land over stated price and to fail to disclose such agreement. 66Utah351, 242P408.

541-54 339 Ill 371, 171NE510; 168 Minn414, 210NW149, 48ALR913; 243 NY439, 154NE303.

541-55 [b] **Broker must disclose all facts.**-215AppDiv196, 213NYS351.

541-57 219Ky282, 292SW780; 145 Wash338, 260P250.

541-58 216Ala628, 114S200; 8LaA165; Mo 298SW756; 58ND455, 226NW501; 103WVa329, 137SE362. See also 8LaA 534. [b] **Sufficiency of disclosure.**-243 NY439, 154NE303. [c] **Broker bound to act in good faith.**-Iowa 228NW45.

541-59 92CalA308, 268P404 (broker employed to sell at fixed price net to owner); 231Mich695, 204NW693 [cit CJ]; 103WVa329, 137SE362. [d] 103 WVa329, 137SE362.

541-60 [a] **Vendor's broker making resale at direction of purchaser** is not vendor's agent required to account for profit. MoA 290SW638.

541-61 [c] **It is not fraud on part of agent to strive to keep his sales of lots good,** even though he takes assignment and makes payments, if there is no fraud in inception and no design at time original contract was made. 246Mich96, 224 NW420 (sale of lots to relatives is not in itself fraud).

541-62½-New. Broker reporting sale as result of which principal completes purchase is liable for any loss where he actually had not made a sale. 215 AppDiv617, 213NYS468.

541-65 224AppDiv1, 229NYS457; Tex CivA 32SW(2d)523; Alta [1930] 3Dom LR999. But see 31Ariz519, 255P164. [c] (2) No estoppel where broker is not prejudiced. Mass 171NE445. [e] **Principal's failure to cancel** held not to ratify agreement of broker himself to purchaser. 143Wash347, 255P132.

542-70 31Ariz478, 254P485, 486 [cit CJ].

542-73 [a] 136Misc527, 241NYS495.

542-74 Conn 152A66. [b] **Mistake.**-300Pa163, 150A298.

542-76 199Cal 90, 247P1088, 48ALR797; Conn 152A66; 226Ky754, 11SW(2d) 926; 94PaSuper333. See also 133Misc 27, 231NYS3. [c] (3) 253Mass321, 148 NE801.

543-78 199Cal 90, 247P1088, 48ALR 797.

543-79 9LaA577, 582, 121S769.

543-80 31Ariz478, 254P485, 486 [cit CJ].

543-80½-New. Broker's failure to communicate facts to customer surrounding arrangement with seller constitutes brokers purchasers of stock. 136Misc301, 240NYS713.

543-81 199Cal 90, 247P1088, 48ALR 797. [c] (2) Broker purchasing stock has been held not responsible for delay of transfer agent in delivering stock. Conn 152A66. (3) Stockbroker giving notice of purchase has been held not answerable for delay in delivering stock. Conn 152A66. (4) Offer of certificate twelve days after brokers were notified to deliver has been held not unreasonably delayed. Conn 152A66.

544-85 31Ariz478, 254P485, 486 [cit CJ].

544-88 31Ariz478, 254P485, 486 [cit CJ]; 199Cal 90, 247P1088, 48ALR797; 25 OhNPNS135. [d] **In absence of showing that broker is unable to deliver stock** on demand and tender of amount due, or has no similar stock on hand, is not liable in conversion for transferring marginal stock repledged to them by transferees. 215AppDiv541, 241NYS193.

544-89 215AppDiv541, 214NYS193.

544-90 31Ariz478, 254P485, 486 [citCJ].

544-91 244NY168, 155NE88.

545-92 244NY168, 155NE88.

545-95 199Cal 90, 247P1088, 48ALR 797; 244NY168, 155NE88.

545-97½-New. Where a local broker, on the credit of bonds deposited with him, purchases other securities for his customer through a correspondent, and, pursuant to implied contract with his customer, pledges the same with his correspondent to secure his general indebtedness, the customer cannot repudiate the pledge on the ground that the bonds have been sold, and he is not indebted to the local brokers. 80CalA571, 252P 662.

545-97½-New. Where a local broker, having the right to repledge with its correspondent securities purchased for his customers, repledges such securities with his correspondent for an amount in excess of his customers' indebtedness to him, the correspondent is not liable to the customers where he did not know or have means of knowing of unlawful repledges. 80CalA571, 252P662.

545-97¼-New. Where securities purchased through a correspondent on the order of a broker were, with the consent of his customers, transferred to the account of a broker to whom he sold his business, the correspondent is entitled to hold them to secure the entire account of the purchaser of the business. 80CalA571, 252P662.

545-1 269US443, 46SCt152, 70Led352; 80CalA571, 252P662; 150Md416, 133A 610; NJSup 150A194(2dcase) (holding broker's hypothecation of purchaser's stock at bank was not conversion).

545-3 [e] **Broker must keep securities pledged** or others of same amount and kind with which to return pledge when debt is paid. 226Ky754, 11SW(2d)926.

545-5 253NY188, 170NE573 (sale of stock without customer's knowledge is conversion); BC [1930] 3DomLR145 (holding that, on sale of collateral and appropriation of proceeds, a debt immediately comes into existence).

545-6 But see 14PaDist&Co83. [b] (2) Insufficient notice. 14PaDist&Co 83.

546-7 226Ky754, 11SW(2d)926.

546-10½-New. The fact that a broker and customer had been engaged in bucketing transactions, in violation of statute, did not in itself render rehypothecation of securities deposited with the broker unlawful. 29F(2d)593.

546-10¼-New. Title of a customer to stocks pledged with a broker as collateral security for stock purchased on margin is not lost by permitting the broker to use, sell, or repledge the securities. 226Ky754, 11SW(2d)926.

546-10¼-New. After payment of debt to broker and of broker's debt to pledgee, customer, as against broker's bankruptcy trustee, is entitled to his collateral wrongfully pledged by broker. Ont [1930] 2DomLR127.

546-10½-New. Agreement authorizing sale of collateral without notice held not to extend to transactions following complete severance for two years of business relations between parties. 14 PaDist&Co83.

546-12 [e] **Relation of pledgor and pledgee** is created. 215AppDiv541, 214 NYS193. [f] **Broker to whom account including stock securing balance** is transferred by other broker is pledgee of stock. 215AppDiv541, 214NYS193. [g] **Agreement to open trading account creates no liability** until deposit of property thereunder. Cal 286P1041.

546-14 247NY479, 160NE921. [g] **Extension of line of credit** does not create liability for closing out which is beneficial to customer. Ala 127S673.

547-18 136Misc527, 241NYS495 (where customer is silent).

547-18½-New. The duty of broker who purchases stock for marginal account is to keep this stock, 215AppDiv541, 214 NYS193.

547-18¼-New. or like amount of similar stock in his possession, 215AppDiv 541, 214NYS193.

547-18¼-New. or, if he repledges same, not to do so otherwise than upon terms of immediate repossession upon tender of exact amount due to broker by customer. 215AppDiv541, 214NYS193.

547-18½-New. Broker may purchase such securities in his own name. 215 AppDiv541, 214NYS193.

547-18½-New. Even when binding agreement by broker to carry stocks on margin is broken by sale of stocks, customer is entitled to nominal damages only in event of his being able to purchase shares at approximately the price for which they were sold. 252Mass287, 147NE850.

547-18½-New. Rescission. Evidence sufficient to support rescission by plaintiff on the ground of ignorance and failure of defendant to give information. 118Kan221, 235P122.

547-18½-New. Stockholder's purchase of stock for customer on margin, or by advancing the entire price, creates relation of pledgor and pledgee. 130Misc 842, 225NYS525.

547-18½-New. Broker's purchase of stock on customer's order constitutes executed contract as respects the broker. 130Misc842, 225NYS525.

547-18 1/10-New. Stock exchange rules respecting the effect of a member's purchase of stock for others do not preclude a contract making a member an agent for his customer. 130Misc842, 225NYS525.

547-18 1/11-New. Broker's liability to customer for exchange specialist's refusal to accept customer's cancellation of order to buy stock. CalA 291P606.

547-19 220AppDiv423, 221NYS642; 8 PaDist&Co 579.

547-20 8PaDist&Co 579. [d] **Notice held sufficient.**-BC [1930] 4DomLR222.

547-21 247NY479, 160NE921. [b] (1) 137Misc363, 242NYS182. (2) After waiving right to close out customer's account without notice under such provision, broker cannot close out account without reasonable notice and opportunity to put up additional margin. 247 NY479, 160NE921. (3) Notifying customer of placing stop-loss orders and prices thereof held waiver of right to sell without notice under customer's agreement. 135Misc508, 239NYS129.

547-22 [a] 135Misc508, 239NYS129; 137Misc363, 242NYS182. [d] **That customer's certain stocks do go as low as stop loss orders** does not affect broker's liability for conversion. 135Misc 508, 239NYS129. [e] **Stockbroker sued for selling without notice** must rebut testimony of previous notices or show retraction of promise not to insist on right to sell without notice. 137Misc259, 241 NYS739.

548-23 220AppDiv423, 221NYS642; 135Misc764, 239NYS585. [c] **Statement by brokers' "customer's man"** that if additional money was required brokers would be heard from held not to change rights under agreement to sell without notice, consideration for alleged new agreement being lacking. 135Misc764, 239NYS585. [d] **Statement by employee of broker** that brokers would be heard

from if they wanted more money does not estop brokers from selling securities without notice. 135Misc764, 239 NYS585. [e] **Waiver of agreed provisions** held not shown. 135Misc764, 239 NYS585.

549-35 [c] **Agreements not authorizing purchase without notice or demand.** Agreement authorizing brokers to buy or sell "securities" without notice or demand does not authorize purchase of cotton futures to close out customer's account on short sale. 247NY479, 160 NE921.

549-36 200Cal192, 252P602; 90CalA 647, 266P565 (disregard of instructions in executing lense); 236 Ill489.

549-40 200Cal192, 252P602.

549-45 126Kan596.

549-46½-New. Realty brokers selling to a corporation, headed by one of their members without disclosure to the land owner, are held accountable for sale commission. 243NY139, 153NE303.

549-46½-New. but not for profits on resale. 243NY439, 154NE303.

549-46¼-New. A broker is entitled to reduce damages by regaining a contract where a broker is guilty of misrepresentation 129Misc237, 220NYS214.

549-46½-New. Counsel fees in procuring reassignment of a contract are not recoverable 129Misc237, 220NYS214.

549-46¾-New. A broker is liable for any loss sustained by the vendor and vendee by failure to pay an encumbrance where he accepted the money therefor and told the vendee that the property was unencumbered 159Tenn76, 168SW (2d)186.

550-47 236 Ill489; 135Misc508, 239 NYS429. See also 39GaA611, 147NE396; 14PaDistACo 83.

550-49 14PaDistACo 83.

550-51 236 Ill489, 253Pa441, 139A 571; Alta [1930] 3DomLR999.

551-53 [a] (2) 253Mass321, 148NE801.

551-59½-New. Where defendant secretly purchased for himself stock of a client which he pretended to sell to others, he is liable for the value of the shares as of the date of the repudiation of the transaction by the client. 70 Utah203, 259P318, 62ALR554.

551-59½-New. Broker purchasing stock for customer and tendering certificate within two weeks after order thereof could recover loss sustained on customer's refusal to accept. Conn 153 A66.

551-60 160La628, 107S170.

551-62 253Mass321, 148NE801.

552-64½-New. Where a broker failed to carry out an agreement to find a purchaser for a purchase money note received on the sale of land, the vendor may recover from him earnest money paid to him by the purchaser. TexCivA 283SW236.

552-64¾-New. Plaintiff may sue for purported real estate broker's deceit without tendering consideration received 115NE98, 139SE190.

552-64¾-New. An action for an accounting brought seven years after the last item of the account held barred by laches 32F(2d)81.

552-65½-New. Where a broker has made secret profit, the principal may affirm the transaction and recover the amount from the broker. NS [1929] 1 DomLR53.

552-66½-New. One holding legal title to land has right to sue real estate agent for breach of trust. MoA 248W (2d)708.

552-66½-New. Action against broker before breach or default of borrower in loan transaction held premature. CalA 291P[illegible]9.

552-66½-New. for breach of contract to obtain land for plaintiff at the lowest price at which it could be purchased. 37GaA776, 142SE175.

552-67 222AppDiv475, 226NYS532 (complaint sufficient against brokers for violation of duty to make complete disclosure).

552-68 160La628, 107S170.

552-69 200Cal192, 252P602; 125 Or 579, 267P824 (complaint held sufficient).

552-69½-New. or for failure to disclose material facts affecting solvency and re liability of defendant's successor as plaintiff's broker. 33GaA664, 127SE661.

552-70½-New. or to recover unlawful profits made in renting real estate. 47 Ida542, 277P554(2dcase).

552-70¾-New. or to recover commissions paid on the ground of the broker's misrepresentations. 47 Ida542, 277P554 (2dcase).

552-71 102CalA277, 282P959 (demurrer to complaint properly sustained for failure to allege that agreement to purchase was ratified by plaintiff vendors); 47 Ida542, 277P554(2dcase); Mo 298SW 756 (petition held to state cause of action); 213AppDiv760, 210NYS406 (complaint held to state cause of action for an accounting as against broker receiving money to invest for client). [a] **Effect of counterclaim for compensation.** TexCivA 283SW235.

552-71½-New. or for failing to discharge an encumbrance with a portion of the purchase price; 159Tenn76, 16 SW(2d)186 (bill stating sufficient cause of action).

552-72 Md 149A465 (allegations held insufficient to show duress).

552-74 30F(2d)671 (complaint held sufficient).

552-75½-New. A declaration in an action against a broker for failure to deliver stock held on margin may be on an account annexed as well as for money had and received. 253Mass321, 148 NE801.

552-75¾-New. , or for deceit causing loss of security. 115NE98, 139SE190.

552-76 [a] (2) Plaintiff's testimony in suit against brokers for balance of proceeds of sale that land was homestead for which plaintiff was not willing to take amount received has been held inadmissible under pleadings. TexCivA 283SW568.

553-78 [a] **Presumption of invalidity** when broker buys for amount less than offer received but not communicated. 47RI441, 133A805. [b] **Where brokers, if acting as agents, would be guilty of fraud,** it will not be presumed they acted as such rather than as principals. 136Misc301, 240NYS713.

553-79 35F(2d)624 (brokers sued for converting bonds had burden of showing good faith purchases and sales); 39GaA611, 147SE396, 220AppDiv123, 221NYS612, 226AppDiv563, 235NYS 405. [c] **Burden of establishing contractual relation between parties** is on plaintiff alleging such relation. 159La 189, 105S285. [f] **When broker buys property himself for lesser amount than an offer he had received** but not communicated to principal, burden of proof of good faith is on broker. 47RI441, 133A805.

553-80 [a] (1) 47 Ida542, 277P554(2d case), [b] 22F(2d)295 (rules of, and punishment by, stock exchange); 200 Cal192, 252P602, 47 Ida542, 277P554 (2dcase), 225Ky816, 108SW(2d)156, 60 ALR1374 (written contract for sale); MoA 290SW638.

553-81 CalA 291P606; 39GaA611, 147 SE396, 260Mass511, 157NE698, 125 Or579, 267P824. [a] (4) MoA 300SW 1014, 70Utah203, 259P318, 62ALR554. (25) 51SD190, 212NW869. (35) To sustain finding that owner's cancellation of earlier order to brokers to sell cotton was not received in time to enable brokers to cancel order. TexCivA 274SW 253. (36) To establish relation of principal and broker 115Kan547, 236P835. (37) To show fraud on part of broker. 115Kan547, 236P835; 51SD190, 212 NW869. (38) To authorize recovery of commissions paid and railroad fare. 82Colo156, 257P1075. (39) To sustain recovery against broker refusing delivery of stock held on margin. 253Mass 321, 148NE801. (40) To show relationship of parties. 143Wash347, 255P132. (41) To sustain finding that broker acted as agent for vendor in transaction whereby he purchased her property. 323 Ill527, 154NE444. (42) To sustain verdict for plaintiff claiming defendant broke agreement to procure title free from encumbrances except one assumed. 87 IndA360, 158NE596. (43) To establish fiduciary relation entitling principal to accounting. 329 Ill637, 161NE 118. (44) To show modification by verbal agreement. 329 Ill637, 161NE118. (45) Other evidence held sufficient. 49 RI358, 142A375. (46) To sustain findings that brokers were agents to exchange bank stock for apartment building and represented that they could not procure building for less than stated number of shares but acquired it for less number of shares and retained remainder. 82CalA525, 255P861. (47) To sustain recovery on theory that defendant brokers had contracted to carry customer so long as he had certain credit margin. 25F(2d)247. (48) To sustain finding that agreement between owner and broker regarding sale of lands was on maximum price basis. 32 F(2d)81. (49) To show that plaintiffs made their own decision after disclosure by broker. Mo 298SW756. (50) To support verdict for principal. MoA 13 SW(2d)578. (51) That agent received money unaccounted for and owner had not ratified his unauthorized payment. 179Minn312, 229NW132. (52) To sustain verdict for plaintiff for profits realized by real estate agent on resale of land. MoA 248W(2d)708. (53) To show fairness of transaction whereby broker with others purchased property. 340 Ill385, 172NE821. (54) To sustain finding of broker's false representations to employer. Minn 232NW5. (55) To sustain finding that principal was not damaged by broker's acts. CalA 293P 136. (56) Other instances. CalA 291P 606. [b] (12) To prove contract to protect account of plaintiff in certain stocks. 252Mass287, 147NE850. (13) To show defendant sued for conversion of money was broker of plaintiff. 159La189, 105 S285. (14) To support finding that reasonable market price of sugar was equal to or greater than price reported to plaintiff by broker. 215AppDiv617, 213 NYS468 (in action for damages for loss on sale of sugar because broker untruthfully reported sale). (15) To show brokers made secret profits on resale of customer's land. 141Wash345, 251P577. (16) To support finding that defendant gave orders to plaintiffs, his brokers, which they failed to execute. 221App Div128, 222NYS606. (17) To sustain finding that customer did not act in reasonable manner to protect account with cotton brokers after being notified that they would close it out. 247NY 479, 160NE921. (18) To sustain judgment ordering accounting. 97CalA43, 274P1006. (19) To support action for money had and received against broker. 97CalA171, 275P486. (20) To establish right to accounting. 32F(2d)81. (21) To warrant finding that defendants paid value for bonds sued for. 35F(2d)624. (22) To show loss to purchaser due to broker's negligence, where stock selling "ex-dividend" was represented as selling "cum-dividend." 198NC44, 150SE 618(1stcase). (23) To show plaintiff never gave broker telephonic order for purchase of wheat. Man [1930] 2DomLR984(2dcase). [c] **Existence of contractual relation between parties** must be established by preponderance. 159 La189, 105S285. [d] **Action is properly dismissed** on failure to establish basis of cause by preponderance of proof. 159La189, 105S285. [e] **Landowner, alleging secret profits** made by broker, must prove that profits on resale were secret. 141Wash345, 251P577.

554-84½-New. In an action against a broker to recover money received by him, the burden rests on defendant to show payment to plaintiff or disbursement for his use and benefit. 47 Ida 542, 277P554(2dcase).

554-85 31Ariz347, 253P626; 47 Ida 542, 277P554(2dcase); Minn 232NW6 (1stcase) (holding directing verdict erroneous); Mo 291SW131; MoA 248W (2d)708 (existence of agency at time defendant took conveyance and resold at profit); 129Misc232, 220NYS214; 283Pa511, 129A571. [a] (4) Whether printed sentence at head of statements rendered in fact represented agreement between parties. 220AppDiv423, 221NYS 642. [b] **Questions held for jury.**—135

Misc508, 239NYS129.

554–86½–New. Damages. Principal may recover from broker for fraudulently procuring contract amount of commissions paid to broker. 40GaA808, 151 SE531.

554–92 16F(2d)578, 588 [quotCJ]; 174 Ark818, 298SW204; 177Ark663, 7SW (2d)336; 106Conn205, 137A740; 90Fla 357, 106877; 243 IllA314; 200 Iowa983, 205NW742; 206 Iowa1225, 219NW419; 4LaA600; 254Mass142, 149NE615; 254 Mass363, 150NE93; Mo 298SW(2d)1112; 136 Okl 218, 277P269; 136 Okl 290, 277P 939; 86PaSuper590; TexCivA 296SW 625, 626 [quotCJ]; TexCivA 296SW678; TexCivA 32SW(2d)710; Utah 292P915; 151Va581, 144SE610; 35Wyo 452, 251P 1, 4 [quotCJ] 49ALR919. [a] 203Cal 459, 264P748; LaA 130S841; 49SD587, 207NW659 (oral offer by broker followed by written acceptance by owners). [g] (2) Other contracts construed. 215 Ky448, 285SW208; 236Mich683, 211NW 48. (3) Contract for commissions held one for sale rather than exchange. Utah 293P1. [l] TexCivA 281SW1106. [n] **Option to purchase** given to brokers does not give them right to brokerage fee on sale. 213Ky752, 281SW1034. [o] **Facts not sufficient to show employment.**–254 Mass363, 150NE93. [p] **Sale of property not listed with broker** entitles him to commission where he claimed general authorization and had previously been paid for any tracts sold. TexCivA 3 SW(2d)482. [q] **In absence of express contract of employment** recovery can be had only on implied contract. TexCivA 58W(2d)780. [r] **Agreement that broker submit lease to prospective lessee** and no other shows intent to have broker act on behalf of lessee and not owner. 27F(2d)314. [s] **Relationship of principal and agent must exist at very time of** performance of services. TexCivA 11 SW(2d)601. [t] **Listing of property with brokers to sell at net price** and to retain any sum received in excess thereof as commission held to constitute agreement to pay commission. 98CalA 671, 277P507; 98CalA797, 277P509(1st case). [u] **Contracts whereby parties separately listed properties are separate obligations,** as regards broker, although broker procured exchange contract between parties. TexCommnA 29SW(2d) 1024.

555–93 16F(2d)578, 588 [quotCJ]; 174 Ark818, 298SW204; 90Fla357, 106877 (in absence of express or implied promise to pay and circumstances negative idea of payment for services); Fla 129S 341; 254Mass142, 149NE615; 317Mo 465, 296SW86, 89 [quotCJ]; Mo 298W (2d)1112; 298Pa208, 148A109; Tex CivA 296SW625, 626 [quotCJ]; TexCivA 48W(2d)199; 192Wis330, 212NW671; 35Wyo 452, 251P1, 4 [quotCJ] 49ALR 919. [c] 7F(2d)70; 86CalA74, 260P298; 256Mass555, 152NE884, 47ALR852; 224 AppDiv41, 229NYS547.

555–95 254Mass268, 150NE63; 33 OhA 84, 168NE571 (where no services were rendered after promises to pay commissions). But see CalA 282P992; CalA 286P429. [a] (2) Vendor's agreement to pay additional sum for services of broker in effecting sale without additional consideration is unenforcible. Fla 130S 421. [b] **Agreement to pay additional commissions for lease if same is renewed** is supported by consideration. 126Mise 176, 212NYS685 (even though broker did nothing to induce renewal). [c] **Want of consideration for provision giving option** to buy is immaterial. TexCivA 32 SW(2d)710.

555–95½–New. In order to render a contract for commission actionable, the parties must have contemplated the assumption of legal rights and duties, and not the rendition of a gratuitous service on the part of broker. 27F(2d)314.

555–95⅓–New. Delivery of documents and papers obtained from foreign government held insufficient consideration for promise to pay commission. 252NY 192, 169NE274.

556–98 81CalA633, 254P676; NJSup 150A230 (contract construed); TexCivA 296SW678; 35Wyo 452, 251P1, 4 [quot CJ] 49ALR919. [a] (2) Other instances. TexCivA 30SW(2d)1060. [c] (2) 200Cal 348, 254P532. [e] **Terms upon which broker shall be entitled to commission** rests with parties. TexCivA 281 SW226. [f] **If lacking mutuality in its inception,** contract for commission in negotiating lease became binding after performance by broker. 27F(2d)314. [g] **Indorsements on back** of commission contract referred to therein are assumed only to extent specified over contract. Utah 293P1.

556–97 35Wyo 452, 251P1, 4 [quotCJ] 49ALR919. [a] (3) Mere naked authority to sell is not contract but only offer till accepted by performance. 116 OhSt 631, 157NE491.

556–98 82Colo 93, 257P262; NJSup 136 A599; 3NJMisc73, 130A151; 35Wyo 452, 251P1, 4 [quotCJ] 49ALR919. [a] (7) Agreement for sale of real estate, reciting that commission was to be paid agent in consideration of work thereafter to be done, is not based on valuable consideration, since option being gratuity, contract must be based on valuable consideration, and not merely on promise to do something thereafter, even though connected with subject of transaction. 28 OhA102, 162NE619.

556–98½–New. Under a contract whereby plaintiff was employed to deal in cotton for defendants and receive half of net profits, all transactions subject to defendants' approval, a transaction in which loss was sustained is not to be excluded from accounting because defendants did not follow plaintiff's advice. 252Mass492, 147NE854.

556–98¾–New. Under a contract which does not require principal to follow broker's advice, in an accounting of profits, amount actually realized on sale by principal acting in good faith, is basis for determining profits, not the amount which would have been realized if sale had been made when requested by broker. 252Mass492, 147NE854.

556–98¼–New. Written agreement in regard to division of profits containing substantially provisions of prior oral agreement was not rescission of oral agreement and did not require two accountings. 252Mass492, 147NE854.

556–98½–New. Under agreement providing that plaintiff was to have drawing account to be charged against his share of net profits, if any, he is not chargeable with amounts so drawn, if there were no net profits. 252Mass492, 147NE 854.

556–98¼–New. Use of word "option" does not necessarily import option to buy only. 216Ala645, 114S308.

556–99 CalA 289P857; 104Conn23, 131 A744 (when enforceable contract is entered into broker entitled to commission on implied contract); 205 Iowa809, 218 NW566, 567 [citCJ]; 249Mich594, 229 NW593; TexCivA 296SW678; 192Wis 330, 212NW671. [a] 17F(2d)22. [f] **Forbidding agent to show property.**–200 Iowa983, 205NW742. [g] **New contract may be implied.**–222MoA1044, 98W(2d) 676.

557–1 TexCivA 297SW287, 289 [quot CJ]. [a] (2) Contract for voluntary services of broker not implied unless vendor knows or has reason to believe services rendered with expectation of receiving payment. 90Fla357, 106877.

557–2 [a] (1) 255Mass459, 152NE351. [c] **General listing** does not constitute contract. 103Conn708, 131A497.

557–3 174Ark818, 298SW204. [a] **Knowledge or grounds to believe** that compensation is expected is necessary. Mo 298W(2d)1112.

557–4 136 Okl 290, 277P939; 192Wis 330, 212NW671. [a] **Where owner is justified in believing that broker is purchaser or represents purchaser,** no promise to pay for services voluntarily rendered will be implied. Mo 298W(2d) 1112.

558–5 35Wyo 452, 251P1, 4 [quotCJ entire section] 49ALR919.

558–6½–New. , or which is expressly agreed to be gratuitous. 236 IllA607.

558–6⅓–New. A broker seeking to recover commissions for procuring a purchaser for real estate under an implied contract must show that services were rendered under the belief, reasonably induced by the owner's conduct, that a request had been made of him by the owner, or under such circumstances as indicated that he expected to be paid and that the owner availed himself of the services knowing the circumstances. 136 Okl 290, 277P939.

558–8 176Ark315, 38W(2d)964; 177Ark 663, 7SW(2d)336. 179Ark657, 17SW (2d)865 (contract to find purchaser for land); 222Ky602, 18W(2d)1054; 145 Miss815, 111S302; 144 Okl 51, 289P352 (2dcase); TexCivA 38W(2d)482 (though sale was consummated more than one year after property was listed with broker). But see 332 Ill 334, 163NE662. [a] **Notice before actual sale is necessary** to charge principal. 104NJL21, 138A702. [b] **Construction of parol agreement.**–Ala 130S211.

558–9 29Ariz383, 241P957; 205Cal 569, 271P1087; 72CalA497, 238P136; 83 CalA616, 257P150; 91CalA538, 267P112; 93CalA577, 269P948 (under Civ. Code § 1624 or Code Civ. Proc § 1973); 45 Ida 327, 362P148; IndA 168NE40 (applies to contract to pay commission for sale of land and not terms of sale); 239Mich 663, 215NW8; 73Mont456, 236P1093; 79Mont292, 256P173; 82Mont393, 267P 296; 102NJL515, 133A70; NJSup 138A 113; 25 OhA130, 157NE398; 116 OhSt 631, 157NE491; 32 OhA192, 165NE592 (1stcase); 32 OhA59, 167NE598; 30 OhA 100, 164NE367; 33 OhA84, 168NE571; 27 OhNPNS115, 27 OhNPNS400 (statute applied to broker employed by purchaser); Utah 293P12; 142Wash630, 253P 1074; 143Wash204, 255P101; 145Wash 277, 259P878; 153Wash54, 279P80; 153 Wash286, 279P745; 194Wis271, 215NW 227, 55ALR780. [a] (2) Object is to protect owners from unfounded claims of brokers. 68CalA538, 229P883. [b] (9) In New York, Pen. L. § 2039, making it a misdemeanor for any one to apply for a loan on real property without written authority of the owner, is unconstitutional. 125Misc825, 211NYS578. [e] (1) See also 135Wash583, 238P899. [f] **Statute does not prevent allowance to broker for services necessary** and beneficial to estate, though agreement not in writing. 98NJEq477, 131A389. [g] **Partial invalidity.**–TexCivA 281SW1106. [h] **Written recognition of authority** together with statement of person to be paid and sum due, etc., is sufficient. NJ Cir 143A84. [i] **In New Jersey.**–105NJL 424, 144A802. [j] **Salesman employed by broker** need not have written authority from him to enable such broker to take advantage of salesman's services. 102CalA136, 282P539. [k] **Part or complete performance insufficient to take oral contract out of statute.**–Ariz 292P 1097.

559–10 81CalA409, 254P272; 30 OhA 97, 164NE365; 30 OhA100, 164NE367 (doctrine of unjust enrichment held not applicable); 26 OhNPNS401; 194Wis 271, 215NW227, 55ALR780.

559–12 29Ariz383, 241P957. But see 97 CalA707, 276P153.

559–12½–New. An agent cannot recover on the ground that the statute did not apply because he did not complete the negotiations. 81CalA409, 254P272.

559–13 29Ariz383, 241P957. [a] 119 OhSt338, 164NE353 (before execution, either party could decline to carry out terms); 26 OhNPNS401. [d] **Statute held not applicable** to contract with one not owner of land. 104NJL209, 141A14. [e] **Typewritten or handwritten addendum attached to contract** relating to commissions controls over printed provision, where they are repugnant. Md 151A44.

559–14 145Wash277, 259P878.

559–15 NJ 145A635(2dcase); 145Wash 277, 259P878; 196Wis310, 220NW174 (expenditure of money by broker for abstracts). [a] (7) 102NJL408, 132A 333. (8) 104NJL158, 138A889. (9) To sale of oil and gas lease. 158La175, 103 S730 (not "real estate" or immovables by nature within statute). (10) One employed to take purchaser to timber and back, survey corners, and cruise timber. 145Wash277, 259P878. (11) Contract between brokers for division of commissions. 195Wis433, 218NW 817. (12) Where part of commissions were to be paid at time of execution of

lease and balance in event options were exercised. 134Misc313, 235NYS297. (13) Sale of easement. 154Wash83, 280 P929. [b] (2) Statute requiring written authority for sale or purchase of real estate does not apply to sale of lease for years. 135Wash583, 238P899. [f] **Person disclosing timberlands and aiding in survey and cruise of timber** is broker and not employee of purchaser. 142Wash630, 253P1074. [g] **In Ohio.**–31 OhA67, 166NE384; 121 OhSt 1, 166NE804, 64ALR1421.

560–16 But see 105NJL367, 144A545.

560–17 105NJL427, 144A796; 30 OhA 225, 164NE778. But see 31 OhA63, 166 NE382.

560–17½–New. Three-year-old broker's contract cannot be considered with unambiguous and complete present writing not referring thereto. 144Wash101, 256P1031.

560–17⅓–New. Particular statutes construed. 79Mont292, 256P173; 25 OhA 130, 157NE398.

560–18 68CalA538, 229P883 (not required that memorandum should so bind principal as to support action for specific performance). [b] (1) 203Cal 17, 262P751; 96CalA306, 273P1114; 96 CalA772, 274P1024; 37GaA656, 141SE 332; IndA 165NE252; 82Mont393, 267 P296; NJSup 132A328; NJCir 143A84; 35 OhA519, 172NE634; 128 Or668, 275P 682. (4) Agreement to pay commissions incorporated in contract of purchase and sale, though not executed by broker. 82 IndA200, 145NE579. [c] (1) 92CalA1, 267P719; 37GaA591, 141 SE88 (consideration not set out with sufficient certainty); 79Mont292, 256P 173; 144Wash101, 256P1031; Wash 291P342. (5) Offer to purchase property to which owner affixed his acceptance, under which terms of sale were conditioned on signing future contract, held not such formal contract of sale as entitled broker to commission. 152 Va460, 147SE203. [f] **Where agents fully performed contract** for sale of lots, contract will not be held invalid for lack of definite terms. 246Mich96, 224NW 420.

560–20 79Mont292, 256P173; 104NJL 1, 139A796; SD 233NW281; TexCivA 288SW270; TexCivA 12SW(2d)829(1st case).

560–20½–New. A recital in a receipt to vendee for a deposit containing the name of the broker and the amount of commissions due him, signed by the vendors, is held sufficient to satisfy statute. NJSup 132A328.

560–21 245Mich192, 222NW103. [a] (4) Writing authorizing agent to sell "property described on reverse side of this card" is sufficiently signed where principal signed at end of face side. 235Ky643, 32SW(2d)39.

560–22 68CalA538, 229P883 (defects or ambiguities in description of property are not fatal when curable by proof of extrinsic facts and circumstances); 92 CalA178, 267P898 (description held sufficient); 98CalA53, 276P607; 3NJMisc 996, 130A456; 143Wash204, 255P101; 144Wash101, 256P1031; 154Wash396, 282P377 (description sufficient as to location shown by letterhead). See also 29Ariz383, 241P957.

561–24 248Mich199, 226NW820 (agreement contained in offer to sell held sufficient). [a] **Failure to state time of payment** does not render promise to pay for past services unenforceable. 81 Cal 633, 254P676.

561–25 96CalA306, 273P1114 (amount of broker's compensation and agreement to pay may be shown by parol where authorization is in writing); 3NJMisc 996, 130A456. [b] **Provision for "regular brokerage commission"** held not to support action for commission. NJ 138 A513. [c] **Contract providing basis on which commission may be definitely computed** is sufficient. 195Wis64, 217 NW702 (contract for commissions naming definite sale price or any other price which principal might authorize).

561–25½–New. Greater liberality is allowed in construing and curing defective descriptions in a broker's contract than in a deed IndA 165NE252.

561–27 203Cal17, 262P751; 81CalA 633, 254P676; Wash 291P342. [a] (2) Parol contract to pay broker's commission, unenforceable under statute, may become, under certain circumstances, sufficient consideration to support subsequent written agreement. 153Wash 254, 279P575.

561–29 102CalA136, 282P539. See also 171Minn44, 213NW58; 36Wyo 37, 253P 17. [f] 151Wash1, 274P722.

561–30 But see 222MoA1044, 98SW(2d) 676; SD 224NW949. [b] (2) Where owner made contract for exchange of land without knowledge that brokers employed by her brother had anything to do with procuring purchaser, her subsequent promise to pay them or see that they were paid is not ratification of their employment by brother. SD 224NW949.

562–31 217Ala27, 114S409; TexCivA 287SW1109 [citCJ].

562–32 98CalA53, 276P607 (oral authorization by husband of wife's signature for him is ineffective).

562–35 199 Ind126, 155NE551; 216 AppDiv487, 215NYS505; 136Wash554, 240P913. See also 217Ala27, 114S409. [c] **Written contract with proviso for written notice** for cancellation can be canceled by subsequent verbal agreement. LaA 129S461.

562–36 See also TexCivA 15SW(2d) 1072.

562–37½–New. Alteration of contract as to commissions by parties to transaction not binding on brokers who were not parties thereto. 125Misc892, 211 NYS647.

562–37⅓–New. Broker may waive right to commissions in consideration of reduction of purchase price. MoA 26 SW(2d)1020.

562–37¼–New. Vendor and purchaser cannot without broker's consent, defer time of payment of commissions fixed by contract. TexCivA 31SW(2d)663.

562–39 217Ala27, 114S409; 225Ky198, 7SW(2d)1040; 227Ky407, 15SW(2d) 240; 252NY192, 169NE274; Va 153SE 727. But see TexCivA 272SW604. [a] (6) **Oral waiver of commissions** in excess of specified amount of price held not abandonment of contract. 78Mont 228, 253P257. [c] **Intent necessary element** of abandonment by broker of his agency. TexCommnA 282SW798.

563–41 216Ala645, 114S308; 217Ala27, 114S409; CalA 274P374; 97CalA426, 275P992; 38GaA760, 145SE534; 229 Ky655, 17SW(2d)731; 154Md290, 141A 363; 255Mass459, 152NE351; 256Mass 555, 152NE884, 47ALR852; 257Mass 563, 154NE84; 259Mass437, 156NE711; 265Mass143, 164NE72; Mass 173NE503 (terms of contract not settled); MoA 291SW190; 28 OhA102, 162NE619; TexCivA 11SW(2d)601; TexCivA 25 SW(2d)237; TexCivA 30SW(2d)685. See also 9LaA655, 121S656. [b] **Contract, giving broker exclusive right to sell property** for three months, and thereafter until sixty days' written notice was given, was terminated sixty days after notice given during the first three months, where the three months' period had expired at end of such sixty days. 227Ky813, 14SW(2d)140.

563–43 216Ala645, 114S308 (holding profits immaterial); 227Ky813, 14SW (2d)140; 174Minn127, 218NW462. [a] **Unless notice of revocation mailed** brokers are entitled to commission under exclusive listing contract. 129Misc230, 220NYS213.

563–44 216Ala645, 114S308; Man [1926] 4DomLR50.

563–44½–New. Contract construed so that right to withdraw offer by principal refers only to particular offer. 216AppDiv305, 214NYS580 (not subsequent offers).

563–45 217Ala27, 114S409; 68CalA583, 229P880 (contract providing for termination on ten days' notice); 96CalA 772, 274P1024; TexCivA 25SW(2d)237; TexCivA 25SW(2d)700 (letter held sufficient to terminate listing made for leasing property). [d] **Notice by owners to purchasers** found by broker of revocation of broker's authority has been held not notice to broker so as to revoke authority. TexCivA 25SW(2d) 237.

564–46 216Ala645, 114S308; 217Ala27, 114S409; 23AlaA498, 127S786; 207Cal 747, 279P781; 111Conn493, 150A690; 37GaA1, 138SE859; 39GaA217, 146SE 795; TexCivA 25SW(2d)237.

564–46½–New. If principal interferes with operations of a broker under a contract undefined in duration, to find a purchaser at a specific sum and prevents the procurement of the purchaser, he is liable for commissions. 147Va1019, 133 SE495.

564–47 216Ala645, 114S308; 255Mass 459, 152NE351. See also 91CalA435, 267P110; 111Conn493, 150A690.

564–47½–New. To be guilty of bad faith, in revoking offer, owner must have profited by broker's exertion. 255 Mass459, 152NE351.

564–48 216Ala645, 114S308, 315 [cit CJ]; 255Mass459, 152NE351.

565–49 37GaA1, 138SE859 (notice of revocation is not required after lapse of reasonable time); 225Ky198, 7SW (2d)1040; 255Mass459, 152NE351; 256 Mass555, 152NE884, 47ALR852; 262 Mass60, 159NE497; Mass 173NE503.

565–50 216Ala645, 114S308, 315 [cit CJ]; 235Ky643, 32SW(2d)39; 5LaA77, 80 [citCJ]. But see 96CalA121, 273P 859.

565–52 Ala 127S841; 196Cal 236, 237 P38 (contract by three brokers is void in entirety if one has no license); Cal 293P40; 72CalA249, 236P968; 75CalA 765, 242P90; 81CalA23, 253P770 (one not employed by broker but completing transaction begun while employed as salesman for another broker); 83CalA 616, 257P150; CalA 291P418; 40GaA 199, 149SE179; 168Ga759, 149SE180; 41GaA150, 152SE275; 233 IllA130; 8 LaA411; 243NY113, 152NE693; 217 AppDiv333, 216NYS710; 224AppDiv16, 229NYS883; 125Misc822, 211NYS569; 125Misc823, 211NYS616; 87PaSuper 282; 89PaSuper521; 90PaSuper165; 144Wash88, 256P1030; 153Wash286, 279P745 (applies to owner's own property); 194Wis298, 216NW502; 197Wis 622, 222NW807; Wis 231NW626. [d] (1) 129Misc800, 222NYS721. [e] **In New York.**–125Misc823, 211NYS616; 214AppDiv659, 212NYS728; 217AppDiv 333, 216NYS710. [f] **In dispute between two persons as to who should get commission** (1) failure of one to procure license not available to other. 285Pa 199, 131A700. (2) President of licensed corporation is authorized by corporate license to conduct business of real estate broker either as such president or as individual. 202Cal569, 262P297. [g] **Under California Real Estate Brokers' Act** employer is chargeable with notice as to whether his salesman is licensed and can conduct no business through unlicensed salesman. 72CalA 249, 236P968. [h] **Broker cannot recover commissions** for sales by unlicensed salesman in his employ. 72CalA 249, 236P968. [i] **Failure of one of two brokers to procure license.**–75CalA765, 242P90. [j] **What is a real estate broker.**–144Wash88, 256P1030. [k] **Delay of state in issuing license** held no bar to recovery. 236 IllA254. [l] **Validity of license cannot be collaterally attacked** in action to recover commissions. 241Mich642, 217NW916. [m] **Holder of real estate salesman's license** may recover commission for services rendered to another broker than one employing him. 96CalA137, 273P600 (1stcase). [n] **In Louisiana statute prevents** recovery of commission by real estate salesman for exchanging property from any person except licensed real estate broker. 167LaA218, 119S26(2d case). [o] **Director acting as broker in sale of realty of corporation** is within provision of act requiring license. 203Cal264, 263P520, 56ALR476. [p] **Sale of realty through "efforts" of agent** comes under statute requiring license for negotiation of sale of realty. CalA 286P429. [q] **Assistance of third party not licensed** does not preclude broker from recovering commission. 13LaA 596, 126S449. [r] **In New York.**–136 Misc132, 239NYS54. [s] **Contract made and performed within another state** is not within application of statute. 48

Ida97, 279P613. [t] **Where only one partner is licensed**, real estate partnership cannot recover commissions for sales made by unlicensed partner. 40 **GaA**371, 149**SE**808. [u] **Statute requiring real estate broker's license** is applicable, though transaction contemplates other than real estate as additional collateral for loan. 135**Misc**241, 237**NYS** 450.

565–53 Cal 293P40; 87**CalA**414, 262P 400 (license obtained prior to consummation of escrow held sufficient); **CalA** 282P992; **CalA** 286P429 (possession of license when commission earned and payable); **CalA** 291P418; 247 **IllA**147; 251**NY**305, 167**NE**452; 254**NY**325, 172 **NE**523; 125**Misc**822, 211**NYS**569; 85**Pa Super**552; 87**PaSuper**282; 89**PaSuper** 521; 90**PaSuper**165; 93**PaSuper**158; 97**PaSuper**595. [a] (3) Plaintiff held not entitled to maintain action for commissions as broker for negotiating sale of property, where securing license only seven days before contract was signed, since no presumption rises that commission is due when contract is executed. 251**NY**305, 167**NE**452. [b] (2) Expiration of license of insurance broker before expiration date of policy is held not to deprive him of commission earned. **TexCivA** 289**SW**1026. [c] **License procured before actual sale** satisfied requirement. 285**Pa**199, 131**A**700 (though broker had no license during negotiations). [d] **Where broker is duly licensed at time commission is earned and is payable**, he may recover commission, although he had no license at time contract was made. 75**CalA**765, 242P90. [e] **As applied to cases** statutes requiring licenses from one leasing or offering to lease real property for another for compensation as whole or partial vocation contemplate leases only for ordinary purposes. 162**La**1048, 111 **S**416. [f] **Where license is revoked** before broker enters into contract for commission and pending appeal from order of revocation, he cannot recover on contract. 202**Cal** 760, 262P735.

566–54 15**F(2d)**942; 233 **IllA**116; 239 **Mich**663, 216**NW**8; 141**Miss**849, 105**S** 760 [citCJ]; 78**Mont**228, 253P257; 104 **NJL**158, 138**A**889; 33**NM**654, 275P98. Contra 196**Cal** 236, 237P38. [a] (1) 233 **IllA**116; 245 **IllA**600. (3) Sale of timber does not require licensed real estate broker. 164**La**46, 113**S**759. [c] **In California.**–196**Cal** 236, 237P38; 75**CalA** 765, 242P90.

566–55 89**PaSuper**408 (must prove contract and rate). [a] **Employee not broker.**–86**Colo** 454, 282P878.

566–56 36**GaA**450, 136**SE**798 (stocks); **NJSup** 132A241; 225**AppDiv**675, 231 **NYS**215.

566–57 36**GaA**450, 136**SE**798.

566–57½–New. Where several persons are employed jointly to purchase real estate and obtain a loan thereon and one of them has no license, the contract is void in its entirety. 196**Cal** 236, 237P38.

566–57⅓–New. One not a real estate salesman within the statutory definition cannot recover even though a promise to pay commissions as such was contained in a contract between the principals to an exchange agreement and the seller was not claiming commission as part of the consideration. 81**CalA** 23, 253P770.

566–57¼–New. Retention of commission fairly earned by a real estate broker having no license is not inequitable and he is under no quasi-contractual obligation to return it. 47 **Ida**542, 277P554 (2dcase).

566–57⅓–New. An agreement of a real estate agent to divide commission with one if he introduces a purchaser is enforceable although the party introducing the customer is not a licensed broker. 11**LaA**582, 123**S**340.

566–59 5**LaA**548. But see **BC** [1928] 4**DomLR**220. [c] **Plaintiff procuring employment of defendant to conduct auction sale** of realty in return of half of commissions is held not to require a license. 218**AppDiv**385, 218**NYS**259.

566–60 167**La**218, 119**S**26(2dcase).

566–62 77**CalA**201, 246P163; 89**CalA** 521, 264P1112; 214**Ky**653, 283**SW**997; 22**AltaL**333, [1927] 1**DomLR**547, [1927] 1**WestWkly**12.

566–63 215**Ala**650, 112**S**232, 53**ALR**134; 31**Ariz**519, 255P164; 170**Ark**519, 280**SW** 5; 77**CalA**201, 246P163; 47 **Ida**542, 277 P554(2dcase); 121**Kan**724, 250P330; 127**Kan**688, 275P160 (evidence held insufficient to show fraud); 214**Ky**653, 283**SW**997; **Minn** 232**NW**5; **MoA** 10**SW** (2d)342, 343 [citCJ]; 294**Pa**464, 144**A** 404; 49**RI** 128, 140**A**916; **TexCivA** 283 **SW**319, 322 [citCJ]. [f] **Failure to secure best possible rental** for property is not conclusive evidence of bad faith. 47 **Ida**542, 277P554(2dcase). [g] **Where brokers secured second listing of realty for smaller net price**, without informing principals of purchasers' agreement to pay commission, they committed fraud depriving them of right of commission. 98**CalA**671, 277P507; 98**CalA**797, 277P 509(1stcase).

567–64 215**Ala**650, 112**S**232, 53**ALR** 134; 170**Ark**519, 280**SW**5; 255 **IllA**35; 214**Ky**653, 283**SW**997; 87**PaSuper**479; 49**RI** 128, 140**A**916.

567–65 31**Ariz**519, 255P164; 170**Ark** 519, 280**SW**5; **CalA** 274P374; **GaA** 155 **SE**65(2dcase); 214**Ky**653, 283**SW**997; 174**Minn**115, 218**NW**464; **NJSup** 145**A** 467; 125**Misc**828, 211**NYS**614; 49**RI** 128, 140**A**916; **TexCivA** 283**SW**319, 322 [citCJ]. But see 205**Cal** 771, 272P1049. [d] **Loyalty to interests of his principal** is essential requisite to agent's right to recover commissions from principal. 102**NJL**196, 130**A**665. [e] **Ratification after knowledge of fraud.**–**MoA** 21**SW** (2d)214 [citCJ].

567–66 91**CalA**165, 266P829 (telling purchaser to take possession after contract was signed without waiting for consummation); 214**Ky**653, 283**SW**997; 50**RI** 221, 146**A**639. [d] **Overstatement of authorized price to purchaser** does not show bad faith to principal. 50**RI** 221, 146**A**639. [e] **Broker's statements as to value** held mere expressions of opinion not authorizing setting off damages against commission for fraud. 248 **Mich**397, 227**NW**537(1stcase). [f] **Refusal to coöperate with principal in effort wrongfully to effectuate forfeiture of lease** does not deprive broker of right to commission on sale of land. **MoA** 32**SW** (2d)103.

567–66½–New. To defeat the broker's right to commissions on the ground of false representations it is not necessary that loss should have resulted to principal. 70**CalA**415, 233P366.

568–67 215**Ala**650, 112**S**232, 53**ALR** 134; 88**CalA**418, 263P568.

568–67 214**Ky**653, 283**SW**997.

568–67½–New. False representations of broker do not prevent recovery for commissions regardless of whether such representations resulted in injury. 140 **Wash**650, 250P59.

568–71 216**Ala**645, 114**S**308; 77**CalA**201, 246P163; 90**CalA**647, 266P565; 47 **Ida** 542, 277P554(2dcase); 214**Ky**653, 283 **SW**997. [c] **Broker's return of deposit to vendee** is held not free of fraud. 77 **CalA**201, 246P163.

568–72 241**Mich**642, 217**NW**916 (misrepresentations by purchaser as to financial condition).

568–75½–New. A real estate broker does not abandon his employment or forfeit his right to commissions by insistence upon the inclusion in a contract of exchange of a provision for payment of commission and by declining to proceed further unless such provision is included where the trade is not prevented thereby but merely jeopardized and delayed for one day. 31 **NM**571, 248P883.

568–75⅓–New. Where other parties were merely to exchange equities, broker's misrepresentations as to title did not affect his commission. **Mich** 233**NW** 356.

568–77 88**CalA**418, 263P568; 40**GaA** 573, 150**SE**470 (purchaser's broker, agreeing to allow principal to negotiate with owner for lower price, forfeits his commission by communicating with owner); **Mass** 166**NE**623; **Mo** 298**W** (2d)1112; 105 **Okl** 52, 233P179; 292 **Pa**256, 141**A**39; 88**PaSuper**258; **RI** 131 **A**200; **TexCivA** 289**SW**189; **TexCivA** 78**W(2d)**601; **TexCivA** 13**SW(2d)**936. But see 96**CalA**121, 273P859. [e] (3) Broker merely acting as go-between for parties and not guilty of fraud or deception may recover commission from vendor. 250**Mich**342, 230**NW**147.

569–78 Mich 233**NW**356.

569–79 217**Ala**432, 116**S**520; 222**Ky**602, 1**SW(2d)**1054; **Mich** 233**NW**356; 49**ND** 687, 193**NW**51; 292**Pa**256, 141**A**39; **Tex CommnA** 292**SW**195; **TexCivA** 289**SW** 189; **TexCivA** 291**SW**639.

570–82 Iowa 233**NW**106 (competing lessors).

570–83½–New. A sale to relatives of a broker does not preclude recovery of compensation. **SD** 226**NW**948.

570–85 227**Ky**79, 11**SW(2d)**988; 237 **Mich**627, 213**NW**156; 99**NJEq**390, 132**A** 110; 105 **Okl** 52, 233P179; 88**PaSuper** 57 (broker selling to his wife); **Tex CivA** 283**SW**319, 322 [citCJ]. Contra. 323 **Ill** 527, 154**NE**444.

571–86 47 **Ida**542, 277P554(2dcase); **TexCivA** 283**SW**319.

571–86½–New. A broker is not accountable for profits on a resale although he acted without full disclosure of the facts to his principal. 243**NY**439, 154**NE**303.

571–87 313**Mo** 426, 285**SW**407. But see 96**CalA**121, 273P859. Contra 323 **Ill** 527, 154**NE**444.

571–89 195**Wis**433, 218**NW**817 (where purchaser's agent waived commissions from purchaser).

571–91 200 **Iowa**853, 205**NW**538.

571–92½–New. Statutes, prohibiting splitting of commissions with unlicensed brokers or salesmen must be given a reasonable and fair construction. 240 **NY**424, 148**NE**623.

571–92⅓–New. Such statute has no effect on transactions occurring before statute requiring license was in effect. 240**NY**424, 148**NE**623.

571–92¼–New. Defendant purchasing property for himself under agreement for division of commissions between plaintiff and defendant, must account for his half to plaintiff. **TexCivA** 26 **SW(2d)**687.

572–93 154**Miss**265, 122**S**200.

572–94 9**LaA**346, 119**S**292.

572–96 33**PortoRico** 621.

572–97 [d] **Broker employed to purchase land** may, after employer's repudiation, recover profits he would have earned. **TexCivA** 297**SW**339.

572–3 249**NY**31, 162**NE**575; 132**Misc** 520, 230**NYS**218; 49**ND**687, 193**NW**51 (may recover losses sustained by principal's breach of warranty of quality). But see 136**Misc**369, 240**NYS**83. [d] **Expenses of litigation** may not be recovered in some cases. 43**F(2d)**589. [f] (3) Contract requiring payment of one half of expenses of stock sales as far as commissions will go construed. **LaA** 130**S**362.

575–22½–New. Contract may provide for payment by client of reasonable attorney's fees. 13**LaA**596, 126**S**449 (ten per cent held reasonable).

575–25 217**Ala**27, 114**S**409; **Ariz** 285**P** 277; 104**Conn**744, 133**A**586; 200 **Iowa** 983, 205**NW**742; 151**Miss**563, 118**S**609 (2dcase); 92**PaSuper**398; **TexCommnA** 27**SW(2d)**142; **TexCivA** 25**SW(2d)**700; 152**Va**827, 148**SE**689. But see 168**La**235, 121**S**755. [c] **Where contract provides for commission on sale through "any person,"** broker is not entitled to commission on sale by owner for less than minimum price fixed by contract. **Ont** [1929] 3**DomLR**360.

576–26 [b] **Bad faith not shown.**–**Tex CivA** 26**SW(2d)**705.

576–31 NJSup 138**A**201; **TexCivA** 16 **SW(2d)**880.

576–32 But see 10**LaA**732, 121**S**687(2dcase).

577–33 250**Mich**342, 230**NW**147; 151 **Miss**382, 118**S**199; 300**Pa**574, 151**A**360; 49**SD**506, 207**NW**478; 103**WVa**329, 137 **SE**362.

577–34 103**WVa**329, 137**SE**362.

577–35 AlaA 130**S**171(2dcase); 203 **Cal** 231, 263P530; 224**Ky**343, 6**SW(2d)** 273; 160**La**465, 107**S**307; 234**Mich**331, 207**NW**895; 151**Miss**382, 118**S**199; **Tex CivA** 18**W(2d)**453; **TexCivA** 22**SW(2d)** 720.

578–36 Iowa 228**NW**45; 224**Ky**343, 6 **SW(2d)**273; 232**Mich**41, 204**NW**710; 234**Mich**331, 207**NW**895; **TexCivA** 297 **SW**339.

578–38 See also 98**CalA**671, 277P507;

CalA 277P509(1stcase).

578–40 218Ala447, 118S665; 102CalA 384, 282P979; CalA 285P1048(2dcase) (statute fixing damages has been held inapplicable in broker's action for commissions); CalA 288P1089 (owner's agreement in reduction of liability for commission held supported by consideration); 245 IllA586; 10LaA250, 120S 773; 170La143, 127S393; 12LaA55, 125 S194(2dcase); LaA 130S841; Md 151A 44 (attached rider held "special agreement"); 238Mich617, 214NW179; 174 Minn127, 218NW462; 225AppDiv270, 232NY625; 92PaSuper401; TexCivA 10SW(2d)201; 153Va591, 151SE146 (sale of interest of part of heirs entitles agent to only part of commissions). Wash 287P209. See 28 OhA46, 162NE 437. [e] **Owner making sale during term of agreement giving broker exclusive agency** is estopped to claim any reduction from agreed commission because property was sold at reduced price. TexCivA 281SW301. [f] **Attorney's fees** are chargeable against owner when suit is necessary to collect. 10 LaA136, 121S194. [g] **Broker was not entitled to commissions on further leases** entered into after exercise of renewal option by reason of employment to which first lease was obtained. 134Misc313, 235NYS297. [h] **Acquiescence in claim for increased commission not shown.**–170La143, 127S393. [i] **Events transpiring after sale** do not affect interpretation of contract. 170La143, 127S393.

579–41 254NY374, 173NE228.

579–42 [b] **Contract having provision for attorney's fees in event of suit.**–Attorney's fees, in action to recover commission on brokerage contract, held reasonable. 12LaA203, 123S389.

579–44½–New. Where the agreed compensation is a percentage of the price received over a stipulated sum and includes compensation for a prior sale, a breach by the owner in making a sale independently of the broker does not entitle the broker to rescind and recover the commissions contracted to be paid on the first sale nor commissions at the customary rate on the price obtained on the subsequent sale. 35GaA122, 132 SE393.

579–45 216Ala645, 114S308; 147Miss 621, 111S743; 78Mont228, 253P257; Mont 288P1021; 85PaSuper525; Tex CivA 272SW604 (percentage of cash paid and indebtedness assumed); 193Wis554, 214NW394; NB [1925] 3DomLR797 (though price did not net vendor minimum stipulated by him). But see 147 Wash101, 265P462. [b] **Where sale is made by one not realty broker,** there is no legal presumption that he is not entitled to usual compensation of real estate brokers. 35F(2d)563.

579–46 245NY522, 157NE842.

579–47 218AppDiv11, 216NYS305. [c] **Not a usury statute** so as to prevent corporation from pleading it as defense in suit for commission. 218AppDiv11, 216 NYS305. [d] **Constitutionality.**–218App Div11, 216NYS305.

580–48 81CalA356, 253P750; 87CalA 720, 262P431(1stcase) (recovery in suit by broker's assignee); 102CalA384, 282 P979; CalA 285P1048(2dcase); 119 Kan394, 239P1106.

580–49 174Ark682, 297SW839; 96CalA 306, 273P1114; 146Miss758, 111S867; 131 Okl 299, 269P243; TexCivA 27SW (2d)851. [c] (3) Five hundred dollars commission held not excessive where net to owner is fourteen thousand dollars. MoA 2SW(2d)178, 180 [citCJ]. [e] **Where owner refused to agree to amount but said he would pay broker well,** contract is one to pay agent what his services are reasonably worth. 224 IllA35.

580–50 245 IllA586; 254Mass464, 150 NE220; TexCivA 290SW261, 263 [quot CJ]; 188Wis200, 205NW798.

581–52 236 IllA607; 243 IllA157; Tex CivA 293SW296.

581–53½–New. A broker's contract for the sale of land at a stated sum per acre "net" does not necessarily mean that no commission is to be paid if land is not sold for a greater price than the sum stated. 70CalA351, 233P350.

581–54 233Mich64, 206NW313; Mo 298 SW756; 90PaSuper443; TexCivA 293 SW296; 195Wis99, 217NW650 (owner is not entitled to benefit of sums received in excess of net price without paying broker anything for his service). [b] (2) Contra NJSup 132A481. (4) Broker is not entitled to commission where sale is not consummated for defective title. 140 Okl 198, 282P357.

581–55 175Ark580, 299SW1006 (profit must be determinable); 179Ark533, 17 SW(2d)319; 90PaSuper443.

581–55½–New. Where a broker secures a lease under an agreement that he shall receive the difference between a stated sum and the price, he cannot be charged with expenses voluntarily incurred by his principal. TexCivA 281SW1106.

582–56 TexCivA 19SW(2d)104; Tex CivA 24SW(2d)1108; TexCivA 27SW (2d)909. [b] **Value of property which principal receives in exchange** is basis of broker's commission unless contract expressly provides for commission based on value of principal's property. Tex CivA 19SW(2d)104.

582–57 216Ala645, 114S308. [a] See also 36GaA61, 135SE220. [c] **Commission under contract.**–87CalA406, 262P 396. [d] **Where sale of property was consummated by stock transfer,** for convenience of parties, jury were properly permitted to consider property of water and light company as basis for commission. MoA 21SW(2d)899.

582–58 33GaA806, 128SE812.

583–62½–New. Under an agreement for commission of ten per cent of the net profits of a shipbuilding contract, expenses not chargeable to the customer under cost plus agreement are to be deducted in ascertaining the net profit. 245NY275, 157NE137.

583–62¼–New. Where a sugar producer agreed to pay a bank commission whether or not the bank made a sale of sugar, and without protest by the bank the producer held the sugar until the price went down, the commission will date as of actual sale. 12PortoRicoFed219.

583–62¼–New. Commissions may be payable on each installment of purchase price as collected. CalA 286P429.

583–64 Mass 169NE433(2dcase) (sale by employee of broker); 102NJL196, 130A665.

583–66½–New. That owner paid commission to agent of purchaser does not abrogate liability of owner to broker for commissioners. 285Pa141, 131A723.

583–68 317Mo 465, 296SW86, 89 [quot CJ]. [a] **Subagent's right to commissions is not dependent on first broker's recovery from vendor.**–215Ala177, 110S 376.

584–72 TexCommnA 292SW195.

584–74 [a] (3) Agreement between A and broker for B to split commission in deal involving exchange of land was held supported by consideration. 240 NY424, 148NE623. [d] 119Kan372, 239 P759; 118 Okl 212, 247P1004; 43 Okl ACR157. [g] **Agreement between broker and other party** to split commission held not illegal as it was not done to defraud principal. 240NY424, 148NE623. [h] **Facts held not to show abandonment of contract.**–73CalA577, 238P1047. [i] **Necessity of contract.**–139 Okl 245, 282P138.

584–75 94CalA614, 271P539; 318Mo 1155, 6SW(2d)947, 953 [quotCJ]; Tex CivA 278SW948. See also 5LaA118.

584–76 11LaA582, 123S340; 261Mass 355, 158NE767; 43 OklACR157; Tex CivA 278SW948. [d] **Facts held to show participation in exchange of property.**–73CalA577, 238P1047. [e] **Where broker accepts notes as commissions,** he is liable to salesman for agreed share on basis of full amount of such commissions regardless of value of notes. 261 Mass355, 158NE767. [f] **Effect of subsequent agreement.**–TexCivA 5SW(2d) 778.

585–77 [a] **Under agreement to split commission,** a portion of broker's payment to another for same information as given by plaintiff is not deductible. TexCivA 278SW948.

585–78 [a] **Broker's silence** as to statement made by plaintiff that particular transaction was not to go through office cannot avoid agreement to divide commission with plaintiff for introducing purchaser where plaintiff misrepresented connection with such office. 11 LaA582, 123S340.

585–84 [a] **Payment with knowledge of agreement.**–TexCivA 5SW(2d)778.

585–85½–New. Agreement between A and broker for B to split commission in exchange of land between A and B held not violating statute prohibiting splitting of commissions between unlicensed broker and salesman in realty transaction. 240NY424, 148NE623.

585–85¼–New. Statute prohibiting the splitting of commissions in realty transactions must be given reasonable and fair construction. 240NY424, 148NE 623.

585–85¼–New. Such statute has no effect on agreements entered into before the statute went into force. 240NY424, 148NE623.

585–85⅛–New. Where two real estate brokers agree to work together as such and divide equally the profits and losses, one of them cannot recover from the other a share of the commission earned on a sale of real property where he did not procure a license until after the negotiation of the sale. 75CalA765, 242P 90.

585–89 102CalA384, 282P979 (agent of owners held liable where he referred in contract to "he and his associates"); 212Ky9, 278SW547. [c] **Liability under particular circumstances.**–13LaA450, 126 S700.

585–90 73CalA140, 238P749; 82Colo 93, 257P262; 13LaA596, 126S449 (purchaser); 52SD97, 216NW860; TexCivA 286 SW633; TexCivA 3SW(2d)920. [k] TexCivA 6SW(2d)425. [l] **Joint and several promise of vendor and purchaser to pay commissions** may be enforced against vendor alone. 81CalA633, 254 P676. [m] **Husband and wife** employing broker are jointly liable for commissions. Md 148A238.

586–91 146Wash90, 261P790 (holding owner of half interest liable for half commission).

586–92 Nev 290P1027; 102NJL506, 133A74; TexCivA 3SW(2d)920.

586–93 73CalA140, 238P749; 318Mo 1155, 6SW(2d)947, 953 [quotCJ]; 86 Mont69, 281P915; Nev 290P1027; 146 Wash90, 261P790, 791 [quotCJ]; 195 Wis64, 217NW702 [citCJ].

586–94 219Ky282, 292SW780; Nebr 226NW912; 133Misc339, 237NYS506 (loan broker). [b] **Breach by party other than principal,** after broker has acquired right to commission, does not give broker right of action for loss of commission against such party. 135 Misc339, 237NYS506.

586–95 219Ky282, 292SW780; 170La 826, 129S217; 149Va500, 140SE674.

586–96 [d] **Where vendor, without lawful excuse, fails to sell property to purchaser,** under agreement whereby purchaser was to pay commission to broker, vendor is liable to broker for commission. 219Ala505, 122S831(2d case).

587–97 [b] **Purchaser's agreement after his refusal to pay owner's price, to pay broker sum,** if and when he purchased property, if broker abandoned his claim for commission against owner, did not entitle broker to recover thereunder on purchase of realty through another broker after abandonment of negotiations. Mass 166NE623.

587–97½–New. on omitted rescission of contract for purchaser by buyer and seller, broker employed by seller cannot retain commissions from purchase money paid by buyer. 67CalA652, 229P 1025.

587–98 136Misc58, 240NYS499. Contra 229AppDiv802, 242NYS278.

587–99 245 IllA592; 1LaA253.

587–99½–New. Agent sharing profit of joint adventure may not recover commission due only on sale by another. 94Fla419, 114S250.

587–1 82Colo 93, 257P262.

587–2 215Ala177, 110S376.

587–3 See also 218AppDiv102, 218NYS 162.

587–4½–New. Time for payment.

Where no time is fixed for payment of commissions, a reasonable time is allowed. 284Pa3, 130A256 (dictum).

587-4½-New. Time of accrual of right to commissions. Right accrues when contract is signed, 126Misc176, 212NYS685 (lease).

587-4¼-New. and in case of renewal of lease at time when notice of renewal was given and accepted without objection by landlord. 126Misc176, 212NYS685 (broker's contract providing for commissions on renewal).

587-5 16F(2d)392; 29Ariz383, 241P957; Cal 285P691; CalA 284P975 (performance as to one coöbligor is performance as to other); 110Conn571, 148A658; 124Kan754, 262P541; 170La594, 128S527; 12LaA438, 126S82; 166Minn163, 207NW193; NJSup 135A352; 130Misc832, 225NYS245; 25 OhA130, 157NE398; 120 Or427, 251P299; TexCivA 283SW298; Utah 293P1; 36Man46, [1926] 4DomLR126, [1926] 2WestWkly854. [c] **Contract to pay commission for arranging financing of building on terms satisfactory to owner** requires definite plan and acceptance thereof. Ariz 287P300 (plan held not sufficiently definite). [d] **Surety** is not entitled to credit for commissions which broker has not earned. LaA 129S432.

588-6 16F(2d)392; CalA 291P248; LaA 129S432; 248NY290, 162NE83; 223AppDiv344, 227NYS650; 129Misc273, 220NYS444; TexCivA 283SW298; Utah 293P12.

588-7 126Kan586; 1LaA91; 12LaA172, 125S167(2dcase); Mo 18SW(2d)382; NJSup 135A352; 216AppDiv487, 215NYS505; 25 OhNPNS178; 125 Okl219, 257P291; 92PaSuper401; 153Wash254, 279P575; 154Wash582, 282P926 (necessity for optionee to realize profit in transaction). [d] **Particular contracts construed.**–216AppDiv487, 215NYS505; 125 Okl 219, 257P291; 48RI86, 135A604, 51ALR1386. [e] **Immaterial conditions.**–TexCivA 20SW(2d)829. [f] **Contract held not mere option** so as to preclude broker from commission. TexCivA 23SW(2d)858. [g] **Procuring option to buy** is not performance of authority to sell so as to entitle broker to commission. 50RI467, 149A254. [h] **Procurance of lessee acceptable to owners** is essential for recovery of commission where contract so provides. Wash 286P27.

588-8 15F(2d)660, 665 [quotCyc]; Mich 233NW364 (sale for less than agreed price); Mo 18SW(2d)382 (substantial conformity is required). [f] **Inability to bring parties to agreement** at first meeting does not release principal. Mich 233NW235.

589-9 37F(2d)508 (acceptance of benefits); 246Mich96, 224NW420. [c] **Seller's consent to deposit** of purchase money as waiver of contract provision. TexCivA 32SW(2d)710.

589-10 85CalA355, 259P359; CalA 263P532; CalA 284P975 (formal tender of performance is excused on vendor's definite refusal to comply with agreement); LaA 129S240. See also 211Ala620, 101S389. [a] (2) Law requires principal to act in good faith and to do no intentional act to discourage, embarrass, or prevent completion of purchase which broker was employed to effect. CalA 263P532.

589-11 15F(2d)660, 665 [quotCyc]; Ala 130S211; Ala 130S380; 111Conn141, 149A239; Mass 170NE459; 129Misc586, 221NYS352; 25 OhA130, 157NE398; 123 Okl 222, 253P56; 147Va1019, 133SE495; 36Man54, [1926] 4DomLR50, [1926] 2WestWkly680; Sask [1930] 3DomLR992. [c] (3) Presumption is that sale would be for cash. TexCivA 286SW343.

590-12 126Kan586; 223Ky619, 4SW(2d)748 (part performance of severable contract); 252Mass279, 147NE821; Mich 233NW356; 145Miss815, 111S302; 25 OhNPNS178; TexCivA 20SW(2d)388 (where specific sum was set as commission if sale was made, broker is entitled to such sum regardless of actual selling price); 135Wash583, 238P899. See also 90PaSuper386. [a] Fla 130S421.

590-13 223Ky619, 4SW(2d)748 (auction sale to one bidding for owners); 318Mo1155, 6SW(2d)947; 25 OhNPNS178.

590-14 222Ky602, 1SW(2d)1054; 252Mass279, 147NE821 (barter held sale within meaning of contract, giving broker right to commission); 253Mass32, 147NE891; TexCivA 289SW1056. See also 3LaA319, 322 [citCJ]. [e] **Right to commission is not defeated** by recovery of commission on subsequent sale to same purchaser of other property. 83CalA155, 256P438. [f] **Broker employed to purchase property** is entitled to his commission when he buys at prices and terms satisfactory to his principal. 152Va827, 148SE689.

590-15½-New. Offer of purchaser and owner's indication of acceptance insufficient. 103Conn708, 131A497 (mere tentative approach to agreement on terms to be fixed later).

590-15¼-New. Broker in good faith selling fraudulent securities for dishonest principal may recover commission from principal. 15F(2d)113.

590-15¼-New. Before acceptance of an offer to purchase, both parties had the right to stipulate as to the terms of purchase, where the written authority given the real estate broker to sell did not express the terms. 321Mo287, 11SW(2d)26.

590-16 Ala 130S211; 145Miss815, 111S302.

591-17 13F(2d)588; 177Ark663, 7SW(2d)336; 200Cal585, 254P946, 62ALR1341; 77CalA193, 246P136; 264Mass457, 162NE769; NJSup 134A874; 216AppDiv487, 215NYS505; 225AppDiv521, 233NYS608.

591-18 97CalA698, 275P1015; 3LaA319, 322 [citCJ]; 216AppDiv487, 215NYS505.

591-19 15F(2d)942; 217Ala27, 114S409; Ala 130S380; 200Cal348, 254P532; 200Cal585, 254P946, 62ALR1341; 70CalA408, 233P391; 77CalA193, 246P136; 200 Iowa853, 205NW538; 124Kan754, 262P541; 221Ky521, 299SW165; 265Mass367, 164NE81; 145Miss815, 111S302; NH 146A508; NJSup 142A366; 113 OhSt682, 150NE752; 129 Or511, 277P823; 85PaSuper525; 51SD154, 212NW868; 52SD97, 216NW860; TexCivA 286SW633; TexCivA 20SW(2d)1084; TexCivA 31SW(2d)663; 66Utah229, 241P221. [a] **Owner's statement that offer is acceptable** on certain conditions does not require broker to resubmit purchaser's acceptance of conditions. 210Ky229, 275SW639.

591-20 214Ala84, 1078914; 70CalA330, 233P84; 77CalA193, 246P136; 78CalA660, 248P774; 90CalA512, 265P1016 (escrow instructions of both parties held to constitute agreement to purchase); CalA 268P455 (on purchaser's acceptance of vendor's proposition to exchange); 93CalA555, 269P943; 87 IndA541, 161NE568; 206 Iowa1158, 221NW785; 240Mich89, 214NW946. 947 [citCyc]; 177Minn544, 225NW726; Minn 231NW415 (1stcase); MoA 10SW(2d)350(2dcase); MoA 24SW(2d)717 (contract construed as one for sale); 103NJL509, 138A201; 127Misc327, 215NYS709; 129Misc149, 220NYS609; TexCivA 286SW633; Wash 286P849. [a] (1) 103NJL509, 138A201.

592-21 200Cal348, 254P532; 206 Iowa1158, 221NW785; 240Mich89, 214NW946, 947 [citCyc]; 103NJL509, 138A201; NJSup 139A806; 49ND194, 191NW464; TexCivA 286SW633; TexCivA 5SW(2d)1037. **Erratum.**–"Moore's Est., 9 Pa. 675" should be "9 Pa. Dist. 675."

592-22 101CalA726, 282P400; 245Mich119, 222NW98; MoA 293SW496; 105NJL588, 147A465 (that date of payment is fixed by future event does not make payment contingent thereon).

592-22½-New. Broker is not entitled to commissions unless buyer's and seller's minds meet on terms of contract. 215AppDiv348, 213NYS401.

592-22¼-New. Performance of conditions. TexCivA 283SW235.

593-23 102CalA563, 283P102; 98Fla1087, 125S243; 336 Ill500, 168NE362 (contract for services in syndication and sale of land trust certificates made payment contingent on success); 170La542, 128S474; 127Me393, 143A698; 256Mass566, 152NE879; Mass 171NE654; 103NJL403, 135A867; NJSup 145A237; 216AppDiv487, 215NYS505; 125Misc105, 210NYS134 (holding that broker was not entitled to commission for procuring tenant where he failed to procure a written acceptable guarantee of the rent, this being an essential element without which the minds of the parties would not have met and not merely a collateral undertaking); 136Misc58, 240NYS499; TexCivA 278SW492; TexCivA 283SW298; 154Wash396, 282P377 (broker held to have consummated deal).

593-24 220Ala282, 124S901 (where rights of minors were involved and contract contemplated completed sale, it is essential that all interested parties be legally bound); 85CalA496, 259P765; 222Ky602, 1SW(2d)1054 (contract held sufficient); 259Mass430, 156NE673; 176Minn357, 223NW603(2dcase); 145Miss815, 111S302; 127Misc327, 215NYS709; 130Misc859, 224NYS715 (till minds of purchaser and seller have met); TexCivA 278SW492; TexCivA 4SW(2d)316 (requirement of actual sale complied with though reduced price is obtained). [c] (2) Oral agreement held sufficient where written contract not required. 111Conn493, 150A690. [e] **Merely procuring a contract of option** where the agreement was for commission "on sale" is insufficient where optional purchaser declined to consummate sale. TexCivA 283SW298. [f] **There must be an enforceable contract** between parties before broker is entitled to commission. TexCivA 278SW492. [g] **Broker held to earn commission.**–Wash 286P849.

594-25 95Fla272, 116S15; 34GaA308, 129SE294; NJSup 133A71; 223AppDiv344, 227NYS650; TexCivA 5SW(2d)1037. See also Mass 171NE654. [d] **Mere recording of deeds passing title is not consummation of escrow** entitling agent to commission. 87CalA414, 262P400.

594-26 91CalA617, 267P354; CalA 282P992; 102CalA563, 283P102; 12LaA335, 125S165; 198NC148, 150SE886; 48RI86, 135A604, 51ALR1386 [citCJ]; TexCivA 284SW226; TexCivA 19SW(2d)605; Sask [1929] 3DomLR712. [c] **Where commissions were not to be paid till purchase money note was paid in cash,** acceptance of return of part of property and surrender of note held to make commissions due and payable. TexCommnA 298SW265. [d] **Commission payable when purchaser pays first installment.**–85CalA783, 260P332 (strictly construed).

594-27 83CalA105, 256P573; 86CalA74, 260P298; 95CalA320, 272P775; 111Conn141, 149A239; 259Mass430, 156NE673; 249 IllA404; Mass 170NE459; 127Misc327, 215NYS709; 225AppDiv521, 233NYS608; TexCivA 278SW492. [f] **Conditional contract.**–83CalA105, 256P573.

595-28½-New. Negotiations commenced by a broker need not be continued uninterrupedly. 88PaSuper386.

595-29 15F(2d)660, 665 [quotCyc]; 35F(2d)563; 216Ala403, 113S265; 217Ala27, 114S409; Ala 130S380; 21AlaA222, 107S909; 176Ark616, 3SW(2d)692; 179Ark657, 17SW(2d)865; 205Cal764, 272P1052; 69CalA301, 231P583; 70CalA408, 233P391; 77CalA193, 246P136; 83CalA105, 256P573; 106Conn205, 137A740; Fla 129S763; 34GaA308, 129SE294 (broker entitled on procuring such purchaser); 3LaA751; 4LaA554; 154Md290, 141A363, 367 [quotCyc]; 254Mass223, 150NE162; Mass 167NE256; 146Miss766, 111S869; 151Miss563, 118S609(2dcase); Miss 128S324; MoA 272SW1071; MoA 275SW566; 82Mont393, 267P296; NH 146A508; NJ 147A484; 216AppDiv600, 215NYS699; 219AppDiv498, 220NYS457; 125Misc824, 211NYS570; 227AppDiv28, 236NYS537; 228AppDiv721, 239NYS147; 27 OhA329, 161NE213; 117 Or455, 244P509; 120Or427, 251P299; RI 132A885; TexCivA 283SW298; TexCivA 4SW(2d)1038; TexCivA 18SW(2d)838; TexCivA 25SW(2d)879; TexCivA 31SW(2d)862; 193Wis554, 214NW394. See also RI 131A200. [c] **Where third person has some interest in property,** but broker held her power of attorney, inability to deliver cannot be claimed to defeat lia-

bility. CalA 289P641.

595-29½-New. To entitle real estate broker to commission on oral agreement, there must be a conveyance to his client, or at least a binding contract of sale with him. 102NJL46, 130 A450.

596-31 NJSup 142A757.

596-32 216Ala645, 114S308; 176Ark 616, 3SW(2d)692; 202Cal 569, 262P 297; 93CalA577, 269P948; 214Mich 946, 947 [citCyc]; 174Minn237, 219NW 149; 177Minn544, 225NW726; 312Mo 30, 278SW747, 754 [citCJ]; 104NJL 408, 140A314; NJSup 146A682; 88Pa Super206; TexCivA 258W(2d)879; TexCivA 268W(2d)742; 101WVa411, 132SE870.

596-33 15F(2d)942; 215Ala650, 112S 232, 53ALR134; 220Ala317, 124S882; 203Cal 17, 262P751; 70CalA330, 233P 84; 73CalA140, 238P749; 78CalA347, 248P296; 83CalA155, 256P438; 83CalA 434, 256P867; 91CalA165, 266P829 (where broker obtained signed contract and owner approved sale over telephone); 96CalA137, 273P600(1stcase); 97CalA707, 276P153; 103Conn693, 131 A417; 104Conn23, 131A744 (enforceable contract entered into under implied agreement); 98Fla1087, 125S243 (listing property "for sale"); 42 Ida240, 245P75; 126Kan723, 271P 293; 10LaA246, 120S542; 169La1069, 126S556; 12LaA203, 123S389; 12LaA 55, 125S194(2dcase); 252Mass275, 147 NE827; 253Mass490, 149NE311; 265 Mass341, 163NE865(2dcase); 265Mass 500, 164NE388; Mass 165NE708; Mass 168NE739; 246Mich32, 224NW330; 167 Minn155, 208NW651; 174Minn237, 219 NW149; 145Miss815, 111S302; 146 Miss766, 111S869; MoA 293SW496; MoA 248W(2d)717; 86Mont69, 281P 915; 105NJL237, 143A335; 105NJL 311, 145A108; NJ 146A175; NJSup 139A806; 251NY305, 167NE452; 129 Misc586, 221NYS352; 136Misc58, 240 NYS499; 49ND194, 191NW464; 49ND 213, 191NW466; 121 Okl 157, 248P 605; 87PaSuper240; RI 131A200; RI 149A861; SD 233NW281; TexCivA 3 SW(2d)920; TexCivA 158W(2d)118; TexCivA 208W(2d)1084; Wis 231NW 182. See also 312Mo 30, 278SW747, 754 [citCJ]; TexCivA 258W(2d)670.

597-36 73CalA140, 238P749; CalA 289 P641; 124Kan754, 262P541; 3LaA319, 322 [citCJ]; 5LaA77, 80 [citCJ]; 146 Miss758, 111S867; NJSup 147A576; 52 SD97, 216NW860, 861 [citCJ]; 193Wis 554, 214NW394. [a] 69CalA301, 231P 583.

597-37 MoA 278W(2d)1052; 193Wis 554, 214NW394.

598-38 263Mass562, 161NE610 (principal not owning property where title was acquired later); 127Misc350, 216 NYS590.

598-42 9LaA195, 119S480. See also 192Wis635, 212NW405.

598-43 227AppDiv28, 236NYS537 (that proposed corporation, accepted as lessee, is not yet in existence does not relieve lessor from paying commission).

598-44 200Cal 585, 254P946, 62ALR 1341; 135Misc339, 237NYS506; 117 Okl 170, 246P216. [d] 256 IllA274. [e] **Adjournment of closing date** without broker's consent cannot delay payment of commission. 135Misc339, 237NYS 506.

599-45 38GaA613, 144SE830.

599-47 106Conn205, 137A740; 216 AppDiv600, 215NYS699. See also 192 Wis635, 212NW405. [b] (1) 95CalA 456, 273P50. (4) Tender of one thousand dollars and offer to pay balance on completion of transaction held evidence of readiness. 200Cal 348, 254 P532. [d] (2) 69CalA301, 231P583.

599-48 203Cal 264, 263P520, 56ALR 476; 69CalA301, 231P583; 95CalA456, 273P50; 154Md290, 141A363 (fact that purchaser's associates are financially responsible is immaterial); 253Mass475, 149NE121; 250Mich81, 229NW595(1st case) (sale to minor); NJ 147A484 (seller produced by broker unable to sell because of encumbrances); 219 AppDiv498, 220NYS457. [e] (5) If purchaser is relying on loan to complete purchase, it must appear that party, offering to advance necessary sum, has financial ability to do so, and has entered into binding agreement to furnish sum. 69CalA301, 231P583. (6) Rule that purchaser procured by broker must be able to buy is satisfied if purchaser has assets of greater value than purchase price and financial rating which will enable him to command funds when needed. 95CalA456, 273P 50. [f] 69CalA301, 231P583, 586 [cit CJ]. [i] **Readiness and willingness to buy** can be shown only by offer to purchase, made to vendor, and not merely to broker. 79CalA330, 233P84. [j] **Financial ability.**-126Misc185, 212NYS 703. [k] **Cash payment.**-254Mass223, 150NE162. [l] **Where no time for payment is fixed in contract,** purchaser must be ready, willing, and able to carry out purchase within reasonable time. 95CalA456, 273P50.

599-49 37GaA656, 141SE332; 13LaA 564, 125S160(2dcase); 12LaA28, 125S 161; 154Md290, 141A363; Mass 171 NE654; MoA 272SW1071; MoA 275 SW566; 226AppDiv271, 235NYS171; 151Wash1, 274P722. See also 102Conn 556, 129A274. But see MoA 248W(2d) 717. [b] 205Cal 764, 272P1052. [c] (2) Other matters not constituting departures from terms. CalA 263P532. [e] **Right to impose new terms as to commissions.**-37GaA656, 141SE332. [f] **Customary terms.**-CalA 263P532.

600-50 200Cal 348, 254P532; 69CalA 301; 231P583; 123Kan151, 254P410; 146Miss766, 111S869. [a] 95CalA195, 272P333; 95CalA456, 273P50. [b] (2) 69CalA301, 231P583; 146Miss766, 111 S869.

600-53 77CalA201, 246P163.

600-53½-New. A broker is not bound to go into the financial condition and resources of the proposed purchaser. 224 IllA35.

600-53¾-New. Where the principal accepts a customer procured by the broker, he is estopped from thereafter denying the purchaser's ability or willingness to complete the contract. 78 CalA660, 248P774.

600-54 17F(2d)22; 179Ark657, 17SW (2d)865; 78CalA724, 248P679; 85CalA 355, 259P359, 360 [citCJ]; 77Colo 598, 238P62 (where contract provided for commission on sale of property, broker cannot recover commission where exchange was effected but can only recover on quantum meruit); 226Ky834, 11 SW(2d)961; 1LaA383, 386 [citCJ&quot Cyc]; 249Mich594, 229NW593; NJ 145 A635(2dcase); 129Misc586, 221NYS 352; 137Misc261, 242NYS188; 25 OhNP NS178; 115 Okl 268, 242P170; 33Porto Rico621; 49SD506, 207NW478; Tex CommnA 282SW210; TexCommnA 282 SW798; TexCivA 272SW604; TexCivA 280SW895; TexCivA 286SW633; Tex CivA 158W(2d)116; TexCivA 17SW (2d)121; 99Vt239, 131A12; BC [1927] 2DomLR480; 21SaskL438, [1927] 2 DomLR819, [1927] 1WestWkly929. But see 13LaA479, 126S264. [b] Tex CivA 17SW(2d)121. [f] **That agent advising deal** had deed made to another, who conveyed to purchaser, to avoid controversy regarding commissions with another agent who had negotiated with purchaser, does not establish fraud. TexCivA 291SW936. [g] **Contract containing usual terms** is not substantially different from broker's authorization defeating right to commission. 92CalA171, 267P884. [h] **Description of property.**-Memoranda of broker's employment to sell, describing ranch by acreage, held sufficient though range and township numbers are erroneous. 86Mont69, 281P915 (inaccuracies in description disregarded if description is sufficient for identification and may be cured by extrinsic evidence).

601-55 78CalA724, 248P679; 33Porto Rico 621.

601-56 15F(2d)660, 665 [quotCyc]; 174 Minn127, 218NW462, 463 [citCJ]; 156 Miss337, 126S6; MoA 278SW788; MoA 22SW(2d)855; 105NJL311, 145A108; 85PaSuper114; 33PortoRico 621; Tex CommnA 282SW210; TexCivA 273SW 624; TexCivA 288SW270; TexCivA 4 SW(2d)316; 147Va1019, 133SE495; BC [1927] 2DomLR480; 21SaskL438, [1927] 2DomLR819, [1927] 1WestWkly 929.

602-57 15F(2d)660, 665 [quotCyc]; 129Kan518, 283P489(2dcase); 143Mass 143, 164NE72; 320Mo 828, 8SW(2d) 828; TexCivA 300SW181. See also 78 CalA347, 248P296; Ont [1928] 4DomLR226.

602-58 Md 148A244. [b] **Acceptance by principal** of vendee's note in payment entitles broker to commission. 78 Colo 366, 242P52.

602-61 15F(2d)660, 665 [quotCyc].

602-62 3LaA244, 247 [quotCJ]; 256 Mass555, 152NE884, 47ALR852; 123 Okl 222, 253P56; 115 Or523, 239P102, 104 [citCJ]; TexCivA 288SW275. But see 10LaA246, 120S542. [a] 3LaA244, 247 [quotCJ].

602-62½-New. where the principal acts in good faith and not for the purpose of depriving the broker of his commission; 123 Okl 222, 253P56.

603-66 MoA 28W(2d)635.

603-67 22F(2d)551; 3LaA244, 247 [quotCJ].

603-67½-New. Sale to corporation after negotiation with individual does not deprive broker of commission where corporation was organized simply as means to end desired. TexCivA 272SW 604.

603-67¾-New. The principal cannot evade payment on the ground that no specific agreement was made to pay commission on sale actually made. Tex CivA 272SW604.

603-68 70CalA408, 233P391; 91CalA 435, 267P110; 36Man46, [1926] 4DomLR126, [1926] 2WestWkly854. [b] **Contract held not option** but binding on both parties. 312Mo 30, 278SW747.

604-69 70CalA408, 233P391; 321Mo 287, 11SW(2d)26; Wash 286P27. [b] **Broker to procure loan.**-TexCivA 3SW (2d)514.

604-70 70CalA408, 233P391 (sale subject to approval of samples); 201 Iowa 355, 207NW378; 151Miss563, 118S609 (2dcase).

604-71 320Mo 828, 8SW(2d)828 (contract held option).

605-73 But see TexCivA 26SW(2d)742.

605-75 [a] (2) Other instances of options not exercised. 251Mich355, 232 NW221.

605-77 13F(2d)588 [citCJ]; 206 Iowa 1158, 221NW785; 8LaA531; MoA 288 SW798; 129Misc215, 220NYS682; Tex CivA 286SW633. See also 86PaSuper 92; TexCivA 158W(2d)1072.

605-78 17F(2d)262; 92CalA178, 267P 898; 206 Iowa1158, 221NW785; 49ND 213, 191NW466; 48Kl 86, 135A604, 51 ALR1386 [citCJ]; TexCivA 158W(2d) 1072. But see Sask [1929] 3DomLR 712.

606-79 But see 90CalA512, 265P1016.

606-79½-New. Where principal and purchaser produced by a broker entered into a contract on condition that principal would obtain a discharge of a certain mortgage which the heirs are unable to do, the broker was not entitled to commission. 258Mass478, 155NE444.

606-81 37GaA1, 138SE859; MoA 28W (2d)635, 637 [citCJ]; 87PaSuper240; TexCivA 78W(2d)601. [a] 5LaA432, 434 [quotCJ]; 113 OhS682, 150NE752. [c] **Acceptance within time limit.**-Tex CivA 32SW(2d)710.

606-82½-New. The agency of a broker employed by the holder of an option to obtain a purchaser is terminated by the lapse of the option and breaking off of all negotiations, and he is not entitled to a commission on a sale thereafter made by the holder of the option. BC [1929] 2DomLR35.

607-83 216Ala645, 114S308; 217Ala 27, 114S409; 77CalA4, 245P808; 77 CalA193, 246P136; 83CalA792, 257P 459; CalA 284P680; 37GaA1, 138SE 859; 232Ky119, 22SW(2d)413 (owner selling after time limited is liable for commission to broker tendering purchaser within limited time); 10LaA 246, 120S542; 11LaA364, 122S878; 3LaA787; MoA 272SW1071; 119 OhSt 338, 164NE353; TexCivA 275SW184.

See also 95CalA456, 273P50. But see MoA 288SW798. [a] TexCivA 275SW184. [c] (2) Provisions for commission on sale made within thirty days or made by owner within forty-five days after expiration of contract is not inconsistent. 13LaA479, 126S264. [e] (1) 219AppDiv139, 218NYS566. See also 170La697, 129S134. (2) Broker is not entitled to commission for sale made on option obtained during time limited but consummated after expiration thereof. 170La697, 129S134. [f] **Particular contracts construed.**–83CalA792, 257P459. [g] **Contract is in force only for reasonable time after termination date** though contract provided for ten days' notice of withdrawal. 26 OhNPNS599.

607–84 216Ala645, 114S308; 77CalA193, 246P136; TexCivA 275SW184 (waiver of exclusive agency with exception is not extension of original contract). [b] **Extension of original contract** for another thirty days, consented to by principal, did not revivify the contract of employment as of date of letter requesting extension. 11LaA375, 123S377.

607–85 216Ala645, 114S308; 96CalA306, 273P1114. See also 104NJL368, 140A418.

607–86 216Ala645, 114S308; 83CalA792, 257P459; TexCivA 275SW184.

607–88 216Ala645, 114S308; 77CalA4, 245P808; 225Ky198, 7SW(2d)1040; TexCivA 275SW184.

608–89 216Ala645, 114S308; 77CalA4, 245P808; 3LaA244, 247 [citCJ]; 172 Minn499, 216NW224; 115 Or523, 239P102 (where prospective purchaser had abandoned determination to purchase before expiration of broker's contract); TexCivA 275SW184; TexCivA 2SW(2d) 321. [a] 10LaA136, 121S194.

608–90 216Ala645, 114S308, 315 [cit CJ]; 73CalA140, 238P749; 78CalA49, 248P258; 222MoA1044, 9SW(2d)676; 85PaSuper443.

608–92 [a] (2) Readiness to complete loan held to refer to specified time after furnishing of abstract, not after notice of approval of application. TexCivA 3SW(2d)514.

608–94 77CalA193, 246P136; CalA 284 P975; 97Fla150, 119S864(2dcase); 201 Iowa355, 207NW378; 125Kan703, 265 P1098 (broker is entitled to commission where seller forfeits and appropriates earnest money on purchaser's default); 212Ky9, 278SW547; 216AppDiv439, 215NYS587; 127Misc327, 215NYS709; 129Misc586, 221NYS352; 137Misc338, 243NYS560; 34 OhA133, 170NE581; 288Pa180, 135A735; TexCivA 297SW 287 (contract construed to be sale, not option); TexCivA 2SW(2d)925. See also 142Va397, 128SE561. [a] (2) Commissions were not recoverable on transaction involving exchange of properties unenforceable because of failure to state how difference in value of equities was to be adjusted. 28 OhA46, 162NE 437. [e] **Where contract unenforceable because of broker's misrepresentations,** however innocently made, broker is not entitled to commissions. 142Va397, 128 SE561. [f] **Where commission is made payable on purchaser's signing formal contract,** broker may recover commission, though formal contract never executed, where vendor recovered damages for purchaser's breach of binder contract. 216AppDiv565, 215NYS625. [g] **Contract need not be one** that can be specifically performed. TexCivA 297SW287. [h] **Contract for exchange of realty held too indefinite** to be basis of action for commissions. 39GaA649, 148SE291(2dcase). [i] **Purchaser's oral acceptance of broker's offer of real property** for sale is unenforceable. TexCivA 18SW(2d)838. [j] **Necessity of procuring enforceable contract.**–12LaA435, 126 S252.

609–96 15F(2d)942; 200Cal585, 254P 946, 62ALR1341; 77CalA193, 246P 136; CalA 263P532; 221Ky521, 299SW 165; 253Mass490, 149NE311; 227App Div28, 236NYS537; 121 Okl157, 248P 605.

609–97 70CalA330, 233P84; 77CalA193, 246P136; 111Conn141, 149A239; 119 Kan394, 239P1106; MoA 293SW496; NJ 145A635(2dcase).

610–99 TexCivA 14SW(2d)335.

610–2 [b] (3) Execution of deed ratified sale at price fixed by broker, which was in excess of price authorized. 50 RI 221, 146A639.

611–6 216Ala645, 114S308; 77CalA 193, 246P136; 78CalA49, 248P258; 78 CalA511, 248P735; 200 Iowa983, 205 NW742; 163La817, 112S732; 2LaA398; 6LaA582; MoA 9SW(2d)860; 129Misc 273, 220NYS444; 136Misc193, 240NYS 617; 285Pa141, 131A723 (efficient cause); 93PaSuper570; TexCivA 5SW (2d)584, 586 [citCJ]; TexCivA 5SW (2d)780; TexCivA 6SW(2d)425; Va 153 SE727; 102WVa355, 135SE175, 177 [cit CJ]; Sask [1929] 3DomLR289; Sask [1930] 3DomLR992. [c] **Sale of property by broker** constitutes transaction within meaning of statute. 94CalA 498, 271P555.

611–7 126 Or610, 268P742.

611–8 5F(2d)676; 22F(2d)551; 83 CalA105, 256P573; CalA 282P992; 201 Iowa355, 207NW378; 163La817, 112S 732; 244Mich672, 222NW76 (held not procuring cause); 298Pa208, 148A109; TexCivA 291SW1109; TexCivA 7SW (2d)601; 102WVa355, 135SE175.

612–9 78CalA49, 248P258; 35GaA786, 134SE800; 126Kan163, 266P743; 228 Ky407, 15SW(2d)240; 169La712, 125S 864; 11LaA420, 123S470; 252Mass279, 147NE821; 253Mass32, 147NE891; 263 Mass278, 160NE803; 249Mich594, 229 NW593; 156Miss169, 125S723; MoA 2 SW(2d)178, 180 [citCJ]; MoA 32SW (2d)103; 33NM577, 273P761; 125Misc 837, 211NYS493; 105 Okl 74, 231P532; 115 Okl 268, 242P170; 155SC488, 152SE 644; 49SD506, 207NW478; TexCommnA 282SW798; TexCivA 286SW495; 152 Va827, 148SE689; 101WVa411, 132SE 870; BC [1930] 2DomLR326; ND [1925] 3DomLR797. [c] **Whether broker was procuring cause** depends on whether lessee accepted lease as direct and proximate result of his services. MoA 294SW103. [d] **It is not necessary for brokers in action for commission to argue that owners prevented sale by them,** but only that owner accomplished sale to purchaser first found by them. 100CalA70, 279P814.

612–9½–New. even though the broker took no part in the negotiations between the principal and the purchaser, 125 Misc837, 211NYS493.

612–9½–New. and the principal did not know that the broker had sent the purchaser, 125Misc837, 211NYS493.

612–9¼–New. and mere fact that sale was consummated with aid of principal will not defeat right to commission, 218MoA433, 277SW62.

612–10 Md 148A238 (purchaser named in contract being agent of real buyer to whom broker introduced principal); Wash 290P224. [a] Man [1929] 1 DomLR825.

612–10½–New. The broker's efforts need not be the sole cause of the consummation of the transaction. 101WVa411, 132SE870.

612–10½–New. A broker has earned his commission when it is shown that he was the efficient cause of the sale, 78CalA49, 248P258.

613–11 115 Okl 268, 242P170; 119 Okl 176, 249P417; TexCivA 286SW495; 101 WVa411, 132SE870. [a] (2) 78CalA 511, 248P735; 101WVa411, 132SE870. [b] (2) Where broker is efficient cause of procuring customer who is ready, willing, and able to lease property on terms specified by owner in contract of employment, or on terms acceptable to owner, he is entitled to commissions. 93CalA577, 269P948. [c] (1) 218MoA 433, 277SW62. (2) Real estate agent who is procuring cause of lease is entitled to commissions regardless of whether lessor dealt with lessee through other agents or on other terms. MoA 294 SW103. [e] **Procurement of contracts through mails** is sufficient compliance with agreement to bring in contracts. 12LaA335, 125S165. [f] **Broker is conclusively presumed to be procuring cause** where vendor sells to party whom broker found while broker is still negotiating with such party. TexCivA 20 SW(2d)388.

613–12 263Mass278, 160NE803 (efforts of another enlisted by broker); 101WVa 411, 132SE870.

613–13 TexCivA 20SW(2d)388; Tex CivA 21SW(2d)1078. But see CalA 286 P429. [a] (2) 102WVa355, 135SE175.

613–14 Wash 290P224.

614–15 163La817, 112S732.

614–16 163La817, 112S732; 298Pa 208, 148A109; TexCivA 5SW(2d)584, 586, [citCJ].

614–17 CalA 276P614.

614–18½–New. Sale of house by owner to purchaser does not entitle broker to commission where such purchaser had previously refused to purchase from agent. 169Ark1089, 277SW868.

614–20 77CalA193, 246P136; 97CalA 698, 275P1015; 312Mo 30, 278SW747, 753 [quotCJ]; 23 OhA249, 154NE66, 67 [quotCJ]; 299Pa17, 148A915; Tex CivA 286SW495; TexCivA 15SW(2d) 118. [a] 265Mass347, 164NE71.

614–21 312Mo 30, 278SW747, 753 [quot CJ]; 23 OhA249, 154NE66, 67 [quotCJ].

615–22 203 Cal 17, 262P751; 234Ky631, 28SW(2d)961 (where broker having exclusive agency showed purchaser land); 312Mo 30, 278SW747, 753 [quotCJ]; NB [1925] 3DomLR797 (holding that, where broker merely shows property to purchaser and quotes terms and purchaser thereafter goes to vendor and makes contract behind broker's back, he is entitled to commission).

615–23 115 Okl 268, 242P170.

615–24 MoA 14SW(2d)29.

615–25 96CalA772, 274P1024; 100CalA 447, 280P149; 213Ky8, 280SW153; Mass 167NE256; 312Mo 30, 278SW747, 753 [quotCJ]; 115 Okl 268, 242P170; 117 Okl 131, 245P852; 131 Okl 299, 269P 243; TexCommnA 298SW394; TexCivA 286SW495; TexCivA 15SW(2d)118; 101 WVa411, 132SE870; NB [1925] 3DomLR797 (consummation behind broker's back after introducing purchaser to property although not to seller).

616–28 118Kan733, 236P644, 646 [quot CJ]; 120Kan260, 242P1024, 1027 [cit CJ]; 265Mass143, 164NE72.

616–29 118Kan733, 236P644, 646 [quot CJ]; 120Kan260, 242P1024, 1027 [cit CJ]; 214Ky162, 282SW1079; 4LaA305; 265Mass500, 164NE388; TexCivA 286 SW495; TexCivA 291SW936; TexCivA 15SW(2d)656; TexCivA 30SW(2d)685. See also TexCivA 28SW(2d)1098. [c] (3) Owner, listing property with real estate firm within three months after termination of contract with selling agent, providing for payment of commission on sale within such time to one with whom agent had negotiated during contract term, made himself liable to both agents for commissions on such sale. But see 10LaA136, 121S194. [h] **Rule held applicable** where one agent promised to assist another. 179Ark488, 16SW(2d)579.

616–29½–New. The broker who brings minds of parties to meet is the one who effects the sale. 215AppDiv721, 212NYS 435.

617–30 120Kan260, 242P1024. [a] 120 Kan260, 242P1024.

617–31 118Kan733, 236P644, 646 [quot CJ].

617–32 77CalA193, 246P136; Colo 282 P250(2dcase) (property sold for less price, through another broker); 120 Kan260, 242P1024; 156Md597, 144A 833; 253Mass32, 147NE891; 23 OhA 249, 154NE66, 67 [quotCJ]; TexCivA 286SW495.

618–33 118Kan733, 236P644; 120Kan 260, 242P1024, 1027 [citCJ]; 125 Okl 219, 257P291; TexCivA 291SW936.

618–34 Alta [1929] 1DomLR268.

618–34½–New. , or aided in influencing consummation of sale. 218MoA433, 277 SW62.

618–35 23 OhA249, 154NE66, 67 [quot CJ].

618–38 202Cal390, 260P867 (first broker held acting for defaulting purchaser in second transaction); 118Kan733, 236P644, 646 [quotCJ]; 12LaA685, 127 S89; 296Pa382, 145A912(1stcase); Tex CivA 291SW1109.

619–41 118Kan733, 236P644.

619–42 118Kan773, 236P644; 154Md 290, 141A363; Mass 166NE623; BC [1928] 3DomLR939.

619–44 216Ala403, 113S265; 216Ala645, 114S308; 93CalA577, 269P948; 77Colo 116, 234P1072; 97Fla673, 122S11; 126 Kan163, 266P743; 127Kan68, 272P99; 213Ky8, 230SW153; 234Ky631, 28SW (2d)961; 8LaA440; 312Mo 30, 278SW 747, 754 [citCJ]; MoA 289SW970; 190 NC783, 130SE842; 129 Or197, 276P 1108; 85PaSuper114; 85PaSuper443; 88PaSuper386; 33PortoRico 621; 49SD 506, 207NW478; TexCivA 286SW495; TexCivA 295SW349; TexCivA 6SW(2d) 425. [b] **Where broker abandoned negotiations,** prospective purchaser's voluntary renewal of negotiations with owner is not new and independent cause depriving broker of right to commission. 127 Kan68, 272P99.

620–45 216Ala645, 114S308; 218MoA 433, 277SW62.

620–46 179Ark657, 17SW(2d)865; 78 CalA49, 248P258; 85CalA355, 259P359; 39GaA217, 146SE795; La 129S679; 252 Mass279, 147NE821; 312Mo 30, 278SW 747; MoA 9SW(2d)860; 226AppDiv53, 234NYS429; 115 Okl 268, 242P170; 115 Or523, 239P102; TexCivA 286SW495; TexCivA 289SW1056; TexCivA 293SW 204; TexCivA 11SW(2d)601; 99Vt239, 131A12; Alta [1928] 1DomLR324. But see Mass 170NE459.

620–47 TexCivA 20SW(2d)273.

621–48 39GaA217, 146SE795.

621–50 10LaA246, 120S542; 11LaA689, 124S717; 174Minn127, 218NW462; Miss 128S324; 119 Okl 176, 249P417; 123 Okl 222, 253P56; 115 Or523, 239P102; Tex CivA 284SW283; TexCivA 2SW(2d)321; TexCivA 26SW(2d)705. But see 95CalA 12, 272P339(2dcase). [b] **Sale of part of property by owner** does not entitle broker to commissions, where contract is not severable. Utah 293P12.

621–52½–New. Where the owner, in revoking a broker's contract, has a bona fide purpose to withdraw the property from the market, and after learns that the broker has enlisted a customer, and sells to him, the owner must pay commission. 216Ala645, 114S308.

621–53 TexCivA 295SW349; TexCivA 20SW(2d)273. But see 229Ky655, 17 SW(2d)731; 230Ky795, 20SW(2d)983. [a] (3) 142SC33, 140SE249 (broker is under no duty to disclose where principal does not ask name). (4) Broker held to have burden of informing principal, as owner ignorant of fact, that purchaser was procured by broker, to the end that owner may not be misled into accepting reduced price for property on theory that he will not have to pay commission to broker. 227Ky56, 11SW(2d) 979.

622–54 129Misc273, 220NYS444.

622–54½–New. Where the owner revokes the agency in good faith and sells to a purchaser without knowing that the purchaser was obtained by the agent, the owner is not liable for commissions, 216Ala645, 114S308.

622–54¼–New. and the owner is not liable for commissions where the agent disclaims that the purchaser was his customer and the owner sells at a lower price because not liable for commissions. 216Ala645, 114S308.

622–54¼–New. The owner revoking the agency because the offer is too low, and selling at a better price to a purchaser not known to be the agent's client, is not liable for commission, 216Ala645, 114S308.

622–56 77CalA193, 246P136; 240 IllA 480; 227Ky813, 14SW(2d)140; 9LaA 328, 119S286; 5LaA77, 80 [citCJ]; 7 LaA182; Mont 288P1021; 133Misc32, 231NYS79; TexCivA 287SW117. [c] (2) 215AppDiv326, 213NYS616. [d] **Commencement of action for commissions** terminates exclusive listing contract, which is not reinstated by failure of broker to maintain his action. 234Mich 36, 207NW840.

622–57 234Ky631, 28SW(2d)961; 12 LaA583, 126S568; 3NJMisc973, 130A 451; 215AppDiv326, 213NYS616; 132 Misc374, 229NYS97, 100 [citCJ]; 10Pa Dist&Co 71; TexCivA 281SW301. See also 57ND639, 223NW691.

622–58 100CalA70, 279P814; 104Conn 744, 133A586. [a] **Distinction immaterial.**–200Wis22, 227NW237.

622–59 100CalA70, 279P814; 104Conn 744, 133A586; 232Ky119, 22SW(2d)413; 168La235, 121S755; 132Misc374, 229 NYS97, 100 [citCJ]. But see 227Ky813, 14SW(2d)140; 136Misc193, 240NYS617.

622–60 172Ark593, 289SW770; 104 Conn744, 133A586; 168La235, 121S 755; 215AppDiv326, 213NYS616 (sale made in good faith to purchaser not procured by broker). [c] **Broker cannot recover** commissions where exclusive listing contract was terminated before owner disposed of his property. 234Mich36, 207NW840.

623–61 103NJL509, 138A201; 23 OhA 230, 155NE573.

623–62 136Misc193, 240NYS617.

623–63½–New. Under a contract of exclusive listing entitling the broker to commission if the property is sold by him or anyone else during the stipulated period, the word "sold" refers to an executory contract of sale entered into by the owner as well as an executed one whereby a conveyance is delivered. 36 GaA511, 137SE298.

623–64 176Ark616, 3SW(2d)692; 96 Fla858, 119S139 (where there is only qualified right and not exclusive); 37 GaA1, 138SE859; NJSup142A761; 119 Okl 176, 249P417; TexCivA 4SW(2d) 577 (agreement for sharing royalty in mineral lands). [e] **Contract construed** to give exclusive right to sell property. 215AppDiv326, 213NYS616. [f] **Exclusive right to sell** does not entitle broker to commission on exchange effected by principal. 25 OhNPNS178. [g] **Sale by principal after expiration of broker's exclusive right.**–92PaSuper398. [h] **Exclusiveness of agency terminates** at end of stipulated time, though agency continues till revoked under provision that agreement shall be revocable only after stated number of days' notice in writing. 87PaSuper406. [i] **Contract providing that agency was not exclusive,** which could not be altered except in writing, prevents recovery on claim of exclusive agency after cancellation by principal. NJSup142A761.

623–65 42Ida240, 245P75; 261Mass 178, 158NE537; 146Miss766, 111S869; NJSup 136A336; 216AppDiv487, 215 NYS505; 53SD491, 221NW93 (effect of failure to complete contract negotiations on right to compensation depends on terms of broker's employment). [a] (2) Where contract provided that customer pay commissions, principal was held not liable for commissions. TexCivA 289 SW439. [b] (1) Contra 312Mo 30, 278 SW747. (4) Agent, in order to recover commission after owner's termination of contract, was under duty of tendering amount that owner was to receive, thereby giving agent claim against purchaser for commission specified in contract. 28 OhA102, 162NE619. (5) Commission held due as of date of vendor's repudiation. 203Cal 17, 262P751. [d] See also NJ 150A406. [e] **Provision making actual transfer condition of right to commission** binding except in case of owner's bad faith and refusal to effectuate it. 34GaA308, 129SE294. [f] **Provision in contract for exchange of property that party failing to perform shall pay all commissions** does not release willing party from liability to broker in absence of election on broker's part. 129 Or511, 277P823. [g] **Broker's contract providing for payment of five per cent of purchase price at settlement,** that final settlement should be on or before certain date, and that time was of essence, did not provide contingency on which payment was to be made as regards right to recover commissions, but merely fixed date. NJ 146A175.

624–66 216Ala645, 114S308; 200Cal 348, 254P532; CalA 263P532; 91CalA 435, 267P110; 91CalA617, 267P354; CalA 285P1048(2dcase); 103Conn693, 131A417 (unwarranted act of owner); 95Fla272, 116S15, 18 [citCJ]; 96Fla82, 117S705; 98Fla1087, 125S243 (cancellation of sale by agreement between owner and purchaser); 42 Ida240, 245P75; 243 Ill A418; 124Kan754, 262P541; 7La A179; 8LaA186; 12LaA55, 125S194(2d case); 261Mass178, 158NE537; 263 Mass278, 160NE803; 245Mich192, 222 NW103; 146Miss758, 111S867; 146Miss 766, 111S869; 86Mont69, 281P915; 125 Misc258, 210NYS524 (attempt of principal to vary terms of contract increasing down payment); 128Misc19, 217 NYS188; 130Misc394, 223NYS517; 137 Misc338, 243NYS560; 23 OhA279, 155 NE158; 129 Or511, 277P823; 283Pa 271, 129A59; 87PaSuper240; 50RI 125, 145A442(2dcase); R I 149A861; Tex CommnA 283SW481; TexCivA 16SW(2d) 429. [a] 128Misc19, 217NYS188. [c] 312Mo 30, 278SW747, 754 [citCJ]. [e] **Inability of owner to procure mortgage loan** is no defense to claim for commissions, if existence of owner's agreement to procure such loan is proved. NH 146 A508.

624–67 CalA 263P532; 92CalA31, 267 P596; 33GaA806, 128SE812 (rule not affected by fact that broker seeks to recover reasonable value of services); 336 Ill 500, 168NE362 (contract not at will of principal); 253 Ill A328; 124Kan 754, 262P541; 9LaA605, 119S284; 150 Md114, 132A594; MoA 27SW(2d)1052; NJSup 139A319; NJSup 139A806; 136 Misc825, 242NYS180; 7PaDist&Co 119; 48RI 86, 135A604, 51ALR1386; Tex CommnA 283SW481; TexCivA 297SW 339; TexCivA 16SW(2d)429.

624–68 220Ala317, 124S882; 178Ark42, 9SW(2d)775; 73CalA140, 238P749; 78 CalA660, 248P774; 82CalA675, 256P301; 83CalA155, 256P438; 83CalA434, 256P 867 (sale of leasehold); 95CalA456, 273 P50; CalA 284P975; 103Conn693, 131A 417; 96Fla82, 117S705; 224 IllA35; 119Kan394, 239P1106; 124Kan754, 262 P541; 125Kan265, 635, 264P19, 266P 101; 232Ky119, 22SW(2d)413; 169La 1069, 126S556; 5LaA567; 253Mass490, 149NE311; 146Miss766, 111S869; MoA 24SW(2d)657; 105NJL588, 147A465 (though commission was payable on completion of initial payment); NJSup 147A576; NC 154SE37; 87PaSuper473; 89PaSuper252; 12PaDist&Co 701; 52 SD97, 216NW860; TexCommnA 283SW 481; TexCivA 295SW349. But see Mass 173NE503. [d] (3) 96Fla82, 117S705. [e] **Tender of consideration,** contract or form of deed not necessary. 103Conn 693, 131A417 (futile act). [f] **That purchaser could not enforce contract against principal because not in writing** does not deprive broker of commission on capricious refusal of owner to complete sale. 216AppDiv305, 214NYS580 (terms agreed upon). [g] **Principal's voluntary rescission of enforceable contract of purchase** cannot deprive broker of commission. TexCivA 18SW(2d)838.

625–69 148Va754, 139SE488.

625–70 205Cal 771, 272P1049; 102CalA 691, 283P372(2dcase); 9LaA195, 119S 480; MoA 279SW168; TexCivA 30SW (2d)1060.

625–71 21AlaA524, 109S555; 10LaA123, 120S878; 117 Okl 170, 246P215.

625–73 98Fla1087, 125S243; 8LaA739; 104NJL343, 140A295, 56ALR910; 48RI 86, 135A604, 51ALR1386.

625–74 154Miss265, 122S200. [a] **Broker's failure to buy property to be embraced in mortgage loan** which he secured did not entitle him to commission thereon, he being exclusive agent for that purpose. 297Pa376, 146A887.

625–74½–New. Under statutes a broker employed by an officer of a corporation was not entitled to commission for procuring a purchaser for the entire assets of the corporation where consent of holders of two thirds of the stock was not obtained and the sale never consummated. 216AppDiv439, 215NYS587.

625–74½–New. Vendor's covenant to assign the purchaser's mortgage to a broker does not import a promise to pay a cash commission if the sale was not consummated. 263Mass565, 161NE598.

625–75 CalA 274P374 (unenforceable contract); 10LaA63, 120S417 (unenforceable contract); 10LaA424, 121S366 (invalidity of contract); 11LaA99, 120S 900; Mass 171NE654; 102NJL119, 130 A560 (where conditional contract of sale is not completed, broker is not entitled to commission); 128Misc149, 220NYS 609; 104WVa438, 140SE145 (injustifiable demand for exorbitant fees by broker

procuring loan). [d] **Where negotiations fail** because of question of assignability of option contract between owner and broker which was merely unenforceable contract to make contract in future, principal was not liable to broker on failure to accept prospective lessee of premises produced by broker. **TexCommnA** 276SW672.

626-76 151Miss584, 118S418(1stcase).

626-77 217Ala432, 116S520; 203Cal 17, 262P75) (good faith required); 83CalA 155, 256P438; 146Miss766, 111S869; RI 149A861. See also MoA 293SW496. [b] **Capriciousness of principal.**–TexCommnA 276SW672.

626-78 200Cal 348, 254P532; 42 Ida 240, 245P75; 119Kan394, 239P1106; 296 Pa176, 145A793; 89PaSuper153; 155 Tenn515, 296SW9; **TexCivA** 25SW(2d) 656. See also 87CalA717, 262P430.

626-79 154Md290, 141A363 (seller listing property with broker at specified price represents deed would be made to cash customer at that price); MoA 293 SW496. [c] **Principal's refusal to go through with contract unless broker accepted reduced commission** cannot deprive broker of commissions. 126Misc 197, 212NYS625.

626-79½-New. Where defendant employed plaintiff to procure such a lessee as would be able and willing to accept the terms to be agreed upon, defendant does not impliedly agree to lease property on reasonable terms. **TexCommnA** 276SW672.

626-80 **TexCommnA** 29SW(2d)1024; 188Wis17, 205NW548. [a] 161La1070, 109S841. [e] **Broker has implied obligation** to see that other party has marketable title. **TexCommnA** 29SW(2d) 1024.

627-82 **CalA** 268P455; **TexCivA** 5SW (2d)1037.

627-85 179Minn42, 228NW339. [a] (4) Defense of indefiniteness and uncertainty of exchange agreement is waived by basing refusal to complete transaction on other grounds. 179Minn42, 228 NW339.

627-86 203Cal 459, 264P748; 87CalA 717, 262P430; 34GaA308, 129SE294 (owner's inability to make good title); 243 IllA418; **LaA** 124S687; 265Mass 219, 163NE739; 154Miss265, 122S200; MoA 293SW496 (unknown to broker); 104NJL176, 138A875; **NJSup** 132A241; 249NY106, 162NE600; 254NY210, 172 NE472; 216AppDiv600, 215NYS699; 125Misc827, 211NYS581 (where broker did not know of defect); 224AppDiv 463, 231NYS238; 23 OhA279, 155NE 158; **TexCommnA** 29SW(2d)1024; **Tex CivA** 16SW(2d)429; **TexCivA** 25SW (2d)656. See also 10LaA250, 120S773. But see 134Wash252, 235P11. [a] 82 CalA675, 256P301. See also 264Mass 18, 161NE621. [i] **If purchaser is willing to accept title** subject to condemnation proceedings set up by owners as preventing performance, broker may recover commission. 196Wis308, 219NW 954. [j] **Broker has right to assume** that principal has marketable title. 169 La1069, 126S556. [k] **Married woman's contract** with brokers producing purchaser is binding on her, though land contract could not be specifically enforced because it affected community. 12LaA203, 123S389. [l] **Law implies representation** that one giving authority to sell lands has legally sufficient title. **TexCommnA** 29SW(2d)1024.

628-89 254NY210, 172NE472.

628-92 But see 133Misc833, 234NYS81.

628-93 **TexCivA** 3SW(2d)514 (failure to furnish abstract of title).

628-93½-New. In the absence of any inquiry by the broker, the owner's failure to notify the broker of an ancient restrictive covenant is not fraudulent misrepresentation or concealment. 221 AppDiv838, 224NYS481.

629-95 155Tenn515, 296SW9; **Tex CommnA** 29SW(2d)1024; **TexCivA** 23 SW(2d)865.

629-96 12LaA203, 123S389; **Wis** 231 NW182 (right to rely on owner's agent as to depth of lot). See also 249NY106, 162NE600. [c] **Broker is entitled to assume that owner is able to make good deed** to purchaser under contract to sell property. 23 OhA279, 155NE158.

630-99 163La885, 113S135; 224App Div463, 231NYS238.

630-1 163La885, 113S135; 224AppDiv 463, 231NYS238; **TexCivA** 15SW(2d) 123. But see 95PaSuper82 (parol condition not sufficiently proved). [a] (4) When plaintiff was to receive commission out of proceeds of sale on oral contract for sale of lots on commission, it has been held that plaintiff had no ground for recovery in alleged breach of contract, where at time of breach no lots had been sold. 32 OhA59, 167NE 598.

630-1½-New. or provides that brokerage would be returned in the event that the title was not closed by reason of a defect or default on the part of the seller; 220AppDiv460, 221NYS641.

631-4 214Ala84, 107S914; 34GaA58, 128SE219; 240Mich89, 214NW946; 66 Utah229, 241P221. [a] (1) See also **NJ Sup** 135A352. (2) 228AppDiv721, 239 NYS147. (3) Where contract is void for mutual mistake, broker is not entitled to commissions. **NJSup** 136A599. [b] **Right to recover commission retained by broker** where contract is not enforceable. 246Mich32, 224NW330.

631-5 77CalA201, 246P163; 34GaA58, 128SE219; 66Utah229, 241P221.

631-6 92CalA178, 267P898; 34GaA58, 128SE219; 38GaA613, 144SE830; 240 Mich89, 214NW946; **NJSup** 136A336; **NJSup** 146A682; 135Misc339, 237NYS 506 (mortgage loan); **TexCivA** 286SW 633; **TexCivA** 23SW(2d)858; 66Utah 229, 241P221. But see 243 IllA418 (absolute inability). [a] **Possible right to terminate lease for breach of lessee's** covenant does not affect right to compensation for procuring lease. 126Misc 176, 212NYS685.

631-7 214Ala84, 107S914; 172Ark137, 287SW740; 69CalA432, 231P344; 255 IllA35; 90KanI2, 132P988; 12LaA55, 125S194(2dcase); 240Mich89, 214NW 946; 228AppDiv444, 239NYS634; 21 OhA265, 152NE688; 88PaSuper206; RI 131A200; **TexCommnA** 295SW187; **TexCivA** 286SW633; **TexCivA** 289SW 439; **TexCivA** 18SW(2d)838; **TexCivA** 21SW(2d)1083. But see 218Ala447, 118 S665; 10LaA430, 120S658; 50RI467, 149A254.

632-8 **TexCivA** 15SW(2d)1072; 150 Wash264, 272P954 (broker representing both parties could recover commission from defendant who did not give good title).

632-9 34GaA58, 128SE219; 104NJL 408, 140A314; 216AppDiv600, 215NYS 699.

632-10 81CalA356, 253P750; 5LaA 609; 263Mass278, 160NE803; 216App Div600, 215NYS699; 128Misc19, 217 NYS188; **Or** 293P430; 284Pa3, 130A 256 (dictum); **TexCivA** 18SW(2d)850.

632-11 91CalA617, 267P354; 37GaA 656, 141SE332; 87PaSuper421 (commission payable only in case of actual settlement). See also 216AppDiv487, 215NYS505. [a] (5) Owner is not liable for commissions because of his failure to sue defaulting purchaser for price. 284Pa3, 130A256 (where no request to bring suit was made nor security offered or tendered to indemnify owner against loss if he did sue, nor was he given reasonable time to sue). [b] (3) Where contract for exchange of realty provided that brokers' commissions should be payable on execution of conveyances effecting exchange, "or" when time specified for execution of conveyances elapsed, and recited that brokers had fully performed all of their services, brokers were entitled to commissions, though exchange of properties was never actually consummated. 149Wash29, 270P110. (4) Sale never having been completed as stipulated in contract, no commission became due though owner made no attempt to enforce specific performance after forfeiture of earnest money as authorized by contract. 153Wash254, 279P575. [c] (2) Where note given to broker for procuring lessee provides for forfeiture thereof on tenants' failure to perform terms of lease, performance under modified lease releasing lessee from consequences of partial failure is not failure of performance within forfeiture clause of note. 25 OhA21, 157NE407. (3) Parol agreement that commission should not be paid until purchase price of land was paid was held not to defeat recovery, where vendor affirmed sale by hypothecating purchaser's note to third parties, receiving full value therefor. **TexCivA** 17SW(2d)463. [d] **Stipulation to pay commission out of money received.**–205Cal 569, 271P1087 (ratification not shown). [e] **Contract provision** for forfeiture of deposit as liquidated damages is inapplicable to broker's claim for commissions. 149 Wash29, 270P110. [f] **Where broker's right to commission on purchaser's default is doubtful** under sale contract prepared by him, seller will be given benefit of doubt. 50RI 467, 149A254.

632-11½-New. Defendant, canceling a contract for default of the purchaser and later settling a suit for specific performance brought by the purchaser, did not prevent passing of title so as to become liable for commissions. 130Misc 730, 225NYS7.

632-11¼-New. and defendant was not required later to convey title on the purchaser's demand. 130Misc730, 225 NYS7.

632-11¼-New. Defendant, after breach by the purchaser, could compromise with the purchaser without becoming liable for commissions. 130Misc730 225NYS7.

632-11½-New. A contract between defendant and purchaser procured by a broker did not continue in force until withdrawal of appeal by the purchaser in an action for specific performance. 130Misc730, 225NYS7.

632-11½-New. Where an escrow constituting the contract for the sale of real property is terminated by consent of all the parties, there is no default within a provision of a broker's contract fixing compensation on default of the purchaser. 90CalA512, 265P1016.

633-15 100CalA70, 279P814; 253 IllA 328; 112 Okl 61, 242P224, 226 [quot CJ]. But see 203Cal 778, 265P913. [c] **Nature and form of action.**–Whether recovery for commission should be on express contract or quantum meruit depends on whether amount of commission was fixed as term of offer. **Mass** 168NE739.

633-16 112 Okl 61, 242P224, 226 [quot CJ]. [b] **Broker's remedy is action for commission and not breach of contract** where owner agrees to pay commission on sale of realty by broker or by owner or another during broker's agency. 132Misc374, 229NYS97.

633-17 112 Okl 61, 242P224, 226 [quot CJ].

634-19 But see 26F(2d)801.

634-20 [a] **Action must be on contract,** not on quantum meruit. 21SaskL438, [1927] 2DomLR819, [1927] 1WestWkly 929.

634-21½-New. Cause of action accrues on repudiation of contract for sale by vendor. **TexCivA** 277SW728.

634-21⅓-New. No affirmative action necessary on part of vendee or broker. **TexCivA** 277SW728.

634-21¼-New. Broker may be entitled to execution against third person, purchasing property with notice of broker's right to commissions. 211Ala620, 101S 389.

634-21½-New. Demand, consisting of statutory penalty for sale without license, is not recoverable until commission is paid, and therefore cannot be litigated in action for commission. 124 Misc606, 209NYS155.

634-21½-New. Performance of conditions. **TexCivA** 283SW235.

634-21½-New. Suit dismissed for prematurity where note given for commission was not due at time of suit. 169 La1079, 126S665.

634-21½-New. A broker who abandoned further efforts to perform his obligation under an executory contract to advertise and aid in selling the corporation's stock on the ground of breach

of contract could only recover on quantum meruit for the value of services actually rendered. **TexCivA** 19**SW(2d)** 605.

634–22 216**Ala**645, 114**S**308.

634–27 See also 252**Mass**275, 147**NE** 827.

634–28½–New. ; nor that the principal was not the owner at the time of contract with the broker. 128**Misc**148, 218 **NYS**369.

634–30 78**Colo** 366, 242**P**52.

634–30½–New. Payment of amount of accrued commissions by third person purchasing property with notice of violation of broker's rights will defeat further proceedings in relation thereto, but not proceedings to recover commission maturing in future. 211**Ala**620, 101**S** 389.

634–30⅓–New. That brokers were discharged before the sale is defensive matter for defendant to prove. **Tex CivA** 285**SW**908.

634–30¼–New. Agreement with an officer of a corporation to share profits with him does not defeat a broker's right to commission for procuring an oil lease for the corporation. **TexCivA** 281**SW**1106.

634–30½–New. A broker not disclosing to the principal all material facts cannot recover commission. 221**AppDiv** 615, 225**NYS**14.

634–30⅙–New. A brokerage contract procured by a broker without disclosing to the principal that he had already procured a purchaser is unenforceable. 221**AppDiv**615, 225**NYS**14.

634–30⅐–New. In an action by brokers to recover a commission for procuring a lease of real property, defendants could not complain against a judgment allowing the brokers' commissions, because they saw fit to accept a lease on terms less favorable to themselves than the terms secured by the brokers. 93**CalA** 577, 269**P**948.

634–30⅛–New. A broker's right to commissions as agreed is not affected by failure of title equal to the purchaser's down payment, which payment the vendor has to refund. 105**NJL**147, 143 **A**433.

634–30⅑–New. A principal is not estopped to contend that his agent failed to perform the contract merely because of a refusal to assign a reason for not accepting the purchaser. **Mo** 18**SW(2d)** 382.

634–30⅒–New. That hotel was not transferred for cash consideration but in exchange for other property is not available defense. 169**La**1079, 126**S**665.

634–30⅓–New. Estoppel. Presence, silence and inaction of broker does not estop her from claiming commissions if she had no knowledge of what was transpiring between owners and purchasers. **Md** 148**A**238.

634–30½–New. The defense that a husband's contract to convey a homestead was not signed by his wife can be waived. 179**Minn**42, 228**NW**339.

634–30⅓–New. Where owner notified broker of completion of sale to another before receiving broker's sale papers, he cannot defend on ground that broker made option contract. **MoA** 24**SW(2d)** 717.

634–30¼–New. Return of purchaser's earnest money is no defense for principal sued for commission. **Or** 293**P**430.

634–35 94**CalA**549, 271**P**529; 29 **OhA** 305, 163**NE**560; 87**PaSuper**282; 151 **Va**220, 144**SE**430.

634–36 222**MoA**1044, 9**SW(2d)**676. Contra **TexCivA** 2**SW(2d)**925.

635–39 TexCivA 274**SW**660 (other broker to whom seller had given note for commission proper party defendant); **TexCivA** 294**SW**699. [a] (3) Where another agent had sixty per cent interest in commission sued for, he was necessary party defendant. **Tex CivA** 14**SW(2d)**313. [d] (1) **TexCivA** 9**SW(2d)**470. (2) Person asserting interest in commissions for negotiating sale of corporation is not entitled to intervene in action for commissions. 223 **AppDiv**35, 227**NYS**373. [e] **Broker may join agent of corporation with corporation** for which he listed property for sale, in action for compensation for latter's failure to sell after broker had found purchaser. 218**AppDiv**102, 218 **NYS**162. [f] **In New York** Civil Practice Act provides that all parties must be joined, 127**Misc**350, 216**NYS**590.

635–41 217**AppDiv**333, 216**NYS**710; 225**AppDiv**557, 234**NYS**27 (purchase price and rate of commission need not be alleged). [a] 217**Ala**432, 116**S**520; 220**Ala**332, 124**S**884 (ownership by defendant principal of lands leased sufficiently shown); 86**CalA**32, 260**P**324; **CalA** 285**P**1048(2dcase) (other instances); 78**Colo**366, 242**P**52; 97**Fla**269, 120 **S**357(2dcase) (compliance with license statute); 37**GaA**1, 138**SE**859 (on express contract rather than on quantum meruit); 42 **Ida**240, 245**P**75; **Mass** 165**NE**708; 145**Miss**815, 111**S**302; 318 **Mo** 1155, 6**SW(2d)**947 (quantum meruit); **MoA** 291**SW**190; **MoA** 24**SW(2d)** 717; 78**Mont**228, 253**P**257; 131**Misc**846, 228**NYS**408; 132**Misc**222, 228**NYS**486; 229**AppDiv**167, 241**NYS**123; 190**NC**783, 130**SE**842; 29 **OhA**305, 163**NE**560; 35 **OhA**139, 172**NE**158 (on written promise); 129 **Or**511, 277**P**823; **TexCivA** 278 **SW**948; **TexCivA** 293**SW**204; **TexCivA** 25**SW(2d)**670 (sufficient against general demurrer); **TexCivA** 25**SW(2d)**879 (other instances); **TexCivA** 31**SW(2d)** 1094 (quantum meruit). [b] 7**F(2d)**70; **Ala** 130**S**380; 196**Cal** 236, 237**P**38; 86**CalA**32, 260**P**324; 95**CalA**535, 273**P** 47 (complaint should allege possession of license); 35**GaA**517, 134**SE**130; 336 **Ill** 500, 168**NE**362 (for personal services in syndication and sale of land trust certificates, where enterprise was not successfully carried out); **IndA** 169**NE** 538 (failure to allege price for which land was sold); 12**LaA**438, 126**S**82 (under allegation that another acted exclusively as agent of defendant); 218 **AppDiv**513, 218**NYS**631; 130**Misc**859, 224**NYS**715; 27 **OhA**329, 161**NE**213; **Utah** 292**P**915; 143**Wash**204, 255**P**101; 35**Wyo** 452, 251**P**1, 49**ALR**919. [f] **Complaint held good against demurrer.**– 21**AlaA**55, 105**S**719 (on ground of improper cause of action). [g] **Failure of plaintiff to allege that he was licensed real estate broker** when his alleged cause of action arose bars action for commission. 132**Misc**374, 229**NYS**97. [h] **License.**–Allegation that plaintiff had proper license is necessary. 89**CalA** 746, 265**P**353. [i] **Breach of contract by employer** must be alleged by brokers under separate contract for commissions. **Md** 151**A**44.

636–43 332 **Ill** 334, 163**NE**662; 225**App Div**557, 234**NYS**27. **TexCivA** 20**SW(2d)** 361 (listing and renewal thereof sufficiently pleaded); **Utah** 292**P**915; 143 **Wash**204, 255**P**101; 35**Wyo** 452, 251**P**1, 49**ALR**919. [a] (1) 45 **Ida**327, 262**P**148. (2) Suit for commission is not converted into one on quantum meruit by allegation that services were worth commission. 27 **OhA**329, 161**NE**213. [f] (1) 136**Misc**743, 241**NYS**721; 230**App Div**523, 245**NYS**266. But see 91**CalA** 538, 267**P**112; 135**Misc**241, 237**NYS**450. Contra 50**Nev**289, 258**P**233. (2) Must be alleged. **CalA** 284**P**517. [g] (2) Where broker's complaint asserts that he was entitled to commissions from one party and damages from another, court will assume that he claims primary employment by former. 219**Ky** 282, 292**SW**780.

636–44 136**Misc**369, 240**NYS**83 (insufficient).

636–46½–New. The fact that a broker alleged that a sale was made on a certain trip, which in point of time was false, will not affect the general scope of allegation that he was the procuring cause. **TexCivA** 286**SW**999.

637–47 [d] **Character of ownership of person sought to be charged** need not be alleged. **Nev** 290**P**1027.

637–48 78**Colo** 366, 242**P**52; 136**Misc** 369, 240**NYS**83. [e] But see 95**Fla**272, 116**S**15. [g] **Complaint held not subject to demurrer.**–**TexCivA** 272**SW**241. [h] **Where principal authorized broker to offer property to designated individual at designated price,** broker need not allege ability of purchaser to carry out contract. **TexCivA** 18**SW(2d)**838.

638–49 TexCivA 25**SW(2d)**670 (petition though vague as description has been held not subject to general demurrer). [a] **Actual value of land principal received** must be alleged in exchange transaction. **TexCivA** 27**SW(2d)** 909.

638–49½–New. , but is subject to demurrer if it fails to identify it with certainty. 34**GaA**308, 129**SE**294.

638–52 9**LaA**452, 121**S**313.

638–52½–New. Petition on contract which conditions right to commission on actual transfer is subject to demurrer for failure to allege unconditional offer or that owner refused to consummate. 34**GaA**308, 129**SE**294.

638–52⅓–New. A complaint must allege that the broker was duly licensed. 217**AppDiv**333, 216**NYS**710. But see 159**La**892, 106**S**371.

638–52¼–New. Conspiracy to deprive broker of commissions and an action for commissions are separate actions and should be separately stated. 218**App Div**513, 218**NYS**631.

638–52⅕–New. Proof of compliance with statute requiring registration at time of rendering services is not necessary. 240 **IllA**363.

638–55½–New. Complaint by one contracting to sell stock alleging expenditures for stamps and telephone calls has been held insufficient for failure to show demand for payment or that defendant agreed to repay expenses. 136**Misc**369, 240**NYS**83.

638–59 218**AppDiv**90, 218**NYS**241.

638–60 103**NJL**509, 138**A**201.

639–62 [b] **Affidavit of defense held sufficient.**–87**PaSuper**135; 90**PaSuper**32.

639–65½–New. The statute of frauds must be specially pleaded. 200**Cal** 348, 254**P**532.

639–65⅓–New. That a contract sued on has been modified by a subsequent agreement can be set up by proper plea. 92**Fla**673, 110**S**267.

639–67 86**CalA**32, 260**P**324; 41**GaA**150, 152**SE**275; 227**Ky**56, 11**SW(2d)**979; 133**Misc**32, 231**NYS**79 (permitting amendment by adding allegation that broker was licensed is proper). But see 132**Misc**374, 229**NYS**97 (defects held not curable by amendment). [c] **Failure to allege fact of being licensed** is curable by amendment. 133**Misc**32, 231 **NYS**79.

639–69 CalA 289**P**641 (no issue of plaintiff's ownership, not pleaded); 125 **Okl** 219, 257**P**291, 293 [citCyc]; **TexCivA** 12**SW(2d)**829(1stcase). [e] **Evidence of procuring oral acceptance of offer to sell** does not entitle broker to commission, where pleading and proof failed to show purchaser's continuing readiness and willingness and that failure to consummate sale was due to default of seller. **TexCivA** 18**SW(2d)**838. [f] **Where principal defaulted,** broker need plead and prove only that he procured purchaser ready, willing, and able to purchase on authorized terms, and that principal refused to sell. **TexCivA** 18 **SW(2d)**838. [g] Broker must plead and prove purchaser's ability to purchase, and that he bound himself by enforceable contract to do so. **TexCivA** 18 **SW(2d)**838. [h] **Allegation and proof of actual value of property exchanged** is necessary to recover commission thereon. **TexCivA** 24**SW(2d)**1108.

640–70 166**Minn**163, 207**NW**193.

640–71 15**F(2d)**660, 665 [quotCyc]; 125 **Okl** 219, 257**P**291, 293 [citCyc]; **Utah** 292**P**915. [b] **Proof of validity and identity of contract** is necessary where answer denies execution of particular instrument. **CalA** 283**P**957.

640–72 29**Ariz**383, 241**P**957; 321**Mo** 287, 11**SW(2d)**26.

640–73 15**F(2d)**660, 665 [quotCyc]; 81**CalA**409, 254**P**272; 205 **Iowa**809, 218 **NW**566; 170**La**567, 128**S**517; 166**Minn** 163, 207**NW**193.

640–76 15**F(2d)**660, 665 [quotCyc]; 77**Colo** 598, 238**P**62 (allegation of sale of property and proof of exchange); 94**Fla**1120, 114**S**759; 37**GaA**1, 138**SE** 859; 233**Mich**133, 206**NW**316 (allegation of sale to principal and proof of sale to agent purchasing for principal held not to constitute variance); **MoA** 14**SW(2d)**29 (no variance, though another contract also was proved); 230 **AppDiv**12, 242**NYS**545; 125 **Okl** 219, 257**P**291, 293 [citCyc]; 90**PaSuper**565; 97**PaSuper**313 (holding no variance);

TexCommnA 13SW(2d)342; **TexCivA** 286SW999; **TexCivA** 4SW(2d)605 (receipt or option held inadmissible under allegation of procuring deed); 136 **Wash**554, 240P913. [d] (3) Allegation of exorbitant commission did not prevent proof and recovery of customary commission. 156Md597, 144A833. [d] (4) Allegations of commissions due on purchases irrespective of prices fixed by buyer and proof of contracts to purchase only at fixed prices does not constitute variance. 299Pa17, 148A915.

641–77 217Ala432, 116S520; 90CalA 512, 265P1016; 255 IllA322 (variance as to contract pleaded not fatal); 129Kan 502, 283P509; 320Mo 828, 8SW(2d)828; **SD** 226NW948. [e] **Agreement for exchange of property containing covenants employing broker** is admissible under allegation of written agreement employing broker. **CalA** 289P641.

641–77½–New. Where oral evidence is admissible to show intent with which parties used ambiguous words, an allegation of fraud, accident, or mistake is not a prerequisite to its admission. 284 Pa3, 130A256.

642–78 97PaSuper313 (objection must be made at trial).

642–80 172Ark642, 290SW353; 78Mont 228, 253P257; 216AppDiv600, 215NYS 699.

643–84 216AppDiv600, 215NYS699.

643–87 [a] 22F(2d)551 (under plea that plaintiff had no part in negotiations).

644–88½–New. , and he may show different contract than that alleged. **Tex CivA** 277SW711.

644–88½–New. Unverified general denial puts in issue question whether purchase in fact made and whether defendant accepted terms. 130Kan96, 285P 630.

644–91 21AlaA524, 109S555 (performance within reasonable time); 172Ark 1176, 291SW72; 175Ark580, 299SW 1006 (that profits were realized); 69 CalA301, 231P583; 76CalA610, 245P 455; 95CalA195, 272P333; 36GaA61, 135SE220; 5LaA143; 169La1079, 126 S665; Md 151A44 (violation of special contract for commissions); 251Mich355, 232NW221; 154Miss265, 122S200; 113 OhSt682, 150NE752 (rule not changed by defendant's setting up in answer contract substantially different from that alleged in petition); 115 Or523, 239P 102; 297Pa376, 146A887 (that he had secured loan according to terms of his authorization); **TexCivA** 282SW921; **TexCivA** 14SW(2d)335 (broker need not prove that purchaser's title was merchantable); 152Va827, 148SE689. But see 96CalA121, 273P859. [d] **Broker was required to show that enforceable contract of sale resulted from his efforts,** or that defendants rendered his efforts a failure by fault of theirs. 226 AppDiv271, 235NYS171.

644–92 83CalA105, 256P573; 11LaA 99, 120S900; Md 148A244; 73Mont456, 236P1093 (valid contract under statute requiring writing must be proved); 79 Mont292, 256P173; 223AppDiv266, 227 NYS697; 224AppDiv41, 229NYS547 (that he acted as agent for defendant who promised to pay for his services); 130Misc832, 225NYS245; 136 Okl 218, 277P269; 85PaSuper114; 89PaSuper 408 (oral contract to pay usual commissions requires proof of what are usual commissions); 188Wis200, 205NW798. [c] 171Minn44, 213NW58.

644–95 216Ala645, 114S308; Ariz 285 P277; NJ 143A739; 129Misc273, 220 NYS444; 85PaSuper114; TexCivA 284 SW283.

645–96 76CalA610, 245P455; 83CalA 105, 256P573; 130Misc859, 224NYS 715 (that customer procured has reached agreement with seller on all terms of sale and incidents of transaction); **Tex CivA** 4SW(2d)577. [e] **Written contract between principal and purchaser is conclusive** admission that broker performed his duty, and broker need not offer evidence of ability, willingness, and readiness of purchaser to perform. 214Ala 84, 107S914.

645–97 21AlaA524, 109S555; 172Ark 1176, 291SW72; 176Ark616, 3SW(2d) 692; Md 148A244; 245Mich119, 222NW 98; 219AppDiv498, 220NYS457; 125 Misc892, 211NYS647; 129Misc273, 220 NYS444; 130Misc730, 225NYS7; 23 OhA249, 154NE66; 297Pa376, 146A887; 148Va754, 139SE488. See also 200Cal 348, 254P532. [a] (1) 227AppDiv28, 236NYS537. [b] **Where sale is not consummated,** broker must show actual signing of enforceable contract to purchase property on part of customer, or that parties have been brought together to enable owner to consummate sale. 95CalA195, 272P333; 152Va460, 147SE 203 (acceptance of altered contract). [h] **Where commission is dependent upon performance** of contract by purchaser, broker must show performance or principal's prevention of performance. TexCivA 284SW226.

646–98 200Cal 348, 254P532; 219App Div498, 220NYS457; 125Misc892, 211 NYS647. See also 3LaA66. But see 220 Ala282, 124S901; 245Mich119, 222NW 98. But see 148Va754, 139SE488.

646–99 130Misc730, 225NYS7.

646–1 NJ 145A635(2dcase); 227App Div28, 236NYS537; TexCivA 17SW(2d) 102.

646–1½–New. The presumption is that the owner can tender good title. 148 Va754, 139SE488.

646–1⅓–New. But such presumption is not conclusive 148Va754, 139SE488.

646–1¼–New. and will not be indulged when contradicted by evidence in a particular case. 148Va754, 139SE488.

646–1⅙–New. A seller's solvency and ability to perform the usual covenants in a contract to convey are presumed. 179Minn42, 228NW339.

646–1⅙–New. Broker has burden of proving that he did not waive right to commissions as alleged in answer. MoA 26SW(2d)1020.

646–1⅐–New. including delivery of a deed signed by his wife in case of a conveyance of a homestead. 179Minn 42; 228NW339.

646–2 200Cal 348, 254P532; 78CalA 660, 248P774; TexCivA 282SW921; TexCivA 20SW(2d)1084 (that commission was partly payable from proceeds).

646–4 TexCivA 20SW(2d)273. [a] **That broker abandoned negotiations** with purchaser must be proved by vendor by showing clear, unequivocal, decisive act and intention on broker's part to make no further effort to effect sale. TexCivA 20SW(2d)273.

646–6 CalA 268P455; 213Ky4, 280SW 132; LaA 129S240; 179Minn42, 228NW 339; TexCivA 280SW895.

646–8 224Ky343, 6SW(2d)273.

646–8½–New. It will be presumed, in the absence of a showing to the contrary, that the principals were interested in receiving the purchase price, and not in the person or persons who would ultimately receive the title. 95CalA456, 273P50.

646–9¼ 251NY305, 167NE452.

647–11 15F(2d)660; 215Ala177, 110S 376; 215Ala650, 112S232, 53ALR134; 179Ark816, 19SW(2d)1010 (evidence respecting value of goods taken in exchange held admissible in broker's action for compensation depending on amount received for selling farm); 83 CalA434, 256P867 (partnership relation between owner and agent); 236 IllA 254; 206 Iowa1225, 219NW419 (reasonable value of services); 12LaA570, 126 S522 (that transaction was in nature of mortgage and not sale is admissible in action for commissions on sale); MoA 293SW496 (to show why owner failed to consummate contract); NJSup 150A 580; 129 Or197, 276P1108; Or 293P 430; 19SD483, 104NW215; TexCivA 20SW(2d)829 (evidence that third party agreed to indemnify defendant on his liability for commission held relevant); 140Wash650, 250P59; 36Wyo 37, 253 P17. [d] **Where fraud is charged to owner** in withdrawal of property and sale to purchaser, evidence of owner's lack of knowledge as to broker's negotiations with purchaser is admissible. TexCivA 278SW483. [e] **Fraud and good faith.**–215Ala650, 112S232, 53ALR 134.

647–12 217Ala432, 116S520; 172Ark 642, 290SW353; 179Ark816, 19SW(2d) 1010 (in action for compensation which depended on amount received for farm, evidence of value of fixtures taken in exchange and sold at agreed price held immaterial); 96CalA121, 273P859 (evidence that property sold was worth more is immaterial); 90CalA647, 266 P565 (to support counterclaim for damages); MoA 296SW838; MoA 27SW(2d) 1052; 73Mont456, 236P1093 (evidence of oral contract of employment properly stricken where statute required contract in writing); NJ 147A109(2dcase) (in action for real estate commission, exclusion of defendant's evidence concerning monetary returns of broker's employee in transaction is proper); 132 Misc55, 228NYS603; 137Misc261, 242 NYS188; 49ND194, 191NW464; Tex CivA 294SW699; TexCivA 20SW(2d) 388 (vendors' good faith in believing that broker had abandoned contract held immaterial where actual damages only were claimed); Utah 280P235 (value placed on land defendant received in exchange).

648–14 206 Iowa1158, 221NW785; 239 Mich440, 214NW419; 128 Or668, 275P 682; 284Pa3, 130A256 (parole evidence admissible to show agreement to pay commissions only at time settlement by payment of purchase price, where contract is ambiguous); 86PaSuper473; 89 PaSuper377. 143Wash204, 255P101. [a] (3) Conversations between owner and broker, tending to show that no commission was in fact to be paid till title actually passed, were held properly excluded. 264Mass457, 162NE769.

648–14½–New. Thus parole evidence is admissible not to vary writing but to explain meaning of doubtful terms. 284 Pa3, 130A256.

648–16 96CalA772, 274P1024 (recordation of deed held admissible); 10La 629, 121S205(2dcase); NJ 147A109(2d case) (in action for real estate commissions, memorandum in writing by which seller was charged with commissions was properly received); TexCommnA 282SW210; TexCivA 22SW(2d)720; Utah 280P235 (contract of exchange signed by defendant but immediately revoked held not admissible); 36Wyo 37, 253P17. [c] TexCommnA 282SW 210. [f] **Broker's contract with party with whom defendant exchanged property** held inadmissible. Utah 280P235.

649–17 174Ark1179, 296SW709; 96 CalA772, 274P1024 (letter from owner's agent held admissible to show broker's performance); 255 IllA322; 136SC448, 134SE415.

649–18 174Ark1179, 296SW709; 265 Mass143, 164NE72 (manual admissible to show information concerning mill was available to anyone); RI 132A732; 140Wash650, 250P59; 36Wyo 37, 253 P17.

650–20 15F(2d)491; 215Ala177, 110 S376; 216Ala645, 114S308 (telephone conversation held admissible as part of res gestæ); 220Ala332, 124S884 (defendant's conversation regarding his liability held not error); 21AlaA524, 109 S555; 96CalA772, 274P1024; 109Conn 589, 145A271 (conversation of agent with purchaser admissible); 39GaA217, 146SE795; NJ 147A109(2dcase) (conversation between broker's agent and purchaser of property which proves performance is competent); TexCivA 3SW (2d)482 (broker's conversations with purchaser); Utah 280P235 (tending to show revocation of broker's authority); 143Wash46, 254P459. [f] **Negotiations prior to fixing compensation.**–85PaSuper 310. [g] **Testimony of owner as to conversation with purchaser** is admissible on issue of fraud and bad faith in withdrawal of property from broker. Tex CivA 278SW483. [h] **Testimony of conversations between broker and prospective purchaser,** not in presence of owner, tending to show purchaser's agreement has been held admissible for all purposes. TexCivA 18SW(2d)838.

650–20½–New. , or whether the broker abandoned efforts to make a sale. 143 Wash46, 254P459.

651–24 68CalA538, 229P883 (evidence extrinsic to written memorandum of

employment may be introduced to cure defect in description of property where so curable but cannot be resorted to to create a description not contained therein); 83CalA470, 256P1109 (broker's acts); 106Conn205, 137A740; 153Md 586, 139A285; 265Mass143, 164NE72; MoA 289SW970; 49SD587, 207NW659; TexCivA 3SW(2d)482 (commissions on prior sales of unlisted property). [c] (2) Stipulated premium insurance company, not required to have all its capital stock sold under statute, had right before change in its charter to contract with plaintiff to pay commissions on sales of stock. 222MoA1044, 9SW(2d) 676. [d] **Defendant may testify that broker did not represent him in transaction.**–128Kan341, 277P1016. [e] **Evidence that bank would make no such loan as broker claimed was in agreement** was erroneously excluded, it being admissible to support defendant's claim that no such agreement was made. NH 146A508.

651–25½–New. Bank's telegram to broker reciting offer of another broker and directing addressee to close the deal held inadmissible on question whether the broker making the offer was entitled to commission. TexCivA 296SW678.

651–26 216Ala645, 114S308; 265Mass 143, 164NE72; Mass 169NE795; MoA 23SW(2d)1100; NJSup 139A30; 222 AppDiv1, 225NYS254; TexCivA 278SW 483; 143Wash46, 254P459.

651–26½–New. Indorsements on contracts made by the principal after execution thereof are not admissible to prove that the brokers were not the procuring cause of the sale. 216Ala403, 113S265.

652–27 TexCivA 274SW660.

652–28 [b] 85PaSuper443. [c] **Payment of commission to son** is inadmissible. TexCivA 15SW(2d)118.

652–29 215Ala177, 110S376; 70CalA 408, 233P391; 97CalA534, 275P978; 146Miss766, 111S869; 82Mont393, 267P 296; TexCivA 278SW483. [e] **Purchaser may be asked whether he was financially able** to purchase land on terms offered. 224 IllA35. [f] **Refusal of defendant before expiration of specified time for payment** to accept proposed buyer rendered exclusion of question as to ability to pay at expiration of such time proper. 78Colo 235, 242P45. [g] **Evidence held inadmissible.**–That tenant was member of partnership having large bank account. 88 IndA399, 164 NE284.

653–30 77Colo 116, 234P1072.

653–30½–New. Prospective lessee's testimony that he did not know of certain requirements of owner is properly excluded where it is shown that he agreed to all requirements made. MoA 27SW (2d)1052.

653–32 TexCivA 290SW261, 263 [quot Cyc].

653–33 TexCivA 290SW261.

653–36 [d] **Where complaint is based on reasonable value,** evidence of contract fixing value is competent to prove reasonable value. 123 Or193, 261P422.

654–37 88 IndA399, 164NE284; 78 Mont228, 253P257. [b] **Where agreement fixed commission at five per cent and principal authorized broker to sell at reduced price,** evidence as to reasonable value of services was admissible. 50RI 221, 146A639.

654–40 69CalA301, 231P583; 86CalA 662, 261P336; TexCivA 30SW(2d)1060. [a] (1) 200Cal 348, 254P532; 146Miss 766, 111S869; MoA 274SW106. (2) To support finding that defendant had not listed lease with plaintiff for sale at stated price at stated commission. TexCivA 280SW895. (3) To show change in terms of contract as to payment of broker's commissions. 216AppDiv487, 215NYS505. [b] 210Ky68, 275SW23. [g] **Bad faith not shown.**–167Minn155, 208NW651. [h] **Failure of proof.**–125 Okl 219, 257P291. [i] **Death of customer.**–154Miss265, 122S200.

654–40½–New. Judicial expressions concerning necessity of clear and satisfactory proof must be construed in the light of fundamental declaration of code on sufficiency of evidence. 69CalA301, 231P583.

654–41 177Ark336, 7SW(2d)336; 70 CalA415, 233P366; 94CalA614, 271P 539; 95CalA195, 272P333 (satisfactory evidence); 199 Ind126, 155NE551; 3 LaA546; 4LaA446; TexCivA 293SW 321. [a] (1) 179Ark700, 17SW(2d)884; 91CalA435, 267P110; 93CalA577, 269P 948; CalA 287P133; 82Colo 93, 257P 262; 37GaA1, 138SE859 (finding for plaintiff authorized under particular count but not required); 240 IllA28; 119Kan394, 239P1106; 123Kan242, 255 P55; 125Kan265, 635, 264P19, 266P101 (special findings); 126Kan163, 266P 743; 127Kan695, 274P1116; 235Ky643, 32SW(2d)39; 236Ky18, 32SW(2d)542; 259Mass392, 156NE673; 233Mich133, 206NW316; 146Miss758, 111S867; 156 Miss337, 126S6; 318Mo 1155, 6SW(2d) 947 (broker versus broker); MoA 28W (2d)178 (finding); MoA 28SW(2d)375; NJSup 139A319; 22 OhA480, 154NE 163; 105 Okl 66, 231P247; 144 Okl 51, 289P352(2dcase); 126 Or610, 268P742; 87PaSuper516; 90PaSuper386; Tex CivA 273SW624; TexCivA 278SW948; TexCivA 286SW999; TexCivA 300SW 650; TexCivA 13SW(2d)965; TexCivA 31SW(2d)1094 (quantum meruit). (8) To show that unlicensed individual was acting as agent of undisclosed licensed broker, plaintiff corporation, and not for himself, 90CalA647, 266P565; 95 CalA320, 272P775; Mass 166NE570; Mass 166NE573; Mass 167NE256; 222 MoA1044, 9SW(2d)676; NH 146A508; 125Misc108, 210NYS131; TexCivA 17 SW(2d)102; 151Va220, 144SE430; 151 Va581, 144SE610. (9) To support judgment for defendant based on broker's fraud in misrepresenting facts. 70CalA 415, 233P366. [a] (10) Other evidence held sufficient. 217Ala432, 116S520; 172Ark137, 287SW740; 81CalA356, 253 P750; 82Colo 93, 257P262; TexCommnA 282SW210; TexCivA 278SW492; Tex CivA 18SW(2d)400. 143Wash679, 256P 71. (11) To show that purchasers were ready and willing. 100CalA70, 279P814. (12) To show exclusive agency, revocable on written notice, was cancelled by verbal agreement. LaA 129S 461. (13) To warrant finding that broker's agreement did not provide for sale at price net to owner. Mass 169NE433 (2dcase). (14) To show agreement to pay commission for sale of land satisfying statute of frauds. 100CalA70, 279 P814. [b] (1) 5F(2d)676; 41F(2d)225; 70CalA415, 233P366; 94Fla1120, 114S 759; 123Kan598, 256P979; 156La1008, 101S398; 252Mass492, 147NE854; 173 Minn483, 217NW596; 174Minn115, 218 NW464; 174Minn237, 219NW149; MoA 272SW1071; 214AppDiv414, 212NYS 353; 230AppDiv12, 242NYS545; 123 Okl 258, 253P55; 136 Okl 218, 277P269; 88PaSuper261; TexCivA 296SW678; TexCivA 20SW(2d)361 (on special issues that listing contract was renewed); 102WVa355, 135SE175; 102WVa567, 135SE667. (2) TexCivA 3SW(2d)591. (8) To sustain finding that parties rescinded contract by oral agreement. 68 CalA583, 229P880. (9) To show waiver by principals of right to set off losses, if any should occur on uncompleted transactions on date for accounting. 252Mass492, 147NE854. (10) To show that plaintiff was "broker" so as to need license. Mont 252P257. (11) To show broker's voluntary surrender of agency to sell property. 132Misc374, 229NYS 97. (12) To sustain finding and judgment for defendants. 87 IndA541, 161 NE568. (13) To show broker was agent for both parties. 292Pa256, 141A39. (14) To show vendor's agreement to pay commission after knowledge that broker was also agent for purchaser. 292 Pa256, 141A39. (15) Other instances. 179Ark700, 17SW(2d)884; 92CalA1, 267 P719; 93CalA577, 269P948; 94CalA614, 271P539; 11LaA115, 119S280; Mass 166NE573; TexCivA 16SW(2d)880. (16) To show prospect's name and address had been furnished as required by agreement. CalA 286P429. (17) To establish agreement of purchaser to pay commission. 228AppDiv374, 240NYS 475. (18) To support contention that fraud of principal prevented consummation of sale during agency. CalA 284 P680. (19) To show owners directly sold property so as to avoid payment of commission to plaintiffs. Mass 170NE 459. (20) To show broker agreed to receive commission only on payments made under contract. 228AppDiv444, 239NYS634. (21) To disprove broker's allegation that he negotiated sale on terms stipulated by defendant. TexCivA 22SW(2d)720. (22) To establish express contract by corporation's president to pay broker commissions for advertising and selling stock. TexCivA 19SW(2d)605. (23) To show misrepresentation as to rentals of property purchased so as to avoid contract. 11 LaA373, 123S376. [c] 129Misc586, 221 NYS352. [f] **Evidence held to sustain finding** that broker is not entitled to commission unless sale consummated. TexCivA 277SW773. [g] **To warrant finding** that broker waived commissions testimony must show intent to so do. Or 293P430.

655–42 Mo 29SW(2d)1112. [a] (1) 70 CalA415, 233P366; 104Conn28, 132A 401; 92Fla1001, 111S113; 205 Iowa 809, 218NW566; 129Misc273, 220NYS 444; 69Hun615, 23NYS195; 54ND376, 209NW852 (sale of real estate); 296Pa 176, 145A793; TexCommnA 283SW481; TexCivA 280SW895; TexCivA 6SW(2d) 425. (6) 205 Iowa809, 218NW566; Tex CommnA 18SW(2d)572. (9) 217Ala27, 114S409; TexCivA 30SW(2d)685. (11) 130Misc832, 225NYS245. (13) TexCivA 18SW(2d)453. (17) To sustain finding of parol employment of real estate broker. 3NJMisc996, 130A456. (18) To sustain finding of exclusive agency. 123Kan 242, 255P55. (19) To show that broker was acting for purchaser. 21AlaA222, 107S909. (20) Other instances. 93CalA 577, 269P948; 94CalA327, 271P211; 96 CalA772, 274P1024; 85Colo 9, 273P653; 10LaA250, 120S773; Mass 167NE256; NJCir 143A82; TexCivA 13SW(2d)936; 198Wis122, 223NW427. (21) To support finding that owner delivered to broker agreement and proposition of exchange which was accepted. CalA 290 P636. [b] (1) 71CalA611, 235P742; Fla 129S341; 252NY192, 169NE274; 220AppDiv457, 221NYS556; 22 OhA480, 154NE163; 86PaSuper590; 92PaSuper 213; TexCivA 296SW625; TexCivA 296 SW678; TexCivA 4SW(2d)199; Tex CivA 18SW(2d)1101; 192Wis330, 212 NW671. (3) 180Ark68, 20SW(2d)645; TexCivA 18SW(2d)1101. (6) LaA 129S 240. (9) To show contract sufficient under statute of frauds. 79Mont292, 256 P173. (10) Other instances. 93CalA577, 269P948; 10LaA629, 121S205(2dcase); TexCivA 16SW(2d)880. (11) To establish contract by manufacturer to pay broker commission. 170La567, 128S517. (12) To show ratification. Mo 29SW (2d)1112.

655–43 320Mo 828, 8SW(2d)828. [a] 129Misc273, 220NYS444. (2) To warrant finding that broker was entitled to commissions on lands he materially assisted in purchasing, notwithstanding they were not mentioned in contract. 152Va827, 148SE689. [b] (1) 174Ark 682, 297SW839; 200Cal 348, 254P532; 90CalA13, 265P370; 111Conn141, 149A 239; 248 IllA162; 123Kan242, 255P55; 125Kan265, 635, 264P19, 266P101; 259 Mass278, 156NE421; 259Mass392, 156 NE673; 55ND817, 215NW268; 87Pa Super473; 89PaSuper153; 89PaSuper 252; 89PaSuper299; 94PaSuper411; RI 132A885; RI 149A861; TexCivA 6SW (2d)425. (3) 200Cal 348, 254P532; 202Cal 569, 262P297; 69CalA301, 231P 583; 95CalA195, 272P333; 240 IllA28; 257Mass563, 154NE84; 259Mass278, 156 NE421; 265Mass367, 164NE81; 167 Minn155, 208NW651; 171Minn44, 213 NW58; 146Miss766, 111S869; 3NJ Misc996, 130A456. 137Misc338, 243NYS 560; TexCommnA 283SW481; TexCivA 278SW483; TexCivA 300SW951. See also 123Kan151, 254P410. (5) 240 IllA 28. (6) 240 IllA28. (7) 203Cal 17, 262 P751. (10) 123Kan436, 256P137. (11) To show broker did not act in bad faith or conceal truth as to agreed price. 219

Ky68, 275SW23; 95CalA456, 273P50. (12) To support verdict that broker failed to produce purchaser ready, able and willing to buy according to contract. 150Or523, 239P102. (13) To show purchaser ready, willing, and able to perform but for prevention by vendor. TexCivA 277SW728. (14) To support finding that vendor not prevented from completing sale by bad faith of brokers. TexCivA 277SW728. (15) To support verdict against broker where sale was conditional upon purchaser's procuring loan to discharge lien. TexCivA 286SW343. (16) To support finding that defendant's refusal to accept lease and chattel mortgage securing rents was justified and in good faith. 76CalA610, 245P455. (17) To show that failure to complete loan was caused by failure of applicant to furnish abstract of title. TexCivA 3SW(2d)514. (18) To show that broker failed to fulfill contract to name buyer and conduct sale of timber land so as to entitle him to commissions. 207Cal747, 279P781. (19) To show purchaser broker procured was not ready, able and willing to purchase. CalA 290P588. [c] (1) 172Ark1176, 291SW72; 74CalA637, 241P576; 101CalA587, 281P1066; 88IndA399, 164NE284; 154Md290, 141A363; MoA 278SW788; 53SD491, 221NW93; TexCommnA 282SW798; TexCivA 291SW639; TexCivA 4SW(2d)577. (3) 83CalA105, 256P573; 232Ky119, 22SW(2d)413; 214AppDiv161, 212NYS99 (on terms fixed and agreed on); 226AppDiv271, 235NYS171; RI 131A200. (8) To support finding that broker secured customer under conditions entitling him to commission. 91CalA435, 267P110. (9) To support finding that prospect's name and address had been furnished as required by agreement. CalA 282P992. (10) To show contract required purchaser to actually take property before commission would be due. MoA 24SW(2d)657. (11) To sustain finding that plaintiff made bona fide continuous effort to procure buyer. 199Wis473, 227NW21. [e] 217Ala27, 114S409. [h] **Proof that broker's salesman told principal that purchaser would pay set price** held not proof of willingness to pay. 125Misc824, 211NYS579.

656–44 93CalA577, 269P948; Mich 233NW235. [a] (1) 9F(2d)512; 176Ark616, 3SW(2d)692; 179Ark657, 17SW(2d)865; 78CalA49, 248P258; 95CalA551, 272P1114; 97CalA282, 275P469; 100CalA70, 279P814; 100CalA685, 280P1024; 81Colo505, 256P18; 10LaA246, 120S542; 12LaA335, 125S165; 12LaA669, 127S19; 253Mass32, 147NE891; Mass 167NE256; 249Mich594, 229NW593; 169Minn317, 211NW161; MoA 14SW(2d)29; MoA 32SW(2d)103; 85PaSuper438; 93PaSuper178; SD 226NW948; TexCivA 272SW604; TexCivA 280SW895; TexCivA 281SW232; TexCivA 295SW349; TexCivA 3SW(2d)482; TexCivA 6SW(2d)425; TexCivA 21SW(2d)563 (cross complainant who was also plaintiff in second suit); TexCivA 21SW(2d)1078. (2) 253Mass32, 147NE891. (5) From which jury might infer plaintiff contributed to bring about sale at price greater than minimum named by defendant to plaintiff. 21AlaA55, 105S719. (6) To show transaction constituted a sale entitling broker to commission. 3NJMisc973, 130A451. (7) To show that vendor and purchaser were brought together by broker. 95CalA195, 272P333. (8) To show that broker's agent procured buyer to whom owner subsequently sold property at price for which broker was authorized to sell. 11LaA420, 123S470. [b] (1) 94CalA549, 271P529; CalA 284P680; CalA 291P248; 36GaA511, 137SE298; 247IllA147; 118Kan733, 236P644; 156La1008, 101S398; LaA 129S461; 265Mass143, 164NE72; Mass 167NE337; 172Minn499, 216NW224; 221MoA1056, 296SW263; 105NJL152, 143A434; 125Misc105, 210NYS134; 129Misc273, 220NYS444; 220App Div457, 221NYS556; 229AppDiv668, 243NYS259; 95PaSuper377; TexCivA 278SW483; TexCivA 288SW275; TexCivA 295SW1112; TexCivA 2SW(2d)321; TexCivA 15SW(2d)656; TexCivA 26SW(2d)1090; TexCivA 30SW(2d)685. (4) To show plaintiff procured purchaser. 214AppDiv514, 212NYS361.

656–45 27F(2d)314; 174Ark682, 297SW839 ($18,750 held not excessive as commission for sale of oil and gas lease for $375,000); 33GaA806, 128SE812 (evidence sufficient to support finding of value of services); 253IllA328 (evidence held to sustain finding as to value of services); 206Iowa1225, 219NW419 (recovery not limited to specific amount when working on per diem basis); 10LaA250, 120S773; SD 226NW578 (plaintiff's own testimony held to show that plaintiff, acting with others, was entitled to only half of commission); TexCivA 290SW261; TexCivA 7SW(2d)1110; 200Wis22, 227NW237 (plaintiff's explanation of ambiguous provision held to establish his right to three per cent and not five per cent); 188Wis200, 205NW798. [b] (2) Actual value of land received by principal in exchange must be proved or judgment for commissions is unauthorized. TexCivA 27SW(2d)909. (3) Without proof of actual value of property received in exchange for principal's property, broker could not recover judgment. TexCivA 19SW(2d)104. [c] **Evidence held insufficient** to show contract in correspondence before formal contract. Wash 287P209.

656–46 135Wash144, 237P11 (evidence sufficient for recovery).

656–47½–New. Evidence held insufficient to support finding that defendant resorted to subterfuge to deprive broker of commissions. TexCivA 2SW(2d)321.

656–47½–New. Amount of recovery. Interest allowed from date of sale by owner. 12LaA669, 127S19.

657–55 NJSup 142A366; TexCommnA 1SW(2d)572 (implied contract to pay commissions). [a] (1) TexCommnA 27SW(2d)142; TexCivA 20SW(2d)388. [c] **Construction of written contract** relating to commissions has been held matter of law. NJ 146A175. [d] **Bad faith of broker should not be inferred by court** unless no reasonable view of evidence will warrant inference of good faith. 50RI221, 146A639. [e] **Evidence of bad faith or fraud on part of defendant** in revoking broker's authority to proceed with contract of sale of timber held insufficient for jury. 207Cal747, 279P781.

657–56 214Ala375, 107S917; 217Ala27, 114S409; 220Ala282, 124S901 (where evidence fails to show full performance); Ariz 285P277; Cal 285P691; 84CalA112, 257P544 (nonsuit erroneously granted); CalA276P614; 85Colo501, 277P473; 35GaA431, 133SE300 (direction of verdict for plaintiff); 201Iowa355, 207NW378; 214Ky653, 283SW997; 262Mass60, 159NE497; 262Mass390, 160NE284; Mass 166NE570; Mass 166NE623; 233Mich133, 206NW316; 238Mich257, 213NW61; 170Minn347, 212NW528; 317Mo465, 296SW86; MoA 9SW(2d)860; 3NJMisc761, 130A16 (direction of verdict for plaintiff); 216AppDiv600, 215NYS699; 226AppDiv53, 234NYS429; 136Okl290, 277P939; 139Okl245, 282P138; 288Pa186, 135A734; 87PaSuper479 (defendant is entitled to binding instructions); TexCivA 299SW449 (evidence held insufficient for jury); TexCivA 5SW(2d)778; TexCivA 19SW(2d)605; TexCivA 20SW(2d)273 (refusing to submit issue of abandonment was not error where evidence was insufficient); TexCivA 25SW(2d)237. [b] **Verdict properly directed for plaintiff.**–86Mont69, 281P915.

657–57 27F(2d)314; 216Ala628, 114S200; 21AlaA524, 109S555; 172Ark1176, 291SW72; 174Ark1179, 296SW709; 175Ark580, 299SW1006 (existence of contract providing for share of profits as compensation and existence of profits); 176Ark616, 3SW(2d)692; 78CalA660, 248P774; 82Colo369, 260P108; 111Conn493, 150A690; 36GaA511, 137SE298; 253IllA328; 234Ky389, 28SW(2d)474; 235Ky643, 32SW(2d)39; Md 148A238; 253Mass490, 149NE311; 259Mass278, 156NE421; 265Mass341, 163NE865 (2dcase); 265Mass367, 164NE81; 265Mass500, 164NE388; Mass 165NE708; 239Mich223, 214NW96; 238Mich677, 214NW182; 239Mich440, 214NW419; 179Minn268, 228NW933 (whether individual defendant was jointly liable with corporate codefendant); Minn 231NW415(1stcase); MoA 14SW(2d)491; MoA 22SW(2d)855; MoA 26SW(2d)832; MoA 27SW(2d)1052; 82Mont393, 267P296; 103NJL459, 135A776; 104NJL408, 140A314; NJ 145A634(2dcase); NJSup 147A472(1stcase) (directing verdict for plaintiff held error); 212AppDiv587, 209NYS360; 127Misc148, 215NYS384; 219AppDiv453, 220NYS159; 129Misc230, 220NYS213; 193NC849, 138SE123; 196NC433, 146SE66(2dcase); 26OhA163, 159NE582; 120Or501, 252P712; 292Pa256, 141A39; 85PaSuper114; 85PaSuper310; 85PaSuper443; 85PaSuper552; 86PaSuper473; 86PaSuper574; 87PaSuper436; 90PaSuper386; RI 131A200; RI 132A732; 48RI86, 135A604, 51ALR1386; TexCivA 281SW301; TexCivA 14SW(2d)335; 148Va754, 139SE488; 143Wash46, 254P459. [a] 21AlaA524, 109S555. [c] 35F(2d)563 (value of services). 36GaA61, 135SE220; 39GaA332, 147SE139 (reasonable value of services); 206Iowa1225, 219NW419 (reasonable value on quantum meruit); 236Mich610, 211NW627, 49ALR546; MoA 297SW715; 50RI221, 146A639; 99Vt239, 131A12. [d] 85PaSuper310; 85PaSuper552. [h] **Refusal to submit issue** when one made party as claimant of part of commission sued for was procuring cause of sale is reversible error. TexCivA 286SW495. [i] **Consideration.**–MoA 298SW1053. [j] **Bad faith of broker is for jury.**–50RI221, 146A639. [k] **Evidence held insufficient to submit to jury.**–Mass 170NE459 (whether direct sale by owners was consummated on terms different than brokers offered).

658–58 13F(2d)588; 216Ala628, 114S200; 217Ala432, 116S520; 174Ark1179, 296SW709; 174Ark682, 297SW839; 206Iowa1158, 221NW785 (existence and terms of oral agreement); 153Md586, 139A285; 156Md597, 144A833; Md 148A244; 259Mass278, 156NE421; 263Mass562, 161NE610; 265Mass341, 163NE865(2dcase); 265Mass500, 164NE388; Mass 165NE708; Mass 169NE920; 237Mich336, 211NW627; MoA 275SW566; MoA 24SW(2d)707; 104NJL1, 139A796; NJSup 140A15; NJSup 147A576 (whether broker's authority was revoked before he procured purchaser); 194NC815, 140SE621 (whether agency was revoked); 6PaDist&Co579; 49SD587, 207NW659; TexCivA 297SW287; TexCivA 7SW(2d)601 (evidence held insufficient for jury); TexCivA 7SW(2d)1110; 142Wash101, 252P540; 188Wis200, 205NW798. But see 177Ark663, 7SW(2d)336. [f] **Evidence held sufficient.**–27F(2d)314.

658–58½–New. whether written agreement sued on was abandoned: 232Mich41, 204NW710.

658–58¾–New. what was the broker's contract in reference to commissions; 206Iowa469, 220NW49.

659–59 142Wash101, 252P540.

659–60½–New. whether under contract broker entitled to commission on sale by others; 190NC783, 130SE842.

659–61 170Ark519, 280SW5; 178Ark1199, 10SW(2d)27; 174Minn115, 218NW464; 125Misc828, 211NYS614 (whether broker misrepresented to defendant amount paid for lots thus procuring defendant to make contract for sale and exchange); 90PaSuper443. [a] (1) 292Pa256, 141A39. (4) 292Pa256, 141A39. (5) Whether broker was precluded from recovering commission from seller because he was receiving commission from buyer without seller's consent and knowledge held question of fact. 154Wash396, 282P377. [b] **Whether fraud was waived is for jury.** Iowa 228NW45.

659–62 Ala 130S380; 253IllA328; 221Ky521, 299SW165; 253Mass490, 149NE311; 254Mass223, 150NE162; 263Mass562, 161NE610; 264Mass18, 161NE621; 238Mich677, 214NW182; 243Mich470, 220NW798; MoA 24SW(2d)657; MoA 27SW(2d)1052; NJSup 147A576; RI 132A885; 50RI125, 145A442(2dcase); TexCivA 14SW(2d)335; 152Va460, 147SE203; 101WVa411, 132SE870. [a] 201Iowa355, 207NW378. [c] **Evidence held insufficient for jury.**–262Mass390,

160NE284. [d] **Whether commission was due on signing of contract is for jury.** TexCivA 297SW287.

659-63 13F(2d)588; 35F(2d)563 (directed verdict denying commission properly refused); 216Ala403, 113So265; 178Ark1199, 108W(2d)27; 77Colo 116, 234P1072, 39GaA217, 140SE795, 206Iowa1225, 219NW419; 156Md597, 144A873, Md 148A244, 259Mass383, 156NE739; 265Mass500, 164NE388, Mass 165NE795, 239Mich440, 211NW119, MoA 259SW970; MoA 291SW103, MoA 2 SW(2d)148 (contract as rider of facts), MoA 28SW(2d)635; MoA 248W(2d)707; 105NJL159, 135A776; 212AppDiv687, 209NYS360; 230AppDiv102, 243NYS261, 115Or523, 239P102, 265Pa111, 131A773, 85PaSuper111, 85PaSuper438; 85PaSuper113; 85PaSuper196, 85PaSuper261, 85PaSuper336; 97PaSuper313, 115Tex124, 128SW(2d)106, TexCommnA 238W(2d)329; TexCivA 284SW273, TexCivA 286SW495; TexCivA 291SW614, TexCivA 78W(2d)601 (evidence held insufficient for jury), Utah 250P295, 143Wash16, 254P152, 10Wyo 1, 251P14. [a] TexCivA 296SW499.

660-64 215Ky506, 258SW1; 243Mich470, 220NW798; RI 132A732; 48RI 86, 135A601, 51ALR1336. [a] **No issue raised as to whether seller agreed to furnish abstract** where he admitted obligation to furnish it in his oral testimony. 56Mont69, 251P915.

660-64½ New. . . whether controlling officer and stockholder of corporate owner agreed to take care of rental rebates; 143Va197, 129SE561.

660-64⅝-New. whether the broker was entitled to his commission, although the sale was for less than price named; 99Va239, 131A13.

660-64¾-New. whether the principal was timely apprised of a prospective buyer's unqualified acceptance of the offer to sell; 124Kan765, 635, 264P19, 266P101.

660-64⅞-New. whether the principal waived the right to cancel a contract; 101NJL157, 135A871.

660-64⅞-New. whether the broker waived his right to commissions; MoA 268SW(2d)1020.

660-64½-New. whether circumstances were such as to imply agreement to pay reasonable broker's commission; TexCommnA 238SW(2d)329.

660-65 366GaA41, 131SE298; 223Ky649, 48SW(2d)748 (whether bidder at auction bid for owners); 263Mass190, 119NE311; 259Mass192, 156NE673; 238Mich677, 211NW152. MoA 296SW838 (where sale was executed but final deed not passed); TexCivA 218SW(2d)1079; 143Wash46, 254P159, 199Wis173, 227NW21 (whether broker made bona fide effort to make sale). See also TexCivA 208SW(2d)742.

660-65½-New. It is for the jury to determine the actual intention of the parties in the use of words that are ambiguous. 28IPa3, 130A296.

660-65¾-New. Whether broker agreed to accept smaller commission than written contract called for 28IPa111, 131A723 (under the evidence).

660-67 120Kan260, 242P1024 (good faith of owner in terminating agency of broker); 318Mo1155, 68SW(2d)947 (action under contract for division of commissions), MoA 289SW970; 91PaSuper129 (instruction held erroneous); TexCommnA 208SW528 (instruction relative to procuring cause held improper). [a] 16F(2d)592; 206Iowa1225, 219NW419, 208Iowa70, 221NW941, 120Kan260, 242P1024 (good faith of owner in terminating agency). 123Kan242, 255P46, 213Ky8, 280SW153; 231Ky389, 28SW(2d)171, Md 148A244 (as to producing purchaser to whom property was sold), 265Mass500, 164NE388 (as to conditions precedent before recovery of commission); MoA 148SW(2d)491; MoA 238W(2d)1080, 216AppDiv139, 215NYS587, RI 131A200, TexCivA 278SW918, 143Va777, 129SE681 (whether broker failed to disclose facts in connection with sale).

660-68 216Ala628, 114S200, 216Ala645, 114S308; 176Ark616, 8SW(2d)692 (instruction that broker was required to procure purchaser and bring about sale held proper); 70CalA415, 233P366 (instructions held correct); 106Conn205, 137A740; 35GaA786, 134SE800; 37GaA1, 138SE859 (erroneous instruction as to notice of revocation after reasonable time for sale); 240IllA28; 125Kan265, 635, 264P19, 266P101 (instructions held proper), 261Mass478, 158NE537; MoA 288SW155 (erroneous instruction as to producing purchaser); 103NJL115, 134A675; 216AppDiv439, 215NYS587; 190NC783, 130SE842 (instruction allowing recovery on quantum meruit proper); Or 293P430; TexCivA 68SW(2d)425 (instruction on procuring cause held proper); TexCivA 158SW(2d)118 (instruction defining "procuring cause" held incorrect); 147Va1019, 133SE495; 136Wash554, 240P913; 36Wyo 37, 253P17. [a] (3) Instruction that broker is entitled to commissions if he was employed to find customer and found one who is ready and willing to buy upon principal's terms 125Misc524, 211NYS579. [b] 213Ky8, 280SW153; 33NM529, 270P896; TexCivA 308SW(2d)685. [d] **Instructions properly refused.**–MoA 248SW(2d)717.

661-69 216Ala645, 114S308; 179Ark816, 198SW(2d)1010; 70CalA415, 233P366 (evidence sufficient); 126Kan723, 271P293 (evidence held insufficient to warrant instruction on fraud or infidelity of agent); 254Mass474, 150NE206; 218MoA433, 277SW62 (correct instruction); MoA 238W(2d)1080; MoA 288SW(2d)375; 190NC783, 130SE842 (charge warranted by evidence); 123Or193, 261P422 (instructions within evidence); 85PaSuper552. [b] **Instruction as to plaintiff's being procuring cause of transactions held proper.**–312Mo 30, 278SW71.

661-70 70CalA415, 233P366 (not assumption of fact); 151Md392, 135A166; 219AppDiv198, 220NYS467; 85PaSuper552.

661-71 216Ala645, 114S308; 23AlaA498, 127S786 (instructions held confusing); 70CalA415, 233P366 (instruction held not misleading); 240IllA28; 218MoA433, 277SW62 (not misleading); 318Mo1155, 68SW(2d)947, 953 (not misleading); Va 153SE727 (misleading). [a] **Instructions held not erroneous.**–35GaA786, 134SE800. [b] **Instructions held conflicting.**–MoA 238SW(2d)1080. [c] **Instructions held misleading.**–MoA 238SW(2d)1080.

662-72 216Ala650, 114S232; 53ALR134; 216Ala645, 114S308; 78CalA660, 213P774; 218MoA433, 277SW62 (omission to require finding on matter conceded and not in dispute is not error); MoA 293SW496; MoA 294SW103 (instruction as to procuring cause); MoA 228SW(2d)855 (failure to require jury to find that plaintiff was procuring cause of sale). [a] 119Kan394, 239P1106. [b] **Instructions held erroneous** as not requiring finding that plaintiff was procuring cause of sale but only that he was employed. Ky 238W(2d)954(2cases).

662-73 123Or193, 261P422 (not prejudicial to defendant); 136Wash554, 240P913.

663-74 70CalA415, 233P366; 35GaA786, 134SE800; 101WVa111, 132SE870.

663-76 216Ala650, 114S232, 53ALR134; 106Conn205, 137A740; MoA 278SW(2d)1052. [a] See also 127Or612, 271P600, 61ALR1441. [b] **Refusal to instruct** that purchaser had to be able, as well as ready and willing, to buy, was held erroneous. 125Misc524, 211NYS579. [c] **Instructions properly refused.**–Md 148A244.

663-77 TexCivA 258SW(2d)237.

663-78 125Kan265, 635, 264P19, 266P101; 101WVa111, 132SE870.

663-79 125Kan265, 635, 264P19, 266P101; 213Ky8, 280SW153; 151Md392, 135A166; 259Mass383, 156NE739; MoA 294SW103; MoA 238W(2d)1080 (placing too great burden on plaintiff); MoA 248W(2d)657; 125Okl230, 257P288; 123Or193, 261P422. [a] **General affirmative charge** properly refused. 21AlaA55, 105S719 (where jury question presented by evidence).

663-80½-New. Refusal of peremptory instruction proper where evidence conflicting. TexCivA 277SW711.

663-81 82CalA675, 256P301 (finding as to performance by broker); 83CalA470, 256P1109 (authority of agent); 119Kan394, 239P1106; 126Kan544, 268P833; 126Kan723, 271P293 (special findings and verdict held not inconsistent); Mass 172NE250 (holding facts and inferences warranted general finding for plaintiff); 51SD154, 212NW868; TexCommnA 32SW(2d)643 (findings held not to conflict); TexCivA 286SW999; TexCivA 278W(2d)909 (testimony held to sustain finding that broker listed all his property); TexCivA 318W(2d)862 (sufficiency of services).

663-84 TexCivA 293SW204.

663-85½-New. Decree should embrace any unpaid installments under contract, maturing before and after filing of bill, and prior to decree. 211Ala620, 101S389.

663-88 255IllA322. [a] 128Misc458, 219NYS113.

664-90 77Colo 116, 234P1072.

664-92 85PaSuper114; 85PaSuper310; 85PaSuper352; 86PaSuper496. See also 69CalA301, 231P583.

664-93 [a] 174Ark818, 298SW204. [b] TexCivA 284SW283.

664-95 [a] (5) Real estate broker had an equitable lien on real estate sold where it is agreed between owner and purchaser that the amount of broker's fees shall be paid to him direct by purchaser as part of the purchase price. TexCivA 288SW267.

665-97 211Ala620, 101S389.

665-1 Cal 274P342 (contract construed not to authorize lien in absence of profits). [b] **Construction of contract.**–CalA 267P151.

665-3 208Cal329, 281P381, 65ALR1075 (lien for advances where contract terminated before fulfillment).

665-4½-New. A broker has no lien for commission on funds in a bank representing a certified check in his possession for part of the purchase price of sale effected by him payable to but unindorsed by principal, although the broker procured certification and notified the bank drawee of his claim to liens on funds. 200Iowa1086, 205NW853, 42ALR622.

665-6½ New. A vendor, employing a realty broker who sold land to a corporation headed by one of their members, could avoid sale, although beneficial interest was in stranger. 243NY439, 154NE303.

665-6¾-New. A principal can hold any party participating in broker's fraud against him to an accounting. 99NJEq390, 132A110.

665-6⅞-New. Agent of vendor fraudulently recording mortgage before vendor's, gives vendor remedy against agent and not purchaser of mortgage. 87Colo 240, 286P275.

665-9 [a] **Authority of broker to affect sale of property in owner's behalf** where broker signed for vendors per owner whose name was signed. LaA 126S246.

666-16 TexCivA 138W(2d)962. [a] **Broker not acting in good faith with principal** will not bind principal by his knowledge. TexCommnA 248W(2d)354.

666-18 255IllA11 (contract may be set aside).

667-21½-New. A principal listing lots for sale with a broker is entitled to recover the property which the broker orally contracted to sell, despite the purchaser's deposit and entry into possession. 193Wis564, 214NW394.

667-21¾-New. A broker employed by vendor to procure a purchaser cannot be deemed the purchaser's agent so as to bind him by his promise to vendor. 294Pa53, 139A606.

667-22 243NY139, 154NE303.

667-23 243NY439, 154NE303.

669-43 83CalA470, 256P1109 (specific knowledge of particular payments is not required).

669-44 MoA 208W(2d)605 (not necessary to rescind unauthorized contract).

669-45 88CalA664, 264P256. [a] (2) See also 339Ill184, 171NE169. (4) False statement of brokers with whom both parties listed properties exchanged held to render party obtaining undue advantage liable in damages. TexCivA

297SW588. (5) Where broker acts for both parties, principal ratifying contract for exchange of property and accepting deed with knowledge of contents held liable for broker's misrepresentations as to area of land. **TexCivA** 297 SW588. (6) Other instances. 339 Ill371, 171NE510.

668-47 18F(2d)883, 885 [citCJ]; **La** 113S456; 220AppDiv160, 221NYS11. See also 244Mich515, 221NW617. [d] **Broker held to be agent of owner** authorizing him to sell property and retain commission out of deposit money. **NJ** 135A353.

669-48 72CalA786, 238P155 (letter construed to authorize broker to offer option to purchase goods subject to acceptance or rejection by seller); 79CalA 713, 250P873 (different terms of sale than originally authorized); 92CalA526, 268P682 (broker not authorized to deliver deed); 327 Ill 406, 158NE692; **NJ Ch** 144A447; 150SC493, 148SE554; **Tex CivA** 48W(2d)627 (specific performance refused); 144Va126, 131SE209 (cannot execute contract of sale unless expressly or impliedly authorized); **Va** 153SE688. [d] 174Ark1010, 298SW209. [e] **Reformation of contract held not warranted** where seller's agent exceeds his authority in misinterpreting to buyer term of contract. 327 Ill 406, 158NE692. [f] **Authority having been revoked** broker has no power to sell so as to give purchaser specific performance against principal. 159La668, 106S26.

669-52 174Ark1010, 298SW209; 90Fla 437, 105S817; 169La1120, 126S679 (listing of property with broker does not authorize him to execute contract of sale); 193Wis554, 214NW394.

670-55 197Cal 269, 240P289.

670-57 [a] **Agreement by broker to** procure for buyer mortgage to pay balance of purchase price does not indicate he was acting as agent throughout for buyer and not for seller. 197Cal 269, 240P289.

670-65 8F(2d)588.

671-68 99CalA182, 278P243.

671-69 197Cal 269, 240P289; 83CalA 470, 256P1109; 178Minn613, 228NW 166; 300Pa238, 150A636 (facts not constituting ratification). [c] See also 178 Minn514, 227NW852.

671-70 197Cal 269, 240P289; 99CalA 182, 278P243; 120Kan19, 242P119; **NJSup** 135A353; 136Misc206, 240NYS 492; **Man** [1929] 1DomLR854. [a] **Broker's possession of agreement for extension of loan secured by real estate mortgage** is not evidence of authority to collect. 176Minn399, 223NW459.

671-71 99CalA182, 278P243.

672-75 208Cal 82, 280P368; 136Misc 485, 241NYS333 (effect of retention of benefits).

672-77 **Sask** [1928] 4DomLR315. [c] (2) Representations made by broker whom owner of property employed were not binding on another, to whom owner had conveyed property to secure indebtedness, where broker was not mortgagee's agent. **TexCommnA** 14SW(2d) 812. [f] **Scienter on part of broker** must be shown. 131Misc689, 227NYS 731.

672-78 17F(2d)971; 33Ariz101, 261P 969, 57ALR107; 133Wash613, 234P449, 238P581; 151Wash273, 275P561. See also 131Misc689, 227NYS731.

673-79 321Mo 47, 9SW(2d)897.

673-80½-New. Where an owner, in order to defeat a broker in collection of his compensation or to change the terms of the transaction, interfered and caused a third person to purchase the property and immediately resell it to the broker's customer, such third person is not guilty of causing loss to the broker where he acted in good faith in ignorance of the broker's contract. 35GaA 122, 132SE393.

673-81 But see 338 Ill 552, 170NE756. [b] (1) 327 Ill 406, 158NE692; 142Wash 500, 253P802. [d] 152Md146, 136A651. [e] **Broker acting for both parties.–MoA** 20SW(2d)605.

673-83½-New. A real estate board regulation that agents for respective parties whose properties are exchanged shall share joint commissions equally did not affect the rights of clients so as to make each agent a representative of both owners as respects notice. 230Ky 393, 20SW(2d)88.

673-89½-New. or who by fraud interferes with principal's carrying out of his contract to pay agent's commission for sale of land. 117 Or455, 244P509.

673-89¼-New. Under statutes defining a real estate broker and real estate salesman the latter is not authorized to execute a contract for exchange of real property in his own name. 81CalA23, 253P770.

673-89¼-New. Corporation employed by owners of realty to find purchaser thereof is owner's agent so that notice to it of owner's approval of offer is not notice to purchaser. 155Wash70, 283P 458.

674-93 **TexCommnA** 295SW187.

674-97 But see 92CalA308, 268P404.

675-1½-New. An attorney cannot recover from a broker for legal services rendered in connection with negotiations for the sale of lands where the attorney knew that the broker had no personal interest in the land and acted only as agent and the attorney dealt with and treated him only as agent. 73CalA571, 239P63.

675-1½-New. One making an offer to the owner's agent to purchase a lot for a stated sum could not recover damages from the agent for failure to consummate the sale because of the owner's refusal. 11LaA585, 123S378.

675-2 **CalA** 274P995.

675-2½-New. Under agreement of brokers to make payment in exchange for dock receipts approved by buyers of goods, approval by buyers is condition precedent to any obligation of brokers to accept and pay for the receipts. 212 AppDiv627, 209NYS373.

675-4½-New. By the very fact of offering securities of another for sale, a broker known to be acting as such represents that he is authorized by the other to sell. 103Conn110, 130A79.

675-5 **Me** 152A53.

675-6 95CalA1, 272P343; **Me** 152A53; 285Pa547, 132A703; 94PaSuper248; **TexCivA** 13SW(2d)711 (where court directed against vendors, vendor's brokers were properly required to return deposit). See also 11LaA99, 120S900.

675-7 11LaA585, 123S378.

675-11 124Misc547, 208NYS503.

676-15½-New. A coal buyer mistakenly contracting with a coal broker, instead of a mine owner, may waive his right to terminate the contract on learning the true situation. 33F(2d)420.

676-17 39GaA163, 146SE566.

676-18½-New. **Right of purchaser to part of commission received by broker.** Agreement by broker to split commission with party to exchange of realty to induce such exchange is not inherently illegal. 240NY424, 148NE623.

676-18½-New. Such contract is supported by valid consideration where exchange is made in reliance on broker's accepted offer. 240NY424, 148NE623.

676-18¼-New. Such agreement is not in violation of statute prohibiting splitting of commissions with unlicensed brokers or salesmen. 240NY424, 148 NE623.

676-20 219Ala450, 122S424.

677-23½-New. The responsibility of the seller's broker to the buyer ceases when the transaction is closed and the deed is delivered. 246 IllA184.

677-24 103Conn110, 130A79.

677-26 [e] (4) Other instances. 131 Or376, 283P16. [i] 219MoA112, 268 SW675. [j] **Laches.–142Wash383, 253P** 463. [k] **Fraud of broker is jury question.–31Ariz347, 253P626.** [l] **In purchaser's suit on broker's bond** because of unreturned payment on failure of transaction, it is no defense that broker was acting for himself and was not agent. 38Wyo 244, 266P109 (where defendant stated he was acting as agent). [m] **Surety on statutory realty broker's bond** is liable for broker's false representations although property is sold at auction. 13LaA651, 127S462.

678-28 [a] (2) **Fla** 130S605.

678-29 330 Ill 160, 161NE515.

678-33 117 Or455, 244P509.

678-33 [a] (2) Usually both prospective vendor and agent must be made defendants to action for return of deposit made with latter. 11LaA585, 123 S378.

678-34 213Ala19, 104S134; 97Fla278, 120S329; 120Kan19, 242P119; 212App Div627, 209NYS373 (complaint held insufficient for failure to allege performance of condition precedent or waiver thereof); 223AppDiv682, 229NYS398. [c] **Allegation of payment or readiness to pay not necessary** in action against vendor where broker accepted check of purchaser. 136Misc206, 240NYS492.

678-35 99Vt343, 132A45.

678-36 **Me** 152A53; 232Mich122, 205 NW147 (amount of damage sustained by purchaser by reason of broker's fraud inducing purchase); 117 Or455, 244P509; 101Vt47, 140A488 (action by broker). [b] **Fraud.–232Mich122, 205** NW147.

679-37 6F(2d)797 (in action for sale through broker correspondence of broker with seller held admissible for certain purposes); 213Ala19, 104S134; 219Ala450, 122S424; 208Cal 82, 280P 368 (in action to set aside note and trust deed on ground of fraudulent representation inducing agreement to exchange property, evidence relating to broker's representations while agent for defendant held admissible); **TexCivA** 4 SW(2d)627 (intent to confer authority on broker); 99Vt343, 132A45.

679-38 197Cal 269, 240P289 (finding that broker received purchase money as agent of purchaser held contrary to evidence); 83CalA470, 256P1109; 327 Ill 406, 158NE692 (evidence held insufficient to warrant reformation of contract); 120Kan19, 242P119 (evidence held sufficient to show authority of seller's broker to receive payment); 152Md 146, 136A651; **Me** 152A53; 253Mass 368, 149NE118; 178Minn514, 227NW 852 (sufficient to show that loan broker was lender's agent); 179Minn83, 228NW346; 179Minn170, 228NW559 (1stcase) (to show loan broker's agency for lender at time of transaction); 213 AppDiv653, 211NYS212; 117 Or455, 244 P509; 94PaSuper175 (insufficient to show authority to sell); 101Vt47, 140A 488 (action by broker effecting exchange of properties for commission). [a] **Evidence insufficient** to warrant finding agreement to indemnify customer. 230 AppDiv454, 245NYS384.

679-39 33F(2d)420 (whether buyer waived right to terminate contract by insistence on its performance after notice that seller was mere broker or agent held question for jury); 219Ala 450, 122S424; 261Mass355, 158NE 767 (whether evidence rebutted presumption that broker accepted notes in payment of commissions, in action against broker for share of commission); **Me** 152A53; 231Mich695, 204NW 693 (whether broker's duties were discretionary or whether he was mere middleman to bring parties together); 232 Mich122, 205NW147 (extent of responsibility of broker for fraudulent conduct of his agent in sale of equity in lots); 321Mo 47, 9SW(2d)897; 219MoA 112, 268SW675 (misrepresentation and fraud of broker); 189NC775, 128SE349 (extent of agent's authority is for jury); 99Vt343, 132A45. [b] **Overruling of demurrer to plaintiff's evidence held proper.–219MoA112, 268SW675.** [c] **Damages.–232Mich122, 205NW147.**

679-40 36GaA149, 136SE319; 253Mass 368, 149NE118; 313Mo 169, 281SW422; **MoA** 19SW(2d)531 (in action against broker for earnest money paid on land contract, instruction that purchaser did not employ defendant to purchase property, and, if check was obtained from purchaser by misrepresentation and fraud, defendant not entitled to check, held not erroneous as being outside issues).

679-40½-New. Finding that owner not chargeable with fraud of broker acting without authority held justified. **CalA** 286P463.

BRONCHITIS

679-9 135Wis259, 115NW869, 17LRA NS1011.
679-10 135Wis259, 115NW869, 17LRA NS1011.

BUCKLE

681-40½-New. A devise for fastening. 13CustAUS367.

BUCK'S EXTENSION

681-40¼-New. Process consisting of some uniform, continuous force or pull applied to leg or foot below break, to overcome natural contraction of muscles of thigh. Wash 259P25.

BUFFET

682-45¼-New. A public place for lunch or light refreshments. 224 IllA251.

BUGLE

682-51½-New. A tube-shaped glass bead, commonly black, used for ornamenting garments. 15CustAUS165.

BUILDING

683-69½-New. That which is built. 3NJMisc609, 129A256 [WebsterD.].
683-69½-New. Fabric or edifice, framed or constructed, 3NJMisc609, 129A256 [WebsterD.].
683-69¼-New. designed to stand more or less permanently and covering a space of land for use as a dwelling, storehouse, factory, shelter for beasts or some other useful purpose. 3NJMisc 609, 129A256.
683-70 [e] (3) 258Mass30, 154NE521, 49ALR1361. [j] (1) 258Mass30, 154NE 521, 49ALR1361.
684-71 258Mass30, 154NE521, 49ALR 1361.
684-74 258Mass30, 154NE521, 49ALR 1361; 219AppDiv422, 219NYS390.
684-75 219AppDiv422, 219NYS390.
684-76 219AppDiv422, 219NYS390.
685-79 258Mass30, 154NE521, 49ALR 1361.
685-82 151Miss467, 118S293, 60ALR 1155.
685-83 258Mass30, 154NE521, 49ALR 1361.
685-92 258Mass30, 154NE521, 49ALR 1361; 99WVa388, 129SE314.
685-93 MoA 78SW(2d)309, 312 [citCJ]. [a] (30) Garage. NJ 143A865. [b] (24) Billboards. 151Miss467, 118S 293, 60ALR1155.
687-99 125 Or150, 266P891.

BUILDING AND CONSTRUCTION CONTRACTS

694-10 200 Iowa572, 203NW935, 937, 205NW205 [citCJ]. [a] (4) One undertaking performance of whole or part of existing contract under which another with whom he contracts is obliged to perform some specific work, and agrees, not only to do work but to do it in accordance with preëxisting agreement. 232Mich238, 205NW157. [b] **Persons held not subcontractors.**–232Mich238, 205NW157.
697-58 But see 107Conn387, 140A749 (unilateral negligent mistake in adding items of estimate held ground for cancellation).
697-62 169Ga104, 149SE914.
697-63 154Miss663, 122S741. [f] **Existence of finished plans not essential at time of contract** to make it binding, where parties began performance and various plans were later furnished. 233 IllA143.
698-75 [i] **Consideration held sufficient.**–98CalA437, 277P137. [j] **Nonenforcement of rights under prior contract.**–91PaSuper33.
701-8 136Misc500, 241NYS202 (holding no contract was implied).
701-10 136Misc500, 241NYS202 (but the silence of a vendor to contractor with vendee does not create implied contract).
701-13½-New. Contractors making repairs to a house, at the request of an adjuster for the insurance company, could not, after denial of liability, recover from the owner of the property on the theory of implied contract. 247 Mich267, 225NW511.
702-23 249 IllA90.
705-71 238Mich164, 213NW93; 98NJ Eq589, 131A223.
705-73 238Mich164, 213NW93.
706-85 Cal 289P828; CalA 288P792; 232 IllA450; TexCivA 328W(2d)388. [d] **Clause in contract for cancellation** of all prior agreements held to refer only to plans abandoned and not to leave parties without contract. 36GaA 723, 137SE901. [e] **"Working days," in light of whole contract,** construed to mean days exclusive of Sundays or holidays on which work could be done by reason of good weather. 232 IllA450. [f] **Construction company held to be independent contractor** not merely agent or superintendent. 214Ala53, 106S338. [g] **Contract for installation of sprinkler system.**–151Miss571, 118S416.
707-90 51ND165, 199NW484.
707-91 256Mass404, 152NE715; 51ND 165, 199NW484.
707-92 232 IllA450.
707-93 [b] **General contractor failing to specify all items in general contract** must take care of items omitted. Utah 290P367.
707-95 [b] **Typewritten sheet, pasted over contract,** and numbered to correspond with printed article of similar number which it covers, changing its terms, controls. 233 IllA143.
707-96 179Ark361, 16SW(2d)7 (made and performable in same state).
707-97 TexCivA 48W(2d)169.
708-4 CalA 288P1107 (architect held to have authority to act as arbitrator).
708-5 ND 229NW449.
708-8 89PaSuper117 (question of fact for court trying case without jury).
709-14 83Colo 305, 264P1092; 256Mass 404, 152NE715; 239Mich174, 214NW 155.
709-16 Utah 290P367.
709-16½-New. One taking a subcontract on a public building is bound to inform himself of the specifications involved in the contract rights and obligations of the party with whom he is dealing and is not relieved by his failure to do so. 239Mich174, 214NW155.
709-18 166Minn7, 206NW934; Tex CivA 283SW260.
710-23 TexCivA 283SW260.
710-24 200 Iowa572, 203NW935, 937, 205NW205 [citCJ]; 208 Iowa24, 221NW 197.
710-27 45 Ida707, 266P1094, 1098 [cit CJ].
711-35 232 IllA450; 126Me454, 139A 497. [a] (55) "Solid rock." 130 Or 341, 278P957. (56) "Up to the ground" construed to mean from the ground up. 110Conn381, 148A131. (57) "Furnish all labor and materials for and construct, erect, and complete" house as including plumbing. TexCivA 19SW (2d)380. (58) Other instances. 130 Or 341, 280P343. [d] (2) Plan requiring soft material to be removed and foundation placed on concrete imposed obligation to excavate deeply enough to procure base sufficient to support building. 162Minn27, 201NW942. [h] (2) See also 4HawaiiFed400.
712-37 126Me454, 139A497.
712-38 [a] (7) Shop spliced. 134 Okl 60, 272P420. (8) "Water tight" as used in sewer contracts. NJSup 149A33.
712-39 [a] **Reformation to correct mistake** in using peso (P) instead of dollar ($) sign. 45Philippine128.
712-41 13F(2d)758; TexCommnA 29 SW(2d)1004.
713-49 232Mich238, 205NW157.
714-55 242Mich665, 219NW593.
714-66 235 IllA191. [f] **Subcontractor impliedly undertakes to conform to requirements of principal contract.**–Iowa 231NW331.
715-63 104NJL399, 140A460 (excluding employment of nonunion labor); 147Va554, 137SE485.
715-63½-New. Contractor agreeing to furnish materials for building is not required to pay for materials but may furnish materials obtained on credit. SD 230NW23.
716-78 238Mich164, 213NW93.
716-79 238Mich164, 213NW93.
717-81½-New. In the absence of a stipulation of damages for delay, none may be recovered in the absence of proof of actual damages. 238Mich164, 213NW 93.
717-86 256Mass404, 152NE715.
717-87 172Ark255, 288SW897; Tex CivA 278SW453. [b] **Where parties modify contract by mutual consent** but retain maximum cost provisions in new contract, that provision can be enforced. 214Ala53, 106S338.
717-88 TexCivA 278SW453.
717-89 [c] **Where owner demands numerous and costly changes,** maximum cost covenant is waived. 214Ala53, 106S 338.
717-90 39Wyo 84, 270P167, 171 [cit CJ].
718-92½-New. Builder under contract to do job for lump sum cannot alter contract to one for wages. 121Kan34, 245P1024.
718-94 256Mass404, 152NE715.
718-95 ND 231NW604. [b] **Written contract is altered by executed oral agreement** for performance of extra labor for extra compensation. 58ND727, 227NW222.
718-96 MoA 38W(2d)263; 39Wyo 84, 270P167, 169 [citCJ].
718-97 233 IllA143.
718-98 27Hawaii399.
718-99 27Hawaii399.
719-6 [b] (2) Receipts given by builder restating original terms of cost plus contract are merely formal and do not estop his claim for compensation beyond limit price as based on implied agreement in modification. 233 IllA143.
719-8 35GaA120, 132SE140.
719-11 235 IllA35.
721-18 235 IllA191.
721-23 172Ark255, 288SW897 (as to extra work).
721-25 212Ky830, 280SW147; 253Mass 239, 148NE456; 173Minn360, 217NW 348, 350 [citCJ].
722-26 39Wyo 84, 270P167, 172 [cit CJ].
722-27 172Ark255, 288SW897. But see Cal 289P828.
722-32 1 LaA21.
722-33 See also 3 LaA343.
722-34 TexCommnA 283SW154.
722-35 TexCommnA 283SW154.
723-43 121Kan34, 245P1024, 1025 [cit CJ].
723-44 121Kan34, 245P1024.
724-49 TexCommnA 283SW154.
725-67 235 IllA191. [a] **Rescission by contractor.**–53SD158, 220NW471.
725-68 121Kan34, 245P1024, 1025 [cit CJ].
726-69 13F(2d)758.
726-71 13F(2d)758.
726-75 13F(2d)758.
727-78½-New. Interference by an owner with the contractor's workmen in petty matters does not excuse abandonment of the work. 240Mich36, 214NW 833.
727-78¼-New. That an owner notified contractor's surety that money paid to the contractor for materials was not so used does not excuse the contractor's abandonment of the work. 240Mich36, 214NW833.
727-84 TexCivA 289SW461.
728-91½-New. If the parties allow the stated time for completion to pass, neither can terminate the contract without giving the other opportunity to perform. 291Pa387, 140A148.
728-92 13F(2d)758; 40F(2d)858 (after knowledge of fraud).
728-93 [c] **Where owner has taken over completion of building** at contractor's request, contractor cannot rescind for breach or fraud. 40F(2d)858.
728-95 291Pa387, 140A148.
729-8 121Kan34, 245P1024, 1025 [cit CJ].
730-13 171Ark750, 285SW379.
730-18 171Ark750, 285SW379.
732-44 104NJL438, 140A433, 435 [quot CJ]; 295Pa374, 145A425; 35Wyo 10, 246P27, 28 [quotCJ].
732-52 [e] See also 86PaSuper67.
733-56½-New. A clause in general conditions made a part of the specification for a schoolhouse providing that necessary materials delivered upon the premises should be the property of the owner and not removable without the consent of the engineer is binding upon a

subcontractor. 239Mich174, 214NW155.
734–70 [b] **Election of remedies.**–103 WVa137, 137SE223.
735–78 17F(2d)536. [a] **Liability of builder and surety** becomes fixed on breach of contract by builder. 27F(2d) 20.
735–88 See also 256Mass404, 152NE 715.
736–93 [d] **Building contractor cannot complain of work done by subcontractor for excavating work outside of pay lines of original contract** where contractor directed work to be done to save expense of showing which was imposed upon contractor by original contract. 232Mich238, 205NW157.
736–94 134Wash647, 236P290. [b] **Where no specific condition is called for,** result such as ordinary care and skill in supervision will produce is contemplated. 190NC644, 130SE635.
736–95 See also Iowa 231NW331.
737–96 6 LaA691.
737–97 220AppDiv672, 222NYS335. [c] **Failure to construct building for price agreed** constitutes breach of promise. 27 OhA362, 161NE287.
737–3 134Wash647, 236P290 (should not follow scale drawings conflicting with plans and specifications).
737–4 170 La783, 129S202.
738–5 NJCh 141A459; 134Wash647, 236P290.
738–6 169 La319, 125S258; 170 La783, 129S202.
738–7 51ND165, 199NW484 (minor changes not entailing extra cost under direction of architect contemplated without order or consent of owner).
738–14 35GaA120, 132SE140.
739–15 35GaA120, 132SE140.
739–18 Ala 106S339.
739–18½–New. A contractor cannot be required to furnish materials different from those specified or to pay more for materials than the prices specified. TexCivA 294SW603.
739–18⅓–New. Where plumbing material is in compliance with the terms of the contract, it is immaterial whether it is good equipment for that purpose. 263Mass220, 160NE888.
739–19 157Md652, 147A790, 65ALR 1285 (contract to install sprinkler system).
739–19½–New. Use of old lumber authorized by specifications is not breach thereof. 170La783, 129S202.
739–23 202Cal 143, 259P735; 81CalA 733, 255P200 (determined in each individual case); 84CalA220, 257P898; 91CalA529, 267P342; 98CalA175, 276P 611; 108Conn186, 142A683; 205 Iowa 1305, 217NW228, 229 [citCyc]; 3LaA 516; 5LaA125; 157Md652, 147A790, 65ALR1285; 152Miss825, 119S308; 194 NC407, 139SE771; 53ND213, 205NW 236; 13PaDist&Co 569; TexCivA 286 SW305; TexCivA 286SW599; TexCivA 24SW(2d)776.
740–24 84CalA220, 257P898; 190NC 644, 130SE635; ND 228NW449; Tex CivA 286SW599. [b] **Contractor having substantially performed** building contract does not forfeit all rights thereunder but should be compelled to remedy defects. TexCivA 28SW(2d)247.
740–25 12LaA646, 126S575.
741–26 13PaDist&Co 569.
741–28½–New. "Substantial performance" is not "full performance." 220 AppDiv468, 221NYS780.
741–29 202Cal 143, 259P735; 165La 291, 115S491; TexCivA 286SW599; TexCivA 27SW(2d)323; TexCivA 28SW (2d)247. [f] **Rule of substantial compliance is applied only** when builder has undesignedly violated strict terms of his contract, owner has received and retained benefit of his labor and material, and is ready to remedy, and defects are trivial. 190NC644, 130SE635.
742–31 190NC644, 130SE635 (where owner consented to causes of defects).
742–32 107Conn532, 141A651; Tex CivA 28SW(2d)247.
742–33 TexCivA 286SW599. [b] **Trial court's enumeration of minor departures** from contract does not show lack of substantial compliance. 98CalA175, 276P611.
742–34 205 Iowa167, 217NW808, 809 [citCyc].
742–35 1LaA573.
742–38½–New. What constitutes substantial performance depends on the facts and circumstances in each case. 98CalA175, 276P611.
742–39 241Mich285, 217NW35.
743–40 220AppDiv468, 221NYS780.
743–41 [a] 219AppDiv429, 220NYS109.
744–46 165La291, 115S491 (afterthought as to use not originally contemplated); 3LaA516, 519 [citCJ].
744–47 17F(2d)536.
744–49 209Ky239, 272SW717, 718 [cit CJ]; 259Mass439, 156NE740; 217App Div10, 215NYS755.
745–58 123Kan584, 586, 256P963 [quot CJ]. **Warranty by statutory liability** of builder by failure of structure within ten years does not apply where the use was not in compliance with design. Can [1930] 4DomLR973.
745–61 122Kan595, 253P595, 597 [quot CJ]; 123Kan584, 586, 256P963 [quot CJ]. [b] **Subcontractor's guaranty of composition, not addressed to any particular person** has been held in nature of warranty running with building. 12 LaA301, 125S179. [c] **Subcontractor's failure to receive payment from general contractors** did not affect owner's right to enforce subcontractor's guaranty of roof. 12LaA301, 125S179.
746–62 122Kan595, 253P595, 597 [quot CJ]; 123Kan584, 586, 256P963 [quot CJ].
746–63 122Kan595, 253P595, 597 [quot CJ]; 123Kan584, 586, 256P963 [quot CJ].
746–64 158La548, 104S364 (shipbuilder not liable to owner for added cost of constructing ships under new plans necessitated by disapproval of bureau of shipping).
748–80 TexCivA 286SW599.
749–85 LaA 122S137; 190NC644, 130 SE635, 637 [citCJ].
750–86 190NC644, 130SE635, 637 [cit CJ].
750–87 128Me75, 145A741(1stcase); 190NC644, 130SE635. [c] (2) 190NC 644, 130SE635.
750–89 100NJEq389, 135A681.
750–92½–New. Consulting engineer under contract to supervise construction of dry dock held to a knowledge of use and necessity of safety devices in general use. 71CalA767, 236P183.
752–10 170La783, 129S202 (where no plans or specifications for readjusting building were made by owner).
752–16 143Wash414, 255P113; 199Wis 99, 225NW700.
753–18 143Wash414, 255P113.
753–19 [a] See also 158La548, 104S 364.
754–31 ND 228NW449.
754–33 157Md420, 146A577; 157Md 652, 147A790, 65ALR1285.
754–36½–New. Builder is responsible for defects in finished building due to use of improper materials selected by him, unless released by something express or implied in contract. Sask [1927] 3DomLR115.
754–39 126Me498, 139A675.
755–40 See also 4LaA226.
755–48 169La319, 125S258.
756–54 [a] **Stipulation in grading contract** that estimates of engineer named should be final and binding included intent that estimates would include kinds of materials removed and number of cubic yards of each. 38GaA303, 143SE909.
756–61 [a] **Dispensing with architect's supervision** does not dispense with condition of doing work in a workmanlike manner. Ala 106S339.
757–66 22F(2d)620; TexCommnA 280 SW174.
757–67 NJCh 144A319; TexCivA 4 SW(2d)639. [f] **Construction of contract.**–209Ky239, 272SW717.
759–81 240NY244, 148NE510.
759–87 260Mass173, 156NE868.
760–95 249 IllA424; NJCh 144A319; NJ 151A843; TexCivA 4SW(2d)636, 638 [citCJ].
761–96 TexCivA 4SW(2d)636 (express disclaimer of intention to waive held shown).
761–3½–New. Matters not constituting relinquishment or abandonment of arbitration rights. 229Misc258, 241NYS 394.
761–3⅓–New. Parties cannot be regarded as having waived or abandoned rights under arbitration clause, unless manifesting such intent. 229Misc258, 241NYS394.
763–27½–New. Where owner assumes functions of engineer he is precluded from relying on absence of certificate. Can [1929] 4DomLR161.
763–30 84CalA187, 257P882.
764–37 TexCivA 4SW(2d)169, 173 [cit CJ].
765–44½–New. That owner's superintendent was self-willed and prejudiced is held not to show lack of good faith. 17F(2d)536.
766–57 202Cal 143, 259P735.
766–58 37F(2d)299.
766–59 [d] **Failure to furnish information as to cost of extra work,** required by contract, precludes issuance of certificate to contractor. TexCivA 23SW (2d)786.
767–73½–New. Engineer is disqualified from acting as umpire where he has previously formed unalterable opinion as to effect of important term of contract. Can [1929] 4DomLR161.
767–74 200 Iowa1003, 205NW650 (reservations properly included in certificate, when in accordance with building contract).
768–79 NJSup 149A33.
769–91 200 Iowa1003, 205NW650.
772–27 38F(2d)52; 196Cal 557, 238P 673; 202Cal 143, 259P735, 739 [quot CJ]; CalA 288P1107; 83Colo 305, 264 P1092; 200 Iowa1003, 205NW650; 208 Iowa24, 221NW197; 124Kan601, 261P 570, 571 [citCJ]; 2LaA8; 82Mont312, 267P207, 211 [quotCJ]; 102NJL705, 133A408; NJSup 149A33; 34NM277, 280P398; 130 Or341, 278P957; 290Pa 299, 138A824; TexCommnA 276SW193, 197 [citCJ]; TexCivA 10SW(2d)786; 147Va554, 137SE485. [b] (6) 196Cal 557, 238P673 (delay in completion not caused by owner).
773–28 213Ky199, 280SW926; 219 AppDiv429, 220NYS109. See also 22 F(2d)256.
773–29 208 Iowa24, 221NW197; 147 Va554, 137SE485.
773–33 213Ky199, 280SW926; 9LaA 317, 120S492 (will not be lightly disregarded); 213AppDiv658, 211NYS218; 290Pa299, 138A824 (where it contains no statement as to satisfactory completion of work).
774–36 51ND165, 199NW484. [a] **Recovery is not precluded by award** where owner prevents fulfillment of award. Cal 292P960.
775–49 208 Iowa24, 221NW197.
775–51 TexCommnA 280SW174.
775–55 TexCommnA 280SW174; 134 Wash647, 236P290 (architect has no power to modify provisions of contract).
776–57½–New. Nor is it binding where owner did not know plans and specifications had not been followed. 134 Wash647, 236P290.
776–59 166La593, 117S729.
776–61 196Cal 557, 238P673; 290Pa 299, 138A824.
777–64 290Pa299, 138A824.
778–80 104Conn430, 133A677. [e] (3) Contract to build within one hundred forty days construed to mean one hundred forty working days, not counting Sundays, holidays, or "bad weather days." 232 IllA450.
778–82 [a] **Under contract providing for completion** within "55 working days" Sundays are not "working days." TexCivA 292SW602.
779–88 [b] **Contract only fixing time of completion** does not imply agreement for commencement. 111Conn342, 149A 851.
780–98 104Conn430, 133A677.
780–4 35GaA120, 132SE140; 89Pa Super117.
780–5 108WVa317, 150SE718.
782–21 196Cal 557, 238P673.

782-22 196Cal 557, 238P673; 103NJL 360, 137A433; 98NJEq589, 131A223.
782-23 98NJEq589, 131A223. [b] **Acceptance of oral notices** held waiver of requirement of written notices. 174 Ark894, 298SW9 [quotCJ].
783-27 25F(2d)216, 217 [quotCJ]; 233 IllA143; 170La783, 129S202; 116 Or 668, 242P842; TexCivA 4SW(2d)636.
783-29½-New. Where a contract requires a contractor to make written claim to an architect for additional time because of delay caused by the owner, he is not entitled thereto where he fails to present such written claim. 98 NJEq589, 131A223.
783-29½-New. The courts will not attempt to apportion mutual delays under a building contract, but will refuse to enforce the penalty. TexCivA 17SW(2d)98.
785-37 233 IllA143.
785-38½-New. Breach of contract to complete drilling of well for certain season of year is not excused by acts of owner after time for completion had passed. 158La587, 104S377.
785-47 116 Oh554, 157NE367, 372 [citCJ].
786-52 104Conn430, 133A677.
786-55 98NJEq589, 131A223.
786-60 But see 199Wis99, 225NW700.
786-62 291Pa311, 139A842, 844 [quot CJ].
786-63 116 Or668, 242P842.
787-69 TexCivA 4SW(2d)636.
787-72 81CalA733, 255P200 (where no damage ensued); ND 228NW449; Tex CivA 17SW(2d)98.
788-75 104Conn430, 133A677.
788-82 232 IllA450.
789-83 Can [1929] 4DomLR132.
789-84 165La200, 115S458.
790-88 246Mich700, 225NW521.
790-91 196Cal 557, 238P673. [c] **Notice of cause of delay constituting basis for extension** need not be given to architect where delay was caused by stoppage of work by architect. 124 Or25, 263P913.
790-91½-New. Building contractor waives materialman's failure to make deliveries at times provided in contract by receiving and accepting deliveries with knowledge that provisions of contract as to time of delivery are not being complied with. 74Mont398, 240P825.
790-98 104Conn430, 133A677, 680 [cit CJ]; 238Mich164, 213NW93.
790-4 104Conn430, 133A677, 680 [cit CJ]; 238Mich164, 213NW93.
790-5 20F(2d)14; 103WVa137, 137 SE223, 225 [quotCJ].
791-7 103WVa137, 137SE223, 225 [quotCJ].
791-9 103WVa137, 137SE223, 225 [quotCJ].
791-10 116 Oh554, 157NE367, 372 [cit CJ].
792-18 Sask [1927] 3DomLR605. [a] In Saskatchewan.-[1929] 2DomLR353.
792-18½-New. Evidence has been held sufficient to show waiver by a contractor of liquidated damages because of a subcontractor's delay in completion of the work. 135Wash254, 237P 289.
792-19 [a] 83NY625; 134NY45, 31NE 271, 30AmSR608; 69AppDiv361, 75 NYS466.
793-31 [1] **Only actual damages are recoverable.**-238Mich164, 213NW93.
793-33 104Conn430, 133A677; Tex CivA 281SW1110, 1111 [citCJ].
793-34 104Conn430, 133A677; Tex CivA 281SW1110, 1111 [citCJ]; Sask [1927] 3DomLR115.
794-42 238Mich164, 213NW93.
794-44½-New. Recovery may be had, where putting in default is required only from the time of placing in default until the time the contract specifies for completion of the work. 166La587, 117 S727.
794-46½-New. Where liquidated damages are not stipulated, damages may not be recovered where actual damages are not shown. 238Mich164, 213NW93.
795-58½-New. Where the owner assumes responsibility for the burning of a building, he may recover a stipulated daily penalty from the time the building should have been completed to the time of the fire only. 165La222, 115S 466.
796-71 17F(2d)536.
796-73 235 IllA191; 190NC644, 130SE 635, 637 [citCJ] (implies satisfaction and waives many rights).
796-74 235 IllA191; [a] 190NC644, 130SE635, 637 [citCJ]. [g] **Approval by owner and architect of materials used for elevator doors,** materials specified being unobtainable, bars claim of defect by owner. 235 IllA191.
797-75 190NC644, 130SE635, 637 [cit CJ].
797-78 241Mich285, 217NW38, 40 [quotCJ]; BC [1928] 3DomLR389.
798-80 241Mich285, 217NW38, 40 [quotCJ].
798-81 241Mich285, 217NW38, 40 [quotCJ].
798-82 13LaA2, 127S76; TexCivA 28 SW(2d)247.
798-85½-New. Where there was a guaranty of roof intended to survive approval and acceptance of the work, the issuance by the architect of the final certificate for payment, after an understanding with the contractor's surety that defects known and objected to would be corrected or paid for, does not constitute a waiver of such defects. 241 Mich285, 217NW38.
798-88 157Md652, 147A790, 65ALR 1285; 251Mich38, 231NW92; 223 AppDiv795, 228NYS191; 219AppDiv 429, 220NYS109; Oh 170NE870; 133 SC249, 130SE755 (should be permitted to show under what circumstances he took possession). [e] (3) Attempted use to minimize loss from breach of contract not acceptance where well not completed according to contract and owner urged driller to complete it. 158 La587, 104S377.
799-89 TexCivA 28SW(2d)247. [a] **An uncommunicated intention** of one taking possession, merely to preserve it does not destroy effect of clause making taking possession conclusive. TexCivA 28 SW(2d)247.
801-12 But see 135Misc819, 238NYS 522.
801-18 220Ala587, 127S148; 1LaA746.
802-20 147Va554, 137SE485.
802-21 153Miss228, 120S458.
802-27 See also 53SD158, 220NW471.
803-43½-New. One promising to pay a contractor for fixtures furnished cannot avoid liability by paying another contractor's claims. NJ 146A216.
803-43½-New. Under contract making no provision for unforeseen calamity, law leaves loss on both parties at stage where calamity found it. Fla 130S25.
803-44 181Ark629, 27SW(2d)793 (where performance prevented by act of God, owner is not liable for not permitting contractor to perform).
804-46 37F(2d)299; 169La319, 125S258 (litigation); NJCh 141A459 (where full performance would be of no benefit to owner because of refusal of third person to perform conditional agreement on owner's failure to perform condition); 299Pa58, 149A93 (contractor liable for breach of contract to subcontractor for refusal to permit work). But see Tex CivA 31SW(2d)511.
804-53 248 IllA343; 242Mich665, 219 NW593; 49RI 408, 143A609. [a] **Receipt of part payment** does not necessitate further demand before abandonment of work because of default in payments. 232Mich238, 205NW157.
805-57 157Md652, 147A790, 65ALR 1285. (Contractor justified in relying on architect's specifications regarding suitability of old pipes for remodeling sprinkler system).
805-63 Fla 130S25; 6LaA153; 147 Miss335, 112S469, 53ALR88; 129Misc 911, 223NYS408; 95PaSuper203.
806-67 165La222, 115S466 (risk of loss by fire is assumed by owner). [b] **Contractor need not construct another building** after burning of partially completed building where contract required owner to insure building. 165La222, 115S466. [c] **Statute imposing risk of loss on contractor** may be dispensed with by contract placing risk on owner. 165La222, 115S466.
806-69 104NJL438, 140A433.
806-70 Fla 130S25.
806-71 Miss 122S469.
806-75 Fla 130S25.
807-77 But see Fla 130S25.
807-89 Fla 130S25; 104NJL438, 140 A433; 129Misc911, 223NYS408.
808-91 178Minn188, 226NW515 (part performance of plumbing contract in dwelling); 129Misc911, 223NYS408. [d] 104NJL438, 140A433.
809-7 123Kan584, 586, 256P963; 158 La587, 104S377 (formal default unnecessary to permit recovery); 11LaA328, 123S130; 8LaA693.
810-19 Mass 172NE855; TexCivA 281 SW600, 601 [citCJ]; TexCivA 27SW (2d)880; Wis 232NW887. But see Tex CivA 286SW599. See also 155Wash98, 283P667 (contract not substantially performed).
811-20 36GaA723, 137SE901; 36GaA 726, 137SE902; IndA 154NE780; 190 NC644, 130SE635. [a] **Amount expended for repairs may not be recovered** in addition to reasonable cost of making work comply with contract. TexCivA 3SW(2d)599.
811-21 169La319, 125S258; 11LaA 328, 123S130; 2LaA284; Mass 172NE 855; 241Mich285, 217NW38; 190NC 644, 130SE635; TexCivA 286SW599; TexCivA 27SW(2d)880; 155Wash98, 283P667; Wis 232NW887.
811-22½-New. or without impairing building as a whole; TexCivA 286SW 599.
811-24 [a] **Contractor constructing roof which leaked** is liable not only for expense of proper roof, but for damages to building and contents. 153Miss228, 120S458.
811-26 83CalA561, 257P127 (allowance of rental value for delay in completion held proper).
812-29 21F(2d)589; 240Mich228, 215 NW321.
812-30 Miss 122S469, 474 [citCJ].
812-32 153Md380, 138A255, 257 [cit CJ].
812-39 27F(2d)20; 201Iowa751, 206 NW254; 208Iowa44, 222NW864; 256 Mass404, 152NE715; 240Mich36, 214 NW833; 147Miss335, 112S469, 474 [cit CJ] 53ALR88; 219AppDiv107, 219NYS 97; TexCommnA 29SW(2d)1004. See also 11LaA255, 122S914.
813-42 219AppDiv107, 219NYS97.
813-43 27F(2d)20.
814-60 240Mich36, 214NW833.
815-62 219AppDiv107, 219NYS97.
815-66 See also 34Ariz68, 267P794 (where contractor ceases work as of right because of owner's failure to pay or tender payment of amount due).
815-67 208Iowa44, 222NW864 (owner is not required to submit cost to competitive bidders or complete work at lowest possible cost); 240Mich36, 214 NW833; TexCivA 294SW603. See also 6LaA547.
816-69 147Miss335, 112S469, 474 [cit CJ] 53ALR88.
816-71 TexCivA 274SW230; TexCivA 294SW603. See also 134SC510, 133SE 444.
816-73½-New. Where the owner does not follow the specifications in completing the contract, he cannot recover, on expert evidence, the difference between the cost of finishing the contract as measured by expert evidence and the contract price. TexCivA 274SW230.
816-74 [a] **County completing contract has no title or lien** on materials purchased by contractor. 37F(2d)326.
817-78 253Mass239, 148NE456; 226 AppDiv450, 236NYS14; 116 Or668, 242 P842. [b] (1) 233 IllA143. (6) 287Pa 485, 135A117. (11) Salary of superintendent for time devoted exclusively to work is proper item of cost. 114 Okl 16, 241P121. (12) Freight on machinery used in constructing building is proper item of cost. 114 Okl 16, 241P 121. (13) Repairs to machinery used in construction of work is proper item of cost. 114 Okl 16, 241P121. (14) That cost exceeded contract amount not ground for charging excess to contractor in absence of proof of agreed limit in view of increasing prices of material and labor and proof that cost plus jobs

were rarely maintained within estimates. 158La663, 104S491. (15) Other contracts construed. 233 IllA143; 82 CalA116, 255P257; 287Pa485, 135A117; 287Pa425, 135A220.

818–86½–New. Additional compensation for early completion. 98NJEq589, 131A223.

818–91 [a] **Unless accepted as complete performance,** substantial performance allows no recovery of full contract price. 157Md652, 147A790, 65ALR1285.

818–94 TexCivA 16SW(2d)983; Tex CivA 19SW(2d)355.

819–96 4LaA180; 6LaA437; 7LaA280; 7LaA656. [a] **Only limited class of cases** are governed by rule that damages are reasonable value of work done. 157Md652, 147A790, 65ALR1285.

819–98 91CalA529, 267P342, 344 [quot CJ]; 253Mass239, 148NE456.

820–3 10LaA219, 120S672.

820–4 209Ky239, 272SW717, 718 [cit CJ].

820–5 121Kan34, 245P1024; 209Ky 239, 272SW717, 718 [citCJ]; 220Ky562, 295SW868 [citCJ]. [b] (1) 209Ky239, 272SW717. (2) Where what has been omitted can be done at a reasonable cost, the difference in value will be measured by the cost of doing the work, considering the contract price for the work. 209Ky239, 272SW717.

821–10 248 IllA343; 1LaA182; 253 Mass239, 148NE456; NJ 146A216, 212 AppDiv429, 209NYS320. See also 127 Me222, 142A781. But see 232Mich238, 205NW157.

822–12 212AppDiv429, 209NYS320.

822–13 121Kan742, 250P264; 125Kan 700, 266P26.

823–23 116 Or668, 242P842.

823–25 [c] **Provision of excavation contract** for twenty-five cents per yard for material taken out and forty-five cents per yard for material leveled does not require payment of seventy cents per yard for all material excavated and leveled. 192Wis275, 212NW657.

824–35 Wash 287P11.

825–42 [a] (2) Where payments have been made from time to time without estimate and refusal to make subsequent payments is not based on failure to make estimates, such refusal cannot be excused on ground of failure to make estimates. 232Mich238, 205NW157.

826–59 129 Okl 106, 108, 263P660 [cit CJ]; 40 OklACR243, 244 [reh pending, and citCJ].

828–78 129 Okl 106, 263P660; 40 Okl ACR243, 244 [reh pending, and citCJ].

828–90 169La319, 125S258 (measure of damages); 249Mich248, 228NW680.

829–92 121Kan34, 245P1024.

829–93 Sask [1927] 3DomLR115, [1927] 2WestWkly838.

829–94 127Kan590, 274P213.

829–95 [b] **Interest on unpaid mechanics' liens** are chargeable against contractor, and not against owner. 88 CalA481, 263P826.

829–96 88CalA481, 263P826.

829–3½–New. The owner is not entitled to withhold payment of the amount owed by the contractor for labor and material where neither the contractor, laborers, nor materialmen can assert a lien on the building. 241Mich534, 217 NW909.

829–4 But see TexCivA 10SW(2d)189 (use of secondhand materials).

830–11 248 IllA343.

831–19 179Ark118, 14SW(2d)257.

831–21 See also 136Misc386, 240NYS47.

831–24 158La587, 104S377.

831–26 166La593, 117S729; Tex CommnA 16SW(2d)517.

832–32 But see 242 IllA315.

832–32½–New. Under some statutes, a contractor cannot recover a balance due without proof of payment of a subcontractor's lien or waiver thereof. 242 IllA315.

832–33 13F(2d)758; 226AppDiv280, 235NYS220. [a] (5) Other instances. Mass 173NE519.

833–34 13F(2d)758.

833–38 83Colo 419, 266P201, 203 [cit CJ]; 242Mich665, 219NW593.

834–54 233 IllA248 (dictum).

835–55 233 IllA248.

835–57 233 IllA248.

835–60 233 IllA248.

835–61 205 Iowa483, 218NW325; 249 Mich248, 228NW680. [e] **Credits and extras.–Wash** 290P994.

835–63 231Ky544, 21SW(2d)835; 129 Okl 106, 108, 263P660 [citCJ]. [c] But see 169La90, 124S182. [d] **Claim of subcontractor, suing on bond,** for wages may be established by written acknowledgment of correctness of pay rolls. 169La90, 124S182 [e] **Proof of claims** against bridge contractor and his surety, under bond conditioned on payment for all materials furnished, will be sufficiently established by showing that materials were ordered by contractor and delivered for use on bridge. 169La 90, 124S182.

836–74 218Ky32, 290SW1070; MoA 256SW516.

839–11½–New. A judgment against a contractor's assignee for the difference between allowance for defective work and balance due assignee after crediting satisfied judgment in mechanic's lien action is erroneous as not based on any liability of assignee. 84Colo 62, 268P 535.

839–16 105NJL242, 143A379. [b] **No implied promise to pay excess** where contract to build was not ambiguous. TexCivA 272SW228.

839–18 164La521, 114S119; 5LaA607.

840–22½–New. Subcontractor is not liable to contractor for cost of extras merely suggested by subcontractor and advantageous to him. 203 Iowa565, 213 NW212.

840–22½–New. In construing cost plus contract it has been held not practical to segregate cost of main work from cost of extras. 135Misc768, 238NYS 451.

840–26 [a] **Deviation from original plan by consent** does not exclude rule of payment provided in contract. Fla 130 S25.

840–27 249 IllA424; 205 Iowa1305, 217 NW228; 6LaA487; 253Mass239, 148 NE456; 58ND727, 227NW222; Tex CommnA 298SW273; TexCivA 289SW 461, 464 [citCJ]; TexCivA 48W(2d) 169.

841–28 3LaA324.

841–29 172Ark255, 288SW897.

841–32½–New. Ambiguity in a contract as to material to be used is a sufficient consideration for the promise of owner to pay for extra labor in use of material chosen. TexCivA 48W(2d) 169.

841–34 216Ala567, 114S130.

842–35 TexCivA 289SW461, 464 [cit CJ]. See also 127Me222, 142A781.

842–37 176Minn402, 223NW456(2d case).

842–40 170La783, 129S202 (consent of owner). [a] 164La521, 114S119. [b] (2) Failure of contractor to furnish statement as to cost of extra work absolves owner from payment of estimate therefor. TexCivA 23SW(2d)786.

842–41 8LaA595, 600 [quotCyc].

843–43 28F(2d)340. [c] **Agreement is to be established** by clear and satisfactory evidence, showing distinct agreement by parties that work shall be deemed extra work, and a definite agreement to pay therefor. 28F(2d) 340.

843–44 MoA 27SW(2d)501.

845–60 216Ala567, 114S130.

845–62 81CalA733, 255P200 (written order and agreement); 201 Iowa647, 207NW750; 164La521, 114S119.

846–63 81CalA733, 255P200 (verbal order followed by written orders during progress of work held sufficient); 201 Iowa647, 207NW750 (especially where owner lived at distance and had no knowledge of extra work until after performance).

846–68½–New. , nor does such provision prevent the parties from making a subsequent different agreement and orally modifying the written contract when mutually agreed upon. 35Ariz226, 276P 521.

846–69 35Ariz226, 276P521; ND 231 NW604.

847–71 81CalA733, 255P200; 264Mass 1, 161NE607.

847–73 81CalA733, 255P200; 204Cal 19, 266P287 (original contract modified by executed oral agreements).

848–79 81CalA733, 255P200 (contractor not liable for cost of alterations required by city under clause requiring him to procure permits and be liable for loss due to violation of ordinances); 166La593, 117S729. [e] **Matters constituting extra work.–**166La593, 117S 729.

848–80 164La521, 114S119.

849–81 88CalA481, 263P826; 164La 521, 114S119.

849–83 88CalA481, 263P826; 116 Or 668, 242P842.

849–85 58ND727, 227NW222.

849–86½–New. A contractor is not entitled to pay for removal of overbreakage from blasting, whether due to his negligence or not, where the contract provided for the removal of overbreakage in solid rock excavation by the contractor at his own expense. 141Wash51, 250P449.

850–98 116 Or668, 242P842.

851–3 135Misc768, 238NYS451.

851–6½–New. Defendant has no right to deduct for work which was legal when performed, becoming illegal thereafter, and replaced by him. 12LaA646, 126S575.

852–25 [c] **Enforcement of arbitration.–**131Misc507, 228NYS222.

853–31 173Minn360, 217NW348 (award for extras held binding).

853–32 45 Ida707, 266P1094. But see 12LaA646, 126S575.

853–33½–New. Where contract contains no provision for extra compensation if construction of ships required more time than contemplated, shipbuilder cannot claim extra compensation for use of ways where construction was disapproved by bureau of shipping requiring change of plans and specifications. 158La548, 104S364.

853–37 45 Ida707, 266P1094. [b] **Rental of construction plant.–Can** [1930] 2 DomLR751 (contract construed in arriving at amount due).

855–49½–New. Where the contract for construction of a building contains plans and specifications for three different buildings, recovery for the owner's breach must be according to the plans and specifications, for the lowest priced building in the absence of an agreement as to which building was to be constructed. 154Miss663, 122S741.

855–52 But see Can [1930] 2DomLR 751.

856–69 7LaA753. [c] (2) Surety for hire is not liable to owner for amount voluntarily paid for materials furnished to contractor when materialmen had failed to file liens within statutory time and obligations were not binding on owner at time of payment. 129 Okl 106, 263P660. [d] **No liability on bond for faithful performance** exists when contract is fully performed. 119Kan560, 240P846.

856–70 128 Okl 215, 262P208.

856–77½–New. A contractor's bond conditioned faithfully to perform the contract on the part of the principal and satisfy all claims and demands incurred for the same and, in case of default, to pay all persons who contracted directly with the principal, for labor or materials, means that in case of default the liability is restricted to such claims and demands for labor and materials as were contracted for directly with the principal and not otherwise. 126 Okl 1, 257P772.

856–77½–New. That the contractor engaged to construct the building at too low a price, or that the building was worth more to the owner than the agreed price, does not constitute a defense to the surety. 127Kan100, 272P 149.

856–78 240Mich36, 214NW833; 128 Okl 215, 262P208. [b] **Watchman's wages, inventory, and advertising costs** may be recovered from surety, on default of principal. 27F(2d)20.

857–79 [a] **Architect's fees,** based on costs of completed building, are not recoverable on principal's default. 27 F(2d)20.

857–79½–New. The surety cannot

claim credit for work called for in the original contract, omitted in the reletting contract. 27F(2d)20.

857-88½-New. A surety is not liable for forfeiture of stipulated per diem amount for delay where bond provides that forfeiture provided for in contract against principal shall not operate as against surety. 158Cl77; 143SE24.

857-88½-New. A contract provision giving the owner the right and power to complete a building on default does not require him to do so in order to recover from the surety. 27F(2d)20.

857-89 15F(2d)993. 227AppDiv745, 236NYS635 (contractors' bond presupposes fault attributable to contractors); 15Philippine128 (instance of exercise of right); TexCommnA 298SW(2d)1004 (completion as effecting assignment of contract). See also NC 154SE640. [b] **Under term of bond** has been held that surety had right to assume dominion and control over building and construction. TexCommnA 298SW(2d)1004.

857-91 15F(2d)993; 217AppDiv420, 217NYS848; 15Philippine128. Tex CommnA 298SW(2d)1004. [b] **Surety entitled to recover not merely reasonable value of the service but upon contract price.** 4bPhilippine128 (in instance case receiving benefit of reformation to correct mistake in contract).

857-92 86Ohio493, 283P1042; Tex CommnA 298SW(2d)1004 [a] **Materialman, furnishing material to contractor,** has claim against amount due on contract superior to that of surety. 217 AppDiv420, 217NYS848.

857-94½-New. Actions. The question, whether the owner told the contractor's employees that no more money would be paid thereby rendering performance impossible, is for the jury on conflicting evidence. 240Mich36, 214NW533.

857-94½-New. An instruction that certain acts of an owner would not justify noncompletion of the work by the contractor has been held correct. 240Mich 36, 214NW533.

857-94½-New. Equity has jurisdiction of suit by surety, completing contract, to adjust all matters arising from default. 21F(2d)1005.

858-89 98PaSuper599.

858-9 But see 129Okl106, 263P660.

858-8 1[illegible]Kan100, 2[illegible]P119.

858-10 167La301, 119S56; 128Okl 215, 262P208.

859-12 291Pa311, 139A842.

859-13 TexCommnA 298SW(2d)1052. [b] **Changes held not to constitute "material alterations"** in subcontract so as to discharge surety. TexCivA 208SW (2d)[illegible].

859-14 But see 88PaSuper182.

859-17 See also 7[illegible]F(2d)20.

859-19 MoA 270SW165; TexCivA 286 SW539.

860-23½-New. Oral agreements as to extras and deductions do not discharge the surety, although the contract requires such agreements to be in writing. 88CalA481, 263P826.

860-23½-New, especially where failure to reduce such agreements to writing was due entirely to the contractor's fault or neglect. 88CalA481, 263P826.

861-41½-New. Where contract for excavating and backfilling fixed pay lines and required contractor to bear the expense of shoring, the surety is not discharged by reason of work done by the subcontractor outside of the pay lines where the work was done under direction of the contractor and saved the expense of shoring. 232Mich238, 205NW157.

861-45 216Mich210, 209NW188.

862-51 [a] **Voluntary payments** by obligee to contractor, which did not reach materialmen or laborers, which was not required by contract and made without required affidavit operates as release of surety. 216Mich210, 209NW 188.

862-52 190NC56, 128SE469, 4[illegible] [citCJ]; NC 154SE640. But see 127Kan 100, 272P140.

862-56 [b] **Deduction of damages for delay and defective work from balance in owner's hands before discharging liens (1)** does not injure surety (88CalA 481, 263P826), (2) and is not matter of which surety can complain (88CalA 481, 263P826). (3) Such deduction is proper where contract authorizes owner to retain enough money due contractor to pay such claims. 88CalA481, 263P826.

862-58 127Kan100, 272P149.

863-62½-New. Payment in the bonds of a municipal owner instead of in cash as required by contract does not discharge the surety. 128Okl 215, 262P 208.

863-64½-New, Requirement that payment be made only in cash may be waived by principal without discharging surety. 128Okl 215, 262P208.

863-73 116Or668, 242P842.

863-74 116Or668, 242P842.

864-76 121Kan34, 245P1024.

864-80 121Kan34, 245P1024.

864-88 157Md652, 147A790, 65ALR 1256, 101W452, 144A376.

864-89 [b] **Where contract defectively executed and buildings accepted and occupied,** contractor may recover on quantum meruit for work done, less damages owner has sustained by breach. 209Ky239, 272SW717.

865-97½-New. An arbitration clause has been construed as excluding as a subject of arbitration a claim of the contractor against the owner. 124Or 25, 263P913.

866-18 NJ 151A91(1stcase). [a] (5) Other complaints held sufficient. 36 GaA723, 137SE901; 36GaA726, 137SE 902; 233 IIIA143.

867-25 33PortoRico 891 (in absence of allegation of agreement for fixed sum).

867-26 89PaSuper412. [b] **Where declaration sets out contract** in hac verba, court determines its legal effect, and allegations as to its legal effect are argumentative and superfluous. 233 IIIA 143. [c] **Subcontractor suing contractor** need not set forth contract between contractor and owner referred to in contract sued on. 39GaA494, 147SE399.

867-33 130Okl 216, 266P757, 758 [quot CJ]; 33PortoRico 891. [b] **Statement of claim** based upon demand and refusal of an architect's certificate shall state whether demand and refusal was oral or in writing. 6PaDist&Co 695.

867-34. 130Okl 216, 266P757, 758 [quot CJ].

867-35 130Okl 216, 266P757, 758 [quot CJ].

871-77½-New. Answer setting up new parol agreement modifying paving contract held defective. 298Pa568, 148A 849.

871-77½-New. If work of subcontractor was not according to contract defendant should show wherein it failed to comply with contract. TexCivA 288SW (2d)877.

871-82 205Iowa167, 217NW808.

872-94 [a] (3) Other affidavits held sufficient. 92PaSuper467. (4) Other instances. 13PaDist&Co 569.

873-6 17F(2d)536; TexCivA 48SW(2d) 169.

873-7 17F(2d)536.

874-9½-New. That there was no agreement as to the price of an item of account is held not to prevent recovery of reasonable value. 259Mass339, 156NE 740.

874-10 [b] **Superfluous allegations,** that defendant refused to arbitrate, where contract did not call for arbitration, need not be proved. 233 IIIA143.

874-11 39GaA490, 147SE420.

874-12 202Cal143, 259P735.

875-31 Mass 107NE266.

876-33½-New. In action by subcontractor against general contractor for his share of profits subcontractor need not allege and prove that general contractor had received payment. TexCivA 22SW (2d)1092.

876-38½-New. Under general allegation of negligence defendant may prove specific defects in construction. 180Ark 947, 238SW(2d)611.

876-41 216Ala567, 114S130 (amount of recovery).

877-51½-New. Where evidence shows permit for building and official approval of architect's plans, it is presumed that the building was constructed under contract provisions, as far as the city ordinance requirements are concerned. 233 IIIA143.

877-53 230Ky44, 18SW(2d)868 (establish contract price in excess of amount admitted in answer). [d] **Burden of proof not sustained.**—213AppDiv658, 211 NYS218.

877-56 See also 291Pa387, 140A148.

877-56½-New. Burden is on plaintiff to show that damage from breaking down of pier was due to breach of builder's contract. 19F(2d)163.

877-57 124Or585, 265P417. [d] **Assignee of contract must prove performance of conditions** for payment before maturity of mortgage. Mass 170NE400.

877-58 253Mass239, 148NE456.

877-66 22F(2d)256; 169La319, 125S 258. [c] **Verbal agreement relieving contractor** of responsibility for defective work. LaA 122S137.

878-69 TexCivA 48SW(2d)169.

878-71 5LaA576.

878-72 But see 291Pa387, 140A148.

878-75 158La663, 104S491 (that cost of building under cost plus contract was to be kept within alleged limits). See also Iowa 231NW331.

878-76 TexCivA 278SW(2d)323.

878-82 NJSup 149A33; 225AppDiv819, 232NYS378; 190NC644, 130SE635 (testimony of building contractor as to amount of his business per year held admissible to show experiential capacity); ND 231NW604; 116Oh554, 157 NE367; Wis 232NW887. [e] **In action on cost plus contract,** time and pay sheets, invoices and bills, and books are admissible if based on sufficient foundation evidence. 233 IIIA143. [f] **Evidence as to whether certain pipe was proper equipment for good steam plant** is inadmissible where issue is whether pipe complied with contract. 263Mass 220, 160NE888.

879-84 [a] **Failure to "kick" on material or object to prices** in itemized statement held admissible as tending to show acceptance. 190NC644, 130SE635.

879-85 Cal 289P828; 29OhA526, 163 NE723 (reasonable value of services); Wash 287P11.

879-88 [b] (2) But where contract makes ample provision for extra work, evidence that extra work orders caused delay is inadmissible. 116Oh554, 157 NE367. [c] **Particular acts of owner held admissible.**—116Oh554, 157NE367. [d] **Delays of other contractors** in furnishing and erecting structural steel and sprinkler system are admissible. 116 Oh554, 157NE367. [e] **Delay of architect and engineer,** caused by inadequacy of drawings and other inefficiencies, is admissible. 116Oh554, 157NE367.

879-89 See also TexCivA 48SW(2d)169.

879-90 89PaSuper117.

879-91 232Mich238, 205NW157; 105 NJL560, 143A347; TexCivA 48SW(2d) 169; TexCivA 19SW(2d)380 (in action by subcontractor against contractor to recover contract price, evidence that defendant expended sums in excess of contract price is properly excluded).

879-92½-New. In an action involving contractor's delay in completion of work evidence to show delay was necessitated by performance of extra work is properly excluded where architect has certified to the contrary. 196Cal557, 238P 673.

879-92½-New. Evidence of another contract is admissible where executed as part of consideration of contract sued upon. TexCivA 27SW(2d)880.

879-93 233 IIIA143; 116Oh554, 157NE 367; TexCivA 286SW599.

880-3 8LaA595, 600 [quotCJ]; 264 Mass1, 161NE607 (evidence admissible to show waiver of written approval by architect representing owner).

880-4 30F(2d)30; 172Ark255, 288SW 897.

880-6 39Wyo195, 271P19, 22 [citCJ].

880-8½-New. Where requirement for engineer's certificate does not apply to extra work not provided for in contract, plaintiff may introduce claims for such extra work without certificate and may show compliance with arbitration procedure of contract and award in his favor for such extra work. 116Oh554, 157NE367.

882-31 Iowa 231NW331.

883-46 30F(2d)30; **Wash** 287P11 (estimates of capacity, corroborated by measurements, held admissible).

884-52 **CalA** 293P140; 110**Conn**381, 148A131. [a] 92**CalA**513, 268P379 (as against claim for deductions under cost guaranty clause); 92**PaSuper**472; 49 **Philippine**957. [b] (1) 46 **Ida**303, 267 P830; 200 **Iowa**103, 205NW650. [e] **Evidence held sufficient to support finding.**–158**La**663, 104S491; 3**NJMisc**838, 129A233.

884-54 107**Conn**532, 141A651 (held not to include inclosure of porch with glass); 226**Ky**338, 10SW(2d)1086; 167 **La**689, 120S52. [a] **Evidence held sufficient** to show new contract was made on cost plus method of compensation. 219 **MoA**222, 269SW942.

884-56 172**Ark**255, 288SW897; 249 **Mich**248, 228NW680. [a] **Evidence held insufficient to warrant finding** as to additional compensation. 230**Ky**44, 18SW (2d)868.

884-60 172**Ark**1177, 289SW781.

884-62 33F(2d)501; 172**Ark**1177, 289 SW781.

884-63 **Cal** 292P960; 12**LaA**301, 125S 179; 126**Me**498, 139A675.

884-64½-New. amount due, 212**Ky**830, 280SW147.

884-65 212**Ky**830, 280SW147; 10**LaA** 544, 121S624; 165**La**200, 115S458 (school board held not to have contributed to delay).

884-66 **CalA** 288P1107; 173**Minn**360, 217NW348; 135**Misc**768, 238NYS451. [a] **Evidence held insufficient.**–200 **Iowa** 103, 205NW650.

884-71½-New. fraudulent collusion between contractor and architect nullifying certificate, 290**Pa**299, 138A824.

884-71¾-New. waiver and abandonment of an agreement to pay laborers' claims against a defaulting contractor, 128**Kan**220, 277P45.

884-73 [a] **Evidence held sufficient** to show that contractor was not responsible for bulkhead's collapse after completion. 147**Va**554, 137SE485. [b] **Evidence held insufficient** to show that collapse of pier was due to fault of defendant. 19F(2d) 163.

885-80½-New. Evidence has been held sufficient to show that construction was finally completed on certain day. 98 **NJEq**589, 131A223.

885-80¾-New. Proof necessary to show gross mistake or failure of an engineer to exercise honest judgment must be clear, convincing, overwhelming, and irrefragable. 34NM277, 280P398 (insufficient).

885-81 [a] (1) 205 **Iowa**1305, 217NW 228; 167**La**689, 120S52; 124 **Or**25, 263 P913. **TexCivA** 27SW(2d)323. (10) To show damage to owner caused by negligence of supervising engineer exceeded just claim of latter for compensation. 71**CalA**767, 236P183. (11) To warrant finding that seven hundred and fifty dollars deduction from price would cover defects in construction. 98**CalA** 175, 276P611. [b] (1) 98**CalA**765, 277P 876; 234**Ky**794, 29SW(2d)545; 235 **Ky**810, 32SW(2d)401; 158**La**587, 104 S377 (drilling well); **TexCivA** 31SW(2d) 511. (4) To sustain finding of no substantial performance. 91**CalA**529, 267P 342. (5) To sustain finding that contractor furnished guarantee as contracted. **TexCivA** 31SW(2d)511. [g] **Failure to offer direct proof of cost of omitted work** has been held not to vitiate verdict where cost was insignificant item. **TexCivA** 27SW(2d)323.

885-82 158**La**587, 104S377.

885-84 126**Me**454, 139A497.

885-85 [a] **Where contract stipulates conditions and circumstances under which work will be accepted,** positive evidence is required to prove waiver thereof. 6**LaA**153.

885-86 158**La**587, 104S377 (insufficient excuse in action to recover for drilling well); 124 **Or**25, 263P913 (excuse for delay shown).

885-87 [a] (1) 10**LaA**544, 121S624; (3) Unsubstantial compliance with contract by builder. 205 **Iowa**167, 217 NW808. (4) To show that window lights were below specifications. 10**LaA** 544, 121S624. [b] **Evidence held sufficient** to sustain deductions for noncompliance with certain details. 91**CalA** 529, 267P342.

885-88 95**PaSuper**508 (sufficient).

885-89 **ND** 228NW449.

886-90 80**CalA**450, 252P652 (evidence held insufficient to show deviation from original plans and specifications justifying recovery on quantum meruit); 173 **Minn**360, 217NW348 (evidence held not to show abandonment). [a] (2) That admitted express contract for same job for lump sum was abandoned by mutual consent held not shown by evidence. 121 **Kan**34, 245P1024.

886-91 121**Kan**34, 245P1024, 1025 [cit CJ].

886-98 264**Mass**1, 161NE607 (whether expenditures alleged were proved held for trial judge as trier of facts).

886-99 **TexCivA** 48SW(2d)169 (error to submit question generally whether performance was in accordance with written contract).

886-1 39F(2d)521; **Ark** 32SW(2d)174; 95**CalA**566, 272P1092; 202 **Iowa**561, 210 NW602; 234**Ky**794, 29SW(2d)545; 126 **Me**498, 139A675; 156**Md**558, 144A705; 235**Mich**633, 209NW807; **MoA** 27SW (2d)501; **NJ** 141A174; 87**PaSuper**191; **TexCivA** 27SW(2d)323; **Wash** 287P11.

887-4 249**Mich**626, 229NW617 (question of rescission).

887-5 28F(2d)340; 233 **IllA**143; 202 **Iowa**561, 210NW602.

887-9 259**Mass**439, 156NE740; 162 **Minn**27, 201NW942; 290**Pa**299, 138A 824; 89**PaSuper**412; **TexCivA** 286SW 599; **TexCivA** 27SW(2d)323. [e] **Whether plaintiffs fulfilled contract** up to time they were excluded from premises by defendant, has been held for jury. 32F(2d)261 [aff 32F(2d)264(1st case)].

887-11½-New. the extent of the authority of the architect to act for the owner; 235**Mich**633, 209NW807.

888-12½-New. whether occupancy of building was acceptance of contract; 133SC249, 130SE755.

888-13½-New. when time limit for completion began to run; 238**Mich**164, 213NW93.

888-14 259**Mass**439, 156NE740; 287**Pa** 425, 135A220. See also **RI** 132A721.

888-19½-New. whether performance within agreed time was waived; 238 **Mich**164, 213NW93.

888-21 **Ark** 32SW(2d)174; 152**Va**453, 147SE265.

888-21½-New. the benefit received by owner as measure of recovery in case of defective performance. 209**Ky**239, 272 SW717.

888-22 226**Ky**338, 10SW(2d)1086.

888-22½-New. Exact time when contract was completed is jury question. 233 **IllA**143.

888-22¾-New. Whether foundation peeled off because of contractor's use of poor gravel is for jury. 126**Me**498, 139 A675.

888-24 124 **Or**585, 265P417; **Utah** 290 P367. [a] (2) Evidence justifying instruction as to waiver of cost guaranty clause of contract. 92**CalA**513, 268P 379. (3) Instruction that plasterer was under obligation to perform work in good and workmanlike manner. **Mass** 170NE410. [b] (5) Instruction on justness of claim independent of fraud on part of architect. 103**NJL**360, 137A433. (6) Instruction on issue of warranty as to depth of bedrock, in bridge building contract, held erroneous. 20F(2d)757 (proper instruction stated). [d] (2) Instruction defining substantial performance held sufficient. **TexCivA** 286SW 599. (3) Other instances. **TexCivA** 27 SW(2d)323.

890-32 [b] **Acceptance.**–190NC644, 130 SE635.

890-33 [c] **Instruction ignoring necessity of notice of claim** for all time because of delay. 103**NJL**360, 137A433.

890-34 291**Pa**387, 140A148 (instruction held not objectionable).

890-36 133SC249, 130SE755 (instruction limiting recovery to negligence erroneous where contract made specific provisions not depending upon contractor's negligence).

891-37 124 **Or**585, 265P417.

891-40 [b] **Court not bound to find** value of items omitted in building house in exact accord with defendant's evidence. 107**Conn**532, 141A651.

892-51 20F(2d)757 (judgment for subcontractor against contractor held not prejudicial on not deducting award to materialmen); 84**Colo** 62, 268P535 (judgment on counterclaim with direction to credit amount due plaintiff and issue execution for balance held irregular).

892-56½-New. An action by a contractor against a corporation is barred by his assignment to the president of a corporation of all claims the contractor had against the corporation. 236**Mich** 536, 211NW85.

892-59 40F(2d)858.

894-76 [a] (5) That building not constructed in conformity with specifications of contract. 45**Philippine**242. (6) Other instances. **Cal** 289P828. [c] **Evidence held insufficient.**–**Can** [1929] 4 **DomLR**132.

894-82 [a] (1) 208 **Iowa**24, 221NW197.

895-84 134**Wash**647, 236P290.

895-86 134**Wash**647, 236P290.

895-91 248 **IllA**140.

895-92 238**Mich**164, 213NW93.

895-93 See also 45**Philippine**242. [a] **Recovery of liquidated indemnity precludes** recovery of ordinary damages. 45**Philippine**242.

896-98½-New. Owner is not estopped to sue for damages for inefficient construction because he has paid the contractor before discovering the defects, on certificates as to progress issued by the owner's architect. 50**Philippine**227.

896-3½-New. In an action for damages from a leaky roof it is no defense that the builder had executed a special contract to keep the roof in repair. 134 **Wash**647, 236P290.

896-7 171**Minn**20, 213NW30. [d] **Action based on failure to complete work.**–**TexCivA** 274SW230. [f] **Custom need not be** alleged in plaintiff's declaration, as it is matter explanatory and not in alteration of contract. 232 **IllA**450. [g] **Petition held sufficient.**–**TexCivA** 3 SW(2d)599.

896-9 248 **IllA**140.

897-24 205 **Iowa**167, 217NW808.

898-29 84**CalA**161, 258P114 (amount and validity of mechanic's liens paid by owner); **Iowa** 231NW331 (in action by subcontractor).

898-30 **Iowa** 231NW331. [b] (6) On counterclaim for damages for loss due to negligent construction evidence as to loss from damage resulting from leak in roof, sinking of building, and loss of profits, not admissible where builder's contract was to furnish labor and material and supervise construction and he used foundation site selected and excavated by owner. 190NC644, 130SE635. (7) In action for breach of contract to build ice plant, expert testimony as to proper methods of construction, acceptability of plans and specifications, and as to shavings for wall insulation is properly excluded. 194NC407, 139SE 771. [f] **To show extent of damages for delay.**–Where no liquidated damages are stipulated, a lower bid based on slower delivery previously submitted by contractor but not accepted by city is not admissible. 238**Mich**164, 213NW93.

899-31 205 **Iowa**167, 217NW808; 134 **Wash**647, 236P290 (damages from leaking roof). [a] (1) 88**CalA**481, 263P826; 241**Mich**285, 217NW38 (actions by contractor and contractor's surety against subcontractor). (8) To sustain finding of owner's consent to causes of defects, subject of counterclaim for damages. 190NC644, 130SE635. (9) To support finding that contractor failed properly to nail hardwood floors. 83**CalA**561, 257P127. (10) To support finding that poor workmanship caused leaking windows. 83**CalA**561, 257P127. (11) That outside wall of building was not constructed in workmanlike manner so as to be weatherproof. 83**CalA**561, 257P 127. (12) To support award of damages for crack in interior plastering due to poor workmanship. 83**CalA**561, 257 P127. (13) That completion of building was delayed beyond specified time. 83 **CalA**635, 257P127. (14) To establish that leaks in guaranteed roof were due

to faulty workmanship or material entitling purchaser to recovery. 11LaA614, 124S615. [b] (4) To show contract with builder. 176Ark597, 3SW(2d) 683. (5) Other instances. 84CalA161, 258P114.

899–37 232 IllA450 (construction of contract is for court; facts of performance or breach of jury); Mass 172NE 597; 238Mich164, 213NW93; 240Mich 228, 215NW321; 91PaSuper33.

899–38 TexCivA 274SW230.

902–67 [a] (2) See also NJ 150A581. (8) "Extending." NJ 150A581.

907–57 153Va261, 145SE366.

915–81½–New. In an action for compensation for the construction of a railroad, excluding defendant's evidence that, after completion of the work by the contractor, and before a survey made by plaintiff's engineer, defendant removed eight hundred cubic yards of slides at a cost of five thousand three hundred and seventy-one dollars and sixty cents, has been held not error, where the evidence included slides and cuts on a part of railroad not involved in the controversy. 153Va261, 145SE 366.

915–81⅓–New. In an action by a contractor for compensation for the construction of a railroad, where the contractor was to be paid sixty cents per cubic yard, testimony of the plaintiff's engineer that he only measured rock cuts, and that there were no slides of any consequence in rock cuts, was competent to show that on most of the work there were no slides. 153Va261, 145SE 366.

915–83½–New. Questions for jury. The amount of yardage removed by a contractor. 153Va261, 145SE366.

921–23 13PaDist&Co 259, 260 [citCJ].

921–28 TexCommnA 26SW(2d)168.

922–29 6LaA142.

922–33 See also TexCommnA 26SW (2d)168.

922–37 6LaA142, 143 [quotCJ].

923–64 TexCommnA 26SW(2d)168.

BUILDING AND LOAN ASSOCIATIONS

923–65 127 Or440, 270P478 (statute construed); 9PaDist&Co 177 (power of secretary of banking); TexCivA 3SW (2d)519 (association held not against public policy); TexCivA 25SW(2d)247. [b] **Constitutionality of statutes.**–Tex CivA 31SW(2d)478.

924–75 [b] **In Mississippi.**–143Miss381, 109S10.

924–79 But see TexCivA 31SW(2d)478.

924–81½–New. Laws providing for payment of fees by saving and loan associations upon the filing of an annual report, in lieu of other corporation fees or licenses, does not exempt savings and loan associations from paying fees for filing a record of increase of capital stock. 150Wash317, 272P959.

924–81⅓–New. The statute places a limitation on the price of each home to be built, and in applying such limitation the house and lot is treated as real property and an entity. 49ND1072, 194 NW710.

924–81¼–New. Such statutes authorize the construction of homes for members of the Home Buyers' League who have assumed the prescribed contingent liability to the state. 49ND1072, 194NW 710.

924–81½–New. The secretary of state has been held entitled to collect from savings and loan association, filing a certificate of increase of capital, fees representing the amount to which the actual capital was increased. 150Wash 317, 272P959.

924–81⅙–New. Special privileges given by statutes to building and loan associations must be strictly construed. 157 Md40, 145A202.

924–81⅙–New. Statute relating to wills held not to repeal special privilege granted saving fund society allowing depositor to appoint person to whom money should be paid in case of deaths without will. NJ 148A622.

924–86½–New. A trust agreement under which an association operated is construed to create a copartnership. TexCivA 279SW593.

924–86⅓–New. A statute permitting a copartnership created under a trust agreement is not unconstitutional. Tex CivA 279SW593.

925–2 255 IllA175.

925–17½–New. Increasing capital stock. Statutory fees on filing articles therefor, applicable to building and loan associations. 134Wash140, 235P 29.

925–17⅓–New. Law requiring payment of fees based on the amount to which the capital stock of a corporation is increased, on filing a certificate of increased capitalization, has been held not retroactive as to a previously organized savings and loan association. 150Wash 317, 272P959.

925–21 157Md309, 145A876; 127 Or 440, 270P478; Wis 229NW632(2dcase).

926–30 NJSup 137A843. [b] **Where plaintiff because of forged application for stock was not a member** of the association he is not bound by its by-laws. TexCivA 298W(2d)839.

927–47 6F(2d)163.

927–69 [a] **Requiring nominations for officers** to be made in monthly meeting preceding annual meeting is proper, under corporate power to regulate time for nominations. NJSup 137A843.

928–76½–New. Directors may fill vacancies in the board where the by-laws so provide. 50Philippine399.

928–76⅓–New. Directors hold office until qualification of their successors. 50Philippine399.

928–76¼–New. Stockholders may, by by-law, prescribe qualifications of directors. 50Philippine399.

928–76⅕–New. Power to remove officer being purely statutory, banking commissioner must comply with statute. TexCivA 31SW(2d)478.

928–79 50Philippine399 (power to maintain general and special reserve).

928–84 88 IndA674, 164NE294.

928–85 153Md36, 137A498.

929–5½–New. The solicitor of an association has no power to bind the association by an agreement to pay compensation to an attorney employed by the superintendent of banking to aid in the investigation of certain building and loan associations. 93PaSuper41.

929–5⅓–New. A bank cashing a check payable to a building and loan association and indorsed by its treasurer is not liable to the association, although the treasurer misappropriates the proceeds, where the bank had no notice of any restriction on his control of funds not deposited, or of any prohibition on his collection of checks. 88PaSuper10.

929–6 [a] **Knowledge of agents** as to alleged fictitious indebtedness of purchasers of property, who applied for loan to pay purchase price, has been held imputable to association. TexCivA 21SW(2d)17.

930–18½–New. Secretary is not entitled to commissions for selling stock until price becomes payable or association refuses to issue stock. 181Ark 1055, 29SW(2d)291.

930–18⅓–New. Secretary is not entitled to commissions for rents collected as part of prescribed duties. 181Ark 1055, 29SW(2d)291 (bonus accepted held payment for extraordinary services).

930–18¼–New. Where compensation of directors is fixed by by-laws, the courts will not question the propriety of the amount. 50Philippine399.

930–18⅕–New. Performance of contract for compensation of a manager expressly ratified by by-law will not be enjoined where the contract is not ultra vires or vitiated by fraud. 50Philippine399.

931–32 [a] **Stockholder is not to sue in his own behalf** association's officers for fraud committed upon association. La 129S810.

932–52 [b] **In Texas.**–CivA 279SW593.

932–58½–New. All persons purchasing a contract through a copartnership building and loan association become members thereof. TexCivA 279SW593.

932–59 See also 157Md40, 145A202.

932–65 6F(2d)163. But see 50Philippine399.

932–76½–New. Fundamental relation between savings and loan association and member is that of debtor and creditor. Wash 289P536.

932–76⅓–New. No individual stockholder has property right in assets of association. La 129S810.

933–98½–New. Knowledge of an association accepting applications for membership, as to representations by salesmen in securing subscriptions, need not be made a matter of record, in a suit by an assignee of members for the recovery of membership fees. 246Mich225, 224 NW379.

933–98⅓–New. Where representations of salesmen to subscribers to a savings association, that a local branch would be established, constituted a controlling inducement for subscription, breach of the agreement entitled the subscribers to rescission. 246Mich225, 224NW379.

933–98¼–New. Where promises and statements of salesmen on taking subscriptions to a savings association were made known to the secretary of the association and approved by him to a representative of the subscribers, it was immaterial that applications contained a clause restricting authority to change or alter its terms. 246Mich225, 224NW 379.

933–98⅕–New. Assignment of claims of members against a savings association for rescission of membership subscriptions were controlled by the general law of assignments. 246Mich225, 224NW379.

933–98⅙–New. Voluntary conduct of a branch office of a savings association by plaintiff after the association had abandoned the project, and after the secretary of state had ordered the association to confine its business to another county, could not be considered as performance by the association of a promise to maintain the branch to induce subscriptions. 246Mich225, 224NW379.

934–22½–New. Issuance of stock under an arrangement for payment and credit from land conveyed to an association is void under a by-law requiring payment in money. 157Md309, 145A876.

934–22⅓–New. Shares in a homestead association have little in common with corporate stock of private corporations. 6LaA142.

934–23 134Wash140, 235P29 (installment stock scheme declared an amendment to charter increasing capital stock).

934–24½–New. Installment payments on stock which has been assigned as collateral for mortgage held by association are not ipso facto payments on mortgage. 12PaDist&Co 442.

934–27 50Philippine399. [c] **In Philippines.**–50Philippine399.

936–46 157Md309, 145A876.

937–64½–New. A stockholder not receiving a mailed notice of a meeting could avoid action taken at such meeting. 157Md309, 145A876.

937–64⅓–New. A request for a meeting signed by two thirds of the stockholders is sufficient. 157Md309, 145A876.

937–64¼–New. That a subscriber violated an agreement to vote stock on the basis of which the subscription was accepted does not invalidate the subscription. 157Md309, 145A876.

939–7 [a] **Permanent disability of member.**–Ariz 284P353.

939–12 [a] **Notice held sufficient.**–13Pa Dist&Co 651.

939–22½–New. Notice need not be given where it would be futile. 153Md36, 137A498.

940–25 See also 30F(2d)325.

941–43 [b] **Redemption by loan with mortgage lien to secure money advanced** creates relationship of mortgagor and mortgagee. Md 148A420.

941–48 153Md36, 137A498, 500 [citCJ].

942–60 [a] (2) 47 OhSt250, 24NE405. **Erratum.**–[a] (2) Strike out next to last line of note.

942–71 85PaSuper336.

942–74 [a] **Mandatory by-law.**–(1) 85 PaSuper336.

943–84 13PaDist&Co 651.

943–89 85PaSuper336.

943-90½-New. Where by-laws fail to prescribe proportions of profits or rates of interest, withdrawing stockholders are entitled to interest at lawful rate. 85PaSuper336.

943-92 Ariz 284P353; 6LaA142. See also 11PaDist&Co 8. [a] **Death as notice of withdrawal.**-6LaA142.

944-6 13PaDist&Co 259, 260 [citCJ].

952-52 [b] **Deposits cannot be transferred** in bulk to another association. 26 OhNPNS29.

952-79½-New. A copartnership organized and doing business in conformity with statute is not contrary to public policy. TexCivA 279SW593.

953-82 [b] **In Philippines.**-50Philippine 399.

953-84 50Philippine399.

953-89½-New. Right of association purchasing property securing loan to summary judgment against original mortgagor see 298Pa431, 148A841.

953-89⅓-New. In making sales of land bought at its own foreclosure sale, an association may sell to a purchaser who obligates himself to pay in installments. 50Philippine399.

953-91 But see Fla 128S254.

954-20 [a] **Carrying on business of savings bank.**-34Ariz95, 268P181.

955-34 50Philippine399.

955-38½-New. A loan association is not prohibited from transferring home purchase contracts to a nonmember borrower on surrender of the same. Tex CivA 5SW(2d)188.

955-39 [b] **Artificial entity.**-50Philippine399.

955-43 [a] **In Philippines.**-50Philippine 399.

955-43½-New. A by-law disabling directors from receiving loans from the association is valid. 50Philippine399.

955-44 168Ark53, 269SW363. [a] **Rights of borrowers from association,** not members thereof, are not affected by by-law of which they had no knowledge. Md 148S420.

955-45 TexCivA 5SW(2d)188.

955-46 [a] 168Ark53, 269SW363.

955-47½-New. Contract to loan money cannot be enforced if not made in conformity with statute. 254Mass82, 149NE657.

955-55½-New. Application for loan. Where prior application for loan conflicts with subsequent one, latter controls. 151Md181, 135A139.

955-55⅓-New. A loan company paying a bonus to one surrendering a contract may do so for the account of one desiring a contract as the basis of a loan. TexCivA 1SW(2d)720.

955-55¼-New. A loan company may reissue a surrendered contract to one making payments in a lump sum instead of issuing a new contract. Tex CivA 1SW(2d)720.

955-55⅕-New. Transfer by a loan association to borrower of surrendered contracts of an association transferred all ownership thereunder to borrower. TexCivA 5SW(2d)188.

956-62 See also 150Md677, 133A843.

957-67 168Ark626, 271SW7 (conduct connected with testimony erroneously admitted, but subsequently cured by instruction to disregard).

957-70½-New. An association may hold the proceeds of a loan and see that such proceeds are actually expended on building. 51SD369, 213NW946.

957-70⅓-New. In the conduct of its business association has the same right to assume liability for one bill as it has to pay another bill. 51SD369, 213 NW946.

957-72½-New. Borrowers are not entitled to notice of stockholders' meetings, although the by-laws do not distinguish between stockholders and borrowers. 157Md309, 145A876.

957-75 [a] **Right to relinquish collateral.**-300Pa501, 150A895.

958-81 But see 254Mass82, 149NE657.

958-81½-New. No loan can be made without first filing written statutory report by security committee. 254Mass 82, 149NE657.

958-3½-New. Printed by-laws of association, referable to relation of mortgagor and mortgagee, must be construed with mortgage as one instrument. Md 148A420.

959-19 254Mass82, 149NE657 (agreement to loan held limited to amount approved by security committee).

962-79 339 Ill 304, 171NE267. [a] **Authorization of commencement of foreclosure proceedings** is immaterial where officers ratified bringing of action. 155 Wash45, 283P479.

962-97½-New. Where a building and loan association, holding a prior trust deed against property, did not know or have reasonable grounds to believe that an agent of another building and loan association had obtained money with which to pay the loan, but permitted the agent to make monthly payments in accordance with a loan contract, believing that the agent had taken over the loan personally, a prior mortgagee was not estopped to foreclose its lien against the mortgagor and other association furnishing money to the agent to take over the first loan. 177Ark539, 7SW (2d)329.

962-99 300Pa417, 150A628 (after default and before purchaser's settlement); 300Pa501, 150A895.

964-38 255 IllA175.

964-46 [b] (3) To show population of city. 255 IllA175. (4) To show usury. 255 IllA175.

965-52½-New. A mortgagee has been held entitled to ten per cent rather than six per cent interest in determining the amount due under its mortgage, under the rule that the contract rate of interest should govern in estimating the present value of anticipated payments in foreclosure of a mortgage given by the borrower of a building and loan association. 177Ark1004, 8SW(2d)460.

965-63½-New. An association which is a trustee under a mortgage securing first and second lien bonds may accept sum due on the first lien and stop the sale under mortgage, where the owner of the second lien does not desire sale. 151Md181, 135A139.

968-92 255 IllA175.

971-41½-New. Construction of contract as providing for computation of interest on diminished balance held unauthorized. Mont 289P555(3dcase).

972-42 [a] **There is no usury** where bonus is exacted by third party not acting for association. TexCivA 3SW (2d)519.

972-43½-New. Money deducted from a loan by a loan company in the amount expended for the borrower in acquiring necessary contracts is not an interest charge making the loan usurious. Tex CivA 1SW(2d)720.

972-43⅓-New. An applicant for a loan claimed to be usurious is chargeable with notice of requirement of a matured membership contract where the application is subject to the regulations of the association. TexCivA 11SW(2d)385.

972-45 [a] **Loans held not usurious.**-TexCivA 5SW(2d)188.

973-50 143Miss331, 109S10.

974-70 132SC276, 129SE44.

974-71½-New. A provision for monthly payments to be applied first on interest due and balance on principal is not usurious. 141Wash392, 251P770.

975-77 141Wash392, 251P770.

976-90 See also TexCivA 11SW(2d)385.

976-96½-New. A stockholder's payment to an agent of a housing trust of seven hundred dollars on a three thousand five hundred dollar loan in addition to the contract rate of interest, has been held not to render the contract usurious, where it appeared that all but seventy dollars of the amount turned over was used to purchase borrowing privileges from other stockholders. Ark 13SW(2d)600.

978-48½-New. Where a loan was made from a loan society, shares of stock of another society pledged as collateral for a note have been held sufficient consideration for an agreement to accept such shares in payment of the debt due the society. 88 IndA674, 164NE294.

978-48⅓-New. Mortgagors can accelerate day of redemption only by complying with by-law of association as to mode of settlement. Md 148A420.

979-51 151Md181, 135A139; 298Pa431, 148A841.

979-63½-New. A provision to this effect is held applicable only to a solvent, going concern. 126Me59, 136A284, 50 ALR526.

979-66 15DelCh455, 133A696; 95Pa Super232; 14PaDist&Co 31.

980-67 15DelCh455, 133A696.

980-70 151Md181, 135A139.

980-72 95PaSuper232; 14PaDist&Co 31.

980-73 But see 10PaDist&Co 757.

981-79½-New. Where member assigns his stock absolutely to association payments subsequently made must be applied to payment of mortgage. 14Pa Dist&Co 31.

981-79⅓-New. Where member assigns his stock to association absolutely or as collateral, association is entitled to retain value of shares to pay off loan. 14PaDist&Co 31.

981-92½-New. Where a contract provides for payment of dues to create sinking fund to meet bonds at maturity, association may not apply dues to payment of bonus. 151Md181, 135A139.

981-95 But see 157Md40, 145A202.

981-99⅓-New. A payment of commission to one not the agent of the loaner to secure a loan should be charged to lender as payment on the note. 141 Wash392, 251P770.

982-5 15DelCh455, 133A696; 126Me59, 136A284, 50ALR526; 95PaSuper232; 11PaDist&Co 215, 216 [citCJ].

983-6 126Me59, 136A284, 50ALR526.

983-14½-New. Payments directed on an original note, after transfer of it to a loan association and execution of the renewal notes, should be credited on renewal notes. TexCivA 5SW(2d) 188.

983-14⅓-New. Borrower acquiring contracts to obtain a loan from a loan association is not entitled to the amount, paid by the association for contracts, which was not paid by the borrower or included in the notes for loan. TexCivA 5SW(2d)188.

984-34 6F(2d)163 (unauthorized loan may be recovered in action for money had and received).

984-35½-New. In an action on a construction bond, the association is not estopped to set up a breach of covenant to expend the entire sum in making improvements by having said nothing to sureties for over year where there was no duty to speak. 168Ark53, 269 SW363.

985-52 Md 148A420 (actual loss by reason of redemption of mortgage debt before maturity).

985-58½-New. Admission of payment without stating time or amounts raises presumption of payment of notes sufficient to discharge monthly installments at maturity. TexCivA 5SW(2d)188.

985-58⅓-New. Evidence held insufficient to show notes to loan association by borrower were usurious. TexCivA 5SW(2d)188.

985-58¼-New. Where pleadings raise the issue whether suit is authorized by the board of directors, an allegation of authority must be proved. 251 IllA429.

985-61½-New. Refusal of a peremptory instruction for defendant on the ground that the purchaser was chargeable with knowledge of the by-laws and bound thereby has been held not error, where it was found that plaintiff was not a member of the association. TexCivA 12 SW(2d)1106.

986-71 [a] **Where association is insolvent** assumpsit will not lie and remedy is in equity. 13PaDist&Co 259.

986-85½-New. Where an application for a loan is not approved by the security committee, because he would not buy lumber from a member, he has no right of action against association. 254 Mass82, 149NE657.

986-86½-New. A covenant in a member's application not to sue the association until the directors pass on his complaint does not cover a suit to restrain the sale by the association under mortgage. 151Md181, 135A139.

986-87½-New. An individual may sue to compel an association to issue membership certificates where a state official having power to sue is acting in collusion with officers of the association. MoA 17SW(2d)275.

987-91 [a] **Buying land in other county** from home office in satisfaction of

debt is held not transacting business in that county so as to give jurisdiction of action therein. 142**Wash**296, 252**P**923.

988–17 157**Md**40, 145**A**202; 171**Minn**343, 214**NW**56.

988–18 156**Md**167, 143**A**708.

988–21 153**Md**36, 137**A**498; 130 **Orl**, 278**P**943 (whether illiterate person entered into contract); **TexCivA** 11**SW(2d)**385.

988–25 13**PaDist&Co** 217. [a] **Other instances of discharge.**–13**PaDist&Co** 651.

988–30½–New. Attorney's fees will not be allowed to state supervisor of building and loan associations intervening in litigation between an association and certain of its stockholders. 120**Kan**471, 243**P**1011.

989–39 TexCivA 25**SW(2d)**247.

989–52 TexCivA 25**SW(2d)**247. [a] **Indebtedness of borrowing member is determinable** as sum received as loan plus unpaid interest and fines less value of his shares determined by amount of dues paid plus credited dividends after deduction of lawful charges. **Tex CivA** 25**SW(2d)**247.

989–57½–New. Adoption of a by-law in conflict with express provision of statute is not ground for forfeiture of charter. 50**Philippine**399.

989–57½–New. Failure of stockholders to attend annual meetings in sufficient number to constitute quorum does not render association subject to dissolution. 50**Philippine**399.

989–57¼–New. A contract with the manager for a percentage of the earnings of an association as compensation for services, ratified by by-law, is not a ground for dissolution in the absence of a showing that the contract was ultra vires or vitiated by fraud. 50**Philippine** 399.

990–73½–New. To show banking commissioner abused discretion in revoking certificate of authority, association must show bona fide effort to comply with commissioner's orders within time allowed. **TexCivA** 31**SW(2d)**478.

990–73½–New. Where building and loan association is insolvent, conducting business contrary to law and in unsafe manner, banking commissioner is required to annul certificate of authority. **TexCivA** 31**SW(2d)**478.

991–10 13**PaDist&Co** 217; 13**PaDist &Co** 259; **TexCivA** 31**SW(2d)**478.

991–12 TexCivA 31**SW(2d)**478.

991–13 126**Me**59, 136**A**284, 286, 50**ALR** 526 [citCJ].

992–17 197**NC**204, 148**SE**25(1stcase) (according to respective rights of parties). [a] **Liquidation of association having banking powers.**–34**Ariz**95, 268 **P**181.

992–23 TexCivA 5**SW(2d)**188.

992–34 13**PaDist&Co** 217.

993–41½–New. Amounts improperly added in notes sued on and interest thereon are held properly allowed in a suit by the receiver as credits as of the dates the notes were executed. **TexCivA** 5**SW (2d)**188.

993–50 126**Me**59, 136**A**284, 285, 50**ALR** 526 [citCJ].

993–51 Fla 128**S**860 (administration by state comptroller).

994–58 TexCivA 299**SW**446 (suit should be brought by attorney-general, but others may sue if he consents thereto).

994–63 Fla 128**S**860 (substitution of equity receiver for statutory liquidator).

994–74 Fla 128**S**254.

994–75 TexCivA 3**SW(2d)**519 (interest on notes from date of receivership proper).

995–85 [a] **Receiver's power to sell an asset** necessarily carries with it power to assign the asset if chose in action. **Fla** 128**S**254.

995–86½–New. A receiver cannot complain of the amount of recovery on a contract where the association was fraudulent. **TexCivA** 285**SW**655.

995–92½–New. A judgment permitting all contract holders to share pro rata in receivership assets irrespective of the terms of the contracts of holders in a copartnership is improper. **TexCivA** 279**SW**593.

995–92½–New. A by-law providing that, on final liquidation, funds shall be applied to payment of shares and the balance distributed in the manner established for distribution of annual profits is valid. 50**Philippine**399.

995–92¼–New. If banking commissioner acts arbitrarily or unlawfully in writing down assets of building and loan association resort may be had to courts. **TexCommnA** 26**SW(2d)**168.

996–2 TexCommnA 26**SW(2d)**168 (as to writing down of stock).

997–12 See also **TexCivA** 25**SW(2d)**247.

997–18 TexCivA 25**SW(2d)**247 (where notice did not inform stockholders of insolvency of association there is no estoppel).

999–48 127 **Okl** 249, 260**P**450.

999–48½–New. Some statutes, providing for forfeiture of a stated sum by a foreign building and loan association transacting business without having obtained a certificate of authority, prescribe an exclusive penalty. 127 **Okl** 249, 260**P**450.

1002–79½–New. It must be presumed that a plan of a housing trust is not contrary to public policy, where it was given a license to operate. **Ark** 13**SW (2d)**600.

BULK

1003–6 [d] 15**F(2d)**1003; **MoA** 279**SW** 761.

1003–9½–New. A charge that "bulk of goods" means something less than all goods is erroneous. 15**F(2d)**1003.

BURGLARY

1009–1 218**Ky**72, 290**SW**1075.

1009–3 [a] **Statutory definitions.**–36 **GaA**284, 136**SE**464.

1009–6 218**Ky**72, 290**SW**1075.

1009–7 142**SC**43, 140**SE**261 (crime of housebreaking is crime against possession and not property).

1009–10 [a] (1) 78**CalA**683, 248**P**713; **CalA** 285**P**1070. (4) 82**CalA**96, 255**P** 209. (5) Burglary constitutes felony. 75**CalA**150, 241**P**924. (6) Amendment of 1923 to Penal Code changed definition of degrees. 78**CalA**683, 248**P**713. (7) Entry of uninhabited dwelling and theft of plumbing fixtures therefrom is not burglary in first degree where offender was not armed with deadly weapon and did not assault anyone during commission of offense. 82**CalA**96, 255**P**209. [c] **In New York.**–219**AppDiv**422, 219 **NYS**390. [d] **In Massachusetts.**–255 **Mass**340, 151**NE**317.

1010–13 206**Cal** 112, 273**P**32; 109**TexCr** 545, 5**SW(2d)**999; **TexCr** 29**SW(2d)**760.

1010–15 200**Cal** 404, 253**P**318; 80**Mont** 181, 260**P**138.

1011–26 23**AlaA**241, 124**S**507(2dcase); **Mo** 11**SW(2d)**1029; 103**TexCr**403, 281 **SW**844; 111**TexCr**256, 12**SW(2d)**585.

1013–35 32 **OklCr**341, 240**P**1075.

1013–40 22**AlaA**380, 115**S**853 (entry through open door or window without further opening it is not burglary).

1016–62 32 **OklCr**341, 240**P**1075 [citCJ].

1018–75½–New. Entry into a pool hall during business hours by defendant or an accomplice is burglary, if the entry was made for the purpose of committing larceny. 47 **Ida**336, 276**P**528.

1020–86 200**Cal** 404, 253**P**318, 319 [cit CJ].

1020–87 200**Cal** 404, 253**P**318, 319 [cit CJ]. [c] (3) Introduction of defendant's arm into the building constituted sufficient "entry" in prosecution for burglary. 94**CalA**297, 271**P**132.

1020–89½–New. The offense is complete on the first entry, with intent to remove property, although removal was not affected until the second entry. 90**CalA** 528, 266**P**349.

1020–94 47 **Ida**336, 276**P**528 (defendant remaining outside as lookout is guilty as principal); 218**Ky**72, 290**SW** 1075; 255**Mass**327, 151**NE**466.

1021–96 177**Arkl**, 5**SW(2d)**355.

1021–2 [c] (2) 101**TexCr**520, 276**SW** 436; 103**TexCr**403, 281**SW**844; 109**Tex Cr**637, 6**SW(2d)**371.

1022–9 79**CalA**682, 250**P**698. [b] **In Iowa.**–201 **Iowa**940, 208**NW**351.

1022–10 78**CalA**683, 248**P**713. [d] **Statutory definitions.**–**OklCr** 271**P**957.

1022–13 71**CalA**150, 234**P**905 (conviction sustained where lodger in boarding house was sleeping in room entered by defendant).

1023–14 CalA 285**P**1070. [a] (2) House is "inhabited" though occupants were temporarily absent therefrom on particular night. 99**CalA**591, 279**P**182.

1023–17½–New. Under some statutes declaring burglary of an inhabited dwelling house or building to be burglary in the first degree, the word "inhabited" applies to building as well as dwelling house and burglary of a house or building in the nighttime may constitute burglary in the second degree. 70**CalA** 262, 233**P**78.

1023–18 45 **Ida**92, 260**P**697. [c] **Garage** immediately connected with dwelling house and having opening into basement of dwelling house through common wall is part of dwelling house. **OklCr** 271**P**957.

1023–19 45 **Ida**92, 260**P**697.

1023–20 34**GaA**182, 129**S**6; 45 **Ida**92, 260**P**697.

1024–21 45 **Ida**92, 260**P**697.

1024–25 45 **Ida**92, 260**P**697.

1025–33 218**AppDiv**251, 218**NYS**210.

1025–37 92**CalA**610, 268**P**702 (lodging house).

1025–41 [d] **Bin open on one side** is not within statute warranting conviction. **CalA** 267**P**383.

1025–43½–New. Statute, declaring crime of burglary to include entering certain enumerated buildings, "or other building or structure used, or kept for private or public use," covers both occupied and unoccupied buildings. 233**Mich**279, 206 **NW**545.

1025–46 [a] (6) Building used for repairing automobiles and where automobile parts, gas, and oil are kept and sold is shop. 161**La**867, 109**S**530.

1026–47 [a] (11) Garage in which tools, etc., of value were stored when broken into, belonging to or used with dwelling house near it but not connected, has been held storehouse, not outhouse, under statute. 229**Ky**400, 17**SW(2d)**262.

1026–56 45 **Ida**92, 260**P**697 (outhouse).

1026–57 [g] 79**CalA**682, 250**P**698 (entry of place where show cases, placed on wall along stairs leading to basement shoe store, were kept). [j] **Structure having walls on all sides** covered by roof is house within meaning of statute. 79**CalA**682, 250**P**698.

1027–62 218**NYS**390. [a] (8) 94**CalA** 297, 271**P**132 (service station).

1028–66 [a] **Outhouse**, walled in, with roof and door, held within statute. 45 **Ida**92, 260**P**697.

1028–70 [e] **In Iowa.**–208 **Iowa**818, 222 **NW**394.

1029–73 36**GaA**284, 136**SE**464.

1029–74 [b] **Mere fact that valuable goods were contained in house** is not alone sufficient to make it place of business. 36**GaA**284, 136**SE**464.

1029–77 200**Cal** 404, 253**P**318.

1030–81 Mo 295**SW**535 (interference with property rights of another is essential).

1030–82 324 **Ill** 101, 154**NE**463; **Mo** 285 **SW**83; 318**Mo** 813, 18**SW(2d)**143. [a] **Ownership of property stolen** is sufficiently proved by showing possession by person from whom it is alleged to have been taken. 72**CalA**292, 237**P**390.

1030–84 200**Cal** 404, 253**P**318; 154**Tenn** 43, 289**SW**529; 195**Wis**555, 218**NW**822. [e] **Defendant need not be armed** or have intention to commit assault in perpetrating crime. 71**CalA**150, 234**P**905. [f] **Liquor, not shown to be intoxicating or unlawfully kept,** is treated as having property value as respects burglary. 157**Miss**548, 128**S**579.

1030–88 [a] (2) 29 **OhA**187, 163**NE**311. [d] **Intent to steal liquor possessed unlawfully** has been held sufficient to sustain conviction. **CalA** 285**P**406.

1031–90 [a] 200 **Ind**585, 165**NE**434. [b] To same effect **CalA** 283**P**848.

1031–93½–New. In burglary with intent to commit rape, there must be an intent to use force. 154**Tenn**43, 289**SW**529.

1031–98½–New. Under some statutes entry of a house with intent to commit a felony constitutes burglary. 75**CalA** 150, 241**P**924.

1031–98¼–New. Breaking into a warehouse with intent to steal whisky unlawfully possessed warrants conviction

under the statute. 229Ky400, 17SW(2d) 262.

1032-4 177Ark1, 5SW(2d)355; 75CalA 150, 241P924; 80Mont181, 260P138. [e] **That articles taken had no value** so that larceny was not committed does not obliterate intent to commit larceny. 80 Mont181, 260P138.

1032-7 [a] (2) **Mo** 256SW769.

1033-11 217Ky83, 288SW1026; 146 Wash585, 264P7, 8 [quotCJ].

1033-13 [a] (9) Entering roof over jeweler's storehouse armed with burglar's tools and appliances and opening window. 217Ky83, 288SW1026. [c] 86 CalA8, 260P558; 217Ky83, 288SW1026.

1033-15 [a] (1) **Mo** 278SW982; 110 TexCr62, 7SW(2d)576. (12) 126Kan 200, 268P98. (17) 316Mo 172, 289SW 651. (27) 43 OklACR318. (33) Burglarizing filling station. 311Mo 461, 278 SW719. (34) Breaking and entering garage with intent to commit larceny. 123 Or231, 261P431.

1034-16 154Tenn43, 289SW529; 112 TexCr350, 16SW(2d)1095; TexCr 32SW (2d)654. [a] 22AlaA165, 113S482; 196 Cal 515, 238P359 (burglary with explosives); GaA 155SE362; 311Mo 461, 278 SW719; Mo 284SW799(2dcase); Mo 290SW145; Mo 12SW(2d)46; Mo 23SW (2d)139; OklCr 289P793. [b] **Forms of indictment.**–NC 153SE605.

1034-20 123 Or231, 261P431; 34Porto Rico 433.

1035-25 Mo 285SW101; 316Mo 243, 289SW852; 123 Or231, 261P431.

1035-27 316Mo 150, 289SW822, 824 [cit CJ].

1035-31 316Mo 150, 289SW822, 824 [cit CJ]; 110TexCr62, 7SW(2d)576.

1036-32 80Mont181, 260P138.

1036-33½-New. Allegation of entry with intent to commit larceny is sufficient. 34PortoRico 433.

1037-39 [d] **In Massachusetts.**–254 Mass390, 150NE181.

1037-41 75CalA434, 243P31; TexCr 28 SW(2d)818. [e] TexCr 29SW(2d)760. But see 110TexCr597, 3SW(2d)1039(2d case).

1037-42 233Mich279, 206NW545.

1038-48 [g] **In Philippines.**–50 Philippine582 (allegation of robbery in store held not equivalent to allegation of robbery in inhabited house).

1038-52 TexCr 281SW1061; TexCr 28 SW(2d)151(1stcase). [b] (2) 110TexCr 594, 9SW(2d)1037.

1039-59½-New. Where location of building burglarized is not element of crime under statute, an averment that building was not adjoining to or occupied as dwelling does not make indictment defective. 233Mich279, 206NW545.

1040-62 [c] **Description held insufficient.**–23AlaA440, 126S609.

1040-67 [b] **It is not sufficient to describe premises** as "garage," but bill of information should have alleged that place broken into was "shop" or used words unequivocally conveying meaning that it was. 158La1014, 105S47.

1040-69 29 OhA187, 163NE311.

1040-70½-New. Failure to allege that garage burglarized was "used or kept for private or public use" in words of statute held not fatal. 233Mich279, 206 NW545.

1041-71 [a] **In Georgia.**–36GaA284, 136 SE464.

1041-77½-New. Where a burglarized residence was occupied by husband and wife and belonged to the husband, the indictment should charge occupancy by the husband rather than the wife. 108 TexCr343, 1SW(2d)293.

1041-79 22AlaA165, 113S482. [b] (2) Ownership of goods taken need not be alleged where information charges ownership and possession of car in railroad company. 43 OklACR318.

1041-81 22AlaA165, 113S482. [a] (5) Information held not defective for failing to allege property in building was of same value. 114Nebr13, 205NW574.

1042-83 Ind 166NE649.

1042-84 [a] (2) It is not essential, in indictment charging unlawful breaking of building and taking of goods therefrom, to describe character of goods taken, as gravamen of offense is unlawful breaking with intent to steal. 228 Ky234, 14SW(2d)759.

1042-85 39GaA30, 146SE35 (complaint held sufficient); 199 Ind203, 156NE515.

1042-87 [a] (3) Other designations held sufficient. 94CalA297, 271P132.

1043-91 89Fla494, 104S783; 91Fla938, 109S91; 95Fla737, 116S629; 334 Ill 38, 165NE190; Mo 295SW535, 536 [citCJ]; 317Mo 398, 295SW739 [citCJ]; 318Mo 813, 1SW(2d)143.

1043-93 317Mo 398, 295SW739; 32Porto Rico 705 (conviction affirmed because objections to complaint not sufficiently developed in brief on appeal and no substantial injustice done defendant).

1043-94 143Wash370, 255P122 [citCJ].

1043-95 143Wash370, 255P122 [citCJ].

1043-96 [e] **In Idaho.**–47 Ida336, 276P 528.

1044-97 228Ky234, 14SW(2d)759; 317 Mo 398, 295SW739. [a] (2) "Commercial establishment of F. A. & Hnos. (Bros.)" without stating whether corporation or partnership. 32PortoRico 705.

1044-98½-New. Where an allegation of ownership is necessary in an indictment for burglary, an averment of corporate ownership is a material one, and the existence of the corporation must be proved, although the fact need not be shown by charter or by articles of incorporation. 334 Ill 38, 165NE190.

1044-99 318Mo 813, 1SW(2d)143; 32 PortoRico 705.

1044-2 143Wash370, 255P122.

1044-3½-New. Failure to state whether the company was a copartnership, corporation, or tradename, is a fatal defect. Mo 289SW540.

1044-5 21AlaA179, 106S391; Fla 126S 767; 103TexCr403, 281SW844; 143Wash 370, 255P122 [citCJ]. [c] **Sufficient allegation of possession.**–MoA 31SW(2d) 559.

1044-6 21AlaA179, 106S391; 95Fla737, 116S629, 630 [citCJ]; 107TexCr535, 298 SW284; 143Wash370, 255P122 [citCJ]. [a] **Indictment alleging both real owner and one in actual possession** held sufficient, though technically defective. 95Fla737, 116S629.

1044-7 143Wash370, 255P122 [citCJ].

1044-10 Fla 126S767.

1044-11 Fla 128S485; 142SC43, 140 SE261; 112TexCr504, 17SW(2d)462(2d case).

1045-12 95Fla737, 116S629, 630 [quot CJ].

1046-24 [a] 105TexCr560, 289SW406.

1047-39 But see 103TexCr403, 281SW 844.

1047-42 43 OklACR318; 32PortoRico 705.

1048-47 32PortoRico 705.

1048-48 23AlaA532, 128S468; 21AlaA 179, 106S391.

1048-50 Fla 126S767.

1049-58 89Fla494, 104S783.

1049-61 [b] **Sufficient allegation.**–43 OklACR318.

1049-62 43 OklACR317.

1049-65 TexCr 32SW(2d)654.

1050-70 [c] 73CalA357, 238P725.

1050-71 95Fla737, 116S629, 630 [citCJ perEllis.CJ]. [d] (5) 112TexCr350, 16 SW(2d)1095.

1051-72 206Cal 480, 275P219; 75CalA 434, 243P31. [a] (4) 94CalA53, 270P 462.

1051-73 171Ark778, 286SW935.

1052-77 318Mo 813, 1SW(2d)143.

1053-78 [a] (3) Indictment for breaking and entering with intent to steal chattels is held not defective for omitting "of another" after "chattels." 95 Fla737, 116S629.

1054-97 75CalA434, 243P31.

1054-99 70CalA262, 233P78.

1054-3 [a] (1) 123 Or231, 261P431. [b] **In Missouri.**–307Mo 500, 271SW55.

1057-27 241Mich111, 216NW434.

1057-36 100CalA235, 279P1067. [f] **In Iowa.**–208 Iowa851, 226NW61.

1059-56 [d] **Element of fraudulent taking** must be included. 113TexCr517, 23 SW(2d)367(4thcase).

1059-62 [a] (2) Conviction of defendant under indictment for breaking into railroad freight car, marked "Frisco No. 130476." is unauthorized where there is no evidence showing that word "Frisco" was on car. 40GaA514, 150SE457(2d case).

1059-65 [d] (2) 108TexCr375, 1SW (2d)292.

1060-67 21AlaA377, 108S643; 45 Ida 92, 260P697 (outhouse held properly designated as such when used for storage). [f] **Evidence of burglary "of place" held insufficient** under indictment charging breaking into house. Tex Cr 27SW(2d)813(1stcase).

1060-70 Fla 110S476.

1061-75 23AlaA557, 129S310(1stcase); 96Fla30, 117S377; 142SC43, 140SE261; 105TexCr216, 287SW244. [a] (5) Proof that burglarized residence was occupied by husband and wife and belonged to husband, who had care and control of it, constitutes fatal variance from allegation of entry of private residence of wife at night, by force with intent to commit theft. 108TexCr343, 1SW(2d) 293. (6) If name in pleading differs in spelling and sound from name shown in evidence, it is held fatal variance. Ind 166NE649. [b] (8) Allegation of ownership of storehouse by one person and proof that such person was lessee and that storehouse was owned by another does not constitute fatal variance. 221 Ky283, 298SW699. (9) Where indictment alleged prosecutor was owner of building, testimony that he was in possession as administrator was admissible. 107TexCr535, 298SW284. (10) Other instances. TexCr 25SW(2d)862.

1061-76 Fla 126S767. [a] (7) **Variance** between indictment as to owner's name and proof thereof held not material. 324 Ill 101, 154NE463. (8) Other instances. 208 Iowa1139, 226NW186.

1062-81 152Miss885, 120S211; 311Mo 452, 278SW740 (proof not required where immaterial, as where mere matter of description of owner).

1062-81½-New. Where an indictment alleges that the building was in the possession and control of a certain person, proof of such fact together with proof that another person was interested in the business conducted therein does not present a fatal variance. 199 Iowa842, 201NW75.

1062-82 21AlaA417, 109S119. But see 105TexCr49, 284SW953.

1062-83 [a] **Allegation of ownership held not essential**, and no variance shown. CalA 285P406.

1062-84½-New. Ownership of goods and commission of larceny is immaterial and evidence of larceny admissible only to show interest. 21AlaA417, 109S119.

1062-85 Miss 130S691.

1062-88 14PaDist&Co 210.

1062-89 14PaDist&Co 210.

1062-91 Contra 255Mass327, 151NE 466.

1064-15 See also Mo 256SW769.

1064-17 22AlaA380, 115S853; 316Mo 172, 289SW651 (corpus delicti). [a] (3) State must prove particular felonious intent. 154Tenn43, 289SW529.

1065-21 [a] **Existence of guardian** for patient in sanitarium from whom property is alleged to have been taken will not be presumed. 72CalA292, 237P390.

1065-25 82CalA98, 255P261; 39GaA30, 146SE34(2dcase); 167La635, 120S33; Mo 285SW83; OhA 173NE206 (motive); 106TexCr118, 290SW537.

1065-27 [a] (12) Condition of show windows after burglary is admissible, as part of store burglarized. 168La925, 123S621.

1065-30 46 Ida20, 265P671 (ownership immaterial under statute except for identification). [b] 265Mass119, 163NE 855. [c] **Evidence of corporate existence** of owner of premises burglarized establishes guilt or innocence of accused. 311 Mo 452, 278SW740.

1066-34 22AlaA380, 115S853 (conclusion as to knee prints on ground).

1066-36 Fla 110S476; 324 Ill 101, 154 NE463; 225Ky461, 9SW(2d)136; 255 Mass327, 151NE466; 191NC213, 131SE 572; 102TexCr604, 278SW1104; 103 TexCr403, 281SW844; TexCr 27SW(2d) 228.

1066-37 104TexCr52, 282SW231. [a] (5) On trial for burglary, testimony of sheriff, that he fitted accused's shoes in

tracks near scene of burglary, and that they fitted exactly, was admissible. 111 TexCr160, 12SW205(2dcase).

1066–37½–New. similarity between tire tracks of an automobile found at defendant's house and those made by an automobile used in the commission of the burglary, 218Ky72, 290SW1075.

1067–41 178Ark212, 10SW(2d)366.

1067–42 See also CalA 290P678.

1067–47 22AlaA173, 114S69; 255Mass327, 151NE466; 221AppDiv521, 224NYS670; TexCr 10SW(2d)723; TexCr 27SW(2d)538. But see 316Mo172, 289SW651. [a] (2) Defendants at store Saturday before week of burglary. 22AlaA173, 114S69.

1067–52 155Miss298, 124S353(2dcase).

1067–53 255Mass327, 151NE466.

1068–57 [b] **Testimony that no seals were found broken on express cars** since defendant's arrest for breaking and entering held properly excluded. 192Wis452, 211NW773.

1068–65 47Ida336, 276P528.

1069–68 95Fla597, 116S476, 477 [cit CJ].

1069–70 126Kan200, 268P98.

1070–75 43Ida648, 253P623, 624 [cit CJ]; 335Ill604, 167NE797; 165La822, 116S199, 202 [citCJ]; 104TexCr58, 282SW230; 106TexCr118, 290SW537; 106TexCr605, 294SW566. [d] (10) It is not error to admit evidence as to stolen property found with property stolen from storehouse charged to have been burglarized where circumstances of finding were such as to render it unfeasible to exclude it. 221Ky283, 298SW699. [h] **Evidence of possession raises no presumption of guilt.** 43Ida648, 253P623.

1071–76 43Ida648, 253P623.

1071–77 43Ida648, 253P623, 624 [cit CJ]. [b] 80Mont181, 260P138.

1071–78 178Ark212, 10SW(2d)366; 80Mont181, 260P138. [a] (11) Witness may give his best judgment and belief. 80Mont181, 260P138. (12) Fact that defendant told officers where missing property could be found and that they found articles answering description there is admissible. 80Mont181, 260P138.

1072–80½–New. Evidence by commonwealth witnesses on surrebuttal that no one else had access to the suitcase but defendant has been held competent as showing that the goods were not placed therein by other parties. 228Ky234, 14SW(2d)759.

1072–81 112TexCr28, 13SW(2d)840(3dcase).

1073–89½–New. Where property has been identified, evidence of possession by codefendant is admissible. 102TexCr284, 278SW221.

1073–90 105TexCr22, 285SW616.

1073–92 78CalA451, 248P929.

1074–6 112TexCr50¼, 17SW(2d)462(2dcase) (evidence held sufficient to support conviction for burglary). [b] 72CalA292, 237P390; 77CalA738, 247P532. [d] **Possession of burglary tools.**–181Ark336, 25SW(2d)752.

1074–7 21AlaA377, 108S643; 22AlaA380, 115S853 (corpus delicti); 92CalA610, 268P702 (evidence held sufficient to prove corpus delicti); 316Mo172, 289SW651; 318Mo813, 1SW(2d)143 (ownership of goods alleged to have been stolen); 109TexCr42, 2SW(2d)861. [a] **Value of property.**–80Mont181, 260P138. [b] **Manner in which entry was made** is immaterial so far as proof of corpus delicti is concerned under some statutes. 80Mont181, 260P138. [c] **Evidence held sufficient to support conviction.**–CalA 276P641; 112TexCr243, 15SW(2d)1041(2dcase).

1074–8 21AlaA377, 108S643; 22AlaA380, 115S853. [a] 68CalA131, 228P670; 79CalA605, 250P578; 81CalA752, 254P666; 100CalA235, 279P1067; 45Ida92, 260P697; 229Ky98, 16SW(2d)778 (finding of keys in defendant's possession, together with testimony of admissions of guilt); OklCr 285P847; TexCr 291SW247; 107TexCr646, 298SW597; TexCr 25SW(2d)862. [b] 21AlaA233, 107S36; 96Fla264, 117S862; 32PortoRico759. [c] 71CalA730, 236P214; 105TexCr574, 289SW684; TexCr 298SW281; 107TexCr646, 298SW597. [f] **Constructive presence at burglary sufficiently shown.**–34NM112, 278P210(1stcase).

1075–9 21AlaA179, 106S391; 30Ariz442, 247P1101; 323Ill61, 153NE705; 324Ill101, 154NE463; 80Mont181, 260P138 (value of property taken where degree of larceny is not of essence of charge); 104TexCr518, 284SW582; TexCr 291SW247.

1075–10 200Wis438, 228NW481(1stcase).

1075–11 36GaA295, 136SE543; 40GaA660, 151SE41; 110TexCr279, 8SW(2d)173.

1075–11½–New. Mere proof of opportunity is insufficient to convict. 221AppDiv521, 224NYS670.

1075–12½–New. If accused lies as to his presence near place of crime such fact may be considered by jury as evidence of guilty presence. 221AppDiv521, 224NYS670.

1075–12⅓–New. But the weight they may give such inference varies according to the amount and weight of other evidence of guilt. 221AppDiv521, 224NYS670.

1075–13 24F(2d)82 (post office); 21AlaA179, 106S391; 22AlaA143, 113S465; 173Ark450, 292SW699; 208Cal295, 280P983; 72CalA292, 237P390; 78CalA46, 247P593; 79CalA605, 250P578; 86CalA646, 261P309; 93CalA497, 269P702; CalA 284P709; CalA 292P538; Fla 126S158(2dcase); Fla 128S485; 35GaA659, 134SE197; 36GaA115, 136SE89; 36GaA654, 137SE863; 37GaA382, 140SE406; 324Ill101, 154NE463; 325Ill307, 156NE369; 335Ill604, 167NE797; 337Ill342, 169NE165; 337Ill300, 169NE182; 337Ill643, 169NE772; 338Ill367, 170NE227; 119Kan670, 240P848; 126Kan200, 268P98; 218Ky72, 290SW1075; 150Miss159, 116S533; 152Miss597, 120S570; 154Miss493, 122S539; 311Mo461, 278SW719; 115Nebr225, 212NW426; NJSup 145A229(2dcase); 221AppDiv485, 224NYS163; 37OklCr24, 255P1022; OklCr 289P793; 104TexCr518, 284SW582; 105TexCr262, 288SW200; 105TexCr574, 289SW684; TexCr 291SW247; 107TexCr42, 293SW1117; 106TexCr605, 294SW566; TexCr 299SW911; 110TexCr484, 9SW(2d)344; 111TexCr9, 10SW(2d)1004; 111TexCr160, 12SW(2d)205(2dcase); 111TexCr372, 13SW(2d)100; TexCr 25SW(2d)862; TexCr 27SW(2d)228; TexCr 27SW(2d)538; TexCr 29SW(2d)770(1stcase); TexCr 29SW(2d)756(3dcase); TexCr 31SW(2d)825(2dcase).

1076–15 74CalA138, 239P705; 197Ind468, 151NE332; Mich 233NW210; 193Wis204, 212NW635.

1076–17 70CalA262, 233P78; 71CalA150, 234P905; 80CalA605, 251P321; 101CalA238, 281P657; 47Ida336, 276P528; OklCr 279P693(2dcase).

1076–18 76CalA216, 244P634; 78CalA455, 248P927; 78CalA503, 248P946; 79CalA306, 249P240; 80CalA605, 251P321; CalA 290P678; Mo 298SW(2d)71; OklCr 287P820; OklCr 287P1087; OklCr 287P1088; 146Wash221, 262P622; 149Wash504, 271P583.

1076–18½–New. of burglary in the third degree, Utah 279P950.

1076–19 107TexCr470, 296SW882.

1076–21 171Ark778, 286SW935; 178Ark212, 10SW(2d)366; 331Ill268, 162NE839; Mo 29SW(2d)71; 29OhA72, 163NE40.

1076–23 320Ill111, 150NE647; 86PaSuper205.

1076–24 230Ky614, 20SW(2d)463.

1076–26 21AlaA377, 108S643; 92Fla373, 109S446; 43Ida648, 253P623; 153Miss1, 120S206; 152Miss597, 120S570; 106TexCr138, 291SW235; 113TexCr606, 21SW(2d)1065(2dcase). [a] **Evidence held insufficient** to convict of burglary in first degree. 73CalA13, 238P374; 78CalA683, 248P713; 82CalA96, 255P209.

1076–26½–New. of burglary in the second degree, 76CalA216, 244P634; 315Mo1305, 292SW45.

1076–27 221AppDiv521, 224NYS670.

1076–28 WVa 155SE661.

1076–30 251NY375, 167NE505.

1076–30½–New. Evidence held insufficient to sustain conviction of housebreaking. 230Ky698, 20SW(2d)722.

1076–30⅓–New. Evidence held insufficient to support judgment of conviction for possession of tools for forcing or breaking open a building, vault, safe, or other depository. 98Fla871, 124S467.

1076–31 316Mo172, 289SW651; OklCr 272P488(1stcase).

1076–32 [a] **Evidence held insufficient** for failure to show that defendant did not enter through open rear door. TexCr 29SW(2d)760.

1076–33 103TexCr403, 281SW844.

1077–36 196NC692, 146SE801(2dcase); 111TexCr256, 12SW(2d)585.

1077–37 200Cal404, 253P318; 98Fla877, 124S444; 223Ky569, 4SW(2d)365; 196NC524, 146SE139; 102TexCr178, 277SW133; 192Wis452, 211NW773.

1077–38 316Mo172, 289SW651.

1077–39 [b] 72CalA292, 237P390; 80Mont181, 260P138.

1077–41 114Nebr13, 205NW574 (owner need not testify to want of consent where facts and circumstances show noncontent). [a] 80Mont181, 260P138.

1077–42 But see 47Ida336, 276P528.

1077–44 255Mass327, 151NE466 (sufficient). [a] (4) To sustain conviction for burglary by entering garage. 106TexCr158, 291SW892. (5) Burglary of store in nighttime. 193Wis204, 212NW635.

1078–46 103TexCr403, 281SW844.

1078–47 21AlaA233, 107S36.

1078–49 32OklCr341, 240P1075 (doubt whether refrigerator or cold storage vault broken into was part of building resolved in favor of defendant); 110TexCr594, 9SW(2d)1037 (private residence). [d] 21AlaA233, 107S36.

1078–50 96Fla30, 117S377; 334Ill38, 165NE190; 318Mo813, 1SW(2d)143; 110TexCr62, 7SW(2d)576; 111TexCr249, 12SW(2d)572. [b] (1) CalA 285P406; 93Fla1110, 113S561; 324Ill101, 154NE463; 338Ill367, 170NE227; 318Mo813, 1SW(2d)143. See also Fla 128S485. (10) To show that things of value were kept in store. 22AlaA165, 113S482. (11) To show legal existence of corporation. 334Ill38, 165NE190. (12) To show ownership of store. 318Mo813, 1SW(2d)143. (13) To show corporate existence of owner of premises burglarized. 155Miss298, 124S353(2dcase).

1078–51 [a] (1) 154Tenn43, 289SW529 [citCJ]. [d] Fla 126S767; 195Wis555, 218NW822. [e] **Evidence held insufficient to show breaking and entering with intent to steal.**–96Fla796, 119S332.

1079–52 199Ind478, 158NE228; 195Wis555, 218NW822.

1079–53 93CalA677, 270P253; 75Mont274, 243P566. [b] **Evidence held insufficient.**–39GaA537, 147SE786.

1079–55 75Mont274, 243P566.

1080–58 [a] (1) 208Iowa236, 225NW254; WVa 154SE866. [b] 88CalA505, 263P856; 75Mont274, 243P566.

1080–59 [a] 199Ind478, 158NE228; 154Tenn43, 289SW529.

1081–65 153Miss1, 120S206.

1081–67 [a] (1) 82CalA98, 255P261; CalA 290P678; 80Mont181, 260P138; 109TexCr204, 4SW(2d)72 (circumstantial evidence). (3) CalA 290P678. (8) Identity of stolen property need not be positively proved by direct evidence. 80Mont181, 260P138.

1081–68 38GaA267, 143SE795(2dcase).

1082–69 32PortoRico759.

1082–70 155Miss298, 124S353(2dcase). See also 32PortoRico759.

1082–70½–New. Possession of stolen property by companions warrants inference of conspiracy. 105TexCr22, 285SW616.

1082–71 30Ariz442, 247P1101; 93CalA677, 270P253; 96Fla264, 117S862; 96Fla796, 119S332; 331Ill268, 162NE839; 122Kan559, 253P593; 232Ky226, 22SW(2d)624; 241Mich111, 216NW434; 155Miss298, 124S353(2dcase); 103TexCr376, 280SW813; 105TexCr22, 285SW616; 109TexCr204, 4SW(2d)72; 108WVa494, 151SE713.

1082–72 93CalA677, 270P253; 100CalA300, 279P836; 335Ill415, 167NE49 (where defendant sold chickens stolen); 228Ky643, 15SW(2d)434; 105TexCr22, 285SW616; 105TexCr460, 287SW152.

1082–74 325Ill307, 156NE369; 337Ill643, 169NE772; 205Iowa592, 218NW

273; 228Ky643, 158SW(2d)434; Mo 279 SW109; 213AppDiv331, 210NYS535; 104TexCr518, 284SW582; 108TexCr282, 18SW(2d)312; 108TexCr664, 28SW(2d) 274; 110TexCr484, 9SW(2d)344.

1083–75 37GaA82, 138SE919.

1083–77 68CalA131, 228P670; 91CalA 53, 266P374; CalA 290P678; 241Mich 111, 216NW434; 32PortoRico 759 (local statute adopted from California).

1083–78 68CalA131, 228P670; 91CalA 53, 266P374 (evidence held sufficient to warrant conviction); CalA 284P709; CalA 290P678.

1083–80 96Fla264, 117S862; 96Fla796, 119S332; 48 Ida648, 253P623, 624 [quot CJ]; 122Kan559, 253P593; 231Ky129, 27SW(2d)672(2dcase); Mo 12SW(2d) 46.

1084–83 30Ariz442, 247P1101; 108 TexCr527, 18SW(2d)630. [a] **Unsatisfactory account of possession of goods** presumptively establishes that defendant stole them by means whereby access was obtained. 234Ky129, 27SW(2d)672 (2dcase).

1084–84 96Fla264, 117S862.

1084–91 168La925, 123S621 (whether store window is part of store).

1084–93 101TexCr251, 275SW835. [a] 34F(2d)863; 21AlaA179, 106S391; 21 AlaA408, 108S650; 22AlaA165, 113S482; Mo 278SW982; Mo 285SW83; Mo 290 SW145; Mo 11SW(2d)1035; Mo 12 SW(2d)46; 191NC213, 131SE572; 43 Okl ACR318; 109TexCr398, 5SW(2d)144; 137Wash360, 242P377, 247P9; 149Wash 504, 271P583. [d] 196NC1, 144SE299. [e] 21AlaA377, 108S643; TexCr 25 SW(2d)845. [g] **Evidence held sufficient** to identify defendant to make question for jury. 102TexCr178, 277SW133. [h] **Evidence held sufficient to take question of corpus delicti to jury.**–80Mont181, 260 P138. [i] **Evidence held sufficient to go to jury on question of guilt of attempted burglary.**–251NY375, 167NE505.

1084–94 22AlaA168, 113S626; 22AlaA 333, 115S420 (time of offense); TexCr 291SW229; 106TexCr605, 294SW566; 197Wis296, 222NW247.

1085–95 76CalA216, 244P634; 340 Ill 434, 172NE819; Mo 279SW109; 191NC 213, 131SE572.

1085–96 221Ky700, 299SW568; 83NH 419, 143A594; 198NC61, 150SE628.

1085–97 177Ark1, 5SW(2d)355; 47 Ida 336, 276P528; 208 Iowa236, 225NW 254; 104TexCr374, 283SW839.

1085–98 38GaA665, 145SE99(3dcase); Mo 279SW109; 80Mont181, 260P138; 108TexCr282, 18SW(2d)312.

1085–99 37GaA82, 138SE919; 196NC1, 144SE299.

1085–1 22AlaA168, 113S626.

1085–6–7 Mo 279SW109.

1085–9 191NC213, 131SE572. [a] **Evidence, though entirely circumstantial,** may be sufficient to make guilt of defendant as participant in crime one of fact for jury. 23AlaA85, 121S4.

1085–10 [a] **Instruction defining "first degree burglary"** has been held not erroneous. 101CalA238, 281P657.

1085–11 114Nebr13, 205NW574 (instruction as to aiding and abetting held sufficient); 107TexCr247, 296SW558; 109TexCr270, 4SW(2d)61 (accused entitled to affirmative charge that mere presence was insufficient to sustain conviction). [b] 126Kan200, 268P98 (in absence of more specific request).

1085–12 109TexCr545, 5SW(2d)999 (held erroneous). [a] (11) In absence of evidence showing how or when entry was made, it is error in prosecution for nighttime burglary to instruct that entry means any kind of an entry without consent of occupant or owner of building. 101TexCr520, 276SW436. (12) Other instructions. 227Ky411, 13 SW(2d)277; 111TexCr249, 12SW(2d) 572. [b] 328 Ill 602, 160NE125.

1086–13 [a] (8) Instruction defining nighttime as any time within "the twenty four hours from thirty minutes after sunset until thirty minutes after sunrise" is technically incorrect because of the use of the words "within the twenty four hours." 103TexCr403, 281 SW844. (9) Where burglary, if committed, was committed in nighttime, instruction is not erroneous for failure to define nighttime. 30Ariz442, 247P1101.

1086–15 224Ky126, 5SW(2d)889. [e] (1) 86CalA235, 260P822 (instructions held sufficient). [i] **Instruction defining "willfully"** should state that it is to be applied to specific, not general, intent. CalA 289P937.

1086–17 Mo 295SW535 (ownership by another). But see Ind 166NE649.

1087–19 224Ky126, 5SW(2d)889. [a] (5) It is not error to charge that the jury could not convict defendant of larceny of property not mentioned in the indictment. 155Miss298, 124S353 (2dcase).

1087–23 [b] **Instructions held not misleading.**–177Ark1, 5SW(2d)355.

1087–25 NC 153SE605.

1087–26 241Mich111, 216NW434; 75 Mont274, 243P566.

1088–28 79CalA605, 250P578; 93CalA 62, 268P1078; 126Kan200, 268P98; 75 Mont274, 243P566; 115Nebr225, 212 NW426; 101TexCr251, 275SW835; Tex Cr 291SW229.

1088–29 75Mont274, 243P566; 101Tex Cr251, 275SW835.

1088–30 93CalA677, 270P253; 161La 867, 109S530.

1088–31 104TexCr420, 284SW545. [c] (1) 104TexCr420, 284SW545.

1088–34 36GaA115, 136SE89.

1088–35 36GaA115, 136SE89; 115Nebr 225, 212NW426.

1088–35½–New. Under statutes in some jurisdictions an instruction as to possession of implements of crime as prima facie evidence of possession with intent to use in commission of crime is proper. 146Wash585, 264P7.

1089–42 78CalA455, 248P927 (that burglary had been committed); 78CalA 451, 248P929 (that burglary had been committed); 106TexCr605, 294SW566.

1089–44 80Mont181, 260P138. [a] (2) 113TexCr490, 22SW(2d)664. [b] (3) 178Ark213, 10SW(2d)366.

1089–45 [d] 106TexCr605, 294SW566. [b] (1) 106TexCr605, 294SW566.

1090–47 [a] **Where full charge on circumstantial evidence is given,** court need not charge specially on question of recent possession. 106TexCr605, 294 SW566.

1090–50 [a] (3) Other instances. 34 Ariz144, 268P617.

1090–55 205 Iowa592, 218NW273; 32 PortoRico 759.

1090–55½–New. Charge should contain the word "recent" in a reference to possession. 36GaA115, 136SE89.

1091–58 [a] 155Miss298, 124S353(2d case).

1092–66 See also CalA 291P600.

1092–69½–New. Where the fact that all articles taken at the time of the burglary were restored to the owner was before the jury, failure of the verdict to declare the value of the property taken and of the amount restored as required by statute is not a fatal defect. 80Mont181, 260P138 (purpose of statute stated).

1092–69⅓–New. In a burglary prosecution, a verdict adjudging defendants guilty of entering in the nighttime without breaking, with intent to steal, was not required to designate the building which was entered. 167La635, 120S83.

1092–71 [a] (1) 75CalA150, 241P924. (3) In California crime of burglary with explosives is punishable by incarceration in state prison. 196Cal 515, 238P 359. (4) Life imprisonment may be imposed for first degree burglary. 132 Misc196, 229NYS281. [c] (10) Two to seven years in reformatory for aiding and abetting held not abuse of discretion. 114Nebr13, 205NW574. (11) Indeterminate sentence of from one to ten years' imprisonment has been held not excessive. 115Nebr225, 212NW426. (12) Fifteen years held excessive and reduced to seven. OklCr 279P693(2d case). [f] **Attempt to commit burglary fully merits sentence** of five years' imprisonment where evidence shows defendant was outlaw and guilty of charge. 217Ky83, 288SW1026.

1093–72 217Ky81, 288SW1025.

1093–73 207 Iowa760, 223NW535 (possession may be joint).

1093–74 50RI 148, 146A407 (intent is important element); 141Wash638, 251 P875.

1093–79 [a] (2) Indictment charging possession of false keys, picklocks, and "miscellaneous implements and tools" is sufficient notwithstanding quoted words. 141Wash638, 251P875.

1094–80 207 Iowa760, 223NW535; 50 RI 148, 146A407. [b] (3) Evidence that defendant had bottle of nitroglycerine on jeweler's premises is competent to explain purpose for which burglar's tools were intended, though nitroglycerine is not burglar's tool. 217 Ky81, 288SW1025. (4) Sheriff's expert testimony is admissible. 207 Iowa760, 223NW535. [d] **Tools** to be admissible must be specified in indictment. 207 Iowa760, 223NW535. [e] **Evidence held inadmissible.**–207 Iowa760, 223NW535.

1094–81 207 Iowa760, 223NW535 (that tools are of kind covered by statute).

1094–82 41GaA838, 155SE49; 217Ky 81, 288SW1025; 141Wash638, 251P875. [e] **Evidence held sufficient** to take case to jury. 207 Iowa760, 223NW535.

1094–83 [a] (1) 50RI 148, 146A407. (2) Whether defendant had possession of tools found in house leased by her. 207 Iowa760, 223NW535. (3) Whether handkerchiefs were arranged so as to be used as masks. 207 Iowa760, 223NW 535. [b] (4) 141Wash638, 251P875.

BURGLARY AND THEFT INSURANCE

1096–12 4F(2d)753; 8F(2d)244; 23 F(2d)665 (excess over amount covered by other insurance); 33F(2d)473; CalA 291P698; 85Colo 565, 277P779 (insurer has no right to hold recovered car to force settlement with insured); 105 Conn402, 135A388, 54ALR463; 240 Ill A 502; 237Mich182, 211NW749; 251Mich 614, 232NW403; 316Mo 278, 290SW 429; 222MoA490, 280SW724; MoA 14 SW(2d)23; 245NY111, 156NE632; Tex CivA 32SW(2d)708.

1096–14 49SD319, 207NW49 (provision against use of automobile for livery purposes construed to be absolute guaranty). [a] **Absolute exclusion of use of automobile** for livery purposes is a promissory warranty. 49SD319, 207 NW49.

1096–15 105Conn402, 135A388, 54ALR 463; Mich 233NW367; 127Misc353, 216 NYS149; TexCivA 298SW459.

1096–19½–New. Insured knowing conditions of automobile theft insurance policy is bound by them. 48RI 473, 139 A212.

1096–19⅓–New. Policy covering liquor bought for personal use when War-Time Prohibition Act was in effect and before National Prohibition Act went into effect was valid where there was no showing of intention to violate law. MoA 273SW125.

1096–19¼–New. "Pay roll," as used in a policy, construed. 89CalA227, 264P 501.

1096–19½–New. Where the insured premises constituted an entire building, the court will disregard a clause of the policy indicating that such premises were part of the building. 222MoA490, 280SW724.

1096–19⅘–New. A policy insuring against pay roll robbery "inside or outside" protects against loss in the city where insured's work is being done, although the office is not located there. 89CalA227, 264P501.

1096–19½–New. A policy covering loss of property from within the premises insured covers the store proper, and also a rear room used as a storeroom and for conduct of some business, although also used as living quarters. 222MoA490, 280SW724.

1096–19⅛–New. In an action on a theft policy covering cars handled by dealers, the general practice of dealers in handling cars for sale should be observed, and the policy should be interpreted with consideration of the custom of dealers in their efforts to dispose of the property. TexCivA 108SW(2d)163.

1096–19⅛–New. Upon recovering the property stolen, insurer may be entitled to retain control for a reasonable time. 85Colo 565, 277P779.

1096-19 1/10-New. A mere gesture of abandonment of stolen goods on the part of insured, in the absence of an acceptance thereof by insurer, is insufficient to vest in the latter the title to stolen goods, so as to make insurer liable as for total loss under a theft policy, notwithstanding recovery of part of the stolen goods. 225AppDiv58, 232NYS5.

1096-19 1/10-New. Exclusion clause of burglary policy must be given reasonable construction. 228AppDiv506, 241 NYS247.

1096-21. 247Mich226, 225NW549 (effects of guests in office safe held to be "collateral for indebtedness to insured" within terms of policy); **Wash** 290P 820. See also 244 **IllA**123. [a] **Allowance of ten per cent only of amount of loss** on articles outside of inner chest in fireproof safe held to apply to articles outside inner chest but within burglar proof door of fire proof safe. **Tex CommnA** 272SW442. [b] **Definitions of fireproof and burglar-proof safes,** as given in manual of bureau of casualty underwriters, of which plaintiff had no knowledge and which were not embodied in policy, are not controlling. 220 **MoA**753, 275SW973.

1096-24 4F(2d)753 (bills of lading included in words "other similar securities"); 33F(2d)473 (burglary and robbery policy); **CalA** 291P698; 240 **IllA** 502; 128Kan265, 276P800; 12LaA315, 126S150 (theft by employee of public garage); 222MoA490, 280SW724 ("premises" includes storage room back of store); 245NY111, 156NE632; 130 Misc778, 225NYS301 (clause requiring that breaking be made through outer doors construed); 121 Oh499, 169NE 573; 49RI159, 141A182 ("theft"); 155 SC400, 152SE672 (failure to return automobile held "theft"); 149Wash70, 270P96. [a] **In South Dakota.**-49SD 225, 207NW108. [b] **Larceny by fraud.**-128 Okl142, 261P927. [c] **Loss of deposit received at depositor's office by bank cashier** who was robbed on way back to bank is covered by policy. **MoA** 148SW(2d)23. [d] **If within reasonable time insured recovers property,** he should be limited to recovery of his actual loss. 225AppDiv58, 232NYS5. [e] **Word "theft" as used in policy does not mean animus furandi** so as to exclude borrowing with intent to steal. 87Colo 147, 285P756.

1096-25 39F(2d)956 (money in empty room held not in "custody" of messenger or paymaster); 77CalA641, 247P507; 105Conn402, 135A388, 54ALR463; 255 **IllA**437; 121Kan406, 247P432; **MoA** 288SW369; 245NY55, 156NE941; 223 AppDiv296, 228NYS226; 127Misc553, 216NYS149; 227AppDiv39, 237NYS39; 113 OhSt153, 148NE923; 85PaSuper50; 49SD225, 207NW108 (failure of policy to state that Leland lock on car would be kept in working condition precludes claim of continuing warranty); **Tex CommnA** 283SW161. [a] (4) Burglary loss after manipulation of lock on safe held not covered by policy requiring visible marks. **TexCivA** 298SW459. (5) Use of force upon inner doors has been held entry effected by force or violence, though outer doors were opened by manipulation of combination locks. **Wis** 230NW704. (6) "Tools" used by burglar does not refer to teller's being forced to open vault by revolver. **Mich** 233NW367. [b] **Under robbery policy** insuring permanent members of insured's household over eighteen years of age, insured is not entitled to recover for robbery of wife who was under eighteen. 126Misc313, 213NYS841. [c] **"Household and personal property common in residences."**-85PaSuper50. [d] **Articles which insured was willing to sell** held not samples within theft policy. 220AppDiv 196, 221NYS4. [e] **Suit cases stolen from taxicab** where they were temporarily left held not stolen from custody of common carrier within theft policy. 220AppDiv196, 221NYS4. [f] **Jewelers' policy covering jewels personally carried or sent by registered post** did not cover those carried by baggage truck. 24F(2d)784. [g] **Negligence of insured need not amount to fraud or design** in order to defeat liability under robbery policy exempting insurer "unless the assured has taken all reasonable precautions to safeguard the property." **MoA** 282SW520. [h] **Property of member of family** does not include property of wife having separate residence. **CalA** 287P510. [i] **Premises from which goods stolen not "within solid walls from floor to ceiling"** within terms of policy. 228AppDiv506, 241NYS247. [j] **Robbery of employee having "care and custody."**-251Mich614, 232NW403.

1097-26 4F(2d)753 (under indemnity bond excepting losses due to forgery, conviction of drawee's bookkeeper of forgery in substituting fictitious bill is not conclusive that loss was due to forgery). 4F(2d)753; 77CalA641, 247P 507; **CalA** 291P698; 98PaSuper517. But see 33 **OhA**207, 169NE33. [b] **Provision avoiding policy** if automobile is used for livery purposes is valid. 49 SD319, 207NW49. [c] **Under indemnity bond** excepting losses by theft by any person to whom indemnitee's employee delivered the insured property theft of bills of lading by drawee's bookkeeper during inspection is not delivery exempting from liability. 4F(2d)753. [d] **Loss from employees' dishonest act** occurs when employee is accessory before fact to robbery with violence. 213 AppDiv750, 210NYS105. [e] **Where limitation covers losses where "visible marks" left at place of entry,** there is no liability where access is gained by intimidating watchman. 241 **IllA**427. [f] **Porter held employee within exception of policy.**-221AppDiv167, 222NYS 641. [g] **Entrance to alley between two factories is "public entrance"** within exception of policy. 34F(2d)738.

1097-27 [a] **Effect of other insurance.**-32F(2d)700; **MoA** 188SW(2d)532 (recovery permitted under secondary policy after settlement in full of liability under primary policy).

1097-28 316Mo278, 290SW429 (policy held to cover sucessive thefts, each to amount in policy).

1097-29 179Minn167, 228NW605 (criminal intent to deprive owner of his property permanently); 26 **OhNPNS**103; **TexCivA** 273SW624; 137Wash246, 242P 40.

1097-30 105Conn402, 135A388, 54ALR 463; 156Miss649, 126S478 (necessity for visible marks on exterior); 216AppDiv 453, 215NYS366. [a] **Visible marks of force and violence,** as essential to recovery under clause in policy, held not to require proof of physical marks where forcible entry and removal of goods were established. 233 **IllA**229. [b] **Removal of cylinder from lock** constitutes visible mark of force and violence, though burglars left no other marks on lock or door. 233 **IllA**229. [c] **Time of employment of force or violence.**-8F(2d)224. [d] **Purpose of requirement.**-8F(2d)224. [e] **Marks of violence.**-220MoA753, 275SW 973. [f] **Visible marks of forcible entry.**-Utah 273P974; **BC** [1929] 3Dom LR140. [g] **Where outer door was opened by manipulation** and inner door forced, theft from safe is covered by policy. **IndA** 171NE219.

1097-31 1/2-New. A policy insuring against loss by statutory larceny covers a loss of securities resulting from a criminal scheme, which by false representations induced insured to part with securities for a worthless check. 127 Misc893, 217NYS95.

1097-31 1/4-New. "In transit" within stockbrokers' theft and negligence policy means while going to make a legal delivery to a customer. 245NY111, 156 NE632.

1097-31 1/4-New. Taking a pay roll without force, followed by shooting to avoid capture, is robbery within the meaning of the policy. 89CalA227, 264P 501.

1097-32 **MoA** 279SW246; **MoA** 295SW 833; **MoA** 25SW(2d)554; 133Misc667, 232NYS643(2dcase); **TexCivA** 295SW 242. [a] **Under policy forbidding use of automobile** for livery purposes, agreement by owner that his son should not use for livery purposes did not excuse breach of condition. 49SD319, 207NW, 49. [b] **Business of insured.**-**MoA** 279 SW246. [c] **Statement that automobile is usually kept in private garage** is not continuing warranty broken by removal to public garage. 53SD228, 220NW503, 61ALR306. [d] **Warranty that automobile was fully paid for** is not broken where rider attached to policy shows mortgage to seller. 53SD228, 220NW 503, 61ALR306.

1097-33 130Misc778, 225NYS301 (insurer not permitted to assert falsity where it had knowledge of facts).

1097-33 1/2-New. Statute to contrary in New York applies only to life insurance. 126Misc199, 213NYS215.

1098-35 See also 127Kan230, 273P430.

1098-37 53SD228, 220NW503, 61ALR 306; 53SD275, 220NW521.

1098-38 **TexCivA** 272SW828 (statement in local agent's office not compliance with stipulation for filing proof of loss at home office); **TexCivA** 108SW(2d)163. [a] (1) 247Mich226, 225NW549. (2) Information need not be obtained from books and papers kept by insured. **MoA** 288SW369. (3) Policy requiring insured to keep books and accounts does not require that proofs of loss be made in any particular manner. **MoA** 288SW 369.

1098-43 1/2-New. An agent with apparent authority may waive proof of loss and accept notice in the absence of insurer's notice of limited authority. 40 GaA375, 149SE798.

1098-44 174Ark827, 296SW718, 54ALR 458.

1098-49 248 **IllA**209; 255 **IllA**437 (not promissory warranty but representation). [a] **Clause applies** where insured keeps no goods for sale but merely receives goods of others for cleaning. **MoA** 291SW153. [b] **Provision construed.**-31 OhA423, 167NE480.

1098-50 253 **IllA**148; 222MoA490, 280 SW724, 726 [citCJ]; **MoA** 288SW369, 373 [citCJ] (no special system is required); 250NY211, 164NE910; 216App Div252, 214NYS693. [a] **Dishonest books, for purpose of deceiving customers or creditors** have been held insufficient to establish liability under theft insurance policy. 250NY211, 164 NE910.

1098-50 1/2-New. Insured cannot recover for robbery under policy requiring one carrying bonds in excess of definite amount to be accompanied by two guards, where carrier was not so accompanied. 241NY252, 149NE849 (even though robbers were in collusion with employees and policy also insured against employee's dishonesty without qualification).

1098-50 1/3-New. Where there is merit in claim and insured has made bona fide effort to comply with provisions of policy, court will adopt liberal interpretation of what constitutes books of account. 216AppDiv252, 214NYS693.

1098-50 1/4-New. Insurer is not estopped from denying liability because facts as to warranties were untrue, on ground that insurance agent before issuance of policy knew of true facts. 125Misc798, 211NYS718.

1098-50 1/5-New. Construction of particular conditions and warranties. 122Kan 375, 252P208; 237Mich182, 211NW749; 239Mich10, 214NW216; 216AppDiv453, 215NYS366; **TexCivA** 295SW242.

1098-50 1/6-New. Whether reasonable precaution had been used to safeguard property insured against depends on the circumstances of each case. 104NJL30, 139A725.

1098-50 1/7-New. A provision in a policy requiring insured to keep books did not relieve insurer from liability where the keeping of books was unnecessary to determine the loss. 104NJL30, 139A725.

1098-50 1/8-New. Insurer issuing a policy in answer to a letter asking for insurance covering territory outside the city where insured has his office is estopped to assert that the policy does not cover such territory. 89CalA227, 264P501.

1098-50 1/9-New. Insured, under a policy insuring against theft of an automobile, is not required to pursue the stolen property after the date when the policy provides that payment is due. 53SD228,

220NW503, 61ALR306.

1098-50½0-New. Where a policy excludes property not locked when unattended, theft of a car left standing while the dealer interviewed a prospective customer has been held within the provision. **TexCivA** 10SW(2d)163.

1098-50½1-New. A lock warranty clause in a policy is not invalidated by a statute providing that failure to lock a motor shall not defeat recovery on the insurance policy. **MoA** 9SW(2d)653.

1098-50½2-New. There is no breach of provision forbidding encumbrances which will void policy unless encumbrance placed on property is valid and subsisting lien. 254 **IllA**248.

1098-50½3-New. Provision requiring custodian to be on duty during certain hours is not warranty but condition subsequent, substantial compliance with which is sufficient. 255 **IllA**437.

1098-50½4-New. Leaving an automobile unlocked in a public garage and giving the keys to an employee is not a breach of special warranty as to locking an automobile when leaving it unattended. 12**LaA**315, 125S150.

1098-50½5-New. Statute providing that warranties in fire, tornado, or cyclone policies not materially affecting risk shall be deemed representations is inapplicable to burglary and theft insurance policies. **MoA** 25SW(2d)554.

1098-52½-New. Right to proceeds. Bailee who has insured property bailed for full amount may recover on behalf of bailor actual loss sustained. 216**AppDiv** 252, 214**NYS**693.

1098-52½-New. Apportionment of loss. 237**Mich**182, 211NW749.

1098-52¼-New. Where plaintiff accepted return of automobile and cost of repairs, he was bound by a clause limiting defendant's liability to the actual cost of repairs and replacement and cannot recover upon the policy. 6PaDist&Co 349.

1098-54½-New. [§ 11b] **A½. Parties.** The sole owner of property may sue, without joining others insured under the policy, where a satisfaction of judgment will relieve the corporation from all further liability. 209**Mich**295, 176NW566.

1098-54½-New. The county is a proper, but not a necessary, party in an action by the county treasurer on a policy issued to him against loss by robbery or theft. 33F(2d)473.

1098-54¼-New. Some policies provide that statutory provisions at variance therewith will supersede limitations specified in the policy. **TexCivA** 272SW 828. [a] **Application.-TexCivA** 272SW 828.

1098-54½-New. Under policy issued to bailee of furs providing loss of property held in trust by insured might be adjusted with owners, and that payment to owners would satisfy loss, owners could sue on policy without insured's consent. 216**AppDiv**252, 214**NYS**693.

1099-55 141 **Okl** 90, 284P624 (sufficient);

1099-57 **Mass** 165NE682.

1099-58 **Mass** 165NE682. But see 242 **Mich**41, 217NW770.

1099-60½-New. The declaration need not allege by whom the thefts were committed. **Mass** 165NE682.

1099-61 8**PaDist&Co** 337 (averments held insufficient).

1099-61½-New. A petition alleging that an automobile was insured for a specified amount, that it was taken away from plaintiff by means of theft, robbery, and pilferage, and totally injured and destroyed, has been held to contain sufficient allegation of value. **MoA** 16 SW(2d)716.

1099-62 255 **IllA**437 (defense held without merit); **TexCivA** 4SW(2d)649 (must be affirmatively pleaded). [a] **Defenses in answer held sufficient.** 125 **Misc**45, 209**NYS**757 (breaches of warranties by assignee under assignment with consent of company subject to conditions, agreements, and limitations of policy).

1099-65½-New. Demurrer is improper to take advantage of delay in bringing an action, under a clause limiting the permitted time; defense must be specially pleaded. **Mass** 165NE682.

1099-66½-New. Parties. Mortgagee of car stolen is not a necessary party to action on policy. 49SD225, 207NW108.

1099-66¼-New. A complaint alleging that a conditional buyer obtained possession of the insured automobile by falsely representing that he had money in the bank to meet a check for the down payment does not allege larceny by trick or device. 207**Cal** 355, 278P861.

1099-68 247**Mich**226, 225NW549; 49SD 225, 207NW108. [b] **Matters not constituting variance.**-253 **IllA**148.

1099-70 15F(2d)48; 34F(2d)738; 174 **Ark**827, 296SW718, 54**ALR**458; 5**LaA** 91; **Mass** 166NE552; 225**AppDiv**58, 232 **NYS**5; 285**Pa**251, 132A120; 86**PaSuper** 542. [a] (2) Proof of transportation of valuable negotiable bonds without adequate or armed guards establishes negligence of plaintiff, and liability to owner within meaning of policy. 213**AppDiv** 750, 210**NYS**105. (3) Plaintiff has burden of proving compliance with policy requirement where such requirement is condition precedent. 220**AppDiv**21, 220 **NYS**356. [b] **In suit on policy requiring exhaustion of other insurance** in payment of claims, plaintiff must prove other insurance has been exhausted as condition precedent. **MoA** 18SW(2d) 532. [c] **Evidence held to show that automobile was stolen.**-168**La**307, 121S876.

1099-71 7**LaA**8. [a] 219**Ala**96, 121S84; 122**Kan**375, 252P208; 214**Ky**688, 283 SW1051; 8**LaA**616; **MoA** 273SW125 (sufficient to sustain finding that property was not obtained in violation of law); **MoA** 288SW369 (amount of loss); **MoA** 168W(2d)716; 139 **Okl** 176, 281P 766; 88**PaSuper**54; 47**RI**172, 131A548; **TexCivA** 18SW(2d)369 (identity of automobile and theft by person not in household or employ of insured); **Wash** 288P 906; 105**WVa**473, 143SE101. [b] 164**La** 260, 113S840 (evidence held to sustain finding that insured car was unlocked); 170**Minn**172, 212NW189; 179**Minn**167, 228NW605; 216**AppDiv**453, 215**NYS** 366; 86**PaSuper**542. [c] 239**Mich**396, 214NW118; 53SD228, 220NW503, 61 **ALR**306. [d] (4) That seller having custody of automobile was negligent. 167**Minn**183, 208NW819. [k] **Evidence must be sufficient to enable person of ordinary intelligence** and familiar with accounts to determine accurately amount of liability. 283**Pa**558, 129A590. [l] **Evidence held insufficient.**-125**Misc** 869, 212**NYS**286; **Utah** 273P974. [m] **Evidence held sufficient.**-40**GaA**593, 151 **SE**56; 222**MoA**490, 280SW724; **NJSup** 147A569(2dcase). [n] **Evidence held to support finding** that plaintiff did not breach condition of policy. 167**Minn** 183, 208NW819. [o] **That wife was not member of insured husband's household** within burglary policy was supported by evidence. **CalA** 287P510. [p] **Evidence held to show that watchman was "inside the premises"** within meaning of policy. **Wash** 288P906.

1099-72 38**GaA**415, 144SE53; 255 **IllA** 437 (that insured's books were not properly kept); 242**Mich**41, 217NW770 (breach of condition respecting lock in automobile theft policy); 220**AppDiv** 21, 220**NYS**356; 135**Misc**909, 240**NYS** 188; **Wash** 290P820. [a] **Evidence held inadmissible** on behalf of defendant. 255 **IllA**437. [b] **Increase of risk.-Wash** 290P820.

1099-73 90**PaSuper**366; 47**RI**172, 131A 548; **TexCivA** 18SW(2d)369.

1099-75 221**MoA**798, 288SW80 (to sustain finding that plaintiff kept automobile equipped with transmission locking device); 49SD225, 207NW108 (evidence held to justify verdict for value of car before theft); **TexCivA** 18SW(2d) 369.

1099-76 122**Kan**375, 252P208; 87**Pa Super**483; 47**RI**172, 131A548.

1100-82 See also 90**PaSuper**366.

1100-83½-New. Lapse of a considerable length of time between discovery of loss and date of trial is a circumstance which may be considered by the jury in deciding whether rings were mislaid or stolen. 47**RI** 172, 131A548.

1100-83½-New. Testimony contradicting statements in the application, part of the policy, is inadmissible. 29F(2d) 607 [aff 29F(2d)609].

1100-83¼-New. Evidence as to the recovery and value of a portion of stolen goods is admissible. 225**AppDiv**58, 232 **NYS**5.

1100-84½-New. The original insurance policy must be produced. 3**NJMisc**994, 130A371.

1100-84½-New. If evidence excusing its nonproduction is produced a copy of the original may then be offered. 3**NJ Misc**994, 130A371.

1100-84¼-New. A copy of an estimate of repairs by automobile company is not evidential. 3**NJMisc**994, 130A371.

1100-84½-New. Complaint of patrolman charging party with theft of car is not evidential. 3**NJMisc**994, 130A371.

1100-84½-New. Envelope memorandum used in prosecutor's office in working on case against thief is not evidential. 3**NJ Misc**994, 130A371.

1100-84½-New. Certified copies of proceedings against thief are not evidential. 3**NJMisc**994, 130A371.

1100-84½-New. Testimony as to articles asserted to have been in the safe of insured at the time of the burglary, although not positive and clear, is competent to go before the jury for what it is worth. 237**Mich**182, 211NW749.

1100-84½-New. Insurer is presumed to know that insured kept no books and accounts. 104**NJL**30, 139A725.

1100-84½0-New. Evidence of false representations as to losses in an application for an earlier burglary insurance policy is inadmissible. 25F(2d)782.

1100-84½1-New. Evidence may be sufficient to show compliance with a condition for keeping books of account. 222 **MoA**490, 280SW724.

1100-84½2-New. A letter of bailee converting insured's property bearing on criminal intent is admissible. **TexCivA** 4SW(2d)649.

1100-84½3-New. Where the question of plaintiff's good faith is in issue in an action on a policy insuring against theft of an automobile, evidence of efforts, of officers to recover the automobile at plaintiff's instance is admissible on plaintiff's behalf. 136 **Okl** 271, 277P591.

1100-84¼4-New. In an action on a policy of burglary insurance, evidence that defendant canceled policies after the burglary is immaterial and irrelevant. **Utah** 273P974.

1100-86 34F(2d)738 (evidence held insufficient to warrant submission); 122 **Kan**375, 252P208; **MoA** 8SW(2d)1078; 105**WVa**294, 142SE251 (evidence held sufficient to take case to jury). [a] **Tex CivA** 4SW(2d)649. [b] 237**Mich**182, 211 NW749.

1100-87 31F(2d)411; 34F(2d)738; 40 **GaA**593, 151SE56 (whether assured kept books as required by policy); 255 **IllA** 437 (whether employee of insured is custodian as defined in policy); 237**Mich** 182, 211NW749; 316**Mo**278, 290SW429; **MoA** 288SW369; **MoA** 291SW153; **MoA** 9SW(2d)653; 104**NJL**30, 139A725; 222 **AppDiv**750, 225**NYS**466; 34 **OhA**508, 171NE354; 136 **Okl** 271, 277P591; 90 **PaSuper**366; 49**RI** 159, 141A182; 135**SC** 155, 133SE553; **TexCivA** 4SW(2d)649 (conversion by bailee); **TexCivA** 32SW (2d)708 (whether bailee intended permanently to deprive owner of automobile). [a] **Evidence held sufficient** to go to jury in action for loss of rings by theft. 47**RI**172, 131A548. [b] **Evidence held insufficient** to take to jury question whether there was felonious entry and burglary. 37F(2d)26.

1100-88 259**Mass**194, 156NE52.

1100-89 255 **IllA**437; **MoA** 16SW(2d) 716; 87**PaSuper**483.

1100-90 **Mass** 166NE552.

1100-92½-New. A finding that the taking of an automobile under the guise of hiring it constituted larceny by fraud necessarily includes a finding of fraudulent intent at the time of obtaining possession. 128 **Okl** 142, 261P927.

1100-93 **Utah** 273P974. See also **MoA** 16SW(2d)716. [a] **Instruction that if owner** was diligent in preventing prohibited use of automobile, he could recover, though his son was using it, held error. 49SD319, 207NW49. [b] **Refusal to charge** held error. 34F(2d)738. [c] **Instructions held proper.**-40**GaA**593, 151 **SE**56.

1100-93½-New. Where the evidence is undisputed, it is the duty of the court to instruct the jury as to whether property lost through burglary came within the terms of the policy. 120 **Okl** 108, 250**P**892.

1100-94 See also **MoA** 274**SW**524. [a] **Instructions held sufficient or not erroneous.**-**Mo** 289**SW**877; **MoA** 288**SW**369; 88**PaSuper**54 (burden on plaintiff).

1100-94½-New. Contradictory instructions are erroneous. 316**Mo** 26.

1100-94¼-New. [§ 15a] E½. **Amount of Recovery.** In suits on an insurance policy to recover for loss of automobiles by theft, the measure of damages is the reasonable cash value of the property immediately before or at the time it was taken. **TexCivA** 10**SW(2d)**163.

1100-94¼-New. Counsel fees in connection with recovering the stolen goods, preparing the case for trial against insurer, and the cost of the premium on a bond given as a condition of securing delivery to insured of certain of such property, cannot be recovered from insurer. 225**AppDiv**58, 232**NYS**5.

1100-94½-New. Amount of recovery. Insured under automobile theft policy is entitled to recover reasonable cash value of car when stolen, not exceeding insurance, less reasonable value when returned by insurer. **MoA** 28**SW(2d)** 423.

1100-94¼-New. Insured under such policy cannot recover costs of mortgagee's foreclosure sale after insurer delivered recovered automobile to mortgagee. **MoA** 28**SW(2d)**423.

1100-99½-New. Allowing a copy of original policy to be introduced in evidence without proof excusing nonproduction of original is reversible error. 3**NJMisc**994, 130**A**371.

BUSINESS

1101-28 23**F(2d)**975; 24**F(2d)**649, 651 [cit CJ]; 26**F(2d)**82; 26**F(2d)**136; 81 **Colo** 161, 254**P**160. [m] **As applied to national banks,** it means business which they are authorized to transact. 242**NY** 277, 151**NE**452.

1102-29½-New. occupation or employment habitually engaged in especially for livelihood or gain; 220**AppDiv**30, 220**NYS**405.

1103-33 151**Miss**503, 118**So**606(2dcase).

1103-35 26**F(2d)**82.

1103-37 [a] (2) Means constant employment or regular occupation. 318 **Ill** 445, 149**NE**507; 220**AppDiv**30, 220 **NYS**405.

1103-38 42 **Ida**169, 244**P**149; 318 **Ill** 445, 149**NE**507.

1103-40 318 **Ill** 445, 149**NE**507.

1103-43 220**AppDiv**30, 220**NYS**405.

1104-51 **Mass** 169**NE**157.

1105-76 24**F(2d)**557.

1105-79 208 **Iowa**164, 225**NW**344.

1106-84½-New. "engaging in business." 42 **Ida**169, 244**P**149.

1106-87 **Sask** [1929] 2**DomLR**507 [cit CJ].

1106-88½-New. Public business: In Oklahoma corporation commission has no jurisdiction to decree a business to be a "public business." 120 **Okl** 223, 251**P**63.

1106-88½-New. Whether a business is a "public business" under Oklahoma statute depends on facts in each case. 120 **Okl** 223, 251**P**63.

1106-88¼-New. One engaged in public business must treat all persons fairly and without unjust discriminations. 120 **Okl** 223, 251**P**63.

1106-88½-New. Discrimination by one engaged in public business is authorized when dealing with persons of different classes or dissimilarly situated. 120 **Okl** 223, 251**P**63.

BUTTON

1107-30½-New. A small knob or stud attached to any object for use or ornament. 13**CustA**172.

BY

1109-59 80**CalA**513, 252**P**630.

1109-60 80**CalA**513, 252**P**630.

1109-65 50**SD**645, 211**NW**691, 692 [cit CJ].

1109-66 80**CalA**513, 252**P**630.

1110-94 25 **OhNPNS**572; 50**SD**645, 211 **NW**691.

1111-12 [a] (4) Because of, through, or in pursuance of. 317**Mo** 744, 296**SW** 431.

BY-BIDDING

1112-23 213**Ky**533, 281**SW**500, 46**ALR** 117.

BY-LAWS

1113-35 167**Ga**555, 146**SE**173.

CALCITE

1116-22½-New. "Calcium carbonate, Ca Co, equals carbon dioxide 44, lime 56, equals 100."17**F(2d)**351, 355.

1116-22½-New. "Pure crystals (of this mineral) have the composition carbon dioxide 44 per cent., lime 56 per cent." 17**F(2d)**351, 355.

CALENDAR YEAR

1118-52 194**NC**1, 138**SE**418, 419 [quot CJ].

1118-53 194**NC**1, 138**SE**418, 419 [quot CJ].

CANADA

1121-49 **Erratum.**-Cross reference should be: See Dependencies, Colonies, and British Possessions, [1925] **CanSC** 458, [1925] 3**DomLR**1089.

CANALS

1127-45 124**Misc**209, 207**NYS**232 (title acquired, though compensation not paid, where certain provision made therefor, of which owners failed to avail themselves).

1128-55 114 **OhSt**437, 151**NE**653 (reservation in contract for acquisition of dam and millrace site for construction of state canal construed as exception reserved to grantor of water privileges as sanctioned for long period of years).

1131-93½-New. The contractor may or may not be entitled to additional compensation for removal of certain old material, reëxcavation, procuring new material for certain purposes, and for other matters, according to the terms of the contract. 247**NY**150, 159**NE**892.

1132-18½-New. The duty to maintain a bridge across a canal, sold by the state, which subsequently took it over as part of the state highway, was on the lessee of the purchasers' assignee after diversion of the highway route therefrom. 285**Pa**551, 132**A**705.

1133-30 256**Mass**293, 152**NE**633; 116 **Nebr**736, 219**NW**11, 12 [citCJ].

1136-82 226**AppDiv**154, 235**NYS**331. [a] (2) That land of claimant flooded by waters of barge canal system did not lie directly on lake itself has been held immaterial on question of state's liability. 135**Misc**188, 237**NYS**383.

1136-83 218**AppDiv**210, 218**NYS**223; 226**AppDiv**154, 235**NYS**331 (extraordinary rainfall held no defense); 135**Misc** 488, 237**NYS**383. [n] **That lease of quarry was unilateral** does not excuse state from liability for damage from negligent flooding of quarry, lessor being entitled to recover loss of rent caused thereby. 224**AppDiv**173, 230 **NYS**19.

1137-84 219**NYS**325.

1137-85 127**Misc**128, 216**NYS**137. [e] **Evidence held not to show negligence** in maintaining canal so as to justify reversal of court of claims' dismissal of claim. 214**AppDiv**139, 212**NYS**36.

1138-87½-New. "Costs, charges, and expenditures" which the state assumed by contract with a canal contractor have been held not to include judgment paid by the company due to its negligence. 219**NYS**325.

1140-17 135**Misc**188, 237**NYS**383 (claimant can only recover from state for destruction of unmatured crops by overflowing of barge canal rental value of land, plus value of labor used in preparing and planting it, cost of seed plant, and fertilizer).

1140-18½-New. An amount claimed in the notice limits recovery against the state. 218**AppDiv**210, 218**NYS**223.

1140-19 226**AppDiv**154, 235**NYS**331.

1140-20 [a] **Evidence held sufficient** to show that flooding of land and destruction of crop was caused by dam constructed by state for barge canal purposes. 135**Misc**188, 237**NYS**383.

1140-24½-New. In an action against a state for damages to crops from discharging waters, evidence has been held to show that flooding of land would have occurred irrespective of negligence of the state. 127**Misc**128, 216**NYS**137.

1142-48 133**Misc**410, 233**NYS**49; 230 **AppDiv**374, 245**NYS**444 (holding statute to be practical construction of extent of lease). [b] **Sales and leases of surplus water** constitute contracts. 33**F (2d)**318. [c] **State acts as proprietor and lessor,** as respects state's lease of surplus water. 230**AppDiv**374, 245**NYS** 444. [d] **Change in state's policy** on subject does not change valid outstanding leases or show improvidence of earlier leases. 230**AppDiv**374, 245**NYS**444. [e] **Practical construction by legislature** and administrative officers should be given great weight in interpreting state's lease of water. 230**AppDiv**374, 245**NYS**444.

1143-62½-New. The lessee of water rights is entitled to renewals provided for in a lease where the state conveyed a portion of the canal subject to lessee's rights, and election to renew is not affected by the fact that the state declines to receive rentals. 13**F(2d)**98.

1143-62½-New. A lease is limited by construction of the law, under which it was executed, excess grant being void. 133**Misc**410, 233**NYS**49.

1143-62¼-New. A lease of surplus waters not necessary for navigation included only water which at the time of the lease was decided by commissioners not to be necessary for navigation, and did not include additional water developed by enlargement of a canal. 133**Misc**410, 233**NYS**49.

1143-62½-New. Practical construction of a lease as covering future increases of surplus water has been held not shown by law substituting a lump sum payment of rent and describing the lease of plaintiff's predecessors as perpetual. 133**Misc**410, 233**NYS**49.

1143-62½-New. Use, without objection by state, of water in excess of the water delivered, did not amount to practical construction showing that plaintiff was entitled to use under original lease of additional surplus water developed. 133 **Misc**410, 233**NYS**49.

1143-62½-New. Construction by the state of a forebay and two raceways after the amount of surplus waters delivered at the time of the lease had increased, was not recognition of a claim that the original lease included additional surplus water developed thereafter. 133**Misc**410, 233**NYS**49.

1143-62¼-New. A law prohibiting the lease of surplus waters resulting from the improvement of a canal until authorized by statute, negatived intent on the part of the state to recognize the rights of plaintiff to claim additional surplus water created by the improvement under the lease executed before the improvement. 133**Misc**410, 233**NYS** 49.

1146-99 But see 33**F(2d)**215.

1146-1½-New. In order to establish negligence in damage to a steamer from a wave caused by falling earth due to a dredge, it is necessary to show the dangerous condition of the bank and failure to guard against it. 15**F(2d)** 935.

1148-18 [b] (2) City accepting deed of portion of canal on condition that right of holder of leases be respected is estopped from repudiating obligation then assumed. 13**F(2d)**98.

1149-32 13**F(2d)**98.

1150-47 But see 33**F(2d)**318.

CANARY SEED

1153-2 15**CustA**288.

CANCELLATION OF INSTRUMENTS

1159–2 102NJEq322, 140A465.
1153–4 CalA 293P105.
1159–4½–New. An action for rescission presupposes existence of contract. 51 Philippine80.
1159–6 71CalA97, 234P432; 164Ga805, 139SE678; 122Kan607, 253P230; 156 Md478, 144A521; 232Mich251, 205NW 165; 137Misc888, 244NYS82; NC 155 SE238(2dcase); 116 Okl 192, 244P198; 123 Okl 284, 253P75; 108WVa612, 152SE 6. [a] In Alabama.–212Ala585, 103S 863. [b] In Porto Rico.–32PortoRico 818.
1160–7 192NC771, 136SE129.
1160–10 242 IllA69; 76Mont332, 247P 166; 9PaDist&Co 392; TexCommnA 291SW876. [a] (9) To declare void and forfeited oil and gas sublease. 76 Mont332, 247P166. (10) To require redelivery of will for cancellation. 156 Md478, 144A521.
1161–13 105WVa259, 142SE443; 39 Wyo 46, 270P163, 166 [citCJ].
1161–14 105WVa259, 142SE443.
1161–16 TexCivA 17SW(2d)859.
1161–18 39Wyo 46, 270P163, 166 [cit CJ].
1162–24 Fla 126S791 (sufficient); 219 Ky612, 294SW191, 192 [quotCyc]; 230 Ky307, 19SW(2d)976; NJ 150A415; NC 155SE238(2dcase); 130 Or211, 279P 939; TexCivA 17SW(2d)859; TexCivA 27SW(2d)260.
1162–25 219Ky612, 294SW191.
1162–26 166La1080, 118S225.
1162–28½–New. Upon the principle that equity will not require a useless thing, cancellation will not be decreed in the absence of evidence of a valid outstanding contract. 329 Ill 637, 161 NE118.
1162–33 16F(2d)473; 19F(2d)481; 21 F(2d)172; 219Ala437, 122S656; Ala 127S543; Ala 130S178; 204 Iowa1195, 213NW264; 122Kan831, 832, 253P431 [quotCJ]; Mass 171NE713; 102NJEq 322, 140A465; 130 Or211, 279P939; 116 Tex356, 291SW860; TexCommnA 15SW (2d)548; TexCommnA 25SW(2d)808; TexCivA 6SW(2d)445; 39Wyo 46, 270P 163. [d] (1) 16F(2d)473. (3) Insurance company suing to cancel insurance policy for fraud is held without legal remedy in view of incontestable clause. 19F(2d)410. (4) Action to cancel policy for fraud and to restrain action thereon not allowed on ground incontestable clause would operate to defeat defense at law where there was fourteen months before clause would become operative. 21F(2d)172.
1163–34 See also 160Ga381, 128SE187. [b] Damages must be of substantial kind in order to authorize cancellation. 39Wyo 46, 270P163.
1163–39 14F(2d)656. [e] Defense held not adequate.–Mo 292SW34, 51ALR863. [f] Insurance policy may be canceled where legal remedy inadequate. 41F (2d)12; Mich 231NW91.
1164–41 21F(2d)172.
1165–47 33F(2d)638 (where incontestable clause of policy limits defense of fraud to within two years after issuance of policy); 38F(2d)524 (where other party could dismiss claim). [b] Insurance policies.–21F(2d)172.
1166–67 Ark 298SW495; 100WVa559, 131SE253.
1166–68 21F(2d)280; 169Ark299, 274 SW6; 163Ga32, 135SE314; 236IllA50; 230Ky307, 19SW(2d)976 (mutual mistake is necessary); 83Mont68, 271P695; 118 Okl 106, 246P468; 100WVa559, 131 SE253. See also 134SC324, 132SE616. [a] 118 Okl 106, 246P468.
1167–73 79CalA601, 250P581, 582 [quot CJ] (mistake of cemetery association contracting to sell lot to negro believing him to be white); 94Fla1010, 114S769, 771 [quotCJ]; 211Ky12, 276SW981; 165Minn433, 206NW711; 174Minn241, 219NW76; 100WVa559, 131SE253. See also 107Conn387, 140A749. But see Wis 230NW47. [c] Rule is statutory in California. 79CalA601, 250P581.
1168–74 [b] 165Minn433, 206NW711.
1168–77½–New. Equity has jurisdiction to cancel a written instrument where there has been a mistake of one party accompanied by fraud or inequitable conduct on the part of the other. 175Ark73, 298SW495.
1168–78 237IllA50.
1168–80½–New. Party to contract who has profited by mistake is not entitled to cancellation. TexCivA 28SW(2d)885.
1169–82 CalA 290P45; 237IllA50; Tex CommnA 276SW653.
1169–83 214Ala458, 108S53.
1169–85 239Mich313, 214NW178.
1169–88 173Ark875, 293SW1026, 57 ALR877; 94Fla1010, 114S769, 771 [quotCJ]; 338 Ill 552, 170NE756; 204 Iowa1011, 216NW765, 767 [citCJ]; 100 NJEq92, 135A511; 132Misc48, 228NYS 624; 192NC771, 136SE129 (cancellation of note for lack of consideration); 118 Okl 106, 246P468; TexCivA 296SW635; Alta [1928] 2DomLR84; Alta [1929] 2 DomLR262.
1170–89 173Ark875, 293SW1026, 57 ALR877; TexCivA 296SW635.
1170–94 20F(2d)394; 21F(2d)280; 97 Fla392, 121S475; 163Ga899, 137SE561, 164Ga581, 139SE56; 317 Ill 356, 148NE 64; 236Mich 540, 211NW64; 193NC769 138SE143; 128 Okl 91, 261P224; 132 Okl 70, 269P255; TexCivA 291SW296 TexCivA 6SW(2d)143.
1171–95 317 Ill 356, 148NE64 (that ejectment will lie no reason for refusing cancellation of a deed not delivered but fraudulently registered by grantee); 125 Mo 402, 134A539; 235Mich268, 209NW 85; 236Mich157, 210NW206; TexCivA 286SW273.
1172–98 5F(2d)873; 16F(2d)473; 215 Ala205, 110S384; 230Ky307, 19SW(2d) 976; 174Minn498, 219NW759; 141Miss 474, 106S766; 213AppDiv523, 211NYS 22; 127Misc66, 215NYS276
1173–2 15F(2d)303; 19F(2d)68; 27 F(2d)304; 215Ala205, 110S384; 88 IndA 426, 164NE318; 127Misc66, 215NYS276; 117 Or192, 244P1093.
1173–3½–New. The existence of a complete defense, based on fraud, in a court of law, does not ordinarily constitute such an adequate remedy for defendant as should impel a court of equity to refuse to entertain a bill filed by the defrauded party for the cancellation and surrender of the contract. 103NJEq 403, 143A529.
1173–4 [a] Where there are allegations of innocent misrepresentation and intentional deceit, equity will take jurisdiction as recognizing both causes of action. 100NJEq92, 135A511.
1173–5 16F(2d)473.
1173–7 20F(2d)394; 43F(2d)163; Mich 233NW370.
1174–9 16F(2d)473; 29F(2d)318; 31 F(2d)971; Ala 122S656; 141Miss474, 106S766; 127Misc66, 215NYS276. But see 158Tenn554, 13SW(2d)795. [b] (3) Insanity of insured held not to give jurisdiction. 16F(2d)473. [c] (2) Before expiration of incontestable period, insurer may sue to cancel policy, though after death of insured and before law action on policy is instituted. 22F(2d) 241. (3) Action to cancel life insurance policy for fraud may be maintained notwithstanding pendency of action on policy by beneficiary, where policy contains incontestable clause and defense may be lost if action is discontinued. 33F(2d)638.
1174–10 141Miss474, 106S766.
1174–14½–New. In the election of remedies a plaintiff induced by fraud to release his cause of action may sue in equity to rescind the release. 309Mo 638, 274SW815.
1174–14¼–New. But it seems that in some states one who has been induced by fraud to release his cause of action may elect to sue in equity to rescind or set aside instrument which effected release. 309Mo 638, 274SW815.
1175–20 Mo 26SW(2d)611; Nebr 231 NW18; 28 OhA289, 162NE653; 120 Okl 282, 251P43; 123 Okl 33, 251P729; 130 Okl 142, 265P1054, 1056 [citCJ]; 142Va 504, 131SE692, 699 [quotCyc].
1175–22 46Philippine179.
1175–24 240Mich387, 215NW295; Tex CivA 291SW296.
1176–29 177Ark656, 7SW(2d)755; 166 La547, 117S586; MoA 300SW1037; 128 Okl 222, 262P205 (total want of consideration). See also 174Minn241, 219 NW76. But see Fla 126S293.
1176–29½–New. Deed is properly cast aside where the consideration is inadequate, the deed unrecorded, and the grantee knows the grantor's condition and intent. 219Ky471, 293SW959.
1176–29¼–New. Contract held properly canceled for failure of consideration. CalA 289P185.
1176–31 128 Okl 222, 262P205 (instrument held illegal).
1176–34 171Ark1189, 283SW368; 125 Okl 114, 256P748; TexCivA 296SW902.
1177–39 29PortoRico874.
1170–40 7PaDist&Co 484.
1177–42 234Mich689, 209NW88.
1177–43 234Mich689, 209NW88.
1177–44 174Ark170, 294SW383; 234 Mich689, 209NW88; 125 Okl 114, 256P 748.
1180–63 93Fla311, 112S80; 163Ga899, 137SE561; 114Nebr522, 208NW630; 115Nebr761, 215NW99; TexCivA 281 SW331.
1180–67 249Mich400, 228NW765.
1181–78 82Colo 1, 256P639, 52ALR1172 [citCJ]; 202 Iowa1304, 211NW839, 841 [citCJ].
1181–79 76CalA530, 245P451; 123Kan 310, 255P52, 54 [citCJ]; 39Wyo 46, 270 P163, 166 [citCJ].
1181–83 [d] (2) That evidence may be lost by institution of law action is not sufficient for equitable relief. 219Ala 437, 122S656. [f] (2) Failure of vendor to erect fence, roof house, furnish mules, and procure loan does not warrant rescission by purchaser. 280Ky307, 19 SW(2d)976. [n] 107WVa576, 149SE 672. [q] Nonperformance of future conditions will not serve as ground for nullification of conveyance. 76CalA530, 245P451.
1182–85 82Colo 1, 256P639, 52ALR 1172; 97Fla777, 122S252; 123Kan310, 255P52, 54 [citCJ]. [a] (2) Building contract held properly rescinded where improper materials and defective work were furnished. 82Colo 1, 256P639, 52 ALR1172. [g] Breach of guaranty agreement.–39Wyo 46, 270P163.
1183–86 85Colo 519, 277P773.
1183–87 229Ky361, 17SW(2d)246; 12 LaA619, 126S923; 125 Or525, 265P420, 422 [citCJ].
1184–95 Ga 155SE513 (cancellation granted).
1185–98 172Minn145, 214NW769; 81 Mont382, 263P967.
1185–99 172Minn145, 214NW769; 38 OhA37, 168NE477.
1188–29 But see 117 Okl 260, 246P448.
1189–36½–New. In determining the right of a vendee of land to rescind, the court must consider the title as it existed at the time fixed for performance of contract and delivery of deed. 203 Iowa 480, 212NW933.
1189–38 [a] Where there is mutual mistake or fraudulent representations as to quantity of acreage in lease assigned to plaintiff, absence of warranty in lease or assignment does not bar cancellation of assignment. TexCivA 6SW(2d)143.
1189–39 171Ark912, 287SW373; 213 AppDiv523, 211NYS22; 130 Or255, 279 P542, 69ALR951; 48Philippine529.
1190–40 213AppDiv523, 211NYS22.
1190–43 101WVa41, 131SE874, 877 [citCJ].
1190–47 213AppDiv523, 211NYS22.
1191–52 317 Ill 356, 148NE64.
1191–53 [a] Ala 130S381.
1191–55 236Mich84, 210NW299; Mo 292SW34, 51ALR863 [quotCJ].
1192–62 165Ga135, 139SE873; 246 NY58, 158NE19 (stock).
1192–63 219Ala161, 121S530(2dcase).
1193–68 123 Or111, 261P72.
1193–70 200 Iowa157, 204NW250.
1193–70½–New. particularly where authority of one maker to deliver has been revoked by joint maker as surety before delivery. 200 Iowa157, 204NW 250.
1193–76 123 Or111, 261P72, 75 [cit CJ].
1194–85 128 Okl 222, 262P205. [f] Where invalidity does not appear on face of instrument, rescission is proper remedy. CalA 279P1011.
1195–87 106WVa507, 146SE59.

1195-89½-New. An innocent party seeking cancellation is not responsible on the theory that he made fraud possible, where the instrument was fully executed where placed by him with a broker who made alterations constituting the forgery. 238Mich210, 213NW200, 51ALR1225.

1196-24 122Kan43, 251P429, 430 [quotCJ]; 99NJEq578, 133A483. [c] **Ratification of lease to one tract** does not prevent suit to cancel lease to another tract. **TexCivA** 258SW(2d)989.

1198-26 122Kan43, 251P429, 430 [quot CJ].

1199-36 161Ga672, 132SE442; 238Mich61, 213NW183; 238Mich65, 213NW185. [a] (8) Seeking to reform and enforce contract. 161Ga672, 132SE442.

1199-37½-New. Delay caused by an unsuccessful attempt by the parties to come to an agreement on a new basis does not involve any principle of estoppel by ratification. 118 Okl 106, 246P468.

1199-38 Fla 126S293; **TexCivA** 275SW307, 309 [citCJ].

1199-39 **TexCivA** 275SW307, 309 [cit CJ].

1199-40 **TexCivA** 275SW307, 309 [cit CJ].

1199-42 **TexCivA** 275SW307.

1199-49 [b] (3) Failure of domestic servant without business experience to complain of misrepresentations at time she interviewed defendant for purpose of rescinding does not preclude relief where she had not then been advised of her legal rights. 241Mich570, 217NW773.

1200-51 27F(2d)1; 106WVa339, 146SE385. [b] **Bill held not to show** laches. 262Mass509, 160NE337.

1200-54 161Ga672, 132SE442; 220AppDiv673, 223NYS385; 115 Okl 207, 242P264; 118 Okl 106, 246P468; 120 Okl 274, 251P1042. See also 321Mo 414, 11SW(2d)729.

1200-55 150Md333, 134A124; 99NJEq404, 132A664.

1200-56 84CalA714, 258P636; 238Mich236, 213NW133; 114Nebr308, 207NW569, 511 [citCyc].

1200-58 100CalA187, 280P383; 168Ga356, 148SE84 (defendant's knowledge of plaintiff's possession); 238Mich236, 213NW133 (three years); 244Mich504, 221NW635; Mo 258SW(2d)84 (five years); 128 Okl 91, 261P224; 158Tenn546, 148SW(2d)963; Wash 287P46.

1201-59 238Mich236, 213NW133.

1201-60 206Cal 609, 275P418; 100CalA482, 280P383 (three years); 85Colo 9, 273P653 (nine months); 169Ga187, 149SE910; 114Nebr308, 207NW509, 511 [citCyc]; 128 Okl 91, 261P224.

1201-61 270US438, 46SCt326, 70L ed669; 24F(2d)417 (more than twenty years); 175Ark73, 298SW495; 150Md333, 134A124; 102WVa652, 136SE184.

1201-61½-New. Attack for fraud after twelve years held too late. **TexCivA** 277SW225.

1201-62 217Ala230, 115S256 (no change rendering relief inequitable); 238Mich236, 213NW133; 47RI366, 133A437.

1202-64 261Mass363, 162NE334.

1202-66 5F(2d)873.

1203-73 174Ark50, 294SW372; 181Ark1146, 27SW(2d)82; 100NJEq75, 134A838; 106WVa339, 146SE385.

1203-74 99NJEq404, 132A664.

1203-75 171Ark612, 287SW373.

1203-84 117 Or192, 244P1093 (suit not delayed unreasonably after discovery of fraud).

1203-85 168Minn227, 209NW507; 27OhNPNS381.

1204-89 5F(2d)873 (grantee's repeated broken promises over twenty year period does not justify delay in beginning suit).

1204-92 [a] **In Porto Rico.**-29Porto Rico 817.

1204-93 118 Or192, 244P1093.

1204-94½-New. In suit to cancel conveyance for breach of condition for maintenance where grantor shared possession with grantee, and after the latter's death with his widow and heirs, there is no laches because of delay in suing. 213Ala319, 104S751.

1204-94¾-New. Delay of an heir in bringing suit to set aside his decedent's deed for fraud and undue influence may be excused where the deed was not placed on record until after decedent's death. 78Colo 36, 238P59.

1204-94¼-New. A bill for cancellation of a contract, filed within a reasonable time after an attempt at peaceful settlement fails, is not barred by laches. 206Cal 526, 275P440.

1204-94½-New. Delay of more than seven years in prosecution of a suit by a stockholder to cancel a lease by the corporation has been held not to constitute laches precluding relief, where the parties had orally agreed that the trial should stand in abeyance pending the determination of another suit. 35 Ariz254, 276P839.

1204-95 99NJEq404, 132A664.

1204-97 [b] **In Porto Rico.**-32Porto Rico 740 (suit to annul title acquired in void execution sale); 33PortoRico 176; 35PortoRico 939.

1204-1 24F(2d)417.

1205-5½-New. In Porto Rico, the statute of limitations begins to run against an action to annul a sale with an agreement for repurchase on the ground that it was not a sale but a mortgage loan from the expiration of the grantor's right to repurchase. 33PortoRico 176.

1205-8 Cal 291P414.

1205-11 82CalA532, 255P854; 164Minn116, 204NW548.

1205-12 164Minn116, 204NW548.

1205-13 82CalA532, 255P854; 338 Ill481, 170NE723; 338 Ill 552, 170NE756; 164Minn116, 204NW548; 168Minn227, 209NW507; 191NC710, 133SE85, 90 [quotCJ].

1206-15 128 Or70, 264P453, 458 [cit Cyc]; 102WVa652, 136SE184.

1206-22 273US456, 47SCt416, 71L ed734; 51SD447, 214NW844.

1206-23 165Ga135, 139SE873.

1207-26 150Va132, 142SE363.

1207-28½-New. where demand for cancellation would be futile, relief will not be denied where such demand was not made, 197 Ind236, 150NE361.

1207-29 248Mich496, 227NW695.

1207-30½-New. Payment to court of money received from sale of land showed sufficient tender in action to cancel deed for fraud. Ark 30SW(2d)823.

1207-32 273US456, 47SCt416, 71L ed734; 200Cal 222, 252P593; 82Colo 13, 257P247; 164Ga257, 138SE333; 45 Ida206, 261P237, 238 [citCJ]; IndA 158NE629; 120 Okl 274, 251P1042; 125Okl 88, 256P743; 123 Or111, 261P72, 74 [citCJ]; 46Philippine757; TexCommnA 280SW571; TexCivA 48SW(2d)307; TexCivA 98SW(2d)180; 134Wash641, 236P566, 567 [quotCJ]. [a] **Rule applies only where contract is executory.**-TexCivA 278SW286.

1209-35 134Wash641, 236P566, 567 [quotCJ].

1209-36 6F(2d)322; 238Mich236, 213NW133 (rule applies only to contract partly executed and not to one wholly executed); 309Mo 638, 274SW815; 120 Okl 274, 251P1042; 123 Or111, 261P72; 134Wash641, 236P566, 567 [quot CJ].

1209-37 134Wash641, 236P566, 567 [quotCJ].

1209-38 TexCivA 278SW286; 134Wash641, 236P566, 567 [quotCJ].

1209-39 134Wash641, 236P566, 567 [quotCJ].

1209-40 134Wash641, 236P566, 567 [quotCJ].

1209-41 134Wash641, 236P566, 567 [quotCJ].

1209-42½-New. When land is sold in its entirety, the contract in a proper case may be rescinded in its entirety. 203 Iowa480, 212NW933.

1209-43 6F(2d)322; 82Colo 13, 257P247; 333 Ill 478, 165NE231; 260Mass178, 156NE903; TexCommnA 276SW174. [b] **Delay for more than year after** discovery of fraud in bringing suit to cancel release of insurance policy, incontestable after one year, prevents recovery. 6F(2d)322.

1209-45 273US456, 47SCt416, 71L ed734; Cal 291P414; 123Kan217, 254P1028; 129Misc493, 221NYS610, 612 [citCJ].

1210-46 129Misc493, 221NYS610, 612 [citCJ].

1210-47 220AppDiv541, 221NYS661; TexCommnA 276SW174, 176 [quotCJ].

1210-48 TexCommnA 276SW174, 176 [quotCJ].

1210-49 129Misc612, 222NYS315.

1211-54 [a] **Complete failure of consideration** obviates necessity of offer to restore property received before suing to cancel contract. CalA 289P185.

1211-55 123Kan217, 254P1028; 174Minn241, 219NW76; TexCivA 291SW296.

1212-59 TexCommnA 280SW571; TexCivA 278SW286. [c] **Where contract is executed,** and plaintiff sold live stock he received for deed, rescission is not precluded by failure to restore in kind. TexCivA 278SW286.

1212-60 203 Iowa480, 212NW933.

1212-61 203 Iowa480, 212NW933.

1212-63 203 Iowa480, 212NW933, 935 [citCJ].

1213-67 TexCivA 18SW(2d)667, 669 [quotCJ]; TexCivA 68SW(2d)143.

1213-71 204Cal 354, 268P334, 60ALR1381; 77Colo 70, 234P694 [citCJ]; 160Ga801, 129SE49; 164Ga257, 138SE333; 197 Ind236, 150NE361.

1214-76 [a] (6) Evidence sufficient to support finding that tender was made in good faith and that party was prepared to make it good if offer of return had been accepted. 51ND1, 198NW546. (7) Where taking of account necessary, liquidation of amount is to be adjudicated upon evidence of facts independent of terms of contract and offer to refund or pay amount decreed is sufficient without tender of amount before action. 67CalA659, 228P383.

1214-81 234Mich331, 207NW895.

1215-86½-New. The rule requiring offer before suit does not apply where immediate suit is necessary, defendant is "out of his mind" through drunkenness, and restitution is offered after suit is filed. 160Ga801, 129SE49.

1215-86¼-New. Mere fact that plaintiff fears difficulty with defendant in personal conference is not excuse for failure to offer restoration. 160Ga801, 129SE49.

1215-86¾-New. Tender is not required where it is evident that it will not be accepted. 175Ark659, 300SW390.

1215-87 19F(2d)410, 412 [citCJ]; 317 Ill 356, 148NE64; 125Me402, 134A539; 236Mich540, 211NW64; 241Mich392, 217NW22; 242Mich568, 219NW655, 656 [citCJ]; 242Mich631, 219NW740; 244Mich653, 222NW110; 27 Oh NPNS358 (not required in rescission on ground of fraud); 132 Okl 70, 269P255.

1215-88 250Mich218, 229NW453.

1215-89 19F(2d)410, 412 [citCJ]; 125Me402, 134A539.

1215-91 114Nebr339, 211NW173.

1216-93 TexCivA 12SW(2d)625.

1216-97 220Ala402, 125S642; Ill 173NE345; 126 Okl 93, 258P892. See also Iowa 231NW363.

1217-4 255 IllA230.

1217-11 144SC252, 142SE498; TexCivA 28SW(2d)352. See also 90Fla621, 106S424.

1218-14 340 Ill 57, 172NE25.

1219-18 45 Ida571, 264P229; 165Minn396, 206NW728 (trustee of constructive trust entitled to reimbursement).

1219-20 273US456, 47SCt416, 71L ed734.

1219-22 32Ariz423, 259P676; 90Fla621, 106S424; 205 Iowa92, 217NW436; 250Mich218, 229NW453.

1220-23 171Ark626, 286SW822.

1220-25½-New. The right of an inmate of a home for the aged to terminate a contract for his care and recover his property has been held not defeated by a claim that the inmate had originally misrepresented the amount of his money. 156Md478, 144A521.

1220-28 163Ga578, 136SE902; 225Ky150, 7SW(2d)1069.

1221-36 221AppDiv779, 223NYS642.

1221-39 163Ga578, 136SE902; 225Ky150, 7SW(2d)1069.

1222-46 115Nebr547, 213NW829, 831 [citCJ]. [d] (2) But where, under statute in force at time of making of note secured by mortgage, such note is nonnegotiable, it may be canceled as against assignee, though such note is made negotiable by subsequent amendment. 198 Cal 196, 244P335.

1223-52 MoA 15SW(2d)382.

1223-59 27F(2d)457 [certiorari den 278 US644, 49SCt80, 73L ed558(3dcase)]; 164Ga96, 137SE833.

1223-61 But see TexCivA 280SW901.

1224-62 173Ark250, 292SW150; 167Ga 622, 146SE455(1stcase).

1224-64 TexCivA 280SW901, 902 [cit CJ].

1224-71 19F(2d)74; 164Ga96, 137SE 833; 255 IllA230 (grantee); Or 291P 352.

1224-72 12LaA224, 125S761. [a] (3) Where quitclaim deeds are necessary to give plaintiff cause of action for cancellation of security deed, such cause of action is incomplete where deeds are not made till after institution of suit. 163Ga478, 136SE517.

1225-77 Cal 270P212; 165La453, 115 S653; 116Tex1, 285SW1063, 1069 [cit CJ]; TexCivA 8SW(2d)241; TexCivA 19SW(2d)621.

1225-79 165La453, 115S653.

1225-81 4F(2d)786; 232Ky781, 24SW (2d)603; 321Mo 849, 12SW(2d)723.

1225-82 163Ga899, 137SE561; TexCivA 271SW311.

1226-86 [b] Posthumous child not necessary party in wife's suit to set aside deed given by her to stifle will contest. TexCivA 275SW468.

1226-94 207Cal 290, 277P1047.

1226-95½-New. In a wife's suit to cancel conveyance executed by her as surety for husband, husband having no legal interest in the matter and against whom there could be no judgment, is not a necessary party. 213Ala173, 104S530.

1226-95½-New. Grantor in warranty deed has sufficient interest in suit to cancel former deed to same property for fraud. Mo 25SW(2d)84.

1226-3 116Tex1, 285SW1063, 1069 [cit CJ].

1227-5½-New. In a suit to cancel notes secured by a deed of trust on property subsequently conveyed, where it was claimed that the property really belonged to one of the grantors subject to certain rights of the grantor, the grantee is a necessary or proper party plaintiff. 116Tex1, 285SW1063.

1227-14 162Ga839, 134SE923; 172 Minn145, 214NW769. But see 164Ga135, 137SE828.

1227-17 TexCivA 14SW(2d)885 (grantee held necessary party); TexCivA 25 SW(2d)989.

1228-18 TexCivA 25SW(2d)989.

1228-20 [a] Concubines of grantor in suit to cancel separate deeds to them as grantees held improperly joined. 33 PortoRico 3.

1228-24½-New. In a suit attacking the donation inter vivos of real property, the donee is a necessary party. 10LaA 117, 119S776.

1228-24½-New. Wife of grantor held not necessary party in suit by grantee. 255 IllA230.

1229-27 See also 13PaDist&Co 743.

1229-35 165Ga306, 140SE875.

1229-37 [a] Signer of contract to convey land for support is proper party though not mentioned in body of contract. 215Ala442, 111S221.

1230-46 180Ark432, 21SW(2d)604 (unnamed beneficiary not necessary party); 83CalA627, 257P163 (assignees of beneficiaries are proper but unnecessary parties); 116Tex1, 285SW1063, 1069 [citCJ].

1230-48½-New. Payee of vendor's note need not be made a party where his interest was divested by foreclosure of deed of trust. TexCivA 272SW212.

1230-48½-New. Payees and holders of notes are necessary or proper parties in an action to cancel a deed of trust securing it. 116Tex1, 285SW1063.

1230-59½-New. Plaintiff rescinding a contract must recover the consideration from the person to whom it paid the money. 223AppDiv24, 227NYS403.

1230-59½-New. A bill against a corporate vendor and subsidiary companies, as the successive assignees of purchase-money notes and mortgage, to recover money paid, and cancel notes and mortgages, has been held not demurrable for misjoinder of parties. 97Fla392, 121S 475.

1231-69½-New. In an action to cancel a life insurance policy, insured's executrix is not a necessary party defendant where tender of the premium is made to her. 33F(2d)638.

1231-73 [b] Contra 122Kan479, 252P 232, 233 [quotCJ].

1231-73½-New. The supreme court is not deprived of jurisdiction in an action to set aside a settlement because of questions as to relief and conflicting jurisdiction. 226AppDiv774, 235NYS43.

1231-76½-New. Complaint sounding in equity asking for cancellation of an insurance policy and setting up facts constituting a valid defense at law held demurrable. 107Conn117, 139A702.

1231-76½-New. In suit to cancel deed, complaint pleading fact entitling plaintiff to some relief in equity is good as against general demurrer. 101CalA500, 281P1073.

1231-77 See also Mo 285SW409.

1232-80 [a] (1) 168Ga356, 148SE84. (2) 163Ga662, 136SE911; 240 IllA136. (5) 91Fla305, 107S633. (6) 163Ga32, 135SE314. (20) To cancel lease of business premises for nonuse. 120Kan455, 244P16. (21) To cancel lease. 164Ga 64, 137SE773; 166Ga757, 144SE241(1st case). (22) To cancel release on life policy as procured by fraud. 5F(2d) 1005. (23) To cancel deed in consideration of agreement to support grantor not performed. 81Mont382, 263P967. (24) To cancel fire policy for fraud. 251Mich 83, 231NW91. [b] (1) 102NJEq322, 140 A465. (2) To set aside stock subscription. 235 IllA132. (3) To cancel rental contract. 170Ga538, 153SE420. (4) To set aside deed. 230Ky143, 18SW(2d) 961. (5) Other instances. Mo 28SW (2d)1017.

1232-81 31F(2d)205; 38F(2d)524 (bill held to state cause of action); Cal 290P 11; 101CalA500, 281P1073; Fla 126S 746(1stcase) (bill held demurrable); 160Ga381, 128SE187 (allegations of petition held sufficient); 321Mo 849, 12SW (2d)723 (held sufficient statement); TexCivA 2SW(2d)909 (existence of cause of action to foreclose lien held insufficient to show right to cancel subordinate lease). [b] (1) 170Ga148, 152SE82. [f] Bill insufficient to cancel deed where no allegations that grantor or grantee asserted any claim to property. 214Ala 234, 107S77. [g] Lack of adequate remedy at law need not be pleaded but facts should be alleged from which conclusion may be drawn. 130 Okl 5, 264P887.

1232-83 219Ky1, 292SW338; 150Md 333, 134A124; 134SC324, 132SE616. [a] (2) In suit to have deed canceled which was recorded through inadvertence and mistake, allegation of nondelivery and recordation without knowledge and consent of plaintiff has been held sufficient allegation of inadvertence and mistake. 101CalA500, 281P1073.

1232-86 22F(2d)241 (held not insufficient as showing accord and satisfaction); 165Ga89, 139SE805 (petition held sufficient in suit by grantee of life estate); 126Kan435, 268P821; 219Ky1, 292SW338; 150Md333, 134A124; 101 NJEq536, 138A371; 129 Okl 40, 263P 130. [a] Allegations held insufficient to warrant exercise of equity jurisdiction. 219Ala437, 122S656. [b] Great latitude must be allowed in pleading fraud. TexCivA 24SW(2d)786.

1233-87 209Ky243, 272SW732; 150Md 333, 134A124; 151Md140, 134A130; 321 Mo 1052, 15SW(2d)329; 129 Okl 40, 263 P130. See also 162Ga734, 134SE767. [c] (10) 27F(2d)304; Cal 290P11; 163 Ga899, 137SE561; 170Ga148, 152SE82; 242 IllA69; 151Md140, 134A130; NJCh 141A561; 253NY159, 170NE530; 132 Okl 5, 269P269; TexCommnA 23SW (2d)308; TexCivA 290SW815; TexCivA 10SW(2d)388; TexCivA 19SW(2d)89. [d] (6) 7Alaska384; 209Ky243, 272SW 732; 86PaSuper185.

1234-90 216Ala344, 113S389. [b] That complaint alleges nonactionable representations is immaterial where it also alleges actionable representations. 82 CalA532, 255P854.

1234-92½-New. Bill is not demurrable for want of equity because contract sought to be rescinded states that no representations other than those stated therein were made to induce signing thereof. 254 IllA584.

1234-93 87CalA272, 262P66; 209Ky243, 272SW732; 142 Okl 168, 285P968.

1235-94 209Ky243, 272SW732 (knew or should have known them to be untrue); 142 Okl 168, 285P968.

1235-95 87CalA272, 262P66.

1235-97 209Ky243, 272SW732; 142 Okl 168, 285P968.

1235-98 209Ky243, 272SW732; 125Me 402, 134A539; 142 Okl 168, 285P968. [a] (2) 82CalA532, 255P854.

1236-99 209Ky243, 272SW732 (that representations were made to induce other party to act).

1236-2 142 Okl 168, 285P968; Tex CommnA 291SW1095. [c] Express allegation of pecuniary damages is unnecessary. 82CalA532, 255P854.

1236-10 213Ala131, 104S393. [a] In Porto Rico.–33PortoRico 739.

1237-15 220AppDiv673, 222NYS285.

1237-17 24F(2d)700 (bill held insufficient).

1237-21 215Ala442, 111S221.

1237-22 163Ga734, 137SE260; 114Nebr 522, 208NW630. [a] (6) Allegation that plaintiff was entirely without understanding and without mental capacity to understand business transactions of the nature involved held to state cause of action based upon void, and not merely voidable, contract. 74Mont245, 240P 376.

1238-31 Ala 130S67.

1239-33 [b] Great latitude must be allowed in pleading undue influence. TexCivA 24SW(2d)786.

1239-35 163Ga734, 137SE260; 165Ga 178, 140SE493. [a] NJ 144A879. [b] Complaint held sufficient.–226AppDiv 774, 235NYS43.

1239-39 But see 255 IllA230.

1240-50 160Ga801, 129SE49 (petition failing to allege restoration or offer before suit demurrable); 164Ga257, 138SE 333. [b] See also 242 IllA69.

1240-54 But see 321Mo 414, 11SW(2d) 729.

1241-57 207Cal 102, 276P990 (complaint held insufficient); 82Colo 13, 257 P247; 85Colo 9, 273P653; 164Ga257, 138SE333; 340 Ill 57, 172NE25 (allegation tendering reimbursement of amount expended in maintenance of premises is superfluous); 125Me402, 134A539. [a] (8) In action to cancel plaintiff's agreement to reassign to defendant half interest in invention and patent, allegation that plaintiff was ready, willing, and able to perform all terms and conditions of original agreement is equivalent to offer to refund such sum, if any, which might be decreed to be due from plaintiff after accounting. 67CalA659, 228P383.

1243-64 220Ala402, 125S642.

1243-70 27 OhNPNS358 (showing of willingness to do equity sufficient).

1243-74½-New. An allegation that irregularities and simulations were publicly known is not a sufficient allegation of knowledge on the part of a subsequent mortgagee and his assignee. 33 PortoRico 933.

1244-76 [a] (3) Ill 173NE168.

1244-77 [b] Averments held insufficient to excuse delay.–331 Ill 11, 162NE144.

1244-85½-New. Such defect is cured by tender in open court before trial commences. 123Kan568, 256P162.

1245-89 Mo 285SW409.

1245-90 255 IllA230 (in action to cancel deed cancellation of contract need not be asked for).

1246-96 [a] Rescission or damages.–234Mich341, 207NW903.

1246-7 94Fla171, 114S225. [b] Defense held insufficient.–226AppDiv774, 235NYS43.

1246-9 213Ala131, 104S393 (defensive matter).

1246-13 220Ala402, 125S642.

1246-14 [b] Allegations in answer held to constitute no defense. 235Ky54, 29 SW(2d)581.

1247-21 242Mich130, 218NW671.

1247-22 [g] **Cross bill held permissible and proper.**–340 Ill 160, 172NE173.

1247-23 15F(2d)292. [a] **Cross complaint for cancellation of deed held sufficient.**–Ga 134SE923.

1247-24 127Misc68, 215NYS277.

1248-32 168Ga105, 147SE110.

1248-33 [a] **Amendment of prayer to ask in alternative for rescission of contract for sale of land or damages for fraud** should be allowed where exact remedy is incapable of determination until proofs are in. 234Mich341, 207NW 903.

1248-34 41F(2d)484.

1248-38 [a] **Supplemental petition has been held insufficient.**–Mo 28SW(2d) 1017.

1249-40½-New. An offer in a supplemental answer to make conveyances gives defendants the same rights which a formal tender outside of court would give. 264Mass303, 162NE334.

1249-44 82CalA532, 255P854; 98Fla 1103, 126S289.

1250-63½-New. Where a bill for rescission alleges fraud against several owners, it will be dismissed where evidence shows that some of the owners were not affected by the fraud. 17F(2d)971.

1251-69 [b] **Question of construction of inconsistent provision** of deed of trust, not involving validity of trust, will not be considered in heir's suit for cancellation of deed of trust. 336 Ill 366, 168NE349.

1251-70 205 Iowa557, 218NW264; 240 Mich419, 215NW362; 39Wyo 46, 270P 163. [d] (2) Burden of proving inadequacy of legal remedy rests on party seeking cancellation. 39Wyo 46, 270P 163, 166 [citCJ]. [j] **Plaintiff, proving material injury,** is entitled to rescind contract without proving extent of injury. CalA 286P714.

1252-71 70CalA47, 232P498 (burden is on plaintiff to prove want of delivery of deed).

1252-72 CalA 290P45; 206 Iowa297, 218NW71 (duress); Iowa 229NW744; 154Md462, 140A593; 232Mich522, 205 NW589; 234Mich367, 208NW450; 241 Mich570, 217NW773; 241Mich632, 217 NW777; 242Mich139, 218NW664; Mo 297SW391; 115Nebr761, 215NW99; 118 Okl 85, 246P593 (undue influence); 123 Okl 33, 251P729; 129 Okl 40, 263P 130; 116 Or626, 239P138, 241P56; 119 Or277, 241P46; 48SD474, 205NW47; Wis 230NW47. See also Okl 291P50.

1252-75 See also 236Mich540, 211NW 64.

1252-79 198Cal 46, 243P657; 252 IllA 575; 241Mich308, 217NW23; 316Mo 674, 291SW109, 112 [citCJ] (attorney and client); 122 Okl 301, 254P979; 128 Okl 91, 261P224; 136Wash378, 240P9; 104WVa600, 140SE689. [b] (1) 115 Nebr761, 215NW99. [d] **In suit to cancel principals' conveyance to agent,** burden is on agent to show fairness and full disclosure of facts. TexCivA 2SW (2d)870.

1253-81 154Md462, 140A593; 119 Or 277, 241P46.

1253-82 114Nebr522, 208NW630; 115 Nebr761, 215NW99; 29PortoRico 874; 48SD474, 205NW47; TexCivA 281SW 331.

1253-84 See also 178Ark862, 12SW(2d) 772, 6SALR1303.

1253-86 51ND1, 198NW546, 548 [quot CJ].

1253-90 NC 154SE631; TexCivA 281 SW331; TexCivA 25SW(2d)212 (under general denial); TexCivA 31SW(2d) 350.

1254-91 15F(2d)646; 173Ark1181, 292 SW669.

1254-92 163Ga734, 137SE260.

1254-93 15F(2d)646; 82CalA532, 255 P854; 236Mich540, 211NW64; 32Porto Rico 591.

1254-94 [a] (4) Evidence as to husband's duress on wife is properly excluded where it is not shown that mortgagee had notice thereof. 163Ga671, 137 SE36.

1254-95 70CalA98, 232P763; Tex CommnA 25SW(2d)597; TexCivA 24SW (2d)786.

1254-2 122Kan755, 253P556; TexCivA 24SW(2d)786.

1254-3 15F(2d)646; 17F(2d)450; 21F (2d)280; 173Ark1181, 292SW669; 174 Ark1179, 297SW1012; 175Ark73, 298 SW495; 176Ark565, 3SW(2d)322; 177 Ark1171, 9SW(2d)560; 219Ky1, 292SW 338, 340 [citCJ]; 230Ky94, 18SW(2d) 887; 231Ky377, 21SW(2d)484; 232Ky 781, 24SW(2d)603; 10LaA117, 119S776; 234Mich367, 208NW450; 316Mo 674, 291 SW109, 112 [quotCJ]; 115 Okl 277, 242 P1047; 129 Okl 40, 263P130; 123 Or 563, 570, 263P75 [quotCJ]; 124 Or509, 264P853; 126 Or227, 269P207; 130 Or 417, 279P865. [b] 176Ark565, 3SW(2d) 322 (unless clear, unequivocal, and decisive). [c] (1) 219Ky1, 292SW338. (2) 219Ky1, 292SW338. [d] (3) Plaintiff, in suit to annul and cancel lease, is not required to establish evidence beyond reasonable doubt that mistake was made, though to make prima facie case, stricter showing is required than in other suits. TexCivA 21SW(2d)552. [g] **Proof of facts and circumstances from which fraud may be presumed** is sufficient. 116 Okl 199, 244P176. [h] **Sufficiency of evidence of mental incapacity.**–198Cal 46, 243P657. [i] **Vendor not entitled to cancellation of contract** where no cloud on title. 324 Ill 367, 155NE296.

1255-4 21F(2d)280; 154Md462, 140A 593; Mo 297SW391, 392 [citCyc]; 100 NJEq75, 134A838; 27 OhNPNS381; 120 Okl 282, 251P43; 123 Okl 33, 251P 729; 128 Okl 188, 261P941; 129 Okl 40, 263P130; 130 Okl 142, 265P1054; 125 Or358, 267P521. [b] 115 Okl 277, 242P 1047 (where evidence is vague and ambiguous). But see ND 230NW11.

1256-5 21F(2d)280.

1256-9½-New. It is not necessary that proof of mutual mistake should be so clear and convincing as to be beyond all possibility of controversy, but it is only necessary that it should be convincing to a moral certainty beyond reasonable controversy. 118 Okl 106, 246P468.

1256-9½-New. Where plaintiff fails to prove his allegations of fraud by a preponderance of the evidence, the action must be dismissed. 241Mich449, 216NW 919.

1256-10 215Ky119, 284SW431; 239 Mich256, 214NW214.

1256-11 41 OklACR118.

1256-12 43F(2d)163; 175Ark1169, 300 SW929; 81CalA295, 253P328 (promise without intention to perform); 89Colo 9, 273P653; 165Ga413, 141SE67; 335 Ill 468, 167NE46; 240 IllA567; 123Kan 217, 254P1028; 125Kan223, 264P50; 231Mich251, 203NW658; 234Mich331, 207NW895; 234Mich367, 208NW450; 235Mich585, 209NW841; 236Mich157, 210NW206; 236Mich540, 211NW64; 237Mich261, 211NW639; 241Mich392, 217NW22; 241Mich570, 217NW773 (reliance on representations); 242Mich139, 218NW664; 242Mich130, 218NW671; 242Mich568, 219NW655; 246Mich10, 224NW334; 165Minn490, 206NW727; 168Minn227, 209NW507; ND 230NW 11; 27 OhNPNS381; 115 Okl 248, 242 P854; 116 Okl 199, 244P176; 123 Okl 181, 252P437; 125 Okl 282, 257P793; 128 Okl 87, 261P228; 128 Okl 188, 261P 941; 132 Okl 141, 269P1067; 135 Okl 208, 275P331; 125 Or507, 265P420; Tex CivA 2SW(2d)870 (agent grantee's nondisclosure of all facts to principals); TexCivA 6SW(2d)143 (independent investigation by plaintiff held not shown). [a] **Material injury shown.**–CalA 286P 714.

1256-14 122Kan755, 253P556; 124Kan 323, 259P684; 128 Okl 91, 261P224.

1256-15 192NC771, 136SE129.

1256-15½-New. fraud and failure of consideration. 236Mich157, 210NW206.

1256-16 169Ark299, 274SW6.

1256-17 101CalA500, 281P1073; 120 Or626, 253P522; TexCivA 30SW(2d) 596. [a] 239Mich197, 214NW92; 113 Nebr677, 204NW517.

1256-18 241Mich308, 217NW23; 114 Nebr563, 208NW669; 122 Okl 301, 254 P979.

1256-19 81CalA295, 253P328; 239Mich 1, 214NW113; 114Nebr563, 208NW669.

1256-20 70CalA98, 232P763; 163Ga32, 135SE314; 213Ky580, 281SW525.

1256-21 174Ark170, 294SW388; 198 Cal 46, 243P657; 241Mich308, 217NW 23; 114Nebr563, 208NW669; 125 Okl 114, 256P748; TexCivA 6SW(2d)227.

1256-22 163Ga32, 135SE314.

1256-24½-New. that a quitclaim deed was executed merely for convenience, Mo 23SW(2d)155.

1256-25 121Kan490, 247P449.

1256-27 168Ark1, 268SW356; 164Minn 116, 204NW548; ND 230NW11; 128 Okl 91, 261P224; 128 Okl 87, 261P228. [a] **Performance by plaintiff** in suit to cancel contract for support is shown by defendant's taking possession and refusing to give up property. 215Ala442, 111S221.

1256-27½-New. that the vendor rescinded a contract for the sale of realty, 80CalA609, 252P733.

1256-27½-New. that there was an unreasonable delay in rescinding after discovery of fraud. 128 Or70, 264P453.

1256-27¼-New. , or that defendant acquired a good title without confirmations of the title sought to be annulled, 166La1098, 118S453.

1256-28 168Ark1, 268SW356 (finding that receiver of note had knowledge of fraud and that purchaser thereof from him was not innocent purchaser held not against evidence); 123 Okl 181, 252 P437.

1256-28½-New. , or that one of defendants was innocent purchaser for value of note given in exchange of property. 168Ark6, 269SW370.

1256-28¼-New. , or that a renewal note secured by chattel and real estate mortgages was executed without knowledge of the forgery of the original note, 204 Iowa887, 216NW274.

1256-28¾-New. or that all of the defendants participated in receiving the consideration as principals. 81CalA 295, 253P328.

1256-29 206 Iowa297, 218NW71; 232 Mich522, 205NW589; 116 Or626, 241P 56.

1256-30 168Ark1033, 275SW653; 122 Okl 210, 253P487; Okl 291P50.

1256-31 15F(2d)646; 175Ark73, 298 SW495; 80CalA538, 252P638; 89CalA 497, 265P345; 78Colo 36, 238P59; 161 Ga877, 132SE81; 164Ga650, 139SE413; 241 IllA102; 253 IllA206; 205 Iowa557, 218NW264; Iowa 229NW744; 121Kan 490, 247P449; 126Kan435, 268P821; 210Ky820, 276SW983; 229Ky649, 17SW (2d)736; 168La15, 121S176 (collusion); 154Md462, 140A593; 231Mich697, 204 NW712; 236Mich520, 211NW103; 237 Mich198, 211NW642; 237Mich620, 213 NW83; 238Mich65, 213NW185; 240 Mich408, 215NW305; 241Mich449, 216 NW919; 242Mich320, 218NW702; 307 Mo 529, 271SW50; 316Mo 674, 291SW 109 (fraud of attorney); 114Nebr308, 207NW509; 118Nebr612, 225NW761; 119 Okl 208, 249P350; 120 Okl 282, 251 P43; 123 Okl 33, 251P729; 129 Okl 40, 263P130; 36 OklACR150 [reh pending]; 123 Or563, 263P75; 86PaSuper185; TexCivA 274SW238; TexCivA 16SW (2d)325(2dcase); TexCivA 19SW(2d) 89 (fraud of subsequent grantee); 68 Utah407, 250P986; Utah 267P1020; BC [1930] 3DomLR475. [a] **Verdict held against weight of evidence.**–103 Conn302, 130A377.

1257-32 80CalA538, 252P638.

1257-33 TexCivA 26SW(2d)694.

1257-35 80CalA538, 252P638; 164Ga 650, 139SE413; 236Mich345, 210NW 248; 240Mich342, 215NW291; 247 Mich298, 225NW488; 114Nebr522, 208 NW630; 115Nebr761, 215NW99; 118 Nebr612, 225NW761; 29PortoRico 874.

1257-36 170Ark1194, 281SW657; 121 Kan451, 247P856.

1257-37 205 Iowa557, 218NW264; 39 Wyo 46, 270P163. [a] 337 Ill 498, 169 NE328.

1257-38 80CalA538, 252P638; 78Colo 36, 238P59; 164Ga650, 139SE413; 236 Mich345, 210NW248; 240Mich342, 215 NW291; 114Nebr522, 208NW630; 115 Nebr761, 215NW99; 118Nebr612, 225 NW761; 119 Or277, 241P46.

1257-39½-New. , or to show that defendant was a bona fide purchaser of a note and mortgage. 240Mich419, 215 NW362.

1257-39½-New. A recital in a contract for exchange of realty, that it was made subject to examination and approval of

property represented as stated therein, is not evidence that no other representations were made. 85Colo9, 273P653.

1257–39¼–New. Fraud may be proved by circumstantial evidence and inference. Or 291P352.

1257–40 [a] 213Ala173, 104S530; 80CalA724, 252P770; 242Mich568, 219NW655.

1257–42 197Cal396, 240P1010; 198Cal46, 243P657; 122Kan607, 253P230; 214Ky179, 282SW1106. [b] (1) 198Cal46, 243P657.

1257–43 214Ky179, 282SW1106.

1257–45 122Kan755, 253P556; 214Ky179, 282SW1106; 123Okl284, 253P75; 122Okl301, 254P979.

1258–46 123Okl284, 253P75.

1258–46½–New. The jury's finding that one purchasing property from plaintiff's husband had notice of plaintiff's claim to the property when purchasing rendered immaterial whether the jury's finding that the husband deeded the property to a purchaser in payment of preëxisting debt was supported by the evidence. TexCivA 15SW(2d)57.

1258–47 TexCommnA 24SW(2d)354; TexCivA 25SW(2d)212.

1258–52½–New. whether a conveyance was procured by a fraudulent promise to marry; TexCivA 19SW(2d)89.

1258–53½–New. ; whether defendant was intoxicated before suit to extent of being "out of his mind" alleged as excuse for failure to offer restoration before suit. 160Ga801, 129SE49 (directed verdict held error).

1258–54 51ND1, 198NW546, 548 [cit CJ]. See also 80CalA724, 252P770.

1258–56½–New. fraud in procuring execution of a deed, 161Ga417, 131SE74.

1258–57 163Ga734, 137SE260; TexCommnA 25SW(2d)597; TexCivA 296SW902.

1258–57½–New. Ownership and validity of a bill of sale are questions of fact in an action to set aside a bill of sale by the first party. 173Ark1181, 292SW669.

1258–58½–New. damages; 87CalA262, 262P61(2dcase).

1258–59 TexCivA 16SW(2d)325(2dcase).

1258–59½–New. and upon other questions. 136Okl180, 276P732.

1258–59⅓–New. Whether the trustee named in a deed of trust planned to gain an advantage over the creator of the trust is a question of fact for the trial court. 198Cal46, 243P657.

1258–59¼–New. Where substantial breach of contract is shown, direction of verdict is proper. 153Md655, 139A534; 79Mont327, 256P497.

1258–59⅓–New. Evidence has been held sufficient to show the execution of a contract for exchange of property as a matter of law. TexCivA 16SW(2d)325(2dcase).

1258–60 123Okl284, 253P75.

1258–62 163Ga666, 136SE904; 164Ga650, 139SE413 (instructions held proper); 167Ga537, 146SE170; 122Kan755, 253P556; TexCivA 9SW(2d)1049 (instruction held sufficient). [a] **Instructions held misleading.**–TexCivA 281SW331. [b] **Instruction defining "undue influence"** as some power or control which "in some measure" destroys free agency is erroneous. TexCivA 281SW331. [c] **Instructions held properly refused.**–127Kan682, 275P185.

1258–63 163Ga666, 136SE904; 163Ga899, 137SE561.

1258–64 161Ga55, 129SE769; 163Ga666, 136SE904; 163Ga899, 137SE561; 165Ga724, 142SE96 (evidence held sufficient to authorize instruction on question of fraud); 169Ga734, 151SE506; 127Kan682, 275P185 (instruction on fraud held authorized by evidence).

1258–65 TexCivA 281SW331.

1258–68 163Ga553, 136SE526.

1259–70 163Ga899, 137SE561; TexCivA 248W(2d)786.

1259–72½–New. An instruction as to the manner in which undue influence may be exercised is of doubtful propriety. TexCivA 281SW331.

1259–72⅓–New. The court may properly instruct that undue influence may be established by circumstances. TexCivA 281SW331.

1259–72¼–New. The court should not enumerate the circumstances which may constitute undue influence. TexCivA 281SW331.

1259–72½–New. The court may properly charge that blood relationship, appeals to affection, advice, and ministration of a son to his mother should not alone be construed as evidence of undue influence. TexCivA 281SW331.

1259–72¾–New. Where the evidence shows the falseness of an allegation of fraud, the court must direct the verdict for defendant. 103Conn302, 130A377 (in action to cancel lease on ground of fraud in its procurement).

1259–73 70CalA98, 232P763; 256Mass169, 152NE367.

1259–74 TexCivA 280SW247 (finding held equivalent to finding that purported indorsement of notes was forged). [b] **Particular findings construed.**–93CalA214, 269P555. [c] **Finding held sufficient** to show that defendant in action to cancel deed never had obtained manual possession of deed at specified time. CalA 288P117.

1259–75 114Nebr563, 208NW669.

1259–76 107Conn124, 139A631 (finding that transaction was loan held proper); 163Ga666, 136SE904; 264Mass303, 162NE334; 247NY145, 159NE891. [a] **Value of equity.**–144Okl192, 291P15. [b] **Payment of taxes.**–144Okl192, 291P15.

1259–78 Mo 30SW(2d)146 (finding held to show that court considered defendant's payments). [a] (2) Other findings held sufficient to cover issues. 126Kan705, 271P395. [c] (2) Other instances. Mass 170NE42. [g] **Findings as to nonactionable representations** are immaterial. 82CalA532, 255P854.

1259–80½–New. A conclusion of law that the law was with plaintiff was sufficient upon which to base a valid judgment for plaintiff. 88Ind548, 164NE709.

1260–81 81CalA295, 253P328 (judgment construed as adjudicating rescission); 85Colo9, 273P653; 166Ga847, 144SE654; NJ 147A490; 116Tex1, 285SW1063, 1070 [citCJ]; 200Wis43, 227NW298. [c] **Court will administer equity** though complainant has not offered to do equity. 6F(2d)43. [d] **Sufficiency of pleadings and proof** in action to cancel deeds and for possession are determinable by rules of practice in ejectment. TexCommnA 291SW876.

1260–82 168Minn227, 209NW507.

1260–83 15F(2d)292; 155Md230, 141A531. [a] **In suit to cancel deed not intended to take effect until grantor's death** court cannot decree transfer of property with life estate back. 83Mont214, 271P433.

1260–83½–New. The court cannot apportion property and must either sustain deeds or nullify them. 202Iowa246, 210NW91.

1260–83⅓–New. Failure of a decree, canceling a deed, to recite that property is subject to mortgages does not invalidate the decree where the holders are not parties. Mo 23SW(2d)155.

1260–84 [a] **Decrees held good in form and substance.**–263Mass206, 161NE243 (cancelling mortgage and mortgage deed).

1260–85 [a] **Judgment annulling contract** and granting recovery of balance due is erroneous as granting inconsistent remedies. TexCivA 285SW631.

1260–86 163La880, 113S133.

1260–86½–New. Judgment setting aside a deed to the extent only of authorizing execution on judgments against the grantor has been held not error. 192NC552, 135SE452.

1260–86⅓–New. Absolute voluntary deed to husband and wife procured by husband's misrepresentation will be canceled as to both where wife knew that absolute gift was not intended. Mo 30SW(2d)146.

1260–89 234Mich689, 209NW88; 168Minn227, 209NW507.

1261–96 136Wash302, 239P837, 1119.

1262–2 78CalA536, 248P779 (in action by infant disaffirming); 12La619, 126S923; 129Misc612, 222NYS315; TexCivA 294SW894. See also 132Misc480, 230NYS116.

1262–4 TexCivA 294SW894.

1262–5 73CalA643, 238P1085; Cal 292P1073; 232Mich251, 205NW155; 129Misc612, 222NYS315; 137Misc883, 244NYS82; 156SC203, 152SE878; TexCivA 291SW296; TexCivA 6SW(2d)147; TexCivA 294SW894. [b] (6) Other instances. SD 226NW734.

1262–6 156SC203, 152SE878 (compensatory damages must not be more than value of instrument).

1263–8 232Mich522, 205NW589.

1263–9½–New. or order conveyance of outstanding municipal claims purchased by defendant, pending cancellation of a fraudulently obtained deed, 215Ala205, 110S384.

1263–12½–New. Rescission may be granted vendee in possession under a deed although judgments have been rendered against vendee in the meantime, where the court adequately protects the vendor against harm therefrom. 203Iowa480, 212NW933.

1263–12⅓–New. An action by one, upon arriving at his majority, to cancel a guardian's deed and other conveyances to his land given during his minority, and for an accounting for rents and profits, is an equitable action, and the relief to which he is entitled is not limited by a statute stating the rule for recovery for wrongful occupation of real property. 135Okl243, 275P335.

1263–12¼–New. Where a bill, instituted for the purpose of securing cancellation of an instrument defining boundaries, contains a prayer for general relief, the chancellor may enter a decree constituting in effect a refusal to cancel the instrument, and construing it as executed between the parties so as to establish the boundaries in accordance therewith. 151Miss771, 119S592.

1263–13 [a] (1) TexCivA 19SW(2d)89.

1264–18 163La880, 113S133.

1264–20 163La880, 113S133; 168Minn227, 209NW507.

1264–22 181Ark463, 26SW(2d)587; 246Mich10, 224NW334.

1265–40 242Mich139, 218NW664.

1266–44 137Misc888, 244NYS82.

1266–50 78CalA536, 248P779.

1266–51 See also 135Wash605, 238P572, 573 [citCJ].

1266–55½–New. In action for damages for fraud in sale of stock in which holder of notes for price sought foreclosure of lien on stock decree canceling notes and revesting title in plaintiff is erroneous. MoA 25SW(2d)566.

1266–58 242Mich568, 219NW655 (adjustment of items not restored may be had as incident to accounting). But see 340Ill57, 172NE25.

1267–62½–New. It is improper to permit a purchaser, on payment of an additional consideration, to retain land conveyed to him for a grossly inadequate consideration by one who was subnormal mentally. 234Mich689, 209NW88.

1267–62⅓–New. Where a mortgage is canceled, each party is entitled to be placed in his original position. 51SD447, 214NW844.

1267–62¼–New. Decree failing to provide for return of property to defendant is erroneous. 80CalA91, 251P654.

1267–62⅙–New. A man operating a woman's farm for their joint maintenance and support, in consideration of illicit relations with her and her oral promise that the property would go to him on her death, occupied no fiduciary and confidential relation entitling him to equitable relief in an action by her to cancel the deed to him and recover possession of the property. 83Mont214, 271P433.

1267–62⅚–New. Whether defendant in a suit to cancel a deed and recover possession of property is entitled to wages for the time he worked the property cannot be considered in the absence of agreement as to wages, where his services were to be compensated for by title to the property on plaintiff's death, and the deed was not executed with the required testamentary formalities. 83Mont214, 271P433.

1267–63 33Ariz374, 265P84; 51ND869,

201NW165, 167 [citCJ].
1267-68 130 Or255, 279P542, 69ALR 951. [c] (2) Grantee failing to perform agreement to support grantor in consideration of conveyance of ranch is not entitled to recover value of services in keeping up ranch. 81Mont382, 263P 967.
1268-72 114Nebr839, 211NW173.
1268-73 Ark 30SW(2d)823.
1269-87½-New. Where a conveyance is set aside for nonperformance by the grantee of an agreement for support and maintenance, he is not entitled to recover money paid to a home for such support. 172Minn145, 214NW769.
1270-97 TexCivA 30SW(2d)596.
1271-5 43 Ida675, 256P529.
1271-7 [a] (3) In action to cancel deed of gift of oil royalty on ground of mistake of scrivener in describing land, court may require execution of deed covering land intended to be described as condition precedent to granting relief sought. 169Ark299, 274SW6. (9) Where conveyance in consideration of support of grantors is canceled, decree should be conditioned on assumption by grantors of loan secured by grantee, proceeds of which were received by grantors. 142Miss641, 107S885. (10) On cancellation of mortgage on property of bank which bank assigned, assignee is entitled to return and foreclosure of mortgage assigned to bank as part of transaction. 51SD447, 214NW844. (11) On cancellation of deed given by client to attorney in consideration of legal services with agreement for reconveyance on payment thereof, purchaser from attorney charged with constructive notice is entitled to reimbursement of principal debt with interest. 82CalA 758, 256P248. (12) In action to cancel exchange of property, purchasers from defendant should be protected only to amount paid where it was much less than value of property. 242Mich130, 218NW671. (13) In suit by defrauded transferee of land contract to set aside transfer and recover property transferred in exchange, plaintiff should account for payments received on land contract where transfers are set aside. 246Mich10, 224NW334. (14) In action to set aside conveyance, where accounting is necessary, relief is granted on condition of payment to defendant of amount found due him on accounting. NJCh 147A43 [aff NJ 147A44].
1271-17½-New. Rescission of contract results from judgment of cancellation. 117 Okl 199, 246P225.
1271-17⅓-New. Cancellation of a deed from a widow to her daughter as forgery merely restores rights reserved to the widow under a prior division deed. 222Ky370, 300SW878.
1271-17¼-New. A decree canceling a quitclaim deed to an undivided one-half interest has been held not limited to a one-quarter interest by reason of the repetition of the words "an undivided one-half interest." Mo 23SW(2d)155.
1271-20 170Ga615, 153SE763. [a] **Costs held recoverable.**-137Misc888, 244 NYS82.
1272-32 198Cal 46, 243P657; 136Wash 378, 240P9. [c] **Findings as to mental incapacity.**-198Cal 46, 243P657.

CANDIDATE

1273-5 126 Or630, 270P768 [citCJ].

CANVASS

1274-43 230Ky566, 20SW(2d)458 (canvass of election returns).

CAPACITY

1275-69 But see 35Man433, [1926] 1 DomLR689, [1926] 1WestWkly426.

CAPITAL

1278-34 [a] (4) Profits realized upon sales held not to belong to life tenant as income. 128Misc577, 219NYS619.
1278-36 [a] (1) 214Ala539, 108S343. (2) 214Ala539, 108S343.

CAPITAL STOCK

1280-74 75CalA471, 242P1078, 1081 [citCJ].

CAPTAIN

1281-82 See also 5LaA504.

CAPTATION

1282-85 163La458, 112S298. [a] (1) 163La458, 112S298. [b] La 112S289. [c] 163La458, 112S298.

CARD CLOTH

1285-31½-New. The leather or india rubber backing of a card; hence "card clothing." 12CustA557.

CARE

1287-62½-New. Care and control of public shade trees does not mean that it shall be officers' duty to do all manual labor upon them that may reasonably be required. 102Conn571, 129A524.
1289-94 [a] **"Due care"** is care commensurate with the danger. Minn 232 NW712.

CARELESSLY

1291-26 213Ky356, 281SW164.

CARPET

1293-69 [a] **"Chenille carpet."**-10CustA 254.

CARRIAGE

1295-87 254Mass208, 150NE167; 178 NC399, 100SE693, 694 [quotCyc]; 21Pa Dist914 [rev on other grounds 54PaSuper97].

CARRIERS

10 C. J.-37-1 [a] **Other definitions.**-197Cal 627, 242P486.
37-2 42 Ida169, 186, 244P149 [quotCJ].
37-4 TexCivA 276SW347, 349 [citCJ]. See also 132 Okl 134, 269P1082. [a] **Test** as to whether one is common carrier is whether he holds himself out that he will, so long as he has room, carry for hire persons or goods brought to him for that purpose. TexCivA 276 SW347. [b] **Statutory definitions.**-65 Utah457, 238P237, 42ALR849.
37-8 65Utah457, 238P237, 42ALR849.
37-9½-New. **"Transportation company"** is defined by statute in some jurisdictions. 119 Or484, 250P213, 51ALR816.
38-13 42 Ida169, 186, 244P149 [quot CJ].
38-14 42 Ida169, 186, 244P149 [quot CJ].
38-17 6F(2d)29; 24F(2d)226, 228 [quotCJ]; 199 Ind217, 156NE513; 153 Md297, 138A29, 56ALR1042; 85Mont 11, 277P437; 34 OhA416, 171NE255; 119 Or484, 250P213, 51ALR816. [e] 6F(2d)883. [f] **Lumber company owning railroad** held subject to state regulation as common carrier. 6F(2d)29. [g] **One delivering oil** in employer's tank on his own truck on commission basis is not "carrier for hire." 51SD50, 211 NW804. [h] **Making of separate contracts is not conclusive,** though it will be considered in determining whether person is private or public carrier. 40 Wyo 462, 278P542.
38-18 181Ark522, 27SW(2d)96(2dcase). [b] **Legislature cannot compel him to become common carrier** so as to be subject to regulations which are applicable only to common carriers. 50RI 37, 144A891.
38-18½-New. Private carriers are not subject to the provisions of an act regulating motor transportation. 119 Or484, 250P213, 51ALR816.
38-18⅓-New. A private carrier cannot be converted into a common carrier by legislative feat. 31Ariz297, 252P1011; 119 Or484, 250P213, 51ALR816.
38-18¼-New. The state may not, by mere legislative fiat, through orders of a commission, convert private contracts of private business into a public utility and make the owner a common carrier. 65Utah457, 238P237, 42ALR849.
38-20 241NY413, 150NE500.
38-21 38GaA304, 143SE789 (ordinary diligence).
39-31 [a] **One may be engaged** in one line of business as common carrier and in another as private carrier. 4F(2d) 826.
39-32 4F(2d)826.
39-33½-New. An express contract for a carrier's services made before rendition of services does not make the carrier a private carrier. 140Wash613, 250P 49.
39-35 6F(2d)29; 16F(2d)517; 24F(2d) 226, 228 [citCJ]; 199 Ind217, 156NE 513; 153Md297, 138A29, 56ALR1042; 241NY413, 150NE500; TexCivA 4SW (2d)641; 151Wash372, 275P726. [a] (3) "Common carrier" is public utility or servant, required to extend its services to all who request it and place themselves within lawful rules and regulations governing its use and operation. CalA 269P728. (5) 42F(2d)775. (31) Other instances. 85Mont11, 277P437. [b] **Individual,** as well as corporation, may be held to liability of common carrier. 285Pa273, 132A364. [c] **Business necessarily involving public interest** is required to constitute one a common carrier. 241NY413, 150NE500. [d] **Delivery carrier.**-244 IllA522. [e] **Other elements than fact of transportation** are necessary to constitute common carrier. 120 Ohl, 165NE355.
40-36 [b] **Common carrier is such by virtue of his occupation** and not by virtue of responsibilities which he assumes. 275US207, 48SCt141, 72L ed241.
40-36½-New. Neither possession of the right of eminent domain nor the exercise thereof is essential to constitute a common carrier if it can acquire its right of way by purchase. 213Ky795, 281SW 1013.
40-37 42 Ida169, 186, 244P149 [quot CJ]; 118 OhSt95, 160NE623; 93Pa Super210. [a] **In determining status as common carrier,** court will rely not upon whether it was authorized to be such, but upon whether it elected to act as common carrier. 6F(2d)29.
40-37½-New. Legislature cannot by legislative fiat convert property used exclusively in business of private character into a public utility, or make the owner a public character. 42 Ida169, 244P149.
41-38 213Ala102, 104S21; 181Ark522, 27SW(2d)96(2dcase); 241NY413, 150 NE500; 90PaSuper373; 65Utah457, 238 P237, 42ALR849; 40Wyo 462, 278P542. [d] **Carrier cannot avoid status** as common carrier by insisting on private contracts with shippers. 6F(2d)29. [e] **Holding out that it is ready, willing, and able** to do business for all that may see fit to employ it up to capacity of facilities is necessary. 241NY413, 150NE 500. [f] **Railroad exercising right of eminent domain** and holding out to public that it will operate as common carrier cannot thereafter contend that it is not common carrier because it has never operated as such. 46 Ida256, 267P439. [g] **Concern carrying only its own products** is not a common carrier. 42F(2d) 775.
41-41 23F(2d)198; 213Ky795, 281SW 1013; TexCivA 276SW347.
41-42½-New. To constitute one a common carrier, he must be engaged in a business involving a public interest. 241 NY413, 150NE500.
41-42⅓-New. The test of a public carrier is determined by the business actually carried on and not by secret intention or mental reservation of the owners or operators. 140Wash613, 250P 49.
41-43 140Wash613, 250P49.
45-74 213Ala102, 104S21; 49SD197, 207NW92.
45-78 Va 153SE865.
45-82 113 OhSt93, 148NE584.
46-86 TexCivA 48W(2d)641.
46-87 [a] **Owner of motor trucks used partly in his own business** and partly for hire to public is common carrier. 115 Oh512, 154NE795.
46-96½-New. That an incorporated railroad only carries a particular kind of freight for a single customer does not change its character as a common carrier. 169Ark552, 275SW896.
46-96⅓-New. A logging railroad is not a common carrier merely because it exercises the right of eminent domain. 48 Idal, 279P298, 67ALR580.
47-13 90Fla721, 106S576; 260Mass541, 156NE698; 218AppDiv782, 218NYS516.
47-16 260Mass541, 156NE698.
47-17½-New. A railroad hauling freight over its tracks from one indus-

trial track to another is a common carrier whether part of the tracks are owned by itself or the shippers. 170 Ark1174, 283SW36.

48-25½-New. Operation of motor busses or coaches and carrying passengers for hire between municipalities has been held to constitute transporting passengers for hire as a business between fixed and regular termini within Gen. L. c 159 § 45, requiring a license. 253 Mass178, 148NE590.

48-26 11LaA170, 123S144(2dcase).

48-27 219MoA294, 269SW654.

49-32 17F(2d)857.

49-34 285Pa273, 132A364.

49-35 [c] **Auto transportation companies regulated by statute** held to cover individual engaged in hauling commodities for public generally on agreed terms and prices. 24F(2d)226.

49-39 181Ark522, 27SW(2d)96(2dcase). [c] 49RI 329, 142A613.

49-40½-New. An armored automobile carrying a bank messenger with money from bank to bank is not a truck or trailer engaged in commercial freighting on regular time or route within the License Law. 164Minn430, 205NW270.

50-42½-New. A truckman, under contract with the United States government to transport special general order merchandise from docks to a bonded warehouse designated by the importer, is a common carrier. 125Misc400, 211NYS 205.

50-43 See also 90Fla721, 106S576. But see 93PaSuper210.

50-45 216MoA561, 260SW129 (loss of bill of lading and failure to forward goods held negligence).

51-59 TexCivA 13SW(2d)983.

51-65 [a] **Company transporting oil for others for hire as well as its own oil is common carrier.** 129 Okl 166, 264P 160.

52-76½-New. [§ 36a] Q. **Lumber Companies Operating Railroads.** A lumber company operating a railway is not required to haul freight for others unless it makes itself a common carrier. 213 Ky795, 281SW1013.

52-76⅓-New. [§ 36a] Q. A lumber company possessing extensive powers to operate a railway may become a common carrier although it is not incorporated as such. 213Ky796, 281SW1013 (what acts make it common carrier).

52-77 197Cal 627, 242P486; 90Fla721, 106S576. See also 96Fla591, 118S731, 60ALR1072.

52-78 [a] **State cannot by legislative fiat** transmute private carrier into public carrier. 197Cal230, 240P26. [b] **Street railway, as competing carrier,** may sue to restrain operation of bus line without franchise. 220Ky728, 295SW1055.

52-80 273US45, 47SCt298, 71Led530; 24F(2d)226 (statute held constitutional); 181Ark522, 27SW(2d)96(2dcase); 90Fla721, 106S576; 96Fla295, 117S869, 59ALR324; 254 IllA149 (intrastate shipment governed by state uniform bills of lading act); 220Ky424, 295SW 419; 153Md297, 138A29, 56ALR1042; 126 Okl 227, 259P552, 56ALR1049; Tex CivA 299SW478 (statute imposing regulation held not ambiguous and sufficient to maintain criminal prosecution); Va 153SE865 (statutes and decisions of particular state control). [b] **Purpose of regulating private carrier** using public highways for transportation of property is to secure adequacy, regularity, and reliability of service and reasonableness of rates and charges therefor. 197Cal 230, 240P26. [c] **In Arkansas.**-6F(2d)29. [d] **Though contract, customs or practices of carriers may be binding between parties,** such agreement is subject to state's paramount power of regulation of carrier's business. 90Fla721, 106S576. [e] **Power is confined to matters materially affecting public interest.**-90Fla 721, 106S576.

53-82 90Fla721, 106S576.

53-83 90Fla721, 106S576; TexCivA 299 SW478.

53-84 126 Okl 227, 259P552, 56ALR 1049; TexCivA 299SW479 (held not to violate constitutional provision).

53-85 [a] (2) **California Auto Stage and Truck Transportation Act does not deny equal protection of law to private carriers engaged in transportation of property of others for compensation over public highways.** 197Cal 627, 242P486. [a] (3) Oklahoma statute regulating use of highways by motor carriers through limitation of use to public convenience and necessity does not deny equal protection of laws. 126 Okl 227, 259P552, 56 ALR1049.

53-85½-New. the abridgment of rights or privileges of citizens, 126 Okl 227, 259 P552, 56ALR1049 (statute regulating use of highways by motor carriers through limitation of use to public convenience and necessity held valid).

53-86 See also 148Wash521, 269P 802. [a] 126 Okl 227, 259P552, 56 ALR1049. [e] **Charges against bus line held not illegal** because based on seating capacity and weight. 220Ky116, 294SW 1080.

53-87 273US45, 47SCt298, 71Led530; 90Fla721, 106S576.

53-88 317 Ill 278, 148NE47.

53-90 44Philippine111.

53-96½-New. to make certain requirements in the operation of trains, for protection of railroad employees, in all intrastate operations, not imposing unreasonable burdens upon interstate commerce. 115 Oh477, 154NE790.

53-99½-New. , or requiring a steamship company to maintain particular schedule of sailing dates. 44Philippine 363.

53-1 [a] (2) Under Washington statute no certificate is necessary for transportation of farm products from place of production to market or for hauling freight under special contract or for hauling merchandise belonging to transporter. 144Wash481, 258P31.

54-7½-New. Legislature may regulate the use of highways by common carriers of persons or property, there being no vested right in highways. 209Ky40, 272 SW18.

54-7⅓-New. Private as well as common carriers are subject to regulation with respect to the use of public highways for their own business. 168Minn190, 209 NW872.

54-7¼-New. The state has power completely to prohibit the use of its highways by a common carrier. 197Cal 627, 242P486.

54-7½-New. The state has like power in respect to private carriers. 197Cal 627, 242P486. [a] **Reason for rule** is that such carriers are making private use of highways which are owned and paid for by public and are open alike to all persons. 197Cal 627, 242P486.

54-7⅚-New. An unreasonable regulation, more burdensome to the carrier than beneficial to the public, is not contemplated in statutory powers. 90Fla 721, 106S576.

54-7⅞-New. A statute requiring transportation of live stock at minimum speed held unreasonable as not consistent with safe railroading. 82Colo 509, 261P864, 55ALR1285.

54-7⅞-New. A statute regulating transportation companies is not unconstitutional as impairing the obligation of a contract in the form of a certificate of convenience issued to a carrier. 37 Wyo 488, 263P621.

54-7⅞-New. Assertion by state of its power to regulate cannot be prevented or postponed by a common carrier making contracts for future transportation. 85Mont11, 277P437.

54-9 90Fla721, 106S576; 96Fla295, 117 S869, 59ALR324; 170Ga873, 154SE439; 220Ky424, 295SW419; 44Philippine363 (power to regulate sailing dates of carriers by water); 108TexCr619, 2SW(2d) 449.

54-13 245 IllA83; 88PaSuper26. But see 143Miss805, 109S868.

54-14 90Fla721, 106S576.

54-14½-New. Public service commission is a public office and public service commissioners are public officers. 21 AlaA245, 107S38.

54-16 [a] **Orders of board cannot be enforced if violative of constitutional protection of property rights.**-90Fla721, 106S576.

54-20 90Fla721, 106S576; 96Fla591, 118S731, 60ALR1072; 167Ga902, 147SE 370; 335 Ill 70, 166NE466 (power to fix reasonable intra-state rates); 245 IllA83; 127Misc841, 217NYS614; 121 Okl 40, 247P74; 88PaSuper26. [a] (6) Ohio public utilities commission is without jurisdiction of application for certificate of convenience for motor service wholly within municipality. 113 OhSt 677, 150NE39. [a] (7) Under general code provisions, commissioner has no authority to require use of air or power brakes on pusher engine in connection with brake system controlling train. 115 Oh477, 154NE790. [k] **Facts held insufficient to show abandonment,** warranting revocation of certificate of convenience for motor transportation service. 113 OhSt650, 150NE37. [l] **In Mississippi** railroad commission has no implied power. 143Miss805, 109S868. [m] **Regulation of terminal companies,** by providing rules as to receiving, handling, and checking of baggage, is within commission's powers. 90Fla721, 106S576. [n] **Proceeding upon petition for refund of excess** under straight demurrage rate over average demurrer rate to which shipper was entitled under proposed agreement has been held within jurisdiction of commission. 194Wis 24, 215NW442. [o] **Power to investigate, hear, and decide questions of overcharges, and make appropriate orders** permitting and authorizing, but not attempting to compel, railway company to refund amount of overcharge, held inferred upon commission. 194Wis24, 215 NW442. [p] **Power to authorize reparation.**-195Wis462, 218NW724. [q] **Grant of certificate** (1) to operate line without pick-up held proper. 117 Oh95, 158NE182. (2) Grant held proper where new operators were barred from service at points covered by protestant. 116 Oh740, 158NE171. [r] **Private carrier cannot be regulated by railroad commission.** 181Ark522, 27SW(2d)96 (2dcase). [s] **Co-ordination of bus and street railroad fare zones.**-NJSup 144A 623.

55-21 21F(2d)4, 20 [citCJ].

55-21½-New. State statute authorizing the state railroad and warehouse commission to fix joint rates has been held by implication to authorize the commission to fix a division by such rates. 21F(2d)4.

55-22 127Misc841, 217NYS614.

55-24 44Philippine363. [a] **Where evidence is conflicting,** findings will not be disturbed if reasonably supported by testimony. 44Philippine363. [b] **Whole tenor and trend of modern legislation** is to vest public utility commission with power to regulate and control operation of public utilities under reasonable rules and regulations in interests of public. 44Philippine363. [c] **State highway commission** may exercise discretion in issuing certificates of public convenience and necessity to transportation companies. 138SC337, 136SE481. [d] **Court will not interfere** with discretion of state highway commission in issuing certificate of public convenience and necessity for transportation company unless abused. 138SC337, 136SE481.

55-26-27 90Fla721, 106S576; 118Kan 673, 236P831 (rules have force and effect of statute); 121 Okl 40, 247P74; 127 Okl 240, 260P468; 44Philippine363. [b] **In Philippines.**-44Philippine363. [c] **Where commission has no jurisdiction,** its decree is nullity. 127Misc841, 217 NYS614. [d] **All orders made by commission** are within rule. 127 Okl 240, 260P468.

55-26-27½-New. Under California Public Utilities Act jurisdiction is lodged exclusively in the supreme court to review orders of the commission. 194 Cal 146, 228P19.

55-26-27⅓-New. **Application** to change, extend, or shorten a route, or to increase or decrease the number of vehicles employed in motor transportation service under a certificate issued by the commission, can only be heard by the commission in accordance with the notice required by Gen. Code § 614-91. 113 OhSt93, 148NE584.

55-26-27¼-New. **Michigan public utilities commission** has jurisdiction of operation of motor vehicle common carriers in the country, and in country and

cities and villages, but not those in cities and villages exclusively. 235Mich85, 209NW146.

55-26-27½-New. Commission has no jurisdiction of motor busses operating in two contiguous cities. 235Mich85, 209NW146.

55-26-27¼-New. Certificate may not be granted to motor transportation company to operate in territory already served by company to which certificate has been granted, except upon proof of inadequacy of the service. 115OhSt47, 152NE25.

55-26-27½-New. and after existing operator has been given not less than sixty days to provide the service required. 115OhSt47, 152NE25.

55-26-27¼-New. A statute is not unconstitutional as vesting an arbitrary discretion in a commission where the discretion vested in it is controlled and guided by the relation of the facts found by it to the public convenience and necessity. 197Cal627, 242P486 (California Auto Stage and Truck Transportation Act).

55-26-27⅒-New. In Ohio public utilities commission is given exclusive power of supervision and regulation of motor transportation companies, operating over routes or parts of a route outside municipalities. 115OhSt47, 152NE25.

55-26-27⅒-New. It is error for the commission to refuse to consider any evidence proving inadequacy of existing service. 115OhSt47, 152NE25.

55-26-27 1/11-New. Construction of particular powers of commission. 115Nebr856, 215NW138; 127Misc841, 217NYS614; 116OhSo, 155NE694.

55-26-27 1/12-New. An injunction restraining a common carrier of freight by motor trucks from engaging in intrastate commerce without a certificate of convenience and necessity is not in violation of a state constitution. 82Colo456, 261P1.

55-26-27 1/13-New. nor is it in contravention of the Federal Highway Act. 82Colo456, 261P1.

55-26-27 1/14-New. Public utility commissioners may, in the proper case, refuse to rescind a bus line restriction similar to a restriction rescinded on another line. 102NJEq371, 140A795.

55-26-27⅒-New. Granting of an application to extend existing bus lines is discretionary with the public utilities commission. 117Oh290, 158NE543, 60ALR199.

55-26-27⅒-New. Authority to extend a bus line overlapping existing bus routes should not be granted. 117Oh290, 158NE543, 60ALR199.

55-26-27½-New. Complaints to railroad commission against carrier. Filing an informal complaint before formal complaint did not avoid effect of limitation statute. 207Cal123, 277P324.

55-26-27⅒-New. A shipper's letter to the railroad commission setting forth a demand for a refund has been held not a complaint. 207Cal123, 277P324.

55-26-27⅒-New. Failure to serve a copy of a complaint on a carrier does not prejudice the rights of complainant. 207Cal123, 277P324.

55-26-27⅒-New. Rules as to the form may be waived. 207Cal123, 277P324.

55-26-27 1/21-New. Findings by the state corporation commission that rates fixed by it are just, reasonable, and nondiscriminatory, will be sustained if supported by substantial and satisfactory evidence. 33NM638, 275P93.

55-29 TexCivA 283SW250.

56-30 TexCivA 283SW250.

56-31 TexCivA 283SW250.

56-34 17F(2d)857; 235IllA151; 217MoA31, 273SW410.

56-35 [a] 235IllA151.

56-36 17F(2d)857; 235IllA151; 121Kan275, 246P1005; 159La946, 106SA434; 217MoA31, 273SW410; 222MoA195, 280SW1050 (action for delay in interstate shipment); MoA 300SW324; 117Okl113, 245P600; 124Or598, 265P408. See also 132Misc563, 230NYS298.

57-38 95Fla114, 116S48.

57-39½-New. The Transportation Act is intended to regulate interstate and foreign commerce and to affect intrastate commerce only incidentally. 89Fla419, 104S602, 39ALR1362.

57-39½-New. Agents or persons acting for a carrier are bound by congressional regulations. 20F(2d)459.

57-39¼-New. A switching railroad and a coal-carrying railroad, separated by a distance of about twelve miles, with all communication by rail between the two properties being effected over tracks of a terminal railroad including a bridge over the Mississippi River, were not under the common control and management of, and operated as a single system within the meaning of, the Interstate Commerce Act. 279US461, 49SCt384, 73Led798.

57-39⅓-New. A carrier entering a bona fide denial of excess operating income is not liable for interest on recapture payments prior to final order. 279US461, 49SCt384, 73Led798.

57-39⅓-New. The commission is required to fix the general level of rates before excess earnings are recapturable. 279US461, 49SCt384, 73Led798.

57-39½-New. Failure of the commission to consider the present value of property for the purpose of recapture is error. 279US461, 49SCt384, 73Led798.

57-39½-New. The actual situation underlying shipment controls in applying acts of congress, not recitals in shipping documents. 31F(2d)951.

57-39⅙-New. The interstate commission has authority, under the Interstate Commerce Act, to remove unjust discrimination against interstate commerce, and to that end may control intra-state rates. 335Ill70, 166NE466.

57-39 1/10-New. The Interstate Commerce Act is remedial. 226AppDiv187, 234NYS454.

58-62 273US45, 47SCt298, 71Led530; 31Ariz297, 252P1011; 208Cal677, 284P663 (public transportation companies); 44Philippine363 (rule invoked as to public utilities in general). See also 155Tenn59, 290SW386. [c] **Term "transportation company"** in California Auto Stage and Truck Transportation Act applies to private carrier engaged as business in transporting property by auto truck for compensation over public highways between fixed termini and over regular route, but solely under private contract. 197Cal230, 240P26. [d] **Under California Auto Stage and Truck Transportation Act** private carrier, subject thereto without consent of railroad commission, cannot raise rates, or discriminate as to rates, or transport for less than established tariff rates. 197Cal230, 240P26. [e] **Carrier, required to file** schedule of routes, tariffs, and charges, who is obliged to render service of kind, character, and quality prescribed by railroad commission, who is restricted as to contracts for service, is subject to disabilities and limitations which circumscribe a common carrier. 197Cal230, 240P26. [f] **Regulation of private carrier** under California Auto Stage and Truck Transportation Act is cognate and germane to regulation of business of common carrier engaged in like transportation. 197Cal230, 240P26. [g] **Adoption by reference in California Auto Stage and Truck Transportation Act** of procedural provisions of Public Utilities Act does not render former act inapplicable to private carriers. 197Cal230, 240P26. [h] **Private carriers.**—State may place private carriers under control of commission, but cannot compel them to become common carriers. 31Ariz297, 252P1011. [i] **Local transfer company is not carrier under statutory authority** of railroad commission and cannot be made agent of terminal company by commission's regulations. 90Fla721, 106S576. [j] **Under Pennsylvania Public Freight Motor Vehicle Law** dairy company operating motor trucks to transport milk from producers to its plant is common carrier where it purchases f. o. b. its plant and deducts cost of transportation from purchase price. 150Md641, 135A136. [k] **Authority to determine whether carrier is common carrier** may be delegated to commission. 115Oh512, 154NE795. [l] **Carriers operating under private contracts** of carriage are not subject to public regulation unless such carriers hold themselves out as willing to serve public indiscriminately. 120Ohl, 165NE355. [m] **Corporation in sand business is not a common carrier** and not subject to regulation of its contracts providing for carriage. 13LaA240, 126S560.

58-62½-New. The business of an operator of a single passenger automobile for hire was held not a "public utility" subject to orders of the commission. 20F(2d)271.

58-62½-New. Aircraft regulation. Minimum altitudes of flight prescribed are applicable alike under state law to interstate and intrastate commerce. 41F(2d)929.

58-62¼-New. Aircraft regulations. Regulations established by Secretary of Commerce have force of law. 41F(2d)929.

58-62½-New. Aircraft regulations. Regulations should not be condemned until having fair and adequate trial. 41F(2d)929.

59-70½-New. Where the Interstate Commerce Act provides for notification of consignee and delivery on surrender of original receipt, special instructions on the shipping tag are not binding. 220MoA989, 272SW76.

59-70½-New. Where special instructions would nullify rules of the interstate commerce commission, an express company is not liable for the mistake of its agent in making them. 220MoA989, 272SW76.

59-71½-New. Union depot companies are subject to regulation. 90Fla721, 106S576.

59-72½-New. A private motor carrier, operating over public highways between fixed points in the transportation of commodities for hire, is a motor carrier within the meaning of the Oklahoma statute, although it does not operate under fixed schedules and conducts business under separate contracts. 126Okl227, 259P552, 56ALR1049.

59-72¼-New. A verbal promise on the part of the holder of a certificate of convenience, to transfer it to another at a future date, is not enforceable, without approval of the commission. 113OhSt650, 150NE37.

59-72¼-New. Under the amendment of 1819 to the California Auto Stage and Truck Transportation Act, the jurisdiction of the railroad commission was extended to private carriers when engaged in the business of transportation companies as there defined, and subjected such private carriers to the burdens imposed by the acts. 197Cal627, 242P486.

59-72½-New. A statute requiring auto transportation companies operating as common carriers over public highways between fixed termini or over a regular route to obtain a certificate of public convenience and necessity does not apply to a transfer company hauling household goods over an extensive area and over routes varying in accordance with the exigencies of the occasion. 168Minn190, 209NW872.

59-72½-New. The word "fixed" as used in such statute denotes predetermination, establishment, and degree of constancy. 168Minn190, 209NW872.

59-72½-New. The state has power to impose the burdens and limitations of such act on common carriers using the public highways for the transaction of their business in the transportation of persons or property for hire. 197Cal627, 242P486. [a] **Reason for rule** is that such carriers are using public highway for their private business. 197Cal627, 242P486.

59-72¼-New. The state has like power in regard to private carriers who engage in the business of transportation for hire over the public highways. 197Cal627, 242P486.

59-72½-New. By such act the state offers to grant the special privilege of using public highways to private carriers upon condition that they submit to regulations imposed, and refuses to

grant such privilege unless they submit. 197Cal 627, 242P486.

59–72 1/10–New. Under such act the commission has jurisdiction to order a carrier to cease operating under private contracts with shippers in the transportation of freight by motor trucks without procuring a certificate of public convenience and necessity where it appears that such carrier is operating between fixed termini or is operating over a regular route. 197Cal 627, 242P486.

59–72 1/11–New. Under such act, a finding by the commission that a private carrier of freight by motor trucks is operating between fixed termini or over a regulate route is subject to review although the statute provides that the finding shall be final and not subject to review. 197Cal 627, 242P486.

59–72 1/12–New. Such review cannot extend beyond the inquiry as to whether or not there is some substantial evidence to sustain the finding. 197Cal 627, 242P486. [a] **Evidence sufficient to sustain findings.**–197Cal 627, 242P486.

59–72 1/13–New. A finding by the commission as a basis for an order requiring a carrier to obtain a certificate of public convenience and necessity has been construed as a negative finding on the issue as to whether the carrier was operating as a common carrier although the commission did not expressly find on such issue. 197Cal 627, 242P486.

59–72 1/14–New. Application for a motor transportation certificate must contain a map of the proposed route, required by statute, whether for a regular or an irregular route. 116 Oh710, 157NE382.

59–72 1/15–New. On filing such application the commission is not required to give a written notice of the filing or hearing to other transportation companies operating over proposed territory. 116 Oh710, 157NE382.

59–72 1/16–New. An applicant for such certificate need only publish notice of filing of the application in a newspaper of general circulation in the county to and from which the carriage is proposed. 116 Oh710, 157NE382.

59–74 See also 96Fla591, 118S731, 60 ALR1072.

59–75 44Philippine363; 100Vt443, 138 A782. [c] (2) Rule requiring furnishing of cars held applicable to shipment of wheat. 118Kan673, 236P831. [h] **Regulation as to sailing schedule.**–44Philippine363.

59–76 [c] **Permitting coal bins along right of way.**–213Ky376, 281SW490, 44 ALR1522.

60–81 100Vt443, 138A782. [e] **Cab stand.**–14F(2d)257.

60–82 1/2–New. Statutes which impose penalties for failure to furnish cars on written demand are constitutional. Tex CivA 272SW250.

61–1 24F(2d)226; 31Ariz297, 252P 1011; 219Ky254, 292SW811; 150Md 641, 135A136; 153Md297, 138A29, 56 ALR1042; 103NJL570, 138A110. [d] **California Auto Stage and Truck Transportation Act** is not regulation of use of highways. 197Cal 230, 240P26. [e] **Right of common carrier** to use public highways for his business is mere privilege or license which legislation may grant on such conditions as it chooses to impose. 197Cal 230, 240P26. [f] **Conditional offer of special privilege** in use of highways given by California Auto Stage and Truck Transportation Act requires offeree to submit to conditions, regulations, and restrictions therein. 197Cal230, 240P26. [g] **State may require reasonable quid pro quo** for privilege of transacting private business over public highways and such is effect of California Auto Stage and Truck Transportation Act. 197Cal 230, 240P 26. [h] **Coöperative marketing company transporting farm products** held required to secure license. 153Md297, 138 A29, 56ALR1042. [i] **Requiring tax** held not to connect private carrier to common carrier. 153Md297, 138A29, 56 ALR1042. [j] **Apportionment of license tax.**–Where there is more than one express company doing business in municipality, tax must be equally divided between companies. 219Ala476, 122S 639.

62–4 TexCivA 299SW479. [c] **Motor vehicle private license law** is construed not to be retroactive so as to require higher tax from one paying tax for entire year of its passage. 140Miss404, 105S852.

62–5 1/2–New. In some jurisdictions statutes of general scope require licenses from local authorities for use of motor vehicles for transportation of passengers for hire. 254Mass28, 149NE628.

62–5 1/3–New. Such statutes are not rendered inapplicable to railway company operating busses by Spec. St. [1918] c 188. 254Mass28, 149NE628.

62–5 1/4–New. St. [1919] c 371 § 4, conferring power on street railway to operate busses, subject to other provisions of act including license by local authorities, did not exempt from local licenses street railway company incorporated under previous special act. 254Mass28, 149 NE628.

62–5 1/5–New. Spec. St. [1918] c 188 § 11 does not authorize operation of busses without licenses from local authorities. 254Mass28, 149NE628.

62–7 [f] **Statute expressly excluding vehicles carrying under five passengers** except as to certain fees does not deprive such vehicles from statutory exemption from local license tax under another act. 212Ky225, 278SW575.

63–19 1/2–New. Where a railroad protesting the grant of a certificate of convenience and necessity to a motor transportation route itself took a longer and less convenient route, the commission's certificate for the motor route held proper. 116 Oh741, 158NE92.

63–19 1/3–New. Certificate of convenience and necessity is revocable license which confers no property rights to holder and may be revoked, altered, or amended by the commission. 113 OhSt83, 148NE581.

63–19 1/4–New. The right to revoke certificate of convenience and necessity applies equally to certificate issued on affidavit prior April 28, 1923, and to certificate issued on application thereafter. 113 OhSt83, 148NE581.

63–19 1/5–New. Order revoking, altering, or amending a certificate of convenience and necessity may be entered upon good cause shown upon notice. 113 Oh83, 148 NE581.

63–19 1/6–New. Regulations of public passenger motor vehicle law have been declared reasonable and statute constitutional. 149Md30, 129A884.

63–19 1/7–New. Where an order grants permission to operate busses, such order implies a finding on the issues favorable to petitioner. 98Vt477, 129A 175.

63–19 1/8–New. No provision of auto transportation act of Kentucky except section 19, providing for payment of fees, is applicable to any motor vehicle having a carrying capacity of five persons or less. 209Ky40, 272SW18.

63–19 1/9–New. Statutes and ordinance regulating operation of jitney busses contemplate supervision by municipality and that permits issued are personal to grantee. 98NJEq7, 129A704.

63–19 1/10–New. Carrying capacity as used in statute refers to seating capacity of cars as operated. 209Ky40, 272SW 18.

63–19 1/11–New. Neither the owner of the cab causing injury nor the surety may deny that a motor vehicle covered by statutory bond is operated under the statute. 143Wash570, 255P930.

63–25 1/2–New. A regulation which is expressly prospective must not be given retroactive application. 136Wash389, 240P362.

63–27 1/2–New. Company operating under statute may sue to restrain unlawful competition. 209Ky40, 272SW18.

63–27 1/3–New. Injunction would not lie to restrain commission from preventing operation of motor vehicles in violation of law, such prevention not a taking of property without due process of law. 149Md30, 129A884.

63–27 1/4–New. In an action to restrain the commissioner from preventing operation of motor vehicles in violation of law, evidence is admissible to show that complainant formerly operated under the required permit. 149Md30, 129A 884.

63–27 1/5–New. In such action evidence is admissible to show previous conviction of complainant for a violation of some statute. 149Md30, 129A884.

63–27 1/6–New. Injunction may be continued until compliance with valid provisions for operation of motor vehicles. 47RI 19, 129A613.

63–27 1/7–New. **Proceedings to enforce or review particular regulations.** 273US625, 47SCt489, 71Led807; 8F(2d)635; 15 F(2d)509; 100NJEq185, 135A284; 130 Misc303, 223NYS398; 142Wash594, 254 P245; 144Wash219, 257P634; 103WVa 173, 136SE833.

63–27 1/8–New. The operator of an automobile for hire, suing to enjoin the public utilities commission from enforcing orders, has been held without remedy at law. 20F(2d)271.

63–27 1/9–New. An interstate carrier, which has not offered to comply with valid provisions of the State Transportation Act, has been held not entitled to enjoin enforcement. 20F(2d)182.

63–27 1/10–New. Complaint may be filed with the commission by a minority stockholder of a railroad, and on proper showing secure revision of joint intra-state rates and division thereof, 21 F(2d)4.

63–27 1/11–New. and this must be done before judicial relief can be granted. 21 F(2d)4.

63–27 1/12–New. An order granting a franchise may not be reversed unless manifestly unfair. 117 Oh95, 158NE182.

63–27 1/13–New. Injunction will issue to restrain the operation of motor vehicle transportation for hire of freight and express between fixed points over established routes within the state by a company as a common carrier which has not first obtained a certificate of public convenience and necessity from the public service commission. 82Colo 456, 261 P1 (evidence held sufficient to show company engaged in intra-state business).

63–27 1/14–New. Such an injunction, if enjoining a carrier from engaging in interstate commerce within the state, is inoperative to that extent. 82Colo 456, 261P1.

63–27 1/15–New. Where such carrier is also engaged in interstate commerce, the injunction against engaging in intrastate business is not an interference with interstate commerce. 82Colo 456, 261 P1.

63–27 1/16–New. Acting as common carrier without certificate required by law may be enjoined. 34 OhA198, 170NE 184.

63–27 1/17–New. In suit by Public Utilities Commission to enjoin defendants from employing their trucks as common carriers, burden is on plaintiff to prove that defendants were actually engaged as common carriers. 34 OhA416, 171 NE255.

63–30 [a] **Carrier's failure to appeal** from state commission's decision, holding lower rates reasonable, held not waiver of right to resist enforcement of subsequent separation order. 271US124, 46SCt447, 70Led865.

64–38 96Fla591, 118S731, 60ALR1072.

65–43 1/2–New. The rule exempting a carrier for failure to divert shipment unless caused by negligence of its employee is void and illegal under the Carmack Amendment. 163Ga494, 136 SE418, 61ALR1304.

65–50 233 IllA109.

66–52 17F(2d)423; 213Ala108, 104S 33; 181Ark522, 27SW(2d)96(2dcase); 119 Oh381, 164NE427 (duty unaffected by controversy with shipper); 119 Or 484, 250P213, 51ALR816; TexCivA 283 SW186; 147Wash630, 267P506 (interstate carrier cannot renounce its intrastate business and cease to do business in state).

66–53 17F(2d)423.

67–65 221MoA338, 273SW424 (refusal to transport alleged beer into dry state).

67–66 [a] (6) Question whether certain beverage is "beer" or not justifying refusal to transport held, on conflicting evidence, for jury. 221MoA338, 273SW 424.

68-77 17Minn205, 214NW17; TexCivA 283SW647.

68-79½-New. Loading live stock. Carrier is not required to transport stock where defective manner of loading is patent. 33GaA705, 127SE878.

68-83½-New. Shipment may be refused if conditions prevent delivery at destination. TexCivA 318SW(2d)868.

70-14 [a] Form of action.—Trespass is proper form of action. 88PaSuper501. [b] Claim arises out of contract with society and not with shipper. 88Pa Super501.

70-20 [a] Excessive charge.—214Ala472, 108S212.

71-31½-New. A carrier receiving a shipment cannot set up deception by appearance as a defense to an action for refusal to ship beverage into a dry state. 221MoA338, 273SW424.

71-33 [c] Evidence to show discrimination held insufficient. 162La487, 110S729.

71-35½-New. Trial. In an action arising from an unjustifiable demand for storage charges, a refusal to instruct the jury that storage charges are presumed to be reasonable is not error. 214Ala472, 108S212.

71-35½-New. Whether beverage which a carrier refused to ship into a dry state was beer and was properly iced and preserved until examined is for the jury. 221MoA338, 273SW424.

71-35¼-New. Whether a shipment of beer into a state was unlawful when the carrier refused if is for the jury. 221 MoA338, 273SW424.

72-51 Fla 126S771, 41GaA794, 154SE809; 217AppDiv83, 216NYS545; TexCommA 300SW35.

72-52 Ark 318SW(2d)290; 217AppDiv 83, 216NYS545.

72-53 217MoA314, 274SW90; 217MoA 662, 274SW935, 938 [citCJ]. [a] Common-law duty requires carrier to provide sufficient cars for transportation, without unreasonable delay, of the usual and ordinary quantity of freight offered to it or which might reasonably be expected. 218MoA314, 274SW90.

72-54 218MoA314, 274SW90 (declaratory of common law); 217MoA662, 274 SW935, 938 [citCJ]. [b] Duty not absolute under Interstate Commerce Act. 218MoA314, 274SW90.

72-55 TexCivA 272SW250 (penalty statutes are constitutional).

72-57 217MoA662, 274SW935.

72-58 [a] (2) Factor in possession and preparing shipment could sue carrier for not furnishing car within time. 41 GaA794, 154SE809. [b] Basis of liability.—217MoA662, 274SW935.

72-59 218MoA314, 274SW90.

73-59½-New. Where a carrier's local agent agrees with a shipper to furnish cars for a shipment of live stock on a certain day and directs the shipper to have his stock there on such day, the shipper is entitled to recover damages caused to such stock by failure of the carrier to provide cars in accordance with the agreement. 113 Okl 232, 241P 135.

73-61 Fla 126S771.

73-63 [a] Measure of obligation.—93 Fla161, 112S66 (proper measure of carrier's obligation is generally determined by amount of freight ordinarily carried in normal times).

73-64 93Fla161, 112S66 (carrier is not bound to furnish means of transportation other than such as it owns and uses or holds out to public on its own route for that purpose).

73-65 93Fla161, 112S66; Fla 126S771; 162La487, 110S729.

74-70½-New. A carrier may show inability to furnish cars at the time demanded without suffering undue interference with its general business. 93 Fla161, 112S66.

74-74 93Fla161, 112S66 (question whether company permitted its cars to be in service of another carrier and they were unavoidably out of reach is for jury).

74-75 See also 93Fla161, 112S66.

74-77 See also 93Fla161, 112S66.

75-84½-New. It is well settled that a carrier in order to be excused from liability to shipper for failure to furnish cars on the date requested must give notice to the shipper of such inability. 218MoA314, 274SW90.

75-84⅓-New. The carrier is liable for failure to furnish cars or timely to notify shipper of its inability to do so notwithstanding invalidity of the contract to furnish cars as discriminatory. 232Mich538, 205NW477.

75-84¼-New. That the carrier owned no cars but used cars of another company does not excuse its negligent failure to furnish cars. TexCivA 274SW 247.

75-84⅓-New. That the shipper did not adopt a more expeditious method of loading has been held not a bar to recovery. 217Ky439, 289SW1094.

75-87 118Kan673, 236P831 (notice held insufficient); 162La487, 110S729.

75-88 118Kan673, 236P831 (notice held sufficient); 162La487, 110S729.

75-88½-New. Rules sometimes require the destination to be stated. 118Kan 673, 236P831.

75-89½-New. Verbal orders for cars to be valid under interstate commerce tariffs rules must be confirmed by the shipper to the carrier's agent and cannot be confirmed by the carrier's agent receiving them to another of the carrier's agents. 237Mich406, 212NW84.

75-90½-New. But a carrier cannot waive an interstate commerce tariff rule requiring orders for cars to be made in writing. 237Mich406, 212NW 84.

75-90⅓-New. Nor is failure to give a written notice waived by failure of the carrier to give notice thereof as a defense under state practice. 237Mich406, 212NW84.

75-92 118Kan673, 236P831.

75-98 [a] (1) MoA 276SW1041.

75-99 [a] (2) Other instances. 41GaA 794, 154SE809.

75-1 [a] (4) Petition alleging railroad's failure to furnish cars to remove coal held to state cause of action. 217Ky297, 289SW237.

76-2 Fla 126S771.

76-3 [a] (3) 49ND191, 190NW776.

76-7½-New. A pleading upon an express contract to furnish cars is insufficient as showing discrimination. 232 Mich538, 205NW477.

76-9½-New. Interstate commerce commission, not the court, has power to determine suit relating to distribution of cars. 217Ky439, 289SW1094.

76-12 [a] (4) Shipper must prove breach of duty in not furnishing refrigerator car, as proximate cause of injury, where defendant never had custody of goods damaged, failure to deliver such car being cause of injury. 148Md465, 130A346.

76-13 [c] Published tariffs are admissible as contract or important element thereof. 93Fla161, 112S66.

76-14 [a] (2) Evidence sufficient to show that cars were wanted for interstate shipment. 237Mich406, 212NW84. [b] (2) 118Kan673, 236P831. (7) 113 Okl 232, 241P135. (14) To show breach of contract to furnish car. 113 Okl 232, 241P135. (15) To show that failure to furnish cars as agreed was not excused. 113 Okl 232, 241P135. (16) To show plaintiff's ability to deliver cattle within time he made demand for car. TexCivA 272SW250. (17) To show shipper had wheat to ship when order for car was given. 118Kan673, 236P831. (18) To show shipper's ability to deliver cattle to railroad within time he demanded cars. TexCivA 272SW250. (19) To show no negligence as to furnishing cars. MoA 276SW1041. [c] (6) To show negligence of express company in failing to furnish refrigerator car as requested. 148Md465, 130A346. [e] Procuring car by bribery is not proof that shipper was able to furnish car to another shipper. 168Ark804, 271SW 464.

76-14½-New. Instruction has been held properly refused. 41GaA794, 154 SE809.

77-16½-New. Car shortage has been held not to excuse delay of thirty-six days where cars were furnished to shippers in nearby towns. 118Kan673, 236 P831.

77-18½-New. That plaintiffs loaded their stock with knowledge that federal government had applied for restraining order against shopmen's strike is not proper matter of defense in an action for delay in furnishing stock cars, defended on the ground that the delay was caused by strike of defendant's shopmen. 218MoA314, 274SW90 (properly stricken out).

77-18½-New. That stock was shipped under a written contract exempting defendant from liability for delays on account of strikes is not a proper matter of defense in an action against the carrier for delay in furnishing cars. 218MoA 314, 274SW90.

77-18¼-New. That plaintiff failed to give notice to carrier before removing injured live stock from car is not proper matter for defense in an action for delay in furnishing cars. 218MoA314, 274SW90.

77-18⅓-New. In the absence of timely notice a shipper has the right to assume that the stock cars would be furnished at the time requested, and is justified in bringing his stock to defendant's station at such time for shipment, 218 MoA314, 274SW90.

77-18⅙-New. and that the shipper knew of the existence of a strike of the carrier's shopmen would not be notice to him of defendant's inability to furnish cars. 218MoA314, 274SW90.

77-18½-New. Under such circumstances the defense that the cars were not delivered within a reasonable time because of a strike of the carrier's shopmen was not available to the carrier. 218MoA314, 274SW90.

77-18⅙-New. Instructions on liability for failure to furnish cars held erroneous. 168Ark804, 271SW464.

77-18⅙-New. While the question of negligence is usually for the jury, 148 Md465, 130A346.

77-18 1/10-New. yet, when controlling facts are unmistakably established and fail to show any unreasonable delay in furnishing refrigerator car, it becomes a question for the court. 148Md465, 130A346.

77-18 1/11-New. State practice does not prevent a defense that an order for cars was not given in writing as prescribed by interstate commerce tariff rules where intended shipment was interstate. 237Mich406, 212NW84.

77-18½-New. What constitutes loose and unsatisfactory instructions, in an action for delay in providing cars. 217 AppDiv83, 216NYS545.

77-18⅓-New. Prevention to furnish cars under contract by matters outside the carrier's control is no defense. MoA 276SW1041.

77-21½-New. Where goods had no market value at point of shipment, market price at nearest point might be shown. 232Mich538, 205NW477.

77-27½-New. In an action for damages for unreasonable delay in furnishing stock cars for an interstate shipment, the measure of damages is the difference between the market price at the place of destination when the shipment should have arrived and when it did arrive plus the reasonable expense incurred because of the delay. 217MoA662, 274SW 935.

77-33 148Md465, 130A346 (express company); 296Pa441, 146A98(2dcase); TexCivA 88SW(2d)247; 101Vt56, 140A 491. [c] Shipper cannot recover on theory cars were inaccessible in absence of written request for cars. NC 154 SE390. [e] Where shipper of fruit furnishes caretaker to look after heat protection carrier is relieved from liability for damages arising from want of heat or directly and solely from use of heaters. 164Minn68, 204NW566. [f] Duty to inspect while in transit.—TexCivA 8 SW(2d)247 (shipment of cotton linters).

78-34 134Misc223, 234NYS727; 101Vt 56, 140A491.

78-40 146Va475, 131SE827. [a] Absent written request required by tariff, shipper is not entitled to recover for carrier's failure to furnish sufficient cars. NC 154SE390.

78-43 93Fla161, 112S66 (whether prop-

erly equipped for normal demand is question for jury).
78-44 93Fla161, 112S66 (question of existence of unprecedented demand not reasonably to be anticipated is for jury).
79-49 **TexCivA** 275SW406 (duty to provide facilities absolute).
79-51 127 **Okl** 106, 260P26; **TexCivA** 278SW478. [b] **Duty may be delegated to another**, but no extra charge is allowable for receiving or delivering stock. **MoA** 22SW(2d)201.
79-56 127 **Okl** 106, 260P26.
79-57 127 **Okl** 106, 260P26.
81-78 127 **Okl** 106, 260P26, 29 [citCJ].
81-81 But see 220**MoA**989, 272SW76.
82-88 220**MoA**989, 272SW76 (owner of express receipt); 197**Wis**316, 222NW232.
82-89 But see 220**MoA**989, 272SW76.
82-90½-New. Express company is not liable for a mistake of an agent in violating rules of the interstate commerce commission. 220**MoA**989, 272SW76.
82-91 37**GaA**729, 731, 141SE678 [cit CJ]; 197**Wis**316, 222NW232. See also 86**PaSuper**443. [a] 214**Ky**658, 283SW1013. [b] **Route embargoed against certain traffic** cannot be said to be available to shippers tendering such traffic. 30F(2d)901.
83-1 217**AppDiv**675, 216NYS186; **Tex CivA** 286SW559.
83-1½-New. In the absence of a specific routing, the carrier must ship by the cheapest and most available route and charge the lowest applicable rate. 216**Ala**89, 112S323.
83-1½-New. Any reasonable routing to a point as to which tariff contains no restrictions is applicable. 216**Ala**89, 112S323.
83-1¼-New. A carrier issuing its own bill of lading or directing shipment is bound by the terms thereof. 216**Ala**89, 112S323.
84-5 216**Ala**637, 114S295; 11**LaA**348, 123S355; 220**MoA**743, 276SW409 (strike held no excuse for noncompliance with reconsignment order). [f] **Division order of goods to be shipped over designated route** sets routing of car at large and imposes on carrier duty to forward without unnecessary delay, though diversion order contained words "gallow billing." 69**CalA**669, 232P169. [g] **Under rules of interstate commerce commission**, requiring written request for diversion of interstate commerce shipment, shipper cannot recover for carmen's failure to divert on oral request. 175**Ark**126, 298SW881.
85-11½-New. A shipper's agent taking possession at the original destination does not thereby ratify the carrier's action in failing to divert on the shipper's instructions. 11**LaA**348, 123S355.
85-14 23F(2d)307; 172**Ark**898, 291SW431; 35**GaA**438, 134SE122; 49**ND**191, 190NW776; 26 **OhA**96, 159NE487 (perfection not required).
85-15 159**La**9, 105S82 (initial carrier furnishing leaky car is liable as warehouseman failing to use ordinary care); **TexCivA** 8SW(2d)247. [a] **TexCivA** 293SW593.
86-18 But see 27 **OhA**188, 160NE730.
86-19 23F(2d)307; 35**GaA**438, 134SE122. [d] **Icing cars.**—144**Va**154, 131SE245. [e] **Potatoes** are perishable within meaning of interstate commerce perishable protective tariffs. 237**Mich**406, 212NW84. [f] **Construction of tariff rule providing for furnishing of refrigerator cars.**—179**Ark**516, 16SW(2d)1001.
86-20½-New. However, the duty is limited under the Interstate Commerce Act and published tariffs to furnishing such car when available with reasonable diligence, at the time and place desired only upon a written request. 148**Md**465, 130A346.
86-26 **MoA** 21SW(2d)1.
86-27 **MoA** 21SW(2d)1. [a] **Recovery limited to reasonable amount.**—**MoA** 21SW(2d)1.
87-32 See also **Va** 155SE630.
87-32½-New. In some jurisdictions it is held that the carrier is not liable for the condition of cars furnished by the consignor unless the defective condition is reasonably apparent from inspection. 37 **OklACR**272.
87-34 **TexCivA** 293SW593.
87-40 **TexCivA** 277SW191.
87-41 7**LaA**105, 109 [quotCJ]; **Tex CivA** 277SW191, 193 [quotCJ].
87-42 **TexCivA** 277SW191, 193 [quot CJ].
87-43 **TexCivA** 277SW191, 193 [quot CJ].
88-47 7**LaA**105, 109 [quotCJ].
88-49 1**LaA**434; 128**Mc**118, 131A145; **TexCivA** 286SW478; 147**Va**415, 137SE496.
89-59 But see **TexCivA** 118SW(2d)335.
89-63 144 **Okl** 216, 291P107.
89-68 **TexCivA** 286SW478.
91-82 But see **TexCivA** 277SW191.
92-96 [a] **Failure to inform of delicate character of goods** relieved carrier from liability for care greater than that necessary in transporting goods of ordinary value and perishability. 92 **PaSuper**180.
92-96½-New. A carrier is not liable for damages or loss of goods from a car while the car is stopped in transit and is in possession of a part owner of the property and is being loaded by him pursuant to an understanding with his associates. 118 **Okl** 87, 246P626.
92-98 279**US**363, 49**SCt**374, 73**Led**739 (carrier may contract to have duty performed by independent contractor); 172 **Ark**1017, 291SW428; 260**Mass**541, 156NE698; 220**MoA**1316, 297SW440, 442 [citCJ]. But see 6**LaA**7.
92-99 174**Ark**10, 294SW357.
92-1½-New. Although delay in delivery is due to the absence of a bill of lading, the carriers while in possession of perishable fruit are required to exercise ordinary care to see that it is properly iced. 174**Ark**10, 294SW357.
93-2 [a] (2) Custom of switching carrier of doing no re-icing held no defense though known to consignee. 260**Mass**541, 156NE698.
93-3 220**MoA**1316, 297SW440, 442 [cit CJ].
93-7 248 **IllA**193.
93-7½-New. , or well established custom known to shipper did not require re-icing except upon shipper's order. 254 **IllA**149.
93-10½-New. The custom of a switching carrier to make no inspection and do no icing, of which consignee had notice, is not a defense to an action for loss where actual delivery was not made. 260**Mass**541, 156NE698.
93-13 71**CalA**42, 234P328 [citCJ]. [b] **Suit on contract requiring ventilation** and imposing greater duty than imposed by law will be construed as action in contract, and not in tort. 71**CalA**42, 234P328.
93-13½-New. **Heat.** While the shipper is under no duty to place an agent in charge of perishable goods requiring heat for their preservation, 149**Md**1, 130A63.
93-13¾-New. where the shipper does place an agent in charge of perishable goods to see that the cars are properly heated, he is responsible for any loss caused by the agent's neglect of duty, at least in the absence of a showing that the carrier knew of such neglect. 149 **Md**1, 130A63.
93-14 **TexCivA** 208SW(2d)260.
93-16 234**Mich**505, 208NW746; **Tex CivA** 278SW478; **TexCivA** 286SW478; 147**Va**415, 137SE496.
94-17 181**Ark**192, 25SW(2d)28; **Tex CivA** 286SW478.
94-18 [a] (1) See also 86**PaSuper**88. [b] **Evidence held to make prima facie case** of negligence and damages in injuries to stock. **Wash** 287P665. [c] **Evidence held to sustain finding** of negligent delay in shipment of cattle. **Tex CivA** 278SW(2d)608.
94-18½-New. A carrier is not liable for shrinkage not caused by negligence or in excess of that caused by exercise of ordinary care. **TexCivA** 283SW294.
94-18¾-New. Where live stock cars should be placed in train. **Or** 292P89 (not within authority of shipper's caretaker to request place).
94-26 [c] **Jerking or jamming must have been accompanied with unusual severity** in order to constitute negligence. 45 **Ida**313, 262P873.
94-28½-New. Carrier placing live stock cars at end of dead freight train at caretaker's request held bound to exercise care commensurate with increased hazard. **Or** 292P89.
94-29 42 **Ida**193, 244P580; **Iowa** 231NW353; 6**LaA**369.
95-32 **MoA** 15SW(2d)901.
95-36½-New. A railroad company holding cattle at a resting point awaiting the shipper's orders has at least as great responsibility in caring for them as an ordinary bailee for mutual benefit. **Utah** 263P195.
95-36¾-New. In such case the liability of the carrier as such immediately attaches on request by the shipper's caretaker to move the cattle forward. **Utah** 263P495.
95-44 218**MoA**633, 267SW74, 76 [cit CJ]; **TexCivA** 17SW(2d)473. See also 224**AppDiv**508, 231NYS424. [d] (1) See also **TexCivA** 32SW(2d)369.
96-45 217**AppDiv**83, 216NYS545; **Tex CivA** 18SW(2d)733.
98-72 217**AppDiv**83, 216NYS545.
99-74 217**AppDiv**83, 216NYS545.
99-78 11**LaA**445, 123S504, 506 [quot CJ].
102-12 **Iowa** 231NW353; 132 **Okl** 281, 270P15, 16 [quotCJ].
102-17 132 **Okl** 281, 270P15, 16 [quot CJ].
102-18 132 **Okl** 281, 270P15, 16 [quot CJ]
102-19 132 **Okl** 281, 270P15, 16 [quot CJ].
102-21 132 **Okl** 281, 270P15, 16 [quot CJ].
102-23½-New. No relation of trust or confidence exists between the carrier and the shipper making the carrier liable for giving inaccurate information concerning quarantine regulations. 147**Va** 415, 137SE496.
102-23¾-New. **Where dipping vat had been closed to public** under proceedings to abate nuisance, shipper could not require carrier to deliver cattle to dipping vat. 167**La**505, 119S530.
102-27½-New. Failure of the carrier to comply with the caretaker's request to remove dead cattle is not negligence unless the request is made to the proper authority. **TexCivA** 6SW(2d)418.
102-29 **NC** 154SE390.
103-30 170**Ark**469, 280SW18.
104-42 127 **Okl** 106, 260P26, 29 [cit CJ]; 144 **Okl** 216, 291P107; **TexCivA** 278SW478 (gates of pens). [f] **No duty rests on shipper** to repair defective gates of pens. **TexCivA** 278SW478.
104-46 **LaA** 129S419; 127 **Okl** 106, 260P26, 29 [citCJ]. But see **Miss** 118S900.
104-48 [a] (2) Other instances. **LaA** 129S419.
104-49 See **Utah** 263P495, 499 [citCJ].
105-51½-New. Under regulations of the interstate commerce commission, a carrier's employees, when unloading and caring for mules until the arrival of the shipper's agent, are the agents of the shipper where the shipper had no agent at the place of destination on arrival of the shipment. 153**Miss**628, 121S265, 62**ALR**521.
105-52 33**GaA**705, 127SE878, 881 [cit CJ].
106-58 33**GaA**705, 127SE878, 881 [cit CJ].
107-67 35F(2d)582.
107-67½-New. It is not the carrier's duty to cause shipment of corn to be reconditioned during transit where overheating was not due to the carrier's fault but to inherent character of the corn. 120**Kan**484, 244P240.
109-82 89**Fla**224, 104S593; 36**GaA**573, 137SE569; 42 **Ida**193, 244P580, 582 [cit CJ]; 233 **IllA**1; 202 **Iowa**1008, 209NW744; 149**Md**1, 130A63; 219**MoA**62, 265SW851; 221**MoA**478, 282SW97; 129**Misc**305, 221NYS298; 134**Misc**223, 234NYS727; **TexCivA** 278SW478; **TexCivA** 283SW647; 147**Va**304, 137SE507; 147**Va** 290, 137SE515; 148**Va**48, 138SE467, 53 **ALR**990; **Va** 153SE865. [a] 167**La**111, 118S822.

109-86 TexCivA 278SW478.
109-87 NJSup 145A316(2dcase); Tex CivA 278SW478.
109-89 42F(2d)272; 42 Ida193, 244P580, 582 [citCJ]; 233 IllA1; 202 Iowa1008, 209NW744; 149Md1, 130A63; 260Mass541, 156NE698; 221MoA478, 282SW97; 220MoA1189, 299SW93; Okl 292P52; TexCivA 282SW919; 147Va304, 137SE507; 147Va290, 137SE515.
109-90 TexCivA 12SW(2d)1070.
109-91 170Ark1174, 283SW36; 124Me373, 129A823.
110-95 178Ark334, 10SW(2d)515; 31OhA533, 166NE428; TexCivA 29SW(2d)905 (invalidity of contract is no defense).
110-98 202 Iowa1008, 209NW744; 26OhA96, 159NE487, 489 [quotCJ].
110-99½-New. To warrant a refusal to receive a damaged shipment of goods from the carrier, they must be unfit for ordinary purposes. 86 IndA67, 154NE32.
110-99¾-New. It is a common-law duty of the carrier to protect property from ordinary weather condition. TexCivA 283SW647.
110-99¼-New. Care taken by a shipper to guard its property does not lessen the carrier's burden of care. 21F(2d)406.
110-1 Va 153SE865.
110-6 59 OntL252, [1926] 4DomLR360.
110-11 148Va48, 138SE467, 53ALR990.
110-12 148Va48, 138SE467, 53ALR990.
111-13 [d] **Liability of defendant contracting to transport by automobile truck load of household goods and furniture is presumed same as that of common carrier, under statute, in absence of express limitations in contract.** 11LaA469, 123S406.
111-14 Ala 127S824; 177Ark1018, 9SW(2d)17; 89Fla224, 104S593; 36GaA573, 137SE569; 42 Ida193, 244P580; 233 IllA1; 202 Iowa1008, 209NW744; 149Md1, 130A63 (dictum); 129Misc305, 221NYS298; 35 OhA291, 172NE425; TexCivA 276SW347; TexCivA 276SW790; TexCivA 283SW647; 147Va304, 137SE507; 147Va290, 137SE515; 148Va48, 138SE467, 53ALR990.
111-15 TexCivA 276SW790.
112-17 168Ark908, 271SW977 (fire caused by lightning).
112-18 36GaA573, 137SE569.
112-23 177Ark1018, 9SW(2d)17.
113-28 234Mich614, 208NW679, 681 [quotCJ].
113-34 89Fla224, 104S593; 42 Ida193, 244P580; 233 IllA1; 202 Iowa1008, 209NW744; 149Md1, 130A63 (dictum); 35 OhA291, 172NE425; TexCivA 276SW347; TexCivA 283SW647; 147Va304, 137SE507; 147Va290, 137SE515; 148Va48, 138SE467, 53ALR990.
114-42 17F(2d)411; 21F(2d)406; 149Md1, 130A63; 221MoA478, 282SW97; 35 OhA291, 172NE425; TexCivA 283SW647; 101Vt427, 144A194; Va 155SE630; 147Va304, 137SE507; 147Va290, 137SE515; 148Va48, 138SE467, 53ALR990.
114-45 129Misc305, 221NYS298; TexCivA 276SW347. [b] (7) Delay of forty-eight hours in removing freight. 235 IllA151.
115-49 149Md1, 130A63, 65 [quotCJ].
115-51 See also 149Md1, 130A63, 65 [quotCJ] (bananas).
115-54 226Ky813, 11SW(2d)953.
115-57 92PaSuper180 (fragile goods). [b] **Estoppel to assert facts contrary to representation** is ineffective if resulting in enforcement of contract limiting liability, or where only one rate applies. Va 153SE865.
116-63 Va 153SE865.
116-66 134Misc223, 234NYS727.
117-69 Va 153SE865.
117-73½-New. Where bills of lading described the shipment as high explosives, the railroad had notice, as matter of law, of the nature of the shipment. 21F(2d)396.
117-78 92PaSuper180.
117-79 92PaSuper180.
118-80 92PaSuper180.
119-84 TexCivA 29SW(2d)905.
119-86 Va 153SE865.
119-92½-New. Consignee is not liable for acts of an independent contractor delivering goods to the carrier. 21F(2d)396.
120-97 171Minn205, 214NW17.
120-2 217Ky399, 289SW226.
120-4 But see 220MoA989, 272SW76 (where express company's agent was not agent of shipper on addressing package).
121-14 11LaA469, 123S406 (overloading).
121-15 142Wash675, 254P248; 195Wis78, 217NW927.
121-17 235Mich399, 209NW182; 35OhA291, 172NE425; TexCivA 283SW647.
121-21 195Wis78, 217NW927.
121-24 42 Ida193, 244P580; 202 Iowa1008, 209NW744, 747 [citCJ]; 120Kan484, 244P240, 243 [quotCJ]; 129Misc305, 221NYS298; 35 OhA291, 172NE425; TexCivA 276SW790; TexCivA 283SW647; 101Vt427, 144A194; 147Va304, 137SE507; 147Va290, 137SE515, 517 [quotCJ].
122-25 202 Iowa1008, 209NW744; 120Kan484, 244P240, 243 [quotCJ]; 149Md1, 130A63 (bananas); 26 OhA96, 159NE487; 147Va290, 137SE515, 517 [quotCJ]; 148Va48, 138SE467, 53ALR990 [quotCJ]. But see 221MoA478, 282SW97.
122-26 120Kan484, 244P240, 243 [quotCJ]; 98PaSuper123; 147Va290, 137SE515, 517 [quotCJ].
122-27 120Kan484, 244P240, 243 [quotCJ]; 147Va290, 137SE515, 517 [quotCJ].
122-27½-New. 120Kan484, 244P240.
122-28 120Kan484, 244P240, 243 [quotCJ]; 147Va290, 137SE515, 517 [quotCJ].
122-29 120Kan484, 244P240, 243 [quotCJ]; 147Va290, 137SE515, 517 [quotCJ].
122-30 120Kan484, 244P240, 243 [quotCJ]; 147Va290, 137SE515, 517 [quotCJ].
122-31 120Kan484, 244P240, 243 [quotCJ]; 147Va290, 137SE515, 517 [quotCJ].
122-32 120Kan484, 244P240, 243 [quotCJ]; 147Va290, 137SE515, 517 [quotCJ].
122-33 202 Iowa1008, 209NW744; 120Kan484, 244P240, 243 [quotCJ]; 149Md1, 130A63; 147Va290, 137SE515, 517 [quotCJ].
122-34 120Kan484, 244P240, 243 [quotCJ]; 147Va290, 137SE515, 517 [quotCJ].
122-35 120Kan484, 244P240, 243 [quotCJ]; 221MoA478, 282SW97; TexCivA 276SW790.
122-36 250 IllA380; 120Kan484, 244P240, 243 [quotCJ]. [a] (1) 261Mass365, 159NE45, 55ALR900. [b] (3) Carrier is not liable for damage to perishable goods from heat without its fault. 6LaA7.
123-39 TexCivA 272SW340.
123-40 181Ark192, 25SW(2d)28 (inherent vices); 45 Ida313, 262P873; LaA129S419; 128Me118, 131A145; 126Me489, 139A784; 219MoA62, 265SW851; 217AppDiv83, 216NYS545; 155SC54, 151SE904. See also 224AppDiv508, 231NYS424.
123-41 219MoA62, 265SW851.
123-41½-New. Carrier is not an insurer against disease in live stock. 201 Iowa712, 208NW78.
123-44 MoA 294SW439.
125-60 177Ark1018, 9SW(2d)17; 35OhA291, 172NE425; 147Va304, 137SE507; 148Va48, 138SE467, 469, 53ALR990 [citCyc]; 103WVa73, 136SE694.
125-62 21F(2d)396; 21F(2d)406; 164Minn68, 204NW566; MoA 15SW(2d)901; 221MoA478, 282SW97; 147Va304, 137SE507.
127-67 [b] 217MoA31, 273SW410.
130-93 101Vt427, 144A194.
132-13 219MoA62, 265SW851.
132-14 21F(2d)396 (rule applies when carrying explosives); 21F(2d)406; 220MoA989, 272SW76; TexCivA 278SW478 (liability as insurer, if any, is removed by federal act).
133-18 167La111, 118S822.
133-22 11LaA170, 123S144(2dcase); TexCivA 283SW250; 35BC232, [1925] 3DomLR302, [1925] 2WestWkly385, 30CanRCas186 (no prohibition by railway board). But see 254 IllA149.
134-23 NH 149A497; 134Misc223, 234NYS727; 198Wis618, 225NW328 (as to goods received at nonagency station).
135-31 170Ark1174, 283SW36; TexCivA 18SW(2d)733; Va 153SE865.
136-33 10LaA755, 120S798(2dcase).
136-36 See also TexCivA 283SW250.
136-37 [a] TexCivA 283SW250.
136-39 25 OhNPNS112.
136-40 25 OhNPNS112.
137-44 224AppDiv508, 231NYS424. [a] **Carmack & Cummins Amendments** do not affect preëxisting law applicable to terminal or connecting carriers. 160Ga205, 127SE768.
137-45 218MoA314, 274SW90.
137-46 TexCivA 278SW478; TexCivA 18SW(2d)733. See NJSup 142A568.
137-47 11LaA170, 123S144(2dcase) (Carmack Amendment does not apply to local transportation companies).
137-47½-New. Under the Carmack Amendment the carrier's liability includes full actual loss and is not limited to value at destination. 220MoA989, 272SW76.
137-48 [a] (1) 163Ga494, 136SE418, 61ALR1304. (2) TexCivA 283SW250.
138-49½-New. The Cummins Amendment is not applicable to shipments made prior to June 2, 1915, when it became effective. 218MoA314, 274SW90. See also 217AppDiv49, 215NYS729.
138-49¾-New. Transportation Act of 1920 further amending the Interstate Commerce Act does not broaden it so as to make provisions governing liability of common carriers to shippers for loss or damage to shipments applicable to shipments to nonadjacent foreign countries. TexCivA 283SW250.
138-50 MoA 4SW(2d)847.
138-52½-New. A carrier should limit common-law liability by no doubtful language. 217Ky211, 289SW263.
138-54 217Misc22, 215NYS718.
139-63 MoA 4SW(2d)847.
140-66 220AppDiv222, 220NYS789.
140-70 134Misc223, 234NYS727. See also Del 143A37.
141-73 159Ga58, 125SE40.
142-80 11LaA170, 123S144(2dcase).
142-81 11LaA170, 123S144(2dcase).
144-8 [a] **Words "shipper's load and count" inserted in bill of lading** do not relieve carrier from liability for shortage, unless goods are loaded and described by shipper. 137Misc865, 244NYS573. [b] **Bill of lading reciting "weight—subject to correction"** does not indicate shipper weighed grain nor relieve carrier from liability for shortage. 137Misc865, 244NYS573.
145-9½-New. Failure to deliver bills of lading to a shipper who left the country does not prevent the carrier from claiming exemption therein. 21F(2d)447.
145-9¾-New. A government bill of lading, providing that, unless otherwise specified, it was subject to the same rules as govern commercial shipments, incorporates by reference the usual requirements that suits for loss be instituted within two years and one day. 22F(2d)113.
145-11 MoA 4SW(2d)847.
146-21 But see 246 IllA451.
146-31 124 Or598, 265P408.
147-32 124 Or598, 265P408.
147-33½-New. And where an agent makes a contract of shipment with a shipping company on behalf of the shipper, the shipper is not bound by a special provision limiting liability made without the shipper's knowledge, when such provision is void by statute as against a party not privy or party thereto. 36BC127, [1925] 3DomLR1169, [1925] 2WestWkly708.
149-51 217Misc22, 215NYS718; 134Misc439, 234NYS622. See also 132Misc563, 230NYS298.
150-53 217Misc22, 215NYS718.
151-60 134Misc439, 234NYS622; 113Okl170, 240P649.
152-63 132Misc563, 230NYS298.
152-64 21F(2d)396.
152-69 15F(2d)101; 18F(2d)930.
152-71 18F(2d)930.

154-86 220MoA695, 294SW100; 220 MoA1316, 297SW440; 51Philippine90.
154-87 51Philippine90.
155-90 252 IllA522; 245NY361, 157NE 267; 217AppDiv83, 216NYS545; 35 OhA291, 172NE425; 120 Okl 60, 250P 500; 130 Or294, 279P861; 51Philippine 90.
156-93 51Philippine90.
156-94 51Philippine90.
161-21 134Misc439, 234NYS622.
161-23 88PaSuper26. [a] **Rule requiring notice to carrier if goods are fragile** is not limitation of carrier's liability within prohibition of statute. 92PaSuper180.
161-27 224AppDiv508, 231NYS424.
162-30½-New. Thus release of carrier from liability for failure to inspect cars chosen by shipper is not void under any federal statute. TexCivA 277SW191.
162-30¼-New. During wartime control by the government stipulation limiting the liability of a carrier of live stock for loss due to negligence held permissible. TexCivA 273SW661.
162-30¼-New. Under the Cummins Act, a tariff provision that all protective service to certain fruits in transit will be governed by the shipper's instructions on the billing has been held not void as limiting the carrier's liability for negligence. 226Ky813, 118SW (2d)953.
163-52½-New. In British Columbia it has been held that a statute making void a provision in a bill of lading exempting the owner of a ship from liability for negligence applies only as to persons not parties or privies to such agreement. 36BC127, [1925] 3DomLR 1169, [1925] 2WestWkly708.
163-54 TexCivA 283SW250; 198Wis 618, 225NW328. [b] (3) Under Interstate Commerce Act and amendments carrier may stipulate for exemption from liability for loss by fire not resulting from its own negligence. 168 Ark22, 269SW47.
164-59½-New. Where a statute prohibits limitation of common-law liability, a contract releasing the carrier from liability for loss by fire is invalid. 170 Ark1174, 283SW36.
164-60 168Ark22, 269SW47.
164-62 9LaA582, 121S769; 218MoA 314, 274SW90; NJSup 142A568 (interstate shipment).
164-63 126Me489, 139A784.
164-66 MoA 12SW(2d)101.
164-70 218MoA314, 274SW90 (where situation has developed without carrier's negligence, such as shopmen's strike, which it has reason to believe will delay transporting stock). [a] **Interstate Commerce Act,** as amended, prohibits exemption from liability of carrier of live stock for loss or damage from delay occasioned by strike of carrier's employees, unaccompanied by violence or intimidation. 220MoA1189, 299SW93.
164-71½-New. Contract to furnish free transportation to shipper on condition that he care for stock shipped and relieve carrier from liability is valid. 234 Mich505, 208NW746.
165-73½-New. A carrier's agreement as to nonliability for erroneous information on quarantine regulations has been held not invalid as a contract against negligence. 147Va290, 137SE496.
165-76 18F(2d)930; 208 Iowa1396, 227 NW407; 217Misc22, 215NYS718; 220 AppDiv222, 220NYS789; 227AppDiv 316, 238NYS50.
167-88 135Misc636, 239NYS713.
168-1 217AppDiv49, 215NYS729.
169-6 217AppDiv49, 215NYS729.
174-35 124 Or598, 265P408.
174-36 [b] **Limited liability required** in receipt given under Carmack Amendment does not apply to special damage from delay in delivery. 137Wash241, 242P24.
174-40 MoA 48W(2d)847.
176-47 129 Or224, 277P107.
176-49 217Misc22, 215NYS718.
176-50 13F(2d)222.
177-54 Contra MoA 256SW499.
177-57 13F(2d)222.
177-65 127 Or29, 270P903[citCJ].
178-69½-New. Under Cummins amendment provisions in bills of lading as to carrier's liability have been held contrary to the act. 168Ark823, 271SW 453.
179-71 [a] (2) 220MoA495, 280SW 1050. [b] **Under clause limiting liability for delay** in case of strikers, mere existence of strike will not excuse delay, unless strike directly affected movement of car or unless there was absence of adequate switching force. 69CalA 669, 232P169.
180-87 128Kan729, 280P896 (liability as carrier continues within specified time).
180-95½-New. Stipulation that carrier's liability is to terminate after forty-eight hours from storage of goods by terminal carrier in public or licensed warehouse is binding. 35GaA43, 132SE 129.
180-95¼-New. And in case of such stipulation when a terminal carrier has given due notice of storage and goods are not removed, the terminal carrier will not be liable for conversion. 35GaA43, 132SE129.
180-2½-New. A rule requiring notice if goods are of fragile and perishable character is not a limitation of liability within the prohibition of the statute. 92Pa Super180.
181-9 [a] **Doctrine of res ipsa loquitur held inapplicable** to case where contract required proof of carrier's negligence. NH 149A497.
182-22 168Ark804, 271SW464; 117Tex 130, 298SW536.
183-24 21F(2d)396.
183-29 101Vt427, 144A194.
183-35 [j] **Heat.**-252 IllA522.
184-39 [a] **Particular contracts construed.**-132Misc563, 230NYS298.
184-40 132Misc563, 230NYS298. [b] **Particular provisions construed.**-77CalA 132, 245P1102.
185-49 25 OhNPNS112 (under second Cummins Amendment); TexCivA 273 SW661. But see 215AppDiv524, 213NYS 652; 135Misc636, 239NYS713.
185-51 TexCivA 28W(2d)493.
185-52½-New. Limitation to value at point of shipment held to apply to maximum loss only and to have no application where a partial loss as measured at point of destination was in issue. TexCivA 273SW661.
186-62 [f] **Lease of part of right of way for warehouse,** whereby lessee assumed risk of fire damage, will not relieve railroad from liability under uniform bill of lading. 128Kan729, 280P896.
186-67 [f] 89Fla224, 104S593.
187-78 220MoA518, 276SW1030.
187-79 254 IllA149; 219MoA62, 265SW 851 (interstate shipments); 136Misc352, 243NYS221.
189-91½-New. A custom incident to the transportation of crude oil that tanks should be strapped in the field three per cent short to allow for losses due to the volatile nature of the product, which custom is made part of a contract of carriage, will be construed not as permitting a deduction of three per cent of the oil received irrespective of the cause or amount of loss, but as requiring the carrier to account for all oil received less only loss due to the excepted cause not exceeding three per cent. 113 Okl 170, 240P649.
189-96 77CalA132, 245P1102.
190-12 [a] **Evidence insufficient to show deviation.**-135Misc636, 239NYS713.
191-27 213Ala151, 106S197.
192-40½-New. Uniform express receipts prescribed by the interstate commerce commission have been held to constitute a contract of carriage. 134Misc 223, 234NYS727.
192-40¼-New. Rules relating to bills of lading, in so far as they may be considered receipts for goods, apply to express receipts. 10LaA463, 120S786.
192-42 244 IllA522. [g] **Bill of lading issued** in accordance with Carmack Amendment constitutes entire contract. 160Ga205, 127SE768.
193-43 171Ark698, 285SW372; 84CalA 325, 258P148; CalA 261P729, 730 [cit CJ]; 217Ky399, 289SW226; 263Mass 192, 160NE783; 217AppDiv675, 216NYS 186; TexCommnA 282SW795.
193-44 191NC473, 132SE160; Tex CommnA 282SW795; TexCivA 283SW 332. [b] (2) Bill of lading is only presumptive evidence of ownership. 84CalA 325, 258P148.
193-46 TexCivA 278SW478 (federal act does not jeopardize shipper's rights where no bill is issued).
194-49 28F(2d)392; 198Wis618, 225 NW328.
194-49½-New. Under the Uniform Bill of Lading Act a receipt marked "nonnegotiable" is a straight bill of lading. 220MoA989, 272SW76.
194-49¼-New. A contract evidenced by a bill of lading is not "for the payment of money" and is not governed by the Commercial Law. 213Ala119, 104S412.
194-49¼-New. For this reason in some jurisdictions it is unaffected by statutes requiring suits on instruments for the payment of money to be prosecuted in the name of the real party in interest. 213Ala119, 104S412.
194-51 175Minn374, 221NW428.
194-53 36F(2d)702.
194-54 146Va442, 131SE846, 44ALR 1175.
194-57½-New. While it is not always necessary for a bill of lading to be issued and signed, there must be some evidence of delivery to carrier to impose liability. Miss 110S871.
195-58 40F(2d)39 (where bills constitute entire contract). [a] (1) 246 IllA 451. [h] **Effect should be given to whole instrument.**-18F(2d)946. [i] **Contract for interstate shipment** should be construed by state law. MoA 16SW(2d)705.
195-59 235Mich399, 209NW182 (purchaser of order bill of lading with letters S L C thereon is not innocent purchaser).
195-63½-New. Under the Carmack Amendment the bill of lading of the initial carrier is the contract of the terminal carrier and not controlled by the five-year statute of limitations. 224 IllA 584.
195-63¼-New. Where only one rate or route is specifically given, ruling of the interstate commerce commission that a carrier must ascertain a shipper's choice of the rate or route in case of ambiguity does not apply. 217AppDiv 675, 216NYS186.
195-63¼-New. Federal Bills of Lading Act is intended to make a bill of lading not only represent the title, but take the place of the goods for which issued, so that goods would be emancipated from the rules of procedure interfering with its transportation. TexCivA 283 SW332.
195-63½-New. Uniform bill of lading drawn under Interstate Commerce Act included lighterage as well as rail carriage. 36F(2d)702.
195-65 235 IllA151. [f] **Rule applies under Carmack Amendment.**-235 IllA 151.
196-71 But see 189NC585, 127SE588. [a] **"Weight subject to correction"** held not words "of like import" to "shippers weight, load and count" and other expressions in Bill of Lading Act prescribing what descriptions in bill of lading shall not render carrier liable for damages caused by carrier's nonreceipt of part of the goods. 6F(2d)947. [b] **Statement in bill that "contents of packages are unknown"** has no application to scrap iron shipped in open car. 235 IllA 151.
196-71½-New. Such statement does not affect liability of carrier for actual contents in cases of goods. 189NC585, 127 SE588.
196-73 But see 242Mich357, 218NW649. [b] **Under federal Bill of Lading Act** when language "shipper's load and count" is inserted in bill of lading, carrier is not estopped from denying terms and conditions of receipt, though it is liable for loss of any goods actually delivered and accepted for carriage. 242 Mich357, 218NW649.
196-76 [d] **Under Bill of Lading Act** holder of order bill of lading is held not estopped from suing carrier for damages for issuance of false bill of lading by redelivery of claim to shipper and shipper's settlement with carrier. 6F (2d)947.
197-80 But see 278US349, 49SCt161, 73Led415 [overr in part 130US416, 9 SCt570, 32Led991].

198-88 21F(2d)447; CalA 261P729, 730 [citCJ]. See also 216AppDiv239, 214 NYS513. [k] **Opportunity must be given to read bills of lading** before being bound by its terms. 171Ark698, 285SW 372.

199-95 84CalA325, 258P148; Tex CommnA 282SW795; TexCivA 38SW(2d) 109.

199-96 216AppDiv239, 214NYS513; 189 NC585, 127SE588; TexCommnA 282SW 795.

199-98 6F(2d)947; TexCommnA 282 SW795. See also Sask [1927] 3DomLR 695.

200-8 See 26F(2d)908.

200-9 252 IllA253 (carrier is not required to inspect contents of bags).

201-10 137Misc875, 244NYS114.

201-13 36F(2d)256.

201-17 215Ala460, 110S904; 216Ala 637, 114S295. [j] **Possession of goods,** consigned to shipper under a nonnegotiable bill of lading, can be obtained by another person only by proper transfer of bill of lading by shipper. 70CalA 708, 234P417. [k] **Title held to pass to transferee,** where bills of lading were forwarded with sight drafts. CalA 284 P736.

202-18 102Conn461, 129A47 (declared bona fide purchaser).

202-20 102Conn461, 129A47 (where its obligation has not been met, bill of lading is not exhausted or spent at time of transfer).

202-21½-New. **In New York,** under statute, a person transferring bills of lading for value, whether by delivery or indorsement, is the warrantor of its genuineness. 216AppDiv322, 214NYS366.

202-21¼-New. Bank receiving drafts with forged bill of lading from seller for collection only is mere bailee without title. 216AppDiv322, 214NYS366.

202-21¼-New. Transfer by it to purchaser for value is not transfer, within statute, whereby "transferor for value" warrants genuineness. 216AppDiv 322, 214NYS366 (notwithstanding unqualified indorsement by bank).

202-21½-New. No title passes to consignee of shipment made on order bill of lading prescribed by interstate commerce commission and requiring production of bill of lading on delivery of property where carrier's agent made delivery without demanding bill of lading. 189NC581, 127SE557.

202-21⅛-New. One paying drafts is entitled to rely on indorsements on bills of lading attached thereto and obligations of indorser is question of law. 15 F(2d)899.

202-21½-New. A bill of lading with the shipper's order named as consignee has been held negotiable. 167La474, 119 S432.

202-21¾-New. Statute requiring transferee of bill of lading to notify carrier to preserve rights against garnishment or attachment is inapplicable to purchase money owing by consignee after delivery. WVa 153SE300.

202-22 See also 244 IllA522.

202-27 122Kan77, 251P188; 151Md422, 135A185, 188 [citCJ]; 118 OhSt459, 161 NE330 (bank discounting draft is not liable for seller's breach of contract as to quality of goods). 33PortoRico 876, 880 [quotCJ]. [c] (4) Bank is to all intents and purposes owner of bill and merchandise. 159La946, 106S451. [f] **Transfer of incidental rights of consignor.**—159La946, 106S451.

203-29 33PortoRico 876, 880 [quotCJ].

203-34 151Md422, 135A185, 187.

204-44½-New. A payee bank, which credited the drawer of drafts with proceeds and indorsed accompanying bills of lading by indorsement guaranteeing prior indorsements, is not "pledgee" within statute. 15F(2d)899.

204-44½-New. Under Louisiana statute the pledgee of a negotiable bill of lading pledged as collateral security for a loan does not lose his lien by returning the bill to pledgor temporarily on trust receipt. 161La1051, 109S834.

204-45 1LaA251. [d] **Stamped indorsement on bill not signed by shipper** is held insufficient to change order to straight bill. 220Ky289, 295SW183.

204-46 70CalA708, 234P417. See also 27F(2d)129(3dcase).

204-48 35GaA438, 134SE122; 191NC 473, 132SE160.

204-49 But see 70CalA708, 234P417.

204-51 190NC438, 129SE815, 816 [citCJ].

205-60 [a] **Parol authority to seller by original consignee to bill cars in name of original consignee and to transfer bills of lading to other purchasers** is not prohibited by federal law. 84CalA 325, 258P148.

205-62 21F(2d)618; 104Conn479, 133A 573; TexCommnA 282SW795.

205-68 21F(2d)618; 154Tenn689, 290 SW994.

205-68½-New. Indorsement of a bill of lading to a bank for the purpose of collection and paying the debt of consignor is held to pass rights of shipper. 36Man14, [1926] 4DomLR262, [1926] 2WestWkly780.

206-70 104Conn479, 133A573.

206-73 307Mo552, 271SW779 (bank on which check is drawn for payment of oil held not innocent purchaser for value of bills of lading from drawer of check where it had notice, actual and constructive, that title to bills was in seller); 295Pa450, 145A511.

206-74½-New. Indorsements calling for payment on bills of lading and for delivery of property and guaranteeing prior indorsements is sufficient to put the drawee of the drafts attached thereto on inquiry as to their genuineness. 15F (2d)899.

206-74½-New. Laws enlarging negotiability of bills of lading should be construed to protect purchasers of bills relying on statements therein. 137Misc 865, 244NYS573.

207-81 21F(2d)883.

207-81½-New. Under statutes in some jurisdictions an assignee is chargeable with notice of shipper's wrongful procurement of bill falsely describing goods. TexCommnA 282SW795.

222-84 See also 42F(2d)272.

207-86½-New. or by an officer of the corporate owner acting without authority. 20F(2d)462.

207-88 [a] (3) Bank refusing to pay check drawn by purchaser of oil after notice that it was as conditional payment given and applying proceeds of drafts drawn on reconsignment by purchaser to purchaser's undue note held liable to seller for amount of check with interest. 307Mo552, 271SW779.

208-94½-New. **Collecting bank** discounting and collecting a draft against a forged bill of lading is not liable to the drawee for the amount of the draft. 216 AppDiv322, 214NYS366.

208-95 [a] **Bank placing to credit of purchaser of oil** proceeds of drafts secured by substituted bills of lading, title to which was in seller, was held on facts to have actual and constructive notice that title was in seller and was bound to know that, when it refused to pay check of purchaser, seller could recover bills or their value. 307Mo 552, 271SW779.

208-96 307Mo552, 271SW779 (bank on which check for purchase of oil was drawn by purchaser held to have notice from notations on check, invoices, and bills of lading that title to bills was in seller and was held liable for conversion by refusing to pay check and converting oil to its own use). See also 105Conn33, 134A223. [a] **Bank refusing payment of checks** and crediting amount to purchaser's account is not bona fide purchaser of bills of lading representing oil for which checks were given. 307 Mo552, 271SW779.

208-99 190NC438, 129SE815.

208-2 See also 122Kan77, 251P188. [b] **Bill of Lading Act** makes ordinary bills of lading fully negotiable. 6F(2d) 947.

209-10 [c] **Title to substituted bills of lading** delivered to purchaser of oil by seller on receipt of purchaser's check, sale being for cash, remains in seller and he is entitled to recover from bank on which check is drawn, on its wrongful refusal to pay check and on its conversion of such bills to its own use, value of oil represented thereby. 307 Mo552, 271SW779.

209-10½-New. The seller is owner of the substituted bills of lading issued by purchaser whose check was not paid. 307Mo552, 271SW779.

209-10⅓-New. A bank receiving a draft and substituted bills of lading from the purchaser is charged with notice of the seller's rights when the draft is not honored. 307Mo552, 271SW779.

209-16 128Misc206, 217NYS767; TexCivA 273SW676 (contract of shipper to pay one half of expenses allowable to service of special train in addition to transportation charge is construed to include as expense on amount paid in compromise of claim of employee injured on such train).

210-28½-New. Where the owner of a shipment in possession of a carrier directs its shipment to a certain point which the carrier advised the owner that he was not in a position to do because of garnishment proceedings, and two days later the carrier complied with the directions of the owner, the garnishment being ineffectual, there was no renunciation by the carrier of the contract for shipment. 165Minn239, 206 NW405.

210-28⅓-New. Delivery to carrier of goods consigned to a third party creates no contractual relation between the latter and the carrier. 217Ky399, 289 SW226.

211-29 But see 224Misc508, 231NYS 424.

211-30 1F(2d)968 (payment for coal by release of claim for freight and demurrage); 197Wis316, 222NW232.

211-43 See also 175Minn374, 221NW 428.

212-51 148Md465, 130A346, 347 [citCJ]; 142SC207, 140SE470, 474 [quotCJ]; TexCivA 280SW235.

212-53 142SC207, 140SE470. But see 264US560, 44SCt410, 68LEd848; 217 MoA662, 274SW935.

213-54 142SC207, 140SE470 (such contract is not prohibited by statute making it unlawful for shippers to receive rebates or certain advantages); TexCivA 280SW235.

213-55½-New. A contract guaranteeing a refrigerator car at a special time and place for the transportation of a common commodity is invalid as discriminatory in view of published tariffs of interstate carrier. 148Md465, 130A346.

213-55⅓-New. In such case knowledge of the published tariffs and rules is imputed to the shipper, 148Md465, 130A 346.

213-55¼-New. as is the rule that the carrier cannot lawfully enter into such contract. 148Md465, 130A346.

213-56½-New. Special agreement to transport and deliver shipper's cattle on certain date is void unless open to all shippers alike. 50SD319, 210NW81.

213-58 [a] (7) Contract to pay additional amount for spotting service covered by tariff held without consideration and illegal. 270US260, 46SCt220, 70 LEd576.

214-66 TexCivA 280SW235. [a] **Where shipper is not notified of shortage of cars,** carrier cannot evade obligation to furnish cars in accordance with contract. TexCivA 280SW235.

214-75½-New. Proof of due diligence does not excuse failure to perform the contract. 148Md465, 130A346.

214-77½-New. Under the Carmack Amendment, actual possession of a bill of lading is not prerequisite to the right to sue on a bill for loss or damage to freight. 38GaA284, 143SE782.

214-80 38GaA284, 143SE782 (petition held sufficient).

215-85 [b] (2) Other instances. 38 GaA284, 143SE782.

215-86½-New. Under the Interstate Commerce Act as amended Febr. 28, 1920 no cause of action can arise for breach of contract, oral or written, to furnish cars for shipment of livestock in interstate commerce. 217MoA 662, 274SW935.

215-86⅓-New. The carrier is not liable for failure to furnish a refrigerator car at a particular place and time under a contract made by an agent, where such contract is discriminatory in view of published tariffs and the Interstate

Commerce Act. 148Md465, 130A346.
215-87 TexCivA 280SW235.
215-93 TexCivA 280SW235. [a] (3) Purchaser of cattle may recover loss of profits where carrier, with knowledge of facts, violated contract to furnish cars, though purchaser forfeited contract and did not obtain title to cattle. TexCivA 280SW235. (4) Verbal contract requiring carrier to transport stock in time for delivery before market closed on same day has been held not binding where bill of lading required transportation with reasonable dispatch. 200Wis 181, 227NW875.
216-2 TexCivA 22SW(2d)759 (agent had authority).
217-11½-New. But an agent has no authority to guarantee use of a refrigerator car where such contract would be discriminatory. 148Md465, 130A346.
217-11½-New. and a shipper has imputed knowledge that the agent cannot enter into such contract. 148Md465, 130A346.
217-12 37GaA271, 139SE914.
217-13 1F(2d)968.
217-14 21F(2d)883.
218-19 113 Okl 232, 241P135; TexCivA 280SW235.
218-24 113 Okl 232, 241P135.
220-50 37GaA271, 139SE914; 220 AppDiv222, 220NYS789.
220-52 37GaA271, 139SE914.
220-55 But see 234Mich505, 208NW746.
221-72 213Ala679, 105S890; 170Ark 1174, 283SW36; 142Miss345, 107S371; Miss 110S871.
222-82 See also 132Misc682, 230NYS 427.
222-84 132Misc682, 230NYS427.
223-85 170Ark1174, 283SW36.
223-86 220MoA941, 278SW1075, 1078 [quotCJ]; 137Wash241, 242P24 [citCJ].
224-89 170Ark1039, 282SW975.
224-93½-New. Where custom is to notify the engine foreman orally, such notice is sufficient. 170Ark1174, 283SW 36.
224-95 36F(2d)702; 4LaA381, 382 [cit CJ]; 5LaA206, 210 [citCJ&Cyc]; 222 MoA495, 280SW1050, 1052 [citCJ]. [g] **Accumulation on platform.**–Carrier is not responsible for destruction by fire of cotton being accumulated by shipper, according to custom and consent of local agent, on station platform till car load is made up. 142Miss345, 107S371.
225-98 170Ark1039, 282SW975; 170 Ark1174, 283SW36. [a] (2) Where shipper loaded and sealed car on its private siding, and carrier issued bill of lading, and there was nothing further for shipper to do, carrier was liable for loss by fire. 132Misc682, 230NYS 427.
225-99 170Ark1174, 283SW36; 130 Kan831, 288P569; 142Miss345, 107S 371, 372 [citCJ]; TexCivA 278SW478. [a] (1) TexCivA 278SW478. [c] 89Fla 224, 104S593.
225-1 170Ark1174, 283SW36; 142Miss 345, 107S371; TexCivA 14SW(2d)903. [a] **Bill of lading, exempting carrier from liability till after cars are attached to train,** does not exempt liability for shipment destroyed while car was on private siding, after being loaded and sealed. 132Misc682, 230NYS427.
226-3 170Ark1174, 283SW36.
226-4 222MoA495, 280SW1050, 1052 [citCJ].
226-4½-New. Where a shipper does all things necessary and required of him to constitute delivery according to custom, delivery is complete and liability of carrier attaches; 170Ark1174, 283SW 36.
226-4½-New. and notice to, and agreement of, engine foreman to move car constitutes acceptance for shipment notwithstanding shipping order is not signed by carrier's agent. 170Ark1174, 283SW36.
226-5 142Miss345, 107S371, 372 [cit CJ].
226-6 142Miss345, 107S371, 372 [cit CJ]; Utah 263P495, 499 [citCJ].
226-7 Utah 263P495.
226-8 TexCivA 14SW(2d)903.
226-12 170Ark1039, 282SW975. [b] **Issuance of bill of lading for sealed car raised inference** of appropriation of possession of goods for carriage, though sealed car remained on shipper's private land. 132Misc682, 230NYS427.
228-36 41GaA740, 154SE455.
229-46½-New. **Enjoining delivery.** Under Federal Bills of Lading Act, shippers to a foreign country on through order bills of lading may not enjoin delivery to destination without first surrendering the bills of lading to the carrier or enjoining their negotiation. Tex CivA 283SW332.
229-47 217AppDiv49, 215NYS727.
230-53 244 IllA522.
230-60 104Conn342, 133A102; 40GaA 448, 150SE100(2dcase); 57 OntL244, [1925] 3DomLR870 (notice held sufficient). [d] **Statute requiring notice; construction.**–Term "claim," used in Ontario statute requiring notice to carrier, is construed to mean claim to stop in transit. 57 OntL244, [1925] 3DomLR870.
230-61 [a] (6) Where carrier recognized notice, but refused to follow it on ground that right of stoppage had ceased, notice was effective. 149Wash 319, 270P1038.
230-63 MoA 23SW(2d)202. [b] **Carrier's refusal to comply with demand of true owner** for goods in his possession on discovering insolvency of consignee amounted to conversion, though carrier is garnisheed by creditor of consignee. 40GaA448, 150SE100(2dcase).
231-64 57 OntL244, [1925] 3DomLR 870 (consignee agent of purchaser).
231-65½-New. A carrier may have reasonable time to investigate or may interplead to protect itself. 104Conn342, 133A102.
231-65½-New. Notice by assignee of consignee to connecting carrier is not binding on initial carrier for whom connecting carrier is not agent. MoA 23 SW(2d)202.
231-66 104Conn342, 133A102; 40GaA 448, 150SE100(2dcase).
231-67 178Ark553, 11SW(2d)463; 40 GaA326, 149SE427.
231-68 See also 149Wash319, 270P 1038.
231-69 57 OntL244, [1925] 3DomLR 870. See also 104Conn479, 133A573. [b] **Consignment to third party; presumption of sale or agency.**–(1) Where purchaser directs consignor to ship to third party, not purchaser's agent, presumption is that third party has purchased goods so as to defeat consignor's right. 57 OntL244, [1925] 3DomLR870.
232-77 TexCivA 26SW(2d)360; Utah 263P495, 499 [citCJ]. [e] **Agreement implied that carrier was to hold cotton as warehouseman** while waiting for remaining cotton. TexCivA 26SW(2d) 360.
233-86 160Ga205, 127SE768 (under act to regulate commerce, transportation includes services of connecting carrier as warehouseman after arrival and till actual delivery to consignee).
233-90 40GaA326, 149SE427; 217 AppDiv49, 215NYS727; TexCivA 18SW (2d)807.
233-91 197NC388, 148SE441; TexCivA 18SW(2d)807.
233-93 40GaA326, 149SE427.
234-96 [a] **Express company held liable as carrier,** where local agent ordered to return goods refused by consignee. TexCivA 22SW(2d)759.
234-1 34GaA304, 129SE292.
235-2 11LaA55, 123S149; 6LaA7; 27 OhA188, 160NE730 (forty-eight hours free time).
236-9 158La504, 104S306; 6LaA7; 127Misc466, 216NYS486. [f] **Notice held sufficient.**–97PaSuper570. [g] **Consignee of order bill of lading is proper party to receive notice,** although bill of lading runs to seller. 217AppDiv49, 215NYS727.
238-23 [b] **By postal card or letter.**–(1) Notice by mail on postal card is sufficient in absence of statute requiring notice by letter. 117 Okl 113, 245P600.
238-28 127Misc466, 216NYS486.
239-37½-New. Where a shipper had no agent at the destination when a shipment of mules arrived, the carrier is relieved of any duty to notify the shipper or his agent of the arrival of the shipment. Miss 118S900; 153Miss 628, 121S265, 62ALR521.
240-48½-New. Where the contract provides that the carrier shall be responsible as such for a stated period after notice, liability as carrier continues during the free time allowed. 6 LaA7.
240-49 213Ala242, 104S418.
240-51 224AppDiv440, 231NYS432 (forty eight hours after notice to consignee); 117 Okl 113, 245P600 (forty eight hours after giving of notice of arrival of interstate shipment).
243-66 But see 34GaA304, 129SE292 (where failure to deliver on demand because of temporary inability was not absolute refusal or conversion, it did not extend indefinitely carrier's liability as insurer).
243-71 214Ala268, 107S746; 34GaA 304, 129SE292 (where stored ready for delivery after failure to deliver on demand because of temporary inability which did not constitute conversion); 35GaA288, 132SE920; 221Ky142, 297 SW1112; 6LaA7; 117 Okl 113, 245P 600; 91PaSuper71.
244-73 21F(2d)298. See also 244 IllA 359.
244-78½-New. A carrier as warehouseman is not liable for goods damaged through the fault of the consignee. 6 LaA7.
244-81 191NC473, 132SE160.
245-84 21F(2d)406 (railroad acting as warehouseman must at all times protect property in its care); 214Ala268, 107 S746; 176Ark341, 2SW(2d)1113; 103 NJL579, 137A596; 117 Okl 113, 245P 600.
245-85 34GaA304, 129SE292; 191NC 473, 132SE160; 117 Okl 113, 245P600; 91PaSuper71. [a] **Rule of public service commission relative to "free time" for removal** has reference solely to liability of consignee for storage and cannot affect liability imposed by law on carrier as warehouseman only. 34GaA 304, 129SE292.
245-87 158La504, 104S306.
246-91 See also 21F(2d)298.
246-92 11LaA55, 123S149; 117 Okl 113, 245P600; 91PaSuper71. [a] **Interstate shipments.**–(1) In case of interstate shipments, burden of proof of negligence is on plaintiff. 117 Okl 113, 245P600.
247-95 176Ark341, 2SW(2d)1113; 117 Okl 113, 245P600 (burden of excusing nondelivery). [b] (2) 117 Okl 113, 245P600; 91PaSuper71. (4) 117 Okl 113, 245P600.
247-96½-New. An owner bringing an action against a carrier as warehouseman, for negligent loss of goods, is not liable for possible negligence of an independent contractor transporting the owner's explosives to the carrier's terminal. 21F(2d)406.
247-98½-New. Absence of previous robberies cannot be shown. 103NJL579, 137A596.
247-1 TexCivA 26SW(2d)360. See also 21F(2d)298 (value of goods is jury question).
247-2½-New. An instruction in an action for loss of an interstate shipment, placing upon defendant the burden of proof on the issue of negligence, is erroneous. 117 Okl 113, 245P600.
247-2½-New. An instruction leaving to the jury the question whether warehousemen could reasonably rely on the fire department to prevent damage by fire and explosion is proper. 21F (2d)406.
247-2¼-New. Evidence as to rules of the interstate commerce commission requiring isolation of cars in case of fire is admissible to show negligence of railroad warehousemen carrying explosives. 21F(2d)406.
247-2½-New. Evidence, in an action for negligence of warehousemen carrying explosives, that its agent considered detectives hired by consignee lessened the carrier's liability is inadmissible, 21 F(2d) 406.
247-2½-New. and evidence as to experience of such detectives is inadmissible where it is not shown that the

detectives were in plaintiff's employ. 21 F(2d)406.

247-2½-New. In an action against a railroad warehouseman for failure to protect goods against fire and explosion, whether defendant's foreman knew that a barge loaded with explosives would tie up near a terminal is irrelevant. 21 F(2d)406.

247-3 TexCivA 283SW219.

248-5½-New. After final delivery at destination the owner may not direct shipment to new parties presumed to be under a new bill of lading to a new consignee. 216Ala637, 114S295.

248-8 92Fla1102, 111S248; 235 IllA 151; MoA 284SW184 (actual delivery of live stock to consignee is necessary to complete contract of carriage). See also MoA 16SW(2d)624 (delivery of wrong car). [b] **Duties of carrier to deliver and of consignee to accept are correlative.**-85CalA440, 259P774. [c] **Injunction restraining delivery.**-(1) Statute forbidding attachment or levy unless order bill of lading is surrendered or negotiation enjoined is inapplicable to injunction interfering with rights of holder. MoA 27SW(2d)72.

248-9 158La504, 104S306; MoA 284 SW184.

248-12 TexCivA 290SW286; 153Va575, 150SE252.

249-16 158La504, 104S306.

249-16½-New. A carrier, where required to notify consignee and deliver to shipper's orders, held not required to deliver without such orders. 16F(2d) 698.

250-28 30F(2d)571; 128Misc238, 218 NYS287.

250-31½-New. On inquiry by shipper, the carrier should inform him that the shipment might be delayed because of conditions within its knowledge. 234 Mich505, 208NW746.

250-34 32F(2d)553 (till instructions are changed). [e] **Delivery alongside track held not delivery "on or about" leased premises** under clause in lease exempting carrier from liability for fires, as "on or about" means anywhere on but not outside of locus. 127Misc466, 216 NYS486. [f] **Where shipping instructions are not clear,** carrier must hold shipment and ask for further instructions. LaA 129S395.

250-38 NH 151A336. [a] **Carrier contracting to deliver car on consignee's private siding** need not place car on public siding on learning after arrival that private siding was occupied. 109 Conn466, 146A846.

251-41½-New. Under an ordinary contract of open shipment providing for delivery at consignee's private side track, the carrier completes its contract by placing the goods on such side track. 37GaA283, 140SE43.

251-41½-New. Where goods are shipped under an order notify bill of lading, and neither contract nor custom authorizes delivery on a private side track of the order notify consignee, unauthorized placement of goods on such side track does not amount to a delivery, 37GaA283, 140SE43.

251-41¼-New. but amounts to nothing more than a tender of delivery upon compliance with the terms of the contract. 37GaA283, 140SE43.

251-41½-New. and does not justify seizure of the goods by the order notify consignee in violation of such terms. 37 GaA283, 140SE43.

251-41½-New. In such case there is no delivery without acceptance by the consignee. 37GaA283, 140SE43.

251-48 16F(2d)698; MoA 22SW(2d) 201.

251-52 See also 217AppDiv49, 215NYS 727.

251-53 LaA 129S395.

252-56 221AppDiv713, 225NYS365, 368 [citCJ].

252-63 Ala 127S802(2dcase).

253-69 85CalA440, 259P774, 778 [cit CJ]. [b] **That shipper and consignee are joint adventurers** does not affect consignee's right of inspection. 85CalA440, 259P774.

253-70 [a] **Where uniform bill of lading forbids inspection unless permission of shipper is indorsed thereon,** in accordance with Carmack Amendment, carrier permitting unauthorized inspection without injury to goods is not liable though purchaser refused to accept goods. 129Kan59, 281P935.

253-73½-New. Instructions to allow examination of repaired coat is held to imply reasonable opportunity to do so; NJSup 136A710.

253-73½-New. and duty of carriers to collect repair charge was subject to exercise of privilege of inspection. NJ Sup 136A710.

253-75 16F(2d)698; MoA 284SW184.

253-76 [b] (2) Delivery on private siding owned and used exclusively by purchaser held to constitute complete delivery. 231Mich323, 204NW120.

254-79 16F(2d)698.

254-80 16F(2d)698.

254-87 MoA 22SW(2d)201.

255-92 134Misc223, 234NYS727.

256-4 136Miss420, 101S563 (though receipted for under trade name different from that under which consigned); 8 PaDist&Co 623; TexCivA 283SW219. [a] (1) 8PaDist&Co 623.

256-6 TexCivA 283SW219.

256-7 206 Iowa292, 220NW322, 324 [cit CJ].

256-8 MoA 16SW(2d)705.

256-10 Wyo 291P809.

257-13 91Fla762, 109S205. [a] **Delivery of live stock to buyer authorized by shipper to accept delivery** does not constitute conversion, though shipper was named as consignee and sale was for cash and buyer failed to pay draft. 53 SD363, 220NW905.

257-14 7F(2d)447; 91Fla762, 109S205. [b] **Under Pomerene Act** transferor of straight bill of lading or transferee may notify carrier not to deliver to consignee named. 7F(2d)447. [c] **Under Pomerene Act,** interstate carrier making delivery to consignee in bill of lading in face of notice by true owner or person entitled to possession is liable to such owner or rightful possessor. MoA 16 SW(2d)705.

257-16 91Fla762, 109S205.

257-20 220MoA989, 272SW76.

257-23 179Ark865, 18SW(2d)376; 244 IllA522; 245 IllA211; 253NY477, 171 NE749 (effect of failure to demand production of straight bill); 24 OhA497, 157NE809; 292Pa251, 141A53; 8PaDist &Co 623; 153Va575, 150SE252. But see 53SD363, 220NW905. [a] (4) Where delivery was made in accordance with erroneous shipping tag, carrier is liable to consignee named in express receipt. 220MoA989, 272SW76. [f] **Delivery by connecting carrier.**-160Ga213, 127SE 771.

258-24 104Conn342, 133A102; 126Kan 651 (liability held to be to shipper); 220Ky289, 295SW183; 226Ky322, 10 SW(2d)1104; 231Mich323, 204NW120; 24 OhA497, 157NE809.

258-25 24 OhA497, 157NE809. [a] (6) Court presumes that bond to carrier for delivering freight without bill of lading is for double the value of the goods. 174Ark318, 295SW705. [c] (1) But see 253NY477, 171NE749. (2) Failure of carrier to require surrender of bills of lading does not make it liable for misdelivery unless loss is proximately caused thereby. 127Misc432, 216NYS 413. [e] 292Pa251, 141A53.

258-26 24 OhA497, 157NE809; 292Pa 251, 141A53.

259-28 TexCivA 13SW(2d)440.

259-28½-New. Surety's bonds to carrier, securing the latter against loss through delivery of freight shipments to principal without surrender of bill of lading, is held valid. 19F(2d)868.

259-28½-New. Statute providing for delivery of freight without bill of lading, "lost, stolen, or destroyed" should be broadly construed. 19F(2d)868.

259-30 167La474, 119S432; 9LaA302, 119S473; 189NC581, 127SE557. See also Man [1927] 3DomLR569 (shipper held absolved by custom).

259-31 [a] **Assignee of bill of lading** describing bales of cotton as marked in certain way cannot refuse tender of bales not so marked. TexCommnA 282 SW795. [b] **Under Cummins Amendment,** providing for recovery of "full actual loss," shipper is entitled to recover sum, with interest, which he would have received had carrier performed its contract. Ala 118S155.

259-35 173Ark747, 293SW15, 18 [quot CJ]; 102Conn461, 129A47; 91Fla762, 109S205; 37GaA283, 140SE43; 162La 223, 110S329. [h] **What constitutes delivery.**-160La676, 107S487.

260-36 102Conn461, 129A47; 37GaA 283, 140SE43; 120Kan21, 245P735.

260-39½-New. An inspection of the goods by the order notify consignee without the knowledge or consent of the carrier does not amount to a conversion by the carrier. 37GaA283, 140SE 43.

260-39½-New. Under the Interstate Commerce Act, special instructions on the shipping tag and express receipt for interstate shipment to notify a third person and to make delivery only on surrender of the receipt are not binding on the carrier when contrary to regulations of the interstate commerce commission. 220MoA989, 272SW76.

260-41 179Ark865, 18SW(2d)376.

261-45 89PaSuper599 (authority insufficient).

261-51 190NC438, 129SE815. [a] **Owner of nonnegotiable express receipt for interstate shipment,** constituting straight bill of lading, is entitled to delivery of goods. 220MoA989, 272SW76.

261-52 177Ark342, 6SW(2d)302.

262-57 35F(2d)582 (replevin).

262-62 179Ark865, 18SW(2d)376 (delivery to another at direction of consignee); 7LaA380; 24 OhA497, 157NE 809; 92PaSuper76; 153Va575, 150SE 252 (initial carrier is liable for value of goods wrongfully delivered by connecting carrier).

262-63 165La33, 115S358; 92PaSuper 76. [a] **Person to whom wrongful delivery** was made cannot be joined as party. 21 OhA227, 153NE166.

262-64 214Ala81, 106S496; 102Conn 461, 129A47; 91Fla762, 109S205; 120 Kan734, 245P734; 247NY20, 159NE708 (C. O. D. shipment); 135Misc635, 239 NYS351; 56ND870, 220NW634, 635 [cit CJ]; 8PaDist&Co 623; 153Va575, 150 SE252 (unauthorized person); 36Man 322, [1927] 1DomLR851, [1927] 1West Wkly317. [f] **Delivery of car of apples** as substitute for car wrongfully diverted, not accepted by consignee, is not defense to conversion. 219MoA419, 271 SW854. [g] **Damages.**-21 OhA227, 153 NE166. [h] **Delivery of interstate shipment.**-220MoA989, 272SW76. [i] **Estoppel.**-TexCivA 18SW(2d)456. [j] **Delivery of goods from seller to buyer conditioned on payment of price so that seller retains title** relieves carrier from liability for conversion, though seller was named as consignee. 53SD363, 220 NW905. [k] **Carrier may show that delivery was to person really entitled to possession,** as excuse for failure to deliver. 135Misc635, 239NYS351.

263-66 132 Okl 134, 269P1082, 1083; 92PaSuper76.

263-67½-New. An express company is not liable for the mistake of its agent in violating rules of the interstate commerce commission regarding special instructions concerning delivery, where to hold it liable would nullify such rules and result in discrimination. 220MoA 989, 272SW76.

263-67½-New. Delivery to wrong person is a breach of contract of carriage for which shipper may maintain an action. 135Misc635, 239NYS351.

263-68 92PaSuper76, 80 [quotCJ].

264-73 165La33, 115S358; 220AppDiv 287, 221NYS391.

264-76 132 Okl 134, 269P1082, 1083 [quotCJ].

266-79 [a] (7) Carrier is not liable for delivery at its terminal goods shipped to swindler, using name of reputable dealer, where shipper actually sent goods to swindler under mistake as to credit rating. 125Misc116, 210NYS172.

267-80 [b] **It is not negligence for carrier to deliver goods at empty store** where shipper designates address. 125 Misc116, 210NYS172.

267-83 284Pa16, 130A263.

267-86 125Misc116, 210NYS172. [b] **Shipper improperly addressing package** which carrier sent to address named exempts carrier from liability. 134Misc 223, 234NYS727.

267-87 165La33, 115S358.

267-87½-New. It is the duty of the shipper to address the package, but where the carrier's agent does so, he is not the shipper's agent to relieve the carrier from liability for his negligence. 220MoA989, 272SW76.

267-87⅓-New. The carrier although strictly responsible for delivery to the proper person, is not the insurer against frauds on the shipper by the consignee. 125Misc116, 210NYS172.

267-89 20OhA523, 152NE686, 687 [quotCJ].

267-90 20OhA523, 152NE686, 687 [quotCJ].

267-91 20OhA523, 152NE686, 687 [quotCJ]; TexCommnA 12SW(2d)158; TexCivA 1SW(2d)456, 457 [citCJ].

267-92 20OhA523, 152NE686, 687 [quotCJ].

267-93 TexCommnA 12SW(2d)158. [a] (5) Shipper ratified unauthorized delivery of car by drawing draft on party receiving car, which was paid. TexCommnA 12SW(2d)158. [b] (1) 102 Conn461, 129A47. (9) Bringing action on sight draft with bill of lading attached is not ratification. 14F(2d)978. (10) Acceptance of part payment from person to whom delivery was made does not constitute ratification of wrongful delivery where not so intended. TexCivA 1SW(2d)456.

268-95 TexCivA 1SW(2d)456.

268-95½-New. But whether different conclusions can be reasonably drawn from the facts relied on as ratification is a question of law. TexCommnA 12 SW(2d)158.

268-97 [a] (2) Carrier depositing shipment with storage company as instructed by claimant must notify storage company to deliver to lawful consignee. 7 F(2d)447.

268-2½-New. In determining liability of an interstate carrier for misdelivery of goods as carrier, warehouseman, or bailee, the state and federal statutes should be considered. 284Pa16, 130A 263.

268-3 244IllA522, 530 [citCJ]; 155 Tenn486, 290SW988 [quotCJ].

268-4 85IndA557, 155NE50; 239Mich 247, 214NW102; 189NC581, 127SE557; 92PaSuper496; 155Tenn486, 290SW988 [quotCJ]. [b] **Bringing attachment** has been held not to constitute tender of goods. MoA 30SW(2d)186.

269-6 239Mich247, 214NW102 [citCJ]. [a] **Demand before suit** held not necessary. 239Mich247, 214NW102.

269-7 239Mich247, 214NW102 [citCJ].

269-8 119Kan336, 239P758, 759 [cit CJ].

269-8½-New. But a carrier negligently making delivery to the wrong person cannot maintain replevin against an innocent purchaser from such person nor from an innocent chattel mortgagee. 119Kan336, 239P758.

269-9 239Mich247, 214NW102; 155 Tenn486, 290SW988 [quotCJ]. But see MoA 30SW(2d)186.

269-10 119Kan336, 239P758, 759 [quot CJ].

269-12½-New. A carrier taking a transfer of a bill of lading from the shipper has a cause of action in the contract for value of goods against consignee to whom its agent delivered interstate shipment made under order bill of lading without demanding a bill of lading. 189NC581, 127SE557.

269-12⅓-New. In such action, in determining whether the carrier is estopped to maintain it, the court must consider not only the bill of lading as evidence of the contract, but the carrier's tariffs and orders of the interstate commerce commission. 189NC581, 127 SE557.

269-12¼-New. The carrier must observe and cannot waive requirements of bills of lading, tariffs, and orders of the interstate commerce commission. 189 NC581, 127SE557.

269-12⅕-New. Carrier is not estopped from bringing such action by the unlawful delivery of shipment by carrier's agent. 189NC581, 127SE557.

269-15 9LaA302, 119S473. But see 90 PaSuper43. [b] **Refusal of directed verdict not erroneous.**-MoA 290SW630. [c] **Instructions held improper.**-MoA 290SW630. [d] **Instructions held erroneous.**-MoA 290SW630.

269-19 42Ida678, 247P786, 788 [quot CJ]. [b] **During subzero weather,** acceptance of delivery of sweet potatoes cannot be forced on consignee. LaA 130 S263.

270-20 214Ala420, 421, 108S238 [quot CJ]; 35GaA288, 132SE920; 42Ida678, 247P786, 788 [quotCJ].

270-21 42Ida678, 247P786, 788 [quotCJ]; 217AppDiv49, 215NYS729.

270-22 42Ida678, 247P786, 788 [quotCJ].

270-23 42Ida678, 247P786, 788 [quotCJ]; 217AppDiv49, 215NYS727.

270-24 42Ida678, 247P786, 788 [quotCJ]; 217AppDiv49, 215NYS727.

270-24½-New. In some jurisdictions statutes authorizing a carrier to deliver merchandise to any warehouse company after sixty days is merely permissive. 216AppDiv500, 215NYS576.

270-24⅓-New. Where tendered delivery without inspection is insufficient to discharge the carrier's obligation, its liability as a common carrier continues. 85CalA440, 259P774.

270-25 35GaA288, 132SE920; 37GaA 215, 139SE586; 40GaA555, 150SE564 (2dcase). [a] 37GaA215, 139SE586. [c] **Action for failure to notify consignor** of inability or failure to deliver is action for breach of contract. 113OhSt 499, 149NE861. [d] **Carrier must exercise due diligence** to notify consignor. 37GaA215, 139SE586.

270-26 217AppDiv49, 215NYS728.

271-28 217AppDiv49, 215NYS728.

271-29 See also 2LaA7, 8 [citCyc].

271-30 217AppDiv49, 215NYS728. [b] **Ordinary care** requires carrier to notify consignor within reasonable time of its failure to deliver to consignee. 113 OhSt 449, 149NE861.

271-31 173Ark747, 293SW15, 18 [quotCJ].

271-34 See also 226AppDiv187, 234 NYS454.

272-43½-New. A carrier is liable for conversion only when conversion is by the carrier itself. 15F(2d)101.

272-47 46Philippine418, 422 [quotCJ].

272-48 221AppDiv713, 225NYS365.

272-49 La 119S165 (abandonment of cattle to carrier and recovery of value).

272-54 [a] **Failure to deliver on demand on account of temporary inability to deliver** is not absolute refusal or conversion. 34GaA304, 129SE292.

273-57 TexCivA 1SW(2d)686.

273-64 See also 26F(2d)796.

274-72 56ND870, 220NW634, 635 [citCJ]. [a] **That carrier repossesses itself of goods and offers to return them to consignor** does not destroy cause of action for conversion already accrued. 56ND870, 220NW634.

274-75 [c] **Loss of cotton by fire after delivery authorized by bill of lading** is not attributable to railroad's conversion. TexCommnA 270SW1008.

274-76½-New. Railroad's sale of goods as unclaimed freight after damage because of failure to deliver to specified terminal constitutes conversion. NJSup 139A881.

274-83½-New. Where consignee did not agree to accept a second car in lieu of one diverted, receipt of the second car is no defense in an action for conversion. 219MoA419, 271SW854.

274-84 8PaDist&Co 623.

275-85 [a] (3) Where goods shipped under order bill of lading are delivered to person to be notified, demand is unnecessary. 162La223, 110S329.

275-99 See also 245IllA211.

275-2½-New. Plaintiff named as consignee in bills of lading tendered with shipment of coal to carrier which refused to sign bills has sufficient right of property and possession to sue in conversion where coal company acquiesced of necessity in carrier's taking coal for its own use or diverting it to others. 213Ala108, 104S33.

275-2¼-New. Such named consignee's right of action for conversion against carrier which refused to accept coal for transportation to him is not affected by the fact that the seller of the coal subsequently, under compulsion, billed the coal to another. 213Ala108, 104S33.

275-2¼-New. A person to whom a shipment was delivered without a bill of lading, who gave the carrier an indemnity bond, may intervene in an action for conversion against the carrier and set up the defense of contract with the consignee. TexCivA 13SW(2d)440.

275-2⅓-New. Where a petition averring shipment to a named consignee showed title in such consignee, no cause of action for conversion was stated. 226 Ky322, 10SW(2d)1104.

276-6 [a] (18) In action for coal shipment shortage weights at points of shipment and destination are presumptively correct. 202Iowa292, 209NW 465. (19) Contract price at which goods actually were sold may be assumed to be actual value to determine seller's loss by failure of carrier to deliver at proper destination. 11LaA348, 123S355, 357 [quotCJ]. (20) In suit for damages for failure to divert shipment on instructions, carrier has burden of showing that loss would have occurred anyway. 11LaA348, 123S355. (21) Where shipment was not diverted as instructed, court assumes that price received on sale by shipper's agent at original destination was reasonable worth. 11LaA 348, 123S355. [c] **Plaintiff must prove delivery** by shipper, receipt of bill of lading, indorsement and transfer for value to himself, delivery by defendant without surrender of bill of lading, and consequent damages. 102Conn461, 129 A47. [d] **Carrier must prove excuse.** 102Conn461, 129A47. [e] **Extent of loss from misdelivery** must be shown. 220 MoA989, 272SW76.

276-7 213Ala108, 104S33 (to show custom); 226Ky322, 10SW(2d)1104.

276-8 153Va575, 150SE252. [a] 11 LaA348, 123S355; MoA 16SW(2d)705. [f] (2) 37GaA283, 140SE43. (6) To show deterioration. 162La223, 110S 329. [n] **Evidence held insufficient to show shipper's knowledge** of seizure under legal process. 35GaA288, 132SE 920. [o] **Court may properly disregard testimony** tending to show that scales frequently disagree as to weight of coal. 202Iowa292, 209NW465. [p] **Opinion evidence** based on description of other witnesses as to condition of condensed milk held entitled to no greater weight. 162La223, 110S329. [q] **Evidence held sufficient to sustain finding** that consignee did not own property and was not entitled to possession at time of alleged conversion. 84CalA325, 258P148. [r] **Evidence held to show compliance with tariff provisions.**-221MoA448, 282 SW459.

276-10 [a] (9) Whether express company conspired with consignee of C.O.D. shipment to have payment immediately garnished held for jury. 214Ala268, 107S746.

276-11 213Ala108, 104S33. [a] 179 Ark865, 18SW(2d)376; TexCivA 288 SW843. [c] See also 206Iowa292, 220 NW322. [e] **Evidence held insufficient to go to jury.**-37GaA283, 140SE43.

277-12 213Ala108, 104S33 (misleading instruction properly refused). [c] **Instruction as to damages held erroneous.**-226Ky322, 10SW(2d)1104.

277-13 [b] **Evidence held to require finding for plaintiff.**-92PaSuper76.

277-14 213Ala108, 104S33 (value at point of destination); 162La223, 110S 329, 331 [quotCJ]; 11LaA348, 123S355, 357 [quotCJ]; 21OhA227, 153NE166. See also 245IllA211. [n] **Mitigation of damages.**-TexCivA 1SW(2d)456. [o] **Shipper is not limited to reasonable market value** where, at time of notifying carrier that consignee was not entitled to shipment, he stated that he had sold shipment at stated price. 221 MoA448, 282SW459.

277-15 213Ala108, 104S33; 226Ky322, 10SW(2d)1104; 162La223, 110S329, 330 [citCJ].

277-16 162La223, 110S329. [a] **In**

Missouri allowance of interest is discretionary. 221Mo442, 232SW459.

270-26½-New. Carrier will not be excused from liability for punitive damages by reason of any priority of rights. 214Ala105, 104S434.

270-26¾-New. Punitive damages may be allowed under circumstances showing that taking was willful and deliberate. 214Ala103, 104S434.

270-26¾-New. Where delivery was made to the wrong person, absence of proof that actual loss was the price at place of origin of shipment requires reversal. 220MoA959, 278SW76.

270-26½-New. In an action for shortage in coal shipment trial court may refuse to deduct from apparent weight any percentage or amount for evaporation, where testimony of fact is supported only by federal bulletins. 202 Iowa797, 209SW16.

270-30½-New. Measure of damages may properly be based on value of shortage at point of shipment. 202 Iowa797, 209NW16.

270-36½-New. Where goods arrived at destination are several days later tendered to holder of shipper's order, bill of lading and refused subsequent loss in market value cannot be recovered of carrier. TexCommA 252SW795.

273-31 56ND770, 220NW631, 635 [cit CJ].

279-30 247NY20, 159NE708 (liable for whatever could have been collected if duty had been fulfilled, but not more than value of merchandise surrendered).

279-38 220AppDiv77, 221NYS351.

279-40 But see 226AppDiv157, 231NYS464.

279-41 [a] (1) 22 OhA37, 153NE522.

279-41½-New. Carrier accepting a forged certified check may show that collection was impossible, although cash had been demanded. 247NY20, 159NE708.

280-57 129Misc305, 221NYS298. See also 177Ark342, 6SW(2d)302.

281-63 35GaA753, 132SE920. [a] **Presenting bill of lading and claiming shortage is held notice of plaintiff's ownership so as to require carrier to notify of seizure under legal process. TexCivA** 292SW55.

281-66 35GaA753, 132SE920; **TexCivA** 292SW552, 555 [citCJ].

281-67 35GaA753, 132SE920.

282-72 **MoA** 278SW(2d)[illegible].

283-77 35GaA753, 132SE920.

283-84 35GaA753, 132SE920.

283-90 214Ala554, 108S765, 767, 46 ALR975 [quotCJ].

283-92½-New. Where express company agreed with consignee of shipment C.O.D. to hold money so consignee could garnish it, it was held a conversion. 214Ala368, 107S746.

283-95 109Conn566, 146A846; 42 Ida193, 244P580, 582[citCJ]; 218MoA314, 274SW90 (under state statutes); **TexCivA** 292SW157, 161V427, 111A194, 147Va290, 137SE515. [a] **Under Carmack and Cummins Amendments.**–218MoA314, 274SW90 (not insurer).

283-96 219Ky794, 294SW163.

283-97 42 Ida193, 244P580.

283-98 42 Ida193, 244P580.

283-99 42 Ida193, 244P580, 90PaSuper578, 582 [quotCJ].

283-99 42 Ida193, 244P580, 218Ky19, 285SW123, 219Ky794, 294SW163; **MoA** 158SW(2d)901 (live stock); 90PaSuper578, 582 [quotCJ]; 92PaDistACo5[illegible], 111SE395, 111SE607; **TexCivA** 283SW175, 147Va290, 137SE515; 200Wis181, 227NW875. [d] 149Md1, 130A63 (where delay caused by ice constituting act of God); 217MoA31, 273SW410. [g] **In action for delay in transporting cattle,** inquiry should be confined to whether there was negligence after acceptance of shipment. **MoA** 328SW(2d)109.

283-1 90PaSuper578, 582 [quotCJ].

283-2 219Ky794, 294SW163, 90PaSuper578, 582 [quotCJ].

283-3 42 Ida193, 244P580; 219Ky794, 294SW163; 217MoA31, 273SW410, 129Misc105, 221NYS295.

283-4 42 Ida194, 244P580; **TexCivA** 292SW559; **TexCivA** 178SW(2d)116 (right to reship to another market). See also 123Kan600, 255P683. [b] **Carriers are not required to hold trains in order to permit shipper to complete loading after train arrives.** 200Wis181, 227NW875.

285-5 109Conn466, 146A846; 42 Ida193, 244P580, 582[citCJ]; 219Ky794, 294SW463; **MoA** 300SW324. [c] **Requirement of bill of lading for transportation "with reasonable dispatch"** does not increase carrier's obligation. **MoA** 300SW324, 326.

285-6 217MoA31, 273SW410; 220MoA1189, 299SW93, 96 [quotCJ].

285-7 219Ky794, 294SW463.

286-9 218MoA314, 274SW90.

286-11 214Ky658, 283SW1013. [a] **Shipper not relying on representation of railroad that there would be carrier delivery** is bound by announcement that delivery would be in three days. 150Va219, 142SE169.

286-13 33GaA705, 127SE878.

286-15 [a] **Where cattle were in fact delivered sooner than they would be if shipped over stipulated route,** no injury was shown. **TexCivA** 258SW(2d)1004.

286-15½-New. Where circumstances arise to prevent delivery within a reasonable time, the carrier under statutes as at common law may limit its liability by contract. 218MoA314, 274SW90.

286-16 42 Ida193, 244P580, 583 [citCJ].

286-17 42 Ida193, 244P580, 583 [citCJ].

287-20 101V427, 144A194.

287-24 215Ky49, 283SW423.

287-25 219Ky794, 294SW463. See also 201 Iowa712, 208NW78. [b] **Carrier bad right to hold three cars of cattle for regular freight train** at division point. **TexCivA** 258SW(2d)1004.

287-25½-New. Statutes in some jurisdictions make it the duty of the carrier to move cars of live stock at the highest practicable speed consistent with reasonable safety and reasonable movement of its general traffic. 201 Iowa712, 208NW78.

287-25½-New. Such statutes also give railroad commissioners power to prescribe speed of shipments. 201 Iowa712, 208NW78.

287-25¼-New. and also provide that proof by carrier that cars were moved according to schedule or time-table shall not be prima facie evidence of compliance with statute as to required standard of speed. 201 Iowa712, 208NW78.

287-25⅝-New. Such statutes contemplate fixing of live stock shipping schedules by railroad commission and that such schedules when so fixed presumably will be reasonable. 201 Iowa712, 208NW78.

287-25⅞-New. and do not justify submission to jury of question of reasonableness of a freight train schedule. 201 Iowa712, 208NW78.

287-27 217MoA31, 273SW410; **MoA** 300SW324, 326 [quotCJ]; 90PaSuper578, 583 [quotCJ].

288-36 157Miss383, 126S16 (failure of carrier to give notice of inability to deliver); 200Wis181, 227NW875.

289-51½-New. As to interstate shipments, strike of defendant's employees, pleaded as an excuse for delay under stipulation in contract of shipment excepting it from liability on account of such delays, is not as matter of law negligence attributable to defendant. 218MoA314, 274SW90.

289-51¾-New. Failure to inspect freight tendered where palpably improperly loaded. 33GaA705, 127SE878.

289-51¼-New. Failure on arrival to place carload of mules on unloading track or to feed or water them constitutes negligence. 181Ark192, 258SW(2d)28.

289-52 33GaA705, 127SE878; 143S0[illegible]; 111SE607; **TexCivA** 283SW294. See also 149Md1, 130A63.

289-53 217MoA31, 273SW410. [a] **Where injury or deterioration of cattle was due to length of journey rather than delay,** carrier is not liable. **TexCivA** 258SW(2d)1004.

289-55 **TexCivA** 275SW423.

290-64 42 Ida193, 244P580, 583 [cit CJ]; 200Wis181, 227NW875 (custom to wait for live stock to be loaded).

290-65 42 Ida193, 244P580, 583 [citCJ].

290-67 241IllA359, 121Okl75, 254P[illegible]02.

291-70 244IllA359; 2LaA164; 149Md1, 130A63; 296Pa441, 146A98(2dcase); **TexCivA** 138SW(2d)144; **TexCivA** 31SW(2d)868.

291-71 [h] **Limited capacity of track designated for delivery.**–**TexCivA** 31SW(2d)868.

291-76 244IllA359; 296Pa441, 146A98 (2dcase) (perishable goods).

291-78½-New. It seems that notice does not excuse carrier for delay which can be avoided. 149Md1, 130A63.

292-80 See also 133SC23, 130SE552, 554 [citCJ].

292-81 296Pa441, 146A98(2dcase) (cars held for demurrage charges). See also 133SC23, 130SE552, 554 [citCJ].

292-84 296Pa441, 146A98(2dcase); 146 Va475, 131SE827, 829 [quotCJ].

292-90 258Mass26, 154NE334. [b] 149 Md1, 130A63 (ice in harbor delaying railroad float operations and trains).

293-93 258Mass26, 154NE334.

293-98 203 Iowa1232, 210NW770, 773 [citCJ]; 218MoA314, 274SW90, 94 [cit CJ]; 220MoA743, 276SW409, 412 [quot CJ]; 222MoA495, 280SW1050, 1052 [cit CJ]; 220MoA1189, 299SW93. [d] **Initial carrier is not relieved from liability** for delay due to strike in connecting carrier's lines. **TexCivA** 294SW290.

293-99 42 Ida193, 244P580.

294-5 168Ark804, 271SW464; 203 Iowa1232, 210NW770, 773 [citCJ]; 218MoA314, 274SW90 (strike of its employees).

294-6 42 Ida193, 244P580; 218MoA314, 274SW90 (may be liable for negligence for failure in this respect).

294-13 203 Iowa12, 212NW322.

295-30 117 Okl185, 245P858.

295-34 [b] **Repairing engine and setting out and picking up cars** are not due to accidental causes excepting carrier from liability. 11LaA445, 123S504.

296-40½-New. Where defense was that delay was caused by strike of defendant's shopmen, it is not proper matter of defense that plaintiff loaded his stock with knowledge that federal government had applied for restraining order against the strike. 218MoA314, 274SW90.

297-56 181Ark192, 258SW(2d)28.

297-57½-New. Neither notice nor filing claim is required as condition precedent to an action for damages for negligent delay and handling of cattle. **TexCivA** 275SW169.

297-71 [a] 37GaA215, 139SE586 (action for failure to notify shipper of consignee's refusal to accept); 220MoA773, 277SW64; 101Vt56, 140A491. [b] **Complaint held to state cause of action.**–**TexCivA** 17SW(2d)150.

297-72 See also 37GaA215, 139SE586.

297-74½-New. Where answer to counterclaim for loss of goods alleges relation as private carrier, shipper cannot recover where he fails to allege and prove negligence. 241NY413, 150NE500.

297-75 **TexCivA** 138SW(2d)144.

298-80 **Ala** 127S802(2dcase).

298-84½-New. Plaintiff must affirmatively plead estoppel, in order to urge that defendant was estopped from relying on a contractual limitation of time within which action might be brought. 88IndA645, 165NE336.

299-92 101Vt56, 140A491.

300-99 **MoA** 118SW(2d)1055; **TexCivA** 17SW(2d)150. [a] (12) In action for damages for delay in transportation of eggs proof of date when they should have been delivered to consignee and market value at such time is essential. 268US85, 45SC437, 69LEd857. (13) On issue as to measure of damages for delay on transporting carload of beverage, proof that beverage had been sold by plaintiff to its customers at destination for certain prices was held inadmissible when plaintiff claimed no special damages. 320IllA341, 151NE225.

301-3½-New. Where a record shows a bill of lading was issued, it should be introduced. 239IllA151.

301-3¾-New. The carrier has the burden of proving the defense that the statute requiring transportation at a certain average speed is invalid. 82Colo509, 261P864, 55ALR1285.

301-4 219Ala206, 121S736; 109Conn466, 146A846; 222MoA495, 280SW1050 (interstate shipment); 143SC395, 141SE607; **TexCivA** 272SW224; 146Va475,

131SE827, 829 [citCJ].

301-5 146Va475, 131SE827; 200Wis181, 227NW875.

301-7 219Ala581, 122S693; Ala 127S 802(2dcase); 203 Iowa1232, 210NW770; 217MoA31, 273SW410; 129Misc24, 220 NYS438; 122 Okl 282, 254P725, 727 [quotCJ]; TexCivA 272SW597; Tex CivA 275SW423 (presumption of negligence); TexCivA 275SW459, 463 [quot CJ]; TexCivA 286SW478; 146Va475, 131SE827; 200Wis181, 227NW875. See also 219Ala206, 121S736; 133SC23, 130 SE552, 554 [quotCJ]. [b] (1) 146Va 475, 131SE827.

301-8 TexCivA 272SW224. But see TexCivA 286SW478.

301-8½-New. A presumption of negligence arises from carrier's delivery of cattle in an injured condition. TexCivA 272SW597.

301-9 217MoA31, 273SW410; 220MoA 743, 276SW109; MoA 278SW814; 222 MoA495, 280SW1050; MoA 118W(2d) 1055; MoA 15SW(2d)884.

302-10 220MoA743, 276SW409. [a] **Unexplained unreasonable delay in transportation of perishable freight** raises presumption of negligence. 217 MoA31, 273SW410.

302-12 MoA 118W(2d)1055; MoA 15 SW(2d)884.

302-15½-New. Plaintiff has burden in an action for delay in transporting an interstate shipment of proving carrier guilty of negligence. 218MoA314, 274 SW90.

302-15¾-New. Under state statutes as at common law it is held that the burden of proving itself free from negligence is placed on the carrier of an intra-state shipment. 218MoA314, 274SW 90.

302-16½-New. In an action for delay in the transportation of an interstate shipment, where the contract relieved the carrier from liability for delay caused by a strike except in case of negligence, and defendant shows that the delay was due to a strike, the burden rests on plaintiff to show negligence. 222MoA495, 280SW1050.

302-19 But see 123Kan600, 255P683.

302-22½-New. Measure of damages. In order to recover depreciation in market value plaintiff cannot be required to show actual sale price of goods. 133SC 23, 130SE552.

302-23½-New. Not admissible to establish special contract to vary terms of bill of lading. 33GaA705, 127SE878.

302-23¾-New. Carrier's representation that stock could be delivered for next morning's market is admissible. 33GaA 705, 127SE878.

302-23¾-New. Excluding classification and tariffs, declared error. 33GaA705, 127SE878.

302-23⅞-New. Evidence that consignor delivered other material during delay by truck is material to show delay by railroad carrier. 92Fla442, 109S457.

302-24 (9) 214Ky658, 283SW1013; MoA 328W(2d)109. [a] (6) Proof of customary way of performing carrier's duty to transport stock may be considered in determining whether carrier has exercised required degree of care. 200 Wis181, 227NW875.

303-26 42 Ida193, 244P580, 582 [cit CJ]; 117 Okl 185, 245P858; 101Vt427, 144A194.

303-27 117 Okl 185, 245P858.

303-32 42 Ida193, 244P580, 582 [cit CJ].

303-36 296Pa441, 146A98(2dcase).

303-42 [a] **Evidence that other cattle,** unloaded subsequent to plaintiff's, were sold on same day held erroneously excluded and admissible on issue of care of plaintiff in avoiding loss. TexCivA 297SW487.

303-42½-New. Under a stipulation in a bill of lading exempting carrier from liability for delay caused by strikes carrier may show delay in intra-state shipment of live stock was not caused by its negligence. 218MoA314, 274SW90.

303-42¾-New. Exclusion of evidence as to carrier's limited facilities is error. 202 Iowa787, 211NW364.

303-42¼-New. That goods were shipped under an ordinary bill of lading was no defense. 296Pa441, 146A98(2dcase).

303-42⅛-New. Evidence as to the rights of other shippers on available delivery tracks and the usual manner of work by switching crews is admissible. 175Minn374, 221NW428.

304-46 203 Iowa1232, 210NW770.

304-51 [a] (3) Testimony as to amount of shrinkage of sheep and lambs when taken by shipper from pens to pasture and later shipped to market is inadmissible where under petition there could be no recovery therefor. 222MoA 495, 280SW1050. [b] (4) Witnesses who examined cattle after their arrival at destination and who are experienced in such matters may testify as to loss of weight. 117 Okl 185, 245P858. (5) Such witnesses may testify as to decrease in market value of cattle by reason of such loss of weight. 117 Okl 185, 245P858.

304-57 178Ark334, 10SW(2d)515 (sustaining finding of notice to carrier of time for cars); 92Fla442, 109S457. [a] TexCommnA 14SW(2d)1004. [c] (1) 131 SC450, 128SE417; TexCivA 272SW597; TexCivA 13SW(2d)996. (5) Whether carrier's agent directed time of shipment with reference to arrival at destination at particular time. 178Ark334, 10SW(2d)515. [e] (2) Defendant's reasonable care and whether time taken to transport shipment was reasonable. 101Vt427, 144A194. [i] (7) Negligent delay in transportation of cattle. 117 Okl 185, 245P858. (8) As to authority of carrier's station agent at destination to contract for through shipment on certain day by arrangement with agent at point of shipment. 220MoA773, 277SW 64. [aa] **To support finding of depreciation in value of cattle by delay.**–TexCivA 272SW597. [bb] **To support finding of negligence.**–258Mass26, 154NE 334. [cc] **To make prima facie case.**–Ala 127S804. [dd] **To establish weight of cotton as basis for damage.**–157Miss 383, 127S269. [ee] **To show market value.**–157Miss383, 127S269.

305-58 203 Iowa1232, 210NW770; 123 Kan44, 254P390; 215Ky49, 284SW423; 218MoA633, 267SW74; TexCivA 272SW 224; TexCivA 274SW305; TexCivA 294 SW290; 150Va219, 142SE409; 137Wash 241, 242P24. [a] 207 Iowa889, 223NW 879. [t] **Evidence as to usual time made by passenger trains** held insufficient to sustain finding as to what was reasonable time for transportation and delivery of eggs. 268US85, 45SCt437, 69 L ed857. [u] **To show negligent delay and warrant verdict for damages against intermediate shipper.**–TexCivA 272SW 224. [v] **To show delay was caused by strike.**–TexCivA 275SW169. [w] **Causal connection** between strike and delay not shown. TexCivA 270SW1089; Tex CivA 275SW169. [x] **To show that damage was proximate result of delay.**–10LaA755, 120S798(2dcase). [y] **To sustain findings of unreasonable delay and loss by reason thereof.**–175Minn374, 221 NW428. [z] **To show customary time consumed in shipments.**–TexCivA 30SW (2d)492. [aa] **Evidence held insufficient.**–(1) To support verdict. 181Ark 1146, 24SW(2d) 319(1stcase). (2) To show breach of duty to make delivery within reasonable time as matter of law in case tried to court. 109Conn466, 146 A846.

305-61 [a] (1) 92Fla442, 109S457; 42 Ida193, 244P580, 583 [cit CJ]; 234Mich 614, 208NW679; 140Miss360, 105S760; 217MoA31, 273SW410; 220MoA1316, 297SW440 (submission held error); Mo A 300SW324; 117 Okl 185, 245P858. [c] **Plaintiff can recover only on the special acts of negligence** pleaded and relied upon to support cause of action. TexCivA 272SW340. [d] **Evidence held insufficient to go to jury** on question whether delay was negligent. 151SC362, 149SE109. [e] **Evidence held not to authorize submission of issue of damages** in difference of market value. TexCivA 27SW(2d)836. [f] **Evidence held to raise issue** as to money expended for extra feed because of carrier's delay. TexCivA 27SW(2d)836.

305-62 92Fla442, 109S457; 33GaA705, 127SE878; 42 Ida193, 244P580, 583 [cit CJ]; 120Kan484, 244P240; 117 Okl 185, 245P858; 122 Okl 282, 254P725; 296Pa 441, 146A98(2dcase); TexCivA 78W (2d)902; TexCivA 17SW(2d)150; 101 Vt427, 144A194. [a] TexCivA 297SW 487. [l] **Reasonableness of freight train schedule is not for jury** under statutes empowering railroad commissioners to prescribe speed of live stock shipments. 201 Iowa712, 208NW78.

306-63 MoA 15SW(2d)884. [a] **Whether strike of carrier's shopmen was unavoidable** is question for jury. 218MoA 314, 274SW90.

306-64 117 Okl 185, 245P858. [b] **Instructions held erroneous** as submitting question of reasonableness of freight train schedule in contravention of statute, empowering railroad commissioners to prescribe speed of live stock shipments. 201 Iowa712, 208NW78.

306-64½-New. Whether delay was caused by strike of carrier's shopmen is question for jury. 218MoA314, 274 SW90 (action for delay of intra-state shipment).

306-65½-New. Where there is no evidence of market value of cattle on an earlier market than one on which they were sold, necessary to furnish basis for verdict for plaintiff, court may properly direct verdict for defendant. 50SD 319, 210NW81.

306-65¼-New. Whether it was practicable for a carrier to comply with a statutory provision as to speed held for the jury on conflicting evidence. 82Colo 509, 261P864, 55ALR1285.

306-66 234Mich614, 208NW679.

306-67 120Kan484, 244P240; 228Ky 492, 15SW(2d)293; 122 Okl 282, 254P 725; 101Vt427, 144A194.

306-69 30F(2d)571.

306-71 120Kan484, 244P240; 50SD319, 210NW81; 101Vt427, 144A194.

306-73 [b] **Instructions held misleading.**–217MoA31, 273SW410.

306-74 172Ark252, 288SW900; 202 Iowa787, 211NW364; MoA 15SW(2d) 901; 217MoA31, 273SW410; MoA 15 SW(2d)884 (instruction not warranted by evidence); 98PaSuper300; TexCivA 294SW290. [f] 217MoA31, 273SW410. [g] **Requested instructions** not supported by evidence held properly refused. 149Md1, 130A63. [h] **Instruction on delay due to failure of cars to arrive on time** held not defective for failure to mention earlier delay which did not contribute. 149Md1, 130A63. [i] **Instruction on notice to shipper** of probable delay held warranted. 149Md1, 130 A63. [j] **Submitting case on theory of oral agreement to furnish cars at definite time** not error, though later written contract specified no definite time. TexCivA 277SW230. [k] **Instructions held proper.**–258Mass26, 154NE334.

306-75 217MoA31, 273SW410; TexCiv A 297SW487.

306-76 119 Okl 138, 249P289 (instruction that carrier must handle interstate shipment of live stock "expeditiously and with reasonable dispatch" held erroneous). [a] (7) Other illustrations of instructions not obnoxious to rule. 217 MoA31, 273SW410 (constituent elements of delay in transportation of nursery stock). (8) Instructions may be correct, though "negligence" not defined or explained. 217MoA31, 273SW410. (9) Other illustrations of correct instructions. 117 Okl 185, 245P858.

306-76½-New. It is error for court to fail to require the jury to find that plaintiff has the burden of proving negligence of carrier for delay in transporting an interstate shipment. 218MoA 314, 274SW90.

307-77 [c] TexCivA 289SW413. [d] **Instructions held erroneous.**–218MoA314, 274SW90.

307-81 MoA 15SW(2d)884 (instruction erroneous).

307-81½-New. Charging the jury that if cattle were delivered with the usual dispatch market value on day of arrival was not to be considered was error as on weight of evidence. TexCivA 272SW597.

307-81¾-New. An instruction was erroneous as argumentative which charges jury not to consider market value on date of arrival if delivery was made

with the usual dispatch. **TexCivA** 272 SW597.

307-81½-New. An instruction, which directs jury not to consider market value on day of arrival if delivery was made with usual dispatch, is erroneous as relieving defendant from duty to use ordinary care. **TexCivA** 272SW597.

307-81½-New. Instruction as to consideration of market value held not warranted by the evidence. **TexCivA** 272 SW597.

307-81½-New. Charge on question of "reasonable dispatch," not erroneous. 33GaA705, 127SE578.

307-81½-New. Failure to give specific unrequested instructions is held not error. 203 **Iowa**1232, 210NW770.

307-81½-New. Finding that shipment was not "transported within reasonable time" held not to support conclusion of negligence. **IndA** 159NE13.

307-81½-New. Instruction that, if jury find that defendant failed to transport live stock within reasonable time, burden is on defendant to prove freedom from negligence is erroneous as applied to interstate shipment. **MoA** 32SW(2d)109.

307-83 92**Fla**1102, 111S248; 120**Kan**105, 242P117.

307-84 228**Ky**492, 15SW(2d)293; 131 SC152, 128SE417 (damages not speculative or special precluding recovery).

307-86½-New. Where a carrier reships goods to the shipper under an agreement that the shipper shall receive lost profits and the difference in freight as damages for delay by reason whereof the consigned refused to accept the shipment, a subsequent resale of the goods at regular prices is immaterial in determining the railroad's liability for loss of profits under the agreement. 21 **OhA**255, 153NE86.

307-86½-New. A provision in a tariff that after five days in elevator railroad assumes storage cost is held not to limit damages for unreasonable delay. 15 F(2d)535.

307-86¼-New. Liability for negligent delay is generally the same, whether in tort or contract. 228**AppDiv**746, 239 NYS478.

307-95 2**LaA**7, 8 [cit**CJ&Cyc**]; 46**Philippine**418, 420 [cit**CJ**].

308-7 [a] (5) Delay in transportation of carload of beverage for over two months during summer. 320 **Ill** 341, 151 NE229.

309-8 320 **Ill** 341, 151NE229.

309-10 15F(2d)535; 172**Ark**252, 288 SW900; 201 **Iowa**712, 208NW78 (live stock); 6**LaA**7; 157**Miss**383, 127S269; 98**PaSuper**300; 133SC23, 130SE552, 554 [cit**CJ**]; 50SD319, 210NW81; **TexCivA** 275SW423; **TexCivA** 286SW559, 563 [cit**Cyc**]; **TexCivA** 292SW552; **TexCivA** 294SW290; **TexCivA** 22SW(2d)492; **TexCivA** 278SW(2d)608. [k] **Railroad delivering cattle** as soon as reasonable care permitted held not liable for loss from shipper's inability to sell on date of arrival. **TexCivA** 297SW487.

310-11½-New. Where grain is shipped for future delivery, damages are difference in price at which grain was sold and market price at destination. 15 F(2d)535.

310-12 133SC23, 130SE552, 554 [cit CJ].

310-15 138**Misc**74, 244NYS326.

311-22 120**Kan**105, 242P117 (delay in transportation of grain shipped to domestic ports "for export").

311-23 218**MoA**314, 274SW90. [b] **Additional expense incurred because of delay** is also allowed. 218**MoA**314, 274 SW90.

311-27 120**Kan**105, 242P117 (grain shipped to ports "for export" and stored in terminal elevators pursuant to stipulation in bill of lading).

311-28½-New. Where there is no market value, the measure of damages is the real or intrinsic value in condition in which they were delivered. **TexCivA** 275SW423.

312-39 15F(2d)535.

312-40 [a] **Shipper need not sell delayed shipment immediately** on arrival unless there is fair opportunity. **TexCivA** 278SW(2d)608.

313-54 42 **Ida**193, 244P580; **TexCivA** 278SW(2d)836. Contra 201 **Iowa**712, 208 NW78. [c] **Amount expended must be shown to be reasonable.**–222**MoA**495, 280 SW1050.

313-55 See also 219**MoA**62, 265SW851.

313-57 219**MoA**62, 265SW851. Contra 201 **Iowa**712, 208NW78.

313-57½-New. Where damages are based solely on negligent delay in shipping, and that delay resulted in sickness of live stock shipped, no recovery may be had for damages to other stock not in shipment because such other stock contracted same sickness by intermingling with stock shipped. 201 **Iowa**712, 208NW78.

314-61 201 **Iowa**712, 208NW78.

314-63 172**Ark**252, 288SW900. But see **TexCivA** 271SW397. [d] **Not construed as interest or nominal** but as part of damages. **TexCivA** 30SW(2d)492.

314-66 See also **MoA** 11SW(2d)1055.

315-67½-New. In case of delay in transporting live stock, market conditions and practices rather than rule hours for opening and closing govern and delivery in fact too late for market of day of arrival is equivalent to delivery for the next day's market. 121 **Kan**275, 246P1005.

315-72 207 **Iowa**889, 223NW879; 157 **Miss**383, 127S269; 227**AppDiv**375, 237 NYS429; 137**Wash**241, 242P24, 25 [cit CJ].

316-73 [a] **Even if speed is main consideration** in delivery, special damage does not follow from failure to exercise it. 137**Wash**241, 242P24.

316-81 [a] (4) Carrier held liable in special damages to owner of sugar factory for nondelivery of fuel oil confiscated by it to operate trains. 162**La**289, 110S425.

317-82 162**La**289, 110S425, 426 [quot CJ].

317-86 162**La**289, 110S425, 426 [quot CJ].

317-88 207 **Iowa**889, 223NW879; **Tex CommnA** 148W(2d)1004.

318-93 137**Wash**241, 242P24, 25 [cit CJ].

318-96 [c] **Information of special circumstances need not necessarily be given to agent having jurisdiction of matter of delivery,** since, in case agent receives information while duly representing principal in particular matter, that information immediately becomes knowledge of his principal. **Tex CommnA** 148W(2d)1004.

319-8 162**La**289, 110S425, 426 [quot CJ].

320-11 [a] (7) Other instances. 207 **Iowa**889, 223NW879.

320-14 220**MoA**773, 277SW64.

321-19½-New. Damages for loss of profits and expenses incurred by failure of a carrier to transport a merry go round in the time agreed may be excessive because of the transitory nature of the business and unfavorable weather conditions causing dispersal of crowds. 220**MoA**773, 277SW64.

321-21 162**La**289, 110S425, 426 [quot CJ].

322-26 **TexCivA** 48W(2d)193 (that shipment consisted of cotton seed meal and hulls held not notice).

322-28 **TexCommnA** 148W(2d)1004.

327-80 173**Ark**810, 294SW401; 239 **Mich**155, 214NW99.

327-82 13F(2d)538; 123**Kan**600, 255P683.

327-84 175**Ark**35, 298SW873.

327-86 See also 149**Wash**319, 270P1038.

328-93 [a] (2) Live stock removed from car during course of shipment and not delivered at destination is not within provision requiring notice. 138 **Okl** 276, 281P240.

328-96 **TexCivA** 270SW1089 (invalid in case of interstate shipments).

329-3 273**US**280, 47SC386, 71**L ed**644.

329-5 273**US**280, 47SC386, 71**L ed**644.

329-7 40**GaA**297, 149SE428 (as to notice of claims in less than ninety days); 87**PaSuper**119. See also 134SC93, 131 SE677.

329-8 [d] **In actions for damages caused by delay and careless, negligent handling in transit** no notice or filing of claim is required as condition precedent to recovery under federal statutes. **TexCivA** 275SW169. [e] **Failure to file damage claim** within time allowed, or to bring case within proviso of Cummins Amendment prevents recovery. 270**US**416, 46SC318, 70**L ed**659.

329-8½-New. Under Act March 4, 1915 to dispense with notice of claim required by express receipt, delay in transportation must be shown to have been the result of carelessness or negligence. 268**US**85, 45SC437, 69**L ed**857.

329-8¼-New. Under the Federal Transportation Act a distinction is made between giving of notice of loss and filing of a claim for damages therefor, and each is made a condition precedent to recovery unless loss is due to the carrier's negligence. 241**Mich**297, 217NW12.

329-8¼-New. Under such statute, where a shipper fails to file a claim within the time allowed therefor for goods stolen in shipment, and fails to show negligence, there can be no recovery. 241**Mich**297, 217NW12.

329-8½-New. Under the Interstate Commerce Act, as amended, filing of a written claim within the prescribed time is a condition precedent to recovery for nondelivery. 221**MoA**241, 300SW1051.

329-8¼-New. A mere showing of nondelivery of an express shipment does not make a case of damage in transit within such statute so as to obviate the necessity of giving notice. 221**MoA**241, 300SW1051.

329-8½-New. The National Transportation Act, providing from what day the time for bringing suit shall be computed, is not retroactive so as to modify the terms of a contract previously made. 89**PaSuper**64.

329-8½-New. Shipper may recover for injuries to cattle due to carrier's negligence without giving written notice, under federal statutes providing that notice is unnecessary in cases due to negligence or unreasonable delay. **Wash** 287P665.

330-28 **TexCivA** 270SW1089.

331-47 133SC298, 130SE878 (shipper must comply). See also **Va** 155SE630.

331-54½-New. A provision that a claim for damages for loss or injury shall be made within four months after delivery or, in case of failure to make delivery, within four months after reasonable time for delivery has elapsed is reasonable and valid. 120**Kan**21, 245P734.

333-78 36**GaA**433, 137SE79; 40**GaA** 103, 149SE71; 40**GaA**297, 149SE286; **IndA** 159NE13; 232**Ky**579, 24SW(2d) 290; 258**Mass**26, 154NE334; 87**PaSuper** 119 (under Cummins Amendment). See also 21**AlaA**66, 106S56; 36**GaA**444, 137 SE83. [a] 174**Ark**6, 294SW416; 42 **Ida** 193, 244P580; 241**Mich**297, 217**Mo** 12. [b] **Defense of no notice** in time, not available where bill of lading required no notice in case of loss through negligence. 21**AlaA**66, 106S56. [c] **Suit based on interstate shipment.**–40**GaA**297, 149SE428.

334-81 [a] **Presentation of claim is not prerequisite,** as to delays in loading and unloading. 228**AppDiv**746, 239NYS478.

334-82 123**Kan**600, 255P683; **TexCivA** 270SW1089.

334-85 **TexCivA** 270SW1089.

334-86 36**GaA**433, 137SE79 (under Cummins Amendment).

335-94½-New. The Cummins Amendment renders unnecessary a claim for damages from delay to interstate shipments. 131SC452, 128SE417.

335-94¼-New. No notice of claim or filing of claim is required as a condition precedent to an action under a bill of lading issued in accordance with the federal statute where the loss, damage, or injury complained of was due to the carelessness or negligence of carrier in delaying shipment of cattle. 42 **Ida**193, 244P580.

335-95 269**US**158, 46SC128, 70**L ed**209, 44**ALR**1357. But see 87**PaSuper**119.

335-98 269**US**158, 46SC128, 70**L ed**209, 44**ALR**1357; 120**Kan**21, 245P734; 106 **Wyo**3, 144SE715.

336-12½-New. Theft of part of money shipped by express is held not damaged in transit within a provision of a statute and receipt excusing filing of claim. 213**Ala**151, 106S197.

336-15 21**AlaA**133, 106SE195.

336-16 [b] (1) 174**Ark**10, 294SW357. [h] **Requirement as to filing written**

notice held sufficiently complied with.–21AlaA133, 106S195.

337-29½-New. Under the Interstate Commerce Act, as amended, written notice of a claim for nondelivery is required, and verbal notice is insufficient. 221MoA241, 300SW1051.

337-33½-New. A claim by a consignee, subsequently becoming the owner of a bill of lading by assignment, is binding as if made by the consignor. 40GaA330, 149SE431.

338-43½-New. Notice to agent of both defendant express company and railroad is sufficient. 223Ky681, 4SW(2d) 679.

338-46½-New. Filing claim, as distinguished from notice of loss, with delivering carrier within time required by bill of lading, not as agent of initial carrier, does not constitute filing claim with initial carrier. 133SC226, 130SE 647.

338-46½-New. Notice to initial carrier with statutory demand to make proof of nonliability. 144 Okl 216, 291P107.

338-50 133SC226, 130SE647 [citCJ].

338-52 [d] (2) Where interstate live stock shipping contract provides for written notice to carrier of visible injury to stock before removal from carrier's possession or mingling with other stock, presence of carrier's representative at unloading will not obviate compliance with contract. 121Kan275, 246 P1005.

339-58½-New. Failure to give notice of loss or injury is not excused because the carrier participated in conversion of the shipment, 120Kan21, 245P734.

339-58½-New, nor because some of the carrier's employees had knowledge of the loss or injury. 120Kan21, 245P734.

339-58¼-New. Failure to make a claim for loss of an interstate shipment within the time required is not excused because the carrier has actual knowledge of the loss. 241Mich297, 217NW12.

339-59 Va 143SE629.

340-66 190NC438, 129SE815; 23 OhA 179, 155NE508. [a] (5) Requirement of notice of injury before removal from carrier's first discovered injury and unloaded live stock, prematurely ending shipment without notice to shipper. 219MoA62, 265SW851.

340-71 123Kan600, 255P683; Va 155 SE630.

340-72 221MoA241, 300SW1051.

340-73 47RI 72, 129A815.

341-78 But see 120Kan21, 245P734.

341-83 [d] **Acts have been held not to show waiver.**–Va 155SE630.

342-91 But see 13F(2d)538.

342-97½-New. The requirement as to notice is waived where the carrier's attorney at the close of the evidence in an action for damages states that the carrier does not raise the question. 172 Ark881, 290SW936.

343-4½-New. Where the consignee filed a claim in accordance with directions of the carrier, the carrier cannot assert that the claim was not filed according to requirements of bills of lading. 21F(2d)396.

343-15 [c] **Transportation Act Febr. 28, 1920,** forbidding limitation of time for bringing suit to shorter period than two years from date of notice of disallowance of claim, does not apply to existing contracts. 119Kan556, 240P 843; 239Mich155, 214NW99; 37 Okl ACR272.

344-16 6F(2d)947; 176Ark296, 2SW (2d)1078; 208 Iowa1396, 227NW407; 119Kan556, 240P843 (where holder on surrendering bill of lading received another in lieu thereof for shipping goods to another city and loss occurred in transit to such city, it was held that the loss arose under the second bill of lading, and suit not brought within time specified therein was barred); 239Mich 155, 214NW99; 220MoA695, 294SW100. See also 95Fla392, 118S52. But see 130 Misc29, 223NYS542. [b] (1) MoA 6SW (2d)628; 56ND870, 220NW634.

344-18 [a] (2) 2LaA4. (9) 120 Okl 150, 250P776. (14) Provision requiring suits to be brought within six months after delivery will not defeat consignor's right to sue within six months after requiring knowledge of carrier's failure to make delivery. 113 OhSt499, 149NE 861. [b] (1) 220MoA695, 294SW100; TexCivA 270SW1089. [e] **Computation of time.**–47RI 72, 129A815.

344-19 [a] **Consideration is necessary.**–MoA 256SW100.

344-23 239Mich155, 214NW99.

344-24 106WVa53, 144SE715 (stipulation held not affected by carrier's diversion of shipment and delivery to another).

344-24½-New. An agreement in an interstate bill of lading that an action for damages in transit must be brought within two years is valid. 239Mich155, 214NW99.

345-25 [a] **Under Amendment to Interstate Commerce Act** of Febr. 28, 1920, carrier cannot restrict time for bringing action on contracts of carriage based on time of delivery of shipment rather than on time of giving notice prescribed therein. 6F(2d)947.

345-28 But see 88 IndA645, 165NE336.

345-31½-New. Under the Transportation Act of 1920, limitations under two years from time of notice of disallowance of claim are invalid. 273US280, 47 SCt386, 71L ed644.

345-31½-New. Federal Transportation Act (1920) § 206(f) refers to statutory periods of limitation and is not contractual. 216Ky611, 288SW347.

345-31¼-New. The Federal Transportation Act did not have effect of reviving right of action barred before its passage. 216Ky611, 288SW347.

345-31⅛-New. As respects an intrastate shipment before the Transportation Act, a bill of lading requiring suits for loss, damage, or delay to be brought within two years and one day is valid. 22F(2d)113.

345-33 See also 246 IllA580.

345-36 174Ark6, 294SW416.

345-37½-New. Assumption by a state court of jurisdiction of a suit by a resident against a foreign corporation is not contrary to public policy because the contract of carriage was made and is to be performed without the state where defendant does business within the state. 173Ark810, 294SW401.

345-38 [b] **In Montana.**–83Mont15, 268 P547.

345-38½-New. In Arkansas venue is governed by general statute and railroad may be sued jointly with another road having line within district. 175Ark630, 299SW999.

345-38⅛-New. Evidence held to warrant overruling plea of privilege in a suit against an initial carrier. TexCivA 18SW(2d)833.

345-38¼-New. In Ohio the fact that a shipment moved through the state does not confer jurisdiction on the state courts. 26 OhNPNS530.

345-41 See also 162Ga616, 134SE605.

346-55½-New. The Ohio statute relative to venue of certain actions against enumerated carriers does not apply to foreign express companies. 22 OhA165, 153NE316.

346-59 [a] **In Florida.**–92Fla1102, 111 S248.

346-61½-New. The consignor's failure to tender freight charges does not preclude suit against a carrier for delivery after stoppage in transitu. 149Wash 319, 270P1038.

346-63 59 OntL252, [1926] 4DomLR 360.

346-64 217AppDiv49, 215NYS727.

347-65 217AppDiv49, 215NYS727.

347-70 191NC365, 131SE728.

348-75 37GaA636, 141SE214; 191NC 365, 131SE728.

348-84 217AppDiv49, 215NYS727.

349-88 221MoA448, 282SW459.

349-91 233 IllA1.

350-4 216Ala637, 114S295.

352-28 39GaA94, 146SE343; 263Mass 192, 160NE783.

353-29 [c] TexCommnA 280SW574.

353-31 233 IllA43; 167La111, 118S822.

354-37½-New. The manager of a live stock shippers' association, who attended to the shipping and received and distributed returns, may maintain an action for loss in shipment. MoA 285 SW159.

354-41 13F(2d)605; 69CalA669, 232P 169; 35GaA438, 134SE122; 38GaA284, 143SE782; 246 IllA451. [b] **"Holder" means,** as provided by the amendment, person who has both actual possession of bill and right of property therein. 35 GaA438, 134SE122. [c] **Wrongful or fiduciary possession of bill of lading** gives no right to sue for loss or damage to freight. 40GaA330, 149SE431.

354-42 94Fla922, 115S185.

354-44 247 IllA325.

354-44½-New. One having bare physical possession of the bill of lading cannot maintain suit thereon. 35GaA438, 134SE122.

354-44¼-New. and hence a mere official custodian of a bill of lading issued to a corporation of which he is an officer cannot maintain the action. 35GaA 438, 134SE122.

354-48 40GaA330, 149SE431; 220MoA 941, 278SW1075.

355-52½-New. Where a seller ships goods in interstate commerce to his own order under a bill of lading directing that the purchaser be notified, and attaches a draft for the price to the bill of lading, and the purchaser pays the draft and takes possession of the goods, the purchaser may maintain an action for damages against the last connecting carrier for an injury to the goods caused by its negligence, although the purchaser acquired title after the damages were inflicted. 35GaA653, 134SE172.

355-63 269US114, 46SCt34, 70L ed186.

355-64½-New. Director general of railroads is the only person who could be sued for loss occurring during the period of federal control. 128Misc238, 218 NYS287.

355-64¼-New. In an action for wrongful delivery, one who wrongfully receives the shipment is not a party defendant. 21OhA227, 153NE166.

356-72½-New. An owner of goods may properly join shipper and railroad in an action for injury to goods in transit. 142Wash675, 254P248.

356-76 [a] **In actions relative to interstate shipments,** common-law rules of pleading govern. 94Fla922, 115S185.

356-77½-New. A complaint was held not demurrable as not stating a cause of action. 219Ala581, 122S693.

356-78 216Ala637, 114S295. [a] **In action for loss or injury to interstate shipment** plaintiff must allege either that he is lawful holder of bill of lading or, where bill was not issued, that he would be entitled to recover thereon if one had been issued. 94Fla922, 115S 185.

356-79 [b] (2) Count in action showing right of action in consignor and not alleging assignment to plaintiff is demurrable. 213Ala119, 104S412.

359-13 [b] (6) Weight of cattle shipper need not be alleged. TexCivA 278 SW478.

359-15 219Ky794, 294SW463.

360-20 35GaA438, 134SE122; MoA 285 SW159; 138 Okl 276, 281P240; Tex CivA 278SW478; 101Vt56, 140A491.

360-24 101Vt56, 140A491.

360-27 33GaA773, 127SE830; 219MoA 451, 274SW906; TexCivA 278SW478 (where several distinct acts of negligence were relied upon); TexCivA 30 SW(2d) 939. [e] **Allegation of damage from rain and mud** not demurrable as being act of God. TexCivA 277SW230.

361-23½-New. A complaint was held sufficiently to show that they were agents acting within the scope of their employment. 219Ala223, 121S716.

361-28½-New. A complaint has been held not demurrable as not showing how negligence caused the damage. 219Ala 223, 121S716.

361-29 But see Iowa 231NW353. [c] **Allegations of negligence held not specific.**–TexCivA 22SW(2d)986; TexCivA 22SW(2d)988.

361-31 TexCivA 278SW478 (petition held not to allege illegal discriminatory contract).

362-33 [b] (2) Complaint alleging issuance of bill of lading on delivery to carrier, and proof showing that none was issued, where copy of bill annexed to complaint was identical with exhibit stipulated to be copy of uniform bill. 28F(2d)392.

364-54 101Vt56, 140A491.

364-57 318Mo723, 300SW769, 774 [cit CJ].

364–64 TexCivA 282SW661.
365–68 TexCivA 270SW1112.
365–68½–New. Where a contract does not require notice or demand, failure to give notice is no defense. 160La1019, 107S891.
365–72 TexCivA 291SW329. [a] (5) Where several shipments of like goods are damaged and delivered commingled making check up difficult or impossible, plaintiff need not plead each shipment and damage thereto in separate count. 213AppDiv262, 210NYS112. [b] **Petition held sufficient** against demurrer, giving sufficient basis for calculation of damages. TexCivA 277SW230.
365–73 TexCivA 291SW329.
365–76½–New. Allegations of damage to cattle by delay and loss in market value not allegation of double damages. TexCivA 278SW478.
367–93 Va 153SE865 (fraud).
363–8 Va 153SE865 (ground of defense insufficient to support estoppel).
368–19 TexCivA 2SW(2d)493.
369–23 224Ky659, 6SW(2d)1084 (fraud of shipper).
369–23½–New. In an action against a carrier for the death of cattle in transit in interstate commerce where it is shown that the shipment was made under a written contract, the written contract is admissible in evidence, although neither the issuance nor contents of the contract is pleaded by either party. 120Kan362, 243P1031.
369–31 221MoA448, 282SW459.
370–46 [a] **Petition charging failure to deliver part of shipment of live stock is not sustained** by proof that plaintiff's shipment had been interchanged with smaller shipment sold as his. MoA 284 SW184.
370–46½–New. [a] (9) Upon complaint in code form based on common-law liability of carrier in action for injury to mules in transit, recovery may be had upon proper proof for breach of contractual obligation of carrier at common law or on bill of lading. 213Ala 234, 104S413. (10) No fatal variance is shown in action for injury to mules in transit based on carrier's common-law liability by fact that bill of lading named another than plaintiff as consignee and place other than point of delivery as destination. 213Ala234, 104 S413. (11) Where specific acts of negligence are charged, plaintiff must prove such negligence or fail in action. TexCivA 282SW949.
370–46⅓–New. Bill of lading naming another than plaintiff as consignee and place other than point of delivery as destination not showing fatal variance is admissible for purpose of identification. 213Ala234, 104S413.
370–46¼–New. Issues, proof, and variance. No variance between allegation and proof of plaintiff's ownership of goods. GaA 155SE375.
371–49 32F(2d)553; 172Ark881, 290 SW936; 233 IllA1; MoA 22SW(2d)201.
371–50 244 IllA270.
371–51 174Ark1, 294SW414; 180Ark 562, 22SW(2d)378 (where claim of shipper was not filed within stipulated time); 128Me470, 148A679; 147SC487, 145SE400.
371–52 21AlaA66, 106S56; 170Ark469, 280SW18; 172Ark881, 290SW936; 174 Ark10, 294SW357; 173Ark810, 294SW 401; 36GaA433, 137SE79; 36GaA441, 137SE83; 202Iowa1008, 209NW744; 160La1019, 107S890; 11LaA386, 122S 724; LaA 129S419; 6LaA169; 220MoA 941, 278SW1075; 221MoA478, 282SW97; 222MoA1189, 18SW(2d)1028; 128Misc206, 217NYS767; 296Pa441, 146A98(2dcase) (loss occasioned by delay); TexCivA 278SW478 (live stock); TexCivA 286 SW478; 101Vt427, 144A194 (though goods are perishable); 147Va304, 137 SE507; 148Va48, 138SE467, 53ALR990; 142Wash675, 254P248. See also TexCivA 12SW(2d)1070. But see TexCivA 20SW(2d)260. [b] **Negligence is presumed** under conditions of rule, and needs no proof. TexCivA 278SW478. [c] **Burden of showing negligence of shipper** in not billing car more promptly rests on carrier. TexCivA 18SW(2d) 493.
371–53 220MoA941, 278SW1075.
371–53½–New. The presumption cannot be invoked where the shipper pleads specific negligence. 222MoA1189, 18W (2d)1028.
371–54 [a] **Burden on plaintiff to show notice** that consignee not owner. 91 Fla762, 109S205.
371–55½–New. One in possession of bill of lading is presumed to be the legal holder hereof. 35GaA438, 134SE 122.
371–56 120 Okl 150, 250P776; 90Pa Super78.
371–58 49RI 329, 142A613.
371–59 10LaA478, 120S703(2dcase); 10 LaA436, 120S786; 220MoA941, 278SW 1075; 189NC585, 127SE588. But see 242Mich357, 218NW649.
371–63 39F(2d)840; 173Ark810, 294 SW401; 254 IllA149; 202 Iowa1008, 209NW744 [citCJ]; 219Ky794, 294SW 463; NJ 141A566; 35 OhA291, 172NE 425; 147Va290, 137SE515; 52NB366, [1925] 3DomLR919. See also 120 Okl 150, 250P776. [a] **Plaintiff introducing evidence of proper loading** is not required to prove compliance with tariff regulations. 35 OhA291, 172NE425.
371–65 16F(2d)812; 246 IllA451; 192 NC25, 133SE414.
371–66 See also 254 IllA149.
372–67 16F(2d)812; 3LaA628; 168 Minn136, 209NW879 [citCyc] (not deciding question). But see 155SC394, 152SE670.
372–72½–New. When the tendency of the evidence is that goods were received by the initial carrier in good condition and conclusively that goods were delivered by the terminal carrier in bad condition, there is a presumption that the damage occurred on the delivering carrier's road. 29 OhA262, 163NE 50.
372–73 130 Or294, 279P861.
372–75 42F(2d)461; 233 IllA1; NH 149A497; 120 Okl 150, 250P776; 90Pa Super78.
372–77 233 IllA1, 5 [quotCJ].
372–78 233 IllA1, 5 [quotCJ].
372–79 174Ark10, 294SW357. See also 21AlaA66, 106S56. [b] **That part of delay in delivery is excusable** does not relieve carrier's liability on account of other delays in absence of intervening agency affecting shipment. 69CalA 669, 232P169. [c] **Plaintiff makes out case against initial carrier** where he proves delivery to initial carrier in good condition and failure of terminal carrier to make delivery. 37 OklACR272. [d] **That no claim for damages was filed** does not change rule. 85CalA440, 259P774.
372–79½–New. Delivery in bad condition of goods loaded in good condition infers negligence by carrier. TexCivA 8SW(2d)247 (cotton linters).
372–79⅓–New. Presumption of damage caused by delivering carrier held inapplicable where shipment was twice broken. 155SC394, 152SE670.
372–80 MoA 6SW(2d)973; 52NB366, [1925] 3DomLR919; Can [1927] 1Dom LR97, [1927] 1WestWkly206. [b] **Under contract requiring proof of carrier's negligence to recover,** evidence merely showing how injury could have happened did not make case. NH 149A 497.
373–81½–New. Commingled deliveries. If the carrier commingles like goods from various shipments, it cannot demand separate proof of the damage to each separate shipment. 213AppDiv262, 210NYS112.
373–82 7PaDist&Co 430; TexCivA 4SW (2d)641 (market value); TexCivA 19 SW(2d)98 (there must be evidence from which jury can determine amount of pecuniary damages); 149Va364, 141SE 113. [c] **Value at place of destination** must be shown. 141Miss199, 106S525.
373–84 123Kan600, 255P683; 133SC 298, 130SE873; TexCivA 282SW661.
373–86 270US416, 46SCt318, 70L ed 659; 174Ark1, 294SW414. [a] **Shipper basing claim for damages to interstate shipment on negligence in transit,** and excusing failure to give notice and claim on such ground must prove actual negligence and cannot rest on proof of delivery in good condition and receipt in bad condition. 174Ark6, 294 SW416.
373–92 221MoA448, 282SW459.
373–95 10LaA478, 120S703(2dcase); 10 LaA436, 120S786; 153Miss601, 121S 272; 318Mo723, 300SW769; 221MoA 478, 282SW97; Okl 292P52; TexCivA 276SW790; TexCivA 277SW230; Tex CivA 278SW478; 147Va304, 137SE507, 508 [quotCyc]; 147Va290, 137SE515, 518 [quotCyc].
374–1 11LaA18, 123S147; 147Va304, 137SE507.
375–10 LaA 126S593(2dcase); LaA 129 S419; 220MoA518, 276SW1030; 142 Wash675, 254P248. [c] **Presumption of negligence arises** in case goods are destroyed by fire, though liability is excepted in contract. TexCivA 29SW(2d) 905.
376–16 175Ark35, 298SW873; TexCivA 282SW919.
376–17 TexCivA 282SW919.
377–21 213Ala242, 104S418; LaA 126 S593(2dcase); 6LaA169; 7LaA754; 8 LaA601; TexCivA 282SW919; TexCivA 29SW(2d)905; 148Va48, 138SE467, 53 ALR990; 142Wash675, 254P248. [c] (3) Act or omission of shipper or owner. 171Minn205, 214NW17. [e] See also 6 LaA638.
377–22 21F(2d)396; 8LaA706.
378–23 175Ark35, 298SW873; 241Mich 297, 217NW12; 128Misc206, 217NYS 767 (dictum); 220NYS391; TexCommnA 280SW540. See also 198Wis618, 225 NW328. [b] (1) 241Mich297, 217NW 12; TexCivA 283SW250; 198Wis618, 225NW328. (3) Presumption of negligence arising from failure to make delivery does not prevail where failure to deliver is accounted for by fire. 241 Mich297, 217NW12. [g] **Loss by theft.–** 241Mich297, 217NW12. [h] **Evidence which only provided opportunity to guess between possible causes** does not amount to proof where contract requires proof of carrier's negligence. NH 149 A497.
378–24 128Misc206, 217NYS767; Tex CivA 283SW250; 198Wis618, 225NW328.
378–25 170Ark469, 280SW18; 246 IllA 451; 246 IllA479. [a] (8) See also 26 OhA 96, 159NE487. (9) Burden rests on carrier to show that speed of twelve miles per hour for fast freight train carrying perishable shipment was not unreasonably slow. 219Ky794, 294SW463. [c] **Where shipper of fruit furnished caretaker to look after heating protection,** proof of delivery to carrier in good condition and of arrival at destination in bad condition because of smoke and soot from heater does not make a cause of action. 164Minn68, 204NW566.
379–27 [d] **Proof by carrier that it was free from negligence is sufficient** without proving cause of damage. 176Minn 46, 222NW290.
379–28 213Ala234, 104S413; Iowa 231 NW353; MoA 15SW(2d)901; 220MoA 518, 276SW1030; MoA 285SW159; MoA 294SW439; MoA 6SW(2d)628; TexCivA 272SW597; TexCivA 286SW478; Tex CivA 299SW668; TexCivA 22SW(2d) 988. See also MoA 289SW343. But see TexCivA 20SW(2d)260.
380–29 TexCivA 286SW478; TexCivA 299SW668.
380–30 TexCivA 286SW478.
380–32 33GaA773, 127SE830, 831 [cit CJ]; 228Ky492, 15SW(2d)293.
380–32½–New. Presumption of shrinkage and stale appearance. TexCivA 283 SW294.
380–34 126Me489, 139A784; MoA 15 SW(2d)901; 86PaSuper88.
380–34⅓–New. Without proof of negligence, the carrier is not liable where a bill of lading exempts it. 9LaA582, 121 S769.
381–35 [b] **Recovery cannot be had** for loss of chicks during shipment without proof of condition when delivered for shipment or proof of actual negligence. 177Minn494, 225NW432.
381–36 MoA 282SW725. [d] 219MoA62, 265SW851. [g] **Carrier has burden of showing that it came within** federal statute permitting animals to be carried in cars longer than specified time without unloading where properly provided with food, water, and opportunity to

rest. **MoA** 15SW(2d)901.

381–38 171Ark698, 285SW372; 176Ark 182, 2SW(2d)3; 45 Ida313, 262P873; 120Kan362, 364, 243P1031 [citCJ]; 164 Minn68, 204NW566, 567 [citCJ]; **Tex CivA** 6SW(2d)418; **TexCivA** 30SW(2d) 939; **TexCivA** 32SW(2d)369. But see **TexCivA** 286SW478. [c] **Mere proof of injuries** is insufficient to establish negligence. 45 Ida313, 262P873.

382–43 **TexCivA** 286SW478.

382–47½–New. A shipper accompanying a shipment of live stock must show that the car was in a position where he could not observe it at the time the injuries occurred before the burden of proof will shift to the carrier to show freedom from negligence. 45 Ida313, 262P873.

382–49½–New. If shipment was not in good condition on arrival, injury thereto is imputable to shipper's negligence. 234Mich505, 208NW746.

382–50 See also **TexCivA** 286SW478.

383–66½–New. Evidence that a standard contract between banana importers and buyers requires notice of every claim against the seller immediately after arrival of the shipment, and a filing of a written statement of the basis thereof within twenty-four hours, has been held incompetent, in the buyer's action against the railroad company for damages to bananas in transit. 226Ky813, 11SW(2d)953.

383–67 See also 127 Or29, 270P903.

383–69 240 IllA6. [b] **In action based on carrier's common-law liability** evidence of shipping contract is immaterial. **TexCivA** 278SW337. [c] **Evidence as to character of bill of lading** admissible. 91Fla762, 109S205.

383–70½–New. In an action for the destruction of goods stored in a warehouse, evidence that delivery to the warehouse was for the purpose of preserving the carrier's lien was inadmissible as contradicting testimony by same party that the delivery was pursuant to the bill of lading. 168Ark908, 271SW 977.

383–70⅓–New. The court properly refused to require plaintiff to introduce the contract where it was no part of his case. **MoA** 289SW343.

383–70¼–New. In an action for damage to a stock shipment, exclusion of the shipping contract not signed by plaintiff was not error. **MoA** 294SW439.

383–71 170Ark1039, 282SW975.

383–74½–New. In an action for damage to a shipment of horses and mules, evidence that the shipper ordered a car for twenty-six animals was admissible on the issue of overloading the thirty-six foot car furnished. **MoA** 294SW439.

383–79 21AlaA66, 106S56; **NJSup** 137 A719; 147Va304, 137SE507. See also 222MoA495, 280SW1050. [a] **Witness held incompetent** to testify to condition of fruit where he did not see it when picked, sorted, or packed, nor examine it while loading. 254 IllA149. [b] **Admitting consignee's testimony as to deterioration** of goods after delivery is error. **TexCommnA** 25SW(2d)306. [c] **Evidence held admissible** to show condition. 35 OhA291, 172NE425.

383–79½–New. Evidence as to condition of straps on cases from which goods alleged to have been taken and of cartons therein when opened at consignee's store is admissible. 189NC585, 127SE588.

383–79⅓–New. Proof of condition proved in other suits inadmissible as hearsay. 21AlaA66, 106S56.

383–79¼–New. as is proof of other complaints as to condition of goods. 21 AlaA66, 106S56.

383–79⅕–New. , as is evidence of the condition after arrival at destination but before delivery. **MoA** 294SW439.

383–79⅙–New. Evidence of condition of goods at time after delivery is inadmissible against carrier. **TexCommnA** 25 SW(2d)306.

384–96 **TexCivA** 292SW939.

385–9½–New. In an action against a railroad for loss resulting from the destruction of a car of lime by reason of a flood while situated on a sidetrack lower than the main track adjacent thereto, testimony to the effect that the loss would not have occurred if the car had been on the main line has been held admissible to show that railroad, by slight effort and diligence, could have moved the car to the main line and saved it from destruction. 177Ark1018, 9SW (2d)17.

385–10½–New. In an action for damages for carrier's failure to recondition car of heated corn evidence of oral agreement between plaintiff holder of bill of lading and carrier as to what should have been done with corn held admissible. 120Kan484, 244P240.

385–10⅓–New. Testimony of packer as to number of days particular kind of produce could stand without rotting was pertinent and relevant in an action for failure to deliver produce and for injuries while delayed five days in shipment. **TexCivA** 276SW790.

385–10¼–New. In an action for loss from spoilage of fruit and vegetables bills of lading of prior similar shipments and testimony that they arrived on days succeeding dates of the bills is inadmissible without proof of the times of delivery to the carrier. 219Ky794, 294 SW463.

385–10⅕–New. Evidence of damage to engine and mail car in passing car on which injured property was loaded, caused by contact with such property, is admissible. 195Wis78, 217NW927.

385–10⅙–New. Defendant may show that loss was not due to its negligence. **MoA** 17SW(2d)557.

385–11 219MoA451, 274SW906 (in action for death of cow during shipment testimony of failure to present to shipper charges for treatment held admissible); **TexCivA** 7SW(2d)902. [a] **In action for injuries to unaccompanied shipment,** rule permitting proof of negligence by circumstances is not affected by contract requiring proof of carrier's negligence before recovery for injuries. **MoA** 282SW725.

385–16 33GaA773, 127SE830 (to refute negligence carrier may show compliance with twenty-eight-hour law).

385–23 [a] **Evidence of other shipment under like conditions is admissible.–MoA** 282SW725.

386–33½–New. Both time consumed on trip and customary time for such trip may be shown. 234Mich505, 208NW746.

386–35½–New. Proof of shipper's inquiry of agent as to time of arrival at destination and agent's reply is admissible on question of shipper's negligence in care of shipment during transportation. 234Mich505, 208NW746.

386–35⅓–New. Testimony that in switching cars they were handled "very rough" is admissible and not conclusion. 234Mich505, 208NW746.

386–35¼–New. Evidence that caretakers requested the railroad to unload dead cattle is inadmissible where the person requested is not identified. **TexCivA** 6SW(2d)418.

386–35⅕–New. Evidence that injury to cattle during transportation was due to natural propensities is admissible. **Tex CivA** 30SW(2d)989.

386–43 **TexCivA** 11SW(2d)335 (evidence of intrinsic value held inadmissible).

386–45 220MoA518, 276SW1030. [c] **Qualifications of witness.–220MoA518,** 276SW1030.

386–47½–New. Letters written by retailers are held admissible on the question of market conditions, in an action on behalf of wholesale dealers. 13F(2d) 605.

386–50 [a] 219MoA62, 265SW851, 854 [citCJ].

387–54½–New. Where there is evidence of market value, evidence of intrinsic value is inadmissible. **TexCivA** 278SW 337.

387–54⅓–New. In an action for damages to goods in shipment, opinion evidence is not the only kind of evidence to prove the difference in value before and after breakage. 142Wash675, 254 P248.

387–56 See also **TexCivA** 276SW790.

388–71 [a] **Cost includes returning** model to shop for repairs. **NJSup** 137 A719.

389–84½–New. The exclusion of a claim for damages filed before suit and based on replacement costs is not error where the legal measure of damages is market value. **TexCivA** 275SW603.

389–87 But see 147SC487, 145SE400. [e] **Evidence held to show** shipper selected and loaded two cars without knowledge of carrier, shipper not relying on duty of carrier in any way and having equal knowledge as to condition of cars. **TexCivA** 277SW191. [f] **Mere conjecture or speculation** cannot be indulged to establish negligence. 45 Ida313, 262P873. [g] **Evidence sufficient to establish prima facie case.–LaA** 129 S419. [h] **Evidence held sufficient** to sustain verdict for plaintiff. 35 OhA 291, 172NE425.

389–88 [a] 177Ark1018, 9SW(2d)17; 191NC473, 132SE160.

389–89 [a] 220MoA941, 278SW1075.

389–90 [b] 213AlaA234, 104S413; 127 Or29, 270P903.

389–91 [a] (1) 233 IllA1; 10LaA463, 120S786; **TexCivA** 295SW639. [c] **Amount delivered.–SD** 225NW654.

389–91½–New. that cause of sickness of livestock arose before delivery to carrier. 201 Iowa712, 208NW78.

389–92 [a] 160LaA1019, 107S890; **LaA** 126S593(2dcase); 171Minn205, 214NW 17; **TexCivA** 282SW919. [b] **Evidence insufficient.–254 IllA149.**

389–93½–New. inspection by carrier's agent of goods offered for transportation. 171Minn205, 214NW17.

389–94 [a] 36GaA241, 136SE167; 162 LaA801, 111S169; 10LaA478, 120S703 (2dcase); 318Mo723, 300SW769 (prima facie case); **MoA** 15SW(2d)901; 11Pa Dist&Co 460.

389–95 [a] 319 Ill 421, 150NE266.

389–96 [a] 21F(2d)396; 233 IllA1; **MoA** 6SW(2d)973. [b] (1) 42F(2d)461; 220MoA989, 272SW76; 189NC585, 127 SE588 (to prove shortage). (2) Failure to deliver to consignee. 90PaSuper78.

389–97 [a] (1) 4F(2d)756; 173Ark747, 293SW15; 174Ark1, 294SW414; 174 Ark6, 294SW416; 176Ark802, 4SW(2d) 22 (injuries to live stock); 89CalA741, 265P337; **Fla** 129S845; 36GaA433, 137 SE79; 36GaA441, 137SE83; 40GaA297, 149SE286; 40GaA297, 149SE428; 11 LaA386, 122S724; 11LaA445, 123S504; 164Minn68, 204NW566; 177Minn494, 225NW432; **MoA** 15SW(2d)901 (injury to live stock); 220MoA518, 276SW1030; **NJSup** 148A158; 127 Okl106, 260P26; 50SD319, 210NW81; **TexCivA** 276SW 790; **TexCivA** 4SW(2d)641; **TexCivA** 18SW(2d)833; **TexCivA** 22SW(2d)986; **TexCivA** 22SW(2d)988; **TexCivA** 29SW (2d)905; 147Va304, 137SE507; 147Va 290, 137SE515. (9) To show carrier did not undertake to recondition corn heated in transit. 120Kan484, 244P240. (10) To show that carrier did not agree to have heated corn reconditioned. 120 Kan484, 244P240. (11) To show that holder of bill of lading made arrangements with elevator company to recondition corn heated in transit. 120Kan 484, 244P240. [b] **Ala** 127S824; 45 Ida 313, 262P873; 128Me470, 148A679; **MoA** 278SW814; 224AppDiv508, 231 NYS424 (delay in shipment); 128Misc 206, 217NYS767; 120 Okl 70, 254P496; **TexCivA** 282SW919; **TexCivA** 283SW 250; **TexCivA** 283SW294; **TexCivA** 3 SW(2d)589; **TexCivA** 23SW(2d)455; 149Va364, 141SE113; **Va** 155SE630. [c] **Proof of jerking of freight train** is not evidence of negligence. 45 Ida313, 262 P873. [d] **Evidence warranting finding** that carrier neglected duty in insufficiently watering hogs. **Iowa** 231NW353.

389–97½–New. Evidence is sufficient to show unusual and unaccountable delay. 160LaA1019, 107S890.

389–98 [a] 142Wash675, 254P248. [b] 128Me118, 131A145; 176Minn46, 222 NW290; **TexCivA** 283SW250.

389–99 [a] 214AlaA420, 108S238; **Tex CivA** 23SW(2d)455. [b] **Evidence insufficient.–11LaA386, 122S724.**

389–1 [a] (3) To show that shipper was not negligent in not billing car more promptly. **TexCivA** 18SW(2d)493.

389–3 [b] **Evidence sufficient.–10LaA** 755, 120S798(2dcase).

389–3½–New. fact that alleged negligence of carrier caused shrinkage of live stock, **TexCivA** 283SW294.

389–4 [a] (5) To show that death of cows did not result from weakness of

animals. 170Ark1194, 281SW897. (6) To show that injury to potatoes was due to cause for which carrier was responsible. 36GaA241, 136SE167. (7) To show act of God cause of damage to goods. TexCivA 276SW790. (8) To support finding for plaintiff. 103WVa73, 136SE694. (9) To show that death of mule was not caused by neglect of railroad, but by pleuropneumonia. 11LaA108, 120S706. (10) To show that death of poultry was due to nature of birds. 224AppDiv508, 231NYS424. (11) To sustain finding that deterioration of butter did not result from inherent vice. 130Kan831, 288P569. (12) To warrant finding that death of hogs was caused by overheating. Iowa 231NW353.

390-5 [a] LaA 130S263.

390-6 [b] 11LaA18, 123S147.

390-7 [a] 144 Okl 216, 291P107. [b] 149Va549, 141SE113.

390-11 [c] **Evidence held to show release of carrier for failure to inspect cars not executed under duress.** Tex CivA 277SW191.

390-12 [b] **Evidence insufficient.**–MoA 4SW(2d)847.

390-15 213Ky248, 280SW974; 160La 1019, 107S890. [a] (1) 36GaA241, 136SE167; 11LaA445, 123S504; 164Minn 68, 204NW566; 220MoA766, 276SW 1038; TexCivA 30SW(2d)503. (2) Where sufficiently shown by evidence, damage for loss of hogs has been held rightly based on average value of hogs delivered. 175Ark630, 299SW999. [b] 37GaA636, 141SE214; 156Miss152, 125S725. [c] **Evidence sufficient to authorize finding of no market for damaged corn at destination or place of damage.** TexCivA 10SW(2d)400.

390-16 141Miss199, 106S525. [a] 10LaA463, 120S786. [b] TexCivA 22SW (2d)492. [e] MoA 4SW(2d)847.

390-17½-New. fraud of shipper as to number of horses shipped, 234Mich505, 208NW746.

390-18½-New. Receipt of notice of shipment by consignee insufficient to establish custom as to delivery. 34GaA 304, 129SE292.

390-18½-New. In an action against individuals sued as partners for loss of goods, a defense that the goods were delivered to an unlicensed foreign corporation of the same name as that of the partnership is not sustained where there is no evidence of the existence of such corporation at the time the goods were delivered to defendants and defendants admit that they acted as individuals and not as officers of a corporation in the receipt of the goods. 285Pa273, 132A364.

390-18¼-New. Evidence held sufficient to justify ruling that lighterage company was independent contractor and not consignee's agent in transporting shipment of explosives to defendant railway. 21F(2d)396.

390-18½-New. Evidence held to support conclusion that cotton was delivered before notification to divert to another place. 32F(2d)553.

390-18⅓-New. Evidence held insufficient to relieve carrier of liability for loss of parts. 11LaA412, 123S195.

390-18½-New. Evidence sufficient to show that deterioration of goods was due to improper refrigeration. LaA 126S593(2dcase).

390-18⅓-New. Evidence of perfect refrigeration held insufficient to establish that deterioration of goods shipped in good condition was due to inherent vice. LaA 126S593(2dcase).

390-20 224Ky303, 6SW(2d)237; 220MoA941, 278SW1075; 189NC585, 127SE588. [a] **Conflicting evidence** made delivery jury question. 220MoA941, 278SW1075. [b] **Whether cattle were in good condition** when received by carrier is jury question. TexCivA 24SW(2d)447.

390-21 223Ky681, 4SW(2d)679.

390-21½-New. whether one charged as "common carrier" comes within the definition thereof; 148Wash521, 269P802.

390-22 219Ky528, 293SW1091; 250Mich648, 230NW939; 127 Or29, 270P903 (whether plaintiff assented to terms of bill of lading).

390-25 TexCivA 282SW661. [c] (2) Whether shipper of baggage had notice of limitation of liability. 11LaA170, 123S144(2dcase).

391-26½-New. whether delivery of shipment of live stock by carrier was made by placing in an unloading chute of the stockyards or was not made until placed in the pens of consignee. MoA 284SW184.

391-27 175Ark630, 299SW999 (hogs); 224Ky303, 6SW(2d)237.

391-28½-New. whether damage occurred in transit or before; 172Ark273, 288SW901.

391-29 215Ala148, 109S881; 181Ark 192, 25SW(2d)28; 221MoA478, 282SW 97; MoA 294SW439 (holding that question whether stock were kicking and fighting was, under conflicting evidence, for jury); 120 Okl 150, 250P776; Tex CommnA 280SW540; TexCivA 29SW (2d)905. See also 177Ark1018, 9SW(2d) 17.

391-29½-New. what was the condition of the shipment; 140Miss360, 105S760.

391-29⅓-New. as to manner in which goods were crated or loaded; 171Minn 205, 214NW17.

391-30 171Ark698, 285SW372; 174Ark 10, 294SW357; 181Ark192, 25SW(2d) 28; Ark 31SW(2d)421 (testimony held not uncontradicted); 33GaA773, 127SE 830 (whether carrier performed its common-law duties as to care of live stock in transit is for jury); Iowa 231NW 353 (whether carrier properly sprayed hogs is for jury); 120Kan484, 244P 240; 218Ky600, 291SW1027; 219Ky 794, 294SW463; 220Ky302, 295SW150; 234Mich505, 208NW746; 153Miss601, 121S272; 318Mo723, 300SW769; 219 MoA62, 265SW851; 220MoA518, 276SW 1030; MoA 282SW725; 220MoA1316, 297SW440 (whether car should have been reiced); MoA 6SW(2d)628; Nebr 230NW102 (rough handling of cattle in shipment); NJSup 132A482; NJSup 142A568; 224AppDiv440, 231NYS432; 26 OhA96, 159NE487 (defect in car and proper refrigeration); 127 Okl 106, 260 P26; 296Pa441, 146A98(2dcase); 147 SC487, 145SE400; 50SD319, 210NW81; TexCivA 299SW668; TexCivA 18SW(2d) 493; TexCivA 6SW(2d)418; TexCivA 18SW(2d)733; 101Vt427, 144A194; 147Va304, 137SE507; Va 153SE865. [a] **Whether agency causing death of** hogs was shipper or carrier is for jury. Iowa 231NW353.

391-30½-New. whether shipment was frozen when delivered to carrier, 202 Iowa1008, 209NW744.

392-31 92PaSuper460 (nonsuit held properly entered); TexCivA 24SW(2d) 447.

392-32 120Kan484, 244P240; 219Ky 794, 294SW463; 234Mich614, 208NW 679; TexCivA 6SW(2d)418.

392-33 21F(2d)396 (but where consignee has no duty to watch explosives, fact that detectives hired by consignee failed to prevent explosion does not raise issue of contributory negligence); 254 IllA149; Iowa 231NW353; 234Mich 505, 208NW746; 164Minn68, 204NW566 (failure of shipper of fruit to see that heater was securely fastened); 35 OhA 291, 172NE425; 50SD319, 210NW81.

392-34 127 Okl 106, 260P26.

392-35 35GaA438, 134SE122 (refrigerator car); 194NC791, 139SE439 (cars); 144 Okl 216, 291P107.

392-37 270US416, 46SCt318, 70L ed659 (negligence of carrier obviating necessity for filing claim is for jury).

392-37½-New. whether a carrier failed in its duty in not notifying the seller of buyer's rejection, or to sell grapes for the benefit of whom it might concern; 224AppDiv440, 231NYS432.

392-39½-New. value of goods injured in transportation; 195Wis78, 217NW 927.

392-40½-New. Value of goods is for the jury. 171Ark698, 285SW372.

392-40⅓-New. Whether carrier could lawfully transport alleged beer into dry territory where question depends upon facts such as real character of shipment and the use to be made of it by the consignee. 221MoA338, 273SW424.

392-40¼-New. Extent of consignee's damages for injury to pecan trees from cold is for jury. 213Ala242, 104S418.

392-40⅓-New. What is reasonable time for delivery of freight is question for jury. 120 Okl 150, 250P776.

392-40⅓-New. Miscellaneous questions of law and fact. 214Ala169, 106S804; 171Ark698, 285SW372; 174Ark122, 294 SW714; MoA 256SW499; 217AppDiv49, 215NYS729; 217AppDiv83, 216NYS545; 191NC473, 132SE160; 5PaDist&Co 257; TexCivA 289SW164.

392-40½-New. Miscellaneous questions of law and fact. 85CalA440, 259P774.

392-40⅓-New. Evidence of delay and damage to goods held to entitle shipper to submit issues to jury. 198NC 492, 152SE390.

392-40⅓-New. Whether carrier repudiated contract and tendered remainder of shipment after fire is question for jury. TexCivA 29SW(2d)905.

392-47½-New. What constitutes a common carrier is a question of law. 148 Wash521, 269P802.

392-49 21F(2d)396; 22AlaA636, 119S 241; 45 Ida313, 262P873; 239Mich155, 214NW99; 125Misc253, 210NYS525; 27 OhA188, 160NE730; 127 Okl 106, 260P 26; 285Pa273, 132A364; TexCivA 283 SW250. [a] **Where no evidence is produced to show carrier's negligence** in transporting live stock, verdict should be directed. 45 Ida313, 262P873. [b] **Thus,** in action against delivering carrier, and carrier whose tracks were used in making shipment, latter carrier was properly dismissed from case. 29 OhA 262, 163NE50.

392-50 213Ala679, 105S890 (affirmative charge for defendant properly refused); 219Ala223, 121S716 (evidence held sufficient to go to jury); 171Ark1092, 287 SW382; 175Ark35, 298SW873; 91Fla 762, 109S205; 214Ky658, 283SW1013; 140Miss360, 105S760; MoA 15SW(2d) 901; 219MoA451, 274SW906; 220MoA 941, 278SW1075; 103NJL658, 137A405; NJ 141A566; 143SC395, 141SE607; Tex CivA 283SW250. [a] (1) 213Ala234, 104 S413. [b] (2) Evidence tending to establish defense precludes preemptory instruction for plaintiff. 221MoA338, 273 SW424.

392-50½-New. In determining defendant's right to a nonsuit, a contract of carriage not offered or received in evidence cannot be considered, although attached to defendant's answer by amendment at the trial. 89CalA741, 265 P337.

393-53 176Ark802, 4SW(2d)22 (mingling strong with weak live stock); Ark 31SW(2d)290; 35GaA438, 134SE122 (sufficient); 244 IllA270; 252 IllA253; 202 Iowa1008, 209NW744 (instruction that carrier was required to exercise only ordinary care held erroneous); 120Kan484, 244P240; 219Ky794, 294 SW463; 174Minn377, 219NW290 (erroneous instruction minimizing presumption of negligence); 153Miss601, 121S272 (sufficient); 220MoA766, 276 SW1038; 220MoA941, 278SW1075; 222 MoA1189, 1SW(2d)1028; 27 OhA188, 160NE730; TexCivA 278SW478 (instruction as to commencement of carrier's liability in shipment of live stock held correct); TexCivA 293SW311; 101Vt427, 144A194; 144Va154, 131SE 245 (instructions contrary to terms of contract evidenced by bill of lading properly refused). [b] 214Ky658, 283 SW1013. [c] 127 Okl 106, 260P26. [d] **Failure of court** to name source of laws and rules of interstate commerce commission not applicable to case is immaterial where instruction otherwise correct. 234Mich505, 208NW746. [e] **Instructions held not erroneous.**–Tex CivA 276SW790. [f] **Instructions properly refused.**–153Miss601, 121S272; 222 MoA1189, 1SW(2d)1028. [g] **Instructions held proper.**–35 OhA291, 172NE 425; TexCivA 20SW(2d)260. [h] **Instructions held erroneous.**–35 OhA291, 172NE425.

393-54 173Ark810, 294SW401.

393-55 [b] **Instructions held sufficiently certain.**–85CalA440, 259P774.

393-56 213Ala679, 105S890 (instruction not misleading in view of others); 173Ark810, 294SW401; 220MoA518;

276SW1030; MoA 289SW343; MoA 294 SW439; 26 OhA96, 159NE487 (instruction not erroneous); 155SC54, 151SE904, [a] (3) Failure to charge that shipper assumes risk of ordinary delays has been held not error, where jury were clearly given to understand that unusual and unexplained delay was essential. 101Vt427, 144A194. [b] **Instructions held erroneous.**–MoA 24SW (2d)1050; 284Pa16, 130A263.

393–57 101Vt427, 144A194.

393–58 213Ala679, 105S890 (instruction properly refused as ignoring testimony); MoA 15SW(2d)901.

393–59 220MoA518, 276SW1030.

393–60 173Ark84, 291SW1001; 35GaA 438, 134SE122 (sufficient); 252 IllA253; 213Ky736, 281SW980; 234Mich505, 208NW746; 220MoA518, 276SW1030; 220MoA766, 276SW1038; 26 OhA96, 159NE487 (proper instruction); 122 Okl 282, 254P725 (duty to define "ordinary care" or "reasonable care and diligence"); 49RI 329, 142A613; TexCivA 294SW349; TexCivA 12SW(2d)1070; 144Va154, 131SE245 (instruction not based on evidence properly refused); Va 153SE865. [a] TexCivA 272SW340. [d] (1) 219MoA451, 274SW906; 220 MoA766, 276SW1038. (2) As to damages. 220MoA766, 276SW1038. [i] **Instruction absolving carrier if loss to perishable goods due to negligence of shipper's agent in charge** held not defective, for omissions of questions of proximate cause and concurring negligence. 149Md1, 130A63.

394–61 120Kan484, 244P240; 220MoA 518, 276SW1030.

394–62 252 IllA253. [a] **Instruction held bad in form.**–Ala 127S804.

394–63 33GaA773, 127SE830 (instructions not erroneous); 202 Iowa1008, 209NW744; MoA 15SW(2d)901; Tex CommnA 280SW540. [a] **Failure to charge that burden is on plaintiff** to prove carrier's negligence concurring with act of God is not error where carrier's evidence tended to show such negligence. 318Mo 723, 300SW769. [b] **Instructions held not erroneous.**–Ala 127 S802(2dcase).

394–64½–New. Where court has so charged he should also charge that carrier would still be liable for negligent misdelivery. 284Pa16, 130A263.

394–65 [d] **Instructions held properly refused.**–35GaA438, 134SE122. [e] **Instruction held correct.**–Ala 127S802 (2dcase). [f] **Instructions on damages held erroneous.**–MoA 24SW(2d)1050.

394–65½–New. Charge as to double damages immaterial where court limits recovery. TexCivA 277SW230.

394–65⅓–New. Court should instruct jury that basis for estimation of damages as agreed in contract of shipment is subject to rules, schedules, and rates of interstate commerce commission in case of interstate shipment. 234Mich 505, 208NW746.

394–65¼–New. Court must, on request, instruct properly as to burden of proof as to extent of liability as to damages. 234Mich505, 208NW746.

394–65⅙–New. Where there is evidence of market value, the court should not charge the jury to estimate damages on evidence of intrinsic value. Tex CivA 273SW337.

394–65⅛–New. Where damages sought are difference between value as delivered and as they should be delivered, it is not necessary to charge on measure of damages, but submit question of difference to jury. TexCivA 293 SW890.

394–65½–New. Where the only negligence alleged in the counterclaim was of an independent contractor, for which plaintiff was not liable, it was proper to instruct the jury to find against the counterclaim. 21F(2d)396.

394–65⅛–New. The question of damages should not be submitted without an instruction by which to measure them with legal accuracy. TexCivA 19 SW(2d)343.

394–66 120Kan484, 244P240 (defendant held not entitled to judgment non obstante veredicto); TexCivA 32SW (2d)369. [d] (2) Findings held not inconsistent or contradictory. TexCivA 18SW(2d)833. (3) Finding has been held not to establish that liability of defendant was limited, except as applying to storage of goods. 97CalA420, 275P471. [e] TexCommnA 18SW(2d) 273. [g] **If jury are unable to determine whether damage was due to negligence of carrier** or inherent condition of goods, they should find for shipper. 221MoA478, 282SW97. [h] **Ambiguous and conflicting special findings.**–Tex CivA 11SW(2d)591. [i] **Conflicting findings.**–In action against carrier for damages to shipment of live stock, finding that injury resulted from nature and disposition of animals and further finding that disposition of animals did not cause injuries have been held conflicting. TexCivA 20SW(2d)260.

395–70 236 IllA595; 3LaA240; Tex CivA 6SW(2d)418 (amount question for jury). [f] **Interstate shipments** are governed by rules of damages as applied in federal courts. 236 IllA595. [g] **Rule under Carmack Amendment.**–220MoA989, 272SW76. [h] **Loss occasioned by reason of delay in putting live stock on market** because of emaciated condition due to negligence of railroad during transportation constitutes legitimate item of damage. 11 LaA445, 123S504.

395–71 117 Okl 52, 244P769. [a] (1) 124Me373, 129A823. (6) No liability for goods delivered to carrier in damaged condition. 160La1019, 107S890. [b] **Damages held excessive.**–Fla 129S 845.

395–73 213Ala242, 104S418 (damages not limited to nominal damages under evidence).

395–73½–New. Admission by carrier as to value is sufficient to support judgment. 104Conn342, 133A102.

395–75 281US57, 50SCt180, 74L ed699, 67ALR1423; 13F(2d)459; 21F(2d)836; 219Ala16, 121S16; 168Ark823, 271SW 453; 236 IllA595; 11LaA469, 123S406 (price of replacement); 258Mass149, 154NE831, 50ALR1464; 141Miss199, 106S525, 526 [citCJ]; 156Miss152, 125 S725; 219MoA1, 268SW99, 102 [citCJ]; 220MoA989, 272SW76, 79 [citCJ]; 217 Misc22, 215NYS718; 189NC585, 127SE 588 (liable for actual contents of cases of goods transported by it); TexCivA 278SW337; TexCivA 281SW887; Tex CivA 22SW(2d)986; Va 153SE865. [e] (3) Market price allowed for cotton should be price testified to by plaintiff and at which loss was adjusted by insurance company. 167La111, 118S822. [h] (2) Amount recoverable is determined by market price in quantity such as that lost. 13F(2d)459. [j] **That market value will include profit** does not change rule. 13F(2d)459. [k] **Damages for loss of fungible goods** are measured by bulk price, absent special circumstances. 281US57, 50SCt180, 74 L ed699, 67ALR1423. [l] **Test of market value may be discarded** in determining market value, if inapplicable or not exact. 281US57, 50SCt180, 74L ed 699, 67ALR1423.

395–75½–New. This is measure of damages provided by Interstate Commerce Act. 258Mass149, 154NE831, 50ALR 1464.

396–76 85 IndA569, 154NE875, 876 [citCJ].

396–76½–New. Retail profits are not recoverable as separate elements of damage. 258Mass149, 154NE831, 50 ALR1464.

396–77 172Ark273, 288SW901; Ark 31 SW(2d)290; 89CalA741, 265P337, 338 [quotCJ] (rule is not changed by fact that injured cattle were treated by veterinarian after arrival and their value was enhanced thereby); 236 IllA595; 244 IllA270; 86 IndA67, 154NE32; 218 Ky600, 291SW1027; 224Ky659, 6SW (2d)1084; 226Ky813, 11SW(2d)953; 160La1019, 107S890; 162La801, 111S 169; 164Minn68, 204NW566; 141Miss 199, 106S525, 526 [citCJ]; 219MoA62, 265SW851; 220MoA518, 276SW1030; 220MoA1316, 297SW440; 217AppDiv49, 215NYS729; 132Misc563, 230NYS298; 127 Okl 106, 260P26; TexCommnA 25 SW(2d)306; TexCivA 281SW887; Tex CivA 286SW559; TexCivA 12SW(2d) 1070 (determination of market value); TexCivA 19SW(2d)343; TexCivA 20SW (2d)1104 (where carrier had no knowledge of special price); TexCivA 22SW (2d)989; 142Wash675, 254P248. [a] (5) For failure to protect goods on consignee's rejection, carrier is liable for difference in value, allowing reasonable time after arrival for delivery. 217 AppDiv49, 215NYS729. (6) Consignee of freight shipment of six hundred bags of sugar, ninety of which were wet, must receive entire shipment and sue for damages. 86 IndA67, 154NE32. [g] **In suit for destruction of goods in transit** proper measure of damage is reasonable market value of particular articles destroyed at time and place of destruction. TexCivA 275SW603 (where the destruction occurred at place of destination). [h] **Carrier is not liable for injury caused by market conditions and not by the injury** suffered by goods while in its possession. 159La9, 105S82. [i] **Where exact value would not be ascertained,** shipper selling damaged and undamaged sugar together held entitled to difference between contract price and amount realized from sale of damaged sugar. 159La9, 105S 82. [j] **Value of goods in sound condition** is erroneous basis from which to determine difference. 172Ark273, 288 SW901. [k] **Damages held not excessive.**–172Ark273, 288SW901. [l] **Where model injured,** damages should include cost of repairs, transportation, and loss of contract. NJSup 137A719.

397–78½–New. In case of a carrier's neglect to protect a perishable shipment on a consignor's rejection, the measure of damages is the difference in value at the time the carrier should have acted and the time of sale. 224AppDiv440, 231NYS432.

397–79 217AppDiv49, 215NYS729.

397–81 TexCivA 278SW337.

397–85½–New. Where statute limits liability. Silk, within a statute providing that a carrier of silk and other specified articles shall not be liable for more than fifty dollars unless he has notice of the nature of the freight, covers silk cloth in its manufactured state. 79CalA598, 250P703.

397–89 [a] Or 292P89.

398–1 But see 219MoA62, 265SW851.

398–2½–New. A shipper of animals sold at a way point because of injury to some of the animals is entitled to recover the difference between the sale price and the market value of the entire shipment at the point of destination, in the absence of showing that so many animals were uninjured that they should have been forwarded. 220MoA518, 276 SW1030.

398–3 TexCivA 2SW(2d)493.

398–4 TexCivA 278SW337.

399–14 TexCivA 278SW337; TexCivA 11SW(2d)335.

399–19 97Fla16, 119S517(2dcase); MoA 48SW(2d)847 (by paying extra charges).

399–20 269US40, 46SCt15, 70L ed154; 132Misc563, 230NYS298 (damages must be estimated to that point in usual way). [a] **Express company is not liable** for lost goods in excess of value fixed by receipt, though carrier knew agent was ignorant of value. 269US40, 46SCt15, 70L ed154.

399–23 TexCivA 273SW661.

400–26½–New. Agreed basis for computing damages to interstate shipment is subject to modification by rules, schedules, and rates approved by interstate commerce commission. 234Mich 505, 208NW746.

400–28 [a] **Interest recoverable from date suit commenced.**–318Mo 723, 300SW 769.

400–29 21F(2d)396; 21F(2d)656 (what law governs as to rate); 221MoA448, 282SW459. See also 217AppDiv49, 215 NYS729.

400–30 TexCommnA 280SW574. [a] **Right to interest is waived** by failure to request correction of instruction which

omits item of interest. **TexCommnA** 280 SW574.

400-31 127 **Okl** 106, 260P26.

400-35 119**Kan**706, 241P693 (attorney's fee of seventy dollars in suit for injury to goods in intra-state shipment held not unreasonable).

400-35½-New. A state statute providing for an allowance of an attorney's fee does not apply to losses in the course of interstate commerce. 123**Kan** 35, 254P379.

401-39 See also 222**MoA**495, 280**SW** 1050. See also 217**AppDiv**49, 215**NYS** 729.

401-40 **TexCivA** 293**SW**593, 597 [quotC J]; 142**Wash**675, 254P248. But see 159 **La**9, 105S82.

401-44½-New. An owner's loss of use of goods damaged in transit during time necessary to repair it is proper element of damage. 142**Wash**675, 254P 248.

401-46 156**Miss**152, 125S725.

401-48 221**MoA**448, 282**SW**459, 462 [cit CJ].

402-49 221**MoA**448, 282**SW**459, 462 [cit CJ].

402-56 221**MoA**478, 282**SW**97. See also **TexCivA** 15**SW(2d)**1098.

403-63⅓-New. Under a fire policy covering cotton, but providing that insurance shall not cover the cotton for a loss for which the carrier may be liable, and providing that the insurance company will loan insured amount of damages repayable only to the extent of recovery from the carrier, amounts advanced operate as absolute payment under the policy in case there is no recovery over from the carrier as regards the carrier's right, under a bill of lading, to credit for insurance paid in excess of judgment rendered against it for the loss of the cotton. 167**La**111, 118S 822.

403-63¼-New. Carrier is not entitled to credit of consignee's overhead cost of sale of goods. 236 **IllA**595.

403-64 141**Miss**199, 106S525, 526 [cit CJ]; 219**MoA1**, 268**SW**99, 102 [citCJ].

403-65 215**Ala**148, 109S881 [citCJ]; 219**MoA1**, 268**SW**99, 102 [citCJ].

403-66 159**La**9, 105A82 (shipper cannot recover freight charges); 220**MoA**1316, 297**SW**440.

404-71 85**CalA**440, 259P774; 2**LaA**7, 8 [citCyc].

404-75 85**CalA**440, 259P774.

404-77 [d] **$500** held not excessive for mutilation of daughter's corpse. 219**Ky** 528, 293**SW**1091.

405-81½-New. A "commodity rate" is one which applies to a specific commodity alone. 145**Va**207, 133**SE**817.

405-81½-New. A "class rate" is one which applies to a number of articles of the same general character. 145**Va**207, 133**SE**817.

405-81¼-New. A "combination rate" is constructed when freight is carried from a point on one railroad to a point on another railroad, when there is no through rate. 145**Va**207, 133**SE**817.

405-87 228**AppDiv**354, 239**NYS**501.

405-89 [a] **Tariffs are construed most strongly against party** preparing them. 179**Ark**516, 16**SW(2d)**1001.

406-90½-New. A carrier taking over the operation of a railroad is bound by tariffs in force at that time as fixed by the interstate commerce commission. 237**Mich**406, 212**NW**84.

406-90⅓-New. A contract with reference to freight rates is subject to the power of the state commission and the federal interstate commerce commission to promulgate and approve rates. 154 **Miss**303, 122S472.

406-91 233**Ky**771, 26**SW(2d)**1025.

406-92 [b] **Necessity of order and hearing** of transit commission. 254**NY** 305, 172**NE**516.

406-94 But see 254**NY**316, 172**NE**520.

406-96½-New. Where misleading symbols used, tariff increasing rates may be cancelled. **Wash** 286P86.

406-1 164**Ga**822, 139**SE**725; 249 **IllA** 383; **TexCivA** 3**SW(2d)**489. [f] **Jurisdiction in particular cases.**-42**F(2d)**775.

407-2 20**F(2d)**379.

408-15 120 **Or**517, 252P955.

408-17 317 **Ill** 278, 148**NE**47.

408-23 220**AppDiv**222, 220**NYS**789.

408-26 7**PaDist&Co** 346.

409-37 151**Md**337, 135A579, 49**ALR** 1470; **NM** 291P920; 118 **Okl** 89, 246P 876, 47**ALR**106; **TexCivA** 3**SW(2d)**489 (effective only by orders of commission); **TexCivA** 19**SW(2d)**583 (rates made by commission are rates of commission regardless of question on whose initiative they were made). [d] **Retroactive freight rates** are within power of railroad commission to establish. 39 F(2d)558.

410-40 But see 143**Miss**805, 109S868; 115 **Okl** 158, 241P776; 118 **Okl** 89, 246P 876, 47**ALR**106; **TexCivA** 19**SW(2d)** 583.

410-42 130 **Okl** 263, 266P253 (duties of commission as enumerated in constitution). But see 143**Miss**805, 109S868. [b] (3) Power and duty of state commission to readjust discriminatory intra-state freight rate when higher than interstate rate for same haul. 130 **Okl** 263, 266P253. (4) State constitution contemplates readjustment of rates apart from general schedule where competition outside state requires rates to be prescribed in elimination of discrimination. 130 **Okl** 263, 266P253. [n] **Reduction of rates.**-120 **Or**517, 252P955. [o] **Maritime Freight Rates Act of 1927 construed.**-**Can** [1928] 1**DomLR**369. [p] **Group rates.**-**TexCivA** 19**SW(2d)** 583.

410-43 [a] (2) Notice of hearing need be given only to railroad companies whose interests are affected. **TexCivA** 19**SW(2d)**583. [f] **Board's order fixing rates effective** when signed and served. 126**Me**23, 135A526. [g] **Order to refund** excess collections applies only to sums collected before order. 126**Me**23, 135A 526. [h] **Commission does not exhaust power to act on equalization matter** by issuing circular prescribing general basis of rates. **TexCivA** 19**SW(2d)**583. [i] **Commission need not dispose of whole matter by single order** but may make preliminary disposition reserving other questions for further consideration without further notice. **TexCivA** 19**SW(2d)**583.

410-45½-New. The legislative power of the corporation commission, in some jurisdictions is subject to the same constitutional limitation imposed on the legislature that laws of a general nature shall have a uniform operation throughout the state and that no special law shall be enacted where a general law can be made applicable. 115 **Okl** 158, 241P776.

410-45⅓-New. Under such limitation no special rates can be established where general and uniform rates can be made applicable. 115 **Okl** 158, 241P776.

410-45¼-New. Under some constitutions the only power of the corporation commission to fix special rates in favor of any person, corporation, or locality is limited to power to authorize a disregard of the constitutional prohibition against a greater charge for a short than a long haul and to prescribe an equitable rate to and from any junction on competitive points or localities, or where the competition of points located without the state made necessary the prescribing of special rates to protect the commerce of the state. 115 **Okl** 158, 241P776.

411-46 44**Philippine**111. [a] **Determination by railroad commission that rate is fair and reasonable is conclusive till set aside by courts** in manner provided by statute. **TexCommnA** 13**SW** (2d)680.

411-46½-New. In some jurisdictions rates and orders established and promulgated by the commission in its delegated legislative capacity have the force and effect of other legislative enactments. 115 **Okl** 158, 241P776.

411-47½-New. Corporation commission cannot declare legally established rates unreasonable retroactively. 147**Va**426, 137SE608.

411-47¼-New. A statute prohibiting questioning the reasonableness of rates in court does not limit the power of the corporation commission to declare rates unreasonable. 147**Va**426, 137SE608.

411-48 [a] **Joint resolution of Congress requiring "lawful changes" in rate structure** to promote movements of agricultural products has been held not to change existing law. 281**US**668, 50**SC** 444, 74**L ed**1098.

411-52 116**SC**496, 144**SE**233.

413-70 [a] **Other definitions.**-**TexCivA** 19**SW(2d)**583.

413-74 See also 332 **Ill** 243, 163**NE**664. [b] **Under Interstate Commerce Act**, as amended, department of public works has jurisdiction to determine proper charge for intra-state transportation of logs, and fact that railroad furnished cars on which shipper brought the logs from Canada to point of shipment is immaterial. 149**Wash**129, 270P300 [certiorari den **US** 49**SC**350(10(hcase)].

413-76 168**Ga**851, 149**SE**128. [a] **Rules of commission fixing charges by weight.**-168**Ga**851, 149**SE**128.

413-80 237 **IllA**483; **TexCivA** 38**SW(2d)** 489.

414-81 147**Va**98, 136**SE**499 (increase of rates on interurban division of railway company held properly granted). [e] **Where fixed rate is established, courts** will not inquire into reasonableness of rate previously charged. 121**Kan**531, 247P881.

414-83 116**Oh**120, 155**NE**862.

414-87 249 **IllA**383; 116 **Oh**120, 155**NE** 862". **TexCivA** 38**SW(2d)**489.

414-88 340 **Ill** 304, 172**NE**708.

414-89 [a] **Findings of commission supported by substantial and satisfactory evidence** will not be disturbed. 33 **NM**468, 270P796. [b] **Group rates.**-**TexCivA** 19**SW(2d)**583.

415-90 [b] **In North Dakota.**-50**ND**184, 195**NW**292.

415-91 [a] (2) Order of department of public works based on finding unsupported by evidence and fixing rates is none the less invalid because fixed for experimental period, where existing rates were shown to be confiscatory. 268 **US**39, 45**SC**412, 69**L ed**837. [b] **The test of reasonableness for courts** is whether commission's finding is supported by substantial evidence. 39F (2d)658.

415-91½-New. A finding of a state public service commission, made without evidence to support it, is arbitrary, and an order based thereon may be set aside by a court of competent jurisdiction. 120 **Or**517, 252P955.

415-91¼-New. Unless it appears that findings of a state commission are not supported by substantial evidence or that there has been some irregularity in the proceedings or error in the application of the law, findings and orders of the commission will not be disturbed. 120 **Or**517, 252P955.

415-94½-New. In proceedings questioning the unreasonableness of rates, the trial is governed by the same rules as in civil causes generally. **TexCivA** 19**SW(2d)**583.

415-96 126 **Okl** 287, 259P230; 127 **Okl** 240, 260P468; 130 **Okl** 263, 267P253. [a] (1) 126 **Okl** 287, 259P230. (3) Finding of commission that broken stone should take same rate as crushed stone, sand, and gravel will be sustained when not shown to be incorrect. 126 **Okl** 287, 259P230. [b] **To what rates constitutional presumption applicable.**-115 **Okl** 158, 241P776.

415-97 **TexCivA** 19**SW(2d)**583.

415-98 32F(2d)466; 35F(2d)861; 335 **Ill** 70, 166**NE**466; 233**Ky**771, 26**SW(2d)** 1025. [b] **Same tests and standards** are applicable to determine reasonable minimum rate as for reasonable maximum rate. 6F(2d)315.

416-6 [a] **In fixing minimum rates** consideration should be given to going rates on same commodity in same or different territories, relation of rates to destination, revenue per car mile and ton mile, variations in traffic density, and peculiarities in transportation affecting general transportation costs. 6 **F(2d)**315.

416-8 19F(2d)591; 29F(2d)140; 230 **AppDiv**260, 243**NYS**430. [b] **Easements** are included in valuation of property for rate-making purposes. 151**Md**337, 135A579, 49**ALR**1470. [c] **Using tax**

valuation as basis of actual value for rate making purposes held error. 151 Md337, 135A579, 49ALR1470.

416-9 127Misc766, 217NYS452.

416-11 29F(2d)140. See also 127Misc 766, 217NYS452. [c] **Commission's denial of motion** of interested citizens for devaluation of property on petition for increased rates held not error. 147Va 98, 136SE499. [d] **Commission held to have authority** to order appraisal of property on petition for increased rates. 147Va98, 136SE499.

416-11½-New. Rate base valuation of a street railway is not intended as the buying or selling price. 17F(2d)673.

417-21 17F(2d)673.

419-55 17F(2d)673. [a] **Allowance for depreciation** must be based on present value. 280US234, 50SCt123, 74L ed390.

419-56 NM 291P920.

419-59½-New. The American rate making system does not take into consideration cost differences in several items that go to make up the total service included in the rate. TexCivA 19SW (2d)583.

419-60 117 Oh304, 158NE648. [a] **Expense of bus operations in determination of street railroad rates.**-29F(2d)140.

419-62 116 Oh120, 155NE862.

419-65 TexCivA 273SW676.

419-66½-New. The cost of hauling ice for refrigeration is properly determined by the rate fixed without including the proportionate share per car of general traffic expenses. 33F(2d)130.

420-67 TexCivA 19SW(2d)583.

420-79 See also 48Philippine900, 910 [citCJ].

421-86 25F(2d)750; 39F(2d)658 (holding comparisons may afford substantial evidence on which commission may establish rates); NM 291P919. [b] **Courts must look to comparisons** to determine whether substantial evidence supports commission's order. 39F(2d) 658.

421-87 335 Ill 247, 167NE38.

421-88 Ill 173NE380; 130 Okl 263, 266 P253.

421-89½-New. Sufficiency of evidence to show uniform rates unreasonable. 118 Okl 89, 246P876, 47ALR106.

421-89⅓-New. The interstate commerce commission's order stating that conditions in Indiana and Illinois were similar in sustaining Indiana rates is not a sufficient basis for an order prescribing intra-state rates for Illinois. 335 Ill 624, 167NE831.

421-89¼-New. Sufficiency of evidence. Ill 173NE380.

421-91 Va 153SE865.

422-1 335 Ill 624, 167NE831 (proportional rate may properly be lower than local rate).

422-3 But see 25F(2d)888.

422-10½-New. Charging less for short than for long haul held proper. 116 Oh 397, 156NE506.

422-10⅓-New. State constitutions in some jurisdictions prohibit greater charge for short than for long haul. 315 Mo 798, 287SW450.

422-10¼-New. But it has been held unavailing where not followed by contemplated suitable legislative enactments for enforcement. 315Mo 798, 287 SW450.

422-10⅕-New. It is not unlawful under some statutes for carriers to charge more for a short haul than for a long haul if the two hauls were in different directions and the circumstances and conditions thereof were not the same. 315 Mo 798, 287SW450.

422-10⅙-New. A statute prohibiting higher freight rate for a shorter than for a longer haul over the same line, where the shorter is included in the longer, does not apply where the intermediate point was on another line and the distance thereto was greater than the distance between the initial and farther point on the original line. 85 IndA49, 151NE365.

423-13 279US159, 49SCt282, 73L ed 652.

424-23 29F(2d)140; 116 Oh120, 155 NE862. [a] **Rate held not confiscatory.**-157Md70, 145A340.

424-26 See also 48Philippine900, 910 [citCJ].

425-32 But see 30F(2d)940.

426-43 279US159, 49SCt282, 73L ed 652.

426-44 17F(2d)673.

426-48 35F(2d)919; 118 Okl 89, 246P 876, 47ALR106.

427-52 233Ky771, 26SW(2d)1025; 118 Okl 89, 246P876, 47ALR106; 120 Or517, 252P955; TexCivA 19SW(2d)583; 99 WVa670, 130SE131. [b] **Commission's order held sustained** by substantial evidence. 39F(2d)658.

427-53 335 Ill 247, 167NE38; 335 Ill 624, 167NE831; 120 Or517, 252P955. [d] **In proceeding to substitute special rates in favor of particular person, corporation or locality** for general and uniform rates fixed by commission burden rests on complainant to show that uniform rates are unjust and unreasonable. 115 Okl 158, 241P776.

427-57 But see TexCivA 19SW(2d)583.

427-59 120 Or517, 252P955. [a] **Evidence held sufficient:** (1) To sustain order reducing rate. 335 Ill 70, 166NE 466. (2) To show that equalization rates were unjustly discriminatory. TexCivA 19SW(2d)583. [b] **Evidence held insufficient:** (1) To sustain order reducing rate. 335 Ill 247, 167NE38. (2) To sustain order of commerce commission reducing freight rates. 335 Ill 624, 167NE831. [c] **Commission's order reducing freight rates** held justified. 340 Ill 304, 172NE708.

427-62 [b] **Failure to offer additional evidence** before court constitutes waiver of whatever right carrier had. 233Ky 771, 26SW(2d)1025.

427-63 149Wash129, 270P300 [certiorari den 279US854, 49SCt350, 73L ed 996 (10th case)]. But see 335 Ill 624, 167NE831. [a] **Commercial competition in connection with other evidence** may be considered by Commission in proceedings for adjustment of rates. 340 Ill 304, 172NE708.

428-64 233Ky771, 26SW(2d)1025.

428-69 See also 332 Ill 243, 163NE 664.

428-72½-New. An order of the commission in another case, not introduced in evidence, is improperly considered by the commission in establishing freight rates. 335 Ill 624, 167NE831.

428-72⅓-New. The comparison of percentages of increase and decrease of freight rates complained of with percentages of increase and decrease generally is not alone a proper foundation for an order fixing the rate. 335 Ill 624, 167NE831.

428-72¼-New. The comparison of existing charges under similar conditions and of ton-mile earnings constitute proper evidence in respect of reasonableness of rates. 335 Ill 624, 167NE831.

428-72⅕-New. In determining reasonableness of rates comparison of prevailing rates under like conditions is of probative value. 233Ky771, 26 SW(2d)1025.

429-83½-New. A carrier by water receiving a shipment from a carrier by rail and issuing a bill of lading for carriage by water and paying freight for carriage by rail at the shipper's request is not taking part in the transportation with the rail carriers so as to require the establishment of through rates and maximum joint rates. 33F(2d)211.

429-83⅓-New. Order fixing basis for divisions of joint rates held not to deny due process. 36F(2d)789.

429-91 104Conn728, 134A220. [a] **Allowance of month's continuance** for change in tariff schedules to permit further publication has been held not unreasonable nor unlawful. 121 Oh 623, 172NE376(2dcase). [b] **Power of utilities commission to allow continuance.**-121 Oh623, 172NE376(2dcase).

430-98½-New. Where no through rate is published, the proper charge is a combination of the lowest intermediate rates applicable. 24F(2d)708.

430-98⅓-New. That a through interstate rate on carload lots has been canceled does not justify application of a local rate for less than carload lots to interstate carload shipments. 24 F(2d)708.

430-1 [a] 317 Ill 278, 148NE647.

430-3½-New. Carriers knowing the possibility of large shipments from a certain point cannot excuse failure to establish rates from such point by imposing duty on the shipper to request rates. 25F(2d)750.

430-7 35F(2d)486; 43F(2d)780; Ont [1929] 1DomLR509. [a] (2) Carrier's custom of routing is not controlling. 43F(2d)780. [c] **Carload of livestock.**-MoA 282SW725 (not limited by schedule to number stated which merely fixes rate). [d] **In determining construction of railroad tariff,** effect should be given to every word, clause, and sentence, and in construing one part thereof resort may be had to other parts. 35F(2d) 486.

430-7½-New. Construction of tariff is not sui generis, but ordinarily presents questions similar to those presented in construction of other documents. 25 F(2d)66.

430-7⅓-New. General and specific provisions are construed together, the specific qualifying the general. 25F(2d)66 (shipment falling within two designations is governed by more specific).

430-7¼-New. In determining the meaning of part of a tariff, resort may be had to other parts, that the whole may stand. 25F(2d)66.

430-7⅕-New. Interstate commerce commission's ruling regulating long established rate tariffs should be accepted unless plainly wrong. 43F(2d)780.

430-7⅙-New. Interstate commerce commission's rule that rate applies to shipment over any route unless unreasonably circuitous or unless carrier has limited rate in tariff is valid. 43F(2d) 780.

431-8 269US40, 46SCt15, 70L ed154; 6 F(2d)305 (through rate published by initial carrier is binding on it); 8F(2d) 662; 20F(2d)384; 25F(2d)66 (tariff treated as statute); 26F(2d)72; 35 F(2d)486; 43F(2d)93; 126Me489, 139 A784; 168Minn402, 210NW282; 170 Minn488, 212NW940; 113Nebr682, 204 NW870, 41ALR446; 216AppDiv500, 215 NYS576; 220AppDiv222, 220NYS789; TexCivA 38SW(2d)489; TexCivA 23SW (2d)455; 142Va355, 128SE624 (right of carrier to make demurrage charges); 196Wis64, 219NW352. See also 272US 445, 47SCt123, 71L ed343.

431-9 8F(2d)662; 23F(2d)307 (till pronounced unreasonable or discriminatory by commission); 25F(2d)66; 25 F(2d)888; 33F(2d)636(2dcase) (carrier is not entitled to recover difference between amount paid under published schedule and prior uncanceled rate); 247Mich549, 226NW216(1stcase); 170 Minn488, 212NW940; 216AppDiv500, 215NYS576; TexCivA 274SW333. See also Del 143A37.

431-11½-New. Interstate rate filed with the commission and published is conclusively presumed to be lawful rate. 20F(2d)384.

431-15 113Nebr682, 204NW870, 41 ALR446; 124 Or598, 265P408; 196Wis 64, 219NW352.

431-15½-New. Tariffs are admissible in evidence in an action against the carrier for failure to give service, as they are the contract or important element of the contract. 93Fla161, 112866.

431-16 24F(2d)113. [a] **Published through interstate rates cannot be avoided** by rebilling from intermediate junction over intra-state line to point of destination. 24F(2d)113. [b] **Estoppel.**-196Wis64, 219NW352.

431-18½-New. Where the interstate commerce commission authorized a carrier to correct a single mistake in the statutory notice, such supplement does not change a rate which should not have been changed but was changed through error of the printer. 170Minn 488, 212NW940.

431-18⅓-New. That nondeparture from published rate would violate statute is no defense therefor. 26F(2d)72.

431-18¼-New. Rights of a shipper against a carrier are determined through

provisions of the tariff embodied in the published rate. 25F(2d)66.

431-18½-New. Failure of tariff filed with interstate commerce commission to state previous rate was cancelled held not to render ineffective new rate. 43 F(2d)93.

432-26½-New. Failure of connecting carrier to participate in publication of joint rate does not render it inapplicable over its lines. 25F(2d)750.

432-33 [a] **Carrier cannot increase or decrease rates** specified in schedules filed. Mo 30SW(2d)974.

432-35 [a] **Failure to post rates** does not affect right of carrier to collect amount prescribed by tariff. 226Ky286, 108SW(2d)1091.

432-40½-New. A tariff should be construed according to the plain import of its language. 114Nebr382, 207NW 503.

432-40¼-New. Supplements are a part of a tariff the same as though they were originally incorporated therein. 114Nebr382, 207NW503.

432-40¼-New. A published tariff is binding only if published as the law requires. 210Ky473, 276SW148.

432-40½-New. Publication of a car rental charge to be made in addition to a charge for transportation service does not legalize it. 210Ky473, 276SW 148.

432-40¼-New. A tariff, or a supplement thereto, must be construed as an entirety. 114Nebr382, 207NW503.

432-40½-New. In construing a tariff both the limitations on its title page and the rules contained therein must be considered. 114Nebr382, 207NW503.

432-40⅛-New. A freight rate once established continues to be the legal rate until legally canceled. 114Nebr382, 207 NW503.

432-40-½-New. After a freight rate has once been established subsequent tariffs naming new rates without canceling previous rates cannot carry the new rates into effect. 114Nebr382, 207 NW503.

432-40⅛-New. Parts of a supplement to a freight tariff may be canceled and the remainder of the supplement continue in effect. 114Nebr382, 207NW503.

432-40¼-New. A special supplement to a tariff issued by a railroad company in form pursuant to special permission of the interstate commerce commission and purporting to increase freight rates is valid and effective where it fairly sets forth the amendments made the cancellation of original rates relating to the same service and information as to where all changes may be found. 114Nebr382, 207NW503.

432-40½-New. Rates, rules, and regulations including forms and stipulations in bills of lading, filed with the public service commission have the force of law, 120Kan21, 245P734.

432-40¼-New. and shippers and carriers are deemed to have knowledge of them, to have contracted with reference to them, and are bound thereby. 120 Kan21, 245P734.

432-40¼-New. Such rates, rules, and regulations when so filed cannot be changed without the approval of the commission. 120Kan21, 245P734.

432-41 See also 6F(2d)663, 666 [cit CJ].

433-45½-New. All parts of the tariff should be considered, and if a plain meaning can be gathered it will control. 142Va355, 128SE624.

433-45⅛-New. The intention of the parties governs in construing a tariff rule. 142Va355, 128SE624.

433-45¼-New. Language of tariff is construed most strongly against carrier in case of doubt. 142Va355, 128SE624.

433-45⅛-New. Nontechnical words are to be given their usual and ordinary signification. 142Va355, 128SE624.

433-45⅛-New. The instrument is to be read as a whole. 142Va355, 128SE624.

433-45½-New. If apparent inconsistencies can be reconciled they should be in order to give full effect to the language used. 142Va355, 128SE624.

433-45⅛-New. The object sought to be accomplished is to be considered in ascertaining meaning. 142Va355, 128 SE624.

433-45½-New. Miscellaneous tariffs construed. 104Conn728, 134A220; 168 Minn402, 210NW282; 69Utah521, 256P 790; 145Va207, 133SE812; 145Va207, 133SE817.

433-45¼-New. Where a through rate it lawful, it is applicable, although a combination of commodity rates makes a lower rate. 25F(2d)888.

433-45¼-New. A shipment from a point in one state to a point in another reconsigned to a point in a third state is regarded as a through shipment for rate purposes. 25F(2d)888.

433-45½-New. Reduced rate for steel ship plates is held not applicable to plates not intended for use and not used on ships. 25F(2d)522.

433-45⅛-New. Under the Cummins Amendment, classifications and tariffs declared by the interstate commerce commission compose part of the contract of carriage. Del 143A37.

433-45¼-New. A shipper is not entitled to receive the benefit of intermediate local rates, which in the aggregate are less than the interstate rates having the approval of the interstate commerce commission, by the device of consigning and reconsigning, where it was the intention from the beginning to make a through interstate shipment, in view of Interstate Commerce Act § 6, as amended by Act June 29, 1906 c 3591 (USCA tit 49 § 6). 29F(2d)660.

433-45¼-New. Where a railroad's tariffs afforded one rate for logs under six feet in length and a cheaper rate for logs without qualification as to the length, applying to movements for less than one hundred seventy miles, a higher rate applicable to shipments of short logs shipped for a distance of one hundred fifty miles. 26F(2d)670(1stcase).

433-45¼-New. The words, "C. L. minimum weight 24,000 pounds" in the classification of lumber shipments mean that the shipment must weigh at least twenty-four thousand pounds to constitute a carload. 168Ga851, 149SE128; 40GaA238, 149SE303.

433-45¼-New. A carrier may charge for transportation in excess of the minimum weight where the weight exceeds the specified carload weight. 168Ga851, 149SE128; 40GaA238, 149SE303.

433-45⅛-New. Construction of tariff with provision for application to intermediate points. 40F(2d)52 (previous tariff rates held superseded).

433-45¼-New. Construction of notification under rule of Interstate Commerce Commission. 40F(2d)56.

433-45½-New. Other tariffs construed. 35F(2d)486.

433-45½-New. Tariffs should be construed favorably to shippers, and in a practical way. 42F(2d)272.

433-45½-New. "Surgical bandage" within tariff on file includes crêpe paper bandage. 42F(2d)600.

434-63 29F(2d)140. But see 233Ky 771, 26SW(2d)1025; Wash 286P86.

434-65 29F(2d)140 (denial of increase of rates); 130Kan478, 287P608; 154 Miss871, 123S876. [a] (6) Other instances. 154Miss871, 123S876.

435-67 154Miss871, 123S876.

436-85 29F(2d)296.

437-95½-New. City properly allowed to intervene where it had contract with carrier respecting rates. 228AppDiv 354, 239NYS501.

437-96 [a] (3) **Ind** 169NE530. [d] **Allegations in complaint** are not taken as true on motion for temporary injunction. **Ind** 169NE530.

437-99½-New. Motion to dismiss bill by street railway against public service commissioners for confiscation of plaintiff's property because of failure to prescribe fair and reasonable rates would be denied under Equity Rules rule 29, notwithstanding operation was under lower rate than was asked for, which did not constitute waiver or abandonment of the pending action and changed the conditions in operation. 29 F(2d)296.

438-4 [a] 36F(2d)789; 120 Or517, 252 P955. [b] **Evidence held insufficient to show unreasonableness of rate.**-120 Or 517, 252P955. [c] **Evidence held insufficient to show unlawful discrimination against interstate commerce.**-120 Or517, 252P955.

438-5½-New. Objections which might have been, but were not, raised by a city to an order of the commission cannot support the city's application to enjoin such use. 331 Ill 360, 163NE141.

438-7 See also 273US625, 47SCt489, 71 L ed807; 126Me23, 135A526. [b] **In Illinois** court is limited to determining whether commission's finding is without foundation in evidence or whether constitutional right of carrier is infringed. 335 Ill 70, 166NE466.

438-12 335 Ill 247, 167NE38.

438-13 332 Ill 243, 163NE664.

438-15 178Ark940, 12SW(2d)915; 335 Ill 247, 167NE38 (on conflicting evidence, great weight will be given to commission's findings).

438-16 See also 332 Ill 243, 163NE664.

438-16½-New. Findings of fact not disturbed unless commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support them. 99WVa670, 130 SE131.

438-18½-New. In Oklahoma, on appeal from an order of the corporation commission substituting special rates in favor of a shipper for established and uniform rates, the cause will be tried on the pleadings and evidence certified by the commission. 115 Okl 158, 241 P776.

438-18½-New. Election to come under local law held not to require exhaustion of state remedies before appeal to the federal court. 273US625, 47SCt489, 71 L ed807.

438-18¼-New. City's rights are not cut off by a street car company's appeal to the federal court. 273US625, 47SCt489, 71L ed807.

438-19 See also 274US597, 47SCt724, 71L ed1224. [c] **Remedy for erroneous rates established by railroad commission** is by new rate either by commission itself or by application to district court as provided by statute. TexCommnA 138SW(2d)679.

439-23 [b] **Evidence held insufficient.**-Ind 169NE530.

439-25 See also 274US597, 47SCt724, 71L ed1224.

439-35 39F(2d)658.

439-36 5PaDist&Co257.

440-47½-New. In Washington Remington Comp. St. § 10434, does not authorize a finding by department of public works that a rate was unreasonable and unlawful, if it was in conformity with order of the department in force at time of shipment. 136Wash389, 240 P362.

440-47½-New. The public utilities commission cannot order reparations to a shipper claiming payment of excessive rates where discrimination against other shippers will result. 69Utah521, 256P790.

440-47¼-New. Hearing in court is de novo but on evidence submitted to Railroad Commission. 233Ky771, 26SW(2d) 1025.

440-49 TexCivA 148W(2d)877(2dcase).

441-52 98PaSuper134.

441-60 See also 5LaA641. [b] **Availability of article for use** is not always determinative in applying tariff rate. 42 F(2d)600.

441-61½-New. Where more than one tariff applies to a shipment, the one most favorable to the shipper must be applied. 179Ark516, 16SW(2d)1001.

441-63 [a] 317 Ill 278, 148NE647. [b] **Abnormal conditions may relieve** from performance, but do not justify extra charge for usual services. 270US260, 46SCt220, 70L ed576. [c] **Shipment under bill of lading calling for certain route makes shipper liable thereunder** where there were three routes, two of them under contract rate and one lower, and shipment was over one of former routes. 217AppDiv675, 216NYS186. [d] **Misquoting of rate.**-TexCivA 198SW(2d) 334.

442-70½-New. An agreement by the consignee of freight to pay more than

the legal rates on an interstate shipment does not render him liable for any amount in excess of the legal rate. 19 **OhA**152.

442-70⅓-New. Where tariff provided carload rates, although cars were not loaded to the maximum, a flat rate of icing must be paid. 15**F(2d)**532.

442-70¼-New. An equalization agreement by which a carrier obligated itself to accept special reduced rates has been held not to include shipments of fuel oil. 32**F(2d)**887.

442-71 210**Ky**473, 276**SW**148. [a] **Under tariff schedule** allowing charge of storage on outbound freight awaiting completion of shipment, carrier cannot charge for beets delivered along right of way before shipment. 5**F(2d)**420.

442-72 [b] **Threat of carrier to sell goods,** refused by consignee, is not sufficient act of dominion inconsistent with shipper's title to defeat claim for storage charges. 125**Misc**283, 211**NYS**362.

442-74 [a] **Tariff schedule fixing storage charges** for freight liable to be damaged by the elements held not applicable to lumber piled on railroad's right of way. 4**F(2d)**827.

442-77 32**F(2d)**466; 134**Misc**44, 235 **NYS**160.

442-79 [b] **Transportation service and switching service distinguished.**–210**Ky** 473, 276**SW**148.

443-90½-New. A carrier may not make a separate and additional charge for one of the necessary elements of transportation service. 210**Ky**473, 276**SW** 148.

443-90¼-New. Such charge is not legalized by a statute declaring that a carrier charging more than a just rate for services therein designated shall be guilty of extortion. 210**Ky**473, 276**SW** 148.

443-91 **Va** 153**SE**865.

444-1 **LaA** 130**S**630.

445-15 34**F(2d)**582; 219**Ala**593, 123**S** 90; 36**GaA**480, 137**SE**115; **GaA** 155**SE** 787(1stcase); 141**Miss**505, 107**S**193; 221 **MoA**757, 288**SW**73; **NJSup** 143**A**834(2d case); 193**NC**444, 137**SE**328; 127 **Or** 364, 272**P**281; 86**PaSuper**1; 86**PaSuper** 587; 92**PaSuper**63; 94**PaSuper**289 (where consignee refuses to accept); 8**PaDist &Co**217. See also 28 **OhA**459, 162**NE** 761. [j] **One signing bill of lading as "shipper"** is presumably consignor. **NJ** 131**A**111 (liability for charges). [k] **Where carrier diverts shipment on purchaser's orders,** consignor is not liable. 14**F(2d)**145. [l] **Shipper of goods entering into bond** guaranteeing prepayment of transportation charges cannot deny its liability therefor. 127 **Or**364, 272**P**281.

445-16 141**Miss**505, 107**S**193; 86**Pa Super**1; 86**PaSuper**587.

445-17 236 **IllA**150; 141**Miss**505, 107**S** 193.

445-18 34**F(2d)**582 (seller consigning goods to himself is liable for insufficient freight charges collected from buyer); 141**Miss**505, 107**S**193; **NJ** 131**A** 111; 86**PaSuper**1.

445-19 141**Miss**505, 107**S**193.

445-22 127 **Or**364, 272**P**281.

445-22½-New. But the consignor's liability ceases when freight is paid by the author, and such other is not subrogated to carrier's rights against the consignor before payment. 164**La**49, 113**S**760.

445-23 34**F(2d)**582 (seller consigning goods to himself is liable for freight charges till delivery to buyer); 219 **Ala**593, 123**S**90; 141**Miss**505, 107**S**193; 193**NC**444, 137**SE**328; 86**PaSuper**587; 94**PaSuper**289. [b] **Shipper is relieved from payment of charges** under Interstate Commerce Commission rules by signing provision directing carrier not to deliver to consignee until charges are collected. 254 **IllA**238.

445-24 94**PaSuper**289; **TexCivA** 15**SW** (2d)25.

445-24½-New. Where goods are en route and the consignee orders their reconsignment to another point, the consignor does not render himself liable for freight charges to the original destination. 239 **IllA**139.

446-25 [a] **Shipment f. o. b. seller's station.**–221**MoA**757, 288**SW**73.

446-26 141**Miss**505, 107**S**193 (parties may agree consignee will be looked to for payment of freight); 221**MoA**757, 288**SW**73, 76 [quotCJ]; **NJSup** 143**A** 834(2dcase); **Ont** [1929] 1**DomLR**817. See also 236 **IllA**150. [f] **Reconsignment.**–113 **OhSt**34, 148**NE**349. [g] **Mere placing of shipment on sidetrack** and crediting charges to consignee has been held not to constitute special contract. **GaA** 155**SE**737(1stcase).

446-27 See also 254 **IllA**238.

446-30 237 **IllA**425; 249**NY**241, 164**NE** 37.

446-31 267**US**395, 45**SCt**233, 69**L ed** 678; 20**F(2d)**379; 35**F(2d)**319; 36**GaA** 480, 137**SE**115; 245 **IllA**503; 248 **IllA** 353; 122**Kan**141, 251**P**440; 221**MoA**757, 288**SW**73; 105**NJL**593, 147**A**457; 230 **AppDiv**729, 244**NYS**394; 19 **OhA**152; 90**PaSuper**216; 103**WVa**532, 138**SE**102. See also 28 **OhA**459, 162**NE**761. [n] **Consignee's claim that consignor** agreed to pay freight charges is no defense after acceptance of goods. 122**Kan**141, 251 **P**440. [o] **Erroneous representation by carrier's employee that charges have been prepaid** is immaterial. 103**WVa** 532, 138**SE**102. [p] **Delivery of goods to third person as directed by consignee** without collecting freight charges may not be grant of credit. 40**F(2d)**905.

446-32½-New. Where the consignee reconsigns en route, he is liable for charges. 236 **IllA**150.

446-32⅓-New. The consignee's direction for a carrier to collect freight from another will not relieve it from liability therefor. 20**F(2d)**379.

446-32¼-New. Where a bill of lading stipulated that the consignee shall pay freight, but by mistake it was marked prepaid, the carrier is entitled to recover charges from the consignee in view of a provision of the statute prohibiting discrimination in rates. 20 **F(2d)**828.

446-32⅕-New. If any acts of ownership are exercised over the consignment by consignee, the carrier may look to him for payment of freight. 8**PaDist &Co**217.

446-32⅙-New. If the consignee refuses to accept the goods except upon the carrier's agreement to look to the consignor for freight, the consignee will not be under liability by accepting the goods. 8**PaDist&Co**217.

446-32⅐-New. A consignee has a right to rely on a provision in a bill of lading prohibiting the railroad from delivering property until payment of all freight charges, and where the consignee sells the consignment and notifies the carrier, he is not liable upon the carrier's delivery to the purchaser without collecting freight charges. **NJSup** 143**A**834.

446-32⅛-New. Extent of liability. Where the original consignee refused to accept goods, the consignee is only liable for subsequent transportation. **Tex CivA** 19**SW(2d)**334.

446-33 21**AlaA**531, 109**S**573. But see 21**AlaA**531, 109**S**574. [c] **Additional charges caused by diversion.**–Consignee obtaining diversion of shipment during transportation is not liable for additional freight charge where in ordering diversion he was acting as agent for consignor and carrier must have known such fact. 37**GaA**729, 141**SE**678.

446-34 35**F(2d)**319; 90**PaSuper**574.

446-35 237 **IllA**425.

447-37 See also 87**PaSuper**205 (consignee's agent held not liable for undercharge).

447-38 13**F(2d)**950; 141**Miss**505, 107 **S**193; 221**MoA**757, 288**SW**73; 127 **Or** 364, 272**P**281 (owner naming itself both consignor and consignee). [c] **Knowledge of consignee's failure to receive shipment,** if obtained by owner of goods otherwise than by formal notice by carrier, renders lien liable for freight. 13**F(2d)**950. [d] **Transfer of title** is not effected prior to payment of draft attached to bill of lading so as to impose liability for freight charges. 127 **Or**364, 272**P**281. [e] **Consignees after becoming owners of goods may be liable for freight charges** on original bill of lading for reconsignment provision of charges to follow car. 40**F(2d)**905.

447-38½-New. Ownership is not decisive in determining liability for transportation charges, apart from other considerations. 221**MoA**757, 288**SW**73.

447-39 14**F(2d)**123; 119**Kan**706, 241**P** 693 (purchaser of goods while in transportation who receives them and pays freight charges is liable for undercharge, though not named as consignee in bill of lading); 103**WVa**532, 138**SE** 102.

447-40 103**WVa**532, 138**SE**102.

447-42 36**GaA**480, 137**SE**115. But see 222**AppDiv**509, 226**NYS**99 (one accepting shipment and paying charges demanded held liable for undercharge which carrier failed to collect).

447-42½-New. Where a prepaid bill of lading was issued to a shipper on the carrier's credit list for consignment of hay to the shipper's order, the person presenting the bill of lading is not liable for transportation charges on failure of the carrier to collect from the shipper. 8**F(2d)**372.

447-42⅓-New. Nor is the one to whom the hay was sold and who received actual delivery liable for such charges under such circumstances. 8**F(2d)**372.

447-42¼-New. A person who has obtained a diversion of a shipment during transportation is not liable for a resulting additional freight charge where, in ordering the diversion, he was acting as agent for another and the carrier must have known such fact. 37**GaA**729, 141**SE**678.

447-42½-New. The fact that the purchaser of the consignee's business owes the consignee money does not make the consignee liable for uncollected freight. 226**Ky**286, 10**SW(2d)**1091.

447-42⅙-New. A person not named as consignee in a bill of lading, but possessing such bill which gave control of shipment, was liable for charges, if by his conduct such person exercised acts of dominion over the shipment consistent only with the idea of its acceptance. 28 **OhA**459, 162**NE**761 (directions to divert).

447-45 98**PaSuper**134.

447-52 123**Kan**161, 254**P**405. [f] **Where order bill of lading of interstate shipment is marked "freight to be prepaid,"** consignee who is compelled to pay amount of draft attached including freight charges cannot recover from carrier damages sustained by being compelled to pay such charges. 123**Kan**161, 254**P**405.

448-58½-New. Freight charges on shipments from a foreign country into the United States are payable in money of the United States. 8**F(2d)**662.

448-60 But see 36**F(2d)**604 (shipper held not entitled to set-off).

449-65½-New. In an action by a carrier against the shipper for transportation charges on an intra-state shipment, a counterclaim will not lie in view of the statute prohibiting discrimination in charges. 221**MoA**43, 297**SW**717, 718 [citCJ].

449-65⅓-New. Damages resulting from failure of a railroad company to accept cars for transportation cannot be made the basis of a counterclaim in an action for freight charges on other shipments. 88**PaSuper**501.

449-65¼-New. A claim in tort not arising out of the same transaction cannot be the basis of a counterclaim in an action for freight charges. 88**Pa Super**501.

449-66 [b] **Recovery of undercharges.**–170**Minn**488, 212**NW**940. [c] **Scope of inquiry.**–196**Wis**64, 219**NW**352.

449-67 [c] **Actions against government** for compensation for transportation charges held not barred by limitations. 270**US**1, 46**SCt**182, 70**L ed**435. [d] **Director general of railroad** cannot recover for breach of contract to ship goods due to lack of cars. 173**Ark**70, 291**SW**979.

449-67½-New. Carrier of intra-state shipment making a lower charge than rates fixed by the state commission may

recover the difference between rate paid and that required to be paid. 141Miss 505, 107S193.

449-67⅓-New. Where the rate fixed by the commission is obligatory, 141 Miss505, 107S193.

449-67¼-New. and shipment is delivered to consignee before the mistake is discovered. 141Miss505, 107S193.

449-67½-New. A railroad's cause of action for recovery of excessive refund on freight overcharge accrues on date of refund. 17F(2d)657.

449-67⅙-New. The federal statute of limitations applies in favor of principal and surety in an action by a carrier on a bond executed by the shipper to recover charges. 27F(2d)765.

449-67⅐-New. A railroad cannot recover undercharges after more than four years. 1LaA681.

449-67⅛-New. The statutory period does not bar an action to recover an excessive refund on a freight overcharge, the action being on implied contract to refund money. 26F(2d) 615.

449-67⅙-New. A suit for undercharge is governed by limitations imposed by congress. 31F(2d)947.

449-67 1/10-New. A carrier's action to recover freight charges is governed by the usual rules applicable to ordinary contracts, where no preference, unreasonable rate, or discrimination is involved. 33F(2d)636(2dcase).

449-67 1/11-New. A carrier can recover charges erroneously refunded although there was an agreement by one defendant to reimburse defendant paying charges. 34F(2d)56.

449-67 1/12-New. Cause of action for charges for moving empty oil tank cars does not accrue when carrier parts with possession thereof. 39F(2d)629.

449-67 1/13-New. "Shipment of property" in act providing for accrual of cause of action, does not include movement of empty oil tank cars. 39F(2d)629.

449-69 175Ark688, 300SW373; 224 IllA584. [a] **Where bill of lading not assigned to plaintiff,** refusal to make initial carrier party to terminal carrier's action for freight charges is not error. 175Ark688, 300SW373. [b] **Shipper can not set off damages** for initial carrier's negligent delays in action for charges by terminal carrier. 175Ark688, 300SW373.

449-69½-New. In an action to recover the difference between lower rate charged and rate fixed by commission carrier has option to sue either shipper or consignee, 141Miss505, 107S193.

449-69⅓-New. unless it has made a binding contract to the contrary. 141 Miss505, 107S193.

449-69¼-New. In Nova Scotia a connecting carrier has no status under the standard form of straight bill of lading to maintain an action against the shipper for freight. NS [1928] 2 DomLR973.

449-71½-New. A defense alleging carrier unreasonably allowed charges to accumulate in excessive amount by failing to deliver merchandise to warehouseman, whose rates were less than carrier's, after sixty days as authorized by statute, is sufficient on its face, 125Misc283, 211NYS362.

449-71⅓-New. and is not open to objection as an attack on reasonableness of rates without preliminary resort to interstate commerce commission. 125 Misc283, 211NYS362.

449-71¼-New. Defense and counterclaim alleging that a carrier unreasonably allowed charges to accumulate in an excessive amount presents no issue in an action to recover charges on refused merchandise. 216AppDiv500, 215 NYS576.

449-71⅙-New. In a shipper's action for damages, the carrier is entitled to deduction of unpaid freight charges without formal plea. 215Ala148, 109S 881.

449-71⅛-New. Pleadings held insufficient to warrant recovery of deficiency in charges from the purchaser of the consignee's business. 226Ky286, 10SW (2d)1091.

449-71 1/7-New. An affidavit of defense held insufficient. 86PaSuper443; 90Pa Super574.

449-71⅛-New. In an action to recover freight charges on an interstate shipment, defendant cannot set up counterclaim for damages to goods in shipment. 25F(2d)315.

449-71⅙-New. Complaint held sufficiently to allege who received the refund, in an action to recover charges erroneously refunded. 34F(2d)56.

449-73 LaA 130S641. See also 246 IllA 22. [a] **Evidence has been held insufficient** to sustain carrier's burden of proving additional charge. **LaA** 130S641.

449-77½-New. It is no defense that the tariffs were not posted in depots. 224 IllA584.

449-77⅓-New. Questions for court or jury. 21AlaA617, 111S196; 173Ark70, 291SW979; 174Ark168, 295SW55; 193 NC444, 137SE328; 148Va140, 138SE471.

449-77¼-New. Burden of proof. 272US 445, 47SCt123, 71Led343.

449-77½-New. Sufficiency of evidence. 36GaA104, 135SE767; 122Kan122, 251 P417.

449-77⅙-New. In an action for undercharge, a verdict for the shipper is erroneous where rates are shown to be less than filed tariffs. 37GaA271, 139SE 914.

449-77⅐-New. Evidence has been held sufficient to sustain a verdict for plaintiff in an action for charges against one to whom the consignor ordered the shipment to be released after the order-notify consignee had refused to accept it. 88PaSuper332.

449-77⅛-New. Questions for jury. Whether delivery was made to defendant or to defendant's nominee is usually a question for the jury. 88PaSuper332.

449-77⅙-New. Whether a seller of coal, directing a mining company's foreman to make a shipment, was the consignor was a question for the jury. 27F(2d) 25.

449-77 1/10-New. Evidence has been held sufficient to sustain a finding that Perishable Protective Tariff Rules, rule 630 applied. 179Ark516, 16SW(2d)1001.

449-77 1/11-New. A carrier had the burden of proving that Perishable Protective Tariff Rules, rule 630 applied. 179 Ark516, 16SW(2d)1001.

449-77 1/12-New. The burden is on defendant to show a lower rate of freight than the regular tariff rate. 5LaA722.

449-77 1/13-New. Evidence held to establish a special contract for the movement of garbage cars at a rate not subject to approved tariffs, which contract could not be abrogated without notice. 168La781, 123S323(2dcase).

449-77 1/14-New. The evidence authorized a directed verdict for plaintiff, in an action to recover the balance due for freight charges. 247Mich549, 226NW 216(1stcase).

449-77 1/15-New. The admission of tariff schedules of several roads held not error, in an action to recover the balance due for freight charges. 247Mich549, 226NW216(1stcase).

449-77 1/16-New. Granting nonsuit in an action by a carrier to recover a difference in rates has been held error where the conceded facts showed that the charges paid were based on an inaccurate rate. **NJSup** 147A635.

449-77 1/17-New. Statute providing for sale of goods is admissible in action to recover charges. 38F(2d)968.

449-77 1/18-New. In action to recover undercharge, consignee is conclusively presumed to know lawful rate. 220Ala 541, 126S846.

449-79 233Ky771, 26SW(2d)1025.

449-80 216Ala89, 112S323; 126Me23, 135A526.

450-84 See also 40GaA190, 149SE92.

450-84½-New. Right of action. 215Ala 638, 112S215.

450-84⅓-New. Attorney's fees may be recovered as a part of the costs in an action for overcharge on a freight shipment. 216Ala89, 112S323.

451-88 [a] **Action for money received** will lie against railroad charging more than legal rate after publication of that rate. 126Me23, 135A526.

451-88 [a] **Statute construed.**-Ga 155 SE525.

451-91 233Ky771, 26SW(2d)1025; 264 Mass427, 162NE897; 96PaSuper590. [b] **In Maine.**-126Me23, 135A526. [c] **In Massachusetts.**-264Mass427, 162NE 897.

451-92½-New. Orders of state board or department fixing rates are ordinarily prospective and not retroactive. 136Wash389, 240P362.

451-92⅓-New. Freight charges in excess of the carload rate assessed on the weight of lumber over the minimum carload fixed by the commission may be recovered. 37GaA176, 139SE116.

451-92¼-New. Proceedings before public service commission for reparation are separate and distinct from proceedings against rates under statute. 96 PaSuper590.

451-92½-New. Appeal lies from order of commission refusing award of reparation. 96PaSuper590 (superior court has jurisdiction of appeal).

451-92¼-New. Under statute no appeal lies direct to any court from order awarding reparation but suit may be brought and appeal taken from judgment of court. 96PaSuper590.

451-93 [a] **Special damage need not be proved.**-130Kan859, 288P589. [b] **Act does not deprive State Railroad Commission of power** to award reparation to shipper for overcharges. 39F(2d)658.

451-94 16F(2d)441; 233Ky771, 26SW (2d)1025. [f] **That judgment on interstate commerce commission's reparation order** resulted in compound interest held not error. 269US217, 46SCt73, 70Led 242. [g] **Interest** from date of each overcharge payment held recoverable by shipper. 16F(2d)441.

452-95 [c] **It is carrier's duty to publish rate immediately on shipper's request for transportation** between points on carrier's line where there was no published tariff. 16F(2d)17.

452-1 TexCivA 273SW676 (switching charge for cars on municipal owned connecting railway held included in agreement to pay published point to point switching or transportation rate).

452-2 32 OhA263, 167NE899. [d] **Charging more for long than for short haul.**-Where tariff naming rate is silent as to route over which rate applies. 34F(2d)221.

452-6 MoA 68SW(2d)1020(1stcase).

452-9½-New. Shipper who voluntarily makes payment of charge in United States money on a shipment from Canada into the United States cannot recover the difference in the exchange value of money. 8F(2d)662.

453-10 269US217, 46SCt73, 70Led242; 40GaA190, 149SE92; 107WVa469, 148 SE855 (participating connecting carriers held jointly and severally liable).

453-11 [a] **Establishment of joint rate** by concurrence of connecting carriers is act of each. 269US217, 46SCt73, 70 Led242.

453-13 269US217, 46SCt73, 70Led242.

453-18 127Kan577, 274P272; 130Kan 859, 288P589.

453-21½-New. Shippers cannot recover overcharges where they do not follow the procedure provided by statute. 32 OhA263, 167NE899.

453-22½-New. A provision of a bill of lading that suits for loss, damage, or delay shall be instituted within two years after delivery or after a reasonable time for delivery has elapsed will bar an action for excess freight charge after two years. 51SD146, 212 NW917.

453-22⅓-New. An action in a state court to recover overcharges barred by statute is held not revived by federal statute extending period of limitations. 152Md594, 137A350.

453-22¼-New. Under the Federal Transportation Act, an action to enforce reparation awards made by the interstate commerce commission may be brought within one year after award by the commission. 21F(2d)562.

453-22⅙-New. The time runs from the date the money is to be paid as fixed

by the order of the commission. 21 F(2d)562.

453-22½-New. Delay in bringing suit to recover reparations ordered by Public Service Commission held not unreasonable. 300Pa242, 150A480 (estoppel not shown).

453-22½-New. Suits to recover freight charges on intrastate shipments must be brought within 12 months after wrong. Ga 155SE525.

453-23 [a] **Consignee may recover for excess** charge even though given credit from consignor on charges. 39F(2d)661. [b] **Shipper may recover overcharges** regardless of whether or not he recouped losses or passed them on to others. 39 F(2d)658.

453-26 [c] **Right to refund for concentration on reshipment.-TexCivA** 1 SW(2d)480.

453-27½-New. Where a consignor sold shipments F.O.B. destination, consignee paying charges and deducting them from amount owing seller, the latter needed no assignment from purchaser. 145Va207, 133SE512.

454-28½-New. The charging of unreasonable and excessive joint through rate is joint tort. 16F(2d)130.

454-34 233Ky771, 26SW(2d)1025.

454-35½-New. Shipper may without prior application to railroad commission maintain common law action to recover sums charged in excess of schedule rate for intrastate shipment. 233Ky771, 26SW(2d)1025.

454-36 220MoA743, 276SW409 (charge that action is ex delicto held properly refused).

454-37½-New. "Action for reparation's" arises where there is a charge within the limits of law but which, notwithstanding that fact, is unreasonable and excessive. 32 OhA263, 167NE899.

454-40 [c] **Complaint held insufficient.** Alleging contract under subsequent bill of lading which did not supersede original bill of lading or interstate shipment. 47 Ida223, 275P576.

454-41 [a] **Petition held sufficient.**-40 GaA190, 149SE92.

455-55½-New. Consignee has burden of proving damage in suit to recover overcharge. **TexCommnA** 24SW(2d)12.

456-66½-New. Evidence of ownership of goods is held inadmissible in an action against a consignee for the balance of freight charges. 237 IllA425.

456-67 220MoA743, 276SW409 (evidence held sufficient). [a] **Deficiency in proof has been held cured** by defendant's evidence. 220MoA743, 276SW409.

456-68 [a] **Additional charge held unreasonable.**-279US768, 49SCt494, 73L ed 947. [b] **Evidence insufficient to sustain judgment** for recovery of overcharge. **TexCommnA** 24SW(2d)12.

456-68½-New. In the notes are cited cases in which the evidence has been examined and held sufficient to sustain findings of overcharges. 168Minn402, 210NW282.

456-68¼-New. Evidence has been held sufficient to support a finding that a railroad line was a direct line within the meaning of a tariff rule for ascertaining the correct rate. 127Kan326, 273P 451, 64ALR322.

456-68¾-New. In the notes are cited cases in which the evidence has been held insufficient to establish overcharges. 47 Ida223, 275P576.

456-68⅛-New. Evidence sufficient to show overcharge. TexCivA 14SW(2d) 888.

456-68⅛-New. Evidence held sufficient to sustain finding that rate collected upon interstate shipment was more than authorized tariff. 130Kan859, 288P 589.

456-69½-New. Finding that crates shipped carried designations and weights different from crates of the same dimensions designated in the tariff, but in accord with the names and weights provided for other classes, was sufficient to sustain judgment for higher rates. 35F(2d)861.

456-71 168Ark908, 271SW977; 123 Kan161, 254P405; **NJCh** 152A251; **TexCivA** 2SW(2d)911 (common-law lien); **TexCivA** 11SW(2d)362.

457-72 38F(2d)968; **Del** 145A172.

457-73 145Wash430, 260P669.

457-81 [a] **In Porto Rico.**-33PortoRico 466.

459-16 145Wash430, 260P669.

460-35 181Ark192, 25SW(2d)28.

460-40 TexCivA 2SW(2d)911. [e] **Resumption of possession** under new carriage contract held not to restore lien. 145Wash430, 260P669.

461-41 127 Or364, 272P281 (liability of shipper is not affected by delivery without collection of freight charges).

462-51 145Wash430, 260P669.

462-71 160NC438, 129SE815 (liable to owner for remainder of proceeds of sale); **Alta** [1927] 2DomLR813, 32 CanBankr356, [1927] 2WestWkly65. [b] **Requirement that goods be held six months** before sale has been held reasonable. 38F(2d)968. [c] **Statute providing for sale of goods held not repealed** by statute relating to demurrage charge. 38F(2d)968.

463-72 Alta [1927] 2DomLR813, 32 CanBankr356, [1927] 2WestWkly65.

463-81 See also 5PaDist&Co257.

463-83 [a] **Evidence held to sustain finding** that stone quarry equipment was subject to rates as derricks and not contractors' outfits in suit to restrain sale of freight for freight and demurrage charges. **TexCivA** 25SW(2d)930.

463-86½-New. Under the Porto Rico statute an action to enforce a preferred credit for conservation and storage is not barred by limitations where the carrier has not parted with possession. 33PortoRico466.

463-87 TexCivA 2SW(2d)911, 914 [citCJ]. See also 164La49, 113S760.

464-95 NJCh 152A251; 143Va865, 129 SE321.

464-96 But see 221MoA43, 297SW717.

464-98 [a] **Penalty exacted by carrier** for detention of interstate lumber cars, awaiting reconsignment is an additional demurrage charge, not improperly exacted, having been approved by interstate commerce commission. 271US259, 46SCt530, 70L ed934.

464-1 142Va355, 128SE624. [c] **Formation of pools.**-142Va355, 128SE624.

465-6 30F(2d)901; 140Miss427, 106S 14, 16 [citCJ]; 148Va140, 138SE471; 149Va13, 140SE823. [b] **Parties may extend time** limited. 23F(2d)499. [c] **Transfer of coke from one car to another** held not to affect right to recover demurrage charges. 38F(2d)968.

465-7 149Va13, 140SE823. [b] **Carrier held entitled to judgment** under agreement. 149Va13, 140SE823. [c] **Demurrage** may be computed by any rule not increasing its aggregate amount. 149 Va13, 140SE823. [d] **"Settlement rule"** held to authorize application of average demurrage rule. 149Va13, 140SE823.

465-8 12LaA124, 124S693 (interest); 242Mich383, 218NW695 (cars used wholly in intra-plant service held subject to demurrage charge under tariff filed pursuant to statute).

465-10½-New. A carrier cannot recover demurrage of another carrier where, under contract between the carriers relating to creosoting ties, the unloading was under the supervision and control of the carrier asserting the claim. 11 F(2d)850.

465-10½-New. Demurrage is recoverable where it has accrued because of an act or an omission of the shipper who can easily abate or avoid the charge, although the shipment has been removed from the shipper's plant, to the carrier's assembly yards on mine car billings prepared by the shipper but not accepted by the carrier because of a lawful embargo. 107WVa429, 148SE493.

465-10¼-New. The rule that demurrage for a delay at points of reconsignment is not collectable has been held inapplicable in favor of a shipper who, at the time of the original shipment, knew of the existing embargo at the destination and consigned first to the intermediate point, intending to evade the embargo. 30F(2d)901.

466-12 13LaA106, 127S442; 140Miss 427, 106S14, 16 [citCJ].

467-22½-New. Demurrage charges are reasonable if based on reasonable wartime embargo regulation. 233 IllA109.

467-23 317 Ill 278, 148NE47.

467-31½-New. Filing tariff concerning demurrage as to interstate shipments as required by the Interstate Commerce Act authorizes demurrage as to such shipments. 317 Ill 278, 148NE47.

467-31½-New. Demurrage charges assessed under tariff declared legal, although certain substitutions of cars were made by authority of exchange agreement. 143Va865, 129SE321.

467-32 220MoA743, 276SW409 (delay caused by fault of carrier gives no claim for demurrage); 87PaSuper432; **TexCivA** 31SW(2d)868. [b] (2) Other instances. 43F(2d)555.

467-33 40GaA190, 149SE92.

467-35½-New. Where a shipment is billed through from the point of origin to the point of destination and the carrier has agreed to make delivery at the point named in the bill of lading, the carrier cannot collect demurrage charges at an intermediate point. 19 OhA152.

468-36 TexCivA 31SW(2d)868. [a] **Notice of arrival and of place where car can be unloaded.-TexCivA** 31SW(2d)868. [b] **To whom notice given.-TexCivA** 31 SW(2d)868.

468-38 [b] **Necessity of registered mail.**-4LaA638. [c] **Failure to notify is no defense,** where defendant fails to show want of actual notice. 13LaA106, 127S442.

468-38½-New. Delivery on "industrial track" renders notice of arrival unnecessary. 13LaA106, 127S442.

468-39 MoA 27SW(2d)72. [a] **Where shipper has actual notice of rejection,** notice by telegraph is not required. **MoA** 27SW(2d)72.

468-42½-New. A strike incapacitating the consignee from unloading cars is no defense to an action for demurrage charges. 317 Ill 278, 148NE47.

468-44 [a] (4) Other instances. **Tex CivA** 31SW(2d)868. [d] **Exemption of "private car"** has been held to include private car leased from railroad company. 167La533, 120S15.

469-50½-New. Provisions of demurrage tariff for charging detention to a new consignee held inapplicable where the original consignee has parted by contract with right to transfer. 148Va140, 138SE471.

469-50⅓-New. Tariff rule excepting loaded cars at "mine sidings" does not except cars at place one hundred miles from mines, 23F(2d)248.

469-50¼-New. notwithstanding carrier's acquiescence in exception during war emergency, where emergency has passed. 23F(2d)248.

469-51 [b] (1) 142Va355, 128SE624. (8) Exchange organized by tidewater shippers, not consignee liable for demurrage. 143Va865, 129SE321. (9) Where demurrage rates were based solely on carrier's tariffs, recourse to rules and regulation of exchange unnecessary to determine amount of demurrage for which member liable. 142Va355, 128 SE624. [c] **Liability of members of consignee exchange.**-153Va691, 151SE126.

469-54½-New. As between the shipper and the consignee the one liable for demurrage is the one through whose fault the demurrage was incurred. 140 Miss427, 106S14.

469-54⅓-New. Member of coal exchange pool is liable for charges, rather than exchange. 272US709, 47SCt254, 71L ed485.

469-54¼-New. Rules authorizing substitution of cars and demurrage against owner, in coal exchange pool, held reasonable. 272US709, 47SCt254, 71L ed 485.

469-54⅓-New. Collecting freight charges from consignee is not waiver of right to demurrage against consignor, liable therefor as owner. 23F(2d)248.

469-56 But see 23F(2d)95 (railroad into whose cars vessel discharges cargo has no demurrage claim against vessel).

469-62 118 Okl 251, 247P62, 46ALR 1151; 149Va13, 140SE823.

469-64 [a] **Consignee prevented from unloading** by force and threats of large bodies of armed men was held not liable for demurrage charges. 100WVa222, 130SE524, 44ALR820.

470-70½-New. Carrier's fault does not

preclude collection of demurrage from consignee for detention caused by consignee. 149Va13, 140SE823.

470-70½-New. Shipper's loss from injunction restraining carrier from delivering shipment is damnum absque injuria and not proper counterclaim. **MoA** 27SW(2d)72.

470-72 140Miss427, 106S14.

470-73 **NJCh** 152A251.

471-81½-New. A carrier's lien for demurrage cannot be sold or assigned. 140 Miss427, 106S14.

471-81¾-New. Such lien is lost if the carrier surrenders possession of the property. 140Miss427, 106S14.

471-81¼-New. Payment of demurrage discharges any lien that the carrier may have therefor. 140Miss427, 106S14.

471-85½-New. Enforcement of demurrage under rules of coal exchange. Proceeding by notice of motion for judgment by carrier against member of exchange based on exchange form and stipulations in rules and regulations of exchange required to be signed by all members is warranted by statute authorizing third person to sue on contract made for his benefit. 142Va355, 128SE624.

471-85½-New. Subsequent rescission of such apportionment by the exchange will not deprive the carrier of its cause of action against a member. 142Va355, 128SE624.

471-85¼-New. Carrier's duty to collect demurrage is imposed by law. 189NC 542, 127SE532.

471-85½-New. and cannot be remitted or waived either by contract or by custom. 189NC542, 127SE532.

471-87 87PaSuper432 (averment in statement of claim insufficient to support judgment).

471-89 See also 87PaSuper432.

471-92½-New. In an action by a railroad company to recover demurrage charges arising out of an intra-state shipment, a written schedule of demurrage charges furnished by plaintiff but not shown to have been authorized by the state public service commission is not admissible in evidence. 36GaA236, 136SE106.

471-94 101CalA715, 282P402. See also 7LaA9. [e] **Carrier unable to fix definite amount** of demurrage held not entitled to recover. 5F(2d)496. [f] **Evidence held to show carriers at fault** for delay. 220MoA743, 276SW409. [g] **Evidence held to show consignee's lack of knowledge** that cars were detained at original consignment point. 220MoA 743, 276SW409. [h] **Admissibility of evidence.-TexCivA** 318SW(2d)868. [i] **Evidence held insufficient.-TexCivA** 31 SW(2d)868.

471-94½-New. Exclusive of evidence. It is error to exclude offer of evidence that carrier delayed unloading through switching interferences. 118 **Okl** 251, 247P62, 46ALR1151.

471-94¾-New. Evidence must be confined to pleadings. 13LaA106, 127S442.

471-95 [a] **Question of liability of carriers** for displacement of cars during forty-eight hours "free time" is for jury. 118 **Okl** 251, 247P62, 46ALR1151.

471-95½-New. In an action against a consignee for demurrage charges an agreement by the consignee to pay demurrage charges prior to the time of delivery of the car is not admissible in evidence. 19 **OhA**152.

471-95¾-New. Failure to warn the shipper of wheat embargo held to estop the carrier from setting up an embargo as a bar to recovery of a demurrage charge. **TexCivA** 287SW113.

471-95¼-New. Question for jury as to what was a reasonable time to keep goods on cars. 5**PaDist&Co** 257.

471-95½-New. Shipper may counterclaim for failure to furnish cars. 26 **F(2d)**90.

471-98 90Fla721, 106S576, 584 [citCJ]; 96Fla646, 119S110. [e] **No contract can relieve carrier of operation of rule.**-90 **Fla**721, 106S576.

472-99 90Fla721, 106S576, 584 [citCJ].

472-2 14F(2d)284; 20F(2d)828; 90Fla 721, 106S576; 120Kan21, 245P734; 120 Kan362, 243P1031; 120Kan484, 244P 240; 221MoA43, 297SW717; **NH** 151A 336.

473-3 90Fla721, 106S576; 193Wis538, 213NW633.

473-8 90Fla721, 106S576.

473-9 90Fla721, 106S576.

473-11 154Miss871, 123S876.

473-14 90Fla721, 106S576.

473-15 42F(2d)669; 90Fla721, 106S 576, 587 [citCJ].

474-17 128Me62, 145A405.

474-18 335 Ill 70, 166NE466.

474-22 See also 226AppDiv187, 234NYS 454.

474-27½-New. Carrier is not permitted to escape the duty to collect the lawful rate by an oversight, and thereby effect a discrimination. 20F(2d)828.

474-27¾-New. Carriers not entering Texas ports cannot be guilty of discrimination against them by participation in joint through rates thereto. 42F(2d) 281.

475-29 See also **NJCir** 143A85.

475-32 42F(2d)669.

475-37½-New. Under the Interstate Commerce Act a special contract for service by a public carrier to a state or city, parish or town government free of costs or at reduced rates is lawful and enforceable. 168La781, 123S323(2d case).

479-69 11F(2d)850; 213Ky376, 281SW 490, 492, 44ALR1522 [citCJ].

480-89 120Kan362, 243P1031. [a] **Matters not constituting unlawful preference.**-Permitting shipper to settle first with consignee to whom shipment was delivered contrary to instructions and thereafter file claim with railroad company. 221MoA448, 282SW459.

480-90 90Fla721, 106S576, 584 [citCJ]; 120Kan484, 244P240; 121 **Okl** 40, 247P 74. [o] **Settlement of damage claims of shippers for elevation of trucks** does not constitute device indirectly to grant concessions on freight rates to tenants where large amounts were paid to shippers who were not tenants. 18F(2d) 299. [p] **Carrier's rule requiring written notice** concerning cars for loading, constituting part of tariffs filed with Commission cannot be waived. **NC** 154 SE390.

481-94 274US564, 47SCt727, 71L ed 1204; 221AppDiv713, 225NYS365, 368 [citCJ].

482-99½-New. A railroad, unauthorized to give special service to have cars at a certain time cannot be liable for failure to notify the shippers that the cars were actually available. 222MoA1135, 13SW(2d)1111.

482-1 264US560, 44SCt410, 68L ed848 (contract to furnish cars on day named void as special advantage to particular shipper without proving preference in fact).

483-5 162La487, 110S729.

483-7 But see 232Mich538, 205NW477 (express contract to furnish cars invalid).

484-22 96Fla646, 119S110. [e] **Railroad may be guilty** of unjust discrimination against another road, though there is no direct physical connection. 270US287, 46SCt226, 70L ed590.

485-24 **NH** 151A336.

486-33 108WVa413, 151SE433 (may include all industries within district in group freight rate).

487-46 **MoA** 282SW1047.

487-48½-New. A carrier's agreement to transport live stock within a certain time is an undue privilege working discrimination. **MoA** 15SW(2d)901.

487-48¾-New. Some statutes requiring that live stock be shipped speedily without discrimination apply only to intrastate shipments. **MoA** 32SW(2d)109.

489-67 279US768, 49SCt494, 73L ed947 (discrimination against freight to be shipped by another road); 315Mo 798, 287SW450; 105NJL593, 147A457. [b] **To avoid discrimination,** carrier is held not estopped from recovering undercharge charged consignee of goods, rate charged being less than established rate. 82NH528, 136A253.

489-67½-New. But common law did not prohibit mere unjust discrimination between localities. 315Mo 798, 287SW450.

489-68 31F(2d)951; 128Kan161, 254P 405; 48RI 11, 135A49. [c] See also 130 **Okl** 263, 266P253.

490-70 127 **Okl** 240, 260P468.

490-73 7F(2d)164; **US** 41F(2d)806; 48RI 11, 135A49; **Wash** 287P672 (commutation rates for trucks).

490-76 [a] (8) Other instances. **Tex CivA** 198SW(2d)583.

491-81 [b] **Retraction of competitive advantage** to shipper held not to render rate invalid. 281US249, 50SCt315, 74 L ed832.

492-83¾-New. Rental paid shipper for use of own "facilities" held proper. 193 Wis538, 213NW633.

493-98½-New. Some statutes authorize the state commission to fix a joint through rate over separately owned lines, less than the sum of local rates. 120 Or517, 252P955.

493-2 [a] **Application of interstate commerce commission rule,** requiring carrier intending to strictly apply rate to particular route to do so by unequivocal language, held not violative of statute. 43F(2d)780.

493-5 7F(2d)164.

495-22 269US1, 46SCt8, 70L ed131 (through rate for long haul greater than aggregate of intermediate rates in force on June 18, 1910, when such rate was declared unlawful remains lawful, if application to suspend operation of section was made, or either allowed and remained undetermined).

495-23 [a] **Application for, or granting of, relief from aggregate** of intermediate clause does not validate rates violation of some other section of Interstate Commerce Act. 269US1, 46SCt8, 70L ed131.

495-24 42F(2d)281.

495-29 **CalA** 290P434.

496-32 [b] **Railroad commission has no jurisdiction to order refund** of charges collected in violation of long and short haul clause. **CalA** 290P434.

496-36½-New. Charging less for short than for long haul has been upheld under conditions and circumstances shown, 116 **Oh**397, 156NE506.

496-36¾-New. and reduction of long haul rate to short haul rate merely to enable long haul shipper to compete with shippers on short haul held error. 116 **Oh**397, 156NE506.

496-36¼-New. Under a statute prohibiting unjust discrimination under similar circumstances, charging more for short haul than for long haul has been held not unreasonable. 48RI 11, 135A 49.

496-47 105NJL593, 147A457. [d] **All persons performing interstate transportation service** (1) not merely carriers, are bound by this provision. 20F(2d) 459. (2) Elevator company, refunding to shippers part of sums collected from railroad for elevator service, is guilty of violating provision. 20F(2d)459.

497-48 31F(2d)951.

497-51 20F(2d)459; 31F(2d)951 (exclusive allowance to single warehouse is void as rebate).

497-52 [a] **Law forbidding remitting any portion of rates** does not prevent shipper from setting up damage to shipment as counterclaim. 281US14, 50SCt 200, 74L ed670.

497-53 31F(2d)951.

497-53½-New. Congress did not intend to limit the offense to cases of collusion between the carrier and shipper. 20F (2d)459.

497-53¾-New. A carrier may select its own agents to perform transportation services and employ one exclusively. 31 F(2d)951.

498-54 See also **NJCir** 143A85. [b] **Device for giving rebate** is one where rate is reduced below public schedule rate. 248Mich49, 226NW677. [c] **"Rate" is determined** by net amount received by carrier from shipper and retained. 248 Mich49, 226NW677.

499-60 178Minn432, 227NW430(2dcase) (defendant's published tariff on wheat held applicable).

499-61 Contra 56ND822, 219NW295.

499-62 35F(2d)486. [a] **Service required of carrier entitled to adequate compensation** see 56ND822, 219NW295 (decision of state railroad commissioners fixing rate under power given them held adequate).

500-76½-New. Duty of carrier to collect demurrage cannot be waived or remitted by contract or custom because it would result in discrimination among

shippers. 189NC542, 127SE532.

501-82½-New. An express company cannot waive limitation of time within which, under the terms of the transportation contract, action must be brought on claim for damages for delay in transit. 88 IndA645, 165NE336.

501-84 [a] **Limitation period for filing complaint.**-CalA 290P434.

501-85 NJCir 143A85.

501-86 48RI 11, 135A49. [a] **Court may consider** convenience to public shipper, fair interest of carriers, traffic and other circumstances. 42F(2d)669.

501-90 TexCivA 3SW(2d)489 (under state statute).

501-91½-New. A shipper's right to reparation under the Interstate Commerce Act is not exclusive remedy, precluding recovery of illegal freight exactions on the theory of trusteeship ex maleficio. 14F(2d)284.

503-99½-New. The power of the public utilities commission, under the Utah statute, to order reparation for alleged discriminatory freight charges cannot be extended beyond the legislative grant. Utah 272P939.

503-99½-New. Under such statute the commission is without authority to order reparation for an alleged discriminatory freight charge, which was the regular established and approved rate on file with the commission, by reason of the fact that a different rate was in force between different points, which were a further distance apart than points from and to which the shipments in question were made. Utah 272P939.

503-4 [c] (2) To show unjust discrimination. 48RI 11, 135A49.

503-11 [b] **Rule as to presumption** of unreasonableness and illegality of through rate higher than aggregate of intermediate rates stated. 269US1, 46SCt8, 70L ed131.

504-19 See also NJCir 143A85 (where, however, payment was made without knowledge that defendant was giving or intended to give rebate to other shippers).

505-28 151Wash142, 275P87.

505-29 NJCir 143A85; CalA 290P434.

506-52 248Mich49, 226NW677 (suit held within jurisdiction of equity). [b] (8) Unjust discrimination resulting from rebating by carrier. 248Mich49, 226NW677.

507-65½-New. An injunction will not lie for past violations of the Elkins Act, it not being repealed at the time the injunction is sought. 18F(2d)299.

507-65½-New. Where leases of railroad property to shippers provide for revaluation at expiration of stated time, the United States cannot, when such period is about to expire, and before any revaluations have been made, maintain suit for injunction to compel discontinuance of granting of concessions to tenants, and discrimination against other shippers, arising from leasing at less than reasonable rentals. 18F(2d)299.

508-69 120Or517, 252P955. [b] **Evidence insufficient to show unlawful discrimination against interstate commerce.** -120Or517, 252P955.

508-70½-New. Commission's order is erroneously set aside where rates are not in fact discriminatory. US 47SCt724.

508-75 42F(2d)669. See also 90Fla721, 106S576.

509-79 270US260, 46SCt220, 70L ed576; 30F(2d)458; 126Me489, 139A784; 130Misc29, 223NYS542; NC 154SE390. [a] (3) Letter held insufficient to constitute valid contract for increasing shipping facilities. NC 154SE390.

509-80 TexCivA 274SW333.

510-81 TexCivA 274SW333.

510-82 TexCivA 274SW333.

510-83 TexCivA 14SW(2d)888. See also 22AlaA613, 118S502.

510-84 TexCivA 274SW333.

510-85 123Kan161, 254P405; TexCivA 274SW333.

511-88 19OhA152; TexCivA 274SW333.

511-89 But see 122Kan141, 251P440.

511-91 123Kan161, 254P405; TexCivA 274SW333. See also 31F(2d)947. But see TexCivA 18SW(2d)706.

511-94 105NJL314, 145A336.

512-96 118Okl251, 247P62, 46ALR1151.

513-4 220AppDiv222, 220NYS789.

514-11 MoA 275SW55; 102NJL332, 131A884.

515-24 170Ark1039, 282SW975.

516-39 22OhA37, 153NE522.

516-43 TexCivA 4SW(2d)641 (held connecting carrier within Federal Twenty-Eight-Hour Law).

517-54 174Ark122, 294SW714; 160Ga205, 127SE768; 160Ga213, 127SE771 (initial carrier liable for failure of terminal carrier to notify consignee of arrival and consignor of arrival and nondelivery); 36GaA433, 137SE79; 236IllA541; 216Ky693, 288SW682; 113OhSt499, 149NE861; TexCivA 271SW401; 153Va575, 150SE252 (wrongful delivery). [d] **Liability does not extend to goods received** by initial carrier in damaged condition. 216Ky693, 288SW682.

518-55 24F(2d)569, 572 [quotCJ]; 102Conn461, 129A47 (federal bills of Lading Act); 235IllA151. [b] (2) TexCivA 6SW(2d)418.

518-55½-New. This limited liability rule has been applied to loss of box car lining and stone furnished by shipper to initial carrier and lost while car was on connecting lines. 124Me416, 130A241.

519-57 40F(2d)39; 102Conn461, 129A47; 92Fla1102, 111S248.

519-58 TexCivA 15SW(2d)25 (under statute).

521-69 See also TexCivA 270SW1112.

521-77 236IllA541.

524-7 144Va422, 132SE360.

524-8 216Ala637, 114S295 (amendment subsequent to suit held without influence thereon); 170Ark469, 280SW18; 160Ga213, 127SE771 (consignor's order to terminal carrier to deliver goods to purchaser is not an "alteration" or "addition" to bill of lading necessary to be indorsed thereon to relieve initial carrier from liability); 163Ga494, 136SE418; 319Ill421, 150NE266; 332Ill93, 163NE316; 235IllA151; 240IllA6; 159La9, 105S82; 6LaA7; 217MoA31, 273SW410; 219AppDiv394, 219NYS727; 37OklACR272; 92PaSuper286; 143SC395, 141SE607; 147SC487, 145SE400; 115Tex431, 283SW157; Tex 288SW539; 144Va422, 132SE360; 146Va475, 131SE827; 101Vt427, 144A194. See also 94Fla1143, 115S825; 221MoA448, 282SW459. [a] **Joint liability of initial with succeeding carrier causing loss.**-MoA 28SW(2d)395.

524-10½-New. , or with the common-law remedy. 37OklACR272.

525-18 36GaA573, 137SE569.

525-19 MoA 285SW159; 37OklACR272; 142Va800, 128SE244.

525-22 159La9, 105S82.

525-23 159La9, 105S82; 37OklACR272.

525-29½-New. The initial carrier is liable for every kind of positive misconduct of connecting carrier affecting the property, and for its negligence or lack of care or effort. 159La9, 105S82.

525-33½-New. Initial carrier who furnishes leaky car is liable as carrier occupying the position of insurer or as warehouseman failing to use ordinary care for damage occurring on connecting line. 159La9, 105S82.

525-33½-New. Carmack - Cummins Amendment does not affect shipper's control over shipment. 144Va422, 132SE360.

525-33¼-New. Amendment creating new right against initial carrier did not abolish existing cause of action against succeeding carrier. MoA 28SW(2d)395.

526-34 But see 96Fla228, 117S890.

526-39 216Ala637, 114S295; 180Ark911, 23SW(2d)976; 94Fla1143, 115S825; 96Fla228, 117S890 (shipper's order for reconsignment transmitted to terminal carrier through initial carrier).

526-41½-New. A shipper owner has the right to direct a connecting carrier to divert interstate shipment. 163Ga494, 136SE418.

526-42½-New. Initial carrier is liable for damages by reason of terminal carrier's failure to divert an interstate shipment in accordance with the shipper's directions, although no notice of diversion was given to the initial carrier where the shipper had the right to direct the diversion. 36GaA573, 137SE569.

526-42¼-New. A rule of the interstate commerce commission relieving the initial carrier from such liability is void. 36GaA573, 137SE569.

526-42¼-New. Initial carrier has been held not liable for acts of subsequent carrier after shipment reached destination. 180Ark911, 23SW(2d)976.

527-51 TexCivA 14SW(2d)879(2dcase) (reconsignment held not to revive carrier's duties where transaction already completed in state).

527-52 TexCivA 283SW250. See also 24F(2d)569.

527-52½ 118Kan651, 236P859 (to recover, shipper must bring himself within statute by showing that shipment was intended to be transported to adjacent foreign county); 321Mo714, 12SW(2d)485 (held not within prohibition).

527-52½-New. Nonadjacent foreign country. TexCivA 283SW250; 149Va683, 140SE661.

527-55 219AppDiv394, 219NYS727.

527-61½-New. In Texas, under statute, an initial carrier issuing a through bill of lading is liable for all damages in transit over its own or connecting lines, irrespective of whether connecting carriers acted on such bill of lading. CivA 10SW(2d)400.

529-94 24F(2d)569, 572 [quotCJ]; 40F(2d)39; 217Ala75, 114S680; TexCommnA 289SW1000; TexCivA 283SW250.

530-97 TexCivA 283SW250.

530-98 TexCivA 283SW250.

531-9 159La9, 105S82.

531-19 See also 133SC41, 130SE549.

532-22 TexCommnA 14SW(2d)1004.

532-23 TexCivA 283SW250.

532-24½-New. These provisions, also, are not applicable to shipments to nonadjacent foreign countries. TexCivA 283SW250.

535-60 5PaDist&Co 182.

536-79 252IllA522. [a] **Effect of provisions of bill of lading.**-252IllA522.

536-82 252IllA522.

536-87 127Or461, 271P976, 62ALR644 (knowledge and assent to printed portion necessary to be binding).

538-13 159La9, 105S82 (initial carrier furnishing leaky car liable as warehouseman failing to use ordinary care).

539-16 See also TexCommnA 289SW1000.

539-22 225AppDiv62, 232NYS165.

539-24 115Tex431, 283SW157. [b] **Facts held to show that carrier acted with reasonable dispatch.**-146Va475, 131SE827.

540-30 180Ark492, 22SW(2d)21.

540-32 5PaDist&Co 182.

541-51½-New. Connecting carrier held not liable for injury from leaks in sealed car, not apparent from outside. TexCivA 293SW593.

541-51½-New. After knowing messenger has left car, carrier is bound to reice shipment. 172Ark1017, 291SW428.

541-54½-New. An intermediate carrier is under no duty to decline traffic tendered to it or to turn it over to a competing carrier having a rate specified by the shipper notwithstanding it cannot transport according to such rate. 128Kan245, 276P834.

541-56½-New. Under a bill of lading for an interstate shipment, a shipper, if the owner, has the right to direct the terminal connecting carrier to divert the shipment to another place on its lines without notifying the initial carrier. 36GaA573, 137SE569.

541-62 328Ill353, 159NE802; 216Ky693, 288SW682; 165Minn43, 205NW605; 115Tex431, 283SW157; 147Va290, 137SE515. [c] **Truckman who had custody of furs for short time** has been held not liable for value of furs stolen. 42F(2d)461.

542-69½-New. Initial and connecting carriers sued jointly for damage to a shipment not accompanied by the shipper are each liable for the whole damages in the absence of showing as to where the injury occurred. 213Ky248, 280SW974.

542-69½-New. After shipment reached destination reconsignment by connecting

carrier rendered it liable as initial carrier for damages on subsequent carrier's line. 180Ark911, 23SW(2d)976.

543-77 221MoA338, 273SW424, 427 [cit CJ].

543-77½-New. By taking a shipment from a contracting carrier and transporting it without a new contract with the shipper, the connecting carrier recognizes and acquiesces in the original contract. TexCivA 280SW335.

543-79 217Ala75, 114S680; 20AlaA535, 103S906; 235 IllA151; 261Mass251, 158NE663; 165Minn43, 205NW605; 189NC585, 127SE588; 115Tex431, 283SW157.

543-80 217Ala75, 114S680; 37 OklACR272. See also 28F(2d)392; 221MoA448, 282SW459.

543-81 213Ky248, 280SW974; 37 OklACR272.

543-82 217Ala75, 114S680; 221MoA338, 273SW424, 427 [citCJ] (terminal carrier bound by initial carrier's knowledge of appearance of shipment) 115Tex431, 283SW157.

543-82½-New. Transportation Act of 1920, amending Interstate Commerce Act, does not broaden its provisions so as to make same applicable to shipments to nonadjacent foreign countries. Tex CivA 283SW250.

544-83 217Ala75, 114S680; 20AlaA535, 103S906; 47 Ida223, 275P576 (though subsequent bills of lading were issued on reshipment); 246 IllA479; 261Mass251, 158NE663; 5PaDist&Co182; Tex CivA 272SW224; TexCivA 275SW603, 605 [citCJ] (dictum); TexCivA 283SW250; TexCivA 298SW454; 147Va290, 137SE515. See also 40F(2d)39. [c] **No liability where shipment received too late** to permit delivery on desired day. Tex CivA 272SW224.

544-86 328 Ill 353, 159NE802; 147Va290, 137SE515.

544-87 TexCommnA 282SW795. [a] **Connecting carrier** cannot escape liability by showing that potatoes damaged in interstate shipment were partially damaged when received from initial carrier. TexCivA 298SW454.

544-87½-New. An intermediate carrier is not liable for delay in delivery where cattle were received too late to permit delivery on time. TexCivA 272SW224.

544-88 See also TexCivA 275SW603.

545-93½-New. The statutes have no application to shipments to nonadjacent foreign countries. TexCivA 283SW250.

546-94 TexCommnA 282SW795.

546-2 217MoA31, 273SW410.

546-5 115Tex431, 283SW157.

546-5½-New. Under statute a terminal carrier is liable to consignee for delay caused by marks on cotton differing from those on bill of lading. TexCivA 275SW459.

546-6 [a] **In absence of special contract** common-law rule of liability prevails as against other than initial carrier. 222AppDiv371, 226NYS309.

547-7½-New. Under Carmack Amendment each connecting carrier is liable for delay on its own line notwithstanding the initial carrier is liable for all delay on all lines. 115Tex431, 283SW157.

547-8 [b] **Shipper consigning freight to himself** in city where he is not known without furnishing address cannot complain of carrier's failure to give notice. 92Fla1102, 111S248.

547-11½-New. A carrier is required to follow the shipper's directions not to deliver the shipment to the consignee named in the original bill of lading. 221MoA448, 282SW459.

549-33 TexCommnA 14SW(2d)1004 (under statute).

550-40 TexCivA 283SW250.

551-52 264Mass596, 163NE180, 60ALR1247 (holding that litigation with initial carrier does not suspend contract limitation as to connecting carriers).

551-63 [d] **In Alabama.**-219Ala581, 122S693.

552-71½-New. Interstate shipper may sue a connecting carrier outside the county of its residence in a county wherein another connecting carrier operates its lines, although the latter carrier is not sued and caused none of damage. 115Tex431, 283SW157.

553-77 37 OklACR272.

553-78 37 OklACR272.

553-79 213Ky248, 280SW974. But see 92PaSuper286.

553-80 [a] **Consignee, purchasing goods** sent by interstate shipment, may sue last connecting carrier for injuries to goods before he acquired title. 162Ga589, 134SE171.

554-92½-New. A petition, alleging that the purchaser of goods shipped in interstate commerce to the seller's order with direction to notify the purchaser paid the draft attached to the interstate bill of lading and was damaged by the delivering carrier's negligence, states a cause of action by the purchaser against the terminal carrier. 35GaA653, 134SE172.

554-92½-New. Where plaintiff elects to proceed on the new cause of action created by the Carmack Amendment, he should confine his prayer for judgment to the initial carrier. 37 OklACR272.

554-92¼-New. Complaint in an action for delay and injury to goods in interstate shipment held not to state cause of action against the initial carrier. 216Ala637, 114S295.

554-92½-New. Complaint against initial carrier for delay to diverted interstate shipment, not naming consignee, or alleging diversion before reaching destruction, failed to state cause of action. 216Ala637, 114S295.

554-92¾-New. and complaint not showing such shipment was under through bill of lading did not state cause of action against initial carrier. 216Ala637, 114S295.

554-95 [a] **Plaintiff suing for damage to shipment by several carriers,** need only allege receipt of shipment in good condition and of delivery in bad condition. 219Ky699, 294SW144.

554-98 [c] **Statute of limitations.**-37 OklACR272.

555-6 189NC585, 127SE588 (that goods claimed were in cases delivered to initial carrier).

558-8½-New. Diversion of shipment to new parties presumed to be under new bill of lading to new consignee. 216Ala637, 114S295.

555-9 240 IllA6.

555-9½-New. Where goods are shown to have been delivered to initial carrier in good order, they are presumed to have been in the same condition when received by the connecting carrier. 202Iowa1008, 209NW744.

555-10 42F(2d)461; 124 Okl 75, 254P702.

556-21½-New. The Carmack Amendment does not abrogate presumption that goods delivered in good condition remained so until delivery to delivering carrier. MoA 28SW(2d)395.

556-22 217Ala75, 114S680; 165Minn43, 205NW605.

556-23 See also TexCivA 275SW603.

556-24½-New. Where connecting carrier pleads that injury to goods occurred from causes beyond its control, the burden is on it to establish such plea. 20AlaA535, 103S906.

556-25 189NC585, 127SE588 (goods in cases missing).

556-26 202 Iowa1008, 209NW744; Tex CivA 271SW401.

556-29 20AlaA535, 103S906; 172Ark1017, 291SW428; 40GaA113, 149SE77; 246 IllA479; 202 Iowa1008, 209NW744; 213Ky248, 280SW974; 216Ky693, 288SW682; 261Mass251, 158NE663; 165Minn43, 205NW605; 222AppDiv371, 226NYS308; 88PaSuper26; TexCivA 271SW401; TexCivA 275SW603; TexCivA 298SW454; 147Va290, 137SE515.

557-30 42F(2d)461; 9LaA582, 121S769; TexCivA 271SW401; 147Va290, 137SE515. [b] **Rule does not relieve shipper from burden of proving** condition or quantity of goods delivered at destination. SD 226NW273.

558-36 261Mass251, 158NE663; 147Va290, 137SE515.

558-39 261Mass251, 158NE663; 217MoA31, 273SW410.

558-42½-New. A connecting carrier sued jointly with the initial carrier for damage to a shipment not accompanied by the shipper has the burden of showing where the injury occurred. 213Ky248, 280SW974.

559-48 202 Iowa1008, 209NW744.

560-66 See also 174Ark122, 294SW714.

560-66½-New. In an action against a connecting carrier the burden is on plaintiff to show receipt of goods by terminal carrier. 20AlaA535, 103S906.

560-67 Ark 31SW(2d)290; 217MoA31, 273SW410 (unusual time consumed in transportation of perishable freight will, in absence of explanation, be presumed to be unreasonable and due to negligence of carrier).

560-69 146Va475, 131SE827.

560-70½-New. There is no presumption that the delay occurred over any particular line. 222AppDiv371, 226NYS309.

560-74 216Ala637, 114S295.

561-84 Ark 31SW(2d)290; 9LaA582, 121S769; 218AppDiv448, 218NYS366. [f] **Evidence held sufficient** to sustain finding that initial carrier did not forward car within reasonable time. Tex CivA 18SW(2d)493.

561-86 See also 9LaA582, 121S769. [b] **Evidence insufficient to show negligence of delivering carrier** after car was turned over to it by intermediate carrier. TexCivA 271SW401.

561-87 TexCivA 280SW611.

561-88 [a] **Evidence insufficient to charge initial carrier.**-180Ark911, 23SW(2d)976.

561-89 222AppDiv371, 226NYS309; TexCivA 288SW539.

561-90 9LaA582, 121S769 (evidence held insufficient); MoA 15SW(2d)901 (both carriers held jointly liable). [a] **Evidence held insufficient** to show that terminal carrier was jointly liable with initial carrier for injury to live stock. MoA 15SW(2d)901.

561-90½-New. that loss was due to excepted cause; 36GaA573, 137SE569.

561-91 216Ky693, 288SW682.

561-93½-New. A consignee weighing coal a mile away from the railroad car from which it was removed cannot recover from the carrier for alleged shortage without evidence of shortage in the coal as delivered from the car. SD 226NW273.

561-96 20AlaA535, 103S906 (whether defendant connecting carrier's evidence sufficient to overcome presumption of injury to goods occurring on its line); Ark 31SW(2d)421. [b] (2) Evidence of unreasonable delay in transportation of shipment of hogs has been held sufficient to go to jury as to initial and delivering carriers and insufficient as to intermediate carrier jointly sued. 228Ky492, 15SW(2d) 293. [c] **Evidence held insufficient** to go to jury on issue of extent of injury in connecting carrier's possession. 39F(2d)840.

562-97 217Ala75, 114S680; 197NC388, 148SE441.

565-97½-New. whether goods were in good condition when delivered to initial carrier. 202 Iowa1008, 209NW744.

562-99½-New. Federal weather service maps and temperature records at the place of shipment may be sufficient to carry to the jury the issue whether the shipment was unfrozen at the time of shipment. 202 Iowa1008, 209NW744.

562-99¼-New. Whether loss of perishable cargo by freezing was caused by delay of carrier or was due to fault of shippee held for jury. 210MoA31, 273SW410.

562-99¾-New. Whether goods received by the initial carrier were in good condition is for the jury. 216Ky693, 288SW682.

62-2 174Ark122, 294SW714; 202 Iowa1008, 209NW744 (error to omit requirement that shipper prove goods delivered in good condition to initial carrier); 216Ky693, 288SW682; TexCivA 280SW611. [a] **Instructions held proper.**-197NC388, 148SE441.

562-4½-New. In an action against an initial carrier for damages to carloads of coin diverted from their original destination, resulting from the leaky condition of the cars, defendant is not entitled to a peremptory instruction. TexCivA 280SW611.

562-4½-New. Anyone of several de-

fendants against whom there is nothing more than mere surmise as to liability, is entitled to directed verdict. 42 F(2d)461.

562-11 [e] **Connecting carriers** may apportion liability for injury to cattle shipment between themselves. **TexCivA** 294SW349.

563-13 See also 142Va800, 128SE244.

565-49 **TexCommnA** 13SW(2d)680.

565-52½-New. Unless the carriers have done or omitted something in violation of some law prescribing a penalty, the commission is without authority to act in collection of penalty. **TexCivA** 3SW (2d)489.

565-54 220AppDiv222, 220NYS789.

566-57 [a] **A penalty cannot be imposed** when performance is rendered impossible by vis major. 100WVa222, 130 SE524, 44ALR820.

566-63 [a] **TexCivA** 272SW250.

567-83½-New. Where the rates charged are those fixed by the commission and have not been attacked in direct proceedings, there is no violation of statute imposing penalty. **TexCivA** 3 SW(2d)489.

567-90 **TexCivA** 3SW(2d)489.

569-8 [b] **Where freight weighed by shipper** at point of origin where carrier had no station or scales statute is inapplicable. **TexCommnA** 24SW(2d)12.

570-37 But see **TexCommnA** 13SW (2d)680 (carrier acting under rate duly approved by commission, though rate is subsequently determined to be unjust and discriminatory).

571-52 233 IllA1.

577-46 82Colo 509, 261P864, 55ALR 1285.

577-52 198NC492, 152SE390.

580-22 **TexCivA** 1SW(2d)686.

582-54 190NC605, 130SE305.

582-54½-New. , and he who sues to recover a penalty must bring his case clearly within the language and meaning of the law. 190NC605, 130SE305.

582-55 [a] **Failure to adjust and pay claims within time specified** is substantive part of plaintiff's cause of action. 190NC605, 130SE305.

583-71 190NC605, 130SE305.

584-84½-New. Plaintiff fails to make out his case for recovery of penalty where he fails to show when he filed claim. 190NC605, 130SE305.

584-84⅓-New. Upon denial of liability plaintiff has the burden of making out his case. 190NC605, 130SE305.

587-33 217AppDiv83, 216NYS545.

590-89 [a] **Action for penalty** for violation of twenty-eight-hour law can be brought only by United States. 33GaA 773, 127SE830.

593-35 [a] **Refusal to submit records to Interstate Commerce Commission.**– 36F(2d)691 (penalty held not excessive).

594-47 [b] **Violation of Interstate Commerce Act** by accepting less than legal fare does not require collusion between carrier and agents. 6F(2d)902.

594-55 6F(2d)902.

597-9 217Ky211, 289SW263.

601-76 217Ky211, 289SW263, 266[cit CJ].

598-29 [a] **Violation of Elkins Act is continuing crime** committed equally and at all times during transportation. 43 F(2d)135.

600-51 43F(2d)135.

600-55 43F(2d)135.

601-76 [a] **Guilty knowledge of carrier** or collusion with shipper is not necessary to offense of knowingly receiving concession from carrier. 270 US512, 46SCt392, 70LEd709.

603-2 217Ky211, 289SW263, 266[cit CJ].

605-31 270US521, 46SCt395, 70L ed713 (preference in distribution of cars). [a] **One securing reconsignment and diversion of shipment** from preferred class of consignees to less preferred class held to violate order of interstate commerce commission affecting priorities in movement and distribution of coal cars. 270 US521, 46SCt395, 70L ed713.

605-36½-New. The statute making it a misdemeanor to falsify a carrier's records was intended to protect the shipper, not the carrier. 279US363, 49SCt374, 73 L ed739.

605-45½-New. "Record or memoranda kept by a carrier," means the official record kept by the carrier, and does not refer to bills or memoranda kept by the contractor as a basis on which the carrier keeps the records. 279US363, 49SCt374, 73L ed739.

606-60 213Ala102, 104S21, 24, 40ALR 1171[quotCJ].

607-62 16F(2d)517; 228NY475, 127NE 584; **TexCivA** 276SW347; 143Va903, 129SE493, 45ALR280.

607-63 143Va903, 129SE493, 45ALR 280.

607-64 16F(2d)517; 213Ala102, 104S 21, 40ALR1171; **TexCivA** 276SW347.

607-67 [a] But see 93PaSuper210.

607-71 213Ala102, 104S21, 24, 40ALR 1171[quotCJ]; 235Mich180, 209NW165, 166[quotCJ]; **TexCivA** 276SW347.

607-73 273US45, 47SCt298, 71L ed530.

607-74 118Nebr459, 225NW232; **Tex CivA** 276SW347.

607-75 120Kan105, 242P469, 470[cit CJ]; 149Md625, 132A153; 254Mass186, 150NE14; **TexCivA** 274SW295; 198 Wis293, 223NW836, 69ALR978. [a] 156 ND407, 217NW662; **TexCivA** 276SW 347.

608-76 94Fla1056, 114S859; 197Ind28, 149NE639; 234Mich398, 208NW602; **TexCivA** 276SW347; 143Va903, 129SE 493, 45ALR280.

608-79 See also 213Ala102, 104S21, 24, 40ALR1171[citCJ].

608-79½-New. Taxicab driver operating off his route, in violation of ordinance, is not a common carrier. 235 Mich180, 209NW165.

608-79½-New. Terminal railroad is common carrier. 218AppDiv782, 218 NYS516.

608-79¼-New. A funeral director superintending the formation of a procession of automobiles furnished by others does not sustain the relation of carrier, public or private, to persons using the vehicles. 241Mich700, 217NW917.

608-79⅓-New. One transporting employees of corporation to and from work over regular route, and under contract of carriage is not a common carrier. **NH** 149A505.

608-80 See also 213Ala102, 104S21, 24, 40ALR1171[citCJ].

609-95 **NH** 149A505.

609-1 16F(2d)517; **Mass** 165NE696; 32 OhA26, 167NE589.

609-3 16F(2d)517; 213Ala222, 104S 526; 213Ala492, 105S663; 285Pa489, 132A575.

610-4 219MoA99, 268SW706.

610-5½-New. An escalator as well as an elevator is deemed a common carrier. 291Pa211, 139A878.

611-11 37GaA218, 139SE581; 260Mass 202, 156NE875; **MoA** 293SW1051.

611-19 37GaA218, 139SE581; 256 IllA 581; **MoA** 293SW1051, 1053[citCJ]; 132 Okl 107, 269P368. See also 258Mass 257, 154NE546.

612-21 244Mich293, 221NW278.

612-22 **MoA** 293SW1051. [b] (2) Pedestrian crossing street in order to board a street car was not passenger as respected right to recover for injury when struck by another car. 265Mass482, 164 NE478(2dcase).

613-28½-New. One using elevator in apartment house is invitee with implied invitation to use elevator, so that relation of carrier and passenger arose. 213Ala492, 105S663.

613-31 217Ala192, 115S246; **Iowa** 230 NW390 (entering depot grounds); **Md** 148A821; **MoA** 293SW1051. [a] (5) Where he enters depot intending to take passage on train due to depart within thirty minutes with means at hand to pay fare and who either purchases ticket or announces intention to do so. 222Ky190, 300SW593.

614-34 **MoA** 293SW1051 (with ticket).

614-38 **MoA** 293SW1051.

614-39 **MoA** 293SW1051. [d] (2) Where depot agent agrees to keep waiting room open for person who announces intention to take train and purchase ticket, person acquires status as passenger, although train is not due within thirty minutes. 220Ky190, 300SW593. [f] **Where carrier not chargeable with notice of intention to become passenger.**– Where person entering depot prior to time statute requires depot to be kept open does not purchase or announce intention of purchasing ticket or obtain leave to wait for train, carrier is not chargeable with notice of his intention to become passenger. 220Ky190, 300 SW593.

615-40 222Ky190, 300SW593.

615-45 213Ala522, 105S874 (party who attempts to board train at station with intention of becoming passenger and presents ticket entitling him to ride is passenger when wrongfully denied entrance).

616-48 [b] **Md** 148A821.

617-54 **MoA** 18SW(2d) 252, 254 [citCJ]; 150Wash61, 272P41. [b] (2) Contract of carriage is complete when intending passenger in response to conductor's signal attempts to board street car standing with doors open. 316Mo798, 293SW119.

618-55 256 IllA581. [b] 69CalA590, 231P1008.

619-67 **Md** 148A821.

619-75 37GaA218, 139SE581; **MoA** 293SW1051. [a] (1) 38GaA280, 143SE 905.

620-76 37GaA218, 139SE581.

620-83 [b] **Exaction of any fare** is sufficient. 221MoA271, 2SW(2d)165.

622-96 258Mass279, 154NE767.

624-11 **Iowa** 230NW390.

624-17½-New. The rule imposed upon carriers of passengers as to care due them is applicable only to a period during which the carrier is, in a certain sense, the bailee of the person of the passenger. **TexCivA** 291SW619.

625-22 [a] 290Pa365, 138A852 (person is considered passenger until he alights from car).

625-23 **Iowa** 230NW390; 171Minn31, 213NW43; **MoA** 20SW(2d)597 (elevator); **NH** 149A602.

626-30 212Ala638, 103S867; 285Pa489, 132A575; 99WVa313, 128SE832 (remains passenger while crossing tracks if such crossing necessary and is way provided). [b] (4) Till she had reasonable opportunity to see about baggage and find means to reach her destination at 3:30 in the morning. 37F(2d)652.

627-34 292Pa522, 141A487, 490 [quot CJ].

627-34½-New. Plaintiff's decedent leaving car on irregular stop in parkway held as to railroad neither a trespasser nor a licensee. 258Mass389, 155NE267.

627-35 164Minn40, 204NW630; **TexCivA** 291SW619, 621 [citCJ].

627-36 291Pa564, 140A496.

628-37 171Minn31, 213NW43.

628-42 103WVa194, 136SE855.

628-44 14F(2d)893; 216Ala616, 114S 218, 61ALR400; **TexCivA** 283SW622.

629-45 216Ala616, 114S218, 61ALR400.

629-55 286Pa85, 132A796, 797 [citCJ].

629-56 103WVa194, 136SE855.

629-57 103WVa194, 136SE855.

630-62 152Md427, 137A30.

631-71 212Ala690, 103S872, 873 [cit Cyc]; 23AlaA203, 123S92; 152Md427, 137A30, 33 [citCJ]; **Mo** 298SW51. [f] But see 152Md427, 137A30.

633-81 [g] **Employee on vehicle,** specially provided to carry him between place of work and car in railroad yards in which he is living, is not a passenger. 66Utah161, 241P1058. [h] **But where employee is engaged to work in different locality** and given transportation, he is a passenger as regards degree of care required crossing track. **Utah** 290P759.

634-85½-New. **Former employee** of carrier by accepting repayment of fare from conductor of accommodation train ceases to be passenger. **Minn** 230NW 793.

635-93 **Minn** 230NW793 (former employee riding as licensee or invitee entitled to exercise of ordinary care not to injure him).

635-95 220Ky219, 294SW1030, 1031 [quotCJ].

635-96 But see 168Ark814, 271SW455.

635-99 14F(2d)893; 217Ala1, 114S290, 55ALR835 (care of passenger inures to baby).

635-3 65Colo 252, 176P279.

636-8 202 Iowa1090, 211NW250.

643-79½-New. or where taxicab pas-

senger desires to be taken off route prescribed in license of driver. 235Mich 180, 209NW165.

647-13 21AlaA354, 108S615.

648-26 21AlaA354, 108S615. [a] **Damages held not excessive.**–21AlaA354, 108 S615.

648-29 [a] 21AlaA354, 108S615.

649-34 273US45, 47SCt298, 71Led530; 171Ark727, 285SW375. [a] **Purpose of Illinois statute** in protecting carrier from competition is to procure more efficient service and at lower rates. 336 Ill 51, 167NE840, 67ALR938.

649-36 209Ky40, 272SW18.

649-39 273US45, 47SCt298, 71Led530.

649-42 209Ky40, 272SW18; 261Mass 269, 159NE41. [a] (2) In exercise of its police power state may exclude from public highways and streets motor vehicles engaged in transportation as common carriers. 67Utah222, 247P284. (3) It follows that state may impose such conditions as it may deem fair and just for use of highways by vehicles thus engaged. 67Utah222, 247P284. [c] (2) Surety on public service car bond is not relieved from liability for death occurring on public highway within municipality by reason of provision of statute relating to such cars, defining public highway to mean only roads outside of incorporated municipalities. 158La 885, 104S914. [d] **Certificate of convenience and necessity** (1) is revocable license. 113 OhSt83, 148NE581. (2) Motor equipment need not be owned by transportation company seeking certificate. 113 OhSt83, 148NE584.

649-43 171Ark727, 285SW375.

649-44½-New. Transportation companies have no inherent or vested right in the highways. 209Ky40, 272SW18.

649-44½-New. Seating capacity under transportation acts refers to cars as operated. 209Ky40, 272SW18.

649-44¼-New. Unrestrained use of the highway by transportation companies is an appropriation of public property for private use, which the legislature may prohibit or regulate. 209Ky40, 272 SW18.

649-44½-New. In Kentucky the Transportation Act applies to cars seating five persons or less except as to payment of fees. 209Ky40, 272SW18.

649-44⅙-New. Operating motor busses on highway without a license constitutes a nuisance. 253Mass178, 148NE590.

649-44⅐-New. Rapid transit in cities is subject to state regulation except as the state has divested itself of such power. 243NY401, 153NE849.

649-44⅛-New. Some statutes forbid a taxi driver holding a permit to solicit passengers along the route assigned to an operator of motor vehicles under a different class of permit except when employed to make a specific trip. 103 WVa337, 137SE360.

649-44⅛-New. The term "facilities" as used in a constitutional or statutory provision relating to discrimination in facilities for transportation includes only such as are employed in transportation and which the carrier is compelled to furnish in its capacity as common carrier. 316Mo709, 294SW88.

649-44 1/10-New. Only those who have a right to demand and receive a facility or service from a common carrier in its capacity as such are protected by such provision. 316Mo709, 294SW88.

649-44 1/11-New. A statute regulating transportation companies is not unconstitutional as impairing the obligation of a contract in the form of a certificate of convenience issued to a carrier. 37 Wyo488, 263P621.

649-45 172Ark90, 287SW763. [b] (1) 93PaSuper210 (certificate required of transfer company operating prior to passage of law); 93PaSuper416 (services rendered by motor bus held not within classification of common carrier under statute). (22) 113 OhSt604, 150 NE81 (provisions mandatory). (23) 116 Oh383, 156NE453; 67Utah222, 247P284. (24) 116 Oh383, 156NE453. (41) Upon good cause shown and proper notice and opportunity to be heard, certificate granted to transportation company may be revoked. 114 OhSt283, 150NE28. (42) Omission of trips scheduled, by reason of diversion of busses to special trips elsewhere for such protracted period as to show neglect, is ground for revocation of certificate. 114 Oh283, 150 NE28. (43) Transportation company, granted certificate with authority to transport passengers by designated motor vehicles over described route, may not use any of such motor vehicles, in absence of grant of authority, in transporting passengers over irregular route, though trip is made under private contract. 114 Oh283, 150NE28. (44) Certificate of convenience is limited franchise. 67Utah222, 247P284. (45) Though commission does not forbid in express terms increase in number of vehicles or trips on route, such increase in service may not be made without obtaining consent of commission. 67Utah 222, 247P284. (46) Rule, requiring consent of commission to additional vehicles or trips, does not injure bus operator by depriving him of use of property in which he has made investment, since he may always be advised as to use of equipment permitted. 67Utah 222, 247P284. (47) Rule of commission, that it will not grant certificate over road, all or part of which is under construction or contract therefor, does not warrant operation of automobile on such road without certificate. 100WVa18, 129 SE707. (48) Holder of permit for transportation of passengers over established routes by motor vehicles is entitled to injunction restraining operator of motor vehicles for hire holding mere certificate of convenience from operating vehicles for hire over such route or any substantial part thereof except as incident to his ordinary business and from soliciting passengers at termini or points along route for carriage along route or substantially similar one. 100WVa32, 129SE751. (49) In determining question of public convenience and necessity commission is governed by conditions existing in territory, rather than opinion of witnesses. 113 OhSt604, 149NE 865. (50) Certificate granted motor transportation company on ground that it was in good faith operating upon certain date merely confirms right it was then exercising and nothing more. 113 OhSt604, 150NE81. (51) General statutes in some jurisdictions requiring notice to grantee of a certificate apply to citation against any certificate holder to show cause why his certificate should not be revoked, altered, or amended for noncompliance with statutes or orders of commission. 113 OhSt604, 150NE81 (five days' notice required). (52) Person, operating automobile omnibus pursuant to contract with camping association, in which he transports exclusively guests and prospective guests of association and their baggage for daily wage, is not common carrier required to obtain permit. 65Utah457, 238P237, 42ALR849. (53) Statutes requiring application upon notice to be made to commission where it is contemplated changing extending or shortening route or increasing or decreasing number of vehicles employed in motor transportation service are mandatory. 113 OhSt618, 150NE81 (provision applicable also to increase in seating capacity of busses). (54) Such required notice applies to revocation, alteration, or amendment of the authority for the issuance of the certificate as well as to that of certificate itself. 113 OhSt604, 150NE81. (55) Certificate of convenience does not give holder right to exclusive use of highway or to exclude therefrom persons not patronizing him. 65Utah457, 238P237, 42ALR849. (56) Revocation of certificate may be had upon noncompliance with mandatory statutes. 113 OhSt604, 150NE81. (57) Statutes, permitting procedure by affidavit to obtain certificate, have been superseded in some jurisdictions by amendments requiring procedure by application and notice, which expressly impose a limitation of date upon proceeding by affidavit after which the new procedure must be followed. 113 OhSt618, 150NE81. (58) Commission cannot of its own motion authorize increased service without notice and hearing as required by statute. 113 Oh 604, 150NE237. (59) Statutes govern time for hearing of application for certificate in some jurisdictions upon giving by notice of publication of filing of the application three weeks immediately prior to day set for hearing, and hearing cannot be had until three full weeks have elapsed from first publication of notice. 113 OhSt618, 150NE81. (60) But refusal on ground of noncompliance with statute to revoke certificate granted on affidavit motor transportation company was in good faith operating on certain date is within discretion of court. 113 OhSt618, 150NE81. (61) Technical failure to comply with provision of statute as to time of notice by publication is not ground for complaint where parties were present before commission without applying for continuance or complaining of being unready for hearing or being deprived of time to secure evidence or opportunity to be heard. 113 OhSt618, 150NE81 (order of commission not unreasonable on such ground). (62) Statute requires establishment, on proper investigation, that operation is necessary or convenient for public and that proposed service is not then being adequately performed by others. 104WVa183, 139 SE744. [c] (2) It may by reasonable regulation prevent discrimination by terminal company against class of passengers in matter of identification of baggage. 96Fla295, 117S869, 59ALR 324. [e] (4) Evidence sufficient to show need of service and desirability of awarding certificate. 113 OhSt618, 150 NE81. [f] 67 Utah222, 247P284; 104 WVa183, 139SE744 (commission should ordinarily give preference to existing carrier). [g] 114 OhSt283, 150NE28; 67 Utah222, 247P284. [r] **Operation prior to regulatory act** does not give one property right transferable without control of commission. 67Utah222, 247P284. [s] **Power to alter or amend orders or decisions** is given to commission in some states. 67Utah222, 247P284. [t] **Operation of motor vehicle transportation service without permit as offense.**–231 Mich246, 203NW948. [u] **Interurban jurisdiction of commission.**–113 OhSt 618, 150NE81. [v] **Construction of particular statutes.**–115 OhSt394, 154NE 730; 115 OhSt449, 154NE734; 116 Oh 383, 156NE453; 126 Okl 48, 258P874; 136Wash445, 240P679; 144Wash47, 256 P333. [w] **Regulation of terminal companies.**–163Ga897, 137SE556. [x] **Holder of permit to operate taxicab between municipalities over fixed route** has right to receive passengers at stations along route or to accept and receive passengers and discharge them on signal. 175Ark 650, 1SW(2d)58. [y] **Terminal company.**–96Fla295, 117S869, 59ALR324.

650-46 136Wash445, 240P679.

650-47 67Utah222, 247P284 (orders in respect of number of vehicles and trips permitted held reasonable and just); 136Wash445, 240P679. [d] **Failure to give railway companies special opportunity to furnish increased facilities before licensing competing motor bus line** does not render action in granting privileges to latter company arbitrary. 144 Wash47, 256P333.

650-48½-New. Orders for additional service and notice thereof, provided by statute in some jurisdiction, apply only to motor transportation companies found by commission not to be giving convenient and necessary service. 113 OhSt 618, 150NE81.

650-48⅓-New. The number of days notice therein required is for the purpose of purchasing and installing such additional equipment as may be found by the commission to be necessary. 113 OhSt 618, 150NE81 (sixty days' notice required).

650-48¼-New. Where various applicants apply for same route, or routes traversing the same territory, the commission has authority to determine which can best meet requirements of public. 115 OhSt449, 154NE734.

650-50 See also 104WVa183, 139SE744. [e] **Technical irregularity** in proceeding does not invalidate order under some statutes. 67Utah222, 247P284. [f] **Proceedings on review.**–104WVa183, 139 SE744.

650-51 126 **Okl** 48, 258**P**874. [d] **Evidence held insufficient.**–126 **Okl** 48, 258**P** 874. [e] **Order authorizing transfer of certificate of necessity** held reasonable. 115 **OhSt**394, 154**NE**730.

650-52 172**Minn**601, 215**NW**188; 67 **Utah**222, 247**P**284; 144**Wash**47, 256**P** 333. [b] 136**Wash**445, 240**P**679. [c] **Number of vehicles permitted.**–67**Utah** 222, 247**P**284. [d] **Findings and order which are arbitrary and in disregard of statutory rights** must be set aside. 136 **Wash**445, 240**P**679. [e] **Findings as to convenience and necessity for increased transportation facilities** are conclusive in absence of showing that action was unfair, arbitrary, and in disregard of rights of parties interested. 144**Wash** 47, 256**P**333.

650-54½-New. Certificate, granting right to operate vehicles over only road then in existence between the termini, does not authorize operation over another road, thereafter constructed and maintained between the two places in addition to original thoroughfare. 135 **Wash**595, 238**P**905.

650-54⅓-New. Operation of vehicles for hire over road not authorized by certificate may be enjoined. 135**Wash**595, 238**P**905.

650-54¼-New. Injunction for operation without certificate may be granted in suit by a railway company having an interest in subject matter. 135**Wash**595, 238**P**905.

650-54⅕-New. Amended order of department of public works authorizing operation over a new road, without a finding of public convenience and necessity, is invalid. 135**Wash**595, 238**P**905.

650-54⅙-New. At instance of railway company interested in subject matter, order authorizing operation of vehicles for hire, without finding of public convenience and necessity, should be reversed and certificate issued therefor should be canceled. 135**Wash**595, 238**P** 905.

650-54⅐-New. Where a certificate of convenience and necessity issued by the public utilities commission to a bus company does not include the right to operate wholly within the city limits of a city or contiguous municipalities, an injunctive order restraining such operation does not impinge on the order of the commission within a statute providing that no court other than the supreme court shall have power to review, suspend, or delay any order made by the commission. 114 **OhSt**652, 151**NE**751.

650-54⅛-New. In determining number of vehicles which may be operated on route, danger from accidents as well as congestion of traffic must be considered. 67**Utah**222, 247**P**284.

650-54⅑-New. When it is made apparent that another utility, rendering part of its service in the territory served by bus operator, will be seriously affected by an increase by latter in number of vehicles operated, or trips made, commission may interfere to prevent such consequences. 67**Utah**222, 247**P**284.

650-54 1/10-New. Public utilities commission held not compelled to require production of records by one transportation agency in controversy with rival. 115 **OhSt**405, 154**NE**365.

650-57½-New. Remedy by public officials to invoke relief by mandamus or injunction against operation of busses without license does not prevent private remedy by injunction where nature of wrong warrants such cause. 253**Mass** 178, 148**NE**590.

650-57⅓-New. A bus company which complies with statutory regulations may enjoin unlawful competition. 209**Ky**40, 272**SW**18.

650-57¼-New. In a prosecution for operating a motor vehicle to transport passengers for compensation without permit, indictment must allege want of permit, but burden is on accused to prove that he had permit. 100**WVa**18, 129**SE** 707.

650-57⅕-New. Transportation certificate is revocable for using unauthorized equipment, failing to pay tax, abandoning part of route, and operating under unrecorded schedules. 117 **Oh**311, 158 **NE**591.

650-57⅙-New. Fines imposed by public service commission for violations of any act defining public service companies are of an administrative and not of a penal character. 34**PortoRico** 741.

650-61 227**Ky**44, 11**SW(2d)**983.

652-71 131**Misc**599, 227**NYS**539.

656-6 96**Fla**591, 118**S**731, 60**ALR**1072 (commercial telegraph company).

656-11 276**US**182, 48**SCt**276, 72**L ed** 523; 276**US**518, 48**SCt**404, 72**L ed**681, 57**ALR**426; 102**NJEq**450, 141**A**161.

656-12 102**NJEq**450, 141**A**161.

657-15½-New. A railroad company's station house and depot grounds must be devoted primarily to public use to extent necessary for public objects intended to be accomplished. 316**Mo** 709, 294**SW**88.

657-17½-New. The city has no property rights in a cab stand established on land vacated by the city and conveyed by it to a railway company. 204 **Iowa** 791, 213**NW**791.

657-18 90**Fla**721, 106**S**576 (dictum); 96**Fla**591, 118**S**731, 60**ALR**1072; 204 **Iowa**791, 213**NW**791, 793 [citCJ] (cab stand). [b] **Taxicab companies.**–316**Mo** 709, 294**SW**88.

657-19½-New. or of conducting telegraph business, 96**Fla**591, 118**S**731, 60 **ALR**1072.

657-23 276**US**518, 48**SCt**404, 72**L ed**681, 57**ALR**426 (contract not invalid as discrimination or contrary to public interest); 90**Fla**721, 106**S**576, 586 [citCJ]; 322**Mo** 463, 15**SW(2d)**758.

658-25 See also 90**Fla**721, 106**S**576.

660-40 321**Mo** 297, 10**SW(2d)**946 (that rate is discriminatory does not make it unlawful unless arbitrary and unreasonable).

660-44 [a] **Higher mileage rate** for fifty-ride bearer commutation tickets than for ten-ride tickets does not establish unjust discrimination. 321**Mo** 297, 10**SW(2d)**946.

661-54 321**Mo** 297, 10**SW(2d)**946.

661-55½-New. Purchase of space in advance to be paid for by day certain creates a contract with carrier, and rates prevailing at time contract is made prevail. 23 **OhA**394, 156**NE**150.

661-55⅓-New. A carrier has no constitutional right to the same rate of return on all business. 321**Mo** 297, 10**SW** **(2d)**946.

661-56 See also 321**Mo** 297, 10**SW(2d)** 946.

662-66 205 **Iowa**72, 217**NW**563.

662-70 164**Ga**822, 139**SE**725; 246**NY** 224, 158**NE**310. [h] **In New York.**–(1) 246**NY**224, 158**NE**310.

663-72 164**Ga**822. 139**SE**725; 246**NY** 224, 158**NE**310; 214**AppDiv**122, 211**NYS** 650.

663-73½-New. State authorities may deal with interstate rates on general level which commission has found fair to interstate commerce. 145**Va**62, 133 **SE**883.

663-73⅓-New. Suspension of police power over public utility rates cannot be accomplished by implication. 26**F** **(2d)**912 [rev on other grounds 279**US**159, 49**SCt**282, 73**L ed**652].

663-73¼-New. A surrender by contract of the governmental power of regulating rates chargeable by public service corporations must be closely scrutinized, in that such a contract has the effect of extinguishing pro tanto an undoubted power of government. 26**F(2d)**912 [rev on other grounds 279**US**159, 49**SCt**282, 73**L ed**652].

663-73⅕-New. Renunciation of the sovereign right to prevent excessive charges by public service corporations must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. 26**F(2d)** 912 [rev on other grounds 279**US**159, 49 **SCt**282, 73**L ed**652].

663-74 214**AppDiv**122, 211**NYS**650. [a] (2) Grant strictly construed 26**F** **(2d)**912 [rev on other grounds 279**US** 159, 49**SCt**282, 73**L ed**652]. (3) Power cannot be extended by inference. 26**F** **(2d)**912 [rev on other grounds 279**US** 159, 49**SCt**282, 73**L ed**652]. (4) Provisions of contract authorizing street railroad to charge certain rate became subject to commission's regulation on becoming unjust and unreasonable. 26**F** **(2d)**912 [rev on other grounds 279**US** 159, 49**SCt**282, 73**L ed**652]. [b] **Award of reparation** is not included in power to fix reasonable rates. **NJCir** 143**A**85. [c] **Effect of franchise agreement.**–**Mo** 30 **SW(2d)**105.

663-75½-New. The power committed to the public service commission to fix rates of public utilities is legislative in character, notwithstanding the manner in which it is exercised is forensic, and, except where limited by statute itself or some constitutional provision, acts of the commission done in the exercise of statutory powers are entitled to the same weight which should be given direct acts of the legislature. 155**Md**572, 142**A**870 [app dism 278**US**567, 49**SCt**79, 73**L ed**510 (8thcase)].

663-87½-New. The public service commission, in determining rates for public utility, must make a depreciation allowance for ordinary obsolescence, which constitutes a tangible and concrete thing, differing from extraordinary obsolescence. 155**Md**572, 142**A**870 [app dism 278**US**567, 49**SCt**79, 73**L ed**510(8th case)].

663-87⅓-New. Public service commission's authority to approve service at cost agreement between municipality and carrier implies power to investigate facts. **Mo** 30**SW(2d)**105.

664-99 164**Ga**822, 139**SE**725.

665-17 164**Ga**822, 139**SE**725; **Mo** 30 **SW(2d)**105 (after deduction of depreciation and expenses); 48**Philippine**900; 146**SC**496, 144**SE**233. But see 26**F(2d)** 912. [b] (5) Return of six and twenty-six hundredths per cent of fair value of property is not necessarily confiscatory. 155**Md**572, 142**A**870 [certiorari den 278 **US**567, 49**SCt**79, 73**L ed**510(8thcase)].

666-19 [a] **Denial by public service commission** of application by public utility for hearing, where statute provides therefor, amounts to confiscation, if rate then in effect is too low. 26**F(2d)**912.

666-20 164**Ga**822, 139**SE**725; 155**Md** 572, 142**A**870 [app dism 278**US**567, 49 **SCt**79, 73**L ed**510(8thcase)] (allowance for depreciation is improperly based on original cost of property).

666-23 [a] **Method of calculating depreciation reserve** by allowance of percentage on gross revenue of public utility has been held artificial, illogical, and unsound. 155**Md**572, 142**A**870 [app dism 278**US**567, 49**SCt**79, 73**L ed**510(8th case)].

666-27½-New. The rating base value of a tramway company is bottomed on the present value of lands held plus present stable cost of constructing plant, less depreciation for use since construction, and plus a fair allowance for going value, intangible elements, and working capital. 18**F(2d)**226.

666-27⅓-New. Such value is no legal criterion for determining actual value. 18**F(2d)**226.

667-34½-New. A finding of the commission that a certain line did not extend farther than the first fare zones of other lines affords substantial basis for including such line within a single fare zone. 155**Md**572, 142**A**870 [certiorari den 278**US**567, 49**SCt**79, 73**L ed**510(8th case)].

667-35 164**Ga**822, 139**SE**725.

669-63½-New. **Special rates for police.** In Canada an order of the governor-general in council fixing the rate chargeable for transportation of members of a provincial police force is valid. **Alta** [1928] 2**DomLR**386(2dcase).

669-67 164**Ga**822, 139**SE**725.

671-92 164**Ga**822, 139**SE**725. [b] **Commutation regulations** are valid, if reasonable. 164**Ga**822, 139**SE**725. [c] **Company's establishment of commutation rate over one route** is no indicia of general policy so as to validate state order for establishment of commutation service generally. 164**Ga**822, 139**SE**725.

672-3 280**US**145, 50**SCt**71, 74**L ed**234.

672-4 [g] **Street railway company's right to establish rules to prevent fraud in use of transfers** does not give it authority to amend change or abrogate ordinances of city council. 149**Va**882, 141**SE**829.

673-8 280**US**145, 50**SCt**71, 74**L ed**234.

673-11 [c] **Fare fixed as condition in**

contract between city and transit company is not subject to regulation by Public Service Commission Law. 136 **Misc**569, 240**NYS**316. [d] **Railway company held bound by predecessor's contract** not to exceed five cent fare. 281 **US**505, 50**SCt**369, 74**LEd**999.

674–16 But see 225**Ky**784, 10**SW(2d)** 305.

675–27 280**US**145, 50**SCt**71, 74**LEd**234; **Mo** 30**SW(2d)**105. [b] **City cannot fix rates of fare by agreement.–Mo** 30 **SW(2d)**105. [c] **Fixing factors determining rates.–Mo** 30**SW(2d)**105.

675–36 [d] **Matter of duty.–26F(2d)** 912 [rev on other grounds 279**US**159, 49 **SCt**282, 73**LEd**652].

676–38 26**F(2d)**912 [rev on other grounds 279**US**159, 49**SCt**282, 73**LEd** 652]; 164**Ga**822, 139**SE**725. [c] (4) Evidence held to warrant injunction of order requiring certain commutation service in state. 164**Ga**822, 139**SE**725. (5) Evidence sufficient for injunction against threatened violation of contract as to fares. 136**Misc**569, 240**NYS**316.

676–39 155**Md**572, 142**A**870 [app dism 278**US**567, 49**SCt**79, 73 **LEd**510 (8th case)]. [a] (7) In New York, in action by city to review appraisal made under contract which provided also for review, it has been held that no ratification was implied from act of public service commission under statute in approving the contract, it having no authority to approve the appraisal as such. 127 **Misc**766, 217**NYS**452. [e] **Issues.–**127 **Misc**766, 217**NYS** 452.

677–42 27**F(2d)**893; 155**Md**572, 142**A** 870 [app dism 278**US**567, 49**SCt**79, 73 **LEd**510 (8th case)].

677–52½–New. Franchise limiting fare on part of system does not deprive public service commission of jurisdiction to increase fares. 131**Misc**398, 227**NYS**18.

678–65 143**SC**91, 141**SE**185, 56**ALR**767 (regardless of whether act is accompanied by some other breach of duty).

678–66½–New. Railroad is liable for damages resulting from conductor's act in willfully overcharging passenger. 143**SC**91, 141**SE**185, 56**ALR**767.

685–82 22**AlaA**199, 114**S**15.

689–28 215**Ky**222, 284**SW**1047, 48**ALR** 327.

691–57 37**GaA**218, 139**SE**581.

692–73 37**GaA**218, 139**SE**581. [e] 209 **Ky**442, 272**SW**912.

692–75 37**GaA**218, 139**SE**581.

692–76 37**GaA**218, 139**SE**581.

693–80½–New. Ticket for continuous passage is not necessarily through ticket. 149**Md**625, 132**A**153.

697–44 [c] **Transfers.–**149**Va**882, 141**SE** 829.

702–14 146**Va**442, 131**SE**846, 132**SE**839, 44**ALR**1175.

702–17 131**Misc**599, 227**NYS**539.

702–18 146**Va**442, 131**SE**846, 132**SE**839, 44**ALR**1175.

703–30 21**AlaA**431, 109**S**890.

703–31 21**AlaA**431, 109**S**890.

704–45 21**AlaA**431, 109**S**890.

709–11 220**MoA**273, 286**SW**153.

714–75 125**Me**338, 133**A**907, 47**ALR**720; 221**MoA**271, 2**SW(2d)**165, 166 [quotCJ]; 120 **Okl** 60, 250**P**500. [f] **It is only where carrier grants gratuitous transportation** that it can exempt itself from liability for injuries received during carriage. 221**MoA**271, 2**SW(2d)**165.

716–77 221**MoA**271, 2**SW(2d)**165.

719–2 35**GaA**488, 134**SE**116.

720–13 29**F(2d)**844; 36**F(2d)**189; **Fla** 128**S**9; 35**GaA**488, 134**SE**116; 125**Me** 338, 133**A**907, 47**ALR**720; 217**AppDiv** 661, 217**NYS**56. [d] **Federal rule allowing exemption is applicable.–**299**Pa** 558, 149**A**877.

720–18½–New. As affecting joint tortfeasor. 217**AppDiv**661, 217**NYS**56.

720–18½–New. A stipulation in a free pass, that the passenger assumes the risk of injuries, is not a release. 245**NY** 36, 156**NE**88.

720–19 39**GaA**216, 146**SE**516. See also 155**Miss**1, 119**S**501, 62**ALR**191.

724–49 125**Me**338, 133**A**907, 47**ALR**720. [d] **If pass to caretaker was "gratuitous"** in ordinary sense of term, contract was illegal, and exemption from liability is of no effect. 125**Me**338, 133 **A**907, 47**ALR**720.

724–50 125**Me**338, 133**A**907, 47**ALR**720.

725–52 [b] **Construction of contract.–MoA** 8**SW(2d)**103.

725–53½–New. Under common law a carrier could waive the requirement of a cattle caretaker's contract that the caretaker give the carrier written notice of injuries. **MoA** 8**SW(2d)**103.

726–66 245**NY**36, 156**NE**88.

731–22 158**La**284, 103**S**769.

732–26 **MoA** 300**SW**528.

734–44 209**Ky**287, 272**SW**740, 42**ALR** 155.

737–64 219**Ky**400, 293**SW**972 [quot CJ].

738–68 37**GaA**218, 139**SE**581; 233 **IllA** 539; 219**Ky**400, 293**SW**972 [citCJ]; 94 **PaSuper**50. [c] 219**Ky**400, 293**SW**972.

738–69 94**PaSuper**50.

738–72 219**Ky**718, 294**SW**143.

739–76 Contra **Iowa** 230**NW**390.

739–76½–New. Where a passenger **is** carried beyond his destination without his fault, the railroad company cannot, without reference to his comfort or convenience, arbitrarily eject him from the train for nonpayment of additional fare. 37**GaA**294, 139**SE**923.

739–78 205 **Iowa**72, 217**NW**563, 564 [cit CJ].

740–83 21**AlaA**431, 109**S**890. See also 151**Va**686, 144**SE**708. [c] **Tender of apparently valid transfer.–**149**Va**882, 141 **SE**829.

742–2 21**AlaA**431, 109**S**890. [e] (1) 21 **AlaA**431, 109**S**890.

743–8 22**AlaA**199, 114**S**15; 21**AlaA**431, 109**S**890. [e] **Meaning of rule** that as between conductor and passenger ticket is customarily considered as evidence of passenger's rights amplified and explained. 209**Ky**442, 272**SW**912. [f] **As between conductor of street car and passenger** face of passenger's transfer is conclusive evidence of extent of right to ride. 149**Va**882, 141**SE**829.

744–11 37**GaA**218, 139**SE**581; 132 **Okl** 196, 270**P**58, 60 [citCJ].

745–19 37**GaA**218, 139**SE**581.

745–20 37**GaA**218, 139**SE**581.

749–55½–New. Passenger may be ejected for refusal to pay fare after his tender of Canadian coin has been rejected by conductor. 158**La**284, 103**S**769.

749–58 132 **Okl** 196, 270**P**58.

752–79 **TexCivA** 282**SW**305, 308 [cit CJ].

753–91 **MoA** 300**SW**528.

755–4 148**Md**512, 129**A**678.

757–21 158**La**284, 103**S**769; 151**Va**686, 144**SE**708.

758–24 149**Va**882, 141**SE**829.

759–30 158**La**284, 103**S**769.

759–31½–New. But where an officer acts wholly in his capacity as a police officer and not at the conductor's direction, defendant is not liable for his acts. 319**Mo** 1040, 6**SW(2d)**591.

763–67 37**GaA**218, 139**SE**581; 245 **IllA** 72.

764–84 245 **IllA**72.

766–12 209**Ky**442, 272**SW**912.

766–12½–New. A passenger can rely on the conductor's assurance that the custom of the railroad is to awaken passengers at their destination and that he would be awakened. 37**GaA**294, 139**SE** 923.

767–17 219**Ky**718, 294**SW**143.

767–19 233 **IllA**539.

767–20 **Iowa** 230**NW**390.

768–30 37**GaA**219, 139**SE**735; 132 **Okl** 196, 270**P**58.

769–31 219**Ky**718, 294**SW**143.

769–34 37**GaA**219, 139**SE**735.

770–41 245 **IllA**72.

770–42 245 **IllA**72.

771–46 319**Mo** 1040, 6**SW(2d)**591.

772–66 209**Ky**442, 272**SW**912; 132 **Okl** 196, 270**P**58.

772–69 37**GaA**236, 139**SE**589; 37**GaA** 219, 139**SE**735.

773–70 37**GaA**236, 139**SE**589; 37**GaA** 219, 139**SE**735; 132 **Okl** 196, 270**P**58.

774–72 132**SC**476, 129**SE**833.

776–93 **TexCivA** 282**SW**305. [a] (8) 245 **IllA**72. (15) 37**GaA**219, 139**SE**735 (where young woman with three-months-old baby was ejected in impolite manner before reaching destination). (22) $15,000. **TexCivA** 282**SW** 305. (23) $1,200. 219**Ky**400, 293**SW** 972. (24) $650. 37**GaA**219, 139**SE**735. (25) $1,750. **TexCivA** 9**SW(2d)**382.

778–94 215**Ky**222, 284**SW**1047, 48**ALR** 327. [a] (22) $700. 215**Ky**222, 284**SW** 1047, 48**ALR**327.

779–97 [a] **In Kentucky.–**209**Ky**442, 272**SW**912.

780–7 [a] (2) Where passenger purchased ticket over connecting roads and was ejected while on road of initial carrier, plea of privilege in action against all carriers in county into which last railroad alone extended should be sustained as to other railroads. **TexCivA** 298**SW**612.

780–11 37**GaA**626, 141**SE**430 (petition held sufficient). [c] **Petition in action for damages for ejection held sufficient.–** 37**GaA**924, 139**SE**923.

787–88 [a] 148**Md**512, 129**A**678.

788–89 [d] **Evidence as to ill effects suffered on subsequent days** because plaintiff did not want to ride in company's busses held irrelevant. 102**NJL** 235, 132**A**515.

788–89½–New. As to whether a police officer, assisting a conductor to eject a sick passenger, thought it was proper to lay him on the sidewalk in December. 319**Mo** 1040, 6**SW(2d)**591.

790–19 [a] (1) 36**GaA**108, 135**SE**496; 37**GaA**219, 139**SE**735; **MoA** 273**SW**221. [b] (4) **NJSup** 136**A**190.

790–22 [a] (7) To show that ejection was made without reference to passenger's comfort and convenience. 37**GaA** 294, 139**SE**923.

791–23 [a] (1) 37**GaA**219, 139**SE**735. (2) To permit punitive damages for wounded feelings. 37**GaA**219, 139**SE** 735.

791–29 37**GaA**294, 139**SE**923; 148**Md** 512, 129**A**678; **TexCivA** 296**SW**647.

791–33 102**NJL**235, 132**A**515; **TexCivA** 282**SW**305. [a] (8) Passenger, suing for ejection, resulting in relapse into tubercular condition, held not without cause of action as matter of law because of failure to inform conductor that she had been affected with tuberculosis. **TexCivA** 282**SW**305.

792–35 **MoA** 7**SW(2d)**1028.

793–42 [a] (1) 224**AppDiv**131, 229**NYS** 700.

793–47½–New. whether passenger sleeping when train reached destination was wrongfully ejected after passing station, **Iowa** 230**NW**390.

793–49 **TexCivA** 296**SW**647. [c] (2) Other instances. 94**PaSuper**50.

794–51 37**GaA**218, 139**SE**581. [a] (5) As to contributory negligence. **Tex CivA** 296**SW**647.

795–53 **TexCivA** 282**SW**305. [b] (1) **TexCivA** 282**SW**305.

797–71 **TexCivA** 282**SW**305.

797–73 **TexCivA** 282**SW**305.

799–92 But see 135**SC**75, 133**SE**231.

799–93 38**GaA**280, 143**SE**905; 135**SC**75, 133**SE**231.

799–94 135**SC**75, 133**SE**231.

799–97 135**SC**75, 133**SE**231.

800–7 135**SC**75, 133**SE**231.

801–14 135**SC**75, 133**SE**231.

801–15 227**Ky**44, 11**SW(2d)**983.

801–20 135**SC**75, 133**SE**231.

801–22 38**GaA**280, 143**SE**905. [d] **Where carrier undertakes to escort passenger to train,** it is under absolute duty to conduct passenger to designated train. 38**GaA**280, 143**SE**905.

802–36 37**GaA**218, 139**SE**581.

802–41 38**GaA**280, 143**SE**905.

804–54 **TexCivA** 2**SW(2d)**874.

804–59 109 **Okl** 141, 234**P**607 (separate entrance required including "step-box" or "extra step" where necessary).

806–82 209**Ky**287, 272**SW**740, 42**ALR** 155.

806–83 209**Ky**287, 272**SW**740, 42**ALR** 155.

807–89½–New. Passenger voluntarily riding on baggage car is subject to the incidents of such travel and cannot recover because she was not furnished a seat. **TexCivA** 283**SW**186.

807–90 147**Miss**164, 113**S**188, 189 [quot CJ].

807–91 209**Ky**287, 272**SW**740, 42**ALR** 155; 5**LaA**57, 59 [quotCJ].

807–92 147**Miss**164, 113**S**188, 189 [cit CJ].

807-94 209Ky287, 272SW740, 42ALR 155 (dictum).
819-57 But see **NJSup** 132A492.
819-61 4LaA658, 659 [citCyc].
821-76 149Md625, 132A153, 156 [cit CJ].
822-94 140Miss410, 105S864; 135SC 75, 133SE231.
823-97 [a] 173Ark256, 292SW94.
824-14 162Ga616, 134SE605; 214Ky 668, 283SW1003; **TexCivA** 286SW526.
825-17 Ark 30SW(2d)209.
825-19 140Miss410, 105S864.
825-20½-New. A passenger's damage from missing a waiting conveyance and being required to walk home in a storm because of the carrier's negligence in carrying him beyond his station is recoverable, although the train was backed to the station after the conveyance had left. 140Miss789, 106S531.
825-24 TexCivA 286SW526.
828-61 35GaA59, 132SE399; 212Ky 723, 280SW89.
830-81 But see Iowa 230NW390.
833-29 216Ala616, 114S218, 61ALR400.
834-33 225Ky625, 9SW(2d)1011, 1012 [cit 169Ky11, 183SW207].
835-45 TexCivA 286SW526.
835-47 Ark 30SW(2d)209; TexCivA 286SW526.
836-48 See also 213Ala522, 105S874.
837-58 140Miss789, 106S531.
837-62 TexCivA 286SW526.
838-64 135SC316, 133SE704.
839-76 35GaA59, 132SE399.
840-82 194NC40, 138SE340, 52ALR 1330.
841-90 [a] (7) 209Ky442, 272SW912 (woman ejected from train before reaching destination at lonely station on dark rainy night). (9) Ark 30SW(2d)209. [b] (14) Seventy-five hundred dollars. 149SC454, 147SE596.
842-91 [a] (10) 216Ala616, 114S218, 61ALR400. (12) Twelve hundred dollars. 155Miss689, 125S114. [b] (9) Four thousand dollars. 173Ark256, 292SW94 (reduced to two hundred dollars).
843-95 213Ala522, 105S874; 34GaA 312, 129SE293 (passenger carried beyond destination).
844-2 216Ala616, 114S218, 61ALR400.
844-4 [a] (7) Carrying past destination. 35GaA59, 132SE399. [b] (1) Ala 128S789.
844-6 213Ala522, 105S874 (in action for failure to transport, no question of negligence vel non is presented or need be averred if plaintiff was unlawfully rejected where relation of carrier or passenger existed).
846-17 213Ala522, 105S874 (willful act will support count for wanton injury).
846-24 135SC75, 133SE231.
847-30 [a] (17) Passenger's testimony as to arrangement to meet her at train which failed to stop is admissible. 173 Ark256, 292SW94.
848-31 154Miss680, 123S859. [a] (6) In action, for being carried beyond passenger's destination, testimony as to what occurred after passenger reached destination was incompetent. 225Ky 625, 9SW(2d)1011.
849-38 [b] (16) To support finding that failure to stop train at station was result of negligence of trainmen. 140 Miss789, 106S531. (17) To show defendant's ownership of car. TexCivA 286SW526. (18) To sustain verdict for negligence in not informing passenger that train would not stop at her station. 173Ark256, 292SW94.
849-40 Ark 30SW(2d)209.
849-42½-New. Custom, in derogation of a reasonable rule regulating the number of trains, is not established by evidence of a few sporadic or isolated instances. 227Ky44, 11SW(2d)983.
850-45 216Ala616, 114S218, 61ALR 400; 214Ky668, 283SW1003; 135SC 316, 133SE704.
850-46 213Ala522, 105S874 (affirmative instruction properly refused); SC 155 SE145; TexCivA 300SW948 (carrying sick passenger past destination without knowledge of sickness). [a] (4) 149SC 454, 147SE596. (7) Whether plaintiff voluntarily left train and otherwise exercised ordinary care in walking back to her destination. 225Ky625, 9SW(2d) 1011.
850-48 157Miss83, 127S725.
851-49 155Miss689, 125S114.
851-50 154Miss680, 123S859; 136SC 34, 134SE220.
851-53 [a] (4) Other instructions held erroneous. 218Ala11, 117S466. [b] (3) Presumption of negligence where passenger injured on train. 149SC454, 147 SE596.
851-54 149SC454, 147SE596 (instruction warranted by evidence). [b] **Instructions erroneously refused.-MoA** 12 SW(2d)767.
852-55 154Miss680, 123S859.
852-57 [b] **Modifying requested instruction as to conductor's duty to stop train** and passenger's duty to inquire as to stops held not erroneous. 173Ark 256, 292SW94.
852-58 140Miss789, 106S531.
852-63 216Ala616, 114S218, 61ALR400.
853-64 213Ala522, 105S874 (instruction confining recovery to nominal damages where count for wanton injury was supported by evidence of willful act); 173Ark256, 292SW94. [b] (2) Inapplicable and erroneous as to defendant pullman company. 35GaA59, 132SE 399.
853-68 [b] **Necessity of violation of statute.-Ark** 30SW(2d)209.
853-68½-New. [§ 1293a] 8. **Damages.** Where a carrier tortiously breaks its contract, it must compensate the passenger for lost time and expense, inconvenience, discomfort, injury, or illness directly resulting. 225Ky625, 9SW(2d) 1011.
853-68⅓-New. It is not essential, in order to recover punitive damages, that the jury find actual damages, providing the finding is of wanton or willful conduct of the carrier. 218Ala11, 117S 466.
854-72 233 IllA432; 1LaA770 [aff 159 La519, 105S606, and citCJ]; 12LaA518, 124S781 (bus carriers); 83NH136, 139A 370; NJ 150A357; 222AppDiv166, 225 NYS412; 286Pa166, 133A158; TexCivA 270SW1038 (must use strictest diligence in safely receiving, carrying, and discharging passenger); TexCivA 285SW 1104.
854-73 147Va576, 137SE500.
854-75½-New. Where a passenger has full knowledge of danger and can avoid it, the carrier need not exercise a high standard of care for protection. 83NH 136, 139A370.
854-76 [b] **There are no degrees of negligence in Indiana.** 86 IndA251, 157 NE58.
855-81 37GaA236, 139SE589; 241Mich 474, 217NW332; Mo 273SW110; 130 Misc570, 224NYS420.
855-85 TexCivA 285SW1105; 194Wis 305, 216NW489.
856-86 86 IndA251, 157NE58; 254 Mass186, 150NE14; NJ 151A99(2d case); 103NJL316, 137A88. See also Man [1928] 1DomLR920.
856-87 220AppDiv503, 221NYS686; TexCommnA 32SW(2d)641.
856-91 42F(2d)70; 20AlaA617, 104S 559; 23AlaA203, 123S92; 110Conn625, 149A127 (street railway); 205 Iowa940, 219NW60, 58ALR687; 228Ky184, 14 SW(2d)768; 167Minn40, 208NW533; 105NJL274, 145A5; 56ND407, 217NW 662; 135 Okl 53, 273P988 (utmost care under statute); 291Pa211, 139A878; 300Pa55, 150A153; 131SC426, 127SE 718; 139SC200, 137SE682; 142SC492, 141SE90; TexCivA 285SW1105; 142 Va96, 128SE538; 149Va549, 140SE648; 150Wash278, 272P736; 153Wash549, 280P50 (auto stage); 99WVa313, 128 SE832; 194Wis305, 216NW489; Man [1927] 3DomLR519. See also TexCivA 276SW460. [i] **Care required of carriers of passengers** more strictly applies to some affirmative act or omission toward passenger rather than control of his person or conduct after acceptance as passenger. 100WVa319, 130SE483.
857-92 233 IllA432; TexCommnA 276 SW641; TexCivA 285SW1105; 194Wis 305, 216NW489; 198Wis293, 223NW 836, 69ALR978.
858-93 42F(2d)70; 105NJL274, 145A 5 (foresight defined); 142Va96, 128SE 538.
858-96 94CalA303, 271P134; 103Conn 641, 131A396; 120Kan105, 242P469; 13 LaA27, 127S57; 171Minn31, 213NW43; 113 Or544, 233P540 (motor bus); 105 WVa156, 141SE622; 194Wis305, 216 NW489.
860-97 194Wis305, 216NW489.
860-98 [d] **Every reasonable and practicable precaution at all times and under all circumstances.-MoA** 282SW525.
860-3 100WVa319, 130SE483.
861-7 231Ky564, 21SW(2d)990; 142 Va96, 128SE538 (which carrier could not foresee might naturally occur). [b] **Passengers on railroad incur risk and peril incident to travel** over which carrier has no control. 231Ky564, 21SW (2d)990.
862-11 263Mass305, 160NE811.
862-12 171Minn31, 213NW43.
862-12½-New. A transfer ticket entitling the holder to resume passage does not necessarily carry the duty to look out for his personal safety during the interim. 212Ala638, 103S867.
862-12¼-New. Carrier is not bound to exercise highest degree of care in any situation passenger may create. Md 148A821.
862-12¼-New. [§ 1300a] e½. **Care as to Persons under Disability.** Negligence, predicated upon extraordinary duty owing by carriers to sick, aged, and infirm passengers, is not established unless notice of the condition of the passenger is brought home to the carrier. 219Ky92, 292SW758.
863-14 174Ark1019, 298SW325; 177 Ark199, 5SW(2d)930, 59ALR936.
863-19 Iowa 228NW320; 315Mo 987, 288SW777; MoA 7SW(2d)1028; 103 NJL316, 137A88; 216AppDiv623, 216 NYS163; 294Pa277, 144A103; 194Wis 305, 216NW489.
863-21 242 IllA384; 205 Iowa940, 219 NW60, 58ALR687; 120Kan58, 242P 469; 209Ky841, 273SW540, 542 [citCJ]; 11LaA1, 123S135; 156Md329, 144A363; Md 149A4; 256Mass217, 152NE239; Mass 168NE171; 315Mo 987, 288SW 777; NJSup 132A310; 103NJL316, 137 A88; 130Misc570, 224NYS420; 87Pa Super393; 142Va96, 128SE538; 194 Wis305, 216NW489.
865-26 194Wis305, 216NW489. See also 262Mass308, 159NE513.
865-29 See also 130Misc570, 224NYS 420.
865-33 168Ark966, 272SW360.
865-33½-New. **Since it is a matter of common knowledge that a good deal of switching** is necessary on mixed trains standing at station, this may be considered in determining contributory negligence of passenger standing in aisle. 168Ark966, 272SW360.
866-34 168Ark966, 272SW360 (passenger is chargeable with knowledge of such facts).
866-37 2LaA244, 248 [quotCJ].
866-37½-New. **Passenger voluntarily riding on baggage car** is subject to incidents of such travel. TexCivA 283SW 186.
867-40 118Nebr459, 225NW232 (bus company).
867-42 242 IllA451; 6LaA606; 172 Minn516, 215NW852 (highest degree of care and foresight); 132 Or161, 285P 219 (very high degree of diligence); 194Wis305, 216NW489. [c] (1) 194Wis 305, 216NW489. (3) Jitney driver owes passenger utmost care, diligence, and foresight in operation and management of vehicle, and is liable for slightest degree of negligence. 143Va903, 129SE 493, 45ALR280.
867-43½-New. A taxicab company, as carrier, must exercise the highest degree of care for the safety of passengers. TexCivA 274SW295. See also 135Wash630, 238P623.
867-43⅓-New. The duty of a carrier by automobile to exercise a high degree of care for the safety of a passenger is not affected by the fact that another passenger in the vehicle has intoxicating liquor in his possession. TexCivA 274 SW295.
867-44 50RI 438, 148A417.
868-46 [d] **Whether street car motorman was negligent toward passenger** in operation of car depends on whether he acted with care required of man in

similar circumstances. 110Conn625, 149A127.

868-49 102CalA58, 282P525; 103Conn641, 131A396; 224IllA42 (where passengers are permitted to ride on running board); 13LaA212, 127S119; 128Or542, 274P915; 298Pa256, 148A102.

869-56 16F(2d)517; 87CalA371, 262P459 (duty is not diminished by statute requiring state inspection); MoA 20SW(2d)597; 32OhA26, 167NE589; 285Pa489, 132A575. [f] (1) 213Ala492, 105S663.

870-57 16F(2d)517; 285Pa489, 132A575; 292Pa200, 140A877.

870-60 16F(2d)517; 213Ala492, 105S663; 318Mo1190, 3SW(2d)241; 219MoA99, 268SW706; 292Pa200, 140A877.

870-61 Md 148A543 (high degree of care); MoA 20SW(2d)597 (leaving elevator); 200Wis292, 227NW274.

871-66 292Pa200, 140A877. See also 220MoA948, 7SW(2d)403; 245NY640, 157NE891.

873-82 125Me338, 133A907, 47ALR720; 254Mass186, 150NE14.

874-85 [e] **Passenger, accepting pass,** held bound by terms exempting street railroad from liability for injuries. 214AppDiv534, 212NYS292. [f] **Where pass is for limited distance,** carrier is not liable to such passenger who is carried beyond such point by car going out of control, injured person not having become thereby passenger from whom fare was due. 214AppDiv534, 212NYS292.

875-94 212Ala690, 103S872; 152Md427, 137A30.

875-1 168Ark814, 271SW455.

876-2 36F(2d)199; MoA 7SW(2d)460 (shipper riding in emigrant car with stock under contract is not trespasser).

876-3 168Ark814, 271SW455.

876-8 244NY84, 155NE58.

877-10 [c] **Even if sale of busses which had caused injury was void,** the nonnegligent buyer was not liable for injuries. 198NC688, 153SE264.

877-11 [b] **One bus company purchasing another's property** does not alone make buyer liable for injury to passenger by seller's negligence. 198NC688, 153SE264.

877-13 244NY84, 155NE58.

877-15½-New. A street railway is held not liable for an injury where the passenger stepped into a hole on a public highway not in the control of the company. 286Pa221, 133A228.

877-19 [a] **Mere fact that defendant owned seventy per cent of common stock of corporation responsible** for operation of train on which railway clerk suffered exposure from lack of heat does not make it liable as for acts of agent. 171Minn34, 213NW57.

878-24 26F(2d)403.

878-27 256IllA442.

880-47 42F(2d)70.

880-54 244NY84, 155NE58.

881-65 42F(2d)70; TexCivA 10SW(2d)767 (even though approved by interstate commerce commission).

882-77 See also 318Mo502, 300SW479.

883-97 Mass 165NE113; 144Miss326, 109S796; 300Pa55, 150A153 (holding taxi company and street railway company concurrently negligent). [a] **In collision between bus and taxicab,** it is no defense to action against owner of bus that injury to plaintiff, passenger in taxicab, was result of joint negligence of both drivers. NJSup 134A891.

883-98 279US320, 49SCt329, 73Led711.

883-2 [a] **Not joint tort-feasors though torts concurrent and related,** where city's liability is based on failure to perform statutory duty to keep street in repair and carrier's liability was at common law for stopping car at dangerous place to alight without warning. 20OhA148, 151NE806. See also 20OhA148, 151NE806.

884-17 [f] **Other instances of persons held to be servants.**-228AppDiv50, 239NYS90.

886-32 94CalA303, 271P134; 102CalA499, 283P375; 234Mich42, 207NW907; 147Va576, 137SE500.

887-38 94CalA303, 271P134; 242NY251, 151NE442. [c] **Where chauffeur of cab company accommodated friends, who were not passengers for hire,** company was held not liable for injury of employee. 242NY251, 151NE442.

887-39 [b] **Closing doors.**-241Mich700, 217NW917.

887-39½-New. Unless there is an abuse of discretion by the operator in separating races on street car, there can be no recovery. 147Va576, 137SE500.

889-56½-New. A railroad company is not liable for indecent assaults by its employees on a person waiting in its station for a train of a different company where it had in no way obligated itself to care for passengers of such company. 222Ky190, 300SW593.

893-84 12LaA692, 127S16.

895-97 213Ala522, 105S874; 55ND104, 212NW776; 6PaDist&Co125; 143SC91, 141SE185, 56ALR767 (passenger may recover for mental suffering).

896-1 55ND104, 212NW776.

897-19 148Md512, 129A678.

898-22 14F(2d)893.

898-23 14F(2d)893.

898-25 [b] **Operators of busses held to know** reasonable probability of pregnant women becoming passengers. 233Ky464, 26SW(2d)20.

898-27 177Ark199, 5SW(2d)930, 59ALR936.

900-34 [b] **Carrier negligent in not providing medical care** for injured passenger after arrival at destination is liable for resulting damages. 157Miss374, 128S896.

900-36 231Ky564, 21SW(2d)990.

900-37 209Ky841, 273SW540, 542 [quot CJ]; 231Ky564, 21SW(2d)990. [b] **Carrier is not responsible for accident occasioned by third person** or instrumentality outside conveyance. 300Pa474, 150A897.

900-38 122Kan652, 253P224; 209Ky841, 273SW540, 542 [quotCJ]; 221Ky97, 297SW1107.

901-39 209Ky841, 273SW540, 542 [quotCJ]; 234Mich42, 207NW907; 94PaSuper121.

901-40½-New. That railroad employees, negligently assisting passenger in boarding moving train, had no notice that passenger's bundle contained explosives, is no defense in action by another passenger for injury from explosion. 222AppDiv166, 225NYS412.

901-41 122Kan652, 253P224.

902-42 234Mich42, 207NW907.

902-43 Can [1928] 2DomLR297. [f] **Railroad company** lighting headlights when it became dark, causing passengers in street car to become frightened, is held not liable for consequences of fright. 23OhA493, 155NE243.

902-44 209Ky841, 273SW540.

902-45 209Ky841, 273SW540.

903-55 87PaSuper393. [b] But see 87PaSuper393.

904-58 122Kan652, 253P224.

905-68 94PaSuper121.

905-70 94PaSuper121.

905-72 252Mass270, 147NE882.

906-75 IndA 170NE341; 219MoA99, 268SW706 (negligent death of elevator passenger caused by negligent operation by trespasser of elevator in negligent condition).

907-76 IndA 148NE335.

907-78 [f] **Broken switch** by third parties for purpose of robbery. 231Ky564, 21SW(2d)990 (failure of fireman to keep lookout, and failure of company to equip branch line with automatic block signals).

907-79 3LaA496, 498 [quotCJ].

907-79½-New. A carrier is liable for injuries to a passenger produced by the concurrent negligence of its servants and third persons. 118Nebr459, 225NW232.

910-1 [a] 130Misc570, 224NYS420.

910-4 [c] **Persons riding on mixed freight and passenger trains** are chargeable with notice of the equipment used thereon. 168Ark966, 272SW360.

911-11 23F(2d)247; 231Mich567, 204NW761; 228AppDiv50, 239NYS90.

911-13 231Mich567, 204NW761.

911-14 MoA 293SW1051.

911-15 105NJL1, 143A743.

911-20 [b] **Spot where alighting passengers naturally step** is included in portion of street occupied by street railway. NH 149A602.

911-22 NJSup 134A893; 141Wash634, 252P100, 101 [citCJ].

912-25 TexCivA 287SW71.

912-27 262Mass56, 159NE507; 231Mich567, 204NW761; NJSup 147A572 (2dcase); 292Pa522, 141A487; 99WVa313, 128SE832, 833 [citCJ].

913-30 [c] 99WVa313, 128SE832.

913-34 215Ky536, 286SW776. [a] 215Ky536, 286SW776.

913-35 CalA 286P456.

913-38½-New. A street car company fulfills its obligation where the means of ingress provided are free from danger to one using ordinary care. 6LaA139.

913-39 141Wash634, 252P100 (dictum).

914-40 [b] (3) Permission to pass along beaten path gives no right to trespass on railroad tracks. 292Pa522, 141A487. (4) That public may use railroad tracks at places other than fixed crossings does not impose liability on railroad company for injury to departing passenger so using them. 292Pa522, 141A487.

914-42 292Pa522, 141A487; 141Wash634, 252P100, 101 [citCJ]. [b] **Injury occurring after passenger arrived at regular platform** would be compensable. 82NH434, 136A250.

914-43 See also 286Pa85, 132A796.

914-44 212Ala638, 103S867, 869 [cit CJ]; Iowa 230NW390; 9LaA699, 120S72(1stcase); 82NH434, 136A250; NH149A602; 192NC287, 134SE855; Tex CommnA 292SW536. [a] (1) 192NC287, 134SE855. (4) Under statute, street railroad company is under duty only of exercising extraordinary care to furnish passenger safe place to alight. 39GaA56, 146SE633.

915-46 212Ala638, 103S867; 262Mass519, 160NE529. [b] **Carrier must exercise greater care** at regular stopping places than elsewhere. CalA 286P456.

915-48 [a] (1) See also 171Minn31, 213NW43. [e] (5) Hole in street six inches deep into which passenger alighting stepped where car stopped to discharge passengers is unsafe place. 20OhA148, 151NE806. (6) Hole in street six inches deep into which passenger alighting stepped when car stopped to discharge passengers is an unsafe place. 20OhA148, 151NE806. [g] **Street railroads are not required to stop their cars with exactness** each time at same point where passengers are discharged, and they may properly permit passengers to alight at other than usual stopping places, if there is no reason to anticipate harm. 295Pa199, 145A76.

916-53 But see 221MoA1123, 298SW107.

916-54 37GaA236, 139SE589; 220Ky552, 295SW866; 224Ky592, 6SW(2d)1050, 1053 [citCJ]; 231Mich567, 204NW761; 143Miss523, 108S496 [citCJ]; MoA 293SW1051; 103NJL316, 137A88; NJSup 138A512; 220AppDiv503, 221NYS686; 192NC287, 134SE855; 290Pa130, 138A89; 99WVa313, 128SE832, 833 [citCJ].

917-60½-New. Duty of carrier as to care of stations is same whether the station is above ground, below ground, or on the surface, where the passengers are admitted through turnstiles. 211Ky774, 278SW116.

917-62 [a] (3) Where municipality places platform in street for convenience and safety of persons waiting for street cars street railway company is under no obligation to see that platform is safe for use. Can [1929] 3DomLR610.

917-66 220AppDiv503, 221NYS686.

919-73 23F(2d)247 (viciousness of dog); 143Miss523, 108S496; 228AppDiv50, 239NYS90.

919-74 192NC287, 134SE855, 859 [quot CJ].

920-82 [d] **Going around end of train to board another train.**-TexCivA 19SW(2d)858.

921-84 311Mo604, 279SW115, 118 [cit CJ]; 135Misc834, 238NYS400 (notice of dangerous condition); 95PaSuper570 (carrier not required to keep platforms clear of snow in midst of snow storm). See also NH 149A602.

921-87 211Ky774, 278SW116; NJ 151 A99(2dcase) (that plaintiff had not been crowded off platform for five years was not measure of liability or duty). But see 264Mass364, 162NE735. [g] 262 Mass542, 160NE300.

921-87½-New. A carrier must exercise the highest degree of care to protect passengers from crowds at terminals, while the passengers are boarding cars. 211Ky774, 278SW116.

921-89 37GaA236, 139SE589.

922-93 37GaA236, 139SE589.

922-94 TexCivA 290SW846.

924-13 109Conn221, 146A494(2dcase); 103NJL316, 137A88; NJSup 147A572 (2dcase); 290Pa130, 138A89.

924-14 212Ala638, 103S867, 869 [cit CJ]; 103Conn641, 131A396; 211Ky774, 278SW116; 232Ky285, 23SW(2d)272; 311Mo 604, 279SW115; 89PaSuper592; 99WVa313, 128SE832. But see 88 IndA 117, 163NE527. [a] (2) Reasonable care under the circumstances is only required of passengers boarding. 109 Conn221, 146A494(2dcase). [e] **Duty exists until passenger has alighted.**–311 Mo 604, 279SW115. [f] **Carrier has duty to inspect,** at intervals, to see if appliances are in good repair. 311Mo 604, 279SW115.

924-15 103Conn641, 131A396; 211Ky 774, 278SW116 (boarding); TexCivA 299SW933.

924-15½-New. although reasonable care has been held to be the proper standard; 103NJL316, 137A88.

925-17 103NJL316, 137A88.

925-18 9LaA699, 120S72(1stcase); 9 LaA91, 119S86.

925-20 201 Iowa1302, 207NW602; 154 Wash547, 283P186.

925-20½-New. High degree of care due passenger inures to baby carried by woman passenger. 217Ala1, 114S290, 55ALR835.

925-22 215Ky536, 286SW776, 778 [quotCJ]; 263Mass553, 161NE623 (catching hand in opening door of elevated train); 83NH136, 139A370; 56 ND407, 217NW662, 664 [quotCyc]; 291Pa564, 140A496 (unnecessary to warn passenger as to condition which is matter of common knowledge).

925-22½-New. and the carrier has not duty to protect one leaving by an unauthorized way, unless it has, or is chargeable with, notice. 220AppDiv 503, 221NYS686.

925-23 103Conn641, 131A396; 164 Minn40, 204NW630; 26 OhA359, 159NE 580; 200Wis401, 228NW471(2dcase).

925-24 164Minn40, 204NW630.

925-25 212Ala638, 103S867, 869 [cit CJ]; 109Conn221, 146A494(2dcase) (necessity of sounding bell); 262Mass 519, 160NE529; NJSup 135A820; 30 OhA411, 165NE373.

926-27 212Ala638, 103S867 (duty of warning or maintaining lights where place, during repairs to bridge over cut, was made dangerous by darkness); NH 149A602.

926-27½-New. Until company knows of danger in cases where it was not bound to know no liability attaches for the failure to warn a passenger. 215Ky 536, 286SW776.

926-27⅓-New. Practice of warning passengers seen to undertake to leave moving street car does not establish duty to warn. 83NH136, 139A370.

926-27¼-New. A conductor of an open street car does not have the duty of warning a passenger undertaking to leave the car before it stopped, although she may have thought it had stopped. 83NH136, 139A370.

926-28 [b] (4) Carrier has right to choose which exit passenger shall use. 220AppDiv503, 221NYS686.

926-32 83NH136, 139A370, 373 [cit CJ].

928-42 202 Iowa1090, 211NW250, 251 [citCJ]. [b] 20SaskL582, [1926] 3DomLR992, [1926] 2WestWkly588.

929-43 43F(2d)715.

931-61 5LaA410, 411 [citCJ]; 220AppDiv503, 221NYS686; 290Pa365, 138A 852. [f] **Passenger voluntarily riding in baggage car** is not entitled to assistance in boarding same and cannot recover for injuries received in entering car without assistance of railroad employees. TexCivA 283SW186.

931-63½-New. Carrier need not anticipate the disabilities or needs of passengers requiring assistance in alighting from train. 22AlaA180, 114S288.

932-75 TexCivA 292SW966.

932-76 217Ala1, 114S290, 291 [quotCJ] 55ALR835 (passenger with baby and baggage); Iowa 230NW390; 56ND407, 217NW662, 664 [quotCyc]; 290Pa365, 138A852; TexCivA 292SW966. [c] **Woman carrying baby.**–217Ala1, 114S 290, 55ALR835.

933-77 NH 149A602.

933-78 177Ark199, 5SW(2d)930, 59 ALR936. [b] (3) Disability need not arise from physical or mental infirmity alone. 217Ala1, 114S290, 55ALR835.

933-79 290Pa365, 138A852.

933-80 22AlaA180, 114S288.

933-80½-New. Passenger's disability, imposing duty to assist, need not arise from physical or mental infirmity alone but may arise from encumbrance of baby and baggage. 217Ala1, 114S290, 55ALR835.

933-82 227Ky841, 14SW(2d)174; TexCivA 283SW622. [c] **Carrier may be liable for injuries caused by icy steps.**–311 Mo 604, 279SW115.

933-83 [a] See also Man [1928] 3DomLR570.

934-85 Mass 168NE171. See also 6LaA 139.

934-86 220AppDiv503, 221NYS686.

934-87 TexCivA 270SW1038.

934-89 TexCivA 283SW622. [b] TexCivA 283SW622.

934-91 134SC185, 132SE47.

935-97 212Ky723, 280SW89; 262Mass 308, 159NE513; NJ 141A168; 134 Okl 251, 273P243.

936-4 MoA 256SW538.

936-5 212Ala638, 103S867.

937-14 But see 88 IndA117, 163NE527.

938-19 89PaSuper592.

939-28 290Pa130, 138A89.

940-31 212Ala638, 103S867.

941-40 Mass 168NE171; 142Wash546, 253P791.

941-40½-New. A carrier is not bound to stop at the usual place for discharging passengers provided a safe exit is afforded. 103Conn641, 131A396.

941-40⅓-New. A street railroad is not negligent in stopping a car at a place when necessity required it. 221Ky424, 298SW1105.

941-40¼-New. A street railway stopping a car at other than the usual place is not liable for injuries to a passenger by an automobile. 221Ky424, 298SW 1105.

941-40⅕-New. A carrier need not announce the arrival or stop the train at a flag station nor call the name thereof, without notice of passenger therefor, 222Ky302, 300SW912.

941-40⅙-New. , and the sale of a ticket to such station is not notice that the passenger would take that train. 222Ky 302, 300SW912.

941-40⅐-New. That many trains stop at a flag station is immaterial in an action for injuries in alighting from a moving train thereat. 222Ky302, 300 SW912.

942-45 319Mo 233, 3SW(2d)371.

943-51 215Ala254, 110S316; 319Mo 233, 3SW(2d)371 (which duty is continuing till safe exit).

945-64 102CalA58, 282P525; 103Conn 641, 131A396; 201 Iowa1302, 207NW 602; 171Minn31, 213NW43; 157Miss 439, 128S327; 26 OhA359, 159NE580. [h] **Due care shown.**–Wash 288P247.

945-66 [b] **Motorman backing car to take up passenger** could rely on passenger's taking natural precaution for safety. 300Pa189, 150A612(2dcase).

945-67 [c] **When signaled at place where not scheduled to stop** (1) it is not duty of motorman to pause in duties and indicate that pedestrian cannot board car. 144Va210, 131SE200. (2) And it is not his duty to follow her movements unless he had reason to believe she would place herself in position of danger. 144Va210, 131SE200. [d] **Mere waiving of hand by pedestrian** at rear end of car will not impute knowledge to motorman that pedestrian expects to board car at place it is not scheduled to stop. 144Va210, 131SE200. [e]**No duty is imposed on conductor to look out for passenger attempting to** board at point where car is not scheduled to stop. 144Va210, 131SE200.

945-68 [a] **Motorman is chargeable with knowledge** of additional danger of discharging and taking on passengers elsewhere than on street corners. 157 Miss439, 128S327. [b] **Duty to warn alighting passenger of danger** of passing vehicles devolved on railroad company at unusual stop. 157Miss439, 128S327.

945-69½-New. Two-way traffic established by a city operating a street railway on half of street alone does not necessarily create a dangerous situation. 144Wash188, 257P393.

945-70 [f] **If there is no reason to anticipate harm,** carriers are not required to stop exactly at same point each time, and passengers may be permitted to alight, though car has gone beyond ordinary point. 290Pa365, 138A852.

946-71½-New. Carrier must not stop cars for persons to alight at places manifestly dangerous. 286Pa221, 133A228.

946-71⅓-New. Effect of ordinance regulating movement of vehicles. TexCivA 286SW578.

946-73 216Ala455, 113S403; 171Minn 31, 213NW43; 105WVa60, 141SE440.

947-76 254Mass157, 149NE607.

947-79 110Conn625, 149A127; 254Mass 157, 149NE607; Mass 165NE658; Mass 172NE862; 92PaSuper242; 97PaSuper 323; [b] 265Mass589, 164NE441(2d case).

947-80 NJSup 132A236.

948-84 216Ala455, 113S403; 2LaA349; 97PaSuper323. [e] **Effect of signal.**–258 Mass257, 154NE546. [f] **Street railway company may assume passengers boarding or leaving car will use reasonable care to protect themselves** from injury by emergency stopping or starting. 110 Conn625, 149A127.

950-96 TexCommnA 283SW777.

950-97 109Conn221, 146A494(2dcase); 3LaA248, 249 [quotCJ].

951-2½-New. Nor is it negligent to slow down a car while rounding a curve or on a crossing and increasing speed again after the curve or crossing is passed, as such act is not an invitation to become a passenger. 69CalA590, 231 P1008.

951-3 212Ala638, 103S867; 103Conn 641, 131A396; 339 Ill 94, 170NE845. [j] (2) In such case it is duty of motorman to wait until alighting passengers have reached place of safety before starting car around corner. 253 IllA498. (3) Duty to exercise care is not affected by fact that alighting passenger, provided with transfer, intended to visit store before continuing journey. 253 IllA498.

952-5⅓-New. and the company is not responsible for peril incurred by a passenger after the car has stopped and the passenger safely alighted. 201 Iowa 1302, 207NW602.

952-7½-New. A street car company owes no affirmative duty to a passenger who has passed from a car in safety to a public street. 201 Iowa1302, 207NW 602.

953-19 232Ky285, 23SW(2d)272; MoA 293SW1051. [b] But see MoA 293SW 1051.

953-22 290Pa365, 138A852.

954-24 194Wis305, 216NW489 (inspection of tire of bus held sufficient).

954-30 149Va549, 141SE753.

955-33 149Va549, 141SE753.

955-35 292Pa200, 140A877, 878 [cit CJ].

955-37 292Pa200, 140A877, 878 [cit CJ]. [b] **Window in passenger car or bus** is "appliance of transportation" as to which carrier should adopt every reasonable known safeguard. 300Pa474, 150A897.

956-46 CalA 284P1041; MoA 293SW 1051.

959-63 179Ark444, 16SW(2d)466; 242 IllA384, 388 [citCJ]; 12LaA91, 124S538; 152Md427, 137A30; 255Mass33, 150NE 850; 256Mass217, 152NE239; 308Mo 1, 271SW48; 216AppDiv623, 216NYS163. [d] (7) Wet floor of street car. Mass 165 NE658. (8) Fruit peelings on floor of car in absence of showing that employees knew of their presence or that they were there for such time as to impute notice. 222MoA1220, 5SW(2d)101. [k] **Obstruction in aisle of car.**–205 Iowa

1077, 217NW434. [l] **Bus company has been held liable** where tire blew out causing bus to overturn. 13LaA27, 127 S57.

959–64 28F(2d)563; 205 Iowa940, 219 NW60, 61 [citCJ], 58ALR687.

960–65 242 IllA384, 388 [citCJ]; 59 OktL609, [1927] 1DomLR259; Sask [1930] 4DomLR543.

960–72½–New. platforms of street cars, 308Mo 1, 271SW48.

960–72½–New. doors of mail cars, 152 Md427, 137A30.

960–74½–New. chains or other safety devices to prevent motor vehicles from skidding, 172Minn516, 215NW852.

961–78 216AppDiv623, 216NYS163.

961–80 NJ 150A401(2dcase); 216App Div623, 216NYS163.

961–81 248 IllA26. See also 216App Div623, 216NYS163.

961–81½–New. It is the train men's duty to close the vestibule doors immediately on train's leaving the station. 13F(2d)34.

961–84 205 Iowa940, 219NW60, 61 [cit CJ], 58ALR687.

962–87 21F(2d)1000; 105NJL300, 144 A305. [c] **Knowledge of dangerous condition** or duty to know thereof in exercise of reasonable care for sufficient length of time before accident to enable carrier to remove same is essential to recovery. 21F(2d)1000.

962–88 255Mass33, 150NE850; 175 Minn96, 220NW429.

962–90 205 Iowa940, 219NW60, 61 [cit CJ], 58ALR687. [b] **Liability for injury in toilet rooms.**–205 Iowa940, 219NW 60, 58ALR687 (not liable for injury to passenger fainting and coming in contact with steam pipes).

963–94 292Pa200, 140A877; 47RI 206, 132A8. [g] **Inspection.**–47RI 206, 132A 8. [h] **Elevator company** may be held liable for injuries by way of indemnity to hotel company. 203 Iowa1152, 211 NW423.

963–96 87CalA371, 262P459 (proprietor is not relieved of liability by statute requiring him to employ inspector holding official certificate of competency).

963–97 292Pa200, 140A877.

963–2 24F(2d)671; 31F(2d)976 (no speeding or jolting); NJ 141A168; 19 OhA370. [c] (3) Acceleration of speed of car while it is in motion is not negligence. 254Mass157, 149NE607. [o] **Duty to give statutory signals** to warn persons on tracks looks to safety of passengers on train as well as of persons on tracks. 153Tenn84, 282SW376. [p] **Taxicab driver's duty to observe rules concerning one-way streets.**–Mass 172NE612. [q] **Shunting car** without lookout into passenger crossing tracks is negligence. Utah 290P759.

964–3 11LaA93, 120S76; 294Pa277, 144A103. [k] **Overturning of autostage through negligence of driver** is not within rule and is not risk assumed by passenger. 82CalA226, 255P279. [l] **Passenger assumes risks** from usual movements of train. 27F(2d)699 [certiorari granted 278US590, 49SCt27, 73Led523 (6thcase)] [m] **Motorman's failure to sound gong is not** negligence where bus collided with lighted street car. 50RI 478, 149A375.

965–11 135 Okl 53, 273P988; Tex CommnA 276SW641. But see 220App Div466, 221NYS623. [a] **Failure to furnish person to keep aisle free from obstruction** may be made basis of negligence of street car company. Tex CommnA 276SW641.

965–12 TexCommnA 276SW641 (obstruction should have been anticipated at Christmas season).

965–16 213Ky831, 281SW1018, 1020, 45 ALR1537 [citCJ]; 218MoA306, 273SW 1104. [b] (2) NJSup 146A587(1stcase). (5) Failure to equip car door with door check is not negligence which would make it liable for injury to passenger caused by slamming of door on finger. 142Va96, 128SE538.

966–17 [a] **Passenger placing hand on fully open door to maintain equilibrium** may not recover from subway company for injury to finger caught between casing and door as it came forward several inches and then slid back into casing. 126Misc452, 214NYS71.

966–18 213Ky831, 281SW1018, 1020, 45 ALR1537 [citCJ].

966–25 [b] (2) Mo 276SW26, 42ALR 1319 (while car standing still).

967–26 105NJL274, 145A5.

967–29 Ark 31SW(2d)756 (notice of plaintiff's position in box car); 245NY 640, 157NE890; 223AppDiv517, 228NYS 505; 19 OhA370.

968–32½–New. The duty of a motorman is to exercise the care of an ordinary prudent man under the circumstances. 214AppDiv652, 212NYS309 (as matter of law).

968–32¼–New. This implies that under differing circumstances a corresponding different conduct is requisite. 214AppDiv652, 212NYS309.

968–32¼–New. Where there was no stop street sign at intersection of through traffic street driver of taxicab is not required to stop at such intersection as regards liability to passenger for collision. 132 Or161, 285P219.

968–34 [g] **Auto-bus driver approaching railway crossing coincidently with railway car** (1) must presume that motorman of car will continue over crossing without slowing down. 82CalA503, 255P868. (2) In such case it is continuing duty of auto-bus driver to use reasonable caution in protecting his passengers from collision. 82CalA503, 255 P868.

971–53 92PaSuper251. [a] (2) Motorman on interurban car has no right to assume that by sounding warning at crossing vehicle having right of way will yield. 216Ky407, 287SW926.

971–54 10LaA91, 119S908.

972–57 50RI 478, 149A375 (speed of street car running eleven miles an hour may not be excessive).

972–60 219Ala162, 121S543.

973–63 317Mo 181, 296SW755.

973–66 250 IllA475; 178Minn561, 228 NW154; Mo 273SW110; 317Mo 141, 296SW428.

974–67 228Ky219, 14SW(2d)780; 259 Mass226, 155NE871.

974–68 265Mass589, 164NE441(2d case); MoA 26SW(2d)50.

974–69 11LaA93, 120S76; 11LaA1, 123 S135; 8LaA463; 252Mass418, 147NE 824; 254Mass157, 149NE607; 256Mass 17, 152NE64; 259Mass226, 155NE871; 261Mass230, 158NE669; Mass 165NE 658; 218MoA306, 273SW1104; 286Pa 465, 134A376; 92PaSuper242; 68Utah 323, 249P1064; 142Va96, 128SE538 (passenger assumes danger incident to lurch going around curve). But see 317Mo 141, 296SW428. [a] (2) NJSup 132A500.

975–71 MoA 7SW(2d)719. [a] (3) Motor bus company is not liable to passenger injured when driver reduced speed to avoid collision with vehicle about to be overtaken which suddenly turned in violation of warnings. WVa 152SE776.

976–80 [a] **Driver of motor bus must have car under such control** and drive at such speed that he can stop in emergency without injuring passengers. 32 OhA93, 167NE606.

976–80½–New. An ordinance providing for the stopping of a car within the shortest time and space possible upon the appearance of danger to persons on foot or to vehicles does not lessen or abrogate safeguards of passengers under the common law. 310Mo 696, 276 SW64.

978–92 [a] **Defective door** is proximate cause of injury to postal clerk assisting employees to close door since attempting to close door is use for which it was intended. 152Md427, 137A30.

978–98½–New. Where street railway detains passenger upon a car several hours after an accident without rendering aid, such carrier has been held liable. TexCivA 288SW582.

978–2 274US65, 47SCt491, 71Led929; 6LaA778; 13LaA257, 127S753; 152Md 427, 137A30; 26 OhA359, 159NE580; TexCivA 286SW578; 142Va96, 128SE 538. See also 94CalA303, 271P134. [c] 215Ky536, 286SW776. [h] **Failure of bus driver to turn off track in time** to avoid collision may be proximate cause. 50RI 478, 149A375.

979–3 [b] **Causa sine qua non.**–72Mont 594, 235P330.

979–4 Mass 168NE171; MoA 7SW(2d) 460 (statement of brakeman that train would not move held proximate cause); TexCivA 286SW578; TexCivA 21SW (2d)24.

979–5 218Ala586, 119S625, 63ALR1; 152Md105, 136A50; 221MoA1123, 298 SW107; 116 Oh448, 156NE598; 292 Pa200, 140A877 (open front on elevator). [b] (2) 218Ala586, 119S625, 63 ALR1.

980–6 279US310, 49SCt300, 73Led706; 218Ala586, 119S625, 63ALR1; 248NY 339, 162NE99; 23 OhA493, 155NE243. [b] (3) Unforeseen assault by fellow passenger is not proximate consequence of carrier's negligence in failing to stop when signaled. 234Mich42, 207NW907. [h] **Vehicle passing behind car failing to stop to take on passengers.**–TexCivA 286SW578.

981–8½–New. A defective mail catcher bar injuring a mail clerk who was repairing it without authority is not the proximate cause of such injury. Tex CivA 277SW776.

981–9 218Ala586, 119S625, 63ALR1; 224 IllA42 (where negligence of motorman and truck driver combined); 159 La519, 105S606 (negligence concurring with that of water board in leaving pipes too near track); 10LaA641, 120S 801; 116 Oh448, 156NE598; 128 Or 542, 274P915.

982–10 TexCommnA 293SW554.

982–11 159La519, 105S606.

982–13 22AlaA199, 114S15 (acts of conductor held relevant in action for damages for sale of wrong ticket).

983–15 211Ky774, 278SW116; 315Mo 987, 288SW777.

983–18 315Mo 987, 288SW777.

983–23 315Mo 987, 288SW777.

984–29 315Mo 987, 288SW777.

985–33 [b] (2) Passenger falsely accused by conductor of trying to ride on wrong ticket cannot recover substantial amount as damages for mental suffering. 146Miss394, 111S588.

987–38 140Miss410, 105S864 (insulting and offensive manner of conductor in refusing to back train to station passed held not ground for punitive damages); 94PaSuper121.

987–40 37GaA236, 139SE589.

988–41 TexCivA 18SW(2d)754.

988–42 146Miss394, 111S588; 101WVa 268, 132SE739.

988–43 15 OhA437.

989–44 15 OhA437.

990–52 26F(2d)403.

992–64 TexCommnA 12SW(2d)163.

992–70 Mo 271SW500; 220MoA1, 285 SW112. [a] (1) 168Ark1168, 271SW 452. (6) 55ND104, 212NW776. (19) Eighty-five thousand dollars. 315Mo 987, 288SW777. [b] (9) TexCivA 10 SW(2d)767. (10) 197Wis513, 222NW 792. (12) 220MoA1, 285SW112. (40) Thirty-five thousand dollars. 315Mo 987, 288SW777. (41) One thousand five hundred dollars actual damages for assault of passenger by conductor causing permanent injuries and impaired earning capacity. TexCivA 18SW(2d)754.

994–71 [a] (12) Eighty-five thousand dollars to thirty-five thousand dollars. 315Mo 987, 288SW777.

995–77 255Mass33, 150NE850.

995–78 [a] (2) Purpose of contract requiring notice is to give carrier opportunity to investigate while facts can be easily obtained. 220MoA294, 286SW 439.

996–82½–New. The duty of a caretaker accompanying cattle in an interstate shipment to give written notice of personal injury sustained is determined under common law. MoA 8SW(2d)103.

996–86 279US320, 49SCt329, 73Led711.

996–89 [c] **In Georgia.**–162Ga616, 134 SE605.

996–92½–New. All railroad companies, in Georgia, are residents, for purposes of suit, in every county through which the road runs. 162Ga616, 134SE605.

997–95 [b] **Insurance company indem-**

nifying transportation company against damages for injury to passenger cannot be joined with company in action for such injuries. 100WVa703, 131SE548. [c] **In action against taxicab company for injuries sustained when street car struck rear of cab,** it was held that defendant cannot have street car company joined as defendant in absence of clear showing of liability over. 218AppDiv 224, 218NYS167.

997-1½-New. Liability insurance company, indemnifying carrier against liability for injuries negligently inflicted upon passenger, cannot be joined in action against carrier for such injuries, unless policy expressly or by necessary implication so provides. 99WVa456, 129 SE478.

997-1½-New. Statute, requiring applicant for certificate of convenience to file with state road commission a liability insurance policy, does not authorize joinder of indemnity company with carrier by person claiming to have been negligently injured while being transported by carrier. 99WVa456, 129SE 478.

997-1¼-New. A liability insurance policy, providing that it shall constitute direct liability to any person injured by a carrier whether the action is brought against insured alone or jointly with insurer, refers only to an action on an implied contract. 103WVa69, 136SE604.

997-1½-New. In an action by a passenger against a bus company, the latter's insurer to whom plaintiff executed a release of claim for damages and assigned rights of action against others is held not a necessary party. TexCivA 4 SW(2d)1003.

997-3 [b] (4) Complaint in action by street car passenger to recover for injuries sustained in collision between car and express company's wagon held to allege concurrent negligence of both defendants. 174Minn294, 219NW179.

998-6 LaA 124S685 (cause of action under doctrine of last clear chance). See also 96Fla375, 118S211. [a] (10) 39GaA216, 146SE516. (27) By overturning of stage coach. 68CalA494, 229 P885. (28) Discharging passenger at dangerous place. TexCivA 18SW(2d) 854. [b] (4) When fire truck struck trolley. 199Wis168, 225NW821.

998-7 171Ark103, 283SW31.

999-9 [c] 104WVa417, 140SE340 (too high degree of care).

1000-13 218Ala541, 119S672 (allegation held sufficient); 198NC688, 153SE264 (complaint held demurrable).

1000-16 1LaA601.

1001-21 17F(2d)748; 218Ala541, 119 S672 (allegation held sufficient); 222 Ky302, 300SW912 (petition held demurrable); LaA 124S685; Mo 276SW26, 42ALR1319, 221MoA1, 296SW473; 10 PaDist&Co 207; 139SC200, 137SE682. [b] (9) That defendant's servants negligently operated train in such manner as to throw plaintiff violently against loose screen projecting from side of car as proximate consequence of which he was injured. 212Ala690, 103S872. (10) Other allegations held sufficient. TexCivA 274SW295; TexCivA 4SW(2d)1003. (11) Complaint in action for damages for humiliation from sale of wrong ticket. 22AlaA199, 114S15. (12) In action against carrier and brick company whose servant opened switch. 318Mo 502, 300SW479. (13) Failure to give customary warning of starting of train. TexCivA 30SW(2d)1062. [i] **Joint liability.**-144Miss326, 109S796. [j] **Allegation held to charge specific negligence.**-MoA 26SW(2d)866.

1002-23 318Mo 1190, 3SW(2d)241 (elevator); MoA 282SW487; 221MoA1, 296 SW473; 115 Or656, 239P825. [a] See also 311Mo 66, 277SW913.

1003-28 320Mo 371, 8SW(2d)11.

1003-30½-New. Allegations as to speed, stopping, and signaling are held immaterial in a suit by one in safety zone, struck by rear end of car. 23 OhA448, 155NE149.

1003-30⅓-New. Allegations of negligence are not objectionable because it occurred at different time from time of accident. 219Ala162, 121S543.

1004-36 139SC200, 137SE682. See also 219Ala162, 121S543.

1005-39 IndA 170NE341 (complaint held not demurrable).

1006-42 15 OhA437 (corporation ought to have known agent to be unfit and likely to commit such acts).

1006-42½-New. A petition in an action against a railroad company for indecent assault by its employees upon a person while in its depot waiting to take passage on a train of another company does not state a cause of action where it does not show any agreement whereby defendant had obligated itself to care for passengers of such other railroad. 222 Ky190, 300SW593.

1006-48½-New. Where a petition contains a general allegation of negligence, a specific allegation of premature starting may be treated as surplusage. 12 LaA586, 122S903.

1007-53 85IndA62, 152NE877; 308Mo 617, 273SW1071 (need not allege jerk was "unusual" or "extraordinary").

1008-58½-New. A petition that, while a passenger was alighting from a car while in motion and after the door had been opened, the speed of the car was suddenly checked throwing him to the street is sufficient without alleging that such movement was unusual. 220 MoA1, 285SW112.

1009-66 85 IndA62, 152NE877.

1009-69 [a] TexCivA 31SW(2d)337.

1010-70 218Ala586, 119S625, 63ALR1. [a] (4) Petition alleging violation of ordinance requiring street car to stop where injury was received from passing vehicle is bad on general demurrer, no causal connection between negligence and injury being shown. TexCivA 286 SW578. [e] 68CalA494, 229P885.

1010-72 212Ala590, 103S872; 218Ala 586, 119S625, 63ALR1.

1011-83 221MoA559, 285SW134.

1011-87 [c] **Affirmative defense is presented** under code by allegation in answer that accident injuring passenger was due solely to third party's negligence. 85CalA216, 258P1107.

1012-99 Nebr 228NW364; 143Wash 127, 254P1086; 150Wash278, 272P736.

1013-4 See also 28F(2d)977.

1013-12 171Ark103, 283SW31. [j] **Passenger injured by collision** between street cars need not prove specific act of negligence causing collision. TexCivA 292SW638. [k] **Result of negligence** must be alleged and proved even where res ipsa loquitur applies. 90CalA555, 266P297.

1014-13 318Mo 502, 300SW479 (burden unaffected by allegations of reply).

1014-14 105NJL1, 143A743.

1015-21 285Pa489, 132A575. [a] (3) To same effect see 308Mo 617, 273SW 1071.

1016-23 261Mass233, 158NE668; 218 MoA306, 273SW1104.

1016-26 MoA 296SW1043.

1017-27 17F(2d)748.

1017-31 279US310, 49SCt300, 73L ed 706.

1018-37 222Ky302, 300SW912; 222MoA 1220, 5SW(2d)101.

1018-38 [a] (13) Other instances. 89 PaSuper316. [c] **No variance.**-Mo 20 SW(2d)34.

1019-44 [a] (23) Allegation in petition of descending elevator and proof of ascending elevator held variance. 318Mo 1190, 3SW(2d)241.

1020-51 216AppDiv623, 216NYS163; 299 Pa558, 149A877.

1021-53 216AppDiv623, 216NYS163.

1021-54½-New. The burden is on the passenger to prove the injury received in an accident, 284Pa59, 130A398 (2dcase).

1021-54⅓-New. and that the injury resulted from such accident. 284Pa59, 130 A398(2dcase).

1021-57 69CalA770, 232P491 (in action for assault by motorman, burden is not on plaintiff to show blow struck was not in self-defense).

1021-58 214Ala597, 108S509.

1021-59 85CalA216, 258P1107; 256 Mass217, 152NE239.

1021-60 82CalA226, 255P279; 256 Mass217, 152NE239. [a] CalA 255P 279.

1022-61 214Ala597, 108S509; 13LaA 625, 127S655; 93PaSuper63.

1022-62½-New. A street railroad is presumed to know that a person standing in the safety zone is in a position of danger on a car rounding a curve. 200 Iowa597, 203NW705, 41ALR368.

1022-62⅓-New. The burden is on a carrier to prove an affirmative defense that the accident was due to a third party's negligence. 85CalA216, 258P1107.

1022-65 CalA 268P451; 213Ky831, 281SW1018, 45ALR1537; 3LaA248; 255Mass140, 150NE891; 256Mass217, 152NE239; 315Mo 987, 288SW777; 218 MoA306, 273SW1104; 72Mont594, 235 P330; 216AppDiv623, 216NYS163; 220 AppDiv466, 221NYS623; 285Pa489, 132 A575; 294Pa277, 144A103; 93PaSuper 63; TexCivA 277SW776; 149Va549, 140SE648; Wis 232NW540. [b] (2) No presumption of negligence from mere fact that passenger slipped on banana peel in aisle. 220AppDiv466, 221NYS 623.

1022-66 274US65, 47SCt491, 71L ed 929; 279US310, 49SCt300, 73L ed706; 29F(2d)735; 220Ky552, 295SW866; 256 Mass217, 152NE239; 319Mo 8, 4SW(2d) 762; 72Mont594, 235P330; TexCivA 277SW776; TexCivA 23SW(2d)512.

1023-67 10LaA91, 119S908. [a] **Taxicab driver's violation of rule** by driving in prohibited direction is evidence of negligence with respect to passenger. Mass 172NE612.

1023-71 71CalA82, 234P863; 12LaA 586, 122S903; 11LaA1, 123S135; 3LaA 64; 7LaA686; 308Mo 1, 271SW48; Mo 276SW26, 42ALR1319; MoA 9SW(2d) 650.

1023-73 [a] **Rule relieves only of necessity of alleging and proving specific negligence,** and not of proving negligence. 315Mo 987, 288SW777.

1024-74 3LaA514; 255Mass140, 150NE 891; 308Mo 1, 271SW48; 315Mo 987, 288SW777; 218MoA306, 273SW1104; MoA 26SW(2d)50; 216AppDiv623, 216 NYS163; 130Misc570, 224NYS420; 115 OhSt262, 152NE726 (glass falling from street car window and injuring passenger boarding car); 290Pa365, 138A852; 68Utah323, 249P1064, 1066 [citCJ]. [b] (3) 216Ky825, 288SW750. (8) Where passenger caught heel of shoe in groove of rail when alighting from street car. 290Pa365, 138A852. [f] **Evidence held not to warrant application of rule of res ipsa loquitur.** 242NY251, 151NE442.

1024-75 279US320, 49SCt329, 73L ed 711.

1024-76 Mass 165NE658; 290Pa365, 138A852. Contra 168Ark966, 272SW 360.

1025-77 216AppDiv623, 216NYS163. Contra 308Mo 1, 271SW48 (where defendant's heel caught and she fell from street car steps).

1025-78 213Ky831, 281SW1018, 45ALR 1537. [a] 291Pa564, 140A496.

1025-79 27F(2d)699 [certiorari granted 278US590, 49SCt27, 73L ed523(6th case)]; 68CalA507, 229P890 (proof of derailment of train, or of automobile leaving highway and going into gulch, is sufficient to make doctrine applicable); Iowa 228NW320 (rule applied to motorbus carriers); 213Ky831, 45ALR 1537; 5LaA146; 5LaA156; 255Mass140, 150NE891; 175Minn96, 220NW429; 308Mo 1, 271SW48; 221MoA537, 282SW 1037, 1042 [citCJ]; MoA 293SW1051; 242NY251, 151NE442; 135 Okl 53, 273P 988; 113 Or544, 233P540; 285Pa489, 132A575; 286Pa166, 133A158; 291Pa 211, 139A878; TexCivA 274SW295; 68 Utah323, 249P1064, 1066 [citCJ]; 149 Va549, 140SE648; 105WVa156, 141SE 622. [i] **In Iowa.**-228NW320.

1026-81 316Mo 474, 290SW425.

1027-87 [a] (3) Proof of injury to passenger, caused by operation of train, makes prima facie case of negligence. 168Ark966, 272SW360. (4) Under Ar-

kansas statute injury to passenger by moving train is prima facie evidence of negligence. 168Ark146, 269SW51.

1028–91 4LaA544; 150Va108, 142SE393. See also 263Mass215, 160NE797.

1028–92 143Miss523, 108S496; 115 Oh St262, 152NE726.

1028–93 230AppDiv681, 245NYS654.

1028–95 24F(2d)671; 81CalA443, 253P970; 90CalA249, 265P839; 90CalA555, 266P297 (evidence held not to preclude application of doctrine); 143Va903, 129SE493, 45ALR280; 149Va549, 141SE753. But see 220MoA1122, 296SW457.

1028–95½–New. An injured passenger does not lose right solely on doctrine of res ipsa loquitur, by introducing evidence tending to show specific acts of negligence, where the evidence does not clearly show what caused the accident. 220MoA1122, 296SW457.

1028–97 68CalA507, 229P890 (pleading sufficient to permit application of doctrine); 81CalA443, 253P970; 82CalA226, 255P279 (where allegations are specific only); MoA 272SW1051; MoA 282SW487; 219MoA683, 284SW840; MoA 26SW(2d)50. But see Iowa 228NW320.

1029–98 82CalA226, 255P279 (where there are both specific and general allegations of negligence).

1029–99 MoA 26SW(2d)869. See also 311Mo 66, 277SW913.

1029–2 72Mont594, 235P330.

1029–4 82CalA226, 255P279 (where cause of accident is not shown as definite fact); 219MoA683, 284SW840; MoA 22SW(2d)199.

1029–4½–New. Nor is he deprived of the benefit of the doctrine by offering proof, not attempting to explain the reason for the accident, but merely to show topography of the country where the accident occurred and the course pursued by, and the position of, the vehicle after the accident. 68CalA507, 229P890.

1029–6 82CalA226, 255P279; 115 Or656, 239P825 (automobile stage); 153 Wash549, 280P50. But see 68CalA494, 229P885.

1030–7 316Mo 474, 290SW425.

1030–8½–New. But skidding of an automobile or a motorbus on the street while going eight or ten miles per hour cannot be presumed to result from negligence. 219MoA683, 284SW840.

1030–8¾–New. The doctrine has been held applicable where an alighting passenger caught heel in the platform of a street car. 308Mo 1, 271SW48.

1030–10 MoA 293SW1051, 1054 [cit CJ].

1030–16 Mass 169NE780 (doctrine not applicable); 310Mo 696, 276SW64; MoA 282SW487; 219MoA683, 284SW840; MoA 9SW(2d)650.

1031–20 224AppDiv438, 231NYS306.

1031–23 117Nebr786, 222NW633; 68 Utah323, 249P1064.

1032–24 68Utah323, 249P1064.

1032–27 CalA 290P482; Iowa 228NW320 (collision between motor bus and automobile); Md 149A4; 220MoA1122, 296SW457; 104NJL371, 140A390 (public bus struck from rear by truck); 284Pa59, 130A398(2dcase); TexCivA 292SW638. But see 169Ark698, 277SW7.

[b] **Res ipsa loquitur doctrine applies** to passenger's injuries from collision caused by open switch connection to another railroad. 42F(2d)70.

1033–28 318Mo 502, 300SW479; MoA 297SW189. But see 299Pa558, 149A877.

1033–33½–New. In collision between bus and truck, no presumption of negligence arises as between defendants. Md 149A4.

1033–34 255Mass140, 150NE891; 94Pa Super191.

1033–36 255Mass140, 150NE891.

1034–38½–New. Where a passenger proved the accident was solely caused by a truck driver's negligence, there was no presumption of negligence by a bus driver requiring an explanation by the owners of the bus. 216AppDiv462, 215NYS478.

1034–42 Mass 172NE349; 315Mo 987, 288SW777; 221MoA621, 287SW813; 149Va549, 140SE648; Man [1927] 3DomLR519. But see 24F(2d)671.

1035–43 CalA 284P1041; Mass 172NE349 (burden of proof on plaintiffs); Mo 298SW51; 149Va549, 140SE648; Man [1927] 3DomLR519.

1036–45 But see 149Va549, 140SE648.

1036–46 149Va549, 141SE753 (showing of transverse fissure in defective rail throws burden on passenger to prove negligence).

1036–49 But see 149Va549, 141SE753.

1036–51 228Ky184, 14SW(2d)768; 232Ky285, 23SW(2d)272; 308Mo 1, 271SW48; 103NJL512, 138A377; NJSup 146A665(2dcase) (breaking of glass window); 286Pa166, 133A158; 300Pa474, 150A897. [b] (4) Doctrine of res ipsa loquitur is inapplicable where passenger's arm is injured by falling window in passenger coach, window not being under exclusive control of carrier. 213Ky831, 281SW1018, 45ALR1537. (5) Unexplained falling held not evidence of negligence. Mass 171NE664.

1037–53 [a] **Presumption from broken axle,** is rebutted by evidence of inspection shortly before accident that it was in proper condition at purchase, and that defendant was ignorant of cause. 256Mass217, 152NE239.

1037–55 13LaA27, 127S57 (bus tire blowing out); 105NJL274, 145A5.

1037–55½–New. In an action based on negligence in an elevated railway's operation of an escalator, plaintiff must prove affirmatively that the defective condition was due to the railway's act of omission. 255Mass571, 152NE94.

1038–62 170La95, 127S376(2dcase); 315Mo 987, 288SW777; 242NY251, 151NE442; 285Pa489, 132A575; 286Pa166, 133A158.

1038–64 68CalA507, 229P890 (pleading sufficient to permit of application of doctrine).

1038–65 170La95, 127S376(2dcase).

1038–66 27F(2d)699 [certiorari granted 278US590, 49SCt27, 73Led523(6th case)]; 104NJL371, 140A390 (overcome by uncontradicted proof to satisfaction of court).

1039–70 285Pa489, 132A575; TexCivA 30SW(2d)416.

1039–71 285Pa489, 132A575, 577 [cit CJ]; 291Pa211, 139A878, 879 [citCJ]. [a] 318Mo 1190, 3SW(2d)241 (presumption not requiring but authorizing verdict for plaintiff).

1039–72 But see TexCivA 30SW(2d)416.

1039–73 200Wis292, 227NW274.

1040–75 [a] **Proof of accident and injury alone** held insufficient. TexCivA 30SW(2d)416.

1040–76 221MoA537, 282SW1037.

1040–82 [a] **Proof that colliding cars** were those of street railway is held prima facie to show operation by company's agents. TexCivA 292SW638.

1041–87 But see TexCivA 272SW308.

1041–91 242IllA451; Md 149A4; 308Mo 617, 273SW1071; NJ 150A401(2dcase).

1041–92 10LaA297, 120S408(1stcase); 150Wash278, 272P736. [a] (12) Evidence as to box cars standing on home track did not contribute to injury. 215Ky663, 286SW929. (13) Other evidence held inadmissible. 218Ala586, 119S625, 63ALR1.

1041–92½–New. **In determining whether subsidiary was mere agency of defendant corporation or a separate organization,** the jury may consider how employees were hired and paid, signs on cars, and other significant facts. 217AppDiv504, 217NYS156 [rev on app].

1042–98 220Ky219, 294SW1030.

1043–3½–New. Evidence as to the amount of money collected by a bus company and a number of cars in use is competent to show that company was a carrier of passengers. 192NC700, 135SE788.

1044–13 214Ala15, 106S239.

1044–16 Md 149A4.

1044–18 315Mo 987, 288SW777.

1045–27½–New. Evidence that plaintiff suing carrier for conductor's assault, was aggressor in another fight is inadmissible. TexCivA 18SW(2d)754.

1045–34 [a] (3) In action by alighting passenger for injuries, evidence of preliminary suggestions as to preferable type of subway platform not binding defendant for fault in plan adopted is held rightly excluded. 259Mass323, 156NE844.

1046–39 [a] **Evidence held admissible.**–264Mass364, 162NE735 (conditions on other platforms at same station held competent on issue of defendant's knowledge in regard to behavior of crowding of passengers).

1046–45 Mass 164NE478(1stcase).

1047–49½–New. Where a passenger on a truck was injured by another truck, also owned by defendant, evidence of the owner's instruction to keep the tail boards up, not made in plaintiff's presence, is held inadmissible. NJSup 138A510.

1047–57 315Mo987, 288SW777.

1049–72 220Ala107, 124S231.

1049–73 CalA 290P491; Mass 169NE905. [a] (7) Where ordinance prohibited stopping on near side of street, evidence of special order by public safety director permitting such stop is inadmissible. 144Va496, 132SE334.

1050–78 Mo 276SW26, 42ALR1319.

1050–80½–New. Testimony of passenger as to purpose of trip is inadmissible. 222Ky302, 300SW912.

1050–80¾–New. Passenger's testimony that he did not know station was a flag stop is inadmissible. 222Ky302, 300SW912.

1050–80¼–New. Proof that station, at which passenger was injured in alighting from moving train, was flag station, is inadmissible. 222Ky302, 300SW912.

1051–83 117Nebr786, 222NW633. [b] **Evidence held inadmissible.**–117Nebr786, 222NW633.

1051–84 [c] (1) 231Ky713, 22SW(2d)108. (4) Speed of autobus quarter of mile from place of accident held not too remote. 85CalA216, 258P1107.

1052–87 155Miss765, 125S340.

1052–90 218Ala586, 119S625, 63ALR1.

1052–94 Mass 169NE905; TexCivA 270SW1038, 1039 [quotCJ]. See also 233Ky464, 26SW(2d)20.

1052–95 TexCivA 270SW1038, 1040 [quotCJ]. [a] (6) May not prove that no such accident had happened in many years, there being no showing of same conditions. TexCivA 270SW1038.

1053–96 109Conn221, 146A494(2dcase). [a] (5) That grooved rail in which plaintiff caught heel of shoe when alighting from street car was used constantly by pedestrians without injury may be shown. 290Pa365, 138A852.

1054–6 22OhA234, 153NE922. [a] (2) 171Minn31, 213NW43.

1055–15 292Pa200, 140A877 (other elevators as standard of comparison).

1055–19 109Conn221, 146A494(2dcase).

1055–24 315Mo 987, 288SW777; MoA 282SW525.

1056–28 233IllA432.

1056–29 [a] **Rule of company admissible** on question of credibility of testimony. 233IllA432.

1056–31 12LaA518, 124S781; 292Pa200, 140A877; 200Wis292, 227NW274. [a] (1) 82CalA226, 255P279 (overturning of automobile stage); 232Ky285, 23SW(2d)272; MoA 22SW(2d)199; 113Or544, 233P540; 115Or656, 239P825; 149Va549, 140SE648. (9) If from common experience accident would not happen without defect in car or roadbed, or carelessness in management, evidence of accident and plaintiff's due care are prima facie sufficient to establish liability where there is no evidence showing carrier not guilty of negligence. 256Mass217, 152NE239. [b] (2) To raise issue of discovered peril. TexCivA 31SW(2d)332.

1056–32 274US65, 47SCt491, 71Led929; CalA 268P451. [a] (1) 274US65, 47SCt491, 71Led929; 171Ark103, 283SW31; 37GaA236, 139SE589; 241Mich42, 216NW460; NJSup 135A820; 290Pa130, 138A89; 48RI301, 137A781; TexCivA 270SW1038. (6) Person boarding car at unsafe place. IndA 169NE478(2dcase). (7) Passenger in bus colliding with auto. Va 152SE357. [b] (1) 3LaA474; 12LaA692, 127S816; 254

Mass157, 149NE607; 216AppDiv623, 216NYS163.

1057–33 [a] (1) 20AlaA617, 104S559; 37GaA236, 139SE589; 254Mass186, 150 NE14. (15) To show plaintiff meeting passenger on station platform was not mere licensee. 176Ark1205, 28W(2d) 1112. (16) Other evidence held sufficient. 197Wis513, 222NW792. [b] (1) 252 IllA33; 256 IllA581. (8) To show fraud inducing cattle shipper to sign bill of lading containing caretaker's contract relied upon as defense. 220MoA 294, 286SW439.

1057–34 [a] (2) 125Misc863, 212NYS 291 (prima facie case of ownership established by appearance of name on car). (9) To warrant finding that defendant's agent furnished car in which plaintiff was riding when injured. 174 Ark1030, 298SW337. (10) That sidewalk surrounding subway station was within control of lessee traction company. 262Mass18, 159NE501. [b] (6) To show street car company owning majority of stock of subsidiary company operated latter in violation of statute. 244NY84, 155NE58.

1058–37 264Mass364, 162NE735; 295 Pa551, 145A602. [a] (1) 274US65, 47 SCt491, 71Led929; 42F(2d)611; 174 Ark1030, 298SW337; 35GaA765, 134 SE830; 258Mass389, 155NE267; Mass 172NE612; 77Mont85, 249P1043; 118Nebr459, 225NW232; 102NJL521, 133A788; 222AppDiv166, 225NYS412; 131Misc311, 226NYS388; TexCivA 286 SW536. (6) Other instances. IndA 170 NE341. [b] (1) 12LaA580, 126S272; 72Mont594, 235P330. (3) 216AppDiv 623, 216NYS163. (5) 254Mass157, 149 NE607. (19) Discoloration of banana peel held no evidence of elevator operator's negligence in not removing it or discovering it. 47RI206, 132A8. (20) Operating train at excessive speed. Mass 166NE633. (21) Other instances. CalA 289P665; 300Pa536, 151A19. [c] Evidence held to warrant finding of want of highest degree of care for passenger. 300Pa55, 150A153.

1058–39 Md 149A4; 285Pa489, 132A 575. [d] Evidence held sufficient.–68 CalA504, 229P889; 256Mass217, 152NE 239.

1058–40 [a] 35GaA765, 134SE830; 129 Misc156, 220NYS174. [b] 89PaSuper 326; 194Wis305, 216NW489.

1058–41 Wis 232NW540.

1059–42 284Pa521, 131A363.

1059–47 129Misc156, 220NYS174.

1059–49 [c] (1) 68CalA504, 229P889; [c] (1) 77CalA164, 247P212; CalA 290 P482; 35GaA765, 134SE830; 308Mo1, 271SW48; 77Mont85, 249P1043; NJ Sup 150A574; 298Pa256, 148A102. (5) Other instances. 12LaA562, 126S274.

1059–50 251 IllA169. [a] 23OhA493, 155NE243.

1059–52 [a] (1) 37GaA236, 139SE589; 335 Ill 164, 166NE530; NJSup 132A310. (9) To show crowded conditions of terminal at certain hours. 211Ky774, 278 SW116. (10) To warrant finding railroad's authorization or approval of dog's presence on premises. 37F(2d)652. [b] (16) To show that brick over which passenger stumbled had been allowed to remain on platform through negligence. 143Miss523, 108S496. (17) To show defendant constructed or maintained bridge or platform at point where defect existed. TexCivA 287SW71. (18) To show banana peel was on stairway through fault of carrier. 258Mass524, 155NE637.

1060–54 256Mass217, 152NE239. [a] (1) 107Conn236, 140A121; 308Mo1, 271 SW48; 104NJL34, 139A322; 132 Okl 107, 269P368; 117 Or598, 243P787 (defective brakes on autobus); 216AppDiv 623, 216NYS163. [e] Evidence insufficient to show liability of initial carrier after turning coach over to connecting carrier. TexCivA 272SW308.

1060–55 [a] (1) 194Wis305, 216NW489 (to show that tire of bus was not properly inspected).

1060–55 [c] Evidence held insufficient to show wreck was unavoidable accident. 13LaA27, 127S57.

1060–56 [a] (1) 172Minn516, 215NW 852 (operating auto-bus on ice covered hill); 24OhA317, 156NE235; 117 Or598, 243P787 (autobus); 48RI301, 137A781; 99WVa313, 128SE832. (3) 132 Okl 107, 269P368. (10) Mo 248W(2d)154. (11) Mass 172NE862. (17) To warrant finding that car was started in unusual and negligent manner. 252Mass418, 147NE 824. (18) To make prima facie case for recovery of damages. 224AppDiv 438, 231NYS306. (19) To warrant finding that railroad could have avoided accident if conductor had looked on both sides of track for presence of additional passengers. 151Va934, 145SE833. (20) To justify finding of negligence of train crew to gratuitous passenger in rounding curve at great speed. 28F(2d)977. (21) To authorize finding that, if defendant had exercised higher degree of care, collision could have been avoided. Mass 165NE113. [b] (1) 13F(2d)34; 256 Mass17, 152NE64; 216AppDiv623, 216 NYS163. (3) 11PaDist&Co87. [c] (1) MoA 26SW(2d)866. (8) Testimony of plaintiff, that car started with terrible jump and that she got sensation that floor of car was going to be torn from under her, is not description of physical fact, and standing alone is insufficient to show negligence in operation of car. 252 Mass418, 147NE824. [d] 87CalA371, 262P459. [g] Descriptive words.–254 Mass157, 149NE607. [h] Distance travelled by car after application of brakes held conclusive as to distance within which it could be stopped. 229AppDiv 361, 241NYS414. [i] Evidence that jerk or jolt was sudden, unusual and extraordinary and evidence that other passengers fell must be submitted to recover for injuries. 97PaSuper323.

1061–57 [a] (1) 178Minn561, 228NW 154. (4) To support judgment for death of plaintiff, who fell while mounting steps of coach. 227Ky841, 14SW(2d) 174. [b] (1) 246AppDiv623, 216NYS163. (4) To sustain recovery for injuries due to boarding train. NJ 130A454. (5) For death resulting from falling out of cab that suddenly lurched forward. 225 AppDiv181, 232NYS485.

1062–58 [a] 171Ark103, 283SW31; Man [1927] 3DomLR519. [b] 256Mass217, 152NE239.

1062–58½–New. or where an automobile ran off the highway; 68CalA504, 229P889.

1062–59 [a] (1) Ark 31SW(2d)756. (9) To show collision occurred. CalA 290P 482. [b] 223AppDiv517, 228NYS505; 94 PaSuper449.

1063–60 [a] (1) IndA 169NE478(2d case); TexCivA 292SW966. [b] (1) 256 IllA581; TexCivA 30SW(2d)1062. (5) To support verdict for pedestrian struck by car while attempting to board at place not regular stop. 144Va210, 131 SE200. (6) To show negligence in obstructing passageway. TexCivA 30SW (2d)1062. (7) To show negligence in failure to have employee assist passenger in boarding train. TexCivA 30SW(2d) 1062.

1063–61 258Mass389, 155NE267. [a] (1) 13LaA625, 127S655. [b] (1) 170 Ark346, 280SW354; 220MoA1, 285SW 112; 56ND407, 217NW662 (tripping on lap robe on floor of taxi); 290Pa130, 138A89. (12) To show prima facie case of negligence. 318Mo1190, 3SW(2d)241. [c] (1) 1LaA600; 7LaA743. (2) Mass 166NE633 (jumping from train to platform because of fear of train's defective brakes).

1064–62 [a] (3) In finding that alleged accident to plaintiff was caused by carelessness of operator of car. NJSup 144A 309. (4) Other instances. 35OhA204, 172NE409.

1064–63 10LaA341, 119S575. [a] (1) 207 Iowa862, 224NW28; MoA 282SW 487; 224AppDiv455, 231NYS385; 129 Okl 263, 264P621; TexCivA 276SW 460; TexCivA 8SW(2d)548. [b] (1) 261 Mass230, 158NE669. (4) Verdict for plaintiff cannot be sustained where passenger attempted to alight after train had started. NJ 144A187(1stcase).

1065–64 [a] 13LaA212, 127S119; 48RI 301, 137A781. [b] (1) 7LaA276; Mass 169NE905. (2) To show that plaintiff was struck by defendant's train while alighting from another train. 284Pa521, 131A363.

1065–65 [a] (1) Mo 208SW(2d)34. (4) To authorize jury to infer that conductor knew what was going on and cause of trouble between two passengers resulting in assault of one by the other. 122Kan652, 253P224. (5) To show that injuries could have resulted from assault. Mo 208SW(2d)34.

1065–66 [a] (2) 209Ky841, 273SW540.

1065–67½–New. , or for injuries to passenger alighting from jitney bus, NJSup 135A820.

1065–67½–New. or for injuries received by passenger when train was fired upon in Costa Rica. 274US65, 47SCt491, 71 Led929.

1065–67¼–New. Evidence has been held sufficient to warrant finding of serious and permanent injuries to passenger. TexCivA 285SW1104.

1066–71 CalA 286P433(2dcase); 35GaA 488, 134SE116; 242NY251, 151NE442; 103WVa194, 136SE855.

1066–72 20AlaA617, 104S559 (under scintilla rule); 85CalA216, 258P1107; 233 IllA539; 149Md625, 132A153; 252 Mass418, 147NE824 (contributory negligence held question for jury); 167Minn 40, 208NW533; 175Minn328, 221NW 232; 114Nebr458, 207NW937; NJ 151 A99(2dcase); 192NC287, 134SE855; RI 133A624. [a] (9) Negligence in permitting suit case to be placed in aisle of street car causing injury to passenger falling over it when car stopped for passengers to alight. TexCommnA 276SW 641. (10) For injury to passenger. 214 Ala597, 108S509. (11) For alleged wrongful ejection from train. 233 IllA 539. (12) For injuries from collision at street intersection. 149Md625, 132A153. (13) As to defendant's negligence resulting in injuries to passenger in head-on collision. TexCivA 286SW536.

1066–73 14F(2d)893; Mass 172NE349; 242NY251, 151NE442.

1067–74 35GaA488, 134SE116; 327 Ill 207, 158NE380; 242 IllA451; 149Md 625, 132A153; 262Mass18, 159NE501; 320Mo1239, 10SW(2d)933 (peremptory instruction not warranted); 242NY251, 151NE442; RI 133A624.

1067–75 230AppDiv654, 245NYS654.

1067–76 263Mass305, 160NE811; Mass 168NE171; Mass 168NE807; 220MoA 294, 286SW439; MoA 26SW(2d)50; NJ 149A758(2dcase); 299Pa558, 149A877 (gross negligence); 68Utah323, 249P 1064; 101WVa268, 132SE739 (punitive damages); BC [1930] 1DomLR790.

1067–77 233Mich150, 206NW494 (direction of verdict for plaintiff held to be proper); 229AppDiv361, 241NYS414.

1067–78 Mass 165NE497.

1067–79 242 IllA384; 125Kan506, 264P 1067; 171Minn34, 213NW57; 104NJL 371, 140A390; TexCivA 30SW(2d)1062.

1067–80 30F(2d)101; 175Minn96, 220 NW429; 221MoA1123, 298SW107 (while transferring); NJ 148A775; 242NY251, 151NE442; 132 Okl 107, 269P368 (civilian acting as mess sergeant for National Guard company en route to encampment).

1068–84 214Ala597, 108S511; 81CalA 443, 253P970; 110Conn625, 149A127; 149Md625, 132A153; 262Mass519, 160 NE259; 239Mich656, 215NW19; 167 Minn40, 208NW533; 155Miss765, 125S 340; 157Miss374, 128S96; 315Mo 987, 288SW777; MoA 297SW451; 103NJL 145, 134A650; 105NJL396, 144A803; NJSup 132A239; 105NJL274, 145A5; NJ 151A624; 242NY251, 151NE442; 86 PaSuper373; 139SC200, 137SE682; Tex CommnA 32SW(2d)641; 143Wash127, 254P1086; 103WVa194, 136SE855. [a] (1) MoA 282SW487 (under doctrine of res ipsa loquitur).

1069–85 115 Or656, 239P825.

1069–86 294Pa277, 144A103.

1069–87 295Pa199, 145A76.

1069–88 215Ky536, 286SW776; Tex CivA 294SW287.

1069–89 308Mo1, 271SW48; 242NY251, 151NE442; 115 Or656, 239P825.

1069–90 14F(2d)893. [a] (3) Question is for jury whether defendant was negligent when conductor required boy between thirteen and fourteen to place his heavy suit case in rack of passenger coach. 20AlaA617, 104S559.

1069–92 219Ky92, 292SW758. [a] Whether passenger's injured eye could

have been saved is for jury. 157Miss 374, 128S96.

1070–93 22AlaA180, 114S288; 150Va 108, 142SE393.

1070–94 20AlaA583, 104S344.

1070–95 213Ala492, 105S663; 321Mo 27, 10SW(2d)649.

1070–96 102CalA499, 283P375; 175 Minn328, 221NW232.

1070–97 CalA 284P1041; 231Ky713, 22 SW(2d)108; Mass 164NE624.

1070–98 Mo 20SW(2d)34.

1070–1 TexCivA 1SW(2d)754.

1070–3 NJ 151A99(2dcase).

1071–8 NJSup 146A665(2dcase) (boy throwing stones at train).

1071–9 221Ky97, 297SW1107 (evidence held insufficient for jury).

1071–10 37F(2d)652; NJSup 133A74; 192NC287, 134SE855.

1071–11 262Mass56, 159NE507; 192NC 287, 134SE855.

1072–12 TexCivA 270SW1038. [b] (1) Minn 230NW264 (failure to protect passenger from push). (4) Minn 230NW 264. (5) Evidence that platform was permitted to become wet and slippery is held sufficient for jury. 220Ky552, 295 SW866.

1072–15 MoA 282SW525 (res ipsa loquitur where train broke through bridge); MoA 293SW1051; 221MoA1, 296 SW473; 86PaSuper159. [c] **Negligence in failure to maintain safety appliance** on switch in proper condition is for jury. 42F(2d)70.

1072–16 215Ky536, 286SW776.

1072–17 Ala 130S786; 109Conn221, 146 A494(2dcase); 317Mo 181, 296SW755; 131SC423, 127SE559; 134SC185, 132SE 47; TexCivA 30SW(2d)1062; 141Wash 385, 250P409.

1073–19 43F(2d)715.

1073–21 258Mass257, 154NE546; MoA 18SW(2d)252; MoA 6SW(2d)976; 105 WVa60, 141SE440.

1074–23 TexCivA 19SW(2d)858.

1074–24 94CalA748, 272P346; 200 Iowa597, 203NW705, 41ALR368 (injury to one standing in safety zone on street); 316Mo 742, 293SW111; 262Mass56, 159 NE507; 77Mont85, 249P1043; 99WVa 313, 128SE832.

1074–25 179Ark444, 16SW(2d)466; 85 CalA596, 259P987; 335 Ill 164, 166NE 530; 227Ky841, 14SW(2d)174; 228Ky 184, 14SW(2d)768; 152Md427, 137A30; 256Mass217, 152NE239 (car axle); 261 Mass364, 158NE659; 175Minn96, 220 NW429; 311Mo 604, 279SW115; NJ 150 A357; NJ 150A401(2dcase); NJSup 146 A788(2dcase) (breaking of car window); 300Pa474, 150A897; RI 133A624; Tex CivA 18SW(2d)760.

1075–26 205 Iowa1077, 217NW434; 222 MoA1220, 5SW(2d)101; 105NJL300, 144A305; 50RI 438, 148A417.

1075–29 228Ky184, 14SW(2d)768; 239 Mich656, 215NW19; 167Minn40, 208NW 533. [d] **Whether motorman should have foreseen danger to pedestrian at earlier time,** under vigilant watch ordinance, and could thereby have avoided sudden stop which caused passenger to fall, are ordinarily questions for jury. 310Mo 696, 276SW64.

1075–30 10LaA91, 119S908.

1075–31 Mo 273SW110.

1075–32 31F(2d)976; 317Mo 181, 296 SW755; MoA 26SW(2d)869; 229App Div361, 241NYS414.

1076–35 250 IllA475; Mass 166NE561; 116 Oh291, 156NE133; Or 277P91; 283 Pa234, 129A91; 152Va883, 148SE694; 152Wash339, 281P994(2dcase). See also 198NC817, 151SE245. [c] **Evidence held insufficient.**–Mass 169NE780.

1076–36 310Mo 696, 276SW64; MoA 7 SW(2d)460; 117Nebr786, 222NW633; NJSup 132A236; 31 OhA488, 166NE391; 32 OhA93, 167NE606.

1077–39 149Md635, 132A153; 318Mo 502, 300SW479; 320Mo 371, 8SW(2d)11 (evidence held sufficient to go to jury); 198NC107, 150SE716 (motor vehicles). See also 132 Or161, 285P219.

1077–40 But see 82CalA503, 255P868 (evidence held to justify direction of verdict against auto-bus driver approaching crossing coincidently with train).

1077–40½–New. or between a bus and an electric car, 200Cal 718, 254P890 (bus driver's negligence resulting in injury to one of his passengers).

1077–41 339 Ill 276, 171NE271 (taxi and street car); 130Kan338, 286P669; Mass 165NE113; 167Minn40, 208NW 533; MoA 297SW189; NJ 135A86; 298 Pa256, 148A102; 89PaSuper380 (trolley car passenger injured); 92PaSuper 251. [d] **Evidence insufficient to go to jury.**–205 Iowa439, 215NW950, 55 ALR473. [e] **Concurring negligence of owner of truck** struck by bus while stopped on highway without rear light has been held for jury. 84CalA736, 258 P627.

1077–41½–New. , or between its taxicab and a street car. 92PaSuper356.

1077–41¾–New. Where a bus driver approaching a railroad track stops and looks but fails to see a train in plain view which is rapidly approaching and should have been seen if the driver had looked carefully, he is guilty of negligence as matter of law. 241Mich474, 217NW332.

1077–41¼–New. Whether plaintiff was on the street car at the time of the collision has been held for the jury. MoA 17SW(2d)376.

1077–41½–New. Whether bus was on wrong side of road at time of collision is question for jury. Md 149A4.

1077–41¾–New. Collision of bus with truck held to present case where injured passenger could not be nonsuited. NJ 149A760.

1077–42 24F(2d)671 (evidence held insufficient to take case to jury); 171Ark 103, 283SW31; CalA 284P1041; 206 Iowa753, 221NW508; Mass 172NE349; 315Mo 987, 288SW777. [c] **Where carrier introduces evidence rebutting presumption of negligence,** verdict for plaintiff should be set aside. 149Va549, 140SE648. [d] **Evidence held sufficient to make case for jury.**–Mo 298SW51.

1078–43 262Mass308, 159NE513 (closing door and starting train while passenger caught); ND 228NW456.

1078–44 305Mo 260, 264SW807 (evidence sufficient to go to jury).

1078–45 Mass 168NE171 (not warranted by evidence); 92PaSuper574; 142SC 492, 141SE90.

1079–47 24F(2d)262.

1079–48 157Miss439, 128S327; 221MoA 1123, 298SW107; 290Pa365, 138A852.

1079–49 262Mass519, 160NE529; 20 OhA148, 151NE806 (hole in street); 144 Va496, 132SE334.

1079–50 300Pa532, 151A13; TexCivA 270SW1038 (failure to provide step box).

1079–51 319Mo 233, 3SW(2d)371.

1080–52 26F(2d)403; 218Ala586, 119 S625, 63ALR1; CalA 286P456; CalA 291P611; 201 Iowa1302, 207NW602; 227Ky841, 14SW(2d)174; 232Ky285, 23SW(2d)272; 233Ky464, 26SW(2d)20; Md 149A4; 245Mich425, 222NW774; 248Mich399, 227NW694; Mo 273SW110; 315Mo 987, 288SW777; 318Mo 502, 300 SW479; 319Mo 8, 4SW(2d)762; MoA 26 SW(2d)869; NJ 151A99(2dcase); 104 NJL34, 139A322; 192NC287, 134SE855; 116 OhA448, 156NE598; 292Pa200, 140 A877; TexCommnA 285SW302; Tex CommnA 292SW536; 144Va496, 132SE 334; 197Wis513, 222NW792. [f] **If injury was caused by fall through open door while train was in motion,** question of fact for jury is presented. 215App Div786, 213NYS168.

1080–54 201 Iowa1302, 207NW602; 152 Md105, 136A50.

1080–54½–New. , or by an act of God. 316Mo 474, 290SW425.

1080–54¾–New. Where, in addition to facts raising the presumption of negligence of the carrier, there was specific evidence of acts of negligence, whether a storm intervened to exempt the carrier from liability is a question for the jury. 316Mo 474, 290SW425.

1080–56 29F(2d)735; 68Utah323, 249P 1064.

1080–57 68Utah323, 249P1064.

1080–58 42F(2d)70; 201 Iowa1302, 207 NW602. [a] (3) Where evidence shows driver wore uniform of defendant company, that defendants honored tickets, that car was registered in defendant's name, that application for license was signed by defendant, and other facts, question of ownership of bus is for jury. 192NC700, 135SE788. [b] **Defendant corporation doing business through subsidiary.**–217AppDiv504, 217NYS156 [rev on app].

1081–60 219MoA99, 268SW706 (whether there were aggravating circumstances); 292Pa200, 140A877. [b] **Refusal to direct verdict not erroneous.**–37F(2d) 895.

1081–61 22F(2d)939; 213Ala492, 105S 663 (whether door being open was attributable to negligence of defendant's employees); 285Pa489, 132A575; 291 Pa211, 139A878; 297Pa185, 146A567, 64ALR1542.

1081–62 47RI 206, 132A8.

1081–66 69CalA770, 232P491. [a] (1) NJ 141A168 (opportunity for alighting); 216AppDiv462, 215NYS478. [b] (1) 168Ark966, 272SW360.

1081–67 [a] (1) 14F(2d)893; 84CalA 736, 258P627; 216Ky407, 237SW926; Md 149A4; 252Mass270, 147NE882; 155 Miss765, 125S340; 157Miss439, 128S327; 317Mo 181, 296SW755; 318Mo 502, 300 SW479; Mo 28SW(2d)1035; NJ 141A 11; 117 Or598, 243P787; 121 Or519, 254 P809; 299Pa558, 149A877; 103WVa194, 136SE855. (2) Mo 20SW(2d)34. (14) In action for injuries to minor child while riding in defendant's auto with friend. 254Mass186, 150NE14. (15) In action for negligence of employee. MoA 27SW(2d)739. [b] (1) 214Ala597, 108S509; CalA 284P1041; Mo 278 SW79; 316Mo 798, 293SW119; MoA 6SW(2d)976; (11) NJSup 133A74; 224AppDiv342, 230NYS751. [d] (3) 256 IllA581. (5) Refusing charge, that when car stops and passenger steps in safety relation ceases, was proper. 157Miss439, 128S327. [f] (3) Instruction improper. 101WVa268, 132SE739. [i] **Instructions as to extent of injuries** are on "merits of the action" and, if prejudicial, are reversible error. 308Mo 6, 17, 273SW1071. [j] **Last clear chance.**–145Va338, 133SE776.

1083–69 [e] **Adjectives** merely should not be used. 116Tex253, 288SW425. [f] **"Relative duty."**–Failure to define words "relative duty" has been held not error in instruction as to defendant street railroad's "relative duty" toward passenger and toward defendant automobile driver. MoA 7SW(2d)719.

1083–70 169Ark698, 277SW7 (instruction as to damages held sufficient in absence of special requests). [a] (3) Charge authorizing recovery without requiring that passengers attempt to alight must have been made at proper time and place proper under evidence. 22AlaA180, 114S288.

1083–71 37GaA236, 139SE589; MoA 20 SW(2d)597; NJSup 132A326. [a] (1) 103Conn678, 131A838; 233 IllA432; Md 148A821; 311Mo 604, 279SW115; MoA 282SW525; 221MoA559, 285SW134; MoA 7SW(2d)424; MoA 26SW(2d)869; 115 Or656, 239P825; 153Wash549, 280P 50. (2) 22AlaA180, 114S288. (5) Res ipsa loquitur. CalA 291P611. [b] (1) 37GaA236, 139SE589; NJSup 138A512. (2) 212Ala690, 103S872 (for safety of postal clerk); 86 IndA251, 157NE58; TexCivA 287SW71. (11) 137SC433, 135 SE563. (12) Other instances. 128 Or 542, 274P915. [c] 95CalA162, 272P 591. [i] **Instructions not objectionable** as making carrier an insurer. TexCivA 272SW308. [j] **Collisions.**–214AppDiv 652, 212NYS309 (duty of both being care of ordinarily prudent man under circumstances). [k] **Instruction held erroneously refused.**–145Va338, 133SE776.

1084–72 [a] (1) GaA 134SE830; 322 Mo1001, 17SW(2d)528; MoA 297SW 455; 153Wash549, 280P50. [b] (1) 214Ala597, 108S509; 39GaA56, 146SE 33; Mo 276SW26, 42ALR1319; Mo 278 SW79; 317Mo 141, 296SW428; 24 OhA 539, 157NE765. (3) 216Ala455, 113S 403. (4) 22AlaA180, 114S288 (disabled passenger). (11) Instruction too broad. 72Mont594, 235P330.

1085–73 35GaA765, 134SE830; 327 Ill 207, 158NE380.

1085–74 [a] 35GaA765, 134SE830. [b] **Instructions held not abstract.**–322Mo 718, 17SW(2d)511.

1085–75 317Mo 141, 296SW428. [a] Mo 30SW(2d)28.
1086–76 322Mo 1001, 17SW(2d)528; 115 Or656, 239P825.
1086–77 NJSup 132A236; 143Wash 127, 254P1086. [a] (1) 105WVa156, 141 SE622.
1086–78 22AlaA180, 114S288; 68CalA 494, 229P885; 89CalA477, 265P268; 94 CalA748, 272P346; 95CalA162, 272P 591; 84Colo 511, 272P6; 256 IllA581; IndA 166NE257; 322Mo 718, 17SW(2d) 511; 115 Or656, 239P825.
1087–85 109Conn221, 146A494(2dcase); MoA 20SW(2d)597; MoA 21SW(2d)491 (evidence held to require instruction that, though passenger was made nervous, there could be no recovery in absence of physical injury); Nebr 228 NW364; 103NJL145, 134A650; 135 Misc834, 238NYS400; 24 OhA539, 157 NE765; 35 OhA204, 172NE409; 116Tex 253, 288SW425.
1087–87 MoA 9SW(2d)650; 105WVa 156, 141SE622.
1087–90 68CalA494, 229P885; 94CalA 748, 272P346; 97CalA720, 276P357; 84 Colo 511, 272P6; 227Ky841, 148SW(2d) 174; 221MoA537, 282SW1037; 103NJL 512, 138A377; ND 228NW456.
1088–91 26F(2d)403; 214Ala597, 108S 509; 216Ala455, 113S403; Ala 130S786; 22AlaA199, 114S15; 22AlaA180, 114S 288; 170Ark346, 280SW354; 233Ky 464, 26SW(2d)20; 149Md635, 132A153; 258Mass257, 154NE546; 311Mo 604, 279 SW115; 322Mo 718, 17SW(2d)511; MoA 293SW1051; 24 OhA317, 156NE235; 117 Or598, 243P787; 105WVa156, 141 SE622. [a] **Instruction charging ordinary care** is properly refused where passenger riding on running board was brushed off and killed. 224 IllA42.
1088–93 178Minn561, 228NW154; 103 NJL512, 138A377.
1088–97 TexCivA 292SW966.
1089–98 69CalA123, 230P970; Mo 24 SW(2d)154; 221MoA559, 285SW134 (instruction held not objectionable).
1089–99 [b] 143Wash127, 254P1086.
1089–8 255Mass285, 151NE302; 318Mo 502, 300SW479; 320Mo 946, 8SW(2d) 832; MoA 20SW(2d)597; TexCivA 276 SW460; TexCivA 288SW582; 144Va 496, 132SE334. [a] (1) 20AlaA617, 104 S559; Ark 31SW(2d)756; Md 148A821; 316Mo 742, 293SW111; 320Mo 371, 8SW (2d)11; Mo 20SW(2d)659; Mo 31SW (2d)50; MoA 274SW933; MoA 285SW 151; MoA 297SW455; MoA 26SW(2d) 869; 105NJL396, 144A803; 216AppDiv 462, 215NYS478; 198NC130, 150SE717; 117 Or598, 243P787; TexCivA 270SW 1038; TexCivA 18SW(2d)754; 144Va 496, 132SE334; Va 137SE500; 135 Wash21, 236P799. (3) Mo 30SW(2d)28. (5) 318Mo 1190, 3SW(2d)241.
1091–9 168Ark966, 272SW360; 90CalA 249, 265P839; 149Md635, 132A153; 255 Mass285, 151NE302; 322Mo 718, 17SW (2d)511; Nebr 228NW364; 117 Or598, 243P787. [a] (1) 214Ala597, 108S509; 168Ark966, 272SW360; 255Mass285, 151NE302; Mo 278SW79; Mo 20SW (2d)659; 32 OhA89, 167NE604.
1092–10 168Ark966, 272SW360; 216 Ky407, 287SW926; MoA 285SW151; MoA 6SW(2d)630; 117 Or598, 243P787. [c] **Instructions as to recovery** for permanent injuries should be so framed as to permit recovery only for those alleged to be permanent. 308Mo 617, 273SW 1071.
1092–11 220Ala107, 124S231; 168Ark 966, 272SW360; 242 IllA451; 216Ky 407, 287SW926; 308Mo 617, 273SW1071 (instruction permitting jury to find permanent injury in absence of evidence is erroneous); 320Mo 1239, 10SW(2d) 933; MoA 293SW(2d)1051; 298Pa256, 148A102. [e] **Where evidence showed that truck was not moving backward,** instruction submitting question whether driver backed so as to cause accident was properly refused. 224 IllA42. [f] **Instruction** properly refused when presumption of negligence not rebutted. MoA 293SW1051.
1093–12 216Ala455, 113S403; MoA 256 SW538; 24 OhA539, 157NE765; Tex CommnA 283SW777; TexCivA 288SW 582.
1093–13 149Md635, 132A153; Mo 298 SW51.
1093–15 [a] (4) Requiring finding that carrier's negligence was proximate contributing cause of fall of bridge. MoA 282SW525. [b] 23 OhA448, 155NE149; TexCivA 276SW460. [c] **Erroneous instructions.**–319Mo 233, 3SW(2d)371.
1094–21 42F(2d)611; 71CalA82, 234P 863 (use of the word "presumption" instead of word "inference" is not fatal); 33 OhA47, 168NE619 (charge of res ipsa loquitur). [a] (1) 37F(2d)895; 85 CalA216, 258P1107; 90CalA555, 266P 297 (res ipsa loquitur); 37GaA722, 141 SE670; 39GaA56, 146SE33; 321Mo 952, 13SW(2d)547; 322Mo 718, 17SW (2d)511; MoA 282SW525; MoA 297 SW189. (6) As to doctrine of res ipsa loquitur in case of collision of street car with automobile truck injuring passenger. 71CalA82, 234P863. (7) As to res ipsa loquitur in action by bus passenger for injuries received where stage ran into ditch. 81CalA443, 253P970. (8) Res ipsa loquitur. 97 CalA720, 276P357. (9) As to charge on presumption based on statute in action by passenger injured while alighting from street car. 39GaA56, 146SE33. (10) Requiring plaintiff to prove negligence by preponderance of evidence. Miss 129S599. [b] (1) 69CalA 123, 230P970; 109Conn221, 146A494(2d case); 311Mo 66, 277SW913; 221MoA 621, 287SW813; MoA 296SW1043; 128 Or542, 274P915 (proximate cause).
1094–22 221MoA621, 287SW813. [a] 80CalA667, 252P773.
1095–24 Mass 172NE349. [c] **Instruction casting burden of proof upon carrier** alone is not erroneous as requiring disproof of negligence by preponderance of evidence. 71CalA82, 234P863. [d] **Instruction on doctrine of res ipsa loquitur held proper.**–84CalA736, 258P 627.
1095–25 Mo 276SW26, 42ALR1319; 318Mo 1190, 3SW(2d)241.
1095–26 319Mo 8, 4SW(2d)762. [b] 71 CalA82, 234P863.
1095–28 289Pa424, 137A796.
1095–31 35GaA765, 134SE830; Mass 165NE114.
1096–35 [b] 88 IndA117, 163NE527; 130Kan338, 286P669; 22 OhA234, 153 NE922.
1096–37½–New. A verdict for a railroad employee and against the railroad is not inconsistent. 169Ark698, 277SW 7 (in view of different rules as to burden of proof).
1096–39 213Ky540, 281SW510; 152Md 427, 137A30; 167Minn40, 208NW533; TexCommnA 293SW554. [a] (2) But see 135Wash630, 238P623, 45ALR293.
1097–40 35GaA59, 132SE399; 220App Div503, 221NYS686; ND 223NW37; 136Wash274, 239P559; WVa 155SE178.
1098–44 127Kan821, 275P136; 220Ky 219, 294SW1030; Mo 274SW26; NJ 150A401(2dcase). [b] **Carrier's furnishing postal clerk with mail car** is implied assurance that it is fit for use. 152Md 427, 137A30.
1098–45 231Ky564, 21SW(2d)990.
1098–46 175Minn328, 221NW232 (question for jury).
1099–52 100WVa319, 130SE483. See also 1LaA770 [aff 159La519, 105S606, and citCJ].
1100–56 [b] 10LaA641, 120S801 (where passenger lost possession of his faculties).
1101–58 102CalA58, 282P525.
1104–78 152Md427, 137A30.
1105–85 168Ark966, 272SW360; 99 CalA656, 279P190(2dcase) (though carrier is guilty of gross negligence); 316 Mo 742, 293SW111; TexCivA 283SW 622; TexCivA 1SW(2d)760. [l] **Leaving train at wrong station** is held not proximate cause of injury to passenger alighting thereat. TexCivA 283SW622.
1107–86 81Colo 33, 253P392, 50ALR 1361.
1107–87½–New. Where an elderly lady had entered a caboose to use the toilet and afterward was injured, her failure to ask for the toilet in the station when she could not find it was not the proximate cause of her injury. 168Ark966, 272SW360.
1107–89 CalA 291P467; 322Mo 386, 15 SW(2d)335. [a] (5) Where intending passenger stepped to edge of railroad track and waived flag to stop train and made no effort to extricate himself from danger, carrier could not be held liable under humanitarian rule. 217MoA442, 268SW682. [h] (2) It was duty of street car company, after discovering dangerous position of prospective intoxicated passenger within few feet of rails, to avoid injury. 10LaA641, 120S 801.
1108–90 23 OhA448, 155NE149.
1108–93 252 IllA151.
1108–93½–New. A carrier cannot be held liable under the humanitarian doctrine, notwithstanding the negligent disregard by its engineer of his duty to persons in places of danger, unless those in charge of the train failed to use ordinary care to avoid the injury after something occurred which should convey information to them that the person in danger would not extricate himself. 217MoA442, 268SW682.
1108–93½–New. Where an intending passenger stands so near the track of a railroad in using a flag to stop a train that the train cannot pass without hitting him, the engineer has a right to assume that he will act as an ordinarily prudent man in regard to his own safety and will step out of danger before the train can strike him even although it does not slacken its speed. 217MoA442, 268SW682.
1109–98 Mo 274SW26.
1109–99 105NJL1, 143A743; 292Pa 522, 141A487. [h] **That passenger used uncovered platform** rather than more distant covered platform is held not to show contributory negligence conclusively. 82NH434, 136A250.
1110–4 217Ala192, 115S246 (failing to stop, look, and listen); 252 IllA151; 125Kan506, 264P1067; 10LaA641, 120 S801; 256Mass236, 152NE741; 235 Mich405, 209NW111; 23 OhA448, 155 NE149. See also Mass 173NE431.
1111–6 NJSup 147A572(2dcase); 151 Va934, 145SE833.
1111–6½–New. A provision of a cattle caretaker's contract reading, "will not walk or stand on any track at stations or other places at night without lantern," did not apply where the caretaker fell into a ditch while walking along the side of a train. MoA 8SW(2d) 103.
1111–7 94CalA748, 272P346; 152Va 604, 148SE683.
1112–9 Mo 24SW(2d)154; NJSup 147 A572(2dcase).
1114–17 141Wash360, 251P559.
1114–20 316Mo 742, 293SW111; NJ Sup 147A572(2dcase).
1114–21 213Ky540, 281SW510; 292Pa 72, 140A522 (boarding car equipped with folding step); 300Pa189, 150A612 (2dcase). [g] IndA 169NE478(2dcase).
1116–26 168Ark146, 269SW51.
1116–26 But see 141Wash634, 252P100.
1116–32 13F(2d)34; NJ 130A454.
1117–35 13F(2d)34.
1117–37 168Ark146, 269SW51.
1117–38 168Ark146, 269SW51.
1118–41 CalA 286P433(2dcase).
1119–47 5F(2d)784; 6LaA433; 121 Oh 26, 166NE898; 89PaSuper592; Wash 257P393. [c] (4) Passenger injured in alighting from bus held contributorily negligent as matter of law in emerging backward and not looking. MoA 27SW (2d)747. [k] **Bus driver's negligence in creating dangerous situation** does not relieve passenger from duty to use ordinary care. MoA 27SW(2d)747. [l] **Duty to use senses.**–MoA 27SW(2d)747.
1120–48 127Kan821, 275P136; NJSup 147A572(2dcase).
1120–49 127Kan821, 275P136 (failure to look for defect in floor of vestibule of street car held not contributory negligence); 130 Or145, 279P559; TexCivA 1SW(2d)760.
1120–51 [a] **Going through partly open door of car standing still,** resulting in passenger being injured by unfolding step, is not contributory negligence of itself. 125Misc863, 212NYS291.
1120–55 See also 1LaA770 [aff 159La 519, 105S606, and citCJ].
1121–56 159La519, 105S606.
1122–61½–New. Where it is the custom

of an operator not to open the doors of a street car until it comes to a full stop at a regular stopping place, a passenger without knowledge may assume when the doors are opened that the car has reached a stopping place and has stopped. **Mo** 208SW(2d)659.

1122-62 321Mo 929, 138SW(2d)541; 99 WVa313, 128SE832 (may presume that railroad will not operate trains while passenger leaves by crossing tracks by way provided). [f] (1) See also 57ND 538, 223NW37. (2) Stepping for stepping box without looking to see if one is there is contributory negligence. 220AppDiv503, 221NYS686.

1122-63 292Pa522, 141A487.

1123-66 103NJL316, 137A88.

1123-69 103NJL316, 137A88.

1124-79 5F(2d)784. [j] **Caretaker of live stock** alighting from caboose in darkness without using flash light in his possession where train had stopped between stations on account of engine trouble having caboose on bridge over which caretaker fell, has been held guilty of negligence barring recovery. 114Nebr 468, 207NW937.

1125-80 **TexCommnA** 292SW536.

1126-89 212Ky723, 280SW89; 135Wash 21, 236P799 (not negligence per se to alight from moving autobus while door open, though ordinance prohibits leaving autobusses when moving). [b] 9 LaA202, 119S880.

1128-90 212Ky723, 280SW89; **Vt** 147A 694. [a] 212Ky723, 280SW89.

1128-95 201 Iowa1302, 207NW602, 605 [citCJ]; 83NH136, 139A370.

1130-3 222Ky302, 300SW912.

1131-9 202 Iowa1090, 211NW250. [c] (5) Mere opening of exit door. **Vt** 147 A694. (6) Other instances. **Mo** 208SW (2d)659. [c] (5) That door of street car is open does not in all cases constitute invitation to passenger to alight. 201 Iowa1302, 207NW602. (6) Whether opening door of street car while car was slowly moving and after passenger had signaled for car to stop constituted invitation to alight is question for jury. 201 Iowa1302, 207NW602.

1133-11 10LaA324, 121S379.

1133-16 179Ark444, 16SW(2d)466 (no duty to inspect appliances furnished); Mass 172NE612; 198Wis293, 223NW836, 69ALR978

1134-18 31F(2d)976 (guard against jolts when car rounds curve); 135Wash 630, 238P623; **WVa** 155SE178. [d] **Failure to protest or prevent taxicab driver from proceeding in wrong direction along one-way street** is not contributory negligence. Mass 172NE612.

1135-21 168Ark966, 272SW360.

1135-25 **MoA** 7SW(2d)460.

1136-31 **Mich** 233NW406.

1136-34½-New. Passenger must take advantage of iron support, car straps or backs of seats to guard against ordinary jars or lurches of car. 110Conn 625, 149A127.

1137-36 [a] (2) It is not duty of passenger, as matter of law, to take first available seat as soon as reasonably possible. 213Ky540, 281SW510.

1137-38 Mass 173NE543. [f] **Getting on step preparing to alight** from street car before car reaches stopping place is not contributory negligence precluding recovery for being struck by pipes placed near track. 159La519, 105S606.

1139-51 See also 1LaA770, 773 [aff 159 La519, 105S606, and citCJ]. But see 242 IllA451.

1140-53 35GaA765, 134SE830. [c] 35 GaA765, 134SE830.

1140-53½-New. An action for injuries to plaintiff, swept from car step by girder, is held not barred by New Jersey statute affecting passengers on platform, 17F(2d)748.

1140-53¾-New. nor by statute affecting contributory negligence of persons boarding moving cars. 17F(2d)748.

1140-53¾-New. A bus passenger extending his elbow over the window sill and sustaining injury does not come under the statute prohibiting riding with part of the body protruding, since the language of the statute does not apply to a street surface car. 250NY165, 164 NE892.

1141-55 196NC423, 145SE770. [b] (1) 228Ky219, 14SW(2d)780. (3) No defense to railroad that its negligence would have proved harmless but for passenger's being in place where he was expected to be. 228Ky219, 14SW(2d) 780.

1142-59 [c] **Owner authorized to accompany property in box car.**–Ark 31SW (2d)756.

1142-60 **Sask** [1928] 1DomLR29.

1144-83 **CalA** 291P467.

1145-84 **BC** [1929] 2DomLR901.

1147-96 81Colo 33, 253P392, 50ALR 1361.

1149-6 **Mo** 208SW(2d)659 (sudden jerk of car); **NJ** 148A775.

1150-19 [b] (6) Other plea held insufficient to show contributory negligence. 220Ala107, 124S231.

1151-34 256 IllA581; 221MoA537, 282 SW1037.

1152-37 170La95, 127S376(2dcase); 13 LaA212, 127S119; 152Md427, 137A30; NH 149A602; 104NJL34, 139A322; TexCivA 283SW622; TexCivA 290SW 846.

1152-38 316Mo 742, 293SW111.

1153-48 258Mass389, 155NE267. [e] **Evidence held admissible.**–Mass 166NE 561.

1155-57 **Vt** 147A694. [a] 11LaA1, 123S135; Mass 173NE431; 175Minn328, 221NW232; 192Wis269, 212NW643. [b] NH 136A251; NJSup 150A574; Tex CommnA 293SW554.

1155-58 **CalA** 291P467; 192Wis269, 212 NW643.

1155-59 [a] 256 IllA581. [b] (1) CalA 286P433(2dcase); 13LaA212, 127S119; MoA 18SW(2d)252.

1155-60 107Conn236, 140A121 (finding of freedom from contributory negligence sustained). [a] (1) 212Ky723, 280SW 89; 114Nebr458, 207NW937; 144Wash 188, 257P393. (5) Other instances. 12 LaA580, 126S272.

1155-61 [b] (1) 242 IllA451; 132 Okl 107, 269P368. (4) In action for injuries to street car passenger, evidence that passenger, while sitting in car, was thrown to floor by collision justified finding that he was exercising due care. Mass 166NE113.

1156-63 114Nebr458, 207NW937.

1156-64 168Ark966, 272SW360; 339 Ill 94, 170NE345; 219Ky307, 292SW791; 152Md427, 137A30; 175Minn328, 221NW 232; 114Nebr458, 207NW937; 105NJL 396, 144A803; NJSup 135A820; 285Pa 489, 132A575; 290Pa130, 138A89; 154 Wash547, 283P186. [a] **Verdict can be directed on ground of contributory negligence only** where undisputed evidence shows contributory negligence. TexCivA 30SW(2d)1062.

1157-67 168Ark966, 272SW361 (old lady); 335 Ill 164, 166NE530. But see Wis 229NW655.

1157-68 17F(2d)748; 137Wash177, 242 P2; 150Wash61, 272P41.

1157-69 17F(2d)748; 198Wis293, 223 NW836, 69ALR978.

1157-70 114Nebr458, 207NW937.

1157-73 152Va604, 148SE683. See also 291Pa564, 140A496.

1157-74 [a] **In Wisconsin.**–229NW655.

1157-74½-New. Passenger's failure to protest bus driver's carrying on conversation, held not contributory negligence as a matter of law. **Md** 149A4.

1157-75 200 Iowa597, 203NW705, 41 ALR368 (waiting in safety zone for street car); 211Ky774, 278SW116; 152 Md105, 136A50; 258Mass389, 155NE267; Mo 274SW26; Mo 278SW79; 317Mo 181, 296SW755; MoA 22SW(2d)870; 85Mont 604, 281P540; 22 OhA234, 153NE922; 134SC185, 132SE47; 151Va934, 145SE 833. [g] **Passenger's knowledge of crowded conditions** at terminal as contributory negligence is question for jury. 211Ky774, 278SW116.

1157-76 Mass 169NE483; 316Mo 742, 293SW111; 321Mo 929, 138SW(2d)541; Mo 248SW(2d)154; NJSup 147A572(2d case); 24 OhA317, 156NE235; TexCivA 19SW(2d)858; 141Wash385, 250P409. [b] **Whether intending passenger had right to assume** that street car was being driven at less than certain speed is for jury. Mo 248SW(2d)154.

1157-76½-New. or in assisting railroad's employees in closing door of mail car; 152Md427, 137A30.

1158-77 212Ala638, 103S867 (whether intoxicated at all or to what extent); 168Ark146, 269SW51.

1158-78 168Ark146, 269SW51; CalA 286P433(2dcase); TexCivA 30SW(2d) 1062.

1158-79 212Ala638, 103S867; 168Ark 146, 269SW51.

1158-80 220Ala107, 124S231; 107Conn 236, 140A121; 262Mass308, 159NE513; 114Nebr458, 207NW937; NH 149A602; ND 228NW456; 20 OhA148, 151NE 806; 130 Or145, 279P559; 290Pa130, 138A89; 92PaSuper574.

1158-81 220Ala107, 124S231; 253 IllA 498; 201 Iowa1302, 207NW602; 135 Wash21, 236P799 (right to assume autobus had stopped because door was open).

1159-82 262Mass519, 160NE529; 290 Pa130, 138A89.

1159-84 179Ark444, 16SW(2d)466; 81 CalA443, 253P970 (continuing as passenger in bus without protest after failing of headlights); Mass 166NE561; MoA 7SW(2d)460; NJ 150A401 (2dcase); NJSup 146A788(2dcase) (attempting to raise car window); 222 AppDiv642, 227NYS279; 117 Or598, 243 P787; Or 277P91; 132 Or161, 285P 219; 135Wash630, 238P623 (failure of passenger in taxicab to warn against negligent driving).

1159-85 Minn 230NW793; 132 Okl 107, 269P368; 131SC382, 127SE724; 100WVa319, 130SE483.

1159-86 167Minn40, 208NW533.

1159-87 168Ark966, 272SW360; 213 Ky540, 281SW510.

1160-89 Mass 173NE543.

1160-90 GaA 134SE830.

1160-91 104NJL34, 139A322.

1160-93 74CalA518, 241P107; Mass 173NE543.

1160-93½-New. The question of negligence of the street railroad company under the humanitarian rule may be for the jury. 322Mo 386, 15SW(2d)335.

1160-95 102CalA58, 282P525; 120Kan 58, 242P469; 232Ky285, 23SW(2d)272.

1160-96 213Ala492, 105S663; 87CalA 371, 262P459.

1161-2 **MoA** 8SW(2d)103. [a] (1) 69 CalA9, 230P958; 233Ky383, 25SW(2d) 1046. (7) As to effect of ability of passenger boarding train to avoid effect of defendant's negligence in permitting step to be wet. 37GaA 722, 141SE670. [b] (1) Mo 274SW26; 311Mo 604, 279 SW115; Or 289P1055; 135Wash630, 238P623. (4) 24F(2d)262; TexCivA 1 SW(2d)760 (holding instruction too general). (8) Instruction as to last clear chance refused. 152Md105, 136A 50.

1162-5 69CalA9, 230P958; 109Conn 221, 146A494(2dcase). [a] (4) Instruction making carrier absolute insurer of safety held erroneous. 100WVa319, 130 SE483. [b] **Instructions held proper.**–35GaA765, 134SE830.

1162-6 109Conn221, 146A494(2dcase).

1162-7 [b] (1) 74CalA518, 241P107. [c] (1) 319Mo 233, 3SW(2d)371. (3) It was reversible error where instructions stated that street car passenger was contributorily negligent if he "willfully" allowed his arm to protrude through window, and that such protrusion contributed to accident. 245Mich 425, 222NW774.

1163-8 109Conn221, 146A494(2dcase) (instruction held erroneous).

1164-13 94CalA748, 272P346.

1164-16 145Va338, 133SE776.

1164-17 253 IllA498.

1165-19 102CalA58, 282P525; 100WVa 319, 130SE483.

1165-20 22AlaA180, 114S288.

1165-21 [a] (1) 316Mo 742, 293SW 111. (2) 37GaA722, 141SE670. [c] (4) Instruction warranted by petition. 221MoA559, 285SW134. (5) Proper submission under humanitarian rule. Mo 248SW(2d)154.

1166-22 23 OhA448, 155NE149. [a] (1) 221MoA559, 285SW134 (assumption of risk); TexCivA 290SW846; 141 Wash385, 250P409.

1167-25 194Cal159, 228P428; 253 IllA 498; 213Ky540, 281SW510. [a] 37 GaA722, 141SE670.

1167-28 213Ky540, 281SW510.
1167-31 TexCivA 283SW622. See also TexCivA 8SW(2d)548.
1167-32½-New. It is not error to refuse an instruction that plaintiff must prove contributory negligence was not the proximate cause of the injury. 135 Wash21, 236P799.
1167-33 TexCommnA 292SW536.
1168-44 35GaA59, 132SE399.
1169-47 35GaA59, 132SE399.
1169-55 [a] **Carrier's contract for Pullman service beyond its own lines.**–127 Or461, 271P976, 62ALR644.
1171-98 127 Or461, 271P976, 62ALR 644 (it is duty of carrier to extend proper care under particular circumstances where it failed to render Pullman service); 132SC321, 128SE504; 137 SC433, 135SE563. But see 156Md329, 144A363.
1172-99 132SC321, 128SE504 (same high degree of accountability as common carriers for wrongful or tortious acts of servants).
1172-16 35GaA59, 132SE399.
1174-37 [d] **Evidence held not to show injury proximately resulted** from alleged wrongful ejection from berth. TexCivA 278SW339.
1175-50 10PaDist&Co 438.
1176-56 7PaDist&Co 91.
1176-60 22F(2d)177.
1176-62 22F(2d)177.
1178-89 22F(2d)177.
1178-92 25F(2d)563.
1179-95 22F(2d)177 (not contributory negligence to place jewelry in receptacle placed in berth for clothing).
1179-99 35GaA59, 132SE399.
1179-1 [b] (1) 35GaA59, 132SE399.
1182-20 [b] (6) Other instances. 127 Or461, 271P976, 62ALR644 (two thousand five hundred dollars).
1183-21 35GaA59, 132SE399.
1183-29 [a] **Though passenger accepted such accommodations as carrier provided,** plaintiff may recover for failure to furnish berth contracted for by carrier. 127 Or461, 271P976, 62ALR644.
1183-31 [a] 35GaA59, 132SE399.
1184-38 [c] **Variance held not fatal.**–17F(2d)670.
1185-61 [a] (11) To warrant inference of negligence in allowing suitcase over which plaintiff stumbled to project in aisle. 132SC321, 128SE504. (12) To show violation of duty of defendant to notify passenger of arrival at destination. 35GaA59, 132SE399 (warranting nominal damages).
1186-68 127 Or461, 271P976, 62ALR 644.
1186-69 137SC433, 135SE563.
1186-71 TexCivA 16SW(2d)363. [a] **Evidence held insufficient for submission to jury.**–17F(2d)670.
1186-74 35GaA59, 132SE399.
1187-79 35GaA59, 132SE399 (questions improperly submitted to jury).
1187-87 130Misc29, 223NYS542; 25 OhA538, 159NE374; 87PaSuper257 (articles held not necessary and convenient); TexCivA 11SW(2d)659.
1189-97 87PaSuper257 (articles held not wearing apparel).
1190-6 [a] See also TexCivA 11SW (2d)659.
1190-10 217Ky211, 289SW263, 266 [quotCJ].
1190-11 217Ky211, 289SW263, 266 [quotCJ].
1193-53 130Misc29, 223NYS542.
1194-55 28PaSuper107.
1195-58 225AppDiv73, 231NYS245.
1195-60 251NY354, 167NE497; Eng [1906] 2KB619. But see 130Misc29, 223 NYS542.
1196-69 99AppDiv163, 90NYS1042; 66 Hun456, 21NYS318; 139NC382, 51SE 973.
1196-73 90Fla721, 106S576, 584 [cit CJ]; 42 Ida169, 244P149, 154 [citCJ].
1197-78 90Fla721, 106S576.
1197-79 90Fla721, 106S576. See also 96Fla295, 117S869.
1197-81 But see 90Fla721, 106S576.
1198-84 113Nebr682, 204NW870, 41 ALR446.
1199-5½-New. A contract with a transfer company to carry baggage from the station to a residence is a new contract independent of a transportation contract with the railroad company. 318Mo723, 300SW769.
1200-16 203Cal680, 265P936, 59ALR 118; 233IllA411; 217Ky211, 289SW 263; TexCivA 276SW347. [b] **State statute,** giving intra state passenger right to recover full value of lost baggage, held not required to be reënacted after termination of federal control. 270US466, 46SCt341, 70Led688.
1200-19 217Ky211, 289SW263.
1200-20 [a] **Effect of custom of placing baggage on running board of jitney.**–TexCivA 276SW347.
1200-21 [a] **Porter service** is not gratuitous but is covered by fare paid for transportation. 203Cal680, 265P936, 59ALR118.
1200-22 [b] **Failure to buy tickets and take passage,** because of theft of trunk from railroad company's depot, does not show that carrier was gratuitous bailee. 141Miss672, 105S481.
1200-24½-New. Liability for loss of bag taken by agent without request not governed by rules where baggage is carried on check system at passenger's request. 25 OhA538, 159NE374.
1200-24¾-New. A railroad company's liability for loss of baggage by a porter employed by the company is that of carrier and not of warehouseman. 203 Cal680, 265P936, 59ALR118.
1201-30 217Ky211, 289SW263.
1201-35 [a] **Liability of carrier** for loss of hand bag taken by carrier's agent from passenger without request not governed by rules where baggage is carried on check system at passenger's request. 26 OhA298, 159NE369.
1202-39 TexCivA 276SW347, 350 [cit Cyc].
1202-40 TexCivA 276SW347.
1205-60 [a] **Under federal law** misdelivery of baggage is not conversion so as to deprive carrier of benefit of limitation on liability. 270US466, 46SCt 341, 70Led688.
1208-96 217Ky211, 289SW263.
1209-99½-New. Passenger's assent to lower of two alternative rates based on different values estops him from claiming more than valuation resulting in lower rate in case of loss. 113Nebr682, 204NW870, 41ALR446.
1209-7 203Cal680, 265P936, 59ALR 118.
1210-13½-New. In some jurisdictions a carrier may curtail its liability for negligence by special contract, where its charges are graduated according to the value of the property as fixed by the passenger, and the passenger may secure full coverage by paying a stipulated charge. 203Cal680, 265P936, 59 ALR118.
1210-13¾-New. A tariff limiting a railroad company's liability for loss of hand baggage handed to porters to a stated sum does not affect its liability. 203Cal680, 265P936, 59ALR118.
1211-18 131Misc599, 227NYS539.
1211-20 146Va442, 131SE846, 44ALR 1175.
1211-21 146Va442, 131SE846, 44ALR 1175.
1213-30 113Nebr682, 204NW870, 41 ALR446 (interstate rate regulation for shipments based on agreed values under bills of lading and amounts recoverable may apply to checked baggage under similar circumstances).
1213-31 113Nebr682, 204NW870, 41 ALR446.
1213-33 217Ky211, 289SW263, 266 [cit CJ].
1214-34 233 IllA411.
1214-44 217Ky211, 289SW263.
1215-48 90Fla721, 106S576, 586 [quot CJ]; 233 IllA411.
1215-54 See also 141Miss672, 105S481.
1217-65 218MoA502, 279SW223. [a] **Carrier is under no duty to accept responsibility as such** where intending passenger purchases ticket and checks baggage already in storage with carrier fourteen hours before departure of train. 218MoA502, 279SW223.
1217-67 218MoA502, 279SW223.
1217-70 221Ky142, 297SW1112; 218 MoA502, 279SW223.
1219-87 221Ky142, 297SW1112; 218 MoA502, 279SW223.
1219-89½-New. A carrier's liability as warehouseman is for default or negligence. 203Cal680, 265P936, 59ALR 118.
1219-91 218MoA502, 279SW223.
1220-1 [a] **Forty-eight hours.**–166La 119, 116S720.
1224-35 134Misc680, 236NYS289.
1227-56 141Miss7, 105S749.
1228-68 But see 141Miss7, 105S749.
1228-69½-New. Mental worry caused by delay in delivery of baggage is not element of damages recoverable. 141 Miss7, 105S749.
1228-73½-New. Punitive damages are not recoverable for delay caused by the willful negligence of an agent not participated in, authorized, or ratified by the carrier. 141Miss7, 105S749.
1229-80½-New. Where partial loss results to baggage checked in a lower rate based on value, agreed valuation is not arbitrary limit of recovery, but a ratio that is the amount the real value of articles lost bears to the actual total value of the baggage. 113Nebr682, 204 NW870, 41ALR446.
1230-99 217Ky211, 289SW263.
1230-1½-New. A passenger not entitled to recover in contract cannot recover in tort. 130Misc29, 223NYS542.
1231-29 26 OhA298, 159NE369. [a] (5) Averment as to defendant being a common carrier. 25 OhA538, 159NE 374.
1232-46 [d] **Denial of railroad's allegation** that it could not in exercise of ordinary care have prevented destruction of trunks made issue thereon. 221 Ky142, 297SW1112.
1233-58 26 OhA298, 159NE369.
1233-61 TexCivA 11SW(2d)659.
1234-67 233 IllA411.
1234-71 [b] **Delivering carrier must rebut presumption** that loss occurred while in its hands. MoA 28SW(2d)395.
1234-74½-New. Passenger showing delivery of baggage to initial carrier and nondelivery by terminal carrier makes out prima facie case of negligence. MoA 28SW(2d)395.
1236-87 87PaSuper257. [a] But see 87PaSuper257.
1236-94 [a] (16) To show that plaintiff had been afforded reasonable opportunity to remove baggage before destruction by fire. 218MoA502, 279SW 223. (17) To show assent of parties that baggage should remain in storage with carrier as warehouseman. 218MoA 502, 279SW223. (18) That bag was never delivered to carrier. 11LaA687, 124S782. [b] (1) 221Ky142, 297SW 1112.
1237-3 NJSup 136A407; 25 OhA538, 159NE374.
1237-4 26 OhA298, 159NE369.
1238-8 221Ky142, 297SW1112; 218 MoA502, 279SW223. [a] 218MoA502, 279SW223.
1238-12 [c] **Whether windstorm following and spreading fire** amounted to act of God held for jury. 221Ky142, 297SW1112.
1239-24 TexCivA 276SW347.
1239-25 TexCivA 276SW347.
1239-27 TexCivA 276SW347.

CARRY

1240-8 [a] **Carry stock.**–13PaDist&Co 237.
1240-9 [e] **As used in tourist insurance policy** see 138Misc9, 245NYS145.
1243-31 74CalA681, 242P100.
1245-85 169Ark552, 275SW896.

CASE

1246-50 [b] **"Case of salmon."**–7Alaska 160.
1247-51 118 Or300, 246P718.
1247-52 274US123, 47SCt511, 71Led 959; 118 Or300, 246P718, 719 [quot CJ].

CASE, ACTION ON

11 C. J.—4-18 214Ala297, 107S849; 248 Mich425, 227NW817 (malicious destruction of will).
4-22 48Mont249, 136P968; 126 Or621, 270P781.

5-25 48Mont249, 136P968.
9-93 37Wyo 419, 263P703, 707 [citCJ].
9-94 126 Or621, 270P781.
9-99 TexCivA 58SW(2d)545.
9-6 See also 37Wyo 419, 263P703.
19-57½-New. 321 Ill 275, 151NE874.

CASE AT LAW

20-1 168Minn84, 209NW907.

CASH

21-19 83CalA298, 256P590. [b] 131 Misc786, 228NYS166.

CASHIER'S CHECK

23-45 80Mont174, 259P1060; 143Wash 514, 255P660, 661 [citCJ]; Wash 289 P47. [a] 143Wash514, 255P660.

CASING-HEAD GAS

26-72½-New. It is a constituent element of oil; in its place it is realty, not personalty. TexCivA 273SW903.

CASUAL

28-18 85 IndA627, 154NE35.
28-19 85 IndA627, 154NE35.

CASUALTY INSURANCE

30-44 [a] **Inherent weakness of article insured.**-172Minn13, 214NW473, 55ALR 938.

CATHOLIC

33-14 7PaDist&Co 18.

CATTLE

33-19 [g] (7) 1LeachCC73, 168Reprint 139.

CAUSE

37-95 [h] (9) See also TexCivA 318SW (2d)887.
39-97 171Ark34, 283SW1.
39-2 171Ark34, 283SW1.
39-17½-New. "separate cause;" Tex CommnA 285SW307.

CAUSEWAY

41-58 43F(2d)309.

CAUTIOUS

42-84 191NC727, 133SE67.

CAVEAT

42-92 [a] 293Pa351, 143A9.
43-2 216Ky774, 288SW685.

CAVEAT EMPTOR

43-4 [a] 210Ky683, 276SW494. [b] (1) 190NC162, 129SE453, 455 [quotCJ in part]. [d] (15) 128 Or83, 262P939. (16) Applies to purchase of specific things, upon which buyer can exercise his own judgment, or whenever buyer voluntarily chooses what he buys. 128 Or83, 262P939. (17) Also applies where it is a term of the contract express or implied that buyer shall not rely on skill or judgment of seller. 128 Or83, 262P939. (18) Has no application where seller has undertaken and buyer has left it to seller to supply goods to be used for purpose known to both parties at time of sale. 128 Or83, 262P 939. [e] (5) 82Mont349, 267P305.

CELLULOSE

47-60½-New. An amorphous white compound, isomeric with starch, insoluble in all ordinary solvents, forming the fundamental material of the structure of plants, and contained in the mantle of tunicates. 15CustA22.

CEMETERIES

50-2 130Kan397, 286P266.
50-7 220MoA187, 281SW119; 127Misc 558, 217NYS413. [a] **Failure to plot land on which mausoleum was erected** is held not to affect nature of entombment space therein as "burial ground in public cemetery," exempt from sale on execution. MoA 281SW119.
50-8 130Kan397, 286P266; MoA 296 SW442, 445 [citCJ].
50-11 190NC520, 130SE189; 23 OhA 21, 155NE147.
50-12 31F(2d)308; 160Tenn468, 26SW (2d)132 (location and maintenance). See also 28F(2d)918. [e] **Revocation of permit without hearing** is held void where grantee incurred expense. 36 GaA709, 138SE88.
51-14 See also 31F(2d)308.
51-19 [a] **In New York.**-218AppDiv 682, 219NYS413.
51-23 160Tenn468, 26SW(2d)132.
51-23½-New. A cemetery is a common municipal agency, 153Tenn393, 284SW 370.
51-23¼-New. and its operation is a governmental function. 153Tenn393, 284SW370.
51-24 153Tenn393, 284SW370.
51-25 167Minn410, 209NW6; 153Tenn 393, 284SW370.
51-26 99NJEq738, 133A758. [a] (4) Ordinance declaring cemetery nuisance and directing removal of bodies therein is not unreasonable exercise of police power. 38F(2d)950.
52-29 But see 130Kan397, 286P266.
52-30 99NJEq738, 133A758.
52-30½-New. City council may enact an ordinance forbidding the issuance of a permit for interment in a cemetery in which no interments had been made, until the city council had first given consent to the use of cemetery for burials. 167Minn410, 209NW6.
52-35 153Tenn393, 284SW370 (empowered to acquire cemetery property beyond city limits).
52-35½-New. Power is conferred on cities and towns in some jurisdictions to hold property appropriated for burial purposes in trust for persons entitled to interment therein. 153Tenn393, 284SW370. See also 127Misc558, 217 NYS413.
52-35¼-New. Statute giving a town the right to acquire property for a cemetery is not rendered invalid by that fact that permission was granted to allow the burial of people who had resided outside of the town. 153Tenn393, 284SW370.
52-35¼-New. After great expense by a newly-organized cemetery company its permit may not be arbitrarily revoked in the absence of a hearing or notice to the association, or without a showing of any violation of conditions of permit. 36GaA709, 138SE88.
52-35½-New. Burial of dead and maintenance of cemeteries is not municipal affair. 38F(2d)950.
52-39½-New. A statute prohibiting persons in control from prohibiting the erection of headstones approved by the government is invalid. 334 Ill 555, 166 NE112.
53-41 See also 23 OhA21, 155NE147.
53-42 [a] **Those with mere beneficial interest** are not "proprietors" of cemetery, under statute. Mass 170NE421.
53-42½-New. Organizers need not transfer to a corporation a permit acquired for its use before complete organization. 36GaA709, 138SE88.
53-42¼-New. A subordinate lodge of the Independent Order of Odd Fellows incorporated under state law with the usual powers of social and benevolent societies is not a cemetery corporation, although it owns and manages a cemetery. 129Kan287, 282P715.
53-43 [a] **In Ohio.**-23 OhA21, 155NE 147.
53-44 [b] **Profit from rental** of parish cemetery cannot be claimed by trustees from parish. Mass 170NE421.
53-47½-New. Incorporators of a cemetery association who have assumed all the risks are not liable as promoters receiving a secret profit in conveying land to the association. 96NJEq101, 130A373.
53-52 [c] **Payment of dividends.**-248 NY152, 161NE452.
53-60½-New. Cemetery association's by-law prohibiting sale of stock, except after offer to sell to association, is valid. 260Mass173, 156NE708.
53-61 [a] (3) Cemetery association's certificate of indebtedness is dependent upon sale of lots and can therefore not be collected in form of money judgment against association. 217AppDiv309, 216 NYS576.
54-62 [a] **Bonds** given in payment for realty were held not nonnegotiable though containing provisions for payment of interest out of proceeds from sale of lots and profits of association. 96NJEq101, 130A373.
54-69½-New. Bonds and bondholders. In determining the rights of bondholders, the fact that the management of a cemetery association is in the nature of a charitable, pious, or sacred trust, must be considered. 96NJEq101, 130A 373.
54-69½-New. In New York remedy of certificate holders is in equity. 217App Div309, 216NYS576.
54-71 [a] **Trustee personally interested** in transaction is not to be counted in determining quorum to authorize such act. 156SC238, 153SE141.
54-73 [a] (4) Under L. (1909) c 40, directors must be elected in such manner that term of office of one third of directors should expire annually thereafter. 135Misc763, 238NYS664.
54-74½-New. Management of a cemetery association is in the nature of a charitable, pious, or sacred trust. 96 NJEq101, 130A373.
54-76½-New. Cemetery may accept gift of real and personal property under will subject to police power of state to prevent establishment and enlargement of cemetery in congested districts. 125Misc634, 211NYS841.
54-77½-New. The acts or words of a cemetery corporation cannot create an obligation contrary to the direct provisions of the statute. 244NY294, 155 NE580.
54-78½-New. A cemetery association organized not for profit is not violating regulatory laws by a contract made with a common-law business trust providing for the sale and conveyance to the association by the trustees of such trust of certain tracts of land. 19 OhA 436, 155NE147.
55-1 [c] **Statutory exception** to such provision does not authorize establishment of new cemetery of less than four acres within prohibited limits of municipalities, but applies to cemeteries previously located. 29 OhA509, 163NE 727.
56-6 99NJEq738, 133A758; 160Tenn 468, 26SW(2d)132 (statutes held not invalid). [a] (2) Although cemetery was established outside of city limits before enactment of L. (1910) p 130, the use of additionally acquired lands for cemetery purposes is within provision requiring consent of county. 162 Ga322, 133SE919. [d] **In New York City** consent of board of aldermen is necessary for maintenance of cemetery in Bronx County. 126Misc122, 212NYS 680. [e] **Burial permit,** if considered in nature of grant running with land, does not attach if land is not used for burial purposes thereunder. 263Mass30, 160NE444. [f] **Permit to use land for burial purposes** is special privilege, and rights therein are not transferable. 263 Mass30, 160NE444.
56-11 But see 99NJEq738, 133A758.
56-15½-New. Revocation of permit granted cannot be arbitrary or capricious, and without notice or hearing to parties affected. 36GaA709, 138SE88.
56-17 99NJEq738, 133A758.
56-21¼-New. Certiorari attacking the issuance of a permit comes too late three and a half years thereafter, and after expenditure by the cemetery company. NJSup 132A85.
56-23 99NJEq738, 133A758.
57-24 36GaA709, 138SE88; 123Kan 645, 256P806.
57-24½-New. City will not be enjoined from using lands for cemetery where lands were only available and suitable site. 193NC555, 137SE582.
57-24¼-New. In such a suit for an injunction the objection will run only to the right of the holders of the property to establish and operate a cemetery. 315Mo 602, 286SW86.
57-30 127Misc558, 217NYS413.
57-36½-New. Purposes for which

property may be acquired. By statute it is provided that a cemetery association may acquire property otherwise than by condemnation, 125**Misc**634, 211 **NYS**841.

57-36½-New. and use the income therefrom, pursuant to the terms on which acquired. 125**Misc**634, 211**NYS** 841.

57-38 155**Md**221, 141**A**525; 190**NC**520, 130**SE**189.

58-41½-New. Cemetery corporation organized for profit holds unsold lots as private property which it may use as it sees fit. **Mont** 288**P**612.

58-41½-New. Statute under which deeds to cemetery lots were executed became part of deeds. 38**F(2d)**950.

58-42 73**CalA**193, 238**P**732.

58-44 [a] **Association may mortgage** to extent of value received for cemetery purposes. **NJCh** 139**A**707.

58-45 73**CalA**193, 238**P**732.

58-48 Cal 291**P**397. See also 9**PaDist &Co** 292.

58-48½-New. Where land had been granted to trustees as a cemetery and changed conditions and the law made further use illegal, it was not a violation of the trust to make the sale after removal of the bodies. 190**NC**520, 130 **SE**189.

58-48¼-New. Statutes in some jurisdictions require a permit to sell lots for cemetery purposes. 163**Ga**36, 135**SE** 405.

58-48¼-New. A mortgage on cemetery lands, given to secure the purchase price to the promoter, has been held not a lien on the land, but on one half the proceeds of sales of burial plots. **NJCh** 145**A**537(2dcase).

58-48½-New. On foreclosure of a vendor's lien, value of the land was properly based on its value as a cemetery. **NJCh** 145**A**537(2dcase).

58-48¼-New. On foreclosure of a vendor's lien on one half of the proceeds of sale of burial plots, interest on the sum found to be value of the cemetery has been held improperly allowed. **NJCh** 145**A**537(2dcase).

58-48½-New. On foreclosure of a vendor's lien on one half of the proceeds of sale of burial plots, allowance for the legal expense incurred in the litigation necessary to obtain the cemetery's franchise has been held improperly allowed. **NJCh** 145**A**537(2dcase).

58-48¼-New. A subordinate lodge of the Independent Order of Odd Fellows, owning and managing a cemetery binding itself to care for lots sold, has the right to sell the cemetery with incidental assets including the upkeep fund. 129**Kan**287, 282**P**715.

58-48½-New. The legislature, on vacating a cemetery, cannot pass legal title to a city, since the state did not have title. 200**Wis**163, 227**NW**870.

58-53 200**Wis**163, 227**NW**870 (cemetery purposes actually put in effect).

58-54 127**Misc**558, 217**NYS**413, 420 [quotCJ]; 218**AppDiv**682, 219**NYS**413, 416 [quotCJ].

59-58 127**Misc**558, 217**NYS**413, 416 [quotCJ].

59-59 218**AppDiv**682, 219**NYS**413, 416 [quot CJ].

60-67½-New. Burial space in a mausoleum is held burial ground in a public cemetery exempt from sale on execution. **MoA** 281**SW**119.

60-69 101**NJEq**399, 138**A**654 (held to be legal estate). [d] **More than mere right of interment.**–127**Misc**558, 217**NYS** 413.

60-70 31**F(2d)**308.

60-73½-New. Title owner cannot get his title adjudicated in a claim by a third person against a cemetery association. 244**NY**571, 155**NE**901.

60-73¼-New. A good faith purchaser of a lot in a cemetery controlled by a township without notice of previous sale to another has the superior right whether the deed was recorded or not where the statute does not declare that the legal effect of the recording deed is to impart constructive notice to subsequent purchasers. 204 **Iowa**1074, 216**NW**630.

60-73¼-New. and a prior purchaser is not entitled to decree quieting title in him which would require removal of the body of the husband of a subsequent purchaser. 204 **Iowa**1074, 216**NW**630.

61-79½-New. Rights in general. In determining the rights of owners of lots, the fact that the management of a cemetery association is in the nature of a charitable, pious, or sacred trust, must be considered. 96**NJEq**101, 130**A** 373.

62-95 [b] **Term "monument"** includes tomb, burial vault, sepulcher, or building wholly or partly in earth or entirely above ground. 135**Misc**81, 236 **NYS**663.

62-96 202**Cal** 738, 263**P**232; 135**Misc** 81, 236**NYS**663 (right of lot owner to enjoin infringement of rights).

62-97 [c] **Action to restrain association from interference with construction of mausoleum.**–In absence of by-laws and compliance with Membership Law, association cannot object to maintenance of action. 135**Misc**81, 236**NYS**663.

62-2 10**PaDist&Co** 195.

62-4 88 **Ind**507, 164**NE**718; 5**LaA**40. [a] **Who may question.**–**Mont** 288**P**612.

62-6 [a] (7) Rule requiring lot owner to employ only employees of association to care for and decorate lots held unreasonable. 167**Minn**223, 208**NW**811, 47 **ALR**64.

63-7 167**Minn**223, 208**NW**811, 47**ALR** 64 (cemetery association may require improvements and decorations to be made by competent persons, to conform to general plan and make reasonable rules regulating character and manner of work).

63-12½-New. Representations by the association as to the care of lots imposes no greater duty than that imposed by statute. 96**NJEq**101, 130**A**373.

63-12¼-New. It is a primary duty of the court to protect the rights of lot owners in respect to care of their lots, even as against bondholders. 96**NJEq** 101, 130**A**373.

63-12¼-New. Thus care of the cemetery requires first consideration in an action by bondholders to compel payment of purchase price of property. 96**NJEq** 101, 130**A**373 (where no fund for care had been set aside).

63-16 79**CalA**601, 250**P**581. [b] **Contract made subject to rules.**–Rule restricting burials to members of Caucasian race is part of contract for sale of lot to negro where contract provides for conveyance subject to rules, though it also provides that it embodies all terms and conditions. 79**CalA**601, 250**P**581.

63-19½-New. A statute permitting revocation or designation of persons to be interned in cemetery lots is held applicable to lots "held in inalienable form" only. 219**AppDiv**573, 220**NYS**379.

63-20 124**Me**397, 130**A**177; 12**PaDist &Co** 439 (burial in Jewish cemetery properly denied one who had embraced another religion).

64-21 124**Me**397, 130**A**177.

64-25 [d] **In suit for desecration of grave,** evidence offered by defendant to show grant of right of way across graveyard was properly excluded. **TexCivA** 178**W(2d)**471.

64-27 [b] **Acts held to constitute trespasses.**–200**Wis**163, 227**NW**870.

64-29 [a] **Liability for injuries.**–109 **Conn**410, 146**A**817.

64-31½-New. One injured by stepping into a hole from which the grave marker had been removed cannot recover from the church maintaining the cemetery without showing who removed the marker or covered the hole and when it was done. 109**Conn**410, 146**A**817.

64-32 101**NJEq**399, 138**A**654; 135**Misc** 81, 236**NYS**663 (infringement of rights of lot owner in cemetery may be prevented by injunction); 96**PaSuper**146.

65-37 100**NJEq**301, 134**A**676.

65-37½-New. The court will not adjudicate title of heirs of the grantee where neither the original grantor nor his successors are parties. 200**Wis**163, 227**NW** 870.

65-43 MoA 296**SW**442, 444 [citCJ]; 200**Wis**163, 227**NW**870 (surviving kindred of persons buried).

65-45½-New. Plaintiff, contracting with the owner of a cemetery lot to erect a mausoleum, is entitled to maintain an action against the cemetery association to restrain interference. 135**Misc**81, 236 **NYS**663.

65-45¼-New. Heirs of the grantee in fee of cemetery lots are entitled to maintain an action to protect interest and remove cloud on title. 200**Wis**163, 227 **NW**870.

66-50½-New. Defendant has burden of proving violation of condition that burial should be refused if deceased had committed suicide. 101**NJEq**399, 138**A** 654.

66-50¼-New. Evidence held insufficient to show suicide.–101**NJEq**399, 138**A**654.

66-50¼-New. [§ 39a] 5½. **Evidence.** Various cases are given below in which the evidence has been held sufficient to sustain the chancellor's findings. **MoA** 296**SW**442.

66-50½-New. Evidence held not to show that mausoleum would be offensive or injurious to the appearance of surrounding lots. 135**Misc**81, 236**NYS**663.

CENSUS

70-1 [a] (3) 54**SD**207, 222**NW**948.

70-9½-New. Where the legislature has provided a method of determining the population, that method is exclusive, and the courts may not act. 149**Wash**173, 270**P**306.

71-16½-New. A city of the third class, acting under a commission form of government law, cannot ascertain its population by enumeration except for the purpose of advancing from a third to a second class city. 149**Wash**173, 270**P** 306.

CENTER or CENTRE

73-7 160**Ga**400, 128**SE**397, 400 [citCJ].

CENTRAL

73-12 160**Ga**400, 128**SE**397.

CERTAINTY

75-71 123 **Or**370, 261**P**69.

CERTIFICATE

77-89½-New. A certificate of a public officer is a statement written and signed, but not necessarily nor usually sworn to, which is by law made evidence of truth of facts stated for all or for certain purposes. 190**NC**768, 130**SE**619.

CERTIFY

79-42½-New. ; to vouch for a thing in writing. 190**NC**768, 130**SE**619.

CERTIORARI

88-2 [c] (1) 310**Mo** 248, 274**SW**1075; 310**Mo** 267, 275**SW**534; 220**MoA**676, 293 **SW**512.

88-4 217**Ala**273, 116**S**131; 340 **Ill** 118, 172**NE**1; 255**Mass**160, 150**NE**892; **MoA** 20**SW(2d)**7; **RI** 133**A**621. [c] **Other definitions.**–**Miss** 130**S**98.

88-10 255**Mass**160, 150**NE**892; **Mass** 171**NE**648; 166**Minn**414, 208**NW**181; **NJCh** 150**A**202; 52**SD**572, 219**NW**258; 99**WVa**663, 129**SE**708, 709 [citCJ]; 103 **WVa**714, 138**SE**362. [b] **Scope of writ quite limited at common law** and is likewise limited in Oklahoma. 122 **Okl** 66, 251**P**31.

88-11 213**Ala**305, 104**S**764; **Ala** 128**S** 443; **Fla** 130**S**7; 247 **Ill**A53; 220**MoA** 193, 282**SW**498; **RI** 133**A**621. [a] (3) 255**Mass**160, 150**NE**892. (4) 213**Ala**305, 104**S**764. (9) 262**Mass**451, 160**NE**312. (12) Writ of review can be resorted to only for purpose of annulling order of court complained of. 93**CalA**189, 269**P** 746. (13) "Writ of certiorari" is simply medium through which judgment in case pending before inferior judicatory may be reviewed in superior court. 39 **GaA**72, 146**SE**639. (14) Function of writ extends to question of jurisdiction of inferior tribunal and external validity of proceedings. 217**Ala**515, 116**S** 684. (15) Office of writ is the review of all questions of jurisdiction, power, and authority of inferior tribunal to do acts complained of. 131**Misc**672, 227 **NYS**629. (16) Writ involves limited review of proceedings of inferior jurisdiction. **Fla** 127**S**313.

89-12 202**Cal** 593, 262**P**324.

89-14 83**Colo** 379, 265**P**687, 689 [cit CJ].

89-14½-New. Certiorari issued under Louisiana statute as ancillary remedy to mandamus. 161La721, 109S400.

89-14½-New. Certiorari is a writ of review. 101Vt195, 142A762.

89-15 Fla 126S149.

89-17 310Mo 248, 274SW1075.

89-21 214Ala332, 107S905.

89-22 Fla 126S149; 338Ill 109, 170NE 254 (not reviewable in absence of appeal).

89-27 153Miss489, 120S173; Miss 130 S98; 310Mo 248, 274SW1075.

90-33 54ND391, 210NW9, 10 [quotCJ].

90-35 240 IllA208; 203 Iowa1240, 212 NW716; 310Mo 267, 275SW534; 103 NJL708, 137A437; NJSup 132A318. [a] **Mandamus, not certiorari,** is proper remedy to compel United States district court to allow writ of error in criminal case. 4F(2d)802.

90-36 NJSup 142A355.

90-38 [a] **Certiorari will not lie** to review refusal of United States district court to allow writ of error. 4F(2d)802.

90-40 310Mo 267, 275SW534.

90-41 241Mich161, 216NW426, 427 [quotCJ].

90-42 93Fla161, 112S66.

90-43 310Mo 248, 274SW1075, 1077 [quotCJ].

91-46 [a] **In South Carolina.**–131SC378, 127SE568.

92-66 [a] **Mere irregularities in proceedings** are not grounds for writ. Ala 128S443.

92-74 93Fla161, 112S66; Fla 127S313; Fla 129S876.

92-75 [a] (2) 35GaA331, 132SE925. [c] **Where judgment is not erroneous,** it is error to grant writ. 35GaA698, 134SE 633.

92-76 235 IllA488 (writ lies only in aid of court's jurisdiction); 250 IllA385.

93-73 201 Iowa1135, 205NW961; 201 Iowa292, 207NW129; 201 Iowa912, 208 NW505; 203 Iowa1277, 212NW391; 206 Iowa452, 221NW354. [b] **Errors not amounting to illegality.**–201 Iowa912, 208NW505.

93-80 [c] Writ only issued to correct errors or protect interests that cannot be aided by appeal. 159La463, 105S510. [d] **Certiorari lies to review refusal of district court to exercise jurisdiction** over proceedings of divorced wife to modify decree. 161La721, 109S400.

93-80½-New. Certiorari lies to prevent a district judge from issuing an order or injunction interfering with or restraining a school board from holding a regular meeting where no reason for such interference is shown. 158La81, 103S 517.

93-81½-New. **In Massachusetts** certiorari does not issue because of formal or technical errors. Mass 171NE648.

93-83 315Mo 347, 286SW82.

94-2½-New. **In Philippines** the appellate court will not issue a writ of certiorari unless it clearly appears that the court to which it was directed acted without, or in excess of, jurisdiction. 45 Philippine173 (abuses of discretionary powers held shown in instant case).

94-3 [d] **Decision declaring attachment bond null and void** violates no rule of procedure, and certiorari does not lie to review it. 43PortoRico 347.

94-4 RI 133A621.

95-18 44Philippine179 (Code Civ. Proc. § 513); 32PortoRico 259. [a] **"When the Legislature has passed a special law** giving a citizen a right of action, recourse must be had to that act and not to the general principles of certiorari." 32PortoRico 259, 261.

95-23 37Wyo 498, 263P708.

95-24 See also 36GaA82, 135SE491.

95-25 [a] **In Georgia.**–162Ga400, 134SE 80.

96-29 3Man509.

96-30 [c] 35BC368, [1925] 2DomLR 696, [1925] 1WestWkly1084.

96-33 35BC368, [1925] 2DomLR696, [1925] 1WestWkly1084.

97-41 77CalA599, 247P249.

97-45 118 Or546, 247P772.

97-49 [a] (1) 74CalA147, 239P853. (2) Orders and judgments not conforming to rules of procedure held not reviewable by writ of review. 202Cal 478, 261P 1001.

97-50 48Nev53, 226P1106 (certiorari lies where court has wrongfully assumed jurisdiction of parties). [a] 202Cal 593, 262P324.

97-52 118 Or546, 247P772. [a] 83Mont 349, 272P242. [b] (2) Writ of review will lie only when there is no other adequate, complete, or plain remedy. 118 Or546, 247P772. (3) Will not lie where plaintiff has complete remedy by action at law. 118 Or546, 247P772. (4) Appeal and review cannot both be taken at same time. 132 Or311, 285P240. [c] **Pleadings.**–118 Or546, 247P772. [d] **Exercise of judicial function.**–118 Or546, 247P772.

98-55½-New. or ministerial acts or orders. 118 Or546, 247P772.

98-58 200 Iowa1030, 205NW865; 103 NJL227, 135A771.

99-59 103NJL227, 135A771. [a] (8) Where circuit court sits as special or statutory court, certiorari is method of review. 102NJL294, 132A503. [c] **Mere enlargement or extension of judicial powers of court** does not make exercise of such powers acts of special tribunal reviewable by certiorari. 104NJL260, 140A883.

99-60 104NJL260, 140A883. [b] **Order of circuit court transferring case from district court to circuit court,** because counterclaim exceeded district court's jurisdiction, is not reviewable on certiorari. 104NJL260, 140A883.

99-61 103NJL227, 135A771.

99-70 Mass 170NE795; 122 Okl 66, 251 P31, 32 [citCJ].

100-71 219Ala457, 122S444; 77CalA599, 247P249; 159La463, 105S510; 322Mo 258, 14SW(2d)646; 222MoA787, 9SW (2d)829; 122 Okl 66, 251P31, 32 [cit CJ]; 155Tenn342, 293SW996.

100-72 Fla 129S876; 122 Okl 66, 251P 31.

100-77 23F(2)221; 219Ala457, 122S 444; 30Ariz620, 249P768; 176Ark1030, 5SW(2d)302; 71CalA701, 236P335; 72 CalA484, 237P763 (review of annexation of one school district to another); 75CalA623, 243P473; 81CalA709, 254P 617 (granting motion to place case on jury calendar not ground for issuance); CalA 291P861; 52Fla634, 42S714; 94 Fla549, 114S232; 252 IllA178; 203 Iowa1277, 212NW391; 159La209, 105 S292 (to inquire into jurisdiction and validity of proceeding in inferior courts); 252Mass331, 147NE866; 261 Mass269, 159NE41; 247Mich192, 225NW 632; 315Mo 347, 286SW82; 322Mo 258, 14SW(2d)646; 220MoA193, 282SW498; 85Mont215, 278P122; NJSup 131A906; 100NJEq162, 134A748; 121 Okl 268, 249 P921; 294Pa385, 144A288 (legislature cannot deprive litigant of writ of certiorari, so far as relates to question of jurisdiction); 45Philippine173; 49Philippine1; 49Philippine152; 49Philippine398; RI 133A621; 50RI 13, 144A 433 (writ ordinarily does not lie to correct error in exercise of jurisdiction); 68Utah220, 249P806. [f] **Though right of appeal is specifically denied,** right of review exists where question of jurisdiction of subject matter exists. Pa 152 A92.

102-85½-New. commissioner of corporations. 75CalA623, 243P473.

102-88½-New. boards of adjustment, NJSup 131A906.

102-91 [a] **Certiorari lies** from order of county board of education void on its face. 174Ark1180, 296SW31.

103-94½-New. street commissioners, 252Mass331, 147NE866.

103-95½-New. Ordinarily there is no appeal from a decision of the inferior tribunal, and its decision that it has jurisdiction cannot be final. 252Mass 331, 147NE866.

103-1 Contra 83Mont400, 272P525.

103-5 46 Ida635, 269P593.

103-11 89CalA177, 264P573.

103-12 83Colo 360, 265P94.

103-13 39 Ida798, 237P700; 46 Ida635, 269P593; 46 Ida642, 269P595.

103-15 50Nev318, 258P289.

103-17 121 Okl 268, 249P921; 142 Okl 243, 286P347.

103-22 142 Okl 243, 286P347.

103-24 310Mo 267, 275SW534; 310Mo 267, 275SW536; 315Mo 347, 286SW82.

103-26 [a] **In Idaho.**–46 Ida635, 260P 593.

103-27 CalA 284P479.

103-28 203 Iowa1277, 212NW391; 310 Mo 697, 276SW631 (attempt to exercise unauthorized powers).

104-36 Ala 128S443.

104-38 [a] 71CalA701, 236P335; 86 CalA187, 260P557.

104-41 202Cal 593, 262P324.

104-44 71CalA701, 236P335.

105-47½-New. A successful defendant is entitled to his costs as a matter of course, under Code Civ. Proc. § 1024, and allowance of costs where the statute makes it mandatory is a jurisdictional question, and refusal to award costs required by statute may be corrected by a writ of review. 93CalA147, 269P553.

105-47½-New. The writ may be used to determine whether there was any testimony to establish certain facts without the existence of which a board of dental examiners had no power to act in proceedings to revoke a license. 85 CalA224, 259P70.

105-49 51Nev206, 273P659. But see 217Ala273, 116S131.

105-55 74CalA147, 239P853.

106-62 203 Iowa1277, 212NW391. See also 46 Ida635, 269P593; 32PortoRico 347. [a] (8) Illegal and ultrajurisdictional action of municipal court judge canceling order made by another municipal court judge is reviewable by certiorari. Iowa 232NW819.

106-66½-New. A writ will be denied where the proceedings appear regular. 217Ala515, 116S684.

106-71 310Mo 446, 276SW1020 (decision as to right of insurance company to collect full amount of premium note after default which by terms of policy merely suspended liability); 313Mo 246, 281SW690; 317Mo 751, 297SW378. But see Mo 32SW(2d)569. [b] **Supreme court** will not determine whether opinion is right or wrong, but only whether it conflicts with supreme court's opinions. 321Mo 130, 9SW(2d)953. [c] **Failure to follow rulings not shown.**–310Mo 446, 276SW1020; 316Mo 418, 289 SW835; 316Mo 346, 289SW957. [d] **Failure to follow previous decisions of court of appeals** is not ground for quashal. 310Mo 446, 276SW1020. [e] **Authorities other than decisions of state supreme court** are of no value upon question of conflict. 310Mo 446, 276SW 1020. [f] **Failure to follow rulings not shown.**–321Mo 1126, 14SW(2d)990.

106-71½-New. , but the supreme court will overrule its own wrongful decision and quash the writ in proper cases. 314Mo 13, 283SW51, 45ALR1466.

106-76 NJSup 130A647.

107-77 75CalA623, 243P473; NJSup 130A647; 50ND753, 197NW871; 55ND 178, 212NW828; ND 228NW816. [b] 201 Iowa912, 208NW505. [d] **Statute, authorizing granting of certiorari writ to prevent miscarriage of justice,** does not extend writ to review of discretion of board. ND 228NW816.

107-79 252Mass331, 147NE866.

107-80 203 Iowa84, 212NW342; 45 Philippine173. [a] **Abuse of discretion in granting amendments** to prosecuting attorney and delaying trial in prejudice of accused's substantial rights, held ground for issuance of writs certiorari and prohibition. 45Philippine173.

107-81½-New. refusal of court to appoint a temporary receiver; 201 Iowa 912, 208NW505 (to close up affairs of corporation whose charter has expired).

107-85 35PortoRico 556 (pleadings).

107-87 165Minn50, 205NW691.

108-90 [b] **Certiorari to review issuance of search warrant** by justice of peace is unauthorized. 153Tenn162, 281 SW936.

108-91 [a] **Where judgment was void for want of jurisdiction,** defendant was entitled to have proceedings had pursuant thereto, including pretended sale by sheriff, set aside and held for naught in certiorari proceeding. 51Nev206, 273 P659.

108-95 166Ga727, 144SE278; 320Mo 1093, 9SW(2d)612.

108-2 NJSup 134A747.

108-3 102NJL511, 134A549.

108-6 [a] NJSup 148A793.

108-7 163**La**213, 111**S**681; 133**Misc**315, 232**NYS**18.
109-13 **TexCivA** 25**SW(2d)**889.
110-27 [a] **In suit to enforce unconstitutional ordinance,** unconstitutionality of ordinance does not render judgment for its enforcement void within meaning of rule. 160**Ga**701, 128**SE**806. [b] **Claim that ordinance is invalid** does not render judgment in suit to enforce the ordinance void. 160**Ga**701, 128**SE** 806.
110-31 310**Mo** 267, 275**SW**534.
110-32 201 **Iowa**378, 207**NW**361; 164 **La**124, 113**S**789; **NJSup** 133**A**397. [c] **Where question involved in injunction proceeding has become moot** because result of injunction is accomplished by lapse of time, allegations of application and return will not be considered. 158**La**81, 103**S**517.
111-45 34**Ariz**2, 267**P**203, 204 [quot CJ]; 47**RI** 323, 132**A**1.
111-52 202**Cal** 593, 262**P**324; 77**CalA** 321, 246**P**334; 83**Colo** 379, 265**P**687; 92 **Fla**515, 109**S**442; 167**La**977, 120**S**617; 166**Minn**414, 208**NW**181; **Miss** 130**S**684; 220**MoA**676, 293**SW**512; 83**Mont**400, 272**P**525; 50**Nev**318, 258**P**289; 127 **Misc**854, 217**NYS**603; 122 **Okl** 66, 251 **P**31; **RI** 133**A**621; 103**WVa**173, 136**SE** 833.
112-54 83**Colo** 379, 265**P**687; **Mo** 298**W (2d)**83; 222**AppDiv**722, 226**NYS**37. But see 285**Pa**432, 132**A**360.
112-56½-New. habeas corpus, 21**F(2d)** 1009.
112-57 100**NJEq**162, 134**A**748; 127 **Misc**854, 217**NYS**603; **RI** 133**A**621.
112-66 75**Mont**147, 242**P**959; 122 **Okl** 66, 251**P**31.
113-67 125**Me**4, 130**A**504.
113-69 44**Philippine**27; 44**Philippine** 179 (inapplicable to proceedings under Code Civ. Proc. § 513).
113-75 [a] **Under statute relative to municipal court of Atlanta,** no writ will lie to verdict, judgment, order, or ruling of such court unless motion for new trial is made and judgment thereon is reviewed by appellate division of such court. 162**Ga**400, 134**SE**80.
113-78 5**F(2d)**292; 212**Ala**533, 103**S** 548; 212**Ala**574, 103**S**666; 219**Ala**369, 122**S**608; **Ala** 128**S**443; 31**Ariz**460, 254 **P**232; 171**Ark**802, 286**SW**962; 181**Ark** 683, 27**SW(2d)**106 (only exception being judgment void on its face); 71**CalA** 418, 235**P**655; 77**CalA**321, 246**P**334; 81 **CalA**709, 254**P**617; 84**CalA**265, 257**P**893; 85**CalA**255, 259**P**95; 89**CalA**330, 264**P** 1110; 99**CalA**501, 278**P**1062; **CalA** 288 **P**629; **CalA** 291**P**861; **Fla** 127**S**313; 43 **Ida**211, 250**P**389; 46 **Ida**635, 269**P**593; **Ida** 287**P**950; 340 **Ill** 118, 172**NE**1; 201 **Iowa**912, 208**NW**505; 203 **Iowa**1064, 213 **NW**801; 203 **Iowa**1028, 213**NW**803; 208 **Iowa**649, 226**NW**13; 175**Ark**724, 300**SW** 370; 162**La**295, 110**S**480; 166**La**645, 117**S**748; 250**Mich**450, 231**NW**89(1st case); 220**MoA**676, 293**SW**512; **MoA** 20 **SW(2d)**7; 75**Mont**147, 242**P**959; 82 **Mont**463, 267**P**803; 83**Mont**400, 272**P** 525 (order held not appealable); 50**Nev** 318, 258**P**289; **NJSup** 130**A**647; 104 **NJL**260, 140**A**883; 122 **Okl** 66, 251**P**31; 124 **Okl** 201, 202, 255**P**678 [quotCJ]; 34 **PortoRico** 795; 50**RI** 13, 144**A**433; 66 **Utah**300, 242**P**348; 69**Utah**26, 252**P**270; **Utah** 272**P**200; 134**Wash**90, 234**P**1017; 155**Wash**296, 283**P**1093; **Wash** 289**P**25; 103**WVa**295, 137**SE**229; **NS** [1930] 1 **DomLR**662. See also 90**Fla**84, 105**S**142. [b] **Orders held reviewable by certiorari.**—Order directing sheriff to postpone execution sale. 31**Ariz**460, 254**P**232.
115-79 318 **Ill** 570, 149**NE**469; 122 **Okl** 66, 251**P**31; 124 **Okl** 201, 202, 255**P**678 [quotCJ].
115-80 125**Me**520, 134**A**545; 250**Mich** 450, 228**NW**762; 124 **Okl** 201, 202, 255 **P**678 [quotCJ].
115-81 176**Ark**530, 3**SW(2d)**319 (proceedings to procure bridge franchise); **Mo** 298**W(2d)**83. [e] **Where judgment is void** and not merely irregular, certiorari will lie though appeal might accomplish vacation of judgment. 169 **Ark**261, 273**SW**1032. [f] **Where viewers act without jurisdiction of subject matter,** certiorari will lie to review their proceedings though appeal is provided for in such proceedings. 201 **Iowa**292, 207**NW**129. [g] **Applicant's failure to ask for second rehearing** in court of appeals held not to preclude granting of certiorari. 161**La**175, 108**S**405.
115-82 176**Ark**1030, 5**SW(2d)**302.
116-84 **CalA** 291**P**861; 39 **Ida**798, 237 **P**700.
116-87 159**La**209, 105**S**292 (appeal does not always afford adequate remedy in case of inquiry into jurisdiction of inferior courts); 310**Mo** 397, 276**SW** 631; 320**Mo** 1093, 9**SW(2d)**612; 122 **Okl** 66, 251**P**31. [b] **Where general statutory authority** for appeals is inapplicable to proceedings under special act, proper remedy is by certiorari. 220**Ala**12, 123 **S**573(4thcase).
116-90 [a] **That remedy by appeal is less speedy** does not authorize review by certiorari where remedy by appeal exists. 82**Mont**463, 267**P**803.
116-92 219**Ala**457, 122**S**444.
116-93 160**La**839, 107**S**593.
116-94 162**La**823, 111**S**177.
116-2 82**CalA**764, 256**P**422.
116-3½-New. The surety of a forfeit bond to appear for sentence has adequate remedy by appeal. 162**La**295, 110**S**480.
116-4 81**CalA**588, 254**P**291 (ignorance of entry of judgment till after expiration of time to appeal).
117-5 50**Philippine**975.
117-6 85**CalA**255, 259**P**95; 85**CalA**381, 259**P**373; 250**Mich**450, 228**NW**762.
117-7 82**CalA**322, 255**P**548; 194**NC**577, 140**SE**230. [b] 192**NC**788, 136**SE**113. [d] (3) Taking full sixty days allowed for serving statement of case on appeal. 192**NC**788, 136**SE**113.
119-36 **TexCivA** 25**SW(2d)**889.
119-46 See also 223**AppDiv**468, 228 **NYS**585.
120-50 92**Fla**515, 109**S**442, 445 [cit CJ]; **Fla** 129**S**876; 124**Ga**116, 52**SE** 300; 206 **Iowa**452, 221**NW**354 (power of legislature to authorize use of certiorari with hearing de novo); 166**Minn** 414, 208**NW**181; 220**MoA**193, 282**SW** 498; **RI** 133**A**621; 103**WVa**173, 136**SE** 833; 103**WVa**714, 138**SE**362.
121-51 197**Cal** 215, 239**P**1076; 87**CalA** 159, 255**P**251; 87**CalA**594, 262**P**177 (3d case) (reviewable only in some way substantially as upon writ of certiorari); **Fla** 129**S**876; 235**Mich**261, 209**NW**122; 310**Mo** 397, 276**SW**631; 220**MoA**193, 282**SW**498; 240**NY**199, 148**NE**189; **RI** 133**A**621; 103**WVa**714, 138**SE**362.
121-58 310**Mo** 397, 276**SW**631; 240**NY** 199, 148**NE**189 (court would refuse to review attempt of board to which no judicial or quasi judicial authority had been confided even when it attempted to exercise judicial powers as all such acts were void and might be ignored by parties affected).
121-59 **Fla** 129**S**876; 103**WVa**173, 136 **SE**833. [c] **Real estate brokers' board's** power to deny or revoke broker's license is quasi judicial and reviewable by certiorari. **Wis** 231**NW**628(2dcase).
122-60 82**CalA**159, 255**P**251 (determination by county board as to proper notice of election).
122-62½-New. Fact that an officer or board in performance of duty has to ascertain certain facts and in doing so determine what the law is does not of itself render the acts judicial. 167 **Minn**307, 209**NW**3.
122-63 167**Minn**307, 209**NW**3; 103 **WVa**714, 138**SE**362.
122-65 **CalA** 284**P**479; 310**Mo** 397, 276 **SW**631.
122-66 92**Fla**515, 109**S**442, 445 [citCJ].
122-70 [a] **Removal from office of constable** by township board of trustees is reviewable by certiorari. 310**Mo** 397, 276**SW**631.
123-83 But see 103**WVa**714, 138**SE**362.
123-84 103**WVa**173, 136**SE**833.
123-89 173**Ark**514, 292**SW**697; 235 **Mich**261, 209**NW**122; 166**Minn**414, 208 **NW**181; 167**Minn**307, 209**NW**3; 143 **Miss**805, 109**S**868; **Mo** 281**SW**420; 240 **NY**199, 148**NE**189; **RI** 133**A**621.
123-90 **NJSup** 139**A**342.
124-9 **NJSup** 133**A**413.
124-10½-New. **Action of water commission** in passing upon a petition for a certificate prescribing the time within which the full amount of appropriations water shall be applied to a useful or beneficial purpose, and in determining that "due diligence" and "good faith" have been exercised, and that there has been "good cause shown" for issuance of the certificate, is not the exercise of a judicial function. 197**Cal** 215, 239**P**1076.
124-23 **RI** 152**A**44(1stcase).
124-24½-New. In Porto Rico, under statute, writ lies to review action of municipal assembly in declaring void election of commissioner of public service, police, and prisons. 32**PortoRico** 259.
124-25 [b] **Act of city clerk** in determining sufficiency of petition for recall of city trustees is not reviewable. 74 **CalA**161, 239**P**855.
125-35 **RI** 133**A**621.
125-47½-New. ; the fixing of intrastate freight rates. 143**Miss**805, 109**S** 868.
125-48½-New. In Porto Rico, by statute "legislative or administrative act of municipal assembly, council of administration or commissioners," infringing constitutional rights or contrary to laws, is reviewable by certiorari. 32 **PortoRico** 259.
126-62 **Fla** 130**S**87; **Mo** 298**W(2d)**83; 220**MoA**676, 293**SW**512, 515 [citCJ]; 83 **Mont**349, 272**P**242; 127**Misc**854, 217 **NYS**603; 53**ND**649, 207**NW**555; 69 **Utah**26, 252**P**270. See also 96**CalA**769, 274**P**992; 101**Vt**195, 142**A**762.
127-71 97**Fla**1054, 122**S**578.
127-72 **Mo** 298**W(2d)**83; 69**Utah**26, 252**P**270.
128-88 72**CalA**383, 236**P**364.
128-94 97**Fla**1054, 122**S**578.
128-96½-New. ; order requiring parties to answer questions propounded in taking of depositions; 96**CalA**769, 274 **P**992.
128-96¾-New. order of court of appeals discharging supersedeas issued by member thereof directed to an order of chancery court dissolving injunction. 158**Tenn**50, 12**SW(2d)**528(1stcase).
128-99 69**Utah**26, 252**P**270.
128-1 [a] **In Florida.**—130**S**87.
128-2½-New. , or constitutional. 35 **GaA**707, 133**SE**41.
128-3 30**Ariz**620, 249**P**768; 173**Ark** 514, 292**SW**697; 181**Ark**693, 27**SW(2d)** 96(1stcase); **Ark** 31**SW(2d)**129; 85**CalA** 255, 259**P**95; 96**CalA**769, 274**P**992; **Fla** 127**S**313; 245 **Ill**447; 263**Mass**124, 160**NE**404; **Mass** 171**NE**648; 250**Mich** 450, 228**NW**762; 310**Mo** 248, 274**SW** 1075; 316**Mo** 865, 293**SW**783; 320**Mo** 465, 8**SW(2d)**16; **Mo** 298**W(2d)**83; 220 **MoA**676, 293**SW**512, 515 [citCJ]; **NJ** 141 **A**170; **NJSup** 136**A**607; **NJSup** 140**A** 677; **NJSup** 143**A**73; **NJSup** 151**A**468; 194**NC**577, 140**SE**230; 122 **Okl** 66, 251**P** 31; 6**PaDist&Co** 139; 32**PortoRico** 347.
129-4 See also **NJSup** 143**A**73.
129-6 See also **Ark** 31**SW(2d)**129.
129-8 220**MoA**676, 293**SW**512.
129-11 **NJ** 141**A**170.
129-11½-New. When an action of tribunal sought to be reviewed was correct, certiorari must be denied. 173 **Ark**514, 292**SW**697.
130-12 194**Wis**456, 216**NW**144.
130-15 **NJSup** 132**A**85.
130-18 **NJSup** 132**A**299; **NJSup** 136**A** 608; 35**PortoRico** 721 (not sufficient ground for denying writ though considered when averments were not clear).
130-20 47**RI** 85, 129**A**813.
131-35 **NJSup** 146**A**673 (where three prior applications seeking to raise same question had been refused).
132-40 35**GaA**202, 133**SE**44; 102**NJL** 262, 132**A**86 (summary proceedings).
132-41 83**Colo** 360, 265**P**94; **Miss** 130 **S**684; 100**WVa**531, 131**SE**7.
132-49 [a] **In Oklahoma.**—139 **Okl** 108, 281**P**220.
132-49½-New. **Courts of appeals.** In Georgia constitutional amendment ratified in 1916 provides for writ of certiorari from supreme court to the court of appeals. 161**Ga**749, 132**SE**90.
132-53 **Fla** 127**S**313; 161**La**721, 109**S** 400.
132-54 41**GaA**353, 153**SE**99(2dcase) (courts of ordinary).
132-57 35**GaA**202, 133**SE**44.
132-58 But see **NJSup** 142**A**417.
133-65 **Minn** 232**NW**788(1stcase); 310 **Mo** 267, 275**SW**534. [a] (16) Order al-

lowing appeal from order appointing administrator pendente lite and suspending executor. 310 Mo 267, 275SW534. [b] 256Mass369, 152NE692.

134 82½-New. boards of adjustment, NJSup 131A566.

134 82½-New. board of commissioners of state bar, 38NM6, 261P816, 817 [cit CJ].

134 87 NJSup 150A687(1stcase); 44 Philippine 36.

134 91½-New. township trustees acting as fence viewers, 201 Iowa292, 207 NW1?9.

134 93 [a] **Subordinate boards** created by legislature may be kept within jurisdiction and compelled to proceed legally by courts. Wis 231NW628(2dcase).

134 95 [a] **In West Virginia.**–100WVa 531, 131E167.

134 96½-New. In Porto Rico the General Act of March 10, 1904, with regard to certiorari, does not authorize the review of proceedings of inferior boards, but only of inferior courts. 32 PortoRico 343.

134 96½-New. Certiorari will not lie to review an order of a commission having state wide jurisdiction but which cannot be legally invested with judicial functions. 75CalA761, 243P707.

134 98 199Cal569, 250P666, 96CalA765, 274P992, 39GaA101, 117SE590(2dcase). Iowa 228NW661 (guardian ad litem in other proceedings); 161La177, 108So351, 50Nev315, 253P229.

134 99 50ND270, 209NW539.

135 1 50Nev315, 253P229.

135 2 157Miss490, 128S332 (one not interested has no right to certiorari).

135 3½-New. The attorney general, in the name and on behalf of the people, has been held entitled to attack by certiorari judgments affecting the power of the secretary of state to have published legislative proposals. 320Mo1093, 98SW(2d)61.

135 10½-New. Certiorari will be denied after time to appeal has elapsed where parties were not given opportunity to be heard on evidence aliunde the record. 35PortoRico551.

135 14½-New. Writ is issued as matter of course to attorney general in proceeding to quash habeas corpus judgment although he was not party. Mo 258SW(2d)479.

136 21 NJ 141A13; NJ 151A863; NJSup 130A189; NJSup 151A468.

137 37 MoA 28SW(2d)113, 115 [cit CJ].

137 42 NJSup 133A196.

138 46 [d] (4) May not insist on personal right on sharp grounds. NJSup 140A677.

139 55 121Okl268, 249P931.

139 66 [a] **In New York.**–136Misc523, 241NYS454 (special term of supreme court of county where branch office of department located).

140 66 100WVa531, 131SE7 (of county in which judgment was rendered or order made).

140 68 201Cal108, 255P?19.

140 78 [d] **Necessity of certificate that claim involves more than one thousand five hundred dollars.** 339Ill635, 171NE999.

141 88 [d] **Action cannot be revived** where relative dies before application for writ. 310Mo248, 274SW1075.

141 91½-New. Citizens, taxpayers, and voters as petitioners held proper parties for certiorari against attorney general to enforce public duty. Miss 169NE552.

143 7 RI 163A361, 112Wash691, 251P?13. [d] **Parties defendant** are prerequisite to issuance of writ. 310Mo248, 274SW1075.

143 8½-New. On certiorari to review action of fence viewers, the party who initiated the proceedings before the viewers is not a necessary party. 201 Iowa292, 207NW1?9.

143 10 255Mass35, 150NE903.

143 13 [c] **Township is not necessary party** to proceedings to quash ouster of constable and appointment of successor by township board. 310Mo631, 276SW631.

143 27 NJSup 140A63(2dcase) (held not premature).

144 31½-New. Where the record did not show that an ordinance was considered and finally passed on the day to which the matter was adjourned for final passage, application for certiorari to review the ordinance was premature. NJSup 143A867(1stcase).

144 31½-New. Where the trial judge predicated a decision partly upon an incomplete record, submission of the case in certiorari proceedings is premature. Iowa 227NW517.

144 34 219Ala154, 121S428(3dcase) (petition filed sixteen days after overruling of application for rehearing should not be granted).

144 35 160Ga467, 128SE581; 41GaA719, 154SE652.

144 36 200Iowa1030, 205NW865.

145 36 97Fla479, 121S466.

145 39 216NYS832; 130Misc204, 223NYS740; 133Misc661, 233NYS217. [b] **Commissioner of education.**–To review determination of commissioner of education, order must be granted and served within four months from rendition. 126Misc155, 213NYS647.

145 41 [a] (2) Statute is inapplicable where board of health revoked physician's license without jurisdiction over person. Mo 328SW(2d)83.

145 45 157Tenn166, 6SW(2d)328. [a] **In New Mexico.**–33NM345, 267P62 (pendency of motion to dismiss appeal sufficient excuse for failure to file within time).

145 46 [d] **Application for writ held not premature** where relator could assume that failure to produce contracts called for in subpoena duces tecum was rejection of demands. 159La169, 105S278.

145 47½-New. In Alabama, a petition to the supreme court for a writ of certiorari within eighteen days after a second denial of a rehearing, has been held in time under supreme court rules. 218 Ala34, 117S915.

145 52½-New. Fact that original case was pending at the time the act was passed does not prevent its application to certiorari proceedings, and such application does not render it unconstitutional as retroactive. 160Ga467, 128SE581.

145 56 [b] **Certiorari held timely.**–228 AppDiv88, 238NYS438.

145 59 157Tenn15, 58SW(2d)472 (from final decree on application for rehearing where rehearing is sought).

146 66½-New. The supreme court is without power under statute to extend time which has already expired. 157 Tenn166, 6SW(2d)328.

146 66½-New. Filing of a cross petition by appellee did not extend the time to apply for a writ of certiorari. 337 Ill 322, 168NE912.

146 74 85CalA381, 259P373; 83Colo 379, 265P687, 688 [cit CJ]; 247 IlA53; 318Mo?7?, 300SW1061. NJSup 132A8?; NJSup 132A199; NJSup 133A105; 102NJL511, 131A549; NJSup 141A162 (writ not barred); NJSup 150A395; NJSup 151A215; 47RI85, 129A813. [c] NJ 141A561. [d] **Notice of decision to agent of applicant** is notice to applicant for purpose of application for certiorari. NJ 141A561.

147 75 308Mo123, 272SW66 (delay of thirty days held not unreasonable where, although mandate had issued no judgment thereon had been rendered); 9 PaDist&Co701.

147 76 308Mo123, 272SW66 (thirty days). NJSup 132A326.

147 79 215IlA115; 316Mo651, 291SW466, 467 [cit CJ]; NJSup 140A425 (where no motion made for dismissal).

147 81½-New. **Stay of mandate of court of appeals pending application for writ of certiorari** should be obtained by timely application to the court of appeals. 312Mo?7?, 300SW1061.

147 82 NJSup 133A774.

148 85 255Mass331, 147NE866.

148 86 See also 317Mo751, 297SW378.

148 88 215Ala581, 112S193; 69Utah26, 252P270. [b] (2) Error in overruling pleas in abatement is not reviewable on certiorari in absence of motion for new trial. 160Tenn177, 22SW(2d)769.

148 90 215Ala581, 112S193.

148 9 41GaA267, 152SE856. [a] 38 GaA779, 115SE533.

148 9½-New. The right to certiorari may be exercised without moving for a new trial. 35GaA202, 133SE44.

148 2½-New. Certiorari will not lie to the Atlanta municipal court without prior motion for a new trial reviewed by the appellate court. 36GaA201, 136SE163.

149 5 310Mo248, 274SW1075, 1077 [quotCJ]. [c] **Proceeding commenced** by filing petition in proper court. 310 Mo248, 274SW1075.

149 12 154Tenn342, 289SW504. [d] 164Ga637, 139SE216. [f] **Separate submission of argument and brief.**–In Georgia under Sup. Ct. Rules, rule 2 argument and brief of authorities must not be included in petition but must be submitted separately. 161Ga749, 132SE90. [g] **Should be directed against proper parties.**–34PortoRico 765 (against mayor and not municipality to review proceedings relating to petitioner's resignation as municipal secretary and appointment of another person).

149 13 [b] (2) Petition to review conviction under Sunday Law must state that applicant was not guilty of charge. 6PaDist&Co 139.

150 17 36GaA263, 136SE799.

150 19 92Fla1015, 110S532; 157Miss714, 124S479(1stcase). [a] 92Fla1015, 110S532.

150 22 44 Ida706, 260P160, 161 [citCJ]. [a] **Application based on conflict of decisions** need not print entire record, but only that pertaining to question of conflict. 307Mo536, 271SW43.

150 24½-New. Evidentiary matters are not properly included in a petition. 262Mass477, 160NE427.

150 25 See also 317Mo751, 297SW378.

150 30 [b] **In New York.**–213AppDiv155, 210NYS178.

150 34 [c] 34GaA193, 128SE817. [d] **In Georgia.**–36GaA628, 137SE911.

151 38 [b] **It has been held unnecessary to show no right of appeal** where judgment was rendered without service of process on defendant. 51Nev206, 273P659.

151 42 44 Ida706, 260P160, 161 [quot CJ]; 51Nev206, 273P659 (sufficient); 46Philippine791. [c] **Allegations sufficient.**–317Mo751, 297SW378.

151 43 44 Ida706, 260P160, 161 [quot CJ].

151 43½-New. The jurisdiction of the lower court must be determined despite ordinarily fatal irregularities in the application. 317Mo751, 297SW378.

151 46 Fla 130S615.

151 49 33GaA694, 127SE660; 36GaA310, 136SE330.

151 51 33GaA694, 127SE660; 36GaA13, 134SE925; 36GaA263, 136SE799; 36GaA750, 138SE336; 38GaA667, 145SE110; 40GaA157, 149SE91(1stcase) (assignment of errors insufficient). [b] (5) Assignment that judgment was illegal, erroneous, and unlawful for divers other reasons is insufficient. 104NJ465, 142A341. [e] (9) Petition for certiorari containing no legal assignments of error is void and should not be sanctioned. 34GaA219, 129SE1. (10) General assignment of error in overruling motion for new trial is sufficient to bring up question of propriety of action in directing verdict where petition for certiorari sets forth grounds of motion and complains of error in directing verdict. 35GaA331, 132SE925. (11) Assignment "that said court erred in sustaining said motion to dismiss, and also in dismissing, said appeal to a jury in said court, and in entering up judgment" is insufficient. 36GaA13, 134SE925. (12) Petition failing to allege grounds for new trial is insufficient. 36GaA263, 136SE799. (13) Specifications held sufficient. 166Ga727, 144SE278. (14) Specifications held insufficient. 38GaA667, 145SE110. (15) Where petition assigned errors on admission of evidence, but failed to specify any ruling as erroneous, writ was properly denied. 40GaA94, 149SE66.

152 52 156Miss644, 126S469.

152 54½-New. **A petition for certiorari** should not be dismissed for want of sufficient assignments where it contains one sufficient assignment. 35GaA331, 132SE925.

152 59 [a] **Affidavit held insufficient.**–

TexCivA 28SW(2d)848.

153-60½-New. Memorandum raising points relied upon, attached to the application and expressly referred to therein, must be considered part of the application. 161La104, 108S229.

153-61 92Fla1015, 110S532; 36GaA 263, 136SE799. See also 83Mont400, 272 P525. [f] **Transcript of evidence** taken at hearing before selectmen held improperly included. 262Mass477, 160NE 427.

153-61½-New. A petition for certiorari will be denied where the abstract is insufficient to enable the court to determine the question presented. 175Ark 1033, 18SW(2d)70.

153-65 51Nev206, 273P659 (need not be signed by attorney).

153-66 40GaA73, 148SE746.

153-67 164La93, 113S778. [c] (7) Where bill of exceptions based on refusal to sanction certiorari embodies exact copy of petition for certiorari and judge certified that bill of exceptions was true, petition for certiorari is sufficiently verified. 35GaA44, 133SE44. [f] **Trial court must certify** brief of evidence and grounds of motion for new trial below. 36GaA814, 138SE248.

153-72 160La925, 107S698.

154-75 [d] (2) 167La537, 119S700(3d case).

154-82 233Mich327, 207NW5 (petition for writ to review action of township boards detaching territory from one school district and attaching it to another may be amended to include question of validity of action under statute providing that land taxed for schoolhouse shall not be set apart within stated period without consent of two thirds majority of resident landowners); 213AppDiv155, 210NYS178 (all mistakes of practice will be disregarded and all papers will be deemed amended to conform to proper practice).

154-84 36GaA750, 138SE336; 39GaA 72, 146SE639.

155-94 [a] **Striking amended petition filed without leave.**-44Philippine27.

155-99 [a] **Timeliness of application** based on illegality of court's jurisdiction is foreclosed by issuance of writ. 317Mo751, 297SW378 (application held timely).

155-1½-New. Filing of demurrer is proper under practice in some jurisdictions. 75CalA623, 243P473.

155-2 38F(2d)182 (demurrer to petition admits allegations of fact therein contained); 262Mass477, 160NE427.

155-5½-New. Rules relating to petition for certiorari will be enforced without necessity of calling court's attention to violations by motions to strike. 339 Ill 637, 172NE63.

155-6 105NJL197, 143A843.

157-52 [b] **In Philippine.**-44Philippine 79.

157-52½-New. When it is seen that result of issuance of writ would be futile, it will be denied. 32NM249, 255P395.

157-56 165Ga742, 142SE73 (motion to dismiss application for writ denied); Okl 293P199.

157-57 [b] **Trial court's findings** are part of record and will be examined. 218Ala34, 117S915.

157-60½-New. On failure to traverse answer, overruling of certiorari is proper. 36GaA772, 138SE287.

157-60½-New. In certiorari proceedings to review denial of building permits by the local board, the court may pass on the validity of zoning ordinances under which the board had been created. 127Misc895, 217NYS353.

158-65½-New. In New Jersey, no argument will be considered by the supreme court which is not presented on the record from the lower court. NJSup 142A653.

158-82 33PortoRico 429.

158-83 La 129S727.

158-84½-New. Certiorari will be allowed where applicant's affidavits disclose a fairly debatable question. NJ Sup 133A172.

158-85 35GaA570, 134SE144; 35GaA 662, 134SE202; 37GaA101, 139SE134 (certiorari properly overruled under facts disclosed by record). See also 35 GaA486, 134SE144.

158-86½-New. In a municipal court composed of more than one judge in which only one judge presided in the original trial of case, right to review by certiorari will not be denied because the judge who rendered final judgment may be unable to certify to antecedent ruling of court rendered while another and different judge was presiding. 35GaA50, 132SE141.

158-86⅓-New. Where, in view of the answer of the trial judge, there is no merit in the assignments of error in the petition, the petition is properly overruled. 37GaA79, 139SE133.

158-86¼-New. When it is impossible intelligently to pass on the question presented without exploring the transcript, the decree will be affirmed. 175 Ark1033, 18SW(2d)70.

158-86½-New. Court's refusal to issue certiorari has been held not adjudication on questions in record not presented to, nor considered by, court. Mo 298SW(2d)83.

159-94 36GaA628, 137SE911. [e] (1) 37Ga821, 142SE304; 36GaA628, 137SE 911.

159-95 37GaA459, 140SE797.

160-3 34GaA171, 128SE694.

160-5 [a] (3) Affidavit should allege that owing to his poverty affiant is unable to give required security. 34GaA 171, 128SE694. (4) Writ void where affidavit merely alleges affiant "is unable to give the security, as required by law." 34GaA171, 128SE694.

161-31 [a] **In Georgia.**-37GaA76, 139 SE84.

161-39 37GaA459, 140SE797.

162-54½-New. Sureties are not liable for compensation and expenses of a receiver where no part of the expenses incurred because of supersedeas or injunction. 155Tenn530, 296SW356.

162-61 206Iowa932, 221NW442(2d case).

162-67 167La537, 119S700(3dcase).

163-71 160Tenn177, 22SW(2d)769 (simultaneously with petition).

163-72 35GaA266, 133SE60 (sufficient).

163-85 [a] 310Mo631, 276SW631.

165-25 [a] **Power to regulate command of writ.**-316Mo865, 293SW783.

167-55 33PortoRico 422, 424 [citCJ].

168-67 [b] **Direction to judge instead of court** will not require dismissal of proceedings where there was only one judge in district. Utah 273P961.

168-76 RI 135A360.

168-79 [d] (3) Failure to serve writ of review on opposite party leaves circuit court without jurisdiction to entertain case. 129 Or100, 276P277.

168-81 [a] (2) Must be served within sixty days after due notice of proceedings sought to be reviewed. 165Minn 493, 206NW718. (3) Where writ issued before formal written notice of order to be reviewed was given determining date as to when service should be made was date of issuance of writ. 165Minn493, 206NW718 (assumed applicants had due notice before applying for writ).

169-85 [b] **Notice in open court and recordation in minutes** held sufficient. 160La925, 107S698. [c] **Service on clerk of court** is sufficient to give jurisdiction to review action of court of which he is clerk. Utah 269P1017.

169-95 165Minn493, 206NW718. Contra 160La430, 107S294. [a] 34GaA149, 128SE590. [c] **Actual failure to serve must clearly appear,** before certiorari will be dismissed. 34GaA149, 128SE 590.

169-96 Utah 269P1017.

170-19 NJCh 147A502; 10PaDist&Co 453; 194Wis456, 216NW144.

170-22 [c] **In Tennessee.**-155Tenn614, 298SW263 (procedure).

170-25 206Iowa932, 221NW442(2d case).

170-26 Okl 293P199.

170-27 155Tenn614, 298SW263.

171-28½-New. Bare filing of petition for certiorari in the supreme court to review judgment of the intermediate appellate court does not remove the case to the higher court. 155Tenn614, 298SW263.

171-28⅓-New. Nor does it operate as a stay of execution of the judgment. 155Tenn614, 298SW263.

171-43 Okl 293P199.

172-59 75CalA623, 243P473; 220MoA 676, 293SW512; 83Mont377, 272P553; 33PortoRico 134; 35PortoRico 276. [a] 86CalA332, 260P919. [c] **Return waives defects** in issuance of writ. 310Mo 397, 276SW631.

172-63 CalA 291P861.

173-78 161Ga392, 131SE70 [citCJ] (if one judge presided at trial and another rendered judgment each should answer as to facts within his knowledge).

173-79½-New. A like rule applies in Montana. 77Mont214, 250P609.

173-83 [a] **Judges presiding at different stages of trial.**-35GaA50, 132SE141.

174-5 [f] **Matters not disclosed by return cannot be considered.**-Mass 171NE 826.

174-10 Mo 29SW(2d)83.

175-12½-New. On certiorari to review a town's rejection of villages' claim, a return denying knowledge or information as to the merits of the claim have been held defective. 129Misc379, 221 NYS337.

175-12⅓-New. Where sufficiency of return is not questioned, it is accepted as true concerning all matters within jurisdiction of respondents. Mass 171 NE826.

175-16 220MoA676, 293SW512. But see Mo 298SW782. [e] **Return must be taken as setting out accurate record thereof** and true to all matters of fact within respondent's jurisdiction. Mass 171 NE648. [f] **Complete record must be certified.**-CalA 291P861.

175-17 Mo 274SW353 (absence of abstract requires dismissal); Mo 18SW (2d)61 (holding that otherwise writ must be dismissed).

175-18 317Mo858, 297SW59. [f] **What judge secretly knew from telephone conversations with person charged with contempt** is not part of record. Iowa 229NW168. [g] **Relator's application for writ cannot be looked to** for matters and facts that should appear in return but do not. Mo 24SW(2d)111 (3case).

176-19 Mo 274SW353 (any instrument referred to in opinion becomes part of record). [b] **Abstract containing opinion sought to be quashed as well as pertinent parts of abstract of record** filed in court of appeals is in substantial compliance with Sup. Ct. Rules, rules 13, 33. 322Mo376, 15SW(2d)815.

176-19½-New. On certiorari to quash an opinion and judgment of the court of appeals as contravening controlling decisions of the supreme court, such opinion constitutes the record in the supreme court. 313Mo200, 281SW398.

176-24 MoA 2SW(2d)113.

176-27 330Ill11, 161NE150 (whether testimony was stricken for failure to connect it up with other proof held immaterial in absence of such proof); 260Mass369, 157NE693; 153Miss489, 120S173; Mo 24SW(2d)111(3dcase). [e] **Record held to show evidence properly preserved.**-Iowa 229NW163.

176-29½-New. Where neither party procures a stenographer to transcribe notes, and the petitioner declines to do so, the court is not required to do so, although he may, if he sees fit. 35GaA 671, 134SE621.

177-32 NJSup 150A231 (substance of evidence).

178-45 [a] **Appellate court may look to bill of exceptions** to review decree not stating substance of evidence. 23 AlaA515, 128S119.

178-46½-New. A bill of exceptions, alleging that the applicant for certiorari excepted to an order refusing to sanction a petition and now excepted on the ground that the petition should have been sanctioned, contains an assignment of error sufficient to review grounds of complaint contained in the petition. 35 GaA202, 133SE44.

178-52⅓-New. The purpose of exceptions to the answer of the trial magistrate to a petition for certiorari and of traverse thereto are to perfect answers so as to present to the reviewing court what actually occurred on the trial. 38 GaA762, 145SE470(2dcase).

178-55 [a] Ill 156NE371.

178-57 46Ida97, 266P677 (recital of facts not otherwise shown by record not considered).

179 71½-New. [illegible] motion for judgment by the relator admits the substantive fact pleaded in the return. 219Mo 1049, 58NW(2d)40.

179 72 256GaA671, 134SE621.

180 73 [illegible] 256GaA671, 134SE621.

180 75 256GaA682, 145SE485(1st case); 180GaA704, 168SE638. [c] **Striking insufficient traverse.** 256GaA671, 134SE621.

180 77 Mo 188SW(2d)561 (rule of court authorizing waiver does not include right to waive printing and filing of abstract). See also 217Mo 1888, 206SW159.

180 81 Iowa 220NW168; 131Misc668, [illegible]

180 89 223AppDiv378, 228NYS176 (village trustees).

181 92-New. Amended abstract of record prepared in accordance with rules respecting abstract pursuant to court order will not be stricken although not a copy of return. Iowa 220NW168.

181 97 [b] **Necessity for notice.** 205 Iowa[illegible] [illegible]NW[illegible]

181 99 NJ sup 140A[illegible]

181 95½-New. Motion for order approving filing of amended return setting out transcript of shorthand notes and exhibits, although not required, held not improper. Iowa 220NW168.

181 97 223AppDiv[illegible], [illegible]NYS[illegible]; But see 256GaA200, 183SE660.

181 3 201 Iowa 1, 16NW[illegible].

181 3 201 Iowa 1, 216NW[illegible].

182 8½-New. On review of an action of a district judge, where he made the record part of his return and certified it to the supreme court, he cannot complain of the court's acceptance of it. 202 Iowa1327, 212NW152.

182 14 [illegible]GaA[illegible], 113SE[illegible]

182 24 223AppDiv[illegible], 228NYS178, 179 [quot'd]. [a] **That supplemental return of village trustees impeaches decision of former trustees** does not afford conclusive effect of such return. 223 AppDiv[illegible], [illegible]NYS[illegible].

182 33 But see 223AppDiv378, 228NYS176.

182 38 [illegible]AppDiv[illegible], [illegible]NYS[illegible]

182 40 [illegible]GaA[illegible] [illegible], NJSup 139 A[illegible] 50[illegible] 11, 114A[illegible]

182 40½-New. Questions which may be determined on demurrer may also be presented on motion to dismiss the proceeding. 75GaA628, 243P478.

182 50½-New. Failure to file the abstract of proceeding below is ground for dismissal where required by court rule. 201 Iowa480, 207NW337.

182 50¼-New. Failure to comply with an order that the cause be submitted in accordance with the rules for submission of civil causes is ground for dismissal. 201 Iowa[illegible], [illegible]NW[illegible].

182 50¼-New. The rule applies, although the parties have stipulated for a submission without abstract or argument. 201 Iowa480, 207NW337.

182 50¼-New. Failure to verify errors. Where the answer fails to verify only assignments of error on which the court could have sustained a writ, petition should be dismissed. 256GaA671, 134SE621.

182 50½-New. Failure of the trial court to certify a brief of evidence has been held ground for dismissal. 3d GaA314, 138SE918.

182 50½-New. Certiorari could not be dismissed on the ground that there was no proof that the prosecutor had property entitling him to attack an action of the municipal body where the prosecutor appeared as a taxpayer. 220Mo 1218, 108SW(2d)940 (opinion of inferior court, in conflict with highest court decision on the state of facts, must be quashed), 7NJMisc[illegible]2, 144A[illegible]

182 50½-New. Failure to file the printed abstract of record as required by rules of court is ground for dismissing writ. MoA 268SW(2d)814.

183 51 161GaA740, 132SE[illegible]; 165GaA[illegible], 117SE118.

184 56 161GaA[illegible], [illegible]; 161GaA[illegible], 117SE[illegible]; 161GaA[illegible], 117SE[illegible]; 161GaA[illegible], 117SE[

day are not available on certiorari. 126 Misc661, 214NYS390.

194-59 156Miss644, 126S469.

194-60½-New. and in Utah, 69Utah26, 252P270.

194-60½-New. Judgment in plaintiff's favor cannot be affirmed on the theory that plaintiff was injured at a place other than the place of injury claimed in the lower courts. 279US7, 49SCt202, 73 L ed578.

194-61 36GaA13, 134SE925; 159Tenn 55, 15SW(2d)753. [a] 41GaA815, 155 SE101.

194-62 275US199, 48SCt53; 154Tenn 304, 285SW576; 156Tenn479, 8SW(2d) 1099. [b] 40GaA218, 149SE291(2d case).

194-65 [a] In Missouri.-307Mo 536, 271 SW43.

194-66 133SC183, 130SE645 (want of jurisdiction appearing on face of record noticed by appellate court sua sponte).

194-68½-New. Where the court of appeals sustained certain assignments of error and pretermitted others, the supreme court has no jurisdiction to pass upon the pretermitted assignments. 154 Tenn394, 285SW576.

194-69 [a] Where brief was stricken because filed too late and petition and assignments of error contain no testimony, relief cannot be granted as to assignment complaining of reduction in amount of recovery. 160Tenn177, 22SW (2d)769.

195-70 195Cal 212, 232P696 (where right of appeal not given); Cal 287P 450; 78CalA551, 248P784; 84CalA605, 258P614; 93CalA320, 269P758; CalA 279P1004; 87Colo 556, 289P1090; 35 GaA339, 132SE925; 46 Ida635, 269P 593; 203 Iowa1277, 212NW391; 220 MoA676, 293SW512; 83Mont540, 273P 290; 135 Okl 114, 274P669; 69Utah26, 252P270; 194Wis456, 216NW144; 196 Wis472, 220NW929. [g] Certiorari will not lie to review judgment of justice's court after appeal taken and determined by superior court. 74CalA147, 239P 853. [h] On review of order dissolving attachment of salary of government employee it is province of court to decide whether or not such salary is subject to attachment. 35PortoRico 347.

195-73 273US52, 47SCt235, 71L ed534; 274US640, 47SCt714, 71L ed1270; 89 CalA177, 264P573; 203 Iowa1277, 212 NW391; 220MoA232, 283SW712; 50 Nev318, 258P289; 135 Okl 114, 274P 669; 53ND121, 220NW475.

196-78½-New. The supreme court may determine whether certiorari is the proper remedy where it issued a writ in first instance and has the record before it although the question is not raised by the parties. 203 Iowa1064, 213NW 801; 203 Iowa1028, 213NW803.

196-78½-New. The question of jurisdiction which the appellate court reviews on vacation of default judgment is not that existing at the time of the original judgment, but at the time the order vacating judgment was made. 203 Iowa1028, 213NW803.

197-98 Wis 231NW628(2dcase) (where no appeal lies).

197-1 See also 203 Iowa1277, 212NW 391; Mo 274SW373. But see 93Fla161, 112S866.

198-11 But see 320Mo 526, 8SW(2d) 927. Contra 274US640, 47SCt714, 71 L ed1270. [b] Sufficiency of complaint.-202Cal 593, 262P324.

198-12 Mo 287SW606; 133Misc315, 232NYS818; 121 Okl 268, 249P921; 69 Utah26, 252P270. But see 37GaA477, 140SE778.

198-18 273US284, 47SCt406, 71L ed 646; 87Colo 556, 289P1090; 38GaA292, 143SE786; 207 Iowa453, 223NW271; 50Nev318, 258P289; 157Tenn597, 12SW (2d)365. But see 36GaA202, 133SE44. [a] Amount of injunction bond will not be disturbed on certiorari. 163La125, 111S622.

199-23 50Nev318, 258P289, 290 [cit CJ]. [b] Where validity of statute was not decided below, supreme court will not consider it on certiorari. Mo 287 SW606.

199-25 [b] In Alabama.-219Ala461, 122S467(1stcase).

199-26 220Ala41, 126S624; 220Ala677, 127S243; 175Ark570, 299SW1014; 176 Ark530, 3SW(2d)319 (proceedings to procure bridge franchise); Ark 30SW (2d)845; 93CalA189, 269P746; 37GaA 108, 139SE134; 330 Ill 589, 162NE 209; 252 IllA178; 201 Iowa1135, 205 NW961; 204 Iowa847, 216NW25; 159 La519, 105S606 (holding court will not go outside record and decide question not raised below); 262Mass451, 160NE 312; 157Miss490, 128S332; 310Mo 397, 276SW631; Mo 291SW468 (abstract of record cannot be waived); Mo 298SW 782 (instructions); 320Mo 1190, 9SW (2d)635; Mo 29SW(2d)83; 220MoA232, 283SW712; 220MoA676, 293SW512; NJ Sup 140A581; 213AppDiv357, 210NYS 686; 122 Okl 66, 251P31; 293Pa557, 143A189; 12PaDist&Co 96; 53ND121, 220NW475; 155Tenn530, 296SW356; Alta [1929] 4DomLR123. See also Mo 289SW583. [d] (2) Subject on which no ruling was made by court of appeals cannot be reviewed by supreme court. 220Ala2, 127S241.

200-28 97CalA344, 275P889; Wis 230 NW59(2dcase).

200-29 Contra 5PaDist&Co 219.

200-31 Mo 274SW373; 310Mo 386, 276 SW1026; 314Mo 13, 283SW51, 45ALR 1466; 318Mo 341, 300SW475 (supreme court must take notice of existing conflict, though particular matter not assigned as conflicting); 318Mo 274, 300 SW1064; 320Mo 1113, 9SW(2d)624; 320 Mo 1234, 10SW(2d)931; 322Mo 360, 20 SW(2d)17. [b] (1) 313Mo 384, 282SW 46. (4) 313Mo 384, 282SW46; 316Mo 865, 293SW783. [c] Matter incorporated by reference in opinion may be considered where it appears that pleading, instruction, or other written document referred to was subject matter of ruling. 316Mo 865, 293SW783.

200-32 NJSup 132A341.

200-33 34GaA186, 129SE13; 34GaA 185, 129SE14. [b] 34GaA186, 129SE 13. [c] Judgment overruling certiorari.-34GaA185, 129SE14.

200-33½-New. Whether the trial magistrate erred in dismissing pleas to jurisdiction cannot be determined by a court of appeals where the petition for certiorari does not contain such pleas either literally or in substance, or where they are not attached as exhibits. 36 GaA16, 135SE101.

201-35 244NY280, 155NE575; 213App Div357, 210NYS686.

201-42 [f] Opinion of court whose judgment is under review may be accepted as to classification of policy sued on. 302Mo 525, 259SW77.

201-46 Fla 127S313 (examination of bill of exceptions); 240 IllA208.

202-50½-New. In Massachusetts petitioners may attack jurisdiction of inferior tribunal, and may, if necessary, introduce evidence in support of his contention. 252Mass331, 147NE866.

202-52 5PaDist&Co 219.

202-58 101NJL481, 129A761.

203-65 274US117, 47SCt482, 71L ed 955; 213Ala305, 104S764; 213Ala129, 106S60 (review of court of appeals by supreme court); 214Ala6, 106S223; 215 Ala299, 110S475; 216Ala295, 112S902; 218Ala12, 117S462(2dcase); 218Ala242, 118S674; 218Ala563, 119S605; 219Ala 139, 121S441(1stcase); 220Ala604, 126 S621; Ala 129S291(1stcase); 21AlaA 338, 108S620; 21AlaA562, 110S564; 39 Ida798, 237P700; 318 Ill 570, 149NE 469; 325 Ill 109, 156NE350; 330 Ill 640, 162NE139; 332 Ill 362, 163NE659; 240 IllA208; 201 Iowa1135, 205NW961; 208 Iowa649, 226NW13; 255Mass160, 150 NE892; 258Mass444, 155NE431; 260 Mass369, 157NE693; Mass 171NE648; 235Mich412, 209NW112; 250Mich450, 231NW89(1stcase); 166Minn414, 208 NW181; 153Miss494, 121S114; 321Mo 1126, 14SW(2d)990 (review of judgment of court of appeals by supreme court); 220MoA232, 283SW712; 103NJL110, 134A658; NJSup 133A405; 53ND649, 207NW555; 135 Okl 114, 274P669; 156 Tenn479, 8SW(2d)1099. But see 220Ala 6, 123S271; 262Mass477, 160NE427; 294Pa385, 144A288. [b] (2) Whether court of appeals drew correct conclusion of law from facts as shown in its opinion is question of law, and reviewable on certiorari. 220Ala1, 123S262.

203-66 214Ala6, 106S223; 21AlaA15, 106S344; 21AlaA635, 111S276; 220Ala 1, 123S262 (supreme court will not review decisions on facts when resort to bill of exceptions must be had); 39 Ida 798, 237P700; Mo 298SW782 (oral testimony); 320Mo 1190, 9SW(2d)635; Mo 25SW(2d)472; 220MoA232, 283SW712; MoA 20SW(2d)7; 50ND30, 195NW16, 17 [cit CJ].

203-68 [a] (4) Does not issue to review questions of fact where there is record evidence to support finding. NJSup 130 A647. [b] In Tennessee.-153Tenn323, 283SW987.

204-70 274US117, 47SCt482, 71L ed955; 215Ala64, 109S360; 218Ala12, 117S462 (2dcase); 218Ala233, 118S262; 35GaA 182, 132SE399; 318 Ill 570, 149NE469; 201 Iowa1135, 205NW961; 239Mich414, 214NW421; Mo 289SW550; NJSup 140 A561; NJSup 140A254; NJSup 150A 672; 53ND649, 207NW555; 47RI 232, 132A613; 50RI 13, 144A433; 157Tenn 597, 12SW(2d)365 (verdict approved by trial judge); 37Wyo 498, 263P708, 709 [cit CJ].

204-71 23AlaA515, 128S119; 37GaA 727, 141SE816; 164Minn482, 205NW 442; 47RI 232, 132A613. [a] (1) 154 Tenn342, 289SW504. (2) Rule is otherwise where court of appeals did not concur in chancellor's findings. 159Tenn 628, 21SW(2d)398. (3) Findings of fact made by court of appeals against party not filing petition for certiorari will not be reviewed by supreme court. 159Tenn628, 21SW(2d)398.

204-72 201 Iowa1135, 205NW961; 53 ND649, 207NW555. [a] (2) Function of judge of superior court, in reviewing evidence on certiorari, involves original discretion, coupled with right to pass on credibility of witnesses and to weigh evidence. 38GaA292, 143SE786.

204-73 214Ala394, 108S7; 35GaA404, 133SE275; 46 Ida642, 269P595; 201 Iowa1135, 205NW961; 239Mich414, 214 NW421; 213AppDiv357, 210NYS686; 294Pa385, 144A288. See also 34GaA49, 128SE204(1stcase).

205-74 [a] Evidence improperly admitted will not be considered in determining whether there is sufficient evidence to support order. 87CalA193, 261 P1036.

205-75 See also 93Fla161, 112S866.

205-77 213AppDiv357, 210NYS686. [a] Fair cost of constructing school building as basis of architect's fee held question of fact for board of education, and not of law for court. 213AppDiv357, 210NYS686.

205-78 224AppDiv286, 229NYS715.

205-79 NJSup 133A405.

205-80 195Cal 212, 232P696; CalA 291 P861; 40 Ida798, 237P700.

206-82 204 Iowa847, 216NW25; 252 Mass331, 147NE866 (return conclusive as to all matters of fact within jurisdiction of respondents and passed upon by them); 175Minn222, 220NW611; 65 AppDiv224, 72NYS641.

206-83 157Miss490, 128S332. [a] Conduct of hearing as set forth in return must be accepted as true. 252Mass331, 147NE866.

207-96 252 IllA178. Contra 252Mass 331, 147NE866.

208-6 202Cal 478, 261P1001; 37GaA10, 138SE862; 38GaA764, 145SE528; 35 PortoRico 276.

208-8 CalA 284P479; CalA 291P861; 170La861, 129S372 (presumption as to omitted words); Mo 289SW550; 194 Wis456, 216NW144 (presumption of collection of tax in absence of order staying proceedings).

208-9 [a] Mo 20SW(2d)46.

208-10 CalA 279P1004; 36GaA577, 137 SE852; Mo 20SW(2d)46; Mo 25SW (2d)472; 244NY280, 155NE575; 50RI 13, 144A433. See also 196NC662, 146 SE599(2dcase). [d] Lower court must be presumed to have construed question on which its determination necessarily depends. 310Mo 367, 276SW869. [e] Ambiguities in answer or return must be construed favorably to judgment below. 40GaA218, 149SE291(2dcase).

208-11 36GaA77, 137SE853; **Mo** 25 SW(2d)472.

208-12½-New. , and state boards. **Mo** 26SW(2d)773 (that meeting of state board of health was legally convened).

208-13 **Mo** 28SW550; **NJSup** 147A 722 (where evidence is not presented in detail). [a] **Evidence, where not returned** on certiorari, is presumed sufficient to justify judgment. **Mich** 233 NW172.

208-14 47RI85, 129A513.

209-17 146Wash419, 263P735, 737 [cit Cyc].

209-19 [a] **Burden of proving that abolition of office of recorder was not in interest of economy** but political maneuver not sustained. **NJSup** 150A 770.

209-20 217Ala273, 116SE131, 98Fla6, 1298787; 98Fla140, 1298547 (final adjudication is to quash judgment or writ); **Fla** 1298876; 235**IllA**488 (either writ or record are quashed on return); 240**IllA**208 (order quashing record where return insufficient held decision that proceeding was void).

210-35½-New. Judgment in extraordinary writs before supreme judicial court is entered only when specially ordered by court. 262**Mass**477, 160NE427.

210-37 37GaA333, 140SE528; 39GaA 319, 146SE916(2dcase).

210-42 316Mo97, 289SW922 (where erroneous ruling of intermediate appellate court was not in conflict with decisions of supreme court).

210-43 37GaA333, 140SE528.

210-46 36GaA631, 141SE214.

210-46½-New. **Missouri supreme court** will not quash record from court of appeals unless it can say from facts stated opinion conflicts with opinion of supreme court. **Mo** 256SW1049.

210-46½-New. Where no rule of law is promulgated contrary to ruling of supreme court, ruling of court of appeals will not be disturbed. **Mo** 256SW1049.

210-47 **NJSup** 131A906; 121**Okl**268, 249P921, 6**PaDist&Co**40. But see **RI** 135A360.

211-60 164Ga771, 139SE529. [a] **NJ Sup** 142A421.

211-61 37GaA450, 140SE636.

212-63 36GaA375, 133SE278; 37GaA 450, 140SE636; 76GaA760, 142SE460 (final judgment erroneously rendered by superior court on certiorari to municipal court where error of law not presented). See also 38GaA654, 145SE198.

212-65 164Ga771, 139SE529; 37GaA 609, 141SE215; 37GaA671, 141SE218; 37GaA647, 141SE426; 39GaA625, 147 SE904. [a] (1) 36GaA328, 136SE537. (2) Where verdict was not required as matter of law, superior court, on certiorari, had discretion to set aside verdict and grant new trial, but could not render final judgment for opposite party. 40GaA336, 149SE135.

212-65½-New. The court does not err in sustaining certiorari and granting plaintiff a first new trial, where the evidence would have authorized a larger verdict for plaintiff. 40GaA58, 148SE 751.

212-70 280US51, 50SC107, 74Led470. [d] (1) **MoA** 20SW(2d)7 (has no power to direct disposition of case on merits). (2) Supreme court, by statement in its opinion, held only to quash opinion, judgment, and record thereof made by court of appeals. 322**Mo**360, 20SW(2d) 17. (3) Court of appeals then has jurisdiction to dispose of case on merits in conformity with law. **MoA** 20SW (2d)7. (4) Quashing of opinion of court of appeals for conflict does not call for retrial in that court, but case is left under submission in that court. 322**Mo**360, 20SW(2d)17. (5) If submission in court of appeals is set aside after quashal of opinion, time for reargument may be given. 322**Mo**360, 20 SW(2d)17 (submission conclusively shown to have been set aside). (6) Objection to opinion dismissed in absence of tender of conflict in opinion. 322**Mo** 360, 20SW(2d)17.

212-70½-New. , or for new trial. 330 Ill640, 162NE139.

212-71 164Ga771, 139SE529.

212-74 170La100a, 129SE617.

213-80 **Mo** 29SW(2d)83.

213-88½-New. An order quashing a record is held not res judicata of the subject matter in proceedings to remove a policeman. 240**IllA**208.

213-92 See also 160La489, 107SE316.

213-93½-New. The court of appeals must follow the mandate of the supreme court on certiorari, in which it quashed a judgment of the court of civil appeals and remanded the cause to it for further proceedings. 222**MoA**763, 9SW (2d)673.

215-13½-New. **Liability of public treasury.** 35GaA671, 134SE621.

215-14 [f] **In Porto Rico.**-33**PortoRico** 265.

215-26½-New. Costs in certiorari proceedings to annul proceedings of fence viewers are properly taxed to the party who initiated the proceedings before the viewers where he became a party to the certiorari proceedings by consolidation with other proceedings. 201**Iowa**292, 206NW129.

215-26½-New. Costs are not taxable against lower appellate court for erroneous entry of dismissal of appeal where no application for relief is made to it. 72**CalA**383, 236P364.

216-41 201**Cal**108, 255P749; 33**Porto Rico**780.

216-42 [c] **In Illinois.**-325**Ill**625, 156 NE826.

217-56 [a] **Denial of certiorari where facts tend to favor issuance** is subject to review. **CalA** 258P693.

217-58 [c] **In Iowa.**-207**Iowa**177, 222 NW403.

217-59 207**Iowa**177, 222NW403.

217-61 70**CalA**732, 234P409.

217-62 [a] **Judgment overruling certiorari** held legal termination of case. 34GaA186, 129SE613.

217-66½-New. An order sustaining a demurrer to a petition for a writ of review was not appealable, where it was followed by an order of dismissal which would remain in force, notwithstanding disposition of the appeal. 97**CalA**724, 276P355.

218-67 100**CalA**116, 279PS12 (order discharging writ seeking to review setting aside default judgment in justice's court).

218-69 201**Cal**108, 255P749.

218-70 164Ga419, 138SE897.

218-77½-New. In a suit against a church and its trustees in which judgment is rendered for plaintiff and no exception is taken by the church to the overruling of a motion for a new trial, the church is not a necessary party to an appeal from a judgment sustaining certiorari brought by the trustees. 37 GaA647, 141SE426.

218-80 37GaA647, 141SE426. See 214 Ala424, 108S260. [a] But see 35**GaA** 757, 134SE806.

218-81 37GaA647, 141SE426; **GaA** 143 SE786; 310**Mo**397, 276SW631; 50**ND** 753, 197NW871 (theory on which case was tried adhered to on appeal). [g] **Constitutional questions not raised below** cannot be reviewed on appeal from denial of writ. 164Ga637, 139SE216.

219-84 164Ga637, 139SE216.

219-86 See also 36GaA93, 135SE493.

219-88 See also 240**IllA**208.

219-90½-New. An order for judgment pending a bill of exceptions is permissible on certiorari before a single justice to show that the petitioners did not desire to amend. 262**Mass**477, 160 NE427.

219-90½-New. and such order takes effect only in case first bill of exceptions should be overruled. 262**Mass**477, 160 NE427.

219-91 320**Mo**1190, 9SW(2d)635. [a] (1) 310**Mo**397, 276SW631. (7) Where bill of exceptions assigned judgment dismissing petition for certiorari as contrary to law and evidence, it was sufficient assignment of judgment as erroneous. 35**GaA**671, 134SE806. [d] **Importance of construing statute** defining authority of township board of trustees held to warrant consideration notwithstanding insufficiency of assignment of error. 310**Mo**397, 276SW631.

219-93 93**CalA**85, 268P1073; 325**Ill** 109, 156NE350. [b] **Disallowed amendment to exceptions to return** not made part of record or otherwise properly brought to attention of court will not be considered. 35**GaA**671, 134SE621.

220-1 325**Ill**109, 156NE350; 33**Porto Rico**134. [b] (2) One who was not party to certiorari proceeding is not proper party to bill of exceptions complaining of judgment therein. 34**GaA**316, 129SE 573; 38**GaA**454, 144SE147(1stcase). (3) Such person should be made party to bill of exceptions even on his own application. 34**GaA**316, 129SE573. (4) Proffered amendment to exceptions to return which was disallowed may not be specified as such in bill of exceptions. 35 **GaA** 671, 134SE621.

221-8 **CalA** 258P693.

221-9½-New. On appeal from an order quashing certiorari the court of appeals can determine that the order was fraudulently obtained. 222**MoA**787, 9**SW(2d)** 829.

221-12½-New. , and decided adversely to plaintiff in error. 155**Tenn**382, 293SW 533.

221-14 **CalA** 258P91; **GaA** 155SE493 (2dcase).

221-14½-New. Where a petition for certiorari was fatally defective and should not have been sanctioned, it is immaterial that the court refused to sanction it for another reason. 36**GaA** 13, 134SE925.

221-14½-New. Where judgment dismissing certiorari was correct for another reason, it is immaterial that the reason given was erroneous. 36**GaA**16, 135SE101.

221-14¼-New. The appellate court is without jurisdiction of appeal from an order of court denying certiorari to the board of zoning appeals to review the record in proceedings to prevent the issuance of a building permit. 88 **IndA** 134, 163NE536.

221-14½-New. On appeal from a final judgment in certiorari proceedings any errors committed by the court in the final judgment, or in previous rulings on interlocutory matters, can be corrected. 207**Iowa**177, 222NW403.

221-16 222**MoA**787, 9SW(2d)829.

221-19 **NJSup** 132A296.

221-24 [a] **Irregularity in issuance of writ by clerk instead of court** not raised in pleadings or assignment during trial will be considered as waived on appeal. 310**Mo**397, 276SW631.

221-28 38**GaA**292, 143SE786.

221-30½-New. Judgment refusing certiorari at court's discretion in absence of demand for verdict will not be reversed. 40**GaA**674, 150SE857(2dcase).

221-31 50**RI**175, 146A182.

222-32 36**GaA**14, 134SE925.

222-33 40**GaA**674, 150SE857(2dcase).

222-34 37**GaA**790, 142SE177.

222-35 37**GaA**647, 141SE426; **GaA** 155 SE769. [a] (2) Where magistrate's judgment was not absolutely demanded by evidence, superior court's granting first new trial must be affirmed. 40**GaA** 73, 148SE746.

222-40 38**GaA**292, 143SE786; 38**GaA** 762, 145SE470(2dcase). [c] **Correctness of reasons** given by judge in properly overruling certiorari. 40**GaA**598, 151 SE59.

222-41 33**PortoRico**265. [d] (2) Where certiorari should have been dismissed on hearing, but was overruled on merits, court of appeals will not reverse since same correct result was reached. 40**GaA** 157, 149SE91(1stcase).

222-45½-New. On certiorari to review judgment of trial court, on habeas corpus, judgment will be affirmed where the judges of the appellate court are equally divided in opinion. 239**Mich**414, 214NW421.

222-45½-New. Judgment properly sustaining the certiorari will be affirmed, but the final judgment erroneously rendered thereon by the reviewing court will be reversed. 37**GaA**760, 142SE460.

222-45½-New. Case presented by exceptions to order overruling demurrer to petition for certiorari was ripe for final judgment where subsequent order excepted to was to remain in abeyance. 262**Mass**477, 160NE427.

223-51½-New. In Georgia, after judgment by the court of appeals reversing a lower court's judgment overruling certiorari, the superior court has jurisdiction at a subsequent term to pass a formal order sustaining certiorari and remanding the case with instructions. 36 **GaA**328, 136**SE**537.

223-51½-New. Reversal for error of judge of superior court in sustaining certiorari and remanding case for new trial. **GaA** 155**SE**381.

223-53½-New. The court has power to pass on the merits of certiorari or may remit the case. 105**NJL**197, 143**A**843.

CERTUM EST QUOD CERTUM REDDI POTEST

223-1 [a] 82**Colo** 438, 261**P**457; 161**Ga** 468, 131**SE**510; 28**Hawaii** 189; 210**Ky** 299, 275**SW**866.

CESSANTE RATIONE LEGIS CESSAT ET IPSA LEX

224-15 [b] 93**Fla**849, 112**S**846; 224**Ky** 107, 5**SW(2d)**893, 897 [citCJ].

224-16 [a] 105**WVa**375, 143**SE**113, 115 [quotCJ] 61**ALR**657.

CHAIN

226-47 321 **Ill** 480, 152**NE**587.

CHAMBER BUSINESS

227-71 122 **Okl** 86, 251**P**486, 491 [quot CJ].

227-73 122 **Okl** 86, 251**P**486, 491 [quot CJ].

CHAMBERS

228-80 122 **Okl** 86, 251**P**486, 491 [quot CJ].

228-81 122 **Okl** 86, 251**P**486, 491 [quot CJ]; **TexCivA** 289**SW**425.

228-82 131**Ga**807, 63**SE**507; 122 **Okl** 86, 251**P**486, 491 [quotCJ].

CHAMPERTY AND MAINTENANCE

232-2 71**CalA**492, 236**P**210.

232-5 71**CalA**492, 236**P**210.

235-34 224 **IllA**411.

235-35 94**Fla**457, 113**S**722.

236-40 71**CalA**492, 236**P**210.

236-41 [a] (8) In West Virginia doctrine can be invoked only in case of inequitable conduct. 108**WVa**194, 151**SE** 700.

236-42 33**Ariz**128, 262**P**995.

236-43 106**Conn**66, 136**A**865; 94**Fla**457, 113**S**722; 224 **IllA**411; **Man** [1930] 2 **DomLR**427.

238-56 22 **OhA**21, 153**NE**240.

239-62 164**La**409, 114**S**78.

239-63 4**LaA**145, 146 [citCJ].

239-64 164**La**409, 114**S**78.

239-65 164**La**409, 114**S**78.

241-2 224 **IllA**411 (where corporation brought replevin against junk dealer to recover milk bottles belonging to its members).

241-9 151**Miss**761, 118**S**899; 251**NY** 265, 167**NE**437; **TexCivA** 288**SW**627. But see 171**Minn**384, 214**NW**276.

243-14 120 **Okl** 70, 254**P**496.

243-17 245 **IllA**8; **TexCivA** 288**SW**627. See also 170**Minn**191, 212**NW**530.

245-32 245 **IllA**8, 17 [citCJ].

246-35 [h] **Sale of real estate to lawyer** by tenant in common involved in partition suit held not champerty. 83 **IndA** 380, 148**NE**497.

246-36 25**F(2d)**999.

247-44 125**Misc**407, 211**NYS**249. Contra **TexCivA** 289**SW**195.

249-51 152**Miss**100, 118**S**706; 233**Ky** 476, 26**SW(2d)**26 (third party, purchasing interest of devisees and heirs after will was sustained and agreeing to pay fee of contestee's attorneys).

249-52½-New. A corporation organized as an exchange and clearing house for used milk bottles was not guilty of champerty or maintenance in bringing replevin against a junk dealer to recover bottles belonging to its members. 224 **IllA**411.

249-52½-New. A contract whereby several persons agree to become partners and that one of them should obtain certain claims, place them in the hands of attorneys and pay to the others a percentage of the amounts received by him from the attorneys is not champertous as matter of law. 168**Minn**168, 209**NW** 883.

249-53 26 **OhA**460, 160**NE**511.

249-57½-New. A contract whereby a person undertakes to reveal to a legatee the place of undiscovered assets, but does not obligate himself to give testimony, is not avoidable because of maintenance. 254**Mass**180, 150**NE**9, 42**ALR** 1142.

251-63 106**Conn**542, 38**A**452, 455 [cit CJ]; 144 **Okl** 297, 291**P**47.

254-89½-New. [§ 44a] E½. **Soliciting Personal Injury Claims.** A statute prohibiting the solicitation of personal injury claims is a proper police regulation. 239**Mich**204, 214**NW**316, 53**ALR** 273 (statute construed).

255-94 **Fla** 130**S**435. [a] (1) 228**Ky** 806, 16**SW(2d)**442 (but not as to land not held adversely).

255-95 109**Conn**693, 145**A**573; **Conn** 151**A**355; 92**Fla**1045, 118**S**490. [a] (1) 208**Ky**524, 271**SW**564; 208**Ky**684, 271 **SW**1033; 210**Ky**121, 275**SW**513 (St. § 210); 210**Ky**498, 276**SW**487; 214**Ky** 353, 283**SW**117; 216**Ky**599, 288**SW**326; 216**Ky**618, 288**SW**289, 220**Ky**188, 11 **SW(2d)**116; 227**Ky**30, 11**SW(2d)**1002; 227**Ky**525, 13**SW(2d)**520. (7) Champerty statute being penal in its nature, evidence to establish facts authorizing its application should be clear and convincing. 228**Ky**139, 14**SW(2d)**402; 233 **Ky**139, 25**SW(2d)**57; 234**Ky**421, 28 **SW(2d)**472; 235**Ky**316, 31**SW(2d)**388. (8) Adverse possession may be abandoned so as to avoid defense of champerty, although adverse possession once existed. 228**Ky**139, 14**SW(2d)**402. (9) Party, relying on contract to convey, executed prior to commencement of adverse possession, to defeat plea of champertous deed raised by adversary, has burden of showing such prior contract or satisfactorily accounting for its loss or absence, if unable to produce it. 227 **Ky**30, 11**SW(2d)**1002. (10) Where grantee went into possession under deed and continued in possession of property up to rail fence, deed to adjoining property in so far as it attempted to cover portion of land on the side of the fence occupied by the first grantee was champertous. 226**Ky**45, 10**SW(2d)**465. (11) Covenant of general warranty in deed is likewise void. 233**Ky**661, 26**SW(2d)**543. [b] (1) 141 **Okl** 110, 283**P**995. (5) 126 **Okl** 232, 259**P**224. (6) 125 **Okl** 21, 256 **P**39. (7) Where guardian of minor allottees sells their lands and purchaser goes into open, notorious, and adverse possession, and minors have never been in possession or claimed any interest in lands, quitclaim deed by heirs after minors have attained majority to one not heir of allottee and who has never been in possession is champertous. 125 **Okl** 21, 256**P**39. (8) Exception of sale of Indian lands by allottees or their heirs of inherited interest in such lands from champerty statute does not extend or apply to any person other than such allottees or their heirs. 133 **Okl** 34, 270**P** 1098.

256-97 [g] (4) Statute removes all restraints on transfer of realty. 157**Miss** 284, 127**S**302.

256-97½-New. A contract consolidating diverse interests in land and authorizing the trustee to handle all matters connected therewith for percentage of capitalization of such consolidated interests is not forbidden by Kentucky statute. 15**F(2d)**480.

256-99 215**Ala**12, 108**S**858, 861 [citCJ]; 104**Conn**285, 132**A**459; **Conn** 151**A**351; 208**Ky**653, 271**SW**700; 215**Ky**316, 285 **SW**199; 216**Ky**434, 287**SW**698.

257-3 **Conn** 151**A**351; **Conn** 151**A** 355; 234**Ky**64, 27**SW(2d)**382.

257-5 220**Ala**182, 124**S**217; 210**Ky**121, 275**SW**513 (not the same, must be actual possession).

257-6 103**Conn**332, 130**A**286; 210**Ky** 121, 275**SW**513; 218**Ky**448, 291**SW**727; 219**Ky**78, 292**SW**465; 224**Ky**1, 5**SW(2d)** 278; 228**Ky**139, 14**SW(2d)**402; 228**Ky** 806, 16**SW(2d)**442; 232**Ky**781, 24 **SW(2d)**603; 234**Ky**18, 27**SW(2d)**399; 120 **Okl** 5, 249**P**1109. See also 225**Ky** 722, 9**SW(2d)**1076. [c] **Deed from record owner** living on land is not champertous under statute because sons holding unrecorded deed were living with him. 208 **Ky**769, 271**SW**1075.

257-7 210**Ky**121, 275**SW**513.

257-13 226**Ky**488, 11**SW(2d)**116; 228 **Ky**806, 16**SW(2d)**442.

258-17 211**Ky**847, 27**S**SW154.

258-29 228**Ky**139, 14**SW(2d)**402.

258-30 210**Ky**498, 276**SW**487.

259-38 208**Ky**653, 271**SW**700.

259-42 215**Ky**316, 285**SW**199.

259-48 **Ala** 129**S**476. See also 220**Ala** 182, 124**S**217.

260-55 155**Tenn**155, 294**SW**509.

260-59 215**Ala**12, 108**S**858, 861 [citCJ]. [a] (3) Possession of life tenant is not adverse to remainderman during continuance of life estate, and hence deeds under which life tenant claimed estate were not objectionable as champertous. 226 **Ky**13, 10**SW(2d)**477.

261-60 215**Ala**12, 108**S**858, 861 [citCJ].

261-60½-New. A widow's possession of land assigned to her as dower was not adverse to an heir, so as to render sale and conveyance void. 227**Ky**125, 12 **SW(2d)**278.

261-69 232**Ky**59, 22**SW(2d)**422. (judgment establishing boundary line).

261-71 234**Ky**817, 29**SW(2d)**573.

263-4 223**Ky**517, 3**SW(2d)**1095; 226 **Ky**685, 11**SW(2d)**708; 234**Ky**64, 27 **SW(2d)**382.

265-29 228**Ky**806, 16**SW(2d)**442.

266-36½-New. Conveyance is not champertous where a person, alleged to be in adverse possession, is a trustee for the grantor. 210**Ky**612, 276**SW**540.

267-45 But see 228**Ky**806, 16**SW(2d)** 442.

267-53 See also 94**Fla**457, 113**S**722, 725 [citCJ].

268-63 166**La**70, 116**S**673.

270-78 166**La**70, 116**S**673; 152**Miss**100, 118**S**706; 142 **Okl** 29, 285**P**59. [g] **Champertous agreement between attorney and client** is not ground for dismissing action. 177**Minn**1, 223**NW**291.

271-85 216**Ky**648, 288**SW**289.

272-89½-New. Whether a deed by the grantor out of possession is champertous is determined by the law existing at the time of the execution of the deed. 220**Ala**182, 124**S**217.

272-90 94**Fla**457, 113**S**722; 120 **Okl** 5, 249**P**1109. [d] (1) 141 **Okl** 110, 283**P** 995.

273-93 [a] **Where evidence fails to show adverse possession,** conveyance is valid. 215**Ky**551, 286**SW**773.

274-94½-New. A deed may be void as to a strip of land in possession of others than the grantor, under statute, and valid as to land of which the grantor had possession at the time of conveyance. 109**Conn**693, 145**A**573.

274-95 94**Fla**457, 113**S**722; 126 **Okl** 232, 259**P**224. [a] (6) Champertous deed is void. 210**Ky**498, 276**SW**487.

274-98 36**GaA**529, 137**SE**288.

274-99 94**Fla**457, 113**S**722. [c] **In Kentucky.**-215**Ky**551, 286**SW**773.

274-99½-New. Where deed is champertous as to one coplaintiff, it is no defense against another, where both seek to establish joint ownership of property. 211**Ky**761, 27**S**SW107.

275-5½-New. In an action of ejectment, the question whether defendant, who was agent for coheirs in the management of a lot in possession of the heirs disclaimed any interest in the lot purchased by plaintiffs, when asked by plaintiffs if he and the other heirs made any claim to the lot, has been held for the jury. 227**Ky**525, 13**SW(2d)**520.

276-19 210**Ky**498, 276**SW**487.

277-27 94**Fla**457, 113**S**722; 123 **Okl** 163, 252**P**418; 126 **Okl** 232, 259**P**224.

277-28 126 **Okl** 232, 259**P**224.

277-31 **Fla** 127**S**855.

278-36½-New. If defendant in possession, with coheirs, of a lot which plain-

tiffs purchased, disclaims any interest in the lot at the time plaintiffs purchased, he is estopped to question a deed which plaintiffs took on the ground that it was champertous. 227Ky525, 13SW(2d)520.

278-40 120 Okl 5, 249P1109.

278-40½-New. [§ 123a] 4½. **Pleading.** Under Kentucky statutes a person in adverse possession may rely upon the statute against champertous deeds, if he has pleaded only the general issue, 210Ky498, 276SW487.

278-40¾-New. or he may plead the violation of the statute; 210Ky498, 276SW487.

278-40¼-New. but a party not in adverse possession is not given the right to rely upon the statute without pleading the facts. 210Ky498, 276SW487.

278-42 228Ky806, 16SW(2d)442 (evidence insufficient). [c] **Evidence held sufficient** to go to jury as to whether deed was champertous. 211Ky711, 277SW1025. [d] **Facts essential to raise defense** allowed by champerty statute must be clearly and strictly proved. 234Ky64, 27SW(2d)382. [e] **Evidence held insufficient** to establish application of champerty statute. 234Ky64, 27SW(2d)382.

278-42½-New. A defense based on a champerty statute must be clearly established. 228Ky806, 16SW(2d)442.

278-42¾-New. [§ 124a] 6. **Instructions.** In an action of ejectment, instruction, regarding disclaimer of defendant in possession at the time plaintiffs purchased a lot, which failed to require the jury to believe that plaintiffs in purchasing the lot did so relying upon disclaimer of defendant made to plaintiffs of any interest in the lot, has been held erroneous. 227Ky525, 13SW(2d)520.

278-43 71CalA492, 236P210.

279-48 228Ky806, 16SW(2d)442; Me 151A542.

279-50 [b] **Barratry indictment failing to state from whom employment was solicited** is invalid. TexCr 28SW(2d)137. [c] **Sufficiency of barratry indictment.**-TexCr 28SW(2d)137.

CHANCE

279-5 68Utah251, 249P1016, 1021 [cit CJ].

279-6 [a] (2) 44Philippine278.

280-19½-New. It is strictly and philosophically true in nature and reason that there is no such thing as chance or accident; it being evident that the words do not signify anything really existing, anything that is truly an agent or cause of any event; but they signify merely man's ignorance of the real and immediate cause, 44Philippine278.

280-19¾-New. though nothing occurs in the world as a result of chance, the occurrence may be a matter of chance to the observer from his ignorance of antecedent causes or of the laws of their operation. 44Philippine278.

281-28 17F(2d)708.

281-29 17F(2d)708; 149Md443, 131A822; 51SD85, 212NW493. [a] (7) 161La929, 109S766.

281-30 17F(2d)708; 149Md443, 131A822; 51SD85, 212NW493. [a] **Doctrine has no application** to defendant except where plaintiff was guilty of contributory negligence. 144Va358, 132SE316.

281-31 17F(2d)708; 149Md443, 131A822; 51SD85, 212NW493 (dictum); 144Va358, 132SE316.

281-32 122Kan256, 259, 252P470 [quot CJ].

282-33 122Kan256, 259, 252P470 [quot CJ].

282-34 144Va358, 132SE316. [a] (9) Doctrine contemplates known peril which can be avoided by due care, not peril which might have been known by exercise of due care. 86IndA270, 157NE60.

283-35 149Md443, 131A822; 190NC116, 129SE146.

283-36 122Kan256, 259, 252P470 [quot CJ].

285-37 122Kan256, 259, 252P470 [quot CJ].

285-38 [b] **Distinction between "last clear chance doctrine" and "humanitarian doctrine."**-157MoA177, 191, 137SW70.

285-38½-New. The doctrine is inapplicable where the person injured is incapable of contributory negligence. 149Md443, 131A822 (child four years old).

CHANGE

287-59 84IndA170, 150NE398.

CHARACTER

289-16 151Miss875, 119S802.

289-19 202Iowa1321, 210NW782.

289-26 31F(2d)902.

289-32 202Iowa1321, 210NW782. [a] (2) 217Ala322, 116S705; 22AlaA444, 116S706.

289-33 202Iowa1321, 210NW782; 151Miss875, 119S802.

289-40 See also 191NC235, 131SE661.

CHARGE

290-58 14F(2d)852.

290-58½-New. to accuse; impute; to ascribe the responsibility of. Century D. [quot 8PaDist&Co765].

291-68 315Mo872, 288SW54.

292-74 315Mo872, 288SW54.

292-75 315Mo872, 288SW54.

292-76 315Mo872, 288SW54.

CHARITABLE

296-37 193Wis415, 214NW347.

296-40 128Misc603, 220NYS50.

CHARITIES

299-1 101NJEq252, 137A582, 52ALR965; 193Wis415, 214NW347.

299-2 91CalA483, 267P327; 101NJEq252, 137A582, 52ALR965; 47RI444, 134A276.

300-3 91CalA483, 267P327; 331Ill182, 162NE888; 335Ill564, 167NE777; 260Mass129, 156NE743; 128Me14, 145A395; 316Mo492, 291SW120, 51ALR877; 101NJEq252, 137A582, 52ALR965; NJCh129A148; 99NJEq572, 134A81; NJCir146A881(2dcase).

300-8 323Ill309, 154NE120.

301-21 [a] (1) 316Mo492, 291SW120, 51ALR877. (5) All gifts for the public convenience, benefit, utility, or ornament in whatever manner the donors desire to have them applied. NJCh129A148. (6) All gifts for the relief and comfort of the poor, sick, and afflicted. NJCh129A148. (7) Includes all gifts in trust for religious and educational purposes in their ever-varying diversity. NJCh129A148. (8) Charitable trust is one having no capital and no provision for making dividends or profits, deriving its funds, mainly from public and private charity, and holding them in trust for the object of the institution. 77Colo763, 238P22, 42ALR964.

301-31 25OhA214, 157NE794.

301-32 125Or579, 267P821, 824 [cit CJ].

302-39 NJCir146A881(2dcase).

303-64 25OhA214, 157NE794.

304-67 31F(2d)869; CalA263P271; 331Ill182, 162NE888; Mo29SW(2d)701 (presumption that rents used for declared purposes); 25OhA214, 157NE794; 123Or144, 261P694, 698 [citCJ]; 48RI411, 137A875. [g] **Whether institution is lessening burdens of government** is one of tests for determining whether it is of charitable or eleemosynary character. CalA263P271. [h] **That some objects of institution are not charitable** does not deprive it of its eleemosynary character, where main purpose is charity. CalA263P271.

304-70 Mo29SW(2d)701; 123Or144, 261P694; 156Tenn589, 3SW(2d)1059, 1060 [quotCJ]. [a] 156Tenn589, 3SW(2d)1059, 1060 [quotCJ].

305-71½-New. Charitable corporations are favorites of the law. 83IndA546, 149NE188.

305-72 [a] **Corporation chartered for maintenance of public worship** in accordance with Jewish faith and maintenance of religious school is a charitable corporation. 263Mass435, 161NE619.

306-3 83NH27, 137A660.

306-6 245NY469, 157NE747.

307-17½-New. Where the names of the agencies managing an institution indicate a purpose of administering charity, it will be presumed to be a charitable institution. 199Cal705, 251P311.

307-20 203Cal641, 266P526 (not invalid as investing trustee with indefinite powers); CalA263P271; 91CalA483, 267P327, 337 [quotCJ]; 318Ill253, 149NE234; 335Ill564, 167NE777 (every presumption consistent with language of will is indulged to favor validity); 340Ill407, 172NE730; 128Me14, 145A395; 238Mich318, 213NW131; 316Mo492, 291SW120, 128 [quotCJ], 51ALR877; 101NJ252, 137A582, 52ALR965; 245NY469, 157NE747; 125Misc381, 211NYS635; 138Misc190, 245NYS294; 138Misc208, 245NYS303; 123Or406, 262P833; 290Pa319, 138A837, 55ALR1301; 47RI444, 134A276; 50RI385, 148A189; 156Tenn495, 2SW(2d)90 (bequest to masonic lodge for benefit of widows' and orphans' home); 161Tenn11, 28SW(2d)340, 69ALR1353; Wyo281P188. See, also 101Vt325, 143A384. [b] **Every presumption consistent with language used** is indulged to sustain charitable trusts. 331Ill182, 162NE888.

308-21 91CalA483, 267P327 (deed of trust sufficiently certain); 101NJEq252, 137A582, 52ALR965; 47RI444, 134A276.

308-25 318Ill253, 149NE234; 316Mo492, 291SW120, 128 [quotCJ], 51ALR877; 101NJEq252, 137A582, 52ALR965.

308-28 218AppDiv317, 218NYS325.

308-31½-New. Reservation of a life estate in a trust deed does not destroy the trust. 91CalA483, 267P327.

308-31¾-New. nor does a provision authorizing the trustor to sell the property during her lifetime with the consent of the trustees, 91CalA483, 267P327.

308-31¼-New. nor a provision authorizing the establishment of a hospital during the trustors' life on waiver of the life estate. 91CalA483, 267P327.

308-31½-New. A provision that if the trustor sold property without the consent of the trustee the proceeds should go for trust purposes is merely a limitation on the power to sell for private gain. 91CalA483, 267P327.

308-31¾-New. A recital that the trustor did not wish to bind the discretion of the trustees respecting the disposition or holding of property is not a direction to hold indefinitely. 91CalA483, 267P327.

308-31¼-New. Right of heirs to attack validity of provision for management of charitable vested trust. 340Ill407, 172NE730.

308-32 82NH281, 133A166, 45ALR1433.

309-36 128Misc603, 220NYS50.

309-39 331Ill182, 162NE888.

310-43 245NY174, 156NE656; 128Misc240, 218NYS385. [a] (3) 3 Comp. L. (1915) § 11575, relating to express trusts has no application whatever to charitable trusts. 238Mich318, 213NW131. [b] (8) The provisions of Pers. Prop. L. § 12 and Real Prop. L. § 113 are only applicable to trusts. 218AppDiv317, 218NYS325.

312-64 156Miss736, 126S656.

312-76 199Cal661, 250P657; Mass166NE863; 101NJEq252, 137A582, 52ALR965; 50RI461, 149A581. [b] **Where bequest to rural church** was more than necessary to maintain private plot as indicated, it was applied to maintenance of entire cemetery. 288Pa130, 135A540.

313-77 331Ill182, 162NE888.

313-78½-New. 199Cal661, 250P657.

313-80 83NH27, 137A660; NH146A645 ("accept and expend"). [a] But see 103NJEq184, 142A667.

313-81 Mass166NE863 (particular purpose).

313-84 203Iowa497, 211NW358; 30OhA345, 165NE101.

313-85½-New. Charitable gifts are to be liberally construed and given the construction which will uphold the act. 199Cal661, 250P657; 82NH281, 133A166, 45ALR1433.

313-86 340Ill572, 173NE110; 170La986, 129S552; 128Me14, 145A395; Me149A623.

313-87 Ala 130S209; 326 Ill 573, 158 NE213, 54ALR634; 258Mass326, 154NE 846; 260Mass129, 156NE743; 316Mo 492, 291SW120, 51ALR877. [b] **Gift to trustee in perpetuity is valid,** if income is to be applied only to charitable use. 48RI 411, 137A875. [c] **To constitute "dedication" of property to charitable uses,** property must be conveyed as gift, stamped with trust for benefit of public or of indefinite beneficiaries. Del 147A165 [citCJ].

314-89 245NY174, 156NE656.

314-90½-New. The mere possibility that a trust fund might be diverted for the enterprise intended for profit does not invalidate the gift for charitable purposes. 125Misc381, 211NYS635.

314-90⅓-New. If the purpose of a gift is described so as to show its charitable purpose, whether it is expressly denominated as "charitable" is immaterial. NJCir 146A881(2dcase).

314-93 323 Ill 309, 154NE120.

314-94 323 Ill 309, 154NE120; 319Mo 633, 5SW(2d)1100.

314-96 323 Ill 309, 154NE120.

314-97 316Mo 492, 291SW120, 51ALR 877.

315-99½-New. Courts will construe trusts to religious, charitable, and benevolent uses as including uses brought by prevailing conceptions within spirit of charitable uses. 245NY174, 156NE 656.

315-99⅓-New. That the use of property for private profit indirectly serves charity or the public welfare does not make the trust charitable under statute. 245 NY174, 156NE656.

315-99¼-New. Where intent to provide for public charitable use is apparent from the context of the will, "institutions" to whom income is given for the benefit of indefinite and uncertain persons may be held to be only those organized for public purposes. 245NY174, 156NE656.

315-99⅙-New. A trust for the benefit of uncertain persons, although intended to advance public welfare, is not valid unless for religious, educational, charitable, or benevolent uses. 245NY174, 156 NE656.

315-1 122Kan741, 253P586; 101NJEq 252, 137A582, 52ALR965; 98NJEq576, 131A388; 103NJEq516, 143A745; 138 Misc190, 245NYS294; 141Wash619, 252 P139; Can [1929] 3DomLR801.

315-3 91CalA483, 267P327 (free and pay patients); CalA 292P144; DC 32 F(2d)960; 195NC734, 143SE541; 47RI 444, 134A276; Tenn 29SW(2d)658, 69 ALR1353. [a] (2) trust for maternity hospital for unfortunate and wayward girls. 123 Or406, 262P833.

317-16 204 Iowa1067, 216NW772, 773 [citCJ]; NJCir 146A881(2dcase) (deed of land for erection of public school); 125 Or579, 267P821, 824 [citCJ]; 48RI 411, 137A875.

317-17 101NJEq252, 137A582, 52ALR 965; NJCir 146A881(2dcase); 245NY 174, 156NE656 (trust for "research" in agricultural chemistry for practical benefit to agricultural development in United States is charitable trust); Can [1929] 3DomLR801.

317-19 199Cal 661, 250P657; NJCir 146A881(2dcase) (for free or public schools); 48RI 27, 134A815, 48ALR1122.

317-20 Ala 130S209; 48RI 411, 137A 875.

318-24 31F(2d)869; 331 Ill 182, 162NE 888; 335 Ill 564, 167NE777.

318-24½-New. The fact that a school of learning charges tuition does not take away its character as a charitable trust. 77Colo 463, 238P22, 42ALR964.

318-32½-New. The founder of a trust for the maintenance of scholarships may declare what preference shall be given to a particular class. 199Cal 661, 250P 657.

318-34 204 Iowa1067, 216NW772, 774 [citCJ]; 198NC642, 153SE114 (conditional charity); 102WVa260, 135SE9, 48ALR1138.

319-41 199Cal 661, 250P657; 106WVa 588, 146SE623.

319-44 245NY174, 156NE656.

319-52½-New. A trust created by will devising property to a trustee for the use of educational institutions is not against public policy as enabling the trustee to use funds for the propagation of principles inimical to democracy where the will provides that the fund shall be used for charitable purposes only. 30 OhA345, 165NE101.

319-52⅓-New. That a gift to a student fund was placed in the hands of trustees to be loaned on interest does not change its charitable character. 331 Ill 182, 162 NE888 (interest going to enlargement of fund).

319-52¼-New. In a suit involving the validity of a gift for a student loan fund, testimony as to the existence and maintenance of a student fund of the college was competent. 331 Ill 182, 162NE888 (evidence held to sustain validity of gift).

320-60 29Ariz138, 240P280.

320-63½-New. A trust for promotion of research in agricultural chemistry constitutes a "charitable trust." 125 Misc381, 211NYS635.

320-66 Del 147A165 [citCJ]; 163La734, 112S667; 128Me14, 145A395; 101NJEq 252, 137A582, 52ALR965; NJCir 146A 881(2dcase); 245NY469, 157NE747; 128 Misc603, 220NYS80.

321-70 Fla 126S135; 128Me14, 145A 395.

321-71 109Conn529, 147A181.

321-73 [a] **Trust and not direct grant.**—Del 147A165.

322-91 NJCh 147A470 (where nonexistent person was directed to pay for masses, sum should be paid in same manner as funeral expenses); 135Misc876, 239 NYS740.

323-5 319Mo 633, 5SW(2d)1100.

323-12½-New. A will devising a residence to one for life, and thereafter to a church for a parsonage, on condition that certain portraits be kept in their proper place, does not indicate a general charitable intent. 28 OhA325, 162NE 714.

324-24 Del 147A165; 203 Iowa409, 212 NW688; NH 146A645; 5PaDist&Co 359. [a] **Effect of partial invalidity.**—128Misc 803, 221NYS225.

325-25 But see 290Pa319, 138A837, 55 ALR1301; Man [1930] 3DomLR453.

325-28 127Misc579, 217NYS323.

325-30 127Misc579, 217NYS323.

325-32⅓-New. Trust giving trustees power to apply entire fund to private portion of land over which road to private cemetery was to be built is void. 340 Ill 572, 173NE110.

325-37 101NJEq252, 137A582, 52ALR 965.

326-43 101NJEq252, 137A582, 52ALR 965; 101Vt325, 143A384.

326-58 [a] **Charitable, benevolent, hospital, educational,** scientific, literary, etc., purposes to which residue was devised create trust exclusively charitable. 44F(2d)172.

326-59½-New. for maintaining a hospital, 318 Ill 253, 149NE234.

326-62 86Colo 221, 279P721(2dcase).

326-67½-New. a gift for carrying on work of boy scouts, 47RI 406, 133A662, 46ALR823.

327-73½-New. A conveyance for the purpose of supplying water from the only spring in the territory without restrictions or charge to all persons was held valid as a public charitable trust. 323 Ill 309, 154NE120.

327-73⅓-New. A gift in trust for the maintenance of a free rest for white, protestant, female teachers is a public charitable trust. 106Conn582, 138A815.

327-80½-New. In Rhode Island a teacher's retirement is held not a charity. 47 RI 461, 134A16, 47ALR60.

327-80⅓-New. A masonic lodge is not a charity. 7PaDist&Co 95.

327-83 200 Iowa1054, 205NW849 (devise held sufficient); 235Ky562, 31SW (2d)919; 99NJEq572, 134A81; NJCh 147A470 (bequest to nonexistent person held void for uncertainty).

327-85 203 Iowa497, 211NW358; 238 Mich318, 213NW131; 101NJEq252, 137 A582, 52ALR965; 139SC262, 137SE727; 141Wash619, 252P139.

327-86 141Wash619, 252P139.

327-87 245NY469, 157NE747; 47RI 406, 133A662, 46ALR823.

328-88 203 Iowa497, 211NW358 (dictum); 235Ky562, 31SW(2d)919.

328-89 199Wis273, 226NW306 (statute must be liberally applied).

328-95 331 Ill 182, 162NE888.

328-97 155Md146, 142A297.

328-98½-New. If extrinsic evidence can disclose testator's meaning, the gift has been held enforceable. 203 Iowa497, 211 NW358.

328-1 98NJEq576, 131A388; 47RI 444, 134A276; 141Wash619, 252P139.

328-2 Ark 30SW(2d)834.

329-3 [a] (5) Devise "to some Catholic institution." NJCh 147A470.

329-4 245NY469, 157NE747; 131Misc 238, 226NYS637; TexCivA 280SW608 (lodge and church purposes).

329-5 200 Iowa1054, 205NW849 (extension of foreign mission work of designated religious society).

329-9 102WVa260, 135SE9, 48ALR 1138.

329-11 102WVa260, 135SE9, 48ALR 1138.

329-11½-New. A bequest to a city for a playground for children is one for educational purposes within a statute providing that bequests or devises for such purpose shall not be invalid for uncertainty of object. 241Mich464, 217NW1.

329-11⅓-New. Such bequest is for a public purpose within a statute providing that bequests or devises for such purpose shall not be invalid for uncertainty of object. 241Mich464, 217NW1.

330-17 245NY469, 157NE747. [a] (12) Rule applied to term "advancement of Christ's kingdom on earth." 218AppDiv 317, 218NYS325.

330-18 See also 284Pa334, 131A188, 190 [citCJ].

330-22½-New. A provision setting aside property for annuities to relatives of the trustor does not destroy the charitable feature, where the provision does not go beyond the lives of persons in being. 91 CalA483, 267P327.

331-24 316Mo 492, 291SW120, 128 [quotCJ], 51ALR877; 82NH281, 133A 166, 45ALR1433; 156Tenn495, 28W(2d) 90. [a] (9) Bequest to "Mount Mellish Union Workhouse" may be received by "Mountmellick Union Workhouse." 199 Cal 705, 251P311. (10) Gift by will to masonic home by name is valid as bequest to grand lodge for benefit of home. 156Tenn495, 28W(2d)90.

331-27 Mass 166NE766.

331-28 [a] 238Mich318, 213NW131.

332-32 [a] **Title to land given in trust** to maintain school, with no named trustee, held not to have vested in county board of education. 162Ga211, 133SE 245.

332-37 199Cal 705, 251P311.

332-45 162Ga211, 133SE245; 203 Iowa 497, 211NW358; 203 Iowa409, 212NW 688; 259Mass539, 156NE724; Mass 166 NE766; 316Mo 492, 291SW120, 128 [quotCJ], 51ALR877; 128Misc803, 221 NYS225; 47RI 406, 133A662, 46ALR 823; Va 155SE129; 102WVa260, 135SE 9, 48ALR1138.

333-47 47RI 406, 133A662, 46ALR823; Va 155SE129.

333-48 128Me14, 145A395.

333-49 336 Ill 551, 168NE658, 66ALR 172; 259Mass539, 156NE724.

333-50 47RI 406, 133A662, 46ALR823.

333-51 131Misc238, 226NYS637; 138 Misc190, 245NYS294.

333-52 299Pa217, 149A157; 12PaDist &Co 273. [b] **Bequest to general charitable use** will not fail on refusal of trustee to accept. 299Pa217, 149A157 (bequest to Harvard University to establish courses in eugenics).

333-53 TexCivA 280SW608, 609 [cit CJ].

334-58 [c] **Where two donations were made** to build hospital, steps taken by donee showing intent to build will be presumed in furtherance of each. 125 Me191, 132A417, 44ALR1333.

334-67 CalA 292P144 (directors of orphans' home); 86Colo 221, 279P721(2d case).

334-68 163La734, 112S667.

334-73 Va 155SE129; 102WVa260, 135 SE9, 48ALR1138. [a] **Quasi-public institution.**—86Colo 221, 279P721(2dcase).

335-75 161Tenn11, 28SW(2d)340, 69 ALR1353.

335-75½-New. An irregular change in the name of a corporate donee has been

held not to invalidate a gift to it. 289Pa 297, 137A268.

335–85 [a] **Capacity of foreign corporation to take gift in excess of amount prescribed by charter** cannot be raised by testator's next of kin or other private person. 155Md146, 142A297.

336–90 DC 32F(2d)960.

336–99 323 Ill 309, 154NE120; 47RI 444, 134A276. See also 44Philippine292. [a] **As such trustee municipality has all necessary powers** to accomplish purposes of trust. 44Philippine292.

336–2 125 Or553, 267P821, 824 [citCJ].

336–7½–New. , or for the construction of a public water system. 44Philippine 292.

337–14½–New. A devise to commissioners of a city-owned cemetery for perpetual care has been held invalid as a trust for a private purpose. 128Misc803, 221NYS225.

337–16 122Kan741, 253P586.

337–16½–New. boards of education, 102 WVa260, 135SE9, 48ALR1138.

337–25 47RI 406, 133A662, 46ALR823; Va 155SE129.

337–26 130Misc1, 223NYS321.

337–27 47RI406, 133A662, 46ALR823.

337–28 47RI 406, 133A662, 46ALR823.

338–30 Ala 130S209; 196Cal 366, 237P 1074 (under statute); 319Mo 633, 5SW (2d)1100 (unincorporated church).

338–30½–New. either already existing or one whose formation is contemplated and authorized by the terms of a will. 196Cal 366, 237P1074. [a] **Charitable bequest is not taken by trustees in their personal capacity** under will which contemplates and authorizes their organization into permanent association to administer charitable foundation, but in capacity of association which on death of testator became invested with corpus of trust. 196Cal 366, 237P1074.

338–31 128Misc603, 220NYS50.

338–32 47RI 406, 133A662, 46ALR823.

338–42 Fla 126S135.

338–44 326 Ill 573, 158NE213, 215 [cit CJ], 54ALR1376.

339–53 14DelCh457, 130A283.

339–57 But see 50RI 461, 149A581.

339–57½–New. Trustee may be beneficiary under charitable trust where there is more than one trustee. Fla 126S 135.

339–57⅓–New. Corporation whose charter was forfeited for failure to file return but existing for purpose of actions is in existence for purpose of trust for benefit of named existing corporations. 50RI 461, 149A581.

339–57¼–New. Such corporation is entitled to take provided its charter is revived within period during which it has capacity to sue and be sued. 50RI 461, 149A581.

339–58 [a] **Reference in charter of hospital** to statute affecting corporations does not alter corporation's charitable purpose and make it business corporation. 50RI 385, 148A189.

339–58½–New. Charitable bequest to hospital lapses on forfeiture of charter of corporation prior to testatrix's death. 50RI 385, 148A189.

339–60 130Kan549, 287P244 (masonic lodge).

340–65 260Mass129, 156NE743; 141 Wash619, 252P139; 102WVa260, 135 SE 9, 48ALR1138.

340–66 Fla 126S135; 217Ky59, 288SW 1016; Mass 166NE766; 319Mo 633, 5 SW(2d)1100; 82NH281, 133A166, 45 ALR1433; 245NY469, 157NE747; 128 Misc603, 220NYS50; 138Misc190, 245 NYS294; 46Philippine642; 141Wash 619, 252P139; Can [1929] 3DomLR801. [a] (2) 238Mich318, 213NW131; 195NC 405, 142SE493. [c] **Mere difficulty in ascertaining** orphans' homes in state does not invalidate general gift to such homes. 217Ky59, 288SW1016.

341–67 203Cal 641, 266P526 (extending aid to Indians and furthering industrial coöperation); 141Wash619, 252P139.

341–68 141Wash619, 252P139.

341–70 256Mass568, 153NE13. [a] **Bequest to such charitable uses and purposes as executor may determine is void for uncertainty.**–319Mo 1068, 5SW(2d) 66.

341–72 200 Iowa1054, 205NW849; 203 Iowa497, 211NW358; 235Ky562, 31SW (2d)919; 256Mass568, 153NE13; 82 NH281, 133A166, 45ALR1433; 83NH 27, 137A660; 30 OhA345, 165NE101; 150Wash301, 272P972; 102WVa260, 135 SE9, 48ALR1138. [a] **Beneficiaries who are such at particular moment** must be ascertainable. 128Me14, 145A395.

341–79 150Md157, 132A595. [a] **Beneficiaries held not uncertain.**–155Md146, 142A297.

342–80½–New. A gift to a corporation for charitable purposes within the scope of its corporate purposes is not invalid for indefiniteness of objects. 31F(2d) 469 (construing Maryland statute).

342–80⅓–New. The appointment of a corporation to hold property in trust for limited purposes within its charter tends to show that no trust for indefinite beneficiaries is involved. 31F(2d)469.

342–83 44F(2d)172; Ala 130S209; 200 Iowa1054, 205NW849; 170La986, 129S 552; 98NJEq576, 131A388; 131Misc238, 226NYS637; 138Misc208, 245NYS303; 147Wash216, 265P466; 199Wis273, 226 NW306 (by statute). [c] **Where statute provides for attorney general** enforcing charitable trust, trust is not void for uncertainty of beneficiaries where trustee was to select beneficiary. 125Misc 381, 211NYS635.

342–84 207 Iowa71, 218NW926(2dcase) (remainder over to some old ladies' home means a substantial home); 235Ky562, 31SW(2d)919; Mass 166NE766.

342–88 98NJEq576, 131A388.

342–88½–New. A will has been construed as giving a trustee power of selection only at the time specified for payment. 133Misc248, 232NYS424.

342–88⅓–New. Where a will indicates testator's preference that trust funds be given to a certain college if at the time of payment such institution shall have a course in ceramics, but leaves it entirely to the discretion of the trustee named to select such institution as to him shall seem advisable, the power of appointment is personal to the named trustee, and cannot be exercised by a successor trustee. 133Misc248, 232NYS424.

342–88¼–New. Under a will devising property to charity and authorizing the executrix to designate the recipients, the executrix, by signing and filing in probate proceeding a paper showing her selection, notifying those designated, and advising them to employ counsel to protect their rights, effectually exercises her power. 150Wash301, 272P972.

343–91 30 OhA345, 165NE101.

343–92 97NJEq447, 129A207 (gift declared void); Can [1929] 3DomLR801.

343–93 14DelCh457, 130A283; 128Me14, 145A395 (evidence held sufficient to establish that testatrix making bequests to methodist episcopal church society intended to designate, as legatee, association with which she had been connected and called by name of either methodist episcopal church or methodist episcopal church society); 256Mass568, 153NE13 (beneficiaries of hospital); MoA 5SW (2d)662; TexCivA 14SW(2d)956 (will giving property in trust for payment to W. C. T. U. of San Antonio held to give property to regular local organization, which was in existence at time of bequest, and of which testatrix was member, and not to faction which bolted from regular local organization after execution of will).

343–95 128Me14, 145A395.

343–98½–New. Where a gift is made generally to orphans' homes in the state, extrinsic evidence is inadmissible to show particular homes were intended. 217Ky59, 288SW1016.

344–5 43F(2d)881; 217Ky59, 288SW 1016; 238Mich318, 213NW131; 320Mo 1058, 10SW(2d)47; 128 Or591, 275P605; 294Pa201, 143A912; 141Wash619, 252P 139, 140 [quotCJ].

344–6 98NJEq576, 131A388; 141Wash 619, 252P139, 140 [quotCJ].

344–7 141Wash619, 252P139, 140 [quot CJ].

344–8 86 IndA709, 159NE771.

346–33 But see 97NJEq447, 129A207.

346–35 125 Or553, 267P821, 824 [cit CJ].

347–58½–New. A trust for promotion of research in agricultural chemistry is a charitable trust within the statute holding that the trust is not invalid by reason of indefiniteness or uncertainty of persons designated as beneficiaries. 125 Misc381, 211NYS635.

347–58⅓–New. A devise of the residue of testator's property to a corporation formed for the establishment and maintenance of art schools, in trust for investment of the fund and application of the income to. the education of deserving and talented art students for study abroad, is valid as a gift to the corporation for charitable purposes. 31F(2d) 469.

347–58¼–New. That the charter of such corporation specifies that business shall be done in New York City did not invalidate such gift. 31F(2d)469.

347–58½–New. A conveyance to the trustees of a denominational institute, to be used for school purposes, is only held to create a trust for the education of children who might attend the denominational institute only. 220Ala274, 124 S871.

347–60 319Mo 633, 5SW(2d)1100.

347–69 200 Iowa1054, 205NW849 (furtherance of foreign mission work of designated religious society).

348–81 But see RI 134A815, 48ALR 1122.

348–91 340 Ill407, 172NE730.

349–92 130Kan714, 288P764; NJCh 149A589; 289Pa297, 137A268.

349–95 118Nebr731, 226NW440 (bequest to city for erection of hospital held to create estate on condition subsequent).

349–98 47RI 444, 134A276.

349–3 128Misc603, 220NYS50, 55 [cit CJ]; 47RI 444, 134A276.

350–7 118Nebr781, 226NW440. [b] **What constitutes reasonable time** will be determined from all circumstances affecting and surrounding gift. 118 Nebr781, 226NW440 (delay held not unreasonable).

350–16 47RI 444, 134A276.

350–18 128Misc603, 220NYS850, 55 [cit Cyc].

350–20½–New. Stock added to first trust fund belongs thereto and is subject to all conditions thereof. 234Ky 286, 28SW(2d)27.

350–21 NJCh 149A589.

351–25 See also 9PaDist&Co 223.

351–28 But see 135Misc893, 238NYS 610.

351–37½–New. Bequest to cemetery to keep plot in repairs passed legacy in trust for perpetual care of plot. 137 Misc46, 243NYS136.

352–52 318 Ill 253, 149NE234; 256 Mass568, 153NE13; 50RI 385, 148A 189; TexCivA 280SW608. [a] (4) Funds being diverted to other uses, as keeping patient in ward of hospital instead of the establishment and maintenance of charitable hospital, constituted unlawful discharge of trust. DC 32F(2d)960.

352–53 318 Ill 253, 149NE234; 256 Mass568, 153NE13. [b] **Distribution of surplus income** accumulated from trust fund. 234Ky286, 28SW(2d)27.

352–54 178Ark892, 12SW(2d)866; 256 Mass568, 153NE13.

353–55 NH 146A645.

353–56 86Colo 221, 279P721(2dcase) (special request for care and attention to testator's dog); NH 146A645.

353–60 [a] **Discretion lodged in trustees** in every charitable trust is absolute discretion, not subject to control of another within limits. 44F(2d)172.

353–61 12PaDist&Co 213.

353–65 318 Ill 253, 149NE234.

354–69 44Philippine292. [b] **All necessary powers to accomplish purposes** of trust are implied. 44Philippine292. [c] **Power to buy includes** power to exchange property. 44Philippine292. [d] **Such fund is liable for obligations** incurred in administration of trust. 44 Philippine292.

354–72 [a] **Trustee managing playground** is not relieved of responsibility for personal misfeasance because trust deed may have created public charitable trust. Mass 173NE406.

354–74½–New. A city receiving a bequest for the erection of a hospital, which is inadequate for such purpose, may receive a fund from other sources

to aid in completion of the hospital. 118Nebr781, 226NW440.

354-76 29Ariz138, 240P280, 285 [quot CJ].

354-77 29Ariz138, 240P280, 285 [quot CJ]; 307Mo 336, 270SW638; Wyo 281 P188.

354-78 [a] (4) Deed in trust that premises be used, kept, maintained and disposed of as place of divine worship. Fla 126S135.

354-80 47RI 444, 134A276. See also 191NC769, 133SE93.

354-83 215Ala271, 110S381, 383 [cit CJ].

354-85 But see Del 147A165 [citCJ].

354-86 190NC520, 130SE189; 48RI 27, 134A815, 48ALR1122; Wyo 281P 188.

355-87 [a] 230Ky168, 18SW(2d)971 (court could authorize sale of parsonage, proceeds whereof were to be used for repairing existing parsonage). [b] **New Jersey statute construed.**-103NJ Eq428, 143A620.

355-88 220Ky113, 294SW804.

355-92 176Ark946, 4SW(2d)933; 220 Ky113, 294SW804; NJCh 149A589 (statutory power). [a] (7) Where conditions changed and law made further use of burial ground illegal. 190NC 520, 130SE189.

355-92½-New. That purchasers of the properties of a public charitable trust were the operators and managers of the properties, does not warrant setting aside of the sale by the trustees. 321 Mo 235, 11SW(2d)278, 62ALR858.

355-92¼-New. That trustees selling properties of a public charitable trust, before giving out information to bidders, referred all inquiries to managers of the properties who were also bidders, and to whom the properties were sold, is not ground for setting aside the sale. 321Mo 235, 11SW(2d)278, 62 ALR858.

355-93 But see 215Ala271, 110S381.

356-96 [a] 307Mo 336, 270SW638.

356-96½-New. An unsuccessful bidder at a sale of properties of a public charitable trust cannot complain that sufficient notice of sale was not given, where he had ample time to submit a comprehensive bid and made no request for more time. 321Mo 235, 11SW(2d)278, 62ALR858.

356-96¼-New. Refusal by trustees selling properties of a public charitable trust to furnish the bidder a statement of earnings of the property for ten preceding years is within their discretion. 321Mo 235, 11SW(2d)278, 62ALR858.

356-96¼-New. Trustees selling properties of a trust could refuse to furnish complete information to bidders as to the value of the properties and its business affairs. 321Mo 235, 11SW(2d)278, 62ALR858.

356-96⅓-New. It was the duty and within the discretion of trustees selling properties of a public charitable trust to pass upon the adequacy of security. 321Mo 235, 11SW(2d)278, 62ALR858.

356-96¼-New. In the absence of a showing that the price obtained by trustees for properties of a public charitable trust was inadequate and that a resale would result in a higher price, the court will not set aside the sale. 321 Mo 235, 11SW(2d)278, 62ALR858.

356-96½-New. If trustees selling properties of a public charitable trust could not accept certain bids, they were under no duty to give consideration to the details of such bids. 321Mo 235, 11SW (2d)278, 62ALR858.

356-96¼-New. An unsuccessful bidder at a sale of properties of a public charitable trust cannot complain that trustees refused to make known the details of any bids. 321Mo 235, 11SW(2d)278, 62ALR858.

356-96⅓-New. Persons charged with the sole duty of managing and operating properties of a charitable trust were not disqualified from purchasing such trust property from the trustees. 321 Mo 235, 11SW(2d)278, 62ALR858.

356-96⅓-New. That persons charged solely with operating and managing properties of a charitable trust refused to furnish a bidder at the sale of the properties information regarding them is not ground for setting aside the sale by the trustees. 321Mo 235, 11SW(2d) 278, 62ALR858.

356-96 1/11-New. That trustees of a public charitable trust did not follow the advice of one of the bidders at a sale of properties of the trust to have an inventory and appraisal made of the properties and a copy furnished to bidders is not ground for setting aside the sale, 321Mo 235, 11SW(2d)278, 62ALR 858.

356-96 1/12-New. nor is refusal of trustees to furnish a bidder at a sale of properties of a trust information as to the value of the properties. 321Mo 235, 11SW(2d)278, 62ALR858.

356-96 1/13-New. The legislature, in authorizing the trustees of a trust for educational purposes to convey the land to the board of education, cannot impose limitations not contemplated by the original grantors. NJCir 146A881 (2dcase).

356-99 [a] **Word "condition"** is not conclusive. 128Misc603, 220NYS850.

356-3½-New. Repaid loan from trust to be used for poor girls not recoverable on theory of gift. Ga 155SE337.

356-11 215Ala271, 110S381, 382 [cit CJ]; 29Ariz138, 240P280, 285 [citCJ]; 318 Ill 253, 149NE234; 47RI 444, 134A 276; 147Wash216, 265P466.

357-15 30 OhA345, 165NE101.

357-16½-New. to appoint a substitute trustee. 128Misc803, 221NYS225.

357-20½-New. to appoint a trustee where the trustee appointed by the instrument has no power to hold title. 323 Ill 309, 154NE120.

357-23 321Mo 235, 11SW(2d)278, 62 ALR858.

357-25 318 Ill 253, 149NE234; 83NH 387, 142A686.

357-27 215Ala271, 110S381, 382 [cit CJ].

358-35 139SC262, 137SE727.

358-35½-New. A decree on petition for an instruction not acted upon because of changed conditions should be vacated and a new decree entered with proper instructions. 48RI 27, 134A815, 48ALR 1122.

358-36 256Mass568, 153NE13.

358-40 But see 215Ala271, 110S381.

358-41 215Ala271, 110S381, 382 [quot CJ]; NH 146A645 (presumed to have contemplated legislative change).

358-44½-New. In some jurisdictions courts of equity cannot devote any portion of a fund dedicated to a charitable use to any object not contemplated by the donor. 139SC262, 137SE727.

358-49 193Wis409, 214NW391.

359-53 Fla 128S258 (doctrine inapplicable); 50RI 385, 148A189.

359-54 [c] (1) 10PaDist&Co 195. (3) Orphans' court may apply doctrine of cy pres in sustaining trust for maintenance of cemetery lot as including improvement of surrounding cemetery grounds. 88PaSuper372. (4) Will directing application for legislation to give college legal existence must be construed as requiring application for franchises under existing laws, since special legislation for corporation is unconstitutional and was so when will was executed. 297Pa272, 146A908. (5) Doctrine not applicable on mere failure of trustee to act. 12PaDist&Co 273. [d] **In Rhode Island.**-49RI 504, 144A 669.

360-55 215Ala271, 110S381; 220Ala 274, 124S871; 14DelCh457, 130A283; DC 32F(2d)960 (District of Columbia).

360-56 [b] 47RI 444, 134A276.

360-62 215Ala271, 110S381, 382 [cit CJ].

360-64 Fla 128S258; 340 Ill 407, 172 NE730; 83NH564, 145A666; NH 146A 645; 97NJEq447, 129A207; 99NJEq 217, 129A148; 128Misc476, 219NYS505; 228AppDiv719, 239NYS219; 136Misc 297, 240NYS658; 137Misc712, 244NYS 307; 137Misc715, 244NYS310; 50RI 385, 148A189; 193Wis409, 214NW391. See also 129Misc506, 221NYS692. [d] **In construing charitable trust, court has no power to devise new scheme** for charity so long as that devised by donor may take effect. NH 146A645. **Failure of designated method of effecting definite charity created** does not destroy it, and equity will substitute another method. 299Pa217, 149A157.

361-65 215Ala271, 110S381, 384 [cit CJ]; 178Ark892, 12SW(2d)866; 99NJ Eq217, 129A148.

361-66 99NJEq217, 129A148.

361-72 99NJEq217, 129A148; 10Pa Dist&Co 195, 199 [citCJ].

362-73 14DelCh457, 130A283; 97NJEq 447, 129A207; 136Misc497, 243NYS576; TexCivA 25SW(2d)171. See also 316Mo 492, 291SW120, 51ALR877.

362-78 50RI 385, 148A189. [a] **Cy pres rule goes to general intent** or scheme of distribution as expressed in will. Fla 128S258.

363-80 220Ala274, 124S871; 14DelCh 457, 130A283. [a] **Where instrument creating trust provides for distribution to named corporations in existence at stated time** cy pres doctrine is inapplicable where corporation is then nonexistent. 50RI 461, 149A581.

363-81 13PaDist&Co 257.

363-87 25 OhNPNS375.

366-43 115 Or281, 237P674, 676 [cit CJ].

366-43½-New. The remedies for nonperformance of a charitable trust are available alone to the attorney-general and to the trustee or cestui que trust. NJCir 146A881(2dcase).

367-44 325 Ill 538, 156NE806; 326 Ill 425, 158NE127; 256Mass568, 153NE13; 321Mo 235, 11SW(2d)278, 62ALR858; 103NJEq184, 142A667; 115 Or281, 237 P674, 676 [citCJ]; TexCivA 18SW(2d) 813.

367-45 214Ala234, 107S76, 77 [citCJ]; 256Mass568, 153NE13.

367-47 [a] **Trustees** not having visitorial powers held without right to maintain bill. 256Mass568, 153NE13.

367-50½-New. It is both the duty and right of original trustees to defend the fund against an attack by the heirs of the testator seeking to destroy the fund and recover property constituting a fund for themselves. 115 Or281, 237P674.

367-51 Mass 166NE863; 321Mo 235, 11 SW(2d)278, 62ALR858. But see 162Ga 211, 133SE245. [b] **Board of visitors** may institute bill. 256Mass568, 153NE 13.

367-52 103NJEq184, 142A667. But see 190NC520, 130SE189.

367-53 326 Ill 425, 158NE127.

367-54 326 Ill 425, 158NE127; 235Ky 562, 31SW(2d)919.

367-56 [a] **Heir of grantor cannot intervene** in statutory summary proceeding to sell land in order to determine legal title thereto. 103NJEq428, 143 A620.

367-57 256Mass568, 153NE13.

368-60 245NY469, 157NE747.

368-64½-New. A social worker, employed to supervise a settlement building, cannot compel application of property acquired by the employer to such charity. 325 Ill 538, 156NE806.

368-64¼-New. An unsuccessful bidder at a sale of properties of a public charitable trust has been held without right to sue to set aside such sale. 321Mo 235, 11SW(2d)278, 62ALR858.

368-69½-New. The only remedy for violation of a deed conveying property in trust for church purposes is by an action to enforce the trust. 128Misc603, 220NYS50.

368-69⅓-New. One denied appointment as chaplain for want of qualifications has been held not entitled to claim the income of the trust, in excess of the amount required by purposes of foundation. 280US1, 50SCt5, 74Led131.

368-73 115 Or281, 237P674 (purchaser of property, title to which is involved in suit between heirs and trustees).

368-74½-New. A person against whom complainant could have no decree is not a necessary party to a suit involving the existence and management of a charitable trust. 123 Or406, 262P833.

368-74½-New. **A residuary legatee or** devisee under a will who could have no vested interest in the property involved in such suit, unless the charity created by the testator has become inoperative or has lapsed, is not a necessary party. 123 Or406, 262P833.

368-78 323 Ill 309, 154NE120, 124 [cit CJ]; 319Mo 633, 5SW(2d)1100 (suit to quiet title); 115 Or281, 237P674, 676 [citCJ]; 47RI 382, 133A648 [citCJ].

369-82 323 Ill 309, 154NE120, 124 [cit CJ]. See also 115 Or281, 237P674, 676 [citCJ].

369-86 [a] **Where defective charitable estate escheats to state,** heir cannot question its validity. 289Pa297, 137A 268.

369-95½-New. In a suit by an unsuccessful bidder to set aside a sale of properties of a public charitable trust, the facts alleged were held not to show conspiracy between the trustees and purchasers. 321Mo 235, 11SW(2d)278, 62 ALR858.

370-97½-New. Facts were held not to sustain the contention that plaintiff and another unsuccessful bidder offered more for the properties of a charitable trust than the successful bidder. 321Mo 235, 11SW(2d)278, 62ALR858.

370-97½-New. Where a trust was created for a denominational institute which was no longer in existence, the court may assume permanent abandonment of the trust. 220Ala274, 124S871.

370-98 [a] **Decree** enjoining interference with public's enjoyment of spring or access thereto held not indefinite. 323 Ill 309, 154NE120.

370-16 See also 103NJEq184, 142A667.

370-17 340 Ill 407, 172NE730 (testamentary sinking fund not subject to termination by beneficiaries); NJCh 149 A589.

370-20 103NJEq184, 142A667.

371-21 13PaDist&Co 699.

371-34½-New. An academy existed as established by charter within a will leaving the income from the trust so long as it remained an institution of learning. 259Mass465, 156NE885.

371-34¾-New. A charitable trust for a maternity hospital for unfortunate and wayward girls is not destroyed by the disposal of a particular property used for such purpose. 123 Or406, 262P833.

371-34¾-New. Under trust agreement providing second trust fund should supplement first trust fund if income therefrom proved insufficient, second trust fund does not fail because of no necessity to draw thereon. 234Ky286, 28 SW(2d)27.

371-39 Fla 126S135; 326 Ill 425, 158 NE127; 322Mo 52, 14SW(2d)982; 103 NJEq184, 142A667; NJCir 146A881(2d case) (heirs and next of kin permanently excluded). [c] **Reverter in favor of purchasers from grantor.**-322Mo 52, 14 SW(2d)982.

371-40 Fla 126S135; 326 Ill 425, 158 NE127; NJCir 146A881(2d case).

372-41 See also 12PaDist&Co 538.

372-42 See also 103NJEq184, 142A667.

372-43 193Wis409, 214NW391.

372-48 [a] **Acts held not intentional diversion** necessitating reverter under provision relating thereto. 234Ky286, 28SW(2d)27.

372-54½-New. Interest of heirs held mere possibility of reverter. 326 Ill 425, 158NE127.

373-60½-New. Affiliation of a charitable corporation with a federation prohibiting affiliated units from soliciting funds has been held not to extinguish membership in the corporation. 128 Misc476, 219NYS505.

373-60½-New. American National Red Cross could defend right of its county chapter to trust fund. 86 IndA709, 159 NE771.

373-60¾-New. An incorporated company of ex-service men from county is held not entitled to fund raised by subscription and given to county Red Cross chapter for relief of ex-service men and families. 86 IndA709, 159NE771.

373-60½-New. Where a will requires the appointment of directors to supervise the expenditure of the income of a foundation and apply for legislation to give a proposed college legal existence, such directors are not authorized to incorporate the foundation. 297Pa272, 146A908.

373-60½-New. In proceedings to incorporate a foundation created by will, the inquiry on appeal is limited to the questions relating to the proper exercise of the trial court's discretion. 297Pa 272, 146A908.

373-60½-New. In proceedings to incorporate a foundation created by a will, the failure to attach such will or set forth its terms is not a sufficient reason for reversing the decree of incorporation. 297Pa272, 146A908.

374-77 77Colo 763, 238P22, 42ALR964.

374-91½-New. Donors of money to county War Chest fund given to local Red Cross chapter may not challenge American National Red Cross' right to administer fund. 86 IndA709, 159NE 771.

374-92 [b] **Hospital** liable for compensation to employee. 222AppDiv402, 226NYS317.

374-94 51Nev372, 277P798 (fact that defendant is charitable institution is not alone sufficient to bar recovery).

374-95 127Kan799, 275P170; 223Ky 355, 3SW(2d)753; 263Mass435, 161NE 619 (place of public worship). [b] **Procurement of indemnity insurance** does not make charitable institution liable for torts of its employees. 223Ky355, 3 SW(2d)753.

375-96 83CalA455, 256P1106; 174Minn 389, 219NW463, 464 [citCJ]. 62ALR 716. [a] **In Wisconsin.**-230NW708.

375-97 206Cal 115, 273P580; 240NY 328, 148NE539. [j] **Evidence held not to show incompetency of employees** selected by university in chemical laboratory storeroom. 240NY328, 148NE539. [k] **In Colorado.**-77Colo 763, 238P22, 42ALR964. [l] **Evidence held properly excluded.**-IndA 171NE10. [m] **Evidence warranted finding** that charitable corporation was negligent in retaining incompetent manager. IndA 171NE10. [n] **Refusal of directed verdict for charitable institution** held not erroneous. IndA 171NE10.

375-97½-New. A party asserting incompetent selection of instructors or employees is held to have the burden of establishing that fact. 240NY328, 148NE539.

375-97½-New. A statute requiring adoption of means to protect laborers from dangerous machinery has been held not applicable to a charitable corporation. 83 IndA546, 149NE188.

375-98 31F(2d)869; 83 IndA546, 149 NE188; 51Nev372, 277P798; 240NY 328, 148NE539. [a] **Nonstock corporation operating schools and colleges** without expectation of profit, acquiring property through charitable gifts and charging less than cost for board and tuition, is eleemosynary institution not liable to student for injuries due to negligence of its officers, agents, or servants. 31F(2d)869.

375-99 197NC41, 147SE672(1stcase). But see Mo 29SW(2d)701.

375-2 Mass 172NE68. [b] **Store operated by organization which used proceeds for charity** is not as matter of law exempt from ordinary rules of liability. Mass 172NE68.

376-3½-New. Public charitable university is not liable for negligence of its instructors in fulfillment of their teaching functions. 240NY328, 148NE539.

376-3½-New. Hospital or university owes its patients or students whatever duty of care and diligence is attached to the relation, as reasonably implicit in the nature of the undertaking and purpose of the charity. 240NY328, 148NE 539.

376-3¾-New. Duty owing to patients or students cannot be less than appropriate investigation of character and capacities of agencies of service from the highest to the lowest. 240NY328, 148 NE539.

376-3½-New. A statute extending a tort liability of nontrading corporations does not abrogate the rule exempting charitable institutions from liability for injuries due to a servants' negligence. 11 LaA423, 123S466.

376-3½-New. Charitable organization by taking out liability insurance does not enlarge its liability for negligence. Mass 172NE68.

376-5 But see IndA 171NE10.

376-6 77Colo 763, 238P22, 42ALR964; Mo 29SW(2d)701. [c] **Trust fund theory** no longer law in New York. 240NY 328, 148NE539. [d] **Where it does not appear that charitable institution has no power to hold property in addition to trust funds,** judgment against it for tort of employee is valid in so far as enforcement of collection is limited to property other than trust funds. 77Colo 763, 238P22, 42ALR964.

376-6½-New. In New York. Trust fund theory, which is the basis of exemption from liability of charitable institutions for negligence in selecting instructors or employees, no longer obtains in New York. 240NY328, 148NE 539.

376-8 240NY328, 148NE539 (evidence held not to show negligence of employees of university in handling chemicals for use in experiments by students).

376-8½-New. Burden of proof. Party asserting incompetent selection of servants has the burden of establishing that fact. 240NY328, 148NE539.

376-8½-New. Sufficiency of evidence. Evidence held not to show selection of incompetent servant. 240NY328, 148NE 539.

376-8¾-New. Evidence held not to show negligence of university employees in handling chemicals for use in experiments by students. 240NY328, 148NE 539.

376-9 240NY328, 148NE539.

376-10 [a] **University owes its students whatever duty of care** and diligence is attached to relation as reasonably implied in nature of undertaking and purpose of charity. 240NY328, 148 NE539. [b] **Duty of care and diligence** owing by university to students cannot be less than appropriate investigation of character and capacity of agencies of service from the highest to the lowest. 240NY328, 148NE539.

377-11 240NY328, 148NE539.

377-11½-New. A public charitable corporation cannot waive its exemption. 224 IllA367.

377-11½-New. A public charitable corporation does not waive its exemption by failure to plead it prior to entry of default judgment. 224 IllA367.

377-14 85Colo 167, 274P740 (evidence held to show that hospital association was charitable institution); 37GaA92, 139SE101 (negligence of anæsthetist); 224 IllA367 (as to tort based on doctrine of respondeat superior); 247 IllA 331; 221Ky538, 299SW159; 2LaA305; 11LaA423, 123S466; LaA 123S726 (competent nurse assisting surgeon); Mass 170NE43 (responsibility not changed by entering into contract of insurance); 156Miss676, 126S465 (effect of insurance policy indemnifying against liability); 115 OhSt539, 541, 155NE126 [citCJ]. But see 229AppDiv58, 240NYS 720. [d] **Charitable hospital** does not become liable for torts because of procurement of indemnity insurance. 74 CalA171, 239P1100. [e] **Charitable hospital not liable to special nurse** not actually in its employ. 229AppDiv58, 240NYS720.

377-15 37GaA92, 139SE101; 222App Div402, 226NYS317; 115 OhSt539, 541, 155NE126 [citCJ]; TexCivA 18SW(2d) 700; 137Wash326, 242P372.

378-17 335 Ill 42, 166NE461; MoA 16 SW(2d)625; 137Wash326, 242P372.

378-20 197NC41, 147SE672(1stcase).

378-22 170Ark1089, 282SW966.

378-24½-New. Hospital corporation cannot assert rule of nonliability in tort where it fails to plead that it is charitable institution. 221Ky538, 299 SW159.

378-24½-New. Evidence held to show that a hospital was a charitable institution, exempt from liability and that a nurse, responsible for injury to a child, was competent. 11LaA423, 123S466.

379-30 220Ala274, 124S871.

379-32 250NY103, 164NE871. [a] **As to law governing** see 108Conn136, 142A 678.

379-36½-New. Where the charitable corporate legatee of a vested remainder, effected a revival of its corporate existence and merger with a similar corporation, after the death of the life ten-

ant, the legacy passed to the merged corporation. 15DelCh1, 130A34.

380-43 135Misc903, 241NYS669.

381-7½-New. Charlatan "One (who) either practices medicine or pharmacy illegally, or being a legally qualified practitioner resorts to vulgar devices to obtain practice, as by advertisements, public exhibitions etc." Foster Encyc. Med. D. [quot 86Misc217, 222, 148NYS 405].

381-7½-New. "A quack, a pretender to medical skill, an advertising doctor." Gould Pract. Med. D. [quot 96Misc217, 223, 148NYS405].

CHATTEL

383-62 [a] (4) 116Tex337, 291SW219.

383-65 9F(2d)928.

383-66 9F(2d)928.

383-69 9F(2d)928.

384-83 9F(2d)928.

384-84 9F(2d)928.

384-85 9F(2d)928.

384-91½-New. , shares of stock. 9F (2d)928.

385-13 119Kan788, 241P467, 471 [cit CJ].

CHATTEL MORTGAGES

398-1 104Conn165, 132A397; 31NM 469, 247P1066, 1067 [quotCJ]; 146SC 123, 143SE663, 666 [quotCJ]; 199Wis 292, 226NW308, 309 [citCJ]; Sask [1927] 3DomLR274, 278 [quotCJ]. [a] (13) 244NY340, 155NE665. (17) Instrument or agreement given and taken to secure payment of money. 91Fla709, 109S677. (18) A mortgage of chattels. 207 Iowa155, 222NW530. (19) Other definitions. 39F(2d)625.

399-2 5F(2d)633; 32F(2d)355; 46 Ida 231, 266P659 (stating common-law rule before it was changed by statute); 206 Iowa75, 218NW622; 129Misc819, 222 NYS238; 132Misc223, 228NYS582 (no legal title until after default); 192NC439, 135SE328; 198NC757, 153SE313; Tex CivA 283SW224. But see 146SC257, 143 SE820. [e] In New York.–244NY340, 155NE665.

399-3 30Ariz188, 245P277; 73CalA44, 238P177; CalA 290P91; 87Colo 55, 284 P1021; 89Fla484, 104S780; 41GaA111, 151SE829; 42 Ida688, 247P791; 43 Ida 540, 253P854, 857 [citCJperGivens.J]; 221MoA1243, 300SW841; 85Mont310, 278P1002; 101NJEq569, 139A389; 31 NM469, 247P1066, 1067 [quotCJ]; 49 ND531, 191NW963; 129 Okl 86, 263P458 (mere incident of the debt); 9PaDist& Co 75, 78 [quotCJ]; 46RI 505, 129A503; TexCivA 278SW907; 147Wash560, 266 P697. But see TexCivA 283SW224. [d] (1) 89Fla484, 104S780. [n] In Texas.–CivA 278SW907. [o] Intention to transfer title to secure mortgagor's obligation is essence of chattel mortgage. 332 Ill 362, 163NE659.

401-4 31NM469, 247P1066, 1067 [quot CJ].

401-6 31NM469, 247P1066, 1067 [quot CJ]; 34NM602, 287P702.

401-9 329Ill 403, 160NE545; 255 IllA 558.

401-12 [c] Oral understanding that bank should have title to defendant's business, if valid, is in nature of chattel mortgage, as regards depositor's creditor. SD 231NW601.

402-14 Mass 171NE820 (assignment of conditional sales contract as security held to be "mortgage"); 146Wash315, 262P636. [c] Contractor's indemnity contract assigning all his interest in supplies and tools to surety on bond as security is in effect chattel mortgage. 37F(2d)326.

402-24 192NC439, 135SE328; 92PaSuper463, 465 [citCJ]. [e] Iowa 218NW 622.

404-36 7F(2d)94; 192NC439, 135SE 328.

404-37 192NC439, 135SE328.

405-46 7F(2d)94.

405-53 323 Ill 232, 154NE139. [a] Mortgagee not to be considered as owner. 5PaDist&Co 191.

406-55 246NY174, 158NE64 (in equity).

406-56 91Fla322, 107S684; 246NY174, 158NE64 (in equity).

406-57 91Fla322, 107S684.

406-58 17F(2d)904; 91Fla322, 107S 684, 687 [citCJ]; 37GaA141, 139SE113 (under Florida statute); GaA 155SE 355; MoA 298SW242; 218AppDiv22, 217NYS652; 142Wash446, 253P643. [a] Recorded instrument retaining title till full payment must be treated as mortgage. 42F(2d)293.

406-59 IndA 162NE418.

406-60 218AppDiv22, 217NYS652; 142 Wash446, 253P643.

406-61 246NY174, 158NE64.

407-63 332 Ill 362, 163NE659; 246NY 174, 158NE64; 142Wash446, 253P643.

407-65 218AppDiv22, 217NYS652.

407-68 See also 246NY174, 158NE64.

407-70 20F(2d)410; 39GaA646, 148SE 288. [b] That seller is given opportunity to repurchase goods at original price does not show mortgage rather than sale. 41F(2d)8.

408-77 47 Ida478, 276P969.

409-81 30F(2d)256; CalA 284P736; 332 Ill 362, 163NE659; MoA 48W(2d) 489; NJSup 133A180; 218AppDiv22, 217NYS652; 117 OhSt69, 158NE81; 118 Or665, 248P137; 126 Or64, 268P746, 747 [citCyc]; TexCivA 28W(2d)344; 142 Wash446, 253P643; 146Wash492, 263P 732; 40Wyo 215, 276P448. [d] Defeasance clause appearing in bill of sale to which lease back to maker is attached, establishes intent that instruments operate as security for loan. 214 AppDiv296, 212NYS230. [e] Bill of sale absolute on face but intended as mortgage is not chattel mortgage where not in statutory form. 172Ark82, 287 SW750. [f] Delivery of property is not required. 176Ark551, 3SW(2d)315. [g] Bill of sale not void as to seller's creditors because of subsequent unrecorded consignment agreements not operating as defeasances. 21F(2d)984.

409-82 91Fla322, 107S684; 37GaA821, 142SE565 (instrument purporting to be mortgage and containing defeasance clause); MoA 14SW(2d)537; 117 OhSt 69, 158NE81.

409-82½-New. An absolute conveyance is prima facie the effect of a bill of sale. 47 Ida478, 276P969.

410-83 TexCivA 11SW(2d)815; 142 Wash446, 253P643.

410-85 101Vt356, 143A276.

410-96 TexCivA 292SW269. [a] (4) Instruments construed as conditional sales.–195NC508, 142SE767.

411-97 232Mich22, 204NW766.

411-99 30F(2d)510; 91Fla322, 107S 684; 132Misc223, 228NYS582 (mortgage); TexCivA 295SW955; 142Wash 446, 253P643; 147Wash560, 266P697; 148Wash110, 268P144 (instrument held chattel mortgage).

411-1 [a] 91Fla 322, 107S684.

412-2½-New. A provision that in case of default the mortgagor's possession shall be that of a bailee for the mortgagee does not constitute an instrument a conditional sale rather than a chattel mortgage. 77Colo 595, 238P63.

412-3 17F(2d)904; 146Wash315, 262P 636. But see 199Wis292, 226NW308.

412-8½-New. That a person claiming that an instrument constituted a conditional sales contract sought by action to recover only possession of the property is not decisive of the question. 146 Wash315, 262P636.

412-9 220Ala216, 124S514; 146Wash 315, 262P636; 147Wash560, 266P697.

412-11 91Fla322, 107S684.

413-12 20F(2d)410; 233Mich161, 206 NW321.

413-14 42F(2d)515. [a] In Minnesota.–176Minn493, 223NW911.

413-15 [b] Under English law governing construction, contract giving vendor right to repurchase within set time at purchase price plus interest held sale with right to repurchase, not mortgage. 126Misc491, 216NYS24.

413-16 246NY174, 158NE64 (sales contract cannot be changed to mortgage by fictitious inference).

413-17 [a] Relation of debtor and creditor must appear in some way, such as from surrounding circumstances. 126 Misc491, 215NYS24. [b] Under English law, there must have been indebtedness to be secured for transaction to mortgage. 126Misc491, 215NYS24.

413-18 142Wash446, 253P643.

413-19 126Misc491, 215NYS24. [a] That price under right to repurchase included amount paid plus interest does not necessarily indicate mortgage. 126 Misc491, 215NYS24 (interest to be paid only on repurchase).

413-20 142Wash446, 253P643.

413-21 126Misc491, 215NYS24 (almost conclusive of mortgage). [a] Adequacy of price depends on market value, not intrinsic value, in determining whether transaction is mortgage or sale with right to repurchase. 126Misc491, 215 NYS24.

413-21½-New. It is equally conclusive where the price paid is adequate that sale was intended. 126Misc491, 215NYS 24.

413-21⅓-New. Under English law one difference between a mortgage and a sale with the right to repurchase is that a mortgage is construed against the letter. 126Misc491, 215NYS24.

413-21¼-New. whereas the right to repurchase must be strictly followed to the letter. 126Misc491, 215NYS24.

413-22 214Ala267, 107S744; 98Fla304, 123S785; Iowa 226NW168; Iowa 233 NW114; 242Mich589, 219NW713 (transaction held conditional sale); 243 Mich401, 220NW780 (notes taken by seller); 244Mich529, 221NW630; 155 Miss343, 124S430(2dcase); 98NJEq523, 131A524; 243NY95, 152NE476; 193NC 663, 137SE874; 50RI 499, 149A611; Tex CivA 28SW(2d)306.

414-23 23F(2d)609 (doubts resolved against seller); 30F(2d)551; 30F(2d) 555; 214Ky9, 282SW190; 227Ky657, 13 SW(2d)1009, 62ALR208; 235Ky66, 29 SW(2d)617; 235Ky66, 29SW(2d)617; 244Mich298, 221NW142; 245Mich56, 222 NW145; 245Mich669, 224NW609; 146 Wash315, 262P636; 147Wash560, 266P 697; 199Wis292, 226NW308 (instrument held not chattel mortgage). See also 91Fla709, 109S677, 687 [citCJ]. [a] (5) See also 91Fla709, 109S677, 687 [cit CJ]. (7) Contract whereby insurer placed sprinkling system in plant under agreement that title should remain in insurer construed as one reserving lien and not conditional sale. 147Wash560, 266P697. [a] (8) Sale contract, providing that title remain in seller till amount was paid as per note and mortgage. 220 Ala216, 124S514.

415-24 [a] (1) TexCivA 28SW(2d)306; TexCivA 32SW(2d)678(2dcase).

415-26½-New. The relation of conditional seller and buyer, and of mortgagee and mortgagor, cannot subsist as to the same property at the same time. 220Ala216, 124S514.

415-27 91Fla709, 109S677.

415-31 98NJEq523, 131A524. See also 92CalA91, 267P766.

415-34 146Wash315, 262P636.

416-36 CalA 291P458.

416-37 148Wash635, 269P1050. See also 147Wash560, 266P697.

417-40 28F(2d)713; 243Mich401, 220 NW780. But see 190NC480, 130SE319.

417-42 14F(2d)917; 29F(2d)902; Fla 130S457; 85Mont310, 278P1002; Nebr 230NW682; TexCivA 11SW(2d)668.

417-45½-New. Lease of a frigidaire cabinet for use in handling ice cream of the lessor held a contract of bailment and not a chattel mortgage. 35F(2d) 439.

418-50 2F(2d)750 (title remained in seller under trust receipt).

418-51 [a] Trust receipts issued by finance corporations held admissible. 215Ala460, 110S904.

419-58 [b] Trust receipts taken on trucks delivered to sales agent held to be chattel mortgage. TexCivA 22SW(2d) 985.

419-58½-New. Where petition to enforce superior lien under trust receipts proceeds on theory that plaintiff holds only chattel mortgage action will be so treated. 233Ky290, 25SW(2d)405.

419-58⅓-New. Trust receipt has been held to be mortgage requiring to be recorded. Mass 171NE820.

419-59 NJCh 148A159 (trust agreement).

419-61 See also 97Fla996, 122S508.

419-64 91Fla322, 107S684. [c] Mortgagor of crops has burden to show he had no interest in land on which crop grown. Ala 129S53.

420–70 91Fla322, 107S684; 156Md662, 145A342.
421–87½–New. Evidence of dealings and transactions between an automobile dealer and third persons in purchase of his cars is irrelevant and inadmissible to prove that the dealer's bill of sale represented merely security for a loan. 156Md662, 145A342.
421–88 45 Ida620, 264P866 (sufficient). See also 148Wash542, 269P842. [b] **Evidence held not to overcome** fact that instruments on face operated as chattel mortgage. 214AppDiv296, 212NYS230. [c] **Evidence held to show** price paid as adequate and did not indicate intent that transaction be mortgage. 126Misc 491, 215NYS24.
422–93 45 Ida620, 264P866.
422–94 TexCivA 295SW955.
422–96 2F(2d)750 (instrument declared not chattel mortgage).
422–97 203Cal 547, 265P190, 191 [cit CJ] 57ALR696; 87Colo 55, 284P1021; 204 Iowa590, 215NW647; 86Mont513, 284P270; 5PaDist&Co 191. See also 39 F(2d)969.
423–1 But see TexCivA 29SW(2d)414.
423–2 33F(2d)104; 251 IllA397.
423–3 251 IllA397.
423–5 172Ark569, 289SW766.
424–7 34Ariz408, 274P155; 35Ariz392, 278P384; 203Cal 547, 265P190, 57ALR 696; 90CalA428, 265P954 (removal without mortgagee's consent); 204 Iowa 590, 215NW647, 649 [quotCJ]; 214Ky 9, 282SW190; 216Ky335, 287SW939; 172Minn458, 215NW844. [d] (1) 27 Oh NPNS175. (2) Failure of mortgagee of California live stock to file certificate of record with secretary of state precludes recovery against innocent purchaser in another state. Nev 292P587. [e] **Property transferred in state other than forum.**–34Ariz408, 274P155.
425–8 204 Iowa590, 215NW647, 649 [quotCJ].
425–9 204 Iowa590, 215NW647.
425–10 221MoA1243, 300SW841, 844 [quotCJ]; 148Miss219, 114S322; NJ Sup 137A444. See also 172Minn458, 215 NW844. [c] **Waiver of lien is effective** at time of removal of property from state. 221MoA1243, 300SW841.
426–12 148Miss219, 114S322.
426–13½–New. The validity of a chattel mortgage executed and delivered in the state where the property was then situated is governed by the laws of the state to which the property was removed where the parties contemplated an immediate removal of the property to such state under a lien good under its laws. 202 Iowa1140, 211NW568.
426–14 13LaA594, 128S700.
426–15½–New. 148Miss219, 114S322 (by statute).
426–17 TexCivA 11SW(2d)362.
426–18 But see 203Cal 547, 265P190, 192 [citCJ], 57ALR696 (no such statute in California).
426–19 87Colo 55, 284P1021.
427–29 116Tex337, 291SW219.
428–36 31Ariz8, 250P248.
428–39½–New. Statute providing chattel mortgage may cover merchant's stock of goods is applicable to bill of sale securing debt. 43F(2d)807.
428–41 44 Ida316, 256P761, 763 [cit CJ]; 254 IllA372; 128Kan132, 276P70; Sask [1929] 4DomLR245. [d] **General rule** is that mortgagor must have possession and title. 258Mass157, 154NE 580. [e] **Where title passes to vendee at time of sale** of property, subsequent chattel mortgage executed by vendor is of no effect. 53ND102, 204NW975.
428–42 22AlaA204, 114S176; 44 Ida 316, 256P761, 763 [citCJ]; 56ND637, 218NW603; 120 OhSt568, 166NE808, 63 ALR674; TexCivA 283SW322, 324 [cit CJ]; TexCivA 294SW686. [b] (4) Chattel mortgage on piano consigned on agency contract signed by agent for himself is not effective against principal. 126Kan519, 268P859. (5) Buyer's chattel mortgage of monoplane is invalid where neither seller nor buyer had appropriated plane to contract with assent of other so as to transfer title. DelCh 149A418. (6) Assignee of recorded mortgage on automobile has been held not entitled to foreclosure where mortgagor was never owner thereof. TexCivA 31SW(2d)1098(2dcase). [c] **That mortgagor purchased property without having paid for it** does not necessarily prevent him from executing mortgage thereon. TexCivA 30SW(2d) 902.
429–43 TexCivA 283SW322, 324 [cit CJ].
429–44 30F(2d)256; 146SC123, 143SE 663; TexCivA 283SW322, 324 [citCJ].
429–45 51Miss102, 117S545, 59ALR285 (mortgage on partnership interest where firm name subsequently changed); TexCivA 283SW322, 324 [citCJ].
429–45½–New. Vendee may mortgage property after passing of title to him. 253Mass383, 149NE313.
429–47 TexCivA 29SW(2d)831.
429–48 TexCivA 283SW322, 324 [cit CJ].
429–48½–New. By execution of mortgage mortgagor represents to mortgagee that he has some interest subject to mortgage. Ala 129S53.
430–56 DelCh 150A81.
431–76 258Mass157, 154NE580.
431–77 214Ala368, 108S31; Ala 129S 53; 20AlaA569, 104S139; 22AlaA281, 115S152 (potential interest). [d] **Evidence held insufficient to show ownership.**–214Ala368, 108S31.
431–81 See also TexCivA 283SW322.
431–82½–New. An execution of a chattel mortgage on crops has been held not a constructive severance of crops as against purchaser at foreclosure sale under deed of trust. MoA 271SW857.
431–82⅓–New. Crop mortgage made by former owner of land without interest in crop after sale of land on foreclosure of mortgage thereon conveys no interest. Mont 289P561.
431–84 116Tex337, 291SW219. See also Sask [1928] 4DomLR400. But see Sask [1928] 4DomLR263.
432–91½–New. A chattel mortgage by a joint owner purchasing the interest of another joint owner covering interest in crops to be grown is valid. TexCivA 2SW(2d)356.
432–91⅓–New. A mortgage on the entire crop by a joint owner cannot affect the potential interest of another joint owner entitled to part of the crop as rent. TexCivA 2SW(2d)356.
432–91¼–New. In Saskatchewan a lessee's chattel mortgage of crops given after making of agreement to cancel lease passes no interest in crops. Sask [1929] 4DomLR38.
432–92 Iowa 232NW633; 116Tex337, 291SW219.
432–93 146SC123, 143SE663; 116Tex 337, 291SW219.
433–6 248 IllA385.
433–14 234Ky613, 28SW(2d)959 (fund in court to be paid to heirs).
434–20 203 Iowa1380, 214NW546; 126 Kan714, 718, 271P302 [citCJ]; 259 Mass585, 156NE871; Mass 173NE532; Or 291P371; 143Wash434, 255P378.
435–22 120Kan81, 242P140, 141 [cit CJ].
435–24 54ND166, 209NW379, 45ALR 1487.
435–25 But see 30Ariz188, 245P277, 278 [citCJ].
435–25½–New. That mortgagor attempted to mortgage cattle not then owned does not invalidate mortgage as to cattle then owned. Or 291P371.
437–34 20AlaA569, 104S139; 258Mass 157, 154NE580; 116Tex337, 291SW219; 143Wash434, 255P378, 379 [citCyc].
437–35 [b] **In North Dakota.**–54ND 166, 209NW379, 45ALR1487.
438–42 258Mass157, 154NE580.
439–46 MoA 7SW(2d)726 (dictum).
440–51 259Mass585, 156NE871.
440–52 47 Ida58, 272P704; 126Kan 714, 718, 271P302 [citCJ]; 228AppDiv 577, 240NYS108.
441–53 MoA 14SW(2d)672.
442–65 17F(2d)555; 50ND322, 195NW 564. [b] **Construction of statutes.**–153 Miss811, 121S816. [c] **In Mississippi.**–153Miss811, 121S816.
442–66 207Cal 373, 278P863; 44 Ida 316, 256P761; 44 Ida332, 257P31, 54 ALR1527; 258Mass157, 154NE580; 80 Mont593, 261P278; 81Mont579, 264P 940; TexCivA 283SW322; 136Wash 214, 239P556; 143Wash434, 255P378, 379 [citCyc].
442–68 TexCivA 283SW322.
442–69 See also TexCivA 283SW322.
443–70 14F(2d)917; 30Ariz188, 245P 277, 278 [citCJ]; TexCivA 10SW(2d) 186.
443–71 30Ariz188, 245P277, 278 (mortgage becomes operative on planting of crop); 36GaA360, 136SE824; 221MoA 31, 297SW724; MoA 7SW(2d)726, 728 [citCJ]; TexCivA 289SW417; 143Wash 434, 255P378. See also 126Kan714, 271 P302. [c] **When acquired.**–MoA 7SW (2d)726.
443–72 22AlaA281, 115S152 (where mortgagor has potential interest in land); 44 Ida316, 256P761; Ida 257P 31, 33 [citCJ]; 203 Iowa1380, 214NW 546; 81Mont579, 264P940; 161Tenn 128, 29SW(2d)654; 144Wash483, 258P 498. [a] (1) 22AlaA281, 115S152. (2) 22AlaA281, 115S152. [g] (1) 51ND241, 199NW863. (3) 51ND241, 199NW863. [j] 81Mont579, 264P940. [k] **Sales Act provision against future sale of goods** has been held inapplicable to chattel mortgage on crops to be grown. 161Tenn128, 29SW(2d)654. [l] **In Georgia.**–A 155SE791.
444–73 200Cal 389, 253P143; 44 Ida 332, 257P31, 54ALR1527; 46 Ida431, 268P37; 244Mich302, 221NW146; 125 Me131, 131A307; 116Tex337, 291SW 219; TexCommnA 280SW521; TexCivA 298SW652 (landlord's share of unplanted crop); TexCivA 1SW(2d)437. [a] **Refusal of mortgagee to finance mortgagor so that he can produce crop** does not affect validity of mortgage on crops for current and succeeding years. Tex CivA 1SW(2d)437.
444–74 174Ark978, 298SW213; 200Cal 389, 253P143, 144 [citCJ&Cyc]; 203 Iowa1380, 214NW546; 205 Iowa1216, 219NW523; 174Minn531, 219NW871, 872 [citCJ]; 79Mont468, 257P469; 81 Mont579, 264P940; 131 Or518, 283P1 (does not attach as to crops planted after conveyance of land by mortgagor); 143Wash434, 255P378. [b] **Mortgage on tenant's share of crop to be grown on land leased on shares** attaches when landlord acquiesces in division of crop made by tenant. ND 231NW859.
444–76 214Ala100, 106S595; 35Ariz 334, 278P68; 89CalA690, 265P403; 47 Ida24, 271P935.
445–90 52SD551, 219NW256.
445–91½–New. Where building material is sold to a vendor in possession of land under an agreement that the building to be constructed therefrom shall remain personalty and the building is constructed so that it can be removed without material injury to the realty, a chattel mortgage on the building given to secure the price of the material is not vulnerable to objection by the vendor of the land that the building is real property. 50ND408, 196NW 312, 30ALR538.
445–91⅓–New. The rule applies notwithstanding an agreement between the vendor and purchaser of the land that building erected on the land shall not be removed and shall become the property of the vendor, 50ND408, 196NW 312, 30ALR538.
445–91¼–New. or after termination of the mortgagor's title to the building, 201 Iowa190, 206NW828.
445–91⅕–New. as where mortgagor who had contracted to purchase land forfeited or abandoned contract of purchase and took lease of land without reservation. 201 Iowa190, 206NW828.
445–92 44 Ida332, 257P31, 54ALR1527. But see 17F(2d)503.
446–2 222MoA339, 297SW91, 93 [cit CJ].
446–3 NJSup 133A180.
446–4 NJSup 133A180; TexCivA 23SW (2d)745.
447–6 18F(2d)462.
447–8 18F(2d)462.
447–10 18F(2d)462, 464 [citCJ].
447–13 69CalA325, 231P366 (evidence held sufficient as against motion for nonsuit to show advances made under crop mortgage); TexCivA 8SW(2d)745.
448–14 134 Okl 237, 273P261.
448–17 49Philippine647, 655 [citCJ].

448-18 49**Philippine**647, 655 [citCJ].
449-32 241 **Ill**A102.
449-38 [b] **Where amount is left blank in stipulation,** reasonable fee may be allowed. **CalA** 267**P**750.
449-43 99**NJEq**418, 132A81. [a] But see **Mass** 171**NE**721.
450-47 But see 99**NJEq**418, 132A81. [a] (10) Additional security. 222**MoA** 339, 297**SW**91. (11) Delivery of warehouse and trust receipts. 31**F(2d)**914. (12) Other instances. **SD** 230**NW**282.
450-48 246 **Ill**A371; 208 **Iowa**254, 225 **NW**411.
450-48½-New. A chattel mortgage given for a past-due indebtedness and in payment of goods to be shipped and actually shipped about date of mortgage is held not a mortgage to secure future advances. **Ont** [1927] 2**DomLR** 153.
450-48½-New. Whether there was consideration for land mortgagor's assignment of rents as additional security is to be determined by rules applicable to chattel mortgages. **SD** 230**NW**282.
451-53 100**Vt**468, 139A250.
451-57 236**Mich**501, 211**NW**71; 221 **MoA**152, 297**SW**727; **SD** 230**NW**282; **TexCivA** 23**SW(2d)**745; 198**Wis**300, 224 **NW**117.
451-62 Mo 23**SW(2d)**64. [a] **Burden of overcoming presumption** rests on defendant. 85**CalA**360, 259**P**460.
451-63 [a] **Evidence held insufficient.**-85**CalA**360, 259**P**460.
451-68 [a] **Clause in conditional bill of sale** (1) construed to be mortgage, permitting vendor on nonpayment of installment to take possession and declare forfeiture, is void. 69**CalA**719, 232 **P**734. (2) Clause, given back at same time by vendee for purpose of securing loan constitutes mortgage. 69**CalA**719, 232**P**734.
452-80 TexCivA 11**SW(2d)**668.
452-81 [c] **Instruments held insufficient.**-39**GaA**397, 147**SE**406.
453-84½-New. Whether a real estate mortgage also constitutes a chattel mortgage may be determined by striking therefrom the part relative to real estate. 203 **Iowa**1380, 214**NW**546.
453-86 264**Mass**181, 162**NE**356 (agreement under which bank obtained legal title to personal property on trust for purpose of liquidating another's debt to it); **MoA** 20**SW(2d)**164; **SD** 225**NW** 661. [c] **In South Dakota.**-225**NW**661. [d] **"Equitable mortgage"** includes every contract so convincingly established as to show clear intention to give lien on specified chattels of and in possession of lienor that contract should be enforced according to such intention in good conscience and equity. **SD** 225 **NW**661.
453-88 74**Mont**476, 241**P**229, 231 [cit CJ].
454-93 118**Nebr**472, 225**NW**230 (crop to be grown).
454-93½-New. A farm lease, clearly expressing the lessee's intention to give the lessor a lien on chattels belonging to and in the possession of the lessee for payment of rent, creates an equitable mortgage. **SD** 225**NW**661.
454-95 [a] **Statutory provisions must be strictly construed.**-203**Cal** 254, 263**P** 537.
454-98 85**Mont**310, 278**P**1002; 100**Vt** 468, 139A250.
455-8½-New. The mortgage must so definitely and certainly state that a lien is given that mortgage is notice to the world. 125**Me**131, 131A307.
456-18 144**Va**311, 132**SE**323, 325 [cit Cyc].
456-25 223**Ky**433, 3**SW(2d)**1084, 1087 [citCJ]. [a] **In Philippines.**-44**Philippine**216.
456-26 90**Fla**617, 106**S**422, 424 [citCJ]; 219**Ky**827, 294**SW**792, 794 [quotCJ].
456-27 90**Fla**617, 106**S**422, 424 [citCJ]; 219**Ky**827, 294**SW**792, 794 [quotCJ].
456-28 90**Fla**617, 106**S**422, 424 [citCJ]; 219**Ky**827, 294**SW**792 [quotCJ]; 2**LaA** 658, 659 [quotCJ]; 127 **Or**206, 271**P** 728; 158**Tenn**341, 13**SW(2d)**325.
456-28½-New. Character of property must be considered in determining sufficiency of description. 51**ND**563, 200 **NW**38.
456-28⅓-New. The entire description must be considered in determining its sufficiency. 202 **Iowa**1140, 211**NW**568.
456-28¼-New. The rule as to description applies alike to a chattel mortgage or conditional sale. 158**Tenn**341, 13**SW (2d)**325.
457-29 103**Conn**732, 132A20; 90**Fla** 617, 106**S**422, 424 [citCJ]; 42 **Ida**688, 247**P**791; 219**Ky**827, 294**SW**792, 794 [quotCJ]; 12**LaA**9, 125**S**77; **MoA** 14 **SW(2d)**668; **Mont** 286**P**1115; 127 **Or** 206, 271**P**728; 44**Philippine**216; 50**SD** 598, 211**NW**452; **TexCivA** 17**SW(2d)** 862; **TexCivA** 18**SW(2d)**848. [a] **Insufficient description** is held to invalidate judgment ordering application of proceeds of sale of personalty to debt secured by mortgage on realty and personalty. 103**Conn**732, 132A20.
457-30 219**Ky**827, 294**SW**792, 794 [quotCJ]; 54**ND**309, 209**NW**655. [c] **Rule requiring certainty is relaxed between parties.**-**Ala** 129**S**472.
457-31 219**Ky**827, 294**SW**792, 794 [quotCJ]; **Mont** 286**P**1115.
457-32 219**Ky**827, 294**SW**792, 794 [quotCJ].
457-34 40**F(2d)**321; 214**Ala**368, 108**S** 31; 106**Conn**159, 137A756; 90**Fla**617, 106**S**422, 424 [citCJ]; 332 **Ill** 362, 163 **NE**659; 202 **Iowa**1366, 212**NW**59; 126 **Kan**215, 268**P**122 (description held sufficient); **Iowa** 232**NW**633; 7**LaA**148; 8**LaA**607; 258**Mass**157, 154**NE**580; 102 **NJL**181, 130A562, 563 [quotCJ]; 51**ND** 563, 200**NW**38; 44**Philippine**216; **Tex CivA** 9**SW(2d)**372; **TexCivA** 32**SW(2d)** 378; 99**Vt**350, 132A135; 144**Va**311, 132 **SE**323; 144**Wash**483, 258**P**498; **Ont** [1925] 3**DomLR**165. [a] (9) "1 service truck 3½ tons, 1 Paige truck 2 tons." 223**Ky**433, 3**SW(2d)**1084. (10) Other insufficient descriptions. **SD** 225**NW**661. (11) "All of my or our live stock and personal property of every kind now in my or our possession and owned by me or us." 220**Ala**224, 124**S**863, 66**ALR** 1454. (12) Mortgage containing incorrect motor number held not as matter of law sufficient to charge subsequent mortgagee with notice. 40**GaA**793, 151 **SE**549. (13) Description as "No. 75 refrigerator." 11**LaA**676, 124**S**775. (14) Description in instrument retaining title. 42**F(2d)**293. [b] **Omnibus or roving descriptions are too indefinite** to furnish means of identification. 51**ND** 563, 200**NW**38.
458-35 106**Conn**159, 137A756; 90**Fla** 617, 106**S**422, 424 [citCJ]; 121**Kan**396, 247**P**862; 102**NJL**181, 130A562, 563 [quotCJ]; 113 **Okl** 291, 241**P**1105; 48 **SD**436, 205**NW**40; 144**Wash**483, 258**P** 498. [a] (5) Listing cows with ages, colors and values. **MoA** 28**SW(2d)**121.
458-36 213**Ala**221, 104**S**320; 214**Ala** 368, 108**S**31; 169**Ark**317, 273**SW**9; 89 **CalA**690, 265**P**403; 106**Conn**159, 137A 756; 90**Fla**617, 106**S**422, 424 [citCJ]; 41**GaA**211, 152**SE**264; 202 **Iowa**1140, 211**NW**568; **Iowa** 227**NW**97; **Iowa** 228 **NW**35; 121**Kan**396, 247**P**862; **Nebr** 230 **NW**487(2dcase); 102**NJL**181, 130A562, 563 [quotCJ]; 51**ND**563, 200**NW**38; 113 **Okl** 291, 241**P**1105; 133 **Okl** 268, 272 **P**1025; 144 **Okl** 163, 290**P**1106; 118 **Or** 665, 248**P**137; 48**SD**436, 205**NW**40; **TexCivA** 9**SW(2d)**372; **TexCivA** 13**SW (2d)**121; **TexCivA** 19**SW(2d)**71; 99**Vt** 350, 132A135; 144**Va**311, 132**SE**323, 325 [citCyc]; 153**Va**183, 149**SE**544; 144 **Wash**483, 258**P**498. See also 42**F(2d)** 293. "It is generally, or at least often," etc. 127 **Or**118, 271**P**53, 55 [quotCJ]. [a] (10) 155**Tenn**250, 292**SW**1. (13) Hotel furniture and fixtures. 100**NJEq** 1, 134A875. (14) Gasoline tank. 169 **Minn**434, 211**NW**838. (15) Farm implements. 144**Va**311, 132**SE**323. (16) Automobile. 99**Vt**350, 132A135. (17) Furniture and equipment of billiard parlor. 18**F(2d)**719. (18) Herd of cattle. 59 **OntL**20, [1926] 3**DomLR**168. (19) Building put on land by tenant. 52**SD** 551, 219**NW**256. (20) Crop. **Ala** 129**S** 53. (21) Truck. **Va** 149**SE**544.
459-37 102**NJL**181, 130A562, 563 [quot CJ].
459-38 89**CalA**690, 265**P**403, 407 [quot CJ]; 2**LaA**658, 659 [quotCJ]; 102**NJL** 181, 130A562, 563 [quotCJ]; 127 **Or** 118, 271**P**53, 55 [quotCJ]. But see 220 **Ala**224, 124**S**863, 66**ALR**1454. "Parol evidence may be employed," etc. 127 **Or**118, 271**P**53, 55 [quotCJ].
459-38½-New. The strictness of the rule as to definiteness of description does not apply in favor of an earlier mortgagee of other property or a purchaser at his sale. 42 **Ida**688, 247**P**791.
460-42 ND 231**NW**859.
460-43 [d] (2) Under Bills of Sale and Chattel Mortgage Act chattel mortgage required to be registered must contain such sufficient and full description of the goods and chattels that same may be thereby readily and easily known and distinguished. **Ont** [1925] 3**DomLR**165. [f] **In Texas.**-**CivA** 271**SW**196. [g] **Description held insufficient** in view of statute. 11**LaA**652, 124**S**593.
461-45 TexCivA 27**SW(2d)**924.
461-56 127 **Or**118, 271**P**53, 55 [quot CJ].
461-57 192**Wis**623, 211**NW**776, 778 [citCJ].
461-59 MoA 14**SW(2d)**672.
463-69 MoA 11**SW(2d)**1084.
463-70 106**Conn**159, 137A756; 36**GaA** 458, 137**SE**125; **TexCivA** 275**SW**860.
463-71 47 **Ida**149, 273**P**945; 258**Mass** 157, 154**NE**580. See also 31**Ariz**89, 250 **P**772, 774 [citCJ].
463-72 36**GaA**458, 137**SE**125.
463-73 TexCivA 275**SW**860.
464-76 See also **MoA** 11**SW(2d)**1084.
465-87 TexCivA 286**SW**604, 607 [cit CJ].
465-88 10**LaA**38, 120**S**795; **Ont** [1925] 3**DomLR**165.
465-89 202 **Iowa**1366, 212**NW**59; **SD** 225**NW**661; **Ont** [1925] 3**DomLR**165.
465-90 TexCivA 286**SW**604.
465-91 202 **Iowa**1140, 211**NW**568.
465-92 224 **Ill**A554; 202 **Iowa**1140, 211 **NW**568, 573 [citCJ]. [b] **Liability not determined by terms of order for bond.**-238**Mich**227, 213**NW**190.
465-93 202 **Iowa**1140, 211**NW**568, 572, 573 [citCJ].
465-95 223**Ky**433, 3**SW(2d)**1084; 220 **MoA**171, 281**SW**101; **TexCivA** 283**SW** 322; **TexCivA** 9**SW(2d)**372.
465-96 202 **Iowa**1366, 212**NW**59 (dictum).
465-99½-New. Description of mortgaged property as located on named leases without stating by whom the property or leases are owned or possessed is insufficient where there are other leases on the same tract known by the same name. **TexCivA** 286**SW** 604.
466-1 213**Ala**221, 104**S**320 (mortgage construed to refer to property in possession of mortgagor, not mortgagee); 220**MoA**171, 281**SW**101.
466-2 121**Kan**396, 247**P**862; 144**Va**311, 132**SE**323.
466-3 223**Ky**433, 3**SW(2d)**1084, 1085 [citCJ]; 220**MoA**171, 281**SW**101; 144 **Va**311, 132**SE**323, 325 [citCyc].
466-6½-New. Location need not be described with such certainty as to preclude extraneous inquiry. **TexCivA** 283 **SW**322.
466-9 144**Va**311, 132**SE**323.
466-10 SD 225**NW**661.
466-11 37**F(2d)**103(2dcase). [a] (5) Statement that goods are "property of the said mortgagor and are situate in, around and upon premises known as 551 Queen Street West," etc., is insufficient where mortgagor's premises were in rear of such premises and accessible from different streets. **Ont** [1925] 3**DomLR**165. (6) Chattel mortgage erroneously giving permanent location of property at point outside of state imparts no constructive notice to subsequent purchaser. 205 **Iowa**813, 218**NW** 516.
466-12 43**F(2d)**807.
467-16 213**Ala**221, 104**S**320; 214**Ala** 100, 106**S**595; 202 **Iowa**1140, 211**NW** 568; **Or** 291**P**371. [a] **Insufficient descriptions.**-**SC** 145**SE**627; **TexCivA** 32 **SW(2d)**378. (2) Description as stated number of yearling Whiteface Shorthorn and Black Pole horned and dehorned steers of stated average weight described brand kept, at described place. **Iowa** 229**NW**829(2dcase). [c] **Conveyance under general description** is unaffected by subsequent specific designation. **Ala** 129**S**472.

467-17 144Va311, 132SE323, 325 [cit Cyc].
467-18 47 Ida24, 271P935 (as to third parties with actual notice).
467-19 36GaA56, 135SE109; 202 Iowa 1140, 211NW568. See also Iowa 228 NW35.
467-19½-New. A description of cows by sex, color, and location is prima facie sufficient. 101Vt471, 144A375.
467-20 2LaA658, 659 [quotCJ].
467-23 202 Iowa1140, 211NW568; 205 Iowa813, 218NW516.
467-27 89CalA690, 265P403.
468-29 8F(2d)667.
468-31 MoA 118SW(2d)1084; 51SD411, 214NW811, 812 [citCJ]; TexCivA 283 SW322. [a] **Description sufficient.**-258 Mass157, 154NE580.
468-32 5LaA613; Mont 286P1115; Tex CivA 283SW322.
468-33 30Ariz188, 245P277.
468-35 30Ariz188, 245P277; 169Ark 317, 273SW9; 172Ark569, 289SW766; 36GaA362, 136SE801; Nebr 230NW487 (2dcase); TexCivA 283SW322; 144 Wash483, 258P498. [b] **Place of harvested crop.**-Nebr 230NW487(2dcase).
468-36 36GaA362, 136SE801; 202 Iowa 1140, 211NW568, 573 [citCJ]; TexCivA 98SW(2d)372. [a] **Roving description insufficient.**-51ND563, 200NW38.
468-36½-New. A description sufficient as to ordinary personal property may be insufficient as to growing crops or crops to be grown. 51ND563, 200NW38.
468-36¼-New. The mortgage must so definitely and certainly describe the crop to be grown that it is notice to the world. 125Me131, 131A307 (holding alleged mortgage of crops insufficient).
469-40 51SD411, 214NW811, 812 [cit CJ]. See also 51ND563, 200NW38. [a] (5) Now planted and growing or that may hereafter be planted. 40GaA219, 149SE175. [d] **Inclusion in mortgage of** crops for season prohibited by statute does not invalidate mortgage as to crops for season permitted. 166Minn396, 208 NW26.
469-41 TexCommnA 280SW521; Tex CivA 289SW417.
469-43 TexCivA 283SW322.
469-44 172Ark569, 289SW766; Tex CivA 283SW322.
469-45 TexCivA 277SW704 (description held insufficient to give notice of prior mortgage).
469-50 [a] **Description held insufficient.**-TexCivA 277SW704.
469-50½-New. Description of the land should be sufficiently definite to be notice to purchaser of crops for value so that by examination of record he can with reasonable certainty know where the crop is situated. 51ND563, 200NW 38.
470-55 149SC192, 146SE604.
470-58 169Ark317, 273SW9; Minn 230 NW266 (mortgage on share does not attach to any part of crop); TexCivA 283 SW322. [a] (5) Undivided half interest in rice crop to be grown on mortgagor's farm. 169Ark317, 273SW9.
470-59 125Kan434, 436, 264P735 [cit CJ]. [a] (4) Other instances. Iowa 232 NW633.
471-73¼-New. "One ten-ton steam roller and one one-half ton steam roller" was sufficient description. 224 IllA554.
471-75 41GaA211, 152SE264; 202 Iowa 1140, 211NW568; 102NJL181, 130A562, 563 [quotCJ]; 40SD436, 205NW40.
471-76 202 Iowa1140, 211NW568; 102 NJL181, 130A562, 563 [quotCJ].
471-80 50SD598, 211NW452 (as against one who took automobile in on trade); 53SD463, 221NW80 (motor number of automobile); Ont [1925] 3 DomLR165.
471-82¼-New. Inclusion of property not owned by the mortgagor does not invalidate the mortgage as to property owned by him and correctly described in the mortgage. 33Wyo474, 240P683.
471-83 Iowa 227NW97 (neither mortgagor nor third parties with notice).
472-91 106Conn159, 137A756, 758 [cit CJ]; 332 Ill362, 163NE659; Iowa 227 NW97; TexCivA 290SW925.
472-92 106Conn159, 137A756, 758 [cit CJ].
472-98 202 Iowa1140, 211NW568.
472-3 But see 105 Okl 69, 231P500.
472-4 220MoA171, 281SW101; 221MoA 152, 297SW727; TexCivA 275SW860.
472-5 202 Iowa1140, 211NW568; 220 MoA171, 281SW101; 221MoA152, 297 SW727; 40SD436, 205NW40.
474-11 42 Ida375, 245P399. [b] **Place of payment.**-31Ariz116, 250P770.
474-17 249 IllA604, 609 [quotCJ]; 155 Tenn250, 292SW1.
474-18 241 IllA102. [a] **Omission of due date.**-203Cal 254, 263P537.
474-20 155Tenn250, 292SW1.
474-26 42 Ida375, 245P399 (amount held to have been made certain where advances were made and accepted); Tex CivA 8SW(2d)745 (it is not necessary that chattel mortgage show amount of future indebtedness, or definitely fix time within which same shall accrue).
476-43 326 Ill 602, 158NE422.
476-48 102Conn684, 129A721; 329 Ill 403, 160NE545; 243 IllA195. But see 252 IllA184.
477-51 102Conn684, 129A721.
477-53 102Conn684, 129A721; 329 Ill 403, 160NE545.
477-59 76CalA610, 245P455.
477-60 76CalA610, 245P455.
477-64 [d] **Signature of wife under subsequent marriage** is not essential to validity of crop mortgage. 46 Ida231, 266P659.
477-65 But see 24 OhNPNS259. [b] **Evidence held sufficient** to support conclusion that illiterate mortgagor took no part in subscribing name to chattel mortgage. 214Ala440, 108S1.
477-68 329 Ill 403, 160NE545.
477-68½-New. Under some statutes a chattel mortgage signed only by the mortgagee is ineffective as against third persons, although the notarial certificate follows the mortgagee's signature. 9 LaA494, 121S316.
478-71 See also 153Md353, 138A249 [citCJ].
478-81 220Ala224, 124S863, 66ALR 1454. But see Ala 129S53.
478-83½-New. A chattel mortgage executed in good faith for a valuable consideration is valid as between the parties although not witnessed as required by law. 113 Okl 104, 239P632.
478-84½-New. The lien created by a chattel mortgage executed in good faith and for a valuable consideration, although not witnessed as required by law, is superior to that of an attaching creditor with actual notice of such mortgage prior to attaching the mortgaged property. 113 Okl 104, 239P632.
479-85 218Ala375, 118S561.
479-97 86Mont513, 284P270.
479-99 206Cal 266, 274P68; 42 Ida48, 246P12; 329 Ill 403, 160NE545; 104 NJL24, 138A695; 146Wash315, 262P 636.
479-2 42 Ida48, 246P12; 104NJL24, 138A695.
479-94½-New. The president of a mortgagee corporation is competent as a nonofficial attesting witness to the signature of the mortgagor. 36GaA362, 136SE801.
480-3 42 Ida48, 246P12.
480-6 [a] **In Louisiana.**-10LaA393, 119 S894.
480-11 See also 248 IllA20.
480-12 243 IllA310.
480-13 [a] (1) 323 Ill 232, 154NE139; 232 IllA1. (6) Acknowledgment in county where chattels not located gives no protection against other lien creditors of mortgagor. 254IllA136.
480-17 99NJEq160, 133A66.
481-21 [b] (3) Deputy clerk of court who was also one of mortgagees. 189 NC684, 128SE155.
481-33 26F(2d)672.
481-45 18F(2d)791; NJSup 133A180; 44Philippine216 (Chattel Mortg. L. § 5); 46Philippine753; 146Wash315, 262 P636; Ont [1926] 4DomLR705. [a] (1) 146Wash492, 263P732. [e] **Statutes not requiring affidavit.**-86Mont513, 284P270.
482-49 30Ariz505, 249P71; 100Vt468, 139A250.
482-50 30Ariz505, 249P71.
483-57 30Ariz505, 249P71.
483-59 Contra Ont [1926] 3DomLR36.
483-61 [b] **Mortgagee's attorney may** take affidavit where no action is pending or contemplated. 18F(2d)462.
483-63 [e] Dummy holder untruthfully affirming he paid consideration renders chattel mortgage void against creditors. 98NJEq38, 129A710. [f] **Tenant.**-89CalA551, 265P551.
484-74 But see 99NJEq160, 133A66.
484-77 18F(2d)462.
484-80 See also 101NJEq180, 137A853.
484-81 100NJEq85, 135A51; NJCir 143A89. [a] (9) Statement that cash was loaned, whereas check was given. 101NJEq180, 137A853.
485-88½-New. Where the mortgage was given to an employee as trustee to secure payment of wages to himself and others, his statement need not name the beneficiaries or state the specific interest of each. 18F(2d)462.
485-89 100NJEq85, 135A51.
485-90 Ont [1927] 3DomLR477.
485-91 [a] 26F(2d)183; 99NJEq160, 133A66; 101NJEq180, 137A853; NJCir 143A89.
485-94 18F(2d)791; 98NJEq38, 129A 710 (must be true as of time of record); 100NJEq85, 135A51.
485-97½-New. Consideration need not be entirely paid prior to stating entire amount in affidavit. 26F(2d)183.
485-98 [c] **Affidavit held sufficient.**-NJCir 143A89.
487-19 [a] (8) That jurat made on other than recited date does not affect validity of affidavit. 30Ariz505, 249P 71.
487-24 [b] **Sufficiency of evidence.**-Tex CivA 30SW(2d)726.
488-32 MoA 285SW1012 (leaving mortgage with notary for mortgagee).
488-36 MoA 285SW1012 (filing without direction of mortgagee).
488-38 TexCivA 30SW(2d)726.
489-43 323 Ill 232, 154NE139.
489-44 323 Ill 232, 154NE139.
489-45 76CalA610, 245P455.
489-49 49ND695, 193NW45 (holding that receipt by mortgagor of copy of mortgage cannot be incorporated in mortgage); 52SD183, 217NW203 (mortgage held not voidable because mortgagor made no demand for copy for which he receipted). See also ND 232NW295.
489-50½-New. Where an instrument intended as a chattel mortgage as such term is commonly understood, is invalid for lack of the mortgagor's receipt for a copy, the contract of security is entirely void and not enforceable in equity. SD 225NW661.
489-50¼-New. A statute requiring the mortgagor's receipt for a copy of a chattel mortgage applies only to chattel mortgages exclusively and primarily intended to secure payment of a debt or performance of an act, and not as a mere incident of another contractual object. SD 225NW661.
489-50¼-New. Leases of farm lands and cropper's contracts are not within such statute. SD 225NW661.
489-51 But see 10LaA393, 119S894.
490-66½-New. Execution, acknowledgment, and recording raise presumption of acceptance. 323 Ill232, 154NE139.
490-71 [b] **Failure to send mortgage** covering other indebtedness than note then given will not render it invalid as to such other indebtedness. 142Miss 502, 107S874.
491-75 208 Iowa254, 225NW411.
491-77½-New. The rights of a holder under a valid chattel mortgage are not affected by the fact that another mortgage held by him was procured by fraud. 175Minn341, 221NW62.
491-81 See also 236Mich501, 211NW71.
491-99½-New. A judgment creditor seizing property belonging to a debtor has a lien thereon, and hence is not precluded, as a general creditor, from questioning the validity of a chattel mortgage. 10LaA38, 120S795.
491-99¼-New. If preëxisting creditor successfully assails mortgage it is void as to both preëxisting and subsequent creditors. 43F(2d)252.
491-2 [a] (4) Mortgagor is estopped from asserting defense that he was not, at time of execution of instrument, owner of property mortgaged. 50ND381,

195NW969. (5) Mortgagor who executed chattel mortgage upon crops to be grown upon specified land of which he was owner, both at time of execution of mortgage and when action was brought to foreclose, is estopped to assert that he was not owner of, and had no interest in, grain described in mortgage and in his possession when seized in aid of foreclosure proceeding. 50ND 381, 195NW969.

492-12 58ND651, 226NW943(3dcase) (duress not shown). [a] **Evidence held insufficient** to establish mortgage on rents in controversy. 171Ark501, 284 SW749. [b] **Evidence held sufficient** to sustain finding that note and mortgage were not given because of threats or to prevent prosecution for felony. 85CalA 360, 259P460. [c] **Presumption mortgage was fraudulent** must be rebutted by proof of no preëxisting debts or of sufficient other assets to pay debts. 43 F(2d)252.

492-13 105WVa174, 141SE791, 793 [cit CJ].

492-19 53ND102, 204NW975.

492-22 44 Ida332, 257P31, 54ALR1527; 134 Okl 237, 273P261.

492-23 44 Ida332, 257P31, 54ALR1527; 99Vt350, 132A135.

493-24 27 OhA326, 161NE224.

493-25 44 Ida332, 257P31, 54ALR1527; 134 Okl 237, 273P261.

493-26 254Mass274, 150NE186; 134 Okl 237, 273P261.

493-27 28Ariz589, 238P392; 134 Okl 237, 273P261. [b] **Written instrument supersedes** all negotiations leading to its execution. Ill 173NE345.

493-29 329 Ill 403, 160NE545; 255 IllA 558; 134 Okl 237, 273P261.

493-29½-New. A chattel mortgage executed pursuant to a prior agreement, the existence of which mortgage came to the mortgagee's knowledge ten days or more after its execution, is held to have become effective then only. 323 Ill 232, 154NE139.

493-29¼-New. Whatever rights plaintiffs had as creditors are surrendered and merged in chattel mortgage. 228 AppDiv577, 240NYS108.

493-30 164La729, 114S633.

493-33 218Ala375, 118S561; 220Ala 216, 124S514; 101NJEq180, 137A853; 214AppDiv296, 212NYS230; 195NC508, 142SE767; 118 Okl 41, 246P381; Tex CivA 2SW(2d)356. [b] (1) 6LaA316; 75Mont52, 243P1082; 84Mont116, 274 P497; 118 Okl 41, 246P381. But see MoA 298SW242. (3) Rule under general statute relating to contracts applied, though note contained no mention of mortgage. 75Mont52, 243P1082. (4) In case of conflict between provisions of note and mortgage concerning attorney's fees recoverable in collection of note, terms of note as principal obligation will control. 84Mont116, 274 P497.

494-39 Ill 173NE345; 134 Okl 237, 273 P261. [a] (8) Where written and typewritten portions of mortgage specifically designate and describe note as obligation secured, a general recital in printed form that mortgage stands as security for all other liabilities, whether evidenced by note or otherwise, will not include in mortgage existing note in definite amount. 134 Okl 237, 273P261. (9) Other instances. 129Kan135, 281P 921.

494-40 [a] (9) Other illustrations. SD 225NW661.

495-45 [a] **Where mortgage expressed exact amount of obligation secured** and was insufficient to include other indebtedness, and there is no evidence of intent at time of execution to include other indebtedness, subsequent parol expression of intent cannot cause additional indebtedness to be included. 134 Okl 237, 273P261.

495-51 249 IllA85; TexCivA 8SW(2d) 745.

495-54 SD 231NW289.

496-63½-New. Where preamble of note designates debt of particular amount, a provision in defeasance clause covering "all other indebtedness which may be due," contemplates in addition only future indebtedness, not indebtedness evidenced by prior notes. 168Ark17, 268SW606.

496-64 178Ark174, 10SW(2d)20.

474-74 23AlaA286, 124S394(2dcase) (attorney's fees).

497-76 129Kan135, 281P921; 246Mich 334, 224NW643. See also 133Misc309, 231NYS422. [a] (4) Mortgagee cannot make acceptance of payment conditional on payment of mortgagor's unsecured debt also. TexCivA 283SW920. [b] **"Together with the other indebtedness which may be due"** appearing in defeasance clause covers only future indebtedness, not existing indebtedness, evidenced by prior notes, where preamble referred to specific sum. 168Ark17, 268 SW606.

497-77 SD 231NW289 (holding mortgage cannot be altered except by written contract or executed oral agreement).

498-86 44 Ida332, 257P31, 54ALR1527.

498-87 44 Ida332, 257P31, 54ALR1527.

498-88 44 Ida332, 257P31, 54ALR1527.

498-89 44 Ida347, 257P31, 54ALR1527. [a] TexCivA 19SW(2d)71.

498-91 Ala 129S472; 102NJEq351, 140 A672 (choses in action held not embraced); Utah 271P226, 229 [citCJ].

498-92 44 Ida332, 257P31, 54ALR1527. [a] (6) Other instances. 129Kan483, 283P617.

499-93 [a] **"Cattle"** includes calves running with their mothers. 117Nebr 327, 220NW575.

499-99½-New. attachments, 54SD296, 223NW195 (threshing separator with attachments held to include separator, feeder, weigher and stacker).

501-26 29F(2d)155; 42 Ida688, 247P 791; 100NJEq1, 134A875; 53ND621, 207NW1003; 135Misc571, 239NYS103; 53SD463, 221NW80; Tex 18SW(2d) 1052 (future advances or deliveries of property of like character). [a] (5) Crop mortgage for 1923 does not cover crops raised in following year. 143SC 51, 141SE103. [b] **When intention to create lien** on subsequent acquired property is clearly expressed, lien attaches as soon as property is acquired. 166 Minn383, 208NW11.

501-27 Mass 173NE532 (holding trustee chargeable with value of after acquired goods purchased at foreclosure sale); MoA 148W(2d)672; NJSup 152 A205; 197NC371, 148SE461. [a] (4) Crop mortgage in certain year does not cover crops acquired subsequent to execution at another place. 21AlaA128, 106S70. [b] **After-acquired property** will not be included in absence of express provision. 166Minn383, 208NW 11. [c] **Property acquired in future by mortgagor is subject to mortgage** if within covenant applicable to after-acquired property. 253NY190, 170NE887. [d] **Where no "after acquired clause"** is used, trustee as mortgagee acquired no title by foreclosure sale to after acquired property. Mass 173NE532.

501-29 [a] **Recorded chattel mortgage pledging after-acquired property** covers interest of mortgagor to property purchased by him under unrecorded conditional sale. 228AppDiv577, 240NYS108.

501-30 232Mich409, 205NW113, 115 [citCJ].

501-31½-New. Mortgagee's taking possession of after-acquired property relates back to the mortgage date, if the rights of third persons have not intervened. 17F(2d)555.

501-31¼-New. Future property, when acquired, is deemed to feed mortgage covering after-acquired property. 253 NY190, 170NE887.

501-31¼-New. Mortgage of future-acquired property is equivalent to covenant to give lien. 253NY190, 170NE 887.

507-32 Or 291P371.

501-33 204 Iowa1273, 214NW491, 55 ALR644 (change of pigs into hogs). [b] **Title by accession under mortgage** imports lien or interest presently valid. 253NY190, 170NE887.

502-37 130 Okl 91, 265P626.

502-44½-New. Automobile tires and tubes conditionally sold are not part of mortgaged automobile under doctrine of accession. 143 Okl 87, 287P993.

502-45 117Nebr327, 220NW575; Tex CivA 19SW(2d)400. [a] (4) Mortgage construed as covering increase of horses and cattle regardless of brand of dams. 35Ariz334, 278P68.

502-46 [b] **Calves running with mothers at time of mortgage** are not included. 117Nebr327, 220NW575.

504-60 But see 117Nebr327, 220NW 575.

505-72 1LaA222; 53ND621, 207NW 1003; TexCivA 290SW289. [b] **Mistake in property.**-TexCivA 10SW(2d)200. [c] **Mortgage describing particular farm crop and all other farm crops** includes all other farm crops as well as particular crop described. Utah 271P226 (mortgage of ten acres of sugar beets and all other crops). [d] **Mortgage on crops, if valid,** can only attach to such interest as mortgagor has in crops at time they come into being. 97Fla996, 122S508.

505-73 143Wash614, 255P915.

505-73½-New. Mortgage on crop creates no interest in land. SD 230NW 766.

505-79½-New. If the right of an executory vendee of the land to use of land terminates before the crops are harvested, his interest in the crops also terminates by his loss of possession, 166Minn58, 206NW948.

505-79¼-New. so that where the owner takes possession of the land before crop matures, he is entitled to crop as against holder of vendee's chattel mortgage. 166Minn58, 206NW948.

505-79¼-New. Evidence of ownership of land to give mortgagor right to fix lien on subsequent crops under a mortgage is held relevant and admissible. 21AlaA130, 106S214.

505-79½-New. A mortgage in all crops estimated is held to include apple crops not specifically mentioned. 44 Ida332, 257P31, 54ALR1527.

505-80 200Cal 389, 253P143; 44 Ida 316, 256P761; TexCivA 10SW(2d)186; Wash 287P678.

505-82 200Cal 389, 253P143.

505-83 144Miss223, 109S698.

505-87 54ND264, 209NW351.

505-91½-New. Cropper's abandonment of lease destroys interest of mortgagee in crops sown after abandonment. 200 Cal 389, 253P143.

505-91¼-New. Future crop mortgage covers what interest mortgagor may have on its coming into existence. 44 Ida332, 257P31, 54ALR1527.

505-92 50SD360, 210NW192.

506-94 44 Ida316, 256P761.

506-97 See also 21AlaA130, 106S214.

506-98½-New. A provision of a crop mortgage that it covers crops of every nature sown, grown, planted, cultivated, or harvested during stated years and until such debt is fully paid, places a lien only on the crop of years named. 30 F(2d)313.

506-98¼-New. Where mortgage is confined to crop or crops now being, standing, and growing, and to be grown, up to the season of a certain year, it would not include crop sown at such a time that it could not mature before the season named. 197Cal 117, 239P1050.

506-99½-New. Under statutes permitting mortgage on unplanted crops, the lien exists in presenti from execution and delivery of the mortgage as between mortgagor and mortgagee. 51ND241, 199NW863.

506-99¼-New. As to subsequent purchasers or encumbrancers who acquire any interest in or liens upon the crop without actual notice, the mortgage lien is effective from date of filing. 51ND 241, 199NW863.

506-9 MoA 297SW982, 984 [citCJ].

506-12 204 Iowa816, 215NW956.

507-13 31F(2d)317.

507-19 [b] **Bill of sale given as security** is within operation of statute. 162Ga 446, 134SE107.

507-32 248Mich171, 226NW888.

508-40½-New. An agreement of the owner of property with the mortgagee of part thereof that the property may be sold applied to payment of the mort-

gage does not extend the lien to that part of the property not covered by the mortgagee. 164Minn422, 205NW268.

509–48 169Ga608, 151SE31; 220MoA 171, 281SW101. See also MoA 3SW(2d) 1031.

509–51 [b] **Assignment for benefit of creditors** is not within statute. 127Me 172, 142A580.

509–52 [c] **Attachment of mortgagor's receipt of copy of mortgage to mortgage** required by statute in some jurisdictions as prerequisite to right to file must be strictly followed. 75Mont416, 244P485.

509–55 51ND225, 199NW961, 965 [cit CJ]; 53ND526, 207NW144. [b] **Object of New York mortgage statute** is to make recording as near as may be equivalent to possession. 5F(2d)633. [c] **Recording is designed as substitute for,** and equivalent of immediate, delivery and continued change of possession of property. 76CalA610, 245P455.

510–62½–New. Motor Vehicle Registration Act did not transfer from counties the duty to register chattel mortgages. 190NC157, 129SE414.

510–62½–New. The statute requiring registration of chattel mortgages is not repealed by Motor Vehicle Registration Act. 190NC157, 129SE414.

510–62¼–New. Lien good as to part of property assigned as security without recording will not fall because bad as to another part for want of recording. 38 F(2d)40.

510–66 TexCivA 272SW323 (mortgagee did not get title but only lien on property); MoA 4SW(2d)489 (bill of sale construed as mortgage held void for failure to record).

510–68 36GaA362, 136SE801.

510–70 19F(2d)18; 89Fla484, 104S780; 202 Iowa1140, 211NW568; 204 Iowa35, 214NW525, 53ALR662. [d] **In Colorado.**–29F(2d)902.

510–75 MoA 17SW(2d)357 (attachment).

510–77 202 Iowa1140, 211NW568.

510–78½–New. In the absence of statute an unfiled chattel mortgage is a valid lien against general creditors from time of execution and delivery. 19F (2d)600.

511–32 14F(2d)170; 18F(2d)314 (construing Connecticut statute); 168Ark 859, 271SW952; 202 Iowa1140, 211NW 568; 127Kan606, 274P227; Mass 171 NE820; 233Mich384, 206NW371; 240 Mich458, 215NW242; 221MoA31, 297 SW724; 75Mont416, 244P485; 79Mont 468, 257P469; 84Mont32, 273P1047; Nebr 230NW487(2dcase); NJ 144A188; 98NJEq432, 131A117, 121 [quotCJ]; 100NJEq1, 134A875; 219AppDiv560, 220NYS369; 117 OhSt69, 158NE81; 142 Okl116, 285P962; RI 135A855; 155 SC426, 152SE678; TexCivA 29SW(2d) 414.

512–84 Mass 171NE820.

513–94 117 OhSt69, 158NE81.

513–95 16F(2d)767; 19F(2d)18; 30F (2d)256; 35F(2d)18; 37F(2d)301; 39 F(2d)625; 214Ala370, 108S13; 92CalA 91, 267P766; 89Fla484, 104S780; 90 Fla617, 106S422; 84 IndA403, 151NE 367; IndA 162NE418; Mass 171NE 820; 245Mich669, 224NW609; 79Mont 468, 257P469; NJSup 133A180; 100 NJEq1, 134A875; 218AppDiv22, 217 NYS652; 136Misc265, 239NYS639; 190 NC480, 130SE319 (registration affects only rights of purchaser to value and creditors); 192NC439, 135SE328; 51ND 225, 199NW961; 117 OhSt69, 158NE81; 49Philippine87; TexCivA 283SW552; Ont [1925] 2DomLR889; 19SaskL546, [1925] 3DomLR648, [1925] 2WestWkly 525 (unregistered bill of sale). See also 8LaA320. But see 250Mich325, 230NW 164. [e] **In Louisiana.**–LaA 129S377.

514–96 217MoA371, 266SW748 (constable who seizes property under attachment writ is in same position as one who purchases from mortgagor).

514–97 169Ga139, 149SE885; SD 231 NW601; Alta [1927] 1DomLR641, [1926] 3 WestWkly775.

514–98 204 Iowa1321, 217NW231 (where mortgage is withheld from record to enable debtor to obtain credit).

514–1 84 IndA403, 151NE367.

514–3½–New. A statute making an unrecorded chattel mortgage void as against creditors, although remedial, is also in derogation and should not be extended beyond the classes of persons intended to be affected. 19F(2d)600.

515–6 212Ala655, 103S839 (statute not applicable to judgment of creditor based on debt contracted by mortgagor prior to mortgage though judgment was recorded prior to recording of mortgage).

515–10½–New. Where a bill of sale is registered before creditors of seller in possession reduce their claims to liens, it cannot be impeached on the ground that it was registered six months after actual sale and was made to replace a prior one defective for nonregistration within statutory period. 19SaskL546, [1925] 3DomLR648, [1925] 2WestWkly 525.

515–15 16F(2d)767; 31F(2d)416 (under Nebraska law); 90Fla542, 106S402, 404 [citCJ]; 124Kan124, 257P752; 175 Minn47, 220NW400; 51SD33, 211NW 801; Utah 272P941; 200Wis211, 228 NW135, 68ALR267. [b] **Fractions of day considered in determining priority.**–162Ga446, 134SE107. [c] **As between recorded general execution, subsequently recorded bill of sale as security, and unrecorded general execution** proceeds of property will be distributed in the order named. 162Ga446, 134SE107.

517–18 17F(2d)417 (South Carolina rule). See also 142Wash446, 253P643.

517–20 214Ala370, 108S13; 30Ariz188, 245P277; 89Fla484, 104S780; 90Fla 617, 106S422; 42 Ida688, 247P791; 204 Iowa35, 214NW525, 53ALR662; Mass 171NE643; MoA 11SW(2d)1084; 79 Mont468, 257P469; 51ND563, 200NW 38; 117 OhSt69, 158NE81; TexCivA 286SW667; TexCivA 4SW(2d)185.

517–21 21AlaA83, 105S434 (recording of retention title contract); 30Ariz188, 245P277; 204 Iowa35, 214NW525, 53 ALR662; 79Mont468, 257P469; 117 Oh St69, 158NE81. See also 138 Okl 98, 280 P439.

517–22 205 Iowa813, 218NW516.

518–25 22AlaA265, 114S673.

518–30 202 Iowa1140, 211NW568.

518–31½–New. Under statutes, a chattel mortgagee's rights under a mortgage not regularly filed for record are good as against the seller under a prior unrecorded conditional sale contract. 84 Mont32, 273P1047.

518–31½–New. Lien of pledgee of warehouse receipt for automobiles for value without notice of prior unrecorded chattel mortgage thereon is superior to mortgagee's lien. 233Ky290, 25SW(2d)405.

518–33½–New. An antecedent mortgagee is not charged with notice of a junior mortgage, although recorded. 123Kan238, 254P1038.

518–36 89Fla484, 104S780 (without notice); 117 OhSt69, 158NE81; 142 Okl 96, 285P828; TexCivA 272SW323; Tex CivA 278SW247; TexCivA 286SW667; 35Man62, [1925] 3DomLR176, [1925] 2 WestWkly348 (invalidly filed prior mortgage). [a] (2) Wyo 283P1100 (mortgagee with notice held not purchaser in good faith). (3) Purchaser with knowledge of unrenewed chattel mortgage is not bona fide purchaser. [1925]CanSC302, [1925] 2DomLR928. [c] (2) Burden rests on purchaser to show he was subsequent purchaser in good faith. 126Kan490, 268P855. (3) In action of replevin by holder of unrecorded chattel mortgage to recover possession of mortgaged property from one claiming as purchaser, burden rests on claimant to show he was subsequent purchaser in good faith. 126Kan490, 268P855. [d] **Person claiming as purchaser in good faith** for value has burden of proof. 48SD436, 205NW40. [e] **Title may pass to purchaser from mortgagor,** without notice of lien. TexCivA 272SW323.

518–37 89Fla484, 104S780; 126Kan 490, 268P855; 190NC480, 130SE319 (unrecorded chattel mortgage void against purchaser for value and recording affects only rights of purchaser and creditors); 142 Okl 96, 285P828; Tex CivA 272SW323. [b] **Trustee under deed of assignment for benefit of creditors** is purchaser for value. 189NC684, 128SE155.

518–40 215Ala309, 110S411; TexCivA 272SW323.

519–44 Iowa 232NW487.

519–50 33F(2d)104; 89Fla484, 104S 780; 90Fla617, 106S422; 204 Iowa961, 216NW272; 117 OhSt69, 158NE81; RI 135A855. See also 217MoA371, 266SW 748; 204 Iowa488, 215NW602. But see Mass 173NE421. [a] 204 Iowa961, 216 NW272 (mortgagor is in actual possession when he has chattels on his farm in actual custody of servant, though mortgagor not resident of premises). [d] **"Actual and continued change of possession"** required by N. Y. Lien Law is not accomplished where chattels remain in possession of mortgagor's tenant or his successor in title. 5F(2d) 157.

520–51½–New. If the mortgagor was in possession at the time of the levy at the instance of the creditor, the levy takes precedence over an unrecorded mortgage, although the constable was informed of the existence of a mortgage prior to the levy. 217MoA371, 266SW 748.

520–53½–New. Sheriff having actual notice of mortgage, recording as to him held immaterial. Md 148A424.

520–53½–New. Actual knowledge of mortgage imparts only such notice as mortgage itself gives and such information as might be obtained by pursuing inquiry mortgage suggests. Mont 286P 1115.

520–54 CalA 283P944; 202 Iowa1140, 211NW568; 124Kan649, 261P555, 556 [quotCJ]; 221MoA420, 279SW764; 221 MoA420, 279SW764; ND 231NW859; 117 OhSt69, 158NE81; 40 OklACR27. But see 196NC154, 144SE835.

520–55 117 OhSt69, 158NE81; 40 Okl ACR27; 35Man62, [1925] 3DomLR176, [1925] 2WestWkly348 (invalidly filed prior mortgage).

521–56 13F(2d)65 (construing Arkansas statute); 189NC684, 128SE155; 190 NC157, 129SE414 (no notice will supply place of registration); Wis 227NW 9; 200Wis211, 228NW135, 68ALR267. But see 200Wis224, 228NW139.

521–64 189NC684, 128SE155.

522–65 69Utah401, 255P439; 153Wash 37, 279P103(2dcase).

522–67 124Kan649, 261P555; 228Ky 506, 158W(2d)502. See also 117 OhSt 69, 158NE81. [c] (1) 124Kan649, 261P 555. (10) Recital in agreement of sale that properties in question were free of all liens excepting certain mortgage. 243 Mich570, 220NW795. (11) Notice found in abstracts of title examined by purchasers' attorney bound him to ascertain whether trust mortgage covered furniture and furnishings by examination of mortgage. 243Mich570, 220NW795. (12) Other circumstances held to show notice. 228Ky506, 158W(2d)502.

523–68½–New. To constitute "good faith" there must be an absence of knowledge, or even notice of facts and circumstances calculated to put an ordinary business man on inquiry, so that he would ascertain the truth. 243Mich 570, 220NW795.

523–70 30F(2d)256; 218AppDiv22, 217 NYS652; 117 OhSt69, 158NE81.

524–73 But see 30F(2d)555.

524–74 218AppDiv22, 217NYS652.

524–83 117 OhSt69, 158NE81 (bill of sale of automobile intended to operate as mortgage).

525–89 TexCivA 294SW237.

525–96 98NJEq432, 131A117.

526–3 80Mont593, 261P278.

526–11 117 OhSt69, 158NE81 (county recorder).

526–12 117 OhSt69, 158NE81.

526–13 Ark 31SW(2d)127(2dcase); 202 Iowa1140, 211NW568; 244Mich523, 221 NW621; 116 Or570, 242P610; 99Vt350, 132A135; Wis 227NW9 (recording mortgage where property was, is insufficient). [d] **Where county is divided into districts,** recording in district where property was located, though mortgagor resided in other district, did not create lien under statute. 179Ark1082, 20SW(2d) 124.

527–20 114 Okl 1, 242P209; TexCivA

32SW(2d)378 (cattle). See also 4LaA 627.

527-22½-New. but if the mortgagor is a nonresident, then where property is; 251 IllA397.

527-25 [a] (3) is recorded in county wherein by its articles of incorporation it is to be located and its principal business transacted. Oh 170NE436.

527-26 [a] Residence is place where mortgagor has established his abode and intends to live and to which whenever he is absent he has intention of returning. 123Kan222, 254P1026.

528-36 219Ala261, 122S167 (unless property is immediately removed).

528-38 13F(2d)65.

529-49 204 Iowa590, 215NW647 (rule applied between states); 194Wis29, 215 NW433.

529-52 114 Okl 1, 242P209.

530-54 85Colo 1, 272P1117; 45 Ida671, 264P873, 874 [citCJ]; 223Ky433, 3SW (2d)1084; 224Ky65, 5SW(2d)475; Tex CivA 278SW302; 99Vt350, 132A135. [a] In California.-CalA 283P944.

530-56 214Ala370, 108S13; 114 Okl 1, 242P209. [a] 142 Okl 96, 285P828. [c] 214Ala370, 108S13. [g] In Oklahoma.-143 Okl 42, 287P392.

530-57 160La945, 107S705. [b] That automobile remained without county for statutory period because of accident necessitating repairs and was returned to county long before attachment was levied does not affect application of statute. CalA 259P90.

530-59 143 Okl 42, 287P392.

531-62 45 Ida671, 264P873; 10LaA448, 121S325; TexCivA 280SW614 (where mortgagee had no knowledge of removal); TexCivA 278SW302. Contra 160La945, 107S705.

531-64 202 Iowa1140, 211NW568, 570 [citCJ]. But see 219Ala261, 122S167.

531-64½-New. Some statutes providing for recordation of chattel mortgages in the county to which the property is removed, apply only to domestic mortgages or mortgages executed on personal property within the state. 203Cal 547, 265 P190, 57ALR696.

531-64¾-New. Under statutes in some jurisdictions constructive notice under the original filing remains in force prescribed time after removal into new county. 142 Okl 116, 285P962.

531-65 76CalA610, 245P455.

531-68 [a] 98NJEq38, 129A710.

531-69 [a] (1) 99NJEq160, 133A66. [b] 98NJEq38, 129A710. [d] Chattel mortgage may be filed after debt secured is due.-90Fla542, 106S402.

532-71 4F(2d)847 (evidence insufficient to show execution not complete and formal acceptance on date subsequent to date recited).

532-76 90Fla542, 106S402, 404 [citCJ].

532-77 90Fla542, 106S402, 404 [citCJ].

532-80 24F(2d)349 (New York); 76CalA 610, 245P455. But see 155Wash256, 284 P76. [a] Mortgagee's ownership unaffected in absence of showing purchase for value. 198NC757, 153SE313.

532-81 30F(2d)510; 9LaA60, 118S854; 19 OhA29.

532-82 24F(2d)349; 30F(2d)510; 76 CalA610, 245P455; SD 228NW374.

533-83 53SD66, 220NW151 (filed after mortgagor's death and before appointment of administrator). [b] Notice dates from filing rather than recording. TexCivA 300SW98.

533-84 24F(2d)349 (New York); 25F (2d)651; 19 OhA29; SD 228NW374.

533-86 17F(2d)417. But see NJCh 144 A188.

533-91½-New. A bill of sale given as security, although recorded after the expiration of the time provided by statute, is superior in dignity to a subsequently obtained unrecorded general execution. 162Ga446, 134SE107.

533-91¾-New. The date of filing for record is immaterial as to one not claiming an interest or claim in the property acquired, or which came into existence after the date of the mortgage. Utah 272 P941.

533-91¼-New. Failure of a mortgagee to record a mortgage within the time prescribed by statute does not affect his rights as against a subsequent mortgagee who was not harmed by the delay. 89CalA690, 265P403.

534-1 251 IllA397; 126Kan349, 353 [quotCJ]; 267P965; 2LaA622.

534-2 219Ky207, 292SW812. [d] In Ohio.-117 OhSt69, 158NE81. [e] In Idaho.-48 Ida357, 283P527.

535-3 219Ky207, 292SW812.

535-8 162Ga446, 134SE107; 252 IllA184 (failure to copy signature at end of certificate of acknowledgment); Tex CivA 271SW196.

535-9 Fla 130S18; 243 IllA532, 536 [citCJ]; TexCivA 271SW196. [a] 243 IllA532, 536 [quotCJ].

536-12½-New. Under some statutes recording a chattel mortgage without filing or minuting is sufficient for constructive notice. 32NM436, 258P350.

536-12¾-New. Recordation of an instrument in compliance with the recordation statute does not afford constructive notice of the contents of the instrument to a subsequent bona fide purchaser, if the effect thereof is limited by some other instrument intended as a defeasance which is not recorded. 156Md662, 145A342.

536-12¼-New. An unrecorded consignment agreement operating as a defeasance deprives a recorded bill of sale of effect as constructive notice. 156Md662, 145A342.

536-12⅛-New. Where a bill of sale and consignment agreement containing a defeasance are intended as a chattel mortgage, recording of the bill of sale alone is insufficient 30F(2d)510.

537-15 TexCivA 271SW196.

537-16 See also 2LaA593.

537-16½-New. In some jurisdictions, recordation of a mortgage in a conditional sales book, where only conditional sale contracts are required to be recorded, is not constructive notice to a purchaser of goods and chattels from the seller in actual possession of the property. 152Va520, 147SE220.

538-20 168Ark859, 271SW952.

538-26 168Ark859, 271SW952.

538-28½-New. Filing of chattel mortgage for record and recording thereof are but constructive notice of its existence. 142 Okl 116, 285P962.

538-30 [c] In Alabama.-20AlaA643, 105 S774.

538-32 169Ark317, 273SW9; 36GaA362, 136SE801; 204 Iowa739, 212NW573; 10 LaA393, 119S894; 228AppDiv577, 240 NYS108; 51ND563, 200NW38; 124 Okl 249, 255P688; 44Philippine630; 148Va 510, 139SE267.

538-34 22AlaA147, 113S473; 51ND563, 200NW38, 40 [citCJ]; 99Vt350, 132A 135. [a] (3) Recording of mortgage gives notice of all facts that purchaser might have learned by pursuing recitations of mortgage. Iowa 229NW829(2d case).

538-34½-New. A mortgage sufficient as to form and execution to entitle it to be recorded is constructive notice to the public of what it actually contains. 48 SD436, 205NW40.

539-35½-New. Chattel mortgage unlike realty mortgage can, by act of filing, fasten itself only to a person and through him upon his property because there is no recording system of preserving or perpetuating titles in personalty. 51ND563, 200NW38.

539-35½-New. A purchaser of property conveyed by mortgage seasonably recorded is chargeable with knowledge of all that the record states, and with all that would be discovered by reasonable inquiry suggested by the record. 219 AlaS, 121S33, 63ALR1453.

539-35¼-New. Mere filing of unrecordable instrument held not to give constructive notice. 232Ky76, 22SW(2d) 420.

539-36 21F(2d)614; 78Colo 384, 242P 68; 36GaA362, 136SE801; 79Mont468, 257P469; 196NC154, 144SE835; 124 Okl 249, 255P688; TexCivA 278SW302; Utah 271P226. But see 11LaA617, 124 S558. [d] Mortgage recorded in foreign state in county where property located is constructive notice to assignee. 35 Ariz392, 278P384.

539-37 220Ala86, 124S234(1stcase); 87 Colo 55, 284P1021 (purchasers in good faith in another state to which property is removed); 202 Iowa1140, 211NW568; 204 Iowa739, 212NW573; 234Ky613, 28 SW(2d)959; Mo 5SW(2d)395; 79Mont 468, 257P469; 135Misc571, 239NYS103; NY 157NES94 [foll Trust, etc., Co. v. Decker, 244NY340, 155NE665] (notwithstanding noncompliance with Personal Prop. L. & 45); 196NC154, 144SE835; 196NC823, 146SE599 (purchaser from licensed dealer); Or 286P588; TexCivA 27SW(2d)924 (description in bill of sale referred to in recorded mortgage); Utah 271P226. See also 146SC257, 143SE 820.

539-38 79Mont468, 257P469. [b] Landlord held not creditor of mortgagee or subsequent purchaser or encumbrancer. 79Mont468, 257P469. [c] Recording gives notice only to those creditors seeking to enforce claims against mortgaged property. 78Mont389, 254P417.

540-40 168Ark859, 271SW952; 75Mont 416, 244P485; ND 232NW295. See also Mich 220NW671. [a] (5) Recording of conditional sales contract before goods were set aside or identified did not give notice to subsequent mortgagees. 27F (2d)206.

540-41 243 IllA195. [a] (2) Under Rev. Codes [1921] § 8276, requiring attaching to mortgage of mortgagor's receipt showing that mortgagee had surrendered to mortgagor copy of mortgage, filing of mortgage imparts no notice to conditional vendor in absence of such receipt. 75Mont416, 244P485.

540-42 168Ark859, 271SW952; Iowa 232NW487; 189NC684, 128SE155 (where acknowledged by disqualified officer, registration is not constructive notice).

540-47 TexCommnA 10SW(2d)690; TexCivA 294SW959, 961 [citCJ]; Tex CivA 31SW(2d)1098(2dcase).

540-47½-New. Mortgage in name of agent. Where transaction is evidenced by bill of sale to an agent and mortgaged by him back to secure balance of purchase price, both instruments appearing on one piece of paper and duly recorded, so that the mortgage does not lie outside the chain of title, such mortgage is constructive notice to persons claiming title through the principal even though the agency is not disclosed in the bill of sale or mortgage back. 217MoA147, 273 SW420 (gasoline pumps to be used at a certain location).

540-48 24 OhNPNS259, 260 [quotCJ]; TexCivA 294SW959, 961 [citCJ].

540-49 24 OhNPNS259, 260 [quotCJ].

540-49½-New. A mortgage executed by the purchaser's agent for the former's accommodation, reciting that the property was to be used by the real purchaser at a certain place, gives notice of facts and does not lie outside the chain of title under statute. 217MoA147, 273SW420.

541-52 220Ala224, 124S863, 66ALR 1454; 22AlaA147, 113S473; 36GaA56, 135SE109; 202 Iowa1140, 211NW568; 205 Iowa813, 218NW516; 202 Iowa1366, 212NW59; 258Mass157, 154NE580; 51 ND563, 200NW38 (omnibus description held insufficient). See also 36GaA458, 137SE125.

541-56 38 OklACR38.

541-57 169Ark317, 273SW9; 44 Ida 332, 257P31, 54ALR1527; 258Mass157, 154NE580; 221MoA31, 297SW724.

541-58 [a] (1) But see Nebr 230NW 487(2dcase).

541-60½-New. Chattel mortgage on interest in crop is not constructive notice to assignee of mortgage executed by tenant. Minn 230NW266.

541-61 126Kan349, 353, 267P965 [quot CJ]; 194Wis29, 215NW433; 198Wis 300, 224NW117.

541-62 126Kan349, 353, 267P965 [quot CJ].

542-73 204 Iowa488, 215NW602.

542-74½ New. In the absence of actual notice, fact of proper record must be proved to effect constructive notice. 22AlaA147, 113S473.

542-74½-New. Evidence has been held sufficient to support a finding that the chattel mortgagor resided, and that the mortgaged property was situated at the date of the mortgage, in the county in which the mortgage was recorded. 10 LaA448, 121S325.

542-78 221MoA152, 297SW727.

542-81 [a] (2) Whether subsequent mortgagee had actual notice of facts

sufficient to put it on inquiry as to seller's retention title contract is question for court sitting without jury. 21 AlaA83, 105S434.

543-87 243Mich570, 220NW795; 51SD 33, 211NW801; Utah 272P941. [a] 53 ND526, 207NW144. [d] **Statute for renewal of mortgages** is subject to same rule of construction as that providing for filing of mortgages. 53ND526, 207 NW144. [e] **In South Dakota.**–51SD33, 211NW801.

543-88 142 Okl 116, 285P962.

543-89 200Wis211, 228NW135, 68ALR 267 (creditor); Alta [1930] 3DomLR 988. [b] **"Subsequent encumbrancer in good faith"** is a creditor who takes security for his debt, his character being determined by the notice he has when the credit is extended, rather than when the security is taken. 53ND526, 207 NW144.

543-90 53SD556, 221NW268.

543-91 53SD556, 221NW268. [b] **Creditor as to whom unrenewed mortgage** is void cannot question its validity unless he has imposed lien on mortgaged property. 53ND526, 207NW144.

543-92 [c] **"Creditor" as used in renewal statute** is one who, without notice that debt secured is unpaid, extends credit, or alters his position as to debtor to his detriment. 53ND526, 207NW144.

544-6 141Wash549, 251P865, 51ALR 585.

544-6½-New. The same result has been reached where the purchasers had notice of facts sufficient to put them on inquiry as to the existence of the prior mortgage. 243Mich570, 220NW795.

545-20½-New. Where a mortgage between the same parties is given to secure a debt in excess of that secured by the prior mortgage, the lien does not attach as of the date of the prior mortgage. 18F(2d)719.

545-21 56ND191, 216NW575.

545-26 144Wash483, 258P498.

545-27 But see 24F(2d)254.

545-30 121Kan218, 246P1010, 1012 [quotCJ].

545-31 121Kan218, 246P1010, 1012 [quotCJ].

546-32 121Kan218, 246P1010, 1012 [quotCJ].

546-33 31F(2d)660.

546-34 [a] **Effect of subsequently taking possession.**–21F(2d)660.

546-42 38F(2d)475(1stcase).

546-46½-New. Where both original and office copy of affidavit were filed and indorsed "filed" by the officer as required by statute, the fact that through inadvertence the original instead of the office copy was taken back by the mortgagee will not render the filing insufficient. 121Kan218, 246P1010.

546-46½-New. A renewal affidavit is not necessary where a new mortgage is filed before the rights of a third person accrue. 133 Okl 268, 272P1025.

547-54 38F(2d)475(1stcase) (statement must be firmly fastened to original mortgage or copy).

547-59 Ont [1926] 4DomLR705.

548-69½-New. Statement that affiant is mortgagor is harmless to purchaser where affidavit identifies mortgage and purpose to extend it and shows that affiant is not owner. 38F(2d)25.

548-69½-New. Affidavit held not objectionable as not showing that affiant was mortgagor's agent in view of answer in foreclosure suit. 38F(2d)25.

548-77 121Kan218, 246P1010; 85Colo 1, 272P1117.

548-80½-New. Only effect of failure to file affidavit of renewal is to render mortgage invalid as to subsequent purchasers or mortgagees. 200Wis211, 228NW135, 68ALR267.

549-82 [b] **Effect of taking mortgage on title of conditional seller.**–Man [1930] 4DomLR982.

549-84 MoA 24SW(2d)641; 239NY51, 145NE737; 136Misc163, 238NYS696; MoA 8SW(2d)88; TexCivA 283SW224. See also 190NC480, 130SE319.

550-85 TexCommnA 291SW1088; TexCivA 283SW224.

550-86 MoA 8SW(2d)88.

550-93 46 Ida231, 266P659; 190NC480, 130SE319 (where contract expressly provided for retention of title in seller).

551-98 43 Ida540, 253P854, 857 [citCJ perGivens,J]. [c] **In Florida.**–89Fla484, 104S780.

551-99 43 Ida540, 253P854, 857 [citCJ perGivens,J].

551-4 TexCivA 283SW224.

552-18 118 Okl 231, 247P353.

553-27 See also TexCivA 108SW(2d)257.

553-34 [c] **Provision allowing mortgagee to take possession** in case of removal by mortgage does not apply to mortgage in form of absolute bill of sale and conditional bill of sale back. 69CalA719, 232P734.

553-35 TexCivA 283SW224.

553-39 TexCivA 283SW224.

554-42 TexCivA 283SW224.

554-49 69CalA719, 232P734 (there is no breach of provision against removal where mortgagor's residence is described and article is in another county at time of execution only for temporary purposes).

554-61 127Misc903, 217NYS621.

555-68 216Ala546, 114S140 (allowance of credit by courts held immaterial).

555-70 127Misc903, 217NYS621; TexCivA 278SW1107, 1112 [citCJ]; TexCivA 293SW896, 898 [citCJ]. [c] 19 SaskL526, [1925] 2DomLR904, [1925] 1WestWkly1134.

555-71 TexCivA 278SW1107. [b] 127 Misc903, 217NYS621.

555-72 [a] (1) TexCivA 2SW(2d)987, 990 [citCJ]. [b] (1) 230AppDiv401, 245NYS37.

556-74 TexCivA 278SW1107.

564-76½-New. Where possession of mortgaged property is not delivered chattel mortgage in creature of statute which must be substantially complied with. Or 291P371.

556-77 214Ala370, 108S13; 233 IllA 519; 84 IndA483, 151NE438; 223App Div44, 227NYS315; 50ND443, 195NW 512; 117 Okl 181, 245P594; 118 Okl 231, 247P353; 146SC257, 143SE820; SD 231NW289; TexCivA 283SW224. But see 27 OhA326, 161NE224. [g] In New York.–5F(2d)633.

557-79½-New. A buyer in possession after default under a title-retaining contract with consent of the seller is a bailee. 190NC480, 130SE319.

557-80 34NM602, 287P702; TexCivA 22SW(2d)1073(2dcase). But see TexCivA 283SW224.

557-83 82Colo 432, 261P456. But see TexCivA 14SW(2d)368.

557-87 SD 231NW289 (holding existence of indebtedness not affecting mortgage immaterial).

558-90½-New. Where a mortgagee obtains abandonment of a levy under execution issued by a justice of peace against a mortgaged automobile, he is held to have taken possession under mortgage. 86 IndA62, 155NE836.

558-90½-New. A mortgagee charged with conversion of property mortgaged could not be held liable in damages for taking possession on default, although the jury found that possession was not taken by agreement. TexCivA 282SW 278.

558-94 TexCivA 4SW(2d)83.

558-99½-New. As against a junior mortgagee asserting no rights and the mortgagor who authorized the senior mortgagee to apply the proceeds of part of the mortgaged property to payment of an open account and then to a mortgage debt, the mortgagee was entitled to possession of the whole of the property or sufficient to satisfy the balance of the mortgage debt although part of the property surrendered would have extinguished the mortgage debt alone. 75Mont36, 241P617.

558-2 245 IllA148.

559-10 212Ala655, 103S839; 190NC 480, 130SE319; Wis 230NW605 (stipulation left blank does not deprive mortgagee from proceeding thereunder).

559-11 204Cal 258, 268P364; CalA 260 P572; 84 IndA483, 151NE438; TexCivA 283SW224; TexCivA 286SW612; TexCivA 292SW271.

560-21 33 OhA488, 169NE716.

560-23 TexCivA 277SW1114; TexCivA 283SW224; TexCivA 286SW612. [a] **No damages recoverable** where possession is taken thereunder. TexCivA 277 SW1114.

561-33 TexCivA 293SW317.

561-38½-New. Mortgagee taking possession of real estate cannot recover from lessee for use of personal property although holding chattel mortgage thereon. Mass 171NE226.

562-49 67Utah60, 245P966, 974 [cit CJ].

563-64½-New. Where a mortgagor without authority turns goods over to another, who incurs expense in connection therewith, and who was charged with constructive notice of lien, the latter could not be reimbursed. 258Mass 157, 154NE580.

563-66 21F(2d)614; 189NC684, 128SE 155 (at common law delivery is not essential between parties); RI 135A855.

563-69 189NC684, 128SE155 (at common law delivery is essential as against creditors and purchasers). [a] **In Minnesota.**–166Minn327, 207NW631; 172 Minn355, 215NW517.

564-73 See also 49Philippine236.

565-85 189NC684, 128SE155.

566-86 224 IllA554 (as against execution creditor); 222MoA1186, 4SW(2d) 503 (not void as to subsequent purchaser). But see 19 OhA29.

566-88½-New. The mortgagee is not bound to take possession on the mortgagor's breach of mortgage provision. 224 IllA554.

566-90 See also 172Minn355, 215NW 517. [a] (1) 24F(2d)349 (2 Rev. St. p 136c 7 § 5 held declaratory of common law). (4) Lien L. § 230 is complete measure of rights of mortgagee filing mortgage too late whether or not repeal of earlier statute revived common law. 24F(2d)349.

566-91 172Minn355, 215NW517.

566-96 25F(2d)378 (agreement to conceal mortgagor's lien after giving possession to mortgagee is repugnant to law and equity). See also 136Misc265. 239NYS639.

568-11 MoA 14SW(2d)537.

569-13 33F(2d)104 (stock certificates in foreign country when mortgage was executed, delivered immediately on arrival in state six months later). [a] But see 33F(2d)104.

569-15 See also 217MoA371, 266SW 748.

569-21 [b] **Where process in foreclosure suit was served before expiration of extension of mortgage** failure to take possession or have receiver appointed does not defeat lien as against purchaser with notice. 38F(2d)25.

569-25 [a] **In Colorado,** mortgagee is entitled to take possession at any time within six months from extended date of lien. 85Colo 1, 272P1117.

571-42 38F(2d)45.

571-42½-New. Who is creditor is jury question. 172Minn355, 215NW517.

571-52 3F(2d)52; 18F(2d)588 (under New York statute); 21F(2d)614; 172 Ark889, 290SW961; 80Colo 412, 252P 348; 86Colo 216, 280P488(2dcase); 323 Ill 232, 154NE139; MoA 281SW134; 222MoA1186, 4SW(2d)503; TexCivA 283SW552; TexCivA 19SW(2d)365. [a] **Assignment of book accounts as security** is within rule. 38F(2d)45.

571-53 18F(2d)588 (under New York statute).

571-54 3F(2d)52; 15F(2d)871 (construing Minnesota statute); 38F(2d)45.

571-57 123Kan238, 254P1038.

572-60 21F(2d)614.

572-64 38F(2d)45.

572-68 18F(2d)719; 123Kan238, 254P 1038, 1039 [citCJ].

572-74 TexCommnA 23SW(2d)702 (trust receipt is not attempt to give lien).

573-81 28F(2d)154; 43F(2d)252; 170 Ark1146, 282SW995; 83Colo 193, 265P 682 (meaning of "creditors or third persons" as used in statute); 134Misc 546, 236NYS1; 124 Okl 294, 256P29; TexCivA 294SW959; 198Wis335, 224 NW114. But see 250Mich325, 230NW 164. [b] (22) TexCivA 274SW1016. (23) Trust receipt executed by retail dealer against automobiles purchased, contemplating release of each car as paid for, is void as chattel mortgage within statute. TexCivA 274SW1016.

(24) And the sale reserving only such trust receipt passes title as well as right to possession. **TexCivA** 274**SW**1016. (25) Automobile in hands of dealer held "stock of merchandise" within statute. **TexCivA** 295**SW**955. [g] **Reason for rule.**–170**Ark**1146, 282**SW**995.

573–81½–New. 82**Colo** 478, 261**P**461.

576–86 But see 198**Wis**335, 224**NW**114.

576–87½–New. In some jurisdictions where delivery of the stock of goods is made to the mortgagee by the mortgagor and the mortgage is foreclosed, title passes as against the creditors who acquire their liens subsequently. 124 **Okl** 294, 256**P**29.

576–87⅓–New. A chattel mortgage is held not invalid as being on shifting stock of goods or because terms were not complied with, in view of the mortgagee's investigation and supervision. 144**Wash**241, 257**P**622.

576–87¼–New. A mortgage covering trees and logs delivered to a lumber manufacturer pursuant to contract, whereby funds derived from sales of lumber by the manufacturer were to be paid directly to the seller and the property covered by the instrument and delivered to the lumber manufacturer was to remain the property of the mortgagee, is not void, as an attempt to create a lien on a stock of goods or merchandise daily exposed for sale in the regular course of business. **TexCivA** 12**SW(2d)**1087.

576–87⅓–New. A statute declaring void mortgages on goods exposed for sale must be strictly construed so as not to include any property except that described. **TexCivA** 15**SW(2d)**130.

576–89 21**F(2d)**614; 31**F(2d)**914; 258 **Mass**402, 155**NE**429.

577–91 124 **Okl** 294, 256**P**29. See also 50**Nev**91, 252**P**322.

577–94 See also 138 **Okl** 35, 280**P**266 (2dcase).

577–96 244**NY**340, 155**NE**665.

579–3 21**F(2d)**614; **MoA** 281**SW**134; 217**AppDiv**137, 215**NYS**669; 134**Wash** 116, 234**P**1033.

579–4 217**AppDiv**137, 215**NYS**669; 134 **Wash**116, 234**P**1033.

579–7 21**F(2d)**614.

580–9 138 **Okl** 35, 280**P**266(2dcase) (mortgage reserving power to mortgagor to appropriate surplus).

580–13 217**AppDiv**137, 215**NYS**669.

581–28 31**F(2d)**317. See also 151**Miss** 102, 117**S**545, 59**ALR**285.

581–29 146**Wash**651, 264**P**423 (void and not voidable where mortgage contains no provision for accounting).

582–30 32**F(2d)**285; 151**Miss**482, 118**S** 413(1stcase).

583–38 198**Wis**335, 224**NW**114.

583–40 89**Fla**484, 104**S**780.

583–42 [b] **If property is already in possession of trustee** when deed of trust is executed, redelivery to trustee is not required. 33**F(2d)**104.

583–44 80**Colo** 412, 252**P**348; **Wis** 232 **NW**853 (stating law of Michigan and Wisconsin). [b] (2) Other instances. **Wis** 232**NW**853.

584–48 **Wis** 232**NW**853.

584–49 80**Colo** 412, 252**P**348; 89**Fla**484, 104**S**780 (chattel must continue truly and bona fide in mortgagee's possession).

584–51 Contra 19 **OhA**29.

584–52 217**MoA**371, 266**SW**748.

585–55 217**MoA**371, 266**SW**748 (testimony that mortgagee nailed doors where grain was located held sufficient to sustain finding of actual possession of grain by him).

585–58 **Wis** 232**NW**853.

585–63 5**F(2d)**157, 159 [quotCJ].

587–83 14**F(2d)**170; 17**F(2d)**555; 42**F (2d)**174; 100**Vt**468, 139**A**250.

587–85 **CalA** 259**P**60; 189**NC**684, 128 **SE**155, 158 [citCJ].

587–86 98**NJEq**99, 129**A**478.

587–92 [a] **Sufficient description.**–Mortgage on contractor's equipment and moneys to become due sufficiently described property so as to make a mortgage lien on property after mortgagee took possession on contractor's default. 332 **Ill** 362, 163**NE**659.

587–92½–New. Placing of mortgage of record is not equivalent to taking possession of property by the mortgagee, with the consent of the mortgagor. 138 **Okl** 35, 280**P**266(2dcase).

588–94 146**Wash**651, 264**P**423 (mortgage on shifting stock containing no provision for accounting).

588–97 216**Ala**546, 114**S**140. [b] **Manner of allowing credits on mortgage** is immaterial in action by mortgagee for conversion. 216**Ala**546, 114**S**140.

588–98 See also 148**Wash**661, 269**P**793. [d] **Mortgagor cannot impair** mortgage security other than by ordinary wear and tear. 78**Colo** 384, 242**P**68.

589–4½–New. Mortgagee suing in trover must show that conversion occurred after he had the right to take or seize the property under mortgage. 216**Ala** 546, 114**S**140.

589–4⅓–New. Mortgagee may recover for mortgagor's conversion although notes were not due until after the property had been converted, where the mortgage gave the mortgagee the right to seize the property whenever he deemed himself insecure. 216**Ala**546, 114**S** 140.

589–5 **CalA** 290**P**91; **TexCivA** 23**SW (2d)**851. [a] (2) Owner of cotton waives right to question propriety of sale by mortgagee, to whom he had delivered cotton to be held as long as possible, by giving new mortgage and otherwise recognizing debt with knowledge of sale. 134**SC**63, 131**SE**322.

589–7 146**SC**257, 143**SE**820; **TexCivA** 278**W(2d)**258.

589–8 **CalA** 290**P**91; 42 **Ida**547, 246**P** 966, 47**ALR**578.

589–10 **TexCivA** 3**SW(2d)**545.

589–19 46 **Ida**551, 269**P**412, 415 [cit CJ]; **TexCommnA** 291**SW**1088; **Tex CivA** 297**SW**1102. [c] **Subsequent parting with his interest** in property will not relieve mortgagee from liability for conversion. 69**CalA**719, 232**P**734.

590–21 **TexCommnA** 291**SW**1088.

590–22 129 **Okl** 211, 264**P**194.

590–24 40**GaA**683, 150**SE**855(2dcase) (credit agreement with power of sale); **TexCivA** 283**SW**224. [a] 146**SC**257, 143 **SE**820.

590–28½–New. Seizure of goods under chattel mortgage as conversion as against Crown. **Man** [1930] 1**DomLR** 132.

590–29 82**Colo** 239, 259**P**6, 7 [quotCJ].

590–30 82**Colo** 239, 259**P**6, 7 [quotCJ].

590–31 82**Colo** 239, 259**P**6, 7 [quotCJ].

590–35½–New. or where the mortgagor interposed every obstacle to the mortgagee's taking possession, 82**Colo** 239, 259**P**6.

590–35⅓–New. or where the mortgagee awaited the outcome of the contested replevin action in which the mortgagor counterclaimed for cancellation of mortgage notes and the return of the property with damages. 82**Colo** 239, 259**P**6.

590–35¼–New. and such counterclaim was sufficient to authorize an injunction, although not specifically prayed for. 82**Colo** 239, 259**P**6.

591–47 **SD** 227**NW**67.

591–55½–New. A senior mortgagee of chattels who, without foreclosure, takes possession of the property, sells it, and applies the surplus proceeds in paying unsecured debts due to him from the mortgagor, is guilty of conversion as against the holder of a recorded subsequent mortgage as to all funds above the amount necessary to pay the senior mortgage. 202 **Iowa**106, 200**NW**275, 276 [citCJ].

591–55⅓–New. In such case the holder of the senior mortgage is bound to account to the junior mortgagee for such part of the proceeds as he applied to such unsecured claims. 202 **Iowa**106, 209**NW**275, 276 [citCJ].

591–58 89**CalA**690, 265**P**403; 117 **Or** 47, 242**P**833, 43**ALR**374.

592–66½–New. Delivery of gin yard tickets for cotton is symbolical delivery of cotton as affects conversion. **Tex CivA** 2**SW(2d)**356.

592–68 102**CalA**10, 282**P**522; 42 **Ida**48, 246**P**12; 46 **Ida**231, 266**P**659 (appropriation or destruction of property); **MoA** 16**SW(2d)**671; 84**Mont**579, 277**P** 805 (liability of landlord to tenant's mortgagee of crops); 50**ND**443, 195**NW** 512; **ND** 231**NW**859; 50**RI** 336, 147**A** 754. [b] **Conditional vendor selling property after tender of amounts by buyer** is liable to chattel mortgagee. **Del** 150**A**81. [c] **Lienholder not guilty of conversion** by intervening and enjoining mortgagee's sale of equipment. **TexCivA** 30**SW(2d)**364.

592–69 146**Wash**137, 262**P**123 (mortgagee held liable to holder of superior lien for taxes during redemption period).

592–71 177**Ark**366, 7**SW(2d)**321; 146 **Wash**137, 262**P**123 (creditor receiving proceeds of sale held not liable). [b] **User of mortgaged machinery with mortgagor's consent** is not liable to mortgagee in conversion, though machinery became worthless from much use, in the absence of demand for possession and refusal after default in payment by mortgagee. 240**Mich**608, 216 **NW**402.

592–72 84**Mont**579, 277**P**805.

592–74 124 **Okl** 249, 255**P**688; **Tex CommnA** 15**SW(2d)**598.

592–76 124 **Okl** 249, 255**P**688.

592–76½–New. Only one cause of action arises for the conversion of, or injury to, mortgaged property, and settlement by the wrongdoer with either the mortgagor or mortgagee, in the absence of fraud or collusion, is a bar to an action of the other. 190**NC**480, 130 **SE**319.

592–76⅓–New. Where an elevator company receives grain and issues storage tickets therefor with knowledge that it is subject to a chattel mortgage, its refusal to comply with the mortgagee's demand for the grain or its proceeds after default prima facie establishes a conversion. 49**ND**502, 191**NW**955.

592–76¼–New. A person who, having actual knowledge of the mortgage, willfully conveys the property beyond the state, thereby destroying the value of the mortgage, is liable in damages to the mortgagee. 35**GaA**368, 133**SE**270.

592–76½–New. **Sale by holder of different lien.** 127**Misc**422, 216**NYS**290.

593–78 205 **Iowa**508, 218**NW**298. But see**TexCivA** 293**SW**228; **TexCivA** 298 **SW**625. [a] **In California** under statute, constable selling mortgaged automobile before execution creditor has furnished statutory bond is liable to mortgagee for conversion. 88**CalA**308, 263**P**545.

593–79 **TexCivA** 282**SW**882.

593–88 7**LaA**134; 127**Misc**903, 217**NYS** 621.

594–92 **TexCivA** 283**SW**224; **TexCivA** 286**SW**612.

594–93 **TexCivA** 283**SW**224; **TexCivA** 286**SW**612.

594–95 84 **IndA**483, 151**NE**438.

594–97 But see 146**SC**257, 143**SE**820.

594–98⅓–New. Mortgagor may not sue mortgagee for repossessing chattels where he expressly waives right in mortgagee. **TexCivA** 3**SW(2d)**545.

595–17 98**Vt**486, 129**A**299.

595–18 **Md** 148**A**424.

595–21 90**CalA**436, 266**P**300.

595–24 44 **Ida**316, 256**P**761, 762 [cit CJ].

595–28¼–New. Judgment void on its face declared no defense. 132**SC**168, 129**SE**136.

596–35¼–New. In replevin to recover machinery sold to defendant for the purpose of foreclosing a chattel mortgage, a general denial is sufficient to state a defense based on the facts that defendant was a skilled mechanic and had kept the property in good repair to plaintiff's knowledge and that therefore plaintiff did not feel insecure because of negligent handling of the machinery as alleged. 34**Wyo** 509, 245**P** 295.

596–40 79**Mont**468, 257**P**469. [c] (2) To sustain verdict for plaintiff in action for conversion of automobile seized under chattel mortgage. 169**Minn**45, 210**NW**618. [d] **Evidence held to sustain finding** that plaintiff did not authorize mortgagee to sell part of mortgaged property and that defendant purchaser knew of protest. 73**CalA**391, 238 **P**816. [e] **Evidence insufficient to show conversion.**–**MoA** 272**SW**1040. [f] **Evidence held sufficient** to show conversion

by mortgagee. 90CalA436, 266P300 (cattle).

596-41 MoA 274SW526 (as to bona fides of mortgagor exercising power of sale). [a] **In action to foreclose mortgage** covering a diamond ring, where mortgagor filed cross complaint for conversion of ring, evidence held sufficient to support finding that ring was never in possession of mortgagee. 73 CalA476, 238P1062.

596-42 [d] **Evidence held not to show** statutory ratification of mortgagee's private sale. 73CalA391, 238P816.

596-43 101Vt356, 143A276.

596-43½-New. In such action where the price received at the mortgagee's sale of the chattel is admitted on the issue of value, proof of the mortgagee's expenditures for repairs before sale should be admitted. 322Mo1077, 18SW(2d)889.

596-45½-New. A mortgagor cannot maintain an action of conversion against a mortgagee entitled to possession by reason of default, without proof of payment or other extinguishment of mortgage. **TexCivA** 283SW224.

596-45⅓-New. Where the validity of a mortgage and the legality of foreclosure proceedings are in issue, the exclusion of mortgage from evidence is error. **TexCivA** 286SW612.

596-45¼-New. Whether a tenant's lease from a purchaser of land covered a particular season is held immaterial where the lease had either expired or was surrendered. 79Mont468, 257P469.

596-45½-New. Evidence may be insufficient to establish defense of careless sale by mortgagor. **MoA** 274SW526.

596-45⅝-New. In an action by a remote assignee of the mortgagor against the mortgagee of chattels, the court must presume that the mortgagor complied with the statute as to giving notice in making an original transfer. 100 CalA756, 281P89.

596-46 TexCivA 128SW(2d)655.

596-47 143 Okl75, 287P1017.

597-48 But see 47 Ida726, 278P224(3d case).

597-48½-New. In an action of replevin the question of payment has been held to be for the jury. **MoA** 272SW1031.

597-49 TexCivA 293SW217. [c] **Evidence held insufficient.**—101Vt356, 143A276. [d] **Failure to find held erroneous under evidence.**—101Vt356, 143A276. [e] **Evidence held not to warrant recovery for conversion.**—12LaA269, 125S490.

597-55 TexCivA 38SW(2d)545 (loss of plaintiff's equity in apartment house not recoverable).

597-56 46 Ida551, 269P412 (evidence insufficient to warrant punitive damages); 80Mont480, 261P273 (evidence held to warrant award of exemplary damages); **TexCivA** 38SW(2d)545.

597-57½-New. Damages must be sustained by evidence to be allowable. **Tex CivA** 38SW(2d)545.

597-58 46 Ida551, 269P412, 415 [cit CJ]. [d] **Damages for seller's conversion** of furniture is difference between marked value and unpaid balance. **Tex CivA** 292SW269.

598-59 46 Ida551, 269P412, 415 [cit CJ].

598-62 80Mont480, 261P273; 54SD296, 223NW195; **TexCivA** 297SW1102. [f] **Overallowance of sum due mortgagee** held not to show passion and prejudice. 80Mont480, 261P273.

598-65 46 Ida551, 269P412, 415 [cit CJ]; **TexCivA** 297SW1102.

598-66 See also 166La497, 117S568.

598-67¼-New. A seller instituting replevin to recover chattels for the purpose of foreclosing a chattel mortgage thereon is not entitled to damages for defendant's use thereof where the seller is not entitled to the use and seeks possession only for the purpose of foreclosure. 34Wyo509, 245P295.

598-67½-New. Where the mortgagee obtains possession of a mortgaged automobile through fraud and without the consent of the mortgagor after tender of the balance due has been made, the mortgagor may recover the expenses incurred in redeeming the automobile. **Tex** 128SW(2d)655.

598-67⅞-New. The measure of damages for alleged conversion of property subject to chattel mortgage is the value of the property at the time of conversion. 47 **Ida**726, 278P224(3dcase).

598-69 37GaA645, 141SE323; 190NC480, 130SE319, 322 [quot CJ].

599-70 190NC480, 130SE319, 322 [quot CJ].

599-73 190NC480, 130SE319, 322 [quot CJ] (either mortgagor or mortgagee may sue sum recovered being held in trust).

599-78½-New. Either mortgagor or mortgagee may sue for possession or damages for conversion, injury, or destruction, the sum recovered being held in trust to be applied according to respective rights. 190NC480, 130SE319.

599-78⅞-New. Registration of sale contract retaining title in seller does not affect right of buyer as mortgagor to maintain action for injuries to the property. 190NC480, 130SE319.

599-85 MoA 228SW(2d)185.

599-87 216AlaS46, 114S140.

600-88 29F(2d)489; 216AlaS46, 114S140; 205CalS38, 269P636; 102CalA10, 282P522; 46 Ida231, 266P659 (law providing for only one action for enforcement of rights secured by mortgage held not to prevent action against third person for conversion); **TexCommnA** 158SW(2d)598; **TexCivA** 218SW(2d)1084; 150 Wash559, 274P102; 152Wash697, 279P103(1stcase). [c] **Where mortgage gave mortgagee right to seize** upon insecurity, action will lie before maturity of debt. 216AlaS46, 114S140. [d] **Common-law right of action can be abridged only** by express statutory enactment. 46 Ida231, 266P659. [e] **Right of action is not lost** because mortgagee took over part of mortgaged property and disposed of it at request of mortgagor where property taken was in part worthless and value of remainder is not shown. 46 Ida231, 266P659.

601-90 21AlaA130, 106S214.

601-92 29F(2d)189; 207CalS457, 278P1035, 63ALR1308; **Cal** 290P583; 86Colo216, 280P488(2dcase); 42 Ida39, 245P88; 252 IllA262; 164Minn416, 205NW274; **MoA** 18SW(2d)544; 20 OhA256, 151NE797; 27 OhNPN8416 (action by holder of note secured by mortgage); 40Wyo283, 276P935 (cannot replevin horses older and heavier than mortgage specified).

602-93 21AlaA549, 110S857.

602-96 89Fla484, 104S780; 143Wash601, 255P953.

603-4 89Fla484, 104S780 (holding action maintainable against stranger). [c] **Creditor with mortgagee has right of action against ordinary creditor** who secretly removes property without knowledge of mortgagor or mortgagee. 169LaS601, 125S729.

603-6½-New. Statutory action for the trial of the right of property may be brought by chattel mortgagee entitled to possession. **TexCivA** 271SW293.

603-6¾-New. Either mortgagor or mortgagee may sue for possession or damages for conversion, injury, or destruction, the sum recovered being held in trust to be applied according to respective rights. 190NC480, 130SE319.

603-7 21AlaA130, 106S214.

604-21 TexCivA 48SW(2d)83.

604-28 Md 148A424 (conditions precedent). But see 147Wash210, 265P158.

604-29½-New. In some jurisdictions a mortgagee cannot maintain replevin against an officer seizing the property under attachment against the mortgagor from whose possession the property was taken and under whom the mortgagee claims. 30 OhA517, 165NE512.

605-47 43 Ida37, 248P855, 866 [cit CJ].

606-63 117 Or47, 242P833, 43ALR374.

606-72 Cal 290P583.

606-73 Cal 290P583.

607-80 85Colo1, 272P1117.

607-93 [a] **TexCivA** 271SW293.

607-93½-New. A sale by a mortgagee of the mortgaged property in order to apply the proceeds of sale in payment of the debt would not defeat right to judgment at time of trial. **TexCivA** 271SW293.

603-21¼-New. Creditor's liability to criminal prosecution for removing mortgaged property does not exempt him from civil liability. 169LaS601, 125S729.

603-21¼-New. Failure of mortgagee to repossess property by replevin does not relieve sheriff's liability for selling property in trover action. **Md** 148A424.

603-21¼-New. Mortgagee of crop after condition broken can maintain replevin notwithstanding landlord's lien. **NM** 290P739(2dcase), 741 [cit CJ].

609-24½-New. An automobile mortgage executed by a debtor with the consent of the registered owner is good against a constable selling the automobile under execution against the debtor before the execution creditor furnished the statutory bond. 88CalA308, 263P545.

609-25 TexCivA 178SW(2d)856.

609-34 [a] 39Wyo423, 272P687.

610-50½-New. The appointment of a substituted trustee under a power in a deed of trust evidenced by a writing addressed to the chancery clerk authorizing the substitution is sufficient to vest the substituted trustee with power to maintain replevin for property covered by the deed of trust. 143 Miss189, 108S431.

610-56½-New. A mortgagee in possession, who was recognized as the owner for the purpose of a transaction involved in a suit against a contractor, need not make the mortgagor a party. 179Ark954, 18SW(2d)916.

610-56¼-New. Mortgagor is not necessary party to mortgagee's action to recover value of property wrongfully removed by third person. 169LaS601, 125S729.

610-62½-New. A purchaser mortgaging rent cotton, growing on land purchased, before a vendor's lien foreclosure sale, was a proper party to a mortgagee's suit against the tenant and the vendor for conversion of such cotton. **TexCommnA** 158SW(2d)598.

610-62¼-New. Where a chattel mortgagor is made a party defendant, judgment can be entered against him, although in default. 227AppDiv742, 236NYS657.

611-71½-New. The same rule applies in an action for conversion. 117 Or47, 242P833, 43ALR374.

611-71¼-New. Under a rule of construction in favor of a petition on demurrer, failure to allege that a mortgage covered the property converted is not fatal. **TexCivA** 58SW(2d)1001.

611-71¼-New. Petition for interference with mortgaged property must show damage to plaintiff and fraud by defendant. 41GaA550, 153SE779 (insufficient).

611-75 53ND421, 206NW416. Contra 153Wash37, 279P103(2dcase).

611-76 53ND421, 206NW416.

611-77 117 Or47, 242P833, 43ALR374.

611-80 49ND531, 191NW963. [a] (7) Allegations of special interest as chattel mortgagee, right to immediate possession, demand for payment of demand notes secured by the mortgage, mortgagor's neglect and failure to pay, and conversion of property by defendant state a cause of action. 50ND443, 195NW512.

612-90 53ND421, 206NW416.

613-11½-New. payment, 176Minn406, 223NW618.

613-14½-New. or payment, 171Minn130, 213NW536.

613-17½-New. In an action for conversion against a purchaser from the mortgagor, defendant, under a general denial, may show that the proceeds of sale were applied to the mortgage debt. 113 Okl291, 241P1105.

63-19½-New. Proceeding in detinue to ascertain amount of mortgage debt upon suggestion need not be by formal pleading. 216Ala252, 112S907.

613-23 [a] **Under statute holder of note, given on purchase price of automobile** and chattel mortgage securing it, suing in detinue to recover automobile on mortgagor's default was properly permitted, during progress of cause and over mortgagor's objection, to amend complaint by adding count on note. 218Ala375, 118S561.

613-27 74CalA621, 241P567. [c] (10) Contra 129 Okl211, 264P194 [overr 75 Okl97, 181P717]. (11) For example, under plea of general denial, evidence of plaintiff's consent to delivery of proceeds

of sale of mortgaged property held competent. **TexCivA** 297SW568.

614-29½-New. Pleading of value does not bar testimony of lesser value, nor require judgment in pleaded sum for defendant claiming an agister's lien. 40Wyo 283, 276P935.

614-32 216Ala546, 1148140; 200 **Iowa** 705, 205NW351; 227AppDiv742, 236 NYS657 (must prove default); **Tex CivA** 271SW293 (mortgagee has burden of proof as against attaching creditor).

614-33 172Minn355, 215NW517; **Tex CivA** 298SW625.

614-34 216Ala546, 1148140; 21AlaA 549, 110857; 46 **Ida**231, 266P659. [b] **Mortgagees suing for conversion** must prove want of consent to taking by defendant. **TexCivA** 297SW568.

614-35 200 **Iowa**705, 205NW351. See also **MoA** 248SW(2d)641.

614-36 **Ark** 318SW(2d)127(2dcase).

615-37½-New. Demand need not be proved in an action for conversion where conversion is shown. 117 **Or**47, 242P833, 43ALR374.

615-42 147Wash210, 265P158.

615-43 But see 172Minn355, 215NW 517.

615-43½-New. Proof of fact of payment casts back on mortgagee the burden of proving that the right of property was continuing. **TexCivA** 271SW 293.

615-43¾-New. In an action for replevin to recover possession from the mortgagor, where the evidence shows that the mortgagor never had title and that an intervener was owner as purchaser from the mortgagee, the mortgagee cannot recover possession without showing some equity arising from want of notice. 200 **Iowa**705, 205NW 351.

615-43¼-New. The intervener has the burden of proof to show that the property seized by the sheriff was the same as covered by the mortgage. 190**NC** 861, 129SE591.

615-45 176Minn406, 223NW618; **MoA** 248SW(2d)641 (presumed to have known goods on which he had mortgages).

615-46 46 **Ida**231, 266P659; **MoA** 78SW (2d)374.

616-53 See also 265Mass51, 163NE651.

616-56½-New. A purchaser, seeking damages for deprivation of the use of an automobile, must prove the falsity of an allegation that possession of the car was in the mortgagor. **TexCivA** 218SW(2d)363.

616-58 21AlaA130, 106S214; 155SC 187, 152SE189. [a] 21AlaA130, 106S 214; 46Ida231, 266P659. [b] **Evidence held erroneously excluded.**-21AlaA130, 106S214.

616-63 20AlaA569, 104S139.

616-64 20AlaA569, 104S139.

616-68 21AlaA130, 106S214.

616-71 172Minn355, 215NW517.

616-73 [a] **Admissibility of evidence.**-(1) Writing evidencing conditional sale is inadmissible in action against seller for conversion where such sale was void as against vendee's mortgagee who was bona fide mortgagee subsequent to sale and prior to filing of such sale contract. 75Mont416, 244P485. (2) Where filing of mortgage given prior to conditional sale imparted no constructive notice because of omission to attach to mortgage mortgagor's receipt for copy thereof, contract of sale is properly admitted in evidence to show vendor's right to take property on vendee's breach of condition. 75Mont416, 244P485.

617-78½-New. Evidence that mortgagor did not grow crop claimed under mortgage is relevant and material. 215Ala114, 110819.

617-78¾-New. Evidence as to mortgagor's physical ability to raise crop is properly rejected as too remote. 215 Ala114, 110819.

617-80 **TexCivA** 292SW631.

617-82 **Md** 148A424.

617-86 **Ark** 318SW(2d)127(2dcase); **MoA** 118SW(2d)1084; **TexCivA** 287SW 299; **TexCivA** 298SW625. [c] 258 **Mass**157, 154NE580. [d] (5) 46 **Ida** 231, 266P659. (11) Identity of property seized under execution with property covered by mortgage. 123**Kan**222, 254P1026. (12) Identity of crop. 46 **Ida**231, 266P659. [e] **Finding of title in intervener** held supported by evidence. 200 **Iowa**705, 205NW351. [p] **Evidence held insufficient** to show conversion of sugar used in business. **Tex CivA** 274SW245. [q] **Evidence held not to authorize** award of fifty dollars for value of converted "crown block." **Tex CivA** 292SW631. [r] **Evidence held insufficient.**-198**Cal**641, 246P1041; 44 **Ida**316, 256P761; 52**SD**260, 217NW 209; **TexCivA** 278SW(2d)321 (suit by assignee of mortgagee). [s] **Evidence held sufficient.**-88**CalA**308, 263P545; 222**MoA**1113, 148SW(2d)683. [t] **Absence of proof of value of property** involved in replevin action at time of trial is insufficient to defeat judgment, involving rights of mortgagee having special interest which was set out in affidavit of replevin and established by evidence. 222**MoA**1113, 148SW(2d)683. [u] **There was no evidence** to show that garage owner possessed or was authorized to execute mortgage on deceased owner's automobile. 86**Colo** 121, 278P 590. [v] **Evidence held to sustain finding** that live stock sought to be replevined was property of intervener. **SD** 230NW20.

617-87 215**Ala**114, 110819.

617-88 42 **Ida**547, 246P966, 47**ALR**578.

617-89 **MoA** 299SW49.

617-90 200 **Iowa**705, 205NW351; **MoA** 188SW(2d)544.

617-94 132SC254, 128SE715; **SD** 231 NW289. See also 213Ala659, 106S41.

617-96 202 **Iowa**1140, 211NW568; 190 **NC**861, 129SE591.

617-98 75**Mont**36, 241P617.

617-99 75**Mont**36, 241P617; 132SC 254, 128SE715 (damages for conversion of mortgaged property and resulting loss, under counterclaim). [a] **Withdrawal of mortgagor's plea of fraud does not entitle plaintiff to directed verdict,** where answer contains general denial and evidence tends to show that mortgagor never had title. 200 **Iowa** 705, 205NW351.

617-1 265**Mass**51, 163NE651; 155SC 187, 152SE189.

617-1½-New. Question of sufficiency of description in mortgage should not be submitted to jury where description is perfect and complete. **Iowa** 229NW 829(2dcase).

617-3 213Ala659, 106S41 (requested charge improperly refused in view of evidence); **Md** 148A424 (notice of mortgage and necessity of demand); 105 **Okl** 69, 231P500 (instruction that second mortgage did not cancel mortgage not reversible error in absence of evidence of intention to cancel first mortgage). [b] **Issue as to ownership by intervener** held fairly submitted. 200 **Iowa**705, 205NW351.

617-4 [b] **Instruction held sustained by evidence.**-132SC254, 128SE715.

618-10 200 **Iowa**705, 205NW351.

618-12 81**CalA**164, 253P352 (false representations held material issue); **Tex CivA** 292SW631. [a] **Implied finding of court** that landlord was guilty of conversion of mortgaged crops held supported by pleadings and jury's special finding that landlord received proceeds of tenant's crop. **TexCivA** 288SW1095. [b] **Findings are required** on issue of false representations made with intent to deceive and relied on by mortgagor, though court made finding that representations were made as statement of opinion. 81**CalA**164, 253P352.

618-16 [b] **Verdict held improper** as not fixing value of property at time of trial. 223**AppDiv**44, 227NYS315.

618-20½-New. Where the complaint was amended to aver election to accelerate payment of installments for default, and the action was tried thereon, judgment pursuant thereto is proper. 55**ND**732, 214NW908.

619-31½-New. Where the court denied replevin by mortgagees of property covered by chattel mortgage, judgment was properly entered for mortgagor warehouseman and mortgagor's landlord. 143**Wash**601, 255P953.

619-31¾-New. Where the holder of a chattel mortgage securing a note given for the purchase price of an automobile in one count sued in detinue for repossession of the car, and in another count sued on the note, and the jury returned a verdict for plaintiff on both counts, judgment properly provided that defendant's payment of judgment on the note count, within the time fixed by law prior to issuance of execution, should be in full satisfaction of the judgment rendered. 218**Ala**375, 118S561.

619-31¼-New. A judgment in plaintiff's favor in a replevin action by the mortgagee to recover an automobile levied on by defendant, determines disputed questions as to whether execution sale to a third party was merely colorable, and whether defendant was in fact in possession of the car at the time of commencement of the action. 85**Colo** 1, 272P1117.

619-31⅞-New. Judgment may properly under some circumstances be rendered against the sureties on defendant's delivery bond for value of property replevied by plaintiff and returned to defendant upon execution of the bond. 177**Ark**1193, 98W(2d)783.

619-32 See also **TexCivA** 271SW293.

619-33 156**Miss**775, 125S826 (limited to interest covered by deed of trust); 117 **Or**47, 242P833, 43**ALR**374.

619-34 204 **Iowa**1273, 214NW491, 55 **ALR**644; **TexCivA** 292SW631. But see 169**La**601, 125S729.

619-36 117 **Or**47, 242P833, 43**ALR**374.

619-37½-New. The measure of damages in an action against a person who willfully conveyed mortgaged property beyond the state with actual knowledge of the mortgage is the value of the property not exceeding the amount due on the mortgage. 35**GaA**368, 133SE270.

619-37¾-New. Award of exemplary damages was unauthorized in conversion action where there was no evidence that conversion was wanton, malicious, fraudulent, or oppressive. **TexCivA** 17 SW(2d)856.

619-38 **SD** 231NW289 (holding measure of alternative damages to be amount due under mortgage).

619-41 **CalA** 284P736.

620-51¼-New. In some jurisdictions judgment for the entire balance due, although exceeding the value of the property, is rendered, to enable mortgagor to prevent foreclosure by paying it. 172**Ark**365, 288SW886.

620-51¾-New. In an action to recover the amount due on a note secured by mortgage for unlawful detention of property, and foreclosure of the mortgage, tried on the theory that the action is in replevin, defendant is entitled to recover actual damages for taking of the property if there was no default that gave plaintiff the right to possession of the property. 39**Wyo** 423, 273P 687.

620-53 [a] **Damages that are too remote** are not recoverable. **Ala** 130S202 (2dcase).

620-61 43 **Ida**37, 248P865, 866 [citCJ]. [a] **Storage charges** should be deducted in determining amount of damages when mortgagee consented to storage. 43 **Ida** 37, 248P865. [b] **Amounts paid to farm laborers who raised or harvested** mortgaged crop should not be deducted in determining mortgagee's damage where only part of such claims was lienable and such part is not established by evidence. 43 **Ida**37, 248P865.

621-67 [a] **Right is not lost** because holder of first purchase-money mortgage by assignment from dealer sought to get his money back from dealer on his written promise to repurchase. **Wyo** 283P1100.

621-70½-New. Where conversion by taking and sale of mortgaged cattle was wrongful, demand is not necessary to entitle the first mortgagee to sue the second mortgagee for conversion. 89**CalA**690, 265P403.

621-70¾-New. Subsequent mortgagees with notice of prior mortgage cannot claim greater rights than mortgagor in action against them for conversion. **TexCivA** 238SW(2d)745.

621-71 217**Ala**289, 116S126.

621-73 TexCivA 29SW(2d)831.
621-75 54SD296, 223NW195.
621-76 See also 166Minn144, 207NW 313.
621-82½-New. Answer held insufficient to show total failure of consideration for mortgage. TexCivA 23SW (2d)745.
621-87 23AlaA105, 121S456; 54SD296, 223NW195; SD 227NW67 (as to animals covered by his mortgage); Tex CivA 29SW(2d)831; TexCivA 30SW(2d) 902. [b] **Evidence held insufficient** to show that first mortgagee had lost lien. 89CalA690, 265P403.
621-88 129Kan426, 283P632 (insufficient); SD 227NW67; TexCivA 29SW (2d)831; TexCivA 2SW(2d)356 (evidence of control exercised over mortgaged cotton held sufficient to make defendant liable for proceeds thereof). [a] **Evidence insufficient** to show defendant mortgagee's acts were contrary to agreement with plaintiff. TexCivA 27SW(2d)835.
621-89½-New. On conflicting evidence question as to whether mortgagee accepted new mortgage, thereby extinguishing prior mortgage, is for jury. 213AlaA659, 106S841.
621-89¼-New. Evidence of identity of chattel is held admissible. 21AlaA412, 109S168.
621-89⅓-New. Evidence of ownership by chattel is held admissible. 21AlaA 412, 109S168.
621-89⅙-New. Junior mortgagee may show as against title of defendant obtained under foreclosure suit, that mortgage foreclosed was invalid. TexCivA 30SW(2d)902.
621-90 172Ark569, 289SW766; MoA 281SW134 (finding held proper).
622-92 [c] See also ND 223NW195.
622-96½-New. The value of a chattel mortgagor's interest in cattle at the time of conversion by a second mortgagee is measure of first mortgagee's damages. 47Ida24, 271P935.
622-1 Fla 130S457 (destruction or impairment of value of property).
623-12 204Iowa590, 215NW647 (mortgagee need exercise no diligence to recover property removed from state).
623-13½-New. Provision in bill of sale securing note that goods will not be removed without payee's consent can be waived by payee. 43F(2d)807.
623-18 28Ariz589, 238P392; 120Kan 662, 244P1047.
623-19 28Ariz589, 238P392; 89Fla484, 104S780 (holding purchaser obtains rights of mortgagor and no other); 120 Kan662, 244P1047; 221MoA1243, 300 SW841; 152SC313, 149SE597.
624-22 Me 151A555 (sale without mortgagee's consent); 132Okl121, 270P9, 11 [quotCJ]; 144Okl163, 290P1106; TexCivA 283SW224.
624-23 See also 197Wis227, 221NW741.
624-23½-New. Where a purchaser of mortgaged cattle, at private sale, from sheriff and owner, takes with full knowledge of the existence of a chattel mortgage against the cattle, he is chargeable with knowledge that any sale of encumbered property by the owner without the consent or knowledge of the mortgagee is at least a questionable transaction, if not an absolute violation of statute. 197Wis227, 221NW741.
624-26 TexCivA 283SW224.
624-28½-New. A sale of the property by a deceased mortgagor's personal representative after his death constitutes a conversion in some jurisdictions. 117Okl181, 245P594.
624-35 3F(2d)52; 169Ark1212, 277SW 347; 91CalA738, 267P746; 41Ida225, 238P306; 45Ida340, 262P514; 46Ida 55, 266P433; 119Kan807, 241P431; 120Kan662, 244P1047; 126Kan58, 266P 739; 166Minn327, 207NW631; 140Miss 875, 105S750; 316Mo426, 289SW623; Mo 5SW(2d)395 (consent may be implied); 221MoA1096, 295SW506; 222 MoA339, 297SW91; 221MoA1243, 300SW 841; 74Mont245, 240P376; 50Nev91, 252 P322, 323 [citCJ]; 49ND768, 193NW 733; OhA 172NE851; 142Okl96, 285 P828; 51SD13, 211NW976; TexCivA 13SW(2d)121; 100Vt439, 138A735. See also 172Minn458, 215NW844. [e] **That mortgage is recorded** does not affect rule. 316Mo426, 289SW623.
624-35½-New. Where he does not know of the mortgage. 219MoA157, 268SW 712.
625-36 Mo 5SW(2d)395; 50Nev91, 252 P322, 323 [citCJ]; TexCivA 11SW(2d) 668.
625-37 Mo 5SW(2d)395; 50Nev91, 252 P322, 323 [citCJ].
625-39 50Nev91, 252P322.
625-41 30NM487, 239P525 (consent not shown).
625-42 216Ala252, 112S907.
625-43½-New. A mortgagor claiming that the mortgagee had agreed to permit him to sell the mortgaged property and apply the proceeds on the mortgage cannot recover damages because of the mortgagee's refusal of permission if the mortgagor had the right claimed. 50SD 307, 210NW49.
625-44 37GaA141, 139SE113, 114 [cit CJ]; 45Ida340, 262P514; MoA 22SW (2d)836.
625-45 45Ida340, 262P514; 85IndA 299, 151NE136; 222MoA339, 297SW91; MoA 28SW(2d)121; 50ND141, 195NW 6. [b] **Mortgagor and mortgagee may agree** in good faith to sell on regular market without foreclosure, and subsequent lienholders in such case have no ground of complaint. 52ND197, 201NW 858.
625-47 140Miss875, 105S750; Mo 5SW (2d)395; 219MoA157, 268SW712; 221 MoA1096, 295SW506, 508 [quotCJ]; 50 Nev91, 252P322; 49ND768, 193NW733; 100Vt187, 136A28. [b] **Recording of mortgage** does not affect rule. 219MoA 157, 268SW712.
625-49½-New. A mortgagor's authority from the mortgagee to sell necessarily includes the right to receive the sale price, regardless of his appropriation thereof. 179Ark71, 14SW(2d)240.
626-55 45Ida340, 262P514.
626-55½-New. As respects a mortgagee's right to revoke his consent to a sale, a dealer in wool, licensed by the government under regulations promulgated by the United States board of war industries, to whom wool was consigned for sale in 1918, was a purchaser, or at least a purchaser pro tanto, as against whom the mortgagee cannot withdraw his consent. 316Mo426, 289 SW623.
626-55⅓-New. Such dealer, if considered as a mere factor, had a special property in the wool to the extent of his advances and charges which precluded the mortgagee from withdrawing his consent after such rights had attached. 316Mo426, 289SW623.
626-59 But see 120Kan662, 244P1047.
626-61½-New. A provision that proceeds of all sales shall be applied on the mortgage note and no uses are to be made of such proceeds without the written consent of the mortgagee constitutes an implied consent to sell. 28Ariz589, 238P392.
626-64 119Kan807, 241P431.
627-77 86Colo216, 280P488(2dcase) (mortgagee consenting to sale of automobile to dealer impliedly consented to sale by dealer to another); 316Mo426, 289SW623; Mo 5SW(2d)395 (circumstances held immaterial in determining question of implied consent).
627-78½-New. That the mortgagor applied the proceeds of the mortgaged property on the mortgage debts until the sale in question is immaterial on the question whether the mortgagee impliedly consented to the sale. Mo 5SW (2d)395.
627-81 316Mo426, 289SW623.
627-86½-New. A stipulation in a chattel mortgage against sale, conversion, or removal is waived by knowingly permitting its violation. 172Ark889, 290 SW961.
627-88 144Okl219, 291P116.
627-89 120Kan662, 244P1047.
628-94 120Kan662, 244P1047.
628-95 119Kan807, 241P431; 39Wyo 152, 270P541, 542 [quot&citCJ]. [a] **Where mortgagee as landlord** had lien on proceeds as such, acceptance of proceeds is held not to imply ratification. 216Ala252, 112S907. [b] **Such conduct constitutes ratification of sale.**-39Wyo 152, 270P541.
628-98½-New. nor does acceptance of proceeds of the sale constitute ratification where the mortgagee understood that a less amount of property had been sold than was actually sold. 120Kan 662, 244P1047.
628-4 86Mont331, 283P420 (sufficient consideration).
628-7 245IllA148; 222MoA1186, 4SW (2d)503 (right of mortgagee to assert mortgage as against purchaser); Tex CivA 283SW224. See also 248IllA518 (foreign mortgage). But see 128Okl 282, 262P675.
628-10 132Misc223, 228NYS582.
628-11 119Kan834, 241P118; 156SC 480, 153SE462 (that agent of purchaser was trying to defraud him does not relieve purchaser of liability).
628-13 TexCivA 283SW224.
629-16½-New. A provision in a chattel mortgage that if the property is disposed of the debt shall be immediately due at the option of the mortgagee, and giving him the right to take immediate possession and enforce his lien, does not invalidate a sale of the mortgagor's interest. 28Ariz589, 238P392.
629-16¼-New. A provision impliedly giving the mortgagor of cattle the right to sell them subject to the condition that the proceeds of sale shall be applied to the indebtedness does not affect the title of the purchaser or impose on him the duty to see to the application of the proceeds. 28Ariz589, 238P392.
629-16¾-New. A purchase of mortgaged property does not of itself give the purchaser an indefeasible right without reference to the title of the seller. 202Iowa1140, 211NW568.
629-16⅙-New. A purchaser of land on which a crop of hay is growing takes subject to a chattel mortgage on the hay. 44Ida316, 256P761.
629-19 Wis 230NW605.
629-25½-New. A purchaser of mortgaged chattels who did not assume the mortgage may avail himself of any defense against the mortgage which the mortgagor might have made. 18F(2d) 955.
629-25⅓-New. Actual knowledge of the existence of a void mortgage is immaterial. Mont 286P1115.
629-36½-New. Negotiations about a balance due the mortgagee between him and a dealer from whom an innocent purchaser bought will not defeat the purchaser's rights. 86Colo216, 280P488 (2dcase).
630-42 TexCivA 283SW224.
630-43 TexCommnA 5SW(2d)753; Tex CivA 283SW224.
630-44 47Ida604, 277P570; 221MoA 420, 279SW764; 149SC192, 146SE604; TexCivA 283SW224; 150Wash559, 274 P102.
630-45 213Ala89, 104S17; 216Ala252, 112S907; 44Ida332, 257P31, 54ALR 1527; Minn 230NW266 (liable to assignee of rent note); TexCivA 278SW 302.
630-46 50ND141, 195NW6.
630-48½-New. Where the purchaser merely buys, pays for, and takes possession and does not act inimical to the mortgagee's rights, the purchase does not in itself constitute a conversion. 89 Fla484, 104S780.
630-50 50ND141, 195NW6.
630-50½-New. The purchaser's liability to the mortgagee for conversion of cotton cannot be reduced by the amount the mortgagor paid for picking. Tex CivA 9SW(2d)1044.
630-51 MoA 11SW(2d)1084.
630-53½-New. 316Mo426, 289SW623.
630-54 TexCivA 275SW860.
630-54¼-New. Purchaser of mortgaged property who secreted it without actual notice of the lien is not liable to mortgagee. 34GaA288, 129SE288(1stcase).
631-60 TexCivA 283SW224.
631-63 216Ala252, 112S907.
632-86½-New. A judgment creditor of a mortgagor, seizing and selling mortgaged chattels under judicial sale, is liable to the mortgagee in damages, where he refuses to disclose the names of purchasers, rendering it impossible for the mortgagee to proceed against the property. 10LaA445, 121S355.

632-87 **TexCommnA** 291SW1088.
632-89 4F(2d)763 (purchaser assuming mortgage debt becomes as between himself and seller the principal debtor to mortgagee); 25F(2d)378, 380 [cit CJ]; **Or** 286P588 (becomes principal debtor).
632-92 [a] **Statute imposing liability for indebtedness on purchaser** buying property without requiring affidavit as to freedom from incumbrances is inapplicable to mortgages confected in foreign jurisdiction. 12LaA486, 126S456.
632-94 4F(2d)763 (evidence held not to support finding that purchaser did not assume mortgage debt).
632-96½-New. An agreement of a purchaser of mortgaged chattels with the mortgagee's consent to pay the purchase price to the mortgagee is not without consideration. 47 **Ida**794, 279P302.
633-3½-New. Where makers of a note given for the price of property and who executed a mortgage on the property to secure the price sell the property to a person who agreed to pay the debt, they do not thereby become sureties unless the mortgagee and holder of the note consents to such change of liability. **TexCivA** 274SW274.
633-9 84**CalA**460, 258P162; **CalA** 279 P165 (consent of mortgagee not shown); 201 **Iowa**1171, 208NW860. But see 51 **Nev**53, 268P46. [a] **Where lien of mortgage on crop is invalid,** mortgagee cannot attack award giving proceeds to another. **GaA** 155SE791.
633-9½-New. or ratified it, 84**CalA**460, 258P162.
633-11 38**Wyo** 285, 267P92.
633-14½-New. Where the mortgagor sells mortgaged property with the consent of the mortgagee and pays over the proceeds on account of the mortgage debt, the creditor of the mortgagor cannot complain or subject equities of the mortgagor in property to payment of its judgment. 169**Ark**455, 275SW914.
633-17 See also 38**Wyo** 285, 267P92.
633-18 119**Kan**834, 241P118.
633-18½-New. A mortgagor has the right to apply the proceeds to a landlord's lien assigned to a third person where such lien is superior to a mortgage. 217**Ala**33, 114S468.
633-19½-New. A chattel mortgagee showing either a legal or equitable right to proceeds of sale of mortgaged property in the hands of a garnishee is protected against liability to a garnishing creditor of the mortgagor. 201 **Iowa** 1171, 208NW860.
633-20 **MoA** 22SW(2d)836; 86**Mont**331, 283P420. See also **TexCivA** 8SW(2d) 745. [d] **In Iowa.**-201 **Iowa**1171, 208 NW860. [e] **Unsecured creditors cannot complain** of such sale by mortgage and deposit of proceeds to be held for mortgagee, where there is no fraud. 86 **Mont**331, 283P420.
634-21 [a] **Parties.-MoA** 22SW(2d)836. [b] **Time to sue.-MoA** 22SW(2d)836.
634-26½-New. As between a judgment creditor garnishing proceeds of a public sale held by the mortgagor and the mortgagee, the latter is entitled to the funds where the goods were avowedly sold by the mortgagor and the mortgagee for the benefit of the latter and the proceeds were received by the clerk of the sale for such purpose. 77 **Colo** 595, 238P63.
634-26½-New. Mortgagee may be estopped by agreement to claim payment from purchaser. **LaA** 129S174.
634-32 84**CalA**460, 258P162; **CalA** 279 P165 (vendor receiving proceeds from sale of crop by receiver must account to crop mortgagee for his share); 205 **Iowa** 1281, 217NW806.
634-34 216**Ala**252, 112S907.
635-36 84**CalA**460, 258P162; 200 **Iowa** 1186, 206NW107; 205 **Iowa**813, 218NW 516. [a] **Where proceeds of sale are placed in bank to be applied to person who shall be adjudged owner,** bank made party to litigation is bound by adjudication. 205 **Iowa**813, 218NW516.
635-39 78**Mont**389, 254P417.
635-40 249 **IllA**44.
635-40½-New. Where notes secured are assigned without mortgage, note holders receiving payment from proceeds of sale without knowledge of sale are not liable to other note holder. 142 **Okl** 50, 285P117.
635-43½-New. Where chattels are sold and the proceeds turned over to the receiver of the mortgagor, the mortgagee is entitled to follow such proceeds and impress a lien thereon. **Iowa** 227NW97.
635-47 217**Ala**289, 116S126; 22**AlaA** 204, 114S176; 86**Colo** 216, 280P488(2d case) (issue of right to immediate possession held under facts to depend on title); 119**Kan**834, 241P118. [b] **Lessee's mortgagee of wheat crop** held entitled to recover against purchaser of crop from lessee for conversion of entire wheat crop notwithstanding lessor's one third interest therein. 136**Wash**694, 238 P647.
635-48 **TexCivA** 283SW224. [a] **Essentials to liability.**-89**Fla**484, 104S780.
635-49 316**Mo** 426, 289SW623. See also 22**AlaA**504, 117S490.
635-50 217**Ala**33, 114S468.
635-51 22**AlaA**204, 114S176; 89**Fla**484, 104S780 (purchase with constructive notice).
635-51½-New. Landlord's lien on crops is superior to a chattel mortgage. 217 **Ala**33, 114S468.
635-57 316**Mo** 426, 289SW623.
636-69 202 **Iowa**1140, 211NW568; 204 **Iowa**35, 214NW525, 53**ALR**662; **Tex CivA** 13SW(2d)121. [b] **Complaint held to sufficiently plead foreign law** in action for conversion of automobile under foreign chattel mortgage. 87**Colo** 55, 284P1021.
636-71 316**Mo** 426, 289SW623. [a] (6) In action by mortgagee to charge one purchasing from mortgagor with conversion and seeking damages therefor, mortgagee is not entitled to recover unpaid balance of purchase price. 316 **Mo** 426, 289SW623.
636-72½-New. Where the mortgagee suing for conversion does not claim absolute ownership of property, the complaint must disclose the character and extent of interest at the time of conversion. 75**Mont**466, 244P277.
636-74½-New. Failure to allege that the purchaser converted mortgaged property to the mortgagee's injury and impairment of his security is fatal as against demurrer. 89**Fla**484, 104S780.
636-74½-New. A mortgagee in an action for conversion need only allege the existence of his unsatisfied mortgage. 204 **Iowa**35, 214NW525, 53**ALR**662.
636-74¼-New. In conversion a petition not alleging either the value of the chattel or the damages sustained is held insufficient. 37**Wyo** 365, 261P905.
636-75 [a] (2) To show mortgagee's consent to sell property free from mortgage. 120**Kan**662, 244P1047. [a] (3) To show conversion by purchaser from mortgagor. 316**Mo** 426, 289SW623. (4) To show that mortgagor was required to notify mortgagee of intended sale before authority to sell vested. 221**Mo A**1096, 295SW506. [b] **Evidence held sufficient.**-10**LaA**445, 121S355; **Mo** 5SW (2d)395.
636-76 175**Ark**1169, 300SW407. [a] (5) Mortgagee has burden of showing cotton purchased by defendant was covered by mortgage. 21**AlaA**128, 106S70. (6) Chattel mortgagee, contesting seller's rights to automobile under conditional sales agreement, has burden of proving that seller or his assignee consented to removal to neighboring state. 174**Ark**575, 297SW846. (7) Where mortgage was recorded, purchaser must show actual and unconditional consent to sale. 45 **Ida**340, 262P514. (8) To show that defendant had notice of mortgage. 221**MoA**420, 279SW764. (9) To sustain finding that there was no agreement that mortgage covering crop of sugar beets and all other crops should include sugar beets only. **Utah** 271P226. (10) To sustain finding that mortgagee knew that money received by him came from mortgagor and represented proceeds of mortgaged property. 39**Wyo** 152, 270P541. [c] (3) To show that mortgagor was owner of mortgaged cattle. 202 **Iowa**1140, 211NW568. (4) To show that seller acquired title through mortgagor so as to entitle buyer to invoke recording law. 202 **Iowa**1140, 211 NW568. (5) To sustain finding that description in mortgage was sufficient to put purchaser on notice. 202 **Iowa**1140, 211NW568. (6) To sustain verdict for buyer. 174**Minn**531, 219NW871. (7) To show that purchaser had notice of mortgage. 221**MoA**420, 279SW764. [d] **Where no evidence that mortgage covered cotton sued for** plaintiff, mortgagee, is not entitled to recover. 21**AlaA**128, 106S70. [e] **Evidence held insufficient** to show consent to sale. 142 **Okl** 96, 285 P828.
636-78 213**Ala**31, 104S232; 213**Ala**662, 106S144; 216**Ala**252, 112S907; 217**Ala** 33, 114S468; 179**Ark**71, 14SW(2d)240; **TexCivA** 275SW860 (defendant's actual knowledge of mortgage lien). [b] **Evidence that landlord instructed tenant** to deliver crop to defendant for advances made by him to such tenant is admissible as waiver of landlord's lien in suit for destruction of mortgage lien. 213 **Ala**31, 104S232.
636-79 44 **Ida**332, 257P31, 54**ALR**1527; **TexCivA** 275SW860; **TexCivA** 1SW (2d)437. [a] **Other mortgage not in evidence.**-20**AlaA**643, 104S774.
636-79½-New. The evidence must afford grounds for reasonable belief that property has been sold or otherwise disposed of. 217**Ala**289, 116S126.
637-80 213**Ala**31, 104S232; 217**Ala**289, 116S126; 53**SD**9, 219NW888.
637-81 [a] (4) Evidence as to mortgagee's consent to transfer held insufficient for jury. 78**Mont**389, 254P417.
637-81½-New. Failure of plaintiff to sustain burden of showing cotton purchased by defendant was cotton conveyed is held to entitle defendant to general affirmative charge. 21**AlaA**185, 106S394.
637-82 [a] **Evidence held to authorize instructions.-Mo** 5SW(2d)395.
637-83 144 **Okl** 219, 291P116. [a] 118 **Kan**276, 235P113. [b] (3) Instruction defining rule for determining sufficiency of description of property in chattel mortgages. **Mo** 5SW(2d)395. (4) Other instructions held not erroneous. **Mo** 5SW(2d)395.
637-83½-New. nor impose an undue burden on the purchaser, **Mo** 5SW(2d) 395.
637-86 179**Ark**71, 14SW(2d)240; 89 **CalA**551, 265P551; 44 **Ida**332, 257P31, 54**ALR**1527.
637-87 10**LaA**445, 121S355 (mortgagee, recovering amount for which defendant sold property, cannot complain that his recovery was inadequate, where such amount is in excess of true value of chattels).
637-91½-New. A judgment for the amount of the mortgage debt and expenses necessarily incurred in pursuing the property is not excessive, where it does not exceed the value of the property. 90**CalA**428, 265P954.
637-92½-New. In claim and delivery by a mortgagee for mortgaged property purchased by defendant, attorney's fees are not allowable as in a suit on note and mortgage. 149**SC**192, 146**SE** 604.
638-98 **TexCommnA** 291SW1088.
638-2 [b] (1) 80**Colo** 412, 252P348.
638-2½-New. , questions for the jury, 48**SD**436, 205NW40.
638-3 80**Colo** 412, 252P348.
638-7 94**CalA**738, 271P920; 87**Colo** 55, 284P1021.
639-31½-New. Under some statutes, a mortgagor removing a mortgaged automobile from the county where it was located at the date of the mortgage and selling it in another state is guilty of larceny. 203**Cal** 547, 265P190, 57**ALR** 190.
639-34½-New. Defendant cannot be prosecuted for failure to turn over the proceeds of sale of mortgaged property. 100**TexCr**493, 272SW143.
640-55 10**LaA**492, 120S115; **MoA** 282 SW161; 103**NJL**238, 136**A**412; **Oh** 171 **NE**20; 33 **OklCr**185, 242P580 (rule applies where injury results from waiver of right invited by person injured).
641-62 **Oh** 171**NE**20.
641-67 100**CalA**756, 281P89 (notice in writing to mortgagee as required by

statute rendered unnecessary). [a] **Consent in good faith** by first mortgagee to removal for sale without foreclosure defeats prosecution, though consent of subsequent lienholders is not obtained. 52ND197, 201NW858.

641-79½-New. [§ 365a] 1½. **Absence of Notice of Transfer to Mortgagee.** Statute applies only where transfer is by original mortgagor. 100CalA756, 281P 89.

642-2 152Tenn181, 274SW536 (ownership of property); 145Wash644, 261P 385.

642-4 322Mo 1, 16SW(2d)96.

642-16 TexCr 32SW(2d)457 (copy of mortgage unnecessary).

643-18 122Kan845, 253P402; 152Tenn 181, 274SW536.

643-28½-New. Information charging defendant with selling mortgaged property in violation of statute is not defective because not alleging bank mortgagee was corporation. Mo 18SW(2d)457.

643-29 106TexCr547, 293SW826. [c] **Description as "an undivided half interest in county acres of wheat of the value of over $20"** is held fatally defective. 122Kan845, 253P402.

643-34 322Mo 1, 16SW(2d)96.

644-51 39GaA556, 147SE776(2dcase) (execution of instrument must be proved as laid); 317Mo 840, 297SW34 (failure to inform purchaser); Oh 171NE20.

644-54 [e] **Variance held fatal.**–Allegation of execution of instrument by defendant and another and proof of execution by such other only. 39GaA 556, 147SE776(2dcase).

645-55 Mich 214NW98.

645-60½-New. Where accused was operating a mortgaged truck between states, a criminal intent to defraud the mortgagee by removing the truck from the state could not be presumed. 103 NJL238, 136A412.

645-73 [a] **Admission of mortgage** comporting with description in indictment is not error. 102TexCr2, 277SW 151 (certified copy).

646-90 40GaA529, 150SE453; 239Mich 283, 214NW98; 322Mo 1, 16SW(2d)96; OklCr 268P1116. [b] (1) 239Mich283, 214NW98.

646-1 40GaA529, 150SE453 (instructions held proper). [a] **Instructions held proper.**–That act of agent in making sale was act of defendant if defendant authorized and directed sale. 322 Mo 1, 16SW(2d)96.

646-2 145Wash644, 261P385 (instruction held sufficient).

646-4 100TexCr493, 272SW143 (refusal of special charge error).

647-15 255 IllA558 (lien held not to extend to indemnity paid owner for condemned cows).

647-17 174Ark978, 298SW213; 207Cal 373, 278P863.

647-18 174Ark978, 298SW213. [a] **Loss of lien.**–86CalA339, 260P830. [b] **Lien does not attach to crop not sown or caused to be sown by mortgagor** but sown by another where mortgagor retains no interest thereon. 48 Ida80, 279 P1097.

647-19½-New. Lien is not waived by a mortgagee permitting property to be taken under a writ of replevin instead of giving a redelivery bond. 40Wyo 283, 276P935.

647-19½-New. To constitute a valid lien a chattel mortgage must conform to the laws of the state of the situs of the property. 251 IllA397.

647-20 35Ariz392, 278P384; 232 IllA1; 203 Iowa1380, 214NW546; 125Kan425, 427, 264P1077 [citCJ]; 234Ky613, 28 SW(2d)959; 193NC663, 137SE874; 116 Or570, 242P610; TexCivA 283SW920; TexCivA 22SW(2d)1074.

647-21 52ND197, 201NW858.

647-25 [a] **Chattel mortgagee held to have no title** against conditional seller's assignee, though property was removed and mortgaged without notice, in another state. 174Ark575, 297SW846.

647-27½-New. A mortgagee under a mortgage recorded in a foreign state in the county where the property is situated at the time was entitled to priority in such state as against a subsequent assignee. 35Ariz392, 278P384.

648-32 55ND399, 213NW498.

648-33 252 IllA120.

648-34 TexCivA 11SW(2d)824.

648-36 177Minn441, 225NW389.

649-43½-New. A valid chattel mortgage to secure future advances is effective as against subsequent purchasers and lienholders with notice thereof. TexCivA 8SW(2d)745.

649-51 118Nebr472, 225NW230 (notice of rights of equitable mortgagee).

649-51½-New. The lien of a trust deed, being paramount to chattel mortgages and a bill of sale covering crops grown on land, the purchaser after foreclosure and sale under deed of trust before severance of growing crops was entitled to possession thereof through receiver, as against the holder of chattel mortgages and bill of sale. 320Mo 1208, 9SW(2d) 925.

649-52 [b] **Where purchaser had improvement constructed by intervener and executed chattel mortgage to intervener on one half of crops grown,** intervener releasing title to improvement made in land to vendor was not entitled to crops under chattel mortgage as against vendor foreclosing mortgage. 179Ark667, 17SW(2d)879.

649-54 41GaA18, 152SE121.

649-55 204 Iowa488, 215NW602.

649-56 204 Iowa488, 215NW602.

649-60½-New. Priority is not waived by action in replevin and execution thereon. 24 OhNPNS259.

649-60½-New. A chattel mortgage given as additional security after being recorded without the mortgagee's knowledge in order to evade obligations to another creditor is not entitled to priority over an existing equitable mortgage lien. TexCivA 280SW350.

649-60¼-New. One taking a chattel mortgage in reliance on a bill of sale not recorded as required by statute is held to have an inferior lien as against one taking a later mortgage from the seller who retained possession. 143 Wash187, 254P829.

649-60½-New. Rights under a receivership clause in a real estate mortgage are superior to a chattel mortgage on crops to be grown during the redemption period executed subsequent to the real estate mortgage where the crops were not in existence when foreclosure of such mortgage was commenced. 205 Iowa1216, 219NW523; 207 Iowa164, 219NW528.

649-60⅛-New. In such case failure to index the record of the real estate mortgage in the chattel mortgage index is immaterial. 205 Iowa1216, 219NW523.

649-60½-New. A chattel mortgage on a landlord's crop rental share of growing crops is prior in right to the claim of a receiver appointed in foreclosure proceedings under a real estate mortgage after execution of the chattel mortgage although the real estate mortgage was executed prior to the chattel mortgage and pledged the rents. 205 Iowa801, 219 NW529.

649-60⅛-New. A chattel mortgage by a joint owner purchasing the interest of another joint owner, covering the vendor's interest in the crop, is superior to a prior mortgage executed by the purchaser on the entire crop. TexCivA 2SW (2d)356.

649-60⅛-New. Upon foreclosure of a deed of trust the purchaser takes title to unsevered crops as against a chattel mortgage. 315Mo 811, 288SW774.

649-60 1/10-New. Where two mortgages are both invalid, the subsequent one will not be protected against the prior one which is valid as between the parties to it. BC [1929] 1DomLR995.

649-60 1/11-New. A subsequent mortgage not complying with statutory requisites is not protected against a prior mortgage also invalid under statute but valid between the parties. BC [1928] 3 DomLR153.

649-60 1/12-New. Recorded general mortgage covering after acquired property may be superior to subsequent chattel mortgage. Fla 128S611.

649-60 1/13-New. Rights of holder of recorded real estate mortgage giving lien on rents held superior to mortgage of growing crops executed after commencement of foreclosure suit. 233Ky94, 25 SW(2d)72.

649-60 1/14-New. When a tenant agreed to give a landlord a chattel mortgage on stock and crops sold to the tenant but defendant, furnishing the money, had no knowledge of the facts entitling the landlord to a lien at the time the mortgage was taken for the money loaned, defendant's chattel mortgage was superior to any lien or mortgage of the landlord. MoA 20SW(2d)164.

650-62 [a] **Where mortgagor moved from county in which mortgages were made before they were recorded therein,** second mortgagee in possession of property was entitled to prevail over first mortgagee, irrespective of which mortgage was first recorded. 179Ark116, 14 SW(2d)239.

650-63½-New. Where a prior mortgagee brings replevin but does not take possession, judgment is not constructive notice to a subsequent mortgagor of the purchaser in the regular chain of title. 27 OhA42, 160NE727.

650-64 181Ark406, 26SW(2d)101(1st case); 97Fla996, 122S508; 204 Iowa 590, 215NW647 (foreign record); 206 Iowa775, 221NW470; 11LaA640, 124S 621; 176Minn90, 222NW571; 98NJEq 81, 129A474; 114 Okl 1, 242P209; 149 SC498, 147SE601; 53SD463, 221NW80; 54SD288, 223NW49; 98Vt486, 129A299. But see 27 OhA42, 160NE727. [b] **Affirmative charge for defendant held proper.**–213Ala520, 105S702. [c] **That buyer used money received from seller's surety to pay for machinery covered by purchase-money mortgage** does not give second mortgagee priority. 29F(2d)155.

650-66 176Minn90, 222NW571.

650-70 See also 124Kan649, 261P555.

650-71 [h] **Where first mortgage covered all crops** except share of tenant of mortgagor, and tenant agreed with landlord to rescind crop agreement, taking mortgage to secure payment, it was held that first mortgage was prior lien on all crops. TexCivA 290SW289.

650-74 179Ark403, 16SW(2d)463(2d case).

651-86 See also 228AppDiv577, 240 NYS108.

651-86½-New. Agreement between the parties to real estate mortgages cannot prejudice rights of a chattel mortgagee who was not a party to the transaction. NJ 144A188.

651-86½-New. Where an automobile was not part of a stock of goods when a mortgage was placed on it by a dealer who was purchasing the car for personal use, his subsequent acts cannot destroy the mortgage which is superior to the mortgage given while the car was exposed for sale. TexCivA 15SW(2d) 130.

1651-86¼-New. An agreement between a vendor and purchaser as to giving a chattel mortgage on his crops for improvements, contemplated that the purchaser should not default in payment to vendor. 179Ark667, 17SW(2d)879.

651-87 177Ark83, 9SW(2d)331; 97Fla 996, 122S508; 125Kan425, 427, 264P 1077 [citCJ]; 222Ky521, 1SW(2d)990; MoA 256SW114 (judgment for price); TexCivA 296SW669; TexCivA 21SW (2d)54(2dcase) (defendant purchasing after vendor gave mortgage thereon).

651-88 [b] (2) Carrier's lien is inferior to right of mortgage of which carrier has actual or constructive knowledge. TexCivA 11SW(2d)362. [d] Conditional seller's lien is superior to that of subsequent purchaser without notice of reservation. CalA 284P736.

652-89 [a] **Lien of purchaser under mortgage foreclosure for interest and taxes** is held superior to chattel mortgage executed after mortgage foreclosed. 143Wash614, 255P915.

652-90½-New. A mortgagee cannot object to a lien for storage because an automobile was held without the mortgagor's consent where he requested that the automobile be held. Ind 154NE28.

652-91½-New. A mortgage to secure unpaid purchase money simultaneously with conveyance, and as part of the same transaction, takes precedence of

all other claims and liens against the mortgagor to the extent of the property sold. 214Ala262, 107S741.

652-91⅓-New. Real estate mortgagee, who commenced possessory action against mortgagor's tenant by lis pendens and other notices, gains only constructive possession of the premises, and the landlord's share of growing crops is insufficient to create a lien thereon as against a lien of the crop mortgagee. 80 Mont593, 261P278.

652-91¼-New. A person employed by the mortgagee with the mortgagor's consent to guard oil well tools lying idle on a lease has a lien for his services superior to the mortgage. 134 Okl 40, 272P879.

652-91½-New. A bank advancing money to gin cotton, with notice that the cotton would be ginned while under crop mortgages, is estopped to deny the effectiveness of the mortgages at the time it took warehouse receipts from the tenant in whose name the cotton was registered at the warehouse. 89CalA551, 265 P551.

652-91¾-New. Agreement by mortgagor's creditor as to disposition of proceeds of crop with mortgagee will be enforced although oral. CalA 286P1068 (2dcase).

652-91⅞-New. Seller's rights under conditional sales contract are not subordinate to equitable lien of mortgagee, under mortgage given before title passed to mortgagor and before delivery. Del Ch 149A418.

652-94 219Ala8, 121S33, 63ALR1453; 175Ark1169, 300SW407; 90Fla582, 107 S354; 233 IllA559; 248 IllA385; 165 Minn330, 206NW646, 44ALR1238 (over subsequent written contract); 217MoA 495, 268SW888; MoA 31SW(2d)218; 118 Or665, 248P137; Or 289P500; 149 SC498, 147SE601; TexCivA 276SW959 (in absence of knowledge by mortgagee of prior equitable lien); TexCivA 26 SW(2d)658(2dcase); 152Va520, 147SE 220. See also 104NJL24, 138A695. [a] **Mechanics' lien,** though attaching after recording of chattel mortgage on lessee's improvements attached to realty, is not subordinate to such mortgage in absence of notice thereof by materialman. 165Minn411, 206NW653. [b] **Execution delivered to marshal** has priority over chattel mortgage subsequently filed. 136Misc49, 239NYS221.

652-94½-New. The statutory lien for a purchaser at a real estate mortgage foreclosure sale on crops grown during the period of redemption for interest on the purchase price and for taxes paid and interest is superior to a chattel mortgage on crops made and recorded subsequent to the record of the real estate mortgage. 146Wash137, 262P123.

652-94⅓-New. Lien of pledgee of cotton for preexisting debt before recording of prior chattel mortgage held superior to mortgage lien in view of recording statute notwithstanding provision for recording liens. 132SC374, 129 SE677.

652-94¼-New. Creditors may be made to share ratably with the mortgagee of an unrecorded mortgage where all were simple contract creditors. 16F(2d)767.

652-95 See also 200Cal 494, 254P262, 266 [citCJ]. [b] (3) Rule applied to garage keeper. 24 OhNPNS585.

653-97 40Wyo 283, 276P935.

653-97½-New. That some of cattle delivered to agister were withdrawn from pasture does not affect priority of his lien as to the rest. 48 Ida643, 284P559.

653-98 43 Ida93, 251P167, 172 [citCJ].

653-1½-New. Where cattle are delivered to an agister with mortgagee's consent the contract for feed and pasturage is the mortgagee's contract as well as the mortgagor's. 48 Ida643, 284P 559.

653-2 43 Ida93, 251P167, 172 [citCJ].

653-5 43 Ida93, 251P167, 172 [citCJ].

654-11½-New. A mortgagee cannot complain because of the addition of cattle to the herd upon which an agister had a lien where such added cattle were not covered by the mortgage and at the time of the final sale the mortgagee received the proceeds from all cattle. 43 Ida93, 251P167.

654-12 214Ala370, 108S13. See also 200Cal 494, 254P262.

654-14½-New. A garage keeper's lien for storage is superior to purchase-price mortgage. 127Misc422, 216NYS290.

654-15 TexCivA 16SW(2d)296. But see NC 155SE573. [b] In Texas.-CivA 281SW1101.

654-15½-New. Garage keeper's lien for repairs is superior to purchase-price mortgage. 217AppDiv4, 215NYS789; 127Misc422, 216NYS290.

654-15⅓-New. Under some statutes, where a person who has furnished materials for the repair of personal property at the request of the owner files his lien statement within sixty days after the last material was furnished, his lien is superior to that of a mortgagee whose mortgage was taken after the first material was furnished, although the mortgagee had no actual or constructive notice of the furnishing of the material. 112 Okl 17, 239P585.

654-15¼-New. Under some statutes, repairmen are given a lien superior to any mortgage, including a purchase-money mortgage. 174Ark945, 298SW217.

654-15⅙-New. But in some jurisdictions a repairman's lien on an automobile is superior. 245NY612, 157NE879.

654-17 198Cal 641, 246P1041; 37GaA 141, 139SE113. See also 50SD596, 211 NW451. [b] **Defective acknowledgment** not lien, through failure to comply with statute. 168Ark859, 271SW952.

654-19½-New. Lessor reserving title to tenant and share of crops and right to deduct advances may deduct advances made in good faith and in ignorance of the mortgage. 52ND918, 204NW887.

654-19⅓-New. Where a crop is removed with the consent of the mortgagee or because of lack of diligence, the right of creditors and subsequent purchasers from the mortgagor are not inferior to the mortgage lien. 91CalA738, 267P746.

654-19¼-New. Mortgage lien on landlord's share of crop attaching on division takes priority of his execution creditor's garnishment against tenant. Iowa 232NW633.

654-20 169Ark547, 275SW901 (indorsement of notes to enable to make crops); 214Ky300, 283SW281.

655-21½-New. or execution, 169Ark 547, 275SW901.

655-22 214Ky300, 283SW81.

655-23 GaA 155SE355.

655-24 [a] **Advances and mortgage relating to crops of different years.**-TexCivA 281SW270.

655-25 See also 214Ky300, 283SW81.

655-26½-New. A crop lien executed by a mortgagor after transferring possession of land to the mortgagee, after default in payment of debt, has been held subject to the lien of the landlord for rent, when advancements were made with knowledge that the mortgagor was in possession as tenant of the mortgagee. 196NC163, 144SE691.

655-29 176Minn90, 222NW571.

655-30 129Kan632, 284P420; 197NC 452, 149SE585(2dcase). [b] **Effect of ignorance of landlord's lien.**-Mortgage by tenant on unplanted or ungathered crop is subject to landlord's superior lien, though mortgagee had no knowledge thereof, actual or constructive. 219 Ala263, 122S27 (description in mortgage held not to give notice to mortgagee that crop was raised on rented land).

655-30½-New. or by a subtenant, 169 Ark547, 275SW901.

656-36½-New. Where a mortgagee of a crop had agreed that the mortgage should be subject to the lessor's claim for rent, a subsequent agreement by the lessor that the mortgagee might pay lienable claims for labor and deduct the amount from the proceeds of sale of the crop before paying rent is without consideration as to payments made before the date of the agreement. 42 Ida277, 245P86.

656-36⅓-New. Purchaser without notice of prior chattel mortgage has inferior lien. TexCivA 293SW881.

656-36¼-New. A landlord's lien on a crop is not lost nor its priority displaced by removal of the crop and storage in a mortgagee's warehouse awaiting better price conditions. 219Ala263, 122S27.

656-37½-New. A landlord's statutory lien on a tenant's share of a crop under a recorded lease is prior to the lien of an antecedent crop mortgage given by the tenant before he had any interest in the land. 144Wash483, 258P498.

656-38 202Cal 75, 259P81 (lien for threshing, sacking, and hauling is superior to preexisting chattel mortgage); 54ND371, 209NW780; TexCivA 19SW (2d)71. But see 170Ark322, 280SW1001.

656-39 90Fla582, 107S354. But see TexCivA 9SW(2d)1044.

656-40 [b] **In North Carolina,** statute provides laborer's lien upon crop shall be preferred to other liens attaching to crop subsequent to commencement of work. 198NC511, 152SE501.

656-42 136Misc265, 240NYS639 (although having actual notice of mortgage).

656-44 214Ala506, 108S515; 233Ky 682, 26SW(2d)519; Tex 18SW(2d)1052 (driller's lien); TexCivA 19SW(2d)71.

656-45 214Ala506, 108S515.

656-46 241 IllA568.

656-48 176Ark263, 2SW(2d)1104; 37 GaA821, 142SE565; 205 Iowa508, 218 NW298; 148Wash110, 268P144. [b] **Mortgagee must take possession of property** in order to protect himself against superior laborer's liens. 176 Ark263, 2SW(2d)1104. [c] **Where execution is issued at instance of laborer,** there is not "seizure" under statute so as to entitle laborer to preference over chattel mortgage. 205 Iowa508, 218NW 298.

656-51½-New. Priority of notice of chattel mortgage lien filed with clerk does not give priority over laborer's lien since chattel mortgage lien need not be filed. 198NC511, 152SE501.

656-54 22AlaA627, 118S678; 36GaA 591, 137SE574; 146SC257, 143SE820. [b] **In Texas.**-TexCivA 22SW(2d)985; TexCivA 24SW(2d)457.

657-55 215Ala357, 110S813; 218Ala 341, 118S578; Iowa 232NW722; 162La103, 110S104; 2LaA756; 142 SC46, 140SE247; TexCivA 278SW 247. [c] (2) Where landlord waived lien on first eight bales of cotton in favor of mortgagee on condition that excess of price of cotton should be paid over on mortgagor's rent, mortgagee was not obligated in absence of agreement to see that eight bales were delivered to mortgagee. TexCivA 9SW(2d) 1054. [d] (2) Chattel mortgagee of hogs who becomes such with notice of landlord's lien takes subject to lien. Iowa 230NW559.

657-55½-New. and over a subsequently recorded chattel mortgage, 12F(2d) 617.

657-56 TexCivA 18SW(2d)848. See also 1LaA164 (lease from month to month). [a] (3) Predated lease under which rent was paid for more than first year of contract. TexCivA 8SW(2d) 293.

657-57 22AlaA314, 116S906; 232Ky 76, 22SW(2d)420; 12LaA52, 125S312 (2dcase); TexCivA 25SW(2d)627 (mortgage recorded before rent contract was made); 101WVa700, 133SE 378.

657-59 [a] **Necessity of compliance with statute.**-In Washington lien for rent can be created, evidenced, and preserved, as against subsequent purchasers or encumbrancers in good faith, only by compliance with statutes requiring affidavit of good faith and filing of instrument for record. 151Wash 344, 275P733.

657-62 See 52SD359, 217NW635. [b] **Bank mortgagee of sheep whose mortgage has been paid cannot claim priority under statute over landlord's lien for rent** where order standing between mortgagor and mortgagee was that lien on sheep should continue. 229Ky280, 17SW(2d)223.

658-63 202 Iowa575, 210NW756.

658-64 [b] Where a lessor of farm land reserved in himself title to the ten-

ant's share of the crop until division and settlement with the right to deduct from the tenant's share an amount sufficient to pay any indebtedness owing from the lessee, the lessor as against a chattel mortgagee of the tenant's share of the crop is entitled to deduct from the lessee's share all loans and advances made in good faith without knowledge of the mortgage. 52ND918, 204NW887. [c] **Knowledge by mortgagee** that mortgagor is tenant is not notice that lease gave landlord lien on exempt property. 202 Iowa575, 210NW756.

658–64½–New. A warehouseman seeing a tenant in possession of cotton stored in a warehouse with indicia of full ownership is entitled to protection for advances made without actual notice of any landlord's lien. 219Ala263, 122 S27.

658–64⅓–New. In some jurisdictions a landlord's lien for supplies takes precedence over that secured by mortgages. 178Ark1199, 13SW(2d)608.

658–64¼–New. A contract between the owner of a life estate in land and the holder of a chattel mortgage on crops executed by the grantee under a sheriff's deed, arranging for harvesting and sale of the crop and deposit of the proceeds in escrow pending disposition of an appeal involving the life estate, has been held to give the owner of the life estate, as result of appeal, priority by virtue of a landlord's lien. 208 Iowa 964, 225NW850.

658–64⅕–New. Lien of landlord for supplies furnished tenant is superior to lien or mortgage of one holding tenant's chattel mortgage under statutes in some jurisdictions. 170Ark1194, 282SW689.

658–64⅙–New. Where a tenant purchased cattle from a bank giving his note for the price and the mortgage on cattle to secure them, and the bank thereafter sold them on a mortgage sale, the title was given to secure the price passed by foreclosure to the purchaser, and took precedence over the landlord's lien for rent. 214Ala262, 107S741.

658–64½–New. Where a lease provides that any assignment of the tenant's right to deposit securing rent should be subject to a lien of the landlord, the latter's lien is superior to a lien of a chattel mortgage executed by the tenant on deposit. Mo 23SW(2d)64.

658–67 30NM528, 240P198, 200 [quot CJ]. [a] **Subsequent lease to one of several lessees.**–30NM528, 240P198. [b] **Chattel mortgage recorded prior to renewal of lease** takes precedence over landlord's lien. 12LaA52, 125S312(2d case). [c] **Lien for future rent under tenancy at will created by holding over** extends only for thirty day period and after term existing chattel mortgages have priority. Iowa 232NW722.

658–71 MoA 281SW134. See also 92 CalA62, 267P937 (secret lien of purchaser).

658–72 204 Iowa816, 215NW956.

658–73 204 Iowa816, 215NW956 (attachment).

658–79 CalA 280P1013; 197NC371, 148 SE461.

659–84 43 Ida37, 248P865; MoA 16SW (2d)671; TexCivA 294SW989. [d] **Warehouseman must learn of mortgage** by exercise of ordinary diligence. Tex CivA 294SW989.

659–85 43 Ida37, 248P865; MoA 24SW (2d)641. [a] **What constitutes consent.**–43 Ida37, 248P865.

659–86 127Misc422, 216NYS290. [a] (3) Under Lien L. § 184 as amended, lien of garage keeper for storage, maintenance, keeping or repairing motor vehicle at request of legal possessors is superior to lien of a prior chattel mortgagee. 217AppDiv4, 215NYS789. (4) Lien of warehouseman is superior to that of mortgagee failing to file mortgage. 130Misc293, 224NYS71. [b] **In New Jersey.**–NJCh 148A159.

659–86½–New. Warehouse receipt.–51 ND757, 201NW176.

659–89½–New. The buyer of range cattle under an oral sale who left the seller's brand on them and placed it on their increase letting them roam in open range with the seller's cattle except in winter cannot claim such cattle as against the seller's mortgagee or purchaser under foreclosure in good faith without notice. 31Ariz89, 250P772.

659–89⅓–New. Chattel mortgagee is not buyer at executed sale within California statute giving such buyer better title than seller. Cal 285P1048(1st case).

660–93 218Ala341, 118S578; 124Kan 649, 261P555; 228AppDiv577, 240NYS 108; TexCommnA 23SW(2d)702; Tex CivA 19SW(2d)71. [a] **Chattel mortgagee from lessee under recorded lease and agreement prohibiting removal of fixtures** cannot remove fixtures which lessee was prohibited from removing. 39 Wyo 1, 269P31.

660–94 15F(2d)360; 218Ala165, 118S 286 (filing for record); 51ND225, 199 NW961.

660–96½–New. Recording seller's retention of title contract after execution of mortgage is ineffective to give such mortgagee from purchaser notice. 21 AlaA83, 105S434.

660–96⅓–New. Assignee of mortgage is not bona fide purchaser without notice of agister's lien where he took assignment before removal of cattle from agister's possession. 48 Ida643, 284P559.

660–96¼–New. Notice of a landlord's lien on crops for rent may be constructive, and knowledge of facts which would put a mortgagee upon inquiry is binding. 129Kan632, 284P420.

660–96½–New. A conditional sales agreement recorded but not signed by the vendor does not constitute constructive notice to bona fide purchasers, and a subsequent mortgagee without actual notice has a lien superior to that of the conditional vendor. 153Va183, 149SE 544.

660–96⅙–New. Purchaser or mortgagee in good faith is one who takes without actual or constructive notice of prior mortgage. 200Wis211, 228NW135, 68 ALR267.

661–5 MoA 256SW114.

661–7 44 Ida347, 257P30.

661–14 MoA 274SW853 (creditor may sue to cancel mortgage); 221MoA31, 297SW724 (action held for equity side where one defendant filed bill in nature of interpleader). [e] **Where mortgagee of land took conveyance** to prevent mortgagee of crop who had secured bill of sale from harvesting, question involved is held not to be priority of mortgages but rights between deed and bill of sale of crop. 136Wash214, 239P556.

661–15 MoA 274SW853 (purchaser from trustee for creditors may sue to establish priority). [a] (3) Trustee of express trust may enforce chattel mortgage held by him. 56ND21, 215NW870. [b] **Chattel mortgagee notwithstanding final foreclosure judgment** is required to litigate priority of lienholder subsequently intervening. TexCivA 30SW (2d)364.

661–16 MoA 274SW853 (petition held sufficient); 80Mont593, 261P278 (real estate mortgagee's cross complaint held demurrable).

662–17 170Ark771, 281SW379; 91CalA 176, 266P849; 43 Ida93, 251P167; 205 Iowa813, 218NW516; 219Ky207, 292SW 812; MoA 256SW114 (mortgagee as innocent purchaser); MoA 274SW853 (evidence held to show mortgagee's waiver of right to assert unrecorded mortgage); 49ND274, 191NW478; 56 ND21, 215NW870 (sufficiency to show plaintiff's priority); 56ND103, 216NW 201 (insufficient to show waiver of priority by mortgagee); TexCivA 280SW350; TexCivA 296SW669; Utah 272P941. [a] (1) 93CalA224, 269P573 (evidence held to sustain finding of knowledge of prior mortgage). (2) To defeat replevin by mortgagee, mortgagor must show that mortgagee acquired title with knowledge of fraud or in bad faith. 84Colo 398, 270 P880. [b] (3) Holder of mortgage must prove technical compliance with statute in order to establish priority as against judgment creditor. 329 Ill403, 160NE 545. [g] **Burden of proving execution of mortgage by mortgagor personally** rests on mortgagee asserting priority over judgment creditor. 329 Ill 403, 160NE 545. [h] **Evidence sufficient.**–39GaA639, 148SE166(2dcase) (to sustain finding that landlord's lien for supplies was superior to mortgage); 151Wash574, 276P 558 (to sustain finding sustaining priority of chattel mortgage over claim for stumpage). [i] **Evidence insufficient.**–39 GaA502, 147SE592.

662–18½–New. questions of law and fact, 329 Ill 403, 160NE545.

662–18⅓–New. questions of fact, 219 AlaS, 121S83, 63ALR1453.

662–19 52SD551, 219NW256 (foreclosure or personal judgment for attorney's fees is not authorized where mortgagor is not party).

662–19½–New. and instructions, 214Ala 506, 108S515.

662–21 See also 51ND225, 199NW961, 962 [quotCyc].

662–22 See also Iowa 232NW487.

662–23 See also 168Ark859, 271SW952.

662–26½–New. A chattel mortgagee has the burden of proving that landlord has waived or is estopped from asserting his prior lien for supplies. 170Ark1194, 282 SW689.

662–26⅓–New. The burden is on a crop mortgagee to rebut the presumption of loss of lien created by removal of the crop. 91CalA738, 267P746.

662–26¼–New. To avoid a lien, the purchaser has the burden of proving the purchase for value without actual notice. 208 Iowa656, 226NW9.

662–26⅕–New. Intervener mortgagee claiming superior lien on truck sought to be recovered has burden of issue. NC 155SE253(2dcase).

663–38½–New. Assignment of chattel mortgage to pass legal title to mortgaged property must be sufficient to transfer title to property itself. Ala 129 S53.

663–38⅓–New. Statutes controlling transfer of personal property control nature of assignment of mortgage of such property to transfer title thereto Ala 129S53 (by blank endorsement).

663–39 [b] **Evidence held insufficient** to show value paid for mortgage. Tex CommnA 29SW(2d)978.

663–44 See also 225Ky12, 7SW(2d)492.

663–45 [a] **Assignment containing blank for insertion of assignee's name** is valid on delivery to purchaser of note secured and receipt by assignor from purchaser of consideration for transfer and where purchaser subsequently inserts his name as assignee. 166Minn144, 207NW313.

664–52 82Colo 598, 262P85.

664–62 82Colo 598, 262P85; 98Fla304, 123S785; 251 IllA469; Kan 292P805 (maker of note bound to know facts); Minn 230NW266; 222AppDiv827, 226 NYS254 (reassignment); 225Ky12, 7 SW(2d)492. [d] **In Illinois.**–233 IllA542.

665–69 98Fla304, 123S785; 129 Okl 86, 263P458.

666–74 [a] **No replevin may be had** where notes are not transferred with mortgage. 326 Ill 285, 157NE243.

666–77 22AlaA147, 113S473; 233 IllA 519.

666–81 22AlaA147, 113S473; MoA 20 SW(2d)164 (no rights were acquired by assignee where loan secured was never consummated).

666–84⅓–New. An assignee is not relieved from liability on notes because of a prior mortgage on the property not disclosed, where the property remaining is equal to the balance due on the mortgage. 132SC40, 129SE134.

666–85 233 IllA519.

667–98½–New. An assignee is entitled to credit on notes to the extent of diminution in value where the mortgage on its face purported to be a first lien and was assigned without recourse. 132 SC40, 129SE134.

668–17 [a] **As between mortgagors and their assignee** buying property, for value, primary liability for mortgage deed rests with mortgagor. TexCommnA 291 SW1088.

668–21 30Ariz505, 249P71, 75 [quot CJ]; Mo 23SW(2d)64. See also 218Ala 375, 118S561.

668–22 30Ariz505, 249P71, 75 [quot CJ]. [a] **Finance corporation lending its money only through local banks and loan companies** which indorsed notes to such corporation and depended on the

mortgagor and mortgagee for legal commercial paper but not as its agents is indorsee for value without notice of defect in mortgage. 30**Ariz**505, 249**P**71.

669-25 218**Ala**375, 118**S**561 (mortgage is entitled to same protection as note).

669-30 228**AppDiv**96, 239**NYS**148.

669-31 30**Ariz**505, 249**P**71, 75 [quot CJ]; 61 **OntL**659, [1928] 2**DomLR**256 (though mortgagor and mortgagee had notice). [b] (1) 228**AppDiv**96, 239**NYS** 148.

670-32 30**Ariz**505, 249**P**71, 75 [quot CJ].

670-33 30**Ariz**505, 249**P**71, 75 [quot CJ].

670-34 30**Ariz**505, 249**P**71.

670-35 30**Ariz**505, 249**P**71, 75 [quot CJ].

670-49 221**MoA**420, 279**SW**764, 767 [cit Cyc].

670-51 But see 22**AlaA**147, 113**S**473.

670-52 But see 22**AlaA**147, 113**S**473.

670-53 245 **IllA**148.

671-59½-New. Assignee of a mortgage securing purchase-money notes must prove legal title to the notes in replevin action. 326 **Ill** 285, 157**NE**243.

671-59⅓-New. To support action of detinue by assignee of mortgage, legal title to mortgaged property must pass by assignment. **Ala** 129**S**53 (indorsement of note secured by mortgage is insufficient to transfer legal title).

671-60 Contra 221**MoA**420, 279**SW**764; 221**MoA**420, 279**SW**764.

671-67½-New. Mere delay by the assignee to enforce his rights under the mortgage will not bar his right of action against a junior mortgagee for conversion. 51**ND**310, 199**NW**940.

671-67⅓-New. Cancellation of the mortgage before assignment is a good defense in an action by assignee. 51**ND** 310, 199**NW**940.

672-90½-New. Evidence. Finding that mortgage was properly assigned to plaintiff held not erroneous. 181**Ark** 124, 24**SW(2d)**958.

672-98½-New. Defense of assignor's misrepresentations is available without showing fraud. 132**SC**40, 129**SE**134.

673-3 TexCivA 289**SW**417. See also 146**SC**257, 143**SE**820. [c] **Wrongful conversion of property by mortgagee** extinguishes lien. 129 **Okl** 211, 264**P**194; [d] **Mortgage lien cannot be declared extinguished** and mortgagors equity of redemption annihilated in claim and delivery proceeding by mortgage assignee against lessor of building in which car was stored, without making mortgagor party, even if car is not worth amount of mortgage debts. 146**SC**257, 143**SE**820. [d] **Mortgagor's unlawful removal of property** to another state does not destroy mortgagee's lien. 87**Colo** 55, 284**P** 1021.

673-7 91**CalA** 738, 267**P**746; **CalA** 283 **P**944.

673-8 46 **Ida**231, 266**P**659 (lien on crop continues after tortious removal without consent of mortgagor or mortgagee though it passed into hands of subpurchaser before delivery to purchaser).

673-15½-New. Where a tenant surrenders possession of land, the landowner becomes the owner of the crop free from a claim of the mortgagee on the tenant's interest in the crop. 53**SD**9, 219**NW**888.

674-18 45 **Ida**340, 262**P**514; 130**Kan**30, 285**P**561 (placing OK indorsement on bill of sale reciting sale free of incumbrances); 316**Mo** 426, 289**SW**623, 632 [quotCJ]; **NJSup** 137**A**444. But see 245 **IllA**148. [h] **Facts not constituting waiver of lien.**-36**Wyo** 232, 254**P**128. [i] **Permitting sale with other property.**-164 **La**729, 114**S**633.

674-19 316**Mo** 426, 289**SW**623, 632 [quotCJ].

674-20 316**Mo** 426, 289**SW**623, 632 [quotCJ].

674-21½-New. Acts relied on as estoppel must have resulted in prejudice. 148 **Va**510, 139**SE**267.

674-22 22**AlaA**204, 114**S**176; **CalA** 290 **P**91; 316**Mo** 426, 289**SW**623.

674-24½-New. The question whether the mortgagee of part of the property, by consenting to a sale of the property and application of the proceeds to payment of his claim, waived his lien is immaterial where the proceeds of the part not covered by the mortgage exceeded the garnishment claim. 164**Minn**422, 205**NW**268.

674-24⅓-New. The lien of a chattel mortgage is not lost by the return of the property by the mortgagee to the mortgagor's administrator after institution of foreclosure proceedings, where the return was for the purpose of having the property sold at administrator's sale to save delay and expense. **SD** 225**NW**53.

674-26 17**F(2d)**904; 100**CalA**756, 281**P** 89; 218**MoA**660, 267**SW**445, 448 [cit CJ]; **TexCivA** 271**SW**293; **TexCivA** 283 **SW**224.

674-27 TexCivA 271**SW**293. [c] **Unless other indebtedness entirely wipes out mortgage debt** mortgagee's action to recover possession cannot be defeated. **SD** 231**NW**289.

674-28 218**MoA**660, 267**SW**445, 448 [cit CJ]; 190**NC**480, 130**SE**319 (is divested and passes to mortgagor).

674-30½-New. Usual legal presumption is that debt secured by mortgage is payable where the payor of the note and mortgage resides or has his place of business. 31**Ariz**116, 250**P**770.

674-30⅓-New. Agreement releasing mortgagors from personal liability on payment but reserving right to proceed against property for unpaid balance does not extinguish mortgage indebtedness. **Or** 286**P**588.

675-36 TexCivA 283**SW**224.

676-52 251 **IllA**414.

676-56 [b] **Renewal of note and mortgage** does not as a matter of law discharge old note and mortgage. 169**Minn** 434, 211**NW**838.

676-57½-New. Where the parties enter into a written agreement fixing the amount due and attach it to the mortgage on file, the mortgagor is entitled to a discharge of the mortgage on paying such amount and tendering interest. 240 **Mich**384, 215**NW**320.

676-57⅓-New. Another indebtedness cannot defeat action unless entirely wiping out mortgage debt. **SD** 231**NW**289.

676-58 244 **IllA**379.

677-67 137**Wash**248, 242**P**354. [a] **Mortgagee who accepts and sells mortgagor's share** of crops to pay mortgagee may not deny mortgagor's title for want of division. 132**SC**254, 128**SE**715.

677-70 119 **Okl** 77, 249**P**717.

677-72 TexCivA 293**SW**317.

678-90½-New. A chattel mortgagee who consents to a sale of the mortgaged property in his name must obey instructions of the mortgagor to apply the proceeds to the mortgage secured debt irrespective of his right in the absence of such instructions. 205 **Iowa**1009, 218 **NW**903.

678-93½-New. A trust deed, securing sureties on a forthcoming bond against loss and requiring sale of property on request if sureties should be required to pay the bond or a part thereof, is not discharged by the principal's payment of judgment on the bond by a cashier's check for an amount borrowed on a note indorsed by the sureties who paid it. 148**Va**510, 139**SE**267.

679-5 45 **Ida**620, 264**P**866, 868 [citCJ]; **TexCommnA** 288**SW**405; **TexCivA** 293 **SW**226; **TexCivA** 12**SW(2d)**655.

679-8 [a] **Evidence held sufficient to show valid tender.**-**TexCivA** 12**SW(2d)** 655.

679-12 [c] **Tender is insufficient** where accompanied by condition wrongfully imposed. 73**CalA**476, 238**P**1062.

679-19 155**SC**187, 152**SE**189; **TexCivA** 21**SW(2d)**363 (tender held insufficient).

682-64 See also 36**GaA**458, 137**SE**125.

682-72 46 **Ida**551, 269**P**412, 414 [quot CJ]; 166**Minn**144, 207**NW**313.

682-73 35**F(2d)**18; 46 **Ida**551, 269**P** 412; 248**Mich**171, 226**NW**888; 166**Minn** 144, 207**NW**313; 119 **Okl** 98, 248**P**1107; **SD** 225**NW**53.

683-75 166**Minn**144, 207**NW**313.

683-76 166**Minn**144, 207**NW**313.

683-89 148**Va**510, 139**SE**267.

684-93 116 **Or**570, 242**P**610.

684-95 116 **Or**570, 242**P**610.

684-98 131 **Or**57, 279**P**534; 38**Wyo** 211, 266**P**124.

685-4 172 **Ark**1176, 289**SW**760.

685-7 172**Ark**1176, 289**SW**760, 761 [cit CJ].

685-7½-New. A transaction substituting a new mortgage may be set aside for false representations that there were no other mortgages, although they were shown by record. 25**F(2d)**251.

685-7⅓-New. A junior mortgagee cannot complain of annulment of the subsequent transaction. 25**F(2d)**251.

685-15 100**Vt**41, 134**A**641. [b] **Sale by mortgagee under agreement with mortgagor to save expense of foreclosure** does not waive mortgage lien as regards priority in proceeds between mortgagee and mortgagor's creditor garnishing proceeds. 52**SD**528, 219**NW**206.

685-15½-New. The consent of the holder of a mortgage to a sale of the property without further agreement for a lien constitutes a waiver of the lien. 42 **Ida**48, 246**P**12.

685-15⅓-New. Under a provision in a mortgage on merchandise authorizing a sale in the course of retail business and providing for application of the proceeds on secured notes, receipt of the proceeds from sales exceeding the amount of the mortgage does not discharge the mortgage lien as security for notes not due. 19 **OhA**29.

685-17 TexCivA 28**W(2d)**344; 137 **Wash**248, 242**P**354. See also146**SC**257, 143**SE**820.

686-20 See also 251**Mich**329, 232**NW** 232.

686-26 87 **IndA**167, 157**NE**109; **Tex CivA** 290**SW**299, 301 [citCJ].

686-28 MoA 30**SW(2d)**1087. [b] **Finance company is not responsible** for failure to resell. **MoA** 30**SW(2d)**1087.

687-45 48**Philippine**910, 914 [citCJ].

688-53 See also 48**Philippine**910, 914 [citCJ].

689-57 31**Ariz**155, 251**P**173; **MoA** 274 **SW**353; 135**Misc**571, 239**NYS**103 (mortgagee buying bankrupt mortgagor's real and personal property); **Or** 289**P**500.

689-59 31**Ariz**155, 251**P**173.

689-60 Or 289**P**500.

689-65½-New. Where a purchaser of land who had executed a vendor's lien note sold the land to one who resold it without such reservation and without giving notice thereof to his purchaser, the latter cannot, by purchasing such crop, keep such lien alive against the verbal reservation where he had notice thereof in time to have stopped payment on his check for the purchase price. 116 **Tex**337, 291**SW**219.

689-65⅓-New. A mortgagee's rights in mortgaged property under his mortgage are merged in his repossession thereon on their resale to him by the mortgagor in satisfaction of the balance of the purchase price, and the mortgage ceased to have any legal existence as between parties thereto. **Utah** 272**P**941.

690-68 TexCivA 23**SW(2d)**745.

690-75½-New. The pledgee of a note secured by chattel mortgage has no authority to release, or make a contract to release, the mortgage. 129 **Okl** 128, 263**P**1094.

690-78 TexCivA 19**SW(2d)**386.

690-82 [a] (3) Inadvertent surrender of mortgage on payment of one of debts secured without record cancellation will not affect rights of parties, where subsequent purchaser had no knowledge of surrender. 142**Miss**502, 107**S**874. [b] (4) Other illustrations of sufficient considerations. 206 **Iowa**848, 218**NW**488. (5) Bill of sale of part of chattels for release of rest. **Minn** 230**NW**120. (6) Other instances. **TexCivA** 19**SW(2d)** 386.

691-84½-New. A lessee's assignment of a lease with the lessor's conditional consent thereto indorsed thereon has been held not to constitute a new lease discharging a chattel mortgage given to secure the original lease. 96**CalA** 607, 274**P**578.

691-86 214**Ala**376, 108**S**43; 225**Ky**12, 7 **SW(2d)**492.

691-92 214**Ala**376, 108**S**43.

691-94 220**Ala**297, 124**S**870, 65**ALR** 1313.

691-98 131 **Or**57, 279**P**534.

692-10 127 **Okl** 220, 260**P**502. [a] **Mortgagees held not liable for penalties,** where mortgages were not recorded in

proper judicial district. 173Ark284, 292 SW138.

692–13½–New. Whether debt is paid in full or canceled by accord and satisfaction is immaterial. 214Ala376, 108S843.

692–22 85Mont293, 279P236. [a] See also 131 Or57, 279P534.

692–23½–New. Plaintiff mortgagor, suing for damages for the mortgagee's failure to enter satisfaction, is required to show that the mortgagee's neglect caused rejection of loan as alleged. 131 Or57, 279P534.

693–35 [a] **Only nominal damages may be recovered** where liability for penalty is barred by limitations and mortgagor fails to prove actual damages. 131 Or 57, 279P534.

693–41 38Wyo 211, 266P124 (recital in release that debt was paid is not conclusive). [a] **Effect of release depends largely on right claimed by virtue thereof.**–38Wyo 211, 266P124.

694–55¼–New. Where two persons have separate mortgage liens, a release of his lien by one of them does not destroy the lien of the other. 119Kan834, 241P118.

694–70 96CalA607, 274P578; 214App Div296, 212NYS230. [a] **It is error** to hold plaintiff bound to prove nonpayment. 214AppDiv296, 212NYS230 (in action to obtain adjudication that instrument was mortgage and to foreclose).

695–80 178Ark1199, 138SW(2d)608; MoA 272SW1031 (evidence held sufficient); 49ND1020, 194NW336 (evidence sufficient). [c] 49ND814, 193NW602. [f] **Evidence sufficient to show payment.**–TexCivA 27SW293.

695–82½–New. Evidence has been held sufficient to show an oral release of a chattel mortgage. 119Kan834, 241P118.

695–90 Wyo 283P1100.

695–91 93Vt486, 129A299. But see 103 NJEq319, 143A344. [d] **So long as any part of note secured is unpaid and debt due,** mortgagee has legal right to seize and dispose of mortgaged property. 132 SC254, 128SE715.

696–93 7Alaska1.

696–96 TexCivA 28SW(2d)987; Can [1930] 1DomLR83.

697–6½–New. A provision of the code, that but one action for recovery of any debt or enforcement of any right secured by mortgage may be brought, has been held inapplicable to an action by a mortgagee against a mortgagor and others for wrongful taking and conversion of wool grown on mortgaged sheep. 205 Cal 38, 269P636.

697–6½–New. Holder of chattel mortgage executed by lessee on building to become property of lessor is without right to foreclose. 143 Okl 246, 289P311.

697–12 127Misc903, 217NYS621; 55ND 732, 214NW908.

698–20 [c] **Waiver not shown.**–Mass 171NE226.

698–26 46 Ida551, 269P412.

698–32½–New. Foreclosure right is not lost by appearance in bankruptcy of mortgagor. 204 Iowa1273, 214NW491, 55ALR644.

698–35 TexCivA 178SW(2d)138.

699–41½–New. Transferee of crops is not estopped from foreclosing bill of sale as mortgage by fact of executing escrow deed for purpose of levy and sale. 36GaA591, 137SE574.

699–53 CalA 267P750 (election by assignee); 121Kan825, 826, 250P283 [cit CJ]; 116 Okl 74, 243P512.

699–54 121Kan825, 826, 250P283 [cit CJ].

699–55 121Kan825, 826, 250P283 [cit CJ].

699–56 121Kan825, 826, 250P283 [cit CJ]; 116 Okl 74, 243P512.

699–56½–New. In rendering judgment for plaintiff in an action upon separate and distinct contracts, the court may be authorized to order foreclosure of a mortgage given to secure the performance of either or both of such contracts, the validity of the mortgage not being in issue and plaintiff having asked such relief as ancillary to his action on the contracts. 117 Okl 124, 246P410.

699–56½–New. 117 Okl 124, 246P410.

700–74 [a] **Mortgagee, dismissing sequestration suit and selling mortgaged property to himself, is not relieved from** conditions of replevy bond. TexCivA 29SW1102.

700–75 Iowa 227NW97. [b] **Mortgagee, by suing to foreclose,** held to have elected not to foreclose by power of sale on mortgage. TexCivA 297SW1102.

700–61 116 Okl 74, 243P512.

700–64 116 Okl 74, 243P512.

700–74 214Ala100, 106S595; TexCivA 283SW657.

700–75 160La692, 107S493; TexCivA 283SW657.

701–76 214Ala100, 106S595.

701–77 33 OhA350, 169NE602 (effect of execution sale prior to foreclosure). See also 214Ala100, 106S595.

701–78½–New. However, the right to sue on a note is not confined to showing extinguishment of security where such security was made valueless by mutual consent. 44 Ida27, 255P303.

701–78½–New. Equity suit is not necessary to foreclose equity of redemption under a chattel mortgage investing the mortgagee or trustee with power of sale. 103WVa490, 138SE116.

701–78¼–New. A chattel mortgagee, not delivering to the mortgagor a verified statement of account, as required by statute before he may maintain suit to foreclose, still has the right to his debt and to any other remedy provided by law for enforcement of its payment. 178 Ark807, 138SW(2d)4.

701–84½–New. Where the holder of a chattel mortgage on a herd of cattle forecloses his mortgage and sells those voluntarily surrendered and obtains a deficiency judgment, he cannot thereafter maintain a separate action in claim and delivery for the recovery of animals held by a third person and not disposed of at the foreclosure sale. 42 Ida39, 245 P88. [a] **Statute is inapplicable unless** action directly affects rights of mortgagor under mortgage. 46 Ida231, 266P 659.

701–84¼–New. Some statutes do not preclude enforcement of lien of mortgage after procuring judgment on secured note. Iowa 230NW347.

701–84¼–New. Where the statute prohibits any action on a debt secured other than foreclosure, another statute permitting enforcement of the debt without regard to a lien is construed as restricted to liens other than mortgage liens. 85 Mont310, 278P1002.

702–96 80Mont374, 260P734, 739 [cit CJ].

702–97 80Mont374, 260P734, 739 [cit CJ].

702–98 80Mont374, 260P734, 739 [cit CJ].

702–2½–New. Third party claiming title has remedy by injunction or by proceeding of trial of right of property under claimant's oath and bond. Tex CivA 298SW(2d)436.

702–3½–New. A temporary injunction is held properly issued under statute to restrain the sale until the amount due and the property covered by the crop mortgage was finally determined. 45 Ida 51, 261P665.

703–11 127Misc903, 217NYS621; 70 Utah1, 257P673.

703–12½–New. Burden of proving chattel mortgagee's lack of good faith because he deemed himself unsafe is a question for trial, not for motion for injunction. 127Misc903, 217NYS621.

703–12½–New. The court will not grant mandatory injunction for return of property to the mortgagor where such relief is not asked for in the complaint. 127 Misc903, 217NYS621.

703–12¼–New. A mandatory injunction before trial for return of chattels to mortgagor will not be granted unless right thereto is clear. 127Misc903, 217 NYS621.

703–12½–New. A mortgagor, not paying notes secured before trial of suit to enjoin seizure of mortgaged cattle on foreclosure in a prior mortgage in suit to which the second mortgagee was not a party, had interest therein. 70Utah1, 257P673.

703–12½–New. A mortgagor, considering the amount of the attorney's fee claimed to be unreasonable, may tender to the mortgagee all that he considers due under his contract, and, if his tender is refused, may sue to enjoin the sale of the property to pay such fee. 84Mont 116, 274P497.

703–12½–New. A mortgagor is not entitled to enjoin a sale to pay attorney's fees where he neither paid nor tendered any amount as a reasonable attorney's fee, and the fee is then due the payee of the note which the mortgage secured. 84Mont116, 274P497.

703–15½–New. Under bill and cross bill the court may have power to take account of the amount due on the mortgage, decree payment thereof, order sale, and report and determine deficiency. 235Mich227, 213NW190.

703–22 [a] **Action on bond.**–238Mich 227, 213NW190.

703–24 80Mont374, 260P731 (complaint with prayer for general relief held sufficient). [d] **Complaint and affidavit must state facts** entitling one to injunctive relief. 127Misc903, 217NYS621.

703–25½–New. By necessary implication bill constitutes an offer to do equity by paying balance if found against party invoking accounting in equity. 238Mich 227, 213NW190.

703–25½–New. The defense of failure of consideration not alleged in the bill to enjoin foreclosure is unavailing. 100Vt 468, 139A250.

703–25¼–New. The complaint, in an action to enjoin a sale of chattels to pay attorney's fees considered unreasonable, constitutes an offer to do equity by paying any balance which the court may find still due on the note and mortgage. 84 Mont116, 274P497.

703–25½–New. The answer in such action is in effect a bill for an accounting or suit to foreclose the chattel mortgage. 84Mont116, 274P497.

703–25½–New. Waiver by the mortgagee of the right to foreclose is not available to plaintiff in an action to enjoin the sale, where not alleged in the complaint. 84Mont116, 274P497.

703–25½–New. The court, in such action, may decree that injunction issue unless the payee of the note secured accepts the amount found due to him, and may enter judgment against the mortgagor for the amount so found due, and thus foreclose the mortgage in court. 84Mont116, 274P497.

703–26½–New. In a suit to restrain a chattel mortgage sale, where the property was sold following dissolution of a temporary injunction and before filing of answer, the court, on apt amendments, could retain jurisdiction for the purpose of ascertaining title and assessing plaintiff's damages. 258Mass562, 155NE426.

703–26½–New. In a suit to restrain a chattel mortgage sale, where the property was sold following dissolution of a temporary injunction and before the filing of an answer, the court could retain jurisdiction for the purpose of ascertaining title and assessing plaintiff's damages. 258Mass562, 155NE426.

703–26¼–New. In a suit to enjoin a chattel mortgage foreclosure sale, prayer for relief "for such other and further relief" warrants a decree for damages for sale after filing of the bill. 258Mass 562, 155NE426.

703–26½–New. In a suit to enjoin a chattel mortgage sale, where the sale was made after dissolution of a temporary injunction, it was error to dismiss the bill and the court should have retained the bill and committed it to the master for assessment of damages as for conversion of property. 258Mass562, 155NE426.

703–26½–New. Plaintiff, in a suit to restrain foreclosure sale of chattel, is entitled to have its title established and damages fixed notwithstanding the sale took place following dissolution of a temporary injunction. 258Mass562, 155 NE426.

704–27 44Philippine763.

704–29 44Philippine763.

704–31 236Mich501, 211NW71.

704–35½–New. A sale by consent of all parties is equivalent to a sale under a power contained in the mortgage. 124 Okl77, 254P29.

704–35½–New. A power of sale, given in a mortgage to a designated person

may not be delegated to another unless so provided expressly or by plain implication, in instrument. **TexCivA** 17 **SW(2d)**138.

704-53 [a] (1) 117 **Okl** 111, 245**P**591. (2) Sale of property pending suit while property in custodia legis may constitute conversion. 117 **Okl** 111, 245**P**591.

705-54 73**CalA**391, 238**P**816; 37**GaA** 172, 139**SE**102 (statute as to notice held applicable to justices' courts and not to superior courts). [e] **Chattel mortgagee, suing for possession of property** described in mortgage in order that it may be sold to pay note secured, on which there were no credits, is not required to furnish mortgagor with an itemized statement as prerequisite, since account is not sued on. 178**Ark**807, 13 **SW(2d)**1.

705-55 **TexCommnA** 284**SW**920; **Tex CivA** 218**SW(2d)**590. But see **NS** [1927] 3**DomLR**13.

705-56 **TexCommnA** 284**SW**920.

705-60½-New. Some statutes permitting removal of proceedings to the court may be taken advantage of by anyone who has a proper interest in the matter. 135**Wash**664, 238**P**614.

705-60¼-New. A case for removal is presented where there is a bona fide defense to the foreclosure. 135**Wash**664, 238**P**614.

705-61½-New. The power cannot be executed before the time prescribed by the instrument. 220**MoA**230, 297**SW**115.

706-70 [a] **In Idaho.**-42 **Ida**638, 248**P** 19.

707-92 166**Minn**383, 208**NW**11 (notice held sufficient to cover after-acquired property).

707-4 47 **Ida**514, 277**P**20 (must be served on all mortgagors found within county, whether one or more are absent from county).

708-18 [d] **Mortgagee must sell within reasonable time.**-**MoA** 272**SW**1040.

708-19 83**Colo** 242, 263**P**719; 166**Minn** 383, 208**NW**11, 13 [citCJ]; **MoA** 274 **SW**526; 222**AppDiv**7, 225**NYS**288; **NS** [1927] 3**DomLR**13. [b] 98**Vt**486, 129**A** 299. [e] **Mortgagor has remedy** against mortgagee when sale not fairly made or for adequate price. 35 **OhA**54, 171**NE** 602. [f] **Showing that mortgagee sold automobile at price grossly inadequate** and in utter disregard of mortgagor's rights makes prima facie case of conversion. 35 **OhA**54, 171**NE**602. [g] **Whether chattel fairly sold held for jury.** -35 **OhA**54, 171**NE**602.

708-20 22**F(2d)**211, 213 [citCJ] (purchase by mortgagee).

708-23½-New. Temporary postponement of sale does not show improper conduct, violating the rights of the assignee for the benefit of the corporate mortgagor's creditors, on the part of an auctioneer endeavoring to obtain the highest price. **Mass** 165**NE**612.

708-23⅛-New. Refusal to adjourn a sale after a successful bid has been made, on the ground that many persons have left, is within the auctioneer's sound discretion and not improper, in the absence of a showing that further adjournment would be likely to result in obtaining a higher price. **Mass** 165**NE**12.

708-23¼-New. Transactions whereby mortgagee sold property after acquiring it on foreclosure sale pursuant to agreement made while mortgagor was in possession have been held constructively fraudulent. 51**Philippine**184.

709-24 **Ill** 173**NE**345 (sale not conducted in places stipulated in statute is invalid). [b] **Property used in interstate commerce** after execution of mortgage is not removed from operation of statute with reference to place of sale. **Ill** 173**NE**345. [c] **Statute is for benefit of mortgagor** and must be complied with by mortgagee. **Ill** 173**NE**345.

709-26 **TexCommnA** 284**SW**920.

709-27 **TexCommnA** 284**SW**920.

709-29 54**SD**288, 223**NW**49. [a] **Sale should be in county where all reside,** if several mortgagors live in same county. **Ill** 173**NE**345.

709-38 [b] (1) **Ala** 130**S**323.

709-40 35 **OhA**54, 171**NE**602; 124 **Okl** 77, 254**P**29.

710-41 124 **Okl** 77, 254**P**29.

710-45 **Mass** 165**NE**12; 166**Minn**383, 208**NW**11.

710-54 220**Ala**86, 124**S**234(2dcase); **TexCommnA**284**SW**920.

710-65½-New. The auctioneer's change in the terms of sale from cash to credit is within his discretion where he acts in good faith. **Mass**165**NE**12.

711-75 82**Colo** 130, 257**P**357; **Mass** 165**NE**12, 166**Minn**383, 208**NW**11, 13 [citCJ].

711-76 **TexCivA** 294**SW**295, 297 [cit CJ].

711-80 **CalA** 289**P**224; **Can** [1930] 4 **DomLR**876; **Sask** [1929] 2**DomLR**835 (rule not changed by Distress Act).

711-82 [c] **Equity will more readily set aside foreclosure sale** at which mortgagee is purchaser. 101**NJEq**569, 139**A** 389.

711-83 35 **OhA**54, 171**NE**602; **Can** [1930] 4**DomLR**876.

713-99 But see 137**Misc**488, 242**NYS** 579.

713-1 3**F(2d)**232; 144**Wash**241, 257**P** 622.

713-6½-New. The exercise of the power of sale granted in a chattel mortgage is in itself a foreclosure of the mortgage and a complete adjudication, having the same effect as though conducted in court. 84**Mont**116, 274**P**497.

713-6¼-New. Defendant taking chattels on void foreclosures under chattel mortgages became trustee for plaintiff's equity of redemption. 137**Misc**488, 242 **NYS**579.

713-8 46 **Ida**657, 270**P**621; 253**Mass**551, 149**NE**542; **MoA** 208**SW(2d)**296 (grantor under trust deed attending sale estopped). See also **TexCivA** 108**SW(2d)** 163. [c] **Effect of failure to file return of sale.**-Failure of person conducting summary foreclosure to transmit return of proceedings to clerk of court does not invalidate purchaser's title. 46 **Ida**657, 270**P**621. [d] **Failure to issue bill of sale** does not affect purchaser's title. 46 **Ida**657, 270**P**621.

713-11 **NJSup** 152**A**205.

713-12 151**Miss**558, 118**S**623.

713-13 119**Kan**389, 239**P**968, 969 [cit CJ].

713-15 **TexCivA** 258**SW(2d)**929 (where holder of first chattel mortgage took bill of sale from mortgagor).

713-17½-New. A purchaser at a mortgage foreclosure sale under a mortgage not intended to cover after-acquired property may not claim property subsequently acquired by the mortgagor. 42 **Ida**688, 247**P**791.

713-17⅛-New. A purchaser at a sale under a mortgage not covering after-acquired property takes no title to such property as against a subsequent mortgagee under an unrecorded mortgage. 42 **Ida**688, 247**P**791.

713-17¼-New. Mortgagee purchasing at a sale is entitled to profit on resale. 253**Mass**551, 149**NE**542.

713-17⅛-New. A bona fide purchaser at a sale under a trust deed, proceeding against claimants of the property, is not responsible for an act of ownership after sale exercised by the former owners without his knowledge or consent. 148 **Va**601, 139**SE**288.

713-17¼-New. Where a second chattel mortgagee, on purchasing the property at a sale by a receiver appointed in a mortgage foreclosure suit, took certain cars of coal, knowing that laborers who had intervened in the suit had liens thereon for unpaid labor, and that the only possible way in which they could be paid was from proceeds of such property, the laborers' liens were superior to the second mortgagee's lien. 178**Ark**643, 128**W(2d)**6.

714-23 83**Colo** 242, 263**P**719.

714-28 51 **Nev**53, 268**P**46.

714-30½-New. Evidence has been held sufficient to show an agreement that a person making advances to develop a crop should have priority in payment over creditors secured by a crop mortgage. 95**CalA**490, 273**P**103.

714-30⅛-New. Provision for application of surplus proceeds to redemption of realty is not operative when the redemption period expired without payment and the mortgagor's trustee in bankruptcy was entitled to the surplus. 47 **Ida**188, 273**P**950.

715-31 **TexCivA** 218**SW(2d)**590 (second chattel mortgagee is entitled to preference over unsecured creditors). But see **Ark** 328**SW(2d)**300.

716-54 [a] **Creditors of mortgagor, failing to secure lien** on property before mortgagee took possession, cannot require mortgagee to account for proceeds of sales. 35**F(2d)**840.

716-65 42 **Ida**638, 248**P**19; **TexCivA** 286 **SW**258. [a] (3) Contention that no opportunity was given mortgagors to surrender property before service of affidavit and notice held ineffective. 48 **Ida** 580, 283**P**613. [b] **Action for deficiency** cannot be maintained, unless mortgage sells in strict compliance with statutes. 42 **Ida**638, 248**P**19; 46 **Ida**289, 267 **P**1078. [c] **Mortgagee selling without mortgagor's consent and without statutory foreclosure** cannot recover deficiency. **Ida** 290**P**405.

716-65½-New. **Action for deficiency.** The statute as to summary foreclosure of chattel mortgages must be strictly followed to authorize subsequent action for deficiency. 47 **Ida**514, 277**P**20.

717-68 51**Philippine**184.

717-69 [g] **Seizure held not wrongful.**-**TexCivA** 17**SW(2d)**138.

717-73 **TexCivA** 274**SW**176, 179 [quot CJ]. [b] **Foreclosure cannot be impeached** because value of property was greater than mortgage, where sale was fair and in conformity with mortgage. 128 **Or**21, 271**P**738.

717-74 **TexCivA** 274**SW**176, 179 [quot CJ].

717-76 **TexCivA** 274**SW**176, 179 [quot CJ].

718-78 118 **Okl** 231, 247**P**353.

718-81½-New. Actions of tort for wrongful and negligent foreclosure of a chattel mortgage, and conspiracy to defraud the mortgagor, cannot be maintained in the absence of illegality or wrongful acts in the foreclosure proceedings. **Mass** 165**NE**12.

718-81⅛-New. The motive of a mortgagee, acting wholly within his legal rights, in foreclosing a chattel mortgage, is unimportant. **Mass** 165**NE**12.

718-81¼-New. In an action for wrongful foreclosure of a chattel mortgage, and conspiracy to defraud plaintiff, evidence has been held not to show conspiracy by defendants to commit a wrongful act. **Mass** 165**NE**12.

718-81⅛-New. Evidence has been held insufficient to show bad faith or negligence in foreclosure of mortgage. **Mass** 165**NE**12.

718-81⅛-New. Chattel mortgagors of property illegally sold are entitled to such credit as property would have brought at legal sale. **CalA** 289**P**224.

718-81½-New. In Philippines mortgagee has been held accountable for full value of property converted which was not covered by the mortgage. 51**Philippine** 184.

718-81½-New. Statutes give owner of property right of action against mortgagee to recover one third of its value for failure to give required notice of foreclosure sale. 255 **IlA**447 (burden of proof and admissibility of evidence).

718-87 148**Va**601, 139**SE**288.

718-93 **NS** [1927] 3**DomLR**13.

718-95 See also 242 **IlA**302 (effect of setting aside foreclosure on ground of fraud).

719-12 217**MoA**147, 273**SW**420.

720-17 [a] 217**MoA**147, 273**SW**420.

720-23 143**NYS**770 [aff on other grounds 162**AppDiv**936mem, 147**NYS** 1114mem]. **Erratum.**-Text should read: "It is improper to unite in one action the foreclosure of several chattel mortgages, given to secure different obligations, some of which are claimed by one defendant and some by others."

720-24 54**ND**925, 212**NW**215.

720-36 **Wyo** 283**P**1100.

720–36½–New. A mortgagee is not required to foreclose within a certain time after taking possession of the mortgaged chattel on condition broken. 146 SC257, 143SE820.

712–44 But see **TexCivA** 21SW(2d) 1084.

721–48 116 Or641, 242P613; 126 Or213, 267P1070.

721–55½–New. In an action to foreclose a mortgage, a counterclaim by defendant for damages sustained is properly allowed. **TexCivA** 10SW(2d)391.

721–55⅓–New. In jurisdictions where by statute crops both matured and unmatured are personalty, the mortgagor's want of valid title to premises on which crops are grown, and outstanding title in third person not a party to the suit, do not bar foreclosure by mortgagee. 163Ga276, 136SE662.

721–56 176Ark463, 3SW(2d)295 (absolute sales as mortgages).

721–58½–New. A chattel mortgage lien may be foreclosed by an action in a court of record. 132Misc734, 230NYS 425.

722–65¼–New. An action has been held properly brought in the county where one of several defendants resides although the property is located elsewhere. **TexCivA** 2SW(2d)1023.

722–77 243Mich495, 220NW769.

722–78 [b] **Mortgagee in disposing of mortgaged property** taken from assignee of mortgagors in suit to which assignee was not party acts at his peril. **Tex CommnA** 291SW1088.

722–78½–New. although the contrary has been held, 243Mich495, 220NW769.

723–86½–New. It is not incumbent on plaintiff to bring in as a party a person contracting to rent machinery involved in the foreclosure suit from defendant, with full knowledge of the suit. **TexCivA** 11SW(2d)611.

723–86½–New. The personal representative of a deceased mortgagor may not be joined for the purpose of binding the estate for the payment of any deficiency. 116 Okl 74, 243P512.

723–97½–New. When no personal judgment is sought service by publication is sufficient. **Ala** 128S438.

723–97½–New. Where the dates of notes and a chattel mortgage are at variance and an order for executory process granted plaintiff varies from the notes as to the names of the payee and plaintiff, such variances are fatal to the order. 11LaA49, 123S403(1stcase).

723–98 [a] **Necessity of verification.**–7 LaA472.

723–99 TexCivA 300SW98. [d] **Petition held sufficient.**–**TexCivA** 32SW(2d) 670.

724–12 214Ala100, 106S595.

724–21 TexCivA 300SW98. [a] **Prayer for general relief** held to warrant relief against buyer from mortgagor. **TexCivA** 300SW98.

725–26 [b] **Allegations insufficient.**–**TexCivA** 10SW(2d)391.

725–44 TexCivA 17SW(2d)862 (description).

725–45 TexCommnA 10SW(2d)690; **TexCivA** 19SW(2d)365; **TexCivA** 19 SW(2d)386. [a] See also **TexCivA** 19 SW(2d)365. [c] 170Ark610, 280SW663; 175Ark337, 299SW9 (to sustain verdict for defendant purchasing crops subject to prior lien for advances); 83CalA276, 256P582; 84CalA460, 258P162 (to sustain finding as to amount of unsecured indebtedness); 36GaA362, 136SE801; 36 GaA360, 136SE824; 37GaA172, 139SE 102 (to sustain verdict crediting mortgagor with wood and logs cut by mortgagee); 224Ky65, 5SW(2d)475 (to show assignee of chattel mortgage did not consent to its removal from state); 169 Minn457, 211NW673; 51Nev53, 268P46; **TexCommnA** 10SW(2d)690 (to require finding that mortgagor was not owner of car at time he executed mortgage thereon); **TexCivA** 272SW819 (to sustain finding that automobile was worth five hundred dollars when replevied by mortgagor during pendency of foreclosure proceedings, in which judgment for that amount was secured against sureties on replevy bond); **TexCivA** 290 SW925; **TexCivA** 18SW(2d)709; **Tex CivA** 25SW(2d)944 (to sustain finding that crop belonged to mortgagor's son and that mortgagor had no interest therein); **TexCivA** 32SW(2d)670 (to sustain judgment); 66Utah501, 243P796 (to sustain finding that possession of sheep was in mortgagors during controversy and that plaintiff merely advised mortgagors at their request in managing and disposing of sheep); 145Wash 214, 259P391, 56ALR447. [f] **Tex CommnA** 10SW(2d)690; **TexCivA** 19 SW(2d)365. [g] **Plaintiff makes prima facie case** by introducing note and chattel mortgage in evidence. 85CalA360, 259P460.

726–46 [a] (2) 49ND751, 193NW252.

726–47½–New. Evidence of giving of notice by buyer to seller of breach of warranty is admissible to establish counterclaim. 52ND112, 202NW280.

726–48 TexCivA 283SW623.

726–49 TexCivA 283SW623.

726–50½–New. Evidence held to warrant judgment for defendant because of fraud. 54ND883, 211NW979.

726–50⅓–New. Evidence as to ownership held sufficient. 74CalA629, 241P 574.

726–50¼–New. A mortgagee is not required to prove the title of the mortgagor as against one claiming by purchase from the mortgagor. **TexCivA** 21 SW(2d)54(2dcase).

726–51 31NM469, 247P1066, 1067 [quot CJ].

726–52 31NM469, 247P1066, 1069 [quot CJ].

726–53 31NM469, 247P1066, 1069 [quot CJ].

726–54 TexCivA 19SW(2d)328. [a] (2) Affidavit must be filed as part of record either as part of original petition or as separate paper before issuance of writ of sequestration. **TexCivA** 289 SW751.

726–55 90Fla282, 105S823. [f] 90Fla 282, 105S823. [g] 90Fla282, 105S823. [h] See also 90Fla282, 105S823. [i] **Writ is in nature of injunction,** creates no lien, which already exists by virtue of mortgage, and serves merely to hold property within court's jurisdiction. 90 Fla282, 105S823. [j] **Property so attached and retaken under statute** requires no order of court for restoration. 90Fla282, 105S823. [k] **Property subject to seizure.**–Where crops grown on land owned by mother and children were mortgaged by two children under circumstances not estopping other owners from claiming interest in crops, levy of attachment on interest other than mortgagor's is unlawful. 206 Iowa28, 217 NW453.

726–56 214Ala100, 106S595; 130Misc 503, 224NYS429 (warrant improperly issued). [c] **Statute is permissive only** and jurisdiction of court to render judgment is not conditioned upon seizure of property under warrant. 51ND280, 199 NW769.

727–62 203 Iowa1380, 214NW546; 50 Nev91, 252P322; 49Philippine647, 654 [citCJ].

727–66 203 Iowa1380, 214NW546.

727–72½–New. Receiver should not be appointed as to purchaser where the mortgagor sold to the purchaser without notice, the mortgagee having given consent to the sale. 50Nev91, 252P322.

728–78 TexCivA 288SW566.

728–91 TexCivA 295SW959.

728–93 85CalA360, 259P460.

728–96½–New. Whether the seller misrepresented hotel property is a question for the jury. **MoA** 298SW101.

728–97½–New. Where the evidence shows that a claimant purchased mortgaged property with notice of the mortgage and identifies the property mortgaged, it is error to direct a verdict for claimant. 36GaA362, 136SE801.

728–97⅓–New. Instructions held proper are listed below. **MoA** 298SW101.

728–98 33Wyo 474, 240P683 (where personal judgment not sought).

728–98½–New. That the judgment determines the amount due on the mortgage and the amount of attorney's fees does not render it a personal judgment so as to entitle defendant to a jury trial. 33Wyo 474, 240P683.

728–98⅓–New. Where no personal judgment is demanded, a prayer that a special master be appointed to take possession of the mortgaged property does not convert the action into one for the possession of personal property so as to entitle defendant to a jury trial. 33 Wyo 474, 240P683.

728–4 81CalA579, 254P296 (failure, in action for foreclosure and accounting, to fund value of property held not error).

728–4½–New. Verdict insufficient to support judgment of foreclosure. **Tex CivA** 277SW1114.

729–9 116 Or641, 242P613 (recoupment and abatement of unliquidated damages for fraud set up by defendant mortgagor to extent of damage sustained, not exceeding amount due under mortgage).

729–15½–New. The mortgagee, succeeding in a suit, is not entitled to have property, sequestered and retained by defendants on giving bond, forthcoming for delivery to said mortgagee, **TexCivA** 276SW439.

729–15⅓–New. but only to have the property returned to the sheriff to be sold to satisfy judgment. **TexCivA** 276 SW439 (construing Texas statutes).

729–15¼–New. In case of property sequestered and retained by the mortgagor on giving bond, it is error to require, as a prerequisite of discharge of sureties, that the property be delivered in undamaged condition, unless it is shown that the property was damaged while held under the bond. **TexCivA** 276SW439.

729–15⅙–New. The extent of the liability of the sureties on such bond is fixed by the terms of the bond. **Tex CivA** 276SW439.

729–15⅛–New. A sale should not be decreed where it would be futile and promote further confusion and litigation because of the superior rights of partnership and copartners. **SD** 227 NW841(2dcase).

729–16 CalA 271P755 (taxes held properly allowed); **TexCivA** 3SW(2d)835. [a] (7) Allowance in decree for taxes paid by mortgagee where such payment not alleged in complaint. **CalA** 267P 750. [b] (2) Increase of property is properly included in decree of foreclosure where complaint states that increase is included in mortgage. 33Wyo 474, 240P683.

730–18 TexCivA 276SW439 (contradictory directions for delivery of sequestered property erroneous).

730–23 [a] **In Texas.**–**TexCivA** 284SW 332.

730–24½–New. Failure of a decree to preserve the equity of redemption has been held not to be error. **CalA** 267P 750.

730–24⅓–New. On proper proceedings the mortgagee is entitled to entry of foreclosure judgment when the mortgagor was owner of property at the time of execution of mortgage. 74Cal A629, 241P574.

730–33 TexCivA 272SW323; **TexCivA** 273SW885.

730–34½–New. Execution. The provision in the statute and execution for its return within sixty days is directory. 51ND280, 199NW769.

730–34⅓–New. Unless an execution, issued upon the foreclosure of a chattel mortgage, is arrested by a counter-affidavit, it is final process. 34GaA186, 129 SE13.

730–34¼–New. The judgment may not be attached collaterally in an action for replevin of property sold thereunder. 141Wash389, 250P106.

731–45½–New. One filing a petition of intervention after a decree of foreclosure ordering sale of the property, whose claim was based on facts alleged in the petition which were denied by the answer, has the burden to prove such allegations. 218Ala498, 119S211.

731–45⅓–New. Where a person claiming an interest in the property based on facts alleged in the petition and denied by answer intervenes after a decree of foreclosure ordering sale, a note of the testimony is necessary. 218Ala498, 119 S211.

731-45¼-New. Where mortgagee sequestered crop not covered by mortgage owner is entitled to recover net value of his interest in crop destroyed while in mortgagee's possession. **TexCivA** 25 **SW(2d)**944.

731-46½-New. The purchaser of mortgaged property is bound to know as matter of law that he could not obtain a good title from the sheriff other than by statutory procedure. 197**Wis**227, 221**NW**741.

731-47 But see 54**ND**322, 209**NW**379.

731-49 1**LaA**313.

731-53 [a] Party desiring sale in separate units should make timely application. **Fla** 128**S**611.

731-57 54**ND**322, 209**NW**379.

731-58 [c] **Report of sale** is prima facie evidence of facts therein stated. 54 **ND**322, 209**NW**379.

731-59½-New. Where mortgaged property was attached on a claim that the mortgage was fraudulent and the court upheld the attachment and ordered a sale on the ground that the property was perishable, but only part of the property was delivered to the purchaser and such part was replevied from him and he paid no part of the price and the parties treated the sale as abandoned, the court may properly confirm a resale of the property. 34**Wyo** 332, 243**P**394.

732-65 MoA 274**SW**1106 (purchaser's title depends on mortgagor's at time of mortgage).

732-67 [e] **Evidence held sufficient** to show purchaser's title. 141**Wash**389, 250**P**106. [f] **Purchaser at foreclosure sale under mortgage given by one having no title** cannot retain property against holder of mortgage given by owner. 56**ND**637, 218**NW**603.

732-69½-New. Mortgagor entitled to allowance for personalty belonging to him that was unaccounted for by mortgagee receiving all mortgaged property at foreclosure. 181**Ark**1147, 26**SW(2d)** 591.

732-71 TexCivA 276**SW**439.

733-84½-New. Where it does not appear that the holder of a mortgage on an automobile purchasing the car at foreclosure sale had collected collision insurance in an amount in excess of that paid for repairs resulting from damages sustained in the collision, the mortgagor is not entitled to have credit for the amount received by plaintiff from the insurance company. 9**LaA**516, 121**S**263.

733-84½-New. In a suit by the holder of a note and mortgage to recover the balance remaining due on the note after foreclosure, defendant has the burden to establish that plaintiff's purchase of the mortgaged property at foreclosure sale was made under agreement to sell and credit the balance over cost of foreclosure proceedings on the note secured. 9**LaA**516, 121**S**263(1stcase).

733-86 47 **Ida**726, 278**P**224(3dcase).

733-88½-New. Where the writing sued upon is too indefinite and contradictory to establish a mortgage lien personal judgment may be rendered on the promise to pay. 39**GaA**397, 147**SE**406.

733-91 99**CalA**756, 279**P**487.

733-94½-New. In some jurisdictions the court, in an action to foreclose a chattel mortgage, is without jurisdiction to render a money judgment against the personal representative of a deceased mortgagor. 116 **Okl** 74, 243**P** 512.

733-95 99**NJEq**839, 133**A**299; **Tex CivA** 292**SW**269.

734-96 99**NJEq**839, 133**A**299; **Tex CivA** 10**SW(2d)**257. But see 206 **Iowa** 28, 217**NW**453.

734-97½-New. Where proceeds of crop were in court for distribution, judgment ordering payment to the chattel mortgagee with six per cent interest held erroneous where the note secured bore ten per cent. 170**Ark**928, 282**SW**3.

734-97½-New. On foreclosure of a first mortgage on cattle it is error to allow payment to a second mortgagee, before satisfaction of the first mortgage, of a sum stipulated for in the second mortgage for care of the cattle, to which neither the first mortgagee nor his successor in title were parties. 31**Ariz**155, 251**P**173.

734-97¼-New. Proceeds of foreclosure of chattel mortgage given to secure two debts, where insufficient to satisfy both debts, should be divided proportionately between them. 253 **Ill**A51.

734-3½-New. Where a seller recovered judgment, refusal to foreclose lien and judgment against the sureties on the purchaser's replevin bond is erroneous. **TexCivA** 10**SW(2d)**391.

734-3½-New. A contention that the trial court abused its discretion in setting aside the jury's verdict is tantamount to a contention that the findings are not supported by the evidence. 85 **CalA**360, 259**P**460.

734-4 [a] (2) Attempted foreclosure of several chattel mortgages in one proceeding, under Comp. St. § 6380, by marshaling separate debts and securities in blanket affidavit not showing amount claimed under any particular note and mortgage, is invalid. 48 **Ida** 424, 282**P**943. [b] **Statute must be strictly complied with.**-48 **Ida**424, 282**P** 943.

735-38 41**GaA**211, 152**SE**264 (property held sufficiently identified). See also 37 **GaA**350, 140**SE**390.

735-43 [a] **Liability of sheriff for keeper's fees.**-(1) Possession of mortgagor as keeper is not possession of mortgagor as such as affects claim against sheriff for labor and materials furnished in caring for cattle. 45 **Ida** 499, 263**P**481.

735-43½-New. As against the mortgagors, it is competent for the sheriff, after levy and seizure of cattle, to appoint one of the mortgagors as keeper pending sale. 45 **Ida**499, 263**P**481.

736-68 [a] **Sufficiency of evidence.**-Evidence that property was covered by mortgage and was in mortgagor's possession when mortgage was executed sustains plaintiff's burden. 41**GaA**211, 152**SE**264.

736-69 41**GaA**211, 152**SE**264 (evidence held insufficient).

737-70½-New. Evidence has been held insufficient to establish the identity of property levied on with the mortgaged property. 36**GaA**223, 136**SE**102.

737-71½-New. [§ 573a] 7½. **Sale.** Where the sheriff appointed the mortgagor as keeper of mortgaged cattle pending sale, the mortgagor's claim for keeper's fees and feed for the cattle constitutes a debt of the mortgagee deductible by the sheriff from the proceeds of sale. 45 **Ida**499, 263**P**481.

737-71½-New. Where the mortgagor assigns such claim to the purchaser at the sale, the sheriff is under no duty to collect the same as a credit due to the mortgagor. 45 **Ida**499, 263**P**481.

737-71¼-New. In such case the mortgagee cannot complain because the sheriff accepts such claim from the purchaser as part payment. 45 **Ida**499, 263 **P**481.

737-72½-New. Under some statutes action against the mortgagor is the only remedy for recovering a deficiency. 45 **Ida**499, 263**P**481.

737-73 45 **Ida**499, 263**P**481, 483 [cit CJ].

737-75 [a] **Services as caretaker.**-Where sheriff installed mortgagor as caretaker, mortgagee is not entitled to allowance for mortgagor's services on theory that labor and new material added to mortgaged articles belong to mortgagee under doctrine of accession. 135 **Wash**464, 238**P**3.

737-80 222**MoA**230, 297**SW**115.

738-86½-New. Liability of sureties on bond. The liability of sureties on a bond by which the mortgagor retains possession of the property cannot be extended so as to impose upon them the costs of the litigation. **TexCivA** 276**SW** 439.

738-89 See also **CalA** 271**P**755.

738-91 See also 4**LaA**536.

738-93½-New. or if unincorporated in the pleadings. **CalA** 271**P**755.

738-99 [a] **In Idaho.**-48 **Ida**424, 282**P** 943.

738-3 CalA 267**P**750; 84**Mont**116, 274 **P**497. Contra 207**Cal** 457, 278**P**1035, 63 **ALR**1308.

738-4½-New. Filing a claim with a mortgagor's assignee for the benefit of creditors, which is resisted, is an action entitling the mortgagor to attorney's fees under a provision in the notes therefor. 204 **Iowa**739, 212**NW** 573.

738-4½-New. Where the attorney's fee becomes immediately due upon its being placed in his hands for collection, the fee is not forfeited by a subsequent sale of the security without a court order. **TexCivA** 8**SW(2d)**194.

739-5½-New. Where a note secured by a chattel mortgage provides for an attorney's fee in a stated percent of the face amount of the note, accrued interest should not be included in computing the amount of the attorney's fee. 33 **Wyo** 474, 240**P**683.

739-5½-New. Attorney's fees for services rendered to a receiver appointed in foreclosure proceedings may be allowed, although the receiver did not obtain permission to employ an attorney where he availed himself of counsel's advice. 168**Ga**443, 148**SE**87.

739-5¼-New. A sheriff selling property to pay a mortgage as provided therein has no judicial power to determine what is a reasonable attorney's fee. 84 **Mont**116, 274**P**497.

739-7 Ala 128**S**438; 146**SC**257, 143**SE** 820. [a] **In case of conditional sale,** contract may be treated in equity as mortgage and redemption allowed. 214 **Ala**582, 108**S**450.

740-11 [b] **Conditional sales contract will be treated in equity** as mortgage, and vendee offering to do equity permitted to redeem. 214**Ala**582, 108**S**450.

740-18½-New. In some statutes "equity of redemption" is used in the common sense denoting title or estate remaining in the mortgagor whether or not the condition of the mortgage has been broken. 98**Fla**186, 123**S**699(2d case).

741-31 128**Me**386, 147**A**867.

742-40 5**F(2d)**633.

742-43 222**AppDiv**7, 225**NYS**288.

744-76½-New. Defendant taking chattels under void foreclosure is entitled to apply on its debt value of chattels in accounting in plaintiff's action to redeem. 137**Misc**488, 242**NYS**579.

744-78 But see 137**Misc**488, 242**NYS** 579. [a] 49**ND**467, 191**NW**615.

744-88 [b] 49**ND**467, 191**NW**615.

745-98 Ala 128**S**438 (bill held not wanting in equity).

745-2½-New. Supreme judicial court of Maine has jurisdiction of bill to redeem chattel mortgage. 128**Me**386, 147 **A**867.

745-4½-New. Where the answer fully informs plaintiff of the nature of evidence of title of one defendant by a bill of sale, it is sufficient to require plaintiff to plead fraud if relied on. 115 **Or** 306, 237**P**671.

745-7½-New. Decree requiring delivery of possession and other relief held proper. 128**Me**386, 147**A**867.

746-14 197**Cal** 117, 239**P**1050. [b] **Provision permitting mortgagee** to take possession on default does not require him to sell property. **TexCivA** 292**SW** 271. [c] **In action to recover balance on note** and for foreclosure, judgment permitting officer to levy on other property of mortgagor if unable to find mortgaged property held valid. **Tex CivA** 292**SW**271.

746-16 197**Cal** 117, 239**P**1050.

746-16½-New. without fault of the mortgagee. 197**Cal** 117, 239**P**1050.

746-20 [b] **In Oregon.**-286**P**588.

746-20½-New. But the statute does not prevent action on notes secured by the mortgage where the security has been destroyed without fault of the mortgagee. 197**Cal** 117, 239**P**1050.

746-23½-New. Under statutes in some jurisdictions maturity of a mortgage debt may be accelerated so as to give the mortgagee the right to immediate action for recovery thereof where he has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed. 136**Wash**573, 240**P** 906.

746-23½-New. Action may be main-

tained on the notes received by a chattel mortgage without first exhausting the remedy on the mortgage. 222App Div827, 226NYS254.
746-30½-New. In particular actions the evidence has been held sufficient to support a finding that all of a crop described in a mortgage was destroyed without fault of the mortgagee by rain and aphis so as to give the mortgagee the right to bring action on note secured. 197Cal 117, 239P1050.

CHAUFFEUR

746-3 [a] **Driver of heavy self-propelled vehicle** plying on public streets and capable of great speed. 230Mo 613, 132SW1143, 33LRANS216.

CHECK or CHEQUE

748-23½ 202 Iowa899, 211NW506, 50 ALR388; 127Misc487, 216NYS509; 115 OhSt340, 154NE244; TexCivA 278SW 459, 462 [quotCJ].

CHECKERBOARD SYSTEM

748-24 TexCivA 278SW459, 462 [quot CJ].

CHILD or CHILDREN

751-61 32Ariz573, 261P40, 41 [citCJ]; 60 OntL323, [1927] 2DomLR1161.
751-63 44Philippine921.
752-81½-New. Child, in its common acceptance is the "persona o animal respecto de see ,padre o de sce madre." Span. Royal Academy D. quot [44Philippine921].
752-81¼-New. The ordinary acceptation of the word "hijo" (child) does not include "nieto" (grandchild). 44Philippine921.
752-82 25F(2d)262 (right to admission of alien).
752-87 TexCivA 280SW310.
752-88 32Ariz573, 261P40, 41 [citCJ].
752-96 Ont [1927] 3DomLR546. See also 163Ga520, 136SE551, 50ALR615.
753-2 126Kan610, 612 [citCJ]; 125 Okl 101, 256P722.
755-17 See also 32Ariz573, 261P40, 41 [citCJ].
756-20 156Tenn168, 299SW770, 772 [quotCJ].
756-42 Mo 31SW(2d)778.

CHIROPRACTICS

758-86 214Ala209, 106S852, 854 [quot CJ].

CHIROPRACTOR

758-88 214Ala209, 106S852, 854 [quot CJ].

CHLOROPHYL

758-99 See also 14CustA323.

CHOCOLATE

758-5 See also 13CustA404.

CHRONIC

761-80 256Mass568, 153NE13.
762-81½-New. Not synonymous with "incurable." 256Mass568, 153NE13.

CHURCH

762-93 Fla 126S135.
762-3 NJCh 147A195.

C. I. F.

765-75 6PaDist&Co 623.

CIPHER

766-93½-New. A secret or disguised written communication unintelligible to one without a key. 148Md210, 129A14.
766-93⅓-New. Cipher unintelligible jargon. 148Md210, 129A14.
766-93¼-New. The word cipher means obscure, unintelligible. 148Md210, 129 A14.

CIRCUMSTANCES

768-26 80CalA494, 251P943, 945 [quot CJ].
768-27 80CalA494, 251P943, 945 [quot CJ]. [b] **Other definitions.**-160La548, 107S402.
768-29 80CalA494, 251P943, 945 [cit CJ].
768-31 80CalA494, 251P943, 945 [cit CJ].

CIRCUMSTANCIAS

768-39 45Philippine137 (nocturnity and previous conviction of crime are aggravating circumstances).
768-40 45Philippine137.

CIRCUMSTANTIAL EVIDENCE

769-42 107TexCr134, 295SW608.

CITATION

771-63 [a] **"Citation** is writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named to do something therein mentioned." 100NJEq24, 134A 904, 907.

CITIZENS

772-1 256Mass568, 153NE13.
773-2 256Mass568, 153NE13.
773-3 256Mass568, 153NE13.
773-4 256Mass568, 153NE13.
773-5 256Mass568, 153NE13.
774-13 22F(2d)147.
774-16 256Mass568, 153NE13.
774-17 205 Iowa108, 215NW661.
774-18 256Mass568, 153NE13.
774-22 256Mass568, 153NE13.
774-24 256Mass568, 153NE13.
776-32 6F(2d)670.
776-41 201Cal 236, 256P545, 53ALR 1279.
777-43 198 Ind95, 151NE411.
777-44 201Cal 236, 256P545, 53ALR 1279.
777-53½-New. "Citizenship" may be defined and the privilege limited by congress. 6F(2d)670.
777-56 22F(2d)554 (congress cannot restrict such effect of birth); 316Mo 31, 292SW434; 45Philippine289.
778-57 3F(2d)592; 23F(2d)862; 316 Mo31, 292SW434; 45Philippine289.
773-58 45Philippine289.
778-59 45Philippine289.
778-60 45Philippine289.
778-61 45Philippine289.
778-62 45Philippine289.
779-67 But see 24F(2d)316.
779-68 But see 19F(2d)951.
779-70 20F(2d)148; 24F(2d)686, 687 [citCJ].
779-71 274US657, 47SCt772, 71Led 1284 (child of citizen born outside of United States before residence of father in United States held not citizen).
780-73 24F(2d)243 (expatriated American mother becoming naturalized).
780-75 21F(2d)801, 802 [quotCJ]; 26 F(2d)588.
780-76 21F(2d)801, 802 [quotCJ].
780-81 See also 25F(2d)210.
780-82 20F(2d)957.
780-83½-New. Applicant for repatriation upon the basis of parent's citizenship must prove that same was derived through the mother and not the stepfather. 26F(2d)148.
780-84 But see 30F(2d)984.
780-86 5F(2d)596; 7PaDist&Co 556, 557 [citCJ]. [c] (2) Marriage of alien prostitute to citizen after her illegal entry does not confer citizenship. 272Fed 783.
781-90 4HawaiiFed437. But see 4 HawaiiFed692.
781-90½-New. The child of a mother becoming a citizen by marriage becomes a citizen. 26F(2d)148.
782-99 [a] (3) That native was under twenty-one years of age when he declared intention not to become citizen does not invalidate declaration where he was over eighteen. 13PortoRicoFed 30.
783-7 [a] 45Philippine289.
783-9 8F(2d)473, 474 [citCJ].
783-10 6F(2d)957; 7F(2d)357. [f] **Congress has power to say** what act shall expatriate citizen and forfeit right to protection abroad. 6F(2d)670.
784-14 [b] Contra 177Minn289, 225 NW158.
784-15 28F(2d)44 (entering foreign military duty during minority does not affect rule).
784-17 299Fed571 (employment in foreign country with American firm).
784-18 24F(2d)686, 688 [citCJ].
784-20-21 17F(2d)647, 650 [quotCJ].
784-22½-New. Expatriation is not limited to cases where there has been naturalization in a foreign state or the taking of oath of allegiance to such state. 34F(2d)219.
785-23 17F(2d)647, 650 [quotCJ]. But see 31F(2d)738.
785-24½-New. One who became a citizen by his mother's marriage to a citizen is not expatriated by enlistment in the Canadian army during the World War. 26F(2d)148.
785-26 29F(2d)527. [a] **Evidence held sufficient** to show taking of oath of allegiance to foreign country when entering military service. 34F(2d)219.
785-27 55AppDC295, 5F(2d)119. [d] **Computing time of absence.**-55AppDC 295, 5F(2d)119.
785-31 [a] **Act is not retroactive** and has no application to one married before passage of statute. 14PaDist&Co 170.
785-33 28F(2d)1004(1stcase) (statute declaratory of common law); 35F(2d) 1007; 36F(2d)481; 222MoA341, 300 SW540 (woman citizen of United States marrying British subject becomes British subject).
785-35 20F(2d)957 (statute held declaratory of common law).
785-36 31F(2d)762.
785-37 31F(2d)762.
786-38 32F(2d)911. [a] **Under act of 1922,** woman does not lose her citizenship by marriage to foreigner unless she renounces or unless husband is ineligible to citizenship. 14PaDist&Co 170.
786-38½-New. Congress may provide that marriage to an alien shall expatriate. 22F(2d)554.
786-38⅓-New. **Substantial testimony** must sustain the fact of marriage to an alien to deprive a native-born citizen of citizenship. 22F(2d)554. [a] **Evidence held insufficient** to show marriage of citizen in China to alien, half Chinese and half East Indian. 22F(2d)554 (secret marriage by Mohammedon priest, and Chinese customs not observed).
786-38¼-New. The fact that some ceremony was performed in a foreign country and that the applicant for admission believed she was married does not establish marriage to an alien. 22F(2d) 554.
786-38⅕-New. The fact that an applicant for admission sought a divorce and obtained an interlocutory decree does not establish marriage to an alien. 22 F(2d)554.
786-40 8F(2d)473, 475 [citCJ].
786-41½-New. [§ 20a] e½. **Resumption of Citizenship.** Congress has power to prescribe prerequisites for resumption of citizenship after expatriation. 6 F(2d)670.
786-41⅓-New. [§ 20a] F. **Repatriation.** Act as to repatriation of citizens who lost citizenship by taking oath of allegiance to foreign allied country does not apply to citizen who took such oath to allied country after this country entered World War. 289Fed814.
786-48¼-New. The legal presumption is that members of a dissolved corporation which was an American citizen because of its incorporation under state laws were also American citizens. 24 F(2d)683.
787-56 [a] (9) Native-born citizen should not be deprived of privilege of citizenship without substantial testimony. 22F(2d)554.

CITY

787-4 175Ark645, 300SW380, 382 [cit CJ].
788-13 175Ark645, 300SW380, 382 [cit CJ].
788-15 168Ark1108, 273SW707.
788-16 168Ark1108, 273SW707.
788-17 175Ark645, 300SW380, 382 [cit CJ].
788-27 But see 321 Ill 230, 151NE481.
789-31 168Ark1108, 273SW707.

CIVIL OFFICE

797-79 79Mont506, 257P411, 53ALR 583.

797-80 79Mont506, 257P411, 53ALR 583.
797-82 79Mont506, 257P411, 53ALR 583.
797-84 [b] (1) 79Mont506, 257P411, 53ALR583.

CIVIL OFFICER

797-84 [b] (2) 10PaDist&Co 23, 25 [quotCJ].
797-85 94Fla620, 113S913, 915 [citCJ].
798-99½-New. State motor vehicle commissioner and special assistant to attorney-general are civil officers. 94 Fla620, 113S913.

CIVIL RIGHTS

802-22 273US536, 47SCt446, 71Led759.
802-23 273US536, 47SCt446, 71Led759.
802-24 233Mich373, 206NW532, 42ALR 1267. [a] **Invasion of rights by private contract.**-233Mich373, 206NW532, 42 ALR1267.
804-43 TexCivA 30SW(2d)722.
804-47 239Mich318, 214NW241, 53 ALR183.
805-51 239Mich318, 214NW241, 53 ALR183.
805-52 323 Ill 138, 153NE667, 49ALR 499.
805-57½-New. The intent and purpose of the Civil Rights Act is to prevent discrimination against any person because of race, creed, or color, with special reference to negroes, as to accommodations in places where the public is invited to attend, 239Mich318, 214NW241, 53ALR 183.
805-57⅓-New. but it does not prevent excluding the rough, boisterous, and rowdyish element. 239Mich318, 214NW 241, 53ALR183.
805-64 81Colo 25, 253P386, 50ALR 1263.
806-65 33Ariz1, 261P629; 148Miss462, 114S332.
807-72 144Miss732, 106S113.
807-73 81Colo 25, 253P386, 50ALR 1263.
809-93 79CalA390, 249P524.
810-6 323 Ill 138, 153NE667, 49ALR 499; 239Mich318, 214NW241, 53ALR 183.
811-17½-New. Regulation assigning portion of parks for negroes only and other portions for whites exclusively is not unconstitutional. 233Ky688, 26SW (2d)554.
811-20 OklCr 274P896.
811-21 OklCr 274P896.
811-22 [b] **Intentional discrimination** held not shown by mere fact that negroes had not been drawn for jury duty for many years. TexCr 7SW(2d)1078. [c] **Evidence held insufficient** to show intentional discrimination in selection of grand and petit jury. TexCr 7SW (2d)1078.
811-23 OklCr 274P896.
812-32 239Mich318, 214NW241, 53ALR 183.
812-40 239Mich318, 214NW241, 53ALR 183. [a] **Negro school children claiming discrimination** by school order may sue for themselves and others similarly situated. 81Colo 25, 253P386, 50ALR 1263.
813-49 323 Ill 138, 153NE667, 49ALR 499.
813-52 144Miss732, 106S113.
813-61 [a] 323 Ill 138, 153NE667, 49 ALR499. [b] 133Misc584, 233NYS411. [c] **Judgment held against weight of evidence.**-126Misc335, 213NYS379 (for defendant).
813-64½-New. [§ 34a] 5⅓. **Findings.** A finding, that plaintiff was not accorded full accommodations, advantages, facilities, and privileges applicable alike to, and given by, defendant to persons of the white race, is direct and certain. 79CalA390, 249P524.

CLAIM

816-47 Wis 230NW698.
817-76 170Minn92, 212NW171.
817-83 116 Or195, 237P974.
818-85 170Minn92, 212NW171; 116 Or 195, 237P974 (any demand for damages).
818-86 170Minn92, 212NW171.
819-94½-New. Claim used in statute in sense of "cause of action." 213Ala 369, 104S662.
820-97½-New. A claim is much more comprehensive than a lien and is generally a liability in personam, while a lien is a liability in rem. 144Va56, 131 SE437.

CLASP

828-42½-New. A fastening by which things or the parts of a thing are bound or held together. 13CustAUS462.

CLEAR

833-18 TexCivA 283SW303, 305 [cit CJ]. [a] **Similar definitions.**-33 OhA 452, 169NE836.
835-59 82Mont393, 267P296; TexCivA 283SW303.

CLERICAL ERROR

839-58 218Ky259, 291SW32, 35 [cit CJ] 51ALR281.
839-60 218Ky259, 291SW32, 35 [cit CJ] 51ALR281.

CLERK

841-84 283Pa345, 129A92.
841-86 283Pa345, 129A92.
841-87 283Pa345, 129A92.
841-88 283Pa345, 129A92.
841-91 283Pa345, 129A92; 11PaDist &Co307, 309 [citCJ].

CLERKS OF COURTS

848-1 [c] **Clerk of justice's court as "officer" distinguished from "employee."**-CalA 289P199.
848-3 17F(2d)379; 133Misc83, 230NYS 765; 135Misc724, 238NYS310.
849-5 250 IllA247.
849-17½-New. Clerks of municipal courts are not officers of an inferior court. 79CalA780, 251P324.
849-17⅓-New. Clerks of the municipal court are necessary adjuncts of that court. 79CalA780, 251P324.
850-43 143Miss821, 107S659.
854-93 225AppDiv47, 232NYS182.
854-94 [b] **Evidence held insufficient** to show that person was de facto clerk with authority to certify transcript on appeal. 169Ark368, 275SW706.
855-12½-New. Intention to mislead will not be imputed to county judge in telling elected county clerk that he would approve bond after time set by statute. 219Ky185, 292SW785.
857-38½-New. Office of county court clerk cannot be declared vacant for failure to give bond within the time prescribed by statute where judge told the clerk elect that he would approve bond on following day. 219Ky185, 292SW 785.
858-42½-New. A vacancy occurs on the creation of a new court of record with clerk thereof in which case regular term of clerk does not begin until first general election thereafter. 94Fla986, 114 S889.
858-45 94Fla986, 114S889.
860-73½-New. After a finding by jury of a sufficient cause for removal, the judge of a superior court still has discretion to determine whether the finding shall be enforced or suspended. 160Ga 520, 127SE759.
860-88½-New. A clerk of a superior court cannot be removed by the judge of a superior court under a statute for misconduct as ex officio clerk of a city court. 34GaA281, 129SE299.
860-88⅓-New. The failure of a clerk of a superior court to give a bond required as ex officio clerk of a city court will not authorize removal as clerk of a superior court. 160Ga520, 128SE759.
860-88¼-New. Incapacity or misconduct as ex officio clerk of a city court will not authorize the removal as a clerk of a superior court. 160Ga520, 128 SE759.
860-88⅕-New. Misconduct covering acts as clerk of a superior court and ex officio clerk of a city court is sufficient ground for removal as clerk of a superior court. 34GaA281, 129SE299.
860-88⅙-New. Appointment of wife as deputy is ground of forfeiture under constitutional provision for forfeiture for appointment of relative within fourth degree. Mo 28SW(2d)363.
861-91 [c] **Notice of hearing and hearing necessary.**-NJ 149A765.
861-97 [b] **Verdict finding clerk of superior court guilty of one charge** will authorize removal, though other counts are not sustained by evidence. 160Ga 520, 128SE759.
861-3½-New. Allegations of a petition that acts of misconduct are illustrated by an auditor's report on file in the office of a clerk of court are sufficient as to particularity and to put defendant on notice. 34GaA28; 129SE299.
861-5½-New. Where records relative to cases are in evidence, it is not error to admit dockets on the ground that defendant is charged with irregularity in keeping them. 34GaA281, 129SE299.
861-5⅓-New. In a suit to remove a clerk of a superior court, it is error to admit evidence as to the conduct of defendant as an ex officio clerk of a city court. 34GaA281, 129SE299.
861-8½-New. Where a petition in a suit to remove a clerk of a superior court contains counts alleging misconduct in that office and as an ex officio clerk of a city court, a conviction under each and all counts is illegal except as it may appear from the evidence that defendant was necessarily found guilty of misconduct as clerk of a superior court. 34GaA281, 129SE299.
861-8⅓-New. Where a petition in a suit to remove a clerk of superior court for alleged misconduct in that office and as an ex officio clerk of city court convictions as to counts charging misconduct as clerk of city court sustained by evidence are authorized. 34GaA281, 129 SE299.
861-9½-New. In Georgia a motion to remove a clerk of a superior court is quasi criminal and the statute must be given strict construction in favor of respondent. 160Ga570, 128SE759.
861-9⅓-New. In a proceeding to remove a clerk of a superior court, his conduct relative to his duties as an ex officio clerk of a city court is irrelevant and immaterial. 160Ga520, 128SE759.
861-9¼-New. After finding by jury, the judge of a superior court has no discretion in determining what is a sufficient cause for removal, except to adjudge the finding contrary to law or evidence on motion for new trial. 160 Ga520, 128SE759.
861-9⅕-New. Allegations of a petition for removal of a clerk of a superior court charging misconduct both in that office and as an ex officio clerk of city court are not subject to general demurrer on the ground that conduct as a city clerk is not ground for removal, a special demurrer or motion to strike being necessary. 160Ga520, 128SE759.
861-13½-New. In a suit to remove clerk of a superior court, refusal to allow defendant to make a statement is harmless where he voluntarily gives testimony under oath. 34GaA281, 129SE 299.
861-13⅓-New. Judgment predicated on conviction upon five counts in a petition for removal of a clerk of a superior court, unauthorized as to counts charging misconduct as an ex officio clerk of a city court, will be set aside and the case remanded. 34GaA281; 129SE299.
862-16 See also 160Ga570, 128SE759.
863-34 217Ala199, 115S252; 146Miss 885, 112S595. [f] **Exemption of duty to account.**-TexCivA 291SW611. [g] **Statute held to intend to enlarge fees paid.**-Fla 129S861.
864-33 30F(2d)960.
864-43 312Mo 157, 279SW33. [a] **Where amending act is void,** salaries remain as of statutes prior to amending act. 312Mo 157, 279SW33.
864-46 129Kan806, 284P367.
864-48 79CalA780, 251P324.
864-50½-New. The statute operates to decrease a clerk's salary where the county drops to a lower class. 156Miss171, 125S96.
865-56 31Ariz56, 250P361; 201Cal 602, 258P49 (not entitled to fee for filing

protests against formation of bridge and highway district). [j] **Filing motion to dismiss bill** for insufficiency of facts alleged is "paper joining issue," requiring payment of five dollars filing fee. 13F(2d)953. [k] **Statute requiring collection of fee for filing of paper joining issue** means issue of fact. 17F(2d)779. [l] **Intervention.**–17F(2d)779.

865–57 17F(2d)779.

865–58 17F(2d)779.

866–64 146Miss885, 112S595.

868–71 17F(2d)779. [e] (3) Clerk of circuit court is entitled to compensation for making final records where nolle prosequi was entered or defendant was discharged. 217Ala199, 115S252.

868–79 TexCommnA 298SW417 (district clerk held entitled to same fees in city, town, and school, as in state and county, tax suits).

870–1 300Pa256, 150A471 (after demand and refusal clerk is entitled to recover interest). [h] **In Kansas.**–129Kan806, 284P367.

871–3 300Pa256, 150A471.

871–4½–New. Where statute fixes prothonotary's compensation in making copies of record, he cannot agree to furnish copies at another price. 300Pa256, 150A471.

871–6 [b] **In Minnesota.**–168Minn385, 210NW105.

874–19 157Tenn326, 8SW(2d)367.

875–33 Fla 129S861.

875–40 [a] (1) Mo 292SW1027; Mo 5SW(2d)403 (clerk of circuit court).

876–46½–New. Under statutes final determination of the salary of a clerk of the probate court rests with the board of county commissioners. 48 Ida462, 282P867.

876–46⅓–New. The salary of a clerk of the probate court may be paid only as authorized by statute. 48 Ida462, 282P867 (cannot be lawfully paid if not included in county budget).

877–52 [a] (2) In Iowa, under statute, clerk of district court is not entitled to retain compensation provided for service on commission of insanity. 207 Iowa 1135, 222NW348.

877–61½–New. An accounting for fees collected should be had in the court of which recipient is clerk. 129Kan806, 284P367.

878–82 [g] **In California.**–289P199.

879–89 258Mass190, 154NE856.

880–1 [f] See also 228Ky168, 14SW(2d)405.

882–26½–New. or that he accepted warrants for amounts less than is due him, 312Mo157, 279SW33.

882–33 21AlaA442, 109S187.

882–33½–New. Assignment without notice of judgment cuts off clerk's equities. 21AlaA442, 109S187.

882–42 [a] **New clerk.**–208Ky757, 271SW1048.

882–46 231Ky386, 21SW(2d)474 (deduction of fee for failure to state what references in exhibits were). [b] 217Ky419, 273SW720. [c] **Stenographer's fees forfeited or denied.**–214Ky572, 283SW1032.

883–47 157Miss371, 128S103. [a] (3) Fee forfeited for failure to index transcript. 214Ky31, 282SW551.

883–50 208Ky782, 271SW1083; 214Ky353, 283SW117; 232Ky781, 24SW(2d)603; 233Ky691, 26SW(2d)536 (failure properly to index record); 234Ky1, 27SW(2d)389.

883–52 [c] **Fees forfeited or denied.**–209Ky451, 272SW917; 214Ky572, 283SW1032.

884–67 [b] **Clerk's duties held purely statutory,** with need for conformity with requirements of statute. 91Fla1015, 109S220.

884–70 [e] **Orders of probate court** are not entered in exercise of chancery powers but under the inherent power of that court to control its own administrative functions. 224 IllA363.

886–99 [a] **Exercise of powers concurrently with judge.**–57ND196, 220NW901 (application for marriage license made to county judge not proceeding in county court under statute authorizing clerk to exercise certain powers).

886–1 Or 289P495.

887–20 328 Ill 27, 159NE237.

887–21 44 Ida751, 260P431 [citCJ].

887–23 44 Ida751, 260P431.

887–28 TexCommnA 108SW(2d)984.

888–31½–New. It is the duty of the clerk of court to correct promptly records in his charge against errors in transcribing. 89Fla499, 105S101 (involving record of notice of entry of appeal).

888–34 57ND196, 220NW901 (clerk of county court not authorized).

888–35 173Ark755, 293SW34.

888–45½–New. A person entitled to money paid into court is not required to draw the money on the day he is notified of its deposit. 205 Iowa801, 218NW529.

888–45⅓–New. It is not part of the duty of a court clerk to collect moneys payable from the proceeds of current runs of an oil and gas leasehold in litigation. 136 Okl 237, 277P233.

889–59 Or 289P495.

890–82 90CalA594, 266P337; 135Misc724, 238NYS310; Or 289P495 (pass on legality of court orders). [a] (20) Passing on sufficiency of petition and bond for removal of cause to federal court. 17F(2d)379. [b] **Signing of salary warrants nonjudicial function.**–312Mo157, 279SW33.

892–97 13LaA642, 128S63.

894–33 [c] **Bond held valid under statute,** and chancery clerk is not subject to statutory penalty or damages if sureties are solvent. 155Miss309, 124S370.

895–48 157Md455, 146A386.

895–50 35GaA224, 132SE649; Md 152A264. [d] 191Wis602, 211NW795.

897–79 195NC460, 142SE579, 59ALR53; NC 154SE828.

899–96 96PaSuper31.

899–99 44 Ida609, 260P152.

900–10 195NC460, 142SE579, 59ALR53. [a] But see 205 Iowa801, 218NW529.

900–16½–New. A bond for each particular term of a clerk of court is liable for the amount misappropriated during such term where the funds are not paid on demand. 195NC460, 142SE579, 59ALR53.

901–19 224 IllA454 (where funds were mingled).

901–22½–New. Clerk has been held not liable for interest unless he actually receives interest. NC 154SE828.

901–36 [m] **Filing of answer** in proceedings for judgment for funds collected by clerk does not cast any greater burden on plaintiff. 205 Iowa801, 218NW529.

903–50 [j] **Failure of company to show judgment against property in abstract.**–229AppDiv520, 242NYS644.

903–53 195NC460, 142SE579, 59ALR53.

905–70 124 Okl 42, 254P31.

905–78 [f] (7) Other instances. 13LaA642, 128S63.

906–95 [c] **Evidence held sufficient** to show clerk's lack of diligence. 13LaA642, 128S63.

907–98 195NC460, 142SE579, 59ALR53 (report of clerk of court, not complying with statute, held not prima facie evidence of correctness of entries contained in it).

907–3 195NC460, 142SE579, 59ALR53 (clerk's failure to pay funds on demand raises presumption of its conversion on receipt).

907–12 229AppDiv520, 242NYS644 (whether negligence of clerk contributed to damages of property purchaser).

907–20 [a] **Plaintiff need not prorate** with those who have not even filed suit to recover on bond, though penalty is less than total amount of claims. 44 Ida609, 260P152.

910–51 [e] **Indictment held insufficient.**–4HawaiiFed703.

910–57 328 Ill 232, 159NE360.

910–64 83CalA764, 257P203 (clerk of superior court).

911–66 145Miss867, 111S372; 157Tenn326, 8SW(2d)367.

911–73 20AlaA507, 103S909.

911–79 20AlaA507, 103S909.

912–90 [b] **In Alabama.**–20AlaA507, 103S909.

912–1 145Miss867, 111S372.

913–5 [a] **Only what he paid deputy under such contract** can be recovered by clerk from county. 156Miss171, 125S96.

913–5½–New. In Louisiana the clerk of the twenty-eighth judicial court for Jefferson Parish is not personally liable for the salary of his assistants and employees. 6LaA118.

913–13 162La852, 111S257. [b] **Statute authorizing assistant clerk or register to perform** such other duties of clerk or register as shall not be performed by them has been held not intended to change existing law or indicate difference between powers of assistant register and assistant clerks. Mass 166NE831.

913–14 215Ky440, 285SW250; 109TexCr481, 5SW(2d)518, 519 [citCJ].

913–18 109TexCr481, 5SW(2d)518.

914–33 215Ky440, 285SW250.

915–37 255 IllA554.

CLOCK

917–12½–New. An embroidered pattern on a stocking at the ankle. 14CustA99.

CLOCKED

917–12⅓–New. Embroidered with clocks. 14CustA99.

CLOCK STOCKING

917–12¼–New. A stocking embroidered with the ornament called a clock. 14CustA99.

CLOTHIER

920–72½–New. One who sells ready-made clothing. 48Philippine764.

CLOUD ON TITLE

920–79 238Mich695, 214NW144; 116Or376, 239P818, 825 [Burnett, J. dis. op., quotCJ].

CLUBS

922–1 [a] (3) 187Wis282, 202NW701.

922–8 260Mass123, 156NE895.

923–36 DelCh 142A786.

924–47½–New. A member of an incorporated club has an undivided interest in fee in the realty of the club on termination of the charter of club. 197NC355, 148SE464.

925–62½–New. A resolution offered and adopted without previous notice, on mere motion by a majority vote instead of by two thirds, cannot have the effect of impairing the binding force of a valid existing by-law. 167Ga555, 146SE173.

925–62⅓–New. A by-law can be adopted by a social club only upon compliance with by-laws providing therefor. 167Ga555, 146SE173.

925–62¼–New. By-laws which are the permanent and continuing rules of government can be amended or repealed only in the manner prescribed by by-laws. 167Ga555, 146SE173.

925–62⅕–New. By-laws of country club cannot, after resignation of member, be amended to change method or amount of compensation for stock. NJ 150A336.

925–69 But see 136Wash220, 230P560.

925–81 153Md666, 139A554 (agent not authorized).

925–82 [a] **Extent of liability for valuables of member.**–84CalA272, 258P155. [b] **Burden of proof.**–84CalA272, 258P155. [c] **Sufficiency of evidence.**–84CalA272, 258P155. [d] **Findings.**–84CalA272, 258P155.

926–85½–New. A Women's club owes a paying guest the duty to use reasonable care to see that the room assigned is reasonably safe. Mass 166NE554.

926–85⅓–New. Where a paying guest knew that the floor was slippery, she cannot recover. Mass 166NE554.

926–89½–New. A by-law providing that nominations from the floor are always in order means that nominations from the floor are in order until an election has in fact been held. Ga 146SE173.

926–89⅓–New. Equity has no jurisdiction over an action to enjoin exercise of office where the question involved is merely one of title to office. 167Ga555, 146SE173.

926–89¼–New. A person is not legally elected where the by-laws and election laws of the club are violated. 167Ga 555, 146SE173.
926–89⅓–New. A motion at a meeting to close nominations cannot affect a subsequent meeting during which officers are elected. 167Ga555, 146SE173.
926–90 153Md666, 139A554 (notice to bookkeeper is binding on club).
927–20½–New. Where directors incorporated club and issued stock so that the director having an option on the property could sell it to a corporation at a large advance, the directors were liable for profits. 325 Ill 612, 156NE 785.
930–71 SD 226NW750 (by mandamus).
930–72 SD 226NW750 (mandamus properly denied).
930–80 87PaSuper153 (membership in country club gives no right to participate in increased value of property). [a] **On dissolution.**–92PaSuper198.
930–87½–New. A contract between a social club and its members, requiring a member feeling aggrieved by any action taken by the club, its board of governors, or any of its committees, with respect to himself or any of its members, first to file a complaint with the organization or board of governors before resorting to the courts for relief, has no application, where a member is aggrieved by the action taken by another member. 152Va446, 147SE201.
930–87⅓–New. On dissolution, only persons who are members are entitled to share in the distribution of assets. 197 NC355, 148SE464.
930–87¼–New. Club membership is not "property" and cannot be sold for debt or reached by creditor's bill. 339 Ill 426, 171NE514.
930–87⅕–New. Seller of dog, having submitted to tribunal of club buyer's charges against him, cannot later challenge jurisdiction of that tribunal. 138 Misc310, 245NYS662.
930–89 166Minn323, 207NW632.
930–90½–New. In the absence of authorization by statute, articles, or contract with stockholders, an incorporated club is without authority to assess its stock or membership. 166Minn323, 207 NW632.
931–92 136Wash220, 239P560.
931–93 136Wash220, 239P560.
931–95 [a] **Member is required to pay dues during suspension for nonpayment of dues.**–Cal 289P806.
931–5½–New. Amendment of by-laws to require payment of dues on each membership certificate owned by member has been held fraud on contract rights of organizer to whom one thousand certificates were issued as compensation. 339 Ill 426, 171NE514.
931–5⅓–New. Club membership certificates issued to organizer as compensation is not subject to dues and assessments. 339 Ill 426, 171NE514.
932–14 TexCivA 4SW(2d)140 (where members build telephone line as commercial venture, they are liable as partners for injuries from negligence of employees).
932–25 But see TexCivA 4SW(2d)140. [a] **Sufficiency of evidence.**–260Mass123, 156NE895.
932–26½–New. Evidence of safety devices to prevent rugs from slipping, is held properly excluded. Mass 166NE 554.

COCO

939–31½–New. In French, cocoanut, 5 LaA637.

C.O.D.

940–47 220AppDiv287, 221NYS391.
940–49 220AppDiv287, 221NYS391.

CODE

941–54 214Ala38, 106S231.
941–55 214Ala38, 106S231.
941–56 214Ala38, 106S231.

COHABIT

949–68 125 Or428, 266P875, 886 [citCJ perCoshow,J. dis. op.].
951–89 125 Or428, 266P875.

COHABITATION

952–11 324 Ill 207, 155NE28.
953–21 125 Or428, 266P875.

COINSURER

957–65 [a] **Separate insurers of same loss** are coinsurers though one of them had gone into hands of receiver at time other issued policy. 205 Iowa1085, 217 NW268, 56ALR463.

COLLATERAL SECURITY

961–35 162Ga758, 134SE775, 778 [cit CJ].
961–40 13F(2d)86.
961–41 162Ga758, 134SE775, 778 [cit CJ].
962–45 162Ga758, 134SE775, 778 [cit CJ].

COLLATIO BONORUM

962–49 29PortoRico 762.
963–49½ 29PortoRico 762 (mortgage representing investment of common funds).

COLLEGES AND UNIVERSITIES

972–2 [a] (2) 75Mont429, 244P287.
975–10½–New. The terms "school," "college," and "university" convey the same idea differing only in grade. 75 Mont429, 244P287.
976–20 Ind 168NE529. See also NJSup 142A409.
976–22 175Minn259, 220NW951; 124 Or629, 265P412, 413 [quotCJ].
976–23 130Misc249, 223NYS796.
977–27 196Wis518, 220NW816.
977–29 175Minn259, 220NW951. [b] 86Mont200, 283P202, 67ALR1020 (statute providing for inspection of gasoline and kerosene samples by head of department of chemistry of state college of agriculture held valid).
977–33½–New. Statute held not to interfere with state control of educational institutions referred specified therein. ND 229NW105.
978–37½–New. Colleges and universities made subject to visitation of regents of state university form constituent parts of state educational system. 130Misc249, 223NYS796.
981–71 [d] **Supply store.**–24 OhA261, 157NE395.
982–79½–New. Question of ultra vires can only be raised by state and not by taxpayers objecting to validity of proceedings based on resolution authorizing petition for road improvement. Mo 24SW(2d)133.
982–82 136Misc831, 241NYS4.
982–85 [b] **Trustees of school held authorized,** under its charter, to educate students in Illinois. 284Pa147, 130A 421.
983–86 [b] **Place specified in application for amended charter** does not limit operation of school of such place. 284 Pa147, 130A421.
983–88½–New. But an act incorporating "the Meadville Theological School, in the borough of Meadville, in the County of Crawford," does not limit its location to such borough or county. 284 Pa147, 130A421, 424.
984–4 317Mo 49, 295SW537, 542 [cit CJ].
984–17½–New. A university chartered and issuing diplomas for practice of drugless healing under statutes in some jurisdictions is guilty of fraud and violation of law where it issues diplomas without requiring proper attendance. 140Wash625, 250P52.
986–43 75Mont429, 244P287 (not excessive).
989–85½–New. Under the Texas constitution payments by lessees of oil and gas leases on university lands go to the permanent fund of the university. 115 Tex332, 281SW192.
990–93 101Vt325, 143A384.
991–12⅓–New. A dormitory building of a state university is the property of the state. 76Mont429, 247P332, 47ALR424.
991–18 [a] **Statute directing conveyance** without consideration to county for use as poor farm of land donated to state for "educational purpose" held void. 54 ND529, 210NW53.
991–24½–New. A contention that an action to set aside as fraudulent a transfer of property was irregular as a collateral attack on the legality of foreclosure is without merit, 125Misc698, 211NYS799.
991–24⅓–New. as is a claim that payment of interest on a mortgage would have created a preference to the exclusion of other creditors. 125Misc698, 211 NYS799.
991–24¼–New. Relief of setting aside a fraudulent transfer will not be denied because registration of a medical college was rescinded by the University of the state of New York. 125Misc698, 211 NYS799.
991–24⅕–New. The state is charged with the management and control of the dormitory building of a state university. 76Mont429, 247P332, 47ALR424.
991–24⅙–New. Regents have full discretionary power over buildings on university campus, subject to review by the legislature, but not by the courts, except in case of abuse. TexCivA 287 SW677.
991–31 33NM214, 264P953 (income from oil royalties part of permanent funds of state university can only be used as current income).
991–31½–New. Appropriations for an agricultural experiment station and extension service not being part of the agricultural college or the state university cannot be charged against a tax levy fraud authorized for maintenance of the university. 75Mont429, 244P287.
992–35½–New. Money deposited by a state university in a bank is treated as funds belonging to the state. 158Tenn 182, 11SW(2d)673.
992–36 [a] **Trustees of University of Wyoming** are corporation created by statute as agency of state through which it manages affairs of state university. 16F(2d)150.
992–37 52SD64, 216NW584 (board of regents held to have control of state college of agriculture and mechanical arts).
993–54 130 Or73, 279P271.
993–61 [a] **Board of regents of university of Oregon** is public corporation. 124 Or629, 265P412.
994–74½–New. Transaction by trustees of a medical college by which the college operated in connection with a hospital is discontinued and only the hospital operated, will be set aside where it is characterized by bad faith, 125Misc 698, 211NYS799.
994–74⅓–New. even though trustees gained no immediate financial return therefrom. 125Misc698, 211NYS799.
994–74¼–New. Where a board of regents is given control of a college, matters of policy are within its exclusive control so long as it keeps within its statutory and constitutional power. 52 SD64, 216NW584.
994–74⅕–New. Where a board of regents, acting within such powers, grants sabbatical leave of absence with pay to the president emeritus of a college, the state auditor may not substitute his judgment for theirs as to the wisdom, propriety, or necessity of such action. 52SD64, 216NW584.
994–75½–New. Transfer of assets. The trustees of a theological school, incorporated by state law, have no power to deliver the assets to a corporation of another state. 284Pa147, 130A421.
994–80½–New. In some jurisdictions bonds issued by the state university pursuant to statute are valid obligations of the university. 32NM428, 258P571.
994–80⅓–New. , and are not obligations of the state. 32NM428, 258P571.
994–80¼–New. A slight misnomer of the university in a statute authorizing it to issue bonds or in the bonds issued by it will not invalidate the bonds where its identity appears or can be made to appear by parol. 32NM428, 258P571.
994–81 155SC507, 152SE707 (estoppel held question for jury).
994–83 [a] **Insurance of bonds by regents as violation of constitutional provision** against indebtedness see 124 Or 629, 265P412.
995–11½–New. Under some statutes a board of regents has power to elect the president of a college president emeritus and grant him sabbatical leave for one year. 52SD64, 216NW584.

995–11⅓–New. Such action does not constitute a gratuity or donation. 52 **SD**64, 216**NW**584.

996–16½–New. The Montana statute, requiring the head of the department of chemistry of the state college of agriculture to make analyses of gasoline and kerosene samples, and authorizing the appointment of an assistant, does not require payment of the assistant's salary from the gasoline inspection fund. 86 **Mont**200, 283**P**202, 67**ALR**1020.

996–18 [a] **Mandamus against insular auditor** to authorize payment of salary of professor in the University of Porto Rico. 32**PortoRico** 841.

996–26 130**Misc**249, 223**NYS**796, 803 [citCJ]; 224**AppDiv**487, 231**NYS**435.

997–35 75**CalA**274, 242**P**892. [a] **Power of regents is subject to statutory limitation as to such rules** under police power. 75**CalA**274, 242**P**892.

997–37 130**Misc**249, 223**NYS**796.

997–38 318**Mo** 263, 300**SW**268; 224**App Div**487, 231**NYS**435.

997–44 318**Mo** 263, 300**SW**268 (rule as to occupation of dormitory held not unreasonable as applied to students who are neither tenants nor lodgers).

997–46 81**Mont**200, 263**P**433, 437, 438 [citandquotCJ].

997–47 81**Mont**200, 263**P**433, 437, 438 [citandquotCJ]; 130**Misc**249, 223**NYS** 796.

998–48 318**Mo** 263, 300**SW**268; 130 **Misc**249, 223**NYS**796.

998–57 130**Misc**249, 223**NYS**796. See also 224**AppDiv**435, 231**NYS**435.

998–59 81**Mont**200, 263**P**433; 224**App Div**487, 231**NYS**435.

998–60 318**Mo** 263, 300**SW**268 (damages not recoverable for expulsion from dormitory). [b] **Facts justifying suspension.**–81**Mont**200, 263**P**433.

998–61 130**Misc**249, 223**NYS**796. But see 81**Mont**200, 263**P**433; 224**AppDiv** 487, 231**NYS**435. [a] **Power to prescribe method for determining necessity for suspension** rests in president of university in absence of statutory provision or regulations of governing body. 81 **Mont**200, 263**P**433.

998–61½–New. Under a rule of the university reciting that, in order to safeguard the ideals of scholarship and moral atmosphere, which are the very purpose of the university's foundation and maintenance, the university reserves the right to dismiss any student at any time for any reason, without disclosing the reason, the university must have a reason for dismissal falling within the two classes stated in the rule, and has not an absolute right to dismiss for any cause whatever. 224**AppDiv**487, 231 **NYS**435.

998–62 130**Misc**249, 223**NYS**796.

998–62½–New. A contract between an infant student and a university is in a way sui generis, and the rules of the university are subject to review by the courts. 130**Misc**249, 223**NYS**796.

998–62⅓–New. A rule reserving the right in a university to require the withdrawal of a student at any time without stating a reason is void as to duly matriculated students. 130**Misc**249, 223 **NYS**796.

998–62¼–New. Rule of constructive knowledge is not applicable to a card signed by a student on entry permitting dismissal at any time. 130**Misc**249, 223 **NYS**796.

998–62⅕–New. Invalidity of the rule permitting a university to dismiss a student for any reason does not defeat the entire contract between the student and the university. 130**Misc**249, 223 **NYS**796.

1000–99 [b] **Acts and omissions of officers and agents of medical college** are imputable to the corporation so far as grounds for forfeiture are concerned. 317**Mo** 49, 295**SW**537. [c] **Matters considered.**–317**Mo** 49, 295**SW**537. [d] **Matters relating to internal management** are not grounds for forfeiture. 317**Mo** 49, 295**SW**537 (failure to keep records required by statute).

1000–5½–New. Where a medical school corporation organized under a statute relative to benevolent associations, providing that no association formed for pecuniary gain shall be incorporated under it, owns nothing and is conducted solely for the use and financial profit of one person, its charter should be forfeited. 315**Mo** 101, 285**SW**980, 46**ALR**1472; 317**Mo** 49, 295**SW**537.

1000–6 315**Mo** 101, 285**SW**980, 984, 46 **ALR**1472 [citCJ]; 317**Mo** 49, 295**SW** 537, 542 [citCJ].

1000–7½–New. The sale by a medical college of an ordinary graduating certificate stating that the recipient has complied with prescribed requirements entitling him to a diploma constitutes a sale of a diploma notwithstanding the word "honorary" is written into the certificate. 315**Mo** 101, 285**SW**980, 46**ALR** 1472.

1000–16 113 **OhSt**15, 148**NE**355 (holding that, where a private university nominates three out of nine trustees of a state educational institution, university is not liable for a tort committed on state land by an employee paid wholly from state funds). [a] **Adjacent property owner has cause of action against university** for leasing athletic field to baseball association causing frequent trespasses on his property. 155 **SC**1, 151**SE**907.

1000–19½–New. Board of regents of state university held entitled to resort to equity for relief where auditor certified appropriation, as reduced by governor's veto. **Nebr** 231**NW**772.

1001–23 113 **OhSt**15, 148**NE**355.

1001–26 **Nebr** 231**NW**772.

1002–41½–New. A student, suing a university for breach of contract resulting from her matriculation in the university, had the burden of establishing such breach by showing that her dismissal from the university was not for a reason within the terms of a rule of the university constituting part of the contract. 224**AppDiv**487, 231**NYS**435.

1002–43 [a] **Nonsuit held improperly granted.**–105**NJL**638, 147**A**383.

1002–44½–New. In an action for injuries to a student jumping from a burning building, a verdict is properly directed for defendant when the uncontradicted evidence shows absence of negligence on the part of defendant. 31**F** (2d)869.

COLLIDE

1002–22½–New. Other definitions. To strike or dash against each other; to come into collision. 75**CalA**129, 242**P** 97.

COLLISION

1011–6 212**Ala**588, 103**S**670 (holding that collision with a stump by automobile driver making detour was an "accidental collision"); **TexCivA** 270**SW** 1055.

1011–8 See also 249 **IllA**152.

1011–10 **TexCivA** 270**SW**1055.

1011–11 [b] **Any violent contact** of one vessel with another, no matter how produced, is collision. 216**AppDiv**202, 214 **NYS**637 (except as such contact is brought about by design).

1011–12 216**AppDiv**202, 214**NYS**637.

1012–24 16**F**(2d)25.

1014–66 [a] **Vessel's course is her apparent course,** and not her heading at any given moment. 20**F**(2d)720. [b] **Steady course vessel is on steady course,** not only when her heading does not change, but whenever her future positions are certainly ascertainable. 20**F** (2d)729.

1020–95 [c] **Schooner propelled by small power boat** made fast to her stern is "steam vessel." 22**F**(2d)182.

1026–94 39**F**(2d)577.

1026–98 39**F**(2d)586.

1026–4 [b] **Test.**–42**F**(2d)971.

1027–19 26**F**(2d)468.

1027–36 [j] **Regular sea watch.**–44 **F**(2d)1.

1028–40 [c] 44**F**(2d)1.

1028–46 39**F**(2d)923.

1028–49½–New. The master must know how the ship would turn in wind and tide. 25**F**(2d)619.

1029–68 42**F**(2d)745.

1029–81 44**F**(2d)1.

1029–83 15**F**(2d)200; 28**F**(2d)795; 38 **F**(2d)782 (master is under duty to avoid risk of collision, not collision itself).

1030–86 20**F**(2d)25. [b] **Contributory negligence not shown.**–20**F**(2d)17.

1031–95 11**F**(2d)836.

1031–97 30**F**(2d)269; 33**F**(2d)97. [e] **Acts held proximate cause.**–27**F**(2d)989. [f] **Absence of man on moored barge** held not contributing cause of collision occurring after it had been set adrift. 42**F**(2d)1005. [g] **Time and distance.**–42**F**(2d)1003. [h] **Absence of anchor on barge** held not intervening cause of collision when adrift rendering negligence of tug which set it adrift not proximate cause. 42**F**(2d)1003.

1031–98 5**F**(2d)612; 43**F**(2d)958; [1927] **CanSC**92, [1927] 1**DomLR**1045.

1032–10 43**F**(2d)965.

1033–20 34**F**(2d)783.

1033–21 [a] (22) In case of submarine whose steering gear failed to function, where dangerous condition was known. 14**F**(2d)480.

1034–26 14**F**(2d)684; 37**F**(2d)734 (insufficient lookout).

1035–33 [a] (17) Damage due to swells produced by passing steamer. 33**F**(2d)332.

1035–45 [c] **Collision between steamship and tow sufficiently accounted for** by sudden change of wind with increased velocity and force of tide. 8 **F**(2d)591.

1036–54 14**F**(2d)480. [b] See also 40 **F**(2d)70.

1038–67 16**F**(2d)483.

1038–71 16**F**(2d)483.

1039–73 25**F**(2d)134 (American vessels in German waters).

1039–76 31**F**(2d)757(2dcase) (law fixing liability for collision in proportion to degrees of fault).

1040–96 [a] (10) Rules for navigation of Panama Canal and approaches thereto authorized by Comp. St. § 10041. 14 **F**(2d)371. (11) Regulation requiring chief wharfinger to appoint a person to shift, moor, or unmoor vessels requiring employment of pilot. 27**F**(2d) 370.

1040–3 8**F**(2d)270.

1040–5½–New. Secretary of war may make rules to prevent collisions between vessels in area of channel improvement. 39**F**(2d)926.

1041–15 [a] (1) 43**F**(2d)965. [d] **Custom to depart from rules of navigation,** if based on safety and not on mere convenience, is valid. 39**F**(2d)926.

1042–16½–New. A local pilot custom, having received judicial sanction and being of long standing, must be considered an exception to pilot rules. 27 **F**(2d)208.

1042–16⅓–New. Exception to pilot rules may be made in case of a local custom generally established and well understood. 27**F**(2d)331.

1042–21 8**F**(2d)514.

1042–22 [e] But see 14**F**(2d)448.

1044–41 [c] **Submarines** belonging to government. 38**F**(2d)782.

1044–45½–New. A schooner being operated as a steam vessel and carrying only one white light astern violates Pilot Rules art 2[f]. 22**F**(2d)182.

1046–67½–New. Sailing rules do not apply to vessels maneuvering. 25**F**(2d) 639.

1046–76 20**F**(2d)25.

1047–79 7**F**(2d)153; 39**F**(2d)926.

1047–82 40**F**(2d)70.

1051–39 35**F**(2d)741 (burdened vessel continuing on course without permission is at fault for collision).

1052–65 19**F**(2d)774; 40**F**(2d)288.

1052–67 19**F**(2d)774.

1053–72 22**F**(2d)840. [g] **Privileged vessel may waive privilege.**–43**F**(2d)125.

1053–76 276**US**454, 48**SCt**369, 72**L ed** 651.

1054–78 22**F**(2d)840.

1054–79 15**F**(2d)684; 37**F**(2d)734.

1054–82 14**F**(2d)371.

1054–84 15**F**(2d)342.

1055–89 25**F**(2d)123.

1056–5 16**F**(2d)483; 20**F**(2d)729; 22 **F**(2d)840 (rule applied to vessels approaching obliquely on same general course); 37**F**(2d)734; 43**F**(2d)958.

1058–26 16**F**(2d)483.

1058–32 19**F**(2d)774; 20**F**(2d)568.

1059–36 19**F**(2d)774.

1060–41 42**F**(2d)745.

1060–42 19**F**(2d)774; 31**F**(2d)963.

1060–49 24F(2d)729.
1060–50 24F(2d)729.
1061–58 17F(2d)804.
1061–62 5F(2d)425.
1063–79 5F(2d)425.
1065–7 17F(2d)804.
1067–33 5F(2d)425.
1070–64 25F(2d)625; 38F(2d)782; 39 F(2d)572; 42F(2d)139.
1070–65 See also US 49SCt45.
1071–77 18F(2d)743.
1072–80 [a] **Overtaking ship, sighting white light twenty minutes before collision** and continuing on course, is at fault. 38F(2d)782.
1072–82 5F(2d)835; 41F(2d)291.
1072–86 18F(2d)743. [c] **Overtaking vessel is not required to contemplate improper navigation of leading vessel.**–39F(2d)553.
1072–87 18F(2d)743.
1073–96 25F(2d)623.
1073–98 5F(2d)835; 25F(2d)623; 25 F(2d)625; 39F(2d)553. [d] **Overtaking vessel is at fault** where she proceeds at excessive speed and overtaken vessel keeps her speed. 25F(2d)625. [e] **Overtaken vessel need not maintain speed** for benefit of overtaking vessel until former signals assent to passing. 39F(2d)572.
1073–6 42F(2d)139.
1074–10 29F(2d)29 [certiorari den 279 US837, 49SCt251, 73L ed985(11thcase)]. [a] **Doubt as to whether other ship is converging or parallel** must be assumed by overtaking ship to be the first. 38 F(2d)782.
1074–18 32F(2d)870 (tug and tow held equally at fault).
1074–21 14F(2d)684; 17F(2d)366; 40 F(2d)47. [a] (13) to proceed at five or six miles per hour though expecting tail of approaching tug's tow to swing towards it and to miscalculate distance (42F(2d)549), (14) after exchanging signals to pass on starboard side, to take sudden sheer to starboard (42 F(2d)296), (15) to delay in starting agreed passing (41F(2d)271).
1075–22 25F(2d)639 (tug held partly at fault for trying to round to in path of transfer); 42F(2d)549.
1075–23 [a] (3) where tow is long and unwieldly (42F(2d)657).
1075–24 43F(2d)188.
1076–31 31F(2d)759 [aff 31F(2d)761].
1076–38 40F(2d)430 (in line). [d] **Failure of tug to keep tow straightened out** rendered it negligent and liable for part damages. 37F(2d)352.
1076–40 6F(2d)980; 23F(2d)880.
1076–51 8F(2d)591.
1077–69 34F(2d)620.
1077–70 21F(2d)314.
1078–73 21F(2d)314. [a] (1) 43F(2d) 586. [c] 43F(2d)586. [d] **Tug is under duty to observe and protect boats** in tail end of tow as well as those in forward end. 42F(2d)657.
1078–74 21F(2d)314.
1078–76 21F(2d)314; 29F(2d)20; 42 F(2d)654. But see 43F(2d)585.
1078–78 21F(2d)314.
1078–80 21F(2d)314; 37F(2d)45 (failure to sound alarm); 42F(2d)657.
1078–81 42F(2d)654.
1078–84½–New. Tug is not at fault in cutting towline to escape being dragged into collision caused by faulty maneuvering of tow. 17F(2d)366.
1078–84⅓–New. Where the navigation and handling of a vessel and tug engaged in moving it are in charge of the vessel's pilot and the tug obeys all orders, the tug is not at fault in a collision with an approaching vessel which its captain cannot see. 31F(2d) 963.
1078–85 17F(2d)366.
1078–86 277US304, 48SCt510, 72L ed 892; 21F(2d)323; 24F(2d)653; 26 F(2d)378; 40F(2d)288. See also 27 F(2d)624. [b] 43F(2d)586.
1079–87 23F(2d)584; 38F(2d)39 (holding head against tide).
1079–88 43F(2d)586. [c] **Failure to establish passing agreement or give signal.**–43F(2d)586.
1079–89 25F(2d)639 (other vessel held partly at fault); 40F(2d)288.
1079–92 25F(2d)619 (vessel abandoning signal as to approaching tug and tow is solely at fault for collision); 25 F(2d)913.
1079–93 21F(2d)314.
1079–95 [a] **Whether tug is adequate** is practical question of reasonable sufficiency for particular trips in judgment of skillful and prudent navigators. 17 F(2d)366.
1079–2 But see 15F(2d)200.
1079–4 14F(2d)448.
1080–6½–New. An owner of a vessel being towed is not guilty of breach of duty by failing to have engines capable of such quick action as to be able to avert collision with a third vessel resulting from the tug's negligence. 31 F(2d)885.
1080–19½–New. It is not negligent for the master of a tug engaged in moving a ship to make fast to the ship's port quarter, although from that position he cannot see an approaching vessel. 31 F(2d)963.
1081–28 34F(2d)620.
1082–41½–New. Where a tug left her tow of ocean-going barges equipped for rough weather in a safe anchorage place, and notwithstanding warning of a coming gale, one of the barges neglected to use her largest anchor until after the barge had begun to drift, when it was too late, the tug cannot be held liable for a resulting collision of such barge with another because it did not come back and care for the barges during the storm. 29F(2d)5.
1082–43 [a] **Where vessel having no motive power and incapable of being steered is towed by competent tug,** neither owner of tow nor ship itself is liable for damage done in course of movement, tug being independent contractor. Can [1929] 2DomLR42.
1082–46 13F(2d)927.
1083–47 8F(2d)324; 13F(2d)927.
1083–50 [b] **Ordinarily** the engagement of a tug to take a steamer through a canal is considered as pilotage and requires the tug to pursue the proper course. 31F(2d)759 [aff 31F(2d)761].
1083–54 8F(2d)287; 26F(2d)710.
1083–56 19F(2d)790.
1083–58 37F(2d)184; 43F(2d)719(2d case).
1083–59 27F(2d)665.
1083–61 42F(2d)207.
1084–63 8F(2d)287; 38F(2d)980; 42 F(2d)207.
1084–70 13F(2d)927; 22F(2d)290; 42 F(2d)549.
1084–73 21F(2d)314.
1085–81 [d] **If tow is inert and helpless,** it is not responsible for faults of tug. 13F(2d)927.
1085–86½–New. An owner of a tow is not shown negligent because a six-inch hawser supplied by the tow parted on the tug's attempting to stop the vessel when it was being towed at a negligent speed. 31F(2d)885.
1086–98 19F(2d)790.
1086–13 But see 30F(2d)452 [aff 30 F(2d)454(1stcase)] (certiorari den 279 US844, 49SCt265, 73L ed989(2dcase)]. [b] **Anchored vessel** is favored, even though it was smaller. 27F(2d)72.
1087–14 5F(2d)780.
1087–17 25F(2d)623 (overtaking vessel held liable in part for injury to anchored vessel where her speed was excessive and engines were reversed to avoid collision).
1087–21 37F(2d)734.
1088–35½–New. Anchored barge having out but one of her two anchors in a gale held in fault for collision with another caused by dragging her anchor. 14F(2d)684.
1088–36 29F(2d)5.
1090–61 7F(2d)153.
1090–74 19F(2d)489; 29F(2d)5.
1091–76 5F(2d)66 (both colliding vessels at fault); 19F(2d)489; 21F(2d) 236.
1091–77 See also 27F(2d)727;
1091–81 21F(2d)236.
1091–81½–New. , or failure to pay out sufficient chain when collision becomes imminent. 5F(2d)66 (both colliding vessels at fault).
1091–85½–New. Failure of lighter to anchor while not under control held proximate cause of collision. 37F(2d) 577.
1092–1 22F(2d)273.
1092–2 22F(2d)273.
1092–13 26F(2d)603; 27F(2d)989 (drifting barge); 34F(2d)783; 41F(2d) 831.
1093–24 40F(2d)430. See also 26F(2d) 603.
1094–34 42F(2d)271.
1094–41 30F(2d)269.
1094–42 30F(2d)269.
1094–43½–New. Violation of the statute is merely prima facie proof of negligence, which places on the offending vessel the burden of showing that disregard of the statute did not contribute to the collision. 30F(2d)269.
1094–43¼–New. A tug, which pivoted her float on a barge lying across the end of a pier in violation of statute, without giving warning and opportunity to the barge to move, is solely at fault in libel proceedings for damage resulting to the barge from the operation. 30 F(2d)269.
1094–52 26F(2d)583.
1095–59 33F(2d)87; 33F(2d)97.
1095–60 39F(2d)971.
1095–63 30F(2d)250.
1095–65 But see 26F(2d)583.
1095–68 13F(2d)927.
1095–69½–New. Scow which is powerless to prevent collision, being without means of propulsion, is not liable for collision where she had been moored by a tug and cut adrift without fault on her part. 13F(2d)927.
1095–69⅓–New. Where the owner of a barge has knowledge of its exposed location and warning of an approaching storm, exercise of reasonable care requires either the removal of the barge to shelter or keeping the bargee on board to care for the lines and renew them if necessary. 30F(2d)250.
1096–70 22F(2d)475. But see 22F(2d) 475.
1096–71½–New. Defective condition and consequent parting of lines of barge next to a dock held proximate cause of collision of her and barge lashed to her side with third barge. 14F(2d)319.
1096–75 [d] **Outside barge must ascertain size, condition, and number of lines** to pier of inside barge and must put out such lines to pier as are necessary to hold her added weight. 22F(2d) 475.
1096–75½–New. Where libelant's barge was placed between the trespassing barge and the dock, the trespassing barge owed no duty to libelant's barge, unless danger could be foreseen. 30F(2d)227.
1096–80 22F(2d)475; 40F(2d)566 (attempting shift on flood tide).
1096–83½–New. Where barges were left at the dock without permission, and, on arrival of another barge, were shifted out from the pier, and made fast to the side of such barge, neither of trespassing barges is liable for injury to a newly arrived barge when the tide ebbed, causing the outside barge to list shoreward, pushing the center barge against newly arrived barge, and squeezing it between the center barge and a ridge at the foot of piles next to the dock. 30F(2d)227.
1097–1 27F(2d)370. [d] **Both vessels at fault.**–41F(2d)270.
1097–2½–New. Anchorage of log raft in a harbor without permit, not a bar to recovery of damages from collision through negligence of another. 3F(2d) 79.
1099–19 [b] **Submarines** running on surface are within application of international rules relative to masthead lights and red lights on port side of vessels. 24F(2d)729.
1101–58 14F(2d)448.
1104–92 [a] (6) Scow moored at side of canal not "a vessel at anchor." 26 F(2d)603.
1104–2 35F(2d)731.
1105–8 26F(2d)603.
1105–18 37F(2d)184.
1105–24 38F(2d)782.
1107–59 26F(2d)175 (sailing vessel held not at fault for showing white lantern at stern when almost directly ahead of steamship).

1107-66½-New. Overtaking vessel is solely at fault where she sees a light in time to avoid collision. 26F(2d)175.
1109-97 39F(2d)484.
1109-3 39F(2d)586.
1109-9 5F(2d)425.
1109-11 37F(2d)184 (rule as to showing shapes on tug towing submerged barge).
1110-15 25F(2d)628 (failure to have proper lights held not to contribute to injury where other vessel had no lookout).
1110-20 32F(2d)988.
1111-28 [a] **Both vessels held equally at fault** for misunderstanding signals. 32F(2d)988.
1111-34 43F(2d)125. [a] **Signals held sufficient.**-20F(2d)17. [b] **Blowing of signal** is not excuse for not being careful after giving it. 42F(2d)654.
1112-47 24F(2d)729.
1112-52½-New. Whether the signal given was lawful depends on the position of the two ships. 33F(2d)42.
1112-53 22F(2d)709; 33F(2d)42.
1113-65 38F(2d)782.
1113-68½-New. Vessel ahead need not signal until signalled to. 22F(2d)840.
1114-76 43F(2d)125.
1114-78 43F(2d)125.
1114-83 33F(2d)42.
1115-86 14F(2d)448.
1115-89 5F(2d)612; 34F(2d)614.
1115-91 6F(2d)954; 33F(2d)42. [a] **Failure of ascending vessel to give first signal** does not give descending vessel right to initiate passing signal. 42F(2d)745 (proximate cause).
1115-94 38F(2d)39.
1116-1 [d] **Cross signal may be given** when vessel first signaling has indicated improper course. 43F(2d)585.
1116-8 31F(2d)963.
1117-10 18F(2d)743.
1117-11 16F(2d)483.
1117-11½-New. A steamship not answering her helm promptly or properly after signals for passing is entirely at fault for a resulting collision. 27F(2d)331.
1118-22 14F(2d)448.
1118-22½-New. A power barge approaching a steamer not blowing a danger signal, when she heard no passing signal at the proper time, is at fault in a resulting collision. 27F(2d)208.
1118-25 5F(2d)425; 18F(2d)295.
1118-26 18F(2d)295; 26F(2d)603; 29F(2d)203; 29F(2d)765; 31F(2d)963; 37F(2d)734. [d] **Steamship held not at fault** for collision with schooner because of placing lookout so far forward that wind and spray interfered with vision. 17F(2d)804.
1119-28 25F(2d)628.
1119-33 37F(2d)352; 42F(2d)657.
1119-34½-New. car floats being towed, 25F(2d)628.
1120-49 19F(2d)489.
1120-55 276US454, 48SCt369, 72Led651; 26F(2d)603.
1121-74 18F(2d)295; 26F(2d)603.
1121-77 14F(2d)101; 21F(2d)233 (top of pilot house one hundred forty feet back from bow, in fog, held insufficient).
1122-78 18F(2d)295; 20F(2d)17; 37F(2d)734.
1122-81 18F(2d)295.
1122-83 18F(2d)295.
1122-87 21F(2d)233 (on top of wheelhouse). See also 34F(2d)620.
1122-91½-New. A vessel going through a congested harbor is at fault if it does not keep an officer on deck to release anchors. 25F(2d)623.
1123-94 39F(2d)572.
1123-95 19F(2d)774.
1123-98 30F(2d)238; 41F(2d)176.
1124-18 6F(2d)860; 14F(2d)448; 18F(2d)295; *20F(2d)568. [b] (3) Vessel is not relieved of obligation to maintain proper lookout because it is preferred vessel if prudent navigator, with aid of good lookout, would have avoided collision. 18F(2d)295.
1125-21 42F(2d)549.
1126-27½-New. For a tug to start out under foggy weather conditions with a tow is not in itself negligence. 18F(2d)415.
1126-28 7F(2d)278; 15F(2d)573; 28F(2d)795; 35F(2d)683 (tug must foresee possibility of being forced into channel by meeting another). [d] **Care required of light draft tug and tow.**-41F(2d)176.
1126-32½-New. A steamship, anchoring during a fog outside the prescribed anchorage grounds, is not without fault in a resulting collision. 35F(2d)730.
1126-33 14F(2d)444; 14F(2d)445; 40F(2d)420 (collision with car float and end of pier).
1126-36 14F(2d)444.
1127-44 14F(2d)444.
1127-48 3F(2d)79 (at fault in entering harbor); 35F(2d)683; 41F(2d)176.
1127-54 28F(2d)795.
1127-59 [c] **Vessel hovering about lightship during fog** held not at fault for collision. 15F(2d)573.
1128-62 14F(2d)923.
1128-65 14F(2d)923. [a] 14F(2d)923.
1128-68 14F(2d)923.
1129-73 11F(2d)884.
1129-86 30F(2d)238.
1129-91 11F(2d)900.
1130-99 But see 30F(2d)238.
1130-2 8F(2d)287.
1130-5½-New. A steam tug has been held at fault in sounding no fog signals, while maneuvering about with her tow, or while at anchor. 30F(2d)238.
1130-5½-New. Blowing an alarm does not excuse a tug from signaling as required when she is in a fog. 30F(2d)238.
1130-5¼-New. A steam tug is at fault where it gives a passage signal which misleads a steamship. 30F(2d)238.
1131-19 19F(2d)294. [a] 19F(2d)294.
1131-20 [a] (4) Float failing to make noise held at fault. 40F(2d)420. (5) Must signal during fog. 40F(2d)420.
1132-25½-New. A log raft is a vessel subject to inland rules as to fog signals. 3F(2d)79.
1132-31½-New. Where the master of a steamer navigating the Great Lakes, after exchanging fog signals with another, thinks, but is not sure, that he hears a passing signal, he should give a danger signal as required by Great Lakes rules. **Can** [1929] 3**DomLR**282.
1132-32 15F(2d)573.
1132-33 11F(2d)900; 15F(2d)573; 21F(2d)233.
1132-35 19F(2d)294; 22F(2d)275.
1132-36 30F(2d)238.
1133-50 18F(2d)295; 22F(2d)275; 32F(2d)206.
1134-52 40F(2d)274.
1136-68 11F(2d)900.
1137-80 11F(2d)900.
1137-86 But see 11F(2d)900.
1137-90 18F(2d)295; **Can** [1930] 3**DomLR**423 (reversing not required under rules except under unusual circumstances).
1138-95 12F(2d)233; 40F(2d)167 (compliance with rule).
1138-99 11F(2d)900; 12F(2d)233; 16F(2d)945.
1138-99½-New. The absolute duty to stop engines is imposed only where the vessel believes that the signal comes from ahead. 32F(2d)206.
1139-6 But see **Can** [1930] 4**DomLR**778.
1139-10 16F(2d)945; **BC** [1929] 3**DomLR**383.
1140-18 11F(2d)900.
1140-20 18F(2d)295.
1141-47 15F(2d)544. [a] (10) Where headings of vessels in winding channel are disclosed, each must prepare in advance for their headings when they meet. 34F(2d)614.
1142-51 [a] **Evidence held to show** steamer grounded in river channel from bad seamanship of crew. 7F(2d)401.
1142-54½-New. A steamer, if in doubt as to whether an approaching steamer would port at buoy, is bound to blow an alarm and back. 34F(2d)614.
1142-56½-New. Vessels electing to proceed under their own steam, instead of being aided by tugs, in navigating Houston channel, assume any risk incidental to the customary method of passing. 27F(2d)331.
1142-57 6F(2d)954; 15F(2d)544; 29F(2d)765; 35F(2d)709; **Can** [1930] 1**DomLR**529.
1143-61 40F(2d)258.
1144-67 **Can** [1929] 3**DomLR**536.
1144-71 40F(2d)167 (rule complied with).
1144-73 See also **Can** [1930] 1**DomLR**529.
1144-74½-New. Port to port passing on signal is proper, where vessels sailing in the opposite direction meet head on in a channel of sufficient width for clearance. 21F(2d)121.
1144-74½-New. Vessels approaching from opposite directions one and one half to two points are considered as head and head. 21F(2d)121.
1144-74½-New. Navigator is under the duty to stop, reverse, and stand still, when it is apparent the other vessel disregarded signals. 21F(2d)121.
1144-78 [b] **Where signals are given** and accepted, responsibility for subsequent safe maneuvers is mutual. 40F(2d)258 (fault for collision of tows held mutual).
1144-80 5F(2d)612; 18F(2d)295.
1145-89 18F(2d)743; 22F(2d)290.
1145-90 28F(2d)542 (failure to wait renders ascending vessel liable for half damages).
1145-91 But see 28F(2d)542.
1145-93 See also 28F(2d)542.
1145-95½-New. Tug with steamer lying dead across channel, accepting passing signal of ferryboat, held not required to warn of tug coming toward opening from other way. 19F(2d)878.
1145-95½-New. Ferryboat, in attempting to pass at full speed through one hundred foot opening between shore and steamer dead in water, colliding with her, held negligent. 19F(2d)878.
1145-95¼-New. Descending or ascending vessels are not required to wait at fixed passing places in a channel, where passing can be made, when ships are properly navigated, without resorting to device of fixed passing places. 27F(2d)906.
1145-95½-New. A ship, deliberately undertaking by passing signals to accomplish maneuver in, or in vicinity of, passing point, must conduct itself with care to keep agreement. 27F(2d)906.
1146-16 8F(2d)514; 14F(2d)686; 28F(2d)939; 30F(2d)923; 38F(2d)501; 42F(2d)971. See also 27F(2d)710. [a] (7) 37F(2d)352. (13) 14F(2d)686; 38F(2d)39.
1147-20½-New. A ferryboat, attempting to cross ahead of a vessel on the starboard hand, is solely at fault in a resulting collision. 27F(2d)710.
1147-20½-New. Signal for passing contrary to rules gives no right until assented to. 20F(2d)25.
1147-21 [b] (2) Vessel proceeding down stream is not at fault, in collision with ferryboat violating starboard hand rule, because proceeding in slight circling course to middle of river, course being obvious to anyone who looked, exercising reasonable care. 27F(2d)710.
1147-23 [a] **Vessel maneuvering to enter anchorage** is not priveleged. 42F(2d)745.
1147-24½-New. A steamship proceeding up river at the time of a collision with a steamship proceeding down river has been held partially at fault in not reducing speed or reversing engines after seeing that the latter ship lay course across her bow in disregard of starboard passing signals until only a minute before collision. 30F(2d)923.
1147-25 28F(2d)939 (down boat may elect which side to take).
1147-30½-New. Where neither of two vessels approaching head on or nearly so has given signals provided for by Great Lakes Rules, rule 25, each must pass to the port side of the other. **Can** [1929] 3**DomLR**536.
1147-30½-New. Where one of such vessels fails to keep to port side of the other and neither of them keeps efficient outlook and gives signals required by the rules which would have avoided the collision if given, both are equally in fault. **Can** [1929] 3**DomLR**536.
1148-35 6F(2d)132.
1148-45 40F(2d)310.

1149–57½–New. Mississippi tug captain must keep out of way of tug on his starboard. 17F(2d)783.
1149–57⅓–New. Tug's failure to observe starboard hand rule, after agreeing to change course, held proximate cause of collision. 17F(2d)783.
1149–58 30F(2d)781.
1149–62½–New. A steamship is not at fault in collision with a descending vessel because of failure to refrain from attempting to enter a narrow channel until the approaching ship has emerged therefrom, where there is ample room for passage in case of proper navigation. 30F(2d)781.
1149–62⅓–New. A motorship, accorded ample room for safe passing in the channel of a river in case she had been properly navigated, is solely at fault in collision with an approaching steamship. 30F(2d)781.
1150–68 21F(2d)314; 37F(2d)45; 43F(2d)585; 43F(2d)965. [a] 18F(2d)743.
1150–69 18F(2d)743; 21F(2d)314.
1150–70 21F(2d)314.
1150–73 41F(2d)952. [a] (2) Other instances. 41F(2d)952.
1150–80½–New. or to tugs passing each other in stream, 42F(2d)549.
1151–96½–New. A tug with a tow attempting to pass through Hell Gate on flood tide in unusually cold and icy weather is at fault for collision of the tow with a drill in midstream. 26F(2d)240.
1151–4 16F(2d)483; 31F(2d)963.
1152–22½–New. Vessels proceeding to mooring buoys back of breakwater held not to be proceeding on crossing courses. 16F(2d)483.
1152–23 [a] **Rule prohibiting vessels running within five hundred feet from and parallel to, pierhead line** applies to vessels running only short distances. 25F(2d)299.
1152–24 29F(2d)849.
1153–31 37F(2d)101 (duty of entering tug colliding with tug moving out).
1153–38½–New. A vessel about to go into a slip is not at fault where, on proper signals, the exhaust valve failed to operate and the vessel failed to stop. 26F(2d)480.
1154–49 20F(2d)568.
1154–54 37F(2d)45 (tug backing out floats in ignorance or disregard of presence of yacht and lighter).
1154–60 [a] **Vessel backed seven hundred feet from pier ends** in North River preparatory to turning is not per se improper. 27F(2d)788.
1154–60½–New. What is reasonable and careful navigation in backing from a ship depends on lawful customs of vessels and special customs of wind and tide and passing traffic. 22F(2d)195.
1155–84 19F(2d)294.
1156–92 22F(2d)275 (ferryboats colliding).
1156–95½–New. A steamer wedged against a fuel scow while being taken through a canal has been held without fault in extricating herself from the position which lack of care on the part of the master had placed her. 31F(2d)759 [aff 31F(2d)761].
1156–95⅓–New. A tug turning in a canal as another tug and tow were coming up is solely at fault as regards damages to a moored motor boat struck by the second tug. 27F(2d)624.
1156–98 30F(2d)675.
1156–1 22F(2d)290.
1156–2½–New. A schooner propelled in a canal at night by a motor boat astern, which could not check speed or move astern quickly, is at fault for collision. 22F(2d)182.
1156–2⅓–New. A motor cruiser, operating in a canal at night, not on her own side of the fairway and failing to keep a proper lookout, is chargeable with contributory fault. 22F(2d)182.
1156–2¼–New. Failure to reduce speed may constitute fault. 30F(2d)675.
1157–7 31F(2d)759 [aff 31F(2d)761].
1157–17 [c] (51) Ship moving at rate of speed of at least seven miles per hour in crowded harbor is at fault in collision with tow proceeding on steady and obvious course. 27F(2d)665. (52) Thirteen to fifteen knots on clear night down stream in New York Harbor. 37F(2d)734. [d] (8) Five or six miles per hour with tow in East River. 42F(2d)549.
1158–18 [a] 22F(2d)275.
1158–20 42F(2d)971.
1158–20½–New. A power barge, approaching a steamer, failing to slacken speed or stop and back when she heard no passing signal at the proper time, is at fault in a resulting collision. 27F(2d)208.
1158–20⅓–New. Collision in a narrow channel is due to the fault of a ship failing to maintain a proper steerageway by reason of reducing speed. 27F(2d)906.
1159–36 [c] **Where speed of lighter was well within limit** several minutes before collision, speed prior thereto is of no importance. 37F(2d)45.
1160–6 39F(2d)586.
1160–9 [h] **Maneuvering of vessel,** in backing out of slip and straightening on course, presents case of "special circumstances." 22F(2d)195. [i] **Vessel maneuvering to leave slip.**–24F(2d)653. [j] **Vessel not consenting to change of existing situation** may not be bound by special circumstance rule. 42F(2d)745.
1162–11 18F(2d)295. [b] (7) Master of launch knowing steamer was about to go into its slip held bound to conduct navigation with reference thereto. 6F(2d)860.
1162–12 18F(2d)295.
1163–27 15F(2d)386.
1163–28 16F(2d)483; 20F(2d)17; 20F(2d)568; 25F(2d)123; 25F(2d)312 (master failing to drop anchor at his suggestion accepted by pilot); 34F(2d)614; 39F(2d)586.
1164–35 16F(2d)483; 39F(2d)98.
1164–36½–New. Any mistake made by captains of ships when collision was imminent must be attributed to prior fault. 43F(2d)958.
1165–37 [n] **Navigators able to avoid collision** when sighting light of sloop collided with are not excused because of error in mistaking light for marker. 39F(2d)586.
1166–40 5F(2d)425.
1167–42 14F(2d)101; 34F(2d)83; 39F(2d)586.
1167–47 34F(2d)83.
1167–49 [c] **Injury to ship in subsequent strandings in attempt to extricate herself.**–11F(2d)836.
1168–58 35F(2d)741.
1169–82 41F(2d)356.
1169–88 30F(2d)442.
1169–93 8F(2d)514.
1170–99½–New. Letter by defendant railroad company notifying plaintiff that it would not be responsible for damages to floating equipment at defendant's terminals which was not acceded to by plaintiff is not defense to liability for negligence by common carrier. 126Misc474, 213NYS329.
1170–99⅓–New. Any doubt in language of notice sent by carrier to exempt itself from liability is resolved against carrier, who used language. 126Misc474, 213NYS329.
1170–4 But see Can [1928] 3DomLR334.
1170–9 21F(2d)236 (charterer by demise charter).
1170–15 33F(2d)275.
1170–25½–New. Tug hired to furnish motive power only to dismantled steamship made fast alongside and acting under orders of master and pilot of ship held not responsible for movements of tow. 20F(2d)192.
1170–25⅓–New. Tug alongside, which followed orders of pilot on ship, held not responsible for collision. 20F(2d)192.
1171–28 27F(2d)134.
1171–29 35F(2d)55. [c] **Liability applies to negligence of anyone in lawful possession,** whether owner or charterer. 27F(2d)134. [d] **Liability includes a refrigerator on ship carrying meat cargoes.** 27F(2d)134. [e] **Source of rule.**–27F(2d)134.
1171–31 5F(2d)998.
1171–32 37F(2d)734. But see 41F(2d)718. [f] **Owner is not liable where master was not acting within scope of employment.** 22F(2d)709.
1171–33½–New. The owner of a dock at which a ship is moored is not guilty of negligence in collision by reason of the manner in which the ship is moored. 27F(2d)370.
1172–35 19F(2d)286.
1172–39½–New. Where a charterer's property on a vessel at fault is not shown to be of value other than as part of the ship, he must share the losses. 27F(2d)134.
1172–42 11F(2d)884.
1172–42½–New. The consignee of a coal barge has been held primarily liable for injury to barges. 35F(2d)55.
1172–43 15F(2d)342.
1172–48 35F(2d)55 (captain of coal barge held not negligent in failing to take soundings).
1173–56 11F(2d)884.
1173–58 But see 30F(2d)923.
1173–62 27F(2d)370 (vessel of United States); 29F(2d)950(2dcase).
1173–62½–New. A managing agent of a United States ship is not liable on the theory of agency for careless navigation by a compulsory pilot for whose selection such agent was not responsible. 29F(2d)950(2dcase).
1173–62⅓–New. A state dock commission is not liable for negligence of a pilot by reason of the fact that the pilot was in the pay of the commission. 27F(2d)370.
1173–64 8F(2d)270. See also 44 Philippine359. [d] **Relative degree of negligence** immaterial. 44Philippine359. [e] **Where both barge moored to pier and barge moored to other cause damage,** both are equally liable where it cannot be determined whether breaking of former's lines or slipping of latter's lines occurred first. 22F(2d)475.
1173–66 44Philippine359.
1173–67 24F(2d)657.
1173–68 19F(2d)489; 25F(2d)623; 26F(2d)583; 30F(2d)238. [a] **Apportionment of damages** does not extend to counsel fees or disbursements. 7F(2d)172.
1174–70 [e] (3) Claim against vessel for collision after end of voyage is not maintainable by intervention in limitation proceedings as to damages occurring during voyage. 21F(2d)236.
1174–79 19F(2d)286.
1174–86 23F(2d)880.
1175–94 14F(2d)642; 36F(2d)1002. [b] **Libel under general allegation of negligence held sufficient** to sustain decree for libelant, based on initial fault of tug in undertaking trip in heavy fog. 35F(2d)683.
1175–11 36F(2d)1002.
1175–13½–New. Custom to depart from rules for navigation is defense which must be pleaded. 39F(2d)926.
1177–31 33F(2d)332; 39F(2d)569; 42F(2d)659(2dcase).
1177–32 8F(2d)514; 20F(2d)17.
1177–34 But see 35F(2d)683.
1177–36½–New. Where fault of one party is gross and unescapable, the alleged contributing fault of any other party must be proved by a clear and convincing preponderance of evidence. 15F(2d)375.
1177–36⅓–New. It must be assumed that a steamship master ramming a schooner was competent and concerned in preventing loss. 34F(2d)83.
1177–36¼–New. Tug owner impleading tug towing barge damaged in collision with claimant's tug has burden of proving impleaded tug's negligence. 42F(2d)549.
1178–40 36F(2d)825.
1178–47 14F(2d)371; 19F(2d)774.
1179–53 25F(2d)625.
1179–56 26F(2d)603; 41F(2d)834; Can [1926] 4DomLR191. But see 30F(2d)452 [aff 30F(2d)454(1stcase) (certiorari den 279US844, 49SCt265, 73Led989 (2dcase)]. [f] (2) In case of damage to barge made fast to bulkhead by reason of being struck and damaged by barges adrift, there is presumption of fault. 30F(2d)250.
1181–64 14F(2d)684.
1181–66 27F(2d)727.
1181–67 34F(2d)783. [a] 14F(2d)480; 18F(2d)415.

1181–70 38F(2d)782.
1181–71 15F(2d)386; 16F(2d)945; 19 F(2d)774; 32F(2d)206; 33F(2d)42; 41 F(2d)356.
1182–74 32F(2d)206.
1182–74½–New. Jamming of the steering gear of a vessel undertaking the proper method of passing was held not the proximate cause of collision. 21F (2d)121.
1182–76–77½–New. Evidence held to show that the collision was due to the action of the vessel in starting full speed ahead without waiting for an answering signal. 21F(2d)121.
1183–83 35F(2d)731; 41F(2d)356.
1184–93 [b] **Presumption arises that persons on tug not hearing signals were not attending strictly to duty.**–41F(2d) 176.
1185–99 25F(2d)123.
1185–3 6F(2d)980. See also 27F(2d) 370.
1185–4 17F(2d)366.
1185–6 See also 27F(2d)665.
1185–7 [a] **Burden** is on claimant to show loss of profits due to detention after collision. 23F(2d)486.
1185–7½–New. Vessel sinking after collision does not have burden of proof of due care after collision. 14F(2d) 101.
1185–8 [e] **Evidence held admissible.**–39F(2d)930.
1185–9 [c] **Evidence properly excluded.**–42F(2d)279.
1187–32 16F(2d)643. [a] (1) 277US 304, 48SCt510, 72Led892; 6F(2d)954; 8F(2d)270; 8F(2d)514; 13F(2d)354; 14F(2d)371; 14F(2d)684; 17F(2d)366; 17F(2d)553; 18F(2d)295; 20F(2d)25; 20F(2d)111; 20F(2d)192; 20F(2d)385; 20F(2d)720; 20F(2d)729; 21F(2d)233; 21F(2d)236; 21F(2d)323; 22F(2d)275 (to show one of two ferryboats still off her slip); 25F(2d)913; 26F(2d)583; 34F(2d)123; 40F(2d)167 (to show vessel solely at fault); 41F(2d)833; 41F (2d)834; 42F(2d)1005; 43F(2d)125; Can [1930] 2DomLR257. (5) To show that hawser between tug and tow broke before collision. 18F(2d)415. (6) To show lights of anchored vessel burned brightly and that ship was within anchorage limits. 37F(2d)734. (7) To show colliding steamer was traveling at excessive speed. 39F(2d)586. (8) To show absence of market for coal barge, sunk in collision. 39F(2d)930. (9) To establish fault of steam lighter in failing to give right of way to tug and tow. 39F(2d)970. [b] (1) 5F(2d) 780 (to show collision due to inevitable accident); 6F(2d)571; 18F(2d)382; 22 F(2d)840; 31F(2d)937; 33F(2d)332; 40F(2d)925; 42F(2d)654; 42F(2d)659 (2dcase). (3) In libel proceedings for collision, evidence has been held to require reversal of trial court's finding that scow striking libelant's schooner was not struck by another boat, which broke loose from its moorings due to fault of lighter, which became unfastened from mooring at slip, in view of positive evidence of witnesses. 26F(2d) 583. (4) To show that privileged vessel did not promptly reverse after inability of other vessel to keep clear was indicated. 14F(2d)371. (5) Where no claim of accident was made or notice of survey for damage, burden of establishing libel is not sustained. 36F(2d) 825. (6) To show third vessel which ship passed before collision, was at fault. 37F(2d)734. (7) To establish identity of impleaded vessel as tug which crossed ship's path prior to collision. 37F(2d)734. (8) To show rudder was struck at only place where barge could have struck it. 39F(2d) 569. (9) To support finding that overtaken vessel, without excuse, sheered into overtaking vessel. 42F(2d)139. [d] (3) Evidence held to show both steamers at fault. 16F(2d)945. [j] **Evidence held sufficient.**–5F(2d)612 (failure of ocean steamer in narrow channel to obey signals of river steamboat); 23F(2d)839. [k] **Overtaking steamer** on Delaware River held solely at fault. 5F(2d)835. [l] **Collision held due to fault in navigation and not to** unseaworthiness. 6F(2d)883. [m] **That salvage company refused to undertake salvage** warrants finding of total loss. 16F(2d)643. [n] **Evidence held not to show** that steamer, backed into river from pier, preparatory to turning and putting to sea, should have sooner appreciated danger. 27F(2d)788. [o] **Where all but one of persons on one vessel perished in collision,** case of surviving ship should be clearly and satisfactorily established. Can [1929] 3 DomLR536. [q] **Evidence held to show** that captain of tug towing barge struck by passing tug did not allow tail of tow to get out of line. 42F(2d)549. [r] **Absence or failure of lookout** held not shown to be contributory cause of collision with barge in tow of passing tug. 42F(2d)549.
1187–33 28F(2d)939. [c] 18F(2d)415. [d] **Evidence held sufficient.**–26F(2d) 603.
1187–34 [a] 14F(2d)319.
1187–38½–New. Evidence held insufficient to show loss of profits. 23F(2d) 486.
1187–42 14F(2d)371; 15F(2d)386; 20 F(2d)25; 21F(2d)233; 31F(2d)806(2d case); 42F(2d)971; 43F(2d)958. See also 27F(2d)788. [b] 18F(2d)295. [c] (1) 14F(2d)923. (2) To show respondent at fault. 6F(2d)571. [e] **Sole fault of vessel causing collision shown.**–13F (2d)435. [f] **Evidence held not to show** that vessel was presumptively at fault for not standing by to render assistance. 34F(2d)622. [g] **Evidence insufficient to show fault.**–37F(2d)45. [h] **To make out case for apportionment of damage,** evidence regarding other vessel's fault must be clear and convincing. 42F(2d)745.
1187–43 32F(2d)206; 35F(2d)866 (conflicting evidence held insufficient to show fault); 36F(2d)581 (fault of vessel colliding with disabled boat held proximate cause of collision). [i] **Under starboard hand rule,** evidence held to show that crossing steamer was at fault in collision with tug. 12F(2d) 959. [j] **Evidence held to show** that both vessels were at fault. 34F(2d)622. [k] **Vessels held at fault.**–35F(2d)707; 35F(2d)709.
1188–45 [d] **Mooring vessel** at point prohibited by law held not contributory to collision. 6F(2d)980. [e] **Evidence held insufficient** to show that steamship with which municipal ferryboats collided was anchored in fairway outside of anchorage grounds. 8F(2d)270.
1188–47½–New. Evidence held to show that a vessel colliding with a vessel backing out of the slip was solely at fault in collision. 22F(2d)195.
1188–50 32F(2d)206.
1190–61 18F(2d) 382 (where point is adequately covered by witnesses produced).
1190–62½–New. Absence of reference in testimony to certain fact considered as discrediting later testimony as to such fact. 43F(2d)585.
1190–69 39F(2d)970.
1191–80 22F(2d)195; 39F(2d)971.
1193–1 18F(2d)295; 23F(2d)554.
1193–1½–New. Evidence held to justify a finding that the fog at the time the tug set out was about the same as when the collision occurred. 35F(2d)683.
1193–2 36F(2d)581 (colliding with disabled boat which had lights burning brightly). [e] **Collision between steam and sailing vessels.**–5F(2d)425. [f] **Delay in sighting approach of vessel,** required finding that that barge was at fault. 35F(2d)709.
1194–13 24F(2d)846 (conflicting evidence).
1194–14 See also 40F(2d)277.
1196–35 41F(2d)356.
1197–51 16F(2d)110.
1197–52 16F(2d)110; 26F(2d)240.
1197–53 15F(2d)684; 27F(2d)788 (appellate court content with findings of trial court under evidence). [c] **Burden to upset decree is on appellant.**–34F(2d) 123.
1197–63½–New. Libelant cannot on appeal, assert a theory not tried in the trial court. 35F(2d)866.
1198–83½–New. Under stipulation for reference to ascertain damages to vessel, respondents are liable for commissioner's fees and stenographer's expense. 42F(2d)279.
1199–91 16F(2d)643. See also 27F(2d) 921.
1199–92 16F(2d)643.
1199–94½–New. Distribution of damages recovered. Before the sum awarded as the value of a vessel sinking after a collision is paid over to the owner of the vessel, just claims against it must be paid. 24F(2d)657.
1199–94¼–New. A recovery by the United States for a government vessel sinking after a collision should be dealt with with full regard for maritime liens of cargo owners. 24F(2d)657.
1199–97 23F(2d)486.
1199–98 41F(2d)356.
1199–99 15F(2d)684.
1201–12 5F(2d)178; 14F(2d)101; 16 F(2d)306; 19F(2d)774; 25F(2d)395; 32 F(2d)870; 44Philippine359. [b] (4) Steamer swells causing collision between barges. 43F(2d)566. (5) Where lights of one vessel were not bright enough and other proceeded across channel, on course, after having heard and answered blast of whistle, without ascertaining that no steamer was coming down channel. 25F(2d)395. (6) Other instances. 34F(2d)614. [m] **Decree for half damages affirmed** where both vessels at fault. 5F(2d)66. [n] **When ship A collides with ship B due to mutual fault,** and cargo owners of B recover against A, but not B, owners of A may recoup against B proper share of amount paid cargo owners. 16F(2d)306.
1203–22 [a] 44Philippine359.
1203–24 30F(2d)923.
1204–28 24F(2d)729; 31F(2d)806(2d case).
1205–47 42F(2d)279.
1206–48 16F(2d)643.
1206–50 16F(2d)643.
1206–53 See also 16F(2d)643.
1206–56 268US146, 45SCt465, 69Led 890; 16F(2d)643; 42F(2d)279.
1206–60 16F(2d)643.
1206–62 But see 15F(2d)573.
1206–64 See also 16F(2d)643.
1206–67 268US146, 45SCt465, 69Led 890 (if there is no market value, measure of damages is sum which under all the circumstances could probably have been obtained for her).
1207–70½–New. Storer on board ship for object of voyage properly included in appraisal value. 14F(2d)101.
1207–70¼–New. Cost of bond in obtaining release of vessel in limitation proceedings is not a proper item. 14F(2d) 101.
1207–70¼–New. To allow damages to barge on basis of replacement value less depreciation; conditions must preclude showing of market value. 39F(2d)930.
1208–93 27F(2d)251; 40F(2d)277; 42 F(2d)279.
1208–94 42F(2d)279. [a] (12) Where seine boat, seine, and fishing vessel were used as one outfit, sinking of seine boat is to be compensated by replacement value thereof. 25F(2d)461.
1208–95 5F(2d)835 (damages for injuries due to stranding directly after collision are reasonable).
1208–96 42F(2d)279.
1208–1½–New. Libelant is entitled to recover the expense of hauling a barge to determine its condition. 27F(2d)921.
1209–5½–New. In an action as shipowner and as bailee of a cargo, damages are not to be reduced by the contribution in general average. 33F(2d) 275.
1209–6 42F(2d)279.
1209–7 See also 27F(2d)251.
1209–9 27F(2d)251; 40F(2d)277.
1209–11 40F(2d)277.
1210–15½–New. Libelant is entitled to the cost of painting as against the contention that the painting should have been done in the usual course of things, and hence was not necessitated by the injury. 27F(2d)921.
1210–15½–New. Where libelant had a representative of its own at survey of a barge injured in collision, the fees of surveyors representing the underwriters

are not elements of damage. 27F(2d) 921.
1210-15¼-New. The penalty agreed on for delay in making repairs is properly deducted. 27F(2d)921.
1210-15½-New. Collision damages are not abated because the owner has other repairs made while collision repairs are being made. 20F(2d)381.
1211-51 22F(2d)581; 24F(2d)846 (allowance reduced from seven to four days); 26F(2d)368. [g] **Detention for taking schooner damaged in two collisions** to nearest repair yard to complete repairs caused by one collision held properly charged against respondent not responsible for that collision. 24F(2d) 846.
1212-52 14F(2d)371; 19F(2d)489.
1212-52½-New. Refusal to charter vessel for amount offered during repairs precludes allowance thereof for demurrage. 19F(2d)489.
1212-53 20F(2d)381; 43F(2d)723.
1212-54½-New. Libelant cannot recover the expense of substituting an idle vessel, not kept for use in emergencies, but merely part of the owner's regular fleet. 27F(2d)921.
1212-55 26F(2d)368. [b] **That barge is under charter** does not alone warrant allowing detention damage. 43F(2d) 723.
1212-56 [a] **Test** is whether reasonable person would have considered collision repairs immediately necessary. 27F(2d) 684.
1212-60½-New. Damages for collision are properly determined by taking the gross market value during the period of delay for repairs, making allowance for expenses paid or incurred, deducting any amount saved because of the vessel's idleness. 27F(2d)162.
1212-60¼-New. Damages for loss of profits cannot be recovered, unless they are established with reasonable certainty. 27F(2d)921.
1212-62 42F(2d)130. See also 27F(2d) 921. [e] **Loss of time of entire plant** of injured dredge is recoverable, and not of dredge itself, where no other dredge is available. 22F(2d)581.
1212-67½-New. Libelant, delivering all oil contracted for, could recover only additional expenses and loss of profits. 27F(2d)921.
1212-67¼-New. Libelant is not entitled to amount on the theory that the barge was injured three-eighths of its value, for expense of filing her three times, instead of only twice, because of reduced carrying capacity. 27F(2d) 921.
1213-70 [a] **Demurrage recoverable is not reduced** by unnecessary repairs not delaying collision repairs. 22F(2d)581.
1213-70½-New. Wages of captain of damaged barge are not deductible from demurrage rate. 43F(2d)723.
1214-83 27F(2d)162.
1214-86½-New. Libelant is entitled to recover extra expense of towing a barge, substituted for the barge injured in collision, to the place of collision and back. 27F(2d)921.
1214-86¼-New. Libelant is entitled to recover canal tolls and pilotage as necessary expense of towing the barge substituted for the barge injured in collision. 27F(2d)921.
1214-88 42F(2d)279.
1215-15 [a] **In Philippines.**-44Philippine359. [b] **Loss to cargo after beaching.**-17F(2d)449.
1216-21½-New. Where damages are due partly to unseaworthiness and deviation of government-owned carrying vessel in public service and partly from collision, the government's claim for damage to the vessel should be deferred to a claim of the owner of the cargo. 8 F(2d)270.
1216-25 16F(2d)306; 24F(2d)657.
1217-49 [a] **Crew entitled to reasonable compensation for exposure and suffering** when forced into water after collision. 37F(2d)734.
1217-54 24F(2d)846. [a] **Allowance of interest held abuse of discretion.**-37 F(2d)337.
1218-71 42F(2d)271. See also 24F(2d) 846.
1218-72 278US41, 49SCt52, 73Led170.
1218-72½-New. Suits in Admiralty Act authorizes recovery of interest at rate of four per cent in suits against the United States. 19F(2d)774.
1218-72¼-New. Under a special act permitting recovery to the extent only of damages suffered other than claims for demurrage, interest is allowable. 20 F(2d)729.
1218-73 11F(2d)836; 24F(2d)846.
1218-84 [b] **Where libel is by United States** and both vessels are found to be at fault, the United States is entitled to recover interest rate of six per cent while other party may recover interest at rate of four per cent under Suits in Admiralty Act. 19F(2d)774.
1219-91 14F(2d)371.
1219-94 27F(2d)921 (by direct evidence). But see 40F(2d)277.
1219-95½-New. Difficulty in proving damages does not require the court to view the matter leniently and decide doubtful questions in libelant's favor. 27F(2d)921.
1219-13½-New. Evidence held to sustain finding as to market value of vessel lost. 268US146, 45SCt465, 69Led 890.
1219-13¼-New. Commissioner's findings as to damage for total loss, when based on competent evidence, must be confirmed. 16F(2d)643.
1219-13¾-New. That detention damages were the proximate result of collision has been held not to have been proved. 27F(2d)684.
1219-13⅛-New. To recover profits lost, circumstances must be shown with sufficient particularity to prove libelant's accustomed use of the barge was such that it could have been spared from its fleet and would probably have found employment. 27F(2d)921.
1219-13⅛-New. Evidence held not to establish unseaworthiness. 41F(2d)270.

COLLODIAL SOLUTION

1219-1½-New. A solution which does not settle in fluid, but remains in suspension. 25F(2d)553.

COLLUSION

1220-13 15F(2d)509.
1220-20 Iowa 230NW418.
1220-21 Iowa 230NW418.
1221-29 Iowa 230NW418.

COLORATION

1223-81 24F(2d)722.

COLORED

1223-85 11CustA90.

COLOR OF OFFICE

1225-13 [a] 35GaA744, 134SE801. [c] **Where there is no authority at all,** there can be no semblance of authority. 35 GaA744, 134SE801.
1226-17 35GaA744, 134SE801.
1226-18 35GaA744, 134SE801.

COMBUSTIBLE

1231-19 260Mass288, 157NE350.

COMFIT

1233-62 11CustA127.

COMITY

1235-81 127Misc898, 217NYS647.
1235-84 127Misc898, 217NYS647.
1236-93 See also 99NJEq135, 132A765, 766 [citCJ].
1236-96 7F(2d)470; Fla 100S539; Fla 130S7; 195NC143, 141SE471, 473 [cit CJ]; 138 Okl 222, 280P801(2dcase). [b] (3) Judicial comity does not require state court to lend its aid in enforcement of contracts which interfere and tend to frustrate policy established by legislature. 166Minn285, 207NW724. (4) Comity involves judicial courtesy between courts where litigants have equal rights. 127Misc898, 217NYS647.

COMMERCE

12 C. J.—5-3 [a] (7) Commerce is movement. 218AppDiv295, 218NYS207.
6-6 195Cal 522, 234P102.
7-8 278US1, 49SCt1, 73Led147 (interstate commerce).
7-11½-New. The production of sugar beets and the manufacture of sugar therefrom is not "commerce." 22F(2d) 122.
7-13 46RI 496, 129A495.
7-16½-New. A reservation granted to the federal government by a state to be used as a military station is not "territory" foreign to the state so as to constitute shipment from state thereto interstate commerce. TexCivA 286SW489.
7-17 273US52, 47SCt255, 71Led534; 46RI496, 129A495.
7-19½-New. Commerce between the United States and Porto Rico is not technically interstate commerce. 11F (2d)993; 16F(2d)545.
8-22 7PaDist&Co 677.
9-34 116Tex497, 295SW598.
9-37 TexCommnA 296SW482.
9-38 [b] **Congress has power to make municipality of state liable for torts of its agents** when it is engaged in interstate commerce. 32F(2d)913.
10-45½-New. Congress may regulate domestic merchant ships on high seas or in foreign waters. 16F(2d)981.
10-46 267US377, 45SCt328, 69Led666; 272US457, 47SCt130, 71Led350; 272US 605, 47SCt207, 71Led432; 273US341, 47SCt383, 71Led672; 274US588, 47SCt 720, 71Led1219; 20F(2d)459; 168Ark 22, 269SW47; 179Ark865, 18SW(2d) 376; 84CalA325, 258P148; 324 Ill 591, 155NE841; 161La1051, 109S834, 49ALR 274; 11LaA55, 123S149; Mass 170NE 385; 249NY445, 164NE541 [motion to amend remittitur granted 166NE324(1st case)]; 134Misc223, 234NYS727; 129 Or216, 277P107; TexCommnA 5SW(2d) 980, 60ALR983; TexCivA 273SW1113; TexCivA 294SW941; 147Wash630, 267 P506; 152Wash548, 278P419. See also 147SC487, 145SE400.
10-47 272US605, 47SCt207, 71Led432; 273US341, 47SCt383, 71Led672; 274 US588, 47SCt720, 71Led1219; 237 IllA 24; 232Ky579, 24SW(2d)290; MoA 23 SW(2d)202; NJSup 149A269; 194NC 188, 138SE608. [c] **Railroads may acquire road running through two states** without further authority than interstate commerce commission's approval. 324 Ill 591, 155NE841. [d] **Power to determine whether state action will obstruct interstate commerce** is in United States. 324 Ill 591, 155NE841. [e] **Power should not be exercised hastily, harshly, or unnecessarily.**-274US588, 47 SCt720, 71Led1219.
11-48 [a] **Transfer of bills of lading.**-84CalA325, 258P148.
11-52 267US377, 45SCt328, 69Led666; 273US341, 47SCt383, 71Led672; 168 Ark22, 269SW47.
11-53 6F(2d)801.
11-55 CalA 291P233; 168La547, 122S 845; MoA 276SW1041.
11-55½-New. That some intra-state traffic is incidentally involved in regulation is no bar to power of congress. 272 US457, 47SCt130, 71Led350.
12-59 272US605, 47SCt207, 71Led432.
12-60 272US605, 47SCt207, 71Led432; 19F(2d)391; 264Mass128, 162NE324.
12-62 273US45, 47SCt298, 71Led530; 214Ala38, 161S231; 254Mass240, 150 NE206; 116 OhSt205, 156NE124. [d] **No defense to prosecution** for violation of license statute that defendant operated partly in interstate commerce. 254 Mass271, 150NE213.
12-63 [a] 53ND73, 204NW994.
12-64 But see 267US427, 45SCt342, 69 Led696; 271US124, 46SCt447, 70Led 865. [a] **Federal Transportation Act does not affect right of state** to require just and reasonable passenger service for intra-state business except as inconsistent with orders of interstate commerce commission. 53ND73, 204NW 994.
12-64½-New. State cannot impose burden upon citizen of another state transacting business therein. CalA 291P233.
12-66 272US605, 47SCt207, 71Led432; 273US34, 47SCt267, 71Led524; 273US 83, 47SCt294, 71Led549; 274US676, 47SCt758, 71Led1292; 278US1, 49SCt 1, 73Led147; 279US245, 49SCt279, 73

L ed683; 16F(2d)290; 28F(2d)736; 36 F(2d)260; 162La956, 111S341; 254Mass 569, 151NE63, 46ALR563; 257Mass572, 154NE182, 55ALR928; 258Mass48, 154 NE516; 127Misc866, 217NYS781; 225 AppDiv182, 232NYS536; 127 Or196, 270 P519; 285Pa1, 131A489; 85PaSuper 149; TexCommnA 292SW869.

13-67 273US83, 47SCt294, 71L ed549; 273US34, 47SCt267, 71L ed524; 16F(2d) 290; 126Me489, 139A784.

13-68 273US83, 47SCt294, 71L ed549; 274US554, 47SCt702, 71L ed1199; 16F (2d)290; 158La262, 103S761, 765 [quot CJ]; 285Pa1, 131A489. See also 274 US676, 47SCt758, 71L ed1292. [a] **North Dakota Grain Grading Act** held to violate interstate commerce clause. 268US189, 45SCt481, 69L ed909.

13-70 273US45, 47SCt298, 71L ed530; 274US135, 47SCt548, 71L ed966; 274US 554, 47SCt702, 71L ed1199; 277US163, 48SCt502, 72L ed833, 62ALR45; 16F (2d)290; 34F(2d)780 (highway regulation); 214Ala38, 161S231; 92Fla837, 110S533; 326 Ill 625, 158NE376, 56ALR 722; 158La262, 103S761, 765 [quotCJ]; 254Mass569, 151NE63, 46ALR563; 257 Mass572, 154NE182, 55ALR928; 249NY 445, 164NE541 [motion to amend remittitur granted 166NY324(1stcase)]; 160 Tenn316, 24SW(2d)898; 100Vt140, 135 A705; 146Wash17, 261P796. See also 162La956, 111S341. [b] (2) Interstate carriers are subject to reasonable uniform, nondiscriminatory regulations for public safety, which do not unreasonably burden interstate commerce. Iowa 230NW540.

14-71 273US45, 47SCt298, 71L ed530; 274US135, 47SCt548, 71L ed966; 274 US554, 47SCt702, 71L ed1199; 277US 163, 48SCt502, 72L ed833, 62ALR45; 16F(2d)290; 214Ala38, 161S231; 158La 262, 103S761, 765 [quotCJ].

14-72 127Misc866, 217NYS781.

14-73 274US554, 47SCt702, 71L ed1199; 277US163, 48SCt502, 72L ed833, 62ALR 45; 285Pa1, 131A489. [c] **In order that statute be declared void** it must clearly appear that it is of more than local nature and has effect beyond state line, or that it burdens, fetters, or regulates interstate commerce prejudicially. 285Pa1, 131A489.

14-75 271US244, 46SCt535, 70L ed928 (establishment of junctions or physical connections between interstate railroad); 18F(2d)991.

14-76½-New. Any action by a state, directly or through its municipalities, exercising such control over interstate commerce as directly to interfere with its operation, must be such as does not impose unreasonable burdens on such commerce. 18F(2d)991.

15-79½-New. Federal power to regulate commerce with Indian tribes is not affected by the fact that states retain their police power. 33F(2d)608.

15-80 Va 155SE630.

15-82 274US588, 47SCt720, 71L ed 1219.

15-87 271US153, 46SCt452, 70L ed 878; 272US457, 47SCt130, 71L ed350; 31 F(2d)448; 35F(2d) 761 (rule of secretary of commerce, forbidding navigation of aircraft at less than five hundred-feet elevation, applies to intrastate, as well as interstate, flights); 95 Fla14, 116S48; 284Pa577, 131A484.

15-87½-New. Rights and liabilities in respect of damages to an interstate shipment depend on acts of congress, agreement of parties, and federal law. 148Va48, 138SE467, 53ALR990.

16-88 273US280, 47SCt386, 71L ed 644; 274US614, 47SCt718, 71L ed1234; 274US676, 47SCt758, 71L ed1292; 90 Fla721, 106S576; 249Mich289, 228NW 791 (regulating tolls of international highway bridge); 81NH566, 129A117, 39ALR1023; TexCivA 15SW(2d)46 (2d case); 274US135, 47SCt548, 71L ed966.

16-89 273US280, 47SCt386, 71L ed 644; 274US135, 47SCt548, 71L ed966; 274US614, 47SCt718, 71L ed1234; 274 US676, 47SCt758, 71L ed1292; 32F(2d) 714; 38F(2d)968; 90Fla721, 106S576; 215Ky514, 285SW241; 262Mass137, 159 NE743, 56ALR784; 318Mo 225, 2SW(2d) 621 (state has jurisdiction to prevent maintenance of bucket shop); 82NH327, 133A451, 47ALR218; 247NY9, 159NE 703 (may prohibit or regulate bridges across navigable streams); 220AppDiv 80, 221NYS129; SD 228NW179; 100Vt 140, 135A705. See also 47RI 19, 129A 613. [i] **State regulation of motor transportation over state highways** applies to motor transportation companies operating in interstate traffic in so far as such application involves no direct burden on interstate commerce. 113 OhSt 565, 149NE713. [g] **In absence of action by congress** state may establish quarantines against plants, the coming in of which may expose crops to disease. 270US87, 46SCt279, 70L ed482. [k] **State regulation in this field must not materially burden** interstate commerce. 90Fla721, 106S576. [l] **Bus lines.**-82 NH327, 133A451, 47ALR218 [L. (1919) c 86]. [m] **Organization of railroad companies.**-118 Oh72, 160NE615.

17-91 273US280, 47SCt386, 71L ed644; 274US135, 47SCt548, 71L ed966; 274 US614, 47SCt718, 71L ed1234; 274US 676, 47SCt758, 71L ed1292.

17-93 267US404, 45SCt243, 69L ed683; 270US87,46SCt279, 70L ed482 (Washington statute giving director of agriculture authority to quarantine infected plants held invalid in view of federal law giving federal agricultural department supervision of horticulture and agriculture of states); 272US605, 47SCt207, 71L ed432; 273US341, 47SCt383, 71 L ed672; 274US588, 47SCt720, 71L ed 1219; 276US165, 48SCt215, 72L ed513; 276US475, 48SCt361, 72L ed661; 13F (2d)673; 16F(2d)313; 16F(2d)378; 19 F(2d)522; 23F(2d)822; 24F(2d)569 (interstate telegraphs); 32F(2d)913; 41 F(2d)806; 213Ala151, 106S197; 168Ark 22, 269SW47; 195Cal 683, 235P50; 89Fla 419, 104S602, 39ALR1362; 160Ga205, 127 SE768; 317Ill278, 148NE47; 324 Ill 74, 154NE433; 325 Ill 387, 156NE298; 328 Ill 353, 159NE802; 235 IllA151; Ind 150 NE407; IndA 168NE249 (regulation of headlights on locomotives); IndA 169 NE358; 217Ky439, 289SW1094; 126 Me489, 139A784; 168Minn393, 210NW 399; 144Miss350, 109S857; 156Miss 463, 125S819; 220MoA989, 272SW76; 222MoA495, 280SW1050; MoA 300SW 324; 113Nebr682, 204NW870, 41ALR 446; 83NH10, 138A315; 223AppDiv 358, 228NYS686; 226AppDiv43, 234NYS 342; 189NC813, 128SE345; 197NC319, 148SE446; 115OhSt477, 154NE790; 35 OhA291, 172NE425; 292Pa44, 140A 618; 46RI 496, 129A495; TexCivA 275 SW505; 115Tex455, 283SW475; 145Va 62, 133SE883; 147Va415, 137SE496; 152 Wash548, 278P419. [f] **Rights under Federal Employers' Liability Act** cannot be affected by state statute or muncipal ordinance. 324 Ill 74, 154NE433. [g] **Approval of compromise** by court on suit against railroad required by state statute is not necessary where claim arose exclusively under Federal Employers' Liability Act. 162La841, 111S 185. [h] **State statutes as to attorney's fees**, in action for failure to transmit money, are suspended where telegraph companies are placed under jurisdiction of interstate commerce commission. 24 F(2d)569.

18-95 272US605, 47SCt207, 71L ed432; 275US404, 48SCt189 (state decisions cannot affect interstate commerce commission's order as to switch connection with sidetrack); 325 Ill 387, 156NE298; 113Nebr682, 204NW870, 41ALR446; 220AppDiv222, 220NYS789; 115Tex 240, 280SW733. But see 335 Ill 70, 166 NE466. [b] **Railroad cannot refuse switch connection** with shippers' sidetrack because of state law declaring such track part of road, as will of congress cannot be controlled by state laws. 275US404, 48SCt189.

18-96 43F(2d)198; 89Fla419, 104S602, 39ALR1362; 327 Ill 574, 158NE857, 57 ALR664. [b] **Federal agricultural department** has exclusive care of horticulture and agriculture of states as injuriously affected by transportation in foreign and interstate commerce. 270US 87, 46SCt279, 70L ed482. [c] **Grain Futures Act** does not regulate whole field of trading in grain futures so as to interfere with state legislation. 318Mo 225, 2SW(2d)621 (state statute held not affected).

18-98 267US493, 45SCt409, 69L ed753 (state public service commission may prohibit discontinuance of switching service, though eighty-five per cent of business done thereon is interstate commerce); 274US588, 47SCt720, 71L ed 1219. [b] **Michigan "Cab Curtain Act"** held by equally divided court not to conflict with "Federal Safety Appliance Acts." 233Mich676, 208NW62. [c] **Neither Hepburn Act** making initial carriers of freight responsible nor act prohibiting confinement of live stock for more than a certain period abrogates the common-law liabilities of carriers as enforced in state courts. 33GaA773, 127 SE830. [d] **State statute held not to impinge upon federal statute.**-34F(2d) 808.

18-99 40F(2d)1.

18-3½-New. Undue encroachment of the federal power on the power of states to fix intra-state rates, which might result from the precedence to be given under the constitution to regulations by the federal power of what is under federal control over conflicting state regulations of what is under state control, is to be guarded against by scrupulous care to act with caution and comity, particularly where the activity is only incidental to a superior federal authority. 30F(2d)116.

18-3¼-New. A state public utilities commission has jurisdiction to require just and reasonable freight and passenger service from an interstate common carrier for intra-state business, so long as such requirement is not inconsistent with an order of the interstate commerce commission. 119 OhSt381, 164NE 427.

18-3¼-New. An act passed by congress does not prevent the state courts from enforcing reasonable rules enacted by the state legislature and those established by the appellate courts for the protection of lives and properties against the negligent movement of trains, although used in interstate commerce. TexCivA 15SW(2d)46(2dcase).

19-7 BC [1929] 1DomLR756 (regulation of marketing).

19-10 273US83, 47SCt294, 71L ed549.

19-16 [b] (1) 124Kan237, 257P959. (17) 7F(2d)715. (18) Patterns, catalogues, and fashion sheets. 4F(2d)910. (19) Shrimp caught within state for transportation and sale in interstate commerce. 278US1, 49SCt1, 73L ed147.

19-16½-New. Real estate is not a subject of interstate commerce. 22AlaA537, 118S253 [certiorari den 118S258].

20-19 273US52, 47SCt255, 71L ed534.

21-26 84CalA237, 257P906.

21-28 124Kan237, 257P959. See also 273US83, 47SCt294, 71L ed549.

21-29 273US52, 47SCt255, 71L ed534; 278US1, 49SCt1, 73L ed147.

21-30 [a] **Solicitation of business of interstate transportation** is not transaction of business beyond protection of federal constitution. 240Mich542, 215 NW390.

21-31 Mass 158NE898 (failure to maintain business in more than one state is not material).

21-31½-New. Business of interstate insurance is not interstate commerce. 13 F(2d)500.

21-31½-New. Manufacture of articles to be shipped out of state is not interstate commerce. 44F(2d)58.

21-33 See also 273US280, 47SCt386, 71 L ed644.

21-34 31F(2d)663; 104Conn479, 133A 573.

21-35 44F(2d)64; 84Colo 353, 270P 867; 166Minn285, 207NW724 (writing insurance on application mailed to insurance company in another state).

22-40½-New. The federal constitution protects from state interference contracts made in interstate commerce wherever made. 233Mich384, 206NW 371.

22-45 273US34, 47SCt267, 71L ed524; 274US676, 47SCt758, 71L ed1292; 125 Me338, 133A907, 47ALR720.

22-46 272US469, 47SCt170, 71L ed359; 274US676, 47SCt758, 71L ed1292; 24 F(2d)569 (money); 44F(2d)58; 46RI

496, 129A495 (transportation of electricity). [b] **Gas moving in pipe line** from one state to another is in interstate commerce. 270US550, 46SCt371, 70L ed726. [c] **Gas produced and piped to customers within state** moves in intra-state commerce, though mingled with gas moving in interstate commerce. 270US550, 46SCt371, 70L ed726.

22-48 272US469, 47SCt170, 71L ed359; 274US676, 47SCt758, 71L ed1292; 84 CalA325, 258P148, 152 [citCJ]; 328 Ill 353, 159NE802; 200Wis243, 227NW948. [c] **Hauling of empty cars** from one state to another is interstate commerce. Mich 224NW429. [d] **Passenger riding on free pass** for purpose of continuous journey from state of Washington to state of Minnesota is interstate passenger. 36F(2d)189. [e] **Distributors of moving picture films transferring them from one state to another for exhibition** are engaged in interstate commerce. 43 F(2d)991.

22-49 274US676, 47SCt758, 71L ed 1292.

23-50 272US469, 47SCt170, 71L ed359; 279US245, 49SCt279, 73L ed683. [d] (1) 43F(2d)170.

23-52 IndA 154NE885.

23-53 273US34, 47SCt267, 71L ed524; 273US341, 47SCt383, 71L ed672.

23-54 272US457, 47SCt130, 71L ed350; 275US257, 48SCt107, 72L ed270; 277US 163, 48SCt502, 72L ed833, 62ALR45 (suburban traffic); 13F(2d)633; 34 F(2d)815 (delivery of motion picture films through exchanges and redelivery thereof to exchanges is interstate commerce); 38F(2d)91. [a] (2) Form of tickets designed to indicate interstate transportation held to be of no consequence so far as purely intra-state traffic is concerned. 254Mass248, 150NE 210. [j] **Mere fact that designation of train was changed** for return trip is held not to change its interstate character. IndA 154NE885. [k] **Essential character of commerce** determines whether shipment is intra-state or interstate, and not when or to whom title passes. 280US98, 50SCt51, 74L ed187.

23-55 [c] **Initiation or completion under local bill of lading,** wholly intra-state, does not affect interstate character of shipment. 280US98, 50SCt51, 74 L ed187.

23-56½-New. In a transaction between buyer and seller of different states calling for lumber to be delivered f. o. b. cars it will be presumed that shipment to buyer's state making it interstate was contemplated rather than violation of laws of seller's state in which buyer corporation had not filed charter. 152 Tenn339, 279SW257.

23-56¼-New. Intent of shipper determines where interstate commerce ends. 16F(2d)441.

23-57 324 Ill 591, 155NE841.

23-58 32F(2d)613.

23-59 [a] **Statute not permitting operator between fixed termini** within state to change nature of business by extending routes beyond such termini is held not to violate interstate commerce clause of United States constitution. 254Mass 240, 150NE206.

23-61 267US404, 45SCt243, 69L ed683; 7F(2d)865; 223AppDiv75, 227NYS510; 225AppDiv182, 232NYS536.

24-66½-New. Intrastate carrier of passengers on highways is not exempt from state highway regulations because it also carries interstate passengers. 21 F(2d)83.

25-67 272US469, 47SCt170, 71L ed359. [b] (4) Delivery of gasoline to general storage tanks is held not to end interstate shipment where further delivery to consignee is contemplated. 16 F(2d)441. (5) Where, thirteen per cent of oil put into storage tanks was used locally, shipment held to have ended. 16F(2d)441.

25-68 16F(2d)441.

25-69 280US98, 50SCt51, 74L ed187 (rail transportation of wood pulp from port through which imported to buyer's place of business in same state, held part of foreign commerce); 7F(2d)715; 16F(2d)441; 43 Ida482, 252P406.

25-69½-New. The intent and purpose of the party making the shipment have an important, if not controlling, bearing upon the question of where the interstate journey ends. 13F(2d)633.

25-70 272US469, 47SCt170, 71L ed359; 16F(2d)441; 29F(2d)660; 43 Ida482, 252P406.

25-71 252NY182, 169NE132.

25-72 32F(2d)271.

25-74 IndA 154NE885.

26-76 Ill 173NE372; 123Kan35, 254P 379. [d] **Effect of substitution of grain at warehouse.**–123Kan35, 254P379. [e] **That further transportation is under new bill of lading** does not affect rule. 123Kan35, 254P379.

26-77 13F(2d)633; 14F(2d)439; 42 F(2d)775. [a] **Distributing points.**–13 F(2d)633.

26-81 275US257, 48SCt107, 72L ed270.

26-82 275US257, 48SCt107, 72L ed270; 119Kan706, 241P693.

26-84 123Kan35, 254P379.

26-86½-New. Shipment which parties knew was destined for foreign county is in foreign commerce, although initial movement was under local bill of lading. TexCivA 277SW191.

26-86¼-New. Interstate shipments of oil and gasoline end on delivery to storage tanks and cars for distribution in the state, title passing at seaboard. 275 US257, 48SCt107, 72L ed270.

26-86¼-New. That tobacco is raised for shipment to another state does not make it subject to interstate commerce rules until it has actually started on the journey. 12PortoRicoFed229.

26-86½-New. That contracts for carriage of grain on the Great Lakes describe elevators at Buffalo as the destination is not conclusive that the grain is no longer in interstate commerce when lifted from the vessel. 250NY345, 165NE805.

26-86¼-New. Grain held for storage in a grain elevator, in the hope of a higher price, is not in transit. 250NY345, 165NE805.

26-90 272US469, 47SCt170, 71L ed359; 273US52, 47SCt255, 71L ed534; 86 IndA 695, 159NE761; 152Tenn339, 279SW 257; TexCivA 264SW551; TexCivA 293 SW670; TexCivA 58W(2d)559. See also 273US83, 47SCt294, 71L ed549. [c] **Sale of notes** by corporation shipping from Tennessee to Alabama held "interstate commerce." 216Ala21, 112S428.

26-91 272US469, 47SCt170, 71L ed359; 273US52, 47SCt255, 71L ed534.

27-92 273US52, 47SCt255, 71L ed534; 12PortoRicoFed203.

27-93 272US469, 47SCt170, 71L ed359; 273US52, 47SCt255, 71L ed534; 281US 511, 50SCt383, 74L ed1004; 215Ala133, 110S299; 175Ark194, 299SW609; CalA 291P233; 214Ky76, 282SW769; 224Ky 134, 5SW(2d)886 (statute relative to peddler's notes held not applicable to notes given for merchandise on order taken by salesmen within state and transmitted to another state for approval); Mass 158NE398; 315Mo 927, 288 SW20; 122 Or572, 260P224 (delivery to carrier); 6PaDist&Co 141; TexCivA 273 SW1113; TexCivA 30SW(2d)388.

27-95 268US189, 45SCt481, 69L ed909; 272US469, 47SCt170, 71L ed359; 273 US52, 47SCt255, 71L ed534.

27-98 116 OhSt205, 156NE124.

27-2 Mo 30SW(2d)447; 131SC466, 128 SE8 (Interstate Commerce Law inapplicable to sale of gasoline from tank by consignees).

27-3 280US390, 50SCt169, 74L ed504 (form of contract cannot convert local business into interstate commerce).

28-5 See also TexCivA 31SW(2d)196.

28-6½-New. That notes for the price and a mortgage given as security are executed within the state does not take a transaction out of interstate commerce where the order is accepted in another state than the one to which the goods were shipped. Utah 283P731.

28-7 273US52, 47SCt255, 71L ed534; 156Miss377, 119S360 (sale held not interstate commerce).

28-7½-New. Whether shipment is interstate commerce is determined by the character of the shipment not by billing or form of contracts. 92Fla61, 109S656.

28-7¼-New. A sale of goods from United States to Porto Rico is held not an interstate transaction. 16F(2d)545.

28-7¼-New. Sale to United States and delivery on military reservation within the seller's state and county is not foreign or interstate commerce. Tex CommnA 3SW(2d)427.

28-7½-New. In determining whether sale was interstate commerce, desire of parties to evade state excise law is immaterial. 280US390, 50SCt169, 74L ed 504.

28-7¼-New. Interstate commerce may include sale of business service as well as commodities. 179Minn457, 229NW 580.

28-9 40F(2d)189 (installation of organs); 118Kan693, 236P654; 217Ky 225, 289SW260; TexCivA 290SW861; Utah 283P731.

28-10 TexCivA 290SW861.

28-11 TexCivA 290SW861.

28-12 4F(2d)840 (buying in New York market live poultry farm agents of interstate shippers held interstate commerce); 181Ark386, 26SW(2d)122; 179 Minn457, 229NW580; 83NH336, 143A 703; 6PaDist&Co 141; TexCommnA 5 SW(2d)980, 60ALR983; TexCivA 290 SW861; Utah 283P731 (where order is accepted in state from which goods are shipped). See also 45 Ida270, 261P683.

29-13 TexCommnA 5SW(2d)980, 60 ALR983.

29-16 TexCivA 287SW127.

29-18 [a] TexCivA 271SW640.

29-19 34F(2d)682; 211Ky239, 277SW 257; 236Mich460, 210NW492, 47ALR 1128.

31-32½-New. In transportation commerce is incidental to buying and selling, it is immaterial whether it comes first or last. 211Ky239, 277SW257.

31-32¼-New. Sale of goods by crew through local store is interstate commerce where sold in original package. 211Ky239, 277SW257.

31-34 [a] But see 15F(2d)208.

32-44 236Mich460, 210NW492, 495 [quotCJ], 47ALR1128.

32-45 236Mich460, 210NW492, 495 [quotCJ], 47ALR1128.

32-46 236Mich460, 210NW492, 495 [quotCJ], 47ALR1128.

34-85 40F(2d)323; 247NY9, 159NE 703.

35-90 173Minn424, 217NW486; 126 Misc182, 212NYS682; 190NC45, 128SE 500; 115Tex240, 280SW733. [b] (3) Contract between New York Cotton Exchange and telegraph for distribution of quotations furnished by Exchange held not violative of Sherman Anti-Trust Act, sales and transactions on exchange not being interstate commerce. 270US593, 46SCt367, 70L ed750.

35-95 MoA 22SW(2d)81.

35-98½-New. The regulation of radio communication is a valid exercise of the power of congress under the commerce clause. 29F(2d)113.

35-98¼-New. Radio transmission and reception among states constitutes interstate commerce. 31F(2d)448.

35-98¼-New. Congress has power to provide for the reasonable regulation of the use and operation of radio stations and to establish agencies to give effect to that authority. 31F(2d)630.

36-7½-New. dealing in commercial paper, 238Mich508, 213NW867.

36-13 22F(2d)559.

36-20 121Kan348, 246P511, 1120, 54 ALR295; 315Mo 823, 290SW416.

37-23 7Alaska160.

37-27 275US274, 48SCt124, 72L ed277.

37-28 275US274, 48SCt124, 72L ed277.

37-29 But see 224AppDiv531, 231NYS 503.

37-33 118 Okl 111, 246P851, 853 [quot CJ].

38-35 279US245, 49SCt279, 73L ed683.

38-36 273US83, 47SCt294, 71L ed549; 154Wash514, 283P462 (manufacturing doors is not interstate commerce). See also 16F(2d)517. [c] **Terms "instruments," "accessories," and "implements of interstate commerce"** do not connote valid conclusion that work upon article so designated is or is not work in interstate commerce. 105Conn122, 134A795. [d] **Empty freight cars.**–Whether freight cars, bringing freight into state after

finishing interstate run to place of consignment, regained interstate character, depends on predetermination of their use and movement, and not on their use and movement after injury sustained by railroad employee. 246 Mich399, 224NW429. [e] **Form of contract** cannot convert what was exclusively local business into interstate commerce. 280US390, 50SCt169, 74L ed504. [f] **Trade acceptances executed pursuant to interstate transaction** are not governed by state statute requiring peddler's note to be so indorsed. 234Ky 469, 28SW(2d)507.

38-38 194NC188, 138SE608.

38-40 24F(2d)569 (transmission of money by telegraph); 38F(2d)77; 262 Mass137, 159NE713, 56ALR784.

38-42 272US605, 47SCt207, 71L ed532; 325 Ill 387, 156NE298; 87 IndA11, 158 NE636; LaA 129S452 (tracks of terminal railroad company largely used in interstate commerce); NJ 130A225; 223App Div663, 229NYS378. But see 222AppDiv 702, 224NYS737. [e] 125Mc96, 131A5. [f] **Siding held instrumentality** of interstate commerce where nearly half the cars moving over it carried interstate shipments. 162La841, 111S181. [g] **Construction of intra-state logging road** by lumber company under agreement for receipt of stock in railroad company for money expended and execution of mortgage on its property to secure bond issue is not within application of Interstate Commerce Act. 146Wash543, 264P705. [h] **Car which is part of local switching haul** (1) is not interstate instrumentality until delivered and appropriated by shipper for interstate loading and hauling. 42F(2d)387. (2) Such car has not entered into interstate commerce when still part of local switching haul and not spotted for use by interstate shipper. 42F(2d)387.

38-43 234 IIIA416.

38-47 22F(2d)795 (car on "belt rail road"); 292Pa44, 140A618.

39-57 140Miss375, 105S770.

39-60 272US359, 47SCt125, 71L ed298.

40-65 274US676, 47SCt758, 71L ed1292.

40-70 235Ky540, 31SW(2d)932.

40-72 [b] **Municipal corporation** cannot prohibit operation of interstate ferry. 4F(2d)899. [c] **Town cannot grant** exclusive franchise to operate interstate ferry. 6F(2d)21.

40-77 269US328, 46SCt122, 70L ed289; 40F(2d)323; 42F(2d)692. See also 26 F(2d)930. But see 42F(2d)692.

41-81 42F(2d)692.

41-85 TexCommnA 296SW482; Tex CivA 78SW(2d)599; 151Va409, 145SE 372.

42-90½-New. An action to enforce personal liability under statute of officers of a foreign corporation is held not to disclose that transactions were in foreign commerce as to which statute was inapplicable. 258Mass48, 154NE516.

42-90¾-New. Interstate commerce is running vehicles which transport passengers or goods interstate or are honestly intended for such purpose. 21F (2d)83.

42-92 162La841, 111S184; MoA 293SW 456; 103NJEq307, 143A438 (carriage of passengers, as well as of goods); 224 AppDiv793, 230NYS705. [a] (5) Maintenance of interstate railway constitutes interstate commerce. 152Tenn189, 274 SW13. (6) Congress may authorize abandonment of wholly intra-state operation when prejudicial to interstate commerce. 271US153, 46SCt452, 70L ed 878.

42-95½-New. A foreign railroad corporation, engaged exclusively in interstate commerce, has the right to solicit business within state without hindrance. 254Mass569, 151NE663, 46ALR563.

42-96½-New. Railroads are not liable for injuries to employees during period of government control and operation. 218AppDiv217, 218NYS111.

42-96¾-New. A terminal company is engaged in interstate transportation of passengers, notwithstanding that it handles trains only over very limited trackage, where such trains are interstate trains, and the company's employees cooperate with train dispatchers of the railroad companies and deliver for them train orders to outbound trains. 30F (2d)109.

42-98½-New. Federal Employees' Liability Act. Liability of interstate railroad carriers to make compensation for personal injuries by employees is regulated both inclusively and exclusively by the Federal Act, and Illinois Workmen's Compensation Act does not apply. 307Mo 596, 271SW358.

43-5 See also 217AppDiv301, 216NYS 656.

43-5½-New. In an action for death of a brakeman engaged in interstate commerce the state court will take necessary action to prevent the recovery under both federal and state law. 284Pa 577, 131A484.

43-7 199Cal 126, 248P501; 237Mich 530, 213NW179; 213AppDiv9, 209NYS 689; Or 288P1003; 292Pa44, 140A618; TexCommnA 273SW834. [c] **Judicial power to determine** nature of commerce, in which injured employee was engaged, in case brought under state statute is not inferior to power in cases brought under Federal Act. 270US611, 46SCt 420, 70L ed757, 53ALR1265.

43-8 39F(2d)798; 232 IIIA398; NC 154SE682; 125Mc96, 131A5; 237Mich 530, 213NW179; 102NJL271, 131A628; 213AppDiv9, 209NYS689; TexCommnA 273SW834; 66Utah161, 241P1058. [b] **Term "employed"** refers to general service which employee is performing for carrier. Nebr 231NW812.

43-9 But see 213AppDiv9, 209NYS689.

44-10 240Mich655, 216NW467; 143 Miss890, 108S503; 149Miss766, 115S 897; 217AppDiv301, 216NYS656; NC 155SE459.

44-11 240Mich655, 216NW467; 140 Miss829, 105S458; 143Miss890, 108S 503; 149Miss766, 115S897; 136SC95, 134SE247.

44-13 12F(2d)995; 91CalA770, 267P 591, 592 [quotCJ]; 102NJL271, 131A 628. [a] **Mere presence of intrastate car on interstate track** does not make it part of interstate commerce. 43F(2d) 692.

44-14 36F(2d)705; 105Conn122, 134A 795; 232 IIIA398; 235 IIIA380; 164 Minn353, 205NW260; 173Minn169, 216 NW940; 309Mo 475, 274SW718 (not engaged in interstate commerce); 115Nebr 164, 211NW1003; 102NJL271, 131A 628; 217AppDiv301, 216NYS656; 218 AppDiv295, 218NYS207; 284Pa577, 131 A484; 287Pa390, 135A102; 288Pa250, 135A648; TexCommnA 273SW834; Tex CivA 28SW(2d)958; 67Utah464, 248P 115, 49ALR1316. [a] **Empty foreign freight car** is in interstate commerce when it begins movement back to point at which received by carrier or is definitely designated and started on its way to receive interstate freight. 198Cal 733, 247P911, 49ALR1330.

44-14½-New. Employment incident to both interstate and intra-state commerce is within the Federal Employers' Liability Act. 318 Ill 537, 149NE514.

44-15 12F(2d)995; 30F(2d)594; 42F (2d)387; 109Conn94, 145A567; 47 Ida 561, 277P426; 336 Ill 560, 168NE686; 235 IIIA380; 242 IIIA428; 85 IndA435, 150NE239; 89 IndA63, 152NE296; 208 Iowa202, 225NW357; 128Kan790, 280P 902; 232Ky702, 23SW(2d)564; 246Mich 399, 224NW429; 164Minn353, 205NW 260; 172Minn447, 216NW234; 173Minn 169, 216NW940; 177Minn233, 225NW 106; 318Mo 79, 18SW(2d)172; 118Nebr 690, 226NW421; 218AppDiv295, 218NYS 207; 115 OhSt91, 152NE753; OhA 153 NE870; 284Pa577, 131A484; Utah 264P 965; Utah 277P408. See also 84Colo 67, 268P538; Wash 290P803. [a] **Work and general repair shops** of railroad and those employed therein are accessories to commerce. OhA 153NE870. [b] **If general service is primarily and directly in interest of interstate commerce** employee is engaged in interstate commerce within statute. 42F(2d)387.

44-16½-New. It is not necessary that an employee know the interstate character of the movement which he is aiding at the time of his injury to be within the Federal Employers' Liability Act. 316Mo 835, 293SW379.

44-16¼-New. A movement, which is purely in intra-state commerce, may be "interstate commerce," if the purpose of the intra-state movement is to facilitate interstate commerce. 26F(2d)905.

44-16¼-New. Every case must be adjudged on its own facts. 33F(2d)866.

44-16½-New. Reasonable exigencies of commerce, in the light of presently existing facts, must fix the nature of service, as being interstate commerce or not. 252NY182, 169NE132.

44-16¾-New. Whether an employee was engaged in interstate commerce at the time of the injury depends on the facts of the particular case. 336 Ill 560, 168NE686.

44-16⅞-New. Any work may be interstate if it constitutes preparatory movements in aid of interstate transportation. 336 Ill 560, 168NE686.

44-16⅞-New. "Interstate employment" begins when workman on carrier's premises makes forward move to serve in interstate traffic. 44F(2d)150.

44-17 8F(2d)317; 42F(2d)633; 47 Ida 561, 277P426; 247 IIIA528; 143Wash 271, 255P110. [b] (1) See also Ill 173 NE372. (3) Unloading of interstate shipment is so closely related as to be practically part of "interstate commerce." Ill 173NE372. [c] **Receiving medical attention.**—Injured employee in seeking and accepting treatment for injury, is not engaged in interstate commerce. 30F(2d)50.

44-18 232 IIIA398; 309Mo 475, 274SW 718; 218AppDiv295, 218NYS207; 288Pa 250, 135A648; TexCivA 48W(2d)320 (loading timbers which would in future be used in interstate bridge); 66Utah 161, 241P1058. [d] **Blasting rock to fill distant interstate railroad track** is not engaging in interstate commerce. 67 Utah464, 248P115, 49ALR1316. [e] **Unloading materials for erection of elevated tracks** is not interstate commerce employment. 232 IIIA398. [f] **Fireman of stationary boiler and locomotive** (1) used to heat railway station is not engaged in interstate commerce. 235 IIIA 380. (2) Fact that locomotive used to heat station was moved to yards to receive coal and water, and was fastened to other locomotives, when injury occurred does not place employment in interstate commerce. 235 IIIA380. [g] **Loading planks for repair of bridge over tracks.**—Railroad employee, injured while loading plank to be hauled to highway bridge crossing railroad tracks for repair of floor thereof, is not engaged in interstate commerce, though wreckage might have fallen to tracks had bridge not been repaired, where no necessity for work on, or removal of wreckage from, tracks had arisen at time of accident. 30F(2d)594. [h] **Moving coal for use in intra-state and interstate engines.**—Carrier's employee, engaged in gathering loaded coal cars and taking them to yard from which they were dropped to pocket where coal was fed to both intra-state and interstate engines, is not engaged in interstate commerce. 105NJL544, 146A59. [i] **Movement of car home** after service in interstate commerce is a necessary incident to that commerce. Ill 173NE 372.

45-19 15F(2d)540; 199Cal 126, 248P 501, 49ALR1323; 105Conn122, 134A795, 797 [quotCJ]; 336 Ill 560, 168NE686; 235 IIIA380; 235 IIIA431; 226Ky561, 10 SW(2d)1064; 237Mich530, 213NW179; 246Mich399, 224NW429; 322Mo 299, 15 SW(2d)825, 65ALR599; 322Mo 396, 18 SW(2d)82; 250NY345, 165NE805; 217 AppDiv301, 216NYS656; 115 OhSt91, 152NE753; 154Tenn224, 289SW520; 200 Wis137, 227NW249. See also 66Utah 161, 241P1058. But see 29F(2d)1. [b] **Status must be determined by facts existing at time of injury and not by matters arising thereafter.** 318Mo 79, 18W (2d)172. [c] **Coupling interstate to intra-state train** not interstate commerce. 319Mo 285, 4SW(2d)1065. [d] **Mere expectation** on being called to perform interstate task is insufficient. 36F(2d) 705.

45-19½-New. ; but the particular act being done at the time of the injury need

not have been to further interstate commerce. 318 Ill 537, 149NE514.

45-20 280US404, 50SCt167, 74L ed513 (1stcase).

45-22 36GaA513, 137SE404; 318 Ill 537, 149NE514; 319 Ill 326, 150NE242; 235 IllA431; IndA 154NE885; IndA 154 NE885; IndA 163NE283; 208 Iowa202, 225NW357; 315Mo 1199, 287SW1047; 321Mo 1190, 188SW(2d)433; 217AppDiv 301, 216NYS656; 224AppDiv793, 230NYS 705; 225AppDiv109, 232NYS363; 284 Pa577, 131A484; TexCivA 284SW664. [a] (1) 307Mo 595, 271SW358. (7) 125 Mo96, 131A5. (67) 23F(2d)777; 220 MoA1088, 291SW166. (78) Workman lining up pipe to transport sand for use of locomotives which stop for sand at sand storage tank along right of way. 173Minn169, 216NW940. (79) Employee crossing interstate track from bunk car to toilet. 33F(2d)866. (80) Hostler injured from scalding water while moving engine to coaling station before connection to cars used in interstate commerce. 232Ky702, 23SW(2d)564. (81) Employee of terminal company whose tracks are largely used by interstate trains will be assumed to be engaged in interstate commerce when injured while policing tracks. LaA 129S452. (82) Employee of railroad killed while engaged in spouting interstate shipment of iron ore from dock to boats. 200Wis243, 227NW948. (83) Teamster employed to haul oil team to steam shovel engaged in changing main channel of river for protection of railroad track. 153Wash 300, 279P1115. (84) Brakeman working on train operating between states injured while handling intrastate freight. Nebr 231NW812. (85) Brakeman engaged in switching refrigerator cars destined for points outside of state. 42F(2d)403. (86) Fireman on engine engaged in intrastate switching operations to clear main track for oncoming interstate train. 42F(2d)387. [b] 23F(2d)323.

46-23 24F(2d)201; 25F(2d)297; 26F (2d)905; 199Cal 126, 248P501, 49ALR 1323; 105Conn122, 134A795; 242 IllA 428; 237Mich530, 213NW179; 246Mich 399, 224NW429; 145Miss555, 110S444; 322Mo 886, 188SW(2d)40; 322Mo 396, 18 SW(2d)82; 102NJL271, 131A628; 250 NY345, 165NE805; 218AppDiv295, 218 NYS207; 118 OhSt612, 162NE793; 287 Pa302, 135A209; 136SC95, 134SE247. [a] (29) Switchman injured by falling under engine just repaired and returning to work of carrying cars in interstate and intra-state commerce is not engaged in interstate commerce. 213Ala 146, 104S269. (30) One employed as member of defendant's bridge and building gang then engaged in work at point where telegraph poles of defendant stored, in helping to place a pole on a flat car to be hauled by others to another point in state is not in interstate commerce. 309Mo 475, 274SW718. (31) Employee testing fire hose on engine. 36 F(2d)705. (32) Brakeman injured when train is backing out of yards to make trip within state. 336 Ill 560, 168NE686. (33) Employee engaged in unloading upon storage platform iron and steel removed from tracks of company engaged in intra-state and interstate commerce is not engaged in interstate commerce though company intends ultimately to ship material to point outside of state. 118Nebr690, 226NW421. (34) Other instances. 128Kan790, 280P902. (35) Marking freight car "return to Copely, Pennsylvania" is not assignment in interstate commerce. 43F(2d)692. [b] **Employee is "on duty"** only when at his post, ready and willing to work. 237Mich530, 213NW179.

46-24½-New. Where the act in question partakes of the characteristics of both interstate and intra-state commerce and at the particular time of the accident the employee is engaged in both classes, the federal statute controls. 115 OhSt91, 152NE753.

46-24¾-New. For a carrier to be liable it must have accepted and designated for interstate use one or more units of a train on which an employee worked. 199Cal 126, 248P501, 49ALR1323.

46-24¼-New. An employee engaged in both state and interstate employment is injured within the scope of his interstate employment, where such injury occurs while he is leaving the premises of his employer at the close of a day's work. 109Conn94, 145A567.

46-24½-New. The issue of fact whether an employee was engaged in interstate commerce at the time of injury must be determined from practical consideration of the circumstances in each case. 246Mich399, 224NW429.

46-25 189NC813, 128SE345.

46-26 CalA 287P538; 322Mo 469, 17 SW(2d)337.

46-28 234Ky504, 28SW(2d)733; MoA 293SW456 (brakeman recording time of partial unloading of car shipped in interstate commerce); 217AppDiv301, 216 NYS656; 284Pa577, 131A484. But see 43F(2d)692.

46-29 19F(2d)808; 219Ala238, 121S722 (switch engine foreman); 321 Ill 620, 152NE594; 336 Ill 560, 168NE686 (hauling empty cars from one state to another); 249 IllA463; 89 IndA63, 152NE 296 (employee operating coal dock); 232 Ky702, 23SW(2d)564; 164Minn353, 205 NW260 (switchman); 172Minn447, 216 NW234 (member of switching crew engaged in moving cars to make room for interstate cars); 176Minn575, 224NW 241 (switching crew engaged in making up train with cars billed for another state); Mo 68W(2d)843 (switchman getting lunch bucket from engine tender); Nebr 231NW812 (train running between different states is instrument of interstate commerce); 223AppDiv563, 229 NYS378; 287Pa590, 135A728; TexCivA 280SW619 (guard protecting engines, tracks, and roundhouse used in interstate commerce); 200Wis137, 227NW 249. See also 218AppDiv295, 218NYS 207. [g] (1) 146Miss630, 113S195. [j] **When employment begins and ends.**-284 Pa577, 131A484. [k] **Continuity of brakeman's service in interstate movement is not broken** (1) by return trip in which no cars of any character were ordered moved. 284Pa577, 131A484. (2) Nor is mere expectation to serve in intra-state service sufficient to interrupt interstate movement. 284Pa577, 131A484. [l] **Employee of interstate carrier checking cars to be moved to points outside of state** is engaged in interstate commerce. Va 153SE874.

47-30 109Conn94, 145A567.

47-30½-New. A laborer at roundhouse used indiscriminately in interstate and intra-state commerce is engaged in interstate commerce. 103NJL4, 135A77.

47-31 173Minn169, 216NW940.

47-32 162La841, 111S184; 9LaA714, 119S759; Minn 231NW922; 307Mo 595, 271SW358; MoA 274SW871; MoA 281 SW456 (section hand); 220MoA1088, 291SW166; 152Tenn189, 274SW13; Tex CommnA 288SW154; Utah 264P965. See also 218AppDiv295, 218NYS207.

47-33 TexCivA 275SW505.

47-34½-New. Although trains could not pass over one of the tracks of a lower deck of a bridge while a train carrying material for repairs was standing thereon, a person unloading material is held engaged in interstate commerce. 220 MoA1088, 291SW166.

47-37 281US345, 50SCt294, 74L ed892 (2dcase); 42F(2d)633; 44F(2d)150; 91 CalA770, 267P591, 592 [quotCJ]; 109 Conn94, 145A567; 41GaA263, 153SE96 (2dcase); 336 Ill 560, 168NE686 (employee working on train containing one car used in interstate commerce); 85 IndA435, 150NE239; 232Ky702, 23SW (2d)564; 173Minn169, 216NW940; 318 Mo 79, 18SW(2d)172; 115Nebr164, 211 NW1003; 227AppDiv822, 237NYS375; 102NJL283, 132A302; 252NY182, 169NE 132; 56ND690, 219NW209; Utah 277P 408. But see 30F(2d)594; 177Minn 233, 225NW106; OhA 153NE870. [e] **Test** is whether rolling stock under repair was withdrawn from service at time of repairs, or merely interrupted in course of interstate haul. 115Nebr164, 211NW1003. [f] **Movement of disabled engines from one state into railroad shops in another state for repairs** (1) constitutes movement in interstate commerce. 322Mo 299, 15SW(2d)825, 65 ALR599. (2) Turntable permanently used for movement of such engines into repair shop is instrumentality of interstate commerce. 322Mo 299, 15SW(2d) 825, 65ALR599.

48-40½-New. A section hand unloading rails for use in the repair of a track over which both interstate and intra-state trains travel is engaged in interstate commerce. 11F(2d)913.

48-41 232 IllA398; 240 IllA332; 206 Iowa499, 221NW228 [certiorari den 278 US658, 49SCt187, 73L ed566(2dcase)]; 225Ky447, 9SW(2d)212; 287Pa390, 135 A102; TexCivA 6SW(2d)192 (paving street crossing not bettering tracks on crossing); TexCivA 23SW(2d)489; Utah 264P965 (injury while adjusting sickle bar of mower to be used to mow weeds on right of way).

48-42 217Ala382, 115S869 (delivering material to be used in repair, construction, or operation of interstate instrumentalities); 173Minn169, 216NW940 (repairing sand pipe of sand storage tank).

48-42½-New. An employee engaged in the repair, rebuilding, replacement, or enlargement of an interstate instrumentality after it has been so characterized by use is engaged in interstate commerce. 91PaSuper307.

48-42¾-New. The test for determining whether work on an instrumentality constitutes repair work or original construction is not whether the instrumentality when repaired, reconstructed or enlarged is entirely made of new material or of new design or of larger size, but whether it is still the original instrumentality retaining the same location and existing for the same purpose. 91PaSuper307.

48-42¼-New. Workman injured while repairing crane used to maintain tracks used in interstate and intrastate commerce, which work covered many days is not injured in interstate commerce. Or 288P1003.

48-44 200Cal 463, 254P258; 218MoA 364, 275SW570.

49-45 200Cal 463, 254P258.

49-46½-New. Interstate broadcasting of radio communications is species of interstate commerce. 36F(2d)115.

49-46¼-New. Radio station employee electrocuted while installing ice machine for cooling radio is employed in interstate commerce. Wash 290P803.

49-47 272US359, 47SCt125, 71L ed298.

49-55½-New. Congress may facilitate amicable settlement of disputes threatening service of necessary agencies of interstate transportation. 281US548, 50SCt427, 74L ed1034.

49-56 281US548, 50SCt427, 74L ed1034.

49-57 317 Ill 278, 148NE47 (may adopt "convenient" means as well as necessary means).

50-68 271US153, 46SCt452, 70L ed878 (excessive expenditures in local interest from fund arising from interstate and intra-state traffic may prejudice interstate commerce).

50-89 [a] **Business of persons handling cotton pending shipment.**-A statute regulating warehouses, warehousemen, weighers, graders, inspectors, samplers, or classifiers, where cotton is stored for safe-keeping and for weighing, grading, sampling, or classing, pending its shipment in interstate commerce, is not invalid as restraining or interfering with interstate commerce. 30F(2d)306.

50-89½-New. A state statute is not invalid unless it improperly burdens interstate commerce. 315Mo 823, 290 SW416.

51-90 268US189, 45SCt481, 69L ed909; 273US83, 47SCt294, 71L ed549; 278US1, 49SCt1, 73L ed147; 41F(2d)542. [c] **Statutes held valid.**-42F(2d)765.

51-91 273US83, 47SCt294, 71L ed549.

51-91½-New. One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose, but may show that in their practical operation its provisions directly burden or destroy interstate commerce. 278US1, 49SCt1, 73L ed147.

51-92½-New. Burden on interstate commerce will not be sustained merely because it applies equally to residents and nonresidents. 326 Ill 18, 156 NE814.

51-92½-New. Congress has power to regulate the action of persons engaged in interstate commerce. 20 F(2d)459.

51-92½-New. Judgment of condemnation of railroad property, by a river regulating district, authorizing the taking of several miles of main line track and right of way, together with stations, side tracks, and terminals, but providing compensation for cost of relocating such facilities is not an unauthorized interference with interstate commerce. 249 NY445, 164 NE541 (motion to amend remittitur granted 166 NE324 (intersue)).

51-92½-New. Equalization of ports with reference to a particular commodity does not impose an undue burden on interstate commerce. **TexCivA** 19 SW(2d)583.

51-95 262 Mass137, 159 NE773, 56 ALR784.

51-98 274 US585, 178 SC720, 71 L ed1219.

51-99 131 Va214, 126 SE87, 38 NH 133A 151, 47 ALR218. [a] **Statute requiring peddler's note to be so endorsed** does not apply to trade acceptances executed pursuant to interstate transactions. 234 Ky169, 28 SW(2d)56.

51-1 285 Pa1, 131 A489.

51-2 43 F(2d)154; 285 Pa1, 131 A489.

51-3 326 Ill 18, 156 NE814.

52-6½-New. A mere declaration that an act excepts interstate carriers does not withdraw the case from federal protection when its effect is to include them. 285 Pa1, 131 A489.

52-9 17 F(2d)374. [d] **North Dakota Grain Grading Act** is not valid as an attempt to carry out purposes of United States Grain Grading Act. 268 US189, 45 SC481, 69 L ed909.

52-20 32 F(2d)711.

52-25 199 Wis338, 226 NW310.

52-26 1 F(2d)5, 4.

54-36½-New. The state cannot discriminate in favor of intra state commerce against interstate commerce. 35 F(2d)867.

54-38 38 F(2d)227, 129 Okl278, 264 P619.

54-39 27 F(2d)447.

54-41 27 F(2d)447, 32 F(2d)711; 223 AppDiv456, 228 NYS686; 129 Okl278, 264 P619. [c] **Regulations regarding importation of hatching eggs and chicks held not unreasonable.** 32 F(2d)711.

56-43 [e] **In Washington** statute against importation of alfalfa infected with weevil held a real quarantine law and not a mere inhibition against importation of alfalfa. 270 US87, 46 SC270, 70 L ed482.

56-52 [b] (8) Giving materials produced in state certain preference in contracts for public works. 83 Colo329, 266 P214. (9) Regulations regarding importation of hatching eggs and chicks. 32 F(2d)711.

58-63 251 Ill91.

59-72 131 Misc566, 226 NYS265.

60-81 267 US132, 45 SC245, 69 L ed599, 37 ALR1407 (motor vehicles known to have been stolen).

61-89½-New. Regulation unauthorized by statute imposes no duty. 17 F(2d)881.

61-4 Cal A290 P652.

62-11½-New. Prohibition of possession of certain fish of less than certain size is held not to violate commerce clause. 92 Fla537, 110 S633.

62-12 65 Utah187, 249 P171, 48 ALR553.

62-14½-New. A statute against the advertising of cigarettes in a newspaper distributed in interstate commerce is unenforceable. 65 Utah187, 249 P171, 48 ALR553.

63-19 [a] **Petition for return of films seized** will be denied where commissioner had probable cause for believing existence of grounds for issuing search warrant and warrant of arrest. 23 F(2d)112. [b] **Act shall be liberally construed.**—23 F(2d)112.

63-22½-New. Reproduction in this country of a reel run in another country is within the act. 238 Fed135.

63-22½-New. The statute is not violated unless the fight films are shown to have been brought into the state through interstate or foreign commerce. 22 F(2d)296 (holding films not subject to seizure).

63-22½-New. A statute prohibiting the transportation of prize fight films in interstate commerce for purposes of public exhibition was not intended to make it an offense to give public exhibitions of films transported in violation of the act. 28 F(2d)189.

63-24 268 US178, 45 SC470, 69 L ed904.

63-39 273 US845, 47 SC298, 71 L ed530; 274 US554, 47 SC702, 71 L ed1199; 195 Cal683, 235 P50; 251 Mass240, 150 NE206; 113 Ohst665, 149 NE713.

64-41 273 US845, 47 SC298, 71 L ed530; 274 US554, 47 SC702, 71 L ed1199; 18 F(2d)991; 24 F(2d)226 (statute held not to impose tolls in violation of federal statute); 251 Mass240, 150 NE206; 82 NH327, 133 A451, 47 ALR218; 113 Ohst 665, 149 NE713, 100 Vt140, 135 A705.

64-42 18 F(2d)991.

64-43 18 F(2d)991.

64-44 18 F(2d)991.

64-45½-New. A state statute requiring transportation companies operating stage coaches for the transportation of passengers for hire to obtain from the railroad commission a certificate of public convenience and necessity as a condition precedent to the use of the highways is invalid as to a company engaged solely in interstate transportation. 195 Cal683, 235 P50.

64-48 [a] **Federal government has power** to prevent destruction in highways used in interstate commerce. 6 F(2d)160.

64-49½-New. A state statute whose primary purpose is not regulation with a view to safety or to conservation of highways and which determines not the manner of use but the persons by whom the highway may be used is in effect a regulation of commerce and, so far as it affects interstate commerce, is an unconstitutional invasion of the field reserved for federal regulation. 195 Cal683, 235 P50.

64-49½-New. Regulation may forbid sale of fish during closed season, although effect may prohibit sale of fish imported from other states. 93 Fla905, 113 S91.

64-49¼-New. Where the state statute expressly regulates commerce on highways to the extent permitted under federal law, provisions of law admittedly waived by state held immaterial. 274 US554, 47 SC702, 71 L ed1199.

66-74 247 NY9, 159 NE703 (may prohibit or control construction of bridges over navigable waters to bed of which it has title).

67-88½-New. Where a corporation, organized under the laws of a state, has procured authority, by act of congress to construct, maintain, and operate a toll bridge across a navigable stream which forms the boundary between such state and another, by which act the federal government reserved a supervising power, the state cannot compel the corporation to continue a branch of its service which, through changed conditions, has become unremunerative. 12 Kan414, 244 P207.

67-93½-New. An action to enforce the personal liability of a foreign corporation under statute cannot be based on a transaction in foreign and interstate commerce. 258 Mass48, 154 NE516.

69-8½-New. A pier located in navigable waters, used solely in interstate commerce, cannot be subject to regulations of the state. 152 Wash548, 278 P419.

69-12½-New. Express companies are carriers engaged in interstate commerce within the commerce clause of the federal constitution. 22 OkA165, 153 NE316.

70-22 16 F(2d)313.

70-31 MoA 274 SW871.

70-35½-New. Federal Employees' Liability Act. Liability of interstate railroad carriers to make compensation for personal injuries by employees is regulated both inclusively and exclusively by the Federal Act and Illinois Workman's Compensation Act does not apply. 307 Mo595, 271 SW358.

70-35¼-New. Road, purely intra-state, which is to carry goods destined to other states, must procure certificate of necessity and convenience from the interstate commerce commission. 25 F(2d)689.

70-35¼-New. Necessity for certificate of convenience from the interstate commerce commission is determined by the effect of new construction on commerce in the state. 25 F(2d)689.

70-35½-New. A federal statute relating to consolidation of corporations has been held not intended to occupy the entire field of railroad incorporation. 26 OhNPNS375.

70-35¼-New. The statutes were not intended to prevent voluntary consolidations under available state laws. 26 OhNPNS375.

70-35½-New. Consolidations are held not to be effected until adoption by the interstate commerce commission of the complete plan provided by statute. 26 OhNPNS375.

70-35½-New. Congress may provide for settlement of disputes between interstate carriers and their employees. 33 F(2d)13 (preventing interference with designation of representatives).

71-37 95 Fla14, 116 S848; 89 Fla419, 104 S602, 39 ALR1362; 220 AppDiv80, 221 NYS129; **TexCivA** 275 SW111, 113 [cit CJ]; **TexCivA** 19 SW(2d)583.

71-40 223 AppDiv385, 228 NYS686 (state's relocation of railroad right of way to serve purpose of flood control is not prevented by federal statutes).

71-42½-New. Condemnation of railroad right of way by river regulating district for purpose of flood control is not an unconstitutional interference with interstate commerce. 223 AppDiv 385, 228 NYS686.

71-43½-New. Municipal ordinance prohibiting operation of steam or smoke emitting trains is an unauthorized interference with interstate commerce. 125 Misc801, 212 NYS1.

72-54 152 Wash657, 279 P114.

72-56 160 Tenn316, 24 SW(2d)898.

72-57½-New. ; to require a flagman at grade crossings; 158 Tenn407, 15 SW (2d)1.

72-58½-New. to install and operate interlocking devices at railroad grade crossings; **TexCivA** 281 SW1084.

72-59½-New. Where the primary purpose of an order of a state public service commission requiring a railroad to discontinue the backward movement of locomotives and to provide turning facilities is to regulate the movement of engines in interstate commerce and not to further the safety of the public or employees it is invalid. 226 AppDiv 43, 234 NYS342.

72-59½-New. An ordinance prohibiting switching of trains across a city's principal street is not violative of an interstate commerce clause. 35 F(2d) 808.

72-59¼-New. , and generally to make needful regulations for government of railroads when required for safety of persons or property. 160 Tenn316, 24 SW(2d)898.

72-59½-New. Statutes held not invalid as imposing burden on interstate commerce. 160 Tenn316, 24 SW(2d)898.

73-75 [a] **Illustration.**—(2) 167 Minn174, 208 NW809, 209 NW913. **Erratum.**—Insert word "not" after word "held."

74-79 But see 167 Minn174, 208 NW809, 209 NW913. [b] **State cannot compel connections under state laws** unless authorized by interstate commerce commission. 144 Miss702, 110 S865.

74-81 See also **TexCivA** 275 SW111.

74-81½-New. or to construct sheds for the use of passengers, 176 Ark761, 4 SW(2d)910.

74-91½-New. An agreement and judgment between a railroad and the state requiring the maintenance of certain shop facilities and terminals requiring an annual expenditure of money has been held not to impose an undue burden on commerce. **TexCivA** 275 SW673.

74-91½-New. State statute requiring railroads to maintain water-closets at

stations is not invalid as burden on interstate commerce. TexCivA 275SW 114.

74-91¼-New. An order of a state railroad commission, requiring an interstate railroad company to furnish the use of terminal facilities and tracks to another company, is without jurisdiction. 18F(2d)784.

74-92½-New. Municipal ordinances requiring railroads to replace wooden bridges by concrete bridges within municipal fire limits is not invalid as burdening interstate commerce. 33F(2d) 719.

74-97 276US165, 48SCt215, 72Led513; 1[illegible]Ark103, 298SW849; 324Ill74, 154 NE433; 234Ky276, 27SW(2d)980; 234 Ky504, 28SW(2d)733; 9LaA714, 1198 759; 240Mich655, 216NW467; 249Mich 685, 229NW479; Mo 188W(2d)567; 220MoA1229, 298SW1069; 191NC153, 131SE670; 129Or169, 276P1094; Or 288P1003; 284Pa577, 131A484; 293Pa 343, 143A5; 10PaDist&Co 110; 151Va 173, 141SE485; Va 153SE574.

75-98 125Me96, 131A5.

75-4 271US472, 46SCt564, 70Led1041; 208Iowa202, 225NW357; 152Tenn189, 274SW13; Utah 277P408. [b] **States cannot control** kind and amount of evidence to establish liability under Federal Employee's Liability Act. 271US 472, 46SCt564, 70Led1041.

76-5 307Mo595, 271SW358.

77-18 16F(2d)313; Mo 198SW(2d)879.

78-24 200Cal463, 254P258.

78-27 200Cal463, 254P258.

79-45½-New. The power of congress extends to the adoption of all measures reasonably necessary for the prevention of a nuisance resulting from unregulated radio broadcasting. 31F(2d)448.

79-45½-New. Congress has power to regulate interstate radio communication by delegating authority to Federal Radio Commission. 36F(2d)111.

79-46 190NC45, 128SE500.

80-53 [a] **Finding of state court** that there was sufficient gas in pipe line moving in intra-state commerce to enable compliance with order of state commission held not to interfere with interstate commerce. 270US550, 46SCt371, 70Led726.

80-53½-New. Distribution by a state utility of natural gas transported interstate is subject to state regulation. 79 Mont269, 256P373.

80-54 190NC314, 129SE805.

80-55 190NC314, 129SE805.

80-64 TexCommnA 296SW482.

80-65 [a] **Use of fish in canneries or reduction plants.**-30F(2d)111.

80-66 38Wyo47, 264P1023, 57ALR675. But see Mo 308W(2d)447.

80-67 267US222, 45SCt233, 69Led583 (failure to have state license as coal dealer does not prevent suit for breach of contract for sale in interstate commerce).

80-68 273US83, 47SCt294, 71Led549.

81-73 But see 273US83, 47SCt294, 71 Led549.

81-74 [b] **Anti-Trust Act** does not apply to contract involving only intrastate commerce. 267US248, 45SCt300, 69Led597.

81-75 24F(2d)199.

81-75½-New. Bingham Coöperative Marketing Act not encroachment on jurisdiction of federal government by reason of amendment to Clayton Act relinquishing rights to regulate interstate commerce in agricultural products. 208 Ky643, 271SW695.

81-75½-New. A sale of sheep located without the state by a commission agent to a purchaser within the state constitutes an interstate transaction and is not within a state statute requiring the filing of a certificate of a fictitious name under which a seller is doing business. 47Ida468, 276P320.

82-82 See also 158La262, 103S761 (ordinance forbidding delivery in town of butcher's meat not previously exposed for sale in public market).

82-90½-New. A statute defining unfair discrimination in the buying of butter fat and prescribing penalty is constitutional. 168Minn378, 210NW163.

82-90½-New. A state statute, requiring payment of an annual fee on insecticides prepared and offered for interstate commerce, held not to apply to a corporation manufacturing products outside of the state and not doing business therein. 34F(2d)808.

82-91 43F(2d)154.

82-97 16F(2d)290. See also 165Ga265, 140SE847.

83-1½-New. A city ordinance prohibiting exhibition of films illustrating indecent scenes is not invalid as an interference with interstate commerce. 32 F(2d)274.

83-3 But see 177Ark920, 9SW(2d)307, 62ALR484. [a] 8F(2d)635.

83-5 274US135, 47SCt548, 71Led966.

83-8 91Fla762, 109S205; 217MoA31, 273SW110, 222MoA495, 280SW1050.

83-9 MoA 276SW1041.

83-11 142Va355, 128SE624.

84-15½-New. Words "practice or practices" used in Interstate Commerce Act are confined to those originated by carrier or resulting in discrimination against interstate or foreign commerce. 42F(2d)765.

84-16 142Va355, 128SE624 (pooling arrangements as to average demurrage agreement not violative of act).

84-20 See also TexCivA 198SW(2d)583.

84-25 [b] **After interstate shipment has terminated** by storage, subsequent shipments are subject to state rates. 6 F(2d)911.

85-30 38F(2d)968; 21AlaA617, 1118 196.

85-37 267US404, 45SCt243, 69Led683.

85-39½-New. Under Interstate Commerce Act transportation includes storage charges. 216AppDiv500, 215NYS 576.

85-39½-New. Where intra-state rates have the effect of attracting foreign or interstate shipments to particular points within the state, they are contrary to a commerce clause of the federal constitution. TexCivA 198SW(2d)583.

85-39½-New. Order requiring differential long haul rate favoring Texas ports is not void as preferring ports of one state where distance to New Orleans is greater. 42F(2d)281.

86-42 84CalA325, 258P148, 152 [cit CJ].

86-43 219Ala16, 121S16; 84CalA325, 258P148; 128Kan729, 280P896; 261 Mass251, 158NE663.

86-44 129Or216, 277P107.

86-48 84CalA325, 258P148, 152 [cit CJ]; 94Fla922, 115S185; 219MoA62, 265SW851; 222MoA495, 280SW1050; TexCivA 298SW454.

86-49 84CalA325, 258P148, 152 [cit CJ]; 129Or216, 277P107. [a] **Construction of contract of interstate shipment** must be in harmony with Federal Transportation Act, under regulations, rates, and rule of interstate commerce commission. 234Mich505, 208NW746. [b] **Straight nonnegotiable bills of lading, so marked on face and used in interstate shipment,** are governed by act of congress, and not by local laws. 84 CalA325, 258P148.

88-69½-New. Laws of United States and common-law principles adopted by federal courts govern in actions at common law against carriers for damages for delays in furnishing cars for interstate shipments and for delays in transporting such shipments. 218MoA314, 274SW90.

88-71 222MoA1135, 138SW(2d)1111 (governed by federal rule).

92-21½-New. Statute prohibiting transportation in interstate commerce of motor vehicles known to have been stolen is valid. 267US432, 45SCt345, 69 Led699, 37ALR1407.

92-27 35F(2d)867 (state cannot discriminate between intra-state and interstate common carriers for hire).

93-37½-New. , and statutes regulating intra-state operation of motor vehicles, 254Mass240, 150NE206.

93-37½-New. and statutes making the obtaining of a license a condition precedent to the operation of motor vehicles, 254Mass253, 150NE212.

93-37¼-New. and statutes regulating bus lines operating within state are void. 219Ky254, 292SW811.

94-55½-New. A condition in a certificate of convenience and necessity granted by a state commission to an interstate motor transportation company that passengers may not be received within the state whose destinations are also within the state is not an unreasonable condition and does not operate as a direct burden upon interstate commerce. 113ObSt565, 149NE713.

94-55½-New. The provisions of the Ohio General Code do not authorize the public utilities commission to exclude motor transportation companies operating in interstate traffic from the highways of the state. 113ObSt565, 149NE 713.

94-55¼-New. A state cannot regulate competition in interstate commerce by refusal to grant certificate of public necessity on ground that public is adequately served. 47RI19, 129A613.

94-55⅛-New. Act regulating operation of motor vehicles declared applicable to intra-state and interstate commerce. 47RI19, 129A613.

94-55⅛-New. Commerce clause did not prohibit regulation of routes by motor vehicles in interstate commerce. 47RI 19, 129A613.

94-55½-New. The burden is on carrier coming within the operation of the state statute to show interference with interstate commerce. 273US45, 47SCt298, 71 Led530.

94-55⅛-New. A state may not burden interstate commerce by legislation as to solicitation of passenger tickets for foreign countries. 273US34, 47SCt267, 71 Led524.

94-55⅛-New. An ordinance requiring indemnity insurance is held not void as to a bus operator receiving interstate passengers only. 198Ind563, 154NE 369.

94-55⅛-New. Commission's rule allowing passengers forty-eight hours to remove their baggage held not invalid as discrimination against interstate passengers. 166La119, 1168720.

94-55½-New. An ordinance requiring auto busses, transporting passengers for hire, to park, take on, and discharge passengers at terminals only, and regulating and prohibiting use of certain streets thereby, is valid as police regulation of local concern, only incidentally affecting interstate commerce. 105NJL286, 144A630.

94-55½-New. Reasonable police regulations by a state or municipality, applicable to interstate motor bus traffic, are valid and not direct or undue burdens on interstate commerce. 105NJL 286, 144A630.

94-55½-New. A state court cannot restrain the operator of a bus line, engaged in interstate commerce, from operating busses, or from accepting or discharging interstate passengers. 225 AppDiv182, 232NYS536.

94-55¼-New. A statute requiring auto transportation companies engaged in interstate commerce to take out liability insurance as a prerequisite to obtaining a certificate of public convenience is a proper exercise of police power. 151 Wash630, 276P858.

94-55½-New. The state commissioner of motor transportation is not authorized to limit interstate bus trips on the ground that the safety of travel on the highway would be affected by additional trips. 35F(2d)867.

94-55½-New. Employees of bus line operating intrastate business without certificate of convenience and necessity may be arrested although also engaged in interstate commerce. 36F(2d)260.

94-55½-New. Motor bus carrier engaged exclusively in interstate commerce may not be required to obtain certificate of convenience and necessity by state. 36F(2d)260.

94-55½-New. A state statute, providing for appeal from refusal of certificate held inapplicable to applicant for permission to operate an interstate bus line. 35F(2d)867.

94-63½-New. Ranging of diseased cattle between states constitutes interstate

commerce. 271US414, 46SCt585, 70L ed 1013.

96-98 272US469, 47SCt170, 71L ed359; 257Mass572, 154NE182, 55ALR928; 146 Miss422, 111S558; 217AppDiv797, 216 NYS619; 285Pal, 131A489; 85PaSuper 149; 161Tenn56, 29SW(2d)257.

96-98½-New. Legislature may not lay direct tax on gross proceeds of interstate commerce except where such tax is in lieu of all other taxes and amounts to no more than the ordinary tax on property. 102WVa272, 135SE582.

97-2 102WVa272, 135SE582.

97-3 34F(2d)682; 261Mass445, 158NE 897.

97-4 161Tenn56, 29SW(2d)257 (state tax on interstate transportation is not burden).

97-5 [b] **Mere declaration that act excepts interstate carriers** does not withdraw case from federal protection where such carriers are in effect included. 285 Pal, 131A489.

97-6½-New. , or how the statute is framed. 285Pal, 131A489.

97-8 217AppDiv797, 216NYS619; 156 Tenn579, 3SW(2d)668, 670 [quotCJ], 60 ALR393.

97-8½-New. Tax on net income derived in whole or in part from interstate commerce is not burden thereon. 326 Ill 18, 156NE814.

97-8½-New. Property may be subject to regulations of congress as interstate commerce and yet subject to local taxation. CalA 289P913.

98-10 161Tenn56, 29SW(2d)257.

98-14 272US469, 47SCt170, 71L ed359; 198Wis281, 224NW126. See also 168La 547, 122S845. [b] (1) 17F(2d)394. (2) It is immaterial that producer of oil and not pipe line company complains of tax. 17F(2d)394.

98-17 279US95, 49SCt292, 73L ed626; 23F(2d)675.

98-18 11F(2d)967; 198Wis281, 224NW 126. See also 16F(2d)441.

99-20 [b] **Porto Rico is on same basis as state,** under constitution, as far as excise taxes on imports are concerned. 16F(2d)545.

99-21 See also 16F(2d)545.

99-23 [a] **Massachusetts Corporation Tax Act** held violative of commerce clause and Fourteenth Amendment as applied to foreign corporation having only local sales office within the state. 268US203, 45SCt477, 69L ed916.

99-24 15F(2d)208; 16F(2d)545; 12 PortoRicoFed329.

99-25 48SD482, 205NW72. [b] (2) 81 Mont423, 263P687. [d] **Power of state to tax goods** imported from other states is not measure of powers of congress over interstate commerce. 4F(2d)840. [e] **Shipment warehoused on refusal of consignee to accept,** title remaining in consignor, is subject to tax, though placed in warehouse in name of carrier. 42 Ida678, 247P786, 48ALR950. [f] **Taxicabs in warehouse after reaching destination** are subject to city tax. CalA 289P913.

100-29½-New. Porto Rico may levy import tax on goods from United States. 16F(2d)545.

100-34 274US76, 47SCt542, 71L ed934; 277US157, 48SCt438, 72L ed830; 29F (2d)604.

100-35 274US76, 47SCt542, 71L ed934; 274US284, 47SCt639, 71L ed1049; 280 US338, 50SCt111, 74L ed463; 285Pal, 131A489.

101-40 270US367, 46SCt234, 70L ed 635.

102-44½-New. The tax on a railroad for payment of a bond issue of a road district does not constitute an unjust burden on interstate commerce. 27F (2d)766.

102-45 173Ark372, 293SW1031; 17F (2d)3. [b] **Oil stored in tanks** of greater capacity than required for continuous operation of pipe lines is subject to local taxation. 5F(2d)514. [c] **Taxable though wholly engaged** in interstate commerce. 173Ark372, 293SW1031.

103-67½-New. A state statute, authorizing the tax commission to fix a specific tax on mortgage bonds when the property covered lies partly within and partly without the state, is not in conflict with the Federal Transportation Act conferring exclusive jurisdiction on interstate commerce commission to authorize interstate carriers to issue securities, and is not superseded by it. 237Mich464, 212NW78.

103-67½-New. The specific tax on mortgages imposed by such state statute affects interstate commerce so remotely as not to be a burden upon it. 237Mich464, 212NW78.

103-69 274US284, 47SCt639, 71L ed 1049; 274US554, 47SCt702, 71L ed1199; 279US392, 49SCt372, 73L ed754 (oyster packers); Fla 130S699; 169Ga354, 150 SE262 (occupation tax on distributors of motor fuels imported or produced in state); 168La547, 122S845; 311Mo 1, 276SW32; MoA 16SW(2d)656; 81 Mont423, 263P687 (though in original package); 48SD482, 205NW72; 155 Tenn560, 296SW7. [b] **State's power to impose reasonable charge upon interstate busses** is not limited to license fee or to legislation appropriating funds exclusively to highway purposes. 161 Tenn56, 29SW(2d)257.

103-70 311Mo 1, 276SW32.

103-71 276US245, 48SCt230, 72L ed551 (mileage tax on interstate motor vehicles using state roads); 281US511, 50 SCt383, 74L ed1004; 8F(2d)635; 19F (2d)256; 21F(2d)521; 36F(2d)260; 43 F(2d)148; 254Mass253, 150NE212; 157 Miss69, 127S690; 83Mont380, 272P684 (tax on imported gasoline); 155Tenn 560, 296SW7; 161Tenn56, 29SW(2d) 257. [c] **Licensing sale of steamship tickets.**-285Pal, 131A489. [d] **Difficulty in refuting motor carrier's contention that he is not engaged in intrastate commerce** justifies enforcement of license requirements insuring supervision. Iowa 230NW540.

103-72 274US554, 47SCt702, 71L ed 1199; 21F(2d)521; 43F(2d)170; 156 Miss377, 119S360. [c] **Pipe line delivery of gas at state boundary.** 43F(2d) 170. Nature of tax. 43F(2d)148.

103-72½-New. , or although the business may involve sale to the United States and deliveries on a military reservation within the state. TexCommA 3SW(2d)427 (gasoline sales tax).

103-74 274US284, 47SCt639, 71L ed 1049; 19F(2d)256.

103-75 276US245, 48SCt230, 72L ed551 (tax must lay disproportionate economic weight on interstate commerce); 277US 163, 48SCt502, 72L ed833, 62ALR45; 7 F(2d)715; 8F(2d)635; 19F(2d)256; 21 F(2d)521; 36F(2d)260; 200Cal 667, 254 P551 (dictum); 225Ky45, 7SW(2d)506; 228Ky453, 15SW(2d)280; 285Pal, 131A 489; 161Tenn56, 29SW(2d)257. [b] **Automobile insurance compulsory** where operating on public highways, not in conflict with interstate commerce clause of federal constitution. 81NH566, 129 A117, 39ALR1023.

104-76 TexCivA 286SW489.

104-76½-New. An ordinance requiring every manufacturer to take out a license and pay a license tax for sales made is not invalid as burden on interstate commerce. 8F(2d)447.

104-76½-New. The amount of license fee or privilege tax imposed by state statute for use of highways need not be limited to the actual cost of regulation. 8F(2d)635.

104-76¼-New. The state may impose several forms of tax on use of its highways in interstate commerce, where the aggregate charge bears a reasonable relation to the privilege granted. 276US 245, 48SCt230, 72L ed551.

104-76½-New. Interstate transportation having ended and a commodity having come to rest within the state, the state may impose a tax on the use as well as sale of the commodity in domestic trade. 278US499, 49SCt188, 73 L ed475.

104-76½-New. An occupational tax is not invalid because the volume of sales on which the amount of tax is adjusted includes sales of goods that have been or may be articles of interstate commerce. 228Ky453, 15SW(2d)280.

104-76½-New. The state may impose a license tax on wholesale and retail dealers in dairy substitutes within the state although shipped from outside and sold by the wholesalers to retailers in the original packages. 34F(2d)682.

104-76¼-New. The state may tax property which has been moved in interstate commerce when it has come to rest within the state, even before sale in the original packages. 34F(2d)682.

104-79 267US222, 45SCt233, 69L ed583 (seller of coal in interstate commerce can recover for breach of contract, though his state license as coal dealer had expired); 273US34, 47SCt267, 71 L ed524; 274US676, 47SCt758, 71L ed 1292; 277US163, 48SCt502, 72L ed833, 62ALR45; 279US245, 49SCt279, 73L ed 683; 17F(2d)394; 17F(2d)410; 43 F(2d)170; 216Ala391, 113S254; CalA 291P233; 78Mont1, 252P301; 103NJEq 307, 143A438; 224AppDiv531, 231NYS 503; 85PaSuper149. [a] (1) 4F(2d) 899. (10) State statute requiring permit from public service commission to operate trucks on state highways in interstate commerce is invalid. 267US 317, 327, 69L ed627. (11) Statute requiring permit from director of public works to operate on state highways busses for transportation of passengers for hire held invalid so far as it prohibited operation between point in state and point in another state. 267US307, 45SCt324, 69L ed623, 38ALR286. (12) City cannot require licensing of one engaged in carrying passengers for hire by auto stage between points in different states. 141Wash194, 251P120. (13) Other instances. 43F(2d)148. [c] **State cannot under guise** of taxing or regulating intrastate commerce impose a burden on interstate commerce. 268US 203, 45SCt477, 69L ed916.

104-81 200Cal 667, 254P551.

105-82½-New. A tax which falls directly on the use of one of the means by which interstate commerce is carried on is a direct burden to commerce. 279 US245, 49SCt279, 73L ed683.

105-82¼-New. A statute imposing a tax on gasoline sold within the commonwealth at wholesale, including sales made for the purpose of resale or distribution, or for use within the state, is violative of the commerce clause of the United States constitution, as applied to taxation of gasoline used for motive power of a ferryboat operated on a river between states and doing exclusive interstate business. 279US 245, 49SCt279, 73L ed683.

105-83 Iowa 230NW540; 318Mo 99, 300SW1076.

105-84½-New. An act of congress requiring licenses for operation of radio broadcasting stations is not void as outside the scope of power of congress to regulate interstate commerce and not unreasonable. 31F(2d)448.

105-86 273US34, 47SCt267, 71L ed524.

106-91 218Ala367, 104S806; 255 IIIA 350.

109-16 281US511, 50SCt383, 74L ed 1004; 200Cal 667, 254P551 (dictum). See also 196Wis410, 220NW390. [a] (1) 27F(2d)1005. (2) 155Miss522, 124 S434. (5) 155Miss522, 124S434. [c] **Burden on interstate commerce and not designation of tax,** as filing fee or license tax controls validity. 200Cal 667, 254 P551(3dcase).

109-19 335 Ill 150, 166NE501; NC 155 SE553.

109-19½-New. or in foreign commerce. 232Mich574, 205NW102.

109-20 278US460, 49SCt204, 73L ed454; 200Cal 667, 254P551; 220MoA695, 294 SW100; Utah 263P926 (annual license fee based on authorized capital stock).

109-23 200Cal 667, 254P551; 254Mass 569, 151NE63, 46ALR563; 256Mass270, 152NE237; 220MoA695, 294SW100; 224AppDiv531, 231NYS503; Utah 284P 328 (law applicable equally to domestic and foreign corporations).

110-24 200Cal 667, 254P551; 147Wash 630, 267P506 (no right to exclude federal instrumentality).

110-26 327 Ill 574, 158NE857, 57ALR 664 (may require fee for permission to amend charter so as to increase capital stock).

110-38½-New. A foreign corporation engaged in interstate commerce is not exempt from net profits tax. 326 Ill 18,

156NE814; 238Mich508, 213NW867.

110-39 279US429, 49SCt380, 73L ed 781; 281US511, 50SCt383, 74L ed1004; 24F(2d)124; 200Cal 667, 254P551 (dictum); 318Mo 1020, 2SW(2d)790; 249 NY369, 164NE253. [a] 319Mo 799, 6 SW(2d)907. [b] **Provision that no par value stock shall be considered equivalent to share having value of one hundred dollars** does not render tax invalid as placing undue burden on interstate commerce. 279US429, 49SCt380, 73L ed 781.

111-41 278US460, 49SCt204, 73L ed 454; 200Cal 667, 254P551; 326 Ill 18, 156NE814; 70Utah265, 259P921; 147 Wash630, 267P506; 198Wis265, 224NW 139.

111-42 Nebr 227NW926.

111-44½-New. An excise tax measured by the paid-up capital and surplus of a domestic corporation whose principal business is foreign commerce is not invalid as imposing a burden on commerce. 232Mich574, 205NW102.

111-44¾-New. An annual franchise tax law is not invalid by reason of a provision that, for the purpose of computing the tax, no par value stock shall be considered the equivalent of having a nominal or par value of one hundred dollars. 29F(2d)604.

111-44¼-New. That the secretary of state, in computing the franchise tax to be paid by corporations on each one hundred dollars of the proportion of capital stock represented by business transacted and property located in the state, included interstate business transacted by corporations as well as intrastate business, does not invalidate the tax. 333 Ill 351, 164NE667.

112-47 105NJL94, 143A841. [a] **Tax is not one on gross receipts** but gross receipts are taken merely as measure of value of franchise. 105NJL94, 143A 841.

112-49 156Tenn579, 3SW(2d)668, 60 ALR393 (tax on earnings from milling of lumber in transit on through shipment between points outside state is not on earnings arising from interstate commerce).

112-50 278US503, 49SCt191, 73L ed 477; 161Tenn50, 29SW(2d)662.

112-51 280US338, 50SCt111, 74L ed463.

113-56½-New. The state cannot burden interstate commerce by an arbitrary method of allocating profits and loss for determining the excise tax on an interstate corporation. 158Tenn458, 14 SW(2d)734.

114-72 247US165, 38SCt432, 62L ed 1049 [aff 234Fed125, and foll 24F(2d) 989]; 267US442, 45SCt348, 69L ed703; 30F(2d)620.

114-73 NC 153SE850; 58ND776, 228 NW192. See also 217AppDiv797, 216 NYS619. [a] **Income tax, not discriminating against interstate commerce** and not assessed upon gross receipts, does not impose burden on interstate commerce nor tax property employed therein. 58ND776, 228NW192.

114-73½-New. Prohibition against laying tax or duty on articles exported from any state is not violated by an income tax imposed by a state on a foreign corporation doing business within the state with respect to income attributable to business or sources within the state. 58ND776, 228NW192.

114-76 17F(2d)374; 253Mass529, 149 NE407.

114-77 16F(2d)545.

115-87 17F(2d)374.

115-89 6F(2d)523.

115-90 [b] **Fish, unloaded, reiced,** and with portion beheaded on wharf, lose character as imports and may be taxed by state according to weight when sold. 276US124, 48SCt227, 72L ed495.

115-95½-New. Nor is an excise tax on sale or use invalid as a tax on imports. 6F(2d)523.

115-97 [a] **Tax on manufacturers of cigarettes for export** is not "tax on exports." 22F(2d)707.

115-97½-New. A state statute imposing an excise tax on gasoline sold, used, or offered for sale in the state by distributors, and a penalty for nonpayment thereof, is not unconstitutional as interfering with interstate commerce where it provides that no tax shall be paid on gasoline moving in, or sales of gasoline constituting, interstate commerce. 85Colo 289, 275P896.

115-1 Cal 292P1076.

116-6 Cal 292P1076.

116-14 29FCasNo17,726a; 13Wall(US) 236, 20L ed624; 254Mass190, 150NE172.

116-16 73Pa194, 197; 198SC218, 222.

116-17 206Fed148, 124CCA214.

118-41 43F(2d)651; 22 OhA165, 153 NE316 (provision authorizing service on managing agent within state). [a] (1) 170Ark1039, 282SW975. [b] **Entertaining jurisdiction of actions for death occurring without state.**—278US492, 49SCt 207, 73L ed470. [c] **Local practice rules.**—No local rule of practice can prevent carrier from laying appropriate foundation for enforcement of its constitutional rights under commerce clause by making seasonable motion. 278US 492, 49SCt207, 73L ed470. [d] **That plaintiff would be without remedy** if state act declared invalid held immaterial. 43F(2d)651.

118-42 274US21, 47SCt485, 71L ed905; 173Minn79, 216NW543 (permitting citizen to sue in own state against foreign corporation); TexCivA 8SW(2d)764.

118-42½-New. A state statute permitting a resident to sue an interstate carrier operating only in other states for damages to interstate shipment does not unduly burden interstate commerce. 128Misc82, 217NYS758.

118-43 177Minn398, 225NW435 (burden of proof).

118-44 173Minn79, 216NW543; 220 AppDiv218, 221NYS332.

118-54½-New. State statute authorizing suit against railroad company in any county of state where company usually keeps office or agent for transaction of usual business does not impose undue burden on interstate commerce as applied to interstate carriers sued for negligent killing of railroad's employee in another state. 309Mo 625, 274SW362.

118-54¼-New. Fact that such interstate railroad corporation was engaged in interstate commerce at time of injury is material only in determining whether federal courts have jurisdiction under commerce clause of Federal Constitution. 309Mo 625, 274SW362.

118-54¼-New. A statute authorizing service of process on a foreign corporation's managing agent within the state in so far as it permits suits by nonresidents against foreign carriers on causes of action arising outside of the state is violative of the commerce clause of the federal constitution. 22 OhA165, 153NE316.

118-54½-New. A suit by a domestic corporation against a foreign corporation lawfully doing business within the state for damage to an interstate shipment from negligence in transit is not an unconstitutional burden on interstate commerce, although the route was wholly without the state. 174Ark6, 294SW 416.

118-54½-New. Trial in state court of action under federal employers' liability act, brought by nonresident against foreign railroad corporation operating in state does not burden interstate commerce. Minn 230NW457.

118-55 235Ky540, 31SW(2d)932; 171 Minn87, 214NW12; 175Minn96, 220NW 429; 178Minn261, 226NW934; 322Mo 469, 17SW(2d)337; 136Misc349, 239 NYS702; 127 Okl 295, 260P745; 288Pa 240, 135A755.

118-57 Miss 130S302; 142Va800, 128 SE244 (traffic balance due foreign interstate carrier).

119-59 [a] **Jurisdiction of foreign carrier cannot be acquired by attaching freight cars** incidentally within state, on cause of action arising outside state. LaA 128S52.

119-61½-New. However, where interstate traffic would be directly affected by the decree, it cannot issue. 16F(2d) 378.

119-61¾-New. A state statute, giving a state court jurisdiction of an action by a resident against a foreign corporation doing business within the state on service of process on a designated agent, does not unlawfully interfere with interstate commerce, although the action involves a contract of carriage to be performed wholly without the state. 173 Ark810, 294SW401.

119-61¼-New. A statute authorizing service of process on the local ticket and freight agent of a foreign railroad company in an action under the Federal Employers' Liability Act for injuries sustained without the state does not offend the federal constitution. 177Minn 1, 223NW291.

119-61½-New. A statute, authorizing service of summons by delivery of copy of writ and petition to any officer or agent of a foreign corporation in charge of any office or place of business within the state, has been held not, in so far as it related to a resident plaintiff, invalid as imposing an unreasonable burden on interstate commerce. 28F(2d) 998.

119-61½-New. State statute authorizing suit by non-resident against foreign corporation doing business within state is unreasonable burden on interstate commerce. 36F(2d)504.

119-61½-New. Refusal to dismiss nonresident's action against foreign railroad corporation operating in state of forum does not impose undue burden on commerce on ground of forum non conveniens. Minn 230NW823.

119-61¼-New. Refusal to dismiss nonresident's action against foreign railroad corporation operating in state of forum does not impose undue burden on commerce. Minn 230NW826.

119-61½-New. Enforcing specific performance of railroad's contract to construct viaduct does not impose unlawful burden on commerce. Mo 25SW(2d) 1055.

119-63 Contra 274US614, 47SCt718, 71 L ed1234.

119-64½-New. State statute, preventing recovery on contract by one using assumed name without filing certificate does not apply to business engaged in interstate commerce. 211Ky239, 277SW 267.

119-66 [a] **Issuance of proclamation under Open Port Law** is held not required to make violence denounced in penal provisions therein public offenses. TexCivA 282SW257.

119-67½-New. A state may adopt reasonable measures to prevent fraud and crime, although they incidentally affect interstate commerce. 285Pa1, 131A489.

119-67¼-New. A state statute making assault on persons engaged in movement of commerce a felony, but failing to make specific intent to hinder commerce on essential element thereof, is held invalid as class legislation. 106 TexCr37, 289SW1072.

119-67¼-New. Offense created by National Motor Vehicle Theft Act is in many respects similar to offense of receiving stolen goods knowing them to have been stolen. 15F(2d)911.

119-67½-New. Interstate transportation by mail or common carrier is essential to offense of receiving prize fight films, but such transportation is not essential to offense of sending them. 22F(2d)834.

120-83 [a] (8) Violation of long and short haul clause. 21F(2d)579.

120-86½-New. In such proceedings it has been held that rulings of the interstate commerce commission, although not conclusive on the federal district court, are at least highly persuasive. 21F(2d)579.

120-86¼-New. Facts showing, in a prosecution for violation of the long and short haul clause, that defendant had knowledge of published rates and that it shipped goods under the contention of a legal right to do so are sufficient to show guilty knowledge or intent required by the law. 21F(2d)579.

120-91 220AppDiv487, 221NYS666.

120-92 40F(2d)921; 220AppDiv487, 221NYS666. See also 17F(2d)881.

120-93 220AppDiv487, 221NYS666.

120-94 220AppDiv487, 221NYS666. [a] (4) Where reparation is sought on ground that rate is unjust and unreasonable, fact must be first passed upon by commission. 17F(2d)978.

120-95 [a] **Not a legislative body.**—17 F(2d)881.

120-97 21F(2d)351; 24F(2d)113 (construction of published tariffs is for courts and not for commission); 33 F(2d)582(2dcase); 220AppDiv487, 221 NYS666. [a] **Statute authorizing commission to permit carriers to issue securities** if it finds certain facts limits jurisdiction of commission. 33F(2d)582 (2dcase).

120-97½-New. Interstate commerce commission must make valuation of interstate carriers in statutory manner and such duty may be judicially enforced. 19F(2d)591.

120-98 See also 331 Ill 360, 163NE141.

120-99½-New. Jurisdiction goes to regulations and conditions of transportation, and their reasonableness. 233 IllA109.

121-99 TexCivA 281SW1084, 1085 [cit Cl].

121-5½-New. Under Transportation Act dictum of commission is last word on such matters as tend to prompt and continuous service in interstate commerce. 89Fla419, 104S602, 39ALR1362.

121-5¼-New. Distinction between jurisdiction of commission and jurisdiction of courts see 119 Okl 49, 247P986.

121-5¼-New. Jurisdiction of commission over transportation to and from foreign country extends only to that part of shipment which takes place in the United States. 8F(2d)662.

121-5⅓-New. Complaints as to reasonableness of rules of interstate commerce commission as to car service are within exclusive jurisdiction of the commission. 172Ark898, 291SW431.

121-10 89Fla419, 104S602, 39ALR1362.

121-11 89Fla419, 104S602, 39ALR1362.

122-24 See also US 51SCt65.

122-25 See also 237 IllA478.

123-32½-New. The commission has jurisdiction where both interstate and intra-state traffic are involved over given line. 272US457, 47SCt130, 71L ed350.

123-32⅓-New. Where interstate and intra-state transactions are involved in the use of terminal facilities, the regulation of the latter is so incidental to, and inseparable from, the former as to be included in the authority conferred on the interstate commerce commission. 18F(2d)784.

123-32¼-New. Commission has no jurisdiction over traffic which is wholly intrastate. 157Miss700, 128S738.

123-34 272US457, 47SCt130, 71L ed 350; 272US605, 47SCt207, 71L ed432; 217AppDiv675, 216NYS186. See also 274US29, 47SCt486, 71L ed911. [a] **Commission may authorize railroad** to abandon branch line wholly within state where it is chartered. 271US153, 46 SCt452, 70L ed878.

123-38 36F(2d)691 (commission's power to examine records). [a] **Where part of business of steamship company is within regulatory jurisdiction of commission,** commission has right to examine any of company's records, whether they relate to that part of its business or not. 29F(2d)742. [b] **Subjecting carrier to statutory penalty.**—Where commission institutes mandamus proceeding against steamship company to compel exhibition of records, it cannot, while dispute remains undecided by court, penalize company under Interstate Commerce Act, by serving formal demand for such records. 29F(2d)742.

124-47 280US52, 50SCt53, 74L ed163 (construction of union passenger station); 89Fla419, 104S602, 39ALR1362 (passenger stations). But see 41F(2d) 806; DC 34F(2d)228. [a] **Change of passenger stations.**—120 OhSt434, 166NE 372(2dcase).

124-48½-New. nor to determine or arbitrate disputed claims for money due from shipper to carrier, 220AppDiv487, 221NYS666.

124-54 [b] **Extent of power.**—278US 269, 49SCt133, 73L ed322.

124-58½-New. Miscellaneous authority and functions of commission. 274US 564, 47SCt727, 71L ed1204; 13F(2d) 200; 234 IllA581; 217Ky439, 289SW 1094; 127Misc866, 217NYS781; 116Tex 497, 295SW598; 145Va62, 133SE883.

124-58½-New. The interstate commerce commission has power to regulate the use of terminal facilities of an interstate railroad. 18F(2d)784.

124-58¼-New. The commission has no power to establish a through route by rail. 21F(2d)351.

124-58⅓-New. Establishment of a through route over a small line at the expense of competitors is not justified by such line's need for more revenue. 21F(2d)351.

124-58¼-New. Power to require construction of a switch connection with the shipper's sidetrack is not abrogated by subsequent legislation limiting the commission's authority as conferred by act of Congress, specified in such subsequent act. 275US404, 48SCt189, 72L ed338.

124-58½-New. Under the Interstate Commerce and Transportation Acts, switch connection with the shipper's sidetrack extending to industry on another road is not extension of railroad under terms of acts. 275US404, 48SCt 189, 72L ed338.

124-58⅛-New. The commission, making advance to a railroad under the Transportation Act, has been held to retain jurisdiction finally to determine the amount necessary to make a good guaranty to the railroad. 23F(2d)221.

124-58⅙-New. Common stock should be valued on the basis of a fair cash value of the property acquired in exchange for stock as of the date of its acquisition, not on the basis of the commission's valuation made several years before, under Interstate Commerce Act, nor at the amount of cash paid in the transaction. 28F(2d)885.

124-58⅒-New. The Interstate Commerce Act as amended vested the interstate commerce commission with power to authorize a carrier engaged in interstate commerce to limit its liability by contract with the shipper. 129 Or216, 277P107.

124-58⅑-New. No court has power to compel Interstate Commerce Commission to issue certificate of necessity and convenience. 280US469, 50SCt192, 74 L ed551.

124-58½-New. The commission's order requiring carriers to deliver to connecting lines at junctions is one affecting rates within its jurisdiction. 33F(2d) 345.

124-58⅓-New. Mandamus to compel inspection of records of steamship company is not election to abandon claims to forfeitures. 36F(2d)691.

124-58¼-New. Estimate of fair cash value of railroad for accounting purposes.—37F(2d)401.

124-58⅕-New. Valid regulations and rules of commission are binding on carrier and public. 40F(2d)56.

124-58⅙-New. Commission is without jurisdiction to award damages because of unreasonable international joint through rate. CalA 289P643.

124-58⅐-New. The commission may insist, in an order authorizing a railroad to issue securities for acquiring an old railroad, that cash under a reorganization agreement should be subject to the commission's supervision. 33F(2d) 582(2dcase).

124-58⅛-New. The commission may not, by conditions subsequent attached to its approval, force to impound with it funds which do not enter into the issuance of securities, consideration for which it finds to be adequate. 33F(2d) 582(2dcase).

124-58⅑-New. Force of rules measured by authority granted by Congress and purpose of rules. 43F(2d)93.

124-58⅒-New. Not all rules of commission have effect of statutes. 43F(2d) 93.

125-61 236 IllA575.

125-63 6F(2d)888; 41F(2d)836 (questions concerning application of rules governing construction of tariff are administrative).

125-64 279US768, 49SCt494, 73L ed 947; 281US249, 50SCt315, 74L ed832; 22F(2d)199; 23F(2d)307 (fairness in commission's discretion); 23F(2d)874; 246 IllA22; 168Minn393, 210NW399; 119 Okl 49, 247P986.

125-64½-New. To prevent rate wars and guarantee reasonable earnings the interstate commerce commission may set minimum rates under the Transportation Act of 1920. 25F(2d)462.

125-68 6F(2d)888.

125-69 279US229, 49SCt266, 73L ed 675; 31F(2d)580 (commission held authorized to prescribe intra-state rate on logs for entire state of Florida); 39 F(2d)167; 335 Ill 70, 166NE466; 168 Minn393, 210NW399. [a] **Extent of power.**—30F(2d)116. [b] 168Minn393, 210NW399.

125-70 [b] **Commission has authority** to increase minimum rate without finding previous rate was noncompensating or unreasonable to prevent discrimination between localities. 6F(2d)315.

126-75 277US291, 48SCt520, 72L ed885 (construction of statute). [b] **Commission has power to change division of joint rates.**—17F(2d)165. [c] **Determination and power to fix division of joint rates** by Interstate Commerce Commission. 36F(2d)789. [d] **Whether extra cost in handling cars over joint line shall be paid in separate joint scale of rates** or higher average rates is determined by commission. 42F(2d)467.

126-77½-New. The statute relating to through rates does not impose a limitation on the commission to deal with rates as such. 33F(2d)345.

126-79 [a] **Commission may direct abandonment** of route seldom used in order not to violate long and short haul clause. 271US268, 46SCt500, 70L ed941. [b] **Commission has power** to relieve carrier from operation of aggregate of intermediate clause. 269US1, 46SCt8, 70L ed131.

126-81½-New. The statute does not authorize the commission to award reparations on account of past divisions of a joint rate voluntarily established. 21 F(2d)4.

126-81⅓-New. The question of just division of joint rates for the future can be determined only by the commission. 21F(2d)4.

126-81¼-New. The commission has full jurisdiction over the form and arrangement of railroad tariffs. 23F(2d) 307.

126-81⅕-New. What the tariff includes is primarily to be determined by the commission. 23F(2d)307.

126-81⅙-New. The statute authorizing the interstate commerce commission to fix rates yielding a fair return does not prevent the reduction of an unreasonable rate without proof of the annual net operating income. 22F(2d)199.

126-81⅐-New. The commission can determine the reasonableness of a joint through rate, although the rate covers transportation both in Canada and the United States. 275US179, 48SCt39, 72 L ed225 (may make order for damages for excessive charges).

126-81⅛-New. The interstate commerce commission has no power to cancel schedules reducing rates in an effort to equal industrial conditions or to offset economic conditions. 25F(2d)462.

126-81⅑-New. A resolution of congress, recommending investigation, by the interstate commerce commission, of industrial conditions, does not give it power to widen the differential between rates because of conditions in several industries. 25F(2d)462.

126-81⅒-New. Commission, in adjusting divisions of joint rates, can base order upon average conditions in groups of carriers in respective territories. 282US74, 51SCt1.

126-81⅑-New. Interstate commerce commission may not change existing divisions of joint rates unless unjust or unreasonable. 282US74, 51SCt1.

126-82 272US457, 47SCt130, 71L ed 350.

126-93½-New. State, when concerned, may file complaint. 272US457, 47SCt 130, 71L ed350.

126-93⅓-New. Commission is required to take jurisdiction for investigating order directing carriers to reduce certain freight rates, regardless of temporary restraining order. 39F(2d)508.

126-93¼-New. Eastern carriers held not necessary parties in proceedings to alter division of joint rates as between

southwestern and western trunk lines. 282US74, 51SCt1.

127-94 22F(2d)199.

127-94½-New. Where complaint attacks rate from particular points of origin in one group, issues will not be unduly burdened by permitting interventions relating to reasonableness of group rate as applied to other points in the group. 22F(2d)199.

127-95 269US217, 46SCt73, 70L ed242.

127-96 [a] **Order denying reparation** is not irrevocable after one year as affects rehearing. 269US217, 46SCt73, 70 L ed242.

127-98½-New. The shipper is not estopped or deemed to have waived rights to recover rates where the plea or evidence fails to show essentials of waiver or estoppel. 25F(2d)750.

127-3 [a] **Nothing more need be pleaded** than in proceeding before court. 42 F(2d)469.

127-5 30F(2d)116. [b] **Prayer for reparation** is held sufficiently broad to cover losses pending proceedings. 269 US217, 46SCt73, 70L ed242. [c] **Prayer held sufficiently broad** to authorize relief as to rates over connecting lines. 269US217, 46SCt73, 70L ed242.

127-8½-New. A petition for a certificate of convenience does not preclude a claim that the new road is solely interstate. 25F(2d)689.

127-15 279US768, 49SCt494, 73L ed 947.

127-18 [a] **Testimony of reasonableness** of "specific" is held competent on issue of reasonableness of through rate. 7F(2d)164.

127-20½-New. Evidence as to favorable blanket rates warrants finding of undue prejudice. 272US658, 47SCt222, 71L ed463.

127-20⅓-New. The interstate commerce commission need not adhere to strict rules of evidence, applicable before the courts. 25F(2d)750.

127-20¼-New. The burden on the carrier to justify a rate increase does not apply to rate reduction and the interstate commerce commission erroneously places such burden on the carrier seeking reduction. 25F(2d)462.

127-20⅕-New. On the question whether removal of discrimination by intrastate freight rates against interstate commerce should be accomplished by lowering interstate rates or by raising intra-state rates, the remunerativeness to the carrier of the state rates is a relevant matter. 30F(2d)116.

127-20⅙-New. Admission of evidence before commission which in judicial proceedings would be incompetent does not invalidate orders of commission. 36F(2d)789.

127-20½-New. Commission is not required to conform to rules governing weight or effect of evidence. 36F(2d) 789.

127-20⅛-New. In proceedings for altered division of rates between carriers of different territories, commission may assume validity of joint rates. 282US 74, 51SCt1.

127-20⅛-New. Report of committee appointed by examiner to secure compromise between carriers respecting freight rates held erroneously admitted on formal hearing as to rates. 43F(2d)987.

127-20 1/10-New. Incompetent prejudicial evidence should not be admitted. 43F(2d)987.

127-20 1/11-New. Evidence held to justify order altering division of joint rates. 282US74, 51SCt1.

127-21 [a] **Necessity of granting full hearing.**-39F(2d)167.

128-23 271US268, 46SCt500, 70L ed 941. [a] **Prior existing rates** are matters for consideration in establishing through rates. 271US268, 46SCt500, 70 L ed941.

128-24 [a] **Procedure required by Interstate Commerce Act** must be followed. 39F(2d)167.

128-25 28F(2d)885.

128-25½-New. Three proceedings, involving freight rates on salt, are properly consolidated for a joint hearing by the interstate commerce commission. 22F(2d)199.

128-25⅓-New. A full hearing which is a prerequisite to prescription of an intra-state rate is had, where the parties to the establishment of the rate present pertinent facts and all others have full opportunity to do so. 31F(2d)580.

128-25¼-New. Establishment of new interstate rates, although affecting discrimination by intrastate rates held not to require de novo hearing where order is based on previous specific finding. 42F(2d)469.

129-42 [a] **In determining remedy for discrimination in intrastate rates** commission should decide whether it is necessary to alter some rates or entire system. 42F(2d)469.

129-43 [a] **In proceedings to alter division of joint rates** commission must consider condition of each carrier, whether division is reasonable and what division will be just for future. 282US 74, 51SCt1.

129-47½-New. The commission, on complaint of a carrier, may determine the division of joint rates voluntarily established. 21F(2d)4.

129-47⅓-New. Jurisdiction of the commission may be invoked by a minority stockholder by filing a complaint charging inequitable division of joint rates. 21F(2d)4.

129-49 272US658, 47SCt222, 71L ed463. [a] **Authority to issue certificate** authorizing abandonment of intra-state line is not conditioned on finding that continued operation would prejudice interstate commerce, or prevent railroad from earning fair return on properties as a whole, or that intra-state business will not earn fair return on property used therein. 271US153, 46SCt452, 70 L ed878.

129-50 42F(2d)281. [a] 272US658, 47 SCt222, 71L ed463; 25F(2d)750 (as to rates being discriminating, unreasonable, preferential, and violation of long and short haul rate provisions); 31 F(2d)580; 31F(2d)951; 35F(2d)769.

129-51 272US658, 47SCt222, 71L ed463.

130-57½-New. A subsequent report of the commission prevails over an earlier report as to matters on which the reports are conflicting. 31F(2d)951.

130-57⅓-New. Failure to report such grounds is not excused because carriers presented evidence on group basis. 282 US74, 51SCt1.

130-57¼-New. Commission ordering change in division of joint rates upon basis of group conditions should report grounds upon which conclusion was based. 282US74, 51SCt1.

130-58 267US493, 45SCt409, 69L ed753 (commission, on finding undue discrimination in continuance of switching service for a certain shipper on a certain side track may order railroad in general terms to remove undue discrimination between interstate shippers); 274 US29, 47SCt486, 71L ed911; 6F(2d)315 (order fixing minimum rates on salt held not outside of pleadings); 25F(2d) 750 (under prayer for general relief). [c] **Order for removal of discrimination** is held not invalid as requiring through rates and joint rates without finding of public necessity or convenience. 270US287, 46SCt226, 70L ed590. [d] **Particular orders construed.**-39 F(2d)167 (establishing minimum for intra-state rates). [e] **Retroactive order held void.**-43F(2d)603. [f] **Order dropping from interstate rate scale differential in favor of joint hauls** held not arbitrary and inconsistent with retention in other rates. 42F(2d)469. [g] **Order establishing maximum rate for intrastate commerce identical with interstate rate** with provision for lower competitive rate where there are alternative routes held valid. 42F(2d)467.

130-60 276US104, 48SCt282, 72L ed 487 (readjustment of past receipts); 279US768, 49SCt494, 73L ed947; 33 F(2d)582(2dcase). [b] **Order requiring carriers** to fix rail and water rates by relation to all rail rates held valid. 6F(2d)888.

130-61 274US29, 47SCt486, 71L ed911.

130-61½-New. An otherwise valid order is not affected by the addition of an invalid condition. 33F(2d)582(2dcase).

130-62 42F(2d)467. [a] **Effect of order** must be determined by its terms unless and until modified by formal actions. 270US580, 46SCt402, 70L ed743. [b] **Orders construed.**-17F(2d)978. [c] **Order of Commission** prohibiting operation of trains without compliance with brake requirements held not void for uncertainty. 36F(2d)670.

130-65 220AppDiv487, 221NYS666.

130-67 See also 272US658, 47SCt222, 71L ed463. [a] (2) In transportation of coal order held valid under transportation Act. 15F(2d)616. [b] **Order for reparation,** holding initial carrier liable where connecting carriers were jointly and severally liable, is held not error. 269US217, 46SCt73, 70L ed242. [c] **Order concerning preference** in car distribution, issued under Transportation Act, has force of law. 270US521, 46SCt 395, 70L ed713.

130-70 269US217, 46SCt73, 70L ed242; 234 IllA581.

130-73 269US217, 46SCt73, 70L ed242; 21F(2d)579 (not conclusive on federal district court); 38F(2d)871 (allowance of claim by Commission resting upon erroneous construction of statute). [b] **Order to remove discrimination** held rescinded by order dismissing proceedings. 270US580, 46SCt402, 70L ed743. [c] **Rescinded order** held not restored by telegram from chairman of division of commission that order stood unrescinded. 270US580, 46SCt402, 70L ed 743. [d] **Order,** rescinded by dismissal of proceedings, held not restored by order reopening proceedings. 270US 580, 46SCt402, 70L ed743. [e] **Reparation order reducing amount** fixed in prior order is held not invalid because without notice to carrier. 269US217, 46 SCt73, 70L ed242.

131-74½-New. Miscellaneous orders construed. 274US29, 47SCt486, 71L ed 911; 13F(2d)914; 19F(2d)591; 217 AppDiv675, 216NYS186.

131-74⅓-New. Decision of interstate commerce commission held quasi-judicial. 23F(2d)221.

131-74¼-New. Award not supported by substantial evidence is illegal. 25 F(2d)750.

131-74⅕-New. An order of the commission directing a railroad to put in effect certain intra-state freight rates to remove discrimination against interstate commerce, is confined to rates in territory respecting which evidence and findings relate and does not fix intrastate rates for the whole state, where the order expressly confines interstate rates to such territory and deals with intra-state rates only by reference to the order fixing interstate rates. 30 F(2d)116.

131-74⅙-New. In construing an order of the commission directed to elimination of unjust discrimination of intrastate rates against interstate commerce, construction which will uphold its validity, rather than one making it invalid, should be adopted. 30F(2d)116.

131-74⅐-New. An order clarifying a previous order prescribing an intrastate freight rate to remove unjust discrimination against interstate commerce, although made without further hearing of evidence, is effective from its date, at least. 31F(2d)580.

131-74⅛-New. The commission's order authorizing a railroad to issue securities for acquiring an old railroad on condition that the new company should impound money received from stockholders in an amount equal to four dollars per share does not affect a trust fund, under a reorganization agreement, set aside for reorganization expenses. 33 F(2d)582(2dcase).

131-74⅑-New. **Construction of orders.** The interstate commerce commission's order should be reasonably and broadly construed. 34F(2d)812.

131-74 1/10-New. Validity of order of Commission fixing new basis for division of joint rates. 36F(2d)789.

131-74 1/11-New. Commission cannot render judgment without having evidence before it. 40F(2d)921.

131-74 1/12-New. That commission considered former application as related matter cannot invalidate its last order. 40F(2d)921.

131-74 1/8-New. Pusher engine is not power brake car within order of commission. 42F(2d)248.

131-74 1/4-New. Findings of fact constitute no part of order of commission. 43F(2d)847.

131-74 1/5-New. Orders of commission should be liberally construed. 43F(2d) 300.

131-74 1/6-New. **Construction of particular orders.** 43F(2d)300.

131-74 1/7-New. Order is analogous to judgment of court. 43F(2d)847.

131-76 TexCommnA 13SW(2d)680. [b] **In action to recover for overcharges** it is not defense that shipper included excessive sales in prices charged to customers. 7F(2d)622. [c] **Shipper selling f. o. b.** at point of destination held entitled to recover excessive freight rates, although buyer was entitled to benefit of decline in tariff. 269US217, 46SCt73, 70L ed242.

131-77 269US217, 46SCt73, 70L ed242; 16F(2d)130.

131-82 16F(2d)130; 20F(2d)613 (orders and reports construed to be finding that rates were unreasonable per se).

131-84 20F(2d)613 (finding of unreasonableness per se held sufficient basis for reparation order without specific finding of maximum reasonable rates).

131-85 1/2-New. Under Transportation Act of 1920 the commission cannot order reparation to shipper compelled to pay domestic rate because of noncompliance with regulations for obtaining lower export rate in the absence of a finding that the regulations are unreasonable. 13F(2d)752.

131-85 1/3-New. Reparation order is not void because one of places of origin involved was not named in the complaint nor in commission's report where shipments from such points were set forth in a statement made under the rules of practice. 16F(2d)130.

132-1 36F(2d)789 (granting or denying rehearing is discretionary).

132-6 29F(2d)67; 220Ky813, 295SW 1010; 18F(2d)369; 25F(2d)888; 41 F(2d)836; 233Ky771, 26SW(2d)1025; 216AppDiv500, 215NYS576, 578 [citCJ]. [b] (5) Shipper's action for damages for failure to furnish cars for use in interstate shipments of coal during period of car shortage involving reasonableness of carrier's rule is not within state court's jurisdiction. 276US482, 48 SCt342, 72L ed664.

133-7 36F(2d)919; 196Wis64, 219NW 352.

133-10 See also 237 IIIA483.

133-11 234 IIIA581. See also 236 IIIA 476.

133-13 1/2-New. Where action involved no question of fact or administrative discretion, the courts have jurisdiction without preliminary resort to the commission. 23F(2d)307.

133-14 4F(2d)827.

133-17 271US259, 46SCt530, 70L ed 934; 216Ala89, 112S323; 233Ky771, 26 SW(2d)1025. [b] **Disputed questions as to weight of articles shipped** and application of conceded rates in admittedly correct classification held not for interstate commerce commission exclusively. 220Ky813, 295SW1010.

133-17 1/2-New. but not where the case involved a rate-making and administrative problem. 23F(2d)307.

134-18 [a] **Where mere mathematical calculation** will determine correct interstate freight charge, proper court may find basic facts and give judgment accordingly. 220Ky813, 295SW1010.

134-19 But see 32F(2d)373.

134-22 1/2-New. An action to recover a special tariff lies without prior hearing by interstate commerce commission. 16 F(2d)485.

134-22 1/3-New. If rates fixed by the state corporation commission are just and reasonable, a state court will not refuse to enforce them because discriminatory as against interstate commerce. 33NM628, 275P93.

134-22 1/4-New. The federal district court has jurisdiction in advance of an action by the commission to determine whether a water carrier is taking part in transportation under an arrangement with rail carriers for continuous carriage or shipment so as to obligate it to file tariffs. 33F(2d)211.

135-25 21F(2d)4; 36F(2d)789; 44 F(2d)243; 33OhA523, 169NE831 (suit to enjoin railroad from operating trains through streets of village). [b] **Courts will not enjoin** order of state commission prohibiting discontinuance of switching service before action by interstate commerce commission. 267US 493, 45SCt409, 69L ed753.

135-26 281US412, 50SCt391, 74L ed 936; 33F(2d)934.

135-26 1/2-New. , and the same rule applies to other proceedings before the commission. 22F(2d)509 (application for approval of lease).

135-27 [a] **Suit to compel switching railroad to receive and switch cars of plaintiff** is not within exclusive jurisdiction of interstate commerce commission. 180Ark492, 22SW(2d)21.

135-27 1/2-New. The courts have jurisdiction of a suit to enjoin the enforcement of an order of the interstate commerce commission, on the ground that it is void, as in excess of the authority of the commission, even without first seeking a remedy from the commission. [a] **Under Transportation Act of 1920** court in action to enjoin construction of alleged "extension" without obtaining certificate of public convenience and necessity may determine whether it is in extension without waiting for determination by interstate commerce commission. 270US266, 46SCt263, 70L ed 578.

135-27 1/3-New. A federal district court sitting in equity is not charged with the duty nor has it the power to fix the value of the property upon which rates are authorized to be fixed by the interstate commerce commission. 8 F(2d)747.

135-27 1/4-New. Suit to enjoin an interstate commerce commission order determining railroad property's final value is held not possible under federal legislation. 273US299, 47SCt413, 71L ed651.

135-27 1/5-New. Nor can such suit be brought under the court's general equity jurisdiction on the ground that valuation order would injure the credit of the carrier. 273US299, 47SCt413, 71 L ed651.

135-27 1/6-New. Until the commission has acted on an application for permission to lease interstate railroads, the courts are without jurisdiction to determine the issues thus presented. 18F(2d)645.

135-27 1/7-New. An interlocutory injunction restraining state authorities from putting in effect intra-state freight rates pending the interstate commission's investigation should be granted. 33F(2d) 934.

135-28 [a] **Shipper seeking annulment of order** authorizing railroad's acquisition of control over another system held without proper cause of complaint unless order related to transportation within meaning of Venue Act Oct. 22, 1913. 271US456, 46SCt545, 70L ed1033.

135-30 [a] (2) Where state Supreme court doubts validity but cannot hold invalid freight classification of interstate commerce commission, it is court's duty to enforce it. 153Miss628, 121S 265, 62ALR521.

135-31 1/2-New. Enforcement of rights of commission is a judicial function for courts of competent jurisdiction. 119 Okl 49, 247P986.

135-37 [a] **Adequacy of legal remedy as denial of equitable relief** since opportunity to defend in suit at law to enforce order of reparation is adequate, equity will not entertain suit to avoid the order. 6F(2d)646.

135-38 272US658, 47SCt222, 71L ed 463; 8F(2d)747; 19F(2d)591; 33F(2d) 582(2dcase) (order authorizing issuance of securities for purpose of acquiring railroad); 37F(2d)401. [a] **Suit to enjoin enforcement** and set aside order is proper remedy to review order authorizing abandonment of branch railroad. 271US153, 46SCt452, 70L ed 878. [b] **When equitable jurisdiction denied; adequacy of legal remedy.**-6 F(2d)646. [c] **Stay of order** held not matter of right. 272US658, 47SCt222, 71L ed463. [d] **Suit to set aside order of Commission denying certificate of necessity and convenience** should be dismissed for want of jurisdiction since order was entirely negative. 280US 469, 50SCt192, 74L ed551. [e] **Separate causes of action** against other defendants cannot properly be joined, collaterally raised or considered by court in suit to set aside order. 41 F(2d)806.

136-39 [b] **District court under transfer statute** has no greater jurisdiction than commerce court had. 41F(2d)836.

136-39 1/3-New. An order fixing final reduction of carrier's property will be annulled where the commission violated the statute by restricting the use of valuation to ratemaking purposes and in failing to follow statutory directions. 19F(2d)591.

136-42 28F(2d)885.

136-42 1/2-New. State courts have no jurisdiction to enjoin conduct authorized by the interstate commerce commission. 237 IIIA24.

136-42 1/3-New. Any supreme court justice may stay order pending appeal. 272 US658, 47SCt222, 71L ed463.

136-42 1/4-New. The action of the interstate commerce commission in issuing certificates pursuant to the Transportation Act has been held not available under the act of June 18, 1910. 277US172, 48SCt466, 72L ed838 [aff 22F(2d)865].

136-42 1/5-New. Special statutory court of three judges has jurisdiction of suit by coal producers affected by rate schedules to enjoin order cancelling schedule reducing rates. 25F(2d)462.

136-42 1/6-New. Suit to enjoin order cancelling rates is properly brought in the district where the parties vitally affected by the rates reside. 25F(2d)462.

136-42 1/7-New. A state court is without jurisdiction to enjoin domestic railroad corporations from leasing their lines to a foreign corporation, pursuant to an order of the interstate commerce commission, although the order is permissive only. 18F(2d)645.

136-42 1/8-New. The federal courts have exclusive jurisdiction to determine the legality of an order of the interstate commerce commission. 18F(2d)645.

136-42 1/9-New. Suits to review an order of the interstate commerce commission, authorizing a railroad corporation of one state to lease its lines to a corporation incorporated and domiciled in another state, made on petition of the latter, must be brought in the federal district in which the petitioning corporation resides. 18F(2d)645.

136-42 1/10-New. That a carrier may suffer in its credit because of the report and findings by the interstate commerce commission of surplus earnings, and request for payment thereof, furnishes no equitable basis for restraining enforcement of the findings, or for declaring them to be invalid. 28F(2d)634.

136-42 1/11-New. Authority conferred on the courts is confined to determining whether the commission's order violates the constitution or exceeds the power delegated by statute. 35F(2d)769.

136-42 1/12-New. The court cannot substitute its opinion and plan for the construction of a railroad line for that of the interstate commerce commission. 35 F(2d)769.

136-42 1/13-New. Errors in reparation order of commission may be corrected in suit brought thereon. 43F(2d)847.

136-42 1/14-New. Statutory provision for suit to set aside or enjoin orders of commission confers jurisdiction only as to quasi legislative orders in which public are interested and not to reparations orders. 43F(2d)847.

136-42 1/15-New. Power of district court to grant injunctions in suits to annul orders of commission is no greater than jurisdiction formerly exercised by commerce court. 43F(2d)847.

136-42 1/16-New. Suit to correct errors in findings made by commission as basis for reparation order held not maintainable as suit to enjoin or set aside order of commission. 43F(2d)847.

136-42 1/17-New. District court is without jurisdiction to set aside or enjoin order of commission awarding repara-

tion for damages for failure of carrier to furnish proper quota of cars. 43 F(2d)847.

136-46 See also 28F(2d)634.

136-47½-New. The court is not concerned with the regularity of the proceeding before the interstate commerce commission, not denying substantial right. 25F(2d)750.

136-47⅓-New. On certiorari, the question as to the error of the commission in the amount necessary to make good a guaranty to the carrier has been held not pertinent. 23F(2d)221.

136-47¼-New. Failure of the commission to cancel a varying proportional rate of petitioner's competitor has been held not subject to review. 279US768, 49SCt494, 73L ed947.

136-47⅓-New. Application to enjoin contemplated action of railroad in abandoning station cannot be included in bill under Urgent Deficiencies Act to set aside Commission's order. 281US 479, 50SCt378, 74L ed980.

136-47⅙-New. The commission's order may not be annulled by imposition of conditions subsequent beyond original power, even though such power be arbitrary. 33F(2d)582(2dcase).

136-48 [a] **Only persons injured may maintain suit on reparation award,** notwithstanding any practice or custom. 39 F(2d)80.

136-49 See also 41F(2d)806.

136-51 [a] **Intervention by plaintiff before commission** does not entitle it to institute independent action to set aside commission's order, in absence of resulting legal injury. 281US479, 50SCt 378, 74L ed980.

136-54½-New. An order requiring payment of damages for an excessive rate by a United States carrier because of the unreasonableness of a joint through rate may be enforced against such carrier, although part of the transportation is by Canadian carrier. 275US179, 48SCt39, 72L ed225.

136-54⅓-New. **Plaintiff's interest as minority stockholder** does not entitle it to bring suit to set aside commission's order granting railroad certificate of public convenience and necessity. 281US 479, 50SCt378, 74L ed980.

136-55 6F(2d)236 ("date of the order" is time fixed by commission for payment of award).

137-70 7F(2d)164; 7F(2d)622; 18 F(2d)369; 20F(2d)613; 23F(2d)307; 25 F(2d)750; 42F(2d)281; 107WVa469, 148SE855 (merely rule of evidence). See also TexCivA 294SW941.

137-73 But see 272US658, 47SCt222, 71 L ed463; 18F(2d)369; 29F(2d)80; 40 F(2d)56. But see 280US98, 50SCt51, 74 L ed187; 36F(2d)789.

138-78 274US564, 47SCt727, 71L ed 1204; 6F(2d)305.

138-80 272US658, 47SCt222, 71L ed463.

138-87½-New. In reviewing the sufficiency of the evidence, the court inquires only if substantial evidence was introduced to support the findings. 25 F(2d)750.

138-87⅓-New. Findings of the commission are only prima facie evidence. 25F(2d)522.

138-87¼-New. Interveners in suit involving validity of rate order, cannot attack commission's finding of undue prejudice and preference. 281US249, 50 SCt315, 74L ed832.

138-88 38F(2d)91.

138-88½-New. A court will not attempt to substitute its judgment for that of the commission in administrative matters. 33F(2d)582(2dcase).

138-90 36F(2d)789; 41F(2d)836. But see 33F(2d)582(2dcase).

138-91 271US268, 46SCt500, 70L ed941 (reasonable or discriminatory nature of rates); 6F(2d)315 (reviewing court cannot weigh testimony as to reasonableness of rates); 19F(2d)591; 30F(2d) 421; 41F(2d)806; 41F(2d)836; 43 F(2d)847; 332 Ill 243, 163NE664. [b] **Where evidence not before court,** court must regard conclusion of Commission as to rates being arbitrary as correct. 39F(2d)167.

138-92 271US268, 46SCt500, 70L ed 941; 7F(2d)164; 25F(2d)462; 29F(2d) 80; 31F(2d)951; 32F(2d)524; 332 Ill 243, 163NE664. [a] **It is not for court to weigh evidence** or inquire into wisdom of commission's conclusion. 36 F(2d)789.

138-93 25F(2d)462. [a] **Shipper electing to make complaint to Commission** in regard to question of law is precluded from pursuing in court alternative remedy. 41F(2d)836.

138-94 6F(2d)315; 41F(2d)293.

138-94½-New. Error as to the burden of proof in interstate commerce commission proceeding does not justify interference of the court. 25F(2d)462.

138-96½-New. The courts are not bound by the action of the interstate commerce commission in making orders under an erroneous theory of law. 25 F(2d)462.

139-98 272US658, 47SCt222, 71L ed 463; 41F(2d)806.

139-99 332 Ill 243, 163NE664.

139-3 32F(2d)524.

139-4 6F(2d)888.

139-4½-New. The court will not interfere with the action of the commission in setting the minimum rate no matter how it disagrees with its reasoning. 25F(2d) 462.

139-5 6F(2d)315; 7F(2d)164.

139-7 7F(2d)164.

140-15½-New. The absence of unanimous opinion in a commission for an order does not alone warrant a stay thereof pending an appeal. 272US658, 47SCt 222, 71L ed463.

140-15¼-New. Orders must be read together to determine if certain rate is discriminatory. 274US597, 47SCt724, 71 L ed1224.

140-15¼-New. All doubts as to the extent of order should be resolved in favor of state power. 274US597, 47SCt 724, 71L ed1224.

140-15½-New. A court is without jurisdiction to enjoin the interstate commerce commission from proceeding under an order reopening valuation proceedings. 14F(2d)850.

140-15¼-New. Taxation of costs and reasonable attorneys' fees in favor of plaintiff suing to enforce reparation award should not be made until judgment becomes final. 16F(2d)130.

140-15½-New. Director general of railroads may be held liable for such attorneys' fees and costs under the Interstate Commerce Act. 16F(2d)130.

140-15⅛-New. **Special statutory court of three judges,** to hear a case seeking injunction of the enforcement of an interstate commerce commission order, must go behind formal conclusions of the commission and ascertain exactly what was done. 25F(2d)462.

140-15⅛-New. A decree dismissing a bill to set aside an order should give its reasons therefor for the purpose of aiding litigants to determine the advisability of an appeal. 275US404, 48SCt189, 72L ed338.

140-15 1/10-New. The effect of altering intra-state rates on complainants' business, and their investments made on the faith of such rates alone cannot avail in the district court to overturn the commission's order. 30F(2d)116.

140-15 1/11-New. Refusal of commission to grant rehearing is not reviewable in suit to set aside order of commission. 36F(2d)789.

140-21 272US658, 47SCt222, 71L ed 463; 274US29, 47SCt486, 71L ed911.

140-22 272US658, 47SCt222, 71L ed 463; 274US29, 47SCt486, 71L ed911; 22 F(2d)199 (this rule also applies to circuit court of appeals). [a] **Where evidence heard by commission** is before court, it will consider objections that essential findings were not made and that findings are not supported by evidence. 271US153, 46SCt452, 70L ed878.

140-23 270US287, 46SCt226, 70L ed590.

140-26 282US74, 51SCt1.

140-27½-New. A decree staying an order of the commission is reversed when not warranted by facts. 272US658, 47 SCt222, 71L ed463.

140-27⅓-New. On partial reversal, directing payment of costs has been held proper, in a proceeding to enforce an alleged lien under judgment against the carrier enforcing the reparation order. 275US156, 48SCt96, 72L ed214.

140-27¼-New. In the absence of irregularity in the proceedings or misapplication of legal rules, the interstate commerce commission's finding as to the reasonableness of rates is conclusive. 22 F(2d)199.

COMMERCIAL LAW

141-30 17F(2d)311, 315 [citCJ].

COMMISSION

144-85 TexCivA 280SW297, 300 [quot CJ].

144-86 TexCivA 280SW297, 300 [quot CJ].

145-88 NJ 135A202; TexCivA 280SW 297, 300 [quotCJ].

145-92 178Minn114, 226NW206(2d case).

145-7 [b] **Legislative power to designate duties.**-99Vt265, 132A40.

COMMODITY

153-65 128Misc123, 217NYS833.

154-74½-New. As applied to inheritance taxes. 256Mass512, 153NE1.

COMMON

154-89 11CustAUS249.

154-92½-New. Word "common" is synonymous with word "public." 30Pa Dist138.

COMMON LABOR

157-57½-New. **Definition.** Labor which is not skilled by period of apprenticeship, as labor of mechanic, or labor that is not skilled by reason of connection with trade or commerce, as labor of storekeeper. 113Nebr761; 204NW788.

COMMON LANDS

162-50½-New. In Porto Rico, the right of private ownership of land carries with it pasture elsewhere, and pastures were finally declared of common use. 12 PortoRicoFed252.

165-3½-New. Proceedings for calling and conducting meetings of proprietors of real estate lying in common in assumed pursuance of statute by assignees of descendants of ancient proprietors of Yarmouth and other towns in Plymouth colony, were invalid, where assignors had no title to lands or interest in the corporation on the day of their assignments. Mass 165NE32.

173-95½-New. And a nonuser of a proprietory corporation franchise extinguished the corporation. 261Mass125, 158NE330.

COMMON LAW

177-18 74Mont587, 241P328.

177-26½-New. There cannot be an operative common law essentially different from a clearly-expressed statute. 15 DelCh409, 138A347.

179-36 47RI 131, 131A198, 42ALR1360.

179-38 90Fla721, 106S576; 157Miss243, 128S105; 298Pa475, 148A695.

179-39 153Miss712, 121S138(2dcase); 154Miss325, 122S373; Mo 28SW(2d)363; 108WVa194, 151SE700.

180-42 [a] **Supreme court** has authority to declare for itself what common law is. 154Miss325, 122S373.

180-45 47RI 131, 131A198, 42ALR1360.

180-53 23AlaA363, 125S685; 98CalA 748, 277P1075; 89Fla303, 103S833; 90 Fla721, 106S576; 98Fla1158, 125S372; 340 Ill 188, 172NE3; 249Mich360, 228 NW721; 245NY186, 156NE660; 127Miss 304, 215NYS767; 51ND399, 200NW505, 37ALR1186; 127 Okl 117, 260P32; 116 Tex82, 286SW458; TexCommnA 291SW 1095; TexCivA 271SW233; TexCivA 275 SW134; TexCivA 10SW(2d)772.

181-56 SC 155SE622.

181-59 See also Cal 290P438.

182-62 8PaDist&Co 77.

183-69 127Misc558, 217NYS413.

183-73 51ND399, 200NW505, 37ALR 1186.

183-74 [a] See also 51ND52, 200NW 505, 37ALR1186.

184-80 235Ky728, 32SW(2d)42; 216 AppDiv368, 214NYS353.

184-81 90Fla844, 107S535; 93Fla849,

119S846; 126Kan427, 268P819; MoA 287SW657 (under Rev. St. [1919] § 7018), TexCommnA 283SW141, 69Utah 268, 254P142.

186-84 [a] **In Texas.**—CivA 290SW772.

186-85 [a] **Act adopting common law abrogated civil law** of Mexico thereto fore existing. NM 290P1015.

186-85½-New. The Cherokee Nation has never recognized the common law. 117 Okl 87, 246P258.

186-85½-New. Matters relative to adoption of the common law were left to the states, each state adopting such part thereof as was consonant with its uses and customs. 193NC513, 137SE587.

186-86 276US71, 48SCt291, 72Led473; 202Cal 56, 259P444, 56ALR264; 196Ind 529, 119NE61, 206Ky613, 271SW696; 35OhA191, 172NE623, TexCommnA 283SW141; 144Wash170, 257P236. [b] 96Fla731, 117S691.

187-88 144SC84, 141SE893.

187-89 96Fla131, 117S691, 196Ind421, 111NE382, 148NE107, 159Md298, 133A59, 118NY302, 162NE87, 130Or669, 281P510, 160Tenn203, 228SW(2d)354; 144Wash170, 257P236 (crime).

187-90 93Fla5, 112S280; 150Md298, 133A59, 61 [cit CJ]; 132Or500, 286P517. [d] **Statute modifying common-law rule** will be enforced only to extent of modification intended. 292Pa304, 141A72.

187-92 101CalA36, 251P1051, 225Ky873, 108SW(2d)277, 197Wis56, 221NW417.

187-94 TexCivA 178SW(2d)841(2dcase).

188-2 Ill 175NE159, 141SE893.

188-3 96Fla721, 106So76; 93Fla849, 112S846; 163Miss712, 124S138(2dcase); 154Miss325, 122S373; 116Tex82, 286SW458.

189-5 49RI 107, 140A359, 360 [cit CJ].

189-6 116Tex82, 286SW458.

189-8½-New. In the absence of statute common law is binding on courts if not opposed to public policy of state. 169 Ark796, 277SW516.

189-9½-New. Christianity is part of common law of Pennsylvania. 290Pa 136, 138A497, 53ALR1027.

189-9½-New. The supreme court has the authority to declare for itself what the common law of the state is. 153Miss 712, 124S138(2dcase).

189-11 [a] **Party seeking to avail himself of technicality** must himself be held to prompt, consistent, exact assertion of such technical right. CalA 285P356.

189-16 156Miss693, 126S650.

190-24 335 Ill 504, 167NE777.

191-72½-New. , and the rule that pedestrians have a right to travel anywhere upon a public highway. 197Cal 82, 239P709, 11ALR1[illegible].

192-16 TexCivA 278SW(2d)354 (the law favors the diligent).

192-23 195Wis98, 221NW401.

193-27 49RI 107, 140A359, 360 [cit CJ]; 155Wash351, 284P213, 68ALR251. Erratum,—"Joseph v. Union R. Co., (R. I.) 79 A 1," should read "State v. Eastern Coal Co., 29 R. I. 254, 70 A 1."

193-30 89Fla403, 103S833. [a] (3) 216 AppDiv368, 214NYS353 (original statute of frauds). (5) 330 Ill 571, 162NE170. (32) Perpetuity statute. CalA 260P940. [c] **In New York.**—216AppDiv368, 214 NYS353.

194-38 160Tenn594, 28SW(2d)47.

195-39 196Ind499, 149NE650; 187Wis 381, 204NW589.

195-40 CalA 285P321.

195-41 100CalA178, 280P179, 160Ga 527, 128SE56; TexCommnA 268SW(2d) 174.

196-43 100CalA761, 279P1008; 203 Iowa918, 210NW264; Iowa 227NW830; 124Kan216, 257P914; Nebr 232NW96; 35OhA191, 172NE623.

196-44 82Colo589, 263P19; 196Ind 499, 149NE650.

196-47 18F(2d)685.

196-48 18F(2d)685. [b] **Common law determines** whether cause of action survives in federal court. 6F(2d)1000, 42 ALR503.

197-53 42F(2d)937.

197-55½-New. Local common-law system of jurisprudence is followed in territory under exclusive federal jurisdiction, unless the common law is set aside by the federal constitution or act of congress, provided the common law prevailed when the territory was acquired. 152Va481, 147SE461.

198-64 47RI 131, 131A198, 12ALR1360.

198-65 47RI 131, 131A198, 12ALR1360.

198-67 47Ida295, 274P802, 66ALR 1396.

199-69 321Mo235, 11SW(2d)278, 62 ALR858.

199-74 [a] **Legal presumption that common law of another state is similar cannot be overcome** by testimony of member of bar of other state where statutes permit judicial notice of decisions of sister state. NJSup 140A429.

200-79 71CalA367, 235P658; 247IllA 81; 253IllA589; MoA 287SW657; 103 NJL11, 135A66; NJSup 140A429; 127 Misc508, 217NYS39.

202-90 127Misc508, 217NYS39.

239-91 Utah 289P132. [a] **In countries which have adopted English common law,** common law of forum is presumed to obtain. 127Misc508, 217NYS39.

202-92 214AppDiv820, 211NYS143 (Penn).

202-95 46Ida622, 269P993; 251Mich 420, 232NW239; 153Tenn250, 283SW 71; 197Wis336, 222NW218.

COMMON RIGHT

206-29 IndA 172NE569.

COMMON SCOLD

208-4 10PaDist&Co 694.

COMMUNITY CHURCH

215-19½-New. Federation of two or more churches all retaining their separate identity and their distinctive doctrines. 78CalA1, 247P605.

COMPANY

221-77 154Tenn77, 289SW492.

COMPENSATION

224-45 See also 33PortoRico 136.

224-58 33PortoRico 136.

230-26 74CalA386, 240P792, 794 [quot CJ]. 128Misc626, 220NYS170.

230-30 74CalA386, 240P792, 794 [quot CJ]; 142Va512, 129SE384.

230-31½-New. restitution on balancing of accounts; 142Wash450, 253P805.

230-33 74CalA386, 240P792, 794 [quot CJ].

230-34 74CalA386, 240P792, 794 [quot CJ].

230-36 194Wis543, 217NW570 ("compensation to be paid" as used in statute means payment in money).

231-46 74CalA386, 240P792, 794 [quot CJ].

COMPETENCY

233-68 95Fla851, 116S865. [b] **Other distinctions.** 117Or621, 223P543, 245P 321 (between competency of witness and competency of evidence).

COMPETENT

233-74 101WVa703, 133SE379.

233-75 101WVa703, 133SE379.

233-76 101WVa703, 133SE379.

233-77 101WVa703, 133SE379.

233-79 101WVa703, 133SE379.

234-80 101WVa703, 133SE379.

234-82 101WVa703, 133SE379.

236-22½-New. Legally competent as answering all requirements of the law. 286Pa199, 133A256.

COMPETITION

236-41 [d] (3) As ordinarily used term is opposed in meaning to "monopoly." 187Wis290, 203NW721.

237-42 [b] **As applied to national banks,** it means devotion of moneyed capital with reasonable continuity and regularity to business that may be carried on by national banks. 242NY277, 151NE152.

237-46½-New. The word has no definition which is inclusive as well as exclusive. 187Wis290, 203NW721, 731 [cit CJ].

COMPETITIVE BIDDING

237-50 218Ky295, 291SW372.

237-51½-New. It means that by due advertisement every one must be given opportunity to bid. 218Ky295, 291SW 372.

237-51½-New. Bidding upon the same undertaking, upon the same material items in the subject matter, upon the same thing. 125Okl 197, 257P374; 126 Okl 114, 258P563.

243-64 Fla 128S801(2dcase).

COMPLIANCE

246-5 [b] **As not synonymous with "performance."**—129Misc229, 220NYS330.

COMPOSITIONS WITH CREDITORS

251-1 273US380, 47SCt372, 71Led692; 273US380, 47SCt372, 71Led692.

254-41 TexCivA 296SW631.

256-58 68CalA717, 230P200 (deed of assignment for purpose of paying consenting creditors pro rata together with consent of two or more creditors to accept such pro rata payment in full is contract based on consideration).

257-66 68CalA717, 230P200.

258-78½-New. A creditor who, with others, assigned his claim to a creditor's committee to deal with the claim as it might seem fit is bound by a composition agreement entered into by it with the debtor while its authority was unrevoked, although the creditor did not formally agree thereto, 199 Iowa797, 202NW570.

258-78½-New. especially where the debtor and all other creditors have acted on the agreement and changed their positions by reason thereof. 199 Iowa 797, 202NW570.

262-30 41GaA770, 154SE912.

263-41 41GaA770, 154SE912.

263-44 34PortoRico 483 (financing creditor).

266-71 136Misc438, 240NYS193 (court cannot make composition agreement between debtor and creditor).

266-80 136Misc438, 240NYS193.

269-14 136Misc438, 240NYS193.

270-21 126Misc213, 212NYS129 (dictum); 142Wash624, 253P1070, 1071 [quot CJ].

270-22 142Wash624, 253P1070, 1071 [quot CJ].

270-23 142Wash624, 253P1070, 1071 [quot CJ].

270-24 142Wash624, 253P1070, 1071 [quot CJ].

270-25 142Wash624, 253P1070, 1071 [quot CJ].

270-26 142Wash624, 253P1070, 1071 [quot CJ].

270-26½-New. Breach of composition agreement confirmed in bankruptcy does not revive original debt in favor of creditor. 126Misc213, 212NYS129 (dictum).

271-29 142Wash624, 253P1070, 1071 [quot CJ entire section].

271-34 68CalA717, 230P200.

271-36½-New. Where a creditor is not entitled to receive interest under a composition agreement, no interest should be allowed in the debtor's counterclaim. 142Wash624, 253P1070.

271-36½-New. The holder of a partnership note, entering a composition agreement with the purchaser of the business, discharged the note in full. TexCivA 296SW631.

271-36½-New. Under common-law compromise debtor is released only upon performance of promises which he has made. 136Misc438, 240NYS193.

271-39 TexCivA 296SW631, 634 [quot CJ].

272-48 68CalA717, 230P200; TexCivA 296SW631.

272-49 Mich 233NW384.

273-55 36F(2d)628 (property of debtor not surrendered to assignee).

273-58 TexCivA 280SW270, 274 [cit CJ].

274-60 36F(2d)628.

275-84 175Minn374, 221NW426, 427 [cit CJ].

276-93 68CalA717, 230P200. [a] **Payments made by indorser to creditor after consent to composition** do not create indebtedness on part of debtor. 68 CalA717, 230P200.

276-96 273US380, 47SCt372, 71Led 692.

277-9 68CalA717, 230P200 (composition performed by debtor).

282-53 TexCivA 296SW631.
282-64 [a] **Admissibility and sufficiency of evidence as to payment.** Mich 233NW384.
283-77 41GaA770, 154SE912.
287-29 TexCivA 296SW631, 634 [quot CJ].
287-30 TexCivA 296SW631, 634 [quot CJ].
287-31 132Misc755, 230NYS596; 226 AppDiv274, 235NYS105; TexCivA 296 SW631, 634 [quotCJ].
287-34 126Misc213, 212NYS129.
288-35 126Misc213, 212NYS129. [a] **No injustice results to preferred creditor** since he may recover on the composition agreement itself. 126Misc213, 212NYS129.
295-16 126Misc213, 212NYS129; 132 Misc755, 230NYS596.
295-24½-New. Rights of assignee of notes given under secret agreement. Unless transferee proves he is a bona fide purchaser of notes given to creditor under secret agreement, such defense is not available to him, even though notes are not absolutely void. 126Misc213, 212NYS129.
296-39 126Misc213, 212NYS129.
297-41 62 OntL105, [1928] 2DomLR 577.

COMPOUND

302-17 143SC156, 141SE267.
302-18 143SC156, 141SE267.
302-19 143SC156, 141SE267.

COMPOUNDING FELONY

305-19 87CalA510, 262P442, 451 [quot CJ].
307-42 [a] **More silence after knowledge of commission of felony** is insufficient. 38F(2d)515.
308-68½-New. Buyer of intoxicating liquor is not ipso facto guilty of misprision of felony. 38F(2d)515.
309-73 89 IndA113, 165NE784.
309-80 [a] Mion 231NW804. [b] 87 CalA510, 262P442.

COMPRESS

310-11½-New. To press together. 84 F(2d)41.

COMPROMISE AND SETTLEMENT

310-19 [a] 251 IllA119 [citCJ].
314-1 191NC731, 133SE16; 40 OklACR 136, 139 [quotCJ, and rehearing pending]; 126 Okl 238, 259P257; 131 Okl 144, 268P245, 247 [quotCJ]. [a] (12) Other instances. 35Ariz383, 278P381. [d] **Object** of contract of settlement is to compose differences and avoid litigation. MoA 291SW147.
314-2 191NC731, 133SE16; 131 Okl 144, 268P245, 247 [quotCJ]; 40 Okl ACR136, 139 [quotCJ, and rehearing pending]. See also 87 IndA333, 158NE 294. [a] (2) Compromise is purchase of peace and settlement is consummation thereof. 144Wash641, 258P479.
315-3 87 IndA333, 158NE294.
316-14 See also 82CalA685, 256P428.
316-17 232Ky298, 22SW(2d)912. [b] **Parties to arbitration agreement** may make settlement contract binding one to pay the other stipulated sum. 205 Iowa956, 218NW941.
316-18 Mass 169NE913 (deceit).
316-20 82CalA685, 256P428; MoA 274 SW885.
316-25½-New. Registration of sale contract retaining title in seller does not affect right of third person to settle with buyer as mortgagor for injuries to the property, and be discharged of further liability. 190NC480, 130SE310.
316-25¾-New. The court cannot make a contract of compromise and settlement for the parties. CalA 281P1043.
317-35 205 Iowa297, 215NW621 (agreement held to constitute compromise and settlement of suit); 130Kan 676, 288P570; 152Va453, 147SE265.
318-36 Iowa 230NW330 (writing setting forth schedule of articles divided among heirs held not settlement of claim for services rendered decedent).
318-37 TexCivA 16SW(2d)316.
318-38 Md 150A118; 84Montl16, 274 P497.
318-40 43F(2d)537; TexCivA 138SW (2d)598.
319-51 Md 150A118.
319-52 87F(2d)308.
319-54 124Kan23, 30, 257P979 [citCJ].
319-55 124Kan23, 30, 257P979 [citCJ].
319-62 39GaA106, 146SE338. 319 Ill 339, 150NE254; 124Kan23, 30, 257P 979 [citCJ]. 12LaA125, 126S213; Md 150A118; MoA 274SW879. Mont 287 P629; 136Misc648, 241NYS695; 137 Misc76, 241NYS18; ND 228NW813; TexCivA 280SW270; TexCivA 280SW 841. [c] **Retention and use of check** accompanied by letter stating it to be in full account to date is accord and satisfaction. 136Misc292, 213NYS81.
320-63 124Kan23, 257P979
320-64 132Misc126, 228NYS647; Tex CivA 158SW(2d)1072. See also 190NC 203, 129SE607.
320-66 18F(2d)724; 181Ark148, 25 SW(2d)449.
320-67 220Ky621, 295SW1073; MoA 287SW799.
320-68 98CalA630, 277P519; 136Misc 438, 240NYS193; 143 Okl 136, 287P 1035. [a] **Acceptance of part of claim in full satisfaction** constitutes accord and satisfaction, although claimant contends he accepted payment but not terms. Md 150A118.
320-69½-New. Agreement to discharge debt by payment of smaller sum fully executed and evidenced by written receipt in full satisfaction constitutes discharge. Ida 291P1071.
320-71 319 Ill 339, 150NE254; 124Kan 23, 257P979; TexCivA 293SW180, 182 [citCJ]; TexCivA 38SW(2d)468.
320-72 Contra 71CalA674, 241P900.
320-74 5F(2d)416; 7F(2d)761; 339 Ill 108, 170NE841; 230Ky509, 20SW (2d)276; 170La37, 127S256; 247Mich 222, 225NW539; 251Mich651, 232NW 386; 172Minn171, 215NW225; Mo 292 SW25; 116Nebr603, 218NW101; 125 Misc261, 210NYS466; 125Misc922, 212 NYS301 (check marked "paid in full"); 191NC243, 131SE665; 197NC407, 149 SE381; TexCommnA 26SW(2d)189 (creditor must refuse check or accept as complete payment); TexCivA 293SW 180, 182 [citCJ]; TexCivA 16SW(2d) 316; 144Wash215, 257P629, 53ALR766.
321-75 But see 170Ark976, 281SW899.
321-77 MoA 274SW885.
321-78 32F(2d)564.
321-78½-New. Retention of a check for an unreasonable time amounts to an election to treat payment as full settlement. 23AlaA246, 123S265, 270 [citCJ].
321-80 But see 208 Iowa70, 221NW941.
321-81½-New. Payee accepting and indorsing check with notation of settlement thereon, is presumed to have accepted and indorsed it in toto. Ida 291 P1071.
321-83 [a] **Failure to reject or ratify proposed settlement after delayed acceptance** waives delay and effects binding settlement. 149Miss856, 116S93.
322-93½-New. An agreement to make a fair and reasonable settlement of a personal injury claim is not enforceable for lack of agreement as to the amount payable. 128Misc884, 220NYS454.
322-95 210Ky785, 276SW840; 213App Div324, 210NYS589; 219AppDiv506, 220 NYS270; 199Wis329, 226NW381.
322-98 234Ky173, 27SW(2d)695; Tex CivA 273SW899. [a] **Compromise held supported by sufficient consideration.**–32F(2d)680. [b] **Payment held sufficient consideration.**–100CalA750, 281P 84.
322-99 Iowa 231NW366.
322-1 41GaA601, 154SE158; 121Kan 291, 246P1017; 138Misc90, 245NYS173; TexCommnA 288SW163.
322-3 82CalA685, 256P428; 205 Iowa 297, 215NW621, 217NW876; Iowa 228 NW658; TexCivA 280SW841; 197Wis 250, 221NW743.
322-9½-New. Where a debtor pays only what it is admitted he owes, there is no consideration for an agreement to release the balance of the claim. 210Ky 785, 276SW840.
322-10 216Ala686, 114S301; 171Ark 168, 283SW360; 79Conn644, 66A161; 337 Ill 520, 169NE324; 144Miss178, 109 S700; 135Misc877, 240NYS203; 50RI 236, 146A636; 153Va540, 150SE238; 151Wash201, 275P[illegible].
323-12 144Miss178, 109S700.
333-16 146Va504, 131SE692.
334-17 89PaSuper47.
334-22 7F(2d)764; 7F(2d)793; 19F (2d)981; 43F(2d)537; 212Ala515, 103 S549; 216Ala314, 113S25; 220Ala568, 126S637; 35Ariz383, 278P381; 174Ark 337, 295SW46; 92Fla295, 109S593, 596 [citCJ]; 205 Iowa956, 218NW941; Iowa 231NW366; 125Kan603, 264P1065; 128 Kan220, 277P45; 210Ky785, 276SW840; 225Ky456, 9SW(2d)209; 230Ky465, 19 SW(2d)1078; 232Ky298, 22SW(2d)912; 161La378, 108S777; 250Mich625, 231 NW121; 164Minn175, 205NW59; 142 Miss641, 107S885; 147Miss412, 112S24; MoA 286SW842; MoA 300SW1026; 86 Mont169, 282P852; 129Misc365, 221NYS 357; 229AppDiv670, 243NYS579; 121 Or432, 253P869; 95PaSuper516; RI 133A350; TexCommnA 288SW163; Tex CivA 297SW532; TexCivA 6SW(2d) 387; TexCivA 8SW(2d)735; 107WVa 75, 146SE885.
326-23 [a] **Dispute as to part of claim.**–30F(2d)[illegible].
326-24 234Ky173, 27SW(2d)695.
327-26 Iowa 230NW373.
327-27 217Ky815, 290SW659; 164Minn 175, 205NW59. [a] **Threat of lawsuit** on claim without foundation is no consideration. 234Ky173, 27SW(2d)695.
327-28½-New. It is not essential to the validity of an executed agreement in satisfaction of a claim that the claim be disputed. 39GaA617, 147SE907.
327-31½-New. The right of the parties to settle disputes before or after the action is brought is recognized. 23AlaA 286, 124S394(2dcase).
327-34 174Ark560, 298SW30; 207 Iowa 735, 223NW487; 247NY435, 160NE778.
328-36 40F(2d)241; 215Ala630, 112S 159; 233Ky12, 24SW(2d)938; 121 Or 432, 253P869, 871[quotCJ]. [d] **Broker's offer to take less commission** at time when there was no claim, dispute, or compromise is held not a compromise of disputed claim. 254Mass268, 150NE 3.
329-37 234Ky173, 27SW(2d)695 (holding it must be determined by the peculiar facts of a claim).
329-39 144Wash215, 257P629, 630 [cit CJ] 53ALR766.
329-40 171Ark77, 284SW12; TexCivA 6SW(2d)387.
330-41 See also 50RI 236, 146A636.
330-44 165Ga198, 140SE501.
331-47 35Ariz383, 278P381; 36GaA 169, 136SE94; 142Miss641, 107S885.
331-48 35Ariz383, 278P381; 36GaA 169, 136SE94.
332-49 Ala 129S58(2dcase); 206 Iowa 21, 218NW483; 230Ky509, 20SW(2d) 276; TexCivA 297SW1059; TexCivA 4 SW(2d)651.
332-51 216Ky22, 287SW25.
332-52 206 Iowa21, 218NW483.
333-57 207 Iowa735, 223NW487. [a] **Jury's finding that contract alleged** had no existence precluded bona fide dispute thereon. TexCivA 297SW1059.
333-59 NJSup 147A488(2dcase); Sask [1930] 1DomLR888.
333-60 35Ariz383, 278P381.
334-66 CalA 291P422.
334-68 MoA 28SW(2d)416.
334-69 35F(2d)990; NJSup 147A488 (2dcase); 40 OklACR136 [rehearing pending].
335-74 242Mich506, 219NW710 (writing construed as settlement of matters in dispute).
335-75 191NC731, 133SE16.
335-76 [a] (1) 2LaA63. [b] **New York rules of civil practice.**–225AppDiv85, 232 NYS 290. [c] **In Montana.**–86Mont169, 282P852 (indorsement of check held not writing within statute).
335-80½-New. A broker's agreement to pay certain amounts in settlement of claims for profits is not binding until signed by all of them. NJ 146A659.
335-86 206 Iowa21, 218NW483 (contract construed as joint, and not joint and several); 220AppDiv649, 222NYS 442; TexCivA 275SW673.
335-87 27F(2d)24; Ida 287P954. [a]

(7) Other agreements construed. 32F (2d)601. [b] **Court cannot make contract of compromise for parties.**–Cal 290 P1029.

336–88 197Wis250, 221NW743.

336–89 205 Iowa297, 215NW621.

336–93 205 Iowa297, 215NW621, 217 NW876 (construed against party who framed instrument).

336–94 See also 205 Iowa297, 215NW 621.

336–96 TexCivA 293SW180.

336–97 Ida 287P954 (clause not in contract will not be read into it).

336–97½–New. Employee's acceptance of check for balance due for services in rug department did not bar claim for compensation in furniture department. 300Pa485, 150A899.

337–3 5F(2d)1005; 38F(2d)153; 217 Ala105, 115S2; 35Ariz383, 278P381; 175Ark507, 299SW749; 97CalA193, 275 P503(2dcase); 93Fla30, 111S525; 165 Ga198, 140SE501; 45 Ida587, 264P386; 325 Ill 165, 156NE334; 317 Ill 173, 147 NE791 (settlement of family disputes by agreement favored by courts of equity); 247 IllA98; Iowa 224NW771; 121Kan 622, 249P675; 211Ky737, 277SW1020 (court not inclined to depart from policy of encouraging rather than discouraging, agreement among adversaries); 234 Ky173, 27SW(2d)695 (holding courts will not scrutinize rights under agreement too closely); 169La319, 125S258; 126Me167, 136A814; 258Mass172, 154 NE583; 242Mich506, 219NW710; 235 Mich157, 209NW113; 245Mich41, 222 NW84; 142Miss641, 107S885; 83Mont 353, 272P534; Mont 292P577; 131 Misc891, 228NYS508 (negligence actions); 137Misc883, 245NYS142; 227 AppDiv378, 237NYS668; 191NC731, 133 SE16; 193NC541, 137SE658; 40Okl ACR136 [rehearing pending]; 125Or38, 263P54; 130Or530, 279P528; 153Tenn 386, 284SW363; 150Va414, 143SE688; 151Wash201, 275P571; 197Wis250, 221 NW743. [a] **Particular transactions construed.**–109Conn244, 146A288.

337–4 193NC541, 137SE658.

337–5 82CalA685, 256P428; 204 Iowa 771, 212NW733.

337–5½–New. Courts will support, so far as they can legally and properly, agreements for amicable settlement of doubtful rights. 126Me167, 136A814.

337–5¾–New. Settlement of notes of indebtedness by acceptance of property discharges the indebtedness and releases the obligors under a contract of indemnity against loss of the notes in the absence of fraud. 169Ga40, 149SE573.

337–6 216Ala556, 114S52; 171Ark968, 287SW173; 175Ark507, 299SW749; 176 Ark601, 3SW(2d)673; 203Cal 252, 263P 533; 97CalA193, 275P503(2dcase); 46 Ida313, 268P31; 46 Ida387, 268P35; 204 Iowa771, 212NW733; 205 Iowa956, 218NW947; 206 Iowa161, 220NW7; 222 Ky542, 1SW(2d)966; 159La992, 106S 540; 162La587, 110S765; 163La757, 112S711; 10LaA89, 120S270; 238Mich 61, 213NW183; 238Mich65, 213NW185; MoA 271SW859; 120Or613, 253P536, 538 [citCJ]; 121Or432, 253P869, 870 [citCJ]; 50Philippine694; 49RI 135, 141A79; 49SD14, 205NW664 (in suit on notes given in settlement of previous suit on notes, evidence relating to former suit and to mistake in believing plaintiff holder in due course is inadmissible); TexCivA 283SW1098; TexCivA 289SW102; TexCivA 293SW180; Tex CivA 293SW284; TexCivA 32SW(2d) 393; 144Wash641, 258P479, 480 [quot CJ]; Wash 288P217; Alta [1927] 1 DomLR682; Alta [1927] 1DomLR904, [1927] 1WestWkly275. [a] (10) Agreement of executrix to pay account for physician's services rendered for less amount than reasonable value thereof, in part carried out, is held binding. Tex CivA 289SW102. (11) Judgment creditor buying in property under execution sale, who agreed to accept certain sum in redemption, thereby waived all other rights to obtain possession. 216Ala556, 114S52. [e] **Provision that determination of one suit for wrongful death does not bar others** not decided on merits is not applicable where all parties agree to settlement. 157Miss326, 128S87.

338–7 216Ala556, 114S52; 120Or613, 253P536; 144Wash641, 258P479, 480 [quotCJ].

338–8 144Wash641, 258P479, 480 [quot CJ].

339–12 268US121, 45SCt451, 69Led876 (agreement not to seek damages from certain defendants in form of abandonment of appeal in action to cancel oil and gas lease as fraudulently granted by guardian of minor Indian is not confirmation of lease).

339–14½–New. A compromise of an action for personal injuries and damage to an automobile is held to include damage to the automobile. 218AppDiv536, 218NYS534.

339–14¾–New. Where a buyer of stock, suing on seller's agreement to repurchase, accepted other stock in exchange for that bought, an action is not barred if the seller gave additional stock as present. 287Pa420, 135A107.

339–15½–New. Receipt for price of certain quantity of timber cut may not be bar to suit for additional timber later discovered to have been cut. 13LaA667, 128S698.

339–17 172Minn171, 215NW225; Ont [1930] 2DomLR409. [a] **In Novo Scotia.**–NS [1930] 2DomLR558.

339–18½–New. A person who has a cause of action against two joint tort-feasors may settle with one of them reserving his right to proceed against the other and such settlement will not constitute a bar to his action against such other. 114Nebr305, 207NW518.

339–18¾–New. Payment of undisputed claim is no bar to action upon separate disputed claim. 22F(2d)723.

339–19 97CalA193, 275P503(2dcase); 40 GaA842, 151SE671; 120Or613, 253P536, 538 [citCJ]; 121Or432, 253P869, 870 [citCJ].

339–20½–New. Fraud and misrepresentation involved in previous transaction are waived. 51ND287, 199NW945.

340–23 15F(2d)474; 19F(2d)981; 25 F(2d)777; 33F(2d)379; 34F(2d)787; 216Ala668, 114S60; 171Ark1074, 287SW 583; 176Ark601, 3SW(2d)673; 97CalA 193, 275P503(2dcase); 42 Ida338, 245P 389; 42 Ida451, 245P934; 160La1054, 108S87; 163La757, 112S711; 1LaA636; 7LaA222; 8LaA569; 235Mich157, 209 NW113; 238Mich1, 212NW953; 320Mo 954, 8SW(2d)966; 83Mont353, 272P534; 291Pa276, 139A844; 49SD14, 205NW 664; TexCivA 28SW(2d)876; 101WVa 26, 131SE719. [a] **Party estopped to repudiate settlement,** where other party stipulated to discontinue action for injuries. 225AppDiv85, 232NYS290.

341–25 [a] **Agreement to accept final estimate** as final settlement of disputed contract implies agreement that final estimate shall be approximately correct. 5F(2d)416.

341–31 19F(2d)981; 176Ark690, 3 SW(2d)996; 206 Iowa507, 220NW74; 130Kan360, 286P269; 235Ky197, 30 SW(2d)882; MoA 299SW74; MoA 4 SW(2d)831; NJCh 144A811; 198NC 273, 151SE631; 87PaSuper106 (compromise agreement not involving rescission of original contract). [a] (3) A compromise and settlement between the maker and original payee of a note, whereby payee agreed to surrender note, does not prevent maker from asserting fraud inducing execution of note in action by transferee. 206 Iowa507, 220 NW74.

342–32½–New. Where bank takes obligation from officer, who has wrongfully placed bank's money to his own credit, with full knowledge of facts in settlement, it ratifies appropriation by him and vests him with legal title to money appropriated. 114Nebr722, 209NW503.

342–36 MoA 299SW74; 148Wash31, 267P777. [a] (6) Other instances. 148 Wash31, 267P777.

342–37 225Ky418, 9SW(2d)119.

343–43 Iowa 228NW658; 198NC6, 150 SE614(2dcase).

343–50 82CalA728, 256P557; 234Ky 173, 27SW(2d)695; LaA 130S127; 238Mich1, 212NW953. [d] **Conditional vendor concluded** (1) by his vendee's compromise with third person injuring property. 153Tenn386, 284SW363. (2) Vendee acts primarily in his own right and is not trustee precluding such settlement without vendor's approval. 153 Tenn386, 284SW363. (3) Only becomes trustee as to surplus after satisfying his own demand. 153Tenn386, 284SW363. (4) Vendee receiving check which he indorses and turns over to vendor is party to settlement so as to prevent recovery by assignee of purchase-money notes against tort-feasor. 153Tenn386, 284 SW363.

344–52 Colo 225P625; 213Ky711, 281 SW811; 221Ky33, 297SW942; 3LaA25; 289Pa327, 137A459. [k] **Lot owners suing for selves and other lot owners** similarly situated may compromise and settle claim as to themselves, but cannot conclude such others thereby. Tex CommnA 6SW(2d)96.

344–55 124Kan66, 257P971.

344–56½–New. Settlement by wrongdoer for conversion of, or injury to, mortgaged property with either mortgagor or mortgagee is bar to action by other, sum recovered being held in trust for distribution according to respective rights. 190NC480, 130SE319.

344–56¾–New. Settlement by tort-feasor for damages to chattel with mortgagor in possession with consent of mortgagee is bar to action by mortgagee whose title retaining contract of sale is duly recorded. 190NC480, 130SE319.

344–56¼–New. Settlement between defendants as to their liability to plaintiff is not binding on plaintiff. NJSup 135 A55.

344–57 268US121, 45SCt451, 69Led876.

344–58 204 Iowa771, 212NW733. But see 127 Or523, 272P890. [c] **Successive compromises** or conciliation proceedings under Spanish law see 32PortoRico 442. [d] **Misrepresentation held insufficient as basis of rescission.**–48 Ida412, 282P 492.

345–62½–New. Where a party sues on an original claim, rescinding settlement, defendant must either accept tendered rescission in toto, or reject it. 204 Iowa 771, 212NW733.

345–62¾–New. Modification by the parties of an executory part of a settlement did not affect past transactions contained in the contract. 32F(2d)680.

345–62¼–New. An offer to restore is not necessary to cancellation of a compromise agreement when nothing was received under the agreement. 207Cal 414, 278P1038.

345–64 Or 293P417.

345–68 247NY435, 160NE778.

345–72 216Ala686, 114S301 (administrator held not entitled to attack settlement by sole beneficiary).

346–81 291Pa276, 139A844.

346–85 171Ark77, 284SW12.

346–93 42 Ida338, 245P389; 3LaA378, 380 [citCJ].

347–98 42F(2d)331; 42 Ida338, 245P 389.

347–99 [d] 35F(2d)990.

347–1 NS [1929] 1DomLR989 (no duress unless arrest illegal).

347–2 35F(2d)990.

347–3 35F(2d)990; MoA 278SW791.

348–9 20F(2d)705; 215Ala630, 112S 159; 165Ga198, 140SE501; 42 Ida338, 245P389; Iowa 224NW771; 159La992, 106S540 (dictum); 3LaA378, 380 [cit CJ].

348–10 45 Ida587, 264P386, 387 [cit CJ]; 208 Iowa254, 225NW411; 8LaA 415; 35PortoRico 269.

349–11 49RI 135, 141A79.

349–12 37F(2d)201.

349–13 165Ga198, 140SE501.

349–14 45 Ida587, 264P386 (rescission warranted).

349–16 171Ark77, 284SW12.

349–22 208 Iowa254, 225NW411. [a] **When law is uncertain,** there is no fraud. 171Ark77, 294SW12.

350–25 50RI 236, 146A636.

350–27 165Ga198, 140SE501.

350–27 But see 32F(2d)634.

350–29 32F(2d)634 (concealment of appraisal of corporation's assets not material where appraisal was inaccurate).

350–30 50RI 236, 146A636.

351–33 RI 147A874(2dcase).

351–40½–New. Where defendants agreed to settle actions for specified sum

and to pay materialman's bill of unspecified sum, a subsequent dispute between defendants and materialman as to the amount of the bill does not justify setting aside settlement. 217App Div187, 216NYS255.

351-42 5F(2d)416; 45 Ida587, 264P 386, 387 [citCJ]; 84Mont38, 274P296; TexCommnA 276SW219.

351-43 5F(2d)416 (mistake of fifty thousand dollars on total of four hundred thousand dollars in final estimate of road contract, agreed to be accepted in final settlement held material mistake avoiding agreement); 142Miss641, 107S 885.

351-49 216Ala314, 113S25; 171Ark77, 284SW12; 163La929, 113S150; 13LaA 542, 128S542 (where circumstances did not disclose that the error was principal motive for settlement); 142Miss641, 107S885.

351-50 216Ala314, 113S25.

352-52 30F(2d)402.

353-59 TexCivA 296SW620, 623 [quot CJ].

353-60 TexCivA 296SW620, 623 [cit CJ].

353-61 TexCivA 296SW620, 623 [cit CJ].

353-64 TexCivA 24SW(2d)739.

354-67 91Fla1011, 109S201; 3LaA378, 380 [quotCJ]; 40 OklACR136 [rehearing pending].

354-72 3LaA378, 380 [quotCJ]. [b] **Inadequacy of consideration may be** considered in determining bad faith. 218Ky707, 292SW311.

355-88 34F(2d)787.

355-91½-New. A stipulation made pursuant to settlement, standing alone, was unavailable as a defense. 226AppDiv 774, 235NYS43.

355-94 19F(2d)981; 32F(2d)680; 30 Ariz347, 247P122; 45 Ida587, 264P386, 388 [citCJ]; 49RI 135, 141A79, 80 [cit CJ]; TexCivA 11SW(2d)533.

356-11 5F(2d)416; 42 Ida338, 245P 389, 391 [citCJ]; 45 Ida587, 264P386, 388 [citCJ].

357-14 [b] **Settlement of personal injury claim.**–TexCivA 11SW(2d)533.

357-19 TexCivA 5SW(2d)862. [b] **Prompt repudiation of settlement is unnecessary.**–TexCivA 5SW(2d)862.

357-20 216Ala686, 114S301.

358-23½-New. Settlement of action not entered as a judgment may be set aside on motion. 21SaskL359, [1927] 1Dom LR205, 1WestWkly113.

358-26 192NC494, 135SE331; 35Porto Rico 269 (sufficient).

358-33 192NC494, 135SE331; 13Porto RicoFed313, [b] (1) Kan 293P400; 249Mich579, 229NW439; 138Misc90, 245 NYS173; 124 Or311, 263P402; 13Porto RicoFed313. (9) Duress. 201Cal 584, 258P47. [c] (1) 177Minn42, 224NW255.

359-41 3LaA378, 380 [quotCJ]. [a] **Good faith may be shown** in same way. 129Kan135, 281P921.

359-42 42 Ida338, 245P389; 45 Ida587, 264P386, 387 [citCJ].

359-44 TexCivA 297SW304.

360-51 82CalA685, 256P428 (performance sufficient); TexCivA 32SW(2d) 393 (one accepting settlement is bound by provision that interest be paid to buyers of goods). [b] Performance sufficient. 77Colo 248, 235P562.

360-52 [b] **Dismissal of suit unnecessary.**–82CalA685, 256P428.

360-54 46 Ida701, 270P1059, 1061 [quotCJ]; 233Ky523, 26SW(2d)48 (only remedy is on original claim); MoA 256 SW120; MoA 291SW147; MoA 17SW (2d)558; 253NY68, 170NE496; Tex CivA 275SW732.

360-56 144Wash641, 258P479.

360-59 MoA 291SW147.

360-60½-New. Where a note was given in settlement of all matters in controversy on the promise of the payee to complete the construction of certain work according to the terms of a contract on failure of the payee to perform, the maker is remitted to his original cause of action and may treat the subsequent contract as abandoned. Tex CivA 275SW732.

360-60⅓-New. Failure of one party to comply with all the provisions of a settlement agreement does not entitle the other to assert a claim for attorney's fees where the breach was not of an essential condition. 34F(2d)787.

360-60¼-New. Where condition that stated sum for release of mortgage was in bank never existed settlement agreement did not prevent cancellation of release. SD 230NW233.

361-70½-New. Alleged insufficiency of bond for performance of settlement agreement does not preclude enforcement thereof. 291Pa276, 139A844.

361-70⅓-New. Rule to compel satisfaction of suit on performance of settlement agreement is not in effect a bill for specific performance as affects the rule against enforcement of an unconscionable agreement. 291Pa276, 139A844.

361-70¼-New. Plaintiff having accepted settlement of judgment on defendant's failure to pay is entitled on execution only to amount due under settlement. MoA 28SW(2d)416.

361-71 205 Iowa956, 218NW941 (recovery against debtor's estate); 127 Or 523, 272P890. [a] See also 204 Iowa771, 212NW733. [b] In Porto Rico.–32PortoRico 442.

361-79½-New. That the compromise agreement was merged into a consent judgment does not impair such right. 142Wash142, 252P692.

361-79⅓-New. In a suit on a compromise contract defendant may set up as an affirmative defense and set-off that he was induced to sign the contract by fraud whereby he suffered damage. 142 Wash142, 252P692.

361-79¼-New. Allegation, that defendants were induced by deceit of plaintiff's assignor to assume an obligation of seven hundred dollars which was in fact twelve hundred dollars, is sufficient. 142Wash142, 252P692.

361-80 197Cal 139, 239P1059; 142Miss 641, 107S885.

362-87 121 Or48, 252P964, 967 [citCJ]; 121 Or432, 253P869, 870 [citCJ]. But see 317 Ill173, 147NE791.

362-92 227Ky583, 13SW(2d)766; MoA 25SW(2d)484(2dcase).

363-95½-New. Evidence of the conditional character of the settlement is inadmissible, in the absence of pleadings to that effect. 230Ky465, 19SW(2d) 1078.

363-3 [b] **Plea alleging generally that claim was satisfied by payment and acceptance of money in full settlement** is good against general demurrer. 39GaA 617, 147SE907. [c] **Pleading and proof.**–MoA 291SW147. [d] **Petition held sufficient.**–234Ky173, 27SW(2d)695.

363-4 220AppDiv427, 221NYS585. [a] 35GaA620, 134SE190. [b] **Plea held sufficient.**–23AlaA246, 123S265, 270 [citCJ]. [c] **Plea held insufficient.**–226AppDiv445, 236NYS32.

363-7½-New. Refusal to allow filing of compromise plea is held error. 91Fla 1011, 109S201.

363-15 [a] 151Miss784, 119S301.

364-20 216Ala171, 113S11; 181Ark587, 26SW(2d)1110; 82Colo 13, 257P247; 204 Iowa532, 215NW501; 11LaA281, 123S 420; Mass 169NE913; 147Miss412, 112S 24; ND 230NW213; 21 OhA393, 153NE 227; 123 Or208, 261P686; TexCommnA 298SW268. See also 233Ky396, 25SW (2d)1043. [b] 201 Iowa148, 205NW833.

364-21 TexCommnA 298SW268.

364-22 8F(2d)672; NM 291P292.

364-23 8F(2d)672.

364-24 8F(2d)672; 13LaA507, 128S177.

364-25 [a] **Defendant has burden to show that certain judgment** not specifically mentioned at time of alleged settlement was intended to be included. Iowa 219NW484.

364-27 IndA 169NE537; Iowa 232NW 133, 134 [citCJ]; 136Misc464, 240NYS 161.

364-27½-New. And delivery of note and making agreement is prima facie evidence that the dispute was bona fide. 215Ala630, 112S159.

365-32 200 Iowa718, 205NW324.

365-35 215Ala630, 112S159; NH 152A 272.

365-36 215Ala630, 112S159; ND 230 NW213; 295Pa241, 145A75.

366-41 207 Iowa735, 223NW487.

366-42 [a] (2) Other instances. 48 Ida 412, 282P492.

366-43 TexCivA 293SW180, 182 [cit CJ]; TexCivA 5SW(2d)862.

366-44 45 Ida587, 264P386.

366-45 207 Iowa735, 223NW487; Iowa 224NW771.

366-47 40GaA842, 151SE671.

366-53 TexCivA 293SW180; TexCivA 293SW284. [a] (3) Defendant's letter offering settlement and tendering check is admissible. 85 IndA577, 155NE48. [c] **Admissibility of court opinion** setting out conciliation agreement made before municipal judge under Spanish law, see 32PortoRico 442.

366-54 See also 32PortoRico 442.

366-56 216Ala171, 113S11; 173Ark1180, 293SW1004; 147Miss412, 112S24; 123 Or208, 261P686. [a] 7F(2d)764; 15F (2d)780; 216Ala314, 113S25; 169Ark 363, 275SW748 (settlement of action with understanding that it should be dismissed); 177Ark1195, 7SW(2d)782; 82CalA728, 256P557; 100CalA750, 281P 84; 39GaA106, 146SE338; 36GaA169, 136SE94; Ida 291P1071; 205 Iowa956, 218NW941; 206 Iowa161, 220NW7; 209 Ky785, 273SW497; 230Ky465, 19SW (2d)1078; 159La992, 106S540; 162La 67, 110S91; 11LaA281, 123S420; Mass 164NE816; 164Minn175, 205NW59; 172 Minn171, 215NW225; 177Minn425, 225 NW273; MoA 15SW(2d)882; NJCh 144 A308; 52ND746, 204NW669; 291Pa276, 139A844 (party to settlement agreement held not to bear confidential relationship to other parties affecting validity of agreement); TexCivA 290SW858; Tex CivA 8SW(2d)735; TexCivA 10SW(2d) 574; TexCivA 12SW(2d)1062. [b] 91 CalA588, 267P121; 94CalA124, 270P735; 257Colo 247, 257P247; 46 Ida313, 268P 31; 87 IndA333, 158NE294; 200 Iowa 718, 205NW324; 204 Iowa532, 215NW 501; Iowa 219NW484 (that certain judgment not included in settlement); 230Ky750, 20SW(2d)713; 10LaA250, 120S773; 13LaA675, 127S46; 6LaA568; 126Me454, 139A497; 123 Or208, 261P 686; TexCivA 283SW180; TexCivA 4 SW(2d)651; 150Va414, 143SE688. See also 233Ky396, 25SW(2d)1043. [i] **Evidence held sufficient** to support finding that jack shipped by defendants to plaintiffs was one they elected to take in compromise. 211Ky72, 277SW301. [j] **Evidence insufficient to make question for jury.**–225Ky418, 9SW(2d)119. [k] **Evidence held to support finding** that payment discharged bank's claim for unpaid purchase price. IndA 168 NE194(2dcase). [l] **Evidence held to show** account sued on was not considered in settlement. 13LaA507, 128S177.

366-56½-New. Findings as to consideration of compromise must be supported by sufficient evidence under general rules. TexCivA 272SW639 (evidence held insufficient).

366-56⅓-New. The fact of settlement may be proved by circumstantial evidence. Iowa 222NW890.

366-56¼-New. Evidence held not to sustain plaintiff's claims of misrepresentation and concealment by defendant. 32F(2d)634.

366-56½-New. Evidence held not to show defendant assumed duty of disclosing all relevant information. 32F (2d)634.

366-56⅙-New. Evidence held insufficient to show settlement was mere screen to permit corporation to borrow money. Wash 290P834.

367-58 27F(2d)24; 172Minn171, 215 NW225; MoA 11SW(2d)1063; TexCivA 10SW(2d)574.

367-59 30Ariz347, 247P122; 39GaA263, 46SE653(2dcase); Iowa 222NW890; 233 Mich390, 206NW549; MoA 279SW1192; MoA 281SW126; 287Pa420, 135A107; TexCivA 32SW(2d)487; 104WVa308, 140SE12. [a] **Defendant is not entitled to instruction in nature of demurrer to evidence** where his check sent to plaintiff reciting payment in full is filed and in evidence. MoA 29SW(2d)205(2dcase).

367-61 230Ky465, 19SW(2d)1078.

367-65 213Ala108, 104S33.

367-67 86Mont169, 282P852; Tex CommnA 288SW163.

367–68 207 **Iowa**735, 223**NW**487; **Tex CivA** 275**SW**732.
367–72 **TexCivA** 275**SW**732.
367–74 20**AlaA**545, 103**S**718; 180**Ark** 532, 21**SW(2d)**969.
367–75 See also 46 **Ida**387, 268**P**35.
368–77 [a] **Instructions approved.**–30 **Ariz**347, 247**P**122.
368–78 [a] (2) Charge that vendor of automobile holding note for balance due, who regained possession under agreement to cancel note, could not recover on note has been held proper. 216**Ala**666, 114**S**60.
368–79 [c] **Instructions held insufficient.**–Impeachment of settlement. 242 **Mich**506, 219**NW**710.
369–93 174**Ark**26, 295**SW**392.

COMPTROLLER

370–8 9**PaDist&Co** 339 [quotCJ].

COMPULSION

370–14 323 **Ill** 328, 154**NE**156.

CONCEAL

375–67 **MoA** 275**SW**60.

CONCEALMENT

376–74 [a] (2) Other instances. 40**F** (2d)659.
376–77 290**Pa**356, 139**A**118.

CONCEALMENT OF BIRTH OR DEATH

379–26 But see 171**Ark**357, 284**SW**42.
381–59 171**Ark**357, 284**SW**42.

CONCILIATION

386–87½–New. **Conciliation in Spanish law** see 32**PortoRico** 442.

CONCUBINAGE

391–62–63 [a] (3) Act or practice of cohabitating in sexual intercourse without authority of law or legal marriage. 161**La**975, 109**S**782.

CONCURS

396–36 160**La**636, 107**S**473, 474 [citCJ].

CONCURSUS

396–38 160**La**636, 107**S**473, 474 [citCJ].

CONCUSSION

396–41 **TexCr** 290**SW**1108, 1112 [quot CJ].
396–42 **TexCr** 290**SW**1108, 1112 [quot CJ].

CONDIMENT

398–74 11**CustA**127.

CONDITION

400–12 197**Cal** 751, 242**P**926, 42**ALR** 1165.
400–14 197**Cal** 751, 242**P**926, 42**ALR** 1165.
402–31 52**SD**11, 216**NW**592, 594 [cit CJ].
403–48 131**Misc**331, 226**NYS**656.
403–49 131**Misc**331, 226**NYS**656.

CONDITION PRECEDENT

407–18 **TexCommnA** 280**SW**762.
408–22 [a] (1) 104**Conn**374, 132**A**916 [citCJ].
408–30 104**Conn**374, 132**A**916 [citCJ].
409–34 104**Conn**374, 132**A**916 [citCJ].
409–35 104**Conn**374, 132**A**916 [citCJ].

CONDITION SUBSEQUENT

410–47 129**Misc**506, 221**NYS**692.

CONDONATION

411–60 323 **Ill** 608, 154**NE**405.

CONDUCT

411–64 29**PortoRico** 754 (defined as "deportment, or the manner in which men govern their lives or regulate their actions"). [c] **Moral conduct.**–29**Porto Rico** 754.

CONFECTIONERY

414–98 See also 13**CustA**404.

CONFIDENCE GAME

419–50 324 **Ill** 331, 155**NE**308; 327 **Ill** 402, 158**NE**677, 56**ALR**722. [e] **When crime not committed.**–327 **Ill** 402, 158**NE** 677, 56**ALR**722.
419–52 324 **Ill** 331, 155**NE**308.
420–53 324 **Ill** 331, 155**NE**308.
420–54 [a] (3) Gist of offense is obtaining confidence of victim by false representation or device. 327 **Ill** 402, 158**NE** 677, 56**ALR**722.

CONFIDENTIAL RELATION

421–67 [c] 124 **Okl** 37, 254**P**64, 66 [cit CJ].
421–70 155**Md**230, 141**A**531, 535 [cit CJ]. [b] 155**Md**230, 141**A**531. [d] **Brothers.**–69**CalA**399, 231**P**375.
421–71 124 **Okl** 37, 254**P**64, 66 [citCJ].
421–72 **IndA** 157**NE**64, 68 [citCJ].
421–73 **IndA** 157**NE**64.
421–74 **IndA** 157**NE**64, 68 [citCJ].
421–75 **IndA** 157**NE**64, 68 [citCJ]. [a] (1) See also 10**PaDist&Co** 541.
422–76 321**Mo** 168, 9**SW(2d)**960.

CONFIRM

423–95 **Vt** 150**A**138.

CONFIRMATION

425–28 166**La**671, 117**S**768, 771; 94**Minn** 365, 368, 102**NW**871; 23 **OhCirCtNS**518, 528; 44**Pa**9, 17.

CONFLICT OF LAWS

434–15 34**Ariz**408, 274**P**155; 198**Cal** 618, 246**P**796; 76**CalA**519, 245**P**209; 203 **Iowa** 430, 212**NW**751; 220**MoA**474, 274**SW** 945; 104**NJL**78, 138**A**873.
435–17 34**Ariz**408, 274**P**155.
436–26 34**Ariz**408, 274**P**155.
436–26½–New. There is no rule of common law determining conflict of laws between states. 253 **IllA**589.
438–36 See also 5**PaDist&Co** 744.
438–39 273**US**119, 47**SCt**308, 71**L ed**569; 203 **Iowa**430, 212**NW**751.
438–40 273**US**119, 47**SCt**308, 71**L ed**569.
438–42 203 **Iowa**430, 212**NW**751.
438–43 273**US**119, 47**SCt**308, 71**L ed**569; 253 **IllA**589; 120**Kan**575, 244**P**1063; 85 **PaSuper**265; 48**RI** 357, 138**A**212.
438–44 [a] (1) 48**RI** 357, 138**A**212.
438–46 273**US**119, 47**SCt**308, 71**L ed**569.
439–50 124**Kan**539, 262**P**16.
439–51 85**CalA**323, 259**P**374, 377 [quot CJ]; 106**WVa**247, 145**SE**381, 382 [quot CJ].
439–52 124**Kan**539, 262**P**16; **TexCivA** 275**SW**134. [d] **Attorney's fees** allowed in accordance with foreign statute where not against public policy of state of forum. 219**MoA**121, 272**SW**79.
439–60 85**CalA**323, 259**P**374, 377 [cit CJ]; **TexCivA** 275**SW**134.
440–67 203**Cal** 547, 265**P**190, 193 [cit CJ], 57**ALR**696.
441–79 34**Ariz**408, 274**P**155.
447–12 20**F(2d)**714; 25**F(2d)**134, 136 [citCJ].
447–31½–New. Where the law of a foreign country applies, but such law is not available by proof or with aid of presumption, the court, in the absence of presumption or proof, will apply law of forum. 127**Misc**508, 217**NYS**39.
449–63 272**US**517, 47**SCt**166, 71**L ed**383; 16**F(2d)**223, 225 [citCJ]; 16**F(2d)**688; 17**F(2d)**242; 17**F(2d)**262; 17**F(2d)**308; 21**F(2d)**309; 29**F(2d)**9 [certiorari den 279**US**840, 49**SCt**253, 73**L ed**986(7th case)] (contracts made and to be performed in same state); 34**Ariz**408, 274**P** 155; 202 **Iowa**1263, 211**NW**864; 127**Misc** 508, 217**NYS**39; 220**AppDiv**160, 221**NYS** 11; 122 **Or**615, 260**P**229 (law of land); **TexCivA** 275**SW**134; 146**Va**641, 132**SE** 840; 57 **OntL**505, [1925] 3**DomLR**927 [app allowed on other grounds 58 **OntL** 130, [1926] 1**DomLR**199]. [b] **Contract is deemed to have been made at place or within state** where final act necessary to make it binding obligation is done. 202 **Iowa**1263, 211**NW**864. [c] **Contrary intent of parties,** express or implied, to effect that some other law than place of making control shall govern, controls. 127**Misc**508, 217**NYS**39.
449–64 16**F(2d)**223, 225 [citCJ]; 17**F (2d)**262.
449–67 16**F(2d)**223, 225 [citCJ]. [a] **Three years after delivery made or tendered** is permitted to bring action. 16 **F(2d)**760. [b] **Question of limitations may be raised by demurrer.**–16**F(2d)**760.
449–68 16**F(2d)**223, 225 [citCJ].
450–69 16**F(2d)**223, 225 [citCJ].
450–69 85**Mont**170, 278**P**126, 67**ALR** 690.
450–70 16**F(2d)**223, 225 [citCJ].
450–73 202 **Iowa**1140, 211**NW**568; 127 **Misc**508, 217**NYS**39, 43 [citCJ]; 124 **Or** 592, 265**P**435.
450–74 57 **OntL**505, [1925] 3**DomLR**927 [app allowed on other grounds 58 **OntL** 130, [1926] 1**DomLR**199] (holding contract governed by place of performance).
450–75 202 **Iowa**1140, 211**NW**568, 570 [citCJ]; 220**AppDiv**160, 221**NYS**11; 135 **SC**339, 133**SE**910; 146**Va**641, 132**SE**840.
451–76 135**SC**339, 133**SE**910.
451–77 127**Misc**508, 217**NYS**39, 43 [cit CJ].
451–77½–New. Where a contract is to be performed in different states or countries not including the place where made, the law of place of making will control. 127**Misc**508, 217**NYS**39.
451–78 [a] 57 **OntL**505, [1925] 3**Dom LR**927 [app allowed on other grounds 58 **OntL**130, [1926] 1**DomLR**199].
451–79 201 **Iowa**1063, 206**NW**808, 47 **ALR**495; 216**AppDiv**362, 215**NYS**184. [a] **Laws of "Moses and Israel"** may be agreed upon as law to govern antenuptial agreement. 216**AppDiv**362, 215 **NYS**184.
451–83½–New. **To be a foreign law,** the law must be that of a foreign state or nation. 216**AppDiv**362, 215**NYS**184.
451–84 240 **IllA**198.
452–19 25**F(2d)**134, 136 [citCJ]; 216 **MoA**599, 265**SW**881; **NJCh** 151**A**546; 103**NJL**11, 135**A**66; 24 **OhA**420, 157**NE** 714, 715 [citCJ]; **WVa** 152**SE**201.
452–21 **Que** [1929] 2**DomLR**24.
453–23 120**Kan**575, 244**P**1063; 12**Pa Dist&Co** 271.
454–42 110**Conn**528, 148**A**330; 140 **Okl** 185, 282**P**345.
454–53 35**F(2d)**717.
455–58½–New. Law of nation whose flag vessel flies govern liability of owner with respect to maritime torts in whatever harbor vessel may enter. 136 **Misc**850, 241**NYS**347.
455–58½–New. Action for death of longshoreman on American vessel in foreign port is governed by laws of United States. 136**Misc**850, 241**NYS**347.
457–5 46 **Ida**512, 269**P**987.
457–9 46 **Ida**512, 269**P**987.
459–31 **BC** [1925] 3**DomLR**854, [1925] 2**WestWkly**689 (holding court will give effect to adoption in foreign jurisdiction, though adoption does not exist under lex fori).
460–33 122**Kan**762, 253**P**424, 425 [quot CJ in part].
460–34 **BC** [1927] 3**DomLR**151.
460–38 136**Misc**863, 242**NYS**464. See also 29**PortoRico** 836.
461–39 34**PortoRico** 22 [citCJ].
467–91 124**Kan**539, 262**P**16; **BC** [1925] 3**DomLR**854, [1925] 2**WestWkly**689 (holding law of place of adoption governs as to right to take under will as "heirs" construed to be next of kin).
468–99½–New. Capacity to sue is governed by the law of domicile. 1**LaA**388.
469–6 42**F(2d)**515; **Sask** [1928] 1**DomLR**318.
471–18 239**Mich**295, 214**NW**110, 55**ALR** 1157. [a] **Necessity for imputing situs.**–239**Mich**295, 214**NW**110, 55**ALR**1157. [b] **Situs of debt owed to foreign corporation.**–239**Mich**295, 214**NW**110, 55**ALR** 1157. [c] **Exceptions to rule** are recognized. 239**Mich**295, 214**NW**110, 55**ALR** 1157.
471–22 124 **Or**592, 265**P**435. [c] **Property situated in jurisdiction where contract made.**–246**NY**174, 158**NE**64.
473–43 **BC** [1930] 3**DomLR**870.
473–45 [c] **In Canada.**–**NS** [1929] 2**Dom LR**435.
474–53 253 **IllA**361. [c] **Rights of statutory liquidator of foreign insurance company need not be given priority over garnishing domestic creditors** by force of comity or federal constitution. 253 **IllA**361.
476–73 124**Kan**539, 262**P**16.
476–74 [a] **Claimants under foreign law** must allege and prove such law. 29**Porto Rico** 836.
477–75 29**PortoRico** 836.

477-81 17F(2d)17; 124Kan539, 262P 16; 104NJL78, 138A873. [d] **Rule held inapplicable.**-216AppDiv362, 215NYS 184.
478-82 156Tenn404, 1SW(2d)1015.
478-83 TexCivA 15SW(2d)194. [b] **Fact that communistic state takes title to all property** within its borders does not prevent citizen of state in United States from asserting rights to property in such state. 26 OhNPNS81.
479-98 124 Okl 193, 255P577.
480-10 124Kan539, 262P16.
480-11 124Kan539, 262P16; Sask [1928] 1DomLR318.
482-37 [a] **Statute of limitations** of state where promissory note was executed applies to actions brought thereon in other states. 224 IllA297.
482-44 201 Iowa1063, 206NW808, 47 ALR495.
483-54 220Ky464, 295SW442.
483-55 17F(2d)242; 171Ark103, 283 SW31; 85Colo 87, 273P1030; 220Ky464, 295SW442; Man [1927] 3DomLR360.
484-59 17F(2d)242.

CONFORMITY

487-12 CalA 262P815.

CONFUSION OF GOODS

491-9 Ariz 292P1020.
492-18 29F(2d)776; 91Fla293, 108S 555; Kan 289P442; 33NM445, 270P884.
492-19 91Fla293, 108S555.
492-22 TexCivA 276SW342.
494-42 168Minn420, 210NW287. [a] (1) But see Ariz 292P1020.
494-44 8F(2d)13; CalA 258P96; 47 Ida24, 271P935; Ida 290P200; 246Mich 45, 224NW413; 168Minn420, 210NW 287; 33NM445, 270P884.
495-48 168Minn420, 210NW287; 126 Okl 139, 258P274.
495-50 168Minn420, 210NW287.
496-57 36GaA337, 136SE475 [citCJ].
496-65 See also Ariz 292P1020.
496-67 204 Iowa1273, 214NW491, 55 ALR644.
497-70 246Mich45, 224NW413.
497-73 97CalA725, 276P134; 206 Iowa 28, 217NW453. [b] **Sufficient separation.**-206 Iowa28, 217NW453.
497-74 213Ala31, 104S232.
497-78 81Colo 483, 256P660, 661 [cit CJ]. [b] **Commingling of mortgaged crops** by tenants held to be fraud against mortgagee. 213Ala31, 104S232.
497-79 34Wyo 199, 242P415, 419 [cit CJ].
497-80 34Wyo 199, 242P415, 419 [cit CJ].
498-90 CalA 258P96.
498-92½-New. Person responsible for commingling of live stock through unavoidable mistake or accident cannot maintain replevin. Ariz 292P1020.
499-99 [a] **Evidence held insufficient** to sustain burden of proof of ownership of commingled cattle. Ida 290P 200.
499-1 168Minn420, 210NW287.
499-6 CalA 258P96.
499-6½-New. Where evidence is insufficient to sustain verdict for plaintiff verdict should be directed for defendant. Ida 290P200.

CONNIVANCE

508-95 120Kan731, 244P1053.
508-1-2 120Kan731, 244P1053.
508-4 120Kan731, 244P1053.

CONNIVE

508-16½-New. To be indulgent to, or disregardant of; to wink at, which is synonymous with to tolerate. 120Kan 731, 244P1053.

CONSCIENCE

512-67 [a] IndA 147NE635.
512-67½-New. Conscience is synonymous with bona fides of the Roman law. IndA 147NE635.
512-67⅓-New. That rule of consent which required a person to keep faith in all his engagements. IndA 147NE 635.

CONSENT

517-36 170Ga70, 152SE114.
518-52 76CalA338, 244P955.
518-57 76CalA338, 244P955.
519-59 76CalA338, 244P955.
519-60 See also NJ 144A169 (tacit consent inferred from want of protest or objection).
520-79 Mo 1SW(2d)834, 836 [quotCJ].

CONSEQUENCE

521-99 [a] MoA 27SW(2d)49.

CONSEQUENTIAL INJURY

521-15 [a] 120 Or600, 253P542, 544 [quotCJ].

CONSIDERATION

525-75 126 Or651, 270P756, 758 [quot CJ].
525-77 103Conn624, 131A420.
525-79 126 Or651, 270P756, 758 [quot CJ].

CONSIGN

526-99 216Ala314, 113S25, 26 [citCJ].
526-4 4LaA576.
526-8 216Ala314, 113S25.

CONSIGNATIO

526-8½ [a] **In Porto Rico.**-32Porto Rico629. [b] **Deposits under mercantile contract** are governed by Code Comm. § 332. 32PortoRico629.
526-8⅓ 32PortoRico 629.
526-8¼ 32PortoRico 629.
526-8⅕ 32PortoRico 629.
526-8⅙ 32PortoRico 629.
526-8⅐ 32PortoRico 629.

CONSIGNEE

527-19 258Mass17, 154NE330, 49ALR 267.
528-26 258Mass17, 154NE330, 49ALR 267.
528-29 14F(2d)984.

CONSIGNMENT

528-35 21F(2d)984.
528-36 118 Or62, 216P743, 245P1083.
528-37 118 Or62, 216P743, 245P1083.

CONSIST

528-49 100Vt217, 136A389.

CONSOLIDATION

530-91 165Ga351, 140SE755.

CONSORTIUM

532-39 30NM557, 240P303.

CONSPIRACY

540-4 274US837, 47SCt522, 71L ed 916, 54ALR791; 5F(2d)712; 6F(2d)43; 13F(2d)756; 15F(2d)494; 23F(2d)112; 171Ark1188, 286SW931; 164Ga529, 139 SE46. 53ALR933; 203 Iowa628, 213 NW274; Iowa 230NW418; 128Me181, 146A437; 315Mo 507, 286SW38; 221 MoA54, 279SW1053; MoA 281SW83, 89 [quotCJ]; MoA 288SW100; MoA 4SW (2d) 1088; 197NC113, 147SE733; Tex CivA 277SW438, 439 [citCJ]; 143 Wash 229, 255P123. [a] (1) Ill 170NE786; Ind 165NE58. (2) 207 Iowa1218, 224 NW766. (18) Conspiracy is combination of two or more persons by some concerted action to accomplish criminal or unlawful purpose, or to accomplish purpose, not in itself criminal or unlawful, by criminal or unlawful means. 74Mont176, 240P829. (19) Unlawful scheme criminally shared by several, who participate therein. 26F(2d)487. (20) A criminal conspiracy is a criminal agreement. 99CalA117, 277P908. (21) Other definitions. 43F(2d)890. [f] TexCivA 271SW172 (as general rule act lawful in itself does not become unlawful when done with wrongful motive toward another). [g] **Persons who possess peculiar power of coercion or who stand in certain fiduciary relations** with another and who combine to accomplish illegal act or legal acts by illegal means to be exerted against that other may be jointly or severally liable in tort. 258Mass 172, 154NE583.
542-5 198Cal 500, 246P53; 27Hawaii 65; MoA 281SW83, 89 [quotCJ].
542-6 MoA 281SW83, 89 [quotCJ].
542-7 MoA 281SW83, 89 [quotCJ].
542-8 273US593, 47SCt531, 71L ed793; 7F(2d)594; 7F(2d)785; 13F(2d)756; 250 IllA547. [b] **Successful fruition of conspiracy** is no bar to prosecution for conspiracy itself. 207Cal 298, 278P227.
542-8½-New. A defendant may be convicted of conspiracy to commit a crime without being guilty of the substantive crime. 5F(2d)45.
542-9 [b] **In its inception conspiracy was, though limited, both a civil and criminal offense.** Fla 126S157(2d case).
542-13 8F(2d)429; 8F(2d)492; 21 F(2d)425; 101CalA122, 281P419; 200 Ind388, 163NE837; 89PaSuper454; 97 PaSuper358.
543-17 32F(2d)472.
543-20 13F(2d)756; 15F(2d)741; 198 Cal 500, 246P53; 71CalA144, 234P924; 35GaA122, 132SE393; 221Ky589, 299 SW211; Mass 165NE12; 236Mich501, 211NW71. [b] **Knowingly participating without agreement** is not conspiracy. 13F(2d)756.
543-22 13F(2d)59.
544-24 13F(2d)841; 21F(2d)829; 24 F(2d)303; 29F(2d)744(2dcase); 38 F(2d)573; 38F(2d)862; MoA 281SW 83.
544-25 38F(2d)862; 103Conn708, 131 A497; MoA 281SW83, 89 [quotCJ].
544-27 5F(2d)712; 13F(2d)756; 20 F(2d)113; 23F(2d)112; 314Mo 635, 285 SW437.
545-30 23F(2d)112 (interstate transportation of prize fight films). [a] **Conspiracy may be continuous agreement** and found to continue until consumption or abandonment. 23F(2d)112.
545-32 See also 260Mass97, 156NE679.
545-33 5F(2d)712; 23F(2d)112.
545-34 27Hawaii65, 88 [quotCJ].
545-35 23F(2d)112; 27Hawaii65, 88 [quotCJ]; 48Philippine868, 875 [cit CJ].
545-35½-New. There can be no ex post facto conspiracy to do that which has already been done. 236Mich501, 211NW71.
545-36 260Mass97, 156NE679; 260 Mass45, 157NE82, 52ALR1125. See also 74Mont176, 240P829.
546-40 124Kan79, 257P937; 221MoA 54, 279SW1053.
546-41 260Mass45, 157NE82, 52ALR 1125.
546-42 [g] **Conspiracy** as a continuing crime. 5F(2d)712.
547-44 23F(2d)112; 41F(2d)852; 82 CalA700, 256P281; 326 Ill 379, 158NE 103; 256 IllA415; 210Ky373, 275SW 883; 210Ky796, 276SW841; TexCivA 277SW438.
547-45 122Kan701, 253P251; 232Ky 686, 24SW(2d)568.
547-46 Cal 268P1050.
548-47 15F(2d)741; 25F(2d)49.
548-48 335 Ill 539, 167NE823.
548-49 326 Ill 379, 158NE103.
548-50 [b] 207Cal298, 278P227.
548-50½-New. Conspiracy to have one of parties commit forgery is not necessary element of conspiracy to violate Alien Land Law. CalA 288P788.
549-58 31F(2d)436; 197NC113, 147SE 733.
549-59 13F(2d)756; 13F(2d)843; 18 F(2d)887; 24F(2d)405; 36F(2d)859; 41F(2d)852; 78CalA395, 248P696; CalA 288P880; 326 Ill 379, 158NE103; 335 Ill 539, 167NE823; 256 IllA415; 230 Ky813, 20SW(2d)980; 89PaSuper82; 97PaSuper358 (unlawful combination as necessity to crime). [e] **Formation of agreement** is the gravamen of offense. 5F(2d)45.
549-61 5F(2d)712; 43F(2d)906; 74 CalA440, 241P97; 326 Ill 379, 158NE 103; 260Mass97, 156NE679; 260Mass 45, 157NE82, 52ALR1125.
550-63 74CalA440, 241P97; 78CalA 395, 248P696; CalA 290P93; 124Kan 245, 259P691; 224AppDiv419, 231NYS 279.
550-64 5F(2d)45; 5F(2d)712; 24 F(2d)405, 407 [citCJ]; 25F(2d)1; 29 F(2d)691; 31F(2d)902; 36F(2d)859; 41F(2d)852; 44F(2d)163. [a] (5) Erection of still or manufacture or keeping of liquor for sale by one of persons agreeing to violate prohibition law. 13 F(2d)564. (6) Concealment of bankrupt's property before appointment of trustee. 25F(2d)49. [e] **Purpose of requiring proof of overt act** is to enable conspirators to abandon unlawful

purpose. 5F(2d)712.
551-65 31F(2d)436; 74CalA440, 241P 97.
551-67 7F(2d)594; 74CalA440, 241P 97; 78CalA395, 248P696.
551-68 28F(2d)189. [a] **Overt act is committed during continuance of conspiracy** so long as there is intention to continue it. 25F(2d)1.
551-68½-New. The overt act need not be an attempt to commit the offense contemplated by the conspirators. 74CalA 440, 241P97.
551-70 44F(2d)163.
551-71 7F(2d)785; 21F(2d)903; 25F (2d)49 (act by codefendant as to whom indictment was dismissed); 31F(2d) 436.
551-72 8F(2d)251; 23F(2d)112 (need not be unlawful or criminal); 28F(2d) 730; 29F(2d)651; 31F(2d)229; 78CalA 395, 248P696.
551-74½-New. Overt act need not be successful, completed, or substantive act or offense. 25F(2d)959.
551-74⅓-New. Unaided overt acts of persons incompetent to enter into conspiracy do not make out case of conspiracy, nor of substantive offense. 32 F(2d)472.
551-76 5F(2d)129; 176Ark1003, 5SW (2d)322; 169Ark770, 276SW858 (night riding); 335 Ill 570, 167NE852; 200 Ind 388, 163NE837; 210Ky373, 275SW883.
552-77 But see 13PaDist&Co 371.
552-79 7F(2d)785; 74CalA440, 241P 97; 78CalA395, 248P696. [c] **Formation of agreement and step taken toward its execution** completes conspiracy. 5 F(2d)45.
552-83 36F(2d)1.
552-84 7F(2d)785.
553-89½-New. Guilt of a conspirator is not dependent on his knowledge of the entire scope of the conspiracy. 19 F(2d)801.
553-98 8F(2d)429; 24F(2d)527 (to violate department regulations for enforcement of prohibition); 78CalA223, 248P716; 210Ky150, 275SW630; 260 Mass97, 156NE679.
553-99 36F(2d)156; 215Ky172, 284SW 1039. See also 158Tenn264, 12SW951. [a] (3) 232Ky226, 22SW(2d)624; 170 La314, 127S735(2dcase). (12) To commit larceny. 260Mass97, 156NE679. (13) To violate Alien Land Act. Cal 268 P1050. (14) To violate anti-narcotic laws. 42F(2d)721. [f] **Construction of statute.**-209Ky318, 272SW743. [g] **Conspiracy to commit felony.**-215Ky172, 284SW1039.
554-1 8PaDist&Co 271; 13PaDist&Co 371.
554-3 8PaDist&Co 271.
554-4 Cal 284P1105(1stcase).
554-5 31F(2d)846. [a] **Conspiracy to transport liquor.**-29F(2d)744(2dcase). [b] **Conspiracy to defraud government of income taxes.**-31F(2d)846.
554-16 [a] **Statute** is coextensive with common law, and covers much more. 23 F(2d)420.
554-17 273US593, 47SCt531, 71L ed 793; 8F(2d)429; 21F(2d)903; 23F(2d) 112. 33F(2d)507 (imitating or counterfeiting mark or device of patentee).
555-21½-New. In determining whether the act is an "offense" against the United States, the question is whether the act is prohibited in the interest of public policy of United States. 28F(2d)295.
555-26½-New. Conspiracy against the United States may be committed by those not corporally within the United States at the time of the conspiracy. 273US593, 47SCt531, 71L ed793.
555-26⅓-New. Citizens or subjects of a foreign nation beyond territorial jurisdiction may commit the offense of conspiracy against the United States. 19 F(2d)506.
555-27 273US593, 47SCt531, 71L ed793.
556-43 5F(2d)799; 19F(2d)431. 34F (2d)630 (defendants might be charged with concealment of assets of bankrupt from ancillary receiver even though appointed in another district). But see 21 F(2d)425.
556-44 19F(2d)431.
556-44½-New. , and to violate the Prohibition Act. 273US593, 47SCt531, 71 L ed793.
556-44⅓-New. to counterfeit patented articles. 28F(2d)295.
557-77 [a] **Conspiracy to defraud** by misuse of mails may be accomplished without mailing letter. 7F(2d)785.
557-78 7F(2d)785.
557-79 26F(2d)487.
557-82½-New. That defendants, charged with mailing letters pursuant to a joint scheme to defraud and with conspiracy, had no belief that stocks had the value ascribed to them by letters, was sufficient to constitute the offense. 13F(2d)961.
557-82⅓-New. When scheme to use mails to defraud is criminally participated in by more than one, it constitutes in and of itself a conspiracy. 41F(2d) 193.
557-83 41F(2d)440.
558-85 5F(2d)504 (scheme to obtain money by letters threatening to murder addressee unless he paid).
558-92 13F(2d)961.
559-97½-New. It is an indictable offense under statutes to conspire to obtain money or property by false pretenses. 78CalA561, 248P990 (indictment held sufficient).
561-33 6F(2d)43.
561-34 5F(2d)712; 24F(2d)50.
561-35 6F(2d)43.
561-37 25F(2d)708 (financial loss to government is not essential).
561-38 28F(2d)965. [c] **Conspiracy to defraud United States** means to interfere with or obstruct lawful governmental functions by deceit, craft, or trickery, or dishonest means. 6F(2d)43.
563-77½-New. [a] **Failure to allege liquors were for beverage purposes** renders indictment insufficient. 23F (2d)244.
564-79 6F(2d)579; 22F(2d)605 (no defense that defendants were deceived and liquor was in fact of domestic origin).
564-92½-New. **Conspiracy to violate department rules** for guarding against liquor traffic is one to commit offense against the United States. 7F(2d)510.
564-92⅓-New. **Conspiracy to secure issuance of permits** contrary to regulations to withdraw liquor for beverage is one to defraud the United States. 7F (2d)510.
564-92¼-New. or to violate prohibition law regulations as to physician's prescription blanks. 25F(2d)708.
564-92⅕-New. Conspiracy to defraud United States concerning its right to honest determination of claims under Trading with the Enemy Act is within statute although defendants who were to make decision are not defrauded. 24 F(2d)353.
564-1½-New. Conspiracy to counterfeit a patented article is not conspiracy to "defraud United States." 28F(2d) 295.
565-10½-New. Conspiracy to injure trade held indictable. 326 Ill 379, 158 NE103.
565-11 101NJEq315, 138A586.
567-48 28Hawaii88.
569-70½-New. If there is probable cause for prosecution, the motive of the prosecutors is immaterial. 86PaSuper 451.
570-93 14F(2d)88.
570-94 245NY260, 157NE130.
570-95½-New. **Sympathetic strike** is held to be illegal generally. 260Mass45, 157NE82, 52ALR1125.
570-98 260Mass45, 157NE82, 52ALR 1125.
571-8½-New. **A strike to compel employment of union foremen** is illegal. 260Mass45, 157NE82, 52ALR1125.
573-37½-New. **Placing manufacturer's name on unfair list** and circulating it is unlawful. Mass 117NE82.
573-45½-New. An agreement to boycott is an agreement to do an unlawful act. 224 IllA430.
576-9 [a] **Absence of pecuniary loss to owner.**-335 Ill 570, 167NE852.
576-10½-New. To show a conspiracy to violate the Alien Land Law, the state must prove the violation of the law by a corrupt agreement to evade it by permitting an alien to have an interest in land and the right to its control, possession, use, or enjoyment except for residential purposes. 144Wash252, 258P16.
576-10⅓-New. That the home of the prosecuting witness was a disreputable resort is no defense to a charge of banding and confederating for the purpose of disturbing and injuring him and his family. 228Ky838, 16SW(2d)474.
576-10¼-New. Intentional acts of two parties in concert to carry out provisions of a contract for conveyance of agricultural land to a corporation, the majority of whose stock was beneficially owned by persons ineligible to citizenship, with knowledge of the alienage, constituted criminal conspiracy, under statute. 207 Cal 298, 278P227.
576-13½-New. There is no need to be corporate officers to be guilty of conspiracy. 326 Ill 379, 158NE103.
576-17 5F(2d)527. See also 250 IllA 547.
577-18 5F(2d)45; 13F(2d)269; 13F (2d)841; 22F(2d)594; 28F(2d)567; 38 F(2d)862; 40F(2d)904; 20AlaA426, 103 S707; 21AlaA534, 109S613; 89CalA18, 264P324; 41GaA430, 153SE223; 325 Ill 612, 156NE785; 336 Ill 412, 168NE380; 199 Ind660, 161NE251; 309Mo 155, 274 SW734; Mo 24SW(2d)1032; NC 154SE 604; 35 OklCr279, 250P544, 49ALR 1129; OklCr 273P1018(2dcase); OklCr 279P908(2dcase); OklCr 283P790; 120 Or508, 252P951; 50Philippine182; 50 Philippine616; TexCr 26SW(2d)251(2d case); 65Utah362, 237P476. But see 135Misc165, 237NYS267. [a] (1) OklCr 281P305. [b] (5) If defendants were members of conspiracy it was immaterial as to them whether either committed overt act. 27F(2d)80.
578-19 13F(2d)841; 335 Ill 539, 167NE 823 (conspiracy is renewed as to all conspirators by every overt act in furtherance of its purpose).
578-20 13F(2d)843; 29F(2d)691; 228 Ky838, 16SW(2d)474.
578-22 20AlaA426, 103S707; 35 OklCr 279, 250P544, 49ALR1129.
578-22½-New. , or that several groups engaged in the conspiracy were all or in part strangers to each other. 13F(2d) 599.
578-22⅓-New. , or whether the several groups knew how the other groups contributed their part to furthering the purpose of the conspiracy. 13F(2d) 599.
578-23 20AlaA426, 103S707; Mo 30SW (2d)132; 287Pa547, 135A313; 65Utah 362, 237P476.
578-24 228Ky838, 16SW(2d)474.
578-25 86CalA542, 261P756, 759 [quot Cyc].
579-29 13F(2d)841; 17F(2d)562; 21 F(2d)903; 158Tenn264, 12SW(2d)951.
579-30 5F(2d)471; 5F(2d)712; 13F (2d)841; 21F(2d)903; 23F(2d)112; 101 NJEq315, 138A586.
579-32½-New. A landlord knowing of the manufacture of liquor on the premises and failing to stop it is not necessarily guilty of conspiracy to violate the National Prohibition Act. 15F(2d) 494.
579-33 200 Ind388, 163NE837.
579-35½-New. Withdrawal must be voluntary to relieve conspirators from liability for acts of a coconspirator during the course of the crime. 287Pa547, 135A313.
580-37 210Ky373, 275SW883.
580-38 25F(2d)1; 252Mass224, 147NE 859. See also Cal 268P1050; 38 OklCr 350, 261P978, 982 [citCJperEdwards,J dis. op.].
580-39 38 OklCr350, 261P978, 982 [cit CJperEdwards,J dis. op.].
580-40 132Misc244, 229NYS462; 38 OklCr350, 261P978, 982 [citCJperEdwards,J dis. op.]. [c] (2) Object is not accomplished so as to merge conspiracy to commit robbery in completed offense till participants have opportunity to convert property to their own use. 25 F(2d)1.
580-43½-New. Under federal decisions a conspiracy to commit a crime is not merged in the completed offense. 31F (2d)846.
581-45 78CalA223, 248P716.
581-50 210Ky373, 275SW883.
581-51 38 OklCr379, 262P503.
581-51½-New. Conspiracy to commit offense against state is declared a felony. 38 OklCr379, 262P503
581-55 DelSuper 148A291.

581-55½-New. Accurately speaking, there is no such thing as civil action for conspiracy. 85**Colo** 346, 276**P**30.

581-57 But see 132**Misc**643, 229**NYS**778 (under penal law).

581-58 [a] **Acquisition of another's property by deceit** is actionable wrong within rule. 74**Mont**176, 240**P**829 (construing Montana statutes).

581-62 40**F(2d)**620 (no action for damages lies for conspiracy itself); 43**F(2d)**23; 108**Conn**683, 145**A**273; 202 **Iowa**378, 210**NW**452; 254**Mass**216, 150 **NE**96; 221**MoA**54, 279**SW**1053; 136 **Misc**46, 239**NYS**225; 112 **Okl** 61, 242**P** 224, 226 [quotCJ]; **TexCivA** 271**SW**261, 263 [citCJ]; 197**Wis**595, 222**NW**806. [e] **Mere conspiracy is not tort** and has no effect on right of action except as it leads to wrongful acts or omissions. 157**Md**521, 146**A**758; 193**Wis**324, 214 **NW**431.

582-63 202**Cal** 675, 262**P**302; **Fla** 126**S** 157(2dcase); 164**Ga**529, 139**SE**46, 53 **ALR**933; 202 **Iowa**378, 210**NW**452; 128 **Me**181, 146**A**437; 254**Mass**216, 150**NE** 96; 262**Mass**348, 159**NE**922; **Nebr** 230 **NW**669; 112 **Okl** 61, 242**P**224, 226 [quot CJ]; **TexCivA** 19**SW(2d)**124; 193**Wis** 324, 214**NW**431.

582-64 221**MoA**54, 279**SW**1053; 112 **Okl** 61, 242**P**224, 226 [quotCJ]; 193**Wis** 324, 214**NW**431.

582-64½-New. Damage from other acts done in pursuance of conspiracy is ground for action. 83 **IndA**647, 149**NE** 449.

582-65 112 **Okl** 61, 242**P**224, 226 [quot CJ]. See also 221**MoA**54, 279**SW**1053.

582-66 108**Conn**683, 145**A**273; **DelSuper** 148**A**291; 201 **Iowa**134, 206**NW**671; 207 **Iowa**1091, 224**NW**84.

583-68 136**Misc**46, 239**NYS**225.

583-69 274**US**837, 47**SCt**522, 71**L ed**916, 54**ALR**791; 224 **IllA**430; 162**La**671, 111 **S**55; 245**NY**260, 157**NE**130. But see **NJ** 143**A**512.

584-79 86 **IndA**246, 155**NE**618.

584-80 162**La**671, 111**S**55, 57 [citCJ].

584-81 162**La**671, 111**S**55; 221**MoA**54, 279**SW**1053.

584-82 260**Mass**45, 157**NE**82, 52**ALR** 1125.

584-83 260**Mass**45, 157**NE**82, 52**ALR** 1125.

585-88 **DelSuper** 148**A**291; 202 **Iowa** 378, 210**NW**452.

585-89 202 **Iowa**378, 210**NW**452; 128**Me** 181, 146**A**437.

585-90 215**Ala**251, 110**S**296, 298 [quot CJ].

585-91½-New. The nature of the cause of action is not changed in legal effect by striking from the petition allegations of conspiracy. 202 **Iowa**378, 210 **NW**452.

586-97 **DelSuper** 148**A**291.

586-98 202 **Iowa**378, 210**NW**452.

586-2 202**Cal** 675, 262**P**302; **MoA** 281 **SW**83, 89 [citCJ].

586-5 202**Cal** 675, 262**P**302; 201 **Iowa** 134, 206**NW**671; **MoA** 48**W(2d)**1088.

586-5½-New. , causing injury. 201 **Iowa**134, 206**NW**671.

586-6 201 **Iowa**134, 206**NW**671.

586-8 86 **IndA**505, 158**NE**631; **MoA** 281 **SW**83.

586-10 **MoA** 48**W(2d)**1088.

586-13 **IndA** 167**NE**731 (defendants must have been either original parties to alleged conspiracy, or have become parties thereto after formation).

587-18½-New. Where legal title had been vested in the assignee for the benefit of creditors, other parties cannot be charged with divesting the assignor of such property on a subsequent date. 258 **Mass**585, 155**NE**589.

587-18⅓-New. That the purchaser of stock made some investigations does not deprive him of recovering for fraudulent conspiracy. 87 **IndA**119, 157**NE**292.

587-18¼-New. Deceptive half truth may amount to conspiracy to defraud. **MoA** 281**SW**83.

587-18⅙-New. In an action for damages caused by fraudulent misrepresentations in a stock sale, pursuant to a conspiracy entered into by defendants, plaintiff cannot base his claim on misrepresentation in a printed prospectus which was in absence of notice, where prospectus was not given to him by any of the defendants and he disclaimed having bought because of it. 97**CalA**329, 275**P**819.

587-18⅛-New. In an action for damages for fraudulent misrepresentations, plaintiff having discovered the falsity of one representation is put on guard as to any other misrepresentations. 97**CalA** 342, 275**P**823.

587-20 206 **Iowa**206, 214**NW**718 (sale by director stockholders of individual to be paid for out of bank deposit of corporation, the purchaser thereupon to place with assets of corporation securities of equal value with amount received from deposits does not establish an actionable conspiracy).

588-37 85**Colo** 194, 274**P**824.

588-40½-New. In the absence of illegality or wrongful acts of defendants in foreclosure proceedings, actions of tort for wrongful and negligent foreclosure of a chattel mortgage, and conspiracy to defraud plaintiff, cannot be maintained. **Mass** 165**NE**12.

589-53 163**La**499, 112**S**395.

589-60½-New. Where contractors had statutory right to file mechanic's lien against owner's property, such filing furnishes no basis for an action for conspiracy. 216**AppDiv**268, 214**NYS**42.

589-61 230**Ky**113, 18**SW(2d)**948; **Ont** [1929] 2**DomLR**336.

590-72 **TexCivA** 277**SW**438, 439 [quot CJ].

591-75 24 **OhA**294, 156**NE**243.

592-94 27**F(2d)**560 (rule in New York).

595-42½-New. The "primary" purpose of a boycott is the principal or fixed intention with which an act or course of conduct is undertaken. 224 **IllA**430.

595-42⅓-New. The "secondary" purpose of a boycott includes not only the ultimate end to be accomplished, but also the acts which would be put in effect to realize the ultimate plan. 224 **IllA**430.

599-85 Compare 27**F(2d)**560 (in New York secondary boycott not illegal per se).

603-39 224 **IllA**430.

605-57 **BC** [1930] 1**DomLR**634.

605-58 6**F(2d)**1016. [a] **Right to combine and act through agents** and to bargain collectively does not entitle members of labor union to conspire to deprive subcontractor of property in contract. 6**F(2d)**1016.

605-63 [a] (9) Constitution of labor union and custom of building contractors of dealing with local unions held not to justify contractor in breaking contract with subcontractor. 6**F(2d)**1016.

605-64 6**F(2d)**1016.

606-68 6**F(2d)**1016.

608-9½-New. Employers may hire and discharge men at will but the combination must be for a lawful end secured by lawful means. 245**NY**260, 157**NE**130.

608-11 [a] (1) 256 **IllA**279.

609-12 245**NY**260, 157**NE**130.

609-21½-New. An agreement to blacklist is an agreement to do an unlawful act. 224 **IllA**430.

609-21⅓-New. That plaintiff violated the terms of the unions' contract is not defense in an action for blacklisting. 224 **IllA**430.

610-36½-New. **Conspiracy to deprive attorney of fee** resulting in loss thereof held actionable against any participant therein. 22**F(2d)**793.

610-36¼-New. **Conspiracy to deprive a person of the right to work** is actionable. 263**Mass**349, 161**NE**272, 62**ALR** 311.

610-36⅓-New. **Conspiracy to transport liquor.** The purchaser and seller are not subject to indictment for conspiracy to transport, by the mere delivery of liquor to the purchaser. 34**F(2d)**839.

610-38 198**Cal** 500, 246**P**53; 202**Cal** 675, 262**P**302; 101**CalA**122, 281**P**419; 264 **Mass**253, 162**NE**319; **MoA** 48**W(2d)** 1088; 224**AppDiv**39, 229**NYS**526; **OkiCr** 283**P**1026; 143**Wash**229, 255**P**123.

611-40 198**Cal** 500, 246**P**53; 202**Cal** 675, 262**P**302; 195**Wis**472, 218**NW**712; 143**Wash**229, 255**P**123.

612-45 84**Mont**338, 275**P**753.

612-45½-New. Failure of a person to disclose to a broker's customer his suspicions that no purchase of stock was made as such customer had directed does not render him guilty of a conspiracy to defraud. 237**Mich**3, 211**NW** 93.

612-49 84**Colo** 266, 269**P**997; 165**Minn** 87, 205**NW**696; 143**Wash**229, 255**P**123.

612-52 [b] **Mother suing for wrongful abduction of child** is not limited to damages sustained within statutory period before suit where alleged wrongful acts were continuous, constituting single wrong. 199 **Ind**660, 161**NE**251.

613-55 120 **Or**508, 252**P**951.

613-57 322 **Ill** 195, 153**NE**357; 120 **Or** 508, 252**P**951.

613-63 204 **Iowa**881, 216**NW**258.

613-64 13**LaA**468, 126**S**733; 27 **Oh NPNS**279; 195**Wis**472, 218**NW**712.

614-66½-New. In Illinois a husband and wife cannot be sued for conspiracy. 224 **IllA**574.

614-67 [a] (1) 16**F(2d)**816; 196 **Ind** 699, 149**NE**438. (6) Indictment for conspiracy to violate intoxicating liquor laws. **Iowa** 227**NW**139(2dcase). [b] **Indictment charging in separate counts** conspiracy to violate National Prohibition Act and Tariff Act held sufficient. 5**F(2d)**712.

614-68 273**US**77, 47**SCt**300, 71**L ed**545; 14**F(2d)**75; 15**F(2d)**625; 16**F(2d)**816; **Ariz** 281**P**601 (information held sufficient to advise defendants of what they were charged); 196 **Ind**699, 149**NE**438; 207 **Iowa**916, 223**NW**870 (sale of liquor); 25 **OhA**531, 159**NE**494. [e] (5) Indictment for conspiracy to defraud life insurance company. 74**CalA**440, 241**P** 97. (6) Indictment for conspiracy to procure fraudulent bail bonds. 15**F(2d)** 625. (7) For conspiracy to conceal property of bankrupt. 25**F(2d)**49 (identification of property sufficiently definite). (8) Other instances. 43**F(2d)**944. [m] **Indictment need not describe offense with same certainty** as would be required in indictment for that offense. 42**F(2d)**812. [ee] **Indictment for conspiracy to commit larceny** held sufficient. 210**Ky**150, 275**SW**630. [ff] **Indictment for conspiracy to smuggle dutiable or prohibited merchandise** held sufficient. 6**F(2d)**579. [gg] **Charge of conspiracy to violate Prohibition Act** held insufficient to charge offense against United States. 16**F(2d)**816. [hh] **Indictment for conspiracy to violate Prohibition Act** held sufficient. 22**F(2d)**766. [ii] **Indictment for conspiracy to defraud U. S.** held sufficient. 25**F(2d)**708. [jj] **Indictment held sufficient** to show conspiracy to qualify stock for sale. 326 **Ill** 379, 158**NE**103. [kk] **Indictment to injure public trade held sufficient.**– 326 **Ill** 379, 158**NE**103. [ll] **Indictment for conspiracy to institute false prosecution against government's principal witness in criminal action** sufficient. 27 **F(2d)**77.

615-69 16**F(2d)**816.

615-70 13**F(2d)**427; 16**F(2d)**816; 23**F (2d)**561; 25**F(2d)**1 (alleging conspiracy to commit offense and overt act to effect object sufficient); 326 **Ill** 379, 158 **NE**103. [a] **Indictment for conspiracy to defraud** by withdrawal of liquor for beverage purposes need not allege amount to which druggist was entitled. 7**F(2d)**510.

615-72 5**F(2d)**712; 16**F(2d)**816.

615-73 37**F(2d)**203.

615-73½-New. Indictment for conspiracy may be as general and indefinite as the conspiracy sought to be proved. 29 **F(2d)**651.

615-73⅓-New. Unless the indictment clearly exhibits a purpose to contravene the statute creating substantive offense, there is no crime. 28**F(2d)**424.

615-73¼-New. Indictment for conspiracy, that bankrupt corporation concealed property from trustee, need not allege that the corporation had been adjudged bankrupt and a trustee appointed. 21**F(2d)**425.

615-74 326 **Ill** 379, 158**NE**103; 95**Pa Super**496; 142**Wash**465, 253**P**655.

615-76 16**F(2d)**816; 142**Wash**465, 253 **P**655.

616-78 5**F(2d)**712; 29**F(2d)**651; **Ill** 170**NE**786 (allegation of joint possession of still unnecessary); 168**La**95, 121 **S**586. [a] (12) Conspiracy with some persons named and others unknown.

NJSup 137A893. [b] (2) Stating as introduction to details of agreement that "it was a part of said conspiracy" to do acts enumerated is sufficient as against contention that conspiracy as a whole is nowhere set up. 5F(2d)45, 46.

616-82 5F(2d)437; 22F(2d)766.

616-83 22F(2d)766.

617-89 17F(2d)187; 12PortoRicoFed 482.

617-93 29F(2d)103.

617-98 7F(2d)594; 89PaSuper82.

617-1 19F(2d)506; 22F(2d)766.

618-3 256 IllA415.

618-6 273US77, 47SCt300, 71L ed545; 5F(2d)712; 16F(2d)816; 21F(2d)425; 142Wash465, 253P655. [a] (2) 19F(2d) 431; 29F(2d)651; **Ind** 165NE61. [g] **Indictment for conspiracy to burn property** alleging insurable interest by one other than owner held sufficient. 179 Ind685, 150NE409. [h] **Indictment need not set forth objects and purposes** of conspiracy with particularity required in indictment of substantive offense. 37 F(2d)203.

618-7 [a] (1) 196 Ind699, 149NE438; 197 Ind685, 150NE409.

619-8 22F(2d)827 (charge of conspiracy to violate Prohibition Law held to charge offense against U. S.); 34F(2d) 94; 256 IllA415.

619-9 271US414, 46SCt585, 70L ed 1013; 273US77, 47SCt300, 71L ed545; 14F(2d)561; 16F(2d)816; 19F(2d)842; 21F(2d)827 (indictment for conspiracy to transport intoxicating liquor must show that liquor was fit for beverage purposes); 28F(2d)965; 31F(2d)19; 31F(2d)229; 37F(2d)677; 39F(2d)52; 197 Ind448, 151NE329; **Ind** 165NE61. [i] **Indictment for conspiracy to assault** employees of bureau of animal industry need not allege acceptance by executive authority of regulations of secretary of agriculture for suppression and extermination of disease among live stock. 271US414, 46SCt585, 70L ed 1013. [m] **Indictment for conspiracy to assault** employee of bureau of animal industry need not allege that cattle being dipped by employees were subject matter of interstate commerce. 271US 414, 46SCt585, 70L ed1013.

619-12 31F(2d)966. [a] **Indictment for conspiracy to manufacture and possess intoxicating liquor in violation of federal statute** need not allege that liquor was designed for beverage purposes. 29F(2d)204.

619-13 [d] **Indictment for conspiracy to steal whisky** is not subject to objection that proposed larceny covered illegally possessed whisky of no value. 82CalA700, 256P281. [e] **Indictment held sufficient.**–36F(2d)156.

620-14 [a] 36F(2d)156.

620-15 CalA 288P788.

620-17 CalA 290P74. [a] (2) Allegation that defendants knowingly caused bail bonds to be approved by federal commissioner by implication charged them with knowledge that there was federal commissioner and knowledge of his function and authority to approve bail bonds. 15F(2d)625.

620-18 [d] (5) Indictment for conspiracy to pass, utter, publish, or sell counterfeit obligations and securities of United States, alleging that conspiracy was in violation of law, unlawful and felonious sufficiently alleges intent to defraud. 31F(2d)902. (6) Where conspiracy to injure public trade was alleged. 326 Ill 379, 158NE103.

621-20 7F(2d)785.

621-21 7F(2d)785.

621-25 326 Ill 379, 158NE103; 9PaDist &Co 721. [b] (4) Held sufficient to allege representation of ownership by seller of property by sale of which defendants sought to obtain money. 83 CalA321, 256P611. [e] (6) Indictment describing forged permits, by means of which liquor was withdrawn, as similar to customs permit with specified number held sufficient. 5F(2d)45. [f] **Indictment for conspiracy to violate National Prohibition Act** need not set forth facts as to particular manner in which it would be violated. 4F(2d)889.

623-29 5F(2d)712; **CalA** 290P595; 142 Wash465, 253P655.

623-32 7F(2d)785; **CalA** 290P74.

623-34 **Ind** 165NE61; 221Ky589, 299 SW211; **Ont** [1929] 2DomLR732.

624-37 7F(2d)785; **Ariz** 281P601; 74 CalA440, 241P97.

624-38 **Ariz** 281P601 (insufficient); 78 CalA395, 248P696, 697 [citCJ].

624-39 78CalA395, 248P696, 697 [cit CJ].

624-40 8F(2d)251; 16F(2d)816. See also 27F(2d)257.

624-42 41F(2d)440.

624-43 26F(2d)487 (details not essential).

624-44 8F(2d)251; 39F(2d)52. [a] (2) Receipt by sheriff of bribe to secure protection from prosecution. 28F(2d) 730. [i] (2) Indictment held sufficient. 35F(2d)174. [j] **Conspiracy to violate National Prohibition Act.**–Allegation that liquor was to be used for beverage purposes is unnecessary. 35F(2d)96.

624-44½-**New.** One overt act well pleaded is sufficient. 16F(2d)116.

625-45 16F(2d)816.

625-48½-**New.** It is not necessary to allege an attempt to commit the crime which is the object of the conspiracy. 74CalA440, 241P97.

625-48¼-**New.** Language charging an overt act may be made more definite by allegations in the charging part of the indictment for conspiracy to transport liquor. 29F(2d)701.

625-49 23F(2d)860. [a] **Indictment need not charge** particular defendant with particular crime. 5F(2d)712.

625-51 [b] 22F(2d)702.

625-52 169Ark770, 276SW858 (night riding).

626-63½-**New.** Bill of particulars setting forth connection of each defendant with conspiracy, by conduct therein, held not required. 22F(2d)766.

626-65 23F(2d)791; 36F(2d)855 (averments describing and identifying conspiracy); 322 Ill 195, 153NE357.

627-67 19F(2d)801; 21F(2d)425; 28F (2d)965; 78CalA395, 248P696.

627-67½-**New.** On a conspiracy charge, the government is not confined to overt acts actually pleaded, but may show other acts of a similar nature. 33F(2d) 265.

627-68 [b] (7) On prosecution for conspiracy to conceal property of bankrupt's estate, evidence that purpose was to conceal certificates of deposit does not raise variance by showing object was to conceal money. 19F(2d)431. (8) Other allegations. 9PaDist&Co 721. (9) Of conspiring to violate National Prohibition Act by proof that liquors were bought for purpose of being used as evidence. 35F(2d)96.

627-69 8F(2d)815.

627-70 25F(2d)49 (allegations sufficient to admit evidence, as to concealment of proceeds of sale, whether property sold was concealed or not).

627-71 8F(2d)815; 13F(2d)841; 16F (2d)29. [a] **Government is not limited to overt acts** as stated in indictment. 36F(2d)859.

627-71½-**New.** Under federal statutes, the government is not limited to evidence of overt acts pleaded. 20F(2d) 454.

627-72 78CalA395, 248P696.

627-75 322 Ill 195, 153NE357.

627-80 7F(2d)259; 8F(2d)815; 36F (2d)859.

628-81 Contra 22F(2d)594.

628-82½-**New.** Prosecution for a joint scheme to defraud and for conspiracy has been held not to involve separate schemes to defraud because of continuance of the same scheme by different defendants. 13F(2d)961.

628-90 89CalA18, 264P324; 256 IllA 415.

629-96 MoA 24SW(2d)1053. [a] (1) 8 PaDist&Co 224. (2) 202Cal 675, 262P 302; 221MoA54, 279SW1053; 224App Div90, 229NYS483; 195NC772, 143SE 868. (4) 2LaA329. (11) 165Ga479, 141 SE291 (fraud on creditors). (13) To defraud vendor of security for notes. 221MoA54, 279SW1053. (14) To defeat recovery of money embezzled. **Tex CivA** 5SW(2d)861. (15) To misappropriate funds of school district. **SD** 229 NW380. [b] 215Ala398, 110S822; 258 Mass172, 154NE583; **NJ** 143A512.

629-97 216AppDiv428, 215NYS470; 55 ND628, 215NW78, 80 [citCJ]; 34 OhA 128, 170NE185 (petition held not demurrable). [a] MoA 21SW(2d)903 (petition held sufficient); 216AppDiv428, 215NYS470; 221AppDiv1, 222NYS291. (3) Complaint held to state cause of action. 81Colo 370, 256P1; 87 IndA119, 157NE292. (4) Where gravamen of action was fraud in depriving vendor of security for purchase money notes by execution of deed of trust to bank lending part of purchase money, petition need not allege nature and amount of fraudulent deed (221MoA54, 279SW 1053), (5) or that plaintiff ever had a deed of trust against the land (221MoA 54, 279SW1053), (6) or that purchaser was insolvent, that plaintiff paid anything on account of fraudulent deed, that such deed was outstanding and unpaid, or that plaintiff had no money to protect his interest (221MoA54, 279SW 1053), (7) or that plaintiff was willing and able to perform contract or did perform it (221MoA54, 279SW1053). [b] (2) Allegations of conspiracy held meaningless in absence of showing purpose of conspiracy was wrongful. 131 Misc774, 227NYS351. [f] **Complaint for conspiracy to injure business** held sufficient. 143Wash229, 255P123. [g] **Complaint held insufficient** for failure to allege overt act or reliance on conduct in alleged conspiracy to defraud. 216 AppDiv428, 215NYS470. [h] **Purpose of conspiracy must be alleged,** mere allegation of conspiracy being insufficient. 216AppDiv428, 215NYS470. [i] **Complaint held insufficient.**–IndA 169NE 77. [j] **Conspiracy to induce contractor to contract for construction of buildings under illegal proceedings.**–Petition held insufficient. IndA 169NE77.

629-99 55ND628, 215NW78, 80 [cit CJ].

629-99½-**New.** An allegation that the owner paid commissions to another broker when that other broker knew that plaintiff was entitled to the commission has been held insufficient to state a cause of action of conspiracy. 218App Div513, 218NYS631.

630-1 55ND628, 215NW78, 80 [citCJ].

630-3 36GaA415, 136SE816; 55ND628, 215NW78, 80 [citCJ].

630-4 224AppDiv39, 229NYS526.

630-4½-**New.** Some statutes provide that necessity for taking right of way for electric transmission line is for determination of petitioner and not of court or jury. 187Wis552, 203NW912.

630-5 But see 220AppDiv812, 222NYS 334.

630-8 36GaA415, 136SE816; 263Mass 199, 160NE790; 8PaDist&Co 224. [e] **Whether representations are oral or written** is matter of proof and not of allegation. 263Mass199, 160NE790.

630-9 24F(2d)89 (sufficient); 164Ga 573, 139SE13; 86 IndA505, 158NE631 (complaint held sufficient); 216AppDiv 428, 215NYS470; 221AppDiv1, 222NYS 291; 224AppDiv39, 229NYS526 (allegations insufficient); 27 OhNPNS279; **Tex CivA** 19SW(2d)124.

630-10 MoA 4SW(2d)1088. [a] (3) Petition alleging conspiracy to defraud petitioners of personalty. 170Ga694, 153 SE771. (6) 224AppDiv11, 229NYS159; 195Wis472, 218NW712. [c] **Insufficient allegations.**–See also **TexCivA** 18SW(2d) 253 (allegations in answer).

630-11 **TexCivA** 18SW(2d)253.

630-12 [c] **Where malice was not alleged** in action for conspiracy to produce breach of contract, no course of action was stated. 34 OhA464, 171NE346.

631-13 108Conn683, 145A273; 254Mass 216, 150NE96; 27 OhNPNS279.

631-16 315Mo 507, 286SW38, 41 [quot CJ].

631-17 315Mo 507, 286SW38, 41 [quot CJ].

632-23 84Colo 266, 269P997.

632-27 224Ky806, 7SW(2d)237.

632-28 21F(2d)508; 21F(2d)829; 38 F(2d) 573; 82CalA700, 256P281 (that liquor defendants conspired to take was

lawfully acquired, possessed, and used by possessor).

632–29 See also 26F(2d)487.

632–31 [a] **Charge of conspiracy** against number of persons must be proved against all. 322 Ill 195, 153NE 357.

632–33 224Ky806, 7SW(2d)237.

632–34 224Ky806, 7SW(2d)237.

632–35 Mo 286SW20, 23 [quotCJ]. [a] **Formal agreement** is not necessary to constitute unlawful conspiracy. 27 F(2d)16.

632–35½–New. In prosecution for conspiracy to violate Alien Land Act allegations that defendant is ineligible alien are taken as true in absence of contrary proof. Cal 286P1025.

632–36 203 Iowa628, 213NW274; Mo 281SW695; TexCivA 48W(2d)574.

633–37 203 Iowa628, 213NW274.

633–37½–New. malice of conspirators, 203 Iowa628, 213NW274.

633–38 203 Iowa628, 213NW274; 74 Mont176, 240P829.

633–41 See also 218AppDiv291, 218NYS 197.

633–42 78CalA395, 248P696. [a] **Scope of conspiracy** must be gathered from testimony and not from averments of indictment. 7F(2d)28.

633–44½–New. Good faith belief in truth of matters published may be shown in mitigation of exemplary damages. 203 Iowa628, 213NW274.

633–44¼–New. Considerable discretion is left to the trial court in conspiracy cases in ruling on admission and exclusion of evidence. 335 Ill 539, 167NE 823.

633–41¼–New. Unlawful agreement between defendants falsely and fraudulently inducing plaintiffs to purchase land will be presumed from unlawful acts committed with common intent. TexCivA 30SW(2d)397.

633–45 273US593, 47SCt531, 71L ed 793; 16F(2d)704; 31F(2d)846; 214 Ala2, 106S617; 21AlaA565, 110S55; 78 CalA395, 248P696; 78CalA223, 248P 716; 319 Ill 437, 150NE435; 335 Ill 570, 167NE852. [b] 203 Iowa628, 213NW 274; 257Mass421, 154NE91; 260Mass 45, 157NE82, 52ALR1125. [h] 199 Ind 660, 161NE251.

633–46 335 Ill 539, 167NE823; 203 Iowa 628, 213NW274. [a] 319 Ill 437, 150NE 435.

633–47 273US593, 47SCt531, 71L ed 793; 7F(2d)785; 16F(2d)704; 20F(2d) 795; 21F(2d)903; 22F(2d)594; 25 F(2d)49; 27F(2d)16; 27F(2d)80; 27 F(2d)223; 32F(2d)15; 36F(2d)1; 21 AlaA565, 110S55; 171Ark1188, 286SW 931; 78CalA395, 248P696; 95CalA242, 272P794; 335 Ill 539, 167NE823; 335 Ill 570, 167NE852; Ill 170NE786; 250 IllA547; 199 Ind660, 161NE251; Ind 165NE58; 87 IndA119, 157NE292; 201 Iowa1186, 207NW247; 203 Iowa628, 213 NW274; 206 Iowa70, 220NW17; 207 Iowa916, 223NW870; 207 Iowa1218, 224 NW766; 210Ky373, 275SW883; 220Ky 585, 295SW888; 224Ky806, 7SW(2d) 237, 240 [citCJ]; 227Ky243, 12SW(2d) 336; 13LaA468, 126S733; 254Mass520, 150NE854; 265Mass377, 164NE239; 314 Mo 662, 285SW62; 314Mo 635, 285SW 437; 315Mo 507, 286SW38; Mo 286SW 20; Mo 8SW(2d)49; MoA 288SW100; 115Nebr255, 212NW540; 191NC404, 132 SE16; 198NC260, 151SE261; 29 OhA 419, 163NE634; 128 Or121, 270P772; 48Philippine868; TexCivA 286SW241, 245 [citCJ]; 193Wis324, 214NW431. [a] 8F(2d)692. [h] **Evidence as to finding bottle on vessel** admissible in rum-running prosecution. 21F(2d)903.

634–48 21F(2d)903. See also 27F(2d) 257 (proof must generally be measurably circumstantial).

634–49 13F(2d)599; 14F(2d)705; 314 Mo 662, 285SW62.

634–51½–New. Declarations not made in the presence of any of the defendants is inadmissible. 224IllA574.

634–51¾–New. In a prosecution for conspiracy to conceal a bankrupt's property, procurance of the property cannot be shown by affidavits of correctness of claims in bankruptcy. 25F(2d)49.

634–52 78CalA395, 248P696; 326Ill 518, 158NE142; Mo 8SW(2d)49; NC 154SE662.

634–53 273US593, 47SCt531, 71L ed 793; 16F(2d)704; 23F(2d)420; 31 F(2d)19; 35F(2d)689 (evidence held admissible in prosecution for conspiring and using mails to defraud); 38F(2d) 777; 41F(2d)26; 214Ala2, 106S617; 22 AlaA144, 113S474; 78CalA395, 248P 696; 78CalA223, 248P716; CalA 281P 1096; 326 Ill 145, 157NE225; 326 Ill 518, 158NE142; 335 Ill 539, 167NE823 (books of account, letter from auditor of public account, and checks paid in part to customer are admissible); 199 Ind660, 161NE251; 86 IndA38, 155NE 717; 221Ky589, 299SW211 (evidence of proposal to conspire held admissible); Mass 172NE97; 253NY330, 171NE393 (to show motive). [h] (5) Evidence of large deposits in trust company by defendant have been held admissible in prosecution for liquor conspiracy in view of other testimony. 13F(2d)750. [u] **Subsequent acts,** after conspiracy is over, are not admissible. 214Ala2, 106 S617. [v] **Financial condition of plaintiff.**–218Ala140, 117S647. [w] **Proximity of places along coast where small boats could land** is admissible in prosecution to transport liquor. 40F(2d)837. [x] **Receipt of money in excess of salary.**–In prosecution for conspiring with others to cheat and defraud city by causing city to pay excessive sums for work and material, evidence that defendant possessed and disbursed upwards of one hundred and forty-five thousand dollars is properly admitted. 227App Div167, 237NYS303. [y] **One not on trial** could be proved to be member of conspiracy. 253NY330, 171NE393.

635–54 273US593, 47SCt531, 71L ed 793; 214Ala2, 106S617; 22AlaA144, 113 S474; 78CalA395, 248P696; 326 Ill 518, 158NE142. See also 22F(2d)776. [h] (4) Evidence of money received in excess of salary is admissible without preliminary proof of financial means. 253NY 330, 171NE393.

635–55 273US593, 47SCt531, 71L ed 793; 31F(2d)19; 78CalA395, 248P696, 697 [quotCJ].

635–56 8F(2d)815; 78CalA395, 248P 696. See also 27F(2d)515.

635–57 8F(2d)815; 27F(2d)856; 78 CalA395, 248P696, 697 [quotCJ]; Tex CivA 278SW503, 506 [citCJ&Cyc].

635–58 27F(2d)856; 218Ala140, 117S 647; 78CalA395, 248P696, 697 [quot CJ]; TexCivA 278SW503, 506 [citCJ& Cyc]. [a] (9) Certified copy of assignment of oil lease has been properly excluded as irrelevant and not best evidence in prosecution for fraudulent use of mails. 16F(2d)71. (10) Acts of defendants and community in which they lived which occurred long prior to alleged conspiracy. 203 Iowa628, 213NW 274. (11) That government not legally bound to fill contracts held immaterial on issue of fraud in inducing government officer to make substituted contracts. 23F(2d)420. [b] **Evidence held admissible.**–27F(2d)856.

635–58½–New. Evidence received on the theory that, when fitted together and considered as a whole, the circumstances have probative value. 27F(2d)257.

636–59 8F(2d)697; 41F(2d)26.

636–60 28F(2d)581; 41F(2d)26. [a] (5) In action for conspiracy to bring in purchasers of land, deeds to other purchasers inadmissible. TexCivA 272SW 550. (6) Representations made by strangers to others than plaintiffs inadmissible. TexCivA 272SW550.

636–60½–New. In a trial of conspiracy to defraud the United States by making false income tax returns, testimony of defendant's expert accountants as to when net worth basis of computing income was proper is properly excluded. 31F(2d)846.

636–63 78CalA395, 248P696 (confession). But see 26F(2d)463.

636–64½–New. Declarations made by one defendant not in the presence of the others are inadmissible. 224 IllA 574.

636–65 89PaSuper82.

636–66 8F(2d)815; 16F(2d)704; 21F (2d)425; 23F(2d)561; 27F(2d)16; 105 NJL383, 144A618. [c] (1) 96PaSuper 76. [g] **Overt acts before those charged** held admissible. 22F(2d)766. [h] **Evidence held inadmissible.**–35F(2d)663.

637–72 35F(2d)553.

637–73 38F(2d)406.

637–74 24F(2d)353 (telegram to secretary); 78CalA395, 248P696; 149Md128, 131A29 (knowledge of time of trial on charge of conspiracy to obstruct justice); 35 OklCr279, 250P544, 546 [cit CJ], 49ALR1129.

637–75 78CalA395, 248P696; 35 OklCr 279, 250P544, 546 [citCJ], 49ALR1129. [b] (1) 176Minn219, 222NW921. [c] **To prove conspiracy to violate National Prohibition Law,** proof of possession of liquor bottles and bottling paraphernalia at another time may be given. 11F(2d) 933.

637–76 35 OklCr279, 250P544, 546 [cit CJ], 49ALR1129.

638–78 29F(2d)881; 20AlaA426, 103S 707; 21AlaA534, 109S613; 144Wash252, 258P16. [a] NJSup 142A365; OklCr 273P1018(2dcase).

638–79 13F(2d)841; 21AlaA534, 109S 613; Ill 170NE786.

638–80 5F(2d)129 (evidence sufficient to warrant finding that cablegrams constituted overt acts within district); 11 F(2d)933; 13F(2d)841; 17F(2d)973; 19F(2d)801; 19F(2d)850; 23F(2d)112; 35F(2d)516 (conspiracy may be shown by circumstantial evidence); 20AlaA426, 103S707; 79CalA499, 250P202; 82Cal A700, 256P281 (sufficient to establish lawful ownership of whisky in prosecution to steal same); 326 Ill 518, 158NE 142; 335 Ill 539, 167NE823 (conspiracy to obtain bank's property by false pretenses); IndA 168NE487 (circumstantial evidence is sufficient); 124Kan245, 259P691; 215Ky172, 284SW1039; 222 Ky393, 300SW874 (conspiracy to commit arson); 253NY330, 171NE393 (established by evidence of particular acts). [a] (1) 5F(2d)132 (to convict attorney for participating in maintaining roadhouse as common nuisance in violation of National Prohibition Act); 6F(2d)795 (to violate Prohibition Act); 7F(2d)259 (to violate Drug Act); 7F(2d)594 (to violate Bankruptcy Act); 7F(2d)785 (to defraud by use of mails); 8F(2d)692; 8F(2d)815; 13F(2d)530 (interstate shipment of opium); 13F (2d)599 (violation of Prohibition Act); 13F(2d)604 (conviction of partner for conspiracy to violate Prohibition Act); 13F(2d)739 (to conduct illegal brewery); 13F(2d)750 (to import liquor); 13F(2d)961; 14F(2d)398 (operating distillery); 14F(2d)561; 14F(2d)582; 14 F(2d)881; 16F(2d)754; 18F(2d)477; 19F(2d)431; 19F(2d)756; 19F(2d)801; 20F(2d)795 (counterfeiting conspiracy); 21F(2d)889 (intent); 22F(2d)594 (to transport and sell liquor); 23F(2d)180 (to rob mail); 23F(2d)420; 23F(2d) 791; 23F(2d)908; 24F(2d)50 (to defraud government); 24F(2d)802; 24F (2d)915 (to possess and transport intoxicating liquor); 25F(2d)1; 25F(2d) 708; 26F(2d)1; 27F(2d)16; 27F(2d) 80; 27F(2d)223; 27F(2d)515; 27F(2d) 856; 28F(2d)567 (to conceal bankrupt's assets); 28F(2d)704 (to import merchandise and liquor without paying duty); 28F(2d)871 (to violate National Prohibition Act); 29F(2d)691; 29F (2d)701; 30F(2d)590; 31F(2d)19; 31 F(2d)229; 32F(2d)241(1stcase); 34F (2d)94 (to transport intoxicating liquors); 34F(2d)630 (conspiracy to conceal assets of bankrupt); 35F(2d)96 (to violate Prohibition Act); 35F(2d) 663; 35F(2d)665 (to violate narcotic laws); 35F(2d)689 (defraud by use of mails); 37F(2d)203; 38F(2d)777; 39 F(2d)52; 39F(2d)897 (to violate National Prohibition Act); 40F(2d)837 (conspiracy to transport liquor); 41F (2d)682; 43F(2d)944; 44F(2d)51; 44 F(2d)163; 169Ark770, 276SW858; 74 CalA440, 241P97 (to defraud life insurance company); 78CalA395, 248P696; 78CalA223, 248P716; 78CalA561, 248P 990; 79CalA541, 250P406; 82CalA700, 256P281; 83CalA321, 256P611 (to obtain money by false pretenses); 83CalA

370, 257P92 (defendant active participant in conspiracy to commit extortion); 84CalA96, 257P544 (to support conviction for conspiracy to falsify election returns); 97CalA71, 274P1018; 47 Ida 785, 280P1039; 322 Ill 195, 153NE357; 326 Ill 379, 158NE103; Ill 170NE786; 200 Ind388, 163NE837; Ind 165NE58; 86 IndA505, 158NE631 (to defraud in sale of stock); IndA 168NE487 (to commit felony); 207 Iowa916, 223NW870; 210Ky150, 275SW630; 212Ky24, 278SW 549 (conspiracy to intimidate and alarm another); 212Ky813, 280SW104; 215Ky 172, 284SW1039 (to take and detain woman); 227Ky255, 12SW(2d)275; 232Ky 226, 22SW(2d)624; 235Ky781, 32SW (2d)351; 252Mass224, 147NE859; 254 Mass86, 149NE600; 254Mass454, 150NE 197 (conspiracy to burn building); 261 Mass20, 158NE260; 314Mo 635, 285SW 437; 105NJL383, 144A618; 224AppDiv 419, 231NYS279; 227AppDiv167, 237 NYS303 (to cheat and defraud city); OklCr 281P305 (to commit rape); 45 Philippine89 (conspiracy to commit arson); 47RI 341, 133A236; 106TexCr55, 289SW161 (robbery). [b] 13F(2d)59; 14F(2d)881; 14F(2d)888; 15F(2d)479; 18F(2d)477; 18F(2d)887; 20F(2d)570; 21F(2d)425 (conspiracy to withhold property from trustee in bankruptcy); 21F(2d)816 (to violate National Prohibition Act); 21F(2d)829; 25F(2d)49; 26 F(2d)463; 27F(2d)16; 28F(2d)581 (conspiracy in buying stolen gold and receiving payment from United States mint); 35F(2d)663 (to violate Prohibition Act); 35F(2d)665 (to violate narcotic laws); 36F(2d)356; 42F(2d)835; 43F(2d)890; 78CalA395, 248P696; 321 Ill 69, 151NE604 (to obtain money by confidence game or by false representations); 326 Ill 518, 158NE142; 215Ky 832, 287SW29; 221AppDiv17, 222NYS 593; 198NC260, 151SE261; 14PaDist& Co 229; 49SD535, 207NW547 (to steal a steer). [c] 8F(2d)118; 14F(2d)400; 19F(2d)842; 21F(2d)409; 24F(2d)640 (to violate National Prohibition Act); 26 F(2d)904 (conspiracy to sell and transport intoxicating liquor); 28F(2d)508 (to manufacture, sell, and possess liquor); 29F(2d)881; 335 Ill 570, 167NE 852 (conspiracy to injure or destroy property); 197 Ind685, 150NE409; 207 Iowa916, 223NW870; 215Ky172, 284SW 1039; 228Ky838, 16SW(2d)474; 29 OhA 419, 163NE634 (conspiracy to commit burglary); TexCivA 286SW241; Utah 269P515 (to commit arson). [d] 13F (2d)843. [e] 15F(2d)741. [k] **Evidence held sufficient to sustain conviction for conspiracy.**–5F(2d)45; 5F(2d)488 (to unlawfully import liquors). [l] **Evidence held sufficient to show certain defendants parties to conspiracy.**–5F(2d) 45. [m] **Evidence held insufficient to sustain conviction of conspiracy.**–210Ky 373, 275SW883 (conspiracy to unlawfully traffic in intoxicating liquor). [n] **Verdict of guilty** of conspiracy held not flagrantly against evidence. 211Ky524, 277SW842. [o] **Conspiracy to conceal assets** of bankrupt, if participation by bankrupt is comprehended, is sufficient though he never joins. 7F(2d)594. [p] **Accused must be shown** to have been party to conspiracy charged. 7F(2d) 28; 23F(2d)791. [q] **Conspirator taking part in one overt act** is subject to indictment. 7F(2d)594. [r] **Evidence held insufficient to go to jury on issue of conspiracy.**–30F(2d)678. [s] **Rule that evidence must show more than mere participation is inapplicable** where there was deliberate and intentional action during considerable period, by all persons accused, with common purpose and intent to assist one another in violation of law. 27F(2d)16. [t] **Evidence held sufficient to establish ownership of building.**–335 Ill 570, 167NE852. [u] **Evidence held sufficient to make prima facie case of conspiracy.**–253NY330, 171NE 393.

638–80½–New. 23F(2d)112 (circumstantial evidence).

639–81 25F(2d)49 (must show facts excluding every other hypothesis except guilt); 38F(2d)573; 79CalA541, 250P 406 (mere possession of stolen goods will not sustain conviction for conspiracy to rob); 210Ky373, 275SW883; 220 Ky585, 295SW888, 889 [citCJ].

639–82 210Ky373, 275SW883; 220Ky 585, 295SW888, 889 [citCJ].

639–83 21F(2d)508; 220Ky585, 295 SW888, 889 [citCJ].

639–83½–New. Conspiracy may be shown by inference. 19F(2d)431.

639–83⅓–New. To sustain a conviction for confederating and banding together to intimidate and disturb third persons, there must be evidence of conspiracy. 230Ky813, 20SW(2d)980.

639–87 7F(2d)944; 169Ark770, 276SW 858.

639–88 8F(2d)140.

639–89 21F(2d)903. [a] 14F(2d)75.

639–89½–New. Where conspiracy is conclusively established, but slight evidence connecting defendants therewith is necessary. 42F(2d)202(2dcase).

639–90 103Conn708, 131A497; Mo 281 SW695, 700 [quotCJ]; MoA 281SW83; MoA 288SW100. [a] 28F(2d)1; 101 CalA122, 281P419; 81Colo 370, 256P1; 103Conn708, 131A497; 319 Ill 437, 150 NE435; 224 IllA430 (conspiracy to injure striking carpenters and general public); 199 Ind660, 161NE251; 86 IndA38, 155NE717; 87 IndA119, 157NE 292; IndA 167NE731 (conspiracy to defraud); 200 Iowa419, 203NW697; 201 Iowa179, 207NW235 (to sell corporate stock by false representation); 120Kan 158, 242P149 (conspiracy to induce sale of hotel for worthless stock); 13LaA 468, 126S733; 262Mass348, 159NE922; MoA 281SW83; NJSup 140A317; 29 OhA211, 163NE304(2dcase); 135 Okl 249, 274P1082. [b] 18F(2d)277; 35 GaA122, 132SE393; 235 IllA89; 206 Iowa206, 214NW718 (sale of corporate stock to be paid for from proceeds of sale by purchaser to corporation of securities); 125Kan234, 263P1062, 1065 [citCJ]; 161La1017, 109S822, 48ALR 1143; 163La499, 112S395; 168La714, 123S301 (conspiracy to dispossess occupant by demolishing building); 170 La941, 129S537 (conspiracy to defraud); Mass 165NE12; 236Mich501, 211NW 71; 239Mich1, 214NW113; 172Minn 183, 214NW925; 221MoA54, 279SW 1053; MoA 21SW(2d)903; 117Nebr411, 220NW590; 191NC404, 132SE16; 88 PaSuper357; TexCivA 272SW550; 142 Wash355, 253P127; 193Wis324, 214NW 431. [c] 97CalA329, 275P819; Iowa 229NW847. [e] 198Cal 500, 246P53. [f] 74Mont176, 240P829; 226AppDiv 53, 234NYS429. [r] **Evidence sufficient to support findings.**–74Mont176, 240P 829. [s] **Evidence must exclude every other inference,** to be sufficient to show tortious conspiracy. 235 IllA89. [t] **Evidence held to create inference** as to conspiracy. MoA 281SW83. [u] **Evidence held sufficient to support finding.**–97CalA329, 275P819; 97CalA339, 275P 824. [v] **Evidence held sufficient to go to jury on issue of conspiracy to violate Prohibition Law.**–265Mass377, 164 NE239. [w] **Evidence held sufficient to show that defendant was member of conspiracy.**–IndA 168NE607. [x] **Conspiracy to defraud may be inferred from circumstances.**–Cal 292P970.

640–91 TexCivA 272SW550 (must be clearly established). [a] **Inference of fraud or conspiracy** in civil case from circumstantial evidence, must be reasonable, probable and unstrained. 6F (2d)43.

640–92 TexCivA 286SW241, 245 [quot CJ].

640–93 But see 129 Or262, 277P85 (charge of conspiracy to ruin corporation).

640–95 180Ark214, 20SW(2d)874; Mo 281SW695, 700 [quotCJ]; 221MoA54, 279SW1053; MoA 21SW(2d)903; 191 NC404, 132SE16; TexCivA 286SW241, 245 [quotCJ]; 193Wis324, 214NW431.

640–95½–New. An action founded on conspiracy fails when proof of conspiracy fails. 216AppDiv268, 214NYS42.

640–95⅓–New. To prove conspiracy by circumstantial evidence there must be substantial proof of circumstances from which it necessarily follows, or at least may reasonably be inferred, that the conspiracy existed. 124Kan278, 259P 687.

640–95¼–New. It cannot be established by conjecture and speculation alone. 124Kan278, 259P687.

640–95⅙–New. Substantial proof of conspiracy must be produced. 221MoA 54, 279SW1053.

640–95⅙–New. Conspiracy may be proved by circumstantial evidence. MoA 21SW(2d)903.

640–95⅐–New. Direct proof of conspiracy is not necessary. 101CalA122, 281 P419.

640–96 6F(2d)40; 7F(2d)785; 22F (2d)968; 31F(2d)966; 326 Ill 379, 158 NE103; 260Mass97, 156NE679; 260 Mass97, 156NE679; 120 Or508, 252P 951. [a] 13F(2d)843. [b] (1) 36F(2d) 315.

640–97 21F(2d)903.

640–98 101NJEq315, 138A586.

640–1 7F(2d)785; 19F(2d)506; 22F (2d)823; 22F(2d)827; 31F(2d)902; 120 Or508, 252P951; Ont [1929] 2Dom LR732. See also 273US593, 47SCt531, 71L ed793.

641–7 23F(2d)420; 203Cal 510, 265P 184; 83CalA321, 256P611 (sufficient where instructions construed as whole); 170Ga843, 154SE232. [g] **Instructions held sufficient or properly refused.**–15F (2d)168. [h] **Requested instruction held properly refused.**–227AppDiv167, 237NYS303. [i] **Instruction describing overt act held not erroneous.**–35F(2d) 96.

641–8 [a] (4) Other instructions held not misleading. 23F(2d)908. (5) Instruction as to overt acts held not misleading, as against contention that jury understood therefrom that overt acts referred to constituted offense charged. 27F(2d)257. (6) Other instances. 39F (2d)30. [e] **Instructions properly refused.**–8F(2d)815 (as to absence). [f] **Instruction permitting evidence of violation** of Prohibition Law to be considered held erroneous. 7F(2d)28.

641–9 [a] **Instruction held sufficient** in stating conspiracy to break and enter a storehouse with intent to steal therefrom without requiring conspiracy to refer to storehouse of particular person. 209Ky318, 272SW743.

641–11⅓–New. Where only two of several indicted persons are on trial, charge that both must or neither could be found guilty held prejudicial error. 17 F(2d)82.

641–14 229Ky493, 17SW(2d)402 (failure held error); Mo 256SW1043 (converse of instruction for state).

641–15 19F(2d)801.

641–15½–New. Instructions embodying immaterial matter are properly rejected. 78CalA223, 248P716.

641–15⅓–New. Instructions are sufficient if they present the case properly in view of other instructions given. 25 F(2d)49.

641–16 78CalA395, 248P696. [a] 13F (2d)564.

641–17¼–New. An instruction that certain evidence, if believed, is sufficient to authorize the jury to infer a conspiracy to commit the offenses alleged is not erroneous where it merely authorizes the jury to infer an agreement to do what was actually done. 8F(2d) 614.

642–20½–New. Instructions as to proof of intent are held not improper. 21F (2d)889.

642–20⅓–New. In a prosecution for conspiracy to restrain interstate commerce an instruction, that it is not necessary for the government to prove that a defendant intended by his actions to violate Anti-Trust Act or to restrain interstate commerce, is not error. 21F (2d)889.

642–20¼–New. In a prosecution for conspiracy to falsify election returns an instruction that the state need not prove specific intent is proper. 84CalA 96, 257P544.

642–26 8F(2d)251; 13F(2d)392; 15F (2d)494; 16F(2d)670; 22F(2d)504; 23 F(2d)112; 23F(2d)908; 24F(2d)303; 24F(2d)353; 30F(2d)590; 34F(2d)863; 41F(2d)440; 41F(2d)449; 41F(2d)654;

33GaA680, 127SE891; 211Ky524, 277SW842; 220Ky128, 294SW1062; 221Ky589, 299SW211; 260Mass97, 156NE679; 165Minn87, 205NW696; NJSup 140A317; 250NY358, 165NE810; NC 154SE62; 91PaSuper571; TexCivA 24SW(2d)99.

642-26½-New. The weight and significance of circumstantial evidence is for the jury. 254Mass520, 150NE854.

642-27 41F(2d)449; NJSup 140A317 (motive of defendant); 253NY330, 171NE393; 227AppDiv167, 237NYS303; 97PaSuper510.

642-28 5F(2d)712; 24F(2d)353; 27F(2d)77; 41F(2d)440; 41F(2d)449.

642-28½-New. Whether sale of securities to defendant in another state is valid is for the jury. 78CalA223, 248P716.

642-31 253NY330, 171NE393.

642-32½-New. Whether there was one conspiracy or several independent conspiracies is a question for the jury. 19F(2d)801.

642-32⅓-New. In some cases, the facts have been held insufficient to go to the jury on the question of conspiracy. 26F(2d)1.

643-36½-New. On trial for conspiracy, each defendant is entitled to a finding by the jury as to his individual connection with the case. 13F(2d)59.

643-37½-New. Proof of one of several overt acts in an indictment is sufficient to uphold conviction. 128Misc176, 218NYS633.

643-39 31F(2d)229; 78CalA561, 248P990.

643-42 7F(2d)594.

643-45 24F(2d)353 (disagreement as to one, conviction of other); 78CalA561, 248P990.

643-48 8F(2d)429. Contra 124Kan245, 259P691.

643-51 89PaSuper454. Contra 124Kan245, 259P691.

643-52½-New. A conviction of conspiracy of only one defendant, where all other principal conspirators are acquitted, cannot be sustained. 31F(2d)229.

644-57 95PaSuper496.

644-59 89PaSuper454, 460 [citCJ].

644-64 [b] **In Pennsylvania.**-293Pa18, 141A723 (sentence for maximum of three years and minimum of one and one-half years invalid).

644-66½-New. A fine of two thousand dollars and imprisonment from one to five years is a proper sentence under Session Laws of Illinois for 1919. 224IllA235.

644-68 197Cal556, 241P852; 83CalA321, 256P611 (penal code provision exclusive and indeterminate sentence not objectionable).

644-70½-New. Statute providing for punishment for conspiracies to commit "any crime" includes all crimes whether felonies or misdemeanors. 197Cal556, 241P852.

644-70⅓-New. Whether the conspiracy is defined by the penal code or by any law or statute of state, the penal provisions are applicable to conspiracy to violate Corporate Securities Act. 197Cal556, 241P852.

644-70¼-New. That same offenses defined by one part of statute are punishable under a certain penal paragraph thereof does not preclude construction that another penal paragraph may prescribe punishment for remainder of offenses not made punishable under the first penal paragraph. 197Cal556, 241P852.

644-70⅕-New. Second penal paragraph of conspiracy statute which provides for punishment for conspiracies to do "any of the other acts described by this section" is sufficiently broad to include all of the offenses created by five subdivisions of the section and for which penalty is imposed in first penal paragraph. 197Cal556, 241P852.

645-74 MoA 281SW83 (instructions held not supported by evidence). [c] **Request for instruction held properly denied** where jury found for defendants on conspiracy and request was for issue on breach of contract, defendants not being parties to any contract with plaintiff. 122Kan15, 251P425. [d] **Words "design" and "purpose"** are synonymous as respects propriety of charge. 30OhA328, 165NE363. [e] **Instruction improperly refused** where warranted by evidence. Miss 130S478.

645-75 [c] **Instructions as to conspiracy to bring groundless suits** held proper. 143Wash229, 255P123.

645-76½-New. An instruction that corporate officers would not be liable for false representations in the sale of stock unless they took part in the sale is properly refused as misleading. 86IndA505, 158NE631.

645-76⅓-New. An instruction relating to immaterial evidence is properly refused. 86IndA505, 158NE631.

645-77 224IllA574.

645-79 [a] **Other instructions held misleading.**-203Iowa628, 213NW274.

645-81 39F(2d)297; Cal292P970; 97CalA329, 275P819; 86IndA38, 155NE717; 204Iowa297, 213NW794; 205Iowa417, 216NW68; 122Kan15, 251P425; 143Wash229, 255P123; 144Wash1, 255P924. But see 39F(2d)297 (when evidence undisputed); Iowa 229NW753 (evidence held to require directed verdict for defendants); 88PaSuper357. [a] **Evidence held insufficient for submission to jury.**-180Ark214, 20SW(2d)874.

646-82 176Minn219, 222NW921; MoA 281SW83; MoA 4SW(2d)1088; TexCivA 4SW(2d)159. See also 39F(2d)297 (joint participation).

646-84 204Iowa297, 213NW794.

646-86 MoA 281SW83; TexCivA 18SW(2d)778 (evidence held sufficient for submission to jury).

646-91 Iowa 229NW847; 128Me181, 146A437; 165Minn87, 205NW696; 84Mont338, 275P753; Nebr 230NW669.

646-94 206Iowa70, 220NW17 (recoverable in absence of proof of conspiracy).

646-95 IndA 167NE731.

646-97 198Cal500, 246P53.

646-98 134Okl79, 272P868.

646-98½-New. Judgment may be entered against some of the parties charged without holding all. 204Iowa297, 213NW794.

646-99 [a] (3) Eight thousand dollars by one purchasing $15,000 of stock. 87IndA119, 157NE292. (4) Other instances. 135Okl249, 274P1082 (twenty-five thousand dollars).

647-12½-New. A creditor can recover damages only in satisfaction of the injury suffered and not on account of the debt due and in satisfaction of it. 112Okl61, 242P224.

647-12⅓-New. Where a felony is committed as a result of a conspiracy, compensatory damages are recoverable. 199Ind660, 161NE251.

647-12¼-New. Plaintiff's loss of time from business to attend to conspiracy of defendants is not element of damages. 34PortoRico59.

647-14½-New. Judgment lien and chattel mortgage on property transferred to plaintiff are proper elements of damage. MoA 4SW(2d)1088.

647-16 319Ill437, 150NE435.

647-19 But see 199Ind690, 161NE251.

647-21½-New. In an action for damages for conspiracy to defraud by misrepresenting the price paid for property in which plaintiff purchased a half interest relying on such misrepresentations, plaintiff is not entitled to recover punitory damages, where the only injury claimed was loss of a fixed sum of money and there were no circumstances of aggravation, insult, cruelty, vindictiveness, or malice. 198Wis222, 223NW839.

647-21⅓-New. The fact that a conspiracy is alleged does not authorize recovery of punitory damages, unless the purpose of the conspiracy was a willful violation of rights under such circumstances of aggravation and insult as to evidence wantonness or malice. 198Wis222, 223NW839.

CONSTITUTIONAL LAW

649-47 [a] **In Pennsylvania.**-284Pa235, 130A407.

675-2 213AppDiv206, 211NYS306.

676-5 327Ill433, 158NE743; 52ND231, 202NW391.

679-40 255Mass366, 151NE378.

680-43 [b] **Railway Act [1919] c 68 § 189** is intra vires of dominion parliament in its effect upon provincial crown lands. [1926] CanSC163, [1926] 1DomLR161 [aff [1926] AC715, [1926] 3DomLR545, [1926] 2WestWkly552]. [g] Act of dominion parliament may be ultra vires as infringement of provincial jurisdiction. 22Alta225, [1926] 3DomLR362, [1926] 2WestWkly456.

681-70 [d] **Voters of states** are excluded from participating in process of amendment. 262Mass603, 160NE439. [e] **"Constitutional amendment" in constitutional provision relating to initiative** held not to refer to Federal Constitution. 262Mass603, 160NE439. [f] **Eighteenth amendment, passed by two-thirds vote of members of House present** is validly adopted. 37F(2d)343.

682-75½-New. The attorney-general's determination that a referendum as to whether a senator should be instructed to vote for a resolution for the repeal of a prohibition amendment was a question of public policy held binding on the court. 265Mass16, 163NE192.

682-78 163La777, 112S718; 246NY115, 158NE42 (Constitution of 1894 held complete new constitution and not amendment of earlier ones); 128Okl269, 263P635; 284Pa235, 130A407. [a] **Excision of questionable paragraph does not affect validity** of remaining provisions of amendment. Mo 19SW(2d)642. [b] **Amendment held not invalid** on ground that it is legislative in character. Mo 19SW(2d)642.

682-78½-New. , or a new one may be put in force by constitutional convention duly assembled subject to ratification by the people. 284Pa235, 130A407.

682-78⅓-New. The provisions as to amendments must be strictly complied with. 213AppDiv206, 211NYS306.

682-81½-New. Adoption of a proposed amendment does not nullify every proposal for amendment of any other article. 241NY96, 149NE211.

682-82 84Colo416, 270P877; 51ND391, 199NW754. [f] **Sufficiency of petition.**-51ND391, 199NW754.

682-83 84Colo416, 270P877.

683-86 163La777, 112S718; 75Mont429, 244P287.

687-35 [j] **In New York.**-213AppDiv206, 211NYS306.

688-38 [a] 169Ark97, 273SW355, 358, 41ALR629 [quot Brown, J, Prohibitory Amendment Cases].

688-39¼-New. **In New York** a proposed amendment is not rendered invalid, 241NY96, 149NE211.

688-39⅕-New. or nullified because another amendment to article proposed to be changed was passed between time of first and second resolutions. 241NY96, 149NE211.

688-39⅙-New. An amendment proclaimed by the governor is held part of the constitution. 125Me529, 133A265.

688-42 Contra 289Pa92, 137A178.

688-43 169Ark97, 273SW355, 41ALR629 (prohibitory amendment cases 24Kan700 criticized and not followed); 48Ida517, 283P532; 187Wis180, 204NW803. [d] 118Nebr150, 224NW6.

689-44 118Nebr150, 224NW6; 45SC196, 143SE31, 68 [quotCJ]. [a] (3) 169Ark97, 273SW355, 41ALR629 [quot 24Ala108].

689-45 213AppDiv206, 211NYS306 (constitution remains unchanged if all provisions not complied with, no matter how large a majority of electorate voted in favor of proposed amendment).

689-47 284Pa235, 130A407, 409 [quot CJ]; 5PaDist&Co314.

689-48 284Pa235, 130A407, 409 [quot CJ]. [b] **Provision in statute for submission at next general election or at any special election** is surplusage where constitution contains such requirement. Okl292P365.

689-48½-New. An amendment although submitted at improper time is effective for all purposes once it is accepted by majority. 284Pa235, 130A407.

689-48⅓-New. Submission of amendment at improper time will be enjoined

if properly attached. 284P235, 130A 407.

689-49 [f] **Submission varying from proposed amendment.**–Amendment fixing four-year term for certain state officers is void where question submitted was whether term should be limited to four years. 48 Ida517, 283P532.

690-51 125Me529, 133A265. [b] **Ballot held sufficient.**–220Ala12, 123S573 (4thcase).

690-54½-New. or the subject of the amendment was not clearly expressed, Mo 19SW(2d)642.

690-58½-New. Submission may be by general instead of special legislation. 187Wis180, 204NW803.

690-58¼-New. The exact form of the question to be submitted for each amendment need not be prescribed by legislature. 187Wis180, 204NW803.

690-58¼-New. An amendment is not invalid because a copy of the official ballot title was not served upon the person offering a proposed amendment, where no appeal was taken from the decision of the attorney-general in regard to official ballot title. Mo 19SW (2d)642.

690-61 See also 284Pa235, 130A407, 409 [citCJ].

691-63 Mo 19SW(2d)642.

691-67½-New. Submission of proposed amendment to single section of article of constitution does not affect proposed amendment to same article. 125Misc1, 210NYS786.

692-72 213AppDiv206, 211NYS306 (amendment held void as not having complied with requirements of constitution). But see 168La560, 122S850 (where failure to comply literally is harmless). [b] **Thus** submission of amendment is rendered nugatory by intervening approval of a different amendment. 213AppDiv206, 211NYS306.

692-73 213AppDiv206, 211NYS306 (proposal in both houses).

692-74 [b] (2) Where proposed amendment as entered on journal of the house is materially different in its language and import of corresponding entry in journal of senate, there is no presumption that two houses of legislature agreed on same proposal. 169 Ark97, 273SW355, 41ALR629. [c] (1) 241NY96, 149NE211. (2) See also 169 Ark97, 273SW355, 41ALR629; 213App Div206, 211NYS306 (entry by title and number held insufficient). (5) 169Ark 97, 273SW355, 41ALR629. (13) Where there is entry of concurrent resolution on journals of both houses by title and number this has been held sufficient. 125Misc1, 210NYS786. (14) Entry in journals of both houses by titles alone is sufficient. 241NY96, 149NE211. [d] **Failure to preserve evidence of original joint resolution** is not fatal where substitute resolution is on file. 187Wis180, 204NW803.

692-75 [b] **Entry without yeas and nays** makes amendment null and void. 213AppDiv206, 211NYS306.

692-76 168La560, 122S850 (substantial compliance held sufficient); 213AppDiv 206, 211NYS306 (majority of both houses). [c] **Unimportant amendments to resolution** proposing constitutional amendment need not be concurred in by two thirds vote of other house than that where they originated. 169La458, 125S447. [d] **Requirement of two thirds vote of each house to order special election** (1) means two thirds vote of all members. Okl 292P365. [e] **Requirement of two thirds vote of each house to order special election** etc. (2) Special election ordered without required vote is unauthorized and result thereof is void. Okl 292P365.

692-77 213AppDiv206, 211NYS306.

693-85 175Minn103, 220NW408.

693-90 220Ala12, 123S573 (4thcase) (act of 1923 proposing drainage amendment to constitution will not be declared invalid because it was indorsed approved by governor).

693-95 Mo 19SW(2d)642 (need not be published in every county by both secretary of state and county clerks). MoA 9SW(2d)870; 118Nebr150, 224NW 6 (publication held insufficient); 213 AppDiv206, 211NYS306 (three months previous to time for making choice to present amendment to next succeeding legislature); 148Wash445, 269P818.

694-96 284Pa235, 130A407 (advertising).

694-96½-New. Electorate has been held to have full knowledge of the terms of an amendment. 125Me529, 133A265.

694-96½-New. A requirement that argument for and against constitutional amendments referred to the people by the legislature shall be filed and printed "in the same manner" does not refer to the time limit in a case where proposed by the people. 148Wash445, 269P818.

694-96¼-New. Arguments for or against amendments proposed by the legislature for submission to voters should be presented and filed with the secretary of state for printing within a reasonable time. 148Wash445, 269P818.

694-99 See also 200Cal585, 254P946, 62ALR1341.

694-2 169Ark925, 277SW22 (amendment adopted when approved at election does not depend upon declaration of speaker nor publication by governor's proclamation).

694-4½-New. Officials cannot by failing to perform ministerial duties thwart right of suffrage on proposed amendment. Okl 292P365.

694-6 [b] **Ballot titles.**–Or 288P505 (2dcase).

695-16 [a] **Majority of those voting on amendment and not majority of electors voting at general election** is required by Arkansas constitution. 170 Ark956, 281SW918. [b] **Referendum amendment to constitute** includes constitutional amendments whether proposed and submitted by legislature or proposed by percentage of legal voters under power of initiative in amendment. 170Ark956, 281SW918.

696-35 128 Okl 32, 261P146, 148 [quot CJ]. [b] (2) Okl. Const. schedule 23, providing that district court of any county, successor of federal court in Indian Territory, should transfer probate proceedings to county court of such county, did not provide exclusive procedure for transfer of such matters to county court. 128 Okl 32, 261P146.

697-42½-New. Legal complaints to submission may be made prior to taking note. 284Pa235, 130A407.

697-42½-New. Validity. A constitutional amendment once sanctioned cannot be attacked for a technical error in adoption, in either collateral, 284Pa 235, 130A407.

697-42¼-New. or direct proceedings. 284Pa235, 130A407.

697-42½-New. An amendment adopted by the people is valid, even though it was submitted at a time contra to that fixed by the constitution. 284Pa235, 130A407.

698-60½-New. A statute may be constitutional as applied to one state of facts and invalid as applied to other states of facts. 256Mass512, 153NE1.

698-62 See also 213AppDiv206, 211NY S306.

699-65½-New. Attorney-general's opinions are not controlling, although of persuasive power. TexCommnA 288SW 409.

699-68 45 Ida406, 262P1048; 327 Ill 433, 158NE743; Ill 173NE145(2dcase); Mo 278SW708; 137 Okl 278, 95P311; 115Tex332, 281SW192. [b] **Public policy cannot be contrary** to express provisions of constitution. TexCommnA 294SW195.

699-71 Cal 292P124; 81CalA1, 253P 151, 154 [quotCJ]; CalA 292P684; 89 Fla271, 103S639; 92Fla601, 109S538; Ind 172NE897; 168La560, 122S850 (presumption as to legality); MoA 294 SW429, 432 [quotCycperBland,J]; 80 Mont515, 261P264 (rule ceases when reason for it ceases); NJ 144A169; 246 NY115, 158NE42; 187Wis180, 204NW 803. [e] **Amendment does not submit more than one subject improperly joined,** because (1) it provides two distinct methods of initiating charter election, one by ordinance and one by initiative petition (310Mo 542, 276SW389), (2) or submits question, whether commission should be chosen to frame a charter, and the names of candidates for membership on the commission at the same election (310Mo 542, 276SW 389). [f] **Construction of similar statute.**–Case upholding constitutionality of similar statute is in point even though attacked upon other grounds. 145Va94, 133SE781. [g] **Supreme court's interpretation is part of constitution** and is binding on suitors seeking enforcement of liabilities created thereby. 115Nebr 848, 215NW140. [h] **Under maxim "noscitur a sociis,"** separate classes of persons referred to together, while distinct, must be considered to have some common quality or relationship. 34Ariz 308, 271P411. [i] **Doctrine of last expression of legislative will is inapplicable** to constitutional amendment proposals. 169La458, 125S447.

700-72 261Mass523, 159NE55; 246NY 115, 158NE42.

700-73 226Ky501, 11SW(2d)133; 118 Tex343, 15SW(2d)589. See also 227Ky 7, 12SW(2d)348.

700-74 29Ariz318, 241P511, 512 [citCJ]; 174Ark298, 296SW729; 222Ky292, 300 SW921; 179Ark79, 14SW(2d)250; Fla 126S308; 165Ga259, 140SE860; 325 Ill 323, 156NE314; 220Ky728, 295SW1055; 125Me529, 133A265; 237Mich338, 211 NW905, 912 [quotCJperSnow,J,dis op]; 175Minn103, 220NW408; 155Miss818, 125S411; 319Mo 497, 5SW(2d)1080; Mo 28SW(2d)363; 74Mont1, 238P316; 213AppDiv206, 211NYS306 (interpreting or construing); 219AppDiv233, 219NYS 189; 137 Okl 95, 278P311; 119 Or101, 248P146; 132 Or175, 285P205; 45SC 196, 143SE31, 68 [citCJ]; Tex 28SW (2d)526; TexCivA 295SW649; 194Wis 397, 216NW509; 187Wis180, 204NW 803; Wis 228NW593. [e] (2) When judicially declared to exist, implied provisions are as effective as express provisions. Fla 126S308.

701-75 218Ala115, 117S673 [app dism US 49SCt176(3dcase)]; 32Ariz515, 260 P435; 34Ariz105, 268P773; 34Ariz308, 271P411; 222Ky292, 300SW921; 179 Ark79, 14SW(2d)250; 200Cal 474, 253 P918; 82Mont502, 267P1113; 116 OhSt 524, 156NE908.

701-76 218Ala115, 117S673 [app dism US 49SCt176(3dcase)]; 32Ariz515, 260 P435; 179Ark79, 14SW(2d)250; 95CalA 414, 273P150; 237Mich338, 211NW905, 912 [quotCJperSnow,J,dis op]; 128 Or 9, 270P764; 187Wis180, 204NW803, 805 [quotCyc]. [b] **Constitutional amendment** should be construed to suppress mischief and advance remedy, former law, mischief, and remedy being kept in mind. 248NY445, 162NE481.

701-77 Ind 164NE489.

701-79 74Mont1, 238P316; 116 OhSt 524, 156NE908.

701-80 See also 8LaA430. [c] (1) 234 Ky846, 29SW(2d)567; 219AppDiv233, 219NYS189. See also 29Ariz318, 241P 511; TexCr 28SW(2d)537(2dcase) (liberal construction applied). (6) Provisions remedial in character are held to require liberal construction. 200Cal474, 253P918. [f] See 218Ala71, 117S626 (perThomas,J,op). [i] **Provisions restricting legislative enactments** must be strictly construed. 220Ala515, 126S162.

702-81 Del 152A45; 234Ky473, 28SW (2d)745; 165La458, 115S655; 175Minn 259, 220NW951; NJ 144A169; 187Wis 180, 204NW803.

702-82 26F(2d)380; 197Cal 504, 241P 874; 187Wis180, 204NW803, 805 [quot Cyc]. See also 167La237, 119S33. [b] (2) Courts should not ignore spirit of constitution. 246NY72, 158NE24. [d] **"Section"** has been construed as meaning part of section of constitution. 187 Wis180, 204NW803.

702-84 282US55, 51SCt49; 92Fla187, 109S228, 231 [citCJ]; 327 Ill 433, 158 NE743; 318Mo 1004, 2SW(2d)796 (constitution may not be changed by opinion of court to avoid hardship); 19 OhA 173; TexCivA 10SW(2d)151.

702-85 92Fla187, 109S228, 231 [citCJ].

703-86 92Fla187, 109S228, 231 [citCJ].

703-87 197Cal 504, 241P874.

703-90 178Ark11, 9SW(2d)797; 246 NY115, 158NE42; Tex 28SW(2d)526; TexCivA 276SW480; TexCivA 295SW 649. [c] **Constitution should not be**

bent to suit law of hour.–213AppDiv206, 211NYS306.

703-91 246NY115, 158NE42.

703-92 TexCommnA 300SW15.

703-94 32Ariz515, 260P435; 197Cal 504, 241P874; 318Mo 285, 300SW274.

703-96 272US365, 47SCt114, 71L ed303, 54ALR1016.

703-97 200Cal 522, 254P896; 200Cal 474, 253P918; 50Nev302, 258P291; NJ 144A169; 22 OhA282, 153NE897; 137 Okl 95, 278P311. [a] (2) "What that intent and meaning is, is to be gathered, if possible, from plain and ordinary meaning of the words used." 213App Div206, 211NYS306.

704-98 164Ga625, 139SE147; 85Mont 466, 279P369; 137 Okl 95, 278P311. [e] **Reasonable interpretation required.**–253NY234, 170NE902.

704-99 Cal 292P124; CalA 284P506; 3Del 15, 129A691 (meaning of constitutional provision cannot be changed by subsequent statute); 164Ga625, 139SE 147; Mass 171NE237; 175Minn103, 220 NW408; 299Pa390, 149A655. But see Del 152A45.

704-99½-New. A word or phrase in the constitution which would make a clause unintelligible may be eliminated. 174Ark298, 296SW729.

704-1 179Ark79, 14SW(2d)250; 125Me 529, 133A265; 137 Okl 95, 278P311.

704-2 34Ariz201, 269P501; 3Del 15, 129A691; 164Ga625, 139SE147; 118 Or 533, 247P812. See also 272US365, 47 SCt114, 71L ed303, 54ALR1016.

705-3½-New. Exception of a particular case in a constitutional provision presupposes that those not included are embraced within the terms of general grant or prohibition. TexCommnA 5 SW(2d)131.

705-3⅓-New. Constitutional amendments will not be construed to be ambiguous and contradictory if such construction is avoidable. TexCommnA 300SW15.

705-3¼-New. The meaning of constitutional guaranties never varies although the scope of their application may expand or contract as conditions demand. 115Nebr525, 213NW835.

705-4 169Ark925, 277SW22; 179Ark 79, 14SW(2d)250; 165Ga259, 140SE 860; 156La925, 101S268; 262Mass603, 160NE439; Mass 165NE900 (amendment); Nebr 231NW772; 213AppDiv 206, 211NYS306; 120 Or444, 250P220; 132 Or175, 285P205; 285Pa39, 131A650; 118Tex534, 18SW(2d)1063; 142Wash 450, 253P805; 155Wash370, 284P788; Wis 228NW593. [d] **Resident as used in constitution means individual or citizen, not corporation.** 215AppDiv15, 213NYS77.

705-5 155Miss818, 125S411.

706-6 230Ky1, 18SW(2d)316; 234Ky 846, 29SW(2d)567; 290Pa174, 138A 679; 299Pa276, 149A176; 299Pa390, 149A655; 300Pa485, 150A889.

706-9½-New. People adopting constitutional provision can give common law phrase or word meaning contrary to ancient usage. Mo 28SW(2d)363.

706-10 145Miss142, 110S240, 242 [cit CJ].

706-13 179Ark79, 14SW(2d)250; CalA 284P506; Del 152A45; TexCommnA 5 SW(2d)131; TexCommnA 10SW(2d) 984.

706-14 Del 152A45; 230Ky1, 18SW (2d)316.

707-27 194Cal 146, 228P19; Cal 292 P124; 93Fla470, 112S253, 256 [citCJ]; 117Kan755, 233P510, 511 [quotCJ]; 149Miss82, 115S121; 121 Okl 285, 249P 959; 122 Okl 211, 253P500, 50ALR1232; 125 Okl 66, 256P704, 52ALR1270; 121 Or538, 256P395; 299Pa390, 149A655; 114Tex535, 273SW799; TexCommnA 5 SW(2d)131; TexCommnA 10SW(2d) 984; 142Wash450, 253P805, 807 [cit CJ].

707-28 117Kan755, 233P510, 511 [quot CJ]. [b] 35Ariz48, 274P634.

707-29 35Ariz48, 274P634; 94Fla1128, 115S537, 538 [citCJ]; 117Kan755, 233 P510, 511 [quotCJ]; 142Wash450, 253 P805.

707-29½-New. Exception of any particular case in a constitutional provision presupposes that all those which are not included in such exception are embraced within the terms of a general grant or prohibition. TexCommnA 10 SW(2d)984.

707-31 84Mont478, 276P958; 50Philippine259.

707-34 172Minn162, 215NW200, 54ALR 333 (construed as written); Nebr 231 NW772.

707-35 272US52, 47SCt21, 71L ed160; 32Ariz515, 260P435, 437 [citCJ]; 181 Ark609, 27SW(2d)102; Ark 32SW(2d) 301; 200Cal 522, 254P896; 197Cal 539, 241P879; 93Fla470, 112S253; 46 Ida 403, 268P26; Ind 164NE489; 152Md 343, 136A754; 175Minn103, 220NW408; 252NY27, 168NE817; 195NC491, 142SE 772; 120 Or444, 250P220; 121 Or538, 256P395; 136SC345, 134SE380; 158 Tenn34, 12SW(2d)532; Tex 28SW(2d) 526; TexCommnA 5SW(2d)131; Tex CommnA 10SW(2d)984; TexCivA 25 SW(2d)259; Utah 263P78; 145Va94, 133SE781.

708-36 Cal 292P124; 310Mo 587, 275 SW932; 93Fla470, 112S253; Ind 164 NE489; 123 Or144, 261P694; 138SC445, 136SE757; 118Tex207, 13SW(2d)353; 145Va94, 133SE781; 134Wash7, 235P37.

708-37 272US52, 47SCt21, 71L ed160; 34Ariz308, 271P411; 121 Or538, 256P 395; 151SC99, 148SE726; TexCommnA 5SW(2d)131.

708-38 33Ariz88, 262P620, 621 [citCJ]; 174Ark298, 296SW729; 197Cal 524, 241 P884; 327 Ill 11, 158NE418; 317Mo 933, 297SW1; 121 Or538, 256P395; 136SC 345, 134SE380; SC 155SE385; Tex CommnA 280SW567.

708-38½-New. In determining the meaning of language employed in a portion of a constitutional amendment, the entire scope and purpose of the amendment as expressed when read as a whole must be looked to and given effect. 197 Cal 504, 241P874. [b] **Amendments to same section** must be construed together. 169La458, 125S447. [c] **In seeking to ascertain real intention of amendment to Constitution,** it is proper to compare language used with other amendments to same section. 151SC137, 148SE719.

709-40 254Mass617, 151NE680.

709-43 77Colo 516, 238P44; 156La331, 100S444; Mont 286P133; Nebr 231NW 772; 145Va94, 133SE781.

709-44 294Pa562, 144A750; 145Va94, 133SE781.

709-45 327 Ill 11, 158NE418, 421 [quot CJentire section].

709-48 174Ark298, 296SW729; Ark 32 SW(2d)301; 221AppDiv36, 222NYS141.

709-50 121 Or538, 256P395; Ark 32 SW(2d)301.

709-50½-New. obscurity requiring construction must not rise out of comparison with a statute. 3Del 15, 129A691.

709-52 179Ark79, 14SW(2d)250; 198 Cal 170, 244P323.

710-54½-New. Constitution and amendments thereto must be construed as one instrument and with reference to purposes for which the constitution was ordained. 123 Or144, 261P694.

710-54⅓-New. An amended constitution must be read as a whole and given the effect as if every part had been adopted at the same time. 128Misc642, 220NYS66.

710-55 281US276, 50SCt253, 74L ed854.

710-57 328 Ill 549, 160NE108.

710-58 Wis 228NW593. [c] **Analogous situations and facts** may be considered in arriving at intention. 220Ky 728, 295SW1055.

710-59 Miss 113S445; 82Mont502, 267 P1113; 53ND54, 205NW9, 12 [citCJ]; 194Wis397, 216NW509.

710-60 Miss 113S445; 148Miss13, 113 S898; 228AppDiv73, 239NYS31 (history cannot be disregarded); 53ND54, 205 NW9, 12 [citCJ]; 194Wis397, 216NW 509. [a] 127Misc295, 216NYS357.

710-61 81Colo 276, 255P610; Miss 113 S445; 82Mont502, 267P1113; 53ND54, 205NW9, 12 [citCJ]; 194Wis397, 216 NW509.

710-62 174Ark298, 296SW729; 179Ark 79, 14SW(2d)250; 200Cal 522, 254P896; Fla 126S308; 254Mass617, 151NE680; 175Minn103, 220NW408; Miss 113S445; 148Miss13, 113S898; 73Mont541, 237P 525; Mont 293P294; 53ND54, 205NW9, 12 [citCJ]; 157Tenn222, 7SW(2d)815, 60ALR408; Wis 228NW593. See also 181Ark533, 26SW(2d)577 (constitutional amendment). [b] 43F(2d)145; 144SC 391, 142SE650; 187Wis180, 204NW803.

711-63 169Ark925, 277SW22; Miss 113 S445; 148Miss13, 113S898; 82Mont502, 267P1113. [d] **Words construed** "Approval and adoption" equivalent to "election" used in prior amendment. 169Ark925, 277SW22.

711-66 Nebr 230NW677.

711-67 Miss 113S445; 148Miss13, 113 S898; Nebr 230NW677; 31NM120, 241 P1027.

711-68 48 Ida618, 284P203; 125Misc 607, 211NYS655; 228AppDiv73, 239 NYS31.

712-73 272US52, 47SCt21, 71L ed160; 23F(2d)519; 230Ky1, 18SW(2d)316; 73Mont541, 237P525; 228AppDiv73, 239 NYS31 (strict interpretation cannot be disregarded); 119 Or101, 248P146; 152 Va616, 148SE789 (contemporaneous construction of constitutional limitations is significant if not decisive). [c] **Practical construction by governors** since 1919 in signing acts more than three days after final adjournment held not entitled to great regard in construing constitutional provision, since period relied on is too short. 109Conn621, 147A126, 64 ALR1453.

714-80 272US52, 47SCt21, 71L ed160; 28F(2d)441; 197Cal 504, 241P874; 340 Ill 363, 172NE757; Nebr 231NW772; 246NY140, 158NE51; 121 Okl 285, 249P 959, 960 [quotCJ]; 118 Or533, 247P812; 120 Or444, 250P220, 225 [citCJ]; 294Pa 25, 143A505; 137SC496, 135SE538; 138 SC445, 136SE757; 148Wash1, 267P770.

714-81 23F(2d)519; 121 Okl 285, 249P 959, 960 [quotCJ].

714-82 121 Okl 285, 249P959, 960 [quot CJ].

714-83 276US394, 48SCt348, 72L ed 624; 272US52, 47SCt21, 71L ed160; NJ 144A169; 143SC120, 141SE265; Tex CommnA 16SW(2d)292.

715-84 272US52, 47SCt21, 71L ed160; 78Mont308, 254P187; 121 Okl 119, 248P 642, 645 [quotCJ].

715-85 121 Okl 119, 248P642, 645 [quot CJ].

715-88 272US52, 47SCt21, 71L ed160; 279US655, 49SCt463, 73L ed894, 64ALR 1434 (as to president's veto); 109Conn 621, 147A126, 64ALR1453 (long settled and established practice is entitled to great regard in determining true construction of constitutional provision); Ind 172NE887; 327 Ill 590, 158NE849; 78Mont308, 254P187; 246NY115, 158 NE42; NJ 144A169; 121 Okl 119, 248 P642; 139 Okl 292, 282P467; 138SC 445, 136SE757; 117Tex489, 8SW(2d) 646; 117Tex516, 8SW(2d)655; Tex CommnA 16SW(2d)292; TexCivA 25 SW(2d)259; 142Wash450, 253P805. See 218Ala71, 117S626 (perThomas,J,op).

715-89 234Ky691, 28SW(2d)980; 145 Miss142, 110S240. See also 272US52, 47SCt21, 71L ed160.

715-90½-New. Construction of the constitution by the court, accepted and acquiesced in for many years, is as much a part of such instrument as if written into it at its origin. 227Ky7, 12SW(2d)348.

716-94 175Minn259, 220NW951. [a] **Violation of constitutional provisions** prescribing method of adopting amendment is not a practical construction binding on courts. 213AppDiv206, 211 NYS306.

716-95 138SC445, 136SE757.

717-1 187Wis384, 204NW589.

717-2 246NY115, 158NE42; 187Wis 384, 204NW589 (holding doctrine inapplicable where no ambiguity).

717-3 246NY115, 158NE42.

717-5 [a] **Acts not amounting to practical construction.**–Wis 228NW593.

717-6 218Ala681, 120S165; Mo 30SW (2d)447 (similar provision in federal Constitution); Tex 26SW(2d)910. But see 246NY115, 158NE42.

717-7 218Ala71, 117S626 (per Thomas, J, op).

717-9 123 Or571, 263P901. [g] **Provisions of constitution** prior to amendment should be looked to. 179Ark79, 14SW(2d)250.

718-12 117Tex489, 8SW(2d)646.

718-13 320Mo 1, 6SW(2d)562; SC 155 SE385. See also 218Ala71, 117S626. [a] (2) Where technical terms were in use prior to constitution, such terms were used in constitution in sense understood at common law. 187Wis384, 204NW589.

718-14 267US87, 45SCt332, 69L ed527, 38ALR131.

718-16½-New. Constitutional provisions are to be interpreted in the light of the common law as it existed at the time of the Revolution. 140Miss184, 105S465, 41ALR1129.

718-16½-New. A constitutional provision prohibiting unreasonable searches and seizures should be construed in conformity with the principles of the common law. 120 Or643, 253P533.

719-23 142Wash450, 253P805; 155 Mis818, 125S411. See also 120 Or444, 250P220; 142Wash450, 253P805.

719-24 142Wash450, 253P805.

719-26 156La331, 100S444; 31NM120, 241P1027; TexCivA 272SW506; Tex CivA 290SW279.

719-27 90Fla563, 107S255 [citCJ].

719-28 122 Okl 268, 254P710.

720-31½-New. The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy. 122 Okl 268, 254P710.

720-32 See also 80Mont515, 261P264.

720-35 208Cal 286, 280P980.

721-45 96Fla740, 119S130; 180Ark19, 20SW(2d)614.

721-48 CalA 274P1028; 89Fla271, 103 S639; 96Fla740, 119S130.

722-56 33Ariz88, 262P620; Cal 287P 343; Cal 291P397; 163La734, 112S667; 166La125, 116S723; 317Mo 671, 296SW 808; 114 OhSt152, 152NE391; 118 OhA 622, 163NE198; 144SC391, 142SE650. [b] **Burden of proving retroactive effect** rests on person asserting it. 33 Ariz88, 262P620. [c] **Statutes passed prior to establishment of republic** are not unconstitutional because not conforming to interpretation of constitutional limitations subsequently adopted. 132Misc449, 230NYS86.

722-62 175Ark860, 3SW(2d)1.

722-63 173Ark1121, 295SW1.

723-71 170Ga773, 154SE264; 137 Wash148, 242P3.

724-95 102CalA413, 283P76 (limiting appeals to certain cases). See also CalA 286P1093 (limiting appeals).

724-99 208Cal 279, 280P982.

724-4 [a] **Constitutional provision relating to appeals applies** though action was commenced prior to adoption of constitutional amendment. CalA 277P 499.

724-6 164La1020, 115S131.

724-6½-New. Repeal by implication should be avoided if possible. 174Ark 298, 296SW729.

724-6½-New. The doctrine of "obsolete law" has never been recognized as applicable to a constitutional provision. TexCivA 10SW(2d)151.

724-8 215Ala458, 111S39, 40 [citCJ]; 223Ky269, 3SW(2d)606, 611 [quotCJ]; 132 Or185, 284P825. [a] **Constitutional amendment creating judicial council plan** displaces prior "pro tempore judge" plan. 102CalA655, 283P345(1st case).

725-9 174Ark298, 296SW729; 170Ark 10, 278SW649; 202Cal 400, 261P476. See also 132 Or185, 284P825 (provisions withdrawn but preserved as existing law until changed by subsequent legislation).

725-9½-New. where amendment is plain, direct, and inclusive, and is manifestly inconsistent and in conflict with earlier provision. 198Cal 170, 244P323.

725-10 174Ark298, 296SW729; 175 Ark76, 298SW1002; 170Ark1160, 282 SW971.

725-11½-New. Mere nominal reënactment of a constitutional provision should not disturb the whole body of statutes in pari materia passed since the original enactment. 174Ark298, 296 SW729, 733 [citCyc].

725-11½-New. In amending a constitutional provision, the omission of a portion of the original provision carries the implication that the omitted part was intended to be ineffective. 50Nev237, 255P1073.

725-17 33Ariz88, 262P620; 159La 1001, 106S544; 226AppDiv331, 235NYS 555 (state finance law).

726-20 202Cal 400, 261P476; Mo 278 SW708.

727-26 Mo 30SW(2d)149; 103NJL711, 139A54; 104NJL173, 139A55; 104NJL 177, 139A56; 123 Or501, 262P946, 947 [quotCJ].

727-26½-New. A constitutional amendment may remove by implication technical objections to constitutional validity of the existing statute. 313Mo 160, 282SW34.

727-29 159La1001, 106S544; 286Pa 129, 133A223.

729-44½-New. A colonial law which had been repealed prior to the adoption of the constitution which continued all existing colonial laws in force as laws of the state is not continued as a law in force. 135Misc796, 238NYS 463.

729-45 Mo 28SW(2d)363, 365 [quotCJ]; 31NM485, 247P828, 831 [quotCJ].

729-46 31NM485, 247P828, 831 [quot CJ].

729-47 236Mich62, 210NW97, 99 [cit CJperBird,CJ]; 31NM485, 247P828, 831 [quotCJ].

729-48 168Ark777, 271SW466; 168Ark 1084, 272SW653; 170Ark464, 280SW 369; Cal 285P311; 160La483, 107S314; 237Mich446, 212NW207; 315Mo 798, 287SW450, 454 [quotCJ]; 320Mo 332, 8SW(2d)887; Mo 28SW(2d)363, 365 [quotCJ]; 31NM485, 247P828, 831 [quotCJ]; 34NM438, 283P902; Okl 292 P345; 123 Or501, 262P946, 947 [citCJ]; 154Tenn679, 290SW399.

730-49 168Ark777, 271SW466; 31NM 485, 247P828, 831 [quotCJ].

730-50 CalA 258P625; 320Mo 120, 6 SW(2d)935; 31NM485, 247P828, 831 [quotCJ].

730-52½-New. A constitutional provision conferring original jurisdiction on the state supreme court in disbarment proceedings involving misconduct has been held self-operating. 160La483, 107 S314.

730-52⅓-New. A constitutional provision establishing a state judicial system held complete and not to depend for efficacy and operation on legislative will. 160La483, 107S314.

730-53 Okl 292P345; 237Mich446, 212 NW207.

730-54 210Ky179, 275SW642; 174 Minn286, 219NW163, 65ALR1407; 299 Pa390, 149A655.

730-55 210Ky179, 275SW642; 315Mo 798, 287SW450, 454 [quotCJ]; 128 Okl 269, 263P635; TexCivA 275SW729, 730 [citCJ]. [b] **Provisions held not self-executing.**-335 Ill 11, 166NE504 (free school system).

730-56 163La1097, 113S573.

730-57 237Mich446, 212NW207.

731-59 But see 143SC120, 141SE265.

731-59½-New. A constitution is not self-enforcing unless special provision is made for that purpose. 319Mo 474, 5SW(2d)50, 57ALR881.

731-63 236Mich62, 210NW97, 99 [cit CJperBird,CJ]; 31NM485, 247P828; 38 OklCr350, 261P978; TexCivA 1SW(2d) 462.

731-64 315Mo 798, 287SW450.

731-66 31NM485, 247P828.

731-68 TexCivA 1SW(2d)462.

731-71 315Mo 798, 287SW450.

732-76 93CalA42, 269P198.

732-80 38 OklCr350, 261P978; 38 Okl Cr379, 262P503.

732-84 320Mo 120, 6SW(2d)935.

733-87 127 Okl 117, 260P32.

733-94 82CalA46, 255P248; 128Misc 642, 220NYS66; 143SC120, 141SE265 (voting bonds by school district); Tex CivA 299SW714.

733-4 Ariz 289P157 (property of soldiers and sailors).

734-7 [a] **Legislature must establish** reasonably framed system for enforcing right. 70CalA695, 234P322. [b] **Legislature cannot enact** scheme of enforcement which will impair constitutional right or unduly hamper its exercise. 70CalA695, 234P322. [c] **Rights of owners of property** must be considered by legislature in framing enforcement statute as well as of those claiming benefit of lien. 70CalA695, 234 P322.

734-8 TexCivA 294SW899.

734-18½-New. Amendment authorizing county courts to issue bonds to secure funds to pay indebtedness is self-executing. 169Ark925, 277SW22.

734-18½-New. Power and method of contracting with public utility for its product or service held self-executing. 27 OhNPNS221.

734-18¼-New. Constitutional provision authorizing municipalities to engage in any business for which municipalities may give franchise is not self-executing. Okl 292P345.

734-19 195Cal 121, 231P1001; 138 Okl 295, 281P126.

734-20 320Mo 120, 6SW(2d)935 (legislative function).

734-27 154Tenn679, 290SW399.

735-34 3Del 344, 138A354, 356 [cit CJ].

735-35 318Mo 1004, 2SW(2d)796; 34 NM438, 283P902.

735-36 128 Okl 269, 263P635.

735-40 78Mont308, 254P187.

735-46½-New. A constitutional provision giving the governor power to remove officers for specified causes is self-executing. 237Mich591, 213NW460, 52 ALR1.

735-46½-New. Constitutional provision that officer appointing relative within fourth degree to render service to state shall forfeit office is self enforcing. Mo 28SW(2d)363.

735-46¼-New. Legislation to put such provision in effect is not required by provision authorizing legislature to provide for removal from office. Mo 28SW (2d)363.

735-50 171Ark576, 286SW873.

736-63 TexCivA 275SW729.

736-81 [a] **Legislation to facilitate operation** is permissible. 204Cal 201, 267 P703.

736-82 328 Ill 377, 159NE811.

737-84½-New. Until the legislature duly provides for special tax rate or rates on intangible property, the organic general rule of uniformity and equality in the rate of taxation of all property, real and personal, including intangible property, remains in force. 96Fla 740, 119S130.

737-86 But see 96Fla740, 119S130.

737-2½-New. A provision that a foreign corporation may be sued in any county where it does business is self-executing. 219Ala581, 122S693.

737-5 33Ariz310, 264P687; 207Cal 79, 277P113, 63ALR861; 331 Ill 622, 163 NE448 (banks); 170Minn360, 212NW 806; 172Minn303, 215NW185; 118Nebr 337, 224NW868; 50SD81, 208NW585.

738-7 32Ariz407, 259P670, 55ALR 1059; 50SD81, 208NW585.

738-9 207Cal 79, 277P113, 63ALR861.

738-9½-New. Legislature cannot vary or diminish such liability in any way where the provision is self-executing. 50SD81, 208NW585.

738-13½-New. A provision relating to the supreme court of appeals has been held to be self-executing. 151Va21, 144 SE469.

738-17 TexCommnA 18SW(2d)1086.

739-18 195Wis366, 218NW440, 57ALR 352.

739-19 CalA 287P364.

739-22 201Cal 486, 258P77 (giving appellate court power to make findings contrary to those of trial court).

739-26 Cal 285P699.

739-27 163La701, 112S655.

740-36 178Ark11, 9SW(2d)797; Cal 245P946; 122 Okl 268, 254P710; 151Va 21, 144SE469 (number of judges of supreme court of appeals); 136Wash25, 239P8. [f] **State supreme court held bound** by constitutional provisions for state boundaries. 136Wash25, 239P8.

740-40 122 Okl 268, 254P710.

740-41 [b] **That general assembly is required to cherish literature and science,** by constitutional provision, does not prevent the enactment of a statute forbidding teaching of evolution theory

in public schools. . 154Tenn105, 289SW 363, 53ALR821.

740-41½-New. It is the duty of the court to follow rules fixed by the constitution. 284Pa235, 130A407.

740-41⅓-New. An amendment authorizing the legislature to provide special rates of taxation on intangible property is not mandatory. 96Fla740, 119S130.

740-42 281US505, 50SCt369, 74L ed999 (state and its agencies); 200Cal585, 254P946, 62ALR1341; 290Pa388, 139A122, 55ALR311 (charitable work of state is controlled by constitution).

740-42½-New. The courts must restrain any acts which are forbidden. 284Pa235, 130A407.

740-43 178Ark11, 9SW(2d)797 (exclusive); 93Fla470, 112S253, 256 [citCJ]; 94Fla1128, 115S537, 538 [citCJ]; Fla 126S308; Fla 126S374; Okl 292P345; Tex 28SW(2d)526; TexCommnA 295 SW1091.

741-58 NJCh 147A220; 137 Okl 95, 278 P311; 151Va21, 144SE469.

741-58½-New. No governmental function may be performed in disregard of fundamental law. 290Pa388, 139A122, 55ALR311.

742-62 A constitutional provision providing for imposition of levee taxes in addition to levee taxes heretofore levied or authorized by law recognizes the validity of an existing law imposing a levee tax. 154Miss317, 122S366.

742-63 29Ariz419, 242P658.

743-77 202 Iowa1019, 210NW139.

743-77½-New. Regardless of any state or federal enforcement law, the United States constitution must be enforced in states. 126Misc574, 214NYS187.

743-77⅓-New. Federal constitution should be strictly construed, while a state constitution should be liberally construed. TexCivA 295SW653.

743-78 4F(2d)915; 131Misc411, 227 NYS142; TexCivA 5SW(2d)561.

743-79 272US581, 47SCt210, 71L ed422, 49ALR575; 277US218, 48SCt451, 72 L ed857, 56ALR583; 28F(2d)846.

743-80 126Misc574, 214NYS187; Wyo 292P2. [c] **Judges, legislators, and executives,** both state and federal are bound by oath to support it. 126Misc 574, 214NYS187.

743-82½-New. Law and court made rules of expediency must not be placed above the constitution. 44 Ida43, 254P 788, 52ALR463.

743-85 120 Or444, 250P220.

744-87 4F(2d)915; 29F(2d)932.

744-88 288Pa230, 135A759.

744-93 268US5, 45SCt446, 69L ed819; 30Ariz258, 246P548.

744-94 79Cal A605, 250P578; 170Ga773, 154SE264; 125Kan88, 262P1032; 316 Mo 9, 289SW838; 198NC45, 150SE615; 54ND753, 210NW525; 153SC106, 149 SE760; 155Tenn364, 293SW757, 758 [citCJ]. [c] 77Mont8, 249P574, 52ALR 454; NJ 135A685; 37 OklCr402, 258P 814. [d] 17F(2d)143; 79CalA605, 250 P578; 44 Ida1, 262P863; 202 Iowa640, 210NW784; 125Kan88, 262P1032; 163 La673, 112S525; 321Mo 58, 12SW(2d) 742; 77Mont8, 249P574, 52ALR454; NJ 135A685; 49ND248, 191NW485; 54ND753, 210NW525; 37 OklCr402, 258 P814; 34Wyo 175, 242P411. [e] 202 Iowa640, 210NW784; 167La92, 118S 703; 34Wyo 175, 242P411. [g] **Seventh amendment.**-52SD51, 216NW600.

745-97 [a] (2) Not intended to abrogate common-law nor create new rights of person and property. 212Ala511, 103S477.

745-98½-New. Virginia Cedar Rust Statute is not violative of the federal constitution. 146Va175, 135SE813.

745-1 323 Ill 427, 154NE198; 223Ky 269, 3SW(2d)606; 75Mont240, 243P 1073; 80Mont1, 257P1029; 53ND140, 205NW17; 124 Or112, 258P193, 60ALR 528; 132 Or572, 287P74; TexCivA 20 SW(2d)148; 146Va1, 135SE693.

745-2 94CalA382, 271P568; 91Fla824, 108S679; 92Fla515, 109S442, 445; 320 Ill 536, 151NE581; 321 Ill 466, 152NE 141; 323 Ill 427, 154NE198; 332 Ill 586, 164NE199; 335 Ill 11, 166NE504 (requirement that legislature provide free school system); 223Ky269, 3SW(2d) 606; 228Ky737, 15SW(2d)531; 234Ky 473, 28SW(2d)745; 242Mich95, 219NW 69; 319Mo497, 5SW(2d)1080; 75Mont 240, 243P1073; 80Mont1, 257P1029; 82 Mont126, 266P387; Mont 293P294; Nebr 231NW772; 196NC284, 145SE563; 53ND140, 205NW17; 124 Or112, 258P 193, 60ALR528; 132 Or175, 285P205; 132 Or572, 287P74; 161Tenn236, 30SW (2d)268; TexCivA 5SW(2d)561; Tex CivA 20SW(2d)148; 144Va65, 131SE 334 (state constitution is restraining instrument only); 146Va1, 135SE693; 142Wash450, 253P805. [c] **Entire legislative power of state is vested in the people** acting either by way of initiative and referendum or through legislature, except as expressly prohibited by constitution. 79CalA780, 251P324.

746-3 200 Ind716, 164NE408, 63ALR 218; 124 Or112, 258P193, 60ALR528.

746-5 215Ala458, 111S39; 216Ala136, 112S317; 34Ariz201, 269P501; 35Ariz 48, 274P634; 91Fla824, 108S679; 97Fla 710, 122S225 (statute held not invasion of rights retained by people); 170Ga 800, 154SE388(2dcase); 320 Ill 536, 151 NE581; 323 Ill 427, 154NE198; 340 Ill 188, 172NE3; 199 Ind78, 155NE198; 215Ky238, 284SW1054; 225Ky641, 9 SW(2d)1006; 227Ky7, 12SW(2d)348; 168La958, 123S639, 67ALR1447(2dcase) (constitutional amendment providing for adoption and promulgation of Code of Criminal Procedure does not authorize unconstitutional amendment); 155 Md252, 141A714; 242Mich95, 219NW69; 249Mich673, 229NW618; 141Miss701, 105S541; 144Miss125, 109S129; 48Nev 397, 232P1078; 251NY467, 167NE705; 53ND140, 205NW17; OhA 173NE22; 120 Or244, 251P895; 53ND609, 222NW 583; 157Tenn222, 7SW(2d)815, 60ALR 408; Tenn 30SW(2d)274; TexCivA 25 SW(2d)259; 144Va65, 131SE334 (legislative power unlimited except as restrained by state or federal constitution); 152Va616, 148SE789; 142Wash 450, 253P805. But see 246Mich255, 223 NW359.

746-5 [a] (4) Legislature has plenary power in matter of appropriations, except as restricted by constitution. 152 SC455, 150SE269. (5) Power of legislature is plenary in absence of any constitutional limitation. 153SC106, 149SE 760.

748-6 92Fla515, 109S442; 29 OhA154, 163NE221.

748-6½-New. State constitution will be liberally construed. TexCivA 295SW 653.

748-8 91Fla824, 108S679; 228Ky737, 15SW(2d)531; Nebr 231NW772.

748-9 3Del 15, 129A691; 93Fla470, 112 S253; Fla 126S308; 160Ga657, 129SE 38; Ind 164NE489; Me 137A50; 175 Minn259, 220NW951; 315Mo 823, 290 SW416; 318Mo 1004, 2SW(2d)796; 245 NY500, 157NE834; 213AppDiv206, 211 NYS306 (in case of conflict fundamental law must govern); 131Misc411, 227NYS 142; 194NC781, 140SE748; 128 Okl 269, 263P635; 116 Or264, 240P418; 124 Or 112, 258P193, 60ALR528; 124 Or105, 258P204; 128 Or292, 274P118; Or 289P 494; SD 226NW280; SD 228NW240. [e] **Constitution is written into every legislative act,** and wholly supposititious conditions neither expressed, implied, nor capable of enforcement cannot be manufactured for purpose of defeating valid excise tax or rendering valid act unconstitutional. 85Colo 289, 275P896; 245Mich558, 222NW752.

748-10 83Colo 43, 262P907; 160Ga657, 129SE38; Me 137A50; 315Mo 823, 290 SW416; 124 Or112, 258P193, 60ALR528, 199Wis85, 225NW873.

748-11 160Ga657, 129SE38.

749-13 TexCivA 291SW645.

749-14 See also 136Misc307, 240NYS 784.

749-15 220Ala515, 126S162; 174Ark 214, 295SW9; 225Ky112, 7SW(2d)839; 235Ky173, 30SW(2d)879; Me 137A50; 315Mo 823, 290SW416; 122 Okl 211, 253 P500, 50ALR1232; 131 Or168, 281P182 (2dcase); 159Tenn573, 20SW(2d)1042; TexCivA 291SW641; 146Va1, 135SE693; 197Wis163, 221NW856. See also 167La 237, 119S33.

749-17 315Mo 823, 290SW416.

749-18½-New. Validity of a statute must be determined by what may be done under it, rather than by that actually done. 20F(2d)416.

749-18⅓-New. When the constitution authorizes the legislature to act, the authority conferred is subject to other constitutional provisions not inconsistent with the provision granting authority. 51SD432, 214NW838.

749-18¼-New. An enactment valid in its general scheme may be unconstitutional in its specific application. 31 F(2d)308.

749-18⅕-New. The question of the constitutionality of a law claimed to be invalid must be determined by its operative effect. 32 OhA472, 168NE227.

749-18⅙-New. General acquiescence in a custom which may not have resulted in harmful violation of the constitution does not preclude a contest when substantial rights are insisted on. 252NY 27, 168NE817.

749-18⅛-New. The constitutionality of legislative acts does not depend upon events which transpire after the adoption of such acts. 50RI 288, 146A777, 66 ALR1553.

749-18⅓-New. The preamble of a constitution declaring its purpose cannot be violated by an act not in contravention of some specific provision. SD 229 NW294.

749-18⅙-New. Statute held not unconstitutional because not covering every emergency. CalA 291P845.

749-22 101Vt391, 143A677.

749-23 176Ark722, 3SW(2d)1000; 92 Fla515, 109S442; 225Ky112, 7SW(2d) 839; 235Ky24, 29SW(2d)619; Me 137A 50; 131Misc411, 227NYS142; 122 Okl 268, 254P710; 156SC299, 152SE865. [f] **Test is what might be done under terms of statute,** not what was done in particular case. 133Misc706, 233NYS292.

749-23½-New. The constitutionality of a statute ought to be tested not only by what is, 125Misc801, 212NYS1.

749-23⅓-New. but also by what may be done under it. 125Misc801, 212NYS 1.

750-24 NJCh 147A220 (senate and general assembly are subject to constitutional limitations and laws as are other bodies, officers, and tribunals). [f] **Where powers and duties of governmental agency are fixed by constitution,** legislature may not add to, or take away from, such powers or duties or substantially alter them. 117Tex291, 3SW(2d) 794.

750-25 251NY467, 167NE705; 146Va1, 135SE693.

750-29 34Ariz201, 269P501.

751-32 117TexCommnA159, 299SW221.

751-33 245NY500, 157NE834.

751-41 31 OhA229, 166NE916 (natural justice or public policy).

752-45 180Ark770, 22SW(2d)993, 68 ALR1018.

752-46 [a] 142 Okl 38, 285P92.

752-47 174Ark214, 295SW9; 228Ky 410, 15SW(2d)256; Nebr 231NW772; 131Misc411, 227NYS142. But see 142 Okl38, 285P92.

753-48 279US620, 49SCt432, 73L ed874, 65ALR866.

753-49 [a] (2) SD 226NW561. [d] **State statute cannot declare public policy** which is contrary to constitution. 46 Ida403, 268P26.

753-50 81CalA590, 254P648, 658 [quot CJ]; 92Fla187, 109S228; 241NY405, 150NE497, 43ALR909; 124 Or112, 258P 193, 60ALR528; 124 Or105, 258P204. [c] 128 Or292, 274P118. [e] (4) Such statutes must be obeyed however impolitic, but statutes violating constitutional restrictions are invalid though politically wise. 252NY437, 169NE637.

754-55 92Fla187, 109S228, 230 [citCJ perBrown,J].

754-56 92Fla187, 109S228, 230 [citCJ]; 213Ky445, 281SW472, 475 [citCJ].

759-54 See also PrEdwIsl [1929] 1 DomLR671. [b] **Act held ultra vires.**-[1925] 3DomLR1.

760-57 273US45, 47SCt298, 71L ed530; 274US603, 47SCt675, 71L ed1228, 53 ALR1210; 275US440, 48SCt174, 72L ed 357; 8F(2d)635; 17F(2d)329; 36F(2d) 967; 41F(2d)38; 218Ala149, 117S473;

21AlaA295, 107S727; Ariz 289P515; Cal 291P405; 85CalA607, 259P976; CalA 288P33; 86Colo 545, 283P534; 92 Fla563, 109S473; 94Fla96, 113S677; 95 Fla901, 116S870; 163GaS49, 137SE264; 48 Ida618, 284P203; 318 Ill 198, 149NE 294; 328 Ill 262, 159NE194; 339 Ill 463, 171NE550; 201 Iowa1050, 205NW543; 204 Iowa1254, 215NW261; 206 Iowa408, 220NW357; 121Kan72, 74, 250P1056 [quotCJ]; 208Ky643, 271SW695; 208 Ky661, 271SW1066, 1068 [quotCJ]; 217 Ky205, 289SW204; 235Ky540, 31SW (2d)932; 158La175, 103S730; 159La 527, 105S608; 161La296, 108S543; 162 La165, 110S188; 162La781, 111S162; 162La956, 111S341; 164La405, 114S76, 55ALR309; 165La511, 115S733; 168La 1033, 123S665; 169La766, 126S54; 8 LaA373; Mass 169NE552; 235Mich133, 209NW51; 168Minn312, 210NW34; 169 Minn145, 210NW635; 174Minn305, 219 NW172, 175 [citCJ]; 176Minn472, 223 NW912; 177Minn146, 225NW86; 140 Miss19, 104S465; 315Mo 713, 290SW 135, 141 [citCJ]; 315Mo 713, 290SW135, 141 [citCJ]; Mo 18SW(2d)896; Mo 19 SW(2d)1049; Mo 24SW(2d)108; 75 Mont328, 243P811; 77Mont66, 249P666; 78Mont156, 252P805; 84Mont225, 274 P1062; 84Mont478, 276P958; 31NM576, 249P242; 31NM641, 249P1074, 58ALR 573; 33NM641, 275P371; 34NM1, 275 P765; 220AppDiv71, 220NYS656; 220 AppDiv549, 222NYS96; 219AppDiv233, 219NYS189; 130Misc124, 222NYS676; 192NC588, 135SE529; 196NC284, 145 SE563; 50ND184, 195NW292; 51ND 792, 200NW898; 52ND26, 202NW391; 52ND533, 204NW356; 53ND683, 208 NW968, 45ALR1337; 56ND468, 217NW 841; 58ND776, 228NW192; ND 229NW 105; 124 Okl 7, 253P66; 119 Or141, 248 P358, 359 [citCJ]; 124 Or112, 258P193, 60ALR528; 288Pa81, 135A651; 292Pa 127, 140A858; 48RI 265, 137A222, 223 [citCJ]; 136SC345, 134SE380; 52SD 516, 219NW122; 152Tenn55, 274SW 538; 155Tenn70, 290SW608; 161Tenn 50, 29SW(2d)662; TexCommnA 267SW 697; 100Vt140, 135A705; 143Va697, 129SE731; 143Wash525, 255P955. See also 48Nev120, 227P1020 (ordinance). [c] (3) When a state agency or department is sued, it may question constitutionality of statute under which suit is filed. Fla 126S374. [f] **Political subdivision of state as such may not invoke** constitutional inhibition against legislative impairment of vested rights. Iowa 222NW378.

762-58 318 Ill 198, 149NE294.

762-60 274US603, 47SCt675, 71L ed 1228, 53ALR1210; 17F(2d)329; 29F(2d) 932; Ariz 289P515; 85Colo 125, 274P 831; 86Colo 545, 283P534; 163Ga849, 137SE264; 333 Ill 158, 164NE173, 61 ALR649; 204 Iowa1254, 215NW261; 228 Ky453, 15SW(2d)280; 162La956, 111S 341; 167La566, 119S875; 164Minn81, 204NW923; Mo 24SW(2d)108; 78Mont 156, 252P805; 219AppDiv233, 219NYS 189; 129 Or620, 278P572; 295Pa571, 145A797, 63ALR1086 (executors and legatees); 48RI 265, 137A222; 136SC 345, 134SE380; 49SD360, 207NW164; 161Tenn50, 29SW(2d)662; 101Vt391, 143A677; 37Wyo 488, 263P621, 623 [cit CJ]. [d] **Complainant cannot attack portion of statute** not affecting him unless its invalidity renders entire act unconstitutional or renders inoperative other applicable portion. 97Fla749, 122 S239. [e] **Sufficiency of notice provided for.**—One who was given ample notice cannot attack statute as not providing for reasonable notice. 84Mont478, 276 P958.

762-61 125Me319, 133A738; 75Mont 240, 243P1073.

762-62 273US510, 47SCt437, 71L ed 749, 50ALR1243; 274US603, 47SCt675, 71L ed1228, 53ALR1210; 17F(2d)329; 27F(2d)153; 40F(2d)351; 41F(2d)799; 92Fla563, 109S473; Ind 166NE270; 201 Iowa1050, 205NW543; Iowa 222NW378; 161La296, 108S543; 168Minn312, 210 NW34; Minn 232NW737; 84Mont225, 274P1062; 85Mont329, 278P514; 224 AppDiv127, 230NYS28 [aff NY 164NE 602(1stcase)]; 52ND533, 204NW356; 124 Okl 7, 253P66; 124 Or112, 258P193, 60ALR528; 292Pa127, 140A858; 48RI 265, 137A222; 136SC345, 134SE380; 160Tenn619, 28SW(2d)351; 143Va697, 129SE731. [a] **One who repudiates statute used to his present disadvantage** may attack it despite previous attempt to comply. 39F(2d)145.

762-63 274US603, 47SCt675, 71L ed 1228, 53ALR1210; 275US440, 48SCt174, 72L ed357; 280US111, 50SCt49, 74L ed 217, 64ALR1430; 17F(2d)329; 34F(2d) 808; 42F(2d)103; 92Fla563, 109S473; 201 Iowa1050, 205NW543; 121Kan72, 250P1056; 162La956, 111S341; 164 Minn81, 204NW923; 171Minn191, 213 NW904, 54ALR495; 317Mo 403, 296SW 381; 196NC284, 145SE563; 48RI 265, 137A222; 155Tenn70, 290SW608; 37 Wyo 488, 263P621, 623 [citCJ]. [k] **Chairman of democratic central committee of one county** is not entitled to attack validity of statute relating to nomination of circuit judges in other counties. 323 Ill 561, 154NE474. [l] **County not affected** by statute cannot challenge constitutionality of law. 293Pa398, 143 A127.

762-63½-New. or the public in general, 80CalA629, 252P746.

763-64 17F(2d)329; 121Kan72, 250P 1056; 162La202, 110S201; 159La527, 105S608 (holding that city chartered under general law cannot attack validity of local assessment statute construed to apply only to cities and towns operating under legislative charter); 151Wash 654, 276P878; 37Wyo 488, 263P621, 623 [citCJ].

763-65 202 Iowa1019, 210NW139; 204 Iowa30, 214NW682; 168Minn312, 210 NW34.

763-66½-New. A statute will not be declared unconstitutional on the ground that persons complaining may lose should the statute subsequently be declared unconstitutional. 295Pa571, 145A797, 63ALR1086.

763-67 273US45, 47SCt298, 71L ed530; 202 Iowa1019, 210NW139; 100Vt140, 135A705.

763-68 CalA 291P233; 327 Ill 387, 158 NE703, 55ALR303 (surveyor claiming regulation invalid); 245Mich411, 222 NW763 (school district); 85Mont329, 278P514; 31NM576, 249P242; 124 Or 112, 258P193, 60ALR528; 288Pa227, 135A630; 54SD429, 223NW342 (school district); 152Tenn306, 278SW59; 156 Tenn278, 300SW565; TexCommnA 267 SW697; Vt 151A650. [d] **Chairman of democratic county committee held to have sufficient interest** to test constitutionality of statute for nomination of judges in own county. 323 Ill 561, 154 NE474. [e] **County court** may challenge validity of act regulating procedure. TexCivA 27SW(2d)340.

764-70 [a] **Corporation cannot attack order** affecting only constitutional rights of its employees. TexCivA 282SW879.

764-71 78CalA759, 248P1068, 1075 [quotCJ]; 94Fla96, 113S677; 163Ga849, 137SE264; 160La902, 107S616; 161La 988, 109S787; 171Minn191, 213NW904, 54ALR495. See also 48Nev120, 227P 1020 (ordinance). [a] **One convicted of taking excessive interest** in violation of Usury Act cannot question constitutionality of other portions of statute. 78 CalA759, 248P1068.

764-72 169La167, 124S769; 171Minn 191, 213NW904, 54ALR495.

764-72½-New. The status of plaintiff motor vehicle operators is not such as entitles them to test the validity of the statute imposing a tax on motor fuel in an injunction suit, it being a matter of public, and not individual, concern. 280US78, 50SCt63, 74L ed175.

764-75 42F(2d)127.

764-78 31NM641, 249P1074, 58ALR573.

764-82 176Ark139, 28SW(2d)44; 87Colo 275, 288P408; 48 Ida618, 284P203; NC 154SE93(1stcase); 153Tenn498, 284SW 61. [b] **Licensees under regulatory statute** cannot attack constitutionality of statute disposing of resulting funds. 51 ND792, 200NW898.

764-83 48 Ida618, 284P203; 170La76, 127S370.

764-84 97Fla749, 122S239.

765-88 119 Or141, 248P358. [a] See also 119 Or141, 248P358.

765-89 111Conn634, 151A171; Minn 232NW737; 78Mont156, 252P805; 135 SC348, 132SE673; 153SC106, 149SE760. See also 211Ky328, 277SW485.

765-90 140Miss676, 106S273; 156SC 299, 152SE865 (county treasurer).

765-91 78Mont156, 252P805; 34NM1, 275P765; 119 Or141, 248P358, 359 [quot CJ]; 154Tenn462, 285SW587, 48ALR 1378.

765-92 318Mo 870, 2SW(2d)713 (city authorities may question constitutionality of law by refusing to obey it); 119 Or141, 248P358, 359 [quotCJ].

765-94 208Ky661, 271SW1066. [a] **State bar board** cannot attack constitutionality of statute disposing of funds in excess of what is necessary to carry out regulatory provisions thereof. 51 ND792, 200NW898.

766-98½-New. A sheriff cannot question the validity of criminal provisions of a statute where his assistance has not been invoked to enforce such provisions. 119 Or141, 248P358.

766-98½-New. A tax collector can question the validity of a statute imposing a levee tax on railroads on the ground of unlawful discrimination, where railroads discriminated against would gain nothing by having the statute held void because another statute would be in force. 154Miss317, 122S366.

766-99 Iowa 230NW540.

766-2 273US510, 47SCt437, 71L ed749, 50ALR1243; Ill 173NE355; 161La296, 108S543; 169La215, 124S832; 169La 995, 126S504 (where affidavit quashed); Mo 26SW(2d)937; 77Mont66, 249P666; 290Pa573, 139A374; 12PortoRicoFed1; 48RI 265, 137A222. [a] **Violation of constitutional rights not established.**—Mass 169NE806.

766-4 204 Iowa977, 216NW271; 158La 203, 103S740; 292Pa395, 141A289. [h] **Statute to effect that, upon trial of indictment for larceny,** jury may return verdict of embezzlement held unconstitutional. 27Hawaii253.

766-5 161La296, 108S543; 157Tenn 522, 11SW(2d)893.

767-7 292Pa395, 141A289; 98Vt466, 129A306 (requiring accused to accept or peremptory challenge each juror as drawn did not deny right given by constitution).

767-8 168La761, 123S317, 69ALR574.

767-10 TexCommnA 3SW(2d)420.

767-13 17F(2d)71; 160La72, 106S698.

767-17 196NC284, 145SE563.

768-20 271US50, 46SCt375, 70L ed827, 45ALR1495; 121Kan72, 74, 250P1056 [quotCJ]; Tenn 30SW(2d)243. But see 76CalA445, 244P946. [c] (3) Corporation, which has issued all its capital stock, cannot complain that taxing statute discriminates against corporations which have not done so. 271US50, 46 SCt375, 70L ed827, 45ALR1495. [g] **One not showing he is nonresident cannot complain** that ordinance discriminates against nonresidents. 121Kan72, 250P1056.

769-25 121Kan72, 250P1056.

769-27 Ala 129S477; 81Colo 25, 253P 386, 50ALR1263.

769-28 76CalA445, 244P946; 100Vt193, 136A26.

769-29 17F(2d)329; 26F(2d)241; 30 F(2d)700; 200Cal 550, 254P542; 204Cal 286, 268P347; Conn 152A297; 95Fla 984, 117S507(2dcase); 27Hawaii65; 41 Ida747, 242P314, 243P654; 318 Ill 494, 149NE478; 336 Ill 472, 168NE401; Mass 172NE232; 319Mo 316, 4SW(2d)467 (subsequent need for sanitation was conceded); Mo 31SW(2d)1026 (raised at earliest possible moment); 117Nebr 511, 221NW438; NH 146A511; 246NY 46, 157NE925 (workmen's compensation); 131Misc411, 227NYS142; 130 Misc124, 222NYS676; 224AppDiv243, 229NYS644; 136Misc696, 240NYS574; 35 OhA311, 172NE401; 49SD360, 207 NW164; TexCivA 298SW462; TexCivA 21SW(2d)31. [b] **Applicant for certificate of convenience and necessity** to operate motor transportation service beyond state line by disclaiming desire for certificate to render exclusively interstate transportation service cannot complain that denial of certificate for interstate transportation service interferes with interstate commerce. 113 Oh

St604, 149NE865. [c] **Insurer voluntarily** issuing policy containing statutory provision cannot question its constitutionality. Mass 166NE761. [d] **Party may stipulate away** constitutional rights. 134Misc228, 235NYS173.

769–30 17F(2d)329; 204Cal 286, 268P 347 (estoppel to rely on exemption).

769–31 Conn 152A297; Mass 168NE78; NJ 152A6. See also 30F(2d)144.

769–32 267US307, 45SCt324, 69L ed 623, 38ALR286; 73CalA268, 238P787; 110Conn80, 147A300; 335 Ill 352, 167 NE101, 68ALR350 (registering title); 126Me532, 140A194 (licensee cannot question validity of authorizing license in proceeding relative to revocation of license); 299Pa402, 149A639. See also 278US515, 49SCt235, 73L ed483. [a] **Rule held inapplicable.**–327 Ill 387, 158 NE703, 55ALR303.

769–33 278US300, 49SCt150; 73L ed 390; 41F(2d)799; 200Cal 550, 254P542; 202Cal 299, 260P789; 73CalA268, 238P 787; Conn 152A297; 237Mich38, 211 NW115; 238Mich580, 214NW208; 116 Nebr33, 215NW559; 58ND776, 228NW 192. But see 202Cal 717, 262P724. [e] **Employer electing to accept** Workmen's Compensation Act is estopped to assert unconstitutionality of section affecting right of review of findings. 271US208, 46SCt491, 70L ed908. [f] **Employer electing to accept provisions of Workmen's Compensation Act** may not assert that act denied due process and equal protection of law. 27F(2d)103.

769–34 267US307, 45SCt324; 69L ed 623, 38ALR286; 278US515, 49SCt235, 73L ed483; 41F(2d)799; 73CalA268, 238P787; 41 Ida747, 242P314, 243P 654; 143Miss821, 107S659; 315Mo 1267, 288SW50; 321Mo 275, 10SW(2d)524; 116Nebr33, 215NW559; 116Nebr282, 216NW815; 155Tenn34, 290SW18.

770–36 267US307, 45SCt324, 69L ed623, 38ALR 286 (one applying for certificate of public convenience for operation of bus under statute and denied certificate may attack constitutionality of statute); Ida 286P353 (ordinance); SD 225NW228. See also 153Tenn469, 284SW372.

770–38 Ida 286P353 (ordinance). See also Ga155SE484. [a] **Parties cannot by consent or waiver** remove from constitution any inhibition therein contained. 127Misc295, 216NYS357.

770–41½–New. Waiver of citizen's constitutional right must appear by clear and positive testimony. 36Wyo 368, 255 P788.

770–41⅓–New. Where a city and public utility are prohibited by the constitution, as construed by state courts, from contracting for irrevocable rates, they cannot avoid the inhibition by putting their agreement into form of a consent decree. 30F(2d)895.

770–42 27Hawaii65; 189NC549, 127SE 629.

770–44½–New. Right to reputation, like right to life, liberty, and pursuit of happiness, is inalienable and cannot be waived. 130Misc249, 223NYS796.

770–52½–New. An officer is not estopped from challenging constitutionality of a statute restoring fee basis of compensation by collecting and retaining fees fixed thereunder which amounted to less compensation than he was entitled to at the lawful rate. 143Miss821, 107 S659.

770–53½–New. Public officers may not waive constitutional rights. 194Wis464, 215NW902.

770–53⅓–New. The court should not permit waiver of constitutional rights by public officers but should raise the question itself where necessary to proper disposition of a case. 194Wis464, 215 NW902.

770–53¼–New. A fish and game commission is not estopped to attack the validity of a statute relative to the use of sardines in reduction plants in a proceeding against it to compel performance of duties under the act by reason of its previous order recognizing the validity of the act in the absence of showing that injury or injustice has resulted to petitioner by reason thereof. 76CalA445, 244P946.

770–53⅙–New. A candidate elected to the office of municipal judge by participating in a secondary election at which he is defeated is not estopped to attack the validity of the statute under which the secondary election was held. 51SD432, 214NW838.

771–56 98Vt508, 129A303.

771–57 27OhNPNS533.

771–58½–New. Corporation held not estopped by statute to claim title by adverse possession. 143Va697, 129SE 731.

771–61 49SD360, 207NW164. See also 38F(2d)52.

771–67½–New. A de facto road district which issued bonds and collected taxes in connection therewith was estopped. 27F(2d)153.

771–68 149Va200, 141SE253. [a] **By seeking and obtaining permission to do business in state,** corporation is not estopped to object to enforcement of statute in conflict with federal constitution. 277US389, 48SCt553, 72L ed927.

771–69 272US494, 47SCt179, 71L ed372, 49ALR713; 274US490, 47SCt678, 71L ed 1165.

771–71 Ala 128S158.

771–74 251NY417, 167NE519(2dcase).

772–92 TexCivA 298SW462.

773–3 198 Ind429, 153NE890, 893 [citCJ]; 131 Or332, 283P12. But see 134Misc529, 236NYS122.

773–4 198 Ind429, 153NE890, 893 [citCJ].

773–5 41 Ida747, 242P314, 316, 243P 654 [citCJ].

773–6 41 Ida747, 242P314, 316, 243P 654[citCJ]; 198 Ind429, 153NE890, 893 [citCJ]; Mass 168NE78. [a] 111Conn 72, 149A231.

773–7 198 Ind429, 153NE890, 893 [citC J].

773–9 318 Ill198, 149NE294; 174Minn 520, 219NW914.

774–14 318 Ill198, 149NE294.

774–18 But see 336 Ill 472, 168NE401.

774–29 131Misc411, 227NYS142.

775–31 164La813, 114S696; 131Misc 411, 227NYS142. See also 28F(2d)898. [h] **Sufficiency of indictment.**–27Hawaii 65. [i] **Condition on which stay of jail sentence** is granted cannot be attacked as invalid after stay is accepted. 82NH459, 135A530. [j] **Constitutional provision for benefit of prisoner** may be waived. 244NY451, 155NE737.

775–36½–New. The right to be tried by a disinterested judge is not waived by failure to assert it, where defendant could not have done so effectively. 20 F(2d)912.

775–42 Conn 151A518; 92Fla187, 109S 228; Fla 128S613; 165Ga447, 141SE 306; 333 Ill 355, 164NE699(2dcase), 61 ALR561; 199 Ind95, 155NE465, 50ALR 1518; 316Mo 709, 294SW88; 321Mo 158, 12SW(2d)742; 124 Or112, 258P193, 60 ALR528; 47RI 378, 133A618; 157Tenn 222, 7SW(2d)815, 316 [citCJ], 60ALR 408; TexCivA 286SW501; 193Wis311, 214NW369, 53ALR463. [b] **That legislature has permitted direct attack in supreme court** on both laws and joint resolutions does not make such method of attack exclusive remedy, unless, notwithstanding statute, no attack could be made. NJCh 144A546.

776–43 91Fla824, 108S679; Fla 129S 904(2dcase); 225Ky294, 8SW(2d)428; 156Md196, 143A800; Mass 169NE552; 140Miss184, 105S465, 41ALR1129; 310 Mo 620, 276SW20; 86Mont114, 284P 134; 31NM220, 243P333; 52ND26, 202 NW391; 37 OklACR650; 295Pa311, 145 A295; 66Utah404, 243P107. But see 23 F(2d)997. [a] **State or federal court.**–27F(2d)893. [b] **Court's duty extends to evasions or indirections** practiced by legislature and is not limited to direct violations of constitution. TexCivA 23 SW(2d)431.

776–44 But see Mo 28SW(2d)1026.

776–44½–New. A stipulation of counsel that the court may pass on the constitutionality of a statute, not harmful to appellants, does not authorize it to do so. 295Pa571, 145A797, 63ALR1086.

777–51 [b] **It is not for court to decide whether law is needed or whether it is wise.**–It cannot declare law invalid except when it is clearly in conflict with constitution. 141Miss701, 105S541.

777–55 157Tenn222, 7SW(2d)815, 60 ALR408. See also 254NY16, 171NE890.

777–56½–New. In a reasonably plain case, every officer must support the constitution. 193Wis311, 214NW369, 53 ALR463.

777–56⅓–New. When acts have been long treated by court as constitutional, it may refuse further to consider question of validity. 160Tenn403, 23SW(2d) 897 (where important rights are thereby fixed).

778–75 [1925] 3DomLR1 (declaring Dominion Act attempting to regulate local occupations and works ultra vires).

779–78 TexCivA 286SW501.

779–80 127Misc141, 215NYS412.

779–81 129Misc94, 221NYS20.

779–84 But see 38F(2d)897.

779–88 12PortoRicoFed329. But see 280US78, 50SCt63, 74L ed175.

780–95 NH 150A551(2dcase); 193NC 496, 137SE669.

780–98 272US365, 47SCt114, 71L ed303, 54ALR1016; 274US603, 47SCt675, 71 L ed1228, 53ALR1210; 7F(2d)397; 7 F(2d)715; 26F(2d)469 (administrative remedies must be exhausted); 34F(2d) 185 (contention that statute authorizing insurance rate reduction is invalid in not requiring notice and hearing will not be considered where both are accorded in instant case); 34F(2d)533; 21AlaA295, 107S727; 30Ariz218, 245P 677, 46ALR828; 176Ark834, 4SW(2d) 520; 78CalA223, 248P716; 78Colo 361, 242P72; 84Colo 300, 269P886; 85Colo 289, 275P896; 87Colo 316, 287P849; 162Ga206, 132SE763; 162Ga208, 132SE 764; 163Ga784, 137SE24; 168Ga659, 148SE735; Ida 288P424; 319 Ill 437, 150NE435; 326 Ill 405, 158NE162; 339 Ill 304, 171NE267 (constitutionality not raised); Ill 173NE61; 197 Ind16, 148 NE420; 197 Ind16, 164NE93; Ind 166 NE270; Iowa 216NW742; 122Kan158, 251P413, 416 [quotCJ]; 213Ky648, 281 SW826; 169La144, 124S673; 169Minn 214, 210NW1001; Minn 232NW737; 146Miss727, 111S840; 147Miss534, 113 S441; 152Miss459, 119S190; 157Miss 124, 126S903; 311Mo 664, 279SW395; 314Mo 55, 282SW715; 315Mo 92, 285SW 972; 315Mo 791, 287SW307; MoA 279 SW221; 74Mont1, 238P316; 76Mont 201, 245P949; 80Mont159, 260P128; 84 Mont225, 274P1062; 118Nebr400, 225 NW28; 118Nebr729, 226NW452 [quot CJ]; 118Nebr797, 226NW454 [quot CJ]; Nebr 232NW96; NJSup 128A389; NJSup 152A175(2dcase); 31NM384, 247 P310; 243NY401, 153NE849; 253NY 243, 170NE905; 224AppDiv127, 230NYS 28; 132Misc769, 230NYS349 (directly and necessarily involved); 190NC322, 130SE10; 190NC471, 130SE154; 191 NC751, 133SE14; 52ND231, 202NW391; 52ND857, 204NW459; ND 229NW105; ND 230NW213; 119 OhSt189, 162NE 802; Oh 171NE90; 39 OklACR267; 114 Or6, 233P563, 234P262; 124 Or112, 258P193, 60ALR528; 285Pa273, 132 A364; 296Pa120, 145A794; 8PaDist& Co 19; RI 150A756; 152Tenn258, 277 SW71; 159Tenn43, 15SW(2d)751; Tex CommnA 267SW690; 105TexCr114, 286 SW1089; 108TexCr533, 2SW(2d)445; 109TexCr320, 4SW(2d)971; TexCr 20 SW(2d)1057(2dcase); 36Wyo 257, 254P 438; 38Wyo 47, 264P1023, 57ALR675. See also 30F(2d)539. [b] (3) 169Minn 214, 210NW1001. (7) Appellate court will not determine whether statute relating to registration of foreign corporations is unconstitutional in so far as it applies to unregistered foreign corporation engaged in interstate commerce, where proof of existence of particular corporation concerned at time of transaction in question is lacking. 285Pa273, 132A364. (8) Where, in its opinion entering judgment on verdict, trial court assumed existence of fact not assumed on trial and not essential to validity of judgment but which, if true, would form basis for contention as to constitutional invalidity of judgment, constitutional question is not presented for review on appeal unless, on motion to vacate judgment and for new trial on ground of mistake of law, party desiring to raise question obtained opportunity to produce and did produce evidence of fact assumed. 285Pa273,

132A364. (9) Supreme court will not decide constitutional question till actually presented. 156Miss99, 125S710. [j] **Aptness of title of statute.**–165La 511, 115S733. [k] **Ordinance will not be held unconstitutional** while referendum petitions are pending. 27 OhA141, 160NE868. [l] **In New York.**–243NY 401, 153NE849.

782–99 176Ark834, 4SW(2d)520; 78 CalA223, 248P716; CalA 284P1070; 89 Fla293, 103S832; 336 Ill 513, 168NE 372; 198 Ind645, 154NE659; 213Ky 648, 281SW826; 160La213, 106S831; 164La1, 113S658; 170Minn454, 212NW 801; Mo 23SW(2d)1013; 34NM458, 283 P907; 51ND792, 200NW898; 52ND343, 202NW814; 50RI 427, 148A317; 49SD 402, 207NW484; TexCivA 282SW912; 101WVa178, 132SE504; 36Wyo 257, 254 P488.

782–1 7F(2d)715; 75CalA591, 243P55; 319 Ill 437, 150NE435; TexCivA 294SW 305. [a] **Constitutionality of ordinance is not in issue** where decree abating nuisance is based on finding of common-law nuisance and not on ordinance. MoA 17SW(2d)616.

782–3½–New. Courts have no general power to nullify legislative acts, and can inquire into their validity only as an incident to power to prevent private injury. TexCivA 12SW(2d)833.

782–6 36F(2d)397; 140Miss184, 105S 465, 41ALR1129.

782–8 21AlaA295, 107S727; 315Mo 92, 285SW972; 57ND310, 221NW883; 146 Wash17, 261P796.

783–11½–New. The court will not declare a statute unconstitutional because inequitable in the absence of express or implied constitutional objection. 213 Ala697, 106S63.

783–11½–New. It has been held that the constitutionality of a statute relating to deposit of state moneys is immaterial in a suit to compel accounting by the state treasurer. 319 Ill 437, 150 NE435.

783–12 21AlaA241, 108S62; 202 Iowa 85, 209NW511, 513 [quotCJ]; Mass 169 NE552. [c] **In suit to quiet title,** unconstitutionality of corporation charter held immaterial. 143Va697, 129SE731.

783–13 202 Iowa85, 209NW511, 513 [quotCJ]; 228Ky737, 15SW(2d)531.

783–14 202 Iowa85, 209NW511, 513 [quotCJ].

783–15 See also 132Misc769, 230NYS 349.

783–19 202 Iowa85, 209NW511, 513 [quotCJ]. [a] See also 202 Iowa85, 209 NW511. [b] 202 Iowa85, 209NW511, 513 [quotCJ].

783–20 202 Iowa85, 209NW511, 513 [quotCJ].

783–20½–New. The effect of a provision for removal in a statute giving the county court supervision over election officers is not determinable in contempt proceedings against officers not attempted to be removed. 334 Ill 465, 166NE 100, 64ALR1006.

783–25 28F(2d)441 (suit is not prematurely brought if danger of injury is imminent); 327 Ill 387, 158NE703, 55 ALR303.

783–28½–New. The validity of a tax law or legality or equality of a tax assessment as made may be judicially determined in adjudicating litigated rights as to the tax. 97Fla426, 120S317.

783–28½–New. Constitutionality of statutes may be attacked under Declaratory Judgments Act in some jurisdictions. 299Pa402, 149A639.

783–30 But see Mass 166NE761.

783–31 283Pa255, 129A64.

784–34 31NM641, 249P1074, 58ALR573.

784–36 160La237, 106S840; 52ND26, 202NW391; 156Tenn278, 300SW565.

784–37 35GaA599, 134SE357; 219App Div233, 219NYS189.

784–38 13F(2d)510; 137Misc470, 244 NYS427; 219AppDiv233, 219NYS189; 52SD516, 219NW122. [d] **Party who seeks to have statute declared unconstitutional** must affirmatively establish that it impairs his rights and is prejudicial thereto. 199 Ind78, 155NE198.

784–39 33F(2d)753 (no allegation of discrimination is present); 170Ga800, 154SE388(2dcase); 34GaA237, 129SE11. See also 38GaA293, 143SE794.

784–42½–New. Challenge to array or motion to set aside indictment does not raise question of denial of equal protection of laws. 102TexCr297, 277SW 1091 (not provided in statute).

784–42½–New. Where the court imposes sentence in a criminal case within the limits of the statute, no constitutional question as to disproportion of punishment can be raised by a mere attack upon the sentence. 321 Ill 45, 151NE 513.

784–42¼–New. It is necessary to attack the law and show that it violated the constitution in order to raise the question. 321 Ill 45, 151NE513.

784–42½–New. Constitutionality of a law on which the relator in a mandamus proceeding relies must be presented in the pleadings. 314Mo 55, 282SW715.

784–42½–New. In original mandamus proceedings a constitutional question not raised by the issues framed cannot be determined unless determination is necessary to rendition of any judgment. 315Mo 84, 285SW501.

784–43 Ga 155SE484; 315Mo 84, 285 SW501; 132Misc769, 230NYS349 (answer).

784–47 Minn 232NW737.

784–48 315Mo 84, 285SW501.

784–50½–New. A general demurrer in mandamus proceedings does not challenge the constitutionality of a statute relied on as the ground of the cause of action unless no judgment can be rendered without deciding the constitutional question. 315Mo 84, 285SW501.

784–51 See also 164Ga278, 138SE154.

784–51½–New. Constitutionality of statute cannot be questioned on appeal by independent assignment of error. Ind 168NE481.

785–54½–New. Motion for judgment non obstante veredicto. Where a constitutional question was not brought before the trial court at the trial, it cannot be brought before the court on a motion for judgment non obstante veredicto where plaintiff's case lacks proof on an essential point in the controversy. 285Pa273, 132A364.

785–55 162Ga730, 134SE760; 36GaA 433, 137SE79; Ill 173NE189; 170La 351, 127S865; ND 230NW729; SD 231 NW943. [c] **Statute composed of several units.**–Parts of statute claimed to be unconstitutional must be specifically pointed out. 50SD293, 209NW545. [d] **To raise question of constitutionality,** both statute and constitutional provision need express designation. 162Ga730, 134 SE760. [e] **Petition for certiorari** merely alleging power of supreme court to review errors is insufficient to raise question. 162Ga730, 134SE760.

785–56 31Ariz317, 252P1018 [citCJ]; 162Ga730, 134SE760; 168Ga377, 147SE 881(1stcase); 36GaA433, 137SE79; 196 Ind529, 149NE51; 201 Iowa1050, 205 NW543, 545 [citCyc]; 227Ky7, 12SW (2d)348; 315Mo 84, 285SW501; 315Mo 1100, 287SW604; Mo 18W(2d)830, 832 [citCJ]; 319Mo 848, 5SW(2d)54; 320Mo 865, 8SW(2d)1001; Mo 271SW536; 52 ND231, 202NW391 [citCyc]; 37Wyo 488, 263P621. See 225Ky205, 7SW(2d) 1046. But see 154Miss317, 122S366.

785–57 Mo 271SW536; 33PortoRico 687.

785–59 201 Iowa1050, 205NW543. [a] **Pleadings insufficient.**–211Ky328, 277SW 485. [b] **Allegations held sufficient.**–Ida 286P353.

785–60½–New. If a statute is unconstitutional for any reason, whether assigned or not, it is void. 145Va94, 133 SE781.

785–61 146Va175, 135SE813.

785–63 200Cal 550, 254P542, 547 [quotCJ]; 41 Ida747, 242P314, 243P654; 315 Mo 84, 285SW501; 315Mo 791, 287SW 307; 315Mo 713, 290SW135; Mo 297SW 47; Mo 18W(2d)830; 319Mo 440, 4SW (2d)424; 319Mo 848, 5SW(2d)54; Mo 24 SW(2d)154; MoA 272SW992; 220MoA 896, 296SW200; MoA 300SW1039; MoA 24SW(2d)218; NJCh 133A519; 53ND 291, 205NW722, 728 [citCJ]; 288Pa85, 135A858. But see 156Tenn529, 3SW(2d) 167.

785–63½–New. , and it must be kept alive during the trial. 315Mo 713, 290 SW135.

786–64 31NM576, 249P242, 249 [citCJ].

786–65 126 Or641, 270P513.

786–69 36GaA679, 137SE855; 221MoA 937, 295SW821.

786–69½–New. or on motion for a new trial; 315Mo 713, 290SW135.

786–70 163Ga919, 137SE272; 204 Iowa 150, 214NW594; 120Kan331, 243P278; 315Mo 1100, 287SW604; 319Mo 848, 5 SW(2d)54; NJSup 133A396; 31NM576, 249P242, 249 [citCJ]; 285Pa273, 132A 364; 288Pa85, 135A858; 290Pa380, 138 A915.

786–71 220MoA896, 296SW200; 114Tex 548, 273SW808. See also 151Va883, 145 SE326.

786–72 31NM576, 249P242.

786–72½–New. A petition in error may be dismissed by the Ohio supreme court on the ground that the alleged constitutional question was not presented to or passed upon by the court of appeals. 113 OhSt703, 150NE920.

786–73 Mo 18W(2d)830; 319Mo 440, 4 SW(2d)424; MoA 295SW808; NJCh 133 A519.

786–74 103NJL159, 134A750. But see MoA 272SW992.

786–75½–New. A special plea to abate prosecution or set aside indictment to raise question of denial of equal protection of law is timely if presented before pleading to indictment. 102TexCr297, 277SW1091 (in absence of code provision for raising question).

786–76 28Hawaii383, 384 [quotCJ]; 196 Ind529, 149NE51.

786–77 28Hawaii383, 384 [quotCJ].

786–78 38 OklACR107, 111 [quotCJ]. [a] **Matters to be considered.**–Wash 289 P536.

786–79 17F(2d)1; 73CalA548, 238P 1089; 46 Ida403, 268P26, 28 [citCJ]; Md 149A547; 76Mont305, 247P162; 84 Mont478, 276P958; 247NY401, 160NE 655; 38 OklACR107, 111 [quotCJ]; 119 Or484, 250P213, 47ALR394; 124 Or112, 258P193, 60ALR528; 122 Or485, 259P 908. [b] **Legislative practices** have very little weight on issue of constitutionality of particular statutes. NH 146A511.

787–80 272US365, 47SCt114, 71Led303, 54ALR1016; 274US603, 47SCt675, 71 Led1228, 53ALR1210; 50Nev125, 253P 671.

787–81 272US365, 47SCt114, 71Led303, 54ALR1016; 37F(2d)846; Mass 169NE 657; 50Nev125, 253P671; NC 155SE553. See also 219AppDiv233, 219NYS189. [f] **Possible violations** of statute are not to be considered. 149Md648, 132A160.

787–83 Fla 130S699; 313Mo 160, 282 SW34; 123 Or345, 262P248 (local assessment statute construed as to due process); 157Tenn222, 7SW(2d)815, 60ALR 408; 157Tenn592, 11SW(2d)876; 158 Tenn445, 14SW(2d)730. [c] **Whole of statute must be considered** in determination of its constitutionality. 335 Ill 352, 167NE101, 68ALR350.

787–84 313Mo 160, 282SW34; 47RI 387, 133A614. [a] **Proper inquiry is not whether constitution in express terms grants power** to legislature to enact statute, but whether there is any constitutional provision expressly prohibiting legislation. 85Mont329, 278P514.

787–85 157Tenn222, 7SW(2d)815, 60 ALR408.

787–86 180Ark713, 23SW(2d)617; 319 Mo 976, 5SW(2d)83; 38 OklACR107, 111 [quotCJ]; 157Tenn222, 7SW(2d)815, 819 [citCJ], 60ALR408.

787–87 75CalA247, 242P749; 38 OklACR107, 111 [quotCJ].

787–87½–New. , although in some jurisdictions it is said that courts are not justified in declaring a statute unconstitutional merely because of its abuse. 118 Or77, 245P1074, 46ALR1173.

787–88 78CalA759, 248P1068; 333 Ill 355, 164NE699(2dcase), 61ALR561; 76 Mont429, 247P332, 47ALR424; 230App Div252, 243NYS644; 38 OklACR107, 111 [quotCJ]; 9PaDist&Co 139; 52SD229, 217NW218. [a] **Legislative declaration of purpose.**–29F(2d)604.

787–89 270US402, 46SCt320, 70Led654; 91Fla824, 108S679; 125 Okl 287, 257P 778, 53ALR1128 [quotCJ]; 124 Or112, 258P193, 60ALR528; 149Wash545, 271

P826. [a] **Things permitted by statute** may be considered in determining whether thing prohibited is arbitrary and violative of due process. 270US402, 46SCt320, 70L ed654.

787-90 75CalA247, 242P749; 157Tenn 222, 7SW(2d)815, 60ALR408; 149Wash 545, 271P826. [b] **Existence of facts will be presumed** sufficient to warrant reclassification by legislature of subjects under police regulation. 75Mont88, 242 P344 (theaters and dance halls).

787-91½-New. Where facts on which alleged constitutionality is predicated are not judicially known, the court is not bound by undenied allegations of pleading or admissions of counsel. 202 Iowa85, 209NW511.

787-92 155Tenn70, 290SW608.

787-93 91Fla824, 108S679; 168La969, 122S643; 124 Or112, 258P193, 60ALR 528.

787-94 [a] **Who is complaining party** may be inquired into by court. Ill 173 NE355.

787-94½-New. Constitutionality of a law must be judged not by what it accomplished in any given instance, but by results which might have followed from its enactment. 215AppDiv97, 214 NYS104.

787-94½-New. The courts will inquire whether there is any rational theory upon which the action of the legislature in passing a law can be sustained. 196 Cal 344, 238P88.

787-94¼-New. If such a theory can be discovered, the questioned act of the legislature will be held to be constitutional. 196Cal 344, 238P88.

787-94½-New. The duty of the court is to hear issues raised by plea of denial of equal protection of law through intentional exclusion of Roman catholics from grand jury duty. 102TexCr 297, 277SW1091.

787-96 272US425, 47SCt122, 71L ed331; 274US341, 47SCt611, 71L ed1083; 274US 588, 47SCt720, 71L ed1219; 17F(2d)988; 35F(2d)386; 37F(2d)330; 37F(2d)846; 43F(2d)148; 214Ala525, 108S568; 216 Ala514, 113S524; 218Ala149, 117S473; 31Ariz297, 252P1011; 199Cal 21, 248P 235; 68CalA297, 228P1055; CalA 289P 651; 91Fla871, 108S836, 47ALR118; 163Ga349, 137SE264; 35GaA599, 134SE 357; 42 Ida169, 244P149; 44 Ida700, 260P155; 45 Ida676, 266P665; 48 Ida 618, 284P203; 318 Ill 188, 149NE269; 330 Ill 79, 161NE145; 244 IllA185; 246 IllA241; 84 IndA144, 149NE647(2d case); 200 Iowa1389, 206NW130; Iowa 230NW540; Md 149A446; 264Mass128, 162NE324; 233Mich414, 206NW798; 235Mich272, 209NW158; 242Mich491, 219NW724; 147Miss1, 112S597; 154 Miss646, 122S771; 156Miss171, 125S896; 156Miss99, 125S710; 313Mo 143, 281SW 47, 45ALR189; 315Mo 1056, 287SW466; 317Mo 1235, 298SW363; 318Mo 870, 2 SW(2d)713; 220MoA582, 287SW1057; MoA 17SW(2d)275; 75Mont88, 242P344; 76Mont429, 247P332, 47ALR424; 85 Mont329, 278P514; 114Nebr676, 209NW 236; 116Nebr862, 219NW394; NJSup 139A425; NJSup 152A175(2dcase); 31 NM384, 247P310; 220AppDiv549, 222 NYS96; 127Misc683, 217NYS565; 128 Misc642, 220NYS66; 132Misc572, 230 NYS321; 230AppDiv252, 243NYS644; NC 154SE852; 56ND468, 217NW841; 27 OhA141, 160NE868; OklCr 286P911; OklCr 288P390; 118 Or260, 246P741; 124 Or112, 258P193, 60ALR528; 123 Or 345, 262P248; 124 Or351, 264P463; 284 Pa421, 131A253; 287Pa376, 135A362; 7PaDist&Co 223; 136SC345, 134SE330; 138SC445, 136SE757; 149SC52, 146SE 686; 153SC56, 150SE347, 66ALR1264; 48SD375, 204NW905; 152Tenn258, 277 SW71; 153Tenn469, 284SW372; 154 Tenn208, 285SW582; 158Tenn166, 11 SW(2d)882; 159Tenn349, 19SW(2d)261; 160Tenn248, 23SW(2d)245; Tex CommnA 26SW(2d)168; TexCivA 274 SW1011; TexCivA 299SW479; TexCivA 10SW(2d)743; TexCivA 25SW(2d)215; 108TexCr142, 299SW437; 68Utah251, 249P1016; 101Vt391, 143A677; 143 Wash326, 255P371; 106WVa687, 146 SE825; 108WVa9, 150SE219 (language of title); 193Wis295, 214NW447; Wis 231NW634; 40Wyo 57, 274P10. See 218 Ala71, 117S626 (perBrown,J,op.). See also 227Ky7, 12SW(2d)348. [a] (2) Act of congress will be construed, if possible, to be in conformity with international law. 5F(2d)838. [d] **Supplying details.**-310Mo 542, 276SW389. [e] **Only a clear violation of the Constitution by** usurpation of power justifies declaring legislative enactment void. 14PaDist&Co 327.

788-97 268US5, 45SCt446, 69L ed819; 275US331, 48SCt194, 72L ed303; 36F (2d)208; 41F(2d)774; 43F(2d)148; 95 Fla345, 116S81; 256Mass426, 152NE 747; 257Mass386, 154NE72; Mass 166 NE558; 157Miss124, 126S903; NJSup 152A175(2dcase); 242NY224, 151NE 214; 55ND1, 212NW217; 119 Or101, 248P146; 125 Or428, 266P875; 284Pa 421, 131A253; 50RI 288, 146A777, 66 ALR1553; 116Tex479, 294SW527; 136 Wash437, 240P557; Wash 290P1005.

788-98 274US341, 47SCt611, 71L ed 1083; 5F(2d)366; 23AlaA1, 121S9(2d case); Ariz 285P1034; 97Fla710, 122 S225; 144Miss614, 109S900; 157Miss 326, 128S887; MoA 296SW198; 31NM 427, 246P908; 230NYS675; 124 Or261, 264P445; 284Pa421, 131A253; 287Pa 376, 135A362; 101WVa178, 132SE504. See also 226Ky353, 10SW(2d)1060.

788-99 Ark 32SW(2d)301; 93CalA277, 270P270; Ind 172NE907; 229Ky264, 17 SW(2d)227, 63ALR932; 147Miss1, 112 S597; 226AppDiv331, 235NYS555; 31 OhA229, 166NE916; 123 Or345, 262P 248; 152Va616, 148SE789 (conflict between statute and constitutional provision should be reconciled, if possible, to uphold statute); 196Wis292, 220NW 197.

788-1 270US466, 46SCt341, 70L ed688; 272US425, 47SCt122, 71L ed331; 274US 588, 47SCt720, 71L ed1219; 281US658, 50SCt444, 74L ed1098 (joint resolution); 6F(2d)100; 6F(2d)964; 19 F(2d)260; 28F(2d)888; 33F(2d)137; 33F(2d)582(2dcase); 36F(2d)309; 40 F(2d)827; 41F(2d)38; 218Ala149, 117 S473; 218Ala71, 117S626 (perThomas, J,op); 220Ala231, 124S523; 174 Ark478, 295SW730; 200Cal 235, 252P 722; 202Cal 290, 260P548; Cal 291P 204; 68CalA297, 228P1055; 69CalA466, 231P601; 78CalA759, 248P1068; 80 CalA629, 252P746; 81CalA128, 252P 1057; 102CalA635, 283P862; 95Fla345, 116S81; 42 Ida169, 244P149; 47 Ida33, 272P498, 65ALR663; 323 Ill 427, 154NE 198; 323 Ill 536, 154NE468; 327 Ill 590, 158NE849; 333 Ill 355, 164NE699(2d case), 61ALR561; Ind 164NE489; 200 Iowa1389, 206NW130; 209Ky101, 272 SW43; 232Ky635, 24SW(2d)259; 166 La689, 117S775; 168La742, 123S310; 168La1005, 123S655, 67ALR1183; 254 Mass569, 151NE63, 46ALR563; 242 Mich95, 219NW69; 170Minn293, 212 NW445; 172Minn263, 215NW71; 143 Miss247, 108S903; 143Miss709, 109S 737; 152Miss17, 118S357; 318Mo 870, 2SW(2d)713; Mo 32SW(2d)281; 75 Mont429, 244P287; 76Mont305, 247P 162; 82Mont98, 265P6; 86Mont200, 283 P202, 67ALR1020; 114Nebr567, 208NW 662; 82NH327, 133A451, 47ALR218; 98NJEq209, 130A17; 33NM347, 267P 55; 241NY405, 150NE497, 43ALR909; 253NY243, 170NE905; 221AppDiv36, 222NYS141; 127Misc683, 217NYS565; 136Misc353, 239NYS706; 230AppDiv 252, 243NYS644; 137Misc852, 244NYS 616; ND 232NW303; 121 OhSt511, 169 NE599; 116 Or264, 240P418; 117 Or 140, 241P979; 119 Or101, 248P146; 124 Or112, 258P193, 60ALR528; 124 Or112, 264P441, 60ALR528; 125 Or428, 266P 875; Or 286P520; 284Pa421, 131A253; 287Pa376, 135A362; 153Tenn469, 284 SW372; 160Tenn316, 24SW(2d)898; 116Tex299, 289SW381; TexCommnA 277SW89 (statute construed as not depriving one of defense, effect of which would be to deprive one of property without due process); TexCommnA 292 SW869; TexCommnA 5SW(2d)500; TexCommnA 12SW(2d)134; 113TexCr 450, 21SW(2d)499; 66Utah404, 243P 107; Utah 285P1001; 146Wash6, 262P 138; 103WVa34, 136SE504. See 96 Fla91, 117S863. See also 50RI 37, 144A 891.

790-2 200Cal 235, 252P722; 68CalA 297, 228P1055; 123Kan191, 254P372; 220MoA582, 287SW1057; 82NH327, 133 A451, 47ALR218; 127Misc683, 217NYS 565; 31 OhA229, 166NE916; 158Tenn 445, 14SW(2d)730; 160Tenn248, 23SW (2d)245.

790-3 91Fla871, 108S836, 47ALR118; 220MoA602, 287SWS79; 220MoA582, 287SW1057; 82NH327, 133A451, 47 ALR218; 101NJL455, 130A14.

790-4 124 Or351, 264P463; Tex CommnA 276SW690 (reading constitutional provision in connection with statute). [a] 102WVa272, 135SE582. [b] (1) 190NC638, 130SE743 (will not construe statute to have intent to open or vacate judgments).

790-5 105NJL642, 146A370. [b] **Legislative intent to produce inequality** will not be presumed. NJCh 150A436.

790-5½-New. , and that the legislature exercised discretion in passing the law. 153Tenn53, 281SW777.

790-5⅓-New. , and that it did not intend to violate any provision of the federal constitution. 102WVa272, 135 SE582.

790-6½-New. It is presumed that the legislature intended to enact those features of a statute which it had power to enact. 42 Ida169, 244P149.

790-6⅓-New. and to exclude an intention to accomplish that which it had no power to accomplish. 42 Ida 169, 244P149.

790-7 163Ga849, 137SE264; 116 OhSt 312, 156NE191.

790-8 TexCommnA 292SW869.

790-9 271US500, 46SCt619, 70L ed 1059; 176Ark324, 3SW(2d)340.

790-10 78CalA759, 248P1068.

790-11 24F(2d)455; Iowa 216NW742. [a] **In interpreting criminal statute** courts cannot reduce its generally inclusive terms so as to limit application to classes of cases within legislative power. 271US500, 46SCt619, 70 L ed1059.

790-12 28F(2d)888; 136SC345, 134SE 380; 158Tenn445, 14SW(2d)730.

790-15 TexCommnA 276SW690.

791-16½-New. Courts, considering the constitutionality of an act, may not disregard a plain command or necessary implication of fundamental law. 225Ky294, 8SW(2d)428.

791-17 167Minn311, 209NW10; 152 Tenn258, 277SW71.

791-18 TexCommnA 276SW647.

791-19 272US425, 47SCt122, 71L ed 331; 274US387, 47SCt595, 71L ed1112; 274US341, 47SCt611, 71L ed1083; 274 US357, 47SCt641, 71L ed1095; 7F(2d) 628; 7F(2d)715; 15F(2d)598; 23 F(2d)719 (authorizing establishment of gas rates); 28F(2d)998; 32F(2d)134; 42F(2d)500; 214Ala38, 106S231; 216 Ala391, 113S254; 171Ark547, 285SW 2; 174Ark214, 295SW9; 180Ark770, 22 SW(2d)993, 68ALR1018; 200Cal 598, 254P951; Cal 291P208; 75CalA247, 242 P749; 78CalA173, 248P532; 78CalA 759, 248P1068; 84CalA295, 257P876; CalA 272P1076; CalA 290P906; 104 Conn579, 134A169; Conn 151A518; 162 Ga641, 135SE84; 163Ga849, 137SE264; 48 Ida618, 284P203; 318 Ill 188, 149NE 269; 324 Ill 530, 155NE294; 329 Ill 173, 160NE186; 340 Ill 644, 173NE90; Ind 172NE186; IndA 168NE38; Iowa 231NW646(2dcase); Iowa 232NW412; 225Ky294, 8SW(2d)428; 235Ky24, 29 SW(2d)619; 162La165, 110S183; 162 La543, 110S749; 165La1012, 116S491; 168La547, 122S845; 168La560, 122S 850; 169La766, 126S54; 170La351, 127 S865; 4LaA718; 125Me319, 133A738; 126Me121, 136A664, 51ALR1194; 148 Md330, 129A370; 253Mass144, 148NE 467; 255Mass160, 150NE892; 256Mass 512, 153NE1; Mass 168NE73; Mass 169NE910; Mass 171NE82(2dcase); Mass 172NE605; 233Mich414, 206NW 798; 239Mich204, 214NW316, 53ALR 273; 320Mo 1146, 9SW(2d)589; 321Mo 92, 11SW(2d)48; Mo 24SW(2d)108; Mo 30SW(2d)149; 74Mont1, 238P316; 82 Mont126, 266P387, 391 [quotCJ]; 82 Mont382, 267P499; 116Nebr373, 217NW 607; Nebr 231NW703; 51Nev315, 274 P921; 31NM220, 243P333; 253NY243, 170NE905; 213AppDiv414, 210NYS269; 131Misc411, 227NYS142; 127Misc683,

217NYS565; 128Misc626, 220NYS170; 129Misc94, 221NYS20; 230NYS675; 136Misc307, 240NYS784; 230AppDiv 252, 243NYS644; 137Misc852, 244NYS 616; 116 OhSt512, 157NE69; 25 Oh NPNS250; 114 Okl 38, 241P178; 133 Okl 162, 271P672; 135 Okl 278, 276P 468; 116 Or581, 242P621; 119 Or613, 250P233; 124 Or112, 258P193, 60ALR 528; 123 Or345, 262P248; Or 285P 1105; Or 288P1015; 285Pa39, 131A 650; 287Pa376, 135A362; 85PaSuper 463; 8PaDist&Co 19; 47RI 258, 131A 641; 47RI 387, 133A614; 136SC345, 134 SE380; 152Tenn258, 277SW71; 153 Tenn469, 284SW372; 154Tenn638, 290 SW381; 157Tenn222, 7SW(2d)815, 60 ALR408; TexCommnA 288SW409; Tex CivA 278SW928; TexCivA 295SW649; TexCivA 32SW(2d)249; 66Utah404, 243 P107; 98Vt343, 129A159, 39ALR1222; 142Va577, 128SE633; 144Va456, 132SE 482; 147Va460, 137SE488, 51ALR1517; 150Va174, 142SE415; 150Va54, 142SE 423; 152Va616, 148SE789; Wash 290 P1010; 193Wis113, 213NW664; 194Wis 543, 217NW570 (legislature presumed not to have intended invasion of rights or deprivation of remedies for wrongs). See also 123 Or144, 261P694. [f] (2) 199Cal 64, 248P225, 48ALR509. [g] 195 Cal 548, 234P398, 38ALR1186; 75CalA 591, 243P55; 95Fla345, 116S81; Iowa 221NW364. [o] When statute is enacted and approved, it is declaration by legislature and governor that it is constitutional. 145Va94, 133SE781. [p] Delegation of authority to impair corporate franchise will not be presumed. 155Md164, 141A509.

794-20 270US402, 46SCt320, 70L ed 654; 274US357, 47SCt641, 71L ed1095; 275US440, 48SCt174, 72L ed357; 281 US431, 50SCt397, 74L ed945; 281US 643, 50SCt434, 74L ed1088; 281US682, 50SCt449, 74L ed1115; 34F(2d)780; 42 F(2d)500; 218Ala71, 117S626 (per Thomas,J,op); 28Ariz527, 238P335; CalA 272P1076; 82Colo 456, 261P1; 110 Conn291, 147A804; 91Fla824, 108S679; 45 Ida380, 263P45; 328 Ill494, 160NE 86; Iowa 221NW364; Iowa 232NW412; 162La543, 110S749; 256Mass512, 153 NE1; 321Mo 969, 13SW(2d)628; 86 Mont595, 285P932; 129Misc94, 221NYS 20; NC 155SE553; 25 OhNPNS250; 114 Okl 38, 241P178; 122 Okl 268, 254P 710; 124 Or112, 258P193, 60ALR528; 85PaSuper463; 5PaDist&Co 54; 8Pa Dist&Co 407; 47RI 387, 133A614; 50 RI 288, 146A777, 66ALR1553; 156Tenn 544, 38SW(2d)661 (classification); 100 Vt193, 136A26; 153Va57, 149SE523; 153Va789, 151SE417. See also 317 Ill 132, 147NE797. [a] (1) 75Mont88, 242 P344. [b] Burden of showing right to amend corporate charter rests on party asserting it. 33Ariz76, 262P616.

794-22 13F(2d)227.

794-22½-New. Constitutionality of statute enacted by people under initiative is presumed to be constitutional. 75 Mont429, 244P287.

794-23 274US341, 47SCt611, 71L ed 1083; 274US357, 47SCt641, 71L ed1095; 8F(2d)641; 26F(2d)508; 36F(2d)397; 216Ala514, 113S524; 195Cal 548, 234P 398, 38ALR1186; 78CalA58, 247P923; CalA 285P374; CalA290P116; 97Fla 710, 122S225; 162Ga641, 135SE84; 163 Ga849, 137SE264; 28Hawaii383; 328 Ill 262, 159NE194; 191 Ind475, 151NE 390; 229Ky264, 17SW(2d)227, 63ALR 932; 168La1005, 123S655, 67ALR1183; 125Me319, 133A738; 126Me537, 140A 382; 259Mass1, 156NE42; 259Mass14, 156NE48; 231Mich409, 204NW140; 152 Miss225, 119S177; 76Mont429, 247P332, 47ALR424; 31NM220, 243P333; 195 NC223, 141SE597; NC 155SE553; 52 ND231, 202NW391 [citCyc]; 26 OhA340, 159NE575; 31 OhA229, 166NE916; 25 OhNPNS20; 25OhNPNS30; 122 Okl 268, 254P710; 36 OklCr186, 253P510; 119 Or264, 240P233; 120 Or244, 251P 895; 128 Or274, 274P308; 8PaDist&Co 407; 49RI 45, 139A662; 132SC241, 128 SE172; 136SC345, 134SE380; 143SC 120, 141SE265; 156SC299, 152SE565 (every presumption); SC 155SE530; 158Tenn119, 11SW(2d)858; TexCommn A 267SW697; TexCivA 278SW928; Tex CivA 297SW652; 68Utah251, 249P1016; 101Vt391, 143A677; 145Va94, 133SE 781.

794-24 214Ala38, 106S231; 195Cal 477, 234P381, 38ALR1479; 195Cal 548, 234 P398, 38ALR1186; 104Conn579, 134A 169; 310Mo 184, 274SW827; 75Mont 429, 244P287 (statute enacted by people under initiative); 83Mont452, 272 P998; 86Mont595, 285P932; Mont 287 P156; 83NH176, 139A747; 131Misc 411, 227NYS142; 226AppDiv480, 236 NYS89; 116 Or581, 242P621; 287Pa 376, 135A362; 297Pa474, 147A239.

794-25 127Me110, 141A699; 317Mo 671, 296SW808; 285Pa39, 131A650.

794-26 271US500, 46SCt619, 70L ed 1059; 274US357, 47SCt641, 71L ed1095; 14F(2d)341; 174Ark214, 295SW9; 195 Cal 477, 234P381, 38ALR1479; 310Mo 184, 274SW827; 318Mo 248, 300SW493; 74Mont1, 238P316; 193NC496, 137SE 669; 25OhNPNS250; 152Tenn258, 277 SW71; 149Va772, 141SE844.

795-27 164Ga485, 139SE11, 53ALR 1286; 45 Ida427, 262P881, 56ALR317; 45 Ida676, 266P665; 228Ky168, 14SW (2d)405; 247Mich404, 225NW885; Okl Cr 28SP390; 124 Or112, 258P193, 60 ALR528; 117Tex489, 8SW(2d)646.

795-29 Fla 128S478.

795-30 13F(2d)227; Ariz 289P515; 220MoA602, 287SW879; 152SC455, 150 SE269; 108TexCr533, 2SW(2d)445; 108TexCr619, 28W(2d)449; 103WVa23, 136SE505.

795-31 281US431, 50SCt397, 74L ed 945; 281US643, 50SCt434, 74L ed1088; 199Cal 64, 248P225, 48ALR509; Cal 290 P25(2dcase); 97Fla710, 122S225; 162 Ga641, 135SE84; 165Ga520, 141SE412; 331 Ill 576, 163NE466; 226Ky501, 11 SW(2d)133; 127Me110, 141A699; 156 Miss99, 125S710; 31 OhA229, 166NE 916; 125 Okl 170, 256P927; 287Pa342, 135A308; 153Tenn469, 284SW372; Tex CivA 278SW928; 153Va789, 151SE417; 142Wash450, 253P805; 101WVa127, 132SE372.

795-32 208Cal 6, 279P998; 82Colo 163, 258P223; 89Fla361, 104S577; 92Fla 187, 109S228; 82Mont98, 265P6; 86 Mont367, 283P769; 226AppDiv480, 236 NYS89; 122 Okl 86, 251P486, 493 [cit CJperHunt,J,disop]; 116 Or581, 242P 621; 118 Or77, 245P1074, 46ALR1173; 120 Or444, 250P220; 123 Or144, 261P 694; Or 285P1105; 286Pa283, 133A 505; 47RI 387, 133A614; 133SC420, 131SE29 (unconstitutionality not manifest beyond reasonable doubt); 117Tex 516, 8SW(2d)655; TexCivA 288SW875; 66Utah404, 243P107; 68Utah251, 249P 1016; 142Va577, 128SE633.

795-33 274US387, 47SCt595, 71L ed 1112; 274US357, 47SCt641, 71L ed1095; 275US440, 48SCt174, 72L ed357; 4F (2d)915; 14F(2d)153; 18F(2d)918; 25 F(2d)873; 26F(2d)380; 28F(2d)441; 42F(2d)500; 20AlaA450, 103S898; 23 AlaA524, 128S774; 31Ariz8, 250P248; 33Ariz432, 265P600; 33Ariz440, 265P 602, 58ALR563; 35Ariz26, 274P163; 176Ark722, 3SW(2d)1000; 203Cal 676, 265P825; 208Cal 6, 279P998; 78CalA 58, 247P923; 80CalA629, 252P746; 102 CalA635, 283P862; CalA 289P651; 104 Conn579, 134A169; 108Conn371, 143A 240, 65ALR943; 89Fla361, 104S577; 92 Fla187, 109S228; 164Ga485, 139SE11, 53ALR1286; 28Hawaii222; 28Hawaii 383; 45 Ida676, 266P665; 47 Ida74, 272 P707; 48 Ida618, 284P203; 318 Ill 188, 149NE269; Ill 173NE361; 205 Iowa 1154, 213NW517; Iowa 221NW364; Iowa 232NW412; 125Kan44, 262P583; 225Ky294, 8SW(2d)428; 229Ky264, 17 SW(2d)227, 63ALR932; 162La543, 110 S749; 165La1012, 116S491; 168La547, 122S845; 239Mich204, 214NW316, 53 ALR273; 141Miss701, 105S541; 310 Mo 184, 274SW827; 322Mo 1129, 19SW (2d)1; 82Mont126, 266P387; Nebr 227 NW922; 193NC496, 137SE669; 195NC 223, 141SE597; 195NC722, 143SE530; 198NC114, 150SE813; 56ND468, 217 NW841; 27 OhA141, 160NE868; 122 Okl 297, 255P150; 125 Okl 170, 256P 927; OklCr 288P390; 119 Or264, 240P 233; 119 Or613, 250P233; 125 Or428, 266P875; 291Pa46, 139A623; 5PaDist &Co 54; 8PaDist&Co 407; 47RI 258, 131A641; 153SC106, 149SE760; Tex CommnA 288SW182; TexCivA 295SW 649; TexCivA 25SW(2d)215; 147Wash 630, 267P506; 193Wis113, 213NW664; 196Wis292, 220NW197; 200Wis518, 228 NW895. 69ALR348(2dcase); 38Wyo 47, 264P1023, 57ALR675. See also 21AlaA 37, 104S885. [b] (1) 21AlaA303, 107S 788.

797-34 8F(2d)641; 214Ala409, 108S 231; 218Ala71, 117S626 (perThomas, J,op); 104Conn192, 132A561; 91Fla 824, 108S679; 92Fla187, 109S228; 97 Fla710, 122S225; 45 Ida244, 263P32; 126Me537, 140A382; 128Me531, 149A 299; 259Mass1, 156NE42; Mass 166NE 558; 231Mich409, 204NW140; 242Mich 95, 219NW69; 317Mo 671, 296SW808, 814 [quotCJ]; 74Mont1, 238P316; 75 Mont429, 244P287 (statutes enacted by people under initiative); 76Mont429, 247P332, 47ALR424; 78Mont308, 254P 187; 79Mont10, 254P875; 82Mont98, 265P6; 85Mont329, 278P514; 86Mont 200, 283P202, 67ALR1020; 86Mont595, 285P932; Mont 287P156; NH 149A 321; 137Misc852, 244NYS616; 52ND 231, 202NW391; 26 OhA340, 159NE 575; 124 Or112, 258P193, 60ALR528; 124 Or105, 258P204; 47RI 387, 133A 614; 135SC348, 132SE673; 139SC188, 137SE597; 143SC120, 141SE265; 147 SC116, 144SE846; 148SC229, 146SE12; 152SC455, 150SE269; 48SD375, 204NW 905; SD 229NW294; TexCivA 274SW 277; 198Wis326, 223NW852.

797-35 42F(2d)500; 220Ala231, 124S 523; 200Cal 277, 252P1043; 86CalA558, 261P1080; 104Conn579, 134A169; 123 Kan191, 254P372; 317Mo 671, 296SW 808, 814 [quotCJ]; 74Mont428, 240P 978; 53ND838, 208NW711; 122 Okl 297, 255P150; OklCr 287P835; 120 Or 244, 251P895; 290Pa427, 139A136; 8 PaDist&Co 19; TexCommnA 292SW869; TexCivA 274SW277; TexCivA 280SW 1070; TexCivA 284SW624; 142Va577, 128SE633; 101WVa127, 132SE372; 103 WVa23, 136SE505. See 225Ky205, 7 SW(2d) 1046.

797-35½-New. clearly, 73CalA268, 233 P787.

797-37 73CalA268, 238P787; CalA 288 P53; 164Ga485, 139SE11, 53ALR1286; 169Ga354, 150SE262; 178Minn244, 226 NW633; 122 Okl 297, 255P150; 120 Or 244, 251P895; 291Pa216, 139A860; 156 Tenn544, 38SW(2d)661 (must be palpably arbitrary).

797-38 317Mo 671, 296SW808, 814 [quotCJ]; 82Mont98, 265P6; Mont 287 P156; OhA 173NE22; 143 Okl 8, 286P 883.

797-38½-New. clearly and certainly, 36 OklCr186, 253P510.

798-39 199Cal 21, 248P235; 122 Okl 297, 255P150.

798-40 86CalA558, 261P1080; Fla 126 S117 (reasonable doubt); 225Ky112, 7 SW(2d)839; Mo 23SW(2d)120; 144Va 456, 132SE482.

798-41 125Kan44, 262P583 (substantial doubt); 239Mich204, 214NW316, 53 ALR273; 152Va992, 147SE262.

798-43 205 Iowa1154, 213NW517; 123 Or571, 263P901 (reasonable doubt); 297 Pa474, 147A239 (where conclusion is so plainly apparent as to leave no doubt).

798-43½-New. a violation of the constitution so manifest as to leave no room for reasonable doubt, 194NC412, 140SE 34.

798-44½-New. The illegality of the act assailed must clearly and indubitably appear before it can be set aside on constitutional grounds. 132SC314, 128SE 712.

798-44½-New. Courts are powerless to declare an act invalid, except where it appears beyond doubt that it contravenes some constitutional provision. 144Va456, 132SE482.

798-44¼-New. The Tax Law imposing a tax on foreign corporations for the privilege of entering the state should be construed in such manner as to free it from doubt as to power of the state to impose liability. 249NY369, 164NE253.

798-46 78CalA759, 248P1068; Fla 126 S117 (must be plain case); 318 Ill 188, 149NE269; 316Mo 9, 289SW838; 131 Misc411, 227NYS142.

798-46½-New. Action of the legislature will be interfered with only on clear

and satisfactory grounds. 225Ky205, 7 SW(2d)1046.

798-47 68CalA91, 228P549; 114 Okl 38, 241P178; 149Wash545, 271P826.

798-48 [a] 198Cal 753, 247P897; Md 150A455; 100Vt193, 136A26.

798-49 110Conn291, 147A804; 148Md 330, 129A370 (court may not assume that administration may result in one quality and discrimination); 157Tenn 222, 7SW(2d)815, 818 [citCJ], 60ALR 408; 157Tenn522, 11SW(2d)893.

798-50 270US402, 46SCt320, 70L ed654; 99Vt17, 130A701.

798-52½-New. Power to declare a law unconstitutional is always exercised with reluctance. 241NY405, 150NE497.

798-52½-New. A court should be slow in striking down legislation honestly enacted for a proper purpose. 287Pa 342, 135A308.

798-52¼-New. Ministerial officers may treat a statute as prima facie valid in the absence of circumstances affecting the right to rely on such presumption. 160Tenn109, 23SW(2d)239.

798-55 201Cal 726, 258P959; 127Me 110, 141A699; 79Mont10, 254P875; 218AppDiv11, 216NYS305; 226AppDiv 331, 235NYS555 (entitled to great weight); 36 OklCr186, 253P510; 119 Or 264, 240P233; 123 Or144, 261P694; 124 Or322, 263P903, 56ALR661.

798-56 340 Ill 20, 172NE60 (treated by courts as constitutional); 162La543, 110S749; 119 Or264, 240P233; 123 Or 345, 262P248. See also 37F(2d)231. [c] Mechanic's Lien Law, long acquiesced in held valid notwithstanding inaptness of title, 314Mo 151, 282SW698.

798-56 [d] Recognition of constitutionality by appellate court in actions in which statute was necessarily involved held authority for its validity. TexCivA 17SW(2d)174.

799-60 36 OklCr186, 253P510; 123 Or 345, 262P248.

799-62 75CalA247, 242P749.

799-63 78CalA117, 248P272; 106Conn 642, 139A106, 55ALR1319 (that it intended valid act); Ill 173NE361; LaA 130S634. See also 85Colo 289, 275P896. [a] (3) It will be presumed that, in passing emergency zoning ordinance, city council will proceed in good faith to enactment of general zoning ordinance. 195Cal 477, 234P381, 38ALR1479. [b] Intent of legislature to exercise powers beyond its constitutional limitations will not be assumed. NJCir 146A881(2d case).

799-66 216Ala514, 113S524; 195Cal 477, 234P381, 38ALR1479; 200Cal 277, 252P1043; 75CalA247, 242P749; 123 Kan191, 254P372; 168Minn378, 210 NW163; 307Mo 307, 270SW318; 213 AppDiv414, 210NYS269 (KuKlux Klan). [b] Discriminatory classifications in statute are presumed to have been made by Legislature with understanding of conditions and upon adequate grounds. 156Miss99, 125S710.

800-68½-New. Where no reason appears for attempted discrimination in a statute, the general rule that the legislature is presumed to have investigated the facts upon which it acts and that its conclusion as impliedly expressed in the statute must be respected by the courts cannot prevail. 76CalA445, 244 P946.

800-69 281US431, 50SCt397, 74L ed945; 37F(2d)602; 75Mont88, 242P344 (discrimination denying equal protection); 215AppDiv97, 214NYS104; 198NC114, 150SE813; TexCommnA 24SW(2d)381. [c] In absence of unmistakably clear language in statute, it will not be found that state attemnted regulatory powers over national agencies. 27F(2d)224.

800-71 326 Ill 18, 156NE814.

800-73 175Ark98, 298SW995.

800-74 327 Ill 508, 158NE814; 143Miss 821, 107S659; 119 Or141, 248P358; 124 Or105, 258P204. [a] 176Ark324, 3SW (2d)340; 124 Or105, 258P204. [b] Ruling governs all cases to which it is applicable.-Conn 151A518.

800-75 114Nebr540, 208NW639. [c] Decisions not given retroactive effect.-143 Okl 110, 287P1025.

801-77 17F(2d)329; Iowa 230NW865; 105NJL518, 146A685(2dcase) (decision declaring act relating to serving process on nonresidents unconstitutional does not operate to repeal statute and leaves legislature free to cure defect).

801-79 114Nebr540, 208NW639; 124 Or105, 258P204.

801-80 124 Or105, 258P204. [b] Statute adjudged unconstitutional as in violation of state constitution does not become operative by subsequent renewal of ground on which decision was based. 5F(2d)905.

801-82 114Nebr540, 208NW639 [quotC J]; Nebr 229NW773; 124 Or105, 258P 204. [a] 124 Or105, 258P204.

801-83 175Minn73, 220NW425; 114 Nebr540, 208NW639 [quotCJ]; Nebr 229NW773; 124 Or105, 258P204.

801-88 327 Ill 508, 158NE814.

801-92 119 Or141, 248P358.

802-94 272US52, 47SCt21, 71L ed160; 163Ga535, 136SE435; 318 Ill 600, 149NE 526; 204 Iowa355, 213NW938; 75Mont 240, 243P1073; 131Misc220, 226NYS585; 52ND231, 202NW391; 118 Or77, 245P 1074, 46ALR1173; 119 Or141, 248P 358; 124 Or112, 258P193; 60ALR528; 123 Or144, 261P694; 152SC455, 150SE 269; 151Va21, 144SE469.

802-6 114 OhSt658, 151NE760.

802-7 Fla 129S876; 164Ga863, 139SE 722; 323 Ill 427, 154NE198; 258Mass 289, 155NE12, 51ALR789; 52ND231, 202NW391; 128 Okl 269, 263P635; TexCivA 10SW(2d)151. [a] All governmental functions may not be among powers which Constitution separates into three departments. Fla 129S876. [b] Powers of three departments of government are to be determined by consideration of language intent and history of Constitution. Fla 129S876.

803-8 128 Okl 269, 263P635.

803-9 Fla 129S876; 323 Ill 427, 154NE 198.

803-10 272US52, 47SCt21, 71L ed 160; 79Mont184, 255P744; 128 Okl 269, 263 P635. [a] Statutes held not violative of provision.-168Ga723, 149SE37 (providing for licensing and regulating business of making small loans).

803-10½-New. Whether particular function is power of government depends on its essential nature and effect rather than name given or officer performing it. Fla 129S876.

803-11 75Mont240, 243P1073, 1077 [citCJ].

803-12 75Mont240, 243P1073, 1077 [citCJ].

803-13 310Mo 542, 276SW389; 226 AppDiv331, 235NYS555.

803-14 114 OhSt658, 151NE760. [b] Courts are solicitous to maintain division between departments of government. Mass 171NE82(2dcase).

804-15 226AppDiv331, 235NYS555.

804-23½-New. Where the constitution does not define the separate powers of the different departments of government, the legislative branch is the one to make the determination. 114 OhSt 658, 151NE760.

804-24 Ind 166NE270 (city manager). [a] In New Mexico.-NM 289P594.

804-26 84Fla634, 94S697, 30ALR471. [c] Act providing for commission and city manager form of government held not unconstitutional as interfering with political parties. Ind 166NE270.

804-27 318 Ill 600, 149NE526; 321 Ill 510, 152NE557, 46 ALR960; 324 Ill 113, 154NE707; 31NM220, 243P333; 52ND 231, 202NW391; 295Pa478, 145A597. [c] Arbitrary and unlimited power is not vested in any department of the state government. 97Fla69, 120S335, 64ALR 1307. [d] No department of state government may be controlled or even embarrassed by another department, unless so ordained in constitution. 200 Ind716, 164NE408, 63ALR218.

804-28 272US52, 47SCt21, 71L ed160.

804-29 277US189, 48SCt480, 72L ed 845; 114 OhSt658, 151NE760.

804-31 272US52, 47SCt21, 71L ed160.

804-36 102CalA237, 283P136.

804-36½-New. The declaration of rights constitutes a limitation upon the powers of every department of the state government. 97Fla69, 120S335, 64ALR 1307.

805-37 52ND231, 202NW391.

805-38 277US189, 48SCt480, 72L ed 845; 21F(2d)320; Fla 129S876; 165 Ga421, 141SE194; 321 Ill 510, 152NE 557, 46ALR960; 323 Ill 427, 154NE198; 324 Ill 285, 155NE318; 50Philippine259; TexCivA 10SW(2d)151; 100WVa461, 130 SE654. [b] (7) Legislature has power to alter or repeal common law, create new offenses, enlarge civil remedies, and fasten responsibility for injuries upon persons against whom common law gave no remedy. 242Mich95, 219NW69. [d] Congress has implied powers to effectuate those powers expressly given.-273US135, 47SCt319, 71L ed580, 50ALR 1.

805-41 226AppDiv331, 235NYS555 (plenary power).

805-42 97Fla69, 120S335, 64ALR1307.

805-43 32Ariz515, 260P435.

805-44 NJCh 144A546. [a] Limitations will not be implied unless failure to do so would to some extent defeat or frustrate effect of other provisions. TexCivA 25SW(2d)259.

805-45 318 Ill 402, 149NE422; 154Miss 765, 122S776.

805-45½-New. The legislative power in a particular respect is not exhausted by a single exercise. 254Mass232, 150 NE234.

805-46 174Ark478, 295SW730; 179Ark 719, 18SW(2d)362; 80Colo 417, 252P 350; 92Fla187, 109S228; 92Fla563, 109 S473; Ga 137SE506; 165Ga421, 141SE 194; 327 Ill 508, 158NE116; 214Ky613, 283SW966; 223Ky269, 3SW(2d)606; 125Me319, 133A738; 75Mont240, 243P 1073, 1077 [quotCJ]; 78Mont235, 253P 1100; 86Mont200, 283P202, 67ALR 1020; 31NM220, 243P333; 128Misc626, 220NYS170; 52ND231, 202NW391; 124 Or112, 258P193, 60ALR528; 284Pa 421, 131A253; 114Tex535, 273SW799; 142Va577, 128SE633; 197Wis394, 222 NW300, 62ALR466. [c] In Montana.-76Mont429, 247P332, 47ALR424. [d] Legislature's power is all-embracing and supreme as that of British parliament. 80Colo 417, 252P350. [e] Legislature may authorize two or more subdivisions to make joint contract. 137SC496, 135 SE538. [f] Legislature is without power to make thing in name what in fact it is not. 42F(2d)913. [g] Constitutional jurisdiction cannot be enlarged or restricted by statute.-Cal 292P124.

805-47 128Misc626, 220NYS170.

805-48 120Kan332, 243P302; 75Mont 240, 243P1073; 52ND231, 202NW391. But see 128 Okl 269, 263P635. [a] Legislature may do all things not prohibited by constitution. 74Mont1, 238P316.

805-48½-New. Legislative powers constitutionally vested can only be constitutionally withdrawn. 77Colo 516, 238P 44.

805-48¼-New. Legislature cannot avoid constitutional restriction by indirection. 216Ala514, 113S524.

805-48¼-New. The legislature may exercise nonlegislative functions when reasonably incidental to full and effective exercise of its legislative powers. 135 SC348, 132SE673.

805-48⅓-New. The legislature cannot destroy the constitutional functions of either the executive or judicial department of government under the guise of regulation. CalA 273P617.

805-48¼-New. People have power through legislature to enact laws for protection of their constitutional rights to direct state government. Tex 28SW (2d)515.

805-48½-New. The Legislature exercises a delegated power, since the sovereign power remains in the people, and its acts are subject to the test of reasonableness. 200Wis518, 228NW895, 69 ALR348(2dcase).

805-49 128 Okl 269, 263P635; 100WVa 461, 130SE654. [a] Legislature as entity.-128 Okl 269, 263P635.

806-51 35F(2d)96; 38F(2d)381; 38F (2d)897; Mass 171NE82(2dcase); 52 ND231, 202NW391; 47RI 13, 129A606, 42ALR1204; 100WVa461, 130SE654, 655 [citCJ]. [b] Means and agencies Congress selects vary to suit life of people. 38F(2d)897.

806-54½-New. The legislature cannot arbitrarily interfere with the enjoyment of rights guaranteed by the constitution. 324 Ill 285, 155NE318.

806-55 NC 155SE562; Utah 289P132; 197Wis261, 221NW864 (drainage district).

806-57 161La1, 108S104.

806-57½-New. The appropriation of state funds for a state purpose, 95Fla 117, 116S66.

806-60 115 Okl 158, 241P776.

806-62 23AlaA5, 120S140.

806-63 21F(2d)320; 226AppDiv331, 235NYS555 (appropriation of funds); 100WVa461, 130SE654, 655 [citCJ].

806-64½-New. the appropriation of public funds and incurring of indebtedness for public purposes, 34Ariz394, 271 P867.

806-65½-New. Determination of what term "property" includes, within constitutional powers is legislative function. 41F(2d)929.

806-66 100WVa461, 130SE654, 655 [cit CJ].

806-67 254Mass342, 150NE231.

806-68 254Mass342, 150NE231.

806-70½-New. When and under what circumstances the state and its municipalities can engage in industrial pursuits must be determined by the legislative department. 34Ariz394, 271P867.

806-70¼-New. Grant of authority to city to erect electric line through another city is legislative function. CalA 291P654.

806-70¼-New. Legislatures have authority to define citizens' rights and prescribe rules to determine such rights. Okl 292P54.

806-73 34Ariz425, 272P95.

807-34 96Fla91, 117S863; 116Nebr359, 217NW610, 612 [quotCJ]; TexCivA 1 SW(2d)907. [c] **Legislature may not divest courts of their judicial power.**–249, Mich147, 228NW723.

807-84½-New. A statute directing submission to electors of question whether congress shall modify a federal statute to enforce the Eighteenth Amendment was held not to be an encroachment on the powers of the judiciary. 243NY 417, 153NE854.

807-85 Cal 270P968. [d] **Legislative power is authority to make laws** while enforcement of laws is judicial function. 277US189, 48SCt480, 72L ed845.

808-91 18F(2d)798; 197Cal 215, 239P 1076; 202Cal 717, 262P724; 200 Ind 716, 164NE408, 63ALR218. See also 114 OhSt658, 151NE760. [g] **Claim of citizenship** entitles alleged alien, sought to be deported, to judicial trial beyond jurisdiction of government department. 7 F(2d)367

809-92 285Pa511, 132A572. See also 181Ark391, 26SW(2d)92.

809-94 130Kan464, 286P204.

809-96 14F(2d)877; 26F(2d)60, 61 [quotCJ]; 200Cal 276, 252P1038; 208 Cal 6, 279P998; 164Ga863, 139SE722; Md 149A446; Mass 169NE552 (merely affecting work of courts incidentally); 114 OhSt658, 151NE760; 161Tenn293, 30SW(2d)601, 602 [citCJ]. [b] (2) 195 Wis410, 217NW738. (16) Prison board. 198Cal 508, 245P1089. (17) Department of registration and education. 324 Ill 285, 155NE318. (18) Railroad Commissioners. Fla 129S876. [j] **Delegation of power to city council to fix damages in condemnation proceedings subject to appeal to court** is not unconstitutional delegation of judicial power. 177Minn 146, 225NW86. [k] **Delegation of power to department of public works to cancel water appropriation** where water has not been put to beneficial use is not void as delegation of judicial power. Nebr 231NW840. [l] **Complicated and contingent details** in performance of quasi judicial functions may be legally performed by administrative officers. Fla 129S876. [m] **Whether function performed by Commission is judicial or quasi judicial** must be determined from its essential nature and attributes and law applicable thereto. Fla 129S876.

810-98 [b] **Provision for sale of memberships in grain exchanges to satisfy lien in accordance with rules of exchange** does not constitute delegation of judicial power where sale remains subject to judicial direction. 164Minn122, 204NW637.

810-3½-New. A statute giving the court of claims sole jurisdiction to determine claims against funds of a liquidated life insurance company in the hands of an administrative officer is a valid provision for administrative proceeding. 215AppDiv424, 213NYS669 (supreme court has no jurisdiction under general constitutional provisions).

810-4 235Mich369, 209NW131 (statute requiring court to hear and determine moot cases is unconstitutional); 118Nebr835, 226NW464, 69ALR257; 247NY401, 160NE655. [c] **Law making supreme court justice delegate of governor in removal of public officers** is invalid. 247NY401, 160NE655.

810-7 [c] **Recovery in tort for breach of contract** may be allowed in statute. 273 US119, 47SCt308, 71L ed569.

811-17 336 Ill 606, 168NE630.

811-21½-New. Provision making certificate of board of public works as to sufficiency of remonstrance to improvement conclusive is invalid. Mo 256 SW798.

811-21½-New. An act providing for appraisal of shares of corporate stock at the value of which the preceding year's dividend is six per cent has been held not usurpation of judicial power. 101Vt391, 143A677.

811-21¼-New. State income tax act is not encroachment on judiciary. 170Ga 370, 153SE58.

811-21½-New. Statute, authorizing refund of illegal inheritance tax is not encroachment on judiciary. Wis 230NW 698.

811-25 219AlaA12, 121S12.

811-26 53ND140, 205NW17, 20 [citCJ].

811-27 206 Iowa390, 220NW328; 161 La1, 108S104; 38 OklACR641.

812-28½-New. An order of the railroad commission that a railway company restore certain discontinued trains is simply legislative. 146SC496, 144SE 233.

812-31½-New. A statute, providing that no person but a licensed attorney shall undertake for others the collection of claims out of court, is not expository. 218Ala277, 120S142.

812-37 Oh 172NE148.

813-42 321Mo 1042, 15SW(2d)342.

813-44 321Mo 1042, 15SW(2d)342.

814-51 78Mont1, 252P301, 304 [citCyc].

814-68 23F(2d)472.

815-73½-New. The legislature may provide for appointment of municipal court judges by the governor. 200 Ind 515, 165NE241.

815-82 251NY127, 167NE194.

815-84 42F(2d)913; 86Colo 1, 278P780 (statute requiring entry of divorce decree); 97Fla749, 122S239 (statute held not invasion of province of judiciary); 142 Okl 260, 286P774.

815-86½-New. Legislature may not declare what compensation shall be in condemnation cases, or prescribe any binding rule in that regard. 126Misc 879, 216NYS2.

815-87 [b] **State's sovereignty over real property** within its boundaries is supreme including right to establish rules of law and procedure for transfers of title. 6F(2d)10.

816-93 25F(2d)736; 165Ga421, 141SE 194; 45 Ida676, 266P665 (statute creating board of commissioners of state bar and providing for investigation and hearing of charges against attorneys subject to review by supreme court held valid); 144Miss125, 109S129 (statute creating county courts in certain counties is not invalid); 49ND248, 191 NW485 (right to practice law is not contract right but license); Tex CommnA 10SW(2d)984.

816-97½-New. Motor vehicle insurance fund law providing compensation for injuries or death caused by automobiles held constitutional and not relating to powers of court. Mass 169NE552.

816-1 34F(2d)163; 340 Ill 250, 172NE 722.

816-2 34F(2d)163; 38F(2d)306; 196 Cal 414, 238P687; 202Cal 717, 262P 724; 202Cal 760, 262P735; 78CalA277, 248P304; 81CalA1, 253P151 (municipal court's jurisdiction over high grade misdemeanors outside of boundaries of municipality); CalA 273P617; CalA 276 P128; 102Conn529, 129A527; 92Fla 515, 109S442; 93Fla161, 112S66 (Rev. Gen. St. [1920] § 3322, authorizing supreme court to issue certiorari writ, does not enlarge court's appellate jurisdiction); 97Fla479, 121S466; Fla 127S313; 168La487, 122S591; 168La 958, 123S639, 67ALR1447(2dcase); 263 Mass444, 162NE217; 168Minn147, 210 NW40; NJCh 144A546; 227AppDiv246, 237NYS248; 135Misc744, 240NYS683; 118 OhSt273, 160NE856; 114 Okl 193, 245P649; 46Philippine22, 25 [citCJ]; TexCommnA 5SW(2d)131; TexCivA 277SW171; TexCivA 280SW243. [b] (3) Statute authorizing mandamus not void. Tex 28SW(2d)515. (4) Statute authorizing writs other than mandamus void. Tex 28SW(2d)515. [h] **Limiting jurisdiction.**–114 OhSt155, 151NE48. [i] **Neither by enactment nor nonenactment** can legislature defeat or nullify constitutional provision conferring appellate jurisdiction on court. 118 OhSt273, 160 NE856. [j] **Law authorizing circuit court stenographers to apply to supreme court for extension of time to file transcripts** is beyond legislative power. 153 Miss697, 119S807. [k] **Statute conferring probate jurisdiction** on county court, conflicting with constitution, is unconstitutional. TexCommnA 10SW (2d)984. [l] **Legislature may restrict but not enlarge jurisdiction of Court of Appeals.** 254NY146, 172NE271.

816-2½-New. Statutes establishing administrative machinery and providing for hearing before administrative tribunal may limit judicial review to fundamental and jurisdictional errors. 30 F(2d)144.

817-3 95CalA42, 272P321; CalA 273P 617; 235Mich272, 209NW158; 168Minn 147, 210NW40; 101NJL455, 130A14; 216AppDiv291, 215NYS43; 114 OhSt 155, 151NE48; 111TexCr446, 14SW(2d) 851(2dcase). [a] **Failure in past to dispute** invasion of constitutional province by legislature does not bar assertion of rights. CalA 273P617.

817-5 21AlaA330, 108S85; 78CalA277, 248P304; 168Minn147, 210NW40; 133 Misc464, 232NYS489. [a] **Municipal courts** may be given exclusive jurisdiction over all misdemeanors arising anywhere in county where court is located. 201Cal 405, 257P76. [b] **Statute not invalid.**–Tex 28SW(2d)515 (making original jurisdiction of supreme court and court of civil appeals concurrent as to mandamus).

817-6 92Fla515, 109S442; 165Ga421, 141SE194; 159Tenn468, 19SW(2d)233 (extension of jurisdiction of municipal court to cases arising under state laws); TexCivA 282SW339; TexCivA 290SW 829. [j] **Act authorizing commissioners' court to appoint commissioners of appraisement of levee districts** is held not unconstitutional as authorizing court to create another court. Tex CivA 282SW339. [k] **Statute giving county judge power to revoke real estate broker's registration certificate and license** is held valid. 92Fla515, 109S 442. [l] **Requiring supreme court in equity case to enjoin use of premises as house of prostitution** and abate it by closing for one year is constitutional exercise of police power. 135Misc151, 238NYS197.

817-7 20 OhA141, 153NE160. [a] **Provision giving jurisdiction to superior court in any county** in cases not otherwise provided for does not abridge power of legislature to designate courts which shall have jurisdiction of particular proceedings. 74CalA114, 239P 415.

817-8 Cal 293P69.

817-9 21AlaA295, 107S727; 178Ark 219, 10SW(2d)856; 130Kan228, 285P 542. [f] **Provision that chancery clerk shall make all sales ordered by court** does not invade jurisdiction of court. 168Ark449, 270SW610. [g] **Statute conferring exclusive jurisdiction on superior court** of county containing largest area of land embraced in drainage district to determine validity of assessment or bond issue is not unconstitutional as trenching on jurisdiction of superior court. 196Cal 414, 238P687. [h] **Where constitution fixed power to**

issue writs of error in certain tribunal, legislature cannot divest that tribunal of such power. 200 **Ind**178, 162 **NE**403.

817-9½-New. Congress may not confer on federal equity courts authority to consider proof in jury cases tried in state courts and determine sufficiency of evidence in such cases. 28**F(2d)** 493.

817-9⅓-New. A charter giving a police court concurrent jurisdiction in civil and criminal matters within the city with a justice's court is valid. **CalA** 276**P**128.

817-10 **NJ** 146**A**328(2dcase).

818-11½-New. Illinois Prohibition Act authorizing an injunction to abate a liquor nuisance does not violate the constitution as conferring equitable jurisdiction on the county courts. 318 **Ill** 198, 149**NE**294.

818-26 **TexCivA** 280**SW**202.

820-66 But see 207**Cal** 227, 277**P**725, 65**ALR**1497. [a] **Held not usurpation of judicial powers.**-207**Cal** 227, 277**P**725, 65**ALR**1497.

821-72 323 **Ill** 536, 154**NE**468; 158**La** 377, 104**S**121; 86**Mont**595, 285**P**932; **TexCivA** 298**SW**462. But see **Conn** 151 **A**518.

821-72⅓-New. Legislature may validate that which has been invalidated by the judiciary, especially in matters of public right. 201 **Iowa**476, 205**NW** 847.

821-83 323 **Ill** 536, 154**NE**468.

821-85 323 **Ill** 536, 154**NE**468.

822-86 **Fla** 126**S**367.

823-15 273**US**119, 47**SCt**308, 71**L ed** 569; 103**Conn**511, 131**A**429; 92**Fla**617, 110**S**451, 460 [citCJ]; 167**Ga**22, 144**SE** 905 [app dism 278**US**577, 49**SCt**176, 73**L ed**516(6thcase) (reh granted **US** 49 **SCt**186(6thcase))]; 311**Mo** 414, 279**SW** 76, 84 [citCJ]; 125 **Okl** 108, 256**P**755.

823-16 273**US**119, 47**SCt**308, 71**L ed** 569; 103**Conn**511, 131**A**429; 311**Mo** 414, 279**SW**76, 84 [citCJ].

823-17 103**Conn**511, 131**A**429.

823-17½-New. or inadmissible; 196 **Cal** 344, 238**P**88.

823-20 273**US**119, 47**SCt**308, 71**L ed** 569; 19**F(2d)**322, 327 [citCJ]; 103 **Conn**511, 131**A**429; 311**Mo** 414, 279**SW** 76.

823-21 273**US**119, 47**SCt**308, 71**L ed** 569.

823-25½-New. that the certified copy of a record of a state chemist showing alcoholic content of liquor seized shall be prima facie proof of the facts therein contained, 103**Conn**511, 131**A** 429.

823-26½-New. The legislature has power to create a rule of evidence by which it will be presumed from insolvency of a bank that such insolvency was caused by acts of those in control of the bank. 165**Ga**44, 139**SE**812.

823-27 324 **Ill** 543, 155**NE**481; **Mo** 21 **SW(2d)**762 (ordinance providing that speed of motor vehicle or street car in excess of twenty-five miles an hour for distance of city block shall be proof of careless driving is unconstitutional); 116**Nebr**359, 217**NW**610 (federal census).

824-28 But see 129**Kan**853, 284**P**611. [b] **Legislature cannot compel courts** to inflict injury which constitution requires them to remedy. **TexCommnA** 291**SW**871, 51**ALR**1135.

824-30 116**Nebr**359, 217**NW**610.

824-32⅓-New. Inquiry as to relevancy of material facts in litigation devolves on judicial department and not the legislative department. 116**Nebr**359, 217 **NW**610.

824-33 **Mass** 171**NE**672 (judgment against land for delinquent taxes).

824-36 125 **Okl** 108, 256**P**755.

825-42 146**Wash**478, 263**P**957 (qualifications).

825-43½-New. A statute forbidding the state bank commissioner from divulging in a civil case information received in examination of banks is an unwarranted interference with the functions of courts. 315**Mo** 75, 285**SW**513, 47**ALR**688.

825-44 273**US**119, 47**SCt**308, 71**L ed** 569; 235**Mich**344, 209**NW**177; 217**App Div**67, 216**NYS**215; 195**NC**832, 143**SE** 857; **TexCivA** 30**SW(2d)**921. [e] **May provide that failure** to carry out prescribed procedure shall not render void object sought to be obtained. 196**Cal** 725, 239**P**38. [f] **Power of legislature is limited to empirical exercise** of power to regulate jurisdiction and proceedings. 217**AppDiv**67, 216**NYS**215. [g] **Discretion of court not subject to regulation.**-217**AppDiv**67, 216**NYS**215. [h] **Motor vehicle insurance fund law** held constitutional as against contention that it refers to powers of court by repealing law for compulsory security against injuries caused by vehicle. **Mass** 169 **NE**552.

825-45 96**Fla**91, 117**S**863; 217**AppDiv** 67, 216**NYS**215.

825-46 217**AppDiv**67, 216**NYS**215.

825-47 235**Mich**344, 209**NW**177; 217 **AppDiv**67, 216**NYS**215.

825-47½-New. The legislature has power to prescribe procedure to establish claims against funds in hands of government administrative body. 215 **AppDiv**424, 213**NYS**669 (despite constitutional jurisdiction of supreme court).

825-47¼-New. A statute dictating the substance of decrees to be entered by a court of equity and prohibiting any lesser degree of restraint, regardless of equity and justice, than that prescribed is an unwarranted interference with judicial power and will not be enforced. 235**Mich**272, 209**NW**158.

825-47¼-New. A court's constitutional power to correct irregularities in its minutes made without judicial action or authority cannot be controlled by legislation. 116**Tex**29, 285**SW**1079, 48 **ALR**355.

825-47½-New. A statute directing venue of prosecution for nonsupport as the place of offense is not an unconstitutional infringement of judicial power. 219**AlaA**12, 121**S**12.

825-47¼-New. Legislature cannot change procedure affecting past transactions in such way as to prevent judicial control of situation. **Conn** 151**A**518.

825-48 102**NJL**281, 132**A**331; **Utah** 273 **P**306.

825-53 94**CalA**382, 271**P**568.

825-54 168**Ark**504, 270**SW**946, 1119 (to prevent breach of contract).

826-59 **Utah** 279**P**878. [a] **Rule applicable to writ of mandamus.**-206**Cal** 758, 276**P**998.

826-70 273**US**119, 47**SCt**308, 71**L ed** 569; 208**Cal** 439, 281**P**1018, 66**ALR**1507 (legislature has power to regulate criminal and civil proceedings and appeals); 86**CalA**10, 260**P**320 (criminal cases); 96**Fla**688, 119**S**128; 146**Miss**799, 112**S** 168; 217**AppDiv**67, 216**NYS**215.

826-71 208**Cal** 439, 281**P**1018, 66**ALR** 1507; 146**Miss**799, 112**S**168; 195**NC**284, 141**SE**886. But see 86**Colo** 1, 278**P**780.

826-72 249**Mich**147, 228**NW**723; 146 **Miss**799, 112**S**168; 319**Mo** 316, 4**SW(2d)** 467; 217**AppDiv**67, 216**NYS**215; 5**Pa Dist&Co** 80. [a] (4) Statute providing that, where both parties are violating state laws, question of who shall be held for damages shall be question of fact in collision is unconstitutional. 247**Mich**661, 226**NW**675. [c] **Determining character of parties** as essential or necessary parties to litigation is judicial and not legislative. 98**Fla**1026, 125**S**237.

826-72½-New. The legislature may by general law establish a cause for continuance but the court must determine from the evidence whether cause for continuance exists. 324 **Ill** 543, 155**NE** 481.

826-73 196**Cal** 414, 238**P**687.

826-74 196**Cal** 414, 238**P**687.

826-77 **Colo** 291**P**1024; 159**Tenn**76, 16 **SW(2d)**186. [a] **Requiring jury trial in contempt cases.**-81**Colo** 431, 256**P** 319.

826-78 **Ga** 155**SE**484.

827-79 217**AppDiv**67, 216**NYS**215.

827-82½-New. The legislature has no power to prescribe rules regulating the conduct of the court's business or matters within the inherent power of the court to regulate. 96**Fla**688, 119**S** 128.

827-82½-New. Such aid in the production of evidence and proper consideration and presentation of law as the exigencies of litigation demand is open to a court. **CalA** 273**P**617.

827-83 92**Fla**617, 110**S**451, 460 [citCJ].

827-88 208**Cal** 439, 281**P**1018, 66**ALR** 1507.

827-89 194**NC**577, 140**SE**230.

827-94½-New. A statute permitting the appellate court to disregard the trial court's finding of fact would be unconstitutional. 213**Ala**592, 105**S**679 (where trial court has better opportunity to pass on evidence).

827-94¼-New. A statutory provision that only questions of law may be reviewed is not invalid. 200 **Ind**515, 165 **NE**241.

827-95 130**Misc**200, 224**NYS**179.

827-98 195**NC**478, 142**SE**705.

827-1 **Fla** 128**S**31(3dcase); 154**Md**46, 139**A**570.

828-18 24 **OhNPNS**113; 122 **Okl** 86, 251**P**486.

828-24 200 **Ind**515, 165**NE**241.

828-25 **Va** 152**SE**382.

828-26 118 **Or**77, 245**P**1074, 46**ALR** 1173.

828-27 Contra 118 **Or**77, 245**P**1074, 46 **ALR**1173.

828-30 136**Misc**242, 240**NYS**673; 190 **NC**638, 130**SE**743 (power to open or vacate judgment essentially judicial).

829-31½-New. Courts' constitutional power to correct inadvertent judgment entries made without judicial action or authority cannot be controlled by legislation. 116**Tex**29, 285**SW**1079, 48**ALR** 355.

829-33 201 **Iowa**476, 205**NW**847.

829-35 201 **Iowa**476, 205**NW**847.

830-49 37 **OklACR**63.

830-50 37 **OklACR**63. [b] (1) 37 **Okl ACR**63.

832-72½-New. Rules governing appeals cannot be abrogated by legislative act. 195**NC**335, 142**SE**222.

832-72½-New. An ordinance is held not invalid because of a provision for an appeal to a city court and as to jurisdiction thereof. 149**Md**648, 132**A**160.

832-72¼-New. Clause granting appeal as of right held unconstitutional. 254 **NY**146, 172**NE**271.

833-73 See also 116**Tex**662, 287**SW**45.

833-76 143**Miss**471, 109**S**16; 217**App Div**67, 216**NYS**215.

833-79½-New. A statute, providing that revenue agent shall not bring or prosecute suit heretofore brought, under authority of antitrust statutes of the state, or any suit abated by acts of 1926 session of the legislature, has been held valid on the ground that legislature was exercising its legislative power of designating duties of state officer. 143**Miss**489, 108**S**180.

833-79⅓-New. 144**Miss**201, 109**S**715.

833-80 217**AppDiv**67, 216**NYS**215.

834-86 206 **Iowa**390, 220**NW**328 (legislature cannot instruct jury how they shall weigh evidence).

834-90 100**Vt**404, 138**A**777. [b] **Statute making willful disobedience of process or order of court a misdemeanor** is not unconstitutional as taking away power court contemned to punish for contempt where it provides additional remedy. 194**Cal** 63, 227**P**914.

834-91 206**Cal** 35, 273**P**767. [a] **Statute regarding insanity** as defense held not unconstitutional. 169**La**520, 125**S** 580.

834-92 **IndA** 166**NE**779; 208**Cal** 439, 281**P**1018; 66**ALR**1507; 102**CalA**237, 283**P**136; **CalA** 286**P**492 (contempt); 35 **OhA**311, 172**NE**401.

835-3 180**Ark**333, 21**SW(2d)**864.

835-4 169**Ga**814, 152**SE**76.

835-5½-New. Legislature cannot enlarge criminal jurisdiction of court as fixed by constitution. 164**La**369, 113**S** 879.

835-5⅓-New. or withdrawing authority to suspend sentence, 24 **OhA**146, 156 **NE**916.

835-5¼-New. A statute requiring life imprisonment for persons convicted of four felonies is not invalid. 245**Mich** 396, 223**NW**67.

835-7 241**Mich**161, 216**NW**426.

835-8 35**Ariz**214, 276**P**325; 252**NY**27,

168NE817; 128 Okl 269, 263P635; Tex CivA 288SW875. [h] **Member of legislature** cannot recover compensation for acting as deputy attorney-general. 318 Ill 600, 149NE526.

835-10 175Minn259, 220NW951; WVa 153SE589 (power of county court in establishment of roads). [b] **Board of county supervisors** held to have no jurisdiction except that conferred by constitution, which legislature cannot change. 141Miss701, 105S541.

835-11 [a] **May prescribe additional duties.**-234Ky743, 28SW(2d)745.

836-13½-New. A statute directing submission to electors of question whether congress should modify federal statute to enforce Eighteenth Amendment was held not to be an encroachment on the powers of the executive. 243NY417, 153NE854.

836-13½-New. The legislature has power to prescribe or regulate the functions of the state university in any of its units, and may broaden its functions. 86Mont200, 283P202, 67ALR 1020 (requiring research and experimental work).

836-14 135SC348, 132SE673.

836-15 But sec 141Miss701, 105S541.

836-16½-New. An act establishing a chain gang with the approval of the legislative delegation of a county is not unconstitutional in giving supervisory authority over the purchase of supplies by the superintendent. 133SC420, 131 SE29.

836-18 277US189, 48SCt480, 72L ed 845; 92Fla187, 109S228, 230 [citCJper Brown, J]; 234Ky473, 28SW(2d)745 (statute held not invalid as conferring executive power on legislative officer); 118Tex449, 16SW(2d)809.

836-19 50Philippine259.

836-20 272US52, 47SCt21, 71L ed160; 153SC106, 149SE760.

836-21 255Mass160, 150NE892; 135 SC348, 132SE673.

836-22 255Mass160, 150NE892.

838-45 92Fla187, 109S228, 230 [citCJ perBrown,J].

838-50½-New. An act providing for the appointment of an advisory board for a county hospital does not violate the constitutional provision against delegation of municipal powers to commissions and other bodies. 7PaDist&Co 725.

838-55½-New. An act establishing a chain gang upon consent of the legislative delegation of a county is not void in giving it incidental authority to approve the election of a superintendent and dismiss him. 133SC420, 131SE 29.

838-55½-New. A statute not permitting a governor to remove a commissioner without the consent of the senate is not invalid. 284Pa421, 131A253.

838-55¼-New. Senate has no power to consent to the removal of officers, as under the constitution the president has sole power. 272US52, 47SCt21, 71L ed 160.

838-58 143Miss745, 109S724, 725 [cit Cyc]; 97NJEq555, 129A624.

838-59 143Miss745, 109S724.

839-60 325 Ill 372, 156NE290; 143 Miss745, 109S724.

839-61½-New. A governor's pardoning power is not hampered by a statutory requirement that a petition be accompanied by a statement of the judge and prosecuting attorney. 325 Ill 372, 156 NE290.

839-68 162Ga327, 133SE843.

839-69 7F(2d)590; 162Ga327, 133SE 843.

839-70 143Miss745, 109S724, 725.

839-71 216Ala558, 114S46; 86CalA558, 261P1080; 91Fla858, 109S315; 95Fla 117, 116S66; 94Fla752, 114S435; 36 GaA709, 138SE88; 325 Ill 452, 156NE 307; Ind 166NE270; 125Me319, 133A 738; Me 151A426; 155Md104, 141A509, 516 [citCJ]; Mass 171NE82(2dcase); 238Mich130, 213NW195; 172Minn179, 215NW215; 313Mo 375, 280SW51, 52 [citCJ]; 318Mo 870, 2SW(2d)713; 75 Mont240, 243P1073, 1077 (fundamental principle implied); 76Mont305, 247P 162; 48Nev397, 232P1078; 222AppDiv 437, 226NYS329; 189NC7, 128SE593; 56ND436, 218NW156; 289Pa437, 137A 635; 10PaDist&Co 241; 152SC455, 150 SE269; 152Tenn258, 277SW71 (to fix salaries of county officers or regular clerk of court); TexCommnA 3SW(2d) 420 (as to school districts); TexCivA 295SW649; 152Va1, 145SE425; 196Wis 472, 220NW929; 197Wis284, 221NW 860. [b] (5) Statute taxing moneyed capital competing with business of national banks was held not invalid as legislative abdication of power to congress. 242NY277, 151NE452.

840-72 195NC811, 143SE841.

840-78 [a] **No board, officer, or individual may vary or change constitutional statute.**-241NY346, 150NE139.

840-79 18F(2d)918, 922 [citCJ]; Fla 129S876; 172Minn179, 215NW215; 189NC7, 128SE593; 152SC455, 150SE 269; 154Tenn208, 285SW582, 585 [cit CJ]; 196Wis518, 220NW816.

840-80 18F(2d)918, 922 [citCJ]; 154 Tenn208, 285SW582, 585 [citCJ].

840-83 18F(2d)918, 922 [citCJ]; 216 Ala558, 114S46; 94Fla752, 114S435; 320 Ill 352, 151NE248; 235Ky86, 29SW (2d)583; 172Minn179, 215NW215; 310 Mo 116, 274SW1058 (power to determine what property would be benefited by condemnation may be delegated); 289Pa437, 137A635; 152SC455, 150SE 269. [a] (1) 94Fla752, 114S435.

841-86 143SC178, 141SE274, 275 [quot CJ].

841-91½-New. The test of delegability is completeness of the statute. 94Fla 752, 114S435.

841-91½-New. Delegation of legislative power is never implied. 126Misc 382, 212NYS639.

841-91¼-New. The assumption of an obligation on the part of a state to pay moral or equitable claims is a nondelegable legislative function. 243NY231, 153NE58.

841-91⅝-New. A statute respecting the powers of the state fire marshal as to buildings liable to fire and so situated as to endanger other property is not violative of a constitutional prohibition against delegation of power to perform municipal functions. 84Mont478, 276P 958.

842-92 318Mo 870, 2SW(2d)713 (Missouri Library Act held not to violate this rule).

842-7 104Kan141, 177P360; Nebr 231 NW689.

842-8 244Mich681, 222NW108; 117 Tex516, 8SW(2d)655.

843-11½-New. , the extension of city water mains into adjacent outside territory, Kan 289P970.

843-12½-New. or to petition the city council to have a petitioner's farm lands disconnected from the city; 52ND533, 204NW356.

843-20-21½-New. The legislature may give discretion in applying statutory relief to a single person. 30F(2d)144.

843-31½-New. A statute is valid which authorizes a senatorial committee of political parties to determine the number of candidates. 333 Ill 606, 165NE 217, 62ALR912.

843-32 9PaDist&Co 507.

843-32½-New. or unlimited authority for the construction of a governmental project to be paid for by taxation. 95 Fla465, 116S72.

844-50½-New. A statute empowering a public utility corporation to sell its assets and franchises to a company authorized to conduct a similar business and conferring powers of the selling corporation on the purchaser does not delegate legislative power to the purchaser or to majority stockholders of the seller. 50RI 288, 146A777, 66ALR 1553.

844-51 278US367, 49SCt163, 73L ed 426; 31F(2d)617; 94Fla752, 114S435; 95Fla117, 116S66 (unlimited authority to purchase property for the state); Fla 129S876; 336 Ill 472, 168NE401 (administrative officers); TexCivA 295 SW649; Va 154SE579. [a] **Power to legislate on compensation** of township officers cannot be delegated to county commissioners. 48Nev397, 232P1078. [b] **Constitutional prohibition against delegation of power to control or interfere with county money or property** is not violated by statute providing for appointment of special counsel to conduct prosecutions in county where district attorney is disqualified. 81CalA 590, 254P648.

844-54 336 Ill.472, 168NE401.

844-55½-New. A statute prescribing a penalty for abandonment after seduction and marriage is held not unconstitutional as attempting to give to officers of the state the right to supend operation of a statute. 105TexCr1, 285SW 323.

844-55½-New. The people cannot, by initiative law, delegate their legislative powers to an agent or executive or administrative body. 34Ariz394, 271P 867.

845-56 272US1, 47SCt1, 71L ed131; 5 F(2d)330; 14CustA350; 95Fla117, 116S 66; Fla 129S876; 320 Ill 536, 151NE581; 172Minn179, 215NW215; 174Minn583, 219NW916; 315Mo 681, 286SW363; 76 Mont305, 247P162 (where procedural directions and things to be done are specified in general terms); 113Nebr 816, 205NW294, 296 [citCJ] (power to determine whether foreign corporation seeking to do business has complied with state law); 131 Or563, 284P166, 68 ALR422; 152SC455, 150SE269. [c] (1) 195Cal 548, 234P398, 38ALR1186. (2) That subordinate body is granted discretion in exercise of power conferred by statute does not necessarily demonstrate that such discretion amounts to use of legislative power. 131 Or563, 284 P166, 68ALR422. [d] **Any power not legislative in character** may be delegated to administrative body. 131 Or563, 284P166, 68ALR422. [e] **Provisions for discretion in administration do not authorize officers to enact or suspend law.** 41F(2d)241.

845-57 320 Ill 536, 151NE581; 230App Div252, 243NYS644; 117 ObSt114, 157 NE488, 54ALR1220; 142 Okl 146, 285P 1040. See also 315Mo 681, 286SW363. [d] **Power to approve real estate bonds** may be delegated to secretary of state. 320 Ill 605, 151NE675.

845-58 8F(2d)155; 315Mo 681, 286SW 363.

845-59 Fla 129S876; 317 Ill 132, 147 NE797; 82NH459, 135A530; 226App Div331, 235NYS555.

845-60 272US1, 47SCt1, 71L ed131; 5 F(2d)687; 39F(2d)926; 34Ariz394, 271 P867; 172Ark835, 290SW591; 44 Ida 440, 258P171, 172 [citCJ]; 313Mo 375, 280SW51; 241NY346, 150NE139; 189 NC7, 128SE593; 51ND45, 199NW128 [citCJ]; 144 Okl 44, 289P306; Wis 220 NW926; 196Wis472, 220NW929.

845-60½-New. Legislative declaration that such rules shall have the force and effect of a law does not make them equivalent of legislative enactment. 241 NY346, 150NE139.

845-61 See also 276US394, 48SCt348, 72L ed624 (law authorizing president to regulate customs duties for certain purposes not invalid).

845-61½-New. or for the sale of seized enemy property unless the president otherwise direct, 272US1, 47SCt1, 71L ed 131.

845-67½-New. Congress has power to authorize secretary of commerce to promulgate regulations in respect to aircraft navigation. 41F(2d)929.

846-73 See also 51ND45, 199NW128 [citCJ].

846-74 See also 172Ark835, 290SW591.

846-75 241NY346, 150NE139.

846-76 39F(2d)247; 178Ark153, 10SW (2d)513; 207Cal 722, 279P989 (inquiring into inclusion or exclusion of territory within bridge and highway districts); Cal 290P451; 73CalA83, 238P 160; Fla 129S870(2dcase); 47 Ida74, 272P707; 162La781, 111S162; 155Md 86, 141A518; 172Minn179, 215NW215; 123 Or180, 261P895, 58ALR665; Va 154 SE579. [d] **Duty of ascertaining facts as to expediency and desirability of incorporation of proposed bank** may be imposed on bank commissioner. 155 Md86, 141A518.

846-77 178Ark153, 10SW(2d)513; 47 Ida74, 272P707.

846-87 105NJL511, 146A428(2dcase)

(judge for court of common pleas). See also 47 **Ida**74, 272**P**707.

846–89 123 **Or**180, 261**P**895, 58**ALR**665.

847–97 93**Cal**A42, 269**P**198; 189**NC**7, 128**SE**593.

847–97½–New. A statute making a second conviction punishable as a felony while a first conviction is punishable as a misdemeanor is not unconstitutional as a delegation of legislative power to the prosecuting attorney. 67**Cal**A597, 227**P**948.

847–99 94**Fla**752, 114**S**435; 154**Md**445, 140**A**840; 155**Md**104, 141**A**509, 514[cit CJ]; 238**Mich**130, 213**NW**195; 75**Mont** 240, 243**P**1073, 1077[quotCJ]; 154**Tenn** 208, 285**SW**582, 585[citCJ]. [b] 45 **Ida** 676, 266**P**665. [c] **Traffic regulations.–** 313**Mo** 375, 280**SW**51.

847–1 196**Cal** 468, 238**P**703, 44**ALR**1; 94**Fla**752, 114**S**435; 324 **Ill** 285, 155**NE** 318.

847–2 8**F(2d)**155; 30**F(2d)**144; 31**F (2d)**448; 42**F(2d)**692; 216**Ala**558, 114**S** 46; 213**Ala**289, 104**S**671; 215**Ala**655, 111**S**907; 174**Ark**971, 298**SW**222; 172 **Ark**835, 290**SW**591, 592[citCJ]; 196**Cal** 453, 238**P**697 (to determine matter relating to right of corporations to increase, reduce, invest, and dispose of their capital and capital stock); 196 **Cal** 453, 238**P**703 (statute authorizing commission of corporation to permit dividends out of other than surplus profits held not delegation of legislative power); 78**Cal**A223, 248**P**716; 93 **Cal**A42, 269**P**198; 94**Fla**752, 114**S**435; **Fla** 126**S**308; 47 **Ida**74, 272**P**707 (state forestry board); 324 **Ill** 285, 155**NE**318; **Ill** 173**NE**137; 126**Kan**233, 268**P**123; 204**Ky**562, 265**SW**277 (rules and regulations for conduct of business held proper); 225**Ky**324, 8**SW(2d)**392; 235 **Ky**86, 29**SW(2d)**583; 261**Mass**556, 159 **NE**70 (determination of area benefited by rapid transit routes); 238**Mich**130, 213**NW**195; 313**Mo** 375, 280**SW**51; 75 **Mont**240, 243**P**1073, 1077 [quotCJ]; 76 **Mont**305, 247**P**162; 79**Mont**385, 256**P** 1071; 241**NY**346, 150**NE**139 (rules); 241 **NY**346, 150**NE**139; 250**NY**173, 164**NE** 895; **ND** 229**NW**105 (statute held not to delegate legislative power to board of administration); **Okl** 292**P**841; 284**Pa** 421, 131**A**253; 152**SC**455, 150**SE**269; 154**Tenn**208, 285**SW**582, 585 [citCJ]; 155**Tenn**476, 295**SW**469, 471 [citCJ], 54 **ALR**725; 161**Tenn**293, 30**SW(2d)**601; **TexCommnA** 17**SW(2d)**458 (industrial accident board); **TexCivA** 295**SW**649; **TexCivA** 9**SW(2d)**446; 99**Vt**265, 132**A**40; 146**Wash**17, 261**P**796; **WVa** 153**SE**305. [d] 153**Tenn**469, 284**SW**372. [h] **In performing details of legislative work delegated to it,** commission acts as administrative arm of legislature. 284**Pa** 421, 131**A**253. [i] **Legislative body may create independent bodies to carry out its purposes. OhA** 172**NE**680.

847–2½–New. But a legislative declaration that such rules shall have force and effect of law does not make them equivalent of legislative enactment. 241**NY** 346, 150**NE**139.

848–3½–New. A statute as to conservation of game and fish, purporting to be a general law, is not invalid as attempting to delegate legislative powers. 96 **Fla**799, 119**S**376.

848–3⅓–New. A statute which is incomplete and incapable of administration without legislative additions by a board of directors of state institutions, which is given absolute discretion, without judicial or other control, as to whether it will engage in enterprises mentioned, including construction and maintenance of dams and reservoirs, is unconstitutional. 34**Ariz**394, 271**P** 867.

848–3¼–New. Denial or revocation of a license because of guilt of the licensee or of an offense which tends to show moral or intellectual unfitness does not constitute punishment for the offense, but is only a measure of the protection of the public, as regards the contention that the legislature, in conferring on an administrative board power to deny or revoke a license, has conferred legislative power. 250**NY**173, 164**NE**895.

848–7 **Fla** 128**S**853(2dcase).

848–7½–New. , and also to delegate duties relating to the inspection of books and revocation of licenses, 315**Mo**823, 290**SW**416.

848–7½–New. and to attach to the board any bureau or department it sees fit. 315**Mo** 823, 290**SW**416.

848–9½–New. A statute requiring a bond to the commissioner of agriculture in order to be licensed to operate a commercial gin is not a delegation of legislative powers to a board. 112**TexCr** 152, 15**SW(2d)**650.

848–11½–New. , and to determine the "convenient" district for the attendance of nonresident pupils. 317 **Ill** 495, 148 **NE**244.

848–12½–New. A statute creating a board of higher education and authorizing the board to allocate to respective educational institutions in its discretion funds received from tax levies is not unconstitutional. 130 **Or**73, 279**P** 271.

848–12⅓–New. Statute providing for transportation of school children held unconstitutional as attempt to grant legislative power to board of education. 27 **OhNPN**852.

849–15 172**Minn**179, 215**NW**215 [cit CJ].

849–16 247**Mich**127, 225**NW**595.

849–20 155**Tenn**476, 295**SW**469, 54**ALR** 725; 187**Wis**463, 204**NW**595 (Blue Sky Law is not delegation of legislative power). [a] **Power delegated held valid.–**187**Wis**463, 204**NW**595.

849–22 324 **Ill** 285, 155**NE**318; 187**Wis** 463, 204**NW**595 (legislature may delegate such power to railroad commission). [b] **Power delegated held valid.–**187**Wis**463, 204**NW**595. [c] **Nature of authority conferred.–**187**Wis**463, 204 **NW**595.

849–25 8**F(2d)**155; 324 **Ill** 285, 155**NE** 318; 114**Tex**548, 273**SW**808.

849–25½–New. pharmacists, 155**Tenn** 476, 295**SW**469, 54**ALR**725.

849–33 8**F(2d)**155.

849–34 324 **Ill** 285, 155**NE**318.

850–36 94**Fla**752, 114**S**435 (plumbers).

850–39 See also 196**Wis**472, 220**NW** 929.

850–40 34**F(2d)**185 (superintendent of insurance).

850–41 315**Mo** 681, 286**SW**363.

850–41½–New. Statutes establishing state fire and tornado fund for insurance of public property are not unconstitutional as delegating taxing power to commissioner of insurance. 53**ND** 683, 208**NW**968, 45**ALR**1337.

850–52 194**Cal** 146, 228**P**19; **Fla** 129**S** 876; 155**Md**104, 141**A**509; 76**Mont**305, 247**P**162; 284**Pa**421, 131**A**253; 99**Vt** 265, 132**A**40. [d] **Leaving to commission to fix license fee within statutory maximum** required for operating motor vehicles for hire is not delegation of legislative power. 75**Mont**240, 243**P** 1073.

851–53 216**Ala**558, 114**S**46; 213**Ala**50, 104**S**538; 75**Mont**240, 243**P**1073; **Tex CivA** 25**SW(2d)**936.

851–54 155**Md**104, 141**A**509; 50**ND**184, 195**NW**292.

851–59 5**F(2d)**831 (interstate commerce commission may be given power to apply rule requiring railroads to install automatic train-stop and train-control devices).

851–60 76**Mont**305, 247**P**162 (unconstitutional). [a] **Statute giving commissioners power to order spurs at will** is purely arbitrary and void. 76**Mont**305, 247**P**162.

852–76 226**AppDiv**447, 235**NYS**505 (determine manner of abolition); 51**ND** 680, 200**NW**796.

852–81½–New. A statute providing for the rate of interest on securities according to agreement of the parties as approved by the public utilities commission is not a delegation of legislative power. 245**Mich**558, 222**NW**752.

852–91 230**AppDiv**260, 243**NYS**430; 284**Pa**421, 131**A**253.

853–93½–New. The legislature may delegate to the state commission power to fix division of joint rates. 21**F(2d)**4.

853–93⅓–New. Statutes may not delegate to a commission power to fix rates to be charged by municipal corporations with respect to public utilities owned by them. **Utah** 271**P**961.

853–96 See also **Ind** 172**NE**186.

853–99¼–New. An administrative determination of the amount of a tax is held not exercise of legislative duties. 16**F(2d)**717.

853–2 195**Cal** 548, 234**P**398, 38**ALR**1186 (not invalid as vesting arbitrary discretion); 238**Mich**130, 213**NW**195; 318 **Mo** 560, 300**SW**675. [a] **Statutes held not to confer arbitrary discretion.–**195 **Cal** 548, 234**P**398, 38**ALR**1186.

853–15 20**F(2d)**741; 213**Ala**92, 104**S** 258; 97**Fla**1007, 122**S**570 (nonjusticiable matters); 206 **Iowa**229, 220**NW**306; 167**Minn**187, 208**NW**757 (determination whether highway should be vacated cannot be committed to courts); 118 **Nebr**835, 226**NW**464, 69**ALR**257. But see 42**F(2d)**30. [d] (3) Statute creating board of commissioners of state bar and providing for investigation of charges against members of bar and review thereof before final review by supreme court. 45 **Ida**676, 266**P**665. [f] **Thus,** where legislature remits to court of claims to determine whether claim is sanctioned by equity and justice, no principle of recovery is set and therefore claim must fail, court having no power to recognize claim. 213**App Div**737, 211**NYS**420. [g] **Assumption of obligation on moral claim** is legislative function which cannot be delegated. 213**AppDiv**737, 211**NYS**420. [h] **Sanitary district statute** held not unconstitutional. 340 **Ill** 20, 172**NE**60. [i] Power of governors of state bar to formulate rules of professional conduct by approval of supreme court held not delegation. **Cal** 289**P**818.

854–18 153**Wash**379, 279**P**1102.

854–19 But see **Can** [1925] 3**DomLR** 729.

854–20 118**Nebr**835, 226**NW**464, 69 **ALR**257 (questions relating to organization, boundaries, powers, and government of light, heat, and power districts).

854–21 97**Fla**1007, 122**S**570 (drainage districts).

854–22 118**Nebr**835, 226**NW**464, 69 **ALR**257 (statute held unconstitutional).

854–24½–New. It has been held that a statute may vest in the court discretion as to whether or not it should apply to pending litigation. **NB** [1925] 3 **DomLR**387.

854–24⅓–New. Statute conferring jurisdiction on court of claims to decide equity of claims attempts to delegate legislative powers to judiciary. 213**App Div**737, 211**NYS**420.

854–24¼–New. An act conferring jurisdiction on the court of claims to determine whether under the facts a moral obligation was imposed on the state to pay a claim is not a delegation of legislative function. 243**NY**231, 153**NE**58.

854–24⅕–New. A statute prescribing penalty for abandonment after seduction and marriage is held not to violate a constitutional provision prohibiting the suspension of laws except by legislature. 105**TexCr**1, 285**SW**323.

854–25 229**Ky**264, 17**SW(2d)**227, 63 **ALR**932 (punishment for legislative contempt).

854–26 118 **OhSt**501, 161**NE**538, 540 [citCyc]; 138**Wash**1, 267**P**770.

855–35 40**F(2d)**889.

855–36½–New. Discretion in applying statute to pending litigation has been held to be properly granted, although a delegation of legislative authority. **Can** [1925] 3**DomLR**729.

855–37 37**F(2d)** 557 (Jones Act); **Fla** 129**S**870(2dcase); 137**Misc**341, 242**NYS** 142; 118 **OhSt**501, 161**NE**538. [a] **Function of finding facts** constitutes quasi judicial function conferrable on circuit courts. **Fla** 129**S**870(2dcase).

855–37½–New. , or to hear evidence to be used in statutory proceedings by executive officers. 127**Misc**791, 217**NYS** 477.

855–47 118**Nebr**835, 226**NW**464, 69 **ALR**257.

855–47½–New. The court in making findings of fact as to whether a proposed road is reasonably necessary and whether it is practical does not assume to exercise legislative discretion or au-

thority. 176Minn94, 222NW578.

855-47⅓-New. Such questions are not purely legislative in character, 176Minn 94, 222NW578.

855-47¼-New. but are incidental to a proper determination of the facts in a judicial road proceeding. 176Minn94, 222NW578.

855-50 213Ala92, 104S258 (statute permitting appeal to chancery court from order eliminating grade crossings does not give court power to veto or approve, on ground of legislative policy, ordinance directing such elimination).

855-51 But see 310Mo 116, 274SW1058.

856-59 152Tenn258, 277SW71; Tex CivA 275SW137.

856-61 Cal 293P69; Mo 29SW(2d)716 (increase collector's fees); 152Tenn258, 277SW71.

856-67 50SD444, 210NW661; 54SD 146, 222NW690.

856-72 120Kan42, 242P456, 461 [cit CJ].

857-73 335 Ill 106, 166NE488; MoA 16 SW(2d)691.

857-75 52ND533, 204NW356, 361 [cit CJ].

857-76½-New. Legislature may delegate to judiciary authority to restrict corporate limits of city. Utah 289P132.

857-84½-New. [§ 353½] 8½. **Levee Districts.** Statute authorizing commissioner's court to appoint commissioners of appraisement for levee district. court of appraisement was created by legislature and power to create such court was not conferred on commissioner's court which had only power to select individuals constituting personnel thereof. TexCivA 275SW137.

857-84½-New. To incorporate conservancy districts. Law relating to creation of conservancy districts has been held unconstitutional as granting legislative power to create districts on district court. Kan 289P966.

857-88 143SC178, 141SE274 (drainage district).

857-91½-New. A statute authorizing a court to vacate plots and to adjudge the title to streets, alleys, and public grounds to be in the persons entitled thereto is not an unconstitutional delegation of legislative powers to the judiciary. 163Minn439, 204NW534, 205 NW613.

857-91⅓-New. Statute empowering courts to decide and declare whether drainage district has been created in accordance with its provisions is not delegation of legislative power. 41F(2d) 433.

857-92 But see 200Cal 632, 254P267.

857-93 67CalA328, 227P664 (counties); 328 Ill 552, 160NE206; 340 Ill 20, 172 NE60; 233Ky688, 26SW(2d)554; 118 Nebr835, 226NW464, 69ALR257; 51Nev 215, 273P983 (public improvements and taxes therefor); 216NYS402; 35Wyo 73, 246P918 (irrigation districts).

858-95½-New. Under some constitutions power of legislature to make special provision for municipal government is plenary. 133SC420, 131SE29.

858-3 213AppDiv677, 211NYS85.

859-12 200Cal 632, 254P267.

859-14 198Cal 753, 247P897.

859-15½-New. Taxing moneyed capital competing with national banks, without defining class of subject of taxation, held not delegation of legislative power. 213 AppDiv677, 211NYS85.

859-15⅓-New. Statutes have been held not unconstitutional as delegating to irrigation districts the power of taxation. 35Wyo 73, 246P918.

859-20 Ala 129S4 (ordinances); 67 CalA328, 227P664 (counties); 84CalA 577, 258P991; 91Fla858, 109S315; Ind 166NE270; Ind 172NE186; 130Kan464, 286P204; 235Ky540, 31SW(2d)932 (franchises); 309Mo 683, 274SW802, 808 [quotCJ]; 241NY346, 150NE139 (rules and ordinances); 197NC404, 149SE375; 131SC473, 128SE410. [c] (2) Other instances. CalA 291P654.

860-21 255Mass160, 150NE892. [a] (4) To determine existence of facts set forth in statute prescribing affirmatively conditions upon which owners of farm lands may have them disconnected from city as matter of right. 52ND533, 204NW 356.

860-22 111Conn433, 150A811; 206 Iowa9, 216NW683; 130Misc492, 224 NYS165. [b] **Power to grant franchises** may be delegated to municipalities as political subdivisions of state. 210 Ky170, 275SW634.

860-24 93CalA277, 270P270; 309Mo 683, 274SW802.

860-25 94Fla1056, 114S859 (power to license and regulate traffic on streets); 337 Ill 469, 169NE265 (authorizing prohibition of intoxicants); 149Md349, 131 A801, 43ALR819; 197NC740, 150SE624 (territory contiguous to corporation).

861-27 246NY140, 158NE51.

861-29 67CalA328, 227P664 (counties).

861-31 [a] **Abridgment of state police power.-Mo** 30SW(2d)105.

861-33 214Ky175, 282SW1091; 145 Wash588, 261P112, 55ALR1175.

861-36⅓-New. Statute permitting mayor to reduce number of special sessions justices would be invalid. 222AppDiv 437, 226NYS329.

861-37 220Ala231, 124S523; 246NY140, 158NE51.

862-41 280US145, 50SCt71, 74L ed234; 26F(2d)912; 229AppDiv295, 241NYS 162.

862-43 Mo 30SW(2d)105.

862-44 See also 280US145, 50SCt71, 74 L ed234.

862-44½-New. Legislature cannot authorize municipality to make contract with utility regarding rates which will prevent state from fixing reasonable rates. Mo 30SW(2d)105.

862-47 86Mont297, 283P430.

862-49 220Ala231, 124S523 (county commissioners' court); 170Ga638, 153 SE749; 170Ga800, 154SE388(2dcase); 225Ky112, 7SW(2d)839; 174Minn305, 219NW172; 141Miss701, 105S541; 50 Nev237, 255P1073; 33NM553, 273P928, 62ALR296; 35 OhA81, 171NE846; 131 Or563, 284P166, 68ALR422; 289Pa437, 137A635; TexCivA 3SW(2d)947; 146 Wash449, 263P735; 185Wis599, 202NW 144. [a] **Legislative act establishing court for appraisement** for levee districts and which authorizes commissioner's court to select individuals to constitute the personnel thereof is valid. TexCivA 275SW137.

862-50 160Ga857, 129SE542; 119 OhSt 93, 162NE393 (power to levy and collect assessment against state). But see 235Ky774, 32SW(2d)353. [b] (2) Statute giving county commissioners of any county having recorder's court, possessing county criminal jurisdiction, authority to confer on it limited civil jurisdiction is void. 189NC7, 128SE593.

862-51 50Nev237, 255P1073. [b] **Salary System Act** establishing salary system in certain counties is not invalid as delegation of legislative power. 160 Ga657, 129SE38.

863-52 Contra 160Ga657, 129SE38.

863-54 Fla 126S308; 136SC345, 134SE 380.

863-55½-New. Act establishing a chain gang upon consent of legislative delegation from a county is not a delegation of legislative power but confers authority or discretion as to execution of law. 133SC420, 131SE29.

863-55⅓-New. A law providing for exercise of legislative powers by county commissioners is violative of a constitutional provision limiting the exercise of legislative powers to the legislative assembly. 131 Or563, 284P166, 68ALR422.

863-65 165Minn361, 206NW642.

863-66½-New. To issue bonds, 153Tenn 306, 283SW751.

863-71 37Wyo 259, 260P537. But see 333 Ill 304, 164NE696.

863-71½-New. Act authorizing county line districts and vesting discretion in district trustees is not reviewable except for palpable abuse. TexCivA 275 SW449.

863-73 97Fla1007, 122S570 (legislative, not judicial, function); TexCivA 15SW (2d)1067.

863-78 233Ky688, 26SW(2d)554; NJSup 152A175(2dcase).

864-83 149Md349, 131A801, 805 [cit CJ], 43ALR819; 169Minn413, 211NW 477; 313Mo 375, 280SW51; 216NYS402.

864-86 149Md349, 131A801, 805 [citCJ], 43ALR819; 169Minn413, 211NW477.

864-87 137Misc341, 242NYS142 (action by court on petition to construct disposal works in village if approval unreasonably withheld); 133SC420, 131 SE29, 30 [quotCJ]; 148Wash1, 267P 770, 774 [quotCJ]; 197Wis284, 221NW 860.

864-88 133SC420, 131SE29, 30 [quot CJ].

864-90 133SC420, 131SE29, 30 [quot CJ].

865-91 162Ga641, 135SE84. [a] (2) Law requiring state engineer to administer law as to particular underground waters on petition of ten per cent of users does not delegate legislative power to petitioners. 34NM611, 286P970.

865-93 130Kan228, 285P542.

865-94 133SC420, 131SE29, 30 [quotCJ notes91-94].

865-96 86CalA558, 261P1080; 162Ga 641, 135SE84; Ind 166NE270. [d] **Distinction is** between delegation of power to make law, and conferring authority or discretion as to its execution to be exercised in pursuance of law. 133SC 420, 131SE29. [e] **Statute contingent on enactment of other legislation** does not constitute unconstitutional delegation of responsibility of deciding expediency of legislation. 86CalA558, 261P1080.

866-1 89Fla414, 104S591; 162Ga641, 135SE84; 204Ky562, 265SW277 (erection of soldiers' and sailors' memorial); 318Mo 870, 2SW(2d)713, 725 [citCJ]; 318Mo 1004, 2SW(2d)796.

867-6 195Wis437, 219NW858 (statute not invalid).

867-9½-New. A provision, that an initiative measure permitting outdoor sports on Sunday for which a fee may be charged is made dependent on the efficacy of local acceptance, is a valid police regulation. 255Mass366, 151NE 378.

868-19 169Ark261, 273SW1032.

868-23 239Mich340, 214NW193.

869-25 89Fla414, 104S591.

869-37 174Ark936, 298SW327; 197Wis 284, 221NW860.

870-43 255Mass366, 151NE378.

871-49 179Ark837, 18SW(2d)359.

871-64 [a] **Courts have inherent and implied powers** properly to function as separate department of state government. 208Cal 439, 281P1018, 66ALR 1507.

871-65 11F(2d)860; 319 Ill 403, 150NE 290; 323 Ill 427, 154NE198; 310Mo 696, 276SW64; 116Nebr359, 217NW610; TexCivA 292SW581; 146Wash588, 264 P403. [a] **Determining if common-law rule exists,** what it is and application to given conditions held functions of court. 298Pa475, 148A695.

871-66 11F(2d)860; 17F(2d)386; 319 Ill 403, 150NE290; 319 Ill 426, 150NE 270; 323 Ill 427, 154NE198; TexCivA 10 SW(2d)151.

871-67 [a] **Doing legal justice** function of courts is not to do justice but to do legal justice. 17F(2d)386.

871-68 120 OhSt44, 165NE573. [a] (4) 324 Ill 285, 155NE318.

872-71 [a] 324 Ill 285, 155NE318.

872-72 217Ky123, 288SW1036; 161La 1, 108S104; 127Misc886, 217NYS300; 295Pa311, 145A295. [b] **Whether legislature has accomplished its intended purpose** by particular phraseology employed is judicial question. 196Cal 161, 236P 304.

872-75 50Philippine259; 40Wyo 462, 278P542 (prohibition of use of highways).

872-79½-New. what is a proper exercise of police power, 112TexCr152, 158SW (2d)650.

872-81 [j] **Ascertainment of compensation** for property taken for public use is judicial function. 267US292, 45SCt 305, 69L ed617. [k] **Whether statutory conditions exist, authorizing exercise of power of eminent domain,** is question for court. 317 Ill 147, 147NE796. [l] **Finding of probable cause** is judicial function. 7F(2d)760. [m] **Determining compensation in condemnation cases** is judicial function. 126Misc879, 216NYS 2. [n] **Trial of those charged with crime**

is judicial function. 254Mass342, 150 NE231. [o] **Imposition of sentences on** those convicted of crime is judicial function. 254Mass342, 150NE231. [p] **Punishing for contempt.**–200 Ind716, 164 NE408, 63ALR218. [q] **What is public use** in application of constitutional provisions to expropriation of private property is judicial question. 281US439, 50 SCt360, 74L ed950. [r] **Determination of what term "property" includes** is judicial function. 41F(2d)929. [s] **Legality of municipal boundaries.**–Fla 130S 28.

872–81½–New. The court is without jurisdiction to determine the life of the senate committee, since it cannot be required to render an unenforceable decision. 21F(2d)144.

872–81½–New. It is the duty of the courts to observe and preserve provisions of the constitution in their full force and integrity. 97Fla69, 120S335, 64ALR 1307.

873–83 200 Ind623, 157NE769.

873–84 200 Ind623, 157NE769.

873–85 75CalA764, 243P702; 200 Ind 623, 157NE769.

875–18 But see Wis 231NW634.

878–84½–New. Power of court over special statutory proceeding to compel filing of nomination acceptance is judicial. Nebr 233NW1.

878–85 5LaA568. [a] SD 232NW20. [b] **Injunction against acts in furtherance of unconstitutional local or special law abolishing county** is not judicial interference with exercise of legislative or political functions. 33NM504, 270P 897.

878–92 21F(2d)396.

878–95 21F(2d)396; 111TexCr264, 12 SW(2d)796.

873–1 51SD131, 212NW626, 628 [citCJ]. [c] 249Mich673, 229NW618. [d] **Reasonable test of judicial power** cannot demand that it must carry unwarranted or unnecessary relief or process of enforcement. 249Mich673, 229NW618.

874–7½–New. A statute providing for a supplementary remedy is valid as a judicial function. 159La831, 106S321.

874–9 [a] **Designation of judge of one district court to sit in another district.**–52ND231, 202NW391.

876–33 TexCivA 275SW137.

877–48 [b] **Municipal zoning ordinance** providing for appeal from Zoning Appeal Bond to city court of Baltimore is held valid. 150Md452, 133A465, 46ALR 80.

878–84½–New. Statute requiring county judge to direct payment to state of amounts due for reformatories is not invalid as investing judge with executive or legislative power. 208Ky661, 271SW 1066.

878–85 281US74, 50SCt228, 74L ed710, 66ALR1460(2dcase); 34F(2d)881; 36F (2d)670; Ga 136SE425, 426 [citCJper Hine,J]; 166La647, 117S749; 68Utah 452, 250P1049; 136Wash467, 241P21.

878–87 68Utah452, 250P1049.

879–2 14F(2d)784; 37F(2d)493.

879–6 281US370, 50SCt335, 74L ed913; 168La1005, 123S655, 67ALR1183.

879–8 122 Okl211, 253P500, 50ALR 1232. See also 163Ga535, 136SE425.

879–17½–New. whether power to create offices and fix salaries of city shall be in board of estimate, or in common council; 222AppDiv416, 225NYS495.

879–22 136Wash467, 241P21. [a] **Sufficiency of grounds for recall** is political question. 136Wash467, 241P21. [b] **Whether proceedings looking to recall of public officer comply with constitutional and statutory provisions** is judicial question. 136Wash467, 241P21.

879–22½–New. whether any nation or other governmental unit can, or should, engage in private enterprise; 29F(2d) 932.

879–24½–New. The size of a legislative committee appointed by statute to serve after adjournment becomes a political question, when the judicial question as to the power to make the appointment is determined. 168Ark989, 272SW678.

879–26½–New. Eligibility of member of board appointed by legislature in act creating board of commissioners may be determined by court. 170Ga687, 153SE 773.

879–29⅓–New. whether property has been taken for public or private use; 202 Iowa508, 210NW604, 54ALR1.

880–30½–New. whether proceedings looking to the recall of an officer comply with constitutional and statutory provisions; 136Wash467, 241P21.

880–36 168La560, 122S850.

881–39 [a] (3) But there is no presumption that senate agreed to house amendments to a proposed amendment where this fact does not appear from the senate journal. Nor is there any presumption, where the record is not clear as to whether the senate and house agreed to the same amendment. 169Ark 97, 273SW355, 41ALR629.

881–49 333 Ill437, 164NE665 [certiorari den US 49SCt349(3dcase)].

881–53 68Utah452, 250P1049.

881–54 TexCommnA 18SW(2d)587; Tex CommnA 25SW(2d)820; TexCivA 10SW (2d)216. [c] **Making and canvassing returns** constitutes integral part of election TexCommnA 25SW(2d)820. [d] **Prior to canvass of returns by secretary of state** election is incomplete at every stage of proceeding therein. Tex CommnA 25SW(2d)820.

881–55 But see 154Tenn679, 290SW399.

881–56 68Utah452, 250P1049.

881–58 125 Or72, 265P1092.

882–59 [a] **Legal rights of candidates** under statutes may be protected by courts. TexCivA 23SW(2d)535. [b] **In absence of constitutional limitation,** courts have power to decide if election was held according to law. 200Wis518, 228NW895, 69ALR348(2dcase).

882–61 TexCivA 23SW(2d)535 (compliance with written law). [b] **Regulation by statute** of canvassing and certifying election returns by county board makes question judicial and not political one. TexCivA 23SW(2d)535.

882–64½–New. Whether recall proceedings complied with constitutional and statutory provisions is a judicial question. 136Wash467, 241P21.

882–64¼–New. The question of a political party committee's right to oust a member for refusal to sign a pledge prescribed by the committee to support the party's presidential candidate is not outside the court's jurisdiction as purely political. TexCivA 9SW(2d)747.

882–64¼–New. No citizen though candidate can contest in court returns made by proper officials until after election is completed. TexCommnA 25SW(2d) 820.

882–66 19F(2d)256; Ariz 289P157 (remedy for securing exemption); Fla 130S699; 329 Ill189, 160NE351; 336 Ill 606, 168NE630 (value of property for taxation purposes); 339 Ill28, 170NE 728; 126Misc188, 213NYS623 (unlimited); 132Misc527, 229NYS516 (method of refunding taxes); 113 Okl200, 241P 124; 119 Or141, 248P358; 123 Or144, 261P694 (exemptions); TexCivA 3SW (2d)947; 145Va644, 134SE721; 196Wis 410, 220NW390. [b] **Whether or not and how much** of road taxes are to be paid to new city is question to be decided by legislature. 196Cal161, 236P 304.

882–67 108Conn715, 145A56; 243NY 173, 153NE39; 198Wis281, 224NW126 (unless exercised beyond all reason); 198Wis349, 224NW132.

882–68 179Ark886, 19SW(2d)1000; 166 Minn22, 206NW942 (motor trucks); 101 Vt391, 143A677.

882–69 Ark 32SW(2d)634; 198Wis281, 224NW126. See also 84Colo 576, 272P 629.

882–71½–New. The legislative determination of the purpose, 125Misc472, 211 NYS334.

882–71⅓–New. extent, 125Misc472, 211 NYS334.

882–71¼–New. and apportionment of tax on property 125Misc472, 211NYS334.

882–71⅕–New. or persons is final and not reviewable by the courts. 125Misc 472, 211NYS334.

882–71⅙–New. 217Ky575, 290SW320.

882–72½–New. The legislature alone **had authority to decide that a great public calamity existed justifying an exemption from taxation, and, having decided that emergency existed, no court could assail such determination.** Tex CivA 271SW436.

882–72⅓–New. The constitution permits legislature to release counties, cities, or towns from payment of taxes levied for state or county purposes in case of a great public calamity, and to the legislature alone is confided the power of deciding if such public calamity exists. TexCivA 271SW436.

882–72¼–New. The method by which a drainage district raises money for the general purposes of the district and for constructing improvements and the property which should be taxed therefor, is a question to be determined primarily by the legislature rather than by the court. 127Kan833, 275P191.

882–72⅕–New. The question of wisdom or justice of permitting personal property taxes to be offset against additional income taxes assessed is one for the legislature and not for the court. 198 Wis377, 224NW124(4thcase).

882–72⅙–New. What are penalties for nonpayment of tax is judicial question. 87Colo 193, 286P280.

882–72⅐–New. Liens for taxes created by statute are not to be enlarged by judicial construction. Iowa 230NW528.

882–73 94Fla347, 115S669; Mo 19SW (2d)891 (where action of legislature is not arbitrary, fraudulent, or confiscatory).

882–74 321Mo 955, 13SW(2d)646; 223 AppDiv485, 229NYS10; 297Pa260, 147 A58.

883–80 97Fla1007, 122S570; 195NC223, 141SE597.

883–81 195NC223, 141SE597.

883–84 148Miss427, 114S887 (dictum).

883–85 148Miss427, 114S887 (right exists only as constitution so provides).

883–90½–New. The supreme court cannot render any opinion as to the general constitutionality or validity of a future legislative action, the exact terms of which necessarily rest entirely in speculation and conjecture. 50SD324, 210NW 186.

883–90½–New. A water improvement district, whatever its degree as a public or governmental agency, has no immunity from liability for injuries referred to in the constitution, prohibiting damaging or destruction of property without adequate compensation. TexCommnA 11 SW(2d)506.

883–91 21F(2d)320; Fla 126S353; MoA 30SW(2d)1039; NJSup 139A425; 253 NY305, 171NE72; 218AppDiv643, 219 NYS139; 25 OhA352, 157NE815; Tex CivA 30SW(2d)431. [b] **Enacting of laws** not function of court. 319 Ill426, 150NE270. [c] **Laws proposed under popular initiative** will not be passed on as to general constitutionality. Mass 169NE552. [d] **It is province of Legislature** to say when decree of segregation of territory from city shall take effect. Utah 289P132.

883–92 104Conn238, 132A690; 89Fla 361, 104S577; 92Fla187, 109S228; 335 Ill11, 166NE504; 117Kan755, 233P510; 31NM641, 249P1074, 58ALR573; 247 NY311, 160NE381; 25 OhNPNS20.

883–97 17F(2d)630; 21F(2d)320; 215 Ala640, 112S243; 220Ala231, 124S523; 31Ariz465, 254P477, 55ALR436; 179 Ark837, 18SW(2d)359; 196Cal 344, 238 P88; Ill 173NE274; Ill 173NE484; 202 Iowa744, 210NW968; Iowa 232NW412; 217Ky123, 288SW1036; 251Mich608, 232NW346 (remedies for defects in law); 243NY423, 154NE298; 221App Div94, 222NYS359; 130Misc631, 225 NYS185; 219AppDiv19, 219NYS373; 120 OhSt44, 165NE573; 48RI 60, 135A 241; 136SC200, 134SE211; TexCivA 27 SW(2d)319; TexCivA 32SW(2d)249.

883–98 270US245, 46SCt248, 70L ed 566; 271US603, 46SCt598, 70L ed 1109 (fixing compensation of land grant railroads for transportation of mails); 272US581, 47SCt210, 71 L ed422, 49ALR575; 21F(2d)320; 23 F(2d)334; 14F(2d)749; 14F(2d)984; 19F(2d)999; 24F(2d)619; 28F(2d)424; 37F(2d)493; 38F(2d)925; 41F(2d)299; 41F(2d)788; 214Ala525, 108S568; 219

Ala350, 122S458; 30Ariz332, 246P1033, 47ALR401; 35Ariz403, 279P257; Ariz 289P515; 173Ark833, 293SW740; 170 Ark587, 280SW632; 181Ark848, 28SW (2d)57; 199Cal 625, 250P669, 48ALR 1308; 196Cal 344, 238P88; Cal 288P 769; 70CalA94, 232P721; 71CalA633, 236P339; 91CalA143, 266P969; 94CalA 779, 272P352; 99CalA330, 278P473 (statute as to revocation of will); 56 AppDC327, 13F(2d)299; 89Fla361, 104S577; 170Ga699, 154SE268; 46 Ida 195, 267P452; 319 Ill 403, 150NE290; 329 Ill 519, 161NE129; 338 Ill 385, 170 NE280; 340 Ill 304, 172NE708; Ill 173 NE361; 202 Iowa673, 210NW912; 205 Iowa508, 218NW208; 207 Iowa621, 223 NW512; 207 Iowa1201, 224NW510; 207 Iowa1248, 224NW813; 208 Iowa614, 226 NW182; 208 Iowa1208, 227NW103; Iowa 232NW412; 211Ky271, 277SW287 (court cannot extend exceptions provided by legislature for giving of testimony by husband and wife against each other); 217Ky123, 288SW1036; 225Ky 294, 8SW(2d)428; 226Ky381, 11SW (2d)144; 170La337, 127S743; 154Md 620, 141A410; 151Md358, 137A702; 153 Md464, 138A404; 155Md507, 142A593; Md 151A134; 251Mich420, 232NW239; Miss 115S726; 156Miss346, 126S840; 310Mo 696, 276SW64; 319Mo 848, 5 SW(2d)54; 322Mo 158, 16SW(2d)190; 322Mo 514, 17SW(2d)960; 75Mont416, 244P485; 76Mont502, 248P193; 80 Mont395, 260P725; 81Mont36, 261P 616; 82Mont382, 267P499; 83Mont 162, 271P446; 83Mont581, 273P1055; Mont 287P624 (courts may construe and apply but not enact law); 49Nev 405, 248P44; 101NJEq799, 138A884, 54ALR1227; NJ 144A169; 246NY 194, 158NE70; 246NY327, 158NE886; 249NY356, 164NE248; 254NY91, 171 NE917; 126Misc194, 213NYS583 (court cannot legislate to enlarge statutory power); 132Misc279, 229NYS476; 219 AppDiv19, 219NYS373; 133Misc302, 231 NYS444; 135Misc809, 240NYS91; 137 Misc388, 244NYS328; 193NC791, 138 SE162; 52ND231, 202NW391; 115 Oh St350, 154NE728; 120 OhSt44, 165NE 573; 30 OhA502, 165NE850; 121 OhSt 329, 168NE842; 22 OhA165, 153NE316; 116 Or543, 241P386; 118 Or77, 245P 1074, 46ALR1173; 118 Or260, 246P741; 123 Or144, 261P694; 125 Or428, 266P 875, 886 [quotCJ]; 132 Or257, 284P 283; 287Pa64, 134A413; 291Pa12, 139 A383; 293Pa1, 141A633; Pa 151A801; SPaDistACo 19; SPaDist&Co 709; 48 RI 60, [35A241; RI 151A5; 144SC84, 141SE893; 156Tenn155, 299SW812, 57ALR601; 157Tenn592, 11SW(2d) 876; TexCommnA 283SW146; Tex CivA 58W(2d)205; TexCivA 27SW(2d) 897; 100TexCr234, 272SW793 (where clear, unequivocal, and constitutional); TexCivA 30SW(2d)921; Utah 263P930; Utah 270P543; 153Wash379, 279P1102; 187Wis101, 203NW742; 192Wis580, 213 NW477; 197Wis4, 220NW393; Wis 231NW590; 39Wyo 461, 273P696. See also 31Ariz465, 254P477, 55ALR436; 244NY451, 155NE737. [d] **Contracts against public policy.**–71CalA492, 236P 210. [e] **Questions as to change of** boundaries of cities are legislative questions. 50ND30, 195NW16. [f] **Right to kill** is matter with which legislature alone should deal, and when it confides to citizen right so important, duty of court is to follow and not extend legislative intent. 102TexCr338, 277SW687. [g] **Time for filing petition** under Insolvent Debtors' Act because of change of sessions of court should be by legislative enactment not judicial decision. NJ 131A387. [h] **Repeal.**–Iowa 232NW 760. [i] **Court cannot nullify statute** by judicial interpretation. RI 151A5

883–98½–New. A question of the extent of authority given by a legislature to an official may not be gone into by the courts. 243NY423, 154NE298.

884–99 245Mich285, 222NW61.

884–2 218AppDiv643, 219NYS139.

884–3 120Kan113, 242P1038, [1]LaA 645, 123S435.

884–5 15F(2d)764; 171Ark1188, 286 SW943; 338 Ill 385, 170NE280; 217Ky 123, 288SW1036; 169La144, 124S673; 318Mo 679, 300SW687; 318Mo 628, 300 SW743; 318Mo 619, 300SW793; 320 Mo 228, 7SW(2d)259; 128 Or515, 273P 323 (all four cases relating to power to fix punishment).

884–5½–New. Fixing punishment for crime is legislative and not judicial. 315Mo 199, 285SW984.

884–6½–New. Courts do not control the discretionary powers of the legislature validly exercised. 85Colo 289, 275P896.

884–7 104Conn238, 132A690; 98Fla 731, 124S279; 86 IndA717, 159NE769; 202 Iowa744, 210NW968; 203 Iowa231, 212NW553; 208 Iowa614, 226NW182; 217Ky123, 288SW1036; 151Md78, 134 A133; 262Mass393, 160NE431; 320Mo 332, 8SW(2d)887; 193NC36, 136SE612; 136SC200, 134SE211.

884–8 274US188, 47SCt563, 71Led992; 17F(2d)630; CalA 288P53; 165Ga447, 141SE306; Ill 173NE361; 203 Iowa231, 212NW553; 213Ky291, 280SW1081; 245NY500, 157NE834; 50Philippine 259; 47RI 258, 131A641.

885–9 21F(2d)320; 35F(2d)416; 82 CalA610, 256P447; 108Conn645, 144 A665; 87 IndA536, 162NE61(1stcase); IndA 173NE458; 217Ky123, 288SW 1036; 11LaA529, 121S621; 151Md78, 134A133; 155Md507, 142A593; Mo 11SW(2d)30; 80Mont395, 260P725; 127Misc477, 217NYS265; 224AppDiv 448, 231NYS308; 56ND875, 219NW 574; 121 OhSt329, 168NE842; 118 Or 260, 246P741; 125 Or428, 266P875; 128 Or292, 274P118; 136SC200, 134SE 211; 143SC347, 141SE610; TexCommnA 283SW146; 67Utah268, 247P486, 47 ALR372; 149Va815, 141SE868; 152Va 800, 148SE831; 150Wash590, 274P181; 33Wyo 387, 240P208 (cannot add necessary words to statute denouncing act as crime). [a] 317Mo 903, 297SW62. [c] (2) 152Tenn217, 276SW867. [f] **Court must carry out legislative intent** and effectuate object and policy of law. TexCommnA 291SW886. [g] **Courts may not read into statute something outside legislative intent.**–338 Ill 154, 170NE250. [h] **Court has no power to correct mistakes** in unambiguous laws. 250Mich349, 230NW202.

885–10 32F(2d)170; 215Ala619, 112 S157; 23AlaA96, 122S606 (cannot revise or correct language); 90CalA602, 266P291; 96CalA520, 274P388; 97CalA 790, 276P361; 97Fla749, 122S239; IndA 169NE91; 217Ky123, 288SW1036; NC 154SE69 (engraft omitted matters); 31 OhA67, 166NE384; 120 Okl 148, 250 P924; 125 Or428, 266P875, 883 [quot CJ]; 136SC200, 134SE211.

885–11 274US188, 47SCt563, 71Led 992; 28F(2d)195; 92Fla187, 109S228; 92Fla563, 109S473; Iowa 232NW412; 117Kan755, 233P510; 122Kan701, 253P 251; Nebr 231NW772; NJSup 142A905 (unjust, inconvenient, or absurd operation held immaterial); 52ND231, 202 NW391; 47RI 258, 131A641; Tex CommnA 292SW869; 193Wis423, 214 NW820, 54ALR419. See also 166La512, 117S573.

885–12½–New. To justify interference by the courts with the right of the Legislature to alienate tidal or submerged lands, it must appear that such grants do or will impair the power of succeeding legislatures to regulate, protect, improve, or develop the public rights of navigation and fishing. 206Cal 148, 273 P797.

885–14 120Kan413, 243P1038; 237Mich 175, 211NW88, 52ALR1118.

885–14½–New. Under our constitutional system requiring the three departments of government to function exclusively within their respective spheres, it remains for the judiciary to say when there has been a transgression in this respect. 118 Or77, 245P1074, 46ALR 1173.

885–14¼–New. This authority vested in the courts is one which should be exercised with extreme caution, 118 Or 77, 245P1074, 46ALR1173.

885–14¼–New. and only when there has been a plain and palpable abridgement of the powers of one department by another. 118 Or77, 245P1074, 46ALR 1173.

885–14½–New. The issuance of an injunction forbidding substantially the same acts which are denounced as crimes by statute does not constitute interference with the province of the legislature. 194Cal 49, 227P908 (acts denounced by Criminal Syndicalism Act).

885–14⅙–New. The discretionary power of the legislature to determine whether to recognize a claim against the state founded on a moral obligation is seldom subject to review except to determine whether the facts do establish the foundation of equity and justice authorizing the legislature to recognize the claims. 243NY231, 153NE58 (legislature may not act without limit).

885–14⅐–New. The courts must give effect to the language and purpose of the statute as enacted. 127Misc477, 217 NYS265.

885–14⅛–New. It is for the legislature and not for the court to depart from the interpretation of Mexican and Spanish laws which have become fully established rules of property. 199Cal 318, 249P197.

885–14⅑–New. Whether bonds for construction of dikes should be issued by diking district under a statute existing at the time of its organization or under acts subsequently enacted is held a legislative question. 143Wash525, 255P 955.

885–14⅒–New. Legislature's decision that state owes moral obligation to pay a claim is not conclusive on the courts. 132Misc182, 229NYS235.

885–14 1/11–New. Foreign relations are matters for executive and legislative departments and are not subject to judicial inquiry or decision. 21F(2d)396.

885–14 1/12–New. The court, in interpreting powers vested by the legislature in ministerial officers of the state, will not by construction confer upon such officers authority which the legislature has seen fit to withhold. 206Cal 242, 273P 1064.

885–14 1/13–New. The judicial department must, in most matters, yield to the power of statutory enactments. 208Cal 439, 281P1018, 66ALR1507.

885–14 1/14–New. The courts cannot interfere with the rights of the legislature to prescribe punishment for crime. Tex Cr 21SW(2d)527.

885–14 1/15–New. Whether acts providing alternative forms of government for cities adopting the same, could be of universal application is for judicial determination. Ind 168NE10.

885–14 1/16–New. Reasonableness of statute is primarily for legislature and judiciary will declare statute invalid only when manifestly unreasonable. Or 285 P1105.

885–14 1/17–New. It is a function of courts to determine whether a legislative act is a competent expression of legislative will. Ind 168NE10.

885–16 46Philippine83.

886–26 [a] **Courts may determine** whether legislative journals show that statute was not duly enacted. 89Fla361, 104S 577.

886–29 See also Fla 127S486(2dcase).

886–34½–New. An attempt by the legislature or by either house thereof to withdraw and apply any part of the moneys appropriated by statute for payment of legislative expenses may be reviewed by the courts in a proper proceeding. 142Wash450, 253P805.

886–35 272US581, 47SCt210, 71Led422, 49ALR575; 335 Ill 136, 166NE451; 323 Ill 561, 154NE474; 317Mo 671, 296SW 808.

886–35½–New. But under a home rule provision in constitution prohibiting legislation relating to cities, special or local in effect, without emergency message and two-thirds vote, whether the legislature exceeded the bounds so set on its authority has been held to be for judicial and not legislative determination. 127Misc56, 215NYS209.

887–36 [a] 132SC241, 128SE172. [b] **In Missouri.**–322Mo 1129, 19SW(2d)1.

887–37 196Cal 77, 235P1000; 135 Okl 270, 276P186; 132SC241, 128SE172.

887–38 272US581, 47SCt210, 71Led422, 49ALR575; 280US117, 50SCt57, 74Led 221, 65ALR939; 7F(2d)141; 8F(2d)

595; 15F(2d)772; 17F(2d)351; 18F (2d)584; 19F(2d)399; 22F(2d)993; 23F(2d)44; 27F(2d)863; 29F(2d)43; 29F(2d)897; 34F(2d)70; 35F(2d)256; 36F(2d)397; 36F(2d)401; 41F(2d)726; 42F(2d)692; 43F(2d)383; 213Ala106, 104S273; 217Ala458, 116S662; 218Ala 407, 118S583; 220Ala231, 124S523; 21 AlaA566, 110S61; 27Ariz484, 232P56; 29Ariz60, 239P506; 29Ariz582, 244P 376; 30Ariz424, 248P34 (leases of grazing lands); 31Ariz389, 254P225; 33 Ariz279, 264P100; Ariz 288P1034; 169 Ark97, 273SW355, 41ALR629; 170Ark 366, 280SW641; 171Ark427, 285SW20; 172Ark480, 289SW324; 175Ark860, 3 SW(2d)1; 179Ark788, 18SW(2d)364 (selection of site for negro sanitarium); 180Ark96, 21SW(2d)406; 180Ark770, 22SW(2d)993, 68ALR1018; 194Cal 146, 228P19; 195Cal 497, 234P388; 195Cal 548, 234P398; 195Cal 605, 234P883; 198Cal 477, 245P1092; 199Cal 590, 250 P684; 202Cal 110, 259P730; 203Cal 106, 263P1017; 206Cal 148, 273P797; 207 Cal 227, 277P725, 65ALR1497 (power to conduct investigations); Cal 288P 769; Cal 290P451; Cal 291P208; 70 CalA200, 232P995; 75CalA591, 243P55; 79CalA230, 249P29; 200Cal 505, 253P 932; 82CalA610, 256P447; 84CalA137, 257P590; 92CalA113, 267P895; 92CalA 537, 268P679; 94CalA382, 271P568; 95 CalA338, 272P799; CalA 289P877; 83 Colo 43, 262P907; 85Colo 576, 277P789 (inadequacy of amount payable to injured employee); 104Conn238, 132A 690; 108Conn371, 143A240, 65ALR943; 110Conn403, 148A350; 111Conn433, 150 A811; 15DelCh459, 136A147; 3Del 514, 139A257; 14DelCh392, 129A512; 92Fla 187, 109S228; 92Fla563, 109S473; 94 Fla347, 115S669; Fla 122S22 (so far as constitutional); 97Fla1007, 122S570; 98Fla731, 124S279; 164Ga185, 138SE 54; 164Ga863, 139SE722; 38GaA648, 145SE109 (discretion); 48 Ida357, 283P 527; Ida 290P387; 321 Ill 466, 152NE 141; 323 Ill 138, 153NE667, 49ALR499; 323 Ill 427, 154NE198; 324 Ill 314, 155 NE332; 326 Ill 65, 156NE766; 331 Ill 360, 163NE141; 331 Ill 459, 163NE396; 332 Ill 243, 163NE664; 337 Ill 100, 168 NE904 (that law is bad); 196 Ind542, 148NE149; 191 Ind475, 151NE390; 199 Ind95, 155NE465, 50ALR1518; 200 Ind30, 161NE249; Ind 171NE65; 201 Iowa730, 207NW789; 203 Iowa86, 210 NW571; 203 Iowa231, 212NW553; 204 Iowa30, 214NW682; 207 Iowa1077, 224 NW73; Iowa 233NW147; 117Kan755, 233P510; 120Kan673, 245P123; 121 Kan167, 246P685; 122Kan701, 253P 251; 123Kan325, 255P87; 124Kan350, 259P1068; 125Kan88, 262P1032; 213 Ky291, 280SW1081; 213Ky636, 281SW 1039; 214Ky613, 283SW966; 224Ky 390, 6SW(2d)460; 225Ky205, 7SW(2d) 1046; 226Ky501, 11SW(2d)133; 228Ky 286, 14SW(2d)1072; 162La956, 111S 341; 163La777, 112S718; 10LaA149, 119S553; 167La907, 120S593; 168La 761, 123S317, 69ALR574; 169La520, 125S580; 126Me537, 140A382; 148Md 330, 129A370; 149Md349, 131A801, 43 ALR819. 149Md648, 132A160; 151Md 78, 134A133; 262Mass137, 159NE743, 58ALR784; 236Mich460, 210NW492, 47 ALR1128; 238Mich146, 213NW79; 238 Mich130, 213NW195; 242Mich95, 219 NW69; 242Mich445, 219NW721; 245 Mich566, 222NW737; 245Mich558, 222 NW752; 251Mich608, 232NW346; 164 Minn142, 204NW916; 169Minn374, 211 NW577; 141Miss701, 105S541; 308Mo 265, 271SW786; 310Mo 542, 276SW389; 314Mo 80, 282SW437; 313Mo 693, 282 SW702; 315Mo 823, 290SW416; 317Mo 671, 296SW808; 318Mo 248, 300SW493; 319Mo 316, 4SW(2d)467; 319Mo 1001, 5 SW(2d)74; 321Mo 92, 11SW(2d)48; 321Mo 58, 12SW(2d)742; 322Mo 293, 15 SW(2d)785; Mo 30SW(2d)447; 218Mo A217, 265SW996; MoA 26SW(2d)830; MoA 30SW(2d)1039; 73Mont122, 235P 422; 76Mont429, 247P332, 47ALR424; 78Mont48, 252P373; 80Mont574, 261P 356, 60ALR551 (succession tax on mortgages owned by nonresident decedent); 86Mont114, 284P134; Mont 287P156; Mont 292P734; 114Nebr653, 209NW 328; 118Nebr373, 224NW860; 82NH81, 129A492; 105NJL57, 143A536; NJSup 139A425; NJSup 142A409; 241NY405, 150NE497, 43ALR909; 244NY317, 155 NE628; 244NY451, 155NE737; 248NY 112, 161NE438; 253NY243, 170NE905; 221AppDiv86, 222NYS319; 125Misc801, 212NYS1 (reasonableness); 126Misc188, 213NYS623; 126Misc574, 214NYS187; 127Misc477, 217NYS265; 127Misc366, 217NYS781; 130Misc416, 224NYS251; 129Misc94, 221NYS20; 133Misc881, 233 NYS553; 226AppDiv331, 235NYS555; 226AppDiv480, 236NYS89; 228AppDiv 73, 239NYS31; 136Misc51, 240NYS393; 230AppDiv252, 243NYS644; 230AppDiv 338, 245NYS44; 193NC36, 136SE612; 193NC248, 136SE713; 193NC496, 137SE 669; 52ND231, 202NW391; 53ND609, 207NW436; 53ND683, 208NW968, 45 ALR1337; 53ND838, 208NW711; 112 OhSt628, 149NE30; 24 OhA331, 157NE 423; 19 OhA173; 23 OhA259, 155NE 652; 120 Okl 148, 250P924; 122 Okl 211, 253P500, 50ALR1232; 125 Okl 226, 257P324; 137 Okl 95, 278P311; 144 Okl 33, 289P298; 33 OklCr5, 242P290; 116 Or310, 241P50; 116 Or543, 241P386; 117 Or274, 243P553; 119 Or141, 248P 358; 132 Or572, 287P74; Or 288P1015; 287Pa259, 134A409; 288Pa280, 136A 213; 291Pa341, 140A626; 291Pa395, 140A347; 8PaDist&Co19; 8PaDist&Co 709; 13PaDist&Co 223; 47RI 258, 181 A641; 46RI417, 133A653; RI 151A5; 136SC200, 134SE211; 136SC345, 134 SE380 (propriety); 136SC439, 134SE 387; 48SD346, 204NW652; 49SD350, 207NW210; 52SD537, 219NW247; 153 Tenn53, 281SW777; 153Tenn30, 281SW 925; 155Tenn310, 292SW458; 156Tenn 229, 299SW1039; 159Tenn379, 19SW (2d)274; 161Tenn236, 30SW(2d)268; 115Tex393, 283SW472; TexCommnA 283SW141; TexCommnA 283SW151; TexCommnA 292SW869; TexCommnA 14SW(2d)1022; TexCommnA 27SW(2d) 119; TexCivA 292SW950; TexCivA 14 SW(2d)1051; 100TexCr110, 271SW627; 106TexCr1, 290SW743; 67Utah268, 247 P486, 47ALR372; 68Utah251, 249P 1016; 69Utah10, 251P1070; Utah 276P 921; 142Va323, 128SE602; 142Va577, 128SE633; 150Va562, 143SE756; Va 152SE537; 136Wash467, 241P21; 146 Wash17, 261P796; 146Wash543, 264P 705; 147Wash176, 265P722, 62ALR139; 149Wash545, 271P826; 151Wash175, 275P81; WVa 135SE263; 187Wis364, 204NW606; 197Wis4, 220NW393; 198 Wis93, 223NW573; Wis 227NW9 (duty of courts to enforce law as written); 200Wis271, 228NW140; 200Wis518, 228 NW895, 69ALR348(2dcase); Wis 231 NW628(2dcase); 34Wyo 349, 244P135; 38Wyo 47, 264P1023, 57ALR675. See also 155Md427, 142A634; 133Misc611, 233NYS565. [a] (1) 38F(2d)207; 13 PortoRicoFed444; 151Wash474, 276P 555. (2) 244NY451, 155NE737. (3) That act requiring payment of organization expenses of water district from proceeds of bond sales may result in loss to persons furnishing services before voting of bonds does not justify construction of act beyond its terms as permitting tax levy before bonds are voted. TexCommnA 283SW151. [h] Necessity.–143Va741, 129SE739. [i] Social, political, or economic aspects of prohibition amendment and Volstead Act cannot be considered by court. 126 Misc574, 214NYS187. [j] Wisdom of statute is for legislature. Iowa 231NW 461.

890–39 27F(2d)863; 86Colo 1, 278P 780; 92Fla187, 109S228; Ind 171NE65; 122Kan701, 253P251; 232Ky479, 23SW (2d)937; 103NJEq487, 143A771; RI 151A5; 159Tenn379, 19SW(2d)274; 117 Tex313, 3SW(2d)429; Wash 287P675; 198Wis349, 226NW301(1stcase); Wis 230NW708; Wis 231NW634. [a] Courts will not refuse to enforce act of congress because it contravenes international law. 5F(2d)838. [b] Public policy is not created by the judiciary. CalA 285P374.

890–40 82NH495, 136A263.

890–40½–New. the creation of school districts, 178Ark443, 12SW(2d)881.

890–41 117 Or274, 243P553.

890–42 324 Ill 314, 155NE332; 117 Or 274, 243P553; TexCivA 287SW147; 197 Wis284, 221NW860.

890–42½–New. the prohibition of discrimination in teachers' salaries because of sex, 127Misc477, 217NYS265.

890–42¼–New. a plan of insurance of property of state and its governmental agencies and political subdivisions, 53 ND683, 208NW968, 45ALR1337.

890–44 149Wash545, 271P826; 108 WVa242, 150SE725.

890–51 179Ark886, 19SW(2d)1000; 121 Or538, 256P395; 124 Or36, 263P893.

890–53 199 Ind78, 155NE198; 313Mo 693, 282SW702. But see 97Fla69, 120S 335, 64ALR1307.

890–53½–New. initiative and referendum legislation on zoning matters under city charters, 200Cal 505, 253P932.

890–56½–New. circumstances authorizing children to be taken from parents and made wards of state, 30 OhA502, 165NE850.

890–57 125Kan88, 262P1032; 24 OhA 331, 157NE423.

890–58½–New. the disposal of federal property 27F(2d)863.

890–59 CalA 270P697 (compensation of officers); 117Kan755, 233P510; Tex CivA 288SW875.

890–60 195Cal 605, 234P883; 329 Ill 453, 160NE836; 165La380, 115S627; 318Mo 1173, 28SW(2d)777 (punishment within range of statute may not be judged excessive); 285Pa511, 132A572.

890–60½–New. Mode in which penalties shall be enforced and disposition of amounts collected, 281US98, 50SCt242, 74L ed726.

891–63 23 OhA259, 155NE652; 46RI 417, 133A653.

891–63½–New. notice and method of conducting general or special elections, 140Wash636, 250P66.

891–64¼–New. requiring a railroad to bear part of the expense of relocating a highway to divert traffic from a grade crossing despite the fact that a competing bus line will be benefited, 187Wis 364, 204NW606.

891–68 78CalA759, 248P1068.

891–69½–New. extension of limits of municipal corporation, 201 Iowa730, 207 NW789.

891–73½–New. a guaranty fund for bank depositors, 120Kan673, 245P123.

891–73¼–New. how a community shall be settled upon its dissolution by death of one of the spouses, 167La1032, 120S 767(1stcase).

891–74 203Cal 306, 265P246. See also 333 Ill 429, 164NE832; 153Md464, 138A 404. [a] Quantum and kind of proof to establish crime as legislative prerogative. 199Cal 1, 248P230.

891–74½–New. the wisdom, or social, political, or economic aspects of prohibition amendment and Volstead Act, 126 Misc574, 214NYS187.

891–74⅓–New. prescribing duties of court reporters to be performed without compensation. 34Wyo 349, 244P135.

891–74¼–New. Courts have nothing to do with wisdom of law requiring secret societies to file certain documents with secretary of state. 241NY405, 150NE 497.

891–74½–New. The courts cannot question the reasonableness or policy of police regulations. 53ND838, 208NW 711.

891–74⅙–New. Questions as to what cases shall be compensable under the Workmen's Compensation Act are for the legislature. 108Conn309, 143A155.

891–75 149Md648, 132A160; 173Minn 572, 218NW115; 317Mo 1216, 298SW 747, 55ALR773; 114 OhSt624, 151NE 775; 124 Or677, 265P790.

891–76 104Conn192, 132A561; Mont 287P156; 245NY500, 157NE834; 198 Wis93, 223NW573. [c] Civil service.–245NY500, 157NE834.

891–77 195Cal 548, 234P398, 38ALR 1186; 196Cal 77, 235P1000; 75CalA591, 243P55; 80CalA131, 251P679; 166Minn 22, 206NW942; 167Minn286, 209NW9; 118Nebr331, 224NW692; 31NM7, 240P 482; 122 Okl 34, 252P408; 130 Or309, 274P118; 155Tenn70, 290SW608; 160 Tenn294, 23SW(2d)669; TexCivA 38W (2d)947.

891–78 42 Ida169, 244P149; 191 Ind 475, 151NE390; 31NM7, 240P482; 122

Okl 34, 252**P**408; 155**Tenn**70, 290**SW** 608.

891-79½-New. The legislature has a wide range of discretion in distinguishing, selecting, and classifying objects of legislation, and the classification made is not reviewable unless palpably arbitrary. 155**Tenn**70, 290**SW**608.

891-79¾-New. Courts may declare and apply policy of state on question of good morals. 291**Pa**341, 140**A**626.

891-79¼-New. Courts may recognize change in public policy indicated by conduct of people. 291**Pa**341, 140**A**626.

891-79⅛-New. Consideration should be given by a court to judgment of the legislature as to what may properly come within an appropriation bill. 168 **La**1005, 123**S**655, 67**ALR**1183.

891-80 22**F(2d)**993 (motives of promptness of legislation); 27**F(2d)**863; 38**F (2d)**652; 83**Colo** 43, 262**P**907; 92**Fla** 563, 109**S**473; 97**Fla**127, 120**S**361(2d case); 97**Fla**710, 122**S**225 (so far as constitutional); 97**Fla**749, 122**S**239; 213 **Ky**291, 280**SW**1081; 167**La**907, 120**S** 593; 34**NM**184, 279**P**509(2dcase); 247 **NY**290, 160**NE**374; 128**Misc**476, 219**NYS** 505; 226**AppDiv**480, 236**NYS**89; 155 **Tenn**476, 295**SW**469, 54**ALR**725; 157 **Tenn**222, 7**SW(2d)**815, 60**ALR**408; **Tex CivA** 2**SW(2d)**1001; 143**Va**741, 129**SE** 739. [a] **Good faith and knowledge of facts** are conclusively presumed in enactment of statute. 27**F(2d)**863.

892-81 97**Fla**127, 120**S**361(2dcase).

892-86 273**US**418, 47**SCt**426, 71**Led** 718, 58**ALR**1236; 99**CalA**747, 279**P**470; 212**Ky**152, 278**SW**593; 330 **Ill** 97, 161 **NE**133; 334 **Ill** 431, 166**NE**115; 339 **Ill** 315, 171**NE**289; 287**Pa**259, 134**A**409.

892-87 272**US**581, 47**SCt**210, 71**Led**422, 49**ALR**575; 279**US**582, 49**SCt**430, 73**Led** 856; 96**CalA**443, 274**P**397; 92**Fla**187, 109**S**228; 97**Fla**710, 122**S**225; 161**Ga** 769, 132**SE**66, 54**ALR**1001; 42 **Ida**169, 244**P**149; 317 **Ill** 132, 147**NE**797; 334 **Ill** 431, 166**NE**115; 212**Ky**123, 278**SW** 533; 168**La**742, 123**S**310 (whether public welfare calls for particular legislation is question primarily for legislature); 127**Misc**244, 216**NYS**442; 129**Misc**94, 221**NYS**20; 136**Misc**307, 240**NYS**784; 53**ND**838, 208**NW**711; 116 **Or**141, 240**P** 536; 116 **Or**310, 241**P**50; 287**Pa**259, 134 **A**409; 295**Pa**311, 145**A**295; 99**Vt**360, 133 **A**352; 187**Wis**463, 204**NW**595; 38**Wyo** 47, 264**P**1023, 57**ALR**675. [b] **Legislative functions of public service commission** may not be usurped by courts. **Mo** 30**SW(2d)**112.

892-88 110**Conn**92, 147**A**294 (courts will not substitute their judgment for legislative judgment); 97**Fla**69, 120**S** 335, 64**ALR**1307; 97**Fla**710, 122**S**225; 42 **Ida**169, 244**P**149 (use of public highways by carrier); 317 **Ill** 132, 147**NE** 797 (question of classification is judicial only when legislative action is clearly unreasonable); 330 **Ill** 97, 161**NE**133; 212**Ky**123, 278**SW**533; 212**Ky**152, 278 **SW**593; 129**Misc**94, 221**NYS**20; 287**Pa** 259, 134**A**409; 295**Pa**311, 145**A**295; 99 **Vt**360, 133**A**352. [c] **Matter to be considered by court in determining validity of regulation.**—Courts will regard validity, necessity, and wisdom of regulations under police power from standpoint of existing conditions and present times. 110**Conn**92, 147**A**294.

893-89 273**US**418, 47**SCt**426, 71**Led**718, 58**ALR**1236; 161**Ga**769, 132**SE**66, 54 **ALR**1001; 334 **Ill** 555, 166**NE**112; 212 **Ky**152, 278**SW**593; **Mo** 30**SW(2d)**447.

893-90 87**CalA**584, 262**P**792; **Iowa** 232 **NW**279; 212**Ky**123, 278**SW**533; 212**Ky** 152, 278**SW**593; 135**Misc**535, 238**NYS** 3; 53**ND**838, 208**NW**711; 116 **Or**141, 240**P**536; **Or** 285**P**1105; 287**Pa**259, 134**A** 409; 200**Wis**518, 228**NW**895(2dcase), 69 **ALR**348.

893-91 50**Philippine**595.

893-92 5**F(2d)**77 (courts have no power to make rates); 31**F(2d)**600; 33**F(2d)** 770 (remedy as to excessive telephone tolls lies with regulation by legislature and not with courts); 327 **Ill** 508, 158 **NE**814; 84 **IndA**333, 151**NE**365; 206 **Iowa**261, 218**NW**563; 130**Kan**2, 285**P** 522; 167**Minn**311, 209**NW**10; **NJ** 147**A** 865; 117**Tex**291, 38**W(2d)**794. See also 51**ND**45, 199**NW**128.

893-93 35**F(2d)**743; 327 **Ill** 508, 158**NE** 814; 84 **IndA**333, 151**NE**365; 167**Minn** 311, 209**NW**10; **NJ** 147**A**865; 117**Tex** 291, 38**W(2d)**794. See also 51**ND**45, 199 **NW**128.

893-93½-New. An order of the circuit court fixing rates of a gas company is held void. **Ill** 158**NE**914.

893-96 **Cal** 287**P**455.

893-97 See also 127**Misc**244, 216**NYS** 442.

893-99 See also 127**Misc**244, 216**NYS** 442.

894-2 129**Misc**94, 221**NYS**20; 187**Wis** 463, 204**NW**595. See also 127**Misc**244, 216**NYS**442.

894-6 50**RI** 288, 146**A**777, 66**ALR**1553.

894-8 315**Mo** 823, 290**SW**416.

894-9 315**Mo** 823, 290**SW**416; 149**Wash** 545, 271**P**826; 187**Wis**463, 204**NW**595.

894-12 196**Cal** 77, 235**P**1000; 38**Wyo** 47, 264**P**1023, 57**ALR**675.

894-15 21**F(2d)**396 (executive department has sole charge of foreign relations free from judicial inquiry or decision); 23**F(2d)**71 (winding up of land bank by receiver appointed by Federal Farm Loan Board); 28**F(2d)**56; 34**F(2d)**881; 42**F(2d)**692; 322 **Ill** 150, 152**NE**575; 326 **Ill** 65, 156**NE**766; 332 **Ill** 243, 163 **NE**664; **Ind** 171**NE**65; **IndA** 171**NE** 221; **IndA** 173**NE**335; 206 **Iowa**229, 220**NW**306; 160**La**325, 107**S**126; 133 **Misc**464, 232**NYS**489; **TexCivA** 281**SW** 883; 110**TexCr**362, 8**SW(2d)**674. See also 295**Pa**311, 145**A**295. [b] **For abuse of discretion courts will control action of highway commissioners,** but this is seldom exercised, unless conduct is so unreasonable as to be oppressive, and manifest abuse is shown. 191**NC**68, 131 **SE**372. [i] **Federal courts** cannot compel prosecuting officers to enforce penal laws. 7**F(2d)**397. [j] **Bank commissioner's refusal to approve incorporation** of bank in exercise of judgment applied to information obtained pursuant to investigation required by law is not subject to judicial review and control. 155 **Md**86, 141**A**518. [k] **Matters of policy affecting prosecution of criminal case** are not within province of court but are questions for district attorney. **CalA** 287**P**373.

895-16 332 **Ill** 243, 163**NE**664; 230**App Div**308, 243**NYS**732.

895-17 287**Pa**259, 134**A**409.

895-19 17**F(2d)**196.

895-20 103**Conn**65, 130**A**289; **Mass** 169 **NE**552.

895-21 329 **Ill** 173, 160**NE**186.

895-21½-New. Courts will not assume jurisdiction in conflict with statutory duties and powers of official derived directly from state itself. 217**AppDiv**681, 216**NYS**256.

895-21¾-New. A statute authorizing a court to vacate a judgment of forfeiture of recognizance is not a delegation to the courts of power properly belonging to the executive. 320 **Ill** 336, 150**NE**634, 43 **ALR**1230.

895-22 232**Ky**312, 23**SW(2d)**277; 131 **Misc**220, 226**NYS**585.

895-26½-New. Decision whether requisition of demanding governor, for fugitive from justice, should be honored is executive in nature, and is conferred on the governor of asylum state. 258**Mass** 289, 155**NE**12, 51**ALR**789.

896-27 167**La**456, 119**S**425.

896-30 223**Ky**285, 3**SW(2d)**641; 223 **Ky**468, 3**SW(2d)**1101; 221**AppDiv**418, 223**NYS**124. But see 232**Ky**312, 23**SW** **(2d)**277.

896-34 171**Ark**620, 286**SW**871, 48**ALR** 1189; 73**Mont**541, 237**P**525. See also 162**Ga**627, 134**SE**448.

897-49 154**Tenn**679, 290**SW**399.

897-50 [a] **Court's jurisdiction to determine** whether municipal appointive officer is qualified as "resident elector" is not ousted by constitutional provision giving municipal officers exclusive jurisdiction to decide qualifications of "electors." 103**Conn**157, 130**A**121.

897-52 154**Tenn**679, 290**SW**399.

897-56 But see 334 **Ill** 465, 166**NE**100, 64**ALR**1006.

897-57 169**La**394, 125**S**283 (irreconcilable conflict between officer with power to appoint and another with power to remove).

897-60 117 **Or**406, 244**P**317; 117 **Or** 370, 244**P**319; 116**Tex**220, 288**SW**417.

897-66½-New. An order for public or private sale by an administratrix is not a delegation of judicial power. **TexCivA** 277**SW**418.

897-66⅓-New. A judge may consult fellow judges, short of sharing responsibility for a decision. 194**Wis**207, 216 **NW**513.

897-67 323 **Ill** 427, 154**NE**198; **Tex CivA** 10**SW(2d)**151; 146**Wash**588, 264 **P**403.

898-68 146**SC**483, 144**SE**227 ("state highway department" is administrative body with fixed duties to perform, and has no authority to set at naught explicit instructions of legislature).

898-71½-New. Act held not to violate constitutional prohibition against officers of one department of government exercising power of another department. 141**Miss**701, 105**S**541.

898-71⅓-New. Execution of sentences is an executive function. 254**Mass**342, 150**NE**231.

898-71¼-New. Proceedings for the organization of a drainage district are administrative. 197**Wis**261, 221**NW**864.

898-71⅕-New. The duty of caring for government property is executive in character. 50**Philippine**259.

898-71⅙-New. Administrative and ministerial functions may be incidental or essential to exercise of governmental powers. **Fla** 129**S**876.

898-79 50**Philippine**259.

899-93 131**Misc**220, 226**NYS**585.

899-93½-New. A statute providing exclusive mode of removal and not permitting the governor to remove a commissioner without the consent of the senate is not invalid. 284**Pa**421, 131**A**253.

899-93⅓-New. The supreme court will not hold a governor's removal of a sheriff pursuant to justices' advisory opinion invalid except for strong and compelling reasons. 126**Me**147, 136**A**810.

899-94 41**F(2d)**299; 21**F(2d)**320; **Md** 151**A**134. [a] **In submitting budget recommendation and acting on appropriations** governor is subject to prohibition against exercise of power conferred on legislature except as expressly permitted. **Nebr** 231**NW**772.

899-94½-New. Commutation of prisoner's sentence by shortening term is not substitution of new form of punishment. 325 **Ill** 372, 156**NE**290.

899-96 21**F(2d)**320.

899-98 5**F(2d)**687; 30**F(2d)**1; 200**Cal** 1, 251**P**784; 206**Cal** 148, 273**P**797; 257 **Mass**32, 153**NE**325, 47**ALR**897. [b] **Regulation of naturalization** bureau requiring certificate of arrival to accompany declaration of intention to become citizen is void. 5**F(2d)**687.

899-99 31**F(2d)**867.

899-1 163**Ga**849, 137**SE**264; 113**Nebr** 830, 205**NW**642.

899-3 163**Ga**849, 137**SE**264.

900-6 30**Ariz**332, 246**P**1033, 47**ALR**401. [a] **Till law is declared invalid by competent authority** officers charged with its administration must ordinarily observe it. 154**Tenn**462, 285**SW**587, 48 **ALR**1378.

900-6½-New. , nor may they extend or restrict reasonably clear law by regulations. 26**F(2d)**139.

900-7 30**Ariz**332, 246**P**1033, 47**ALR** 401; 85**Colo** 576, 277**P**789; 48 **Ida**357, 283**P**527.

900-13 **Cal** 270**P**968 (control of attorneys); 200 **Ind**716, 164**NE**408, 63**ALR** 218; 200 **Ind**515, 165**NE**241; 155**Md**104, 141**A**509. 514 [citCJ]; 126**Misc**879, 216**NYS**2; 133**Misc**881, 233**NYS**553; **Wis** 231**NW**590. [b] **Validity of lien** for labor and material furnished vessel sought to be forfeited for violation of Tariff Act is not within power of secretary of treasury but determinable by court. 33**F(2d)**763.

900-14 97**NJEq**447, 129**A**207.

900-16 161**La**1, 108**S**104; **MoA** 272**SW** 992; 97**NJEq**447, 129**A**207.

900-18 154**Tenn**462, 285**SW**587, 48**ALR** 1378.

900-21½-New. The executive has no inherent power to charge the judiciary with administrative functions except those reasonably incidental to fulfillment of judicial duties. 247**NY**401, 160 **NE**655.

900-21⅓-New. Refusal of the attorney-general to bring suit to set aside the sale of properties of a public charitable trust, did not constitute an exercise of

judicial power by the executive department. 321Mo 235, 11SW(2d)278, 62ALR 858.

900-21½-New. A statute empowering a public corporation to sell its assets and franchises to a company authorized to conduct a similar business, and conferring powers of the selling corporation on the purchaser, does not delegate judicial power to the purchaser or to majority stockholders of the seller. 50RI 288, 146A777, 66ALR1553.

900-22 325 Ill 372, 156NE290.

900-23 [a] **Where pardon issued was regular on its face,** governor cannot decide issue of fact that pardon had been obtained by fraud, and cancel pardon. 152SC410, 150SE54, 65ALR1459.

900-24½-New. A governor's discretion to grant a release cannot be utilized to extend imprisonment. 221AppDiv418, 223NYS124.

900-25 42F(2d)177; CalA 292P684 (district attorney); Fla 129S876; 323 Ill 427, 154NE198. [e] (2) Congress may empower administrative officers to enforce penalties. 36F(2d)631; [f] **Act held not providing for exercise of judicial power.**-143Wash326, 255P371.

900-26 106Conn223, 137A742; 144 Okl 231, 291P95.

901-28 102CalA237, 283P136; 106Conn 223, 137A742; Fla 129S870(2dcase); Fla 129S876; 163Ga849, 137SE264; 164 Ga350, 138SE670; 323 Ill 427, 154NE 198; 155Md104, 141A509; 127Misc683, 217NYS565; 135Misc290, 238NYS95. [g] **Statute authorizing transfer of prisoner** is held valid. 254Mass342, 150NE 231. [h] **Tariff Act of 1922 does not take from federal courts their admiralty jurisdiction** to adjudicate maritime liens against vessel sought to be forfeited and require adjudication thereof by secretary of treasury. 33F(2d)763.

901-29 90Fla721, 106S576; 163Ga849, 137SE264; 233Ky801, 26SW(2d)1045 (authorizing banking commissioner to determine insolvency of bank); 254Mass 342, 150NE231; 141Miss701, 105S541; 128Misc84, 218NYS57; 199Wis342, 226 NW286. [e] **Empowering attorney-general to investigate fraudulent practices and subpœna witnesses** is not a judicial power. 243NY423, 154NE298. [f] **Statute conferring power on attorney-general** to examine dealers in securities is held not delegation of judicial powers. 128Misc84; 218NYS57.

901-30 128Misc84, 218NYS57.

902-32 164Ga350, 138SE670.

902-32½-New. A statute empowering an attorney-general to investigate fraudulent practice in securities and to subpœna witnesses is held not an unlawful grant of judicial power. 243NY423, 154 NE298.

902-32¾-New. A law relating to buying and selling of foreign exchange and authorizing auditor of public accounts to revoke or suspend license in certain instances is held not invalid as conferring judicial powers on auditor. 323 Ill 427, 154NE198.

902-33 35F(2d)43; 200Cal 1, 251P784; 75CalA764, 243P702; 45 Ida676, 266P 665; 219Ky212, 292SW837; 308Mo 359, 275SW940; 26 OhNPNS33 (county board of education); TexCivA 286SW 501. But see Fla 129S876. [a] (3) Mo 31SW(2d)67. (6) State corporation commission is not empowered to pass on validity of private contract or enforce its provisions. 143Va106, 129SE324. [d] **Power of board of commissioners in reference to charges against attorneys.**-45 Ida676, 266P665. [e] **Powers conferred held not judicial.**-129Kan126, 281 P863. [f] **Investigation of charges against attorney by Board of Governors** without presenting complaint does not violate rule. Nev 292P291.

902-34 16F(2d)717; 41F(2d)593; 196 Cal 468, 238P703, 44ALR1; 200Cal 1, 251P784; 73CalA268, 238P787; 78CalA 223, 248P716; CalA 293P128; 90Fla 721, 106S576; 163Ga849, 37SE264; 164 Ga863, 139SE722; 330 Ill 79, 161NE145 (policemen's pension retirement board); 336 Ill 606, 168NE630; 198 Ind356, 153 NE777 (control over municipal bond issues may be delegated); Mo 31SW (2d)67; 75Mont240, 243P1073 (fixing amount of surety bond required of person before commencing operations under license to operate motor vehicles for hire); 249NY172, 163NE297; 50ND184, 195NW292; 116Tex82, 286SW458; Tex CivA 295SW649; TexCivA 31SW(2d) 478; 143Va106, 129SE324 (powers of commission limited to those specifically granted by constitution); 99Vt265, 132 A40; 187Wis463, 204NW595 (holding Blue Sky Law not delegation of judicial power). [c] **Statute authorizing commissioners to compromise judgment** against surety on bail bond has been held constitutional. 340 Ill 188, 172 NE3.

903-38 324 Ill 363, 155NE316.

903-39 Fla 129S876; Nev 292P291; 187Wis463, 204NW595 (holding provision in Blue Sky Law for judicial review of railroad commission satisfactory within constitutional requirement). [a] **Longshoremen's and Harbor Workers' Compensation Act** is not violative of constitutional provision that federal judicial power shall extend to all cases of admiralty and maritime jurisdiction, since final hearing on facts by court is authorized. 33F(2d)137.

903-40½-New. The fact that a commission may act judicially in that its forms of procedure are largely those used in courts of equity and at law does not render it a court of record. 284Pa421, 131A253.

903-40½-New. A statute making the finding of a compensation board conclusive is held constitutional. 220Ky381, 295SW464.

903-40¼-New. Power to levy assessments and issue executions is held executive and ministerial. 164Ga350, 138 SE670.

903-40½-New. Quasi judicial functions conferred upon Railroad Commissioners are not judicial powers exercisable only by courts. Fla 129S876.

903-44 20AlaA450, 103S898 (in misdemeanor cases); 194Wis441, 217NW277.

903-46 167La1032, 120S767(1stcase).

903-50½-New. to take affidavits, 20 AlaA450, 103S898.

903-59 105NJL57, 143A536.

903-60 75CalA764, 243P702.

903-61 TexCivA 10SW(2d)151.

904-69 164Ga863, 139SE722.

904-82 47RI 431, 133A812.

904-86½-New. In ascertaining whether a street to be improved is a public highway in a residential district, and whether the petition was signed by a majority of the resident property owners, boards cannot be regarded as exercising judicial functions. Mo 19SW (2d)891.

904-89 16F(2d)639; 200Cal 434, 253P 718; 94CalA382, 271P568; 327 Ill 387, 158NE703, 55ALR303; 331 Ill 360, 163 NE141; 212Ky152, 278SW593; 168La 742, 123S310; 149Md349, 131A801, 803 [citCJ], 43ALR819; 318Mo 870, 2SW (2d)713, 722 [quotCJ]; 198NC551, 152 SE693; 116 OhSt205, 156NE124; 25 OhNPNS315; 287Pa259, 134A409; 99 Vt360, 133A352; 145Va225, 133SE800; Wash 290P1010; 38Wyo 47, 264P1023, 57ALR675. [a] (7) 195NC722, 143SE 530. (10) 46Philippine440. [b] 21 AlaA303, 107S788; 320 Ill 536, 151NE 581; 340 Ill 42, 172NE22; 212Ky123, 278SW533; 136Misc307, 240NYS784. [c] 334 Ill 555, 166NE112; 149Md349, 131A801, 43ALR819. [f] **In its inception** police power was closely concerned with preservation of public peace, safety, morals, and health without specific regard for general welfare. 195Cal 477, 234P381, 38ALR1479.

905-90 81CalA590, 254P648, 653 [quot CJ]; 160Tenn316, 24SW(2d)898; 99Vt 360, 133A352.

905-91 195Cal 477, 234P381, 38ALR 1479; 287Pa259, 134A409. See 166La 776, 117S827. [e] Police power is subject to constitutional limitations not attaching to that of eminent domain. 262 Mass404, 160NE285.

906-5 73Mont147, 237P528 (regulation not divested of its character as exercise of police power by fact that revenue incidentally results therefrom).

907-10 26F(2d)912 (primarily vested in legislature); 32F(2d)134; 195Cal 477, 234P381, 38ALR1479; 149Md349, 131 A801, 43ALR819; 53ND838, 208NW 711; 142 Okl 146, 285P1040; 287Pa259, 134A409.

907-11 91Fla241, 107S364. [a] **Constitutional provision that exercise of police power shall never be abridged** is merely declarative of fundamental principle of government. Mo 25SW(2d) 1055.

907-12 276US272, 48SCt246, 72L ed 568; 14DelCh392, 129A512; 230AppDiv 252, 243NYS644; 25 OhNPNS315.

907-12½-New. All constitutional rights are subject to such reasonable conditions as may be deemed by the governing authority essential to the safety, health, peace, good order, and morals of the community. 167La674, 120S47.

907-13 16F(2d)639.

907-14 53ND838, 208NW711; 142 Okl 146, 285P1040.

907-15 32F(2d)134; 115Nebr525, 213 NW835; 53ND838, 208NW711.

907-16 CalA 272P1076; 191NC592, 132 SE565.

907-17 195Cal 477, 234P381, 38ALR 1479.

907-18 115Nebr525, 213NW835.

907-19 16F(2d)639; 24F(2d)541; 75 Mont88, 242P344.

908-21 195Cal 477, 234P381, 38ALR 1479; 326 Ill 625, 158NE376, 55ALR 654; 168La1005, 123S655, 67ALR1183.

908-21½-New. Police power is in its nature continuance and cannot be suspended by contract or irrepealable law. 200Cal 434, 253P718.

908-22 195Cal 477, 234P381, 38ALR 1479; Iowa 232NW412; 212Ky123, 278 SW533; 242Mich95, 219NW69; 120 Or 444, 250P220; 46Philippine440.

908-23 273US418, 47SCt426, 71L ed 718, 58ALR1236; Iowa 232NW412; 241 NY288, 150NE120, 43ALR651. [a] **In determining whether particular zoning ordinance** is valid, courts must decide whether the scheme is reasonably necessary to public health, safety, morals, or general welfare and whether the method of classification and districting has been applied fairly and impartially in each instance. 195Cal 477, 234P381, 38ALR 1479.

908-24 16F(2d)639; 195Cal 477, 234P 381, 38ALR1479; 115Nebr525, 213NW 835; 287Pa259, 134A409.

908-25 CalA 288P53; 128Misc650, 220 NYS315. [c] 75Mont88, 242P344; 253 NY305, 171NE72. [e] 142 Okl 146, 285 P1040. [h] **Statement of Justice Holmes.**-195Cal 477, 234P381, 38ALR 1479. [i] **"Police power" defined as right of legislature,** or, on proper occasion, of courts, to regulate, curtail, or prohibit conduct tending to suppress measures or schemes in furtherance of permissible public policy. 212Ky123, 278SW533. [j] **Legislature has wide discretion** in exercise of police power. 214Ala236, 107S86.

908-26 81Colo 344, 255P443; 325 Ill 511, 156NE778; Ill 173NE361; 202 Iowa1019, 210NW139; 115Nebr525, 213 NW835; 241NY288, 150NE120, 43ALR 651; 247NY290, 160NE374; 128Misc 650, 220NYS315; 124 Or677, 265P790, 59ALR512. See also 24F(2d)541. [a] **Public policy which controls police power** is principle which declares no one can lawfully do what is injurious to public welfare. 212Ky123, 278SW533. [b] **"General welfare" as scope of police power is limited** to regulations necessary to preserve public order, health, safety, or morals. 149Md349, 131A801, 43ALR819.

909-27 128Misc650, 220NYS315.

909-28 Mont 287P156; 191NC643, 132 SE792; TexCivA 299SW705.

909-29 270US402, 46SCt320, 70L ed654 (state has wide discretion in selecting things for regulation).

909-30 272US365, 47SCt114, 71L ed 303, 54ALR1016; 16F(2d)639; 195Cal 477, 234P381, 38ALR1479; 206Ky643, 271SW695; 212Ky123, 278SW533; 115 Nebr525, 213NW835; 198NC551, 152SE

693; 145Va554, 134SE914.

909-31 272US365, 47SCt114, 71L ed 303, 54ALR1016; 16F(2d)639; 195Cal 477, 234P381, 38ALR1479; 115Nebr 525, 213NW835.

909-31½-New. 242Mich95, 219NW69.

909-31⅓-New. The measure of reasonableness of a police regulation is not necessarily what is best but what is fairly appropriate to the purpose of the act. 317 Ill 132, 147NE797.

909-31¼-New. Every one holds his property subject to the proper exercise of the police power of the state. 217 Ky135, 289SW223.

909-31⅕-New. Court will look behind even a declared intent of the legislature to relieve citizens against oppressive acts, where the primary purpose is not protection of the public health, safety, or morals. 193Wis311, 214NW369, 53 ALR463.

909-31⅙-New. The state exercising its police power does not confer on persons directly or indirectly affected thereby a property right. 197Wis261, 221NW864.

909-32 200Cal 434, 253P718; 14DelCh 392, 129A512; 97Fla458, 121S565; 97 Fla710, 122S225; Ill 173NE361 (public property); 191 Ind475, 151NE390; 220Ky116, 294SW1080; Md 150A447; 118Nebr562, 225NW709; 241NY288, 150NE120, 43ALR651; 191NC643, 132 SE792; 26 OhA340, 159NE575; 120 Or 444, 250P220; 287Pa259, 134A409; 117 Tex34, 297SW206; 145Va554, 134SE 914. See also 334 Ill 431, 166NE115; 167La771, 120S290, 62ALR1512. [a] 75Mont88, 242P344. [d] **Private property devoted to public use** subject to police power. 171Ark727, 285SW375. [e] **Private advantage or æsthetic considerations held not included.**–47RI 387, 133A614. [f] **Legislature may declare new crimes,** or impose criminal liability for torts, in exercise of police power. 249Mich147, 228NW723.

909-32½-New. Police power is not limited to promote public health, morals, or general welfare, but extends to promoting public convenience or general welfare. 214NY288, 150NE120.

909-32¼-New. It may extend to providing for detection and prevention of imposition and fraud. 97Fla710, 122S 225.

909-33 82Colo 574, 261P858; 191 Ind 475, 151NE390; 115Nebr525, 213NW 835; 128Misc650, 220NYS315; 191NC 643, 132SE792; 116 OhSt67, 156NE 107; 149Wash545, 271P826; 37Wyo 488, 263P621.

909-34 14DelCh392, 129A512; 325 Ill 511, 156NE778; 167La511, 119S532; 236Mich460, 210NW492, 47ALR1128; Mont 287P156; 25 OhNPNS315.

910-35 236Mich460, 210NW492, 47 ALR1128.

910-37½-New. May curtail private property rights.–129Misc94, 221NYS20.

910-38 Iowa 232NW477; 238Mich130, 213NW195; 116 OhSt205, 156NE124; 288Pa230, 135A759; 143Va310, 130SE 516, 51ALR855.

910-42 See also 29F(2d)900.

911-45 7F(2d)566; 43F(2d)597; 331 Ill 360, 163NE141; 334 Ill 431, 166NE 115; 337 Ill 469, 169NE265; 149Md349, 131A801, 43ALR819; 316Mo 9, 289SW 838; 79Mont25, 255P11, 14 [citCJ], 54 ALR1091; NJSup 132A335; TexCivA 248W(2d)61; Vt 151A650; 145Va554, 134SE914; 103WVa51, 136SE863. [b] **Delegation may be within provisions of existing law.**–316Mo 9, 289SW838.

911-53 177Ark821, 9SW(2d)75; 36 Ga709, 138SE88; 238Mich130, 213NW 195; Mo 30SW(2d)105.

911-54½-New. Where a statute provides punishment for the violation of a regulation or orders of the commission, power to create a crime is not thus delegated to the commission. 238Mich130, 213NW195.

912-56 331 Ill 360, 163NE141; 120 Okl 206, 251P37.

912-57 8F(2d)155; 200Cal 434, 253P 718; 202Cal 179, 259P937; 36GaA709, 138SE88; 117Kan622, 233P508; 120 Kan273, 243P311, 312 [quotCJ]; 226Ky 409, 11SW(2d)94; 308Mo 328, 275SW 940; 319Mo 316, 4SW(2d)467; Mo 25 SW(2d)1055; Mo 30SW(2d)105; 155 Tenn63, 290SW990; 145Va225, 133SE 800, [e] But see 120 Okl 206, 251P37. [f] (2) City's agreement to bear expense of opening street across railroad held not to infringe police power. 271US303, 46SCt517, 70L ed517. [j] **Surrender of power to regulate charges for public services** is expressly prohibited by some constitutions. 120 Okl 206, 251P37.

913-59 197 Ind475, 151NE390.

913-60 81CalA105, 252P1053.

913-64 36F(2d)967; Cal 287P455 (health regulations unaffected by constitution); 73CalA268, 238P787; 204 Iowa30, 214NW682; Iowa 232NW412; 124Kan237, 257P959; 150Md452, 133A 465, 466, 46ALR80 [citCJ]; 82NH451, 135A531; 137Misc341, 242NYS142 (sewers).

914-72 82NH426, 135A159.

915-78 47RI 431, 133A812; 99Vt360, 133A352.

915-87 Ind 171NE199; 120 OhSt500, 166NE583.

916-90 Fla 130S699; 124Kan237, 257 P959; 150Md452, 133A465, 466, 46ALR 80 [citCJ]; 242NY330, 151NE637. [c] **Destruction of building.**–Owner of building has vested property rights therein, which cannot be summarily destroyed under guise that building is nuisance, except in cases of great emergency. 322Mo 342, 15SW(2d)343.

916-91 84Mont478, 276P958. [b] **Statute, forbidding advertising by cleaners and dyers** till licensed by state fire marshal as safety measure against fires, is unreasonable and void, as it forbids advertising by those who do no work on their own premises. 212Ky 152, 278SW593.

917-98 NJSup 132A335; 124 Or677, 265P790, 59ALR512.

917-99½-New. The restriction of private property under guise of police power must bear some definite and substantial relation to the public welfare. 102NJL170, 130A635.

917-1 242NY330, 151NE637.

917-5 NJ 130A458. [a] **Legislature may declare** ownership or possession of firearms by a person convicted of felony harmful to public welfare. 71CalA374, 235P81.

917-10 172Ark835, 290SW591, 592 [cit CJ]; 191 Ind475, 151NE390; 104WVa 660, 140SE839 (safe crossing of railroad track by highway).

918-21 161La278, 108S481, 482 [citCJ]; 150Md452, 133A465, 466, 46ALR80 [cit CJ]; 10PaDist&Co 775.

918-28 73CalA268, 238P787; 124Kan 237, 257P959.

919-29 93Fla415, 111S801, 52ALR51; 236Mich460, 210NW492, 47ALR1128.

919-37 124 Or677, 265P790, 59ALR 512.

920-44 73CalA268, 238P787, 791 [cit CJ]; 164Ga529, 139SE46, 53ALR933; 216AppDiv250, 214NYS670; 127Misc 683, 217NYS565; 187Wis463, 204NW 595 (Blue Sky Law regulating sale of securities); 38Wyo 47, 264P1023, 1025, 57 ALR675 [citCJ] (requiring label on woolen articles offered for sale showing amount of virgin wool in them).

920-56 26F(2d)623; 195Cal 477, 234P 381, 38ALR1479; 73CalA268, 238P787; 108Conn371, 143A240, 65ALR943; 324 Ill 618, 155NE781; 124Kan237, 257P 959; 115Nebr525, 213NW835; 241NY 288, 150NE120, 43ALR651; 219AppDiv 19, 219NYS373; 129Misc94, 221NYS20; NC 154SE29. [e] **Growth of sentiment** in favor of zoning is evidence of its value for promotion of moral and material welfare of people. 195Cal 477, 234 P381, 38ALR1479. [f] **Violation of fundamental rights** will not be permitted. 73CalA548, 238P1089. [g] **Contribution to general welfare.**–200Cal 277, 252P 1043.

921-59 CalA 288P53; 164Ga755, 139SE 559, 55ALR230; 327 Ill 387, 158NE703, 55ALR303; 239Mich204, 214NW316, 53 ALR273.

921-60 272US425, 47SCt122, 71L ed331; 173Ark661, 293SW14; 164Ga755; 139SE 559, 55ALR230; 327 Ill 387, 158NE703, 55ALR303; 219MoA436, 274SW880; Mont 287P156. [e] **Land surveying under private contract is not subject to** police power regulation. 327 Ill 387, 158 NE703, 55ALR303.

921-61 81CalA105, 252P1053; 327 Ill 387, 158NE703; 55ALR303; 339 Ill132, 171NE154; 212Ky152, 278SW593; 51SD 485, 215NW487, 54ALR719.

922-62 219MoA436, 274SW880; 111 TexCr233, 13SW(2d)93(2dcase); 40Wyo 462, 278P542.

922-63 15F(2d)881; 327 Ill387, 158NE 703, 55ALR303 (recognizing rule); 167 La674, 120S47; 219MoA436, 274SW880; 191NC809, 133SE391.

922-64 [a] **Determination of suitability.**–Legislature itself has power to determine suitability of persons to engage in specified kinds of business. 187Wis 463, 204NW595.

922-64½-New. State may restrict the territorial limits within which certain business may be conducted or certain privileges enjoyed. 75Mont88, 242P344.

922-67 [a] **Regulation of business proper regardless of whether it is licensed.**–128Misc84, 218NYS57.

922-68 195Cal 477, 234P381, 38ALR 1479; 195Cal 497, 234P388 (zoning plan regulating location and segregation of industries, though not nuisances or near nuisances, is valid exercise of police power).

922-69 199Cal 263, 248P1017; 73CalA 268, 238P787; 164Ga529, 139SE46, 53 ALR933; 209Ky40, 272SW18; 159La 723, 106S252; 239Mich204, 214NW316, 53ALR273; 134Misc542, 236NYS70; 150 Tenn292, 264SW353, 354 [citCJ]; 115 Tex149, 277SW1036. [g] 117 OhSt227, 157NE758. [h] **Rates.**–Mo 30SW(2d) 105.

923-70 6F(2d)633; 180Ark770, 22SW (2d)993, 68ALR1018; 87CalA584, 262P 792; Ga 137SE506; 239Mich318, 214NW 241, 53ALR183; 308Mo 328, 275SW940; Mont 293P294. [a] **It is for Legislature** to declare that business is impressed with public use. 170La3, 127S345(1st case).

923-71 73CalA268, 238P787; Mo 24SW (2d)108.

924-72 152Md1, 136A41, 50ALR620.

924-72½-New. If in the conduct of business upon city streets the public is endangered, the regulation may require a bond to secure payment of damages. 317 Ill 132, 147NE797.

924-72⅓-New. That the statute requires the operator of a taxicab to file a bond or liability insurance policy and does not permit a deposit of money or securities as an alternative does not show that the statute is arbitrarily discriminatory and unreasonable. 317 Ill 132, 147NE797.

924-72¼-New. The legislature may not impose onerous or unreasonable burdens on lawful and useful occupations in guise of the police power. 199Cal 263, 248P1017.

924-72⅕-New. Right to regulate property, service, and business depends on special conditions and is not universal. 273US418, 47SCt426, 71L ed718, 58ALR 1236.

924-72⅙-New. Prices may be regulated only where the business is affected with public interest. 273US418, 47SCt 426, 71L ed718, 58ALR1236.

924-72½-New. Business is not public because the public has concern in its maintenance. 273US418, 47SCt426, 71 L ed718, 58ALR1236.

924-72⅛-New: Nor is it public because much used by the public for ease or benefit or enjoyment. 273US418, 47SCt 426, 71L ed718, 58ALR1236.

924-72⅑-New. The test of police power is found in the effect which the pursuit of the calling has on the public weal. 97Fla710, 122S225.

924-75½-New. asylum-keepers, although licensed physicians, 82NH451, 135A531.

924-79 [b] **Ordinance forbidding colored barbers** to serve patrons under certain age held invalid. 164Ga755, 139SE 559, 55ALR230.

924-80 97Fla710, 122S225; 5PaDist& Co 738.

924-88 NJSup 133A870.

924-92 261Mass269, 159NE41.

924-1 200Cal 598, 254P951.

925-5½-New. rental agents, 33 OklCr5, 242P290.

925-6 [a] (1) 127Misc683, 217NYS565; 187Wis463, 204NW595.
925-13½-New. gasoline filling stations. 169Ark244, 275SW321.
925-13½-New. An occupation which may be carried on only by permission will justify a degree of regulation not permissible in case of occupation pursued as a matter of right. 317 Ill 132, 147NE797.
925-13¼-New. The legislature may regulate professions, trades, occupations, and contracts in the interest of the public welfare. 150Tenn292, 264SW353, 354 [citCJ].
925-18 164La405, 114S76, 55ALR309.
925-25 [a] (1) 142 Okl 146, 285P1040.
925-26½-New. buildings, 53ND838, 208NW711.
925-29 124Kan237, 257P959.
926-64 82Colo 574, 261P858, 859 [cit CJ]: TexCivA 2SW(2d)1001.
926-65 274US392, 47SCt630, 71L ed 1115 (dictum). [a] (1) 274US392, 47SCt 630, 71L ed1115 (dictum). (3) May be prohibited by ordinance in exercise of police powers of state delegated by general statute. 132SC182, 128SE36.
927-32 But see 244NY317, 155NE628; 128Misc382, 219NYS131. [a] In New York.-244NY317, 155NE628.
927-98½-New. misbranding, 73CalA 268, 238P787.
927-4 238Mich130, 213NW195.
928-5½-New. and ownership of farm lands by aliens. 200Cal 434, 253P718.
928-5¼-New. Establishment of five hundred foot minimum altitude rule for aircraft. 41F(2d)929.
923-6 124Kan237, 257P959; 149Md 349, 131A801, 43ALR819 (vast); 79Mont 25, 255P11, 14 [citCJ]; 54ALR1091, 152Tenn258, 277SW71.
928-7 149Md349, 131A801, 43ALR819, (vague); Mo 30SW(2d)447 (that enforcement will result in expense does not render act invalid).
928-8 124Kan237, 257P959; 149Md349, 131A801, 43ALR819.
928-8½-New. Regulation by government to preserve health, safety, or morals of the people must not be based on an arbitrary desire to resist the natural operation of economic laws for purely æsthetic considerations. 287Pa259, 134 A409.
928-9 202 Iowa 1019, 210NW139.
928-12 50Nev125, 253P671; 51SD485, 215NW487, 54ALR719.
928-13 73CalA548, 238P1089; Iowa 221 NW364; 126Me537, 140A382; 149Md 349, 131A801, 43ALR819; 79Mont314, 257P1007, 56ALR872; NH 150A551(2d case); 191NC643, 132SE792; 128 Or274, 274P308; 143Va310, 130SE516, 51ALR 855 (constitution supreme, but courts will not restrain exercise of police power unless conflict is plain).
928-13½-New. or any implied prohibition thereof, 149Md349, 131A801, 43ALR 819.
928-14 50Nev125, 253P671 (dictum).
928-18 124Kan237, 257P959; Utah 292 P194.
929-19 200Cal 1, 251P784; 45 Ida427, 262P881, 56ALR317; 317 Ill 132, 147NE 797; 202 Iowa1019, 210NW139; 167La 674, 120S47; 236Mich460, 210NW492, 47 ALR1128; 239Mich204, 214NW316, 53 ALR273; 112 OhSt628, 149NE30; 5Pa Dist&Co 738.
929-19½-New. No amendment of the federal constitution interferes with state or municipal proper exercise of police power. 167La771, 120S290, 62ALR1512.
929-20 Cal 292P124; 124Kan237, 257P 959; 149Md349, 131A801, 43ALR819; 79Mont314, 257P1007, 56ALR872; 191 NC643, 132SE792; 128 Or274, 274P308; 5PaDist&Co 443, 444 [quotCJ]; 47RI 387, 133A614; 51SD485, 215NW487, 54 ALR719. But see 295Pa311, 145A295. [b] (1) See 264Mass460, 163NE82. [e] Æsthetic considerations.-169Ark244, 275 SW321.
929-21 15F(2d)881; 195Cal477, 234P 381, 38ALR1479; 199Cal 263, 248P1017; 99CalA747, 279P470; CalA 292P988; 327 Ill 387, 158NE703, 55ALR303; 160 La294, 107S115; 149Md349, 131A801, 43 ALR819; 236Mich460, 210NW492, 47 ALR1128; 213AppDiv414, 210NYS269 (may forestall prospective evil); 134 Misc652, 236NYS293; 287Pa259, 134A 409. [c] No specific label or declaration is essential in order to support validity of statute as exercise of state's police power. 197Wis261, 221NW864.
930-22 278US116, 49SCt50, 73L ed210 (zoning regulation); 195Cal 477, 234P 381, 38ALR1479; 124Kan237, 257P959; 236Mich460, 210NW492, 47ALR1128; 287Pa259, 134A409; 51SD485, 215NW 487, 54ALR719.
930-23 47RI 387, 133A614.
930-24 CalA 292P988; 5PaDist&Co 443, 444 [quotCJ].
930-25 32Ariz222, 257P366, 367 [citCJ], 54ALR736; 199Cal 263, 248P1017; 327 Ill 387, 158NE703, 55ALR303; 149Md 349, 131A801, 43ALR819; 136Misc307, 240NYS784; 287Pa259, 134A409.
931-26 47RI 387, 133A614.
931-30 287Pa259, 134A409.
931-30½-New. The validity of regulation must depend on the circumstances of each case. 241NY288, 150NE120.
931-30⅛-New. And in determining whether it is reasonable or arbitrary the character of regulation and whether it is really designed to accomplish a legitimate public purpose is considered. 241 NY288, 150NE120.
931-30¼-New. Constitutional limitations on use of police power are dependent on character of evil and degree of danger sought to be avoided. 235Ky265, 30SW(2d)968.
931-31 195Cal 477, 234P381, 38ALR 1479; 195Cal 497, 234P388; 76CalA227, 244P930; Ill 173NE361; 159La723, 106 S252; 126Me537, 140A382; 231Mich409, 204NW140; 236Mich460, 210NW492, 47 ALR1128; 239Mich318, 214NW241, 53 ALR183; 239Mich204, 214NW316, 53 ALR273; 321Mo 969, 13SW(2d)628; 115 Nebr727, 214NW746; 118Nebr174, 224 NW18; 53ND838, 208NW711; 47RI 431, 133A812; 47RI 387, 133A614 (dictum); 155Tenn70, 290SW608.
932-32 73CalA548, 238P1089; 161Ga 769, 132SE66, 54ALR1001; Ind 172NE 309; 117Tex34, 297SW206; 136Wash 437, 240P557.
932-33 278US116, 49SCt50, 73L ed210; 195Cal 477, 234P381, 38ALR1479; 195 Cal 497, 234P388 (findings of referee held not to show that inclusion of plaintiff's property in section restricted by zoning ordinance to dwellings, tenements, hotels, and similar uses was arbitrary, unreasonable, or discriminatory); 202Cal 56, 259P444, 56ALR264; 73CalA548, 238P1089; Fla 128S4; 339 Ill 315, 171NE289; 124Kan237, 257P959; 235Ky265, 30SW(2d)968; 118Nebr562, 225NW709; 209NYS126; 47RI 387, 133 A614 (dictum); Utah 292P194; 150 Wash203, 272P517. [b] Reasonableness constitutes test.-Or 288P1015.
932-34 320 Ill 536, 151NE581; 124Kan 237, 257P959; 160La294, 107S115. [b] Zoning ordinance permitting occupants of quasi-residential district to have in their homes offices for professional business is not based on classification inherently discriminatory and unnatural. 195Cal 497, 234P388. [c] Limitations on police power apply equally to legislative acts and administrative and judicial proceedings. 117Tex34, 297SW206.
932-36 195Cal 497, 234P388 (zoning ordinance is not discriminatory because certain property is zoned for residential purposes where purpose is to avoid residential property on one boulevard abutting on business property on another avenue).
932-37½-New. A police regulation, which, in its enforcement, divests a citizen of his property without ordinary citation and without a hearing in court, must be strictly complied with. 9LaA 313, 119S477.
932-38 272US425, 47SCt122, 71L ed 331.
932-39 195Cal 477, 234P381, 38ALR 1479; 161Ga769, 132SE66, 70, 54ALR 1001 [citCJ]; 320 Ill 536, 151NE581; 202 Iowa1019, 210NW139 [citCJ]; 224 Ky390, 6SW(2d)460; 149Md349, 131A 801, 43ALR819; 236Mich460, 210NW492, 47ALR1128; 169Minn374, 211NW577; 115Nebr727, 214NW746; NH 150A551 (2dcase); 53ND838, 208NW711; 116 Or 310, 241P50; 125 Or428, 266P875; 287Pa 259, 134A409; 187Wis463, 204NW595.
932-39½-New. The question of reasonableness of police regulations is primarily for the legislature. 199Cal 263, 248P1017.
933-40 161Ga769, 132SE66, 70, 54ALR 1001 [citCJ]; 325 Ill 511, 156NE778; 212Ky152, 278SW593; 149Md349, 131A 801, 804 [citCJ], 43ALR819; 287Pa259, 134A409; 47RI 387, 133A614. [b] Matters to be considered in determining validity of statute. 170La175, 127S592. [c] Whether legislation has substantial relation to public health, safety, morals or welfare is for determination of court. 235Ky265, 30SW(2d)968.
933-41 272US425, 47SCt122, 71L ed331; 161Ga769, 132SE66, 70, 54ALR1001 [cit CJ]; 320 Ill 536, 151NE581; 325 Ill 511, 156NE778; 339 Ill 315, 171NE289; 212 Ky152, 278SW593; 236Mich460, 210NW 492, 47ALR1128; 169Minn374, 211NW 577; 79Mont314, 257P1007, 56ALR872; 287Pa259, 134A409; 47RI 387, 133A614; 155Tenn70, 290SW608. But see NH 150 A551(2dcase).
933-42 161Ga769, 132SE66, 70, 54ALR 1001 [citCJ]; 236Mich460, 210NW492, 47ALR1128; 47RI 387, 133A614. [a] 125 Or428, 266P875.
934-43 195Cal 477, 234P381, 38ALR 1479; 195Cal 516, 234P396 (municipal ordinance limiting, for business purposes in town, where total acreage is not less than two thousand five hundred acres, area of only one and one-tenth acres, already occupied by existing business, is unreasonable restriction of business uses); 117Tex34, 297SW206.
934-44 272US425, 47SCt122, 71L ed331; 73CalA268, 238P787; 236Mich460, 210 NW492, 47ALR1128; Mont 287P156; 253NY305, 171NE72; 134Misc652, 236 NYS293; 136Misc353, 239NYS706; 117 Tex34, 297SW206; 38Wyo 47, 264P1023, 1025, 57ALR675 [citCJ]. [a] 142 Okl 146, 285P1040.
934-45 NH 150A551(2dcase).
934-46 33Ariz440, 265P602, 58ALR563; 195Cal 497, 234P388; 236Mich460, 210 NW492, 47ALR1128.
934-47 33Ariz440, 265P602, 58ALR563; 73CalA268, 238P787; 212Ky152, 278SW 593; 236Mich460, 210NW492, 47ALR 1128; 79Mont314, 257P1007, 56ALR872.
934-48 28F(2d)825; 33Ariz440, 265P 602, 58ALR563; 195Cal 477, 234P381, 38ALR1479; 195Cal 497, 234P388 (zoning ordinance); 199Cal 263, 248P1017; 239Mich204, 214NW316, 53ALR273; 79 Mont314, 257P1007, 56ALR872; 264 AppDiv483, 231NYS368; 53ND838, 208 NW711.
934-49½-New. Congress and executive in exercising powers must have regard for the rights of private persons. 27F (2d)262.
935-51½-New. right to beget children. 231Mich409, 204NW140.
935-52 273US28, 47SCt248, 71L ed520.
935-54 Ga 154SE436; 231Mich409, 204 NW140; 224AppDiv243, 229NYS644. [h] Statute prohibiting physicians from prescribing more than pint of spirituous or vinous liquor in ten days is not violative of guaranties of life, liberty, and property. 4F(2d)915.
935-55 [a] 261Mass484, 159NE495, 55 ALR1309 (by advertisement). [b] Disciplinary proceedings against attorney on petition, simply directing attention to attorney's disbarment in federal court, is not in violation of Declaration of Rights, depriving him of life, liberty, and property according to standing laws. Mass 167NE749.
935-58 [a] Suffrage not a personal and fundamental right, and right of women to vote is not extended to Porto Rico by force of Nineteenth Amendment. 33 PortoRico 76.
935-59 33PortoRico 76. [a] Conservancy Act of New Mexico (1) does not violate constitutional provision for free exercise of suffrage. 31NM188, 242P683. (2) Provision in act for appointment of direction of conservancy district by district court does not violate right of people to govern themselves. 31NM188, 242 P683.
935-60 [c] Constitutional rights ought not to be abridged on ground of public policy, unless welfare of people is really and substantially involved. 72CalA331, 237P554.
936-63 273US28, 47SCt248, 71L ed520. [a] Guaranties of persons and property do not include rights pertaining to nei-

ther person nor property. 55AppDC341, 5F(2d)764.

936-66½-New. Sections of bill of rights in state constitution relating to different subjects are separately construed as the meaning of each section is controlled by matters covered. 81Colo 276, 255P610.

936-67 321 Ill 305, 151NE911, 45ALR 1457 (deprivation of liberty prohibited except for good cause shown); 187Wis 463, 204NW595. [a] (1) See also 81Colo 276, 255P610.

936-68 [a] **Citizen's liberty cannot be curtailed or interfered with** except where necessary under police power for protection and preservation of public health, safety, or morals. 99CalA747, 279P470.

936-69 167Ga165, 144SE726, 60ALR 747; Mass 166NE401; 187Wis463, 204 NW595; 196Wis472, 220NW929 (not circumscribed except for weighty reason).

937-74 191 Ind475, 151NE390; 82NH 495, 136A263.

937-75 191 Ind475, 151NE390.

937-76 325 Ill 511, 156NE778; 191 Ind 475, 151NE390; 118 OhSt25, 160NE473. [b] **Public welfare must require deprivation.**-339 Ill 315, 171NE289.

937-76½-New. The right to personal liberty may not be alternately granted and denied without just cause. 70Utah 296, 259P1044, 54ALR1463 (granting and revoking suspension of sentence).

937-76⅓-New. A statute allowing supplementary remedy to judgment creditor is not repugnant to federal constitution. 159La831, 106S321.

937-78 [c] **Legitimate authority for control and education of children** is not within constitutional prohibition against involuntary servitude. 151Miss398, 118 S184, 60ALR1325.

938-86 TexCivA 3SW(2d)947, 957 [cit CJ]. [c] **Statute requiring public warehousemen to furnish tax assessor with list of property stored and names of owners** is not unconstitutional as requiring warehousemen to perform involuntary servitude. TexCivA 3SW(2d) 947.

938-90 152Tenn431, 278SW65.

938-92½-New. Compelling a receiver to continue as such by denial of his motion for discharge does not impose involuntary servitude. 82Colo 280, 260P 101.

939-5 [a] **One ordered to be deported** cannot be held indefinitely in prison. 5F(2d)238.

939-10 34F(2d)417; 155Tenn364, 293 SW757; TexCivA 299SW479 (statute held valid providing imprisonment for failure to pay seating fee for busses).

939-11 170Ark41, 278SW654; 76CalA 347, 244P940; CalA 291P233.

939-12 228Ky410, 15SW(2d)256; 228 Ky468, 15SW(2d)276. [b] **Every doubt in enforcement of provision** should be resolved in favor of liberty of citizen. 331 Ill 351, 163NE6, 60ALR316.

940-16½-New. In Illinois there is no imprisonment unless the evidence clearly shows accused has money within his power to pay, or had money and wrongfully disposed of it. 331 Ill 351, 163NE 6, 60ALR316.

940-16⅓-New. One cannot be imprisoned for failure to pay over money he does not have and never had. 331 Ill 351, 163NE6, 60ALR316.

940-19 194NC498, 140SE216 (giving worthless check with knowledge that no funds on deposit).

940-25½-New. Prohibition of imprisonment for debt applies only to debts arising from actions ex contractu. 92Fla 848, 110S522.

940-27 [a] **Judgment in bastardy proceeding,** where secured as provided by statute, becomes debt preventing imprisonment. 141 Okl 75, 284P294.

940-31 76CalA347, 244P940; 92Fla848, 110S522; 312Mo 600, 280SW421; Oh 126 NE38, 40 [citCJ]; 24 OhA272, 156NE 510; OklCr 274P684; 119 Or658, 250 P834, 49ALR384; 150SC452, 148SE474; 155Tenn364, 293SW757. [f] **Judgment for money stolen** cannot become part of sentence of imprisonment on defendant's conviction of larceny. 23AlaA379, 125S 788. [g] **Statute making it felony for cash buyer to willfully refuse payment after demand** is unconstitutional as authorizing imprisonment for debt. CalA 291P233.

941-32 312Mo 600, 280SW421; 112 Oh St374, 147NE754, 40ALR73; 140 Okl 194, 282P353 (fine for nonpayment of license tax).

941-33 140 Okl 194, 282P353.

941-34 See 331 Ill 351, 163NE6, 60ALR 316 (disobedience must be willful).

941-34½-New. One who never had possession of funds could not be imprisoned for noncompliance with an order requiring delivery. 331 Ill 351, 163NE6, 60ALR316.

941-34⅓-New. But regard must be had to the relation of the parties to each other and to the court. 331 Ill 351, 163 NE6, 60ALR316.

941-35½-New. Alimony does not constitute a "debt" within a prohibition of the constitution against imprisonment for debt. 157Md166, 145A488.

941-37 120 Or444, 250P220; 48Philippine169.

941-39 See also 128Misc84, 218NYS57.

941-40 [a] **Statute authorizing sexual sterilization of mental defectives** does not violate constitutional prohibition against cruel and unusual punishment. 143Va310, 130SE516, 51ALR855.

941-42 217Ala16, 114S357, 358 [citCJ] 55ALR171.

941-43 NJCh 147A220.

941-46 42F(2d)845.

942-49 180Ark546, 21SW(2d)966.

942-50 81Colo 276, 255P610; 263Mass 435, 161NE619 (Jews protected); 102 TexCr297, 277SW1091. [b] **Act providing for bond issue** to raise money for loans to war veterans, except those dishonorably discharged, or conscientious and political objectors, held not based on improper classification, or as making religious discriminations. 193NC496, 137SE669.

942-51 81Colo 276, 255P610.

942-53 81Colo 276, 255P610.

942-58 30F(2d)971.

942-62 MoA 300SW316.

942-62½-New. The act providing for the issuance of bonds by the state and use of money to make loans to war veterans, excepting, among others, conscientious objectors, is not invalid as religious discrimination. 193NC496, 137SE669.

942-62⅓-New. To require an Orthodox Jew to procure wine for sacramental purposes in the manner provided by statute does not violate the constitutional right to worship God according to the dictates of his conscience. 49SD56, 206NW468.

942-62¼-New. Reasonable regulations for sale of religious books are not prohibited by constitutional provisions. Mass 172NE114.

942-65 81Colo 276, 255P610.

943-69 81Colo 276, 255P610; 171Minn 142, 214NW18, 57ALR185.

943-76½-New. A statute providing for the purchase of school books to be supplied to school children free has been held not violative of a constitutional provision prohibiting the use of public funds for the support of private or sectarian schools. 168La1005, 123S655, 67ALR1183.

944-85 MoA 300SW316; 75Mont219, 243P1067 (prohibiting unlawful possession of narcotic as against claim of possession for sacramental purposes).

944-98 See also ND 229NW569.

945-3 See also 44Philippine292.

945-7½-New. A charter establishing a religious educational institution exempt from taxation is not a violation of the constitution. 331 Ill 308, 163NE1.

945-11 130Kan863, 288P729; 163La 409, 111S889; 316Mo 9, 289SW838.

945-12 120 Or444, 250P220.

945-14 118 OhSt25, 160NE473.

945-22½-New. or by refusal to allow unvaccinated child to attend school. 82NH495, 136A263.

945-23 209Ky299, 272SW748; 212Ky 152, 278SW593 (constitution guarantees right to earn livelihood).

945-24 7F(2d)715; 73CalA548, 238P 1089; 162Ga552, 150SE839 (statute held not violative of constitution); 325 Ill 511, 156NE778; 339 Ill 315, 171NE 289 (use); 242 IllA548; 317Mo 1, 293 SW780, 52ALR879; 53ND683, 208NW 968, 970 [citCJ], 45ALR1337; Va 154 SE579. [d] **It is usurpation of power** by legislature to say one may not defend his own property. 71CalA386, 235 P664.

945-24½-New. It is a fundamental principle of law that an individual may engage in and conduct any legitimate business without legislative assent. 23 OhA21, 155NE147.

945-24⅓-New. The state may not interfere with the sale by an individual of his own property lawfully acquired and possessed. 73CalA548, 238P1089.

945-25 180Ark770, 22SW(2d)993, 68 ALR1018 (statute providing for commission's refusal of certificate authorizing operation of ice business); 196Cal 211, 237P538, 40ALR782; 71CalA386, 235P664 (statute forbidding disbarred attorney from appearing in his own behalf in action, subject of which was assigned subsequent to disbarment, held unconstitutional); CalA 288P53 (advertising); 89Fla224, 104S593; 92Fla 617, 110S451; 325 Ill 511, 156NE778; 339 Ill 315, 171NE289 (in absence of necessity for public welfare); 149Md 349, 131A801, 43ALR819; 313Mo 143, 281SW47, 51 [citCJ], 45ALR189; 152 Tenn466, 278SW660 (limiting salaries of trustees of counties of certain population).

946-26½-New. or to forbid dealing in raw milk; 314Mo 80, 282SW437.

946-23½-New. or from engaging in any lawful pursuit without being made subject to police regulation; 81CalA 105, 252P1053.

946-28⅓-New. or from selling merchandise by "endless chain plan"; 81 CalA105, 252P1053 (ordinance).

946-35½-New. , or to prohibit an owner of property from contracting for the insurance thereof. 313Mo 143, 281SW 47, 45ALR189.

946-37 Ark 31SW(2d)739; 110Conn 291, 147A804; 94Fla1056, 114S859; 325 Ill 511, 156NE778; 235Ky265, 30SW (2d)968; 149Md349, 131A801, 43ALR 819; 149Md648, 132A160; Mass 166NE 401; NJSup 147A570; NJSup 147A746; 133Misc802, 233NYS570; 118 OhSt25, 160NE473; 32 OhA472, 168NE227; 287 Pa259, 134A409; 155Tenn70, 290SW 608. [c] **Person has no property right in garbage** of individuals and corporations before collection. Ind 171NE199.

946-40 22F(2d)341; 94CalA667, 271P 768; NJSup 129A390; Utah 292P194.

947-54½-New. may regulate meat industry; 149Md648, 132A160.

947-54⅓-New. may authorize summary destruction of diseased animals; Oh 165NE499.

947-56 169Ga112, 149SE882.

947-60½-New. , regulate and adjust conflicting rights and interests of landowner and public. 41F(2d)929.

947-61½-New. Right to possess intoxicating liquors is not an inherent inalienable right, inviolable by state legislation. 80Colo 417, 252P350.

947-61⅓-New. A statute empowering the state tax commission to equalize assessments but not authorizing arbitrary assessment is not violative of constitution. 213Ky445, 281SW472.

947-67 53ND683, 208NW968, 970 [cit CJ], 45ALR1337.

949-5 31Ariz33, 250P354, 49ALR1311; 327 Ill 387, 158NE703, 55ALR303 (private land surveying); 330 Ill 160, 161 NE515; 333 Ill 225, 164NE393, 63ALR 157; 212Ky123, 278SW533; Mass 164 NE393; Mont 287P156; 130Misc249, 223NYS796; 144Va727, 130SE794. See also NJSup 147A735. [b] **Right does not extend to illegal contracts,** or those made illegal by valid exercise of police power. 212Ky123, 278SW533. [c] **That unscrupulous men may enter into fraudulent contracts** as to lawful business is not ground for prohibiting lawful contracts respecting such business. Mont 287P156.

949-6 47 Ida33, 272P498, 65ALR663 (mortgage); 201 Iowa931, 208NW503; 239Mich204, 214NW316, 53ALR273; 155Miss31, 119S366; 53ND683, 208NW 968, 970 [citCJ], 45ALR1337; TexCivA 275SW134; TexCivA 5SW(2d)856. [a] **Statutes held not to interfere with right of contract.**-39F(2d)16.

949-6½-New. And the term "liberty," also, as used in the constitution, im-

plies the right to make lawful contracts. 187Wis463, 204NW595.

949-9 276US71, 48SCt291, 72L ed473; 168Minn378, 210NW163; 147Miss335, 112S469, 53ALR88; 53ND683, 208NW 968, 970 [citCJ], 45ALR1337; 196Wis 472, 220NW929.

949-10 147Miss335, 112S469, 53ALR 88; Mont 287P156.

949-11 147Miss335, 112S469, 53ALR 88; Mont 287P156.

949-12 317 Ill 278, 148NE47.

949-13 276US71, 48SCt291, 72L ed473; 212Ky123, 278SW533; 158La439, 104S 200 (ordinance forbidding negroes to reside in "white communities," and white persons in "negro communities," has been held not invalid as interfering with liberty of contract); 174Minn36, 218NW238; 147Miss335, 112S469, 53 ALR88; Mont 287P156; 53ND683, 208 NW968, 970 [citCJ], 45ALR1337; Oh 172NE148; 32 OhA357, 168NE55 (statute and ordinance held not unconstitutional as interfering with right to contract by making premiums on city employees' bonds payable to surety company); 199Wis379, 225NW209. But see TexCivA 272SW234.

950-16 102WVa305, 135SE4; 199Wis 379, 225NW209.

950-19 323 Ill 580, 154NE427; 169 Minn214, 210NW1001; OhA 173NE22.

950-26½-New. or from regulating animal racing, 167La511, 119S532.

950-27½-New. , or from making compromise agreements or assignments under the Workmen's Compensation Act illegal, unless approved by the compensation board. 212Ky123, 278SW533.

951-37 246NY46, 157NE925 (Workmen's Compensation Act leaves workmen free to contract as heretofore and settle claims for injury).

951-37½-New. Statute is unreasonable and arbitrary which prohibits written contracts for personal services in connection with burial of human bodies when not made in contemplation of immediate death. Mont 287P156.

951-41½-New. A statute fixing the maximum rate which a newspaper, under contract to publish legal notices, may charge for publication of an order of publication to parties who cannot be personally served with process does not impair the right or freedom to contract. 313Mo 693, 282SW702.

951-41⅓-New. The legislature may not under the guise of regulation or control engage in arbitrary price-fixing. 169Minn321, 210NW163.

951-41¼-New. The constitutional guaranty does not operate in behalf of governmental agencies and political subdivisions so as to inhibit the legislature from limiting or prohibiting their right of contract. 53ND683, 208NW 968, 45ALR1337.

951-41½-New. Exercise of legislative authority to abridge freedom of contract is justified only under exceptional circumstances. Mont 287P156.

951-44 [a] Statute compelling motorists to contribute to state insurance fund may create monopoly. Mass 171 NE294.

951-47 [a] **Legislature may regulate contract** between owner and original contractor so as to protect subcontractor without infringing too much on right of contract. 35Wyo 224, 248P353.

951-53 [a] **Limitation of attorney's fees** in workmen's compensation case is valid. 267US540, 45SCt399, 69L ed775.

951-54 164Ga755, 139SE559, 55ALR 230; Mass 166NE401; 118 Or693, 247P 809; 46Philippine440. [b] **Statute prohibiting employment of women held unconstitutional.**-27.OhNPNS77 (as drivers of taxi cabs).

952-57½-New. A statute requiring that contracts for public works shall provide that workmen shall be paid wages at not less than prevailing rates has been held valid. 244NY317, 155NE628.

952-57⅓-New. A statute prohibiting the employment of more than one student apprentice in any barber shop is void as an unreasonable interference with the liberty of a citizen. 30F(2d) 839.

952-63 99CalA651, 279P213 (constitutional right of free speech goes to every citizen of state in matter of free expression of sentiment on all public subjects); 122 Or311, 258P822. [b] **Code provisions specifying privileged communications between persons** is controlled by constitutional guaranty of free speech. 99CalA651, 279P213.

952-66 11F(2d)860; 13F(2d)673; 194 Cal49, 227P908; 174Minn457, 219NW 770, 772, 58ALR607 [citCJ] (use and not abuse of press is protected); 117 Nebr710, 222NW625.

952-67 99CalA651, 279P213; 122 Or 311, 258P822; TexCivA 271SW209 (injunction against communicating with plaintiff or her husband did not curtail freedom of speech).

952-69 [a] **Corresponding right to keep silent** is not violated by statute requiring warehousemen to furnish to tax assessor list of property stored and names of owners thereof. TexCivA 3SW(2d)947.

952-73 209Ky299, 272SW748 (right to express unobjectionable opinions through speech to lawful assembly). 174Minn457, 219NW770, 58ALR607.

952-74½-New. 194Cal 49, 227P908.

952-74⅓-New. Equity will not permit the invasion of the constitutional guaranty of freedom of speech and of the press. TexCivA 281SW596.

952-74½-New. Right to work for amendment of constitution does not extend to aliens. 40F(2d)255.

952-74⅓-New. Freedom of press is not interfered with except by suppression of newspaper before publication. 44 F(2d)227.

952-76 274US357, 47SCt641, 71L ed 1095; 174Minn457, 219NW770, 773, 58 ALR607 [citCJ]; 320Mo865, 8SW(2d) 1001; 118OhSt25, 160NE473. But see TexCivA 272SW234.

952-82 274US357, 47SCt641, 71L ed 1095; 295Pa311, 145A295.

953-86 174Minn457, 219NW770, 58 ALR607.

953-86½-New. or may prohibit fortune-telling; 118 Oh25, 160NE743.

953-90½-New. Statute, making publication and circulation of malicious, scandalous, and defamatory newspaper a public nuisance, does not violate free press guaranty. 179Minn40, 228NW 326 (1st case).

953-93 13F(2d)673; 194NC146, 138SE 616, 53ALR626.

953-94 13F(2d)673; 292Pa277, 141A50.

953-95 106TexCr37, 289SW1072.

953-99 Cal 292P481.

953-99½-New. Any attempt to influence the courts of justice constitutes an abuse of right of free speech. 193Wis 602, 216NW127, 55ALR1355.

953-1 13F(2d)673.

954-22 200Wis518, 228NW895(2dcase), 69ALR348 (corrupt practice law).

954-26½-New. Any law, under the guise of regulating elections, is void to the extent that it destroys the right of free speech. 200Wis518, 228NW895 (2dcase), 69ALR348.

954-27 NJComPl 150A217 (consent of authorities as requisite to meeting).

954-30 NJComPl 150A217.

955-34 287Pa171, 134A430, 47ALR745.

955-36 209Ky299, 272SW748 (right to assemble peaceably to hear unobjectionable speech); 52ND533, 204NW356; 35 PortoRico 594.

955-37 265Mass425, 164NE480, 62ALR 402.

955-40½-New. A provision of a state constitution that the right to petition shall not be abridged protects the right as known and exercised at the time of the adoption of the constitution. 193 Wis602, 216NW127, 55ALR1355.

955-40⅓-New. The only petitions to courts protected by such constitutional provision are petitions established as part of judicial procedure. 193Wis 602, 216NW127, 55ALR1355.

955-40¼-New. The right to petition never included the right to attempt to influence a decision of the court through the medium of a petition. 193Wis602, 216NW127, 55ALR1355.

955-40⅕-New. Right is not violated by state Criminal Syndicalism Law. 274US357, 47SCt641, 71L ed 1095.

955-46 12F(2d)938; 321 Ill 291, 151 NE900; 205 Iowa1154, 213NW517; 51 Philippine498. [a] (2) 12F(2d)938, (8) 51Philippine498. (9) "Vested right" implies interest which state should recognize and protect and of which individual may not be deprived arbitrarily. 102CalA299, 283P298. [b] **Essential elements.**-105NJL518, 146A685 (2d case). [c] **No vested right** where inception thereof is procured in fraud. 136 Misc259, 240NYS456.

955-46½-New. Beneficiary of war risk insurance has no vested rights as to future installments. 222Ky713, 28W (2d)395.

955-47 321 Ill 291, 151NE900; Ill 173 NE189 (no vested interest in any rule of common law); 205 Iowa1154, 213 NW517.

956-48 327 Ill 91, 158NE470, 474 [CitCJ]; 205 Iowa1154, 213NW517; 158 Tenn12, 11SW(2d)552.

956-49 321 Ill 291, 151NE900; 327 Ill 91, 158NE470, 474 [citCJ]; 100NJEq 193, 135A351.

956-52 [a] **Purchase and use of liquor** even for lawful purposes and obtaining of permit therefor is not a vested right. 39F(2d)219.

956-53½-New. The constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law to attain a permissible legislative object. 280US117, 50 SCt57, 74L ed221, 65ALR939.

956-54 98CalA284, 276P1083; 126Misc 829, 215NYS159; TexCommnA 299SW 224.

956-55 168Ark1079, 272SW662; 202Cal 56, 259P444, 56ALR264; 80CalA363, 252 P656; 98CalA284, 276P1083; 320 Ill 449, 151NE239; 321 Ill 291, 151NE900; 324 Ill 32, 154NE441; 337Ill 431, 169 NE254; Me 151A670; 156Md40, 143A 666; Nebr 227NW449; 129Misc845, 223NYS470; 193NC278, 136SE879; 195 NC439, 142SE477; 23 OhA506, 155NE 813.

957-56 98CalA284, 276P1083; 126Misc 829, 215NYS159. [a] But see 126Misc 829, 215NYS159.

957-57 98CalA284, 276P1083; 167La 771, 120S290, 62ALR1512; 121 Okl 14, 247P55.

957-62 121 Okl 14, 247P55.

957-62½-New. Vested property rights are held subject to laws for the enforcement of public and private duties and may be divested through the operation of such laws. 80CalA363, 252P656.

957-62⅓-New. A failure to exercise a vested right before the adoption of a constitutional provision which seeks to divest it in no wise affects or lessens such rights. 121 Okl 14, 247P55.

957-62¼-New. When by discretionary action of an executive officer rights of private parties have become vested neither he nor his successor in office can annul those rights by undertaking to revoke such action. 114Tex561, 273SW 789.

957-62½-New. Vested interest cannot be asserted against proper exercise of police power. 81Colo344, 255P443.

957-63 12F(2d)938; 36F(2d)108; 117 Or244, 243P767, 772 [citCJ].

957-68 105TexCr204, 287SW262.

957-69 159La723, 106S252; TexCivA 2SW(2d)1001.

957-70 47RI 431, 133A812.

958-71 172Minn428, 215NW840, 841, 55ALR461 [quotCJ entire section].

958-72 7F(2d)728.

958-72½-New. in statutory right to resume citizenship by returning to reside in the United States after termination of marital relation with an alien, 6F(2d)670.

958-80½-New. , or in serving out unexpired sentence. 273US589, 47SCt504, 71L ed790.

958-80⅓-New. Restaurant owner has no vested right of patronage of persons who do not wish to patronize. 22 OhA 265, 154NE362.

958-80¼-New. Suspended sentence, being matter of sovereign grace, conveys no vested rights. Iowa 232NW798.

958-85 327 Ill 91, 158NE470; 205 Iowa 1154, 213NW517; 310Mo542, 276SW 389; 104NJL312, 140A440 (permit to carry revolver under statute not vested right). See also 189NC697, 128SE4.

958-86 169Ark383, 275SW762.
958-87 75CalA591, 243P55; 87CalA 584, 262P792 (no vested right created by license); 97Fla710, 122S225; 13Pa Dist&Co 511; 99Vt265, 132A40. [a] **Right to use highways,** not vested right, and law forbidding motor vehicles to compete with trolley lines is no infringement of such right. 99Vt265, 132 A40.
959-96½-New. such as the business of motor vehicle transportation, 75Mont 240, 243P1073.
959-97½-New. However, the right to engage in lawful business may not be unreasonably restricted without divestiture thereof. 164Ga755, 139SE559, 55 ALR230.
959-97½-New. No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control under the police power. 73 CalA268, 238P787.
959-1½-New. Party has no vested right in name of street or in number originally assigned to house. 247NY 311, 160NE381.
959-1⅓-New. No one can acquire a vested right to continue in possession of that which is a menace to the public safety. 76CalA227, 244P930.
959-1¼-New. Zoning ordinance is held not invalid as to one who had previously instituted a suit to compel the issuance of a permit to erect a filling station. 217Ky136, 289SW223.
959-1½-New. Indian's vested right to water and ditch rights appurtenant to patent issued to him by prior statute and confirmed many years by authorized agents of government cannot be divested or impaired by subsequent statute requiring payment therefor. 12 F(2d)938.
959-1¾-New. One entering lawfully on school lands to explore for minerals, expending considerable sums in developing claims and making improvements, acquires a vested right to continue so long as he is complying with the requirements of an authorizing act. 98 CalA284, 276P1083.
959-1 1/7-New. Repeal by fraternal benefit society of by-laws adding benefits does not violate vested rights. 338 Ill 441, 170NE735.
959-1⅓-New. An abutting property owner has no vested right in sidewalks as against the state or its municipalities. NJCh 147A502.
959-1⅙-New. Law providing that underground waters boundaries of which are reasonably ascertainable shall belong to public and be subject to appropriation is not subversive of vested rights. 34NM611, 286P970.
959-1 1/10-New. Rule of railroad commission as to proximity of oil or gas well to any other well on same or adjoining land and to property line is not invalid as adjudication of vested rights. TexCivA 25SW(2d)936.
959-1 1/11-New. Statute authorizing building and loan association to reduce liability of association to members does not violate vested rights of shareholders where association is insolvent. Tex CommnA 26SW(2d)168.
959-2½-New. Vested rights or interests of depositors in banks closed after guaranty act goes into effect are not affected by a statute modifying the plan of original act so as to authorize the guaranty fund commission in its discretion to prorate payments on claims of depositors in banks that had closed when the legislature convened, rather than to require payment in full to a few depositors and leave a large majority to wait indefinitely. 51ND603, 200 NW524.
959-4 154Md438, 140A836; 23 OhA506, 155NE813. [b] **Change or limitation not affecting vested rights** does not violate constitution. 154Md438, 140A836 (right of redemption of ground lease). [c] **Right to amend restrictive covenants in deed** is vested contract right, which cannot be impaired by subsequent zoning ordinances. TexCivA 30 SW(2d)590.
959-7 321 Ill 291, 151NE900; 197NC 292, 148SE313.
960-24 202Cal56, 259P444, 56ALR264. But see 207Cal 314, 278P236.
960-30 But see 195NC8, 141SE480.
960-32½-New. or a devisee under a will. 193NC278, 136SE879.
961-48 121 Okl 14, 247P55, 57 [quot CJ].
961-54½-New. Denial to uxorcide of share in wife's estate does not deprive him of any vested right. 140Wash679, 250P456, 51ALR1088.
961-57 168Ark981, 272SW869; 180 Ark1023, 24SW(2d)314; 327 Ill 214, 158NE475.
962-69 See also 100NJEq193, 135A351. But see NJCh 152A9.
962-70 See also 298Pa33, 148A37.
963-81 Cal 263P1013; 204Cal557, 269 P519.
963-84 332 Ill 11, 163NE428.
963-94 197Cal 189, 240P21.
964-11½-New. The probate court has no power to administer estates of persons alive as such action would be in violation of the Fourteenth Amendment of the federal constitution. 235Mich 344, 209NW177.
965-40 [b] **Subsequent mortgage priority over mechanics' liens.** 220AppDiv 616, 221NYS690.
965-42 147Wash86, 265P167, 172 [quotCJ].
966-58 34F(2d)308; 98NJEq209, 130 A17, 19 [citCJ].
966-59 98NJEq209, 130A17, 19 [cit CJ].
967-62½-New. A statute fixing the time for giving notice of expiration of the redemption period and for recording the tax certificate is not unconstitutional as impairing vested rights where a reasonable time for performing such acts is allowed. 164Minn195, 204NW 648.
967-64 23 OhA1, 154NE748. But see 140 Okl 178, 282P611.
967-65½-New. A statute exempting benefits of fraternal benefit societies from liability for debts of members or beneficiaries does not impair contract made after its enactment. SD 229NW 294.
967-67 121 Okl 14, 247P55.
967-74 110Conn130, 147A513; 197Ind 28, 149NE639 (operation of jitney busses subject to regulation, though owner was using them on streets when ordinance was adopted). 168La752, 123 S314; Mo 24SW(2d)108 (permit for installation of gasoline tanks underground); TexCivA 2SW(2d)1001 (dance hall); 99Vt265, 132A40. [a] **Financial loss** does not of itself give vested right to continue business, if it is one whose location may be regulated by city under police power. 34Ariz495, 272P923.
967-78½-New. But a zoning ordinance not resting on public health, safety, comfort, or morals, was held void as to the owner of a garage existing at the time of its adoption. 125Misc215, 211 NYS438.
967-78⅓-New. An owner does not acquire a vested right to store gasoline in a filling station under an ordinance restricting the amount which may be stored without a permit. 203Iowa576, 213NW262.
967-78¼-New. Purchaser of property after enactment of zoning ordinance could assume classification would not be changed except required for public good. 339 Ill 315, 171NE289.
967-78⅕-New. Rights are acquired by a property owner under a valid zoning ordinance and he cannot be divested thereof by a subsequent ordinance. 155 Wash244, 284P93.
967-79 TexCivA 2SW(2d)285.
967-80 151Va801, 145SE257.
967-81 Cal 290P1033; 110Conn130, 147A513; 247Mich394, 225NW500; 132 Misc82, 229NYS32. See also 224AppDiv 744, 230NYS58; TexCivA 30SW(2d) 339.
967-82 CalA 288P1092; 225AppDiv 179, 232NYS506.
967-82½-New. Purchasers of property formerly occupied by a church have no vested use therein which precludes the city from enacting an ordinance prohibiting the erection of a creamery. 116 Or141, 240P536.
967-82⅓-New. Permittee acquires no vested right by entering into construction work under building permit obtained by misrepresentations. 136Misc 259, 240NYS456.
967-82¼-New. Where preliminary permit was issued for excavating for apartment subject to zoning laws property owner, who let contract under which contractor purchased materials and let contract for excavation, had vested right to erect apartment which could not be defeated by refusal of final permit. 299Pa155, 149A195.
967-85½-New. The holder of a municipal bond payable on or before a specified date is deprived of no vested right by the subsequent enactment of a statute enabling the municipality to exercise its option to accelerate the date of payment. Iowa 218NW20.
968-91 259Mass14, 156NE48; Utah 289P132.
968-92 Ill 172NE13; 127Kan207, 272 P177.
968-95 137Misc62, 241NYS391.
968-97 [a] **Reassessment for previous years, where prior assessment roll has been stricken,** is not invalid as impairing vested rights. 126Misc188, 213NYS 623.
968-10 197Cal 50, 239P719.
968-11 197Cal 50, 239P719.
969-18 TexCivA 298SW462. [a] 37 F(2d)373.
969-20 32F(2d)857.
969-27 247NY290, 160NE374 (holding that voting trust agreement does not confer property right as respects legislative regulation).
969-27½-New. The reorganization of an assessment insurance company whereby it becomes a legal reserve insurance company does not violate either state or federal constitutional provisions protecting vested rights or contractual obligations. 208 Iowa1053, 223 NW257.
969-27⅓-New. The holder of stock on which a cumulative dividend has accrued has vested interest, which may not, in the absence of prior consent, be extinguished, in corporate surplus which might be applied in payment. 34F(2d)533.
969-35 200Cal 463, 254P258; 107Conn 312, 140A734; 94Fla1023, 114S760; 331 Ill 360, 163NE141; 250Mich614, 231NW 52; 126Misc829, 215NYS159; TexCivA 283SW281.
969-36 126Misc829, 215NYS159.
969-38 200Cal 463, 254P258; 104NJL 480, 141A673; 126Misc829, 215NYS159; TexCivA 283SW281.
970-41 251Mich396, 232NW235.
971-52½-New. Certificate of public convenience and necessity for operating passenger motor vehicles is privilege, revocation of which destroys no vested rights. 262Mass583, 160NE321.
971-52⅓-New. The right of members of a charitable corporation to vote for trustees is not a vested interest entitled to protection under the constitution. 250NY103, 164NE871.
971-54 339 Ill 103, 170NE721. [a] **Statutes validating road districts** held not to destroy vested rights. TexCivA 298 SW462.
971-55 [e] **Right to performance of ordinance contract** requiring railroad to construct viaducts is not destroyed by statute empowering public service commission to regulate railroad crossings. Mo 258W(2d)1055.
971-55½-New. A privilege granted to a municipal corporation by the organic law may be withdrawn by a valid constitutional amendment. 169La458, 125S 447.
971-56½-New. The legislature has the power to deprive a county of an existing right of preference in a deposit of money belonging to a county in an insolvent bank. 203 Iowa71, 212NW337.
971-64½-New. Creation of a school district does not give residents vested rights that would inhibit control of the location of schoolhouses, etc. TexCivA 272SW559.
971-64⅓-New. Holders of warrants have no vested right to application of money appropriated by Legislature to purchase warrants. 208Cal 661, 284P 668.
972-85 Cal 290P438; Conn 151A524;

138Misc81, 245NYS81 (right of action for wrongful death); TexCivA 234SW 275; Utah 263P78; 196Wis310, 220NW 174; Wis 231NW182. But see 100NJEq 193, 135A351.

972-86 TexCivA 23SW(2d)820.

972-87 41F(2d)892; Cal 293P62; 100 NJEq193, 135A351; TexCommnA 295 SW588; Wash 291P330.

972-93 TexCommnA 295SW588.

973-95 But see 100NJEq193, 135A351.

974-12 156Tenn216, 300SW12.

974-17 32F(2d)857; 34F(2d)328 (statute of limitation); 102CalA237, 283P 136; 102CalA299, 283P298 (procedure for ascertaining compensation); 320 Ill 449, 151NE239; 338 Ill 583, 170NE664; 153Md367, 138A334; 105NJL518, 146A 685(2dcase) (except in cases in which remedy is part of right itself); 24 OhA 475, 156NE606; TexCivA 5SW(2d)1025.

974-18 34F(2d)308 (parties, in entering mortgage contract, did so in contemplation of right of legislature to enlarge or restrict mortgagee's remedy); 42F(2d)886; 43F(2d)866; 70CalA200, 232P995; 205 Iowa1154, 213NW517; 127Me110, 141A699 (attachment); 153 Md367, 138A334; 262Mass45, 159NE543 (registration of title to land); 315Mo 113, 285SW65; 105NJL518, 146A685(2d case) (where right itself is not impaired); 24 OhA475, 156NE606; Tex CivA 22SW(2d)540. But see TexCivA 6 SW(2d)432. [a] (2) Fixing of date for ascertaining value of property taken is procedural matter and distinct from constitutional right to receive just compensation. 102CalA299, 283P298. (3) Owner's right to just compensation for taking his property does not include right to particular mode or time for ascertaining such compensation. 102 CalA299, 283P298. [b] **In eminent domain cases** the same right exists in Legislature to change rules of procedure or remedies provided contracts or vested rights are not impaired. 102CalA299, 283P298. [c] **Legislature's power is continuous** and is not exhausted by one exercise thereof. 102CalA299, 283P298.

975-28 NJSup 150A771.

975-32 32Ariz407, 259P670, 55ALR 1059.

975-36½-New. When the object of an act is to perpetuate evidence in the case of claims to land adverse to the state and to dispose of such claims within a reasonable time, providing for the commission to investigate such claims does not deprive claimant of vested rights. 125Misc453, 211NYS731.

975-37 Mich 232NW746.

975-39 32NM397, 258P573.

976-48 102CalA299, 283P298 (changing date for determining value in eminent domain proceedings); 320 Ill 449, 151NE239; 235Mich344, 209NW177; 106TexCr1, 290SW743.

976-57 7PaDist&Co 209.

977-64½-New. A statute exempting a homestead from sale under execution on a judgment entered after the homestead declaration is filed, although the declaration is filed after an attachment has been levied, enters into and constitutes a part of all contracts of sale so that a seller attaching the buyer's property is not deprived of any vested right by the filing of a homestead declaration. 76 Mont239, 245P953.

977-76 158La309, 104S55.

977-78½-New. The probate court has no power to administer estates of persons alive as such action would be in violation of the Fourteenth Amendment of the federal constitution. 235Mich 344, 209NW177.

978-93 202 Iowa1002, 210NW129 [cit CJ]; 169Minn57, 210NW622, 49ALR 1260; 130Misc556, 224NYS44.

978-94 198Cal 631, 246P1046, 46ALR 1095.

978-97 38F(2d)483; 198Cal 631, 246P 1046, 46ALR1095; Ill 154NE441; 202 Iowa1002, 210NW129 [citCJ]; 169Minn 57, 210NW622, 49ALR1260; 218AppDiv 541, 218NYS420.

979-98 169Minn57, 210NW622, 49ALR 1260.

979-99 [a] 169Minn57, 210NW622, 49 ALR1260.

980-10 43F(2d)829(2dcase); 198Cal 631, 246P1046, 46ALR1095; TexCivA 29SW(2d)476.

980-19 41F(2d)886; 22AlaA281, 115S 152; 169Ga251, 150SE73, 67ALR287.

981-21 34F(2d)328; 37F(2d)373; 38 F(2d)239; 38F(2d)483. But see TexCivA 29SW(2d)476. [b] **Statute relating to recovery of overpayments of income tax** is not unconstitutional as depriving tax payer of vested right accruing from statute of limitations. 36 F(2d)529.

981-22 22AlaA281, 115S152.

982-39 12PaDist&Co 345.

982-43 240 IllA20; TexCivA 5SW(2d) 1025, 1027 [citCJ].

982-44 240 IllA20; Mich 232NW746; 219AppDiv169, 218NYS446; SD 226NW 265; 106TexCr1, 290SW743; 105TexCr 650, 290SW754.

982-49½-New. A statute requiring a contract to pay the commissions for the sale of realty to be in writing is valid where the contract is made before the enactment of the statute but consummated thereafter. 25 OhA130, 157NE 398.

983-52 240 IllA20.

983-53 161Ga492, 131SE503 (presumption that female will not voluntarily consent to fornication under certain age); 130 Or644, 275P55.

983-56 240 IllA20.

984-72 320 Ill449, 151NE239; 324 Ill 32, 154NE441; 158La309, 104S55.

984-86 320 Ill 449, 151NE239.

984-89 CalA 286P443; 160La563, 107S 427, 431 [citCJ]; 164La624, 114S491; 298Pa487, 148A699, 68ALR1172; Pa 151A801 (where only private interests concerned).

984-93 320 Ill 449, 151NE239.

984-94 83Mont282, 272P543(2dcase) (may deprive party of right to attack judgment for mere irregularities).

985-5½-New. Legislature may control final judgment involving merely public interest unless constitutionally prohibited. Pa 151A801 (holding school directors liable for illegal expenditures).

986-19 49RI 45, 139A662, 663 [citCJ].

986-23 200 Iowa840, 205NW520 (holding that time allowed for appeal cannot be reduced by legislature after judgment).

986-24 70CalA200, 232P995; CalA 285 P332; CalA 285P335; 307Mo 137, 270 SW339; 117Tex200, 299SW869.

986-25 115 Oh654, 155NE484.

987-33 See also 262Mass45, 159NE543.

987-35 279US797, 49SCt507, 73Led963. [b] **Provision is mandatory, and so state may ignore it.**-217AppDiv67, 216 NYS215.

987-36 Conn 151A518; 234Mich258, 207 NW884; 38 OklACR289; TexCommnA 10SW(2d)698; 144Va727, 130SE794.

987-36½-New. In Canada; abrogation of contractual rights. A provincial legislature has within its jurisdiction power to do anything not naturally impossible; it can, therefore, by means of a commission, abrogate even vested contractual rights. Ont [1925] 2DomLR 707 (Dartmouth College decision impossible in province).

987-37 33Ariz76, 262P616; 33Ariz88, 262P620; 131Misc451, 227NYS120; 288 Pa230, 135A759. But see 143Va722, 129 SE499.

988-38 TexCivA 275SW449. [b] (3) Proposed state constitution, ratified by voters of territory and approved by congress before admission of state is in effect act of congress and not within constitutional prohibition against impairment of obligation of contracts. 33Ariz 88, 262P620.

988-40 Conn 151A518; 324 Ill 32, 154 NE441; Nebr 227NW449; 217AppDiv 67, 216NYS215; 114 Okl 77, 243P232; TexCommnA 299SW224; TexCommnA 10SW(2d)698; 143Va722, 129SE499.

988-41 14F(2d)650; 125Me465, 134A 689; 174Minn36, 218NW238 (statute relating to liquidation of insolvent banks).

989-49 91Fla241, 107S364.

989-51 16F(2d)763.

990-53½ 17F(2d)143.

990-54 240 IllA198; 124Kan97, 258P 295; 316Mo 454, 290SW133; Mo 20 SW(2d)657; 194Wis298, 216NW502.

990-57 124Kan97, 258P295; 316Mo 454, 290SW133; 194Wis298, 216NW 502. See also 320Mo 1047, 108SW(2d)923. Compare 264Mass436, 163NE70.

990-58 321Mo 586, 118SW(2d)1036.

991-63 194Wis298, 216NW502.

991-66 16F(2d)639; 16F(2d)763; 200 Cal 434, 253P718; 91Fla241, 107S364; 196NC48, 144SE519.

991-68 102NJL303, 131A915.

992-69 274US387, 47SCt595, 71Led 1112; 16F(2d)401; 16F(2d)763; 216 Ala178, 112S742; 147Miss534, 113S441; 230AppDiv601, 245NYS510.

992-70 16F(2d)639; 200Cal 434, 253P 718.

992-71 274US387, 47SCt595, 71Led 1112; 16F(2d)401; 16F(2d)639; 16 F(2d)763; 33F(2d)675; 216Ala178, 112 S742; 200Cal 434, 253P718; 168La984, 123S648; 261Mass523, 159NE55; 264 Mass460, 163NE82; 147Miss534, 113S 441; 244NY482, 155NE749; 136Misc 307, 240NYS784; 5PaDist&Co 738, 740 [citCJ]; 161Tenn293, 30SW(2d)601. [i] (2) Although contract of public service corporation is thereby rendered partially or wholly invalid change of rates by state through a commission does not impair obligation of contract within guaranties of state or federal constitution. 6F(2d)633. [j] **Obligation of railroad to maintain farm crossing.**-102NJL303, 131A915.

993-72 16F(2d)763.

993-75 33Ariz76, 262P616 (constitutional provision imposing double liability on stock).

993-80 20F(2d)40; 173Ark645, 293 SW2; 225Ky324, 8SW(2d)392; 261 Mass523, 159NE55.

993-81 286Pa561, 134A481.

993-84 16F(2d)256; 31NM188, 242P 683 (provision of Conservancy Act of New Mexico giving priority to assessment lien, except as to taxes, does not impair obligation of contracts).

994-86½-New. Contracts are made subject to right of state to change tax laws and change in tax laws does not impair obligation of contracts in violation of Const. art 1 § 10. 13F(2d)227.

995-2 NH 146A511.

996-9 279US620, 49SCt432, 73Led874, 65ALR866.

996-9½-New. A statute creating an excise tax on domestic corporations which includes interest derived from municipal and county tax exempt bonds is not invalid where the exemption pertains only to local taxation. 264Mass396, 163NE 75.

996-11 83Colo 43, 262P907; 261Mass 556, 159NE70. [c] (3) Provision contained in statute may, when accepted and acted upon, result in contract which succeeding legislatures are powerless to repudiate. 83Colo 43, 262P907. [d] **Statute prohibiting sale of products of prison in competition with products of free labor** is unconstitutional in so far as it impairs contracts and leases for sale of prison products entered into by state board of corrections. 83Colo 43, 262P907.

997-16 169Ark115, 273SW362.

997-34½-New. Rural credit mortgage under statute is contract of state not subject to impairment. 52SD229, 217 NW218.

997-34¼-New. Statute providing that state hail insurance shall not attach to crop of delinquent rural credit borrower held unconstitutional. 52SD229, 217 NW218.

997-34¼-New. A legislative grant is a "contract," within the obligation clause of the constitution. 146SC496, 144SE 233.

997-34½-New. A statute requiring a commission to prescribe a rate per mile to be paid to those operating privately owned cars on state business does not impair the contract of an employee of a board specifying the rate to be paid for use of a private automobile whose employment is by the day at the will of the board. SD 225NW54.

997-34¾-New. A law requiring the head of a department of a state college, as state chemist, to analyze gasoline and kerosene samples does not violate a subsequent contract with the state chemist. 86Mont200, 283P202, 67ALR 1020.

997-36 274US812, 47SCt480, 71L ed898 (dictum); 126Misc829, 215NYS159.
997-39 29F(2d)401; 23AmA5, 120S 140.
997-41 11F(2d)887; 126Mo532, 140A 194.
999-67½-New. A statute allotting to counties a portion of state funds does not impair obligation of state bonds. 169Ark1032, 277SW411.
1000-74 [f] **TexCivA** 275SW449.
1000-93½-New. Statute validating void reservation in sale of land by state does not impair obligation of contract. 23 F(2d)16.
1000-93¾-New. Where a grant is made with reference to an official plot known by parties to have been made without survey, a statute validating a subsequent official survey and locating the land in accordance therewith does not violate the contract clause. 13F(2d)878.
1000-83¾-New. Statute permitting withdrawal of state from land settlement project does not impair obligation of contracts. Cal 290P454.
1001-91 279US797, 49SCt507, 73L ed 963.
1001-93 See also Mo 32SW(2d)583.
1001-94½-New. A state law purporting to abandon a portion of a canal for both canal and hydraulic purposes is, as respected leases and grants for use of surplus water for power purposes, unconstitutional. 33F(2d)318.
1002-10 169Ark383, 275SW762; 142 Miss584, 107SC673.
1002-11 142Miss584, 107SC673 (statute requiring notice of sale to holder of recorded lien and voiding purchaser's deed for failure to give such notice). **1002-15** 176Ark625, 38SW(2d)694. But see 181Ark848, 28SW(2d)57. [b] 176 Ark625, 38SW(2d)694.
1002-19 142Miss584, 107SC673, 674 [cit CJ].
1002-24 169Ark383, 275SW762.
1002-25 53ND278, 205NW850.
1003-33 196NC184, 145SE628 (implied consent to be sued).
1003-43 197Cal50, 239P719.
1004-53 **TexCivA** 275SW449, 450 [cit CJ].
1005-58½-New. Contracts entered into by counties pursuant to statutes enacted in the exercise of the police power of the state are subject to such changes and alterations as the legislature may see fit to make thereafter. 169Minn145, 210NW635.
1005-58¾-New. A statute providing that when part of a school district is annexed to a city district the remainder shall be liable for issued bonds is invalid as impairing the obligation of contract. 178Ark448, 12SW(2d)881.
1006-72 167La612, 120S25.
1007-85 77CalA404, 247P527.
1007-90 **TexCivA** 275SW449, 450 [cit CJ].
1007-94½-New. A statute, authorizing counties to become purchasers of all lands sold for taxes, does not impair the obligation of contract of the owner of an outstanding tax certificate. 198Wis 326, 223NW852.
1007-96 **TexCommnA** 38SW(2d)420 (taxpayers of reduced school district cannot complain).
1008-5 169Ark115, 273SW362.
1008-17 **TexCommnA** 38SW(2d)420 (school district).
1008-22 323Ill246, 154NE112. [a] **Refusal of city to carry out discriminatory contract** does not impair obligation of contract. 233Ky709, 26SW(2d) 599.
1008-23 271US303, 46SCt517, 70L ed 517; 227Ky508, 13SW(2d)515; 195NC 213, 141SE744 (teacher's salary). [c] **Contracts of de facto municipal corporations** are within rule. **TexCommnA** 291SW209.
1008-24 47F(2d)379; 323Ill246, 154 NE112; 126Misc829, 215NYS159; **Tex CivA** 28SW(2d)285 (building permit not affected by ordinance subsequently passed).
1008-25 323Ill246, 154NE112; 215Ky 384, 285SW228. [c] **Dock commissioner's denial of permit** to city's grantees of lots under water to fill same is held to impair obligation of contract. 271 US364, 46SCt569, 70L ed992.
1008-26 323Ill246, 154NE112; 324Ill 618, 155NE781.
1008-26½-New. motor busses, 126Misc 829, 215NYS159.
1008-27 269US67, 46SCt36.
1010-28 [e] **Water company not estopped,** by letter to continue to supply water at same rate, from putting in effect higher rates authorized by utility board. 98NJEq171, 130A530.
1010-29 215Ky384, 285SW228.
1010-30 [a] **Ordinance fixing rates for water power** has been held not to impair prior contract alleged to have arisen from conversations and correspondence. 277US100, 48SCt489, 72L ed801.
1010-31 292Pa384, 141A259 (contract held not impaired).
1010-35½-New. a statute creating a new office or employment, as it affects an existing contract of employment, 169 Ark115, 273SW362.
1010-35¾-New. a statute providing for division of fire forces into platoons, 199Ind78, 155NE198.
1011-44 328Ill242, 159NE199 (statute held not to impair obligation of contract).
1011-47 98NJEq174, 130A530 (holding that contract with public utility is subject to state's power).
1012-53 324Ill618, 155NE781; 147Va 43, 136SE575 (holding contract between telephone company and city embodied in franchise ordinance does not prevent subsequent rate regulation). But see 271US364, 46SCt569, 70L ed992. [d] **Creating commission to establish charges for public utilities** does not impair obligation of contract by city and street railway which limited rate of fare. 27 F(2d)406 [app dism 278US572, 49SCt93, 73L ed513(6thcase)].
1012-55 169La122, 124S308.
1012-60½-New. A building permit is subject to a later ordinance restricting a building in residential zone. 147Miss 534, 113S441.
1012-61 27F(2d)377; 176Ark156, 2SW (2d)56; 56ND146, 216NW344, 345 [cit CJ]; 140Okl131, 282P282 (bondholders); Wis 231NW588. [e] **Change of law under which bonds were issued.**–38 OklACR289. [f] **Law extending time for redemption from sale of lands for nonpayment of drainage assessments** cannot be applied to prejudice of bondholders. 160Tenn619, 28SW(2d)351.
1012-64½-New. An act requiring an act validating municipal bonds to be submitted to electors does not impair the obligation of the contracts. 194NC 22, 138SE443.
1012-64¾-New. Legislation reducing value of plighted land in market impairs security so as to impair obligation of contract. 160Tenn619, 28SW(2d)351.
1013-67 17F(2d)1. [e] **Statute held not to impair obligation.**–15F(2d)996.
1013-68 319Mo316, 4SW(2d)467.
1013-72 147SC433, 145SE186.
1014-76½-New. Statute authorizing transfer of funds to proper school fund in advance of receipt of school funds and retransfer of such funds upon payment of first school money into school fund does not impair obligation of contracts. 80CalA131, 251P679.
1014-77 15F(2d)996; 199Wis85, 225 NW873.
1014-79 56ND146, 216NW344; **Tex CommnA** 38SW(2d)420 (bondholders of school district not prejudiced where remaining territory sufficient to pay claims). [b] **Statutes validating road districts** held not to violate obligation of contracts. **TexCivA** 29SSW462.
1014-80 [c] **Jurisdiction of court to dissolve municipality** will not be construed to impair obligations of contracts. **TexCommnA** 291SW209 [aff **TexCivA** 257SW609].
1014-81 **TexCommnA** 295SW1091.
1014-83 153SC106, 149SE760.
1015-86 202Cal290, 260P548.
1015-87 202Cal290, 260P548.
1015-90 16F(2d)401; 126Misc524, 214 NYS113.
1015-91 16F(2d)401. But see 321Ill 466, 152NE141. [b] **Ordinance granting water company right to use streets for mains, pipes, etc.,** upon certain conditions, is contract, on acceptance and performance, protected against impairment. 126Misc524, 214NYS113.
1015-93 175Ark289, 299SW355 (where grant not exclusive municipality may grant similar rights to rival corporation).
1016-95 [a] **State corporation commission may order discontinance of street car line to avoid confiscation.**–144Va29, 131SE328.
1016-96 281US682, 50SCt449, 74L ed 1115; 33F(2d)719; 91Fla241, 107S364.
1016-99 [c] **Ordinance revoking rights under prior ordinance amounting to contract** is void. 126Misc524, 214NYS 113.
1016-3½-New. An ordinance, granting a railway company the right to maintain bridge piers, encroaching on the paved portion of a street, in perpetuity, being contrary to the constitution and charter, as bartering away the city's police power, does not create a valid and binding contract, impaired by an ordinance ordering removal of the piers. 167La771, 120S290, 62ALR1512.
1016-8 274US387, 47SCt595, 71L ed 1112.
1017-21 202Cal400, 261P476.
1017-23 169Ark115, 273SW362; **CalA** 270P697.
1017-24 169Ark115, 273SW362.
1018-27 274US174, 48SCt266, 72L ed 517.
1018-28 214Ky613, 283SW966; 125 Misc136, 210NYS582 (school teacher).
1019-29 276US174, 48SCt266, 72L ed 517. [i] **Retroactive statute taking from officer part of salary** already earned is unconstitutional. 276US174, 48 SCt266, 72L ed517.
1019-34 196NC48, 144SE519.
1019-36 310Mo542, 276SW389.
1020-43 326Ill579, 158NE220, 54ALR 940.
1021-54 337Ill431, 169NE254; 146SC 496, 144SE233.
1022-56 34Ariz105, 268P773.
1024-76 33Ariz310, 264P687; **Del** 142 A654; **Ind** 163NE489; 250NY103, 164 NE871; 128Misc476, 219NYS505; 52 ND26, 202NW391 [citCJ]; **Tex CommnA** 29SW(2d)316.
1025-77½-New. The legislature has the right to alter corporate charters only where provision in regard to repeal is contained in laws relating to corporations. 33Ariz76, 262P616.
1025-78 34NM443, 283P900; 128Misc 476, 219NYS505; 114OhSt58, 151NE 709; 49SD518, 207NW467.
1025-80½-New. A reservation in the organic law of a territory of the right in congress to annul territorial laws or modify acts of congress or amend bill of rights is not a reservation to the territory of the right to alter the charter of a corporation created under its laws. 33Ariz76, 262P616.
1026-88 153Md523, 138A487.
1027-97 250NY103, 164NE871.
1028-9½-New. A legislature may amend a charter of a charitable corporation so as to impair the rights which it could impair or destroy by repeal of charter. 128Misc476, 219NYS505.
1028-10 128Misc476, 219NYS505.
1028-11 34F(2d)533; 128Misc476, 219 NYS505.
1029-15 34F(2d)533; **Mass** 166NE401.
1030-18½-New. An amendment of the charter of a charitable corporation so as to provide for election of trustees by trustees whose terms have not expired instead of by members is not unreasonable. 250NY103, 164NE871.
1032-41 169La300, 125S130.
1033-53 See also **NJSup** 151A215.
1033-56 278US429, 49SCt196, 73L ed 441; 128Me108, 146A10.
1035-80 114Tex484, 271SW1106.
1036-89 288Pa420, 135A726.
1036-92 **Mo** 30SW(2d)105.
1036-93 169Ga51, 149SE638, 65ALR 1361.
1036-96 128Misc335, 219NYS418.
1037-97 **TexCivA** 282SW912.
1037-97½-New. A contract with a city under an ordinance providing for free or maximum price water service is subject to regulation by state under its police power. 285Pa172, 131A716.

1037–97½–New. Raising the water rates fixed by contract at the time the public service company was private impairs the obligation of contract. 205 **Cal** 231. 270**P**444.

1038–19 101**CalA**456, 281**P**717; 326 **Ill** 65, 156**NE**766.

1039–27 326 **Ill** 65, 156**NE**766; 115 **Nebr**727, 214**NW**746.

1039–30 37**Wyo** 488, 263**P**621.

1040–43 49**ND**248, 191**NW**485.

1041–58 50**RI** 288, 146**A**777, 66**ALR** 1553.

1042–69 [d] **Act relating to local improvement guaranty fund** is held not to impair obligation of contracts subsequently entered into. 142**Wash**249, 252 **P**929.

1042–70 271**US**577, 46**SCt**627, 70**L ed** 1093.

1043–78 161**Tenn**50, 29**SW(2d)**662.

1046–14 275**US**129, 48**SCt**94, 72**L ed**196.

1048–55½–New. Act regulating transportation for hire by motor vehicles held not unconstitutional as impairing obligation of contract. 170**Ga**873, 154 **SE**439.

1049–74½–New. A statute providing for an assessment to restore impaired capital, sale of stock to satisfy assessment, and personal liability of stockholders for deficiency, is within the reserved power of the legislature in some jurisdictions, and does not impair the contract of the corporation with the state. **Iowa** 226**NW**374; **Iowa** 226 **NW**378(1stcase); **Iowa** 226**NW**378(2d case); **Iowa** 226**NW**378(3dcase).

1052–26 TexCommnA 10**SW(2d)**698. [d] **Constitution protects contracts made in foreign jurisdiction** with aliens domiciled in friendly foreign country. 217 **AppDiv**67, 216**NYS**215. [e] **Agreement extending and limiting time for collection of tax** entered into between taxpayer and collector is binding contract. 28 **F(2d)**54.

1053–39½–New. A zoning law cannot constitutionally relieve land within a district covered by it from lawful restrictions in a deed affecting its use. 257**Mass**399, 153**NE**884, 48**ALR**1431.

1053–39½–New. A statute extending the time for review of an award of compensation on the ground that an employee returned to work is held not to impair the contracts. 324 **Ill** 32, 154**NE** 441.

1053–39¼–New. A statute forbidding assignment of compensation payable under the Workmen's Compensation Act does not impair obligation of contracts made after its enactment. **Nev** 282**P** 879.

1053–44½–New. Law existing at the time and place of contracting is read into a contract by implication and becomes a part thereof within the constitution prohibiting laws impairing the obligation of contracts. **TexCommnA** 10**SW(2d)**698.

1053–48 93**Fla**849, 112**S**846.

1054–52 34**F(2d)**308 (statute permitting foreclosure for past-due installments held not unconstitutional as impairing obligation of mortgagor's contract). [a] **Giving priority to lien of city** for local improvements did not impair mortgagee's vested right under mortgage antedating statute which authorized improvement lien. 98**Fla**176, 123**S** 692.

1054–58½–New. Stipulation in a deed of trust permitting foreclosure at any time after default did not create any obligation which could be impaired by subsequent legislation. **TexCommnA** 10**SW(2d)**698.

1054–58½–New. That the security of a mortgage is diminished by a tax on the property does not constitute impairment of the obligation of contracts. 88 **PaSupr**117.

1054–59 111**Conn**65, 149**A**234.

1054–61 La 130**S**1.

1054–63 144**Wash**118, 256**P**1033.

1055–78 214**Ala**391, 108**S**11; 92**Fla**818, 110**S**539; 298**Pa**33, 148**A**37.

1055–80 180**Ark**1023, 24**SW(2d)**314 (inchoate right of dower); **TexCivA** 264 **SW**529 (failure to provide direct cause of action to wife for breach of marital obligations by husband not in violation of constitutional guaranty).

1055–84 16**F(2d)**639; 244**NY**482, 155 **NE**749; 217**AppDiv**67, 216**NYS**215. [a] (1) See also 142**Miss**584, 107**S**673. (6) 16**F(2d)**639. [b] **Obligation of contract is determined by law in force when made.**–254**NY**126, 172**NE**264.

1056–85 16**F(2d)**639; 217**AppDiv**67, 216**NYS**215.

1056–88 16**F(2d)**639; 169**Ark**115, 273 **SW**362; **Conn** 151**A**518; 310**Mo** 227, 274**SW**1025; 217**AppDiv**67, 216**NYS** 215; 53**ND**262, 205**NW**686 (dictum). [a] **TexCivA** 275**SW**449.

1057–89 169**Ark**115, 273**SW**362; 204 **Cal** 286, 268**P**347 (tax on future sales where tax may be added to selling price); 101**CalA**456, 281**P**717; 159**La** 1016, 106**S**549; 152**Md**343, 136**A**754; 85 **Mont**329, 278**P**514; 254**NY**126, 172**NE** 264; 228**AppDiv**14, 238**NYS**477. [b] **Statute regulating real estate brokers** and creating real estate commission is not invalid as impairing obligation of contracts. 97**Fla**710, 122**S**225.

1057–90 45 **Ida**244, 263**P**32, 36 [quot CJ].

1057–93 NC 154**SE**852; 147**SC**433, 145 **SE**186.

1057–93½–New. Repudiation of contract is not impairment of its obligation. 20**F(2d)**40.

1057–93¼–New. Construing lessor's obligations to issue bonds to the extent it lawfully might is not impairment of contract. 256**Mass**600, 153**NE**19.

1057–95 271**US**50, 46**SCt**375, 70**L ed** 827, 45**ALR**1495 (statute affecting taxation of no par value stock, as applies to corporation previously issuing such stock, has been held not to impair obligations of contract).

1057–99 264**Mass**436, 163**NE**70; 129 **Misc**521, 222**NYS**203. [b] **Statutes held not unconstitutional.**–**TexCivA** 31 **SW(2d)**675 (invalidating employees' waiver of rights under compensation law).

1057–1 17**F(2d)**143; 319 **Ill** 311, 150 **NE**256.

1058–4 53**ND**262, 205**NW**686.

1058–6 37**GaA**259, 139**SE**732, 733 [quot CJ].

1058–7 37**GaA**259, 139**SE**732, 733 [quot CJ].

1058–8 37**GaA**259, 139**SE**732, 733 [quot CJ].

1058–9 37**GaA**259, 193**SE**732, 733 [quot CJ].

1059–25 125**Me**465, 134**A**689, 690 [cit CJ]; 53**ND**262, 205**NW**686.

1060–39 But see 125 **Okl** 264, 258**P**269.

1060–43½–New. A statute validating an ultra vires policy of insurance after a default in payment of premium but within the time within which payment might be made does not impair the obligation of contracts. 120**Kan**252, 243 **P**272.

1061–49 128**Misc**476, 219**NYS**505.

1062–70 But see 39**F(2d)**9.

1062–74 33**Ariz**310, 264**P**687.

1063–81½–New. A constitutional provision imposing double liability on stockholders of banks is unconstitutional as to a bank previously incorporated under a charter exempting stockholders from liability for corporate debts. 33 **Ariz**76, 262**P**616.

1063–81½–New. Such constitutional provision is not rendered valid as to such bank, by reason of a statute enacted before the bank was incorporated providing that depositors shall have priority in security over creditors. 33**Ariz**76, 262**P**616.

1063–81¼–New. Increasing corporation's bonded indebtedness beyond amount authorized by charter may not impair obligation of stockholder's contract. 39**F(2d)**9.

1063–81½–New. Power reserved to the legislature to control articles of incorporation, by-laws, rules, and regulations, and to alter, abridge, or set aside by-laws and franchises, does not authorize the legislature to impose additional obligations or liabilities on stockholders as to existing conditions. **Iowa** 226**NW**374; **Iowa** 226**NW**378(1stcase); **Iowa** 226**NW**378(2dcase); **Iowa** 226 **NW**378(3dcase).

1063–81½–New. A statute imposing personal liability on a bank stockholder for deficiency on sale of his stock to replace impaired capital is not violative of a stockholder's constitutional rights where it operates prospectively only and refers only to subsequent impairment of capital. **Iowa** 226**NW**374; **Iowa** 226**NW**378(1stcase); **Iowa** 226 **NW**378(2dcase); **Iowa** 226**NW**378(3d case).

1063–85 [b] **Right to consolidate or merge** granted to utility corporation held not to impair obligation of contract despite objections of minority stockholders. 50**RI** 288, 146**A**777, 66 **ALR**1553.

1064–95 89**CalA**558, 265**P**583 (statute providing for consolidation of banking corporations); 121 **Oh**588, 170**NE**574.

1065–15 267**US**231, 45**SCt**263, 69**L ed** 588 (authorizing increase of rates by gas company after it became public service corporation); 308**Mo** 328, 275 **SW**940. See also 26**F(2d)**912 [rev on other grounds 279**US**159, 49**SCt**282, 73 **L ed**652].

1065–23 294**Pa**99, 143**A**495, 60**ALR**737.

1066–29½–New. The state is without power to make or enforce any law governing bankruptcies, which impairs the obligation of contracts, or extends to persons or property outside its jurisdiction, or conflicts with the national bankruptcy laws. 278**US**261, 49**SCt**108, 273**L ed**318.

1066–42 237 **Ill**A86, 91 [citCJ], 262 **Mass**235, 159**NE**603 (holding statute inapplicable to contracts entered into prior to enactment); 217**AppDiv**67, 216 **NYS**215.

1066–44 337 **Ill** 431, 169**NE**254.

1067–47½–New. an act authorizing a stay of action on insurance contracts payable in Russian roubles until after recognition by Russian government, 244 **NY**482, 155**NE**749.

1067–57½–New. an act limiting beneficiaries, 189**NC**697, 128**SE**4.

1067–60½–New. Repeal by fraternal benefit society of by-laws adding benefits does not impair obligation of contract. 338 **Ill** 441, 170**NE**735.

1067–60¼–New. Statute limiting payments by beneficial societies applies only to subsequent contracts since otherwise it would be void as impairment of contract. 13**PaDist&Co**474.

1067–61 208 **Iowa**1053, 223**NW**257.

1067–63½–New. Under an act providing for its dissolution and reincorporation, a death benefit association can do nothing which impairs the contract of a certificate holder without his consent. 337 **Ill** 431, 169**NE**254.

1067–65 208 **Iowa**49, 222**NW**548.

1067–66 [a] **Statute permitting foreclosure for past-due installments** held not unconstitutional as depriving mortgagor of property without due process of law. 34**F(2d)**308.

1067–68 16**F(2d)**502; 324 **Ill** 32, 154 **NE**441; 153**Md**367, 138**A**334; 315**Mo** 113, 285**SW**65; 25 **OhA**130, 157**NE**398.

1068–69 217**AppDiv**67, 216**NYS**215.

1068–70 244**NY**482, 155**NE**749; 217**App Div**67, 216**NYS**215. See also **NC** 154 **SE**852.

1069–71 244**NY**482, 155**NE**749; 217**App Div**67, 216**NYS**215.

1069–72 102**CalA**299, 283**P**298; 25 **OhA** 130, 157**NE**398; **TexCivA** 22**SW(2d)** 540.

1069–73 25 **OhA**130, 157**NE**398.

1069–74 153**Md**367, 138**A**334.

1069–75 153**Md**367, 138**A**334; **Tex CommnA** 10**SW(2d)**698.

1071–4½–New. The remedy of a trustee in a deed of trust may be changed by the bankruptcy court without impairing obligation of contracts. 16**F(2d)**853.

1071–7 16**F(2d)**657; 45 **Ida**244, 263**P**32 (maintenance lien statute held valid).

1071–7½–New. A statute giving superiority to liens for wages, due within six months before distribution of the property of a corporation among its creditors over a vendor's lien on the real property of the corporation, is not unconstitutional as to a vendor's lien created after the enactment of the statute. 213**Ky**55, 280 **SW**462.

1071–8½–New. If a statute determining priority exists, where a contract lien is

created, no constitutional provision is violated by giving precedence to a subsequently acquired statutory lien. 200 Cal 494, 254P262.

1071-8½-New. A statute creating a lien in favor of a municipality on property for water does not impair the obligation of contract under which a tenant had covenanted to pay the water rates. 264 Mass460, 163NE82.

1074-56½-New. Statutes relating to the reorganization of insolvent banks do not impair obligations of contracts subject to the effective date of the statute. SD 225NW305.

1075-69 But see 205 Iowa1154, 213NW 517.

1076-80 76Mont239, 245P953.

1076-82 216Ala133, 112S911.

1076-83 5F(2d)326.

1076-85 [c] (2) Statute declaring proceeds of life insurance exempt from debts of insured, is not unconstitutional, as impairing obligation of contracts, as applied to debt contracted after enactment of statute. 10LaA650, 121S358.

1076-92 49Philippine365, 369 [citCJ].

1077-7 See also 168Ark112, 269SW365.

1078-8 But see 168Ark112, 269SW365.

1078-24 217AppDiv67, 216NYS215.

1078-25 244NY482, 155NE749; 217 AppDiv67, 216NYS215.

1079-30½-New. Suspension of remedies to recover leased buildings is not an impairment of obligation of contract. 128Misc630, 219NYS662.

1079-30¼-New. A statute suspending an action on insurance contracts until the Russian government is recognized is unconstitutional. 244NY599, 155NE913.

1079-35 TexCommnA 10SW(2d)704; TexCivA 8SW(2d)354.

1079-36 16F(2d)657.

1079-38 TexCommnA 15SW(2d)1028 (2dcase). [a] 319 Ill 311, 150NE256.

1079-40 12LaA62, 125S473; TexCommnA 10SW(2d)698; TexCommnA 15SW(2d)1028(2dcase).

1080-41 16F(2d)657; Miss 130S486.

1080-43½-New. A statute prohibiting contracts limiting time for suit to less than the specified time, applied to a foreign contract containing such stipulation, but valid under the laws of the foreign country, does not impair the obligation of contracts. TexCommnA 15 SW(2d)1028(2dcase).

1081-59 20F(2d)741, 743 [citCJ].

1081-61 16F(2d)502; 329 Ill 543, 161 NE108; 208 Iowa21, 222NW855. [a] Venue.-208 Iowa21, 222NW855.

1081-68 16F(2d)502.

1081-72 153Md367, 138A334.

1082-86 32Ariz407, 259P670, 55ALR 1059.

1082-89½-New. The designation of the state treasurer to sue on bonds of a private banker, which were executed before the statute making such designation was passed, does not impair the obligation of contracts. 218Ky172, 291 SW21.

1082-96 TexCivA 27SW(2d)354. [a] Requiring contract to be in writing to be enforceable.-25 OhA130, 157NE398.

1084-34 25 OhNPNS315; TexCivA 272 SW559.

1084-36 126 Or268, 269P853, 60ALR 260.

1084-41 28F(2d)30.

1085-44 8F(2d)155; 42F(2d)127; 107 Conn697, 142A574; 111Conn65, 149A 234; 127Me351, 143A272; 126 Or268, 269P853, 60ALR260; 193Wis295, 214 NW447. [d] (6) Increasing salary of chief clerk of Kentucky house of representatives. 214Ky613, 283SW966. [f] Only application of retroactive statute so as to cause arbitrary and burdensome tax is objectionable. 38F(2d)659.

1085-45 102CalA299, 283P298; 84Mont 225, 274P1062; 197NC292, 148SE313.

1085-47 323 Ill 536, 154NE468.

1085-49 323 Ill 536, 154NE468.

1086-51 Conn 151A518; 25 OhNPNS 315.

1086-53 256Mass512, 153NE1; 316Mo 1008, 292SW1037; TexCivA 19SW(2d) 325 (constitution prohibiting grant of extra compensation to any officer after performance of public service held to prohibit legislature from passing law authorizing payment of additional compensation to tax collector after expiration of term).

1086-54 Cal 287P343 (laws not impairing obligation of contracts or disturbing vested rights); 159La831, 106S321; 123 Or1, 260P1004. [b] Not all retroactive laws come under constitutional law.-TexCivA 278SW310.

1086-55 159La831, 106S321, 323 [cit CJ].

1086-55½-New. Statute held not to violate a provision forbidding the legislature to pass a retroactive law for the benefit of private persons or corporations. 86Mont114, 284P134.

1086-57 96Cal 93, 273P871; CalA 288 P711; 310Mo 227, 274SW1025. [j] (2) May be limited or restricted by retroactive statute. 331 Ill 193, 162NE859. [k] Law of succession may be changed and made applicable to previously acquired property. 95CalA754, 273P109. [l] Act authorizing sale of bank stock of holders not paying assessment may not be unconstitutional as retroactive. 170Ga487, 153SE184. [m] Statute imposing tax assessed, as of, but before, taxing date may not be void as retroactive. 137Misc62, 241NYS391. [n] Law requiring lien claimants to file claims within thirty days held to regulate substantive rights. TexCivA 29 SW(2d) 493.

1087-58 167Ga579, 146SE462; 332 Ill 11, 163NE428; 119 Oh332, 164NE351; 142 Okl 260, 286P774. See also 293Pa 404, 143A105.

1087-59 15F(2d)706; 204Cal 297, 283P 60 (eliminating unlawful exemption of prior statutes); 203 Iowa576, 213NW 262; 84Mont225, 274P1062.

1088-68 CalA 286P1093 (discontinuing right of appeal); 77Colo 414, 236P1006; 160Ga467, 128SE581; 315Mo 113, 285SW 65; 117 Oh102, 157NE388; 25 OhA130, 157NE398; Oh 170NE637; TexCivA 284 SW275; TexCivA 29SW(2d)476.

1088-69 160Ga467, 128SE581; 167La 1032, 120S767(1stcase); 235Mich344, 209NW177; 102NJEq187, 140A11 (bail); 117 Oh102, 157NE388; 50RI 339, 147A756; TexCivA 284SW275.

1089-71 84Mont225, 274P1062.

1089-72 [a] 35F(2d)260; 12LaA62, 125 S473; 169Minn57, 210NW622, 49ALR 1260.

1089-74 25 OhA130, 157NE398.

1090-75 TexCivA 284SW275; 198Wis 326, 223NW852.

1090-76 35F(2d)197; 169Ga251, 150SE 78, 67ALR287; 255 IllA239; TexCivA 29SW(2d)476.

1090-81 TexCivA 273SW615.

1090-89 [a] Interest.-Statute providing for six per cent. interest on back income taxes assessed is not unconstitutional. 198Wis368, 224NW121.

1090-90 119 Oh332, 164NE351.

1090-93½-New. Purported ordinance levying tax for preceding year is void as retroactive. TexCommnA 272SW767.

1091-96 TexCivA 273SW615.

1091-97½-New. A statute, imposing excise on property of persons who died in the interval between the expiration of the former statute and the date of the enactment of the present statute, is not invalid as a retroactive law. 256 Mass512, 153NE1.

1091-97¼-New. Income tax may be retroactive in its scope without violating federal constitution. 38F(2d)155.

1091-97¼-New. A statute increasing the tax upon business done by foreign insurance companies during the prior year is unconstitutional. 119 Oh332, 164NE351.

1091-99 [a] Estate tax imposed on property of decedent in trust created to take effect at or after his death, whether trust created before or after passage of act is held not unconstitutional as to trust created before its passage. 7F(2d) 483.

1091-99½-New. The retroactiveness of the National Taxing Statute does not produce unconstitutionality. 12F(2d) 625.

1091-2 Nebr 229NW773 [quotCJ].

1091-4 22F(2d)681; 79CalA650, 250P 686; Fla 126S367; 323 Ill 536, 154NE 468; Ill 172NE763; 201 Iowa1050, 205 NW543; Mass 171NE432; 83Mont282, 272P543(2dcase); 134Misc810, 236NYS 455; 197NC314, 148SE470; 197NC419, 149SE397; 123 Or501, 262P946, 948 [cit CJ]; 149SC234, 147SE346; 159Tenn 321, 17SW(2d)901; 116Tex299, 289SW 381; TexCivA 278SW310; TexCivA 298 SW462. [d] Statutes not curative.-Tex CivA 8SW(2d)319.

1091-5 123 Or501, 262P946, 948 [cit CJ].

1091-6 16F(2d)990; 107Conn697, 142 A574; 321 Ill 499, 152NE560; 83Mont 282, 272P543(2dcase); TexCivA 18SW(2d) 907; TexCivA 7SW(2d)648.

1092-11 Conn 151A518; Nebr 229NW 773; 8PaDist&Co407.

1092-11½-New. The legislature has no power to validate a statute which is void as partial legislation where the validating act is unconstitutional for the same vice. 160Tenn109, 23SW(2d)239.

1093-30 Nebr 229NW773; 148Va494, 139SE284.

1093-36 123 Or501, 262P946; 9PaDist &Co 32.

1093-41 5WallUS194, 18L ed610; 95US 644, 24L ed521; 97US687, 24L ed1098; 116US356, 6SCt413, 29L ed633; 120US 759, 7SCt736, 30L ed786; 88Fed720 [aff 177US558, 20SCt736, 44L ed886]; 217 Fed158; 48Ala579; 158Ala208, 48S391; 16Cal 220; 16Cal 332, 76AmD521; 18Cal 590; 42Cal 446; 42Cal 513; 118Cal 160, 50P277; 46Fla502, 35S88, 110AmSR 104; 5Ga561; 21Ga275; 131Ga269, 62 SE185; 34 Ill 405; 97 Ill 72; 271 Ill 412, 111NE291; 20 Ind477; 72 Ind161; 187 Ind53, 118NE531; 17 IndA324, 46 NE685; 6 Iowa304; 110 Iowa175, 81 NW476, 80AmSR280; 146 Iowa690, 125 NW866; 3Kan104; 13Kan569; 69Kan 82, 76P451; 81Kan369, 105P531; 9 BushKy247; 2RobLa209; 53Me82; 96 Me539, 53A62; 66Md381, 7A561, 10A 671; 89Md689, 43A784, 44A1033; Mass 171NE432 (granting pensions); 153 Miss476, 121S267 (school districts); 66Mo 328; 13NJL135; 27NJL185; 38 NJL419; 57NJL452, 31A625; 55NY 361; 63NY239; 111NY446, 18NE618 [aff 1NYS840]; 159NY427, 54NE62; 68 Misc445, 124NYS368; 18 OhCirCt216, 9 OhCirDec833; 36Pa29, 78AmD359; 57 Pa433, 98AmD237; 169Pa300, 32A408; 179Pa634, 36A354; 289Pa437, 137A635; 10SCL227; 113Tenn697, 87SW1016; TexCommnA 30SW(2d)301(2dcase); 13 TexCivA200, 35SW837; TexCivA 298 SW462; 82Vt301, 73A574; 2Wash576, 27P462; 9Wash112, 37P306; 13Wash 708, 42P622; 21Wis217; 26Wis23; 27 Wis147; 29Wis400, 9AmR578; 38Wis 363; 100Wis666, 76NW593; 150Wis 616, 138NW76; 37CanSC75.

1094-51 83Mont282, 272P543(2dcase).

1094-55 93Fla470, 112S253, 257 [cit CJ]; 95Fla984, 117S507(2dcase); 154 Miss536, 121S826(2dcase); 116Tex299, 289SW381.

1095-60 93Fla470, 112S253, 257 [cit CJ].

1095-65 Iowa 231NW646(2dcase).

1095-66 142Miss756, 107S545.

1096-70 107Conn697, 142A574; 90Pa Super203. [a] Confirmation of assessment by curative act does not present inquiry as to constitutionality of assessment. Fla 126S367.

1096-72 See also 90PaSuper109.

1096-76 [c] Cannot make void contracts valid.-Ark 31SW(2d)533. [d] Legislature cannot make contracts for parties where they have made none. Ark 31SW(2d)533.

1096-77 100NJEq193, 135A351. But see 195NC8, 141SE480. [e] Deed executed by husband and wife in which husband's name omitted from body of deed may be validated at least to extent of his inchoate right of curtesy. 100NJEq 193, 135A351.

1097-86½-New. A curative statute cannot render a mortgage effective against a person who did not sign it. 175Ark 641, 1SW(2d)59.

1097-88 193NC278, 136SE879, 885 [quotCJ]; 195NC8, 141SE480 (deed of gift not registered within two years as required by statute cannot be ratified by curative acts).

1097-89 193NC278, 136SE879, 885 [quotCJ].

1097-3 269US167, 46SCt68, 70L ed216;

8F(2d)155; 15F(2d)823; 88CalA558, 263P857; 323 Ill 536, 154NE468; 159La 831, 106S321; NJ 148A776; 105TexCr 204, 287SW262; 143Wash99, 254P 454. [c] 8F(2d)155; Cal 286P1025; CalA 284P487 (substituting simpler definitions and forms of pleading without changing nature of offense nor rules of evidence); Mass 172NE84; 249Mich147, 228NW723 (law defining negligent homicide with automobile).

1098-4 159La831, 106S321, 323 [quot CJ].

1098-5 159La831, 106S321, 323 [quot CJ].

1098-6 88CalA558, 263P857; 159La831, 106S321, 323 [quotCJ].

1098-7 [a] **Deportation of aliens** not under constitutional prohibition. 42 F(2d)127.

1099-14 100NJEq193, 135A351; 126 Or 268, 269P853, 60ALR260. See also 310 Mo 542, 276SW389.

1099-18 Conn 151A526; 323 Ill 536, 154NE468; 264Mass396, 163NE75 (does not apply to law dealing with excise tax); 84Mont225, 274P1062; 119 Or141, 248P358; 126 Or268, 269P853, 859 [cit CJ], 60ALR260; 50RI 71, 145A102. [e] 50RI 71, 145A102.

1100-19 323 Ill 536, 154NE468; 265 Mass135, 163NE893; 50RI 71, 145A102. See also 100NJEq193, 135A351.

1100-20 25 OhA130, 157NE398. See also 100NJEq193, 135A351.

1101-23 Cal 292P267.

1101-25 105TexCr204, 287SW262.

1101-26 267US188, 45SCt264, 69L ed 568, 37ALR1378 (making possession of liquor in home crime as applied to liquor already possessed); 76CalA227, 244 P930; 47RI 431, 133A812; 105TexCr1, 285SW323.

1101-27 92CalA543, 268P373 (amendment not aggravating punishment); 96 Fla768, 119S380.

1101-28 200 Iowa884, 205NW518, 519 [citCJ].

1101-29 134Misc586, 236NYS161.

1102-36½-New. Law is not ex post facto because in providing for punishment of future offenses it authorizes consideration of past conduct and graduated punishment accordingly. 71CalA374, 235P81.

1102-36½-New. An act increasing punishment for crime for former convictions has been held not ex post facto despite prior convictions being before passage of the statute. Iowa 210NW922.

1102-36¼-New. A statute authorizing the governor to make commutation subject to the jurisdiction of the parole board is not ex post facto as to one sentenced prior thereto. 225AppDiv193, 232 NYS459.

1102-37 [c] **Repeal of provision fixing minimum term for life prisoners** is not ex post facto as to credits not earned. NJ 151A294.

1102-39½-New. Law subjecting prisoner whose sentence is commuted to jurisdiction of parole board is not ex post facto, where law was in effect before sentence was commuted, although after it was imposed. 130Misc748, 226NYS98.

1102-39½-New. And the same rule applies to law compelling prisoner to serve commuted time if he commits felony during period commuted. 130Misc748, 226 NYS98.

1103-65 180Ark333, 21SW(2d)864; 89 CalA530, 265P392.

1103-68 23F(2d)420.

1103-69 269US167, 46SCt68, 70L ed216; 159La831, 106S321; 134Misc586, 236 NYS161. [a] **Statute placing right of persons** jointly indicted to separate trials in discretion of court held valid. 269US167, 46SCt68, 70L ed216.

1104-70 88CalA558, 263P857; 229Ky 178, 16SW(2d)1030; NJ 148A776.

1104-71 316Mo995, 292SW70.

1105-88 32NM404, 258P209, 53ALR 706.

1105-91 CalA 284P487.

1105-92 See also 101CalA376, 281P700.

1105-97 94Fla60, 113S736.

1106-17½-New. A statute is not ex post facto because applying to conviction had before the statute became effective, where it punished certain felons for owning or carrying weapons that may be concealed. 71CalA374, 235P81.

1107-23½-New. A statute imposing an additional tax, based on a statement of the previous year, for the current year is ex post facto. 31 OhA437, 166NE245.

1107-24 205Cal 534, 271P902; 69CalA 94, 230P1001 (prior conviction under Volstead Act before enactment of state statute); 71CalA374, 235P81; 95CalA 92, 272P786; 203 Iowa327, 210NW922; 169La215, 124S832; 245Mich396, 223 NW67; 175Minn508, 221NW900; 214 Nebr257, 207NW207; 134Misc586, 236 NYS161; 128 Or515, 273P323. [e] **Statute punishing one possessing pistol** after conviction of felony is not ex post facto law, though applying to convictions prior to its passage. 69CalA466, 231P601; 71CalA374, 235P81.

1107-25 See also 37F(2d)330.

1108-35 8F(2d)155.

1108-43 8F(2d)155.

1108-48 171Minn87, 214NW12.

1109-49 13F(2d)852; 213Ala50, 104S 538.

1109-50 123 Or144, 261P694.

1109-51 20F(2d)220.

1109-61 198 Ind95, 151NE411.

1109-66 [b] **Citizen of state has no right to complain** that laws of state are more favorable to citizens of another state. 137Misc852, 244NYS616.

1109-66½-New. , or over its employees. 154Tenn105, 289SW363, 53ALR821 (statute forbidding teaching of evolution in state schools).

1110-74½-New. A Massachusetts trust or common-law business association cannot invoke the constitutional provision. 238Mich508, 213NW867.

1110-74½-New. The provision does not take from states power to regulate the right to succession of property. 327 Ill 474, 158NE727.

1110-74¼-New. Construing a statute exempting charitable institutions from transfer tax so as to apply only to a beneficiary within the state is not unlawful discrimination. 327 Ill 474, 158 NE727.

1110-74½-New. Construing the Transfer Tax Act to exempt gifts to charitable institutions only within the state is not discrimination based on diversity of citizenship. 327 Ill 474, 158NE727.

1110-75 118 Or260, 246P741.

1110-86 138SC468, 136SE891.

1111-91 144Wash429, 258P328.

1111-92 13F(2d)852 (dictum).

1111-93 13F(2d)852 (dictum).

1111-94 TexCivA 273SW874 (privileges not abridged by restraining imitation of fraternal order emblems).

1111-96 167Ga495, 146SE189.

1111-97 198 Ind95, 151NE411.

1111-97½-New. Act prohibiting grazing of sheep in cattle ranges has been held not contrary to the Fourteenth Amendment. 31Ariz389, 254P225.

1111-97½-New. The right to succeed to property is not a privilege or immunity within the meaning of the amendment. 327 Ill 474, 158NE727.

1111-97¼-New. Statutes requiring membership corporations or associations, which prescribe an oath as a condition of membership, to file a sworn copy of constitution, oath, by-laws, and list of members and officers with the secretary of state, and penalizing members knowingly attending meetings of noncomplying associations, has been held not violative of the constitution. 278US63, 49SCt61, 73L ed184, 62ALR 785.

1111-99 CalA 293P117; 48SD482, 205 NW72.

1111-1 38F(2d)652; 122 Or485, 259P 908. [e] 118 Or260, 246P741. [f] **Nonresident aliens** are not entitled to benefit of provision. 118 Or260, 246P741. [g] **Statute authorizing city council to cancel any improvement lien previously levied** is violation of constitutional provision. 122 Or485, 259P908. [h] **Matters constituting violation.**–35Ariz26, 274P163. [i] **Tax which is equal and uniform in application** to all persons of same class within taxing district is not violative of provision. 53SD174, 220NW 618 (tax for agricultural extension work).

1111-2 217Ky119, 288SW1049; 193NC 290, 136SE709; 193NC496, 137SE669 (issuance of bonds to raise money for loans to veterans of World War). [b] **Prohibition of special privileges,** except for public services, must be construed in light of past history of state. 193NC 496, 137SE669. [c] **Consideration for pensions** for war service is implied. 193 NC496, 137SE669.

1112-4 35Ariz26, 274P163; 193NC290, 136SE709.

1112-5½-New. Provisions of the Illinois Motor Vehicle Law, requiring a person operating a taxicab to file a liability insurance policy or bond, do not violate the constitutional provision against grant of special or exclusive privilege, immunity, or franchise. 317 Ill 132, 147 NE797.

1112-5½-New. Constitutional provision prohibiting special privileges must be construed in the light of past history of the state. 193NC496, 137SE669.

1112-9 220Ala309, 125S51. [a] (1) Mass 169NE502. (3) City charter providing preference in civil service examination to soldiers, sailors, and marines held not unconstitutional. CalA 283P 891. [b] **Evasions of civil service.**–245 NY500, 157NE834.

1113-21 147Va720, 129SE489.

1113-23 143Wash326, 255P371.

1113-24 [a] **Exemption of single county from cost of state highway running through several** is unconstitutional. 160 Tenn577, 28SW(2d)50. [b] **General law applicable to all counties** cannot be affected by special act applicable to only one. 160Tenn577, 28SW(2d)50.

1113-25 122 Or485, 259P908.

1113-25½-New. Statutory provisions as to eligibility, qualification, nomination, and election of city officials and prohibiting active political participation by city employees are not unconstitutional. Ind 166NE270.

1113-25½-New. An act providing for alternative forms of government for cities adopting the same held void as conferring special privileges. Ind 168 NE10.

1113-27 276US71, 48SCt291, 72L ed473.

1113-31 152Va1, 145SE425 (act, authorizing town council to grant manufacturing corporation right of way for tramway along streets thereof, has been held invalid as authorizing grant of special right to private corporation).

1113-32 Ind 168NE529.

1113-42 180Ark770, 22SW(2d)993, 68 ALR1018 (statute authorizing refusal of authority to engage in ice business held unconstitutional).

1114-44 217Ky119, 288SW1049; 49ND 248, 191NW485.

1115-97½-New. statute authorizing withdrawal of state from land settlement project, Cal 290P451.

1115-98½-New. , an act providing for bond issue to raise money for loans to war veterans. 193NC496, 137SE669.

1115-98½-New. Act respecting state's liability for agent's negligence in automobile accidents has been sustained as not granting special privileges. Cal 289 P160.

1116-30½-New. Code provisions regarding state's liability for loss occasioned by its agents' negligence in automobile operation does not grant special privilege. Cal 284P209.

1116-31 220Ala309, 125S51.

1117-53 196Cal 77, 235P1000; 10Pa Dist&Co 618.

1117-54 196Cal 77, 235P1000 (Auto, Stage, and Truck Transportation Act).

1117-63½-New. A statute prohibiting the state bank commissioner to disclose information obtained in examination of banks except when called as a witness in a criminal prosecution but permitting such disclosure is unconstitutional as a grant of exclusive rights and privileges. 315Mo 75, 285SW513, 47ALR688.

1117-66½-New. , or exempts residents of a city from payment of license taxes imposed on nonresidents conducting the same character of business, 68CalA744, 230P175.

1117-75 [a] **Valid exemptions.**–199Cal 21, 248P235; 199Cal 42, 248P244. [b] **Invalid exemptions.**–199Cal 21, 248P235.

1118-82 274US284, 47SCt639, 71L ed 1049.

1119-18 35F(2d)193.

1119-19½-New. A provision restricting resident licenses to persons having the qualifications of legal voters is invalid. 172Ark866, 291SW89.

1119-19¾-New. A statute permitting taking game for scientific and propagation purposes during the closed season held valid. 146Wash17, 261P796.

1119-20 329 Ill 173, 160NE186.

1119-27½-New. A statute regulating advertising by osteopaths is not discriminatory. 145Wash146, 259P17, 54 ALR393.

1119-32½-New. A statute requiring a license for the carrying on of a slaughtering business is unconstitutional as in effect granting to certain citizens privileges and immunities which are not granted to others similarly situated, where different taxes are imposed on persons engaged in the same business, without basing the difference on reasonable classification. 85Ariz194, 276 P1.

1119-32½-New. A statute requiring the sale of original package medicine other than patent medicines to be made under the supervision of registered pharmacists is not unconstitutional. 206Cal 497, 274P974.

1120-57½-New. Statute giving materials produced in state preference in letting contracts for public works is not abridgment of rights of citizens of other states. 83Colo 329, 266P214.

1120-59 274US632, 47SCt632, 71L ed 1091; Fla 128S864.

1120-62½-New. An ordinance forbidding delivery in town of butchers' meat not previously exposed for sale in public market does not discriminate against nonresident citizens. 158La262, 103S 761.

1120-62¾-New. Labor union rule that a contractor, the resident of a different town from that where work is being done, must pay higher rate of wages prevailing in either town, applying to everybody regardless of state residence, is not an unlawful discrimination. 12 F(2d)945.

1120-62¼-New. Federal constitution does not prohibit state legislation holding nonresidents liable for damages from careless operation of automobiles in state. 40F(2d)727.

1121-68 [a] 168La111, 121S592; 198 Wis265, 224NW139.

1121-70 19F(2d)159; 29F(2d)789; 238 Mich508, 213NW867.

1122-71½-New. A law relating to action by a nonresident against a foreign corporation is not discriminatory as between citizens of the state and those of other states. 279US377, 49SCt355, 73 L ed747.

1122-73 50Nev125, 253P671.

1122-74 274US200, 47SCt584, 71L ed 1000; 50Nev125, 253P671; 160Tenn463, 26SW(2d)132.

1122-80 [a] **Statute requiring inspection and payment of inspection fee** for soft drinks manufactured in states other than states not requiring inspection or license held unconstitutional as unjustifiable burden on interstate commerce, denying to such states privileges and immunities of citizens of several states. 199Wis338, 226NW310.

1122-93½-New. , or may pass laws regulating watering stock on a public range, 50Nev125, 253P671.

1122-93¾-New. and may provide for vasectomy and salpingoctomy of mental defectives, under certain carefully supervised conditions. 274US200, 47SCt 584, 71L ed1000.

1123-95 29F(2d)789; 111TexCr233, 13 SW(2d)93(2dcase).

1123-99 97Fla710, 122S225.

1123-1 86Colo 446, 282P1068. [a] See also 213Ala170, 104S440.

1124-6 32Ariz222, 257P366, 54ALR736.

1124-17 TexCivA 3SW(2d)947.

1124-29 320 Ill 605, 151NE675.

1124-31 158La262, 103S761.

1124-32 158La262, 103S761 (ordinance not interfering with interstate commerce).

1124-33 See also 38Wyo 47, 264P1023, 57ALR675.

1125-36 144Wash429, 258P328.

1125-42½-New. may impose a license tax for the privilege of engaging in the sale of real estate located in another state, 22AlaA537, 118S253.

1125-47½-New. A statute providing that workmen on public works shall be paid not less than the prevailing rate of wages in the locality is valid and does not abridge the city's privileges and immunities. 127Misc307, 216NYS141.

1125-48½-New. , or violate similar state constitutional prohibitions. 217 Ky119, 288SW1049.

1125-51½-New. **Statute giving commonwealth absolute right to rehearing** has been held not discriminatory. Va 155SE823.

1126-58 273US536, 47SCt446, 71L ed 759.

1126-64 [a] **Establishment of courts.**-84CalA425, 258P164.

1126-84 85CalA323, 259P374; IndA 155NE831; 195NC143, 141SE471.

1127-86 [a] **Court may refuse to take jurisdiction of cause of action given by foreign statute** in direct conflict with statute or policy of law of forum. 85 CalA323, 259P374.

1127-88 274US352, 47SCt632, 71L ed 1091.

1127-94 See also 274US352, 47SCt632, 71L ed1091.

1127-5½-New. Policy adopted by state as to whether and to what extent it will entertain in its courts transitory actions where causes of action have arisen in other jurisdictions must operate in the same way upon its own citizens and those of other states. 171Minn87, 214 NW12.

1127-7 But see 113TexCr478, 22SW (2d)306.

1128-13 143Wash525, 255P955.

1128-14 45 Ida380, 263P45 (statute based on extent of irrigation projects held valid); 337 Ill 100, 168NE904.

1128-15 110Conn291, 147A804; 155 Tenn364, 293SW757, 759 [citCJ].

1128-17 274US387, 47SCt595, 71L ed 1112; 274US357, 47SCt641, 71L ed1095; 35Ariz26, 274P163; Fla 130S710; Ga 155SE338; 28Hawaii88; Ill 173NE361; 217Ky305, 289SW312; 49ND248, 191 NW485; TexCivA 32SW(2d)249; 149 Wash545, 271P826; 102WVa272, 135SE 582; 187Wis463, 204NW595 (holding classification incidental to legislation).

1128-18 274US387, 47SCt595, 71L ed 1112; 274US357, 47SCt641, 71L ed1095; 24F(2d)989; 197Cal 627, 242P486; Cal 284P209; Cal 289P160; 75CalA591, 243 P55; 84CalA295, 257P876; 89CalA390, 265P325; 91CalA103, 267P172; 200 Iowa1293, 206NW297; 168La742, 123S 310; 155Md86, 141A518; 231Mich409, 204NW140; 315Mo 75, 285SW513, 47 ALR688; 315Mo 823, 290SW416; 31NM 7, 240P482; 220AppDiv624, 222NYS 294; 53ND278, 205NW880, 884 [quot CJ]; 123 Or225, 261P443; Or 288P 1015; 150Tenn292, 264SW353 (act relating to sales over five hundred dollars based on reasonable classification); TexCivA 2SW(2d)1001, 1007 [quotCJ]; TexCivA 4SW(2d)592, 594 [quotCJ]; 153Va57, 149SE523; 144Wash429, 258P 328; 108WVa299, 150SE738. See also 12F(2d)945. [a] **Large discretion is vested in legislature** in determining question of proper classification. 161 Tenn293, 30SW(2d)601.

1129-19 34F(2d)47.

1129-20 161Tenn293, 30SW(2d)601.

1129-21 94Fla1056, 114S859 (wide discretion accorded legislature); 53ND278, 205NW880, 884 [quotCJ]; 155Tenn364, 293SW757.

1129-22 45 Ida380, 263P45; 75Mont88, 242P344; 116 Or581, 242P621.

1129-23 31NM7, 240P482; 53ND278, 205NW880, 884 [quotCJ]; 155Tenn364, 293SW757; TexCivA 4SW(2d)592, 594 [citCJ].

1130-24 201Cal 376, 257P57 (legislature has wide discretion); 53ND278, 205NW880, 884 [quotCJ]; 122 Okl 34, 252P408; 116 Or581, 242P621; 123 Or 225, 261P443, 445 [quotCJ].

1130-25 196Cal 77, 235P1000; 76CalA 445, 244P946; 94Fla1056, 114S859; 53 ND278, 205NW880, 884 [quotCJ]; 56ND 41, 216NW212, 214 [citCJ]; 122 Okl 34, 252P408; 116 Or581, 242P621; 123 Or 225, 261P443, 445 [quotCJ]; TexCivA 4SW(2d)592, 594 [quotCJ].

1130-27 195Cal 548, 234P398, 38ALR 1186; 199Cal 42, 248P244; 45 Ida380, 263P45; 322 Ill 390, 153NE688; NC 154 SE838; 53ND278, 205NW880, 884 [quot CJ]; 116 Or581, 242P621; TexCivA 3 SW(2d)947; 149Wash545, 271P826. [a] **Classification must affirmatively appear arbitrary and unreasonable** in order to render act invalid. 161Tenn293, 30SW (2d)601.

1130-28 81CalA128, 252P1057; 128Me 531, 149A299; 239Mich204, 214NW316, 53ALR273; 140Miss676, 106S273; 315 Mo 75, 285SW513, 47ALR688; 31NM7, 240P482; 220AppDiv624, 222NYS294; 193NC290, 136SE709; 120 Or594, 253P 1; 123 Or225, 261P443; TexCivA 23SW (2d)778; Wash 289P551; 187Wis463, 204NW595 (must not be so unreasonable or arbitrary as to violate fundamental or personal rights). See also 12F(2d) 945.

1130-29 38F(2d)652; 155Tenn364, 293 SW757. [a] **Matters to be considered.**-128Me531, 149A299.

1130-30 274US387, 47SCt595, 71L ed 1112; 31F(2d)308; 35Ariz26, 274P163; 110Conn291, 147A804; 320 Ill 536, 151 NE581; 199 Ind95, 155NE465, 467 [cit CJ] 50ALR1518; 231Mich409, 204NW 140; 239Mich204, 214NW316, 53ALR 273; 140Miss676, 106S273; 315Mo 75, 285SW513, 47ALR688; 116 Or581, 242P 621; 120 Or594, 253P1; 123 Or225, 261 P443; 187Wis463, 204NW595. See also 12F(2d)945.

1130-31 196Cal 77, 235P1000; 45 Ida 380, 263P45; 320 Ill 536, 151NE581; Ind 163NE489; 128Me531, 149A299; 231Mich409, 204NW140; 315Mo 75, 285 SW513, 47ALR688; 315Mo 681, 286SW 363; 120 Or594, 253P1; 187Wis463, 204 NW595. See also 34F(2d)780. [a] (3) 322 Ill 390, 153NE688.

1130-31½-New. A statute is not unconstitutional merely because the legislature has failed to bring within its operation every one who may do the acts which are subject to regulation when done by those in the particular class covered by the statute, 167Minn286, 209 NW9.

1130-31¾-New. although the law need not be all inclusive or extend to all cases which might legitimately be included in that class. 187Wis463, 204NW595.

1130-32½-New. Rule of law, though working hardship, does not violate due process clause if operating without discrimination against all persons of class. 250Mich273, 230NW170.

1131-37 274Us387, 47SCt595, 71L ed 1112; 203Cal 384, 264P488; 327 Ill 214, 158NE475; 127Kan157, 272P666 (Narcotic Act); 169La122, 124S308.

1131-38 322 Ill 390, 153NE688; 224Ky 390, 6SW(2d)460; 75Mont88, 242P344; 143Wash525, 255P955.

1131-39 217Ky305, 289SW312; 75Mont 88, 242P344. [a] **Forms of amusement.**-75Mont88, 242P344.

1131-40 231Mich409, 204NW140.

1131-43 248NY308, 162NE89.

1131-51 84CalA137, 257P590 (disbarred attorneys).

1131-62 201Cal 414, 257P515.

1131-66½-New. commercial delivery automobiles, 116 Or581, 242P621.

1131-66¾-New. breeding cattle, Nebr 229NW332.

1132-69 See also 195Cal 548, 234P398, 38ALR1186.

1132-73½-New. have denied corporation's defense of usury, 149Md223, 131A 332, 43ALR1.

1132-80½-New. A statute permitting an officer or agent of corporate landowners to vote at district elections only if he resides in the county has been held not unconstitutional as discriminating against individual nonresidents denied such right. 143Wash525, 255P955.

1132-80¾-New. Statutory provisions for the transfer of a trusteeship on a transfer of the bank's business do not offend as class legislation. 97CalA138, 275P453.

1132-80¼-New. , discriminating between private sureties and surety companies. 27 OhNPNS92.

1133-2 34F(2d)780; 191 Ind475, 151

NE390; 231Mich409, 204NW140; 109 TexCr474, 6SW(2d)353. [e] **Racial destructions** may furnish legitimate grounds for classifications under some conditions of social or governmental necessities. 195Cal 71, 231P554.

1133-4 69CalA466, 231P601 (statute prohibiting possession of pistol after conviction of felony is not discriminating because act for which defendant was convicted might in another state be only misdemeanor or not criminal act whatsoever); 82Colo 574, 261P858 (counties); 12LaA531, 126S531; 75Mont88, 242P344, 346 [citCJ]; 248NY308, 162NE89; 132SC182, 128SE36 (may prescribe different and inconsistent laws for different localities); 155Tenn310, 292SW458; TexCivA 25SW(2d)215 (certain school districts).

1133-6½-New. statutes requiring landowners to remove obstructions from highway, 223Ky427, 3SW(2d)1077.

1133-6¾-New. or imposing duties and liabilities for protection of forests from fire, 176Minn472, 223NW912.

1133-8½-New. a statute limiting the practice of itinerant optometrists to three counties, 155Tenn310, 292SW458.

1133-9½-New. A statute providing for issuance of delinquent tax certificates against lands within irrigation and drainage districts, 123 Or225, 261P443.

1133-12½-New. statute confining regulation of location and maintenance of cemeteries to particular localities, 160 Tenn468, 26SW(2d)132 (congested centers).

1133-14½-New. a statute permitting operation of a dance hall or pavilion in a public park on Sunday and closing one on that day operating outside the park, 75Mont88, 242P344.

1134-21½-New. Classification of streets of a city according to location and use, for the purpose of regulation, is valid. 274US387, 47SCt595, 71L ed1112.

1134-26 [a] **Classification not objectionable.-TexCivA** 8SW(2d)249.

1134-29 84CalA425, 258P164; 155Tenn 70, 290SW608.

1134-30 119 Or264, 240P233.

1134-39½-New. A classification of irrigation districts based on whether or not their systems had been constructed before or after the enactment of an irrigation statute is valid. 31NM7, 240P482.

1135-41 307Mo 67, 269SW383, 38ALR 1032.

1135-45 149Md223, 131A332, 43ALR1.

1135-46 287Pa376, 135A362; 108TexCr 533, 2SW(2d)445; 108TexCr619, 2SW (2d)449.

1135-49 TexCommnA 26SW(2d)168.

1135-51½-New. agricultural coöperative associations, 200 Iowa1293, 206NW 297.

1135-53 287Pa376, 135A362.

1135-54 130 Or309, 274P118.

1135-55½-New. A statute exempting from taxation property of power companies used in developing or transmitting electrical energy for pumping water for irrigation purposes is not void as fixing arbitrary and unreasonable classification. 48 Ida618, 284P203.

1135-68½-New. Ordinance providing for reimbursement to railroad of its pro rata share of cost of sewers held void as discriminatory. 233Ky709, 26 SW(2d)539.

1136-76 CalA 292P988.

1136-78 273US414, 47SCt363, 71L ed 414; 162Ga246, 134SE42; 135Misc535, 238NYS3; 145Wash146, 259P17, 54ALR 393. [c] (3) Fact that statute regulating chiropody does not prohibit advertising business is not unjust discrimination against osteopaths subjected by statute to regulation as to advertising. 145Wash146, 259P17, 54ALR393.

1136-80 202Cal 299, 260P789.

1137-81 75Mont88, 242P344 (dance halls on Sunday); 121 Okl 51, 247P390 (coöperative cotton gins); TexCivA 275SW282; 102WVa272, 135SE582; 38 Wyo 47, 264P1023, 57ALR675 (sale of woolen articles).

1137-82 323 Ill 138, 153NE667, 49ALR 499; 155Tenn310, 292SW458; TexCr 25SW(2d)865.

1137-83 89CalA390, 265P325; 329 Ill 173, 160NE186; 197 Ind28, 149NE639; 234Mich398, 208NW602; 155Tenn310, 292SW458; TexCivA 275SW282; Tex CivA 38SW(2d)947; 144Wash429, 258P 328; 187Wis463, 204NW595 (holding classification of securities subject to Blue Sky Law not invalid). [e] **Ordinance restricting use of public market on city property to producers** is not discriminatory class legislation. 126Misc47, 213 NYS217.

1137-83½-New. An act requiring contracts of sale to be in writing is not invalid because it excepts sales for less than a certain sum. 150Tenn292, 264 SW353.

1138-98 Cal 284P209 (providing for state's liability for agents' negligence in operating automobiles); Fla 126S374.

1138-99 Cal 289P160.

1138-1 25F(2d)930.

1138-2 108WVa299, 150SE738 (priority).

1138-5 49ND248, 191NW485.

1138-6 49ND248, 191NW485.

1138-9 See also 202Cal 717, 262P724.

1139-27 142Va577, 128SE633 (making general reputation of defendant as violator of prohibition laws admissible in prosecution for violation thereof); 142 Va596, 128SE638 (making general reputation of defendant as violator of prohibition laws admissible in prosecution for violation thereof).

1139-29 Miss 130S302.

1140-37 321 Ill 324, 151NE915 (damages against complainant on dissolution of injunction).

1140-42½-New. A statute requiring a fee in a stated amount to cover the appearance of the district attorney in every suit for divorce is reasonable. 120 Or244, 251P895.

1140-44 307Mo 137, 270SW339.

1140-49 274US357, 47SCt641, 71L ed 1095; 69CalA466, 231P601; 322 Ill 390, 153NE688; 229Ky264, 17SW(2d)227, 63 ALR932; 100Vt404, 138A777.

1140-50 100Vt404, 138A777.

1140-51 100Vt404, 138A777.

1140-52 100Vt404, 138A777.

1141-55 45 Ida168, 260P1095.

1141-59 106TexCr37, 289SW1072 (statute making assault on employee of common carrier felony held void).

1141-60 [a] See 110TexCr232, 8SW (2d)134, 59ALR430.

1141-60½-New. or in different counties. 307Mo 67, 269SW383, 38ALR1032.

1141-64 213Ala50, 104S538; 102TexCr 297, 277SW1091. [b] **"Equal protection" of law means** protection of equal laws. 8F(2d)529.

1141-66 [a] **"Equal protection of the law"** cannot mean equal immunity in its violation or evasion. Iowa 232NW 445.

1141-68 273US414, 47SCt363, 71L ed 714 (dictum); 274US392, 47SCt630, 71 L ed1115 (dictum); 173Ark93, 291SW 978; 217AppDiv67, 216NYS215. [e] **Aliens may be forbidden to engage in certain business,** as pool room business. 274US392, 47SCt630, 71L ed1115.

1141-70 40F(2d)727.

1142-76½-New. A state may prohibit the possession by unnaturalized foreign born persons of firearms capable of being concealed on the person. 69CalA 137, 230P675.

1142-76½-New. Constitutional guaranty may be invoked by and for all who are similarly situated. 153Va57, 149SE 523.

1142-77 217AppDiv67, 216NYS215; 118 Or260, 246P741.

1142-79 277US389, 48SCt553, 72L ed 927.

1142-80 317 Ill 366, 148NE23.

1142-81 274US490, 47SCt678, 71L ed 1165.

1142-81 278US105, 49SCt57, 73L ed 204; 29F(2d)140; 29F(2d)789; 42F (2d)500; 230Ky776, 20SW(2d)753; 178 Minn72, 225NW915(2dcase); 253NY305, 171NE72; Wash 289P536. See also 153 Va57, 149SE523.

1143-82 274US490, 47SCt678, 71L ed 1165.

1143-85 8F(2d)595; 43F(2d)724 (prohibiting corporations setting up usury as defense); 32 OhA357, 168NE55.

1143-87 272US295, 47SCt88, 71L ed 243.

1143-89 272US494, 47SCt179, 71L ed 372, 49ALR713; 317 Ill 366, 148NE23; 113Nebr816, 205NW294. [c] **Statute amending charter** of corporation as to election of trustees does not violate constitution. 250NY103, 164NE871.

1143-89½-New. A statute denying the defense of usury to corporations is not unconstitutional as depriving them equal protection of law. 149Md223, 131 A332, 43ALR1.

1143-91 212Ala511, 103S477. [b] **Peculiar facts** of individual case must be considered in determining whether equal protection of laws denied. 276US71, 48 SCt291, 72L ed473.

1144-92 37F(2d)938(2dcase); 102Tex Cr297, 277SW1091. [d] **Courts may not through judgment or decree violate Constitution.**-298Pa487, 148A699, 68 ALR1172.

1144-93 215Ala363, 110S801; Colo 291 P822; 233Mich373, 206NW532, 42ALR 1267.

1144-97 337 Ill 70, 168NE895.

1144-99 146Wash210, 262P965.

1144-1 160La563, 107S427.

1144-4 274US490, 47SCt678, 71L ed 1165; 73CalA548, 238P1089, 1096 [quot CJ]; 81NH566, 129A117, 39ALR1023 (equal in right but not on enjoyment).

1145-5 278US515, 49SCt235, 73L ed483; 200Cal 585, 254P946, 62ALR1341; 200 Cal 598, 254P951; 73CalA548, 238P1089, 1096 [quotCJ]; 75CalA247, 242P749 (dictum); 75CalA591, 243P55; 97Fla 127, 120S361(2dcase); Fla 128S632 (unjust discrimination); 167La674, 120S 47.

1145-6 268US258, 45SCt490, 69L ed 944; 278US499, 49SCt188, 73L ed475; 8F(2d)155; 14F(2d)341; 30F(2d)121; 34F(2d)682; 36F(2d)967; 180Ark1023, 24SW(2d)314 (inchoate right of dower); 78CalA58, 247P923; 75CalA247, 242P749; 327 Ill 474, 158NE727; 159 La723, 106S252; 166La566, 117S720 (statute and municipal ordinance enacted pursuant thereto); 167La81, 118S 699(2dcase); 168La742, 123S310; 168 La752, 123S314; 154Miss155, 122S195; 315Mo 681, 286SW363; 317Mo 1, 293SW 780, 52ALR879; 81NH566, 129A117, 39 ALR1023; 248NY454, 162NE484; 133 Okl 71, 271P162; OklCr 287P729; 283 Pa464, 129A458; 141SC407, 139SE842; 156SC299, 152SE865; 106TexCr37, 289 SW1072; 110TexCr232, 8SW(2d)134, 59ALR430; 153Va57, 149SE523; 144 Wash429, 258P328; 146Wash210, 262 P965; 108WVa299, 150SE738; 200Wis 518, 228NW895, 69ALR348(2dcase) (Corrupt Practice Act, subjecting all candidates to same restraints, does not deny equal protection).

1147-7 148Md330, 129A370; 81NH 566, 129A117, 39ALR1023.

1147-8 81NH566, 129A117, 39ALR 1023.

1147-9 200Cal 598, 254P951; 75CalA 247, 242P749.

1147-10 78CalA58, 247P923; 94Fla60, 113S736; 148Md330, 129A370.

1147-10½-New. or because it is not all embracing and does not cover the whole field of possible abuses, 237Mich204, 214 NW316, 53ALR273.

1147-11 278US63, 49SCt61, 73L ed184, 62ALR785; 75CalA247, 242P749; 327 Ill 474, 158NE727; 148Md330, 129A370; TexCivA 24SW(2d)449; 146Wash210, 262P965.

1147-13 75CalA591, 243P55; 328 Ill 494, 160NE86; 224Ky390, 6SW(2d) 460; 75Mont88, 242P344; 31NM7, 240 P482; 213AppDiv414, 210NYS269 (Ku Klux Klan). [a] 75Mont88, 242P344.

1147-15 268US137, 45SCt424, 69L ed 884; 278US63, 49SCt61, 73L ed184, 62 ALR785; 75CalA247, 242P749; 75CalA 591, 243P55; 108Conn371, 143A240, 65 ALR943; 94Fla1056, 114S859; 327 Ill 474, 158NE727; 328 Ill 494, 160NE86; Md 150A455; 239Mich204, 214NW316, 53ALR273; 154Miss155, 122S195; 156 Miss99, 125S710; 75Mont88, 242P344; 31NM7, 240P482; 220AppDiv624, 222 NYS294; 155Tenn364, 293SW757; Tex CivA 32SW(2d)249; 146Wash210, 262 P965; 193Wis642, 215NW446, 55ALR

370 (prohibiting placing automobiles in wooden buildings with exception in favor of owners of existing garages).

1148–16 268US276, 45SCt491, 69L ed 953; Wis 233NW100.

1148–17 34F(2d)70; 239Mich204, 214 NW316, 53ALR273; 156Miss99, 125S 710; 75Mont88, 242P344. See also 248 NY454, 162NE484.

1148–18 278US63, 49SCt61, 73L ed184, 62ALR785; LaA 130S879; 126Me537, 140A382; 75Mont88, 242P344; 31NM7, 240P482; 241NY405, 150NE497, 43ALR 909; 220AppDiv624, 222NYS294; 120 Or594, 253P1, 2 [citCJ]; 123 Or225, 261P443, 445 [quotCJ]. [b] **Distinction between oath bound secret societies and societies binding members by pledges of less solemnity held reasonable.** 241NY405, 150NE497, 43ALR 909. [c] **Differences as well as resemblances must be considered in ascertaining reasonableness of classification.** 224Ky390, 6SW(2d)460.

1149–19 278US63, 49SCt61, 73L ed184, 62ALR785; 43F(2d)724; 108Conn371, 143A240, 65ALR943; 154Miss155, 122S 195; 154Miss317, 122S366; 31NM7, 240 P482; 220AppDiv624, 222NYS294; 120 Or594, 253P1, 2 [citCJ]; 153 Va57, 149SE523. [d] **Economic expediency is no justification for palpable discrimination.** 39F(2d)104.

1149–20 28F(2d)825; 75CalA591, 243P 55; 154Miss155, 122S195; 156Miss99, 125S710; 103NJEq307, 143A438; 120 Or594, 253P1, 2 [citCJ]; 141SC407, 139 SE542.

1149–21½–New. **In Alabama** "the no fence law" does not unlawfully discriminate between resident and nonresident owners of cattle. 90Fla398, 106S 73.

1149–21½–New. The primary purpose of the amendment was to protect recently freed negroes in their constitutional rights. 102TexCr297, 277SW1091.

1149–21¼–New. Intentionally excluding Roman catholics from grand jury duty is within the prohibition. 102 TexCr297, 277SW1091.

1149–21⅓–New. A provision in a coöperative act denying to nonmembers of a coöperative association the same rights of disposing of their cotton as members violates the equal protection clause. 160 La294, 107S115.

1149–21⅙–New. The legislature may amend or repeal a corporate charter without violating the guaranty of equal protection of laws. 128Misc476, 219 NYS505.

1149–21½–New. Equal protection clause does not require state laws to cover entire field of proper legislation in one act. 13F(2d)227.

1149–21⅛–New. Coöperative Marketing Act does not contravene the equal protection clause of the constitution. 25 OhNPNS1.

1149–22 94Fla60, 113S736, 740 [citCJ]; 94Fla1056, 114S859.

1150–35 See also 5PaDist&Co 515.

1150–35½–New. Statute excluding from service city employees in retirement system is not arbitrary discrimination. 130Misc124, 222NYS676.

1150–36 274US387, 47SCt595, 71L ed 1112, 21F(2d)440; 78CalA53, 247P923; 97Fla127, 120S361(2dcase); 164Ga863, 139SE722; 224Ky390, 6SW(2d)460, 462 [citCJ]; 148Md330, 129A370 (Motor Vehicle Act); 116 Or141, 240P536. [c] **Different method of accusation against criminal may be provided for** in different counties. 94Fla60, 113S736, 740 [citCJ].

1150–37 126Me537, 140A382; 148Md 330, 129A370.

1150–38 Mo 32SW(2d)69; 155Tenn364, 293SW757.

1150–39 224Ky390, 6SW(2d)460.

1150–40 168La742, 123S310; 148Md 330, 129A370; 307Mo 307, 270SW318; Mo 19SW(2d)891 (authorizing special assessments for local improvements).

1150–42 317 Ill 132, 147NE797; 148Md 330, 129A370.

1150–44 197Wis284, 221NW860.

1150–54½–New. Salary system in certain counties does not violate the constitution in regard to uniformity of county offices. 160Ga657, 129SE38.

1151–55 33F(2d)427 (filling stations); 124Kan237, 257P959; 126Kan233, 268P 123; 156Tenn278, 300SW565.

1151–57 281US146, 50SCt310, 74L ed 775 (close distinctions or scientific uniformity not required); 34F(2d)682; 35 F(2d)386; 44F(2d)64; NC 153SE850; 98Vt343, 129A159; Va 155SE823. [g] **Requiring corporation affiliated in consolidated return with corporation not subject thereto to file statement of net income** does not render statute unequal law. 254Mass609, 150NE851.

1151–58 75CalA247, 242P749; 327 Ill 474, 158NE727; 287Pa161, 134A404; 98 Vt343, 129A159 (reasonable classification).

1151–59 282US19, 51SCt15; 18F(2d) 926; 39F(2d)104; 197NC604, 150SE 190.

1151–60 280US80, 50SCt64, 74L ed178; 34F(2d)47; 220AppDiv549, 222NYS96; 197NC604, 150SE190; 102WVa272, 135 SE582.

1151–61 175Ark956, 2SW(2d)25.

1152–63 277US32, 48SCt423, 72L ed 770; 13F(2d)227. [b] **If all within any taxing unit** are treated alike there is no denial of equal protection. 29F(2d)897; 198Wis326, 223NW852. [c] **Refund of taxes.**–38F(2d)403.

1152–64 13F(2d)227; 34F(2d)682; 42 F(2d)500; 104Conn192, 132A561. [a] **Severance tax on natural resources** in so far as it applies to crude oil or petroleum has been held not violation of equal protection clause. 28F(2d)441, 49SCt176 (5thcase).

1152–65 18F(2d)926; 34F(2d)47; 34 F(2d)682; 75CalA247, 242P749; 104 Conn192, 132A561; 327 Ill 474, 158NE 727; 230Ky182, 18SW(2d)1009; 254 Mass609, 150NE851; 81Mont423, 263P 687; NC 154SE838; 244NY56, 154NE 821; 220AppDiv549, 222NYS96; 287Pa 161, 134A404. [b] **Taxing moneyed capital,** competing with national banks, not violation of equal protection of laws. 213AppDiv677, 211NYS85. [c] **State cannot enforce forbidden tax** on one person to facilitate collection of lawful tax from another. 270US230, 46SCt260, 70 L ed557, 43ALR1224. [d] **Rebate on prompt payment of county tax in boroughs and townships** held not to violate equal protection requirement. 292 Pa269, 141A37.

1152–67 [a] 13F(2d)227.

1152–70 157Miss197, 127S686.

1152–73 38F(2d)261.

1152–76 317 Ill 366, 148NE23 (foreign different from domestic).

1152–89 179Ark848, 18SW(2d)906; 180 Ark765, 22SW(2d)556 (assessing mineral rights apart from land).

1152–94½–New. Taxation of leasehold interests in state-owned land does not constitute a denial of equal protection of the laws although other leasehold interests are not taxed. 162Ga818, 135SE 68.

1152–94⅓–New. Those within the same class are protected against unequal taxation. 275US393, 48SCt180, 72L ed329.

1152–95 277US389, 48SCt553, 72L ed 927; 28F(2d)825; 35F(2d)386 (division of domestic and foreign corporations); 42F(2d)500; 107Conn697, 142A574; 109 Conn388, 147A9; 196NC145, 144SE701; 48SD482, 205NW72, 74 [citCJ]; 198Wis 326, 223NW852. [a] **Statute providing for tax on insurance premiums to maintain firemen's disability and pension fund** is invalid. 154Miss155, 122S195.

1152–96 270US230, 46SCt260, 70L ed 557, 43ALR1224; 277US32, 48SCt423, 72L ed770; 109Conn388, 147A9 (taxing lessees of land of religious society).

1152–97 268US203, 45SCt477, 69L ed 916 (Massachusetts Corporation Tax Act held invalid as attempted taxation of property without state); Ida 290P714; NY 157NE894 [foll 245NY486, 157NE 753] (inheritance or transfer tax). [a] **In taxation of nonresident,** court will look to fairness and reasonableness of purposes and practical operation, rather than minute differences, of application. 270US367, 46SCt234, 70 L ed635.

1152–99 48SD482, 205NW72, 74 [cit CJ].

1153–2½–New. or to tax donations or transfers not made in contemplation of death. La 129S801.

1153–5 42F(2d)500; 137SC496, 135SE 538.

1153–5½–New. An owner not pursuing the legal remedy by appeal from tax valuation is not entitled to certiorari for denial of equal protection. 104NJL 48, 139A410.

1153–5⅓–New. That a statute authorizes counties to become purchasers of lands sold for taxes is not a denial of equal protection. 198Wis326, 223NW 852.

1153–5¼–New. A statute of the state which undertakes to tax things utterly beyond its jurisdiction conflicts with Const. Amendm. xiv. 280US83, 50SCt59, 74L ed180, 67ALR386.

1153–5⅕–New. A state may not tax anything not within its jurisdiction. 280US204, 50SCt98, 74L ed371, 65ALR 1000.

1153–5⅙–New. A statute imposing a tax on amount of "authorized" capital stock and not merely issued stock of foreign corporations, has been held violative of equal protection. 198Wis265, 224NW139.

1153–8 282US19, 51SCt15; 179Ark848, 18SW(2d)906; 327 Ill 590, 158NE849 (method of assessment held not to violate equal protection clause); 315Mo 424, 287SW427; La 129S722(2dcase); Wis 231NW865.

1153–9 97Fla426, 120S317; 319Mo 445, 3SW(2d)1021. See also 146Va146, 135 SE669. [a] **There must be intentional systematic undervaluation of other property** to constitute arbitrary discrimination. Ala 128S596.

1153–9½–New. A statute imposing an annual franchise tax on foreign and domestic corporations by valuing no par stock at a certain rate is not a denial of equal protection. 279US429, 49SCt380, 73L ed781.

1153–12 277US32, 48SCt423, 72L ed 770; 220Ala309, 125S51; 180Ark1090, 24SW(2d)324; 156SC299, 152SE865. **Statutes violating equal protection clauses.**–42F(2d)500.

1153–13 32F(2d)586; Ill 158NE727; TexCivA 271SW436 (great public calamity).

1153–14 [b] **Statute exempting single county from cost of highway running through several** is unconstitutional. 160Tenn577, 28SW(2d)50.

1153–16 213Ky762, 281SW1017 (exempting certain mortgages from payment of recording tax).

1153–18 98Vt343, 129A159 (municipal light plant).

1153–19 327 Ill 474, 158NE727.

1153–22 US 39F(2d)104 (every inequality is not discriminatory); 179Ark 886, 19SW(2d)1000. [a] **Income tax statute** requiring donee selling stock to account as income for difference between selling price and value when acquired by donor is held not to contravene Fifth Amendment. 20F(2d)561.

1153–23½–New. An income tax levied upon a foreign corporation doing business within the state with respect to income attributable to business or sources within the state, which is not more onerous than similar taxes imposed upon residents, does not deny equal protection of the laws. 58ND776, 228NW192.

1153–23⅓–New. Method of allocation of income of a corporation doing business both within and without the state, for the purpose of a tax upon income derived within state, does not violate the equal protection guaranty where the method does not work a discrimination in favor of others engaged in similar business. 58ND776, 228NW192.

1153–23¼–New. Where factors employed have the proper bearing upon the apportionment of such income, their employment does not work an arbitrary discrimination because of the inherent possibility that a taxpayer might make such factors operate in his favor. 58 ND776, 228NW192.

1153–23⅕–New. Law imposing tax on banks and not on individuals held unconstitutional. Wash 289P551.

1153–23⅙–New. Tax based on marriage relation has been held not unreasonable. Wis 233NW100.

1153–23⅐–New. Tax held invalid. Or 292P813.

1153-23⅛-New. Tax held invalid. Or 292P821.

1153-23½-New. Statute imposing tax held unconstitutional as denial of equal protection. Wash 289P536.

1153-25 195NC811, 143SE841.

1154-32½-New. Forbidding deduction of federal inheritance tax in determining the market value of property transferred is not a denial of equal protection of laws. 268US137, 45SCt424, 69 L ed884. [a] **Statute construing gifts** within six years of donee's death as made in contemplation of death held invalid as arbitrary classification. 270 US230, 46SCt260, 70L ed557, 43ALR 1224.

1154-32½-New. Statute providing for refund of inheritance taxes may not deny equal protection. Wis 230NW698.

1154-34 278US484, 49SCt192, 73L ed 464.

1154-35 [a] **Transfer tax on shares of stock** owned by nonresidents in foreign corporation doing business and owning property in state held unconstitutional. 270US69, 46SCt256, 70L ed475, 43ALR 1374.

1154-37 127Misc206, 216NYS523.

1154-41½-New. , or because a different rate is imposed on estates of nonresident decedents than of resident decedents. 220AppDiv549, 222NYS96.

1154-41⅛-New. A statute providing for a tax on succession to property after the death of the donor and excluding bona fide purchasers has been held constitutional. Mass 167NE757.

1154-41¼-New. Statute purporting to tax exercise in will of power of appointment created by nonresident is unconstitutional. 111Conn594, 151A252.

1154-42 169La646, 125S841.

1154-44½-New. In Louisiana ad valorem tax for school purposes on oil in storage tanks awaiting shipment was held not to be unfair and discriminatory because it may not have resulted in the same benefit to owner or his property as to others. 11F(2d)967.

1154-44⅛-New. A statute requiring high school instruction to be furnished to nonresidents at less than the actual cost violates the constitution as to equality of taxation and due process of law. TexCivA 23SW(2d)431.

1154-46 279US692, 49SCt457, 73L ed 903 (additional assessment). But see 277US389, 48SCt553, 72L ed927.

1154-47 [b] **Provision for reassessment** of corporate and not of individual property is no violation of equal protection. 279US692, 49SCt457, 73L ed 903.

1154-49 271US577, 46SCt627, 70L ed 1093.

1154-51 271US50, 46SCt375, 70L ed 827, 45ALR1495 (statute that, for purpose of franchise tax, no par value stock shall be considered as of par value of one hundred dollars per share has been held not based on arbitrary or discriminatory classification); 272US 494, 47SCt179, 71L ed372, 49ALR713; 78Mont62, 252P876.

1155-53 [a] **Tax on net receipts of foreign corporation** held invalid if in excess of similar tax on domestic corporation. 272US494, 47SCt179, 71L ed372, 49ALR713.

1155-54 232Mich574, 205NW102; 246 Mich174, 224NW653.

1155-55 272US494, 47SCt179, 71L ed 372, 49ALR713; 35F(2d)386. See also 272US295, 47SCt88, 71L ed243.

1155-56 287Pa59, 134A441. But see 42F(2d)500.

1155-56½-New. Where, as a result of the application of an arbitrary and artificial standard in determining the value of a franchise as property for taxation, a corporation is deprived of exemptions from taxation upon a class of property which is exempt in the hands of individuals, there is a denial of equal protection of the laws. 53ND 28, 204NW861, 42ALR1039.

1155-56⅛-New. A tax on a foreign corporation of a specified amount on each share of no par value capital stock has been held lacking in equality. 26F(2d) 713.

1155-56¼-New. Laws imposing a license fee of six cents on each share of no par value stock of a foreign corporation, have been held violative of the constitution as arbitrarily fixing a tax without regard to the value of stock, and denying equal protection of the laws. 224AppDiv100, 229NYS657.

1155-56⅛-New. A tax on the amount of authorized capital of foreign corporations is violative of the equal protection clause. 198Wis265, 224NW139.

1155-56⅛-New. A tax on a company authorized to do business within jurisdiction based upon premiums paid on insurance policies made outside thereof with a company not authorized to do business therein is held violative of equal protection guaranty. 275US87, 48SCt100, 72L ed177.

1155-56½-New. Such tax based upon premiums paid on insurance policies with a company authorized to do business within jurisdiction is held valid. 275US87, 48SCt100, 72L ed177.

1155-58 [c] 278US503, 49SCt191, 73 L ed477.

1155-60 [f] **Tax on rolling stock** of foreign railroad corporation held not discriminatory. 270US367, 46SCt234, 70L ed635. [g] **Statute imposing tax based on annual gross earnings** does not violate equal protection of laws provision because of application to iron ore tonnage originating within state and carried with single charge for transportation, including dock service in another state. 278US503, 49SCt191, 73L ed477.

1155-67 154Miss317, 122S366.

1155-68 269US269, 46SCt110, 70L ed 270; 272US494, 47SCt179, 71L ed372, 49ALR713; 281US146, 50SCt310, 74 L ed775 (act imposing oil taxes graduated according to gravity is not discriminatory); 19F(2d)159; 200Cal 667, 254 P551; 78CalA223, 248P716; CalA 291 P233; Fla 130S699; Fla 130S710; 326 Ill 18, 156NE814; 153Md607, 139A291; 288Pa280, 136A213; 47RI 258, 131A 641; 48SD482, 205NW72, 74 [citCJ].

1155-68½-New. Suspension of licenses without taking similar action against competitors of licensee is held not arbitrary or invasive of constitutional rights. 261Mass269, 159NE41.

1156-76 83Colo 329, 266P214 (giving preference to materials produced in state).

1156-78 See also 166Ga232, 143SE119.

1156-80 274US188, 47SCt563, 71L ed 992; 128Me531, 149A299; 152Md343, 136A754.

1156-82 19F(2d)927; 28F(2d)825; 36 F(2d)554; 213Ala269, 104S517, 41ALR 872 (statute providing for assessment against street railroad property); 170 Ga699, 154SE268; 45 Ida112, 261P244; TexCivA 19SW(2d)186 (statute providing for water improvement districts held valid). See also CalA 275P835.

1156-83 240NY199, 148NE189 (holding that, where determination as to property benefited is made with palpable and arbitrary discrimination, it is denial of equal protection of law).

1156-84 238Mich381, 212NW950.

1156-86½-New. The action of a board of review arbitrarily reducing assessments of individual landowners and increasing that of a railroad company, although the land owned by each is substantially the same, constitutes a denial of equal protection of the law. 238 Mich381, 212NW950.

1156-88 155Md427, 142A634; Mo 24 SW(2d)106; 31NM7, 240P482, 488 [quotCJ].

1156-89 31NM7, 240P482, 488 [quot CJ].

1157-90 31NM7, 240P482, 488 [quot CJ].

1157-91 31NM7, 240P482, 488 [quot CJ].

1157-91½-New. Where a city, by unnecessarily taking the whole of a lot, causes an adjacent lot to abut on the avenue and thus be liable for a special assessment, such assessment is invalid. 246Mich149, 224NW616.

1157-91⅛-New. A statute authorizing county supervisors to order an election submitting a proposal to issue bonds for a road district on petition of electors is not unreasonably discriminatory per se on the ground that the burden of taxation is not spread on the district in proportion to the benefits. 154Miss536, 121S266(2dcase).

1157-91¼-New. A statute providing for loans by a city to improvement districts to meet the inability to pay bonds or warrants because of the delinquency of property assessed for improvements, is not violative of equal protection. 86 Mont114, 284P134.

1157-92 270US45, 46SCt196; 95Fla530, 116S449; 31NM188, 242P683 (Conservancy Act of New Mexico held valid).

1157-93 28F(2d)56.

1157-1½-New. a statute providing for payment by state highway commission for cost chargeable to lands in benefit districts against which no assessment has been levied. 130Kan456, 286P244.

1157-3½-New. , or limiting the time for the right to a hearing after promulgation of an election result. 27F(2d) 766.

1157-5 248NY15, 162NE10; 125Misc 269, 210NYS748; 287Pa376, 135A362; 50RI 288, 146A777, 66ALR1553.

1157-6 33F(2d)918; Mass 169NE910; 196NC284, 145SE563.

1157-7 [a] **Due process of law.**-125 Misc269, 210NYS748.

1157-8 30F(2d)121.

1157-8½-New. But where the state constitution prohibits special acts, a statute which in effect can apply to one corporation only is invalid as conferring power of eminent domain. 199 Ind95, 155NE465, 50ALR1518.

1157-9 274US357, 47SCt641, 71L ed 1095; 278US105, 49SCt57, 73L ed204; 317 Ill 132, 147NE797; 320 Ill 536, 151 NE581; 126Kan607 (sterilization); 175 Minn73, 220NW425; 112 OhSt628, 149 NE30; 47RI 387, 133A614; TexCivA 24 SW(2d)449.

1158-10 320 Ill 536, 151NE581; 124 Kan237, 257P959; 112 OhSt628, 149NE 30. [a] (1) 47RI 431, 133A812. (2) Ordinance declaring cemetery nuisance and directing removal of bodies is not discriminatory because two similar cemeteries were not declared to be nuisances. 38F(2d)950.

1158-11 320 Ill 536, 151NE581; 124 Kan237, 257P959; 112 OhSt628, 149NE 30.

1158-12 320 Ill 536, 151NE581; 124 Kan237, 257P959.

1158-13 320 Ill 536, 151NE581; 124 Kan237, 257P959; 126Kan607; 159La 723, 106S252; 231Mich409, 204NW140 (statute authorizing sterilization of mental defectives held valid).

1158-14 274US357, 47SCt641, 71L ed 1095; 95Fla345, 116S81; 317 Ill 132, 147 NE797; 320 Ill 536, 151NE581; 124Kan 237, 257P959; 321Mo 969, 13SW(2d)628.

1158-15 274US357, 47SCt641, 71L ed 1095; 317 Ill 132, 147NE797; 320 Ill 536, 151NE581; 321Mo 969, 13SW(2d)628. See also 94Fla60, 113S736, 740 [citCJ].

1158-16 274US357, 47SCt641, 71L ed 1095; 93Fla415, 111S801, 808 [citCJ], 52 ALR51; 320 Ill 536, 151NE581; 213App Div414, 210NYS269 (sustaining law requiring filing of constitution, by-laws, oaths, list of officers, and roster of Klu Klux Klan and making it crime to attend meeting if this has not been done). [c] **Destruction of trees at request of freeholders.**-22F(2d)341.

1158-17 28F(2d)825 (arbitrary); 200 Cal585, 254P946, 62ALR1341; Fla 129 S330; 317 Ill 132, 147NE797; 320 Ill 536, 151NE581; 124Kan237, 257P957; 164La405, 114S76, 55ALR309 (statute against entry on land of citizen in nighttime, without consent, to remove, or assist to remove, tenant or laborer, does not violate equal protection clause, for failure to include land owned by residents of other states); 231Mich409, 204 NW140 (statute authorizing sterilization of mental defectives held valid). [b] **Statute authorizing sexual sterilization of mental defectives** held based on reasonable classification and valid. 143Va 310, 130SE516, 51ALR855.

1158-18 200Cal585, 254P946, 62ALR 1341; 317 Ill 132, 147NE797; 320 Ill 536, 151NE581; 124Kan237, 257P959.

1158-18½-New. Statute aimed at particular evil held not invalid because oth-

er instances applicable. 274US357, 47 SCt641, 71L ed1095.

1158-20 273US119, 47SCt308, 71L ed 569; 276US71, 48SCt291, 72L ed473; 197 Ind28, 149NE639; 102NJL492, 134A 115; 121 Okl 51, 247P390.

1158-21 30F(2d)111.

1159-22 26F(2d)508; 166La776, 117S 827; 167La674, 120S47; 321Mo 58, 12 SW(2d)712; 102NJL492, 134A115.

1159-23 8F(2d)155; 27F(2d)478; 97 Fla710, 122S225 (brokers).

1159-25 CalA 288P53; 149Md648, 132 A160; 242NY330, 151NE637.

1159-26 273US119, 47SCt308, 71L ed 569; 220AppDiv634, 222NYS294.

1159-27 273US119, 47SCt308, 71L ed 569, 168La612, 123S310.

1159-28 278US105, 49SCt57, 73L ed204; 35F(2d)21; 42F(2d)88; Ariz 257P366; 200Cal 598, 254P951; 162Ga228, 133SE 345; 164Ga755, 139SE559, 55ALR230; 230Ky776, 20SW(2d)753. [b] **Act of Philippine legislature** prohibiting keeping of account books in any other language than English, Spanish, or a local dialect as applied to Chinese merchants unable to speak, read, or understand such languages or dialects is invalid. 271US500, 46SCt619, 70L ed1059.

1159-29 35F(2d)21; 36F(2d)967; 87 CalA584, 262P792 (reclassification held valid).

1159-30 102NJL492, 134A115; 220App Div624, 222NYS294; 298Pa475, 148A 695.

1159-31 42F(2d)107; 214Ala236, 107S 86; 197 Ind28, 149NE639.

1160-35½-New. Regulatory statute is not arbitrarily discriminatory because it applies to the operation of taxicabs and not to other motor vehicles. 317 Ill 132, 147NE797.

1160-36½-New. The requirement of bond or liability insurance policy from a person operating a motor vehicle on the public street for hire, 317 Ill 132, 147 NE797.

1160-43 169Minn214, 210NW1001; 187 Wis463, 204NW595. But see 73CalA548, 238P1089.

1160-52½-New. the grazing of sheep on cattle ranges, 31Ariz389, 254P225.

1160-53 149Md648, 132A160. [a] **Meat inspection ordinance held not unconstitutional** because exempting farm products. 149Md648, 132A160.

1160-55 [b] **Statute requiring warehousemen to keep and permit inspection** of records of sales held valid. 143Va741, 129SE739.

1160-61½-New. persons engaged in the business of making small loans, 168La 761, 123S317, 69ALR574.

1160-64½-New. corporations as sureties on official bonds, 32 OhA357, 168NE 55.

1160-64¾-New. voiding, as against third parties, unrecorded conditional sale contracts, 41F(2d)726.

1160-65½-New. cooperative marketing. 206Ky643, 271SW695; 220AppDiv 624, 222NYS294.

1160-67½-New. that natural person must secure broker's permit before he may sell his own securities, 81CalA55, 253P187.

1161-73½-New. An act regulating public auction of jewelry has been held not discriminatory, 214Ala236, 107S86.

1161-73½-New. or fixing resale prices of theatre tickets. 273US418, 47SCt426, 71L ed718, 58ALR1236.

1161-73¾-New. Requiring gasoline storage tanks to be placed underground is a valid exercise of police power. 27F (2d)173.

1161-75 272US425, 47SCt122, 71L ed 331; 32F(2d)669 (veterinary medicine and surgery) 106TexCr261, 285SW317.

1161-77 271US40, 46SCt384, 70L ed818; 272US425, 47SCt122, 71L ed331; 8F(2d) 155; 213Ala170, 104S440 (requiring certificate of qualification); 162Ga246, 134 SE42; 162La681, 111S58; 106TexCr261, 285SW317.

1161-78 Mass 166NE658.

1161-79 272US425, 47SCt122, 71L ed 331.

1161-80 155Tenn476, 295SW469, 54 ALR725.

1161-81 273US414, 47SCt363, 71L ed 714; 86Colo 446, 282P1068; 247Mich 127, 225NW595.

1161-82 315Mo 681, 286SW363; 106Tex Cr261, 285SW317.

1161-84 274US392, 47SCt630, 71L ed 1115 (statute forbidding aliens to operate poolrooms is valid); 106TexCr261, 285SW317. [b] **Securities Act** is held not unconstitutional. 5PaDist&Co 738.

1161-85 274US392, 47SCt630, 71L ed 1115; 97Fla710, 122S225; 168La742, 123S310 (plumbing). See also 278US 515, 49SCt235, 73L ed483.

1161-86 200Cal 585, 254P946, 62ALR 1341 (brokers); 164Ga755, 139SE559, 55 ALR230.

1161-87 200Cal 585, 254P946, 62ALR 1341; 164Ga755, 139SE559, 55ALR230; 317 Ill 524, 148NE287 (power to waive examination for license to practice medicine in case of officer of army, navy, and public health service involves no discrimination rendering act invalid as to ordinary practitioner).

1161-90 280US111, 50SCt49, 74L ed217, 64ALR1430.

1162-97 [a] **Statute suspending insurance company's license** if fees are paid nonresident agents for business within state has been held invalid. 270US426, 46SCt331, 70L ed664.

1162-97½-New. A statute requiring the operating expenses of a foreign insurance company to be under thirty per cent of the income not applying to domestic companies is unreasonable. 116 Oh127, 156NE114.

1162-2 [a] **Basis for different rates.**—Mass 169NE657.

1162-8 4F(2d)835 (reasonable attorney's fee may be awarded in suits on insurance policies).

1162-20 29F(2d)907. [b] **Ordinance prohibiting sale** of fresh meats and fish within defined area, except in market house, is held not invalid for lack of uniformity or equal protection. 193NC 207, 136SE489.

1163-21 206Cal 497, 274P974.

1163-35½-New. regulating jewelry auctions, 75CalA591, 243P55 (ordinance).

1163-36 See also 158La262, 103S761.

1163-37 See also 89Fla340, 103S615.

1163-40 220Ala4, 124S909. [a] (2) Statute requiring bond held not intended to prevent fraud, but to compel payment for merchandise sold, and was outside of scope of police power. 134Misc 652, 236NYS293.

1164-47 [b] **Tax on royalties** from ore mines held not discriminatory. 271US 577, 46SCt627, 70L ed1093.

1164-48 [a] **Statute allowing minimum production** of gas from wells subsequently drilled has been held not discriminatory as to old wells allowed more than minimum. 162La781, 111S162.

1164-49 [a] **Statute discriminating against already existing establishments** is unreasonable and unconstitutional. 162La165, 110S188.

1164-52 113Nebr816, 205NW294.

1164-54 But see 294Pa142, 144A97.

1164-58 337 Ill 100, 168NE904.

1165-60 157Tenn522, 11SW(2d)893.

1165-63 224Ky390, 6SW(2d)460.

1165-71 128 Or121, 270P772.

1167-8 57ND310, 221NW883.

1167-11 113 OhSt111, 148NE367.

1167-13 But see 32PortoRico 766.

1167-13½-New. **Wages at prevailing rates.** 127Misc307, 216NYS141.

1167-15 277US163, 48SCt502, 72L ed 833, 62ALR45; 281US537, 50SCt401, 74 L ed1023; 35F(2d)808; 287Pa376, 135A 362.

1167-16 117Tex34, 297SW206 (levee improvement district may, in exercise of police power, condemn railroad property for constructing levee without violating equal protection requirements, if acts are reasonable).

1167-17 24F(2d)226.

1167-19 197 Ind28, 149NE639 (jitney busses operating over definite routes are subject to regulation as class distinct from taxicabs and other service cars operating without definite route).

1167-20 28F(2d)825.

1168-21 320 Ill 605, 151NE675; 160La 1028, 107S894.

1168-21½-New. No discrimination because the statute regulating water companies exempts municipally operated waterworks. Ala 113S57.

1168-23 See also 278US24, 49SCt69, 73 L ed161, 62ALR805.

1168-23½-New. or to eliminate grade crossings, 216Ala178, 112S742.

1168-40 TexCivA 275SW111.

1168-43½-New. to keep agents at certain stations, 177Minn136, 225NW94.

1168-54 See also 53ND73, 204NW994.

1169-67½-New. Municipal ordinance prohibiting operation of steam or smoke emitting trains is a denial of the equal protection of laws. 125Misc801, 212 NYS1.

1169-67½-New. Requiring a company to pave between tracks has been held no denial of due process. 274US387, 47 SCt595, 71L ed1112.

1169-67¼-New. The decision of state officers to issue but one certificate of convenience to operate a motor-bus line over a route is not arbitrary and unconstitutional. 25F(2d)988.

1169-82 164Ga822, 139SE725.

1170-87 267US359, 45SCt259, 69L ed 656 (rate of five per cent. on valuation of electric company's property held confiscatory).

1170-84 164Ga822, 139SE725.

1170-87 36F(2d)54 (less than six per cent return on present fair value of telephone company's property held denial of equal protection). [b] **In proceeding to value gas company's property** for rate-making, allowance of seven per cent for overheads, financing cost, going concern value, etc., held not unreasonable. 121 Oh507, 169NE575.

1171-8 31F(2d)600.

1171-30 See also 108WVa299, 150SE 738.

1171-22½-New. A statute giving to shippers of grain a first lien upon memberships in grain exchange to secure indebtedness arising from consignment of grain to the owners of such memberships is not unconstitutional. 164Minn122, 204NW637.

1171-22¼-New. A statute authorizing assignment of rents and profits of property mortgaged under a trust mortgage to secure bonds issued or to be issued thereunder has been held valid. 247 Mich524, 226NW233 [citCJ].

1171-24 26F(2d)640; 35F(2d)657; 81 Colo 344, 255P443; 159La1016, 106S 549; 47RI 387, 133A614. [a] **Legitimate exercise of police power** held essential. 47RI 387, 133A614.

1171-25 274US603, 47SCt675, 71L ed 1228, 53ALR1210; TexCivA 27SW(2d) 868.

1171-29 26F(2d)640; 210Ky520, 276 SW534. [a] **Zoning ordinance** held not to deny equal protection of laws. 164La 564, 114S159.

1171-30 See also TexCivA 10SW(2d) 151.

1172-36 Ill 173NE361; 31 OhA229, 166 NE916.

1172-39 78CalA759, 248P1068.

1172-39½-New. **Defense of usury.** The statute denying to corporations the defense of usury is not unconstitutional as depriving them of equal protection of law. 149Md223, 131A332, 43ALR1.

1172-40 149Md578, 132A73.

1172-42 273US536, 47SCt446, 71L ed 759.

1172-43 273US536, 47SCt446, 71L ed 759; 33F(2d)177; 42F(2d)101; 164Ga 755, 139SE559, 55ALR230; Mo 289SW 558; 104WVa480, 140SE324.

1172-47 164Ga755, 139SE559, 55ALR 230.

1172-50½-New. A statute barring negroes from voting in primary election violates constitutional guaranty. 273US 536, 47SCt446, 71L ed759.

1172-53 [a] 160La943, 107S704. [b] **Ordinances forbidding establishment of residences** by negroes in "white communities" and by white persons in "negro communities" without consent of majority of opposite race is valid, as being merely social distinctions and in exercise of police power. 158La439, 104S 200.

1173-59 171Minn177, 213NW545, 52 ALR916; OklCr 274P896; 102TexCr 297, 277SW1091; 104WVa480, 140SE 324.

1173-61 95Fla289, 116S470; OklCr 274 P896.

1173-64 102TexCr297, 277SW1091 (by act of jury commission).

1173–65 104**WVa**480, 140**SE**324.

1173–66 95**Fla**289, 116**S**470; 104**WVa** 480, 140**SE**324.

1174–68 **OklCr** 274**P**896 (evidence held sufficient); 102**TexCr**297, 277**SW**1091. But see 95**Fla**289, 116**S**470.

1174–68½–New. There must be no discrimination because of sex. 171**Minn** 177, 213**NW**545, 52**ALR**916.

1174–76 148**Miss**462, 114**S**332.

1174–78 275**US**78, 48**SCt**91, 72**L ed**172 (rule applied to validate rule to compel Chinese child to attend equally equipped colored school). [1] **Exclusion of Chinese boy from white school** does not violate constitutional guaranty where he is afforded opportunity of attending colored school maintaining equal facilities. 148**Miss**462, 114**S**332.

1175–81½–New. Assigning certain portions of parks for negroes only is not deprival of equal protection of laws. 233**Ky**688, 26**SW(2d)**554.

1175–88 See also 166**La**924, 118**S**85.

1176–94½–New. or which prescribes a lighter punishment for the female offender than the male offender in prosecutions for adultery; 28**Hawaii**88.

1176–96½–New. A statute requiring the husband's consent to a wife's will to deprive him of more than two thirds of her estate is not violation of equal protection. 79**Mont**10, 254**P**875.

1176–96⅓–New. **The equal protection guaranty is not violated** by a statute imposing an indeterminate sentence for females where there is none for males. 116 **Oh**512, 157**NE**69.

1176–96¼–New. The legislature may classify according to sex for the purpose of punishment and reformation of those convicted of crime. 256**Mass**539, 152**NE**914.

1176–96½–New. A statute exempting females from arrest as judgment debtors is held not void. 141**SC**407, 139**SE**842.

1176–97 157**Miss**740, 128**S**503 (surety on sheriff's bond).

1176–10½–New. A statutory provision which apparently makes one deriving benefit from fraud practiced by others liable for exemplary as well as actual damages is void as unreasonable and discriminatory. **TexCivA** 272**SW**824.

1176–10¾–New. Statute requiring surety company, in order to demand indemnity, so to stipulate in contract is invalid. 230**Ky**776, 20**SW(2d)**753 [overruling 142**Ky**361, 134**SW**481].

1176–13 [a] **Statute imposing penalty of fifty per cent** for failing to pay industrial awards within ten days is valid. 116 **Okl** 131, 244**P**44.

1177–19½–New. Mental anguish statute has been held not violative of equal protection. 140**SC**244, 138**SE**673.

1177–19⅓–New. An act providing that no guest shall have a cause of action against the owner or operator of an automobile, unless the accident was intentional, or reckless, has been held not invalid, as denying guests equal protection of the laws. 108**Conn**371, 143**A**240, 65**ALR**943.

1177–19¼–New. A statute, prohibiting recovery from automobile owners for injuries to gratuitous passengers, has been held not unconstitutional, though some abuses may not be hit. 280**US**117, 50**SCt**57, 74**L ed**221, 65**ALR**939.

1177–19⅕–New. Legislative restriction on liability of persons operating vehicles for injuries to mere guests or licensees need not reach every class to which it might be applied. 280**US**117, 50**SCt**57, 74**L ed**221, 65**ALR**939.

1177–19⅙–New. The distinction between gratuitous passengers in automobiles and other classes of vehicles by statute prohibiting recovery from the owner is not so evidently groundless as to be arbitrary. 280**US**117, 50**SCt**57, 74 **L ed**221, 65**ALR**939.

1177–19⅐–New. Enforcement of liability for injury to a minor employee against the employer because of employment of the minor without a certificate of employment has been held not unconstitutional. 337 **Ill** 70, 168**NE**895.

1177–20 167**Ga**880, 147**SE**77; **Mass** 172 **NE**84 (forfeiture of money won at gambling game); 147**Miss**695, 112**S**877; **OhA** 172**NE**670; 149**SC**52, 146**SE**686.

1177–21 316**Mo** 398, 289**SW**925.

1177–27 [a] **Imposing additional demurrage charges** for detention of cars awaiting reconsignment on shippers of lumber held not denial of equal protection of laws. 271**US**259, 46**SCt**530, 70 **L ed**934.

1177–30½–New. Statute imposing penalty for insurer's delay in paying loss is violative of equal protection clause. 38**F(2d)**557.

1177–30⅓–New. A statute providing for restoration of automobiles seized for forfeiture for violation of a prohibition act to owners or lienors if residents of Virginia or District of Columbia is void because of arbitrary discrimination. 153**Va**57, 149**SE**523.

1177–31 23**F(2d)**968.

1178–41 82**Colo** 77, 257**P**259. But see 208**Ky**643, 271**SW**695.

1178–42 81**CalA**98, 252**P**1075 (action by employee for personal injuries against employer who has not brought himself within Workmen's Compensation Act); 319 **Ill** 372, 150**NE**330.

1178–45 159**La**236, 105**S**302.

1178–50½–New. actions against sureties on bond; 159**La**236, 105**S**302.

1178–60½–New. or in actions to recover the amount paid for stock sold in violation of a statute. 319 **Ill** 372, 150 **NE**330.

1180–83 34**F(2d)**70 (damages for fire resulting from latent defect in tank car).

1182–27 **CalA** 277**P**499; **Ind** 166**NE**2.

1182–31 **LaA** 130**S**634; 73**Mont**451, 236 **P**1076, 1077 [citCJ]; **TexCommnA** 14 **SW(2d)**1022.

1183–34 174**Minn**583, 219**NW**916 (subrogation by sureties to rights of state on depositary bond).

1183–35 271**US**632, 46**SCt**591, 70**L ed** 1123; **TexCivA** 264**SW**529 (failure to provide direct cause of action to wife for breach of marital obligations by husband not in violation of constitutional guaranty).

1183–39 217**AppDiv**67, 216**NYS**215; 132 **SC**264, 128**SE**360 (appeal).

1183–40 See also 217**AppDiv**67, 216**NYS** 215.

1183–40½–New. Denying plaintiff's right to appeal where granted to defendants is not discriminatory. 203**Cal**384, 264**P**488.

1183–41½–New. But a special law giving an individual the right to sue the state for a tort denies those not included within its provisions the equal protection of the laws. 132**SC**241, 128**SE** 172.

1183–42 [b] **Operation of automobile by one unlicensed** may properly preclude owner's action for damages. 110 **Conn**288, 147**A**871.

1183–43 193**Wis**145, 211**NW**916.

1183–45 35**F(2d)**232 (substituted service).

1183–49 But see 131**Misc**618, 227**NYS** 109.

1184–54 [c] **Venue statutes held not to discriminate.**–155**Miss**75, 124**S**74.

1184–57½–New. Statute authorizing attachment suit against nonresident railroad in county where it has no line of railroad or agent held not invalid. **Miss** 130**S**302.

1184–57⅓–New. That nonresident railroad corporation may be subject to personal judgment does not preclude state from subjecting it to attachment on ground of nonresidence. **Miss** 130**S**302.

1184–60½–New. A decision holding that reversioners' rights lost by laches deprive them of the equal protection of the law. 220**Ala**380, 125**S**392.

1184–60⅔–New. Revival of a barred claim against an employer is unconstitutional. 252**NY**1, 168**NE**442.

1184–62 31**Ariz**39, 250**P**356; **Iowa** 233 **NW**137; 149**Md**223, 131**A**332, 43**ALR**1.

1184–63 281**US**362, 50**SCt**299, 74**L ed** 904, 68**ALR**434; 28**Ariz**527, 238**P**335; 208**Cal**279, 280**P**982; **CalA** 261**P**1053; 91**Fla**824, 108**S**679; 96**Fla**327, 118**S**60; 10**LaA**307, 120**S**895; 73**Mont**451, 236**P** 1076, 1077 [citCJ]; **Nebr** 223**NW**21(2d case) (taking of depositions). [a] (1) 253**Mass**478, 149**NE**122.

1185–69½–New. Misconstruction of law during trial is not denial of equal protection. **Ill** 172**NE**47.

1185–69⅓–New. One allowed to perfect appeal, although not taking steps to perfect record in which testimony could be included, is not denied equal protection. 250**Mich**556, 231**NW**76.

1185–72 **TexCivA** 22**SW(2d)**990. Contra **TexCivA** 5**SW(2d)**1027; **TexCivA** 5 **SW(2d)**1030 [both foll 274**US**490, 47**SCt** 678].

1185–73 **TexCivA** 22**SW(2d)**1090.

1185–75½–New. Statutes as to venue of actions must keep within constitutional limitations. 274**US**490, 47**SCt**678, 71 **L ed**1165.

1185–75⅓–New. A statute authorizing action against a foreign corporation in any county designated by plaintiff is unconstitutional where a different rule applies to domestic corporations. 178 **Minn**72, 225**NW**915(2dcase).

1185–75¼–New. Statute permitting change of venue on application of a public officer sued out of the county of his residence is not discriminatory. 157 **Miss**822, 126**S**480.

1185–75⅕–New. Compelling defendant to proceed to trial did not deprive him of the equal protection of the laws. 131 **Or**382, 283**P**12.

1185–83½–New. burden of proof, 177 **Minn** 398, 225**NW**435.

1185–88½–New. A statute prohibiting the state bank commissioner to disclose information obtained in examination of banks except when called as a witness in a criminal prosecution but permitting such disclosure to certain banks, clearing houses, and federal offices is unconstitutional as a denial of equal protection of the laws. 315**Mo** 75, 285**SW**513, 47**ALR**688.

1185–88⅓–New. Statute creating presumption of negligence of railroad in case of damage is not violative of equal protection clause. 38**F(2d)**963.

1185–89½–New. Judgment setting aside default judgment, held not to deny equal protection of the laws. 196 **Ind** 570, 148**NE**19.

1185–89⅓–New. Nor do statutory provisions which authorize an appellate court to order final judgment for appellant where his motion for a directed verdict was made and denied in the trial court. 264**Mass**337, 162**NE**689.

1185–89¼–New. [§ 952a] f. **Review.** A statute permitting the supreme court to order entry of judgment for defendant, whose motion for a directed verdict was denied in the trial court, does not violate the equal protection clause of the federal constitution. 264**Mass**337, 162 **NE**689.

1185–92 274**US**357, 47**SCt**641, 71**L ed** 1095; 167**Ga**165, 144**SE**726, 60**ALR**747 (prohibiting possession of home brew); 167**Ga**495, 146**SE**189; 322 **Ill** 174, 152 **NE**597; **Ind** 166**NE**270; 162**La**781, 111 **S**162; 193**NC**290, 136**SE**709, 710 [cit CJ]; 150**Wash**326, 272**P**964.

1186–93 193**NC**290, 136**SE**709, 710 [cit CJ].

1186–94 318**Mo** 998, 2**SW(2d)**747, 748 [cit CJ].

1186–95 113**TexCr**478, 22**SW(2d)**306.

1186–1 274**US**357, 47**SCt**641, 71**L ed** 1095.

1186–6½–New. to display red flag as aid to seditious propaganda, **CalA** 290**P** 93.

1186–15 **CalA** 278**P**252 (burden of proof); 317**Mo** 330, 296**SW**370, 371 [quotCJ]. [a] **Parol law must apply equally** to county and state prisons. 5 **PaDist&Co** 80.

1186–16 48**SD**346, 204**NW**652; 110**Tex Cr**560, 9**SW(2d)**360. [a] **Periods of limitation.**–317**Mo** 330, 296**SW**370.

1186–17 204**Cal** 470, 268**P**909 (different procedure for trials in some class of offenses); 317**Mo** 330, 296**SW**370.

1186–18 84**CalA**295, 257**P**876; 48**SD** 346, 204**NW**652.

1186–21 94**Fla**60, 113**S**736.

1187–39½–New. A statute authorizing county judges to act as committing magistrates, construed as not authorizing change of judge on presentation of

affidavits of prejudice as in case of examinations before justices of the peace, is not unconstitutional where the same procedure is provided for all persons in like situation. 48Mo546, 204SW952.

1167 39½-New. The bringing of an habitual criminal charge by supplemental information does not deprive accused of equal protection of the laws. 115Wash[illegible]

1167 39½-New. A voluntary statement in the nature of a confession made to a government agent, is admissible, without evidence that the government waived privilege, where the name of declarant and facts disclosed by statements had become matters of general notoriety. Mass 105N647

1167 39½-New. An argument to the jury which is an appeal to race prejudice constitutes a denial of equal protection. 112TexCr275, 16SW(2d)253.

1167 39½-New. Statute committing defendants convicted under insanity plea to state hospital is not denial of equal protection. CalA 291P[illegible]

1167 41 21Hawaii[illegible], 107Mo 67, 269 SW[illegible]; 43ALR1012 (prohibiting discharged prisoner from entering or residing in certain counties and imposing penalty therefor); 213Mo 908, 28SW(2d) 747 (punishment must operate equally on all within state); 193NC290, 136SE 709, 710 [citCJ]. See also OkiCr 287P 276. [a] Legislature cannot prescribe penalties for general offenses in particular locality different from penalties prescribed for entire state by use of Const art 8 § 9 authorizing penalties for violation local cond law. 114TexCr232, 8 SW(2d)134, 59ALR430

1167 42 28Hawaii88 [quotCJ]; 256 Mass539, 152NE911, 106TexCr659, 294 SW555; Utah 276P921 (sterilization of mental defectives). See also 102Ga627, 131SE418

1167 43 See also 28Hawaii88 [quotCJ]

1167 44 326 Ill 402, 158NE143 See also 28Hawaii88, 91 [quotCJ]

1167 45 16[illegible]Ga99, 11[illegible]9.1(2dcase) See also 28Hawaii88, 91 [quotCJ].

1168 46 206Cal534, 274P902; 98Fla 708, 110S330

1168 47 198Cal508, 245P1089. See also 28Hawaii88, 91 [quotCJ]. [b] Conviction of statute as requiring life sentence for unarmed fourth offender would be denial of equal protection of laws if another statute permitted twenty five year sentence to armed fourth offenders. 130Misc831, 226NYS 397

1168 47½-New. A statute relative to punishment for crime need not apply universally in order to be uniform in operation, but it is sufficient that it bears equally in burdens and benefits upon persons in the same category. 198 Cal502, 245P1029

1168 48 [a] Indeterminate sentence Law of California is not unconstitution of 24CalA[illegible]

1168 49½-New. A statute authorizing the prison board to determine the duration of imprisonment after the minimum term is not unconstitutional as discriminatory. 192Cal305, 24aP1039.

1168 49½-New. A statute requiring juries to prescribe the punishment in counties of between sixty and seventy thousand is not a denial of equal protection of the laws. 166Ga539, 144SE60.

1168 52½-New. Probation laws have been held not to constitute a denial of equal protection of the laws. 162Ga327, 133SE843

1168 52½-New. Punishment by imprisonment for double term for which prisoner was sentenced held unconstitutional. OkiCr 287P729 (offense of escape from state prison).

1168 53 [illegible]AppDivCt0, 236NYS89. [a] Phrase has same meaning in federal and state constitutions. 20CalA 766P[illegible]16

1168 54 8PaDistACo 6[illegible]

1168 55 92Fla848 110S[illegible]; 8PaDistACo 61.

1168 57 21AlaA403, 107S788; 326 Ill 552, 160NE206; 319Mo 474, 58SW(2d)50, 57ALR881. See also 332 Ill 49, 163NE 367 (other definitions). [a] (1) 315Mo 1279, 289SW792 (6) Due process means more than adjudication by public officer whose decision is supreme and whose acts courts have no jurisdiction to review. 128Misc42, 217NYS751.

1169 58 104Conn192, 132A561, 92Fla 818 110S522, 326 Ill 327 157NE247; 159La674 106S25 (process according to law of land) 195NC284, 145SE563; 51ND753 240NW525, 126Or417, 270P 502; 8PaDistACo 445, 446 [citCyc]; 47 Ill258, 131A641. [a] (1) 110TexCr232, 8SW(2d)134, 59ALR430. (6) 33F(2d) 753.

1169 59 89Fla361, 104S577; 126Or417, 270P502.

1169 66 104Conn192, 132A561; 126Me 537, 116A[illegible] 139Misc[illegible]15, 223NYS170.

1169 67 19F(2d)163; 91Fla824, 108S 679, 326 Ill 372, 158NE118, 55ALR196, 14PaDistACo 220; TexCommnA 276SW 647.

1169 68 273US510, 47SCt437, 71L ed 749, 50ALR1243, 19F(2d)163, 165 [citCJ]; 203Cal306, 265P246; 93PaSuper 323. [a] (2) 273US510, 47SCt437, 71 L ed749, 50ALR1243

1169 71 19F(2d)163 73CalA265, 238P 757, 204Cal306, 265P246, 257 [citCJ]; 102CalA299, 284P298 CalA 290P637; 326 Ill 372, 158NE118, 55ALR196; 208 Iowa94, 222NW535; 265Mass135, 163 NE[illegible]; 133Misc161, 232NYS189 (personal notice is not indispensable); 226 AppDiv480, 236NYS80; 189NC549, 127 NE629; 32 OhA16, 165NE746; Okl 288 P316 5PaDistACo 51, 118Tex218, 13 SW(2d)57. [a] (7) Essential elements are notice and opportunity to be heard and defend in orderly proceeding adapted to nature of case. 98Fla103, 1228 223. (8) Further definitions. 337 Ill 641, 169NE736.

1169 72 126Me537, 140A382; 100NJEq 24, 134A904

1169 73 273US510, 47SCt437, 71L ed 749, 50ALR1243. But see 73CalA268, 238P787.

1169 76 273US510, 47SCt437, 71L ed 749, 50ALR1243. 320Mo489, 8SW(2d) 1003

1169 77 273US510, 47SCt437, 71L ed 749, 50ALR1243; 92Fla818, 110S522.

1169 79 115Nebr631, 211NW256.

1169 80 273US384, 47SCt406, 71L ed 646; 30F(2d)700; 33F(2d)187; 41 F(2d)538; 259Mass453, 156NE890; 196 NC[illegible]24, 115SE563, 33Wyo357, 240P 205

1169 81 13F(2d)952, 22F(2d)993.

1169 82 273US536, 47SCt116, 71L ed [illegible] 13F(2d)557, 30F(2d)700; 33 F(2d)117, 213Ala50, 104S535, 153Miss 549, 120S434(2dcase); 120Misc820, 215 NYS159; 196NC284, 145SE563 [a] Effect. 250NY130, 164NE852

1169 84 167Minn311, 209NW10; 126 Misc320, 215NYS159, 259Pa307, 137A 601; TexCommnA 276SW647. See also 97Fla426, 120S317 [b] 47ALR258, 131A 641, 131A614 [d] Pennsylvania 295Pa 169, 148A[illegible]

1169 86 273US312, 47SCt103, 71L ed 270, 48ALR1102 21AlaA169, 109S[illegible]; 97Fla[illegible], 110S[illegible]. [a] (1) 94Fla1056, 114S850. [c] Constitutional right must be sedulously preserved against direct attack or specious impairment Mass 171NE[illegible](2dcase)

1169 87 273US312, 47SCt103, 71L ed 270, 48ALR1102; 12F(2d)938; 337 Ill 70, 168NE895; 243NY493, 154NE298; 110TexCr[illegible], 8SW(2d)134, 59ALR430.

1169 89 203Cal306, 265P246, 257 [citCJ].

1169 90 21AlaA[illegible], 103S177. See also 43Ida293, 253P[illegible]. [a] Right is not unlimited, it may be abridged or dispensed with altogether by due process. Mont 293P294

1169 91 273US312, 47SCt103, 71L ed 270, 48ALR1102.

1169 94 31F(2d)148

1169 95 92Fla818, 110S522.

1169 96½-New. Statute so indefinite as to be without meaning is void as not providing due process. TexCommnA 276SW1051 (whether remedial or criminal).

1169 96½-New. In determining whether essential elements of due process of law exist, substance of matters, and not their mere form, governs. 284Pa455, 131A265.

1169 96¼-New. To invoke due process clause, some substantial injury must be threatened by exercise of governmental powers. 243NY423, 154NE298.

1169 96½-New. Regulation under proper exercise of police power is due process even though a property in whole or part is taken or destroyed. 287Pa259, 134A409.

1169 96½-New. A client's right to a day in court does not mean an opportunity for his attorney to present any claim or defense, however unworthy of belief he may think it, nor to put forward legal theories, which he is personally convinced are unsound. 29 F(2d)932.

1169 96½-New. Prohibition against denying due process is directed against passage and not misconstruction of laws. 43F(2d)236.

1169 97 273US510, 47SCt437, 71L ed 749, 50ALR1243; 279US253, 49SCt314, 73L ed688; 281US673, 50SCt451, 74L ed 1107; 33F(2d)242; 33F(2d)753; 37 F(2d)938(2dcase); 76Mont395, 247P 162; NJCh 144A546; 298Pa487, 148A 699, 68ALR1172 (courts may not violate constitution by their decrees or judgments); 8PaDistACo 61. [a] 17F(2d) 143. [c] (1) 13F(2d)852, (2) 13F(2d) 852. [f] 17F(2d)143. [g] In determining adjective and substantive law of state, courts must accord parties due process of law. 281US673, 50SCt451, 74 L ed1107.

1169 98 273US510, 47SCt437, 71L ed 749, 50ALR1243.

1169 99 243NY423, 154NE298.

1169 99½-New. Provision prohibiting the deprivation of life, liberty, or property is applicable only to criminal proceedings RI 152A225.

1169 3 333 Ill 304, 164NE696; 167La 674, 120S47; 161Tenn236, 30SW(2d) 268; 153Va57, 149SE523.

1197 4 104Conn192, 132A561, [b] 241 NY405, 150NE497 (classification which does not include all oath bound secret societies may be reasonable). [c] In regulating secret societies legislature must adopt reasonable ground of classification. 241NY405, 150NE497. [d] Distinction between oath bound societies and those binding members by pledges of less time honored solemnity may be reasonably made 241NY405, 150NE497.

1197 5 TexCivA 28W(2d)1001. [a] (2) Law prohibiting going on land of citizen in nighttime, without his consent, and removing or assisting in removing, tenant or laborer, is not violation of due process clause for failure to include land of noncitizens. 164La405, 114S76, 55 ALR309.

1197-6 206Cal35, 273P767.

1197 7 204Cal470, 268P909; 92CalA 69, 268P388. [a] Resort to court of justice is not required in all cases. Fla 126 S117.

1197-11 271US200, 47SCt584, 71L ed 1000; 271US387, 47SCt595, 71L ed112; 271US603, 47SCt675, 71L ed1228, 53ALR 1210; 278US105, 49SCt57, 73L ed204; 278US63, 49SCt61, 73L ed184, 62ALR 786, 281US682, 50SCt449, 74L ed1115; 7F(2d)715; 16F(2d)401; 22F(2d)998; 21AlaA303, 107S788; Ark 318SW(2d) 739 69CalA166, 231P601; 91Fla241, 107S364 45Ida427, 262P881, 56ALR 317, 208Iowa94, 222NW535; 125Kan 41, 262P583 159La723, 106S952; 261 Mass523, 159NE655; 261Mass160, 163NE 82 236Mich160, 210NW492, 47ALR 1128; 174Minn107, 219NW770, 773, 58 ALR807 [citCJ]; LaMinn73, 220NW 175 310Mo512, 276SW389, 321Mo969, 13SW(2d)628. 128OkI17, 261P183; 287Pa259 134A409. 289Pa307, 137A 601, 158Tenn107, 15SW(2d)1; 160Tenn 468, 26SW(2d)132 TexCivA 24SW(2d) 149; 145Wash146, 259P17, 54ALR393; 193Wis[illegible], 212NW289.

1198-12 28F(2d)825 (held invalid if arbitrary); 126Me537, 140A382; 236 Mich160, 210NW492, 47ALR1128; 287 Pa259, 134A409.

1198-12½-New. A statute purporting to be enacted to protect health, morals, or safety, but really having no substantial relation to those objects, is

without due process. 148Va795, 139SE 508, 55ALR781.

1198-13 [a] **Power of state** over municipal corporations within its territory is not restrained by Fourteenth Amendment. 270US378, 46SCt236.

1198-14 273US284, 47SCt406, 71Led 646.

1198-17½-New. Under the state constitution a "citizen" includes one who maintains a residence outside of the state but continues to maintain a home within the state. 118Tex433, 13SW(2d) 358.

1198-19 278US105, 49SCt57, 73Led 204; 14F(2d)257; 29F(2d)140; 29 F(2d)789; 230Ky776, 20SW(2d)753; 126Misc829, 215NYS159; 153Va57, 149 SE523. [c] 153Va57, 149SE523.

1199-22 TexCommnA 295SW591.

1199-24 15F(2d)881; 81Colo276, 255P 610; 111TexCr233, 13SW(2d)93(2dcase) (statute defining forbidden practice of optometry without license held unconstitutional); 145Wash146, 259P17, 54ALR 393. [c] **Assigning certain portions of parks to negroes only** is not violation of provision. 233Ky688, 26SW(2d)554.

1200-25 NH 146A170; 295Pa311, 145A 295; 145Wash146, 259P17, 54ALR393. [a] (4) Statute, requiring every person having child of age of eight years and not exceeding seventeen years in his control to cause child regularly to attend some public or private day school or be instructed by competent person, is valid. SD 228NW470. [b] **Denial of right of alien ineligible to citizenship to make cropper's contract** does not deny him ordinary means of making livelihood. 195Cal 71, 231P554.

1200-26 [a] **Ordinance providing segregation of residences of white and colored persons** held not deprivation of life and liberty. 160La943, 107S704.

1200-26½-New. The legislature may reasonably regulate secret societies without depriving members thereof of their liberty without due process of law. 241 NY405, 150NE497, 43ALR909.

1200-27 116 Or310, 241P50.

1200-28 274US1, 47SCt506, 71Led893, 52ALR163; 39F(2d)198; Mont 293P294 (right to contract in relation to his business); 116 Or310, 241P50 (right to purchase or sell labor is protected); TexCivA 297SW491, 495 [quotCJ]; TexCr 28SW(2d)161.

1200-29 267US552, 45SCt441, 69Led 785; 274US1, 47SCt506, 71Led893, 52 ALR163; 13F(2d)500; 220Ala4, 124S 909; 327 Ill 387, 158NE703, 55ALR303 (private land surveying); 160La294, 107 S115; Mass 166NE401 (contract of employment); 46Philippine440; 40Wyo 462, 278P542. [a] (2) Forbidding by state of contracts of insurance between citizens and corporation in another state would be unlawful invasion of liberty of contract. 13F(2d)500. [e] **Kansas Court of Industrial Relations Act** establishing compulsory arbitration and fixing hours of labor in business of manufacturing and preparing of food for human consumption held to violate due process clause. 267US552, 45SCt441, 69 Led785. [f] **Minimum Wage Law of Porto Rico** held unconstitutional. 32 PortoRico 766. [h] **Deprivation of right to terminate contract** constitutes violation of due process of law. TexCivA 19SW(2d)845.

1200-30 267US540, 45SCt399, 69Led 775 (limitation of attorney's fee in workmens' compensation cases); 33F(2d)21 (necessity for approval of contracts with Osage Indians); 174Minn36, 218NW 238; 310Mo 542, 276SW389; 116 Or310, 241P50; 152Va1041, 148SE774, 779 [quotCJ] (prohibiting assignment of salary at usurious rate of interest). [b] 113 OhSt111, 148NE367. [g] **Reserving agricultural lands for use, occupancy, benefit, and enjoyment of citizens and those eligible to citizenship** is not infringement of any constitutional rights of aliens ineligible to citizenship. 195 Cal 71, 231P554. [h] **Clause protects only legal contracts and not those which are illegal.**-212Ky123, 278SW533. [i] **Law making compromise agreements or assignments under Workmen's Compensation Act illegal unless approved by compensation board** is constitutional under due process clause. 212Ky123, 278 SW533.

1200-33 200Wis518, 228NW895, 69ALR 348(2dcase).

1200-33½-New. terms or periods of employment. 156Tenn443, 3SW(2d)164.

1201-41 317 Ill 197, 148NE5 (liquor law); 322 Ill 174, 152NE597; Mass 172 NE209; 194Wis207, 216NW513. [c] **If court arbitrarily,** without observing legal formalities, sentences for contempt, supreme court may prohibit execution of sentence. 161La293, 108S487. [d] **Commitment by justice of witness** for refusal to answer grand jury questions does not violate due process. 110Conn 482, 148A551.

1201-42 267US517, 45SCt390, 69Led 767; 110Conn482, 148A551 (refusal to give properly required testimony); 192 Wis1, 211NW926; 194Wis207, 216NW 513 (without charge or hearing). [c] **Pufishing for contempt** without giving hearing or right of assistance of counsel because attorney wrote contemptuous letter to judge held improper as not committed in open court. 267US517, 45 SCt390, 69Led767.

1201-43 267US517, 45SCt390, 69Led 767; 323 Ill 452, 154NE195; 161La293, 108S487; 117Tex325, 3SW(2d)406, 57 ALR541. [c] (2) Where attorney was not advised that his conduct was under investigation, contempt order was entered without due process. 36F(2d)639. [d] **Requiring defendant** to proceed with hearing on same day, and rendering judgment of imprisonment in absence of her counsel generally employed, who without fault was in distant city, does not constitute reasonable opportunity for preparation or presentation of defenses. 113Tex218, 13SW(2d)57.

1201-46 [b] **Notaries.**-317Mo 392, 295 SW532.

1201-47½-New. Due process of law is not observed by public service commission where defendant was declared in contempt without his knowledge and without hearing. 161La293, 108S487.

1202-56 274US357, 47SCt641, 71Led 1095; 217Ala219, 115S308; 21AlaA2, 106 S344; CtlA 290P470; 329 Ill 223, 160N 582; 163La94, 111S611; 320Mo 296, 6 SW(2d)915, 919 [quotCJ] (court's refusal to permit jury to assess punishment); 116Nebr440, 218NW83; 135 Misc842, 241NYS641; 117 Oh102, 157NE 388; 117 Or466, 242P440; 298Pa169, 148A73; 142Va577, 128SE633, 635 [quot CJ]. See also 127Misc290, 216NYS468. [c] 149Miss718, 115S879; 149Va427, 141 SE249. [t] **Bastardy proceeding** is criminal prosecution within constitutional guaranty. 210Ky445, 276SW154, 44 LRA386. [u] **Trial.**-117 Oh114, 157NE 488, 54ALR1220. [v] **Maintenance of citizen's constitutional rights** is essential to maintenance of government. 22AlaA 370, 115S771. [w] **Proceeding before board of medical examination and registration** to revoke license is not criminal. Kan 289P64. [x] **Interest which will disqualify justice of peace,** within constitutional provision, must be direct, personal, substantial, and pecuniary. OklCr 288P354; OklCr 288P357(1st case). [y] **Ample notice and opportunity to secure counsel** and prepare for trial are required for "due process." 298 Pa169, 148A73. [z] **To secure time necessary to prepare defense** it is not necessary for defendant to outline his defense or name his witnesses. 298Pa169, 148A73.

1202-57 117 Or466, 242P440; 142Va 577, 128SE633, 635 [quotCJ].

1202-58 274US357, 47SCt641, 71Led 1095; 277US61, 48SCt439, 72Led784; 21F(2d)625; 175Ark1047, 1SW(2d)546; 84CalA295, 257P876; 329 Ill 223, 160 NE582; Mo 273SW1037; 142Va577, 128 SE633, 635 [quotCJ].

1202-59 142Va577, 128SE633, 635 [quotCJ].

1202-60 142Va577, 128SE633, 635 [quot CJ].

1202-61 142Va577, 128SE633, 635 [quot CJ].

1202-61½-New. However, a trial before a magistrate unable to maintain an impartial position because he is antagonistically interested is denial of due process. 273US510, 47SCt437, 71Led 749, 50ALR1243.

1202-61¼-New. That trial judge is paid by fee is not a deprivation of due process of law where the fee is not contingent on conviction. 109TexCr148, 4 SW(2d)79.

1202-62 169Ark289, 273SW11; 76CalA 227, 244P930; 92Fla548, 110S522; Fla 129S703; 167Ga165, 144SE726, 60ALR 747 (prohibiting possession of home brew); 167Ga495, 146SE189; 203 Iowa 918, 210NW961; Mo 30SW(2d)447. [a] (16) Iowa 230NW865. (31) Shooting at, or wounding or killing, human being, in mistake for either game or wild creature of any description, and imposing penalties. 8PaDist&Co 445. (32) Other instances 41F(2d)538.

1203-67 269US385, 46SCt126, 70Led 322; 274US357, 47SCt641, 71Led1095 (dictum); 274US445, 47SCt681, 71Led 1146. [d] **State must frame statute** so that standard of required conduct is clear. 274US445, 47SCt681, 71Led1246. [e] **Statutes held not too indefinite** in defining crime. 169Ga515, 151SE23; 249Mich147, 228NW723.

1203-68 [a] (8) Statute providing for punishment of person setting fire to building owned by himself or another or procuring same to be done, construed as applying only to acts done willfully and maliciously, is not violative of due process of law. 237Mich247, 211NW650. (9) Statute punishing breach of contract concerning segregation of races held void. TexCivA 289SW1067.

1203-69 274US357, 47SCt641, 71Led 1095.

1203-72 22AlaA646, 119S250; 168La 958, 123S639(2dcase), 67ALR1447; Mo 28SW(2d)1026. [b] **Order of removal** after excluding evidence of defendant's innocence, held not to deprive him of right to be tried in district where crime was committed. 271US142, 46SCt459, 70Led875.

1203-73 16F(2d)776. [a] **Statute making homicide triable in county of assault or death** held not invalid. 105TexCr 516, 289SW54.

1204-80 144Miss52, 109S265, 266 [quot CJ].

1204-81 96Fla768, 119S380.

1204-82½-New. That the same act is punishable as a crime under both state and federal laws and constitutions is not violation of double jeopardy provisions of state and federal constitutions. 126Misc762, 214NYS781.

1204-82½-New. Const. Amendm. V guarantees against double jeopardy in federal courts. 126Misc762, 214NYS 781 (does not prohibit second prosecution in state courts).

1204-82¼-New. New York State constitution prohibits double jeopardy in its courts. 126Misc762, 214NYS781 (does not deny United States courts right to punish after state prosecution).

1204-82½-New. Statute held not unconstitutional in that pleadings required are insufficient for defendant to plead double jeopardy. CalA 290P470.

1204-87 329 Ill 223, 160NE582; 91Pa Super544.

1204-88 267US80, 45SCt209, 69Led 522 (arrest on warrant from federal court in New York of one en route to Washington, D. C., for trial there does not violate due process clause).

1204-91½-New. Fingerprinting. A statute denying admission of accused to bail until fingerprinted, and by implication requiring fingerprinting forthwith on arrest, violates due process. 127 Misc141, 215NYS412.

1205-96 94Fla60, 113S736; 203 Iowa 333, 210NW934, 212NW550; 159La674, 106S28.

1205-97 159La674, 106S28; 259Mass 453, 156NE890.

1205-98 159La674, 106S28.

1205-99 131Misc411, 227NYS142; SC 155SE385. [c] **Due process held fully shown** by minute entry of selection, swearing, impanelling, and charging of

grand jury. 159La674, 106S28.

1205-1 274US380, 47SCt655, 71Led 1108; 96CalA430, 274P433; 158La799, 104S720 (following language of statute).

1205-2 [a] 158La129, 103S534. [e] **Information may be amended** to show former conviction. 101CalA376, 281P 700.

1205-2½-New. Refusal of bill of particulars where defendant had long understood the nature of the charge is not a denial of due process. 23F(2d)235.

1205-2⅓-New. The bringing of an habitual criminal charge by supplemental information does not deprive accused of due process of law. 146Wash221, 262P 622.

1205-2¼-New. Where information charging unlawful transportation of moonshine whisky, a felony, and in another count charging unlawful possession of moonshine whisky, a misdemeanor, fairly advised defendant of the nature and cause of the accusation against him, held, amendment of the information by dismissal of the felony charge before trial was authorized by statute in Missouri, and conviction was not in violation of due process of law. Mo 11SW(2d)1024.

1205-2½-New. An information charging both principals and accessories at length with an offense does not deny any of the defendants due process of law. 322Mo 234, 14SW(2d)628.

1205-2⅚-New. Accused has constitutional right to demand nature and cause of accusation against lien. 23AlaA452, 126S887.

1205-5 35 OhA311, 172NE401; 117 Or 466, 242P440.

1205-6½-New. Statutory regulation of a plea of not guilty by reason of insanity does not deny due process. 206Cal 35, 273P767.

1205-8 165Ga44, 139SE812 (presumption and rebuttal thereof); 142Va577, 128SE633, 635 [quotCJ]. [g] **Abolition of privilege against self-incrimination** is not violation of due process clause. 242NY13, 150NE585.

1205-9 142Va577, 128SE633, 635 [quot CJ].

1206-10 28F(2d)695; 168La204, 121S 744 (refusal to allow defendant to testify for codefendants); SD 227NW73; 142Va577, 128SE633, 635 [quotCJ].

1206-11 279US1, 49SCt215, 73Led575; CalA 278P252; 246Mich680, 225NW501.

1206-12 196 Ind608, 149NE166.

1206-13 169Ga515, 151SE23; 196 Ind 608, 149NE166; 141Wash638; 251P 875; Wash 286P81.

1206-14 196 Ind608, 149NE166.

1206-15 100TexCr295, 273SW582; Va 154SE598.

1206-18½-New. Due process clause would not be violated by abolition of rule against self-incrimination. 242NY 13, 150NE585.

1206-18⅓-New. Similarly as to immunity against search and seizure without warrant in so far as it relates to use of evidence so obtained. 242NY13, 150NE 585.

1206-18¼-New. Conviction without sufficient evidence under statute is denial of due process of law. 274US380, 47 SCt655, 71Led1108.

1206-18⅓-New. A voluntary statement in the nature of a confession, made to a government agent, is admissible without evidence that the government waived privilege, the facts and name of declarant being matters of general notoriety. Mass 165NE457.

1207-20 21AlaA352, 108S351; 94CalA 628, 271P765. [f] **Right to counsel.**– 117 Oh114, 157NE488, 54ALR1220. [g] **Forcing defendant to trial** on day of arrest despite counsel's statement that preparation was impossible held violation of his constitutional rights. 298Pa 169, 148A73.

1207-21 35F(2d)689; 204Cal 470, 268P 909.

1207-22½-New. or refusing more time to go to trial. 23F(2d)235.

1207-26 [a] **State may limit to ten challenges** on each of two indictments tried together. 270US424, 46SCt333, 70 Led662.

1207-36½-New. , refusal of second continuance not amounting to abuse of discretion. 190NC810, 130SE848.

1207-36¼-New. Refusal to hear evidence of judge's prejudice on request to remove case triable without jury is denial of due process. 118 Oh487, 161NE 532.

1207-38 270US424, 70Led662, 46SCt 333 (state could authorize whole story connected with two murders to be brought out at trial, though two indictments were involved); 41F(2d)538.

1207-40 135Misc842, 241NYS641; Tex CivA 8SW(2d)741 (judge held not disqualified so as to render conviction denial of due process). [b] (3) Trial under protection of state militia called to protect defendant from unlawful violence held not denial of due process of law. 20F(2d)906.

1207-41 196 Ind570, 148NE195.

1207-43½-New. Failure to exclude solicitor's remark in argument to the jury that defendant did not put friends on the witness stand has been held to violate the right to due process of law. 21AlaA352, 108S351.

1207-43⅓-New. Statute providing that failure to demur to indictment waives objections has been held constitutional. 203 Iowa333, 210NW934, 212NW550.

1207-43¼-New. Trial before a magistrate whose fees and costs depend on conviction is denial of due process. 273 US510, 47SCt437, 71Led749, 50ALR 1243.

1207-43⅙-New. Trying defendant at a single trial before one jury for more than one infamous crime and imposing separate punishment is not unconstitutional. 16F(2d)921.

1207-43⅙-New. Unenforced announcement that public would be excluded during murder trial is not denial of due process of law. 277US81, 48SCt468, 72 Led793.

1207-43⅐-New. Record containing daily entries showing all parties and counsel present during trial for murder is held compliance with due process of law. 277 US81, 48SCt468, 72Led793.

1207-43⅛-New. That the trial judge had direct and substantial pecuniary interest in imposition of sentence is held denial of due process. 20F(2d)912.

1207-43⅑-New. Trial before a magistrate where fees and costs depend on conviction is denial of due process. 26 OhNPNS368.

1208-45 27Hawaii844; 168La958, 123S 639, 67ALR1447(2dcase); 119 Oh349, 164NE359; Wyo 252P14, 16 [citCJ].

1208-51½-New. The fact that violation of a municipal ordinance is also an indictable offense does not prevent a summary trial without a jury for violation of such ordinance. 165Minn150, 206NW 51.

1208-53 272US312, 47SCt103, 71Led 270, 48ALR1102.

1208-54 272US312, 47SCt103, 71Led 270, 48ALR1102.

1208-56 See also 162Ga627, 134SE448.

1209-65 272US312, 47SCt103, 71Led 270, 48ALR1102.

1209-67 251Mich187, 231NW95. See also 194NC271, 139SE436.

1209-67½-New. A statute requiring juries to prescribe punishment in counties of between sixty and seventy thousand is not a denial of due process of law. 166Ga539, 144SE6.

1209-68 93Fla590, 112S87.

1209-69 Cal 288P769.

1209-74½-New. Statute indicating place of execution held not violative of due process. 164Ga204, 138SE206.

1209-74⅓-New. Due process is not denied by order of execution, after affirmance of conviction in capital case, without resentence. 198Cal 601, 246P802.

1209-74¼-New. Probation statutes have been sustained as against objection that they attempt to cause the probationer to serve an antecedent sentence for the commission of an alleged subsequent offense without any provision for any legal proceeding or trial to determine his guilt or innocence of the second offense. 162Ga327, 133SE843.

1209-74⅓-New. Execution for murder held lawful despite unexpired sentence. 273US589, 47SCt504, 71Led790.

1209-74⅙-New. Sentence to insane ward of penitentiary is not denial of due process under the state law. 146 Wash202, 262P970.

1209-76 117 Oh102, 157NE388; 36 Wyo 111, 253P14, 16 [citCJ]. [b] **Time for filing bill of exceptions** may be regulated by statute and made applicable to pending cases without violating constitutional guaranty. 117 Oh102, 157NE 388.

1210-81 201Cal 474, 259P47.

1210-83 See also 36Wyo 111, 253P14.

1210-85½-New. , or permits a warden arbitrarily to deny a prisoner in the penitentiary a private interview with counsel to prepare an appeal. 117 Oh 114, 157NE488, 54ALR1220.

1210-89 Mo 30SW(2d)750 (denial by trial judge's successor).

1210-91 255Mass369, 151NE839.

1210-96 274US392, 47SCt630, 71Led 1115.

1210-1 Iowa 229NW205.

1210-2 151Miss398, 118S184, 60ALR 1325.

1211-8 TexCivA 291SW950.

1211-10½-New. A statute, authorizing sterilization of mental defectives and requiring notice of time and hearing by personal service on the defective and relatives or the person with whom he resides, giving an opportunity to defend and the right of appeal, has been held to require due process of law. 231Mich 409, 204NW140.

1211-17 Cal 288P769.

1212-24 279US797, 49SCt507, 73Led 963; 39F(2d)366 (chose in action); 323 Ill 246, 154NE112; 126Misc829, 215 NYS159. See also 27F(2d)262 (private property). [b] **It is property,** and not its original cost, of which owner may not be deprived without due process. 6F(2d)243. [c] **Existence of property** must be shown. NJCir 150A363. [d] **Injunction decree has been held not to create vested right** subject to protection. 298Pa487, 148A699, 68ALR1172.

1212-29 [b] **Statute permitting wife after divorcing husband** to dispose of property does not violate due process as to husband though his curtesy is destroyed. 298Pa33, 148A37.

1212-30½-New. A chose in action is "property," within the protection of the constitution, providing that no person shall be deprived of his property without due process of law, and which denies to congress power to transfer property from one to another, directly or indirectly. 29F(2d)597.

1212-35½-New. railroad property, 202 Iowa579, 210NW787, 50ALR139.

1212-40½-New. the security obtained by levy of an attachment. 71CalA204, 234P903.

1212-42 [1926] AC299. [1926] 1 DomLR840, [1926] 1WestWkly398. See also Utah 292P194.

1212-43 323 Ill 246, 154NE112; 126 Misc829, 215NYS159; 128Misc863, 220 NYS349. [a] **Unauthorized franchise.**– 169La122, 124S308.

1212-46½-New. employee's right of access to employing market, 260Mass45, 157NE82, 52ALR1125.

1212-46⅓-New. right to pursue any lawful business, 97Fla710, 122S225.

1213-50 278US116, 49SCt50, 73Led 210; Fla 128S4; 126Me537, 140A382 (to use and derive profit from land); TexCivA 10SW(2d)151; TexCivA 27 SW(2d)885.

1213-52 [a] **Owner's right to fix price** at which his property shall be sold or used is inherent attribute of property. Mont 293P294.

1213-53 11F(2d)887.

1213-54 320 Ill 382, 151NE250.

1213-56½-New. or to practice medicine, 162Ga246, 134SE42.

1213-57½-New. or to operate a motor vehicle, 47RI 258, 131A641.

1213-58½-New. or to maintain gasoline pumps on sidewalks; 26 OhA87, 159NE492.

1213-62 99Vt265, 132A40.

1213-70 214Ala565, 108S456, 47ALR 270.
1213-73½-New. A statute repealing or amending the charter of a charitable corporation by excluding members from voting for trustees and vesting rights in existing board has been held not to take property without due process of law. 128Misc476, 219NYS505.
1213-73⅓-New. Private property devoted to public use ceases to be private and is subject to public regulation. 14 F(2d)257.
1213-73¼-New. Statute authorizing state entomologist to order destruction of infected cedar trees held not to deny due process of law because of provision for petition of freeholders. 14 F(2d)341.
1213-73⅓-New. Judgment of affirmance by intermediate appellate court is not property right after higher appellate court having jurisdiction compels reinstatement of appeal. 13F(2d)723.
1213-75 80Colo 465, 253P465, 475 [quotCJ]; 160Ga657, 129SE38; 316Mo 524, 296SW90.
1214-76 80Colo 465, 253P465, 475 [quotCJ]. [a] **If manifest purpose of act abolishing office is removal of officer** on merely colorable charges it is unconstitutional. 156Tenn539, 3SW(2d) 660.
1214-77 80Colo 465, 253P465, 475 [quotCJ]; 111Conn634, 151A171; 156 Tenn443, 3SW(2d)164.
1214-78 [c] **There is no vested right in pension,** and statute authorizing inquiry into validity thereof is held not unconstitutional. 326 Ill 579, 158NE 220, 54ALR940.
1214-81½-New. A statute requiring a court clerk to pay over to the county treasurer fees belonging to other persons which have not been called for within one year is constitutional. 129 Kan806, 284P367.
1214-82 US 12F(2d)938.
1214-83 US 12F(2d)938.
1214-87 274US651, 47SCt669, 71L ed 1279; 14F(2d)257; 35F(2d)193 (removal of oysters); 38F(2d)950; 47 Ida 74, 272P707; 328 Ill 552, 160NE206; 202 Iowa1019, 210NW139; Mass 167NE 303; NH 146A159; 23 OhA33, 155NE 166; 155Tenn70, 290SW608; 99Vt265, 132A40. [c] **Resort to court of justice** is not in all cases required by due process of law. 95Fla901, 116S870. [d] **Zoning Law** does not take property without due process. 164La564, 114S 159.
1214-88 31F(2d)448.
1214-89 274US651, 47SCt669, 71L ed 1279; 16F(2d)639; 126Me537, 140A 382; 133Misc907, 234NYS708; 155Tenn 70, 290SW608; 99Vt265, 132A40. [d] **Radio broadcasting licenses.**–36F(2d) 111; 36F(2d)115.
1215-90 155Tenn70, 290SW608.
1215-91 121 Okl 51, 247P390; 155Tenn 70, 290SW608. [c] **Authorizing construction of logging road across highway by owner of lands on both sides thereof** does not take or damage property of other owners along highway. 174Minn305, 219NW172.
1215-92 126Me537, 140A382; 127Me 110, 141A699; 79Mont314, 257P1007, 56 ALR872.
1215-93 267US552, 45SCt441, 69L ed 785; 273US418, 47SCt426, 71L ed718, 58ALR1236; 79Mont314, 257P1007, 56 ALR872; 129Misc845, 223NYS470.
1215-94 131Misc451, 227NYS120 (though congress not forbidden to impair obligation of contracts).
1215-96 7F(2d)715; 28F(2d)825; CalA 292P988. [b] **Zoning ordinance amendment changing classification of area** from commercial to residential may be void as to those purchasing prior to amendment. 339 Ill 315, 171NE289.
1215-97 Fla 128S4 (zoning ordinance held arbitrary and unreasonable); Tex CommnA 12SW(2d)976.
1216-98 129Misc845, 223NYS470.
1216-3 [a] (8) Forbidding use of highways to motor vehicles competing with trolleys. 99Vt265, 132A40.
1216-6½-New. acts providing for establishment of drainage districts; 155 Tenn590, 296SW354.
1216-7½-New. an act requiring persons to furnish wagons and teams for county road service under which such persons are required to supply bed for hauling gravel; 155Tenn364, 293SW 757.
1216-18½-New. act providing for equitable division of funds and debts of transferred school districts. 113 OhSt 466, 149NE634.
1216-22½-New. an act authorizing municipalities having population in excess of specified number to regulate use of land so that commercial may be separated from residential districts; 155Tenn70, 290SW608.
1217-23½-New. an act providing for transfer to the state comptroller of funds of defunct insurance companies, 133Misc464, 232NYS489.
1217-29½-New. an act amending the charter of a corporation so as to provide for election of trustees by other trustees, instead of by members, 250NY 103, 164NE871.
1217-29⅓-New. an act providing for special assessments for local improvements in counties of seventy five thousand or more inhabitants, and prescribing that a petition for an improvement shall be filed and signed by the majority of resident property owners liable to taxation therefor; Mo 19SW(2d)891.
1217-30½-New. ; refusal of city to carry out discriminatory contract; 233 Ky709, 26SW(2d)539.
1217-30⅓-New. statute prohibiting aid to school district not levying prescribed tax for maintenance; TexCivA 25SW (2d)215.
1217-30¼-New. a statute prohibiting fishing with nets, traps, or seines; 281 US261, 50SCt296, 74L ed840.
1217-30½-New. an act authorizing zoning regulations and regulations passed pursuant thereto; 110Conn92, 147A294.
1217-30⅙-New. , an act relating to dower rights of a widow; 327 Ill 214, 158NE475.
1217-30⅐-New. , an act prohibiting property owners from setting certain fires during the summer season without permission from state officials. 47 Ida 74, 272P707.
1217-30⅛-New. An act providing that title to property sold under judgment by default after service by publication and to purchaser in good faith is not affected by successful defense in subsequent proceedings by defendant. 191 NC166, 131SE648, 44ALR610.
1217-30⅑-New. That public service duty requires expenditure of capital for supplying facilities does not constitute taking property without due process. 13F(2d)510.
1217-30 1/10-New. an act, making unpaid installments of soldiers war risk insurance payable to the soldier's estate after the death of the surviving beneficiary, does not violate due process. 222Ky713, 2SW(2d)395.
1217-30 1/11-New. Statute authorizing retirement of corporate stock is held valid in view of adequate assurance of payment of value. 261Mass523, 159NE 55.
1217-30 1/12-New. A statute authorizing the sale of corporate property is held valid in view of provisions for exchange of shares or payment for shares of nonassenting stockholders. 261Mass556, 159NE70.
1217-30 1/13-New. A statute authorizing detachment of territory from a school district is not denial of due process. 197Wis284, 221NW860.
1217-30 1/14-New. Repeal by fraternal benefit society of by-laws adding benefits does not violate due process clause. 338 Ill 441, 170NE735.
1217-30 1/15-New. A statute requiring any person killing a bovine animal to preserve the hide unchanged and unmutilated for thirty days for inspection is not a violation of due process. 34 NM405, 281P481.
1217-30 1/16-New. Establishment of minimum altitude as respects aircraft. 41 F(2d)929.
1217-30 1/17-New. Denying applicant for building permit right to erect building higher than other owners in district. Ill 172NE710.
1217-31½-New. an act providing for reserving from distribution money to pay contingent or unliquidated claim against decedent's estate; 223NYS470.
1217-34½-New. a provision requiring the owner to furnish feed for a team in an act requiring persons to furnish wagons and teams for county road service; 155Tenn364, 293SW757.
1217-34⅓-New. an act prohibiting a cemetery from barring the erection of headstones approved by the government for soldiers' graves; 334 Ill 555, 166NE112.
1217-34¼-New. legislative appropriation to reimburse depositors for losses sustained in banks; Nebr 231NW703.
1217-35½-New. Act authorizing oil and gas leases on certain public lands has been held not violative of the right of the lessee to purchase under prior statutes in case the land was sold. 267 US415, 45SCt312, 69L ed689.
1217-35⅓-New. , or which fixes rules governing boundaries of lands on streams. 163Ga867, 137SE56.
1217-35¼-New. Appointment of a board of water engineers is not violation of due process. TexCivA 295SW 649.
1217-35⅕-New. When a right is extinguished by the happening of a condition to which it has always been subject, there is no deprivation of property without due process of law. 164La729, 114S633.
1217-35⅙-New. An act giving the divorced wife property in her possession after judgment is one of limitation and not a denial of due process. 130Misc 701, 225NYS426.
1217-35⅐-New. An act declaring provisions in employment contract whereby either party undertakes not to become member of labor union is void. Mass 171NE234.
1217-35⅛-New. In absence of adjudication as person non compos mentis, court cannot deprive person of control of property against his will or invalidate his gift. NJCh 151A274.
1217-36 [e] **Mutual benefit brotherhood's** contract right to lawful administration of properties is not negatived by this constitutional provision. 214 Ala565, 108S456.
1217-37 322Mo 1086, 18SW(2d)30, 67 ALR41.
1217-38 [b] **Valid acts of municipality not impairing property rights.**–NJSup 150A777.
1217-40 16F(2d)401; 33F(2d)318; 126 Misc829, 215NYS159. [a] **Where railroad violated terms of federal grant of land** by refusing to sell to settlers at stipulated price per acre, statute revesting title in United States to all lands not sold prior to July 1, 1913 and requiring accounting of all receipts from land grantor does not violate constitutional rights. 8F(2d)645.
1218-42 16F(2d)401; 126Misc829, 215 NYS159.
1218-49½-New. Grant of state lands.–13F(2d)878.
1218-52 11F(2d)887.
1219-61 274US387, 47SCt595, 71L ed 1112.
1219-67 235Mich344, 209NW177 (statute held valid).
1219-70 235Mich344, 209NW177.
1220-82 50RI 288, 146A777, 66ALR 1553. [a] **In North Dakota.**–49ND248, 191NW485.
1220-85 271US40, 46SCt384, 70L ed 818; 281US362, 50SCt299, 74L ed904, 68ALR434; 33F(2d)753; 34F(2d)308; 203Cal 306, 265P246; Fla 118S360; 323 Ill 427, 154NE198; 284Pa455, 131A265.
1220-86 217AppDiv67, 216NYS215; 141 Okl 36, 284P65.
1220-87 17F(2d)125; 91Fla824, 108S 679, 688 [citCJ]; 197 Ind457, 151NE 333; 217AppDiv67, 216NYS215; Utah 263P78 (opportunity to be heard). [b] (2) Where statute gives superintendent of banks right to collect claims of insolvent bank without remedy to stock-

holders or creditors on refusal, it has been held that latter are denied due process. 219Ala638, 123871. (3) Denying right of foreign life insurance company to remove to federal court on pain of revocation of authority to do business in state has been held unconstitutional. 197NC337, 148SE439.

1221-88 323 Ill 427, 154NE198; 326 Ill 372, 158NE118, 55ALR196; 201 Iowa 579, 207NW769.

1221-91 33F(2d)753; 227AppDiv90, 237NYS110.

1221-92 273US269, 47SCt353, 71L ed 639; 43F(2d)98; 203Cal 306, 265P246; 103Conn65, 130A289; Mass 172NE232; 151Miss734, 118S425; 251NY127, 167 NE194.

1222-93 273US269, 47SCt353, 71L ed 639; 203Cal 306, 265P246; 332 Ill 316, 163NE707; Ill 172NE47. [a] **Erroneous decision does not deprive unsuccessful party** of his property without due process of law. 196 Ind570, 148NE195.

1222-94 167La1042, 120S770(2dcase); 253NY382, 171NE579, 69ALR809; 284 Pa455, 131A265.

1222-95 273US119, 47SCt308, 71L ed 569; 284Pa455, 131A265.

1222-96½-New. It is justified in passing any reasonable legislation designed to prevent delay in the administration of justice and to bring the litigation to a speedy conclusion. 265Mass358, 164 NE82.

1222-97 273US119, 47SCt308, 71L ed 569.

1223-99½-New. In performing its judicial function, the court should be careful to keep within the constitutional limits of its own power and proceed by due course of law. 89Fla361, 104S577.

1223-99¼-New. Statute rendering usury statute ineffective as to contracts executed before effective date as applied to pending action violates due process clause. 43F(2d)724.

1223-2 35F(2d)823; 82Colo 456, 261P 1 (injunction against carrier engaging in intra-state business without certificate of convenience and necessity); 233 Ky734, 26SW(2d)1039; TexCivA 273 SW874. [a] (3) Order for appointment in proceedings instituted without notice or opportunity for hearing denies due process and is void, so that response of creditors or stockholders to order to show cause will not validate it. 31F(2d)556. (4) Due process requires advance notice to mortgagee of proceeding for appointment of receiver for mortgagor. 154SC154, 151SE452. [c] **Statute prohibiting injunctions in labor disputes** has been held to be deprivation of property rights if construed to prevent injunctions against picketing where interference causes substantial reduction in owner's business. 119Kan713, 241P 459.

1223-4 39F(2d)318.

1223-8½-New. The right of a judgment creditor of an insolvent railway to due process on the issue as to whether the receiver shall continue to operate the railroad and as to priority of operating expenses is not satisfied by giving the creditor a hearing on the issue whether priority shall be ordered as to expenses already incurred without any authorizing an order therefor. 202 Iowa579, 210NW787, 50ALR139.

1223-13 48Nev198, 228P617.

1224-21 277US29, 48SCt422, 72L ed 768; 98Fla627, 125S2; 164Ga350, 138 SE670; Ga 154SE775; 165La1012, 116 S491; 151Miss398, 118S184, 60ALR1325 (proceedings for commitment of delinquent children); 119 Or141, 248P358; 131SC462, 128SE722 (opportunity for hearing on charge of violating ordinance under which board of health acted satisfies due process of law). See also 80 Colo 465, 253P465. [a] **Mother's Pension Fund Act** is not unconstitutional as taking county funds without due process by permitting ex parte informal application by indigent mother, where funds are not county funds but are provided pursuant to legislative authority. 152Tenn217, 276SW867. [b] **Requiring father of bastard child to pay for mother's support and expenses of childbirth or be committed to jail for default** is not unconstitutional. 121 Oh393, 169 NE301(2dcase).

1224-25 208Cal 42, 280P124; 45 Ida 676, 266P665; Mass 167NE749; Nev 292P291. [a] **Disciplinary proceedings against attorney** on petition simply directing attention to attorney's disbarment in federal court held valid. Mass 167NE749

1224-26 235Mich344, 209NW177.

1224-30½-New. for nunc pro tunc order to record order appointing a guardian of an insane person as of the date before the guardian's sale of the ward's property, 98Fla103, 122S222.

1224-33 128Misc630, 219NYS662. [b] **Appointment of guardian to receive fund of incompetent.-Md** 149A446.

1224-34 13F(2d)673; 115Tex82, 273 SW813, 40ALR900 (summary order to bank to pay over money to receiver is not due process).

1224-37 135Misc151, 238NYS197.

1224-41½-New. , and for the revocation of physician's license by medical board according to statutory procedure. 103Conn65, 130A289.

1224-42 103Conn65, 130A289.

1224-45½-New. The holder of a mechanic's lien is not entitled to personal notice of a sale of the property under a power of sale contained in the deed of trust securing the superior lien of the vendor. TexCivA 118SW(2d)541.

1224-47½-New. Statute providing for declaratory judgment is not unconstitutional as denying due process of law since all elements of due process are present. 284Pa455, 131A265.

1224-47½-New. An order requiring the production of books for inspection in a suit is a violation of due process where no safeguards are provided against the general investigation of the party's records. 329 Ill 612, 161NE137.

1224-47¼-New. Failure of a referee on reexamination to determine the reasonableness of an attorney's fee in accordance with Bankruptcy Act, to decide matter on oral testimony, is not a failure of due process of law. 30F(2d) 607.

1224-47½-New. Detention of petitioner's wife in the county hospital for the insane under an order in proceeding before a legal tribunal is made on due process of law. NJCh 145A459(2dcase).

1224-47¼-New. A court fixing the fee and enforcing the lien of an attorney in a summary proceeding does not violate due process. 320Mo 870, 8SW(2d) 998.

1224-47½-New. Retroactive application of a statute, to permit a complaint to be brought against fathers of illegitimate children born to married women as well as single women does not deprive the father of a child born before passage of the act of due process of law. 50Ri 71, 145A102.

1225-49 [a] **As regards foreign contracts** made in a state recognizing contract limitation as valid, statute making contract limitations of less than two years void does not deny due process of law. TexCivA 8SW(2d)354.

1225-51 Nebr 233NW458 (continuance); TexCommnA 15SW(2d)1028(2d case) (applied to foreign contract).

1225-54 Miss 130S486.

1225-56 220Ala380, 125S392.

1225-59 152Md594, 137A350.

1225-60 145Wash101, 258P1039.

1225-61 145Wash101, 258P1039.

1225-62½-New. Statute prohibiting stipulations in contract reducing time to sue to period less than two years is void as denying due process. 281US397, 50SCt338, 74L ed926.

1225-69 273US119, 47SCt353, 71L ed 639; 253NY382, 171NE579, 69ALR809.

1225-70 258Mass133, 154NE549; 143 Va310, 130SE516, 51ALR855.

1226-71 21AlaA241, 108S62; 91Fla770, 108S820, 51ALR731; 326 Ill 372, 158 NE118, 55ALR196; 143Va310, 130SE 516, 51ALR855 (lawful jurisdiction).

1226-72 254Mass569, 151NE63, 46ALR 563; 240NY379, 148NE556, 40ALR792 (statute, allowing foreign administrators and executors to be substituted for deceased defendant in actions in personam, held unconstitutional.

1226-77 240NY379, 148NE556, 40ALR 792; 254NY328, 172NE524. See also 124Kan97, 258P295.

1226-86 52ND231, 202NW391 [citCJ].

1226-89½-New. or, in a proceeding to liquidate a bank, in the county in which the state capital is located. 52ND231, 202NW391.

1227-94½-New. A statute permitting action against a foreign corporation in any county in the state has been held unconstitutional. 274US490, 47SCt678, 71L ed1165.

1227-95 28F(2d)195; 317 Ill 625, 148 NE384. But see 196Wis125, 218NW193.

1227-96 227AppDiv160, 237NYS162.

1227-98½-New. or a guardian ad litem to represent an insane person, 54ND753, 210NW525.

1227-99½-New. or authorizing the receiver to recover double liability of stockholders for the benefit of creditors, 32Ariz407, 259P670, 55ALR1059.

1227-1½-New. Since the unsuccessful bidder at a sale of properties of a public charitable trust has no property right in a trust fund, he is not deprived of due process protection by the court adjudging that the attorney-general alone has the power to institute suit to set aside the sale. 321Mo 235, 11SW 278, 62ALR858.

1227-1¼-New. Statute authorizing joinder of insurance carrier with employer is constitutional. NJSup 151A 446.

1227-5 30F(2d)436. See also 167La 1032, 120S767(1stcase).

1227-6 196Cal 414, 238P687; 91Fla 770, 108S820, 51ALR731; 211Ky799, 278SW121 (divorce); 251NY588, 168NE 438(1stcase); 191NC166, 131SE648, 44 ALR610. [f] **Law presumes that owner of res in court's jurisdiction** keeps in touch with his property, and that he will be informed if it is imperiled. 211 Ky799, 278SW121. [g] **All terms of statute respecting service by publication** must be strictly pursued. 154Miss 481, 122S535.

1227-7 243NY80, 152NE472.

1227-8 295Pa390, 145A430.

1227-9 100NJEq24, 134A904.

1227-11½-New. A statute providing for proceedings via executiva contradictorily with the surviving widow in community alone in enforcing a mortgage importing confession of judgment on community property, does not lack due process of law. 167La1042, 120S770(2d case).

1227-12 220Ky504, 295SW457; Md 149 A547 (suits against nonresidents growing out of automobile accidents). See also 225AppDiv403, 233NYS368. But see 206 Iowa1187, 221NW840; NJSup 129A738.

1227-13 40F(2d)727; 177Minn90, 224 NW694 (statute held constitutional); 155Tenn601, 296SW353. See also Ind 172NE124.

1227-13½-New. A law authorizing action against a nonresident without personal service is valid. 253Mass478, 149 NE122.

1227-13⅓-New. Law authorizing substituted service of process on nonresidents using state highways in actions for damages resulting from use held constitutional. Minn 231NW714.

1227-14½-New. A statute providing that nonresidents operating automobiles in the state without a state license make the secretary of the state an agent for acceptance of process in a civil suit by a resident arising out of an accident in the state has been held valid. 108NJL 130, 134A727.

1227-14⅓-New. Service of process on a nonresident by the mailing of a registered letter has been held valid under the statute. 274US352, 47SCt632, 71 L ed1091.

1227-14¼-New. But see 131Misc618, 227NYS109 (holding New Jersey law invalid as failing to provide for notification of suit to defendant).

1228-16 271US40, 46SCt384, 70L ed 818; 276US13, 48SCt259, 72L ed446, 57 ALR1230; 281US362, 50SCt299, 74L ed 904, 68ALR434; 13F(2d)673; 24F(2d) 1007; 28F(2d)493; 38F(2d)665; 21 AlaA241, 108S62; 203Cal 238, 263P

1009; 91Fla770, 108S820, 51ALR731; 91Fla815, 109S468; 326 Ill 372, 158NE 118, 55ALR196; 339 Ill 162, 171NE186; 339 Ill 540, 171NE632; 201 Iowa579, 207NW769; 202 Iowa579, 210NW787, 50ALR139; 204 Iowa892, 216NW6; Mass 171NE672; 75Mont147, 242P959; 196NC284, 145SE563; 289Pa307, 137A601; Utah 279P612; Utah 290P950; 99Vt453, 134A606; 143Va310, 130SE516, 51ALR855. See also 31F(2d)556. But see Va 150SE413. [b] In Georgia.–271US632, 46SCt591, 70L ed1123.

1229-17 201 Iowa947, 208NW511; 76Mont305, 247P162; 289Pa307, 137A601. [a] **Where legislature creates special tax district,** fixes basis for taxation, and declares that improvements authorized are for benefit of property owners, question of necessity of notice is concluded. 137SC496, 135SE538.

1229-19 289Pa307, 137A601.

1229-20 13F(2d)673; 76Mont305, 247P162; 289Pa307, 137A601. [a] **Proceedings of board of appeals to vary zoning regulations** require due notice to interested parties, as property rights are involved. 128Misc67, 217NYS593.

1229-21 128Misc67, 217NYS593; 289Pa307, 137A601.

1229-22 76Mont305, 247P162.

1229-23 76Mont305, 247P162.

1229-24 281US643, 50SCt434, 74L ed1088; 68CalA297, 228P1055; Nebr 228NW369.

1229-25 99Vt453, 134A606.

1229-27½-New. Notice and opportunity for hearing are not essential to validity of legislative enactment. 76Mont305, 247P162.

1229-27⅓-New. but nevertheless such legislation may be invalid, violative of fourteenth amendment because arbitrary, unjust, and unreasonable. 76Mont305, 247P162.

1229-28 203Cal306, 265P246; 265Mass135, 163NE893; 239Mich437, 214NW412; 167Minn458, 209NW638 (court in pending judicial ditch proceedings may be authorized to audit claims without notice to county). [a] **Original notice whereby jurisdiction is acquired and not notice of time when jurisdiction will be exercised** is what is required. 203Cal306, 265P246.

1229-29 [a] **Judgment based on cross complaint** to which nonappearing defendants were not made parties and with which they were not served is without due process, where it purports to take defendants' lands. 89CalA375, 265P260.

1230-31½-New. Statute requiring claimant of lands adverse to state to file claim within fixed time or be barred from asserting his claim is unconstitutional in that it might arbitrarily deprive owner in possession of title without notice of state's claim. 215AppDiv97, 214NYS104.

1230-31⅓-New. Where a party waives notice of an order overruling his demurrer and giving him time to answer, he cannot claim that due process of law was denied him by entry of a default judgment without notice on his failure to answer within the time allowed. 203Cal306, 265P246.

1230-32 91Fla824, 108S679, 688 [cit CJ]; 339 Ill 540, 171NE632; 115Nebr801, 215NW167; 226AppDiv480, 236NYS89.

1230-33 91Fla824, 108S679, 688 [cit CJ]; 93Fla1018, 114S373; 115Nebr801, 215NW167.

1230-34 91Fla824, 108S679, 688 [cit CJ]; 134Misc253, 236NYS96. [a] **Statute relating to service on associations** held constitutional as to association and members named. CalA 293P117.

1230-36 226AppDiv480, 236NYS89.

1230-38 274US123, 47SCt511, 71L ed959; 115Nebr801, 215NW167 (service by mail); 130Misc631, 225NYS185. [b] **Due scheduling of debt** imparts sufficient notice of bankruptcy proceedings. TexCivA 78SW(2d)686.

1231-39 274US123, 47SCt511, 71L ed959; 91Fla770, 108S820, 51ALR731; 96Fla327, 118S60; 220Ky822, 295SW1023; Nebr 209NW273; 243NY80, 152NE472; 249NY122, 163NE124; 191NC166, 131SE648, 44ALR610. [a] (1) 91Fla824, 108S679. [b] **Notice of character of suit** must be stated in order for publication to constitute due process. 91Fla815, 109S468.

1231-41 35F(2d)232; 91Fla824, 108S679, 688 [citCJ].

1232-47 115Nebr801, 215NW167. [d] **Charter provision requiring written claim against city within thirty days** after damage is unconstitutional if applicable to limit recovery for continuous damage from nuisance. 230AppDiv612, 245NYS680.

1232-49 91Fla815, 109S468; 201 Iowa516, 207NW778; 201 Iowa770, 208NW519; 115Nebr801, 215NW167.

1232-50 93Fla1018, 114S373.

1232-59½-New. Where no provision for notice is made by statute, the court may prescribe a notice which is reasonably calculated to give the interested party knowledge of the proceedings and an opportunity to be heard. 201 Iowa516, 207NW778.

1232-59⅓-New. A statute authorizing abatement of liquor nuisances and closing of premises for one year, is not unconstitutional because containing no provision for adequate notice to the owner of a building, so that he may take proper steps to abate the nuisance of which complaint is made. 265Mass135, 163NE893.

1233-68½-New. or amendment to conform to proof; 260Mass265, 157NE532.

1233-76 Kan 290P3.

1233-78½-New. Defendant is not deprived of due process by not being permitted to amend answer on reversal of judgment of dismissal and remand for decision on merits. 159La431, 105S421.

1233-78⅓-New. Denial of right to present and argue motion for judgment on pleadings is not denial of due process. CalA 236P482.

1233-79 17F(2d)507; 170Ga585, 154SE149 (proof beyond reasonable doubt); 250Mich273, 230NW170; 104WVa140, 139SE641.

1233-83 99CalA401, 278P898(2dcase); TexCommnA 276SW647; TexCommnA 291SW868, 871 [citCJ]; TexCommnA 291SW871, 872 [citCJ], 51ALR1135.

1233-84 268US178, 45SCt470, 69L ed904 (presumptions from possession of opium); 268US258, 45SCt490, 69L ed944 (presumption of intent to avoid escheat in conveyances for benefit of aliens ineligible to citizenship); 273US119, 47SCt308, 71L ed569; 181Ark780, 27SW(2d)992; 75CalA323, 242P887; 167Ga22, 144SE905; 45 Ida427, 262P881, 56ALR317; 104WVa140, 139SE641. But see 279US639, 49SCt445, 73L ed884. [a] **Statutes held denial of due process.**–279US1, 49SCt215, 73L ed575 (presumption of fraud as to every insolvency of bank). [b] **Statute creating presumption of negligence of railroad** in case of damage is not violative of due process. 38F(2d)963.

1233-85 273US119, 47SCt308, 71L ed569; Cal 286P1025; 177Minn398, 225NW435.

1233-86 332 Ill 316, 163NE707; 150Miss621, 116S287.

1234-91 7F(2d)532; 119Kan844, 241P433; Wash 262P129; 100WVa543, 131SE11. [a] (1) 167Ga22, 144SE905. (2) Charge raising presumption of negligence against railroad on proof of injury to person by locomotive held violative of due process. 40GaA184, 149SE101.

1234-92 279US639, 49SCt445, 73L ed884; 119Kan844, 241P433, 435, 436 [cit CJ]. But see 119Kan844, 241P433.

1234-93 But see CalA 290P637.

1234-94 Ga 155SE484; 119Kan844, 241P433, 435 [citCJ]; TexCommnA 291SW871, 872 [citCJ], 51ALR1135; 100WVa543, 131SE11. See TexCivA 8SW(2d)217. [a] **Banking law** providing that, upon failure of any officer or director to examine the bank, he shall be held to have had knowledge of insolvency of bank or that it was in failing condition at time deposits were unlawfully received, provides rule of substantive law and does not violate constitutional guaranty. 119Kan844, 241P433.

1234-97½-New. A ruling that evidence is inadmissible, although based on an unconstitutional statute, does not constitute a denial of due process of law where the counsel are afforded an opportunity to be heard on the question of admissibility. 196Wis242, 219NW197.

1234-98 326 Ill 372, 158NE118, 55ALR196; 227AppDiv90, 237NYS110; 289Pa307, 137A601, 602 [citCJ].

1234-99 326 Ill 372, 158NE118, 55ALR196; 14PaDist&Co 220.

1234-1 26SUS276, 45SCt491, 69L ed953 (statute giving right of appeal from decision of board of commissioners in highway condemnation proceedings is not invalid because not providing for hearing before appraisers or county commissioners); 271US70, 46SCt384, 70L ed818; 281US362, 50SCt299, 74L ed904, 68ALR434; 7F(2d)408; 13F(2d)673; 38F(2d)665; 21AlaA241, 108S62; Fla 118S360; 98Fla627, 125S2; 317 Ill625, 148NE384; 339 Ill 540, 171NE632; 201 Iowa579, 207NW769; 204 Iowa892, 216NW6; Mass 171NE672; 250Mich273, 230NW170 (in re summary judgments); 76Mont305, 247P162 (that administrative order is so arbitrary, unjust, and unreasonable as to be deprivation of property in violation of due process under federal and state constitutional provisions); 220AppDiv549, 222NYS96; 227AppDiv90, 237NYS110; 196NC284, 145SE563; 289Pa307, 137A601; TexCivA 273SW874; Utah 279P612; 99Vt453, 134A606; 143Va310, 130SE516, 51ALR855; 37Wyo299, 261P122. [a] (4) Highway condemnation statute giving right of appeal from determination of commissioners held not invalid as providing no public record by which time for appeal could be determined, but providing for publication of all proceedings of commissioners. 268US276, 45SCt491, 69L ed953. (5) Arbitration law waiving right to be heard on merits is unconstitutional. 227AppDiv790, 237NYS110.

1236-2 13F(2d)673; ND 230NW9; TexCommnA 291SW868.

1236-3 98Fla627, 125S2.

1236-10 103Conn65, 130A289; 206 Iowa1070, 221NW809; 14PaDist&Co 220.

1236-11 36F(2d)789.

1236-13 TexCivA 22SW(2d)151. See also Wash 291P1077.

1237-15½-New. A hearing on an application to charge operating loss of railroad during receivership to corpus after loss sustained does not serve purpose of opportunity to resist incurring of loss in advance. 202 Iowa579, 210NW787.

1237-23 [e] **Overruling of demurrer to evidence** followed by judgment against defendant is not violation of due process. 102WVa215, 136SE30.

1237-24 TexCivA 4SW(2d)1023.

1237-29 See also Wis 231NW155.

1237-30 129Misc908, 223NYS395.

1238-42 269US163, 46SCt50, 70L ed213.

1238-42½-New. That a verdict for principal of notes did not allow interest claimed is not the taking of property without due process. 315Mo1091, 287SW610.

1238-42⅓-New. Admission of incompetent evidence is not denial of due process. Wis 231NW155.

1238-48 273US269, 47SCt353, 71L ed639; 203Cal306, 265P246; 149Wash489, 271P589.

1238-50 271US323, 46SCt521, 70L ed969; 203Cal306, 265P246; 332 Ill316, 163NE707; 298Pa487, 148A699, 68ALR1172.

1238-50½-New. A defendant is not deprived of due process by the holding that it was liable for maliciously preventing one from securing employment in its stockyards. 164Minn457, 206NW396.

1238-50⅓-New. Decree requiring defendant railroad company to perform its obligations under agreement granting it or its predecessor in title an easement in plaintiff's property of which defendant had full knowledge is not in violation of due process. 143Va722, 129SE499.

1238-50¼-New. Nor because a property owner is dissatisfied with the ruling of a tribunal in matters of law in a

proceeding for taking his property. 102 CalA299, 283P298.

1238–54½–New. , or against a person liable over, although nominally not a party. 203 Iowa1152, 211NW423.

1238–54¼–New. Rendition of judgment by judge taking office after evidence was taken stenographically at trial is not denial of due process of law. 165 La1101, 116S572.

1238–55 215Ala660, 111S913; 83Mont 282, 272P543(2dcase); 131Misc85, 226 NYS263; 123 Or501, 262P946.

1238–56 226AppDiv56, 234NYS202.

1238–58½–New. General verdict against both insured and insurer is not invalid as depriving insurer of property without due process of law. 46RI 417, 129 A339.

1238–58⅓–New. Allowing damages against members of a debtor's committee nunc pro tunc as of the date of the original petition, seeking only information relative to reorganization, is held contrary to due process. 19F(2d)903.

1238–58¼–New. A judgment in a suit by a creditor against a nonresident wife of a debtor to have real property fraudulently conveyed to her seized and sold is held due process of law, where there was no personal obligation imposed on her except for costs. 287Pa61, 135A 210.

1238–58⅕–New. The question whether a foreign corporation was doing business within a state so as to give a court jurisdiction to render judgment against it is not one of local law or statutory construction but one of due process of law. 316Mo 812, 293SW760.

1238–58⅙–New. Where such corporation directly raised the question of the court's jurisdiction and permitted an adverse decision to stand unreversed without appeal, it is not deprived of due process of law. 316Mo 812, 293SW 760.

1238–58⅐–New. Action on a foreign judgment, rendered against the sole defendant and a corporation jointly by a court of competent jurisdiction after a full trial at which defendant was present, does not affect any rights secured to him under the Fourteenth Amendment. 264Mass414, 163NE63.

1238–58⅛–New. A judgment denying the assignee of a tax bill recovery against an abutting owner on the ground that the contract was void does not deny due process. 320Mo 1047, 10 SW(2d)923.

1238–58⅑–New. A foreign judgment against a United States citizen and resident, based on service of notice in the state of residence, is not enforceable there. 226AppDiv56, 234NYS202.

1238–58 1/10–New. A decree abating a common-law nuisance by requiring removal of buildings of a lessee of a railroad right of way does not deprive the lessee of property without due process of law, where the evidence justifies findings that the buildings constitute a public nuisance. MoA 17SW(2d)616.

1238–58 1/11–New. Judgment denying relief in equity for failure first to seek administrative relief violates due process where administrative relief was never available. 261US673, 50SCt451, 74L ed1107.

1238–58 1/12–New. Summary judgment law, applicable to actions on contracts, judgment, and statutes, does not deny due process. 250Mich273, 230NW170.

1238–61 196 Ind570, 148NE195 (judgment setting aside default judgment does not deprive plaintiff of his property without due process of law).

1239–69 NJ 137A430.

1239–73½–New. A statute authorizing the superintendent of banks to issue an execution against a stockholder of an insolvent bank for the amount of his liability as a stockholder assessed as necessary to pay off depositors has been held unconstitutional. 162Ga718, 134SE781.

1239–75 272US533, 47SCt186, 71L ed 394; 281US74, 50SCt228, 74L ed710, 66 ALR1460(2dcase); 21AlaA241, 108S62; 326 Ill 372, 158NE118, 55ALR196; 206 Iowa488, 221NW223; Iowa 227NW136; Iowa 229NW205; 126Kan607; 307Mo 137, 270SW339; 318Mo 1031, 4SW(2d) 1072; 220AppDiv549, 222NYS96; 129 Misc2, 221NYS302; 115 OhSt654, 55NE 484; 33 OklCr5, 242P290; 132 Or660, 285P815; TexCommnA 14SW(2d)1022. [c] **Absence of statute providing for appellate review of order or judgment in habeas corpus** is held not denial of due process. 21AlaA241, 108S62. [d] **Denial of right to appeal from order directing confinement or killing of dog attacking sheep** is held not violative of due process. 129Misc2, 221NYS302. [e] **Appellate review is matter of grace.**–272US533, 47SCt186, 71L ed394.

1239–76 265Mass358, 164NE82; 295Pa 390, 145A430 (time of appeal); 197Wis 237, 221NW766.

1239–76½–New. and making appeal an exclusive method of review in certain cases, 73Mont451, 236P1076.

1239–77 30F(2d)144. [b] **Statute permitting appellate court** to order entry of judgment for defendant, whose motion for directed verdict was denied in trial court, does not violate due process clause of Fourteenth Amendment. 264 Mass337, 162NE689.

1239–78 271US208, 46SCt491, 70L ed 908 (denial of review of question whether finding of industrial commission is against preponderance of evidence, where election to take benefit of act is optional).

1239–78½–New. Due process is not violated by action of the appellate court in requiring consent remittitur as condition for affirmance and refusal of new trial. 114 OhA560, 151NE805.

1239–78⅓–New. A statute which permits the appellate court to order judgment for appellant, where his motion for a directed verdict has been denied by the trial court, has been upheld. 264 Mass337, 162NE689.

1239–79 Ark 31SW(2d)739 (general statutes granting appeals). [b] 148Miss 890, 115S394.

1239–79½–New. Setting aside a verdict and granting a new trial as to one of issues only does not constitute a denial of due process of law. 101Vt514, 144A 856.

1239–81 But see 149Miss738, 115S885.

1239–86½–New. Suspending the operation of an injunction pending an appeal from a decree granting the same does not constitute a deprivation of property without due process of law. 197Cal 649, 242P725.

1239–86⅓–New. Statute creating county courts which confers on circuit judges power to try appeals in vacation without notice is unconstitutional. 144 Miss125, 109S129.

1239–86¼–New. One allowed to perfect appeal, though not taking steps to perfect record in which testimony could be included, is not denied due process. 250 Mich556, 231NW76.

1239–88 See also 228Ky168, 14SW(2d) 405.

1240–90 159La236, 105S302.

1240–91 4F(2d)835. See also 159La 236, 105S302.

1240–96½–New. Where remedy for motion to retax is available, party is not denied due process by taxation of costs against him without notice or opportunity to be heard. 161Ga711, 132SE 547.

1240–97 273US103, 47SCt302, 71L ed 560; 47 Ida74, 272P707; 323 Ill 427, 154NE198; 118 Or260, 246P741; 289Pa 307, 137A601. [c] 30F(2d)984. [d] **Errors in decision alone** do not establish want of due process, in deportation proceedings. 273US103, 47 SCt302, 71L ed560.

1240–98 207 Iowa1094, 224NW95(2d case); 76Mont305, 247P162; 289Pa307, 137A601.

1240–99 273US103, 47SCt302, 71L ed 560; 19F(2d)671; 38F(2d)511 (action of public service commission); 201 Iowa 579, 207NW769 (delegation to inferior tribunal of authority to revoke medical licenses is not denial of due process); 250NY136, 164NE882; 114 OhSt658, 151 NE760 (matters of taxation). [b] **Statute for sexual sterilization of defectives conferring jurisdiction after notice on special board** to hear petitions under act held to comply with requirements of due process. 143Va310, 130SE516, 51ALR855.

1240–1 289Pa307, 137A601.

1240–3 97Fla749, 122S239.

1241–4 31F(2d)785; 92Fla515, 109S 442, 445 [citCJ]. See 132Misc449, 230 NYS86.

1241–5 47 Ida74, 272P707; 233Ky801, 26SW(2d)1045; 220AppDiv351, 222NYS 29. [d] **Refusal of immigration authorities to credit testimony of immigrant witness** may not be denial of due process. 39F(2d)895.

1241–6 13F(2d)673; 34F(2d)848; 201 Iowa579, 207NW769; 289Pa307, 137A 601. [a] 14F(2d)650; 47 Ida74, 272P 707; 201 Iowa579, 207NW769 (revocation of physician's license). [d] (1) See also 8F(2d)155.

1241–7 289Pa307, 137A601. [a] 289 Pa307, 137A601. [c] **Revocation of license to practice** medicine by state board of health without notice, not a violation of any constitutional rights. 103Conn65, 130A289. [d] **Absence of provision for notice, actual or constructive,** does not render statute, providing for seizure of property of absconding parents of children likely to become public charges and application to maintenance of such children invalid as against due process clause. 132Misc449, 230NYS86. [e] **Statute authorizing issuing warrant to seize absconder's** property on application of public welfare commissioner to prevent absconder's family becoming public charges held not unconstitutional because not providing for notice. 280US218, 50SCt94, 74L ed 378.

1241–10½–New. Matters usually classed as of judicial cognizance may be submitted for determination to administrative boards and commissions or other public officials, if provision is made for a judicial review. 114 OhSt658, 151NE 760.

1241–10¼–New. Meat inspection ordinance is held not void as providing for withdrawal of inspectors from establishment without notice or opportunity to be heard. 149Md648, 132A160.

1241–10¼–New. Denial of the right to counsel in a deportation proceeding held unconstitutional. 21F(2d)376.

1241–10⅕–New. A statute authorizing discharge of a teacher for cause by necessary implication requires notice to the teacher concerning the charge. Iowa 228NW585(3dcase).

1241–10⅙–New. A statute authorizing a board of directors of a school district to remove a teacher for cause is not unconstitutional as not affording due process of law, the right to discharge in accordance with statute being part of a teacher's contract. Iowa 228NW585(3d case).

1241–11 103Conn65, 130A289; 332 Ill 243, 163NE664; 114 OhSt658, 151NE 760; 146SC496, 144SE233. See also 278 US24, 49SCt69, 73L ed161, 62ALR805. But see 227AppDiv262, 237NYS465. [d] **Extent of review.**–317 Ill 482, 148NE250, 39ALR1257.

1241–12 278US24, 49SCt69, 73L ed161, 62ALR805; 213Ala50, 104S538 (appeal and trial de novo); Nebr 231NW840.

1241–13 323 Ill 427, 154NE198; 146SC 496, 144SE233. See also 147Miss695, 112S877. [a] **Law relating to buying and selling of foreign exchange** and authorizing auditor of public accounts to revoke or suspend licenses is held not denial of due process notwithstanding absence of provision for appeals or review by court. 323 Ill 427, 154NE198.

1242–19 273US119, 47SCt308, 71L ed 569; 140SC244, 138SE673.

1242–20½–New. One claiming property attached, giving bond to perform judgment, is held not deprived of property without due process by judgment on bond. 217Ky384, 289SW280.

1242–26 [a] **Statute making vessel liable** for treatment of diseased alien held valid. 269US304, 46SCt114, 70L ed281.

1242–32 277US88, 48SCt443, 72L ed796.

1242–32½–New. a statute providing a

depositor with a remedy against directors or officers of an insolvent bank who knowingly permit deposit; 319Mo 474, 5 SW(2d)50, 57ALR881.

1242–34½–New. A statute providing for withholding of money to pay claims against public contractors; 118Tex268, 14SW(2d)802.

1242–34¾–New. a statute authorizing recovery by the employer after award of compensation to an injured employee against the person liable for the injury; 160Tenn248, 23SW(2d)245.

1243–39½–New. A statute making school district liable for high school instruction of pupils from the district. 125Misc230, 211NYS413.

1243–39¼–New. Failure to provide a cause of action in favor of a wife for breach of marital obligations by the husband does not violate the constitutional guaranty. TexCivA 264SW529.

1243–39¼–New. A provision giving an insurance carrier paying an award to the state treasurer right of action against wrongdoer is not against due process. 128Misc626, 220NYS170.

1243–39⅓–New. An express company organized to take over the business of constituent companies is liable for claims against such companies, and enforcement of claims against the consolidated company is not a denial of due process. 143SC1, 141SE144.

1243–39⅓–New. A statute making the owner of an automobile liable for damages to third persons for the negligent operation by bailee does not violate due process. 205Iowa261, 215NW724, 61 ALR851.

1243–39½–New. A city ordinance giving to persons injured by blasting operations a right of action on the bond required to obtain permission to carry on such operations is not violative of due process. 322Mo 1050, 17SW(2d)977.

1243–39¾–New. Assessment against bank stockholders to make good impairment of capital stock is not a violation of due process. 169Ga115, 149SE645.

1243–41½–New. to require planking to be laid on bridges by one driving vehicle of certain weight over them as condition to recovery for damages resulting from bridge giving away. 120Kan598, 245P 100.

1243–43 337 Ill 70, 168NE895.

1243–55½–New. An ordinance making the owner of premises, irrespective of contract, liable to pay for water used by a tenant on the premises is a violation of due process, 148Va795, 139SE 508, 55ALR781.

1243–55⅓–New. notwithstanding a connection of the house with a municipal water system was necessary to the health of the occupants. 148Va795, 139 SE508, 55ALR781.

1243–55¼–New. A statute making compulsory allowance of interest in pending actions on claims for unliquidated damages for breach of contract is void. 225 AppDiv606, 233NYS503.

1243–57 219AppDiv444, 220NYS76.

1245–34 114Nebr438, 208NW139, 140 [citCJ].

1245–35 165US1, 17SCt243, 41L ed611; 169Ark552, 275SW896; 138Mo 242, 28 SW496.

1245–87½–New. A statute may make a railroad company liable for damages resulting from fire caused by derailment resulting from a latent defect in a car containing benzol. 34F(2d)70.

1246–99 272US465, 47SCt133, 71L ed 354.

1246–4 261Mass504, 159NE613, 61ALR 548.

1246–5 23F(2d)968; 89Fla224, 104S 593.

1246–6 272US465, 47SCt133, 71L ed354. [a] **Right to use alcohol for nonbeverage purposes** can be taken away only as penalty for wrongdoing to be tried and determined as other penalties are determined. 5F(2d)262.

1247–7 272US465, 47SCt133, 71L ed 354; Ark 318SW(2d)739; Mass 172NE 84; 135Misc151, 238NYS197 (enlarging equity jurisdiction to restrain and abate houses of prostitution is not violation of due process).

1247–10 26F(2d)706 (permitting civil suit to recover penalty after conviction does not deny due process).

1247–15 [b] (2) Other instances. 36F (2d)691; Ark 318SW(2d)739.

1248–23½–New. ; by a statute authorizing double damages in actions for unlawful detainer; 307Mo 160, 270SW 315.

1248–28½–New. Statute imposing penalty of fifty per cent for failure to pay industrial awards within ten days does not violate due process clause. 116 Okl 131, 244P44.

1248–29 [a] **Exacting demurrage** for detention of cars containing interstate shipments awaiting reconsignment without further notice than duly filed tariff held not denial of due process. 271US 259, 46SCt530, 70L ed934.

1248–29½–New. by a statute penalizing vendor selling deficient fertilizer or falsely branding it; 167Ga880, 147SE77.

1248–29⅓–New. by an ordinance authorizing condemnation of fire menaces and dangerous buildings, not affording owners opportunity to be heard; 227Ky 314, 12SW(2d)688.

1248–29¼–New. by a statute providing for abatement of liquor nuisance and closing of premises; 265Mass135, 163 NE893.

1248–35½–New. Statute imposing penalties against corporation failing to mail financial statement on request does not deny due process. OhA 172NE670.

1249–38½–New. Statutory forfeiture of an innocent owner's or lienor's interest in a car used to violate liquor laws has been held valid. 272US465, 47SCt133, 71L ed354.

1249–38⅓–New. Statute imposing penalty for insurer's delay in paying loss is violative of due process. 38F(2d)557.

1249–38¼–New. A statute providing for forfeiture of automobiles used in illegal transportation of liquor is not unconstitutional for failure to provide for personal notice to owner. SD 229NW307.

1249–38⅙–New. Provision for penalty relating to suppression of nuisances has been held violative of due process. 230 AppDiv543, 245NYS95.

1249–40 173Ark837, 293SW738; 147 Miss335, 112S469, 53ALR88.

1249–48½–New. by statute giving priority to lien of repairer of automobile over lien of chattel mortgagee. 121Kan 113, 245P1013; 123Kan99, 254P399.

1249–56½–New. A tax lien may not be created without due process of law. 134 Misc810, 236NYS455.

1250–68½–New. State requiring surety company, in order to demand indemnity, so to stipulate in contract is invalid. 230Ky776, 20SW(2d)753 [overr 142Ky 361, 134SW481].

1251–77 [c] **Injunction** held not to amount to confiscation of property. 33 OhA287, 168NE757.

1251–79 267US493, 45SCt409, 69L ed 753 (order of state commission prohibiting discontinuance of switching service held not confiscatory).

1251–81½–New. Destruction of property in the exercise of police power is not without "due process." 27F(2d)478.

1251–81⅓–New. In a suit for condemnation for adulteration and misbranding, the government's taking of samples of medicines for testing does not deprive claimant of due process. 36F(2d)53.

1251–89 167La771, 120S290, 62ALR 1512.

1252–93 329 Ill 223, 160NE582; 170 Minn349, 212NW591.

1252–94 339 Ill 595, 171NE742.

1252–95 Conn 151A526; 329 Ill 223, 160NE582. [b] **Liquor lawfully possessed for home use** may be destroyed without compensation under a subsequent statute making such possession unlawful. 267US188, 45SCt264, 69L ed 568, 37ALR1378.

1252–96 267US188, 45SCt264, 69L ed 568, 37ALR1378 (statute, providing for seizure and destruction of liquor, lawfully acquired, but unlawfully possessed, without hearing or notice to possessor, does not violate due process clause).

1252–5 See also 276US272, 48SCt246, 72L ed568.

1252–5½–New. cedar trees constituting host plants for cedar rust, 22F(2d)341.

1252–10½–New. Provisions of Illinois Motor Vehicle Law, requiring person operating taxicab to file liability insurance policy, or bond, either with corporate or individual surety, are not confiscatory. 317 Ill 132, 147NE797.

1252–10⅓–New. A statute providing that on filing of a complaint by the state fire marshal against the owner of a building constituting an alleged fire hazard, the judge shall issue an order to show cause is not unconstitutional as not requiring service on the owner. 84 Mont478, 276P958.

1252–10¼–New. A statute providing that, on filing of complaint against the owner of an alleged fire hazard, the judge shall issue an order to show cause requiring the owner to appear at a time specified not less than five nor more than ten days from the date of the order, provides for reasonable notice. 84 Mont478, 276P958.

1252–10⅙–New. On proof that a structure is unsafe, a city may order its demolition. 168La984, 123S648.

1252–10⅛–New. Ordinance zoning lot on one side of main highway as residential while opposite side was given over to business purposes held confiscatory. 299Pa402, 149A639.

1252–10⅐–New. Failure of a statute providing for the eradication of apple rust to provide for a hearing before destruction of cedar trees constituting the host plant of apple rust does not render it unconstitutional. 108WVa242, 150SE 725.

1252–86–91 US 51SCt56; 17F(2d)857; 199 Ind95, 155NE465, 50ALR1518; 75 Mont493, 244P298; 285Pa102, 131A728. [i] **Statute granting right of eminent domain to electric company** owning major part of head and volume of usable flow held not denial of equal protection of laws nor taking of property without due process. 125Misc269, 210NYS748. [h] **Law providing free school books to school children** is not taking of property for private purpose. 281US370, 50 SCt335, 74L ed913.

1253–92 197Wis59, 221NW399.

1253–94½–New. When a railroad has performed its duty to the public, its property is protected by the guaranty that its property shall not be taken for a private use. 197Wis59, 221NW399.

1253–96 335 Ill 352, 167NE101, 68ALR 350.

1255–27 272US295, 47SCt88, 71L ed243; 273US407, 47SCt393, 71L ed709; 274US 284, 47SCt639, 71L ed1049; 280US409, 50SCt164, 74L ed516; 281US146, 50SCt 310, 74L ed775; 13F(2d)227; 16F(2d) 256; 21F(2d)333; 24F(2d)989; 33F (2d)724 (inclusion of tenancies by entireties in transfer inheritance tax held valid); 37F(2d)231; 38F(2d)155 (income tax); 38F(2d)381 (transfer tax); 38F(2d)403 (facilitating presentation of claims for refund of taxes unlawfully assessed); 42F(2d)144; 42F(2d)177; 43F(2d)679 (statute preventing recovery of tax paid after limitations); 30 Ariz307, 246P770; Ariz 288P1034 (creation of state board of tax survey); 208 Cal 359, 281P389; CalA 285P896(2d case) (leasehold interest); Fla 129S904 (2dcase); 162Ga641, 135SE84; 162Ga 818, 135SE68; 213Ky445, 281SW472; 165La443, 115S650; 169La646, 125S 841; 148Md330, 129A370; 254Mass232, 150NE234; Mass 166NE729; 319Mo 799, 6SW(2d)907; 78Mont62, 252P876; 118Nebr136, 223NW667; 127Misc211, 216NYS321; NC 153SE850; 287Pa59, 134A441; 137SC288, 135SE153; 137SC 496, 135SE538 (act creating highway district and levying assessment held not invalid for failure to provide hearing on assessment); 144SC234, 142SE509; TexCivA 275SW137; TexCivA 285SW 345; TexCivA 3SW(2d)947; Va 155SE 823; 136Wash285, 239P840; 144Wash 320, 257P851. But see 33F(2d)1018. [i] **Method of valuation resulting in excessive rating** of intangible property is held invalid. 274US76, 47SCt542, 71 L ed934. [j] **Failure to give notice** of increased assessment ordered by state board does not violate due process clause. 319Mo 445, 3SW(2d)1021. [k] **Necessity of jurisdiction.**–280US204, 50 SCt98, 74L ed371, 65ALR1000. [l] **Construction of income tax law.**–36F(2d) 208. [m] **Act imposing oil taxes gradu-**

ated according to gravity is not arbitrary. 281US146, 50SCt310, 74L ed775. [n] **Failure to deduct back taxes from** amount of annual appropriation is not depriving of due process. **Mass** 168NE 73. [o] **Enforcement of taxes against nonresident by suit within taxing state** is not denial of due process. **NM** 289 P801. [p] **Statute authorizing constructive service** in action to foreclose tax certificates of sale held not without due process. 226AppDiv480, 236NYS89. [q] **Method of assessment.–Wis** 231NW 865.

1255–28 274US259, 47SCt607, 71L ed 1037; 280US124, 50SCt46, 74L ed226; 16F(2d)970. But see 35F(2d)43.

1255–29 273US407, 47SCt393, 71L ed 709; 282US19, 51SCt15; 16F(2d)545; 208Cal 359, 281P389; **Mass** 166NE575 (corporation liquidation tax); 213App Div677, 211NYS85; 161Tenn236, 30SW (2d)268; **Wis** 232NW770(2dcase).

1256–30 213AppDiv677, 211NYS85; 161Tenn236, 30SW(2d)268.

1256–31½–New. Taxing personal property of deceased situated in another state and taxed there is a violation of the due process clause of the constitution. 284Pa1, 130A240.

1256–31½–New. In Canada indirect taxes are ultra vires and unconstitutional. **Can** [1927] 2DomLR70.

1256–36 196Cal 43, 235P1004 (act of 1921 incorporating public utility districts in unincorporated territory inhabitants of which are subject to tax by district for municipal purposes only held constitutional); 200Cal 277, 252P 1043; 166Ga232, 143SE119 (act authorizing pavement on petition by fifty-one per cent of abutting owners not denial of due process); 128Kan100, 276P77; 117Tex342, 292SW164. See also 26 F(2d)753; 137Misc341, 242NYS142. [e] **Qualifications of signers of initiatory petition for creation of irrigation district** rest in discretion of legislature and requirement that signers shall be resident freeholders does not violate due process provision of federal or state constitution. 31NM7, 240P482. [f] **Statute held not unconstitutional** because it requires city to do more than constitution commands, as condition for granting right of eminent domain in connection with city's water supply. 227App Div345, 238NYS55.

1256–37 160La325, 107S126; **Wis** 232 NW770(2dcase).

1256–45 30F(2d)700 (act held valid).

1256–46 274US188, 47SCt563, 71L ed 992; 128Me531, 149A299; **TexCivA** 289 SW202.

1256–47 32F(2d)748; **CalA** 285P414; 335Ill 299, 167NE106; 217Ky575, 290 SW320.

1256–47½–New. Authority to county to take over and keep up certain highway and levy tax therefor declared not invalid as taking property without due process of law. 190NC128, 129SE154.

1256–47¼–New. Ordinances of municipality creating improvement districts, under statutes which give full opportunity to owners to be heard, are not in conflict with the Fourteenth Amendment. 170Ark1160, 282SW971.

1256–47¼–New. Relocation of bridge without compensation is held not to deprive nonabutting property owners of property without due process. 152Md 566, 137A358.

1256–47½–New. Curative statutes. Statute curing defects in organization of irrigation district and issuance of its bonds held not violation of due process. 86Mont595, 285P932.

1257–48 15F(2d)637; 229Ky189, 16SW (2d)1036 (land damaged instead of benefited); 319Mo 316, 4SW(2d)467.

1257–51 170Ga690, 154SE268.

1257–53 229Ky598, 17SW(2d)703; 147 Miss244, 111S818, 56ALR926.

1257–54 [a] **Procedure for creation of local improvement district for improving county roads** held to afford due process. **Fla** 127S486(2dcase).

1257–57 319Mo 316, 4SW(2d)467; 139 SC188, 137SE597.

1257–60½–New. consolidation of school districts. 146Miss56, 111S831.

1257–61 167Ga579, 146SE462; 125Kan 88, 262P1032.

1257–63 [a] **Property owner has no right to notice or hearing** as to whether his lands may be included within the limits of a quasi-municipal corporation and thus subjected to burden of general tax nor on question of benefits to his land before it can be included within boundaries of public utility district created under act of 1921. 196Cal 43, 235P1004. [b] **Organization of district** without notice thereof is held not violative of due process clause. 147Miss 244, 111S818, 56ALR926.

1257–64 147Miss244, 111S818, 56ALR 926.

1257–64½–New. Indian land patent resting in owner of water and ditch rights free of taxation may not be impaired by statute imposing on owner proportionate share of construction costs of irrigation and such statute violates constitutional prohibition. 12 F(2d)938.

1257–65 19F(2d)927; **TexCivA** 275SW 137.

1257–67 [1] **Assessment of street railroad** for paving between tracks under statute is not denial of due process. 213 Ala269, 104S517, 41ALR872. [m] **Omission of lands from benefit district** will not void tax bill under due process clause. 318Mo 192, 300SW1088.

1258–68 274US188, 47SCt563, 71L ed 992; 169Ark610, 276SW367; 221Ky604, 299SW587. [c] **Evidence held not to show arbitrary or unwarranted abuse of powers** by including defendant's land in drainage district. 168La969, 123S 643.

1258–70 22F(2d)681; 36F(2d)554 (assessment not invalid where not unjust, arbitrary, or discriminatory); 31NM384, 247P310.

1258–71 28F(2d)825 (some substantial relation must exist between legislation and objects to be attained); **Cal** 293P 57; 92CalA69, 268P388; 95Fla530, 116 S449; 98Fla430, 436, 123S830(2dcase); 238Mich381, 212NW950. [b] **Construction of assessment.–TexCivA** 30SW(2d) 655.

1258–72 15F(2d)637; 36F(2d)650; 238 Mich381, 212NW950; 172Minn554, 216 NW318 (assessment without benefit); 155Tenn382, 293SW533. Contra 147 Miss244, 111S818, 56ALR926.

1259–73 39F(2d)884.

1259–74 35F(2d)331.

1259–78 167Ga222, 145SE84; 217Ky 575, 290SW320; 166La1059, 118S134; 169La1103, 126S673; **Mo** 24SW(2d)106; 31NM384, 247P310; 155Tenn382, 293 SW533.

1260–80½–New. A law probably resulting in disproportionate tax with regard to benefit is held unsupportable on the complaint of one so taxed. 203 **Iowa** 298, 211NW375.

1260–80½–New. A statute authorizing a tax on land of proposed drainage district for paying expenses without any determination as to benefits is in violation of due process. 43 **Ida**703, 255P 638.

1260–80¼–New. Statute exempting street railway from paving assessment does not deny due process of law to city. **Ga** 155SE34.

1260–83 274US123, 47SCt511, 71L ed 959; 219Ala465, 122S448; 215Ky139, 284SW1027; 83Mont282, 272P543(2d case); 192NC161, 134SE403; 126 **Or** 417, 270P502; **TexCivA** 300SW246; 144Wash585, 258P505; **Wis** 232NW770 (2dcase). [e] **Weed removal cost** may not be assessed on property unless resolution describes property sufficiently to constitute notice. **CalA** 284P479.

1260–84 269US396, 46SCt141, 70L ed 330; 219Ala465, 122S448; 220Ala639, 127S210; 43 **Ida**703, 255P638; 246 Mich517, 224NW619; 165Minn22, 207 NW322 (opportunity given by right to resist proceeding to enforce tax sufficient without requirement of notice); 83 Mont282, 272P543(2dcase); 249NY398, 164NE330; 134Misc810, 236NYS455; 192NC161, 134SE403; 126 **Or**417, 270P 502; **TexCivA** 8SW(2d)319; 101Vt391, 143A677; 144Wash585, 258P505. [g] **Road district statute** is held unconstitutional for failure to provide for hearing on question of benefits. 269US396, 46 SCt141, 70L ed330. [h] 97CalA769, 276 P600.

1261–87 28F(2d)56; **TexCommnA** 12 SW(2d)134.

1261–88 274US123, 47SCt511, 71L ed 959; 13F(2d)1007; 146Va1, 135SE693.

1261–89 30F(2d)700; 162Ga534, 134SE 152, 47ALR233; 336Ill 606, 168NE630; 123Kan430, 255P1105; 177Minn598, 225 NW909; 116Nebr862, 219NW394; 123 Or345, 262P248; 153Tenn469, 284SW 372; **TexCivA** 296SW974; 101Vt391, 143A677. [d] 276US567, 48SCt396, 72 L ed703; 19F(2d)927; 198Cal 308, 245 P164; 123Kan430, 255P1105; 215Ky 139, 284SW1027; 152Md343, 136A754; 31NM7, 240P482; 126 Or417, 270P502; 51SD336, 213NW952. [g] **Railroad company not availing itself of notice** given at a time when it was exempt from assessments for local improvements cannot, after revocation of exemption, complain that it did not have opportunity to be heard. 165Minn8, 205 NW609.

1261–90 199Wis85, 225NW873.

1262–91 309Mo 683, 274SW802.

1262–93 123 Or345, 262P248.

1262–97½–New. Where the legislature itself determines the manner of apportionment of a tax or assessment the lack of notice to the landowner does not deprive him of his property without due process of law. 31NM7, 240P482.

1262–97½–New. Where a statute provides that an assessment to pay interest and retire bonds of an irrigation district shall be based on a rate per acre basis so that the apportionment is a mere matter of mathematical calculation, no notice to landowners and hearing is necessary. 31NM7, 240P482.

1262–99 157Miss336, 128S91; 123 **Or** 345, 262P248.

1262–5 148Miss7, 113S908.

1262–6 198Cal 753, 247P897; 148Miss 7, 113S908; 199Wis85, 225NW873.

1263–9 13F(2d)1007; 40F(2d)216; 198Cal 477, 245P1092; 164Ga721, 139SE 521; 319Mo 316, 4SW(2d)467; **Mo** 19 SW(2d)891; 153Tenn469, 284SW372. [c] 19F(2d)927; 30F(2d)700; 175Ark 834, 1SW(2d)1; 198Cal 308, 245P164; 164Ga721, 139SE521; **Mo** 19SW(2d)891; 31NM7, 240P482; 34NM346, 282P1; **TexCivA** 275SW716; **TexCivA** 8SW(2d) 198. [e] **Sufficient opportunity for a hearing.–198Cal** 753, 247P897. [f] **Property owner is entitled to hearing** regarding matters other than those of which action by legislature establishing districts is conclusive. **Mo** 19SW (2d)891.

1263–12 48 **Ida**77, 279P412(1stcase); 123 **Or**345, 262P248 (with privilege of offering proof on appeal).

1263–15 319Mo 316, 4SW(2d)467; 51 SD336, 213NW952. See also 26F(2d) 753.

1263–16 51SD336, 213NW952.

1263–17 **Mo** 19SW(2d)891 (where district established by legislature).

1263–23 But see **Mo** 256SW798.

1263–27½–New. Where legislature fixes boundaries of district and finds all property therein is benefitted, the property owners are not entitled to hearing. 198Cal 477, 245P1092.

1264–29½–New. Where the right is provided for contest of an assessment and for its correction, setting of the hearing as to benefits after the levy of an assessment does not violate the due process of law provision of the constitution. **TexCivA** 275SW716.

1264–30 48 **Ida**65, 279P1095. But see 219Ala465, 122S448.

1264–32½–New. Limiting the time for right to a hearing after promulgation of an election result on a tax is not violation of due process. 27F(2d)766.

1264–34 316Mo 398, 289SW925, 930 [quotCJ]. See also **TexCivA** 4SW(2d) 213. [a] (1) **TexCr** 18W(2d)322.

1264–35 316Mo 398, 289SW925.

1264–36 316Mo 398, 289SW925, 930 [quotCJ].

1264–45 95Fla530, 116S449.

1264–46 84Colo 494, 271P629; **Fla** 129 S904; 166Ga232, 143SE119; 168Ga67, 146SE908; 45 **Ida**112, 261P244; 146 Miss56, 111S831; 147SC498, 145SE412; 116Tex299, 289SW381. [b] (3) Mississippi statute authorizing county superintendent to order election on proposal to issue bonds for road district on petition of electors does not deny due

process of law. 154Miss536, 121S826(2d case). [g] **Action of city in existence on first Monday of March, 1922** in levying assessment for year 1922 to pay bonds for special improvement district is not taking without due process of law, because district was not formed until after first Monday of March, 1922. 198Cal278, 245P178. [h] **Statutes held invalid.**–138SC468, 136SE891.

1265-47 45 Ida112, 261P244.

1265-47½-New. Withdrawal for assessment purposes of property acquired by a city after formation of an improvement district does not deprive bondholders of property without due process of law. 207Cal697, 280P360.

1265-48 274US175, 47SCt561, 71L ed982; Fla 129S904(2dcase).

1265-49 [b] **Due process shown.**–Cal289P850.

1265-51 119Oh54, 162NE268.

1265-52 But see TexCommnA 23SW(2d)325.

1265-61 274US603, 47SCt675, 71L ed1228, 53ALR1210; 35F(2d)657; 78Colo246, 242P47; 159La1016, 106S549; 53ND838, 208NW711; 117Oh382, 159NE365; 47RI387, 133A614; TexCivA 5SW(2d)561. [g] **Zoning regulations** are constitutional. 195Cal477, 234P381, 38ALR1479. [h] **Zoning ordinance** is not unconstitutional because vesting city council with power to determine whether permit shall be granted for construction of building within district other than as authorized in accordance with ordinance. Iowa 228NW870.

1265-62 [a] **Stores.**–161Ga769, 132SE66, 54ALR1001.

1266-67 195Cal477, 234P381, 38ALR1479; 221AppDiv773, 223NYS467; 53ND838, 208NW711; 23OhA33, 155NE166.

1266-69 53ND838, 208NW711.

1266-71 274US603, 47SCt675, 71L ed1228, 53ALR1210; 166La776, 117S827; 53ND838, 208NW711; 23OhA33, 155NE166.

1266-76½-New. Forbidding the erection of apartment houses in a restricted residential district has been held unconstitutional. 112OhSt654, 148NE842, 43ALR662.

1266-77 278US116, 49SCt50, 73L ed210 (philanthropic home).

1266-77½-New. A statute giving cities of a stated number of inhabitants or more power to regulate the height of buildings, the percentage of the lot that may be occupied, the density of population, the size of open spaces and the location and use of buildings has been held valid. 53ND838, 208NW711.

1266-78 91Fla241, 107S364; Ill172NE60; 166La566, 117S720; 247Mich127, 225NW595 (filing birth certificate); 291Pa216, 139A860; 47RI431, 133A812.

1266-79½-New. Laws for promoting or conserving the public health are not invalid because regulations are made effective without giving those affected opportunity to be heard on the question of necessity or propriety of adopting them. 166Minn498, 207NW639.

1267-83½-New. Legislature may authorize municipalities and counties to require persons to be vaccinated. 191NC643, 132SE792.

1267-90 88CalA691, 264P281 (removal by duly authorized persons only).

1267-92 120Oh500, 166NE583.

1267-5½-New. Sterilization of certain defectives held valid exercise of police power. 274US200, 47SCt584, 71L ed1000.

1267-6 273US119, 47SCt308, 71L ed569.

1268-8 23F(2d)719 (regulating gas company).

1268-20½-New. A statute permitting ouster of a foreign corporation in quo warranto proceedings by the attorney-general is not unconstitutional. 25F(2d)794.

1268-21 90Fla721, 106S576; 220AppDiv80, 221NYS129.

1268-22 220AppDiv80, 221NYS129.

1268-23 274US564, 47SCt727, 71L ed1204.

1268-24 92Fla1139, 111S281; 164Ga822, 139SE725; 220AppDiv80, 221NYS129; 117Tex34, 297SW206 (levee improvement district may, in exercise of police power, condemn railroad property for constructing levee without violating due process requirements).

1268-25 268US39, 45SCt412, 69L ed837 (basis for estimating operating cost of log traffic in a portion of the state of Washington held to be denial of due process of law); 276US182, 48SCt276, 72L ed523; 28F(2d)825 (requiring railroad to construct all of highway lying within its right of way); 89Fla224, 104S593; 164Ga822, 139SE725; 160La1028, 107S894; 76Mont305, 247P162; 146SC496, 144SE233; TexCivA 5SW(2d)542. See also 29F(2d)140.

1269-26 92Fla1139, 111S281.

1269-30½-New. Refusal to hear evidence to establish petitioner's right to review is denial of due process. 262Mass137, 159NE743, 56ALR784.

1269-33 220AppDiv80, 221NYS129. But see 271US303, 46SCt517, 70L ed850.

1269-40½-New. the erection of a new station. 148Va630, 139SE281.

1269-40⅓-New. the keeping of an agent at certain stations, 177Minn136, 225NW994.

1269-41 Cal288P775.

1269-41½-New. the receipt of baggage by terminal companies and issuance of train checks therefor, 163Ga897, 137SE556.

1269-41⅓-New. the construction of sheds for the use of passengers. 176Ark761, 4SW(2d)910.

1269-42 TexCivA 275SW111.

1269-44½-New. or flagmen 158Tenn407, 15SW(2d)1.

1269-46 53ND73, 204NW994. [f] **Continuance of interurban service.**–267US330, 45SCt249, 69L ed631.

1270-55 33F(2d)719.

1270-62½-New. or at other junction points, 53ND73, 204NW994.

1270-63 114Nebr438, 208NW139, 140[cit CJ].

1270-67 278US24, 49SCt69, 73L ed161, 62ALR805; 115Nebr727, 214NW746.

1270-67½-New. the removal of bridge piers from a street, 167La771, 120S290, 62ALR1512.

1271-77 270US287, 46SCt226, 70L ed590.

1271-87½-New. and "assigned car" regulation. 274US564, 47SCt727, 71L ed1204.

1271-93½-New. requiring a railroad to construct a crossing over a street railway later constructed by the city. 164La1033, 115S136.

1271-97½-New. ; and requiring commutation service over certain routes. 164Ga822, 139SE725.

1271-97⅓-New. and compelling a railway to restore certain trains. 146SC496, 144SE233.

1271-97¼-New. ; prohibiting operation of one-man cars. 37F(2d)910.

1272-3 73CalA268, 238P787, 793 [cit CJ].

1272-3½-New. Order of commissioners requiring railroad to construct spur without notice of hearing is violative of due process. 76Mont305, 247P162.

1272-18½-New. regulating contracts of a canal company appropriating and distributing water for irrigation; 279US125, 49SCt325, 73L ed637.

1272-19 25F(2d)988; 95Fla279, 116S23; 75Mont240, 243P1073; 83Mont483, 272P987.

1272-19½-New. regulating and licensing auto transportation companies, 24F(2d)226.

1272-20 320Ill605, 151NE675.

1272-20½-New. , or requiring street car company to pave between tracks. 274US387, 47SCt595, 71L ed1112.

1272-20¼-New. Regulating transportation for hire by motor vehicles. 170Ga873, 154SE439.

1272-21½-New. State statute limiting telephone rates was held confiscatory and unconstitutional. 5F(2d)77 (under facts).

1272-21¼-New. If rates fixed by legislature are so low as to be confiscatory, it is taking of property without due process of law. 5F(2d)77.

1272-21¼-New. Imposition of legitimate burdens is not invalid because street car company operates under unprofitable rate. 274US387, 47SCt595, 71L ed1112.

1272-21½-New. Depriving interstate motor bus transportation company of right to continue intra-state business does not deprive it of property without due process of law by lessening the value of motor vehicles. SD 228NW179.

1272-23 272US425, 47SCt122, 71L ed331; 273US119, 47SCt308, 71L ed569; 279US392, 49SCt372, 73L ed754; 16F(2d)639; 29F(2d)762, 49SCt342(8th case); 42F(2d)107; 43F(2d)154; 86Colo446, 282P1068; 36GaA457, 137SE124; 159La723, 106S252; 316Mo9, 289SW838; 321Mo58, 12SW(2d)742; 242NY330, 151NE637; 243NY423, 154NE298 [aff 127Misc683, 217NYS565]; 197NC740, 150SE624; 117Oh78, 157NE792; 118Oh25, 160NE473; 111TexCr233, 13SW(2d)93(2dcase); 99Vt265, 132A40; 143Va741, 129SE739; 104WVa44, 138SE737. See also 27F(2d)478. [f] **Requiring gasoline storage tanks** to be placed underground is valid exercise of police power. 27F(2d)478. [g] **Law forbidding unlawful combinations** of cotton ginners held not violative of due process provisions. 156Miss99, 125S710.

1273-24 Fla130S699; 113Nebr816, 205NW294. [c] **Absence of provision for notice to creditors** of corporation's application for permission to divide surplus capital does not deprive them of property without due process of law. 196Cal468, 238P703, 44ALR1.

1273-26 278US105, 49SCt57, 73L ed204; 36F(2d)397; 97Fla710, 122S225; 164Ga755, 139SE559, 55ALR230; 230Ky776, 20SW(2d)753; 134Misc652, 236NYS293; 228AppDiv420, 239NYS63. [c] **Act prohibiting use of shoddy** in manufacture of comfortables held invalid. 270US402, 46SCt320, 70L ed654. [d] **Act of Philippine legislature** prohibiting keeping of account books in any other language than English, Spanish, or a local dialect, as applied to Chinese merchants unable to speak, read, or understand such languages or dialects is invalid. 271US500, 46SCt619, 70L ed1059. [e] **Statute making unlawful issuance of coupons, checks, or tokens in payment of wages** of laborers held unconstitutional. 170La175, 127S592.

1273-26½-New. The fundamental right to engage in a business or occupation otherwise lawful and not inimical to the public welfare cannot be taken away without due process of law. 76CalA621, 245P447.

1273-31½-New. a business making small loans, 168Ga723, 149SE37.

1273-36 30F(2d)111.

1273-36½-New. animal racing, 167La511, 119S532.

1273-37 160La294, 107S115.

1273-37½-New. or regulating operation of busses on state highways. 273US45, 47SCt298, 71L ed530.

1273-38½ 82Colo574, 261P858 (dance hall).

1273-38½-New. real estate brokers, 97Fla710, 122S225.

1274-46 272US425, 47SCt122, 71L ed331; 273US414, 47SCt363, 71L ed714; 32F(2d)669 (veterinary medicine and surgery); Ga 154SE436; Mass 166NE558 (practicing optometry); 191NC643, 132SE792. [d] **State may restrict, by regulations,** practice in state hospitals to certain class of physicians, thus barring osteopaths. 273US414, 47SCt363, 71L ed714.

1274-47 23AlaA5, 120S140 (license); 70CalA129, 234P906; 191NC643, 132SE792.

1274-48 272US425, 47SCt122, 71L ed331; 213Ala170, 104S440 (requiring certificate of qualification); 162La681, 111S58; 191NC643, 132SE792.

1274-48½-New. chiropractics, 329Ill173, 160NE186.

1274-50 272US425, 47SCt122, 71L ed331; 191NC643, 132SE792; 151Wash654, 276P878 (limiting applicant to two examinations). [b] **Requiring diploma of dentist** from accredited dental college held valid regulation. 272US425, 47SCt122, 71L ed331.

1274-50½-New. accountancy, 191NC643, 132SE792.

1274-51 191NC643, 132SE792; 294Pa142, 144A97 (regulation held unreasonable and void).

1274-54 191NC643, 132SE792; TexCivA 48W(2d)592.

1274–57 191NC643, 132SE792.

1274–62 271US583, 46SCt605; 15F(2d) 881. [b] **Private carrier** cannot, against his will be converted into public carrier by legislative enactment. 271US583, 46 SCt605, 70L ed1101, 47ALR457.

1275–63 Minn 232NW517.

1275–64 162Ga246, 134SE42; 329 Ill 432, 160NE769.

1275–65 271US40, 46SCt384, 70L ed 818; 108Conn74, 142A473; Kan 289P 64; 316Mo 770, 293SW362.

1275–65½–New. The right to operate a cotton gin and collect tolls therefor, after a satisfactory showing of public necessity, is not a mere license, but a franchise granted by the state in consideration of the performance of a public service, and as such constitutes a property right within the protection of the Fourteenth Amendment. 278US515, 49SCt235, 73L ed483.

1275–65⅓–New. The legislature may not prohibit occupations unless they are detrimental to the public welfare. 40 Wyo 462, 278P542.

1275–66 21F(2d)440; 159La723, 106S 252; 128 Okl 17, 261P183; 115Nebr525, 213NW835; 116 Or141, 240P536; 155 Tenn70, 290SW608. [j] **Camping grounds.**–126Me537, 140A382. [k] **Drug stores.**–168La752, 123S314.

1275–68 Mo 24SW(2d)108.

1275–69 162Ga228, 133SE345; TexCr 28SW(2d)161. [d] **Requiring consent of neighboring owners** for permitting store in residence zone renders zoning ordinance violative of due process clauses. 337 Ill 507, 169NE220.

1275–73 316Mo 9, 289SW838; 290Pa 136, 138A497, 500 [citCJ], 53ALR1027; 144Wash429, 258P328.

1275–74 316Mo 9, 289SW838; 144Wash 429, 258P328.

1276–81 14F(2d)690; 98Vt508, 129A 303. [d] **Term involves something beyond "quasi-public" or "not strictly private"** significance. 273US418, 47SCt 426, 71L ed718, 58ALR1236. [e] **Legislative declaration that business is affected with public interest** is held not conclusive. 273US418, 47SCt426, 71L ed 718, 58ALR1236. [f] **Extent of regulation** varies with different kinds of business. 15F(2d)133. [g] **Sale of gasoline** is not business affected with public interest so as to authorize fixing of price. 278US235, 49SCt115, 73L ed287, 60ALR 596.

1276–82 167La674, 120S47; 149Md30, 129A884.

1276–88 22F(2d)993.

1276–92½–New. A statute, requiring every pharmacy to be owned by licensed pharmacists, and in case of corporations, associations, and copartnerships requiring all partners or members to be licensed pharmacists, except as to those already engaged in such business, has been held violative of the due process clause. 278US105, 49SCt57, 73L ed 204.

1276–2 [a] **Charge held erroneous.**–MoA 296SW249.

1277–3½–New. prohibit use of another's milk bottle having owner's name stamped thereon, 230AppDiv252, 243 NYS644.

1277–16½–New. The right to conduct a restaurant business cannot be taken away without due process of law. 76 CalA621, 245P447.

1277–16⅓–New. An ordinance prohibiting the sale of milk except in original containers is not invalid as denying due process of law. 195Wis148, 217NW703.

1277–22 220Ala4, 124S909 (statute held arbitrary and unreasonable).

1277–29 267US126, 45SCt320, 69L ed 538 (statute authorizing person injured to sue insurer under automobile liability policies in case of insolvency or bankruptcy of insured was held valid); 272US295, 47SCt88, 71L ed243; 105NJL 642, 146A370 (limiting agents' commissions); 154Wash269, 282P44.

1278–31 115Nebr801, 215NW167.

1278–38½–New. may provide for an insurer's direct liability on a policy of automobile liability insurance to a person injured; 193Wis179, 212NW289.

1278–39 165Minn330, 206NW646, 44 ALR1238.

1278–41 [a] **Statute suspending insurance company's license** if fees are paid nonresident agents for business within state held violative of due process. 270 US426, 46SCt331, 70L ed664.

1278–45 104WVa44, 138SE737. [a] **Act restricting taking gas** from wells is held not denial of due process because uncertain where uncertainty was due to technical subject matter. 162La781, 111 S162.

1278–53 16F(2d)639 [quot and cit entire section].

1278–54 159La723, 106S252; 179Minn 40, 228NW326 (publication and circulation of malicious, scandalous and defamatory newspaper).

1279–64 279US582, 49SCt430, 73L ed 856.

1279–71 93Fla415, 111S801, 52ALR51; 174Minn457, 219NW770, 773, 58ALR 607 [citCJ].

1279–75 164Ga529, 139SE46, 53ALR 933; Wyo 264P1023 (woolen articles). But see 134Misc652, 236NYS293.

1280–76 But see 43F(2d)154.

1280–78 73CalA548, 238P1089.

1280–79 191NC643, 132SE792; 187Wis 463, 204NW595. [a] **Statutes held unconstitutional.**–81CalA55, 253P187 (requiring broker's permit of person before he may sell his own securities where not issuer or underwriter).

1280–82½–New. Blue Sky Law has been held not unconstitutional as taking property without due process of law by interfering with right to labor and acquire property. 187Wis463, 204NW595.

1280–82⅓–New. , and that he may subpœna witnesses and conduct investigations of suspected violators. 129Misc 708, 222NYS552.

1280–82¼–New. A statute permitting a state officer to investigate fraudulent practices in the sale of securities and empowering him to compel dealers to furnish information is held constitutional. 127Misc683, 217NYS565; 128Misc 84, 218NYS57.

1280–90 274US344, 47SCt604, 71L ed 1085; 31F(2d)600; Ill 173NE274. [a] **State may fix higher rate than that fixed by private contract** where carrier holds itself out as common carrier. 275US207, 48SCt41.

1281–92 14F(2d)690. [h] **Statute limiting amount** of attorney's fees in presenting claim for war risk insurance is held not violative of due process clause. 269US93, 46SCt64.

1281–93 6F(2d)633; 317 Ill 278, 148NE 47; 167Minn311, 209NW10; Mo 30SW (2d)105 (irrespective of franchise); Mont 293P294 (maximum and minimum). [a] **Congress** may authorize president to fix price of coal, etc. 279 US253, 49SCt314, 73L ed688.

1281–94 272US576, 47SCt198, 71L ed 420; 274US344, 47SCt604, 71L ed1085; 7F(2d)192; 16F(2d)297; 44 Idal, 262P 863 (undervaluation of or failure to value water right owned by utility in fixing rates); 118Tex491, 18SW(2d)585 (fixes arbitrary standard). [d] **Denial by public service commission** of change of confiscatory rate is denial of due process of law. 26F(2d)912 [rev on other grounds US 49SCt282]. [e] **Public utility cannot be compelled** to render service without compensation. Mont 293P 294.

1282–95 37F(2d)938(2dcase) (franchise providing for determination of rate by state board held not to rebut claim that rates contravened due process). See also 282US74, 51SCt1. [a] **Gas company may be ordered** to extend mains warranted by present development, although maximum rate chargeable was confiscatory. 269US244, 46SCt83, 70L ed255.

1282–96 167Minn311, 209NW10.

1282–97½–New. An order eliminating interstate Pullman surcharge is held taking property without due process. 145Va62, 133SE883.

1282–97⅓–New. Prices of theater tickets on resale are not subject to regulation. 273US418, 47SCt426, 71L ed718, 58ALR1236.

1282–97¼–New. Fourteenth Amendment is no guaranty against competition, and no cause to attack statute fixing rates because aggregate collections thereunder are insufficient to yield reasonable profit to all engaged in business so regulated. 275US440, 48SCt174, 72L ed357.

1282–97⅕–New. Statute denying employment agencies right to charge fee for services is violation of due process. 39F(2d)198.

1282–2½–New. Failure specifically to provide for court review of rates fixed by commission is not denial of due process. 37F(2d)938(2dcase).

1282–2⅓–New. Provision for review by court is not conclusive that fixing of rate is not denial of due process. 37F (2d)938(2dcase).

1282–4 16F(2d)297. See also 154Wash 32, 280P739(1stcase). [a] (1) 26F(2d) 912 [rev on other grounds US 49SCt282] (rate held confiscatory). (2) In determining valuation, certain allowance for overheads, cost of financing, etc., held reasonable. 121 Oh507, 169NE575. [b] 155Md572, 142A870 [certiorari den 278 US567, 49SCt79, 73L ed510(8thcase)]; TexCivA 19SW(2d)583. [c] 272US576, 47SCt198, 71L ed420; 274US344, 47SCt 604, 71L ed1085; 280US234, 50SCt123, 74L ed390 (returning six and twenty-six hundredths per cent to street railroad); 16F(2d)297; 36F(2d)54 (return of less than six per cent); 42F(2d)899; 43F (2d)478. [d] **Rates unreasonable and void.**–267US359, 45SCt259, 69L ed656.

1282–6½–New. In determining reasonableness of rate, fair present value as compared to original cost must be taken so that owner whose property has appreciated in value may not be deprived of it without due process. 126Misc382, 212NYS639.

1282–11 See also 280US420, 50SCt220, 74L ed524.

1283–15 116 Or310, 241P50.

1283–16 116 Or310, 241P50.

1283–17 272US306, 47SCt86, 71L ed248; 337 Ill 100, 168NE904. [g] **In Oklahoma.**–269US385, 46SCt126, 128, 70L ed 322. [h] **Statute making criminal conduct designed to further strike for unlawful purpose** has been held valid. 272 US306, 47SCt86, 71L ed248.

1283–19 113 ObSt111, 148NE367.

1283–21 274US112, 47SCt509, 71L ed 952.

1283–25 274US112, 47SCt509, 71L ed 952; 33F(2d)137.

1283–28 337 Ill 100, 168NE904. [a] **Statute prohibiting employment of mechanic not qualified voter** in construction of public work not violation of due process. 170La851, 129S368.

1283–31 33Wyo 387, 240P208. [a] **Penal statutes** have been held void because of indefiniteness and uncertainty of penal provisions relating to such employment. 33Wyo 387, 240P208.

1283–36 [a] **Statute prohibiting employment of mechanic not qualified voter** does not deprive contractor of due process. 170La851, 129S368.

1284–38 But see 6F(2d)237.

1284–44 Mass 171NE234.

1284–46 128 Or121, 270P772.

1284–48 95Fla901, 116S870; 9LaA313, 119S477.

1284–51 90Fla525, 107S269.

1284–52 169La1014, 126S511.

1285–55 90Fla525, 107S269.

1285–62 208 Iowa94, 222NW535; Iowa 232NW412; 115Nebr435, 213NW578; 117Nebr588, 221NW712.

1285–64 Oh 165NE499. [a] **Provision for partial indemnity** is held not to take property without due process of law. 115Nebr435, 213NW578.

1285–65 Iowa 232NW412; 115Nebr435, 213NW578; 117Nebr588, 221NW712. [a] **Bovine tuberculosis law** as denying due process. Iowa 232NW412.

1285–65½–New. A statute creating a live stock sanitary board for the purpose of quarantining and treating animals within an infested area with the purpose of eradicating Texas cattle fever tick is constitutional. 154Miss765, 122S776.

1285–68½–New. prohibiting grazing of sheep on cattle ranges, 31Ariz389, 254P 225.

1285–69½–New. authorizing quarantine of premises for refusal to submit herd to tubercular test, 129Misc94, 221NYS 20.

1285–71½–New. regulating watering of stock on public ranges, 50Nev125, 253P 671.

1285–73 156Tenn544, 3SW(2d)661.

1285–75 156Tenn544, 3SW(2d)661 (upon notice to owner if known).

1285–79 [a] **Refusal of commissioner of motor vehicles to pass on head-lamp device** after test has been held not unconstitutional. 128Misc127, 245NYS346.
1285–79½–New. and the doubt must be one which appeals to the judicial conscience. 77Mont66, 249P666.
1285–82 See also 37F(2d)712.
1286–83½–New. Private carriers cannot be converted into common carriers by mere legislative command. 275US207, 48SCt41, 72Led241.
1286–99 135Misc290, 238NYS95. [c] **State statute forfeiting wrongdoer's interest** in automobile used to transport intoxicating liquors is valid. 6F(2d)288. [d] **State forfeiting automobile** used in transporting intoxicating liquor, including rights of innocent chattel mortgagee held to be taking of private property without just compensation. 6F(2d)288.
1287–2½–New. Statute declaring keeping or carrying of intoxicating liquors to be a nuisance which may be enjoined is not violative of due process of law. 33F(2d)597.
1287–4½–New. Statute authorizing increase of fees for collecting drainage taxes is not unconstitutional. Mo 29SW(2d)716.
1287–5 [a] **Special act** passed without advertisement extending boundaries of city is held not taking property without due process. 7F(2d)141.
1287–5½–New. Statute as to enlargement of school district is held not to deny due process for insufficiency of notice of election, **TexCivA** 2SW(2d)889.
1287–5⅓–New. or because of divesting old districts of title to property and vesting same in newly-created district. **TexCivA** 2SW(2d)889.
1287–6½–New. Legislature may regulate secret societies reasonably without depriving members of liberty without due process. 241NY405, 150NE497.
1287–6⅓–New. Permitting county board to decide school matters held not denial of due process. 164Ga863, 139SE722.
1287–8 Ga 155SE202; 196NC164, 145SE23; 118 Oh487, 161NE532; 32 OhA241, 167NE901; Okl 256P680; 116 Or310, 251P50; 133SC491, 131SE603; **TexCivA** 264SW529, 538 [quotCJperConner,CJ]. [a] (2) Petition directing attention to disbarment in federal court held proper in disciplinary proceedings against attorney. Mass 167NE749. [b] **Litigant does not have his day in court** where court is without jurisdiction to render judgment. 166Ga256, 142SE879.
1287–12 [a] **It is policy of the law** that litigant should have his day in court to establish wrong and recover damage. **TexCivA** 25SW(2d)622(2dcase).
1287–16½–New. To require a member of a labor union to accept decision of union authorities as to contract rights does not violate constitutional guaranties. 214Ala565, 108S456, 47ALR270.
1287–17 IndA 167NE145; 160La237, 106S840.
1287–18 92Fla617, 110S451; 46 Ida294, 267P828; **TexCommnA** 276SW647; **TexCivA** 264SW529, 538 [quotCJperConner, CJ]; **TexCivA** 296SW663; 65Utah571, 239P781. See also 310Mo542, 276SW389.
1287–4½–New. For a county to allow money to a private person or organization, to be dispensed without control of law, would be to take the taxpayer's money without due process of law. 142Miss146, 105S774.
1288–23 89Fla128, 103S422 (not applicable to flooding of lands by state agency).
1288–25 127 Or589, 271P998; **TexCommnA** 276SW647.
1288–26 TexCommnA 276SW647; **TexCivA** 22SW(2d)151.
1288–32½–New. Refusal to permit respondent in quo warranto to offer evidence in rebuttal after he moved for judgment on relator's case is not denial of "day in court." 80Colo465, 253P465.
1288–32⅓–New. No matter how meritorious a cause of action appellee may have, appellant is entitled to his day in court. Tex 285SW637.
1288–32¼–New. Mere commission of crime is no warrant to set aside constitutional guaranties. 26F(2d)141.
1288–38½–New. The fact that no cause of action is provided in favor of a wife for breach of marriage obligations by the husband is not a violation of such guaranty. **TexCivA** 264SW529.
1288–43½–New. and provisions exempting city from liability for damages from improvements; **TexCommnA** 267SW697.
1289–51 312Mo655, 280SW1040; Okl 256P680. [a] **Statute providing for investigation of charges against attorneys by commission** subject to review by supreme court is not invalid as not providing for hearing before impartial body. 45Ida676, 266P665. [b] **Character of disqualifying interest.–OklCr** 288P354; **OklCr** 288P357(1stcase).
1289–59½–New. An initiative proposal of a law to create a motor vehicle insurance fund for compensation in automobile accident cases is not inconsistent with the right of access to the courts with respect to rates. Mass 169NE552.
1289–59⅓–New. Nor is such a proposal violative of right of access to the courts because no provision is made for judicial review of the officers' decisions. Mass 169NE552.
1289–64 41F(2d)593; 237Mich367, 211NW636.
1289–65½–New. Suspension of remedies by statute may not be extended by judicial construction. 237Mich367, 211NW636.
1290–83½–New. , nor by statute making judgment on question of fact in certain cases final. 156Tenn443, 3SW(2d)164.
1291–89½–New. A statute authorizing consolidation of corporations, notwithstanding dissenting minority stockholders, does not violate guarantee. 50RI288, 146A777, 66ALR1553.
1291–93 214Ala565, 108S456, 47ALR270.
1291–98½–New. A statute authorizing double damages in actions for unlawful detainer is not violative of the constitutional guaranty. 307Mo160, 270SW315.
1291–2 168Ark449, 270SW609 (absence of provision for pro rata return of unused fees does not render law invalid); 228Ky168, 14SW(2d)405.
1292–12 But see 95Fla1003, 117S385.
1292–14 Fla 126S305. See also 118 Or568, 247P815.
1293–40½–New. A statute providing for appraisal by a representative of the owner of destroyed animal and the department of agriculture to determine the value of the animal is not a denial of right of appeal. Oh 165NE499.
1293–40⅓–New. Improper refusal to settle and sign bill of exceptions may constitute denial of "right of appeal" and to have "justice administered without denial." Fla 129S752.

CONSTRUCT

1294–14 315Mo707, 286SW1.
1295–29½–New. , nor power to select routes. 315Mo707, 286SW1.

CONSTRUCTION

1302–21 25 OhA360, 157NE908.

CONSTRUCTIVE CONVERSION

1303–60 TexCivA 23SW(2d)851.

CONSTRUCTIVE POSSESSION

1305–9 83Mont185, 271P452.

CONSUMMATE

1309–19 225Ky190, 7SW(2d)1045.

CONTEMPLATE

1312–78 Utah 269P103.

CONTEMPLATION OF DEATH

1313–95 Utah 269P103.
1313–98 Utah 269P103.

CONTEMPT

13 C. J.—4–1 [a] (6) Conduct which tends to obstruct untrammeled and unprejudiced exercise of judicial power is punishable contempt under statute irrespective of place where act was committed. 33F(2d)660.
5–2 231Ky185, 21SW(2d)266. [a] (7) 76Mont222, 246P250 [citCJ]. (9) Interfering with proper execution of legal process or to influence court in its decision of matter pending before it. 29OhA434, 163NE627. [d] (1) 125 Okl66, 256P704, 52ALR1270.
5–4 68CalA407, 229P1010; NJCh 147A338; 35Wyo430, 251P460.
5–5 165Minn203, 206NW402.
5–6 165Minn203, 206NW402.
5–10 68CalA407, 229P1010; 233 IllA389, 391 [quotCJ]; 165Minn203, 206NW402 (immediate presence of court); 76Mont495, 248P213; 83Mont200, 271P439. See also 334 Ill609, 166NE513. [a] (3) 38 OklCr313, 260P1069.
5–11 334 Ill609, 166NE513; 233 IllA389, 391 [quotCJ]; 239 IllA369; 250IllA428; Pa 152A33; 152Tenn416, 278SW54. [b] **Acts not constituting contempt.–Pa** 152A33.
5–12 44F(2d)115; 68CalA407, 229P1010; 334 Ill609, 166NE513; 233 IllA389, 391 [quotCJ]; 196 Ind501, 149NE54; 200 Iowa79, 202NW542, 39ALR1349 (act held constructive contempt); 76Mont495, 248P213 (indirect contempt); 83Mont200, 271P439; OklCr290P345.
6–13 110TexCr579, 9SW(2d)733, 62ALR456 [quotCJ].
6–14 18F(2d)288; 232 IllA462; 200Iowa79, 202NW542, 13ALR1349 (act held criminal contempt); Okl 256P680; 35Wyo430, 251P460. [a] (5) 38 OklCr313, 260P1069. [b] **Proceedings held not criminal contempt proceedings.–143Wash687, 255P1025.**
6–17½–New. Contempt committed in presence of court is criminal. 253 IllA422.
6–18 14F(2d)471; 23F(2d)303; 20AlaA514, 518, 104S561 [quotCyc&CJ]; 30Hawaii80; 232 IllA462; 229Ky733, 17SW(2d)1018; Okl 256P680; 38 OklCr313, 260P1069; 35Wyo430, 251P460.
7–19 18F(2d)288; 20AlaA514, 518, 104S561 [quotCJ].
7–20 20AlaA514, 518, 104S561 [quotCJ]; 232 IllA462.
7–23 20AlaA514, 518, 104S561 [citCJ]; 317Mo1320, 298SW750, 755 [citCJ]; NJCh 147A338; 35Wyo430, 251P460.
7–24 28Hawaii291; Okl 256P680; 35Wyo430, 251P460. See also 200Wis454, 229NW31 (basis of offense). [c] **Statute declaring certain contempts to be misdemeanors** gives definite quality of criminal offenses to such contempts. 194Cal63, 227P914. [d] **Rule that criminal statutes should be strictly construed** is applicable in construing contempt statutes. NC 153SE600.
7–25½–New. In at least one other jurisdiction contempt of court is not a crime. 125 Okl66, 256P704, 52ALR1270.
7–26 129 Okl219; Okl 256P680; 35Wyo430, 251P460.
7–27 [b] (2) It is sufficient if acts tend to obstruct justice. 33F(2d)660. [e] **Impertinent allegations in pleading,** in commencing action against receiver without leave, is contempt. 234IllA371.
8–31½–New. In some jurisdictions the common-law rule as to contempt applies. Okl 256P680.
8–31⅓–New. Power to punish contempt may extend to punishment for misconduct of court officers in connection with ministerial duties. 334 Ill465, 166NE100, 64ALR1006.
8–31¼–New. Interference with an officer of court in performance of his official duties constitutes contempt of court. Nev 286P418.
8–32½–New. Although the legislature may not restrict a court's inherent jurisdiction in contempt proceedings, it may enlarge a court's powers by declaring certain improper conduct to be contempt which was not previously so. 334 Ill465, 166NE100, 64ALR1006. [a] **Appointment by county court of election judges and clerks** with power to punish by contempt proceedings, under statute, is valid exercise of legislative au-

thority. 334 Ill 465, 166NE100, 64ALR 1006.

8-32½-New. and may regulate practice in proceedings in cases within such extended jurisdiction. 334 Ill 465, 166 NE100, 64ALR1006.

8-33 200 Iowa79, 202NW542, 13ALR 1349.

8-37 293Pa63, 141A724.

8-47 91Fla593, 109S212, 48ALR957.

8-49 232 IllA462.

9-53 76Mont222, 246P250.

9-54 [b] **Where two contradictory affidavits are filed,** it is immaterial as to which one is false. **NJCh** 152A241.

9-66 41F(2d)231; 168Ark700, 271SW 710; 197Cal 321, 240P765; 69CalA 598, 232P157; 80Colo 452, 252P343; 111Conn243, 149A664; 36GaA37, 135 SE102; 4HawaiiFed667, 669 [citCyc]; 204 Iowa103, 214NW877; 232Ky173, 22SW(2d)593; 164La458, 114S96; Mass 166NE848 (decree in equity); 237Mich 10, 211NW90; 103NJEq416, 143A559; 91PaSuper458; 13PortoRicoFed428; 67 Utah578, 248P815; 144Va676, 132SE 332; 194Wis207, 216NW513. [a] (9) Superintendent of state prison may be punished for contempt by court sentencing one convicted of crime to state prison where he releases prisoner before completion of minimum sentence, though done in good faith on governor's order recommended by board of pardons and paroles. 30Ariz332, 246P1033, 47ALR 401. (10) Disobedience of order forbidding taking of photographs in or near court room. 152Md114, 136A312, 51ALR 356. (11) Failing to comply with court order to furnish undertaking. 226App Div327, 235NYS169. (12) Failure of subordinate lodge to pay over funds and deliver stock to state lodge as required by decree suspending subordinate lodge and ordering it to cease functioning. 91 PaSuper458. (13) In such case it constitutes contempt for members of subordinate lodge to erect hostile lodges. 91 PaSuper458. [b] (3) Removal of machinery two weeks after two-day inspection thereof pursuant to court order. Alta [1930] 4DomLR231. (8) Where marshal's return showed that chattels in replevin requisition had been leased to third party, defendant in failing to turn over chattel was not guilty of contempt. 126Misc179, 212NYS727. (9) Directing attorney to be seated while conducting cross-examination. 72CalA258, 236P975. (10) One delivering assignment pursuant to order of court is not guilty of contempt because assignment is nullity due to involuntary petition in bankruptcy filed against such person. 212 AppDiv848, 212NYS147. (11) In action for assault, where defendant failed to appear for trial, after notice given as required by court rule, it was held such failure is not contempt, but mere violation of terms of bond. 161La104, 108S 229. (12) Other instances. 249Mich 669, 229NW402. [g] **Adopting rules which give unsuccessful candidate** duties of office to which court has decreed he is not entitled is contempt. 224 IllA 221. [h] **Employment of subterfuge to evade decree** constitutes contempt. 242 Mich34, 217NW896 (decree enjoining operation of lottery scheme in connection with oil business). [i] **Prohibitive writs, orders, or judgments issue only in civil actions** to prevent civil wrongs, except as they incidentally forbid commission of crimes. Ariz 281P944. [j] **Such power does not include power to punish for violating statute.**–170La418, 127S888.

10-69½-New. A sheriff is in contempt if he refuses to obey an order issued by two of a bench of three judges in conflict with an order of the third. 8PaDist &Co 155.

11-71 [a] (4) Successor in office of district judge cannot be punished for refusing to obey writ issued against his predecessor. 48 Ida572, 285P456.

12-87½-New. Acts committed prior to making of order restraining doing of such acts are not contempt. 68CalA407, 229P1014.

12-88½-New. Settlement between sheriff, bondsman, and fiscal court, without consent of taxpayer, after remand of taxpayer's suit, is not contempt. 211Ky 737, 277SW1020.

12-88½-New. Refusal of an attorney to cease argument on a question arising during the trial after having been ordered to do so constitutes contempt. 74 CalA420, 240P788.

12-88¼-New. Jail guard who assaults federal prisoner held under federal mittimus is not in contempt for violation of court order. 26F(2d)215.

12-88⅓-New. That defendant made a statement to one of plaintiff's witnesses that a decree enjoining certain acts did not become operative until the expiration of sixty days cannot relieve defendant of the duty to obey the court's decree. Utah 275P9.

12-88⅓-New. "Willful" disobedience in contempt statute means doing act purposely and deliberately and means more than intention to do thing. NC 153SE 600.

12-91 223AppDiv773, 227NYS467; 292 Pa63, 140A533; 299Pa9, 148A863; 12 PaDist&Co 228 (payment of money arising on contract). But see Mass 166NE 848.

12-92 48Nev198, 228P617, 618 [citCyc]. See also 229Ky733, 17SW(2d)1018; 247 Mich201, 225NW531. [b] **Chamberlain** refusing to pay as ordered in partition suit held in contempt. 240NY470, 148 NE639 (where he made payment to another under another void order).

12-93 67Utah578, 248P815.

13-7 131Misc385, 226NYS649.

13-9 236Mich313, 210NW319; 130Misc 745, 225NYS123.

13-12 240NY470, 148NE639.

13-13 251Mich126, 230NW905.

14-17 25F(2d)851, 857 [citCJ]; 22AlaA 592, 118S145; 32Ariz307, 257P986, 56 ALR169; 170Ark41, 278SW654; Cal 290 P448; 79CalA655, 250P700; 87CalA375, 262P48; CalA 284P494; Ill 173NE64 (1stcase); 237 IllA71; 245 IllA524; 200 Iowa79, 202NW542, 39ALR1349; 200 Iowa1173, 206NW132; 242Mich624, 219 NW714; 316Mo 457, 290SW443; 320Mo 20, 6SW(2d)597, 600 [quotCJ]; Mo 12 SW(2d)508(1stcase); 86Mont387, 284P 128; 217AppDiv187, 216NYS255; 115 Tex82, 273SW813, 40ALR900 (order in violation of due process); 116Tex1, 285 SW1063, 1075 [citCJ]; 110TexCr362, 8 SW(2d)674; 110TexCr579, 9SW(2d)733, 62ALR456; Utah 284P992; 99WVa504, 129SE401, 403 [citCJ] (disobedience of ex parte order requiring all persons who have placed obstructions in county road is not contempt); 193Wis132, 214 NW396; Wis 229NW636. See also 36 Wyo 159, 253P667. But see 42F(2d)832. [b] 38F(2d)833. [i] **Where court improperly vacates settlement,** subsequent trial and judgment directing plaintiffs to return amount received on settlement is also improper and furnishes no basis for adjudging plaintiffs in contempt. 217AppDiv187, 216NYS255.

15-25 298Pa71, 148A48.

15-27 24F(2d)426; 25F(2d)851; 204 Iowa103, 214NW877; 242Mich624, 219 NW714; 48Nev198, 228P617; NJCh 151A289; 230AppDiv308, 243NYS732.

15-28 48Nev198, 228P617.

15-29 200 Iowa79, 202NW542, 544, 39 ALR1349 [citCJ]; 103NJEq416, 143A 559.

15-32 88CalA253, 262P1098; 220MoA 614, 288SW966, 969 [citCJ]; 227AppDiv 631, 236NYS35(2dcase); 229AppDiv204, 241NYS543 (order held not sufficiently clear and precise); 132 Or350, 285P809; 298Pa71, 148A48. [c] **Where language is indefinite** court should not make finding of contempt until reasonably satisfied defendant knew his conduct violated decree. 132 Or350, 285P809.

15-33 298Pa71, 148A48.

15-34 298Pa71, 148A48.

16-41 172Minn102, 214NW776. [d] **Where bond not filed by executor to make his appeal a supersedeas,** by default in payment for reasonable time thereafter he stands in contempt. 293 Pa63, 141A724.

16-45 33PortoRico 863.

17-47 156Miss582, 126S485 (it is not contempt of court to file motion for new trial).

17-55 [a] (2) **Demand of attorney not** of record is insufficient. 137Misc900, 245NYS621.

17-62 68CalA407, 229P1014; 219App Div261, 219NYS709.

18-63 68CalA407, 229P1014; 132 Or 257, 284P283; 293Pa63, 141A724 (facts showing actual notice). See also 202Cal 738, 262P332.

18-64 44F(2d)218; 202Cal 738, 262P 332; 69CalA598, 232P157. See also 293 Pa63, 141A724.

18-72 236 IllA420; 237 IllA314; 83 Mont200, 271P439; 132 Or257, 284P283.

19-74 237 IllA314; 219AppDiv804, 220 NYS319.

20-81 165La145, 115S439 (subsequent inability); 173Minn100, 216NW606 [cit CJ]; 102NJEq270, 140A334; 130Misc 745, 225NYS123. See also 229Ky733, 17 SW(2d)1018. [b] **Defendant held able to make payments.**–148Wash293, 268P 1118.

20-82 99NJEq719, 134A291.

20-88 331 Ill 351, 163NE6, 60ALR316; 293Pa63, 141A724.

21-97 40F(2d)282; 79CalA149, 248P 1057; Fla 128S483 (subsequent levy of property already validly attached); 138 Misc69, 244NYS320. [a] (3) Removal and failure to return property upon which sheriff had levied writ is contempt of court and is not excused by fact that person with knowledge thereof so removing property had prior writ which sheriff failed or refused to levy on the property. 142Miss118, 107S553. (4) Interference with water rights by destruction of dam. Nev 286P418.

21-97½-New. A jailer has no discretion but to obey a warrant of commitment and may not for his convenience or that of the prisoner permit the latter to leave the jail. 13F(2d)269.

21-3½-New. Defendant in replevin, where plaintiff waives right to immediate possession, is not subject to punishment for contempt in selling the property. 104NJL251, 140A31.

22-18 99Vt306, 131A847, 849 [citCJ]. [b] (2) Other instances. 44F(2d)218.

22-21 279US749, 49SCt471, 73Led938, 63ALR1258; 68CalA758, 230P191; 37 GaA478, 140SE789; 163La94, 111S611; 5PaDist&Co 184; 10PaDist&Co 558.

22-22 163La94, 111S611; 5PaDist&Co 184.

23-31 57ND726, 224NW211.

23-40 5PaDist&Co 184. [a] 12Porto RicoFed490.

23-44 OklCr 275P351.

24-49 194Wis207, 216NW513.

24-63 [f] **Court may punish witness** subpœnaed under wrong name where he tacitly admits being subpœnaed. 34 PortoRico 84.

25-68 27F(2d)453; 36F(2d)601; 198 Ind629, 154NE478, 479 [citCJ]; Sask [1927] 3DomLR758. See also Mass 172 NE209. But see 200Wis454, 229NW31. [b] **Statutes to this effect are not unconstitutional** under "due process" clause of federal constitution. 17PortoRico 1037. [c] **In Porto Rico.**–33PortoRico 247. [d] Other instances. 256 IllA233.

25-69 198 Ind629, 154NE478.

25-72½-New. False swearing does not constitute civil contempt. 125Misc783, 211NYS877.

25-72⅓-New. To be punishable as civil contempt perjury must be something other than in open court, 125Misc783, 211NYS877.

25-72¼-New. or otherwise, on the strength of which an order or decree passes. 125Misc783, 211NYS877.

25-72⅕-New. To be civil contempt perjury must be a direct deceit on the court. 125Misc783, 211NYS877.

25-72¼-New. Landlord testifying falsely in summary proceeding held not guilty of civil contempt. 125Misc783, 211NYS877.

25-73 27F(2d)453.

25-77 194Wis207, 216NW513 (refusal to be sworn).

26-78 248NY465, 162NE487 (lawyer's professional acts).

26-79 40F(2d)201; 177Ark13, 5SW(2d) 337; 177Minn200, 224NW838; 109 TexCr387, 4SW(2d)974. [a] **Witness claiming not to understand questions** held improperly adjudged in contempt

for refusal to answer. 113TexCr418, 21 SW(2d)299(2dcase).
26-82 [b] **Refusal to answer in taking of deposition** is criminal in nature and independent of main action. 73Mont297, 236P553.
26-86 36GaA363, 136SE808, 811 [citCJ perStephensJ,disop]; 73Mont297, 236P 553; 109TexCr337, 4SW(2d)974.
26-87 207Cal 323, 278P432; 74CalA 171, 239P1100; 22 OhA141, 153NE297, 298 [citCJ]; 22 OhA141, 153NE297, 298 [citCJ].
26-88 22 OhA141, 153NE297.
26-89 22 OhA141, 153NE297.
28-7 [c] **Persistence in prematurely claiming privilege** against self-incrimination has been held to constitute contempt. 40F(2d)201.
29-14 207Cal 323, 278P432; 36Wyo 159, 253P667.
29-23 71CalA744, 236P205; 152Md114, 136A312, 51ALR356; 29 OhA434, 163 NE627. [i] (10) Standing and walking between court and jury after ordered to be seated while crossing-examining witness. 72CalA258, 236P975. (11) Attorney's repetition in different form of question to which objection was sustained. 28F(2d)684(1stcase).
29-23 [m] **Assault on judge** outside his court's territorial jurisdiction does not affect power to punish for contempt. 174Ark875, 298SW15, 55ALR1226.
29-24 74CalA420, 240P788; 38 OklCr 313, 260P1069.
29-25 38 OklCr313, 260P1069.
29-26 152Tenn416, 278SW54. [b] 165 Minn203, 206NW402. [e] **Taking exception** to remark of court that use of word "guess" in characterizing answers of witness was "unbecoming" held not contempt. 72CalA258, 236P975. [f] **Persistence and vehemence** in attorney is not contempt so long as his language is not offensive or against common rules of decorum and propriety. 72CalA258, 236P975.
30-31½-New. All statements criticizing court had to be considered as one document. 200 Ind623, 157NE769.
30-36 267US517, 45SCt390, 69L ed767. See also 204Cal 175, 267P316; 71CalA 744, 236P205.
31-43½-New. Preparing and setting out in motion for new trial reasons why an attorney believes that the court erred is not contempt. Ind 166NE265.
31-46 233 IllA389, 392 [quotCJ].
31-47 29Hawaii323; 233 IllA389, 392 [quotCJ].
31-47½-New. judges chambers, 68CalA 407, 229P1010.
31-48. 233 IllA389, 392 [quotCJ].
31-49 233 IllA389, 392 [quotCJ].
31-49½-New. One who merely accompanies another to court where latter presents to court, and later files with clerk, an order in a suit prepared by alleged contemner, who is not an attorney is not guilty of contempt in presence of court. 68CalA407, 229P1010.
31-50 But see 36F(2d)601 (false statements before grand jury held direct contempt).
31-52 233 IllA389, 392 [quotCyc].
31-54 See also 17F(2d)976.
31-55½-New. Where against repeated admonition of court to desist after having been advised by court that objection based on motion to dismiss would go to every proceeding in the cause, attorney repeatedly persisted in making such motion he was properly adjudged guilty of contempt. 76Mont222, 246P250.
31-55½-New. Any act which is calculated to impede, embarrass, or obstruct the court in the administration of justice will be considered as done in the presence of the court. 125 Okl 66, 256P704, 52ALR1270.
31-56 25F(2d)357. But see 27 OhNPNS 156.
31-57 NJ 146A32.
32-58 CalA 290P293.
32-59 Okl 256P680; 125 Okl 66, 256 P704, 52ALR1270.
32-60 334 Ill 609, 166NE513.
32-64½-New. Filing false petition in summary proceeding is not a contempt of court. 125Misc783, 211NYS877.
32-65 156Miss582, 126S485.
32-66 See also CalA 286P1077.
32-70 36F(2d)882; Okl 256P680.
32-75½-New. Filing of affidavit of disqualification against trial judge when court not sitting to hear cause in which affidavit is filed is not an act committed in presence of the court. 76Mont495, 248P213.
32-75½-New. Where an attorney files papers embodying charges of dishonesty and other official misconduct against members of the court, the truth of the charges does not relieve him from liability to punishment for contempt. Okl 256P680 (may be considered in mitigation of punishment).
32-75¼-New. Where the language used by a litigant in an instrument filed and presented in court is such as to carry beyond question its own inherent and inevitable significance, the user will be deemed to have intended the natural consequences of such language. 125 Okl 66, 256P704, 52ALR1270.
32-75½-New. Filing sworn answer subsequently shown false is not a direct contempt. 117Tex325, 3SW(2d)406, 57 ALR541.
32-76 See also Cal 290P293. But see 39GaA1, 145SE914.
33-77 36GaA37, 135SE102; 200 Iowa 79, 202NW542, 543, 39ALR1349 [citCJ] (destruction of liquor); 133Misc357, 232 NYS22. [e] (3) Other instances. 105 WVa441, 143SE93.
34-89 75CalA122, 241P934, 935 [quot CJ].
34-90 11F(2d)860; 75CalA122, 241P 934, 935 [quotCJ]; 200 Ind623, 157NE 769; 117Nebr710, 222NW625.
34-91 36F(2d)230; Cal 292P481; 75 CalA122, 241P934, 935 [quotCJ]; 200 Ind623, 157NE769. [b] **It is as wrong to flatter judge** into erroneous decision as it would be to threaten him into such decision. 12PortoRicoFed180. [c] **Mere consent to publication,** express or implied, held sufficient. 248Mich297, 226 NW907.
34-92 75CalA122, 241P934, 935 [quot CJ]; 117Nebr710, 222NW625.
35-93 33F(2d)660; 75CalA122, 241P 934, 935 [quotCJ]; 244Mich165, 221NW 138; 248Mich297, 226NW907.
35-94 75CalA122, 241P934, 935 [quot CJ].
35-96 75CalA122, 241P934, 935 [quot CJ].
35-97 75CalA122, 241P934, 935 [quot CJ].
35-98 75CalA122, 241P934, 935 [quot CJ]; 75CalA122, 245P212.
35-99 Cal 292P481; 75CalA122, 241 P934, 935 [quotCJ].
35-1 75CalA122, 241P934, 935 [quot CJ].
36-12½-New. The only legitimate purpose of a contempt proceeding against an editor who has impugned the motives of the district attorney and the character of the prosecuting witness in a pending criminal case is to punish for improper interference with the orderly administration of justice. 75CalA122, 241 P934.
36-12½-New. Publications on different dates of different articles calculated to interfere with the administration of justice with the purpose of influencing jurors in a pending action constitute separate and distinct contempts. 75CalA122, 245P212.
36-12¼-New. Report held contemptuous. 200 Ind623, 157NE769.
36-14 75CalA122, 241P934, 935 [quot CJ].
37-21 248Mich297, 226NW907 (fact that publication was made by attorney could be considered).
37-22 27Hawaii855.
38-28 11F(2d)860.
38-29 Cal 292P481.
38-32 165Ga254, 140SE491; 38GaA690, 145SE463.
38-33 165Ga254, 140SE491; 37GaA594, 141SE89 (statements made by accused and another to parents of complaining witness with intent that they should be communicated to witness); 29Hawaii 323.
38-34 17F(2d)976; 165Ga254, 140SE 491.
38-35 In order that tampering with witness may constitute constructive contempt, act need not be committed within court house. 13PortoRicoFed50.
38-41 See also 35F(2d)941.
39-44 17F(2d)976; 133Misc704, 233 NYS294.
39-46½-New. even though threats failed to prevent attendance. 143Miss231, 108 S716.
39-48 8F(2d)20.
39-52 200 Iowa79, 202NW542, 543, 13 ALR1349 [quotCJ].
39-53 200 Iowa79, 202NW542, 543, 13 ALR1349 [quotCJ].
39-54 200 Iowa79, 202NW542, 543, 13 ALR1349 [quotCJ].
39-63 See also 39GaA1, 145SE914.
39-63½-New. A defaulting executor who has been judicially declared to be a weak-minded person after the defalcation may be attached and committed. 9PaDist&Co 200.
40-68 298Pa347, 148A504.
40-74 33PortoRico 863.
41-77 33PortoRico 863.
41-88 41F(2d)231 (United States Attorney and aides); 79CalA149, 248P 1057; 242 IllA338; Vt 148A750. [c] **Attorney is not liable** where he had nothing to do with publication of report. 200 Ind623, 157NE769. [d] **Courts will look with much allowance on zeal and partisanship** of counsel in clients' behalf. 110TexCr585, 10SW(2d)105.
41-89 101NJEq315, 138A586.
41-91 230AppDiv308, 243NYS732.
42-92½-New. Attorney's failure to inform court of appointment of receiver in another department is contempt under some circumstances, although such appointment was invalid. 79CalA149, 248 P1057.
42-93½-New. An attorney's obligation to give information to a court on demand as to residence of persons sought as witnesses arises out of duty as citizen. 32Ariz307, 257P986, 56ALR169.
42-94½-New. Attorney for alleged fugitive is not guilty of contempt because bail was not furnished and fugitive absconded pending appeal. 222 AppDiv243, 225NYS461.
42-95 322 Ill 174, 152NE597; 166La 1028, 118S122.
42-96½-New. election judges, 247 IllA 220.
42-98 146Wash679, 264P988.
42-6½-New. Judges and clerks of election, although nominated by the election board, may be properly designated in statute as county court officers punishable by contempt. 334 Ill 465, 166 NE100, 64ALR1006.
42-6⅓-New. De facto officers, acting as judges of election, held subject to punishment for contempt, under City Election L. art 2 § 13. 337 Ill 169, 168NE 882.
43-9 292Pa63, 140A533.
43-11 200 Iowa1173, 206NW132.
43-12½-New. Discharge of one respondent does not affect the rights of others. 242 IllA565.
43-14 Cal 292P481.
43-17½-New. Ill-temper or harshness of judge during trial will not excuse attorney's positive disobedience of court's orders or a contemptuous disregard of authority. 76Mont222, 246P 250.
43-17⅓-New. The superintendent of a jail is not protected by directions of the sheriff for disregard of federal process by permitting prisoners to leave jail. 13F(2d)269; 13F(2d)280.
43-17¼-New. Failure to punish associate attorney is no excuse for contempt. 234 IllA371.
43-17⅙-New. A communication to a United States attorney as to favoritism and misconduct of a judge has been held not privileged so as to relieve the writer from punishment for contempt. 33F(2d)660.
43-17⅙-New. A communication to a member of the house of representatives concerning improper conduct of a federal judge is privileged. 33F(2d)660.
44-23 But see 41F(2d)231.
44-26 [c] **Passage of new ordinance is immaterial** where not before court. CalA 286P443.
45-37 334 Ill 609, 166NE513; 76Mont 222, 246P250.

45–38 76**Mont**222, 246**P**250.

45–40 93**CalA**488, 269**P**664. [b] (6) Disobedience by lower court of higher court's order, resulting from misinterpretation thereof, held not punishable in absence of intentional disrespect of court. 68**CalA**407, 229**P**1014. [c] (4) Lack of actual knowledge pending suit is no defense where there was knowledge sufficient to put on notice. **NJCh** 147**A**328.

46–42 30**F(2d)**106; 20**AlaA**514, 518 104**S**561 [citCJ]; 168**Ark**700, 271**SW**710 (implied from statutory authority to subject defendant in person to authority of court); 194**Cal** 146, 228**P**19; **Cal** 292 **P**481 (though committed out of its presence); 81**Colo** 431, 256**P**319; 91**Fla**593, 109**S**212, 48**ALR**957; 200 **Ind**623, 157 **NE**769, 775 [citCJ]; 231**Ky**185, 21**SW (2d)**266; 164**La**458, 114**S**96; 152**Md**114, 136**A**312, 51**ALR**356; 165**Minn**203, 206 **NW**402; 76**Mont**222, 246**P**250; **Nev** 286 **P**418; 57**ND**726, 224**NW**211; **Okl** 256 **P**680; 125 **Okl** 66, 256**P**704, 52**ALR** 1270; 126 **Okl** 37, 258**P**879; 5**PaDist &Co** 184; 102**TexCr**105, 277**SW**699 (district court); 144**Va**244, 132**SE**303; 102 **WVa**677, 136**SE**202, 49**ALR**968; 196 **Wis**534, 221**NW**603. See also **Pa** 152 **A**33. [d] **Court of Special Sessions** held to have jurisdiction under information for prosecution for misdemeanor of criminal contempt. 253**NY**221, 170**NE** 898.

47–43 20**AlaA**514, 104**S**561; 68**CalA** 407, 229**P**1010; 83**Mont**200, 271**P**439.

47–46 89**CalA**177, 264**P**573; 164**La**458, 114**S**96, 97 [quotCJ].

47–47 20**AlaA**514, 104**S**561; 200 **Ind** 623, 157**NE**769; 260**Mass**369, 157**NE** 693; 76**Mont**222, 246**P**250; 117**Nebr**710, 222**NW**625; 131**Misc**220, 226**NYS**585 (power essentially judicial); 125 **Okl** 66, 256**P**704, 52**ALR**1270; 126 **Okl** 37, 258 **P**879; 102**WVa**677, 136**SE**202, 49**ALR** 968. But see 248**Mich**297, 226**NW**907.

47–49 20**AlaA**514, 104**S**561; 317 **Ill** 197, 148**NE**5; 83**Mont**200, 271**P**439; 125 **Okl** 66, 256**P**704, 52**ALR**1270. [a] 165**Minn** 203, 206**NW**402. [d] **Statute requiring jury trial** in cases of alleged contempt not committed in presence of court is unconstitutional. 81**Colo** 431, 256**P**319.

48–51 [a] 105**WVa**441, 143**SE**93.

48–52 76**Mont**222, 246**P**250.

48–54½–New. Statute conferring ancillary and additional power upon courts is held not to cut down inherent power. 260**Mass**369, 157**NE**693.

48–54¼–New. That two other circuit judges sat with presiding judge is held not to prevent tribunal's being judicial body with power to punish for contempt. 193**Wis**132, 214**NW**396.

48–58 200 **Ind**623, 157**NE**769, 774 [cit CJ]; 163**La**94, 111**S**611. [c] 30**F(2d)** 106; 20**AlaA**514, 104**S**561.

49–60 36**GaA**37, 135**SE**102.

49–62 334 **Ill** 465, 166**NE**100, 64**ALR** 1006; 138**Misc**69, 244**NYS**320; 36**GaA** 37, 135**SE**102.

49–65 174**Ark**875, 298**SW**15, 55**ALR** 1226.

49–66 152**Tenn**416, 278**SW**54.

50–84 13**PaDist&Co** 191. [b] **Offender should be returned to court for indictment.**–13**PaDist&Co** 191.

50–90 260**Mass**369, 157**NE**693.

51–94 20**AlaA**514, 104**S**561; 317 **Ill** 197, 148**NE**5; 260**Mass**344, 157**NE**684, 54 **ALR**1422; 101**NJEq**315, 138**A**586. [b] **Circuit court judge does not exercise its equity jurisdiction** (1) in imposing punishment for contempt nor are contempt proceedings necessarily equitable in character. 20**AlaA**514, 104**S**561. (2) He exercised special power inherent in all courts of record. 20**AlaA**514, 104**S** 561.

51–1 11**F(2d)**860; 23**F(2d)**303; 36 **F(2d)**601.

51–2 26**F(2d)**215.

51–3 27**F(2d)**453; 40**F(2d)**201.

52–10 **Okl** 256**P**680, 702 [quotCJper Henry,VCJ].

52–11 26**F(2d)**215 (only court offended may punish); 171**Ark**148, 283**SW**45; 79**CalA**618, 250**P**587 (superior court of one county held without jurisdiction to punish for contempt of superior court of another county consisting in disobedience of its order). **Mass** 172**NE** 209; 143**Miss**231, 108**S**716; 125 **Okl** 66, 256**P**704, 711 [quotCJ], 52**ALR**1270; **TexCommnA** 24**SW(2d)**813(1stcase). [d] **Where disobedience of process or order is declared misdemeanor,** courts of appropriate criminal jurisdiction have jurisdiction to punish offense. 194 **Cal** 63, 227**P**914 (police court).

52–12 **Okl** 256**P**680, 702 [quotCJper Henry,VCJ]; 125 **Okl** 66, 256**P**704, 711 [quotCJ] 52**ALR**1270. But see 171**Ark** 148, 283**SW**45.

52–13 125 **Okl** 66, 256**P**704, 711 [quot CJ] 52**ALR**1270.

52–14½–New. , and where judges in each of several districts are given power to preside in courts of other districts. **TexCivA** 276**SW**728.

53–21½–New. Ministerial or other nonjudicial officers have no power to punish for contempt unless authorized by law. 78**CalA**561, 248**P**990.

53–25 23**AlaA**183, 123**S**87 [certiorari den 219**Ala**607, 123**S**88]. [a] **Court, not judge,** possesses power to punish disobedience as contempt. 216**Ala**423, 113 **S**309.

53–26 156**Miss**582, 126**S**485 (court is without power to hear and enter decree of contempt).

54–32 144**Va**684, 132**SE**306.

54–37 194**Wis**207, 216**NW**513 (special judges investigating local legal practice).

54–41 [a] **The granting of a nolle prosequi** where criminal contempt is charged is within the discretion of the court. 224 **Ill**A221.

54–42 36**GaA**37, 135**SE**102; 298**Pa**146, 148**A**75; 200**Wis**454, 225**NW**746. [b] **Power should be exercised only where necessity arises** and with intelligent discretion. 83**Mont**200, 271**P**439.

54–45½–New. Power to punish for contempt is not arbitrary but must be exercised only when necessity arises and with intelligent discretion. 85**Mont**215, 278**P**122.

54–46 117 **Oh**400, 159**NE**475 (on remand by supreme court to intermediate appellate court latter has jurisdiction of contempt).

55–49½–New. Court of civil appeals may entertain motion for contempt in disobeying injunction granted by it. **TexCivA** 276**SW**728.

55–49¼–New. But where judgment is rendered by court of civil appeals on reversing judgment of the district court it becomes the judgment of the district court whose duty and right it is to enforce it in contempt proceedings. **TexCivA** 276**SW**728.

55–49¼–New. Where injunction is dissolved on appeal, proceedings are precluded, although motion for rehearing is pending. **TexCivA** 288**SW**281.

55–55 4**HawaiiFed**667, 669 [citCyc]; 13**PortoRicoFed**50.

55–55½–New. In some jurisdictions, where disobedience of any process or order is made a misdemeanor by statute, remedies in court whose process or order is disobeyed and in appropriate court of criminal jurisdiction are cumulative. 194**Cal** 63, 227**P**914.

56–68 194**Cal** 63, 227**P**914 (violation of injunction order). But see 160**Tenn**599, 28**SW(2d)**49.

56–74½–New. [§ 79a] **O. Executive Officer.** Such officer has only such power to punish for contempt as is expressly conferred by statute, constitution, or charter. 120 **Oh**370, 166**NE**357.

56–76 18**F(2d)**371; 20**AlaA**514, 104**S** 561; 253**Mass**122, 148**NE**567; 125 **Okl** 66, 256**P**704, 52**ALR**1270; 13**Porto RicoFed**39.

56–77 36**F(2d)**601; 194**Cal** 63, 227**P** 914; 242 **Ill**A565 (power of legislature to provide for summary trial); 200 **Ind** 716, 164**NE**408, 63**ALR**218; 260**Mass** 344, 157**NE**684, 54**ALR**1422; 125 **Okl** 66, 256**P**704, 52**ALR**1270. [a] **Summary proceedings lie only** where contempt is committed in presence of court and where it has judicial cognizance of facts. **Nebr** 226**NW**801.

56–79 20**AlaA**514, 518, 104**S**561 [cit Cyc]; 73**Mont**297, 236**P**553; **NJCh** 147 **A**338.

57–82 260**Mass**344, 157**NE**684, 54**ALR** 1422.

57–82½–New. Proceedings are sometimes resorted to for purpose of enforcing private rights. 196 **Ind**501, 149**NE** 54.

57–83½–New. Punishment for civil contempt may be had only by direct proceeding. 215**AppDiv**316, 213**NYS** 671.

57–83¼–New. Where statute provides no procedure to be pursued in contempt cases, reference must be had to common law and modifications. 102**TexCr**105, 277**SW**699.

57–83¼–New. In some jurisdictions contempts of court are governed by constitutional and statutory provisions, and not by common-law rules. **OklCr** 272**P**1032.

57–83½–New. Objections to form of proceeding for contempt against grand jury witness is without merit where witness was present fully advised and made no objection. 40**F(2d)**201.

57–84 166**Ga**553, 144**SE**106; **Okl** 256 **P**680; 125 **Okl** 66, 256**P**704, 52**ALR**1270.

57–85 166**Ga**553, 144**SE**106.

57–87 20**AlaA**514, 104**S**561; **Or** 288**P** 1054; 13**PortoRicoFed**428; 144**Va**244, 132**SE**303; 35**Wyo** 430, 251**P**460, 464 [citCJ].

57–88 194**Cal** 63, 227**P**914; 260**Mass** 369, 157**NE**693; 83**Mont**200, 271**P**439; 100**NJEq**185, 135**A**284; **Okl** 256**P**680; 13**PortoRicoFed**78; 148**Wash**526, 269**P** 793, 59**ALR**1265; 102**WVa**677, 136**SE** 202, 46**ALR**968; 35**Wyo** 430, 251**P**460, 464 [citCJ].

58–89 100**NJEq**188, 135**A**282; **NJCh** 147**A**338 (defendant cannot be compelled to give evidence against himself); 102**WVa**677, 136**SE**202, 46**ALR** 968.

58–90 18**F(2d)**371; 20**AlaA**514, 104**S** 561; 194**Cal** 63, 227**P**914; **Okl** 256**P**680; 125 **Okl** 66, 256**P**704, 52**ALR**1270; 126 **Okl** 37, 258**P**879.

58–91 18**F(2d)**371; 20**AlaA**514, 104**S** 561; 253**Mass**122, 148**NE**567; 125 **Okl** 66, 256**P**704, 52**ALR**1270. [b] (1) See also 227**AppDiv**57, 237**NYS**85. (2) It is competent for legislature to provide that disobedience of lawful process of court should be punished as crime. 227 **AppDiv**57, 237**NYS**85.

58–93 173**Minn**100, 216**NW**606; 129 **Okl** 219; 151**Va**229, 144**SE**460.

58–94 260**Mass**344, 157**NE**684, 54**ALR** 1422.

58–95 194**Cal** 63, 227**P**914.

59–96 194**Cal** 63, 227**P**914.

59–97 103**NJEq**195, 142**A**822; **NJCh** 147**A**338.

59–98 41**F(2d)**910; 200 **Ind**716, 164**NE** 408, 63**ALR**218; 260**Mass**344, 157**NE**684, 54**ALR**1422; 236**Mich**169, 210**NW**246. See also 334 **Ill** 536, 166**NE**108.

59–1 194**Cal** 63, 227**P**914.

59–2 41**F(2d)**910; 194**Cal** 63, 227**P**914.

59–4½–New. Some statutes provide for investigation and punishment of both classes of contempt in the same manner and according to the same rules. 194**Cal** 63, 227**P**914.

59–4¼–New. Under some statutes willful disobedience of any process or order lawfully issued by any court is given a double aspect, in one of which it is regarded as an offense against the dignity of the court remediable in accordance with rules prescribed by the code of civil procedure, in the other it is regarded as an offense against the state punishable under rules prescribed by the penal code, and it may also be regarded as an offense against private rights and remediable by action at law. 194**Cal** 63, 227**P**914.

59–4¼–New. A test by which to distinguish between civil and criminal contempt is not the imposition of fine or imprisonment. 260**Mass**344, 157**NE**684, 54**ALR**1422.

59–5 227**AppDiv**390, 236**NYS**361.

60–14 143**Miss**231, 108**S**716 (attempt to intimidate witness).

60–17 68**CalA**407, 229**P**1010 (direct contempt); **Fla** 129**S**818.

60–21 **Okl** 256**P**680, 702 [quotCJper Henry,VCJ]; 125 **Okl** 66, 256**P**704, 711 [quotCJ] 52**ALR**1270.

60–22 167**Ga**602, 146**SE**446; 125 **Okl** 66, 256**P**704, 711 [quotCJ] 52**ALR**1270; 35**Wyo** 430, 251**P**460, 464 [citCJ].

60-23 125 **Okl** 66, 256**P**704, 711 [quot CJ] 52**ALR**1270.

61-28½-New. Statutes regulating venue of trials of criminal offenses generally are inapplicable to contempt proceedings. 143**Miss**231, 108**S**716.

61-28⅓-New. Statutory provisions relative to change of venue have no application to proceedings to punish contempts unless such proceedings are expressly included eo nomine in the written law. 125 **Okl** 66, 256**P**704, 52**ALR** 1270.

61-29 23**F(2d)**352 (one-year limitation of Clayton Act).

61-31 287**Pa**150, 134**A**478. [a] **Time of exercise of court's power to punish for direct contempt.**-165**Minn**203, 206 **NW**402 (not lost by deferring action reasonable time in interest of justice and fairness).

63-59 143**Miss**231, 108**S**716 (information sufficient).

63-60 125 **Okl** 66, 256**P**704, 52**ALR** 1270; 129 **Or**612, 277**P**1012, 63**ALR**1216.

63-63 132 **Or**556, 287**P**82.

63-64 253 **IllA**422. [a] **"In Chancery of New Jersey.**-In the matter of (naming the respondents) charged with contempt of court" has been held to be usual and correct form. **NJCh** 147**A**338, 341. [b] **Order of commitment for criminal contempt** is insufficient when entered and entitled as one in civil proceeding. 253 **IllA**422.

63-67 30**Ariz**129, 245**P**273, 274 [quot CJ].

63-68 30**Ariz**129, 245**P**273, 274 [quot CJ]; **Cal** 290**P**293; 68**CalA**407, 229**P** 1010; 72**CalA**258, 236**P**975; **Fla** 129**S** 818; 334 **Ill** 609, 166**NE**513; 233 **IllA** 389, 392 [quotCJ]; 239 **IllA**369, 373 [cit CJ]; 250 **IllA**428; **Mass**172**NE**209; **Okl** 256**P**680; 38 **OklCr**313, 260**P**1069; **Okl Cr** 272**P**1032; 51**SD**246, 213**NW**9; 152 **Tenn**416, 278**SW**54; 192**Wis**1, 211**NW** 926; 193**Wis**132, 214**NW**396.

64-71 233 **IllA**389, 392 [quotCJ].

64-72 233 **IllA**389, 392 [quotCJ].

64-76½-New. A constitutional requirement that all prosecutions be in the name of, and by authority of, the people of the state and shall conclude in a certain way applies only to a formal accusation by presentment, indictment, or information. 334 **Ill** 536, 166**NE**108.

64-76⅓-New. A prosecution for a separate and subsequent alleged contempt can be brought only in a new and separate information. 200 **Ind**623, 163**NE** 272, 58**ALR**954.

64-77 20**AlaA**514, 104**S**561; 23**AlaA** 183, 123**S**87 [certiorari den 219**Ala**607, 123**S**88]; 194**Cal** 49, 227**P**908; 68**CalA** 407, 229**P**1010; 97**CalA**713, 276**P**363; 82**Colo** 173, 257**P**1086; 323 **Ill** 452, 154 **NE**195; 334 **Ill** 609, 166**NE**513; 250 **IllA**423; 196 **Ind**501, 149**NE**54; 200 **Ind** 623, 163**NE**272, 58**ALR**954 [quotCJ]; 125**Kan**202, 263**P**789; 73**Mont**297, 236 **P**553; 76**Mont**495, 248**P**213; **Nebr** 226 **NW**801; **OklCr** 290**P**345; 51**SD**246, 213 **NW**9; 148**Wash**526, 269**P**793, 59**ALR** 1265. [e] **Court is without jurisdiction to punish for contempt** where affidavit or required statement is not filed. 76 **Mont**495, 248**P**213.

64-77½-New. except in those cases where a statement of facts has been made by referee or arbitrators or other judicial officers; 68**CalA**407, 229**P**1010.

64-78 20**AlaA**514, 516, 104**S**561 [citCJ].

64-79 20**AlaA**514, 516, 104**S**561 [citCJ].

65-81 143**Miss**231, 108**S**716 (information sufficient).

65-82 23**AlaA**183, 123**S**87 [certiorari den 219**Ala**607, 123**S**88]; 69**CalA**281, 231 **P**347; 148**Wash**526, 269**P**793, 59**ALR** 1265.

65-83 **Or** 288**P**1054.

65-84 18**F(2d)**371. [a] **Information need not conclude** against peace and dignity of state where contempt consists of attempt to intimidate witness. 143**Miss** 231, 108**S**716.

65-85 20**AlaA**514, 104**S**561; 68**CalA**407, 229**P**1010; 69**CalA**281, 231**P**347; 76**CalA** 419, 245**P**212; 87**CalA**375, 262**P**48; 81 **Colo**420, 256**P**325; 232 **IllA**462; 200 **Ind** 623, 163**NE**272, 58**ALR**954 [quotCJ]; 221**MoA**721, 285**SW**765, 767 [quotCJ]; 49**ND**851, 193**NW**928 (affidavit together with recital of facts in second order to show cause is sufficient); 108**TexCr**89, 299**SW**264. See also 132 **Or**257, 284**P**283. [c] 36**GaA**37, 135**SE**102; **Ind** 173**NE**456; 244**Mich**165, 221**NW**138. [e] 76**CalA**419, 245**P**212; 99**CalA**455, 278**P**873(1stcase); 143**Miss**231, 108**S**716 (information); **Okl** 256**P**680. [h] **Affidavit need not contain** prayer for relief. 69**CalA**784, 232**P**725. [i] **Affidavit in proceeding to punish witness** for refusal to answer must show questions were pertinent and legal, that a prima facie cause of action exists, and that witness possesses pertinent facts which after service of subpœna he refuses to divulge. 73**Mont**297, 236**P**553. [j] **Citation for contempt alone may be sufficient** to give accused information of offense with which he is charged. 221 **MoA**721, 285**SW**765.

65-89 221**MoA**721, 285**SW**765, 767 [quotCJ].

65-89½-New. Failure to state venue does not make information void. 143 **Miss**231, 108**S**716.

65-92 See also 20**AlaA**514, 104**S**561. [b] **Basis of criminal charge.**-20**AlaA**514, 104**S**561.

66-94 68**CalA**407, 229**P**1010.

66-98 69**CalA**784, 232**P**725.

66-99 69**CalA**281, 231**P**347. But see 132 **Or**257, 284**P**283.

66-4 **Ind** 173**NE**456.

66-7 18**F(2d)**371; 244**Mich**165, 221**NW** 138.

67-10½-New. Indorsement of circuit judge on information authorizing clerk to issue citation amounts to leave of court to file information. 143**Miss**231, 108**S**716.

67-10⅓-New. In some jurisdictions there is no provision by constitution or statute for compulsory affidavits to support an information for contempt. 125 **Okl** 66, 256**P**704, 52**ALR**1270.

67-10¼-New. An information for contempt is not bad for duplicity. 18**F(2d)** 371.

67-10⅕-New. General allegations that a judge cited for contempt granted frivolous motions and violated every holding of the court of appeals are limited by specific allegations that he granted a particular motion and violated specific decisions. **MoA** 17**SW(2d)**586.

67-11 **Ida** 288**P**157(2dcase).

67-12 69**CalA**784, 232**P**725; 125 **Okl** 66, 256**P**704, 52**ALR**1270.

67-18 143**Miss**231, 108**S**716; **Pa** 152 **A**33.

67-24 See also 129 **Okl** 219, 280**P**1097.

68-25 148**Wash**526, 269**P**793, 59**ALR** 1265.

68-30½-New. Defects and irregularities in a complaint are deemed to have been waived in the absence of demurrer or objection to the introduction of evidence. 129 **Okl** 219, 280**P**1097.

68-32 23**AlaA**183, 123**S**87 [certiorari den 219**Ala**607, 123**S**88]; 235**Mich**151, 209**NW**191; **OklCr** 290**P**345 (written notice).

68-33 23**AlaA**183, 123**S**87 [certiorari den 219**Ala**607, 123**S**88]; 170**La**671, 129 **S**125 (proceeding by rule for failure to pay alimony contradictorily tried with defendant held proper); 215**AppDiv**316, 213**NYS**671; 132 **Or**257, 284**P**283.

69-37 40**F(2d)**201; 69**CalA**784, 232**P** 725.

69-39 100**WVa**70, 130**SE**86, 88 [citCJ].

69-51½-New. Some statutes providing that no warrant of commitment can be issued without previous attachment to answer or notice or order to show cause do not refer to a commitment issued upon conviction of a criminal offense pursuant to the provisions of the penal code but refer to a warrant of commitment issued pursuant to the procedure prescribed by the code of civil procedure. 194**Cal** 63, 227**P**914.

70-52 171**Ark**148, 283**SW**45; 33**Porto Rico** 247.

70-56 171**Ark**148, 283**SW**45. [b] **Opportunity to make defense.**-Order of citation must be sufficiently definite to apprise accused party of charge with reasonable certainty in order to afford opportunity to make defense. 171**Ark**148, 283**SW**45.

70-58½-New. Rule nisi must be based on sufficient information or affidavit. 23 **AlaA**183, 123**S**87 [certiorari den 219**Ala** 607, 123**S**88].

70-62 See also 292**Pa**63, 140**A**533.

70-70 235**Mich**151, 209**NW**191.

71-72 30**F(2d)**99; 202**Cal** 738, 262**P**332.

71-77 235**Mich**151, 209**NW**191.

72-6 [a] **Response to informal letter from court** has been held not an "appearance." 230**AppDiv**508, 243**NYS**732.

72-15 13**F(2d)**278; 242 **IllA**338; 48**Nev** 198, 228**P**617.

73-22½-New. Defendant is not entitled to bail under a writ of attachment for the purpose of bringing defendant before the court for sentence for criminal contempt. 101**NJEq**361, 139**A**328.

73-28 [a] **Interrogatories or answer may be filed** in criminal contempt case. 232 **IllA**462.

73-29 310**Mo** 339, 275**SW**529; 49**ND** 851, 193**NW**928. [b] 49**ND**851, 193**NW** 928.

74-48 232 **IllA**462. [c] **Disclaimer of guilt** is held sufficient to put at issue questions of law pleaded in state's motion. 161**La**104, 108**S**229.

74-55½-New. An amendment to an answer may properly be rejected where it fails to set up any defense. 161**Ga**287, 130**SE**580.

74-55⅓-New. Allegations in an answer that are not denied in the answer are deemed admitted. 76**CalA**419, 245**P**212.

74-55¼-New. An answer is insufficient where it is a mere statement of conclusion. 229**Ky**733, 17**SW(2d)**1018.

74-56 232 **IllA**462.

74-57 334 **Ill** 354, 166**NE**67; 232 **IllA** 462; 102**NJEq**270, 140**A**334. But see 334 **Ill** 465, 166**NE**100, 64**ALR**1006.

75-58 167**Ga**447, 145**SE**878.

75-59 317 **Ill** 159, 147**NE**916 (contempt not purged by sworn answer in proceeding for violation of injunction under Illinois Prohibition Act).

75-60 233 **IllA**389.

75-61 13**PortoRicoFed**39.

75-62 242 **IllA**565.

75-69½-New. [§ 109a] M½. **Traverse of answer.** A traverse of a sworn answer is not required before the court can proceed to determine whether the facts show that the party charged is guilty of disobedience of an order of the court. 161**Ga**287, 130**SE**580.

75-70 267**US**517, 45**SCt**390, 69**L ed**767; 36**F(2d)**882; 334 **Ill** 609, 166**NE**513; **Mass** 172**NE**209; 125 **Okl** 66, 256**P**704, 52**ALR**1270; 38 **OklCr**313, 260**P**1069.

76-72 334 **Ill** 354, 166**NE**67. But see 200 **Ind**623, 162**NE**441. [a] (6) Other evidence held admissible. 242 **IllA**565. (7) District attorney's reading of transcript before grand jury in proceeding for contempt before it. 40**F(2d)**201. [b] **Evidence held inadmissible.**-279**US** 749, 49**SCt**471, 73**L ed**938, 63**ALR**1258.

76-75 20**AlaA**514, 104**S**561.

76-76 173**Minn**100, 216**NW**606.

76-77 224 **IllA**221.

76-78 224 **IllA**221.

76-80 213**Ky**221, 280**SW**970; 248**Mich** 297, 226**NW**907.

76-81 117**Nebr**710, 222**NW**625 (defendant may testify as to his intent).

76-84½-New. Under some statutes, the taking of testimony is not absolutely required in a proceeding to punish for constructive contempt. 76**CalA**419, 245 **P**212 (necessity of calling witnesses).

76-84⅓-New. Evidence of conduct of Kangaroo court by inmates of jail is prejudicially admitted. 26**F(2d)**215.

76-84¼-New. On a relator's motion to modify judgment, his act of presenting evidence to a member of the court in the absence of the adverse party should estop him from setting up those facts in the nature of newly discovered evidence after judgment has been rendered. 200 **Ind**623, 163**NE**272, 58**ALR**954.

76-85 15**DelCh**282, 136**A**887; **Ind** 166 **NE**265.

77-86 15**DelCh**282, 136**A**887; 323 **Ill** 452, 154**NE**195.

77-88 237 **IllA**314.

77-89 69**CalA**598, 232**P**157 (burden is on petitioner in habeas corpus to purge himself of contempt by showing inability to comply with court's order through

no fault of his own).

77-92 72CalA258, 236P975; 34OhA47, 170NE369.

77-92½-New. In a proceeding to punish for contempt it was held that accused is presumed to know everything he can learn upon inquiry, being possessed of facts suggesting the inquiry. 13F(2d)269.

77-92¾-New. No presumptions are to be indulged with respect to jurisdiction of the court, in the absence of an essential averment. 97CalA173, 276P36.

77-93 151Ark375, 29-8W15, 55ALR1226 (evidence held to warrant finding that assault on judge was committed while case was pending); 79CalA149, 229P1067 (sufficient), 36GaA37, 135SE102; 233IllA488; 206Iowa1389, 222NW553, 100NJEq60 131A763, 101NJEq315, 138A586 (evidence held sufficient); 130Misc696, 224NYS634; NC 153SE600 (evidence held insufficient to show wilful noncompliance). [a] (1) 13F(2d)269, 13PortoRicoFed123, 13F(2d)280; 164Ga81, 137SE821; 213Ky221, 280SW970; Okl 256P630. [b] 204Iowa103, 214NW877; 173Minn100, 216NW606. [c] **Evidence held to warrant finding that assault was made on judge for purpose of influencing court in trial of defendant,** 174Ark875, 298SW15, 55ALR1226. [d] **Evidence held sufficient to support charge of contempt.**–279US749, 49SCt471, 73LEd938, 63ALR1358; 200Wis151, 225NW716. [e] **Evidence held insufficient to support charge of contempt.**–279US749, 49SCt471, 73LEd938, 63ALR1358, 53Mont200, 271P439; 33PortoRico21.

77-94 69CalA592, 232P157 (evidence sufficient), 39GaA1, 145SE911 (evidence held sufficient) Ind 166NE265, 200Iowa79, 202NW542, 39ALR349 (purpose and intent of act of contempt sufficiently shown); 208Iowa472, 225NW954. [b] **Testimony of witness held material as regards propriety of contempt order for perjury.** 200Wis454, 225NW746.

78-98 30F(2d)601, 15DelCh282, 136A237, 53Mont200, 271P139 101NJEq196, 142A323; 11PortoRicoFed15, 13PortoRicoFed428 111Va44, 137SE303; 102WVa677, 136SE207, 49ALR965 But see 13F(2d)276

78-99 15DelCh282, 136A887; 224IllA231; 230AppDiv783, 244NYS697; 12PortoRicoFed190, 200Wis151, 225NW746.

78-1 236IllA420; 173Minn100, 216NW606. [a] **Evidence held sufficient.**–89CalA177, 261P531.

78-4 But see 202Iowa104, 209NW274.

78-6½-New. If there is reasonable ground for doubting wrongfulness of defendant's conduct contempt should not be adjudged. 15F(2d)854.

78-9 117Nebr710, 222NW625.

78-10 267US517, 45SCt390, 69LEd767 (refusal of hearing for constructive contempt is denial of due process of law); 242IllA338; 235Mich151, 209NW191; 100NJEq125, 135A284 NJCh 11A345; 141Okl 256P1[illegible], OklCr 2[illegible] P1012 128Ore6, 5[illegible]P395, 132Or267, 284P283; 33PortoRico247 (contempt in giving false testimony); 151Wash192, 276P546. [f] **Assistance of counsel may be denied in case of contempt committed in open court.** 267US517, 45SCt390, 69LEd767. [g] **Argument of counsel.**–46Ida97, 266P677. [h] **Rights waived.**–128Or257, 274P283

79-12 15Misc472, 126SE150, 141Okl75, 284P18(2dcase); OklCr 290P345. [a] **One making no attempt to obtain a hearing is not entitled to discharge because of delay.** 100WVa70, 130SE86

79-13 Ind 173NE466.

79-15 Contra 100NJEq188, 135A282

79-17 89Colo173, 257P1056, OklCr 290P345 See also 235Mich169, 210NW246, 247 [cit CJ].

79-18 235Mich169, 210NW246, 247 [cit CJ].

79-19½-New. An application to punish for contempt is addressed to the discretion of the court. 13F(2d)143.

79-19¾-New. Failure of defendant to demand a hearing is held no waiver of right. 100NJEq138, 135A282

79-19¼-New. In a proceeding for constructive contempt, where an answer has been filed denying allegations of the affidavit, an issue is presented and a trial is had as in other cases. 76CalA419, 245P212.

79-19⅝-New. Defendant duly served with notice and not appearing may be condemned on ex parte affidavits showing guilt by legal evidence. 101NJEq361, 139A328.

79-19½-New. Defendant may waive the right to be confronted by witnesses and have guilt determined by oath of witnesses subject to cross-examination. 101NJEq361, 139A328.

79-19⅞-New. In criminal contempt proceedings, if affidavits fail to make out case, defendant could absent himself and depend on failure of proof. 101NJEq361, 139A328.

79-19⅞-New. In criminal contempt proceedings the court should not hear testimony when defendant, although notified, is absent and not represented by counsel 101NJEq361, 139A328.

79-19½-New. A party given due opportunity to be heard in criminal contempt proceedings cannot complain of being condemned on insufficient proof. 101NJEq361, 139A328

79-19½-New. Defendant cannot be punished corporally except on appearance before court. 101NJEq361, 139A328.

79-19½-New. Allowing defendant, condemned while absent, to appear and cross examine witnesses gives him the right without which defendant could be imprisoned 101NJEq361, 139A328.

79-19½-New. Whether statements presented to Supreme Court in motion for leave to file petition for rehearing constitutes contempt is question of law. 36F(2d)832

79-21 [b] **Court does not lose jurisdiction** to punish for contempt in its presence by delaying for several days after completion in trial in which contempt was committed. 72CalA258, 236P975.

79-28 115OhSt694, 155NE231, 232 [quotCJ].

80-33 Mass 172NE269 (judicial discretion); 80Colo458, 252P343.

80-35 See also 138Misc69, 244NYS320.

80-39 127Misc785, 214NYS498; 298Pa71, 148A48; 91PaSuper458.

80-41 28Hawaii291; 322MoA897, 6SW(2d)646, 648 [quotCJ].

81-42½-New. In a proceeding against an attorney for contempt based on alleged wrongful misrepresentation of the record in his brief on appeal the attorney is entitled to full and distinct vindication where the charges are shown to be unfounded. 68CalA228, 228P665.

81-43 194Wis267, 216NW613

81-46 [a] **In Iowa,** under statute relative to contempt, trial court may impose immediate judgment for imprisonment and fine for defendant's disobedience of restraining order entered in divorce suit. 206Iowa1389, 222NW358.

81-51½-New. An order cannot be made before evidence is filed for record. 202Iowa928, 211NW403; 205Iowa482, 218NW253.

81-53 207Cal227, 277P725, 65ALR1497 (contempt for failure to answer questions); 72CalA258, 236P975 (facts held sufficiently set forth in order); 156Miss582, 126SE485, Nebr 226NW801; 300OhA93, 163NE305. [a] **Where proceeding is summary without written charges,** record must show facts upon which conviction is based, so that it can be known that court has jurisdiction. 30Ariz129, 245P273. [b] **In case of direct contempt** order must recite facts showing contempt committed. 83Mont200, 271P139. [c] **In case of constructive contempt** court must make findings of fact in order showing guilt of contempt or make reference to, or adopt allegations of, affidavit. 83Mont200, 271P439.

81-55 68CalA407, 229P1010; 156Miss582, 126SE485; 222MoA897, 6SW(2d)646, 648 [quotCJ], 49ND851, 193NW928. [a] 68CalA407, 229P1010; Miss 126SE485; 49ND851, 193NW928. [b] 69CalA598, 232P157; 317Mo1320, 298SW750. [d] **Practicing law without license.**–68CalA407, 229P1010.

81-56 73CalA604, 238P1053.

81-59 242IllA338 (findings held sufficient).

82-61 7Alaska186; 30Ariz129, 245P273; 156Miss582, 126SE485.

82-62 30Ariz129, 245P273; 68CalA407, 229P1010; 76CalA419, 245P212, 215 [quotCJ].

82-63 [a] **Where grounds of order differed from grounds in show cause order,** contempt order could not be sustained. 230AppDiv308, 243NYS732.

82-64 76CalA419, 245P212, 215 [quot CJ].

82-65 27OhA290, 161NE346 (sentence not following statute is improper).

82-69 117Tex583, 8SW(2d)508.

82-72 117Tex583, 8SW(2d)508.

82-74½-New. Where a defendant is found guilty of separate acts of contempt, judgment must be pronounced separately for the separate contempts. 76CalA419, 245P212, 218 [citCJ].

82-74¾-New. Judgment against person, of whom judge had no jurisdiction, is void. 82Colo173, 257P1086.

82-74¼-New. A judgment of contempt must be based on a record showing substantial facts warranting the judgment. 85Mont215, 278P122.

83-83 [a] (3) Provision for imprisonment for nonpayment of costs is erroneous. 202Iowa50, 209NW522.

83-93½-New. Subsequent acts cannot be made the basis of a motion to modify the judgment and increase the sentence. 200Ind623, 163NE272, 58ALR954.

83-94 101TexCr432, 276SW709 (verbal commitment erroneous); 102TexCr105, 277SW699.

83-3 101TexCr432, 276SW709; 102TexCr105, 277SW699.

83-3½-New. But commitment under written order is valid, although order not entered on minutes until after issuance of habeas corpus. 102TexCr105, 277SW699.

84-3 But see 33PortoRico863. [b] **Presence of defendant in court** must be recited in case of contempt of criminal nature. 253IllA422.

84-19½-New. A commitment on a void judgment is invalid. 310Mo339, 275SW529.

84-19¾-New. The issuance of a second commitment of a witness for contempt of court in refusing to answer questions on the ground of possible incrimination is beyond the court's jurisdiction. 93CalA488, 269P664.

84-19¼-New. An order of commitment has been held premature and unauthorized when issued within period allowed for paying fine for contempt and without additional hearing. 137Misc665, 244NYS534.

84-22 30Ariz129, 245P273 (when proceedings are summary without written charges); 93CalA177, 269P547. [d] **Where only record required is order of commitment** it should set out fully facts constituting offense. 253IllA422. [e] **Object of requirement stated.**–253IllA422.

85-32 Fla 128SE811 (warrant held invalid for indefiniteness as to time of imprisonment); Fla 129SE818; 117Tex583, 8SW(2d)508. See also 236IllA420.

86-33 141Okl85, 284P18(2dcase).

86-41½-New. Commitment to sheriff will not be construed as commanding him to hold prisoner beyond term specified in judgment of court punishing for contempt. 21AlaA48, 105SE698.

86-46 7F(2d)169.

87-49 [g] **In Federal Courts,** under 28U. S. C. A. § 385, court cannot punish with both fine and imprisonment. 26F(2d)215.

87-50 36F(2d)230; 37GaA178, 140SE789; 39GaA1, 145SE914; 164La458, 114SE896.

87-51 68CalA407, 229P1010 (direct contempt); 164La458, 114SE896. See also 36F(2d)230 (probation). [b] **Punitive sentence appropriate only to criminal contempt** cannot be imposed in proceedings instituted and tried up to moment of sentence as part of original cause of action. NJCh 147A338.

87-54½-New. Separate judgments against the same person for as many different acts of contempt are proper. 209Ky372, 272SW906.

87-56 292Pa63, 140A533.
87-58 168Ark700, 271SW710; 98Fla52, 123S3 (failure to disclose property outside of state); Fla 129S818; Iowa 229 NW163; 221MoA325, 273SW195; 99NJ Eq719, 134A291; 101NJEq460, 138A 375; 33PortoRico 863; 152Tenn431, 278SW65.
88-69½-New. Defendant may be imprisoned in the case of criminal contempt. 101NJEq361, 139A328.
88-72 221MoA325, 273SW195; 102NJ Eq270, 140A334; 117Tex533, 8SW(2d) 508; TexCivA 299SW433, 486 [quotCJ]; Wash 292P737. But see DC 38F(2d) 541; 154Md675, 141A387, 58ALR634; 310Mo 339, 275SW529. [b] **Duration of imprisonment.**–168Ark700, 271SW710.
89-83 68CalA598, 232P157; 178Minn 158, 226NW188; 215AppDiv316, 213 NYS671 (punishment by fine or imprisonment on default of payment of fine).
89-92 196 Ind501, 149NE54 [citCJ] (no such statute in Indiana).
91-11 154Md267, 140A205, 56ALR697.
91-13 CalA 290P626 (appellate process); 223Ky836, 4SW(2d)1112.
91-15 144Wash299, 258P9. [a] **Refusal to comply with order** requiring payment of temporary alimony does not authorize denial of his right to defend libel. 162Ga351, 133SE740.
91-21. [a] **Answer.**–219AppDiv261, 219 NYS709.
91-23 126 Or519, 270P484, 62ALR660. [a] **Failure of intervenor in** equity suit for receiver to purge contempt for disturbing receiver's possession of property is not ground for dismissal of intervention. 162Ga351, 133SE740.
92-28 41F(2d)379 (protection against self incrimination). [b] (4) See also 81CalA742, 254P939.
92-34½-New. Failure of holder of note and deed of trust to obey order of court to produce his encumbrances for surrender on payment of amount found due in suit by junior encumbrancers will not justify further order of court relieving plaintiff of duty to pay and satisfy such encumbrance found to be first lien. 197Cal 321, 240P765.
92-37 8PaDist&Co 155.
92-39 [a] (3) Imposition of maximum penalty of fifty dollars fine and one-day imprisonment, under Code (1924) § 12543, for defendant's violation of order entered in wife's divorce suit restraining him from interfering with her or her possession of homestead, should be modified by removing jail sentence. 206 Iowa1389, 222NW358. (7) Imprisonment for one year and fine of five thousand dollars for filing motion containing charges of dishonesty and other official misconduct against judges. 125 Okl 66, 256P704, 52ALR1270. (8) One year's imprisonment for misconduct in conducting election. 337 Ill 169, 168NE 882.
93-41 245 IllA202, 210 [citCJ]; 175 Minn57, 220NW414.
93-43 [a] **Imprisonment until compliance with orders which prisoner is unable to comply with** is unauthorized as amounting to life imprisonment, though prisoner contumaciously put it out of his power to perform. 125Kan807, 266 P650. [b] **Imprisonment for false statements before grand jury which has been discharged** must be for definite term. 36F(2d)601. [c] **Power to punish for contempt is limited by Bill of Rights,** prohibiting indefinite or cruel and unusual punishments. Fla 129S 818.
93-44 7F(2d)169.
93-45 [d] **Circumstances may modify extent of offense but will not excuse it.** 8PaDist&Co 155. [e] **Whether contempt consisted in refusing to do act commanded or in doing act forbidden may** determine nature of punishment. NJCh 147A338. [f] **Mistake of law.**–36F(2d) 230.
93-47 177Ark13, 5SW(2d)337.
93-48 41F(2d)231.
93-49½-New. In contempt proceedings, the nature of the case being such that prospective profits of the judgment debtor under contract assigned by him cannot be ascertained, punishment is limited to a fine. 133Misc357, 232NYS 22.
93-49½-New. Where a contempt decree is against two defendants but is reversed as to one, it will be reduced one half as against the other, in the absence of anything showing that liability is joint and several. 30F(2d)99.
94-51 [a] **Judgment imposing imprisonment for longer period than authorized** must be deemed inadvertence. 111 Conn243, 149A664.
94-52 13F(2d)278; Cal 292P481. [a] (2) Several utterances in radio speech commenting on causes pending and undetermined before court has been held to constitute separate offense. Cal 292 P481.
94-52½-New. There is no presumption that beneficiary under will seeking confirmation of reconversion is married woman. Iowa 229NW241.
94-61 88CalA253, 262P1098 (court held without jurisdiction to punish plaintiff refusing, in absence of court, to allow private inspection of checks produced in court by order); 194Wis207, 216 NW513.
94-66½-New. It is within the discretion of the court to purge defendant of contempt in failure to comply with an order in supplementary proceedings for conveyance of property where plaintiff has not been injured and is protected by bond. 172Minn102, 214NW776.
94-67 33F(2d)13 (condition to purging contempt); 127Misc788, 217NYS498.
95-69½-New. One may purge himself of contempt by showing the invalidity of the order sought to be enforced in contempt proceedings. 93CalA481, 269 P744.
95-71 12PortoRicoFed379.
95-79 30F(2d)106.
95-85 78Mont92, 252P388.
97-9 31NM276, 242P332.
97-10 267US87, 45SCt332, 69L ed527, 38ALR131.
97-11 267US87, 45SCt332, 69L ed527, 38ALR131.
97-12 [a] **In other jurisdictions** contempt is not offense subject to criminal prosecution under constitution and bill of rights, and court may enforce execution of judgment for contempt notwithstanding governor's power to pardon under constitution. 200 Ind716, 164NE 408, 63ALR218.
97-14 Fla 129S818; 102WVa677, 136 SE202, 49ALR968.
97-15 214Ala278, 107S750; Ariz 281P 944; Cal 290P448; Fla 129S818; 161 La293, 108S487; 152Md114, 136A312, 51ALR356; TexCivA 284SW347; 102 WVa677, 136SE202, 205, 49ALR968 [cit CJ]. Contra 293Pa63, 141A724.
97-16 102WVa677, 136SE202, 205, 49 ALR968 [citCJ]; 105WVa441, 143SE 93.
98-18 Ind 173NE456 (ruling on rule to discharge information for indirect contempt).
98-21 91Fla82, 107S251.
98-23 253Mass172, 148NE570; 292Pa 63, 140A533; 88PaSuper147; 160Tenn 500, 26SW(2d)152; 200Wis454, 225NW 746 (criminal contempt).
98-25 220MoA614, 288SW966; 219App Div261, 219NYS709. [c] **In Montana.**–85Mont215, 278P122.
99-28 See also Md 148A826.
99-31 29Hawaii323; 125 Okl 1, 256P 340. But see 260Mass369, 157NE693. [a] **In other jurisdictions** right of review of criminal contempt is held to be authorized by statutes. 102WVa677, 136SE202, 49ALR968.
99-32 161La293, 108S487.
99-33½-New. An appeal from a decree overruling a motion to dissolve a temporary injunction and adjudging one respondent in contempt has been held not subject to dismissal since part of the decree was appealable. 214Ala278, 107S750.
99-38 Contra 148Wash526, 269P793, 59 ALR1265.
99-41 137Misc356, 239NYS82. [a] (10) Order defaulting defendant and his surety, held not final judgment where writ of error will lie. 253Mass 172, 148NE570.
100-42 Mass 166NE848.
100-44 253Mass172, 148NE570.
101-60½-New. In some jurisdictions the state can appeal only from decisions of trial court involving questions of law. 160Tenn500, 26SW(2d)152.
101-61 [d] But see 83Mont200, 271P 439. [e] **Proceeding before court of last resort.**–In Indiana any ruling of supreme court in original proceeding for indirect contempt by which either party may feel aggrieved may be properly presented by motion for new trial. 200 Ind623, 162NE441. [f] **In Massachusetts.**–166NE848.
101-64 219Ala508, 122S819; 200Cal 403, 253P135; 89CalA177, 264P573 (sufficiency of proof); 161La104, 108S 229. [b] (1) 202 Iowa345, 209NW285. (2) Trial court, after proceeding for contempt has been removed by certiorari, cannot enter, without notice to petitioner, nunc pro tunc amendment to the record showing petitioner entered plea of guilty in contempt proceeding. 202 Iowa713, 210NW907.
101-65 [a] **In Louisiana.**–170La671, 129S125 (facts not reviewable).
102-68 194NC577, 140SE230 (writ will not lie if appeal not perfected because of appellant's negligence).
102-71 170La671, 129S125.
102-73½-New. Where evidence is sufficiently substantial to give the court jurisdiction, further inquiry on a writ of review may not be had. 76CalA419, 245P212.
102-73½-New. No inquiry will be made into the evidence on application for certiorari. 163La94, 111S611.
102-78 [b] 166Minn263, 207NW617.
102-79 260Mass369, 157NE693. [c] **Writ of error held to present moot question,** where defendants had surrendered possession, confinement being for previous failure to do so. 170Ga232, 152SE 256.
102-82 [a] **Proceeding for contempt in violating injunction** against arrest is treated as civil for purpose of appeal and reviewable as one in equity. 220 MoA614, 288SW966.
102-89 Cal 290P293; 247 IllA220; 198 Ind629, 154NE478; 202 Iowa50, 209NW 522; 213Ky221, 280SW970. [a] (2) Defendant was held not entitled to take advantage of court's failure to reduce statement to writing where he was present and did not object. 198 Ind629, 154 NE478.
103-90 Mass 166NE848. [a] (3) Where abstract does not purport to contain all evidence. 337 Ill 169, 168NE 882.
103-91 242 IllA338.
103-93 Ind 173NE456.
103-93½-New. Where defendant, after adverse ruling on his motion to quash and demurrer, rested his case without putting anything before the court, he cannot complain of the judgment of contempt because rendered without introduction of evidence. 76CalA419, 245P 212.
103-9½-New. Stay is within the trial court's discretion. 194Wis207, 216NW 513.
103-12 68CalA407, 229P1010; 202 Iowa718, 210NW907. [h] 202 Iowa50, 209NW522. [i] **Schedule accompanying brief** cannot be considered as record. NJSup 137A647. [j] **Where petition is insufficient,** court will not of its own motion dismiss, but petition may proceed under statute. NJSup 137A647. [k] **Return on certiorari** should contain affidavits on which order to show cause issued, order and judgment sought to be reviewed, certified by clerk. 92CalA 695, 268P669 (review limited to properly authenticated record). [l] **Who required to have record made up.**–92 CalA695, 268P669.
104-13 253 IllA422.
104-14 33PortoRico 247.
104-16 [a] **As against attorney's counterstatement** reviewing court must rely on order of trial court reciting facts, truth of which cannot be inquired into. 76Mont222, 246P250.
104-17 [a] **Pleadings in civil action** out of which civil contempt proceeding

arose are properly included in transcript. **Or** 283P23.

104-17½-New. The information, interrogations, and answers are properly parts of the record and need not be embodied in the bill of exceptions. 224 IllA221.

104-17¼-New. Specifications filed by the attorney-general are held part of record. 260Mass369, 157NE693.

104-17¼-New. Papers not certified to by anyone nor made part of record by consent of parties cannot be considered as part of record on appeal. 67Utah 578, 248P815.

104-17½-New. In some jurisdictions, where a writ of certiorari staying proceedings is issued and served on the clerk of the trial court, the trial court is without power materially to alter or add to the record as made. 83Mont 200, 271P439.

104-17¼-New. Order of commitment is only record required to be made in case of contempt committed in open court without charge, plea, issue or trial. 253 IllA422.

104-19 26F(2d)215 (court is confined to errors of law); 20AlaA514, 525, 104 S561 [citCJ]; 37GaA478, 140SE789; 30Hawaii80; 200Wis454, 225NW746. [d] 194Wis509, 217NW691.

104-20 46 Ida97, 266P677 (evidence is reviewable to extent of determining whether there is any evidence to furnish competent basis for adjudication); 204 Iowa103, 214NW877. [a] **In Montana.**–83Mont200, 271P439.

104-21 204 Iowa103, 214NW877; 192 Wis1, 211NW926, 930 [quotCJ]. [b] **On certiorari** (1) proceedings are not triable de novo. 202 Iowa104, 209NW 274. (2) Evidence as applied to merits cannot be considered. 76CalA419, 245 P212.

104-22 17F(2d)976; 29F(2d)59; 81 Colo 431, 256P319; 170Ga291, 152SE 574; Ind 166NE265; 244Mich165, 221 NW138; 248Mich297, 226NW907; 83 Mont200, 271P439; 292Pa63, 140A533 (court will not examine merits of original decree); 200Wis454, 225NW746.

104-23 20AlaA514, 525, 104S561 [cit CJ]; 101Vt381, 143A676; 200Wis454, 229NW31. [b] **Assertion of judgment taken as true on appeal** unless contrary is shown. 165Minn203, 206NW402 (that attorney's manner was contemptuous and insolent to court). [c] **Character of contempt** in violating injunction affects extent of review of evidence. 220 MoA614, 288SW966.

105-24 102WVa677, 136SE202, 205, 49 ALR968 [quotCJ].

105-25 102WVa677, 136SE202, 205, 49 ALR968 [quotCJ].

105-28½-New. Review of exercise of the special inherent power of a court of equity is not a review of the exercise of equity jurisdiction. 20AlaA514, 104S 561.

105-28½-New. The trial court's construction of an alimony agreement is conclusive in review of contempt proceedings. 89CalA177, 264P573.

105-28¼-New. On certiorari the supreme court is confined to the record. 208 Iowa472, 225NW954 (order of commitment annulled on insufficient record).

105-28½-New. On appeal from adjudication of guilt of contempt for failure to pay alimony, where the fact of nonpayment was admitted, judgment will not be reversed unless the evidence in the record shows that the order of commitment should not have been made. 129Kan541, 283P918.

105-29 81Colo 420, 256P325.

105-32 Fla 129S818; 242 IllA338; 194 Wis509, 217NW691 (order affirmed on appeal held law of case). [c] 242Mich 624, 219NW714.

105-36 76CalA419, 245P212; 37GaA 478, 140SE789; 122Kan520, 253P598; 292Pa63, 140A533; 96PaSuper478 (order adjudging defendant not guilty of contempt); 200Wis454, 225NW746.

105-40 29F(2d)445; 81Colo 431, 256P 319; 167Ga447, 145SE878; 213Ky221, 280SW970.

106-43 Fla 129S818; 242 IllA565; 247 IllA220; 198 Ind629, 154NE478. [a] (6) Finding of circuit court must be taken as reflecting purpose of assault on judge of municipal court on appeal from refusal to quash contempt judgment. 174Ark875, 298SW15, 55ALR 1226. (7) It is presumed that court refused to approve agreement relating to alimony where decree differs therefrom. 89CalA177, 264P573.

106-45 72CalA90, 236P927.

106-47 92CalA695, 268P669 (with due regard for parties' rights); 242 IllA 338.

106-52 80Colo 452, 252P343; 73Mont 297, 236P553 (affidavit held insufficient to give trial court jurisdiction in failing to state nature and character of action).

106-53 80Colo 452, 252P343.

106-54 81Colo 431, 256P319; 81Colo 420, 256P325; 292Pa63, 140A533.

107-61 68CalA407, 229P1010 (failure of record to show jurisdiction of lower court, to punish, by failure to set out facts).

107-62 162Ga84, 132SE755 (question moot); **Or** 283P23 (appeal not dismissed for correction of defect in record made without notice).

107-62½-New. or the contemner, if imprisoned, may be discharged on habeas corpus. 68CalA407, 229P1010.

107-63 178Minn158, 226NW188 (for resentence where sentence held excessive).

107-64 41F(2d)910; 292Pa63, 140A 533.

107-68 [a] But see 128 Or667, 275P 679 (taxation held not authorized).

CONTEST

110-41 28Hawaii99.
110-42 28Hawaii99.
110-42½-New. to contend; Standard D. [quot 28Hawaii99].
110-44 28Hawaii99.
110-46 28Hawaii99.
110-47 28Hawaii99.
110-48 28Hawaii99.
110-49 28Hawaii99.

CONTIGUOUS

111-68 [a] 35GaA689, 134SE796.
112-69 Mont 289P559.
112-77 35GaA689, 134SE796.

CONTINGENT

114-13 263Mass57, 160NE437; 172Minn 231, 215NW223. See also 129Misc845, 223NYS470.
114-14 [a] 70Utah124, 258P342, 64ALR 368.
114-15 172Minn231, 215NW223; 70 Utah124, 258P342, 64ALR368.
116-36 See also 129Misc845, 223NYS 470.

CONTINUANCE

118-57 241NY389, 150NE303.

CONTINUANCES

122-1 322Mo 892, 17SW(2d)524. [b] **Other definitions.**–222MoA408, 7SW(2d) 279.
122-3 222MoA408, 7SW(2d)279.
123-6 219Ala369, 122S608 (power resides in court and not in trial judge).
123-13½-New. Defendant may ask for continuance although no notice of trial was served. 221AppDiv482, 224NYS162.
123-13½-New. Absence of affidavit of merits justifies denial of continuance. 221AppDiv482, 224NYS162.
123-14 12F(2d)667; 22F(2d)59; 23F (2d)493; 215Ala321, 110S469; 215Ala 688, 112S239; 217Ala200, 115S302; 218 Ala415, 118S794; 219Ala369, 122S608; 173Ark956, 293SW1015; 176Ark1188, 5 SW(2d)916; 177Ark177, 6SW(2d)10; 181Ark1145, 26SW(2d)576(2dcase); 88 CalA281, 263P383; 83Colo 587, 267P 792; 89Fla312, 103S828; 165Ga472, 141 SE207; 36GaA54, 135SE224; 41GaA51, 152SE148; 43 Ida654, 254P215; 46 Ida 355, 267P611; 240 IllA254; Iowa 231 NW332; 207 Iowa1385, 224NW809; 120 Kan 575, 244P1063; 125Kan76, 262P 1030; 125Kan403, 265P66; 211Ky729, 277SW1018; 125Me494, 135A198; 257 Mass409, 153NE888; Mass 167NE656; Mass 168NE78; 174Minn297, 219NW180; 176Minn331, 223NW605; 142Miss199, 106S633; 153Miss722, 121S156; 308Mo 201, 271SW481; 310Mo 655, 276SW36; 84Mont158, 274P489; 114Nebr438, 208 NW139; 50Nev46, 249P865; 197NC617, 150SE120; 24 OhA471, 157NE803; 124 Okl 278, 255P697; 139 Okl 16, 280P1087; 139 Okl 164, 281P773(2dcase); 115 Or 668, 240P222; 126 Or384, 270P501; 89 PaSuper179; 50Philippine867; 33Porto Rico 13; 145SC53, 142SE828; 116Tex 325, 273SW1109; TexCivA 275SW473; TexCivA 295SW675; TexCivA 118SW(2d) 214; 144Va220, 132SE335; 135Wash31, 237P19; 147Wash667, 267P46. [b] (1) 198 Ind695, 154NE666.

125-15 169Ga770, 151SE381(2dcase); 11LaA22, 122S143; 125Me494, 135A198; 308Mo 201, 271SW481.

125-16 12F(2d)667.

125-19 213Ky317, 280SW1090.

126-22 TexCivA 283SW920.

126-26 198 Ind695, 154NE666 [quot CJ]; 161La653, 109S345.

126-27 213Ala414, 104S817 (refusal to continue attachment suit for defendant's failure to answer interrogatories held proper where ground for attachment was stated in information and belief).

126-29 101CalA411, 281P714.

126-30 TexCivA 13SW(2d)735(1stcase).

126-31 TexCivA 25SW(2d)153.

127-32 164Ga573, 139SE13.

127-36 37F(2d)141.

129-80 222MoA408, 7SW(2d)279.

130-88 161La653, 109S345.

130-88½-New. If the motion is opposed by plaintiff it is not a sufficient ground alone for continuance that a settlement is being attempted. 12PortoRicoFed 434.

130-90 TexCivA 298SW631.

130-91 TexCivA 298SW631.

130-95 80Mont453, 260P1051.

130-97 80Mont453, 260P1051.

131-4 TexCivA 299SW292.

131-8 [d] **Where appellant without joining city as party** was entitled to trial of cause at term at which it was called, mere fact that defendant filed cross petition against joint tort-feasor did not entitle it to continuance. 208Ky 728, 271SW1046.

131-14 See also 33PortoRico 13.

133-37½-New. Where adverse party is member of petit jury panel and has served as such court should grant continuance or call jurors not on panel. 179Minn557, 230NW91.

133-41 207 Iowa1385, 224NW809; 216 Ky819, 288SW749.

134-44 83Colo 587, 267P792.

134-46 35Ariz246, 276P837 (failure of defendant to keep counsel advised of his whereabouts); Iowa 231NW332.

134-51 But see 102CalA359, 282P826 (2dcase).

134-52 But see Wash 291P721.

134-57 145SC53, 142SE828.

135-58 161La653, 109S345.

135-59 170Ga486, 153SE25(2dcase); 299Pa45, 149A91.

135-63 TexCivA 293SW915.

136-82 101CalA186, 281P514 (where proceedings in equity have no bearing upon issues involved). [b] **Denial of continuance held not error.**–197NC617, 150SE120.

136-86 164Ga803, 139SE552.

136-90 TexCivA 26SW(2d)327.

137-3½-New. The court is not obliged to grant a continuance and may resort to other courses prescribed. 22AlaA573, 117S912.

137-3½-New. A party who fails to move under the provisions of Code (1923) § 7773 cannot complain of the court's failure or refusal to postpone the trial or take other action within his discretion under § 7770. 22AlaA573, 117S912.

137-13 213Ky317, 280SW1090.

138-22 86Colo 389, 282P251; TexCivA 293SW858.

138-24 137Misc382, 244NYS23.

139-26 35Ariz246, 276P837.

139-27 140 Okl 138, 282P295 (motion properly overruled). [e] **Denial of continuance not abuse of discretion** where absent defendant had not kept his attorney acquainted with his whereabouts, paid no attention to preparation of case, and no showing of sickness. 211Ky729, 277SW1018.

139-28 35Ariz246, 276P837 (failure of

defendant to keep counsel advised of his whereabouts).
139–32 207**Cal** 386, 278**P**855.
140–41 170**Ga**486, 153**SE**25(2dcase); 37 **GaA**390, 140**SE**426.
140–42½–New. Where a party intends to testify as a witness and a continuance is asked for on this ground, the same rule applies to him as to other witnesses. 35**Ariz**246, 276**P**837.
140–43 126 **Or**384, 270**P**501; 135**Wash** 91, 237**P**19; 40**Wyo** 89, 275**P**101.
140–44 195**Wis**341, 218**NW**188.
140–45 [a] **Refusal of continuance to permit guardian ad litem** to get in touch with minor defendant absent from state held error. 173**Ark**66, 291**SW**996.
141–46 171**Ark**521, 285**SW**5.
141–48 84**CalA**499, 258**P**438; 88**CalA** 281, 263**P**383.
141–49 86**Colo** 389, 282**P**251; 128**Me**542, 148**A**565; 114**Nebr**829, 211**NW**172; **Nebr** 231**NW**843.
141–53 36**GaA**54, 135**SE**224; 37**GaA**63, 139**SE**123; **NJ** 151**A**105(1stcase) (refusal on physician's unsworn certificate not an abuse of discretion).
141–54 76**Mont**93, 244**P**1007.
142–55 37**GaA**63, 139**SE**123; 120**Kan** 575, 244**P**1063; 76**Mont**93, 244**P**1007.
142–56 35**GaA**234, 132**SE**647 (refusal of continuance because of illness held improper); 37**GaA**63, 139**SE**123; 118**Kan** 351, 234**P**944 (ruling on conflicting evidence sustained); 120**Kan**575, 244**P**1063; 76**Mont**93, 244**P**1007.
142–58 37**GaA**63, 139**SE**123; 120**Kan** 575, 244**P**1063.
142–62 84**CalA**499, 258**P**438 (presence at home not shown to be necessary); 132**SC**488, 129**SE**428.
143–65 [b] 168**Ga**398, 148**SE**80.
144–85 206**Cal** 88, 273**P**579; 6**LaA**74; 139 **Okl** 164, 281**P**773(2dcase) (not necessarily ground for continuance).
144–87 39**GaA**139, 146**SE**330.
144–92 **CalA** 284**P**950; **NJ** 150**A**393; **SC** 155**SE**136.
144–93½–New. Where it does not appear that the services of counsel are expected at the next term of court, no cause for continuance is shown. 37**GaA** 390, 140**SE**426.
144–93½–New. Where counsel for plaintiff defaults on call of the calendar, the opposing attorney may, without further explanation, obtain an adjournment. 134**Misc**42, 234**NYS**396.
145–95 232**Ky**94, 22**SW(2d)**421.
145–99 148**SC**419, 146**SE**237.
145–1 206**Cal** 18, 272**P**1042.
146–9 137**Misc**380, 244**NYS**1.
146–10 [c] **In California.**–82**CalA**764, 256**P**422.
146–12 137**Misc**380, 244**NYS**1.
146–13 324 **Ill** 543, 155**NE**481.
146–15 122**Kan**524, 253**P**551; 166**La**30, 116**S**583; 168**La**468, 122**S**584; 308**Mo** 201, 271**SW**481; 218**MoA**187, 265**SW**866.
146–19 131**Misc**597, 227**NYS**568.
147–33 11**LaA**22, 122**S**143; 308**Mo** 201, 271**SW**481; **TexCivA** 11**SW(2d)**608.
148–35 241**Mich**534, 217**NW**909 (one of several counsel disqualified); 114**Nebr** 438, 208**NW**139.
148–36 [a] **Motion for continuance not deprived of its equity** because of presence of other counsel. **TexCivA** 293**SW** 858.
148–38 **TexCivA** 293**SW**858.
149–56 12**F(2d)**667; 12**F(2d)**693; 7 **Alaska**257; 165**Ga**472, 141**SE**207; 239 **IllA**442; 1**LaA**526; **Md** 149**A**4 (not appealable); 142**Miss**199, 106**S**633; 319 **Mo** 139, 3**SW(2d)**374; 50**Nev**46, 249**P** 865; **NJ** 143**A**733(1stcase); **NJSup** 146 **A**666(1stcase); 50**ND**357, 195**NW**656, 658 [citCJ]; 132 **Okl** 100, 269**P**357; 300 **Pa**569, 151**A**362; **Tex** 296**SW**672; 143 **Va**206, 129**SE**367; **Wash** 291**P**469. [a] **Absence of essential evidence** is not, alone, compelling reason for continuance. **NJ** 151**A**852.
150–57 3**LaA**555; **LaA** 129**S**398; 50**ND** 357, 195**NW**656, 658 [citCJ]; **TexCivA** 275**SW**207; **TexCivA** 11**SW(2d)**608; **TexCivA** 26**SW(2d)**377.
150–62 **CalA** 261**P**1053.
151–67 37**Wyo** 78, 259**P**185 (telegram of physician is insufficient where unaccompanied by affidavit by one having knowledge of illness).
151–72 200 **Iowa**357, 204**NW**423 (refusal of continuance not error where action already fully determined on petition of intervention on issues identical with those presented by movement for continuance); 233**Ky1**, 24**SW(2d)**942. [c] **Refusal of continuance held not justified** because insurer had opportunity to get another medical witness. **Tex CivA** 26**SW(2d)**377.
151–73 169**Ark**73, 272**SW**843 (secondary evidence of contents of letter not shown to be lost); 76**Mont**93, 244**P**1007; **TexCivA** 288**SW**845. [b] See also 231 **Ky**682, 22**SW(2d)**111.
152–79 76**Mont**93, 244**P**1007, 1010 [cit CJ]; **TexCivA** 275**SW**207; **TexCivA** 288 **SW**845; 153**Va**221, 149**SE**491.
152–80 218**Ala**616, 119**S**635; 203**Cal** 233, 263**P**802; 76**Mont**93, 244**P**1007, 1010 [citCJ]; 144 **Okl** 144, 289**P**706; **TexCivA** 17**SW(2d)**835(2dcase); **Tex CivA** 19**SW(2d)**591; **Wash** 291**P**469.
153–95 200 **Iowa**357, 204**NW**423.
154–98 169**Ark**73, 272**SW**843; **CalA** 285 **P**1052; 86**Mont**553, 284**P**769 (properly refused); **TexCivA** 295**SW**675.
154–99 175**Ark**101, 298**SW**1023; 39**GaA** 371, 147**SE**163(2dcase).
154–1 44 **Ida**729, 262**P**152.
154–10 **Mo** 29**SW(2d)**89.
155–18 **TexCivA** 31**SW(2d)**675.
155–19 [b] **But refusal of continuance** for absent physician was unjustified by admission of his medical chart with explanation. **TexCivA** 26**SW(2d)**377.
155–20 135**Wash**91, 237**P**19.
155–21½–New. or that a witness' statement may be read without objection. **TexCivA** 285**SW**925.
155–22 135**Wash**91, 237**P**19.
155–31 216**Ala**321, 113**S**495; 218**Ala**616, 119**S**635; 44 **Ida**729, 262**P**152; 200 **Iowa** 357, 204**NW**423; 223**Ky**544, 4**SW(2d)** 368 (where witness excused without laying foundation for impeachment, continuance not granted to recall him); **LaA** 129**S**398; 308**Mo** 201, 271**SW**481; **MoA** 4**SW(2d)**1100; 52**ND**209, 202**NW**404; 132 **Okl** 100, 269**P**357; **TexCivA** 275**SW** 207 (where facts in petition show no amount of diligence would have availed defendant); **TexCivA** 285**SW**925; **Tex CivA** 287**SW**121; **TexCivA** 288**SW**545; **TexCivA** 297**SW**352; **TexCivA** 19**SW (2d)**591.
158–52 144**Va**220, 132**SE**326.
158–57 178**Ark**635, 12**SW(2d)**18; 226 **Ky**776, 11**SW(2d)**956; **TexCommnA** 12 **SW(2d)**1009. [b] (2) Other instances. 86**Mont**553, 284**P**769.
159–61 216**Ala**321, 113**S**495.
159–73 **TexCivA** 25**SW(2d)**153.
159–74 165**La**478, 115**S**662; 9**LaA**614, 120**S**423.
160–75 73**CalA**218, 238**P**728.
160–78 149**Miss**21, 115**S**116.
160–79 38**GaA**685, 145**SE**672; 9**LaA**614, 120**S**423; **TexCivA** 19**SW(2d)**591.
160–87 132 **Okl** 100, 269**P**357 (fault of adverse party).
161–88 46 **Ida**355, 267**P**611.
161–89 **TexCivA** 275**SW**207.
161–94 **TexCivA** 25**SW(2d)**153.
162–16 175**Ark**101, 298**SW**1023.
163–20 101**WVa**337, 132**SE**887, 888 [cit CJ].
163–21 101**WVa**337, 132**SE**887, 888 [cit CJ].
163–22 101**WVa**337, 132**SE**887, 888 [cit CJ].
163–23 101**WVa**337, 132**SE**887, 888 [cit CJ].
163–27 37**GaA**63, 139**SE**123; 50**Nev**46, 249**P**865; **Tex** 286**SW**611; **TexCivA** 288 **SW**845; 37**Wyo** 78, 259**P**185. [e] **Where deposition taken was inadmissible**, refusal of continuance to procure witness outside state was held error. 100**Vt**328, 137**A**324.
163–28 **Tex** 286**SW**611; 37**Wyo** 78, 259 **P**185.
164–31 86**CalA**439, 260**P**893.
165–37 132 **Okl** 100, 269**P**357.
165–38 218**Ala**616, 119**S**635.
165–42 50**Nev**46, 249**P**865; 50**ND**804, 197**NW**868.
165–49 171**Ark**521, 285**SW**5; 176**Ark** 1188, 5**SW(2d)**916; **TexCivA** 285**SW**650.
166–50 48 **Ida**288, 282**P**90.
167–63½–New. It is error to refuse a continuance to enable a party to produce an original deed and to prove that the record had been altered by changing the date since the date of an abstract on which the party relied. 47 **Ida**589, 277**P** 548.
167–75½–New. Showing of diligence insufficient. 308**Mo** 201, 271**SW**481.
167–80 **Wash** 292**P**429.
167–81 176**Ark**179, 2**SW(2d)**15; 128**Me** 393, 148**A**147, 68**ALR**481; 52**ND**209, 202 **NW**404.
168–82 222**MoA**930, 10**SW(2d)**969; 128 **Okl** 102, 261**P**549; 128 **Okl** 239, 262**P** 660; **TexCommnA** 276**SW**170.
168–84 128 **Okl** 102, 261**P**549.
168–87 128 **Okl** 239, 262**P**660. [b] **Where defendant delayed** seven months in answering petition, he was not entitled to continuance to procure testimony to controvert amended petition. **TexCivA** 23**SW(2d)**853.
169–89 143**Wash**444, 255**P**666.
169–90 12**F(2d)**693; 207 **Iowa**939, 223 **NW**862; **MoA** 296**SW**1036; 128 **Okl** 239, 262**P**660; **TexCivA** 21**SW(2d)**710; 147 **Wash**667, 267**P**46. [b] **If inadmissible testimony is offered after withdrawal of motion to amend**, remedy, is not by renewal of motion for continuance. 143 **Wash**444, 255**P**666.
169–94 12**F(2d)**693; 36**GaA**816, 138**SE** 263; 208 **Iowa**970, 226**NW**117 (unnecessary and nonessential amendment); 144**Va**782, 130**SE**773 (allegation that notes had been listed and assessed for taxation, required by statute, not ground for continuance).
170–95 218**Ala**415, 118**S**794; 235 **IllA** 344; 73**Mont**321, 236**P**550; 89**PaSuper** 175.
170–96 128 **Okl** 102, 261**P**549; **TexCivA** 298**SW**631.
170–97 235 **IllA**344.
172–15 **TexCivA** 275**SW**430.
173–19 [a] **Voluntary elimination of issue** in case is no ground for continuance. 208 **Iowa**133, 217**NW**472.
173–19½–New. Where plaintiff is forced to an election between two counts, refusal of defendant's request for continuance is not abuse of discretion where defendant offered no proof nor showed why he did not do so. 236**Mich** 294, 210**NW**231.
173–21 [a] (4) Action on accident insurance policy, where defendant required further time for investigating. 214**Ky**142, 282**SW**1104.
173–26 101**CalA**426, 281**P**723.
174–32 **MoA** 16**SW(2d)**649; 105**WVa** 366, 142**SE**518.
174–39 **Wash** 286**P**856 (refusal, after amendment, of continuance longer than one day, held not error).
174–39½–New. Continuance to amend pleading may properly be granted. 165 **Ga**472, 141**SE**207.
174–42 [b] **TexCivA** 298**SW**631.
174–47 170**Ark**945, 282**SW**1; 317**Mo** 1255, 298**SW**69, 82 [citCJ].
174–48 170**Ark**945, 282**SW**1; 317**Mo** 1255, 298**SW**69.
176–70 172**Ark**421, 288**SW**908.
176–71 36**GaA**706, 137**SE**842.
176–72 36**GaA**706, 137**SE**842; **TexCivA** 288**SW**845.
176–74 36**GaA**706, 137**SE**842.
176–76 36**GaA**706, 137**SE**842.
177–80 **TexCivA** 13**SW(2d)**452.
177–88 178**Ark**856, 13**SW(2d)**591; **Tex CivA** 4**SW(2d)**320.
178–5 88**CalA**281, 263**P**383; **Wash** 286 **P**282.
178–13 83**Colo** 587, 267**P**792 (continuance to prepare case); 145**Wash**390, 260 **P**255.
179–17 209**Ky**165, 272**SW**413 (for filing of reply consisting of traverse, when counsel present in courtroom at time of filing and made no objection); **Md** 149 **A**4. [c] **After judgment is rendered**, court loses power to pass an application. **TexCivA** 20**SW(2d)**107.
179–18 **TexCivA** 282**SW**608.
179–20 145**Wash**390, 260**P**255 (diligence required by statute not shown). [e] **In Texas.–CivA** 8**SW(2d)**326.
179–23 See also 237 **IllA**122.
180–26 101**CalA**411, 281**P**714; **LaA** 129 **S**398.
180–31 130 **Okl** 82, 265**P**650.
181–44 **TexCivA** 8**SW(2d)**326.
181–49 [c] **Signing.–Tex** 286**SW**611.
181–52 324 **Ill** 543, 155**NE**481; **LaA** 129 **S**398.
181–53 130 **Okl** 82, 265**P**650.

181-53½-New. Where a statute provides that certain conclusions shall be made to appear before proceedings by the court are authorized, facts upon which a conclusion may be based must be shown by documentary evidence or testimony under oath. 324 **Ill** 543, 155 **NE**481.

182-58 101**WVa**492, 133**SE**106, 107 [quotCJ]. See also 101**CalA**411, 281**P** 714.

182-59 101**WVa**492, 133**SE**106, 107 [quotCJ].

182-60 101**WVa**492, 133**SE**106, 107 [quotCJ].

182-61 324 **Ill** 543, 155**NE**481.

182-64 35**GaA**111, 132**SE**142; 40**GaA** 386, 149**SE**721.

183-75 101**CalA**411, 281**P**714. [b] **If presence of defendant is necessary to advise and assist attorney,** application should state such facts. 101**CalA**411, 281**P**714.

183-78 101**CalA**411, 281**P**714.

183-82 101**CalA**411, 281**P**714.

183-82½-New. Application for continuance held properly denied. 101**CalA**411, 281**P**714.

183-88 See also 222**MoA**930, 10**SW(2d)** 969.

184-97 **TexCivA** 275**SW**207 (sufficient); **TexCivA** 11**SW(2d)**214.

184-6 115 **Or**668, 240**P**222. [c] **Affidavit held sufficient.**-128**Me**542, 148**A**565.

184-8 24**F(2d)**78 (kind of expert witness to be produced not shown).

184-9 35**Ariz**246, 276**P**837.

185-11 35**Ariz**246, 276**P**837.

185-14 215**Ala**547, 112**S**124; 35**Ariz** 246, 276**P**837; 69**CalA**606, 232**P**152; 88 **IndA**693, 165**NE**526; 87 **IndA**507, 159 **NE**555; 249**Mich**115, 227**NW**799; 115 **Or**668, 240**P**222; 12**PortoRicoFed**434.

186-22 **TexCivA** 288**SW**845.

186-24½-New. There must be a showing that the additional proof will tend to establish what the party claims it will. 217**Ky**716, 290**SW**718.

186-25 169**Ark**73, 272**SW**843; 176**Ark** 666, 4**SW(2d)**25 (whereabouts of witness); **TexCivA** 295**SW**675.

187-40 209**Ky**165, 272**SW**413.

188-42 12**PortoRicoFed**434; **TexCivA** 295**SW**675.

188-43 52**ND**209, 202**NW**404.

188-50 209**Ky**165, 272**SW**413; **MoA** 4 **SW(2d)**1100; **TexCivA** 295**SW**675.

189-53 52**ND**209, 202**NW**404; 139 **Okl** 16, 280**P**1087.

190-72 324 **Ill** 543, 155**NE**481; **Tex CivA** 8**SW(2d)**326. [b] **Court is not obliged to hear testimony** before denying continuance where pleading revealed all that proof could do. **CalA** 268**P**481.

190-74½-New. In deciding upon the sufficiency of a motion and affidavit for continuance, no presumption favorable to the applicant is to be indulged. 89 **Fla**312, 103**S**828.

190-78 89**Fla**312, 103**S**828.

190-79 89**Fla**312, 103**S**828.

190-80 89**Fla**312, 103**S**828.

190-81 89**Fla**312, 103**S**828.

191-86 89**Fla**312, 103**S**828.

191-95 [c] **Where all cases are continued by order of court until next term,** special order of continuance is not necessary, although alias summons is not sued out. 222**MoA**408, 7**SW(2d)**279.

191-99½-New. Although a litigant does not have a special order of continuance from one term to another appearing of record in his case and does not sue out an alias summons, his case stands continued under an order continuing all cases to the next term. 322**Mo** 892, 17 **SW(2d)**524.

192-8 **TexCivA** 20**SW(2d)**849.

192-8½-New. Securing continuation is waiver of all questions of jurisdiction. 224 **IllA**210.

192-8½-New. Where, upon motion, the affidavit shows that the party and witness cannot attend court the same day, the effect of a continuance for several hours only is to overrule the motion. 85 **IndA**536, 154**NE**675.

192-16 **TexCivA** 8**SW(2d)**296.

192-18½-New. Power and authority to set aside a continuance and reset the case for trial resides in the court, not the trial judge. 219**Ala**369, 122**S**608.

192-19 85 **IndA**536, 154**NE**675.

193-39 **Wash** 292**P**429.

194-44 52**SD**436, 218**NW**148 (equivalent to denial of application for continuance).

195-77 **CalA** 291**P**438; **Mo** 285**SW**409; 76**Mont**93, 244**P**1007 (where movant offered to go to trial if adverse party would agree that witness would testify to statements contained in affidavit and adverse party so agreed); 50**ND**357, 195**NW**656; 39 **OklACR**368; 126 **Or**384, 270**P**501; **TexCivA** 288**SW**845.

196-78 228**Ky**446, 15**SW(2d)**271.

196-80 [a] (5) Person electing to allow reading of affidavits is bound thereby. 233**Ky**383, 25**SW(2d)**1046.

196-85 35**Ariz**246, 276**P**837; **Iowa** 220 **NW**338; 76**Mont**93, 244**P**1007.

197-88½-New. A motion for a continuance will be denied where the opposing party consents to the use of all or any part of the testimony of an absent witness given during previous trials. 12 **PortoRicoFed**476.

197-96 **MoA** 286**SW**428.

197-1 35**Ariz**246, 276**P**837; 265**Mass** 301, 164**NE**89.

198-6 **MoA** 29**SW(2d)**741.

198-11 **MoA** 29**SW(2d)**741.

199-19 **TexCivA** 272**SW**508 (filing of answer on day for trial waived by announcing ready for trial).

199-19½-New. ,or by calling "ready" when the case is called for trial. 36**GaA** 816, 138**SE**263.

199-24½-New. Failure to call court's attention to fact that adverse party is member of jury panel does not constitute waiver of right to continuance on such ground. 179**Minn**557, 230**NW** 91.

199-26 **Fla** 129**S**700.

199-26½ **TexCivA** 292**SW**281; **Va** 154 **SE**492.

199-27 50**Nev**46, 249**P**865.

200-31 39**GaA**36, 145**SE**909.

200-32 207**Cal** 386, 278**P**855.

200-41 41**GaA**51, 152**SE**148.

200-51 **GaA** 155**SE**356(2dcase); **Tex CivA** 28**SW(2d)**253 (properly denied).

201-55 164**La**1085, 115**S**278 (refusal of continuance not abuse of discretion where witnesses probably evading process of court); **TexCivA** 295**SW**675.

201-56 **TexCivA** 20**SW(2d)**142.

201-60 231**Ky**305, 21**SW(2d)**435.

201-70 99**CalA**423, 278**P**1051 (simple request of counsel).

201-73 [b] **Third application properly refused** where requested on same grounds and diligence not shown. **Tex CivA** 277**SW**425.

CONTINUE

203-26 [b] **Despite mere temporary interruption** without abandonment, one continues in business uninterrupted within meaning of statute. 127**Misc**538, 217**NYS**217.

203-31½-New. Continue used as law term means to adjourn, prorogue, or put off. 241**NY**389, 150**NE**303.

CONTRACT

210-32 [a] **Appointment to public office** held not to be contract within meaning of penal statute. 242**NY**453, 152**NE**259.

CONTRACTOR

211-48 128 **Okl** 188, 261**P**941.

211-61 **TexCivA** 32**SW(2d)**220.

211-61½-New. In a general sense a contractor is one who enters into a contract to do a special piece of work for another according to price, specifications, and terms agreed upon. 241**Mich** 478, 217**NW**565.

212-64 162**La**255, 110**S**413 [citCJ].

CONTRACTS

237-2 17**F(2d)**919; 23**F(2d)**611; 41**F (2d)**552. [a] (3) 31**F(2d)**53; 190**NC** 203, 129**SE**607. (6) 190**NC**203, 129**SE** 607. (8) See also **Colo** 293**P**345. (11) 190**NC**52, 128**SE**401. (22) 197 **Ind**236, 150**NE**361, 363 [citCJ]. (32) A contract express or implied, executed or executory results from concurrence of the minds of two or more persons, and its legal consequences are not dependent upon impressions or understandings of one alone of parties to it. It is not what either thinks, but what both agree. 190 **NC**203, 129**SE**607. (33) Other instances. 207 **Iowa**826, 221**NW**843. (34) Other definitions. 181**Ark**14, 24**SW(2d)**870; **TexCommnA** 25**SW(2d)**597. [g] (3) Deed, upon being executed and delivered, becomes contract. 25 **OhA**149, 157 **NE**496. [k] 127 **Or**461, 271**P**976, 62 **ALR**644.

238-4 35**GaA**635, 133**SE**634.

239-10 221**MoA**47, 297**SW**1001, 1002 [citCJ].

239-13 103**Conn**624, 131**A**420. [b] **Promise** may be implied or express. 193 **NC**496, 137**SE**669.

239-13½-New. Promise may be express or implied. 193**NC**496, 137**SE**669.

239-15 181**Ark**14, 24**SW(2d)**870; 46 **Philippine**217, 235 [quotCyc].

239-18 17**F(2d)**113; 142**SC**531, 141**SE** 156.

240-22 **Iowa** 229**NW**266; **TexCivA** 292 **SW**917; 146**Va**442, 131**SE**846, 44**ALR** 1175. But see **MoA** 21**SW(2d)**635.

240-26 231**Ky**308, 21**SW(2d)**459.

241-33 7**F(2d)**566; 48**RI** 223, 136**A**882, 883 [quotCJ]; **TexCivA** 273**SW**694.

241-37 41**F(2d)**552; 84**CalA**669, 258**P** 663; 111**Conn**299, 149**A**668; 83 **IndA** 488, 149**NE**85; 206 **Iowa**514, 219**NW** 305; **Iowa** 229**NW**266; 231**Ky**308, 21 **SW(2d)**459 (evidence must disclose purpose to assume legal obligation); 161**La** 348, 108**S**667; 13**LaA**612, 128**S**688; 3 **LaA**252; **NJ** 148**A**626; 27 **OhA**107, 160 **NE**865; 299**Pa**452, 149**A**705; 48**RI** 223, 136**A**882; 135**SC**417, 133**SE**901, 909 [quotCJperCothran,J]; **TexCommnA** 1 **SW(2d)**572; **TexCivA** 3**SW(2d)**466, 468 [citCJ]; 146**Va**442, 131**SE**846, 850 [cit CJ] 44**ALR**1175.

242-38 41**F(2d)**552; 136**Misc**500, 241 **NYS**202 (defendant's benefit and consent alone is insufficient); 135**SC**417, 133**SE** 901, 909 [quotCJperCothran,J]; 52**SD** 252, 217**NW**192; 154**Tenn**521, 290**SW** 391, 50**ALR**1023; **TexCivA** 292**SW**917; **TexCivA** 19**SW(2d)**102. [a] (9) Promise in contract may be inferred wholly or partly from such conduct as justifies promisee in understanding that promisor intended to make promise. 231**Ky**308, 21**SW(2d)**459.

242-39 83 **IndA**488, 149**NE**85; 116**Tex** 356, 291**SW**860; **TexCivA** 273**SW**694, 696 [quotCJ]. See also 231**Ky**308, 21 **SW(2d)**459.

242-40 83 **IndA**488, 149**NE**85; **IndA** 169**NE**688 (meeting of minds); 231**Ky** 308, 21**SW(2d)**459; 136**Misc**500, 241 **NYS**202; 26 **OhA**455, 160**NE**506; **Tex CivA** 273**SW**694, 696 [quotCJ]. [a] (1) **Iowa** 231**NW**705; **Iowa** 232**NW**725. (2) Contract implied in fact necessitates meeting of minds. 247**Mich**267, 225**NW** 511. (3) Implied contract, like express contract, grows out of intentions of parties-and requires meeting of minds. 89 **IndA**374, 166**NE**611(2dcase).

242-41 **TexCivA** 273**SW**694, 696 [quot CJ].

242-42 **Iowa** 229**NW**266; **TexCivA** 19 **SW(2d)**102.

242-43 **Md** 148**A**536; **MoA** 9**SW(2d)** 870. [a] (8) To pay for privilege of removing waste paper. 136**Misc**268, 239 **NYS**715. [c] **Promise will be implied where agreement is instinct with obligation** and supported by circumstances. 136**Misc**492, 240**NYS**148.

242-44 7**LaA**562.

243-48 **Iowa** 231**NW**705.

243-49½-New. By statute in some jurisdictions a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all of the obligations arising from it so far as the facts are known or ought to be known to the person accepting. 43 **OklACR**157.

243-50 **Ariz** 291**P**1000.

243-54 43**F(2d)**232; 111**Conn**299, 149 **A**668; 96**Fla**151, 117**S**853; **Iowa** 232**NW** 725; 125**Me**386, 134**A**198; 316**Mo** 621, 291**SW**136; 51**SD**62, 212**NW**50; 196**Wis** 56, 219**NW**370.

244-60 318**Mo** 1155, 6**SW(2d)**947, 952 [quotCJ].

244-61 120 **Or**229, 250**P**876.

244-62 41**F(2d)**552; 107**Conn**691, 142**A** 398; 231**Ky**308, 21**SW(2d)**459; 247**Mich** 267, 225**NW**511; **Mont** 288**P**455; 244 **NY**182, 155**NE**93; 48**RI** 296, 137**A**776, 777 [citCJ], 53**ALR**365; 154**Tenn**521, 290**SW**391, 50**ALR**1023; **TexCivA** 3**SW (2d)**466, 468 [citCJ]; 101**WVa**748, 133

SE699. [a] (4) Essence of quasi-contractual obligation lies in fact that obligor received benefit which it would be inequitable for him to retain. 47 Ida 542, 277P554(2dcase). [b] **Quasi contract arises only on clear indication that plaintiff expected payment.**–136Misc268, 239NYS715.

244–62½–New. In Porto Rico, Civ. Code § 1788 provides "quasi contracts are licit and purely voluntary acts by which the authors thereof become obligated with regard to a third person, and sometimes, by which there results a reciprocal obligation between the parties concerned." 32PortoRico 55.

244–63 244NY182, 155NE93.

244–64 107Conn691, 142A398; 244NY182, 155NE93; 48RI296, 137A776, 777, [citCJ] 53ALR365.

244–65 CalA 270P690; 51Nev150, 271P467, 468 [quotCJ]; 244NY182, 155NE93; 48RI296, 137A776, 777 [citCJ], 53ALR365; 101WVa748, 133SE699.

244–66 7F(2d)566 (it is no defense to action on quasi contract to allege that parties did not contract); 244NY182, 155NE93; 141Wash28, 251P103.

245–67 50Nev359, 261P655, 657 [cit CJ]; 244NY182, 155NE93; 48RI296, 137A776, 53ALR365; 141Wash28, 251P103. But see 136Misc268, 239NYS715.

245–68½–New. cases in which one receives that which is not due him through error or knowingly; 160La763, 107S566.

245–71 129Misc814, 222NYS233, 235 [citCJ].

245–73 51Nev150, 271P467, 468 [quot CJ].

245–79 CalA 290P613; 58ND881, 228NW217; TexCivA 6SW(2d)445. [a] (3) 40OklACR317 [rehearing pending]. (6) Something which has been but is no longer "contract" as defined in statute. CalA 290P613.

245–80 TexCivA 6SW(2d)445. [a] (4) 40OklACR317 [rehearing pending]. [b] (5) Other illustrations. TexCivA 21SW(2d)83.

246–93 324Ill77, 154NE426; 326Ill189, 157NE240; 327Ill145, 158NE364. [a] 144Wash229, 257P632, 634 [citCJ]. [b] **Confirmatory letter not mutually adopted by parties** does not make oral contract written one. 50RI375, 147A891.

246–94 MoA 289SW667, 669 [citCJ]; 119Or55, 248P158, 162 [citCJ]; 50RI375, 147A891. But see 116Oh609, 157NE478, 54ALR992.

247–4 207Iowa826, 221NW843; 67Utah60, 245P966 (creditor's agreement to extend time if minor's and adults executed mortgage securing indebtedness held bilateral).

247–5 207Iowa826, 221NW843; 288Pa579, 136A847, 848 [citCJ]. See also 234IllA222. [a] TexCivA 294SW660.

247–6 216Ala303, 113S74; 36GaA616, 138SE85; 234IllA444.

247–10 201Iowa1063, 206NW808; 172Minn349, 215NW781; 216AppDiv362, 215NYS184; 127Misc508, 217NYS39; 114Okl77, 243P232; 57OntL505, [1925] 3DomLR927 [app allowed on other grounds 58OntL130, [1926] 1DomLR199]. [a] **"Laws of Moses and Israel"** may properly be designated by parties as law to govern contract. 216AppDiv362, 215NYS184.

247–12 127Misc508, 217NYS39; 114Okl77, 243P232, 235 [citCJ]; 120Okl19, 20 [citCJ], 250P71; 38OklACR289, 291 [citCJ].

248–13 127Misc508, 217NYS39.

248–16 7F(2d)470; 21F(2d)207; 21F(2d)309; 30F(2d)580; 33F(2d)415; 36F(2d)661; 42F(2d)515; 33Ariz220, 263P626; 203Cal483, 265P190, 57ALR696; 40GaA371, 149SE808; 208Iowa1261, 226NW137 [citCJ]; 261Mass385, 158NE795 (where made and to be performed); 264Mass414, 163NE63; Mass 169NE897(2dcase); Mass 172NE243; 174Minn68, 216NW778; 142Miss584, 107S673; 319Mo899, 8SW(2d)834; 320Mo1208, 9SW(2d)925; 322Mo121, 14SW(2d)576; MoA 27SW(2d)452; 247NY465, 160NE916; 124Misc829, 209NYS493; 127Misc508, 217NYS39; 221AppDiv595, 224NYS555; 229AppDiv126, 241NYS302; 48RI152, 136A305, 54ALR512; TexCivA 275SW134; 99WVa399, 129SE462; 57OntL505, [1925] 3DomLR927 [app allowed on other grounds 58OntL130, [1926] 1DomLR199] (prima facie proper law of contract).

249–17 21F(2d)309; 214Ala507, 108S244; 214Ala565, 108S456, 47ALR270; 108Conn333, 143A163, 61ALR846; 126Misc491, 215NYS24 (unless positively to be performed elsewhere); 127Misc508, 217NYS39; 56ND14, 215NW875; TexCivA 275SW134; TexCivA 13SW(2d)720. [d] **Rebutting presumption.**–57OntL505, [1925] 3DomLR927 [app allowed on other grounds 58OntL130, [1926] 1DomLR199]. [e] **Fraud.**–30F(2d)10.

249–18 126Misc491, 215NYS24.

249–19 28F(2d)340; 171Ark521, 285SW5; 41GaA150, 152SE275; 172Minn349, 215NW781; 142Miss584, 107S673; 114Nebr584, 208NW742; 127Misc508, 217NYS39; 5PaDist&Co417; 57OntL505, [1925] 3DomLR927 [app allowed on other grounds 58OntL130, [1926] 1DomLR199]. [a] **Validity of contract** is determined by law of that state where occurred last act necessary to make contract complete. 32F(2d)725.

249–19½–New. But the fact that acts are to be done abroad does not make contract one to be performed abroad, in a legal sense. 126Misc491, 215NYS24.

250–22 But see 43F(2d)537.

251–24 127Misc508, 217NYS39.

251–30 246NY174, 158NE64 (rule occasionally applied that instrument, which is act and deed of one person only, may be governed by law of maker's domicile has no application where both parties execute instruments).

251–31 25F(2d)493; 201Iowa1063, 206NW808; 127Misc508, 217NYS39. But see 43F(2d)724; 43F(2d)730.

251–34½–New. Where parties in antenuptial contract designate "laws of Moses and Israel" as law governing contract, such provision will be given effect in so far as not contrary to law of forum. 216AppDiv362, 215NYS184.

251–35 201Iowa1063, 206NW808; 172Minn349, 215NW781; 127Misc508, 217NYS39.

251–36 13F(2d)500.

252–42 319Mo899, 8SW(2d)834.

252–45 27Hawaii221. [a] **Clerk of supreme court not authorized** to enter into contract on behalf of territory. 27Hawaii221.

252–53 322Mo121, 14SW(2d)576; 99Vt17, 130A701 (place of contract is where last act was done essential to completion).

253–57 43F(2d)985; 214Ala507, 108S244; 214Ala565, 108S456, 47ALR270; 30Ariz316, 247P117, 49ALR994; 108Conn333, 143A163, 61ALR846; 98NJEq230, 130A463, 466 [citCJ]; 52ND617, 204NW683; 132Or422, 285P208; TexCivA 13SW(2d)720.

254–67 220MoA1205, 299SW132.

255–69 127Kan86, 272P187. [d] **Contract by clerk of court in his own name** and not in name of territory held not to comply with Rev. L. (1915) § 1419 and auditor need not certify. 27Hawaii221.

255–74 34Ariz408, 274P155; 130Misc306, 223NYS765; TexCivA 275SW134; TexCivA 2SW(2d)995. [c] **Comity or will of contracting parties** cannot set aside public policy of county. 134Misc439, 234NYS622.

255–74½–New. Some courts hold that it may be avoided if contrary to public policy of the state where the contract is made. 21F(2d)207.

256–76½–New. Public policy will not render unenforceable a contract valid where made, unless transaction is inherently vicious, wicked, or immoral, or judicial enforcement would present an example pernicious and detestable. 30Ariz316, 247P117, 49ALR994.

256–76⅓–New. Public policy does not require courts to refuse enforcement of a contract made in the state having different public policy unless the law of such state cannot be reconciled to public policy of the state where the action is brought. 130Misc306, 223NYS765.

256–76¼–New. Courts will not refuse to enforce a foreign contract as against public policy unless it undermines public morals, health, safety, or is contrary to all decent notions of life. 130Misc306, 223NYS765.

256–77 132Misc590, 230NYS372. [b] **Rule held inapplicable.**–216AppDiv362, 215NYS184.

256–83 42F(2d)575.

258–5 131Misc158, 226NYS92.

258–16 85IndA296, 152NE872; 172Minn349, 215NW781.

259–18 27F(2d)616; 172Minn349, 215NW781.

259–22 7F(2d)470; 22F(2d)384; 214Ala507, 108S244; 220Ky464, 295SW442; 248Mich85, 226NW883; 142Miss584, 107S673; 319Mo899, 8SW(2d)834 (remedy and procedure); 322Mo121, 14SW(2d)576; 247NY465, 160NE916; 132Or422, 285P208.

259–24 37F(2d)870; 98NJEq230, 130A463.

259–25 124Misc829, 209NYS493.

260–26 319Mo899, 8SW(2d)834; 132Or422, 285P208.

260–27 132Or422, 285P208.

261–42 322Mo121, 14SW(2d)576.

261–44 336Ill359, 168NE312; 82NH399, 135A25; 114Okl77, 243P232; 117Okl269, 235P611, 246P444.

261–45 118Okl244, 247P404.

261–47 114Okl77, 243P242 (breach before change of law). But see 39GaA353, 146SE920.

262–59 181Ark1031, 28SW(2d)1050; CalA 291P615; 88IndA309, 152NE609; 26OhA142, 159NE839; 136SC312, 134SE395, 396 [citCJ].

262–62 17F(2d)919; 171Ark1189, 283SW368; 328Ill420, 159NE790; 100WVa559, 131SE253. [b] **Effect of previous disability.**–Cal 290P15. [c] **Parties sui juris** may make whatever contracts they choose. Fla 129S777.

262–65 80CalA538, 252P638; 197Ind236, 150NE361; 231Ky377, 21SW(2d)484; 74Mont245, 240P376. See also 149Miss123, 115S199.

262–66 80CalA538, 252P638.

262–67 171Ark1189, 283SW368; 197Ind236, 150NE361; 153SC100, 150SE610.

262–67½–New. In general, every adult person has a right to contract with respect to his property rights, and the court cannot annul obligations thus assumed unless procured by fraud. 146Va504, 131SE692.

262–69 100WVa559, 131SE253, 262 [cit CJ].

262–71 222MoA201, 297SW151, 155 [quotCyc]; 100WVa559, 131SE253, 262 [citCJ].

263–74 17F(2d)919; 41F(2d)651; CalA 292P146; 34GaA260, 129SE119; 36GaA415, 136SE816; 36GaA616, 138SE85; 336Ill168, 167NE790; 197Ind236, 150NE361; 197Ind386, 151NE134; 212Ky770, 280SW127; 231Ky308, 21SW(2d)459; 160La294, 107S115; 8LaA45; Me151A423(2dcase); 166Minn207, 207NW307; 172Minn511, 216NW225; 145Miss845, 111S376; 148Miss568, 114S385; 220MoA95, 278SW1060; 222MoA990, 6SW(2d)655; 75Mont369, 243P1093; 79Mont550, 257P1016; 249NY58, 159NE723; 134Misc37, 233NYS645; 129Okl22, 263P126; 49SD619, 208NW170; Tex293SW800; 117Tex263, 18W(2d)872; TexCommnA 3SW(2d)65; TexCivA 278SW492; 146Va442, 131SE846, 850, 132SE839, 44ALR1175 [citCJ]; 141Wash372, 251P570; 100WVa559, 131SE253. [b] **Contract may be ratified** where it is voidable for want of consent. CalA 290P478. [d] TexCivA 278SW492. [e] **Sale at auction of land in which infants are interested, made subject to approval of court** as to infant's interest, is enforceable contract and does not lack mutuality. 134SC54, 131SE319.

263–76½–New. One cannot be made a debtor, 241NY216, 149NE837.

263–76⅓–New. any more than he can be made a creditor, 241NY216, 149NE837.

263–76¼–New. except by his consent, either expressed, 241NY216, 149NE837.

263 76½ New. or implied 241NY216, 119NE[illegible]

263 76½ New. A party not under contract with another has the right to refuse to enter into contractual relations with him regardless of motive. **Mass** 166NE[illegible]; [illegible] 261Iowa[illegible], 215NW911, 207Iowa1061, 221NW20; Md 118A546, 25Z Mass257, 117NE250, 118Mass565; [illegible] Mo 299SW(2d)112, 121Or652, 5Z P10, 125Or42, 266P[illegible], 26 [illegible] Portashop Ills. op.] **TexCommA** 290SW517, 63Utah65, 240P133, 135 [quotCJ]. See also 216Ala564, 110P[illegible], 121Ran652, 261P[illegible], 122Misc690, 219NY252.

264 79 68Utah65, 240P133, 135 [quotCJ].

264 80 213Ala7, 105S607 (there must be meeting of minds); 148Miss568, 114S[illegible]. 75Mont360, 243P1099 (at same time). 121Okl236, 253P693, 121Or652, 257P10. **TexCommA** 290SW517, **TexCivA** 6SW(2d)169; 68Utah65, 240P133.

264 81 201P(2d)712, 17Z(2d)671, 61Ida1097, 113S1095, 5Z [illegible] 207Iowa1251, 211NW[illegible], 201Iowa725, 214NW911, 120Ran[illegible], 217P[illegible], 227Mass111, 117N[illegible]56, 115Miss15, 111S[illegible]; **MoA** 195W(2d)[illegible], 100NJEq[illegible], 111A[illegible], 129Okl[illegible], 263P[illegible], 118Or[illegible], 216P211, 16Philippine217, 240 [quotCJ]. **TexCivA** 231SW[illegible], 67Utah[illegible], 245P1101, 65Utah[illegible], 249P[illegible], 100Wis[illegible], 1218E253. See also 25ObA[illegible], 162NE[illegible].

264 82 2P(2d)949, 4Ind[illegible], 188A[illegible], 91Ida1097, 115S[illegible], 120Kan[illegible], 121P[illegible], 129Okl[illegible], 263P[illegible], 100WVa[illegible], 131SE[illegible].

265 87 175Ark1018, 118W(2d)20, [illegible] Can[illegible]97, [1920] 4DomLR[illegible].

265 88 175NY[illegible], 121A[illegible], 8B 116A[illegible], 118NY[illegible], 150NE[illegible], 19ALR[illegible].

265 90 156Mich[illegible], 207NW10[illegible], 224 AppDiv[illegible], 231NY[illegible].

266 95 [illegible](2d)[illegible], 191Cal671, 272P[illegible], 103Conn[illegible], 131A[illegible], 1Geo[illegible], 128S[illegible]70 (essential prerequisites); 84 GeoA260, 120SE[illegible]19; 207Iowa1068, 224 NW[illegible], 7Mont[illegible], 5Z P[illegible], 79Mont[illegible], 115Okl[illegible], 117P[illegible], 129Or[illegible], 7Z P[illegible], 12PortoRico[illegible]; 190Wis[illegible], 212NW[illegible]. [a] **That offer is in form of legacy in will does** not change usual rules governing offers in contract. 99AppDiv[illegible], 244NY[illegible].

266 96 TexCivA [illegible]6SW[illegible].

266 96½ New. When offer is accepted, it becomes a promise. 103Conn[illegible], 131A[illegible].

266 97 16Philippine217, 235 [quotCJ].

266 5½ New. Offers in the alternative. Where an offer is made containing alternative propositions acceptance on one proposition constitutes a binding contract according to the terms of the proposition accepted. 169Ark[illegible], 270SW[illegible].

266 6 17P(2d)919; **Colo** 290P[illegible]; 10Ind[illegible]; 9A[illegible]; 8Ind[illegible]; 1Ga[illegible]; 1Wall[illegible]; 116A[illegible]; 165Mass[illegible], 161NE[illegible]; LaA [illegible]; Mass [illegible]; **MoA** [illegible]; **MoA** [illegible] SW(2d)[illegible]; 77Mont[illegible], 5Z P[illegible], 103NJEq[illegible]; 111A[illegible]; 220AppDiv[illegible], 227NY[illegible]; 12Mass[illegible]; 7LNY[illegible]; 137Misc[illegible]; 211NY[illegible], 191NC[illegible]; 3B ObiACR[illegible], 120Or[illegible], 250P[illegible]; 192Cal[illegible], 110A[illegible]; 165Mich[illegible]; 6Utah[illegible], 245P1101 [a] [illegible] 259Mass[illegible], 151NE[illegible]. [b] Agreement by insurance adjuster [illegible] AppDiv[illegible], 212NY[illegible]. [c] Agreement that one of parties should in future enter into agreement with third party as to organization of corporation. 120Ala[illegible], 124[illegible]. [d] Contract by bank to make periodic loans from time to time held too indefinite to be enforceable. 169Ga[illegible], 1[illegible], 10 [illegible] Other instances: 16GaA[illegible], 1[illegible]; **MoA** 218W(2d)201; **Pa** 15A585, 156SE[illegible]; 15PSE[illegible]. [e] **Agreements not void for uncertainty.** 291(2d)[illegible]. [f] **"Uncertain contract" distinguished from "incomplete contract."** 182Va[illegible], 140SE[illegible]. [g] **Provision for higher rate unless certain amount of advertising space was used has been held not to render contract indefinite.** 116Misc[illegible], 211NY[illegible]. [h] **That rules respecting advertising space were not enumerated or were subject to change has been held not to render contract indefinite.** 116Misc[illegible], 211NY[illegible]. [g] **Agreements not void for uncertainty Okl** 293P[illegible]. [k] **Particular contracts sufficiently certain.** 56 HA[illegible].

267 7 Colo 294P[illegible], 122Okl[illegible], 254P[illegible]. 120Or[illegible], 250P[illegible], 254Pa[illegible], 11[illegible].

268 10 137Misc[illegible], 244NY[illegible].

268 11 MoA 7SW(2d)[illegible].

268 12 [a] **Contract for advertising in street car held void** 9[illegible]. **TexCivA** 294SW[illegible].

268 13 125Kan[illegible], 266P[illegible]; **Okl** 261P[illegible].

268 21 Colo 294P[illegible].

269 95 126Kan[illegible], 641 [quotCJ]; 125Misc[illegible], 211NY[illegible] (provision in contract whereby parties agreed to agree on minimum value of pictures produced for sale is not void for uncertainty where value may be determined by objective standards). 143Okl[illegible], 2[illegible]P 1019, 3B ObiACR[illegible]. [a] (35) Agreement by insurance adjuster. 224AppDiv[illegible], 212NY[illegible]. (36) Other instances: 14GaA[illegible], 287P1019.

269 97 Mass 167NE[illegible].

270 98 17GaA70, 130SE[illegible], 137Misc[illegible] 211NY[illegible], 3B ObiACR[illegible].

270 99 126Kan[illegible], 642 [quotCJ].

270 31½ New. That a contract does not specify the rate of interest on an indebtedness does not render it invalid. 212Mich112, 205NW112.

271 33 89CalA[illegible], 265P311, 126Kan[illegible], 642 [quotCJ], 242Mich112, 200NW112.

271 33 89CalA[illegible], 265P311.

271 34 191NC[illegible], 133SE[illegible], 798 [quotCJ].

271 38 16Philippine217, 247 [quotCJ].

271 39 13P(2d)[illegible], 175Mass[illegible], 227NW101, 56ND[illegible], 195NW[illegible] [quotCJ]. **TexCivA** 18W(2d)102, 165 [quotCJ].

271 41 See also 175Mass[illegible], 227NW101.

271 43 225Ky[illegible], 98W(2d)[illegible]; 79Mont[illegible], 5Z P[illegible], 116Va[illegible], 131SE[illegible]. 11ALR[illegible].

273 48 191Ark[illegible], 248W(2d)[illegible]. **CalA** [illegible], 16Conn[illegible], 131A[illegible], 241HA[illegible]; 95HA[illegible]; 126Kan[illegible], 266P[illegible]; 126Kan[illegible], 268P[illegible]; 173Minn[illegible], 216NW[illegible]; 148Miss[illegible], 114S[illegible]; MoA [illegible]; 79Mont[illegible], 5Z P[illegible], 129Okl[illegible], 263P[illegible], 3B ObiACR[illegible], 12Or[illegible], 5Z P[illegible] [quotCJ]. 116Va[illegible], 131SE[illegible], 1[illegible]; 14Va[illegible], 138SE[illegible]; 44ALR[illegible]; 148Va[illegible], 138SE[illegible]; Can [1930] 1DomLR[illegible]. [b] **Where contract arose from acceptance of one of two alternative propositions in offer,** breach of such contract does not constitute acceptance of other proposition. 162Ark[illegible], [illegible] SW[illegible]. [c] **Acceptance cannot be compelled by offerer.** 83CalA107, 256P607, 273[illegible]. 126Kan497, 500, 265P[illegible] [quotCJ]. 207Pa[illegible], 11A[illegible]. [c] **Person has right to determine for himself with whom he will enter into contractual relations.** 175Minn[illegible], 220NW[illegible].

273 51 10Conn[illegible], 131A[illegible].

274 60½ New. Mere acknowledgment of receipt of offer does not constitute acceptance. 57OutL[illegible]. [192o] 3DomLR[illegible]; [illegible] judge allowed on other grounds 58OutL[illegible]. [1926] 1DomLR[illegible].

274 60½ New. Acceptance of a contract may be expressed by any language which unqualifiedly and unequivocally expresses an intention to accept. 205Iowa[illegible], 211NW[illegible].

274 61 231HA[illegible].

274 62 [1[illegible]Conn[illegible], 147A[illegible], 236HA[illegible]. Mass 165NE[illegible].

275 66½ New. Alleged option agreement by tenant to sell lease to landlord for a specified sum is an offer for an act and not an offer for a promise and could not be accepted by letter unaccompanied by payment. 126Misc[illegible], 218NY[illegible].

275 66½ New. Where a written instrument signed by both parties constitutes an agreed statement of a then existing situation, the law places on each certain mutual obligations by reason thereof. 103Conn[illegible], 131A[illegible].

275 72 234HA444; 206Iowa514, 219NW305, 207Iowa526, 221NW843; 207Iowa1068, 224NW[illegible], 227Ky[illegible], 118W(2d)991, Mass 173NE111, 78Mont[illegible], 252P313, 227AppDiv226, 237NY[illegible]; 122Or[illegible], 255P[illegible]. 231Or[illegible], 257P10, 13 [quotCJ]. 28IPa[illegible], 131A[illegible], 330 [quotCJ]. TexCivA 248SW(2d)726; 146Va442, 131SE[illegible], 132SE[illegible], 44ALR[illegible]; 149Wash[illegible], 270P[illegible]; 199Wis[illegible], 225NW[illegible]. [a] (5) When party delivered goods to another who had agreed to launder them such act could be found to be acceptance of agreement. 253Mass[illegible], 151NE[illegible]. [b] **Assent may be inferred from acts and conduct of offeree.** 146Va[illegible], 132SE[illegible]. [c] **Commencement of performance** may constitute acceptance. 234HA444.

275 74 Iowa 228NW[illegible]; 264Mass[illegible], 162NE[illegible].

276 79 Mo 151A423(dense); 100Va[illegible] 135A[illegible], 70[illegible] [quotCJ].

276 80 See also 37GaA[illegible], 140SE[illegible].

276 81 23P(2d)[illegible].

277 84 100Va[illegible], 135A[illegible].

277 86 MoA 7SW(2d)[illegible].

277 87 110Misc[illegible], 106NE[illegible]; **TexCivA** 295SW[illegible], 543 [quotCJ].

277 89 180Ark1036, 248SW(2d)[illegible]; 77CalA291, 246P332. Mass 173NE[illegible]; 46Philippine217, 237 [quotCJ]. 146Va442, 131SE[illegible], 850, 132SE[illegible], 44ALR[illegible]. [a] **Rule otherwise** where paper altered by offeree and returned to offerer and parties dealt on terms thereof as they were before alteration and offerer had no actual knowledge of alteration. 104WVa[illegible], 140SE[illegible].

277 90 77CalA291, 246P332, 146Va442, 131SE[illegible], 850, 132SE[illegible], 44ALR[illegible].

277 91 146Va442, 131SE[illegible], 850, 132SE[illegible], 44ALR[illegible] [quotCJ entirescection].

278 3 77CalA291, 246P332, 333 [quotCJ]. 34PortoRico479 (where signature preceded objectionable stipulation).

279 11 141Wash253, 251P274, 278 [quotCJ].

279 12 141Wash253, 251P274, 278 [quotCJ].

279 13 16P(2d)39; 215Ala325, 118S570, 94Fla1097, 115S198, 504 [quotCJ]. 30GaA379, 136SE[illegible]. 41GaA509, 154SE[illegible]. 42Ida[illegible], 243P444, 47ALR916, 224HA[illegible]; 246HA133, 88IndA[illegible], 163NE112, 203Iowa1034, 213NW929, 204Iowa787, 215NW944, 126Kan478, 477, 268P817 [quotCJ]; 61LaA725; Mont 293P[illegible], 103NJEq[illegible], 113A316, 218AppDiv[illegible], 218NY[illegible]. 224AppDiv392, 231NY[illegible], 225AppDiv[illegible], 234NY[illegible]; 190NC[illegible], 130SE[illegible]; 191NC313, 131SE[illegible]; 44Philippine[illegible]; TexCivA 6SW(2d)169, 67Utah[illegible], 248P1101.

280 22 30GaA379, 136SE[illegible].

281 25 215Ala[illegible], 118S[illegible].

281 30 271US13d, 168S[illegible]; 70LEd[illegible], 16P(2d)39, 26P(2d)[illegible], 220Ala[illegible], 12S[illegible]. Ala 130SE[illegible], 79CalA[illegible], 251P[illegible], 100CalA[illegible], 279P[illegible]. CalA [illegible]; 8Ind[illegible], 163NE112, 201Iowa[illegible], 207NW[illegible], 381 [quotCJ]. 203Iowa1044, 213NW929, 204Iowa787, 215NW944, 218Kan[illegible], 290SW[illegible]. 169LaL120, 126SE[illegible]. 51LaA[illegible]; 165Minn[illegible], 206NW[illegible]. 165Minn[illegible], 206NW[illegible]. MoA 18SW(2d)[illegible]. Mont 293P[illegible], 218AppDiv[illegible], 219NY[illegible]; 138Misc[illegible], 211NY[illegible], 191NC[illegible], 131SE[illegible], 1[illegible]; 9OhA[illegible], 1[illegible]; 129Okl[illegible], 263P[illegible], 291Pa[illegible], 139A[illegible]. 44Philippine[illegible]. TexCivA 293SW[illegible]. TexCivA 8SW(2d)[illegible]. TexCivA 6SW(2d)[illegible], TexCivA 10SW(2d)[illegible]. Alta [1925] 1DomLR[illegible]. Man [1926] 3DomLR[illegible] [app allowed on other grounds [1927] 1DomLR[illegible]. [1926] 3WestWkly[illegible]. 57OutL[illegible]. [1925] 3DomLR[illegible]. [app allowed on other grounds 58OutL[illegible]. [1926] 1DomLR[illegible].

282 31 TexCivA 295SW[illegible].

282-36 [a] (18) Where amount of first payment under option to buy sugar centrale was not mentioned and acceptance attempted to fix it. 44**Philippine**326. (19) Where order called for entire shipment and seller acknowledged receipt but shipped in installments. 57 **OntL** 505, [1925] 3**DomLR**927 [app allowed on other grounds 58 **OntL**130, [1926] 1 **DomLR**199].

283-39 258**Mass**331, 155**NE**18; 143 **Okl** 112, 287**P**1033.

283-42½-New. Acceptance conditioned on what is implied by law is good acceptance creating contract. 203 **Iowa** 1034, 213**NW**929.

283-42¼-New. Where counter proposal is prepared by offeree's agent any doubt as to its meaning must be resolved against the offeree. 217**Ky**839, 290**SW** 675.

283-47 13**F(2d)**533; 220**Ala**43, 124**S** 86; 77**CalA**291, 246**P**332; **TexCivA** 5 **SW(2d)**529; 69**Utah**1, 251**P**1067; 57 **OntL**505 [1925] 3**DomLR**927 [app allowed on other grounds 58**OntL**130, [1926] 1**DomLR**199].

283-48 104**WVa**517, 140**SE**529.

283-50 36**GaA**379, 126**SE**811.

284-54 234 **IllA**366; 162**La**117, 110**S** 109; 300**Pa**327, 150**A**645; **Can** [1927] 3 **DomLR**762. See also 127**Misc**88, 215 **NYS**305. [a] **Communication held sufficient.**–110**Conn**234, 147**A**709.

284-57 126**Kan**640, 642 [quotCJ]; 284 **Pa**384, 131**A**378; 298**Pa**574, 148**A**858.

284-57½-New. , unless the circumstances are such that the party to be bound cannot inform himself by inquiry. 284 **Pa**384, 131**A**378.

284-58 **TexCommnA** 277**SW**631, 632 [citCyc].

285-63 207 **Iowa**826, 221**NW**843.

285-67 36**F(2d)**198.

285-69 136**Wash**74, 239**P**4, 6 [citCJ].

285-70 **Or** 245**P**158; 136**Wash**74, 239**P** 4, 6 [citCJ].

285-71 136**Wash**74, 80, 239**P**4 [citCJ]; 197**Wis**627, 222**NW**814 (post office made agent).

287-83½-New. **Contract will not be implied by law** where parties did not intend to enter into one. 84**CalA**130, 257 **P**586.

287-83¼-New. An intention to contract may be determined in the situation, acts, and conduct of the parties, by attendant circumstances, and by inferences ordinarily drawn therefrom. **Iowa** 227**NW** 833.

287-89 206 **Iowa**514, 219**NW**305; 127 **Misc**88, 215**NYS**305; 127**Misc**368, 216 **NYS**639; 48**RI** 24, 134**A**645. [a] **Naked intention to become obligated is insufficient** to constitute binding promise. 86**Colo** 101, 278**P**611.

288-91 207 **Iowa**826, 221**NW**843; 127 **Misc**368, 216**NYS**639; 46**Philippine**217; 48**RI** 24, 134**A**645, 646 [citCJ].

288-94½-New. No particular form of words is necessary to show intention. 147**Va**566, 137**SE**371.

288-95 127**Misc**88, 215**NYS**305; 46 **Philippine**217.

289-2 203 **Iowa**1144, 212**NW**691, 692 [citCJ]; **MoA** 9**SW(2d)**103.

289-5 173**Minn**337, 217**NW**345; **NJ** 150 **A**330; 51**Philippine**926. [b] **In word contest for prize,** it was held that words in one list having been counted similar words in list of plaintiff should be counted. 173**Minn**337, 217**NW**345. [c] **Substantial compliance with terms and conditions of contest** is necessary. **Iowa** 228**NW**263.

290-8 85**CalA**746, 259**P**1115, 1116 [citCJ]; 100**WVa**559, 131**SE**253.

290-9 7**F(2d)**435; 12**F(2d)**640; 77 **CalA**4, 245**P**808; 94**Fla**1097, 115**S**498, 503 [quotCJ]; 86 **IndA**185, 156**NE**562 (agreement to make agreement is unenforceable); 124**Kan**652, 261**P**574; **NJSup** 137**A**784; 127**Misc**88, 215**NYS**305; 129 **Okl** 22, 263**P**126; 118 **Or**127, 246**P**211; **TexCivA** 6**SW(2d)**169, 170 [quotCJ].

290-10 173**Minn**200, 217**NW**112; 196 **NC**116, 144**SE**694; 67**Utah**605, 248**P**1101.

290-11 77**CalA**4, 245**P**808; 85**CalA**746, 259**P**1115; 124**Kan**652, 261**P**574; 128 **Misc**618, 219**NYS**99; 67**Utah**605, 248**P** 1101; 68**Utah**65, 249**P**133. [a] (2) Contract which contains agreement to make contract upon terms to be agreed upon in future is not enforceable as to such agreement. **TexCommnA** 284**SW** 210.

290-12 15**F(2d)**451; 35**F(2d)**640; 85 **CalA**746, 259**P**1115; 164**La**472, 114**S** 101; 1**LaA**518; 3**LaA**790; 169**Minn**100, 210**NW**872; 128**Misc**618, 219**NYS**99; 58 **ND**455, 226**NW**501; **TexCommnA** 276 **SW**672; **TexCivA** 274**SW**288; **TexCivA** 278**SW**492; **TexCivA** 5**SW(2d)**529; **Tex CivA** 6**SW(2d)**169, 170 [quotCJ]; 100 **WVa**559, 131**SE**253. [b] (1) 16**SArk**38, 269**SW**375; 75**Mont**594, 244**P**480. (2) Where parties intend that agreement shall be binding from time it is made with understanding that later it shall be put in writing, failure so to reduce it to writing does not affect its binding force. 75**Mont**594, 244**P**480 (overruling language intimating contrary in 58**Mont** 404, 193**P**389). (3) Rule applied to agreement that plaintiff should continue taking care of cattle, made orally on the round up at expiration of written contract for running of cattle. 75**Mont** 594, 244**P**480. [c] **Presumption of intention; statute.**–Where statute requires contract to be reduced to writing, there can be no presumption of intention to consummate it in any other form. 168 **Ark**38, 269**SW**375.

291-13 27**F(2d)**148; 168**Ark**38, 269**SW** 375; 67**CalA**432, 227**P**679; **CalA** 290**P** 304; 201 **Iowa**788, 208**NW**283; 103**NJEq** 121, 142**A**441; 127**Misc**88, 215**NYS**305 (dictum); 128**Misc**618, 219**NYS**99 (dictum); 58**ND**455, 226**NW**501; 129 **Okl** 22, 263**P**126; 46**Philippine**217, 236 [quotCyc]; **Va**153**SE**676 (stipulation for formal contract does not affect validity of contract made); 144**Wash**284, 257**P** 843; 144**Wash**289, 257**P**845; 151**Wash** 613, 276**P**562. But see 169**Minn**100, 210 **NW**872. [a] (2) In determining whether parties negotiating contract contemplated that formal agreement should be prepared and signed and that they did not intend to bind themselves till agreement was so made, each case must be decided upon particular facts and circumstances. 103**NJEq**121, 142**A**441.

292-14 67**CalA**432, 227**P**679.

292-17 103**NJEq**121, 142**A**441. See also **Can** [1930] 1**DomLR**127.

292-19 206 **Iowa**1158, 221**NW**785. See also 12**LaA**117, 124**S**603.

292-20 86 **Ind**185, 156**NE**562; **NJSup** 137**A**784.

292-22 263**Mass**561, 161**NE**606 (not conclusive); 128**Misc**618, 219**NYS**99. See also 58**ND**455, 226**NW**501.

292-25½-New. Parties to one contract may specify therein how they may become bound by another contract embodied therein, and the manner specified must be followed if the parties are to become bound by the additional contract. 42 **Ida**12, 242**P**444, 47**ALR**916.

292-25¼-New. An assent thereto in any other different form will not be presumed. 42 **Ida**12, 242**P**444, 47**ALR** 916.

292-25¼-New. Where one party binds himself to perform at option of the other upon receipt of written notice, the party having the option must exercise it in the manner indicated by the contract. 42 **Ida**12, 242**P**444, 47**ALR**916.

292-25⅓-New. Intention of the parties governs the determination of the question whether a verbal arrangement with an agreement to reduce the contract to writing creates a binding contract. 42 **Ida**505, 247**P**796.

292-25⅙-New. The terms of an oral agreement so far as they are executory may not be enforced if the agreement was that they should be committed to writing before they should become binding. 75**CalA**737, 243**P**686.

292-25½-New. But the fact that parties themselves act upon and in accord with terms of the oral contract, which it had been expressly agreed should supersede or be substituted for an existing agreement, is competent proof of an intention to abandon and cancel it and consequently of the abandonment and cancellation of the agreement. 75**CalA** 737, 243**P**686.

292-27 110**Conn**234, 147**A**709; 28**Hawaii**211; 203 **Iowa**1034, 213**NW**929; 131 **Misc**167, 225**NYS**400; 115 **Okl** 53, 241 **P**496; 136**Wash**74, 239**P**4. See also 234 **IllA**444.

293-30 16**F(2d)**253; 213**Ala**41, 104**S** 239; 244 **IllA**61; 246 **IllA**433; 148**Miss** 568, 114**S**385; 79**Mont**550, 257**P**1016, 1019 [citCJ]; 248**NY**86, 161**NE**428; 131**Misc**167, 225**NYS**400, 401 [citCJ]; **TexCivA** 285**SW**681 [citCJ]. See also 34 **GaA**19, 128**SE**70 (code provision).

293-34 24**F(2d)**204.

293-36 **TexCivA** 285**SW**681 [citCJ].

294-37 79**Mont**550, 257**P**1016; **Tex CivA** 285**SW**681 [citCJ].

294-39 **CalA** 285**P**392. But see 34**GaA** 19, 128**SE**70.

294-45 251 **IllA**454; **TexCivA** 285**SW** 681 [citCJ].

295-48 21 **OhA**369, 153**NE**209 [quotCJ]. [a] **Extension of option without consideration** held lawfully revoked before acceptance. 21 **OhA**369, 153**NE**209.

295-54 190**NC**501, 130**SE**200.

296-62 76**CalA**683, 245**P**766; 69**Utah**1, 251**P**1067.

297-63 **TexCivA** 5**SW(2d)**529, 540 [cit CJ].

297-69½-New. Where an offer is made in the alternative, acceptance of terms of one relieves the officer from liability on the other. 169**Ark**556, 275**SW**889.

297-70 34**GaA**19, 128**SE**70 (to be binding offer must be accepted before time fixed).

297-71 34**GaA**19, 128**SE**70; **Me** 151**A** 423(2dcase); 78**Mont**516, 255**P**1043, 1048 [citCyc]; 229**AppDiv**356, 243**NYS** 328.

297-72 34**GaA**19, 128**SE**70 (generally for jury but may become question of law); 10**LaA**242, 120**S**416; 229**AppDiv** 356, 243**NYS**328 (acceptance of offer in will to sell legatee future enjoyment of part of estate).

298-74½-New. A change of circumstances may cause an acceptance to be too late. 78**Mont**516, 255**P**1043.

298-82 86**Colo** 59, 278**P**804; 41 **Ida**547, 240**P**593; 203 **Iowa**1034, 213**NW**929; 148**Miss**568, 114**S**385; 129 **Okl** 22, 263**P** 126; **Va** 153**SE**676; 100**WVa**559, 131 **SE**253.

298-83 22**AlaA**267, 115**S**73; 181**Ark** 415, 26**SW(2d)**80; **Miss** 113**S**385; 114 **Okl** 161; 245**P**39, 47**ALR**156; 129 **Okl** 22, 263**P**126; 100**WVa**559, 131**SE**253.

298-84 **TexCivA** 264**SW**551.

298-85 148**Miss**568, 14**S**385.

299-87 **TexCommnA** 29**SW(2d)**1015.

299-88 129 **Okl** 22, 263**P**126.

299-92 94**Fla**1097, 115**S**498, 504 [quot CJ]; 100**WVa**559, 131**SE**253.

299-93 100**WVa**559, 131**SE**253. [a] **Because parties construe contract differently** it cannot be said there was no meeting of their minds. **Miss** 128**S**569.

299-94 94**Fla**1097, 115**S**498, 504 [quot CJ].

299-98 100**WVa**559, 131**SE**253.

300-4 190**NC**700, 130**SE**728.

300-7 20**F(2d)**67; 33**F(2d)**415; 214 **Ala**507, 108**S**244; 240 **IllA**559; 148**Miss** 568, 114**S**385; 117**Nebr**34, 219**NW**798, 801 [citCJ]; 114 **Okl** 116, 245**P**39, 47 **ALR**156; 299**Pa**527, 149**A**887 (post-office department is agent of offeror); **TexCivA** 278**SW**278; **Can** [1927] 3**Dom LR**762; 38**BC**419, [1927] 2**DomLR**759; 20**SaskL**601, [1926] 3**DomLR**207, [1926] 2**WestWkly**294.

301-8 20**F(2d)**67; 148**Miss**568, 114**S** 385 (acceptance must be made as offer is made). See also 204 **Iowa**804, 213**NW** 757.

301-9 114 **Okl** 161, 245**P**39, 47**ALR**156.

301-10 33**F(2d)**415.

301-15 38**BC**419, [1927] 2**DomLR**759.

301-17 62 **OntL**319, [1928] 3**DomLR** 268.

301-18 **TexCivA** 1**SW(2d)**378.

302-24 62 **OntL**319, [1928] 3**DomLR** 268 (no contract where acceptor dies after giving agent acceptance for mailing and before it is mailed).

302-26 **TexCivA** 286**SW**564, 565 [quot CJ].

302-27 234 **IllA**366; 244 **IllA**61; **Tex CivA** 286**SW**564, 565 [quotCJ].

303-43½-New. Contract binding under rules relating to simple contracts is valid as such, although unnecessarily sealed. **Fla** 130**S**421.

303-46 22 **OhA**129, 153**NE**345; 34**Porto Rico** 422 (where third person not affected); **TexCommnA** 288**SW**147.

303-48 [a] See also 45**Philippine**286 (Spanish Civ. Code arts 1278, 1091). [d] **In porto Rico.**–29**PortoRico** 803.

303-50½-New. Unless contract is required by statute to be in writing, it may rest in parol. 77**Mont**539, 252**P** 368.

303-51 157**Md**504, 146**A**579; **TexCivA** 278**SW**492.

303-52 164**La**472, 114**S**101; 169**Minn** 100, 210**NW**872; 85**PaSuper**33.

303-53½-New. Where there is no intention to be bound until the contract was reduced to writing, the writing is necessary. 224 **Ill**A538.

303-54 206 **Iowa**514, 219**NW**305 (formality in proposal and acceptance not required); **TexCommnA** 3**SW(2d)**65. [c] (2) Lack of writing does not preclude court from considering contract valid in suit for damages on breach. 33**PortoRico** 6.

303-54½-New. A contract full and complete on its face and signed by the parties is binding even though there is a provision for the execution of a more formal document, 125**Misc**834, 211 **NYS**580.

303-54½-New. where there is no proof that the contract was to be enforceable only on execution of the formal document. 125**Misc**834, 211**NYS**580.

304-55 13**LaA**48, 127**S**111.

304-57 174**Ark**1115, 299**SW**18.

304-60½-New. Character of contract is determined by provisions rather than name given it. 34**PortoRico** 567.

304-61 94**CalA**527, 271**P**546; 35**GaA** 550, 134**SE**142.

304-66 But see 205 **Iowa**557, 218**NW** 264.

304-68½-New. Memorandum which a party makes for his own use in connection with a transaction which was not signed or known to the other party is not part of a contract. 234**Mich**356, 208 **NW**437.

304-68½-New. Fact of two different writings would not necessarily constitute two different contracts. 181**Ark** 415, 26**SW(2d)**80.

305-69 11**NTex**255, 14**SW(2d)**53.

305-72 168**La**[illegible], 117**S**774.

305-76 37**GaA**412, 140**SE**412; 127 **Or** 11, 270**P**499, 500 [quotCJ](2dcase).

305-77 215**Ala**621, 112**S**245, 249 [cit CJ]; 37**GaA**412, 140**SE**412.

305-79 215**Ala**621, 112**S**245, 246 [cit CJ]; 37**GaA**412, 140**SE**412; **Tex CommnA** 25**SW(2d)**828 (signed by one and accepted by the other).

305-80 43**F(2d)**392; 37**GaA**412, 140**SE** 412; 329 **Ill** 555, 161**NE**91; 337 **Ill** 396, 169**NE**258; 242**NY**134, 151**NE**155 (one accepting and acting upon written agreement is bound thereby though he does not sign); 288**Pa**579, 136**A**847, 848 [citCJ]; **TexCivA** 1**SW(2d)**455. [a] (2) Acting on letters offering new lease constitutes binding agreement to lease. 242**NY**134, 151**NE**155.

305-81 43**F(2d)**392; 210**Ky**429, 276**SW** 115; 127 **Or**11, 270**P**499, 500 [quotCJ] (2dcase).

305-82 129**Kan**296, 282**P**706. [a] **Where contract was agreed to by owner,** who did not sign, and acted on by other parties, it bound the owner. **Tex CommnA** 25**SW(2d)**828.

306-84 216**Ala**564, 114**S**135.

306-85 210**Ky**429, 276**SW**115.

306-86 100**CalA**302, 279**P**1024; 126 **Kan**497, 500, [citCJ] 268**P**794. See also **MoA** 290**SW**105, 108 [citCJ].

306-87 30**F(2d)**296; 337 **Ill** 396, 169**NE** 258; **TexCivA** 276**SW**947. [a] **Party accepting benefits of contract is bound** thereby though he did not sign it. 89 **CalA**361, 265**P**271. [b] **Acceptance by one party and signing by other** may be binding on both. **TexCivA** 20**SW(2d)** 803.

306-87½-New. If a written contract is viewed as the consummation of negotiations, no contract exists until signed by the parties. 125**Me**105, 131**A** 136.

306-87½-New. Concurrence of time and place for execution held not essential. 193**Wis**89, 213**NW**673, 52**ALR**681.

306-91½-New. But a memorandum below the signatures of the parties, signed by one party, may be disregarded as surplusage. 103**Conn**491, 130**A**844.

307-98 [c] **In Philippines.**–51**Philippine**676.

307-4 214**Ala**440, 108**S**1.

307-5 242**NY**134, 151**NE**155.

307-6 [a] **Forged instrument** is mere nullity and cannot ordinarily be basis of legal right against putative maker or anyone else. 213**Ky**617, 281**SW**803.

307-7 **TexCivA** 273**SW**1019; **TexCivA** 283**SW**1115; 144**Va**263, 132**SE**337, 46 **ALR**485. But see 116 **Or**376, 239**P**818.

307-8 232 **IllA**266, 271 [quotCJ]; 210 **Ky**429, 276**SW**115; 322**Mo** 869, 17**SW (2d)**345; 50**ND**465, 196**NW**556; 52**ND** 307, 202**NW**642; 142 **Okl** 128, 286**P**796; 116 **Or**376, 239**P**818; **TexCivA** 273**SW** 1019; 67**Utah**60, 245**P**966 (delivery on condition that another shall become obligated).

308-11 122 **Or**498, 259**P**891.

308-11½-New. Delivery is ordinarily, but not always, an expression of the intention that the contract shall become effective. 166**Minn**207, 207**NW**307.

308-11½-New. Intentional nondelivery shows no contract. 166**Minn**207, 207**NW** 307.

308-11¼-New. Where a contract in accordance with the understanding of the parties is reduced to writing in duplicate by one of the parties, and both copies are delivered to the other party who signs one copy and returns the unsigned copy, no formal delivery is necessary. 122 **Or**498, 259**P**891.

308-12 4**F(2d)**847 (delivery may be inferred from circumstances).

308-14 40 **Ida**530, 234**P**465; 253**NY** 359, 171**NE**569.

308-16½-New. Delivery is not accomplished so long as the instrument remains in possession or under control of the grantor. **TexCivA** 283**SW**1115.

308-18½-New. Finding of nonnegotiable instruments in the desk of the payee who was the maker's brother and administrator does not establish delivery to the payee. 220**AppDiv**477, 221**NYS** 768.

308-18½-New. Delivery of an incompleted instrument is not effective. 86 **Mont**1, 281**P**537.

308-19 322**Mo** 869, 17**SW(2d)**345.

308-20 But see **CalA** 283**PS**95.

308-28 225**AppDiv**874, 233**NYS**10. But see 226**AppDiv**190, 234**NYS**432.

309-34 [c] **Contracts for sale** of standing timber held documents to which revenue stamp must be affixed. 31**F(2d)** 733.

311-64 82**Colo** 13, 257**P**247; 82**Colo** 93, 257**P**262; 103**Conn**624, 131**A**420; **IndA** 171**NE**202; 241**Mich**652, 217**NW** 787; 191**NC**809, 133**SE**391; 120 **Okl** 177, 178, 250**P**908 [quotCJ]; **TexCivA** 278 **SW**243; 146**Va**670, 132**SE**698. [a] (15) 172**Ark**575, 290**SW**51. (26) Additional instances. 93**PaSuper**566. [b] (1) 81 **Mont**248, 263**P**693. [b] (2) 52**ND**29, 201**NW**693; 39 **OklaCR**8. (3) "A consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise." Civ. Code (1910) § 4242 [quot 35**GaA**749, 750, 134**SE**846]. [c] **Consideration is primary element moving execution of contract.**–94**Fla**403, 114 **S**431.

312-65 82**Colo** 93, 257**P**262; 120 **Okl** 177, 178, 250**P**908 [quotCJ].

312-66 82**Colo** 93, 257**P**262; 120 **Okl** 177, 178, 250**P**908 [quotCJ]; **TexCivA** 278**SW**243.

312-67 17**F(2d)**919; 38**F(2d)**35; 21 **AlaA**161, 106**S**58 (contract for personal services); 82**Colo** 13, 257**P**247; **Ill** 172**NE**7; **Me** 151**A**423(2dcase); 263 **Mass**168, 160**NE**786; 136**Miss**114, 100**S** 292 (promise to assume obligation of third person); 217**MoA**504, 269**SW**626; 74**Mont**549, 241**P**613; 77**Mont**477, 251**P** 517; 217**AppDiv**1, 215**NYS**792, 122 **Or** 597, 260**P**222, 55**ALR**180; 135**SC**138, 133**SE**202, 45**ALR**1192; **SD** 232**NW**29; **TexCommnA** 277**SW**634; **TexCommnA** 298**SW**538; **TexCivA** 280**SW**600; **Tex CivA** 3**SW(2d)**545; **TexCivA** 26**SW(2d)** 1100; 153**Va**540, 150**SE**238; 100**WVa** 559, 131**SE**253. But see 205 **Iowa**483, 218**NW**325. [a] 82**Colo** 448, 261**P**6, 9 [citCJ].

312-67½-New. Consideration is a matter of contract, 202 **Iowa**1085, 209**NW** 293.

312-67½-New. and that which is claimed to be such must be within the express or implied contemplation of the parties. 202 **Iowa**1085, 209**NW**293.

313-68 98**Fla**1004, 124**S**751; 323 **Ill** 143, 153**NE**744; 120**Kan**602, 245**P**107; 166**La**1014, 118**S**117; 217**AppDiv**1, 215 **NYS**792; **TexCivA** 3**SW(2d)**545.

313-69 [b] **Conversely,** contract may be based on several considerations. **MoA** 30**SW(2d)**186.

314-74 41 **Ida**257, 239**P**522; 205 **Iowa** 483, 218**NW**325; **TexCivA** 294**SW**610, 611 [citCJ].

314-75 29**Hawaii**548; 235**Mich**301, 209 **NW**78; **TexCivA** 277**SW**705 (contract to answer for debt, default, or miscarriage of another).

314-76 See also 199**Cal** 218, 248**P**678.

314-77 232 **IllA**583; 234 **IllA**222; 252 **IllA**315; **Me** 149**A**574; 254**Mass**180, 150 **NE**9; 293**Pa**13, 141**A**629; 6**PaDist&Co** 65; 146**Va**680, 132**SE**848. See also 246 **IllA**86.

315-79 **Mass** 165**NE**396.

315-80 **Mo** 248**SW(2d)**1017.

315-81 Contra **Mo** 248**SW(2d)**1017.

315-83 146**Va**680, 132**SE**848.

315-90 100**CalA**706, 280**P**1017; 82**Colo** 13, 257**P**247; 82**Colo** 93, 257**P**262, 263 [citCJ]; 35**GaA**749, 134**SE**846; 42 **Ida** 451, 457, 245**P**934 [citCJ]; 335 **Ill** 524, 167**NE**564; **Ill** 172**NE**7; 206 **Iowa**848, 218**NW**488; 208 **Iowa**211, 225**NW**266; 124**Kan**319, 259**P**785; 223**Ky**668, 4**SW (2d)**686; 170**La**57, 127**S**363; **Me** 151**A** 423(2dcase); 222**MoA**339, 297**SW**91; **MoA** 22**SW(2d)**174; 80**Mont**308, 260**P** 1039; 105**NJL**427, 144**A**796; 219**App Div**65, 219**NYS**155; 219**AppDiv**65, 219 **NYS**252; 190**NC**423, 130**SE**49; 191**NC** 679, 132**SE**796; 191**NC**809, 133**SE**391; 194**NC**244, 139**SE**376; 196**NC**327, 145 **SE**619; 52**ND**29, 201**NW**693; 24 **OhA** 324, 156**NE**913; 29 **OhA**97, 163**NE**45; **OhA** 173**NE**39; 87**PaSuper**195; 89**Pa Super**306; 138**SC**10, 135**SE**646; **Tex CivA** 278**SW**243; **TexCivA** 285**SW**687; **TexCivA** 293**SW**264; **TexCivA** 11**SW (2d)**344; 101**Vt**488, 144**A**683. [a] **Employment through which employee learns business methods and secrets** is consideration for contract not to engage in similar employment. **NJ** 151**A** 617.

316-91 82**Colo** 93, 257**P**262; 36**GaA**329, 136**SE**477; 126**Kan**640; 154**Md**414, 141 **A**348 (any form of compensation sufficient); 164**Minn**99, 204**NW**647 [citCJ]; 219**AppDiv**65, 219**NYS**155, 157 [citCJ]; **SD** 226**NW**263; **TexCivA** 278**SW**243; 103**WVa**539, 138**SE**104.

317-92 206**Cal** 571, 275**P**430; 82**Colo** 93, 257**P**262; 226**Ky**381, 11**SW(2d)**144; 156**Md**346, 144**A**510, 62**ALR**1497; 164 **Minn**99, 204**NW**647 [citCJ]; 219**AppDiv** 65, 219**NYS**155; 220**AppDiv**443, 221**NYS** 638; 29 **OhA**97, 163**NE**45; **TexCivA** 278 **SW**243; **TexCivA** 8**SW(2d)**189; **Tex CivA** 24**SW(2d)**485. [c] **In Porto Rico.**–29**PortoRico** 926.

317-93 323 **Ill** 143, 153**NE**744; **Me** 151 **A**423(2dcase); 254**Mass**22, 149**NE**618, 43**ALR**1447; 241**Mich**652, 217**NW**787.

318-97 82**Colo** 93, 257**P**262, 263 [cit CJ].

318-98 82**Colo** 93, 257**P**262, 263 [citCJ].

318-99 82**Colo** 93, 257**P**262, 263 [citCJ].

318-99½-New. Consideration is a matter of contract. 201 **Iowa**961, 208**NW** 273.

318-99½-New. What is claimed to be the consideration for a contract must have been within the expressed or implied contemplation of the parties. 201 **Iowa**961, 208**NW**273.

318-99¼-New. One consideration may support any number of promises. 208 **Iowa**211, 225**NW**266.

318-99⅛-New. The civil law requires a consideration to be serious and not altogether out of proportion to the obligation. 166**La**1014, 118**S**117.

319-2 127**Misc**498, 216**NYS**616.

319-6 172**Ark**575, 290**SW**51.

319-19 298**Pa**535, 148**A**707.

320-29 203 **Iowa**518, 210**NW**453; 222 **MoA**268, 296**SW**205; 26 **OhA**145, 159**NE** 860; 199**Wis**139, 225**NW**822.

320-30 99**NJEq**224, 129**A**404.

320-31 **Ark** 29**SW(2d)**1088.

320-37½-New. The fact that an employment contract is fatally uncertain

in its inception as to compensation to be paid is no ground for denying a quantum meruit after the services have been fully performed. 203 Iowa518, 210 NW453.

320-38 109Conn521, 147A36. [a] "Underwriting contract" is not agreement to loan money, but one to insure sale of bonds or stock. 161Ga919, 132SE535, 45ALR559.

320-39 200 Iowa1265, 206NW657 (attorney's fees); 234Ky173, 27SW(2d) 695; 128Misc288, 218NYS382; 48RI 223, 136A882.

320-40 23F(2d)986, 988 [quotCJ].

320-42 NC 155SE734.

320-44 170Ark887, 281SW670; MoA 290SW105.

321-47 128Misc288, 218NYS382.

321-50 MoA 28SW(2d)425; TexCivA 282SW888.

321-51 81Colo 501, 256P312; DelSuper 143A410; 163La933, 113S152; TexCivA 282SW888.

321-52 39 OklACR295, 297 [quotCJ]; 128 Or415, 274P1098(2dcase).

322-58 215Ala179, 110S291, 293 [cit CJ].

322-65 50ND857, 198NW472 (agreement to support held sufficiently definite); 29PortoRico 926 (boarding promisor's children). [a] **Maintainance and support of promisor's children.**–29Porto Rico 926.

322-66 220Ky230, 294SW1088; 222 MoA483, 280SW720; NC 148SE315. See also 168Minn474, 210NW397.

323-80 137Misc255, 242NYS632.

323-99½-New. submission of bid for bonds, although a higher bidder purchased; 299Fed279.

323-99½-New. prosecuting error to the appellate court; 29 OhA97, 163NE45.

323-6 See also TexCivA 271SW417.

324-24½-New. , and actual expenditures in performance of license. 164Ga 440, 138SE910.

324-24½-New. A contract delivered with a deed reciting that property should be used solely for religious purposes has been held a valid personal covenant based on good consideration. 220AppDiv244, 221NYS396.

324-25 200 Iowa1265, 206NW657 (agreement to reconvey land and assume attorney's fees); 127Misc498, 216NYS 616.

324-34½-New. promise by county to release a seed lien; 52ND29, 201NW 693.

325-45 36F(2d)646; 205 Iowa1311, 217 NW441; Iowa 231NW334; 126Kan640; Md 148A223; MoA 198SW(2d)541; 127 Misc413, 217NYS182; 29PortoRico 926 (support of children); 134SC466, 133 SE98; TexCivA 283SW249.

325-46 TexCivA 283SW249; TexCivA 208SW(2d)1076.

325-47 13PaDist&Co 427.

325-49 36GaA156, 136SE98; Iowa 231 NW334; MoA 296SW201, 203 [citCJ]; 249NY183, 163NE554.

325-50 [a] **Motive is immaterial** if there is good consideration for contract. 13LaA691, 127S414.

326-54 100WVa559, 131SE253.

326-65 RI 129A264.

326-69 77CalA562, 247P264.

326-70 219AppDiv65, 219NYS155.

327-79 82Colo 13, 257P247; 33GaA760, 127SE883; 234 IllA222; IndA 171NE 202; Iowa 231NW334; 219AppDiv65, 219NYS155; 190NC52, 128SE401; 191 NC679, 132SE796; 136Wash74, 239P4. [a] (17) To refrain from making claim against insurance company. 224AppDiv 628, 232NYS53.

328-80 MoA 272SW1091, 1092 [citCJ].

328-81 34F(2d)892; 37F(2d)8; 213 Ala264, 104S264; 73CalA769, 239P 358; 82Colo 13, 257P247; 126Kan601; 156Md346, 144A510, 62ALR1497; MoA 272SW1091, 1092 [citCJ]; 219AppDiv 65, 219NYS155; 127Misc413, 217NYS 182; 190NC52, 128SE401; 52ND29, 201 NW693; 118 Or280, 246P726; 283Pa 434, 129A559; 44Philippine320; 135SC 138, 133SE202, 45ALR1192; 138SC10, 135SE646; TexCommnA 277SW634 (mutual obligations); 136Wash74, 239 P4; Wash 286P95. [a] (2) **Promise to make gift to hospital held supported by sufficient consideration by implied promise on part of hospital authorities to devote donation to specified purposes.** 125Me191, 132A417, 44 ALR1333. [b] (10) See also 34F(2d) 892.

328-81½-New. , even though the thing that is promised may be of no real benefit to the promiser. 52ND29, 201 NW693.

329-84½-New. or expenses and costs to be incurred in litigation, 73CalA769, 239 P358.

329-88 234 IllA222.

329-89½-New. Distinction should be drawn between mutual promises as consideration sufficient to sustain contract and mutuality as relating to specific performance. 193Wis350, 214NW349, 53 ALR281.

329-90 339 Ill62, 170NE705; 127Misc 413, 217NYS182; NY 1Cal583.

329-92 339 Ill62, 170NE705; 219App Div832, 222NYS220; 220AppDiv584, 222NYS66; 40Wyo 297, 276P930.

329-98 252NY192, 169NE274; TexCivA 25SW(2d)913.

330-3 35F(2d)982; 41GaA77, 152SE 300; 244Mich267, 221NW171.

330-5 252NY277, 169NE383.

330-14 272US351, 47SCt142, 71L ed294; 35GaA635, 133SE634.

330-15 220Ala69, 124S108 (even though event may depend upon will of party who afterward seeks to avoid its obligation); 86 Ind185, 156NE562, 565 [cit CJ]; 12LaA583, 126S568.

331-16 102CalA160, 282P981; 196NC 748, 147SE13; 127 Okl 141, 259P838; 283Pa434, 129A559; TexCivA 285SW 681; Va 154SE558.

331-17 17F(2d)919; 216Ala303, 113S 74.

331-18 12F(2d)640; 213Ala41, 104S239; 216Ala303, 113S74; 216Ala441, 113S385; 177Ark613, 7SW(2d)783; CalA 286P449; 33GaA760, 127SE883; 36GaA616, 137 SE85; 323 Ill 443, 154NE231; 246 IllA 558; 218Ky29, 290SW1035; 166La1014, 118S117; 11LaA99, 120S900; 262Mass 595, 160NE405; 249NY206, 163NE735; 214AppDiv606, 212NYS710 (contract held unenforceable as lacking mutuality and definiteness); 217AppDiv1, 215NYS 792; 217AppDiv541, 217NYS256; 129 Misc762, 222NYS584; 116 Oh631, 157 NE491; 29 OhA123, 163NE57; 5PaDist &Co 391, 393 [quotCJ]; TexCivA 281 SW1087; TexCivA 289SW451; TexCivA 17SW(2d)106; 67Utah605, 248P1101; 151Wash201, 275P571; Man [1930] 3 DomLR352, 357 [quotCJ]. But see 207 Iowa1340, 224NW467. [a] (10) See also 220Ala69, 124S108. [b] **Coöperative marketing contract.**–84 IndA51, 150NE 106.

332-19 35GaA120, 132SE140; 166La 1014, 118S117 (contract being invalid); 152Md190, 136A631, 60ALR207; MoA 16 SW(2d)742; 223AppDiv222, 227NYS 675, 677 [citCyc]; 136Misc483, 241NYS 403; 116 Oh631, 157NE491. [a] **If one of several parties to deed** founded on mutual covenants neglects to execute deed, contract is not binding on others. 250Mich13, 229NW409.

332-20 83CalA249, 256P618 (doctrine of mutuality of obligation not applicable to unilateral contracts); 339 Ill 504, 171NE494.

332-21 17F(2d)113; 17F(2d)896; 180 Ark926, 23SW(2d)632; 89CalA75, 264P 341; 96Fla379, 118S205; MoA 272SW 1091; 228AppDiv176, 239NYS619(2d case); 127 Okl 141, 259P838; TexCivA 8SW(2d)189. [a] (12) 9LaA596, 121S 681; 245Mich442, 222NW715. (39) Contract to deal exclusively in manufacturer's product in return for free installation and use of latter's apparatus. 152Md190, 136A631, 60ALR207. (40) Other instances. Me 149A574; Wash 287P209. [b] **Contract for sale of goods was not rendered unilateral** because of stipulation that seller could determine or modify credit extended. 39GaA742, 148SE349. [c] **Courts exercise discretion with care in determining whether** unilateral contract was converted into bilateral. 339 Ill 504, 171NE494.

333-23 315Mo 927, 288SW20; 122 Okl 19, 250P524.

333-24 38F(2d)35 (if potestative condition is supported by serious consideration, contract is not void).

333-25 23F(2d)447; 99CalA783, 279P 483; 207 Iowa994, 222NW3; 207 Iowa 1340, 224NW467; 196NC748, 147SE13; TexCommnA 290SW1090.

333-26 TexCommnA 290SW1090; 147 Va960, 133SE685.

333-28 333 Ill 31, 164NE194.

333-29½-New. Contract, mutually executory as to consideration, consisting of promises, cannot be enforced. 26F (2d)33.

333-31 215Ala388, 110S711; 247 IllA1; 315Mo 927, 288SW20, 32 [quotCJ]; 283 Pa434, 129A559.

333-32 TexCommnA 290SW1090. [a] (5) A contract of guaranty of payment of existing and future indebtedness from sale of goods to another is supported by consideration of main contract and is not unilateral. TexCivA 283SW249.

334-37 5F(2d)723 (contract to "purchase" by implication binds other party to sell); 73CalA748, 239P373; 246 NY369, 159NE173; 217AppDiv541, 217 NYS256; 190NC423, 130SE49 (law will not imply promise where none exists in fact); 137 Okl 288, 279P340. [a] (7) Contract conveying exclusive right of hunting, accepted but unsigned by grantee who has covenants to perform thereunder, cannot be attacked as unilateral, after consideration has been paid for twenty years. 234Mich60, 207NW915. [b] (2) Contracts held not enforceable. 24F(2d)46.

334-38 132Misc693, 230NYS155.

334-41 73CalA748, 239P373.

334-42 130Kan826, 288P593.

334-43 197Cal 694, 242P709; 80CalA 450, 252P652; 89CalA75, 264P341; 208 Iowa412, 226NW10, 11 [citCJ]; MoA 9SW(2d)251; TexCivA 28SW(2d)885, 887 [quotCJ]; 145Wash525, 261P93, 95 [cit CJ].

335-44 34GaA126, 128SE695; 211Ky 137, 277SW302 (where party is not bound to perform condition); 222Ky 476, 18SW(2d)532; 228Ky450, 15SW(2d) 270; TexCivA 28SW(2d)885, 887 [quot CJ]; TexCivA 25SW(2d)913 (contract enforceable on part performance); 149 Va755, 141SE759; 145Wash525, 261P93. [a] (2) Mere part performance of contract not binding on parties does not make it binding so far as it remains executory. 20F(2d)738.

335-45½-New. Partial performance satisfies the requisite of mutuality. 40GaA 185, 149SE89.

335-46 220Ala210, 124S420; 80CalA450, 252P652; 85CalA140, 259P63; 82Colo 121, 257P355; 40GaA185, 149SE89; Mass 173NE411; 313Mo 552, 281SW744; MoA 9SW(2d)251; 116 Oh631, 157NE 491. But see 219Ala365, 122S315. [a] (7) Admitting in evidence unilateral contract, where plaintiffs had partially performed such contract, held not error. 220Ala210, 124S420.

336-47 225AppDiv536, 234NYS63.

336-48 19F(2d)311, 313 [quotCyc]; 35 F(2d)14; 116Nebr729, 218NW753; 10 PaDist&Co 261; TexCivA 25SW(2d)671.

336-51 83CalA249, 256P618. [a] (2) 237Mich548, 213NW137. [c] **In Philippines.**–44 Philippine326. [d] **Notice of intention to accept option is binding without tender of purchase price** in absence of stipulation to contrary, especially where parties knew there must be delay in payment. 62 OntL341, [1928] 3DomLR374.

337-52 216Ky494, 288SW350, 351 [quotCJ]. [b] **Acceptance to be binding** must be plain and unconditional. 44 Philippine326.

337-53 19F(2d)311.

337-56 245NY535, 157NE847; 147Va 960, 133SE685.

337-60 267US248, 45SCt300, 69L ed 589; 37F(2d)545; 122 Okl 19, 250P524, 525 [quotCJ].

337-61 122 Okl 19, 250P524, 525 [quot CJ].

337-64 12LaA431, 125S191(2dcase); 122 Okl 19, 250P524, 525 [quotCJ]. [a] **Provision that neither party shall be liable** for failure due to any cause beyond control of failing party does not destroy mutuality. 17F(2d)476.

337-67 5F(2d)439; 92CalA457, 268P 490; 98CalA650, 277P519; 163Ga352, 136SE143; 212Ky825, 280SW151, 153 [quotCJ]; 218Ky29, 290SW1035; 212 Ky825, 280SW151, 153 [quotCJ]; 5Pa Dist&Co 391. [a] **Provision that manu-**

facturer might cancel dealer's order for any month gave no discretionary right to refuse to sell cars and parts. 42F(2d) 440.

338-69 163Ga352, 136SE143; 212Ky 825, 280SW151, 153 [quotCJ]; **TexCivA** 28SW(2d)202. But see 80CalA450, 252P 652.

338-70 170La57, 127S363.

338-72 42F(2d)440.

338-74 29F(2d)3; 216Ky838, 288SW 741; 150Wash377, 272P957.

339-82 [c] **Unilateral contract lacks mutuality,** in absence of signing by beneficiary or acts denoting acceptance. 339 Ill 62, 170NE705.

339-83 323 Ill 443, 154NE231.

339-85 267US248, 45SCt300, 69L ed 589; 17F(2d)485; 29F(2d)193; 30 F(2d)90; 105Conn252, 135A42; 247 IllA 1 (contract considered mutual); 154Md 581, 141A343; Mass 172NE789; 140 Miss155, 106S17; 196NC748, 147SE13; 129 Or357, 277P716; **TexCivA** 291SW 959; 145Wash525, 261P93.

339-85½-New. A contract is not void for want of mutuality because sellers are released from liability by causes beyond their control, there being a legitimate subject of contract which must be complied with. 143Va469, 130SE393.

339-86 CalA 285P349(2dcase) (dealer's agreement to push sales of motors held insufficient); 86Colo 101, 278P611; 86 Colo 270, 281P111; 41GaA413, 153SE 218; 329 Ill 637, 161NE118; 122Kan 215, 221, 252P459 [citCJ]; 228Ky450, 158SW(2d)270; 226AppDiv368, 234NYS 656; 5PaDist&Co391; 135NC138, 133SE 202, 45ALR1192; **TexCivA** 291SW313; **TexCivA** 38SW(2d)845. But see 199Wis 379, 225NW209. [b] **Thus** grantor may withdraw before deed is accepted in writing or price paid, where grantee is not bound to pay price. 159La604, 105S 728.

339-87 219Ala365, 122S315; 86Colo 270, 281P111; 228Ky317, 148SW(2d) 1082; 129Mise762, 222NYS584. But see 32F(2d)74. [c] **Contract for sale and purchase of land** is not nonmutual because of existence of mortgage on land. 201 Iowa1107, 206NW959.

339-88 28F(2d)942 [certiorari den 279 US847, 49SCt345(3dcase), 73L ed991]; 86Colo 270, 281P111.

339-89 25F(2d)742 (contract to buy gas in quantities ratably with other producers); 33F(2d)248; **TexCommnA** 16 SW(2d)285. See also 26F(2d)33.

340-90 7F(2d)38; 25F(2d)742; 37 F(2d)545; 43F(2d)309; 86Colo 270, 281 P111; 170La57, 127S363. But see **Tex CivA** 284SW322. [a] (3) Agreement to furnish all ice cream needed by defendant's drug business held enforceable because it implies plaintiff's agreement to furnish it. 152Md190, 136A631, 60ALR 207.

340-92 See also 99NJEq224, 129A404.

340-94 252NY277, 169NE383.

341-95 [a] **Agreement not to sell in certain territory** as long as jobbers purchased certain quantity lacks mutuality. 223AppDiv572, 229NYS56.

341-97 86Colo 270, 281P111.

341-98 MoA 31SW(2d)544, 546 [quot CJ].

341-99½-New. A contract of sale may not be invalid for want of mutuality although delivery of an additional quantity is optional. 283Pa434, 129A559.

341-99¼-New. Consideration is essential, while mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise. 283Pa 434, 129A559.

341-99½-New. The question of mutuality does not arise where consideration appears elsewhere in the contract. 283 Pa434, 129A559.

341-99⅝-New. In a contract for sale and purchase of nitrate, to be brought by sellers from South America by ship, a provision, "no arrival no sale," and giving the sellers an option to cancel if the vessels were lost or otherwise could not arrive, held not to make the contract void for lack of mutuality. 13F(2d)999.

341-99⅞-New. A provision of a contract allowing cancellation by the sellers in case of loss of the vessel held not to render it void for lack of mutuality. 13 F(2d)999.

341-99¾-New. A contract for the sale and purchase of goods is not void for want of mutuality because every obligation set up in the contract is not met by an equivalent counter obligation. 122 Okl 19, 250P524.

341-99⅞-New. A contract by which the seller does not undertake to deliver a definite quantity is unilateral and unenforcible unless the quantity sold can be determined or the variation is slight. 221MoA1207, 299SW598 (contract to sell all stock owned on future date).

341-99⅞-New. A condition of a contract for the purchase of real estate that it was "subject to homestead loan" was potestative. 10LaA725, 122S600.

341-1 132Misc693, 230NYS155; **Tex CommnA** 296SW868.

341-2 21AlaA161, 106S58, 59 [citCJ]. [b] **Contract to sell on commission,** but no obligation on defendant to sell, is unilateral. 32 OhA59, 167NE598.

341-3 21AlaA161, 106S58, 59 [citCJ].

342-6 But see **TexCivA** 58W(2d)856.

342-6½-New. An agent's agreement to sell and pay expenses is good consideration for principal's obligation to provide goods. **TexCommnA** 277SW634.

342-6⅞-New. The obligation of principal to supply goods is implied from agent's obligation to sell and pay expenses. **TexCommnA** 277SW634.

342-7 35F(2d)620; 82Colo 93, 257P 262; 169Minn156, 210NW885; 221MoA 898, 295SW1083, 1089 [citCJ]; 79Mont 550, 257P1016; 81Mont248, 263P693, 696 [citCJ]; 219AppDiv65, 219NYS155; **TexCivA** 275SW468, 471 [quotCJ]. [a] **Release from, or cancellation of, illegal or void contract** can never be valid consideration. 98CalA650, 277P519.

342-8 **TexCivA** 275SW468, 471 [quot CJ].

342-9 **TexCivA** 275SW468, 471 [quot CJ].

342-9½-New, whether or not of substantial value. 52ND29, 201NW693.

342-10 **TexCivA** 275SW468, 471 [quot CJ].

342-11 **TexCivA** 275SW468, 471 [quot CJ].

342-12 **TexCivA** 275SW468, 471 [quot CJ].

342-13 **TexCivA** 275SW468, 471 [quot CJ].

343-14 **TexCivA** 275SW468, 471 [quot CJ].

343-15 82Colo 93, 257P262; 260Mass 255, 157NE523. See also 219AppDiv65, 219NYS155.

343-19 Iowa 231NW334.

344-21 81Colo 155, 253P1069 [citCJ]; **TexCivA** 8SW(2d)726.

344-29 264Mass166, 162NE300.

344-48½-New. , or release by divorced wife of claims against husband. 169 Minn156, 210NW885.

344-49 208 Iowa325, 223NW763; Me 151A423(2dcase); 262Mass247, 159NE 909; 119 Okl 72, 247P983; 120 Okl 202, 251P54; 132 Okl 125, 269P1054; 8Pa DistCo 293; 12PaDist&Co 106, 109 [cit CJ]; **TexCivA** 280SW892, 895 [quot Cyc]. But see 11F(2d)921; 37GaA220, 139SE583.

345-50 MoA 294SW734, 736 [citCJ]; 119 Okl 72, 247P983; 120 Okl 202, 251P 54; 132 Okl 125, 269P1054; Sask [1927] 3DomLR274.

345-58 180Ark479, 21SW(2d)962.

346-68 Me 150A491; 295Pa146, 144A 904; 8PaDist&Co 583.

346-69 25F(2d)777, 781 [quotCJ]; 234 Ky173, 27SW(2d)695; Wash 289P1000.

346-70 125Kan603, 606, 264P1065 [quotCJ].

346-71 **TexCivA** 280SW892, 895 [quot Cyc].

347-76 94CalA453, 271P542; 125Kan 603, 606, 264P1065 [quotCJ]; MoA 256 SW1088, 1091 [citCJ].

347-77 8PaDist&Co 293.

347-79 28F(2d)740 [certiorari den 278 US655, 49SCt179, 73L ed565(11thcase)]; 202Cal 778, 262P742; 8PaDist&Co 293.

348-83 79Mont550, 257P1016.

348-84 202Cal 778, 262P742; CalA 292 P547; 201 Iowa961, 208NW273, 274 [citCJ]; 136Miss114, 101S292.

348-85 Me 151A423(2dcase).

349-5 28Ariz497, 238P327, 330 [citCJ]; 204 Iowa1283, 213NW617; NJ 138A705; NJSup 147A488(2dcase); 284Pa47, 130 A417, 419 [citCJ].

349-8 CalA 291P422.

350-10 129Kan59, 281P935, 937 [quot CJ].

350-14 235Mich598, 209NW821; NJSup 133A778.

350-23½-New. to waive right to move for new trial; 8F(2d)490.

350-23⅞-New. to waive right to ask for modification of decree to conform to statute; 8F(2d)490.

350-24 8F(2d)490.

351-26 82CalA685, 256P428.

351-27 74CalA674, 241P900; 76CalA 774, 246P77, 81 [citCJ]; 78CalA362, 248P947; 166Ga228, 142SE885; 235 IllA 35; 200 Iowa1265, 206NW657; 209Ky 800, 273SW452, 453 [citCJ]; 168La475, 228S586; 253Mass374, 149NE115, 41ALR 1319; 254Mass22, 149NE618, 43ALR 1447; 166Minn259, 207NW617, 618 [cit CJ]; 155Miss411, 124S472; MoA 299SW 152; 81Mont543, 264P675; 49Nev438, 248P887, 889 [quotCJ]; 226AppDiv516, 235NYS63; 228AppDiv321, 239NYS16; 190NC423, 130SE49; 116 Oh609, 157NE 478, 481 [quotCJ] 54ALR992; OhA 173 NE39; 119 Or629, 250P745; 119 Or645, 250P760. See also Pa 151A812.

351-28 116 Oh609, 157NE478, 481 [quot CJ]. 54ALR992.

351-29 81Mont543, 264P675; NH 146A 172; Okl 291P43; 122 Or597, 260P222, 55ALR180. See also 68Utah582, 251P 373, 374 [citCJ]. [b] **Doctrine not applicable when there is no legal duty.**– 254Mass180, 150NE9.

352-30 83 IndA717, 149NE86.

352-39 217Ala235, 115S258, 259 [cit CJ].

352-42 85CalA46, 258P705; 122 Or597, 260P222, 55ALR180.

353-45 14F(2d)466; 34Ariz68, 267P 794; 76CalA774, 246P77, 81 [citCJ]; 94 Fla550, 114S375, 376, 381 [quotCJ]; 233 IllA190; 13LaA691, 127S414; LaA 129 S556; Mass 169NE148(2dcase); 166 Minn259, 207NW617, 618 [citCJ]; 81 Mont543, 264P675; 228AppDiv321, 239 NYS16; 116 Oh609, 157NE478, 54ALR 992; 119 Or645, 250P760; **TexCommnA** 298SW538; Utah 267P1020; Va 152SE 346. [a] (11) Promise to repay money advanced under employment agreement held without consideration. 233 IllA190.

353-46 76CalA774, 246P77, 81 [citCJ]; 94Fla550, 114S375, 376, 381 [quotCJ]; 240 IllA384, 393 [citCyc]; 204 Iowa683, 215NW967; 166Minn259, 207NW617, 618 [citCJ]; 155Miss411, 124S472; 119 Or498, 248P1090. [a] **Contract to pay stated sum** for all services "in connection with this entire matter" does not invalidate subsequent contract to pay for further services relating to same subject matter after full performance of first contract. 5F(2d)959. [b] **Party promising to pay additional compensation is not estopped to assert absence of consideration** by reason of performance of original contract by other party. 155Miss411, 124S472.

354-47 MoA 274SW885, 886 [quotCJ].

354-48 170La55, 127S362; MoA 274 SW885, 886 [quotCJ].

354-56 **TexCommnA** 298SW538; Utah 267P1020. See also 235 IllA35.

355-57 254Mass22, 149NE618, 43ALR 1447.

355-63 15F(2d)918, 919 [citCJ]; Mass 169NE148(2dcase); 217AppDiv10, 215 NYS755. See also 127Misc498, 216NYS 616. [a] (5) Promise to pay contractor bonus for hastening completion of building. 217AppDiv10, 215NYS755.

355-64 221MoA898, 295SW1083, 1089 [citCJ].

356-73 142Miss641, 107S885, 888 [cit CJ]. See also OhA 173NE39.

356-74 76CalA774, 246P77, 81 [citCJ]; 205 Iowa1264, 216NW278, 279 [citCJ].

357-79½-New. Where a contractor had a contract with the state highway commission to construct a highway and made the contract with a subcontractor to perform the work, an agreement to pay one employed by the subcontractor held supported by consideration. 192 NC816, 135SE120.

357-80 171Ark576, 286SW873.

357-82 75CalA770, 244P110; 170Minn 128, 212NW2, 3 [citCJ].

357–87 170Minn128, 212NW2, 3 [citCJ].
357–88 171Ark576, 286SW873.
358–95 17F(2d)242, 243 [citCJ]; 176 Ark585, 3SW(2d)316 (blood or love and affection); 166Minn167, 207NW317 (inapplicable); MoA 291SW190, 192 [cit CJ]; 103NJL166, 134A687, 48ALR234; 249NY183, 163NE554.
358–96 205 Iowa841, 216NW634, 635 [citCJ]; 9PaDist&Co 730.
359–98 80Mont308, 260P1039. [a] 30F (2d)761.
359–4 249NY183, 163NE554.
359–7 163Ga352, 136SE143; 38GaA761, 145SE537; 200 Iowa1265, 206NW657; Mass 172NE216; MoA 291SW190, 192 [citCJ]; 103NJL449, 135A880; 249NY 183, 163NE554; 134Misc683, 236NYS 343; 228AppDiv874, 240NYS475; 33 OhA 84, 168NE571; 39 OklACR272, 273 [quot CJ]; 146SC281, 143SE875, 59ALR174.
360–8 39 OklACR272, 273 [quotCJ].
360–9 225AppDiv557, 234NYS27; 39 OklACR272, 273 [quotCJ].
360–10 163Ga352, 136SE143; 254Mass 268, 150NE3; 128 Or415, 274P1098(2d case). [a] (2) Procurement of job for another is not valid consideration for agreement to divide earnings. 235Mich 301, 209NW78.
360–16½–New. Past services which were not for the benefit of the promisor do not constitute consideration for a contract. 235Mich301, 209NW78.
360–17 219AppDiv65, 219NYS155.
361–25 80Mont308, 260P1039.
362–36 See also 82Mont559, 268P549, 553 [citCyc], 58ALR1304.
362–37 38F(2d)35; 13LaA521, 128SS540; 132Misc693, 230NYS155.
362–38 232Mich579, 206NW508; 80 Mont308, 260P1039, 1042 [citCJ].
362–39 232Mich579, 206NW508; 222 MoA268, 296SW205, 209 [citCJ].
362–41 215Ala94, 109S749 [citCJ]; 80 Mont308, 260P1039; 142SC531, 141SE 156.
363–42 Ariz 263P937; 70CalA41, 232P 489; CalA 292P547; Ida 292P590.
363–48 [a] **Subsequent promise to pay debt discharged by failure to exercise diligence** in presenting check given therefor is not supported by sufficient consideration. 46 Ida278, 267P458.
364–53 87 IndA42, 155NE528 [citCJ]; TexCivA 22SW(2d)765.
365–66 82CalA685, 256P428; 83CalA 249, 256P618; 88CalA34, 263P285, 292 [quotCJ]; 99CalA153, 277P1093; 100 CalA750, 281P84; 82Colo 13, 257P247, 256 [citCJ]; 36GaA156, 136SE98; 203 Iowa1183, 212NW343; 126Mel67, 136A 814; 149Md385, 131A815, 818 [quotCJ]; 152Md190, 136A631, 60ALR207; 156Md 346, 144A510, 62ALR1497; 232Mich579, 206NW508 (contract for personal services of one party during lifetime of other); 132Misc693, 230NYS155; 136 Misc268, 239NYS715; 137Misc637, 244 NYS231; 190NC52, 128SE401, 403 [quot CJ]; 116 Or626, 239P108, 241P56; 125 Or579, 267P824; 129 Or357, 277P716; 50RI 75, 145A97; 99WVa407, 129SE482; 103WVa539, 138SE104; 188Wis4, 205 NW486. [a] (8) 83CalA249, 256P618; 151Miss814, 119S318. But see 126Misc 777, 215NYS549. (18) Withdrawing execution and granting extension of time to open up judgment. Sask [1925] 3 DomLR418. (19) Agreement of employee to continue work on promise of contractor other than one employing him to pay him. 215Ala327, 110S716. (20) Agreement to transfer bank stock to daughter on mother's death in consideration of care. 224Ky346, 6SW(2d)274. (21) Contract to care for one during life for conveyance of home, though decedent died shortly after contract was made. 208 Iowa412, 226NW10. (22) Other instances. Wash 287P209. [b] **Under civil law** consideration need not be equivalent or adequate as it is matter for parties to determine for themselves. 166La1014, 118S117.
366–67 26F(2d)331; 26F(2d)442; 22 AlaA465, 116S892; 82Colo 13, 257P247, 256 [citCJ]; 149Md385, 131A815, 818 [quotCJ]; 254Miss180, 150NE9. [b] **Though contract is improvident on part of one party,** law must give effect to its lawful provisions. 213Ala666, 106S133.
366–74 [a] (1) 163La627, 112S509.
366–75 82Colo 13, 257P247; 42 Ida614, 247P10, 11, 49ALR598 [quotCJ]; Ill 172NE32; 149Md385, 131A815, 818 [quot CJ]; 236Mich258, 210NW295; Mo 26 SW(2d)611; TexCivA 31SW(2d)350.
366–76 Okl 291P800; TexCivA 31SW (2d)350.
367–79 299Fed279.
367–88 192NC330, 135S141, 149 [quot CJ].
367–89 TexCivA 290SW790 [citCJ].
368–91 192NC330, 135S141, 149 [quot CJ]; TexCivA 278SW466 (want of consideration cannot be pleaded where contract was wholly performed).
368–93 TexCivA 290SW790 [citCJ].
368–94 171Ark1010, 287SW370; DC 26 F(2d)975; 245NY260, 157NE130; 192 NC330, 135SE141, 149 [quotCJ]; 158 Tenn546, 14SW(2d)963; Utah 272P204; Sask [1926] 2DomLR462. See also 42 Ida443, 246P5. [a] **Doctrine is predicated** on happening of events materially changing rights of parties and not within contemplation of parties at time of execution of contracts. 131Misc827, 228NYS365.
368–99½–New. Under an agreement to pay for plaintiff's services in a song recital, the fact that another artist, advertised on the program, failed to appear held not to show failure of consideration. 32Ariz13, 255P486.
368–2 81Mont248, 263P693, 697 [cit CJ]; TexCivA 278SW466 (want of consideration cannot be pleaded where contract was performed in part by other party). [a] (2) Where there is breach of collateral agreement, there is partial failure of consideration for contract. 246Mich225, 224NW379.
369–4 248Mich104, 226NW838.
369–6 110Conn255, 147A841(2dcase) (defects in automobile diminishing value thereof); MoA 14SW(2d)685; 243NY 156, 153NE33; 192NC330, 135SE141, 149 [quotCJ]; Sask [1925] 3DomLR 418.
369–15½–New. Freedom of will is essential. Cal 292P1073.
369–18 MoA 14SW(2d)685. See also 35F(2d)365. [b] **Mistake to warrant cancellation** must not result from want of due care and diligence. 258Mass205, 154NE851.
369–18½–New. Mistake as to some future contingency cannot avoid a contract. MoA 14SW(2d)685.
369–20 190NC776, 130SE845 (common law does not give indemnity against consequences of indolence, or careless indifference, to ordinary accessible means of information).
369–22 235 IllA89; 212Ky231, 278SW 541 (court of equity has jurisdiction to cancel such contract); 222Ky198, 300SW592; 1LaA404; 6LaA79; 191NC 679, 132SE796; TexCivA 281SW616. But see Sask [1925] 3DomLR418. [a] **Contracts are binding** only when made with knowledge of rights or circumstances putting party on inquiry. 142 Wash306, 252P934.
369–24 22F(2d)444; 222MoA268, 296 SW205; 190NC284, 129SE721; Tex CivA 299SW671, 673 [quotCJ].
370–25 25F(2d)232; 26F(2d)331; 29 F(2d)466; 40F(2d)858; 23AlaA561, 129 S300; 171Ark675; 286SW865; 68CalA 583, 229P880; 83Colo 109, 262P1020; 161Ga823, 131SE889; 35GaA286, 132SE 921; 39GaA212, 146SE559(2dcase); 39 GaA785, 148SE542; 40GaA219, 149SE 175; GaA 155SE773(2dcase); 47 Ida 675, 277P1112; Ida 285P1023; 236 IllA 236; 203 Iowa372, 212NW678; 204 Iowa991, 216NW269; 205 Iowa542, 218 NW255, 58ALR153; 206 Iowa1081, 221 NW828; Iowa 230NW851; 121Kan622, 249P675; 123Kan286, 255P48; 126Kan 31, 266P737; 216Ky782, 288SW745, 746 [citCJ]; 225Ky510, 9SW(2d)226; 159 La604, 105S728 (duty to read contents); 6LaA124, 126 [citCyc]; 13LaA557, 128 S189; 252Mass341, 147NE822; 258Mass 205, 154NE851; Mass 155NE5; 262 Mass377, 160NE268; 236Mich147, 210 NW264; 236Mich258, 210NW295 [quot CJ]; 173Minn585, 218NW112; 140Miss 582, 105S639 [citCJ]; 146Miss651, 111 S591; 149Miss603, 115S720; 315Mo 927, 288SW20; MoA 7SW(2d)387; MoA 285 SW1015 (rescission barred); MoA 7SW (2d)387; 222MoA1098, 14SW(2d)31; 80Mont308, 260P1039; 82NH543, 136A 400, 50ALR1276; 131Misc511, 227NYS 137, 138 [citCJ]; 133Misc85, 230NYS 665; 225AppDiv229, 232NYS508; 190 NC397, 130SE40; 192NC557, 135SE 450; 194NC344, 139SE694; 50ND455, 196NW307, 310 [citCJ]; 54ND559, 209 NW996; 57ND639, 223NW691; OhA 154NE161; 29 OhA88, 163NE53; 114 Okl 61, 242P1030; 116 Okl 255, 244P 414; 122 Okl 208, 253P485; 129 Okl 40, 263P130; 39 OklACR245; 119 Or224, 242P628; 128 Or70, 264P453; 128 Or 668, 275P682; 86PaSuper122; 133SC 256, 130SE893; TexCommnA 276SW 653; TexCommnA 3SW(2d)72; Tex CivA 277SW754; TexCivA 285SW641; TexCivA 294SW894; TexCivA 299SW 671, 673 [quotCJ]; 58 OntL650, [1926] 3DomLR38. See also 30Ariz599, 249P 761; Sask [1928] 1DomLR29. [a] (3) 122 Okl 208, 253P485. [b] 202Cal 748, 262P322. But see Sask [1928] 4Dom LR480. [c] 315Mo 927, 288SW20. [g] **Circular letter.**–216AppDiv28, 214NYS 753 (in absence of showing of fraud). [h] **Negligence precluding relief.**–68 CalA583, 229P880. [i] **Signer conclusively bound.**–253NY159, 170NE530. [j] **One will be presumed** to know meaning of unambiguous language of instrument executed by him. CalA 290P45.
371–28 Utah 290P759.
371–29 40F(2d)858; 175Ark659, 300 SW390; 83Colo 109, 262P1020 (dictum); 235 IllA89; 236 IllA236; 121 Kan172, 246P520; 6LaA79; Mo 23SW (2d)1029; 131Misc511, 227NYS137; 190NC397, 130SE40; 50ND455, 196NW 307, 310 [citCJ]; OhA 154NE161; 116 Okl 255, 244P414; 40 OklACR358, 363 [quotCyc, and rehearing pending]; 128 Or70, 264P453; 130 Or1, 278P943; 136 SC496, 134SE505, 506 [citCJ]; 143SC 325, 141SE564, 567 [citCJ]; TexCivA 277SW754; TexCivA 294SW894 (dictum); 65Utah444, 238P240. See also 163Ga761, 137SE233; 125Misc853, 213 NYS42. [a] 202 Iowa1229, 211NW875; ND 232NW609. But see TexCivA 277 SW754.
372–32 But see 128 Or70, 264P453.
372–34 236Mich147, 210NW264; 116 Okl 255, 244P414. [a] **Misreading of paper purporting to contain contract** is fraud available to party misled only where he was induced to rely on misreading. 317Mo 221, 295SW116.
372–36 130 Or1, 278P943.
372–37½–New. A person may by his own negligence be precluded from relying on a fraud which induced him to sign an instrument. 200 Iowa490, 203 NW293.
372–38 37GaA464, 140SE797; Ida 285 P1023; 123Kan286, 255P48; 258Mass 240, 155NE5; NJ 143A511; 190NC397, 130SE40.
372–39 37GaA464, 140SE797; 123Kan 286, 255P48, 50 [quotCJ]; 159La604, 105S728; 246Mich255, 224NW359; MoA 285SW1015; MoA 22SW(2d)88; 86Pa Super103; 86PaSuper122. See also Sask [1928] 1DomLR1073. [a] 202 Iowa1229, 211NW875.
373–41 190NC397, 130SE40.
373–43 138Misc592, 245NYS696.
373–45 [a] 101NJL530, 129A187.
373–50 212Ky231, 278SW541, 544 [cit CJ].
373–51 209Ky761, 273SW508, 509 [quotCJ]; 255Mass228, 151NE116; Mass 170NE52; 191NC814, 133SE193; TexCommnA 276SW653; TexCivA 299 SW671, 673 [citCJ]; TexCivA 4SW(2d) 661; TexCivA 26SW(2d)319; Sask [1925] 3DomLR418.
373–52 209Ky761, 273SW508, 509 [quotCJ]; 255Mass228, 151NE116; 103 NJEq121, 142A441. But see 107Conn 387, 140A749.
374–53 78CalA362, 248P947 (under statute); 94Fla1010, 114S769; 337 Ill 41, 168NE625 (where parties can be placed in statu quo); 209Ky761, 273 SW508, 509 [quotCJ]; NJCh 151A117; TexCivA 29SW(2d)877. See also 212Ky 231, 278SW541.
374–54 209Ky761, 273SW508, 509 [quotCJ]. [a] 78CalA362, 248P947 (mistake of fact as defined by Civ. Code § 1577).

374–57 241Mich673, 217NW760.
374–58 175Ark659, 300SW390, 394 [quotCJ]; 65Utah444, 238P240; Man [1930] 2DomLR587.
374–59 175Ark659, 300SW390, 394 [quotCJ]; 177Minn415, 225NW290; Mont 293P288.
375–60 170Minn326, 212NW595.
375–63 43F(2d)457; Fla 129S497; 255 Mass228, 151NE116; 127Misc848, 217 NYS732, 735 [quotCJ]; NC 155SE238 (2dcase); SD 226NW339; TexCivA 285 SW641; TexCivA 299SW671; TexCivA 31SW(2d)154. [a] (1) 258Mass205, 154 NE851; 103NJEq121, 142A441. (2) May arise without misrepresentation by either of contracting parties. TexCivA 290SW781.
375–64 35F(2d)365; 100WVa559, 131 SE253.
376–68 35F(2d)365; 193Wis647, 215 NW451.
376–70 94Fla1010, 114S769.
376–71 Mont 293P288.
377–72 34F(2d)367; 37BC401, [1926] 4DomLR78, [1926] 3WestWkly305.
378–81 119 Okl 168, 249P302 [quotCJ]; TexCivA 275SW70, 74 [citCJperStanford,J].
378–82 119 Okl 168, 249P302.
379–85 172Ark437, 288SW923; Ida 292 P222; 53ND249, 205NW684; Sask [1925] 3DomLR418. [b] **Mistake of law by one party only** is not ground for rescission where it does not arise from a misapprehension of law of which the other party was aware and which he did not ratify. 79CalA353, 249P238.
379–86 243Mich447, 220NW750.
379–87 WVa 153SE909.
379–89 170Minn326, 212NW595; Tex CivA 281SW616, 620 [quotCJ].
379–90 TexCommnA 276SW219.
380–92 TexCivA 281SW616, 620 [quot CJ].
380–94 TexCivA 281SW616, 620 [quot CJ].
380–95 170Minn326, 212NW595.
380–97 [b] **In North Dakota.**–58ND33, 224NW871, 63ALR1337.
380–98 172Ark437, 288SW923; 69CalA 447, 231P604.
380–99 208 Iowa254, 225NW411.
381–7 [a] **Intent is issue** in action to rescind. CalA 286P714.
381–11 But see 228AppDiv836, 240NYS 539.
381–11½–New. False representations to constitute fraud relieving one signing a contract must be such representations as will deceive a person of ordinary prudence. 130 Orl, 278P943.
381–13 TexCommnA 25SW(2d)808; TexCivA 296SW635.
381–16 256Mass442, 152NE918. [a] **Person trusted** is liable for expressing dishonest opinions. 256Mass442, 152NE 918. [b] **Relations not confidential or fiduciary per se.**–Iowa 227NW529.
381–17 See also 11F(2d)873.
382–26 31F(2d)571; 8PaDist&Co 423, 424 [quotCyc]. [b] **Fraud in factum** arises from want of identity or disparity between instrument intended and that executed, through trick, artifice, or imposition. 190NC397, 103SE40.
382–30 5F(2d)873; 11F(2d)873; 20F (2d)364; 26F(2d)331; 36F(2d)634; 77 CalA18, 246P126; 99CalA323, 278P871; 99CalA794, 278P872; 90Fla234, 107S 175; 97Fla392, 121S475; Fla 129S759; 41GaA788, 154SE716; Mass 170NE467; 81Mont434, 263P985; NC 155SE238(2d case); 86PaSuper261; TexCivA 27SW (2d)327. See also 190NC776, 130SE845. [b] **Contract between plaintiff and defendant who was sole legatee of testatrix's estate** to disclose assets not discovered by executor held not a fraud on testatrix. 254Mass180, 150NE9.
383–33½–New. Fraud in the execution of an instrument, as distinguished from fraud in the representation, goes to the issue of non est factum, while fraud in the agreement, colloquium, or negotiation, leading to the execution of the instrument, deals only with the treaty. The one relates to the execution of the memorial of the agreement, the other to the meeting of the minds preceding execution of instrument. 190NC397, 130 SE40.
383–33¼–New. Fraudulent representations or promises need not be embodied in the contract in order to furnish grounds for avoidance. TexCivA 291SW 296.
383–33¼–New. Fraud in execution.–Where a party trusted to write contract omitted or inserted provisions not agreed upon, such conduct is fraud. 171 Ark719, 285SW385.
383–33½–New. Misrepresentations of collateral inducements not affecting essence and substance of contract are not ground for relief at law or in equity. DelCh 139A457.
383–33½–New. Fraud upon a stranger to a contract is a good defense to an action thereon. BC [1929] 1DomLR843.
383–35 231Ky377, 21SW(2d)484.
383–36 19F(2d)412; 126Kan31, 266P 737; MoA 78SW(2d)387.
383–39 65Utah444, 238P240, 244 [quot CJ].
383–40 164Ga445, 139SE2; 196NC685, 146SE803(3dcase); 65Utah444, 238P 240, 244 [quotCJ].
383–41 65Utah444, 238P240, 244 [quot CJ].
384–42 92CalA767, 268P954 (mere friendship and affection held not confidential relation); 90Fla234, 107S175. [a] **Courts do not define "fiduciary relationship"** in such way as to exclude new cases. 90Fla234, 107S175.
384–43 90Fla234, 107S175; 49SD619, 208NW170
384–47½–New. Confidential relation exists where confidence is reposed by one party and a trust accepted by the other. 90Fla234, 107S175.
384–48 123Kan82, 254P391; TexCivA 281SW646. [a] (18) That tenants were very desirable. Mass 165NE873.
385–50 26F(2d)331.
386–52 173Ark1033, 294SW17; 169Ga 184, 150SE91; 84IndA666, 151NE338, 836; 123Kan82, 254P391; 240Mich384, 215NW320; 251Mich402, 232NW177; NH 146A641; NC 155SE238(2dcase); 115 Okl 233, 242P535; 283Pa406, 129A 333; TexCivA 289SW173.
386–53 NC 155SE238(2dcase).
386–54 6F(2d)873; 219Ala396, 122S 362; 77CalA18, 246P126; 87Colo 498, 289P599 (where defense is failure of consideration); 169Ga184, 150SE91; 168Ga182, 147SE494; 229Ky396, 17SW (2d)252 (considered representation of future fact); 251Mich402, 232NW177; 103NJEq145, 142A344; 221AppDiv779, 223NYS642; NC 155SE238(2dcase); TexCivA 275SW732; TexCivA 281SW 646; TexCivA 291SW296.
386–55 253 IllA491; 134SC493, 133SE 437.
387–57 222MoA964, 6SW(2d)51.
387–58 169Ga495, 150SE828; 51ND374, 199NW757.
387–60 208 Iowa156, 225NW353; 208 Iowa254, 225NW411.
387–62 19F(2d)412; 80Mont308, 260P 1039.
387–63 106Conn41, 137A159; MoA 7 SW(2d)387; 80Mont308, 260P1039.
388–65 190NC776, 130SE845.
389–79 [a] **Defendant, in action to be restrained from inducing breach of producers' contracts with plaintiff,** cannot defend on ground of representations made in procuring contracts. 199Wis 379, 225NW209.
390–81 231Ky386, 21SW(2d)474; 100 NJEq537, 136A179.
390–82 213Ala526, 105S666 (must be fraud in procurement of contract); DelCh 139A457; Fla 129S497; 333 Ill 41, 164NE205; Md 150A28; 254Mass180, 150NE9; Mass 165NE665; Miss 119S 326; 115Nebr875, 215NW120; 190NC 776, 130SE845.
390–83 DelCh 139A457; Fla 108S299. [a] (4) Merely finding of slight facts tending to show plaintiff had been deceived not ground for setting aside contract. 222Ky132, 300SW327. (5) False representation as to financial condition of proposed sublessee of oil lands. Alta [1929] 4DomLR107.
391–85 202Cal 251, 259P752. [b] **If any one of material representations** upon which claim for rescission is based is true, party aggrieved is entitled to judgment if other elements entitling party to rescission are present. CalA 258P435.
391–86 106Conn41, 137A159.
391–88 27F(2d)1; 106Conn41, 137A 159; 3Del 259, 138A392; Fla 129S497; 40GaA559, 150SE600; 235Ky54, 29SW (2d)581; Md 150A28; Mass 165NE665; 115Nebr875, 215NW120; 190NC776, 130 SE845 (must be reasonably relied on). [b] **Party induced to sign contract without reading in reliance on other's statement** as to contents may avoid contract on ground of fraud. 134Misc389, 235NYS321.
391–89½–New. A party is not bound to one who deceived him where with reasonable prudence he relied on fraudulent representations. 190NC397, 130SE 40.
391–90 DelCh 139A457.
392–94 TexCivA 280SW859; TexCivA 285SW670.
392–96 155SC147, 152SE17.
392–98 213Ala205, 104S396; 169Ark 491, 276SW583; 169Ga495, 150SE828 (failure to read or understand); 206 Iowa1081, 221NW828; 242Mich486, 219 NW637; NJCh 149A636(1stcase).
393–99 But see 164Ga445, 139SE2; Tex CommnA 3SW(2d)72; TexCivA 285SW 670.
393–1 ND 230NW11.
394–6 27F(2d)1; 36F(2d)628; 214 Ala452, 108S69; 115Nebr875, 215NW 120. But see 76CalA785, 246P121; 77 CalA18, 246P126. [b] **To rescind contract** for fraud damages must be substantial. TexCommnA 291SW1095.
394–7 226AppDiv235; 234NYS463.
394–12 213Ala675, 106S171; 93Fla30, 111S525; 321 Ill 354, 151NE871; 212 Ky97, 278SW586; 219Ky727, 294SW 489, 490 [citCJ]; 253Mass205, 148NE 609; 263Mass76, 160NE408; 309Mo 638, 274SW815; 321Mo 1, 9SW(2d)967; 223 AppDiv175, 228NYS54; 190NC608, 130 SE505 (one induced to sign written contract by fraudulent representations is not bound if he acted with reasonable prudence); 193NC769, 138SE143; 125 Okl 202, 257P298; 116 Or641, 242P613; 117 Orl1, 242P830; 91PaSuper157; 136 SC496, 134SE505; 193Wis531, 214NW 332. But see 153Wash102, 279P402. [a] (1) 309Mo 638, 274SW815. (2) 262 Mass247, 159NE909. [b] (1) 164Ga 581, 139SE56. (2) Title does not pass where contract is induced by fraud. 40 GaA559, 150SE600. [c] 66Utah1, 239P 29. [d] **Fraud in treaty and fraud in factum distinguished.**–195NC337, 142 SE26. [e] **Fraud going to essence of contract** makes it void ab initio. 223 AppDiv175, 228NYS54. [f] **In Tennessee.**–158Tenn546, 14SW(2d)963.
394–13 17F(2d)386; 219Ala645, 123S 38 (fraud will vitiate any contract); 171Ark719, 285SW385; 90Fla234, 107 S175; 93Fla30, 111S525; 131Misc682, 227NYS258; 137Misc564, 241NYS759; 190NC397, 130SE40; 191NC679, 132SE 796; 123 Or469, 259P1064, 260P1099; 155SC147, 152SE17.
394–13½–New. If the party defrauded misunderstands the nature of the contract so that the minds of parties never meet on its terms, it is void. 309Mo 638, 274SW815.
394–13½–New. Defense of fraud relates back to its inception and if proved vitiates the contract ab initio. Tex CommnA 282SW570.
394–13¼–New. Fraud vitiates everything it enters into. Miss 130S290.
394–15 193Wis531, 214NW332.
395–16 213Ala675, 106S171.
395–17 218AppDiv431, 218NYS490; 125 Okl 202, 257P298; 117 Orl1, 242P 830.
395–18 118Nebr297, 224NW316; Tex CivA 278SW286.
395–20 But see 117 Orl1, 242P830.
395–21 Iowa 228NW45; 223Ky510, 4 SW(2d)403 (acceptance of benefits); 197 NC305, 148SE434; 125 Okl 202, 257P 298, 301 [quotCJ]; Alta [1930] 1Dom LR557.
395–23 18F(2d)817; 32F(2d)838; 214 Ala452, 454, 108S69 [citCJ]; 76CalA 278, 244P916; 335 Ill 363, 167NE54; 83 IndA385, 148NE486; 200 Iowa527, 202 NW119; 212Ky97, 278SW586; MoA 271SW545; 193NC769, 138SE143; 132 Okl 70, 269P255; 116 Or641, 242P613; TexCivA 280SW622; TexCivA 281SW

646; 142Wash142, 252P692, 695 [quot CJ]; 105WVa453, 143SE98 (action for fraud inducing contract). [a] (3) If fraudulent representations are not discovered till transaction is completed, party defrauded may affirm it and sue for damages. 164Minn293, 204NW963.

396-28 Ark 30SW(2d)860; 76CalA278, 244P916; 164Ga445, 139SE2; 206 Iowa 90, 219NW44, 48 [citCJ]; 235Mich268, 209NW85; 164Minn367, 205NW262; MoA 271SW545 (defense may be complete or partial); TexCommnA 282SW 570; TexCivA 281SW646; TexCivA 13 SW(2d)714. [a] **Defense of fraud is available despite exculpatory provisions in contract.**–228AppDiv717, 239NYS283. [b] **Defense of fraud is founded on theory that no valid contract was made.**–51Philippine80.

396-31 Mich 233NW223.

396-40 19F(2d)186; 318 Ill 218, 149 NE306; 258Mass585, 155NE589; 240 Mich360, 215NW341; 99NJEq404, 132 A664, 666 [citCJ]; NJCh 147A781; 213 AppDiv578, 211NYS262, 266 [quotCJ]; 86PaSuper370. [a] (8) Other definitions. 95Fla889, 116S863. [e] 202Cal 326, 260P553.

397-41 213AppDiv578, 211NYS262, 266 [quotCJ]; 196NC51, 144SE545, 62ALR 1474(2dcase); 86PaSuper370.

397-42 258Mass585, 155NE589; 99 NJEq404, 132A664; TexCivA 28 SW(2d)941.

397-43 99NJEq404, 132A664, 666 [cit CJ].

397-44 34PortoRico 239.

397-45 318 Ill 218, 149NE306.

397-51½-New. Enforcement of a legal right by legal means is not evidence of duress. 258Mass585, 155NE589.

398-52 13F(2d)932; 19F(2d)186; 163 La272, 111S702; 258Mass585, 155NE 589; Mass 173NE522; 196NC51, 144 SE545, 62ALR1474(2dcase); 121 Okl 7, 246P1091; TexCivA 283SW203; Tex CivA 14SW(2d)870; Sask [1925] 3 DomLR418.

398-52½-New. County alleging recognition by both counties of surveys establishing boundaries has burden of proving such fact. TexCivA 4SW(2d) 610.

398-53 163La272, 111S702; 258Mass 585, 155NE589; Mass 173NE522; 121 Okl 7, 246P1091; 34PortoRico 239; Tex CivA 14SW(2d)870.

398-55 191NC679, 132SE796. [a] **Acts of duress** operating on mind only are voidable, not void. 270US438, 46SCt 326, 70L ed669.

398-56 121 Okl 7, 246P1091.

398-56½-New. Defendant is not estopped to set up defense of duress, in absence of delay, silence, or acquiescence. 19F(2d)186.

398-58 13F(2d)932.

398-59 13F(2d)932; 160Ga732, 129SE 57 (any illegal imprisonment).

398-60 13F(2d)932; 160Ga732, 129SE 57 (legal imprisonment used for illegal purpose).

399-68 271US43, 46SCt389, 70L ed822. [a] **To make refusal to perform contract constitute duress,** probable consequences must be such that remedy at law is inadequate. 271US43, 46SCt389, 70L ed 822.

399-69 98CalA297, 276P1043; 163La 272, 111S702; 1LaA151; MoA 274SW 112, 114 [quotCJ]; 227AppDiv585, 238 NYS419.

399-70 CalA 278P469.

399-71 MoA 274SW112.

399-72 55AppDC267, 4F(2d)879 (threats to bring bankruptcy proceedings); Tex CivA 275SW298; TexCivA 4SW(2d) 610 (permanent natural objects readily found).

404-73 79CalA533, 250P205; 204 Iowa 635, 215NW634.

400-74 213AppDiv430, 210NYS346.

400-77 13F(2d)932; 240Mich360, 215 NW341; 34PortoRico 239.

400-78 13F(2d)932; 202Cal326, 260P 553; 162Ga137, 133SE870; 194NC298, 139SE440. [b] (2) Where transfer would not have been made but for the coercion, duress exists, though threat is not of unlawful imprisonment. 13F(2d)932. [e] **Duress may arise** from threat of prosecution for crime of which party is guilty. TexCivA 294SW226. [f] **Where purpose of threat is to exact consideration** wholly disconnected from offense for which prosecution is threatened. TexCivA 288SW1092.

400-79 13F(2d)932; 162Ga137, 133SE 870; GaA 155SE785(3dcase); TexCivA 294SW226.

401-81 13LaA37, 127S104.

402-90 179Minn17, 228NW167; 122 Or 523, 259P900; TexCivA 14SW(2d)870; 104WVa174, 139SE654, 656 [quotCJ].

402-91 122 Or523, 259P900; 104WVa 174, 139SE654, 656 [quotCJ].

402-92 122 Or523, 259P900; 104WVa 174, 139SE654, 656 [quotCJ].

402-93 13F(2d)932; 74Mont531, 241P 322 (no fixed standard of resistance required); 104WVa174, 139SE654, 656 [quotCJ]. Contra 163La272, 111S702.

402-94 13F(2d)932; 318 Ill 218, 149 NE306; 235 IllA89; Mass 173NE522; 74Mont531, 241P322; 227AppDiv585, 238NYS419 (compulsion actual, present, or potential); 144 Okl 157, 290P181(2d case); 122 Or523, 259P900; 104WVa 174, 139SE654, 656 [quotCJ].

402-95 19F(2d)751, 755 [citCJ]; 160 Ga732, 129SE57 (mere threats will not constitute duress); TexCivA 28SW(2d) 941 (action taken must have been induced by threats alone); 104WVa174, 139SE654, 656 [quotCJ]; Alta [1929] 2DomLR232.

402-96 160Ga732, 129SE57 (must subvert will and substitute will of another); 74Mont531, 241P322; 214AppDiv 315, 212NYS175; Or 259P900; 104WVa 174, 139SE654, 656 [quotCJ].

403-4 203 Iowa207, 212NW476, 479 [quotCJ]; TexCivA 284SW702.

403-11 203 Iowa207, 212NW476, 479 [quotCJ].

403-11½-New. It has been stated that under certain circumstances one may be a "necessitous borrower" so as to be entitled to relief from a harsh contract on the ground of duress. 149Md 385, 131A815.

403-13 [a] **Duress may be asserted** against third person claiming fruits thereof where notice of wrong is imputable to him. 102WVa79, 135SE244.

404-14 122 Or523, 259P900.

404-15 122 Or523, 259P900.

404-20 202Cal 778, 262P742, 745 [cit CJ] (wife); 123Kan674, 256P967; 310 Mo 287, 275SW540; 122 Or523, 259P 900. [b] **Whether oral or written,** contract is unenforceable. 202Cal 778, 262 P742.

404-21 240Mich360, 215NW341 (threat against son-in-law); 310Mo 287, 275 SW540; 74Mont531, 241P322; 122 Or 523, 259P900; TexCivA 9SW(2d)1049. [a] **Nearness of relationship** is of secondary importance. 122 Or523, 259P 900.

404-23½-New. Threats need not have been made directly to the person on whom the duress is alleged to have been exerted where they were made with the intention that they should be communicated to him and were so communicated. 310Mo 287, 275SW540; 122 Or523, 259P900.

404-25 [b] **Undue influence** is species of fraud. Ala 130S226; 90Fla162, 105 S321.

405-26 173Ark856, 293SW728; Tex CivA 31SW(2d)350.

405-28 208 Iowa300, 225NW419; 126 Me130, 136A667; Me 150A378.

405-34 144SC252, 142SE498, 503 [cit Cyc].

405-35 224Ky346, 6SW(2d)274.

405-37 144SC252, 142SE498, 503 [cit Cyc].

406-38 Ala 127S527 (where dominant party in close fiduciary relationship benefits by transaction, he must overcome presumption of undue influence); 173Ark856, 293SW728; 208 Iowa300, 225NW419; 226AppDiv858, 137Misc89, 241NYS178; 122 Okl 301, 254P979; 128 Okl 91, 261P224.

406-43 99CalA96, 278P488.

406-52 Me 150A378.

407-59 93Fla67, 111S541; 224Ky346, 6SW(2d)274; 136Wash378, 240P9. [b] **Exercise of undue influence in fact or existence of mental weakness** is not essential to application of doctrine of confidential relationship. 208 Iowa300, 225NW419. [c] **Necessity of pleading and proof of confidential relation.**–205 Iowa1379, 219NW492.

407-63 128 Okl 91, 261P224. [b] **"Fiduciary or confidential relation"** embraces both technical and informal relations where one man relies on another. Me 150A378.

407-68 80CalA538, 252P638; 33NM55, 263P758.

407-72 80CalA538, 252P638 (rule requiring independent advice not applicable, but if applicable held satisfied); Man [1929] 4DomLR128. See also 208 Iowa300, 225NW419; 146Va504, 131SE 692.

408-74 [b] **Evidence insufficient to show confidential relationship.**–Iowa 227 NW529.

408-79 208 Iowa300, 225NW419; 231 Ky377, 21SW(2d)484.

410-88 72CalA409, 237P784; 80CalA 501, 251P973; 82CalA83, 254P942, 943 [citCJ]; 118Kan663, 236P845, 846 [cit CJ]; 102NJEq20, 139A817; Tex CommnA 282SW791, 46ALR521; 100 WVa559, 131SE253.

410-89 191NC809, 133SE391; TexCivA 274SW648; Utah 266P1037.

411-90 150Miss559, 115S323, 330 [quot CJperEthridge,J].

411-90½-New. To invalidate a contract the illegality must be inherent and not merely collateral. 159Tenn655, 21SW(2d)392.

411-91 29F(2d)254; 118Kan663, 236P 845, 846 [citCJ]; 228Ky569, 15SW(2d) 423; 250NY370, 165NE814; 229App Div469, 242NYS381 (holding contract not illegal because of possibility of breaking law in performance of it). [c] **Future event.**–156Md346, 144A510, 62 ALR1497.

411-93 [a] **Contract harsh as to one party** is not void as against public policy. 54ND559, 209NW996.

411-95 NC 154SE50 (slowness of courts to enforce).

411-97½-New. Parties may make any contract not contrary to public policy or good morals. 162La73, 110S93.

411-97½-New. Generally speaking, a contract is valid unless its terms are in contravention of law or contrary to public policy. 206 Iowa1386, 222NW350.

411-98 102NJL545, 133A290; TexCivA 281SW616.

411-1 11F(2d)907; 80CalA501, 251P 973; 322 Ill 489, 153NE677; Me 151A 542; Mich 233NW375; 315Mo 22, 285 SW479, 482 [citCJperWalker,J dis. op.]; 216AppDiv380, 215NYS200; 191NC809, 133SE391; 33 OhA468, 169NE825 (act to be done must not nullify positive provision of expressed law); 128 Okl 137, 261P916; 86PaSuper414; TexCivA 274 SW309; TexCivA 281SW616; TexCivA 10SW(2d)408.

412-2 102NJL545, 133A290, 291 [cit CJ]; 191NC809, 133SE391.

412-3 99CalA235, 278P494 (contract of sale); 34GaA210, 129SE570; 216App Div380, 215NYS200; 192NC620, 135SE 616.

412-4 150Miss559, 115S323, 330 [quot CJperEthridge,J].

412-6 99CalA528, 279P202; 225Ky456, 9SW(2d)209.

412-8 Colo 293P345; Me 151A542; 194 NC19, 138SE348; 128 Okl 137, 261P916. [b] **Agreements held not invalid.**–Not contemplating commission of act denounced by statute licensing practice of optometry. 119 Or252, 237P965.

413-19 225AppDiv407, 233NYS279.

413-23 33 OhA468, 169NE825.

413-29 US 21F(2d)893; 118Kan663, 236P845; 33 OhA468, 169NE825.

414-31 119 Or252, 237P965. [c] **Contracts held not invalid.**–119 Or252, 237 P965.

415-44 12F(2d)724; 19F(2d)751; 24 F(2d)791 (division of attorney's fees with one who recommended him to client); 125Kan449, 265P50; 294Pa464, 144A404. [a] **Gain** must be object to render contract void. 71CalA492, 236P 210.

415-45 See also TexCivA 14SW(2d)935.

415-47 134Misc247, 234NYS687.

416-48 [b] **Contract by attorney to procure and furnish information as to whereabouts of fugitive** in consideration

of compensation to be paid by bail is not illegal as matter of law where attorney had been employed by fugitive in different matter only and relation of attorney and client had terminated. 37 GaA670, 141SE320.

416–52 139 Okl 152, 281P559.

417–57 71CalA492, 236P210. [b] (2) Contract, made by dealer of building materials with employee of purchaser, to pay such employee commission on all materials purchased for account of his employer, with consent and approval of employer, is not illegal and void. 135 Okl 174, 274P871.

418–58½–New. Disclosure by one in fiduciary relation of contract affecting such relation must be complete. 24 F(2d)791.

418–60 255Mass273, 151NE305, 45 ALR788. [b] **Contracts held not invalid.**–275US199, 48SCt53, 72L ed 238.

418–61 TexCivA 3SW(2d)842. But see TexCivA 15SW(2d)59. [b] **Failure of corporate directors to fully comprehend legal significance of transaction** does not affect validity of notes based on illegal consideration. TexCivA 3SW(2d) 842.

419–63½–New. Agreement to keep one in control of corporation as long as he does his best for it is illegal. 255Mass 273, 151NE305, 45ALR788.

419–64 236 IllA187. See also 255Mass 273, 151NE305, 45ALR788.

419–65 236 IllA187.

419–67 236 IllA187.

420–70 217AppDiv691, 217NYS67.

420–73 217AppDiv691, 217NYS67.

420–73½–New. Agreement by stockholder to accept new lease of corporation, or certain sum on cancellation of old lease, has been held not illegal. 255 Mass599, 152NE87.

420–75 6F(2d)721; 36F(2d)634; 263 Mass76, 160NE408. [b] **Fraud entering into substance of contract** is not subject to stipulation in contract against redress therefor. 252Mass265, 147NE 892.

420–77 24F(2d)791 (division of fees by attorney on legal business brought in by one not attorney); 78Cal 362, 248P 947; 72CalA249, 236P968; 82CalA107, 255P225; 330 Ill 121, 161NE300; 255 IllA67; 127Kan86, 272P187; 11LaA 199, 123S178; 8LaA28; Mo 30SW(2d) 100; 85Mont170, 278P126, 67ALR690; 102NJL545, 133A290; 249NY206, 163 NE735; 250NY370, 165NE814; 216 AppDiv380, 215NYS200; 135Misc446, 238NYS616; 191NC809, 133SE391; 54 ND330, 211NW597; 55ND45, 212NW 236, 51ALR296; 287Pa87, 134A384, 385 [citCJ]; Tex 282SW791, 46ALR 521; TexCivA 281SW616; 198Wis56, 223NW575(2dcase); NS [1929] 1Dom LR207. See also 103Conn21, 130A81. See also 192Wis93, 212NW402. [a] **No recovery can be had by either party** on contract, legal when made, performance of which is subsequently made illegal. 114 OhSt523, 151NE645. [b] **Parties cannot fix venue** by agreement. Tex 297SW344. [c] **Where contract is made crime by statute,** it becomes immoral contract. 37GaA268, 140SE767.

421–78 34GaA210, 129SE570 [citCJ].

421–79 55ND45, 212NW236, 51ALR 296.

421–81 Cal 268P1050; 207Cal 298, 278 P227; 68CalA592, 229P1020; 72CalA 249, 236P968; 82CalA83, 254P942, 943 [citCJ&Cyc]; 82CalA109, 255P225; 90 CalA519, 265P1032; 13LaA350, 127S 467; 315Mo 22, 285SW479, 482 [citCJ perWalker,J, dis.op.]; 85Mont170, 278P 126, 67ALR690; 191NC809, 133SE391; 194NC19, 138SE348; 124 Or423, 263P 920.

422–84 146Miss862, 111S748, 749 [quotCJ]. [c] **Where contract is not evil in itself** and invalidity is not declared by statute, courts will not declare it invalid. Okl 292P48.

423–86 16F(2d)933; 72CalA249, 236P 968; 34GaA210, 129SE570 (money lender).

423–93 72CalA249, 236P968.

423–97½–New. a money lender, NJDist 136A711.

423–6 178Minn188, 226NW515 (ordinance requiring license held not to prevent persons who are not plumbers from contracting to have plumbing work done by licensed plumbers).

423–9 68CalA239, 228P731; 232 IllA 532, 558 [quotCJ]; 165La222, 115S466; TexCivA 272SW234, 236 [citCJ].

424–10 232 IllA532, 558 [quotCJ]; 129 Misc772, 222NYS579, 581 [quotCJ]; TexCivA 272SW234, 236 [citCJ].

424–11 34GaA210, 129SE570 [citCJ]; 192NC620, 135SE616; 54ND830, 211NW 597; 124 Or423, 263P920; 284Pa361, 131A286.

424–15 254 IllA514. But see Mass 170 NE410.

424–19 22F(2d)893; 41F(2d)588; 78 CalA362, 248P947, 951 [quotCJ]; 86 Colo 320, 281P364, 65ALR995; 104Conn 271, 132A461; 91Fla322, 107S684; 240 IllA222; 118Kan663, 236P845; 213Ky 167, 280SW937, 939, 45ALR544 [CitC J&quotCyc]; 154Md438, 140A336; 234 Mich60, 207NW915; Miss 130S745 (2dcase); 85Mont170, 278P126, 67ALR 690; 114Nebr423, 207NW674, 676 [quotCJ]; NJCh 151A389; 225AppDiv 29, 232NYS84; 137Misc59, 243NYS141; 191NC809, 133SE391; 128 Okl 137, 261 P916; 134 Okl 60, 272P420; 289Pa280, 137A251 [quotCJ]; 92PaSuper94; TexCivA 3SW(2d)842. **In determining** what is public policy courts may have recourse not only to enacted law, but also to decisions of courts of last resort. 71CalA492, 236P210. [b] **Comity or will of contracting parties** cannot set aside public policy of country. 134 Misc439, 234NYS622.

425–20 71CalA492, 236P210; 78CalA 362, 248P947, 951 [quotCJ]; 213Ky167, 280SW937, 939, 45ALR544 [citCJ& quotCyc]; Mont 287P156; 130Misc249, 223NYS796; 297Pa543, 147A608; 117 Tex313, 3SW(2d)429 (interest of others than parties involved).

425–21 78CalA362, 248P947, 951 [quot CJ]; 213Ky167, 280SW937, 939, 45 ALR544 [citCJ&quotCyc]; 114Nebr 423, 207NW674, 676 [quotCJ].

425–22 39F(2d)408; 78CalA362, 248P 947, 951 [quotCJ]; 213Ky167, 280SW 937, 939, 45ALR544 [citCJ&quotCyc]; 114Nebr423, 207NW674, 676 [quotCJ]; 105WVa81, 141SE515.

425–22½–New. But courts should be satisfied that advantage to public resulting from holding contract void as against public policy is certain and substantial where contract does not stipulate for anything malum in se or malum prohibitum. 71CalA492, 236P210.

425–23 106Conn66, 136A865; 213Ky 167, 280SW937, 939, 45ALR544 [citCJ &quotCyc]; 114Nebr423, 207NW674, 676 [quotCJ]. [a] **Injury to public and circumstances of each case** determine legality of contract. 39F(2d)408.

426–29 338 Ill 82, 170NE8.

426–29½–New. A contract opposed to the public policy of the state is not enforceable, although valid where made. 21F(2d)128.

426–29⅓–New. Contract will be declared illegal because of public policy only in clear cases. 39F(2d)408.

426–36 299Fed279; 21F(2d)128; 78 CalA362, 248P947; 46 Ida403, 268P26; Ill 173NE465; 234Mich60, 207NW915 [quotCJ]; 150Miss1, 115S598; Mont 287P156; 10PaDist&Co 733, 740 [cit Cyc]; TexCivA 275SW134.

426–37 316Mo 492, 291SW120, 51ALR 877; Mont 287P156 (not determined by judges' private convictions or notions).

426–38 Mo 30SW(2d)100; Mont 287P 156; 118 Or602, 247P766, 47ALR394.

427–43 78CalA362, 248P947; 82CalA 793, 256P296.

427–45 71CalA492, 236P210; 212Ky 123, 278SW533, 536 [citCyc]; 33NM 136, 262P185; 213AppDiv406, 210NYS 49, 51 [citCJ].

427–47 39F(2d)408.

427–49 213Ky167, 280SW937, 45ALR 544; 53ND797, 208NW82, 88 [quotCJ].

427–50 275US199, 48SCt53, 72L ed238; 12LaA506, 126S460; 254Mass180, 150 NE9, 42ALR1142; 53ND797, 208NW 82, 88 [quotCJ]. See 27F(2d)392 (recognizing rule).

427–51 275US199, 48SCt53, 72L ed238; 22F(2d)893 (free from doubt); 163Ga 352, 136SE143; 38GaA583, 144SE824; 44 Ida110, 255P309; 225Ky456, 9SW (2d)209; 8LaA800; 153Md501, 138A 665 (contract held not void as against public policy); 254Mass180, 150NE9, 42ALR1142; 249Mich204, 228NW690; Mich 233NW439; 315Mo 927, 288SW20; 34NM317, 281P25; 53ND797, 208NW 82, 88 [quotCJ]; 138 Okl 156, 280P616; 117Tex313, 3SW(2d)429; TexCommnA 24SW(2d)359; TexCivA 9SW(2d)437; TexCivA 13SW(2d)474; TexCivA 14SW (2d)935; TexCivA 15SW(2d)59; Sask [1926] 4DomLR333, [1926] 2WestWkly 637. [b] (77) Tobacco growers coöperative association organized under Kentucky Marketing Act is not trust on restraint of trade, and its contract with grower is not void as against public policy. 114 OhSt361, 151NE471. (78) Agreement to reveal undiscovered assets of decedent estate. 254Mass180, 150NE9. (79) Contract by which parties agreed that, when either of them died, bank shares of deceased should become property of survivor. 191NC 679, 132SE796. (80) To pay percentage of bonds on submission of bid by promisee. 299Fed279. (81) Secret agreement to furnish information as to prospective purchasers of stock. IndA 153 NE179. (82) Other agreements. 225 AppDiv822, 232NYS515. (83) Making time of essence. Mont 287P629. (84) Agreement of stockholders for purchase of stock to continue parties as directors and officers. 230AppDiv57, 242NYS548. (85) Agreement to furnish information to tax officials of omitted property for twenty per cent contingent fee. Mont 285P195. (86) Other instances. 256 IllA279; Iowa 227NW637; 34NM317, 281P25; 135Misc764, 239NYS585; Wis 232NW525. [c] (4) Guaranty of payment of existing and future indebtedness arising from sale of goods to another is not against public policy. TexCivA 283SW249. [e] **In Oklahoma.**– 133 Okl 23, 270P854.

429–52 78CalA362, 248P947; 118 Or 127, 246P211.

429–53 193Wis531, 214NW332. [a] (27) Bank loan in violation of statute limiting loans to individual. 52ND49, 201NW696. (28) Conduct of parties in chilling bids on contracts for public improvements. 118 Or127, 246P211. (29) Agreement where plaintiff undertook to combine his earnings as attorney with defendant's held illegal. 214 AppDiv60, 210NYS661. (30) Other agreements held void. 236 IllA324; 213 Ky167, 280SW937, 45ALR544; 170 Minn373, 212NW602, 56ALR1; 220App Div515, 221NYS703; 55ND45, 212NW 236, 51ALR296; 105WVa81, 141SE515; 193Wis531, 214NW332. (31) Provision of notice to stop payment of check releasing bank from all liability by reason of compliance or noncompliance with notice. 78CalA362, 248P947. (32) Agreement between persons interested in purchase of public lands eliminating one of them as competitor at sale or discouraging other prospective bidders. 129 Okl 191, 263P1102. (33) Other instances. 208 Iowa385, 226NW 75, 76 [quotCJ]; 245Mich599, 223NW 218; 176Minn4, 222NW341; 128 Or673, 275P670; 133 Okl 43, 271P158; Can [1930] 4DomLR241. (34) Mortgage based on consideration involving violation of laws of neighboring country. Ont [1929] 4DomLR734. (35) Contracts limiting transfer and ownership of property to members of Caucasian race. CalA 284P247. (36) Agreement between refiners of gasoline to acknowledge validity of all patents that might be issued to each other. 33F(2d)617. (37) Other contracts held void. 86Colo 320, 281P364, 65ALR995; Mass 168NE161. (38) Agreement to procure excessive insurance on property. 129Kan111, 281P 891. (39) Relieving principal from liability for misrepresentations of agent. 131 Or185, 282P546.

429–54 [c] **Contracts for pecuniary consideration having as object control of conduct of state government** and agencies and departments thereof are not void. 219Ala623, 123S27.

430–55 178Ark588, 11SW(2d)469; Tex

CivA 271SW145; **TexCivA** 16SW(2d) 544.

431-56 [b] **Contract to procure payment from United States government** to county of moneys equitably due held not void as lobbying contract. 153**Wash** 399, 280P31, 67**ALR**668.

431-58 275US199, 48SCt53, 72L ed238; 7**Alaska**150; 200**Cal** 318, 253P726; 200 **Iowa**809, 202NW530; 115 **Or**409, 237P 961, 14**ALR**1362. [a] (5) Employment of attorneys by board of supervisors on behalf of drainage district to induce legislature to make appropriation to pay assessment on state-owned land. 200 **Iowa**1333, 206NW83.

432-59 178**Ark**588, 11SW(2d)469; 200 **Cal** 318, 253P726. [b] **Constitutional right of people to petition their legislature for redress** of grievances is no impediment in way of board of supervisors to employ attorneys to secure legislation which will carry out moral obligation on part of state. 200 **Iowa** 1333, 206NW83 (in behalf of drainage district).

432-60½-New. It is neither illegal nor improper to expend such reasonable sums as may appear to be necessary to present by fair and open means the merits of any matter advocated before a legislative body, 199**Cal** 168, 248P658, 47**ALR**904.

432-60½-New. and it is to be presumed in the absence of evidence to the contrary that such means only were employed. 199**Cal** 168, 248P658, 47**ALR** 904.

433-68 244 **Ill**A224; 192NC561, 135SE 618; 146**Va**594, 131SE850, 46**ALR**186.

433-73 33NM269, 263P761.

433-74 128**Kan**174, 277P54, 64**ALR**606.

434-88 **TexCivA** 276SW305.

435-89 162**Ga**534, 134SE152, 47**ALR** 233.

435-90 162**Ga**534, 134SE152, 47**ALR** 233.

435-93 89 **IndA**184, 154NE697.

436-98 89 **IndA**184, 154NE697.

436-99 **TexCivA** 281SW638, 639 [quot CJ].

436-1 175**Ark**306, 299SW24; **TexCivA** 281SW638, 639 [quotCJ].

436-5½-New. An agreement between persons interested in the purchase of public lands eliminating one of them as a competitor at a sale or discouraging other prospective bidders is contrary to public policy. 129 **Okl** 191, 263P1102.

437-12 219**Ala**623, 123S27 (relocation of highway). [a] **Contracts for procuring governmental action** in locating route of public highway are not void. 219**Ala**623, 123S27.

437-13 **CalA** 284P457.

438-28 171**Ark**11, 283SW17, 19, 45**ALR** 1396 [citCJ]; 40**GaA**400, 149SE722; 236 **Ill**A400; 226**Ky**155, 10SW(2d)622.

439-29 171**Ark**11, 283SW17, 45**ALR** 1396.

439-33 See also 235**Ky**240, 30SW(2d) 945.

440-49½-New. Agreement of candidate for sheriff to permit another to name deputies in return for political support is not sale or farming of office. 235**Ky** 240, 30SW(2d)945.

441-63 But see 159**La**1065, 106S567.

442-70½-New. Ambiguous tariffs are to be construed favorably to shippers. 15F(2d)486.

443-79 180**Ark**828, 23SW(2d)264.

443-84 **MoA** 15SW(2d)362.

443-85 [a] **Bond guaranteeing payment of judgments to prevent levy of execution,** executed in good faith under agreement between judgment debtor, judgment creditors, officer, and guarantors, and without duress and compulsion of any kind, is valid. **MoA** 15SW(2d)362.

443-87 **TexCivA** 288SW639.

444-88 90**Fla**721, 106S576; 117**Tex**331, 3SW(2d)790, 792 [citCJ], 58**ALR**797.

444-89 36F(2d)323; 90**Fla**721, 106S 576; **TexCivA** 293SW923; 117**Tex**331, 3SW(2d)790, 58**ALR**797. [a] **Contract between corporation producing natural gas and one distributing same at retail** is invalid in so far as it authorizes producer to forfeit contract where both parties are public service corporations. 117 **Tex**331, 3SW(2d)790, 58**ALR**797.

445-96½-New. The contract of a mill to indemnify a railroad for damages resulting from dangerous construction of buildings near tracks, being for the protection of railroad employees, is not void as against public policy. 159**La**36, 105S91.

445-97 90**Fla**721, 106S576.

446-3 217**Ala**124, 115S13; 114**Nebr**423, 207NW674; 194**NC**298, 139SE440; 132 **SC**370, 128SE720, 721 [quotCyc]. [b] **This agreement may either be expressed or implied** from all facts proved. 132 **SC**370, 128SE720.

446-11 [c] **Promise to pay fees of commissioner appointed by court.**–In Philippine Islands agreement by litigant to pay certified accountant for services in examining and reporting upon accounts filed by adverse party is valid, though accountant was appointed commissioner for such purpose by court. 50**Philippine**507.

446-12 114**Nebr**423, 207NW674.

446-13 24F(2d)268 (compromise and fixing, by indemnitee, of indemnitor's liability).

447-15 136**Misc**15, 240NYS375.

447-17 136**Misc**731, 240NYS426. [b] **Agreements not invalid.**–236**Mich**664, 211 NW34.

447-21 118**Kan**663, 236P845.

448-25 [a] (3) Possibility of collusion, by injured person accepting part payment from principal on indemnity bond and suing surety for balance, held not to render contract against public policy. 131**Misc**541, 227NYS266.

448-26 102**CalA**413, 283P76; 194**NC** 298, 139SE440; 26 **OhA**460, 160NE511.

448-31 26 **OhA**460, 160NE511.

449-36 253**Mass**374, 149NE115, 41**ALR** 1319; 114**Nebr**423, 207NW674.

449-42 214**Ala**536, 108S358; 74**Mont** 531, 241P322, 328 [citCJ]; 194**NC**298, 139SE440; 50**ND**544, 197NW138.

450-52 **TexCivA** 15SW(2d)692.

450-56 95**CalA**524, 273P66.

450-59 245**Mich**599, 223NW218; **Mo** 29 SW(2d)692 (stifle competition); 12**Pa Dist&Co** 162; 156**SC**443, 153SE487; 136 **Wash**598, 241P7, 9 [citCJ]; 136**Wash** 598, 241P7,,9 [citCJ]. But see **TexCivA** 16SW(2d)910.

451-61 **TexCivA** 16SW(2d)910.

452-65 23F(2d)250; 217**Ala**124, 115S 13; 179**Ark**214, 14SW(2d)1107; 85**Cal** A360, 259P460; 36**GaA**191, 136SE108; 336 **Ill** 80, 168NE6; 216**Ky**593, 288SW 332; **LaA** 130S120; 194**NC**298, 139SE 440; **TexCivA** 19SW(2d)127 (note given by defendant for nonprosecution). See also 110**TexCr**282, 8SW(2d)167.

453-69 201 **Iowa**636, 207NW795; 49N D364, 191NW783. [a] **Alta** [1929] 2 **DomLR**232.

453-70 201 **Iowa**636, 207NW795.

453-71 214**Ala**536, 108S358; 40**GaA** 289, 149SE323 (notes given in settlement of property damage); 228**Ky**827, 16SW(2d)453, 454 [citCJ].

453-73 214**Ala**536, 108S358; **IndA** 170 **NE**105.

454-77 214**Ala**536, 108S358.

454-79 49ND364, 191NW783.

454-80 49ND364, 191NW783.

455-97½-New. for fornication, 36**GaA** 191, 136SE108.

455-98 36**GaA**191, 136SE108.

455-3 29F(2d)988 (no application to insured's failure to comply with policy provision requiring her to separate damaged and undamaged merchandise and make inventory thereof); 41F(2d)651; 68**CalA**171, 228P873; 83 **IndA**519, 148 **NE**177; 259**Mass**424, 156NE534; 213 **AppDiv**98, 210NYS164; 217**AppDiv**685, 217NYS226; 125**Misc**417, 211NYS270; 128**Misc**108, 217NYS686 [rev on other grounds 218NYS103]; 193**NC**610, 137 **SE**869; 125 **Or**528, 266P238, 59**ALR** 1436; 6**PaDist&Co** 730; 48**RI** 60, 135A 241; **TexCivA** 276SW336; **TexCivA** 287 SW76; **TexCivA** 287SW294; **TexCivA** 288SW239; **TexCivA** 11SW(2d)620. [a] (3) Attempt to deprive equity court of jurisdiction to foreclose mortgage is void. **CalA** 267P750. [d] 213**AppDiv** 98, 210NYS164; 125**Misc**417, 211NYS 270. [e] **Mere inability of defendant to establish** hypothetical defenses is not ground for refusing jurisdiction. 125 **Misc**417, 211NYS270.

456-4 **TexCivA** 287SW76. [a] (3) 207 **Cal** 285, 277P1039; **TexCivA** 13SW(2d) 408.

456-9 [a] (1) 129**Kan**790, 284P430, 68 **ALR**321. (9) Agreement of automobile dealers to keep within territorial limits in making sale and providing that in case of dispute between such dealers "the distribution decision shall be final." 83 **IndA**519, 148NE177. (10) To provision that judgment of one party to contract of law regarding any question which may arise shall preclude other party from contesting it in court of law or equity. 68**CalA**171, 228P873. (11) To provision in insurance policies that suits thereon should be subject solely to jurisdiction of Russian courts. 217 **AppDiv**685, 217NYS226. (12) Provision in insurance policy prohibiting insured person from garnishing insurer. **MoA** 3SW(2d)272. [b] **Rule does not apply** to stipulation in application for indemnity bond that proper evidence of payment by company shall be conclusive, in absence of showing of want of good faith or fraud. **TexCivA** 274SW1002.

456-10 178**Ark**856, 13SW(2d)591. [b] (2) Parties may agree that construction of contract by one of parties shall be "absolute and final" and such construction made in good faith, fairly and impartially, will be sustained by courts. 169**Ark**148, 273SW368. [d] **Provision as to measure of damages** is not invalid as ousting courts of jurisdiction. **TexCivA** 287SW294.

457-11 **TexCivA** 286SW241.

457-11½-New. Industrial insurance policy making wife of insured beneficiary and providing that insurer might pay amount due to beneficiary or any other person equitably entitled by having incurred burial expense for insured does not oust probate court of jurisdiction of estate of deceased person. **TexCommnA** 276SW643.

457-11½-New. Parties to a contract may agree on rule of evidence to be applied in controversy between them. 192 **NC**330, 135SE141.

457-11¼-New. A provision for arbitration will not be enforced. 259**Mass**424, 156NE534.

457-11½-New. Provision that shipment be governed by rules of certain association is not invalid for ousting jurisdiction of court. 37F(2d)472.

457-13 205 **Iowa**798, 216NW957.

457-16 77**CalA**268, 246P566; 170**Minn** 215, 212NW449; 193**NC**610, 137SE869; 50**Philippine**69; **TexCivA** 48W(2d)131.

458-20 7F(2d)833; **CalA** 286P498; 46 **Ida**153, 266P795 (provision in contract for sidewalks for final estimate of engineer); **Mass** 164NE820; 170**Minn**215, 212NW449; 252NY284, 169NE386; 199 **Wis**230, 225NW331, 63**ALR**1165. See also 244 **Ill**A466. [c] **Provision for arbitration as to one term of contract** held not to prevent suit for breach of another part of contract. **CalA** 286P498.

458-21 169**Ark**148, 273SW368; 130 **Or** 341, 278P957; **TexCommnA** 280SW174.

459-23 290**Pa**322, 138A860, 862 [cit CJ].

459-24 216**Ala**303, 113S74.

460-36 See also 142**Miss**444, 107S669; **Ont** [1928] 4**DomLR**500 (customs law).

460-37 118**Kan**663, 236P845; 245NY 558, 157NE856; 190**NC**829, 130SE609; 191**NC**809, 133SE391; 128 **Okl** 137, 261 P916.

460-44 82**NH**506, 136A128, 50**ALR**973; 217**AppDiv**614, 216NYS161, 163 [quot CJ]; 126 **Or**193, 268P75; 103**WVa**394, 137SE543 (dictum).

460-45 216**Ky**674, 288SW301; 217**App Div**614, 216NYS161, 163 [quotCJ]; 126 **Or**193, 268P75; 103**WVa**394, 137SE543 (dictum).

461-46 217**AppDiv**614, 216NYS161, 163 [quotCJ].

461-49 See also 217**AppDiv**614, 216 NYS161.

461-51 222**Ky**396, 300SW876; 236 **Mich**447, 210NW483; 103**WVa**394, 137 SE543, 546 [citCJ].

461-53 103**WVa**394, 137SE543 (dictum).

462-56 233**Ky**808, 27SW(2d)416; 103 **WVa**394, 137SE543.

462–57½–New. Illicit relation not part of consideration, nor contemplated, will not invalidate contract. 233Ky808, 27SW(2d)416.

462–59 150Miss559, 115S323, 330 [quot CJperEthridge,JJ]; 242NY74,. 150NE605; 132Misc121. 228NYS657; 133Misc109, 231NYS221.

462–60 242NY74. 150NE605.

463–68 12PaDist&Co 717.

463–70 214Ala334. 107S818; 83CalA345. 256P826; 87Colo 149. 285P757; 94Fla516, 114S371; 39GaA108, 146SE323 (2dcase); Mo 30SW(2d)49; 98NJEq230, 130A463, 465 [citCJ]; 284Pa414, 131A236; 155Wash33. 283P457.

463–71 284Pa414, 131A236; 289Pa280, 137A251 [quotCJ]; 92PaSuper94.

464–74 35F(2d)345; 118 Or602, 247P766, 47ALR394.

464–74½–New. An agreement tending to facilitate the granting of a divorce is illegal although not made primarily for that purpose. 92PaSuper94.

464–75 10LaA416, 121S678; 98NJEq230, 130A463, 465 [citCJ]; 97PaSuper429.

464–75½–New. A contract in advance of marriage providing that the husband shall be relieved from the burden of supporting his wife in the event of divorce is contrary to public policy and unenforceable. 29Ariz538, 243P402.

464–81 68CalA134. 228P720.

464–82 133Misc807. 234NYS274.

464–83 See also Mass 165NE17.

464–85 94Fla516, 114S371; 215Ky299, 284SW1073; 241Mich416, 217NW42; 98NJEq230, 130A463, 465 [citCJ]; 284Pa414, 131A236, 238 [citCJ]; 48RI 420, 138A179.

465–87 94Fla516, 114S371; 215Ky299, 284SW1073; 241Mich416, 217NW42; 95PaSuper17.

465–88 94Fla516, 114S371; 241Mich416, 217NW42;, 241Mich679, 217NW924; 98NJEq230, 130A463; 284Pa414, 131A236; 48RI 420, 138A179.

465–88½–New. Agreement settling property rights which leaves husband free to inflict marital wrongs, such as to compel wife to obtain divorce, is contrary to good morals and void. 78CalA326, 248P685.

465–88½–New. Parties cannot, by postnuptial agreement, oust the court of jurisdiction to award alimony. 178Minn75, 226NW211.

465–89 94Fla516, 114S371.

465–89½–New. Agreement that husband and wife do not live together until after performance of religious ceremony is in violation of law. 242NY74, 150NE605 (Domestic Rel. L. § 51).

465–92 Man [1926] 4DomLR588; Ont [1927] 3DomLR321.

465–93 220Ala372, 125S335; 29Ariz398, 242P337, 339 [citCJ]; 83CalA74, 256P595; 95CalA690, 273P86; CalA289P645 (release of alimony claims, attorney's fees and support); 83Colo 494, 266P497, 498 [citCJ]; 94Fla516, 114S371; 316Ill 569, 147NE440; 200Iowa695, 205NW339 (agreement for division of property); 129Kan824, 284P379; 208Ky690, 271SW1037; 215Ky598, 284SW1113; 178Minn75, 226NW211; 76Mont38, 245P257; 81Mont587, 264P667; MoA 284SW186; 127Misc416, 216NYS341, 345 [quotCJ]; 131Misc66, 225NYS692; 225AppDiv29, 232NYS84; 137Misc59, 243NYS141; 53ND631, 207NW434, 435 [citCJ]; 124 Or508, 264P845; 284Pa384, 131A378; 284Pa414, 131A236; 9PaDist&Co 681; SD 226NW725 (4thcase) (contract for future support made in contemplation of divorce held not contrary to public policy); Tex CivA 6SW(2d)175; 146Va417, 131SE800. [b] (2) 33NM132, 262P1007. [c] **Law does not favor contracts** agreeing to separate and live apart in future. 137Misc59, 243NYS141.

465–93½–New. Agreement for continuance of existing separation is not contrary to public policy. 53ND631, 207NW434.

466–94 29Ariz398, 242P337; 204Ky703, 265SW274; 215Ky299, 284SW1073; 98NJEq230, 130A463, 466 [citCJ]; Tex CommnA 148W(2d)805; TexCivA 6SW(2d)175 (conveyance for support); 97PaSuper429.

466–98 235Mich598, 209NW821; MoA 15SW(2d)912. [a] (6) Dismissal of wife's suit for divorce and resumption of marital relations is legal consideration for husband's agreement to pay money, settle property on wife, or to do some other thing for her material benefit. 235Mich598, 209NW821.

467–99 235Mich598, 209NW821.

467–5 255Mass321, 151NE309; 52ND137, 202NW132; Wis 229NW635.

467–6 215Ala388, 110S711; 48Ark138, 28W777; 160Ga620, 128SE891; 88IndA469, 150NE384; 255Mass321, 151NE309; 257Mass12, 153NE99; 126MoA279, 102SW1066; 101NJEq170, 137A645; 101NJEq644, 139A408; 2TexACivCas§723. [d] **Contracts held valid.**–83IndA294, 148NE203.

468–9 88CalA250, 263P277; 127 Okl124, 260P10; TexCivA 290SW235. [a] (2) Good will may be secured to purchaser by negative covenants reasonably necessary for such purpose, and such covenants do not unlawfully infringe liberty of seller. TexCivA 275SW87. [b] **Void restrictive covenant,** preventing seller from competing with buyer in particular district, does not invalidate other portions of contract for sale of business. TexCivA 21SW(2d)372(2dcase).

468–10 101NJEq170, 137A645; BC [1925] 3DomLR109. [a] **Construction.**–BC [1925] 3DomLR109.

468–13 TexCivA 276SW726, 727 [cit CJ].

468–14 [b] **Statutes declaring void agreements in restraint of trade** do not apply to agreements by employee not to use for his own benefit formulæ of his employer which he learned by reason of his employment. 239Mich70, 214NW152.

469–19 101NJEq409, 139A41 (restraint held reasonable). [a] **Earlier rule is not applicable** to present day conditions. 136Misc521, 241NYS158.

469–20 250Mich419, 230NW188; NJCh 151A92.

469–29 160Ga690, 128SE891; NJCh 151A92; 23 OhA218, 155NE496. But see 219Ala346, 122S406.

470–37 160Ga620, 128SE891; Iowa 229NW257; 248Mich371, 227NW669; 98NJEq536, 131A513; 142Wash118, 252P680, 682 [quotCJ]. [a] **Reasonable time** will be implied where no time is fixed in agreement. 114Nebr496, 208NW615.

470–38 85Colo 232, 274P932; 256 IllA540; 13LaA521, 128S540; 140Miss249, 105S538; 142Wash118, 252P680, 682 [quotCJ]; 61OntL558, [1928] 1DomLR1009. Contra 166Ga804, 144SE256 (1st case).

471–39 142Wash118, 252P680, 682 [quotCJ].

471–40 142Wash118, 252P680, 682 [quotCJ].

471–41 142Wash118, 252P680, 682 [quotCJ].

471–42 142Wash118, 252P680, 682 [quotCJ].

471–42½–New. So also an agreement by the purchaser of a business to refrain from conducting such a business after termination of lease within a specified distance from another store of seller is valid. 98NJEq536, 131A513.

471–43 142Wash118, 252P680, 682 [quotCJ].

471–44 142Wash118, 252P680, 682 [quotCJ].

471–45 Iowa 229NW257.

471–45½–New. A covenant not to engage in the same business made as part of consideration for sale of business must be reasonably construed. 221AppDiv307, 223NYS484.

471–47 [a] (10) 129 Or98, 276P282. (22) 114Nebr496, 208NW615.

472–49 But see 296Pa161, 145A719.

472–51 See also 119 Or252, 237P965.

472–57 212Ala560, 103S649; 174Ark639, 297SW1027, 59ALR1128; 174Ark1179, 298SW882; 81Colo 254, 254P990; 164Ga811, 139SE716; 205 Iowa542, 218NW255, 58ALR153 (agreement by osteopathic physician not to practice in certain city for three years after termination of agreement with another physician); 216Ky69, 287SW225; 233Ky115, 25SW(2d)62; Md 148A223; 101NJEq409, 139A41; 34NM35, 275P922; NC 155SE734; 34 OhA331, 171NE339; 119 Or252, 237P965; 296Pa161, 145A719; TexCivA 284SW615; 36Wyo 106, 252P1024. See also 141Wash606, 252P115. [a] **Duration of employment** may be looked to in determining whether restraint for specified time and space is reasonable. 25 OhA100, 157NE393.

472–62½–New. A contract by two companies, acquiescing in representation by the same dealers, to pay to the latter a commission for remaining neutral and to make no effort to get certain business sought by each company for either of them is not illegal as tending to stifle competition. 222Ky183, 300SW633.

472–63 TexCivA 284SW615.

473–66 81Colo 254, 254P990 (six months). [a] (2) TexCivA 284SW615. (4) 37F(2d)545; 175Minn431, 221NW642. (15) 168Minn474, 210NW397.

473–73 38F(2d)35; 174Ark639, 297SW1027, 59ALR1128; 81Colo 254, 254P990; 93Fla214, 111S722; 160Ga620, 128SE891; 255Mass321, 151NE309; 168Minn474, 210NW397; 52ND137, 202NW132 [citCJ]; 119 Or252, 237P965; TexCivA 275SW87; TexCivA 278SW466; TexCivA 18SW(2d)1096; 141Wash606, 252P115; Wis 229NW635; BC [1925] 3DomLR109. [b] **Coöperative marketing contract** is held not in restraint of trade. 88 IndA469, 150NE384. [c] **General rule now embraced in statute** is that agreement by one selling out his business not to engage in similar business should specify reasonable territory and time. 219Ala346, 122S406.

474–74 81Colo 254, 254P990; 114 OhSt361, 151NE471 (contracts incident and ancillary to lawful business not unreasonable in scope and operation are not illegal); TexCivA 278SW466; Wis 229NW635. [a] **Restrictions held valid.**–177Ark984, 8SW(2d)459.

475–75 127 Okl124, 260P10; TexCivA 278SW466 (good will).

475–77 160Ga620, 128SE891, 896 [cit CJ]; 155Md280, 141A542, 67ALR993; TexCivA 271SW145 (test is tendency, not result or motive).

475–78 160Ga620, 128SE891.

475–79 160Ga620, 128SE891.

475–80 174Ark639, 297SW1027, 59ALR1128; 90CalA22, 265P372; 93Fla214, 111S722; 160Ga690, 128SE891, 896 [cit CJ]; 155Md280, 141A542, 67ALR993; 168Minn474, 210NW397; 141Wash606, 252P115, 117 [citCJ]; Sask [1926] 3DomLR810, [1926] 2WestWkly604.

475–81 160Ga620, 128SE891, 896 [cit CJ]; Md 148A223.

475–82 160Ga620, 128SE891, 896 [cit CJ].

476–65 119 Or252, 237P965 (no distinction made between contracts of professional men and those of tradesmen).

476–86 [a] (30) Engraving and manufacturing of dies, stencils, etc. BC [1925] 3DomLR109 (holding valid covenant by retiring partner not to engage in business for five years in Province). (31) Manufacture and sale of brick. 160Ga620, 128SE891, 896 [citCJ]. (32) Truck line. 134Wash245, 235P9. (33) Coöperative marketing contract. 84IndA51, 150NE106. (34) Other business. 231Ky601. 21SW(2d)1004; 248Mich371, 227NW669. [b] (5) Hair dye. 99NJEq224, 129A404. (6) Ice. TexCivA 21SW(2d)372(2dcase).

476–87 [a] (3) 141Wash606, 252P115. (4) Agreement of physician not to practice medicine in county after stated date. TexCivA 17SW(2d)1083.

477–89 121Kan870, 250P262; 52ND137, 202NW132 [citCJ]; TexCivA 18SW(2d)929. [c] **Contract held not incidental to, or in support of, another contract.**–TexCivA 18SW(2d)929.

478–96 114Nebr496, 208NW615 (restriction held not to injure public); TexCivA 18SW(2d)929. [b] **In Illinois.**–252 IllA591.

479–2 39F(2d)408 [quotCJ].

480–8 52ND137, 202NW132 [citCJ]; TexCivA 278SW466; TexCivA 18SW(2d)929; 154Wash514, 283P462 (exclusive sales agency). [b] (4) Agreement in deed to purchase gasoline from C, as long as C is agent for X Co., at prevail-

ing rates. 164Ga811, 139SE716. [c] **Monopolization that is condemned** is condition whereby power exists to control prices or exclude competition. 39F(2d) 408. [d] **Evidence held to show** tendency of contract to lessen competition in insurance business. TexCivA 18 SW(2d)929. [e] **Contracts held invalid.** –TexCivA 18SW(2d)929.

481–14 [b] **Where agreements merely regulate competition** and promote free flow of commerce, they are not unlawful. 34F(2d)815.

491–15 125Misc86, 210NYS591.

485–53 215Ala183, 110S133; 261Mass 94, 158NE346, 54ALR1215 (contract restraining one from doing productive work is not countenanced).

485–54 217Ky269, 289SW295, 297 [cit CJ]; 263Mass235, 160NE801; NJ 151 A617; NJCh 129A399; TexCivA 275 SW87; TexCivA 278SW466 (contract looked at with greatest scrutiny); 141 Wash606, 252P115.

485–55 241 IllA208; 217Ky269, 289SW 295, 297 [citCJ]; 233Ky115, 258W(2d) 62; 155Md280, 141A542, 544 [citCJ], 67ALR993; 263Mass235, 160NE801; MoA 168SW(2d)735; 137Misc255, 242 NYS632; NC 155SE154; TexCivA 276 SW726, 727 [citCJ]; TexCivA 278SW 466 (agent for ice company); TexCivA 299SW440. [b] (1) NJCh 129A399; TexCivA 276SW726. See also 253Mass 94, 148NE373. (2) See also TexCivA 275SW87. (25) 100NJEq110, 135A673. (27) Agreement by driver of ice wagon not to sell ice on his route for year after leaving employer. TexCivA 278SW466. (28) Other contracts held valid. 216Ky69, 287NW225; 217Ky269, 289SW295; 25 OhA100, 157NE393.

485–56 217Ky269, 289SW295, 297 [cit CJ]; NJCh 129A399; TexCivA 275SW 87; TexCivA 278SW466; TexCivA 299 SW440. [a] (17) Covenant not to enter employment within certain territory and within five adjacent squares is not enforceable as to such squares where route is confined to territory not including such squares outside of which no good will is established. TexCivA 275SW87.

486–57½–New. Business of employer must be considered in determining the validity of a contract restraining an employee from engaging in competitive business. 217Ky269, 289SW295.

486–58 137Misc702, 244NYS239.

486–59 29F(2d)3; 164Ga811, 139SE 716. But see 39F(2d)408. [a] (2) 83 IndA519, 148NE177. (15) Contract to buy all gasoline used in operation of filling station from defendant was not in restraint of trade. TexCommnA 16 SW(2d)285.

487–61 164Ga811, 139SE716.

487–62 [a] (17) Agreement not to practice medicine within certain area. 114 Nebr496, 208NW615. (18) Agreement by owner not to lease building for use in designated business. 86 IndA246, 155NE618.

488–69 NJCh 129A399.

489–76 See also 56ND1, 215NW868.

489–80 TexCivA 138SW(2d)474.

490–83½–New. A contract in restraint of employment without reasonable limitation is contrary to public policy. 174 Ark104, 294SW353.

490–83½–New. A provision in a contract to indemnify surety on a bail bond, permitting surety's employment of an attorney to represent accused in substitution of his own attorney and to appear in accused's absence and enter a plea of guilty without accused's knowledge, and authorizing the attorney so employed by surety to plead accused guilty to any other offense carrying a less or the same penalty as that prescribed for the offense with which he is charged, is against public policy. 95 CalA521, 273P66.

490–85 118Kan663, 236P845; 118 Or 359, 244P308. [b] (4) Contract with president of corporation for division of salary and commission is void. TexCivA 277SW207.

490–86 278US160, 49SCt144, 73Led243.

490–91½–New. Contract whereby insurer of one guilty of negligence toward an employee of another agrees to pay compensation therefor to insurance carrier of employee's employer, if such negligence be kept secret, is not void as against public policy. 71CalA492, 236P 210.

490–92 Mo 308SW(2d)49.

490–94 297Pa543, 147A608.

491–96½–New. A trust agreement between parents for the benefit of a child has been held enforceable, although unexpressed consideration was agreement to obtain a divorce. 214Ala334, 107S 818.

491–98 27F(2d)392; 21AlaA587, 111S 199; 78CalA362, 248P947, 953 [quot CJ]. [a] **Person may contract against liability** for damage resulting from his own negligence unless such damage results from breach of duty imposed by law. 179Minn25, 228NW175.

491–99 78CalA362, 248P947, 953 [quot CJ].

491–2 78CalA362, 248P947, 953 [quot CJ].

491–8½–New. As a general proposition contracts against liability for negligence are not favored by law. 141Wash253, 251P274.

492–11 See also Mass 165NE5.

492–13 20 OhA317, 151NE808, 812 [quotandcitCJ]. [a] 20 OhA317, 151NE 808. [b] **Contract between street railway company operating all lines in city and employee's union** to employ only union labor and requiring employees not members to join union within stated time or be discharged is illegal as against public policy. 20 OhA317, 151 NE808.

493–18 278US160, 49SCt144, 73Led 243; 19F(2d)751; 21F(2d)893; 36F (2d)166; 214Ala334, 107S818; 220Ala 214, 124S89; 28Ariz278, 237P380, 381 [citCJ], 44ALR1495; 175Ark306, 299 SW24; 206Cal782, 276P345; 71CalA 492, 236P210 (courts are not called upon to settle questions of conscience between parties to contracts against public policy but are interested only in higher duty of protecting society from effect of such contracts); 75CalA765, 242P90; 79CalA55, 248P1085; CalA 271 P771; 163Ga578, 136SE902; 163Ga794, 136SE903; 86Colo 320, 281P364, 65ALR 995; 170Ga467, 153SE26; 45 Ida206, 261P237, 238 [citCJ]; 47 Ida542, 277 P554(2dcase); 254 IllA514; 204 Iowa 1195, 213NW264; 224Ky56, 58W(2d) 271; 235Ky240, 30SW(2d)94; 13LaA 244, 126S587; 254Mass366, 150NE225; 262Mass170, 159NE41; Mass 168NE 161; Mich 233NW375; Mich 233NW 428; 176Minn4, 222NW341; 76Mont320, 246P953, 48ALR1125; 85Mont170, 278 P126, 67ALR690; 114Nebr423, 207NW 674; Nebr 230NW251; 83NH124, 139 A359; 102NJL545, 133A290; 32NM 369, 257P993, 53ALR1356; 253NY313, 171NE675; 315AppDiv411, 214NYS19 (courts will not enforce prohibited contract); 226AppDiv352, 235NYS368; 190NC829, 130SE609; 50ND544, 197 NW138; 52ND49, 201NW696; 52ND 470, 206NW773; 54ND141, 208NW840; 55ND45, 212NW236, 51ALR296; 116 Oh 205, 156NE124; 114 OhSt623, 151NE 645; 20 OhA317, 151NE808; 125 Okl 264, 258P269; 128 Okl137, 261P916; 132 Okl 214, 270P23; 118 Or359, 244P 308; 118 Or602, 247P766, 47ALR394; 284Pa364, 131A286; 86PaSuper114; 87 PaSuper235; 87PaSuper376; 6PaDist& Co 384; 6PaDist&Co 721; 152Tenn339, 279SW257; TexCivA 271SW145; TexCivA 274SW168; TexCivA 274SW309; TexCivA 276SW955 (violation of statute); TexCivA 283SW224; TexCivA 294 SW967; 146Va594, 131SE850, 46ALR 186; Wash 291P1115(2dcase); 101WVa 284, 132SE717, 719 [citCJ]. See also 275 US274, 48SCt124, 72Led277 (state may refuse to enforce contract providing for doing of act forbidden by its laws). [b] **Illegal conditions** in contract are binding on no one. 34GaA196, 129SE618. [c] **Obligations obtained by insurance company to deceive insurance commissioner** are unenforceable notwithstanding claim that wrongdoing was that of company's officers. 83Colo 176, 263P408. [d] **Acts which are main prohibita are in same class** with acts which are mala in so as respects rule denying recourse to civil courts to redress grievances growing out of such transactions, with exception of transaction such as usury. 225AppDiv 198, 232NYS449.

495–19 19F(2d)751; 175Ark306, 299 SW24; 83Colo 176, 263P408; IndA 169 NE340; 204 Iowa1195, 213NW264; 205 Iowa542, 218NW255, 58ALR153; 254 Mass366, 150NE225; 245Mich599, 223 NW218; 20 OhA317, 151NE808; 135 Okl 253, 275P285; 152Tenn339, 279SW 257; TexCivA 294SW987.

495–20 79CalA55, 248P1065; 20 OhA 317, 151NE808; 101WVa284, 132SE717, 719 [citCJ].

496–22 75CalA765, 242P90.

496–23 71CalA492, 236P210; 75CalA 765, 242P90; 85Mont170, 278P126, 67 ALR690; 53ND470, 206NW773; 10Pa Dist&Co 288; TexCivA 38SW(2d)842; 101WVa284, 132SE717, 719 [citCJ].

496–24 175Ark306, 299SW24; 71CalA 492, 236P210; 206Cal782, 276P345; MoA 158SW(2d)893, 50ND544, 197NW 138.

497–25 19F(2d)751; SD 231NW538.

497–25½–New. Where plaintiff requires the aid of an illegal transaction to establish his case, he cannot recover. 146Va594, 131SE850, 46ALR186.

497–25½–New. Incidental acts of illegality do not render lawful contract unlawful. 146Va594, 131SE850, 46ALR 186.

497–27 19F(2d)751; 26F(2d)123, 125 [citCJ]; 320Mo 665, 8SW(2d)63; 128 Okl 215, 262P208, 211 [citCyc]; 137 Wash304, 242P21, 23 [quotCJ]. But see Wash 291P1115(2dcase). [a] (4) Illegal agreement enabling defendant to practice law through plaintiff will be discarded in adjusting equities arising after its discontinuance. 214AppDiv60, 210NYS661.

498–28 TexCivA 293SW874, 878 [cit CJ].

498–29 19F(2d)751; 30Ariz581, 249P 666; 95CalA400, 273P74; Mich 233NW 375; 58ND176, 225NW124; 125 Okl 134, 256P916; 117 Or244, 243P767; TexCivA 293SW874, 878 [citCJ]; 198 Wis56, 223NW575(2dcase). See also 211Ala334, 107S818, 50ND544, 197NW 138, 139 [citCJ]. [a] **Person can assume** that party preparing contract was not presenting an illegal instrument. TexCivA 308SW(2d)388.

498–30 TexCivA 308SW(2d)388. See also 50ND544, 197NW138, 139 [citCJ].

499–31 176Minn4, 222NW341 (parties not in pari delicto); Ont [1930] 2Dom LR916 (security set aside but recovery of money paid refused).

500–39 128 Okl 215, 262P208.

501–51 41F(2d)588; 83NH124, 139A 359.

502–54 83NH124, 139A359, 365 [citCJ].

502–57 16F(2d)190; 21F(2d)667, 31F (2d)435; 42F(2d)76; Ark 138SW(2d) 600; 197Cal176, 239P1090; 75CalA765, 242P90; 77CalA772, 247P611; 173 Minn283, 217NW354 [citCJ]; MoA 273SW125; 32NM369, 257P993, 996 [quotCJ], 53ALR1356; 127 Okl 215, 260 P497; 6PaDist&Co 613; 45Philippine 286 (enforcing pledge by ordinary procedure notwithstanding void stipulation for appropriation by pledgee of property pledged upon default); TexCivA 273SW946; TexCivA 299SW476, 477 [quotCJ]; TexCivA 158SW(2d)711; TexCivA 198W(2d)124; 103WVa394, 137 SE543, 545 [citCJ]; Can [1928] 3Dom LR501; Ont [1930] 2DomLR199.

503–58 103Conn24, 130A81; 32NM369, 257P993, 53ALR1356; 125 Okl 264, 258 P269; 131 Or522, 284P189; TexCivA 293SW874; 103WVa394, 137SE543, 545 [citCJ].

503–59 85Mont170, 278P126, 67ALR 690.

503–60 85Mont170, 278P126, 67ALR 690.

504–66½–New. County officer held entitled to recover premiums on bond which county should have paid where he did not rely on illegal contract. 173 Minn283, 217NW354.

504–67 75CalA765, 242P90; 128 Okl 137, 261P916.

504–68 78Mont357, 254P174, 177 [cit Cyc].

505–72½–New. Where an illegal contract has been executed and the benefit

conferred on one party was due in justice and good faith, the other cannot recover the consideration paid. 47 Ida542, 277P55(2dense).

506-77¼-New. Where a state officer unlawfully deposited state money with a bank, accepting securities to protect the deposit, which after failure and reopening of the bank were returned to the bank to be sold, the state officer is entitled to the return of the securities or proceeds after second closing of the bank. 30Ariz581, 249P755.

506-79 71CalA192, 235P210, 23NR124, 139A359; 54ND141, 208NW840; 20 Ohio A317, 151NE808 (by laxity in invoking claim of illegality); 118 Or127, 246P211.

506-79½-New. Equity will not strain unduly to discern illegality at the request of the parties to the illegal scheme. 13CMisc755, 230NY8526.

506-80 Cal 290P15; 162Ga534, 134SE152, 153 [cit CJ], 47ALR213, 40GaA100, 149SE722; 125 Okl 264, 258P269, 31 PortoRico 25; TexCivA 276SW305, 307 [cit CJ]; TexCivA 281SW616; TexCivA 28W(2d)925.

506-81 See also BC [1930] 2DomLR824.

506-82 72CalA109, 237P734, 124 Or 423, 263P920.

506-83 71CalA492, 236P210, Cal 290P 15; 106Conn34, 137A13, 139Minn249, 210NW998; Mo 308W(2d)49; 125 Okl 264, 258P269.

506-83½-New. Nor does estoppel arise where contract is void under statute. 72 CalA409, 237P734.

506-83½-New. The director of a bank may be estopped to set up illegality of a contract. 177Ark542, 98W(2d)410.

507-84 313Mo143, 281SW47, 45ALR 139.

507-85 Mo 308W(2d)49; NJSup 116A731; 20 OhA317, 151NE808.

507-86 54ND830, 211NW597, 598 [cit CJ]; 118 Or127, 246P211.

507-89 91CalA706, 26P975 (duty of court); 54ND230, 211NW597, 598 [cit CJ]; 118 Or127, 246P211; TexCivA 281SW638. [b] 166Minn206, 207NW633. [c] **Illegal contract or illegal performance of legal contract will not be enforced in court,** though illegality was neither alleged nor raised at trial. Mass 166NE822.

507-90 [a] **Where defendant relies on contract in answer as definitive part of title he cannot subsequently assert invalidity of contract.** Mo 308W(2d)616.

507-91½-New. On the other hand, a contract illegal on its face may be declared so where surrounding circumstances are before the court, even though the illegality is not raised by defendant. 103Conn350, 130A383.

507-92 40GaA400, 149SE722. [a] **Where act is explicitly forbidden but no fair implication arises that it is void** act will not be held void as against party performing his side of transaction. Mo 308W(2d)100.

508-93 Nash [1929] 4DomLR289.

508-99 86Colo320, 281P364, 65ALR 995.

508-1 192Wis242, 212NW261, 50ALR 291.

509-8 284Pa414, 131A236, 238 [cit CJ].

509-9 236IllA400; Mass 164NE812; TexCivA 271SW145, 154 [quot CJ]; 106 WVa126, 145SE642, 45 [quot CJ].

509-10 TexCivA 271SW145, 154 [quot CJ]; 103WVa394, 137SE443.

510-11 TexCivA 271SW145, 154 [quot CJ].

510-12 TexCivA 271SW145, 154 [quot CJ].

510-14 TexCivA 274SW168.

511-23 78CalA76, 21P790, 81Colo516, 256P640, 86Colo370, 281P361, 65ALR 995, 133 Okl 23, 240P951, 119Wash 135, 270P299. [c] **In Washington** 136 Wash550, 240P291.

511-27 103WVa394, 137SE543, 546 [cit CJ].

512-30 34F(2d)435 (unnecessary stipulation in contract of guaranty which is invalid); 42F(2d)76; 160Ga620, 135SE891, 83 IndAp19, 148NE177, 201 Iowa1072, 206NW804; 218Ky813, 293SW489, NJSup 116A653 (promise not to marry severable from promise to care for brother); 20 OhA317, 151NE808, 812 [quot CJ per Roberts, J], 134 Okl 9, 272P423, 153Va71, 149SE632, 195Wis 379, 226NW309.

512-31 201 Iowa1072, 206NW804.

512-32 126 Or193, 268P76.

512-35 153Va71, 149SE632.

512-37 233Ky115, 258W(2d)62, 152Va 471, 147SE214; BC [1928] 1DomLR 1028.

512-40 23F(2d)350, 214Ala334, 107S 218, 214Ala536, 108S353, 215Ala525, 112S102; 196Cal236, 237P38, 42 [quot Cyc], 88CalA34, 263P253, 262 [cit Cyc]; CalA 279P1011; 236 IllA400; 145Miss 342, 110S676; 102NJL545, 133A290; 51ND141, 208NW840, 239Pa280, 137A 261, 92PaSuper94; TexCivA 277SW 207; TexCivA 288W(2d)931.

514-42 215Ala528, 112S102; TexCivA 277SW207.

514-43 115Miss342, 110S670.

514-45 211Ky390, 277SW461; 29 OhA 300, 162NE776.

514-52 236 IllA400.

515-56 75CalA765, 242P90; 77CalA 772, 217P611, 90CalA22, 265P272; CalA 271P1011, 102NJL545, 133A290, 128 Okl 216, 262P203 (severable objects of contract); 133 Okl 75, 271P166; 138 Okl 40, 250P271, 295Pa235, 148A83, TexCivA 232SW267. See also 215Ala 552, 112S138, 139 [cit CJ].

515-58 Wash 292P112.

516-60 114 OhSt523, 151NE645 (recovery on contract permitted so far as executed before prohibited by statute, if amount due can be apportioned); BC [1929] 4DomLR377.

516-61 TexCommnA 283SW779.

516-62½-New. In the absence of any oral testimony as to the intentions and acts of the parties the validity of the contract must be determined from the face of instrument. 236Mich664, 211 NW34.

516-67 TexCommnA 283SW779.

517-69 215Ala528, 112S102; 95Pa Super441. Ont [1930] 2DomLR199.

517-74 Iowa 204NW252, 253 [cit CJ].

518-75 TexCivA 283SW639, 37Wyo 93, 259P520, 522 [cit CJ].

519-97 Nash [1929] 3DomLR755.

520-1 82Colo13, 257P247. [b] **Resort is had to arbitrary rules of construction** where language of contract is ambiguous or contradictory. 213Ala66, 104S85. [c] **One party is presumed to know rights of other contracting party.** 248Mich85, 226NW553.

520-2 Mass 160NE897(2dense); Mo 31 SW(2d)7 (not controlling when thwarting intention of parties); 25 OhA360, 157NE908.

520-3 16F(2d)464.

520-4 [a] **Instruments must be construed in light that parties might fairly and reasonably be expected to understand them.** 126Misc606, 214NYS 381.

520-5 21F(2d)257; 32F(2d)555, 39 F(2d)788; 180Ark918, 258W(2d)452; 70CalA650, 234P116, 86CalA773, 260 P832; 82Colo18, 257P247; 337 Ill483, 169NE718, 202 Iowa1053, 208NW563 [cit CJ], 120Kan133, 242P154, 54IaA 83, 131IaA612, 128N150, 215Mass36, 151NE528, 106Minn377, 206NW1[illegible], 310Mo111, 276SW380, 11ALR1172, MoA 274SW951, 75Mont356, 243P582, Mont 229P188, 190NC737, 130SE707, 23 OhA499, 165NE409; 29PortoRico984 (Civ. Code § 1248); TexCommnA 11 SW(2d)183; TexCivA 283SW416, TexCivA 208W(2d)1099; 101Vt464, 144A 457; 153Va471, 147SE214; 145Wash 295, 259P1079, 197Wis562, 223NW[illegible]. [a] **Contract held ambiguous** 213Ala 181, 119S17.

520-6 21F(2d)257, 180Ark885, 238W (2d)686; 181Ark994, 28SW(2d)1067; 101CalA552, 281P1097; 82Colo13, 257 P247, Iowa 230NW319, 211Ky103, 21 SW(2d)131, 91IaA103, 120S196, 101IaA 366, 130S20, 12IaA9, 123S77, 265 Mass35, 164NE523, 165Minn327, 206 NW452; MoA 108W(2d)668; 86Mont 478, 284P526; NJSup 132A655; 129 Misc68, 222NYS278, 191NC036, 132 SE800; 117 Okl 55, 244P756; 144 Okl 58, 289P716; 29PortoRico984 (Civ. Code § 1248); TexCommnA 12SW(2d) 203; TexCivA 284SW339; 145Wash295, 259P1079.

520-6½-New, Merchant's contracts should be interpreted according to understanding of terms used among merchants. 216AppDiv334, 213NYS540 (unless contrary intention appears).

520-6¾-New. The courts will not make an agreement for the parties, but will ascertain what their agreement was. 241 NY231, 149NE541.

520-6¼-New. Where a contract is void because made on Sunday, court will not construe it. 236Mich261, 210NW335.

520-6½-New. In every judicial controversy under contract, it, as well as law, must be interpreted. 77CalA664, 247P 621.

520-6¾-New. Parties to a voluntary contract have equal rights, although one may be exercising powers granted by the state. 154Wash102, 281P11.

520-7 16F(2d)464; 168Minn455, 210 NW591; MoA 274SW951.

521-8 [b] **In case of ambiguity court** must ascertain intent from language used. 175Ark1161, 18W(2d)801.

521-9 TexCivA 288SW656.

521-13 75Mont356, 243P582.

521-14½-New. Provisions that are not mandatory do not require strict construction. 325 Ill559, 156NE754.

521-15 6F(2d)762; 26F(2d)10; 195 Cal426, 233P965; 133Misc894, 234NYS 68. [b] **Legal relation of parties to contract is determined by effect of agreement rather than by what parties called themselves therein.** Del 146A605.

521-16 26F(2d)10, 195Cal426, 233P 965, 190NC284, 129SE721.

521-18 5F(2d)160; 7F(2d)228; 8F(2d) 151, 8F(2d)639; 21F(2d)257; 25F(2d) 824; 27F(2d)433; 29F(2d)882; 38 F(2d)874; 41F(2d)573; 41F(2d)767; 43F(2d)337; 213Ala66, 104S; 215Ala 142, 110S275; 215Ala398, 110S822; 216 Ala81, 112S444, 52ALR636, 216Ala564, 114S135, 173Ark772, 293SW47, 175 Ark1161, 18W(2d)801; 176Ark601, 3 SW(2d)673, 177Ark552, 7SW(2d)765; 177Ark575, 8SW(2d)452, 177Ark997, 8 SW(2d)502; 178Ark260, 10SW(2d)374; 178Ark1036, 13SW(2d)28; 178Ark1073, 13SW(2d)291; 179Ark118, 14SW(2d) 357; 181Ark994, 28SW(2d)1067; 201 Cal231, 256P550; 207Cal50, 276P1004; Cal 291P184; 68CalA551, 229P1002; 75 CalA335, 242P756, 77CalA552, 247P 264; 83CalA227, 256P835, 100CalA126, 279P1036, CalA 282P1003; CalA 293P 162; 103Conn624, 131A420; 89Fla194, 103S825, 91Fla322, 107S684; 94Fla528, 114S438; 163Ga468, 136SE334; 36GaA 396, 137SE85; 36GaA341, 132SE783; 40 Ida712, 237P284, 44 Ida532, 257P 31, 34 [cit CJ] 54ALR1527; 44 Ida539, 258P540, Ida 256P360(2dense); 199 Ind166, 154NE480; 205 Iowa408, 216 NW71; 201 Iowa911, 216NW276; 206 Iowa1121, 221NW561; Iowa 232NW 492; 120Kan637, 245P119; 122Kan640, 253P563, 126Kan340, 266P60, 211Ky 123, 277SW416, 212Ky33, 278SW151; 22Ky245, 58W(2d)1077, 225Ky77, 7 SW(2d)853, 164La443, 114S90; 125Me 201, 132A856; 152Md190, 136A631, 60 ALR207; 155Md444, 137A501; 154Md 171, 140A64, 255Mass19, 152NE107, 262Mass555, 160NE532, Mass 162NE 435; Mass 172NE677; 233Mich1, 206 NW520, 163Minn50, 203NW139, 205NW 65; 169Minn140, 210NW801; 172Minn 323, 214NW781; 154Miss587, 122S844; 307Mo160, 270SW315; MoA 274SW 951, 221MoA195, 281SW968; 221MoA 195, 281SW968, 82Mont150, 266P869, 84Mont207, 274P850; Nev 284P307; 83 NH450, 144A67; 103NJL635, 137A423, 424 [cit CJ]; NJ 148A626; 30NM524, 239P1034; 246NY270, 158NE618; 216 AppDiv780, 215NYS267; 217AppDiv 541, 217NYS256; 127Misc350, 216NYS 590, 218AppDiv502, 219NYS811; 132 Misc135, 230NYS249, 133Misc93, 231 NYS261, 137Misc312, 244NYS80 (agreement to apportion corporation income tax); 190NC737, 130SE707; 51ND145, 199NW484; 51ND737, 200NW906; 26 OhA100, 157NE398; 21OhA265, 152NE 688; 32 OhA158, 167NE693; 114 Okl 13, 242P760, 117 Okl 96, 243P671; 114 Okl 237, 246P238, 121 Okl 132, 247P 967, 124 Okl 150, 264P84, 128 Okl 215,

262P208; 134 Okl 237, 273P261; 36 OklACR595; 39 OklACR8; 116 Or376, 239P818; 44Philippine94; 47RI 395, 133A621; 144SC218, 142SE504; 154SC 78, 151SE199(2dcase); 50SD604, 211NW 446; 117Tex368, 5SW(2d)960, 60ALR 672; 11STex509, 19SW(2d)27; Tex CommnA 271SW886; TexCommnA 280 SW767; 117Tex277, 298SW523; Tex CommnA 3SW(2d)65; 118Tex91, 11 SW(2d)496; TexCivA 274SW210; Tex CivA 275SW673; TexCivA 278SW508; TexCivA 283SW651; TexCivA 284SW 339; TexCivA 284SW1057; TexCivA 286SW564, 565 [citCJ]; TexCivA 289 SW436; TexCivA 295SW944; TexCivA 297SW312; TexCivA 8SW(2d)206; Tex CivA 13SW(2d)174; TexCivA 14SW(2d) 919; TexCivA 25SW(2d)902; 101Vt147, 141A682; 147Va566, 137SE371; 101 WVa596, 133SE318; 103WVa567, 137 SE895; 187Wis232, 202NW34; 192Wis 275, 212NW657; 193Wis218, 214NW 613; 199Wis489, 227NW1; Man [1930] 2DomLR587.

523-19 7F(2d)689; 213Ala66, 104S5; 216Ala81, 112S444, 52ALR536; 176Ark 601, 3SW(2d)673; 177Ark552, 7SW(2d) 765; 177Ark875, 8SW(2d)452; 180Ark 885, 23SW(2d)986; 35GaA83, 132SE 783; 199 Ind166, 154NE480; Iowa 229 NW257; MoA 10SW(2d)668; 102NJEq 20, 139A817; 51ND737, 200NW906; 114 Okl 13, 242P760; 114 Okl 237, 246 P238; 128 Okl 215, 262P208; 36 Okl ACR595; 47RI 395, 133A621; TexCivA 284SW1057; TexCivA 286SW564, 565 [citCJ].

523-20 92CalA343, 268P408; 110Conn 452, 148A342; Mass 169NE897(2dcase); MoA 274SW951; 220MoA1070, 282SW 74; 217AppDiv541, 217NYS256; 128 Misc875, 220NYS281, 286 [citCJ]; 25 OhA100, 157NE393; 128 Okl 215, 262P 208; 141 Okl 9, 283P556; 29PortoRico 984; 65Utah581, 238P648; 101WVa596, 133SE318; 105WVa589, 148SE674(3d case) (technical meaning of word or phrase disregarded). [b] **In Porto Rico.**–29PortoRico 984, 990. [c] **To effect contractual situation,** words must be understood and intended by parties to effect such result. 254Mass411, 150 NE216. [d] **Courts do not permit inapt expression** to defeat evident intent of parties. 85Colo 546, 277P782. [e] **Intent of parties must** be gathered from the contract. Me 149A801.

523-21 15F(2d)241; 40 Ida712, 237P 284; 32 OhA158, 167NE693; 124 Okl 220, 255P693; 29PortoRico 984. [a] **In Porto Rico.**–29PortoRico 984.

523-23 82NH318, 133A340.

523-24 170Ark58, 278SW645; 77CalA 562, 247P264; 51ND737, 200NW906; 21 OhA265, 152NE688; 114 Okl 237, 246 P238; 124 Okl 150, 254P84; 36 OklACR 595.

523-25 8F(2d)202; 27F(2d)240; 106 Conn411, 138A458; 232Ky630, 24SW (2d)263; Mass 168NE174(2dcase); 33 NM11, 261P813; 135Wash575, 238P 644.

524-26 CalA 291P698; 94Fla528, 114S 438; Ill 172NE7; 78Mont145, 252P 872; 117 Okl 96, 245P571; TexCivA 274 SW210.

524-27 76CalA460, 245P206; 77CalA 562, 247P264; 114 Okl 13, 242P760.

524-28 114 Okl 13, 242P760.

524-29 16F(2d)464; 25F(2d)824; 41 F(2d)573; 216Ala564, 114S135; 218 Ala415, 118S764; 173Ark772, 293SW47; 177Ark552, 7SW(2d)765; 207Cal 50, 276 P1004; 79CalA458, 250P188; 84CalA 206, 257P907; 85CalA616, 260P333 (written contract); 102CalA536, 283P 84; 110Conn516, 148A358; 89Fla194, 103S825; 252 IllA366; 122Kan640, 253 P553; 211Ky123, 277SW316; 226Ky 492, 118SW(2d)114; 228Ky176, 14SW (2d)421; 164La443, 114S90; 9LaA239, 119S272; 153Md44, 137A501; Md 148 A273; 253Mass79, 148NE374; 239Mich 81, 214NW160; 79Mont327, 256P497; 242NY125, 151NE152; 242NY125, 151 NE152, 45ALR751; 137Misc182, 243 NYS526; 192NC330, 135SE141; 51ND 737, 200NW906; 53ND789, 208NW380; 21 OhA265, 152NE688; 32 OhA69, 167 NE592; 115 Okl 121, 242P214; 118 Okl 87, 246P626; 120 Okl 108, 250P892; 121 Okl 132, 247P967; 116 Or376, 239 P818; TexCommnA 280SW742; Tex CommnA 280SW762; TexCivA 16SW (2d)901; TexCivA 16SW(2d)980; Tex CivA 18SW(2d)224; 142Va769, 128SE 55; 135Wash195, 237P295; 145Wash 66, 258P1035, 54ALR1382; 152Wash 480, 278P183; 198Wis122, 223NW427. [b] **In case of doubt,** intent with which words are used may be considered. 132 Misc701, 230NYS473.

524-30 43F(2d)673; 216Ala564, 114S 135; 181Ark994, 28SW(2d)1067; 168 Ga705, 149SE432; 44 Ida539, 258P540; 201 Iowa48, 206NW258; 204 Iowa911, 216NW276; 218Ky473, 291SW760; 222 Ky345, 300SW864; 228Ky844, 16SW (2d)482; 9LaA439, 121S232; 154Md 171, 140A64; Mass 173NE409; 320Mo 813, 7SW(2d)967; MoA 274SW951; 78 Mont145, 252P872; 114Nebr605, 209NW 243, 245 [citCJ]; 115Nebr720, 214NW 628; NH 151A817; 224AppDiv487, 231 NYS435; NC 155SE856; 53ND789, 208 NW380, 124 Okl 150, 254P84; 126 Okl 225, 259P227; 37 OklACR260; 35Porto Rico 474; TexCommnA 280SW742; Tex CommnA 280SW762; Utah 273P312; 148Va431, 139SE247.

524-31 210Ky820, 276SW983; 192Wis 275, 212NW657.

525-32 Fla 128S408; 27Hawaii122; 156Md478, 144A521; Mass 170NE652; 33NM11, 261P813; 192Wis275, 212NW 657.

525-33 16F(2d)464; 27Hawaii792; 44 Ida539, 258P540; 45 Ida707, 266P1094, 1097 [citCJ]; 89 Ind680, 166NE667; 201 Iowa48, 206NW258; 210Ky820, 276 SW983; 160La916, 107S621; Md 151A 21; Mass 168NE737; 165Minn327, 206 NW452; 78Mont145, 252P872; 79Mont 327, 256P497; 53ND789, 208NW380; 118 Okl 41, 246P381; 126 Okl 3, 258P 906; TexCommnA 291SW876; Tex CommnA 298SW535; TexCommnA 11 SW(2d)778; TexCivA 291SW301; 152 Va254, 146SE284; 192Wis275, 212NW 657.

525-34 16F(2d)464; 30F(2d)634; 37 F(2d)637; 27Hawaii109; 44 Ida539, 258P540; 204 Iowa911, 216NW276; Me 149A801; 78Mont145, 252P872; Nev 283P404; 136Misc700, 240NYS542; 117 Oh421, 159NE573; 126 Okl 225, 259P 227; 120 Or202, 250P722; Or 289P1058, 1060 [citCJ]; TexCommnA 298SW535; TexCivA 291SW301.

525-35 124 Okl 150, 254P84; 142Va 301, 128SE447 (words of exclusion not contained in contract). [a] **Silence cannot destroy** plain, positive provisions. 7F(2d)432.

525-37 8F(2d)202 [citCJ]; 216Ala564, 114S135; 217Ala168, 115S156, 56ALR 1075; 176Ark1204, 3SW(2d)680; 205 Cal 302, 271P104; 206Cal 273, 274P57; 70CalA650, 234P116; 85CalA783, 260P 332; CalA 262P470; CalA 263P378; CalA 265P301; CalA 266P307; 77Colo 570, 237P1116; 78Colo 250, 241P542; 82Colo 13, 257P247; 82Colo 220, 257P 1082; 85Colo 419, 276P972; 43 Ida292, 252P494; 325 Ill 559, 156NE754; 326 Ill 442, 158NE97; 329 Ill 158, 160NE222, 57 ALR1039; 204 Iowa911, 216NW276; 206 Iowa21 218NW483; 123Kan72, 254P 362; 209Ky234, 272SW724; 209Ky269, 272SW734; 219Ky539, 293SW1078; 222Ky198, 300SW592; 224Ky353, 6SW (2d)262; 164La1090, 115S280; Md 148 A273; Mass 167NE765; 239MichS1, 214 NW160; Mich 233NW367; 149Miss123, 115S199; MoA 299SW152; MoA 300SW 544; MoA 16SW(2d)663; MoA 18SW (2d)532; 74Mont70, 237P518; 76Mont 332, 247P166; 78Mont145, 252P872; 80 Mont308, 260P1039; 81Mont434, 263P 985; 115Nebr420, 213NW813; NJSup 132A655; NJSup 148A170; 98NJEq 617, 130A829; 250NY132, 164NE881; 254NY1, 171NE884; 215AppDiv73, 213 NYS277; 223AppDiv57, 227NYS418; 129Misc768, 222NYS728; 218AppDiv 411, 218NYS457; 221AppDiv261, 223 NYS157; 135Misc113, 236NYS692; 135 Misc497, 239NYS113; 190NC737, 130SE 707; 191NC291, 131SE757; 195NC51, 141SE352; 196NC721, 147SE12; NC 155SE721; 27 OhA405, 161NE360; 35 OhA107, 172NE288; Okl 261P962; 131 Okl 279, 269P286; 137 Okl 116, 278P 294; 143 Okl 220, 289P315; 119 Or224, 242P628; 118 Or22, 245P515; 118 Or 143, 246P352; 132 Or38, 284P562; 289 Pa426, 137A598; 291Pa507, 140A506; 44Philippine94; 49SD96, 206NW236; 157Tenn1, 4SW(2d)959; TexCivA 291 SW301; TexCommnA 18SW(2d)263; TexCivA 264SW551; TexCivA 284SW 339; TexCivA 294SW268; TexCivA 15 SW(2d)692; TexCivA 20SW(2d)843; TexCivA 22SW(2d)1107; TexCivA 25 SW(2d)902; Utah 285P640; 145Va536, 134SE670; 104WVa44, 138SE737; 199 Wis440, 223NW559; Ont [1930] 3DomLR98.

525-38 207Cal 50, 276P1004; 82Colo 13 257P247; Iowa 228NW664 (where rights not carefully guarded); 221MoA 930, 288SW788; MoA 299SW152; 78 Mont145, 252P872; 129Misc768, 222NYS 728; 289Pa426, 137A598.

525-39 Ark 31SW(2d)533 (cannot make contract for parties); 82Colo 13, 257P247; 15DelCh195, 134A99; 132 Kan786, 253P563; 78Mont145, 252P872.

525-40 82Colo 13, 257P247; 120Kan 133, 242P454; Ky 299SW199; NJ 148 A626 (implied covenants); 44Philippine 94; TexCivA 276SW936.

525-41 7F(2d)221; 8F(2d)202; 25F (2d)742; 28F(2d)560 [certiorari den 279US838, 49SCt252, 73Led985(4th case)]; 34F(2d)401; 35F(2d)142; 37F (2d)220; 195Cal 426, 233P965; 201Cal 231, 256P550; 208Cal 447, 281P604, 65 ALR989; 73CalA527, 238P1077; 79Cal A458, 250P188; 90CalA22, 265P372; CalA 288P141; 82Colo 13, 257P247; 103Conn624, 131A420; 98Fla121, 123S 561(2dcase); 163Ga434, 136SE317; 164 Ga712, 139SE417; 36GaA396, 137SE85; 40 Ida712, 237P284; 324 Ill 254, 154NE 889; 201 Iowa788, 208NW283; Md 148 A273; Mass 172NE243; 236Mich323, 210NW244; 166Minn346, 207NW737, 46 ALR1167; 141Miss38, 106S209, 44ALR 393; 220MoA462, 274SW930, 932 [cit CJ]; 80Mont239, 260P119; Mont 289P 388; 114Nebr505, 208NW632; 102NJ Eq20, 139A817; 218AppDiv502, 219NYS 14; 53ND887, 207NW987; 120 Okl 108, 250P892; 120 Okl 194, 250P1018; 121 Okl 132, 247P967; 126 Okl 3, 258P906; 128 Okl 215, 262P208; 36 OklACR595; 116 Or376, 239P818; 123 Or539, 259P 419, 262P938; 29PortoRico 984; 118 Tex255, 148SW(2d)53; TexCivA 275SW 673; TexCivA 18SW(2d)850; TexCivA 20SW(2d)1099; TexCivA 23SW(2d)786; 68Utah486, 251P16; 69Utah112, 252P 570; Utah 291P303; 152Va254, 146SE 281; 154Wash559, 283P173; 101WVa 596, 133SE318; 103WVa567, 137SE895; 104WVa449, 140SE285; 21SaskL194, [1927] 1DomLR687, [1927] 1WestWkly 223.

525-42 7F(2d)822; 8F(2d)202; 17F (2d)896; 21F(2d)257; 35F(2d)142; 39 F(2d)788; 211Ala181, 108S836; 216Ala 81, 112S444, 52ALR536; Ala 130S792; Ala 130S799; 168Ark555, 270SW965; 180Ark140, 20SW(2d)611; 181Ark4, 24 SW(2d)852; 195Cal 426, 233P965; 201 Cal 231, 256P550; 208Cal 447, 281P604, 65ALR989; Cal 291P184; 73CalA105, 238P111; 73CalA527, 238P1077; 73Cal A732, 239P350; 79CalA458, 250P188; CalA 277P1105; 99CalA456, 278P913; 82Colo 13, 257P247; 103Conn624, 131 A420; 89Fla194, 103S825; 95Fla885, 116S869; 36GaA396, 137SE85; 40 Ida 712, 237P284; Ida 28P360(2dcase); 324 Ill 254, 154NE889; 211Ky123, 277 SW316; 222Ky164, 300SW350; 224Ky 245, 58W(2d)1077; 162La891, 111S271; 125Me201, 132A386; Me 149A801; Md 148A273; Mass 172NE77; 235Mich598, 209NW821; 240Mich213, 215NW394; 163Minn35, 205NW65; 141Miss38, 106 S209, 44ALR393; Mo 31SW(2d)7; 220 MoA462, 274SW930, 932 [citCJ]; MoA 285SW753; 222MoA1068, 9SW(2d)840; MoA 24SW(2d)717; Mont 28SP616; 246 NY519, 159NE418; 216AppDiv218, 214 NYS653; 218AppDiv502, 219NYS14; 226AppDiv190, 234NYS432; 138Misc 310, 245NYS662; 190NC737, 130SE707; 53ND789, 208NW380; 53ND887, 207 NW987; 32 OhA158, 167NE693; 116 Okl 169, 243P743; 120 Okl 108, 250P 892; 126 Okl 150, 259P125; 128 Okl 215, 262P208; 129 Or427, 275P684; 137SC345, 135SE380; TexCommnA 293 SW815; TexCommnA 10SW(2d)973; TexCommnA 17SW(2d)772; TexCivA 12

SW(2d)620; TexCivA 20SW(2d)266; 68 Utah486, 251P16; 69Utah112, 252P570; Utah 286P623; 103WVa567, 137SE895; WVa 143SE353; 105WVa589, 148SE 674(3dcase); Man [1930] 2DomLR587. But see 151Wash344, 275P733.

527-43 21F(2d)257; 31F(2d)411; 177 Ark875, 8SW(2d)452; 181Ark994, 28 SW(2d)1067; 197Cal 321, 240P765; 201 Cal 231, 256P550; 205Cal 541, 271P 1091(2dcase); 75CalA335, 242P756; 40 Ida712, 237P284; 126Kan473, 268P817; 13LaA285, 127S749; 220MoA462, 274 SW930, 932 [citCJ]; MoA 24SW(2d) 1058; 80Mont239, 260P119; 227App Div226, 237NYS442; 53ND789, 208NW 380; 126 Okl 3, 258P906; 126 Okl 150, 259P125; 128 Okl 215, 262P208; 36 OklACR595; 29PortoRico984; 103WVa 567, 137SE895. [a] In Porto Rico.–29 PortoRico 984, 991. [b] It will not be assumed that sentence was put into contract without intent to affect parties' rights. 23F(2d)171.

527-44 42F(2d)957; 201Cal 231, 256P 550; Cal 291P184; 76CalA460, 245P 206; 79CalA458, 250P188; CalA 282P 992; CalA 286P429; CalA 291P698; 82 Colo 13, 257P247; 103Conn624, 131A 420; MoA 294SW930, 932 [citCJ]; 126 Okl 3, 258P906; 126 Okl 150, 259P125; 128 Okl 215, 262P208; 36 OklACR595; 137SC345, 135SE380; TexCommnA 298 SW520; 68Utah486, 251P16; Utah 291 P303; 192Wis209, 212NW259.

527-45 180Ark140, 20SW(2d)611; 82 Colo 13, 257P247; 103Conn624, 131A 420; 125Me201, 132A386; 125Me494, 135A198; MoA 284SW191; MoA 294 SW930, 932 [citCJ]; 53ND887, 207NW 987; TexCommnA 298SW520; Sask [1929] 3DomLR64.

527-45 [a] Rule of "Noscitur a sociis" defined.–219MoA322, 271SW1011.

527-46 21F(2d)257; 21F(2d)661; 25 F(2d)66, 69 [citCJ]; 33F(2d)923; 41 F(2d)573; 28Ariz589, 238P392; 29Ariz 280, 240P1031; Ariz 284P353; 207Cal 50, 276P1004; 70CalA561, 232P58; 73 CalA732, 239P350; 76CalA460, 245P 206; 79CalA458, 250P188; 79CalA641, 250P710; 81CalA633, 254P676; 83CalA 227, 256P835; CalA 263P378; 103Conn 624, 131A420; 35GaA334, 132SE783; 324 Ill 254, 154NE389; Ill 172NE7; 201 Iowa788, 208NW283; Iowa 229NW257; 216Ky470, 287SW962; 170La372, 127S 872; 2LaA685; 150Md40, 132A261; 263 Mass409, 161NE612; Mass 169NE897 (2dcase); 173Minn462, 217NW369; 141 Miss38, 106S209, 44ALR393; 156Miss22, 125S429; Miss 130S743; MoA 16SW (2d)663; 80Mont239, 260P119; 84Mont 207, 274P850; 114Nebr505, 208NW632; 104NJL394, 140A395; 213AppDiv92, 209NYS572; 220AppDiv679, 222NYS 472; 133Misc93, 231NYS251; 53ND887, 207NW987; 120 Okl 24, 250P141; 120 Okl 28, 250P113; 121 Okl 132, 247P967; 126 Okl 3, 258P906; 126 Okl 150, 259P 125; 128 Okl 215, 262P208; 129 Okl 114, 263P652; 36 OklACR595; 38 OklACR 55; 295Pa396, 145A534; Pa 151A785; 6PaDist&Co 718; 11PaDist&Co 737; 48 Philippine108; TexCommnA 285SW 603; TexCommnA 17SW(2d)772; Tex CivA 289SW1045; TexCivA 8SW(2d) 206 (words and figures should be harmonized if possible); TexCivA 16SW (2d)901; Utah 291P303; Vt 150A138.

528-47 Ala 130S799; 6PaDist&Co 706; TexCivA 2SW(2d)987.

528-50 15F(2d)323, 326 [citCJ]; 24 F(2d)59, 62 [citCJ]; 25F(2d)576; 34 F(2d)889; 181Ark415, 26SW(2d)80; 74CalA591, 241P897; 76CalA610, 245P 455; 79CalA458, 250P188; 93CalA770, 270P235; 110Conn452, 148A342; 237 IllA166; 86 Ind185, 156NE562; 86 Ind A185, 156NE562; Iowa 231NW479; 124 Kan637, 261P587, 588 [citCJ]; 126Kan 601, 605 [quotCJ]; 233Ky823, 27SW (2d)427; 255Mass104, 151NE84; 265 Mass595, 164NE652; 240Mich213, 215 NW394; 173Minn75, 216NW545; Miss 128S569; MoA 273SW764; 220MoA 1004, 274SW894, 898 [quotCJ]; 222 MoA307, 297SW129; MoA 5SW(2d) 699; 222MoA439, 7SW(2d)434, 437 [cit CJ]; 115Nebr177, 212NW39; 190NC 284, 129SE721; 26 OhNPNS117; 128 Okl 215, 262P208; 38 OklACR482; 116 Or376, 239P818; 116 Or433, 240P549; 123 Or215, 261P691; 132 Or297, 285P 231; 50SD604, 211NW446; 52SD100, 216NW862; TexCivA 274SW210; Tex CivA 299SW440; TexCivA 5SW(2d) 796; TexCivA 19SW(2d)368; 144Va 355, 132SE178; 148Va413, 139SE254; 152Va173, 146SE254; Va 153SE659; 143Wash297, 255P117; 187Wis232, 202 NW34; 39Wyo 1, 269P31, 33 [quotCJ]. Erratum.–"N. Y.—Mallory v. Tioga R. Co., 42 N. Y. 354" should be "3 Keyes 354." [b] (1) 72CalA78, 236P956; 75 Mont52, 243P1082. (2) Statute merely establishes rule of interpretation not necessarily applicable where contract is unambiguous. 50ND573, 196NW820. [c] (4) Original agreement read in light of supplemental agreement. 258Mass 282, 154NE769. [d] Supplemental agreements must be construed in connection with prior contracts between parties. 37F(2d)637.

529-51 124Kan637, 261P587, 588 [cit CJ]; Va 153SE659.

529-52 74CalA591, 241P897; 79CalA 458, 250P188; 101CalA762, 282P515; 42 Ida90, 245P78; 237 IllA166; IndA 159NE3; 124Kan637, 261P587, 588 [cit CJ]; 126Kan601, 605 [quotCJ]; 234 Mich1, 208NW31; 242Mich301, 218NW 779; 77Mont580, 252P362; 190NC284, 129SE721; 116 Okl 21, 243P248; 128 Okl 215, 262P208; 115 Or379, 238P347; 141Wash606, 252P115; 143Wash297, 255P117.

529-53 32F(2d)202; 202 Iowa1352, 212 NW115; 220MoA1004, 274SW894, 898 [quotCJ]; 74Mont104, 239P773 (construing statute, requiring several contracts which relate to same matter to be taken together); 78Mont504, 255P 1063.

530-54 151Md181, 135A139, 143 [quot CJ]. [a] This rule will not be followed, if it results in construction contrary to intent of parties. 221AppDiv253, 223 NYS110.

530-55 151Md181, 135A139, 143 [quotC J]; 192Wis275, 212NW657.

530-56 CalA 290P633; 151Md181, 135A 139, 143 [quotCJ]; WVa 153SE303.

530-57 82CalA710, 256P279; 138 Okl 19, 280P273 (instruments not executed at same time held required to be construed as one contract).

530-58 181Ark415, 26SW(2d)80; 42 Ida720, 248P9.

530-60 78Mont504, 255P1063.

530-61½-New. The mere fact that a contract for the sale and purchase of gas provides that it shall run as long as a contract whereby the seller purchased the gas from another does not require the two contracts to be construed together or make any of the terms of the contract whereby the seller acquired the gas binding on the purchaser from him. 115 Okl 27, 241P 161.

530-63 222AppDiv564, 226NYS485.

530-64 141Wash253, 251P274.

530-65 177Ark984, 8SW(2d)459.

530-66 216Ala9, 112S151; 199Cal 386, 249P513; 76CalA610, 245P455; 87Colo 436, 288P627; 35GaA784, 134SE841; 235Mich502, 209NW660; 319Mo 401, 4 SW(2d)438; MoA 8SW(2d)1090; 121 Okl 132, 247P967; TexCivA 283SW260; 187Wis232, 202NW34. [b] Reference to one class of details in indorsement, without including more, implies exclusion of all not expressed. Utah 293P1.

531-67 CalA 275P825(2dcase); Nev 284P307.

531-70 21F(2d)257; 30F(2d)287; 34 F(2d)655; 41F(2d)573; 215Ala521, 111 S15; 216Ala564, 114S135 (full import); 178Ark1036, 13SW(2d)28; 83CalA227, 256P835; 100CalA126, 279P1036; 100 CalA766, 281P102; CalA 288P444; CalA 291P698; CalA 291P445; 103Conn 624, 131A420 (proper meaning); 94Fla 528, 114S438; 27Hawaii326, 328 [cit CJ]; 207 Iowa1101, 224NW67, 63ALR 292; 228Ky275, 14SW(2d)1056; 260 Mass255, 157NE523; MoA 4SW(2d)489; 80Mont214, 260P711; NJCh 146A680; 242NY125, 151NE152, 45ALR751; 250 NY132, 164NE881; 217AppDiv541, 217 NYS256; 128Misc875, 220NYS281; 133 Misc735, 234NYS166; 129Misc406, 221 NYS321; 132Misc701, 230NYS473; 135 Misc113, 236NYS692; 137Misc444, 242 NYS185; 190NC737, 130SE707; NC 155 SE734; 25 OhA100, 157NE393; 25 OhA 360, 157NE908; 32 OhA158, 167NE693; 33 OhA396, 169NE707; 121 Okl 132, 247 P967; 126 Okl 3, 258P906; 137 Okl 95, 278P311; 144 Okl 58, 289P716; 87Pa Super421; TexCivA 283SW615; Tex CivA 290SW251; TexCivA 291SW301; Utah 271P226; 152Va254, 146SE284; Can [1925] 3DomLR762; Sask [1929] 3DomLR64.

531-70½-New. Lexicographers' opinions may and should help, but cannot control, the legal interpretation of a term. 132Misc701, 230NYS473.

531-71 38F(2d)874; 197Cal 321, 240P 765; 160La261, 107S103; 246NY519, 159NE418; 190NC737, 130SE707; 119 Or252, 237P965; 139SC411, 138SE184; TexCivA 288SW656.

532-73 74Mont70, 237P518; 132Misc 435, 230NYS239; Pa 151A573.

532-75½-New. Circumstances may be considered in determining the sense in which the parties have used particular words. 252Mass314, 147NE863.

532-75½-New. "Use in plant" as applied to gasoline for a taxicab company should be construed to mean that gasoline would be stored at the plant until put into automobiles. 252Mass314, 147NE863.

532-76 139SC411, 138SE184; Tex CommnA 298SW535.

532-78 128Misc875, 220NYS281, 286 [quotCJ].

532-79 33 OhA396, 169NE707; BC [1929] 1DomLR77.

532-81 25 OhA100, 157NE393; WVa 143SE353.

532-84 108Conn126, 142A674; Mass 169NE897(2dcase); TexCivA 288SW 545.

532-85 216Ala367, 113S592, 595 [cit CJ]; Fla 130S15.

532-5½-New. "and, or"; 159La872, 106S364.

532-7½-New. "approximately and more or less"; 258Mass282, 154NE769.

533-10 Can [1925] 3DomLR762.

533-13½-New. "at once"; 8F(2d)689.

533-17½-New. "barber business"; 98 NJEq194, 129A739.

533-27½-New. "cubic yard"; 108Conn 126, 142A674.

533-40½-New. "exhibition value"; 125 Misc756, 211NYS838 (minimum price expectancy).

533-41 TexCivA 273SW619 ("expenses incurred").

533-53½-New. "from date"; 141Miss 38, 106S209, 44ALR393.

533-53½-New. "from maturity"; 141 Miss38, 106S209, 44ALR393.

533-55½-New. "whatsoever"; 25 OhA 100, 157NE393.

533-71½-New. "issuance"; 119 Or252, 237P965.

533-76½-New. "lease"; TexCivA 284 SW1057.

533-76½-New. "leaving"; 25 OhA100, 157NE393.

533-80½-New. "location and use"; 125 Me255, 132A745.

533-82½-New. "minimum sale"; 125 Misc756, 211NYS838 (minimum price expectancy).

533-84 258Mass282, 154NE769.

533-91½-New. "on demand after date"; 141Miss38, 106S209, 44ALR393.

533-96 14F(2d)424.

534-5½-New. "pole"; 210Ky820, 276 SW983.

534-10 TexCivA 288SW656.

534-22½-New. "semiannually"; 141 Miss38, 106S209, 44ALR393.

534-30 175Ark733, 1SW(2d)51.

534-40½-New. "then value"; 122Kan 19, 251P431.

534-60 219MoA322, 271SW1011, 1013 [quotCJ]; TexCommnA 298SW520.

534-61 219MoA322, 271SW1011, 1013 [quotCJ]. [a] 232Ky111, 22SW(2d) 426. [b] It will be assumed that parties understand logical and grammatical use of words, phrases, and clauses in contract. Okl 292P52.

535-62 18F(2d)879; Iowa 231NW479; 123Kan731, 733, 256P981 [quotCJ]. But see Okl 292P52. [c] Rule as to use of comma in connection with restrictive clause stated.–Okl 292P52. [d] Words in parentheses or brackets inserted in midst of sentence are supposed to be

used by way of comment or to qualify or limit meaning. Fla 130S432.

535-67 116 Or376, 239P818; TexCivA 276SW936.

535-68 27F(2d)433; 128Misc875, 220 NYS285.

535-72 [b] **Holding that, to give effect to general meaning of contract,** words are sometimes supplied. 128Misc875, 220NYS281.

535-73 27F(2d)433.

535-74½-New. Striking out of clause requiring employment of only union workmen indicated intention to eliminate such condition. 299Pa58, 149A 93.

535-75 37F(2d)220; 42F(2d)886; 181 Ark148, 25SW(2d)449; 68CalA554, 229 P1002; 163Ga468, 136SE434; 4LaA155; Mass 165NE7; 135Misc89, 236NYS434; 137Misc182, 243NYS526; TexCivA 4SW (2d)1038; 192Wis130, 212NW253.

536-76 7F(2d)221; 30F(2d)302; 180 Ark140, 20SW(2d)611; 79CalA443, 249 P886; 92CalA343, 268P408; 96CalA269, 274P415; MoA 16SW(2d)722; Mont 289 P571; 160Tenn551, 26SW(2d)135, 68 ALR1380; TexCivA 16SW(2d)832; Tex CivA 20SW(2d)266; Utah 291P303; BC [1928] 1DomLR910.

536-77 68CalA554, 229P1002; 79CalA 443, 249P886; Nebr 231NW763; 36 OklACR595; 144SC417, 142SE593, 597 [quotCJperCothran,J]; 192Wis130, 212 NW253.

536-78 56AppDC342, 13F(2d)313; 102 NJEq20, 139A817.

536-79 6F(2d)721; 102NJEq20, 139A 817.

536-80 213Ala66, 10485; 75Mont356, 243P582; 117Nebr6, 219NW583, 590 [quotCJ]. But see 35F(2d)990; 40 F(2d)606. [b] **Conflicting provision inserted by accident** will be disregarded. 170La372, 127S872.

536-83 Utah 293P1.

536-85 35F(2d)990.

536-87 16F(2d)265; 31F(2d)979; 39 F(2d)406; 76CalA460, 245P206; 98 CalA507, 277P167; CalA 283P949; 35 GaA683, 134SE627; 38GaA428, 144SE 135(2dcase); Md 151A44; 117Nebr6, 219NW583; 128Misc510, 219NYS84; 134 Okl 237, 273P261; TexCivA 293SW 855; Can [1930] 4DomLR343; Alta [1929] 4DomLR591. [c] **Whether written portion be by hand, typewriter, or stamped** is immaterial. 39F(2d)406.

537-89 28Ariz589, 238P392; 79CalA 443, 249P886; 128Misc510, 219NYS84; 13PaDist&Co 321; TexCivA 25SW(2d) 176.

537-89½-New. , and a stamp over printing. 16F(2d)265.

537-90 21F(2d)661, 663 [quotCyc]; 28 Ariz589, 238P392, 395 [citCJperRoss,J]; 35GaA683, 134SE627.

537-91 28Ariz589, 238P392; 35GaA 683, 134SE627.

537-91½-New. Printed matter will not be considered part of contract where it is not intended to include it. TexCivA 26SW(2d)319.

537-95 160Tenn403, 23SW(2d)897.

537-96 94Fla254, 113S629, 630 [citCJ]; 226Ky621, 11SW(2d)434; 80Mont214, 260P711; 124 Okl 150, 254P84.

537-98 83CalA227, 256P835; 114Nebr 584, 208NW742; 120 Okl 226, 253P273, 274 [citCJ]; 127 Or188, 270P927, 929 [citCJ]; 29PortoRico 984; TexCommnA 11SW(2d)778. [a] **Qualifying words** will be intended as qualifying over immediate antecedent, unless contrary intention appears. 215Ala183, 110S133. [b] **Only where same subject matter** is involved in general description following particular description does rule apply. 246NY270, 158NE618.

537-99 220Ala372, 125S335; 74CalA 551, 241P429; 308Mo 453, 273SW95, 101 [citCJ]; MoA 291SW178; Nebr 227 NW925; 126Misc465, 214NYS488; 114 Okl 293, 245P653; 120 Okl 226, 253P 273, 274 [citCJ]; 38 OklACR487, 490 [citCJ]; Utah 271P226, 229 [citCJ]; Wis 232NW848. [c] **Where language is not obscure or doubtful,** rule of ejusdem generis should not be resorted to. Utah 271P226.

538-1 75Mont167, 242P956 (under statutes); 126Misc465, 214NYS488; Sask [1927] 1DomLR649.

538-2 25F(2d)66, 69 [quotCJ]; 114 Nebr584, 208NW742; 246NY270, 158NE 618; 294Pa562, 144A750.

538-3 28F(2d)560 [certiorari den 279 US838, 49SCt252(4thcase) 73Led985]; 44 Ida332, 257P31, 54ALR1527; MoA 291SW178; 75Mont356, 243P582; 115 Nebr177, 212NW39, 45 [citCJ]; 246NY 270, 158NE618.

538-4 73Mont560, 238P599 (recitals properly considered to determine intention and situation of parties, when operative parts of agreement are ambiguous); 6PaDist&Co 65, 66 [citCJ].

538-5 239 IllA117, 124 [citCJ]; 165NY 48, 58NE765. See also Cal 291P184.

538-6 6PaDist&Co 65, 66 [citCJ].

538-7 256 IllA540; 26 OhA485, 160NE 482.

538-8 102NJEq20, 139A817.

539-9½-New. Memorandum below signatures of parties may be disregarded as surplusage. 103Conn491, 130A 844.

539-10 Can [1930] 4DomLR343.

539-12 219Ala265, 122S29; 79CalA458, 250P188; 90CalA22, 265P372; 3Del 390, 138A598, 600 [quotCJ]; 41 Ida432, 242P297; 86 IndA185, 156NE562; 223 Ky413, 3SW(2d)1088, 1089 [quotCJ]; 223Ky698; 4SW(2d)726; 219MoA283, 269SW693; 222MoA586, 292SW1079; 83NH459, 144A67; NJ 152A196; 250 NY370, 165NE814; NC 147SE3; 49ND 414, 191NW493; 26 OhA460, 160NE511; 29 OhA305, 163NE560; 124 Okl 150, 254 P84; 128 Okl 215, 262P208; 133 Okl 23, 270P854; 116 Or376, 239P818; Tex CommnA 283SW779; TexCommnA 295 SW578; TexCivA 284SW1057. [b] **Presumption** is that persons executing instrument intend it to have some effect. TexCommnA 293SW815.

539-13 25 F(2d)742; 33F(2d)248; 196NC748, 147SE13.

539-14 86 IndA185, 156NE562; 136 Misc483, 241NYS403; 133 Okl23, 270P 854.

539-15 14F(2d)459; 15F(2d)380; 15F (2d)480; 16F(2d)728, 732 [citCJ]; 31 F(2d)337; 73CalA527, 238P1077; 71 CalA492, 236P210; 81CalA633, 254P676; 90CalA22, 265P372; 36GaA450, 136SE 798; 86 IndA185, 156NE562; 216Ky 470, 287SW962; 223Ky413, 3SW(2d) 1088, 1089 [quotCJ]; 223Ky698, 4SW (2d)726; 157Miss298, 127S716; 98NJ Eq672, 130A557; 221AppDiv94, 222 NYS359; 113 Okl 257, 241P746; 127 Okl 215, 260P497; 128 Okl 215, 262P 208; 133 Okl 23, 270P854; 119 Or252, 237P965; 116 Or376, 239P818; 284Pa 414, 131A236, 239 [citCJ]; 135SC89, 133SE215, 45ALR1172; 154SC415, 151 SE741 (adverse to public interests); TexCommnA 295SW578; TexCommnA 12SW(2d)160; TexCivA 280SW908; TexCivA 293SW613, 618 [citCyc]; Tex CivA 3SW(2d)462, 465 [citCJ]; Tex CivA 14SW(2d)337; TexCivA 23SW (2d)527.

540-16 131 Or302, 282P764.

540-17 208 Iowa1086, 226NW774; Miss 130S507.

540-18 Ida 286P360(2dcase).

540-19 31F(2d)610; Ida 292P613; 226Ky492, 11SW(2d)114; 252NY284 169NE386; 128 Okl 215, 262P208; 36 OklACR595, 598 [quotCJ]; 101WVa748, 133SE699.

540-20 CalA 263P378; 104Conn222, 132A414; 128 Okl 215, 262P208; 36 OklACR595, 598 [quotCJ].

540-21 74Mont385, 240P391; TexCivA 3SW(2d)462, 465 [citCJ].

540-22 8F(2d)202; 21F(2d)661; 37F (2d)220; 37F(2d)695; 43F(2d)427; 180Ark885, 23SW(2d)986; 181Ark994, 28SW(2d)1067; 76CalA52, 243P676; 81 CalA633, 254P676; 107Conn724, 142A 387; 110Conn571, 148A658; 89Fla194, 103S825; 324 Ill 254, 154NE889 [citCJ]; 206 Iowa1025, 219NW411; Iowa 229N W724; 225Ky77, 7SW(2d)853; Mass 169NE897(2dcase); 246NY519, 159NE 418; 221AppDiv94, 222NYS359; 218 AppDiv411, 218NYS457; 49ND414, 191 NW493; 21 OhA265, 152NE688; 283 Pa434, 129A559; TexCivA 288SW656; TexCivA 289SW152; TexCivA 295SW 944; TexCivA 16SW(2d)901.

541-23 32F(2d)247; 213Ala66, 10485; 107Conn724, 142A387; 89Fla194, 103S 825; 324 Ill 254, 154NE889 [citCJ]; 120 Kan637, 245P119; 223Ky549, 4SW(2d) 370, 371 [quotCJ]; 12LaA625, 125S 757; 157Miss298, 127S716; 246NY519, 159NE418; 214AppDiv242, 211NYS896; 216AppDiv218, 214NYS653; 218AppDiv 411, 218NYS457; 124Misc881, 210NYS 303, 308 [citCyc]; 296Pa40, 145A686; TexCivA 16SW(2d)901.

541-24 28F(2d)373; 75CalA335, 242P 756; 89Fla194, 103S825; 208 Iowa1086, 226NW774.

541-25 CalA 287P515; 324 Ill 254, 154 NE889 [citCJ].

541-25½-New. A waiver of a party's ordinary and usual remedy by resort to the courts must be expressed in unequivocal terms, and equivocal language will not be interpreted in favor of a party claiming such waiver. 68Utah 486, 251P16.

541-25½-New. Any doubt in the meaning of language relied on as a waiver of such right should be resolved in favor of the party claiming such right. 68 Utah486, 251P16.

541-26 27F(2d)191; 170Ark478, 280S W15; 196Cal686, 239P324; 205Cal 245, 270P447; 79CalA443, 249P886; 98 Fla124, 123S561(2dcase); 209Ky562, 273SW24; 220Ky822, 295SW1063; 216 Ky494, 288SW350, 351 [quotCJ]; MoA 287SW781; MoA 16SW(2d)654; MoA 32SW(2d)103; 86Mont435, 284P147(2d case); NJ 152A73; NJSup 137A560; 227AppDiv733, 236NYS565; 290Pa67, 138A85, 87 [citCJ]; 291Pa335, 140A 139, 140 [citCJ]; TexCivA 280SW331; TexCivA 283SW891; TexCivA 283SW 910; TexCivA 288SW1111; TexCivA 10 SW(2d)267; 146Wash435, 263P598; 106WVa429, 145SE744.

541-27 223Ky413, 3SW(2d)1088; 148 Miss690, 114S810; 133Misc667, 232NYS 643(2dcase).

542-29 21F(2d)661; 205 Iowa1126, 217 NW429; Kan 291P774; 160La916, 107 S621; Md 150A732; MoA 32SW(2d) 103; 76Mont38, 245P257; 119 Okl 225, 249P420; 291Pa335, 140A139 (ordinary meaning not distorted to create ambiguity); 104WVa44, 138SE737.

542-30 273US326, 47SCt368, 71Led 663; 8F(2d)689; 21F(2d)257; 34F(2d) 655; 36F(2d)982; 37F(2d)695; 44F (2d)192; 216Ala564, 114S135; 220Ala 372, 125S335; 171Ark11, 283SW17, 45 ALR1396; 181Ark994, 28SW(2d)1067; 205Cal 541, 271P1091(2dcase); 71CalA 611, 235P742; 79CalA443, 249P886; 77 CalA562, 247P264; 83CalA537, 257P 121; 103Conn624, 131A420; 111Conn 77, 149A513; 89Fla194, 103S825; 94 Fla528, 114S438; Ida 286P360(2dcase); 244 IllA302; 199 Ind166, 154NE480; 201 Iowa48, 206NW258; 205 Iowa297, 215NW621; 206 Iowa1025, 219NW411; 207 Iowa294, 222NW893; 208 Iowa1086, 226NW774; 120Kan637, 245P119; 122 Kan640, 253P553; 211Ky123, 277SW 316; 3LaA510; 153Md44, 137A501; 260 Mass255, 157NE523; 235Mich598, 209 NW821; 240Mich462, 215NW314; 166 Minn346, 207NW737, 46ALR1167; 170 Minn175, 212NW408; 170Minn242, 212 NW446; 147Miss374, 112S7; Miss 130 S507; 307Mo 160, 270SW315; 319Mo 899, 8SW(2d)834; 220MoA1070, 282SW 74; MoA 14SW(2d)526; 103NJL635, 137A423; 218AppDiv411, 218NYS457; 190NC737, 130SE707; 53ND887, 207 NW987, 990 [citCJ]; 23 OhA399, 155 NE409; 111 Okl 286, 239P564; 114 Okl 237, 246P238; 118 Okl 87, 246P626; 128 Okl 215, 262P208; 134 Okl 237, 273 P261; 36 OklACR467; 36 OklACR 595; 284Pa414, 131A236, 239 [citCJ]; 290Pa67, 138A85, 87 [quotCJ]; 144SC 218, 142SE504; TexCommnA 276SW 187; TexCommnA 293SW815; Tex CommnA 298SW520; 117Tex277, 298 SW523; TexCivA 271SW201, 204 [cit CJ]; TexCivA 275SW673; TexCivA 278 SW508; TexCivA 284SW339; TexCivA 8SW(2d)683; 142Va529, 129SE389; 147Va566, 137SE371; 101WVa675, 133 SE338; 101WVa748, 133SE699; 102 WVa572, 135SE666; 103WVa366, 137SE 539; 103WVa567, 137SE895; 192Wis 209, 212NW259; 197Wis562, 222NW 818; [1926]CanSC692 [1926] 4DomLR 568.

542-31 8F(2d)106; 21F(2d)257; 205

Cal 733, 272P740; 103Conn624, 131A 420; 94Fla528, 114S438; 326 Ill 442, 158NE97; Ill 172NE7; Iowa 229NW 257; 120Kan637, 245P119; 226Ky492, 11SW(2d)114; 153Md44, 137A501; Md 148A836; 147Miss374, 112S7; 309Mo 638, 274SW815; 222AppDiv82, 225NYS 317; 53ND887, 207NW987, 990 [citCJ]; 120 Okl 108, 250P892; 126 Okl 150, 259 P125; 284Pa414, 131A236; TexCivA 271SW201, 204 [citCJ]; 101WVa748, 133SE699.

543–32 273US326, 47SCt368, 71Led 663; 21F(2d)257; 27F(2d)385; 38F (2d)874; 43F(2d)427; 43F(2d)625; 213Ala329, 104S831 [quotCJ]; 216Ala 564, 114S135; 220Ala372, 125S335; 68 CalA554, 229P1002; 75CalA335, 242P 756; 98CalA437, 277P137; 89Fla194, 103S825; 94Fla528, 114S438; 199 Ind 166, 154NE480; 201 Iowa48, 206NW 258; 208 Iowa150, 225NW339; Iowa 231NW479; 211Ky427, 277SW497; 9 LaA272, 120S119; 151Md392, 135A166; 153Md44, 137A501; Md 148A273; 253 Mass79, 148NE374 (subject matter and accompanying circumstances); 170Minn 175, 212NW408; 147Miss374, 112S7; 309Mo 638, 274SW815; 241NY231, 149 NE841; 246NY519, 159NE418; 223App Div292, 228NYS260; 128Misc875, 220 NYS281; 190NC737, 130SE707; 195NC 508, 142SE767; 51ND737, 200NW906, 908 [citCJ]; 53ND887, 207NW987, 990 [citCJ]; 115 Okl 121, 242P214; 117 Okl 96, 245P571; 114 Okl 237, 246P238; 118 Okl 87, 246P626; 124 Okl 150, 254 P84; 126 Okl 150, 259P125; 118 Or88, 244P877; 284Pa414, 131A236; 290Pa 67, 138A85, 87 [quotCJ]; 290Pa561, 139 A315; 299Pa100, 149A108; 48Philippine492; TexCommnA 280SW762; Tex CommnA 18SW(2d)265 (tests to be made during progress of work of drilling well); TexCivA 271SW201; TexCivA 278SW508; TexCivA 288SW656; Tex CivA 16SW(2d)901; 69Utah112, 252P 570; 101Vt367, 143A639; Vt 150A138; 146Va417, 131SE800; 147Va566, 137SE 371; 135Wash195, 237P295; 101WVa 596, 133SE318; 101WVa675, 133SE388; 101WVa748, 133SE699; 103WVa366, 137SE539; 103WVa567, 137SE895; Wis 230NW83. See also 163Ga434, 136 SE317.

543–32½–New. although a written agreement cannot be varied by circumstances out of which it grew. 241NY 231, 149NE841.

544–33 43F(2d)885; 95CalA299, 272P 770; 45 Ida707, 266P1094, 1097 [citCJ]; 319Mo 899, 8SW(2d)834; 33NM11, 261 P813; NJCh 146A680; 34PortoRico 363; TexCommnA 11SW(2d)778.

544–36 TexCivA 281SW608.

544–37 214Ala176, 106S862; 236 IllA 111; 219Ky256, 292SW817; Miss 112 S393; 150Miss272, 116S294; 74Mont 104, 239P773; 78Mont145, 252P872; TexCivA 288SW271.

544–38 164Ga777, 139SE549; 295Pa 492, 145A586; 104WVa449, 140SE285, 286 [citCJ].

544–39 164Ga777, 139SE549; 258Mass 172, 154NE583; 137SC366, 135SE363.

544–40 21F(2d)257; 181Ark148, 25SW (2d)449; CalA 291P464; 258Mass282, 154NE769.

544–41 258Mass172, 154NE583. [a] **Specifications and letters exchanged** held not to constitute contract in view of further negotiations resulting in oral agreement. 254Mass380, 150NE171.

544–41½–New. Care must be taken not to construe as an agreement letters which the parties intended only as preliminary statements. 224 IllA538.

545–42 21F(2d)257; 27F(2d)385; 30 F(2d)302; 43F(2d)885; 43F(2d)408; 216Ala89, 112S323; 216Ala551, 114S 37; 217Ala511, 116S681; 218Ala484, 119S17; Ala 130S799; 31Ariz147, 250 P993; Ariz 284P353; 170Ark478, 280 SW15; 173Ark772, 293SW47; 176Ark 238, 3SW(2d)20; 177Ark875, 8SW(2d) 452; 177Ark984, 8SW(2d)459; 177Ark 997, 8SW(2d)502; 181Ark148, 25SW (2d)449; 205Cal 338, 270P943, 61ALR 267; Cal 291P184; Cal 292P950; 84 CalA298, 257P901; 82Colo 86, 257P265; 84Colo 207, 269P9; 86Colo 101, 278P 611; 94Fla254, 113S629; 94Fla528, 114 S438; 98Fla1103, 125S521; 245 IllA 175; 252 IllA17; 205 Iowa297, 215NW 621; 208 Iowa1086, 226NW774; Iowa 232NW79; 130Kan367, 286P258; 215 Ky448, 285SW208; 217Ky635, 290SW 503, 504 [citCJ]; 218Ky119, 290SW 1059; 9LaA616, 118S387; 12LaA343, 126S76; Me 149A801; Md 148A273; 260Mass255, 157NE523; Mass 165NE 389; 238Mich52, 213NW175; 238Mich 617, 214NW179; 240Mich462, 215NW 314; 247Mich508, 226NW228, 229 [cit CJ]; 249Mich89, 227NW674; 250Mich 583, 230NW919; 251Mich450, 232NW 181(2dcase); 166Minn7, 206NW934; MoA 287SW1069, 1071 [citCJ]; Nebr 231NW141; 99NJEq288, 133A184; 100 NJEq110, 135A673; 241NY231, 149NE 841; 124Misc881, 210NYS303, 308 [cit Cyc]; 216AppDiv305, 214NYS580; 129 Misc406, 221NYS321; 133Misc93, 231 NYS251; 137Misc564, 241NYS759; 137 Misc444, 242NYS185; 137Misc506, 243 NYS319; 229AppDiv593, 243NYS548; 30 OhA167, 164NE436; 32 OhA158, 167 NE693; 296Pa40, 145A686; 298Pa249, 148A81, 67ALR1428; 12PaDist&Co 449; 155SC488, 152SE644; SD 226NW760; SD 233NW281; TexCivA 283SW676; TexCivA 289SW152; TexCivA 289SW 155; TexCivA 20SW(2d)266; 69Utah 112, 252P570; Utah 293P1; Utah 293 P12; 100Vt232, 136A394, 51ALR628; 152Va827, 148SE689; 152Wash480, 278 P183; 192Wis275, 212NW657; [1926] CanSC692, [1926] 4DomLR568. But see 201Cal 231, 256P550. [b] (2) **Application of rule.**–234Mich233, 207NW 803. [d] **Rule is particularly applicable to contracts executed after conflicting judicial constructions of language.**–118 Oh421, 161NE276.

545–44 262Mass99, 159NE505.

545–45 [a] **Where form and phraseology are prescribed by statute,** rule is inapplicable. Iowa 218NW20.

545–46 222MoA221, 296SW1049.

545–48 98Fla1103, 125S521.

545–49 82Colo 86, 257P265; 227Ky813, 14SW(2d)140; 135Misc508, 239NYS129 (printed form of customer's contract must be strictly construed against stock brokers who prepared it).

546–51 216Ala551, 114S37. See also 314Mo 288, 284SW482.

546–52 MoA 287SW781, 782 [citCJ].

546–52½–New. , but where the clause is inserted for the protection of one party, it should be construed in his favor. 84Colo 207, 269P9.

546–53 216Ala551, 114S37; 130 Or255, 279P542, 69ALR951. [a] 170La714, 129 S139(2dcase).

546–54 7F(2d)335; 8F(2d)125; 8F (2d)689; 16F(2d)182; 23F(2d)783; 24 F(2d)692, 694 [citCJ]; 30F(2d)754; 37 F(2d)637; 42F(2d)681; 215Ala499, 111 S231; 217Ala511, 116S681; 220Ala372, 125S335; 220Ala643, 127S237; 176Ark 601, 3SW(2d)673; 176Ark1149, 6SW (2d)28, 31 [quotCyc]; 177Ark997, 8SW (2d)502; 178Ark260, 10SW(2d)374; 179Ark398, 16SW(2d)6; Cal 292P953; 75CalA212, 242P518; 79CalA443, 249P 886; 80CalA609, 252P733; 86CalA753, 261P520; 98CalA437, 277P137; CalA 285P384; CalA 288P138; CalA 292P 1082; 86Colo 270, 281P111; 103Conn 624, 131A420; 106Conn562, 139A99; Fla 130S428; Ill 172NE7; 244 IllA302; 245 IllA473; 251 IllA177; 84 IndA115, 150NE116; IndA 169NE596; 201 Iowa 48, 206NW258; Iowa 224NW550; 205 Iowa 408, 216NW71, 73 [quotCJ]; Iowa 232NW492; 120Kan637, 245P119; 122 Kan640, 253P553; 127Kan724, 275P 155; 211Ky384, 277SW474, 476 [cit CJ]; 212Ky33, 278SW151; 212Ky825, 280SW151; 217Ky639, 290SW505; 220 Ky81, 294SW813, 814 [quotCJ]; 235 Ky388, 31SW(2d)624; 162La891, 111S 271; 6LaA767; 125Me494, 135A198; Me 149A801; 256Mass600, 153NE19; Mass 166NE922; Mass 168NE106; 238 Mich20, 213NW73, 74 [citCJ]; 239Mich 81, 214NW160; 242Mich204, 218NW 784; 246Mich96, 224NW420; 251Mich 450, 232NW181(2dcase); 170Minn147, 212NW178, 180 [citCJ]; 318Mo 225, 2 SW(2d)621 (construed as understood and acted upon by parties); 319Mo 386, 4SW(2d)427; 319Mo 899, 8SW(2d)834; Mo 26SW(2d)969; Mo 32SW(2d)587; 222MoA184, 296SW1047; Mont 288P 616; Nebr 231NW763; 103NJL635, 137A423, 424 [citCJ]; NJ 144A808; 100 NJEq110, 135A673; 243NY490, 154NE 535; 250NY495, 166NE179; 212AppDiv 646, 209NYS369; 216AppDiv218, 214 NYS653; 217AppDiv541, 217NYS256; 223AppDiv331, 227NYS633; 127Misc59, 215NYS244; 133Misc735, 234NYS166; 134Misc801, 236NYS306; 135Misc89, 236NYS434; 191NC575, 132SE576, 579 [citCJ]; 193NC524, 137SE593, 595 [cit CJ]; 197NC110, 147SE819; 51ND737, 200NW906, 908 [citCJ]; 52ND98, 201 NW851 [citCJ]; 52ND688, 204NW344; 53ND887, 207NW987, 990 [citCJ]; Oh 170NE870; 21 OhA373, 153NE201 (controlling where contract ambiguous); 115 Okl 1, 240P1063; 118 Okl 87, 246P 626; 117 Okl 117, 245P608; 135 Okl 235, 275P1061; Okl 291P38; 118 Or88, 244P877; 122 Or74, 257P690; 129 Or 161, 276P265; Or 286P563; 290Pa87, 138A94; 5PaDist&Co 623; 34PortoRico 792; 159Tenn69, 16SW(2d)25; Tex CommnA 291SW876; TexCivA 273SW 903; TexCivA 275SW673; TexCivA 275 SW841; TexCivA 281SW344; TexCivA 290SW251; TexCivA 290SW552; Tex CivA 300SW253, 255 [citCJ]; TexCivA 18SW(2d)787; TexCivA 31SW(2d)154; TexCivA 31SW(2d)1095; 101Vt367, 143 A639; Vt 150A138; 142Va529, 129SE 389; 145Va731, 134SE696, 697 [cit Cyc]; 152Va173, 146SE254; Va 154SE 526; 154Wash389, 282P208; 99WVa 310, 129SE127; 100WVa331, 130SE447; 101WVa675, 133SE388; 104WVa449, 140SE285; 188Wis45, 205NW393; 192 Wis130, 212NW253; 192Wis275, 212 NW657. See also 52ND366, 203NW195; 295Pa408, 145A578. Contra 244Mich 267, 221NW171. [e] **Where there is uncertainty,** construction by parties prevails. 144Va371, 132SE322. [f] **Parties' construction no evidence of meaning** where evidence shows no enforceable contract. 220MoA95, 278SW1060.

548–55 15DelCh198, 134A97; 160Ga93, 127SE610; 204 Iowa202, 215NW229 (dictum); 263Mass409, 161NE612; 53 ND887, 207NW987, 990 [citCJ]; 122 Or74, 257P690; 290Pa87, 138A94; Tex CivA 4SW(2d)597. [a] **Practical construction** cannot govern matters arising after controversy. 204 Iowa202, 215 NW229. [b] **Acts whether contemporaneous or subsequent to making of contract** may be resorted to. Ill 172 NE7.

548–56 MoA 9SW(2d)661; 127Misc59, 215NYS244. See also 217AppDiv49, 215 NYS727.

548–57 13F(2d)622; 75CalA212, 242P 518; 96CalA269, 274P415; 101CalA552, 281P1097; 102CalA232, 282P965; 204 Iowa202, 215NW229; MoA 300SW324, 326 [citCJ]; 102NJEq20, 139A817; 242 NY125, 515NE152, 45ALR751; 127Misc 59, 215NYS244; 218AppDiv502, 219NYS 14; 191NC575, 132SE576; TexCivA 8 SW(2d)206; TexCivA 20SW(2d)1099; 142Va331, 128SE518 (when terms obscure version of parties shown by construction they place upon, it may be considered); 148Va651, 139SE325; 192 Wis275, 212NW657.

549–58 23F(2d)628; 75CalA212, 242P 518; 202 Iowa1053, 1057, 208NW853 [citCJ]; 204 Iowa202, 215NW229; Mass 171NE229; 235Mich4, 209NW104; 317Mo 951, 298SW39; 319Mo 899, 8SW (2d)834; MoA 300SW324; 218AppDiv 502, 219NYS14. See also 142Va331, 128 SE518.

549–59 [a] **Construction must be in good faith.**–223AppDiv533, 229NYS390.

549–60 35F(2d)129; 192Wis275, 212 NW657. [c] **Practical construction not used to defeat clear right,** in absence of estoppel, merely because of delay in asserting right. 127Misc59, 215NYS 244.

549–61 13F(2d)622 (acquiescence under protest for purpose of previous similar contract held not agreement as to construction); CalA 290P545. [a] 118 Or88, 244P877 (making quarterly payments on installment mortgage). [b] 202 Iowa1053, 208NW853.

549–63 220Ky621, 295SW1073; 242 Mich472, 219NW610. But see 13LaA11, 127S87. [c] **Party seeking to enforce contract is bound by his own construc-**

tion of it inconsistent with his position in trial and not inconsistent with reasonable construction of terms. **MoA** 284SW191.

549-69 120Kan133, 242P454 (conduct of party such as to bind him to certain interpretation); 125 **Okl** 194, 257P295.

550-71½-New. Construction placed by person on his language constitutes highest evidence of his intention. **Tex CommnA** 26SW(2d)166.

550-74 214Ala215, 107S53; 83**Colo** 99, 262P921 (contract to make advances in furtherance of invention).

550-75 8**LaA**303; **Minn** 231NW926.

550-80 50**Philippine**69; **Utah** 282P776; **Wis** 232NW847.

551-87 290Pa87, 138A94.

551-7 15**DelCh**198, 134A97.

551-11 46**Philippine**930; 154**Wash**389, 282P208.

552-22 [a] **Land development contract.**-Pa 151A573.

552-23 [a] **Particular contracts construed.**-73**CalA**769, 239P358.

522-28 235**Ky**425, 31**SW(2d)**701 (removal of pillars and stumps from coal mines).

553-33 130 **Or**522, 279P867 (payment of interest and attorney's fees in suit against third party contracting to pay note of others).

553-34 99**CalA**783, 279P483 (payment of five cents royalty on every barrel of cement produced till loan is paid with interest); 130 **Or**530, 279P528; 130 **Or** 530, 280P877.

553-35 40**GaA**788, 151SE567.

553-37 214**Ala**215, 107S53.

553-38 130 **Or**530, 280P877.

553-39 40**GaA**810, 151SE532(2dcase); 246 **IllA**100.

553-40 246 **IllA**137.

553-43 40 **Ida**712, 237P284 (note).

553-57 74**Mont**385, 240P391.

554-58 9**PaDist&Co** 684.

554-69½-New. Provisions of a contract as to attorney's fees are not applicable. 258**Mass**282, 154NE769.

554-70 [b] 106**WVa**416, 145SE760; 144**Wash**375, 258P314.

555-80 But see **CalA** 291P877.

555-84 244**NY**14, 154NE649; 97**Pa Super**114.

556-86 **CalA** 287P980(2dcase); **MoA** 287SW781; **MoA** 16SW(2d)735; 153 **Wash**175, 279P566(2dcase).

556-87 **Wis** 229NW635.

556-98 296**Pa**161, 145A719. But see **MoA** 293SW794.

557-99 244**NY**14, 154NE649.

557-2 See also **NJCh** 129A399. But see 155**Md**30, 141A440.

557-5½-New. Where the seller of an undertaking business agrees not to enter a similar business for a specified time, the employment of his wife, not a party to the contract, by her brother-in-law in such business is not a breach of the agreement in the absence of fraud. **TexCivA** 20SW(2d)338.

557-6 212**Ala**560, 103S649; 61 **OntL** 558, [1928] 1**DomLR**1009.

557-7 **Wis** 229NW635; **Sask** [1929] 4 **DomLR**829.

557-8 212**Ala**560, 103S649; 101**NJEq** 383, 139A518.

557-12 125**Misc**865, 212NYS300 (assisting another to establish competing business).

558-15 **Md** 148A223.

558-24 273**US**326, 47SCt368, 71L ed663; 35F(2d)117; 206**Cal** 468, 274P966; 67 **CalA**488, 227P787, 790 [quotCJ]; 73 **CalA**748, 239P373; 330 **Ill** 11, 161NE 150; 233**Ky**448, 26SW(2d)13; **Mo** 31SW (2d)7; **MoA** 17SW(2d)597; 250NY410, 165NE829 (construction of implied terms); 217**AppDiv**541, 217NYS256; 220**AppDiv**265, 221NYS512; 50ND866, 198NW816; 116 **Oh**554, 157NE367, 370 [citCJ]; **TexCommnA** 7SW(2d)61; **Tex CivA** 13SW(2d)950; **Can** [1930] 1**Dom LR**127; **Man** [1930] 2**DomLR**587. But see **TexCivA** 7SW(2d)878. [a] (19) When promisee enters into another contract with promisor and third party in which he agrees that third party may perform services due to him, and not of a character requiring performance by promisor, latter is impliedly released from performance. 70**CalA**561, 232P 58. (20) Contract for sale of stock at a minimum price implies that such minimum price continues till modified or revoked. 27**Hawaii**109. [c] **Whatever is necessary for contractor to do in order to accomplish work, which he is obligated to perform,** is parcel of contract, though not specified. 107**WVa**151, 147 SE542.

559-25 273**US**326, 47SCt368, 71L ed 663; 215**Ala**363, 110S801; 216**Ala**303, 113S74; 84 **IndA**264, 151NE137; 219 **MoA**645, 284SW834; **MoA** 17SW(2d) 597; 131**Misc**331, 226NYS656; 299**Pa** 452, 149A705; 116**Tex**356, 291SW860; **TexCommnA** 17SW(2d)772; **TexCivA** 289SW98.

559-26 273**US**326, 47SCt368, 71L ed 663; 117**Tex**439, 6SW(2d)1039, 1042 [quotCJ], 60**ALR**890; **TexCommnA** 276 SW672; **TexCivA** 13SW(2d)950; 69 **Utah**1, 251P1067, 1070 [quotCJ].

559-27 330 **Ill** 11, 161NE150; 242 **IllA** 548; 135**Misc**76, 239NYS585; 35 **OhA** 107, 172NE288; 69**Utah**1, 251P1067, 1070 [quotCJ]. [c] **Implied warranty** to perform certain services in workmanlike manner does not exist where there is express contract. **TexCivA** 21SW(2d) 546.

559-28 **NJ** 148A644 (contract is complete); **TexCommnA** 276SW672; 69**Utah** 1, 251P1067, 1070 [quotCJ]. [a] 11**LaA** 541, 121S617.

560-29½-New. , or because it may be advantageous to one party. 330 **Ill** 11, 161NE150.

560-31 **MoA** 256SW555; 91**PaSuper** 589. [a] (4) Appraisee held to exercise ordinary care as to value which implies highest degree of diligence. **TexCivA** 273SW619.

560-33 319**Mo** 401, 4SW(2d)438.

560-37 7F(2d)470; 8F(2d)227; 13F (2d)607; 14F(2d)362; 16F(2d)688; 19 F(2d)781; 31F(2d)663; 216**Ala**367, 113 S592; 30**Ariz**36, 243P919; 33**Ariz**56, 262P1; 174**Ark**1110, 298SW1032; 86 **CalA**676, 261P539; 96**CalA**145, 273P 825; 100**CalA**252, 279P1059; **CalA** 286 P473; 91**Fla**322, 107S684; **Fla** 126S 142; **Ill** 173NE465; 84 **IndA**264, 151NE 137; 202 **Iowa**1263, 211NW864; 10**LaA** 326, 121S201; 174**Minn**36, 218NW238; 219**MoA**121, 272SW79; 220**MoA**1070, 282 SW74; 221**MoA**999, 295SW847; 86**Mont** 200, 283P202, 67**ALR**1020; 117**Nebr**6, 219NW583; 135**Misc**695, 238NYS178; 136**Misc**386, 240NYS47; 190**NC**563, 130 SE156; 195**NC**274, 142SE12; 196**NC** 408, 145SE787, 61**ALR**821; 54**ND**559, 209NW996; 114 **Okl** 77, 243P232; 120 **Okl** 19, 250P71; 140 **Okl** 247, 282P1090; 121 **Or**677, 257P23; 122 **Or**615, 260P 229; 149**SC**402, 147SE444; **Tex** 293SW 896, 899 [quotCJ]; **TexCommnA** 271SW 886; **TexCommnA** 295SW578; 118**Tex** 268, 12SW(2d)127; **TexCivA** 278SW527, 530, 531 [quotCyc&citCJ]; **TexCivA** 278 SW527, 531 [citCJ]; **TexCivA** 283SW 300, 302 [citCyc]; **TexCivA** 7SW(2d) 878; **TexCivA** 24SW(2d)539; **TexCivA** 25SW(2d)247; 66**Utah**272, 241P1051; 99**WVa**399, 129SE462; 104**WVa**458, 140 SE323; 38**Wyo** 1, 264P93. See also **MoA** 290SW105, 108 [citCJ]. [d] **Person is not presumed to covenant against act of sovereignty.**-167**Minn**453, 209NW323, 46**ALR**816.

561-38 14F(2d)362; 30**Ariz**36, 243P 919; 94**CalA**349, 271P343; **MoA** 10SW (2d)665; 80**Mont**214, 260P711; 31**NM** 120, 241P1027; 122 **Or**615, 260P229; **TexCommnA** 288SW121; **TexCivA** 278 SW527, 531 [citCJ]; **TexCivA** 31SW(2d) 314.

561-40 See also 229**AppDiv**660, 242NYS 676.

561-41½-New. One contracting to pay a proportion of a corporation's income tax for a stated year was held not liable for taxes paid under a retroactive statute subsequently passed, but only for taxes assessed under the statute in force when the contract was made. 84 **IndA**264, 151NE137.

561-43 98**Fla**933, 124S722.

561-44 84 **IndA**264, 151NE137.

561-45 86**CalA**676, 261P539.

561-48 **TexCivA** 278SW527, 530 [cit Cyc].

561-49 41F(2d))336; **CalA** 286P498 [quotCJ]; 224**Ky**284, 6SW(2d)249, 250 [citCJ]; 20 **OhA**317, 151NE808. [a] (1) 100**WVa**515, 131SE12. (3) Contract is entire when promises of both parties are interdependent and relate to same subject. **WVa** 153SE147. (4) Other instances. 223**AppDiv**254, 228NYS139.

561-50 41F(2d)336; **CalA** 286P498 [quotCJ]; 226**Ky**492, 11SW(2d)114; **TexCivA** 291SW692, 694 [citCJ]; 100 **WVa**515, 131SE12. [a] (2) Other instances. 223**AppDiv**254, 228NYS139.

561-51 **CalA** 288P814; 42 **Ida**614, 247 P10, 49**ALR**598.

561-52 29F(2d)331; 154**Wash**236, 281 P996(2dcase).

562-53 146**Va**417, 131SE800. [a] **CalA** 285P714 (exchange of realty and personalty); **CalA** 286P498; **Me** 149A574 (for management of theater on percentage); 177**Minn**487, 225NW441; 20 **OhA**317, 151NE808 (contract between street railway company and union of employees providing terms and conditions of work); 95**PaSuper**247; 5**PaDist&Co** 251; 11**PaDist&Co** 438; 146**Va**417, 131 SE800, [b] 176**Ark**401, 4SW(2d)912; 88**CalA**60, 262P822; 87**Colo** 436, 288P 627 (plaintiff agreed to haul from one place, and defendant to pay for hauling from two places); 48 **Ida**412, 282P 492; 204 **Iowa**881, 216NW258; 253 **Mass**79, 148NE374 (employment contract with provision to set aside percentage of stock of corporation for employee payable from dividends on stock); 258**Mass**540, 155NE639; **NM** 288P1044 (contract to lease drilling equipment); 190**NC**764, 130SE614 (covenants of consent judgment that one half of joint bank account belongs to husband and that husband will execute deeds on wife's request); 21 **OhA**444, 153NE313 (lease held severable as to cropping provisions).

562-57½-New. Although a contract for services in separate writings provides for different prices, payable in installments, and is advisable, it does not follow that it is not a single contract. 258 **Mass**282, 154NE769.

562-57½-New. The caption of a contract is not controlling in determining whether it is severable. 204 **Iowa**881, 216NW258.

562-58 41F(2d)336; **CalA** 286P498; 206 **Iowa**21, 218NW483; 224**Ky**284, 6 SW(2d)249; 253**Mass**79, 148NE374; **NM** 288P1044; **Oh** 170NE870; 20 **OhA**317, 151NE808; 96**PaSuper**273; 146**Va**417, 131SE800, 802 [quotCJ]; 100**WVa**515, 131SE12; **NB** [1925] 3**DomLR**1103 (whether payment due before work completely performed).

563-59 90**CalA**13, 265P370; 48 **Ida**412, 282P492; 223**Ky**619, 4SW(2d)748; 253 **Mass**79, 148NE374; 20 **OhA**317, 151NE 808; **TexCommnA** 292SW863; **TexCivA** 299SW440; **TexCivA** 12SW(2d)620; 146 **Va**417, 131SE800, 802 [quotCJ].

563-60 **TexCommnA** 292SW863; **Tex CivA** 12SW(2d)620; 146**Va**417, 131SE 800, 802 [quotCJ].

563-61 206 **Iowa**21, 218NW483; 146**Va** 417, 131SE800, 802 [quotCJ].

563-62 146**Va**417, 131SE800, 802 [quot CJ].

563-63 41F(2d)336; 90**CalA**13, 265P 370; **Ida** 293P327; 206 **Iowa**1237, 219 NW487; 226**Ky**492, 11SW(2d)114; 232 **Mich**238, 205NW157; **NJCh** 129A399; 53**ND**213, 205NW236, 239 [citCJ]; 124 **Okl** 220, 255P693; 96**PaSuper**273; **TexCivA** 12SW(2d)620; 100**WVa**515, 131SE12.

563-65 90**CalA**13, 265P370; 144**Wash** 620, 258P517; 100**WVa**515, 131SE12.

563-66 100**WVa**515, 131SE12.

563-67 232**Mich**238, 205NW157; 5**Pa Dist&Co** 254, 256 [quotCJ]. But see 53 **ND**213, 205NW236.

564-69 **CalA** 288P814 (installment payable from particular proceeds); 153**Md** 380, 138A255; **Oh** 170NE870.

564-72 10**LaA**237, 120S783.

564-73 103**Conn**624, 131A420; 126 **Okl** 3, 258P906. [a] **Provision of contract for sale of ice business and employment of seller** that seller would not engage in such business in city for stated period of time after termination of employment is unconstitutional. **TexCivA** 284SW615. [b] **Stipulations not construed as conditions precedent** unless compelled by plainly expressed lan-

guage. 170La714, 129S139(2dcase).

564–74½–New. A condition introduced into a contract is deemed to have been inserted for some purpose, which was not to leave the parties in the position they would have been in without the condition. 96Fla337, 118S3.

564–75 CalA 284P244.

564–75½–New. Mutual conditions are to be performed at the same time or as agreed upon by the parties. 213Ala66, 104S5.

564–76 See also 29PortoRico 745.

564–77 76CalA610, 245P455, 458 [cit CJ]; 102CalA536, 283P84 (payment conditioned upon receipt of special fund or designated source); 104Conn374, 132A916; 42Ida349, 245P95, 96 [citCJ]; 339Ill 504, 171NE494 (holding unilateral contract does not become bilateral until conditions precedent are met); 246Mich225, 224NW379; 252NY468, 169NE648; 214AppDiv807, 210NYS742 (where condition on which right to entire proceeds of sale depended never occurred, it could not be given effect); TexCivA 118SW(2d)652. [c] **Parties may make** any unimportant covenant agreement, or duty a condition precedent. 101WVa41, 131SE874.

565–78 76CalA610, 245P455; 42Ida 349, 245P95, 96 [citCJ]; 228Ky176, 14SW(2d)421; 127Me203, 142A735; Tex CommnA 280SW762.

565–81 215Ala412, 111S427; 102CalA 536, 283P84; CalA 284P244; 103Conn 624, 131A420; 104Conn374, 132A916; 226AppDiv391, 235NYS243; 126Okl 3, 258P906. [a] Mo 274SW462 (only consideration for contract to convey); 129 Misc370, 221NYS330. [b] 101CalA186, 281P514 (fixing time for second payment from date of first payment eliminates another condition, as condition precedent); 202Iowa205, 208NW624 (contract to repay sum paid on purchase price of land when sold held payable at stipulated time regardless of whether land sold); 222AppDiv488, 226NYS692.

565–83 221MoA495, 281SW968 (sum payable on contingency is not debt); 126Okl 3, 258P906. [a] (18) 244Mich 46, 221NW274.

565–83½–New. A construction of a provision as a condition precedent to liability under subsequent provisions is disfavored. 129Or357, 277P716.

566–84 TexCivA 293SW313.

566–85 19F(2d)406; 26F(2d)580; 214 Ala674, 108S562; 178Ark775, 12SW(2d) 865; 85CalA757, 260P358; CalA 290P 122; Fla 128S827(2dcase); 333Ill 629, 165NE148; 339Ill 504, 171NE494 (holding option contract not to come within rule against forfeitures); 164La95, 113 S779; 245Mich128, 222NW166; 151Miss 387, 118S195; MoA 284SW191; 86Mont 435, 284P147(2dcase); Mont 287P629; 196NC654, 146SE705; NC 154SE743; SD 225NW218; TexCivA 288SW1111; TexCivA 293SW313.

567–86 218Ala296, 118S513; 85CalA 717, 259P1013; 90CalA122, 265P564; CalA 290P122; 42Ida729, 249P771; NJCh 146A667(2dcase); TexCivA 288 SW1111; TexCivA 293SW313. [c] **If contract specifies grounds for forfeiture,** such grounds are exclusive. TexCivA 297SW1045.

567–87 108Conn707, 145A33, 62ALR 926.

567–88 126Okl 3, 258P906.

567–90 See also 3LaA577.

567–95 173Minn87, 216NW790, 59ALR 1164.

567–96 216Ky637, 287SW994, 998 [quot CJ]; 129Misc288, 222NYS5, 6 [quotCJ]. See also 114Tex496, 272SW126.

567–4 [a] **Strike clause in contract** should receive reasonable, rather than narrow, interpretation. 132Misc704, 230 NYS482.

567–5 103Conn624, 131A420; 224Ky 284, 6SW(2d)249, 250 [citCJ]; 248Mich 104, 226NW838; 102NJL279, 131A879, 880 [citCJ].

568–6 102NJL279, 131A879, 880 [cit CJ].

568–7 103Conn624, 131A420; 250NY 132, 164NE881.

568–8 224Ky284, 6SW(2d)249, 250 [cit CJ].

568–12 215Ala412, 111S427; 103Conn 624, 131A420; 97Fla777, 122S252; 42 Ida349, 245P95, 96 [citCJ]; 164Minn 186, 204NW625; 31NM358, 246P904, 48 ALR366; 221AppDiv174, 222NYS650; 223AppDiv254, 228NYS139; 134Misc234, 236NYS118; 229AppDiv632, 242NYS 329; 196NC116, 144SE694; 132Or515, 286P558; 47RI 210, 132A6.

568–13 213Ala66, 104S5; 215Ala412, 111S427; 42Ida349, 245P95, 96 [citCJ]; 31NM358, 246P904, 48ALR366; 47RI 210, 132A6.

569–14 213Ala66, 104S5; 42Ida349, 245 P95, 96 [citCJ].

569–15 213Ala66, 104S5; 42Ida349, 245P95, 96 [citCJ]; NJCh 129A399.

569–16 42Ida349, 245P95, 96 [citCJ]; 132Or596, 286P554; 47RI 210, 132A6.

569–17 47RI 210, 132A6.

569–18 248Mich104, 226NW838; 47RI 210, 132A6, 7 [citCJ]; TexCivA 27SW (2d)563; 36Wyo 221, 254P134.

569–19 215Ala412, 111S427; 103Conn 624, 131A420; 47RI 210, 132A6, 7 [cit CJ].

569–23 103Conn624, 131A420.

570–25 77CalA393, 246P1081; 164Minn 186, 204NW625; 31NM358, 246P904, 48 ALR366.

570–26 31NM358, 246P904, 48ALR366.

570–28 42Ida349, 245P95, 96 [citCJ]. But see 215Ala412, 111S427.

571–31 132Or515, 286P558.

571–33 36F(2d)213; CalA 273P1070; 31NM358, 246P904, 48ALR366; 47RI 210, 132A6, 7 [quotCJ].

571–34 36F(2d)213; 47RI 210, 132A6, 7 [quotCJ].

571–35 CalA 273P1070; 47RI 210, 132 A6, 7 [quotCJ].

572–38 See also 33PortoRico 19.

572–41 248Mich104, 226NW838.

572–45 81Colo 310, 255P985 [citCJ]; 227AppDiv372, 237NYS453.

572–46 [b] **Whether contract is intended for benefit of third person,** under statute, is question of construction. 99 CalA456, 278P913.

573–48 219AppDiv486, 220NYS340.

573–53½–New. There is no inference that persons other than the original parties whose signatures appear on the contract are sureties or joint promisors. 219AppDiv486, 220NYS340.

573–53¼–New. A third person taking a deed subject to contract becomes privy to the contract. TexCommnA 12SW(2d) 187.

573–54 LaA 126S235 (nondisclosure of principal); 192Wis442, 213NW653. [b] (1) 317Ill 348, 148NE19. [c] **Mere descriptio personæ may be disregarded.**–29F(2d)331.

573–56 44F(2d)152.

573–57 297Pa432, 147A85; 192Wis442, 213NW653.

573–59 261Mass355, 158NE767.

573–60½–New. , or vice versa. 261Mass 355, 158NE767.

574–71 264Mass475, 163NE162.

574–74 Mass 172NE77; 132Misc335, 230NYS332.

574–82 See also 5LaA327. [c] **Statute making party jointly bound severally liable** is inapplicable where third party not signing agreement as contemplated does not, therefore, become jointly bound. 216Ala564, 114S135.

576–6 TexCommnA 24SW(2d)23.

576–7 [b] See also Pa 151A785.

576–8½–New. Under some statutes rights may be enforced either jointly, severally, or jointly and severally as the facts may warrant. 81Mont68, 261P 609.

576–9 77CalA772, 247P611.

577–17 206Iowa21, 218NW483; 319 Mo 899, 8SW(2d)834; Pa 151A785; 13 PaDist&Co 541.

577–18 7F(2d)228.

577–19½–New. The nature of a joint obligation is not affected by the manner of its discharge. 319Mo 899, 8SW(2d) 834.

577–21 319Mo 899, 8SW(2d)834; MoA 280SW54; Pa 151A785; 13PaDist&Co 541.

578–24 319Mo 899, 8SW(2d)834.

578–25 81CalA633, 254P676; 133Okl 196, 271P1026; 144Okl 25, 288P942; [a] **Presumption is rebuttable.**–81CalA 633, 254P676.

578–27 169La29, 124S135; LaA 126S 235.

578–29 319Mo 899, 8SW(2d)834.

578–31 See also MoA 297SW730.

579–45 238Mich617, 214NW179.

579–46 Mass 172NE77.

579–48 [a] (20) Other instances. Pa 151A785.

580–52 206Iowa21, 218NW483, 486 [quotCJ]; 13LaA327, 127S637 (in absence of provision of solidary liability).

580–54½–New. The nature of a joint obligation is not affected by the manner of its discharge by one or both obligors. 319Mo 899, 8SW(2d)834.

580–57½–New. A contract providing that the railroad companies agree to receive and pay for coal shipped is joint and several. 319Mo 899, 8SW(2d) 834.

581–58 43F(2d)985; 220AppDiv160, 221NYS11, 13 [citCyc].

581–59 14F(2d)362; 19F(2d)781; 22 F(2d)384; 41F(2d)12; 43F(2d)985; 202Iowa1263, 211NW864; 206Iowa499, 221NW228; 319Mo 899, 8SW(2d)834; TexCivA 286SW564, 565 [citCJ].

581–59½–New. The place of contracting, for the purpose of ascertaining the law which governs, is determined by the court of the forum. 319Mo 899, 8SW (2d)834.

581–60 [b] (1) 78CalA522, 248P967. (2) 78CalA522, 248P967.

581–61 Contra 33F(2d)415.

582–65 21AlaA438, 109S176, 177 [quot CJ].

582–67 CalA 288P444; 290Pa59, 137 A913. [b] **Where plaintiff agreed to haul from one place,** and defendant agreed to pay for hauling for two places it was a contract as to the one place and an option to haul from other. 87 Colo 436, 288P627.

582–79 38F(2d)948; 104Conn430, 133 A677; 324Ill 346, 155NE343; 88IndA 685, 148NE430; 203Iowa1034, 213NW 929; Iowa 229NW257; 168Minn455, 210NW591; NC 154SE743; 132Or345, 285P259; 47RI 395, 133A621, 133SC281, 130SE870. [a] 104Conn430, 133A677; 100NJEq110, 135A673; 133Misc735, 234 NYS166; 23OhA470, 155NE173; 92Pa Super70 (subscription to bank held directory); 8PaDist&Co 26; 192Wis209, 212NW259.

583–80 104Conn430, 133A677; 324Ill 346, 155NE343; 203Iowa1034, 213NW 929; 133SC281, 130SE870; 192Wis209, 212NW259.

583–81 339Ill 340, 171NE263 (holding that defaulter cannot claim time as essence of contract where other party performs his share); 133SC281, 130SE 870.

583–82½–New. A person may agree for a valuable consideration that a sum be paid to another at the death of the promisor. 142SC531, 141SE156.

583–85 [a] **Contracts take effect** between parties from time of their execution. 33PortoRico 176. [b] **Where provision for cancellation "if purchasers payments due on first of each month are not made on or before first of following month"** held no default till expiration of month in arrears. 13PaDist&Co 463.

583–89 203Iowa1034, 213NW929.

583–90 TexCivA 20SW(2d)108.

584–98 [a] **Rights of parties are determined as of time** of execution of contract. 170Ark58, 278SW645.

584–1 But see 10LaA287, 120S684.

584–1½–New. , or at the time of delivery of a written agreement. 143 Wash297, 255P117.

584–2 10LaA709, 120S898; 296Pa10, 145A591.

584–3 170Minn175, 212NW408; 197 Wis250, 221NW743. [a] 32F(2d)699 (advertising contract with liability commitments); 101CalA694, 282P429 (provision for increase of price per foot for each one hundred-foot unit after reaching certain depth in well drilling); CalA 291P877 (nursing services payable from month to month); 102Conn488, 129A384; 324Ill 254, 154NE889; 200 Iowa479, 203NW247; Iowa 231NW350 (compensation for accountants or percentage of tax refund); 165La312, 115S574; Mass 165NE665 (necessity of payment in cash); 236Mich54, 209NW 804; 168Minn455, 210NW591; 84Mont 158, 274P489; NJ 142A649 (contract providing for installment payments for

heating system); 247NY119, 159NE882 (percentage agreement for securing reduction of income tax); 133Misc220, 231NYS235; 227AppDiv350, 237NYS588 (where compensation for recovery of overpayments on income tax is percentage of amounts refunded, interest on overpayment included in refund must be considered); 240NYS835 (percentage contract); 53ND213, 205NW236; 292Pa516, 141A448 (percentage of refunds on taxes); 96PaSuper57; Tex CivA 6SW(2d)229 (letter held unconditional promise to pay out of proceeds of loan). [b] **Time of payment for services.**–CalA 291P877.

585–5 201 Iowa706, 207NW753; 224Ky353, 6SW(2d)262; TexCivA 278SW939. [a] 201 Iowa706, 207NW753 (contract for hauling material at stated price per load not embracing right of recovery for days there was no hauling to do); Iowa 231NW350; Pa 151A588 (whether "cost plus contract" or "cost contract"); TexCivA 278SW93; TexCiv A 288SW855.

585–7 See also 40F(2d)176 [a] **Reasonable diligence** in making sale or finding market is required where compensation is to be made on sale of article on which services have been performed. 71CalA308, 235P76.

585–7½–New. Where a person contracts to furnish materials for cost plus a stated percentage thereof, he cannot make a profit in excess of that agreed upon and, where he receives an additional commission from the person from whom he procures the materials, he cannot recover the agreed percentage of the materials furnished. 135Wash209, 237P307.

585–7½–New. Where plaintiff agrees to look to a particular fund for payment, his right is limited thereto. 297Pa26, 146A139.

585–8 CalA 288P785; 9LaA44, 118S787; 253Mass239, 148NE456; 225App Div733, 232NYS177; 53ND213, 205NW236; TexCivA 11SW(2d)615; Man [1925] 3DomLR205. [b] (2) Reimbursement for special expenses. Pa 151A573. [c] **Percentage of profit** contracted for must be paid, though profit is substantially more than anticipated. 23F(2d)273.

585–9 [a] **Failure to make deductions held not erroneous.**–CalA 292P179.

585–9½–New. As regards compensation, specifications made by a railroad company that a tunnel was expected to be earth and rock formation constitute a warranty, 21F(2d)1.

585–9½–New. and such specifications are to be construed against the railroad company if ambiguous. 21F(2d)1.

585–9½–New. Where defendant contracted to furnish all necessary labor to operate plaintiff's cannery, and agreed to pay for employer's liability insurance, plaintiff, who paid the premium, could deduct the amount from the contract price. 148Wash509, 269P833.

585–11 TexCivA 289SW723, 725 [cit CJ].

585–12 225AppDiv733, 232NYS177; 115 Okl 31, 241P121; TexCivA 289SW723, 725 [citCJ]. [a] 126Me566, 140A380 (board and care of aged person); 46Philippine176.

585–14 TexCivA 289SW723, 725 [cit CJ].

585–15 43F(2d)418; 41F(2d)608; 45 Ida707, 266P1094.

586–16 41F(2d)608; 262Mass545, 160 NE319.

586–17 164La521, 114S119 (in writing); TexCivA 278SW939.

586–18½–New. Drawings prepared by engineers for the contractee, after discovery that earth formation differed from the specifications, met the contract clause requiring authorization for extra work. 21F(2d)1.

586–18½–New. A subcontractor is entitled to recover the additional cost of a tunnel where the railroad authorized him to proceed on discovering that the formation was different than shown in the specifications. 21F(2d)1.

586–20 [b] **Conversely,** where deductions in amount of work to be done and adjustments therefor are provided in contract, contract price should be reduced for eliminated portion. 227App Div214, 237NYS225.

586–20½–New. Where changes are required to be in writing, parties can waive the requirement. TexCommnA 296SW506.

586–21 218MoA597, 265SW993.

586–33 See also 43F(2d)337.

587–42 125Kan768, 266P60 (facts held to show irrevocable election by city to deliver bonds in payment for price of sewer); Mass 165NE873.

587–44 202 Iowa646, 210NW793; MoA 3SW(2d)286, 287 [citCJ].

588–48 255Mass599, 152NE87.

588–54 34F(2d)367 [citCJ].

588–55 78Mont122, 252P796; 191NC679, 132SE796; 117 Or438, 243P773, 776 [quotCJ]. [a] TexCivA 275SW166, 168 [quotCyc&CJ].

588–58 191NC679, 132SE796; 117 Or438, 243P773, 776 [quotCJinpart].

589–71 191NC679, 132SE796.

589–79½–New. Equity will recognize the right of parties to incorporate forfeiture provisions in their contracts and will respect the rights of a party rightfully declaring a forfeiture. 324 Ill 549, 155NE477.

589–79½–New. Equity to prevent forfeiture will extend the time for performance unless the time has been made the essence of the contract. 47RI 327, 133A85.

589–82 125Misc127, 210NYS169.

589–85 15F(2d)918, 919 [quotCJ]; 213 Ala526, 105S666; 217Ala280, 116S125; Ariz 286P183; 172Ark255, 288SW897; 178Ark1098, 13SW(2d)587; 197Cal 674, 242P713; 156Md346, 144A510, 62ALR 1497; 319Mo 401, 4SW(2d)438; 72Mont 519, 234P475; 129Misc768, 222NYS728; 285Pa299, 132A350; 285Pa299, 132A 350; 85PaSuper245; 89PaSuper153; TexCivA 278SW453, 455 [citCJ]; Tex CivA 293SW199; TexCivA 298SW305, 306 [quotCJ]; 101Vt356, 143A276. [c] **Party may waive provision prohibiting alteration** except in peculiar manner. 41GaA231, 152SE611.

590–86 15F(2d)918, 919 [citCJ].

590–87 153Tenn362, 284SW72. [c] **Sufficiency of notice of modification.**–68 CalA171, 228P873.

590–91½–New. Parties may modify a contract notwithstanding contrary stipulation. 220Ky167, 294SW1048.

590–91½–New. New conditions may not be annexed to the contract by one party after receiving benefit thereunder. 223Ky668, 4SW(2d)686.

590–92 129Misc768, 222NYS728.

590–93 But see 205 Iowa483, 218NW 325.

590–95 110Conn234, 147A709 (contractor's attempt to deduct from subcontractor's bid portion of cost of bond held not to alter contract); TexCivA 270 SW1109; TexCivA 13SW(2d)923. [a] **Certainty.**–133 Okl 23, 270P854.

590–96 121 Okl 132, 247P967; 285Pa 305, 132A368.

590–98 121 Okl 132, 247P967.

590–2 204 Iowa561, 215NW628 (separate independent undertaking is not modification).

590–3½–New. or from subsequent agreement or conduct of parties. 101 WVa191, 132SE726.

591–6 45 Ida707, 266P1094; 285Pa299, 132A350; 98PaSuper134; 153Tenn362, 284SW72; TexCivA 299SW348; Tex CivA 2SW(2d)347.

591–7 202 Iowa1270, 211NW860; 24 OhNPNS145 (where parties are unable to agree upon modification of price, contract price continues); 129 Or161, 276 P265. [c] **Joint contract.**–77Colo 501, 238P50.

591–9 13F(2d)533.

591–10 129 Or161, 276P265; 39Wyo 84, 270P167. [b] **Acquiescence with knowledge of facts may imply assent and give rise to an obligation.**–233 IllA143.

592–15 14F(2d)466, 469 [quotCJ]; 213 Ala274, 104S645, 42ALR981; 34Ariz68, 267P794; 101CalA470, 281P1062; 94 Fla550, 114S375; 224 IllA187; 235 IllA 35; 254 IllA587 (written modification of oral contract); 255 IllA21; 240Mich 23, 214NW951; MoA 27SW(2d)473 (contract executed by one party); 127Misc 498, 216NYS616, 617 [citCJ]; 229App Div2, 240NYS749; TexCommnA 298SW 538; TexCivA 13SW(2d)923; Utah 267 P1020. See also 213Ala612, 105S802. But see Vt 150A148. [a] **Consideration for modifying agreement** must be reciprocal. 235 IllA35.

592–16 But see Wash 291P725.

592–17 240Mich23, 214NW951.

592–19 213Ala526, 105S666; Ala 130S 80; 21AlaA524, 109S555; 82Colo 13, 257P247.

592–20 156Md346, 144A510, 62ALR 1497; 220AppDiv244, 221NYS396; 146 Wash328, 262P645.

592–21 221MoA1037, 295SW803. See also 213Ala526, 105S666.

593–27 82Colo 13, 257P247, 256 [cit CJ].

593–28 MoA 27SW(2d)473. [a] **Where unexpected obstacles arise making performance onerous,** subsequent agreement providing for extra compensation for meeting new obligations is not without consideration. 224 IllA187.

593–30 82Colo 13, 257P247; 329 Ill 637, 161NE118.

593–31 13F(2d)533; 265Mass513, 164 NE382.

593–34 213Ala274, 104S645, 42ALR981; 213Ala526, 105S666, 668 [citCJ]; 219 Ala65, 121S59; 224 IllA187 (where one party refuses to perform except on condition which other agrees to); TexCivA 11SW(2d)338; 196Wis25, 219NW373.

593–35 172Ark1088, 291SW795; 156Md 346, 144A510, 62ALR1497. [a] **Abandonment of former contract by acting on substituted contract changing obligations of both parties** is sufficient consideration for new agreement. 221 MoA1037, 295SW803.

593–36 213Ala612, 105S802 (mutual obligations assumed); 197Cal 674, 242 P713; 82Colo 13, 257P247, 256 [citCJ]; 155Miss411, 124S472; 127 Or523, 272P 890.

593–37 50RI 75, 145A97.

593–37½–New. It seems that if one of the parties does not assume any obligation or release any right, a promise by the other is nudum pactum and void. 213Ala612, 105S802.

593–37½–New. Where a contractor refuses to proceed with a contract made unduly onerous by circumstances not contemplated when the contract was made, and the promisor induces him to proceed by a promise of additional compensation, it cannot be said that there is no consideration for such promise. 106Conn642, 139A106, 55ALR1319.

593–39 39F(2d)348; 213Ala274, 278, 104S645, 42ALR981 [citCJ]; 34Ariz 68, 267P794, 797 [citCJ]; 172Ark255, 288SW897; 172Ark1088, 291SW795; 173Ark147, 293SW50; 177Ark31, 5SW (2d)726; 41GaA231, 152SE611 (executed contract); 329 Ill 637, 161NE118; 334 Ill 642, 166NE455; 224 IllA187; 231Ky630, 21SW(2d)1006 (where written contract not required); 233Ky27, 24SW(2d)917; 161La111, 108S303; 127 Me442, 144A207; 265Mass513, 164NE 382; 248Mich593, 227NW720; Mich 233 NW329; MoA 299SW105; 101NJEq757, 139A223 (oral modification of provision as to consideration); 291Pa335, 140A139; 292Pa122, 140A774; 298Pa 568, 148A849; 85PaSuper245; Tex CommnA 288SW161; TexCivA 278SW 453; TexCivA 3SW(2d)911 (contract determinable at option of either party); 101Vt356, 143A276; Vt 150A148; 39Wyo 84, 270P167.

594–41 82Cal 793, 256P296; 73CalA 643, 238P1085; 75CalA737, 243P686; CalA 261P729; 101CalA470, 281P1062; CalA 290P613.

594–42 52ND366, 203NW195.

594–44 117 Okl 15, 244P164; 127 Okl 10, 257P382; 128 Okl 286, 262P672 (statute construed); 135 Okl 198, 274 P886; 138 Okl 126, 280P598; 37 OklACR 417; 45 OklACR310.

594–45 78Mont532, 255P1052; 137Misc 398, 241NYS194.

594–46 CalA 290P613.

594–48 75CalA737, 243P686.

594–50 30F(2d)30; 27Hawaii399; Tex CivA 278SW453, 455 [citCJ].

594–50½–New. The rule is otherwise

in some jurisdictions. 118 Okl 41, 246 P381.

595-53 235 IllA35; 253 IllA333; 218 AppDiv259, 218NYS135; 219AppDiv615, 220NYS409.

595-59 294Pa212, 144A93.

595-60 219AppDiv615, 220NYS409; 225 AppDiv309, 232NYS599.

595-61 213Ala612, 105S802; 34Ariz68, 267P794; 172Ark255, 288SW897; 202 Iowa1270, 211NW860; 171Minn461, 214 NW288; 122 Or360, 257P685; Tex CommnA 23SW(2d)333.

595-61½-New. Where an architect's plans are changed by the owners to increase the cost of the building after being drawn as contemplated by the parties in the first instance, the architect is entitled to compensation, notwithstanding a provision limiting compensation if the cost exceeded a certain amount. 95CalA75, 271P1114.

595-62 172Ark255, 288SW897; CalA 290P613; 93Fla781, 113S570; 202 Iowa 1270, 211NW860; Iowa 229NW257; 171 Minn461, 214NW288; 112 Okl 81, 239P 622; 37 OklACR417; TexCommnA 23 SW(2d)333; Utah 291P303; 39Wyo 84, 270P167.

596-63 42 Ida90, 245P78; 212Ky830, 280SW147; 253Mass239, 148NE456; 171Minn461, 214NW288; TexCommnA 23SW(2d)333; 148Wash188, 268P151. [b] **Original contract is not destroyed,** but only modified. 285Pa299, 132A350.

596-64 TexCommnA 23SW(2d)333.

596-64½-New. Where a contract to furnish logs to defendant had been modified and plaintiff put on the job of cutting and hauling defendant's timber, defendant was held to be within his rights in ordering plaintiff to cease work because of oversupply of logs. 161 La111, 108S303.

596-64½-New. After modification of a contract to furnish logs, plaintiff is entitled to no damages for alleged breach of contract after his refusal, without cause, to haul timber as directed by defendant. 161La111, 108S303.

596-66 83Colo 99, 262P921.

597-71 42 Ida90, 245P78.

597-79 29F(2d)228 [certiorari den 279 US838, 49SCt252, 73L ed985(8thcase)]; 35F(2d)110; 42F(2d)449; 217Ala27, 114S409; 31Ariz239, 251P891; 33Ariz 294, 264P471; 34Ariz68, 267P794; 173 Ark147, 293SW50; 83Colo 109, 262P 1020; 241 IllA102; 256 IllA305; 84 IndA 666, 151NE338, 836; IndA 172NE550; 206 Iowa1158, 221NW785; 207 Iowa 692, 223NW395; 228Ky569, 15SW(2d) 423; 210Ky806, 276SW803; 230Ky307, 19SW(2d)976; 169La893, 126S228; Mass 170NE467; Mass 171NE466; 232 Mich630, 206NW359; 235Mich481, 209 NW576; 236Mich147, 210NW264; 308 Mo 453, 273SW95; 319Mo 401, 4SW(2d) 438; MoA 291SW190, 192 [citCJ]; 250 NY461, 166NE167; 117 Okl 156, 246P 833; 119 Okl 225, 249P420; 120 Okl 130, 247P673; 123 Okl 186, 252P37; 126 Okl 28, 258P278; 131 Okl 166, 268 P195; 132 Okl 4, 268P1110; 134 Okl 60, 272P420 (whether or not law requires contract to be in writing); 118 Or62, 216P743, 245P1083; 50SD436, 210NW 671; SD 227NW438; SD 228NW397; TexCivA 5SW(2d)215; TexCivA 22SW (2d)736(2dcase); 70Utah124, 258P342, 64ALR368; 142Va769, 128SE55; 145 Wash582, 260P1074; 106WVa513, 146 SE51; 187Wis640, 205NW402; 197Wis 250, 221NW743. See also Mo 8SW(2d) 941 (waiver of provision of written contract cannot be based on prior occurrences).

597-80 217Ala27, 114S409; 31Ariz239, 251P891; 173Ark1180, 292SW135; 179 Ark533, 17SW(2d)319; 73CalA769, 239 P358; 83Colo 109, 262P1020; 331 Ill 622, 163NE448; MoA 291SW190, 192 [citCJ]; MoA 9SW(2d)856; 137Misc 648, 244NYS145; 119 Okl 225, 249P420; 123 Okl 186, 252P37; 126 Okl 28, 258P 278; 127 Okl 141, 259P838 (by statute); 132 Okl 4, 268P1110; 118 Or62, 216P743, 245P1083; 295Pa146, 144A 904; 7PaDist&Co 308; TexCivA 5SW (2d)215; Utah 290P979; 142Va769, 128 SE55; 104WVa449, 140SE285, 286 [cit CJ]. But see TexCivA 264SW551. [c] **Rule does not apply** where contract was induced by fraud. 309Mo 638, 274SW 815. [d] **If acquiesced in after execution,** written contract merges prior oral agreement, though it contains other provisions. 234Ky95, 27SW(2d)675.

598-81 31Ariz239, 251P891; 195NC 328, 142SE27; TexCivA 286SW958.

598-83 309Mo 638, 274SW815 (rule of merger inapplicable where contract induced by fraud); MoA 3SW(2d)263; Utah 290P979.

598-83½-New. Merger depends on intention of the parties as shown by their conduct or from the writing itself. 291 Pa165, 139A745.

598-84 32F(2d)23.

598-86 29F(2d)228 [certiorari den 279 US838, 49SCt252, 73L ed985(8thcase)]; 169Ark169, 273SW396.

598-88 MoA 17SW(2d)591. [a] **Inconsistent subsequent agreement** covering entire subject matter of earlier contract stands as sole agreement between parties. 46 Ida387, 268P35. [b] **Where parties entering contract intend it to rest in parol** a subsequently executed written agreement in part performance of it does not supersede it. Utah 290P 979.

598-89 Fla 126S362.

598-90 200 Iowa809, 202NW530; 155 Wash564, 285P433.

598-91½-New. The entire agreement must be considered in order to show the intent of the parties in determining whether one contract is merged in another. MoA 17SW(2d)591.

598-95 [a] **Any rights under preliminary contract** may be enforced without further execution of additional agreements. 229AppDiv450, 242NYS396.

598-96½-New. Where, after recommending work, a guaranty is to perform in satisfactory workmanlike manner, it means to do so under the then existing conditions. DC 26F(2d)975.

598-98 43F(2d)51; 171Ark359, 284SW 50; 226Ky109, 9SW(2d)1091; 156Md 346, 144A510, 62ALR1497; 172Minn 539, 216NW248 (new contract accompanied by release of old held substitute for, and not mere supplement to, its predecessor); NJ 141A10 191NC679, 132SE796; TexCivA 13SW(2d)713.

599-2 205 Iowa1351, 219NW530, 60 ALR1024.

599-9 290Pa348, 139A114, 117 [quot CJ].

599-12 [a] **Mutual provisions of contract** apply only to situations arising during term of contract. 26F(2d)901.

599-14 [b] 13LaA285, 127S749 ("twelve months and until thirty days' written notice"); 293Pa39, 141A732 (contract to furnish drainage till coal in mine was worked out); TexCivA 299 SW279.

600-17½-New. Where both parties carry forward a contract limited in time and recognize it as continuing, in certain particulars each is bound to the extent that he has so accepted it. 238 Mich617, 214NW179.

600-17½-New. "Termination" and "cancellation" of a conditional contract mean to abrogate so much of it as remains unperformed, doing away with an existing agreement, while "rescission" means restoration of the parties to their former position. 98CalA482, 277P152.

600-19 73Mont339, 237P209 [quotCJ].

600-21 116 Or253, 240P886, 889 [cit CJ].

600-21½-New. An agreement to cancel or rescind a contract at a future day if certain things are not done is valid. TexCivA 289SW433.

600-21½-New. An agreement for cancellation of a contract did not constitute release or cancellation where there was no performance of the conditions of the agreement. Mass 166NE713.

600-22 36F(2d)595; 213Ala526, 105S 666; 174Ark337, 295SW46; 178Ark 1098, 13SW(2d)587 (capacity to agree); 98CalA482, 277P152; 102CalA213, 283 P107; 90Fla787, 108S211; 128Kan390, 277P796; MoA 298SW1073; 73Mont 339, 237P209; 129Misc768, 222NYS728; 192NC199, 134SE488; 117 Or328, 243P 560.

600-23 174Ark337, 295SW46; 12LaA9, 125S77; 291Pa335, 140A139.

600-24 73Mont339, 237P209.

600-27 Contra 174Ark337, 295SW46.

601-28 77CalA268, 246P566; CalA 290 P613; 334 Ill 642, 166NE455; 339 Ill 340, 171NE263; MoA 279SW226; 137 Misc398, 241NYS194; 120 Okl 202, 251 P54; 297Pa399, 147A90; TexCommnA 288SW161; TexCivA 274SW643; Vt 150A148. [a] **In Oklahoma.**-135 Okl 198, 274P886.

601-29 MoA 279SW226.

601-30 CalA 265P957; 95CalA99, 272 P330; 192NC199, 134SE488.

601-37 213Ala526, 105S666; 194Cal 574, 229P327; CalA 265P957; 97Fla 848, 122S513 (one party cannot rescind contract); Ill 173NE80; 206 Iowa1090, 221NW774; 225Ky175, 7SW(2d)1060; 228Ky407, 15SW(2d)240; 162La73, 110 S93; 73Mont339, 237P209; 192NC312, 135SE34; 117 Okl 199, 246P225; 116 Or253, 240P886, 889 [citCJ]; 122 Or 124, 256P652; TexCommnA 7SW(2d) 872; 187Wis34, 203NW746.

601-38 73Mont339, 237P209; 116 Or 253, 240P886; 6PaDist&Co 439.

601-39 116 Or253, 240P886; 6PaDist& Co 439.

601-41 208Ky676, 271SW1070 (cancellation determined in light of all circumstances according to parties' understanding of their words as shown by their conduct). [a] **Letters** between business men not read with technical accuracy, matter determined on what writer understood and intended recipients to understand. 208Ky676, 271SW 1070.

601-42 102CalA53, 282P519 (notice and subsequent conduct of parties); 206 Iowa1090, 221NW774.

601-43 216Ala199, 112S819, 53ALR173.

602-48 19F(2d)157, 158 [citCJ]; 216 Ala199, 112S819, 821 [citCJ], 53ALR 173; Iowa 202NW836, 838 [citCJ]; 51 ND66, 199NW138. But see TexCivA 275SW307.

602-49 216Ala199, 112S819, 53ALR173; 217Ala216, 115S389.

602-51 213Ala526, 105S666; 174Ark 337, 295SW46; MoA 298SW1073, 1074 [citCJ]; MoA 27SW(2d)473; 111 Okl 269, 239P640, 642 [quotCJ]; Tex CommnA 288SW161.

602-52 222MoA524, 293SW476; 111 Okl 269, 239P640, 642 [quotCJ]. See also MoA 298SW1073.

602-52½-New. Agreement for termination of the well-drilling contract on payment of certain sum to plaintiff is valid and enforceable. TexCivA 18SW(2d) 679(1st case).

602-54 117 Okl 199, 246P225; 193Wis 80, 213NW637.

603-55 35GaA262, 133SE53.

603-65 Conn 129A276, 278 [citCJ]; 205 Iowa845, 216NW737 (rescission of indorsement of note); 173Minn75, 216NW 545; 192NC199, 134SE488; TexCivA 275SW166, 168 [quotCyc]; 152Wash 131, 277P453; Wyo 256P663. [b] **Where substituted agreement is acted on,** former contract is abandoned. 221 MoA1037, 295SW803.

604-66 248Mich606, 227NW784.

604-72 TexCivA 278SW939. [b] **Option to "suspend" operations** does not include right to discharge architect on suspension. TexCivA 278SW939.

604-74 195NC274, 142SE12.

605-76 207 Iowa820, 221NW194.

605-78 164Minn167, 204NW644; 165 Minn250, 206NW405 (trilateral contract terminable at will and renunciation by any party terminates it as to all).

605-80 207 Iowa820, 221NW194; MoA 10SW(2d)668 (option must be exercised promptly). See also 92CalA575, 268P 939. [b] (2) Contract for any or all of fifty-two weeks' service may be suspended by advertiser after one week's service. 8PaDist&Co 26.

606-89 116Nebr729, 218NW753, 756 [citCJ].

606-90 309Mo 276, 274SW699; 137Misc 570, 244NYS44; 124 Or267, 264P357; TexCommnA 283SW154.

606-91 98CalA482, 277P152; 223Ky16, 2SW(2d)1031; TexCommnA 23SW(2d) 333.

606-93 223Ky16, 2SW(2d)1031; Tex CommnA 23SW(2d)333.

606-95 101CalA436, 281P692. See also MoA 10SW(2d)668.
607-97 271US536, 46SCt613, 70L ed 1074.
607-98 3LaA319, 322 [citCJ]; 122 Or 230, 257P801, 803 [citCJ]; 129 Or357, 277P716.
607-2½-New. Where a provision that a contract shall become null and void on a party's default is not inserted for the benefit of both parties, "void" will be construed as "voidable" at the favored party's election. 129 Or357, 277P716.
607-9 271US536, 46SCt613, 70L ed 1074.
607-13 309Mo 276, 274SW699.
607-17 244 IllA61 (held sufficient); 92 PaSuper70.
607-18 But see 101CalA436, 281P692.
607-19 233Mich587, 207NW905 (notice of relinquishment of exclusive license for use of patented article held sufficient).
607-21 216Ala562, 114S132, 134 [cit CJ].
607-22 216Ala562, 114S132, 134 [cit CJ] (letter).
608-26 93Fla46, 111S532, 536 [quot CJ].
608-30 223Ky16, 2SW(2d)1031; 221 MoA639, 283SW747, 749 [citCJ].
603-31 221MoA639, 283SW747, 749 [cit CJ]; MoA 10SW(2d)668.
608-32 124 Or267, 264P357.
608-35 CalA 273P161.
608-38 101CalA436, 281P692.
603-39 NC 154SE743; 122 Or230, 257 P801, 803 [citCJ].
608-40 122 Or230, 257P801, 803 [cit CJ].
608-41 204 Iowa1208, 212NW726, 729 [citCJ].
608-42½-New. Forfeitures of contracts are not barred. 215Ky644, 286SW846.
608-42¾-New. A provision for forfeiture and avoidance of a contract on default does not prevent the contract from remaining in effect to protect the rights of innocent parties. 100CalA302, 279P 1024.
603-43 TexCivA 21SW(2d)552.
608-44 See also 211Ky427, 277SW497.
603-45 312Mo 30, 278SW747, 752 [quot CJ].
609-48 312Mo 30, 278SW747, 752 [quot CJ].
609-49 216Ala562, 114S132, 134 [cit CJ]; 46 Ida55, 266P433; 321 Ill 450, 152NE133; 37 OklACR313.
609-50 216Ala562, 114S132, 134 [cit CJ]; 37 OklACR313.
609-51 CalA 290P122; 137Misc82, 242 NYS729 (law does not favor forfeitures); 134SC532, 133SE440; 116Tex 160, 288SW115, 47ALR876.
609-54 216Ala562, 114S132, 134 [cit CJ]; 39GaA528, 147SE725. See also 201 Iowa690, 207NW790, 791 [citCJ].
609-55 216Ala562, 114S132, 134 [cit CJ]; 77Colo 539, 238P38; 123 Or539, 259P419, 420, 262P938 [quotCJ]; 116 Tex160, 288SW115, 47ALR876; Ont [1928] 4DomLR704. See also 201 Iowa 690, 207NW790, 791 [citCJ].
609-56 123 Or539, 259P419, 420, 262P 938 [quotCJ]. See also 201 Iowa690, 207NW790, 791 [citCJ].
609-66 See also 92CalA457, 268P490.
610-78 69CalA447, 231P604 (innocent recipient of gift procured through fraud of third person cannot set up his innocence as defense in action by donor against such third person to rescind for fraud).
610-84 133Misc229, 231NYS544. [d] **Contract may be set aside if for non-existent consideration.** 192NC771, 136 SE129.
610-89½-New. A contract cannot be rescinded merely because it later appears that it is a bad bargain. 230Ky94, 18 SW(2d)887.
610-89¾-New. The mere fact that a contract may become burdensome does not authorize a party thereto to avoid it. 296Pa40, 145A686.
611-92 72CalA725, 238P150; Fla 129 S777; 222Ky132, 300SW327; 149Md 385, 131A815; 247Mich109, 225NW562; 73Mont456, 236P1093; 122 Or230, 257 P801, 803 [citCJ].
611-95 173Ark872, 294SW11; 181Ark 1146, 28SW(2d)329; 205Cal 386, 270P 934; 71CalA272, 235P455; 76CalA278, 244P916; 95CalA327, 272P772; 40GaA 559, 150SE600; 121Kan860, 250P273; 212Ky97, 278SW586; 235Ky54, 29SW (2d)581; 1LaA44; 164Minn367, 205NW 262; 80Mont82, 258P1085 (what constitutes fraud under statute); 193NC769, 138SE143; NC 153SE858; 127 Okl 141, 259P838; 132 Okl 70, 269P255; 116 Or 641, 242P613; TexCivA 278SW943; Tex CivA 281SW646; TexCivA 297SW623; TexCivA 299SW276; TexCivA 3SW(2d) 824, 825 [citCJ]; Alta [1929] 4DomLR 107; Sask [1925] 3DomLR1090. See also 134Misc614, 235NYS617. But see 102NJEq183, 140A11 (remedy at law for damages, not rescission). [a] (2) Rescission of contract for fraud is based on theory that contract is nonexistent for lack of true assent. 242NY346, 152 NE110, 45ALR1041. [b] TexCivA 278 SW943.
611-98 See also 77CalA219, 246P143; 131 Or185, 282P546.
611-98½-New. Misrepresentation of law is not ground for rescission unless special circumstances make it a misrepresentation of fact. Sask [1928] 3DomLR 295.
611-98¾-New. Injury. Rescission will not be enforced for fraud unless the complaining party has been injured. TexCivA 272SW550.
611-3 76CalA278, 244P916; IndA 158 NE629; 200 Iowa527, 202NW119; Mass 168NE174(2dcase); Mass 172NE204; 234Mich385, 208NW609, 611 [citCJ]; 124Misc906, 210NYS320; 132 Okl 70, 269 P255. [a] **Action for price may be maintained at law or in equity.**–200 Iowa527, 202NW119.
611-5 22F(2d)680; 234Mich385, 208 NW609, 611 [citCJ]; 116 Or641, 242P 613.
611-6 285Pa472, 132A579, 584 [quot CJ].
611-13 TexCivA 283SW203.
612-16 89CalA153, 264P496; 51Nev437, 279P32 (whether mistake unilateral or bilateral); 132Misc583, 230NYS273; 134 SC324, 132SE616.
612-19 But see 79CalA601, 250P581; 165Minn433, 206NW711.
612-19½-New. or mistake of one party and the conduct of the other amounting to fraud in knowingly taking advantage of the mistake, 132Misc583, 230NYS273.
612-21 But see 36F(2d)323.
612-22 333 Ill 636, 165NE205; Man [1930] 2DomLR587.
612-26 Ala 129S43; 155Miss411, 124S 472.
612-31 Va 153SE659.
612-33 80Mont82, 258P1085; 124 Okl 220, 255P693.
612-34 Va 153SE659.
612-35 290Pa67, 138A85; TexCivA 10 SW(2d)776.
612-36½-New. Interference by the seller with the buyer's right to remove a building does not constitute failure of considerations entitling the buyer to cancellation of notes given for the purchase price. TexCivA 292SW909.
613-38 120Kan602, 245P107.
613-42 82Colo11, 256P639, 52ALR1172; 246 IllA100; 9LaA367, 119S282; 115 Nebr177, 212NW39; NJ 148A626; 128 Misc690, 219NYS252; 122 Or230, 257P 801; 290Pa67, 138A85; TexCommnA 25 SW(2d)808.
613-43 34GaA19, 128SE70; 29Porto Rico 901 (Civ. Code § 1091).
613-44 115Nebr177, 212NW39; Tex CivA 6SW(2d)445.
613-47 13F(2d)758; 229Ky361, 17SW (2d)246; 153Md655, 139A534; 136Misc 890, 241NYS288; 195NC799, 143SE851; 296Pa40, 145A686; TexCommnA 15SW (2d)548; TexCivA 29SW(2d)441. [a] **Nonperformance of promise to do something in future** without fraudulent intent is not sufficient to authorize rescission. Fla 126S293.
613-48 99CalA524, 279P177; TexCivA 17SW(2d)1083.
613-50 229Ky361, 17SW(2d)246.
613-51 229Ky361, 17SW(2d)246.
614-59 72CalA202, 237P386; 95CalA 481, 272P1106; 102CalA691, 283P372 (2dcase); 205 Iowa1019, 218NW611, 613 [citCJ]; 170La57, 127S363; 246Mich 465, 224NW630; 170Minn430, 212NW 908 [citCJ]; 217AppDiv107, 216NYS 191; 122 Or230, 257P801; TexCommnA 276SW187. [a] **Violation similar to that complained of.**–89CalA462, 265P287.
614-65 27 OhA208, 161NE232 [quotCJ perWilliams.J].
614-68 93Fla46, 111S532, 536 [quotCJ].
614-72 13F(2d)758.
614-73 5F(2d)636. But see 128Misc 690, 219NYS252; TexCivA 17SW(2d) 1083.
615-76 127Misc604, 217NYS284.
615-81 MoA 24SW(2d)715; TexCivA 6SW(2d)445; 152Wash226, 277P982. [a] **Motive and intention of partial breach are material,** and surrounding circumstances will be considered to ascertain same, on question of right of other party to rescind severable contract. TexCivA 6SW(2d)445.
615-82 NJ 148A626.
615-85 40Wyo 226, 278P76. [a] **Absolute and unqualified refusal** is required to authorize rescission. 243Mich470, 220 NW798.
615-86 13F(2d)758; 97CalA354, 275P 881; 93Fla46, 111S532, 536 [quotCJ]; 97Fla848, 122S513; 116 Or222, 240P873; TexCommnA 276SW187; 36Wyo 442, 256P662, 663 [citCJ]; Sask [1927] 3 DomLR394.
615-87 122 Or124, 256P652.
615-88 122 Or124, 256P652. See also 203Cal 1, 262P1087.
615-89 97CalA354, 275P881; IndA 169 NE333. [c] **Acts held insufficient to show repudiation.**–Mere refusal to pay money, even when money is due, does not warrant rescission. 127Me203, 142A735.
615-91 127Misc604, 217NYS284.
616-94 6F(2d)721; 16F(2d)694; 32F (2d)680; 71CalA617, 236P349; Fla 129 S759; 123Kan169, 254P326; Mont 289 P1028; 82NH462, 136A370, 375 (quot CJ); 242NY346, 152NE110, 45ALR1041; 124 Okl 220, 255P693; 117 Or328, 243P 560; TexCivA 281SW616; 212Ky163, 278SW615. [b] **Delay caused by negotiations looking to amicable settlement** does not preclude rescission. 242Mich 646, 219NW668. [c] **Failure to rescind within reasonable time is plenary evidence of election** not to do so. NJCh 150 A834.
616-95 204Cal 381, 268P624; 95CalA 481, 272P1106; 242NY346, 152NE110, 45ALR1041.
616-96 253Mass205, 148NE609, 41ALR 658. [a] **Delay bars equitable remedy where it will cause loss** to others equally innocent. 212Ky163, 278SW615.
616-97 83CalA725, 257P175; 147Wash 140, 265P468.
616-98 42F(2d)76; 51ND1, 198NW546.
616-99 Ala 130S554; Ala 130S383; 175 Ark73, 298SW495; 99CalA283, 278P462; 122Kan43, 251P429, 430 [citCJ]; 123 Kan169, 254P326; 123Kan183, 253P 1093; 223Ky510, 4SW(2d)403; 150Md 333, 134A124; 240Mich569, 215NW772; 250Mich419, 230NW188; Mich 233NW 339; Miss 130S745(2dcase); 197NC305, 148SE434; 51ND1, 198NW546 (prompt action required by statute); 116 Or641, 242P613; 120 Or607, 253P531; TexCivA 281SW646; TexCivA 291SW587; Tex CivA 1SW(2d)330; 142Wash555, 253P 788; Wash 288P916; Sask [1925] 3Dom LR1090 (rescission held proper on prompt repudiation).
616-1 5F(2d)873; 27F(2d)1; Ala 130S 383; 173Ark872, 294SW11; 175Ark73, 298SW495; Fla 126S356; 251 IllA585; 122Kan43, 251P429, 430 [citCJ]; 123 Kan169, 254P326; 123Kan183, 253P 1093; 123Kan746, 256P997; 218Ky825, 292SW511; 240Mich569, 215NW772; NJCh 140A574; 242NY346, 152NE110, 45ALR1041; 223AppDiv175, 228NYS54; 127 Okl 141, 259P838; 120 Or607, 253P 531; 130 Or590, 280P511; TexCivA 281 SW646; TexCivA 297SW555; TexCivA 29SW(2d)893; Ont [1929] 1DomLR239. [e] **Three months** after discovery held unreasonable delay. 221Ky131, 297SW 1114. [f] **One month** after discovery has been held not an unreasonable delay. 111Conn269, 149A785. [g] **Time held unreasonable.**–NJCh 150A834 (two years).
617-2 [a] **Knowledge which requires inquiry to be made** must be such that to person of ordinary prudence further

inquiry would not only be suggested, but imperatively demanded. 71CalA617, 236P349. [b] **Misstatement of one material fact** should induce person interested to investigate every other representation inducing him to enter into the contract. 71CalA617, 236P349.

617-4 122Kan43, 251P429; 238Mich 236, 213NW133, 134 [citCJ]; **NJCh** 147A193(2dcase); 95PaSuper223.

617-5 71CalA617, 236P349 (notice that value of collateral given as security for note taken in part payment for sale of hotel has been misrepresented to vendor is not notice that certain representations as to operation of the hotel at loss were false and fraudulent); **Mich** 233NW339. [c] **Notice of facts** putting man of ordinary intelligence on inquiry is equivalent to knowledge of facts. 5 F(2d)873.

617-7 **Ala** 130S383; 92CalA715, 268P 948; 150Md333, 134A124; **Mich** 233NW 339.

617-7½-New. Under statutes in some jurisdictions requiring prompt rescission for fraud, the right to rescind is waived by unexcused delay, although delay is not injurious or prejudicial. 51ND1, 198NW546.

618-15 36F(2d)323; **Fla** 126S356.

618-16 103NJEq121, 142A441.

618-17 [a] **In New York** rescission for nonperformance may be made at any time within period of limitations. 242 NY346, 152NE110, 45ALR1041.

618-20 240Mich621, 216NW431; 12 LaA431, 125S191(2dcase); **Sask** [1925] 3DomLR418 (must disaffirm and not accept benefits).

618-21 **CalA** 287P547; 34GaA19, 128 SE70; 240Mich621, 216NW431.

618-22 69CalA447, 231P604 (notice held sufficient); **CalA** 287P547; **Tex CivA** 294SW223.

618-23 **Mass** 166NE828 (filing bill to compel defendant to return note and mortgage). [a] (1) **Illustrations.**-71 CalA617, 236P349.

618-24 212AppDiv792, 209NYS727.

618-24½-New. Fact that notice of rescission need not generally specify ground does not permit false ground assigned to be treated as surplusage. CalA 287P547.

618-24¾-New. Notice of intention to rescind on one ground precludes resort to different ground. **CalA** 287P547.

618-25 **CalA** 293P140.

618-26 84Mont521, 277P14 (must be brought promptly).

619-32 202Cal754, 262P713.

619-35½-New. Where contract involves mutual continuing duties on part of both parties and one breaches but does not repudiate contract, other cannot rescind without giving notice and opportunity to perform. **Ala** 130S383.

619-41 16F(2d)694; 19F(2d)410; 32F (2d)680; 41F(2d)484; **Ala** 130S383; 69CalA447, 231P604; 77CalA268, 246P 566; 82Colo 13, 257P247; 48 Ida611, 284P257; 318 Ill 323, 149NE256; 321 Ill 354, 151NE871; 200 Iowa952, 205NW 744; 204 Iowa223, 215NW232; 207 Iowa1038, 221NW918; 229Ky361, 17 SW(2d)246; **MoA** 277SW50; **MoA** 21 SW(2d)214; **MoA** 248SW(2d)206; 244 NY73, 154NE826; 128Misc690, 219NYS 252; 133SC472, 131SE22; **TexCommnA** 280SW571; 144Wash229, 257P632, 634 [citCJ]. But see 252Mass291, 147NE 872; 251NY1, 166NE783.

619-43 90CalA715, 266P367; **Tex CommnA** 280SW571.

619-44 27F(2d)1; 97Fla1085, 1198 326; 321 Ill 354, 151NE871; 212Ky97, 278SW586; 197NC305, 148SE434; 50 ND123, 195NW300.

620-45 **BC** [1925] 3DomLR1121. [b] **Substantial restoration** is sufficient where change is not such as to prevent same. **BC** [1925] 3DomLR1121.

620-52 16F(2d)694; 43F(2d)457; 71 CalA617, 236P349; 77CalA268, 246P 566; 79CalA787, 251P319; 82Colo 13, 257P247; 34GaA19, 128SE70; 321 Ill 354, 151NE871; 323 Ill 227, 154NE111; 251 IllA585; 204 Iowa223, 215NW232; 204 Iowa683, 215NW967; 240Mich621, 216NW431; 244Mich518, 221NW621; **MoA** 284SW186; **MoA** 58W(2d)660; **MoA** 218W(2d)214; **MoA** 248W(2d)191; 76Mont1, 245P532; 124 Okl 220, 255P 693; 117 Or328, 243P560; 49Philippine 944; 133SC472, 131SE22; **TexCommnA** 276SW187; **TexCivA** 278SW286; **Utah** 288P1068; 148Wash348, 268P1036. [c] **As dependent on whether action is at law or in equity.**-241Mich392, 217 NW22. [d] **Where contract is executed before offer to rescind,** restoration in kind is not necessary as condition to action to rescind. **TexCivA** 7SW(2d) 657.

620-56 323 Ill 227, 154NE111. But see 12LaA301, 125S179.

620-57 **CalA** 285P371.

620-59 [a] (1) 79CalA787, 251P319.

621-60 **MoA** 248W(2d)191.

621-63 212Ala576, 103S678 (must place adversary in statu quo); 214Ala 454, 108S69; 76CalA785, 246P121; 160 Ga801, 129SE49; 166Ga71, 142SE543; 321 Ill 354, 151NE871; 253 IllA491; 255 IllA230; 124Kan33, 259P1068; 212 Ky97, 278SW586; 260Mass541, 157NE 698; 240Mich569, 215NW772; **Mo** 282 SW392; 124Misc906, 210NYS320; 223 AppDiv175, 228NYS54; 132 Okl 70, 269 P255; 116 Or641, 242P613; 120 Or607, 253P531; 130 Or590, 280P511; **Tex CommnA** 276SW174; **TexCommnA** 280 SW571.

621-64 206 Iowa90, 219NW44 (failure to return recited consideration of one dollar held not to prevent rescission).

621-65 **TexCivA** 1SW(2d)667.

621-65½-New. An offer by the maker of a promissory note to return everything which he has received by virtue thereof is sufficient offer to put the holder in statu quo. 203 Iowa333, 208 NW726.

622-66 220AppDiv541, 221NYS661; 127Misc50, 215NYS281; **TexCommnA** 276SW174.

622-67½-New. The parties may by agreement dispense with observance of the rule. **MoA** 298SW1073.

622-68 221AppDiv658, 224NYS572.

622-69 111Conn269, 149A785; **Iowa** 213NW786; 238Mich236, 213NW133, 135 [quotCJ]; 241Mich356, 217NW60; 127 Or308, 271P988, 60ALR1165.

622-70 26F(2d)331; 127Misc50, 215 NYS281.

623-76 69CalA447, 231P604.

623-78 212Ala576, 103S678; 73CalA 643, 238P1085.

623-80 214Ala452, 108S69; **Ala** 112S 429, 430 [citCJ]; 166Ga71, 142SE543; 318 Ill 323, 149NE256; 252 IllA395; **Iowa** 233NW118; 216Ky637, 287SW 994, 996 [citCJ]; 260Mass120, 156NE 835; 82NH462, 136A370; 32NM518, 260P411, 55ALR261; 197NC305, 148SE 434; 52ND910, 204NW621; 131 Or509, 283P2; 49Philippine404; 35PortoRico 474 (cannot treat several contracts as entirety for purpose of rescission and also as several as to legal effect of entirety); **TexCommnA** 292SW863; **Tex CivA** 289SW169; **TexCivA** 18W(2d)429; 144Wash229, 257P632, 634 [citCJ].

623-81½-New. Divisible contract cannot be rescinded as to a part which has not been breached. **TexCivA** 289SW169.

623-83 117 Okl 199, 246P225; **Sask** [1927] 3DomLR394.

623-84 72CalA202, 237P386; 128Kan 390, 277P796; 228AppDiv559, 240NYS 328; 57ND674, 223NW808(2dcase); 131 Or509, 283P2. But see 231Ky454, 21SW (2d) 825; 55ND292, 213NW359.

623-85 20F(2d)63. [a] **On abandonment of contract** by defendant plaintiff may treat as rescinded and recover on quantum meruit, or keep contract alive for benefit of both parties or sue for profits they would have realized if not prevented from performing. 72CalA202, 237P386.

623-85½-New. A contract to rescind operates as a mutual release of the parties 8F(2d)672.

623-85¾-New. and is a general and final settlement of their differences arising under the first contract. 8F(2d)672.

623-86 20F(2d)63.

623-91 72CalA202, 237P386; 240Mich 524, 215NW324. See also 284Pa476, 131 A275. [a] **After rescission by both parties** remedy is confined to action on common counts. 72CalA202, 237P386.

623-92 165Minn54, 205NW626.

624-95 102CalA213, 283P107.

624-98 95CalA481, 272P1106.

624-99 80CalA91, 251P654 (clearest evidence of confirmation held essential): **Fla** 126S293; 221AppDiv658, 224NYS 572. [b] **Consistent insistence on rights during pendency of efforts for adjustment** does not constitute waiver of right to rescind. 242Mich646, 219NW668. [c] **Acceptance of benefits under contract** nullifies assertion of rescission. 247NY 486, 160NE924. [d] **Acts held to constitute ratification.**-233Ky503, 23SW(2d) 945, 68ALR1481. [e] **Payment of consideration after discovery of facts entitling party to rescind** constitutes waiver of right to rescind. **Mont** 289P1028.

624-1½-New. As affects the right to rescind, the legal effect of receipt of payments is not determined by declarations or understanding of the recipient. 221 AppDiv658, 224NYS572.

624-2 125Kan657, 266P104; 219Ky 727, 294SW489; **MoA** 21SW(2d)214; 99 NJEq578, 133A483; **NJCh** 147A193(2d case); **TexCivA** 280SW622; 142Wash 142, 252P692; 142Wash555, 253P788.

624-3 **Ala** 130S383; 121Kan860, 250P 273; 219Ky727, 294SW489; **TexCivA** 2SW(2d)899; 142Wash142, 252P692; 142Wash555, 253P788; 199Wis503, 226 NW950. [a] **Source of information** is immaterial. **Mont** 289P1028.

624-4 116 Or641, 242P613. But see **MoA** 248W(2d)238.

625-6 221Ky131, 297SW1114; **Ont** [1928] 3DomLR289.

625-8½-New. Acts relied upon to show ratification must have been done with an intention to ratify or must be of such a nature that an intention to ratify may be inferred. 124 Or423, 263P920.

625-8¼-New. Full knowledge of fraud or of facts imposing duty of inquiry is necessary for waiver of fraud. **Ala** 130S 383.

625-8½-New. Right of defrauded party to rescind is not prejudiced by notifying other of facts and inviting him to make good representations. **Ala** 130S383.

625-9 36GaA541, 137SE102 [citCJ].

625-10 36GaA541, 137SE102; 232Ky 503, 23SW(2d)945, 68ALR1481.

625-11 123Kan674, 256P967.

625-12 36GaA541, 137SE102 [citCJ].

625-14 34GaA19, 128SE70 (but cannot do both). **TexCivA** 294SW645. [b] **In Porto Rico.**-29PortoRico901.

625-16 13F(2d)758; 45Ida303, 262P 149; 104NJL152, 138A871; 221AppDiv 174, 222NYS650.

625-16½-New. Payment on a contract per se implies continued existence thereof. 214Ala327, 107S816.

626-17 86PaSuper562.

626-19 45 Ida303, 262P149, 151 [cit CJ]; 130Misc625, 225NYS106; **Tex CommnA** 298SW520. See also 34GaA19, 128SE70 (use of articles received equivalent to election to abide by contract).

626-24½-New. An unconscionable agreement will not be disturbed where ratified with full knowledge of all its bearings. 130Misc625, 225NYS106.

626-26 [a] **Buyer continuing to accept deliveries** after expiration of contract, without suggesting change in terms or price, impliedly agreed to extension of contract, and hence was liable for contract price, not merely market value, of milk thereafter delivered. 96Cal 18, 273 P831.

627-33 17F(2d)386; 22F(2d)256; 333 Ill 442, 164NE836; 246 IllA100; 225Ky 175, 7SW(2d)1060; 3LaA1; 3LaA5; 3 LaA370; 3LaA593; 142Miss584, 107S 673; 246NY270, 158NE618; 135Misc 497, 239NYS113; 124 Or332, 263P391; 85PaSuper63 (enforced according to terms); 47RI 237, 132A609; 51SD536, 215NW695; **TexCivA** 6SW(2d)133 (court cannot make contract for parties); **Man** [1925] 3DomLR205.

627-36 10LaA136, 121S194.

627-37 See also 40F(2d)187.

627-37½-New. Any action unwarranted by terms of contract gives to the other a right either of cancellation or suit. 283 Pa434, 129A559.

627-37¾-New. Contract creates property rights which may not be taken away except by default. 131Misc813, 227NYS459.

627-38 [b] See also 8LaA726.

627-41 164Minn186, 204NW625; 220 AppDiv273, 221NYS171.

627-41½-New. Liability for breach. The law of the place where contract was made and was to be performed governs the liability for breach of contract and not the law of the forum. 125Misc417, 211NYS270.

627-43 5F(2d)807; 34F(2d)377; 208Cal 114, 280P535; CalA 284P713; 88 IndA 685, 148NE430; 207 Iowa252, 222NW 872; 224Ky284, 6SW(2d)249, 251 [cit CJ]; 233Ky823, 27SW(2d)427; 162La 355, 110S556; 255Mass334, 151NE313; MoA 256SW134; 250NY469, 166NE169. 63ALR1151; 195NC173, 141SE542; 287 Pa436, 135A116, 117 [quotCJ]; TexCivA 23SW(2d)786; TexCivA 27SW(2d)563. [c] **Rule held subject to exceptions.**–176 Ark1016, 5SW(2d)364.

628-44 287Pa436, 135A116, 117 [quot CJ].

628-45 35F(2d)829; 168Ark243, 269 SW582; Mo 295SW558; 287Pa436, 135 A116, 117 [quotCJ].

629-47 88 IndA685, 148NE430.

629-47½-New. A party to a contract is guilty of the first breach who fails to do what he is contractually bound to do. 106WVa642, 147SE22.

629-51 110Conn234, 147A709; 164Minn 186, 204NW625; Miss 107S527; 221App Div174, 222NYS650; 134Misc234, 236 NYS118.

629-53 34GaA298, 129SE562; 224Ky 284, 6SW(2d)249; 5PaDist&Co 254.

629-54 167Minn399, 209NW259; 124 Okl 220, 255P693. [a] **Contracts held to be severable within meaning of rule.** 167Minn399, 209NW259.

629-56 179Minn574, 229NW871; 46 Philippine81.

630-63 100WVa559, 131SE253, 261 [cit CJ].

630-64 100WVa559, 131SE253, 261 [cit CJ].

630-67 17F(2d)536; 7LaA709, 713 [quotCyc]; 150Miss383, 116S598 (furnishing of certain statements held not condition precedent); 228AppDiv790, 240NYS45; 47RI 237, 132A609.

631-73 127Me203, 142A735; 258Mass 282, 154NE769; TexCivA 278SW508. [a] (6) To pay for timber cut if supreme court decides certain deed to pass fee simple to grantees in deed. TexCivA 278 SW508.

631-74 99CalA783, 279P483; 109Conn 521, 147A36; Fla 130S421; Ida 290P 377, 379 [citCJ]; 127Me203, 142A735.

631-76 CalA 293P162; TexCivA 278SW 326, 329 [quotCJ].

631-77 Fla 130S421.

632-78 Fla 130S421.

632-79 Fla 130S421; TexCivA 278SW 326, 329 [quotCJ].

632-80 96Fla82, 117S705.

632-85 290Pa67, 138A85, 88 [quotCJ].

633-86 290Pa67, 138A85, 88 [quotCJ].

634-99 7LaA709, 713 [quotCyc]; 50ND 465, 196NW556, 559 [citCJ]; 95PaSuper342; 100WVa559, 131SE253, 260 [cit CJ]. [b] **Third person, for whose benefit contract is made,** must perform conditions, before there can be recovery. 38 F(2d)10.

634-1 100WVa559, 131SE253, 260 [cit CJ].

634-2 124 Okl 64, 253P1021; 136 Okl 261, 277P649.

635-7 42 IdaI2, 242P444, 47ALR916 [citCJ].

635-13 260Mass255, 157NE523; NJ 148 A641; 33NM445, 270P884, 885 [citCJ]; 150SC167, 147SE848; 100WVa559, 131 SE253; 192Wis635, 212NW405. [c] **Want of performance of obligation is excused by operation of law** under statutes in some jurisdictions. 83CalA197, 256P607 (abrogation of contract not affected by such statute).

635-14 260Mass255, 157NE523.

635-15 260Mass255, 157NE523.

635-16 260Mass255, 157NE523.

636-17 105NJL242, 143A379; 244NY 438, 155NE733; 100WVa559, 131SE253. See also TexCivA 274SW643, 647 [cit CJ].

636-18 100WVa559, 131SE253; 192Wis 635, 212NW405. [c] **That adverse party is unprepared to perform** does not justify offerer's inability. CalA 289P242.

636-19 275US471, 48SCt153, 72L ed378 (cancellation of government contract for completion of which defendant purchased lumber of plaintiff); 43F(2d) 418; 161La1077, 109S844; 260Mass255, 157NE523; 100WVa559, 131SE253.

637-20 7F(2d)873; 18F(2d)197.

637-27 Mo 25SW(2d)1055; 244NY482, 155NE749.

637-29 293Pa39, 141A732; Pa 149A93.

637-31 18F(2d)197; 86Mont435, 284P 147(2dcase); 225AppDiv407, 233NYS 279; 136Misc569, 240NYS316; 293Pa 39, 141A732 (relative financial gain to plaintiff or loss to defendant not considered).

637-32 241Mich478, 217NW565; 86 Mont435, 284P147(2dcase).

637-36 29F(2d)483.

637-38 37F(2d)637.

637-45 43F(2d)315; 287Pa505, 135A 223.

637-45½-New. Party will not be relieved from performance of his contracts except for fraud, 215AppDiv73, 213NYS 277.

637-45⅓-New. mutual mistake, 215App Div73, 213NYS277.

637-45¼-New. or other sufficient reason. 215AppDiv73, 213NYS277.

638-49 134Misc234, 236NYS118.

638-50½-New. Insolvency of promisor constitutes no defense to action to enforce contract. Mo 25SW(2d)1055.

638-51½-New. Neither party may sue for penalty when both are in default. 13 LaA450, 126S700.

638-53 17F(2d)46.

639-58 136Misc163, 238NYS696 (bankruptcy).

639-60 272US351, 47SCt142, 71L ed 294; 86CalA209, 260P601; 130Misc503, 224NYS429; 191NC679, 132SE796.

639-61 161La1002, 109S816; 192Wis 635, 212NW405 (to make title).

639-62 225AppDiv407, 233NYS279; TexCivA 19SW(2d)87.

639-65 TexCivA 19SW(2d)87.

639-67 101CalA694, 232P429; 232 IllA 27; 167Minn453, 209NW323, 46ALR 816; 129Misc911, 223NYS408; 230App Div156, 243NYS396; 290Pa495, 139A 140; 7PaDist&Co 279; TexCivA 282SW 267, 276 [citCJ]; 100WVa559, 131SE 253, 260 [citCJ]; 107WVa658, 150SE9. But see DelCh 150A81.

640-68 [c] **Porto Rico Civil Code.**–34 PortoRico 479.

640-70 6F(2d)996; 131Misc331, 226NYS 656.

640-71 252Mass287, 147NE850; 250NY 69, 164NE745.

640-72 27Hawaii122; 131Misc331, 226 NYS656.

640-73 131 Okl 49, 267P855, 859 [cit CJ]; 293Pa39, 141A732.

640-74 77CalA562, 247P264; 106Conn 484, 138A503, 506 [citCJ].

640-74½-New. Contracts made with reference to subject within restrictive power of a government contain implied condition that change in law may be made and obligation of parties varied or avoided. 214AppDiv693, 213NYS146.

641-76 222Ky443, 1SW(2d) 540, 542 [quotCJ]; 152Miss327, 120S182(2dcase); 33NM445, 270P884, 885 [citCJ]. [f] **Where performance is not impossible,** act of God destroying subject matter or rendering performance more difficult does not excuse performance. 233Mich1, 206NW520.

642-78 See also TexCivA 274SW643, 647 [citCJ].

642-83 272US351, 47SCt142, 71L ed294; 255Mass599, 152NE87.

642-84 272US351, 47SCt142, 71L ed 294.

642-85 94Fla403, 114S431; 157Md652, 147A790, 65ALR1285; 127Misc604, 217 NYS284; 290Pa67, 138A85, 87 [citCJ]; TexCivA 270SW1109; TexCivA 296SW 981; Ont [1927] 3DomLR820. See also 244NY14, 154NE649. [a] **Condition may be express.**–94Fla403, 114S431.

643-86 94Fla403, 114S431; NJSup 134 A883; 127Misc604, 217NYS284.

643-89 94Fla403, 114S431 (dictum). See also 244NY438, 155NE733.

643-91½-New. Demarcation between purely personal contracts and others is in many cases a pure question of fact. 94Fla403, 114S431.

643-93 253NY256, 170NE910.

643-94 See also Ont [1927] 3DomLR 820.

643-97 73CalA732, 239P350, 352 [quot Cyc]; 7LaA66; 33NM445, 270P884; 127 Misc604, 217NYS284; 129Misc911, 223 NYS408; 290Pa67, 138A85.

644-98 [b] **Destruction of telegraph line which railroad company agreed to reconstruct** does not excuse performance, though line was destroyed by act of God. 233Mich1, 206NW520.

644-2 290Pa67, 138A85.

644-3 Ala 114S431; 198Cal 163, 244P 340, 44ALR1341; 42 Ida729, 249P771, 772 [citCJ]; 262Mass577, 160NE417; 33NM445, 270P884; 253NY256, 170NE 910; 226AppDiv511, 234NYS716; 90Pa Super554; 9PaDist&Co 327; 193Wis305, 214NW345. But see 227AppDiv452, 238 NYS230.

645-5 198Cal 163, 244P340, 44ALR 1341; 207Cal 600, 279P664, 64ALR1412 (contracts for cultivation of soil); 94Fla 403, 114S431 (dictum); 252NY495, 170 NE119; 227AppDiv452, 238NYS230. [a] (3) Building contracts usually, but not always, are in this class. 198Cal 163, 244P340, 44ALR1341.

645-6 198Cal 163, 244P340, 44ALR 1341; 94Fla403, 114S431 (dictum); 227 AppDiv452, 238NYS230; 297Pa543, 147 A608 (otherwise valid contract for maintenance and education of child held unaffected by promissor's death). [a] 297 Pa543, 147A608. [c] **Presumption.**–94 Fla403, 114S431. [d] **Law presumes that parties to contract** intend to bind not only themselves, but their personal representatives. 227AppDiv452, 238NYS 230.

646-7 198Cal 163, 244P340, 44ALR 1341; 297Pa543, 147A608.

646-9 TexCivA 274SW643, 647 [citCJ]. See also 128Misc673, 219NYS705.

646-10 6F(2d)733; 33NM445, 270P884; 214AppDiv693, 213NYS147; 131Misc331, 226NYS656 (entire contract).

646-11 [a] **Defense of supervening illegality which can be cured** by proper steps in behalf of party pleading it is not good basis for claim of frustation. 37F(2d)593.

647-15 138Misc600, 245NYS527.

647-22 81CalA356, 253P750, 751 [quot CJ]; 250NY410, 165NE829; TexCivA 3SW(2d)514, 519 [citCJ].

647-23 MoA 4SW(2d)831; 250NY410, 165NE829 (defense as to party not at fault); 136Misc700, 240NYS542; 53ND 213, 205NW236; 102WVa119, 135SE249, 49ALR668.

647-24 83CalA155, 256P438; 99CalA 140, 277P1086; CalA 288P694; 168Ga 511, 148SE265; 29Hawaii579; 316 Ill 183, 147NE42; 1LaA443; 2LaA60; Mass 172NE597; MoA 20SW(2d)166; 74Mont385, 240P391; 32NM518, 260P 411, 414 [citCJ], 55ALR261; 53ND213, 205NW236; RI 136A19; 102WVa587, 135SE841.

648-25 32NM518, 260P411, 414 [cit CJ], 55ALR261 (acts not creating impossibility of performance).

648-27 133Misc225, 231NYS451.

648-32 128 Okl 215, 262P208, 211 [cit CJ]; 102WVa587, 135SE841.

648-37 71CalA308, 235P76 (refusal of defendant to make sale, on making of which depended plaintiff's compensation is breach of agreement justifying immediate institution of suit); 81CalA 356, 253P750, 751 [quotCJ]; 86CalA 527, 261P723; 96Fla82, 117S705; 98 Fla1087, 125S243; Fla 130S421; 214 AppDiv135, 211NYS833; 130Misc730, 225NYS7; TexCivA 3SW(2d)514, 519 [citCJ].

649-43 TexCivA 294SW984; 147Wash 140, 265P468 (warrants abandonment). [a] (4) Defendant's refusal to permit plaintiff to install sprinkler system gives plaintiff seller cause of action for breach of contract. 35GaA8, 131SE543.

650-44 203Cal 1, 262P1087; 69CalA 225, 230P978; CalA 288P694; 35GaA8, 131SE543; 221Ky131, 297SW1114; 82 Mont312, 267P207, 213 [quotCyc]; TexCivA 294SW984; 102WVa587, 135SE 841. [a] **Remedy for damages** for delay due to adverse party's fault held to be action on bond, not rescission. 221Ky 131, 297SW1114.

650-45 20F(2d)757; TexCivA 294SW 984.

650-47 93Fla295, 112S57, 58 [citCyc];

157Md341, 146A223; 134Misc657, 236 NYS308.

650–48 99CalA783, 279P483; CalA 288 P694; 93Fla295, 112S57.

651–49 250NY178, 164NE897. See also 93Fla295, 112S57, 58 [citCyc]. [a] **Party in default cannot be subjected to damages** without showing that he would have received what he contracted for had he performed. 250NY178, 164NE 897.

651–53 179Ark110, 14SW(2d)1104; 32 OhA183, 161NE362. See also 43F(2d) 625. [a] **Bankruptcy of promissor breaches implied term of contract** that promissor, through bankruptcy or insolvency, shall not disable himself from making performance. 229AppDiv632, 242NYS329.

651–55 5F(2d)106; 33F(2d)963; 166 Minn346, 207NW737, 46ALR1167. [b] **It is implied in every contract** that parties will not permit themselves through bankruptcy to become disabled from performance. 166Minn346, 207NW737, 46ALR1167.

651–57 19F(2d)388; 34F(2d)517; 40F (2d)488; 219Ala666, 123S52; 32Ariz96, 255P994 [citCJ]; 101CalA382, 281P639; 102CalA536, 238P84; 93Fla295, 112S57, 58 [citCyc]; 317 Ill 251, 148NE12; 202 Iowa1159, 211NW704; 126Kan139, 141, 266P941 [quotCJ]; 166Minn200, 207 NW326; 320Mo 57, 6SW(2d)576, 580 [quotCJ], 67ALR489; MoA 286SW405, 406 [citCJ]; 221MoA47, 297SW1001; NJSup 137A567; 243NY283, 153NE75; 223AppDiv292, 228NYS260; 191NC679, 132SE796; 138 Okl 234, 280P819; 122 Or124, 256P652; 132 Or596, 286P554; 297Pa26, 146A139; TexCommnA 5SW (2d)976; TexCivA 277SW728 (discharge for repudiation of contract); TexCivA 23SW(2d)890; 69Utah112, 252P570, 573 [citCJ]; 143Wash17, 253P1078; 103WVa137, 137SE223; 198Wis43, 223 NW579 (executory contract of sale). [c] **Contract is not invalidated** by fact that either party may refuse to perform. 319 Mo 386, 4SW(2d)427.

653–58 34GaA298, 129SE562; 126Kan 139, 140, 266P941 [quotCJ].

653–61 31Ariz187, 251P453, 455 [cit CJ].

653–63 40F(2d)488; 31Ariz187, 251P 453, 455 [citCJ]; 203Cal 1, 262P1087; 202 Iowa1159, 211NW704; 126Kan139, 140, 266P941 [quotCJ]; NJSup 137A 567; 116 Or222, 240P873; 122 Or124, 256P652; 128 Or142, 273P954; 103WVa 137, 137SE223.

653–64 40F(2d)488; 243Mich470, 220 NW798.

653–65 202 Iowa1159, 211NW704.

654–66 40F(2d)488; 93Fla295, 112S57, 58 [citCyc]; MoA 277SW50; NJ 148A 626; 196NC116, 144SE694; 116 Or222, 240P873; 132 Or596, 286P554 (promisee may stop performance under contract but treat it as alive to adjust rights as to breach). TexCivA 277SW728 (discharged); 69Utah112, 252P570, 573 [cit CJ].

654–67 [a] 91CalA654, 267P572, 573 [citCJ].

654–68 197Cal 694, 242P709 (action for breach of contract to rent photo films held premature as to films not delivered or tendered).

654–70 CalA 288P134.

654–71 36F(2d)583; 44 Ida620, 258P 555; 243Mich470, 220NW798; 154Miss 233, 122S475.

654–72 98PaSuper61. See also 169Ark 649, 276SW595.

655–75 226Ky137, 10SW(2d)636; 309 Mo 276, 290, 274SW699 [citCJ].

655–76 172Ark642, 290SW353; 99CalA 783, 279P483; 230Ky534, 20SW(2d) 284; 309Mo 276, 290, 274SW699 [cit CJ].

655–77 172Ark642, 290SW353.

655–78 203Cal 1, 262P1087; NJSup 137 A567; 116 Or222, 240P873; 132 Or533, 286P560; 103WVa137, 137SE223.

655–79 103WVa137, 137SE223.

655–80 NJSup 137A567; 132 Or596, 286P554.

656–82 35GaA206, 132SE264; MoA 29 SW(2d)170; NJSup 132A494; 25 OhA 325, 158NE15; 103WVa137, 137SE223.

656–84 MoA 29SW(2d)170.

656–85 MoA 29SW(2d)170.

657–88 180Ark339, 21SW(2d)405.

657–90 35GaA206, 132SE264; 175Minn 236, 220NW946, 948 [citCJ]; 98Pa Super61.

657–92 34Ariz68, 267P794; 168Ark504, 270SW946, 1119; Ark 31SW(2d)945; 120Kan450, 243P1030; NJ 148A626; 124 Or332, 263P391; TexCivA 277SW 728 (discharge for refusal to perform). [d] **Failure to enforce covenant with third person** as to use of premises. 244 NY14, 154NE649.

657–93 40GaA788, 151SE567; 167La 301, 119S56; 226AppDiv532, 235NYS8; 124 Or332, 263P391.

657–96½–New. There can be no breach of contract by agreement of parties. 154Miss233, 122S475.

658–98 13F(2d)758, 762 [quotCJ]; 15 F(2d)1003; 204 Iowa746, 216NW78, 83 [citCJ]; NJSup 139A431; 191NC679, 132SE796; 147Wash140, 265P468 (upon substantial breach injured party may elect within reasonable time either to abandon or perform and recover damages); 99WVa657, 129SE718, 47ALR 189. [a] **Forfeitures** are not favored by law. 160Ga93, 127SE610; TexCommnA 27SW(2d)111.

658–99 13LaA521, 128S540 (act held not to constitute breach). [a] 219Ky 313, 292SW833. [b] 15F(2d)41; 235 Ky425, 31SW(2d)701. [e] **Breach held not to justify abandonment.**–72CalA 202, 237P386.

658–7½–New. Defendant's failure to make monthly payments justified plaintiff's refusing to repaint signs under contract. Mass 172NE101.

659–8 83Colo 99, 262P921; TexCommnA 2SW(2d)416. [c] **Party loses all rights to contract** under renewal clause where he fails to perform his contract first year. 125Misc127, 210NYS169.

659–8½–New. An unauthorized demand not amounting to an intimation of intention to be no longer bound does not authorize the other party to treat the contract as at an end. 202 Iowa1128, 211NW367.

659–8½–New. A master, discharging a servant, hired under a contract providing for arbitration of disputes and differences, does not lose the right to arbitrate differences. 130Misc887, 225 NYS513.

659–8¾–New. As respects the right to arbitration, the master could affirm the contract by proceeding under arbitration clauses. 130Misc887, 225NYS513.

659–8½–New. "Repudiation of contract" means rejection or abandonment thereof, while in "breach of contract" the party may still claim under it and thereby affirm agreement. 130Misc887, 225NYS513.

660–13 36F(2d)213.

660–14½–New. After breach, the rights of the innocent party are not affected by an offer to perform by the party who has broken the contract. 48 Ida611, 284P257.

660–15 23AlaA305, 124S504 (notice not prerequisite to house owner's claim for unskilful work under contract guaranteeing roof); Mass 166NE828. See also 224AppDiv516, 231NYS51. [a] **Notice of breach.**–244NY14, 154NE649.

660–16 But see 51Philippine926.

660–19 3LaA9. [b] **Waiver.**–166La587, 117S727.

660–20 [a] **Violation not active.**–166La 587, 117S727.

660–22 TexCivA 285SW691, 693 [cit CJ]. See TexCivA 4SW(2d)83, 84 [cit CJ].

660–24 CalA 288P814; 33 OhA452, 169 NE836 (demand for performance within reasonable time). See also Wash 290P 813.

661–32 202 Iowa646, 210NW793.

661–34 227AppDiv372, 237NYS453.

661–35 7LaA553; 223AppDiv533, 229 NYS390; 136Misc163, 238NYS696 (bankruptcy).

661–36 7LaA26; 116 Or222, 240P873.

661–40 202 Iowa646, 210NW793.

662–43 Wash 290P813. [a] **Where no time is fixed for performance of next step by defaulting party,** other party may demand performance at once. 159 Tenn10, 15SW(2d)749.

662–50 222MoA524, 293SW476, 479 quotCJ]; 216AppDiv665, 215NYS657; 227AppDiv372, 237NYS453; TexCivA 23SW(2d)786. [a] **"Tender"** means readiness and willingness to perform, provided other party is ready and willing to perform. 245 IllA492.

662–52 [c] **One who is not ready, able, and willing to perform** contract on due day cannot recover for anticipatory breach of contract by other party. 28 F(2d)518.

663–54 236 IllA426, 441 [quotCJ].

663–55 40F(2d)488; 236 IllA426, 441 [quotCJ].

663–57 26F(2d)40. [a] **Requirements of good faith and ability to perform** are not affected by statute making tender dependent on performance of concurrent condition. CalA 289P242.

664–58 13F(2d)105; 236 IllA426, 441 [quotCJ]; 244 IllA330; 245 IllA492, 495 [quotCJ]; 250Mich172, 229NW463; 227AppDiv226, 237NYS442 (where defendant informs plaintiff that contract has been let to another); 116 Or222, 240 P873; 138SC435, 136SE762.

664–59 236 IllA426, 441 [quotCJ].

664–60 MoA 9SW(2d)245.

664–66 138SC435, 136SE762.

665–72 221MoA789, 287SW1075, 1079 [quotCJ].

665–76½–New. Where the defense of fraud is interposed, tender of performance is not necessary. Vt 146A72.

665–79 136Wash74, 239P4.

666–91 138 Okl 234, 280P819.

667–21 221MoA789, 287SW1075, 1079 [citCJ].

668–23 [a] **Not affected by statutes eliminating necessity of tendering by actual production of money.**–CalA 289P 242.

669–44 85Mont31, 277P433(2dcase).

669–48 236 IllA426.

669–52 236 IllA426, 441 [citCJ].

669–53 But see 11F(2d)958.

670–63 15F(2d)323, 328 [citCJ]; 178 Ark1098, 13SW(2d)587; MoA 294SW 426; 131Misc411, 227NYS142; 48RI 430, 138A57, 57ALR823; TexCivA 17 SW(2d)98.

671–69 36F(2d)982; 48RI 430, 138A 57, 57ALR823.

671–70 25F(2d)498; 32F(2d)825; 174 Ark1115, 299SW18; 10LaA259, 120S 714; 39Wyo 84, 270P167.

671–73 103Conn624, 131A420; 171Minn 445, 214NW503, 53ALR573.

671–74 103Conn624, 131A420.

671–75 40F(2d)488; 103Conn624, 131A 420; 222AppDiv304, 226NYS175 (failure to reject forgings of improper quality where contract excuses machining of forgings so furnished); TexCivA 1SW (2d)400, 403 [quotCJ].

671–80 217MoA592, 274SW941 (provision is contract of sale for guaranty of payment); TexCivA 1SW(2d)400, 403 [quotCJ]; 39Wyo 84, 270P167.

671–81 TexCivA 283SW679; 106WVa 642, 147SE22.

671–82 121 Okl 124, 247P990. [a] 171 Ark750, 285SW379; 101CalA470, 281P 1062 (long delay explained by testimony); LaA 130S570(2dcase); 263 Mass228, 161NE240; 137Misc384, 244 NYS2; Wash 286P662 (demanding too much). [e] **Facts held not to show waiver.**–TexCivA 294SW223.

671–83 335 Ill 273, 167NE74.

671–87 155Md30, 141A440 (right of action remains on happening of any breach regardless of number of breaches); 132 Or453, 285P244; 106WVa642, 147SE22. But see 32Ariz331, 258P256; 160Ga93, 127SE610.

672–88 Iowa 213NW442; 208 Iowa458, 223NW521. [a] **It is not waiver of nonperformance** where one party does not notify other that he will not renew contract. 125Misc127, 210NYS169.

672–88½–New. , or inform him that the former has knowledge of the latter's breach. Iowa 213NW442.

672–89½–New. It is not waiver to make an honest attempt to induce a party breaching contract to perform same. TexCivA 277SW728.

672–91 216Ala645, 114S308.

672–92 122Kan1, 252P242.

672–93 But see CalA 285P351.

672–94 But see 9LaA326, 120S397.

672–95 Mass 172NE101.

672-1 205Cal 309, 271P470, 60ALR630 [quotCJ]; 288Pa314, 136A221.
672-5 45 Ida303, 262P149. [a] 5F(2d) 278.
673-7½-New. Acceptance of delayed performance is not inconsistent with, nor waiver of, right of action for damages. 20F(2d)56.
673-9 205Cal 309, 271P470, 60ALR630 [quotCJ]; TexCivA 286SW339, 340 [quotCJ].
673-10 [a] **Contract is not performed till completely performed.**-83Mont15, 268P547 (contract to transport stock is not performed till safe delivery).
673-13 133Misc220, 231NYS235. [d] (12) 31 OhA22, 164NE434. (18) Tex CivA 26SW(2d)319. (26) Contract to tan skins. 14F(2d)125. (27) Plastering. 217AppDiv10, 215NYS755. (28) Painting synagogue and performing certain prayers. 133Misc766, 234NYS 246. (29) Architect's failing to furnish plans within cost limit. LaA 130S570 (2dcase). [i] (69) To prevent sale of competing articles. 244NY14, 154NE 649. (70) Painting radiators. 216Ky 411, 287SW942. (71) Audit of accounts for refund of tax, compensation to be on "final conclusion" of proceedings. 52SD240, 216NW946. (72) Drilling water well. TexCommnA 1SW(2d)265. (73) Digging well. 146Wash328, 262P 645. (74) Other instances. 37F(2d) 637. [j] **Payment of damages not performance.**-132 Or453, 285P244.
674-14 115Tex310, 280SW523, 526 [cit CJ].
674-17 131Misc836, 228NYS314.
674-21 70CalA561, 232P58.
675-28½-New. Where contract required testing of validity of legislative act, that court determined question in suit by persons not parties to the contract, it is nevertheless sufficient determination within requirements of the contract. 215AppDiv225, 213NYS555.
675-30 19F(2d)311, 315 [quotCJ]; 151 Md690, 136A37; 106WVa642, 147SE22.
676-34 1LaA135, 137 [citCyc]. [a] (20) Radio receiving sets. Ala 130S405.
676-34½-New. In doubtful cases, especially where the thing furnished is so attached to realty that its value would be lost to the seller unless paid for, a stipulation will be construed as one to furnish a thing that ought reasonably to satisfy the buyer. 100CalA 315, 279P1076.
677-36 50RI 345, 147A877. [a] 283Pa 434, 129A559.
678-41 53ND42, 204NW849. [b] (2) 217AppDiv10, 215NYS755.
678-43 Ala 130S405; 100CalA315, 279 P1076; 257Mass12, 153NE99; 259Mass 439, 156NE740; 261Mass456, 158NE 846; 236Mich29, 209NW805; TexCivA 15SW(2d)150. [b] **Rule applicable to contract to furnish written guaranty.**-Iowa 233NW133.
679-45 98PaSuper127.
679-47½-New. Lawful termination of employment because plaintiff was dissatisfied with defendant's services held a termination which made defendant's covenant operative. 257Mass12, 153 NE99.
679-48 50ND465, 196NW556, 559 [cit CJ]; 29PortoRico 745.
679-50 50ND465, 196NW556, 559 [cit CJ]; TexCivA 15SW(2d)150.
680-53 14F(2d)813.
680-54 14F(2d)813; 170Minn53, 212 NW9; 245NY337, 157NE259; 247NY 277, 160NE369; 222AppDiv543, 226NYS 562; 130Misc887, 225NYS513; Tex CivA 290SW804; 148Wash188, 268P151. [a] (2) Court cannot order arbitration under statute after termination of contract, where parties had agreed to settle disputes by arbitration with respect to claims arising in respect to right to rescind while contract is still operative. 241NY148, 149NE333. [c] 242NY97, 150NE614. [g] **Arbitration clause held not to include** contractor's claim for damages. 240NY244, 148NE510; 247 NY277, 160NE369. [h] **Refusal to arbitrate on demand therefor** constitutes waiver. 242NY97, 150NE614. [i] **Unreasonable delay in making application** may constitute waiver. 242NY97, 150 NE614. [j] **Arbitration agreement though improperly pleaded as defense or counterclaim** is assertion of rights under agreement rebutting inference of waiver from service of answer. 242NY 97, 150NE614. [k] **Party to arbitration agreement** may waive rights thereunder. 242NY97, 150NE614. [l] **Rights under arbitration agreement** may be waived by party to such agreement. 242NY97, 150 NE614. [m] **Enforcement of arbitration clause.**-132Misc590, 230NYS372. [n] **Invocation of remedy under clause.**-132Misc590, 230NYS372.
680-54½-New. Filing of mechanics' liens by contractor's receivers held waiver of right to arbitrate. 240NY244, 148NE510.
680-55 39F(2d)1012; 169Ark148, 273 SW368 (arbitrator's honest judgment on meaning of term "near relative" upheld); 151Md690, 136A37; Tex CommnA 277SW1046; TexCommnA 280 SW174; 199Wis230, 225NW331, 63ALR 1165.
680-57 But see 7F(2d)335. [a] **Decision of judges of newspaper subscription contest** cannot deprive contestant of legal rights, though rules of contest provide that decision of management shall be absolute and final upon any question arising. 68CalA171, 228P873.
680-60 TexCommnA 280SW174.
680-62 [a] **Arbitration clause,** providing for submission of all questions "arising under contract and in performance of work thereunder," was held not to include claim for damages where adverse party prevented performance of contract. 240NY244, 148NE510.
680-64½-New. A contestant in a newspaper subscription contest is not bound by a decision of judges of the contest not shown to have been selected according to the terms of the contract or to have jurisdiction over the controversy. 68CalA171, 228P873.
680-65 148Wash188, 268P151.
680-66 38GaA303, 143SE909 (estimates of named civil engineer).
680-67 35F(2d)919; Mass 172NE855.
681-72 [a] **Where fraud in inducement of contract is in issue,** that is triable before right to arbitration may be enforced. 218AppDiv652, 219NYS96.
683-1 4F(2d)845; 181Ark696, 27SW (2d)1005; 83CalA187, 256P825; 98CalA 787, 277P1099; CalA 288P814; 106 Conn519, 138A462; 36GaA140, 135SE 759; 88 IndA685, 148NE430; 209Ky 250, 272SW728; 219Ky524, 293SW 1089; 232Mich112, 205NW142; Mich 233NW329; MoA 28SW(2d)416; 115 Nebr420, 213NW813; 103NJL440, 135A 897; 101NJEq176, 137A849; 220 AppDiv443, 221NYS638; 218AppDiv 411, 218NYS457; 134Misc467, 235NYS 45; 192NC135, 133SE402; NC 154SE 37; NC 154SE743; 126 Okl 144, 259P 128; 139 Okl 35, 280P1075 (optional contract); 43 OklACR157; 43 OklACR 173 [reh pending]; 116 Or222, 240P 873; 51SD225, 213NW3; TexCommnA 29SW(2d)1011; TexCivA 5SW(2d) 1033; 144Wash558, 258P488; Wash 291P711; 107WVa658, 150SE9. [a] (14) Repayment of money furnished to pay factory price of trucks purchased for resale. 209Ky250, 272SW728. (15) Repayment of money advanced to be used as deposit to secure credit. 209 Ky250, 272SW728.
684-4 73CalA678, 239P92; 100CalA 706, 280P1017.
684-9 Fla 130S421. See also CalA 288 P814.
685-17 MoA 281SW98.
685-18 43 OklACR173 [reh pending].
685-20 But see 155Wash107, 283P1087.
685-25½-New. Where a contract for cleaning out and drilling an oil well provided that the owner furnish water, no time being fixed, it was held that he was required only to perform within a reasonable time after demand or notice. 217Ky553, 290SW319.
685-26 15F(2d)545; 218Ala645, 119S 851; 219Ky524, 293SW1089; Mich 233 NW329; NJ 145A637 (diligence); 192 NC135, 133SE402, 403 [quotCJ]; 51SD 225, 213NW3; TexCivA 286SW330; TexCivA 5SW(2d)1033, 1036 [citCJ]; 107WVa658, 150SE9. [a] (18) Twenty-six days is not reasonable time for performance of contract to remove house in "about 10 days." 119 Or55, 248P158. (19) Three or four years is more than reasonable time to return money advanced for factory price of trucks purchased for resale. 209Ky250, 272SW 728.
686-27 192NC135, 133SE402, 403 [quot CJ].
686-28 MoA 10SW(2d)668; 192NC135, 133SE402, 403 [quotCJ]; TexCivA 5 SW(2d)1033, 1036 [citCJ].
686-33 222Ky443, 1SW(2d)540; OhA 172NE839.
686-35 218MoA597, 265SW993 (time of essence); 250NY178, 164NE897.
686-36 213Ala150, 104S323; 179Ark 1001, 18SW(2d)1025; 222Ky443, 1SW (2d)540; 33 OhA452, 169NE836 (nevertheless time specified will be considered material as measure of permissible delay); 291Pa503, 140A500.
687-37 33 OhA452, 169NE836.
687-39 99CalA524, 279P177; 51Philippine926. [a] See also 34GaA19, 128SE 70. [c] **Time need not be declared to be of essence of contract in so many words,** but it is sufficient if intent of parties is shown. 56ND485, 217NW848.
687-40 309Mo638, 274SW815; Va 152 SE343 (to determine, court looks first to language, then to circumstances leading to execution).
687-41 127Me406, 144A1; MoA 282SW 470; MoA 285SW141; MoA 9SW(2d) 87; 117 Okl 117, 245P608.
687-42 36GaA140, 135SE759.
687-43 87CalA772, 262P419 (performance within reasonable time held sufficient); 309Mo 638, 643, 274SW815 [citCJ]; MoA 9SW(2d)87; Okl 245P 608; TexCivA 5SW(2d)1033. [c] Ida 293P327; 127Me406, 144A1. [d] 309 Mo 638, 274SW815, 821 [citCJ] (contract for purchase from paving contractor of municipal bonds to be issued upon completion of work); TexCivA 17SW(2d)1083 (agreement not to practice medicine in county). [e] **Mere designation of particular date** does not make that date essence of contract. 251 NY224, 167NE424.
688-45 Mont 287P629; 133 Okl 264, 271P1042; 141Wash204, 251P112.
688-46 73CalA678, 239P92; 93Fla46, 111S532; 262Mass203, 159NE530.
688-47 CalA 290P122.
688-48 CalA 290P122.
688-51 33F(2d)727; 215Ala412, 111S 427; 73CalA678, 239P92; 223AppDiv 451, 228NYS455; 92PaSuper70.
688-52 43 OklACR173 [reh pending].
688-54 77CalA591, 246P1064.
689-62 21AlaA524, 109S555; 223Ky 668, 4SW(2d)686; 252Mass314, 147NE 863; 295Pa486, 145A595 (mere failure to complain does not amount to waiver of time limit).
689-63 179Ark1001, 18SW(2d)1025; 160Ga93, 127SE610; 120Kan602, 245P 107; 252Mass314, 147NE863; 262Mass 203, 159NE530 (accepting overdue payments); 253NY166, 170NE530; 295Pa 486, 145A595; 142Wash513, 253P817. But see 98CalA765, 277P876.
689-67 104Conn430, 133A677; 293Pa 97, 141A638. But see 223Ky668, 4SW (2d)686.
689-68 295Pa486, 145A595.
689-68½-New. A party consenting to, or requesting postponement of, performance of a stipulation for his benefit by the other party cannot avail himself of the latter's default and treat the contract as forfeited, although performance at the time specified was of the essence of the written contract. 77Colo 539, 238 P38.
690-72 21AlaA524, 109S555. See also 201 Iowa690, 207NW790, 791 [citCJ].
690-73 Wash 290P813. See also 201 Iowa690, 207NW790, 791 [citCJ].
690-74 See also 201 Iowa690, 207NW 790, 791 [citCJ]. [a] **Waiver of past failures** does not necessarily waive future defaults. Wash 290P813.
690-78½-New. If promisee waives timely performance nobody else can complain. 120Kan602, 245P107.
690-82½-New. Default under contract

making entire indebtedness due operates automatically without option by creditor to accelerate maturity. 41GaA406, 152 SE509(2dcase).

690-53 16F(2d)185; 239 IllA623, 625 [quotCyc]. See also 214AppDiv135, 211 NYS853 (holding conditions expressed or implied in fact must be exactly fulfilled).

690-54 201Cal204, 256P207. 55IndA 635, 143NE130. 205Iowa167, 217NW 808; NJSup 149A826(2dcase); 129 Misc106, 221NYS221. 225AppDiv207, 233NYS87; 53ND213, 205NW236; 147 Wash570, 266P726; 35Wyo381, 249P 790. See also 29PortoRico745 (conditional obligation dependent upon act of third person).

691-55 214Ala473, 108S339, 340 [cit CJ]; 35Wyo381, 249P790.

691-56 201Cal204, 256P207. 218SuskL 16 [1926] 1DomLR717, [1926] 3West Wkly355. [a] 171Ark930, 287SW161.

691-56½-New. "Substantial performance" is not "full performance." 220 AppDiv162, 221NYS720.

691-57 81Colo310, 255P985, 987 [cit CJ].

692-59 201Cal204, 256P207 (grading contract); 35Wyo381, 249P790.

692-91 214Ala473, 108S339, 340 [cit CJ]. 220Mass57, 107S143.

692-93 Iowa228NW263 (participant in word building contest, intentionally violating rules of contest, held not to have substantially performed); 220AppDiv 10, 220NYS634; TexCivA 272SW616; 35 Wyo381, 249P790. [b] **Acts not amounting to substantial performance.** 220AppDiv10, 220NYS634.

692-95 Mass 167NE460, 220AppDiv 468, 221NYS780; 120Misc406, 231NYS 321; Oh 170NE870; TexCivA 272SW 616.

692-95½-New. If contract provides in detail method of performance, court cannot apply doctrine of substantial performance and ignore such provisions. TexCivA 272SW616.

692-95¾-New. Recovery may be had for substantial compliance if defects in work are such as can be corrected at slight expense. 35Wyo381, 249P790 (contract to sell, remove, and reconstruct oil well drilling rig).

693-96 73CalA105, 235P111; 93CalA 722, 269P1114; 82Colo1, 256P639, 52 ALR[1]12, 223Ky619, 18SW(2d)718, 119 Md86, 131A34; 153Mi380, 138A255; 232Mich579, 206NW508; 178Minn188, 220NW610 (unless performance is rendered impossible by act of God, law, or other party); 230AppDiv672, 232NYS 335; 225AppDiv308, 233NYS87; 218SuskL 16, [1926] 4DomLR717, [1926] 3West Wkly355.

693-2 15F(2d)545; 220Ala587, 127S 118; 105Conn136, 132A53. 163Minn 253, 217NW107 (recovery allowed for work done). See also 35Wyo381, 249P 790.

693-3 220Ala587, 127S148; 241Mich 673, 217NW760.

693-4 81CalA630, 261P578, 241Mich 673, 217NW760.

693-5 108Conn186, 142A683 (mere intention is not treated as acceptance).

693-8 105Conn136, 142A683. 316Ill 155, 147NE12, 153Md350, 135A255.

694-12 82Mont312, 267P207, 213 [quotCyc]; 117Or482, 244P528, 529 [quotCJ]. [a] **Where permanent change in weather makes continued threshing impossible** before following spring, thresher is entitled to immediate payment for work done and is not liable for damages from cessation of work. Alta [1928] 3DomLR284.

694-15 295Pa156, 145A595.

694-16 223Ky619, 18SW(2d)748; 124 Okl220, 255P593.

694-19 195NC799, 143SE851. See also 69Alabl72, 75S800.

694-20 30F(2d)561, 171Ark930, 287 SW161, 63CalA[1]1, 228P[1]3 (acceptance of uncertified checks and receipt of cash thereon held waiver of provision requiring checks to be certified); 12LaA 15, 123S430 (operating car with knowledge of defect); 173Minn337, 217NW 346; Okl 292P7; TexCivA 288SW(2d) 877 (acceptance of work held waiver).

694-22 171Ark1010, 287SW370; 88 CalA339, 263P548; 84IndA666, 151NE 335, 336.

695-24 [b] **Payment after inspection** does not constitute waiver where owner has no opportunity to discover defects in work and defects are not ascertainable at time of payment. 11LaA310, 123S 511.

695-26 16F(2d)339, 28F(2d)518.

695-27 37OkiaCR313, 316 [quotCJ].

695-29 37OkiaCR313, 316 [quotCJ].

695-35 243NY473, 154NE314, 195NC 76, 147SE684(2dcase); 136Okl69, 276P 1[illegible] (may sue for damages or on quantum meruit or for specific performance); TexCivA 224SW934. TexCivA 128SW (2d)1059, 107WVa576, 149SE672.

696-42½-New. After full performance, the offeree may sue in terms of proposal or on common counts or quantum meruit if terms of the offer are not fixed. 257 Mass563, 154NE34.

696-46½-New. Where defendant sends applications from one state for correspondence courses and the applications are accepted in another state, if defendant refuses to accept and pay for some of the courses, plaintiff school cannot sue on the contract in the former state, but it can only sue for damages, if any, for breach of the contract. 218Mich85, 186NW283.

696-49 177Ark211, 6SW(2d)29. 130Or 255, 279P512, 69ALR561; TexCommnA 38SW(2d)412; TexCommnA 35SW(2d) 808 (where remedy effectual).

696-50 200Iowa1293, 206NW297 (contract between cooperative association and member).

696-51 17F(2d)896. TexCommnA 25 SW(2d)303.

696-55 51ND634, 200NW818 (action on unexecuted accord). See also TexCivA 318SW(2d)830.

697-90 [a] (4) Plaintiff's alleged breach by failing to tender note indorsed by certain parties according to agreement, 8F(2d)930. (5) Where damages are sought for anticipatory breach, it is defense to show that, if contract had continued, promisee would not have been entitled to performance, 34F(2d) 653. [b] (14) Clause in subcontract authorizing delay in payment of subcontractor for hauling till after contractor received payment, 102CalA536, 283P 84. (15) Contractor's attempt to deduct from subcontractor's bid proportion of cost of bond is no defense in action for failure to carry out bid. 110Conn234, 147A709. (16) Other matters not constituting defenses. Mo 78SW(2d)387; TexCivA 118SW(2d)570, 195Wis78, 217 NW227.

697-91 128Misc165, 218NYS666.

697-95½-New. Fact that a prospective judgment in an action on contract will be worthless is no defense to the action. 8F(2d)329.

697-95¼-New. A party to a contract cannot take advantage of his own wrong to escape liability. 125Okl134, 256P 916.

697-95¼-New. An owner who agreed to pay a materialman for material furnished for a house built for him by another is not entitled to credit for payments made to the contractor as made on the faith of a receipt showing payments made by the contractor to the materialman where the owner knew that the materialman signed the receipt on the faith of a bad check. 81Colo155, 253P 1069.

697-95½-New. Commission of an act which the contract itself authorizes affords no basis for action on the contract. 223Ky16, 28SW(2d)1031.

697-95¾-New. Insolvency does not relieve from breach of contract. 26F(2d) 40.

698-7 253Mass461, 149NE156 (mistaken).

698-18 37F(2d)708, [c] **Buyer assuming payment of indebtedness** due from seller to third person may set up defenses between buyer and seller. Ala 127S818.

699-26 216Ala199, 112S819, 53ALR 173; 193NC769, 138SE143, 146 [cit CJ]. Utah 272P201. 36Wyo221, 254P134, 135 [quotCJ].

699-27 193NC769, 138SE143, 146 [cit CJ]; Utah 272P204; 36Wyo221, 254P 134, 135 [quotCJ].

699-28 193NC769, 138SE143.

699-29 221MoA1204, 300SW840; 193 NC769, 138SE143.

699-31 216Ala199, 112S819, 53ALR 173; 127Me58, 141A99, 100 [citCJ]; 36 Wyo221, 254P134, 135 [quotCJ].

699-40 128Misc238, 218NYS287. [a] **Time of performance of alternative agreement** is time for bringing suit. 83 CalA187, 256P825.

700-45 [a] (3) 94CalA663, 271P780.

700-54 135Misc594, 238NYS684.

700-56 309Mo276, 274SW699.

700-58½-New. Where, after breach of contract for services for a term, the injured party engages in other business, an action cannot be brought before expiration of such term. 145Miss372, 110 S774.

701-63 161Ga503, 131SE904, 44ALR 599; 35GaA494, 132SE454; 38GaA286, 144SE333; 28Hawaii494. [a] **In Ohio.**–22OhA507, 153NE287. [b] **Right of action on implied contract** follows the consideration. 97Fla679, 122S107(2dcase).

701-64 116Or683, 242P826. [a] **Purpose and effect of statute.**–116Or683, 242P826.

701-66 37F(2d)279; 174Ark90, 294SW 361; 36GaA459, 137SE106; IndA 172 NE656; 219Ky528, 293SW1091; 255 Mass587, 152NE623, 47ALR1; 256Mass 404, 152NE715; Mass 168NE794; 248 Mich199, 226NW820; 164Minn411, 205 NW257; 83ND365, 142A689; 218App Div237, 218NYS204; 44PhilippineC369 (Civ. Code art 1257); 32PortoRico55; SD 226NW739; 194Wis559, 217NW307. [b] **In Porto Rico.**–32PortoRico 55.

702-67 97Fla340, 121S477; 125Kan524, 265P78; 103NJL517, 133A307.

702-68 30F(2d)461; 164Minn411, 205 NW257 (no privity shown).

702-68½-New. Where a tenant's chattel mortgagee agreed with the landlord not to foreclose, the damages collected by the landlord for breach belong exclusively to the landlord. Iowa 227NW 582.

703-87 See also 20OhA400, 152NE394, 397 [quotCyc].

703-88 DelCh 152A130; 37GaA564, 141SE659; Mass 168NE794 (stranger to consideration has no right of action); 292Pa304, 141A27; 10PaDist&Co83; 10PaDist&Co402. See also 20OhA400, 152NE394, 397 [quotCyc].

704-90 NB [1926] 4DomLR727. See also NB [1928] 1DomLR332.

704-91 84Colo325, 270P650; 37GaA 564, 141SE59. See also 20OhA400, 152 NE394, 397 [quotCyc].

704-92 20OhA400, 152NE394, 397 [quotCyc]; 13PaDist&Co569.

704-92½-New. In Porto Rico, under Civ. Code § 1224, when contract "contain any stipulation in favor of a third person, he may demand its fulfilment, provided he has given notice of his acceptance to the person bound" before revocation, and filing suit before revocation equivalent to notice of acceptance. 32PortoRico55.

704-93 See also 20OhA400, 152NE394, 397 [quotCyc].

704-94 [a] In Porto Rico.–32PortoRico 55.

705-95 297Pa543, 147A608 (aunt's contract with parents of niece for latter's maintenance and education held enforceable by such child's guardian).

705-1 [a] In Porto Rico.–32PortoRico 55.

705-2 36GaA130, 135SE755.

705-4 13F(2d)98; 17F(2d)242, 243 [cit CJ]; 215Ala521, 111S815; 216Ala199, 112S819, 53ALR173; 217Ala153, 115S 91, 55ALR1231; 34Ariz19, 267P598; 205Cal196, 277P898; 77CalA219, 246P 143; 84CalA298, 257P901; 81CalA206, 253P906; 106Conn683, 138A501; 109 Conn256, 146A293; Fla 130S440; 161 Ga808, 132SE422; 168Ga878, 149SE213, 33GaA815, 127SE395; 35GaA550, 134 SE142; 86IndA129, 158NE188; 205 Iowa1204, 216NW278, 219NW318; 120 Kan400, 243P1058; 122Kan666, 253P 235, 238 [citCJ]; 219Ky528, 293SW 1091; 231Ky302, 218SW(2d)439(2dcase); 234Ky645, 29SW(2d)650, 151Md1, 133 A821, 174Minn297, 219NW180; 174

Minn350, 219**NW**287; 221**MoA**1204, 300 **SW**840; **MoA** 28**SW(2d)**448; 127**Misc** 413, 217**NYS**182; 127**Misc**545, 217**NYS** 426; 191**NC**253, 131**SE**659; 193**NC**780, 138**SE**131, 53**ALR**1404; 193**NC**769, 138 **SE**143; 196**NC**733, 147**SE**9; 198**NC**177, 151**SE**93; 20 **OhA**400, 152**NE**394, 397 [citCJ]; **OhA** 173**NE**19; 110 **Okl** 17, 235**P**921; 115 **Okl** 1, 240**P**1063; 120 **Okl** 244, 251**P**478; 284**Pa**47, 130**A**417; 44 **Philippine**369; 136**SC**207, 134**SE**232; 139 **SC**411, 138**SE**184; 159**Tenn**76, 16**SW(2d)** 186; **TexCivA** 300**SW**641 (privity of contract between owners of land covered by oil lease and oil well shooter); **Utah** 272**P**204; 142**Va**355, 128**SE**624; 144**Wash**272, 257**P**835. [c] **Contract may be made for third person's benefit.–MoA** 28**SW(2d)**448.

707-5 127 **Or**461, 271**P**976, 62**ALR**644.

707-6 228**Ky**844, 16**SW(2d)**482 ("donee," "creditor," and "incidental beneficiary" distinguished); 292**Pa**304, 141 **A**27. **Erratum.**–N. Y.–Omit quotation from "Ward v. Cowdrey, 5**NYS**282." [a] **Rule held one of substantive law.–** 292**Pa**304, 141**A**27.

707-8 **TexCivA** 10**SW(2d)**1037.

707-10 30**F(2d)**665; 215**Ala**327, 110**S** 716; 22**AlaA**325 (right not affected by subsequent agreement or release); 77 **CalA**219, 246**P**143; **Iowa** 232**NW**724; 213**Ky**670, 281**SW**791 [quotCJ]; 228**Ky** 844, 16**SW(2d)**482 (creditor beneficiary may recover judgment against either promisor or promisee); 83**NH**365, 142**A** 689 (insolvency of debtor is immaterial); 127**Misc**33; 215**NYS**145; 193**NC**769, 138**SE**143; 120 **Or**396, 252**P**563; 125 **Or** 375, 264**P**865; **TexCommnA** 16**SW(2d)** 517 (acquires no better right to enforce it than held by contracting parties themselves); **TexCivA** 48**SW(2d)**599; **TexCivA** 18**SW(2d)**224. [a] **Directions to bank or agent** do not alone constitute agreement by bank or agent for benefit of another. 243**NY**45, 152**NE**460.

708-11 235**Ky**574, 31**SW(2d)**910; 152 **Miss**825, 119**S**308; **TexCommnA** 1 **SW(2d)**572; **TexCivA** 288**SW**260; 141 **Wash**369, 251**P**585.

708-11½-New. and formal acceptance by plaintiff is not necessary before bringing suit; **TexCivA** 288**SW**260.

708-12 161**Ga**503, 131**SE**904, 44**ALR** 599.

709-16 164**Minn**201, 204**NW**936; 5**Pa Dist&Co** 235 (child may sue, though not mentioned in bond).

709-17½-New. to a contract to leave property by will to a child of one of the contracting parties; 219**AppDiv**627, 220**NYS**785.

709-25 17**F(2d)**242, 243 [citCJ]; 213 **Ky**670, 281**SW**791 [quotCJ].

709-25½-New. to a bond given to state superintendent of banks. 164**Minn**265, 204**NW**938.

709-27½-New. to a surety contract in favor of lessor of property not a party thereto. 44**Philippine**369.

709-28 213**Ala**248, 104**S**425 (beneficiary of reinsurance contract); 228**Ky**844, 16 **SW(2d)**482; 115 **Okl** 1, 240**P**1063 (drilling contract held made for benefit of those furnishing labor, material, and supplies used in drilling oil well); 44 **Philippine**369 (surety contract to which obligee not party).

709-28½-New. A contract wherein an automobile dealer given exclusive selling agency agrees to pay any other dealer percentage of a sale in the other's exclusive territory is enforceable by such other dealer. 127**Misc**413, 217**NYS**182.

709-28½-New. Where stockholders agreed to transfer stock and the buyer agreed to pay money to the corporation, the corporation could sue. 151**Md**1, 133 **A**821.

709-29 13**F(2d)**732; 17**F(2d)**242, 243 [citCJ]; 30**F(2d)**464; 213**Ala**248, 104**S** 425; **Ala** 128**S**376; 171**Ark**585, 286**SW** 878, 48**ALR**456; 77**CalA**219, 246**P**143; 93**CalA**609, 269**P**975; 83**Colo** 464, 266**P** 209; 109**Conn**256, 146**A**293 (promisor should assume direct obligation to him); **Fla** 130**S**440; 161**Ga**503, 131**SE**904, 908, 44**ALR**599 [quotCycperHill and Gilbert,JJ]; 252 **IllA**41; 86 **Ind**429, 158**NE**488 (intention to impose obligation in favor of third person must clearly appear); 228**Ky**844, 16**SW(2d)** 482 (whether third person can sue depends on facts and circumstances); 234 **Ky**764, 29**SW(2d)**29; 234**Ky**645, 29 **SW(2d)**650; 248**Mich**199, 226**NW**820; 164**Minn**411, 205**NW**257; 322**Mo** 621, 15 **SW(2d)**770; 74**Mont**43, 238**P**877; 99 **NJEq**381, 131**A**909, 910 [citCJ]; 218 **AppDiv**341, 218**NYS**317, 218**AppDiv**237, 218**NYS**204; 138**Misc**76, 244**NYS**331; 51 **ND**202, 199**NW**582; 54**ND**211, 209**NW** 388; 56**ND**152, 217**NW**150; 113 **Or**398, 233**P**547, 554 [cit&quotCJ] (contract held not made for benefit of plaintiff); 292**Pa**304, 141**A**27; 9**PaDist&Co** 732, 738 [citCJ]; 139**SC**163, 137**SE**444, 450 [citCJperCothran,J]; **TexCivA** 282**SW** 888; **TexCivA** 295**SW**337. [a] (6) Subsidiary corporation, whose stock is owned by main corporation, is not entitled to enforce against employee of main corporation duties under contract with it. 252 **IllA**41. [b] (1) See also 142**Va**301, 128**SE**447. (5) Code [1919] § 5143 greatly enlarges right of action of beneficiaries under contracts to which they were not made parties. 142**Va**301, 128**SE**447. (6) Purpose of this section is to extend remedy mentioned therein to such beneficiaries where such extension is not forbidden by contract itself. 142**Va**301, 128**SE**447. (7) Its purpose was not to limit powers of parties to contract, or right to select parties with whom they would contract. 142**Va**301, 128**SE**447. (8) Nor is its purpose to prevent parties from limiting right of action to immediate parties with whom contract was made, nor to create beneficiaries not made so by contract. 142**Va**301, 128**SE**447. (9) Guaranty to pay all indebtedness of named parties in attached contract jointly and severally is not exclusively for benefit of such parties but inures to benefit of their creditors who could sue thereon in their own names under Code [1919] § 5143. 142**Va**301, 128**SE**447. (10) Such section is to be liberally construed. 142**Va**301, 128**SE** 447. (11) In federal courts third party may recover on contract only where he is sole beneficiary and when parties intend him as primary party in interest. 13**F(2d)**732. [c] (2) Banker's agreement to transmit money to designated firm in foreign country cannot be enforced by firm's successor in interest contract for benefit of firm where in absence of evidence that money belonged to plaintiff or firm. 127**Misc**33, 215**NYS** 145. [e] **Promisor is held liable to third party** only in case of misfeasance, where there is no contractual obligation to plaintiff. 218**AppDiv**237, 218**NYS**204. [f] **Priority between parties** held essential. 17**F(2d)**242. [g] **Contract need not be for exclusive benefit of plaintiff.–** 77**CalA**219, 246**P**143. [h] **Creditor of lessee has no claim on fund deposited with lessor** as security for performance of lease, where lessor is unauthorized to pay creditors. **IndA** 168**NE**44.

711-30 99**CalA**456, 278**P**913; **SD** 226 **NW**739; 39**Wyo** 195, 274**P**13.

711-31 120**Kan**400, 243**P**1058.

711-32 122**Kan**666, 253**P**235, 238 [cit CJ]; 139**SC**411, 138**SE**184; **TexCivA** 288**SW**260.

711-33 127**Misc**413, 217**NYS**182; 20 **OhA**400, 152**NE**394.

711-34 99**CalA**456, 278**P**913; 127**Misc** 413, 217**NYS**182.

711-35 127**Misc**413, 217**NYS**182.

711-36 205 **Iowa**1264, 216**NW**278, 219 **NW**318 (contract between joint purchasers of land for benefit of vendor); 205 **Iowa**1311, 217**NW**441; 122**Kan**666, 253 **P**235, 238 [citCJ]; 127**Misc**413, 217**NYS** 182; **TexCommnA** 38**SW(2d)**1109, 1111 [citCJ] 61**ALR**1459.

711-37 213**Ala**248, 104**S**425; 44**Philippine**369. [c] **Acceptance implied from conduct.–44Philippine**369. [d] **Election to accept or reject new party as debtor.–** 217**Ala**216, 115**S**389.

711-38 213**Ala**248, 104**S**425; **Tex CommnA** 18**SW(2d)**572; **TexCivA** 288**SW** 260.

711-38½-New. Payment of consideration by a person for whose benefit a contract is made supplies the necessary privity. 161**Ga**898, 132**SE**422.

712-40 253 **IllA**333; 10**PaDist&Co** 83; 10**PaDist&Co** 331.

712-45 **TexCivA** 275**SW**307, 308 [cit CJ]. See also 17**F(2d)**242.

712-46 217**Ala**153, 115**S**94, 55**ALR**1231; 138**Misc**76, 244**NYS**331. [a] Consideration passing between original and new debtor is sufficient consideration for promise to pay debt consented to by creditor. 217**Ala**216, 115**S**389.

712-48 7**F(2d)**822; 200 **Iowa**l, 201**NW** 787; 126**Kan**473, 268**P**817; 57**ND**624, 223**NW**700; **TexCivA** 275**SW**307, 308 [citCJ].

713-50 217**Ala**216, 115**S**389; 58**ND**881, 228**NW**217; **TexCivA** 275**SW**307.

713-51 **TexCivA** 275**SW**307.

713-52½-New. Third party may enforce contract at any time before rescission. 51**ND**66, 199**NW**138.

713-53 23**F(2d)**638 (state highway commission); 202**Cal** 778, 262**P**742; 90 **CalA**41, 265**P**844; 200 **Iowa**199, 204**NW** 237 (one who did not sign written contract); 205 **Iowa**483, 218**NW**325; 150 **Md**677, 133**A**843; **TexCivA** 290**SW**187; **TexCivA** 15**SW(2d)**148. But see 35**GaA** 550, 134**SE**142. [b] **Party to tripartite agreement,** inuring to benefit of another, must perform his promise. 132**Misc** 335, 230**NYS**332. [c] **Deed executed by one who had contracted to execute covenant not to convey to negroes** will not be canceled where neither grantor's wife nor negro grantee signed contract. **Mo** 24**SW(2d)**1017.

713-61 101**CalA**548, 281**P**1047; 46**Philippine**514. [b] **Where there is no privity of contract** between parties. 55**AppDC** 302, 5**F(2d)**125.

713-62 **Mo** 24**SW(2d)**1017; 220**AppDiv** 648, 222**NYS**366.

713-62½-New. An action cannot be maintained against a stranger to a contract by which a debt or obligation is created to recover damages in satisfaction of the debt. 117 **Okl** 131, 245**P**852.

713-62½-New. Stipulation in contractor's application to surety for bond that evidence of loss paid by surety shall be conclusive is not binding on subcontractor's assignee. **Minn** 231**NW**798.

713-62¼-New. In an action on a contract to pay a promissory note executed to plaintiff by others, persons signing the note were not necessary parties. 130 **Or**522, 279**P**867.

713-64 246**NY**516, 159**NE**416.

713-65 217**Ala**216, 115**S**389 (where original debtor released vendee assuming debt who resold to subvendee likewise assuming debt); 120**Kan**400, 243**P**1058.

714-67 31**F(2d)**337; 236**Mich**29, 209 **NW**805.

714-68 10**LaA**736, 121**S**785; 150**Wash** 676, 274**P**698.

714-69 173**Ark**633, 293**SW**36; 76**Mont** 24, 245**P**958, 46**ALR**906.

714-78 20**F(2d)**757; 26**F(2d)**218; 37 **F(2d)**87 (amended petition); 215**Ala** 311, 110**S**396, 398 [citCJ]; 81**Colo** 155, 253**P**1069; 37**GaA**412, 140**SE**412 (petition held demurrable); 214**Ky**70, 282 **SW**785; 252**NY**495, 170**NE**119; 225 **AppDiv**360, 233**NYS**153; 190**NC**129, 129 **SE**193 (complaint held sufficiently to state cause of action for breach of contract as against demurrer); 193**NC**274, 136**SE**869; 50**ND**443, 196**NW**503 (action for breach of contract to redeem from foreclosure for benefit of mortgagor); 158**Tenn**346, 13**SW(2d)**330; **TexCivA** 271**SW**145; **TexCivA** 20**SW(2d)**843; **TexCivA** 21**SW(2d)**1109; **TexCivA** 23 **SW(2d)**527; **TexCivA** 25**SW(2d)**927; **Wash** 291**P**485. See also 5**LaA**749; 29 **PortoRico** 901. [h] 37**GaA**263, 139**SE** 921. [i] **In Porto Rico.–29PortoRico** 901. [j] **Complaint held sufficient** as stating cause of action. 84 **IndA**264, 151**NE**137. [k] **Allegation for work, labor, and services** permits recovery either on express or implied contracts. 243**NY**473, 154 **NE**314. [l] **Petition held insufficient.** 40**GaA**259, 149**SE**321(2dcase); 128**Kan** 722, 280**P**788. [m] **Petition held sufficient.–TexCivA** 30**SW(2d)**428.

715-80 166**Minn**18, 208**NW**1 (complainant failing to allege value of firm at time defendant agreed to produce a purchaser fails to state a cause of action); **NC** 153 **SE**630 (allegations of damages held insufficient). [e] **Particular petitions construed.–40GaA**370, 149**SE**710.

715-81 124**Kan**614, 261**P**826 (implied

contract pleading conversion). See also 206 Iowa893, 221NW512.

715-82½-New. Allegations of conspiracy by defendants do not give plaintiff the right to a decree for specific performance. 260Mass15, 156NE689.

715-85 TexCivA 295SW292.

715-88 Ill 173NE92. [b] **Allegations held insufficient.**-Ill 173NE92.

715-89½-New. In an action at law against a copartnership the fact that one of the partners was at the date of the contract the husband of plaintiff, does not prevent recovery by plaintiff from the remaining partners. 27Hawaii 369.

715-90 220Ala587, 127S148; 36GaA2, 135SE448; 36GaA130, 135SE755; 227 AppDiv543, 238NYS387; 9PaDist&Co 797. [a] **Complaint setting forth contract contravening public policy** states no cause of action. 118 Oh285, 160NE 852.

716-92 6PaDist&Co 736. [c] **Complaint held not to state cause of action.**-220App Div584, 222NYS66.

716-93 22AlaA325, 115S385 (sufficient to show obligation to pay note).

716-97 35GaA707, 134SE798; 215Ky 45, 284SW425; 8PaDist&Co 153. [d] **Allegations held insufficient** to show that contracts had different meaning or effects than expressed. 13F(2d)607.

717-8½-New. When meaning of language of complaint is not certain and free from doubt, the better practice is to determine the validity of the contract upon the evidence at the trial. 165 Minn374, 206NW716.

717-9 29 OhA305, 163NE560.

717-13½-New. Language of complaint alleging contract must be construed in favor of a legal rather than an illegal contract. 165Minn374, 206NW716.

718-22 33GaA760, 127SE883.

719-31 255 IllA93 (failure to follow rule a actions in assumpsit is substantial defect).

719-34 But see 129 Okl 22, 263P126.

719-35 See alsoMoA 297SW730.

719-37 BC [1926] 4DomLR971.

719-39 But see 12PortoRicoFed210.

719-41 Ala 129S39 (must set out parts material to breach); 249 IllA280; MoA 30SW(2d)777; 220AppDiv584, 222NYS 66; 227AppDiv543, 238NYS387; Tex CivA 5SW(2d)244, 246 [citCJ].

719-43 58ND617, 226NW810(2dcase).

720-44 TexCivA 5SW(2d)244, 245 [quot CJ]; TexCivA 18SW(2d)256.

720-48½-New. Failure to plead entire contract will not defeat recovery for partial breach. MoA 272SW1091.

720-55 TexCivA 282SW903.

720-56 220Ala69, 124S108 (demurrer properly sustained to count not alleging whether contract was oral or written).

720-56½-New. Under Pennsylvania statute, in actions on a contract, it shall be stated whether the contract is oral or written. 6PaDist&Co 132.

720-60 235Ky526, 31SW(2d)901.

720-61½-New. In one jurisdiction the statement of claim must clearly state whether the contract is oral or in writing. 8PaDist&Co 153.

720-61½-New. unless from the whole statement an irresistible inference arises which establishes the class to which it belongs. 8PaDist&Co 153.

720-63 264Mass530, 163NE165.

720-63½-New. Action on book account need not state whether it is oral or written. 5PaDist&Co 678.

721-64 220Ky476, 295SW440, 442 [quot CJ].

721-65 213Ala274, 104S645, 42ALR981; Ida 285P1023; 220Ky476, 295SW440, 442 [quotCJ]; 75Mont594, 244P480 (subsequently executed oral agreement); 5PaDist&Co 280. [d] **Allegations held insufficient.**-39GaA637, 148SE411.

721-66 220Ky476, 295SW440, 442 [quot CJ].

721-72 125Misc894, 211NYS649 (it is sufficient to state that contract was made before commencement of action).

721-73 5PaDist&Co 280.

722-91 34Ariz68, 267P794; Mo 248SW (2d)1017; 217AppDiv1, 215NYS792. [c] (4) Other instances. Wis 229NW 635.

723-92 217AppDiv1, 215NYS792.

723-95½-New. Demurrer to complaint for breach of contract as not showing mutuality should be sustained. 21AlaA 161, 106S58.

723-95½-New. A petition alleging an illegal consideration does not state a cause of action. 36GaA191, 136SE108.

724-2 166Minn18, 208NW1 (consideration for agreement to resell purchased farm held sufficiently stated).

724-12 125Misc894, 211NYS649.

724-15 Fla 130S421; 217AppDiv10, 215 NYS755; TexCivA 297SW904. [a] (3) Allegation that plaintiff performed all conditions of contract on his part to be performed is sufficient showing that tender of arbitration, which was condition precedent to maintenance of action, had been made. 135Wash211, 237P251. (4) Allegation held sufficient as showing fulfillment of condition of securing subscriptions. 5PaDist&Co 286.

725-20½-New. Fulfillment of a guarantee not made a condition precedent by the contract to plaintiff's right to demand payment need not be alleged. 142 Miss428, 107S557 (matter of defense).

725-23 AlaA 130S165; 77Colo 386, 236 P1016; 217AppDiv10, 215NYS755; 219 AppDiv278, 219NYS656; 227AppDiv632, 236NYS35(1stcase); 196NC116, 144SE 694; TexCivA 281SW242; TexCivA21SW (2d)87; 36Wyo 221, 254P134. [a] 40 GaA 185, 149SE89 (part performance and prevention of complete performance). [b] **Plaintiff must allege either performance or excuse for nonperformance** since they are not same. 195Cal 655, 235P438. [c] **In case of anticipatory breach,** though actual tender is excused, plaintiff must allege readiness to perform had it been required. 135 Misc103, 236NYS673.

726-24 Va 153SE722; Va 154SE568.

726-26 36Wyo 221, 254P134. [a] 42 Ida349, 245P95.

726-28 217AppDiv10, 215NYS755. [a] **Allegations held sufficient.**-220Ala587, 127S148.

726-29 214Ala215, 107S53; 42 Ida349, 245P95, 96 [citCJ]. [a] (2) Receipts of proceeds of sale of timber are held to show waiver of requirement for furnishing bill of lading. 214Ala215, 107S53.

727-30 162La891, 111S271, 275 [cit CJ]; 217AppDiv10, 215NYS755.

727-33 217AppDiv10, 215NYS755.

727-36 35Wyo 381, 249P790.

727-37 218AppDiv141, 218NYS856; Tex CivA 288SW855. [a] (1) See also 217 AppDiv10, 215NYS755.

727-39 [a] **"Duly" performed.**-35Wyo 381, 249P790.

727-41 35Wyo 381, 249P790, 792 [cit CJ].

728-42 199Cal 168, 248P658, 663, 47 ALR904 [quotCJ].

728-46 217AppDiv10, 215NYS755; 218 AppDiv141, 218NYS856.

728-51 14F(2d)38.

728-51½-New. But it is not necessary to allege readiness, ability, and willingness to perform independent covenants. 190NC764, 130SE614.

728-53 TexCivA 291SW959.

728-55 121 Okl 31, 246P623 [citCJ]; 144SC64, 142SE34.

729-65 217Ky553, 290SW319; Tex CommnA 296SW506; TexCivA 285SW 691, 693 [citCJ].

730-80 72CalA757, 238P143 (ownership of claim sued on by plaintiff need not be alleged in absence of complaint or proof of transfer); 84CalA206, 257 P907 (nonrescission); TexCivA 288SW 855.

731-83 217MoA592, 274SW941; 121 Or28, 253P879.

731-84 218AppDiv141, 218NYS856; 121 Or28, 253P879. [b] 217MoA592, 274 SW941.

731-87 69CalA384, 231P567; 215Ky 45, 284SW425; 220Ky569, 295SW863, 864 [citCJ].

732-88 27Hawaii122; 217Ky553, 290 SW319.

732-94 14F(2d)813; 214Ala215, 107S 53; 221Ky494, 299SW181. [a] **Complaint held sufficient** as to allegations of breach. 84 IndA264, 151NE137. [b] **Allegations held insufficient.**-CalA 286 P507.

732-95 96Fla151, 117S853 (reasonable certainty); 214Ky70, 282SW785. [a] 102Conn488, 129A384.

732-97 96Fla151, 117S853; 127Me194, 142A734.

732-5 96Fla151, 117S853.

733-18 127Me194, 142A734.

734-26 131 Okl 134, 268P224, 225 [cit CJ]; 122 Or579, 260P444, 447 [citCJ].

734-28 122 Or579, 260P444, 447 [cit CJ].

734-33 See also 217AppDiv10, 215NYS 755.

735-47½-New. In an action to recover a sum of money under contract pleaded in hæc verba and which provides for an accounting, it is not necessary for defendant to demand an accounting in his pleading. 78CalA122, 248P278.

735-47½-New. In such case defendant is justified in relying on a performance of the contract, 78CalA122, 248P278.

735-47¼-New. especially where plaintiff alleges that he demanded performance of the contract in all its terms including an equitable adjustment. 78 CalA122, 248P278.

735-60 102Conn488, 129A384 (answer insufficient); 236Mich471, 210NW478.

736-65 220MoA447, 276SW415, 416 [citCJ].

736-71 244NY14, 154NE649; 122 Or 579, 260P444.

736-72 [d] **Defense that plaintiff agreed to look to fund to be raised for compensation** cannot be proved under general denial in action for services. 115 Or472, 239P96, 41ALR750.

737-77 203 Iowa518, 210NW453; 216 AppDiv476, 215NYS564.

737-78 102Conn488, 129A384; Tex CivA 118SW(2d)578.

737-79 102Conn488, 129A384 (that bills were presented to city's contractor did not absolve city under its contract of indemnity).

737-80 203 Iowa518, 210NW453.

737-84 216AppDiv476, 215NYS564.

737-87 MoA 274SW532; TexCivA 271 SW145.

737-88 TexCivA 271SW145.

737-93 27Hawaii122; 217Ky28, 288 SW1031.

738-94 217Ky28, 288SW1031.

738-97½-New. Any representations made prior to, or contemporaneous with, execution of written contract constitute no defense to an action on such contract. 116 Okl 255, 244P414.

738-3 TexCivA 280SW266.

738-5 84CalA206, 257P907; 45 Ida303, 262P149; 117 Okl 199, 246P225 (sufficiency of plea).

738-6 TexCivA 280SW266.

738-11 137Misc398, 241NYS194 (defense sufficient on face).

738-12 [a] 121Kan860, 250P273.

739-16 Nebr 228NW267.

739-20 135Wash211, 237P291.

739-21 77CalA393, 246P1081, 1083 [cit CJ]; Nebr 228NW367.

740-43 88 IndA469, 150NE384.

740-45 215Ala598, 111S641, 642 [cit CJ]. See also 202 Iowa15, 209NW516, 519 [citCJ].

741-49 Mo 23SW(2d)64.

741-51 CalA 289P855; 220AppDiv603, 222NYS425.

741-52 220AppDiv603, 222NYS425.

741-56 TexCivA 278SW243.

742-66 191NC616, 132SE575.

742-67 92Fla763, 110S265.

742-68 See also TexCivA 278SW243.

742-72 217AppDiv59, 216NYS437.

742-73 217AppDiv59, 216NYS437.

742-74 252NY495, 170NE119; 217 AppDiv59, 216NYS437; 126 Or384, 270 P501, 502 [citCJ]. [d] **Defense of ultra vires** must be specially pleaded. 53ND797, 208NW82, 86 [citCJ].

742-75 80CalA501, 251P973 (objection held available at any time); 54ND830, 211NW597. See also TexCivA 277SW 433 (illegality need not be pleaded).

742-76 217AppDiv59, 216NYS437; 126 Or384, 270P501, 502 [quotCJ].

743-79 MoA 274SW532; 52ND617, 204 NW683; 53ND797, 208NW82, 86 [citCJ]. But see 166Minn306, 207NW633. [c] **But when, though not pleaded, facts establishing illegality are disclosed by record,** defense becomes available because court will not consciously enforce illegal contract. 52ND617, 204NW683.

743-81 225AppDiv366, 233NYS896.

744-83 166Minn306, 207NW633.
744-84 But see 228Ky827, 16SW(2d) 453.
744-86 43 Ida327, 251P757, 759 [cit CJ]; 136SC496, 134SE505; 51SD288, 213NW507; TexCivA 28SW(2d)877. See also TexCivA 275SW70, 72 [quotCJ].
744-87 See also TexCivA 275SW70, 72 [quotCJ].
744-88 See also TexCivA 275SW70, 72 [quotCJ].
744-89 TexCivA 275SW70, 72 [quot CJ] (mistake of identity of party contracted with); TexCivA 28SW(2d)877. [b] **Necessity of claim for rectification.**–BC [1928] 2DomLR95.
744-90 39GaA387, 147SE190. [a] 35 GaA286, 132SE921; BC [1929] 1DomLR843.
744-91 136SC496, 134SE505; 51SD 288, 213NW507.
745-96 86PaSuper386.
745-3 51SD288, 213NW507.
746-15½-New. A plea of non est factum must plead affirmatively that the pleader did not sign the paper, and that he authorized no one to sign it for him. 218Ky302, 291SW393.
747-44 221MoA67, 294SW123 (proof of special contract sued on is sufficient to warrant recovery); 132Misc48, 228NYS 624.
748-49½-New. In an action to recover on a cost plus contract for labor and materials in which defendant pleads the general issue, plaintiff must prove all items of weekly pay rolls for labor. 145 Miss827, 111S290.
748-49⅓-New. Fraud as a ground for avoiding a contract must be proved. 51SD288, 213NW507.
748-49¼-New. Defendant is under no duty to prove his pleaded version of what a contract really was where he has also met plaintiff's averment of the contract by a general denial. 202Iowa 1251, 211NW898.
748-49⅕-New. Matters of defense specially pleaded must be proved. CalA 289P855.
748-55 103Conn491, 130A844 (evidence held to identify contract alleged and one proved); MoA 289SW356; MoA 3SW (2d)263; 125 Okl 219, 257P291, 293 [citCyc]; TexCommnA 272SW1105 (no variance); TexCivA 27SW(2d)653(1st case); 102WVa550, 136SE33. [b] **Claim of forfeiture must be clearly shown** in particular manner providing for forfeiture. TexCommnA 271SW886.
748-56 15F(2d)660; 103Conn491; 130 A844 (variance held fatal); 145Miss 372, 110S774; Mo 18SW(2d)382; 194 NC694, 140SE611; 196NC255, 145SE 232.
748-57 TexCommnA 13SW(2d)342; TexCivA 15SW(2d)150.
748-58 205 Iowa809, 218NW566, 567 [citCJ].
748-59 15F(2d)660, 665 [quotCyc]; 39 GaA610, 147SE902; 46Ida303, 267P 830; 200Iowa853, 205NW538; 212Ky 253, 278SW583; 220Ky476, 295SW440; 229Ky335, 17SW(2d)196; 235Ky372, 31SW(2d)610; 162La891, 111S271; 3 LaA41; 155Md157, 141A538; 151Miss1, 117S336; MoA 256SW134; 220MoA 1077, 279SW769; MoA 21SW(2d)203; 125 Okl 219, 257P291, 293 [citCyc]; 132 Or145, 285P214; 284Pa410, 131A360; 133SC202, 130SE758; TexCivA 271SW 155; TexCivA 275SW397; TexCivA 294 SW699; TexCivA 299SW676; TexCivA 18SW(2d)685; TexCivA 31SW(2d)506; TexCivA 31SW(2d)839. [b] **Oral agreement to do what law requires** to be done is not such express contract as will do violence to rule. MoA 290SW1022.
749-62 255Mass519, 152NE107; 220 MoA1077, 279SW769; 80Mont214, 260P 711; TexCivA 278SW939. But see 259 Mass439, 156NE740.
749-63 205 Iowa809, 218NW566, 567 [citCJ].
749-64 220MoA1077, 279SW769.
749-67½-New. Where quantum meruit is withdrawn, plaintiff cannot recover without justifying his failure to perform the contract. 208 Iowa1113, 224 NW785.
749-68 9LaA49, 118S783; 51SD62, 212 NW50.
750-69½-New. An action on a debt cannot be proved by introduction of note. 217MoA131, 273SW197.
750-70½-New. Proof of an express contract in an action for the reasonable value of services does not constitute a variance where the court limits the purpose for which the evidence may be considered to the question of the reasonableness of the service. 40 OklACR233 [rehearing pending].
750-71 205 Iowa809, 218NW566, 567 [citCJ].
750-72 124 Or461, 263P916, 918 [cit CJ].
750-73 73CalA140, 238P749.
750-79 CalA 292P275; 203 Iowa518, 210NW453; 240NY233, 148NE331; TexCommnA 13SW(2d)342; TexCommnA 29SW(2d)1011; TexCivA 18SW(2d)750; TexCivA 29SW(2d)853; 103WVa728, 138SE456.
751-81 40 OklACR233, 235 [citCJ, and rehearing pending].
751-83 103Conn491, 130A844.
752-98 MoA 30SW(2d)777.
752-99 38GaA303, 143SE909.
753-3 216Ala567, 114S130.
753-7 39GaA606, 147SE911(2dcase).
753-9 But see 103Conn491, 130A844.
753-13 214Ala536, 108S358.
753-15 6F(2d)313; 214Ala536, 108S 358; TexCivA 25SW(2d)919. Contra 86 Mont1, 281P537. [a] **Plea may be sustained by proof** that article was valueless and instrument was secured by fraud. 127 Or308, 271P988, 60ALR 1165.
753-15½-New. Plaintiff, not pleading failure of consideration, cannot raise the question. MoA 256SW1088.
753-16 8F(2d)726; 83Colo 143, 263P 16; 137Misc384, 244NYS2.
753-17 195Cal 655, 235P438; 202Cal 501, 261P994; Mass 168NE745; Mass 172NE101.
754-22 121 Or28, 253P879.
754-26½-New. Where an answer denying plaintiff's general allegation of performance states particulars of nonperformance, defendant is limited on such issue to introduction of evidence of such particulars. 199Cal 168, 248P658, 47 ALR904.
754-27 84CalA220, 257P898.
754-30 Iowa 228NW263.
754-32 10LaA544, 121S624.
755-47 [a] **Variance held not fatal.**–155 Wash564, 285P433.
755-52 MoA 22SW(2d)880.
755-52½-New. Date may be corrected by evidence. 5PaDist&Co 280.
755-53 19F(2d)378. But see TexCivA 29SW(2d)855.
755-54 97Fla679, 122S107(2dcase).
755-56 69CalA195, 230P964; 127Me187, 142A727; Md 148A536.
756-2 133Misc136, 231NYS285.
756-3 3LaA330; 32PortoRico 674 (Civ. Code § 1182).
756-5 202 Iowa1270, 211NW860.
756-6½-New. Although defendant by answer, after denying the making of a contract set up in the petition, alleges substantially a different contract, the burden of proof is not shifted to defendant. 113 ObSt682, 150NE752.
756-6⅓-New. Defendant having a contract to publish constitutional amendments, voluntarily paying plaintiff a portion of the price received for publication in plaintiff's paper knowingly permitted, has been held to have voluntarily paid what he considered the reasonable value of the publications made by plaintiff, defendant being presumed to know his legal rights. MoA 9SW(2d) 870.
756-7 216Ala69, 112S426; 202 Iowa 1251, 211NW898; Iowa 222NW450(1st case); 229Ky738, 17SW(2d)1024; 3 LaA105; 3LaA142; 3LaA178; 6LaA 775; 250Mich662, 230NW941; 22 OhA 146, 154NE47.
757-8 TexCivA 21SW(2d)83. See also Can [1927] 3DomLR762. [b] **Acceptance of offer in prize contest.**–Iowa 228 NW 263.
757-10 102WVa574, 136SE42.
757-13½-New. Where the pleadings present the issue of agreement or no agreement, the party relying on the agreement must prove a valid one. 172 Ark763, 290SW355.
757-15 203 Iowa518, 210NW453; 120 Kan591, 244P867; 242Mich253, 218NW 801; MoA 290SW90; 22 OhA146, 154NE 47; 147Va448, 137SE452. [a] **One receiving benefits** of agreement under fiduciary relationship must show agreement was fair. 326 Ill 302, 157NE161.
757-18 121Kan124, 245P744; 167La 262, 119S42; 45Philippine256 (CodeCiv. Proc § 285).
757-18½-New. Burden is on one ordering services or goods to show other party understood, or should have understood, he was dealing with agent. 129 Misc197, 221NYS89.
757-18⅓-New. Courts will presume transactions between parties occupying confidential relations where one obtains undue advantage of the other are fraudulent. 326 Ill 302, 157NE161.
757-22 [a] **Testimony as to contract not referred to as in writing** is held admissible as primary evidence. 33Porto Rico6.
757-26 145Wash295, 259P1079. [b] **Where instrument was executed shortly before death,** knowledge of purport of instrument will not be inferred unless instrument is explained as well as read. 137Misc564, 241NYS759.
757-27 116Nebr339, 217NW583; Tex CommnA 25SW(2d)597; WVa 153SE 244.
758-29 176Minn324, 223NW612.
758-30 318 Ill 297, 149NE228; 208 Iowa 722, 217NW239; 208 Iowa156, 225NW 353; 51SD288, 213NW507; TexCommnA 118SW(2d)305; 153Va190, 149SE537; Sask [1928] 4DomLR956.
758-31 89CalA653, 265P357 (reliance); 115Nebr875, 215NW120.
758-32 51SD288, 213NW507.
758-37 NJCh 148A167; Okl 293P179; Utah 271P797.
758-37½-New. That parties are closely related by blood raises no presumption of confidential relations. 202 Iowa1166, 211NW699.
758-37⅓-New. Transactions between parties, not dealing on terms of equality by reason of superior knowledge, is presumed void, and person benefited has burden of showing absence of fraud. 137Misc564, 241NYS759.
758-38 318 Ill 218, 149NE306; 229App Div466, 242NYS583; 116 Or626, 239P 108, 241P56.
758-39 147Va478, 137SE511; Va 153 SE807.
758-42 29F(2d)83; 43F(2d)392; 215 Ala621, 112S245.
759-49 But see 58ND455, 226NW501.
759-49½-New. Presumption. Where statute requires contract to be reduced to writing, there can be no presumption of intention to consummate it in any other form. 168Ark38, 269SW375.
759-50 51SD288, 213NW507.
759-56 42F(2d)810; 99WVa335, 128 SE735.
759-57 99WVa335, 128SE735 (date of delivery).
759-64½-New. Presumption is that benefits of contract inure to parties, and not to third persons, in absence of clear intent. 136Misc81, 240NYS238.
759-65½-New. Assent of third party to contract will be presumed. Or 291P495.
759-66 85Colo 519, 277P773; OhA 173 NE16. See also 246 IllA100.
760-74 299Fed279; 202 Iowa1166, 211 NW699; 206 Iowa848, 218NW488; 121 Kan82, 245P745; 51ND246, 199NW930, 938 [citCJ]; 119 Okl 133, 249P938; 128 Okl 215, 262P208; 129 Okl 222, 264P 164; 44Philippine326; 51Philippine476; TexCivA 278SW243. [a] **Presumption is disputable one.**–97CalA628, 276P122.
760-75 44Philippine326 (Civ. Code art 1277).
760-76 CalA 289P855; 202 Iowa1166, 211NW699; 206 Iowa848, 218NW488; 121Kan82, 245P745; 80Mont308, 260P 1039; 81Mont248, 263P693; 85Mont69, 277P636; 119 Okl 133, 249P938; 128 Okl 215, 262P208; TexCivA 278SW243.
760-78 236Mich531, 211NW62.
760-80 15F(2d)380; 22F(2d)893; 21 AlaA358, 108S400; 93Fla214, 111S722; 225Ky456, 9SW(2d)209; 133Misc220, 231NYS235; 146Va594, 131SE850, 46 ALR186; 147Va409, 137SE370.
760-81 275US199, 48SCt53, 72L ed238; 25F(2d)742; 21AlaA358, 108S400; 93

Fla214, 111S722; 225**Ky**456, 9**SW(2d)** 209; **La** 129S655; 236**Mich**664, 211**NW** 34; 252**NY**495, 170**NE**119; 229**AppDiv** 469, 242**NYS**381; 51**Philippine**476; 146 **Va**594, 131**SE**850, 46**ALR**186; 147**Va**409, 137**SE**370.

761–82 276**US**518, 48**SCt**404, 72**L ed**681, 57**ALR**426; **IndA** 153**NE**179. But see 338 **Ill** 185, 170**NE**269.

761–84 **IndA** 170**NE**105; 201 **Iowa**636, 207**NW**795.

761–86½–New. Plaintiff claiming a division of attorneys' fees from business brought by plaintiff, who recommended the attorney, must show full disclosure to client in fiduciary relation. 24**F(2d)** 791.

761–87 **TexCivA** 278**SW**466.

761–89 **TexCivA** 278**SW**466.

761–92 263**Mass**409, 161**NE**612; **Tex CommnA** 11**SW(2d)**158.

761–97 298**Pa**249; 148**A**81, 67**ALR** 1428; **TexCivA** 278**SW**508.

761–2½–New. It is presumed that parties intend to make a reasonable rational contract. 213**Ala**66, 104**S**.

761–2½–New. Parties are presumed to contract with knowledge they have on subject of contract. 25**F(2d)**742.

761–2½–New. A contract in writing is presumed to express the intention of the parties. 164**La**443, 114**S**90.

761–3½–New. Burden of showing contract between third persons was for benefit of plaintiff rests on plaintiff. 275**US** 303, 48**SCt**134, 72**L ed**290; 113 **Or**398, 233**P**547.

762–8 8**F(2d)**215; 19**F(2d)**834; 325 **Ill** 38, 155**NE**784; 327 **Ill** 254, 158**NE** 442; 163**Lad**008, 113**S**356; 7**LaA**449; 27 **ObA**245, 160**NE**725; 133 **Okl** 23, 270 **P**854; 122 **Or**64, 255**P**392; 291**Pa**335, 140**A**139; 32**PortoRico** 117; 107**WVa** 151, 147**SE**542.

762–10 107**WVa**151, 147**SE**542.

762–11 172**Ark**1088, 291**SW**795; 32 **PortoRico** 117.

762–13½–New. Where parties did not contemplate any change in conditions during life of contract sued on, defendant has burden of proving any change or substantial modification of situation. 35**PortoRico** 478.

762–14 **Nebr** 230**NW**835. [a] 328 **Ill** 487, 159**NE**819.

762–18 69**CalA**384, 231**P**567. [a] (3) Where making of contract to borrow money is not denied by defendant, burden is on him to prove plaintiff refused to make loan. 215**AppDiv**448, 213**NYS**730.

762–19 239 **IllA**623, 625 [quotCyc]; 4 **LaA**388; 216**AppDiv**476, 215**NYS**564; 222**AppDiv**494, 226**NYS**570 (defendant counterclaiming for balance due); 91**Pa Super**524; **TexCivA** 281**SW**242.

762–20 32**PortoRico** 674 (extinction of obligation Civ. Code § 1182).

762–21 208 **Iowa**1113, 224**NW**785; 8 **LaA**421; 149**Miss**123, 115**S**199.

763–28 **Ark** 31**SW(2d)**945.

763–34½–New. In a suit for compensation for securing evidence, plaintiffs need not prove work was proximate cause of fees defendant attorney obtained. 171**Minn**384, 214**NW**276.

763–36 77**CalA**393, 246**P**1081; 7**LaA** 254; **TexCivA** 289**SW**113 [quotCJ].

763–37 77**CalA**393, 246**P**1081; **Tex CivA** 289**SW**113 [quotCJ].

763–40 77**CalA**393, 246**P**1081; 154**Md** 171, 140**A**64, 69 [citCJ]; **TexCivA** 22 **SW(2d)**1107.

763–41 77**CalA**393, 246**P**1081.

764–44 **Can** [1926] 3**DomLR**561.

764–47 **CalA** 289**P**242 (continuous readiness to perform after tender); 216 **AppDiv**665, 215**NYS**657.

764–49 But see 35**GaA**8, 131**SE**543.

764–52 **Ida** 278**P**222; 47 **Ida**692, 280**P** 678(2dcase); **TexCivA** 11**SW(2d)**527.

764–55 128**Kan**779, 280**P**749; **Me** 149**A** 801.

764–57 33**Ariz**64, 262**P**489, 492 [quot CJ].

764–58 216**Ala**567, 114**S**130 (more expensive materials); 69**CalA**384, 231**P** 567; 285**Pa**299, 132**A**350.

765–62 216**Ala**567, 114**S**130.

765–64 215**Ala**327, 110**S**716. [a] 102 **Conn**558, 129**A**538; 235**Mich**217, 209 **NW**129 (negotiations preliminary to oral contract); 84**Mont**158, 274**P**489.

765–65 150**Md**18, 132**A**258.

765–66 **CalA** 266**P**312; 34**GaA**66, 128 **SE**220 (evidence of fraud, accident or mistake properly rejected where not pleaded); 44 **Ida**560, 260**P**150; **Tex CivA** 277**SW**800 (exclusion of irrelevant and immaterial evidence not error); **TexCivA** 14**SW(2d)**870; **TexCivA** 31**SW(2d)**839; 141 **Wash**369, 251**P**585. [a] (9) In architect's action for fees, exclusion of evidence of general character of proposed location is held not error. **RI** 137**A**467.

766–69 150**Md**18, 132**A**258.

766–71½–New. Rulings by the trial court in the admission or rejection of evidence, based upon the theory that the terms of an alleged contract are as stated by one or the other litigant, are not for that reason erroneous, when it is clear that the parties made a parol contract but disagreed as to the terms of the same. 57**ND**864, 224**NW**313.

766–72 44 **Ida**560, 260**P**150.

766–74 **TexCivA** 22**SW(2d)**737.

767–83 **CalA** 266**P**312 (evidence properly excluded).

767–89½–New. Plaintiff may show that a contract was with defendant notwithstanding a charge on the books against a third party. 48**RI** 160, 136**A**439.

767–95 16**F(2d)**253; 82**NH**423, 134**A** 718. [d] **Memorandum** relating to terms is held admissible. 5**PaDist&Co** 27.

767–96 [b] (2) Testimony of each of several witnesses as to portion of conversation relative to change in contract for construction of building held admissible. 219**MoA**222, 269**SW**942.

768–97 9**LaA**600, 121**S**674; 58**ND**820, 227**NW**556.

768–98 216**Ky**525, 287**SW**973; **Tex CivA** 286**SW**307.

768–1½–New. The existence and terms of an agreement between defendant and others than plaintiff were not evidence that plaintiff ever agreed to sign such an agreement. 264**Mass**355, 162**NE**773.

768–6 71**CalA**661, 236**P**176; 91**CalA**310, 266**P**980; 5**PaDist&Co** 603.

768–7 71**CalA**661, 236**P**176; 264**Mass** 530, 163**NE**165; 5**PaDist&Co** 603; **Tex CivA** 28**SW(2d)**883.

768–7½–New. On the issue whether an oral contract was in fact entered into, if the court allows one party to testify to his intention and understanding, he must not refuse the other party the same right. 202 **Iowa**1251, 211**NW**898.

768–11 But see **MoA** 9**SW(2d)**870.

769–16 97**CalA**77, 275**P**257.

769–19 231**Ky**377, 21**SW(2d)**484; 147 **Va**478, 137**SE**511.

769–21 58**ND**937, 228**NW**432. [b] (1) 37 **OklCrR**539.

769–22 **Fla** 129**S**773. [a] **Great latitude is allowed** in proof of fraud alleged. 51**SD**288, 213**NW**507.

769–28½–New. Long recognition of contract by party thereto is material on issue of duress. 202 **Iowa**1166, 211**NW** 699.

770–39 But see **Mass** 170**NE**410.

770–40 250**NY**370, 165**NE**814. See also 214**Ala**334, 107**S**818.

770–44 77**CalA**137, 246**P**150; 242**NY** 125, 151**NE**152 (conduct of parties may fix meaning to words of doubtful import); 133**Misc**93, 231**NYS**251; 125 **Okl** 176, 256**P**906; **TexCivA** 25**SW(2d)**950; **TexCivA** 28**SW(2d)**877; 194**Wis**78, 215 **NW**939; **Alta** [1930] 2**DomLR**21. [b] But see 82**NH**342, 134**A**520.

771–49½–New. Conduct of parties may not change terms of contract. 242**NY** 125, 151**NE**152 (though it may fix meaning to words of doubtful import).

771–49½–New. Thus when contract is clear in eyes of law error of parties cannot control its effect. 242**NY**125, 151 **NE**152.

771–50 33**Ariz**474, 266**P**3; **Ariz** 281**P** 211; 84 **IndA**666, 151**NE**338, 836; **Okl** 291**P**38.

771–52 103**NJL**635, 137**A**423.

771–56 93**CalA**775, 270**P**382; 75**Mont** 356, 243**P**582; 82**NH**318, 133**A**340; 242 **NY**125, 151**NE**152; 50**ND**573, 196**NW** 820, 822 [citCJ]; **Utah** 267**P**1020, 1027 [citCJ].

772–59 **MoA** 7**SW(2d)**387.

772–62 [a] (9) Where sole issue is whether seller authorized elimination of arbitration provision from contract, evidence as to seller's motive in repudiating contract is inadmissible. 214**App Div**601, 213**NYS**153. (10) Other illustrations. **Vt** 150**A**148.

772–67 75**CalA**737, 243**P**686; 264**Mass** 238, 162**NE**339.

773–69 75**CalA**737, 243**P**686.

773–70 **Mass** 172**NE**243; 151**Va**706, 144 **SE**635. [a] (23) 23**AlaA**112, 121**S**499 (2dcase). (28) Agreement to machine-finish three-inch Russian shrapnel bodies. 250**NY**410, 165**NE**829. (29) Contract to put road in good condition for hauling lumber. 155**Wash**564, 285**P**433. [b] (13) On question whether plaintiff properly installed heating plant, plaintiff's skill and experience excluded as immaterial. 86 **IndA**331, 157**NE**445.

773–71 But see 41**F(2d)**177.

773–71½–New. or compliance by him with requirement of contract, 8**F(2d)** 930.

773–74 129 **Okl** 22, 263**P**126.

773–75 153**Va**261, 149**SE**507.

774–77 153**Va**261, 145**SE**366.

774–79 **NJSup** 137**A**432. [b] 47**RI** 29, 129**A**594.

774–80½–New. Where plaintiff fails to establish a breach of contract, evidence on the issue of damages is properly excluded. 111 **Okl** 279, 239**P**663.

774–81 **TexCivA** 292**SW**976 [citCJ].

774–82 **TexCivA** 278**SW**939.

775–87 231**Ky**720, 22**SW(2d)**105.

775–89½–New. In an action on quantum meruit where there was a contract it is competent evidence as to the reasonable value of services. 73**CalA**140, 238**P**749.

775–91 168**Minn**455, 210**NW**591. [a] (1) 102**Conn**558, 129**A**538; **Ga** 155**SE** 482; **GaA** 155**SE**494; 207 **Iowa**294, 222 **NW**893; 122**Kan**101, 250**P**1077; 124 **Kan**614, 261**P**826 (implied contract to pay value of bonds converted); 209**Ky** 593, 273**SW**449; 211**Ky**687, 277**SW**1010 (to support findings); 166**La**593, 117**S** 729; 168**Minn**455, 210**NW**591; 171**Minn** 384, 214**NW**276; 31**NM**453, 247**P**548 (contract for hauling lumber); 110 **Okl** 17, 235**P**921; 124 **Or**267, 264**P**357 (liability upon exercise of option to terminate contract); 132 **Or**137, 284**P**838; **TexCivA** 293**SW**842; **TexCivA** 10**SW (2d)**574; 101 **WVa**404, 132**SE**738. (8) To sustain finding of unreasonable delay. 88 **IndA**685, 148**NE**430. (9) To sustain finding that plaintiff was not real party in interest. 236**Mich**471, 210 **NW**478. (10) To sustain judgment for defendants. 104**NJL**170, 139**A**222.

776–93 [a] 173**Ark**1182, 291**SW**94; **IndA** 168**NE**582; 11**LaA**442, 123**S**477 (to show defendant's indebtedness to plaintiff in any sum); **LaA** 130**S**626; 126**Mc**600, 138**A**568; **MoA** 290**SW**90; **MoA** 9**SW(2d)**870; 133 **Okl** 196, 271**P** 1026.

776–94½–New. One who has violated a contract cannot insist on proof which, by reason of his breach, cannot be furnished. 34**F(2d)**589.

776–95 227**AppDiv**596, 238**NYS**353.

776–95½–New. Relationship of cocontractors may be proved by circumstantial evidence as well as by direct evidence of the contract between them. **TexCivA** 10**SW(2d)**223.

776–96 30**F(2d)**912; **Ark** 32**SW(2d)** 177; 330 **Ill** 11, 161**NE**150. [a] (1) 33 **F(2d)**501 (oral contract providing for payment in addition to amount named in written contract); 181**Ark**14, 24**SW (2d)**870; 200**Cal** 428, 253**P**320; 75**CalA** 111, 241**P**917; 77**CalA**219, 246**P**143; 77 **CalA**137, 246**P**150; **CalA** 266**P**312; 81 **Colo** 155, 253**P**1069; **Ind** 168**NE**873; 122**Kan**767, 253**P**414; 209**Ky**593, 273 **SW**449 (installation of store front on a cost plus basis); 216**Ky**504, 287**SW**977; 220**Ky**230, 294**SW**1088; 12**LaA**657, 126 **S**732; **Mo** 274**SW**462; **MoA** 296**SW**243; **MoA** 9**SW(2d)**655; **NJSup** 135**A**803; **NJSup** 146**A**688(1stcase) (use of water pipes); **NJSup** 151**A**399; 129 **Okl** 22, 263**P**126; 125 **Or**375, 264**P**865 (agreement to pay obligations of corporation whose property defendant took over); 248**Pa**541, 131**A**468; 89**PaSuper**508; **TexCivA** 283**SW**1095; **TexCivA** 28**SW (2d)**877; 142**Wash**118, 252**P**680; 148 **Wash**173, 268**P**142. (2) In building contract. **NJSup** 135**A**501. [b] (1) 40

F(2d)176; 41F(2d)255; 178Ark183, 10 SW(2d)14; 181Ark415, 26SW(2d)80; CalA 284P472; 211Ky547, 277SW846; 4LaA16; 125Me105, 131A136; Me 151A 423(2dcase); 173Minn200, 217NW112; 175Minn115, 220NW551; 177Minn434, 225NW295; 317Mo246, 295SW105; MoA 30SW(2d)154; 224AppDiv377, 231 NYS203; 57ND624, 223NW700; 124 Or 332, 263P391; TexCommnA 280SW548; TexCivA 6SW(2d)169; 143Wash644, 255P1039. (2) Lender and borrower agreement. 199Wis171, 225NW696. [c] (2) Oral contract to convey land by will or deed, in consideration of support for life, must be established by clear, decisive, and convincing testimony, and not merely by weight of testimony. 178 Ark183, 10SW(2d)14. [f] **Under evidence findings not disturbed.**–125Me105, 131A136. [g] **Consummation of provisional contract.**–Utah 250P1045. [h] **Correspondence and telegrams will be closely scrutinized** to determine whether contract was agreed on. 86Colo 59, 278 P804. [i] **Testimony as to express agreement** in legal effect denies implied agreement. TexCivA 28SW(2d)941.

777-97 100CalA531, 280P543 (agreement to pay owner of paper route for advertising); 48RI 223, 136A882; 199 Wis139, 225NW322. [b] **Meeting of minds may be proved** by writings, words, or conduct as conclusively as by solemn instrument. 37F(2d)874.

777-1 [b] **Part payment after ratification** by third party beneficiary showed knowledge by promisor of real beneficiary. 151Md1. 133A821.

777-2 IndA 153NE179; TexCivA 18 SW(2d)224.

777-2½–New. Identity of parties, Mass 167NE641.

777-3 7LaA233. [c] **Recognition for several months** of existence of contract and retention of benefits thereunder renders unnecessary strictest proof of due execution. 197Cal 694, 242P709. [d] **Evidence held insufficient.**–Written contract executed as consummated transaction. 125Me105, 131A136.

777-6 Ark 32SW(2d)174; 98CalA437, 277P137; 229Ky738, 17SW(2d)1024; 9LaA439, 121S232; 11LaA281, 123S420; LaA 121S161 (sharing expenses of protection levee); 11LaA524, 124S313 (evidence held to show contract executed on condition precedent); 13LaA252, 126S 534(1stcase); 13LaA240, 126S560; LaA 130S570(2dcase); 174Minn439, 219NW 462; MoA 9SW(2d)870; NJSup 135A 803; 117 Or350, 243P91, 244P83; 50RI 140, 145A874; TexCivA 6SW(2d)229 (subordination of vendor's lien to materialman's lien); TexCivA 32SW(2d) 225; 141Wash253, 251P274; 142Wash 118, 252P680; 192Wis168, 212NW286. [a] (2) To show that contractor did not agree to pay owner for use of road-grading outfit by subcontractor. 36 Wyo 249, 254P121. [b] **Evidence held sufficient.**–168Ark1168, 272SW660; TexCivA 277SW194. [c] **Evidence insufficient to go to jury** on defendant's promise to pay. 247Mich534, 226NW224. [d] **Evidence held insufficient to establish term of contract.**–12LaA688, 127S 98.

777-7 76CalA774, 246P77; 165Ga362, 141SE55 (evidence held not to show consideration); 126Kan473, 268P817 (forbearance to sue); 9LaA568, 121S 642; MoA 30SW(2d)186; NJSup 135A 830; 138 Okl 47, 279P905, 67ALR1279 (insufficient to show failure of consideration); 51SD117, 212NW496. [b] **That no consideration passed when instrument was signed** is not sufficient to sustain burden of proving want of consideration of contract under statute importing considerations for written contracts. 202 Iowa1166, 211NW699. [c] **Evidence held sufficient.** 77CalA93, 246 P81; TexCivA 283SW529. [d] **To set aside contract on ground that compensation is excessive,** there should be positive evidence to that effect. Tex CommnA 11SW(2d)305. [e] **Evidence held insufficient to show consideration** for defendants' promises to notify plaintiff when notice of completion was filed. 208Cal 246, 280P962.

778-8 [a] **Evidence held sufficient** to show mortgagor's assent to agreement of mortgagee with another creditor to pay his debt out of proceeds of mortgage. 137Wash280, 242P42. [b] **Evidence insufficient** to show certain use as mutual basis of contract. [1930] 4Dom LR1040(1stcase).

778-9 13LaA669, 128S720; MoA 31SW (2d)552.

778-11 43F(2d)337; 91CalA307, 266P 989; CalA 289P178 (evidence held not to show agreement as to board and lodging); 140Wash593, 250P26.

778-17 169Minn386, 211NW306; WVa 153SE244. [a] 204 Iowa1394, 213NW 225; 121Kan474, 247P868; 227AppDiv 596, 238NYS253. [b] 147Va478, 137SE 511. [c] **Evidence held insufficient.**–74 Mont245, 240P376 (to show entire want of understanding at time of executing contract sought to be canceled). [d] **Evidence held to show sanity.**–179Ark 1162, 19SW(2d)1015.

778-19 26F(2d)73; 36F(2d)306; 181 Ark180, 25SW(2d)15; 229Ky649, 17SW (2d)736; 1LaA438; 115 Okl 233, 242P 535; 120 Okl 282, 251P43; 143 Okl 140, 287P1003; 49SD619, 208NW170 (fraudulent intent); 147Va478, 137SE511, [b] 51SD288, 213NW507. [c] 16F(2d) 899; 17F(2d)386; GaA 146SE559(2d case); 205 Iowa542, 218NW255, 58ALR 153; 9LaA568, 121S642; 252Mass341, 147NE822; 236Mich258, 210NW295; 175Minn341, 221NW62; 175Minn431, 221NW642; 147Va478, 137SE511. [e] **Absence of intention** or lack of ability to carry out promises must be proved by clear and unquestioned facts. 5 F(2d)873. [f] **Proof of oral statements inconsistent with written contract** is insufficient to show fraud. 51SD288, 213 NW507. [g] **All elements must be proved to make prima facie case.**–81Mont 434, 263P985. [h] **Fact that one party got best of transaction** is not conclusive evidence of fraud. Ill 172NE32.

778-20 Contra 49SD619, 208NW170.

778-21 37 OklACR539; 147Va478, 137 SE511.

778-21½–New. Plaintiff seeking to hold defendant to performance of apparent contract must show that he did not suppress material facts necessary to defendant's assent. 49SD619, 208NW 170.

779-22 230Ky307, 19SW(2d)976; 176 Minn324, 223NW612; 103NJEq121, 142 A441. [a] 162LaS91, 111S271; 65Utah 444, 238P240 (mistake induced by false representations).

779-26 202Cal 778, 262P742 (sufficient). [c] 116 Or626, 239P108, 241P56; 147Va 478, 137SE511.

779-27 Mo 19SW(2d)1054; MoA 300 SW1004 (various elements considered in determining undue influence); 147Va 478, 137SE511. [a] Ark 29SW(2d)1082. [b] 224Ky346, 6SW(2d)274; 147Va478, 137SE511.

779-27½–New. Undue influence must be proved by clear, cogent and convincing testimony. Va 153SE807.

779-28 275US199, 48SCt53, 72Led238; 181Ark1146, 28SW(2d)329; Mass 166 NE822; 52ND49, 201NW696. But see 338 Ill 185, 170NE269. [a] (5) 201 Iowa636, 207NW795. (12) That language of oral contract did not require or contemplate that plaintiffs would solicit claims. 165Minn374, 206NW716. (13) Conspiracy to violate alien land laws. 206Cal 782, 276P345. (14) Alleged conspiracy to violate law of friendly nation. Ont [1929] 4DomLR643. [c] **Evidence held not to show** that agreement to facilitate divorce was collusive or void. 98NJEq230, 130A463. [d] **Evidence held not to show illegality.**–228Ky827, 16SW(2d)453.

779-29 [a] (2) To show consideration for note illegal, as agreement interfering with course of justice. 132SC370, 128SE720. (3) To show conclusively that notes were executed and indorsed to stop criminal prosecution of maker. 29 OhA390, 162NE776. (4) To sustain finding that note and chattel mortgage were not given because of threats or to prevent prosecution for felony. 85CalA 360, 259P460. [b] (2) To show collusion by withdrawal of charge of adultery in divorce action. 98NJEq230, 130 A463. [c] **Conclusive showing not affected** because court records did not show that maker was dismissed at instance of plaintiff. 29 OhA390, 162NE 776.

779-30 [a] **Collusion** may be implied from act of parties. 98NJEq230, 130A 463. [b] **Evidence held to show** that defendant was engaged in bakery business in stepdaughter's name in violation of agreement with buyer of his business. 174Ark1179, 298SW882.

779-31 11LaA115, 119S280; 45 Okl ACR310.

779-32 27 OhA245, 160NE725; 135 Okl 198, 274P886; 45 OklACR310. [a] 294 Pa300, 144A280. See also 13F(2d)112.

779-33 291Pa335, 140A139 (needs only evidence convincing to jury).

779-34 27 OhA245, 160NE725. [b] 174 Ark1179, 297SW841; 255Mass104, 151 NE84; 149Wash102, 270P293; 101WVa 191, 132SE726 (modification by conduct). [c] 12LaA698, 127S75; Miss 112S393; BC [1930] 1DomLR484.

780-35 236Mich29, 209NW805 (evidence sufficient to sustain finding of jury that defendants were guilty of fraud in canceling contract); 170Minn 53, 212NW9 (insufficient); TexCivA 289 SW461. [b] **Acts or conduct of parties** (1) may justify inference of rescission. CalA 265P957. (2) Conduct must furnish stronger basis for inference of consent than mere speculation or conjecture. CalA 265P957.

780-36 333 Ill 636, 165NE205; 334 Ill 642, 166NE455; 339 Ill 340, 171NE263; 235Ky574, 31SW(2d)910; 135 Okl 198, 274P886; 294Pa488, 144A403. [a] 75 CalA737, 243P686; 264Mass238, 162NE 339; 124 Or267, 264P357. [b] 214Ky 63, 282SW760; 197NC76, 147SE684(2d case). [d] **Circumstances and conduct.**–321 Ill 442, 151NE877.

780-39 169Minn356, 211NW322. [a] (1) 168Ark1168, 272SW660; 176Ark 1203, 28SW(2d)13; 180Ark1018, 24SW (2d)328; 92CalA618, 269P665; 93CalA 685, 270P239; 102CalA536, 283P84; CalA 286P498; 38GaA517, 144SE331 (1stcase); 39GaA490, 147SE420; 85 IndA706, 153NE927; 123Kan151, 254P 410; 216Ky504, 287SW977; 13LaA2, 127S76; 312Mo 694, 281SW725; NJ 151 A62; 219AppDiv615, 220NYS409; Va 153SE676; 143Wash266, 255P107. (3) BC [1930] 1DomLR634. (7) 11LaA623, 124S547. (15) 206Cal 468, 274P966; CalA 291P615; TexCivA 14SW(2d)870. (16) 200Wis357, 228NW475. (19) 9LaA 317, 120S492. (23) 98CalA517, 277P 183. (29) TexCivA 286SW599. (44) To show breach by both parties disentitling either to recovery. 168Ark240, 269SW582. (45) Other evidence held sufficient. 170Ark931, 282SW14; 173 Ark1180, 292SW135; 220Ky562, 295SW 868; 312Mo 694, 281SW725; NJSup 135 A501; 216AppDiv476, 215NYS564. (46) To sustain finding that seller of gin aided another in setting up rival gin in breach of contract justifying recovery of stipulated damages. 174Ark639, 297SW 1027, 59ALR1128. (47) To show performance of contract to render service in sale of stock. IndA 153NE179. (48) To sustain finding of waiver of breach of contract for division of fees. 174Ark 1115, 299SW18. (49) To show performance of contract to build up good reputation for hotel. 84Mont158, 274P489. (50) To prove plaintiff's partial performance. MoA 296SW243. (51) To warrant finding that defendants were jointly and severally liable for failure to deliver cotton under terms of their contract. TexCivA 16SW(2d)413. (52) To show performance by plaintiff. 252 IllA401. (53) Waiver. 130Kan516, 287 P249. (54) To show plaintiff's services were properly and competently rendered. 12LaA549, 126S261. (55) To show breach of agreement by manufacturer to assist dealer in promoting sales. NJSup 147A739. (56) To establish acceptance of only part of well contracted for. 101CalA694, 282P429. (57) Time services terminated. CalA 291P877. [b] (1) 200 Iowa1094, 205NW966 (by plaintiff); Me 149A801; Minn 232NW739; 312Mo 694, 281SW725; 125MisC86, 210 NYS591; 134Misc91, 234NYS592; 190 NC195, 129SE197 (agreement to advance loan to specified amount for labor and material); RI 136A19; 48RI 160, 136A 439. (7) 44 Ida620, 258P555. (8) 31 OhA22, 164NE434. (11) 225AppDiv308,

233NYS7; Va 153SE701; 101WVa404, 132SE738. (20) To support defense that plaintiff had no claim under policy. 287Pa505, 135A223. (21) To show waiver of breach. 20F(2d)757. (22) To show that forgings, partly machined, were not machineable. 222 AppDiv304, 226NYS175. (23) To show purchaser's waiver of seller's covenant not to engage in theater business. Iowa 231NW383. (24) To show waiver of covenant not to engage in business. Iowa 231NW383. (25) To show value of work done by plaintiff in constructing second house contracted for, where defendant's failure to pay for first house was alleged as reason for not constructing second house. Mass 168NE745. (26) To show work was not done in proper and expert workmanship manner. TexCivA 248W (2d)775. (27) To show amount of lumber hauled justifying recovery. Mont 292P714. [c] **Recovery may be had for items performed under separate contracts** but admitted by defendant. 125 Misc520, 211NYS613. [d] **Waiver of breach** not shown. 84 IndA666, 151NE 333, 836.

781-40½-New. Issues raised by defendant's denial are for jury. 79Mont327, 256P497.

781-41 83Colo 480, 266P225 (contract).

781-41½-New. Intention is question of fact to be determined from evidence. TexCivA 293SW935.

781-41½-New. When an instrument is not ambiguous, the intention of a party to it is a question of law, and should not be submitted to a jury. TexCivA 19SW(2d)111.

781-41¼-New. Ratification is question of fact. 232Ky503, 23SW(2d)945, 68 ALR1481.

781-44 See also 319Mo 899, 8SW(2d) 834.

781-45 13F(2d)62; 118Kan411, 234P 1003; 256Mass66, 152NE347; 220MoA 1112, 296SW257; TexCivA 288SW545.

781-46 220MoA1112, 296SW257.

781-47 20F(2d)824; 213Ala7, 105S697 (meeting of minds); 218Ala325, 118S 570; 125Me386, 134A198; 256Mass66, 152NE347; 232Mich579, 206NW508; 237Mich652, 212NW879; 145Miss827, 111S290; MoA 30SW(2d)645; 218 AppDiv557, 218NYS605; 26 OhA145, 159NE860; 88PaSuper394; 48RI 223, 136A882; RI 147A624; TexCommnA 23 SW(2d)333; 143Va811, 129SE525; 137 Wash280, 242P42; 107WVa465, 148SE 854.

782-49 71CalA308, 235P76; 214Ky 526, 283SW1022; 259Mass439, 156NE 740; 264Mass530, 163NE165; 145Miss 827, 111S290; 157Miss256, 126S35; 250 NY410, 165NE829; 223AppDiv221, 227 NYS742 (to alter portrait); 223AppDiv 741, 227NYS678.

782-50 136Wash74, 239P4. [b] **Revocation of offer before acceptance** is question for jury. 136Wash74, 239P4.

782-51½-New. Where one of two instruments relating to the purchase and sale of the same personal property is undated, the question whether the instruments were executed on the same day is for the jury on conflicting evidence. 117 Okl 96, 245P571.

782-52 TexCivA 5SW(2d)529.

782-53½-New. Where a party contends that because a portion of his letter was not replied to it was accepted as the true statement of what had previously transpired, the effect of such silence as acquiescence is for the jury. 123 Or215, 261P691.

782-54 But see 144 Okl 279, 291P571.

782-55 241 IllA229.

782-59 327 Ill 219, 158NE426; MoA 278SW738; MoA 138SW(2d)1095; 143 Va815, 129SE513. [b] **Thus** whether contract was obtained through joint efforts and for joint use and benefit is for jury. 211Ky687, 277SW1010.

782-62 327 Ill 219, 158NE426.

782-65 17F(2d)386; 37GaA200, 139SE 431; 225Ky270, 8SW(2d)399; 229 AppDiv572, 243NYS51; 147Wash119, 265P485. [b] **Conflicting testimony.**-254Mass180, 150NE9.

783-66 137 Okl 90, 278P281.

783-69½-New. Whether other party knew of mistake in making contract is a question for jury. TexCivA 26SW (2d)319.

783-70 TexCivA 293SW695.

783-71 19F(2d)186; 101WVa669, 133 SE370.

783-72 But see 122 Or597, 260P222, 55 ALR180.

783-73 MoA 218SW(2d)932.

783-74 136Misc521, 241NYS158; 118 Oh285, 160NE852; 152Va471, 147SE 214. [b] (2) Reasonableness of restraint is in all cases question for court to determine. 160Ga620, 128SE891.

783-75 217Ala124, 115S13; 222Ky396, 300SW876; NJ 146A45(2dcase); 146 Va594, 131SE850, 46ALR186. [c] **Whether promise made to dismiss prosecution** held question of fact. IndA 170 NE105.

783-77 5F(2d)807; 8F(2d)689; 14 F(2d)297; 15F(2d)514; 21F(2d)257; 34F(2d)616; 217Ala27, 114S409; 33 Ariz294, 264P471; 171Ark11, 283SW 17, 45ALR1396; 77CalA137, 246P150; 95CalA299, 272P770; 104Conn645, 133A 913; 106Conn677, 138A788; 47 Ida542, 277P554(2dcase); 246 IllA380; 255 IllA 21; IndA 157NE64; 202 Iowa1251, 211 NW898; 124Kan742, 262P556; 126Kan 544, 268P833; 128Kan779, 280P749; 230 Ky485, 20SW(2d)76; 233Mich640, 207 NW814; 235Mich36, 209NW154, 48ALR 1049; 166Minn7, 206NW934; MoA 285 SW1028; 103NJL635, 137A423; 102NJ Eq20, 139A817; 242NY125, 151NE152, 45ALR751; 252NY284, 169NE386; 218 AppDiv411, 218NYS457; 190NC764, 130 SE614 (contract made part of complaint); 190NC737, 130SE707; 194NC 6, 138SE343; 195NC328, 142SE27; 195 NC799, 143SE851; ND 228NW449; 21 OhA444, 153NE313; 21 OhA444, 153NE 313; 115 Okl 121, 242P214; 119 Okl 133, 249P938; 125 Okl 176, 256P906; 125 Okl 215, 257P282; 132 Okl 272, 270 P329; Pa 131A312; 287Pa403, 135A 124; 47RI 395, 133A621; 136SC448, 134 SE415; 53SD37, 219NW949, 60ALR 1173; TexCommnA 18SW(2d)265; Tex CommnA 23SW(2d)333; TexCivA 288 SW656; TexCivA 295SW702; TexCivA 8SW(2d)757; TexCivA 24SW(2d)99; TexCivA 25SW(2d)689; TexCivA 25SW (2d)927; BC [1928] 3DomLR26 (court is not deprived of function to construe contract by agreement to refer certain things to single person for decision).

784-78 15F(2d)514; 17F(2d)476; 41 F(2d)1; 34Ariz489, 272P921; 171Ark 11, 283SW17, 45ALR1396; 86CalA523, 261P721; 106Conn677, 138A788; 35 GaA334, 132SE783; 30Hawaii230; 202 Iowa1251, 211NW898; 121Kan124, 245 P744; 124Kan742, 262P556; Mass 169 NE74; 233Mich128, 206NW342; 170 Minn242, 212NW446; MoA 290SW630; 117Nebr219, 220NW238; NJSup 142A 366; 242NY125, 151NE152, 45ALR751; 218AppDiv411, 218NYS457; 19 OhA57; 30 OhA15, 164NE65; 111 Okl 286, 239 P564 (contract expressed in letters); 124 Okl 174, 254P713; 116 Or217, 240P 895; 49RI 99, 140A3; TexCommnA 280 SW742; TexCommnA 284SW542; Tex CivA 25SW(2d)700; 152Va471, 147SE 214; Va 153SE667. [c] **Construction of written contract** is ordinarily for court; court cannot shift burden to jury but must construe contract and inform jury of result. 96Fla186, 117S 840.

784-79 [a] **The construction of a written contract.**-233Mich640, 207NW814.

784-80 217Ala27, 114S409; 256Mass 66, 152NE347.

785-82 126Kan331, 267P961; 242NY 125, 151NE152, 45ALR751; 30 OhA167, 164NE436; 287Pa403, 135A124; 47RI 395, 133A621.

785-83 29Ariz280, 240P1031, 1032 [cit CJ]; 33Ariz474, 266P3; Ariz 281P211; 171Ark11, 283SW17, 45ALR1396; 179 Ark578, 17SW(2d)284; 180Ark729, 22 SW(2d)1007; 104Conn645, 133A913; 127Me406, 144A1; Mass 165NE679; 233 Mich64, 206NW313; 235Mich36, 209 NW154, 48ALR1049; 248Mich606, 227 NW784; 105NJL613, 146A215; 242NY 125, 151NE152, 45ALR751; 215AppDiv 412, 214NYS10 (construction of unambiguous contract is for court); 114 Okl 293, 245P653; Pa 131A312; 287Pa403, 135A124; 47RI 395, 133A621; Tex CommnA 293SW815; TexCivA 283SW 651.

785-88 56AppDC342, 13F(2d)318; 242 NY125, 151NE152, 45ALR751.

785-89 27F(2d)32; 29Ariz280, 240P 1031; Ariz 281P211; 171Ark11, 283SW 17, 45ALR1396; 177Ark97, 5SW(2d) 732; 104Conn645, 133A913; 201 Iowa 148, 205NW833; 125Kan700, 266P26; 256Mass66, 152NE347; 233Mich640, 207 NW814; 242Mich204, 218NW784; MoA 293SW432, 435 [citCJ]; 102NJEq20, 139A817; 216AppDiv780, 215NYS267; 223AppDiv292, 228NYS260; 223AppDiv 199, 228NYS377 (whether word "until" in offer excluded date mentioned); 192 NC166, 134SE419; 195NC328, 142SE 27; 117 Okl 96, 245P571; 120 Okl 108, 250P892; 125 Okl 176, 256P906; 130 Okl 48, 265P102; 132 Okl 272, 270P329; 133 Okl 104, 271P635(2dcase); 287Pa 403, 135A124; 295Pa425, 145A525; 49 RI 99, 140A3, 6 [citCJ]; 136SC448, 134 SE415; 144SC417, 142SE593, 597 [quot CJperCothran,J]; 152Va666, 148SE576; TexCivA 283SW651; TexCivA 16SW (2d)880; TexCivA 25SW(2d)689; 143 Va768, 129SE672.

786-90 27F(2d)240; 124 Okl 174, 254P 713; 125 Okl 176, 256P906; 133 Okl 104, 271P635(2dcase); TexCivA 22SW (2d)504.

786-91 104Conn645, 133A913, 914 [cit CJ].

786-92 104Conn645, 133A913, 914 [cit CJ]; TexCivA 300SW253.

786-93 [a] 319Mo 401, 4SW(2d)438.

786-96 MoA 11SW(2d)54.

786-97 29Ariz280, 240P1031; 171Ark 11, 283SW17, 45ALR1396; 205Cal 221, 270P668; 242Mich204, 218NW784; 144 SC417, 142SE593, 597 [quotCJperCothran,J].

786-98 [a] Ariz 281P211. [b] 106 Conn677, 138A788; 258Mass282, 154NE 769.

787-99 104Conn645, 133A913; 120 Okl 108, 250P892; TexCommnA 293SW 815.

787-1 116Tex356, 291SW860.

787-2 103WVa12, 136SE509.

787-5 287Pa403, 135A124.

787-6 258Mass551, 155NE604; 260 Mass566, 157NE702; 287Pa403, 135A 124; TexCivA 32SW(2d)699.

788-8 96PaSuper456.

788-12 157Md341, 146A223.

788-14 219MoA429, 275SW979.

788-15 219MoA429, 275SW979, 981 [cit CJ].

788-18 225AppDiv829, 232NYS563.

788-22 15F(2d)514; 217Ala27, 114S 409; 27 OhA235, 161NE40.

789-23 15F(2d)514; 47 Ida615, 277P 572.

789-24 47 Ida615, 277P572.

789-29½-New. Whether or not prior written agreements are merged in subsequent one is for court. 287Pa505, 135 A223.

789-30 [a] **Construction or application of contract.**-81NH451, 130A145.

789-31 232Ky630, 24SW(2d)263.

789-31½-New. Whether a contract is severable or indivisible must be determined by the court from the subject matter of the contract. 48 Ida412, 282 P492.

789-33 NJSup 139A431.

789-34 224 IllA187 (oral modification of a written agreement); 252Mass314, 147NE863; 255Mass104, 151NE84; 265 Mass513, 164NE382; 19 OhA57; 123 Or215, 261P691.

789-37 224 IllA187.

789-38 MoA 28SW(2d)456.

789-40 177Ark1193, 7SW(2d)327; Nebr 230NW835. But see 157Md341, 146A223.

790-44 104NJL152, 138A871 (question whether conduct indicated intent to waive right to terminate is for jury).

790-45 204Cal 381, 268P624 (primarily for trial court); 250Mich419, 230NW 188; MoA 24SW(2d)191; TexCivA 291 SW587.

790-50 [a] **Substantial performance.**-TexCivA 286SW599.

790-51 214Ala473, 108S339; 259Mass 439, 156NE740; Mass 168NE154(2d

case); 224AppDiv22, 229NYS313; 193 NC274, 136SE869; 25 OhA157, 157NE 825; 48RI160, 136A439; 50RI345, 147 A877 (satisfactory manner of work); TexCivA 24SW(2d)776; TexCivA 31SW (2d)839; 141Wash369, 251P585; 147 Wash140, 265P468 (whether breach substantial warranting other party's refusal to continue performance); 200 Wis357, 228NW475 (workmanlike manner of painting).

790-53 86 IndA331, 157NE445.

790-53½-New. Waiver of partial nonperformance has been held question of fact. 253Mass548, 149NE413.

790-54 91PaSuper524; TexCivA 24SW (2d)776.

790-58 252Mass314, 147NE863 (waiver); MoA 20SW(2d)166 (whether plaintiff prevented performance); NJSup 139A246; TexCivA 274SW230.

790-60 235Ky425, 31SW(2d)701; NJ Sup 147A739 (whether alleged repudiation was communicated); 43 OklACR 173 [reh pending]; 116 Or222, 240P 873; 48RI430, 138A57, 57ALR823.

791-61 227AppDiv372, 237NYS453 (issue of tender and demand for performance held presented).

791-63 129Kan554, 283P489(1stcase); 236Mich425, 210NW488; 221MoA1204, 300SW840; 45SC393, 143SE9.

791-64 262Mass203, 159NE530 (waiver of stipulation); Mass 168NE154(2d case); 48RI430, 138A57, 57ALR823; TexCivA 292SW602.

791-68 259Mass439, 156NE740.

791-69 126Me498, 139A675.

791-70 231Ky720, 22SW(2d)105.

791-71 15F(2d)545; 77CalA591, 246P 1064; NC 154SE37.

791-72 77CalA591, 246P1064; NC 154 SE743; TexCivA 286SW330.

791-74 78Mont516, 255P1043, 1048 [cit Cyc]; 229AppDiv356, 243NYS328.

792-77 127Me406, 144A1; 124 Okl 174, 254P713, 715 [citCJ&Cyc].

792-78 124 Okl 174, 254P713, 715 [cit CJ&Cyc].

792-78½-New. Whether plaintiff's delay was due to defendant's request held for jury. TexCivA 31SW(2d)839.

792-80 NJSup 139A431. [c] **Instructions on burden of proof held erroneous.**-113 OhSt682, 150NE752. [d] **Instructions held proper.**-MoA 9SW(2d) 655.

792-84 Ala 129S88; 218Ky32, 290SW 1070; MoA 21SW(2d)932; 137Wash 280, 242P42. [a] **Held not misleading** to state terms of original contract. Tex CivA 293SW842.

793-90 146Va594, 131SE850, 46ALR 186.

793-92 108Conn126, 142A674; TexCivA 288SW545. [a] MoA 9SW(2d)664; Tex CivA 290SW844.

793-95 Iowa 226NW116 (charge on reasonable value where quantum meruit not laid); 151Miss1, 117S336.

793-4 129 Okl 22, 263P126. [a] 172 Ark575, 290SW51; 122 Or498, 259P 891.

794-6 252Mass314, 147NE863; MoA 283SW729; 73Mont407, 236P1069.

794-7 [a] **Thus** instruction submitting only question of time of making contract held unduly favorable to defendant. 211Ky687, 277SW1010.

794-10 73Mont407, 236P1069.

794-11 Ark 29SW(2d)1088; MoA 293 SW432.

795-21½-New. Instruction authorizing no recovery unless contract was made proper. 211Ky232, 277SW453.

795-21¼-New. Instructions are necessarily erroneous when to the effect that defendant is entitled to the verdict only in case he establishes his version of the contract. 203 Iowa518, 210NW453.

795-21¼-New. An instruction permitting the jury to find for defendant on a counterclaim, if he established his contract "substantially as alleged and testified to by him," is not erroneous as permitting the jury to render a verdict on the counterclaim under evidence of an implied agreement, whereas the pleading asserted an express contract. 207 Iowa843, 223NW895.

795-32 319Mo 401, 4SW(2d)438. [a] 92Fla903, 110S536; Mass 172NE101.

795-33 91PaSuper524; TexCivA 286SW 599. [a] **Instructions held erroneous.**-35Wyo 381, 249P790.

795-34 TexCivA 286SW599; 135Wash 555, 238P637.

796-41 96PaSuper57 (sufficient). [f] **Contract to audit books.**-192NC135, 133 SE402. [g] **Reasonable value of services.**-231Ky720, 22SW(2d)105.

796-43 237Mich652, 212NW879.

796-47 [a] See also 124 Or332, 263P 391.

796-48 165Ga534, 141SE653.

797-54 117 Okl 164, 246P855 (demurrer to evidence under cross petition).

797-55 [b] 68CalA171, 228P873; 35GaA 779, 134SE838; NJ 141A3; 220AppDiv 265, 221NYS512.

797-56 [a] (1) 169Ga28, 149SE561; 241 Mich522, 217NW750; 86PaSuper261; 86PaSuper379; 93PaSuper66; TexCivA 278SW518. (5) Where plaintiff had assigned all rights under contract. 236 Mich536, 211NW85. [b] 17F(2d)476; 68CalA171, 228P873; 42 Ida597, 243P 14; 192NC135, 133SE402; 26 OhA546, 160NE97; 122 Or511, 259P890; 123 Or 215, 261P691; 48RI160, 136A439.

797-58 TexCivA 285SW899.

798-62 96CalA760, 274P1020; 85 IndA 584, 155NE54; Mass 166NE828; Tex CivA 15SW(2d)42; TexCivA 22SW(2d) 959.

798-63 77CalA219, 246P143; 216App Div476, 215NYS564; TexCivA 271SW 145 (special finding not conflicting); TexCivA 15SW(2d)42.

798-65 [a] **Judgment against wife only** in action against husband and wife for price of goods is proper where evidence shows that entire transaction was opened, carried on and consummated exclusively by wife. 69CalA195, 230P 964.

798-66 91CalA75, 266P811 (judgment erroneous).

798-67½-New. It is not necessary for defendant to have asked for an accounting under a contract providing therefor, where, in an action for a sum of money, the contract was pleaded in hæc verba. 78CalA122, 248P278.

798-67¼-New. and, under the evidence, defendant in such case is prejudiced by an action of the court in entering final judgment against defendant and in favor of plaintiff for the amount sued for and directing defendant to convey to plaintiff all interest in the subject of the contract without an accounting. 78 CalA122, 248P278.

CONTRA NON VALENTEM AGERE NON CURRIT PRÆSCRIPTIO

799-57 [b] 46Philippine906.

CONTRATOS

802-1 12PortoRicoFed39 (contract is required for payment of personal services).

803-12 44Philippine326.

803-15 45Philippine296 (deficiency in quantity).

804-26 44Philippine369. [c] **In Philippines.**-44Philippine369.

804-28 [d] **Stipulation for appropriation by pledgee of property pledged** upon default void. 45Philippine286.

806-42 44Philippine326; 46Philippine 897.

807-57 45Philippine286.

808-61 33PortoRico 6.

809-89 [a] **Form of "pujanza" (lease) contract in the Philippines,** with sureties see 44Philippine369.

811-38 [b] **Obligations arising from contract have force of law** between contracting parties. 45Philippine286.

813-82 [a] **Damages for breach** under Porto Rico Civ. Code § 1073 allowed for actual loss and also for profit which would have been realized from performance. 33PortoRico 6.

816-20 33PortoRico176.

817-21 33PortoRico 176.

CONTRIBUTE

818-32 TexCivA 287SW906.

818-33 TexCivA 287SW906.

818-35 TexCivA 287SW906.

CONTRIBUTION

821-4 110Conn342, 148A326.

821-6 180Ark869, 248SW(2d)326(2d case); 45 Ida724, 265P697, 698 [citCJ]; 203 Iowa792, 206NW586; 116Nebr170, 216NW182, 185 [quotCJ]; 191NC340, 132SE21; 123 Or280, 261P55, 57 [quot CJ]. [a] 172Minn52, 214NW767.

821-7 31F(2d)817; 82CalA342, 255P 523; 203 Iowa792, 206NW586; 260Mass 165, 156NE870; 246Mich214, 224NW362, 64ALR210; 172Minn52, 214NW767; 116 Nebr170, 216NW182, 185 [quotCJ]; 83 NH365, 142A689; 191NC340, 132SE21; 123 Or280, 261P55, 57 [quotCJ]. [c] One liable under Workmen's Compensation Act is not liable in contribution to joint tort feasor liable for negligence. 13PaDist&Co 465, 467 [quotCJ].

822-16 172Minn52, 214NW767, 768 [quotCJ].

822-17 73CalA769, 239P358; 172Minn 52, 214NW767, 768 [quotCJ]; 116Nebr 170, 216NW182, 185 [quotCJ]; 83NH 365, 142A689.

822-18 181Ark1046, 29SW(2d)268; 172 Minn52, 214NW767, 768 [quotCJ]; 116 Nebr170, 216NW182, 185 [quotCJ]; 47 RI487, 134A22. [b] **One maintaining infringement suit on patent** may recover part of expenses from other owner of patent. 34F(2d)787.

822-19 203 Iowa792, 206NW586; 116 Nebr170, 216NW182, 185 [quotCJ].

822-20 73CalA769, 239P358, 363 [cit CJ].

822-21 203 Iowa792, 206NW586.

822-23 203 Iowa792, 206NW586; 172 Minn52, 214NW767, 768 [quotCJ].

823-25 195Wis458, 218NW834; 199Wis 608, 227NW396; 200Wis601, 229NW74 (common liability absent).

823-27 226Ky762, 11SW(2d)916. But see Wis 230NW621.

823-28 138SC318, 136SE297 (husband's insolvency is immaterial in wife's action to recover on joint note paid by her).

823-31 136Wash261, 239P545 [quotCJ].

823-32 110Conn342, 148A326; 231Ky 713, 22SW(2d)108; 260Mass165, 156NE 870; TexCommnA 276SW177, 183 [quot CJ&Cyc]; TexCivA 30SW(2d)911; 136 Wash261, 239P545 [quotCJ]. [c] (1) 123 Or280, 261P55; TexCommnA 276 SW177. [g] **Payment need not be made in money.**-123 Or280, 261P55, 57 [cit CJ].

823-34½-New. Prior payment by a coobligor of more than his proportionate part of the common debt is not a condition precedent to an action for contribution between active and passive joint tort-feasors. TexCommnA 276SW 177.

823-34¼-New. Anything of detriment to one obligor which has the effect of discharging his coprincipal or cosurety from joint obligation is sufficient to constitute payment for the purpose of contribution. TexCommnA 276SW177. [a] **Rule applies** whether relief is sought in original action or by cross actions in suits by injured parties. TexCommnA 276SW177.

823-34¼-New. A cause of action in favor of the maker sued on a note against a codebtor for a judgment over is not purely one for contribution so as to require him to show prior payment of the joint debt. TexCommnA 276SW177.

823-34½-New. Where one person alone signs a note for a common debt, prior payment of the note is not a condition precedent to a cross action by him against his codebtors for contribution in an action against him on the note. TexCommnA 276SW177.

823-34¼-New. Where there is an undoubted equity in favor of a debtor sued on a common debt and the whole matter can be litigated between solvent parties without undue prejudice to any person prior payment is not essential to contribution. TexCommnA 276SW 177.

823-34½-New. The rule is especially applicable where bad faith or unfairness in the original form of action against defendant sued alone and he would have to make further payment before he could enforce contribution against his codebtor. TexCommnA 276 SW177.

824-35 31F(2d)817; 76CalA492, 245P 227; 110Conn342, 148A326; 165Minn 346, 206NW441; 172Minn362, 215NW 512. [a] NJ 140A442. [d] **Right based**

on support of poor relative.–165**Minn**346, 206**NW**441. [e] **Under ordinance requiring hallways** to be lighted and cleaned, performance of this duty by one lessee of two adjoining premises using common hallway gives no right of contribution where expense incurred was only sufficient to discharge duty enjoined on him. 54**ND**346, 209**NW**784.

824–41 **Ida** 288**P**162.

824–45 199 **Iowa**1337, 203**NW**787, 788 [citCJ].

824–46 199 **Iowa**1337, 203**NW**787, 788 [citCJ].

824–46½–New. A judgment, although paid by one of the defendants, cannot support an action for contribution where it was not final in that it did not dispose of all of the parties to the action and left the suit still pending. **Tex CommnA** 276**SW**218.

824–48 250 **Ill**A184; 195**Wis**304, 218 **NW**590.

825–52 But see 110**Conn**342, 148**A**326. [b] **Where codebtor's land is sold under execution,** price bid fixes value for purpose of contribution. 25**F(2d)**271.

825–56 **Md** 150**A**723; 246**Mich**214, 224 **NW**362, 64**ALR**210; 217**AppDiv**360, 217 **NYS**131; 290**Pa**420, 139**A**131.

825–60 246**Mich**214, 224**NW**362, 64**ALR** 210; 126 **Okl** 150, 259**P**125 [citCJ]; 123 **Or**280, 261**P**55. [b] **Share of deceased insolvent coöbligor** must be borne ratably by others liable to contribution. 126 **Okl** 150, 259**P**125.

826–64 **Mass** 166**NE**857 (contribute only one third of amount paid); **TexCivA** 280**SW**286, 288 [citCJ].

826–64½–New. Rule of contribution between members of stockholders' committee adjudged liable for stock received as compensation for services in reorganizing corporation is actual value of stock received by each, regardless of price for which he sold it. 217**AppDiv** 360, 217**NYS**131.

826–72 **Md** 148**A**444; 123 **Okl** 167, 252 **P**21.

826–73½–New. A co-contractor is not entitled to contribution where the agreement between the parties shows that the other contractor was not to be liable for any part of the amount for which contribution is sought. **Alta** [1928] 3 **DomLR**136.

826–74 110**Conn**342, 148**A**326; 260**Mass** 165, 156**NE**870; 172**Minn**52, 214**NW**767; 198**NC**219, 151**SE**269; **TexCivA** 280**SW** 911, 913.

826–75 **Ark** 32**SW(2d)**315 (exclusive remedy); **CalA** 286**P**1062; **NC** 155**SE** 263. [e] **Payment to comaker.**–83**NH** 365, 142**A**689. [f] **Contribution between directors indorsing corporation's note.**–**Can** [1930] 1**DomLR**705 (no contribution where company's funds used to pay note).

827–77 [a] **Right of coindorser to contribution.**–**Ala** 130**S**791.

827–80 **Mass** 169**NE**923; 191**NC**340, 132 **SE**21.

827–81½–New. Stockholders indorsing corporation's note are not required to contribute their individual property to pay judgment against corporation. **SC** 155**SE**141.

827–85½–New. Statute authorizing contribution under certain circumstances against co-judgment debtors is not exclusive but cumulative. **Ida** 288**P**162.

827–86 19**F(2d)**693.

828–91 **Iowa** 230**NW**415.

828–92 [a] **Lessee of one of adjoining properties paying for light and janitor service** for stairs and hallway one half of which is on either side of dividing line, knowing other party was unwilling to share expenses, cannot recover one half from lessee of other premises. 54 **ND**346, 209**NW**784.

828–94 19**F(2d)**448; 32**F(2d)**145; 76 **CalA**492, 245**P**227; **CalA** 287**P**550; 103 **Conn**29, 130**A**76; 213**Ky**518, 281**SW**503, 504 [citCJ]; 218**Ky**455, 291**SW**709; 221 **MoA**160, 290**SW**78; **NJ** 140**A**442; 190 **NC**611, 130**SE**502 (generally no contribution among mere tort-feasors); 195 **NC**30, 141**SE**492; **Oh** 173**NE**194; 34 **OhA** 544, 171**NE**411 (indemnity insurer of joint tort-feasor); **TexCivA** 278**SW**501; **TexCivA** 294**SW**977; **TexCivA** 300**SW** 975. See also 226**Ky**762, 118**SW(2d)**916. [a] (9) Officers of bank are not entitled to contribution from bank for fraudulent acts they performed in representative capacity. **TexCivA** 278**SW**501.

829–11 76**CalA**492, 245**P**227; 166**Minn** 388, 208**NW**13; **TexCivA** 32**SW(2d)**264.

830–15 292**Pa**354, 141**A**231, 232 [quot CJ].

830–15½–New. The rule does not apply where both parties have been at fault but not in the same degree and contribution is sought from the party whose fault is the primary or efficient cause of the injury. 190**NC**611, 130**SE**502.

830–19 219**Ala**286, 122**S**169 (intentional wrongdoer); 149**Tenn**375, 264**SW**641.

830–20 292**Pa**354, 141**A**231, 232 [quot CJ]; 105**WVa**184, 142**SE**444, 447 [cit CJ].

830–30 166**Minn**388, 208**NW**13, 14 [cit CJ]; **NJ** 140**A**442; 292**Pa**354, 141**A**231, 235 [citCyc].

831–31 195**NC**30, 141**SE**492; **TexCivA** 297**SW**244; 200**Wis**420, 228**NW**512 (common liability for injury). See also 292**Pa**354, 141**A**231, 234 [citCyc].

831–33 190**NC**611, 130**SE**502; **Tex CommnA** 6**SW(2d)**344.

831–37 But see 245**NYS**138.

832–39½–New. An amendment permitting contribution between joint tort-feasors is not retroactive. 196**NC**776, 147**SE**299.

832–40 See also **MoA** 18**SW(2d)**106.

832–42 221**MoA**160, 290**SW**78.

832–42½–New. It does not apply where judgment goes against one defendant and in favor of the other. 221**MoA**160, 290**SW**78.

832–46 221**MoA**160, 290**SW**78.

832–53 201 **Iowa**117, 206**NW**665; 50 **Nev**383, 263**P**774, 776 [citCJ].

833–54 **TexCivA** 38**SW(2d)**937.

833–55 110**Conn**342, 148**A**326.

833–57 **Iowa** 230**NW**415 (subjection of land of comortgagor to payment of proportionate share).

833–59½–New. Statutory remedy for contribution on judgment not exclusive **CalA** 290**P**1053.

833–60 199**Wis**608, 227**NW**396.

834–80½–New. Where defendant had advised plaintiff not to pay because contract was fraudulent, he could not recover if contract was in fact fraudulent, defendant not being required to advance defense of fraud until sued. 134**Wash** 158, 234**P**1035.

834–80½–New. Where independent contractor provided compensation insurance for employees, general employer had no right of contribution against contractor. **TexCivA** 32**SW(2d)**264.

834–82 **Mass** 169**NE**923.

834–95½–New. Pleading, including petition, answer, and cross complaint in an action against the sole maker of a note given for a common debt have been held sufficient to justify joinder of the codebtor as defendant. **TexCommnA** 276 **SW**177.

834–96 **CalA** 286**P**1062; 191**NC**340, 132 **SE**21. [a] **CalA** 287**P**550. [b] **Cross petition held insufficient.**–231**Ky**713, 22 **SW(2d)**108.

835–99 **TexCivA** 32**SW(2d)**264.

835–5½–New. A cross bill stating a transaction in which the accounting "might" show cross complainants entitled to relief from plaintiff is insufficient to state a cause of action. 25**F(2d)** 271.

835–12 208 **Iowa**949, 225**NW**414, 65**ALR** 817. [a] (5) Evidence to substantiate husband's claim that payments by him on joint note were act of kindness to wife held admissible. 138**SC**318, 136**SE** 297.

835–13 123 **Or**280, 261**P**55.

835–19 [a] (1) 165**Minn**346, 206**NW** 441; 172**Minn**52, 214**NW**767; 123 **Or**280, 261**P**55. (4) To show that support of mother was not voluntary, demanding contribution from sister. 172**Minn**362, 215**NW**512. (5) That certain signers of note were insolvent. 123 **Or**280, 261**P** 55. (6) Verdict for contribution held not excessive. 172**Minn**362, 215**NW**512. [b] (2) To show that signers of note agreed to limit their contribution to one fourth. 172**Minn**22, 214**NW**760; 123 **Or**280, 261**P**55. (3) That loan was made to signers of note and not to corporation. 123 **Or**280, 261**P**55.

836–32½–New. Evidence that signers of a note were stockholders of makers is held to show signers were cosuretics. 191**NC**340, 132**SE**21.

836–32½–New. Proof of payment of debt must be shown by cosurety or joint maker. 191**NC**340, 132**SE**21.

836–32¼–New. Evidence insufficient to rebut presumption as to equal liability of comakers. **CalA** 290**P**903.

836–32½–New. As among themselves, comakers of note are presumed, in absence of evidence to contrary, to be liable in equal amounts. **CalA** 290**P**903.

836–34 208 **Iowa**949, 225**NW**414, 65**ALR** 817.

836–34½–New. Construction of particular findings. **CalA** 290**P**903.

836–35½–New. Judgment may be rendered against coöbligors, although they are insolvent. 123 **Or**280, 261**P**55.

CONTROL

838–28½–New. power or authority to control; 52**ND**26, 202**NW**391 [quot Webster Int. D.].

839–31 83**NH**200, 140**A**169 (includes power to determine what shall be done on premises).

840–33½–New. Right of "control" over thing does not ordinarily include right to destroy. 251**Mich**256, 231**NW**621.

840–33½–New. Word "control" as regards control of property has been construed to mean possession. **Or** 289**P** 1063.

841–36 251**Mich**336, 232**NW**350; 131**SC** 473, 128**SE**410.

841–43 131**SC**473, 128**SE**410.

841–44 152**Md**694, 137**A**514.

841–47 131**SC**473, 128**SE**410.

842–52 131**SC**473, 128**SE**410.

842–53 152**Md**694, 137**A**514; 131**SC**473, 128**SE**410.

842–54 152**Md**694, 137**A**514.

CONTROLLER

842–68 9**PaDist&Co** 339, 341 [quotCJ].

CONTROVERSY

843–73½–New. Broad term applied to any disputation. 220**MoA**883, 295**SW** 529.

CONVENIENT

846–45½–New. "more convenient," 217 **Ky**67, 288**SW**1013.

CONVERSION

852–1 [a] (1) 220**Ala**319, 125**S**28. (3) 101**WVa**320, 132**SE**735. (6) Other instances. 207 **Iowa**374, 223**NW**106.

852–2 135**Misc**730, 241**NYS**94.

852–3 200**Cal** 482, 253**P**921; 253**Mass** 130, 148**NE**593; 139**Miss**636, 103**S**432; 135**Misc**730, 241**NYS**94; 133**SC**103, 130 **SE**343; 142**Va**285, 128**SE**550.

853–4 291**Pa**22, 139**A**582; 142**Va**285, 128**SE**550. [b] 200**Cal** 482, 253**P**921.

853–4½–New. **But such fiction ends** upon devolution from first decedent. 6 **PaDist&Co** 193.

853–9 142**Va**285, 128**SE**550. See also 133**SC**103, 130**SE**343. [b] **Under this doctrine,** real estate is regarded as converted from time it ought to have been converted. 253**Mass**130, 148**NE**593.

854–13 207 **Iowa**374, 223**NW**106 (presumption against application of theory). [c] **Where conversion has actually taken place,** it is not necessary to invoke doctrine and it has no application. 133 **SC**103, 130**SE**343.

854–13½–New. The doctrine should not be applied in such manner as will defeat any lawful disposition one may make of his property. 247**Mich**468, 226 **NW**234.

854–22 325 **Ill** 429, 156**NE**481, 484 [cit CJ].

855–25 109**Conn**307, 147**A**4, 66**ALR** 1036; **IndA** 158**NE**581; **NJCh** 146**A**583; 129**Misc**190, 220**NYS**689; 50**ND**616, 197 **NW**595; 48**RI** 401, 137**A**699.

855–26 **IndA** 158**NE**581, 582 [citCJ]; 129**Misc**190, 220**NYS**689; 48**RI** 401, 137 **A**699. [a] **Statutory rule** is subject to terms of contract. 135**Misc**730, 241**NYS** 94. [b] **Doctrine cannot be extended** to permit inheritance tax on unpaid purchase money under contracts of sale of real estate located in other states. 14 **PaDist&Co** 251.

855–27 129**Misc**190, 220**NYS**689; 133

Misc581, 232NYS680.

855-31 325 Ill 429, 156NE481, 484 [cit CJ].

856-38 But see 135Misc730, 241NYS94.

858-59½-New. Where a trust includes both real and personal property in one fund, all must be converted into personalty from the beginning. Mass 165NE 701.

859-75 15DelCh1, 130A34; 15DelCh99, 131A536; 87 IndA281, 156NE575, 124 Kan599, 261P596; 226Ky668, 118SW(2d) 721; MoA 31SW(2d)271; 98NJEq538, 131A208; 101NJEq105, 137A86; 213 AppDiv487, 211NYS179; 124 Okl 207, 255P561.

860-79 [a] **Discretionary power to sell realty during life estate** held in trust held not to convert proceeds into personalty. 125Misc95, 210NYS155.

869-80½-New. Party having no interest in will has been held not entitled to raise question of conversion. 300Pa146, 151A339.

860-81 245NYS173.

860-82 200Cal 482, 253P921; 127Misc 361, 216NYS750; 291Pa22, 139A582; 49 RI 162, 141A326 (doctrine not applied to defeat testator's intention).

860-83 5PaDist&Co 719.

860-84 200Cal 482, 253P921; 98NJEq 55, 130A22; 127Misc579, 217NYS323; 300Pa146, 151A339.

861-88 253Mass130, 148NE593.

861-91 Mo 198SW(2d)898; 245NYS173.

861-93 332 Ill 533, 164NE5; 124Kan 599, 261P596; Mo 198SW(2d)898; 83 NH453, 144A63; 99NJEq514, 133A705; 101NJEq105, 137A86; 245NYS570; 124 Okl 207, 255P561; 5PaDist&Co 719.

862-94 127Misc361, 216NYS750; 245 NYS173; 291Pa22, 139A582.

862-95½-New. The words "trust fund" indicate testator meant personal rather than real estate. 253Mass130, 148NE 593.

862-96 253Mass130, 148NE593; Mo 19 SW(2d)898; 101NJEq66, 137A434; 127 Misc361, 216NYS750; 229AppDiv453, 243NYS366; 291Pa22, 139A582; 300Pa 146, 151A339. [c] **It must be shown** that testator, after payment of debts, failed to leave sufficient personalty to pay legacies, in order to work equitable conversion to pay legacies. Mo 198W (2d)898.

863-97 127Misc361, 216NYS750. [a] **Power to divide fund** carries with it implication that it is to be first transmitted into form susceptible of reasonable division according to customs. 253 Mass130, 148NE593.

863-98 133Misc519, 232NYS204; 291Pa 22, 139A582. [c] (2) Will, bequeathing moneys from sale of realty coming to testator from estate of prior decedent to certain eleemosynary institutions, does not work such blending of personalty and real estate as to show intent to create fund and make testamentary disposition in money. 200Cal 482, 253P 921.

863-99 207 Iowa374, 223NW106.

864-6 MoA 318W(2d)271.

865-7 240 IllA457; 127Misc399, 216 NYS267; 20 OhA203, 153NE185.

865-11 15DelCh99, 131A536; 320 Ill 547, 151NE539; 323 Ill 397, 154NE216; 333 Ill 643, 165NE208; 335 Ill 395, 167 NE94; 87 IndA281, 156NE575; 207 Iowa 374, 223NW106; Iowa 229NW241; 139 Miss636, 103S432 (land devised not subject to curtesy so as to prevent conversion); 99NJEq514, 133A705; 101NJEq 105, 137A86; 125Misc615, 211NYS545; 136Misc612, 244NYS119; 142Va285, 128 SE550 (direction to dispose of estate and divide proceeds); 145Va116, 133SE773. See also 5PaDist&Co 719. [d] **Illegal attempt to devote proceeds of sale of land to educational purposes** does not effect an equitable conversion so as to charge proceeds of real estate with debts to exoneration of residuary legatees. 156Miss718, 126S656.

866-12½-New. But the exercise of a power of sale given for convenience of fair distribution does not work a conversion in the absence of anything in the will to indicate that the testator intended a conversion. 98NJEq55, 130A 22.

866-13½-New. Contract of sale made by executor under power of sale to effectuate gift of over one-half of testator's property to charity is invalid and does not convert realty into personalty. 216AppDiv72, 215NYS50 (where statute prohibits gift of over one-half of property to charity).

866-13⅓-New. A mere power of sale to facilitate dispositions provided for does not of itself work equitable conversion nor necessarily indicate an intention so to do. 127Misc579, 217NYS323.

866-16 200 Iowa926, 205NW755; 124 Kan599, 261P596; 99NJEq514, 133A705; 26 OhA122, 158NE588; 132SC120, 128 SE837. [d] **Duty imposed on trustee to sell real estate** is implied from will where trustee is directed to distribute fund during the cestui que trust at the termination of the trust. 253Mass130, 148NE593.

867-19 200Cal 482, 253P921; 207 Iowa 374, 223NW106; Mo 198W(2d)898; 127 Misc399, 216NYS267; 245NYS173; 284 Pa200, 130A426; 291Pa22, 139A582. [a] (9) Where power of sale was clearly discretionary and property might be given beneficiaries in specie consistent with testator's intent, there is no equitable conversion. 245NYS173.

868-23½-New. There is no conversion where beneficiary has option to purchase. 240 IllA457.

868-24 223AppDiv640, 229NYS171; 129 Misc398, 222NYS345.

868-26½-New. Where real estate is sold under discretionary power vested by will and it does not appear when it was sold, it must be considered as personalty. 98NJEq69, 131A210.

868-27 335 Ill 395, 167NE94; 101NJEq 105, 137A86; 125Misc615, 211NYS545.

869-38 15DelCh99, 131A536; 87 IndA 281, 156NE575; Iowa 229NW241; 124 Kan599, 261P596; 253Mass130, 148NE 593; Mo 198W(2d)898; 101NJEq105, 137A86; 213AppDiv487, 211NYS179; 5 PaDist&Co 719.

869-38½-New. Doctrine of equitable conversion held not to operate as of date of instrument creating the trust when not so expressly specified. 253Mass130, 148NE593.

870-40 220Ala319, 125S828; 124Kan 599, 261P596; 253Mass130, 148NE593.

871-41 253Mass130, 148NE593.

871-42 157Md565, 146A742.

871-44 102NJEq494, 141A574; 284Pa 200, 130A426.

871-45 5PaDist&Co 719.

871-47 220Ala319, 125S828 (gift of proceeds of land to be sold); Mo 198W(2d) 898; MoA 274SW486; 98NJEq538, 131 A208; 127Misc399, 216NYS267. [b] (2) Mo 198W(2d)898. (4) Where purpose of conversion fails because of illegality of bequest, conversion will be recognized only to extent necessary to carry out lawful objects of will. 213AppDiv487, 211NYS179.

872-49 213AppDiv487, 211NYS179. [a] **Will directing distribution of residue equally to three sons** and equal division of surplus over three thousand dollars each among four sons is held to require conversion so as to ascertain surplus, if any, for division into four shares. 127Misc361, 216NYS750.

872-55 See also 133Misc299, 232NYS 526.

873-57 136Misc199, 137Misc329, 239 NYS588.

873-65 98NJEq538, 131A208.

874-67 287Pa102, 134A462.

874-69 101NJEq66, 137A434; 102NJ Eq470, 141A450; 129Misc716, 222NYS 596.

875-73½-New. Direction of will to convert realty into cash is invalid to the extent that it gives over one half of the estate to charity, and the balance passes as intestate property without equitable conversion. 128Misc51, 217NYS318.

875-73⅓-New. Where realty in excess of that allowed by law is devised to charity, equitable conversion does not apply as to excess which will pass as intestate property. 128Misc56, 217NYS 316.

876-80 NJCh 147A814 (specific portion of land set aside as curtesy of husband). See also 133SC103, 130SE343, 345 [cit CJ].

876-81 192NC614, 135SE632.

876-83 [b] **Where owner consents to decree authorizing sale of land** in which he has created trust, an actual conversion takes place which precludes his claim of homestead exemption, his interest being transferred to note and mortgage taken on sale. 133SC103, 130 SE343.

876-83½-New. Where the life tenant predeceases the remainderman, the proceeds of sale under court order made during life tenancy become personalty in fact on death of the life tenant, and therefore descend to the executor rather than devisees of the remainderman on the latter's death. 261Mass373, 158NE 791.

876-87 DelCh 147A244.

877-91 [f] **Regarded as land** for purpose of paying mortgage. 102NJEq144, 140A229.

877-92 But see 126Misc256, 212NYS 240.

878-4 129Misc356, 221NYS449. [f] **Court of equity** never permits property of infant to be changed from personal to real or from real to personal so as to affect succession to it. 154Tenn476, 290 SW12. [g] **Sale under statute so providing.**-154Tenn476, 290SW12. [h] **Statute making infant's interest in proceeds of realty same as his interest in property** held merely declaratory of chancery rule. 129Misc356, 221NYS449.

879-9½-New. Equity has power to authorize a change of property from real to personal. 332 Ill 551, 164NE1.

879-10 136Misc607, 241NYS563.

879-17 332Ill 551, 164NE1.

881-28½-New. On direction of sale and rendition of judgment thereon, equitable conversion takes place, 126Misc256, 212 NYS240.

881-28⅓-New. and is not affected by subsequent death of party before conveyance of some of property. 126Misc 256, 212NYS240 (in partition suit).

881-29 [d] **Person taking under will** takes property in character impressed thereon by testator. 335 Ill 395, 167NE 94.

882-34½-New. Equitable conversion does not give property to be sold character of cash. TexCr 58W(2d)610.

882-35 See also 333 Ill 643, 165NE208.

882-36 335 Ill 395, 167NE94. See also 333 Ill 643, 165NE208.

882-37 [a] **Title to real property never vested in executors** because of nonperformance with terms of will, where personalty was sufficient to pay legacies. 252NY381, 169NE616.

882-43 48RI 401, 137A699. [a] **Thus,** where party to partition suit died after sale of part of property and after rendition of judgment confirming sale and directing distribution of proceeds of remaining property, but before conveyance of such property, his share is personalty which goes to administrator free from dower, where wife had released dower interest to deceased before his death. 126Misc256, 212NYS240. [b] **Where agreement does not work conversion,** descent of title is not affected on death of owner. 325 Ill 429, 156NE481.

883-52 [b] **Where agreement does not work conversion,** heirs of owner of land are not barred from suing for partition. 325 Ill 429, 156NE481.

883-56 124Kan599, 261P596 (does not pass to heir).

883-57½-New. Where the beneficiary assigns interest during life tenancy, the beneficiary retains no interest which he can thereafter convey to another, so that his trustee in bankruptcy has no interest in setting aside a conveyance made in contemplation of bankruptcy. 124 Kan599, 261P596.

883-60 125Misc909, 212NYS616.

885-93 252NY381, 169NE616.

886-95 334 Ill 137, 165NE598, 65ALR 344; 200 Iowa926, 205NW755; Iowa 229NW241 (where no trust preventing reconversion is created).

886-2 142Va285, 128SE550 (acts must clearly manifest intention). [a] (6) Mere holding of individual residuum of tract does not indicate intention to reconvert, being bare failure to act, and consistent with holding for sale. 142Va 285, 128SE550.

837-4 Compare 142Va285, 128SE550.
837-9 But see 200 Iowa926, 205NW755.
837-11½-New. Election to reconvert must be unequivocal act of all parties interested. 142Va285, 128SE550.
838-25 200 Iowa926, 205NW755 (election by all heirs held necessary).
889-33 Mo 198SW(2d)898.
890-51 But see Iowa 229NW241.
890-55 Iowa 229NW241.

CONVEY

894-44 117 Or244, 243P767.
894-45 105WVa69, 141SE521.
894-46 117 Or244, 243P767.
895-54 [a] 117 Or244, 243P767 (same legal effect).

CONVEYANCE

898-75 [a] Saddle horse held conveyance within accident policy. 23F(2d) 211.
898-78 [a] (3) "Conveyance" within insurance policy means vehicle or instrument other than legs of man. 23F (2d)211.
898-83 498D442, 207NW449, 450 [quot CJ].
899-97 103WVa301, 137SE747.
900-31 103WVa301, 137SE747.

CONVICT

903-91 320Mo 296, 68SW(2d)915, 919 [quotCJ].
904-98 144Wash598, 258P484.

CONVICTION

905-12 99CalA240, 278P476.
906-28 101NJEq72, 137A404.
906-43 106TexCr154, 291SW539.
907-62 3Del 93, 130A854.
908-70 3Del 93, 130A854.
909-78 3Del 93, 130A854.
909-88 9PaDist&Co 202.
910-96 242 IllA508, 515 [quotCJ].

CONVICTS

912-1 [a] (3) One who has been proved guilty of criminal offense in court of competent jurisdiction. 114Nebr653, 209NW328.
912-12 TexCivA 282SW289, 291 [quot CJ entire section].
914-37 115Nebr557, 213NW809, 812 [quotCJ]; TexCivA 282SW289, 291 [quotCJ].
914-38 115Nebr557, 213NW809, 812 [quotCJ]; TexCivA 282SW289, 291 [quotCJ].
914-40 140Wash679, 250P456, 51ALR 1088.
914-41 200Cal 44, 251P808, 49ALR 1377; TexCivA 282SW289, 291 [quot CJ]; 140Wash679, 250P456, 51ALR 1088.
914-45 216Ala412, 113S274; 117 OhSt 114, 157NE488, 54ALR1220.
915-43 But see 127Kan732, 275P196.
917-36 115Nebr557, 213NW809. [a] (1) 115Nebr557, 213NW809.
918-99 198Cal 713, 247P205, 48ALR 580.
919-11 But see 25 OhNPN8231.
919-19 Mo 290SW1007 (pendency of appeal); 322Mo 1163, 17SW(2d)932 (prior information or indictment).
919-19½-New. Prisoner serving sentence cannot be denied right to trial for other offense. 19F(2d)462.
919-20 118 Or397, 247P146 (statute relative to punishment for successive offenses held not to change rule).
919-22 254NY255, 172NE489; 118 Or 397, 247P146.
920-23 118 Or397, 247P146.
920-26 Mo 188SW(2d)1041.
920-29 20Ala665, 104S847 (management and control of state prisoners if for legislature).
921-37½-New. A person serving sentence in a federal penitentiary may be brought to the place of trial under statutory procedure. 19F(2d)462.
921-40 [a] **Conditional release by board of clemency.**—27 OhA486, 161NE 358 (revocation of release and return of convict by another state).
922-55 173Ark868, 293SW1007. [a] 173Ark868, 293SW1007.
922-56 173Ark868, 293SW1007.
923-69 133SC420, 131SE29 (act establishing chain gang on approval of legislative delegation of county not unconstitutional).
923-70 20AlaA665, 104S847; 200Cal 44, 251P808, 49ALR1377; 68CalA522, 229P984 (statute construed to apply to misdemeanor prisoners). [c] **In Arkansas.**—170Ark880, 281SW678. [f] **In California.**—68CalA522, 229P984. [g] **Statutes construed.**—200Cal 44, 251P808, 49 ALR1377.
923-73 IndA 171NE221 (license not required). IndA 173NE335. [c] **Constitutionality of statutes.**—83Colo 43, 262P 907.
923-73½-New. Such employment is for a "public purpose" within a constitutional provision that the right of the state to engage in business for such a purpose shall not be denied. 108 Okl 4, 232P807 (manufacture of shirts).
923-75 [a] **Defendant electing to serve sentence** pending appeal becomes prisoner subject to control of board of administration. 20AlaA665, 104S847.
923-75½-New. The state is entitled to the labor and services of its convicts, and may produce by such labor things of commercial value. 108 Okl 4, 232P 807.
923-75¾-New. A statute purporting to amend such repealed statute is ineffective so far as it refers to the duties of such commission of prison labor. 83 Colo 43, 262P907.
923-75¼-New. A statute creating a state commission on prison labor has been held impliedly repealed by a statute giving control of penal institutions to a state board of corrections. 83Colo 43, 262P907.
925-90 178Ark662, 128SW(2d)17.
925-93½-New. That a contract for the hiring of convicts for eleven months to raise a cotton crop exceeded authority conferred by statute, prohibiting a lease thereof for any definite period, did not abrogate the whole contract, which might have been made with reference to customs in making and gathering crops, so as to authorize hiring for a year, with the proviso that the state might retake convicts whenever it deemed it necessary or expedient. 179 Ark43, 148SW(2d)233.
925-96½-New. An action of a board of charities and correction in allowing a corporation to use convicts after expiration of the year for which it hired them, until a new board took office, created an implied obligation on the part of the state to renew or continue the contract for another year on the same terms. 179 Ark43, 148SW(2d)233.
926-19½-New. Complaint has been held to state cause of action. TexCommnA 168SW(2d)283.
927-22½-New. Costs. A convict bond approved by a judge is due and legal process for enforcement of a judgment requiring the convict to pay costs. Tex CommnA 168SW(2d)283.
927-26 178Ark662, 128SW(2d)17.
927-29 179Ark43, 148SW(2d)233.
927-32 178Ark662, 128SW(2d)17.
928-40½-New. Person using convict labor under contract is not liable for nuisances committed by convicts. 194 NC817, 140SE733.
928-40¾-New. Where convicts are leased by the state board of charities and correction to farmers, the farmers take the risk of having on their hands a stockade which they may not need if the state withdraws the convicts, so that such farmers cannot recoup any part of the cost thereof against a suit of the state to collect the amount due for the time the convicts worked. 178Ark662, 128SW(2d)17.
928-40¼-New. In a state's action to recover the amount due for the hire of convicts for a certain year, the court erred in allowing defendant to recoup the loss from being prevented from gathering part of such year's crop as damages for breach of contract in taking the convicts from defendant after permitting it to use them for part of the ensuing year, such damages not being within the reasonable contemplation of the parties when the contract was made. 179Ark43, 148SW(2d)233.
929-83 [a] **Surplus of articles to be sold must not compete with free labor.** IndA 173NE335.
929-83½-New. The state has implied power to sell and dispose of the commodity produced by convict labor at the penitentiary. 108 Okl 4, 232P807 (contract to manufacture at penitentiary and sell to dealer valid).
929-83¾-New. The use of the revolving prison fund for establishing a manufacturing industry at a state prison is not a misapplication of public funds, nor expenditure of money for which no appropriation has been made. 108 Okl 4, 232P807.
929-83¼-New. A contract to manufacture goods at a state prison and sell them to an individual does not amount to contracting convict labor, forbidden by the constitution. 108 Okl 4, 232P 807.
929-83⅛-New. Convict labor can be used for manufacturing articles to be used by the state, only the surplus to be sold. IndA 173NE335.
929-83¾-New. Statute requiring license for sale of convict goods is inapplicable to state. IndA 173NE335.

COPPER

933-65 [a] **"Copper matte."**—10CustA 228.

COPY

935-5½-New. A substantial copy of a writing means a copy of all material and essential elements, terms, and conditions thereof. 148Miss97, 114S145.

COPYRIGHT AND LITERARY PROPERTY

945-1 [a] (10) Act by government granting certain monopoly to person who has exercised his ability. 27F(2d) 176.
947-29 27F(2d)556; 28F(2d)529.
949-43 128Misc284, 219NYS196. [b] **Author has right to control making of copies.**—27F(2d)556.
949-45 5F(2d)379 (copying uncopyrighted post cards, which plaintiff was distributing to public will not be restrained); 27F(2d)556.
949-46 28F(2d)529; 128Misc284, 219 NYS196.
951-61 28F(2d)529.
952-75 28F(2d)529; 128Misc284, 219 NYS196.
953-93 [b] **In Manitoba.**—[1928] 2DomLR545.
953-86 128Misc284, 219NYS196.
953-92 128Misc284, 219NYS196.
954-5 128Misc284, 219NYS196.
956-26 36F(2d)694.
956-27 37F(2d)54.
956-33 36F(2d)694; 253NY281, 171NE 56.
957-35 16F(2d)805; 28F(2d)529; 36F (2d)694; 253NY281, 171NE56.
962-78½-New. Even though in England statute has abrogated common-law copyright, a British citizen has right to sue for infringement of common law copyright in New York. 126Misc86, 213 NYS134.
963-86 125Misc238, 210NY374, 376 [quotCJ] (conceding rule of text, but denying application to facts of case).
967-22 Ida 288P162.
967-29 [b] **Delivery of manuscript with intention of passing title is sufficient.** 27F(2d)556.
968-55 But see 27F(2d)556.
971-73 [c] **Evidence held to show valid contract authorizing production of play** so as to bar petition to enjoin its production by defendants in England. 217AppDiv107, 216NYS191. [f] **Letter of attorney to author recommending extension of time to produce play held of itself** not extension, but evidence of author's treating contract as continuing. 217AppDiv107, 216NYS191.
974-3 36F(2d)727; 43F(2d)885.
976-10 13PortoRicoFed93.
979-37 [b] **Absolute unrestricted sale of printed copy** of article amounts to publication, especially when accompanied by filing similar copies with register of copyrights. 27F(2d)556. [e] **Submission of "thrift purchase plan" for consideration does not permit appropria-**

tion without originator's consent. 43F(2d)685.
987–26 31F(2d)236.
989–49 28F(2d)529; 253NY281, 171NE56.
989–50 28F(2d)529.
989–52 See also 253NY281, 171NE56.
989–55 [a] **Part of literary work, however small,** appropriated by another is material where result is suggestion of similarity or identity. 253NY281, 171NE56.
990–65 28F(2d)529; 253NY281, 171NE56. [d] **Evidence held sufficient** to show that idea was not obtained from plaintiff. 43F(2d)685.
999–77½–New. The Spanish law of 1879 extended to include the Philippine Islands in 1887 and recognized by treaty of Paris in 1898 must be respected in the case of one complying with its provisions 1889 regardless of a change in sovereignity. 44Philippine855.
1004–61½–New. An assignee of the performing rights in a musical composition, whose assignment is subsequent to the Copyright Act, cannot maintain an action for infringement of such right unless his assignment is registered under such act. 60 OntL280, [1927] 2DomLR928.
1007–30 [a] **Various sections of act must be reconciled** by court if possible, in absence of direct appeal. 27F(2d)176.
1008–36 [b] **Statute may be applied** to unanticipated conditions if they come fairly within its intent or meaning. 5F(2d)411, 40ALR1511.
1010–62 31F(2d)236. [c] **Author is entitled to copyright** when he has combined existing material into new form by exercise of skill and discretion. 28F(2d)132.
1010–65 16F(2d)805.
1011–67 40F(2d)290. [b] **Work of art may present old theme** if there is distinguishable variation. 23F(2d)159.
1013–83 42F(2d)782.
1013–39 15F(2d)35.
1014–90 Man [1928] 2DomLR545.
1016–39 40F(2d)290.
1026–48 212AppDiv646, 209NYS369.
1026–49 212AppDiv646, 209NYS369.
1026–50 [b] **Dramatic incident** is not copyrightable. 39F(2d)468.
1027–63 39F(2d)468.
1028–71 [a] **Plot or scene of play** (1) can be copyrighted. 34F(2d)142(2dcase). (2) Plot of play consists in showing how human effort and intention is aided or thwarted by greater forces with which humanity is surrounded. 34F(2d)142(2dcase). [b] **Environment or motif of play** as distinguished from plot thereof is not copyrightable. 34F(2d)142(2dcase).
1029–86½–New. Copyright on lyric and music of song protected separate use of each. 22F(2d)412.
1029–93 [c] (2) Musical composition of theme of old song, but with different words and music, attended with commercial success, will support copyright claim against infringer. 27F(2d)1014.
1031–24½–New. A dress pattern in the nature of a design to be stamped on dress goods is not copyrightable as a work of art. 34F(2d)291.
1036–20 Man [1928] 2DomLR545.
1037–38 40F(2d)290.
1038–59 16F(2d)805.
1041–87 27F(2d)176; 31F(2d)583.
1041–88 31F(2d)583; 34F(2d)43. [b] **Copyright not invalidated.**–27F(2d)176.
1042–90 102WVa677, 136SE202, 205, [quotCJ] 49ALR968.
1042–91 See also 31F(2d)583.
1042–92 31F(2d)583.
1047–46 40F(2d)290.
1047–46½–New. Inference may be indulged that an independent contractor with representations of the state for the preparation of an index to code for a sum less than the actual cost of work did not intend that right to copyright be surrendered. 27F(2d)82.
1048–53 [a] **Ownership** of unpublished composition presumptively included privilege of publication and securing copyright. 23F(2d)159.
1049–67 27F(2d)82.
1049–68 [c] **Publisher under contract to state** to prepare code index for both his and state's publications, for which state would pay less than cost of production, is independent contractor, not employee, so far as proprietorship of copyright is concerned. 27F(2d)82.
1067–24 26F(2d)150 (notice is condition precedent to recovery for infringement).
1067–25 [b] **Where copies are sent as samples,** notice is not required. 23F(2d)159.
1067–29 [b] **Public performance using copyrighted music rolls is infringement,** though no notice shows on roll. 40F(2d)501.
1068–31 36F(2d)991. But see 34F(2d)300. [a] **Omission is unimportant** where other party admits that work was copyrighted. 27F(2d)82.
1069–46 34F(2d)300 (notice on last page held not sufficient).
1075–16 27F(2d)176.
1076–20½–New. Failure to file notice is no defense against a suit for infringement of right to perform publicly for profit. 31F(2d)832.
1087–34 28F(2d)529.
1088–47 16F(2d)805.
1090–68 16F(2d)805.
1093–98 31F(2d)236. [a] **Where exclusive property in copyrighted article is obtained under terms** that once published it could be reprinted with or without credit to holder of copyright, such copyright to terminate in accordance with such terms, especially where republication was assented to. 27F(2d)556.
1093–99 31F(2d)236; 36F(2d)991 (acts held not to be abandonment). [b] **Intent to abandon or abandonment not shown.**–Evidence that proprietor permitted state to publish index to code under apparently authorized promise of state to acknowledge source, and of failure to assert rights on breach of promise, does not show intent to abandon. 27F(2d)82. [c] **Delivery of copyrighted lectures** to paying audience only is not abandonment or dedication to public. 28F(2d)132.
1094–2½–New. Publication of part of copyrighted label does not forfeit protection by copyright. 31F(2d)583.
1097–58 [a] (3) Corporation paying copyright owner substantial consideration for talking motion picture rights, without knowledge of prior contract, not recorded in copyright office, for exclusive stage rights in certain territory, must be regarded as bona fide purchaser for value. 30F(2d)634.
1098–61 [a] **Effect of failure to register assignment.**–Can [1929] 2DomLR1.
1099–73 30F(2d)634.
1099–80½–New. A subsequent purchaser ordinarily is bound by a covenant in a contract, prohibiting or restricting transfer of rights to others, only when he takes with actual or constructive knowledge thereof. 30F(2d)634.
1102–21 212AppDiv646, 209NYS369.
1103–30 212AppDiv646, 209NYS369.
1106–53 36F(2d)94 (rescission and recovery of copyrights). [b] (2) Where composer rescinds royalty contract and secures back copyrights bankrupt publisher must have returned to him royalties paid in advance and not yet earned. 36F(2d)94.
1106–58½–New. Author who assigned right to copyright song in return for royalties cannot sue for an accounting in equity, relation of debtor and creditor being created. 215AppDiv116, 213NYS395.
1106–58½–New. **Pleading.** Complaint alleging agreement to pay royalties for assignment of right to copyright song does not state cause of action in failing to allege that copies have been sold or moneys received. 215AppDiv116, 213NYS395.
1106–59 [c] (2) Infringement of work of fancy, that is or tries to be pure literature, constitutes plagiarism. 34F(2d)142(2dcase). [f] **Other definitions.**–28F(2d)529. [g] **Copying some substantial part of copyrighted work** is necessary to constitute infringement. 34F(2d)142(2dcase).
1107–75½–New. Copyright protects the exclusive use of a theme presented in an original, with novelty of treatment or embellishment. 31F(2d)236.
1108–86 28F(2d)529. [d] **Emotions** are not subject to copyright, though manner of expressing them may be. 34F(2d)145.
1110–95 31F(2d)236.
1112–27 [a] (2) Copying to constitute infringement of copyright, includes various modes in which matter in publication may be adopted, imitated, or transferred, with more or less colorable alteration. 31F(2d)236.
1113–41 39F(2d)922 (actual copying).
1114–43 39F(2d)468 (similarities in incidental details).
1115–49 42F(2d)782.
1116–59 28F(2d)132.
1116–63 28F(2d)132.
1118–88 27F(2d)82.
1120–7 15F(2d)35.
1120–21 [b] **To determine question of protection given by copyright,** proprietor's rights must be reconciled with public interest in having subsequent workers in same field permitted to use accumulated knowledge. 27F(2d)82.
1121–29 22F(2d)412. But see 32F(2d)366.
1122–43½–New. Under Canadian Act intent to evade law is essential in order that owner of copyright may recover penalty for infringement. Can [1925] 3DomLR875.
1122–45 [b] **Premature publication** of copyrighted article constitutes infringement. 27F(2d)556.
1126–81½–New. A textbook, under the law of copyright, differs fundamentally from compilations in that the former is the result of independent intellectual labor and the latter may be substantially duplicated. 27F(2d)82. The result of comparative reading on the imagination of a reader, not the dissection of sentences and incidents, determines whether infringement of a literary work of imagination has been committed. 34F(2d)142(2dcase).
1127–1 39F(2d)922.
1130–42 16F(2d)805.
1130–45 16F(2d)805.
1136–87½–New. But it is not permissible to use a competing publication, for the purpose of "checking up" original work, obviously so incomplete that comparison must result in much appropriation. 27F(2d)82.
1139–11 [b] **Greater latitude** as to authors consulting textbooks is to be expected than in case of one compiler using similar compilations. 27F(2d)82.
1142–44 [a] **Some similarity is to be considered inevitable** in determining whether one of two annotated statute books, both based on earlier works, infringes copyright of other. 27F(2d)82.
1142–45½–New. Use of citations in annotated statutes may be an infringement where it is done before independent gathering of authorities, even though the cases are later examined. 27F(2d)82.
1142–45½–New. So, where an annotator of statutes uses the citations of a competing work to "check up" a glaringly incomplete list, such use is an infringement, even though the text is not copied. 27F(2d)82.
1143–53 31F(2d)236.
1145–85 [c] **Piracy of plot or scene** may consist in appropriating action of play without any of words. 34F(2d)142(2dcase).
1145–88 [a] (2) Similar use of Jewish and Irish characters with different treatment does not constitute infringement. 34F(2d)145.
1147–7 78CalA58, 247P923.
1148–21½–New. Use of copyrighted song for one performance, where admissions were charged, held use thereof for profit. 22F(2d)112.
1149–31 16F(2d)829.
1149–36 [b] **Operator of radio receiving set** does not "perform." 40F(2d)734.
1149–37 16F(2d)829. [a] **Broadcasting by radio** a copyrighted song for advertising purposes is public performance for profit. 5F(2d)411, 40ALR1511.
1149–38 31F(2d)832.
1149–42 31F(2d)832.

1149–42½–New. as is a broadcast radio performance, 16F(2d)829.
1149–43 16F(2d)829.
1151–61½–New. Café owner receiving copyrighted music over radio broadcast from station with license therefor did not infringe. 40F(2d)734.
1151–63½–New. Radio. An owner of a radio receiving set, over which a copyrighted composition is heard, is not an infringer, infringement, if any, being by the broadcaster. 32F(2d)366.
1154–93 23F(2d)159.
1159–45 See also 42F(2d)881. [a] **Photoplay,** depicting miracle scene not infringement on dramatic composition. 42 F(2d)881.
1159–53 [b] **Whether print is commercial or purely art,** it must be copyrighted in order that relief for alleged infringement may be had. 27F(2d)176.
1160–58 36F(2d)991.
1160–76 26F(2d)149 (theater owner); 36F(2d)354.
1161–82 36F(2d)354.
1165–78 23F(2d)159; 27F(2d)176; 40 F(2d)290.
1167–92 [a] 40F(2d)290.
1168–7 [c] **Suit to enjoin infringement** and recover damages therefor must be dismissed, where article was published with owner's consent and without notice of copyright. 27F(2d)556.
1169–18 22F(2d)412.
1169–20 26F(2d)833.
1169–22 26F(2d)833.
1171–42 [b] **Delay in asserting rights** against third person's infringement will not avail otherwise infringing defendant. 27F(2d)82.
1172–48 See also 27F(2d)82.
1174–68 27F(2d)556.
1175–80 [a] **Amount defendant would have paid** for exclusive first publication may be recovered as profits. 27F(2d) 556.
1178–30½–New. Even though damages cannot be had at equity, where infringement was after loss of copyright, such may be recovered under a bill for injunction, amended to state the cause at law. 27F(2d)556.
1178–31 [a] **Award of damages** for infringement of patent or copyright is made only as incident to equitable relief of injunction. 27F(2d)556.
1178–31½–New. Unexcused delay of over nine years between the first and continued hearings bars recovery by reason of laches. 32F(2d)215.
1178–32 [a] 40F(2d)501 (statute construed).
1179–38 [a] **Recovery may be had** of extra cost of reasonably necessary changes in publication because of infringement and for impaired confidence in plaintiff's ability to protect its releases to press. 27F(2d)556.
1179–53 [a] **Where much evidence as to damages and profits has been introduced** by defendant, award should be so made, even though plaintiff elected award in lieu of damages under act. 27F(2d)556.
1179–58 26F(2d)833 (minimum awarded); 39F(2d)922.
1179–59 26F(2d)149 (ten dollars for unlicensed use of each composition awarded).
1180–62 [a] **Where less than two hundred and fifty books** were sold, statute was not applicable. 26F(2d)833.
1180–69 22F(2d)412; 31F(2d)832; 32 F(2d)366. See also 32F(2d)622.
1180–72 [a] **Replacement of obsolete infringing sheet** of defendant's loose leaf book is not separate and distinct infringement, being only continuation of first infringement. 26F(2d)833.
1192–37 34F(2d)291.
1193–40 17F(2d)207.
1195–64 16F(2d)805.
1195–72 36F(2d)991 (where holder of legal title was party plaintiff).
1196–92½–New. In a suit for infringement in playing a composition for patrons, the defense that no notice of copyright appeared on the record and that defendant had no knowledge of the copyright has been held insufficient. 24F (2d)876 (victrola record); 24F(2d)877 (piano player roll).
1197–99 But see 31F(2d)583.
1198–24 36F(2d)727 (system can be explained by proof). [a] **Thus** failure of complaint to allege that label registered contained copyright subject matter or was original work was not fatal, complaint setting forth that label was published with copyright notice and that plaintiff had complied with requirements. 27F(2d)176.
1200–51 23F(2d)159 (averment on information and belief sufficient).
1200–63 [b] **Under Copyright Act § 12, as amended by Act March 28, 1914** § 1 (17 U. S. C. A. § 12), requiring deposit of two complete copies of best edition then published, an allegation that "two copies of best edition of said picture" were deposited is sufficient. 23F(2d) 159.
1201–69 23F(2d)159 (allegation held sufficient).
1201–78 23F(2d)159 (allegation held sufficient).
1202–9 [c] **Printed copy of production** claimed to be covered need not be attached to, or incorporated in, bill. 12 PortoRicoFed401.
1205–66½–New. Defendant may not have codefendant's liability determined in suit. 16F(2d)805.
1205–66½–New. Defendant may not set up counterclaim, except where it is the subject of an independent action. 16 F(2d)805.
1205–75½–New. Presumptions. The grant of a copyright carries with it the presumption that the law regarding it has been complied with. 27F(2d)176.
1206–94½–New. Certificate of copyright registration is prima facie evidence of facts stated therein. 22F(2d)412.
1207–11 31F(2d)236. [a] **Under act defendant has burden** of producing evidence sufficient to overcome such prima facie presumption. 28F(2d)132.
1209–32 43F(2d)441.
1209–41½–New. Where original deposited copies have been destroyed, a print of the picture, produced in evidence bearing the same title and the name of the same author as the copyrighted picture, may be sufficient proof of the existence of the copyright. 23F(2d) 159.
1209–42 [b] **Evidence held to show** alleged infringer received notice of copyright. 27F(2d)556.
1210–52 23F(2d)159. [e] **Where plaintiff proves title,** burden of going forward shifts to defendant. 23F(2d)159.
1211–58 16F(2d)805; 34F(2d)142(2d case).
1211–61 Can [1925] 3DomLR875.
1211–64 36F(2d)991; 37F(2d)54. See also 16F(2d)805. [b] **No assumption is raised** by high professional standing of defendant publishers that it would have been almost impossible for them to have done anything amounting to legal infringement of copyright. 27F(2d)82.
1212–73 27F(2d)82.
1212–74 26F(2d)741(2dcase) (evidence held to show copyright not infringed); 36F(2d)991. [a] (2) Method used by alleged infringing annotator tended to prompt his employees to appropriate ideas, both as to literary expression and in designation of points of cases. 27 F(2d)82.
1213–78 23F(2d)541; 43F(2d)441 (book of fiction and autobiographical work on buffalo hunting).
1213–86 [b] **Numerous inapplicable similarities** are cumulative in effect as evidence of infringement. 27F(2d)82.
1213–87 [a] (3) Striking coincidences and unmistakable improprieties, as verbatim copying of long sections and similarity of brief abstracts, show that at least considerable assistance was derived from the one. 27F(2d)82. [b] **Evidence sufficient to show copying.**—27F(2d)82. [c] **Evidence has been held insufficient** to show substantial appropriation of copyrighted play. 39F(2d) 468.
1214–89 [b] **Similar numbering of statute** as to chapters and sections is not significant evidence of infringement where most of numbers were official and rest conventional. 27F(2d)82. [c] **More than ordinary emphasis on similarities is justified** in determining infringement, where alleged infringing annotated statute aims at extreme brevity but competing work aims at completeness of statement. 27F(2d)82.
1214–93 Ont [1930] 4DomLR513.
1215–4 27F(2d)82; 34F(2d)142(2d case); 37F(2d)54.
1216–5 [b] (4) Numerous common errors which could not be accounted for in any other reasonable way than as copies, or as highly suggestive thereof, clearly indicate copying. 27F(2d)82.
1217–12½–New. Where plaintiff fails to establish intent to evade law when made essential under statute, his action fails. Can [1925] 3DomLR875.
1217–24 36F(2d)354; 36F(2d)991; 37 F(2d)54.
1219–60½–New. Reference in respect of attorney's fees is discretionary with the court. 26F(2d)833.
1219–61 26F(2d)833.
1220–69 8F(2d)460.
1220–70 8F(2d)460; 22F(2d)412; 36F (2d)991; 37F(2d)54. [a] (7) Attorney's fees may not be reduced because minimum damages fixed by statute are more than evidence justifies. 22F(2d)412. [a] (8) Where defendant only withdrew its infringing matter under pressure of anticipated suit, plaintiffs are entitled to reasonable allowance for attorney's fees. 26F(2d)833.
1221–75½–New. Under the Copyright Act allowance of attorney's fee is in the discretion of the court. 8F(2d)460.
1232–37 [a] **Following additional countries are now members** of the International Copyright Union: Austria, Brazil, Bulgaria, Czecho-Slovakia, Dantzig (Free City of), Greece, Hungary, Luxemburg, Morocco (excepting the Spanish zone), Poland, Sweden, Le Droit d' Auteur, 15 Jan. 1924, p 1.

COQUINE

1234–71½–New. In French, thief. 5 LaA637.

CORAM

1235–6 32PortoRico 740.

CORAM VOBIS

1235–12 [a] (2) To correct error of fact made in inferior court. 89CalA225, 264P346.

CORDIAL

1235–22 See also 11CustA60.

CORN

1237–44 [a] **Corn whisky** must be whisky, not some other kind of liquor, made of, or containing a product of, corn, intoxicating and potable. 312Mo 99, 279SW144. [b] **Included in "hootch and moonshine."**–312Mo 99, 279SW144.

CORNER

1238–54½–New. A point where two lines join. TexCommnA 290SW530.

CORONERS

1243–57 161La187, 108S410.
1245–5 9PaDist&Co 395.
1246–15 100CalA201, 280P163; 113 Oh St641, 150NE78, 79 [quotCJ].
1246–16 113 OhSt641, 150NE78.
1246–17 113 OhSt641, 150NE78, 79 [quotCJ]; 50SD372, 210NW348, 48ALR 1205.
1246–19 113 OhSt641, 150NE78, 79 [quotCJ]; 50SD372, 210NW348, 48ALR 1205.
1246–20 113 OhSt641, 150NE78.
1247–21 113 OhSt641, 150NE78.
1247–22 113 OhSt641, 150NE78.
1247–23 113 OhSt641, 150NE78.
1247–24 113 OhSt641, 150NE78, 79 [quotCJ].
1247–25 113 OhSt641, 150NE78.
1247–33 113 OhSt641, 150NE78.
1247–34 100CalA201, 280P163 (where wife represented that husband died from unnatural causes).
1247–35 50SD372, 210NW348, 48ALR 1205.
1249–68½–New. That oath does not strictly comply with statute held imma-

terial. 161La187, 108S410.
1250-85 256 IllA47 (has sole authority).
1250-86 100CalA201, 280P163.
1250-88 118 Or568, 247P815.
1251-96 9PaDist&Co 395.
1251-3 9PaDist&Co 395.
1256-12 160La854, 863, 107S599 [quot CJ].
1256-13 35GaA770, 134SE639; 324 Ill 497, 155NE313; 160La854, 863, 107S599 [quotCJ].
1256-14 160La529, 107S395, 398 [quot CJ]; 160La854, 863, 107S599 [quotCJ].
1256-15 35GaA770, 134SE639; 203 Iowa960, 211NW238, 252 [citCJ].
1257-34 [e] (6) Remedy for recovery of fees earned by deceased coroner is provided by statute. 13PaDist&Co 661.

CORPORATIONS

14 C. J.—49-1 84 IndA51, 150NE106; 130Misc110, 222NYS532; 196NC784, 147SE307. [a] (2) 115Nebr177, 212NW39. (16) Corporation is an entity, having existence only in contemplation of, and by force of, law, being wholly artificial and dependent for its existence upon power conferred by sovereign. 114 OhSt149, 150NE743. [h] 122 Or323, 259P201; TexCommnA 288SW409.
50-4 [a] (3) 114 OhSt582, 151NE709.
51-6 [a] (2) Only those joint-stock companies and associations having powers or privileges not possessed by individuals or partnerships are corporations. 318Mo784, 18W(2d)163, 58ALR493.
51-6½-New. It is within the power of the legislature to define a "corporation." 238Mich508, 213NW867.
51-13 13F(2d)40; 22F(2d)870; 124 Or276, 261P432.
51-18 13F(2d)305, 309 [citCJ].
51-19½-New. However, corporate entity cannot cloak fraud. TexCivA 294SW883.
51-19⅓-New. A corporation is real, regardless of the motive which occasioned it. 15F(2d)509.
52-23 272US713, 47SCt280, 71L ed487; 6F(2d)672, 673 [quotCyc]; 18F(2d)305, 309 [citCJ]; 22F(2d)870; 43F(2d)507; 41F(2d)676; 214Ala553, 108S452; 197 Cal765, 242P918; 201Cal587, 258P382; Cal 286P1001; 82Colo343, 259P512; 163Ga919, 137SE272; 202 Iowa1094, 211NW488; 204 Iowa1254, 215NW261; 206 Iowa1025, 219NW411; 1Z3Kan659, 256P983 [citCJ]; 229Ky556, 17SW(2d)722; 248Mich49, 226NW677; 172Minn508, 215NW855, 856 [citCJ]; 217MoA16, 272SW1066; 77Mont477, 251P517; 114 Nebr664, 209NW249; 250NY103, 164NE871; 130Misc865, 226NYS1; 135Misc113, 236NYS692; 122 Or652, 260P237; 286Pa545, 134A438, 48ALR992; 8Pa Dist&Co 383; 160Tenn57, 22SW(2d)6; TexCivA 283SW324; 136Wash116, 238P641; 107WVa290, 148SE122. [d] **Ownership of shares.**–230Mich260, 202NW991. [e] **Evidence has been held insufficient** to permit court to disregard fiction of separate corporate existence. Cal 286P1001.
53-25 38F(2d)232; 96CalA427, 274P382; 168La139, 121S602; 149Md223, 131A332, 43ALR1; 130Misc865, 226NYS1; 286Pa545, 134A438, 48ALR992; 300Pa312, 150A616.
53-25½-New. Circumstances of a case may sometimes require a court of equity to ignore the separate entity of a corporation and look to the sole owner of its capital stock as the real party in interest. 30NM566, 240P469; 23 OhA482, 154NE345.
53-25⅓-New. A court of equity will look beyond the corporate entity where to recognize it would result inequitably, although the corporate organization was not fraudulent in itself. 30NM566, 240P469.
53-25¼-New. Courts may disregard the fact that a corporation is a legal entity in determining questions of substance or form in court procedure. 23 OhA249, 154NE66.
53-25⅕-New. Corporate entity may be swept aside in order to reach illegal acts where there is no formal corporate action. 243NY193, 153NE45.
53-26 8F(2d)522; 16F(2d)410; 38 F(2d)77 (subsidiary treated as corporation by defendant); 163Ga919, 137SE272; 123Kan659, 256P983 [citCJ]; 163La439, 112S38; 164La800, 114S659; 172Minn508, 215NW855, 856 [citCJ]; 124 Or276, 261P432.
54-28 See also 150Wash576, 274P106 (Istcase).
54-28½-New. A corporate entity will not be disregarded where to do so would work fraud on one of two persons owning the entire stock. 208Cal228, 280P954.
54-29 202Cal175, 259P725; 123Kan659, 256P983 [citCJ]; 136Wash116, 238P641.
55-30 199Cal286, 249P188, 51ALR1380.
55-33 40F(2d)554; 42F(2d)833; 123Kan659, 256P983; 136Wash116, 238P641. [c] **Where stockholder mortgages individual property as guaranty of corporation's debt,** he cannot contend that contract was individual and not corporate act because he was sole owner of entire stock. 149Md223, 131A332, 43ALR1.
56-34 255 IllA51.
56-36 42F(2d)833.
56-38 84CalA154, 258P111 (fraud).
57-51 172Minn508, 215NW855 (corporation stockholder held not entitled to sue on guaranty).
58-57 6F(2d)672.
58-64 TexCivA 283SW324.
58-67 18F(2d)305; 211Ky111, 277SW290; 124 Or276, 261P432 (dictum); 146 Wash367, 262P984.
59-67½ 146Wash367, 262P984. See also 33PortoRico157.
59-67¼ 16F(2d)410; 211Ky111, 277SW290 (business conducts or alter ego of one another). See also 246Mich198, 224NW438.
59-67⅓-New. , or where relationship is so intimate as to work fraud on third persons. 146Wash367, 262P984.
59-68 [a] 13F(2d)40.
59-70 82Colo343, 259P512; 79Mont269, 256P373, 378 [quotCJ].
59-71 13F(2d)510; 25F(2d)592 [quot CJ]; 39F(2d)610; 32Ariz560, 261P35; Ariz 283P926; 197Cal765, 242P918; 82 Colo343, 259P512; 208Ky606, 271SW693; 79Mont269, 256P373; 124 Or276, 261P432 (dictum); 12PaDist&Co 693; 32PortoRico661 (restraining use of name by attempted incorporation).
61-78 8F(2d)522; 25F(2d)1003; 43F(2d)226; Ala 128S799; 28Ariz514, 237P958; 197Cal765, 242P918; 201Cal587, 258P382; 208Cal228, 280P954; 75CalA299, 242P914; 80CalA1, 251P830; 85CalA140, 259P63; 94CalA533, 271P525; CalA 275P529; 98CalA748, 277P1075; CalA 292P173; 27Hawaii572, 582 [citCJ]; 226Ky561, 10SW(2d)1064; LaA 130S122; 149Md223, 131A332, 43ALR1; 246Mich198, 224NW438; 248Mich486, 227NW794; 81Mont222, 262P1039 (facts not justifying application of rule); 83Mont282, 272P543 (2dcase); Nebr 231NW519; 254NY319, 172NE521; 127Misc282, 215NYS766; 224AppDiv614, 231NYS265; 117 OhSt576, 159NE829, 830 [quotCJ]; 286Pa305, 133A556; TexCivA 294SW883; 149Va867, 141SE856; 150Wash235, 272P962. See also 124 Or276, 261P432. [b] (2) See also 197Cal765, 242P918. [c] (2) 261Mass426, 158NE891. [g] **Burden of proof.**–27Hawaii572. [h] **It is question of law** for court to decide, whether two corporations are separate and distinct entities, on admitted set of facts. 27Hawaii572. [i] **As device to evade taxes.**–43F(2d)226. [j] **Tax commission may look beyond corporate entity.**–43F(2d)226.
61-78½-New. , or where it is necessary to enforce a paramount and superior equity. 149Md223, 131A332, 43ALR1.
61-78⅓-New. And the rule applies where acts amount to constructive fraud only. 25F(2d)592.
62-80 83CalA227, 256P835 (agreement for division of profits and option for purchase of stock).
62-82 5F(2d)615; 30F(2d)812; 31F(2d)265; 79Mont269, 256P373, 378 [quotCJ]. See also 29F(2d)623; 37F(2d)141.
63-83 200 Iowa384, 202NW595.
64-90 24F(2d)299. [f] **Corporation is person within meaning of law** and is entitled to same rights as natural person. 115Tex417, 282SW576. [g] **Rights of corporation as person** are generally fixed by statute. 115Tex417, 282SW576.
65-95 22AlaA168, 113S641.
65-99 118Tex433, 13SW(2d)358.
66-30 314Mo373, 284SW464, 470 [cit CJ]; 217MoA16, 272SW1066.
67-31 24F(2d)299.
67-34 149Md461, 131A776. See also 123 Or144, 261P694.
67-38 123 Or144, 261P694, 699 [quot CJ].
67-39 276US71, 48SCt291, 72L ed473; MoA 24SW(2d)653; 123 Or144, 261P694, 699 [quotCJ].
68-44 [c] 45Philippine142.
69-50 22F(2d)870 (corporations and partnerships, general or limited, are distinct commercial organizations); 170Ga832, 154SE357 (partnership).
71-78 93Fla849, 112S846.
72-80 [a] **In Florida.**–93Fla849, 112S846.
72-83 254 IllA264 (not against public policy).
73-90 156Miss240, 125S816.
73-96 156Miss240, 125S816.
74-3 46Philippine583.
74-17 156Miss240, 125S816.
75-39 317Mo696, 296SW418, 420 [quot CJ] (legal entity need not be called corporation to make it such).
77-51 290Pa356, 139A118.
77-56½-New. Stockyards company in view of Federal Packers & Stockyards Act of 1923 is a public corporation. 153Tenn225, 280SW1015.
78-70 115Nebr177, 212NW39.
79-95 320Mo1146, 9SW(2d)589.
80-2 115Nebr177, 212NW39. [g] **Whether corporation is "stock" or "membership" corporation** depends on character of shares and whether stockholders receive share of profits. 226 AppDiv496, 235NYS58.
83-9 5PaDist&Co 713.
84-11 [a] (12) Coöperative marketing association is corporation not for profit. 234 IllA222.
92-40 43F(2d)383; 15DelCh409, 138A347; 198NC524, 152SE489.
92-42 89CalA558, 265P583; 161Ga524, 131SE517, 44ALR534 (granting of charters is performance of legislative power); 120Kan557, 245P143, 145 [citCJ]; Mont 285P191; 128Misc476, 219NYS505; 21 OhA375, 152NE393.
94-59 163Ga857, 137SE382; 261Mass556, 159NE70; 287Pa241, 134A419; TexCivA 300SW112. [d] **General incorporation laws of New Mexico** are taken from New Jersey. 33NM473, 270P881. [e] **Powers not possessed by natural persons** may be granted to or withheld from corporations. 42F(2d)500.
95-77 34Ariz105, 268P773.
97-94 81CalA128, 252P1057.
98-3 [a] (1) 81CalA128, 252P1057.
98-14 81CalA128, 252P1057. [a] **Corporations so organized are not different** from those organized in one of the states. 81CalA128, 252P1057.
100-55 [a] **"Sociedades anonimas" or Spanish corporation.**–Provisions of the Code of Commerce relating to sociedades anonimas repealed by (Art. No. 1459) Corp. L. § 191, but existing sociedades allowed to continue. 45Philippine142.
100-60 163Ga857, 137SE382.
100-64 163Ga857, 137SE382.
101-69½-New. Action may be brought to annul acts of the corporation commission. 26F(2d)508.
102-90 208Cal677, 284P663.
104-10 94Fla52, 113S670.
107-42 DelCh 151A218.
110-86 157SC1, 153SE537; 143Va697, 129SE731.
116-29 13PaDist&Co 610.
116-38½-New. Exemption from state statutes, if attempted in a certificate of incorporation, would be void. 131Misc563, 227NYS435.
116-38⅓-New. Legality of incorporation is to be determined by law existing at time of incorporation. 13LaA321, 127S633.
116-39 Del 143A257.
117-42 IndA 169NE91; 208 Iowa49, 222NW548.
117-44 34F(2d)533; 15DelCh108, 132A

138; 114 OhSt582, 151NE709. [b] **Court must give effect** to all provisions of statute and certificate of incorporation which are sufficiently clear to express agreement between incorporators and between corporation and stockholders. 34F(2d)533.

118-50 40F(2d)554.

118-53 120Kan557, 245P143.

119-65 13LaA321, 127S633.

120-72 201Cal 587, 258P382.

122-79 15DelCh108, 132A138.

122-81 [c] (4) Under will providing for creation of corporation to carry on decedent's business, such corporation comes under statute. 162Ga767, 135SE 99.

124-82 [a] (1) 6PaDist&Co 550. [b] (6) Other instances. 12PaDist&Co 253 (automobile club). [c] (3) Association of automobile dealers formed to encourage and protect sales and service has been held not entitled to charter as first-class corporation. 296Pa431, 146 A26 (where primary purpose is increased profits to limited class).

126-99 133Misc513, 231NYS669; 296 Pa431, 146A26.

131-21 12PaDist&Co 253.

132-24 133Misc513, 231NYS669.

132-37 [b] **Courts may not grant power to corporation to create** corporations of its own accord. 163Ga857, 137SE382.

133-40½-New. In Georgia the legislature has delegated to the superior courts the power to create private corporations. 161Ga524, 131SE517, 44ALR534.

133-40½-New. In Georgia prior to the passage and approval of the act of 1913 authorizing judges of superior courts to grant charters in vacation, a judge of a superior court was without jurisdiction to grant a charter to a private corporation in vacation in a county other than that where the application was pending. 161Ga524, 131SE517, 44ALR 534 (judgment held to show its rendition in vacation outside of county).

133-40¼-New. And an order purporting to grant a charter in vacation in another county is a mere nullity. 161 Ga524, 131SE517, 44ALR534.

133-41 163Ga857, 137SE382.

133-44 12PaDist&Co 253.

134-64½-New. Failure to certify to the secretary of state when ten per cent of the capital stock had been subscribed does not render status that of a partnership. 25 OhNPNS225.

136-70 163Ga919, 137SE272.

136-75 163Ga919, 137SE272.

137-86 [a] (5) Application for charter of membership corporation that failed to show it to be non profit. It should, where such is the case, show that intent is not to maintain orphan asylum but merely to assist it with voluntary contributions. 125Misc217, 210NYS541.

138-94 170La270, 127S624.

139-96 76CalA354, 244P1089, 1093 [quotCJ].

139-97 37CalA354, 244P1089, 1093 [quotCJ in part]; Del 143A257. [c] 137 Okl 194, 278P654, 64ALR699. [d] In Ohio.-25 OhNPNS397.

140-16 [a] **Subscriptions by "trustees" for other subscribers** to avoid long list in articles do not satisfy precise requirement of statute. 212Ky163, 278 SW615.

141-23 [b] (4) Affidavit of attorney or other person familiar with facts is sufficient to show age, citizenship, and residence of incorporators of membership corporation. 125Misc217, 210NYS 541 [crit 70Misc273, 128NYS561].

142-26 [b] (2) Member of directors of membership corporation must be specified. Provision for "not exceeding thirty-five" is not sufficient compliance with law. 125Misc217, 210NYS541.

142-33 [b] (6) Statement that proposed fire company will transact business in named borough is sufficient. 14 PaDist&Co 50.

143-36 [b] (1) 125Misc217, 210NYS 541.

144-44 [a] (8) 204 Iowa1027, 216NW 640. (11) Maximum amount of indebtedness held sufficiently stated where amount of capital stock provided for was given as fifty thousand dollars, followed by statement of provision that fifteen thousand dollars each of common and preferred "may" be original issue. 200 Iowa374, 202NW839. (12) Failure to state when capital stock was to be paid in held not noncompliance with statute. 200 Iowa374, 202NW839. (13) Statement of amount of capital stock subscribed, amount actually paid in, and amount of indebtedness, required to be kept posted by Code (1897) § 1625, need not be embodied in articles and notice thereof. 200 Iowa374, 202 NW839. (14) Requirement of Code (1897) § 1611, as to statement of maximum indebtedness held sufficient. 200 Iowa374, 202NW839.

146-51 [a] (3) It is the duty of justice to determine whether objects of proposed membership corporation are in accord with public policy. Pennsylvania rule quoted with approval. 125 Misc217, 210NYS541. [b] (1) 14Pa Dist&Co 50.

147-52 125Misc217, 210NYS541 (showing by affidavits advised).

147-53 [a] (3) It is not ground for refusal of charter to proposed volunteer fire company that proposed corporation is unnecessary. 14PaDist&Co 50. [b] (1) 125Misc217, 210NYS541 (but meaning must be shown in English and that name is not one to engender discord or injure feelings of any section of community). (6) That time for holding annual meeting is not specified. 125Misc 217, 210NYS541. (7) That annual meeting falls or may fall on Sunday. 125Misc217, 210NYS541. (8) That additional financial burden will be imposed on people is not ground for refusal of such charter where support of corporation must be entirely by voluntary contributions. 14PaDist&Co 50. (9) Such charter will not be refused on ground that friction with existing company will be created. 14PaDist&Co 50.

147-55 133Misc513, 231NYS669; [a] 125Misc217, 210NYS541 (holding that secretary of state may refuse charter notwithstanding approval by justice).

147-56 198Cal 609, 246P807; Mont 285 P191 (ministerial officer with quasi-judicial judgment). [a] **Collection of license fee to do business** not such exercise of prerogative power, but is mere ministerial function. 198Cal 609, 246P 807.

148-62½-New. In Pennsylvania an order of the public service commission approving the incorporation of a motor bus company does not authorize the beginning of the exercise of any of its powers, and raises no question of destructive competition. 92PaSuper136.

149-71 176Minn588, 224NW245 (attempt to amend held ineffectual).

149-74½-New. Order of incorporation is not void as not being based on application published as required by law, where after publication of petition the court allowed an amendment changing the period of duration of the corporation from thirty to twenty years. 163 Ga919, 137SE272.

151-79 201Cal 428, 257P511 (amendment as to filing copy certified by secretary of state held not retroactive).

152-80 201Cal 587, 258P382.

153-98 Mass 169NE783.

154-4 Mass 169NE783. [a] (1) 136 Wash462, 240P900.

155-7 228Ky120, 15SW(2d)249.

155-8 13LaA321, 127S633 (omission of affidavit cured by incorporation articles).

155-9 154Tenn521, 290SW391, 50ALR 1023.

155-10 154Tenn521, 290SW391, 50ALR 1023.

156-12 13LaA321, 127S633.

157-18 194Wis72, 216NW141.

158-23½-New. That capital stock was not paid for in cash but by conveyance of property to a corporation is an irregularity that could only be raised by the state or by an aggrieved creditor, and not by incorporators who were parties thereto. TexCivA 198SW(2d)454.

158-24 198NC524, 152SE489. [b] Ill 172NE705 (corporation substituting no par stock for par value stock is not liable for additional initial fee); 251Mich 673, 232NW202; 320Mo 908, 8SW(2d) 970. [c] (18) In Pub. Acts (1891) No. 182 § 4, providing for fee on extension of corporate existence, is obsolete and inoperative. 241Mich457, 217NW 334. (19) Under Pub. Acts (1921) No. 84, no franchise fee can be exacted from corporation upon renewal or extension of its corporate existence, notwithstanding Pub. Acts (1891) No. 182, in view of Const. art 10 § 6, relative to imposition or continuation of taxes. 241 Mich457, 217NW334. (20) Pub. Acts (1921) No. 84, in failing to provide for payment of fee on extension of corporate existence, is not in conflict with Const. art. 10 § 1. 241Mich457, 217NW 334.

160-41 Miss 108S158, 160 [citCJ].

160-42 Miss 108S158, 159, 160 [quot& citCJ].

161-43 Miss 108S158, 160 [citCJ].

161-44 Miss 108S158, 160 [citCJ]. [d] **Corporation's authority to do business** for more than one purpose is "corporate franchise," dependent on legislative grant. 116Tex193, 292SW168.

161-44½-New. Corporation takes charter subject to obedience to laws. 290Pa 136, 138A497, 53ALR1027.

161-47 161Ga524, 131SE517, 44ALR 534; 258Mass74, 154NE839; NJ 130A 730; 498D518, 207NW467.

163-62 175Ark618, 299SW1016, 1018 [quotCJ].

163-65 135Misc676, 241NYS352 (corporation de jure).

163-69½-New. Where different parties, each claiming prior right to resort to the property of a corporation for the satisfaction of their respective indebtedness, had dealt with the common debtor during the same period of time as a corporation, and it is essential to the claim of priority of one party to establish the nonexistence of the corporation upon a given date within such period, such party has the burden of proving that fact. 52ND806, 204NW 673.

163-71 90CalA447, 265P1038.

163-72 335 Ill 11, 166NE504; 35Wyo 319, 249P795, 796 [citCJ]. See also 253 NY23, 170NE479.

164-78 41 Ida729, 241P1014.

164-80 253NY23, 170NE479.

165-82 175Ark618, 299SW1016, 1018 [quotCJ]. See also 220Ala86, 124S234 (2dcase).

165-83½-New. The use of the term "Inc." in connection with the name of a person does not raise a presumption of fact that the name used is that of a corporation. 329 Ill 403, 160NE545.

165-99 177Ark164, 6SW(2d)2; 104 NJL414, 140A326.

166-4 32F(2d)195.

166-5 11LaA199, 123S178.

166-6 125 Or375, 264P865.

167-7 [b] 33Wyo 474, 240P683.

168-21 81Mont222, 262P1039; 119Or 252, 237P965; 127 Or57, 270P913; Tex CivA 273SW886.

173-76 See also 246 IllA178.

174-82½-New. An ex parte certificate of the secretary of state to the effect that a corporate charter is canceled on the records of his office for failure to file an annual report, and not reinstated, is not competent evidence of the facts therein stated. 52ND806, 204NW 673.

174-89 80Mont524, 261P283.

175-97 98CalA65, 276P597 (sufficient on collateral attack).

176-8 [b] **Where corporation is alleged as owner only,** its de facto existence need be shown. 171Ark705, 285SW380.

176-10 171Ark705, 285SW380.

177-20 204 Iowa1254, 215NW261 (on issue of certificate after filing of articles).

177-21 161Ga524, 131SE517, 44ALR 534; IndA 161NE580; 204 Iowa1254, 215NW261.

178-23 204 Iowa1254, 215NW261.

178-25 TexCivA 273SW655, 656 [cit Cyc].

178-34 See also 9LaA425, 121S227.

179-37 81Mont222, 262P1039 (whether corporation is de facto or de jure).

180-43 [b] (3) Action looking toward extension of corporate life must be taken while corporation is functioning.

241Mich457, 217NW334.

180–44 Mich 233NW386 (duty to pay franchise fee on extension).

181–50 [b] **Corporators must pay franchise fee** to renew while corporation must pay fee to do business on renewal. Mich 233NW386.

181–52 Mich 233NW386 (considered new corporation as regards fees).

182–54 [c] **Alteration of certificate of incorporation of brewing corporation** held not such radical or fundamental change as would be unauthorized. 242 NY490, 152NE271.

182–55 [c] **Right to amend implied** from recognition of de facto existence. 198Cal 609, 246P807.

183–62 34F(2d)533.

183–69½–New. The public service commission may amend a public company's charter substituting for shares thereof no par value stock. 148Md90, 129A22.

183–69⅓–New. The form, type, and manner of stock reissue require an order of the public service commission under statute. 148Md90, 129A22.

183–69¼–New. Where articles require three fourths of stock for amendment and prohibited two members of the board amending articles over protest of third, one director's obtaining two thirds of stock could not amend under the statute authorizing amendment by owners of two thirds of stock. 192Wis 532, 213NW315.

183–69⅓–New. Amendment to corporate charter may be treated as though written in original charter. 287Pa241, 134A419.

185–35 34Ariz105, 268P773.

187–56 34Ariz105, 268P773.

188–60 168Ga145, 147SE102.

189–65 34Ariz105, 268P773.

190–93 34F(2d)533.

192–23 33Ariz76, 262P616.

194–42 See Del 142A654.

195–54 34F(2d)533; 334 Ill 459, 166 NE110. [c] (2) Amendment held to articles of incorporation, though purporting to be amendment of by-laws. Mass 168NE521(3dcase). (3) Supreme judicial court can only interpret words used in amendment, and not supply omissions. Mass 168NE521(3dcase). [j] **In Delaware.**–142A654. [k] **Valid amendments.**–34F(2d)533.

196–56 [e] (2) Notice held substantial compliance with statute. 204 Iowa1027, 216NW640.

197–60 Mont 285P191.

197–62 29F(2d)955; 222MoA1044, 9 SW(2d)676.

199–72 TexCivA 8SW(2d)574.

199–75 161Ga524, 131SE517, 44ALR 534 (condemnation proceedings).

200–77 172Minn471, 215NW845, 847 [citCJ].

200–80 6LaA75.

200–86 33Ariz147, 264P468.

201–89 171Ark399, 284SW755.

202–95 136Misc893, 242NYS417.

202–7 6F(2d)854.

204–18 204 Iowa1254, 215NW261.

204–19 163Ga857, 137SE382; 204 Iowa 1254, 215NW261; 54SD128, 222NW680.

204–21 22F(2d)677; 172Ark317, 288 SW715; 198Cal 609, 246P807; 201Cal 587, 258P382; 325 Ill 114, 156NE258; 335 Ill 11, 166NE504; 255 IllA175; 204 Iowa1254, 215NW261; 121Kan448, 247 P1048; 10LaA665, 121S196(2dcase); 264Mass343, 162NE691; 240Mich372, 215NW294; 172Minn471, 215NW845; MoA 28SW(2d)683; 81Mont222, 262P 1039; 131Misc117, 225NYS370; 139 Okl 75, 281P223; 119 Or252, 237P965; 86 PaSuper558; 117Tex313, 3SW(2d)429 (abnormality in depriving certain class of stock of right to vote); TexCivA 25 SW(2d)987. [a] (2) 198Cal 609, 246P 807. [f] **Corporate franchises and rights** cannot be impeached collaterally for mere irregularity or informality. Utah 290P161.

208–29 201Cal 587, 258P382 (contract); 121Kan448, 247P1048; 172Minn471, 215 NW845, 848 [citCJ]; 81Mont222, 262P 1039; 131 Okl 167, 268P228.

209–32 198Cal 609, 246P807.

209–33 201Cal 587, 258P382.

210–43 220Ala601, 127S173.

212–69 131 Okl 167, 268P228.

212–71 107Conn216, 140A477, 482 [cit CJperBanks,J].

214–87 220Ala601, 127S173.

214–89 99NJEq224, 129A404; 100Vt 122, 135A492.

214–92 198Cal 609, 246P807; 201Cal 587, 258P382; CalA 258P693; 163Ga 857, 137SE382; 335 Ill 11, 166NE504; 204 Iowa1254, 215NW261; 208 Iowa921, 223NW899; 121Kan448, 247P1048; 264Mass343, 162NE691; 172Minn471, 215NW845, 847 [citCJ]; 316Mo 21, 296 SW806, 807 [citCJ]; MoA 28SW(2d) 683, 685 [quotCJ]; 99NJEq224, 129A 404; 139 Okl 75, 281P223; 119 Or252, 237P965 (evidence sufficient). [a] 198 Cal 609, 246P807 (reason for rule).

216–1 161Ga524, 131SE517, 44ALR534.

217–10 172Minn471, 215NW845; 229 AppDiv56, 241NYS411.

218–14 163Ga857, 137SE382, 386 [quot CJ].

219–21 204 Iowa1254, 215NW261.

220–28 335 Ill 11, 166NE504; 208 Iowa 921, 223NW899.

220–31 208 Iowa921, 223NW899.

221–33 [a] (16) Attempt to incorporate for two separate purposes. Iowa 233NW137.

221–35 201Cal 587, 258P382. See also 208 Iowa921, 223NW899.

222–39 255 IllA175.

222–57 81Mont222, 262P1039.

222–58 81Mont222, 262P1039.

222–59 81Mont222, 262P1039.

222–64½–New. , or although there is abnormality in the charter in depriving a certain class of stock of the right to vote. 117Tex313, 3SW(2d)429.

222–66 6F(2d)854; 34F(2d)183; 46 Ida355, 267P611.

223–70 6F(2d)854.

223–77 81Mont222, 262P1039; 52ND 806, 204NW673, 676 [citCJ].

225–87 52ND806, 204NW673, 676 [cit CJ].

225–89 52ND806, 204NW673, 676 [cit CJ].

226–92 204 Iowa207, 215NW250, 255, 54ALR1116 [citCJ] (dictum).

226–95 161Ga524, 131SE517, 44ALR 534; 168La664, 123S116.

227–8 175Ark133, 298SW857 (bringing suit against defendant as corporation and alleging that it was corporation); 181Ark415, 26SW(2d)80; 45 Ida753, 265P664; 48 Ida412, 282P492; 246 IllA 38; 240NY368, 148NE552; 131Misc117, 225NYS370, 372 [citCJ].

227–9 46Philippine144, 145 [citCJ].

227–10 240NY368, 148NE552.

228–14 80CalA470, 251P237; 95CalA 101, 272P789; 6LaA831; 81Mont222, 262P1039; 229AppDiv56, 241NYS411; 131 Okl 167, 268P228; 49Philippine117; 102WVa181, 135SE235.

230–16 CalA 288P879.

230–17 [a] (14) NJ 150A413.

230–26 192Wis40, 211NW790.

231–27 Mo 20SW(2d)899, 903 [quot CJ]; 81Mont222, 262P1039.

231–31 54SD128, 222NW680.

233–56 46 Ida355, 267P611; 240NY 368, 148NE552 (bank, accepting deposit, estopped to deny corporate existence of depositor); 131Misc370, 226NYS653.

233–63 93Fla849, 112S846, 858 [citCJ].

235–92 246 IllA38; 13LaA321, 127S633 (irregularities in internal administration immaterial); 125Misc763, 211NYS 556 [citCJ]; 139 Okl 75, 281P223.

236–97 38F(2d)707; IndA 161NE580; 119 Or252, 237P965.

237–3 81Mont222, 262P1039.

239–19 172Minn471, 215NW845 (trustees of religious society held estopped from asserting title as against consolidated corporation).

240–26 6LaA75.

242–35 40GaA436, 149SE812(2dcase).

243–46 6LaA75 (where person contracting with supposed corporation protests its corporate existence before receiving any benefit).

247–80 161Ga524, 131SE517, 44ALR 534.

247–89 161Ga524, 131SE517, 44ALR 534.

247–93 40GaA436, 149SE812(2dcase).

247–94 44 Ida76, 258P557, 560 [citCJ].

248–97 118 Okl 230, 246P1102 [quot CJ].

248–98 200 Iowa1151, 202NW505, 506 [citCJ]. [h] **Admissions held not to create estoppel of record.**–163Ga857, 137 SE382.

248–1 118 Okl 230, 246P1102 [quotCJ]; 13PaDist&Co 610.

248–2 240Mich372, 215NW294; 118 Okl 230, 246P1102 [quotCJ].

249–4 194Wis72, 216NW141.

249–5 118 Okl 230, 246P1102 [quotCJ].

249–8 126Kan419, 268P560.

250–17 [a] See also 81Mont222, 262P 1039 (personal representative is estopped where he would be estopped in his personal capacity).

251–27 198Cal 609, 246P807; 204 Iowa 1254, 215NW261.

251–32 165La1, 115S347, 350 [quotCJ] (persons held not promoters); 134 Okl 43, 272P405, 407 [quotCJ].

252–34 [c] 322Mo 955, 19SW(2d)721. [d] **Evidence held not to show** sole parties who had assumed all risks, as promoters of cemetery corporation. 96NJ Eq101, 130A373. [e] **Facts held not to constitute party promoter.**–Utah 285P 640.

253–40 MoA 3SW(2d)400, 405 [citCJ].

253–45 CalA 283P879; 165La1, 115S 347, 350 [citCJ]; MoA 3SW(2d)400, 405 [citCJ]; 101NJEq581, 138A709.

254–49 77CalA562, 247P264. [c] **Promoter receiving contributions** to cost of motion picture film under agreement for share in profits and stock of corporation when formed is obligated to retain rights which were to constitute principal assets of corporation and to organize corporation and turn over rights to it. 77CalA562, 247P264.

255–57 21F(2d)893; 173Ark1128, 293 SW1041; IndA 151NE7; 212Ky163, 278SW615; 5LaA264; 261Mass1, 157 NE725; 48RI131, 136A243; TexCivA 18SW(2d)737; TexCivA 26SW(2d)403; 39Wyo 130, 270P411.

256–58 102CalA365, 283P329.

256–59 44F(2d)83; 173Ark1128, 293 SW1041.

256–61 107Conn216, 140A477 (cannot enforce contract before final organization).

256–62 But see 9LaA568, 121S642.

257–63 1F(2d)973; 5F(2d)723; 7 F(2d)419; 21F(2d)893; 22F(2d)480; 30F(2d)588; 214Ala553, 108S452, 454 [citCJ]; 107Conn216, 140A477; 15Del Ch248, 135A846; IndA 151NE7; 229Ky 569, 17SW(2d)715, 66ALR1423 (corporation adopting contract may sue on it); 236Mich638, 211NW45, 46 [citCJ]; 250 Mich22, 229NW495; 127Misc470, 216 NYS481; TexCivA 289SW173; TexCivA 291SW974; TexCivA 26SW(2d)403. [f] **Statute declaring void contracts made by corporation before complying with act** does not invalidate contracts made by incorporators preliminary to filing articles of incorporation. 236Mich638, 211 NW45. [g] **Promoter giving note in satisfaction of corporate debt** and corporation acting thereon imposes direct duty under agreement on acceptor of note. 83NH365, 142A689.

258–64 214Ala553, 108S452, 454 [quot CJ].

258–66 [a] (12) Contract to purchase merchandise, fixtures, and raw material is one which corporation could have made. 1F(2d)973. (13) Employing geologist before formation of oil corporation held proper. 173Ark1128, 293 SW1041.

259–67 [a] **Promoter's agreement to loan money without interest to purchase stock** held subject to satisfaction. IndA 151NE7.

259–72 22F(2d)480; 214Ala553, 108S 452; IndA 151NE7.

259–73 236Mich638, 211NW45.

259–74 22F(2d)480; 329 Ill 42, 160NE 127; IndA 151NE7; 13LaA222, 127S47. [g] (1) 173Ark1128, 293SW1041. [h] 18F(2d)975; 39Wyo 130, 270P411. [j] **Estoppel.**–25F(2d)651.

260–75 214Ala553, 108S452, 454 [cit CJ]; 173Ark1128, 293SW1041; 326 Ill 528, 158NE101; IndA 151NE7; 13LaA 222, 127S47; TexCivA 18SW(2d)737. [e] (6) Use of supplies under belief that they were furnished under promoter's agreement held not ratification. 102

CalA365, 283P329. [f] (1) 39Wyo130, 270P411.

262–81 214Ala553, 108S452; IndA 151NE7.

263–84 206Cal609, 275P418.

264–95 See also 62OntL387, [1928] 3DomLR661.

265–1 21F(2d)893. [c] **Promoter's** knowledge of his secret agreement respecting purchase of option held not imputable to corporation. 21F(2d)893.

265–2 22F(2d)480.

265–3 22F(2d)480; 15DelCh248, 135A846.

266–23 30F(2d)754 [certiorari den 49SCt418(3dcase)].

267–28½–New. Statement by incorporators in articles of incorporation that land then owned by them was land of corporation is sufficient to transfer title to corporation. MoA 25SW(2d)566.

267–34 TexCivA 281SW221.

268–35 [d] **Petition, to recover amount paid on purchase price** of stock in corporation never organized, declared to state cause of action. 208Ky591, 271SW668.

269–50 27OhNPNS454 (incorporators of unorganized corporation liable for negligence); BC [1928] 4DomLR440.

269–52 IndA 151NE7, 9 [quotCJ]; 134Okl43, 272P405, 407 [quotCJ]; 48RI131, 136A243. See also Ariz 262P1007.

269–53 294Pa503, 144A525; 48RI131, 136A243. [b] **Promoters held not released from liability** under their agreement promising plaintiff life employment and opportunity to purchase stock. IndA 151NE7.

270–54 IndA 151NE7, 9 [quotCJ].

270–56 43F(2d)337; TexCivA 11SW(2d)348.

270–57 TexCivA 11SW(2d)348.

270–58 TexCivA 11SW(2d)348.

271–59 181Ark370, 26SW(2d)63; Mass166NE822. [b] **Landlord cannot be bound by any agreement** between incorporators as to their respective rights and liabilities when not shown to have assented thereto. 181Ark370, 26SW(2d)63.

272–63 See also 218AppDiv83, 217NYS820.

272–64½–New. Promoters executing note and signing their names thereto prior to incorporation as officers without stating for whom or for what company they are acting are personally liable for the payment of the debt. 175Ark883, 300SW453.

273–82 181Ark370, 26SW(2d)63; 125Kan53, 262P1022.

274–90 [b] 258Mass153, 154NE759.

275–95 224AppDiv401, 231NYS291.

275–99 37F(2d)8 (organizers of corporation could recover for breach of contract).

275–8 [d] **Promoter's assignment of stock in partial reparation** for fraud in misrepresenting outstanding stock held supported by sufficient moral consideration. 19F(2d)97.

276–10 83CalA111, 256P551, 554 [cit CJ]; 134Okl43, 272P405; TexCivA 297SW673, 675 [quotCJ]; TexCivA 23SW(2d)820 (use of assets of supposed corporation has been held conversion). [a] **Evidence held admissible** in action by subscriber against promoters and their agents to recover money paid on subscription. 83CalA111, 256P551. [b] **Promoters retaining funds subscribed** are individually liable for full amount thereof. TexCivA 297SW673, 675 [cit CJ].

276–11 5PaDist&Co 9.

276–12 [b] **Promoters and their agents receiving money are jointly and severally liable** for return of money whether money collected by agents was actually transmitted to promoters or not. 83CalA111, 256P551. [c] **Persons held not liable as promoters.**–83CalA111, 256P551.

277–25 289Pa272, 137A266, 267 [quot CJ].

277–30½–New. Recovery is measured by the real value of shares on the date of promised issue. 288Pa277, 135A856 (evidence of value).

277–31 28F(2d)910. See also 28F(2d)911.

278–39 [a] **One who has exercised absolute control over corporation** and used it to enrich himself will be held personally responsible. 197Cal765, 242P918.

278–44 [r] **Rescission of contracts.**–84CalA375, 258P129.

281–55½–New. Finding that proceeds of note represented plaintiff's investment in proposed new corporation, and that plaintiff therefore was not entitled to contribution from defendants on payment of the note, has been held not against the preponderance of the evidence. 178Ark1200, 12SW(2d)912.

281–55¾–New. It is immaterial that a new corporation was never formed, on the question whether the proceeds of a joint note were used to enlarge the plant or merely constituted an investment. 178Ark1200, 12SW(2d)912 (in suit for contribution).

281–55¼–New. Whether a note executed by plaintiff and indorsed by defendants was given for a loan used for the purpose of buying machinery for a plant, under an agreement to organize a new corporation, entitling plaintiff to contribution, or merely represented a personal loan by plaintiff, by which he secured money which he invested in the corporation, has been held a question of fact. 178Ark1200, 12SW(2d)912.

282–61 163Ga352, 136SE143; 39Wyo130, 270P411 (promise to pay is not implied under facts).

282–62 107Conn216, 140A477; TexCivA 18SW(2d)923 (fee of attorney for preparing charter and other necessary incorporation papers).

282–63 Del 141A197, 219 [citCJperHarrington,J]. [d] (2) Advances under agreement for sale of stock on termination of contractual relation become due and payable. CalA 287P552.

283–67 See also 12LaA704, 127S17.

283–70 250Mich22, 229NW495.

284–73½–New. The question of the amount due a proposed corporation from the promoter, under the original stock subscription, has been held a question of fact on conflicting evidence. 178Ark1200, 12SW(2d)912.

284–75 Del 141A197; 164La109, 113S784; 101NJEq581, 138A709.

284–77½–New. Sale of property to corporation by promoters need only be on fair terms. 15DelCh231, 136A140.

284–77¾–New. Formation of corporation by promoter to purchase property does not itself create agency on behalf of corporation. 15DelCh231, 136A140.

284–78 See also 99NJEq451, 132A105.

285–83 101NJEq581, 138A709.

285–84 97Fla788, 122S264; 222Ky378, 300SW854.

285–85 250Mich22, 229NW495; [d] **Secret agreement** to deliver option to purchase all stock of corporation to promoter of new corporation to be paid for in stock of new corporation held fraudulent and unenforceable. 21F(2d)893. [e] **Where original contract called for money payment** and substituted contract required payment in stock in new corporation, principle that fraudulent contract adding nothing to original obligation is unenforceable held inapplicable. 21F(2d)893. [f] **Evidence insufficient** to support judgment against shareholders for fraud in incorporation. TexCivA 22SW(2d)760.

286–88 101NJEq581, 138A709, 714 [cit CJ].

290–3½–New. There is sufficient consideration for issuance of stock to promoters where they transferred in return therefor stock in another company owning valuable property rights firmly fixed by contract of purchase and sale. 15DelCh40, 131A165.

292–21 Del 141A197; 15DelCh40, 131A165; 97NJEq469, 129A413.

293–23 Fla 126S356.

293–25 101NJEq581, 138A709, 714 [quotCJ].

293–26 29Ariz129, 239P799, 43ALR1359 (promoter receiving all of stock cannot be required to account for proceeds of his sales); 15DelCh40, 131A165.

294–37 222Ky378, 300SW854, 857 [cit CJ].

294–38 101NJEq581, 138A709, 714 [cit CJ].

294–40 101NJEq581, 138A709, 714 [quotCJ].

295–54 165La1, 115S347, 350 [citCJ].

296–59 250Mich22, 229NW495.

297–73 97Fla788, 122S264 (or at law).

298–77 [a] **Stockholders are entitled to their bargain for stock in corporation** unburdened by secret profits of promoters. 250Mich22, 229NW495.

298–78 250Mich22, 229NW495 (equity has jurisdiction).

298–81½–New. Money expended by corporation in defending defendants is a proper charge against them. 250Mich22, 229NW495.

298–82 97Fla788, 122S264.

298–83 97Fla788, 122S264.

299–84 263Mass295, 160NE889.

299–86 97Fla788, 122S264.

301–10 101NJEq581, 138A709; 132Okl169, 270P17, 20 [quotCJ].

301–12 101NJEq581, 138A709.

303–24 MoA 296SW838.

303–28½–New. A promoter who pays out money for a proposed corporation is entitled to a certificate of stock for the amount paid. 178Ark1200, 12SW(2d)912.

303–31 250Mich22, 229NW495.

303–35 97Fla788, 122S264.

304–37 1F(2d)973 [foll 189US260, 23SCt624, 47LEd802]. [a] (2) 1F(2d)973.

304–40½–New. A vendor may not urge actual fraud or pecuniary injury as prerequisite to the right of a corporation to rescind. 97Fla788, 122S264.

304–41 [a] **Agreement that preferred shares are issued to syndicate** must be taken to mean shares containing preferential features called for in plan of incorporation. Mass 169NE783. [b] **That attempt to incorporate was for partners' own convenience** does not render contract for organization of corporation against public policy. 42F(2d)65.

304–41½–New. Surviving partners cannot be compelled to join with deceased partner's executor in formation of corporation. 299Pa333, 149A473.

304–41¾–New. A partnership which failed to incorporate a third party who subscribed for stock, is not bound in an action for debt of the partnership by a statement of the firm purporting to name officers, directors, and stockholders. 153Wash669, 280P62 (evidence insufficient to make prima facie case).

304–43 Mass 169NE783 (assignment of right to unpaid subscriptions to syndicate has been held within scope of syndicate managers).

305–53 33GaA815, 127SE905; 252IllA259; 100Vt439, 138A735.

305–54 48RI490, 139A312.

305–56 34F(2d)183 (where partnership insolvent); 98CalA748, 277P1075 (payee of note not in pari delicto with parties to agreement in violation of statute); 89PaSuper274; TexCivA 17SW(2d)1116. [c] (5) Sufficient consideration. 98CalA748, 277P1075.

306–57 7F(2d)473 (incorporation by individual); 34F(2d)183; 246IllA538; 53SD477, 221NW87, 89 [citCJ]; TexCivA 271SW233.

307–60 See also Mass 169NE783.

307–60½–New. Where the corporation renewed a partnership note, other creditors of the corporation are not entitled to notes obtained from the sale of the partners' stock and assigned by the corporation in payment of the renewed note. 53SD477, 221NW87.

307–64 125Kan641, 266P65 (agreement of partner to finish construction of mill at his own expense held not abrogated by transfer of mill to corporation).

307–67 102WVa181, 135SE235.

307–69 231Mich463, 204NW92 (failure in good faith, of incorporators to record executed articles of incorporation, does not make them liable on notes for stock subscription, executed by another incorporation to order of company and indorsed in the name of corporation by an individual as representative and general sales manager of corporation).

308–82½–New. A foreign corporation by its incorporation is legally invested with its name. 129Or375, 276P1100, 66ALR934.

308–88 35GaA85, 132SE138; 164La800, 114S659; 6PaDist&Co147, 148 [citCJ].

308–89 35GaA85, 132SE138; 164La800, 114S659; 6PaDist&Co147, 148 [citCJ]; 105WVa20, 141SE398.

309-90 5PaDist&Co 597 [quotCJ].

309-1½-New. Having the right to use the name, which is included in the good will expressly sold, the purchaser could transfer and assign this right, and the transferee would have the authority to procure a charter for the purpose of carrying on the business under the same name as the original vendor. 167 Ga463, 146SE19.

309-1½-New. In California, the abbreviation "Inc." is equivalent to phrase "a corporation." 102CalA710, 283P856.

309-3 [a] **Neither foreign nor domestic corporation may be registered** under fictitious name. 13PaDist&Co 524.

309-8 41GaA420, 153SE229(1stcase).

310-11 [c] (3) Customary phrase, "of a location," after corporate name, is not part of such name so that omission or addition thereof is generally regarded as immaterial. MoA 10SW(2d)319.

311-19 85Colo 17, 273P648; TexCivA 273SW874 (incorporation under act of congress did not give immunity against injunction restraining imitation of fraternal order's name and emblements). [d] (3) Right assured, to have corporate name distinguished from other corporations of like kind subsequently created, does not depend on showing of actual use, in business, of name. DelCh 144A656. (4) Amendment requires name to be such to distinguish corporation on records in office of secretary of state from names of other corporations organized under laws of state. Del Ch 150A174.

312-20 269US372, 46SCt160, 70L ed317.

312-21 129 Or375, 276P1100, 66ALR 934.

312-23 DelCh 144A659(1stcase). See also 85Colo 17, 273P648 (test is tendency to deceive).

313-24 DelCh 144A656; 129 Or375, 276 P1100, 66ALR934. [b] **Greater similarity of names will be tolerated** where business caters to small highly specialized group than where it caters to all comers. 129 Or375, 276P1100, 66ALR 934.

313-25 148Md609, 130A57, 59, 43ALR 206 [citCJ]; 117 Or678, 245P324; 129 Or375, 276P1100, 66ALR934.

314-30 [a] (3) On finding that use of name D. U. Club was not to induce belief of connection with Delta Upsilon Fraternity. 264Mass343, 162NE691.

314-31 117 Or678, 690, 245P324 [cit CJ].

314-34 DelCh 144A656.

314-34½-New. Action of secretary of state in filing a corporate certificate is not conclusive upon the question of the distinguishableness of defendant's name from that of the senior corporation. Del Ch 144A656.

315-39 51Philippine115. [b] **In Philippines.**-51Philippine115.

316-48 [a] (20) Pi Sigma sorority over objections by Pi Sigma fraternity. 5Pa Dist&Co 502.

317-73½-New. Fraternal corporation organized to aid an existing voluntary association by protecting its name had a right to use its name, even though it did not adhere to the tenets of the national association. Mass 165NE479.

318-78½-New. Word "state" in name of proposed body corporate called "State Motor Vehicle Insurance Fund" does not make it public corporation. Mass 171NE294.

319-87 8PaDist&Co 383.

321-12 131Misc138, 227NYS96, 98 [quot CJ]; 8PaDist&Co 383, 386 [citCJ].

322-14 131Misc138, 227NYS96, 98 [quotCJ].

322-15 8PaDist&Co 383.

322-19 300Pa389, 150A613.

323-36 6PaDist&Co 147, 148 [citCJ].

323-37 5PaDist&Co 597 [quotCJ].

324-44 MoA 3SW(2d)399, 400 [citCJ].

324-45 6PaDist&Co 147, 148 [citCJ].

324-47 29F(2d)975.

324-49 164La800, 114S659; 5PaDist& Co 597; 6PaDist&Co 147, 148 [citCJ]; 145Wash214, 259P391, 392, 56ALR447 [citCJ].

324-49½-New. A contract executed by a corporation in an assumed name is not rendered invalid by the accidental omission from the signature on a duplicate copy given to the other party of the abbreviation "Inc." forming the last part of such name. 164La800, 114S659.

324-49½-New. Such omission may be corrected by a letter from the corporation to the other party expressly recognizing the contract and calling for performance. 164La800, 114S659.

325-55 8PaDist&Co 383, 386 [citCJ].

326-80 11F(2d)881; 26F(2d)727 (injunction denied under evidence); 205 Cal 167, 270P184; 164Ga437, 138SE908; 166Ga679, 144SE212; 12LaA555, 125S 306; 148Md609, 130A57, 43ALR206; MoA 26SW(2d)826; 129 Or375, 276P 1100, 66ALR934; 135SC282, 133SE706; TexCivA 28W(2d)510. [e] **Benevolent organizations.**-MoA 26SW(2d)826.

327-81 163La175, 111S667; 148Md609, 130A57, 43ALR206; 117 Or678, 245P 324. [a] (1) 117 Or678, 245P324.

328-83 161Ga110, 129SE783; 129 Or 375, 276P1100, 66ALR934; 135SC282, 133SE706, 708 [citCJ].

328-84 But see 11F(2d)881.

328-87 11F(2d)881. [a] **Persons cannot be denied right to incorporate under name** which they were first to use and become known by, even where others have adopted their name and preceded them in incorporating under it. 117 Or678, 245P324. [b] **Unauthorized use of trade name may be enjoined** by one having right to use thereof regardless of priority in filing application of charter. TexCivA 28W(2d)510.

329-88 163La175, 111S667; 117 Or678, 245P324 [quotCJ]. [b] **Probability of deception is** sufficient to authorize injunction. MoA 26SW(2d)826.

329-89 See also Mass 165NE479.

329-90½-New. Restricted relief. Relief granting a defendant permission to add a suffix to the name has been held erroneous, as defendant using the name to mislead the public should be enjoined in toto. 161Ga110, 129SE783.

329-90⅓-New. Rule extends to enjoin fraternal organization from using similar ritual, passwords, signs, etc. 161Ga 110, 129SE783.

329-90¼-New. Where no injury can come to the corporation or its stockholders and officers suing to enjoin use of the same name, action will not be entertained. 217AppDiv781, 217NYS105.

329-90½-New. Under findings that a corporate plaintiff having the same name as a voluntary fraternal association had no property, that it elected officers, and had been kept alive, but was inactive, defendants had not maintained the burden of proving that plaintiff's activities as a corporation were of such a nature as to entitle defendants to injunctive relief. Mass 165NE479 (injunctive relief precluded under findings).

329-92 117 Or678, 687, 245P324 [quot CJ]. [b] **Words chosen from public domain implying national business** cannot be used in corporate name by first appropriator so as to demand complete exclusion of later appropriator, but first appropriator must be content with added explanatory matter by second appropriator. 129 Or375, 276P1100, 66 ALR934. [c] **Words "Grand Orient"** when used in connection with fraternal order, are not used in geographical sense for which exclusive right to use can not be obtained. 12LaA555, 125S 306.

330-93 164Ga437, 138SE908; 148Md 609, 130A57, 59, 43ALR206 [quotCJ]; 129 Or375, 276P1100, 66ALR934. [b] **Phrase "drive it yourself" is descriptive of business** of renting automobiles without driver and its mere inclusion in corporate name will not give exclusive right to its use. 148Md609, 130A57, 43 ALR206.

330-94 117 Or678, 687, 245P324 [quot CJ].

330-95 148Md609, 130A57, 43ALR206.

330-98 32PortoRico 661 (temporary restraining order held properly granted against incorporators).

331-6 11F(2d)881.

331-13½-New. In a suit to enjoin the use of a deceptively similar name, the question of the superior rights of the other organization is not presented. 85 Colo 17, 273P648.

331-13½-New. Whether incorporation was in proper form is immaterial in suit to enjoin association from using similar name. 12LaA555, 125S306.

331-14 34F(2d)432 (unlawful use of name and conduct of Klan members).

331-16½-New. Where suit is not brought in good faith but merely to harass defendant corporation, action will not be entertained. 217AppDiv781, 217NYS105.

331-17 [a] (1) 11F(2d)881.

332-18 11F(2d)881.

332-23½-New. But a stockholder of a corporation whose assets, corporate name, and franchise had been sold under receivership cannot maintain an action. 245NY516, 157NE840.

332-29½-New. So, also, where a corporation has no assets, has ceased to do business, and is apparently defunct, its stockholders and officers may not sue to enjoin the corporate assignee of the purchaser of its good will from using a similar name. 217AppDiv781, 217NYS 105.

333-35 115 Okl 63, 241P762.

333-39 [a] See also 192Wis528, 213NW 328, 329 [citCJ]. [d] (1) 192Wis528, 213NW328, 329 [citCJ]. [g] **In Pennsylvania.**-13PaDist&Co 524.

334-42 12PaDist&Co 40.

334-43 [b] **Statute providing for common seal held not mandatory.**-100NJEq 455, 136A297.

334-47 11PaDist&Co 494.

335-53 100NJEq455, 136A297.

335-58 100NJEq455, 136A297, 298 [quotCJ].

337-79 100NJEq455, 136A297, 298 [quotCJ].

338-1-37 169Ga139, 149SE885; Iowa 231NW671; 131Misc548, 227NYS203; TexCivA 12SW(2d)638; TexCivA 22SW (2d)684; 35Man37, [1925] 3DomLR570 [1925] 2WestWkly289, 44CanCrCas229. [e] **Corporation created by Congress,** other than national bank, is not citizen or resident of states in which it transacts business. Iowa 231NW671.

339-38 131Misc548, 227NYS203.

339-41 217MoA16, 272SW1066, 1068 [citCJ].

340-51 85Colo 419, 276P972; 94Fla1, 113S667, 669 [citCJ].

340-53 Iowa 231NW671; 217MoA16, 272SW1066.

342-75 284Pa147, 130A421, 424 [citCJ].

342-81 284Pa147, 130A421, 424 [quot CJ].

342-82 6F(2d)192 (Maryland corporation held to have principal place of business in New York); 284Pa147, 130A 421, 424 [quotCJ]; 33PortoRico 8.

343-83 See also 118Tex46, 10SW(2d) 687.

344-8 BC [1925] 3DomLR757. [a] (12) "By-law" is permanent rule of action for government of members of corporation in conduct of corporate affairs. 167Ga555, 146SE173.

345-10 Ont [1927] 3DomLR163.

345-13½-New. A resolution cannot have the effect of impairing the binding force of a valid existing by-law. 167 Ga555, 146SE173.

345-21 316 Ill 183, 147NE42, 43 [cit CJ].

346-23 [a] **Constructive notice,** under statute, is imputed to third persons only if copy of by-laws is posted as prescribed. 117Nebr388, 220NW830.

346-28 216AppDiv1, 214NYS523; 150 Wash366, 273P196. See also 211Ky638, 277SW500.

346-29½-New. A statute covering the same subject as a by-law prevails. 157 Md309, 145A876.

346-30 13F(2d)78; 168Ark504, 270SW 946, 1119; 87Colo 166, 285P1100 (binding on all stockholders whether they expressly consented to them or not); 316 Ill 183, 147NE42; 121 OhSt114, 167 NE366, 63ALR1100; 132 Or128, 283P 755; [a] **In case of conflict** articles of incorporation prevail over by-laws. Mo 31SW(2d)72.

347-31 See also 87Colo 166, 285P1100.

348-43 316 Ill 183, 147NE42.

348-47 [a] 222Ky264, 300SW631, 632 [citCJ].

349-53 51Nev32, 267P827, 828 [citCJ].

350-62 166Ga620, 144SE111.

352-82 316 Ill 183, 147NE42.

354-9 206 **Iowa**201, 220**NW**36, 37 [cit CJ].
357-36 132 **Or**128, 283**P**755.
358-58 98**CalA**230, 276**P**636; 167**Ga** 555, 146**SE**173. See also 34**Ariz**105, 268 **P**773.
359-60 [b] **Where by-laws give directors power to make amendments only at regular meeting** amendments adopted by directors at meeting other than regular meeting are invalid. **DelCh** 151**A**298.
360-78 233 **IllA**414. See also 87**CalA** 435, 262**P**375.
360-78½-New. By-laws may not extend or diminish powers of corporation, 216 **AppDiv**1, 214**NYS**523.
360-78¾-New. although they may explain such powers. 216**AppDiv**1, 214 **NYS**523.
362-7 **Tex** 23**SW(2d)**282.
362-8 **DelCh** 146**A**337.
363-12 **DelCh** 146**A**337.
364-26 134**Misc**152, 234**NYS**683.
367-37 **Or** 285**P**755.
373-38 8**F(2d)**368.
374-91 8**F(2d)**368.
376-20 67**CalA**488, 493, 227**P**787 [quot CJ].
376-21-23 67**CalA**488, 227**P**787.
376-27-52 94**PaSuper**145.
377-54 217**Ky**35, 288**SW**1027.
377-55 190**NC**194, 129**SE**198 [citCJ] (generally presumed to cover entire subject matter).
377-57 176**Ark**1, 1**SW(2d)**818.
377-58 212**Ky**163, 278**SW**615 (clerical errors in date of director's meeting may be shown); 217**Ky**35, 288**SW**1027, 1028 [citCJ]. See also 190**NC**194, 129**SE**198 [citCJ].
377-64½-New. In proceedings for the determination of election of directors, a set of minutes, not original, will be rejected in favor of another set where there were evidences of tampering in rewriting. **DelCh** 147**A**317.
377-65½-New. **If president and secretary certify minutes,** they will be estopped from challenging them ordinarily. 99**NJEq**543, 133**A**857.
377-67 209**Ky**170, 272**SW**392 (records of abstract company).
379-81 106**Conn**19, 137**A**20.
379-91 196**Cal**468, 238**P**703; 124**Kan** 83, 86, 257**P**717 [citCJ]; 320**Mo** 908, 8 **SW(2d)**970. [b] **"Capital stock"** is intended as fund for ultimate security and payment of all creditors. 245**NY**343, 157**NE**261.
379-92 80**CalA**501, 251**P**973; 124**Kan** 83, 86, 251**P**717 [citCJ]; 8**PaDist&Co** 30.
379-93 80**CalA**501, 251**P**973; 124**Kan** 83, 86, 251**P**717 [citCJ].
380-94 196**Cal**468, 238**P**703; 124**Kan** 83, 86, 251**P**717 [citCJ].
381-11 196**Cal**468, 238**P**703; 15**DelCh** 431, 141**A**277; 320**Mo** 908, 8**SW(2d)**970.
381-12 [b] **"Stated capital"** is capital with which corporation, issuing shares without par value, begins business, changed by net additions or deductions. 320**Mo** 908, 8**SW(2d)**970.
381-15½-New. **Stated capital** which must be fixed by corporation changing stock to no par value shares is real capital in absence of valid law authorizing arbitrary valuation of one hundred dollars per share as basis for assessment of stock bonus. 287**Pa**42, 134**A**390.
381-17 148**Md**90, 129**A**22 (legal ownership of capital or capital stock is in corporation as legal entity or person, while ownership of stock is in individual stockholders, according to their respective holdings).
382-23 80**CalA**501, 251**P**973.
382-29 247**Mich**418, 225**NW**878. [b] **Value of outstanding stock** is determined by capital and surplus of corporation. **Mo** 20**SW(2d)**523, 67**ALR**476.
383-31 124**Kan**83, 257**P**717.
383-32 124**Kan**83, 257**P**717.
383-33 124**Kan**83, 257**P**717.
383-34 328 **Ill** 368, 159**NE**15; 241 **IllA** 454, 463 [quotCJ].
383-37 223**AppDiv**767, 227**NYS**606.
383-39 241 **IllA**454, 463 [quotCJ].
383-42 75**Mont**567, 244**P**489; 136**Wash** 220, 239**P**560; 200**Wis**476, 228**NW**130.
384-46 21**F(2d)**667; 219**Ala**513, 123**S**6; 219**Ala**638, 123**S**71; 106**Conn**19, 137 **A**20; 317**Mo** 1028, 298**SW**91, 56**ALR** 1276; 149**Va**274, 141**SE**240.
385-47 106**Conn**19, 137**A**20; 28**Hawaii** 528; 206 **Iowa**100, 220**NW**42; 234**Ky** 814, 298**W(2d)**566.
385-48 319**Mo** 1048, 5**SW(2d)**40, 45 [cit CJ].
385-48½-New. Certificate of ownership held not to be shares. 116**Tex**154, 287 **SW**902.
385-51 8**PaDist&Co** 383.
387-69 19 **OhA**243. [a] 8**PaDist&Co** 30.
387-70 219**Ala**497, 122**S**824.
388-72 43 **Ida**64, 249**P**254; 126 **Okl** 172, 259**P**253, 54**ALR**1152; **TexCivA** 278 **SW**321, 323 [quotCyc]. See also 197**Wis** 71, 221**NW**376 (capital stock).
388-74 124**Kan**83, 86, 251**P**717 [citCJ].
389-80 124**Kan**83, 86, 257**P**717 [citCJ].
389-84 7**F(2d)**158; 241 **IllA**454, 461 [citCJ].
390-92 7**F(2d)**158. See also 16**F(2d)** 355.
390-95 16**F(2d)**355; 232**Mich**330, 205 **NW**99.
390-96 [c] **In New Jersey.**-7**F(2d)**769.
390-97 219**Ala**497, 122**S**824; **DC** 33 **F(2d)**643; 10**PaDist&Co** 133. See also 16**F(2d)**355.
391-98 [a] (3) Capital stock, to extent of authorized amount, may be taxed in foreign state where corporation does business, as franchise tax, and where there is no showing that it does interstate business. 136**Wash**285, 239**P**840.
391-8 **DelCh** 147**A**317.
391-9 28**Hawaii**528.
392-16½-New. A statute authorizing the issue of no par value stock imposes the same burdens and regulations as on other corporations consistent with the purpose. 318**Mo** 1020, 2**SW(2d)**790.
392-18 **Mass** 167**NE**286.
393-23 216**Ala**216, 113**S**61.
393-26½-New. A constitutional provision limiting consideration for issue of stock to money, labor, or property does not deprive the legislature of the power to regulate conditions upon which corporations may exercise their limited right to deal. 196**Cal** 463, 238**P**697, 44 **ALR**1.
393-27 198**Cal**609, 246**P**807.
393-28 198**Cal** 609, 246**P**807 (stock of differing par values not permitted by statute). [a] **In California.**-196**Cal**488, 238**P**710.
393-30 [a] **Corporation may amend articles of incorporation** providing for preferred and common stock of different value. 113 **OhSt**491, 149**NE**866.
393-31½-New. Subsequent action of defendants after improperly acquiring control through purchase of nonpar voting stock and whether they have voted it for the best interests of the company is not considered in determining whether the action taken in disposal of stock was authorized. 233**Mich**87, 206**NW**320.
393-31⅓-New. Power of one of plaintiffs to purchase nonpar voting stock, purchase of which by one of the directors was declared to be a fraud on other stockholders, has been held not to affect the rights of other plaintiffs. 233 **Mich**87, 206**NW**320.
393-31¼-New. Sale by directors of majority of nonpar voting stock to one of their members, thus giving him control of the corporation without owning the majority of the common stock, may be fraud on the other stockholders. 233 **Mich**87, 206**NW**320.
393-31⅓-New. Pennsylvania statute authorizes stock corporations to provide for the issuance of either preferred or common shares without either nominal or par value. 8**PaDist&Co** 708.
393-31⅓-New. The right to issue nonpar stock is a new privilege for which the statute charges a bonus on each share of stock so issued to be paid to the state. 8**PaDist&Co** 709.
393-31½-New. The measure of such bonus is for the legislature to determine. 8**PaDist&Co** 709.
393-31¾-New. Under the statute the corporation must pay a bonus of one third of one per cent. upon an assumed value of one hundred dollars per share unless such shares have been converted from a par value to a nonpar value basis. 8**PaDist&Co** 709.
393-31⅞-New. **Nonpar common stock** cannot be considered as outstanding stock with the right to vote where the certificate contained no statement of the total number of shares to be issued. **DelCh** 147**A**317.
393-31 1/10-New. Constitutional provision prohibiting issuance of stock except for equivalent in money, labor or property does not prohibit stock without par value. 234**Ky**814, 298**W(2d)**566.
393-31 1/11-New. Proceeds of no par value stock may be allocated to capital and surplus within discretion of directors. 234**Ky**814, 298**W(2d)**566.
394-37 317**Mo** 1028, 298**SW**91, 56**ALR** 1276 (rule applies whether stockholder's interest is large or small); 157**Tenn**131, 7**SW(2d)**43, 44 [citCJ]. But see 253**NY** 274, 170**NE**917. [a] (1) See also 317**Mo** 1028, 298**SW**91, 97 [citCJ] 56**ALR**1276.
394-42 253**NY**274, 170**NE**917 (must obtain waiver of stockholders).
395-43 253**NY**274, 170**NE**917.
395-45 253**NY**274, 170**NE**917.
395-47 210**Ky**309, 275**SW**784; 102**NJEq** 302, 140**A**321; 196**Wis**351, 220**NW**215, 59**ALR**1528. [c] **Consolidation of corporations** stockholder's right to purchase proportion of new issue of stock does not survive consolidation where right can be traced to charter of only one of consolidated corporations. **Md** 148**A**234.
396-56 210**Ky**309, 275**SW**784.
397-80 196**Wis**351, 220**NW**215, 59**ALR** 1528.
397-81 285**Pa**449, 132**A**352.
397-85-86½-New. It has been held that the benefit from a subscription to additional stock is to be divided between the corpus and the income in the same manner as an extraordinary stock dividend. 292**Pa**149, 140**A**862.
398-90 But see **Del** 140**A**265 (holding issuance of Class A no par common stock to Class A stockholder at less than that to other stockholders not illegal in view of benefit to corporation).
398-94 **CalA** 286**P**165(4thcase); 253**NY** 274, 170**NE**917; 147**Va**937, 133**SE**576.
403-60 216**Ala**216, 113**S**61.
405-82 15**DelCh**183, 133**A**698.
405-83½-New. Where stock was issued to a promoter for property, the corporation agreeing to pay the promoter for all payments made thereon and assume all sums due thereon, there was a fraudulent issue of stock. 15**F(2d)**62.
405-83¾-New. A corporation, agreeing to take stock for debt due from another corporation, is not chargeable with fraud in acquiring stock at a lower price than others, because of an alleged failure to disclose the price, at the request of the president of the debtor corporation, in view of necessary secrecy and knowledge by directors of the actual price. 13**F(2d)**781.
406-89 15**DelCh**183, 133**A**698; **Sask** [1927] 3**DomLR**786.
406-90 15**DelCh**183, 133**A**698.
406-5 28**Hawaii**528, 531 [citCJ]; 241 **IllA**454, 464 [quotCJ].
406-6 241 **IllA**454, 464 [quotCJ].
406-7 28**Hawaii**528, 531 [citCJ]; 241 **IllA**454, 464 [quotCJ].
407-15 **Del** 141**A**197; 241 **IllA**454, 464 [quotCJ]; 8**PaDist&Co** 30, 32 [quotCJ].
407-16 241 **IllA**454, 464 [quotCJ]; 8 **PaDist&Co** 30, 32 [quotCJ]. See also 142**Wash**423, 253**P**638.
407-17 241 **IllA**454, 464 [quotCJ].
407-19. 241 **IllA**454, 464 [quotCJ].
407-24 8**PaDist&Co** 30, 32 [quotCJ in part].
407-25 **MoA** 25**SW(2d)**566; 8**PaDist&Co** 30, 32 [quotCJ]; 157**Tenn**131, 7 **SW(2d)**43, 44 [citCJ]; 142**Wash**423, 253**P**638, 639 [citCJ].
408-35 8**PaDist&Co** 30.
408-36 157**Tenn**131, 7**SW(2d)**43, 44 [cit CJ].
408-41 54**ND**734, 210**NW**514, 519 [quot CJ] 51 **ALR**1123.
408-42 But see 54**ND**734, 210**NW**514, 519 [quotCJ] 51**ALR**1123.
408-43 54**ND**734, 210**NW**514, 519 [quot CJ] 51**ALR**1123.
409-64 148**Md**90, 129**A**22 (corporation may replace common stock, with common stock of no par value); 224**AppDiv** 268, 229**NYS**735.

410–66 [a] **Ont** [1929] 3**DomLR**558.
410–70 98**NJEq**326, 129**A**244, 44**ALR**60 (issue not violative of Corporation Act).
411–76 See also **Alta** [1928] 1**DomLR** 135.
411–81. But see 224**AppDiv**268, 229**NYS** 735.
412–83½–New. Designation in the original certificate of incorporation of stock as "preferred" is ineffectual where the preferences to which the stock should be entitled were not described. **DelCh** 147 **A**317.
412–91 224**AppDiv**268, 229**NYS**735.
413–1 214**Ala**658, 108**S**755.
414–8 124**Kan**83, 88, 257**P**717[citCJ].
414–12 [a] **Nature of lien.**–When articles of incorporation of corporation organized to purchase and sell real estate grant to holders of preferred stock first lien on all assets of corporation, lien is blanket lien on all assets and not lien on particular items of property. 205 **Iowa** 465, 218**NW**321.
415–24 7**F(2d)**221; **DelCh** 151**A**228; 34 **OhA**361, 170**NE**371.
415–25 8**F(2d)**716. [e] **Where preferred stock certificates had no fixed maturity date short of life corporation,** all stockholders, whether preferred or common, were on equal basis as to stock maturities except as otherwise provided in certificate. 199 **Ind**166, 154**NE**480.
416–26 149**Va**274, 141**SE**240; **Ont** [1929] 3**DomLR**558, 562 [quotCJ].
416–27 220**AppDiv**39, 220**NYS**532.
416–27½–New. Preferred stockholders have been held not prejudiced by a transaction whereby the majority stockholders purchased preferred stock of the corporation held by it. 205 **Iowa**465, 218**NW**321.
416–28 35**F(2d)**966; 202 **Iowa**1094, 211 **NW**488; 124**Kan**83, 87, 257**P**717 [cit CJ]; 118**Nebr**5, 223**NW**277; 196**NC**784, 147**SE**307; 291**Pa**282, 139**A**853.
416–29 124**Kan**83, 87, 257**P**717 [citCJ].
416–30 8**F(2d)**716.
417–32 124 **Okl** 135, 253**P**1005, 1007 [quotCJ].
417–34 124 **Okl** 135, 253**P**1005. [b] **Facts of particular case and not name given by parties** determine whether holder of certificate is stockholder or creditor. 124 **Okl** 135, 253**P**1005.
417–35 8**F(2d)**716, 720 [quotCJ]; 124 **Okl** 135, 253**P**1005.
417–37 39**GaA**261, 146**SE**637(2dcase); 202 **Iowa**1094, 211**NW**488, 494 [citCJ]; 124**Kan**83, 257**P**717.
417–38 202 **Iowa**1094, 211**NW**488, 494 [citCJ].
418–39 124**Kan**83, 257**P**717.
418–42½–New. Instruments having attributes commonly attached to preferred stock as such will, where rights of creditors are involved, be construed as stock unless a contrary intention clearly appears. 124 **Okl** 135, 253**P**1005.
418–42¼–New. One who holds a certificate of stock and claims to be both a creditor and stockholder by virtue of the same contract has the burden of proving that such an anomalous relation exists. 8**F(2d)**716.
418–42¼–New. Surrender by preferred stockholder of right to vote does not make him a creditor. 8**F(2d)**716.
418–43 280**US**197, 50**SCt**106, 74**L ed**368, 67**ALR**762 (rights of holders of preferred noncumulative stock); 12**F(2d)**671; 25 **OhNPNS**107; 149**Va**274, 141**SE**240 (interpreted as average investor would understand language).
418–44 7**F(2d)**221; 224**AppDiv**268, 229 **NYS**735 (general rule); 34 **OhA**361, 170 **NE**371; 25 **OhNPNS**107.
418–46 [b] **Letters patent issued under Canadian Companies Act** (1) construed as entitling owners of ordinary shares to dividends equal to amount paid to preferred shareholders before latter could participate further. **Ont** [1930] 3**Dom LR**555. (2) Such letters cannot be overridden by stock certificate. **Ont** [1930] 3**DomLR**555. (3) Ordinary stockholders are not estopped by declarations as to respective rights of two classes of shareholders appearing in certificate. **Ont** [1930] 3**DomLR**555.
418–46½–New. A corporation cannot amend the certificate of incorporation to permit exchange of preferred stock where such action would divest preferred stockholders of rights to the surplus. 101**NJEq**554, 139**A**50.
418–46¼–New. Preferred stockholders, where the dividend is limited to six per cent, cannot get more although the statute provides that they may get up to eight per cent. 25 **OhNPNS**107.
419–48 7**F(2d)**221; **Wash** 286**P**48.
419–49 [c] (1) 23**F(2d)**691.
420–50 8**F(2d)**716.
420–52 8**F(2d)**716; 66**Utah**128, 240**P** 175.
421–54 [a] (2) Where certificate of preferred class A stock made such stock entitled to receive preferential dividends "before any dividends shall be paid upon any other stock," board of directors could not declare dividends on preferred B stock till A stock was fully satisfied as to dividends. 30**F(2d)**260 [certiorari granted 279**US**828, 49**SCt**265, 73**L ed**979 (5th case)].
421–56 **Mo** 31**SW(2d)**72. [b] **Whether cumulative must be indicated in articles of incorporation** or in proceeding to increase capital before issuance of preferred stock. **Mo** 31**SW(2d)**72.
421–57 8**F(2d)**716; **Wash** 286**P**48. [b] **Cumulative dividend clause construed.**–199 **Ind**166, 154**NE**480.
421–58 12**F(2d)**671, 675 [quotCJ]; 23 **F(2d)**691. [a] **Holders of second preferred stock** held entitled to dividends when net surplus was sufficient, after satisfying prior preferred cumulative demands, to pay it for any given year. 7**F(2d)**221.
421–58½–New. "Cumulative dividends" must be paid regardless of the year in which earned, whereas "noncumulative dividends" paid in a year are dependent upon the earnings of that year. 30 **F(2d)**260 [certiorari granted 279**US**828, 49**SCt**265, 73**L ed**979(5thcase)].
421–58¼–New. Unpaid dividends on cumulative preference shares, although not declared, are liabilities of a company under contract for the purchase of common shares entered into on the basis of the correctness of the auditor's report as to the assets and liabilities of the company. **Can** [1928] 3**DomLR**161.
421–58¼–New. The right to have dividends on stock cumulative is a "preference right" under general corporation statutes providing for amendments altering preference rights of preferred stock. 34**F(2d)**533.
421–59 43**F(2d)**777. [a] **Leading case** is New York, etc., R. Co. v. Nickals, 119 U. S. 296, 7**SCt**209, 30**L ed**363 [cit 12**F** (2d)671].
421–60 12**F(2d)**671.
421–61 23**F(2d)**691. [a] **Discretion to declare dividends, under statutes authorizing same when corporation organized,** is not limited by subsequent statute. 23**F(2d)**691.
421–62 23**F(2d)**691.
422–65 See also 39**GaA**261, 146**SE**637 (2dcase).
422–66⅓–New. Where profits are made in a particular year and they are not devoted to some corporate purpose, the directors may in a subsequent year declare dividends and pay them. 12**F(2d)** 671.
422–66¼–New. Where charter amendments created classes of prior preferred stock, payment from future earnings on such preferred issues in advance of accrued dividends on the first preferred stock is proper. 34**F(2d)**533.
422–66½–New. In Ontario some letters patent preclude dividends exceeding seven per cent to preferred stock-holders until total dividends upon ordinary shares since incorporation equal rate paid on preferred shares. **Ont** [1929] 4**DomLR**879.
422–68 7**F(2d)**221; 9**PaDist&Co** 446.
422–69 29**F(2d)**810.
422–71 220**AppDiv**39, 220**NYS**532, 535 [quotCJ].
423–76 218**Ky**586, 291**SW**780.
423–78 200**Wis**476, 228**NW**130.
423–91 263**Mass**160, 160**NE**539.
423–92 37**F(2d)**593. [a] **Plaintiff suing for damages** for corporation's refusal to convert preferred stock into common stock must show that he was stockholder of record of preferred stock. 37**F(2d)**593. [b] **Damages for refusal to convert preferred stock** to the difference between sale price and what he would have been able to sell it for if converted. 37**F(2d)**593. [c] **Defense that defendant had transferred to another preferred stock certificate** has been held not good in action for damages for refusal to convert preferred stock into common stock. 37**F(2d)**593. [d] **Sufficiency of pleading** in action for damages for refusing to convert preferred stock into common stock. 37**F(2d)**593.
424–95 261**Mass**523, 159**NE**55 (statutory provisions for ascertaining value held valid); 118**Nebr**5, 223**NW**277 (retirement from corporate earnings only); 200**Wis**476, 228**NW**130.
424–98 200**Wis**476, 228**NW**130 (preferred stockholder may compel redemption if value of corporation's assets exceeds its liabilities). See also 224**AppDiv**268, 229**NYS**735.
425–1½–New. A provision in a certificate of incorporation requiring conversion of preferred stock into common stock upon presentation and surrender requires reasonable diligence by the corporation to comply with such obligation. 33**F(2d)**916.
425–1⅓–New. Burden is on preferred stockholder to show that redemption can be made without prejudice to rights of creditors. 200**Wis**476, 228**NW**130.
425–1¼–New. In action to enforce agreement of corporation to redeem at fixed rate, neither creditors nor other stockholders are necessary parties. 200 **Wis**476, 228**NW**130.
425–1⅓–New. Preferred stockholder's right to be paid at fixed date cannot be affected by making stock payable at call, without stockholder's consent. 200 **Wis**476, 228**NW**130.
425–1¼–New. Preferred stockholder who unsuccessfully sought to compel redemption held entitled to continue as stockholder. **DelCh** 151**A**218.
425–1½–New. Determination of book value of stock for purposes of redemption. **DelCh** 151**A**218.
425–1¼–New. Preferred stock held not redeemable on basis of actual or fair value of assets. **DelCh** 151**A**218.
426–11¼–New. Preferred stockholders could enjoin the board of directors from paying dividends upon junior stocks until after the earned dividends of their preferred stock were first paid and satisfied. 30**F(2d)**260 [certiorari granted 279**US**828, 49**SCt**265, 73**L ed**979(5th case)].
428–25½ 88 **Ind**A309, 152**NE**609.
428–28 76**CalA**785, 246**P**121, 124 [cit CJ].
428–32½–New. Unless consideration for nonpar stock is fixed by stockholders as provided by statute, it is void. **DelCh** 147**A**317.
429–39 106**Conn**41, 137**A**159. [d] **Burden is on defendant** to prove defense that plaintiff had violated contract and was indebted to defendant. 12**LaA**525, 125**S**330. [e] **Sufficiency of evidence.**–12**LaA**525, 125**S**330.
429–47 **CalA** 286**P**165(4thcase) (valuable consideration); 15**DelCh**183, 133**A** 698.
429–48 76**CalA**785, 246**P**121, 124 [cit CJ].
430–49 15**DelCh**119, 132**A**442; 15**DelCh** 183, 133**A**698; 161**La**784, 109**S**490. [a] **In Philippines.**–51**Philippine**601.
430–51 15**DelCh**183, 133**A**698.
431–60 [a] **Fairness of intent is immaterial** where stock is sold for other than cash. **CalA** 290**P**1048.
432–66 196**Cal** 453, 238**P**697, 44**ALR**1 (under constitutional provision); 197 **Cal** 765, 242**P**918; 263**Mass**160, 160**NE** 539 (stock); 115**Nebr**848, 215**NW**140; 193**NC**534, 137**SE**585; 159**Tenn**337, 17 **SW(2d)**1; **Ont** [1930] 3**DomLR**98; **Man** [1929] 4**DomLR**555; **Man** [1929] 4**Dom LR**1001.
433–68½–New. The fact that an option for property was assigned to a third party and reassigned to a corporation does not disturb effect of issuance of stock for property. 32**F(2d)**646.

433–68⅓–New. Where there is some consideration emanating from a legitimate transaction not tainted with fraud and intended to redound to the benefit of the corporation, the statute is satisfied so far as the corporation or the stockholders are concerned. 99**CalA** 714, 279**P**181.

434–79 118**Tex**173, 12**SW(2d)**957.

434–81 **Mo** 20**SW(2d)**56.

435–92 154**Wash**559, 283**P**173.

435–95½–New. A conveyance to a corporation subject to a mortgage securing a stock purchase, in consideration of new stock issue, cannot be avoided without proof of fraud. **Mass** 167**NE** 319.

435–95⅓–New. Issuance of stock to claimant of oil property for extension of time for payment of moneys due, under a contract to purchase it, is supported by the same consideration and is not void. 99**CalA**714, 279**P**181.

435–95¼–New. A contract of a corporation to pay an attorney for services by crediting the value thereof on his subscription to its stock is valid. **Tex CivA** 18**SW(2d)**923.

435–95⅙–New. An order, requiring return of stock issued to an attorney as payment of services, held gross injustice. **Colo** 281**P**737(2dcase).

435–96 15**DelCh**119, 132**A**442.

435–96½–New. Permitting use of dividends to purchase nonpar class of stock at less than market price in order to create demand for such stock has been held not acceptance of illegal consideration. 15**DelCh**119, 132**A**442.

436–11 104**Conn**683, 134**A**236; **Mass** 167**NE**286.

437–25 204 **Iowa**1027, 216**NW**640 (assumption by corporation of full ownership of personal property upon issuance of stock held equivalent to formal bill of sale of property to it).

438–33 **DelCh** 141**A**54.

438–34 **DelCh** 147**A**317.

439–39 15**DelCh**431, 141**A**277, 284 [cit CJ]; 200 **Iowa**463, 203**NW**687 (note accepted and discounted by corporation constitutes payment pro tanto); 235**Ky** 296, 31**SW(2d)**373; 26 **OhA**190, 159**NE** 852.

439–44 But see 15**DelCh**183, 133**A**698.

439–46 177**Ark**190, 5**SW(2d)**937 (constitutional prohibition); 115 **Okl** 97, 241 **P**1097. [c] (1) 53**ND**244, 205**NW**681. (2) Under Comp. L. (1913) § 4529, note is not considered payment for stock which cannot be issued before payment of note given "in settlement when paid." 56**ND**786, 219**NW**472.

440–54 326 **Ill** 528, 158**NE**101.

441–60 15**DelCh**119, 132**A**442; **TexCivA** 4**SW(2d)**668.

441–61 15**DelCh**119, 132**A**442.

441–66 59 **OntL**278, [1926] 4**DomLR** 306; **Que** [1926] 4**DomLR**976.

441–66½–New. The question whether transactions of corporations affect the relation between their actual and their stock capitalization is not a mere question of law to be ascertained by inspection of organic law, but in most cases a mixed question of law and fact depending on facts of each individual case. 196**Cal** 453, 238**P**697, 44**ALR**1.

441–67 120 **Or**306, 252**P**85, 87 [quotCJ] 56**ALR**392.

441–69 120 **Or**306, 252**P**85, 87 [quot CJ] 56**ALR**392.

442–70 **DelCh** 141**A**54. [b] **In Delaware.**–13**F(2d)**781.

443–78 [g] (4) Transaction held illegal under Ont. Companies Act, forbidding issue of shares as commission for sale of shares of company. **Can** [1928] 3**DomLR**1.

445–81 15**DelCh**119, 132**A**442.

445–84 [f] **When merely voidable.–Tex CivA** 286**SW**285.

446–85 **TexCivA** 286**SW**285.

446–86 196**Cal** 453, 238**P**697, 44**ALR**1; **DelCh** 141**A**54.

447–87⅓–New. A constitutional provision that no corporation shall issue stock except to bona fide subscribers therefor or to their assignees is intended to prevent issuance of stock except to persons who pay for it at its face value. 29**Ariz**560, 243**P**400.

447–87⅙–New. Such provision is intended more for the protection of creditors than otherwise. 29**Ariz**560, 243**P** 400.

448–93 **Que** [1926] 4**DomLR**976.

449–96 **Ark** 31**SW(2d)**746.

450–6 115 **Okl** 97, 241**P**1097.

450–12 223**Ky**1, 2**SW(2d)**1075. [b] **Corporation issuing stock in violation of permit of corporation commission** authorizing sale at par for cash cannot recover its value. 83**CalA**298, 256**P**590 (acceptance of stock is not agreement to pay cash so as to make transaction legal).

452–39 15**DelCh**183, 133**A**698.

453–48 15**DelCh**183, 133**A**698.

453–50 29**Ariz**560, 243**P**400. [b] **Illustration.**–29**Ariz**560, 243**P**400.

455–70 142**Wash**423, 253**P**638, 639 [cit CJ].

456–76 15**DelCh**183, 133**A**698.

456–81 15**DelCh**183, 133**A**698.

456–83 15**DelCh**183, 133**A**698.

457–5 **Mo** 20**SW(2d)**60.

458–15 251 **IllA**89.

459–28 32**F(2d)**646 (issue of bonus stock held valid).

462–60 [c] 32**F(2d)**646 (conspiracy to defraud).

463–76 **CalA** 283**P**879; 15**DelCh**183, 133**A**698; **NJCh** 148**A**178; 246**NY**58, 158**NE**19.

463–77 223**Ky**1, 2**SW(2d)**1075 (corporation's only right); 246**NY**58, 158**NE** 19.

463–82 15**DelCh**183, 133**A**698.

464–84 15**DelCh**183, 133**A**698.

464–91¼ [a] **Mistake in issuing new certificate** without surrender of old does not prevent suit to recover old in hands of wrongful holder. 246**NY**58, 158**NE**19.

464–93 **NJCh** 148**A**178.

465–12½–New. In an action by a stockholder for an accounting and recovery of stock issued in the trustee's name by a corporation to third party in exchange for plaintiff's certificates, the corporation is a necessary party. 215 **AppDiv**336, 213**NYS**389.

467–38 [b] **Burden of proof.**–224 **IllA** 327.

468–40 82**CalA**109, 255**P**225, 226 [cit CJ].

469–51 [a] **Extent of liability** is limited to debt secured by pledge on being subrogated to pledgee's claim, or to new stock issued in place of void stock on refusal to permit subrogation. 156 **La**921, 101**S**266.

470–61 [a] (1) 22**F(2d)**524 (secretary forging president's name and pledging certificate for private loan).

471–73 22**F(2d)**524 (forged certificates).

472–89 21**F(2d)**667; 29**F(2d)**457; 246 **NY**58, 158**NE**19. [a] **Complaint held sufficient.**–245**NYS**273.

474–96 54**ND**734, 210**NW**514, 51**ALR** 1123.

474–97 54**ND**734, 210**NW**514, 51**ALR** 1123.

475–21 **DelCh** 147**A**317 (no ratification by holder of nonpar stock illegally issued). [a] **Nonpar stock not validated** by exchange for new certificates after amendment of certificate attempting to cure defect. **DelCh** 147**A**317.

475–23 **CalA** 286**P**165(4thcase). [b] **Facts insufficient to cause estoppel.**–106 **Conn**41, 137**A**159. [c] **Two certificates for same holding.**–246**NY**58, 158**NE**19.

475–23½–New. That stock was paid for under the belief of its validity is not ground for equitable relief where the purchaser knew every fact connected with payment and issuance. 98**CalA**469, 277**P**177.

477–36 **DelCh** 141**A**54, 62 [citCJ].

477–37 30**F(2d)**505 (stock issued for note).

478–44 207**Cal** 115, 277**P**313; 78**CalA** 305, 248**P**525; 15**DelCh**209, 135**A**486; **DelCh** 147**A**247; 28**Hawaii**590; 338 **Ill** 246, 170**NE**285(2dcase); 217**Ky**842, 290 **SW**720; 226**Ky**754, 11**SW(2d)**926; 235 **Ky**296, 31**SW(2d)**373; 166**Minn**346, 207**NW**737, 46**ALR**1167; 220**MoA**223, 282**SW**729; 118**Nebr**5, 223**NW**277; 19 **OhA**243 (only evidence of interest of stockholder in company); 126 **Okl** 172, 259**P**253, 54**ALR**1152; 124 **Or**379, 264**P**452; 130 **Or**32, 278**P**972; 8**PaDist&Co** 30; 34**Wyo** 495, 245**P**304, 51**ALR**13.

479–45 84**CalA**114, 257**P**611; 220**MoA** 223, 282**SW**729; 116 **Okl** 287, 245**P**562, 565 [quotCJentiresection] 47**ALR**171; 126 **Okl** 172, 259**P**253, 54**ALR**1152.

480–68 221**AppDiv**697, 224**NYS**609.

481–79 **Can** [1930] 3**DomLR**81.

481–87 207**Cal** 115, 277**P**313; 78**CalA** 305, 248**P**525; **DelCh** 147**A**247; 328 **Ill** 368, 159**NE**815; 200 **Iowa**463, 203**NW** 687; 206 **Iowa**100, 220**NW**42; 217**Ky** 842, 290**SW**720; 235**Ky**296, 31**SW(2d)** 373; 261**Mass**1, 157**NE**725; 166**Minn** 346, 207**NW**737, 46**ALR**1167; 136**Misc** 893, 242**NYS**417; 197**NC**202, 148**SE**174 (stock must be issued and accepted as such); 131 **Okl** 110, 267**P**835; 121 **Or** 92, 254**P**800, 51**ALR**1200; 121 **Or**98, 254 **P**802; 124 **Or**379, 264**P**452; 8**PaDist&Co** 30; 34**Wyo** 495, 245**P**304, 51**ALR**13.

483–12 But see 264**Mass**431, 162**NE**902.

484–33½–New. Void certificates are not choses in action. 98**CalA**469, 277**P**177.

484–33⅓–New. Public utilities commission of Ohio, after authorizing a public utility to issue capital stock, may for good cause shown suspend the right to further issue and dispose of such stock within the state. 119 **OhSt**632, 165**NE** 528.

484–37 **Mass** 169**NE**783 (treasurer).

484–41½–New. Receipt without intention to accept ownership of certificate after repudiation by purchaser because of corporation's breach of conditions will not make purchaser owner so as to prevent rescission. 284**Pa**380, 131**A**191.

484–42 **DelCh** 147**A**247; **SC** 155**SE**619 (signature of purchaser as receipt not prerequisite).

485–46 See also 137**Misc**120, 242**NYS** 726.

485–57 126 **Okl** 172, 259**P**253, 54**ALR** 1152; **TexCivA** 13**SW(2d)**708; **TexCivA** 14**SW(2d)**292. [b] **On wrongful refusal to issue certificate** of another class of stock in exchange for plaintiff's stock, remedy is not for conversion of other class of stock, but in damages for breach of contract and action to compel transfer. 39 **OklACR**338.

485–58 8**F(2d)**522; 199**Cal** 194, 248**P** 668; **DelCh** 147**A**247 (not required to give bond under by-law or statute as in case of lost certificate); 154**Md**599, 141 **A**334; **TexCivA** 14**SW(2d)**292. [b] (2) To sustain judgment that plaintiff had repudiated and abandoned subscription which had therefor been canceled by mutual consent. 209**Ky**719, 273**SW**483. [c] (2) Corporation is indispensable party. 154**Md**599, 141**A**334. (3) Plaintiff's deceased father's executor may be made party defendant where necessary to take away stock from estate. 154**Md** 599, 141**A**334.

486–60½–New. The court does not disregard general corporation laws or the Uniform Stock-Transfer Law by directing transfer on parol evidence. 161**La** 282, 108**S**483.

486–60⅓–New. Complaint held not to state cause of action against president of corporation. 87**Colo** 483, 289**P**366.

486–60¼–New. Complaint in possessory action held to state cause of action. 87 **Colo** 483, 289**P**366.

486–62 8**F(2d)**522.

486–63 174**Minn**219, 219**NW**82 (remedy at law held inadequate). [a] **Evidence held sufficient** to show contract between stockholders to take person into corporation on equal basis. 222**Ky**476, 1**SW** (2d)532 (number of shares to which plaintiff was entitled determined).

486–64 36**GaA**536, 137**SE**84, 92 [citCJ]; **TexCivA** 14**SW(2d)**292.

486–64½–New. The right to recover money paid on refusal to deliver a certificate is dependent on giving notice of election and demand. 8**F(2d)**522.

486–65 162**La**703, 111**S**66.

487–67 [b] **Laches of subscriber** held good defense, though not pleaded. 209 **Ky**719, 273**SW**483.

487–70½–New. Where a corporation wrongfully refused to issue certificates of stock, the fact that the stock was subject to pledge to another to secure a debt, and that plaintiff was not entitled to possession of a certificate, was no de-

fense to an action against the corporation for conversion. **TexCivA** 13**SW (2d)**708.

487–75 209**Ky**719, 273**SW**483, 484 [quot CJ].

487–76 209**Ky**719, 273**SW**483, 484 [quot CJ].

488–78½ [a] **In action for wrongful refusal** to exchange plaintiff's stock for stock of another class, it is error to instruct that plaintiff could recover highest market value of such other stock from date of failure to issue and time of trial. 39 **OklACR**338.

488–79 [b] **Stockholder is not entitled to damages** for depreciation in value during time stock was withheld without allegation and proof that he contemplated selling. 49**Nev**80, 237**P**377.

488–82 [c] **For wrongful refusal** to issue certificate of another class of stock in exchange for plaintiff's stock, measure of damages is difference in value between value of plaintiff's stock and other class of stock. 39 **OklACR**338.

488–85 [b]. 238**Mich**464, 213**NW**859; 238**Mich**476, 213**NW**863.

488–87 **TexCommnA** 15**SW(2d)**550.

488–87½–New. To estop an owner of a stock certificate, after loss thereof, it must appear that negligence was the proximate cause of the acquisition of the certificate by another, and the loser must have anticipated that the finder would probably transfer the certificate. **TexCommnA** 15**SW(2d)**550 (original pledgee, if negligent in losing stock, is not estopped by negligence against another to whom pledgor repledged after finder returned it to pledgor).

489–88 238**Mich**464, 213**NW**859, 862 [citCyclperBird.J]; 238**Mich**476, 213**NW** 863, 864 [citCyclperBird,J]. [a] **Evidence held sufficient** to make prima facie case entitling heirs of owner of lost stock to have stock issued to them. 160 **La**422, 107**S**291.

489–93 [c] (6) Bond need not be signed by surety. 170**La**1092, 129**S**647. (7) Where value of lost corporate stock is problematical, requiring bond for their par value is proper. 170**La**1092, 129**S** 647. [i] 170**La**1092, 129**S**647.

489–94 10**LaA**676, 120**S**893 (bond must be given).

490–1 216**Ala**216, 113**S**61. [a] **Stock will be cancelled without restitution** for legal services claimed to have been given for stock where willfully caused to be issued by attorneys without authority in open fight for corporate control. 172 **Minn**110, 215**NW**192.

490–2 216**Ala**216, 113**S**61; 30 **OhA**161, 164**NE**641.

490–3 15**DelCh**183, 133**A**698; 56**ND**908, 219**NW**778 (stock issued to makers of notes, purchasers of which took stock as security without notice, may not be canceled for alleged fraud in issuance).

490–4 15**DelCh**431, 141**A**277 (issued without sufficient consideration). [c] **Purchaser of stock issued in first instance to promoters** and returned by them to corporation cannot sue in corporation's name to cancel stock. **Del** 141**A**197. [d] **Action to cancel stock issued to organizers of corporations.**–56 **ND**908, 219**NW**778 (sufficiency of evidence). [e] **Corporation suing to cancel sale of treasury stock** must restore or offer to restore every thing of value it received from other party. **CalA** 286**P** 165(4thcase).

490–5 See also 85**Colo** 419, 276**P**972. [a] **Action for wrongful cancellation** of club membership certificates. 339 **Ill** 426, 171**NE**514 (procedure).

491–7½–New. The board of directors has no power to cancel stock issued. 22 **F(2d)**779.

491–7¾–New. Where the owner has mingled lawful and unlawful stock, the burden is on him to show which is valid. 15**DelCh**209, 135**A**486.

491–7¾–New. If one has lawfully and unlawfully acquired stock, and he sells the unlawful, an equal amount of the lawful may be cancelled. 15**DelCh**209, 135**A**486.

491–14 259**Mass**162, 156**NE**7; 239**Mich** 563, 215**NW**1.

492–27 35**GaA**114, 132**SE**396, 398 [quot CJ].

493–33½–New. Other transactions not amounting to reduction of capital. **BC** [1930] 2**DomLR**961.

493–37 See also 172**Minn**334, 215**NW** 428, 55**ALR**325.

493–42 [a] **Amendment increasing stock is fundamental.**–239**Mich**563, 215 **NW**1.

495–65 196**Cal**468, 238**P**703 (it is only capital stock in strict sense that cannot be withdrawn or divided without violating constitutional provision); 99**NJEq** 543, 133**A**857.

495–68 317**Mo** 1028, 298**SW**91, 97 [cit CJ] 56**ALR**1276; 123 **Or**208, 261**P**686; 289**Pa**233, 137**A**235.

496–72 168**Ga**145, 147**SE**102.

496–73 239**Mich**563, 215**NW**1.

496–74½–New. Power and authority to apply for amendments to the charter by a vote of the majority of the stock as conferred in the original charter does not authorize the grant of power to increase the capital stock. 168**Ga**145, 147 **SE**102.

496–75 148**Md**90, 129**A**22 (wisdom of increasing stock is matter of internal regulation and beyond control of public service commission).

496–76½–New. nor to reduce capital stock. 289**Pa**233, 137**A**235.

496–77 [d] **Compliance with Blue Sky Law** is not necessary by domestic corporation before receiving subscriptions from stockholders for their proportionate share of new stock. 20 **OhA**51, 153 **NE**144.

496–81 [d] 123 **Or**208, 261**P**686.

497–86 [e] **In computing fee** for filing certificate of amendment, only number of shares authorized by amendment is to be considered. 121 **OhSt**329, 168**NE**842.

498–96 44**Philippine**469.

499–11 192**Wis**595, 213**NW**298.

499–12 196**Wis**1, 220**NW**201.

500–28 196**Cal** 453, 238**P**697, 44**ALR**1; 208**Ky**414, 271**SW**577.

501–30 196**Cal** 468, 238**P**703 (amount by which capital stock is reduced is properly carried to surplus).

501–31 196**Cal** 453, 238**P**697, 44**ALR**1.

501–31½–New. Such distribution of some portion of its capital assets among its stockholders does not necessarily and of itself violate a constitutional provision limiting consideration for the issue of stock to money, labor, or property. 196**Cal** 453, 238**P**697, 44**ALR**1.

501–31¾–New. It is the duty of the commissioner of corporations under the provisions of the corporate securities acts in some jurisdictions to entertain, file, consider, and determine a corporation's application for permission to distribute to its stockholders specified a sum out of its surplus money and property on hand. 196**Cal**453, 238**P**697, 44 **ALR**1.

501–31¾–New. Where such surplus had been created by reducing its capital stock by reducing the par valuation of shares pursuant to the statute and after compliance with the requirements of law therein provided. 196**Cal** 453, 238 **P**697, 44**ALR**1.

501–39½–New. In an action by preferred stockholders for damages for failure to issue to them the then pro rata share of the stock dividend, refusal to require an amendment of the declaration to allege true ownership of the stock was not error. 147**Va**509, 137**SE**620, 52**ALR**213.

501–39¾–New. Preferred stockholders having the right to the issue of stock are entitled to relief in equity or to damages for breach of contract. 147**Va**509, 137**SE**620, 52**ALR**213.

501–39¾–New. The date of delivery of the stock dividend is the proper date for fixing the measure of damages for failure to issue shares to preferred stockholders. 147**Va**509, 137**SE**620, 52**ALR** 213.

502–47 172**Minn**334, 215**NW**428, 55**ALR** 325.

502–55 263**Mass**160, 160**NE**539.

504–84 253**Mass**130, 148**NE**609.

504–90½–New. A minority stockholder who did all that he could to have litigation started promptly to set aside an illegal increase of stock is not guilty of laches. 239**Mich**563, 215**NW**1.

504–90¾–New. Delay in bringing such suit is not very important where the corporation was not prejudiced thereby. 239**Mich**563, 215**NW**1.

505–11 327 **Ill** 574, 158**NE**857, 57**ALR** 664 (held not to deprive railroad corporation engaged in interstate commerce of due process of law); 320**Mo** 908, 8**SW (2d)**970 (statute construed as to no par value stock).

505–12 88 **IndA**513, 164**NE**717 (basis of fee); 10**PaDist&Co** 489. [a] (1) 10 **PaDist&Co** 659. [a] (5) Question of valuation of no par stock of domestic corporation held matter of state statutes only. 290**Pa**380, 138**A**915. (6) Valuing no par stock at one hundred dollars per share held not error in view of Act July 12, 1919 § 11. 290**Pa**380, 138**A**915. (7) Act of April 20, 1927 revising laws relating to bonus held prospective only. 290 **Pa**380, 138**A**915.

507–19 229**Ky**556, 17**SW(2d)**722.

507–21 See also 149**SC**8, 146**SE**612. [b] **Before date specified in agreement** attempt to redeem stock by corporation is ineffective. 126**Misc**457, 214**NYS**53 (founder's stock). [c] **Where certificate authorizes redemption by majority vote of stockholders,** attempt by board of directors to redeem is ineffective. 126**Misc** 457, 214**NYS**53 (founder's stock). [d] **Complaint** alleging corporation's refusal to declare dividend or redeem stock stated cause of action as showing contractual obligation to redeem. 229**App Div**174, 241**NYS**250.

507–24 **NJCh** 149**A**817.

507–25 See also 190**NC**655, 130**SE**545, 546 [citCJ]. But see **NJCh** 149**A**817.

507–28½–New. Where stock is to be purchased for retirement each stockholder is entitled to an opportunity of selling to a corporation his holdings on a pro rata basis. 98**NJEq**326, 129**A**244, 44**ALR**60.

507–28¼–New. Purchaser of stock for retirement, on basis other than pro rata holding, may be enjoined. 98**NJEq**326, 129**A**244, 44**ALR**60.

507–28¾–New. Under the Canadian Loan Companies Act the holder of a debenture stock certificate in a loan company cannot compel the company to redeem it in a proceeding by the company to increase the amount of money it may receive upon deposit. **Ont** [1929] 3 **DomLR**405.

507–29 78**CalA**29, 247**P**600; 28**Hawaii** 528; 34 **OhA**361, 170**NE**371 (rights of common and preferred stockholders are controlled by contract); **TexCommnA** 1 **SW(2d)**873, 875 [quotCJ].

507–32 203 **Iowa**792, 206**NW**586; 166 **Minn**346, 207**NW**737, 738, 46**ALR**1167 [citCJ].

507–33 166**Minn**346, 207**NW**737, 738, 46 **ALR**1167 [citCJ].

508–37 150**Va**276, 142**SE**376, 377 [quot CJ]; 153**Va**283, 149**SE**487.

508–38 124**Kan**132, 257**P**746; 166**Minn** 346, 207**NW**737, 738, 46**ALR**1167 [cit CJ]; 19 **OhA**243; 124 **Or**379, 264**P**452, 453 [citCJ].

508–39 124**Kan**132, 134, 257**P**746 [quot CJ]; 166**Minn**346, 207**NW**737, 738, 46 **ALR**1167 [citCJ].

508–40 166**Minn**346, 207**NW**737, 738, 46**ALR**1167[citCJ].

508–41 124**Kan**132, 134, 257**P**746 [quot CJ]; **NJSup** 132**A**494; 53**SD**546, 221 **NW**264. [d] (2) Contract held for purchase of shares and not subscription. 166**Minn**346, 207**NW**737, 46**ALR**1167.

509–42 124**Kan**132, 134, 257**P**746 [quot CJ].

509–43 [a] **Recovery by corporation for breach of contract of sale of stock** must be had under stacute relative to breach of contract where title has not vested in buyer. 53**SD**546, 221**NW**264.

509–48½–New. Where stock in a corporation is delivered to a person who gives his notes therefor and at the same time enters into a contract with the corporation whereby he has an option to take the stock within six months or leave it, the transaction constitutes an option rather than an agreement to repurchase. 124**Kan**132, 257**P**746.

510–56½–New. Right to permit employees to subscribe for stock. 210**App Div**753, 206**NYS**834.

510–67 36F(2d)617; 181Ark750, 27SW (2d)505; 78CalA29, 247P600; 53ND 244, 205NW681. [a] **Contract for sale of stock which corporation is without legal power to issue** (1) is void for lack of consideration moving to purchaser. 35GaA635, 133SE634. (2) That corporation subsequently obtains legal authority for issuance of stock does not render contract binding on purchaser in absence of conduct on his part amounting to ratification. 35GaA635, 133SE634.

511–68 248 IllA579.

511–69½–New. A corporation may agree to sell stock certificates returned to it. 219AppDiv634, 221NYS77.

511–69¾–New. That subscribers were unable to meet the balance due on stock subscriptions does not affect bona fides of their subscriptions. 36Wyo 413, 256 P84.

511–69¼–New. That a subscriber for stock in a corporation must pay the amount of his subscription is a fundamental principle of law. 222Ky753, 2 SW(2d)367.

511–70 16F(2d)253; Or 286P546.

512–78 235 IllA370; 255 IllA101 (contract liberally construed); 135Misc676, 241NYS352; 127 Or639, 271P983; Tex CommnA 3SW(2d)1109, 61ALR1459.

513–81 235 IllA370; 232Ky87, 22SW (2d)444 (whether date of signing of stock subscription is before or after filing of articles of incorporation is immaterial). [g] **Mere fact of incorporation** is not acceptance. 28Hawaii32.

514–82 170Minn353, 212NW587; Ont [1927] 3DomLR797.

515–92 28Hawaii32, 34 [citCJ]; 235 IllA370; 241Mich226, 217NW54; 53ND 244, 205NW681. [c] **Mere fact of incorporation** is not such acceptance. 28 Hawaii32.

515–95 28Hawaii32, 34 [citCJ].

516–97 233Ky206, 25SW(2d)379.

516–7 Ont [1925] 3DomLR488 (holding that, in absence of allotment, corporation has no right to negotiate note given therefor).

517–12 Ont [1927] 3DomLR797.

517–15 [a] **Unauthorized negotiation of note by corporation in absence of allotment** will estop it from denying that it had accepted offer of subscription. Ont [1925] 3DomLR488.

518–23½–New. In Philippines subscription contract for shares in corporation represented in contract to have stated capital stock is void where capital had been increased. 51Philippine 310.

518–25 137Misc790, 244NYS502. [a] (4) 128Kan576, 279P7(2dcase). [c] **Subscription insufficient to charge promoters or incorporators.**–235 IllA89.

519–42 36Wyo 413, 256P84.

520–44 241 IllA454, 462 [citCJ].

520–49 [c] **Commissions.**–(1) Contract must contain statutory words referring to commissions of agent. 192NC620, 135SE616. (2) Fact that contract was taken by citizen serving without compensation is immaterial where corporation acting as agent received commission on sale. 192NC620, 135SE616. (3) Statute is applicable though subscription was not obtained by fraud (192NC 620, 135SE616) (4) and though stock has none of characteristics of "Blue Sky" stock (192NC620, 135SE616).

524–89 22 OhA146, 154NE47.

524–92 TexCivA 290SW810, 811 [quot CJ].

524–93 16F(2d)253, 255 [citCJ].

524–94 TexCivA 290SW810, 811 [quot CJ].

525–95 TexCivA 290SW810, 811 [quot CJ].

525–97 107Conn216, 140A477.

526–99½–New. Where corporation, by wrongfully transferring a note given for shares not alloted, is estopped from denying acceptance of an offer, the subscriber has the option of either compelling allotment or revoking offer. Ont [1925] 3DomLR488.

526–12 107Conn216, 140A477, 480 [cit CJ].

527–25 212Ky163, 278SW615 (signature of each person subscribing indorses organization papers, giving each subsequent subscriber right to rely on genuineness of signatures and of subscriptions); 8PaDist&Co 301; TexCommnA 3SW(2d)1109, 61ALR1459.

528–40 [a] 94CalA200, 270P1016.

529–41 107Conn216, 140A477, 480 [quotCJ].

529–44 233Ky55, 24SW(2d)925.

529–50 106Conn41, 137A159; 199 Ind 166, 154NE480.

529–51 53ND244, 205NW681.

529–52 Fla 126S142 (separate or secret agreement).

530–55 199 Ind166, 154NE480.

530–63 106Conn41, 137A159.

530–64 6LaA407.

530–69 245Mich37, 222NW162.

531–70 [1926] CanSC412, [1926] 3 DomLR612.

531–72 246 IllA374; 245Mich37, 222 NW162; MoA 256SW163.

532–74 TexCivA 16SW(2d)307.

533–81⅓ 245Mich37, 222NW162.

534–88 106Conn41, 137A159.

534–91 [a] (1) 253Mass79, 148NE374. (2) 106Conn41, 137A159. (3) Agreement that certificate be issued upon final payment of stock subscription held entire and indivisible. 125Misc 521, 211NYS405. (4) Contract of employment with provision to set aside percentage of stock for employee payable from dividends on stock. 253Mass 79, 148NE374. [i] **Series of subscriptions construed as whole.**–68Utah421, 250P1033. [j] **Intention of parties.**–149Va274, 141SE240. [k] **Subscription contract alone can determine agreement of parties** to subscribe for stock. 36 F(2d)617. [l] **Contract for preferred stock** is satisfied by issuance of shares carrying right to preferred dividend but without voting power. Ont [1929] 3DomLR558.

535–95 [d] **Contract to purchase and not subscription,** though "subscribe" is used in contract. 166Minn346, 207NW 737, 46ALR1167. [e] **Contract of sale and not subscription.**–53SD546, 221NW 264.

535–95½–New. A promise of the seller of stock to place the stock in escrow for the buyer and a promise of the buyer to furnish securities for payment of the balance of the stock held concurrent. 81Colo 310, 255P985.

535–95⅓–New. Nonperformance of concurrent promises in a contract for sale of stock prevented either party from recovering for breach by the other party. 81Colo 310, 255P985.

535–96 16F(2d)253, 255 [citCJ].

535–96½–New. Law of state in which contract for sale of stock was executed controls rights of parties. 135Misc676, 241NYS352.

535–99 Fla 126S142; 115Nebr848, 215 NW140; TexCivA 16SW(2d)307 (contract construed in light of statute); 144 Wash33, 256P74.

535–4 115Nebr848, 215NW140.

536–5 Fla 126S142.

537–17 137Misc790, 244NYS502.

538–36 197Cal 245, 239P1086; 136 Wash462, 240P900.

538–39 136Wash462, 240P900. [e] **Such condition is implied part of contract.**–136Wash462, 240P900.

541–41 See also 206Cal 98, 272P1042.

542–46½–New. Where common stock was held in the treasury ready for subscribers on payment, a subscriber could not complain that the stock was not transferred to a syndicate. 32F(2d) 202.

542–52 212Ky197, 278SW607; 68Utah 421, 250P1033, 1041 [quotCJ]. [a] **Subscription cannot be avoided** on the ground that other subscriptions total amount required or agreed upon. 212 Ky197, 278SW607.

544–76 68Utah421, 250P1033. [a] **That subsequent subscriptions were obtained by unauthorized persons** does not vitiate subscription in question. 68 Utah421, 250P1033.

545–96 [c] (11) Mere attendance at meetings prior to organization by person who took no active part in organization and did not assume any official connection with corporation is not ground for estoppel. 136Wash462, 240 P900. (12) By participation in meetings preliminary to organization of corporation. 136Wash462, 240P900.

547–6 [a] (1) 44Philippine755. (8) Statute prohibiting issuing of certificates till corporation has received par value thereof is not violated by taking subscription payable wholly or partly by notes where stock is not to be issued till full payment made. 203 Iowa 792, 206NW586. (9) Subscriber is liable on such subscription, though, under such statute, no certificate can be issued to him and he cannot be deemed stockholder till payment has been made in full, and notwithstanding statute declaring stockholder's liability for unpaid installments on stock "owned by him." 203 Iowa792, 206NW586.

549–21 25F(2d)884 (construing Massachusetts statute); 172Ark193, 287SW 1017; 15DelCh431, 141A277.

549–22 181Ark748, 27SW(2d)515.

549–23 [c] **Where seller agrees to deliver stock and purchaser agrees to redeliver such stock to be held as collateral security** there is no failure of consideration for the notes when the respective undertakings were not performed. 224 IllA359.

549–25½–New. A note for corporate stock is not utterly void, but may be valid, where interest of an innocent purchaser for value intervenes. Tex CommnA 299SW848.

549–25⅓–New. Mutual exchange of a note for corporate stock constitutes a defense only when the intention of the purchaser and the corporation was that the note was in exchange for stock and a subsequent purchaser for value knew of such intention and facts in evidence thereof. TexCommnA 299SW848.

549–25¼–New. The statute requiring payment in cash does not preclude the maker of a note from showing conditional delivery of the note. 52SD324, 217NW393.

549–25⅕–New. Note held not illegal because part thereof was given in full payment of stock which corporation was only authorized to sell when 40 per cent of purchase price was paid in cash. CalA 284P466.

549–34 TexCivA 19SW(2d)445.

549–34½–New. Corporation could not accept payment for stock subscribed and issue certificate to third person, simply because he liquidated purchaser's indebtedness to another. 235Ky 296, 31SW(2d)373.

550–51 32F(2d)202 (no defense); 200 Iowa463, 203NW687; 128Kan576, 279 P7(2dcase); 6LaA407; 166Minn346, 207NW737, 46ALR1167; 125Misc521, 211NYS405 (dictum); 19 OhA243. See also 53ND244, 205NW681.

550–53 166Minn346, 207NW737, 46 ALR1167.

550–53½–New. Where there is an offer by a creditor of the corporation to accept shares in settlement in lieu of money, a tender of the shares by the corporation is necessary to effect an agreement which would be binding on the creditor. 123 Or208, 261P686.

550–53⅓–New. Failure to issue stock does not constitute a failure of consideration for a note given for the subscription. 124 Or379, 264P452.

551–54 Wis 228NW478. [a] **Technical breach of contract as to delivery of stock** does not relieve subscribers from contemporaneous performance by payment. Wis 228NW478.

551–56 53ND244, 205NW681, 682 [quot CJ].

551–58 166Minn346, 207NW737, 46 ALR1167.

551–59 [b] **Estoppel to refuse stock tendered.**–87CalA165, 261P739.

551–64 23F(2d)76; 220 ApoDiv454, 221NYS653. See also 164La109, 113S 784. But see 249 IllA109. [a] (3) Corporation has no power to bind itself to sell stock in excess of its authorized capitalization as respects broker's right to commissions. TexCivA 19SW(2d) 605. [b] **Effect of stock salesman's false representations.**–84CalA635, 258P 670. [c] **Corporation with seven direc-**

tors cannot recover commissions paid to salesmen merely because they were directors. 84**CalA**635, 258**P**670. [d] **Actions to recover compensation.**–**TexCivA** 19**SW(2d)**829.

552–66 153**Va**283, 149**SE**487.

552–68½–New. Promoter is impliedly obligated during life of contract with agent for sale of stock, not to do anything to deprive stock of market value. **TexCivA** 25**SW(2d)**678.

552–68¼–New. Where plaintiff contracted to sell certain oil stock for defendant and plaintiff's agent had not sold amount required within stipulated period evidence in action on contract held to raise issue of plaintiff's breach. **TexCivA** 25**SW(2d)**678.

553–90 233**Ky**19, 24**SW(2d)**903. [a] (3) Where subscribers to corporate stock signed and delivered subscription to promoters in blank loss if any resulting to third party from promoter's filling in blank beyond authority must fall on subscriber. 233**Ky**19, 24**SW(2d)**903.

554–91 233**Ky**19, 24**SW(2d)**903.

555–9½–New. Public policy does not forbid division of capital stock of corporation among its stockholders. 154 **Wash**34, 280**P**939.

556–20 22 **OhA**146, 154**NE**47.

556–21 153**Va**283, 149**SE**487.

556–26 [b] (13) Clause "the hotel to cost not less than," inserted by subscriber, constituted condition subsequent or subscription on special terms. 34**GaA**56, 128**SE**212.

558–35 127 **Or**639, 271**P**983. [a] (17) Others. 32**F(2d)**202.

560–44 127 **Or**639, 271**P**983.

561–53 127 **Or**639, 271**P**983.

562–68 36**F(2d)**617; 165**Ga**598, 141**SE** 793 (stipulation that whole amount of capital must be subscribed before subscriber may be held liable); 127 **Or**639, 271**P**983.

564–78 36**Wyo** 413, 256**P**84.

564–79 36**Wyo** 413, 256**P**84.

565–85½–New. A provision that first payment be considered liquidated damages in case of default permits the purchaser to decline making further payments. 243**Mich**611, 220**NW**771.

566–95½–New. Where a subscription by a corporation is not binding, the oral agreement of other parties to take up the stock is valid and sufficient compliance with the condition that all stock was to be subscribed. 37**Wyo** 201, 259**P**1053.

566–2 68**Utah**421, 250**P**1033.

566–6 36**F(2d)**617; 22 **OhA**146, 154**NE** 47.

567–8 200 **Iowa**463, 203**NW**687.

567–10 56**ND**9, 215**NW**865; 127 **Or**639, 271**P**983.

569–29 98**NJEq**326, 129**A**244, 44**ALR**60. [a] (9) Stipulation for payment from first dividends. 51**Philippine**601.

570–31 93**CalA**738, 270**P**286.

570–33 51**Philippine**601.

570–34 8**F(2d)**716; 222**Ky**320, 300**SW** 872.

571–39 284**Pa**380, 131**A**191.

573–67 **Fla** 126**S**142.

573–68 **Fla** 126**S**142.

574–75 **Mass** 167**NE**765 (failure of former employees to pay installments on their subscriptions after termination of employment not relieving them from obligation).

574–76½–New. Under a contract giving a corporation an option to cancel or sell stock in case of nonpayment by a certain date, time for payment is of the essence. 264**Mass**431, 162**NE**902.

575–88 See also 248 **IllA**152. [d] **In Philippines.**–51**Philippine**601.

575–93 284**Pa**380, 131**A**191.

575–94 75**CalA**609, 243**P**41; 82**Colo** 399, 260**P**1019; 86**Mont**500, 284**P**267 (contract not enforced after corporation has become insolvent); 284**Pa**380, 131**A** 191; **TexCivA** 4**SW(2d)**662. [g] **Where stock is repurchased,** it becomes part of company's property and is presumed to be held as asset of corporation for sale. 82**Colo** 399, 260**P**1019. [h] **Complaint held not demurrable** in action to enforce obligation of corporation to repurchase stock. 86**Mont**500, 284**P**267. [i] **Insolvency of corporation will not prevent enforcement** of its agreement to repurchase stock if creditors and other stockholders will not be prejudiced. 86 **Mont**500, 284**P**267.

576–96 [a] 103**Conn**380, 130**A**383 (agreement to repurchase held ultra vires and illegal as not within provisions of statute providing methods by which corporation may hold its own stock).

577–1 **Or** 286**P**546.

577–2 [d] **Provision for repurchase "at any time"** considered in determining what is reasonable time. **CalA** 285**P**868 (six years delay not fatal).

577–3½–New. Where a purchaser seeks rescission of sale, and the action is based on a by-law requiring the corporation to redeem stock at par on condition subsequent, he must plead and prove that his right of action comes within the terms of the by-law. 139 **Okl** 38, 280**P**1072(1stcase).

577–5 284**Pa**380, 131**A**191.

577–5½–New. After such rescission by purchase, it is too late for the corporation to ratify. 284**Pa**380, 131**A**191.

578–7 153**Va**283, 149**SE**487.

578–9 101**CalA**94, 281**P**396 (allegations sufficient as to value of stock).

578–11 128**Misc**690, 219**NYS**252.

579–13 **Fla** 126**S**142.

579–14 153**Va**283, 149**SE**487.

579–18 **Wis** 233**NW**79.

579–20 14**F(2d)**466. [b] 145**Wash**66, 258**P**1035, 54**ALR**1382.

580–22 162**La**73, 110**S**93; 88**PaSuper** 394. See also 177**Ark**832, 9**SW(2d)**310. But see 42**F(2d)**37; 249**NY**406, 164**NE** 333. [c] (4) Satisfaction of contract may be valid consideration for original notes given by defendant and associates for repurchase of stock and for all renewal notes. 177**Ark**832, 9**SW (2d)**310. (5) Official and financial interest of director and treasurer of corporation has been held sufficient consideration. 109**Conn**593, 145**A**58. [e] (3) Contract to repurchase on specified day has been construed to make time of essence of contract. 56**ND**485, 217 **NW**848. [f] (2) Failure to return option to purchaser did not make a new contract superseding the option. **Wis** 233**NW**79. (3) Asking stock owner to state price for his stock does not waive option to purchase it. **Wis** 233**NW**79. [g] (3) Delay must be unreasonable in order to bar rights under contract where no time is fixed. 196**Wis**275, 220**NW** 538 (delay of six years held not unreasonable). [j] (2) Complaint held sufficient against objection to introduction of evidence. 56**ND**485, 217**NW**848. (3) Evidence held sufficient to sustain judgment for plaintiff. 56**ND**485, 217 **NW**848. [k] **Solvency of corporation must be shown** at time performance of agreement to repurchase is sought, in order to enforce it. 247**Mich**104, 225**NW** 528. [l] **Pleadings sufficient against general demurrer.**–**TexCivA** 17**SW(2d)** 113(2dcase). [m] **Purchase of stock held to be within reasonable time** under agreement. **Wis** 233**NW**79.

581–23 322**Mo**928, 19**SW(2d)**281; 200 **Wis**103, 227**NW**265 (option held not exercised within reasonable time). But see 88**PaSuper**394; 196**Wis**275, 220**NW** 538. [c] **Tender of notes belonging to corporation by one agreeing to repurchase** does not comply with contract requiring payment in cash or in secured lien notes to be approved by parties. **TexCivA** 17**SW(2d)**113(2dcase).

581–24 8**F(2d)**716. [a] (2) Written contract guaranteeing dividends is presumptive evidence of consideration. 72 **CalA**367, 237**P**550. [b] (3) Agreement held original contract and not guaranty. 72**CalA**367, 237**P**550.

581–25 77**Mont**539, 252**P**368.

581–25½–New. Where an underwriting agreement authorized syndicate managers to borrow money for payment of corporate stock subscribed for by members, and the managers executed a note to the corporation for stock and deposited an agreement with the trustee as collateral for payment of the note in which certificates of participation were issued, and on nonpayment of sufficient subscriptions to extinguish the note the corporation executed a note to a third party secured by such managers' note, from the proceeds of which the participation certificates were paid, a substituted trustee was held entitled to recover on the stock subscription of a member of the underwriting agreement the amount of the third party's loan with interest. 30**F(2d)**505.

581–27 239**Mich**101, 214**NW**142.

581–31 **TexCivA** 26**SW(2d)**351.

582–34 [b] 75**CalA**609, 243**P**41.

582–37 56**AppDC**380, 15**F(2d)**894.

582–38 177**Ark**190, 5**SW(2d)**937; 115 **Okl** 97, 241**P**1097; **TexCivA** 293**SW**341.

583–43 115 **Okl** 97, 241**P**1097.

583–45½–New. The rule that a subscription to stock constitutes a sufficient consideration for a note or promise to pay therefor does not apply to a mere proposal to buy accompanied by a note. 192**Wis**124, 212**NW**280.

583–45¼–New. A collateral note agreement signed by a stock subscriber has been held to require a signature on the note, following a provision giving the corporation option to require further collateral. 150**Va**73, 142**SE**351.

583–45¼–New. A note for a stockholder's proportion of a voluntary assessment does not violate the constitutional provision against issue of stock except for money or property. 179**Ark**615, 17 **SW(2d)**324.

584–51 132 **Or**515, 286**P**558 (as to whether payment of entire amount due on note was intended to be conditional on delivery of stock at time of payment).

584–51½–New. Directors are without power to cancel a note given in payment for shares. 22**F(2d)**779.

584–52 68**Utah**421, 250**P**1033.

584–53 **CalA** 272**P**600.

585–58 208**Cal** 205, 281**P**50 (statute requiring twenty-five per cent of purchase price be paid in cash); **CalA** 272**P** 600.

585–59 [f] **Evidence sufficient for jury.**–**MoA** 30**SW(2d)**638.

585–60 [c] 177**Ark**190, 5**SW(2d)**937 (whether note was given for stock).

585–61 206 **Iowa**100, 220**NW**42 (evidence held insufficient to go to jury).

585–62 208**Cal** 205, 281**P**50; **MoA** 30 **SW(2d)**638. [g] **Evidence held insufficient.**–192**Wis**124, 212**NW**280.

586–63 200 **Iowa**463, 203**NW**687 (where purchaser sold stock and made settlement of all claims against corporation, defense of fraud not available in action on note given for stock); **MoA** 30 **SW(2d)**638.

586–65 200 **Iowa**463, 203**NW**687 (evidence held not to show payment by resale of stock to corporation).

586–72 248**Mich**68, 226**NW**876. [a] (2) See also 68**Utah**421, 250**P**1033.

587–74½–New. A recital in a subscription that the first payment should be liquidated damages in the event of default relieves the purchaser from obligation on a note. 243**Mich**611, 220**NW**771.

587–78 200 **Iowa**463, 203**NW**687; 68 **Utah**421, 250**P**1033, 1041 [citCJ]; 34 **Wyo** 495, 245**P**304, 51**ALR**13.

588–82 200 **Iowa**463, 203**NW**687.

588–90 35**F(2d)**649 (note executed in violation of statute).

588–93 **CalA** 286**P**714.

588–94 22 **OhA**146, 154**NE**47; 143**Va**51, 129**SE**220; 153**Va**1, 149**SE**528. See also 76**CalA**785, 246**P**121; 77**CalA**18, 246**P** 126. [c] **Fraud is complete and full defense** to action to recover on subscription to stock. 19 **OhA**243. [d] **Party defrauded in subscription contract** may rescind or await suit and defend for fraud. 75**CalA**785, 246**P**121.

589–95 22 **OhA**146, 154**NE**47. But see 76**CalA**785, 246**P**121.

589–97½–New. Where there is no evidence of entry on the corporation's book, purchaser may, in an action against him on notes given for stock, defend on the ground of fraud. **Man** [1927] 2**DomLR**749, [1927] 1**WestWkly** 902.

589–98 [a] **Plaintiff must have suffered legal injury** in order to recover in suit for rescission. **TexCommnA** 25**SW(2d)** 313 (evidence held to show legal injury).

589–1 317 **Ill** 165, 147**NE**785; 200 **Iowa**463, 203**NW**687. Contra **Ont** [1925] 3**DomLR**725. [d] **Questions held for jury.**–39**F(2d)**297.

589–2 196**NC**462, 146**SE**689.

589–4 But see 200 **Iowa**463, 203**NW**687.

590–5 200 **Iowa**463, 203**NW**687 (sale

back to corporation held ratification).

590–6 [a] **In determining whether plaintiff sustained any damage** in suit for rescission of sale of quarter interest in shares, value of remainder interest as compared with price received must be determined as of time of sale and not that of life tenant's death. **TexCommnA** 25**SW(2d)**313.

590–12 25**F(2d)**614; 36**F(2d)**595; 200 **Iowa**463, 203**NW**687; 203 **Iowa**792, 206 **NW**586; 163**La**426, 112**S**34; 242**Mich** 481, 219**NW**705 (corporation is necessary party); 127 **Or**639, 271**P**983; 143 **Va**51, 129**SE**220 (dictum); **Ont** [1925] 3**DomLR**725 (only remedy, if available). [e] **Rescission does not amount to sale to corporation** of stock purchased from it under fraudulent transaction. 128 **Kan**390, 277**P**796.

592–15½–New. An employee's breach of employment contract held not to prevent rescission for fraud of stock purchase constituting a part of the same transaction. 131**Misc**779, 227**NYS**412.

592–18 200 **Iowa**463, 203**NW**687 (must rescind to defend on ground of fraud in action on note, though no certificate delivered); 203 **Iowa**792, 206**NW**586; 163**La**426, 112**S**34; 233**Mich**577, 207**NW** 883.

592–21 33**F(2d)**997. [f] (2) Officers of corporation may be joined in action to rescind purchase induced by fraud of corporation and such officers. 254 **NY**216, 172**NE**475(1stcase). [i] **Allegations held sufficient** to set up defense of ratification. 131**Misc**779, 227**NYS**412.

593–22 227**Ky**323, 12**SW(2d)**852; 163 **La**426, 112**S**34. [j] **Questions for jury.** –203 **Iowa**333, 208**NW**726.

593–23 165**Ga**598, 141**SE**793 (petition improperly dismissed). [a] **Allegations held insufficient** to show prompt rescission. **Ala** 130**S**554.

594–25 But see 244**Mich**518, 221**NW**621.

594–29 [c] **Giving of renewal notes secured by mortgage** does not constitute waiver of original fraud where they were procured by reiteration of original false representations. 208 **Iowa**722, 217 **NW**239.

594–30 200 **Iowa**463, 203**NW**687; 122 **Kan**43, 251**P**429; 153**Va**1, 149**SE**528. [a] (22) Execution of repeated renewal notes given for price of stock. 200 **Iowa**1165, 206**NW**122. (23) Retention of dividends paid after discovery of fraud and institution of action to rescind constitutes reaffirmance of contract though stockholder claims to have accepted dividends as partial return of purchase price. 247**NY**486, 160**NE**924. [d] **Effect of acceptance of dividends paid cannot be changed** by notice by stockholder, not assented to by corporation, that he will take them as something else. 247**NY**486, 160**NE**924.

595–31 122**Kan**43, 251**P**429.

596–35 CalA 286**P**714; 203 **Iowa**792, 206**NW**586; 122**Kan**43, 251**P**429; 212 **Ky**163, 278**SW**615; 212**Ky**197, 278**SW** 607; 10**LaA**320, 120**S**531; 129**Misc**25, 220**NYS**711; 191**NC**710, 133**SE**85; 67 **Utah**90, 245**P**977, 46**ALR**466; 153**Va**1, 149**SE**528. But see **CalA** 286**P**1050. [a] (7) After corporation purchased property and two months after signing of articles subscriber is too late to question validity of subscription. 212**Ky**197, 278 **SW**607. [d] (5) Six months held not laches. 106**Conn**41, 137**A**159. (6) Purchaser held not guilty of laches. 163**La** 651, 112**S**518. (7) Where notice of rescission was given within one year from time of purchase and within several days after plaintiff discovered fraud not barred by laches. 93**CalA**261, 269**P**692.

597–36 67**Utah**90, 245**P**977, 46**ALR**466.

597–37 [a] **Evidence held sufficient** to show purchaser knew of fraudulent misrepresentation nearly year before suing to rescind. 129**Misc**25, 220**NYS**711.

597–40 67**Utah**90, 245**P**977, 46**ALR**466.

597–40½–New. In an action by receiver to recover purchase price of stock, defendant, relying on defense of fraud, must allege and prove the same degree of diligence as is requisite when the action is to enforce stockholder's liability. 164**Minn**507, 205**NW**436.

597–40½–New. Mere knowledge of fraud before receivership does not constitute laches. 25**F(2d)**614.

597–42 129**Misc**25, 220**NYS**711; 150**Va** 276, 142**SE**376. But see 25**F(2d)**614. [a] (1) But see 93**CalA**261, 269**P**692. (2) Offer to credit dividends on verdict in action to recover money paid for stock does not affect needed readjustment where corporation is insolvent and in hands of receiver. 247**NY**486, 160**NE** 924. (3) No issue of failure to return dividend is raised, where complaint alleged that plaintiff tendered shares of stock purchased and "every other thing of value received by him in connection with the sale," and such allegation was admitted by answer. 93**CalA**261, 269**P** 692. [l] **Not necessary to allege return of dividends** in action for cancellation of subscription contract. 106**Conn** 41, 137**A**159. [m] **Though certificate is held by subscriber's creditor as collateral,** unconditional tender of certificate is sufficient where creditor intervenes. 208 **Iowa**722, 217**NW**239. [n] **Where purchaser received stock before executing note** as part consideration therefor, he was not required first to return stock in order to defeat recovery on note. 127 **Or**308. 271**P**988.

598–43 10**LaA**795, 123**S**181(2dcase).

599–47 143**Va**51, 129**SE**220, 221 [citCJ].

599–48 200 **Iowa**1272, 206**NW**613.

599–49 215**Ky**695, 286**SW**984; 67**Utah** 90, 245**P**977, 46**ALR**466. [b] **Receiver may interpose** defense of equities of subsequent creditors. 67**Utah**90, 245**P**977, 46**ALR**466.

599–51 203 **Iowa**792, 206**NW**586, 594 [citCJ].

600–54 See also **Ont** [1925] 3**DomLR** 725 (court intimating rule if rescission was sought).

600–55 203 **Iowa**792, 206**NW**586, 594 [citCJ].

600–56 233**Mich**577, 207**NW**883, 884 [citCJ].

600–57 153**Va**1, 149**SE**528. [e] **Burden of proof,** in action to rescind for fraud, is on receiver and subsequent creditor to show latter became such before insolvency and appointment of receiver. 67**Utah**90, 245**P**977, 46**ALR**466. [f] **All essential elements of estoppel must appear.**–133 **Okl** 205, 271**P**1014.

601–58 [a] **In Oklahoma.**–133 **Okl**205, 271**P**1014.

601–60 25**F(2d)**614; 32 **OhA**284, 168 **NE**69 (separate action for cancellation of certificates may be maintained against receiver). [a] **To give subsequent creditors equities** over defrauded stockholder direct evidence of reliance on subscription is not essential, but facts and circumstances must appear in addition to fact that debts were incurred subsequent to subscription. 67**Utah**90, 245 **P**977, 46**ALR**466.

601–60½–New. In some jurisdictions a subscriber may plead fraud in defense of an action by the receiver of an insolvent corporation to recover on the contract for the benefit of corporate creditors unless corporate debts were contracted subsequent to the contract of subscription. 203 **Iowa**792, 206**NW**586.

601–60½–New. Such defense is not available where corporate debts were contracted subsequent to the contract of subscription and contract was not rescinded before application was made for the appointment of a receiver. 203 **Iowa** 792, 206**NW**586.

601–61 203 **Iowa**792, 206**NW**586.

602–62 203 **Iowa**792, 206**NW**586, 594 [citCyc].

602–63 203 **Iowa**792, 206**NW**586; 163 **La**651, 112**S**518, 520 [quotCJ].

602–64 [a] 153**Va**1, 149**SE**528.

602–65 163**La**651, 112**S**518.

602–67 212**Ky**163, 278**SW**615 [quotCJ].

602–68 25**F(2d)**614.

602–73 [d] (1) 19**F(2d)**97; **CalA** 286 **P**714.

603–74 76**CalA**785, 246**P**121; 77**CalA**18, 246**P**126; 77**CalA**381, 246**P**824; 163**La** 426, 112**S**34. [d] (1) 76**CalA**785, 246 **P**121; 77**CalA**18, 246**P**126; 66**Utah**1, 239**P**29.

603–75 129**Misc**25, 220**NYS**711. [b] 191**NC**710, 133**SE**85. [c] (2) Whether plaintiff was guilty of laches was held properly submitted to jury. 191**NC**710, 133**SE**85. [d] (1) 200 **Iowa**86, 204**NW** 233; 208 **Iowa**56, 221**NW**214; 191**NC** 710, 133**SE**85; 56**ND**786, 219**NW**472; **OhA** 154**NE**161; **TexCivA** 18**SW(2d)** 264. [e] (1) 235 **IllA**89; 129**Misc**25, 220**NYS**711; 300**Pa**389, 150**A**613; 68 **Utah**421, 250**P**1033. [h] (2) Defense of pari delicto on ground of failure of defendant to comply with statute requiring certain provision in contract held inapplicable. 191**NC**710, 133**SE**85. [i] **Directors who knew that part of money subscribed for shares was taken by promoter as fees,** but did not acquire knowledge till after stock was paid for, are not chargeable with fraud in procuring subscription. 235 **IllA**89. [j] **Preponderance of evidence only required** to establish fraud inducing subscription. **OhA** 154**NE**161. [k] **Instructions.**–191**NC**710, 133**SE**85. [l] **Question for jury** whether representations are fraudulent. 143**SC**505, 141**SE**732. [m] **Evidence inadmissible to show fraud.**–89**CalA**628, 265**P**378.

604–80 [e] **Prospectus must not make untrue statements** and must omit no facts affecting inducements held out. 163**La**426, 112**S**34.

604–83½–New. Not every representation will enable a subscriber to set up the defense that he was induced by fraud to sign a subscription for corporate stock. **Oh** 154**NE**161.

605–86 OhA 154**NE**161.

605–87 56**ND**786, 219**NW**472.

605–89 But see **CalA** 286**P**714.

605–90 76**CalA**785, 246**P**121; 77**CalA** 18, 246**P**126; 129**Misc**25, 220**NYS**711; **OhA** 154**NE**161.

606–92 [a] **Finding of reliance** supports conclusion of inducement. 106 **Conn**41, 137**A**159.

606–93 129**Misc**25, 220**NYS**711; 66 **Utah**1, 239**P**29.

606–96 208**Ky**575, 271**SW**682 (where president took mortgage to cover his advances, he was estopped to assert it against persons buying through his misrepresentations).

606–97 [a] (3) False statement that company had paid and was paying twelve per cent dividends is sufficient defense to action on note for balance of subscription. 76**CalA**321, 244**P**958.

607–2 76**CalA**785, 246**P**121.

607–3 106**Conn**41, 137**A**159.

607–4 20 **OhA**156, 153**NE**183 (nondisclosure of secret arrangement with promoters).

607–7½–New. A representation that the corporation is organized under the banking law is one of fact. 66**Utah**1, 239**P**29.

607–7½–New. Representation that a corporation had adopted a definite and regular dividend policy does not justify rescission. 129**Misc**25, 220**NYS**711.

607–8 153**Va**1, 149**SE**528.

607–9 129**Misc**25, 220**NYS**711; 300**Pa** 389, 150**A**613. [b] (13) Statements that corporation, when organized, would invest its funds largely in securities offered in Pacific Coast territory. 94 **CalA**200, 270**P**1016.

608–10 CalA 286**P**1050; 202 **Iowa**333, 208**NW**726; **TexCivA** 18**SW(2d)**264. [a] (2) 89**CalA**628, 265**P**378.

609–13 76**CalA**18, 246**P**126; 94**CalA**200, 270**P**1016; **Mass** 169**NE**783; 153**Va**283, 149**SE**487; 34**Wyo** 495, 245**P**304, 51**ALR** 13; 36**Wyo** 406, 256**P**84. [a] (6) See also **ND** 196**NW**953. [c] **Where part of series of closely interwoven statements relate to future,** entire series of representations must be considered in determining question of fraud. 208 **Iowa** 722, 217**NW**239.

609–14 76**CalA**785, 246**P**121; 76**CalA** 18, 246**P**126.

609–15 76**CalA**785, 246**P**121.

610–16 [d] **Representation that corporation is subject to inspection by bank examiner** is one of law. 66**Utah**1, 239**P** 29.

610–23 93**CalA**261, 269**P**692; 129**Misc** 25, 220**NYS**711.

610–24 [b] **Subscription obtained on false representation** that B had subscribed for one hundred shares, when there was secret agreement that B should be required to take only ten shares, unenforceable as between B and corporation, cannot be enforced against subscriber. 20 **OhA**156, 153**NE**183.

611-32 [a] **Evidence held insufficient** to show scienter. 129Misc25, 220NYS 711.
611-37 300Pa389, 150A613. [b] **Evidence.**-39F(2d)297.
611-38 93CalA261, 269P692; 129Misc 25, 220NYS711; 300Pa389, 150A613. [d] **Sufficiency of evidence.**-129Misc25, 220NYS711.
612-40 [c] **Knowledge of unsafe investment** is not knowledge of fraud. 25 F(2d)614.
612-43 Nebr 228NW531.
612-49 10LaA320, 120S531; 36Wyo 413, 256P84.
613-50½-New. A subscriber to corporate stock is not always bound to investigate the truth of a statement made by the solicitor with full knowledge of the facts. Oh 154NE161.
613-52 154Wash358, 282P203.
613-54 OhA 154NE161; TexCivA 292 SW561.
613-54½-New. A representation of a law that the corporation is subject to inspection by the bank examiner coupled with one of fact that the corporation was organized under the state banking law has a tendency to mislead and may be relied on without independent investigation. 66Utah1, 239P29.
613-57 See also 77CalA18, 246P126. [c] **That purchaser received high rate of interest on investment** does not support claim that he was not injured where payments were made out of principal of corporate funds regardless of earnings. 89CalA628, 265P378. [d] **That purchaser received salary in excess of services** does not support claim that he was not injured where salaries were increased because of disparity in former salaries with salaries of other employees who were stockholders. 89CalA628, 265 P378.
614-58 76CalA321, 244P958; 77CalA 18, 246P126.
614-59 [d] **Evidence held sufficient.**-CalA 286P1050; 191NC710, 133SE85.
614-61 215Ala200, 110S286; 118Nebr 711, 226NW321; TexCivA 18SW(2d)264 (provision in contract that agent has no authority to make other representations is of no avail); 154Wash358, 282P203.
615-62 40F(2d)349.
615-63 191NC710, 133SE85.
615-64 212Ky163, 278SW615 [citCJ].
615-65½-New. All cases agree that to rescind subscribers must act promptly. 212Ky163, 278SW615.
615-69 129Misc25, 220NYS711.
616-70½-New. Negligence or bad judgment is not alone sufficient to warrant a finding of fraud. 129Misc25, 220NYS 711.
616-93 129Misc25, 220NYS711.
616-93 235 IllA370; 118 OhSt10, 160 NE460; 19 OhA243 (subscription by stockholder pursuant to resolution of board of directors increasing number of issued shares of capital stock); 20 OhA 51, 153NE144. [b] **Transaction has been held to amount to mutual cancellation of completed sale of stock** where corporation in consideration of surrender of unpaid stock canceled buyer's indebtedness. CalA 286P733. [c] **After receiver has been ordered to collect assets,** subscriber cannot cancel unpaid subscription. 137Misc790, 244NYS502.
617-98 [c] **Right to rescind for misrepresentation as to withdrawal privileges** after delay of three years. Ala 130S554.
617-6 300Pa389, 150A613 (question for jury whether notice of withdrawal was given). [b] **Sufficiency of notice.**-300Pa 389, 150A613.
617-8 36Wyo 413, 256P84.
617-8½-New. Tender of certificates received is all that is required where the purchaser rescinds for breach by the corporation and did not accept ownership of the certificates when received. 284Pa380, 131A191.
617-8½-New. An agreement by the stockholders of a corporation to take a person into the corporation on an equal basis with them in consideration of his payment of a stated proportion of the assets is not abrogated by a statement of one of the stockholders that he did not consider himself bound by the agreement not communicated to such person. 222Ky476, 18SW(2d)532.
618-9 136Misc34, 239NYS239.
618-10 IndA 169NE883(2dcase). [h] **Subscription cancellation agreements construed.**-Iowa 232NW831.
619-15 116 OhSt424, 156NE499. [c] **Consideration held insufficient.**-116 OhSt 424, 156NE499.
619-21 212Ky197, 278SW607 (all subscribers); Ont [1927] 3DomLR797. [d] **Silence of subscribers at disavowal by one subscriber at meeting** raises no estoppel against corporation to sue on subscription contract. 212Ky197, 278 SW607.
619-25 212Ky163, 278SW615 (promoters or bookeepers); 239Mich295, 214 NW110, 55ALR1157.
620-29 216Ky440, 288SW342.
620-31 44Philippine469.
621-39 CalA 286P733.
623-66½-New. Where a corporation or its agents forged a name to stock subscription, recovery could not be had for the balance due on another application, signed by the same person whose name appeared in the forged subscription. 10 LaA63, 120S810.
623-71 32F(2d)202 (delay in establishing voting trust held no defense); 220 MoA205, 282SW91; 128Misc690, 219NYS 252; 284Pa380, 131A191; TexCivA 16 SW(2d)307 (organization of eighty thousand dollars instead of fifty thousand dollars capital held not to release subscriber). [b] (5) Establishment of chain store in subscriber's town. 220 MoA205, 282SW91. [f] **Where contract to repurchase was repudiated** by corporation and it appeared that such contract would not injure or prejudice either creditors or other stockholders, purchaser is entitled to rescind. 284Pa 380, 131A191. [g] **Evidence held sufficient to show substantial injury warranting rescission.**-90CalA260, 265P855. [h] **Corporation cannot claim that tender of stock was invalid** where it refused written tender by purchaser seeking rescission and gave no reason for refusal. 90CalA260, 265P855. [i] **Action for rescission is not premature** when brought after expiration of time fixed for performance of condition. 90CalA260, 265 P855.
625-76½-New. Breach of condition that notes should be deposited with trustee is merely technical and not ground for rescission. 68Utah421, 250P1033.
625-76½-New. Seller is not entitled to return of stock furnished under contract on the buyer's breach, where it made no attempt to place the buyer in status quo. 81Colo 310, 255P985.
625-76¼-New. Where sales are disapproved by the capital issues committee created by act of congress, the purchaser is discharged. 240Mich569, 215NW 772.
625-93 TexCivA 16SW(2d)307 (injury necessary).
628-40 94CalA200, 270P1016.
629-62 36F(2d)617.
629-63 245Mich37, 222NW162.
630-64 220MoA205, 282SW91; 221App Div658, 224NYS572 (as acceptance and retention of dividends).
630-66½-New. Mere receipt of stock certificates without intention of the purchaser to accept ownership does not make him the owner so as to bar his right to rescind because of breach by the corporations. 284Pa380, 131A191.
630-71 15F(2d)234.
631-81 170Ga467, 153SE26 (participating in acceptance of charter and by-laws).
631-82 137Misc790, 244NYS502.
631-84 255 IllA101.
631-87½-New. A subscriber for stock having paid part of the amount due thereon, and after being advised before the corporation was organized that the plan was unlawful, notifying the corporation that he would have nothing further to do with such an illegal undertaking, was guilty of nothing which would prevent him from contesting the validity of the subscription. 152Va471, 147SE214.
633-20 But see CalA 291P422.
633-29 42 Ida254, 245P392.
633-30 42 Ida254, 245P392.
634-39 86CalA409, 260P813
635-69 255 IllA101 (contract construed).
636-85½-New. A call for the balance due on stock subscriptions held to have been made within a reasonable time in which all stock should be sold. 36Wyo 413, 256P84.
636-91 [a] **Whether assessment shall be levied or property sold** to meet obligations is question for corporation and its officers and not for court. CalA 289 P946.
636-96 20F(2d)959 (liability held contingent); 86CalA409, 260P813; 107Conn 216, 140A477.
637-4 107Conn216, 140A477.
637-15 170Minn242, 212NW446.
638-32 107Conn216, 140A477.
639-63 42 Ida254, 245P392, 396, 397 [citCJ&Cyc].
641-99 Contra 248 IllA579.
645-65 9PaDist&Co 490.
645-67 30F(2d)505.
645-68 36Wyo 413, 256P84.
647-6 92CalA113, 267P895 (some stockholders may be sued, and as to others stock may be forfeited).
650-93 73CalA321, 238P754.
653-61 130 Or401, 280P492; Or 280P 495(1stcase).
654-75½-New. A corporation must deliver or tender the stock certificate before it can recover. 219AppDiv634, 221 NYS77.
654-76 255 IllA101. But see 107Conn 216, 140A477. [b] **Demand, in absence of fixed time for payment,** must be made by action of board of directors, demand by president or attorney being insufficient. 234 IllA260.
654-79 46 Ida606, 269P597, 598 [citCJ].
655-85 See also TexCivA 16SW(2d)307.
655-85½-New. Defense of fraud held available without pleading or proof of damage. 76CalA246, 246P121.
655-87½-New. Set-off for a proportional amount under a participation certificate has been properly disallowed where other certificate holders are not parties. 31F(2d)940.
655-87¼-New. Set-off for a proportional share of the amount collected has been properly disallowed where the expense of making collections was not shown. 31F(2d)940.
655-91½-New. It has been held that suit upon subscriptions must be brought in the domiciles of the respective subscribers. 161La784, 109S490.
655-93 41GaA77, 152SE300; 255 IllA 101.
655-99 255 IllA101.
655-9 [a] **Purchaser of unpaid subscription from receiver of corporation** may not recover amount due thereon. 165La659, 115S815.
656-17 86CalA409, 260P813 (facts creating personal liability must be alleged). [b] **Petition in action on note for stock to be issued is insufficient** where it shows that at time contract of sale was made corporation was without legal authority to issue stock. 35GaA635, 133 SE634.
657-30 See also 41GaA446, 153SE436 (1stcase).
657-31½-New. It is not necessary to allege compliance by the corporation with the Blue Sky Law. 19 OhA243.
657-34 [b] **General allegation of performance of conditions is insufficient** to allege procedure required by statute for payment of unpaid calls or assessments. 86CalA409, 260P813.
657-46 [a] (2) Petition affirmatively disclosing that subscription is voidable under Securities Act is subject to general demurrer. 37GaA778, 142SE565.
658-61 166Minn346, 207NW737, 46ALR 1167.
658-64 166Minn346, 207NW737, 46ALR 1167.
658-65 166Minn346, 207NW737, 46ALR 1167.
660-11 [b] **Amendment held properly refused.**-233Ky55, 24SW(2d)925.
660-19 232Ky87, 22SW(2d)444.
660-21 [b] 233Ky55, 24SW(2d)925.
661-53 10LaA63, 120S810.
661-59 234 IllA260.
661-64 Ont [1926] 4DomLR976.

662–71 79CalA212, 249P41; 19 OhA243; 20 OhA51, 153NE144. [b] **Where parties all agree that contract was to be changed,** and it was changed, rule acquiring clear and convincing proof of fraud or mistake does not apply. 212 Ky197, 278SW607.

662–79½–New. , and that written guaranty of dividends lacked consideration. 72CalA367, 237P550.

662–82½–New. The legal presumption is that the record owner of stock is the real owner. 19F(2d)920.

662–84 [a] (9) In action by buyer of note given for purchase of stock, where maker's defense was fraud of promoter, receipt in full for claims against promoter and deed from promoter pursuant thereto was held admissible. TexCivA 292SW589. [b] (9) Noncompliance of company with Blue Sky Law. 19 OhA 243.

663–96 97Fla403, 121S473 [reh den 97 Fla409, 122S274(2dcase)]. [a] (1) 233 Ky55, 24SW(2d)925. (12) 76CalA785, 246P121; 208 Iowa722, 217NW239; TexCivA 23SW(2d)820. (17) To warrant finding of due diligence in rescission for fraud. 164Minn507, 205NW436. (18) Compliance with provision that certain amount of shares should be sold. 170Ark1194, 278SW644. (19) That renewal note for stock subscription note was obtained by repetition of false representations as to financial status of corporation. 208 Iowa722, 217NW239. (20) Receipt by corporation of amount paid on subscription procured by fraud. 208 Iowa722, 217NW239. (21) That defendant authorized signing of his name to contract agreeing to purchase stock. 232Ky87, 22SW(2d)444. (22) That defendant's subscription was accepted by corporation and that payment was demanded. 233Ky55, 24SW(2d)925. (23) Other instances. 146Wash628, 264P421 (that stock sold was treasury stock). [b] (1) 165La577, 115S757. (2) 16F(2d)645; 67Utah90, 245P977, 46ALR466; 68Utah421, 250P1033. (12) 67 Utah90, 245P977, 46ALR466. (13) Alleged falsity of representations. 77CalA 381, 246P824. (14) Set-off for alleged assessments upon paid-up stock. 116 Nebr14, 215NW458. (15) That representations made as to business of company were false. 79CalA212, 249P41. (16) Fraud. 30F(2d)505. (17) That subscriber was not liable for unpaid balance. IndA 173NE334. [g] **Degree of proof.–Oh** 154NE161; 19 OhA243. [h] **Preponderance of evidence** is essential to show fraud. 79CalA212, 249P41.

663–1 36F(2d)617; 232Ky87, 22SW(2d)444 (direction of verdict).

663–2 32F(2d)202 (evidence held insufficient for jury); 232Ky87, 22SW(2d)444; 164Minn507, 205NW436 (diligence in rescinding for fraudulent representations); 68Utah421, 250P1033.

663–3 232Ky87, 22SW(2d)444.

663–5½–New. A direction of verdict in an action on a note is proper if plaintiff agreed to deliver stock therefor and defendant agreed to redeliver as collateral security. 224 IllA359.

663–5½–New. Instructions held erroneous. 230Ky651, 20SW(2d)482.

663–8 336 Ill 586, 168NE655; TexCivA 218SW(2d)552.

664–20 CalA 266P801; 238Mich464, 213 NW859; 167Minn113, 208NW645; TexCommA 15SW(2d)550.

665–22 167Minn113, 208NW645.

665–23 238Mich464, 213NW859.

665–28 160Ga372, 127SE729; 238Mich 464, 213NW859.

665–29 238Mich464, 213NW859.

665–30½–New. Indorsement of a stock certificate in blank gives power to any possessor to pass title by delivery. 238 Mich464, 213NW859.

665–33 206Cal 334, 274P512.

665–37 129Misc460, 221NYS540; 135 Misc113, 236NYS692. [a] **Restraint on alienation not favored.–DelCh** 147A312.

666–41 [1927] CanSC84, [1927] 1DomLR193.

666–46½–New. Restrictions on sale of stock are valid and binding. Mass 168 NE521(3dcase).

666–46½–New. Officer of corporation may sell his stock. 300Pa312, 150A 616.

666–50 DelCh 147A312.

667–56½–New. , or on the certificate of stock. 233 IllA414.

667–56½–New. Restrictions imposed under statutory authority must be reasonable and not contrary to law or public policy. 233 IllA414.

667–58½–New. Uniform Stock Transfer Act does not change the law in regard to ownership of stock. 19 OhA130.

667–63 [a] **Statute requiring agreement restricting alienation of stock to appear on certificate** cannot protect president who, knowing of agreement, sought to violate it. IndA 172NE801.

667–66 251 IllA499.

668–68 157Tenn131, 7SW(2d)43.

668–68½–New. A purchaser is not chargeable with notice of restriction not printed on the certificate of stock. 251 IllA499 (rule applicable to pledgee).

668–71½–New. , or sale to any other than a stockholder without the approval and consent of the majority of stockholders. 251 IllA499.

668–75½–New. A provision that a holder of stock on retirement, shall transfer it to the director for the use of the corporation does not apply to one discharged. Mass 168NE521(3dcase).

669–92 DelCh 147A312; 260Mass99, 156 NE708; 264Mass499, 163NE184. [b] (4) Provisions held not unreasonable as against various objections. DelCh 147 A312. [d] (3) Restriction, requiring appraisal and offer for sale to corporation before sale to other persons or on death of stockholder, was valid and binding. 264Mass499, 163NE184. [g] **Restriction must be printed on certificate** under some statutes. Wis 229NW544. [h] **Directors act as fiduciaries** and their duties are enforceable in equity. Mass 172NE647.

670–93 233 IllA414, 419 [quotCJ]; IndA 172NE801; 214AppDiv654, 212 NYS561 (not against public policy).

670–96 233 IllA414, 419 [quotCJ].

671–98½–New. Estoppel. Stockholders accepting stock certificates with knowledge of restrictions printed on face thereof are estopped from questioning its validity. 214AppDiv654, 212NYS561.

671–98½–New. and cannot show that corporation is in no financial condition to repurchase the stock. 214AppDiv654, 212NYS561.

671–98¼–New. By-law passed by unanimous vote of stockholders after organization restricting sale, which was printed on stock certificates is binding contract on the parties. 214AppDiv654, 212 NYS561.

671–1 Wis 229NW544.

671–4 69CalA748, 232P495 (by-law requiring stock to be offered for sale to corporation not binding on transferee where certificate recites no such restriction).

671–4½–New. Restriction does not apply to special administration. 259Mass 220, 156NE41.

671–5 Mass 169NE268 (waiver by directors).

671–8 214AppDiv654, 212NYS561.

671–12 69CalA748, 232P495; 103NJL470, 136A209. [a] (3) Evidence of assignment to husband, placing of stock in corporate safe accessible to husband, and recognition of husband as stockholder show husband owner. 134Misc 265, 234NYS497.

671–13 69CalA748, 232P495.

672–17 [a] (2) Delivery by owner of certificate with intent to transfer it creates obligation to indorse which may be specifically enforced. 170La871, 129S 513.

672–31½–New. Some statutes prescribing formalities of transfer are mere codifications of common-law principles. 247 IllA81.

673–35½–New. Since the transferor must provide and pay for stamps, the transferee could insist on registration and surrender of the certificate with the requisite stamps. 134Misc265, 234NYS 497.

673–37 180Ark459, 21SW(2d)871.

673–47 134Misc265, 234NYS497.

673–48 237 IllA500; 94PaSuper333.

673–51 237 IllA500.

674–53½–New. Where stock was transferred on the books of a corporation, but the transferor retained possession of the certificates, title did not pass. 229Ky 666, 17SW(2d)733.

674–62 46 Ida313, 268P31 (mere transfer on books of corporation cannot constitute delivery). [b] **Presumption of proper indorsement and delivery.–Utah** 293P4.

674–67½–New. Possession of unindorsed stock certificates alone did not clothe the holder with authority to indorse or forge the names of owners thereon. 225AppDiv81, 232NYS178.

674–67½–New. Delivery of a stock certificate for consideration, without power of attorney to authorize the transfer on the corporation's books, was an equitable assignment. 152Va108, 146SE274.

675–73 [a] **"Properly indorsed"** means indorsed so as to pass title. TexCommA 292SW531. [b] **Signatures of husband and wife** are necessary to reissuance of shares of stock known to be property of wife. TexCommA 292SW 531.

675–82 69CalA748, 232P495; 73CalA 627, 239P71; 247 IllA81; 129Misc891, 223NYS383.

676–93 247 IllA81.

677–4 69CalA748, 232P495 (by-law requiring presentation of stock before transfer is reasonable); NJCh 150A346; 134Misc265, 234NYS497.

677–5½–New. and by the officers and other stockholders of the company. 20 OhA26, 153NE187.

677–7 237 IllA500.

677–8 But see 83Colo 259, 264P660.

677–10 115Tex278, 280SW505, 509 [quotCJ].

677–11 115Tex278, 280SW505, 509 [quotCJ].

678–12 115Tex278, 280SW505, 509 [quotCJ] (stock constituting overissue).

679–31 28Hawaii590, 702 [citCJperPeters,CJ]; 246NY58, 158NE19.

679–32 28Hawaii590, 702 [citCJperPeters,CJ].

679–33 TexCommnA 292SW531.

679–34 246NY58, 158NE19.

679–35 See also 246NY58, 158NE19.

679–37½–New. Nor is a corporation protected by cancellation of the old certificates. 246NY58, 158NE19.

679–39 206Cal 334, 274P512; 73CalA 627, 239P71; 164La140, 113S795.

680–44 129Misc891, 223NYS383.

680–45 73CalA627, 239P71.

680–49½–New. Failure of transferee to whom stock was indorsed in blank to have entry made on the books of the corporation does not work an estoppel as between the parties where it does not appear that the transferror disposed of the certificates to any other person. 145 SC91, 142SE811.

681–64 [b] **Sale of stock has been held valid.–CalA** 286P723. [c] **Provisions of Uniform Sales Act** are applicable to sales of corporate stock. 251 IllA454.

681–66 250NY132, 164NE881; 151Wash 585, 276P902. [b] (4) Contract to sell controlling interest in corporation giving purchaser right to withdraw held not void for want of mutuality. 19F(2d)311. [g] **Where offer to sell stock containing guaranty of delivery within stated time** is not accepted but is met by counter offer on different terms, making no reference to guaranty of delivery, and counter offer is accepted, contract does not include guaranty of delivery. 69Utah1, 251P1067.

682–67 170La270, 127S624.

682–71½–New. Sale of shares is a sale of goods. 43 Ida64, 249P254.

682–71½–New. Stockholders after securing an agreement to sell from a stockholder need not inform him of abandonment of the intention to establish competing business. 106Conn216, 137A644.

682–71¼–New. Seller's agreement not to assign contracts without notifying the buyer held not to make an assignment without notice void, but merely rendered the seller liable in damages. 223AppDiv94, 227NYS425.

682–73 [b] **Tenants of hotel company** may purchase stock of landlord corporation. 337 Ill 345, 169NE240.

682–80 [a] (5) Contract for sale of corporate stock, unaccrued dividends, and claims against corporation is not without consideration in that corporation did

not earn dividends where purchaser resold stock to corporation and retained stock. **TexCivA** 275**SW**841. (6) Ten dollars. 19**F(2d)**311. (7) Payment of debt. 247 **IllA**81.

682–84 42 **Ida**1, 243**P**355.

683–90½–New. Under statutes the parties may provide in the contract for sale of stock that all of the arbitrators under provision for arbitration shall agree as to the value. 152**Wash**226, 277**P**982.

683–98½–New. Shares of stock in a corporation can only be transferred by the holder of the stock or by some one authorized by him to do so. 220**MoA**1041, 279**SW**728.

683–2 **TexCivA** 274**SW**187. [a] (2) Statements as to value. 229**Ky**396, 17 **SW(2d)**252. (3) Others. 31**F(2d)**721. [b] (2) Other instances. **Kan** 290**P**1.

684–12½–New. A corporation officer selling stock must disclose fully material facts relating to the business and his interest in the proceeds of sale. 223 **Ky**685, 4**SW(2d)**677.

684–15 221**MoA**495, 281**SW**968; **Tex CivA** 8**SW(2d)**714. See also **Mass** 169 **NE**897(2dcase).

684–17 30**F(2d)**98; 157**Tenn**275, 8**SW (2d)**489, 60**ALR**693. [a] (9) A contract for sale and not subscription. 166**Minn** 346, 207**NW**737, 46**ALR**1167.

684–18 256 **IllA**480; **Mass** 169**NE**897(2d case); 221**MoA**495, 281**SW**968; **MoA** 258**SW(2d)**799; **Can** [1929] 3**DomLR**719. [a] (12) Agreement to accelerate payment held not part of note given for shares. 202 **Iowa**1352, 212**NW**115. (13) Agreement construed as one for sale of seller's right, title, and interest in stock held in escrow without guarantee of delivery. 69**Utah**1, 251**P**1067. (14) Contract for sale of stock is construed to require buyer to pay income taxes above those seller would have been obliged to pay without sale. 222**AppDiv**137, 225 **NYS**482. (15) Contract providing for audit to determine earnings has been held not to permit deduction of reserve for unfulfilled subscriptions from net earnings where subscriptions were previously treated as asset. 27**F(2d)**385. (16) Contract for sale of stock providing that any additional assessment shall be paid by then stockholders includes federal excess profits tax for prior year and state income tax. 221**MoA**495, 281 **SW**968. (17) Other instances. **CalA** 288 **P**138.

685–19 **TexCivA** 274**SW**187; 69**Utah**1, 251**P**1067.

685–20 166**Minn**346, 207**NW**737, 46**ALR** 1167; **TexCivA** 274**SW**187.

685–21 166**Minn**346, 207**NW**737, 46**ALR** 1167. [a] (3) Under bill of sale providing it shall include all debts due corporation, it was held that transferor was entitled to share of refund of tax paid with moneys advanced by stockholders. 172**Ark**485, 289**SW**321.

685–26½–New. Under a contract for the sale of only the seller's right, title, and interest in stock held in escrow, there is no implied agreement to guarantee delivery. 69**Utah**1, 251**P**1067.

685–26½–New. Purchasers of corporate stock were held not liable for the debt of plaintiff on a note for the benefit of the corporation in the absence of an agreement. 44 **Ida**343, 256**P**946.

685–28 216**AppDiv**540, 215**NYS**447; 130 **Misc**684, 225**NYS**190; **TexCivA** 274**SW** 187, 189 [citCJ].

686–29 **TexCivA** 274**SW**187, 189 [cit CJ].

686–31 216**AppDiv**540, 215**NYS**447; **Tex CivA** 274**SW**187, 189 [citCJ].

686–36 236**Mich**328, 210**NW**209.

686–39 170**La**270, 127**S**624 (amount for option applied on price of stock). [b] **Construction of option.**–251 **IllA**454 (under Uniform Sales Act). [c] **Price paid for option cannot be considered earnest money** where agreement expressly provides to contrary. 170**La**270, 127**S** 624.

686–40 [c] **Option to employer to** repurchase stock sold to employee is continuing offer and does not require exercise within reasonable time. 236**Mich** 328, 210**NW**209.

686–46 251 **IllA**454 (sufficiency of acceptance and performance under option).

687–47 220**AppDiv**454, 221**NYS**653; **NS** [1930] 2**DomLR**801.

687–51½–New. Under the Uniform Sales Act, the holder of an option for purchase, who accepts stock from the optioner and sells and delivers to a third person, must be deemed to have accepted the terms of the option. 251 **IllA**454.

687–55 24**F(2d)**916. [b] **Consideration held insufficient.**–220**Ala**137, 124**S**302.

687–56 99**CalA**270, 278**P**876; 249 **IllA** 121; 213**Ky**417, 281**SW**152; 114**Nebr** 284, 207**NW**204; 145**Wash**66, 258**P**1035, 54**ALR**1382; 38**Wyo** 267, 267**P**86 (agreement held to sale of his own stock by officer of bank and not sale by bank). But see 10**PaDist&Co** 348. [d] **Not binding where repurchase price not fixed.**–292**Pa**12, 140**A**542.

687–59 See also 9**PaDist&Co** 608.

687–64½–New. In an action on a contract to repurchase to recover money paid for shares, questions of fact are for the jury. 91**PaSuper**396.

687–64½–New. Burden of proving rescission of contract to repurchase rests on seller asserting it. **Nebr** 230**NW**835.

688–69 87**Colo** 207, 286**P**109; 292**Pa** 12, 140**A**542; 91**PaSuper**396. [e] **Whenever buyer needs money.**–114**Nebr**284, 207**NW**204 (demand after lapse of three and one-half years held timely).

688–78 See also 24**F(2d)**916.

688–86 245 **IllA**492 (affidavit of claim held sufficient to admit proof of waiver of tender or excuse for failure to make tender). [b] **Seller's declaration of inability to perform** is equivalent to refusal to perform. 245 **IllA**492.

688–89 See also 245 **IllA**492.

689–92½–New. Where the purchaser is required to prove his ability and readiness to perform, such proof must be directed to the time when he was seeking to put the seller in default. 245 **IllA** 492.

689–94 **Nebr** 230**NW**845.

689–98 262**Mass**224, 159**NE**534 (not entitled to share in excess taxes refunded by government).

689–12½–New. **Warranty by seller of** stock in building corporation, that no new leases would be made, is for benefit of buyer of the stock, and damages from breach of the warranty are recoverable by him. 310**Mo** 665, 276**SW**49.

689–12½–New. **"Warranty" as defined by Uniform Sales Act** does not apply to sales of corporate stock. 13**F(2d)**932.

689–13 [a] (2) Clause providing that sale is based upon statement to buyers "approximating assets" so much, "liabilities" so much, held express warranty. 135**SC**321, 133**SE**829.

689–14 But see 13**F(2d)**932.

690–16 [a] **Superior knowledge of buyer.**–135**SC**321, 133**SE**829.

691–38 40**GaA**367, 149**SE**664.

691–41½–New. In a contract for sale of all of the capital stock of a corporation, the use of the word "assets" in a statement that the buyer should receive all property listed as "assets" in the nature of accounts receivable did not imply a warranty that such accounts could be collected. 202**Cal** 565, 261**P** 1015.

691–41½–New. The owner of stock of a bankrupt corporation warrants the existence of the corporation, although the stock was indorsed "without recourse." 7**LaA**320.

691–47 See also 160**La**718, 107**S**502.

692–58½–New. Where an oral contract for the sale of stock has been fully agreed upon by several stockholders, an unsigned written memorandum inside by only one of them without consultation with the other is not binding when contradictory of the real agreement. 210**Ky**309, 275**SW**784.

692–58½–New. A contract for the sale of stock, definitely expressing an absolute obligation to sell and to buy, could not be converted by the buyer by its own default into mere option without the consent of the seller. 30**F(2d)**98.

692–62 [a] **Transfer of part held not consummation.**–13**F(2d)**932.

692–65½–New. **Recovery of dividends.** Sellers of stock rescinding sale are entitled to recover dividends paid to the purchaser, with interest. 23**F(2d)**357.

692–73 13**F(2d)**932; **NJ** 146**A**301 (sale held not made under duress).

693–80½–New. That officers wasted corporation's assets is no ground for rescission on ground of fraud. 215**AppDiv** 149, 213**NYS**9.

693–82 164**Ga**311, 138**SE**580.

694–91½–New. Such representations are mere promises looking to future for fulfillment. 215**AppDiv**149, 213**NYS**9.

694–91½–New. Representations that officers would use their best efforts to make corporation a success is no ground for rescission for fraud. 215**AppDiv** 149, 213**NYS**9.

694–98 [b] (2) Officer is not obliged, in dealing with stockholder for purchase of his stock, to disclose condition of company or value of stock. 214**Ky**705, 283**SW**1047.

694–99 164**Ga**311, 138**SE**580.

694–1 [a] (4) Statement that binding post for radios was not patentable. 28 **OhA**309, 162**NE**701.

695–2 104**Conn**73, 131**A**412.

695–3 **Ga** 137**SE**580.

695–4 **Ga** 137**SE**580.

696–11 [a] **To set aside transfer** induced by fraud seller must prove damages. 133**Misc**28, 231**NYS**31.

696–18 [a] (3) Failure to remit shares sold. 214**AppDiv**235, 212**NYS**79. (4) Arbitrarily reducing shares of stock sold. 214**AppDiv**235, 212**NYS**79.

697–28½–New. A contract for the purchase of bank stock representing a controlling interest is entitled to rescind where the seller is unable to make the stipulated transfer. 118**Nebr**750, 226 **NW**435.

697–28½–New. In such case the rule that a contracting party who is unwilling to perform his part of the contract cannot rescind is inapplicable. 118 **Nebr**750, 226**NW**435.

697–34 285**Pa**257, 132**A**342; 9**PaDist& Co** 608.

697–35 285**Pa**257, 132**A**342.

697–39 **CalA** 274**P**995. [b] (1) 98**CalA** 748, 277**P**1075.

698–46 23**F(2d)**357; 88 **IndA**309, 152 **NE**609; 232**Mich**392, 205**NW**174; 228 **AppDiv**559, 240**NYS**328.

698–54 97**CalA**354, 275**P**881; 260**Mass** 541, 157**NE**698.

698–59½–New. On mutual rescission of a contract for the sale of stock, a note given by the buyer to the seller must be returned. 88**CalA**34, 263**P**285.

699–60 But see 247**Mich**329, 225**NW**504.

699–73 88**CalA**34, 263**P**285.

700–76 222**AppDiv**56, 225**NYS**290.

700–79 41**F(2d)**679; **Mass** 169**NE**897 (2dcase); 129**Misc**424, 222**NYS**348; 104 **WVa**640, 141**SE**1 (agreement held to bind company but not purchasing trustee as to deferred payments).

700–79 [f] **Refund of payments** under option agreement is matter to be determined by single justice. **Mass** 169**NE** 897(2dcase).

700–84½–New. Under an oral contract for the sale of stock to be valued within a reasonable time in the future, where delay in fixing value is not so great as to excuse the purchaser from taking the stock when tendered, the purchaser is entitled to a reasonable time to investigate the correctness of the valuation. 210**Ky**309, 275**SW**784.

700–84½–New. In such case the refusal of the purchaser to receive the certificate when offered without such opportunity does not estop him from setting up his claim. 210**Ky**309, 275**SW**784.

700–84¼–New. A buyer under an executory sale lost title to the seller's account for advances to a corporation, assigned as an incident of the subject of sale, when he defaulted and the stock was sold. 98**CalA**610, 277**P**347.

700–84½–New. A change in the structure of a corporation by the issue of additional stock without increasing the assets relieves stockholders from a written contract to buy stock at a certain price. 297**Pa**399, 147**A**90.

700–85 18**F(2d)**883.

700–86 18**F(2d)**883; 196**NC**116, 144**SE** 694.

700–88 223**AppDiv**94, 227**NYS**425.

700–89 246**NY**152, 158**NE**56. [a] (2) Where seller of stock tried to foreclose judgment against corporation contrary to agreement with purchaser, latter did not lose rights by suspending payments. 246**NY**152, 158**NE**56.

701–92½–New. If buyer waives con-

dition as to delivery within reasonable time he cannot again impose it without notice. 214AppDiv235, 212NYS79.

701-97 111Conn709, 151A177 (order construed as requiring broker to deliver stock to bank with sight draft attached and to deliver certificates to buyer on payment); Can [1930] 3DomLR81.

701-7 CalA 275P825(2dcase); 129Kan 272, 282P579.

701-14 See also Utah 264P975. But see 111Conn709, 151A177.

703-50 MoA 273SW764 (contemporaneous note and contract constituted mutual and dependent covenants and together comprise contract between parties); 254NY298, 172NE514; 57ND550, 223NW186 (issuance and delivery of bonds held full performance). [b] **Refusal of seller to accept** corporate bonds for stock in accordance with agreement is not justified by fact that due date of some of bonds was after expiration of charter where owner of stock had knowledge when contract was made. 57ND550, 223NW186.

704-51 137Misc444, 242NYS185.

704-56½-New. A seller of stock after the purchaser's breach of contract providing for payment in cash or lien notes is under no obligation to receive anything but cash. TexCivA 17SW(2d)113 (2dcase).

704-70 TexCivA 274SW187, 189 [cit CJ].

704-71 166Minn346, 207NW737, 46ALR 1167.

704-72 217Ky842, 290SW720.

705-75 166Minn346, 207NW737, 46ALR 1167.

705-78½-New. That the owner of practically all of the shares of a corporation sold some of his shares on a long time note with an agreement for payment out of profits does not preclude his heirs after his death from increasing the rent of a building which he had leased to the corporation and which they inherited. TexCivA 280SW254.

705-79 TexCivA 274SW187, 189 [cit CJ]. [a] **Right to stock delivered to trustee in escrow** until certain amount of treasury stock is sold is not presumed abandoned from lapse of time where no demand made of purchaser for payment. Alta [1930] 2DomLR788.

705-81 CalA 288P138 (installment contract not inconsistent with vendor's lien statute); 166Minn346, 207NW737, 46 ALR1167.

705-82 [a] NJSup 132A494.

706-2 220Ala137, 124S302 (insolvency of corporation at time of purchase is no defense); CalA 275P825(2dcase); 97 Fla398, 121S465; 39GaA310, 147SE147; 151Wash585, 276P902. But see Mass 165NE885.

706-9½-New. Mistake. The aid of the court cannot be invoked to relieve one from consequences of a mistaken judgment of value. 208Ky414, 271SW577.

706-9⅓-New. A defrauded seller may sue for the return of stock or for damages. 243Mich388, 220NW741.

706-9¼-New. But one fraudulently inducing the sale of stock thereafter resold cannot be compelled to surrender stock of like character in his possession. 243Mich388, 220NW741.

707-14½-New. In a suit to enforce an oral sale of stock at a valuation to be determined in future, where it appears that the purchaser is entitled to a large credit and no question is raised as to his solvency the court need not require him to execute a bond against any deficit which his account may show but may require payment thereof before delivery of the stock and give the stockholders a lien on the stock for security. 210 Ky309, 275SW784.

707-14½-New. Party who disclaims ownership of stock received in exchange does not waive right to trade back stock by taking new certificates. 251Mich478, 232NW355(2dcase).

707-15 43 Ida64, 249P254.

707-16 43 Ida64, 249P254; 234Mich385, 208NW609.

707-18 29Ariz129, 239P799, 43ALR 1359; 43 Ida64, 249P254; Kan 290P1; 234Mich385, 208NW609.

707-20 Kan 290P1; 172Minn412, 215 NW833. But see 206 Iowa100, 220NW 42.

708-25½-New. A purchaser cannot base an action against the corporation for fraud upon false representations contained in letters to brokers and stockholders where he was not a stockholder at the time the letters were written and did not purchase from the brokers to whom the letters were written but purchased in open market. 241Mich 524, 217NW786.

708-32 97CalA354, 275P881.

708-39 But see 97CalA354, 275P881.

708-39½-New. In a suit to recover the price of stock sold in noncompliance with a security law, tender of stock taken in exchange for such stock is sufficient. 318 Ill 139, 149NE2.

708-42 Utah 264P975.

708-45½-New. Agreed conditions must be fulfilled prior to the seller's right to recover. 77CalA766, 247P609.

708-45⅓-New. Where an agreement for the repurchase of stock provided that the stock should be pledged as security for payment of the purchase price, no tender was necessary before bringing suit for the purchase price. CalA 275P 825(2dcase).

708-45¼-New. Tender of stock is unnecessary where defendant is unable to consummate the purchase and states that no tender would be necessary. 99 CalA270, 278P876.

708-45⅙-New. Where restoration of stock would extinguish the lien, no tender of stock to defendant, agreeing to repurchase and pledging it for payment, is necessary. 99CalA270, 278P876.

709-47 31F(2d)721.

709-51½-New. Defense of laches has been held not available in an assignee's suit to have the names of other assignees of stock stricken from the assignment and a new certificate issued to plaintiff. 149Md629, 132A158.

709-54 TexCivA 8SW(2d)714.

709-56½-New. In a suit by a purchaser of stock to have agreement for purchase and certificate canceled, both bank and receiver are proper parties to join with sellers of stock. 117 Or83, 243P78.

709-58 10LaA79, 120S523; 221MoA 1207, 299SW598.

709-59 126Misc597, 214NYS202. [c] **Complaint held insufficient to allege** cause of action on any theory, there being no allegation of return, offer to return or excuse, or failure of value of stock. 43 Ida64, 249P254.

709-60 130 Or522, 279P867 (complaint sufficient in suit against third party agreeing to pay seller's note to plaintiff); 6PaDist&Co 210.

710-61 [a] (4) Petition held sufficient. 41GaA60, 151SE813. [c] **Petition held insufficient.**-41GaA60, 151SE813.

710-62 [b] **Complaint showing sale** as evidenced by broker's bought and sold notes held sufficient. 5F(2d)809. [c] **Complaint held sufficiently** to show breach of contract by seller. 5F(2d) 809.

710-65 232Mich392, 205NW174 (complaint construed as one for rescission); 238Mich5, 213NW152. [a] (4) 104Conn 73, 131A412.

710-66½-New. nor to allege damages where it was alleged that defendant promised to pay a reasonable value for stock; 99CalA270, 278P876.

710-67½-New. In an action by the buyer for rescission and return of the purchase price, an allegation that the seller knew of the falsity of misrepresentations is not essential. 104Conn73, 131A412.

710-67⅓-New. Allegations alleging fraud held sufficient to invoke jurisdiction of court of equity to decide every question presented arising from wrongfully changing assignment of stock indorsed on certificate. 149Md629, 132A 158.

710-69 [c] **In cross-complaint** of one defendant against another, cross complaint may show surroundings, connections, and relationships of various parties to transactions as part of his contention that he was surety for his codefendant who had made false representations inducing him to sign contract. TexCivA 282SW876. [d] **Counterclaim held insufficient.**-202Cal 565, 216P1015 (alleging that seller guaranteed accounts receivable as collectable). [e] **Amendment** held properly refused. 40 GaA291, 149SE438.

711-73 34Wyo 299, 242P1111. [a] (3) Other instances. 12PaDist&Co 326.

711-74 238Mich5, 213NW152.

711-75 234Mich385, 208NW609; 238 Mich5, 213NW152. [a] (2) Other instances. Utah 265P597.

711-76 234Mich385, 208NW609.

711-81 245 IllA492; 232Mich392, 205 NW174.

711-85 25F(2d)813; 102NJL596, 133A 298.

712-87 13F(2d)62.

712-87½-New. In an action to rescind the purchase of stock for fraud, plaintiff need not prove scienter. 220AppDiv 231, 221NYS159.

712-89 [a] (6) In suit to recover shares of stock which plaintiff claimed to have purchased from defendant, defendant's testimony relative to sale thereof is admissible. 198NC200, 151SE 257.

712-90 [a] (4) In action for rescission where complaint alleged false representation by defendant that he could secure loan from corporation, testimony that plaintiff attempted to obtain loan on stocks at a bank is irrelevant and properly excluded. 104Conn73, 131A412.

712-91 [a] (3) In suit to recover stock claimed to have been purchased, testimony of defendant's witness respecting conversation with plaintiff is material as bearing on contract alleged. 198NC 200, 151SE257.

713-6 202Cal 251, 259P752 (to show that defendant's statements were opinions only); 222AppDiv17, 225NYS263. [a] (1) 210Ky309, 275SW784 (present sale); Alta [1929] 4DomLR23; Alta [1929] 4DomLR745; 99CalA270, 278P 876. (18) That plaintiff's option to purchase stock had expired and was not extended by implication. 213AppDiv 667, 211NYS234. (19) To show that certain account was properly included among assets of corporation in determining value of stock under contract for sale of stock to be valued in future. 210 Ky309, 275SW784. (20) To sustain judgment for stockholder against plaintiff claiming right to purchase stock. 162La703, 111S66. (21) To show that stock was not of value equal to, or greater than, sum received for it at date of sale. 25F(2d)813. (22) To warrant finding for defendant on material issues presented on seller's fraud. Utah 265P597. (23) To show fraud in sale of stock of insolvent bank. 172 Minn412, 215NW833. (24) To support judgment for seller in buyer's action for breach of contract. CalA 288P138. (25) To sustain verdict for damages for breach of contract to repurchase stock. Nebr 230NW835. (26) Other instances. CalA 275P825(2dcase); Kan 290 P1; Mass 165NE885; 243Mich388, 220 NW741; 254NY298, 172NE514; 130 Or 32, 278P972; TexCivA 8SW(2d)714. [b] (3) CalA 258P435 (mere statements of opinion); 229Ky396, 17SW(2d)252; TexCivA 300SW653. (12) To show that plaintiff surrendered any supposed rights to defendant as their agreement was unsupported by any consideration. 213AppDiv667, 211NYS234. (13) To sustain holding that stockholders agreed to specific time to impound stock as collateral for indebtedness. 152Wash 620, 278P691. (14) To show damage as result of fraud. 133Misc28, 231NYS31. (15) To show buyer's fraud warranting rescission. NJCh 151A87. (16) Other evidence held insufficient. 44 Ida343, 256P946; 217Ky842, 290SW720; 160La 718, 107S502; 126Me29, 135A657. [d] (3) Evidence held not to show certain intangible rights carried on books as of value of fifty thousand dollars, to be without value nor that this item was not properly included in computing the sale price. 209Ky744, 273SW458.

714-7 [a] (1) 88CalA34, 263P285; 104 Conn73, 131A412; MoA 9SW(2d)839. (4) 93CalA328, 269P740. (5) Other instances. 88CalA34, 263P285; 93CalA 328, 269P740. [b] (2) To show worthlessness of stock obviating necessity of

tender of its return. 232Mich392, 205 NW174.

714-8 126Me29, 135A657. [a] (1) 104 Conn73, 131A412.

714-10 [a] **Evidence insufficient** to prove mutual mistake. 208Ky414, 271 SW577.

714-12½-New. In an action on the seller's agreement to repurchase stock if it did not pay three times as much as a certain farm, testimony that the stock had not paid anything is prima facie sufficient to authorize recovery, regardless of what the farm paid. 287Pa420, 135A107.

714-15 Mass 165NE885 (evidence raised issue of fact for judge); 310Mo 665, 276 SW49; 220AppDiv454, 221NYS653; 188 Wis30, 205NW407. [a] (2) 104Conn73, 131A412; 238Mich5, 213NW152. (11) Whether there was waiver of condition of complete delivery of all shares bought. 214AppDiv235, 212NYS79. (12) In action on agreement to refund option money on plaintiff's securing new purchaser, question is for jury. 220AppDiv 454, 221NYS653. (13) Right of plaintiff to recover payments made for purchase of stock. 97CalA354, 275P881. (14) Whether debt for which note was given was that of defendant or her husband. 220Ala137, 124S302. (15) Other questions for jury. 219Ky524, 293SW1089; NJ 132A605; 220AppDiv454, 221NYS 653; 146Va488, 131SE810. [c] **Delivery of stock due within reasonable time** under circumstances. 214AppDiv235, 212 NYS79.

715-16 [a] (2) Directed verdict held proper where plaintiff admitted six months' delay in rescinding stock purchased after acquiring knowledge of facts. 285Pa257, 132A342.

715-19 39GaA310, 147SE147; 234Mich 385, 208NW609; 198NC200, 151SE257.

715-20 [b] **Instructions held not erroneous.**-146Va488, 131SE810.

715-22 91CalA590, 267P372 (finding sufficient to support judgment); 130 Or 32, 278P972 (special finding held not inconsistent with general verdict); 49SD 135, 206NW695 (in action by seller on note given for stock, where defense is fraud, failure of court to find any drainage in specific account entitles seller to judgment).

715-27 243Mich388, 220NW741. **Erratum.**-Substitute "buyer" for "seller" in second line of text.

715-28½-New. Interest on the price is held to run from the date of contract where the buyer received dividends. 106 Conn411, 138A458.

715-30 41GaA60, 151SE813; Mass 165 NE885 (time when brokers had notice of refusal); NJSup 132A494; 146Va488, 131SE810.

716-42 See also Utah 264P975.

716-45 41F(2d)679.

717-50 234Mich385, 208NW609.

717-58 101CalA94, 281P396; 34Wyo 299, 242P1111.

717-59 41F(2d)41. [b] **Year and half after breach of contract** to resell stock is more than reasonable time within which purchaser could have protected himself. 41F(2d)41.

717-63 111Conn709, 151A177; Alta [1929] 4DomLR23.

718-67½-New. In an action for breach of contract to sell and deliver stock only nominal damages may be recovered where the value at the time fixed for delivery is neither alleged nor proved. 34 Wyo 299, 242P1111.

718-77 248Mich387, 227NW764.

718-81 CalA 279P1011.

721-27 244 IllA 302. [a] (1) 200 Iowa 361, 202NW768.

721-32 132Misc819, 230NYS480.

722-39 34F(2d)677 (agreement held pledge); 75CalA286, 242P879.

723-51 CalA 288P138 (stock remaining in seller's possession is not deemed pledge thereof by buyer); 213Ky44, 280 SW458. [e] **Constructive delivery sufficient.**-75CalA286, 242P879.

723-52 213Ky44, 280SW458.

723-60 136Misc915, 242NYS505.

723-60½-New. In Porto Rico public instrument is not necessary to make effective pledge of shares of stock as collateral. 34PortoRico 713.

723-63 207 Iowa1011, 221NW574 (letter held insufficient notice). [b] **Actual knowledge of secretary of corporation that stock has been pledged** does not protect lien of one holding stock as collateral security against claim of pledgor's creditor, who has levied execution thereon. 207 Iowa1011, 221NW574. [c] **Oral notice** of pledge is not sufficient compliance with statute requiring written notice, and does not render levy of execution junior to such outstanding pledge, where statutory notice has not been given. 207 Iowa1011, 221NW574. [d] **Notice of pledge given after levy of execution on stock as property of pledgor** does not affect validity of execution. 207 Iowa1011, 221NW574.

724-67 43F(2d)703 (agreement need not be filed for record).

724-71 80Colo 385, 252P355; 123Kan 359, 255P37, 38 [citCJ]; 49SD135, 206 NW695.

724-73 See also 206 Iowa721, 221NW 208.

724-73½-New. A statute providing that stock in a domestic corporation is transferable on the corporation's books has been held applicable to pledge of a stock certificate transferable only on the corporation's books notwithstanding the corporation was not domiciled within the state. 191NC352, 131SE732.

724-75 80Colo 385, 252P355; 206 Iowa 721, 221NW208.

724-76 213Ala236, 104S760 (holding that pledge is valid without transfer on books of bank as against bank which was creditor with notice).

724-77 206 Iowa721, 221NW208.

725-79 123Kan359, 255P37, 38 [citCJ].

726-89 See also 258Mass53, 154NE557. But see 167La527, 119S697(2dcase).

726-95 249NY159, 163NE135.

727-98 253Mass8, 149NE112.

727-99½-New. Pledgee must fill in blank the assignment or power of attorney before demanding transfer and issuance of a new certificate. 253Mass 8, 149NE112.

728-16½-New. Pledgee of stock is under the duty not to diminish the value of the corporation's property. 13F(2d) 743.

728-16¾-New. Uniform Stock Transfer Law has been held not to repeal the statute Code regulating rights as between the pledgor and the pledgee of stock. 167La527, 119S697(2dcase).

728-16¼-New. A pledgor claiming that the pledgee received dividends in excess, of a loan for which the pledgee did not account cannot take part of the new capital employed to increase business. 296 Pa108, 145A834.

728-20 [a] (3) Pledge of collateral "to secure whatever indebtedness pledgor may owe said bank" does not cover indebtedness of pledgor as indorser. 161 Ga655, 131SE529, 43ALR1059.

729-34 [b] **Loss of pledge through negligence.**-TexCivA 3SW(2d)849 (evidence held to sustain findings that first pledgee was negligent in losing stock and that such negligence was proximate cause of repledge).

729-37 123Kan359, 255P37.

729-39½-New. Attorney's statutory charging lien continues though stock was pledged for preëxisting debt without notice. Ida 286P923.

729-41 171Minn65, 212NW738.

729-42 [b] (1) 222Ky264, 300SW631 (in absence of provision in articles of incorporation or general law giving lien); 117Nebr388, 220NW830.

729-45 117Nebr388, 220NW830 (notice held timely).

730-51 208 Iowa1086, 226NW774 (agreement held not to release pledge of stock).

730-63½-New. ; or by asserting a claim of ownership and asking the transfer on books in good faith. 75CalA286, 242P 879.

730-66½-New. Security is not waived by pledgee's carrying item secured on his books as an open account. 43F(2d) 539.

731-78 CalA 290P470; TexCivA 3 SW(2d)849, 852 [citCJ]. But see 150 Va236, 142SE356. [b] **Pledgor is owner** as against collateral attack. Utah 293 P4.

731-79 Utah 293P4.

731-85½-New. A person to whom stock has been pledged, on receiving notice of an assignment of the equity of redemption in the stock, is under a duty to protect the assignee by delivering the stock to him on repayment of the amount of the debt secured. 187Wis606, 205NW 389. [a] **Sufficiency of notice.**-187Wis 606, 205NW389.

731-85¼-New. In such a case where the pledgee after receiving notice of the assignment parts with the stock by permitting the pledgor to sell it to a third person, the pledgee is liable to the original assignee for the value of the pledgor's interest. 187Wis606, 205NW389.

731-87 Ala 129S40; 338 Ill 245, 170 NE285(2dcase); 200 Iowa361, 202NW 768.

731-96 49SD135, 206NW695 (has "title as security").

732-98 22F(2d)268; 200 Iowa361, 202 NW768.

732-4 253Mass8, 149NE112. [a] **Where pledgee loses pledged stock,** pledgor may accept it when it is returned to him by finder, and his possession thereof is lawful. TexCivA 3SW(2d)849.

733-25 253Mass8, 149NE112.

733-30 TexCivA 2SW(2d)333, 336 [cit CJ]. But see 249NY159, 163NE135.

733-32 69CalA748, 232P495; 150Md 416, 133A610; 238Mich464, 213NW859; NJCh 148A178; 23 OhA71, 154NE357.

734-37 249NY159, 163NE135 (stolen stock).

734-38 91CalA590, 267P372.

735-39 178Ark669, 11SW(2d)483.

735-40 78Mont254, 255P1067; Tex CivA 2SW(2d)333.

735-41 TexCivA 2SW(2d)333.

735-42½-New. Apparent alteration and condition of one stock certificate pledged is constructive notice of pledgor's title as to all certificates pledged. Tex CivA 2SW(2d)333.

735-42¾-New. Pledgee's failure to make inquiry before lending money on stock certificates purporting to have been transferred years before issuance impeaches good faith. TexCivA 2SW (2d)333.

735-42¼-New. Pledgee of certificate pledged without authority, although innocent, is not entitled to retain the certificates against the owner, where pledgee can collect from pledgor. Tex CivA 2SW(2d)333.

736-53 CalA 291P684.

736-54 Ida 286P923; 132 Or381, 285P 1025.

736-55 37F(2d)301.

736-58 Ida 286P923 (taking new note on deposit of stock collateral without extension of time does not furnish consideration).

736-61 136Misc139, 239NYS26. See also 152Wash620, 278P691. [a] **Particular contracts construed.**-CalA 263P378.

736-68½-New. The lawful sale of corporate assets before the pledgor's stock was paid extinguished the pledgor's equity so that he could not have a return of the certificate. 296Pa108, 145A 834.

737-77 [b] **Particular contracts construed.**-CalA 263P378.

737-78 167La527, 119S697(2dcase); 253Mass8, 149NE112; TexCivA 285SW 885.

738-89 258Mass53, 154NE557.

738-95 102CalA452, 283P321.

739-22 [d] **Damages for conversion.**-174Minn143, 218NW557.

740-33½-New. Pledgee may jointly sue in conversion the pledgor and pledgee who buy corporate assets knowing that stock had been pledged under agreement of stockholders not to sell property. 49SD135, 206NW695.

740-33¾-New. Pledgee may jointly sue one acting as conduit for transfer of corporate assets, knowing that stock had been pledged under stockholders' agreement not to sell assets with pledgor and purchaser with knowledge of terms of pledgee. 49SD135, 206NW695.

740-34½-New. Pledgee of stock of two corporations all of whose properties were converted is entitled to recover the

value of his interest in the properties or that proportion of value of the whole property of each corporation as pledged stock bore to the total stock outstanding in each company. 50SD416, 210NW513.

740-34½-New. Pledgee cannot hold pledgor's costockholders liable for difference between face value of their stock and amount paid therefor. Ala 129S40.

740-34¼-New. Pledgee cannot, by dissolving corporation, condemn property of others to payment of debt. Ala 129S40.

740-44 132Misc819, 230NYS480.

741-49½-New. The illegality of the collateral security does not prevent an action on the indebtedness. 103Conn380, 130A383.

741-54 TexCivA 6SW(2d)173.

742-63 78Mont254, 255P1067.

742-70½-New. Where a mortgaged lease is transferred to a corporation for stock, and the stock is pledged, mortgagee is not a proper party to a proceeding to enforce the pledge. 222Ky721, 2SW(2d)390.

742-79 131Misc6, 225NYS509.

743-81 37F(2d)141.

743-83 TexCivA 19SW(2d)808 (sale voidable by pledgor where in excess of authority).

743-86½-New. The law implies warranty of title as against a pledgee, although he did not have authority to sell, where the purchaser is without knowledge. TexCivA 19SW(2d)808.

744-97 [b] **Additional consideration is unnecessary** for pledgee's promise to give actual notice of sale. 102CalA452, 283P321.

744-98 33Ariz466, 266P8.

745-19 33Ariz466, 266P8 (question of fact).

746-40 33Ariz466, 266P8.

746-49 But see NJCh 148A178.

747-54 [b] **Where contract provides that pledgee may purchase** provided sale is made at broker's board or public sale, purchaser acquires no title by purchase at private sale. 80Colo385, 252P355.

747-61 Mass 165NE701.

747-69 Utah 276P170 (judgment for defendant sustained).

748-77 [f] **Stock pledged to third party without owner's knowledge or consent.**-238Mich464, 213NW859.

748-82 [b] **Complaint held subject to special demurrer.**-CalA 263P378.

749-85½-New. In an action by the maker of original and renewal notes to recover the agreed value of stock pledged as collateral, the court is required to assume that additional shares pledged were returned not later than the due date of the original notes where the contract so required and the complaint does not allege the contrary. CalA 263P378.

749-87 220MoA1041, 279SW728.

750-20 [b] (2) Evidence held insufficient to show that plaintiff was equitable owner of stock. 220MoA1041, 279SW728.

750-33 [b] **Decree should not order return to corporation** when its rights are not involved. 258Mass53, 154NE557.

751-42 15F(2d)464.

751-46 255Mass72, 150NE898.

751-47½-New. The Uniform Stock Transfer Act has been held not applicable where there is no finding that the corporation issuing the stock was organized in a state where the act was not operative. 255Mass72, 150NE898.

751-50½-New. Whether pledgee of a stock certificate had constructive notice of a defect in pledgor's title is a fact question. TexCivA 2SW(2d)333.

751-53 3Del331, 138A361; 170Minn242, 212NW446; TexCivA 283SW601.

752-55 31Ariz137, 250P995; 172Minn110, 215NW192; 191NC352, 131SE732; 152Va108, 146SE274.

752-56 SC 155SE619.

752-60 SC 155SE619.

752-68 206Cal334, 274P512; TexCivA 188SW(2d)728.

753-71 73CalA627, 239P71; 84CalA114, 257P611 (evidence sufficient to show ownership); 80Colo385, 252P355; 172Minn110, 215NW192; 179Minn373, 229NW353; 220MoA223, 282SW729; 145SC91, 142SE811, 821 [quotCJ]; Utah 293P4.

754-81 216Ala504, 113S609, 54ALR1413; 325Ill16, 155NE773.

754-87 31Ariz137, 250P995.

754-89 31Ariz137, 250P995.

755-91 80Colo385, 252P355; TexCivA 283SW601, 602 [citCJ].

755-97 TexCivA 283SW601, 602 [citCJ]; 152Va108, 146SE274.

757-14 TexCivA 283SW601, 602 [citCJ].

757-29 14DelCh417, 129A857 (transfer not enjoined where court did not have jurisdiction of transferor); 200Ind535, 165NE323; TexCommnA 292SW531.

758-33 258Mass53, 154NE557.

758-33½-New. It is the duty of corporation officers to ascertain whether stock is being transferred in accordance with the law and by-laws. 253Mass8, 149NE112.

758-35 [c] **Right to information.**-Wash 290P427.

758-38 See also 78Mont402, 254P422.

758-43 258Mass53, 154NE557.

759-44 Wash 290P427.

759-50 [a] (2) 260Mass99, 156NE708.

759-52 81CalA187, 253P185.

759-53 81CalA187, 253P185.

760-59 See also 223AppDiv844, 228NYS174.

760-60 [b] **One taking shares represented as fully paid and nonassessable,** being innocent purchaser for value, is entitled to transfer of stock on books of corporation though in fact not fully paid. 14PaDist&Co281.

760-61 216Ala504, 113S609, 54ALR1413.

760-65½-New. that the corporation has a claim against the transferor, in case of transfer to a bona fide purchaser; 19OhA130.

760-69½-New. that transferee has only a defeasible title; 253Mass8, 149NE112.

761-85 81CalA187, 253P185.

761-86 81CalA187, 253P185.

761-89 81CalA187, 253P185.

761-92 See also 229AppDiv785, 242NYS59.

761-94 CalA 284P685; NJCh 148A178. [b] **Purchaser to whom certificate is duly indorsed** is attorney in fact for seller for purpose of completing transfer. Wash 290P427.

762-7½-New. Where a judgment debtor became the owner of shares of stock by virtue of heirship, a judgment creditor having an execution lien may have the shares transferred on the books of the corporation to the debtor although the debtor had pledged the stock, where the pledge was not registered within the statutory time. 80Colo385, 252P355.

762-7½-New. Custody of stock certificates by plaintiff suing to have transfer on books does not conclusively establish right to sue. 39F(2d)834.

762-8 MoA 27SW(2d)481; 251NY439, 167NE580 (though stockholder owed corporation money); 223AppDiv844, 228NYS174 (may have ownership noted on books).

762-12 See also CalA 292P135(1stcase).

764-36 258Mass53, 154NE557.

764-43 258Mass53, 154NE557.

764-45½-New. Irregular election of plaintiff as a director has been held not to estop his action for wrongful transfer. 78Mont402, 254P422.

765-55 69CalA748, 232P495 (decision of trial court on conflicting evidence as to whether plaintiff presented certificate for transfer not disturbed on appeal).

765-58 TexCivA 284SW654.

765-59 77CalA306, 246P816; 87CalA435, 262P375 (failure first to offer stock for sale to corporation is no defense to action); 2LaA710; 78Mont402, 254P422, 425 [citCJ]; 19OhA130; 126Okl172, 259P253, 54ALR1152; 145SC91, 142SE811, 822 [citCJ]. [e] **No recovery** where no damage is shown. 136Wash606, 241P10.

766-62 19OhA130.

766-67 258Mass53, 154NE557.

766-67½-New. nor is the transfer agent liable for refusal to make the transfer when acting under instructions of the principal, 253Mass8, 149NE112.

766-68½-New. A stockholder has no right of action against officers of the company for wrongful refusal to transfer his shares where he has sustained no damage. 136Wash606, 241P10.

766-73 [a] (1) 220Ky551, 295SW865 [citCJ].

766-74 81CalA494, 254P278 (where assignor's wife claimed stock as community property).

769-2 [b] **Allegations of damage** held not in alternative. 78Mont402, 254P422.

770-31 See also 77CalA306, 246P816.

770-32 23F(2d)595 (ownership of registered stock).

770-33 [b] (3) Evidence as to authority to sign name of corporation on notes is immaterial. 75CalA286, 242P879.

770-34 [a] (7) Evidence held sufficient to show defendant possessed no legal reason for refusal to transfer. 69CalA748, 232P495. (8) Other findings. CalA 284P685.

771-48 78Mont402, 254P422.

771-50 19OhA130.

772-54 78Mont402, 254P422.

772-64 TexCivA 284SW654, 658, 663 [citCJ].

772-65 TexCivA 284SW654, 663, 664 [citCJperStanford,Jdisop].

772-66 TexCivA 284SW654, 661 [citCJ]. See also TexCommnA 294SW843.

773-77 [c] 23F(2d)605. [d] **Laches not precluding recovery.**-134Misc140, 234NYS646.

773-78 170La871, 129S513; 225AppDiv81, 232NYS178; 134Misc140, 234NYS646 (innocent purchaser is not necessary party to rightful owner's action against corporation); TexCivA 284SW654 [citCJ]. [b] **Rightful owner not entitled to dividends** upon recovery of money damages with interest. 134Misc140, 234NYS646.

774-79 23F(2d)605; 225AppDiv81, 232NYS178. But see 134Misc140, 234NYS646.

774-85 See also 129Misc891, 223NYS383, 388 [citCJ].

774-85½-New. and the rule applies to stolen certificates indorsed in blank as in the case of forged indorsements; 129Misc891, 223NYS383.

774-86½-New. Person procuring transfer on corporation's books on forged indorsements is liable for conversion although he acted innocently. CalA 290P548.

774-88 TexCivA 284SW654, 661 [citCJ].

774-89 TexCivA 284SW654, 661 [citCJ].

776-5½-New. Where a person entrusted with a certificate of stock indorsed in blank fills in his name as transferee followed by the word "trustee," the corporation is put on notice that he does not hold the certificate in his own right or have power to sell or transfer it. Utah 263P490.

776-11 Utah 263P490.

776-11½-New. or he may require the corporation to purchase an equal amount of stock for him, Utah 263P490.

776-12 23F(2d)605. [d] **Evidence** as to purpose of assignment of plaintiff's certificates in blank is admissible, though not pleaded. 88CalA659, 263P1023.

777-19 See also 128Kan699, 280P916.

777-21½-New. Where a wrongful transfer by a corporation deprives a stockholder of his rights as such, he alone has the right to exercise an election to require the corporation to purchase an equal amount of stock for him so as to restore his rights or to sue as for conversion. Utah 263P490.

777-22 23F(2d)605.

777-27½-New. An action to require issuance of a new certificate commenced within one month after knowledge of an unauthorized transfer is not barred by negligence or laches where facts previously known did not put the stockholder on notice. Utah 263P490 (receipt of cashier's checks for dividends held not to put stockholders on notice).

777-32 23F(2d)605 (cannot intervene).

778-39½-New. **Evidence held insufficient** to show lack of authority to sell stock certificates delivered with blank indorsement. Md 150S261(2dcase).

778-40 23F(2d)605 (alternative money judgment, not prayed for, held improper).

778-50 [b] **Court acting on parol evidence** in transferring stock to real owner has been held not to have disregarded General Corporation Law or Uniform Stock Transfer Law. 161La282, 108S483.

779-57 [b] **Brother has no enforceable title** to deceased's stock on transfer to him on records, where deceased kept certificate. MoA 27SW(2d)481.

779-57½-New. Incompleted fraud of deceased transferring stock on books to defeat wife's rights does not preclude executrix from having stock transferred to her in equity. MoA 27SW(2d)481.

779-58 TexCivA 284SW654.

779-59 But see TexCivA 284SW654.

779-65 19F(2d)97; 31F(2d)721; 332 Ill126, 163NE319; 237 IllA500; Mass 169NE897(2dcase).

779-66 CalA 266P801; 245 IllA552.

780-69 See also 332 Ill126, 163NE319.

780-76 SC 155SE619.

780-78 225AppDiv81, 232NYS178. [b] **Owner of stock is protected** in ownership so long as he appears on the stock book. 216Ala504, 113S609, 54ALR1413.

781-90 [a] **Sole legatee under will of stockholder** who receipted for and retained stock without complying with statute requiring transfer on books of corporation is not personally liable for unpaid assessment. 78CalA29, 247P600.

782-93 78CalA29, 247P600.

783-7 238Mich464, 213NW859; 238 Mich476, 213NW863.

783-8 206Cal334, 274P512; 69CalA 748, 232P495; Ida 286P923; Kan 291P 750.

783-11 238Mich464, 213NW859; Tex CivA 28SW(2d)333, 336' [citCJ].

783-12 238Mich464, 213NW859.

784-13½-New. At common law, an owner cannot be deprived of stock indorsed in blank and delivered to one who wrongfully disposed of it to a bona fide purchaser, unless custom treats the certificate of stock as negotiable. 255 Mass72, 150NE898.

784-13⅓-New. Possession of stock certificates may be reclaimed by the owner where there is no passing of title by the pledgee to a bona fide purchaser. 255 Mass72, 150NE898.

784-20 Contra 238Mich464, 213NW859.

784-27 Iowa 232NW835.

784-28 102CalA71, 282P801 (constructive notice is given by entries in books of corporation).

784-30 238Mich464, 213NW859. [b] (2) That certificates of stock were offered in regular course of trade by person who was not holder named on face thereof, but with blank power of attorney signed by named holder, was not alone sufficient to place purchaser on notice. 206Cal334, 274P512.

785-31 238Mich464, 213NW859.

785-36½-New. A purchaser of stock certificates, made negotiable by signature in blank of person to whom issued, owes no duty to such person to inquire into the title of the party in possession. 238Mich464, 213NW859.

785-37 Iowa 232NW835.

786-54 See also 167La527, 119S697(2d case).

786-64 244Mich452, 221NW631; 198 NC104, 150SE713(2dcase); 7PaDist&Co 371; TexCivA 21SW(2d)552.

787-68 19 OhA130.

787-74 CalA 284P685; 129Misc460, 221NYS540.

788-82 216Ala216, 113S61; 239Mich 249, 214NW197; 171Minn65, 212NW 738; 143 Okl220, 289P315. [a] **Construction.**-239Mich249, 214NW197.

788-83 171Minn65, 212NW738, 742 [cit CJ].

788-90 See also 223AppDiv844, 228 NYS174.

791-29 239Mich249, 214NW197.

791-30 222Ky264, 300SW631 (in absence of provision in articles of incorporation or general law giving authority to pass by-law).

791-39 251NY439, 167NE580.

792-51 But see CalA 284P685.

795-89 171Minn65, 212NW738, 742 [cit CJ].

795-90 [b] **Corporation held estopped** to assert lien on its stock owned by bankrupt by neglecting to amend claim filed on unsecured creditor. 174Ark924, 298SW17.

796-22 216Ala216, 113S61.

797-19½-New. Attacking creditor of holder of corporate stock must ascertain whether the corporation has a lien. 216 Ala216, 113S61.

797-19⅓-New. A corporation, which issues stock without stating thereon its right to a lien for the unpaid purchase price, may not assert its lien against one who holds in due course, or in good faith, for the value and without notice. 239Mich249, 214NW197.

797-36 [a] (2) Bill held sufficient. 216 Ala216, 113S61.

798-47 124Kan83, 257P717; 317Mo 1028, 298SW91, 98 [citCJ], 56ALR1276; 287Pa190, 134A455; 5PaDist&Co 333; TexCommnA 286SW167, 170 [citCJ]. [k] **Nature of dividends** as property and subject of contract. 39F(2d)40.

799-50 106Conn19, 137A20; Mass 172 NE647; 317Mo1028, 298SW91, 56ALR 1276. [e] **Distribution of profits without declaring dividends.**-136Misc893, 242NYS417 (ratification by acceptance).

799-50½-New. "Income" includes return earned by capital stock. 290Pa 457, 139A200, 56ALR1303.

800-52 7F(2d)221; 7F(2d)455; 8F (2d)716; 15DelCh409, 138A347; 15Del Ch147, 133A48; DelCh 151A228; 240 Mich569, 215NW772; 241NY427, 150NE 505; 286Pa226, 133A232; 287Pa216, 134A397, 400 [citCJ]; 291Pa543, 140A 498.

800-52½-New. "Profits or income" of a corporation is earned by capital stock and may be declared as dividends. 290 Pa457, 139A200, 56ALR1303.

800-53 7F(2d)221; 291Pa543, 140A 498.

800-54 240Mich569, 215NW772.

800-56 15DelCh147, 133A48; 145Wash 604, 261P393. [f] **Statute not violated.**-154Wash559, 283P173.

802-67 245NY343, 157NE261; 287Pa 216, 134A397, 400 [citCJ]; 291Pa543, 140A498. [a] **Payment of dividends from current profits** is unlawful if prior impairment of capital still exists. 9Pa Dist&Co 179.

802-70 [a] **In Ohio.**-7F(2d)271.

802-71 15DelCh409, 138A347, 350 [cit CJ&Cyc]; 15DelCh147, 133A48.

802-79 195NC119, 141SE344, 348 [cit CJ].

803-80 Nebr 228NW531; 195NC119, 141SE344; TexCivA 18SW(2d)737. [a] (7) When property of corporation exceeds sum limited for its capital in its charter, excess is surplus, which may be divided among each stockholder. 29 F(2d)810.

803-81 245NY343, 157NE261.

804-85½-New. Increase in value of corporation's assets should not be included in surplus. 129Misc25, 220NYS711.

804-85⅓-New. Until creditors have been paid, no surplus or net profits can be available for dividends. 223AppDiv 654, 229NYS414.

804-85¼-New. A corporation cannot postpone indefinitely payment of an obligation contingent upon its earning net profits by putting into improvements the income which would otherwise become net earnings. TexCivA 18SW(2d)737.

804-85⅕-New. Loss in capital stock must be replaced before estimating earnings. TexCivA 18SW(2d)737 (rule is not applied to mining corporations).

804-87 Nebr 228NW531.

804-93 15DelCh147, 133A48; 195NC 119, 141SE344; TexCivA 18SW(2d)737.

805-94 195NC119, 141SE344; TexCivA 18SW(2d)737.

805-95 TexCivA 18SW(2d)737.

805-95½-New. Amortization item is not properly included in computing book losses of a corporation operating a granite quarry. TexCivA 18SW(2d)737.

805-96 TexCivA 18SW(2d)737 (but not interest on capital).

805-4 [a] (3) 287Pa216, 134A397.

805-8 TexCivA 18SW(2d)737.

806-12 241NY427, 140NE505.

806-25 [b] **Statute authorizing commissioner of corporation** to permit dividends other than from surplus profits held not to conflict with constitution so far as relates to surplus capital resulting from assessments on stock wholly paid for at par value. 196Cal468, 238 P703.

807-28 26F(2d)540; 106Conn19, 137A 20; 110Conn150, 147A562.

807-32 220Ala613, 127S195.

807-33 129Misc875, 224NYS77; 103 WVa259, 137SE217, 51ALR938.

807-34½-New. A corporation, illegally declaring dividend, is liable for ordinary and natural consequences thereof. 129 Misc25, 220NYS711.

807-34¼-New. Declaration of dividends is a corporate act involving internal management and policy and controlled solely by the law of domicile. 109Conn268, 146A727.

808-40 17F(2d)79; DC 36F(2d)543; 129Misc875, 224NYS77; TexCommnA 286SW167; 103WVa259, 137SE217, 51 ALR938.

808-43 23F(2d)595 (dividends are not due till earned and declared). See also Mass 172NE647.

808-44 280US197, 50SCt106, 74Led368, 67ALR762; 7F(2d)221; 29F(2d)810; 30 F(2d)260 [certiorari granted 49 SCt265 (5thcase)]; 216Ala486, 113S516; 148Md 90, 129A22; 263Mass308, 160NE894, 67 ALR758; Mass 172NE647; NJCh 151A 389; 241NY427, 150NE505; 133 Okl 130, 271P675, 679 [citCJ]; 289Pa233, 137A235, 237 [citCJ]. [k] **That net profits were not applied to improvement of corporate property in any particular year** does not entitle holder of noncumulative preferred stock as of right to have dividends declared in such year. 263 Mass308, 160NE894, 67ALR758. [l] **That directors are prejudiced against nonassenting preferred stockholders refusing to waive accrued dividends** is not sufficient reason for depriving directors of discretion in declaration of dividends. 263Mass308, 160NE894, 67ALR758. [m] **Stockholders are not necessarily deprived of dividends** because surplus in certain years is not applied to company property nor declared as dividends. 263 Mass308, 160NE894, 67ALR758. [n] **Delay in declaring dividend** will not be disturbed if in good faith and not in plain violation of stockholders' rights. Mass 172NE647.

809-45 29F(2d)810; 32F(2d)37 (equity cannot declare dividend); 241NY 427, 150NE505. [g] **Authority to declare dividends** does not permit impairment of stockholder's rights. 7 F(2d)221. [h] **Refusal to declare dividend on noncumulative preferred stock** held not abuse of discretion. 263Mass 308, 160NE894, 67ALR758.

810-46 263Mass308, 160NE894, 67ALR 758.

810-47 7F(2d)221.

810-49 148Md90, 129A22 (only in the statutory method).

810-59 241NY427, 150NE505.

811-65 Ont [1929] 3DomLR907.

811-66 See also Ont [1927] 3DomLR 163.

811-74 241NY427, 150NE505. But see Ont [1927] 3DomLR163.

811-74½-New. Where such declaration is not for an ulterior purpose, 241NY427, 150NE505.

811-74¼-New. even though effect was to deprive minority of partial control of subsidiary whose stock was to be distributed. 241NY427, 150NE505.

812-80 148Md90, 129A22 (exchange of common stock for stock of no par value not a stock dividend); 250NY1, 164NE 723; 129Misc875, 224NYS77 (exchange of no par value stock for par value stock held stock dividend in part). [a] 317Mo 1028, 298SW91, 56ALR1276. [b] **Other definitions.**-Mo 20SW(2d)523, 67ALR 476.

812-84 106Conn19, 137A20; Mo 20SW (2d)523, 67ALR476; 241NY427, 150NE 505.

812-84½-New. The mere creation and issue of new shares of stock upon a basis of surplus assets thus converted into stated capital amounts to a stock divi-

dend. 129Misc875, 224NYS77.
812-85 241NY427, 150NE505.
812-89½-New. Stock dividend is held mere dilution of value of outstanding shares. 274US91, 47SCt497, 71Led942, 55ALR705.
812-89½-New. Stockholder's acceptance of stock representing stock dividend can be presumed where he has done all in his power to confirm transaction. CalA 290P548.
813-91 7F(2d)221; 216Ala486, 113S 516; 241NY427, 150NE505.
813-92 216Ala486, 113S516; 133 Okl 130, 271P675, 679 [citCJ].
813-94 30F(2d)260 [certiorari granted 279US828, 49SCt265, 73Led979(5th case)].
813-96 15DelCh119, 132A442; Ont [1929] 3DomLR907.
814-97 241NY427, 150NE505; Ont [1929] 3DomLR907.
815-7 135Wash8, 236P794 (rule applied to salaries of stockholder employees of coöperative corporation which paid no dividends).
815-13½-New. Where stock was illegally issued for notes, a declaration of a dividend in cash for the sole purpose of paying for shares illegally issued is illegal. 25F(2d)884.
815-16 8F(2d)56; 109Conn268, 146A 727.
816-17 But see 109Conn268, 146A727.
816-20 DC 36F(2d)543 (mere declaration without setting aside of funds does not constitute dividend).
816-22 23F(2d)595; 43F(2d)777.
817-34 31Ariz137, 250P995, 997, 998 [citCJ]; Mo 20SW(2d)523, 67ALR476 (stock dividend); 98NJEq326, 129A244, 44ALR60 (stockholder may object to use of accrued dividends for the purchase of stock for retirement so far as dividends belong to stockholder, but no stockholder may object to use of dividends belonging to other stockholders); 99NJEq207, 132A652; 251NY439, 167 NE580; 131Or597, 282P760; 10PaDist &Co 695; 149Va274, 141SE240; Ont [1929] 3DomLR907.
818-35½-New. Agreements between a corporation and its preferred stockholders have been construed as entitling the holders of stock to dividends at the stipulated rate whenever earned and, if not earned by operation, out of assets on dissolution. TexCivA 275SW841.
818-35½-New. Charter contract of a corporation covers the rights of the several classes of stock, as regards right to dividends. 29F(2d)810.
818-36 23F(2d)994; NJCh 150A5 (go to second life tenant where declared after death of first life tenant); 133Misc 159, 232NYS212.
818-38 But see 23F(2d)994.
819-39 See also 152Va108, 146SE274.
819-40 134Misc138, 235NYS389 (stock dividend declared after theft upon stock in hands of holder not shown to be bona fide purchaser).
819-41 39F(2d)40; 191NC352, 131SE 732, 734 [citCJ]. See also 249NY159, 163NE135. [e] **In absence of statute or by-law,** notice of transfer of dividends is not necessary. 39F(2d)40.
819-43 39F(2d)40. See also 249NY159, 163NE135.
820-49 221Ky67, 297SW695. But see 157Tenn275, 8SW(2d)489, 60ALR693. [e] **Intention of parties controls.**-157 Tenn275, 8SW(2d)489, 60ALR693.
821-50 5F(2d)809.
821-51 5F(2d)809; 129Misc424, 222 NYS348; 134Misc138, 235NYS389.
822-54 Mo 20SW(2d)523, 67ALR476 (no right of action in pledgor for failure or refusal of corporation to issue stock dividend to him). See also 249NY159, 163NE135. But see 253Mass8, 149NE 112; 150Va236, 142SE356.
822-64 134Misc138, 235NYS389.
822-65 Mo 20SW(2d)523, 67ALR476.
823-73½-New. **After sale of stock on default of pledgor,** the latter cannot demand delivery of stock dividends. Mo 20SW(2d)523, 67ALR476.
823-74 134Misc138, 235NYS389.
823-80 106Conn19, 137A20.
823-82 106Conn19, 137A20. [c] **Stock dividend consisting of stock in another corporation,** declared in testator's lifetime, does not pass to specific legatee. 106Conn19, 137A20.
824-86 99NJEq207, 132A652.
824-87 99NJEq207, 132A652.
824-89½-New. Remainderman is entitled to stock dividends earned before life estate commenced. 99NJEq207, 132A 652.
824-90 23F(2d)595; 31Ariz137, 250P 995; 15DelCh144, 132A687; 99NJEq207, 132A652. [n] **Questions of fact.**-121 Oh St250, 167NE883.
825-93½-New. A stockholder may have an equitable right to division of part of the surplus. 247Mich418, 225NW878.
826-11 See also 117Nebr388, 220NW 830.
826-12 152Va108, 146SE274.
826-14½-New. Where the record owner of stock transferred the certificate to plaintiff for a valuable consideration but failed to execute power of attorney authorizing its transfer on the corporation's books, plaintiff was not entitled to an allowance of interest until after he had taken the necessary legal procedure to establish his ownership. 152Va108, 146SE274.
826-16 152Va108, 146SE274.
826-19½-New. Where dividends were not declared until after the death of the stockholder of record on the corporation's books, the corporation could not apply such dividends in reduction of deceased stockholder's debt to it. 152Va 108, 146SE274.
827-29 121OhSt250, 167NE883.
828-39 262Mass1, 159NE536.
828-42 195NC119, 141SE344; 289Pa 233, 137A235, 237 [citCJ] (dictum). [d] **Court will not order payment of dividend,** where radical change in company's condition requires substantial expenditure. 136Wash302, 239P837, 1119.
828-45½-New. Demurrer to bill to enforce payment of dividends should be sustained regardless of fact that such bill contained prayer for accounting which was purely ancillary. 15DelCh 144, 132A687.
828-45½-New. Before directors can be compelled to declare a dividend from an alleged surplus accumulated through fraud and bad faith, such surplus must be shown to exist. 223AppDiv654, 229 NYS414.
829-46 [b] **Circumstances not authorizing injunction.**-15DelCh351, 138A352.
829-53 223AppDiv615, 229NYS250; 127 Misc701, 217NYS605; 135Misc329, 239 NYS362; 292Pa149, 140A862 (instrument creating trust controls); TexCivA 11SW(2d)608. [a] **In NewYork.**-134 Misc281, 235NYS83.
829-54 317Mo1028, 298SW91, 95 [cit CJ] 56ALR1276; 127Misc 399, 216 NYS267; 135Misc329, 239NYS362; 12 PaDist&Co 159. See also 197Wis304, 222NW323. [d] 252 IllA495. [e] (2) Accumulated earnings of corporation, if not capitalized, are properly treated as income when distributed in dividends. Md 150A282. [f] **Increase in value of original capital investment** is not income of trust estate, but part of corpus not distributable to life beneficiaries. Mo 23SW(2d)32 (increase represented by shares of new no par value stock).
830-55 226AppDiv574, 235NYS399; 135Misc329, 239NYS362. [a] (4) 226 AppDiv574, 235NYS399.
830-58 217Ky664, 290SW490, 492 [cit CJ]; 127Misc701, 217NYS605; 197Wis 304, 222NW323.
830-64½-New. Extra dividends on stock in trust which impair the value of stock as of date of testator's death are not payable to life tenant. 126Misc54, 213NYS286.
830-66 126Misc54, 213NYS286 (stock dividends which did not impair value of stock as of date of testator's death); 127Misc701, 217NYS605; 12PaDist&Co 398 (under statute forbidding accumulation of income beyond certain period); 193Wis84, 213NW641; 197Wis304, 222 NW323. [a] **Stock dividends not intrenching on principal** constitute income belonging to life tenant. 134Misc511, 236NYS275. [b] **Exchange of old stock of certain par value** for new no par value stock is mere alteration in character and form of stock and not stock dividend or distribution of surplus. Mo 23SW(2d) 32.
831-68 247Mich418, 225NW878.
831-71 285Pa449, 132A352.
831-71½-New. In determining whether an extraordinary stock dividend should go to the life tenant or remainderman, the court should consider facts and circumstances, and the nature of the transaction and dividend, according to justice and equity. 217AppDiv573, 217NYS79.
831-71½-New. Whether a stock dividend belongs to the remainderman or the life tenant turns on the question whether the declaration of the dividend has intrenched upon the capital of the trust represented by the value of the stock at the time of the testator's death. 199Wis 131, 225NW733.
831-72 256Mass179, 152NE52. [a] 252 IllA495.
831-74 252 IllA495. [b] **Stock of another corporation received in exchange for property and distributed pro rata to stockholders** constitutes income where resolution provided for such distribution as dividend from accumulated earnings. 252 IllA495. [c] **That dividend is for amount of proceeds of sale of building and leaseholds** does not render it distribution of capital assets where resolutions declare it to be distribution of accumulated earnings. 252 IllA495. [d] **Distinction between extraordinary and ordinary current dividends** is irrelevant where intent of corporation is essential factor in determining whether dividend is capital or income. 252 IllA495.
831-76 252 IllA495; Mass 167NE338; 317Mo 1028, 298SW91. 56ALR1276. [b] 111Conn325, 149A846.
832-77 [g] (1) 111Conn325. 149A846 (letter of president to stockholders held not declaration of stock dividend from earnings). (2) Rule that stock dividends belong to trust fund applies unless declared to be from earnings. 111 Conn325, 149A846.
832-81 285Pa449, 132A352. See also 317Mo 1028, 298SW91, 96 [citCJ] 56 ALR1276.
832-82 Md 150A282; 217AppDiv573, 217NYS79. [a] (2) Where creator has not expressed his wishes, cash and stock dividends from surplus profit made prior to the establishment of the trust estate go to the remainderman, such dividends from profits made after the creation of the trust go to the life tenant, those from profits made both before and after creation are to be apportioned in the ratio of earnings before to earnings after. 240NY172, 148NE180. (3) Burden of proof is on whoever attacks correctness of determination of directors as shown by books as to value of capital and surplus as of date of creation of trust or declaration of dividend. 240NY 172, 148NE180. (4) Where extraordinary losses have depleted capital, ordinary cash dividends from subsequent profits belong to the life tenant. 240NY 172, 148NE180. (5) Where extraordinary losses wipe out all or large part of surplus and loss is made good from profits accruing during life estate and then this restored surplus is distributed either in cash or in stock dividends, they belong to remainderman exactly as though no loss had occurred. 240NY 172, 148NE180. (6) Where stock dividend is declared of stock of subsidiary owned by corporation prior to creation of trust, remainderman is entitled thereto. 240NY172, 148NE180. (7) Decision of directors as to when loss occurred or how much of loss subsequently found to be total had occurred on certain date will not be disturbed where evidence fails to show that their decision in light of facts then known should have been otherwise. 240NY172, 148NE180. (8) Profits credited temporarily to "realization reserve" to make good extraordinary losses become part of surplus and when subsequently distributed either in cash or stock dividends belong to remainderman. 240NY172, 148NE180. (9) Under trust agreement placing stock owned by life beneficiaries in trust for their use and benefit, extraordinary dividends earned before creation of trust fund must be returned to trust fund subject to terms of trust. 226AppDiv 328, 235NYS81. [b] **Presumption must yield to proof** of adverse facts. 296Pa 436, 146A111(2dcase).
833-84 Md 150A282.

833-85 Md 150A282; NJCh 150A5; 130 Misc551, 224NYS718; 285Pa449, 132A 352; 12PaDist&Co 783 (stock dividend from current earnings). [b] **Stock dividend declared after life tenant's death** goes to his executor. NJCh 150A5.

833-86 Md 150A282; 133Misc863, 234 NYS596; 217AppDiv573, 217NYS79; 6 PaDist&Co 1; 12PaDist&Co 575. [a] (1) 217AppDiv573, 217NYS79. (2) 285 Pa186, 131A714; 292Pa149, 140A862 (intact value at time of purchase governs); 12PaDist&Co 575. (5) Court will presume that corporation received equivalent value in trading stock for assets of another corporation. 292Pa 149, 140A862. (6) Stock dividend declared on bank stock in 1927 is apportionable between principal of trust fund and beneficiary so as to leave principal intact as it existed when trust was established where trust was created by will of testator who died prior to May 17, 1926. 133Misc820, 234NYS494. [b] (4) Market, intrinsic, or actual value of stock in new corporation to which property was sold should be disregarded in determining whether corpus of trust fund was encroached upon. 217AppDiv 573, 217NYS79. (5) Market value does not affect apportionment of stock dividends between corpus of trust and income. 292Pa149, 140A862. (6) Apportionment to preserve value of estate has been held properly made with regard to actual or book value and not market value. Md 150A282.

833-87 NJCh 151A545; 5PaDist&Co 351; 12PaDist&Co 605. [a] **In New York.**–133Misc820, 234NYS494.

834-89½-New. Where, after life estate, testator bequeathes to remainderman the principal of corporate stock and "unpaid income and dividends," the remainderman is not entitled to income which had accrued and been distributed as dividends, but only to such income and dividends as had not been paid by the corporation. 285Pa186, 131A714.

834-90 217Ky664, 290SW490, 492 [cit CJ]; 221Ky245, 298SW701. See also 317Mo1028, 298SW91, 96 [citCJ] 56 ALR1276. [b] **Dividends paid from accumulated surplus on reduction of stock** belong to life tenant rather than remainderman. 221Ky245, 298SW701. [c] **Life tenant is entitled to dividends declared on stock after testator's death.**–230Ky488, 20SW(2d)90.

834-95 235Ky296, 31SW(2d)373.

834-99 115Nebr177, 212NW39.

834-1 115Nebr177, 212NW39.

834-1½-New. In Illinois corporations not for profit have no stock or stockholders. 325 Ill 323, 156NE314.

835-3 [d] (1) 78CalA305, 248P525.

835-4 NJSup 135A663 [citCJ].

835-5 33F(2d)782 (persons holding stock as trustees). See also 273US182, 47SCt315, 71L ed596.

836-25 245Mich32, 222NW193. [a] (1) 78CalA305, 248P525; 317Mo1344, 300 SW798.

836-25½-New. Evidence, showing defendant not participating in management of corporation, and it only appearing that he signed subscription and paid two installments, was held to show intention that defendant be not a stockholder until certificates are issued to him. 125Misc521, 211NYS405.

836-26 96CalA42, 273P595.

836-27 273US182, 47SCt315, 71L ed 596; 197NC202, 148SE174; Utah 285P 1011. [a] **Person holding stock assigned in blank as collateral security** is not stockholder. 43F(2d)364.

837-35½-New. Corporate books showing discrepancies in their contents were held to give no aid in establishing whether or not defendant was a stockholder. 125Misc521, 211NYS405.

837-38 249 IllA121, 124 [citCJ].

838-42 BC [1930] 3DomLR870.

839-66 338 Ill 245, 170NE285(2dcase).

839-82 37F(2d)593 (holder of street certificate); 78CalA29, 247P600.

840-90 [a] **A pledgor,** before foreclosure, does not have character as stockholder extinguished. Utah 293P4.

840-98½-New. Stockholders cease to be such on adjudication of bankruptcy of corporation. 214AppDiv367, 212NYS 356.

840-2 245 IllA413, 420 [quotCJ]; Mass 170NE810.

841-11½-New. Mere mismanagement of the affairs of a corporation by its officers or agents will not warrant withdrawal of members therefrom, 115Nebr 177, 212NW39.

841-11½-New. nor the repudiation of the obligations assumed by them as such members. 115Nebr177, 212NW39.

841-11¼-New. Where a corporation voted to retire first and second preferred stock, exchanging therefor equal amounts of new convertible seven per cent preferred, holders of the old second, preferred have been held entitled to appraisal. 250NY242, 165NE279.

841-11⅛-New. A statute giving an objecting stockholder an absolute right to appraisal of shares, and the right to demand payment thereof if a new certificate of incorporation "alters the preferential rights of any outstanding shares," does not refer to common stock. 224 AppDiv268, 229NYS735.

841-11¼-New. Where holders of a small minority of second preferred stock were required to exchange stock for new convertible stock limited to payment of seven per cent dividends, whereas the old stock paid dividends of ten per cent, and whereas the old shares might acquire a market value far in excess of sale, but the new shares were callable at one hundred and ten, and the old shares were entitled to share on distribution of assets only to half the amount of the new shares, wishes of stockholders as to an appraisal of the stock held by them should prevail rather than the conception of courts. 250NY242, 165NE279.

841-11½-New. The statute is applicable only if alteration prejudicially infringes on preferential rights. 224AppDiv268, 229NYS735 (certificate held not to alter preferential right).

841-11¼-New. The statute is mandatory. 224AppDiv268, 229NYS735.

841-11½-New. In deciding whether a preferential right has been altered, the court should exclude from consideration the relative values to the stockholder of that which he had before and after the reclassification of share capital. 224 AppDiv268, 229NYS735.

841-19½-New. Courts will interfere to keep corporate a tribunal within its jurisdiction as prescribed by the rules of the association, and will inquire whether the action taken was in bad faith or in violation of the laws of the land, but will not investigate the merits of tribunal's decision. 30F(2d)625.

843-56 30F(2d)625 (complaint held insufficient).

843-63 34Ariz445, 272P643; 78CalA29, 247P600; DelCh 146A337; 220AppDiv 39, 220NYS532; 54ND614, 210NW342, 48ALR660.

843-64 13F(2d)51; 219Ala497, 122S 824; 176Minn588, 224NW245; 118Nebr 5, 223NW277; 54ND614, 210NW342, 48 ALR660.

843-65 34Ariz445, 272P643.

843-72 81Mont222, 262P1039.

844-74 29F(2d)383.

844-81 MoA 108SW(2d)68. See 26F(2d) 830.

844-87 [a] (2) Pertinent statute law is part of charter contract between corporation and preferred stockholders. 15 DelCh409, 138A347.

844-87½-New. A stockholder is not a party to corporate contracts. 162La941, 111S336.

844-88 Ariz 290P155.

844-90 Ariz 290P155.

845-91 Ariz 290P155.

845-96 118Nebr5, 223NW277.

845-2 125Kan710, 266P101.

845-12 136Wash220, 239P560; 155 Wash280, 284P80.

845-13 42 Ida254, 245P392.

846-15 42 Ida254, 245P392; 166Minn 323, 207NW632; 116Nebr14, 215NW 458; 130 Or401, 280P492; 130 Or408, 280P495(1stcase). [a] (1) 130 Or401, 280P492; 130 Or408, 280P495(1stcase). [b] **Mere fact of ink line through clause "nonassessable"** will not authorize such assessment. 116Nebr14, 215NW458.

847-18 145 Ida244, 263P32 (statutory limitation controls charter authority).

847-20 See also 155Wash280, 284P80.

847-25 CalA 289P946; 42 Ida254, 245 P392.

847-29¼-New. A forfeiture of stock sold for delinquency in payment of a void assessment in invalid. 42 Ida254, 245P392.

847-29½-New. Generally an invalid forfeiture will be annulled at the suit of a stockholder. 42 Ida254, 245P392.

847-29¼-New. An assessment and sale of stock for a delinquent assessment is a proceeding to enforce a forfeiture. 42 Ida254, 245P392.

847-29⅛-New. Where a portion of the stock has been deposited in the treasury pursuant to a resolution inviting stockholders to deposit their stock for a certain time exempt from assessments, an assessment on the balance of stock outstanding is an assessment as distinguished from a call. 42 Ida254, 245 P392.

847-29⅛-New. Stock so deposited does not become treasury stock so as to be exempt from assessment. 42 Ida254, 245P392.

847-29½-New. Where stock has been so deposited, an assessment on the outstanding stock is void for inequality. 42 Ida254, 245P392.

847-29⅛-New. Directors' motive in levying assessment for proper purpose is immaterial. CalA 289P946.

848-47 245Mich599, 223NW218.

848-50 43F(2d)507.

849-51 See also 9LaA528, 119S439(2d case).

849-54½-New. A stockholder has the right to hold a corporation's mortgage bonds, and there is no merger of the two estates unless an affirmative intention appears. 334 Ill 147, 165NE632.

849-54⅛-New. Voluntary contribution becomes an asset of the corporation, and creates no obligation on its part to repay the same. 9LaA528, 119S439(2d case) (made in response to request).

849-54¼-New. The claim of a principal stockholder is properly rejected where he treated the business as his own. 168La248, 121S759.

849-67 [a] (1) 149Va867, 141SE856.

850-70 253NY274, 170NE917; 123 Or 406, 262P833.

850-71 339 Ill 121, 171NE159.

850-74 7F(2d)335.

850-76½-New. A stockholder may call other stockholders' attention to conditions regarded in good faith as prejudicial to the corporate interests. Tex CivA 16SW(2d)319.

850-78 DC 41F(2d)117; 239Mich300, 214NW126; 300Pa479, 150A902.

851-80 23F(2d)531; 253NY274, 170NE 917.

851-81 300Pa479, 150A902.

851-81¼-New. No combination of stockholders less than all will be permitted to manage or control a company in their interest alone. 50Nev52, 250P 245.

851-82 34Ariz245, 270P1044; 239Mich 300, 214NW126.

851-84 175Minn138, 220NW423.

851-85 239Mich300, 214NW126.

852-87 50Nev56, 250P369.

852-91 50Nev56, 250P369, 375 [citCJ].

852-93 Ariz 290P155.

852-99 168Ga145, 147SE102.

853-6½-New. Minority stockholders must accept within legal limits what is for the best interests of all stockholders. 259Mass259, 156NE424.

853-9 106Conn216, 137A644; 99NJEq 282, 132A477.

853-9½-New. 99NJEq282, 132A477.

853-10 99NJEq282, 132A477.

853-16 155Md66, 141A425 (right not unlimited); 130Misc110, 222NYS532; 191NC809, 133SE391.

853-20 23F(2d)406; Del 143A257; 28 Hawaii68; 196 Ind600, 149NE170; 80 Mont328, 260P722; Nebr 229NW118; 191NC809, 133SE391; 119 Or44, 247P 155, 248P156.

854-21 119 Or44, 247P155, 248P156.

854-24 Del 143A257.

854-25 Del 143A257. See also Colo 291P1024.

854-29 Del 143A257 (every case involving right to examine books and records must be determined on its own

facts); 196 Ind600, 149NE170; 136Misc 136, 239NYS41; 119 Or44, 247P155, 248 P156. See also 218AppDiv632, 219NYS 181.

855–30 196 Ind600, 149NE170; 119 Or 44, 247P155, 248P156.

855–36 196 Ind600, 149NE170; 119 Or 44, 247P155, 248P156.

855–39 [a] (5) May examine books or records showing or tending to show financial status of corporation. 208 Iowa1217, 227NW101.

856–43 28Hawaii68.

856–46 254 IllA445; 119 Or44, 247P 155, 156, 248P156 [citCJ].

856–49 220Ala404, 125S667.

856–52 [a] **Presumption of good faith and honesty of purpose** attends stockholder's request to inspect books and records till contrary is proved. 121 OhSt582, 170NE434.

857–56 233 IllA508; 119 Or44, 247P 155, 156, 248P156 [citCJ] Utah 285P 1011; 149Wash143, 270P297 (under Idaho statutes). Contra 114 OhSt231, 151 NE122, 59ALR1368. [b] **That purpose of stockholder is to bring suit against corporation** is not ground for denying inspection. 119 Or44, 247P155, 248P156. [c] **Pending suit** by stockholder against corporation does not deny stockholder right to examine books. 220Ala404, 125 S667.

857–61 249Mich609, 229NW434; 119 Or44, 247P155, 156, 248P156 [citCJ].

857–64 Utah 285P1011.

857–66 119 Or44, 247P155, 248P156.

857–70½–New. A stockholder's right of inspection of books of a corporation of another state is governed by the statute of that state. 149Wash143, 270P 297.

857–70¾–New. Only ground for refusal of examination under some statutes is that stockholder has sold or offered to sell list of stockholders or has aided or abetted another in procuring list for sale. 254 IllA445.

857–70¼–New. Purpose of statute is to enable stockholder to get information as to conduct of business. 254 IllA445.

858–75 [b] **Entry "fully paid"** in stock book does not preclude stockholder's right to investigate why book failed to recite consideration received for stock issued. 126Misc457, 214NYS53.

858–77 Utah 285P1011.

858–84½–New. That stockholder has been given privilege of inspection on several previous occasions does not justify refusal of further inspection. Utah 285P1011.

859–4 150Wash366, 273P196.

860–20 325 Ill 16, 155NE773; NJSup 136A317 [citCJ].

860–39 28Hawaii68; 254 IllA445.

860–44 144Wash246, 257P849.

860–46 254 IllA445 (any agent); 191 NC809, 133SE391; 197Wis518, 222NW 786.

861–52 [a] **Request held sufficient.**–29 Hawaii508.

861–55 See also Del 143A257.

862–63½–New. Arbitrary or capricious refusal by directors not sustained. Colo 291P1024.

862–63¾–New. Demand by stockholders is not insufficient because written on paper containing letterheads of stockholders' protective association which is not stockholder. TexCivA 31 SW(2d)150.

862–63¼–New. Written demand is not necessary. TexCivA 31SW(2d)150.

862–73½–New. That corporation audited books annually and furnished copies thereof to officers is not defense to proceeding for inspection. TexCivA 31SW (2d)150.

862–74 See also 332 Ill 18, 163NE479.

862–83½–New. A corporation is not a necessary party where a stockholder brings mandamus against an officer to inspect a book. 233 IllA508.

862–86½–New. Petition by several stockholders to inspect books is not demurrable on ground that their interests are distinct. TexCivA 31SW(2d) 150.

862–87 Colo 291P1024; 28Hawaii68; 208 Iowa1217, 227NW101; 119 Or44, 247P155, 248P156.

862–88 28Hawaii68; 119 Or44, 247P 155, 248P156.

862–89 254 IllA445 (as evidence of stock value). [a] **Evidence held admissible.**–254 IllA445 (to determine amount of penalty).

863–92 [a] **Instructions held correct.**–254 IllA445.

863–93 [b] TexCivA 31SW(2d)150.

863–98½–New. Corporation cannot complain of condition imposed on stockholders requiring examination by resident certified accountant. TexCivA 31 SW(2d)150.

863–7 42F(2d)886; Ariz 290P155; 205 Cal 515, 271P1060; 336 Ill 586, 168NE 655; 286Pa545, 134A438, 48ALR992; TexCommnA 286SW167; TexCivA 280 SW254. [f] **Good will of corporation** cannot be transferred by stockholder. CalA 287P980(2dcase).

864–8 7F(2d)335; Ariz 290P155; DC 41F(2d)117; TexCivA 280SW254.

864–9 26F(2d)21; 130Misc846, 225NYS 385; TexCommnA 128SW(2d)971. [a] **Stockholders own the capital stock, surplus and franchise** (1) of the corporation. 20 OhA166, 151NE780. [b] **Rights of stockholders** in corporate assets are not superior to rights of creditors. 7F(2d)335.

864–11 168La664, 123S116; TexCivA 278SW321, 323 [quotCyc].

864–12½–New. Distribution is always a condition of the right of a stockholder to any part of the corporate assets. 285Pa312, 131A854.

864–16 181Ark85, 24SW(2d)972.

864–17 45 Ida303, 262P149; Ill 173NE 270.

865–19½–New. A distribution of corporate assets to stockholders can be made only by a majority of the directors or stockholders acting in their corporate capacities or by a court of justice in a litigated proceeding. 285Pa312, 131A854.

865–19¼–New. Beneficiaries of a trust consisting of stock in a corporation cannot complain of any fraud by the corporation in creating a partnership for the purpose of buying a membership in a stock exchange where they are not deceived thereby and lose nothing in consequence. 313Mo 642, 285SW462.

865–19¼–New. Stockholder cannot complain that property is in form of surplus instead of capital. 234Ky814, 29SW(2d)566.

865–19½–New. Absolute ownership of corporate stock gives the stockholder the right to have the income of corporate property applied to conduct corporate business. 131 Or597, 282P760.

865–27 87CalA435, 262P375.

865–31½–New. Stockholders may by unanimous agreement, where rights of creditors are not involved and a proposed act will not impair their obligation to the state, dispose of corporate assets without restriction. 8F(2d)368.

865–32 TexCommnA 286SW167; Tex CivA 18W(2d)348.

865–33 12PaDist&Co 301 (withdrawals of money not fraudulent in absence of impairment of capital or insolvency).

866–33 81Mont222, 262P1039; Tex CivA 280SW254. [a] **Where no merger took place** corporation acquiring majority of its stock does not succeed to assets and property of former. Ariz 290 P155.

866–39 199Cal 286, 249P188, 51ALR 1380.

866–40 34Ariz245, 270P1044; Ariz 290 P155 (rescind act); 47RI470, 134A6; Ont [1928] 4DomLR269.

866–44 6F(2d)228; 29F(2d)383; 243 IllA122; 321Mo 1104, 14SW(2d)425. But see DelCh 147A257.

866–45 6F(2d)228; 243 IllA122, 128 [citCJ]; Mass 171NE830; 321Mo 1104, 14SW(2d)425.

866–46 NJCh 147A105 (manner prescribed by statute must be followed); 296Pa108, 145A834 (in absence of fraud); TexCivA 3SW(2d)842.

866–47 See also Pa 151A815.

866–48 216AppDiv439, 215NYS587; 131Misc563, 227NYS435. [b] **Voidable sale** subsequently ratified by special meeting of stockholders held for that purpose is valid. 337 Ill 345, 169NE240.

867–52 29 OhA123, 163NE57.

867–55 See also DelCh 147A257. [a] **Question of value to be determined** is value of assets for sale purposes, which may be more or less than actual value. DelCh 147A257 (that price will yield fair profit to purchaser does not indicate that price is unfair).

867–56 Pa 151A815.

867–59 See also RI 150A756.

867–60 [i] **Necessity for "sale."**–221 AppDiv113, 222NYS633. [j] **Proceedings for appraisal of stock of dissenting stockholder.**–105NJL573, 147A449 (2dcase).

867–68 105NJL573, 147A449(2dcase).

867–69½–New. Where the owner of forty-nine per cent of the stock of a poultry farm corporation who resided on the farm and operated it caused the corporation to deed the farm to her without notice to the other stockholders, the deed is void. 239Mich290, 214 NW135.

867–69¾–New. Failure to give a minority stockholder notice of a sale of the entire corporate assets is not excusable on the ground that he could not have prevented the sale. 145SC91, 142SE811.

867–69¼–New. Where a creditor of a corporation, knowing of a stockholder's interest as such, without legal authority takes over the entire assets of the corporation in payment of the debt, he is guilty of a conversion of such stockholder's stock. 145SC91, 142SE811.

867–69½–New. Equity will more readily consider laches of stockholders questioning validity of sale of assets to public utility. RI 150A756.

868–77½–New. Where two stockholders owning each one half of stock leased premises intended for, and used solely by, corporation, subletting of premises by corporation created no obligation to deceased stockholder or his estate for half of rentals under sublease. 67CalA 654, 228P42.

868–82 Ariz 290P155.

868–83 97Fla1085, 119S326.

868–86½–New. A stockholder of mining company cannot relocate the company's mining claims for his own benefit. 13 F(2d)743.

868–86¾–New. Majority stockholders had the right to cause the sale of a corporation's business and assets, but not in such a way as to benefit themselves at the expense of the minority without becoming liable for breach of trust. 29 F(2d)383.

868–87 6LaA35, 36 [quotCJ].

868–93 315Mo 254, 286SW16; 51SD 288, 213NW507. [b] 51SD288, 213NW 507. [c] **Sale of stock of another company.**–41F(2d)454.

869–94 34PortoRico 338 (as agent of vendor).

869–4½–New. A stockholder executing a note to the corporation in lieu of assets withdrawn by him preparatory to dissolution is liable to the corporation, under an agreement therefor, for the percentage of the debt of the corporation that the note bore to other assets. TexCivA 285SW1107.

869–4¾–New. Payment of personal debts of stockholders by a corporation, while improper, is not wrongful if such payments are charged to the proper parties, who are required promptly to reimburse the corporation. 14F(2d)758.

869–12 See also 56ND800, 219NW565.

870–29 14F(2d)29, 32 [citCJ]; 35GaA 114, 132SE396.

870–30 14F(2d)29, 32 [citCJ].

870–31 14F(2d)29, 32 [citCJ].

871–50 35GaA114, 132SE396.

871–54 7F(2d)335; 88 IndA309, 152NE 609; TexCivA 24SW(2d)742.

871–55 7F(2d)335; 130Kan838, 288P 579; Mass 171NE285. [a] (14) Where one stockholder purchased two lots, one for himself and one for another stockholder, giving corporation's check for down payment, one half of which was charged to each, his estate is not liable to such other stockholder for one half of refund of decedent's share of down payment returned by vendor. 174Minn

331, 219NW167. (15) Arrangements whereby stockholding children in family corporation occupied corporate property rent free held not terminated by father. 223AppDiv226, 227NYS653. (16) Stockholder's agreement to use best effort to list company's stock has been held not violated by measures tending toward withdrawal of privileges. Mass 171NE285.

872–57 214Ky224, 282SW1101.

872–58 [a] **Stockholder's contracts making equitable assignment of surplus funds** with equitable lien therefor held inferior to rights of corporation's creditors. 7F(2d)335.

872–62 [a] **Agreements held not illegal or ultra vires.**–134Misc634, 235NYS595.

873–69½–New. Under contract to share equally in common stock, each party becomes the owner of net assets. IndA 157NE64.

873–71½–New. Where two persons own in equal parts all stock except five shares under contract, intending equal corporate control, the purchase of the five shares by the wife of one of them in conspiracy with the husband for control is illegal. 207 Iowa1218, 224NW 766.

873–71⅓–New. Stock agreed to be offered to other stockholders, parties to an agreement on the death of a stockholder, should be valued on the date of the death rather than the date of the offer to sell. 226AppDiv554, 235NYS410.

873–76 CalA 284P984; 326 Ill 528, 158 NE101.

874–88 249Mich107, 227NW702 (fair association).

875–8½–New. A person, owning rival business, cannot as a stockholder, maintain suit against a corporation to further his own personal business at the expense of the corporation. 28F(2d) 192.

875–10 [a] **Where action is really to enforce contract between corporation and third person,** it cannot be maintained on theory that it is one to compel corporation to furnish to stockholders a service which is involved in contract and which corporation agreed to furnish. 136Wash116, 238P641.

875–17 165Minn121, 205NW951, 45 ALR1507 [citCJ]; 127Misc470, 216NYS 481.

876–18½–New. or an improper distribution of corporate assets, 285Pa312, 131A854.

876–19 127Misc470, 216NYS481.

877–32 249Mich107, 227NW702.

877–39 NJCh 151A95 (purchase of property already leased); 47RI 470, 134 A6.

878–56 [a] (2) Findings in suit by corporation to recover money received for stock resold to plaintiff that defendants resold to president, or whether corporation was insolvent and whether money was with defendant's knowledge paid from working capital held immaterial. 67Utah487, 248P127.

879–67 288Pa398, 136A232.

879–70 TexCivA 286SW285.

879–71 [a] (6) Four years. TexCivA 286SW285.

879–87 190NC268, 129SE614, 617 [cit CJ].

879–88 96CalA549, 274P597; 199 Iowa 1285, 202NW14, 18 [citCJ]; 137Wash 317, 242P367, 370 [citCJ].

880–91 101CalA263, 281P646 (failure to publish notice of assessment is defect or irregularity of sale, requiring tender of assessment as condition precedent).

880–92½–New. A stockholder can maintain an action to recover stock sold for nonpayment of a void assessment without having made tender of payment. 42 Ida254, 245P392.

880–94½–New. That an assessment was levied to pay a corporation's debts and most of the stockholders had paid their assessments is immaterial as respects the right of stockholders to recover stock sold for nonpayment of assessment. 101CalA263, 281P646.

880–8 96CalA549, 274P597.

880–10 15F(2d)157.

881–14 15F(2d)157.

881–17½–New. In an action to quiet title to shares of stock sold for nonpayment of an assessment on the ground that the assessment was void because it was made only against outstanding stock and not against stock deposited in the treasury in pursuance of a resolution inviting stock exempt from assessment, stockholders so depositing their stock are not necessary parties. 42 Ida254, 245P392.

881–24 NJCh 144A868.

882–37 15F(2d)157. [a] 15F(2d)157. [b] 157Md136, 145A385.

883–52½–New. Where stockholders sold stock to a corporation on the basis of balance sheet net worth, the court is not authorized to reduce accounts receivable for error therein in the absence of an allegation of mistake, fraud, overreaching, or prayer for reformation. 217AppDiv368, 217NYS195.

883–52⅓–New. Refusal to permit filing of an amended bill by a stockholder for injunction restraining the sale of assets by a corporation has been held not an abuse of discretion. 157Md136, 145A 385 (where bill was defective).

883–58 [b] **Evidence held admissible.**–Testimony of president and secretary of corporation as to what actually occurred at meeting relative to board's action in levying assessment. 101CalA 263, 281P646.

883–59 80Colo 355, 251P1049.

883–60 [a] (7) That majority stockholder in other corporation had no title in certain mining claims owned by controlled company. Ariz 290P155. (8) To justify finding that corporation had principal place of business at stated place. CalA 289P946. (9) Other evidence held sufficient. 217AppDiv368, 217 NYS195; TexCivA 286SW285. [b] (7) To show that purchase of stock from stockholder was in furtherance of intent to dissolve corporation. 194Wis 362, 216NW481. (8) To warrant accounting. 27F(2d)727. (9) To support finding that order levying assessment was in compliance with statute. 101 CalA263, 281P646. [c] (5) That lessor hotel never forfeited lease evidenced fact that no great amount of waste was committed by tenants. 337 Ill 345, 169 NE240.

883–63 80Colo 355, 251P1049.

883–65 104Conn683, 134A236.

884–69 [b] **Notice of application for injunction** and receiver may be dispensed with where irreparable injury would be done if notice was given. 7F(2d)548.

884–74 93Tenn691, 28SW90, 27LRA98.

884–83 35Ariz238, 276P526.

884–84 [b] **Stockholder's representative action against other stockholders** to recover rent due to corporation held to redress wrong to corporation, not to plaintiff. 223AppDiv226, 227NYS653.

884–87½–New. A stockholder may sue other stockholders in control of the corporation for conspiracy to cheat and defraud him of his property, stock, royalties, and salary. 293Pa52, 141A728.

884–87¼–New. Stockholders, owning two thirds of stock, paying an amount of judgment against the corporation have been held not entitled to have payments credited on the judgment recovered against them by another stockholder holding the remaining one-third of stock for a pro rata share of liability on a note given to secure the indebtedness of the corporation. 9LaA425, 121 S227.

885–94 See also Ont [1929] 1DomLR 51 (minority may sue majority for misappropriation).

885–1 223AppDiv226, 227NYS653 (stockholder's remedy against other stockholders occupying corporate property rent free).

885–10 293Pa52, 141A728, 729 [citJ].

885–14½–New. Minority stockholders' suit should be brought on behalf of all who wish to come in. 215Ala32, 109S 153.

885–16½–New. Minority stockholder suing stockholders should allege prior effort to gain relief within the corporation. 215Ala32, 109S153.

885–21 RI 132A730.

886–22 [a] **Evidence held insufficient** to overcome presumption in favor of fairness of price for sale of corporate assets. DelCh 147A257 (irregularity in proceedings authorizing sale not considered).

886–23 [a] (4) Fraud. 181Ark260, 25 SW(2d)429.

886–23½–New. Questions for jury. Whether money was loaned to defendants personally or to the corporation has been held for the jury. 142Wash 699, 253P636.

886–27½–New. Transfer and accounting may be ordered in single suit by minority stockholder. 215Ala32, 109S 153.

886–27⅓–New. Where the wife of one of two stockholders conspired with her husband by purchasing stock to violate an agreement for equal corporate control, the other stockholder is entitled to decree that the wife's stock should not be voted unless half was sold to him at the price paid by her. 207 Iowa1218, 224NW766.

886–29 129Misc521, 222NYS203, 213 [quotCyc].

886–32 124 Or94, 262P851, 852 [citCJ].

887–47½–New. On the death of a majority stockholder and director, the remaining directors were required to call a stockholders' meeting in lieu of the annual meeting as soon as practicable after appointment of a person legally capable of representing the stock of the deceased stockholder. 264Mass499, 163 NE184.

887–47⅓–New. Directors could not postpone a stockholders' meeting until after exercise of an election to take estate's stock. 264Mass499, 163NE184 (meeting applied for by administrator of majority stockholder).

887–47¼–New. Directors are not entitled to postpone a stockholders' meeting, applied for by a special administrator of the majority stockholder, until the administrator should be appointed. 264Mass499, 163NE184.

887–49 [a] (5) Where by-laws provide that president or secretary may call special meeting, secretary alone may do so. 90Fla595, 106S473.

888–55 158La324, 104S60.

888–57½–New. Officers and directors judicially ousted cannot call meeting. Minn 232NW262.

888–60 DelCh 151A298.

888–65 [a] **When call sufficiently addressed to secretary.**–70CalA454, 233P 404.

889–72 284Pa325, 131A226, 228 [cit CJ].

889–84 43F(2d)869; 259Mass162, 156 NE7; 284Pa325, 131A226; 156SC43, 152SE721.

890–89½–New. Purpose of statute requiring call for stockholders' meeting to remove directors to be addressed to secretary is to bring call to his attention so that he may read it and act upon it. 70CalA454, 233P404.

890–92½–New. Under some statutes prescribing the mode of calling a meeting for the purpose of removing directors an order of the acting president need not precede publication of notice of the meeting. 70CalA454, 233P404.

890–93 111Conn475, 150A693 (trustee in bankruptcy of stockholder).

890–97½–New. Notice addressed to estate of deceased stockholder is irregular. 170La997, 129S614.

890–98 [a] **Time held reasonable.**–DelCh 151A298.

890–99 157Md309, 145A876. [c] **Where by-law changing length of notice is invalid** notice as required by original by-law is sufficient. DelCh 151 A298.

891–18½–New. Change of date made before the annual meeting date where necessitated by an erroneous date in the first notice is not required to be made sixty days before election. DelCh 139A762.

891–25 6F(2d)228 (better practice as to give notice of business of unusual character).

892–38 284Pa325, 131A226, 228 [cit CJ].

892-39 34Ariz105, 268P773. [a] **In determining sufficiency of notice of elections held by association organized to provide irrigation water,** such elections are in effect, though not technically, stockholders' meetings. 34Ariz 105, 268P773 (notice held sufficient).

893-48½-New. Statutory rights of stockholders as to publication on refusal of secretary to act, stated in 70CalA 454, 233P404.

893-56 243 IllA122; 157Md309, 145A 876; 284Pa325, 131A226, 228 [quot Cyc]; 103WVa259, 1378E217, 51ALR 938.

894-57 243 IllA122; 284Pa325, 131A 226, 228 [citCJ]; 103WVa259, 137SE 217, 51ALR938.

894-65 [a] **Effect of president's refusal or neglect to formally open meeting.-DelCh** 151A223.

895-70 But see **DelCh** 151A223.

895-71 See also **DelCh** 151A223.

895-74 **DelCh** 151A223.

895-76 158La324, 104S60 (president cannot refuse to produce minute book at meeting of stockholders and directors).

895-78 But see **DelCh** 151A223.

895-86½-New. A subsequent meeting cannot be bound by irrepealable acts or rules of procedure. 167Ga555, 146 SE173.

895-89 166Ga620, 144SE111 [quotCJ].

896-92 27Hawaii678; 193NC367, 137 SE132.

896-93 325 Ill 323, 156NE314; 191NC 809, 133SE391.

896-95 130Misc494, 223NYS791. [a] **By-laws.-27Hawaii678.**

896-96 121 OhSt114, 167NE366, 63 ALR1100.

896-98 90Fla595, 106S473.

897-3 See also 256Mass326, 152NE703.

897-7 20 OhA26, 153NE187 (determination of questions as to which there is division of opinion at annual meeting of stockholders of corporation organized for profit but not governed by provisions of General Code § 8638).

897-8 121 OhSt114, 167NE366, 63ALR 1100.

897-14 **DelCh** 145A115; **DelCh** 151A 223; 11PaDist&Co 465.

898-16 27Hawaii678.

898-17 216Ala486, 113S516; 15DelCh 333, 138A74; 179Minn373, 229NW353; 124 Okl 135, 253P1005, 1008 [quotCJ]; 131 Or597, 282P760.

898-18 15DelCh333, 138A74.

898-27½-New. Where stock is illegally held by a corporation, it may not be voted because equitable owners so desire. 325 Ill 114, 156NE258.

899-34 **NJCh** 150A347.

899-38½-New. Stockholders may exercise wide liberality of judgment so long as no advantage is obtained at expense of fellow stockholders. **DelCh** 151A303.

899-42 111Conn475, 150A693 (bankrupt); 325 Ill 16, 155NE773; 78Mont 402, 254P422.

900-43 179Minn373, 229NW353; 20 OhA26, 153NE187; 6PaDist&Co 7.

900-46 78Mont402, 254P422.

901-57 8F(2d)716; 261Mass556, 159 NE70.

901-58 8F(2d)716; 117Tex313, 3SW (2d)429 (one class of stock deprived of vote pursuant to contract of promoters). See also **TexCivA** 8SW(2d)574. [b] **Where there is no outstanding nonpar common stock** because of illegality of issuance, preferred stock is entitled to vote at stockholders meetings till there should be outstanding nonpar common stock. **DelCh** 147A317.

901-61 261Mass556, 159NE70. [a] **Acts of management** within incorporation certificate denying preferred stockholders right to vote thereon. 42F(2d) 174.

902-68 93CalA738, 270P286.

902-83 **Ont** [1928] 4DomLR269.

903-87 325 Ill 16, 155NE773.

903-97 **NJCh** 150A347.

904-2 22F(2d)268; 22F(2d)627; **NJCh** 149A817.

907-51½-New. In Delaware cumulative voting is permitted only when the charter so provides. 15DelCh333, 138 A74.

907-54 217AppDiv691, 217NYS67. [a] **Other definitions.-DelCh** 151A223.

907-54½-New. , and creates temporary relationship. 126Misc753, 214NYS643.

907-56 6PaDist&Co 7.

907-58 170Minn242, 212NW446; 6 PaDist&Co 7. [b] **Vote is binding on stockholder,** except where it is cast in furtherance of conspiracy, or by collusion between person holding proxy and wrongdoer. 132Misc509, 230NYS122.

908-63 170Minn242, 212NW446.

908-64½-New. Prohibition against receiving consideration for proxy.-127 Misc169, 216NYS317.

909-72½-New. A married woman may appoint a proxy other than her husband to vote her corporate stock for her. 90 Fla595, 106S473.

909-78 90Fla595, 106S473, 478 [citCJ].

910-86 See also 20 OhA26, 153NE187.

910-99 **DelCh** 151A223.

910-99½-New. 20 OhA26, 153NE187.

910-5 24F(2d)97 (estoppel).

910-7 **DelCh** 147A317 (proxies cannot vote for resolution directing issuance of stock to themselves).

911-8½-New. Where majority of attorneys are authorized by proxy to act for the stockholder, action of the majority in the proper exercise of power is presumed to express the will of the stockholder. **DelCh** 145A115.

911-8½-New. When a stockholder gives unrestricted proxy, naming an attorney in fact, it must be presumed that what the attorney does in proper exercise of power expressed the will of the stockholder. **DelCh** 145A115.

911-8¼-New. Proxy is merely an agent with the duty to act in strict accord with the requirements of the fiduciary relationship. **DelCh** 147A317.

911-8½-New. General proxy executed at time of purchase of stock is limited to conduct of ordinary business of corporation. **TexCivA** 25SW(2d)247.

911-8½-New. Person authorized by proxy can abandon his agency though he had solicited authority. **DelCh** 151A 223.

911-18½-New. Slight circumstances justify conclusion person soliciting proxy acted on authority when granted. **DelCh** 151A223.

911-19 See also 20 OhA26, 153NE187.

911-20 25F(2d)783 (voting trust agreement held not to violate Minnesota statute relative to voting by proxy).

911-20½-New. A general power of attorney to vote whatever stock the named stockholder had, neither any specific number of shares, nor at any special meeting, may be used to vote the stock at any meeting where it remained unrevoked on file in the office of the company. 20 OhA26, 153NE187.

911-22 **TexCivA** 25SW(2d)247.

911-27 77CalA297, 246P342; 217App Div691, 217NYS67.

913-63½-New. In California a stock voting agreement for twelve years is void. 77CalA297, 246P342.

913-63½-New. A contract of the promoters of a corporation, subsequently carried into the charter, under which one class of stock only have voting power, is valid. 117Tex313, 3SW(2d)429.

915-78 88 IndA309, 152NE609; Mass 166NE744 (trustees not given management and control of corporation); 217 AppDiv691, 217NYS67. [e] **Statutory right of stockholders to transfer shares to voting trustee** is inchoate personal privilege to which no one has indefeasible vested claim. 247NY290, 160NE374. [f] **Privilege of any stockholder to become party to legal voting trust agreement** is element of such agreement. 247 NY290, 160NE374. [g] **Existence of trust dependent on all trustees qualifying.-Mass** 166NE744.

915-78½-New. It confers qualified title with irrevocable authority. 247NY 290, 160NE374; 126Misc753, 214NYS 643.

915-79 See also 126Misc753, 214NYS 643.

915-79½-New. Voting trust agreement is not such real trust as equity would effectuate by designating trustee. 126 Misc753, 214NYS643.

915-79¾-New. A voting trust is distinguishable from a proxy in that it vests in trustee an interest in stock which cannot be revoked except by attempted breach of contract. 217AppDiv 691, 217NYS67.

915-80 325 Ill 16, 155NE773; 217 AppDiv691, 217NYS67. See also 242 IllA343 (agreement granting veto power in one stockholder). [d] **Statutes authorizing voting trust is purely permissive** and does not validate such agreement in other respects against public policy. 126Misc753, 214NYS643. [e] **In New York.-217AppDiv691, 217 NYS67.** [f] **Enactment of statute authorizing voting trust agreements** does not justify holding that previously such agreements were illegal. 25F(2d)783; 247NY290, 160NE374.

915-81 131Misc380, 226NYS621; 217 AppDiv691, 217NYS67.

915-84½-New. Every stockholder is entitled to become party to voting trust agreement. 126Misc753, 214NYS643.

915-84¾-New. Thus agreement may not impose such onerous terms as would reasonably deter stockholders from becoming party thereto. 126Misc753, 214 NYS643.

915-84¼-New. Agreement requiring stockholders to give trustees authority to consent to merger or consolidation on any terms they deem fit, and to dissolution is destructive of right of stockholder to join voting trust and is therefore invalid. 126Misc753, 214NYS643.

915-84¾-New. Agreement authorizing trustees to exchange stockholder's certificates in names of their nominees is invalid as negativing statutory requirement that new certificates be issued to trustees with indorsement showing nature of agreement. 126Misc753, 214 NYS643.

915-84¼-New. The appointment of stockholders' protective committees to safeguard their interests has been held not fraudulent. 260Mass81, 156NE897.

915-87 325 Ill 16, 155NE773.

918-9 25F(2d)783.

919-11 255Mass273, 151NE305, 45ALR 788.

919-23 See also Mass 166NE744.

919-24½-New. Title of trustee. Trustee does not acquire any equitable or beneficial interest, but holds only bare legal title. 6PaDist&Co 479.

920-33½-New. Persons purchasing trust certificates after the creation of a common stock voting agreement cannot question the legality of the voting trust. 25F(2d)783.

920-34 191NC809, 133SE391.

920-37 90Fla595, 106S473, 478 [citCJ].

921-40 192NC216, 134SE492; 193NC 305, 136SE716.

921-47 193NC305, 136SE716.

921-48½-New. Adoption of the minutes of a previous meeting is a mere acknowledgment that the secretary correctly recorded that which occurred at the meeting. 167Ga555, 146SE173.

921-49 99NJEq543, 133A857.

921-51 See also 11PaDist&Co 465 (effect of by-law).

921-54 [b] **Where majority of shares are voted against motion to adjourn;** the motion is not properly declared carried against protest of owners of such majority of shares, though large majority of owners of stock voted in favor of motion. 20 OhA26, 153NE187.

922-68 90Fla595, 106S473, 478 [citCJ].

922-70½-New. Notwithstanding record that at stockholder's meeting increase of capital was voted unanimously the evidence found by master may be insufficient to warrant an inference that proxies were voted. 253Mass205, 148 NE609, 41ALR658.

922-70¼-New. It will be presumed that proxies presented and voted were regularly executed and given by persons entitled to vote. 90Fla595, 106S473.

924-11 24F(2d)378; 201Cal 210, 256P 210; 208Cal 308, 281P58; **DelCh** 139A 766; 41 Ida729, 241P1014; 250 IllA127; 83 IndA250, 148NE157; 162La941, 111 S336; La 129S810; 258Mass585, 155NE 589; Mass 164NE915; Mass 168NE812; 216AppDiv634, 215NYS735; 125Misc 247, 211NYS366; **TexCivA** 280SW254;

136Wash116, 238P641. See 174Minn 143, 218NW557, 558 [citCJ]. [b] (4) 24F(2d)378. (16) Action for tort in inducing employees of corporation to leave employment. 24F(2d)378. [c] **Rights of stockholder, as such, can be worked out only through corporation** and not in name of individual stockholder. 24F(2d)378; 285Pa312, 131A854. [d] **Though defendant is animated by malice toward stockholder,** he may not sue for injury done to corporation. 24 F(2d)378.

925-12 Mass 164NE915.

925-13 24F(2d)378.

925-14 216AppDiv634, 215NYS735 (ninety-eight per cent); TexCivA 280 SW254; TexCivA 17SW(2d)125.

925-15 [b] **Collection of debt due corporation.**–Person indebted to corporation cannot be compelled to pay any part of debt to stockholder of corporation. 285Pa312, 131A854.

925-19 208Cal 308, 281P58; 15DelCh 431, 141A277; 83 IndA250, 148NE157; IndA 169NE91; 125Miss247, 211NYS 366; 196NC762, 147SE291.

926-20 CalA 278P469(2dcase); 130 Misc348, 233NYS817.

926-21 171Ark175, 283SW977; 201Cal 210, 256P210; CalA 278P469(2dcase); 135Misc424, 237NYS591.

927-23 50Nev56, 250P369; 285Pa312, 131A854.

927-24 15DelCh431, 141A277; 289Pa 233, 137A235.

927-26 137Wash317, 242P367; Alta [1929] 1DomLR608.

927-28 Alta [1929] 1DomLR608.

928-29 173Minn104, 217NW139; 50 Nev56, 250P369; 136Wash116, 238P641, 642 [citCJ]. [a] (2) Where trustees refused to act because they believed, and were so advised by counsel, that an action against third person would fail. 136Wash116, 238P641.

929-46 See 174Minn143, 218NW557, 558 [citCJ]. See also 74Mont176, 240P829. [c] **Defenses.**–145SC91, 142SE811.

929-46½-New. A stockholder cannot recover, unless he shows an injury to himself individually apart from the injury to the corporation. 285Pa312, 131 A854.

929-50 Alta [1929] 1DomLR608.

929-50½-New. A stockholder can assert no greater rights than the corporation itself. 159La627, 105S794.

929-54 26F(2d)153; CalA 274P997.

930-56 201Cal 210, 256P210; 208Cal 308, 281P58 (application for intervention filed after granting of motion for new trial held timely); CalA 274P997; 229AppDiv179, 241NYS335.

930-58 43F(2d)485.

931-69 136Misc511, 240NYS15 (rule held not to work deprivation of property).

931-70½-New. The court cannot do for stockholders that which they may do for themselves. 80Mont328, 260P722.

931-71 201Cal 210, 256P210; 83 IndA 250, 148NE157; La 129S810; 80Mont 328, 260P722; 190NC268, 129SE614.

931-73 201Cal 210, 256P210; 96CalA 549, 274P597; CalA 286P507; 80Mont 328, 260P722; 5PaDist&Co 311.

932-74 201Cal 210, 256P210; CalA 274 P997; 15DelCh431, 141A277; 80Mont 328, 260P722; 133Misc340, 232NYS112.

932-75 208Cal 308, 281P58; CalA 286P 507; 80Mont328, 260P722; 133Misc340, 232NYS112.

932-76 201Cal 210, 256P210.

932-77 201Cal 210, 256P210.

932-80 201Cal 210, 256P210; 241NYS 188.

933-88 201Cal 210, 256P210.

933-91 201Cal 210, 256P210.

933-94 80Mont328, 260P722. [a] **In Alberta.**–Alta [1929] 3DomLR621.

933-95 80Mont328, 260P722.

933-96 14DelCh427, 129A775 (payment of retainer fee of plaintiff's attorneys by board from corporate funds does not preclude right of plaintiff to sue officer of corporation for breach of trust in name of corporation).

933-98 [a] 136Wash116, 238P641.

934-13 13F(2d)206; 43F(2d)485; 41 Ida729, 241P1014; 176Minn411, 223NW 624; 25 OhNPNS363; 288Pa362, 136A 673, 676 [citCJ]; 5PaDist&Co 311.

934-14 190NC268, 129SE614.

934-16 14DelCh427, 129A775; 133Misc 340, 232NYS112.

935-19 15DelCh431, 141A277.

935-23 43F(2d)485.

935-26 80Mont328, 260P722 (president of board of directors).

936-40 122 Okl 140, 252P54, 55 [citCJ] 49ALR1141.

936-43 96CalA549, 274P597 (minority stockholder).

936-44 But see 300Pa479, 150A902.

936-51 CalA 278P469(2dcase) (corporation is real party in interest and stockholder mere nominal plaintiff).

937-61 133Misc340, 232NYS112.

938-80 201Cal 210, 256P210.

938-87 21F(2d)4, 13 [citCJ].

938-88 318Mo 1031, 4SW(2d)1072.

939-89 Ariz 283P926.

939-94 21F(2d)4.

940-99½-New. As respects laches, the consequences of failure to prosecute prior arbitration are the same as if such agreement was not made. 21 F(2d)4.

940-99½-New. Stockholders, who did not know that officers of the corporation had loaned United States liberty bonds held by it to a bank to be used as protection for public funds, are not estopped from claiming that such loan was ultra vires. Ariz 283P926.

940-6 DelCh 139A766. [b] 5PaDist &Co 311.

941-24 172Minn110, 215NW192; 5Pa Dist&Co 311. But see 136Wash116, 238 P641. [b] **Corporation whose stock was sold to another company** by third person was not proper party in suit by stockholder of other company to cancel sale. DelCh 139A766.

941-30 5PaDist&Co 311. [a] **In stockholders action for breach of contract between bank and some directors and another bank** individual directors who were parties to agreement held necessary parties to action. 228AppDiv790, 240NYS845.

942-37 133Misc340, 232NYS112.

942-42 7F(2d)548.

942-48 96CalA549, 274P597. [b] 173 Minn104, 217NW139. [c] **Bill held demurrable** for failure to allege fraud in suit to cancel loan alleging nonpayment because of common control of corporation. DelCh 142A831.

942-49 96CalA549, 274P597.

942-51 133Misc340, 232NYS112. [c] (2) Other instances. 241NYS188.

942-52 133Misc340, 232NYS112 (matter of defense need not be pleaded). [c] **Bill held sufficient as against demurrer.**–DelCh 142A831.

943-55 CalA 278P469(2dcase) (insufficient allegations); DelCh 139A766; 133Misc340, 232NYS112. [a] 145SC91, 142SE811.

943-56 [b] 133Misc340, 232NYS112.

943-69 35F(2d)227 (petition should be construed as whole in determining right to amend).

943-74 241NYS188; 5PaDist&Co 311.

944-75 87Colo 237, 287P89.

945-85 80Mont328, 260P722.

945-89 7F(2d)548.

946-91 145SC91, 142SE811 (allegations held sufficient).

946-4½-New. Defendant borrowing money from a corporation could not complain on demurrer of a portion of a stockholder's bill seeking cancellation of the loan to a third party. DelCh 139 A766.

947-22 87Colo 237, 287P89; 190NC268, 129SE614.

947-26 315Mo 907, 287SW438. [a] (5) To show full consideration for mortgage placed in property of corporation. 159La627, 105S794. (6) To warrant submission of issue of punitive damages. 145SC91, 142SE811. [b] 255Mass52, 151NE167; 50Nev56, 250P369. [c] **It is presumed** that in exchanging stock for stock of another corporation majority stockholders acted for their own best interest. 50Nev56, 250P369. [d] **Evidence held insufficient** to show conspiracy between directors and mortgagee to place fraudulent mortgage on property of company. 159La627, 105S794.

947-28½-New. The burden of proof is on minority stockholders, suing the corporation for wrongs occurring over six years before filing the bill, to show that application of the doctrine of laches is inequitable. 21F(2d)4.

947-28¼-New. In the absence of an allegation to the contrary it will be presumed that there were other directors besides the president of the board. 80 Mont328, 260P722.

947-28¼-New. Evidence, showing that the directors might have called a meeting, and that the president sued by stockholders on the part of the corporation did not control the directors, fails to show that the stockholders exhausted their remedy within the corporation. 80Mont328, 260P722.

947-29 135Misc424, 237NYS591.

948-41½-New. In a suit by stockholders in behalf of the corporation to set aside a sale, purchasers are entitled to the benefit of rent advanced, and are required to account for property not returnable. 131Misc563, 227NYS435.

948-42 122 Okl 140, 252P54, 55 [quot CJ] 49ALR1141.

948-58½-New. Following the general rule in some jurisdictions, in the absence of statute, a stockholder suing to set aside fraudulent sale of corporation's property cannot recover attorney's fees even though successful in the suit. 55 ND830, 215NW284.

949-62 170Ark426, 280SW383; 175Ark 728, 1SW(2d)41; 169Ga805, 151SE504; 260Mass38, 157NE39; 123Kan659, 256 P983; Mich 233NW362; 140Miss502, 106S97, 44ALR124; 243NY333, 153NE 437; 8PaDist&Co 383; 107WVa519, 149 SE22.

949-63 170Ark426, 280SW383; 84CalA 154, 258P111; 140Miss502, 106S97, 44 ALR124; NJ 148A741.

950-72 123Kan659, 256P983 (debt). See also 244NY84, 155NE58. [a] **Stock control** acquired for purpose of making corporation mere agency of another will not prevent placing responsibility on owning corporations. 7F(2d)432.

950-89 203 Iowa276, 211NW386; 240 Mich569, 215NW772; 243NY333, 153NE 437; 286Pa226, 133A232.

951-7 196Cal 468, 238P703.

951-10 196Cal 468, 238P703.

951-11 196Cal 468, 238P703; 129 Okl 222, 264P164.

951-12 [a] **Trust fund doctrine** does not apply to surplus capital resulting from assessments on stock wholly paid for at par value. 196Cal 468, 238P703.

951-13 243NY333, 153NE437; SC 147 SE676(2dcase).

952-16 243NY333, 153NE437.

952-18 214AppDiv367, 212NYS356.

952-22 35F(2d)649; 107Conn216, 140 A477; 234 IllA538; 167Minn113, 208 NW645; 243NY333, 153NE437; 49ND 543, 207NW536; 144Wash33, 256P74.

954-27½-New. If any equities are involved they are with a creditor who in good faith furnished labor and material to the corporation and who has the legal rights clearly with him. 49 SD543, 207NW536.

954-27½-New. Statute making stockholder liable to creditors for unpaid subscriptions is part of subscription contract. 214AppDiv367, 212NYS356.

955-32 243NY333, 153NE437. But see 214AppDiv367, 212NYS356.

955-37 222Ky753, 2SW(2d)367.

956-48 Man [1929] 4DomLR381.

956-49 203 Iowa792, 206NW586.

956-50 167Minn113, 208NW645; 170 Minn242, 212NW446; 49SD543, 207NW 536.

957-52½-New. Where a solvent corporation took a note of one stockholder in lieu of notes of two others withdrawing from the company, the creditors cannot complain where the note was good. 216Ky440, 288SW342.

957-54 167Minn113, 208NW645; 170 Minn242, 212NW446.

958-57 205Cal 373, 270P946.

958-58½-New. Where a prior holder of stock has paid full par value to the corporation, one receiving the stock as a bonus for purchasing and paying full par value for shares of an original issue is not liable in an action by the receiver on insolvency of the corporation. 167 Minn113, 208NW645.

958–59 205**Cal** 373, 270**P**946; 170**Minn** 242, 212**NW**446.
960–79 42 **Ida**491, 247**P**746; **NJCh** 144 **A**723. [c] 42 **Ida**491, 247**P**746. [d] 167**Minn**113, 208**NW**645.
961–82 165**La**593, 115**S**791. [d] **Valuation fixed in statutory report** is not conclusive on creditors. 165**La**593, 115 **S**791. [e] **That directors complied with statute in listing and appraising property** does not relieve stockholder from liability. 165**La**593, 115**S**791.
962–84 115**Nebr**848, 215**NW**140; 193 **NC**534, 137**SE**585; 102**WVa**181, 135**SE** 235.
963–85 193**NC**534, 137**SE**585.
967–22 203 **Iowa**792, 206**NW**586; 13 **LaA**321, 127**S**633; **Mo** 276**SW**611; 243 **NY**333, 153**NE**437; 125**Misc**521, 211**NYS** 405; 154**Tenn**521, 290**SW**391, 50**ALR** 1023.
967–23 115**Nebr**848, 215**NW**140; 243 **NY**333, 153**NE**437.
967–24 50**RI** 506, 149**A**609.
967–25 But see 50**RI** 506, 149**A**609.
967–27 54**SD**122, 222**NW**675.
967–28 See also 125**Misc**521, 211**NYS** 405.
967–28½–New. So also where in a former action for unpaid subscription judgment was rendered holding defendant not a stockholder of the corporation. 125**Misc**521, 211**NYS**405.
967–30½–New. A subscriber for corporate stock is liable for the unpaid balance thereon, on insolvency of the corporation, although he indorsed and turned over to the corporation a note of a third person under an agreement that the corporation would collect the note and turn over the balance to him after satisfying the subscription contract, where such note has never been collected by the corporation. 203 **Iowa** 792, 206**NW**586.
967–30½–New. Stock issued under waiver of right to participate in assets and dividends in case of dissolution until security holders were paid in full should be included in computing stockholders' liability. 207**Cal** 595, 279**P**661.
967–32 Contra 243**NY**333, 153**NE**437; 130**Misc**565, 224**NYS**339 (joint, not several).
967–34 See also 234 **IllA**538.
969–48 166**Minn**265, 207**NW**620.
969–50 24**F(2d)**661 (dividends paid in fraud of creditors).
969–58 Mass 167**NE**314 (stockholder not exonerated by good faith or by statutory liability of directors).
970–63 Iowa 232**NW**501.
970–68½–New. and also for claims against a corporation for personal injuries, 245**NY**628, 157**NE**886.
970–69 227**Ky**71, 11**SW(2d)**990 (though bond given to indemnify creditors).
970–71½–New. A creditor can proceed against the officers and members of a corporation under statute only where the corporation is private and the property the creditor seeks to recover was concealed with intent to hinder creditors. 290**Pa**356, 139**A**118.
970–71½–New. The honesty of grantee's conduct must be considered in determining whether the assets of a corporation were distributed with the intent to hinder creditors. 290**Pa**356, 139**A**118.
970–71¼–New. Where the assets of a corporation were distributed in good faith, a creditor cannot recover from the stockholders. 290**Pa**356, 139**A**118.
971–79½–New. Stockholders, agreeing that corporate officers might incur corporate indebtedness for the corporation and execute corporation obligation, are not estopped to deny liability for contribution of a proportionate amount of the liability incurred by the directors. 207 **Iowa**371, 222**NW**889.
971–79½–New. Subscription contract by which stockholders agree to pay amounts set opposite their names to pay off corporation's debt is not void for want of consideration. 130**Kan**622, 287 **P**242.
972–93 80**CalA**415, 252**P**752; 243**NY** 333, 153**NE**437. [a] 172**Minn**303, 215 **NW**185.
972–98 207**Cal** 79, 277**P**113, 63**ALR**861 (statutory liability cannot exceed that fixed in constitution).
972–4 [a] **Statute authorizing issue of nonpar stock** is not violation of constitutional provision making each stockholder liable to amount of stock held or owned by him. 172**Minn**303, 215**NW** 185.
973–8½–New. Where the liability of stockholders for certain debts of the corporation is secondary, the legislature may provide the manner of enforcement in the absence of constitutional provision therefor. 235**Mich**410, 209**NW**802.
973–8½–New. The constitutional and statutory liability of a stockholder for the debts of a corporation is in the nature of a continuing guaranty of payment of debts contracted by the corporation during his ownership of stock and to the extent provided. 199**Cal** 286, 249**P**188, 51**ALR**1380.
973–9 199**Cal** 286, 249**P**188, 51**ALR** 1380; **Iowa** 227**NW**587; 170**Minn**360, 212**NW**806; 173**Minn**603, 218**NW**121. But see 80**CalA**415, 252**P**752.
973–11½–New. The constitutional and statutory liability of a stockholder for debts of the corporation is not based upon the agency of the corporation to impose such liability upon him, but upon his own agreement. 199**Cal** 286, 249**P**188, 51**ALR**1380.
974–14 Mass 165**NE**889; 243**NY**333, 153**NE**437; 286**Pa**226, 133**A**232; 290**Pa** 356, 139**A**118.
974–15 115**Nebr**848, 215**NW**140.
975–31 167**Minn**333, 209**NW**17; 173 **Minn**1, 216**NW**325.
975–33 173**Minn**1, 216**NW**325. [b] (12) Corporation given power by its articles, to mine, quarry and prepare for market minerals and manufacture same into products and transport and sell same in crude or manufactured form. 167**Minn**333, 209**NW**17. (13) Corporation with power to carry on exploration, etc., for minerals. 173**Minn**1, 216**NW**325.
976–38 167**Minn**333, 209**NW**17.
976–39 But see 173**Minn**1, 216**NW**325.
977–58 170**Minn**360, 212**NW**806. [a] (1) 172**Minn**303, 215**NW**185.
978–63½–New. Under some constitutions, if debts remain after application of corporate assets to their payment, stockholders are liable to the par value of their stock for debts unpaid up to the charter limit. 168**Minn**234, 210**NW** 29, 55**ALR**321; 173**Minn**10, 216**NW**252.
979–77½–New. The test of exemption from a double liability proviso under statute is whether the company does or does not have the right to engage in other than strictly manufacturing business, over objections of stockholders or the state. 172**Minn**394, 215**NW**521.
979–77½–New. Where the charter restricts a company to a manufacturing business, there is no double liability. 172**Minn**394, 215**NW**521.
979–78 78**CalA**90, 248**P**546; 80**CalA** 415, 252**P**752.
979–78½–New. , or to the whole subscribed capital stock of corporation. 99 **CalA**159, 278**P**247.
979–80 [a] 78**CalA**90, 248**P**546; 80 **CalA**415, 252**P**752.
979–85½–New. The liability is determined by the amount of stock owned by the stockholder at the time the debt is curred. 80**CalA**415, 252**P**752.
980–87 200 **Iowa**374, 202**NW**839.
980–88 200 **Iowa**374, 202**NW**839.
980–88½–New. They do not create contractual liability. 200 **Iowa**374, 202**NW** 839.
980–92½–New. In Tennessee violation of a condition subsequent as full subscription of capital stock, where the company does business, does not render the stockholders liable except for fraud. 154**Tenn**521, 290**SW**391, 50**ALR**1023.
982–30 154**Tenn**521, 290**SW**391, 50**ALR** 1023 (dictum).
984–43 [a] (4) Mere failure to comply in every particular with statute requiring notice of amendment increasing capital stock will not alone subject stockholders to liability. 204 **Iowa**1027, 216 **NW**640. [d] **Effect of creditor's knowledge.**–204 **Iowa**1027, 216**NW**640.
984–47 [a] (1) 204 **Iowa**1027, 216**NW** 640.
985–59 115**Nebr**848, 215**NW**140.
985–60 115**Nebr**848, 215**NW**140.
986–72 [a] **In Michigan.**–235**Mich**410, 209**NW**802.
986–77 120**Kan**557, 245**P**143; 154**Tenn** 521, 290**SW**391, 50**ALR**1023 (dictum). But see 131**Misc**117, 225**NYS**370, 372 [citCJ]. [a] (6) Signers of act of incorporation, carrying on business, where incorporation was not completed, made themselves liable as partners. 10 **LaA**633, 120**S**535 (objects set forth in act of incorporation, if carried out by partnership constituted commercial partnership, making signers liable as partners solidarily).
987–86 208 **Iowa**921, 223**NW**899.
988–1 7**F(2d)**473.
989–2 154**Tenn**521, 290**SW**391, 50**ALR** 1023 (dictum).
989–6 154**Tenn**521, 290**SW**391, 50**ALR** 1023 (dictum); **TexCivA** 273**SW**655, 656 [citCyc].
990–21 154**Tenn**521, 290**SW**391, 50**ALR** 1023 (dictum).
990–22 208 **Iowa**921, 223**NW**899.
991–33 See also 154**Tenn**521, 290**SW** 391, 50**ALR**1023.
991–38 270**US**560, 46**SCt**413, 70**L ed**733; 215**Ala**261, 110**S**147; 198**Cal** 618, 246**P** 796; 200 **Iowa**1322, 206**NW**617; 152**Va** 800, 148**SE**831. [e] **Rule applies to stockholders of foreign corporation** doing business in state. 198**Cal** 618, 246 **P**796.
993–56 135**Misc**265, 237**NYS**682.
995–71 251 **IllA**353.
997–82 200 **Iowa**1322, 206**NW**617.
997–88 126**Misc**685, 214**NYS**444.
998–93 54**ND**614, 210**NW**342, 48**ALR** 660.
998–95 208 **Iowa**537, 226**NW**5 (statute and laws of domicile of foreign corporation determine liability of stockholder).
999–8 7**F(2d)**473; 243**NY**333, 153**NE** 437; 50**RI** 506, 149**A**609.
999–14 215**Ala**261, 110**S**147; 200 **Iowa** 1272, 206**NW**613; 170**Minn**242, 212**NW** 446.
1000–17 168**Minn**365, 210**NW**38; 170 **Minn**242, 212**NW**446.
1000–23 240**Mich**688, 216**NW**464.
1002–28 But see 144 **Okl** 69, 289**P**260.
1002–32 7**F(2d)**917.
1002–37 177**Minn**72, 224**NW**454.
1003–38 [a] **Officers and directors** required to pay note of corporation guaranteed by them cannot recover from other stockholders on ground that corporation was incompletely organized. 192**Wis**40, 211**NW**790.
1003–39 127 **Or**639, 271**P**983. [a] **If creditor first pays his own subscription in full,** he may file bill to reach unpaid subscription of other stockholders. 127 **Or**639, 271**P**983.
1004–55 177**Minn**72, 224**NW**454 (director or officer).
1006–78½–New. One who purchased stock through fraudulent inducements is not subject to stockholder's liability. **CalA** 284**P**221(2dcase).
1006–84 197**NC**202, 148**SE**174.
1007–91 Minn 232**NW**523; 214**AppDiv** 367, 212**NYS**356; 219**AppDiv**634, 221 **NYS**77; 131 **Okl** 110, 267**P**835, 836 [cit Cyc]; 121 **Or**92, 254**P**800, 51**ALR**1200; 121 **Or**98, 254**P**802. See also 125**Misc** 521, 211**NYS**405.
1007–92 214**AppDiv**367, 212**NYS**356; 219**AppDiv**634, 221**NYS**77; 121 **Or**92, 254 **P**800, 51**ALR**1200; 121 **Or**98, 254**P**802.
1007–92½–New. On the other hand one may have stock certificates and not be liable to pay for stock represented by them. 125**Misc**521, 211**NYS**405 (dictum).
1007–93½–New. Stockholders of a holding corporation, as well as a holding corporation, are liable for subsidiary corporate debts. 96**CalA**42, 273**P**595.
1007–94 46 **Ida**606, 269**P**597.
1007–97 Contra 174**Minn**427, 219**NW** 466.
1008–12 [b] **Stock never issued and canceled for nonperformance of escrow conditions** does not make organizers liable as stockholders. 27**F(2d)**327.
1009–14½–New. Where an increase in the stock of a corporation, although irregular, was not beyond the power conferred by statute on the corporation, a purchaser of the stock who reserved benefits accruing therefrom is liable thereon as a stockholder. 168**Minn**234,

210NW29, 55ALR321.
1009–15 CalA 291P422; 259Mass162, 156NE7; Mich 233NW431; 178Minn9, 225NW927; Minn 232NW519; 125Misc 521, 211NYS405 (participating in management of corporate affairs).
1010–17 197NC202, 148SE174 (one not buying, subscribing, or accepting stock when delivered is not estopped). [b] (3) Fraud, inducing purchase of stock and attempted rescission, does not constitute defense to action by receiver of corporation to collect assessment where defendant became stockholder more than two years before corporation became insolvent. 179Minn259, 228NW 917.
1010–19 81CalA276, 253P336 (contract for purchase of shares held void because of failure of corporation to obtain permit from corporation commissioner for sale of capital stock).
1010–21 49SD543, 207NW536.
1010–23 78CalA90, 248P546.
1011–31½–New. A corporation's payment on a debt is not such an assumption of indebtedness as will fix personal liability on a stockholder who acquired stock after the debt was incurred but before such payment. 78CalA90, 248P 546.
1011–36 31NM180, 241P1025 [citCJ].
1012–42 199Cal 286, 249P188, 51ALR 1380.
1012–53 123Kan638, 256P961; 259 Mass162, 156NE7.
1013–59½–New. No obligation rests on estate of deceased stockholder to pay debts of corporation. 153SC73, 150SE 351.
1013–60 But see 123Kan638, 256P961.
1015–90 [a] **Heirs of intestate** do not own estate so as to be liable as stockholders, when they never held themselves out as owners, when there has been no administration on estate and no showing as to extent or distribution of estate or as to debts and discharge thereof. 202 Iowa364, 210NW425.
1015–96½–New. Where stock is issued to persons already stockholders for money furnished the corporation and the issue entered on the books of the corporation, the transaction is a loan as between the parties but a sale as to creditors. 178Minn179, 226NW513.
1016–98 208 Iowa537, 226NW5.
1017–9 Cal 286P1038; Cal 286P1041; 168Minn406, 210NW148.
1017–10 [i] **In California.**–80CalA415, 252P752.
1020–24 Minn 230NW645(2dcase).
1020–27½–New. An executor whose testator transferred stock in a corporation before it sold pledged bonds to pay indebtedness is not liable to the pledgor where the liability of the corporation was that of the bailee. CalA 279P188.
1021–33 36Wyo 202, 254P117.
1021–34 36Wyo 202, 254P117, 119 [cit CJ].
1021–34½–New. Where liability attaches to stockholders who were such when debt was contracted, liability continues on acceptance of note without agreement that it is accepted in payment. Cal 289P621.
1021–35 36Wyo 202, 254P117; 36 Wyo 210, 254P137.
1021–36 36Wyo 202, 254P117; 36Wyo 210, 254P137.
1022–56 [e] 240Mich688, 216NW464.
1024–70 227Ky71, 11SW(2d)990 (record holder not relieved).
1025–75 197NC202, 148SE174; 49SD 543, 207NW536. See also 31NM180, 241 P1025 [citCJ].
1026–85 31NM180, 241P1025 [citCJ]; 36Wyo 210, 254P137, 140 [citCJ].
1027–87 167Minn113, 208NW645; 170 Minn242, 212NW446. But see 54SD122, 222NW675.
1027–92 42 Ida491, 247P746; 222MoA 322, 296SW828.
1028–95 170Minn242, 212NW446; MoA 279SW751.
1030–9 Contra 170Minn242, 212NW 446.
1031–24½–New. A person to whom stock is transferred in trust is not thereby subjected to liability to creditors. 170Minn242, 212NW446.
1031–24½–New. Stockholders are liable to the extent of unpaid treasury stock held by the treasurer as trustee for all stockholders. 234 IllA538.
1031–24¼–New. Where there is no cestui que trust, the subscriber for stock as trustee only is personally bound. 32 F(2d)864.
1032–45 [e] **Damages for breach of lease.**–80CalA415, 252P752.
1032–46 243NY333, 153NE437. [b] **No distinction between debts incurred in ordinary course of business and debts for royalties under license agreement** as respects stockholder's liability. 243NY 333, 153NE437.
1033–48 78CalA90, 248P546. [e] **Where corporation accepts work contracted for by stockholder in its behalf** corporation is liable on theory of estoppel on ratification. Cal 289P621.
1033–60 169Ga805, 151SE504. [d] (2) Amount of indebtedness authorized under charter of corporation is maximum amount for which stockholders may be held personally liable. 167Minn237, 208 NW959. [f] **Void sale of corporate assets** does not pass title and original stockholders are liable for debts incurred by corporation under management of purchasers. CalA 284P221(2d case).
1034–62 TexCivA 3SW(2d)832, 834 [quotCJ].
1035–76 87CalA664, 262P762 (employees hired by month).
1036–98 See also Mass 165NE889 (services rendered after stockholders voted to distribute all assets).
1038–36 78CalA90, 248P546.
1039–46½–New. A stockholder is liable for debts of a dissolved corporation to the extent of the value of assets acquired by him on dissolution. 15F (2d)528.
1040–70 175Minn44, 219NW945. [b] (8) Release of claims under lease. 23 F(2d)648. [c] (8) **What is not waiver or release.**–80CalA415, 252P752; 192 Wis40, 211NW790.
1041–72 175Minn44, 219NW945.
1041–73 175Minn382, 221NW426.
1041–74½–New. A creditor having actual knowledge of the form of consideration to be paid for stock and participating in appraisement of the property used in payment is precluded from claiming that the property was not worth the amount of appraisement. 204 Iowa1027, 216NW640.
1042–79 240Mich688, 216NW464.
1042–89½–New. Under some statutes imposing primary liability on stockholders in the proportion that stock owned bears to subscribed capital stock, a creditor's rights to enforce such liability is not impaired by recovering judgment against the corporation. 80 CalA415, 252P752.
1043–96 115Nebr848, 215NW140. [a] (3) Subscriber is not liable to creditor for unpaid subscription, after acceptance and negotiation by corporation of promissory note given for the unpaid subscription. 200 Iowa1272, 206NW 613.
1044–5 78CalA90, 248P546.
1044–10½–New. Payment by receiver of insolvent corporation of wages due laborers discharged personal liability of stockholders in reference thereto. Wis 229NW85.
1046–28 174Minn387, 219NW452; 135 Misc265, 237NYS682.
1046–34 But see 87CalA664, 262P762.
1048–49 46 Ida606, 269P597, 598 [cit CJ]; 8LaA93; 8LaA488.
1048–51 259Mass295, 156NE443; 235 Mich410, 209NW802.
1048–54 32F(2d)864 (creditor's bill); 259Mass295, 156NE443.
1049–58 171Ark521, 285SW5; 199Cal 286, 249P188, 51ALR1380; 80CalA415, 252P752; CalA 271P338. [a] (1) 199 Cal 286, 249P188, 51ALR1380. (10) Statute making stockholder jointly and severally liable to amount of sum refunded to him where capital is withdrawn or refunded before payment of debts for which stock is liable. 240 Mich688, 216NW464.
1049–63 235Mich410, 209NW802.
1051–78 243NY333, 153NE437.
1053–1 Contra 214AppDiv367, 212NYS 356.
1054–12 214AppDiv367, 212NYS356.
1054–14 173Minn493, 217NW940 (in equity or under statute).
1055–22 243NY333, 153NE437.
1055–23 243NY333, 153NE437.
1056–39 214AppDiv367, 212NYS356.
1057–41 [a] **In Louisiana,** under statute, receivership proceeding by which property of corporation has been sold and proceeds distributed and receiver discharged is insolvency proceeding authorizing creditor to sue. 165La593, 115S791.
1057–44 165La593, 115S791.
1058–49 214AppDiv367, 212NYS356.
1059–63 244NY421, 155NE727.
1061–93 127 Or639, 271P983.
1061–94 But see 90CalA519, 265P1025 (judgment held prima facie evidence).
1061–95 118 Okl 279, 248P601.
1061–96 118 Okl 279, 248P601.
1065–20 See also CalA 271P338.
1065–21 CalA 271P338.
1065–26 CalA 271P338.
1065–32 127 Or639, 271P983.
1066–33 177Minn526, 225NW649.
1066–41 But see 118 Okl 279, 248P601.
1068–59 But see 200 Iowa384, 202NW 595.
1070–94 54ND614, 210NW342, 346 [cit CJ], 48ALR660. [b] **Order of assessment by court appointing receiver** is conclusive as to necessity for assessment. 31NM404, 247P275.
1071–95 54ND614, 210NW342, 346 [cit CJ], 48ALR660.
1071–96 MoA 10SW(2d)68; 54ND614, 210NW342, 346 [citCJ], 48ALR660.
1080–35 199Cal 286, 249P188, 51ALR 1380. [a] **Effect of mortgage by corporation.**–199Cal 286, 249P188, 51ALR1380.
1083–88½–New. Stockholder must look to sequestration court as to proper application of money he pays and for protection of his equities. Minn 230NW645 (2dcase).
1084–4 [b] **Liability of stockholders of foreign corporation** must be enforced by suit in nature of creditors' bill. 170 Minn475, 212NW911.
1084–5 7F(2d)917.
1085–10 173Minn603, 218NW121.
1085–11 286Pa226, 133A232.
1086–19 50RI 506, 149A609 (equal distribution to creditors).
1086–22 36F(2d)826.
1087–31 127 Or168, 271P38.
1087–40½–New. Constitutional provision for superadded liability creates a substantive right. 173Minn603, 218NW 121 (statutory remedy for enforcement held not exclusive).
1088–53 23F(2d)835.
1089–64½–New. A void contract between a corporation and its stockholders relieving them from paying the full amount of subscriptions need not be canceled by a proceeding in equity before the stockholders could be sued for unpaid subscriptions. TexCivA 19SW (2d)445.
1090–83 243NY333, 153NE437.
1091–94 200 Iowa1272, 206NW613.
1093–24 78Mont295, 253P895.
1093–32½–New. The failure of a person having a claim for labor against a corporation to pursue his right to have his claim allowed as a preferred claim in receivership proceedings in which a receiver was appointed for the corporation deprives him of his right to maintain an action on the claim against a stockholder. 235Mich410, 209NW802.
1094–35½–New. An account of debts, assets, and unpaid capital need not be taken before commencement of an action by a receiver of an insolvent corporation to recover the amount of an unpaid subscription where the whole amount of unpaid stock is required to pay debts. 91PaSuper278.
1095–47½–New. Written notice may be given by registered mail or otherwise. 129Misc814, 222NYS233.
1097–73 200 Iowa1272, 206NW613.
1097–80 259Mass162, 156NE7. [a] (2) 165La593, 115S791.
1098–96 164Minn305, 204NW941 (sale of stock to defendant, in violation of Blue Sky Law, not defense to assess-

ment on his constitutional liability as stockholder).

1098-12½-New. A stockholder is not relieved of his constitutional double liability because the assets of the corporation exceed the charter limit of indebtedness. 168**Minn**234, 210**NW**29, 55**ALR** 321.

1098-12⅓-New. A stockholder is not relieved from such double liability because the property of the corporation was, by an arrangement between the corporation and its creditors, taken into possession of a committee of creditors and the business was continued at a loss. 168**Minn**234, 210**NW**29, 55**ALR** 321.

1099-23 208 **Iowa**537, 226**NW**5 (question with defendant was whether stockholder may be litigated in suit by nonresident receiver of foreign corporation); 165**La**235, 115**S**471 (unfulfilled condition precedent).

1099-26 175**Minn**44, 219**NW**945 (waiver of liability).

1099-31½-New. that stock was not all fully subscribed; 144**Wash**33, 256**P**74.

1099-32 144**Wash**33, 256**P**74. [b] **In Iowa.**-203 **Iowa**792, 206**NW**586.

1100-53½-New. Possession of stock certificate is not a necessary condition precedent to such an action. 125**Misc** 521, 211**NYS**405 (dictum).

1100-61 But see 204 **Iowa**1254, 215**NW** 261. Contra 124**Kan**466, 260**P**645.

1100-62 Contra 124**Kan**466, 260**P**645.

1101-66 54**ND**614, 210**NW**342, 48**ALR** 660.

1101-66½-New. The federal court has jurisdiction to empower its receiver of a corporation to institute actions to enforce constitutional superadded liability of stockholders under state statutes providing remedy. 173**Minn**603, 218**NW** 121.

1101-68 46 **Ida**606, 269**P**597, 598 [cit CJ].

1101-70 23**F(2d)**648 (prevails over general statute).

1101-71 214**AppDiv**367, 212**NYS**356.

1101-74 46 **Ida**606, 269**P**597, 598 [cit CJ].

1101-74½-New. Liability of stockholders under Canadian Winding-Up Act for amount unpaid on shares is not affected by statute of limitations. **Man** [1929] 4**DomLR**381.

1102-34 46 **Ida**606, 269**P**597, 598 [cit CJ]. [j] **Overvaluation of property accepted in payment of stock.**-Right to recover from stockholders to whom stock was issued for property at overvaluation is barred under some statutes at expiration of five years from time property was received for stock. 165**La**593, 115**S**791.

1104-1 **CalA** 279**P**188.

1104-2 205**Cal** 238, 270**P**440; 80**CalA** 415, 252**P**752. [a] (8) Statute of limitations on stockholder's liability for corporation's breach of lease begins to run from date of execution of lease and not from date of breach of covenant therein. 80**CalA**415, 252**P**752.

1104-9 80**CalA**415, 252**P**752.

1104-12½-New. Where a new, different, and distinct agreement based on a new and valuable consideration is made and is intended to change certain covenants in the old agreement rather than to extend or renew it, a new obligation is created from the date of which the liability of stockholders begins to run. 80**CalA**415, 252**P**752.

1105-14 [a] (3) Action is barred where over two years have elapsed since corporation became hopelessly insolvent and had not transacted and could not transact any business, and receiver or trustee in bankruptcy had been appointed. 214**AppDiv**367, 212**NYS**356, 359 [citCJ].

1105-20 32**F(2d)**864.

1105-21 36**F(2d)**826.

1105-26½-New. A creditor alone cannot sue a stockholder in a foreign corporation where a receiver has been appointed. 216**AppDiv**608, 215**NYS**488.

1105-26⅓-New. Trustee in bankruptcy may not enforce creditor's statutory rights against holder of unpaid stock, 214**AppDiv**367, 212**NYS**356.

1105-26¼-New. such invested rights being personal to creditors. 214**AppDiv** 367, 212**NYS**356.

1107-40 124**Kan**466, 260**P**645; 173 **Minn**496, 217**NW**595. See also 250 **IllA** 537.

1107-41 124**Kan**466, 260**P**645.

1107-42 243**NY**333, 153**NE**437; 129 **Misc**814, 222**NYS**233.

1107-44 130**Misc**565, 224**NYS**339.

1103-58 80**CalA**352, 251**P**959.

1109-59 80**CalA**352, 251**P**959.

1109-76 317**Mo** 1344, 300**SW**798.

1109-78 80**CalA**352, 251**P**959.

1110-82 32**F(2d)**864.

1110-87 32**F(2d)**864; 317**Mo** 1344, 300 **SW**798.

1111-9½-New. A receiver alone can sue where liability is as a stockholder in a foreign corporation. 216**AppDiv**608, 215 **NYS**488.

1113-44 [a] **Where bill invoked law of another state** and placed domicile of corporation therein, such allegations are unnecessary. 215**Ala**261, 110**S**147.

1114-60 215**Ala**261, 110**S**147.

1116-1 32 **OhA**399, 168**NE**149.

1118-29 42 **Ida**491, 247**P**746 (failure to state when indebtedness was incurred is not subject of demurrer).

1118-31 But see 32 **OhA**399, 168**NE**149.

1118-40 [a] (8) That corporation is insolvent and has been placed in hands of receiver. 165**La**593, 115**S**791.

1119-43 317**Mo** 1344, 300**SW**798 (sufficient).

1120-62 42 **Ida**491, 247**P**746; 317**Mo** 1344, 300**SW**798.

1121-74 42 **Ida**491, 247**P**746.

1122-89 199**Cal** 286, 249**P**188, 51**ALR** 1380; 99**CalA**159, 278**P**247 (allegations not constituting admission of averment by plaintiff of number of shares of stock outstanding when debt incurred).

1122-94 215**Ala**261, 110**S**147.

1122-94½-New. Where a conveyance to a trustee as security for a bond issue provides that the trustee may, and on request of a stated percentage of the bondholders shall, declare the principal due for default in payment of interest, an allegation of such request in an action against stockholders based on the bonds is immaterial and a denial thereof raises no issue. 199**Cal** 286, 249**P**188, 51**ALR**1380.

1123-14 177**Minn**526, 225**NW**649 (facts pleaded held insufficient to show fraud).

1124-49 **Mass** 165**NE**889 (discretion of court).

1124-53½-New. In an action to enforce stockholders' liability, plaintiff may amend his complaint so as to add as party defendant the administrator of a deceased stockholder who was not made a party to the original complaint. 80 **CalA**352, 251**P**959.

1124-53⅓-New. A general order granting leave to amend is sufficient to permit an amendment bringing in such administrator. 80**CalA**352, 251**P**959.

1124-54 [a] (2) Stockholder's liability cannot be enforced by assignee of creditor where alleged assignment was never offered in evidence. 78**CalA**90, 248**P**546.

1125-61 [a] (3) Variance between allegation that indebtedness was for goods sold and delivered and proof that debt was for overpayment to corporation is fatal where limitations prevent amendment of pleading. 78**CalA**90, 248**P**546.

1126-77 10**PaDist&Co** 593.

1126-80½-New. It will be presumed that officers of a corporation performed their statutory duty to publish annually notice of corporate debts in the absence of evidence to the contrary. 115 **Nebr**848, 215**NW**140.

1126-81 115**Nebr**848, 215**NW**140.

1126-86 167**Minn**113, 208**NW**645; 115 **Nebr**848, 215**NW**140.

1126-87 See also 99**CalA**159, 278**P**247; 197**NC**202, 148**SE**174.

1126-88 [b] **In suit against stockholders of coöperative association,** alleging extension of credit to association, defendants had burden to prove de facto existence of corporation. 208 **Iowa**921, 223**NW**899.

1127-97 222**MoA**322, 296**SW**828.

1127-5 115**Nebr**848, 215**NW**140.

1127-6 115**Nebr**848, 215**NW**140.

1127-8½-New. If a judgment creditor seeks to hold a stockholder liable for failure of the corporation to publish annual statements of debts, the creditor must prove when the debt owing to him was created, and default in publication of notice at that time. 115**Nebr**848, 215 **NW**140.

1127-9 205**Cal** 238, 270**P**440.

1127-12 78**CalA**90, 248**P**546; 99**CalA** 159, 278**P**247.

1128-23 208 **Iowa**537, 226**NW**5. [a] **Incorrect and incomplete book entries properly excluded.**-99**CalA**159, 278**P**247 (on issue of stock outstanding).

1128-25½-New. An assignment of a claim against a corporation, not dated and not stating that it covered the right of action against the stockholders, is properly excluded. 78**CalA**90, 248**P**546.

1129-47½-New. A default judgment against the corporation is not admissible in evidence to prove facts recited therein before the expiration of the time to appeal therefrom has expired. 80 **CalA**415, 252**P**752.

1129-65 [a] (1) 170**Minn**360, 212**NW** 806; 317**Mo** 1344, 300**SW**798. (12) 16 **F(2d)**33; 170**Minn**353, 212**NW**587; 174 **Minn**427, 219**NW**466; 317**Mo** 1344, 300 **SW**798. (23) 317**Mo** 1344, 300**SW**798. (39) 222**MoA**322, 296**SW**828. [a] (56) To show that subscription contract was not rescinded. 203 **Iowa**792, 206**NW**586. (57) Other evidence held sufficient. 171 **Ark**521, 285**SW**5; **TexCivA** 13**SW(2d)** 130; 36**Wyo** 202, 254**P**117. (58) To show purchaser of stock was not stockholder nor subject to double liability. **Minn** 232**NW**519.

1130-66 **CalA** 286**P**733. [a] (9) 115 **Nebr**848, 215**NW**140. (20) Show time of incurring liability or creation of debt. 78**CalA**90, 248**P**546. (21) Show stockholder's liability for corporation's indebtedness before he became stockholder. 78**CalA**90, 248**P**546. (22) Justify finding that defendant knew that stock was fraudulently issued. 222**MoA** 322, 296**SW**828. (23) Other evidence held insufficient. **Nebr** 215**NW**140; 36 **Wyo** 202, 254**P**117.

1130-68½-New. A complaint against only part of the stockholders need not be dismissed unless plaintiff failed to bring in the necessary parties when need of their presence was made clear. 243 **NY**333, 153**NE**437.

1130-69 [a] 197**NC**202, 148**SE**174.

1130-70 204 **Iowa**1254, 215**NW**261. See also 205**Cal** 238, 270**P**440. [a] 208 **Iowa** 537, 226**NW**5.

1130-71 [a] **Mo** 31**SW(2d)**774.

1131-77½-New. Whether a contract passed ownership of stock to defendant is a question of law. 170**Minn**242, 212 **NW**446.

1131-77⅓-New. Where a corporation agreed to pay an attorney's fee by crediting the amount thereof on his stock subscription, the court, after insolvency, has power to fix the value of the attorney's services. **TexCivA** 18**SW(2d)** 923.

1131-92 23**F(2d)**648 (not for prospective damages on account of broker's commission for releasing building); 98 **CalA**748, 277**P**1075.

1131-3 16**F(2d)**33.

1132-6 See also 248 **IllA**565 (judgment running in favor of receiver).

1133-50 166**Minn**265, 207**NW**620.

1133-51½-New. An order assessing stockholders on their constitutional liability is final and appealable. 169**Minn** 131, 210**NW**628.

1133-51⅓-New. Evidence which supports findings that defendants held stock which was not fully paid when the debt was contracted is not reviewable on appeal. 243**NY**333, 153**NE**437.

1133-51¼-New. Irregularity in bringing separate action to enforce stockholder's liability for amounts due laborers at time receiver was appointed does not preclude review of judgment. **Wis** 229 **NW**85.

1135-78 195**Wis**304, 218**NW**590.

1135-80 42**F(2d)**177; 191**NC**340, 132 **SE**21.

1136-99 175**Ark**10, 299**SW**361.

1136-3½-New. [§ 1789a] (4). **Right Based on Payment to Corporation for Stock.** Corporation stockholders who have fully paid for their stock may,

upon the insolvency of the corporation, maintain an action for contribution against stockholders who have not fully paid for their stock in order that, in final settlement of corporate affairs, the burden of discharging corporate obligations may rest upon all stockholders in proportion to their respective stock holdings or obligations. 203 Iowa 792, 206NW586.

1136-3½-New. In such a case it is immaterial that all the stockholders were fraudulently induced by the corporation to subscribe for its stock. 203 Iowa792, 206NW586.

1136-3¼-New. In such case the liability of a subscriber for the unpaid portion of his subscription to the creditors of the corporation and to its receiver establishes equality of liability in proportion to their subscriptions with other subscribers which may be enforced by contribution. 203 Iowa792, 206NW586.

1138-31½-New. Venue. An action by one stockholder of an insolvent corporation who has fully paid for his stock for contribution against other stockholders who have not fully paid for their stock in order to equalize the losses between stockholders may be maintained in a county where the corporation and some of the stockholders are residents. 203 Iowa792, 206NW586.

1133-34 203 Iowa792, 206NW586 (action by stockholder who has fully paid for stock for contribution from other stockholders who have not fully paid for stock in order to equalize losses between stockholders).

14a C. J.—49-5 Mass 168NE521(3d case) (stockholders may refuse to reëlect director).

49-6 216Ala486, 113S516; **DelCh** 152A220.

49-12 339 Ill 121, 171NE159.

49-22 80Mont328, 260P722. [b] **Election of greater number** than provided for by certificate of incorporation is irregular and voidable. 131Misc747, 228NYS70.

50-23 20 OhA26, 153NE187. [a] **Such number selected at annual meeting constitute board of directors** succeeding old members as such and none of members of old board holds over. 20 OhA26, 153NE187.

51-44 9PaDist&Co 501.

51-58½-New. A statute providing for the calling of a meeting of stockholders for the election of officers applies to an election of directors. 195Wis73, 217NW736.

51-59 [a] **Chancellor's discretion** in ordering an election of directors should not be governed by personal notions in selection. **DelCh** 152A220. [b] "**Vacancy**" within statute authorizing chancellor to order election implies previous incumbency. **DelCh** 152A220.

52-60½-New. Request by nearly majority of stockholders for order requiring election to fill vacancies is prima facie support to chancellor's discretion. **DelCh** 152A220.

52-64 264Mass499, 163NE184.

53-89½-New. Statute providing for election at time and place named in by-laws, not to be changed within stated time before election, is inapplicable to additional new directors. **DelCh** 151A298.

53-89½-New. Statute requiring making of list of stockholders ten days before election is directory only and does not invalidate by-law providing for special meeting on five days notice. **DelCh** 151A298.

53-91½-New. A corporate director who is also a receiver of the corporation is not estopped from attacking the validity of election of directors at a special meeting because of his presence and participation therein. 15F(2d)78.

54-13 15DelCh28, 130A282.

54-14 DelCh 145A115.

54-16 [a] **Requirement as to change of time and place for election of directors** applies only where standing by-law provisions are altered. **DelCh** 139A762.

54-18 [a] **Election of new directors by de facto directors** resulting in creating more directors than allowed by certificate of incorporation is illegal and void. 131Misc747, 228NYS70.

54-19 DelCh 139A762; 20 OhA26, 153NE187 (voting shares not entitled held immaterial where result is not affected).

54-23½-New. A corporation not for profit may make valid regulations for election of directors by convention of delegates. 325 Ill 323, 156NE314.

56-59 [a] **Proxies** in custody in one of judges not formally offered until twenty-four hours after close of election through oversight should be received and counted. 213AppDiv774, 211NYS61.

56-62 Del 141A191 (transferee of stock containing unauthorized voting restriction); 325 Ill 114, 156NE258.

56-63 CalA 286P172 (right of pledgee to be represented).

56-66 264Mass499, 163NE184.

56-69 DelCh 151A298.

56-79½-New. Where transfer of stock has been adjudged invalid, the original owners are entitled to vote thereon although the corporation has failed to issue new stock to them prior to election. 127Misc169, 216NYS317.

57-85 NJCh 150A347.

57-94 15DelCh333, 138A74.

58-5 [a] **Right of stockholder to vote** may be determined in suit to review corporate election without making him party. **Del** 141A191.

58-11 See also 113 OhSt491, 149NE866.

58-12 [a] **Ballots cast in effort to cumulate votes without authority** have been held properly counted as straight ballots. **Del** 141A191.

58-12½-New. A statute prescribing a different procedure for election of directors of corporations organized for profit and those not for profit does not violate constitutional provision as to cumulative voting. 325 Ill 323, 156NE314.

58-14 See also 10PaDist&Co 606.

59-24½-New. Votes cast must be counted as straight votes where the charter does not provide for cumulative voting. 15DelCh333, 138A74.

59-24½-New. A provision for cumulative voting in a certificate of incorporation may be amended by substituting therefor a scheme of simple straight voting for directors. **DelCh** 147A255.

60-33 216Ala486, 113S516.

60-43 127Misc169, 216NYS317.

60-44 127Misc169, 216NYS317. [a] **Final result.**-213AppDiv774, 211NYS61.

60-47½-New. That United States revenue stamps on proxies were not canceled did not make them invalid and did not justify judges in refusing to receive and count them when the polls were still open. 213AppDiv774, 211NYS61.

60-47½-New. Title of directors elected at a corporate meeting depends on the ballots as cast. 325 Ill 114, 156NE258.

61-58½-New. A contract appointing a person general manager for a term of years is not one to hold the office of president. 195Wis73, 217NW736.

61-60 245NY497, 157NE833 (sufficient).

61-73½-New. A contract between stockholders to keep one of them as general manager, subject only to unanimous consent as to removal, is contrary to public policy and invalid. 235 IllA532.

61-73½-New. An officer elected by a pledgee of stock not entitled to vote thereon is illegally elected. 22F(2d)268.

61-73¼-New. The election of a director as secretary has been held valid, where with his vote he received a majority of the full board and without it he received a majority of a quorum present. **Mich** 224NW623.

62-87 But see **CalA** 283P957.

63-3½-New. In New York statute title to office is also tried through summary proceedings. 214AppDiv252, 212NYS193 (Gen. Corp. L. § 32).

63-7 90Fla595, 106S473. See also 214AppDiv252, 212NYS193.

63-10 77CalA297, 246P342; 90Fla595, 106S473; 325 Ill114, 156NE258.

64-19 235 IllA532, 541 [quotCJ]. [b] **Pleadings.**-77CalA238, 246P342.

64-22 74CalA114, 239P415. [b] **In California.**-74CalA114, 239P415.

65-27 131Misc747, 228NYS70. [b] **Fact that stockholder did not favorably participate** at election will not affect right to bring action. 131Misc747, 228NYS70.

65-30½-New. A director participating in the election of other directors cannot question its validity. 85Colo 419, 276P972 (nor can he blame elected directors for his own acts or those in which he freely participated).

65-30⅓-New. Duly elected directors may sue to restrain others from attempting to act as directors. 325 Ill 114, 156NE258.

65-30¼-New. A removed director may contest the election of the sole director ousting him as president and director. 131Misc84, 225NYS307.

65-42 131Misc747, 228NYS70 (defect cured by appearance).

65-45 Del 141A191; 15DelCh333, 138A74. [b] **One appearing on books of company as stockholder** may be made party. 15DelCh333, 138A74.

66-54 [a] **Evidence held insufficient** to establish a quorum. 15DelCh28, 130A282.

66-55½-New. In contested elections the niceties of procedural law will be disregarded where fairness and circumstances demand it. 213AppDiv774, 211NYS61.

66-57 [a] **Evidence held sufficient** to justify finding favorable to pledgee on issue of whether it accepted stock in good faith. **CalA** 286P172.

66-60 15DelCh28, 130A282.

66-69 127Misc169, 216NYS317.

67-93 [a] (3) Under statute requiring three members of board to be residents, nonresident receiving more votes than resident may not be declared elected in suit instituted by him for such purpose where to do so would exclude one of three residents required. 221MoA265, 2SW(2d)185. (4) Election of residents receiving fewer votes than nonresidents in order to comply with such statute does not authorize court to order new election. 221MoA265, 2SW(2d)185. (5) In such case fact that nonresident elected director was director of another railroad corporation so that he was required to obtain permission from interstate commerce commission to act does not entitle nonresident receiving more votes than resident to be declared elected. 221MoA265, 2SW(2d)185. (6) Amendment of such statute after institution of action by nonresident to be declared elected does not affect case. 221MoA265, 2SW(2d)185.

68-97½-New. An objection that a statute requiring a corporation to have a resident officer has been violated concerns the state alone and cannot be raised by a private person. 195Wis73, 217NW736 (president held not entitled to continue in office because all officers elected were nonresidents).

68-99 216Ala486, 113S516; 78Mont402, 254P422.

68-2 148Wash602, 269P1048 (one share).

69-5 325 Ill 16, 155NE773.

69-13 [a] **As against collateral attack,** owner of stock, though stock book does not disclose certificate issued to him, is qualified to act as director. **Utah** 293P4.

69-14 216Ala486, 113S516.

69-19 [a] **Pledgors are not disqualified** to act as directors. **Utah** 293P4.

69-23 See also 216Ala486, 113S516.

71-70 241NYS188.

71-74 DelCh 152A220.

72-93 100NJEq41, 134A888; 102NJEq112, 139A798; **NC** 155SE603.

73-99 But see **NC** 155SE603.

73-12 101CalA450, 281P709.

74-40 90Fla595, 106S473; 156SC43, 152SE721. [a] **Publication of notice** of stockholder's meeting for removal of directors is not required to be preceded by order of acting president under California statute. 70CalA454, 233P404.

74-41 NJSup 132A322. See also 246Mich267, 224NW623, 63ALR774.

75-50 316 Ill 183, 147NE42.

75-51 104NJL341, 140A286.

76-65 [a] (10) Buying and selling articles may be authorized by corporate charter. 158La642, 104S484. (11) Transaction conducted by general man-

ager in good faith and for interest of corporation, though resulting in loss does not justify removal. 158**La**642, 104 S484. (12) Manager's method of doing certain acts approved by members of board of directors not ground for removal. 158**La**642, 104**S**484.

76–67 6**F(2d)**922.

76–67½–New. Equity may determine the right to office, and to remove and enjoin an incumbent not entitled thereto, when it has jurisdiction or other grounds, and such relief is merely incidental. 90**Fla**595, 106**S**473.

76–70 [c] **Evidence insufficient** to show wrongdoing in management of corporation's affairs. 308**Mo** 272, 271**SW**768.

77–77 316 **Ill** 183, 147**NE**42.

77–81 178**Minn**164, 226**NW**401 (directors and officers held properly reinstated in quo warranto proceeding).

78–96 322 **Ill** 372, 153**NE**749, 753 [cit CJ]; **Mass** 173**NE**537; 296**Pa**48, 145**A** 697(2dcase) (corporation is bound by his acts).

78–99 208**Cal** 537, 282**P**954.

79–1 **Mass** 173**NE**537.

79–4 172**Minn**110, 215**NW**192.

79–13 But see 131**Misc**747, 228**NYS**70.

80–19 **Mass** 173**NE**537.

80–19½–New. De facto officers cannot invoke the aid of their own acts as such to promote their individual interests. 172**Minn**110, 215**NW**192.

80–20 **CalA** 289**P**946; **DelCh** 151**A**298; **Minn** 231**NW**197. [c] **Evidence held insufficient** to show that former stockholder and officer was officer de facto at time he caused entry to be made on books of corporation. **CalA** 285**P**382.

80–21 15**F(2d)**78; 208**Cal** 537, 282**P** 954; **DelCh** 152**A**220 (electing more directors than there are places); 78**Mont** 402, 254**P**422.

80–23 78**Mont**402, 254**P**422.

80–28 15**F(2d)**78.

81–31 **DelCh** 152**A**220.

81–32 **DelCh** 152**A**220.

81–36 322 **Ill** 372, 153**NE**749.

81–45 107**Conn**216, 140**A**477; 160**La** 425, 107**S**292.

81–46 [b] **Ratification not shown.–CalA** 291**P**603.

81–48½–New. Corporate officers are not agents of each other. 141**SC**207, 139 **SE**386.

81–49 80**Mont**328, 260**P**722.

81–50 325 **Ill** 114, 156**NE**258; 251**Mich** 630, 232**NW**360; **NJCh** 150**A**347; 137 **Misc**73, 241**NYS**474; 129 **Okl** 222, 264**P** 164; 40 **OklACR**699 [reh pending]; 123 **Or**208, 261**P**686; 123 **Or**406, 262**P**833.

82–51 40**OklACR**699 [reh pending]. [a] **Presumption is in favor of regularity of authority** of directors on collateral attack. **Utah** 293**P**4.

82–52 40 **OklACR**699 [reh pending].

82–55 6**F(2d)**192.

82–56 6**F(2d)**192.

83–62 **TexCivA** 293**SW**339, 340 [citCJ].

83–63 201 **Iowa**777, 208**NW**519.

83–66 216**Ala**486, 113**S**516; 37**Wyo** 299, 261**P**122.

83–71½–New. Acts of directors chosen according to law are not illegal because directors owed their office to an illegal voting trust. 85**Colo** 419, 276**P**972.

83–73 321**Mo** 461, 12**SW(2d)**64; 129 **Okl** 222, 264**P**164; 9**PaDist&Co** 501.

84–75 **CalA** 289**P**946; 325 **Ill** 114, 156 **NE**258; **Minn** 215**NW**192; 241**NY**427, 150**NE**505.

84–78 7**F(2d)**335; **Del** 142**A**654; 172 **Minn**110, 215**NW**192.

84–85 14**F(2d)**328, 329 [quotCyc]; 92 **CalA**258, 267**P**914; 201 **Iowa**777, 208 **NW**519; 242**Mich**120, 218**NW**652 [cit CJ]; 102**NJEq**112, 139**A**798; **NJCh** 147 **A**590(2dcase); 124 **Or**94, 262**P**851; 66 **Utah**404, 243**P**107; 37**Wyo** 299, 261**P** 122, 125 [citCJ].

85–88 124 **Or**94, 262**P**851.

86–91 14**F(2d)**590.

86–97½–New. Action taken by directors at an illegal board meeting may be ratified and given validity only at a subsequent legally held board meeting. 14**F(2d)**328.

86–98 [a] **Where articles of incorporation provide for meeting at principal place of business,** meeting at corporation's office as provided by its by-law is sufficient where statute provides that meeting must be held at its office or principal place of business. 197**Cal** 69, 239**P**716.

86–3 **CalA** 289**P**946.

86–4 [a] **Notice naming different place.–CalA** 289**P**946. [b] **Adjournments.–CalA** 289**P**946.

87–11 14**F(2d)**328, 329 [quotCyc]; **Minn** 231**NW**197. [b] (7) Where special meeting is not regularly called, and one director, not notified, is absent, board is without power to levy legal assessment. 73**CalA**321, 238**P**754. [c] **Lack of notice cannot be availed of** by third party not connected with title of corporation owning property. 66**Utah**103, 240**P**165.

88–12 14**F(2d)**328; 137 **Okl** 194, 278**P** 654, 64**ALR**699 (directors may waive irregularities).

88–13 14**F(2d)**328. [a] (2) 14**F(2d)** 328.

88–18 73**CalA**321, 238**P**754; 102**CalA** 71, 282**P**801.

88–21 **CalA** 289**P**946.

89–35 6**F(2d)**192.

90–39 158**La**324, 104**S**60 (president cannot refuse to call meeting because of fear directors will interfere with his management).

90–52 **Md** 149**A**556.

91–59 246**Mich**267, 224**NW**623, 63**ALR** 774.

92–69 264**Mass**499, 163**NE**184.

92–72 33**F(2d)**589; 216**Ala**486, 113**S** 516.

92–73 170**Ark**530, 280**SW**677; 81**Mont** 44, 261**P**620; 37**Wyo** 299, 261**P**122.

92–74 **CalA** 289**P**950; 125 **Okl** 300, 258 **P**910. [b] **Contract made when interested** director is necessary to constitute quorum is voidable and requires affirmative act of disaffirmance. 198**Cal** 261, 244**P**325, 45**ALR**781.

92–75 170**Ark**530, 280**SW**677; **MoA** 24 **SW(2d)**175; 81**Mont**44, 261**P**620; 125 **Okl** 300, 258**P**910; **TexCivA** 1**SW(2d)** 334.

93–77 216**Ala**486, 113**S**516; **TexCivA** 24 **SW(2d)**742.

93–79 125 **Okl** 300, 258**P**910.

93–88 15**DelCh**248, 135**A**846.

93–90 8**F(2d)**338.

93–92 230**Mich**260, 202**NW**991.

93–96 **NJCh** 147**A**590(2dcase); 53**ND** 291, 205**NW**722, 724 [citCJ]. [b] **Particular by-laws construed.–**255**Mass**480, 152**NE**240.

94–97 52**ND**806, 204**NW**673; 5**PaDist&Co** 613, 614 [quotCJ].

94–99½–New. President is considered head of corporation. 80**CalA**1, 251**P**830.

94–3 316 **Ill** 183, 147**NE**42 (other duties not incompatible with duties of vice president); 176**Minn**411, 223**NW**624.

94–8 93**CalA**738, 270**P**286 (secretary appointed by board till legal successor makes demand); 201 **Iowa**860, 208**NW** 209, 210 [citCJ].

94–11½–New. Secretary has been held without authority to execute an agreement binding the corporation to assume personal liabilities of secretary and another. **CalA** 291**P**603.

95–13. **MoA** 2**SW(2d)**157; 136**Misc**141, 239**NYS**568; 101**WVa**480, 482, 133**SE**73 [citCJ].

95–14 See also 32**PortoRico** 169. [b] **Manager intrusted with general supervision of branch** has powers of general agent coextensive with business intrusted to him. 87**PaSuper**195 (corporation is bound by contracts within apparent scope of authority).

95–16 214**Ala**553, 108**S**452, 455 [citCJ]; 82**Mont**150, 266**P**869.

95–17 82**Mont**150, 266**P**869, 874 [cit CJ]. See also 49**Philippine**428.

95–19 5**PaDist&Co** 613, 614 [quotCJ].

95–21 292**Pa**164, 140**A**871, 874 [citCJ] (general authority not shown).

95–22 292**Pa**164, 140**A**871, 874 [quot CJ].

95–26 208 **Iowa**767, 226**NW**174 (may delegate to manager authority to employ and fix salaries of those employed); 137 **Misc**73, 241**NYS**474.

96–29 14**F(2d)**328, 329 [quotCyc].

96–31 See also **TexCivA** 277**SW**746.

96–34 130 **Or**195, 279**P**539.

96–37 See also 32**PortoRico** 169.

96–43½–New. The president could not be heard to say to third persons dealing with a company that he had intrusted his duties to others, and was unacquainted with the company's affairs. 89 **IndA**318, 164**NE**298.

97–53 [a] **Evidence held to sustain finding of authority** of two directors to act for corporation as committee. 125 **Me**191, 132**A**417, 44**ALR**1333.

97–56 19**F(2d)**24; 215**Ala**566, 112**S**139; 216**Ala**486, 113**S**516; 15**DelCh**119, 132**A** 442; 94**Fla**1151, 115**S**541; 97**Fla**493, 121**S**789 (quasi fiduciary); 325 **Ill** 612, 156**NE**785; **IndA** 169**NE**678; 199 **Iowa** 1285, 202**NW**14; 200 **Iowa**384, 202**NW** 595; 201 **Iowa**236, 207**NW**228; 210**Ky** 309, 275**SW**784; 161**La**784, 109**S**490; 256**Mass**442, 152**NE**918; 260**Mass**81, 156 **NE**897; 264**Mass**499, 163**NE**184; **Mass** 165**NE**889; 234**Mich**528, 208**NW**691; 78 **Mont**22, 252**P**316; 130**Misc**110, 222**NYS** 532; 192**NC**246, 134**SE**656; 147**Va**937, 133**SE**576; 196**Wis**10, 219**NW**361; 200 **Wis**423, 228**NW**481(2dcase). [b] **Fiduciary relationship does not extend** to persons outside corporation, who may be prospective stockholders. 217**Ala**62, 114 **S**796.

97–57 216**Ala**486, 113**S**516; **IndA** 169 **NE**678; 161**La**784, 109**S**490; 256**Mass** 442, 152**NE**918; **Sask** [1927] 3**DomLR** 786.

97–58 216**Ala**486, 113**S**516; 85**Colo** 419, 276**P**972; 94**Fla**1151, 115**S**541; 325 **Ill** 612, 156**NE**785; 210**Ky**309, 275**SW**784; 315**Mo** 907, 287**SW**438; 103**NJEq**199, 142**A**819 (board of management); **NC** 155**SE**558. [a] Contra 214**Ky**705, 283 **SW**1047.

98–59 315**Mo** 907, 287**SW**438; 32 **OhA** 216, 167**NE**699.

98–60 215**Ala**566, 112**S**139; 15**DelCh** 119, 132**A**442.

98–62 50**Nev**56, 250**P**369; **NC** 155**SE** 558.

98–63 15**DelCh**119, 132**A**442.

99–65 216**Ala**486, 113**S**516; 325 **Ill** 612, 156**NE**785.

99–66 216**Ala**486, 113**S**516; **DelCh** 141 **A**54; **IndA** 169**NE**678; 260**Mass**81, 156 **NE**897; 231**Mich**621, 204**NW**750; **MoA** 285**SW**538; 149**Wash**393, 270**P**1041; **Sask** [1927] 3**DomLR**786.

99–66½–New. , and to exercise best judgment and care. 215**Ala**566, 112**S** 139.

99–67 19**F(2d)**24; 215**Ala**566, 112**S**139; **TexCivA** 3**SW(2d)**842.

99–69 See also 165**La**1, 115**S**347.

99–69½–New. Where one agrees to accept office of president and director upon conditions never fulfilled by the corporation and subsequently formally notifies it that he would not accept the positions, there is no fiduciary relation. 164**Minn**466, 203**NW**228, 205**NW**449, 206 **NW**380.

99–70½–New. One director is not the agent of another director so as to make the latter liable for his acts. 129**Misc** 25, 220**NYS**711.

99–71 23**F(2d)**357; 41 **Ida**729, 241**P** 1014; 199 **Iowa**1285, 202**NW**14; **MoA** 29**SW(2d)**165; 78**Mont**457, 254**P**432; 192**NC**246, 134**SE**656.

99–72 97**Fla**493, 121**S**789; **IndA** 167 **NE**625; 78**Mont**22, 252**P**316.

99–74 315**Mo** 907, 287**SW**438; 78**Mont** 457, 254**P**432.

100–75 78**Mont**22, 252**P**316.

100–78 **NJCh** 149**A**362; 40 **OklACR**699 [reh pending].

100–79 34**Ariz**95, 268**P**181, 184 [citCJ].

100–81 32 **OhA**216, 167**NE**699. [a] **Knowledge of cashier of bank's indorsement of rediscounted paper without recourse** is not chargeable to bank directors sued on guaranty of rediscounted paper. 206 **Iowa**90, 219**NW**44.

100–82 206 **Iowa**90, 219**NW**44.

100–85 250**Mich**198, 229**NW**513; 129 **Misc**25, 220**NYS**711.

100–92½–New. While officers are acting for the corporation, their knowledge of certain conditions as officials of the corporation is likewise knowledge to them as individuals. 123**Kan**502, 255**P** 975.

100–92½–New. A member of the board of directors is charged with knowledge of all lawful acts done by the board although he was not present at the meeting and did not participate in the pro-

ceeding. 40 OklACR699 [reh pending].
100-94 TexCivA 295SW311.
101-9 MoA 285SW538, 541 [citCJ]; WVa 153SE240 (overpayment of salaries).
102-16 286Pa305, 133A556.
102-31 23F(2d)357; 84CalA627, 258P666; IndA 169NE678; 264Mass253, 162NE319. See also NJCh 150A347.
102-32 30F(2d)85; Cal 277P862; 208Cal508, 282P787; 15DelCh119, 132A442; 325 Ill 612, 156NE785; 170La969, 129S547; 264Mass499, 163NE184 (directors cannot manipulate affairs to secure control in particular stockholders); 223AppDiv101, 227NYS489. See also 148Wash602, 269P1048. [a] **Directors may be forced to account** in equity for breach of common-law duties. 213Ala137, 104S322.
102-32½-New. and cannot exercise power to the detriment of the corporation in advancing their own interest or in the interest of another corporation in which they own interest. 215Ala566, 112S139.
103-33 8F(2d)532; NC 155SE558. [b] **Complaining stockholder, as director, participating in acts prejudicial to stockholders,** does not, by suing for appointment of receiver, exempt himself from liability. 300Pa479, 150A902.
103-34 Ala 127S544; Mass 172NE871; 253NY274, 170NE917 (directors must be free from fraud in relations with shareholders).
103-34½-New. failure to exercise diligence and good faith, 179Ark448, 17SW(2d)286.
103-35 179Ark1087, 20SW(2d)186 (director, guilty of negligence, is liable to stockholder); 192NC246, 134SE656; 195NC127, 141SE489; 32 OhA216, 167NE699. See also 227AppDiv224, 237NYS573.
103-36 32 OhA216, 167NE699.
103-37 260Mass81, 156NE897; 264Mass253, 162NE319; 264Mass386, 162NE770; Mass 168NE521(3dcase); 192NC246, 134SE656; 195NC127, 141SE489; 32 OhA216, 167NE699.
103-40 But see Mo 30SW(2d)976(2dcase).
103-42 84CalA627, 258P666; Fla 129S759; 251Mich413, 232NW197. [c] **Where negligence causes no loss,** it is not actionable. 251Mich413, 232NW197.
104-53½-New. Directors who act in strict accordance with the vote of stockholders in charging off losses and in leasing and selling property are not individually liable for the amount of such losses in a suit by a stockholder and director who took part in the meetings and made no objection. 308Mo272, 271SW768.
104-53⅓-New. Officers of a corporation may appoint a manager and agent to transact its business. 313Mo642, 285SW462.
104-53¼-New. Directors are under duty to render aid in securing capital. DelCh 141A54.
104-53⅕-New. An executive officer of a corporation cannot avoid the consequences of his own acts by virtue of the artificial nature of the corporation and the doctrine of separate entity. 28F(2d)807.
104-53⅙-New. In the absence of fraud, breach of trust, or ultra vires transactions, the conduct of directors in the management of a corporation is not subject to attack by minority stockholders. 96CalA549, 274P597 (discretionary acts).
104-53⅐-New. Liability of officers for negligent or unauthorized acts rests on the common law rule, rendering the agent, violating authority or neglecting duty, liable to his principal. 227AppDiv224, 237NYS573.
104-53⅛-New. Director has duty of attending meetings and assisting in supervising business. 251Mich413, 232NW197.
104-53⅑-New. Directors are under duty to know transactions of corporations. Iowa 232NW72.
104-56 192NC246, 134SE656.
104-58 Mass 172NE871.
104-61 Mass 172NE871 (diversion of corporate funds through agency of another corporation controlled by defendant); 192NC246, 134SE656.
105-72½-New. A director sustaining the relation of agent to the company was bound to the utmost good faith and loyalty to his principal during continuance of the relationship. 243Mich578, 220NW699.
105-76 8F(2d)532. [c] **Stock dividends.** -Mich 215NW772; 134Misc107, 234NYS529 (that president presiding at meeting did not vote for declaration does not absolve him).
105-78 289Pa260, 137A252.
106-80 134Misc107, 234NYS529.
106-80½-New. Settlement with some of the officers and directors does not release the president as to the declaration, of a dividend out of capital. 134Misc107, 234NYS529.
106-81 [b] **Fact that dividends are paid from current profits** will not exempt directors from liability if prior impairment of capital still exists. 9PaDist&Co179.
106-86 See also 165La1, 115S347.
106-96 13F(2d)40.
107-10 NH 150A545.
107-11 165La1, 115S347, 351 [quot CJ].
107-12 [a] **Complaint that directors negligently failed to stop false representations** by agents of corporation held not to state cause of action. 135Misc278, 238NYS74.
107-14 But see 264Mass253, 162NE319.
107-17½-New. The president is individually liable for misrepresentations of the general manager to whom he sent a purchaser. 154Wash358, 282P203.
108-23 161La784, 109S490; Mass 165NE671; 37Wyo299, 261P122. [a] **Management of corporate property** should be left to directors so long as they act in good faith. 317Mo1028, 298SW91. 56ALR1276.
108-25 See also 264Mass386, 162NE770.
108-29 DC 37F(2d)798; 161La784, 109S490; 11LaA199, 123S178. See also MoA 298SW1040. [a] **Removal of mortgage encumbrance** is not ipso facto misappropriation or voluntary gift of corporate funds, though mortgage debt is due from another. Ala 127S544.
108-30 8F(2d)368; MoA 285SW538 (fraud not condoned except by unanimous consent of stockholders); NJCh 150A12.
108-32 [a] **Family corporation cannot complain of directors occupying premises of corporation rent free,** where conduct negatived idea that directors misappropriated corporate property. 223AppDiv226, 227NYS653.
108-33 288Pa549, 137A113, 52ALR506. [b] **Third person liable to corporation** for assisting officers wrongfully to divert funds. Mass 172NE871.
109-36 8F(2d)368; 264Mass253, 162NE319; 264Mass386, 162NE770 (for profit to themselves); Mass 168NE727.
109-38½-New. but he is liable if he acted willfully or negligently. 286Pa226, 133A232.
109-43 264Mass253, 162NE319.
110-58 286Pa226, 133A232.
110-76 Mass 168NE727.
110-79 See also 161La784, 109S490.
111-3 But see 149Va789, 141SE764.
111-15 28F(2d)793; IndA 151NE336; 11LaA112; 288Pa549, 137A113, 52ALR506; 49SD476, 207NW471; TexCivA 11SW(2d)804; TexCivA 279SW581, 584 [citCJ]. But see TexCivA 30SW(2d)797.
112-16½-New. One receiving check drawn on corporate funds in payment of individual debt of sole owner of the stock in a corporation held not liable to refund in absence of finding of knowledge. Presumption arising from face of check is a rebuttable presumption. 169Ark56, 273SW370.
112-20 325 Ill 612, 156NE785.
112-23 50Nev56, 250P369.
112-29½-New. A constitutional provision making directors liable for money misappropriated by officers is not applicable to the purchase of assets of another corporation at an excessive price. 84CalA627, 258P666.
112-30 170Ark1029, 282SW355; 194NC80, 138SE428.
112-31 170Ark1029, 282SW355; 94Fla1151, 115S541, 542 [citCJ]; 135Misc397, 238NYS276; 194NC80, 138SE428.
113-32 325 Ill 612, 156NE785; 240Mich569, 215NW772 (surrender to directors of policies of insurance on their lives upon payment of surrender value); 54ND479, 209NW993, 48ALR474; 125 Okl300, 258P910; TexCivA 18W(2d)334, 337 [citCJ]; TexCivA 2SW(2d)980. [a] (9) Where corporation was represented by majority of board, president was not disqualified from purchasing property. 170Ark1029, 282SW355. [c] **Majority of stockholders** have power to sell property of corporation to president on terms and price as it may see fit. 200Wis423, 228NW481(2dcase).
113-33 240Mich569, 215NW772; 193NC367, 137SE132; 125 Okl300, 258P910; TexCivA 18W(2d)334.
113-34 193NC367, 137SE132; TexCivA 18W(2d)334; 200Wis423, 228NW481(2dcase).
113-35 37GaA137, 139SE108 (purchaser must take notice that officer may have acted for his own benefit).
113-37 [a] **Where trustee of corporation purchases its property** with knowledge of directors and stockholders, it must account for full value thereof. Tex CivA 2SW(2d)980.
113-39 240Mich569, 215NW772.
113-43½-New. Corporation's conveyance to officers or directors must be authorized or ratified. 193NC367, 137SE132.
113-43⅓-New. Transfer of the assets of a corporation to an officer is void as against the corporation if made without valid consideration. 37GaA137, 139SE108.
113-43¼-New. Where a deed of assets to the president is not discredited, the grantee of the president is protected in the absence of notice of invalidity. 37GaA137, 139SE108.
113-43⅕-New. Director or officer is not forbidden to purchase property from corporation. 135Misc397, 238NYS276.
113-43⅙-New. Stockholder has no right to object where majority of stockholders decided to sell property to president unless sale was induced by fraud or bad faith. 200Wis423, 228NW481(2dcase).
113-45 291Pa416, 140A514.
114-48 315Mo907, 287SW438; 105WVa102, 141SE529 (sale avoided by corporation for want of officer's good faith). See also 6LaA445.
114-50 105WVa102, 141SE529.
114-53 105WVa102, 141SE529 (gross inadequacy of price sufficient).
115-69 29F(2d)457; 234Mich528, 208NW691. But see 134Misc107, 234NYS529.
115-73 MoA 285SW538, 541 [citCJ].
115-74 MoA 285SW538 (purchase with corporate funds and resale to corporation at profit).
116-84½-New. A corporation is not barred from recovery for directors' fraud by the fact that the directors turned back part of the stock where the corporation took no formal action, accepting the stock as full settlement. 325 Ill 612, 156NE785.
116-84⅓-New. Stockholders are not charged with notice of a transaction by which a director purchased property and sold it to the corporation at a profit by the fact that a news item of the transfer to the director appeared. 325 Ill 612, 156NE785.
116-84¼-New. Where directors jointly participated in fraud in the sale of property to a corporation, liability to the corporation was joint and several. 325 Ill 612, 156NE785.
116-85 215AppDiv416, 213NYS569, 574 [quotCJ].
116-86 215AppDiv416, 213NYS569, 574 [quotCJ].
116-87 244NY209, 155NE102; 215AppDiv416, 213NYS569, 574 [quotCJ].
116-88 215AppDiv416, 213NYS569, 574 [quotCJ].
116-89 215AppDiv416, 213NYS569, 574 [quotCJ].
116-90 215AppDiv416, 213NYS569, 574 [quotCJ].
116-91½-New. Where the directors of

a corporation consider and determine that the corporation cannot legally acquire the interest of a cotenant in land by the purchase of a tax title thereon, a stockholder and director engaged in the business of purchasing tax titles does not violate any duty to the corporation and is not guilty of fraud by acquiring such title in his own name with the knowledge of the directors. 236Mich 401, 210NW204.

116-93 234Mich528, 208NW691; 244 NY209, 155NE102.

116-94 244NY209, 155NE102. [b] **Officer and director of corporations acquiring timber lands with knowledge that one of the corporations** was contemplating purchase of such lands holds excess in price subsequently paid by corporation in trust for such corporation. 215AppDiv416, 213NYS569.

116-95½-New. Where the business manager of a corporation agrees with a trustee to conceal from the corporation the interest of the trustee in property proposed to be purchased by the corporation, and the trustee profits by the sale to the corporation, the act of the business manager in presenting the proposition to the corporation is the act of the trustee. 234Mich528, 208NW 691.

117-97 43 Ida129, 250P1081. [a] **Transfer of lease to its treasurer** and director by the corporation is illegal only where it is unfair or fraudulent. 168 Ark1098, 272SW836. [b] **Such lease is not in fraud of minority stockholders** where corporation is insolvent and foreclosure proceedings are about to be instituted. 43 Ida129, 250P1081.

117-99 43 Ida129, 250P1081.

117-2½-New. The lease to directors is not void or necessarily fraudulent where within the power of the corporation and is subsequently ratified by stockholders. 43 Ida129, 250P1081.

117-6 23F(2d)357.

117-21 216Ala486, 113S516; 77Cal 238, 246P1049; 103NJEq199, 142A819 (regardless of good faith); 244NY209, 155 NE102.

118-22 See also 208 Iowa767, 226NW 174.

118-24 TexCivA 24SW(2d)742.

118-26 135Misc397, 238NYS276; 37Wyo 299, 261P122 (contract voidable).

118-28 Ark 32SW(2d)618; 241Mich 426, 216NW922; 103NJEq199, 142A819; TexCivA 24SW(2d)742.

118-31 14F(2d)29; 22F(2d)558; 23F (2d)531; 216Ala486, 113S516; 168Ark 1098, 272SW836; IndA 169NE678; 199 Iowa1285, 202NW14, 19 [citCJ]; 78Mont 22, 252P316; 37Wyo 299, 261P122.

119-32 168Ark1098, 272SW836; Ark 32SW(2d)618; 325 Ill 612, 156NE785; IndA 169NE678; 81Mont44, 261P620, 627 [quotCJ]; 37Wyo 299, 261P122.

119-33 14F(2d)29; 168Ark1098, 272 SW836; 325 Ill 612, 156NE785; 199 Iowa 1285, 202NW14, 19 [citCJ]; 240Mich569, 215NW772; 241Mich426, 216NW922; 244Mich83, 221NW131; 124 Or311, 263P 402; 37Wyo 299, 261P122.

119-34 Ark 32SW(2d)618 (lease to corporation under agreement made before organization); 206 Iowa172, 218NW895; 223Ky685, 48SW(2d)677; 241Mich426, 216NW922; 245Mich493, 222NW754; 78Mont22, 252P316; TexCivA 28SW(2d) 950; 103WVa329, 137SE362; 37Wyo 299, 261P122.

119-35 7F(2d)308; 206 Iowa172, 218 NW895; 240Mich569, 215NW772; 241 Mich426, 216NW922; 244Mich83, 221 NW131; 78Mont22, 252P316; 135Misc 397, 238NYS276; 124 Or311, 263P402. See also IndA 169NE678.

119-36 78Mont22, 252P316; 148Wash 602, 269P1048.

120-42 IndA 169NE678; 244NY209, 155 NE102.

120-43 TexCivA 18W(2d)334.

120-44 22F(2d)331; Minn 231NW7(2d case); TexCivA 291SW974. But see Tex CivA 18W(2d)334.

120-46½-New. Where a third person joins with a corporate officer in dealing with the corporation, with knowledge that he is such officer, the contract may be set aside as to him as well as the corporate officer. 241Mich426, 216NW 922.

120-47 [a] **Rule invalidating contracts with director in case of fraud held inapplicable** where persons making contract held all stock. TexCivA 291SW 974.

120-49 22F(2d)558.

120-50 TexCivA 11SW(2d)562; Tex CivA 24SW(2d)742.

120-52 See also 244Mich83, 221NW131.

120-53 36F(2d)675; 299Pa97, 149A 103; TexCivA 24SW(2d)742.

120-59 168Ark1098, 272SW836; 94Fla 1151, 115S541, 542 [citCJ]; 81Mont44, 261P620; 135Misc397, 238NYS276; 149 Va789, 141SE764 (that he applied proceeds of note made to himself individually to payment of corporate obligations); 37Wyo 299, 261P122. [a] **Evidence held insufficient** to warrant finding of good faith in contract between president of corporation and its secretary whereby president's note to corporation was released for fifteen thousand five hundred dollars less than was due thereon, though note was amply secured by collateral. 81 Mont44, 261P 620.

121-60 244NY209, 155NE102.

121-61½-New. The president of a corporation who has entered into a contract with its secretary for the release of the president's note at a large discount through a sale of the president's stock is not entitled, in a suit to enforce the contract, to be placed in statu quo with respect to the stock as a condition of denial of his recovery. 81Mont44, 261 P620.

121-61½-New. In such case the president's remedy is by an action on quantum meruit. 81Mont44, 261P620.

121-63 216Ky51, 287SW226; 256Mass 442, 152NE918; Mass 165NE671; Tex CivA 25SW(2d)942 (title acquired not void but subject to attack only by corporation or its officers or creditors).

121-64 40F(2d)67; Mass 165NE671.

121-65 40F(2d)67. See also 96CalA42, 273P595.

121-67 Ida 290P390, 392 [citCJ].

121-69 210Ky309, 275SW784, 789 [cit CJ]; 85Mont78, 277P622, 64ALR772.

121-70 210Ky309, 275SW784, 789 [cit CJ].

122-79 23F(2d)357; 40F(2d)67; 170 Ark530, 280SW677; 325 Ill 612, 156 NE785; 240 IllA567; 260Mass485, 157 NE520 (rule cited held not sufficient to put bank on notice that there was fraud in corporation check payable to treasurer with "securities" stated as purpose of check); 78Mont22, 252P316; 244 NY209, 155NE102; TexCivA 288SW536; TexCivA 2SW(2d)980; TexCivA 3SW (2d)842 (sale of entire corporate property); 147Va937, 133SE576; 136Wash 302, 239P837, 1119; Wis 232NW561. [c] **Director may not vote on transaction in which he is interested personally.**–136Wash302, 239P837, 1119.

122-80 23F(2d)357; 325 Ill 612, 156NE 785; Mass 165NE671; 244NY209, 155 NE102; TexCivA 2SW(2d)980.

123-82 240 IllA567.

123-83 244NY209, 155NE102.

123-83½-New. Distribution of profits among directors of a corporation jointly participating in fraud does not affect liability to account. 325 Ill 612, 156 NE785.

123-89 30F(2d)85; 170Ark530, 280SW 677; 325 Ill 612, 156NE785; 244NY209, 155NE102.

123-91 30F(2d)85; DelCh 141A54; 325 Ill 612, 156NE785; 244Mich83, 221 NW131; MoA 285SW538; 244NY209, 155NE102; TexCivA 2SW(2d)980. But see 135Misc397, 238NYS276.

124-92 170Ark530, 280SW677; 244NY 209, 155NE102; 136Wash302, 239P837, 1119.

124-96 136Wash302, 239P837, 1119.

124-97 136Wash302, 239P837, 1119. See also 244NY209, 155NE102. [a] **Transaction held ratified.**–136Wash302, 239P837, 1119.

125-5½-New. A mortgage of corporate property by directors to purchase stock of complaining stockholders is fraudulent where it is made at a time when the corporation has ample funds on deposit with its president. 170Ark530, 280SW677.

125-7 TexCivA 3SW(2d)842, 843 [cit CJ].

125-10½-New. The briber of an officer and director to induce his associates to sell the business is liable as a tortfeasor. 225AppDiv350, 233NYS73.

125-12 24F(2d)718; Nebr 231NW18.

125-13 31F(2d)265.

125-14 CalA 293P122.

125-15 31F(2d)1; 194NC80, 138SE428, 432 [citCJ]. See also 198Wis78, 223NW 233. [a] 194NC80, 138SE428. [e] Mass 171NE830.

125-16 76CalA80, 243P710; 194NC80, 138SE428, 432 [citCJ]; 287Pa216, 134 A397.

126-17 76CalA80, 243P710; 194NC80, 138SE428; 287Pa216, 134A397.

126-19 215Ala566, 112S139.

126-20 249Mich107, 227NW702.

126-21 CalA 293P122; 29 OhA289, 162 NE653. See also 223AppDiv101, 227 NYS489. But see 194NC80, 138SE428. [f] **Right of stockholders to object** held lost by laches. 76CalA80, 243P710.

126-22 76CalA80, 243P710; 29 OhA 289, 162NE653.

127-24 34Ariz245, 270P1044; 137 Okl 82, 277P1026.

127-25 Nebr 231NW18; 137 Okl 82, 277P1026.

127-26 29 OhA289, 162NE653 (no presumption of unfairness or fraud).

127-27 But see 215Ala566, 112S139.

127-29 215Ala566, 112S139.

128-48 237 IllA156, 163 [citCyc]; Mass 169NE268; 307Mo 19, 269SW599.

128-50 307Mo 19, 269SW599 (where no fraud shown as in purchasing stock under its value where value known to seller).

128-54 237 IllA156, 163 [citCyc]; 214 Ky705, 283SW1047; NS [1929] 4DomLR813.

129-55 214Ky705, 283SW1047.

129-56 But see Mass 169NE268. [c] **Evidence as to time of declaration of dividend** held to make it question for jury whether transfer was before or after declaration of dividend. 238Mich 30, 212NW957. [d] **Right to dividends.**–238Mich30, 212NW957.

129-56½-New. But rule has no application where seller has also been director of company, knows all about its property and book value of stock. 307 Mo 19, 269SW599.

129-60½-New. The secretary and manager of a corporation must make truthful disclosure of facts within his knowledge affecting the value of stock when a stockholder makes specific inquiry as to such value. 192Wis460, 212NW299.

129-60½-New. Whether an officer may buy corporate stock on his own behalf depends on whether it is his duty to buy stock for the corporation. 19F(2d) 24.

129-60¼-New. A director could not rescind a stock purchase on the corporation's bankruptcy because of its failure to comply with the statute. 19 F(2d)350.

129-60⅓-New. Where managing officers purchase stock through the use of corporate funds so that the corporation, in effect, pays therefor, the stock will be canceled. 23F(2d)357.

129-60⅓-New. and the corporation may recover dividends received thereon. 23 F(2d)357.

129-60½-New. Where officers acquire stock from minority stockholders by a fraudulent scheme in disregard of the latter's rights, the sales may be rescinded. 23F(2d)357.

129-60⅔-New. Stockholder who transferred stock to director of corporation cannot complain that director violated duty to him in not offering stock to corporation as by-laws provided. Mass 169 NE268.

130-61 161La784, 109S490.

130-62 157Md309, 145A876 (stock may not be issued against interest of stockholders as whole for benefit of directors); Sask [1927] 3DomLR786.

130-64 161La784, 109S490.

130-68½-New. A director, not voting for illegal declaration of dividends, nor knowing of another's false representations, is not liable to the purchaser. 129Misc25, 220NYS711.

130-68½-New. Directors are not liable for misrepresentation inducing purchase of stock from the corporation unless fraud and deceit are shown. 129Misc25, 220NYS711.

130-68¼-New. Directors defrauding stock purchasers, relying on their statements in advertisement and prospectus, should be required to account as mandatories or trustees for property intrusted to them. 287**Pa**216, 134**A**397.

130-68½-New. The representations of stockholders as individuals that their money was invested in the corporation together with their acts as directors in issuing notes was held to be a fraud on subscribing stockholders and estopped them to deny the truth of their representations. 255**Mass**52, 151**NE**167.

130-70 233**Mich**384, 206**NW**320 (return of stock illegally sold to directors ordered on payment of amount received therefor).

130-71 [a] **Estoppel.**-132**Misc**509, 230 **NYS**122.

130-76 208**Ky**816, 271**SW**1101.

131-79½-New. Where the president and secretary made a secret agreement to sell all outstanding stock of a shipping corporation at a named price per share, they, as officers, could not purchase its treasury stock without disclosing all facts of sale to other directors and stockholders. 147**Va**937, 133 **SE**576.

131-79⅓-New. Purchasing and paying for a portion of the stock as increased by a lease of land by majority of the stockholders, who were the directors consummating the deal, has been held ratified by the stockholders by their acceptance of a dividend thereafter and by joining with the directors as defendants in an action by minority stockholders seeking cancellation of the shares of stock transferred. **TexCivA** 11**SW(2d)**562.

131-85 134**Misc**107, 234**NYS**529 (resolution of stockholders ratifying all acts does not absolve president).

131-95½-New. Evidence has been held not to show, as matter of law, that the president of a corporation in selling his stock to it, obtained the contract therefor by fraud. 35**GaA**114, 132**SE** 396.

131-95⅓-New. Where a director who was indebted for his stock surrendered it to the corporation knowing that the corporation was facing a large deficit and that the value of the stock was falling, he may be required to pay his indebtedness. 240**Mich**569, 215**NW**772.

132-99 231**Mich**621, 204**NW**750.

132-8½-New. Where director, although acting bona fide, wrongfully participates in transfer, to bona fide purchaser, of note given corporation for shares not allotted he is liable to indemnify maker against liability to holder. **Ont** [1925] 3**DomLR**488.

132-8⅓-New. Directors have been held not guilty of fraud or breach of trust, as against life tenant, in not declaring dividends of all net earnings, allowing equity interference. 19**F(2d)**198.

132-8¼-New. Conversion of stock placed in the hands of the treasurer for transfer renders him liable in damages to a stockholder. 258**Mass**53, 154**NE** 557.

132-8½-New. An officer is not liable to the corporation for an unpaid balance of the purchase price of stock under a contract turned over to the corporation by him. 134**Misc**107, 234**NYS**529.

132-8¼-New. A resolution providing for maintenance of families of officers may be limited by a letter from an officer to the directors. **NJSup** 147**A**723.

132-8½-New. Stockholder delivering stock to officers to be sold need not investigate corporation books to determine truth of officers' statement as to the stock. **Cal** 293**P**26.

132-10 86**Colo** 559, 283**P**772; **Pa** 151**A** 815; **TexCivA** 279**SW**581, 585 [quotCJ].

132-11 **TexCivA** 279**SW**581, 585 [quot CJ].

132-12 **TexCivA** 279**SW**581, 585 [quot CJ].

132-13 **NJCh** 147**A**776 (rule making voidable, corporate contract with director at instance of stockholder does not authorize repudiation by stockholders of corporate debts due directors); **Tex CivA** 279**SW**581, 585 [quotCJ]. [b] **Acquiescence of corporation** for twelve years in handling of property under trust deed held to waive objection to validity of deed because of interest of directors as creditors. 198**Cal** 261, 244**P** 325. 45**ALR**781.

132-13½-New. Directors, who are also creditors of corporation, purchasing practically all property of railroad corporation from purchasers at execution sale on foreclosure of construction liens, after expiration of redemption period in good faith, take free from equity in favor of subsequent judgment creditors of corporation. 200 **Iowa**384, 202**NW** 595.

132-13⅓-New. Director creditor of corporation may buy its property at forced sale where it is unable to pay obligations where he has done all that is required of him to protect it in good faith. 200 **Iowa**384, 202**NW**595.

132-13¼-New. Director creditors, after failing in good faith to obtain money from stockholders to redeem corporate property from foreclosure sale, may after redemption period has expired purchase all its property from purchaser at sale and cause deed to be made to another corporation of which they are stockholders and liquidate such property among themselves without obligation to judgment creditor of first corporation becoming such after execution sale, either as against themselves or the first corporation. 200 **Iowa**384, 202 **NW**595.

132-14 33**F(2d)**496 (appointment of special master and waiver of defenses in inquiry as to president's ownership of bonds); 200 **Iowa**384, 202**NW**595; 291**Pa**416, 140**A**514; **TexCivA** 279**SW** 581, 585 [quotCJ].

133-15 **TexCivA** 279**SW**581.

133-18 220**Ala**613, 127**S**195; 86**Colo** 559, 283**P**772; 127**Me**91, 141**A**321; 19 **OhA**495; 150**Wash**235, 272**P**962; 105 **WVa**610, 144**SE**410, 62**ALR**740. See also 234**Ky**580, 28**SW(2d)**783.

133-19 28**F(2d)**107. [c] **Deficit on overdraft,** paid by directors of bank, is recoverable. 101**NJEq**61, 137**A**827.

133-25 **Mass** 168**NE**727.

133-26½-New. That an obligation is in the form of a demand note does not defeat the manager's right to interest. 28**F(2d)**192.

134-28 96**CalA**42, 273**P**595; 245**Mich** 505, 222**NW**707; 38**Wyo** 182, 265**P**453 (note).

134-31 See also 96**CalA**42, 273**P**595.

134-38 28**F(2d)**192; 234**Ky**580, 28**SW** **(2d)**783; **NJCh** 147**A**776; 19 **OhA**495; 106**WVa**142, 145**SE**160.

135-45½-New. Where a director of a corporation, who was also president of a bank, arranged for a loan from the bank to the corporation to be secured by collateral furnished by plaintiff, the corporation's president, and thereafter the corporation's note signed by its secretary was delivered to the bank by plaintiff's private secretary, who subsequently made similar deliveries of renewal notes, it has been held that plaintiff could not thereafter repudiate the transaction. 89 **IndA**318, 164**NE**298.

136-58½-New. It has been held that an officer may not transfer the note of a corporation to pay a personal debt, even though the corporation is indebted to him. 288**Pa**549, 137**A**113, 52**ALR**506.

136-58⅓-New. A director accepting co-directors' notes in payment of a corporate debt on a note to a third person and himself becomes in effect the indemnitor or insurer of the corporation against liability to such third person. 83**NH**365, 142**A**689.

136-58¼-New. It is fraud on a corporation and its creditors for those who manage its affairs to obtain liens on its assets in exchange for their stock. 33 **F(2d)**496.

136-59 But see 106**WVa**142, 145**SE**160.

136-64 18**F(2d)**971, 974 [citCyc]; 214 **Ala**553, 108**S**452, 454 [citCJ]; 216**Ala** 486, 113**S**516 520 [citCJ]; 220**Ala**613, 127**S**195; **DelCh** 141**A**54; 45 **Ida**99, 260 **P**1032; 50**Nev**46, 249**P**865 [citCJ]; 229 **AppDiv**353, 243**NYS**156; 193**NC**605, 137 **SE**721; 122 **Okl** 47, 250**P**796, 798 [quot CJ]. See also 218**Ala**619, 119**S**833. [d] (7) Officers who are also directors cannot recover compensation for services voluntarily rendered without any agreement express or implied with the corporation or its owners or their representatives. 122 **Okl** 47, 250**P**796.

137-65 220**Ala**613, 127**S**195. [b] **Director rendering services as solicitor** with consent of codirectors cannot recover therefor. **Can** [1929] 3**DomLR** 577 (recovery not authorized under Nova Scotia Trustee Act [N. S. Rev. St. (1923) c 212 § 56]).

137-66 214**Ala**553, 108**S**452; 220**Ala** 613, 127**S**195; 171**Ark**175, 283**SW**977; 205**Cal** 698, 272**P**290(1stcase); 85**CalA** 786, 260**P**399 (right of secretary to compensation is not affected by becoming stockholder); 104**Conn**683, 134**A** 236; **DelCh** 141**A**54; 45 **Ida**99, 260**P** 1032; 155**Md**51, 141**A**434, 438, 58**ALR** 767 [citCJ]; **Mass** 165**NE**889 (formal note is unnecessary); 132**Misc**579, 230 **NYS**202; 225**AppDiv**675, 231**NYS**215; 193**NC**605, 137**SE**721; 151**Wash**46, 274**P** 789. See also **MoA** 16**SW(2d)**619. [a] (3) 171**Ark**175, 283**SW**977. (15) President and treasurer of corporation held entitled to commissions on sale made by their salaried employee. 213**AppDiv** 455, 210**NYS**808.

138-67 214**Ala**553, 108**S**452; 248 **IllA** 242.

139-69 50**Nev**46, 249**P**865 [citCJ].

138-70 220**Ala**613, 127**S**195.

139-71½-New. Dealings of an officer with the corporation should be scanned critically when he asserts a claim for services on the ground that the services rendered were not incident to his duties as officer. **Nev** 283**P**404.

139-72 181**Ark**1055, 29**SW(2d)**291. But see 35**F(2d)**499.

139-73 181**Ark**1055, 29**SW(2d)**291. But see 180**Ark**592, 22**SW(2d)**36(2d case).

139-74 37**F(2d)**508; 213**AppDiv**455, 210**NYS**808.

139-83 23**F(2d)**357 (breach of good faith and duty to stockholders); 29 **F(2d)**457. [a] 316 **Ill** 183, 147**NE**42.

139-84 218**Ala**619, 119**S**833.

140-85 35**F(2d)**499 (contract for additional compensation); **CalA** 290**P**1084; 246**NY**559, 159**NE**651 (contract not ultra vires). [a] Contracts held valid. 220**AppDiv**148, 221**NYS**174.

140-86 **DelCh** 141**A**54; **Can** [1929] 3 **DomLR**577.

140-87 325 **Ill** 114, 156**NE**258; 296**Pa** 141, 145**A**708; 125 **Or**673, 268**P**49, 50 [quotCJ].

140-89 See also 85**CalA**786, 260**P**399.

140-92 132**Misc**509, 230**NYS**122 (directors' decision held final in absence of clear abuse); 137**Misc**73, 241**NYS**474. [b] **Executive committee appointed by board of directors** has authority to fix salaries of corporate officers. 170**La**55, 127**S**362.

140-95 307**Mo** 74, 269**SW**593 (in absence of fraud, court will not interfere with bonus payments to officers and employees).

140-96 See also **Ont** [1928] 4**DomLR** 403. But see **Alta** [1928] 1**DomLR**417.

141-98 **Man** [1926] 4**DomLR**350, [1926] 2**WestWkly**864.

141-1 171**Ark**175, 283**SW**977.

142-9 **Mass** 170**NE**455.

142-12 [a] (2) Where unanimous consent of all members of board of directors is required to effect change in salary of officer, salary for preceding year remains salary of current year where board unable to agree on change. 192 **Wis**532, 213**NW**315.

142-13½-New. Contract by stockholder employees of coöperative corporation that same wages shall be paid to all of them is binding on all. 135**Wash**8, 236 **P**794.

142-17½-New. Payment of bonus to officers and employees, when appropriately authorized, is not in itself fraud upon dissenting stockholders; legality depends upon purpose and circumstances under which it is authorized. 307 **Mo** 74, 269**SW**593.

142-17⅓-New. Payment to directors for selling stock is not unlawful, although no prior agreement to pay is shown. 84**CalA**635, 258**P**670.

142-17¼-New. That stockholders while directors voted salary does not estop them from objecting to an increase by a new board. 296**Pa**141, 145**A**708.

142-17½-New. Under the Nova Scotia Trustee Act, authorizing a trustee to

charge for services as solicitor performed with the consent of his cotrustees, a director of a corporation is a trustee and is entitled to recover for his services as solicitor performed with the consent of his codirectors. **NS** [1929] 2 **DomLR**519.

142-17½-New. In such case the director performing such services is not estopped from claiming payment therefor because he acquiesced in annual statements which omitted to show his claim. **NS** [1929] 2**DomLR**519.

142-17½-New. Where amount of salary of manager is fixed by resolution of board to continue until canceled by act of board, it is not prevented from changing amount of salary and terms of employment. 38**F(2d)**199.

142-17½-New. General manager whose salary has been fixed by resolution of board cannot recover salary for duties he failed to perform on ground modification of original contract was unauthorized. 38**F(2d)**199.

142-17½-New. Stockholders and directors in fixing compensation of officers must act in good faith. **WVa** 153**SE** 240.

142-19 212**AppDiv**681, 209**NYS**388 (compensation contingent on corporation's profits).

142-23½-New. , or to be too indefinite to permit recovery as on contract although authorizing recovery on quantum meruit. **MoA** 16**SW(2d)**619.

142-26½-New. Ordinary rules of construction of a contract apply. 242 **IllA** 233.

142-26½-New. Designation of officer's salary "for ensuing year" necessitates conclusion that salary was for that year only, and not for an indefinite period. 200**Wis**233, 227**NW**868.

142-28 193**NC**605, 137**SE**721.

143-30 242 **IllA**233. [a] **Additional compensation by way of stock** has been held not gift for past services, where term of employment was not fixed and officer was free to resign and directors could have dispensed with services at any time. 132**Misc**509, 230**NYS**122.

143-33 242 **IllA**233 (where compensation is fixed after rendition of services, it cannot thereafter be altered).

143-33½-New. An agreement between stockholders that two of them be paid an additional amount for property sold to the corporation and that the other be paid as officer for past services, accepting payment by the former under director's resolution to effect an agreement is a ratification of the past service item. **Mass** 165**NE**889.

143-33½-New. An officer present at a meeting of stockholders when a motion is adopted to employ him in the future at a stated compensation, in view of past services rendered without compensation, is estopped to sue for compensation for such past services on implied contract. **Nev** 283**P**404.

143-35 201 **Iowa**236, 207**NW**228; 116 **OhSt**343, 156**NE**494, 495 [quotCJ].

143-36 35**F(2d)**499; 216**Ala**486, 113**S** 516; **CalA** 290**P**1084; **Ill** 173**NE**270; 201 **Iowa**236, 207**NW**228; 208 **Iowa**767, 226**NW**174; 232**Mich**505, 205**NW**583; 116 **OhSt**343, 156**NE**494, 495 [quotCJ]; 136**Wash**302, 239**P**837, 1119. But see 22**F(2d)**558.

143-37 **Mass** 170**NE**455.

143-38 216**Ala**486, 113**S**516; 201 **Iowa** 236, 207**NW**228; 116 **OhSt**343, 156**NE** 494, 495 [quotCJ].

143-39 216**Ala**486, 113**S**516; 116 **OhSt** 343, 156**NE**494, 495 [quotCJ].

143-40 216**Ala**486, 113**S**516; **CalA** 290 **P**1084; 201 **Iowa**236, 207**NW**228; **Oh** 156**NE**494, 495 [quotCJ].

144-41 242 **IllA**233.

144-49 30**F(2d)**85 (prima facie voidable); 136**Wash**302, 239**P**837, 1119.

144-52 23**F(2d)**531 (open to investigation). [a] **Directors** must, in fixing their salaries, have regard for corporation's financial condition. 23**F(2d)**531.

144-53 [a] **Salaries** held convenient method of absorbing profits. 23**F(2d)** 531.

144-54 220**Ala**613, 127**S**195.

144-56 240**Mich**569, 215**NW**772 (directors voting to increase their salaries held liable to account for increase); 136**Wash**302, 239**P**837, 1119.

144-57 220**Ala**613, 127**S**195; 136**Wash** 302, 239**P**837, 1119.

144-59 233**Mich**87, 206**NW**320.

144-62 [a] **In New York.**-132**Misc**509, 230**NYS**122.

144-62½-New. Where the circumstances show clear oppression, bad faith, or breach of trust by directors of a corporation in voting compensation to officers, the courts will give redress. 132 **Misc**509, 230**NYS**122.

145-64 22**F(2d)**558; 104**Conn**683, 134 **A**236; 136**Wash**302, 239**P**837, 1119. But see 232**Mich**505, 205**NW**583. [a] **Ratification held evidenced by failure to act with knowledge of action** increasing salary. 136**Wash**302, 239**P**837, 1119.

145-66 [a] **Dissenting stockholder, not present at meeting where salary was increased,** is held not to have ratified. 136**Wash**302, 239**P**837, 1119.

145-68½-New. Ratification by stockholders of an award of stock to an officer as compensation precluded the complaint that the compensation exceeded the value of the services. 132**Misc**509, 230**NYS**122.

145-69 19**F(2d)**24; 104**Conn**683, 134**A** 236. [c] **Large profits** alone do not justify large salaries. 232**Mich**505, 205 **NW**583. [d] **That directors are principal stockholders** does not affect legality of their action as directors in voting large salaries for themselves. 232**Mich** 505, 205**NW**583.

145-70 19**F(2d)**24.

145-70½-New. , or by the board of directors. 325 **Ill** 114, 156**NE**258.

145-71 19**F(2d)**24; **NJCh** 150**A**12.

145-72 19**F(2d)**24. See also 132**Misc** 509, 230**NYS**122.

145-73 19**F(2d)**24.

145-74 19**F(2d)**24; 199**Wis**458, 225 **NW**693. [a] 19**F(2d)**24.

145-75 19**F(2d)**24 [quotCJ].

145-80 296**Pa**386, 146**A**27 (provision for bonus of fifty per cent of divided profits does not apply to balance sheet surplus).

145-81½-New. Directors have power to make an agreement with an officer, paid on an annual basis but not bound to remain, for greater compensation in the course of the year, to induce the officer to stay. 132**Misc**509, 230**NYS**122.

146-84½-New. Acceptance of reduction on promise of reëlection or agreement to postpone payment is not binding as without consideration where reëlection is denied and officer is shortly discharged. 163**La**454, 112**S**44.

146-85½-New. Agreement to wait for payment of back salary until accumulation of specified net cash balance in treasury is void as potestative condition under Rev. Civ. Code art 2034. 163**La** 454, 112**S**44.

146-95 242 **IllA**233; 163**La**454, 112**S** 44; 104**NJL**341, 140**A**286 (removal from office).

146-1½-New. Where the vice president of a corporation wrote the minutes of a meeting establishing his salary, he is estopped from thereafter claiming an amount in excess of that specified in the written record under an alleged agreement therefor. 193**NC**305, 136**SE**716.

146-1½-New. Salary and expense account approved by stockholders at a meeting voting to pay interest on yearly balances is not subject to any statute of limitation. 177**Minn**72, 224**NW**454.

146-1¼-New. In the absence of express agreement reimbursing of officers will be governed by the manner of settlements previously made. 177**Minn**72, 224**NW**454.

146-1½-New. Manager whose employment revocable at will was terminated held entitled to compensation at customary rate. **CalA** 290**P**1084.

146-7½-New. After the death of employee his heirs are not entitled to difference between his share of profits and cost of hiring one in his place under contract so providing in case of his unavoidable absence. 135**Wash**8, 236**P**794.

147-15½-New. Officers have discretion to settle with an agent on such terms as they think the interest of the corporation requires. 230**Ky**398, 19**SW(2d)** 1071.

147-15½-New. Where an agent has been diligent, the corporation may pay him an agreed price for what he has done although he has not done as much as the contract provided. 230**Ky**398, 19 **SW(2d)**1071.

147-22½-New. Judgment against a director for an amount ascertained by the referee is error where an action at law was sufficient. 85**Colo** 419, 276**P**972.

147-23 158**La**642, 104**S**484 (petition sufficient); 212**AppDiv**681, 209**NYS**388; 225**AppDiv**675, 231**NYS**215.

147-37 35**F(2d)**499 (contract for additional compensation being fair, honest, and reasonable); 218**Ala**619, 119**S**833.

148-42 218**Ala**619, 119**S**833; **TexCivA** 26**SW(2d)**403.

148-53 193**NC**605, 137**SE**721.

148-57½-New. Parol testimony is permissible to show understanding for additional compensation besides a fixed salary. 35**F(2d)**499.

148-58 [a] (2) 252**Mass**523, 147**NE**887. (15) To show ratification by board of directors of employment of counsel by president. 252**Mass**523, 147**NE**887. (16) To show employment of plaintiff as secretary and treasurer of corporation. 50**Nev**46, 249**P**865. (17) To sustain finding as to value of service of secretary and treasurer. 50**Nev**46, 249**P**865. (18) To sustain finding that compensation was reasonable. 104**Conn**683, 134 **A**236. (19) To show reasonable value of services as secretary. 85**CalA**786, 260**P**399. (20) To warrant finding that there was no implied contract to pay corporation president for services as general manager. 180**Ark**592, 22**SW(2d)** 36(2dcase). (21) Support judgment against corporation. **CalA** 288**P**710.

148-59 [a] (2) **Okl** 250**P**796. (10) To show privity of contract, with respect to payment of commissions, between alleged agent to sell participating certificates in corporation and corporation. 120**Kan**681, 244**P**850. (11) To show contract of employment procured by fraud. 158**La**642, 104**S**484. (12) Support verdict for full amount claimed as vice president. **NJSup** 142**A**354. (13) To show that services of secretary were to be gratuitous. 85**CalA**786, 260**P**399. (14) Other findings. **IndA** 170**NE**340.

148-60 218**Ala**619, 119**S**833; 201 **Iowa** 236, 207**NW**228; **TexCivA** 26**SW(2d)** 403; 151**Wash**46, 274**P**789. [a] (9) Whether agreement for compensation was modified by subsequent agreement. 38**F(2d)**199.

149-61 218**Ala**619, 119**S**833.

149-64 218**Ala**619, 119**S**833.

149-69½-New. In case directors who have illegally voted salaries for themselves offer no justification, and no showing is made of amount which would be reasonable, court can do no less than hold them liable for total amount which they have received. 232**Mich**505, 205**NW** 583.

149-69½-New. To warrant the court's adjusting the salary of an officer, the record must show an abuse of power. 296**Pa**141, 145**A**708.

149-69¼-New. A court finding the salary paid exorbitant should have found the extent and directed a return of the excess. 296**Pa**141, 145**A**708.

149-69½-New. An officer expressing willingness to the court's fixing compensation cannot thereafter deny the right to do so. 296**Pa**141, 145**A**708.

149-71 325 **Ill** 612, 156**NE**785; 160**La** 425, 107**S**292; **Mo** 30**SW(2d)**976(2d case); 195**NC**127, 141**SE**489; 286**Pa**226, 133**A**232; 133**SC**446, 131**SE**612, 613 [cit CJ]. But see 263**Mass**321, 160**NE**816. [a] **Statutes fixing bounds of liability of officers to creditors** have not taken away or limited right of corporation to bring suit against directors. 264**Mass**386, 162 **NE**770. [b] **Right of action as asset.**-151 **SC**424, 149**SE**164.

149-72 129**Misc**268, 221**NYS**6. [a] **Actions based on negligent acts or omissions** are at law. 129**Misc**268, 221**NYS**6.

149-73 **Mass** 165**NE**889; 129**Misc**268, 221**NYS**6; 286**Pa**226, 133**A**232; 291**Pa** 416, 140**A**514 (for accounting). [a] (2) **Injunction restraining former president**

from soliciting business for three years has been held not unreasonably long. **MoA** 29**SW(2d)**165. [c] **Actions based on misappropriation of property are in equity.**–129**Misc**268, 221**NYS**6.

149–74 129**Misc**268, 221**NYS**6.

151–97 [a] **Director of corporation is not debarred by becoming director from asserting defense** to note given prior thereto or from claiming failure of corporation to perform condition precedent to his liability thereon. 41 **Ida**129, 238 **P**308.

151–9½–New. Nor is it a defense that a corporation was not lawfully doing business at the time the president received money sued for. 77**CalA**238, 246 **P**88.

151–10 168**Ark**1098, 272**SW**836. [a] **Suits barred by laches.**–168**Ark**1098, 272 **SW**836.

151–12 168**Ark**1068, 272**SW**836.

151–15½–New. Laches do not apply where delay did not prejudice defendant. 325 **Ill** 612, 156**NE**785.

152–29½–New. A corporation is a proper party to complain of misappropriation of its capital stock. 84**CalA**627, 258 **P**666.

152–30 315**Mo** 907, 287**SW**438. [a] 84 **CalA**627, 258**P**666. [b] **Allegations held not to show unlawful expenditures** so as to make directors liable under constitutional provision. 84**CalA**627, 258**P**666. [c] **Bills, complaint, and petition held insufficient.**–**Ala** 127**S**544.

152–31 Ala 127**S**544.

152–32 Ala 127**S**544.

152–41½–New. Bill for an accounting for secret profits, containing no prayer for damages, held properly dismissed as to defendant's not participating in fraud proceeds. 23**F(2d)**191.

152–43 Mass 170**NE**804.

152–45½–New. or payment. 113**Nebr** 801, 205**NW**288.

152–46 291**Pa**416, 140**A**514.

152–48 [a] (7) Reports on plaintiff's tax returns. 287**Pa**216, 134**A**397. (8) Evidence of value of machinery sold to corporation by insolvent corporation through common directors. 287**Pa**216, 134**A**397. (9) Other instances. 53**SD** 574, 221**NW**597. [b] (4) In action against trustee for fraud based on representations that price paid for property was lowest for which it could be bought, and that plaintiff was buying direct from original owner instead of from trustee, evidence as to value of property showing that plaintiff had not suffered loss is inadmissible. 234**Mich** 528, 208**NW**691. (5) Illegal monopoly of corporations seeking accounting. **Mass** 172**NE**871.

153–50 [a] (1) 77**CalA**238, 246**P**88. (13) To sustain finding that defendant had no fiduciary relation to plaintiff when he bought its lease of oil land at mortgage foreclosure, and owed no duty to it in the premises. 164**Minn**466, 203**NW** 228, 205**NW**449, 206**NW**330. (14) To establish fraud whereby treasurer on resigning procured corporation's check for his stock. 99**NJEq**543, 133**A**857. [b] (1) **Mass** 170**NE**804. (12) To show payment by defendant officer to corporation by intermingling his funds with those of corporation. 113**Nebr**801, 205 **NW**288. (13) To warrant finding that transfer of machinery to corporation by another corporation through common directors was for benefit of latter's stockholders. 287**Pa**216, 134**A**397. (14) To take case to jury in action against officers for negligence and mismanagement. 174**Minn**339, 219**NW**185. (15) Other instances. **Ala** 127**S**544.

153–50½–New. Presumption exists in transaction between director and corporation that self-interest of director will overcome fidelity to principal. **IndA** 169**NE**678.

153–51 234**Mich**528, 208**NW**691 (misrepresentation by trustee that price was lowest for which property could be purchased); 53**SD**574, 221**NW**597.

153–52 193**NC**367, 137**SE**132.

153–53 35**GaA**114, 132**SE**396. But see 174**Minn**339, 219**NW**185.

154–57 264**Mass**253, 162**NE**319 (master's findings held to show that only defendant against whom final decree was entered acted jointly with other defendants in bad faith in perpetrating fraud on plaintiff by obtaining control of its stock by unlawful means).

154–60½–New. Findings that payment of dividends from capital did not prejudice creditors of corporation, suing former directors for accounting held erroneous. 287**Pa**216, 134**A**397.

154–64 160**La**425, 107**S**292; **Mass** 171 **NE**285 (misconduct in managing corporate affairs); **Mo** 30**SW(2d)**976(2d case); 229**AppDiv**369, 241**NYS**717; 285 **Pa**312, 131**A**854.

154–65 Mo 30**SW(2d)**976(2dcase); 285 **Pa**312, 131**A**854; 148**SC**125, 145**SE**702 (all persons are entitled to share assets).

154–67 170**Ark**530, 280**SW**677.

154–69 286**Pa**226, 133**A**232.

155–71 NJCh 150**A**347.

155–73 23**F(2d)**531; 213**Ala**95, 104**S** 237; 220**Ala**613, 127**S**195; 325 **Ill** 114, 156**NE**258; 199 **Iowa**1285, 202**NW**14; **La** 130**S**344(2dcase); 239**Mich**300, 214 **NW**126; 285**Pa**312, 131**A**854; 286**Pa** 226, 133**A**232.

155–74 170**Ark**530, 280**SW**677; 199 **Iowa**1285, 202**NW**14; **Wis** 232**NW**561. [a] **Action is not one against, but for benefit of, corporation.**–28 **OhA**373, 162 **NE**696.

155–75½–New. It is not a defense in representative action against directors and corporation, that the corporation owed individual defendants and that plaintiff had not paid stock subscription. 129**Misc**404, 221**NYS**339.

155–75¼–New. Directors' claims for compensation for management services is held proper counterclaim in stockholder's representative action for their misconduct in management. 129**Misc**404, 221**NYS**339.

155–75¼–New. Where a sale of corporate property to the president appears to be authorized by the secretary's signature and the corporate seal, a stockholder cannot sue the purchaser from the president for damages. 37**GaA**137, 139**SE** 108.

155–75⅕–New. Release by a stockholder of demands to a corporation and the officer committing wrongs against the corporation could not affect the corporation's rights against the officer in a suit brought in its behalf by the stockholder. **Mass** 165**NE**671.

155–75⅙–New. The right of an objecting stockholder to an appraisal of stock and payment is not exclusive so as to prevent an action to render liable the directors for breach of trust. 227**App Div**224, 237**NYS**573.

155–76 192**Wis**532, 213**NW**315.

155–77 30**F(2d)**178; 36**F(2d)**675 (stockholder must sustain personal wrong before he can compel president to account to corporation); 217**Ala**62, 114**S**796 (failure to disclose financial condition of corporation before taking additional stock subscriptions); 258 **Mass**53, 154**NE**557; 190**NC**458, 467, 130 **SE**195 [quotCJ]; 291**Pa**543, 140**A**498; 293**Pa**52, 141**A**728. [b] **Stockholder's petition** against officers is held to show no cause of action, as it showed no duty, plaintiff being controlling stockholder at time of alleged wrong. 35**GaA** 766, 134**SE**789.

155–78 190**NC**458, 467, 130**SE**195 [quot CJ].

155–78½–New. Stockholder cannot recover as money had and received, money paid under canceled assessment, if directors expended money in paying corporate debts. **CalA** 292**P**189.

156–79 312**Mo** 300, 279**SW**65.

156–86 203 **Iowa**524, 211**NW**219; 232 **Ky**66, 22**SW(2d)**265.

156–87 25 **OhNPNS**363.

156–92½–New. Under a will bequeathing corporate stock in trust for employees while employed by a corporation, they have no such interest in the stock as will permit them to sue for mismanagement. 219**Ala**497, 122**S**824.

156–92⅓–New. Under a will bequeathing stock in trust for the benefit of employees to be used for purposes mentioned in the discretion of the trustees the latter could not sue for construction of the will and for mismanagement by officers. 219**Ala**497, 122**S**824.

156–93 21**F(2d)**4, 12 [citCJ]; 35**F(2d)** 227; **Mass** 165**NE**889 (equitable rights); 218**AppDiv**632, 219**NYS**181; 285**Pa**312, 131**A**854; 147**Va**937, 133**SE** 576.

157–96 147**Va**937, 133**SE**576.

157–1½–New. In a suit to recover secret profits of an officer of a corporation in a sale of outstanding stock, theory on which equity acts is that of restoring defrauded party primarily and fraudulent party as necessary incident to their former positions. 147**Va**937, 133**SE**576.

157–2 229**AppDiv**369, 241**NYS**717; 133 **SC**146, 131**SE**612.

158–3 35**F(2d)**227; 213**Ala**95, 104**S**237; 220**Ala**399, 125**S**644; 244**Mich**83, 221 **NW**131; **Mo** 30**SW(2d)**976(2dcase); 25 **OhNPNS**363; 133**SC**446, 131**SE**612; **Alta** [1928] 2**DomLR**799.

158–4 170**Ark**530, 280**SW**677; **Mo** 30 **SW(2d)**976(2dcase); 25 **OhNPNS**363.

159–10 Mo 30**SW(2d)**976(2dcase).

159–16 21**F(2d)**4; 94**Fla**1151, 115**S**541; **Mass** 165**NE**889 (five years after agreement and three years after directors' vote); 250**Mich**443, 230**NW**509; 136 **Wash**302, 239**P**837, 1119. [a] (1) 135 **Misc**397, 238**NYS**276. (4) 94**Fla**1151, 115**S**541. (5) Nine years. 43 **Ida**129, 250**P**1081.

159–17 See also 226**AppDiv**764, 234**NYS** 273.

159–18 213**Ala**95, 104**S**237.

160–24 133**Misc**689, 234**NYS**46.

160–25 220**Ala**613, 127**S**195; **Ga** 154**SE** 882; 128**Misc**246, 218**NYS**346. But see 147**Va**937, 133**SE**576.

160–29 Ga 154**SE**882; 147**Va**937, 133 **SE**576.

160–33 213**Ala**95, 104**S**237.

161–43½–New. In an action for accounting directors were proper formal parties, although no relief was sought against them, since subpœnas would not preclude a plea to jurisdiction. 14**Del Ch**417, 129**A**857.

161–43⅓–New. In a suit by stockholders for restoration to corporate treasury of funds fraudulently appropriated by directors petition of one claiming to be purchaser of claim from the corporation and praying for substitution as sole plaintiff is properly denied in absence of showing of good faith in sale of claims. 239**Mich**300, 214**NW**126.

161–43¼–New. Purchaser of stock borrowing money for such purchase is the real party in interest after the loan is paid. 25 **OhNPNS** 363.

161–43½–New. In a suit to cancel a sale of stock alleged to be fraudulent, the present owners of stock who purchased from the original purchasers should be made parties. 37**Wyo** 299, 261**P**122.

161–47 8**F(2d)**820.

161–50 41 **Ida** 729, 241**P**1014.

161–53 CalA 286**P**507. [a] 216**Ala**486, 113**S**516; 218**AppDiv**632, 219**NYS**181; 227**AppDiv**224, 237**NYS**573. [b] 167**Ga** 908, 147**SE**562; 232**Ky**66, 22**SW(2d)**265; **NJCh** 151**A**95; 198**Wis**78, 223**NW**233.

161–55 227**AppDiv**224, 237**NYS**573 (acts of negligence need not be set out with great particularity).

161–56 [a] **Facts constituting derivative action** by stockholders may be alleged on information and belief. 218 **AppDiv**634, 219**NYS**181. [b] 241**NYS** 188.

161–57 [a] 216**Ala**486, 113**S**516. [b] 37 **GaA**137, 139**SE**108; **Wis** 232**NW**561.

161–58 Mo 30**SW(2d)**976(2dcase); 218 **AppDiv**632, 219**NYS**181. [b] 34**F(2d)** 66; **Mo** 30**SW(2d)**976(2dcase); **MoA** 256**SW**565 (only cause in favor of plaintiff individually); 218**AppDiv**632, 219 **NYS**181. [c] (1) 45 **Ida**584, 264**P**381; **Mo** 30**SW(2d)**976(2dcase). (2) Absence of allegation of demand on corporation to bring action. 229**AppDiv**369, 241**NYS** 717.

162–59 218**AppDiv**632, 219**NYS**181.

162–66½–New. Error in appointing a receiver for a proposed corporation instead of for its assets is held amend-

able. 289Pa272, 137A266.

162-66¼-New. A stockholder may amend a petition before trial in order to supply deficiencies. 35F(2d)227.

163-71½-New. Demurrer sustained where petition of a stockholder did not support alleged misuse of assets, although alleging acts to be fraudulent. 208Ky816, 271SW1101.

163-79½-New. It may be presumed that the judgment of the directors in fixing the terms of sale of the corporation's assets was exercised honestly and in good faith. **DelCh** 147A257.

163-80 23F(2d)531; **Mass** 165NE889 (burden not sustained). [a] **Oppression, bad faith, or breach of trust** must be proved by stockholder in suit to recover stock held by officer. 132Misc509, 230NYS122.

163-82½-New. Evidence to overcome burden of proof cast on director to show fair transaction need not come alone from such director, but may come from either side of the case. 37Wyo 299, 261P122.

163-85 Mass 165NE889 (findings not clearly wrong under evidence); 245 Mich505, 222NW707. **TexCivA** 24SW (2d)742. [a] (1) 35Ariz254, 276P839. (28) To sustain finding that director and general manager of corporation was agent and trustee of other stockholders from whom he secured options to sell their stock at less than par. 231 Mich621, 204NW750. (29) To show absence of fraud in payment of bonus to officers and employees, and benefits to corporation from such payment. 307 Mo74, 269SW593. (30) To show that execution of mortgage by corporation was part of scheme to close out dissatisfied stockholders for benefit of corporation. 170Ark530, 280SW677. (31) To entitle stockholder to interlocutory judgment directing corporation's fiscal agent to account. 219AppDiv317, 219 NYS606. (32) To show that books kept were inadequate. 23F(2d)531. (33) Unfairness of contract. 23F(2d)531. (34) To show necessity for accounting. 23 F(2d)531. (35) To show that person sought to be held liable as officer of corporation, for secret profits, was not director or promoter. 222Ky378, 300 SW854. (36) To warrant instruction preventing recovery of milk rebate from former manager if expended for advertising. 179Ark831, 18SW(2d)369. (37) To justify finding. **Mass** 165NE889. (38) Other evidence held insufficient. 245Mich505, 222NW707. (39) To show that acts of treasurer were fraud on corporation. **Mass** 168NE727. (40) To show purchase of machines by president of purchasing company from selling corporation in which he was director was made in good faith. 135Misc397, 238 NYS276. (41) To show president made no secret profits in transaction. 200 Wis423, 228NW481(2dcase). (42) To show that corporation had principal place of business at stated place. **CalA** 289P946. (43) To support finding as to policy of corporation. **CalA** 293P 122. (44) To support finding that common directors of two corporations did not hold majority of stock. **CalA** 293 P122. [b] (1) 214Ky705, 283SW1047; 307Mo 19, 269SW599 (depression of market value of stock by withholding dividends). (13) 315Mo 907, 287SW438. (22) To show that directors favored another mill in which they were interested at corporation's expense, by employing joint salesman. 213AppDiv455, 210 NYS808. (23) To show that directors were guilty of wrongdoing. 308Mo 272, 271SW768. (24) To sustain finding that stockholder should have discovered falsity of statement by secretary purchasing his stock. 192Wis460, 212NW299. (25) To show that managing directors kept false set of books. 23F(2d)531. (26) Other evidence held insufficient. 30 F(2d)85; **NJ** 146A320(2dcase); 132 Misc509, 230NYS122. (27) To show profits made by corporation. 232Ky176, 22SW(2d)582. (28) To show conspiracy by certain directors to get control of corporation by levying stock assessment. **CalA** 289P946. (29) Actionable negligence. 32 OhA216, 167NE699. (30) Other instances. 253NY274, 170NE 917.

163-85½-New. Whether directors of a corporation intended to defraud stockholders generally, being a question of fact, cannot be inferred from graphic denunciation. **Mass** 168NE521(3dcase).

163-85⅓-New. Granting request of defendant director that he was not acting as stockholder's agent in making sale of stock is not prejudicial error. **Mass** 169NE268.

164-87½-New. Whether amounts withdrawn by the directors exceeded the fair value of services is a question of fact. **Mass** 165NE889.

164-89 285Pa312, 131A854.

164-94 29F(2d)457; **Mass** 165NE671; 285Pa312, 131A854.

165-96 29F(2d)457.

165-98½-New. A stockholder, suing to require a corporation's fiscal agent to account, is held entitled to reserve cross-examination respecting balance due defendant until accounting. 219 AppDiv317, 219NYS606.

165-98⅓-New. A purchaser is not entitled to rescission as against individual directors, inducing purchase of stock from corporation by fraudulent representations. 129Misc25, 220NYS711.

165-98¼-New. In an action to recover damages for false representations of the secretary of a corporation inducing a stockholder to sell his stock to him, a finding as to the actual value of the stock sustained by evidence is not affected by a finding of book value of the stock. 192Wis460, 212NW299.

165-98⅕-New. When suit is brought by a stockholder in a representative capacity, it is the corporation alone whose interests are immediately concerned. **Mass** 165NE671.

165-98⅙-New. No distribution of assets can be made in an action to compel directors to restore money taken as wages. 132Misc579, 230NYS202.

165-98⅐-New. and it is only on dissolution that a director could be awarded wages due for services. 132Misc579, 230NYS202.

165-98⅛-New. Whether increase in salary was in excess of fair and reasonable salary in business of kind and size of corporation has been held question of fact. **Mass** 170NE455.

165-99 71CalA367, 235P658 (oral evidence to show company de facto corporation is admissible).

165-1 [a] (5) Stockholder partially successful in canceling voidable acts, but who alone benefits other stockholders having ratified, cannot recover attorney's fees. 136Wash302, 239P837, 1119. (6) Purchaser of stock is entitled only to recover difference between purchase price and market value of stock, with interest, from directors fraudulently inducing purchase. 129Misc25, 220NYS 711.

165-2½-New. In an action against an officer for conversion of stock placed in his hands for transfer, it is error for the court to order return of shares converted to the corporation and not to the stockholders. 258Mass53, 154NE 557.

165-3 **TexCivA** 286SW638, 640 [citCJ].

165-4 103NJEq300, 143A378; 23 OhA 143, 154NE743; **TexCivA** 286SW638, 640 [citCJ].

165-5 23 OhA143, 154NE743; **TexCivA** 286SW638, 640 [citCJ].

165-5½-New. Receivership of voting stock will not be extended to assets of the corporation where an officer agrees to transfer the voting power. 133Misc 689, 234NYS46.

166-6 148Wash602, 269P1048.

166-20½-New. Directors who have paid misappropriated funds to a corporation pursuant to a decree may be prevented thereafter from improperly disposing of same. 285Pa312, 131A854.

166-21 **Mass** 165NE671.

167-23½-New. **Accounting.**-147Va937, 133SE576.

168-54 [a] **Liability as affected by request.**-OhA 172NE670.

169-81 35Wyo398, 250P1, 8 [citCJ].

169-85 161La784, 109S490; 196Wis10, 219NW361.

169-88 35Wyo 398, 250P1, 8 [citCJ].

170-93 240Mich549, 215NW364.

170-97 100CalA330, 279P1016; LaA 130S646; 124Kan309, 259P690; 223App Div434, 228NYS414; 295Pa74, 144A823. [a] (4) Directors purchasing assets of corporation from foreclosure purchaser held not liable on default judgment obtained by creditor of corporation against it and against corporation to which directors had caused assets to be transferred. 200 Iowa384, 202NW595.

170-1 228AppDiv402, 240NYS139.

171-19 217Ala399, 116S420; 29 OhA 192, 163NE500; 286Pa421, 133A554; **TexCivA** 288SW260.

171-20 74CalA278, 240P32.

171-21 74CalA278, 240P32.

171-21½-New. A contract to assume debts of a corporation cannot be avoided by notifying each of the directors that the contract would not be performed. **TexCivA** 288SW260.

171-21⅓-New. Rescission of a contract to take over property as corporation's and assume its debts required consent of corporation. **TexCivA** 288SW260.

171-23 10FCasNo5708, 8Biss13; 49 NYS475. See 92US107, 23Led486.

172-25 51ND374, 199NW757 (indorsement of note in individual names without disclosing corporation or representative capacity). [a] **No presumption** that they were merely acting officially when officers sign note. 144Va 263, 132SE337, 46ALR485.

172-26 286Pa421, 133A554.

172-28 200 Iowa1213, 206NW256 (liable, though signature guaranteeing note is followed by official designation as "director"); 286Pa421, 133A554. [c] **Indorsers of corporation note** are not indorsers for value merely because they are officers and stockholders. 218MoA 39, 264SW1000.

172-30½-New. Individuals organizing corporation which when incorporated was to assume promoter's notes are not individually liable where they have not expressly assumed liability. 23 OhA367, 155NE500.

172-31 [a] **Officers and directors, guarantors on corporate bond and mortgage** who negotiated extension of mortgage, are estopped to claim release of their obligation. 136Misc382, 240NYS74.

172-34½-New. An agreement to extend is held consideration for directors' promise to pay corporate debt. 286Pa 421, 133A554.

172-44 131Misc117, 225NYS370.

173-45 39F(2d)548; 20 OhSt375, 152 NE393.

173-53 168Ark599, 271SW449.

173-55 168Ark599, 271SW449.

173-56½-New. Mistake in meaning of language of certificate does not relieve from liability. 168Ark599, 271SW449.

173-60 315Mo 507, 286SW38.

174-63 145Miss330, 110S795.

174-64 217Ala399, 116S420.

174-69½-New. Officers and directors of a foreign corporation are not liable for debts contracted in the state because of failure of the corporation to appoint an agent on whom summons may be served. 25 OhNPNS298.

174-72 165La247, 115S475 (under statute).

175-73 30Ariz569, 249P751; 131Misc 336, 225NYS756; 198NC364, 151SE735; 117 Or583, 245P510, 513 [citCJ]. [b] (5) 232Ky755, 24SW(2d)607. [c] **Measure of damages** for destruction of corporate records whereby judgment creditor was prevented from enforcing liability of stockholders is amount of judgment. 90 CalA453, 265P1025.

176-79 228AppDiv402, 240NYS139.

176-82 13LaA651, 127S462; 175Minn 563, 222NW335; MoA 24SW(2d)722.

176-83 297Pa454, 147A103 (conversion).

176-83½-New. , or merely because of his office or interest as a stockholder. 30Ariz569, 249P751.

176-84 217Ala62, 114S796 (acts of codirector in execution of joint design); 175Minn563, 222NW335.

176-85 285Pa521, 132A712.

176-86 39F(2d)297; 217Ala62, 114S 796; **Mass** 172NE240; 175Minn563, 222 NW335; 285Pa521, 132A712. [d] **That treasurer of corporation profited by destruction of its books** does not render him liable for destruction by other officers. 90CalA453, 265P1025.

176-86½-New. Where a corporate land-

lord's attempted sale of a bankrupt's property for nonpayment of rent was ineffectual and void, the corporation alone was responsible for the loss. 29F(2d) 22.

177–88 [a] **Liability of directors** under California constitution for money misappropriated by officers does not extend to damages resulting from negligence or mismanagement. 198Cal 652, 246P1049, 46ALR1095.

177–89 217Ala399, 116S420; 160La425, 107S292; MoA 24SW(2d)722; 224App Div199, 229NYS719; 229AppDiv590, 243NYS545.

177–90 35Wyo 398, 250P1, 4 [citCJ].

177–91 35Wyo 398, 250P1, 4 [citCJ].

177–92 59 OntL20, [1926] 3DomLR168.

178–96 [c] **Distance of director's residence from place where books are kept and business is conducted** does not excuse nonperformance of his duties. 242 Mich192, 218NW700.

178–98 242Mich192, 218NW700.

180–32 30Ariz569, 249P751.

180–34 105NJL121, 143A333; 297P454, 147A103.

180–35 86Colo 175, 279P41(1stcase) (not liable in absence of evidence of participation); TexCivA 138SW(2d)708; 196Wis10, 219NW361.

180–42 See also MoA 24SW(2d)722.

180–46 [a] **In California.**–198Cal 652, 246P1049, 46ALR1095. [b] **Creditors may pursue funds,** same as corporation might do. Mass 167NE276.

180–47 206 Iowa206, 214NW718; NJCh 150A12 (liability to corporation's trustee in bankruptcy).

181–48 243NY333, 153NE437.

181–52 198Cal 652, 246P1049, 46ALR 1095.

181–58½–New. Directors distributing among stockholders the proceeds of sale of all of the property of the corporation are liable to creditors. 253 IllA36.

188–64 See also 12PaDist&Co 384.

181–67 164Ga888, 139SE802; 170La47, 127S360; 155Md178, 141A550; 196NC 462, 146SE89; 117 Or583, 245P510, 512 [quotCJ]; Wash 290P859. [c] **Gross negligence in permitting fraud to be practiced** by officers or agents under their control. 39F(2d)297.

182–68 164Ga888, 139SE802; 117 Or 583, 245P510, 513 [quotCJ].

182–69 164Ga888, 139SE802; 117 Or 583, 245P510, 513 [quotCJ].

182–70 164Ga888, 139SE802; 117 Or 583, 245P510, 513 [quotCJ].

182–71 164Ga888, 139SE802; 117 Or 583, 245P510, 513 [quotCJ].

182–73 Wash290P859. But see TexCivA 3SW(2d)832. [a] (1) 291Pa60, 139 A611, 612 [citCJ]. [c] **In Michigan.**–242 Mich192, 218NW700.

183–84½–New. Ordinarily the president of a corporation cannot recover for misrepresentation as to his company's assets. 126Me413, 139A231.

184–5½–New. Fraud on part of director is no defense where a bona fide purchaser from corporation intervened and action by prior holder of stock who sold to corporation on fraud of director is defeated. 253Mass90, 148NE448.

185–16 236Mich90, 210NW222.

185–19 See also 84CalA154, 258P111.

185–20 217Ala62, 114S796, 798 [quot CJ] (more silence of director); 77Colo 289, 236P777 (rule applied to officers).

188–61 105WVa610, 144SE410, 62ALR 740. [a] **Solvent corporation** may pay unsecured debts, although some of directors were liable as sureties on part of such debts. 54ND479, 209NW993, 995 [citCJ] 48ALR474.

189–75 [a] **In action against directors** (1) to recover money misappropriated by officer through sale of automobiles at excessive price to corporation, it is error to refuse to make allowance for value of automobile. 198Cal 652, 246P1049, 46ALR1095. (2) Value of use of automobile sold by officer to corporation at excessive price may not be deducted. 198Cal 652, 246P1049, 46 ALR1095.

190–87½–New. Fact that director creditors of corporation who purchased corporate property from purchaser at execution sale, took title in name of another corporation composed of themselves raises no imputation of fraud. 200 Iowa384, 202NW595.

190–97 218AppDiv612, 219NYS34.

190–98 234Mich558, 208NW754.

191–8 133SC446, 131SE612, 613 [quot CJ].

191–21 198Cal 652, 246P1049; 46ALR 1095; MoA 293SW448. [a] **Complaint alleging officer misappropriated** corporate funds by selling his automobile to corporation at excessive price states facts cognizable in equity. 198Cal 652, 246P1049, 46ALR1095.

193–50½–New. That corporation is in hands of receiver is no defense to an action for wrongdoing of officers. 198 NC364, 151SE735.

193–56 164Ga888, 139SE802, 804 [cit CJ]; 195NC127, 141SE489.

194–63 198NC364, 151SE735.

194–70 217Ala399, 116S420; 198Cal 652, 246P1049, 46ALR1095; 228AppDiv 138, 239NYS178; 224AppDiv401, 231 NYS291 (complaint held sufficient); 198 NC364, 151SE735. [a] 215Ala200, 110S 286; TexCivA 3SW(2d)832.

195–72½–New. Bill averring that defendants, directors, negligently expended money belonging to plaintiffs need not be amended to show acts of negligence which were set forth in findings. 285Pa521, 132A712.

195–74 [b] **Under petition charging agreement** by defendant as agent of corporation no recovery can be had against agent individually. TexCivA 291SW916.

195–76 [a] (1) TexCivA 3SW(2d)832. (14) To warrant chancellor's conclusion that corporate officers negligently dissipated plaintiff's money as promoters of their own interests. 285Pa521, 132A712. (15) To authorize finding that acts of treasurer were reported to directors and notified by them. 258Mass306, 154NE 835. (16) To show that corporation's officers willfully and fraudulently destroyed stock and transfer book preventing plaintiff from enforcing stockholders' liability. 90CalA453, 265P1025. (17) To sustain conclusion that corporation and not president was liable. 100 CalA447, 280P149. (18) To show that money distributed to stockholders was proceeds of sale of property of corporation. 253 IllA36.

195–82½–New. In action by stock purchaser against officer having no knowledge of unauthorized misrepresentation of agent, evidence thereof is inadmissible. 77Colo 289, 236P777.

195–83 242Mich192, 218NW700. [b] **Evidence held admissible.**–TexCivA 3SW (2d)832.

196–87 242Mich192, 218NW700 (declaration of dividends when corporation was insolvent); MoA 24SW(2d)722. [a] (4) Upon conflicting evidence question is for jury, whether directors were diligent in respect to financial condition of corporation before they sanctioned a dividend. 234Mich558, 208NW754. (5) Whether plaintiff in purchase of bonds relied upon declaration of a dividend is for jury to decide, where evidence is conflicting. 234Mich558, 208NW754. (6) In action against corporation as indorsee of note question as to treasurer's authority to indorse note is for jury. 258Mass306, 154NE835. (7) Liability of director for fraud of codirector in selling stock in execution of joint design. 217Ala62, 114S796.

196–88 155Md681, 142A50 (in action for services in surveying land, prayer authorizing verdict for plaintiffs has been held misleading in failing to require jury to find that all work agreed to be paid for had been performed).

196–89 [a] (1) 155Md681, 142A501.

196–90½–New. Evidence showing that corporation, not individual members contracting to form a corporation, was liable upon promoter's note does not authorize judgment against such members. 23 OhA367, 155NE500.

197–11 265Mass108, 163NE883.

197–12 Cal 289P834 (creating debts in excess of capital stock); CalA 291P670; 219Ky579, 293SW1064.

201–33 [a] **Construction of statute** relative to excess corporate indebtedness. CalA 291P670.

201–34 Cal 289P834.

201–43 CalA 291P670; 219Ky579, 293 SW1064.

201–49 219Ky579, 293SW1064.

202–58½–New. Construction in light of cognate laws and general law of land. 219Ky579, 293SW1064.

205–21 [c] **Under Ontario Companies Act** going into bankruptcy is going into liquidation as regards liability of directors for wages. Ont [1930] 2DomLR139.

205–24 [a] (6) Mining engineer employed on monthly basis to devote entire time to work on company's premises under directions of managing director is servant. Alta [1929] 4DomLR838.

207–61 170Ark727, 280SW981; 24 Oh NPNS313. [c] **Recovery by creditors who are stockholders.**–Colo 291P1038. [d] **Recovery by assignee of claim assigned for collection only.**–Colo 291P 1038.

208–62½–New. Liability of estate.–Estate of officer is liable for the statutory penalty. 176Ark435, 2SW(2d)1100.

208–68 170Ark727, 280SW981; 77Mont 399, 251P524.

208–72 168Ark599, 271SW449.

209–75 170Ark727, 280SW981.

209–76 29F(2d)891.

209–81 77Mont399, 251P524.

210–98 168Ark599, 271SW449.

211–8½–New. Where defendants were officers at the time plaintiff's debt was contracted, their liability was not avoided by resignation before judgment was rendered. Mass 164NE772.

211–21 24 OhNPNS313.

211–23 7F(2d)352.

213–51 [a] 85Colo 50, 273P21(1stcase).

217–37 [a] (7) Designation of advances on account of anticipated royalties as "merchandise." Mass 164NE772.

217–39 TexCivA 293SW609.

218–46 See also 261Mass38, 158NE269.

218–58 [b] **Particular statutes construed.**–CalA 291P670. [c] **Matters not constituting a defense.**–CalA 291P670.

218–59 137 Okl 194, 278P654, 64ALR 699. [a] **Statute gives creditor civil remedy against directors.**–CalA 291P 670.

219–65½–New. Erratum.–In 1926 Annot. "53Vt450" should be "53Vt452."

220–85 CalA 291P670.

220–89 Contra 219Ky579, 293SW1064.

220–93 CalA 291P670.

220–95 219Ky579, 293SW1064.

221–99½–New. Where violation of law is not proximate cause of loss, director is not liable. 219Ky579, 293SW1064.

221–2½–New. Liability is subject to any equity in favor of particular creditor. 200 Iowa1363, 206NW268.

221–4 CalA 291P670. [a] **Creditor's suit abates** on satisfaction of his debt. CalA 291P670.

221–9½–New. Under some statutes, the liability of the directors is limited to the amount of the debt created. 137 Okl 194, 278P654, 64ALR699.

221–10 CalA 291P670; 200 Iowa1363, 206NW268.

221–11 137 Okl 194, 278P654, 64ALR 699.

222–12½–New. Number of creditors is immaterial under some statutes. 200 Iowa1363, 206NW268.

222–14½–New. Loss must be natural result of noncompliance. 219Ky579, 293SW1064.

222–14½–New. Provision in a corporation's notes to pay attorney's fees, unauthorized by the directors, which create a debt exceeding the subscribed capital stock, cannot be enforced against the directors. 137 Okl 194, 278P654, 64 ALR699.

222–22 BC [1925] 3DomLR757. [b] **Trust agreement provision under which bonds were issued precluding their personal liability** is held to protect directors from liability to bondholders for alleged violation of duty not to declare dividends out of capital assets. 218 AppDiv612, 219NYS34.

222–28 Mass 165NE889 (drawing and accepting checks to effect distribution).

222–30½–New. Discharge of deceased director's executor on completion of administering estate is held no defense to bondholder's action for wrongful declaration of dividends. 218AppDiv612, 219NYS34.

223–33 Mass 165NE889 (distribution of proceeds of sale of all assets).

224–49½–New. Liability is not limited to debts existing when a dividend is declared. Mass 165NE889.

224-49½-New. No obligation rests on the widow or estate of a deceased officer to pay debts of the corporation. 153SC73, 150SE351.

224-52 161La784, 1098490.

224-53½-New. To render director liable for loss sustained by reason of unlawful acts, liabilities of corporation must exceed assets. 12F(2d)941.

224-58½-New. Distribution by directors of shares of stock to themselves and subscribers without equivalent return renders directors liable to creditors under some statutes. 161La784, 1098490.

224-59 161La784, 1098490.

225-74 99NJEq179, 138A193. [a] **Directors,** not the preferred creditors, are primarily liable under such statute. 100NJEq41, 134A888.

226-87½-New. And a director is not liable to a creditor for an unpaid note accepted by directors in payment for stock. 245NY519, 157NE841.

226-88 165La593, 1158791. [a] **That stock was issued in violation of constitution and was therefore void** does not constitute defense. 165La593, 1158791. [b] **Valuation fixed in statutory report** is not conclusive on creditors. 165La593, 1158791. [c] **Compliance with statute in listing and appraising property** received in payment does not relieve directors from liability. 165La593, 1158791.

227-8½-New. Aside from statutes, directors may be liable for debts incurred after distributing assets to stockholders. Mass 165NE289.

228-36½-New. Stockholder, who is a creditor of a corporation, may employ the remedy given creditors against officers and directors. 263Mass99, 160NE628.

228-44 244HA56; 219Ky579, 293SW1064. [a] (1) 200Iowa1363, 206NW268. [c] (4) Formal return nulla bona is insufficient but sheriff must, by search and inquiry, obtain information justifying return. Alta [1929] 4DomLR838. (5) Sheriff's certificate of nulla bona is insufficient where writ of fieri facias is not returned. Alta [1929] 4DomLR838. [f] **In New York.**–128Misc246, 218NYS346.

231-70 See also 165La1, 1158347.

231-71 See also 218AppDiv612, 219NYS34.

231-74 165La593, 1158791 (directors issuing stock to themselves for property at overvaluation).

232-79 77Mont399, 251P524.

232-81½-New. In some jurisdictions, no statute of limitations bars the creditors' action against the directors of a dissolved corporation who created debts exceeding the subscribed capital stock although claims against the corporation were barred before dissolution. 137Okl194, 278P654, 64ALR699.

232-81¾-New. Where the liability of directors for debts by reason of failure to file an annual report has accrued, it is not affected by subsequent renewal of notes evidencing the debt. 77Mont399, 251P524.

232-81¼-New. The statute of limitations applicable to actions based on statutory liabilities applies to an action based on the statutory liability of a director for failure to file an annual report. 77Mont399, 251P524.

232-81½-New. The statute begins to run against such action on creation of the liability and not on discovery of the facts by the party aggrieved. 77Mont399, 251P524.

232-81¼-New. The foregoing rule applies, although the action is brought by the receiver of the corporation. 77Mont399, 251P524.

233-91 [a] **Agreement in assignment for benefit of creditors** that as consideration all debts of corporation were to be extinguished is not defense to statutory liability of officers for failure to file annual report. 7F(2d)352.

232-91½-New. In bondholder's action against directors for alleged fraudulent declaration of dividends, allegation that trustee alone could declare bonds due before maturity held no defense. 218AppDiv612, 219NYS34.

232-92 See also 218AppDiv612, 219NYS34.

232-96 170Ark727, 280SW981.

232-99 Contra 219Ky579, 293SW1064.

233-29½-New. An action to enforce directors' liability for diverting and misappropriating assets of a corporation may be brought in the domicile of the corporation or any director. 161La784, 1098490.

234-37 See also 137Okl194, 278P654, 64ALR699.

234-51½-New. The original creditor's assignee may sue to enforce a statutory right of action against the directors creating excessive debts. 137Okl194, 278P654, 64ALR699.

235-69 285Pa521, 132A712.

236-83 85CalA43, 258P651 (exhaustion of legal remedy against corporation). [b] (1) 165La593, 1158791. (4) 83Colo476, 266P213. [g] **Petition held insufficient as to stockholders** where recovery based on trust fund theory. TexCivA 258SW(2d)675.

236-91¼-New. Amendment of the complaint is within the court's discretion. Mass 165NE889.

237-1½-New. A failure to allege facts showing plaintiff is judgment creditor of a corporation is fatal to the cause of action under a statute which requires claims of creditors to be reduced to judgment. 128Misc246, 218NYS346.

238-24 See also 218AppDiv612, 219NYS34.

238-25½-New. Defense of payment of corporate debt must be pleaded. 172Ark212, 287SW1015.

238-29 [a] (2) Under general denial defense of legality of consolidation is provable in bondholder's action for impairment of capital. 218AppDiv612, 219NYS34.

239-35 [a] (3) 137Okl194, 278P654, 64ALR699. (6) To show directors not guilty of mismanagement. La 130S344 (2dcase). [c] (4) To establish negligence of directors. 179Ark1087, 208SW(2d)186.

240-45 176Ark435, 28SW(2d)1100 (checks).

240-48 Mass 164NE772.

240-49 [a] **Under Canadian Companies Act** judgment for wages, though voidable, is not open to collateral attack in action against directors. Alta [1929] 4DomLR838.

241-68 [a] TexCivA 293SW609.

241-69 176Ark435, 28SW(2d)1100; TexCivA 293SW609 (whether two directors participated in alleged fraudulent transaction).

241-71½-New. on holding that plaintiff had no right at law to sue directors in case of excessive indebtedness, judgment dismissing suit should be in abatement and not in bar. 200Iowa1363, 206NW268.

241-72 See also 172Ark212, 287SW1015.

242-87 78Colo468, 242P74.

243-2½-New. Where a statute imposes a fine as well as civil liability for neglect to file an annual report properly verified, a delinquent officer paying a judgment against him for corporate debts cannot recover contribution from other officers equally guilty, as, in stating a cause of action, he must prove his own violation of criminal law. 169Ark380, 275SW708.

243-13 190NC528, 534, 130SE180 [cit CJ]; 143SC283, 141SE454 (violation of Sunday laws); 143SC347, 141SE610.

243-14 44Philippine126.

243-16 74CalA109, 239P413.

243-16½-New. None of the corporate officers signing a bad check can be prosecuted as maker, drawer, utterer, or deliverer under the penal statute. 133Misc288, 232NYS187.

244-22 20AlaA626, 1048777 (president not liable for corporation's violation of Sunday law where it was not shown that he aided or authorized manager to do so); 176Ark1041, 5SW(2d)306; Conn 151A325; Ont [1930] 1DomLR736 (elements of offense). [a] **Instructions held correct.**–176Ark1041, 5SW(2d)306. [b] **Misappropriation of money.**–Conn 151A325.

244-28 149SC195, 146SE657; 143Wash636, 255P952. [c] **Oral statement may constitute offense under statute.** 19OhA191. [d] **"Has,"** as used in prospectus with reference to property of corporation, in absence of explanation or qualifying words, means ownership. 19OhA191. [e] **Indictment** under such state is not defective by reason of statement of preliminary facts in one sentence followed by offense proper in following portions of indictment. 19OhA191. [f] **Evidence** is liberally admitted on question of intent to deceive purchaser of stock, but irrelevant evidence may be rejected. 19OhA191. [g] **Instructions held correct.**–19OhA191. [h] **Statute held not repealed by subsequent statute.**–143Wash636, 255P952. [i] **Statute held applicable** (1) to public reports. 143Wash636, 255P952. (2) Private publications. 143Wash636, 255P952.

244-30 [a] **Entries in books of account if entries of actual events cannot** be termed false, no matter what may be their nature. CalA 286P703.

244-31½-New. to issue certificates of stock not authorized by charter and by-laws; Mo 25SW(2d)101(2dcase). [a] **Issuance of stock in violation of charter** constitutes offense under Missouri statute regardless of whether act was in violation of by-laws. Mo 25SW(2d)101(2dcase). [b] **That overissue of stock is contrary to law** does not prevent conviction under Missouri statute for causing issuance of shares not authorized by charter and by-laws. Mo 25SW(2d)101(2dcase). [c] **Pleading and proof.**–Mo 25SW(2d)101(2dcase). [d] **Evidence held sufficient** to sustain conviction on theory that stock was overissue. Mo 25SW(2d)101(2dcase). [e] **Verdict** finding defendant guilty of procuring false certificate to be signed with intent to issue as charged in indictment is sufficient. Mo 25SW(2d)101(2dcase). [f] **Any violation of statute giving life to corporation** is violation of charter within statute defining offense. Mo 25SW(2d)101(2dcase).

244-37 80CalA501, 251P973 (by repurchase of own stock).

244-41½-New. Statutes relating to false representations of corporate resources must be strictly construed. 143SC63, 141SE165.

245-42 [a] (5) Use of capital assets to pay directors for services rendered held not violation of Pen. L. § 664. 132Misc579, 230NYS202. [b] (1) CalA 286P703; 19OhA191. (2) To show that entries involving discount on certain note did not represent actual transaction. CalA 286P703.

245-43 [b] 19OhA191.

245-43½-New. Failure of indictment for misrepresenting a corporation's resources and for perjury to give name of official administering oath, or to show whether defendant was charged with statutory perjury, is not prejudicial. 143SC63, 141SE165.

245-43¾-New. Proof of false misrepresentations is essential to conviction under the statute relative to fraudulent misrepresentations of the corporation's resources. 143SC63, 141SE165.

245-49 CalA 286P703.

246-66 13F(2d)249; 28F(2d)63 (powers conferred by law); 193NC573, 137SE666; TexCivA 21SW(2d)552.

246-69 23F(2d)349; 15DelCh409, 138A347; 45Ida244, 263P32, 34 [citCJ]; 325Ill114, 156NE258; 242Mich558, 219NW736, 738 [citCJperPotter,J.dis op]; 176Minn588, 224NW245; 220AppDiv487, 221NYS666 (cannot act as arbitrator even by consent); 130Or309, 274P118; 287Pa241, 134A419; 295Pa228, 145A128; 118Tex46, 10SW(2d)687; TexCivA 277SW746; 142Va323, 128SE602; 145Va266, 133SE888; Wis 227NW952; Eng [1926]AC708, [1926] 3DomLR209. See also DelCh 142A654.

250-76 Fla 126S142.

250-79½-New. General laws under which corporation is formed and not its articles of incorporation determine powers lawfully granted, 76CalA354, 244P1089; and incorporators' assumption of power or privilege not permitted by laws is unauthorized and void. 76CalA354, 244P1089.

251-96 20F(2d)924; **Fla** 126S142; 125 Kan710, 266P101; 219Ky579, 293SW 1064; 196NC784, 147SE307; 53ND470, 206NW773; **TexCivA** 277SW(2d)746; 149Va867, 141SE856; 153Wash526, 280 P9.

252-3½-New. Corporation has no implied power to violate act of assembly. 290Pa136, 138A497, 53ALR1027.

252-11 26F(2d)343; 28F(2d)63; 200 Cal 760, 255P188, 194 [citCJ], 52ALR 569; 84CalA611, 258P440; 234 IllA222; 11LaA331, 123S480; 258Mass453, 155 NE422; Mich 233NW431 (permission to file report implying extension); 321Mo 461, 12SW(2d)64; Nev 280P321(2d case); **TexCommnA** 3SW(2d)72; **Tex CivA** 287SW906; **TexCivA** 2SW(2d) 1018; 145Va266, 133SE888. [b] **Powers held implied.**–321Mo 461, 12SW(2d)64. [c] **Charter powers of land and investment company** are liberally construed as to implied and incidental powers. 252 IllA508.

254-13 252 IllA508.

255-14 **TexCivA** 277SW746.

255-15 5F(2d)451, 454 [citCyc].

256-20 [a] **Acquisition of railroad right of way. NC** 154SE834.

257-25 [a] 321Mo 461, 12SW(2d)64.

257-28 **TexCivA** 277SW746 (must be reasonably necessary). [a] **Must require only reasonable expenditure** of corporate capital. **TexCivA** 277SW746.

258-34 See also 321Mo 461, 12SW(2d) 64.

258-38 45 Ida244, 263P32; 98Vt508, 129A303.

259-40 319Mo 865, 6SW(2d)954 (railroad).

259-51 **Mass** 168NE521(3dcase); 172 Minn394, 215NW521.

260-52 172Minn394, 215NW521.

260-56 [b] **Grant to public service corporation** for advantage of public will be liberally construed to effectuate purposes of grant. **TexCivA** 2SW(2d)1018.

265-85 250Mich614, 231NW52.

267-4 172Minn394, 215NW521.

267-8 **Mass** 168NE521(3dcase) (amendments thereto).

270-35 172Minn394, 215NW521.

272-37 94CalA200, 270P1016.

272-38½-New. Corporations organized under statute for more than one purpose are not limited to such purposes only as are related. 321Mo 461, 12SW (2d)64.

272-38⅓-New. A nonprofit or membership corporation may engage in business provided the making of profit is not one of the principal objects. **DelCh** 142A786.

272-39 172Minn394, 215NW521. See also 321Mo 461, 12SW(2d)64. [a] (1) 172Minn394, 215NW521.

273-40 **TexCivA** 1SW(2d)666.

275-54½-New. A public service company may enforce a reasonable rule to refuse service if the correct bill is unpaid. 231Ky558, 21SW(2d)976.

275-58 35GaA114, 132SE396; 263Mass 99, 160NE528; Mass 168NE521(3dcase); 240Mich549, 215NW364; 230Mich260, 202NW991; 173Minn104, 217NW139; 226AppDiv349, 235NYS336; **TexCivA** 4 SW(2d)662; 142Wash423, 253P638 (repurchase of treasury stock is valid); 194Wis362, 216NW481.

276-59 35GaA114, 132SE396; 178Minn 179, 226NW513 (purchase for notes and sale for cash held valid); 86Mont500, 284P267.

277-60 [a] **Distribution of excess of reserves over expenditures.** 217AppDiv 368, 217NYS195.

277-61 86Mont500, 284P267.

277-63 29F(2d)969.

277-66 [c] **Even if authorized to purchase its own stock for legitimate corporate purpose** corporation cannot, in absence of statutory authority, purchase its issued stock for purpose of creating treasury stock. 157Tenn131, 7SW(2d) 43. [d] **Corporation organized for profit cannot traffic in its stock** on theory that it is coöperative association under statutes authorizing such associations to invest percentage of their stock in other associations organized thereunder. 157 Tenn131, 7SW(2d)43.

277-70 **BC** [1930] 2DomLR961 (transaction not amounting to purchase of shares).

279-80 82Colo 399, 260P1019; 153Md 501, 138A665.

279-81 80CalA501, 251P973. [e] **Statute prohibiting purchase** of its own stock by corporation authorizes suit to recover purchase price paid. 137Wash304, 242P21. [f] **Objection on this ground** may be made at any time, in suit on note given for such purchase. 80CalA501, 251 P973.

279-82 153Md501, 138A665.

279-83 87CalA435, 262P375 (stating denial of right with exceptions).

280-89 99NJEq543, 133A857.

280-90 249NY206, 163NE735; 143 Wash229, 255P123 (stockholder who is creditor); 200Wis476, 228NW130. [a] (1) 240Mich549, 215NW364.

280-91 143Wash229, 255P123. [a] (4) Corporation's purchase of own shares, nonassenting stockholder being charged with price as offset against obligation owed to him, is held invalid. 143Wash 229, 255P123.

281-1 35GaA114, 132SE396; 46 Ida490, 269P90; 240Mich549, 215NW364.

282-2 46 Ida490, 269P90.

282-3 46 Ida490, 269P90.

282-5 226AppDiv349, 235NYS336. But see 82Colo 399, 260P1019 (statute construed not to restrict funds to surplus). [a] (2) 226AppDiv349, 235NYS336. [b] (1) 226AppDiv349, 235NYS336. (2) 252 NY262, 169NE378 (surplus ceases to exist). [f] **Purpose of statute** is to prevent depletion of corporate resources by withdrawal of part of capital stock, thereby injuring rights of existing creditors. 240Mich688, 216NW464.

282-8 [b] 155Wash280, 284P80.

283-9 194Wis362, 216NW481 (with dissatisfied stockholders).

283-13 [a] **In Washington** corporation, and not solely receiver, can recover price paid for purchase of its own stock. 137 Wash304, 242P21(2dcase).

283-15 82Colo 399, 260P1019.

284-20 226AppDiv349, 235NYS336.

285-28½-New. Subject to law forbidding stock to be voted to lessen competition, corporation may acquire stock of another corporation and vote it. 325 Ill 114, 156NE258.

285-28⅓-New. Foreign corporations for general agency, brokerage, and commission business may not acquire stock in local corporation. 325 Ill 114, 156 NE258.

285-28¼-New. It has been held that a corporation may subscribe for stock in civic enterprises for the benefit of the public generally, although foreign to the purpose of the corporation. **TexCivA** 298SW309.

285-34 **NC** 154SE54. [c] **Grocery company's subscribing of stock held proper** as contribution to civic enterprise. **Tex CivA** 287SW906

285-35 **NC** 154SE54; 10PaDist&Co 792; **BC** [1929] 1DomLR814.

287-53 8F(2d)595.

287-59 321Mo 461, 12SW(2d)64.

288-69 **GaA** 155SE356(2dcase).

289-75 **Mass** 171NE830.

290-92 [c] **Such control does not make either agent** of other or merge them. 208Ky606, 271SW693. [d] **In Arizona.**–50Nev56, 250P369.

290-93 38F(2d)77 (court will look through form and deal with substance of transaction).

290-94½-New. Rule that corporation does not lose its identity when its stock is owned by another corporation does not apply where corporate identity is lost through fraud. 283Pa205, 129A71.

290-94⅓-New. Although corporation may carry on business through subsidiary corporation without incurring responsibility, it may, on proper proof, be question of fact whether it does so to escape responsibility in which case it will be liable for subsidiary's acts. 217 AppDiv504, 217NYS156 [reversed on appeal].

290-94¼-New. Where one corporation is controlled by another corporation, the latter is not relieved from liability for the former's acts by fact of their separate entities. 8F(2d)522.

290-94⅕-New. Nor can it defeat bona fide creditors by resorting to the corporate fiction. 8F(2d)522.

290-94⅙-New. That a parent corporation owns all of the stock of a subsidiary does not alone make it liable for debts or obligations of the subsidiary. 27 OhA 219, 160NE878.

290-94⅐-New. That stockholders of two corporations are the same, with one exercising control over the other through stock ownership, does not cause a contract or act of one to bind the other. 29F(2d)623.

290-94⅛-New. A company making repairs to a vessel under orders from a parent corporation has been held not entitled to recover the amount due from the subsidiary, on the ground of unjust enrichment. 31F(2d)265.

290-94⅑-New. Liability of parent corporation interfering with subsidiary in connection with development of lease. 43F(2d)1 (not liable for acts of subsidiary on theory of agency).

291-97 [b] (2) Where defendant corporation, after acquiring all stock of phosphate mining corporation, took secret lease of latter's property with provision limiting output to amount of phosphate necessary to fill existing contracts of purchased corporation, it was estopped to deny obligation to another holding contract for certain phosphate deliveries at specified minimum price, since for certain time it had granted purchaser such contract terms. 33F(2d)812.

291-3½-New. Decree directing accounting of profits by a corporation accruing from unfair competition does not require it to account for profits of another corporation having the same stockholders. 5F(2d)731.

291-3⅓-New. In a suit by a holding company the misuse of funds of subsidiary company whose stock is held by holding company cannot be pleaded in set-off or recoupment. **Del** 134A47.

291-3¼-New. Where a corporation does not own the capital stock of another corporation, the latter corporation cannot be considered an adjunct of the former. 16F(2d)886.

291-3⅕-New. A corporation is not liable to the United States under contracts of subsidiaries with the Emergency Fleet Corporation. 26F(2d)503.

291-3⅙-New. Property of a de facto corporation, which was merely a holding company for a coöperative association, also having a de facto corporate existence, was properly impressed with a trust in favor of creditors of its subsidiary. 208 Iowa921, 223NW899.

291-3⅐-New. Where two corporations are apparently the same, both law and equity will disregard the legal fiction that they are distinct entities and will treat them as identical, in order to protect the rights of third persons. 100 CalA12, 279P829.

291-3⅛-New. Corporation organized by officers and stockholders of another to assist in establishing stores held not entitled to recover as assignee of note given latter. 87Colo 498, 289P599.

291-3⅑-New. Contracts between corporation wholly controlled by same interests are not void but voidable. 41F(2d) 806.

292-7 118 Or359, 244P308; Or 293P422.

293-16 [a] **Courts will look through the form** to get at real intent of associations or corporations forming organization. 7F(2d)335.

293-17 220Ala210, 124S420. [e] **Coal corporation** may agree with another to obtain exclusive agency for mine's output. 20F(2d)647.

294-18 220Ala210, 124S420.

294-22 252 IllA401.

294-24 8F(2d)267.

294-28 82Mont150, 266P869. [a] **Where relation of corporations is such that one is mere agency or department of other,** latter is liable for wrongful or illegal acts of former. 24F(2d)718.

295-30½-New. A loan of money by one corporation to another does not render the borrower agent of the lender. 24F (2d)718.

295-30⅓-New. That stockholders of two corporations are the same, with one

corporation exercising control over the other, does not make either the agent of the other. 29F(2d)623.

295–48 [a] **Construction of statute.**–10PaDist&Co 226 (opinion of attorney-general).

296–61 173Ark445, 292SW695.

296–63 76CalA354, 244P1089; **Minn** 232NW318; **NJ** 151A630. [c] (1) 76 CalA354, 244P1089. [h] **Corporation may not practice law by reason of fact** that legislature has authorized by statute the formation of corporations for any purpose for which individuals may lawfully associate themselves. 76CalA 354, 244P1089. [i] **Though all directors and officers of corporation are duly licensed members of legal profession** practice of law by corporation would nevertheless be illegal. 76CalA 354, 244P1089. [j] **Trust company holding itself out as qualified to draft wills and trust declarations** illegally represents itself as qualified to practice law. **Ida** 288P157(2dcase). [k] **Practicing through attorney.**–Corporation cannot practice law by hiring attorney to conduct general practice under agreement whereby fees become income of corporation. **Minn** 232NW318.

297–66 76CalA354, 244P1089.

299–84 35GaA619, 134SE195; 244NY 84, 155NE58. See also 127Me290, 143A 61.

300–85 244NY84, 155NE58.

300–86 37F(2d)72; 96CalA42, 273P 595; CalA 284P984; 35GaA619, 134SE 195.

300–87 96CalA42, 273P595; 252 IllA 508.

300–93 [a] (2) Evidence has been held prima facie sufficient to show corporation was authorized to own stock in another corporation. 96CalA42, 273P595.

300–94 22AlaA68, 112S543.

302–21 258Mass74, 154NE839.

302–22 Va 155SE707.

303–23 201Cal 210, 256P210.

303–24 Ill 173NE270; Iowa 224NW 531; 228AppDiv402, 240NYS139; 137 Misc888, 244NYS82.

303–30 6LaA75.

305–43 Va 155SE707 (closed corporation).

305–51 Cal 289P844.

305–53 48RI 490, 139A312.

307–71 200Cal 760, 255P188, 52ALR 569; 80CalA501, 251P973; 246 IllA38; 166La457, 117S554; 258Mass306, 154 NE835.

307–73 200Cal 760, 255P188, 52ALR 569.

307–74 166La457, 117S554.

308–76 55ND45, 212NW236, 51ALR 296.

308–77 200Cal 760, 255P188, 52ALR 569.

309–85 55ND45, 212NW236, 243 [cit CJ], 51ALR296.

309–93 5F(2d)451.

310–1½–New. Reservation of sewers in instrument dedicating streets without charter authority held void as against public policy. **TexCivA** 300SW177.

310–2 5F(2d)451.

312–13 255 IllA175.

312–19 90Fla595, 106S473. [a] 90Fla 595, 106S473.

312–20 But see 215Ala667, 112S134 [cit CJ].

312–21 246 IllA38.

313–29 5F(2d)451.

315–49 35GaA619, 134SE195.

315–50 43F(2d)867; 43 Ida158, 252P 182.

316–54½–New. In determining whether equitable relief will be granted in a given case, the courts will balance the equities and govern themselves accordingly, and, in doing so, will take into consideration whether the act complained of is merely ultra vires, or is against the public policy, unlawful, and wholly void. 117Nebr723, 223NW797 (2dcase).

316–58 Iowa 227NW637.

316–59 32F(2d)658; CalA 286P165(4th case); 244NY84, 155NE58; 191NC809, 133SE391; Alta [1926] 3DomLR82; 59 OntL278, [1926] 4DomLR306.

316–61 244NY84, 155NE58.

316–65 130Misc348, 223NYS817; 130 Misc846, 225NYS385.

317–69 130Misc348, 223NYS817.

318–77 Mo 28SW(2d)1001.

319–83 252 IllA298; MoA 148W(2d)23 (neither void nor voidable); 53ND797, 208NW82, 88 [citCJ]; 32 OhA69, 167NE 592; TexCivA 271SW410.

319–85 Mo 28SW(2d)1001.

319–85½–New. Equity will deny relief as to consummated purely ultra vires acts of a corporation, even though it be technically expedient and proper, when, to grant it will occasion the public great inconvenience, and the defendant serious loss, if the plaintiff may be readily compensated in damages. 117Nebr723, 223 NW797(2dcase).

319–86 Man [1927] 1DomLR99.

320–88 43 Ida158, 252P182, 184 [cit CJ]; 219Ky579, 293SW1064; 318Mo 1120, 28W(2d)607, 611 [citCJ]; MoA 14 SW(2d)23; 53ND797, 208NW82, 88 [cit CJ]; TexCivA 11SW(2d)217 (ultra vires cannot be pleaded as defense).

322–92 144Miss890, 110S785; 59 OntL 213, [1926] 4DomLR13.

323–97 32F(2d)658; 153Va71, 149SE 632.

324–1 43 Ida158, 252P182; 144Miss 890, 110S785, 787 [citCJ]; 220MoA889, 296SW1052. [b] **Partnership contract.**–118 Or359, 244P308.

325–2 165Minn330, 206NW646, 44ALR 1238.

326–10 114Nebr463, 208NW144. [a] (4) Receipt of money in sale of stock with agreement to repurchase. 103Conn 380, 130A383.

326–12 5F(2d)451; 18F(2d)490; 32F (2d)658; 42F(2d)45; 33Ariz206, 263P 584, 586 [citCJ]; 181Ark265, 25SW(2d) 434; CalA 286P165(4thcase); 82Colo 399, 260P1019; 43 Ida158, 252P182; 46 Ida534, 269P82; 159La627, 105S794; 170La10, 127S347(2dcase); 165Minn330, 206NW646, 44ALR1238; 319Mo 899, 8 SW(2d)834; Mo 28SW(2d)1001; 220 MoA889, 296SW1052; 250NY304, 165 NE456; 198NC477, 152SE403; 26 OhNPNS257, 273 [citCyc]; TexCivA 264 SW513; TexCivA 13SW(2d)432; Tex CivA 20SW(2d)1081. [b] (15) On bond given as surety. 43 Ida158, 252P182.

329–15 18F(2d)490; 201 Iowa240, 207 NW121.

329–18 43 Ida158, 252P182. [a] (5) Directors' resolution declaring surety bond to be in furtherance of company's business is held to entitle other party to rely thereon. 43 Ida158, 252P182.

329–21 IndA 169NE91; 201 Iowa240, 207NW121.

330–26 Contra 234 IllA222.

330–29 234 IllA222; LaA 130S818; 144 Miss890, 110S785, 787 [citCJ]; NJSup 131A679; 48SD629, 205NW714; Tex CivA 300SW102.

331–31 234 IllA222.

332–36 43 Ida158, 252P182; 159La627, 105S794 (stockholder can assert no greater right than may be pleaded by corporation itself); 165Minn330, 206 NW646, 44ALR1238.

332–39 42F(2d)45; Ida 290P379; 130 Misc846, 225NYS385.

332–40 130Misc846, 225NYS385.

332–42 43 Ida158, 252P182; 165Minn 330, 206NW646, 44ALR1238.

334–53 La 129S655; 286Pa405, 133A 551, 553 [citCJ].

334–54 53ND797, 208NW82, 86 [citCJ].

334–55 NJSup 131A679; 53ND797, 208 NW82, 86 [citCJ]; 286Pa405, 133A551, 553 [citCJ].

334–56 53ND797, 208NW82, 86 [cit CJ]; 286Pa405, 133A551, 553 [citCJ].

334–67 MoA 287SW835; MoA 14SW (2d)23.

335–72 IndA 169NE91.

335–78 275US404, 48SCt189, 72Led 338; 243 IllA122; 214Ky261, 283SW75; Mass 171NE440; 53ND66, 204NW985, 986 [citCJ]; 53ND797, 208NW82, 88 [citCJ]; 9PaDist&Co 501; Tenn 29SW (2d)658; TexCivA 290SW866; TexCivA 290SW920; TexCivA 58W(2d)215; Tex CivA 248W(2d)742.

336–80½–New. Where a corporation gave its notes for, and canceled, stock at a time that it had no creditors, a receiver in sequestration proceedings could not attack the transaction. 178Minn 179, 226NW513.

336–87½–New. Corporation cannot plead ultra vires in action by its attorney for services in enforcing obligation arising out of its ultra vires ownership of real property. Mass 171NE440.

336–94 217Ky48, 288SW1024; 26 OhNPNS257; 129 Okl 222, 264P164.

337–96 129 Okl 222, 264P164.

337–97 217Ky48, 288SW1024.

337–98 217Ky48, 288SW1024.

337–3 214Ky261, 283SW75; 53ND66, 204NW985, 986 [citCJ].

337–4 220Ala293, 124S866 (either party to executory contract to which one of parties is corporation is entitled to interpose defense of ultra vires). [b] (7) Materialman not perfecting lien against property until after conveyance thereof to bona fide corporate purchaser cannot attack validity of conveyance on ground purchase was in excess of corporation's powers. 214Ky261, 283SW75.

338–12 89CalA558, 265P583; 331 Ill 360, 163NE141; 101WVa127, 132SE372. [a] **Statute requiring corporation to file documents** with secretary of state is held not unreasonable and arbitrary. 241NY 405, 150NE497, 43ALR909.

338–13 39F(2d)822; 42F(2d)500; Fla 128S402; 32 OhA69, 167NE592 (no shift or device can escape application of statute where consequence of acts is applicability of law); TexCivA 282SW912; 101WVa127, 132SE372. [a] **Retroactive effect.**–134Misc152, 234NYS683.

339–14 [a] **Statute requiring certain corporations** to file with secretary of state, sworn copy of its by-laws, regulations, membership oaths, roster of membership and list of officers is not palpably unreasonable and arbitrary. 241 NY405, 150NE497.

339–16 Fla 128S402; 209Ky40, 272SW 18.

339–22½–New. In determining whether a corporation is a public utility and therefore subject to the control of the railroad commission the acts of the corporation and not its charter control. 192Wis464, 213NW469.

339–22½–New. Continued enjoyment of special privilege does not ripen into a right where it is unfair and discriminatory. Mo 18SW(2d)420.

340–41 96Fla392, 118S478(2dcase); 98 Fla891, 124S461.

340–44 294Pa108, 143A574; 157SCl, 153SE537. See also 9PaDist&Co 518.

340–50 19F(2d)24; 34F(2d)533; 216Ala 486, 113S516; Colo 28P737(2dcase) (questions of business policy are for stockholders, not courts); La 130S344 (2dcase); Mass 170NE455; 172Minn 303, 215NW185; NJCh 152A166 (operation or closing of business during depression); 137Wash317, 242P367; 197Wis595, 222NW806; 198Wis78, 223 NW233; Wis 232NW561; BC [1926] 4DomLR759, [1926] 3WestWkly378. See also NJCh 144A869. [d] **Discretion in matter of dividends** will not be interfered with unless bad faith is shown. 241NY427, 150NE505.

340–50½–New. Declaration of dividends will not be controlled by court when done in good faith. 325 Ill 114, 156NE 258.

340–50½–New. Court will not interfere with acts of directors on possibility of future dissension. 325 Ill 114, 156NE 258.

340–51 201 Iowa777, 208NW519.

341–56 34Ariz105, 268P773 (sufficiency of notice of stockholders' meeting); 13PaDist&Co 353 (authority of court to interfere at end). [a] **Amendment of charter** favored by majority stockholders and directors not subject to judicial interference. Del 142A654.

341–59 [a] **Whether property of solvent corporation not intending to carry out purposes should be sold,** and time, place and amount of sale is within trial court's discretion. 300Pa479, 150A902.

341–60 [a] **Since enactment of Utility Act,** chancery court is without jurisdiction to fix or regulate rates of public utilities. NJCh 148A402.

341–68½–New. Prior election lawfully held prevents chancellor from ordering election. DelCh 139A762.

341–68½–New. Where none of the corporate creditors were complaining of a transaction whereby the corporation issued its mortgage notes in lieu of preferred stock theretofore issued in payment of an architect fee in accordance

with agreement, the court will not interfere. 29F(2d)969.

341-68¼-New. Courts at instance of stockholders are slow to displace directors in management of corporate business. 249Mich234, 228NW705.

341-68½-New. Where rates are established for definite term by contract between city and public corporation court will not relieve utility from its obligation however inadequate the agreed rates. 136Misc569, 240NYS316.

341-83 101WVa127, 132SE372.

342-90 See also 278US63, 49SCt61, 73 Led184, 62ALR785.

342-95 Ind 171NE65.

342-2 [b] **Public service commission has no control** of company installing and maintaining sprinkler systems as protection against fire. 219Ala595, 122 S837.

343-14½-New. In some jurisdictions appeals from orders of the corporation commission are taken in the manner as appeals are taken to the supreme court from the district court. 122 Okl 36, 252 P11.

343-14½-New. Selectmen may not prejudicate an issue in relation to a public utility. 83NH551, 145A786.

343-21 [a] **Construction of statute.**-10PaDist&Co 166; 10PaDist&Co 222. [b] **Annual report nullity** where answers omitted to several questions. Colo 291P1038. [c] **Sufficiency of report.**-Colo 291P1038.

343-37½-New. Where two statutes require a corporation to file annual reports for different purposes, one for the information of the public as to its assets and solvency and one for the information of the secretary of state to enable him to compute the franchise tax, both reports must be filed. 241Mich501, 217NW900.

343-37⅛-New. Where two statutes, requiring the filing of annual reports by corporations, each requires different information to be furnished and the secretary of state furnishes blanks embodying all information required by both acts, the filing of such blank properly filled out is a compliance with both statutes. 241Mich497, 217NW902.

343-37¼-New. The fact that a corporation is organized too late in the year to comply in certain respects with a statute requiring it to file a report as a basis for computing its franchise tax does not excuse its failure to file a report furnishing other information required by such statute and another statute requiring an annual report for the information of the public. 241Mich501, 217NW900.

343-37⅛-New. Under some statutes requiring a corporation to file an annual report for the information of the public as to its assets and solvency, the powers of a corporation are suspended where it fails to file a report, and a contract made during the period of default is void. 241Mich501, 217NW900.

344-42½-New. A statute applicable alike to foreign and domestic corporations requiring them to file annual returns with the secretary of state and prescribing a cash penalty does not render void contracts made by a corporation while doing business in the state prior to making the report and paying the tax. 36GaA777, 138SE270.

345-88 [a] **In California.**-76CalA354, 244P1089.

346-92 321Mo 461, 12SW(2d)64 (corporation temporarily providing banking facilities held not subject to fine).

347-24 159Tenn655, 21SW(2d)392.

347-27 220Ala210, 124S420; 153Md666, 139A554; 78Mont40, 252P313; NH 150 A545. [b] **Board of directors.**-230Ky 465, 19SW(2d)1078.

347-30 MoA 23SW(2d)644.

347-30½-New. To obligate a corporation upon a contract, it must be proved that the contract was its act, by corporate action, that of an authorized agent, or by adoption and ratification. 105 NJL461, 145A478.

348-32 93Fla354, 114S444; 103NJL 137, 134A663; TexCivA 26SW(2d)333.

348-33 103NJL137, 134A663; 129Misc 822, 222NYS733; 34F(2d)513 (executive officers of corporation held authorized to sign waiver of limitations in order to secure further consideration of tax liability); TexCivA 26SW(2d)333.

348-38 25F(2d)973; 93Fla354, 114S 444 (parol contract); 262Mass588, 160 NE434; 78Mont40, 252P313; 247NY1, 159NE700; 190NC406, 130SE32. [c] 50ND622, 197NW689.

349-41 6F(2d)7; 210Ky690, 276SW 558; NH 150A545; 296Pa291, 145A831; 299Pa236, 149A190; 107WVa290, 148 SE122.

349-44 102WVa16, 135SE242; 108WVa 686, 152SE635.

349-48 40F(2d)21; Ala 130S545; 172 Ark117, 288SW377; 174Ark332, 295SW 49; Cal 289P844; 75CalA737, 243P686; 88CalA740, 264P270; 208Ky606, 271 SW693; La 129S655; 258Mass343, 155 NE22; 262Mass588, 160NE434; 164 Minn293, 204NW963; MoA 296SW838; McA 23SW(2d)644; 78Mont40, 252P313; NJCh 149A362; 30NM517, 239P865; 190NC406, 130SE32; 52ND752, 204NW 818, 40ALR1021; 131 Or580, 283P20; 98PaSuper183; TexCivA 10SW(2d)422; 143Va656, 129SE687; 200Wis48, 227NW 308 (in view of prior course of dealing, corporation's managing officers held clothed with apparent authority to pledge bonds); Ont [1929] 4DomLR42. But see 34F(2d)155. [a] (4) Agent to whom corporation intrusts management of local affairs may bind it by contract necessary and proper to be made in ordinary prosecution of business. 78 Mont40, 252P313. (5) Maintenance of proper sanitary conditions about railroad yards is within apparent authority of freight and passenger agent in charge of premises and company is bound by his contract for cleaning toilets. 78 Mont40, 252P313. (6) Where secretary-treasurer, who had signed original income tax return, signs waiver extending time for additional assessment, it is binding on corporation and its receiver, as to claims not barred by limitations, though waiver was signed during pendency of application for receivership. 34 F(2d)155. (7) Partnership transacting all business regarding trust property of holding corporation held corporation's agent to assign contract for sale of realty. Wash 289P1010. [b] **Estoppel** is usually element of apparent authority. Utah 272P933.

350-49 84CalA611, 258P440; 52ND752, 204NW818, 40ALR1021; RI 147A749.

350-50 Cal 289P844; 127Me91, 141A 321; 30NM517, 239P865; Ont [1929] 4DomLR42.

350-54 130Misc110, 222NYS532. [a] **President of corporation dealing with its secretary** cannot rely on his ostensible authority. 81Mont44, 261P620.

351-55½-New. Corporation's liability for acts of officer within apparent scope of authority is not restricted to acts done in furtherance of business of corporation. 164Minn293, 204NW963.

351-57 TexCivA 295SW638.

351-58 174Ark332, 295SW49; 226Ky 479, 11SW(2d)147; 258Mass453, 155NE 422; 299Pa236, 149A190; TexCivA 277 SW746 (authority may not be assumed); TexCivA 3SW(2d)911.

351-60 TexCivA 277SW746; TexCivA 290SW861.

351-63 14F(2d)599; 40F(2d)21; 93 CalA455, 269P665; 321 Ill 572, 152NE 523; 201 Iowa240, 207NW121; 168La 635, 122S889; 170La47, 127S360; 315 Mo 849, 288SW359; 292Pa164, 140A871; 149Va789, 141SE764 (where note on its face shows that it is for officer's personal benefit).

352-64 TexCivA 9SW(2d)374.

352-66 34F(2d)155.

352-69 75CalA737, 243P686; MoA 2SW (2d)157; 78Mont40, 252P313; 149Va 789, 141SE764.

353-70 75CalA737, 243P686; 78Mont40, 252P313; 52ND51, 203ND176.

353-72½-New. One accepting corporation check from officer in payment of personal obligation is not liable to trustee in bankruptcy where investigation would have disclosed authority so to do. 126Misc283, 213NYS25 (where creditor's rights have not been imperiled).

353-73 144Miss828, 110S787; 81Mont 44, 261P620 (president of corporation dealing with its secretary).

353-74 255Mass480, 152NE240; 116 Nebr776, 219NW145; 224AppDiv659, 229NYS41; 299Pa236, 149A190; 144Va 263, 132SE337, 46ALR485.

354-75 Mass 165NE396; 144Miss828, 110S787.

354-78 86CalA577, 261P733; LaA 130 S646; 252Mass383, 147NE870; 307Mo 607, 271SW788; MoA 287SW835; 77 Mont477, 251P517; 82Mont150, 266P 869; 247NY1, 159NE700; 228AppDiv 402, 240NYS139; 48RI 473, 139A212; 116Tex207, 288SW402; TexCivA 5SW (2d)215; TexCivA 6SW(2d)165; TexCivA 24SW(2d)742; TexCivA 31SW(2d) 488.

354-79 262Mass588, 160NE434; 307Mo 607, 271SW788.

354-79½-New. A corporation cannot be bound by the statements of a stranger. 258Mass453, 155NE422.

354-79⅛-New. A corporation cannot be bound by the statements of a stranger. 258Mass453, 155NE422.

355-93 77Mont477, 251P517; 299Pa97, 149A103; TexCivA 31SW(2d)489.

355-98 74CalA278, 240P32 (majority); Mass 168NE106 (power to sell department of business); TexCommnA 26SW (2d)168.

356-7 149Va867, 141SE856.

356-15 5F(2d)902 (construing Indiana Law); 105NJL206, 144A30; 130Misc 865, 226NYS1 (instrument signed by president held not corporate act).

357-16 See also 88 IndA674, 164NE294. [c] (2) Corporation's president is ex vi termini its general agent. 198NC675, 153SE158.

357-17 77Mont477, 251P517; 100NJEq 455, 136A297, 298 [quotCJ].

357-19 127Misc627, 216NYS419.

358-21 246 IllA38; 77Mont477, 251P 517; 127Misc848, 217NYS734; 129Misc 822, 222NYS733. [b] (5) President of real estate corporation held to have had authority to execute dedication contract. 219Ky418, 293SW986. (6) President is presumed to have authority to ratify contract. 247NY332, 160NE388.

358-22 77Mont477, 251P517.

358-25 10LaA186, 121S331(2dcase); La 129S655; 255Mass480, 152NE240; MoA 2SW(2d)157; 247NY332, 160NE388; 129 Misc822, 222NYS733; TexCivA 296SW 661, 663 [citCJ]; TexCivA 28SW(2d) 1098; TexCivA 28SW(2d)1102.

359-26 247NY332, 160NE388; TexCivA 296SW661.

359-28 105NJL206, 144A30.

359-30 But see Kan 292P805.

359-33 Cal 289P844; 99NJEq160, 133 A66. See also 20F(2d)967. [a] (2) Secretary cannot authorize renewal of lease. 158La463, 104S208.

359-35 Cal 289P844.

359-44 214Ala403, 405, 108S23 [quotCJ].

360-45 213Ala215, 104S758; 214Ala403, 405, 108S23 [quotCJ]; MoA 23SW(2d) 644; 190NC406, 130SE32.

360-46 213Ala215, 104S758; 214Ala 403, 405, 108S23 [quotCJ]; CalA 283P 895; 255Mass334, 151NE313; 127 Okl 295, 260P745; 292Pa164, 140A871, 875 [quotCJ]. [a] (1) 190NC406, 130SE32. [e] **May act in emergency.**-190NC406, 130SE32.

360-47 213Ala215, 104S758; 214Ala 403, 405, 108S23 [quotCJ]; 11LaA331, 123S480.

360-48 213Ala215, 104S758; 214Ala403, 405, 108S23 [quotCJ].

360-50 214Ala403, 405, 108S23 [quotCJ]; 190NC406, 130SE32; 127 Okl 295, 260P745; 292Pa164, 140A871, 875 [quotCJ].

360-52 87CalA297, 261P1115; 86 IndA 597, 158NE913.

361-54 But see MoA 274SW951.

361-60 Ill 173NE270; 262Mass588, 160 NE434; 130Misc865, 226NYS1 (instrument signed by owner of all stock held not corporate act); 107WVa290, 148SE 122. But see 86 IndA597, 158NE913.

361-63 170Ark50, 278SW643. See also 101NJEq403, 138A900. [d] **Mortgage bonds** are held valid where pledged by dominant stockholder in control of business, his representations binding company. 170Ark50, 278SW643.

361-64 See also 286Pa305, 133A556.

361-65 74CalA278, 240P32; Va 152SE562.
362-69 74CalA278, 240P32.
362-70½-New. Where a stockholder becomes the guarantor of a corporation's transactions, he cannot contend that the contract was an individual and not a corporate act because he was sole owner of the entire stock. 149Md223, 131A332, 43ALR1.
362-72 32F(2d)176 (giving company note for personal loan); 174Ark746, 296SW714; 50ND622, 197NW689; TexCivA 279SW581, 584 [quotCJ].
363-77 TexCivA 279SW581, 584 [quot CJ].
363-78 TexCivA 279SW581, 584 [quot CJ].
363-79 20F(2d)462; TexCivA 279SW581, 584 [quotCJ].
363-80 TexCivA 279SW581; Wash 287P50.
363-81½-New. Adverse interest of agent, acting for corporation, in part of contract which is divisible, does not bar enforcement of another part of the contract in which the agent does not have such interest. 50ND622, 197NW689.
363-81¼-New. The trustees of a common-law trust innocently participating in carrying out the purposes of a legitimate common-law trust are not immune from accountability to a corporation for transactions in its name with the trust through an officer in fraud of the corporation. 208Cal228, 280P954.
363-82 33NM251, 264P947; 49SD476, 207NW471; TexCivA 279SW581, 584 [quotCJ]. See also 32F(2d)176; 126Misc283, 213NYS25.
364-84 49SD476, 207NW471. But see CalA 288P29.
364-87 TexCivA 279SW581, 584 [quot CJ].
364-88 169Ark56, 273SW370; 127Me91, 141A321 (apparent irregularity of check fully met by fact of being for dividend declared and due officer); 33NM251, 264P947; 126Misc283, 213NYS25; TexCivA 279SW581, 584 [quotCJ]. [b] Rule creates presumption of knowledge.—169Ark56, 273SW370.
364-89 TexCivA 279SW581, 584 [quot CJ].
364-89½-New. Where bank cashes check against corporation account for the corporation's vice president, who was also treasurer, general manager and principal stockholder, it is not liable to the corporation, even though prior to cashing check it had received stop payment order. 215AppDiv318, 213NYS716.
364-89¼-New. Under some authorities a person receiving such a check must have knowledge that the funds are those of the corporation. 169Ark56, 273SW370.
364-89¼-New. And the presumption of knowledge arising from the form of the check is rebuttable. 169Ark56, 273SW370.
364-89½-New. Instruction authorizing president of corporation to sign checks on its behalf but not purporting to instruct as to disposition of proceeds does not violate such instruction by paying corporation's checks signed by president and used for his benefit to bank's knowledge. 141Wash483, 251P774.
365-9 But see CalA 288P29.
366-14 TexCivA 18SW(2d)334.
366-17 129Misc875, 224NYS877.
366-18 261Mass326, 158NE784.
367-25 30NM517, 239P865; 129Misc875, 224NYS877.
368-34 198NC705, 153SE327.
368-39 DelCh 149A428; 211Ky26, 276SW975, 976 [quotCyc].
368-40 14F(2d)590; Cal 286P1001; 74CalA278, 240P32, 35 [citCJ]; 75CalA299, 242P914; 91CalA654, 267P572; 34GaA153, 128SE693; 246 IllA38; 246 Ill A457; 157Md51, 145A378; 255Mass35, 150NE905; 256Mass442, 152NE918; 261Mass326, 158NE784; 237Mich657, 213NW147; 101NJEq403, 138A900; 127Misc515, 216NYS713; 136 Okl 226, 277P219; 5PaDist&Co 613; 149Va867, 141SE856; 101WVa662, 133SE373, 374 [citCJ]. [a] (5) Where board of directors left entire management to general manager, who signed all checks and notes, without objection or repudiation, corporation cannot deny liability, on one such note because of his lack of authority. 11LaA331, 123S480. [b] Deed executed without formal resolution of board of directors.—176Minn411, 223NW624.
369-41 256Mass442, 152NE918.
370-43 NJCh 151A208.
370-44 85CalA533, 259P1007; 103NJEq470, 143A621; TexCivA 11SW(2d)804. [b] Estoppel by representations of corporate officers may arise, though based on mistake of law. 6F(2d)845.
370-47 66Utah82, 240P1105.
370-48½-New. The rule that one cannot serve two masters has been held inapplicable where the president of a corporation fraudulently pretended to act for an inventor in advising him as to the release of an interest in the invention. 256Mass442, 152NE918.
370-49 41F(2d)588; IndA 169NE91 (no estoppel where act is in violation of statute).
370-50 74CalA278, 240P32; 261Mass326, 158NE784.
370-53 Minn 232NW327. [a] (2) But rule has no application to pastor of baptist church giving deed where matter was not discussed at any church meeting. 215Ala667, 112S134, 135 [citCJ].
370-56½-New. A corporation is not estopped to deny a contract entered into with the manager by one who did not take up the matter with any officer or director. TexCivA 277SW746 (no notice to directors).
371-59 315Mo849.
371-61½-New. To estop the corporation a majority of the directors must have had knowledge of the facts concealed or acquiesced in which, if known by them, would in law establish estoppel. 315Mo849.
371-63½-New. or where the officer did not know of the essential facts. 114Nebr491, 208NW635.
371-65 315Mo849.
371-66 237Mich657, 213NW147; 102WVa16, 135SE242; 315Mo849, 288SW359 (third person not injured by reliance upon representation).
372-71 Utah 272P933 (person ignorant of existence of corporation).
372-74 130Misc348, 223NYS817.
372-75 176Minn411, 223NW624; 136 Okl 226, 277P219.
372-79 39F(2d)348; 38NJL74.
373-82 56AppDC327, 13F(2d)299.
373-84½-New. Accommodation indorser is estopped to plead defense of ultra vires in acquiring of note by holder. 160La371, 107S143.
373-87 203Iowa792, 206NW586.
373-88 34F(2d)533; 35F(2d)499; 214Ala226, 107S857; CalA 286P736; 43Ida343, 251P1051; 86IndA407, 157NE63; 215Ky338, 285SW239; 250Mich198, 229NW513; NJSup 147A723; 191NC809, 133SE391; 122Okl 277, 254P748; TexCommnA 28SW(2d)329; TexCivA 7SW(2d)601; TexCivA 11SW(2d)804; TexCivA 16SW(2d)542; 153Va128, 149SE503; 101WVa662, 133SE373, 374 [citCJ].
373-90 194NC80, 138SE428; 124 Okl 294, 256P29.
374-91½-New. or which is fraudulent, 307Mo74, 269SW593.
374-94 230Ky465, 19SW(2d)1078; Va 152SE562.
374-95 99WVa438, 129SE474.
374-99 126Me74, 136A292; 237Mich657, 213NW147; 35OhA443, 172NE561; 121Okl127, 247P978; 46PhilippineC608; Utah 273P933.
374-1 Mass 172NE871; 241Mich426, 216NW922.
375-2 250Mich198, 229NW513. But see Mass 172NE871.
375-3 43F(2d)369.
375-5 Utah 272P933.
376-11 203Iowa792, 206NW586; 81Mont44, 261P620.
376-12 203Iowa792, 206NW586.
376-14 241Mich426, 216NW922.
377-19 TexCivA 24SW(2d)742.
377-20 CalA 284P984.
378-47 8F(2d)368; 41F(2d)230; 191NC809, 133SE391. See also 32F(2d)825.
378-48 8F(2d)368; 108WVa686, 152SE635.
378-49 130Misc348, 223NYS817.
379-59 8F(2d)368.
380-71½-New. Majority of stockholders cannot ratify fraudulent use of corporate funds by directors, 239Mich300, 214NW126.
380-71¼-New. nor compromise law suit brought to compel directors to restore such funds to treasury, 239Mich300, 214NW126.
380-71¼-New. unless in doing so such majority acted honestly and in the interests of the corporation. 239Mich300, 214NW126.
380-77 43F(2d)369; CalA 283P957. [c] Where vote of disqualified member of executive committee was necessary to constitute majority vote, resolution ratifying contract is ineffective. 81Mont44, 261P620.
380-79 [c] Directors may vote at meeting to ratify bonus paid themselves and other officers and employees. 307Mo74, 269SW593.
381-82 14F(2d)758.
381-83 252Mass552, 148NE105.
381-84 241Mich426, 216NW922.
382-97 252Mass552, 148NE105; 241Mich426, 216NW922; 122Okl 277, 254P748; Va 155SE707; 101WVa662, 133SE373, 374 [citCJ].
382-3 160La694, 107S493. [a] (3) No ratification where conditions referred to in resolution of authority were not agreed on. 92CalA258, 267P914.
383-11 14F(2d)758; 14F(2d)762; 215Ky338, 285SW239; 219Ky418, 293SW986; 127Me91, 141A321; 230Mich260, 202NW991; 250Mich198, 229NW513; 307Mo336, 270SW638, 642 [citCyc]; 315Mo849, 288SW359; 105NJL461, 145A478; 286Pa305, 133A556; Tex 286SW901; TexCivA 11SW(2d)804; TexCivA 28SW(2d)1098.
384-13 142SC477, 141SE15.
384-14 CalA 293P140; 127Me91, 141A321.
384-15 La 129S655.
385-19 122Okl 277, 254P748.
385-23 8F(2d)368; 36F(2d)675; 247IllA574.
386-28 315Mo849, 288SW359; TexCivA 16SW(2d)542.
386-29 158La463, 104S208 (recording in conveyance records unauthorized letter of secretary stating renewal of lease has been held not notice to corporation); TexCivA 7SW(2d)601.
386-36 NJSup 135A669; TexCivA 16SW(2d)542.
387-37 107WVa290, 148SE122.
387-39 41F(2d)230; 256Mass442, 152NE918; 44Philippine635, 646 [quotCJ].
387-40 31F(2d)379; 34F(2d)513; Ariz 286P822; Cal 289P844; 74CalA278, 240P32, 35 [citCJ]; 75CalA299, 242P914; CalA 284P244; CalA 286P736; 43Ida343, 251P1051; 129Kan272, 282P579; 214Ky41, 281SW1022; 215Ky338, 285SW239; 121LaA577, 126S249; 166La457, 117S554; 127Me91, 141A321; MoA 23SW(2d)644; 81Mont44, 261P620, 626 [quotCJ]; 86Mont500, 284P267; 105NJL461, 145A478; 127Misc627, 216NYS419; 228AppDiv176, 239NYS619(2d case); 191NC809, 133SE391; 194NC80, 138SE428; NC 154SE654; ND 196NW953; 51ND889, 200NW910; 124 Okl 294, 256P29; 136 Okl 226, 277P219; 92PaSuper185; 10PaDist&Co 75; 44Philippine635, 646 [quotCJ]; TexCivA 26SW(2d)333; Utah 272P933; 149Va867, 141SE856; 136Wash340, 239P1018; 197Wis250, 221NW743.
388-41 74CalA278, 240P32, 35 [citCJ]; 44Philippine635, 646 [quotCJ]; 99WVa438, 129SE474.
389-42 73CalA769, 239P358; 44Philippine635, 646 [quotCJ].
389-43 84CalA611, 258P440; 10LaA729, 121S780 (estoppel); 191NC809, 133SE391 ("accepting" auditor's report "as information," though displeasing); 44Philippine635, 646 [quotCJ]; Man [1927] 3DomLR146.
389-44 74CalA278, 240P32, 35 [citCJ]; 40GaA497, 150SE461; LaA 122S81.
389-45 214Ky41, 281SW1022; ND 196NW953; 136Wash340, 239P1018.
390-47 219Ky349, 293SW543, 552 [cit CJperMcCandless,J]; 81Mont44, 261P620, 626 [quotCJ]; 92PaSuper436.
390-48 CalA 286P1084; 127Me91, 141A

321 (replacement by officer of money previously appropriated); 315Mo 849, 288SW359; 315Mo 849, 288SW359.

390-49 292Pa164, 140A871.

390-52 149Va789, 141SE764 (application to payment of its just obligations).

390-53 122 Okl 277, 254P748.

391-54 4LaA611.

391-56 75CalA299, 242P914.

391-61 73CalA769, 239P358; 170La714, 129S139(2dcase).

391-65½-New. Majority stockholders may ratify bonus payment to officers and employees, in the absence of fraud, after suit has been brought by minority stockholders to compel restoration of such bonus after payment. 307Mo 74, 269SW593.

392-69 43 Ida843, 251P1051; 191NC 809, 133SE391. [d] **Statute making diversion of corporate property a felony** has no application as ground for civil liability of parties dealing with corporate agent in payment of private debts, where corporation ratifies transaction. 14F(2d)762.

392-70 171Ark872, 286SW1010; 43 Ida 243, 251P1051; 191NC809, 133SE391.

392-72 32PortoRico 800.

392-72½-New. Majority stockholders' ratification of bonus payment to officers and employees disposes of minority stockholders' suit to compel restoration thereof, in the absence of fraud. 307Mo 74, 269SW593.

393-75 250Mich198, 229NW513; 136 SC448, 134SE415.

393-77 14F(2d)758; Colo 281P737(2d case).

395-96 203 Iowa467, 212NW886.

395-98 CalA 293P122; 156Miss337, 126 S6; 245NY116, 156NE634; 224AppDiv 659, 229NYS41; 34Wyo 368, 243P596, 598 [citCJ]. [a] (6) In indorsing and discounting negotiable paper for corporation. 49SD476, 207NW471. (7) Contract executed by general manager is presumed to be contract of corporation. 82Mont150, 266P869. (8) Contract executed by assistant to general manager of corporation is presumed to be contract of corporation. 82Mont150, 266P 869.

395-99 216AppDiv439, 215NYS587.

395-2 29 OhA130, 163NE51 (deed).

395-4 ND 196NW953.

396-6½-New. Where proof of authority to sign instrument sued on is waived, there is presumption that instrument was signed by officer and of his authority to do so. 125Me108, 131A138.

396-6½-New. Presumption of treasurer's authority is to negotiate notes for corporate purposes only and not to pay individual debts. 125Me108, 131A138 (where authority to sign notes and checks is shown).

396-6¼-New. An officer is presumed to have no authority to use the corporation's funds or securities to pay or secure his personal debts. 288Pa549, 137 A113, 52ALR506.

396-8 CalA 284P685; 129 Okl 222, 264 P164.

396-12 44 Ida786, 260P168; 88 IndA 674, 164NE294; 77Mont477, 251P517; 50ND622, 197NW689; TexCivA 8SW (2d)516.

396-13 111Conn497, 150A511; 321 Ill 124, 151NE487; 156Miss337, 126S6; MoA 7SW(2d)298.

396-15 75CalA299, 242P914; 77Mont 477, 251P517.

397-16 75CalA299, 242P914.

397-17 181Ark798, 27SW(2d)1008; 75 CalA299, 242P914; CalA 284P685; CalA 286P177; 168Ga129, 147SE387; 37GaA 137, 139SE108; 335 Ill 101, 166NE495; 105NJL375, 146A355, 65ALR324; NJCh 146A873; 139 Okl 278, 281P977; 7Pa Dist&Co 795; 157Tenn440, 9SW(2d)704; TexCivA 264SW513; TexCivA 1SW(2d) 334; TexCivA 24SW(2d)742; 153Wash 526, 280P9; 107WVa290, 148SE122. [h] **Presumption is not destroyed** because conveyance bears grantee's signature. 37GaA137, 139SE108.

398-19 157Tenn440, 9SW(2d)704.

398-24 107WVa290, 148SE122. [a] **Presumption** is overcome where instrument shows on its face that two of three executory directors were disqualified by interest. 198Cal 261, 244P325, 45ALR 781.

398-26 NJCh 146A873.

398-27 105NJL375, 146A355, 65ALR 324.

399-39 93Fla354, 114S444, 446 [citCJ]; Iowa 224NW536; 125Me108, 131A138; 221MoA733, 285SW779; NJSup 145A 104; 216AppDiv439, 215NYS587; 292Pa 164, 140A871; TexCivA 11SW(2d)654; 149Va789, 141SE764.

400-40 93Fla354, 114S444, 446 [citCJ].

400-41 223Ky777, 4SW(2d)707.

400-47 77Mont477, 251P517.

400-49 CalA 286P177; 88 IndA674, 164 NE294.

401-53½-New. **In Maine,** where no affidavit of authority is filed, proof of signing instrument sued on and of authorization is waived. 125Me108, 131A138.

401-54 126Me74, 136A292; 33NM251, 264P947.

401-57 81Mont44, 261P620, 627 [citCJ].

402-68 Mass 166NE867; 150SC459, 148 SE478. [a] (8) Evidence as to authority of one indorsing name of corporation payee to transfer promissory note. 51 ND573, 200NW42. (9) Corporate resolution authorizing lease by treasurer. 296Pa493, 146A123. [b] (1) 74CalA278, 240P32; 321 Ill 124, 151NE487.

402-71 Cal 289P844; 84CalA611, 258P 440; 127Me91, 141A321; 247NY1, 159 NE700. [b] (3) Evidence of vote of directors in naming bank as depositary and providing for signing and countersigning of check is inadmissible as bearing on the authority of the treasurer to indorse notes. 258Mass306, 154NE835.

403-81 92CalA258, 267P914; 262Mass 588, 160NE434; 292Pa164, 140A871.

403-82 151Miss814, 119S318.

403-83 200 Iowa434, 204NW298; 307 Mo 74, 269SW593; 221MoA733, 285SW 779.

404-88 84CalA611, 258P440; 88CalA 740, 264P270 (defense of no authority is looked on with disfavor); 91CalA654, 267P572; 255Mass104, 151NE84; MoA 23SW(2d)644.

405-91 119 Or498, 248P1090, 1094 [quotCJ].

405-2 260Mass265, 157NE532.

406-9 84CalA611, 258P440; Mass 171 NE440.

406-13 ND 196NW953 (unauthorized indorsement of note).

407-22 [a] (18) Other matters. 92CalA 171, 267P884. (19) Other evidence held sufficient. 74CalA278, 240P32; 75CalA 737, 243P686; 82CalA342, 255P523; 258 Mass343, 155NE22; 127Misc515, 216 NYS713; TexCivA 292SW589. (20) That agent was authorized to employ help. TexCivA 277SW768. (21) To support implied conclusion that vendor corporation in whose name representative of selling agent waived certain contract provision was owned by selling agent and was but instrumentality of such selling agent corporation. 100CalA 12, 279P829. [b] (9) To show authority of defendant corporation's president to bind it by indorsement and guaranty of certain promissory notes. 119Kan 545, 240P856. (10) To show that president authorized stock holder to contract with broker to sell property. 5F(2d) 676. (11) To show ratification of unauthorized employment of broker. 5F(2d) 676. (12) That president contracted to purchase land as agent of corporation and not for himself. 141Wash697, 250 P1087. (13) Authority given by board of directors to president or assistant secretary of corporation to execute lease. Utah 272P933. (14) Other instances. CalA286P1084; LaA 130S646. [d] **Facts and circumstances must establish by implication existence of relationship.**– 152Miss9, 118S347.

408-23 92CalA258, 267P914 (that signer of contract is director does not establish agency). [a] (1) 74CalA278, 240 P32; 127Misc515, 216NYS713 (by estoppel). [b] 223Ky777, 4SW(2d)707.

408-24 84CalA387, 258P141; 95CalA 101, 272P789; 98CalA198, 276P1064 (authority sufficiently shown); 9LaA 535, 119S725. [a] (3) 203 Iowa792, 206 NW586. (19) Other instances. Mass 164NE916; 54SD107, 222NW667; Tex CivA 284SW288; 39Wyo 238, 270P1082. (20) Of custom authorizing officer of corporation to indorse checks and deposit them to his account. 211Ky185, 277SW292. (21) Other evidence held sufficient. 43 Ida149, 249P895; 254 Mass229, 150NE1; TexCivA 283SW266; 193Wis350, 214NW349, 53ALR281. [b] (1) 321 Ill 124, 151NE487 (binding corporation to repurchase stock on thirty days' notice); 100NJEq455, 136A297. (15) To show authority of manager of mercantile corporation to guarantee debts of bank. 170Ark984, 282SW371. (16) Other instances. 220Ala601, 127S 173; 156Miss337, 126S6. (17) To cancel contract. CalA 293P140 (prima facie). [c] (4) other instances. 220 Ala601, 127S173. [e] (2) Mass 167NE 272 (lease of refrigerating plant). (7) To sign trade acceptances. MoA 23 SW(2d)644. [f] (5) Kan 292P774; 223 AppDiv134, 227NYS449. (11) Of employing plaintiff to operate farm. Tex CivA 4SW(2d)1058. (12) To show such holding out of broker as agent as to authorize third persons to rely upon his authority to make contract of sale. 72CalA786, 238P155. (13) Of temporary officers to sell all of corporation's assets. 216AppDiv439, 215NYS587. (14) Of temporary officers to bind corporation to pay commission to broker for procuring purchaser of its assets. 216AppDiv439, 215NYS587. (15) Of officers to order autopsy. 93Fla354, 114 S444. (16) Of agent to alter contract so as to estop corporation from disputing agent's authority. 101CalA470, 281P1062. (17) Of assistant treasurer to obligate corporation by guaranty against loss on contract. Me 151A534. [g] (1) 221MoA733, 285SW779; Tex CivA 19SW(2d)605. [h] (6) To pledge unissued stock. 54ND734, 210NW514, 51ALR1123. [i] (5) To bind corporation on contract signed by another corporation as its agent. 292Pa164, 140A 871 (managing director). [m] **Evidence insufficient** to sustain finding that president did not have authority to issue corporation check to pay personal obligation. 126Misc283, 213NYS825. [n] **Estoppel.**–Evidence held sufficient to estop corporation receiver to deny authority of president to pledge bonds for benefit of corporation. 68CalA432, 229 P968. [o] **Evidence of customary acts in disregard of formal resolution of board of directors,** though known to corporation, is not evidence of actual authority. Utah 272P933. [p] **Assistant treasurer shown without express authority** to obligate corporation by guaranty. Me 151A534.

409-25 [a] (1) 74CalA278, 240P32; Wash 287P50. [b] (1) 148Md628, 129A 915.

410-26 315Mo 849, 288SW359; NH 150 A545; 46Philippine608; TexCivA 3 SW(2d)507 (evidence sufficient); 136 Wash340, 239P1018. [a] (4) To show knowledge of indorsement of note. 136 Wash340, 239P1018. (5) To show knowledge of president of company as to performance of advertising services under contract with company's advertising manager. TexCivA 283SW266.

410-27 [a] (1) 208Cal 723, 284P671; 75CalA737, 243P686; 130Kan798, 288P 549; 252Mass552, 148NE105; 121 Okl 127, 247P978. (10) Recital in corporation minutes that managing officer had appropriated corporation funds to his own use shows ratification of officer's act of cashing check after bank received stop payment order. 215AppDiv318, 213NYS716 (precluding corporation from recovering against bank). [b] (1) 111Conn475, 150A693; 93Fla354, 114S 444; 9LaA535, 119S725; 315Mo 849, 288SW359; 81Mont44, 261P620; 46 Philippine608. (2) Iowa 227NW908.

410-30 299Pa236, 149A190; TexCivA 10SW(2d)422.

410-32 33F(2d)49; 150Md24, 132A278; 83NH542, 145A139; TexCivA 5SW(2d) 215.

410-34 148Md628, 129A915 (no error in refusal of prayer); 150Md24, 132A 278; 255Mass104, 151NE84; 261Mass 326, 158NE784; Mass 165NE396; Tex CivA 24SW(2d)742; TexCivA 28SW(2d) 1102 (notice of rejection of contract). [a] (1) 151Miss814, 119S318; 143Va 656, 129SE687. (2) MoA 21SW(2d)932. (8) As to estoppel to deny authority

of agent to execute contract. 237Mich 657, 213NW147.

411-35 261Mass326, 158NE784; 127 Misc282, 215NYS766 (as to notice to holder of check).

411-36 200Iowa434, 204NW298; 126 Mc550, 140A182; NJ 146A216; 150SC 459, 148SE478.

411-37 150Md24, 132A278; 261Mass 326, 158NE784 (as to holding out by corporation); Mass 165NE396; 250Mich 491, 230NW909; MoA 296SW838; NJ 146A216; 150SC459, 148SE478. [a] (14) Authority of sales manager to sell car purchased by plaintiff. 261Mass326, 158NE784. (15) Whether vice president's authority to hire engineer included power to fix compensation. MoA 21 8SW(2d)932. [b] (1) 143Va656, 129SE 687. (6) To employ agents. Mass 172 NE240. (7) To employ broker. Tex CivA 28SW(2d)1098. [e] (1) Ala 130S 545.

412-38 176Ark642, 3SW(2d)685; 132 Misc772, 230NYS353 (evidence held not to warrant finding as matter of law). [a] (4) Whether seller knew agent of corporation was acting for undisclosed principal. Mass 166NE708.

412-39½-New. **Directing verdict** for bank against the drawer's managing officer is unauthorized in an action by a corporation against a bank for cashing a check to the officer after receiving a stop payment order, where the officer has been brought in as a party defendant by the bank without asking for a verdict against him, but claiming that the money was properly paid. 215AppDiv318, 213NYS716.

412-41 170Ark654, 280SW630; 121 Okl 127, 247P978 (evidence insufficient).

412-42 252Mass552, 148NE105; Mass 165NE326; 190NC655, 130SE545 (contract not invalid as inference of law); 121 Okl 127, 247P978; TexCivA 11SW (2d)804; TexCivA 24SW(2d)742; 100 WVa331, 130SE447. [a] (5) Other instances. 105NJL461, 145A478. [b] **Whether directors meeting to ratify conveyance to president** knew that consideration was not paid as recited in deed has been held question of fact for jury. TexCivA 24SW(2d)742.

413-45 237Mich657, 213NW147.

413-50 61OntL478, [1928] 1DomLR 640.

413-51 TexCivA 279SW581, 585 [cit CJ] (indorser of note).

414-69 252Mass535, 147NE895 (secretary not authorized, by virtue of his office alone, to sell, demise, or otherwise dispose of property of corporation); 58ND66, 224NW661; 288Pa549, 137A113, 52ALR506.

414-70 288Pa549, 137A113, 52ALR506.

414-73 See also TexCommnA 23SW (2d)329.

415-90 See also NC 155SE603.

416-97 265Mass143, 164NE72; NJCh 149A362; 35 OklACR492; 288Pa549, 137 A113, 52ALR506; TexCivA 24SW(2d) 742; TexCivA 31SW(2d)488.

416-99 307Mo 336, 270SW638.

416-1 TexCivA 24SW(2d)742.

417-13 265Mass143, 164NE72 (substantial part of property).

419-42½-New. **General manager.** Power of attorney given manager of Russian corporation has been held not to authorize him to assign claim for damages after the corporation's destruction by the Soviet government. 214AppDiv14, 210NYS629.

419-48 NH 150A545.

419-53 See also NH 150A545.

419-54 NJCh 147A105 (manner of disposition prescribed by statute must be followed).

420-60 NJCh 151A208.

420-65 15F(2d)669.

420-68 101WVa662, 133SE373.

420-71 CalA 286P1084; 157Md51, 145 A378; 100NJEq128, 135A869; NJSup 146A475(1stcase).

421-74 3LaA663.

421-89½-New. An officer cannot, without authority in by-laws or charter, so contract with a nonstockholder as to give him the privileges and subject him to the liabilities of a stockholder. PrEdwIsl [1925] 3DomLR767.

422-80 NC 154SE54.

422-89 40GaA497, 150SE461; Iowa 227NW908; NJSup 137A891; TexCivA 294SW270; 102WVa16, 135SE242.

422-93 Ill 173NE270; 223AppDiv533, 229NYS390.

423-95 CalA 283P895; 321 Ill 124, 151 NE487; 337 Ill 111, 168NE908 (agency rule as to signing corporate contract does not apply to president who, as executive officer, is more than agent); Ill 173NE270; MoA 28SW(2d)157; 77 Mont477, 251P517; 223AppDiv533, 229 NYS390. But see Ill 173NE270. [a] **Cancellation of contract within scope of business.**—CalA 293P140.

423-95½-New. Where the president and owner of most of the stock of a corporation borrowed plaintiff's stock in another corporation to use as collateral, that, after he got the stock, he did not hypothecate it to secure a loan, but sold it contrary to his agreement with plaintiff, did not affect the validity of the contract. 226Ky364, 10SW (2d)1077.

423-97 13LaA374, 128S62.

424-6 190NC655, 130SE545 (authority under by laws as general manager); TexCivA 8SW(2d)702.

424-10 Va 155SE707.

424-15 CalA 285P868 (contract which nature of employment seemed to warrant); NC 154SE54; TexCivA 20SW (2d)1081. See also 157Md51, 145A378. [e] **Written evidence** is not necessary for authority to execute contract of purchase. 92CalA171, 267P884.

425-16 [a] (2) General manager of publishing corporation has ostensible authority to decide what books to publish and contract for printing them. 255Mass480, 152NE240.

425-18 255Mass480, 152NE240 (ostensible power is real power to those having no actual notice).

425-20 [a] (3) Corporation is not bound by storage receipts for cotton falsely and fraudulently issued by its general manager. 6F(2d)7.

426-22 [a] **Administrative officers** may waive condition of contract. 7F(2d) 814.

426-24 102NJL647, 133A407; 100 NJEq128, 135A869 (unless power is conferred on him).

426-25 101CalA470, 281P1062. But see 219Ala65, 121S59 (superintendent authorized to negotiate and sign contract has implied authority to modify such contract).

426-26 14F(2d)466, 468 [quotCJ].

426-27 14F(2d)466; NJ 147A436 (contract under seal between vendor and purchasing corporations cannot be modified by president of former); TexCivA 294SW270.

426-30 See also TexCivA 10SW(2d) 574.

426-33 [a] **Evidence respecting conversation with certain officers** is admissible in suit to recover for services. Mass 172NE113.

427-35 242 IllA548.

427-39 216AppDiv439, 215NYS587; 144Wash118, 256P1033. [a] (4) Consent of two thirds of stockholders must be obtained before officers can employ broker to sell all of corporation assets. 216AppDiv439, 215NYS587.

428-50 249 IllA194.

428-64 265Mass143, 164NE72 (agent to sell substantial part of property); 50 Nev52, 250P245.

429-65 50Nev52, 250P245.

429-67 37F(2d)508. [a] (3) Power of president to make contract of employment for more than one year depends on by-laws, character of business, and practical operation thereof. 100WVa331, 130SE447.

429-68 93Fla354, 114S444 (employment of doctors to perform autopsy on deceased officer); Mass 172NE240; 87 PaSuper398.

429-69 [a] (3) President and general manager of real estate investment corporation has authority to employ attorney. TexCivA 18SW(2d)923.

429-71½-New. , a factory foreman. NJSup 135A668.

429-73 37F(2d)508.

430-81 170Wis619, 176NW58.

430-82 NH 150A545.

430-86 100CalA231, 279P1060(2dcase); 228AppDiv176, 239NYS619(2dcase); 46 Philippine608, 614 [quotCJ]; TexCivA 28SW(2d)1098. [e] (2) Agent to sell substantial part of corporate property. 265Mass143, 164NE72.

431-88 NH 150A545.

431-95 101CalA343, 281P641 (rate of commission). [a] (4) Manager agreeing to exchange shares of corporation's stock for another party's services has been held binding on corporation. 251 Mich478, 232NW355(2dcase).

431-2 46Philippine608, 614 [quotCJ].

432-16 NJSup 137A891.

439-25 NC 154SE54.

433-30½-New. The mere calling of doctors to perform an autopsy on the president, found dead in a river, has been held not to constitute a promise to pay for such services. 93Fla354, 114 S444.

433-32 But see NJSup 137A891.

433-37 83NH542, 145A139.

433-39 83NH542, 145A139.

438-12 200Iowa1000, 205NW776; 245 NYS367; 29 OhA192, 163NE500.

438-13 [a] (2) Corporation is not liable for breach of officer's individual agreement for sale of his own stock. 5 F(2d)881.

438-15 [b] **Statute authorizing sale** should be liberally construed. Del 140 A265. [c] **Discretion of directors** in sale of no par stock should not be interfered with except for fraud. Del 140 A265.

438-16 But see 321 Ill 124, 151NE487.

439-20½-New. A person procuring a pledge of unissued stock from the secretary may be estopped to claim that he dealt with the secretary as sole managing agent and that the secretary had authority coextensive with the powers of the corporation because of inactivity of the directors for a long period. 54 ND734, 210NW514, 51ALR1123.

439-20½-New. Directors may not substitute one stock subscriber for another. TexCivA 16SW(2d)307.

439-22 99NJEq543, 133A857.

439-24 [b] **Directors cannot dispose of outstanding stock** for purpose of acquiring majority, even where corporation may purchase such stock. 157Tenn 131, 7SW(2d)43.

439-32 [b] **Lease of real property for corporation** executed by president and secretary without authorization of board of directors or executive committee as required by by-laws, and not bearing seal of corporation, is invalid. 86CalA577, 261P733.

439-33 86CalA577, 261P733; 113Nebr 801, 205NW288 (acquiescence by directors in prior purchases does not authorize future purchases).

439-36 7LaA60.

440-44 313Mo 642, 285SW462.

440-49 See also 211Ky185, 277SW292.

440-53 TexCivA 281SW1106.

440-54 TexCivA 5SW(2d)215.

441-55 86CalA577, 261P733. [a] **Absent notice to lessor of limitation on president's power,** corporation is bound. 198NC675, 153SE158.

441-65½-New. Hotel president, after being deposed as managing officer, could not, as vice president, lease cab stand in hotel. 26 OhA181, 159NE377.

444-10½-New. Where a vendor corporation gives notice of intention to cancel a contract for the sale of its land, executed by a corporation owned and controlled by it, the purchaser is justified in treating the contract as abandoned and suing to recover any amounts paid. 100CalA12, 279P829.

444-10½-New. A waiver indorsed on a contract for the sale of land by an agent of a selling agent corporation which owns and controls the vendor corporation is binding on the vendor. 100CalA 12, 279P829.

444-11 107WVa290, 148SE122.

444-16 100CalA529, 280P897 (purchase of nursery stock by president of cut flower corporation).

444-22 TexCivA 18SW(2d)666.

444-33 157Md51, 145A378.

445-39 95**CalA**551, 272**P**1114. [b] **Authority to sell does not include** authority to waive a forfeiture. 102**NJL**196, 130**A**665.
445-43½-New. The president of a corporation has no power to sell the corporate business and property in its entirety in the absence of specifically conferred authority to sell. 210**Ky**170, 275 **SW**634.
445-43½-New. In the absence of authority from stockholders the president of a bridge company is without authority to sell its bridge. 210**Ky**170, 275 **SW**634.
445-45 **CalA** 268**P**443; 93**CalA**685, 270 **P**239; **TexCommnA** 3**SW(2d)**72. [f] **Remodeling storehouse.**-215**Ala**97, 1098 751.
445-50 149**Va**867, 141**SE**856 (purchase of real estate).
446-55 261**Mass**326, 158**NE**784; **Tex CivA** 6**SW(2d)**165.
446-56 **TexCivA** 6**SW(2d)**165.
446-57 [a] **Though money is not turned over to corporation,** it is liable to purchaser for price paid to general manager, held out as authorized to sell automobile which is later seized by corporation. 261**Mass**326, 158**NE**784.
446-67 160**La**694, 107**S**493.
447-76 **CalA** 285**P**359.
447-82 **NJCh** 151**A**834 (payment may be recovered by corporation); **TexCivA** 272**SW**258.
447-85 See also 10**LaA**452, 121**S**334.
447-87 **TexCivA** 272**SW**258.
447-96 **Me** 151**A**534.
447-97½-New. It is not within the apparent scope of authority of the secretary and treasurer to pay debts of officers and employees from the corporation fund. 144**Miss**828, 110**S**787.
447-1½-New. When by by-law payment must be approved by the president, the treasurer cannot pay debts of officers or employees without such approval. 144**Miss**828, 110**S**787.
448-6½-New. That manager is authorized to buy implies authority to pay for his purchases. **MoA** 23**SW(2d)**644.
448-14 **Ark** 30**SW(2d)**215.
449-26 46**Philippine**342.
450-49 234**Ky**580, 28**SW(2d)**783.
450-60 **Iowa** 224**NW**536.
451-68 See also 76**CalA**761, 245**P**810.
451-69 149**Va**789, 141**SE**764.
452-75 See also 1**LaA**279.
452-84 **TexCivA** 15**SW(2d)**36. [e] **Treasurer.**-258**Mass**306, 154**NE**835.
452-87 51**ND**573, 200**NW**42 (authority to indorse).
452-88 [a] (1) 51**ND**573, 200**NW**42. (2) Legal sufficiency of ostensible authority to issue or indorse negotiable paper negatives idea that only written authority is sufficient. 51**ND**573, 200 **NW**42.
452-89 150**Va**82, 142**SE**373.
452-90 43 **Ida**149, 249**P**895.
453-91 140**Wash**495, 249**P**979.
453-10½-New. That a note was made payable to an individual instead of to such individual and his son is insufficient to sustain a plea of non est factum where the note was the only one executed and was accepted by the person whose name was omitted. **TexCivA** 275 **SW**732.
453-10½-New. Treasurer held not authorized to draw corporate check to pay personal debt by board's voting him retroactive salary. 126**Me**74, 136**A**292.
453-11 **NB** [1927] 3**DomLR**479.
454-12 **CalA** 286**P**736; 43 **Ida**149, 249**P** 895; 150**Va**82, 142**SE**373.
454-23 258**Mass**343, 155**NE**22; **ND** 196 **NW**953. [b] (3) President and manager of corporation which owned common stock of another is authorized to give check to enable latter to pay dividends on preferred stock. 258**Mass**343, 155**NE** 22.
455-31 **Iowa** 224**NW**536; 170**La**47, 127 **S**360; 52**SD**321, 217**NW**391.
455-32 105**NJL**206, 144**A**30 (indorsement by president held not valid indorsement conferring title).
456-37 170**La**47, 127**S**360.
456-38 129**Misc**822, 222**NYS**733.
457-41 **Iowa** 224**NW**536.
457-42 220**Ala**601, 127**S**173.
457-43½-New. Personal indorsement of notes by the president of the corporation is not binding on the corporation, although he owned nearly all of its stock. 68**CalA**717, 230**P**200.
457-43⅓-New. Implied power of the president to execute notes on behalf of the corporation should be strictly construed, 77**Mont**477, 251**P**517.
457-43¼-New. , especially where the note purports to be executed by the corporation itself. 77**Mont**477, 251**P**517.
457-57 See also 246 **IllA**92.
458-60 [c] **Secretary apparently clothed with authority of general manager** and generally handling corporate business held authorized to execute trade acceptance. **Cal** 289**P**844.
458-61 149**Va**789, 141**SE**764.
458-63½-New. Where custom warrants a bank in accepting a check to a corporation indorsed by an officer and depositing it to his account, the bank is in the same position as the corporation had it brought action on such check. 211**Ky**185, 277**SW**292.
458-64 **TexCivA** 295**SW**665.
458-64 [c] **Assistant treasurer with duty to indorse checks** on behalf of company has no authority to place check payable to company to credit of president individually. 233**Ky**206, 25**SW(2d)** 379.
458-67 248**NY**141, 161**NE**449; 136**Misc** 355, 239**NYS**655; 149**Va**789, 141**SE**764.
458-68 [a] But see 127**Misc**91, 141**A**321.
459-69 [d] **Resolution of board of directors** authorizing but not requiring assistant treasurer to countersign signatures has been held not limitation on general power of treasurer to indorse notes. 136**Misc**355, 239**NYS**655.
459-71 149**Va**789, 141**SE**764.
459-72 170**La**47, 127**S**360; 136**Misc**141, 239**NYS**568.
459-72 But see 37**GaA**409, 140**SE**766 (note held valid despite by-law limiting power to president).
459-73 37**GaA**409, 140**SE**766; 136**Misc** 141, 239**NYS**568 (manager must be one in charge or direct business).
460-74½-New. A corporation is not liable on a branch manager's individual check given to one who advanced money to cover remittance to the corporation. 126**Misc**329, 213**NYS**348 (branch manager having no authority to borrow money or draw checks).
460-74⅓-New. Acceptance of bill by manager is acceptance by corporation itself through agency inherent in its existence and operation. **MoA** 23**SW(2d)** 644.
460-75 233 **IllA**302; 201 **Iowa**240, 207 **NW**121.
460-79 **Mass** 166**NE**840; **Va** 152**SE**562.
461-80 233 **IllA**302; 258**Mass**306, 154 **NE**835. [c] **Where sales manager indorsed note to accommodate** another corporation, company is held liable where it benefited from transaction and ratified act. 136**Wash**340, 239**P**1018.
461-84 125 **Okl** 110, 256**P**737 (board of directors).
461-92 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123.
461-93 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123; 108**WVa**686, 152 **SE**635.
461-94 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123.
462-95 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123.
462-96 212**Ky**222, 278**SW**565; 54**ND** 734, 210**NW**514, 520 [quotCJ], 51**ALR** 1123.
462-97 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123.
462-5 170**La**714, 129**S**139(2dcase) (partial releases of land).
462-6½-New. Directors of a corporation have no authority to mortgage corporate property for the purpose of purchasing stock of complaining stockholders in order to take the corporation out of a receivership and regain control. 170**Ark**530, 280**SW**677.
463-14 234**Ky**580, 28**SW(2d)**783 (board may authorize certain directors).
463-21 200**Wis**48, 227**NW**308.
464-32 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123. But see **Tex CommnA** 277**SW**1060.
464-33 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123.
464-34 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123.
464-35 54**ND**734, 210**NW**514, 520 [quotCJ], 51**ALR**1123.
465-36 31**F(2d)**375; 31**F(2d)**379; 54 **ND**734, 210**NW**514, 520 [quotCJ], 51 **ALR**1123.
465-45 315**Mo** 849, 288**SW**359 (unauthorized act of secretary in attesting unauthorized mortgage); 54**ND**734, 210 **NW**514, 520 [citCJ], 51**ALR**1123.
465-46 54**ND**734, 210**NW**514, 520 [citCJ], 51**ALR**1123.
465-46½-New. or by the stockholders, 54**ND**734, 210**NW**514, 520 [citCJ], 51 **ALR**1123.
466-53 212**Ky**222, 278**SW**565. [a] (3) Mortgagee who took note and mortgage from agent admitted by corporation to be in charge of particular business. 212**Ky**222, 278**SW**565.
466-54 40**F(2d)**21.
466-63 **Iowa** 227**NW**908.
467-66½-New. Ordinary business corporation is unauthorized to enter into contract of guaranty. 258**Mass**306, 154 **NE**835.
467-67½-New. Agreement by a business corporation which undertook, as an accommodation to become responsible for obligations of another corporation is ultra vires. 258**Mass**453, 155**NE**422.
467-67⅓-New. An agreement by a business corporation which undertook as an accommodation to become responsible for the obligations of another corporation is ultra vires. 258**Mass**453, 155 **NE**422.
467-67¼-New. An ordinary business corporation cannot become surety for another corporation or an individual as to a matter not connected with the purposes for which it was created. 258 **Mass**453, 155**NE**422.
468-68 160**La**694, 107**S**493.
468-69 30**F(2d)**372 (directors' vote being sufficient). [a] **Account stated.**-157 **SC**371, 154**SE**641.
468-70 81**Mont**44, 261**P**620.
468-76 250**Mich**625, 231**NW**121.
469-79 255**Mass**52, 151**NE**167.
469-92 179**Ark**831, 18**SW(2d)**369 (release held contract necessary to carry on business); 250**Mich**625, 231**NW**121.
471-19 [a] **Oaths for affidavit in forma pauperis** may be made by president, vice-president, secretary and treasurer. 41**GaA**366, 153**SE**76(1stcase).
472-41½-New. Attorneys for a corporation have been held not without power to enter a stipulation with plaintiffs for setting aside an order granting a new trial, and for entry of new judgment, against the contention that the directors could not authorize such action. **CalA** 274**P**997.
472-44 See also 264**Mass**355, 162**NE** 773.
472-48 322 **Ill** 372, 153**NE**749, 753 [citCJ].
473-54 See also 127**Misc**591, 216**NYS** 153.
474-75 See also 17**F(2d)**503.
474-87 24**F(2d)**776; 247**NY**1, 159**NE** 700. But see 35**F(2d)**467.
475-88 [c] **Ignorance of agent** is no defense to corporation where it had knowledge through other agents. 90 **CalA**291, 265**P**873.
475-92 See also 127**Misc**470, 216**NYS** 481.
475-94 14**F(2d)**466, 468; 90**CalA**83, 265**P**835; 237**Mich**657, 213**Mich**147.
475-4 23**AlaA**346, 125**S**795(2dcase).
476-6 153**SC**56, 150**SE**347, 66**ALR**1264 (corporation can testify through its officers).
476-12 [f] **Undelivered letter signed by president under mistake,** containing statement that one corporation was subsidiary of another, does not estop denial of such fact. 211**Ky**111, 277**SW**290.
477-16 [a] 84**Mont**521, 277**P**14.
480-66 51**ND**889, 200**NW**910.
482-92 21**AlaA**183, 107**S**735; **Iowa** 229 **NW**173; **Mont** 287**P**170.
482-94 21**AlaA**183, 107**S**735; 135**SC**190, 133**SE**709; 103**WVa**329, 137**SE**362.
482-95 23**F(2d)**803; 32**F(2d)**425; 219 **Ala**546, 122**S**677; 21**AlaA**183, 107**S**735; 80**CalA**1, 251**P**830; 98**CalA**75, 276**P**383; **CalA** 288**P**29; 41 **Ida**129, 238**P**308; 252

NY366, 169NE612; 217AppDiv468, 216 NYS755; 228AppDiv176, 239NYS619(2d case); 245NYS71; 57ND598, 223NW 350; 114 OhSt24, 150NE921; TexCivA 286SW901; TexCivA 290SW861; Tex CivA 3SW(2d)507; 68Utah530, 251P 354; 99WVa438, 129SE474; 103WVa 329, 137SE362; 103WVa646, 138SE370; 192Wis249, 212NW796. [a] (4) Bankrupt corporation, whose officers were identical with those of corporation purchasing machinery delivered to bankrupt corporation, is chargeable with notice of everything that came to such officers' knowledge. 33F(2d)594.

484–96 27Hawaii572.

484–97 22F(2d)480 (as promoter); 80 CalA1, 251P830; CalA 291P220; 40GaA 497, 150SE461; 201 Iowa888, 208NW 371; 12LaA9, 125S77; 103NJEq268, 143A428; 217AppDiv468, 216NYS755; 156SC43, 152SE721. [b] (5) Of service of summons on corporation by president having charge of its litigation. 75Mont 332; 243P576. (6) Lien. Colo 291P 1036.

484–98 114 OhSt24, 150NE921. [a] **Failure to return claim** by vice president does not relieve corporation from liability, since possession of vice president is corporation's liability. 148 Wash348, 268P1036.

484–99 TexCivA 286SW901.

484–99½–New. assistant secretary, 114 OhSt24, 150NE921.

484–1 22F(2d)480 (as promoter); 34 OhA233, 170NE885.

485–3 80CalA1, 251P830; 15DelCh248, 135A846; 200 Iowa434, 204NW298 (fiscal agent in charge of stock sales); Tex CivA 11SW(2d)654. [a] (3) Lumber inspectors' knowledge of laborers' liens on lumber purchased. 177Ark683, 7SW (2d)800.

485–4 13LaA14, 127S54.

485–8 40F(2d)88; NH 150A545 (committee).

486–10 NH 150A545 (one of committee of two appointed by board); 107 WVa290, 148SE182. [c] NH 150A545.

486–13 151Md392, 135A166, 173 [cit CJ]; 114 OhSt24, 150NE921. See also 331 Ill 563, 163NE333.

486–16 22F(2d)480 (as promoter); 229 AppDiv555, 242NYS383.

487–20 220MoA686, 293SW517 (dictum).

487–22 232Ky262, 22SW(2d)620.

488–31 220MoA686, 293SW517 [citCJ entire section].

488–33 155Md66, 141A425; 220MoA 686, 293SW517; 73Mont219, 236P250; 189NC647, 127SE693; TexCivA 272SW 258; TexCivA 284SW654; 196Wis391, 220NW177.

489–34 220MoA686, 293SW517.

489–35 [a] **Knowledge of president of corporation** that stock sold by him became property of married woman is imputable to corporation. TexCommnA 292SW531.

489–38 220MoA686, 293SW517 [citCJ entire section].

490–49 TexCommnA 292SW531; 103 WVa650, 138SE317.

490–50 244 IllA16; 223Ky777, 4SW (2d)707; 261Mass1, 157NE725; Mass 172NE871; 316Mo 129, 289SW814; 320 Mo 209, 7SW(2d)269; 320Mo 623, 8SW (2d)858; 73Mont219, 236P250; 92 PaSuper436. But see TexCivA 3SW (2d)507.

490–51 27Hawaii572; 85Mont149, 278 P116.

490–52 316Mo 129, 289SW814.

491–53 TexCivA 3SW(2d)507.

491–53½–New. A corporation claiming the benefit of an officer's investigation cannot claim lack of notice because the officer is adversely interested. TexCivA 18SW(2d)267.

491–54 316Mo 129, 289SW814; 99WVa 438, 129SE474.

491–60 73Mont219, 236P250.

491–62 166Minn400, 208NW24.

492–63 39F(2d)400.

492–69 96PaSuper497.

492–69½–New. That the agent of a stockholder in the purchase of his stock was a director of a bank which purchased the entire assets of the corporation does not impute to the stockholder constructive knowledge of such agent as such officer where there is no showing of actual knowledge of the agent. 145SC91, 142SE811.

492–69⅓–New. A subsidiary corporation is charged with knowledge of the financial condition of the parent corporation where the president and director is also an officer of the parent company. 27F(2d)888.

492–71 77Mont406, 251P157, 162 [cit CJ].

493–76 244 IllA171; 225AppDiv412, 233NYS404; 135SC417, 133SE901, 909 [citCJperCothran,J]; TexCivA 3SW(2d) 507.

493–78 86 IndA392, 156NE568; 241 NY216, 149NE837; 92PaSuper436.

494–87 213Ala556, 105S590.

494–91 198NC524, 152SE489. See also 296Pa108, 145A834.

494–95½–New. Corporation lacking power to acquire land will be required to dispose of it. Nebr 231NW18.

496–20 204 Iowa159, 214NW598; Mo 28SW(2d)1001; Or 283P747; 60 OntL 267, [1927] 2DomLR991.

496–22 204 Iowa159, 214NW598.

496–24 See also 246Mich261, 224NW 621.

501–91½–New. The fact that a corporation continued to operate for many years after expiration of its charter and the time for winding up has been held not to cause its property to escheat to the state. 197NC355, 148SE464.

501–93 26 OhNPNS257; 294Pa127, 143 A582; TexCommnA 23SW(2d)329.

502–95 60 OntL267, [1927] 2DomLR 991.

504–14 321Mo 461, 12SW(2d)64.

506–32 321Mo 461, 12SW(2d)64.

509–77 [b] In Ohio.–23 OhA21, 155NE 147.

510–86 [c] In Philippines.–50 Philippine399.

515–32 See also 101Vt325, 143A384.

518–82 137 Okl 194, 278P654, 64ALR 699 (giving notes in payment not ultra vires).

519–99½–New. Where the company's agent helped the grantor to erase name in blank for the grantee he acted as the grantor's agent, the company not being involved until deed is delivered to it and then being impliedly authorized to fill in its name as grantee. 315Mo 1046, 287SW1042.

519–22½–New. The use of the word "successors" is necessary to convey the fee to a bishop in his capacity as a corporation sole. 93Fla849, 112S846.

519–22⅓–New. A deed to a bishop of the Roman catholic church and his successors in office and assigns forever conveys the fee to the bishop in his corporate capacity. 93Fla849, 112S846.

520–43 NC 154SE834.

520–47 35F(2d)916 (bill of sale to corporation of property including realty held to vest in corporation equitable title to such realty).

521–51½–New. Property acquired by a legal, existent corporation remains the property of the corporation until disposed of in the manner provided by charter or law. 168La664, 123S116.

521–62 176Ark642, 3SW(2d)685; 73 CalA193, 238P732; Mass 168NE106; Nebr 231NW18; 220AppDiv404, 229 NYS739; 198NC524, 152SE489; 299Pa 97, 149A103; Pa 151A815; TexCommnA 23SW(2d)329.

522–81½–New. Constitutional and statutory provisions forbidding issue of stock except for money paid, labor done, or property received, do not inhibit pledge of stock as collateral for property purchased, although not delivered until later. TexCivA 264SW513.

523–91½–New. Minority stockholder petitioning for valuation of shares of insolvent corporation must show that he recorded vote against selling its entire property. 126Me108, 136A456.

523–93 220AppDiv404, 221NYS739.

523–95 220AppDiv404, 221NYS739; 116 Okl 3, 243P160. [a] (2) So long as assets are available, creditor cannot complain whether they are called capital or surplus. 234Ky814, 29SW(2d) 566.

523–96 220AppDiv404, 221NYS739.

524–97½–New. , and creditors have no right to complain if the corporation is not thereby rendered insolvent. 14F(2d), 762.

524–1 66Utah103, 240P165.

525–29 66Utah103, 240P165.

527–67 66Utah103, 240P165.

528–74 Pa 151A815.

529–87 [b] In Texas.–CivA 8SW(2d) 699. (2) Under this latter statute contribution to building of hotel to upbuild business of citizens is for civic enterprise. CivA 8SW(2d)702. [c] **Changing beneficiary of insurance policy on president's life from corporation to creditor** is ultra vires if intended as gift. 34F(2d)598.

529–88 DC 37F(2d)798.

531–15 43 Ida540, 253P854, 857 [citCJ perGivens,J].

531–17 Imp [1930] 1DomLR465.

532–33½–New. Adequacy of description in deed of conveyance of personal property is immaterial where, by statute, offer and acceptance operate as transfer of title without deed. 66Utah 103, 240P165.

532–33 214Ala615, 108S591.

533–43 218Ala219, 118S402 (deed executed by corporation may be either witnessed or acknowledged).

534–61½–New. Neither the vice president of a corporation nor the corporation for which he acts can take advantage of a clerical error in a deed, which he executes for the corporation, making it appear that he is the president. 176Minn411, 223NW624.

534–66 [b] **Where officers illegally elected** by pledgee of stock, not entitled to vote thereon, execute deed of corporation's property, such deed is invalid. 22F(2d)268. [c] **Power to execute conveyance is derived from statute.**–Tex CivA 18W(2d)334.

535–82 [a] **Authority to sign deed** carries with it power to have signature acknowledged and to perform other things incidental to complete execution. 29 OhA130, 163NE51.

535–86 Tex 289SW128, 130 [citCJ].

535–93 TexCivA 289SW128, 130 [cit CJ].

536–12½–New. Seal on deed is prima facie showing that corporation was properly organized and the person signing the deed was duly authorized. 170 Ark1029, 282SW355.

539–60 254Mass317, 150NE155.

540–71½–New. An innocent buyer of corporate property from a purchaser, unlawfully sold at public auction, acquires no title, but is entitled to a return of the amount paid. 131Misc563, 227NYS435.

540–71⅓–New. An innocent purchaser's rights are not defeated by a mere irregularity in authorizing a sale. 29 OhA 123, 163NE57.

540–75 32 OhA97, 167NE597 (corporation is liable for street improvement assessment where contract to sell its property and stock was made after completion of improvement but before amount of assessment had been determined); 129 Okl 177, 264P169.

540–77½j–New. Unauthorized deed of corporation of its property to a minority stockholder will be canceled and an accounting decreed on suit by executor of a deceased stockholder. 239Mich290, 214NW135.

540–81 35Ariz238, 276P526 (in furtherance of its business); TexCivA 3SW (2d)842 (resolution of directors held to show sale of holdings and not of stock).

540–82 76CalA80, 243P710.

541–85 Pa 151A815.

541–87 43 Ida540, 253P854, 857 [citCJ perGivens,J]; 132 Okl 100, 269P357, 359(3dcase) [citCJ]. [a] **Who may complain of form of transaction.**–83CalA 679, 257P209.

541–88½–New. Transfer by corporation of practically all of its assets to a corporation of another state in consideration of stock thereof is in excess of its powers and fraudulent. 13F(2d)249.

541–88⅓–New. A going corporation has no implied power to dispose of its assets to another corporation for stock therein except there is an intention to wind up its affairs and distribute its assets. 13F(2d)249.

541-89 35**Ariz**238, 276**P**526 (realty corporation).
541-91 125 **Okl** 300, 258**P**910.
541-95 13**F(2d)**249, 251 [citCJ].
542-99 **Mass** 171**NE**830 (sale to another corporation in exchange for bonds).
542-1 216**AppDiv**439, 215**NYS**587.
542-3 **Miss** 108**S**158, 160 [citCJ]; 224 **AppDiv**14, 229**NYS**325.
542-10 **Miss** 108**S**158, 160 [citCJ].
542-11 **Miss** 108**S**158, 160 [citCJ].
544-34 261**Mass**556, 159**NE**70 (authority to mortgage franchise and property held not to authorize sale).
544-39 **Miss** 108**S**158, 160 [citCJ].
544-40 **Miss** 108**S**158, 160 [citCJ].
547-65 8**F(2d)**338; 260**Mass**145, 156 **NE**877.
547-66 8**F(2d)**338.
547-68½-New. Fact that mortgagor corporation had a balance to its credit will not affect the validity vel non of the mortgage. 159**La**627, 105**S**794.
552-70 9**PaDist&Co** 404.
556-19 122 **Okl** 277, 254**P**748; 59 **OntL** 293, [1926] 3**DomLR**864 (what constitutes "floating charge").
556-21 122 **Okl** 277, 254**P**748.
557-38 [a] **Conveyance by corporation of all of its property by deed of trust** is not conveyance of income or future earnings within statute. **Miss** 108**S**158. [b] **Words "income and future earnings"** mean gain or profit derived by corporation from its property or business. **Miss** 108**S**158.
557-41 **Miss** 108**S**158, 160 [citCJ].
557-43½-New. The franchise referred to in a statute providing that a mortgage conveying the franchise of any corporation shall not be valid against certain debts of the corporation is not the primary but the secondary franchise of a corporation. **Miss** 108**S**158.
558-50 **Miss** 108**S**158, 160 [citCJ].
559-73 93**Fla**849, 112**S**846; **Mo** 28**SW (2d)**1001; 161**Tenn**11, 28**SW(2d)**340, 69**ALR**1353; **TexCivA** 1**SW(2d)**661.
560-74 **Tenn** 29**SW(2d)**658.
561-75 93**Fla**849, 112**S**846.
562-84 **Mo** 28**SW(2d)**1001.
564-16 [b] **Conveyance of land, subject to escheat to state,** gives good title to purchaser, if made before action is taken. 115**Nebr**33, 211**NW**210, 62**ALR**489.
564-28 307**Mo** 336, 270**SW**638.
565-38 22**F(2d)**558 (solvent corporation); 34**F(2d)**533.
565-44 157**Md**51, 145**A**378; **TexCivA** 20**SW(2d)**1081.
566-49 171**Ark**817, 286**SW**971.
566-54 174**Minn**166, 218**NW**885, 886 [citCJ].
571-1 199 **Iowa**1285, 202**NW**14 (employment of broker to sell).
573-21 [a] **Matters not constituting incurring indebtedness.**–205 **Iowa**465, 218 **NW**321.
574-30 See also 34**Ariz**105, 268**P**773.
574-30½-New. To abridge a corporation's right of contract, a plain warrant for so doing must be found in the language of the statute. 207**Cal** 630, 280**P**101.
574-30⅓-New. A statute abridging the right of contract should receive a reasonable interpretation in the light of the purposes to be accomplished. 207 **Cal** 630, 280**P**101.
574-37 26 **OhA**190, 159**NE**852.
574-38 203 **Iowa**276, 211**NW**386; 115 **Nebr**770, 215**NW**102; 57**ND**550, 223**NW** 186.
575-60 34**Ariz**105, 268**P**773 (refunding bonds).
576-87½-New. Where a charter fixes the capital stock at a stated amount and fixes the debt limit at an amount not exceeding the capital stock, the debt limit increases with an increase of the capital stock. 168**Minn**234, 210**NW**29, 55**ALR**321.
576-89 86 **IndA**407, 157**NE**63. [a] **Corporation formed to continue business of individual,** when all assets are conveyed to corporation in exchange for corporate stock, is liable for debts owing to preëxisting creditors of such individual. 240 **IllA**425.
578-10 86**IndA**407, 157**NE**63.
579-28 See also 93**Fla**354, 114**S**444.
579-29 [a] **Corporation is liable** on implied contract for organization services of attorney employed by promoters, accepted by corporation. 102**WVa**119, 135 **SE**249, 49**ALR**668.
579-32 93**Fla**354, 114**S**444.
580-49 15**F(2d)**408.
580-50 **TexCivA** 21**SW(2d)**552.
580-51 153**Va**71, 149**SE**632.
580-53 174**Ark**843, 296**SW**713.
580-55 181**Ark**38, 25**SW(2d)**410.
581-58½-New. Ultra vires contracts are not always void as to everybody and for all purposes. **TexCivA** 300**SW**102.
581-62 114**Nebr**463, 208**NW**144.
581-65 37**F(2d)**72; 219**AppDiv**668, 220 **NYS**491, 493 [quotCJ]. But see **Minn** 232**NW**327.
582-66 219**AppDiv**668, 220**NYS**491, 493 [quotCJ].
582-67 219**AppDiv**668, 220**NYS**491, 493 [quotCJ].
582-69 But see 321**Mo** 815, 12**SW(2d)** 755.
583-77 26 **OhNPNS**257. [k] **If corporation under its charter may become surety for another corporation** only for consideration, proof of lack of compensation is required to sustain contention of ultra vires. 35**GaA**619, 134**SE**195.
585-82 84**CalA**611, 258**P**440; 169**Minn** 249, 210**NW**998; 198**NC**477, 152**SE**403.
585-84 34**Ariz**160, 269**P**68; 114**Nebr** 463, 208**NW**144; 132 **Okl** 221, 269**P** 1100; 153**Va**71, 149**SE**632. [f] **Recovery on implied contract is limited to** benefit actually received. **Ariz** 283**P** 273.
586-85 [a] **Recovery against corporation is limited to benefits received.**–34 **Ariz**160, 269**P**68.
587-3 251**Mich**478, 232**NW**355(2dcase).
587-9 See also 90**Fla**721, 106**S**576.
587-18 125**Kan**657, 266**P**104; **TexCivA** 293**SW**859, 861 [citCJ].
588-25½-New. **Of implied powers** contract for purchase of cotton seed by corporations selling gins involving more than one third of capital stock is ultra vires. **TexCivA** 277**SW**746.
588-25⅓-New. In the absence of estoppel, the custom of gin companies to purchase cotton seed for patrons does not make such contract ultra vires. **TexCivA** 277**SW**746.
589-27 203 **Iowa**276, 211**NW**386. See also 15**F(2d)**408.
589-29 114**Nebr**463, 208**NW**144.
589-35 See also 114**Nebr**463, 208**NW** 144.
590-46 173**Ark**402, 292**SW**364; 127 **Misc**627, 216**NYS**419. [a] **Contracts to purchase bonds** not signed by seller held not void for want of mutuality or seller's failure to sign. 173**Ark**402, 292 **SW**364.
590-54½-New. A contract properly authorized by a resolution of the directors need not be entered on the minutes of the corporation. 211**Ky**536, 277**SW**836.
590-54⅓-New. Nor need the statutory consent of stockholders be obtained for the contract of purchase constituting ordinary business of the corporation. 211**Ky**536, 277**SW**836.
590-54¼-New. Contracts of a public corporation are generally signed in its behalf by its executive officer. 161**La** 471, 109**S**34.
591-67 35**GaA**85, 132**SE**138 [citCJ].
592-77 35**F(2d)**467 (companies handling same product held bound by territory agreement previously made, though not signed); 67**CalA**488, 227**P** 787.
593-98 218**Ala**619, 119**S**833.
593-4 [a] **Signing for corporation by agent without authority** does not render corporation liable. **CalA** 283**P**957.
593-6 **MoA** 273**SW**237 (rubber stamp signature).
594-9 101**CalA**343, 281**P**641; 310**Mo** 104, 274**SW**770.
595-15½-New. Failure of one of two corporations named as lessees to sign lease contract does not release obligation of signer. 198**NC**675, 153**SE**158.
596-24 226**Ky**364, 10**SW(2d)**1077.
596-27 126**Me**550, 140**A**182.
596-30 153**Md**501, 138**A**665; 230**Mich** 498, 202**NW**933, 934 [citCJ].
596-31 230**Mich**498, 202**NW**933, 934 [citCJ].
597-45 **Fla** 130**S**421 (instrument signed by president and secretary and impressed with corporate seal held obligation of corporation).
597-50 3**Del** 124, 131**A**566; 198**NC**675, 153**SE**158.
599-56 **Man** [1926] 4**DomLR**1188.
601-78 7**PaDist&Co** 795.
602-87 153**Md**501, 138**A**665; 77**Mont** 477, 251**P**517; 157**Tenn**440, 9**SW(2d)** 704.
603-9 15**DelCh**248, 135**A**846; 77**Mont** 477, 251**P**517; 283**Pa**205, 129**A**71; 32 **PortoRico** 800.
604-17 See also 32**PortoRico** 800.
605-37 226**Ky**364, 10**SW(2d)**1077; 122 **Okl** 277, 254**P**748, 751 [citCyc]; **BC** [1925] 3**DomLR**757. [h] **Mining companies.**–77**Mont**477, 251**P**517.
607-44 26 **OhNPNS**257; 122 **Okl** 277, 254**P**748, 751 [citCyc].
607-46 See also 226**Ky**364, 10**SW(2d)** 1077.
608-66 [c] **Construction.**–128**Misc**413, 219**NYS**632.
608-67 [a] **By-law held not condition precedent.**–**BC** [1925] 3**DomLR**757.
608-77 [a] (7) It may lawfully contract to pay bonus. 153**Va**128, 149**SE** 503.
609-86 329 **Ill** 34, 160**NE**160. [b] (2) Provision held to refer to borrowing of sum not exceeding capital stock and not to notes issued and rate provided therein. 24 **OhA**475, 156**NE**606. [c] **Act authorizing corporation to borrow money at interest** held not to annul Interest Act as to usury. 329 **Ill** 34, 160**NE**160.
609-88½-New. A corporation is not limited to borrowing at the rate marked in issue of notes or bonds for borrowed money. 24 **OhA**475, 156**NE**606.
609-88⅓-New. Statute construed as not limiting the borrowing of money to rate of interest named in issue of notes or bonds. 24 **OhA**475, 156**NE**606.
609-88¼-New. **In Ohio** corporation may borrow money not exceeding amount of capital stock, and limitation on interest rate does not apply to such borrowing if maturing a year or more from date. 24 **OhA**475, 156**NE**606.
609-88⅓-New. Statutory limitation held inapplicable to borrowing of sum not exceeding amount of capital stock and maturing one year or more after date. 24 **OhA**475, 156**NE**606.
609-90 77**Mont**477, 251**P**517.
610-12 **NB** [1928] 3**DomLR**166; **Sask** [1928] 3**DomLR**51.
613-50 **NS** [1928] 1**DomLR**809 (priorities).
614-75 See also **Alta** [1928] 3**DomLR** 841.
616-14 But see 34**Ariz**105, 268**P**773.
616-21 See also 57**ND**550, 223**NW**186.
616-31 196**Wis**1, 220**NW**201 (certificate of authority issuable only on compliance with statute as amended before right to certificate became vested). See also 192**Wis**595, 213**NW**298.
616-32 150**Va**515, 143**SE**741.
617-38 249**NY**263, 164**NE**45.
617-39 249**NY**263, 164**NE**45.
617-41 249**NY**263, 164**NE**45.
617-42 249**NY**263, 164**NE**45.
617-47½-New. That bonds are payable to bearer or to registered holders does not affect their negotiability. 249**NY** 263, 164**NE**45.
617-54½-New. Where the meaning of bonds is doubtful, the court must adopt the construction most favorable to the holders in determining whether they are negotiable. 249**NY**263, 164**NE**45.
618-57 215**AppDiv**738, 212**NYS**726.
618-57½-New. Where interim certificates obligate company to deliver bonds to another "or order," it has been held such certificates are negotiable. 25 **OhA** 138, 157**NE**414.
618-59 [a] (2) Agreement of promoter to convey assets of old corporation. 15 **DelCh**248, 135**A**846. (3) Where president of corporation signed its notes as surety to enable it to secure money to keep it running, there is valid consideration for its delivery of its bonds to him as security. 206 **Iowa**172, 218**NW** 895.
618-60 57**ND**550, 223**NW**186 (outstanding stock).
618-61 134**Misc**417, 236**NYS**37.
619-74 26**F(2d)**961 (cancellation of corporation's mortgage securing return of collaterals is sufficient consideration); **TexCivA** 286**SW**285.

619-75 TexCivA 286SW285.
620-90 8F(2d)546; 55ND593, 215NW 89 (bonds issued as collateral for existing indebtedness).
620-91 26F(2d)961.
620-3 23F(2d)737.
621-7 200Wis48, 227NW308 (purpose of statute is protection of stockholders and creditors).
621-15 See also TexCivA 286SW285.
622-32 48 Ida153, 279P716 (provision of trust deed requiring certificate that bond was one issued thereunder may be waived).
622-47½-New. Debentures not void as against innocent purchaser for failure to file prospectus as required by statute. 58 OntL618, [1926] 3DomLR29.
623-57 249NY263, 164NE45.
623-65 15DelCh248, 135A846.
627-27½-New. Corporate bonds payable to registered holder may be transferable as between the seller and the purchaser. 240NY257, 148NE514.
627-31 [a] **Guaranty company, when certifying duplicate registered bonds,** does not give assurance against existing equities. 240NY257, 148NE514.
629-96 [b] 32F(2d)725. [c] **Pleading.**-223AppDiv48, 227NYS403. [d] **Parties.**-223AppDiv48, 227NYS403.
630-6½-New. Company receiving money for bonds sold is liable for a refund on rescission, regardless of the disposal of the money. 223AppDiv48, 227NYS 403.
630-7 33F(2d)162 (contract held underwriting agreement).
630-8 38F(2d)10.
630-9 [a] **Underwriter is agent of bondholders** under contract in which he reserves certain rights for their protection. 38F(2d)10 (bound as agent to disburse proceeds of bonds in accordance with agreement).
631-19½-New. Where an underwriting investment house assumes the sale of bonds, the supervision of the construction, and payment of the proceeds of the bonds to meet authorized expenditures, it becomes a trustee of such proceeds. 33F(2d)162.
631-25½-New. Laborers and materialmen held not entitled to proceeds of bonds remaining in underwriter's hands. 38F(2d)10.
631-44½-New. On a seller's breach of agreement to repurchase corporate securities on a certain future date at a stipulated price, the buyer had the option to retain certificates for the seller and sue for the contract price, or sell them as the seller's agent and sue for the difference between the contract price and the net proceeds of resale, or to retain the securities for itself and sue the seller for the difference between the contract price and the market price at the time and place of delivery fixed by contract. 28F(2d)268.
632-47 [b] **On accepting attempted transfer of bond without delivery** one takes title only of original registered holder. 240NY257, 148NE514.
632-49 240NY256, 148NE514 (effect of issue of duplicate bonds). [a] **Broker, as indorsee of registered bonds,** acquires right to them which he can protect. 240NY256, 148NE514.
632-49½-New. A mortgagor and trustee may contract that transfer of bond could be completed by registry when the bond is presented accompanied by properly executed power of attorney. 240NY 257, 148NE514.
632-49½-New. A contract to transfer registered bonds has been held to have consideration as they become more easily salable. 240NY257, 148NE514.
632-52½-New. A contract to transfer registered bonds has been held to have consideration where it was shown that they became more salable. 240NY257, 148NE514.
632-52½-New. Defendant's contract that bonds might pass from hand to hand is not subject to limitations that they must be presented for transfer before duplicate bonds are issued. 240 NY257, 148NE514.
632-52½-New. A purchaser of duplicate registered bonds cannot stop a trustee from transferring the original bonds on the corporation's books. 240 NY257, 148NE514.
632-52½-New. **Interim certificates.** Whether interim certificates are treated as intangible choses in action or as personal property, title to them is subject to transfer by indorsement and delivery. 25 OhA138, 157NE414.
632-52½-New. Instrument held not to constitute transfer of bonds. 130Kan14, 285P616.
632-67 8F(2d)338; 174Minn68, 218NW 451; 200Wis48, 227NW308.
633-68 23F(2d)737 (present and future advances).
633-70 200Wis48, 227NW308.
633-74½-New. The pledging by an officer of a corporation of redeemed bonds after maturity to secure outstanding debts of the corporation is unauthorized and does not entitle the pledgee to participate in foreclosure proceedings instituted by the holders of unredeemed bonds. 125 Okl 110, 256P737.
633-74½-New. Where a corporation does not own bonds pledged by its president, it cannot replevy same from pledgee on ground that pledgee is not holder in due course. 287Pa337, 135A 105. [a] **Evidence held sufficient** to show corporation suing to replevy bonds pledged by its president was not owner of bonds. 287Pa337, 135A105. [b] **Question held for jury** as to ownership of corporation's bonds pledged by its president. 287Pa337, 135A105.
633-74½-New. Bonds pledged by a mortgagor corporation as security for a loan to another corporation owning all the stock of the mortgagor corporation are enforceable, although no consideration passed to the mortgagor, where there are no stockholders or creditors of the mortgagor in a position to complain. 134Misc417, 236NYS37.
633-74½-New. A resolution of the board of directors expressly providing that, to secure a note of a certain amount, bonds in a larger amount be delivered, shows that the bonds were pledged and not delivered for the purpose of a sale. 33F(2d)945.
633-74½-New. An oral agreement for sale and release of bonds by a bank and application of the proceeds to a corporation's debt to it does not show that a pledge of the bonds was not intended. 200Wis48, 227NW308.
633-76 219Ala50, 121S54; 200Wis48, 227NW308.
633-77 See also 31F(2d)375.
633-78 8F(2d)546; 13F(2d)367; 23F (2d)737 (change in form immaterial).
633-79 23F(2d)737.
633-83½-New. Cancellation of a corporation's mortgage securing the return of collateral pledged by the mortgagee is sufficient consideration for substituting bonds in place of such mortgage. 33 F(2d)945.
634-91 [a] **Where debt exceeds par value,** and in no event could creditors receive dividend, no one can complain of rate at which pledgee accounts for bonds. 200Wis48, 227NW308.
634-92 But see 200Wis48, 227NW308.
634-95 [a] **State commission's permission** to sell pledged bonds at no more than stated discount would not preclude court from authorizing pledgee to account therefor at greater discount within statutory limit. 200Wis48, 227NW308.
634-96 200Wis48, 227NW308 (where contract silent, statutory percentage applies).
634-99 8F(2d)546.
634-1 46 Ida534, 269P82.
635-19½-New. Fact that pledged bonds had past-due coupons attached does not put pledgee on notice of infirmities in pledgor's title. 287Pa337, 135A105.
635-19½-New. In British Columbia a pledgee of debentures may apply to the trustee to enforce the trust mortgage. BC [1929] 2DomLR209.
635-33 [a] **Right to particular security.**-Iowa 228NW103.
636-40½-New. Indorsee of registered bonds acquires right to them which he can protect, by compelling transfer on the trustee's books. 240NY257, 148NE 514.
636-40½-New. The right to have registered bonds transferred is not lost by the issuance of duplicate bonds. 240NY 257, 148NE514.
636-42 32F(2d)658.
636-46½-New. Where interim certificates are negotiable because they obligate company to deliver bonds to another "or order," innocent purchaser of them for value is protected. 25 OhA138, 157NE414.
637-54 [a] **Illustrations.**-240NY257, 148NE514.
638-80½-New. **Interim certificates.** Title of innocent purchaser for value of negotiable interim certificates from owner's transferee is not affected by owner's acknowledgment on such certificates of receipt of bonds at time bonds were still retained by the company, made in conformity to regular business practice. 25 OhA138, 157NE414.
640-20½-New. Bondholders induced to purchase bonds by fraudulent representation of corporation holding securities in trust may sue in equity for accounting, appointment of trustee, and sale of the securities for bondholders' benefit, 176Ark278, 28SW(2d)1096, 57ALR 296.
640-20½-New. and such action is not premature where the prayer is only for deficiency after sale of the securities. 176Ark278, 28SW(2d)1096, 57ALR296.
641-27 316Mo 1257, 293SW382, 383 [cit CJ].
643-67 245NY343, 157NE261.
645-4½-New. A person who, having no interest to protect, voluntarily attempts to purchase bonds after they have been paid, in excess of the power of the corporation, cannot be subrogated to the rights of the original bondholders under their deed of trust, as against a subsequent mortgagee, in the absence of proof that in the transaction in which he acquired such bonds he acted under an honest mistake of fact, or that he was imposed upon in some manner so as to justify the intervention of equity. 125 Okl 110, 256P737.
645-4½-New. Invalidity of a pledge of bonds does not follow them into the hands of a third party, to whom they were delivered after return of the bonds to a corporation. 26F(2d)961.
645-6 32F(2d)800 (holder of convertible bonds is not required to accept principal and interest as complete discharge). [b] **Where consent of stockholders was not necessary for original indebtedness under charter,** it is not necessary for issuance of refunding bonds. 34Ariz105, 268P773. [c] **After surrender of bonds and acceptance of amount deposited** for purpose of redemption, bondholder's right of conversion is lost. 37F(2d)220. [d] **Acceptance of money deposited for purpose of redemption** held to estop bondholders of seven per cent bonds who wished to assert right to convert them into six per cent bonds. 37F(2d)220.
645-12 37F(2d)220.
645-15 32F(2d)800 (offer to deposit held sufficient under circumstances).
645-21½-New. A bondholder may recover damages from a corporation for refusal to convert bonds in accordance with contract. 32F(2d)800 (cause of action extinguished by accepting payment).
646-43½-New. Exchange of stock for alleged valueless bonds held not ratified as matter of law by acceptance of dividends on stock. 135Misc851, 241 NYS579.
647-69 16F(2d)654. [a] **Bonds extending over period longer than life of corporation not invalid.**-34Ariz105, 268P 773.
648-90½-New. The obligation of a corporation to redeem and cancel annually a certain amount of par value of outstanding bonds is valid and binding. 229Ky556, 17SW(2d)722.
653-3 46 Ida534, 269P82.
658-39 168Gal, 147NE80.
658-47 241Mich426, 216NW922. [a] 130Misc846, 225NYS385.
658-49 [a] **To extent of antecedent payment, lien of mortgage is invalid** in case of mortgage issued to officer in return for assumption of corporate in-

debtedness. 26F(2d)937.
658–52 43 Ida343, 251P1051.
658–55 315Mo 849.
658–56 246Mich261, 224NW621; 315Mo 849, 288SW359.
659–66 But see 137Misc815, 245NYS92.
659–66½–New. Mortgages, in order to bind the corporation, must be its act, either by its corporate action or by its ratification or acquiescence, or because made by its authorized agent. NJCh 146A873.
661–21 137Misc815, 245NYS92.
662–48½–New. A resolution authorizing the president and secretary to issue bonds and to secure payment by executing a mortgage lien on all property of the corporation, both real and personal, includes authority to mortgage real estate covered by contracts for deeds owned by the corporation where the corporation owns no other real estate. 122 Okl 277, 254P748.
662–65½–New. The execution of a mortgage without previous authority may be ratified and confirmed by payment of interest on bonds and other acts showing a clear recognition of the mortgage by the corporation. 122 Okl 277, 254P 748.
663–68 166La457, 117S554.
663–69 See also 166La457, 117S554.
663–71 128Misc413, 219NYS632.
663–72 245NY559, 157NE856.
663–73 85Colo 146, 274P826. But see 125Misc839, 211NYS468.
663–81½–New. Advancing present value for a mortgage does not take such mortgage out of statute requiring consent of stockholders. 125Misc839, 211NYS 468.
663–81⅓–New. A stockholder who voted for the execution of a mortgage at a stockholders' meeting cannot withdraw such consent except by vote at a proper meeting or by written notice filed with the corporation. 246Mich261, 224NW 621.
665–19½–New. When a resolution by stockholders authorizing a corporation to execute a mortgage on its property has been entered on the minutes of the corporation, but the minutes are lost or destroyed before execution of the mortgage, the corporation may by vote of its stockholders pass a similar resolution. 168Ga153, 147SE392.
665–23 315Mo 276, 286SW3. [a] (2) That certain stockholders received no notice of special meeting or did not assent to mortgage, and that notice was not published as required, did not invalidate mortgage securing return of securities which mortgagee had pledged to extend mortgagor corporation's credit. 33F(2d)945.
665–30 246Mich261, 224NW621.
665–35 168Ga153, 147SE392.
665–39½–New. Where holders of more than two thirds of stock participate in effecting a first mortgage to a bank and a second mortgage to a stockholder, both mortgages were held valid liens. 128 Misc413, 219NYS632.
665–43½–New. A resolution authorizing pleading of all securities, commercial paper, bills and accounts receivable, claims, or any other property, is not broad enough to authorize execution of mortgage. 128Misc413, 219NYS632.
666–52½–New. That stockholders' written approval was not filed in a corporation's office has been held immaterial. 166La457, 117S554.
666–53 128Misc413, 219NYS632.
666–56 26F(2d)937; 246Mich261, 224 NW621.
667–74 But see 137Misc245, 242NYS671.
667–82 181Ark798, 27SW(2d)1008.
667–87 29F(2d)975.
668–95 170Ark50, 278SW643.
668–4 43 Ida343, 251P1051; 292Pa228, 140A900. [f] 43 Ida343, 251P1051.
669–10 [a] **Informal delivery of trust mortgage is sufficient.**–292Pa228, 140A 900.
669–20 49Philippine857.
669–28 170Ark50, 278SW643.
669–29 26F(2d)937; 175Ark133, 298 SW857.
670–37 [a] **Where property was conveyed to president, mortgaged, and reconveyed to corporation,** transaction held equivalent to mortgage by it. 198 NC705, 153NE327.
671–61½–New. or a provision excluding raw material acquired or taken from the mortgagor's lands and used in its manufacturing, 8F(2d)35.
671–61⅓–New. and permitting the corporation prior to any default to sell its products and retain the proceeds. 8 F(2d)35.
671–65 198Cal 261, 244P325, 45ALR781 (trust deed for benefit of creditors held not in violation of California statute).
671–71½–New. Clause covenanting that a corporation controlled by mortgagor corporations would not dispose of property is of no binding force and effect. 23F(2d)357.
671–74 235 IllA462; 159La627, 105S 794, 798 [quotCJ]; NJCh 146A873; 128 Misc413, 219NYS632; 130Misc846, 225 NYS385. [a] (1) NJCh 146A873 (particularly where stockholders knew of it but make no objection). (7) Where requisite number of stockholders acquiesce and corporation returns benefits. 26 F(2d)961.
672–39 See also 137Misc815, 245NYS92.
673–3 253NY190, 170NE887. [a] **Covenant against encumbering property** is not breached by lease of right of way over property for which adequate rental is received. 18F(2d)515.
673–15 [a] **Real property not specifically described** was included in mortgage describing plant and real property of manufacturing company with provision including all property. 26F(2d)937.
673–19 42F(2d)886.
674–25 146Wash543, 264P705 (estoppel to deny properly included).
674–41½–New. A clause covering "choses in action" includes a claim in a suit by a corporation when it executed a mortgage. 8F(2d)35.
674–41⅓–New. A deed of trust covering "all those certain tracts or parcels of land" does not include personal property. 194NC44, 138SE349.
674–41¼–New. although a bond secured by a deed of trust described the property as all the assets of such company. 194NC44, 138SE349.
675–49 253NY190, 170NE887. [a] **Mortgage of after-acquired property** by public service corporation is valid. 6 F(2d)179.
675–57 [a] **Mortgage covering after-acquired property** covers property subsequently required by mortgagor or by another by virtue of mortgagor's rights. 6F(2d)179.
675–62½–New. Clause does not include land to which corporation never had title, although subsequently held in trust for corporation by one who subsequently acquired title. 8F(2d)35 (not "realty" under statute).
675–62⅓–New. A mortgage by a public utility corporation is valid in respect to after-acquired property, necessary and appropriate for its physical operation under its franchise. 248NY322, 162NE 93.
675–70 146Wash543, 264P705.
676–87 See also 246 IllA457.
677–97½–New. A trust agreement, although specifically stated to secure subscribers to corporate bonds prior to formation of corporation, but further providing that it was on further trust for benefit of all holders, secures the whole bond issue and not merely subscribers who paid their subscriptions prior to formation of corporation. 216AppDiv 380, 215NYS200.
677–4 206 Iowa75, 218NW622. [a] **Bond holder creditors and trustee in bankruptcy** by accepting bonds for their debts acquire no rights superior to bonds turned over to mortgagee in substitution of unrecorded mortgage. 33 F(2d)945.
681–66 137Misc245, 242NYS671.
682–87 260Mass145, 156NE877.
682–90 But see 33F(2d)945.
682–99 NJCh 146A873.
683–4½–New. An act providing that a mortgage by a corporation cannot exempt property from execution for satisfaction of a judgment against the corporation for labor and clerical services, applies only to judgments by employees, and not by an officer. 196NC603, 146 SE576.
683–4⅓–New. In proceedings, by a purchaser of corporate property on foreclosure, to enjoin the sale of property to satisfy a judgment against a corporation, for clerical services performed for the corporation, a finding, that the judgment creditor gave notice of claim against the corporation, did not determine the controversy. 196NC603, 146SE576.
683–4¼–New. A mortgage or deed of trust, to secure creditors of corporate property, is void as against judgments recovered on claims for labor and clerical services performed in behalf of the corporation. 196NC603, 146SE576.
683–11 196NC603, 146SE576.
685–61 [a] **Title of trustee.**–25F(2d) 807. [b] **Powers of trustee under particular contracts.**–170La1036, 129S628.
686–71½–New. **Reference in bonds to mortgage.** Where reference is made in bonds to the mortgage, securing them as to rights of holders in collecting debt, provisions therein govern as to respective rights of trustee and bondholders. 15DelCh31, 131A202.
686–71½–New. **Rights as between trustee and individual bondholders.** 15Del Ch31, 131A202.
686–71¼–New. First and second mortgagees are not chargeable with receivership expenses under sale by agreement, beyond those which would necessarily be incurred by them in realizing on property by foreclosure. 196Wis581, 219NW439.
686–71⅓–New. First and second mortgagees are properly allowed interest on mortgages under some circumstances. 196Wis581, 219NW439.
686–73 40F(2d)841.
686–89 [b] **Certificate does not render trustee liable as guarantor.**–292Pa228, 140A900.
686–90 [a] (4) Guarantee company held not liable to holder of duplicate bonds. 240NY257, 148NE514.
687–3½–New. Where decree of foreclosure directs payment of taxes from proceeds of sale, trustee is general creditor of corporation for amount paid for taxes levied before receivership, which were unpaid through fault of mortgagor, 8F (2d)35.
687–3⅓–New. but for those levied after receivership the trustee is entitled to reimbursement from any funds applicable to such expenses. 8F(2d)35.
687–3¼–New. A corporation under provision of a trust deed may collect collateral placed with a trustee and retain the proceeds thereof. Iowa 226NW85.
687–3⅓–New. Where a trust deed requires the trustee to surrender mortgages requested by the trustor when the amount of the mortgages held exceeds the amount of bonds by one hundred per cent. the actual, and not the par value of the mortgages retained must exceed such percentage. Iowa 228NW103.
687–4 Iowa 226NW85. [a] **Provision requiring trustee to surrender mortgages** when amount of mortgages held exceeds amount of bonds by over one hundred per cent. does not authorize substitution of less valuable securities placed with trustee for purpose of creating excess. Iowa 228NW103.
687–6 See also Iowa 226NW85.
688–15½–New. A trustee consenting to a change of securities without authority has the burden of proving that the substituted securities were as valuable as the original securities. Iowa 228NW 103.
688–25 Iowa 226NW85 (permitting withdrawal and substitution of collateral); 253NY369, 171NE574. [a] **Permitting loss of security.**–Iowa 228 NW103. [b] **Permitting substitution of securities.**–Iowa 228NW103.
688–37 253NY369, 171NE574 (measure of damages). [a] **Provision for protection of trustee.**–253NY369, 171NE 574.
688–39 253NY369, 171NE574.
689–43½New. Trustee certifying duplicate bonds issued by the mortgagor on a false affidavit of the owner is not

liable to the holder thereof for dereliction of duty as trustee. 240NY257, 148NE514.

689-43½-New. Contract of trustee that registered bond might pass from hand to hand and transfer to be complete on registry has been held not subject to limitation that they must be presented for transfer before duplicates are issued. 240NY257, 148NE514.

689-43¼-New. A purchaser of a duplicate bond cannot stop the trustee from transferring originals on the corporation's books. 240NY257, 148NE514.

689-43½-New. A trustee certifying duplicate bonds on presentation of false affidavit does not give assurance to a purchaser thereof against the existence of superior equities and title of the owner of original bonds. 240NY257, 148NE514.

689-46 253NY369, 171NE574 (not liable because bonds worthless). [a] **Failure to record mortgage.**-292Pa228, 140A900.

689-48 149Wash400, 271P82.

689-64 253NY369, 171NE574.

690-72 149Wash400, 271P82.

690-73 149Wash400, 271P82.

690-88 149Wash400, 271P82.

691-4 206 Iowa562, 218NW306.

691-24 196Wis581, 219NW439 (rights not waived).

692-25 Iowa 226NW85, 89 [citCJ] (entitled to value of collateral at time of unauthorized conversion).

692-28 [b] **Suit in equity and not action on bonds** is proper remedy of bondholder where trustee is derelict or disqualified. 206 Iowa562, 218NW306.

693-46½-New. Managing corporate officers, participating in conversion by withdrawal and substitution of collateral securing a bond issue, are liable to bondholders. Iowa226NW85, 89 [citCJ] (not absolved by trust deed precluding claim against stockholders).

693-51 15DelCh31, 131A202.

693-56½-New. A requirement that a trustee prosecute all actions against corporations does not apply to an action by a particular bondholder not affecting the bondholders as a class. 32 F(2d)800 (action for refusal to convert bonds).

694-73 [1927] AC 369, [1927] 1DomLR 1121, [1927] 1WestWkly869.

694-73½-New. In Nova Scotia arrangement sanctioned by two thirds of bondholders accepting part of bonds' value in cash and certain preference shares and releasing company was held proper exercise of power of modification. NS [1930] 2DomLR309.

696-20 7F(2d)280.

696-27½-New. The corporation may question the validity of a mortgage. 125 Misc839, 211NYS468 (as affected by consent of stockholders).

697-45½-New. A mortgage participation certificate is not an assignment of the mortgage, where the issuing company remains the mortgagee of the record and is to release or foreclose in its own name. 148Md234, 129A641.

697-48½-New. Refunding. Payment of notes secured by portion of mortgage bonds providing for delivery of bonds to trustee on payment of notes as further security under mortgage is not a refunding of the bonds so that payments into sinking funds on outstanding bonds are payable on such bonds. 215AppDiv 122, 213NYS314.

697-50 174Minn525, 219NW921.

698-65 26F(2d)961.

698-84½-New. The court may not so limit a trustee's right to foreclose a mortgage securing bonds of a private corporation, for which receivers have been appointed, as to deprive the trustee of the full amount of its lien. 31F (2d)270.

699-87 31F(2d)270.

709-20 42F(2d)886. [b] **Buying claims** of creditors to procure consent to sale of two thirds as provided in deed and receiving amounts of assignments as credits on purchase held not per se fraudulent. 198Cal 261, 244P325, 45ALR 781. [c] **Finding that sale of property** under trust deed was authorized by consent of requisite number of creditors held sustained by evidence. 198Cal 261, 244P325, 45ALR781.

700-24 [a] **Failure to give notice to** corporation of negotiations for sale, where not required by deed, does not show fraud. 198Cal 261, 244P325, 45 ALR781.

701-38½-New. Trustee for bondholder seeking to foreclose must pay conditional sales contract for machinery as preferred lien without delay. 37F(2d) 117

701-38⅓-New. Payment or recognition of preferred lien expenses is condition precedent in action to foreclose. 37F(2d)117.

701-38¼-New. Payment or recognition of preferred claim expenses incident to qualification of receiver is condition precedent in action to foreclose. 37F(2d) 117.

701-40½-New. Consolidation of foreclosure cases with receivership does not take from mortgagees right to strict foreclosure. 42F(2d)886.

702-71 15DelCh31, 131A202.

703-72 15DelCh31, 131A202; 206 Iowa 562, 218NW306.

703-73 [a] **Allegation that trustee, because of partiality, will be less aggressive than bondholder in prosecuting action** does not entitle bondholder to maintain action. 206 Iowa562, 218NW 306.

704-95 251 IllA135.

704-1½-New. Where the president of a corporation signed its notes as surety and received its bonds as security and was thereafter required to pay the notes, he is entitled to sue to foreclose the trust deed given to secure the bonds. 206 Iowa172, 218NW895.

704-10 46 Ida534, 269P82.

705-32½-New. Mortgagees cannot require accounting by trustees in action to which trustees are not parties. SC 155SE141.

706-61 15F(2d)434.

707-70½-New. Rights of intervening bondholder are no higher than those of corporation. 291Pa188, 139A856.

707-73 [a] **Connection between officer and directors** of separate corporations does not make mortgage between them fraudulent. 175Ark133, 298SW857.

707-76½-New. Intervening petition is insufficient if, on its face, it appears that the petitioner is not entitled to assert his right. 129 Okl 222, 264P164.

707-76⅓-New. 129 Okl 177, 264P169.

707-77 [a] **Petition held insufficient** where it failed to show real legal interest, or that receiver was improperly administering property, or that stockholder had unsuccessfully sought relief from corporate officers, or that intervention was necessary. 15F(2d)434.

709-14 42F(2d)886.

709-25 43 Ida343, 251P1051.

709-33½-New. An answer interposing a counterclaim for rescission has been held a sufficient basis for proof of substantial injury to a corporation. 97 Fla788, 122S264.

709-37 175Ark133, 298SW857 (evidence held to show execution in fact by mortgagor, though name of mortgagee by obvious mistake was signed in place of mortgagor).

711-75½-New. Where a complaint alleges that plaintiff is owner of bonds in a stated amount, but the proof shows that he is owner of part of them and pledgee of the remainder, the court may grant relief consistent with the case made by the complaint and within the issues. 46 Ida534, 269P82.

713-35½-New. A receiver in foreclosure is not entitled to take charge of property not covered by mortgage. 27F(2d) 201.

713-35⅓-New. The court could not appoint receivers in the absence of an application by the mortgage trustee. 31 F(2d)270.

713-35¼-New. and the court has no authority to direct suit by a receiver to recover bonds exchanged by a corporation for stock in the absence of prayer for relief involving the validity of the transfer. 27F(2d)201.

713-38 42F(2d)886. [a] **Sale of real and personal property in bulk** is unauthorized under some statutes. 146Wash 543, 264P705.

713-50½-New. It is discretionary with the court to fix an upset price. 15F(2d) 434.

714-58½-New. The fact that a majority of the bondholders joined in a reorganization plan does not affect their rights under mortgages and indentures to control acts of trustee. 15F(2d)434.

714-66 15F(2d)434.

714-77½-New. A purchaser under a mortgage describing realty by metes and bounds is liable to the receiver for personalty appropriated by him under sale. 217AppDiv490, 216NYS611.

716-15 42F(2d)886.

718-62½-New. Funds for discharge of corporate mortgages are properly charged with so much of receivership expenses as were for benefit of mortgagees. 196Wis581, 219NW439.

720-8½-New. Compensation of corporation receivers and receivership expenses are not proper charges on a fund realized from the sale of property on foreclosure of a corporation mortgage, as against third persons, asserting liens thereon, who are not parties to the receivership proceeding, never consented to the receivers' appointment, and received no benefit therefrom. 31F(2d) 270.

720-8⅓-New. Corporation receivers and their attorneys cannot look for compensation to the proceeds of sale of property on foreclosure of a corporation mortgage, unless the mortgagee consented to the receivership or derived some benefit therefrom. 31F(2d) 270.

721-31½-New. Under a provision of a mortgage authorizing redemption on any interest due date, recitals in additional interest coupons held to show that such was interest and not bonus to purchasers. 156Miss22, 125S429.

721-37 52ND806, 204NW673. [b] **Security for existing debt.**-Corporation may give chattel mortgage on its property to secure existing debt. 52ND806, 204NW673.

721-46½-New. The validity of a chattel mortgage executed by an authorized officer is not affected by the fact that it was not executed in the office of the corporation where the sheriff had previously locked such office in attempting to levy upon corporate property to satisfy a personal debt of an officer of the corporation. 52ND806, 204NW 673.

721-46½-New. Where a bank released a chattel mortgage securing a note on the promise of payment by a majority stockholder, satisfaction of the mortgage cannot be construed as knowledge by the bank of facts concerning the organization of the corporation. MoA 148SW(2d)48.

722-59 30F(2d)555; 85Colo 146, 274P 826.

722-66 30F(2d)555.

723-73 30F(2d)551; 30F(2d)555. See also 85Colo 146, 274P826.

723-82 52ND806, 204NW673.

723-94 34F(2d)962 (place for recording).

724-23 5F(2d)451; 16F(2d)589, 49ALR1503; 42F(2d)45; 77Mont477, 251P 517; 129Misc822, 222NYS733.

725-25 77Mont477, 251P517.

726-32 [a] **Loans are made both for and by guarantee company,** authorizing its indorsement of notes of ranch company to bank lending money, where guarantee company owns bank and two thirds of stock of ranch company. 34 Wyo 368, 243P596.

727-64½-New. A corporation's notes, reciting that they were issued under a trust agreement, to which reference was made for description of terms under which the notes were issued, are held sufficiently to incorporate trust agreement as part of notes. 14F(2d)912.

727-64⅓-New. Limitation in corporation's trust agreement on noteholders' right to sue is held not inconsistent with makers' promise contained in note. 14F(2d)912.

727-64¼-New. Trust notes issued by a corporation in accordance with a trust

instrument with deposit of collateral securities, in payment for legal services, are issued for general corporate purposes. 32**F(2d)**691.

728–90 **CalA** 271**P**771.

729–99½–New. The mere fact that the note was improperly signed by the company as surety would not outlaw it as property which the company was authorized to purchase and deal in. 35 **GaA**619, 134**SE**195.

729–99⅓–New. This rule is applicable where the corporation has and exercises its power under its charter to purchase obligations of other corporations and to execute notes for indebtedness incurred in the conduct of its business. 35**GaA**619, 134**SE**195.

729–3½–New. The individual check of corporation's branch manager is not the check of the corporation just because it is rubber stamped after the individual signature with the corporation name. 126**Misc**329, 213**NYS**348.

730–21½–New. As in case of a natural person, the seal of the corporation is not necessary to the validity of a promissory note. 3**Del** 124, 131**A**566.

730–24 140**Wash**495, 249**P**979.

730–29 **Va** 152**SE**562.

731–47 125 **Or**122, 266**P**236.

732–60 22**AlaA**68, 112**S**543; 36**GaA**340, 136**SE**541; 233 **IllA**302; 252 **IllA**508; 201 **Iowa**240, 207**NW**121; 262**Mass**242, 159**NE**625; **Mass** 166**NE**840; **Va** 152**SE** 562. [b] **Accommodation indorsement is ultra vires and void.**–233 **IllA**302.

733–71 13**F(2d)**147; 16**F(2d)**589, 49 **ALR**1503; 252 **IllA**508. [a] (14) Note executed by corporation and individual in connection with refinancing of joint and several debts is not accommodation note. **Va** 153**SE**841.

734–79½–New. or power to borrow money and give security therefor, **Mass** 166**NE**840.

734–86 See also 35**GaA**619, 134**SE**195.

734–88 13**F(2d)**147.

734–91 **Va** 152**SE**562 (ratification is not necessary by treasurer where it was within scope of his authority).

735–93½–New. A corporation's indorsement of notes is not prejudicial to creditors if the proceeds were used in aid of corporation. 13**F(2d)**147.

735–97 49**SD**476, 207**NW**471.

735–4½–New. In such case it will be presumed that the indorsement is a corporate act. 124 **Or**379, 264**P**452.

735–11½–New. Where an officer indorses notes in settlement of personal obligations, the holder presumptively acquires no title. 112**Me**108, 131**A**138.

736–15 36**GaA**340, 136**SE**541.

736–32½–New. Constitutional provisions in some jurisdictions declare all fictitious increase of stock or indebtedness void. 8**F(2d)**338.

737–36 9**LaA**535, 119**S**725.

737–41 203 **Iowa**792, 206**NW**586.

737–43 **MoA** 274**SW**87, 88 [citCJ].

738–53 36**GaA**340, 136**SE**541.

738–54 36**GaA**340, 136**SE**541; **Mass** 166 **NE**840.

738–56 36**GaA**340, 136**SE**541.

738–69 **Va** 152**SE**562. But see **Mass** 166**NE**840.

738–71 **Va** 152**SE**562.

739–75 **Ariz** 286**P**822; 170**Ark**984, 282 **SW**371; **Minn** 232**NW**327 (charter held not to confer power to become accommodation guarantor); 222**MoA**586, 292**SW**1079, 1082 [quotCJ]; 130**Misc** 348, 223**NYS**817; 108**WVa**686, 152**SE** 635; **Man** [1925] 3**DomLR**407 (cannot execute guaranty outside specific powers).

739–77 **Man** [1925] 3**DomLR**407 (statute granting common-law capacity).

741–18 16**F(2d)**589, 49**ALR**1503; **Ariz** 286**P**822; 35**GaA**619, 134**SE**195; 260 **Mass**134, 156**NE**893; 131**Misc**697, 227 **NYS**292; 52**ND**51, 203**NW**176; **BC** [1929] 3**DomLR**638.

742–46 321**Mo** 461, 12**SW(2d)**64.

743–59 22**F(2d)**727 (agreements to honor drafts for purchaser in course of authorized business are valid).

744–74 16**F(2d)**589, 49**ALR**1503.

746–15 See also 43 **Ida**158, 252**P**182.

746–24 130**Misc**348, 223**NYS**817.

747–45 **TexCivA** 294**SW**320.

750–95 160**La**371, 107**S**143.

750–12 131**Misc**361, 226**NYS**667.

755–90½–New. Cancellation of mortgage. Under a statute requiring authorization to cancel record of mortgage, given to corporation, to be indorsed on mortgage, authorization on a separate piece of paper is insufficient. 104 **NJL**229, 140**A**679.

756–10½–New. A suit against a corporation for breach of a contract to furnish goods of its own and subsidiary corporation was held proper under evidence showing that the goods of both corporations were intended under the contract with defendant alone. 242**NY** 106, 151**NE**146.

756–10⅓–New. Contract for sale of land is not "sale" within Stock Corporation Law § 20 and therefor not void for having been executed before the stockholder's consent was obtained. 215**AppDiv**371, 214**NYS**91.

756–10¼–New. Assignment of corporation's claim for conversion is not invalid because of bankruptcy of majority stockholder. 111**Conn**475, 150**A**693.

756–13 176**Ark**642, 3**SW(2d)**685.

757–20½–New. Consent of stockholders is not necessary for ordinary sales in the ordinary course of business. 214 **AppDiv**668, 213**NYS**213.

757–20⅓–New. Fact that one party had bought all stock of corporation would not bring to an end lease of corporation existing at time of purchase. 13 **LaA**222, 127**S**47.

759–49 **Ariz** 284**P**350.

759–62 27 **OhA**345, 161**NE**353 (execution by corporation by its managing officer held sufficient).

760–78 20**F(2d)**924 (employing stevedore to load lumber cargo held not ultra vires).

761–85 **DC** 37**F(2d)**798 (medical and surgical aid).

762–4 **RI** 129**A**264 (agreement to pay as much as paid to another employee).

762–5 153**Md**501, 138**A**665.

762–7 **Ala** 130**S**320 (broker to sell all corporation's property).

762–8 [b] **Executors of New York resident,** obtaining consent of Missouri authorities, could compel Missouri corporation to transfer stock of resident in New York, though Missouri laws required ancillary administration. 131 **Misc**586, 227**NYS**587.

763–19½–New. The resolution of directors to issue paid-up stock to an attorney for past legal services to the corporation is valid and binding. 29 **OhA**88, 163**NE**53.

764–33 88**CalA**784, 264**P**521.

765–81 137**Misc**888, 244**NYS**82; 149**Va** 906, 141**SE**860 (wrongs to person). [c] **Illegal transactions.**–84 **IndA**522, 148**NE** 205.

767–83 116**Tex**207, 288**SW**402; **Tex CivA** 6**SW(2d)**432. [c] **Authorization of manager to "hedge" grain** bought, as deemed necessary, held not to authorize speculating in futures and options. 84 **IndA**522, 148**NE**205. [d] **Cashier of public bathing establishment** refusing to admit colored man is chargeable to corporation where cashier received no instructions as to admitting colored persons. 126**Misc**335, 213**NYS**379.

768–86 150**Md**24, 132**A**278.

768–89 24**F(2d)**383 (actual control and operation, not mere ownership, essential); **NJ** 148**A**741. But see 244**NY**84, 155**NE**58.

769–92 See also 205**Cal** 515, 271**P**1060.

769–93½–New. Under some statutes, a corporation organized as a nonprofit corporation is not liable in damages for the torts of its members. 240**Mich** 372, 215**NW**294.

769–99 176**Ark**278, 2**SW(2d)**1096, 57 **ALR**296.

770–8 149**Va**906, 141**SE**860.

771–17 **TexCivA** 279**SW**581.

772–21 See also 6**LaA**270.

772–27 119**Kan**576, 240**P**970.

772–30 119**Kan**576, 240**P**970 (evidence held to show nonliability of certain defendant stockholders as nonparticipants in tortious action charged); 13**LaA**468, 126**S**733.

775–58 226**Ky**364, 10**SW(2d)**1077; 80 **Mont**426, 260**P**709; 137**Misc**888, 244**NYS** 82.

775–62 96**CalA**192, 273**P**1074; **CalA** 284**P**719; 34**PortoRico** 338.

775–63 13**LaA**468, 126**S**733.

776–73½–New. Conspiracy to eliminate competitor entered into by manager renders corporation liable. **TexCivA** 277**SW**438.

776–74 252 **IllA**92; **Mass** 166**NE**550(2d case); **TexCivA** 282**SW**854; 149**Va**906, 141**SE**860.

777–89 219**Ala**546, 122**S**677; 196**NC** 610, 146**SE**573.

779–7 82 **IndA**504, 146**NE**835; **MoA** 9 **SW(2d)**543; 149**Va**906, 141**SE**860.

780–8 252 **IllA**92; 189**NC**658, 127**SE** 710; **TexCivA** 283**SW**880; 149**Va**906, 141**SE**860 (insulting words); 150**Va**101, 142**SE**387. See also 82 **IndA**504, 146 **NE**835.

780–11 37**GaA**684, 141**SE**423.

781–16½–New. As to conditionally privileged statements by a manager having foundation, a corporation is not liable for slander. 197**Wis**432, 222**NW** 451.

782–24 **DC** 39**F(2d)**512; 223**Ky**812, 4 **SW(2d)**741; 33 **OhA**488, 169**NE**716; 143 **Okl** 196, 288**P**309; 142**SC**125, 140 **SE**443 (basis of award); 116**Tex**207, 288**SW**402; 149**Va**906, 141**SE**860.

783–26 **TexCivA** 300**SW**201 (where salesman neither official nor in authority, court properly refused submission of exemplary damages).

783–31 **DC** 39**F(2d)**512; 116**Tex**207, 288**SW**402; 149**Va**882, 141**SE**829; 150 **Va**101, 142**SE**387.

785–48 220**AlaS**6, 124**S**234(2dcase) (presumed where action brought in name imparting corporate character); 203 **Cal** 712, 265**P**821; **CalA** 259**P**349. [a] **Statute denying to all corporations defense of usury** does not violate constitutional provision that corporations shall have right to sue and be sued in like cases as natural persons. 251 **Mich**279, 231**NW**619.

786–55 145**Wash**348, 260**P**531. [a] **In suit by assignee of corporation on assigned cause of action** for money lent and other items, corporation's failure to pay annual license fee last due is no defense. 145**Wash**348, 260**P**531.

786–60 91**CalA**356, 267**P**169.

786–66½–New. Under such statutes a corporation in default cannot maintain an action on the theory that its charter is forfeited and that it may maintain the action for the purpose of settling its affairs where no judicial proceeding has been brought to declare a forfeiture. 241**Mich**446, 217**NW**25.

786–66⅓–New. Under some statutes a corporation is not authorized to continue an action at law, when it is in default for failure to pay a license fee and file its annual report, although the action was begun before default. 241 **Mich**446, 217**NW**25.

786–66¼–New. Where a corporation filed an annual report just before commencement of suit, it could maintain suit for trespass to land, although it had not filed such a report for many years. 82**Colo** 288, 259**P**1025.

787–75 15**DelCh**431, 141**A**277; **Mo** 30 **SW(2d)**976(2dcase).

787–77 37**GaA**24, 138**SE**797.

788–85 7**LaA**289.

789–7 127**Misc**470, 216**NYS**481.

789–10 [a] (3) Other instances. 156**SC** 397, 153**SE**473.

790–13 288**Pa**398, 136**A**232.

790–21 [a] **In Virginia.**–146**Va**215, 135 **SE**823.

790–22 159**La**36, 105**S**91; 136**Wash**653, 241**P**303.

791–23 **TexCivA** 19**SW(2d)**176.

791–24 **CalA** 287**P**364; 164**Ga**351, 138 **SE**898; 164**Minn**525, 205**NW**448; 9**Pa Dist&Co** 199; 141**Wash**504, 252**P**526.

791–25 164**La**502, 114**S**112.

791–27 But see 164**Ga**351, 138**SE**898.

791–29½–New. The circuit court of a county has complete jurisdiction in an action against a corporation having its principal office in the county and the secretary resident of another county,

but jurisdiction can only be acquired by process lawfully served. 146Va215, 135SE823.

791-31½-New. A party having an option to sue a corporation in either of two counties may not by binding agreement barter it away in advance. **TexCivA** 282SW315.

791-31¾-New. Neither courts nor statutes make any distinction so far as venue is concerned between domestic and foreign corporations. 115Tex417, 282SW576.

791-31¼-New. Plaintiff is entitled to invoke venue that accords with allegations in his petition regardless of the possibility of failure thereof on trial. **TexCivA** 5SW(2d)1027.

791-34 164Ga351, 138SE898; 164La502, 114S112; 300Pa384, 150A638; **Tex CivA** 273SW655; **TexCivA** 9SW(2d)425. See also 76CalA708, 245P790.

791-35 41OklACR31.

791-38 164Ga351, 138SE898.

792-42 [b] **Residence for purpose of venue** is fixed by certificate of incorporation, though corporation does business in other counties. 126Misc351, 214NYS311. [c] **Suit in county named in articles of incorporation is not precluded** by statute providing for suit in county where cause of action accrued or where corporation has usually kept office. 217MoA16, 272SW1066.

792-46 9PaDist&Co 199.

792-48 9PaDist&Co 199.

792-50 127Kan119, 272P119.

793-63 NJSup 146A790 (transitory action arising out of state).

793-64 314Mo373, 284SW464, 468 [quotCJ].

793-64½-New. Where its secretary is codefendant with a corporation, a statute permits service on secretary in the county where he resides and after the proper service judgment by default on cause of action against secretary individually. 146Va215, 135SE823.

793-65 314Mo373, 284SW464, 468 [quotCJ].

793-67 Contra 179Minn583, 229NW318; **NJCh** 149A369.

793-68 164Ga351, 138SE898; 38GaA481, 144SE349; 115Tex417, 282SW576; **TexCivA** 22SW(2d)990; 144Wash246, 257P849; 145Wash532, 261P97. [b] **Plaintiff's rights not affected.**-100CalA578, 280P695.

793-68½-New. Under some statutes, where corporations are engaged in business in more than one parish, certain actions must be brought in the office which has supervision of the transaction from which cause of action arose. 159La36, 105S91 (allegations of petition held to give court jurisdiction).

793-73 **TexCivA** 22SW(2d)990.

793-80 144Wash246, 257P849.

794-83 214Ala132, 107S73; 214Ala615, 108S591; 164Ga351, 138SE898; 204Iowa159, 214NW598; **TexCommnA** 272SW1105 (where corporation has agency or representative); **TexCivA** 278SW855; **TexCivA** 283SW189. [a] 200Iowa434, 204NW298 (sales of stock at hotel and acceptance of notes in payment); **Tex CivA** 278SW855. [c] **Person in charge of work of corporation in county is agent.**-**TexCivA** 278SW855.

794-84 6LaA154; 136Wash653, 241P303. [a] 141Wash504, 252P526. [c] (4) Where corporation, acting as agent of several insurance companies, authorized resident agent to solicit business in county where action was begun, and policies were issued by corporation as general agent and forwarded to resident agent who delivered policies, deducted commission from premiums he collected and sent remainder to general agent. 136Wash653, 241P303. [e] **Casual or occasional transactions** are insufficient to authorize suit in county. 141Wash504, 252P526. [f] **Nature of business transacted.**-141Wash504, 252P526.

794-90 208Iowa882, 226NW178.

794-91½-New. Under such statutes an agent of a corporation may sue it in the county where the business of the agency is conducted. 204Iowa159, 214NW598.

794-91½-New. Isolated business transactions do not constitute doing business or transacting business within the meaning of such statutes. 204Iowa159, 214NW598. [a] **Employment of agent to sell branch store** does not constitute establishment of office or agency in county where such store is located. 204Iowa159, 214NW598.

794-92½-New. There is no constitutional provision in some jurisdictions prohibiting suit against corporation in a county where it is not doing business. 219Ala581, 122S693.

794-94 115Tex417, 282SW576.

794-96 164Ga351, 138SE898 (dictum); 41OklACR31; 118Tex354, 15SW(2d)542; **TexCivA** 278SW855; **TexCivA** 3SW(2d)930; **TexCivA** 17SW(2d)128 (statute held valid); **TexCivA** 19SW(2d)203; **TexCivA** 22SW(2d)1090; **Tex CivA** 32SW(2d)227; 193Wis129, 214NW500; **Wis** 229NW61. [c] **TexCivA** 3SW(2d)472; **TexCivA** 5SW(2d)1027. [d] **Two recent cases in Texas have declared such statute unconstitutional.**-**TexCivA** 5SW(2d)1027; **TexCivA** 5SW(2d)1030 [both cases foll 274US490, 47SCt678]. [e] **"Cause of action"** within meaning of statute is composed of two elements of primary right of plaintiff and the act or omission of defendant. **TexCivA** 25SW(2d)229.

795-99 76CalA708, 245P790.

795-2 90CalA722, 266P549; **Tex CommnA** 272SW1105; **TexCivA** 278SW855; **TexCivA** 286SW633; **TexCivA** 22SW(2d)960; 193Wis129, 214NW500. [g] **Action or breach of implied warranty in sale of personalty** may be brought in county in which plaintiff's primary right arose or in county where defendant's wrongful act was done. **Tex CivA** 3SW(2d)930.

795-3 **TexCivA** 286SW633; **TexCivA** 3SW(2d)471; **Wis** 229NW61.

795-4 204Cal195, 267P320 (note and mortgage executed in county where land lay); 78CalA522, 248P967; **TexCivA** 282SW315. [a] (3) Corporation may be sued for commissions in county where its broker found prospective purchaser on satisfactory terms, though corporation failed to execute contract. **TexCivA** 286SW633.

795-5 78CalA522, 248P967; 209Ky199, 272SW426.

795-6 78CalA522, 248P967.

795-7 78CalA522, 248P967; 38GaA481, 144SE349 (statute is cumulative).

795-8 164Ga351, 138SE898; 164La502, 114S112; 2LaA331; 122Okl182, 252P1101; 129Okl210, 264P154; 116Tex65, 285SW593; **TexCivA** 32SW(2d)227. [a] **TexCivA** 13SW(2d)393.

796-12 But see 164Ga351, 138SE898.

796-13½-New. In an action by a corporation arising ex delicto, where several defendants sued are bound in solido, defendants cannot be sued except at their respective domiciles. 161La784, 109S490.

796-16 See also 10LaA141, 119S777.

796-18 164La502, 114S112 (trespass).

796-21 **TexCommnA** 18SW(2d)595, 63ALR1009.

796-23½-New. Change of venue will not be granted for local prejudice against the president of a corporation. **TexCivA** 296SW902.

796-25 78CalA522, 248P967; **CalA** 287P364; **Wash** 290P331.

797-26 78CalA522, 248P967.

797-26½-New. Where joinder of action against a corporation on contractual liability with that against the individual stockholders on their statutory liability is bona fide, a motion by the individual defendants for a change of venue to the county of their residence is properly denied. 100CalA578, 280P695.

797-33 87CalA301, 262P452 (affidavit conclusive as to uncontradicted matters). [b] (1) 204Cal21, 266P290; 87CalA301, 262P452 (affidavit held sufficient). (2) Probative facts should be stated. 78CalA522, 248P967. But see 208Iowa882, 226NW178. [c] 78CalA522, 248P967; 87CalA301, 262P452; **TexCommnA** 18SW(2d)595, 63ALR1009 (allegations held allegations of fact and not conclusions). [d] **Allegations held sufficient.**-**TexCommnA** 18SW(2d)595, 63ALR1009 (local prejudice).

797-35 200Iowa434, 204NW298. [b] (2) 78CalA522, 248P967. [g] **Construction of pleadings.**-**TexCivA** 5SW(2d)1027. [h] **Evidence held sufficient** to show that action against corporation, or part thereof, arose in county of suit. **TexCivA** 5SW(2d)1027. [i] **Character of cause of action** will be assumed to be that purported to be stated by petition. **TexCivA** 3SW(2d)930.

797-37 142Wash296, 252P923.

797-38 NJSup 146A790.

798-40½-New. An officer of a corporation sued jointly therewith waives objection to venue by failing to raise question by plea in abatement. 146Va215, 135SE823.

798-44 [a] **In action on note against corporate equitable owner of property of corporate maker and of latter's corporate predecessor in title,** latter corporations are not necessary parties. Utah 285P1008.

798-45 232Mich648, 206NW564, 566 [citCJ].

798-47 **IndA** 161NE580 (incorporators); **TexCivA** 17SW(2d)125.

798-51 222MoA570, 293SW61. [a] **Corporation adopting promoter's contract is real party in interest,** but joinder of promoter is proper where no formal assignment is made to corporation. 229Ky569, 17SW(2d)715, 66ALR1423.

798-58 209Ky170, 272SW392 (action for direction as to place of keeping corporate records).

799-59 DelCh 151A303.

799-60 DelCh 151A303; 128Misc246, 218NYS346.

799-61 128Misc246, 218NYS346.

799-62 128Misc246, 218NYS346.

799-66 See also 33PortoRico157.

799-66½-New. Suit against corporation for breach of contract to furnish material of its own and subsidiary corporation is proper where it is shown that material of both corporations was intended under contract with defendant alone. 242NY106, 151NE106.

799-70 39GaA374, 146SE924; 176Minn529, 224NW149.

800-73 201Cal715, 258P933 (stockholder properly allowed to intervene where otherwise defense to action against corporation would not be asserted).

800-75½-New. To intervene a stockholder must disclose an unsuccessful effort to secure action on the part of stockholders. 23F(2d)192.

800-79 201Iowa777, 208NW519.

800-80 201Iowa777, 208NW519.

800-81 94Fla1, 113S667; 201Iowa777, 208NW519. [a] **In Iowa.**-201Iowa777, 208NW519.

800-83 300Pa384, 150A638 (existing when action brought).

800-86 51Nev330, 275P1. [a] 300Pa384, 150A638.

800-93 **MoA** 279SW751. [a] **Summons may be issued in first instance to county other than that of suit** where facts enumerated in statute exist. **MoA** 279SW751. [b] **Power of clerk to determine facts.**-**MoA** 279SW751. [c] **That summons issued to county where suit was begun has not been returned** does not deprive clerk of power to issue summons to another county where requisite facts exist. **MoA** 279SW751. [d] **Prior issuance of summons to county where suit was begun** does not affect right of clerk to issue summons to another county where requisite facts exist. **MoA** 279SW751.

801-15 311Mo604, 279SW115.

802-21 **TexCivA** 278SW456.

802-27 73Mont401, 236P1077 (affidavit for service on secretary of state held not defective).

802-30 **TexCommnA** 23SW(2d)312.

802-34½-New. Montana statute does not require that affidavit for substituted service on corporation contain statement that cause of action arose in the state. 73Mont401, 236P1077.

802-34½-New. Statutory provision for substituted service does not require affidavit stating in words of statute that plaintiff has good cause of action. 73Mont401, 236P1077.

803-41 38GaA481, 144SE349; **NJ** 129

A398 (where corporation had office in Essex County wherein cause of action arose, service in Camden County is insufficient); 300Pa384, 150A638; 146Va 215, 135SE823. [c] **Service where business carried on.**–285Pa45, 131A725.

803–49½–New. In New York service on nonresident officer of corporation without the state gives court jurisdiction of property within the state. 214App Div668, 213NYS213 (without order of court).

804–55 93Fla366, 112S64; 47 Ida386, 279P627 (service on county auditor of county in which corporation has principal place of business). [a] **In Idaho.**–47 Ida595, 277P567.

804–56 9LaA691, 120S239; TexCivA 278SW456.

804–64½–New. In action against domestic corporation in Montana only persons on whom service of summons can be made are the president or other head of corporation, secretary, cashier, or managing agent, or in their absence the secretary of state or his deputy. 73Mont401, 236P1077.

804–64¼–New. Substantial compliance with the statute is sufficient in an order for substituted service on the secretary of state or his deputy. 73Mont 401, 236P1077.

804–65 201 Iowa777, 208NW519.

805–71 [b] TexCivA 278SW456.

805–73 14PaDist&Co 337 (person for time being in charge).

805–75 300Pa384, 150A638.

806–76 [a] **Statute authorizing service on trustee, officer, or general managing agent** does not authorize service on director. 201 Iowa777, 208NW519, 521 [citCJ].

806–82 12PaDist&Co 317 (where residence of officer within county cannot be ascertained). [b] (6) Other instances. 156SC537, 153SE571.

806–86 TexCivA 278SW858. [a] **Local agent, indicated as president** on writ and return, is held properly served under statute. TexCivA 278SW858.

806–86½–New. an agent employed in the general management of the corporation. 201 Iowa777, 208NW519.

807–87½–New. Service on agent's wife is void. 100WVa422, 130SE663.

807–88 315Mo 276, 286SW3.

807–90½–New. In some jurisdictions service on an agent exercising discretionary and supervisory powers is sufficient. 35GaA372, 133SE479.

807–90¼–New. The fact that a delivering carrier is in point of law the agent of the initial carrier in completing a shipment does not authorize service of an original notice on the initial carrier by service on the delivering carrier. 202 Iowa1008, 209NW744.

807–91 Wyo 285P146 (managing agent or person in charge of corporation). [b] (1) 201 Iowa777, 208NW519.

807–92 [a] (8) District managing agent. CalA 291P255. [b] (10) 134 Misc258, 235NYS288.

807–93 CalA 291P255. [b] **"Person in charge,"** under statute, whether managing agent or not, is one in complete charge of affairs of corporation after chief officers had left state. Wyo 285 P146.

808–95 [a] **Agent must be of sufficient rank** to make it reasonably certain defendant will be apprised of service. CalA 291P255.

808–96 66Utah103, 240P165; 145Va 429, 134SE677; 100WVa422, 130SE663, 665 [citCJ]. [a] (1) 145Va429, 134SE 677. (3) 145Va429, 134SE677. [b] **Authorization or ratification.**–145Va429, 134SE677.

808–2 101CalA450, 281P709; 201 Iowa 777, 208NW519 (evidence held insufficient to show alleged agency); 140Miss 289, 105S519; 100WVa422, 130SE663, 665 [citCJ].

809–16 37F(2d)730.

809–22 93Fla366, 112S64; 94Fla1, 113 S667; 20 OhA427, 152NE679. [a] (2) Statute, authorizing service by publication where corporation has failed to elect officers or to appoint agent upon whom service of summons can be made, and which has no place of doing business in state, is constitutional. 25 Oh NPNS287.

809–25 94Fla1, 113S667; 20 OhA427, 152NE679; 135 Okl 84, 274P29; 135 Okl 85, 274P36. [d] **In Ohio.**–20 OhA 427, 152NE679.

809–28 178Ark995, 13SW(2d)13 (return held insufficient); 236 IllA442; 247Mich237, 225NW554. [a] (1) CalA 291P255; 35GaA140, 132SE270; 237 IllA442. (3) Local agent, designated as president, served. TexCivA 278SW 858. [c] 315Mo 276, 286SW3.

810–30 TexCivA 280SW856.

810–33 100WVa422, 130SE663.

810–34 100WVa422, 130SE663. [a] **Return alleging president was "not found in the City of Chicago"** is sufficient, no allegation as to county being necessary for service on agent. 236 IllA 442.

810–35 100WVa422, 130SE663.

810–37 Ill 173NE486; 12PaDist&Co 317; 66Utah103, 240P165.

810–37½–New. A return stating inability to effect service is insufficient where it fails to show that the corporation had no office in the county, or that no one could be found in charge of its office, or that the president or chief officer could not be found in the county. MoA 279SW751.

811–43 TexCommnA 23SW(2d)312.

811–60 [b] **Continuance granted to individual** representing corporation, sued with him, is held to constitute appearance of both. 172Ark1088, 291SW795.

812–72½–New. An affidavit of illegality attacking service because the individual served was not an officer of the corporation is insufficient in the absence of a traverse of the officer's return. 35GaA140, 132SE270.

812–72⅓–New. The sufficiency of affidavits of illegality to show want of jurisdiction has been considered. 35 GaA140, 132SE270.

812–72¼–New. Affidavit held to show falsity of return reciting service on managing agent. 25 OhA16, 157NE316.

812–74 123 Or406, 262P833.

812–77 242Mich481, 219NW705.

812–78 Tex 285SW637.

812–79 123 Or406, 262P833.

813–91 263Mass308, 160NE894, 67ALR 758.

813–96 241NY427, 150NE505 (declaration must be for benefit of all stockholders).

814–98 67CalA654, 228P42 (action by administrator of deceased stockholder against corporation and surviving stockholders for and on account of moneys had and received); 173Minn374, 217 NW503, 56ALR970 (complaint in action by officer for reimbursement of expense of suit held demurrable); 153 Miss494, 121S114; 228AppDiv138, 239 NYS178. [a] **Counterclaim held not to state cause of action.**–223AppDiv739, 227NYS265. [b] **Complaint held sufficient.**–223AppDiv88, 227NYS371.

814–98½–New. A complaint, insufficient as to defendant directors in an action under Stock Corp. L. § 58 or Gen. Corp. L. § 90, must fail as to corporation defendant. 128Misc246, 218NYS346.

814–98¼–New. A complaint, failing to allege consideration for a promise to turn over money to a corporation or receipt of money in official capacity on behalf of corporation, insufficient. 217 AppDiv1, 215NYS792.

814–99 128Misc246, 218NYS346.

814–1 [a] **Complaint held sufficient** which alleges loan and refusal to repay at maturity, even though there is also an allegation of tender back of security claimed to be void. 103Conn 380, 130A383 (in action for debt).

814–5 [b] **Answer held not bad** as matter of law. 254Mass317, 150NE155.

815–23 [c] **Doing business in county by agent.**–213Ala565, 105S555.

815–29 127 Okl 215, 260P497.

816–36 89CalA167, 264P784.

817–51 192Wis646, 212NW295.

817–52 192Wis646, 212NW295.

817–54 [a] (9) "Bell Bros. Marble Company." 36GaA340, 136SE541.

818–59½–New. In some jurisdictions it is held that corporate character may not be implied from the mere use of the word "company" in a name. 192 Wis646, 212NW295.

819–63 LaA 130S672.

819–70 320Mo 353, 8SW(2d)66.

824–28 246 IllA178.

824–29 94Fla272, 114S240; 19 OhA 399; 132 Okl 100, 269P357(3dcase) (verified general denial); Utah 282P 1029; 35Wyo 319, 249P795, 796 [cit CJ]. See also 32F(2d)195.

825–30 116 Or399, 241P393.

825–36½–New. , although such answer is verified. 86 IndA251, 157NE58.

825–42 80Mont524, 261P283. [c] **Constitutionality.**–Iowa 233NW137.

826–67½–New. A plea in abatement must precede a plea in bar. 86 IndA 251, 157NE58.

826–69 40GaA314, 149SE389; 58Nebr 511, 78NW1070; 52Nebr355, 72NW356; 3NebrUnoff549, 92NW175; 108NY242, 15NE311; 17Misc124, 39NYS353; 19 Misc655, 44NYS427; 19 OhA399; 43SC 17, 20SE790.

828–82 253 IllA404.

828–92 86 IndA251, 157NE58.

829–95 [f] **Pleas held insufficient.**–40 GaA314, 149SE389.

829–97 143SC152, 141SE363.

830–6 80Mont524, 261P283.

830–10 22F(2d)457.

830–11 208Cal 371, 281P500.

831–25 255 IllA175.

832–38 132 Okl 100, 269P357(3dcase).

832–41 175Ark618, 299SW1016; 86 IndA251, 157NE58.

832–42 126 Or602, 268P1007.

834–59 [a] **Word "Inc."** used in pleading is equivalent of phrase "a corporation." 102CalA710, 283P856.

834–61 See also MoA 10SW(2d)319.

835–82 239Mich136, 214NW154.

835–86 37GaA24, 138SE797.

835–87 MoA 10SW(2d)319. [d] MoA 10SW(2d)319.

838–38 TexCivA 285SW1107.

838–39 TexCivA 285SW1107.

839–41 [a] TexCivA 285SW1107.

839–46 122 Or605, 260P203, 55ALR 504.

839–56 122 Or605, 260P203 (dictum), 55ALR504.

839–59 147Wash542, 266P706 (payment of annual license fee).

839–60 [c] **Noncompliance with Blue Sky Law.**–19 OhA243.

839–66 122 Or605, 260P203, 55ALR 504.

841–93 22AlaA68, 112S543; 84CalA611, 258P440; 310Mo 665, 276SW49; Mo 23 SW(2d)64; 252NY430, 169NE635; 53 ND797, 208NW82. [a] (4) Other instances. Mo 23SW(2d)64.

842–95 208Cal 371, 281P500 (failure to plead it waives such defense); 127Me 290, 143A61 (where not shown by declaration).

842–98 53ND797, 208NW82; 51SD221, 213NW17.

843–10 GaA 155SE356(2dcase); TexCivA 20SW(2d)1081.

844–20 105WVa610, 144SE410, 62ALR 740.

844–31½–New. A corporation sued under a contract providing for repurchase of its stock should set up affirmative defenses of insolvency, impairment of capital, or appointment of receiver. 82 Colo 399, 260P1019.

844–36½–New. The general rules of pleading determine the sufficiency of allegations as to representation of a corporation by its agent in the commission of a tort. 82 IndA504, 146NE 835 (slander by agent).

845–38½–New. In charging negligence either against corporation or its agents there is no substantial difference in nature of charge or proof. 220Ala497, 126 S619.

845–40 176Minn529, 224NW149.

845–41 84CalA611, 258P440; 12PaDist&Co 457.

847–55 33GaA579, 127SE819; 202 Iowa15, 209NW516.

847–64 [b] (5) Other instances. 137 Misc721, 244NYS283.

847–65 [b] (4) In action for slander. 37GaA684, 141SE423. (5) Other instances. TexCivA 258SW(2d)913. [c] **Allegation that fraudulent act of plaintiff's president in assigning lease** has never been ratified by plaintiff corporation is equivalent to averment that

no part of purchase price received by president was accepted by corporations. 158La982, 105S36.

848-67½-New. The petition in an action against a corporation for slander by an agent alleging that the utterances were expressly authorized and ratified without showing when, where, and how they were authorized or ratified is insufficient on special demurrer. 37GaA684, 141SE423.

848-67⅓-New. In an action for libel, an allegation that the libel was uttered by an agent within the scope of the company's business and in the course of his employment is sufficient to charge the corporation. 37GaA684, 141SE423.

848-73 47 Ida58, 272P704.

849-84 208Cal 371, 281P500; **TexCivA** 8SW(2d)516 (authority of officer). [a] (4) Amendment to unverified general denial to petition which alleged existence of plaintiff as corporation is properly denied where amendment seeks to allege dissolution of corporation. 116 Okl 10, 243P154. (5) Other amendments allowed. 237Mich657, 213NW 147; 142Wash363, 253P460.

849-85½-New. A more liberal rule should be applied in permitting amendments changing front by a corporation organized not primarily nor principally for profit than in case of an individual. 237Mich657, 213NW147.

849-86 200 Iowa170, 202NW774 (may be made after judgment).

849-88 218Ala179, 118S328(1stcase).

850-94 Ala 128S130.

850-96 But see 9PaDist&Co 113.

850-2 **TexCivA** 10SW(2d)204 (where one corporation is substituted for another, allegation of transfer of cause of action is essential).

851-17 **TexCivA** 19SW(2d)75 (unverified plea of want of authority held nullity).

851-18 **TexCivA** 8SW(2d)516.

851-22 [a] (3) Verification of materialman's claim by manager of materialman's corporation held sufficient. 95 CalA307, 272P1068. **Erratum.**-[f] (2) Word "sufficient" should be "insufficient." [g] (2) Verification by employee, clerk, agent, or local manager is insufficient. 138SC106, 136SE132.

852-23 [a] (2) Verification by president held sufficient where substantially, though not precisely, in form of language of code. 196Cal 445, 238P670. [k] **In Texas.-CivA** 19SW(2d)75.

853-34 See also 32F(2d)693; 32F(2d) 696.

853-49 133Misc188, 231NYS493.

854-50 125Me260, 132A892; 292Pa 164, 140A871; **TexCivA** 285SW1107.

854-53 **TexCivA** 18SW(2d)737.

855-60 **TexCivA** 271SW654 (authority must be pleaded and proved).

855-62 218MoA60, 262SW66 (where defendant denied personal liability, evidence of incorporation of named company and defendant's authority to act for it is admissible). See also 47 Ida 58, 272P704.

855-64 **TexCivA** 271SW654 (ratification may not be shown where not pleaded).

855-66½-New. Where a note in a suit was signed by the president and secretary of a defendant corporation, a denial of the execution of the note does not make it incumbent upon plaintiff to prove the authority of the officers to execute it. 77Mont477, 251P517.

855-69 37F(2d)310.

855-70 154Wash25, 280P742. [a] (1) 37GaA63, 139SE123 (semble, indorsement of note).

855-72½-New. Where a stockholder, owner of a business, transfers the assets to a corporation, the corporation is presumed to have assumed his debts. **TexCivA** 4SW(2d)1029.

856-76 **Ark** 32SW(2d)618; **Iowa** 224 NW536 (execution of check by corporation); 27 OhA219, 160NE878; 128 Or 643, 275P680 (execution by corporation of note sued on).

856-77 22F(2d)627; 82Colo 399, 260P 1019; **TexCivA** 285SW1107.

857-85 35Wyo 319, 249P795.

857-89 215Ala436, 111S817; 37GaA63, 139SE123 (transfer of note made to corporation, by use of signature of officer and seal, held admissible by admission of note).

857-92 176Ark642, 3SW(2d)685; 258 Mass343, 155NE22; **MoA** 21SW(2d) 932; 247NY332, 160NE388; **Tex CommnA** 3SW(2d)72; **TexCivA** 22SW (2d)737.

857-93 176Ark966, 4SW(2d)926; 148 Md628, 129A915; 258Mass343, 155NE 22; **TexCivA** 22SW(2d)737.

858-96⅔-New. Books and documents of corporation are competent to impeach verity of statements as to financial standing. 317 Ill 65, 147NE785.

858-96⅓-New. A telegram is inadmissible as against a corporation, in the absence of evidence of authority of the person sending it. 252Mass383, 147NE 870.

858-97 **TexCivA** 300SW177. [a] (1) 176Ark966, 4SW(2d)926; 84CalA611, 258P440; 96CalA42, 273P595; **Iowa** 229NW748; 157Md51, 145A378; **Mass** 169NE419; **MoA** 21SW(2d)193; 116 Nebr776, 219NW145; 49ND945, 194NW 660; 5PaDist&Co 613; 149Wash666, 272P39. (21) To show president, signing and executing note in name of corporation, owned and to all intents and purposes was corporation. **TexCivA** 277 SW398 (rendering corporation liable). (22) To show ratification of contract made by manager of corporation. 52 ND465, 203NW176. (23) To sustain judgment for lien. **Colo** 291P1036. (24) To show that shipments to one corporation were understood and accepted as deliveries to another, parent, corporation. 261Mass385, 158NE795. (25) To sustain finding that note signed by corporation defendant's president and director was for corporation's debt. 175Ark153, 298SW863. (26) To sustain recovery on note as against claim of no consideration and lack of authority of executing officer. 88CalA740, 264P 270. (27) Other evidence held sufficient. 172Ark1088, 291SW795; 287Pa 337, 135A105; **TexCivA** 291SW974. [b] (1) 21F(2d)207 (cancellation of bonds); 93CalA455, 269P665; 215Ky273, 284SW 1082; **LaA** 130S646; **Me** 151A534; 251 Mich630, 232NW360; 48RI 490, 139A 312; **TexCivA** 18SW(2d)737. (10) To show that plaintiff corporation was subsidiary corporation of another and that both were one and same concern. 169 Ark1046, 277SW513. (11) To prove that at time of sale of property by parent corporation to subsidiary corporation, former was indebted to parties through whom defendant claimed title. 66Utah103, 240P165. (12) To show collusion between mercantile company giving checks for cotton and officers of bank inducing deposit of such checks shortly before bank closed. 170Ark984, 282SW371. (13) To show that fraud of directors was condoned by all other stockholders. **MoA** 285SW538. (14) To warrant recovery against corporation. 12LaA176, 125S475. (15) To warrant finding that corporation was merely vehicle for certain stockholders' individual transactions. 154Wash25, 280P742. (16) To show that another corporation was dummy to shield defendant corporation. 230Ky750, 20SW(2d)713. (17) To relieve corporation from liability on contract. 101CalA343, 281P641.

858-2½-New. Contract might be inferred from corporate acts without any direct evidence of existence or terms thereof. **Mass** 169NE419.

859-7½-New. Where lack of jurisdiction appears on the face of the record, the court is without jurisdiction to take any further proceedings except to sustain the motion. 41 OklACR31.

859-7⅓-New. In such case the motion must be determined by the allegations of the petition at the time of filing the motion. 41 OklACR31.

859-7¼-New. Where plaintiff corporation failed to prove its existence and right to sue, denial of a motion for nonsuit was error. 80Mont524, 261P283.

859-14 216Ala434, 113S299; 223App Div88, 227NYS371; 127Misc515, 216 NYS713; 287Pa337, 135A105. [a] (9) Authority of agent of corporation to make contract for sale of land binding on corporation. 189NC775, 128SE349. (10) Liability of certain defendant stockholders in action for depriving plaintiff of his rights under contract for management of corporate affairs and interests on its assets has been held question for jury. 119Kan576, 240P 970. (11) Authority of corporation's president to contract with agent for sale of corporation land. 189NC775, 128 SE349. (12) Materiality of question whether certain stocks were listed on New York Stock Exchange. 247NY1, 159NE700. (13) Whether one who takes check signed by president of corporation has notice. 127Misc282, 215NYS766. (14) Whether corporation signed contract sued on, even though proper corporate name was not used. **MoA** 3SW (2d)399. (15) Whether corporation ratified contract for exchange of automobiles. 13PaDist&Co 6. [b] **Thus,** where evidence sustains allegations of complaint, question of fact should be submitted to jury, even though defendant's evidence contradicts plaintiff's evidence. 103Conn380, 130A383. [c] **Evidence that notes of corporation were given for personal debts** of officer raises question for jury. 125Me108, 131A138.

859-15 35F(2d)563 (instruction that treasurer had authority as matter of law held erroneous).

859-16 [a] 123 Or208, 261P686.

859-20 [a] (3) 87Colo 479, 288P1050; **TexCivA** 18SW(2d)267. (4) 176Ark642, 3SW(2d)685; 39GaA490, 147SE420; 150 SC459, 148SE478; 143Wash229, 255P 123. [d] (1) 216AppDiv439, 215NYS 587. (4) Instruction to find for corporation unless directors acted in bad faith held properly refused. 147Va522, 137SE614. [f] **Instruction held sufficient** as to liability of stockholders for excluding plaintiff from possession of corporate assets. 119Kan576, 240P970.

860-25 **TexCivA** 18SW(2d)737 (finding held erroneous).

860-28½-New. A finding that an assignment for the benefit of creditors had been agreed to by certain creditors and a direction that a receiver be appointed to carry out its terms are not inconsistent with a finding that plaintiff never agreed to the assignment. 49Nev451, 248P893.

860-31 242Mich481, 219NW705.

860-35½ [a] (2) Where corporation is but instrumentality for transaction of business of individual defendants, evidence sustaining judgment against corporation will sustain judgment against individuals. **CalA** 284P 520.

861-42½-New. A judgment against a corporation in an action by its president, who appeared for defendant and waived notice is void. 145Va429, 134 SE677.

861-42⅓-New. A recital in a judgment, "comes the plaintiff by its attorneys and defendants in person and by their attorneys," supports the intendment that plaintiff was a corporation. 220Ala86, 124S234(2dcase).

861-42¼-New. That two separate corporations are entirely owned by one individual does not justify court in rendering joint judgment against corporations. **CalA** 292P173.

861-52 **CalA** 274P997.

863-67 But see **Or** 286P546.

863-84 **Miss** 108S158, 160 [citCJ].

864-94 200 Iowa384, 202NW595 (where mere naked title to property of another rested at one time in corporation, and no credit was given thereon by judgment creditor against corporation, it is not subject to satisfaction of judgment against corporation).

864-3½-New. The property of a public corporation cannot be taken on execution so as to interfere with the duties imposed on the corporation. 290Pa356, 139A118.

865-31½-New. Assets can be distributed to stockholders only by majority of directors or stockholders when acting in corporate capacity or by court in a litigated proceeding. 285Pa312, 131A854.

866-44 34Ark245, 270P1044, 1049 [cit CJ]; 216AppDiv439, 215NYS587.

866-45½-New. A receiver cannot be appointed in proceedings supplementary

to execution in case of a domestic corporation. 133Misc624, 233NYS128.

867-53½-New. On an appeal from a directed verdict the truth of appellant's testimony must be presumed, although contradicted, if the jury could reasonably have found such facts. 103Conn380, 130A383.

867-53⅓-New. It is reversible error for the court to direct a verdict where there is sufficient evidence from which the jury could reasonably find for the adverse party. 103Conn380, 130A383.

867-53¼-New. The court will not consider claims as to which the record does not give adequate information. 103Conn 380, 130A383.

867-55 41GaA366, 153SE76(1stcase) (oath must be made by appropriate officer or agent).

868-72 [b] **In New Jersey.**-151A630.

870-10½-New. Change of name of defendant corporation in affidavit and bond is immaterial where all parties used two names interchangeably. **TexCivA** 25 SW(2d)274.

870-14 See also 49RI 446, 143A857.

870-20 [b] **Requirement of service on agent in charge of office or business of garnishee corporation in county** is satisfied by service on agent in charge of office in absence of president who remains in charge of business. 160Ga394, 128SE192.

871-44 14PaDist&Co 166.

872-49 74CalA109, 239P413.

874-66 194Wis636, 217NW412. See also 10LaA665, 121S196(2dcase).

874-67 194Wis636, 217NW412.

874-67½-New. A corporation may be criminally liable for acts of its agents in doing things prohibited by statute. 248NY159, 161NE455.

875-72 But see 248NY159, 161NE455.

876-94 [a] **Sufficiency of evidence.**-248 NY159, 161NE455 (insufficient). [b] **Questions for jury.**-248NY159, 161NE 455.

876-94½-New. There must be intent to steal, to misappropriate, and to apply property of another to the use of the corporation. 248NY159, 161NE455.

876-94⅓-New. A corporation is liable in larceny only for acts which it authorized through action of its officers or which were done with the acquiescence of its officers. 248NY159, 161NE455.

876-94¼-New. [§ 3036a] f½. **Larceny.** Under laws in some jurisdictions a corporation may be convicted of larceny. 248NY159, 161NE455.

877-16 But see 143SC283, 141SE454; 143SC347, 141SE610.

878-29½-New. Attempt to influence votes of employees. Under a statute forbidding any person to attempt to influence votes of employees, a corporation has been held liable for the acts of a superintendent having authority to hire and discharge employees. 194Wis636, 217NW412.

878-42½-New. In Porto Rico corporations are proceeded against by information under Code Cr. Proc. § 458. 32 PortoRico 5.

880-73 86Mont500, 284P267. Contra 8 F(2d)546.

881-78 147Wash69, 264P1009.

881-79 8F(2d)546; 15DelCh321, 137A 79; Mass 171NE830; 131Misc712, 227 NYS717; 30 OhA476, 165NE593; 294Pa 108, 143A574.

882-80 100NJEq41, 134A888; NJCh 150A774; NJCh 151A283.

882-81 100NJEq41, 134A888.

882-83 NJCh 151A283.

882-87 But see 100NJEq41, 134A888.

883-95½-New. A corporation which is a going concern engaged daily in extensive operations is presumed solvent. 14F(2d)758.

883-95⅓-New. The code, providing for the payment at par of preferred stock on insolvency of a corporation means insolvency that has placed the corporation in custodia legis. 30 OhA476, 165 NE593.

883-97 Mass 171NE830.

883-3 NJCh 150A199. [a] **Except for statutes, insolvent corporation is in similar position** to that of insolvent individual. 100NJEq41, 134A888.

884-7 DelCh 151A257.

884-16 [a] 97CalA508, 275P984 (finding held justified); TexCivA 21SW(2d) 711 (inability for some time to meet its bills). [b] DelCh 151A257. [g] **Evidence of insolvency must be clear and convincing and free from doubt.**-DelCh 151A257.

884-16½-New. The appointment of a receiver is held not conclusive on the existence of insolvency. 289Pa240, 137 A230.

884-16⅓-New. Receiver cannot be appointed on presumption that nonpayment of declared dividends was because of lack of funds. DelCh 151A257.

884-22 170Ark1029, 282SW355; 220 AppDiv404, 221NYS739.

885-24 170Ark1029, 282SW355.

885-25 170Ark1029, 282SW355.

885-28 20F(2d)786.

885-29 [a] 205 Iowa1351, 219NW530, 60ALR1204.

886-32 [a] **Effect of subsequent statutes.**-NJCh 150A774.

886-33 NJCh 150A774. [a] 98NJEq 710, 130A606.

886-36 [a] **Statute inapplicable to transfer of property held in trust.**-NJCh 151A550.

887-43 [a] (1) 219Ky196, 292SW831. [b] Fla 130S599.

887-43½-New. Disposal of assets by Delaware corporation to Virginia corporation of same name and continuance of corporate business so as to give public and person dealing with corporations no information is a fraud in law. 1 F(2d)249.

887-49 220AppDiv404, 221NYS739.

888-60 Wis 232NW536 (new corporation agreeing to pay certain obligations).

888-67 170Ark1029, 282SW355.

888-68 153Wash526, 280P9 (conveyances by president and secretary in corporation's name to themselves held voidable).

889-69 149Wash393, 270P1041. [a] (5) Payment by president of salary to himself for which no service was rendered and which caused insolvency, was fraudulent as to creditors. Mass 167 NE276. (6) Substitution of corporation's creditor as beneficiary in place of corporation under policy on president's life for purpose, not of giving security to creditor, but of paying him president's personal debts and providing balance for president's wife, is ultra vires and void. 34F(2d)598. (7) That shares of stock required to be surrendered by officer and stockholder on reconveyance of land to him are still outstanding after such reconveyance is sufficient alone to render reconveyance voidable at instance of other creditor or stockholder. 153 Wash526, 280P9. (8) Transfer of corporation's assets to directors and others with notice is void against plaintiff injured by corporation's negligence and later recovering judgment. 137Misc 295, 241NYS701. [b] (2) Other transactions held not fraudulent. 31F(2d) 375; 31F(2d)379; 136 Okl 158, 275P 649. [c] **That conveyance of corporate property to directors and stockholders may be treated as trustee's deed** does not avail grantees where without consideration to hinder creditors. MoA 24 SW(2d)175. [d] **Transfer for sole benefit of stockholders in manner inimical to creditors** is not permitted. MoA 24 SW(2d)175.

889-72 [c] **In absence of good faith** deed by officer to himself may be avoided. 126Me443, 139A461. [d] **Purchaser from corporate officer** who executed deed to himself need only inquire into officer's authority and adequacy of consideration. 126Me443, 139A461. [e] **Deed from corporation officer,** executed by himself in behalf of corporation, puts mortgagee on inquiry as to officer's authority. 126Me443, 139A461. [f] **Failure to set forth real consideration** in corporation's deed to director may put purchaser on inquiry. 126Me443, 139A 461.

889-79 34F(2d)252.

889-80 Mass 167NE314 (recovery of dividends paid); MoA 24SW(2d)175; 145Wash101, 258P1039.

890-84 290Pa356, 139A118.

890-85 29Ariz227, 240P351.

891-87 145Wash101, 258P1039.

891-88 129 Okl 222, 264P164.

891-90 20F(2d)786.

891-92 319Mo 644, 5SW(2d)413; Utah 285P1008.

891-93 29Ariz227, 240P351; 319Mo 644, 5SW(2d)413. [c] **Questions for jury.**-319Mo 644, 5SW(2d)413. [d] **That selling corporation was foreign corporation having no office in state** is matter for consideration for jury in action against purchasing corporation by servant of selling corporation for injuries sustained a few days before transfer. 319Mo 644, 5SW(2d)413.

892-1 6F(2d)147 (purchaser of all stock of corporation who takes all its assets is liable for its debts to extent of such assets).

892-1½-New. That corporation carried liability insurance is no defense to suit against fraudulent transferees where insurance is inadequate. 137Misc295, 241NYS701.

892-2½-New. Distribution of assets mistakenly made to stockholders may be retained by them as against subsequent creditors. 290Pa356, 139A118.

893-15 126Me443, 139A461.

893-16 Wash 288P241.

894-26 TexCivA 21SW(2d)711.

895-42½-New. A corporation's judgment creditor, on proof that the corporation was never indebted to directors, but that directors, for purpose of hindering, delaying, and defrauding creditors, caused to be executed on behalf of the corporation a note and trust deed in favor of one of their number, and that the corporation was at the time insolvent, has been held entitled to set aside the trust deed as fraudulent. 97CalA508, 275P984.

895-45½-New. Transfer of stock held properly attacked in garnishment proceedings. 44 Ida200, 256P99.

895-50 23F(2d)803; 86 IndA369, 158 NE234; 203 Iowa276, 211NW386 (dictum); 52ND806, 204NW673; 124 Or276, 261P432; 145Va429, 134SE677.

897-52 8F(2d)338; 17F(2d)546; NJ 147A863(2dcase); NJCh 152A2; 248NY 298, 162NE86; 143SC516, 141SE705; 52 SD1, 216NW597; 53SD414, 220NW876; 141Wash483, 251P774; 149Wash393, 270P1041. [c] 17F(2d)546. [d] **Equity administers assets** of insolvent corporation on theory that they belong to creditors and stockholders. 269US504, 46 SCt179, 70Led380. [e] **Payment in ordinary course of business** does not warrant inference of intention to prefer. 36 F(2d)507.

897-53½-New. No lien exists in creditors of solvent corporation, on any true trust theory. 26F(2d)227.

897-53 124 Or276, 261P432.

897-54 [a] (4) Doctrine has no application in absence of proof of insolvency when private debts of stockholders were paid out of corporate funds, ratified by corporation. 14F(2d)758. [c] **Liability of one receiving corporate assets impressed with trust** for payment of corporate debts extends to full value of assets. 42F(2d)177.

898-57 14F(2d)762.

898-68 37F(2d)907; Ala 128S394; 249 NY206, 163NE735; 252NY262, 169NE 378; 143SC516, 141SE705; 52SD1, 216 NW597; TexCommnA 11SW(2d)507; TexCivA 25SW(2d)675 (corporation must be insolvent and have ceased to do business in order to invoke trust fund rule); 136Wash220, 239P560; 141 Wash483, 251P774; 145Wash604, 261P 393; 149Wash393, 270P1041; Wash 288 P241 (transfer voidable only).

898-59 203 Iowa276, 211NW386 (dictum).

898-60 8F(2d)338; 34F(2d)598 (loose business methods, arising from friendship between corporate officer and creditor must be construed according to their legal effect where creditors' rights are involved).

898-61 19F(2d)624; Wash 288P660.

898-63 NJCh 150A774; 141Wash483, 251P774.

899-69½-New. The trust which equity impresses on assets of an insolvent corporation is one in favor of only those creditors who relied on, or whom law presumes relied on, the particular asset of the corporation. 141Wash483, 251P 774.

899-69½-New. Claimant, which surrendered a lien for interest under a deed of trust, was not a "creditor" of the bankrupt, within law dealing with unlawful preferences. 30F(2d)372.

899-74 234Ky580, 28SW(2d)783; 124 Or276, 261P432; 142Wash428, 253P644.

899-77 8F(2d)338; 31F(2d)375; NJCh 146A353; 142Wash428, 253P644. [c] **But where loan was made to corporation on condition** that it would not continue business, it was held not made before suspension of ordinary business within meaning of statute, although lender did not know corporation was insolvent. 100NJEq41, 134A888.

900-80½-New. Where creditors of an insolvent corporation, one of whom was its president, obtained priority over another creditor through waiver of notice of motion for judgment, it was held not per se fraud. 145Va429, 134SE677.

901-96 [b] **Contract to purchase own stock unenforceable after insolvency** as preference to stockholder. 190NC655, 130SE545.

901-96½-New. Where a corporation had contracted to pay an attorney's fee by crediting the amount thereof on his unpaid stock subscription, he is entitled to set off such amount in a proceeding by an unsatisfied judgment creditor against stockholders for unpaid stock subscriptions as against the contention that it would give him a preference. Tex CivA 138SW(2d)923

901-99 86IndA369, 158NE234.

901-99½-New. or officers. 145Va429, 134SE677.

903-1 7F(2d)308, 309 [quotCJ]; 8F (2d)338; 8F(2d)546; 14F(2d)29; 28F (2d)107; 31F(2d)375; 201Iowa337, 207NW374, 377 [citCJ]; NJCh 151A 834; 70Utah543, 262P97. [f] **Appropriation of corporation's most valuable asset** to pay directors for past advances is void as preference to detriment of creditors. 28F(2d)107.

904-3 8F(2d)338; 33F(2d)496 (obtaining corporate bonds secured by lien on assets in lieu of stock holdings); 89Fla 324, 103S620; 201Iowa240, 207NW374, 377 [citCJ].

905-4½-New. In the absence of insolvency, or intent to hinder or delay other creditors, a corporation may lawfully give security to a director for a preexisting debt, even though it does thereby effectuate a preference. 31F(2d)379.

905-6 See also 26F(2d)937. [a] (3) Other instances. 176Minn516, 223NW 785.

905-7 234Ky580, 28SW(2d)783.

906-28 70Utah543, 262P97.

907-30 216Ky440, 288SW342.

908-45 105WVa610, 144SE410, 62ALR 740.

909-58 8F(2d)546; 17F(2d)546.

909-59 See also 99NJEq451, 132A105.

909-62 55ND856, 215NW810, 56ALR 200.

910-66 [c] (7) NJCh 147A509 (not for "valuable consideration"). (17) Corporation contemplating insolvency cannot, to detriment of creditors, secure preexisting debt. NJCh 151A834. (18) Second mortgage given by corporation while insolvent within statute, though for presently moving consideration, is void where mortgagee knew of insolvency. NJCh 151A283.

911-68½-New. Where a corporation is chartered for the purpose of transacting a particular business under strict regulations, the right to prefer creditors depends upon the intent of legislature. 55ND856, 215NW810, 56ALR200.

912-71 248NY298, 162NE86. [c] **Amendment** requiring proof that creditor had reasonable cause to believe he was being preferred is applicable although enacted after suit was instituted but before trial. 36F(2d)507.

913-78 See also 248NY298, 162NE86.

913-81 [d] (2) 42F(2d)886.

914-87 26F(2d)937.

915-99 8F(2d)546; 287Pa205, 134A 422; Wash 288P660.

915-2 34OhA442, 171NE251.

915-4½-New. Purported assignment of fire policies to corporate creditor is held void as preference under trust fund doctrine. 142Wash601, 254P240.

916-18 See also 34OhA442, 171NE251.

917-24½-New. Whether a sale, if upheld, would constitute preference over other claimants, was not involved, where it was not shown in the record that the receivers were appointed because of insolvency. 294Pa185, 144A77.

917-28 [a] **In New Jersey.-Ch** 146A658.

918-41½-New. Where preference consisted in improper disposition of proceeds of sale of corporate assets, an officer not participating in the transaction has been held not liable. 70Utah 543, 262P97.

918-41½-New. Property distributed to stockholders is a trust fund for creditors. 23F(2d)714.

918-42 70Utah543, 262P97.

918-42½-New. Preferred creditor need not refund enough to pay completely unpaid creditors, but only enough to place him and those who received nothing. 100NJEq41, 134A888.

918-43 70Utah543, 262P97.

919-58½-New. Creditors may attack validity of bonds where receiver to wind up affairs and his counsel take neutral attitude. 8F(2d)546.

919-58½-New. Defendant in a suit to adjudge corporate mortgage preferential is entitled to determination of court's claim for amount paid to prevent forfeiture of corporation's leasehold estate. 219Ky196, 292SW831.

919-58¼-New. General rules of pleading apply in an action by a stockholder to set aside a transfer by a corporation. 131Misc712, 227NYS717 (complaint sufficient to show assignment for creditors unlawful).

919-58½-New. Evidence held insufficient to sustain a bill to set aside a collusive attachment. RI 139A299.

919-58⅙-New. A charge that a mortgage would be valid, although executed when the corporation was insolvent, if it was executed in good faith and without any fraud or intention to delay creditors and in pursuance of contract between the corporation and president that the president would advance the money, has been held proper. 168Ga153, 147 SE392.

919-58½-New. Testimony that several years before execution of a mortgage directors authorized the corporation to execute a mortgage to the person subsequently becoming president of the corporation, for the same indebtedness as secured by the mortgage finally executed, was admissible to rebut a claim of fraud. 168Ga153, 147SE392.

919-58⅛-New. The minutes of a corporation authorizing execution of a mortgage to the president were properly admitted as a circumstance which might be considered by the jury in defense against an attack on the mortgage for fraud and to establish the bona fides of the transaction. 168Ga153, 147SE392.

919-58⅛-New. Lienors may challenge an assignment as giving a preference, without surrendering their own liens. 248NY298, 162NE86.

919-58 1/10-New. Court cannot adjudge transfer was in contemplation of insolvency and for preference without proof. 234Ky558, 28SW(2d)737.

919-60 7F(2d)308.

921-70 NJCh 148A898.

921-85 BC [1926] 4DomLR759, [1926] 3WestWkly378.

923-19 But see 131Misc712, 227NYS 717.

923-25 131Misc712, 227NYS717 (that stockholder alleges that corporation was "insolvent" when assignment was made does not show that stockholder was not injured).

924-36 287Pa205, 134A422.

924-43 [a] (4) Agreement transferring stock to creditor's committee to continue business, liquidate, or sell for creditors, is held to create trust for creditors. 287 Pa205, 134A422.

924-44 [c] (3) Execution of mortgage on small portion of corporate property about one year before bankruptcy does not constitute general assignment. 43 Ida343, 251P1051.

926-69 232Mich505, 205NW583.

926-78½-New. Right of lessor.-260 Mass166, 157NE353.

927-93 190NC655, 130SE545 (trustee for corporation, stockholders, and creditors).

927-93½-New. Duty of trustee to protect rights of corporation stockholders and creditors. 190NC655, 130SE545.

927-2½-New. Assignee is personally liable for claim for freight charge by federal government accruing while operating a railroad where the assets were distributed under a state court order without giving preference to such claim. 200Iowa1160, 206NW251.

927-4½-New. A general assignee for the benefit of creditors may raise the question as to the validity of a mortgage. 125Misc839, 211NYS468 (affected by consent of stockholders).

927-4⅓-New. Trustee, to whom corporation transferred its assets for benefit of creditors, is held not authorized to assign proceeds of assets to stockholders' receiver. 129Misc377, 221NYS 404.

927-4¼-New. In the absence of power of appointment in a trust instrument transferring property for the benefit of creditors, the court alone has the right to appoint a substitute trustee. 129 Misc377, 221NYS404.

928-19 232Mich505, 205NW583 (trust enforcible in property acquired from corporation through fraudulent transactions of directors); 192NC37, 133SE 181.

929-39½-New. In an action against directors to recover property, interveners, alleging purchase of interests in property without giving dates thereof, and offering no evidence to support claim, were held to have no interest in the property. 232Mich505, 205NW583.

930-57½-New. Judgment creditor is not required in sequestration to sue in representative capacity where the rights of other creditors are not involved. 127 Misc114, 215NYS328.

930-57½-New. Failure to give security prior to execution does not prevent suit for sequestration where exhaustion of plaintiff's remedies was shown by sheriff's return. 127Misc114, 215NYS328.

930-59 23F(2d)714; 41F(2d)60; 89 Fla324, 103S620.

930-61 TexCivA 299SW488.

931-65½-New. A creditors suit is the remedy accorded creditors to reach corporate property and apply it in satisfaction of claims. 31F(2d)527.

931-65⅓-New. A creditor's bill, brought against a corporation and directors to set aside a deed of trust has been held maintainable in a county other than that in which the land was situated. 97CalA 508, 275P984.

931-65¼-New. Protection of public at large from imposition and general interest of creditors and stockholders is required in suit. NJCh 150A199.

931-74 83Colo 242, 263P719.

932-99½-New. An individual acting as intermediary in transfer of assets of one mining company to another and taking title thereto and paying debts of grantor in the limited amount which he agreed is not liable in a suit by the grantor's creditors as trustee with the grantee of grantor's assets. 29Ariz357, 241P514.

932-99⅓-New. Under statutes suit lies against all those in any way liable for the debts of a corporation, and jurisdiction attaches immediately upon filing of a bill by creditors of the corporation in which it is made a defendant. 251 IllA89.

932-99¼-New. Stockholder held not liable to creditors for sum received on sale of stock of insolvent corporation. 300Pa312, 150A616.

932-99⅕-New. Defendant in a suit is shown to be a stockholder by his pleading, and testimony admitting his subscription for stock, and the record of his receipt therefor. 251 IllA89.

932-99⅙-New. A stockholder is estopped to deny his responsibility for debts of a corporation incurred prior to the time it could legally incur indebtedness where he had charge of transactions and participated in incurring bills. 251 IllA 89.

933-3½-New. That debt of creditor is

for small amount is inconsequential. **NJCh** 150A199.

933-16½-New. Statute of limitations does not run against creditors' claims until prescribed time after same accrue. 251 **IllA**89.

933-20 88**CalA**784, 264**P**521; 97**CalA** 319, 275**P**500(1stcase); 220**AppDiv**404, 221**NYS**739; 116 **Okl** 3, 243**P**160.

934-21 96**CalA**549, 274**P**597.

934-23 23**F(2d)**714 (property distributed to stockholders).

934-25 20**F(2d)**786.

934-28 **TexCivA** 299**SW**488.

935-47 20**F(2d)**786 (joinder held proper in suit for receiver and injunction); **NJCh** 150A199.

936-50 [a] **Receiver is necessary party plaintiff** in action by creditors against insolvent corporation, its stockholders, directors, and officers for accounting and recovery of property. 51**SD**53, 211**NW** 965. [b] **Error in failing to join receiver,** where necessary party plaintiff held caused by court's ordering him to appear as party plaintiff. 51**SD**53, 211 **NW**965.

936-56 20**F(2d)**786.

936-62 153**Md**501, 138**A**665 (receiver held proper party).

937-82 [a] 29**Ariz**227, 240**P**351; 160 **Ga**591, 128**SE**906 (petition against insolvent corporation and individual organizers who transacted business in its name before minimum capital was subscribed held not subject to general or special demurrer); 162**Ga**309, 133 **SE**249; 51**SD**53, 211**NW**965.

938-85½-New. Creditor's suit to recover assets from officers of a bankrupt corporation must allege that no trustee was appointed, or, if appointed, has been discharged. 160**Ga**341, 127**SE**754.

938-85¼-New. A petition against an insolvent corporation and individual organizers who transacted business in its name before the minimum capital stock was subscribed brought by creditors of the corporation on behalf of themselves and others who might intervene, praying judgment against all defendants, and seeking to require the individual defendants jointly and severally to make good the minimum capital stock is not subject to demurrer for misjoinder of parties plaintiff and defendant. 160**Ga**591, 128**SE**906.

938-85¼-New. A bill to subject to satisfaction of a judgment, assets of a debtor corporation, is not defective because not filed for the benefit of all creditors of the corporation. 218**Ala**100, 117 **S**672.

938-96 336 **Ill** 586, 168**NE**655; 220**App Div**404, 221**NYS**739.

938-97 97**CalA**508, 275**P**984. [a] (5) Other evidence held sufficient. 171**Ark** 24, 283**SW**41, (6) 127**Misc**114, 215**NYS** 328. (7) That payments to stockholders were for sale of stock and not distribution of proceeds of corporation's mine. 336 **Ill** 586, 168**NE**655. [b] (4) That burden of proving indebtedness to complainant was sustained. 336 **Ill** 586, 168**NE**655.

939-11 **NJCh** 150A199.

939-11½-New. Corporation after filing of bill to have it decreed insolvent cannot effect dismissal by payment of debt. **NJCh** 150A199.

940-40½-New. A petition to enjoin a transfer as a fraud on creditors set out a cause of action. 167**Ga**802, 146**SE**830 (3rdcase).

941-47 145**Va**568, 134**SE**570.

941-50¼-New. Court will not ordinarily, before adjudication of claims of creditors, permit lessor of insolvent mining company to forfeit lease and recenter premises. 101**WVa**247, 132**SE**510.

941-57 334 **Ill** 362, 166**NE**82.

942-59 [a] **Courts of chancery have no general power** to appoint receivers of corporation. 254 **IllA**213.

942-62 229**Mich**491, 201**NW**448.

942-65 255 **IllA**196.

942-68 **TexCivA** 286**SW**638. See also 28**OhA**373, 162**NE**696.

943-69 23 **OhA**143, 154**NE**743.

943-69½-New. A court of equity which has appointed a receiver has no right to order directors of such corporation to file voluntary petition in bankruptcy, 5**F(2d)**39.

943-69¼-New. or to admit its inability to pay its debts, 5**F(2d)**39.

943-69¼-New. or to indicate its willingness to be adjudicated a bankrupt. 5**F(2d)**39.

943-69⅓-New. A court of chancery has inherent power to appoint receivers for domestic corporations. 239**Mich**295, 214**NW**110, 55**ALR**1157.

943-69⅓-New. The court has no authority to establish a receivership to run business indefinitely for the purpose of restoring solvency. 29**F(2d)** 176

943-69⅓-New. A receiver may be appointed for a solvent corporation in a proper case. 294**Pa**108, 143**A**574.

943-69⅓-New. Receiver may be appointed for corporation in some jurisdictions under statutes. **Ida** 285**P**1039.

943-71 **NJCh** 148**A**898 (notwithstanding assignment by corporation for benefit of creditors).

943-76 230**AppDiv**268, 243**NYS**446.

944-79 [a] **Appointment of receivers in another state** is not invalidated by subsequent appointment of receiver on suit by stockholders in state of origin before final decree of distribution. 233 **IllA**398.

944-87 88**CalA**784, 264**P**521; 85**Colo** 419, 276**P**972; 238**Mich**261, 213**NW**120; **NJCh** 148**A**898; **NJCh** 150**A**347; 294 **Pa**108, 143**A**574; **TexCivA** 286**SW**638.

945-88 199 **Ind**166, 154**NE**480.

945-89½-New. In the absence of a showing that the receiver may be better able than the directors to preserve the property of a corporation or save it from foreclosures of mortgages thereon, necessity for appointment of receiver does not appear. 238**Mich**261, 213**NW** 120.

945-91 85**Colo** 419, 276**P**972.

945-91½-New. ; that it owes a debt. 85**Colo** 419, 276**P**972.

945-3½-New. Failure to comply with the statutory requirement as to certifying to the secretary of state when ten per cent. of the capital stock is subscribed and to elect officers and directors is not ground for appointment of a receiver, where persons have subscribed to articles of incorporation, invested in property, and held themselves out as a corporation. 25 **OhNPNS**225.

945-3½-New. That majority stockholders may not elect party controlling twenty-four per cent of stock as director is no ground for appointment of receiver. 170**La**997, 129**S**614.

946-5 325 **Ill** 114, 156**NE**258; 158**La** 327, 104**S**61; 294**Pa**108, 143**A**574; **Tex CivA** 286**SW**638.

946-6 99**NJEq**282, 132**A**477.

947-10 220**Ala**613, 127**S**195; **La** 130**S** 344(2dcase); 49**Nev**145, 241**P**317, 322, 43**ALR**1331 [citCJ]; 294**Pa**108, 143**A** 574.

947-11 101**CalA**541, 282**P**21 (where corporation was formed by husband to deprive wife of community rights in property); 294**Pa**108, 143**A**574.

947-13 **NJ** 149**A**44.

948-14 **NJ** 149**A**44. See also 294**Pa** 108, 143**A**574.

948-17 111**Conn**497, 150**A**511; **DelCh** 142**A**793; **DelCh** 151**A**257; 97**Fla**493, 121**S**789; **NJ** 149**A**44. See also 103**NJ Eq**294, 143**A**326.

948-18 116 **Okl** 3, 243**P**160. [a] **Discretion is abused** in appointing receiver for alleged insolvent corporation where all creditors have been satisfied with and of principal creditor. **DelCh** 142**A**793.

948-20 72**CalA**18, 236**P**570 (primary beneficiaries in output of oil well may have receiver appointed where directors violate corporate agreement made with them); **NJCh** 152**A**166; 289**Pa**233, 137 **A**235. [h] **Communistic corporation.**– 166**La**77, 116**S**675. [i] **Stockholder's bill must be given effect of creditor's bill** when corporation proves to be insolvent. 276**US**36, 48**SCt**268, 72**L ed**457.

948-21 [a] **Application of one stockholder out of 2,000** is properly refused where only creditor did not join in request. 156**SO**429, 153**SE**283.

948-22 289**Pa**233, 137**A**235, 237 [citCJ]. [a] **Preservation of assets merely** is insufficient to warrant appointment of receiver. 334 **Ill** 362, 166**NE**82.

948-24 23 **OhA**143, 154**NE**743; 289**Pa** 233, 137**A**235; **TexCivA** 286**SW**638.

949-25 **Mass** 170**NE**453; 6**PaDist&Co** 279.

949-27½-New. Under preferred stock certificate, stockholder could not have receiver appointed for failure to pay dividends where there were no profits. 199 **Ind**166, 154**NE**480.

949-27⅓-New. Appointment of receiver is for benefit of all stockholders and creditors, and not for the stockholder bringing the action alone. 200 **Ind**350, 160**NE**43.

949-28 199 **Iowa**1285, 202**NW**14, 18 [quotCJ].

949-29 199 **Iowa**1285, 202**NW**14, 18 [quotCJ].

949-30 199 **Iowa**1285, 202**NW**14, 18 [quotCJ].

949-31 199 **Iowa**1285, 202**NW**14, 18 [quotCJ]; 116 **Or**440, 241**P**388.

949-32 254 **IllA**213; 199 **Iowa**1285, 202**NW**14, 18 [quotCJ]; 6**PaDist&Co** 279; **TexCivA** 286**SW**638. But see 289 **Pa**233, 137**A**235. [b] (27) Other irregularities and faults held insufficient to authorize appointment of receiver. 166**La**77, 116**S**675. (28) That officers purchased bad paper is not ground for appointment of receiver to bring suit against officers. **DelCh** 142**A**793. (29) Employment of others to perform deceased manager's duties, resulting in increased salaries is not mismanagement. 170**La**997, 129**S**614. (30) Decline in price of commodities in which corporation deals, entailing losses, is not mismanagement. 170**La**997, 129**S**614. [c] (3) That board decided on advice of counsel to prosecute rather than settle suit to set aside mortgage foreclosure on ground of usury, on property purchased by corporation subject to mortgages where meritorious questions involved. 238**Mich**261, 213**NW**120.

950-33 199 **Iowa**1285, 202**NW**14, 18 [quotCJ].

950-34 199 **Iowa**1285, 202**NW**14, 18 [quotCJ]; **TexCivA** 286**SW**638.

950-36 254 **IllA**213.

950-36½-New. That former directors had defrauded corporation giving it causes of action is not ground for receivership where the present board had not refused to take action or had not been requested to act. 238**Mich**261, 213 **NW**120.

950-36¼-New. Acts amounting to gross mismanagement entitle a stockholder to appointment of a receiver. 155 **Md**549, 142**A**885 (or misapplication of assets).

950-37 85**Colo** 419, 276**P**972 (that directors for whom plaintiff voted were dummies and hand picked not ground); **NJCh** 151**A**95 (purchase of property already leased); 289**Pa**233, 137**A**235; 6 **PaDist&Co**279; 294**Pa**108, 143**A**574; 142**Wash**688, 253**P**1086. [g] **In absence of proof of dissension** among directors making it impossible for corporation to carry on business, court of equity ought not to displace board of directors by receiver. 238**Mich**261, 213**NW**120. [h] **Questions of policy of management** are left solely to directors as regards receivership. **NJCh** 151**A**95.

951-39 29**F(2d)**176; 85**Colo** 419, 276**P** 972.

951-43 199 **Iowa**1285, 202**NW**14, 20 [citCJ].

952-46 199 **Iowa**1285, 202**NW**14, 20 [citCJ].

952-47 **TexCivA** 286**SW**638; **TexCivA** 178**SW(2d)**844. [a] 142**Wash**688, 253**P** 1086.

952-49 220**Ala**613, 127**S**195; 97**Fla**493, 121**S**789; 131**Misc**393, 226**NYS**599; 131 **Okl** 159, 268**P**205; 289**Pa**233, 137**A**235; 294**Pa**108, 143**A**574; 300**Pa**479, 150**A** 902; **TexCivA** 286**SW**638. [f] **Acts of directors not justifying appointment of receiver.**–**La** 130**S**344(2dcase).

953-50 202 **Iowa**38, 209**NW**410; 289**Pa** 233, 137**A**235; 294**Pa**108, 143**A**574; **Tex** 286**SW**638, 640 [citCJ].

953-52 294**Pa**108, 143**A**574.

953-53 202 **Iowa**38, 209**NW**410 (right of stockholders expressly reserved by statute).

953-54½-New. A federal district court is not deprived of jurisdiction of a suit

by Pennsylvania stockholders for appointment of a receiver of a West Virginia corporation which controlled a Pennsylvania corporation by reason of a Pennsylvania statute authorizing suits in the courts of that state under such circumstances. 13Ka2d(c)63.

954-67 111Conn497, 150A511. [c] **Insolvency unnecessary.** 111Conn497, 150A511.

955-68 NJCh 151A(6,1C)(dcase).

955-71 289Pa283, 137A235, 237 [cd(C)J].

955-72 289Pa283, 137A235, 237 [cd(C)J]. **Alta** [1930] 1DomLR203 (negative statement of rule).

955-76 116Or440, 241P388; **Alta** [1930] 1DomLR203 (negative statement of rule).

955-77 289Pa211, 137A235.

956-79 42F(2d)382.

956-83½-New. Acts of officers amounting to gross mismanagement or misapplication of assets entitle creditors to appointment of a receiver. 155Md549, 142A885.

956-84 23Mich261, 213NW120. [c] [c(C)].

956-88 [c] See also 147Wash69, 264P1009.

956-89 R1 131A554.

956-90 85Colo419, 276P972. [a] (2) Holder of note of president of corporation not converting claim into corporate bond is not creditor of corporation. 48F(2d)364.

957-91 5F(2d)108; 43F(2d)364; 88CalA751, 264P[illegible]; CalA 2d[illegible] 100Ga[illegible] 291Pa[illegible] 111A571.

957-93½-New. Under some statutes a judgment creditor of a corporation may have a receiver appointed, although dissolution of the corporation results. 35Wyo496, 252P499.

957-93½-New. It has been held that, where it is to the benefit of a corporation and it will protect the creditors, the receivership will be appointed at suit of ordinary creditors. R1 131A554.

957-96 95CalA731, 261P521, 35Wyo496, 252P499.

957-1 See also R1 131A554. [b] **Mismanagement ground for appointment.** 171Ark[illegible] 298SW[illegible].

958-5 **DelCh** 140A801. [c] **Amount owing applicant is immaterial** on question of whether he is creditor entitled to appointment of receiver. **DelCh** 140A801. [d] **Claimant for breach of contract is creditor** within statute entitling him to appointment of receiver. **DelCh** 140A801.

958-13 **DelCh** 151A257, 10Neb[illegible] 241P317, 43ALR1331. [e] **Time of insolvency.** **DelCh** 151A257.

959-15 291F(2d)176.

959-19 101NJEq294, 141A326, 291Pa108, 143A574.

960-26½-New. A corporation is not insolvent where it is without assets or creditors the assets having been sold to satisfy creditors. **DelCh** 142A793.

960-30 [a] (1) 15**DelCh**321, 137A791; **DelCh** 140A801. (6) Where corporation is insolvent and has exhausted efforts and resources to keep going, receiver is properly appointed. **DelCh** 140A801. [a] (7) Insolvency may be deficiency of assets below liabilities or inability to meet maturing obligations. **DelCh** 142A793. [e] (2) Stockholder cannot have receiver appointed on ground of corporation's insolvency. 160La77, 1[illegible]675. [b] (4) NJ 147A494(2dcase). [m] (9) That minority stockholders will be irreparably damaged and corporation suffer great loss, if not insolvency, is insufficient to authorize appointment of receiver under statute. **TexCivA** 286SW618.

962-38 35Wyo496, 252P499. [a] (2) Equity may appoint receiver in proceedings by one creditor who has no judgment where corporation does not object, but consents. 5F(2d)23. [b] **Persons bound by waiver.**—35Wyo496, 252P499.

963-49 [b] **Where the fraud and mismanagement charged is that of former directors against whom it thereby has cause of action, minority stockholder must make reasonable efforts to procure present directors to redress his grievances.** 239Mich261, 213NW120.

963-51 [a] **Establishment of definite amount of creditor's claim is not condition precedent.** NJ 147A494(2dcase).

963-53 [a] **Where receivership incidental to action affecting real property,**—[illegible]A[illegible], [illegible]P[illegible].

964-60 [a] **Director participating in act prejudicial to stockholders** is not precluded from suing for appointment of receiver. 300Pa479, 150A602.

966-91 **TexCivA** 58SW(2d)10a.

966-97½-New. Whether a party shall be permitted to intervene rests in the discretion of the court. 35Wyo496, 252P499.

966-98 See also **TexCivA** 88SW(2d)1051 (owner of bonds).

966-99 [b] **Lienholders** 215Ky248, 291SW49.

966-9 [a] (4) Sufficient complaint. 8D 239NW250.

966-4 16Ga502, 116SE301(dcase) (petition held sufficient); 160La356, 125S270; **TexCivA** 6SW(2d)139. [b] 210Ala50, 96So[illegible]; 72Cal18, 236P570 (suit by multholders to sell well for violation of trust); **Idn** 285P1019; 130Kan[illegible], 286P[illegible]; 100WVa[illegible], 115SE[illegible]. [c] 218F(2d)991; 254IIA213; 23ObA143, 151NE[illegible]; **TexCivA** 286SW[illegible].

967-5 72CalA18, 236P570 (petition sufficient).

967-11 [b] **Allegations held insufficient.** **TexCivA** 280SW[illegible].

967-12 72CalA18, 236P570 (petition sufficient); 100Ga[illegible], 11[illegible]S[illegible] (complaint sufficient).

967-16 72CalA18, 236P570 (petition sufficient). [b] **Allegations held to state sufficient cause of action.** Mo 19SW(2d)1000.

968-21 255IIA196. [b] Wyo 285P146.

968-52 **TexCivA** 88SW(2d)1051 (averment held sufficient).

968-53½-New. A bondholder's plea to intervene has been held not fatally defective in not averring that he first called on the trustee to rectify wrongs charged as required by the trust deed securing bonds before appealing to the court in propria persona, in view of averments showing that such demand would have been futile. **TexCivA** 88SW(2d)1051.

968-53½-New. In determining matter of appointment of receiver for corporation, it is proper to consider matters alleged in answer. 150NC429, 153SE283.

970-60 132Kan779, 256P[illegible]; 231Ky[illegible], 25SW(2d)[illegible]; 27ObA143, 151NE743; **TexCivA** 17SW(2d)844.

970-63 [a] **TexCivA** 250SW[illegible].

971-74 [a] **Rules of court governing practice.** 111Conn497, 150A511 (making temporary appointment permanent).

971-76½-New. If insolvency has been removed since the bill is filed, a receiver should not be appointed. **DelCh** 142A793.

971-76½-New. Appointment of a receiver on the ground of mismanagement, without taking proof in support of the bill, is proper. 155Md549, 142A885.

971-76¾-New. Where defendant corporation denies allegations and sets up defenses, it is entitled to be heard on matter of appointment of receiver. 160La356, 125S270.

971-78½-New. In statutory action to sequester property right of lessee of defendant to retain money withheld to satisfy certain claims cannot be determined summarily on motion to appoint receiver. 228AppDiv504, 240NYS229.

971-78½-New. No evidence as to matters admitted by officers in pleading is necessary. 155Md549, 142A885.

971-86½-New. Fact that receiver was appointed for defendant corporation in another jurisdiction is circumstance encouraging exercise of court's discretion to appoint receiver for alleged insolvent corporation. 15**DelCh**321, 137A79.

971-86½-New, but such fact is entirely irrelevant on jurisdictional question of whether corporation is insolvent. 15**DelCh**321, 137A79.

971-86¼-New. Matters not pleaded are inadmissible. 85Colo419, 276P972.

971-86½-New. Other evidence held admissible. 111Conn497, 150A511.

971-87 218Ky19, 290SW1055; **Mass** 170NE455. [a] (1) 167Minn468, 210NW59; **Mo** 19SW(2d)1000, 103NJEq93, 141A157. (6) 111Conn497, 150A511, 202Iowa38, 209NW410. [b] (3) 142Wash655, 254P1056. (4) To show insolvency at time bill was filed. 15**DelCh**321, 137A79. (6) To show fraud and mismanagement of directors. **TexCivA** 250SW638. (6) To establish salary of party taking place of deceased manager was excessive. 170La997, 129S611. [c] **Inability to meet obligations** is not demonstrated, where it appears aid of principal creditor enabled corporation to meet debts. **DelCh** 142A793. [d] **Appointment warranted** under facts. 155Md549, 142A885.

972-91 15**DelCh**321, 137A79. [b] **Insolvency disputed.** 15**DelCh**321, 137A79.

972-92 85Colo419, 276P972.

972-94¼-New. Judgment for a corporation against a director for the value of bonds admitted to be outstanding obligations of the company has been held erroneous. 85Colo419, 276P972.

972-94½-New. The order appointing a special receiver for the corporate assets for the purpose of applying same "towards the satisfaction" of the judgments is not appointment of a general receiver. 119ObS393, 164NE419.

972-94¼-New. An order appointing receivers and granting an injunction without notice or opportunity for hearing was a final decree. 31F(2d)556.

972-94½-New. An order to show cause why the receivers appointed without notice to the corporation should not be continued violated the statute. 31F(2d)556.

972-94¾-New. A void order was not validated by obedience of creditors and stockholders to the court's direction to show cause why the receivers should not be continued. 31F(2d)556.

972-97 158La327, 104So[illegible] (stockholders successfully resisting application held entitled to attorney's fees).

974-16 207Iowa41, 217NW477.

974-31 See also Wyo 285P146. [a] **Receiver held not creditor.**—Wyo 285P146.

975-34½-New. Where an order to show cause why the receivers should not be continued was addressed only to the creditors and stockholders, the corporation was not chargeable with any dereliction for failure to file answer. 31F(2d)556.

975-34½-New. The objection to venue can be waived by the unqualified motion of the corporation to remove the receiver appointed for it and to appoint another, thereby asking for affirmative relief. 30F(2d)893.

975-42½-New. It is within the court's discretion to continue receiver for one corporation as receiver for another corporation, and there is no abuse of discretion where the two have for years been operated practically as one. 30F(2d)893.

975-47 234Ky558, 28SW(2d)787.

975-48 NJ 149A14.

975-53 [a] **Where orders appointing receivers and for injunction were void,** order modifying injunction was likewise void. 31F(2d)556.

976-57 26F(2d)6,5 (where property is in possession of receivers disqualified by friendliness to one of two contending factions, disinterested receiver will be appointed). 208Iowa662, 218NW306.

976-58 See also 103NJEq294, 143A326.

977-73½-New. Where corporation executed bond to secure release of property and discharge of temporary receiver claimant indemnified is entitled to recover on bond on establishing claim. Iowa 229NW748.

977-77½-New. Where the order appointing receivers was void, it created a trust for the administration of the corporation's property under the supervision of the court. 31F(2d)556.

977-77½-New. Court appointing temporary pending determination as to which of two sets of directors were properly elected must turn over property to those found properly elected. 12F(2d)35.

977-80 20F(2d)775; **DelCh** 152A216; 117Nebr431, 220NW566, 567 [citCJ]; 132Misc144, 228NYS705.

978-86 132Misc144, 228NYS705.

978-90½-New. Rights of creditors are fixed as of the time a receiver is appointed although the corporation is not definitely known to be insolvent. 28F(2d)331.

978-91 34F(2d)155 (corporate officers' acts between application for, and appointment of, receiver are binding on corporation unless prejudicial to creditors).

978-93 13F(2d)901; 250NY233, 165NE275; **TexCommnA** 23SW(2d)339. But see **CalA** 284P247.

978-96½-New. Trustees of a defunct corporation cannot execute a valid mortgage of corporate property. 229Mich491, 201NW448.

979-1½-New. After receivership has been in existence for over four months, officers have no authority and are estopped to file voluntary petition in bankruptcy. 13F(2d)901.

979-5 [a] **Court cannot through receivership** prevent stockholders from exercising powers expressly conferred on them under by-laws. **CalA** 284P247.

979-13½-New. Stockholders ordinarily receive no dividends during a receivership. 28F(2d)176.

979-22 **NC** 154SE50. See also 170La1036, 129S628.

982-59 34Ariz278, 271P25; 12LaA365, 124S544. [c] **Defenses available to trustee under corporate mortgage** are not abrogated by appointment of receiver. 146Wash543, 264P705.

983-62 18F(2d)617 (lessor's lien under Louisiana statute); 196Wis581, 219NW439.

983-64½-New. A creditor having a first lien on personal property which is insufficient security may be allowed reasonable compensation for use of the property by the receiver in conduct of the corporate business. 107WVa460, 148SE574.

983-64⅓-New. A chattel mortgage on trucks coming into the hands of the mortgagor's receiver did not cover their earnings, and the mortgagee had no claim against the receiver for the use of the trucks by the receiver, even after demand for possession. 29F(2d)489.

983-66 164Ga735, 139SE525.

983-68 205Iowa147, 217NW800 (where receivership temporary, and not for purposes of winding up).

983-69 33F(2d)496.

984-76 12LaA365, 124S544 (sheriff's surrender of attached property to receiver does not destroy attaching creditor's privilege).

985-5 20F(2d)775; 205Iowa147, 217NW800; 149Wash500, 271P329.

986-16 See also 149Wash500, 271P329.

987-21½-New. Appeal. A corporation may appeal from judgment against it, obtained after entry of a judgment of sequestration and appointment of a receiver. 214AppDiv367, 212NYS356.

988-50½-New. Whether general receiver appointed in bondholder's suit to conserve assets shall be required to become party to pending suit by stockholder to recover wasted assets is within discretion of court. 8F(2d)820.

988-54 111Conn605, 151A248; 206Iowa562, 218NW306; 218Ky289, 291SW381; 229Mich491, 201NW448; 235Mich136, 209NW61. [b] **Whether power of chancery court** in appointing receiver for defunct corporation was prudently exercised will not be inquired into in collateral proceeding. 229Mich491, 201NW448.

989-55 235Mich136, 209NW61. [a] (1) 31NM404, 247P275. (2) 235Mich136, 209NW61. [c] **Receiver is bound by decree** of court appointing him, stating that corporation was solvent, in replevin defended by receiver on ground of insolvency. 294Pa422, 144A421, 61ALR974.

989-57 31F(2d)556 (where order was made without notice or opportunity to be heard); 162La133, 110S176; 229Mich491, 201NW448. [d] **Fact that stockholder appeared in response to order to show cause** does not estop corporation from asserting invalidity. 31F(2d)556.

990-59½ 14F(2d)758; 164Minn507, 205NW436; **NJ** 150A420.

990-60 34Ariz278, 271P25; 203Iowa792, 206NW586.

990-61 42F(2d)515.

990-62 Iowa 227NW627 (after annulment of charter); 223Ky1, 28SW(2d)1075.

990-63 **DelCh** 152A216; 86IndA565, 155NE222.

990-64 14F(2d)762; **IndA** 169NE91; 100NJEq1, 134A875; **TexCivA** 8SW(2d)285.

990-65 **TexCivA** 8SW(2d)285. [a] **Allegation in set-off held to set forth valid defense.**-22OhA482, 154NE345.

990-66 14F(2d)758.

991-67 241Mich106, 216NW397.

991-69 86IndA565, 155NE222.

991-71½-New. Enforcing conflicting equities of creditors is no part of the function or duty of a receiver. 203Iowa792, 206NW586.

991-71⅓-New. Jurisdiction to determine conflicting claims to property sold.-98NJEq523, 131A524.

991-71¼-New. In Philippines where receiver is appointed under statute prescribing his powers and duties they are limited to the provisions of the statute. 51Philippine549.

991-71½-New. It is no part of the function or duty of a receiver to enforce conflicting equities of creditors in the assets of a corporation. Iowa 227NW97.

991-71⅔-New. Receiver cannot waive any rights of subsequent creditors in property transferred. 42F(2d)515.

992-86 Iowa 227NW627.

992-87 **NJCh** 150A183; **NJCh** 152A2 (filing of bill). See also 245NYS2.

992-89 Iowa 227NW97; **NJCh** 146A346; 195NC508, 142SE767; 146Wash543, 264P705. [a] **As against vendors of goods under conditional sale contracts,** receiver is not vested with title. **NJCh** 146A346.

992-90 195NC508, 142SE767. [a] **Cashier's checks purchased by motor company with money derived from sales of automobiles, title to which was in finance company,** belong to finance company as against receiver of motor company. 195NC508, 142SE767. [b] **As innocent purchaser.**-Receiver of organization having lien on property stands in no better position with reference to being innocent purchaser than organization would have been if it had acted in its own name. **TexCivA** 13SW(2d)388.

992-90½-New. If a corporation, sued in replevin by a conditional vendor, was in fact insolvent, the receiver had the right of an attaching creditor, and the conditional vendor could not maintain the action. 294Pa422, 144A421, 61ALR974.

992-90⅓-New. Unless a corporation is insolvent when receivers are appointed, the receivers do not have the rights of levying or attaching creditors, but only the rights possessed by the corporation itself. 294Pa185, 144A77.

992-91 19F(2d)766; 37F(2d)105; 176Ark469, 28SW(2d)1087 (may not take possession of property not belonging to corporation).

992-92 13F(2d)901; 35F(2d)189 (protection from external attack); 206Iowa1194, 221NW823 (rights of creditors are fixed when receiver takes possession); 12LaA365, 124S544; 221MoA215, 300SW1054; 94PaSuper207 (as against conditional vendor). [b] **It is right and duty of court to protect possession of receiver,** though it had no jurisdiction to appoint him. 25F(2d)794. [c] **Tax deed of corporate property under sale after appointment of receiver** is void irrespective of jurisdiction of court in receivership proceedings. 25F(2d)794.

992-93 242Mich624, 219NW714.

992-93½-New. Assets in the hands of a receiver may be paid out or disbursed only on order of court. 221MoA215, 300SW1054.

992-93⅓-New. Where a chattel mortgagee's motion in a receivership suit for the return of mortgaged trucks or payment of installments overdue was not pressed, but adjourned from time to time because of the expected sale subject to the mortgage, the mortgagee waived any claim for conversion by the receiver. 29F(2d)489.

992-94 220Ala529, 126S102.

993-96 221MoA215, 300SW1054. But see 146Wash543, 264P705.

993-1½-New. Creditors or stockholders may, on refusal of the receiver on demand to enforce a cause in favor of the corporation, prosecute such action at their expense, and a recovery in such action will inure to the benefit of all creditors and stockholders. 196NC762, 147SE291.

994-24 215Ala261, 110S147 (stating Texas law); Iowa 227NW627; 8PaDist&Co301; 50RI506, 149A609; 145Wash247, 259P716. [f] **Avoidance of fraudulent contracts with subscribers.**-203Iowa792, 206NW586.

994-25 See also 145Wash247, 259P716.

994-27 223Ky1, 28W(2d)1075.

995-35 But see 32OhA399, 168NE149.

995-45 But see Wis 229NW85.

996-51 167Minn20, 208NW424 (evidence sufficient to support refusal to grant order asserting stockholders till receiver had attempted to collect unpaid stock subscriptions).

996-52 Iowa 227NW627.

998-60 91PaSuper278.

998-62 54ND614, 210NW342, 346, 48ALR660 [citCJ].

998-63 173Minn436, 217NW483 (statute construed as providing for service on nonresident by publication). [a] **Failure to give notice to nonresident stockholder** is not available to stockholder duly served with notice as ground for resisting application for order for assessment. 174Minn166, 218NW885.

998-66 54ND614, 210NW342, 346, 48ALR660 [citCJ].

998-70 Iowa 227NW627 (statute of limitations held no bar to assessment).

999-77 See also Iowa 227NW627. [a] **Time of existence of indebtedness.**-174Minn166, 218NW885.

999-82 [c] **That corporation's debts exceed charter limit** is not ground for resisting assessment on stockholders not producing amount of such limit. 174Minn192, 218NW887.

999-83½-New. Objecting stockholders may insist that the receiver make proper and sufficient proof of the grounds for an assessment. 167Minn283, 208NW997.

999-83⅓-New. The degree and kind of proof required is left largely to the discretion of the trial judge. 167Minn283, 208NW997.

999-83¼-New. Actual fraud in the transaction need not be established in order to render the stockholders liable to assessment. **NJCh** 144A723.

999-83½-New. Proceedings for assessment may be by petition in the insolvency suit or by original bill in aid of the insolvency administration. **NJCh** 144A723.

999-83¾-New. Conflicting rights between creditors or between creditors and stockholders does not preclude a receiver from proceeding with an assessment against subscribers to capital stock. Iowa 227NW627.

999-85 54ND614, 210NW342, 346, 48ALR660 [citCJ]. See also Minn 230NW645(2dcase).

999-86 172Minn33, 214NW764.

999-87 172Minn33, 214NW764.

999-90 172Minn33, 214NW764.

999-91 172Minn33, 214NW764.

999-92 172Minn33, 214NW764.

999-93 172Minn33, 214NW764.

999-94 172Minn33, 214NW764.

1000-1 See also 10PaDist&Co200 (direction by court not granted).

1000-9½-New. A stockholder, although a resident of another state, cannot question the propriety of the assessment in an action subsequently brought to enforce the assessment. **NJCh** 144A723.

1001-14½-New. Some statutes expressly authorize the joinder of the representatives of deceased subscribers or stockholders with others. 203Iowa792, 206NW586.

1001-17 166La445, 117S549.

1001-23 NC 155SE558; 133SC446, 131 SE612, 613 [citCJ].
1001-24 195NC127, 141SE489.
1001-24½-New. But where the corporation sued and failed to recover, the receiver has no greater right to recover on behalf of the stockholders in a subsequent action. 141Wash483, 251P774.
1002-27 14F(2d)758.
1002-27½-New. Receiver cannot sue on behalf of creditors to recover funds diverted by officer of corporation where creditors had knowledge thereof or became creditors after reorganization. 141 Wash483, 251P774.
1002-31 145Wash604, 261P393 (notice and hearing held condition precedent to equity suit). [b] **Pleading.**-24F(2d)661.
1003-42 241Mich106, 216NW397.
1003-43 But see 27F(2d)201.
1003-44 241Mich106, 216NW397; 153 Wash526, 280P9.
1004-45 241Mich106, 216NW397 (transfer in violation of Bulk Sales Law).
1004-47 NJCh 152A2.
1004-50½-New. The receiver may raise question of the validity of a mortgage. 125Misc839, 211NYS468 (as affected by consent of stockholders).
1005-57 30F(2d)318 (losing business). [a] **Receiver of corporation should sustain loss** resulting from his conducting business without authority from court. NJ 149A44.
1005-57½-New. A receiver may be authorized to conduct the affairs of a corporation as a going concern. 35Wyo 496, 252P499.
1005-58 294Pa185, 144A77.
1005-59 294Pa108, 143A574.
1005-62½-New. A receiver is not chargeable with loss on oil sold to a large pipe line company on the ground that it could be sold to smaller companies at a greater price, where operators generally preferred to sell to larger companies. 179Ark56, 16SW(2d)181.
1005-63½-New. The court did not err in refusing to charge the receiver with the difference between the amount of oil sold and accounted for by him and the total amount transferred to him, where the oil in storage had largely evaporated and included a large amount of water and sediment. 179Ark56, 16 SW(2d)181.
1005-63⅓-New. The failure of a receiver to resist a bankruptcy petition of a debtor of the company does not render him liable for the indebtedness, where it is undisputed that the debtor committed an act of bankruptcy. 179 Ark56, 16SW(2d)181.
1005-65 But see 294Pa108, 143A574. [b] **Court cannot incur financial obligation** through receiver to displacement or prejudice of existing liens, except for purpose of preserving property. 29 F(2d)176.
1006-80 35Wyo 496, 252P499.
1006-82 IndA 169NE350; 198NC133, 150SE879; TexCommnA 23SW(2d)339; 35Wyo 496, 252P499.
1006-83 Md 149A556.
1006-84 Md 149A556 (circumstances sustaining court's decision as to necessity of sale).
1007-86 100NJEq525, 135A814.
1007-87½-New. Partial payment of claims from proceeds of sale. Receiver cannot determine validity of claim of bank excluded from participation in payment of half of claims of all claimants except bank, so as to allow bank's claim to preference as secured creditor. 38F(2d)254.
1007-87⅓-New. Stay of sale by court. Where owners of eight-ninths of stock joined in request for sale to preserve assets personal act of two directors purporting to give statutory corporate bond to stay sale will not be accepted by court as valid corporate act. Md 149A556.
1007-93½-New. A decree directing apportionment of proceeds requires marshaling of the payments derived from the security apportioned to the bondholders. 31F(2d)527.
1007-94 [a] **All persons affected should have notice** (1) and an opportunity to show cause why sale should not be made. Md 149A556. (2) Error in failing to give notice may be cured by subsequent events. Md 149A556 (affording hearing to objecting party).
1007-7⅓-New. Contract to purchase, where two contract jointly with another to purchase the corporate assets of a receiver's sale, and one of the two advances the money with which the other purchases it in his own name, they are jointly and severally liable to the third party on failure to account. 125Misc27, 210NYS382.
1007-11 9F(2d)354 [citCJ]. See also 294Pa108, 143A574.
1007-12 9F(2d)354 [citCJ]; 234Ky558, 28SW(2d)737.
1007-13 RI 146A761 (interlocutory decree of sale held warranted where offer presented was shown to be best obtainable).
1008-17 234Ky558, 28SW(2d)737. [b] **Personal property sold separately,** where not essential to operation. 234Ky558, 28SW(2d)737. [c] **Land sold separately.**-234Ky558, 28SW(2d)737.
1008-21 12LaA365, 124S544; 155 Md 500, 142A512; 240Mich28, 215NW6; 35 Wyo 496, 252P499. See also 103NJEq 287, 143A349. [b] **Necessity for sale.**-35Wyo 496, 252P499. [c] **Parties holding liens must have notice.**-35Wyo 496, 252P499.
1008-22 100NJEq525, 135A814.
1008-23 189NC656, 127SE695 (amended statute authorizing sale free of incumbrances held applicable to proceedings begun prior to its passage).
1008-24 100NJEq525, 135A814; 34NM 562, 287P64. See also NJ 149A44. [a] **Consent of lienor** held not to render decree valid. 100NJEq525, 135A814.
1008-27½-New. Waiver of encumbrances. Where, at the sale an encumbrancer, in pursuance of a written contract he waives his right, he is not thereafter, as a condition precedent to a suit on the contract, obliged to make a tender of his interests. 125Misc27, 210 NYS382.
1008-27⅓-New. A lien claimant not appealing from an order for sale from liens is precluded from thereafter asking leave to sell a portion of the property to satisfy his lien. 240Mich28, 215NW6.
1008-31 TexCivA 299SW488.
1009-43 TexCommnA 23SW(2d)339.
1009-49 TexCivA 299SW488; 145Va 370, 133SE659.
1009-62½-New. Where purchaser is willing, but unable, to carry out contract of purchase, he is entitled to a return of his deposit if the property is resold at a higher price in excess thereof. 98NJEq477, 131A389.
1009-62⅓-New. Rights as against conditional vendor; jurisdiction of receiver.-98NJEq523, 131A524.
1010-66 286Pa226, 133A232. [a] **Where discovery and accounting is necessary,** equity will grant relief at suit of receiver. 286Pa226, 133A232.
1010-69½-New. Suit by receiver to enforce directors liability for diversion and misappropriation of corporate assets may be brought in domicile of corporation or any director. 161La784, 109 S490.
1010-75½-New. Where the receiver of an insolvent corporation has refused on demand of creditors and stockholders to enforce a cause of action existing in favor of the corporation the court will ordinarily order the receiver to bring action. 196NC762, 147SE291.
1010-82 IndA 169NE91.
1011-98 287Pa92, 134A490. [c] **In action to cancel mortgage to officer** (1) given by corporation, failure to allege that officer was director held to bar recovery. 86 IndA369, 158NE234. (2) In action to recover dividends paid from capital. 145Wash604, 261P393.
1011-3½-New. 287Pa92, 134A490.
1011-3⅓-New. Creditors of an insolvent corporation cannot sue for the corporation's property without alleging the receiver's failure to protect the assets. 178Ark619, 11SW(2d)441.
1011-7½-New. [a] **Receiver suing to enforce rights of creditors** in respect to private payments by checks of corporation has burden of proof of facts necessary to recovery. 14F(2d)758.
1011-8 178Ark1200, 13SW(2d)612(2d case); 294Pa185, 144A77. [b] (4) To show fraud in transactions between closely allied corporations. 18F(2d)615. (5) To establish director's claim of equitable lien against bonds received by director from corporation for advances made. 28F(2d)107. (6) That stockholders consented to give director amount owed to corporation prior to attachment of creditor's rights. MoA 298SW1040.
1011-8½-New. Stockholders seeking to recover money paid to a receiver in satisfaction of an asserted liability for bonus stock have the burden of proving that there are no creditors who became such after the stock was issued. 168 Minn365, 210NW38.
1011-8⅓-New. The burden of proof is on defendant, in a receiver's suit to set aside deeds executed by officers to themselves, to show the validity thereof. 153Wash526, 280P9.
1012-15 215Ala307, 110S468; 150Wash 235, 272P962. [c] **Claim of conditional vendor to property after sale thereof by receiver.**-98NJEq523, 131A524.
1012-15½-New. Becoming "provable" means stripped of all contingencies. 309 Mo 381, 274SW722.
1012-15⅓-New. The court has discretion to decide, if it will determine all claims against or by the receiver it appointed, or allow them to be decided elsewhere. 233 IllA398.
1012-16 203 Iowa792, 206NW586. [a] **Claim under agreement for rescission of subscription contract.**-203 Iowa792, 206 NW586.
1010-19 TexCivA 27SW(2d)275.
1011-91½-New. Receiver sued for amount due on contract with corporation selling assets to parties has been held not entitled to have them made parties defendant. NC 154SE650.
1011-98 NC 154SE650.
1011-6 [a] **Burden of proof.**-Wash 288 P660.
1011-8 [b] (2) **Other instances.** Wash 288P660.
1012-10½-New. A decree against a receiver is binding as against corporate assets in his hands. Iowa 227NW627.
1012-15 [a] (5) Subsidiary is not entitled to recover against parent company's receiver on claim based on fictitious entries made for purpose of deception. 34 F(2d)655.
1012-15½-New. Where claim of creditor had been reduced after receivership by application of funds he can only prove portion remaining unpaid as basis for determining his interest in assets. IndA 170NE562.
1012-15⅓-New. After property has passed into receiver's hands, penalties for nonpayment of taxes thereon are not allowable. 41F(2d)218.
1013-23 Iowa 232NW831.
1013-26 309Mo381, 274SW722.
1013-29 See also 28F(2d)326. [a] **Notes given as further evidence of original debt** are not collateral security and may not be used to increase total amount of claim as basis of distribution. 28 F(2d)326.
1013-32 15DelCh31, 131A202; BC [1926] 3DomLR974, [1926] 3WestWkly 290 (as to right of secured creditors of company in liquidation).
1013-32½-New. , and to the full extent of his debt regardless of the amount realized on security, where the amount realized was insufficient. 15DelCh31, 131A202.
1014-35 15DelCh31, 131A202.
1015-46 34F(2d)157 (mortgage company paying taxes for corporation from proceeds of sale held not entitled to interest on such amount in absence of contract provision or court order authorizing it, where receiver was justifiably delayed in making reimbursement); NJ 150A769.
1015-47 8F(2d)163.
1015-51 23F(2d)717 (internal revenue taxes).
1015-55½-New. The date to which interest is to be allowed is a matter to be settled by receivership court. 19F(2d) 766.
1015-55⅓-New. Unsecured creditors are allowed interest to date of appoint-

ment of a receiver. 28F(2d)176.

1015-55¼-New. A corporate manager is entitled to interest on salary and expense account in accordance with his agreement. 177Minn72, 224NW454.

1015-55½-New. Acceptance of the principal sum paid as taxes, although with protest against nonpayment of interest, waives the right to interest. 34F(2d) 157.

1015-57 [a] (2) Insurance company is creditor in sum of deposit made for it with state insurance department by corporation that acting as its stock sales agent failed to turn over to such insurance company proceeds of stock sold. 8F(2d)532.

1016-63½-New. Where, in an action against individuals to cancel stock subscriptions and notes given therefor on the ground of fraud, the court canceled the subscriptions and notes and appointed a receiver for the corporation to protect the interests of the subscribers and creditors, a claim of the attorney for defendants for services to them and to the corporation is not payable out of the funds in the hands of the receiver. 234Mich92, 207NW838.

1016-63½-New. In proceedings for the appointment of a receiver of an oil company it is error for the court to dismiss claims of lien claimants who furnished supplies and acquired liens therefor without affording such claimants an opportunity to prove their claims before the receivers commissioner. 218Ky248, 291SW49.

1016-65 19F(2d)766; 218Ky248, 291 SW49.

1016-68 221MoA215, 300SW1054.

1016-69 [a] **Manner of establishment.**-221MoA215, 300SW1054.

1016-70 221MoA215, 300SW1054.

1017-76 [a] **Iowa** 232NW831; **Minn** 231NW801. [b] **Iowa** 227NW908; 118 **Nebr**179, 224NW9.

1017-79 197 **Ind**527, 151NE420; 309**Mo** 381, 274SW722; 221MoA215, 300SW 1054.

1017-81½-New. Federal government need not file claim in time limited or get extension where notice thereof is given to assignee for benefit of creditors. 200 **Iowa**1160, 206NW251.

1017-82 25F(2d)614; 33F(2d)127 (mere lapse of time does not create laches). [b] **Inexcusable lack of diligence** will prevent right to file claim. **NJCh** 152A241.

1017-83 197 **Ind**527, 151NE420; **Iowa** 232NW831. [a] (2) 33F(2d)127 (where no distribution had yet been made). [c] **Not matter of course.**-Application for leave to file claim after time fixed should not be granted as matter of course but should be carefully considered. 33F(2d) 127.

1018-89 221MoA215, 300SW1054.

1018-92½-New. A creditor failing to file a claim pursuant to proper notice until after final distribution is precluded from sharing in the assets. 221MoA 215, 300SW1054.

1018-92¼-New. In proceedings for the appointment of an ancillary receiver, where the time for presenting claims has been determined, an order to show cause may properly be issued requiring the United States to file its claim for taxes within a stated time. 18F(2d)231.

1019-14 [a] **State cannot object** to allowance of claims of holders of stock alleged to have been fraudulently procured from other stockholders. 119**Kan** 689, 240P954.

1019-19½-New. Labor lien claimants, failing to assert their claims before a special master as directed in an order of reference, are not entitled to assert their claims on an exception to the master's report as grounds for refusing to confirm the report. 18F(2d)617.

1019-21 8LaA215.

1019-26½-New. A judgment dismissing a claim is void where the claim was not filed and claimant was not a party to the receivership proceedings. 218**Ky** 248, 291SW49.

1019-26½-New. Allowance of a claim is equivalent to judgment in personam against debtor. 19F(2d)766.

1019-26¼-New. Determination of time and manner of payment of claim is in nature of decree in rem and is equivalent to execution against assets. 19F(2d) 766.

1019-26½-New. Assets of subsidiary in receivership are not liable for claims allowed against another subsidiary. 26 F(2d)503.

1019-26½-New. Court allowing tax claims including penalties can later correct mistake by entering decree disallowing penalties. 41F(2d)213.

1019-32 [a] **Corporation held to have made assignment** for creditors under priority statute giving priority to debts due United States. 269US504, 46SCt 179, 70Led380.

1019-33 92PaSuper292; 136SC511, 134 SE510.

1020-34 136SC511, 134SE510.

1020-43½-New. Where assets are not sufficient to leave surplus or to pay all creditors in full, allowance of interest to a preferred creditor would be at the expense of those not so preferred. 125 Misc806, 212NYS258.

1020-43½-New. Interest on a claim for a city tax against an insolvent corporation is not a preferred claim as against other creditors. 125Misc806, 212NYS 258.

1020-43¼-New. Conditional vendor is not a preferred creditor as to the balance due on contract price but is a general creditor to the extent of the unpaid amount after exhausting remedies under the title retained. 98NJEq523, 131A524.

1020-43½-New. Rights of seller to corporation of its own stock as to assets of corporation are superior to those of subsequent creditors with notice of sale. 252NY262, 169NE378.

1021-55 15DelCh248, 135A846; 34NM 562, 287P64.

1021-55 205 **Iowa**147, 217NW800.

1021-58 235Mich619, 209NW802.

1022-65 99NJEq734, 133A542.

1022-68 220MoA1205, 299SW132.

1023-85 See also 99NJEq734, 133A542.

1023-93 26F(2d)311 (department head's share of profits).

1024-2 NJCh 144A452.

1024-6 198NC705, 153SE327.

1024-7 31F(2d)270.

1025-8½-New. A conditional vendor is not a mortgagee so as to be entitled to preference. 98NJEq523, 131A524.

1025-12 NJ 150A769 (amount representing bonus for making loan).

1025-13 7F(2d)308.

1027-39 26F(2d)872; 6F(2d)672, 673 [quotCJ]; 8F(2d)522; 44 **Ida**200, 256 P99.

1027-41 8F(2d)522.

1027-44 35F(2d)643 (after redemption date of stock).

1027-45 196NC784, 147SE307.

1028-47 8F(2d)522.

1028-48 See also 196NC784, 147SE307.

1028-53½-New. A charter, giving preferred stockholders a first lien on the corporation's realty, is not valid against general creditors, where not duly probated and recorded. 196NC784, 147SE 307.

1029-55 8F(2d)522.

1029-64 8F(2d)522; 35F(2d)643.

1030-68 101WVa728, 133SE628. [b] **On accounting as trustees** for assets unlawfully disbursed by them after insolvency, directors-trustees cannot offset debts due them from company, but must share ratably with other creditors. **NJ Ch** 146A691.

1030-79½-New. Claims of directors of an insolvent corporation will be postponed to payment of all other claims where they were guilty of actual or legal fraud and gross mismanagement of affairs of corporation. 8F(2d)532.

1030-79½-New. Claim of seller to corporation of stock for balance of purchase price is superior to claims of officers for salaries accruing subsequently. 252NY262, 169NE378.

1032-96½-New. Holder of bonds secured by mortgage have preference over general creditors. 15DelCh248, 135A 846.

1032-97 NJ 150A769.

1033-23 23F(2d)717 (internal revenue taxes); 30F(2d)525 (payment of carrier's debt due United States and of mortgage executed by railroad held subject to prior payment of taxes, where United States permitted continuance of receivership at loss); 32F(2d)355 (except as to chattel mortgages); 34F(2d) 155 (government's claim for income taxes); NJ 149A44. But see 206 **Iowa** 1194, 221NW823. [c] **Taxes due United States.**-18F(2d)231. [d] **Federal income tax has priority** over state tax on personal property. 147Wash176, 265P 722, 62ALR139.

1033-26½-New. Where only part of the corporate assets passed to equity receivers there was no general assignment and the federal government is not entitled to priority under Rev. St. § 3466. 26F(2d)839.

1033-26½-New. Excise taxes on automobiles manufactured by a receiver operating the business have been held entitled to priority. 30F(2d)318.

1033-26¼-New. The question of a lien is not involved in determining such claim for priority. 26F(2d)839.

1033-26½-New. A claim of the United States against the proceeds of the sale of personal property for federal income taxes has priority over claims of counties for taxes under assessments subsequently made. 279US80, 49SCt321, 73 Led621.

1033-26½-New. Claims of the United States against the proceeds of the sale of personal property for general federal taxes are entitled to priority over counties' claims under assessments of taxes made before a receiver was appointed and before assessment by the commissioner of internal revenue, where these county taxes have not become a specific lien. 279US80, 49SCt321, 73Led621.

1033-28 [a] 18F(2d)731. [b] 32F(2d) 355 (except as to preëxisting mortgage lien). [d] 18F(2d)731.

1033-29 37F(2d)22.

1034-31 NJCh 145A477. [a] **Particular claims entitled to priority.**-167La 359, 119S256. [b] **Debts of receivership are entitled to priority over debts of insolvent.**-167La359, 119S256. [c] **Expenses incurred before appointment** by receiver as attorney of creditors, to preserve property, constitute "privileged debt." 167La359, 119S256. See also 155Md500, 142A512. But see 146Wash 543, 264P705.

1034-36½-New. Undetermined amount of outstanding receiver's checks cannot be declared a lien on corporate property prior to a lien of a mortgage thereon. 176Ark469, 2SW(2d)1087.

1034-36½-New. Under some statutes lien claims cannot be diminished by charging costs and expenses against them so long as there are general funds to pay such expenses. 34NM562, 287 P64.

1034-45½-New. A claim for a freight charge by the federal government while operating a railroad is a preferred claim. 200 **Iowa**1160, 206NW251.

1034-45½-New. A United States claim for damages to a harbor buoy has priority except as to the chattel mortgagees. 32F(2d)355.

1034-45¼-New. Purchasers of stock certificates acquired same interest as vendors had on sale of corporate property. **Mich** 233NW410.

1034-46 240Mich28, 215NW6.

1035-50 But see 173Minn133, 216NW 546.

1035-52 173Minn133, 216NW546.

1036-64 173Minn133, 216NW546.

1037-92-99½-New. Against stockholders of a corporation, interest is chargeable down to payment of claims before there can be a return of any surplus to stockholders. 125Misc806, 212NYS258.

1037-92-99½-New. Surety for liquidator is not liable for embezzlement as agent for secured creditor who retained securities. **Can** [1927] 3DomLR67.

1037-92-99¼-New. The court appointing the receiver has power to determine the persons entitled to the funds in the hands of the receiver and the amount that each is entitled to receive. 221MoA 215, 300SW1054.

1037-92-99½-New. Generally, distribution should not be ordered until after the receiver has accounted for receipts and disbursements. 221MoA215, 300SW 1054.

1037-92-99⅙-New. Distribution may be ordered before the determination of a separate action instituted by a creditor to establish his claim. 221**MoA**215, 300 **SW**1054.

1037-92-99½-New. A receiver has no discretion as to the distribution of funds but the court will award them to the parties entitled on proper application, notice, and proof. 221**MoA**215, 300**SW** 1054.

1037-92-99⅚-New. If there is an excess after payment of all claims and attorney's fees, the corporation is entitled thereto. **TexCivA** 299**SW**488.

1037-4 255 **IllA**175 (legally organized association not required to reincorporate).

1037-9 255 **IllA**170.

1038-27 255 **IllA**170.

1039-28 175**Ark**10, 299**SW**361.

1039-30½-New. Where a corporation is reincorporated because of a mistaken belief that its charter has been forfeited, the new corporation is functioning for the old one and the original corporation is still owner of the corporate assets and entitled to conduct the corporate business. 241**Mich**6, 216**NW**476.

1040-55½-New. An action by a receiver of a tramway company requiring the fixing of value of its property does not preclude the company, after its reorganization, from asserting its insolvency at such time for the purpose of determining the fairness of a provision for unsecured creditors. 18**F(2d)**226.

1040-55⅓-New. In determining the solvency of a tramway company at the time of reorganization for the purpose of determining the fairness of a provision for unsecured creditors, the rating base value determined in an action to increase rate of fares is not conclusive. 18**F(2d)**226.

1040-57 84**CalA**627, 258**P**666 (old company held to be promoter in fiduciary relation with new company).

1040-62 126**Me**141, 136**A**721.

1041-75½-New. For equity court to have jurisdiction over reorganization it must have control of its assets. 14**F(2d)** 168.

1041-75¼-New. Receiver should bring proceeding for damages occasioned receivership estate through alleged fraud of noteholders' committee. 19**F(2d)**903.

1041-75¼-New. and such proceeding should be plenary one at law or in equity. 19**F(2d)**903.

1041-75⅚-New. Where stockholders had no equity in assets of corporation, court cannot adjudicate fairness of any plan of reorganization. 42**F(2d)**886.

1041-79 29**F(2d)**383. [a] (3) Consideration for sale of corporation's assets, being promise to pay its debts and issuance of stock in new company, is held not illegal. 260**Mass**81, 156**NE**897.

1042-82 318**Mo** 1031, 4**SW(2d)**1072 (held not void).

1042-83 245**Mich**599, 223**NW**218; **Mich** 233**NW**410.

1042-91½-New. Agreements that property shall be sold to a certain person, made in good faith, are not contrary to public policy. 245**Mich**599, 223**NW**218.

1042-94 29**F(2d)**383.

1043-3 **NJCh** 150**A**209.

1043-6½-New. Creditors who assigned claims to debtor corporation's reorganization committee is held authorized to withdraw such assignments when reorganization plan was abandoned. 14 **F(2d)**920.

1043-9 [a] (1) 256 **IllA**175. (2) Other contracts construed. 54**ND**455, 209**NW** 988.

1043-10 325 **Ill** 16, 155**NE**773.

1044-20½-New. Documents merely annexed to petition of intervening noteholders' committee in receivership proceeding are not part of plan as approved. 8**F(2d)**392.

1044-22½-New. A contract between the sole stockholders and a trustee, providing for the sale of stock for cash and notes of the company and for payment of company obligations by depositary, has been held a plan of reorganization binding on the company. 104**WVa** 640, 141**SE**1.

1044-26 [b] **Evidence held sufficient to** show that parties entered into contract for reorganization. 89**CalA**292, 264**P** 587.

1044-29 [a] **Bill held insufficient** as predicated upon superseded agreement. 93**Fla**781, 113**S**570.

1045-40 34**F(2d)**533 (expenses of reorganization committee properly assumed). [a] **Test of propriety** of directors' action in assuming and paying expenses of reorganization committee is whether action was within scope of their authority. 34**F(2d)**533.

1045-46 [a] **Committee are fiduciaries for all creditors and parties beneficially interested** and not merely for those whose claims have been assigned to them. 8**F(2d)**392. [b] **Member of committee** who first opposed plan of others is liable with rest for usual administration where he assented to plan. 8**F(2d)** 392. [c] **Where committee allows directors to make large secret profits** in sale of bonds, they are guilty of breach of trust. 8**F(2d)**392.

1045-46½-New. A committee for carrying out reorganization plan guilty of fraud damaging receivership estate are responsible thereto without regard to whether decree authorizing reorganization is vacated or not. 13**F(2d)**158.

1045-48½-New. Payment from receivership estate with approval of reorganization committee of attorneys' fees for work other than for corporation or for beneficiaries of court's trust is an unwarranted depletion of estate. 8**F(2d)** 392

1045-50½-New. Members of the reorganization committee may be disqualified by adverse interest or past action. 8**F(2d)**392.

1045-52 See also **NJSup** 131**A**679.

1045-56½-New. A plan of reorganization adopted by holders of more than two thirds of outstanding stock is held not fraud on corporation or minority stockholders. 260**Mass**81, 156**NE**897.

1045-56⅓-New. The fact that underwriting syndicate assisted stockholder to secure a loan to obtain its stock to vote for reorganization is held not to affect reorganization plan. 260**Mass**81, 156**NE**897.

1046-59 126**Me**141, 136**S**721.

1047-84½-New. A suit by certain minority stockholders for stock in a reorganized corporation does not excuse long delay of other stockholders in seeking the same relief. 34**F(2d)**135.

1047-84⅓-New. Great increase in value of a reorganized corporation's stock will not entitle minority stockholders in the old corporation, who did not join the other minority stockholders in a suit for portions thereof, to the aid of an equity court after the lapse of many years. 34**F(2d)**135.

1047-88 [b] **Remedies of stockholders.-DelCh** 141**A**54. [c] **Evidence held to require finding** that preferred stock was worth sixty per cent and common stock nothing. **DelCh** 141**A**54. [d] **Stockholders participating in sale of assets to new corporation** are barred right to complain against issuance of stock to promoter. **DelCh** 141**A**54.

1047-91 94**CalA**533, 271**P**525.

1047-1½-New. Where the directors of a corporation organize a new corporation of the same general nature as the old, and to transact the same business, stockholders in the old company, the legal title to whose stock is held by such directors, are entitled to notice and an opportunity to participate in the purchase of stock in the new corporation proportionate to their holdings in the old corporation. 210**Ky**309, 275**SW**784.

1047-1⅓-New. Provisions of a reorganization plan giving to unsecured creditors dollar for dollar for their claims have been held not inequitable or unfair in comparison with provisions made for old stockholders. 18**F(2d)**226.

1047-1¼-New. Where a company has power to reorganize, minority stockholders cannot get the court to interfere on the ground that the reorganization may be unfair. **NS** [1927] 2**DomLR** 964.

1047-1⅓-New. A new corporation has been held bound to account to a minority stockholder for her proportion of the value of the old company's good will. 29 **F(2d)**383.

1047-1⅙-New. In Canada, where a company has been reorganized pursuant to an agreement of its stockholders for collection of its assets, payment of debts and distribution of balance among them, and all assets have been so distributed except a claim for refund of taxes paid, the new company receives the refund as trustee for the stockholders of the old company and a transfer of shares by a member of the old company to a member of the new company confers no right in such refund. **Alta** [1929] 2 **DomLR**175.

1047-1⅐-New. Prereorganization stockholders not bringing suit against reorganization until corporation showed profit held estopped by laches. **Oh** 172 **NE**280.

1047-3 216**MoA**412, 268**SW**425 (cannot recover interest coupons on old bonds subsequently acquired).

1048-27½-New. The court in receivership proceedings wherein a decree approved plan of reorganization owes an affirmative duty to give auditors notice of unjust and illegal acts of the reorganization committee and of their rights on account thereof. 8**F(2d)**392.

1048-27⅓-New. A decree of approval of a plan of reorganization obtained by fraud should be vacated except as to any creditors chargeable with knowledge disentitling them to rescind their acceptance of reorganization subject to rights of bona fide purchasers of bonds under reorganization. 8**F(2d)**392.

1050-55½-New. A claim against an old corporation assigned to a new corporation which was ordered filed by the receiver is a good consideration for an agreement to furnish an automobile, although the time for filing the claim had expired. 148**Wash**348, 268**P**1036.

1050-55⅓-New. Liability of new corporation for taking over of property not included in reorganization agreement. 256 **IllA**175.

1051-58 133 **Okl** 130, 271**P**675, 679 [quotCJ]. [a] (4) Commissions for procuring contracts prior to corporation coming into being. 206 **Iowa**198, 220 **NW**62. [b] **Sufficiency of consideration.**-28 **OhA**104, 159**NE**842.

1051-60 219**Ky**843, 294**SW**801.

1051-61 37**F(2d)**381; 175**Ark**10, 299 **SW**361; 86**Colo** 559, 283**P**772; 150**Va** 236, 142**SE**356. But see 98**CalA**787, 277 **P**1099.

1051-62 42**F(2d)**120; 218**Ky**172, 291 **SW**21; 242**Mich**28, 217**NW**761 (where assets turned over to new corporation exceeded debts of old corporation); 25 **OhA**415, 158**NE**554. [a] **Rights of creditors of old corporation cannot be impaired** by agreement between incorporators of new company or between new corporation and securities commission. 242**Mich**28, 217**NW**761. [b] **Where stock in new corporation is placed in trust for payment of certain creditors of old corporation,** trustee mingling proceeds of sale of such stock with funds of new corporation from which certain creditors are paid is not liable to receiver of new corporation. 242**Mich**28, 217**NW**761.

1052-64 27**F(2d)**795; 42**F(2d)**120.

1052-64½-New. **Property of corporation taking over assets of insolvent corporation** could not be appropriated to debts of insolvent corporation contracted after its dissolution. 255**Mass**359, 151**NE**744.

1052-64⅓-New. A corporation taking an assignment of claim against an old corporation for the purpose of ratifying an agreement of the old corporation was under the duty of making its disapproval known to relieve it of such obligation. 148**Wash**348, 268**P**1036.

1052-64¼-New. A new corporation taking an assignment of claim against an old corporation in consideration for an agreement could not assert that the agreement was not supported by the consideration. 148**Wash**348, 268**P**1036.

1052-70½-New. A minority stockholder, whose stock was held in trust by two of the majority stockholders, had no remedy at law by an action for conver-

sion barring suit against the new corporation for her proportion of the value of the good will. 29F(2d)383.

1053–78⅓–New. Limitation on noteholder's right to sue is held to apply to suit against new corporation. 14F(2d) 912.

1053–86 [c] (1) 325 Ill 16, 155NE773. (3) Other instances. 133 Okl 130, 271P 675.

1053–87½–New. A complaint alleging that defendant company sold its assets at an excessive price to a new corporation organized and controlled by the old company's stockholders states a cause of action not subject to demurrer. 84CalA 627, 258P666.

1053–90 84CalA627, 258P666 (disproving presumption of inadequate consideration for transfer of old company's property to new). [a] **Burden is on indorsee** to prove new corporation's indebtedness, where he received check given in distribution of assets to incorporator as stockholder in old corporation, who had assigned stock as security. 150Va236, 142SE356. [b] **Presumption of undue influence and insufficient consideration** is raised by sale at grossly excessive price of assets of old company to new company organized by all stockholders of old company. 84 CalA627, 258P666.

1053–94 [a] (5) Other evidence held sufficient. 29F(2d)383; 84CalA611, 258 P440. (9) To show decree of approval of plan of reorganization under receivership was obtained by fraud. 8 F(2d)392. (10) To show that trustees held stock of corporation for distribution among joint-stock company's stockholders. 218Ky172, 291SW21. (11) To sustain finding that stock tendered to minority stockholder was all he was entitled to. 18F(2d)567. (12) To show transfer of cause of action to plaintiff corporation. 23F(2d)567. [b] (3) Other evidence held insufficient. 29F(2d) 383.

1053–94½–New. In a minority stockholder's action to compel issuance to him of stock of a corporation to which assets of the original corporation had been transferred, it is not error for the court to refuse to go into past transactions of the corporations covering many years. 18F(2d)567.

1054–4 165Ga351, 140SE755.

1054–6 198NC524, 152SE489.

1055–12 165Ga351, 140SE755; 187Wis 528, 205NW492.

1055–13 198NC524, 152SE489; 187Wis 528, 205NW492.

1055–14 165Ga351, 140SE755.

1055–18 195NC456, 142SE590.

1055–19 24F(2d)718.

1055–20 165Ga351, 140SE755.

1056–41 34Ariz245, 270P1044, 1049 [cit CJ]; 172Minn306, 215NW221; 287Pa 376, 135A362.

1057–46 322 Ill 99, 152NE526; 198NC 524, 152SE489.

1057–55½–New. Generally, there is no constitutional inhibition against merger of corporate franchises. 287Pa241, 134 A419.

1057–56 287Pa241, 134A419.

1058–62½–New. Special act authorizing consolidation held not repealed. 322 Ill 99, 152NE526.

1058–69 232Ky66, 22SW(2d)265; 157 SC1, 153SE537 (public service corporations). [e] **Statutes construed.**–157SC1, 153SE537.

1058–69½–New. Interlocking of directors as stockholders does not vitiate proposed merger. 126Misc786, 214NYS747.

1058–69⅓–New. It merely requires closer scrutiny of proceedings than otherwise. 126Misc786, 214NYS747.

1060–92 34Ariz245, 270P1044, 1049 [cit CJ]; 283Pa323, 129A115, 40ALR271 (stockholder is not bound to consent).

1060–94 [a] **Statute or charter provision becomes part of contract.**–34Ariz 245, 270P1044, 1049 [citCJ]. [b] **Statute concerning dissolution of corporations prior to expiration of period fixed by articles** does not authorize merger or consolidation of corporations for purpose of carrying on business under single name. 34Ariz245, 270P1044, 1049 [citCJ].

1060–98 [b] **Agreement of controlling stockholders** that stock of another company issued to them and minority stockholder for transfer of property should not be placed on market till issuing company was fully financed held binding on minority stockholder. 49Nev80, 237P377.

1060–5 155Md66, 141A425. [a] **Acceptance of stock in consolidated corporation** (1) equal in value to that surrendered does not legalize merger as to objecting minority stockholders. 34 Ariz245, 270P1044, 1049 [citCJ]. (2) Such acceptance does not ratify consolidation where minority stockholders believed that they were bound by action of majority. 34Ariz245, 270P1044, 1049 [citCJ].

1061–13 34Ariz245, 270P1044, 1049 [cit CJ].

1061–16 34Ariz245, 270P1044, 1049 [cit CJ].

1061–18 155Md66, 141A425.

1061–18½–New. The smallness of complainants' holdings is irrelevant in a suit to protect all stockholders. NJCh 146A60.

1061–20 155Md66, 141A425 (approval of two thirds is property right).

1061–21 [a] **Evidence held not to show conspiracy to defraud.**–126Misc786, 214 NYS747. [b] **Fraud not shown.**–155Md 66, 141A425. [c] **Duty of disclosure.**– 34Ariz245, 270P1044, 1049 [citCJ].

1061–23 [a] **Evidence held not to show** directors acting against corporation's interest with improper motives. 126 Misc786, 214NYS747.

1061–24 101NJEq543, 138A772.

1061–26 34Ariz245, 270P1044, 1049 [cit CJ].

1062–37 126Misc786, 214NYS747.

1062–39 126Misc786, 214NYS747.

1062–42½–New. Allegations that prior merger was fraud and unloading of corporation on stockholders is no ground for injunctive relief against contemplated merger. 126Misc786, 214NYS 747 (mere evidence of director's misconduct).

1062–42⅓–New. Stockholders are entitled to the fullest discovery and protection against the directors as to a bulk sale, in effect a merger. NJCh 146A60.

1062–43 But see NJCh 149A36. [a] **Evidence held not to show** such inadequacy of consideration as to create inference of dishonesty of directors and requiring denial of injunction. 126Misc 786, 214NYS747. [b] **Facts not warranting injunction.**–155Md66, 141A425 (allegations of bill held insufficient).

1062–47½–New. Merger will not be enjoined unless plaintiff shows merger as improvident as to stockholders, 126Misc 786, 214NYS747.

1062–47⅓–New. and that it is so far against corporation's interest as to create inference of improper motive. 126 Misc786, 214NYS747.

1063–49 34Ariz245, 270P1044, 1049 [cit CJ]; 50RI 288, 146A777, 66ALR1553 (corporation must withhold from sale sufficient assets to satisfy claims of dissenting stockholders).

1063–54 131Misc151, 226NYS141.

1063–59½–New. A petition by dissenting stockholders for appointment of appraisers to determine the market value of stock of a merged corporation is to be filed within thirty days of filing of the merger agreement. NJ 143A 755.

1063–61 155Md66, 141A425 (fair value).

1063–64 [b] **Undivided profits withheld from common stockholders** and accumulated into surplus are properly considered as assets in appraising value of preferred stock. 131Misc151, 226 NYS141.

1063–72 NJ 143A755. [a] **In New York.**–133Misc184, 231NYS60.

1064–73 NJSup 143A755.

1064–77 34Ariz245, 270P1044.

1065–10 See also 103NJEq461, 143A 729.

1065–18 [a] **Merger is largely question of intention** depending on circumstances surrounding each particular case. Ariz 290P155.

1066–26½–New. A merger agreement providing for exchange of capital stock of a merging company for redeemable preferred stock of a consolidated company is illegal. 103NJEq461, 143A 729.

1066–27 But see 157SC1, 153SE537.

1066–35 172Minn471, 215NW845, 848 [citCJ].

1066–36½–New. But an attempted merger without a colorable compliance with the statute will not effect a de facto consolidation. 15DelCh1, 130A 34.

1067–50 157SC1, 153SE537.

1067–51 TexCivA 294SW883.

1067–54 131Misc151, 226NYS141; 226 AppDiv299, 235NYS127 (new corporation becomes and is possessor of each of its component members); 9PaDist &Co 192.

1067–56 29F(2d)955; 322 Ill 99, 152NE 526.

1068–69½–New. Corporation may be considered "successor" of another corporation, though both retain their corporate identity and no amalgamation, merger or consolidation takes place. TexCivA 23SW(2d)494.

1068–71 8F(2d)522.

1068–71½–New. , although stock certificates were not in fact issued. 8F(2d) 522.

1069–83 NJSup 143A382.

1070–7 168Ga385, 147SE890 (merger); 9PaDist&Co 192 (duration of existence). [a] (12) Rights under executory contract of merged corporation. 224App Div516, 231NYS51.

1070–10 214Ala486, 108S353, 355 [quot CJ]; 287Pa241, 134A419.

1071–13 92PaSuper1; Wis 233NW442 (formal assignment unnecessary).

1071–15 172Minn471, 215NW845. [d] Rights under contracts go to possessor corporation under merger. 224AppDiv 516, 231NYS51.

1071–16 [a] **Refrigerator company** owned by carriers is held not an independent corporation, but subsidiary corporate joint agency or trustee of carriers. 7F(2d)335.

1071–18½–New. The sale of corporate property of public service corporation to similar corporation passes only such franchises as are consistent with purchasing corporation. 287Pa241, 134A 419.

1072–33 89Fla324, 103S620; Fla 129S 859; 168Ga385, 147SE890 (merger); MoA 256SW100 (in sum equal to value of assets taken from constituent corporation). See also 220MoA695, 294SW 100; MoA 28SW(2d)427; TexCommnA 23SW(2d)704; 149Va200, 141SE253 (at least to extent of property acquired).

1072–34 MoA 273SW135; 224AppDiv 516, 231NYS51 (possessor corporation in merger). But see 239Mich329, 214 NW88; 94CalA12, 270P400.

1073–43 330 Ill 11, 161NE150 (employee's pensions are not recoverable from purchaser of corporation's assets).

1073–49 253NY190, 170NE887.

1074–54 See also 253NY190, 170NE887. [a] **Mortgage of after-acquired property.**–6F(2d)179.

1075–75 143SC1, 141SE144.

1075–76 135Misc889, 238NYS688; 291 Pa282, 139A853.

1076–84½–New. Preferred stockholder, as such, is not a corporate creditor. 283 Pa323, 129A115, 40ALR271.

1076–84⅓–New. On the repudiation of an executory contract by the possessor corporation in a merger, the repudiation may be accepted and suit for breach lies. 224AppDiv516, 231NYS51.

1076–90 211Ky111, 277SW290; 213Ky 464, 281SW471. [b] **Liability for torts.**– TexCivA 275SW735.

1076–92 TexCivA 275SW735 (provision in assigned franchise held not to impose liability).

1076–93 207 Iowa820, 221NW194.

1076–93½–New. or if such intent appears in the absence of provision for payment of such debts, 239Mich329, 214 NW88.

1077–8½–New. Representations of corporation held not sufficient to predicate liability against corporation succeeding

it. 169Ark1046, 277SW513 (in absence of knowledge or acquiescence).

1077-8½-New. That corporation succeeded to business of another corporation associated with a third corporation is not sufficient to render the former liable in absence of agreement. 169Ark 1046, 277SW513.

1077-8¼-New. Nor is the fact that creditor deemed corporation to be part of the debtor corporation sufficient to predicate liability. 169Ark1046, 277SW 513.

1077-9 213Ky464, 281SW471. See also 220MoA695, 294SW100. [a] **Possessor corporation liable on contract** of merged corporation to pay rent for meters during term of executory contract so long as it operated cabs on which meters were installed. 224App Div516, 231NYS51.

1077-14½-New. A possessor corporation is not bound by an executory contract of a merged corporation so far as extension thereof depended on the will of the latter. 224AppDiv516, 231 NYS51.

1077-14⅓-New. A possessor corporation is vested with liabilities, under an executory contract of the merged corporation. 224AppDiv516, 231NYS51.

1077-16 101NJEq543, 138A772.

1078-18 291Pa282, 139A853.

1078-19½-New. [§ 3663a] 1½. **Form of Action.** In a suit to recover from a new corporation on a judgment obtained against its predecessor, an action in debt will lie. 149Va200, 141 SE253.

1078-25½-New. A corporation taking over the assets of another pending litigation submitted itself to jurisdiction by reason of its conduct in prosecution of the litigation. 29F(2d)703.

1078-31 193NC233, 136SE609, 610 [cit CJ].

1078-38 [b] **Complaints held sufficient.**-132Misc276, 229NYS367.

1080-67 [a] **Evidence held insufficient** to show merger. Ariz 290P155.

1080-68 See also MoA 28SW(2d)427.

1080-78 [a] (3) To sustain finding for plaintiff in action for damages for depriving plaintiff of his property rights and interest in mercantile stock and its related assets. 119Kan576, 240P 970. (4) That another corporation had not succeeded to interest of defendant before claim arose. 214Ala615, 108S 591.

1080-79 119Kan576, 240P970 (in action for damages in depriving plaintiff of his property rights and interest in mercantile stock and its related assets, defendant's motion for judgment was held properly overruled).

1081-90 114Nebr341, 207NW664, 665 [citCJ], 44ALR1172. [b] **Distinguished from "merger."-NJCh** 149A36.

1081-1 TexCivA 297SW1049.

1081-2 TexCivA 297SW1049.

1082-11½ 216Ala231, 113S34.

1082-12½-New. An agreement of stockholders to go out of business and dissolve the corporation is effective as to stockholders and all interested parties. TexCivA 298SW620.

1082-22 216Ala231, 113S34.

1082-24 [a] **Preferred stockholders** whose stock has fully matured have no legal interest in continuance of corporation provided their right of priority to assets is protected and they cannot oppose dissolution. 205 Iowa465, 218NW321.

1083-46 261Mass556, 159NE70; NH 150A737.

1084-52 171Ark175, 283SW977; 97Fla 493, 121S789; 209Ky741, 273SW462; 28 OhA373, 162NE696. See also Ont [1928] 4DomLR735.

1084-53 24 OhNPNS483.

1084-68 [b] **Statute authorizing two-thirds vote for dissolution is not retroactive** and does not supersede prior by-law for continued existence where ten members consent. 134Misc152, 234 NYS683 (must act in good faith).

1086-94 Mass 170NE455.

1087-13 290Pa356, 139A118.

1087-17 29F(2d)176 (court has no power to appoint receiver to wind up business); 88CalA784, 264P521; 334 Ill 83, 165NE191; 249Mich234, 228NW 705; 312Mo 300, 279SW65; 230AppDiv 268, 243NYS446; 24 OhNPNS483.

1088-21 204 Iowa1254, 215NW261; 312 Mo 300, 279SW65.

1088-22 219Ala293, 122S36 (generally only ground); 207 Iowa41, 217NW477, 480 [citCJ]; 237Mich295, 214NW110, 55ALR1157. But see 312Mo 300, 279 SW65.

1088-25 216Ala231, 113S34; 204 Iowa 1254, 215NW261; 24 OhNPNS483.

1088-26 See also 204 Iowa1254, 215NW 261. [f] **Issuance of certificate creates corporation** liable to dissolution procedure in equity. 204 Iowa1254, 215NW 261. [j] **In South Dakota.**-50SD627, 211NW602. [k] **In Ohio.**-28 OhA373, 162NE696.

1089-33 204 Iowa1254, 215NW261.

1090-46 99CalA775, 279P496 (nonpayment of franchise tax does not operate as automatic dissolution); 94Fla1023, 114S760; 192Wis307, 212NW651.

1091-53 258Mass74, 154NE839; 241 Mich6, 216NW476; 127 Or57, 270P913.

1092-55 123Kan176, 254P323; 127 Or 57, 270P913, 916 [citCJ].

1092-56 241Mich6, 216NW476.

1092-59½-New. or that for failure to comply the charter of the corporation shall be void, 241Mich6, 216NW476.

1093-74 241Mich6, 216NW476.

1094-92 [a] MoA 24SW(2d)175.

1094-93 135Wash315, 237P722 (provision of statute authorizing secretary of state to note that corporation is dissolved is annulled and superseded by statute providing corporation whose name has been stricken may at any time thereafter be reinstated). But see 140 Wash596, 249P1057.

1094-94 But see 135Wash315, 237P722.

1094-1 115 OhSt269, 152NE643 (transactions of corporation, after act of secretary of state purporting to cancel articles of incorporation, held not void so as to prevent valid liens from arising therefrom).

1094-9 192Wis307, 212NW651. [b] **Equity ordinarily has no jurisdiction to dissolve corporation** at instance of stockholders except where objects of corporation have become impossible. 199 Ind 166, 154NE480.

1096-22½-New. Mistreatment by one stockholder of another is not ground for dissolution. 8PaDist&Co 523.

1096-22⅓-New. Corporate rights, privileges, and powers of a domestic corporation are suspended for nonpayment of taxes, but it does not forfeit its charter and become defunct, and the statute expressly reserves power to defend any action brought against it. 95CalA320, 272P775.

1096-22¼-New. Acquisition by the organizers of all except one share of capital stock did not of itself dissolve a corporation. TexCivA 17SW(2d)125.

1096-24 204 Iowa1254, 215NW261.

1096-25 255 IllA196; 204 Iowa1254, 215NW261.

1096-28 See also Sask [1928] 1DomLR 479.

1097-36 15DelCh108, 132A138.

1099-72 161Ga524, 131SE517, 44ALR 534; 201 Iowa912, 208NW505; 168La 664, 123S116.

1099-78½-New. Only the state in which a foreign corporation was incorporated can question its existence because of the expiration of the period for which it was incorporated. 322 Ill 99, 152NE526.

1099-80 204 Iowa207, 215NW250, 255, 54ALR1116 [citCJ].

1099-81 201 Iowa912, 208NW505; 204 Iowa207, 215NW250, 255, 54ALR1116 [citCJ] (dictum).

1100-86 322 Ill 372, 153NE749.

1102-27½-New. Forfeiture of franchise does not amount to dissolution. TexCivA 294SW909.

1103-39½-New. Failure to perform such act does not dissolve the corporation. 214AppDiv367, 212NYS356.

1104-60 14PaDist&Co 267.

1104-61½-New. **In Massachusetts** there is no statutory condition requiring that there must be a continuous active exercise of corporate functions. 258Mass74, 154NE839.

1104-61⅓-New. Nonuser alone is not sufficient to operate as surrender of corporate charter. 258Mass74, 154NE839.

1105-64 320Mo 740, 8SW(2d)1.

1105-65 TexCivA 297SW1049.

1105-67 See also 261Mass125, 158NE 330.

1106-90 157SC1, 153SE537.

1107-98 142Miss894, 108S298 [quot CJ]; 315Mo 101, 285SW980, 46ALR 1472; 8PaDist&Co 77.

1107-7 DelCh 142A786 (clear abuse of corporate franchise and privileges); 290 Pa136, 138A497, 502 [citCJperKephart, J], 53ALR1027.

1107-8 [b] 317Mo 49, 295SW537, 542 [citCyc].

1108-9 321Mo 461, 12SW(2d)64.

1108-26 114 OhSt582, 151NE709; 8Pa Dist&Co 77. See also 142Miss894, 108S 298, 302 [quotCJ]; 321Mo 461, 12SW (2d)64.

1108-28 See also 142Miss894, 108S298, 302 [quotCJ].

1109-30 142Miss894, 108S298, 302 [quotCJ]; 315Mo 101, 285SW980, 46 ALR1472; 99WVa473, 129SE465.

1109-31 142Miss894, 108S298, 302 [quotCJ].

1109-32 See also 142Miss894, 108S298, 302 [quotCJ].

1109-37 317Mo 49, 295SW537, 542 [cit Cyc].

1110-49½-New. In a suit to forfeit a nonprofit corporation's charter, the fact that profit-making activities are carried on indirectly is immaterial. DelCh 142 A786.

1110-50 [b] **Holding real property for period longer than allowed by law** is not ground for forfeiture in absence of showing of obstinacy or pertinacity in contempt of law. 50Philippine399.

1111-57 [b] **Failure to pay annual license fee and file annual report** as prescribed by statute with time fixed thereby operates as forfeiture of charter and corporation's existence ends where forfeiture is declared by state charter board. 123Kan176, 254P323. [c] **Failure to pay annual franchise tax.**-252 IllA135.

1111-58 50Philippine399; 192Wis307, 212NW651.

1111-60 221MoA600, 283SW65.

1111-63 [c] **Filing returns.**-221MoA 600, 283SW65.

1111-63½-New. Under the North Dakota statute, failure to pay the annual fee required by law does not ipso facto work a forfeiture of a corporate charter. 52ND806, 204NW673.

1111-65 50Philippine399 (discretion held not abrogated by provision of Corporation Law for dissolution by quo warranto proceedings).

1112-70 [a] 24 OhNPNS313.

1112-71 317Mo 49, 295SW537, 542 [cit Cyc].

1113-84 TexCivA 8SW(2d)558.

1114-93 172Minn508, 215NW855.

1114-3½-New. Equity will not dissolve a corporation because officers were not regularly elected. 199 Iowa1285, 202 NW14.

1114-4 See also 81Mont222, 262P1039.

1114-8 249Mich234, 228NW705.

1116-37 170La270, 127S624; Mo 28 SW(2d)1001 (lease); TexCivA 17SW (2d)125. But see 290Pa356, 139A118.

1117-52½-New. Evidence that a corporation continued to function and own property after having made a partnership composed of former stockholders its agent to transact its main business does not show that the property passed by operation of law to such partnership. 313Mo 642, 285SW462.

1117-55½-New. An assignment, providing for payment of creditors out of corporate assets and return to corporation of any excess, does not operate as dissolution of corporation. 232Mich 505, 205NW583.

1118-73 122Kan77, 251P188; 124Kan 309, 259P690.

1118-76 33F(2d)496 (where corporation is found hopelessly insolvent, upon appointment of receiver, court can proceed to wind it up).

1118-79 140Wash596, 249P1057.

1119-82 122Kan77, 251P188.

1119-83 124Kan309, 259P609.

1119-90 [a] **Statute authorizing dissolution** of insolvent corporation, giving

preference to creditor by executing mortgage, held inapplicable to foreign corporations. 175Ark133, 298SW857.

1119-4½-New. Mere recital in a decree against the receiver that the corporation was solvent is not conclusive. 94 PaSuper207.

1120-8 313Mo 642, 285SW462.

1120-13¼-New. Equity will not dissolve a corporation because corporate meetings are not regularly held. 199 Iowa1285, 202NW14.

1121-27 127 Or57, 270P913 (cannot transact new business, but remains as repository of title and obligor of debt).

1121-39 See also 28F(2d)971 (that stock of decedent's estate is being voted by executor in his own interest, and contrary to wish of legatees, is not ground of complaint in suit by minority stockholder, stranger to estate).

1122-49 32 OhA405, 168NE213 (benefit must affect all stockholders).

1122-51 118Nebr5, 223NW277.

1122-56 [d] **Diversion of corporate assets by administrative officers to their own use and profit** does not justify court of equity in dissolving solvent corporation at instance of minority stockholder. 199 Iowa1285, 202NW14.

1123-59 151Va715, 145SE260.

1123-61 151Va715, 145SE260 (where new management is elected).

1123-64 24 OhNPNS483, 484 [citCJ].

1123-69 24 OhNPNS483.

1128-52 101WVa127, 132SE372.

1128-53 [a] **Jurisdiction is not lost** because continuance was granted on return day as being for best interest of stockholders and creditors. 234Mich 664, 209NW54.

1129-54½-New. A statute authorizing dissolution upon adoption by two thirds of the stockholders of the corporation of a resolution authorizing it is as much a part of the corporate charter as if expressly written therein. 307Mo 137, 270SW339.

1129-59½-New. On a suit for dissolution no receiver appointed unless applied for on special grounds. 216Ala 231, 113S34.

1129-59⅓-New. Letter, setting forth plan of corporation liquidation by "sale of capital asset," is held not to imply sale of stock by stockholders to corporation at fixed price. 19F(2d)24.

1129-59¼-New. A statement in a corporation's certificate as to the location of the corporation's principal office is conclusive of its residence for the purpose of proceedings for its dissolution. 225AppDiv773, 232NYS52.

1129-64 99NJEq282, 132A477.

1129-65 [a] **Where parties were appointed by corporation to settle and wind up its affairs,** it was a proceeding to dissolve corporation. 162La133, 110 S176.

1130-81½-New. No verification necessary. 216Ala231, 113S34.

1131-17 234Mich664, 209NW54 (intervention must be in subordination to recognition of property of main proceeding).

1131-19 234Mich664, 209NW54.

1131-21 [a] **Intervening creditor** cannot file judgment creditor's bill to secure appointment of another receiver. 234Mich664, 209NW54.

1132-37½-New. Collection of stock subscriptions may be adjudicated in the decree. 204 Iowa1254, 215NW261.

1133-54 232Mich55, 204NW691; 85Pa Super527.

1133-56½-New. The application is addressed to sound discretion of court, and its decree will not be disturbed on appeal unless there has been an arbitrary abuse of discretion. 85PaSuper 527.

1133-62 [a] **Where decree was procured by fraud however,** court, to vindicate its authority and purge its judgments, will set aside decree, though of no benefit to applicant. 85PaSuper527.

1134-67 [b] **There is no laches** where delay is not unreasonable under circumstances and neither corporation nor stockholders have been harmed or prejudiced or have lost anything by delay. 85PaSuper527.

1134-82½-New. Limitations. The state is not precluded from proceeding for formal dissolution by failure to intervene in prior dissolution proceedings. 124Kan785, 262P1027.

1134-84 204 Iowa1254, 215NW261, 263 [citCJ].

1134-85 204 Iowa1254, 215NW261, 263 [citCJ].

1134-86 204 Iowa1254, 215NW261, 263 [citCJ].

1135-89 [b] **In New Mexico.**-34NM562, 287P64.

1135-91 204 Iowa1254, 215NW261.

1135-93 204 Iowa1254, 215NW261 (in equity).

1135-96 204 Iowa1254, 215NW261 (equitable action).

1135-97 144Miss628, 109S866. [a] **In Mississippi.**-144Miss628, 109S866.

1135-1 204 Iowa1254, 215NW261.

1135-3 161Ga524, 131SE517, 44ALR 534; 289Pa233, 137A235; 295Pa228, 145A128.

1136-6 289Pa233, 137A235.

1136-7 [a] **State commissioner of finance** is proper officer under Missouri statute to maintain suit against coöperative company. Mo 25SW(2d)98.

1137-21 161Ga524, 131SE517, 44ALR 534.

1137-43½-New. Under some statutes all stockholders are proper parties to an action for dissolution. 203 Iowa792, 206NW586.

1138-68 [a] **Petition held sufficient** to show noncompliance with Coöperative Companies Act and conduct of lottery. Mo 25SW(2d)98.

1141-22 204 Iowa1254, 215NW261.

1141-24 [a] **Statute giving preferred stockholders right to require liquidation** of corporation is held to refer only to failure to comply with such conditions and stipulations as parties could lawfully make. 199 Ind166, 154NE480.

1141-30½-New. Preferred stockholder's rights to have receiver appointed and corporation dissolved depends on stipulated preferences in stock certificate. 199 Ind166, 154NE480.

1141-35 [a] **In equitable action by stockholder to dissolve solvent corporation,** he must establish mismanagement by managing officers prejudicial to him. 178Minn457, 227NW655.

1142-41 See also 11PaDist&Co 465 (choice between county where it operates and county of principal office).

1142-42½-New. Where assets consist of real estate, the action must be brought in state where the real estate is located. 223Ky751, 4SW(2d)717.

1142-43 [a] **Percentage of stock owned.-TexCivA** 286SW638.

1142-47 199Wis200, 225NW834.

1142-48 220Ala613, 127S195. But see 223Ky751, 4SW(2d)717.

1142-50½-New. Administrator of stockholder proper party. 216Ala231, 113S34.

1142-50⅓-New. Distributee of deceased stockholder is not a necessary party. 216Ala231, 113S34.

1142-50¼-New. Whether distributee was a necessary party can be raised only by him under statute. 216Ala231, 113S34.

1142-54½-New. Where there are no directors, stockholders may sue to wind up the affairs of a defunct corporation. 223Ky751, 4SW(2d)717.

1142-59 220Ala613, 127S195.

1143-64 MoA 7SW(2d)474 (creditors may appear and resist dissolution).

1143-64½-New. The fact that one stockholder was made defendant and entered appearance as such does not show collusion invalidating the proceedings. 223Ky751, 4SW(2d)717.

1143-64⅓-New. Subscribers for debentures are not stockholders, but debtors of a corporation, and therefore not proper parties defendant. 199Wis200, 225 NW834.

1143-71 28F(2d)971 (complaint insufficient to state cause of action).

1143-72 [a] (6) Other allegations held sufficient. 28F(2d)971. (10) Other allegations held insufficient. 23F(2d)991.

1144-74½-New. Great liberality should be allowed in matters of pleading in actions to dissolve and wind up the affairs of a corporation and for accounting. 124Kan185, 257P748.

1144-87 28F(2d)971.

1144-88 [a] (2) In absence of allegation that corporation is insolvent, minority stockholders are not entitled to sue for dissolution. TexCivA 286SW 638.

1146-28 MoA 7SW(2d)474.

1146-39½-New. A mere order of dissolution does not extinguish and discharge claims, although it so recites. 26 F(2d)532.

1147-46 307Mo 137, 270SW339. [a] **In Missouri.**-307Mo 137, 270SW339.

1147-49 MoA 7SW(2d)474 (court cannot enter judgment dissolving corporation pending creditor's appeal from order striking objections to dissolution).

1147-54½-New. A creditor who has appeared and resisted dissolution may appeal from final adverse holdings upon their objections. MoA 7SW(2d)474.

1147-55 [a] **Refusal to vacate judgment** for alleged fraud and collusion held not abuse of discretion. 50SD627, 211NW602.

1147-59 [a] **In Michigan,** under statute, creditor can petition for dissolution only where charter has expired. 242Mich515, 219NW752.

1148-73 [a] **Complaint held insufficient** to show equity in suit by simple contract creditors. 20F(2d)967.

1149-94½-New. Under some statutes, voluntary dissolution of a corporation by resolution of stockholders takes effect from the filing of affidavit of dissolution with the secretary of state, and not from the vote of stockholders. MoA 17SW(2d)685.

1150-98 161Ga524, 131SE517, 44ALR 534; 114Nebr341, 207NW664, 44ALR 1172. [h] **Corporation failing to pay annual license tax** does not die as natural person or as corporation whose term of existing has terminated, but is in state of suspended animation from which it can be relieved by payment of penalties. 44 Ida76, 258P557. [i] **During suspension** for failure to pay taxes, corporation and directors are powerless to borrow money, execute notes, or sell stock. 99CalA528, 279P 202.

1150-8½-New. In an action for breach of a sales contract against an individual doing business in the name of the corporation after forfeiture of its charter, it is not necessary for plaintiff to allege facts showing defendant's liability as partner for debts of the corporation. 221MoA600, 283SW65.

1150-16½-New. After the dissolution of the charter of a corporation, there can be no corporation de facto. 161Ga 524, 131SE517, 44ALR534.

1151-22 223Ky751, 4SW(2d)717.

1151-24 NJCh 152A161.

1153-45 NJCh 152A161; 149Wash393, 270P1041.

1153-46 204 Iowa207, 215NW250, 54 ALR116; TexCivA 283SW324. [d] **Right to corporate name.**-100CalA152, 280P144.

1153-48 Ariz 288P3; 223Ky751, 4SW (2d)717; 151Md274, 134A206; Or 290 P556; TexCivA 283SW324. But see 168 La664, 123S116. [b] **As tenants in common.**-TexCivA 283SW324.

1154-53 99NJEq436, 132A78.

1154-67 30 OhA476, 165NE593. [b] **Guarantor of performance of lease by tenant corporation** is held not released by dissolution of corporation. 254Mass 331, 150NE177.

1155-83 [d] **Contract for purchase of corporate property.**-168La664, 123S116.

1158-10 44 Ida76, 258P557.

1158-11 TexCivA 294SW909.

1158-12 [c] **Stock subscriptions** taken after corporate powers were suspended and certificates issued thereunder are void, and subscribers are entitled to refund of price paid. 99CalA528, 279P 202.

1158-17½-New. Subscribers to the stock of a corporation, of whose suspension they were unaware, are not precluded from securing a refund of the purchase price, as being in pari delicto, although they subscribed on specially favorable terms. 99CalA528, 279P202.

1158-17⅓-New. Subscribers' failure to surrender the stock certificates or a

partial refund of the purchase price of stock subscribed for after the corporation's suspension does not preclude recovery of the balance of the purchase price, since such subscription and certificates are void. 99CalA528, 279P202.

1161-64 121 Or76, 252P708.

1161-65 See also 205Cal 413, 271P494.

1161-69 CalA 286P177.

1161-70½-New. Execution of claim after restoration of status of corporation is not invalid for want of consideration where corporation did not become extinct under statute. 192Wis307, 212NW651.

1161-70½-New. A deed executed by officers of a domestic corporation after forfeiture of its charter for failure to pay the annual fee is not void where officers are by statute constituted trustees with power to settle corporate affairs. 44 Ida76, 258P557.

1161-81 15DelCh227, 138A602.

1163-11 Iowa 227NW627 (application of doctrine).

1163-15 24 OhNPNS490.

1164-32 See also 205Cal 413, 271P494.

1166-73½-New. A levy of execution on a renewed judgment in favor of a corporation cannot be enforced where the judgment was rendered after the dissolution of the corporation. 231Mich 577, 204NW802.

1166-73½-New. Where a levy was legally made in behalf of a corporation before it was dissolved, the right of the officer to enforce the levy is not affected by the subsequent dissolution of the corporation. 231Mich577, 204NW802.

1166-74½-New. A corporation had no power to assign a judgment. 96CalA 460, 274P769.

1166-78 174Ark270, 294SW998.

1166-79 174Ark270, 294SW998.

1166-80½-New. Notice of appeal by a corporation, from cancellation and vacation of order allowing it judgment in an action instituted after it forfeited its corporate charter for nonpayment of a state corporation license tax, has been held a nullity. 96CalA460, 274P769.

1166-80½-New. Although, pending its appeal from judgment in an action by it to recover money, a corporation's rights were suspended under statute, the court will hear an appeal after its rights are restored. 84CalA627, 258P 666.

1167-90 201 Iowa912, 208NW505; 226 Ky488, 11SW(2d)116.

1168-96 204 Iowa207, 215NW250, 54 ALR1116.

1168-14½-New. Under a statute not limiting the time after dissolution for winding up affairs, reasonable time is allowed. 224Ky356, 6SW(2d)497.

1168-18 201 Iowa912, 208NW505; 116 Or336, 241P66, 68 [quotCJ].

1169-19 116 Or336, 241P66, 68 [quot CJ].

1169-26½-New. Where a statute does not limit the time within which corporate affairs must be closed, it must proceed with reasonable speed to wind them up. 201 Iowa912, 208NW505.

1169-31 201 Iowa912, 208NW505.

1169-32 116 Or336, 241P66.

1169-35½-New. to grant permission to its grantees to use lots for a certain purpose, where the corporation's deeds with restrictive covenants reserve right to grant such permission. 116 Or336, 241P66.

1170-53 78Colo 421, 242P638; 122Kan 771, 253P225; 99NJEq436, 132A78; NJCh 152A161; 191NC736, 133SE18; TexCivA 26SW(2d)732. See also 99 CalA327, 278P255; 201 Iowa912, 208 NW505.

1170-54 [a] (1) 100CalA152, 280P144 (deed by such alleged trustees passes no title since none was vested in them by suspension of corporate right to do business). (4) Statutory limitation as to setting aside action of trustees of dissolved corporation held inapplicable to suit to quiet title by corporation suspended for nonpayment of franchise tax, since that did not affect dissolution or create anyone trustee. 99CalA775, 279P496.

1170-54½-New. Construction of arbitration clause of trust agreement for liquidating corporation. CalA 287P556.

1170-64 78Colo 421, 242P638.

1170-65½-New. These statutes are intended to enable corporations to dispose of their assets to wind up their affairs without intervention of a receiver, 201 Iowa912, 208NW505.

1170-65½-New. unless appointment thereof is necessary to preserve assets, make disposition thereof, and conserve and protect interests of creditors and stockholders. 201 Iowa912, 208NW505.

1170-65½-New. Court of equity is not wholly deprived of right to exercise some discretion in dealing with the facts bearing on the question as to whether a receiver shall be appointed. 201 Iowa 912, 208NW505.

1170-65½-New. Liquidators of a corporation owe no trust duty to stockholders respecting dealings in stock, unless the situation makes it inequitable to buy stock. 19F(2d)24.

1170-65½-New. Facts are held not to show that it was the duty of the liquidators of a corporation not to deal in corporate stock in their own behalf. 19 F(2d)24.

1171-70 [a] (2) Where defendant stockholders left liquidation entirely in hands of plaintiff, holder of half corporation's stock, who without authority acquired property on foreclosure of mortgage belonging to corporation, and did not object to liquidator's accounts but partially reimbursed him for advances made to pay taxes, they are not estopped to deny personal liability for their share of such advances. 168La 774, 123S321. (3) Where plaintiff stockholder by suit against fellow stockholders obtains recognition as liquidator, approval of his account as such, and order to sell certain property to satisfy his advances, he is estopped to sue subsequently as trustee to recover personal judgment against defendant stockholders for same advances. 168La 779, 123S323(1stcase).

1171-79 [a] **Trustees hold property as joint tenants** with right of survivorship. 191NC736, 133SE18.

1171-82 NJCh 144A450.

1172-90 See also 78Mont357, 254P174.

1172-94 85Colo 262, 275P12.

1172-95 78Colo 421, 242P638; 78Mont 357, 254P174.

1172-7 See also 93PaSuper183.

1173-17 [a] **Validity of sale of corporate assets by majority of directors to one of their number** depends on fairness and good faith of transaction. 37Wyo 432, 263P607 (evidence held to sustain finding that directors did not act fraudulently).

1173-22½-New. Trustees may release grantee from restrictions. 191NC736, 133SE18.

1173-22½-New. Statutory trustees of a corporation which has forfeited its charter for failure to pay the annual license fee may file a mechanic's lien for it. 44 Ida520, 258P529.

1173-23 122Kan771, 253P225; 133Misc 340, 232NYS112; TexCivA 26SW(2d) 732. [d] **Trustees may not mix** personal claims against or with each other in controversy over distribution. 78Colo 421, 242P638.

1173-24 122Kan771, 253P225; Utah 278P529.

1173-25 122Kan771, 253P225.

1173-27½-New. Directors, securing purchaser for corporation's plants, are not required to account for profits and stock received for services to purchasing corporation, and for underwriting and financing its securities. 19F(2d) 24.

1173-28 300Pa355, 150A658.

1173-30 210Ky498, 276SW487 (sole stockholder held liable for payment to himself of commissions and remaining assets, before payment of debts, where he gave guaranty for payment of obligations).

1173-31 133Misc340, 232NYS112.

1173-33 122Kan771, 251P225.

1173-34 99NJEq436, 132A78.

1174-37 But see 300Pa355, 150A658.

1174-38½-New. Statutory trustees are held not relieved of liability in action for debt by distribution of all proceeds. 78Mont357, 254P174.

1174-38⅓-New. A creditor is entitled to judgment and execution, regardless of a contract with the liquidator for deposit to guarantee payment of a dividend. TexCivA 16SW(2d)309.

1174-46 149SC40, 146SE680.

1174-50½-New. Failure of creditors suing trustees to intervene in proceedings to distribute property is held no bar to action. 78Mont357, 254P174.

1174-50½-New. Statutory trustees of a corporation, which has forfeited its charter for default in payment of the annual license fee, may maintain an action to foreclose a mechanic's lien. 44 Ida520, 258P529.

1174-50¼-New. A director's action as liquidating trustee against a codirector for malfeasance has been held properly brought in the name of such director as liquidating trustee, rather than in the name of the corporation. 149SC40, 146SE680.

1174-50½-New. A director, sued individually for malfeasance, has been held not required to be joined as a party plaintiff in his capacity as liquidating trustee. 149SC40, 146SE680.

1174-57½-New. Where a receiver duly appointed to wind up the affairs of a defunct corporation is still acting and undischarged, subsequent action brought by former directors of the corporation as statutory trustees is properly dismissed. 120Kan281, 243P541.

1174-58½-New. Action against officers acting as trustees. TexCivA 26SW(2d) 732 (nature and proceedings thereunder).

1174-59 19F(2d)24.

1175-61 294Pa127, 143A582.

1175-63 15DelCh166, 132A892; 124 Kan785, 262P1027 (appointment held proper); 294Pa127, 143A582.

1176-1½-New. A stockholder's acquiescence in corporation officers' failure to liquidate for ten years and his joinder in the work of liquidation does not compel him to wait until majority stockholders see fit to act before asking for appointment of a receiver. 294Pa127, 143A582.

1177-18 204 Iowa207, 215NW250, 54 ALR1116.

1177-19 204 Iowa207, 215NW250, 54 ALR1116.

1178-46 201 Iowa912, 208NW505.

1178-47 201 Iowa912, 208NW505.

1178-48 201 Iowa912, 208NW505.

1180-77 294Pa127, 143A582.

1180-79 99NJEq282, 132A477.

1181-80 294Pa127, 143A582.

1181-81 201 Iowa912, 208NW505.

1181-84½-New. operating at a loss with insufficient assets to pay preferred stockholders in full and litigation threatened which would deplete assets, 118Nebr5, 223NW277.

1181-88½-New. hopeless insolvency and voluntary liquidation by board of creditors, 103NJEq179, 142A651. [a] **Offer to deposit fund sufficient to pay claim of complainant** did not warrant denial. 103NJEq179, 142A651.

1182-97½-New. In proceedings for dissolution, coupled with a prayer for an injunction, a receiver will not be appointed where the granting of the injunction makes a receiver unnecessary. 28 OhA373, 162NE696.

1182-99 226AppDiv326, 235NYS159 (notice to attorney-general). But see 118Nebr5, 223NW277.

1183-6½-New. That a brewing company, which had ceased to function for the main purpose of its incorporation because of the Volstead Act, expected a change in such law, is no defense to proceedings for the appointment of a receiver to distribute assets among the stockholders. 294Pa127, 143A582.

1183-18½-New. Under statutes in some jurisdictions the only ground upon which the court can properly dismiss a petition for the appointment of a receiver is upon a trial on the merits. 201 Iowa912, 208NW505.

1183-18½-New. Motion for appointment of a receiver should not be allowed unless proceedings for dissolution are brought within the statute. 28 OhA373, 162NE696.

1183-18½-New. A decree refusing immediate appointment of a receiver, but retaining jurisdiction of bill so as to permit renewal of the application, if majority stockholders and directors failed to take any active steps toward liquidation within a reasonable time, has been held proper. 294Pa127, 143A582.

1183-29 [a] **Appointment of receiver** is ancillary to dissolution proceedings. 101NJEq569, 139A389.

1183-30½-New. Where there has been no active violation of law or disobedience of an order of court, it is an abuse of discretion to appoint a receiver in an action for dissolution before the issue has been joined on matters alleged in the petition and before trial of the action. 125Kan337, 264P44.

1184-45½-New. A seller who retained title to chattels under conditional sale is entitled to reclaim the property as against the receiver. 243Mich401, 220NW780.

1185-72½-New. Jurisdiction of affairs of a corporation through a receiver continues until relinquished by order of court or until his trust has been fully executed. 120Kan281, 243P541.

1185-79½-New. The title of a receiver relates back to the date of an order appointing him, and not to the date of the institution of an action to dissolve. 127Misc396, 216NYS302.

1185-86½-New. Stockholders present in court when the receiver reported an offer for assets agreeable to the creditors, and who agreed to the order for sale and made no objections that the sale was in violation of statute, waive their right to object and are estopped to make such objection against confirmation of sale. 240Mich532, 215NW412.

1186-88½-New. One having pecuniary interest in accepted bid cannot recover sum paid for extension of option. 41F(2d)500.

1186-12 But see 286Pa226, 133A232.

1188-53 13LaA495, 128S196; **TexCivA** 283SW324. [c] **If there is receiver or liquidator,** individual creditor cannot directly sue individual debtor or stockholder of dissolved corporation. 13LaA495, 128S196.

1188-54 149Wash393, 270P1041.

1188-71 [a] **Limitations** are no defense to stockholders where they have not run against corporation. 24F(2d)844.

1189-77½-New. In a suit by a creditor against stockholders receiving distributive shares, all stockholders are properly made parties. 24F(2d)844.

1189-77½-New. A decree of dissolution does not operate to defeat a right of assessment against subscribers to stock on the ground of no corporation, either de jure or de facto. **Iowa** 227NW627.

1189-78 221MoA600, 283SW65 (allegation as to partnership not necessary).

1189-89 206 **Iowa**405, 220NW6 (subscription contracts cannot be rescinded by stockholders filing claims with receiver after decree of dissolution).

1190-12 [a] **In order to establish claim for face value of bonds** with interest, and procure discharge of personal liability of obligor thereon, trustee under mortgage securing same must show that mortgage and purchaser's assumption thereof are insufficient security. 99NJEq441, 131A882(2dcase).

1190-13 210Ky498, 276SW487.

1191-27 6F(2d)713; 127Misc396, 216NYS302.

1191-28 6F(2d)713.

1192-48 [b] **Intervening creditor** who filed judgment creditor's bill is not entitled to preferences over other creditors. 234Mich664, 209NW54.

1194-4½-New. A statute providing for application of funds in the hands of a receiver appointed to enforce the stockholders' liability has been held not to require the payment of a tax on land disposed of before the receivership. 172Minn567, 216NW250.

1195-24½-New. Objection against mortgage assigned as collateral security for payment of notes of stockholder is untenable, where all parties are before court and their rights can be later adjusted. 128Misc413, 219NYS632.

1195-28½-New. An order allowing claims of creditors is final and appealable. 169Minn131, 210NW628.

1196-34 319Mo1048, 5SW(2d)40, 45 [citCJ].

1196-42 30OhA476, 165NE593; 289Pa233, 137A235. [c] **Where rights of creditors are not affected,** some statutes authorize distribution among stockholders before formal dissolution by filing proper paper in office of secretary of state. **TexCivA** 298SW620.

1196-43 31Ariz137, 250P995, 997, 998 [citCJ]; 289Pa233, 137A235; 300Pa355, 150A658. [e] **Organization agreement determines rights** of common and preferred stockholders inter sese on dissolution. 131Misc151, 226NYS141. [f] **Distribution properly refused.**-300Pa355, 150A658.

1196-46½-New. After a sale and conveyance of all of the assets of a corporation pursuant to a prior agreement between stockholders to go out of business and dissolve the corporation, the stockholders may, at a meeting to settle its affairs, bind the corporation by an agreement to divide the proceeds of sale after payment of debts. **TexCivA** 298SW620 (evidence held to show agreement).

1196-46½-New. Actual delivery of checks for stockholders' shares pursuant to such agreement is not necessary to transfer title of the corporation to the proceeds of such sale on deposit in a bank. **TexCivA** 298SW620.

1196-46¼-New. That the corporation was not wound up under the court's direction held not to alter rights of the parties. 23F(2d)406.

1197-54 191NC352, 131SE732, 734 [cit CJ]; **DelCh** 146A337. [c] **Right of preferred stockholders.**-Mo 31SW(2d)72.

1197-57 25F(2d)105 (unattested assignments held insufficient).

1198-66 [a] **DelCh** 151A228. See also **DelCh** 151A228.

1198-68 23F(2d)406; 228AppDiv268, 229NYS735 (general rule). [e] **Statute in force at time of incorporation** determines right to priority of preferred stockholders, in absence of provision thereon in articles of incorporation. 232Mich356, 205NW111. [f] **Where corporation** is transferred to another state, original holders of stock in latter state are bound by conditions of transfer. 23F(2d)406. [g] **Dividends are not payable** where profits or surplus never existed. **DelCh** 151A228.

1198-69 **DelCh** 146A337.

1198-70 224AppDiv268, 229NYS735 (common stock).

1198-71 220AppDiv39, 220NYS532; 34OhA52, 170NE178.

1198-72½-New. Adoption of resolution, as to division of assets, among preferred and common stockholders, does not effect an estoppel against stockholders who were not present when resolution was adopted and had no notice of meeting. 232Mich356, 205NW111.

1198-73 See also 118Nebr5, 223NW277.

1199-81 226AppDiv349, 235NYS336.

1199-82 See also 300Pa355, 150A658.

1199-89½-New. The purchase of a corporation's assets takes only the title which the corporation had when it ceased to exist. 223Ky751, 4SW(2d)717.

1199-91 119Kan831, 241P257, 258 [quotCJ]. See also 11PaDist&Co465.

1199-92 See also 94CalA21, 270P456.

1199-97½-New. A suit by a stockholder to wind up the affairs of a corporation and for distribution of its assets based on the theory that its charter had been forfeited should be dismissed where the corporation is still in existence and entitled to conduct business. 241Mich6, 216NW476.

1199-97⅓-New. Preferred stockholders have been held entitled to have their stock redeemed at one hundred and fifteen dollars per share, under an agreement providing therefor, on dissolution of the corporation and merger with another corporation. 30OhA476, 165NE593.

1200-8 **Cal** 287P470 (failure to pay license tax as suspending corporate rights).

1200-9 286Pa108, 133A34; 287Pa6, 134A435 [citCJ]; 290Pa356, 139A118. But see 108Conn436, 143A568.

1201-21½-New. Where corporation's name has been stricken from books of secretary of state for nonpayment of annual license fees under statute entitling it to reinstatement, 135Wash315, 237P722.

1201-26 But see 221MoA633, 285SW535.

1201-31 286Pa108, 133A34.

1201-33 40F(2d)544; 214Ala214, 107S84; 39GaA121, 146SE329(1stcase); 134Misc245, 235NYS28; 286Pa108, 133A34; 287Pa216, 134A397; 6PaDist&Co11. See also 232NYS112. [d] **Statute does not apply** where trial not had and verdict rendered within statutory time though suit commenced before dissolution. 47RI108, 130A863.

1202-38½-New. Under some statutes a corporation which has been suspended for failure to pay its license and franchise tax may be made a party defendant in an action commenced subsequent to suspension. 89CalA558, 265P583.

1202-38⅓-New. By statute, suit may be maintained against dissolved corporation in its former name and judgment obtained in such name. **TexCivA** 22SW(2d)1083.

1202-38¼-New. Dissolved corporation is subject to garnishment in view of statute. **TexCivA** 22SW(2d)1083.

1202-41 214Ala214, 107884; **TexCivA** 292SW973.

1202-42 55AppDC323, 5F(2d)538.

1203-66½-New. An action to quiet title by a corporation is not barred by a six months' limitation statute on actions to set aside the acts of trustees of a dissolved corporation where mere suspension and not dissolution results from the corporation's failure to pay taxes. 100CalA152, 280P144.

1203-73½-New. Minority stockholders will be held guilty of such laches as to be barred of recovery on making no claim for nine years after liquidation of the corporation by a receiver. 167Ga678, 146SE630.

1203-76 **TexCivA** 22SW(2d)1083.

1204-87 See also 131Misc930, 229NYS273.

1204-93 226Ky488, 11SW(2d)116; 133Misc527, 233NYS255.

1205-3½-New. Where, under statute, a corporation remained in existence for three years, the corporation or its receiver were proper parties to a stockholder's action to recover freight claims. 190NC128, 129SE153.

1205-4 [a] 44Ida520, 258P529.

1205-4½-New. Action commenced in corporation's name after right to do business was suspended for failure to pay registration fee is valid to extent that amendment substituting stockholders is permissible. **Ariz** 288P3.

1205-4⅓-New. Such amendment is proper, although corporation did not then exist as legal entity. **Ariz** 288P3.

1205-6 34OhA52, 170NE178.

1205-18 See also 108Conn436, 143A568.

1205-22½-New. Facts showing that corporation has been dissolved must be alleged. 116Or399, 241P393.

1206-24 [b] **Corporate revivor.**-100CalA152, 280P144. [c] **Evidence held inadmissible.**-100CalA152, 280P144.

1206-24½-New. Under some statutes the forfeiture of the charter of a domestic corporation for failure to pay the annual license fee can be proved only by introducing the original proclamation of the governor or a certified copy thereof and proof of its publication. 44Ida76, 258P557.

1206-26 [a] **Judgment for or against domestic corporation delinquent in paying license** is void and may be attacked for court's lack of jurisdiction. **Cal** 287P470.

1206-30 [a] 44Ida76, 258P557.

1206-32 82Colo288, 259P1025.

1206-33 [a] **Reinstatement after for-**

feiture.–3Del 42, 130A37.

1206–34 286Pa108, 133A34.

1206–35 99NJEq282, 132A477.

1206–35½–New. Upon reinstatement, a corporation may maintain a suit for trespass although it has not paid license fees for five years. 82Colo 288, 259P 1025.

1206–35⅓–New. Where a corporation, stricken from the rolls for delinquency after bringing a suit to quiet title, is reinstated before the trial, it is entitled to go to trial. 152Wash225, 279P728.

1206–38 [c] **Proceedings of any other creditor may be restrained** under statutes investing court with discretion as to whether and when such injunction shall be issued. 53ND656, 207NW492.

1208–97½–New. , nor to a company which has been dissolved by being struck off the register. NS [1929] 1 DomLR274.

1209–1 Man [1930] 4DomLR572 (winding up refused as not just and equitable); Ont [1930] 3DomLR882.

1210–20 See also Man [1927] 3DomLR 229.

1212–36 NB [1927] 3DomLR800.

1214–19 44 Ida573, 258P526.

1214–21 [b] **National bank of state other than that in which it is located** is foreign corporation. 25 OhNPNS263.

1214–22 128Misc138, 217NYS856.

1215–36 232Mich330, 205NW99; 114 OhSt149, 150NE743; 46Philippine70; 118Tex46, 108W(2d)687.

1216–41 272US494, 47SCt179, 71L ed 372, 49ALR713; 248NY97, 161NE432.

1217–42 114 OhSt149, 150NE743.

1217–44 20F(2d)924; 179Ark1029, 18 SW(2d)1028, 65ALR1446 (foreign corporation complying with local laws is authorized to conduct its business in compliance with its charter except as plainly restricted by state constitution); 198Cal 618, 246P796, 798 [quotCJ]; 325 Ill 114, 156NE258; 235 IlA9; 118 Nebr383, 225NW46; Nev 280P321(2d case); 114 OhSt361, 151NE471; 122 Okl 277, 254P748; 46Philippine70; 47 RI 108, 130A863.

1218–45 198Cal 618, 246P796, 798 [quotCJ].

1218–47 198Cal 618, 246P796, 798 [quot CJ].

1218–51 But see 116Tex193, 292SW 168.

1218–53 198Cal 618, 246P796, 798 [quotCJ].

1218–54 198Cal 618, 246P796, 798 [quotCJ].

1220–60 198Cal 618, 246P796.

1220–61 [a] **Constitutional provision embodying principle.–Utah** 284P328 (statute not invalid).

1220–67 233Mich597, 208NW148 (where statute has been complied with); 114 OhSt361, 151NE471.

1224–94 94Fla1, 113S667; 238Mich366, 213NW140; 215AppDiv15, 213NYS77; 33PortoRico 8; 34PortoRico 693; 115 Tex417, 282SW576.

1225–95 6F(2d)504; 33F(2d)773; 238 Mich366, 213NW140. [b] (1) 33F(2d) 773.

1225–95½–New. or may maintain a local agent there for receiving service of process; 6F(2d)504.

1226–3 33PortoRico 8.

1226–12 29PortoRico 850.

1227–17 See also 6F(2d)504.

1228–24 99Vt397, 133A367.

1230–28 224 IlA336.

1230–29 180Ark148, 20SW(2d)636.

1230–29½–New. The trend of judicial opinion is to favor placing foreign corporations on the same footing as domestic corporations with respect to right to transact business within the state. 224 IlA336.

1234–62 198Cal 618, 246P796; 244NY 482, 155NE749; 219AppDiv643, 220NYS 685.

1234–63 244NY482, 155NE749; 288Pa 362, 136A673.

1236–78 288Pa362, 136A673.

1236–82 12F(2d)634.

1236–87 227Ky804, 148SW(2d)150.

1239–13½–New. Ultra vires of a joint and several contract is determinable by the place of contract. 319Mo 899, 88W (2d)834.

1239–13⅓–New. The question whether a joint and several contract of a foreign company was ultra vires of the corporation, is determinable by the law of the place where the contract was made. 319Mo 899, 88W(2d)834.

1239–18 TexCivA 290SW866.

1240–22 319Mo 899, 88W(2d)834 (estoppel to assert ultra vires determined by law of place of making contract).

1240–23½–New. The question of estoppel of a railroad to assert the defense of ultra vires is determinable by the law of the place of making the contract. 319Mo 899, 88W(2d)834.

1240–26 TexCivA 293SW341.

1240–27 40 Ida426, 233P518, 519 [cit CJ].

1240–28 45 Ida159, 261P239, 240 [cit CJ]; 132Misc144, 228NYS705; 122 Okl 125, 251P482; ND 231NW942.

1241–29½–New. A foreign corporation, permitted to do business in a state, may not be subjected to state statutes in conflict with the federal constitution. 278 US105, 49SCt57, 73L ed204.

1242–35 84 IndA51, 150NE106.

1242–36 [b] **Statute subjecting foreign corporations to same liabilities** and restrictions as domestic corporations does not apply to foreign corporation not doing business within state. 193NC233, 136SE609.

1242–37 205Cal 479, 271P747.

1242–37½–New. The fact that a foreign corporation, engaged in business within the state, is within the jurisdiction, does not subject it to legislation purporting to regulate the exercise of its inherent powers. 205Cal 479, 271P747.

1244–56 84 IndA51, 150NE106. [a] (12) Statute providing for appointment of trustees of creditors and stockholders where corporation is ousted or dissolved. 114Nebr341, 207NW664, 44 ALR1172.

1244–57 [a] (20) Provision of statute saving corporations incorporated and reincorporated thereunder. 90Fla264, 105S446. (21) Statute relating to enforcement of liability of stockholders. 170Minn475, 212NW911.

1244–59½–New. Before a state may compel a corporation of another state to submit to its jurisdiction, it must be in the state in some form. 294Pa99, 143A 495, 60ALR737.

1244–60 272US494, 47SCt179, 71L ed 372, 49ALR713; 277US537, 48SCt577, 72L ed978; 317 Ill 366, 148NE23; 325 Ill 114, 156NE258; 220Ky504, 295SW 457; 147Wash630, 267P506.

1245–61 272US494, 47SCt179, 71L ed 372, 49ALR713; 13F(2d)500; 90Fla 264, 105S446, 447 [citCJ]; 317 Ill 366, 148NE23; 84 IndA51, 150NE106; 206 Iowa1228, 219NW24; 220Ky504, 295 SW457; 8LaA50; 232Mich330, 205NW 99; 171Minn87, 214NW12; 190NC314, 129SE805; 127 Or196, 270P519; 153Va 498, 150SE419; 147Wash630, 267P506; 192Wis293, 212NW665; 198Wis265, 224 NW139. See also 320Mo 1047, 108W (2d)923. [d] **Construction of statute.–** 251Mich602, 232NW367.

1247–63 272US494, 47SCt179, 71L ed 372, 49ALR713; 235 IlA9; 235 IlA 518; 118Nebr383, 225NW46; 126 Or588, 269P236, 238 [citCJ], 60ALR1165. See also 90Fla264, 105S446. [c] **Violation of laws or fixed policy of state** is ground for ouster of foreign corporation. 114 Nebr341, 207NW664, 44ALR1172.

1248–67 235 IlA9; MoA 248SW(2d) 653; 126 Or588, 269P236, 238 [quot CJ], 60ALR1165.

1248–73 272US494, 47SCt179, 71L ed 372, 49ALR713.

1248–74 272US494, 47SCt179, 71L ed 372, 49ALR713; 274US490, 47SCt678, 71L ed1165; 278US235, 49SCt115, 73 L ed287, 60ALR596.

1248–75 126 Or588, 269P236, 238 [cit CJ], 60ALR1165.

1249–88 See also 35F(2d)386.

1250–3½–New. Under the constitution the right of a party to sue a foreign corporation in any county of the state cannot be affected by statute. 219Ala 581, 122S693.

1250–5 274US490, 47SCt678, 71L ed 1165.

1250–6 272US494, 47SCt179, 71L ed 372, 49ALR713.

1250–7 127 Or196, 270P519; 153Va498, 150SE419.

1250–10 272US494, 47SCt179, 71L ed 372, 49ALR713; 274US490, 47SCt678, 71L ed1165; 173Ark234, 292SW98.

1250–10½–New. A statute relative to venue must be construed so as to place foreign corporations within the equal protection clause of the Fourteenth Amendment to the federal constitution. 178Minn72, 225NW915(2dcase).

1251–12 274US490, 47SCt678, 71L ed 1165. But see 317 Ill 366, 148NE23.

1251–15½–New. A statute relating to actions against a foreign corporation by a nonresident is not discriminatory as between state citizens and others. 279US377, 49SCt355, 73L ed747.

1251–16 317 Ill 366, 148NE23.

1252–22 274US490, 47SCt678, 71L ed 1165.

1252–22½–New. A statute providing that a foreign corporation may be sued in any county in the state and that a resident corporation may be sued in any county in which it does business is not unconstitutional. 178Minn261, 226NW 934.

1252–29 TexCommnA 298SW(2d)316.

1252–30 90Fla264, 105S446, 447 [cit CJ].

1252–31 90Fla264, 105S446, 447 [cit CJ].

1252–39 TexCivA 283SW862.

1253–42 25F(2d)794.

1253–45 41F(2d)542; 84 IndA51, 150 NE106; 220MoA695, 294SW100; 242 NY224, 151NE214; 190NC314, 129SE 805; TexCivA 38W(2d)501 (permit to do business).

1253–47 235Mich57, 209NW144; 66 Utah459, 468, 244P210 [citCJ].

1253–48 174Minn68, 216NW778; 220 MoA695, 294SW100; 83NH336, 143A 703; 242NY224, 151NE214 (foreign corporation need not procure certificate to transact interstate business); 127 Or 196, 270P519; Utah 263P926; 135Wash 368, 237P987 (foreign corporation doing wholly interstate business cannot be required to designate agent or have place of business within state); 147 Wash630, 267P506.

1254–53 24F(2d)124; 153Va498, 150 SE419.

1255–55 25F(2d)794.

1255–59 235Mich57, 209NW144; 242 NY224, 151NE214 (agents may be sent into state to contract for sales or purchases); 117 Okl 256, 246P417; Tex CommnA 58W(2d)980, 60ALR983.

1255–60 TexCivA 283SW862.

1256–71 40 Ida426, 233P518; 116 Or 399, 241P393; 126 Or588, 269P236, 238 [quotCJ], 60ALR1165; 118Tex46, 10 SW(2d)687. [a] **Effect of failure to pay annual license fee.–**40 Ida426, 233P518. [b] **In Florida.–**90Fla264, 105S446. [c] **License tax not penalty.–**223AppDiv864, 228NYS189. [d] **Regardless of whether foreign corporation has obtained certificate** authorizing it to do business under Stock Corporation Law, it is liable for license tax under Tax Law. 223 AppDiv864, 228NYS189.

1256–71½–New. A foreign corporation, having begun business, may not escape its obligation to pay a tax by subsequent withdrawal from the state. 249 NY369, 164NE253.

1256–72 141Miss177, 106S646; 116 Or 389, 241P393. [l] **Corporations within statute.–**TexCivA 273SW630.

1258–77 40 Ida426, 233P518; 207 Iowa1077, 224NW73; 116 Or389, 241P 392. [b] (5) Agent need not be employee or officer of company. CalA 292 P699. (6) Other instances. Fla 126S 282. [l] (4) Applicability of amended statute requiring instrument designating agent to give agent's residence. CalA 292P699. [m] **Statutes liberally construed.–**38F(2d)177. [n] **Statutes held valid.–**38F(2d)177 (withdrawal from state ineffective to defeat service).

1259–78 283Pa146, 129A60 (appointment continues till bona fide withdrawal from state). [a] 10PaDist&Co 753. [c] **Dismissal of secretary of commonwealth** is ineffectual so long as any liability is outstanding. 283Pa146, 129A 60.

1259–82 [a] **No other authority is con-**

ferred where agent is appointed solely to receive process. 223Ky777, 48W(2d) 707.

1260–86 [c] **"Principal office"** is synonymous with "principal place of business." 125Misc759, 211NYS602. [d] **On removing from such place** corporation should notify secretary of state. 13PaDist&Co 514.

1260–89 249NY369, 164NE253; 125 Misc759, 211NYS602 (fulfilling requirement is condition precedent to right to do business); 134Misc566, 236NYS265 (requirement should be reasonably interpreted); TexCivA 283SW217; Tex CivA 290SW866; Utah 290P161. See also 244 IllA16. [d] 251 IllA579. [h] (3) In Missouri, under statute, corporation not organized for pecuniary gain is not required to take out license. 221 MoA493, 287SW846. (4) Under such statute corporation organized for purpose of marketing oranges without profit is not required to take out license. 221MoA493, 287SW846. [o] **In Indiana.**–85 IndA563, 155NE46. [p] **Stock Corporation Law prohibiting foreign corporation from doing business in state without obtaining certificate** is held inapplicable to corporation engaged in interstate commerce. 242NY224, 151 NE214. [q] **Foreign corporation may send agents into state to contract** for purchase of sale of goods without obtaining certificate prescribed by statute. 242NY224, 151NE214. [r] **Certificate properly refused to foreign corporation** named "Bankers Company of New York" under statute relating to words "bank" or "banking" in name of corporation. 335 Ill 455, 167NE31, 63ALR 1046.

1260–89½–New. The procuring of the certificate must precede the transaction of business or making of contracts. 125 Misc759, 211NYS602.

1260–89¼–New. In Texas, under Rev. St. (1925) art 1302 subd 88, and arts 1529, 1532, a foreign corporation is entitled to a permit to do business for more than one purpose. 116Tex193, 288SW141.

1260–89¼–New. A foreign corporation, failing to pay delinquent franchise taxes, cannot be refused a new permit on proper request and tender of filing fees. 116Tex193, 288SW141 (statute construed).

1260–89⅓–New. An application for a permit prior to the expiration of the previous permit is premature. 116Tex 193, 288SW141.

1260–89⅓–New. A void forfeiture of a corporation's license for failure to pay a license tax under an unconstitutional statute does not prevent the corporation from assigning and collecting notes. 84 CalA387, 258P141.

1261–90 116 Or389, 241P393.

1261–91 116 Or389, 241P393.

1264–21 [a] **Such provision is not violated by internal arrangement of corporate organization** by which there is limitation of stockholder's liability. 198 Cal 618, 246P796.

1265–23 147Wash10, 264P1010.

1265–24 35F(2d)386.

1269–69 IndA 172NE319 (unreasonable construction).

1270–76 24 OhA434, 157NE828.

1270–79 127 Or196, 270P519, 521 [quot CJ].

1270–80 127 Or196, 270P519, 521 [quot CJ]. [a] **Court assumes that what company has done is not ultra vires** and preparation of lands for purpose of selling in lots is declared doing business. 98NJEq206, 129A871.

1270–81 218Ala245, 118S508 ("before engaging in or transacting any business" does not differ from constitutional phrase "doing any business"); 327 Ill 367, 158NE698; 232 IllA532, 546 [quot CJ]; 238Mich508, 213NW867, 58ALR 507; 251Mich602, 232NW367; 156Miss 55, 125S548 (soliciting subscriptions with intention of constructing canning factory); 242NY224, 151NE214; 129 Misc173, 220NYS667; 190NC314, 129SE 805; 156Tenn19, 300SW574. [a] (4) Investment and refunding operation of holding company do not constitute doing business. 212AppDiv763, 210NYS 385. (5) Foreign corporation is doing business in state where character and extent of its business warrant inference that it has subjected itself to jurisdiction and laws of state. 171Minn87, 214 NW12. (6) Other instances. 207 Iowa 1077, 224NW73. [e] **Regularly doing business.**–148Md545, 129A839. [f] **Irregular, occasional, or accidental use** of port of Baltimore by tramp steamers would not constitute regularly doing business or regularly exercising corporate franchise within state. 148Md545, 129A839. [g] **Obvious purpose of word "regular"** is to qualify, narrow, and limit meaning of phrase "doing business." 148Md545, 129A839. [h] **Other statements of rule.**–327 Ill 367, 158NE698. [i] **Test is** whether or not corporation is doing such acts as are within function of its corporate powers. 156Miss 55, 125S548.

1270–81½–New. Equity will look through mere fiction of corporate entity to fact that parent corporation is doing business in state of its subsidiary's domicile. 13F(2d)510.

1271–82 16F(2d)122; 16F(2d)498; 247 Mich317, 225NW538; 135Misc543, 239 NYS176; TexCivA 289SW1042. [a] **Maintenance of agents in state with power only to solicit orders** which corporation approves or disapproves and where it makes its own collections is doing business in state. 205 Iowa862, 219NW 28, 60ALR986.

1272–83 238Mich508, 213NW867.

1272–86 [a] **Carrying on farming operations.**–Wash 287P886.

1272–92 20F(2d)593 (employment of mechanic to visit plants of customers and adjust machines periodically); 10 PaDist&Co 753; 147Va235, 136SE646, 55ALR717 (constructing addition to city gas plant).

1272–94½–New. the sale and installation of window shades; 239Mich593, 215NW57.

1272–95 125 Or63, 266P248. See also 133Misc890, 234NYS83.

1272–97 132Misc144, 228NYS705 (whether in receiver's hands or not).

1272–97½–New. transportation of oil in tank cars; 118 Okl 111, 246P851.

1272–98 33 OhA89, 168NE758.

1273–2 137Misc513, 241NYS242.

1273–4½–New. Contracts requiring a corporation to furnish and provide all necessary materials and perform all necessary work for completing construction of plants, have been held construction contracts rather than agreements of sale. 295Pa232, 145A125.

1273–5 32F(2d)519; 28Ariz511, 238P 326; 176Ark469, 28W(2d)1087; CalA 286P740; 44 Ida148, 255P414; 46 Ida 355, 267P611; 85 IndA563, 155NE46; 204 Iowa159, 214NW598, 601 [citCJ]; 148Md545, 129A839; 234Mich461, 208 NW443; 174Minn68, 216NW778; 48 Nev53, 226P1106, 1107 [quotCJ]; NJSup 138A509; 242NY224, 151NE214 (single contract); 125Misc604, 211NYS495 (one sale); 22 OhA487, 153NE909; 118 Okl 111, 246P851; 122 Or572, 260P224; 152 Tenn97, 275SW340; 156Tenn19, 300SW 574. [a] 44 Ida148, 255P414; 232 IllA 532; 85 IndA563, 155NE46; NJ 138A 509; 242NY224, 151NE214. [b] (1) 242 NY224, 151NE214; 134Misc566, 236NYS 265. (3) It must maintain and carry on business with same continuity of act and purpose. 242NY224, 151NE214. [e] **Evidence of intention to engage in continuous business in state** (1) is held shown by inquiries as to license and fee, so as to rebut contention of isolated transaction. 232 IllA532. (2) Intention to continue business in state may be inferred from single transaction when circumstances justify it. 156Tenn19, 300 SW574. (3) Time required to perform contract for material and work in building held, under circumstances, not test as to such intention. 156Tenn19, 300 SW574. (4) Payment of privilege tax held not conclusive. 156Tenn19, 300SW 574. (5) That corporation engaged in similar transaction some years prior to one involved held not conclusive. 156 Tenn19, 300SW574.

1274–6 44 Ida148, 255P414; 251Mich 602, 232NW367.

1274–7 44 Ida148, 255P414.

1275–15 233Mich53, 206NW547; 140 Miss699, 106S437; 242NY224, 151NE 214; 122 Or572, 260P224.

1275–15½–New. or specific property owned by it within state, 141Miss177, 106S646.

1275–18 181Ark386, 26SW(2d)122.

1276–21½–New. by taking an assignment of mortgage on land in the state; 234Mich461, 208NW443.

1276–21½–New. by taking a single conveyance of mortgaged property; 85 Ind 563, 155NE46.

1276–26½–New. or by performing a contract made without the state for labor and material on a building, 156Tenn 19, 300SW574.

1276–26¼–New. or a contract for extra materials and labor on a building incidental and supplemental to the principal transaction. 156Tenn19, 300SW574.

1276–27 17F(2d)155, 157 [citCJ]; 31F (2d)837; 37F(2d)141; 175Ark205, 299 SW747, 748 [quotCJ]; 327 Ill 367, 158 NE698; Iowa 229NW733; Mich 233NW 437; 73Mont392, 236P1080 (business must result in income); 126Misc208, 212 NYS245; 22 OhA487, 153NE909, 913 [cit Cyc]; 122 Or572, 260P224.

1277–28 17F(2d)155, 157 [quotCJ]; 19 F(2d)163, 169 [quotCJ]; 28Ariz511, 238 P326; 102CalA710, 283P856; 253 IllA 97; 22 OhA487, 153NE909, 913 [citCyc]. [b] **Maintaining agent to bring and defend actions** as well as actually having engaged in litigation does not make corporation subject to service. 126Misc208, 212NYS245.

1278–29 117 Or527, 244P661.

1278–50½–New. A foreign corporation named as trustee in bonds issued by a school district, and having no beneficial interest in the bonds, was not, by reason of bringing suit for collection of the bonds, "doing business" within the state. 178Ark443, 12SW(2d)881.

1279–51 16F(2d)821; 175Ark205, 299 SW747, 748 [quotCJ]; 102WVa402, 135 SE272.

1279–52 Wis 233NW442.

1279–52½–New. or substitution of one debtor for another, MoA 300SW1001.

1279–53 MoA 300SW1001; 102WVa402, 135SE272.

1279–54 MoA 300SW1001, 1004 [citCJ].

1279–55 16F(2d)504; 17F(2d)155, 157 [quotCJ]; 21F(2d)152; 327 Ill 367, 158 NE698, 703 [citCJ]. See also 29Porto Rico 850.

1279–56 327 Ill 367, 158NE698, 703 [cit CJ].

1279–57 218Ala245, 118S508 (lease of store); 327 Ill 367, 158NE698, 703 [cit CJ]; 232 IllA532, 546 [citCJ]. But see 98NJEq206, 129A871.

1279–58 327 Ill 367, 158NE698, 703 [cit CJ]; 240 IllA80, 84 [citCJ].

1279–59 327 Ill 367, 158NE698, 703 [cit CJ].

1279–60 327 Ill 367, 158NE698, 703 [cit CJ].

1279–60½–New. A lease executed after a foreign corporation has qualified to do business within the state is not invalidated because negotiations were conducted before it was so qualified. Ariz 284P350.

1279–61 16F(2d)504.

1280–66 239Mich295, 214NW110, 55 ALR1157. [b] 239Mich295, 214NW110, 55ALR1157.

1280–67 TexCivA 17SW(2d)141.

1280–68 42F(2d)712; 224AppDiv531, 231NYS503.

1280–69 But see 98NJEq206, 129A871.

1281–70 MoA 300SW1001 (procuring sale contract and contracting against loss by corporation thereunder); 242NY 224, 151NE214.

1281–72 327 Ill 367, 158NE698, 701 [cit CJ]; 22 OhA487, 153NE909.

1281–73 327 Ill 367, 158NE698, 701 [cit CJ]; 22 OhA487, 153NE909.

1281–74 327 Ill 367, 158NE698, 701 [cit CJ]; 73Mont392, 236P1080; 242NY224, 151NE214.

1281–77 327 Ill 367, 158NE698, 701 [cit CJ].

1281–77½–New. or disbursing funds; 73Mont392, 236P1080.

1281–78 327 Ill 367, 158NE698, 701 [cit CJ].

1281–78½–New. or making deposits in banks; 73**Mont**392, 236**P**1080.
1281–78½–New. or receiving interest on bank deposits; 73**Mont**392, 236**P**1080.
1281–85 [a] **Solicitation of business** through agents not permitted to conclude bargains is not "doing business" in state. 20**F(2d)**593.
1281–86½–New. In determining whether a foreign steamship corporation was doing business in the state without a certificate from the secretary of state, financing of the vessel in the state was a mere incident to ownership or control of the vessel, and could not be considered as disassociated therefrom. 224**App Div**531, 231**NYS**503.
1282–87 13**F(2d)**500; 25**F(2d)**252; 137 **Misc**688, 244**NYS**372.
1282–88 13**F(2d)**500.
1283–92 43 **Ida**343, 251**P**1051, 1053 [cit CJ].
1283–93 178**Ark**518, 12**SW(2d)**870.
1283–94 43 **Ida**343, 251**P**1051, 1053 [cit CJ]; 43 **Ida**654, 254**P**215; 192**Wis**293, 212**NW**665.
1283–94½–New. Nor is foreclosure of such mortgage doing business within state. 43 **Ida**654, 254**P**215.
1283–95 181**Ark**386, 26**SW(2d)**122; **MoA** 300**SW**1001; 137**Misc**622, 244**NYS**312.
1283–96 43 **Ida**654, 254**P**215, 216 [cit CJ]; 193**NC**233, 136**SE**609.
1283–1½–New. by leasing and delivering tank cars outside of the state to a company which used them within the state; 118 **Okl** 111, 246**P**851.
1283–3 149**Va**200, 141**SE**253 (statute requiring appointment of secretary of commonwealth as agent for service).
1284–5 253 **IllA**97; 233**Mich**384, 206**NW** 371; 315**Mo** 927, 288**SW**20; 113**Nebr**731, 204**NW**798; 223**AppDiv**41, 227**NYS**230; 125 **Or**63, 266**P**248; 285**Pa**273, 132**A**364; 12**PortoRicoFed**5; **Utah** 283**P**731; 196 **Wis**191, 218**NW**835 (lessor of machine temporarily within state held entitled to recover under agreement with lessee for expenses and compensation of expert in attempt to make it work); **Wis** 230**NW** 135.
1285–7 See also 156**Tenn**19, 300**SW**574.
1286–9 15**F(2d)**408; 17**F(2d)**155; 175 **Ark**194, 299**SW**609; 234 **IllA**497; **Iowa** 229**NW**733; 214**Ky**76, 282**SW**769; 233 **Mich**384, 206**NW**371; 168**Minn**183, 209 **NW**876; 140**Miss**699, 106**S**437 (sales of goods on credit); 315**Mo** 927, 288**SW**20; 117 **Okl** 256, 246**P**417; 122 **Or**572, 260**P** 224; 129 **Or**85, 276**P**273; 12**PortoRico Fed**136; 12**PortoRicoFed**144; **TexCivA** 273**SW**1113; **TexCivA** 5**SW(2d)**559; **TexCivA** 31**SW(2d)**196; **Utah** 283**P**731.
1287–10 See also 152**Tenn**339, 279**SW** 257. [a] (16) Sale and installation of acetylene gas plant with additional equipment secured locally. **TexCivA** 290 **SW**861. (17) Sale and installation of window shades in apartment house. 239 **Mich**593, 215**NW**57.
1287–11 175**Ark**194, 299**SW**609; 45 **Ida** 753, 265**P**664 (contract of guaranty); 233**Mich**384, 206**NW**371; 127 **Or**196, 270 **P**519; 152**Tenn**339, 279**SW**257; **TexCivA** 273**SW**1113; **TexCivA** 1**SW(2d)**385. [b] (1) 86 **IndA**144, 154**NE**677 [dist 73 **IndA** 149, 126**NE**866]; **Utah** 283**P**731. (2) 233**Mich**384, 206**NW**371. (5) Furnishing engineer to superintend installation and construction of brick burning equipment and to instruct as to operation. 168**Minn**183, 209**NW**876. (6) Installation of refrigerating plant. 233**Mich** 597, 208**NW**148.
1288–12 176**Ark**620, 3**SW(2d)**688.
1289–15 **TexCommnA** 283**SW**781.
1289–17 40**F(2d)**671; 206 **Iowa**1164, 221**NW**777; **Iowa** 229**NW**733; 166**Minn** 151, 207**NW**201; 83**NH**336, 143**A**703; 242**NY**224, 151**NE**214 (sending agents); 229**AppDiv**568, 242**NYS**700; **Utah** 283**P** 731. [a] 242**NY**224, 151**NE**214. [e] **Maintaining office in state** is not in and of itself doing business within state. 242 **NY**224, 151**NE**214. [f] **Foreign corporation may sue** on contract involving in part interstate business, made two weeks before obtaining certificate of doing business, where no other transactions were made prior to obtaining certificate. 242 **NY**224, 151**NE**214. [g] **That notes for price and mortgage given as security are executed in state** does not take transaction out of interstate commerce. **Utah** 283**P**731.
1290–18 22 **OhA**118, 153**NE**231.
1291–39 **TexCivA** 13**SW(2d)**438.
1291–44½–New. Foreign corporation loaning money and purchasing chattel mortgages by mail within state in which it has no office or agent is not doing business therein. 253 **IllA**97.
1292–45 37**F(2d)**141; 327 **Ill** 367, 158 **NE**698.
1292–46 267**US**333, 45**SCt**250, 69**L ed** 634.
1292–52 [a] (3) Where Oklahoma company organized a Texas company and latter was used only for purpose of doing business in Texas, it was held that the former could not maintain an action in Texas. **TexCivA** 286**SW**760.
1292–55 See also 244 **IllA**466.
1292–61½–New. A foreign corporation transacting a general intra-state business in a state without compliance with the laws of such state is subject to all of the regulations and penalties imposed thereby for such noncompliance. 122 **Okl** 125, 251**P**482.
1292–61⅓–New. A corporate officer cannot defeat the substantive interest of stockholders by declining to exercise the power he had to see that the corporation qualified by complying with the Corporation License Act. 30**F(2d)** 754 [certiorari den 279**US**860, 49**SCt**418, 73**L ed**1000(3dcase)].
1293–63½–New. Where a corporation has complied with all constitutional and statutory requirements relative to filing copies of charter and articles of incorporation, failure to pay the license fee does prevent it from enforcing its contracts and other rights in the courts. 115 **Okl** 63, 241**P**762.
1293–64 272**US**494, 47**SCt**179, 71**L ed** 372, 49**ALR**713; 113**Nebr**781, 205**NW** 246, 41**ALR**992. [a] See also 117**Nebr** 121, 219**NW**848.
1293–66 113**Nebr**781, 205**NW**246, 41 **ALR**992 (payment of dividends from sales of its stock and not from earnings justifies ouster).
1293–72 [a] **Evidence held insufficient** to sustain decree of distribution of assets owing creditors and stockholders. 113**Nebr**781, 205**NW**246, 41**ALR**992. [b] **Statutes relating to distribution of assets** in cases of ouster by quo warranto proceedings apply only where distribution is properly decreed. 113**Nebr** 781, 205**NW**246, 41**ALR**992.
1294–77 114 **OhSt**149, 150**NE**743.
1294–82 218**Ala**245, 118**S**508 (lease made before engaging in business not invalid); **IndA** 162**NE**64; 65**Utah**527, 238**P**245.
1294–84 But see 200**Wis**341, 228**NW** 510.
1294–85 238**Mich**508, 213**NW**867; 320 **Mo** 1047, 10**SW(2d)**923; **MoA** 300**SW** 1001; 128 **Okl** 65, 261**P**175; 65**Utah** 527, 238**P**245.
1295–87½–New. Contracts made in interstate commerce may be sued on by foreign corporation, even without license in state. 234 **IllA**497.
1295–87⅓–New. Rights of parties determined by nature and purpose of statute and public policy, and not from consideration of private contract rights. 232 **IllA**532.
1295–87¼–New. Under some statutes contracts made prior to compliance with their requirements are void only at the option of the citizens who were parties thereto. 129 **Okl** 171, 264**P**206.
1295–87⅕–New. In Kentucky it is no defense that a foreign corporation failed to file a statement. 225**Ky**258, 8**SW(2d)** 377.
1295–88 [c] **In South Dakota.**–53**SD** 590, 221**NW**673.
1296–94½–New. Under the Georgia General Tax Act contracts of corporations are not rendered void or unenforceable by reason of failure to register with the secretary of state and pay the tax imposed. 36**GaA**777, 138**SE**270.
1296–95 327 **Ill** 367, 158**NE**698 (recognizing rule); 232 **IllA**532; 235 **IllA**518; 235**Mich**57, 209**NW**144.
1298–98 16**F(2d)**902; 218**Ky**271, 291 **SW**388; 219**Ky**195, 292**SW**814.
1298–99 218**Ky**271, 291**SW**388.
1299–2 327 **Ill** 367, 158**NE**698; 232 **IllA** 532; 251 **IllA**579 (strictly construed); **IndA** 165**NE**763(2dcase); 315**Mo** 927, 288**SW**20; 128 **Okl** 65, 261**P**175; **Tex CivA** 283**SW**217; **TexCivA** 286**SW**760; **TexCivA** 289**SW**1042; **TexCivA** 7**SW (2d)**599 (does not apply to transactions in interstate commerce).
1299–3 38**F(2d)**739; 264**Mass**588, 163 **NE**172; 46**Philippine**70.
1300–5 36**F(2d)**661.
1300–8 16**F(2d)**645; 36**F(2d)**661; 242 **NY**224, 151**NE**214; **TexCivA** 283**SW** 217; **TexCivA** 295**SW**308, 310 [citCJ].
1300–9 38**F(2d)**739; 327 **Ill** 367, 158 **NE**698 (recognizing rule); 232 **IllA**532.
1301–10 See also 16**F(2d)**645.
1301–10½–New. A foreign corporation must be doing business within the state without a proper certificate at the time of making the contract in order for the statute to prevent suit. 242**NY**224, 151 **NE**214.
1301–11 176**Ark**620, 3**SW(2d)**688; 251 **Mich**152, 230**NW**906; 141**Miss**177, 106 **S**646 (statute does not prevent foreign corporation, on discontinuing business in state, from selling its property therein; no forfeiture of property in state results from failure to file charter); 134**Misc**649, 236**NYS**241 (meaning cannot be extended merely because statute provides penalty). See also 125**Misc** 604, 211**NYS**495. [b] (3) Corporation furnishing and installing window shades without complying with statute is not entitled to lien therefor. 239**Mich**593, 215**NW**57. [e] **Lease made while corporation was doing business within state** is unenforcible for noncompliance with statute. 125**Misc**759, 211**NYS**602.
1302–14 16**F(2d)**645; 16**F(2d)**836.
1302–17 16**F(2d)**836.
1302–17½–New. Such a statute precludes a foreign corporation not complying therewith from obtaining an enforceable lien against money due under a public contract by filing statutory notice of lien. 131**Misc**281, 227**NYS**64.
1302–17½–New. A foreign corporation, selling land in the state as trustee of an estate and taking a mortgage, could maintain suit to foreclose the mortgage without complying with the acts. 97 **Fla**452, 121**S**460.
1302–17¼–New. An act requiring a foreign corporation to comply with certain requirements before it shall be authorized to transact business in the state, does not preclude a foreign corporation which has not complied with statute from seeking adjudication in the courts of the state of rights acquired under the federal constitution or laws in interstate traffic. 97**Fla**437, 121**S** 103.
1302–18 232 **IllA**532; 156**Miss**55, 125**S** 548. [c] 135 **Okl** 275, 275**P**1048 (right of corporation asserted by way of counterclaim upheld).
1303–20 38**F(2d)**739.
1303–21 103**NJL**620, 137**A**534, 536 [cit CJ].
1303–32 **IndA** 172**NE**319.
1304–34½–New. Under some statutes a corporation complying with the statute after making a contract may maintain an action on the contract subject to the right of defendant to defend on the ground of noncompliance with the statute before making the contract. 129 **Okl** 171, 264**P**206.
1304–35 118 **Or**487, 247**P**756, 760 [cit CJ].
1304–36 103**NJL**620, 137**A**534, 536 [cit CJ].
1305–42 16**F(2d)**836; 236 **IllA**84. [b] 236 **IllA**84.
1305–43 264**Mass**588, 163**NE**172 (assignee for value); **TexCivA** 286**SW**760. [b] **In Ohio.**–19 **OhA**495. [c] **Personal judgment against assignee** where he intervenes in action is erroneous. **Tex CivA** 286**SW**760.
1306–44 See also 224**AppDiv**396, 231 **NYS**176.
1306–52 216**Ala**21, 112**S**428; 221**Ky** 527, 299**SW**162; **TexCivA** 16**SW(2d)** 851.
1306–53½–New. Agent may sue in equity unlicensed foreign corporation

under void contract. 232 IllA532.

1306–53⅓–New. Where an action is to recover money paid on a void contract, default of other party on contract is no defense. 232 IllA532.

1306–53¼–New. Readiness of foreign corporation to perform no bar to action to recover money paid it on void contract. 232 IllA532.

1307–61 232 IllA532.

1307–64½–New. An agent of a corporation is not estopped from setting up noncompliance when sued by a corporation. TexCivA 293SW590.

1307–64⅓–New. Under statute, contracts entered into by a corporation during the period in which it had no statutory agent in the county are void at the option of an interested party, Ariz 263P937.

1307–64¼–New. but execution and delivery of notes thereafter when it did have such an agent in the county restoring its right to transact business in the state will estop the maker from relying on failure to have such agent in the first instance. Ariz 263P937.

1307–64½–New. Where a citizen who has made a contract with a corporation before it complied with the statute brings an action against the corporation invoking the contract, he is estopped to avoid the contract when sued by the corporation after compliance with the statute. 129 Okl 171, 264P206.

1307–64¼–New. The right of a foreign corporation to do business in the state cannot be inquired into when it seeks execution on a judgment already recovered. 48 Ida254, 282P273(2dcase).

1308–71 Iowa 232NW689; 233Mich 384, 206NW371. But see IndA 163NE 517.

1308–72 233Mich597, 208NW148, 150 [citCJ].

1309–78 36F(2d)661.

1309–81 170Ark1039, 282SW975; 207 Iowa619, 223NW365(1stcase).

1310–83 181Ark85, 24SW(2d)972; 129 Okl 171, 264P206.

1310–84 129 Okl 171, 264P206.

1310–88½–New. While a chattel mortgage given by a foreign corporation who has failed to file its articles with the secretary of state is enforceable against the corporation, it is not enforceable against one who joined as mortgagor but who had no interest in, and received no benefit from, the transaction. 99 CalA756, 279P487.

1311–96 [d] 233Mich312, 206NW525.

1312–3 233Mich312, 206NW525; 250 Mich535, 231NW128.

1312–4 115 Okl 63, 241P762.

1312–9½–New. Where a foreign corporation doing business in a state without compliance with statutory requirements loaned its property and the borrower never claimed title or denied the lender's rights until after the lender complied with the statute and instituted a replevin suit, but answered denying the lender's right of possession and property, the lender can assert his right of action in tort. 128 Okl 65, 261P175.

1312–9⅓–New. In such case the lender's cause of action is not based on the loan contract but arises out of the wrongful denial of its right of property and possession. 128 Okl 65, 261P 175.

1312–9¼–New. In such action plaintiff cannot recover the rental or usable value of the property on the theory that there was an express or implied contract on the part of the borrower. 128 Okl 65, 261P175.

1312–9½–New. A foreign corporation without a permit to do business may sue for appointment of a receiver for a subsidiary domestic corporation. Tex CivA 8SW(2d)1051.

1312–11 TexCivA 292SW(2d)958; Utah 269P147, 153 [citCJ].

1313–16½–New. Under such statute a foreign corporation cannot plead as a set-off against rent owing by it, a loan and a note and mortgage securing the same made while the corporation was doing business in the state without compliance with the statute. 65Utah 527, 238P245.

1313–18½–New. A statute requiring a permit to do business in the state does not prevent a foreign corporation from defending an action to recover title to property vested in it. TexCivA 290SW 866.

1313–26 84Colo 353, 270P867; 155 Tenn93, 290SW992, 51ALR372; 155 Tenn93, 18SW(2d)783 (not liable where services out of which indebtedness arose were performed in foreign state). [d] **That claim arises out of interstate transaction** (1) is not conclusive. 155Tenn 93, 290SW992, 51ALR372. (2) Test is whether claim is for indebtedness arising out of work done, service rendered, contracts performed, or business done within or outside of the state. 155Tenn 93, 290SW992, 51ALR372. (3) Corporation which agreed with undomesticated foreign sales corporation to advertise outside of state products purchased by it from domestic manufacturing company for resale in other states cannot recover debts so contracted from stockholder of sales company, though some business done in state. 155Tenn93, 290 SW992, 51ALR372.

1313–29 20 OhA375, 152NE393; 25 OhNPNS298.

1313–32 232 IllA532; 295Pa74, 144A 823. Contra 254 IllA576; 114 OhSt149, 150NE743.

1314–43½–New. Failure of a foreign corporation to comply with an act has been held not to defeat the right of stockholders to compel a corporate officer to convey property to the corporation in accordance with terms of an agreement made directly between the officers and stockholders. 30F(2d)754 [certiorari den 279US860, 49SCt418, 73 L ed1000(3dcase)].

1314–43⅓–New. An order requiring a corporate officer to comply with an agreement to convey property to a corporation, before such corporation had qualified, has been held premature. 30 F(2d)754 [certiorari den 279US860, 49 SCt418, 73L ed1000(3dcase)].

1314–43¼–New. Promoters of a foreign corporation not authorized to do business within the state are personally liable for goods bought in the company's name. 206 Iowa1228, 219NW24.

1314–44 269US148, 46SCt59, 70L ed204 (corporation held to be doing intrastate business so as to be liable to penalty); 156Tenn19, 300SW574.

1315–51 204 Iowa1052, 216NW956; 217Ky575, 290SW320.

1316–53½–New. Failure of the corporation to appoint an agent under statute does not render its contract void except at the option of the other party, and an agent subsequently appointed can make a binding contract to perform the obligation previously incurred. Ariz 263P937.

1317–64 40F(2d)736; 16F(2d)645.

1317–65 16F(2d)645; 30F(2d)364.

1317–65½–New. Where a state statute merely prohibits a foreign corporation from doing business in the state without complying with requirements, a corporation may enforce a contract in federal courts although the state courts would refuse to enforce it. 23F(2d)65.

1318–69 16F(2d)645.

1318–71 16F(2d)645.

1318–71½–New. A Michigan corporation's failure to comply with a Minnesota act cannot be urged as defense to a suit by it in a Michigan court against its agent in Minnesota to recover money fraudulently obtained. 244Mich351, 221 NW179.

1319–75 251Mich602, 232NW367.

1319–76½–New. The capacity of a foreign corporation to hold title to real estate in state by reason of failure to procure permit to do business or for other reasons can be questioned only by state. TexCivA 290SW866.

1320–91 [a] 179Ark1029, 18SW(2d) 1028, 65ALR1446 (applied to electric transmission company).

1322–1 181Ark386, 26SW(2d)122; 125 Kan386, 265P46.

1322–2 [a] **Statute forbidding foreign corporations** to take and enforce mortgages on land in state held not retrospective. 48SD629, 205NW714.

1322–3 48SD629, 205NW714.

1323–16 232Ky635, 24SW(2d)259.

1324–27 325 Ill 114, 156NE258.

1326–40 207Cal 630, 280P101; 115Nebr 33, 211NW210, 62ALR489.

1327–46 216AppDiv380, 215NYS200 (trustee under mortgage by individual for benefit of bondholders).

1327–51 15F(2d)211, 215 [citCJ]; 25 F(2d)655; 198Cal 618, 246P796 (inequality of voting rights is internal question and is not involved in mandamus proceedings to compel granting of license to do business in state); 155Md 189, 141A528; 99NJEq57, 132A308.

1328–55 288Pa362, 136A673 (not want of jurisdiction, but want of power).

1329–60 205Cal 479, 271P747. [b] **Railroad commission had no authority to issue permit for issuance of stock** by foreign public utility. 205Cal 479, 271P 747.

1329–65 15F(2d)211; 230AppDiv57, 242 NYS548.

1330–77 33F(2d)667 (validity of election is determinable only by laws of country of incorporation).

1330–82½–New. to enjoin and set aside reorganization, 15F(2d)211.

1330–82¼–New. or where, in a stockholder's suit to set aside reorganization, fraud is not alleged sufficiently; 25F (2d)655.

1330–91½–New. , or to grant relief by mandamus to compel election officers to receive contested ballots of proxies. 213 AppDiv774, 211NYS61.

1332–7 8PaDist&Co 71; 149Wash143, 270P297.

1332–15 TexCivA 290SW866, 869 [cit CJ].

1332–17 15F(2d)408; Iowa 233NW137; TexCivA 290SW866, 869 [citCJ]. [a] **Foreign de facto corporation** is dealt with as is a domestic de facto corporation. Iowa 233NW137.

1333–21 Iowa 233NW137; 240NY368, 148NE552; 46Philippine144, 145 [cit CJ].

1335–48 7F(2d)769; 7F(2d)777.

1335–53 DC 41F(2d)567.

1336–54 13F(2d)920 (suit in federal court); 23F(2d)357, 366 [citCJ]; 121 Kan827, 250P338; 239Mich295, 214NW 110, 55ALR1157; 100NJEq362, 134A 867; 102NJEq310, 140A569.

1338–56 13F(2d)920; 174Ark228, 295 SW31; 239Mich295, 214NW110, 55ALR 1157.

1338–58 13F(2d)920 (to prevent mismanagement by resident officers); 23F (2d)357, 366 [citCJ].

1338–60 7F(2d)777.

1338–61 NJCh 151A463(2dcase).

1338–61½–New. That a petition praying for the appointment of a receiver of a foreign corporation also prays for dissolution does not deprive the state court of jurisdiction to appoint a receiver. 239Mich295, 214NW110, 55ALR 1157.

1338–61⅓–New. A complaint alleging that a Florida corporation for which a receiver was sought was organized under the laws of New York, has been held fatally defective and the appointment of a receiver illegal. 149SC151, 146SE810.

1339–63 99NJEq57, 132A308 (receiver may be appointed upon insolvency of foreign corporation); 286Pa226, 133A 232. [b] **Potential or inevitable insolvency** is ground for appointment of receiver in some jurisdictions. NJCh 151 A463(2dcase).

1339–66 See also 130 Okl 27, 264P904.

1339–69½–New. Under some statutes a district court, on entering judgment of ouster against a foreign corporation for violation of laws or fixed policy of the state, is empowered to appoint three trustees for the creditors and stockholders of such ousted corporation with powers and duties prescribed by the statute. 114Nebr341, 207NW664, 44 ALR1172.

1339–69⅓–New. In such case the court is without power to order the return or refund to the individual stockholders of the surplus, if any, after paying costs and liabilities within the state against the corporation, but such surplus must be ordered returned to the proper officers or representatives of the ousted

[illegible] 114Neb241, 215NW333.

1340-70 [illegible] 2 App Div 558, [illegible] [a] **Comity requires permission to receiver of foreign corporation to sue local stockholder** on statutory liability, and to bar action by creditor. 216App [illegible]

1340-71½-New. Powers and liabilities of receiver. A receiver appointed in a state other than that of the corporation's domicile is not liable for conversion of property located in the state of its domicile where the appointment did not affect such property and the corporation merely failed to manage and control it. 25F(2d)794.

1340-71½-New. Such receiver is not liable for conversion of property voluntarily sent to him by the corporation from the state of its domicile under mistake as to the receiver's authority. 25F(2d)794.

1340-71¼-New. Money received by such receiver from a bank in the state of the corporation's domicile representing sales therein should be returned to the corporation in such state although the corporation has been ousted from the state in which the receiver was appointed. 25F(2d)794.

1340-71½-New. Such receiver should not be charged with interest on such money during the time it was in his possession with the consent of the corporation. 25F(2d)794.

1340-71½-New. Such receiver should be required to return to the corporation with interest money withdrawn by him without authority from a bank in the state of the corporation's domicile where it was deposited to the credit of the corporation. 25F(2d)794.

1340-71½-New. Such receiver should be allowed his necessary and proper expenses incurred for the benefit and in preservation of the corporate property in the state of his appointment. 25F(2d)794.

1340-71½-New. A nonresident receiver of a foreign corporation may sue in the state to enforce a stockholder's liability. 208Iowa527, 226NW5.

1340-71½-New. Receiver appointed for foreign corporation in state of domicile may maintain action in another state where no rights of resident creditors intervene. 26 226NW22.

1340-73 [a] 127Misc262, 215NYS613.

1340-[illegible] 251Pa[illegible], 1[illegible]A[illegible].

1344-21½-New. Domiciliary receiver's rights are paramount for purposes of dissolution and distribution of surplus among stockholders of insolvent foreign corporation. 127Misc262, 215NYS613.

1344-21½-New. Domiciliary receiver may intervene in ancillary proceedings before referee respecting claims of resident creditors of corporations. 127Misc262, 215NYS613.

1344-21¼-New. especially where questions as to fraudulent character of certain claims are involved. 127Misc262, 215NYS613.

1344-21½-New. In such intervention by domiciliary receiver his legal expenses are chargeable against funds in the hands of ancillary receiver. 127Misc262, 215NYS613.

1344-21½-New. but compensation must be fixed by court. 127Misc262, 215NYS613.

1344-21½-New. and only for services actually rendered. 127Misc262, 215NYS613.

1344-21½-New. and the court will not authorize payment for anticipatory services by attorney. 127Misc262, 215NYS613.

1344-21½-New. Domiciliary receiver of foreign corporation may sue in courts of New York to recover uncollected assets of corporation. 127Misc262, 215NYS613.

1344-21½-New. and if he lacks funds and in good faith brings actions in other states to collect such amounts he is entitled to allowance for expenses out of funds in hands of ancillary receiver. 127Misc262, 215NYS613.

1344-21½-New. and this is regardless of outcome of litigation. 127Misc262, 215NYS613.

1344-21½-New. He may also apply for advance disbursements on notice to ancillary receiver. 127Misc262, 215NYS613.

1345-29 127Misc262, 215NYS613.

1345-31 [a] **In New York.**—127Misc262, [illegible]

1346-41½-New. Claims against funds of an insolvent foreign corporation in the hands of a receiver appointed in New York must be determined on reference and not by summary order. 127Misc262, 215NYS613.

1347-50½-New. So a court of equity may entertain a suit by simple contract creditors praying judgment for balances due on unpaid subscriptions, and discovery and distribution of the assets [illegible] among all the creditors. 212Ala556, 1058590. [a] **Sufficiency of bill.**—212Ala556, 1058590. [b] **Complainants as judgment creditors.**—212Ala556, 1058590. [c] **Action for benefit of complainants alone.**—212Ala556, 1058590. [d] **Invitation to other creditors.**—212Ala556, 1058590. [e] **Debtor of corporation a foreign corporation.**—212Ala556, 1058590.

1348-65½-New. Preferred stockholders of an insolvent foreign corporation in receivership cannot appropriate assets in the state, as a creditor is in preference to foreign creditors or preferred stockholders. 291Pa282, 139A852.

1348-71 263Mass444, 162NE217 (right cannot be implied).

1349-79½-New. In minority stockholders' action because of merger, subsequent merger of consolidated corporation could not be considered. 219AppDiv642, 220NYS683.

1349-79½-New. Minority stockholders in foreign corporation merged with another corporation in strict compliance with foreign law are not entitled to recover value of their stock. 219AppDiv 642, 220NYS683.

1349-82 12F(2d)920; 239Mich295, 214 NW110, 55ALR1157; 114Nebr241, 207 NW651, 665 [cit CJ], 44ALR1172.

1349-83 174Ark622, 295SW31; 162La 133, 1108176, 177 [quotCJ]; 239Mich 295, 214NW110, 55ALR1157. [a] **Where liquidators were not duly appointed** in state of incorporation, civil district court was without jurisdiction to wind up affairs of corporation. 162La133, 1108176.

1350-87 240NY368, 148NE552 (Russian Soviet decree, attempting to punish settlements abroad, held not to terminate corporate capacity).

1350-87½-New. An attempt by a court of one state to dissolve a corporation organized in another state is open to attack in a collateral proceeding. 239 Mich295, 214NW110, 55ALR1157.

1350-97½-New. Where the charter of a foreign corporation has been forfeited in the state granting it and its directors have become trustees of its property, one of them cannot maintain an action in another state for the removal of another and to have himself declared sole trustee. 129Kan723, 284P375.

1350-98 [c] **Soviet decree, nationalizing corporations,** held not to terminate existence. 240NY368, 148NE552.

1350-99 240NY368, 148NE552 (Soviet decree, annulling shares, bonds, and securities not listed with government bank, held not to terminate Russian corporation).

1350-92½-New. Russian Soviet decree, prohibiting and attempting to punish settlements abroad without permission of the government, held not to effect termination of Russian corporation. 240 NY368, 148NE552.

1350-92½-New. Soviet decree annulling shares, bonds, and securities not listed with a government bank, held not to terminate Russian corporation. 240NY 368, 148NE552.

1350-92½-New. Soviet decree nationalizing certain Russian corporations does not terminate their corporate existence in absence of express language to that effect. 240NY368, 148NE552.

1350-92½-New. Court properly exercises jurisdiction by requiring accounting of dissolved foreign corporation, where corporation had principal office in state, and officers and directors resided here. 288Pa362, 136A673.

1351-1 174Ark622, 295SW31.

1351-2 9PaDist&Co 704.

1352-4½-New. Long lapse of time after annulment of charter without disposition of property in domestic state is held to raise presumption that there were no proceedings for the disposition thereof. 151Md274, 134A206.

1352-5 151Md274, 134A206.

1352-6½-New. Domestic court has jurisdiction of an action by stockholders to dispose of property of a foreign corporation in the state for the benefit of stockholders. 151Md274, 134A206 (necessary parties).

1352-6½-New. Proof of stock ownership by stock book and other documentary evidence without production of stock certificates is held sufficient. 151 Md274, 134A206.

1352-7 [b] **Accounting from officers and directors should not be denied** because government would claim as taxes any sum disclosed. 288Pa362, 136A673.

1352-8 47RI108, 130A863.

1352-9 See also 291Pa383, 140A143.

1352-13 [a] **Judgment rendered after dissolution of corporation** has no extraterritorial effect. 168Ark756, 271SW954.

1354-20 16F(2d)645; 247Mich645, 226 NW672; 48Nev52, 226P1106 (transaction of single piece of business is not "doing business" so as to necessitate compliance with statutory requirements as condition precedent to right to sue); **NJSup** 138A509; 289Pa240, 137A230; **TexCommnA** 290SW727; 143Wash24, 254P464.

1355-21 315Mo927, 288SW20; 103NJL 620, 137A524; **TexCivA** 285SW699.

1356-22 315Mo927, 288SW20.

1356-31 152Tenn97, 275SW340.

1356-32 289Pa240, 137A230.

1356-33 **TexCivA** 218SW(2d)705.

1356-34½-New. , or foreclosure. 143 Wash24, 254P464.

1356-36 [b] 117Nebr121, 219NW848.

1356-37 57ND17, 220NW130.

1356-40½-New. To prevent a foreign corporation from suing in the state, it must be doing business therein without proper certificate. 242NY224, 151NE 214.

1356-41½-New. In Illinois statutes do not prohibit non-profit foreign corporation sole from bringing suit. 254IllA 264.

1356-43½-New. A foreign corporation which has not complied with the law before doing business in the state may defend property rights in courts if made defendant by act of complainant or by order of court. 91Fla345, 108S173.

1356-43½-New. A foreign corporation doing business within the state which has paid its taxes for the year during which suit is brought but fails to pay taxes during subsequent years while the action is pending is precluded under some statutes from maintaining the action. 80CalA433, 251P935.

1357-52 See also 33PortoRico 8.

1357-60½-New. In a suit only for accounting against officers and directors, dissolved foreign corporation is held not necessary party. 288Pa362, 136A 673.

1357-62 [a] **Word "Inc.,"** used in pleading, is equivalent to phrase "a corporation." 102CalA710, 283P856.

1358-77 244IllA16. [c] (2) 244IllA 16.

1358-77½-New. The right of a party to have a contract declared void or decline to do so, for failure of the corporation to appoint on agent under statute, is not required to be exercised only in answer to the complaint in an action against him for debt, but he may do so before suit. Ariz 263P937.

1358-77½-New. Denial that plaintiff was a corporation organized and doing business under laws of foreign state did not deny plaintiff was corporation but merely that it was organized and doing business. 181Ark415, 268SW(2d) 80.

1358-78 70CalA438, 233P409, 410 [cit CJ]; 128Mo433, 148A561; 24ObA434, 157NE828; 116Or399, 241P393, 395 [cit CJ]; **TexCommnA** 290SW727; **TexCivA** 295SW932. See also 66Utah459, 467, 244P210 [cit CJ]. [a] (1) See also 66Utah459, 467, 244P210 [cit CJ]. (2) See also 66Utah459, 467, 244P210 [cit CJ].

1359-79 210Mich79, 214NW923; 116 Or399, 241P392, 395 [cit CJ]. **Tex CommnA** 290SW727.

1360-80 **TexCommnA** 290SW727. [a] **TexCommnA** 290SW727.

1360-83 7Alaska31; **TexCivA** 2?8SW630. **TexCivA** 2?8SW710. **TexCivA** 283SW217; **TexCivA** 300SW91. **TexCivA** 18W(2d)914 [c] (1) 125Misc601, 211NYS495; 125Misc759, 211NYS602. (8) **Failure to so allege is ground for dismissal of complaint as not stating cause of action.** 125Misc604, 211NYS495 [d] **Allegations held sufficient** to warrant assumption that complainant comes within statute requiring certificate of authority to do business in state. 125Misc604, 211NYS495. [e] **Complaint of foreign corporation** showing but one sale within state held not to show it **"doing business"** within state so as to prevent its action for failure to obtain certificate of authority to do business within state. 125Misc604, 211NYS495. [f] **Fidelity, guaranty, and surety company** is not required under some statutes to plead and prove permit to do business within state. **TexCivA** 248W(2d)474.

1361-84 125Misc604, 211NYS495 (by answer); **TexCommnA** 290SW727 [quot CJ]; **TexCivA** 18W(2d)914; 66Utah459, 244P210. [b] **Complaint not showing transaction was intrastate business** need not allege corporation had complied with statutes authorizing it to do business in state. 66Utah459, 244P210.

1361-84½-New. , and complaint will not be dismissed on motion. 125Misc604, 211NYS495.

1362-90½-New. A petition in an action by a foreign corporation showing a transaction of an interstate nature is not demurrable for failing to allege a permit to do business. **TexCivA** 300SW91.

1362-91 116 Or399, 241P393 [b] **Noncompliance not raised by mere denial of corporate existence.**-48 Ida412, 282P192.

1363-92 117 Or527, 241P661; 46Philippine70. But see **IndA** 162NE264 116 Or399, 241P393. [c] **In Idaho.**-48 Ida412, 282P192.

1363-92½-New. , and cannot be raised by demurrer where complaint does not show noncompliance. 70CalA438, 233P409.

1363-94 **IndA** 163NE517 (defense that contract was void on ground that corporation was not qualified to transact business in state held not demurrable); **TexCivA** 138W(2d)405.

1364-95 **TexCivA** 295SW596.

1365-98½-New. In some jurisdictions the pleader must point out with particularity wherein a foreign corporation has not complied with statutory requirements. 116 Or399, 241P392.

1365-98½-New. Special demurrer or denial is essential to raise issue, or it is waived. 43 Ida196, 253P383.

1365-16 116 Or399, 241P393, 39a [quot CJ]; **TexCommnA** 290SW727.

1365-19½-New. Where plaintiff must plead compliance with statutory requirements, it must prove such compliance in order to maintain action. **Tex CivA** 283SW217.

1366-21 102CalA710, 283P856; **MoA** 300SW1001 (defendant must show plaintiff was doing business within state without license); **MoA** 68W(2d)984 (burden of proving noncompliance is on defendant); **TexCivA** 58W(2d)59.

1366-22 116Tex193, 292SW168

1366-24½-New. A presumption of law in favor of the legality of a contract rather than illegality applies to foreign business corporations as well as domestic. 208 Iowa1042, 226NW772.

1366-28 116 Or399, 241P393.

1367-38 **MoA** 68W(2d)984 (plaintiff doing business). [a] (4) Justify holding that foreign corporation had never qualified to do business in state. **Tex CivA** 273SW630. [a] (5) To show plaintiff corporation withdrew from doing business within state and was entitled to sue on contract. 102CalA710, 283P856. (6) To show plaintiff corporation is Maine corporation, referred to as I. R. Co. Inc. 102CalA710, 283P856. (7) To show contract for furnishing materials was not made within state so as to prevent enforcement thereof. 50RI3?, 147A?91. [c] **Foreign corporation purchasing incumbered public utility warehouse** at trustees' sale is no proof of its intention to operate public utility. 207Cal630, 280P101.

1367-43 80Mont?24, 261P?83

1367-45 175Ark618, 299SW1016.

1367-49 125Misc759, 211NYS602 (having principal office in state raises presumption of "doing business" within state).

1367-50½-New. On plea in abatement that plaintiff was not entitled to sue because of failure to comply with the statute requiring filing of certificate with the secretary of state the burden of showing that the transaction constituted intra-state rather than interstate commerce is on defendant. **Tex CivA** 273SW1113.

1367-50¾-New. An allegation that plaintiff was foreign corporation raises a presumption that it is a foreign stock corporation. 125Misc759, 211NYS602.

1367-50¾-New. The certificate of the corporation commissioner of the state of the forum and substantial compliance with statute is admissible as prima facie evidence of corporate existence and right to do business in the state. 116 Or399, 241P393.

1367-52 129Misc687, 222NYS404.

1367-55 223AppDiv41, 227NYS230; 147Tenn?, 2?8SW?10

1368-63 **TexCivA** 283SW217.

1368-67 **TexCivA** 2?8SW610. **TexCivA** 2?8SW?1?. **TexCivA** 2?8SW1012.

1368-70 **TexCivA** 273SW630.

1368-75 [a] **Where petition states joint cause of action against two corporate defendants,** one of which is resident and other nonresident, court obtains jurisdiction of nonresident defendant. 222 **MoA** 436, 7SW(2d)290.

1368-80 273US119, 47SCt308, 71Led569; 23F(2d)233; 28F(2d)698; **Del Super** 113A?? [?]?6Ky169, 105W(2d)633; 2?1Mass569, 151NE?63, 16ALR?63, 210Mich612, 215NW590, 169Minn19, 210NW620, 2?0NY?03, 161NE?0, 129Misc612, 221NYS?5, 2?0AppDiv?65, 242NYS?00, 13?Misc685, 211NYS83?; 127Okl295, 260P?15, 288Pa240, 135A755. **TexCivA** 295SW935 [d] **General Corporation Act relating to service on foreign corporations** applies to personal actions as distinguished from actions in rem. 98NJEq206, 129A871.

1369-81 78Mont40, 252P318. [a] 173Ark180, 292SW677

1369-83 ?91US320, 198SCt?79, 731Led711; 8F(2d)13, 17F(2d)305, 18F(2d)677; 174Ark6, 294SW116; 160Ga812, 129SE86; 220Ky159, 105W(2d)633; 172Minn585, 216NW331; 98NJEq206, 129A871 (service may then be made upon any officer or agent, in some manner as domestic corporations may be served); 250NY233, 165NE?70; 220AppDiv218, 221NYS83?; 131Misc129, 226NYS162 (action for conversion); 133Misc890, 234NYS883 (though not filing statutory certificate); 136Misc411, 240NYS15; 190NC311, 129SE?05; 192NC115, 133SE424, 127Okl295, 260P?15, 295Pa232, 115A125; **TexCivA** 295SW935

1371-85 127Okl295, 260P745.

1372-94 172Minn585, 216NW331, 332 [quotCJ].

1372-95 172Minn585, 216NW331, 332 [quotCJ]; 192NC115, 133SE424.

1372-96 172Minn585, 216NW331; 192NC115, 133SE424, 426 [cit CJ].

1372-97 172Minn585, 216NW331, 332 [quotCJ]; 192NC115, 133SE424, 426 [cit CJ].

1372-98 28F(2d)626; 172Minn585, 216NW331, 332 [quotCJ]; 192NC115, 133SE424, 426 [cit CJ]; 127Okl295, 260P715. [a] **Courts look to substance of transaction.** 12F(2d)490

1372-99 172Minn585, 216NW331, 332 [quotCJ]; , 192NC115, 133SE424, 426 [cit CJ].

1372-6 172Minn585, 216NW331, 332 [quotCJ]; 192NC115, 133SE424, 427 [cit CJ].

1372-9 277Mo169, 178SW(2d)347

1372-11 273US119, 47SCt308, 71Led569, 161F(2d)198, 201(2d)?0, 2?F(2d)?6, 181Ark?86, ?6SW(2d)?1?, 174Ark?0?, ?9SW?5, 3?0, 1?0Ky?, **TexCivA** ?5?SW?35.

1372-12 201(2d)?07, 174Ark?70, ?9?SW?5, 3?9 [cit CJ]. [a] 174(2d)1?0.

1372-13 174Ark?70, ?9?SW?5 [b] NC311, 129SE?05; 192NC115, 133SE424.

1372-14 174Ark?70, ?9?SW?5, 1?9 [cit CJ]. 192NC115, 133SE424. [b] **Residence in county.**-160Ga812, 129SE86.

1373-15 174Ark420, 295SW378

1373-16 174Ark420, 295SW378, 379 [cit CJ].

1373-17 174Ark420, 295SW378, 379 [cit CJ].

1373-18 174Ark420, 295SW378, 379 [cit CJ].

1373-19 16F(2d)198; 174Ark420, 295SW378, 379 [cit CJ]; 172Minn585, 216NW331, 332 [cit CJ]; 284Pa569, 131A487; **TexCivA** 295SW935.

1373-21 192NC115, 133SE424; 284Pa569, 131A487

1373-22 169Minn49, 210NW620

1373-24 17F(2d)155; 42F(2d)302; 169Minn19, 210NW620, 192NC115, 133SE424, 427 [cit CJ].

1373-26 192NC115, 133SE424, 427 [cit CJ]

1373-27½-New. The business done in the state which will subject the corporation to the jurisdiction of its courts may be either intra-state or interstate. 147Tenn544, 279SW795.

1373-27¾-New. 13?Okl295, 260P?15

1373-27¾-New. Foreign corporation must be within state during the time the business is transacted. 192NC115, 133SE424.

1373-32 80CalA?9, 261P191, **TexCivA** 295SW935, 937 [cit CJ].

1374-33 17F(2d)305, 25F(2d)?7, 28F(2d)626; 220Ky159, 105W(2d)633; 172Minn585, 216NW331; 192NC115, 133SE424; 125Or63, 266P248. [d] **The agency cannot be established solely** by statements of person claiming to be agent. 220AppDiv?; 2?2NYS150

1374-36 169Minn19, 210NW620

1374-37 169Minn19, 210NW620

1374-40 273US119, 47SCt308, 71Led569, 169Minn19, 210NW620, 129Misc612, 221NYS?5; 13?Misc111, 239NYS783, 288Pa240, 135A755. **But see 29F(2d)113**

1375-41 273US119, 47SCt308, 71Led569, 61F(2d)153, 29F(2d)161, 217NA375.

1375-42 169Minn19, 210NW620.

1375-44 273US119, 47SCt308, 71Led569, 223AppDiv316, 228NYS836, 139Misc612, 221NYS?5

1375-46 273US119, 47SCt308, 71Led569, 220Ky159, 105W(2d)633

1375-53 [c] **Office resulting in flow of business** with reasonable continuity constitutes doing business for purpose of process. 27F(2d)100.

1376-55 36F(2d)?58. [a] **In absence of showing** that office resulted in continuous flow of products into state, corporation is not subject to process. 27F(2d)100

1376-56 36F(2d)?58; **NJSup** 137A192, 216NY564, 159NE618; 129Misc612, 221NYS?58. [a] (1) Railroad having branch office for soliciting freight and performing minor acts of business courtesy held not doing business within county. 283Pa?10, 135A755.

1376-58 169Minn19, 210NW620

1377-60 250NY233, 165NE274

1377-71 101WVa127, 132SE723, 725, 45ALR1442 [cit CJ]

1377-75 127Okl295, 260P715, 101WVa127, 132SE723, 725, 45ALR1112 [cit CJ]

1378-90 [a] (3) Operation of grain elevator, maintenance of agent in charge, and shipping grain purchased to foreign country, constitute doing business within state. 127Okl295, 260P745

1378-91 132Misc311, 229NYS783 (purchase of merchandise within state)

1379-6 See also 29F(2d)592, 192NC115, 133SE424, 427 [cit CJ].

1379-7 192NC115, 133SE424, 427 [cit CJ].

1380-19½-New. That a foreign corporation owns property within the state does not enable the local courts to acquire jurisdiction to render a personal judgment against it on service of process on an officer residing within the state where the corporation is not doing business within the state at the time of service and has not entered into contracts of extended duration and mutual obligation with citizens. 169Minn49, 210NW620.

1380-22 23F(2d)233.

1380-26 250NY203, 164NE907.

1380-27 284Pa569, 131A487. But see 129Misc512, 221NYS758.

1380-28 284Pa569, 131A487. [b] **Resales; sale by sample.**-284Pa569, 131A487.

1380-29 284Pa569, 131A487.

1380-32½-New. Merely having a traveling agent in the state is not doing business in the state. 24OhA434, 157NE828.

1380-33 16F(2d)504; 16F(2d)821; 20F(2d)707; 28F(2d)347; 219Ky699, 294SW144; 254Mass569, 151NE63, 46ALR563; 220AppDiv573, 222NYS130; 125Or63, 266P248; 284Pa569, 131A487. [b] (1) 254Mass569, 151NE63, 46ALR563. (2) Maintenance of office within state for solicitation of business of interstate transportation by foreign corporation neither owning nor operating lines within state is not doing business within state. 240Mich542, 215NW390. [c] 29F(2d)164.

1380-34 254Mass569, 151NE63, 46ALR563.

1380-35 16F(2d)498; 28F(2d)347 (activities held to constitute doing business); 220AppDiv218, 221NYS332; 284Pa569, 131A487; 288Pa240, 135A755. [a] (5) Foreign railroad, maintaining financial and freight and passenger soliciting offices in state held doing business in state. 220AppDiv218, 221NYS332.

1381-36 16F(2d)498.

1381-37 16F(2d)498.

1381-44 225AppDiv145, 231NYS630; TexCommnA 10SW(2d)975; 144Va154, 131SE245 (railroad engaged in interstate commerce owning real and personal property in state becomes resident for purposes of suit).

1381-46 TexCivA 295SW935.

1381-49½-New. Where receivers were appointed in the state of Vermont to run a railroad corporation organized in Vermont, and the corporation carried on only interstate business within the state of New York, a New York court, in suit for wrongful death occurring in the state of Vermont, acquired no jurisdiction by service of summons on a director residing within New York. 250NY233, 165NE275.

1382-60 169Minn49, 210NW620; 171Minn87, 214NW12, 13 [citCJ]; 125Or528, 266P238, 243 [citCJ], 59ALR1436.

1382-61 213Ala556, 105S590.

1382-65 171Minn87, 214NW12, 13 [cit CJ]; 172Minn585, 216NW331; 220AppDiv573, 222NYS130; 66Utah103, 240P165.

1382-67 171Minn87, 214NW12, 13 [cit CJ]; 66Utah103, 240P165. See also 146Miss22, 111S741.

1382-68 37F(2d)141; 169Minn49, 210NW620. [a] **Nonresident corporation doing business in state** does not impliedly consent to be reached by process of courts of that state. Iowa 231NW671.

1382-69 37F(2d)141; 216Ala221, 113S45; 254Mass569, 151NE63, 46ALR563; 251Mich439, 232NW194; 169Minn49, 210NW620; 288Pa240, 135A755. [b] **Action to recover sum of money can only be initiated by attachment** against corporation not doing business in state. 131Misc922, 229NYS277. [c] **Service on subsidiary corporation** is not service on foreign parent corporation not doing business within state. 251Mich439, 232NW194.

1382-69½-New. Default judgment may be taken against a foreign corporation where the citation gives the name of the agent served without proof of agency, TexCivA 28SW(2d)360.

1382-69½-New. but such judgment will be set aside where the sheriff's return merely recited that he had "served" such citation on defendant's agent. Tex CivA 28SW(2d)360.

1382-69¼-New. Default judgment will also be set aside where the petition failed to show whether the agent served was local or traveling agent or traveling salesman. TexCivA 28SW(2d)360.

1383-73 20F(2d)707; 171Minn87, 214NW12, 13 [citCJ]; 152Tenn544, 279SW795, 797 [quotCJ]; 196Wis451, 220NW534.

1383-74 19F(2d)163; 125Or63, 266P248, 249 [citCJ]; 152Tenn544, 279SW795; 196Wis451 220NW534 (discretion of court not abused in entertaining jurisdiction).

1383-75 279US320, 49SCt329, 73Led711.

1383-76 279US405, 49SCt360, 73Led762.

1383-76½-New. The courts of state may properly refuse to pass on a controversy relating to the internal management of a foreign corporation. Mass 167NE278.

1383-76¼-New. State courts cannot interfere in a foreign corporation's management of its internal affairs. 219Ala497, 122S824.

1383-76¼-New. Controversies relating to internal management of foreign corporation must be settled by courts of state creating corporation. 39F(2d)290.

1383-78 125Or528, 266P238, 59ALR1436.

1383-81 309Mo625, 627, 274SW362 [cit CJ].

1384-82 309Mo625, 627, 274SW362 [cit CJ].

1384-84 NJ 148A629.

1384-91 125Or528, 266P238, 243 [cit CJ], 59ALR1436.

1384-94 [a] (1) 128Misc138, 217NYS856.

1385-99 128Misc138, 217NYS856.

1385-2 [b] (7) In suit for breach of foreign corporation of c. i. f. contract executed in London to ship rails to Baltimore documents to be delivered and payment to be made in New York, cause of action arises in New York so as to support action under St. subd. 3. 127Misc51, 215NYS214.

1386-3 128Misc138, 217NYS856.

1387-10½-New. Tennessee Act of 1887 (Shannon Code §§ 4543-4546), has no application to a case in which a foreign corporation is doing business in the state and has an agent residing in it. 152Tenn544, 279SW795.

1387-10¼-New. In some jurisdictions a state court has jurisdiction of an action by a domestic corporation against a foreign corporation for damages to an interstate shipment made wholly without the state arising from negligence. 174Ark6, 294SW416.

1387-13 171Minn87, 214NW12, 13 [cit CJ]. See also NH 151A709.

1388-18 124Okl7, 253P66.

1388-19 124Okl7, 253P66.

1388-21 See 17F(2d)155.

1388-26 98NJEq206, 129A871 (General Corporation Act relating to service on foreign corporations applies to personal actions as distinguished from actions in rem).

1389-29½-New. A court of general jurisdiction assuming to act under Oklahoma statute is a court of special jurisdiction for the purpose of the proceeding and its power to adjudicate must appear from the terms of the statute. 124Okl7, 253P66.

1389-31½-New. The question of whether a creditor's bill is properly brought against a West Virginia corporation and receiver appointed of its assets in Ohio where its principal office was located cannot be raised by a stranger to such suit who seeks to enjoin levy of execution upon a personal judgment obtained by the corporation in Kansas against a citizen thereof. 121Kan827, 250P338.

1389-32 224AppDiv179, 228NYS131 (before or after default judgment).

1389-34 NJCh 147A202 (ex parte application for leave to appear specially to question jurisdiction).

1389-38 121Kan827, 250P338.

1389-42½-New. A foreign corporation may voluntarily submit to the jurisdiction of the court in any action, 126Misc208, 212NYS245.

1389-42¼-New. by appearance in person, 126Misc208, 212NYS245.

1389-42¼-New. or through an agent. 126Misc208, 212NYS245.

1389-43 NJSup 140A13.

1390-48 But see 41F(2d)542.

1390-64 [a] **In Alabama.**-213Ala556, 105S590.

1390-67 23F(2d)357; 100NJEq362, 134A867; 288Pa362, 136A673.

1390-68½-New. Where a buyer could not enforce obligations at law, because the corporation was nonresident and could not be personally served, he could apply to equity to seize the subject matter of the contract, within the jurisdiction of the court. 167Ga144, 145SE87.

1391-71 113Nebr781, 205NW246, 41ALR992.

1391-80 Miss 130S302.

1392-83 142Miss428, 107S557; Miss 130S302 (foreign railroad corporation having property in state and agent for service of process). See also NJ 146A206(1stcase).

1392-87 MoA 280SW448.

1392-90 10PaDist&Co641. See also 219NYS778mem.

1392-92 160LaS31, 107S590.

1392-93 43F(2d)651 (Alabama courts without jurisdiction on cause of action arising in another state).

1393-98½-New. Statutes subjecting foreign corporations found doing business in the state to suits to same extent as domestic corporations do not domesticate foreign corporations or relieve them of liability to attachment on ground of nonresidence. 142Miss428, 107S557.

1393-98¼-New. Foreign corporations, not filing declarations of domicile and names of agents, their property within the court's jurisdiction may be attached in a suit in rem, although they are engaged in business, and have offices, in the state. 10LaA512, 120S781.

1393-98¼-New. Foreign corporations, not filing written declarations of domicile and names of agents, were absentees, whose property in the state may be attached without service on the secretary of state. 10LaA512, 120S781.

1393-98½-New. One claiming ownership of property levied on as that of a foreign corporation should proceed by a third party claim before the sheriff. 134Misc133, 234NYS196.

1393-5 But see 37F(2d)141.

1394-12½-New. A warehouseman has been held to have a right to attach property of defendant, after satisfying sums due the holder of warehouse receipts, transferred to it as collateral security. 30F(2d)842.

1396-35 213AppDiv629, 210NYS705. [c] **On failure to allege corporation was doing** business in state, defect held cured by allegations in opposing affidavit. 219NYS778.

1396-37 213AppDiv629, 210NYS705.

1396-39 [a] (4) Attorney's affidavit on information and belief based on his conclusions from client's statements is insufficient. 214AppDiv634, 213NYS54.

1396-43 [b] (4) Affidavit merely stating that all transactions with defendant were in New York as of its general office in foreign state is insufficient to show that contract arose in state to support attachment. 214AppDiv634, 213NYS54.

1397-57 [c] **Constructive service,** though insufficient to authorize personal judgment, is valid to extent of lien established against its garnished property. Ariz 288P1024.

1399-70 43Ida589, 254P515; 78Mont40, 252P313; 131Misc373, 226NYS723; 33PortoRico8. But see 176Minn78, 222NW524; TexCivA 29SW(2d)861. [b] (2) Compliance with constitutional and statutory provisions as to designation of principal place of business and person upon whom service of process may be had does not entitle foreign corporation to be treated as resident for purposes of suit. 78Mont40, 252P313.

1399-71 173Ark810, 294SW401; 43Ida589, 254P515; 178Minn261, 226NW934; NJ 148A629 (venue may be laid

where service can be had); 33PortoRico 8; 34PortoRico 693. [a] (1) 169Ark 748, 276SW599. (2) Statute is one of procedure prescribing venue where actions may be brought against foreign corporations by either resident or nonresident plaintiff. 169Ark748, 276SW 599. [b] **General statute does not apply** to actions against insurance companies, there being special provisions as to revenue. 43 Ida589, 254P515.

1399-72 116Tex65, 285SW593.

1399-74 218Ala681, 120S165; 115 Okl 18, 239P668. [a] **General provision for trial of equity cases in county where defendant resides against whom substantial relief is prayed** authorizes equity suit against foreign railroad to enforce partial assignment of wages in county where railroad has agent and place of business although not county where contract of employment was made. 160Ga842, 219SE86.

1400-84 157Miss626, 128S887; 124 Okl 7, 253P66.

1400-85 [a] **Statutes providing that all railroad companies be sued in county where cause of action accrued** (1) is applicable to foreign railroad corporations. 160Ga842, 129SE86. (2) But is properly applicable only to actions at law and is not controlling in case of equitable action, though based on contract, venue of which is fixed by constitutional provision. 160Ga842, 129SE86.

1400-89 [b] **Statutory rule confining suits against railroad companies for tort to county in which cause of action arose** does not apply to torts committed outside state by nonresident railroad company. 34GaA312, 129SE293.

1400-90 See also 34GaA312, 129SE293.

1400-90½-New. Under statute authorizing action in county where corporation transacted business when cause of action arose, execution of attachment bond by foreign corporation constitutes transacting business. Wash 289P1023.

1400-91 147Miss296, 111S874; Tex CivA 21SW(2d)376.

1400-92 288Pa240, 135A755.

1400-93 See also 144Va154, 131SE245.

1400-94 116Tex65, 285SW593. [c] **Insurance contracts.**-Action may be in county where loss occurred or plaintiff resides. 43 Ida589, 254P515.

1400-94½-New. In any county where the cause of action arose or plaintiff resides; 122 Okl 182, 252P1101.

1401-97 See also 157Miss626, 128S 887.

1401-99 11LaA450, 123S474.

1401-1½-New. In Oklahoma an action by a resident or citizen of the state against a foreign corporation which has complied with statutory requirements must be brought within county in which the cause of action arose where substituted service of process on the secretary of state is relied on to give jurisdiction of the person. 124 Okl 7, 253P66.

1401-1½-New. When a corporation is doing business in the state without license or authority and without having an agent in the state, suit may be brought in any county of the state, whether instituted by a resident or citizen or by a nonresident. 124 Okl 7, 253 P66.

1401-1¼-New. In Idaho, an action may be brought in any county, later statute as to venue in actions against domestic corporations being held not to change rule. 43 Ida589, 254P515.

1401-3 225AppDiv145, 231NYS630. See also 29PortoRico 850.

1401-4 205 Iowa1259, 217NW621 (dismissal of action is not proper remedy).

1401-9½-New. Where an action is brought in the county where a company has an agent, the fact of the party's residence in another county is not sufficient for change. 147Miss296, 111S874.

1401-9¾-New. In Porto Rico, a foreign corporation has no residence in Porto Rico, and the fact that it has its principal place of business there does not entitle it to a change of venue by reason of residence. 33PortoRico 8.

1401-9¼-New. Under statutes an employee's action for injuries may be brought in the county where the corporation has its business localized, and it may not have a change of venue to a county where its principal office is. 155 Miss75, 124S74.

1401-9½-New. Foreign corporation having head office in city of one district cannot by reason thereof change venue in action brought against it in another district. 34PortoRico 419.

1402-21½-New. Foreign corporations may interpose defense and counterclaim as defendant. 220AppDiv3, 220NYS 455.

1403-28½-New. Bill to marshal and administer affairs of insolvent foreign corporation operates to the benefit of all creditors coming in before final decree, although no invitation is given to share burdens and benefits. 213Ala556, 105S 590.

1403-32½-New. Plaintiff suing a foreign corporation need not personally request the clerk to issue the citation. TexCivA 2SW(2d)360.

1403-33 28F(2d)877; 93Fla366, 112S 64; 224AppDiv179, 228NYS131 (service is ineffective for any purpose unless statute is complied with); 124 Okl 7, 253P66.

1403-38 18F(2d)677; 149Va200, 141SE 253 (not self-executing).

1404-39 149Va200, 141SE253.

1404-43 123 Okl 101, 252P29. [b] **Statute does not apply** where corporation no longer doing business in state. 216Ala221, 113S4.

1404-45½-New. That the affidavit of a nonresident corporation's attorney, verifying plaintiff's pleading to obtain a warning order used the word "correct," instead of "true," has been held not to vitiate it. 178Ark778, 13SW(2d)312.

1404-46 124 Okl 7, 253P66.

1404-49 124 Okl 7, 253P66.

1404-50 16F(2d)498; 124 Okl 7, 253P 66. [a] **Corporations not authorized to do business in state.**-State may enact laws for service of original notice or summons on such corporations. 205 Iowa862, 219NW28, 60ALR986.

1404-51 174Ark146, 294SW395.

1404-52 16F(2d)498; 123 Okl 101, 252 P29. [b] 127 Okl 295, 260P745.

1405-53 174Ark146, 294SW395; 123 Okl 101, 252P29; 149Va200, 141SE253.

1405-60 127 Okl 295, 260P745.

1405-62½-New. Statutes permitting service upon a designated agent at any place in the state are not unconstitutional as violative of due process. 169 Ark748, 276SW599; 173Ark810, 294SW 401.

1405-62¼-New. or as impairing the obligation of contracts, 169Ark748, 276 SW599.

1405-62¼-New. or denying equal protection of the laws of the state. 169Ark 748, 276SW599; 173Ark810, 294SW401.

1405-62¾-New. Nor is such statute violative of a constitutional provision requiring foreign corporations to be subject to the same regulations, limitations, and liabilities as like corporations of the state. 169Ark748, 276SW599.

1405-63 122 Okl 125, 251P482.

1405-63½-New. ; and that such statute does not deny equal protection of the laws, 122 Okl 125, 251P482.

1405-69 267US333, 45SCt250, 69Led 634 (ownership of stock of subsidiary domestic corporation is not doing of business within state so as to make parent corporation amenable to process); 16F(2d)122; 16F(2d)148; 23F(2d)233 (held not doing business); 129Misc173, 220NYS667; 127 Okl 295, 260P745; 143 Wash641, 255P1030; 101WVa327, 132 SE723, 45ALR1442.

1406-70½-New. Service on officer of foreign corporation not authorized to do business and having no office in state is invalid. 129Misc217, 220NYS683.

1406-80 [a] **Where petition states joint cause of action** against corporation resident of county of suit and foreign corporation resident of another county, court obtains jurisdiction of nonresident defendant by service in county of its residence. 222MoA426, 7SW(2d) 290. [b] **Service on nonresident corporation in county of its residence confers no jurisdiction,** where facts justifying such service are not presumed. 222 MoA426, 7SW(2d)290.

1406-81 209Ky199, 272SW426.

1406-85 48Nev53, 226P1106.

1406-86½-New. A statute providing that the general agent of a foreign corporation may be served with notice of suit wherever found, means within the limits of the state. 207 Iowa1077, 224 NW73.

1406-87 28F(2d)626; 181Ark1140, 29 SW(2d)1077 (prima facie case of service); 160La831, 107S590; 176Minn415, 223NW674; 229AppDiv568, 242NYS 700; 137Misc688, 244NYS372.

1407-92 125 Or528, 266P238, 59ALR 1436.

1407-93½-New. Designation by corporation of agent to receive service does not render service on others invalid who are in fact agents for that purpose under statute. 8F(2d)43.

1407-97 [a] **Service may be made on state official,** under statute, on cause of action arising before consent thereto had been filed in manner required by law. 129Kan53, 281P906.

1407-97½-New. Service on nonresident corporation, in suit to enjoin common-law fieri facias, in its favor, by delivery of process to its attorney for purpose of enforcing fieri facias, is not authorized by the statute providing for service in equitable actions on attorneys of nonresident defendants representing them in court. 160Ga583, 128SE744.

1407-97¼-New. Under statute authorizing state auditor to accept service his authority is not limited to accepting service in cases where cause of action arose within state. 37F(2d)695.

1407-99 18F(2d)677.

1407-1 TexCommnA 10SW(2d)975.

1407-3 172Minn585, 216NW331.

1408-18 33GaA716, 127SE902; 251 IllA 1; 226Ky159, 10SW(2d)633 (service gives court jurisdiction); 160La831, 107 S590; 149Va200, 141SE253.

1408-22 247Mich317, 225NW538.

1408-25 146Miss11, 111S435.

1408-28 25F(2d)225.

1408-29 8F(2d)43; 13F(2d)954 (Florida statute).

1408-30 173Minn79, 216NW543 (ticket agent at station of railroad company).

1408-30½-New. Shannon Code § 4540, relating to service of process upon an agent, applies to both foreign and domestic corporations. 152Tenn544, 279 SW795.

1408-30¼-New. The only representative of a foreign corporation residing in a county is necessarily the "chief agent" residing there, within the meaning of a statute designating the person upon whom service may be made. 152Tenn 544, 279SW795.

1408-31 288Pa240, 135A755; Tex CommnA 10SW(2d)975.

1408-32 240Mich542, 215NW390.

1409-35 183Fed845 (service on insurance company's physician held void); 146Miss11, 111S435; NC 150SE701; 135 Wash368, 237P987. [b] **Provision that service on foreign corporation** "doing business within the state" may be made on any "agent" means that doing of casual business within state does not subject corporation to judgment in personam by service on agent not connected with particular transaction. 135 Wash368, 237P987.

1409-36 NJCirCt 150A681.

1409-38 131Misc590, 228NYS131 (service on implied agent is good only as to cause of action originating in state).

1409-45 NC 150SE701.

1410-52 See also 28F(2d)626.

1410-55 8F(2d)43.

1410-57 Contra 40F(2d)671.

1410-61 16F(2d)122.

1410-67 14F(2d)864; 207 Iowa1077, 224NW73 (general agent in state). [b] (3) Service of third party order is not properly served on managing agent. 135 Misc485, 237NYS695. (4) Managing agent need not be expressly authorized to accept service. 137Misc688, 244NYS 372. [d] **In Louisiana.**-160La831, 107S 590.

1411-72 [a] (1) NC 150SE701; 25 OhNPNS507. (12) "Territorial manager in charge of sales and service" in designated territory in a part of state is held agent for service of process. 16F(2d) 122. (13) Foreign corporation's sales agent in sole charge of office. 129Misc 173, 220NYS667. [b] (18) Insurance solicitor who had ceased to solicit applications in defendant insurance corpora-

tion. 140Mich225, 103NW611, 104NW 670. [c] (6) Sales agent in charge of local office paying all expense of maintaining office. 132Misc735, 230NYS441. [d] (3) Suit will not be dismissed for want of due service where subpœna was served on attorney for defendant. 256 Mass246, 152NE379.

1412-79 137Misc688, 244NYS372.

1412-83½-New. Service of process on a general agent of a corporation not maintaining its office in the state is valid under some statutes. 207 **Iowa** 1077, 224NW73.

1412-83¼-New. The business of a foreign corporation in which an agent may be engaged to be served with process is not confined strictly to powers declared in the charter, but also involves caring for property which may belong to the corporation, or in which it has an interest. 207 **Iowa**1077, 224NW73.

1412-84 173**Minn**79, 216NW543. [a] **Authority to receive money** is not exclusive test of agency. 190**NC**375, 129**SE** 828.

1412-85 125 **Or**63, 266P248. [b] (4) Service of summons upon ticket and freight agent at station of foreign railroad company, engaged in interstate and intra-state commerce within county where action is brought, to recover under Federal Employers' Liability Act may be valid service, conferring jurisdiction. 177**Minn**1, 223NW291. [c] (1) 148**Md**545, 129A839. (3) 198**NC**73, 150 **SE**701.

1413-86 [a] **Estoppel.**–137**Misc**688, 244 **NYS**372.

1413-87 20F(2d)707; 31F(2d)182.

1413-90 115 **Okl** 18, 239P668.

1413-92 41F(2d)542; 254**Mass**569, 151 **NE**63, 46**ALR**563.

1413-95 **NJCirCt** 150A681.

1413-98½-New. Under some statutes service cannot be legally made on an agent personally interested in the suit adversely to the corporation. 66**Utah** 103, 240P165.

1414-2½-New. , or by leaving process at place of transacting usual and ordinary public business of corporation. '8 **F(2d)**43.

1414-3 131**Misc**590, 228NYS131 (statute is interpreted to authorize service on secretary of state only where it can be constitutionally made); 190**NC**314, 129**SE**805; 190**NC**375, 129**SE**828; 124 **Okl** 7, 253P66. [c] **In Oklahoma.**–124 **Okl** 7, 253P66.

1414-4 [a] **Where railroad is not required by statute to appoint agent** in county in which it is not transacting business, provision for alternative service is not applicable. 115 **Okl** 18, 239**P** 668.

1414-6 124 **Okl** 7, 253P66; 66**Utah**103, 240P165. [d] (3) Service on secretary of state where agent has removed from state cannot be sustained unless liability incurred within state. 131**Misc** 590, 228NYS131 (service held invalid in transitory action arising outside state). [e] **In North Carolina.**–154**SE**620.

1415-14 37F(2d)141; 206 **Iowa**804, 221 NW499 (after discharge of mere employee); 136**Misc**275, 240NYS824 (corporation ceased all business).

1415-15 **NJSup** 148A166(1st case).

1415-17 [b] But see 149**Va**200, 141**SE** 253. [c] **In Ohio.**–38F(2d)177.

1416-26 7F(2d)783.

1416-29 39F(2d)309.

1417-38¼-New. A warning order is not required, if the corporation has an agent in the state on whom process may be served. 209**Ky**199, 272NW426.

1417-38½-New. Some statutes permitting service on the secretary of state in the absence of designation by the corporation of an agent upon whom service may be made do not require the secretary of state to give notice to the corporation. 122 **Okl** 125, 251P482.

1417-38¼-New. Service on officer of nonresident corporation without state is ineffectual to confer jurisdiction. **Iowa** 231NW671.

1417-47 223**AppDiv**857, 228NYS423.

1417-49 **Fla** 126S282.

1417-51 [c] **Where action against foreign corporation not doing business in state can only be initiated** (1) by warrant of attachment, service by publication cannot be ordered without proof of issuance and levy of such warrant. 131 **Misc**922, 229NYS277 (plaintiff is not entitled to supply omission as to levy in motion papers). (2) Recitals in motion papers for order of publication held insufficient as to issuance and levy of attachment. 131**Misc**922, 229NYS277. (3) Where order of publication is void, order and warrant of attachment will be vacated after lapse of thirty days under Practice Act. 131**Misc**922, 229NYS277.

1418-54 131**Misc**126, 226NYS385; 226 **AppDiv**8, 234NYS214 (affidavit sufficient); 135 **Okl** 84, 274P29; 135 **Okl** 85, 274P36. [b] (7) Affidavit not disclosing cause of action arising within state or existence of property in state or that corporation was doing business within state. 223**AppDiv**857, 228NYS423.

1418-63 7**PaDist&Co** 344.

1418-72½-New. Acknowledgment of service reciting service on behalf of foreign insurance company signed by insurance commissioner held sufficient. **GaA** 155SE313.

1419-74 226**Ky**159, 10SW(2d)633. [a] 25F(2d)257; **TexCr** 18SW(2d)321. [b] **Returns held insufficient under particular statutes.**–8F(2d)43.

1419-75 **TexCivA** 31SW(2d)1098(1st case). [a] **In case of alternative service** on agent, return must show that service could not be made on officers or persons in superior class named in statute, and, if not made on one in superior class, return must show that person served came within inferior class. 66 **Utah**103, 240P165.

1419-85 226**Ky**159, 10SW(2d)633.

1419-85½-New. Sufficiency of service is to be determined by amended, rather than original, affidavits. 100**Vt**472, 139 A209.

1419-85¼-New. The affidavit of a person serving a nonresident corporation process that he knew the person served to be the corporation's treasurer because he had done business with him is sufficient. 100**Vt**472, 139A209.

1419-85¼-New. Sufficiency of an affidavit of service as to the process server's knowledge of the identity of the person served is for the court. 100**Vt** 472, 139A209.

1419-87 40F(2d)671. See also 226**Ky** 159, 10SW(2d)633.

1419-93½-New. Leave to amend rests in the court's discretion. 100**Vt**472, 139 A209.

1419-97½-New. A lesser degree of activity is required for a foreign corporation to constitute doing business to justify service of process than is required for purposes of taxation. 129 **Misc**687, 222NYS404.

1420-98 218**Ala**681, 120S165.

1420-3 29F(2d)623.

1420-4 29F(2d)623.

1420-5 [b] **Where foreign corporation was served in county of its residence with summons issued in action commenced in another county,** it cannot be presumed that facts existed authorizing such service. 222**MoA**426, 7SW(2d)290.

1420-11 28F(2d)604.

1420-12 [a] **Motion to vacate held properly granted.**–126**Misc**236, 213**NYS** 193.

1420-16 [a] **Unnecessary allegations.**–142**Miss**428, 107S557.

1420-18 33**Ariz**220, 263P626 (failure to allege corporate existence held not admission of incapacity to sue).

1420-21 23F(2d)349.

1421-23 [a] **Instrument introduced in evidence showing designation of agent for service of process** must be considered as though properly pleaded, where not objected to as not within issues. **CalA** 292P699.

1421-25 [b] **Doing business in county.**–160**Ga**842, 129**SE**86, 89. [c] **Doing business in parish or county.**–11**LaA**450, 123S474.

1421-30½-New. Plaintiff may not avail himself of ground that defendant corporation had not complied with statute and was therefore without capacity to defend. 211**Ky**638, 277SW500.

1421-30¼-New. Where the secretary's certificate authorizing a foreign corporation to do business in a state is not made part of the complaint, the corporation cannot set up the inapplicability of the registration statute to foreign corporations in interstate commerce. 84 **IndA**51, 150**NE**106.

1421-32 [a] **Allegation held insufficient** to show that plaintiff corporation ceased to exist. 240NY368, 148NE552.

1421-36 136**Misc**288, 240NYS731.

1421-37 136**Misc**288, 240NYS731.

1421-39½-New. Answer on information and belief that plaintiff is not a corporation held sufficient. 240NY368, 148 NE552.

1421-39¼-New. Allegation that plaintiff corporation ceased to exist is insufficient, when information supporting the allegation does not show nonexistence. 240NY368, 148NE552.

1421-39¼-New. Answer, alleging on information and belief that plaintiff is not a corporation, held sufficient. 240 NY368, 148NE552.

1421-39½-New. Answering the cross complaint of a nonresident corporation waives the issue of incapacity to sue. 176**Ark**31, 28SW(2d)70.

1421-39¼-New. Foreign corporation's plea in abatement is demurrable in not alleging that it was not doing business in the county. 219**Ala**581, 122S693.

1421-39½-New. Party not pleading failure of plaintiff corporation to comply with statute respecting foreign corporations waived right to interpose such defense. **IndA** 172NE319.

1421-39¼-New. Corporation's right to do business in state without permit can only be raised by plea in trial court. **TexCivA** 30SW(2d)506.

1421-44 **TexCivA** 294SW248.

1422-52 129**Misc**687, 222NYS404. See also 128**Misc**460, 219NYS892.

1422-55½-New. Where a contract of a foreign corporation would be invalid if made within the state because of failure of the corporation to comply with statutory requirements, it will be presumed that it was made outside of the state where it was lawful to make it. 233**Mich**597, 208NW148.

1422-58 [a] **Admissibility of evidence** to show that branch was unprofitable as bearing on good faith in terminating agency. 148**Md**545, 129A839 (advertisement showing sailing of companies' ships). [b] **Exclusion of evidence** on question whether shipper was bound by service of summons, exclusion of circumstances under which shipment was made, held not error. 148**Md**545, 129A 839.

1422-63 [a] (4) 148**Md**545, 129A839. (10) Sustain finding that foreign corporation was doing business in state. 132**SC**352, 128**SE**166. (11) Sustain finding that person on whom service was made was agent of foreign corporation. 132**SC**352, 128**SE**166. (12) Sustain finding that foreign corporation was Louisiana corporation and not Missouri corporation. **TexCommnA** 276**SW** 664. (13) That corporation was doing business in state. 172**Minn**585, 216NW 331. (14) Show that plaintiff corporation was doing business in state without license. **Del** 143A255; **MoA** 5SW(2d) 1105. (15) Sustain finding that foreign corporation complied with statute regulating transaction of business in state. 58**ND**853, 228NW204. (16) Sustain finding that certain acts were part of interstate transaction. **Mich** 233NW 437. (17) Other matters. 155**SC**436, 152**SE**658.

1422-63½-New. Evidence has been held insufficient to show that a transaction constituted intra-state, rather than interstate, commerce. **TexCivA** 273**SW** 1113.

1422-66 192**NC**115, 133**SE**424.

1422-68 40F(2d)357; 238**Mich**508, 213 NW867.

1423-78 224**AppDiv**179, 228NYS131 (default judgment properly entered though special appearance was filed by defendant's attorney before entry).

1423-79 [c] **Failure of secretary of state to notify foreign corporation of service of process on him** as authorized by statute does not constitute such unavoidable casualty or misfortune as to warrant vacation of default judgment against such corporation under Comp.

St. (1921) § 810 subd 7. 122 Okl 125, 251P482.

1423-85½-New. Default judgment against a foreign corporation served by publication is valid only as to the property attached and held by the trustee. 261Mass422, 158NE844.

1423-87 137Misc513, 241NYS242.

1423-88 261Mass422, 158NE844 (judgment by default).

1424-10½-New. Filing certificate of surrender of authority to do business does not preclude right to institute action for alleged fraudulent practices. 137Misc293, 241NYS693.

1424-10½-New. Foreign corporation engaging in alleged fraudulent practices became liable to people in collective capacity. 137Misc293, 241NYS693.

1425-53 214Ky760, 285SW237, 238 [quotCJ].

CORROBORATE

1428-7 157Md476, 146A266, 65ALR 165; 191NC210, 131SE577.

1428-11 191NC210, 131SE577.

1428-22 [a] (2) Corroborating evidence is supplementary to that already given and tending to strengthen or confirm it. 191NC210, 212, 131SE577.

1428-22½-New. Corroborative evidence is that which, when added to original evidence, makes it stronger and more credible. 157Md476, 146A266, 65ALR 165.

CORROBORATION

1429-25 91PaSuper571, 576 [citCJ].

COST

1433-12 211Ky791, 278SW124.

1433-14 214Ala176, 106SS62.

COST PRICE

1434-41 211Ky791, 278SW124.

COSTS

15 C. J.—19-1 100CalA416, 280P181(2d case); Mass 172NE340; 132Misc723, 230NYS554; 192NC538, 135SE458; Utah 263P930. [b] (8) 170Ark298, 280 SW389.

19-1½-New. Taxable costs are, in contemplation of law, full indemnity for the expenses of a party who is successful in a suit whether at law or in equity. 252Mass258, 147NE878.

19-2 20AlaA633, 104S679; Mass 172 NE340.

20-4 Utah 290P358(2dcase).

20-6 Utah 290P358(2dcase).

20-8 132 Okl 45, 269P257, 258 [citCJ].

20-11 [a] 49RI 452, 144A148.

20-15 120 Or244, 251P895.

21-21 BC [1927] 3DomLR720.

21-24 20AlaA633, 104S679; 233 IllA 483; 76Mont288, 246P536.

21-26 198Cal 469, 245P1089; 71CalA 352, 235P66; 76CalA52, 243P676; 44 Ida363, 257P38; 233 IllA483; 158La 1083, 105S72; 76Mont288, 246P536; 83 Mont130, 269P158; 126Misc555, 214 NYS39; 132Misc723, 230NYS554; 245 NYS234; 192NC538, 135SE458; 7Pa Dist&Co 354; 29PortoRico 951; 47RI 487, 134A22; TexCivA 293SW260, 263 [citCJ]; 68Utah30, 249P121, 50ALR 1303; Utah 263P930; 198Wis496, 224 NW705. But see 38F(2d)605.

22-27 198Cal 469, 245P1089; 76CalA 52, 243P676.

22-27½-New. Statutory costs are a matter of right, 126Misc555, 214NYS39.

22-27½-New. but authority for an item claimed must be found in the statute. 126Misc555, 214NYS39.

23-29 29F(2d)288(1stcase); NJCh 148 A570; 228AppDiv14, 238NYS477. [d] In Porto Rico.-32PortoRico 75.

23-34 136Misc826, 242NYS354.

24-42 129 Okl 37, 263P443.

24-48 262Mass45, 159NE543.

24-56 [b] In Wisconsin.-198Wis496, 224NW705.

25-57 76Mont288, 246P536; 13PaDist &Co 254.

25-57½-New. Act providing penalty for defendant if action not brought in precinct where one defendant resides held constitutional. Wash 290P987.

25-59 35F(2d)211; 37F(2d)216; 43 F(2d)462; 205Cal 6, 269P525; 70CalA 108, 232P986; 71CalA389, 235P653; 93 CalA147, 269P553; 15DelCh351, 138A 352; 41GaA586, 153SE796; 215Ky344, 285SW204; 162La571, 110S759; 76 Mont288, 246P536; 214AppDiv435, 212 NYS462; 127Misc78, 216NYS69; 192 NC538, 135SE458; 194NC80, 138SE428; 33PortoRico 470; 33PortoRico 672; 34 PortoRico 59; TexCivA 282SW638; Tex CivA 283SW199; TexCivA 291SW293; TexCivA 293SW223; 135Wash424, 237P 1008. But see 45SC148, 143SE17. [e] Where plaintiff offered no evidence in justice's court, defendant was entitled to costs under statute of both justice's and county courts. TexCivA 18SW(2d) 697. [f] Successful plaintiff liable for costs as to defendant not served, but included in judgment. 13LaA573, 128 S732.

26-63½-New. The rule is not affected by the fact that the case was tried before a referee by consent of the parties. 194NC80, 138SE428.

26-68½-New. Where both parties fail to make out case no costs are assessed. Mich 233NW203.

26-69 148Miss153, 114S34. [c] Circumstances not authorizing variance from usual rule.-11LaA298, 123S472.

26-69½-New. Statutes in some jurisdictions give court discretion in taxing costs in actions founded on contract, 220MoA284, 286SW140.

26-69¼-New. but such statutes do not apply to actions not founded on contract. 220MoA284, 286SW140.

26-70 See also 3LaA499; Ont [1930] 4 DomLR273.

27-75 Ont [1930] 4DomLR273.

27-81 But see LaA 12SS546.

27-85 60OntL101, [1927] 1DomLR 1149. [b] In New Jersey.-Ch 145A641.

27-86 74CalA286, 240P59; 79CalA533, 250P205; 44 Ida560, 260P150, 152 [cit CJ]; 164La971, 115S51; 168La356, 122 S64; TexCivA 292SW296. See also 11 LaA454, 123S442.

28-87 74CalA286, 240P529; 44 Ida560, 260P150, 152 [citCJ]. But see 123Kan 344, 255P43.

28-88 22AlaA82, 112S537; 42 Ida619, 248P13. [b] (2) Trial court in partition suit may apportion negligible costs of accounting phase of proceeding. 219 MoA694, 284SW145. [e] In Texas.-CommnA 278SW425; TexCivA 283SW 199.

28-90 34PortoRico 849.

28-91 BC [1929] 4DomLR648; BC [1930] 2DomLR308. [c] (6) All of the costs may be taxed against defendant, if plaintiff is successful as to part of his suit, and costs would have been same had issue on which he prevailed been only one tried. 217MoA371, 266 SW748. [g] In British Columbia.-[1928] 2DomLR986(1stcase); [1930] 2 DomLR241.

29-92 128Misc395, 219NYS116.

29-96 128Misc395, 219NYS116.

29-99 128Misc395, 219NYS116.

30-5 128Misc395, 219NYS116.

30-7 128Misc395, 219NYS116.

31-16 30NM566, 240P469; 130Misc436, 223NYS838. [a] Defendant unnecessarily counterclaiming for reformation of deed cannot recover costs, though plaintiff failed to recover. 191Wis570, 211 NW768.

31-19 Sask [1925] 2DomLR789.

31-20 Sask [1925] 2DomLR789.

31-21 Sask [1925] 2DomLR789.

31-25 130Misc610, 224NYS361 (in such case, where counterclaim demands more than complaint, plaintiff is entitled to costs on amount demanded in counterclaim).

31-26 85Mont341, 278P1011; 134Misc 603, 235NYS674.

31-27 See also 137Misc45, 242NYS702. [b] In New York.-130Misc610, 224NYS 361.

32-28 Sask [1930] 2DomLR48.

32-34 See also Ont [1928] 4DomLR815. [a] In Saskatchewan.-[1930] 2DomLR 48.

32-45 162Ga474, 134SE608.

32-46 [a] In Arkansas statute allowing costs to plaintiff recovering judgment does not apply to equity cases. 170Ark 298, 280SW389.

32-47 281US1, 50SCt194, 74Led659; 41F(2d)637; 170Ark298, 280SW389; 171Ark385, 284SW764; 172Ark193, 287 SW1017; 176Ark1023, 5SW(2d)330; 179Ark391, 16SW(2d)17; 180Ark441, 21 SW(2d)961(1stcase); Cal 291P577; 161 Ga711, 132SE547 (upon whom costs shall fall); 162Ga474, 134SE608; 170 Ga615, 153SE763; 325 Ill 114, 156NE 258; 329 Ill 253, 160NE552; 252Mass 258, 147NE878; 258Mass7, 154NE252; 131Misc233, 226NYS371; 214AppDiv 429, 212NYS336; 192NC538, 135SE 458; 57ND224, 221NW1; 136 Okl 1, 275 P634; 286Pa413, 133A627; 135Wash 424, 237P1008; 140Wash538, 250P57; Wis 230NW607. [a] (5) Where proceeding for discharge from mortgage was on appeal from order denying discharge on merits dismissed as improper remedy, costs would not be allowed. 214 AppDiv429, 212NYS336. [c] Costs in litigation in nature of judgment creditor's action rest in discretion of court. 132Misc723, 230NYS554.

34-48 85Colo 247, 274P931; 162Ga474, 134SE608; 244 IllA370; 254 IllA409; 286Pa413, 133A627. But see 218Ala440, 118S638. [a] 121 Or582, 256P646.

34-49 121 Or582, 256P646.

34-50 174Ark114, 295SW35; 162Ga 474, 134SE608; 99NJEq558, 134A119; 140Wash538, 250P57.

34-51 20F(2d)949; 121 Or582, 256P 646.

35-52 329 Ill 253, 160NE552.

35-53 20F(2d)949.

35-54 281US1, 50SCt194, 74Led659.

35-56 20F(2d)949; 331 Ill 308, 163NE 1; 165La1091, 116S568; 167La262, 119 S42 (though amount reduced on appeal); 239Mich1, 214NW113; 40Wyo 89, 275P101; Sask [1930] 1DomLR271. [h] When complainant prevailed in action to rescind contract for support by son and cancellation of deed, though son established counterclaim for improvements, it was error to allow latter costs. 214Ky198, 282SW1075. [i] Where plaintiff loses contested issues, costs are properly awarded to defendant, though plaintiff prevails on questions as to which defendant admits liability. 286Pa413, 133A627.

35-57 20F(2d)949; 200 Iowa121, 204 NW260 (where plaintiff was defeated on main issue, taxation of costs to defendant who conceded correctness of item on which judgment was rendered and which was not demanded in petition held improper). [b] (2) Previous confusion of funds and recklessness of testimony adduced in their behalf will warrant denial of costs to defendant executors though complainant fails to prove misuse charged. NJCh 130A11. [c] Successful defendant cannot recover costs for which he is not personally liable. BC [1929] 1DomLR273.

35-58 162La941, 111S336; 82NH193, 132A12.

36-59 15DelCh9, 130A39.

36-66 171Ark385, 284SW764. See also Cal 291P577.

36-67 171Ark385, 284SW764.

37-70 286Pa413, 133A627.

37-71 235Mich191, 209NW102; 120 Or 313, 252P80.

37-72 100NJEq479, 135A545.

38-80 228AppDiv820, 240NYS549.

38-83 219Ala652, 123S18; 178Ark643, 12SW(2d)6; 180Ark441, 21SW(2d)961 (1stcase); 162Ga474, 134SE608; Ga 154 SE886(1stcase); 325 Ill 114, 156NE258; 130Kan691, 288P745 (action not involving recovery of money or property); 157Miss788, 128S560; 289Pa164, 137A 184 55ALR908. [a] (3) 129Kan269, 282P573. (4) In action to enjoin enforcement of rate statute as confiscatory where both plaintiff public utility and public service board benefited by settlement of question. 5F(2d)77. (5) Plaintiff allowed only part of expense of record on appeal where record was lengthened because of its fault. 20 F(2d)949.

38-84 174Ark114, 295SW35; 91CalA 75, 266P811 (costs erroneously apportioned); 162Ga474, 134SE608.

39-86½-New. Where in injunction such plaintiff, defeated in main contention, may be made to pay part of costs. 289 Pa164, 137A184, 55ALR908.

39-87 134Wash682, 236P279.

39-88 134Wash682, 236P279.

39-89 134Wash682, 236P279; 58ND 657, 227NW183.
39-90 7F(2d)689; 219Ala652, 123S18; 236 IllA187; 165La1091, 116S568.
39-91½-New. In suit to establish right to tracts of land as against defendant's claim to over half the number of tracts judgment for defendant for costs against plaintiff recovering less than claimant is not error. Mont 286P140.
40-96½-New. Where plaintiff succeeds on issues as to which defendant admits liability but fails on controverted issues, costs are properly awarded to defendant. 286Pa413, 133A627.
40-99 But see 179Minn587, 229NW579 (2dcase).
40-4½-New. All costs may be taxed against unsuccessful complainant in action to cancel deed where cross-complainants were compelled to offer additional testimony because of answer to cross-bill. Ill 172NE173.
40-5 118 Or487, 247P756.
40-7 220Ala657, 127S227.
41-9½-New. Where litigation was the direct result of neglect of all parties, no costs will be allowed to either party as against the other. 96NJEq101, 130A 373.
41-11 See also 217Ala215, 115S248.
41-12 251NY574, 168NE432(3dcase); 214AppDiv435, 212NYS462; 127Misc 85, 215NYS263. [f] **Where coplaintiffs are awarded individual amounts,** totaling more than the minimum set by Civ. Pract. Act § 1474 applicable to Erie County, New York, they are entitled to one bill of trial costs, under § 209 making them an entity for purpose of trial of action. 127Misc669, 217NYS357.
41-12½-New. and costs cannot be taxed against defendant is such case; 214AppDiv435, 212NYS462.
42-27 [a] (4) Other instances. Man [1930] 2DomLR989.
43-30 Ont [1925] 3DomLR426. [a] (1) Ont [1925] 3DomLR426 (subject matter must be not exceeding five hundred dollars), (4) Where it is not shown that subject matter does not exceed in value or amount five hundred dollars, action is properly brought in supreme court rather than county court, and plaintiff may recover costs on supreme court scale. Ont [1925] 3DomLR 426
43-34 320Mo 514, 8SW(2d)597.
44-45 50Nev157, 254P1074. [b] See also 36Wyo 166, 253P862. [f] In Nevada.-49Nev80, 237P377. [g] In Montana.-78Mont221, 254P412.
45-56½-New. Where restriction of statute refers solely to costs of party seeking recovery costs may be allowed successful defendant though amount involved in suit for damages is below that prescribed. Ida 287P205.
45-59 5PaDist&Co 677.
47-81½-New. [§ 54a] g. **Where Both Action and Counterclaim Dismissed.** Where both plaintiff's action and defendant's counterclaim for a larger sum are dismissed by stipulation, plaintiff is the prevailing party entitled to costs. 133Misc753, 233NYS142.
48-99 BC [1929] 4DomLR542; NS [1929] 3DomLR192.
50-35 [a] **Where questions involved in action for declaratory relief** were such as justified both parties in asking for final determination of their rights, no taxable costs allowed. 199Wis214, 225 NW838.
50-37½-New. where two cases were consolidated for trial, statutory attorney's fee could be taxed in each case. 143Wash547, 255P939, 52ALR851.
50-37½-New. **Where equitable defense raised,** verdict under one hundred dollars includes costs. 5PaDist&Co 677.
52-47 [d] (8) Action of trespass to plaintiff's oil rights held not action to which statute applicable. 36Wyo 166, 255P3, 52ALR91. [e] (3) Judgment creditor's action to set aside conveyance. 138Misc66, 245NYS285.
54-61 But see 207Cal 643, 279P772.
55-71 Utah 290P358(2dcase) (provisional remedies). Contra 35PortoRico 509 (under statute).
55-74 [a] (18) Certiorari against municipalities under statutes. 35Porto Rico 509.
55-75 [a] (10) To lay out private road. 131Misc734, 228NYS649.
55-76 236Mich51, 209NW811 (suit by public officer brought in good faith with apparent right of action); 52ND 351, 202NW807.
56-84 42F(2d)901.
56-85½-New. **On granting motion finally determining action,** costs are taxable, irrespective of statute relating to motion costs, 214AppDiv292, 212NYS 381.
56-85¼-New. and are properly included in the judgment. 214AppDiv292, 212 NYS381.
56-85¼-New. A party in an application to correct his own mistake is not entitled to costs. 102NJEq66, 139A716.
56-86 135Misc663, 239NYS353 (judgment rendered on application for summary judgment).
56-87 100NJEq18, 135A267.
57-97 NJSup 139A897. But see 127 Misc53, 216NYS68.
57-6 229AppDiv550, 242NYS149.
58-18 254 IllA409.
59-34½-New. No costs will be allowed to defendants successfully moving for change of venue, who failed to assert defense in action to foreclose mechanic's lien on public improvements. 129 Misc478, 221NYS382.
59-37½-New. **In New York** municipal court's motion to dismiss for failure to prosecute is not "trial" within a statute entitling defendant, recovering judgment after trial, to costs. 126Misc555, 214NYS39 (Municipal Court Code § 167 subd 77).
59-37¼-New. In such case, on granting of motion, he is entitled to ten dollars costs under Municipal Court Code § 167 subd 10. 126Misc555, 214 NYS39.
60-60 Ida 290P402, 403 [citCJ].
60-65½-New. Appellant failing to procure extension of time to serve case on appeal before expiration thereof can be relieved from default only by paying costs. 221AppDiv817, 224NYS4.
60-67 109AppDiv514, 96NYS313.
63-98 2NYCityCt301.
67-61 [b] **In Maryland,** defendant is exempt from payment to plaintiff where court authorizes him to proceed with defense after overruling demurrer. 150 Md265, 132A633.
68-80 [a] See also 199Wis42, 225NW 141.
68-94 157Md175, 145A497; 34Porto Rico 610; TexCivA 271SW228.
70-17 See also 34PortoRico 610.
71-35 See also 167Ga531, 146SE126.
71-35½-New. Costs are not allowable on discontinuance, where lack of jurisdiction appears on the face of the summons. 133Misc626, 233NYS136.
71-36 [a] **Withdrawal of counterclaim against another defendant** for sum exceeding jurisdiction is equivalent to discontinuance. 133Misc626, 233NYS 136.
71-38 78Mont221, 254P412, 413 [cit CJ].
71-39 78Mont221, 254P412, 413 [cit CJ].
71-41 129Misc805, 223NYS876.
71-45 251Mich476, 232NW213(1st case).
72-58 267US326, 45SCt242, 69Led629.
72-59 255Mass132, 150NE870; NS [1929] 1DomLR581. [e] **Dismissal for lack of jurisdiction** is "trial" carrying statutory costs as of course. 126Misc 569, 214NYS81. [f] **Court has authority to determine whether it has jurisdiction** on merits. 255Mass132, 150NE870.
75-78½-New. [§ 131a] 3. **By Resignation of Officer.** Where equity suit abates by resignation of public officer who is defendant costs cannot be imposed on either party. 13PortoRicoFed378.
76-3 129Misc699, 223NYS515; Tex CommnA 284SW542.
77-11 215Ala143, 110S372; 5LaA35; 135SC1, 133SE451; TexCommnA 288SW 405.
77-12 11LaA53, 123S185; 53SD77, 220 NW146; TexCommnA 272SW442 (in all courts).
78-17 123 Or651, 262P263. See also 248Mich601, 227NW783.
78-18 220Ky562, 295SW868.
78-19 123 Or651, 262P263.
78-21 234Ky508, 28SW(2d)780.
79-22 223AppDiv634, 229NYS157.
80-35 168La356, 122S64 (tender in presence of two witnesses); 220MoA284, 286SW140.
81-44 TexCivA 282SW926.
81-45 TexCivA 282SW926.
81-46 Wash 292P429.
81-49 13LaA359, 126S718.
81-50 220Ala657, 127S227; 134SC207, 132SE620; TexCivA 284SW717.
81-51 MoA 273SW133; MoA 16SW(2d) 663; Mont 286P415; TexCivA 284SW 717.
82-55 11LaA197, 123S177.
82-57 214Ky560, 283SW424.
87-26 158La423, 104S194.
89-54 [a] **Long delayed disclaimer** may not absolve defendant from liability for costs. 205 Iowa534, 218NW274 (disclaimer after opposing appointment of receiver).
91-83 Can [1930] 4DomLR989.
92-87½-New. In British Columbia where all plaintiffs are successful but only one recovers amount entitling him to costs, he is entitled to full costs. BC [1929] 4DomLR484.
92-93 148Wash214, 268P876.
92-94 [c] **Rule applied where nominal codefendant,** without interest in suit, failed to answer, he being granted whatever costs he might have incurred. Tex CivA 278SW225.
92-97½-New. In Manitoba where defendant reasonably brings in third person as codefendant and action is dismissed with costs to both, added defendant is not entitled to costs against codefendant. Man [1930] 2DomLR667.
93-4 Can [1930] 4DomLR989.
94-28½-New. Whether a landlord is made defendant in ejectment and joined in the suit by plaintiff or on motion of defendant, it is proper to award judgment for the whole costs including those accrued prior to his being made a party. 220Ala35, 123S229.
94-30 217Ala215, 115S248 (entitled to costs but not to aliquot parts under recent amendment to code).
95-42 135Misc664, 239NYS332; 137 Misc322, 244NYS452.
95-45 [c] **Defendants held entitled to costs.**-137Misc322, 244NYS452.
96-54½-New. Costs of an application to remove an administrator and appoint another cannot be awarded as between solicitor and client. BC [1927] 2Dom LR605.
96-61½-New. **Nominal party.** Costs for which the nominal party is technically responsible must be charged to the actual parties. 168La81, 121S581.
96-61¼-New. Plaintiff is not liable for costs to defendant improperly interpleaded by the original defendant without notice to him. 227AppDiv275, 237 NYS599.
97-62 205Cal 111, 270P201 (attorney's fees).
97-63 Wis 230NW607. [c] **Purchaser at foreclosure sale** voluntarily becomes party to action as regards award of costs. Ida 290P402.
97-64 [a] (1) TexCivA 290SW871.
99-91½-New. Under statutes plaintiff suing game wardens for false imprisonment not entitled to costs. Wis 232 W593.
99-94 But see Alta [1930] 4DomLR 291.
100-12½-New. [§ 195a] I½. **Persons in Official Capacity.** Board of public utility commissioners are not chargeable with costs in a successful suit to enjoin them from putting proposed water rates in force. 30F(2d)859 [certiorari den 279 US858, 49SCt353, 73Led999(2dcase)].
101-14 163Ga655, 137SE28.
101-18½-New. Refusal to allow costs against intervener is held not abuse of discretion. 193Wis97, 213NW646.
101-20 [b] **Auctioneer claiming right to retain greater part of deposit** is not mere stakeholder, and is liable for costs in action by vendor to recover deposit. 88CalA430, 263PS46.
101-23 244 IllA89, 102 [quotCJ].
101-24 19F(2d)693.
102-26½-New. Where a wife's suit for injuries, and husband's suit for loss of services and expenses, against same defendant, were consolidated and wife was successful but husband unsuccessful,

wife was entitled to costs against defendant and defendant to costs against husband, as of course and not discretion. 127Misc78, 216NYS69.

102-28 Sask [1930] 4DomLR722. [c] **In Ontario,** where tort action is properly brought against two defendants and is dismissed as against one of them and judgment is given for plaintiff against other, losing defendant may be ordered to pay successful defendant's costs. [1928] 2DomLR223. **Plaintiff cannot recover against unsuccessful defendant** costs he must pay successful defendant. **BC** [1930] 2DomLR987.

102-28½-New. In a suit against several defendants where plaintiff is successful only as to one defendant he is not taxable with whole cost but only with an equitable proportion. 8F(2d)241.

102-31½-New. Plaintiff is held not entitled to order that unsuccessful defendant pay costs of successful defendant who should not have been sued. 59 OntL549 [1926] 4DomLR331.

102-31½-New. In a suit to remove a building erected in a street by the lessee of an abutting owner, the abutting owner was the real party in interest and subject to costs. 152Wash315, 278P 161.

102-32 158La874, 104S747 (widow and heirs of defendant decreed in solido though damages were awarded separately in stated proportion); 37BC412, [1926] 4DomLR219, [1926] 3WestWkly 208.

103-40 130Kan360, 286P269.

103-44½-New. Defendant who conducts a losing cause de bene esse is liable to costs thereby caused as if it was defended generally. 287Pa61, 135A210.

103-44½-New. Defendant, bringing into action another defendant, is subject to taxation for costs in favor of defendant brought into the action and subjected to the peril of judgment against it. 134Misc767, 236NYS273.

103-45 125Kan818, 266P85.

104-47 163Ga655, 137SE28, 31 [quot CJ]; 125Kan818, 266P85.

104-49 163Ga655, 137SE28, 31 [quot CJ]. [a] **Extra allowance,** awarded in partition action to successful defendant, is held chargeable against unsuccessful parties. 129Misc805, 223NYS76.

104-50 163Ga655, 137SE28, 31 [quot CJ].

104-51 163Ga655, 137SE28, 31 [quot CJ].

104-52 163Ga655, 137SE28, 31 [quot CJ].

105-59 163Ga655, 137SE28.

105-61 CalA 263P252.

105-63 CalA 263P252.

105-64 6F(2d)305; 27Hawaii745; Mass 172NE340 (after hearing); BC [1927] 2 DomLR471. See also LaA 129S197.

106-66 254 IllA409.

106-69½-New. Where fraud on court attempted court will not aid in collecting costs. 97PaSuper317.

106-76½-New. Costs are not waived by moving for new trial on account of inadequacy of verdict without entering judgment. 76Mont288, 246P536.

107-80 200 Iowa121, 204NW260. But see 29Ariz198, 240P341.

107-93½-New. Stipulation by plaintiff to pay referee's and stenographer's fees is not relieved by witness' attitude prolonging examination before trial. 126 Misc855, 214NYS414.

107-93½-New. An agreement of a third party to advance costs is held valid. 76 CalA52, 243P676.

107-95 [f] **On final judgment by agreement** requiring plaintiff to pay costs incurred by her execution for costs should not issue against plaintiff. 219Ky656, 294SW181.

108-96½-New. Where the court ordered a demonstration to be made at the trial on condition that plaintiff pay the expense thereof as he offered to do and no demonstration is made on a record trial, plaintiff cannot be allowed such item of expense at either trial. 75CalA 345, 242P885.

108-2 Mass 172NE340 (counsel fees). [c] **In equity.**-252Mass258, 147NE878.

108-6½-New. All parties are required to avoid needless costs in litigation. 214 Ala243, 107S210.

108-6¼-New. Fee of curator ad hoc, appointed to represent absent defendant in attachment proceedings, is held taxable as costs against plaintiff. 159La 933, 106S385.

108-7 136Misc826, 242NYS354; 37BC 412, [1926] 4DomLR219, [1926] 3West Wkly208. [e] (2) Set-off of interlocutory costs must be made after applying limitation of costs of successful party. 36Man129, [1926] 4DomLR1131, [1926] 3WestWkly580. Under statute total costs to and including trial, recoverable against unsuccessful party, limited to three hundred dollars and disbursements, includes costs of interlocutory motions and appeals therefrom. Man [1930] 2DomLR649. [f] **In British Columbia.**-BC [1930] 2DomLR699. **In New York.**-125Misc279, 211NYS441.

110-19 8F(2d)777.

110-20½-New. Costs in issuing and service of process on successful defendants may not be taxed against unsuccessful defendants. 140Miss643, 106S 433.

111-42 38F(2d)605 (guardian ad litem for infants). [a] **Guardian ad litem's services** includes services in looking after wards' interests to same extent that individual sui juris ordinarily looks after his own affairs. 38F(2d)605. [b] **One acting as guardian ad litem and as attorney for minor** is entitled to separate allowances. 38F(2d)605.

111-45½-New. Notarial fees are allowed in proper case. 8F(2d)777.

111-46 127Misc53, 216NYS68.

112-56 [h] **Taxing clerk's commission** on money paid into court as part of costs held proper. 269US125, 46SCt52, 70Led195.

112-62 [c] **Where debtor paid judgment before sale of attached property,** commissions allowable on collection of judgment on execution are taxable as costs. 34NM413, 282P382.

113-75 TexCivA 293SW234.

114-87 163La1057, 113S454.

114-88 3LF(2d)65; 38F(2d)605; 197 Cal 103, 239P847; 71CalA389, 235P653; 169Ga13, 149SE565; 206 Iowa1217, 220 NW333; Mass 172NE340; Minn 232 NW515; MoA 31SW(2)274; 76Mont 288, 246P536; 118Nebr477, 225NW468; Nebr 229NW118; 55ND830, 215NW 284; 25 OhA426, 158NE279; 117 Or673, 244P82, 245P321; TexCivA 298SW620.

114-89 197Cal 103, 239P847; 71CalA 389, 235P653; 117 Or673, 244P82, 245 P321. TexCivA 273SW619. [a] **Where mortgage securing price of goods sold provides for attorney's fees,** they may be recovered in action for price. Tex CivA 274SW210.

114-90 214Ala573, 108S375, 45ALR935; 239Mich1, 214NW113. But see 25 OhA 426, 158NE279. [a] **"As between solicitor and client."**-(1) 28F(2d)233.

115-91 42F(2d)791; 165La94, 115S380 (document held not amicable demand required under statute allowing costs); Mass 172NE340 (probate jurisdiction); 117 Okl 93, 245P555; 118 Okl 279, 248 P601; 32PortoRico 634; 51SD552, 215 NW778. See also [1930] 4DomLR1028 (1stcase); See also Ont [1928] 4Dom LR854. [g] **In South Dakota.**-48SD629, 205NW714. [h] **In Porto Rico.**-32Porto Rico 634; 32PortoRico 644. [i] **Under Interstate Commerce Act** attorney's fee may be awarded in action for recovery of damages for wrongful exaction of rate in excess of that authorized by official tariffs of carriers. 127Kan326, 273 P451, 64ALR322.

115-92 159La236, 105S302 (statute allowing ten per cent. of attorney's fee in action on bond held not unreasonable and unconstitutional).

115-93 41F(2d)76; 160La371, 107S 143; 170La879, 129S515. [a] (3) Allowance of attorney's fees under Arkansas statute is in nature of penalty and is restricted to suits based exclusively on violation of statute by railroad and is improper in action involving negligence as well as violation of statute. 168Ark146, 269SW51. [b] (7) Fees allowed plaintiff's attorney for bringing fund into court. 165Ga724, 142SE96. (8) Creditor refusing to accept payment but levying fieri facias acted in bad faith and debtor's nonpayment of fees at trial is immaterial. 167Ga176, 145SE71. [c] (3) Statement of particulars of claim sufficient to justify allowance of attorney's fees. 153Md312, 138 A269. [f] (11) Judgment reciting "costs are imposed upon defendant" includes attorney's fees. 32PortoRico 634. (12) Discretion to allow attorney's fees includes such allowance even in special proceedings, like election contest, also injunction proceedings to recover possession. 32PortoRico 644. (13) Unnecessary to show that attorney's fees included in verified memorandum of costs have been paid or that successful party has agreed to pay them. 32PortoRico 600. [i] **Fee not allowed** where verdict was for less than amount claimed. Tex CivA 271SW263. [m] **In California.**-71CalA389, 235P653. [n] **That statute in force when contract was made did not provide for allowance of attorney's fees** does not prevent allowance where statute was in force at time remedy was sought to be enforced. 129 Okl 37, 263 P443. [o] **In Nebraska.**-227NW455(2d case).

115-96 32PortoRico 634.

116-98½-New. Award of attorney's fees is held inseparable from success in proceedings. 162La941, 111S336.

116-98½-New. An award of counsel fees against complainant on dismissal of an unnecessarily protracted injunction suit may be proper. NJ 144A715(1st case).

116-1 164La278, 113S847 (provision for fees in specific performance held not to apply in suit for return of deposit). [c] **In what court recoverable.**-125Kan657, 266P104.

116-5 101NJEq347, 139A406. [b] **Party to chancery suit appearing as solicitor** in his own behalf is entitled to allowance made by fee bill except retaining fee. 101NJEq347, 139A406.

116-7 102NJEq71, 139A799.

116-9 See also 32PortoRico 546 (several injunctions by different plaintiffs against same defendant).

117-13 155Wash133, 283P1076.

117-15 Contra 32PortoRico 600; 34 PortoRico 563.

117-19 [a] **In Massachusetts.**-252Mass 258, 147NE878.

117-21 117 Or673, 244P82, 245P321.

117-23 8F(2d)460; 8F(2d)777; Mass 172NE340 (determined by judge); 120 Or554, 252P961; 32PortoRico 634; 32 PortoRico 642; 34PortoRico 546; 34 PortoRico 563 (reasonable estimate of value of services reduced to reasonable amount under circumstances of case); 51SD552, 215NW778. [a] 8F(2d)777; 217Ky660, 290SW475; LaA 128S706; 137Misc888, 244NYS882; 32PortoRico 546; 51SD552, 215NW778. [b] **Allowance held excessive.**-33PortoRico 24; 33 PortoRico 192; 35PortoRico 800. [d] See also 121 Or582, 256P646. [g] **In Ontario.**-57 OntL310, [1925] 3Dom LR911. [h] **Compensation paid public officers for services of similar character** constitutes standard in particular case. Mass 172NE340.

117-24 8F(2d)460; 217Ky660, 290SW 475; 115 Or396, 237P982 (amount fixed by court under stipulation of parties sustained by evidence); 32Porto Rico 23 (five hundred dollar fee on judgment for three thousand one hundred fifty seven dollars twenty four cents); 32PortoRico 642; 51SD552, 215 NW778. [b] **Amount allowed by lower court for attorney's fees will not be increased on appeal** in absence of clear showing of abuse of discretion. 32 PortoRico 642. [c] **Tendency of Porto Rico supreme court is to reduce** amounts allowed by district courts. 32 PortoRico 642.

118-25 33PortoRico 192.

118-26 34PortoRico 546. [b] **Trial judge may reduce amount for attorney's fees included in memorandum of costs after objections** to memorandum stricken out because not timely filed. 32 PortoRico 642.

118-28 120 Or554, 252P961.

118-29 TexCivA 290SW872.

118-30½-New. Statutes providing for an attorney's fee contemplate a reasonable fee. 18F(2d)223.

118-33 34PortoRico 608.

118-34½-New. Court may fix the amount where parties so stipulate. 120 Or554, 252P961.

118-34½-New. Notwithstanding stipulation, if attorneys fees are prayed for and allowed in general terms in complaint and judgment their amount and collection must be pursuant to proceeding fixed by law. 35PortoRico 204.

118-34½-New. Defendant undertaking to pay attorneys fees without fixing amount is not bound by agreement between plaintiff and his attorney beyond reasonable value of services rendered or to be rendered. 35PortoRico 248.

122-24 129Misc621, 221NY8503.

122-32 129Misc621, 221NY8503.

122-33 But see 134Misc67, 234NY8535.

124-58 [c] In Utah.-291P298.

125-76 Mont 292P730 (witness fees of judge taxable though present on judicial business); 136Misc826, 242NY8 354 (witnesses' fees allowable in summary proceeding).

125-76½-New. Witness fees have been held allowable for each of the two trials of case. 155Wash133, 283P1076.

125-78 TexCivA 288SW(2d)610.

125-81 See also 41F(2d)268.

126-86 44 Ida363, 257P38, 40 [cit CJ].

126-87 44 Ida363, 257P38, 40 [cit CJ].

126-88 44 Ida363, 257P38, 40 [cit CJ].

126-93½-New. Attorney held entitled to witness fees. Mont 292P730.

126-99 38F(2d)824.

127-5 Sask [1930] 2DomLR160.

128-10 [a] Under statute unsuccessful party is not obliged to pay fees of more than two witnesses who were summoned and who testified to single fact. 196NC450, 146SE674.

128-15 274US277, 47SC613, 71Led 1045. [a] 274US277, 47SC613, 71Led 1045.

128-16 41F(2d)268; 75Mont317, 243P1063. [c] Fees for experts who testified taxable though they were not summoned. 163La555, 1128415.

129-17 4HawaiiFed404.

129-17½-New. Good faith must be exercised by litigants in procuring the attendance of witnesses whether by means of subpœna or where they are induced to appear voluntarily. 75Mont 317, 243P1063.

131-38 38F(2d)824. See also 4Hawaii Fed635. [d] Presumption that witness not called to testify is not material may be rebutted by showing good and sufficient reasons for not calling witness to testify. 38F(2d)824.

131-42 See also 13LaA444, 1278781.

131-43 32F(2d)490 (under Maine statute); 13LaA444, 1298170 (necessity of appointment by court and giving of testimony on technical or scientific subject).

131-44½-New. Where testimony of some witnesses for plaintiff overlapped his several causes of action on one of which he recovered, witnesses' fees therefor are properly allowed. 44 Ida 560, 260P150.

132-51½-New. Under Louisiana statute successful party could not tax witness fees and mileage in excess of six witnesses. 163La555, 1128415.

132-51¾-New. Rule of six witnesses does not apply to experts. 163La555, 1128415.

133-74 75Mont317, 243P1063.

133-74½-New. Where nonresident witness was present within the state before it was necessary for attendance as a witness and did not journey into the state in contemplation of being a witness, mileage can be taxed only from the place where a subpœna could have been served on him. 44 Ida288, 256P 372.

133-74¾-New. Mileage paid to witnesses is properly allowed as costs. 97 CalA166, 275P478.

133-75 [c] In Idaho costs are taxable for mileage out of state. 44 Ida363, 257P38.

133-76 44 Ida288, 256P372.

133-78 But see 51Nev100, 269P606.

133-79 128 Or177, 270P911.

133-79½-New. Allowance to witness, subpœnaed by mail to foreign state line one way only, is held proper. 76 Mont468, 257P469.

134-81 Contra 274US277, 47SC613, 71 L. ed1045.

134-84 But see 30F(2d)334.

134-84½-New. Fees for travel and attendance before an auditor can be taxed only for the attendance necessary to enable him to testify, and for the travel necessary for the purpose of such attendance. 29F(2d)428 (not for purpose of consultation with counsel).

134-90½-New. In codifying the statute, a provision for mileage for going and returning was not changed in effect by a double amount of mileage for going to the place of attendance. 82 Misc57, 143NY8624.

134-93 82Misc57, 143NY8624.

134-96 44 Ida363, 257P38.

135-99½-New. Where witnesses' expenses were paid, fact of their failure to make affidavit is held immaterial on question of allowance of items. 78 Mont221, 254P412.

135-1 Ont [1929] 3DomLR397 (where it was prudent act, as distinguished from over caution, to have witnesses in attendance).

135-3 8F(2d)777; 30Ariz144, 245P 274; CalA 291P451; 163La555, 1128 415; 138Misc66, 245NY8285.

135-7½-New. On plaintiff's taking deposition for written interrogatories defendant will be required to pay for oral cross-examination granted on his request and for oral redirect examination permitted as condition to granting request. 129Misc794, 222NY8621.

135-10½-New. Under New York Practice Act §10 only allowed for taking depositions of parties regardless of number of parties. 130Misc155, 223 NY8599.

135-14 141Wash372, 251P570.

136-25 7F(2d)605.

136-36 [a] In Alberta.-[1930] 3Dom LR622.

137-47 [a] In New York, under Civil Practice Act, plaintiff electing to take depositions outside of state should pay defendant for expenses at hearing. 226 AppDiv717, 233NY8481.

137-49 [c] In Alberta.-Alta [1930] 3 DomLR622.

137-51 26 OhNPN8217.

139-80 [a] See also 8F(2d)777.

139-81 29F(2d)428 (agreement not implied); 134Misc67, 234NY8535 (fees for furnishing copy of minutes held not taxable under oral agreement not spread on record or reduced to writing).

140-83½-New. The expense of a stenographer's minutes of the trial, submitted to the trial court on the court's direction by plaintiffs after trial without a jury, is not taxable as a "disbursement." 132Misc663, 230NY8337.

140-84 But see 29F(2d)428; 127Misc 53, 216NY868.

140-90½-New. Under the federal statute, the cost of a stenographic carbon copy of respondent's testimony and of the abstract of evidence for use in an argument is not taxable. 29F(2d)288(1st case) (not necessary expenditure under statute).

140-90¾-New. A stenographer's charge for a copy of the testimony for the private use of a party is not taxable as costs. 163La81, 1218581.

140-91 [b] (5) Statutes do not authorize another than official reporter to take down evidence in shorthand as regards taxation of costs. 86CalA657, 260P 1106. (6) Official reporter's fees for transcription are taxable against defendant as costs, though defendant's private stenographer took notes which were used as basis of motion for new trial. 86CalA657, 260P1106. [a] In Georgia.-161Ga711, 132SE547. [c] In Nevada.-48Nev108, 227P1018, 233P844, 236P1101.

141-93 29F(2d)428.

141-95 See TexCivA 88SW(2d)196. [b] Where plaintiff is in the main successful on hearing of motion, fees of referee who took testimony will be ordered paid by defendant. 127Misc53, 216NY868.

141-98½-New. Where, upon judgment for plaintiff, reference is ordered as to damages, directing the referee to enter judgment for the amount ascertained and for costs, plaintiff can have no costs of reference where the referee finds no damages were sustained. BC [1929] 1DomLR887.

142-6 [d] (5) 129Misc621, 221NY8503. (9) Plaintiff, if prevailing in consolidated actions which could originally have been joined, can recover only costs recoverable if actions had been originally joined. 222AppDiv852, 227 NY8173. (10) Defendant, if prevailing in action consolidated by plaintiff, who could have originally joined actions, may tax costs accruing in unconsolidated actions. 222AppDiv852, 227NY8173.

142-7 [b] In Alberta.-[1930] 3DomLR 692.

143-9 [e] Under statute taxation of an item for map not introduced in evidence attached to brief will be disallowed. 136 Misc291, 240NY8728.

144-32 34PortoRico 401; 53SD635, 222 NW141.

144-38 34NM413, 282P382 (expenses of preserving attached personalty).

145-49 8F(2d)777.

146-50 8F(2d)777.

146-51 125 Or598, 268P63.

146-56 Wis 230NW607 (not limited to three copies of findings).

146-63 [b] Where court does not order surety company bond, premium paid therefor may not be taxed. 217AppDiv 116, 217NY8116.

146-64 Contra 29F(2d)428.

146-65½-New. In federal court premiums paid on cost bonds are allowed. 8F(2d)777

146-67 5F(2d)160; Ark 318SW(2d)130; Sask [1925] 3DomLR141 (proceedings respecting infant's property). [b] Costs occasioned by unnecessarily bringing in third party will not be allowed against plaintiff in favor of successful defendant. Ont [1930] 4DomLR394.

149-2 [a] Arbitrary sum as additional costs cannot be imposed upon intervenors. Fla 129S760.

149-11 135Misc655, 239NY8385.

150-17½-New. Referee to state account is without power to give extra allowance of costs to plaintiff. 214 AppDiv455, 212NY8690 (in action by one author against coauthor for accounting).

151-26 134Misc765, 236NY8169.

152-40 135Misc655, 239NY8385.

153-55½-New. Partition suit. 129 Misc805, 223NY876.

154-62½-New. An action for declaratory judgment involving validity of lease is not difficult and extraordinary so as to entitle successful party to extra allowance. 217AppDiv443, 217NY8 15.

155-94 217AppDiv443, 217NY815. [c] (33) In injunction case against use of flashboards in Hudson river resulting in loss of water for plaintiff's plants, extra costs allowed on amount of damages recovered. 129Misc544, 221 NY8671. (34) Right to use water of river without interference. 249NY495, 164NE558 [certiorari granted 279US 829, 49SC348, 73Led980(2dcase)].

156-95 129Misc544, 221NY8671.

156-97 217AppDiv443, 217NY815.

157-4 But see 223AppDiv559, 229NY8 445.

157-4½-New. ; or where action is brought for a declaratory judgment involving validity of lease value of which is not involved. 217AppDiv443, 217 NY815.

159-35½-New. The appellate division will deny extra costs where the court of appeals refused to amend its remittitur so as to present question of extra costs to appellate division. 219AppDiv 369, 220NY87.

162-82 137Misc899, 244NY8539.

162-82½-New. Likewise a statute permitting removal of limitation as to amounts of costs cannot be availed of

by amendment of the judgment after its entry. **Man** [1925] 3**DomLR**75.

163–90 136 **Okl** 26, 275**P**1045 (opportunity for hearing required).

164–1 135**Misc**655, 239**NYS**385.

168–76 [a] **Petition voluntarily amended** cannot be considered as held insufficient within statute. **MoA** 279**SW**171. [b] **Petition held insufficient on motion to make more definite and certain** is not insufficient within statute. **MoA** 279**SW** 171.

168–80 256**Mass**269, 152**NE**312.

169–8½–New. Dismissal against one of two defendants by plaintiff did not give right to tax costs of defendant in dismissed action against remaining defendant. **TexCivA** 271**SW**228.

169–9 120 **Okl** 240, 251**P**472.

169–10 256**Mass**269, 152**NE**312 (twelve per cent. allowed where defendant's exceptions were plainly frivolous).

170–12 61 **OntL**423 [1928] 1**DomLR**293.

170–28 36**GaA**168, 136**SE**89; 140**Miss** 120, 1058739.

170–29½–New. Costs may be awarded, even though the court may be without jurisdiction over the cause on its merits. **Mass** 167**NE**656.

170–30 94**Fla**649, 1148502.

171–33 36**GaA**168, 136**SE**89.

171–35½–New. Jury cannot award costs. 220**Ky**451, 295**SW**467.

171–45 [c] 225**AppDiv**515, 234**NYS**217.

175–7 25**F(2d)**863; 140**Miss**120, 1058739 (statute providing for correction of erroneous taxation held not to authorize amendment after adjournment of court of award of costs made in judgment rendered during term).

175–16 2**Edw(NY)**108.

175–17 196**NC**450, 146**SE**74.

175–24 [b] **Proceeding for taxing of costs** involves matter collateral or ancillary to particular judgment in procurement of which such costs were incurred. 74**CalA**152, 239**P**856. [c] **Rule to tax costs** involves liability for costs and amount in dollars and cents. 12**LaA** 89, 1258318(1st case).

176–25 140**Miss**120, 1058739.

176–25½–New. A statute, relating to taxing procedure, if ambiguous, must be liberally construed. 86**Mont**358, 284 **P**125.

176–28 But see 129**Misc**183, 221**NYS**52.

176–36 140**Miss**120, 1058739 [citCJ].

176–41½–New. Between litigants, officers of court should maintain disinterested attitude. 20**AlaA**633, 1048679.

177–43 86**Mont**358, 284**P**125 (notice of filing of memorandum).

177–44½–New. Where remedy by motion to retax is available, party is not denied due process of law by taxation of costs against him without notice or opportunity to be heard. 161**Ga**711, 132 **SE**547.

177–56½–New. Under some statutes notice need not be given in any prescribed way. 86**Mont**358, 284**P**125.

177–57 See also 86**Mont**358, 284**P**125.

178–69 **Fla** 126**S**746(2dcase).

178–69½–New. Notice not mailed in time is invalid. 130**Misc**155, 223**NYS** 599.

178–77 86**Mont**358, 284**P**125. [a] **Bill at second trial held to show costs at first trial** were chargeable. 205**Cal** 6, 269**P** 525.

178–78 But see 100**CalA**416, 280**P**181 (2dcase). [a] **Construction of statutes.** –86**Mont**358, 284**P**125.

178–78½–New. Statute held not to require the party claiming costs to deliver a memorandum of costs to the clerk before delivery to his adversary, or vice versa. 86**Mont**358, 284**P**125.

178–79½–New. Whether single bill of costs or separate bills to several defendants be awarded rests in the sound discretion of the court. 252**Mass**258, 147 **NE**878.

179–83 [b] **Defendant's proceeding to tax costs was properly dismissed** where she failed to itemize costs. 168**La**672, 1238119.

179–86 [a] **Not necessary to show that attorney's fees included in memorandum have been paid** or that party has agreed to pay them. 32**PortoRico** 600.

179–87 [b] **Inclusion of item for attorney's fees** in verified memorandum of costs is prima facie evidence that they are owed. 32**PortoRico** 600.

180–11 1**LaA**713. [d] **In Porto Rico.** –33**PortoRico** 24.

180–12 **CalA** 290**P**458.

180–13 32**PortoRico** 600. [a] (3) Signature of affiant attorney placed after jurat, and clerk failing to certify to knowledge of affiant. 33**PortoRico** 24. (4) Affidavit of attorney is not insufficient because of failure of clerk of court to state that he knows attorney. 33 **PortoRico** 24. (5) That signature of attorney appears above that of clerk of court and after words "Sworn to and signed," etc., does not invalidate affidavit. 33**PortoRico** 24. [d] **Attorney swears to memorandum** because he is better informed than his client as to items. 32**PortoRico** 600.

181–16 97**PaSuper**271 (rule construed).

181–18 32**PortoRico** 786 (within ten days after judgment has become unappealable, or, if appealed, within ten days of receipt in lower court of official advice of decision on appeal). [b] **Where no right of appeal exists,** memorandum may be filed immediately after judgment notwithstanding provisions of Act [1917] No. 15. 32**PortoRico** 786. [c] **In Oregon.**–289**P**1067.

181–19 70**CalA**108, 232**P**986; 76**Mont** 375, 247**P**328. [a] (2) 91**CalA**529, 267**P** 342. (12) Different construction is presumed to have been intended by legislature of words in one statute providing for service of memorandum of costs "after notice of court's decision" and statute providing for service of notice of intention to move court within certain time "after receiving notice." 76**Mont**375, 247 **P**328. [c] **Premature filing.**–44 **Ida**663, 258**P**541.

181–20 44 **Ida**663, 258**P**541. [a] **Time for service.**–90**CalA**276, 265**P**1010. [b] **Service by mail.**–90**CalA**276, 265**P**1010.

181–22 35**PortoRico** 204.

181–23 76**Mont**375, 247**P**328.

181–27 [b] (1) 76**Mont**375, 247**P**328.

182–36 100**CalA**12, 279**P**829.

182–38 33**PortoRico** 528; 35**PortoRico** 53.

182–39½–New. Under the Porto Rico statute a memorandum of costs filed in the trial court before it receives the judgment of the supreme court is premature. 33**PortoRico** 528.

182–39½–New. Asking for an extension of time within which to object to a memorandum of costs is not a waiver of the right to move to strike out the memorandum because prematurely filed. 33**PortoRico** 528.

182–40 34**PortoRico** 73. [d] **Moving papers under motion for permission to amend cost bill** has been held insufficient to justify application to trial court to exercise its powers to make record speak truth. **CalA** 284**P**696. [e] **Allowing purported amendment to cost bill and denying motion to strike unverified memorandum** has been held error. **CalA** 284**P**696.

182–42 **CalA** 284**P**696.

182–45 8**F(2d)**777; 178**Minn**232, 226 **NW**700 (where verdict has been set aside and new trial granted).

182–46 [c] **Discretionary taxation after expiration of time.**–57 **OntL**310, [1925] 3**DomLR**911.

183–50 192**Wis**269, 212**NW**643.

183–50½–New. In Saskatchewan, the time within which a solicitor's bill may be referred for taxation will not begin to run until completion of services or termination of retainer. **Sask** [1929] 2 **DomLR**372.

183–50¼–New. , and in Saskatchewan. [1930] 2**DomLR**30.

183–53 224**AppDiv**621, 232**NYS**879. [a] (1) Or 289**P**1067.

183–54 32**PortoRico** 642. [f] **Where objections to memorandum stricken out because not timely filed,** losing party places himself in same position as if he voluntarily had failed to appear. 32 **PortoRico** 642. [g] **In Porto Rico.**–32 **PortoRico** 642.

183–58 137**Misc**834, 243**NYS**728.

184–74 138**Misc**66, 245**NYS**285 (failure of proof). [a] (2) Full, complete, and accurate account of disbursements for which reimbursement is desired should be kept and proved with certainty and precision. 8**F(2d)**777.

184–76 [a] (6) Excluding evidence as to whether it had not been witness' practice in past years to return home for summer vacation held not error. 79**Mont** 468, 257**P**469.

184–80½–New. A bill of exceptions, showing that a memorandum of costs was duly verified, constituted a prima facie showing that the items therein were necessarily expended or incurred, and, unless controverted, should control the decision of the trial court, where charges appear on the face thereof to be for proper and necessary disbursements. 205**Cal** 6, 269**P**525.

184–80½–New. Attorney's fees should not be fixed without considering any evidence. **Ala** 130**SE**1.

184–83 12**PaDist&Co** 808; **TexCivA** 299 **SW**516.

185–1 161**Ga**711, 132**SE**547; 164**Ga**742, 139**SE**540; 202 **Iowa**498, 210**NW**559; **Nev** 290**P**1024.

186–2 161**Ga**711, 132**SE**547; 225**App Div**515, 234**NYS**217 (motion to strike out costs awarded by court in excess of amount consented to); 191**NC**257, 131 **SE**653.

186–6½–New. motion for new trial, 164 **Ga**742, 139**SE**540.

186–16 202 **Iowa**503, 210**NW**530.

186–18½–New. Unless motion for review of taxation is asked, clerk's taxation cannot be questioned on appeal. 136**Misc**826, 242**NYS**354 (refusal to tax).

187–33½–New. Rules do not apply to costs taxed as condition to relief. 214 **Ala**95, 1068594.

187–36 See also 57 **OntL**310, [1925] 3 **DomLR**911.

188–40½–New. Delay of nearly two years, pending appeal in moving to retax costs, excused. 130**Misc**155, 223**NYS** 599.

188–47 130**Misc**155, 223**NYS**599.

189–56 [c] **Motion denied** where items objected to are not specific. 196 **Ind**396, 148**NE**405.

189–65 205 **Iowa**612, 218**NW**282 (not ordered because of proceedings had as to which no costs were incurred).

190–67 213**Ala**317, 1048786.

190–72 [1930] 4**DomLR**1034.

190–76½–New. Upon the question of good faith required of litigants in procuring attendance of witnesses whether by subpœna or voluntarily, the court may, on motion to retax, consider the necessity of witness' attendance, circumstances under which he is called, and the like. 75**Mont**317, 243**P**1063.

191–85 [e] (3) Sum deducted on retaxation must be credited on execution or other mandate to enforce judgment and not by amending judgment. 134**Misc**67, 234**NYS**535.

191–89 136**Misc**826, 242**NYS**354.

192–7½–New. Where a successful plaintiff fails to give notice of retaxation, he is liable for the costs of defendant's motion for retaxation. 134**Misc**67, 234**NYS** 535.

192–10 164**La**283, 1138849.

192–13 136**Misc**848, 241**NYS**345.

192–14 [a] **In South Dakota.**–231**NW** 897.

192–15 36**F(2d)**886; 136**Misc**848, 241 **NYS**345; **Man** [1927] 3**DomLR**478.

193–21 9**PaDist&Co** 453; 11**PaDist&Co** 369.

193–22 [b] **Not affected by Reciprocal Enforcement of Judgment Act.**–**Alta** [1927] 2**DomLR**314.

193–28 [c] (2) Where deposition of plaintiff shows an intention to reside within state by written contract to perform work, and no present intention of moving from state, it has been held that no security for costs is required. 9**Pa Dist&Co** 453.

194–33 213**Ala**425, 1048843; 36**ManL** 180 [1927], 1**DomLR**425 [1926], 3**West Wkly**473.

198–1 9**PaDist&Co** 13.

198–8½–New. A summary proceeding to compel an attorney's return to a nonresident client of corporate stock delivered to him when he was employed to bring about dissolution of the corporation is not an action within a statute

relative to security for costs. 141Wash 584, 251P863.

198-8 205Iowa141, 217NW809, 811 [cit'CJ].

198-10 21SaskL271, [1927] [DomLR 533, [1927] [WestWkly44.

200-28 [a] **Grounds held not** frivolous or vexatious. Alta [1930] 3DomLR159 (1stcase).

200-31 [c] **"Defendant,"** within Civ. Pract. Act § 1522, means defendant originally sued or brought in on plaintiff's motion. 136Misc32, 242NYS380.

200-35½-New. Intervenor joined as defendant on his own motion is not entitled to security for costs from plaintiff. 136Misc32, 242NYS380.

200-39 136Misc848, 244NYS345 (one defendant against another).

201-40 CanExch [1926] 4DomLR1035.

201-47 [b] In **Texas.**-CivA 158SW(2d) 1085 (requirement not limited to case in which plaintiff has discontinued suit).

201-51 [a] (2) Under statute authorizing clerk to collect $5 on each action commenced clerk could not require such payment in suits against taxpayers to recover possession of land sold to state and county for taxes. 235Ky728, 32SW (2d)42.

202-64½-New [§ 490a] 8. **Original Plaintiff's Assignee.** Court satisfied that plaintiff's assignee is solvent may permit him to proceed without executing a cost bond. 228Ky806, 168SW(2d)142.

203-67 [d] In **Pennsylvania.**-14PaDist &Co118.

203-74 20AlaA633, 104S679 (application must be by party against whom process has issued).

203-75 20AlaA633, 104S679 (right to security waived by filing pleas).

203-77½-New. Court has no inherent power to authorize clerk to make motion requiring nonresident plaintiff to give security. 20AlaA633, 104S679.

203-81 36F(2d)886 (denial of application for security presented late has been held not improper); BC [1926] 4DomLR 799 [1926] 3WestWkly 353.

205-95 6PaDist&Co580.

205-1 [a] **Refusal to dismiss after evidence is closed** is not error. 216Ala52, 112S412.

205-8 13PortoRicoFed101 (judgment for plaintiff).

205-11 [d] **Unsuccessful resident defendant** cannot require security for costs. 13PortoRicoFed101.

206-27 136Misc848, 241NYS345.

207-39 164La283, 113S849, 851 [cit'CJ]; Alta [1926] [DomLR470, [1926] 3WestWkly301.

208-57 10PaDist&Co91.

209-70 Sask [1930] [DomLR873 (application on account of poverty of plaintiff dismissed).

210-89 30Ariz557, 249P747.

212-25½-New. Where the statute is silent as to how the amount of security shall be determined, the judge has authority to fix the amount in his discretion. 164La283, 113S849.

213-45 SC 155S230.

213-45½-New. Undertakings held sufficient.-52ND273, 202NW852.

215-82 SD 231NW897.

215-86 SD 231NW897.

216-7 213Ala425, 104S844 (refusal to require security to be given during trial held not abuse of discretion).

216-8 52ND112, 202NW852.

216-15 [a] In **Alabama** right to require security from plaintiff removing from state is waived if not exercised before trial. 213Ala425, 104S844.

217-30 156Miss638, 126S189.

217-31½-New. Where sureties are insolvent the court should allow a reasonable time to make another bond or to deposit money for costs before dismissing the suit. 156Miss638, 126S189.

218-34 205Iowa141, 217NW809 (statute held directory); 13LaA91, 126S269 (order of dismissal necessary); 144Miss505, 110S436. See also 251Mich273, 231NW575(2dcase). [d] **Demand for security for costs** on foreign corporation by one of two defendants does not stay proceedings between plaintiff and nondemanding defendant. 73Mont180, 235P770.

218-35 157SC150, 154S694. See also TexCivA 295SW214.

219-60 [d] **Where bond filed prior to ruling on motion,** dismissal of action is not justified. 205Iowa141, 217NW809.

220-72 46Ida759, 271P321.

220-77 102WVa613, 135SE900.

220-79 102WVa613, 135SE900.

221-86 TexCivA 238SW(2d)188.

221-99 130Okl242, 266P758.

226-8 165Tenn530, 296SW356.

226-13 146Miss192, 111S437, 50ALR 1454.

227-29 146Miss192, 111S437, 50ALR 1454.

231-5½-New. That after plaintiff foreign corporation began its suit in which bonds for costs sued on was given it was dissolved by decree of court and makers of bond thereby released is a frivolous defense. 165Minn184, 206NW384.

231-5½-New. Defense in the nature of a counterclaim that, before judgment for costs was rendered against plaintiff foreign corporation, it assigned the cause of action involved in the suit to defendants in the present action on bond for costs and that such cause of action is larger in amount than sum total of bond for costs and undertaking on appeal in such suit, is frivolous. 165Minn184, 206NW384.

231-5½-New. Sureties on bond for costs given in action by plaintiff foreign corporation have no defense by pleading as counterclaim the cause of action alleged by the corporation in an action in which bond given and in which such cause of action was adjudged not to exist. 165Minn184, 206NW384.

232-55 CalA 286P732; 191NC257, 131SE653. [b] In **Alberta.**-[1928] [DomLR 1110.

233-60 226Ky744, 118SW(2d)932.

233-64 226Ky744, 118SW(2d)932; 156Miss638, 126S189.

234-74½-New. Leave to woman of doubtful character to bring divorce suit in forma pauperis will be denied. 100NJEq38, 135A332.

236-21 98CalA729, 277P757; 2LaA460; 100NJEq38, 135A332.

236-23 98CalA729, 277P757.

236-25 194Cal1, 227P156.

237-28 Kan 232P788 (action dismissed where affidavits untrue).

237-32 98CalA729, 277P757. [a] (3) Evidence held insufficient. 154Miss188, 122S469(2dcase).

238-37 223AppDiv60, 227NYS245.

238-55½-New. The trial court when making up a judgment of an appellate court reversing a judgment upon a former review should enter judgment for costs due to the state, taxed in the reviewing court, and recovered by such party as plaintiff in error, although the appeal had been taken upon an affidavit in forma pauperis. 35LaA132, 132SE244.

238-57 191NC257, 131SE663.

239-78 See also 161Tenn128, 29SW(2d) 654.

239-93 146Va426, 131SE689.

239-84 32PortoRico 224. [a] (1) 32 PortoRico 224, (4) Phrase "without special imposition of costs" in judgment on appeal refers to costs in lower court. 32PortoRico 224. (5) Affirmance by circuit court of appeal "with costs" refers to costs in such court. 32PortoRico 224.

239-84½-New. In questions of public interest neither party is allowed costs on appeal. 251Mich528, 232NW375.

240-86 BC [1928] [DomLR162

240-93 But see 191Wis597, 211NW780.

240-94 TexCivA 299SW516. See also 200Cal307, 252P1052.

240-94 [b] **Costs in litigation in nature of judgment creditor's action** rest in discretion of court. 132Misc723, 230NYS554.

240-95½-New. Where the appellate court does not touch on the question of costs, the chancellor, below, may exercise his discretion. 215Ala247, 110S394.

240-97 220Ala667, 127S227; 74CalA 352, 235P66; 76CalA52, 243P676; CalA 284P1072; 329Ill253, 160NE552; 48Nev286, 229P1098, 232P1082, 235P1117; 54Nev201, 273P177; 116Or 562, 237P690, 239P193; 122Or179, 257P701; 132SC1, 128SE857; TexCommnA 300SW27; 146Va426, 132SE705; 149Va597, 140SE810. [c] **Agreement of prevailing party** for reimbursement to him of costs paid by third person, or advancement of costs by latter, held not to bar recovery. 76CalA52, 243P676.

241-10 [a] **Respondents, forced to defend decree in their favor,** are "prevailing parties," and entitled to costs and disbursements. 126Or250, 269P490.

241-11 21LaA183; 198Wis461, 225NW737. [g] **Plaintiff's gaining nothing by appeal** from judgment in unsatisfactory amount, should be taxed with costs of appeal. La 129S649.

241-10½-New. Appellants are not entitled to costs where appeal from order was without merit. 43Ida675, 256P529.

241-10½-New. Defendant procuring in the supreme court reversal of a judgment of the court of civil appeals denying offset is entitled to costs in the supreme court. TexCommnA 300SW27.

241-11 224IllA474; 239Mich1, 214NW113; 147Miss885, 114S127; 104NJL 248, 139A900 (dictum); 115Or562, 237P690, 239P193; 284Pa528, 131A536.

241-12 284Pa528, 131A536.

241-14 151Va240, 144SE444 (where appellant substantially prevailed). [a] **Where appellants were public officials acting in official capacity** costs were not allowed either party. Utah 289P132.

241-16 15F(2d)618.

241-17 15F(2d)618; 239Mich286, 214NW148.

242-18 177Minn222, 225NW85.

242-19½-New. where respondent's brief contains improper matter intended to influence the appellate court; 166Minn269, 207NW618.

242-28 TexCivA 58SW(2d)624.

242-31 232Mich255, 205NW86; 232Mich415, 205NW149; 146Wash143, 262P131; Wash 287P658.

243-43 102WVa367, 135SE280.

243-45½-New. In some jurisdictions under rules of court it is the duty of appellee as well as appellant to see that a transcript of the record exhibits cause prepared for appeal in accordance with prescribed rules of court. TexCivA 282SW841.

243-48 CalA 284P1065; 44Ida363, 257P38; 236IllA487; 80Mont214, 260P711; 123Or651, 262P263; TexCommnA 9SW(2d)1105; TexCommnA 18SW(2d) 614(1stcase). [b] **Unsuccessful party** held not entitled to costs to be charged against trust fund which unsuccessful party tried to defeat. 94CalA795, 271P1100.

244-51 But see 104NJL248, 139A900.

244-59 28F(2d)863.

245-61½-New, or where defendant in error has substantially prevailed; 101WVa45, 131SE712.

245-75 NJSup 148A2(1st case).

245-78 127Misc669, 217NYS357.

245-79 TexCivA 248SW(2d)75. See also 100CalA416, 280P181(2dcase).

245-80½-New. Where a decree of the district court in a suit in equity was reversed by the circuit court of appeals with costs, the court below was held not deprived of its discretion in the matter of costs in that court. 20F(2d)949.

245-81½-New. In New Jersey, where judgment for defendant is reversed and nominal damages are awarded to plaintiff, no costs will be allowed either party. 104NJL248, 139A900.

246-83½-New. unless reversal and new trial are made necessary through the losing party's fault. 52ND112, 202NW280.

246-87 TexCivA 296SW865.

246-95 157Tenn168, 7SW(2d)40; TexCivA 9SW(2d)445.

247-97 238Mich178, 213NW76.

247-4 [b] 146Va426, 131SE689. [c] **Repeal of ordinance** on which suit was based requires dismissal without costs. 158La70, 103S513.

247-4½-New. Costs will not be allowed on dismissal of an appeal where respondent has neither appeared nor submitted brief. 125Misc825, 211NYS587.

247-9½-New. Where in effect appellant has substantially prevailed in the object of the litigation, he is entitled to costs, although the appeal is dismissed by reason of abandonment of defense on the part of appellee. 146Va426, 132SE705.

247-9½-New. Where the question is moot, the court may under statute make

such order concerning payment of costs on appeal, as may seem just and proper. 31NM591, 249P107.

247-9¼-New. Where judgment appealed from is void, costs may be taxed against appellee. 21AlaA441, 109S179.

249-27 122 Or179, 257P701.

249-33 275US156, 48SCt96, 72L ed214; 44 Ida363, 257P38; 132SC1, 128SE857.

249-34 92Fla129, 109S238.

249-35 Wash 292P112.

249-36 142Va350, 128SE462.

249-37½-New. An order awarding costs falls with the reversal of the part of the judgment upon which it is based. 100CalA416, 280P181(2dcase).

249-38 212Ala645, 103S850; 137Wash 214, 242P32.

250-39 Ont [1928] 2DomLR539.

250-40 162La235, 110S334.

250-43 TexCivA 288SW840.

250-46½-New. On appeal from an order dismissing a bill for declaration, judgment, and injunction, appellant denied injunctive relief has been held not entitled to costs. 156Tenn278, 300SW 565.

250-48 [f] (3) Where no extra expense is incurred by erroneous judgment against one defendant, costs on affirmance as to others will be taxed against them. TexCivA 3SW(2d)524.

251-53 165Ga449, 141SE205; 167Ga 149, 144SE785; 169Ga720, 151SE360; 162La571, 110S759; 11LaA298, 123S 472; 232Mich251, 205NW155; 48 Nev60, 227P320 (modification in relation to attorney's fees); 13PaDist& Co 506; 142SC477, 141SE15; 141Wash 186, 251P127; 145Wash295, 259P1079; 152Wash205, 277P447 (appellant recovering a more favorable judgment than below).

251-57 16F(2d)598; Mo 274SW397; TexCivA 22SW(2d)1091; 154Wash541, 282P847.

251-58 43 Ida64, 249P254; 123 Or469, 260P1099; 124 Or569, 265P1117.

251-59 20F(2d)1; 144Wash195, 257P 395; 144Wash185, 257P624; Wis 230 NW66.

251-60 44 Ida237, 256P97.

251-66½-New. Where no complaint was made of the error because of which the amount of the judgment recovered by appellant was increased on appeal, costs of the appeal will be taxed against appellant. TexCivA 298SW620.

251-68 TexCivA 286SW760; 144Wash 195, 257P395.

251-69 76CalA672, 245P777; 38GaA 621, 144SE919; 243Mich423, 220NW 717; 123 Or469, 259P1064, 260P1099; TexCivA 288SW476; Can [1930] 2DomLR751.

252-70 97Fla636, 121S806; 164La971, 115S51; Sask [1929] 4DomLR750.

252-71 155Wash133, 283P1076.

252-73 See also 127 Or450, 271P741.

252-74 105WVa197, 141SE789.

252-74½-New. Reduction in amount does not entitle appellant to costs if his appeal is based on denial of any liability. 16F(2d)598.

252-74⅓-New. Where defendant appeals from the justice's judgment and upon trial anew in the circuit court contests plaintiff's entire claim, plaintiff is entitled to costs in both courts, although recovery in the circuit court is greatly less than in the justice's court. 220MoA 582, 287SW1057.

252-79 175Ark101, 298SW1023; NJ 130A736. But see 233 IIIA522.

253-81 [a] Thus appellee is liable for appeal costs where remittitur is not filed till after appeal is perfected. TexCivA 277SW1116.

253-90 43 Ida405, 252P675; 167La262, 119S42.

253-91 Wash 290P994.

253-93 22F(2d)749 (where case came upon single record).

254-97½-New. Where cross appellant obtains substantially more favorable judgment on appeal, he is entitled to costs. 141Wash676, 252P91, 50ALR207.

254-97⅓-New. Where the result reached is practically that reached in the court below, although a slight modification is ordered, no costs will be allowed. 240Mich28, 215NW6.

254-99 TexCommnA 48SW(2d)961.

254-6 34Ariz565, 273P728; 54SD592, 223NW824; TexCivA 271SW397; Tex CivA 290SW299.

254-7 TexCivA 289SW1042; TexCivA 290SW299; TexCivA 24SW(2d)796. But see TexCivA 291SW287.

254-8 30Ariz197, 245P354. [a] **Costs on affirmance** disallowed where ground of affirmance was not raised below. 7 F(2d)308.

254-9 13LaA120, 125S296; 81Mont170, 261P962; TexCommnA 1SW(2d)594; TexCivA 291SW287; TexCivA 294SW 317; TexCivA 297SW888; TexCivA 298 SW303; TexCivA 5SW(2d)567; Tex CivA 6SW(2d)173; TexCivA 24SW(2d) 1113; TexCivA 29SW(2d)816; Tex CivA 30SW(2d)501; 195Wis64, 217NW 702; Sask [1930] 1DomLR907. [a] (5) Dismissal of alternative demand as of nonsuit on appeal where plaintiff has taken voluntary nonsuit at trial. 7LaA 628.

255-11 80Mont480, 261P273; SD 230 NW28(1stcase).

255-14 170La389, 127S878 (failure to amend error by application for new trial).

255-15½-New. [§ 632a] 3½. **Delay in Filing Brief.** For failure to file a brief in time, costs taxable are those incurred between the time of appeal and filing the brief. 224Ky200, 5SW(2d)1042.

255-16 84Colo 445, 271P177; TexCivA 297SW592.

255-18 131 Or327, 283P15 (not chargeable against appellee); 284Pa369, 131 A276; TexCivA 280SW916; 100Vt112, 135A715. [c] 235Mich191, 209NW102. [f] **Nonobservance of rules as to arrangement of transcript and indexing of record.**-79Mont256, 255P1058. [g] **Successful appellant** not complying with index rule is not allowed costs on appeal. SD 232NW17.

256-20 205 Iowa156, 217NW829 (as to costs in court below); 227Ky634, 13SW (2d)782; 156Md552, 144A703. [d] **Appellee procuring reargument,** thereby confesses error and warrants assessment of costs against him. 84Colo 174, 269P574.

256-20½-New. Where appellant incurred expense by reason of ineffective stipulation with appellee for order extending time to settle bill of exceptions, supreme court on granting appellee's motion to dismiss writ of error for want of jurisdiction will award costs of appellate court to appellant. 233 Mich283, 206NW308.

256-21 276US305, 48SCt317, 72L ed 584; 244Mich653, 222NW110.

256-21½-New. On appeal in equity, where the party seeking relief did not offer to do equity, he will be awarded no costs, although the decree below dismissing his bill is reversed and he is required to do equity. 241Mich46, 216 NW448.

256-21⅓-New. Each party to an action for collision of automobiles through the fault of both will be required to pay half of the costs in both courts. 11LaA 39, 122S727(2dcase).

256-22 115 Or562, 237P690, 239P193 (failure to file cost bill). [a] (2) Where appellee by stipulation extended time for settlement of bill of exceptions and waived irregularities, and his motion to dismiss for lack of jurisdiction of appellate court because no order granting extension of time was made till record and appellant's brief were printed, appellate court in granting motion will award costs to appellant including cost of such printing. 231Mich634, 204NW749.

256-23½-New. [§ 638b] (11) **Failure To Comply with Rules as to Argument.** Costs will not be taxed in favor of appellee where he fails to comply with supreme court rules in matter of argument. 202 Iowa259, 209NW273.

256-23⅓-New. [§ 638c] 12. **Briefs Unnecessarily Long.** No costs should be taxed for either party where the briefs of both are unnecessarily long. 52SD 387, 217NW676.

256-25 TexCivA 16SW(2d)926. [b] **Purchaser at foreclosure sale.**-Mortgagee awarded costs on appeal from order denying motion to set aside sale is entitled to judgment against all adverse parties including purchaser. Ida 290 P402. [d] **Corporation being nominal appellant,** costs are taxable against directors and stockholders who were real appellants. Md 149A556.

257-35 169La914, 126S422.

257-39½-New. Parties prosecuting joint appeal are presumed to share equally in expenses thereof. TexCivA 283SW 189.

257-40 48Nev286, 229P1098, 232P1082, 235P1117.

257-43 [c] **Where three separate appeals** were printed in one record, disbursements should be taxed one third to each appeal. 217AppDiv753, 216NYS 418.

257-44½-New. Where plaintiff was found entitled to nominal damages, an appeal from judgment for defendant on a directed verdict will be modified to order each party to pay his own costs on appeal. 36Wyo 166, 253P862.

257-44½-New. The supreme court has authority to apportion the costs as justice requires. 217Ala75, 114S680.

257-44¼-New. Where equal portions of the testimony show that the judgment should be reversed in part and affirmed in part, costs other than printing briefs will be apportioned equally. 78CalA145, 248P983.

257-44⅓-New. Costs should be divided equally where both parties' applications for writs of error were granted and both sustained in different respects. Tex CommnA 16SW(2d)519(1stcase).

257-44¼-New. Where satisfaction of erroneous judgment for attorney's fees was made of record after the appeal was perfected, there should be apportionment of costs in the appellate court. Iowa 227NW584(1stcase).

257-44½-New. In suit for partnership settlement, appellant secured reversal as to only two small items, costs should be apportioned on appeal. Miss 126S842 (4thcase).

257-44¼-New. Apportioning costs of appeal is vested in discretion of Supreme Court. Miss 130S152.

258-53 [b] **Order 57, rule 13,** referring to security for costs on stay of execution pending appeal, does not authorize ordering of security for costs on appeal. NS [1929] 1DomLR61.

258-55 [b] **In Saskatchewan.**-[1930] 2 DomLR253.

258-59 [e] **In New Brunswick.**-[1928] 1DomLR295(2dcase).

258-67 68CalA752, 230P196.

258-70 264Mass230, 162NE340; 132 Misc723, 230NYS554.

259-77 264Mass230, 162NE340. But see 166La1028, 118S122 (on transfer of case). [a] **Certification.**-Ida 290P402.

259-79 281US1, 50SCt194, 74L ed659.

260-90 32PortoRico 224 (construing judgment of circuit court of appeals, first circuit).

260-92½-New. of Massachusetts, 264 Mass230, 162NE340.

260-94 32PortoRico 224 ("without special imposition of costs" refers to costs in lower court, not in supreme court, statute not allowing any in latter).

260-95 241NY505, 150NE530.

260-98 [c] **Order of appellate division, affirmed by court of appeals, which reversed "with costs"** order of special term and granted judgment to defendant on pleadings and dismissed complaint is final judgment within Civil Practice Act for purpose of taxing costs on appeal. 126Misc792, 215NYS602.

260-2½-New. A reversal with costs and costs on appeal is presumed a personal charge against defendant. 132Misc723, 230NYS554.

260-5 136Misc305, 241NYS79.

261-6 136Misc305, 241NYS79. [b] Contra 217AppDiv477, 216NYS778 (holding rule laid down in Peo. v. Greene and Snyder v. Collins not applicable since passage of Civ. Pract. Act § 1489 [Code Civ. Proc. § 3237] and that event contemplated means success on merits or retrial).

262-17½-New. Where costs of appeal

are awarded to appellant to abide the event of a new trial, the "event" referred to is not his success in obtaining favorable exercise of the trial judge in awarding him costs, upon the retrial, but whether or not he obtains judgment in his favor or the merits. 217**App Div**477, 216**NYS**778.

262-19 [b] **Filing of cost bill** on reversal of judgment and award of costs to appellant has effect of entry of judgment for amount thereof upon which execution may issue. 74**Mont**355, 240**P**667.

262-23½-New. In some jurisdictions the filing of a cost bill in the district court upon a remittitur from the supreme court has the effect of the entry of a judgment for the amount of the award in favor of the prevailing party. 74**Mont**355, 240**P**667.

262-23¼-New. In some jurisdictions the appellate court has no jurisdiction to tax costs which accrued in the trial court. 170**Ark**859, 281**SW**661.

262-23¼-New. Jurisdiction to tax or retax costs of the stenographer at the trial is in the trial court and not in the appellate court. 170**Ark**859, 281**SW**661.

262-23½-New. Costs for the sum paid to a court reporter for a transcript of the trial court proceedings should be taxed in the supreme court and not in the circuit court. 198**Wis**496, 224**NW**705.

262-24 91**CalA**26, 266**P**597; **Tex CommnA** 276**SW**899; 49**Nev**310, 246**P**1. [f] **In case several parties appeal,** one may recover costs for all. 48**Nev** 274, 229**P**1095, 232**P**1081. [g] **In Kentucky.**–214**Ky**234, 283**SW**1012. [h] **Motion to tax costs of printing abstract filed at term rehearing was denied** is timely, although opinion on appeal was handed down at previous term. **MoA** 24 **SW(2d)**696.

262-28½-New. An affidavit has been held sufficient, as to cost of typing and printing, which stated that the items were correct and were necessarily incurred, although it was not stated in so many words that they were "actual" costs. 49**Nev**310, 246**P**1.

263-29 69**CalA**509, 231**P**571 (technical error in affidavit held not to necessitate striking bill of costs from files). [a] **Sufficiency of affidavit.**–48**Nev**60, 227**P**320.

263-33½-New. Failure to object and use of papers objected to held to waive alleged error in taxation. 50**Nev**191, 257**P**1.

263-34 [a] **Where amount allowable without filing cost bill** even when it is filed late taxation should be allowed. **Wash** 293**P**287.

263-37½-New. In the absence of an application for an order eliminating unnecessary matter from appellant's abstract, the clerk may overrule an objection to taxation of costs on the ground that the amount allowed for printing the abstract is excessive. 52**SD**391, 217 **NW**678.

263-37¼-New. A court rule depriving a party of an allowance of costs for unnecessary portions of his brief does not require the objecting party to have the unnecessary portion stricken before objecting to the allowance of such unnecessary costs. 52**SD**391, 217**NW**678.

263-39 [a] **Whether portions of abstract are unnecessary** should be determined by appellate court on appeal from clerk's taxation of costs. 52**SD** 391, 217**NW**678.

263-40 [b] **Before issuing mandate** court may exercise discretion to strike improper items. **TexCivA** 13**SW(2d)** 908.

263-41 [a] (3) Supreme court, on motion to retax costs after reversal and remand, may adjudicate as to item of costs for statement of facts awarded in court below. **TexCommnA** 5**SW(2d)**767.

263-45½-New. Failure to show specifically count of typed folios claimed overtaxed held to preclude correction. 50 **Nev**191, 257**P**1.

263-45¼-New. In Saskatchewan where judgment is reversed with costs on one issue right to costs on another issue cannot be determined on appeal from taxation. **Sask** [1930] 2**DomLR**160.

264-49 [b] **Motion to correct judgment as to costs** is suggestion of error and must be filed within time allowed by court rule for filing suggestions of error. 154**Miss**611, 122**S**537.

264-52½-New. A motion to have costs of appeal retaxed should be denied when not seasonably made. 170**Ark**859, 281 **SW**661.

264-52⅓-New. The supreme court could not hear a motion to retax costs where the aid of the court of civil appeals was not first invoked. **TexCommnA** 299**SW** 640.

264-52¼-New. The court will presume on motion to retax that the transcript of the evidence in narrative form and the statement of facts are one and the same thing where the contrary is not shown. **TexCommnA** 7**SW(2d)**65.

264-53 136**Misc**305, 241**NYS**79; **Sask** [1930] 3**DomLR**987. [b] **In California.**–(1) 84**A**237, 257**P**906.

264-54 140**Miss**336, 105**S**637; **BC** [1928] 1**DomLR**462.

764-58 281**US**1, 50**SCt**194, 74**L ed**659 (purpose authorizing an inclusion of attorney's fee in excess of statutory amount should be clearly expressed in decree of federal equity court). [a] **In Manitoba.**–[1929] 2**DomLR**703.

264-61 84**CalA**237, 257**P**906. [a] (2) Premium of surety bond given to stay execution of judgment is not recoverable. 84**CalA**237, 257**P**906.

264-63 76**CalA**52, 243**P**676; 198**Wis** 496, 224**NW**705.

265-65 But see 198**Wis**496, 224**NW**705.

265-67 But see 136**Misc**305, 241**NYS**79.

265-68 222**AppDiv**680, 225**NYS**52.

265-74 32**Ariz**135, 256**P**507; 37**GaA** 234, 139**SE**685; 245 **IllA**153; 147**Miss** 211, 113**S**325; 78**Mont**485, 257**P**406; 146 **Wash**361, 263**P**188 (where respondent did not appeal from order claimed as objectionable). [a] (9) Where party used transcript in another case and was at no expense, he cannot include transcript in costs. 48**Nev**274, 229**P**1095, 232 **P**1082.

266-75 **NM** 289**P**596.

266-77 26**F(2d)**563; 33**F(2d)**70; 107 **Conn**32, 139**A**348; 236**Mich**351, 210**NW** 300; 147**Miss**211, 113**S**325; 194**NC**580, 140**SE**212; 144**SC**41, 142**SE**801. See also 166**La**1028, 118**S**122.

267-81 200 **Iowa**1217, 206**NW**110, 42 **ALR**1158.

267-82 24**F(2d)**491.

268-92 166**La**1028, 118**S**122.

268-10 [c] **Cost of printing opinion of trial judge as brief for respondent** will not be allowed where it is also printed in case. 197**Wis**578, 222**NW**809.

269-20 208 **Iowa**300, 225**NW**419; 247 **Mich**267, 225**NW**511; 247**Mich**210, 225 **NW**565; 200**Wis**208, 227**NW**879; **Wis** 230**NW**141. [a] (9) 206 **Iowa**655, 221 **NW**360.

270-25 See also 221**MoA**1173, 300**SW** 997. But see 29**Hawaii**853.

270-30 238**Mich**186, 213**NW**124.

270-31 **Iowa** 230**NW**519 (correspondence not part of record should not be abstracted).

270-31½-New. or not allowed, although party incurring them prevails. 237**Mich** 371, 211**NW**738.

270-33 207 **Iowa**95, 222**NW**401; 170 **Minn**83, 212**NW**25.

271-36 76**CalA**52, 243**P**676. [a] 201**Cal** 438, 257**P**521 (portion of record required to be printed in brief or in supplement appended thereto cannot be taxed separately where it was in brief for which taxation has been allowed). [c] 122 **Or**179, 257**P**701. [e] **In Michigan.**–238**Mich**186, 213**NW**124.

271-37 125**Misc**561, 211**NYS**588 (reasonable expenses). [a] **In New York.**–125**Misc**561, 211**NYS**588.

271-43 205 **Iowa**573, 218**NW**278; **Wis** 229**NW**633(1stcase); **Wis** 229**NW**643 (1stcase); **Wis** 229**NW**657; **Wis** 230**NW** 81(1stcase).

271-48 41 **Ida**538, 240**P**600 (though motion to strike brief was denied); 46 **Ida** 326, 268**P**6; 46 **Ida**780, 271**P**462; 47 **Ida** 115, 273**P**6(1stcase). [a] **On affirmance, respondent not filing brief within time** provided by rule of court will not be allowed cost of printing it. 46 **Ida**74, 266, **P**421.

271-49 But see 41 **Ida**511, 239**P**1049.

271-49½-New. No costs will be allowed for a brief intentionally misleading. 195 **Wis**19, 216**NW**522.

271-50 202 **Iowa**1396, 212**NW**142; 168 **Minn**165, 209**NW**871; 52**SD**391, 217**NW** 678; 54**SD**325, 223**NW**208; **SD** 226**NW** 267 (evidence in question and answer form); 146**Wash**361, 263**P**188.

272-63½-New. Under some court rules the amount allowed for printing briefs is limited to a maximum of a dollar and a quarter a page unless, for special reasons apparent from the record, it is otherwise ordered. 117 **Or**231, 243**P**76.

272-63⅓-New. The mere fact that appellant was charged more by the printer is not sufficient reason for allowing larger amount than that fixed by the rule. 117 **Or**231, 243**P**76.

273-64 40**F(2d)**988; 292**Pa**422, 141**A** 239 (omissions from transcript).

273-68 See also **Utah** 265**P**751.

273-71 **Or** 284**P**837; 89**PaSuper**69; 68 **Utah**21, 249**P**118. [a] (4) See also 202 **Iowa**1396, 212**NW**142.

274-80 281**US**1, 50**SCt**194, 74**L ed**659; 200 **Iowa**873, 205**NW**502; 33**NM**78, 260 **P**1086 (holding allowance matter for trial court); 115 **Or**562, 237**P**690, 239**P** 193; 32**PortoRico** 224.

274-82 178**Minn**432, 227**NW**430(2d case); 145**Miss**767, 111**S**357.

275-87½-New. Where judgment dismissing complaint is reversed for new trial, application for attorney's fees must be made to trial court on new trial. 16 **F(2d)**17.

276-3 86**CalA**106, 260**P**310; 48**Nev**108, 227**P**1018, 233**P**844, 236**P**1101; 114**Tex** 490, 271**SW**1108; **TexCommnA** 276**SW** 899; **TexCommnA** 5**SW(2d)**767; **Tex CommnA** 7**SW(2d)**65 (rate per hundred words); **TexCommnA** 9**SW(2d)**1105. [f] (3) **TexCommnA** 276**SW**899. (4) Cost of preparing statement of facts cannot be taxed. **TexCommnA** 276**SW** 899. (5) Clerk of court of civil appeals should collect as part of costs stenographer's fee for narrative statement of facts. **TexCivA** 273**SW**978. (6) Appellant is entitled to tax as costs stenographer's fee for statement of facts. **TexCivA** 273**SW**978. (7) Clerk of trial court should include in bill of costs stenographer's fee for statement of facts in narrative form. **TexCivA** 273**SW**978. [g] **In California.**–71**CalA**352, 235**P**66.

276-4 **Mass** 170**NE**385. [b] **Expense not shown to have been incurred.**–**Tex CommnA** 298**SW**548. [c] **In Missouri.**–**A** 279**SW**432.

276-5 126 **Or**250, 269**P**490.

276-12 166**La**1028, 118**S**122.

277-14 120 **Or**134, 251**P**761.

277-20½-New. Where a motion for diminution of the record was not necessary for review of the questions involved, costs incident thereto are taxed to the mover. 24**F(2d)**606.

278-42 126**Misc**37, 212**NYS**376 (premium paid on undertaking to stay execution on judgment subsequently reversed); 222**AppDiv**680, 225**NYS**52.

278-43 136**Misc**305, 241**NYS**79; 122 **Or** 360, 258**P**823.

278-46 122 **Or**360, 258**P**823.

278-57½-New. The clerk's bill may be reduced where he fails to index the transcript as required by court rule. 223 **Ky**574, 4**SW(2d)**385.

279-63 [b] **Expense of storing automobile** pending appeal is not allowable as costs. 69**CalA**509, 231**P**571.

279-76 241**NY**505, 150**NE**530.

280-82½-New. Where two remittiturs are handed down relating to same judgment, and are identical, defendant is not entitled to judgment on both. 241**NY** 505, 150**NE**530 (where plaintiff brought two appeals on separate records).

280-91 **Wis** 233**NW**98 (double costs allowed on appeal).

280-96 155**Miss**351, 121**S**817.

280-98 147**Miss**885, 114**S**127. [a] **Law strictly construed.**–147**Miss**885, 114**S**127.

281-2 144**Miss**384, 109**S**859, 111**S**434.

281-3 233**Ky**521, 26**SW(2d)**36.

281-8 1**LaA**15; **TexCivA** 285**SW**695; **Wis** 230**NW**86.

281-9 278**US**191, 49**SCt**160, 73**L ed**259;

7F(2d)613; 16F(2d)111; 31F(2d)437; 31Ariz386, 253P899; 202Cal764, 262P307; 70CalA458, 233P415; 71CalA155, 234P910; 79CalA611, 250P699; 90CalA722, 266P549; 90CalA622, 266P554; 91CalA257, 267P320; 102CalA136, 282P539; 35GaA236, 133SE519; 36GaA467, 137SE131; 41GaA565, 153SE778(2d case); 41GaA462, 153SE781; 87IndA368, 158NE250; 87IndA672, 162NE414; 9LaA70, 118S839; 1LaA316; 1LaA563; 3LaA263; 3LaA446; 258Mass525, 155NE635; 116Or136, 240P890; 132Or619, 287P219; 51SD117, 212NW496; TexCivA 287SW1118; TexCivA 16SW(2d)331(1stcase); 36Wyo245, 254P127. [b] (2) Under Mississippi statute, where county court awarded sum of money to claimant in garnishment proceeding and judgment was affirmed in circuit court, supreme court, on affirming judgment, should award statutory damages. 149Miss814, 116S739. [f] **Demand for damages** can be requested only in answer to appeal under code. 161La728, 109S403. [g] **Statute imposing penalty is mandatory.**–Miss 130S152.

282–11 29Ariz285, 240P1033; 203Cal411, 264P752; 205Cal590, 271P1070; 35GaA569, 134SE346; 36GaA527, 137SE127; 38GaA681, 145SE470(1stcase); 40GaA499, 150SE431(1stcase); 40GaA495, 150SE569(1stcase) (both holding damages denied); 159La560, 105S620 (where not manifest that appeal was taken merely for delay, damages will not be awarded); 164La278, 113S847; 12LaA553, 125S886; MoA 293SW77 (held not vexatious). See also 36GaA80, 135SE318. [b] (1) 10LaA337, 119S573(2d case). (2) 9LaA403, 120S496. (3) Where it is not certain that appellants did not believe in merits of defense, damages will not be awarded. 159La560, 105S620.

283–13 36GaA80, 135SE318.

283–18½–New. Damages for a frivolous appeal cannot be made on motion to dismiss the appeal, but can only be requested in answer to appeal. 161La728, 109S403.

283–18¼–New. A penalty for a frivolous appeal is not recoverable where the judgment bears eight per cent interest and fifteen per cent attorney's fees. 9LaA220, 120S131.

283–18¼–New. In an action which is purely petitory damages for a frivolous appeal cannot be allowed. 170La8, 127S347(1stcase).

283–19 37F(2d)234; 29Ariz198, 240P341; 205Cal26, 269P626; 79CalA611, 250P699; 40GaA140, 148SE920(1st case); 10LaA63, 120S407(2dcase); 7LaA736; 51SD117, 212NW496; TexCivA 1SW(2d)501; TexCivA 5SW(2d)777; Wis 230NW86. See also 37Wyo329, 261P121.

283–22 9LaA12, 118S769(1stcase); 6LaA112. See also 9LaA361, 120S510.

283–24 31Ariz128, 250P885; 6LaA112; 8LaA190.

283–26 278US188, 49SCt158, 73Led258.

283–29½–New. where brief and record are presented from which appellate court cannot determine whether trial court erred; 30Ariz25, 243P611.

283–30 See also 219Ala123, 121S412.

283–33 16F(2d)111; 37Wyo329, 261P121.

283–34 205Cal202, 270P451; 206Cal3, 272P1057; 101CalA530, 281P1035; 10LaA5, 119S451(1stcase). [a] (6) Proceeding in error by defendant, based on failure of petition to allege execution and delivery of note which was plainly unnecessary, held without reasonable cause. 36Wyo245, 254P127.

284–35 204Cal334, 267P1087; 13LaA1, 126S741.

285–38 169La620, 125S735.

285–39 La 129S731; 135Misc327, 238NYS204. See also 169La731, 125S871.

285–41 36GaA683, 137SE906.

285–43½–New. Other appeals not considered frivolous. 160La371, 107S143; 161La713, 109S398; 161La728, 109S403.

285–43¼–New. Appeal from an interlocutory order is not subject to taxation of costs on affirmance. 147Miss885, 114S127.

285–43¼–New. Where appellant abandons appeal from order terminating proceedings to procure transcript which is found no penalty for frivolous appeal is authorized. 102CalA548, 283P125(1st case).

285–44 83CalA670, 257P454; 95CalA113, 272P331; 166Ga737, 144SE319(1st case); 33GaA673, 127SE671; 37GaA147, 139SE126; GaA 155SE770(1stcase); 236IllA227; 158La386, 104S124; 159La560, 105S620; 164La278, 113S847; 167La243, 119S35; 10LaA308, 121S370; 170La504, 128S291; 11LaA22, 122S143; 2LaA539; 7LaA117; MoA 291SW145; MoA 16SW(2d)687(2dcase); MoA 16SW(2d)712; 33NM245, 264P951; 39Wyo372, 271P876.

285–47 [b] (2) 34GaA227, 129SE13.

285–48 39GaA688, 148SE287(2dcase) (request of damages denied); 41GaA607, 154SE212(1stcase).

285–50 34GaA129, 128SE691(2dcase); 34GaA138, 128SE691(1stcase) (both holding court not satisfied); 37GaA148, 139SE129 (denied where court was not convinced); 41GaA536, 153SE784(1st case).

286–53½–New. Appeal has been held not frivolous which involved question never directly decided by highest court of the state. 158La386, 104S124.

286–56 6LaA112; 147Miss885, 114S127.

286–59½–New. There is no want of prosecution where the appeal was dismissed because of an error of the clerk in approving the bond. 332Ill89, 163NE390.

286–60 [b] **In Kentucky.**–233Ky521, 26SW(2d)36.

286–64 TexCivA 1SW(2d)759 [citCJ].

286–69 11LaA206, 123S502(1stcase); 13LaA436, 128S304(1stcase). But see 83CalA670, 257P454.

287–73½–New. abstract, 31Ariz128, 250P885.

287–76½–New. Where appellee is required to set out parts of record which appellant intentionally omitted, costs may be taxed against appellant. IndA157NE7.

287–77 214Ky682, 283SW1012. But see 220Ala344, 125S217. [b] **Repeated appeals.**–224Ky107, 5SW(2d)893.

287–78 224Ky107, 5SW(2d)893 (dismissal for failure to file transcript). [a] **Where appeal was granted without authority or supersedeas was executed when there was no right to take it,** no damages will be allowed on dismissal. 224Ky107, 5SW(2d)893.

287–79 224Ky107, 5SW(2d)893.

287–85 214Ky682, 283SW1012.

288–90 233IllA69; 164La739, 114S637; 167La705, 120S58. [a] (20) From judgments for possession of property. 233IllA69.

288–94 2LaA533; 2LaA535; 4LaA207.

288–95 170La712, 129S139(1stcase).

289–98 10LaA351, 119S573(1stcase).

289–99 9LaA697, 120S69(1stcase).

289–12 [b] **In South Dakota** ten per cent of judgment is allowed. 51SD117, 212NW496.

289–13 29Ariz198, 240P341 (five per cent allowed); 31Ariz386, 253P899.

289–16 8LaA134. See also 8LaA154.

289–20½–New. Where the appellate court is not fully convinced that the appeal was for delay, damages are not recoverable. 40GaA149, 148SE919(2d case).

290–26½–New. Defendant is not relieved from liability of penalty for a frivolous appeal by the fact that plaintiff released attachment liens after defendant's default in completing appeal record. 31Ariz128, 250P885.

292–32 TexCivA 299SW516.

293–90½–New. In North Carolina, on appeal from judgment of justice of peace, where plaintiff's claim was for money demand and counterclaim was of the same kind, plaintiff, having recovered final judgment for difference in demands, was entitled to entire costs. 192NC538, 135SE458.

295–28½–New. It is error to tax defendant on appeal cost occasioned by constable's refusal to obey supersedeas writ when served. TexCivA 258SW(2d)887.

295–33 227AppDiv116, 237NYS131.

297–55½–New. Successful party on new trial may recover costs of former trial. 76Mont288, 246P536.

297–55⅓–New. Plaintiff moving for new trial because of inadequacy of verdict and successful in new trial may recover costs of former trial. 76Mont288, 246P536.

297–55¼–New. But where such plaintiff does not recover more on second trial than on first, the court may deny costs of the first trial. 76Mont288, 246P536.

297–55⅓–New. In New Jersey costs of former trial abide event of a new trial. NJSup 132A92.

297–56 [c] (2) Costs are not allowed on granting new trial for jury's misapprehension of evidence and disregard of instructions. 130Misc644, 224NYS587.

297–63 TexCivA 13SW(2d)908.

298–69 NJSup 132A92.

298–75 47RI487, 134A22.

298–78 19F(2d)693.

298–82 47RI487, 134A22.

298–86 47RI487, 134A22.

299–6 [b] **Contempt proceedings.**–Part of judgment adjudging defendant guilty of contempt, which required defendant to serve time in county jail if costs are not paid, is void, under Utah statute. Utah 275P9.

300–26 214Ala120, 106S798; NC 153SE845 (statute requiring payment of costs before commencement of new suit is mandatory and burden is on plaintiff to show payment). [a] 217Ala210, 115S244 (holding that good cause was shown not abuse of discretion).

300–27 See also 129Kan19, 281P925, 68ALR415; 229AppDiv152, 241NYS109.

302–41 Man [1927] 1DomLR898, [1927] 1WestWkly85.

302–49 149Md374, 131A766; 134Misc41, 234NYS380; 155SC234, 152SE430; Man [1927] 3DomLR497.

303–68½–New. Authority to stay appeal does not extend to a suit on the appeal bond after affirmance, and an order staying proceedings for nonpayment of costs does not prevent prosecution of such suit. 149Md374, 131A766.

303–68⅓–New. The court may not make trial of plaintiff's case dependent on satisfying of rule for costs against one made a party at instance of original defendant where plaintiff has fully satisfied rule of costs entered against her. TexCivA 16SW(2d)858.

303–69 Ala 130S206.

307–10 214Ala120, 106S798.

308–33 223AppDiv60, 227NYS245.

308–38 [a] **Failure to pay motion costs** did not take away right of court to determine that stay resulting from failure to pay costs terminated upon tender in cash to plaintiff's attorney. 133Misc901, 235NYS6.

308–39½–New. Where all proceedings on the part of plaintiff were stayed until payment of costs is fixed in the order, plaintiff's motion for leave to amend the complaint was held premature. 134Misc9, 234NYS659.

309–50 137Misc642, 244NYS207.

309–63½–New. Statute is inapplicable to costs of judgment. 137Misc642, 244NYS207.

310–72½–New. Trial of action after affirmance of order denying judgment on pleadings may constitute waiver. 137Misc642, 244NYS207.

310–76 124Kan15, 17, 257P953 [citCJ]; 75Mont122, 242P421 (in mandamus proceeding).

310–76½–New. On filing of a cost bill upon a remittitur some statutes authorize the issuance of an execution thereon. 74Mont355, 240P667.

310–77½–New. In some jurisdictions costs of appeal may be enforced at any time by execution issued by the clerk of the appellate court, although the mandate is not filed in the lower court within one year. 170Ark859, 281SW661.

311–94½–New. On reversal of judgment in favor of claimant, in claim proceeding, execution for costs on appeal issued against claimant and sureties on forthcoming bond, that judgment on remittitur included sureties as liable with claimant for costs, did not render judgment and execution illegal as to claimant. 36GaA45, 135SE222.

311–95 [a] **Filing of cost bill on reversal of judgment and award of costs** has effect of entry of judgment for amount thereof upon which execution may issue. 74Mont355, 240P667.

312–5 [a] **Thus in New York** (1) motion costs are collectable by execution

against personal property only. 214App Div292, 212NYS381. (2) But this is limited strictly to such costs of motion as does not authorize entry of judgment thereon. 214AppDiv292, 212NYS381.

312-8 221MoA64, 290SW103 (statute construed not to authorize caplas execution).

313-39½-New. Levy for costs of appeal issued in name of plaintiff for use of court officers is not subject to arrest by affidavit of illegality because costs were advanced by plaintiff's attorney. 36GaA 45, 135SE222.

316-88 134Misc834, 243NYS728.

316-89 137Misc834, 243NYS728.

317-10 [a] In British Columbia.-[1928] 2DomLR560.

318-20 245Mich310, 222NW698; 5Pa Dist&Co 67; 9PaDist&Co 358.

318-21 5PaDist&Co 67.

318-35 [c] Want of jurisdiction.-12Pa Dist&Co 163.

319-45 [a] Justice of peace in misdemeanor case may tax costs in absence of objection. 225Ky135, 7SW(2d)836.

319-46 112TexCr182, 15SW(2d)1039 (defendant indicted for felony and convicted of misdemeanor).

320-56 14F(2d)755.

320-65 14F(2d)755.

320-67 NB [1927] 3DomLR826.

321-74 9PaDist&Co 22.

322-86 98PaSuper595; 12PaDist&Co 488.

323-21½-New. No appeal lies by a prosecuting witness taxed with costs in a justice's court for instituting a prosecution without reasonable cause. 143 Miss777, 109S740.

324-28½-New. Court cannot set aside verdict in misdemeanor case imposing costs on private prosecutor. 12PaDist &Co 432 (private policeman of corporation).

324-30 11PaDist&Co 140.

324-41 203 Iowa567, 213NW258 [cit CJ].

325-44 233 IlA483.

326-69 [a] Costs paid by county or else entry of nolle pros. is conditioned on defendant's payment. 13PaDist&Co 500.

328-95 But see 40Wyo 144, 275P102.

328-96 [b] Rule of court cannot be basis for taxing sovereign for costs in absence of statute. 275US70, 48SCt97, 71L ed168.

328-97 157Tenn528, 12SW(2d)388. [d] Costs may be imposed against state in litigation arising out of criminal prosecution to test validity of state statute. 275US70, 48SCt97, 71L ed168 (Jud. Code § 254).

330-26 [a] In Georgia.-162Ga42, 132 SE417.

330-27 [b] Costs awarded against defendant on acquittal do not include: (1) Expenses of detective service. 13 PaDist&Co 254. (2) Expenses of chemical examination of liquor used as evidence. 13PaDist&Co 254. (3) District attorney's expenses in connection with investigation and apprehension. 13Pa Dist&Co 254.

330-28 [a] (3) Clerk of federal district court cannot exact fee on oral entry of plea of not guilty. 7F(2d)255.

330-30 See also 245Mich310, 222NW 698.

330-30½-New. Costs imposed must bear a true relation to the expense of the prosecution. 247Mich672, 226NW 671.

330-45½-New. In a prosecution for possessing liquor, the expense of transporting a barrel of liquor to the place of trial is properly placed on defendant. 35F(2d)941. Additional costs accruing because of convicted person's default in paying "fine and cost bond" is properly taxable against him. Fla 130 S715.

332-80½-New. Judgment for "costs" on new trial after reversal by appellate court includes all costs of prosecution, including those of first trial. 21AlaA 310, 107S789.

332-83 101WVa157, 132SE200 [citCJ].

332-90 Wash 293P287.

333-92 See also 292Pa395, 141A289.

333-96½-New. On appeal from a conviction in the mayor's court, judgment for costs cannot be rendered without trial or adjudication of guilt, and in defendant's absence. 23AlaA17, 121S 436(2dcase) [certiorari den 121S437(1st case)].

333-96¼-New. The circuit court, in dismissing an appeal from a justice of the peace for want of an appeal bond, had jurisdiction to render judgment for costs against defendant. 157Tenn532, 11SW(2d)854.

333-7½-New. In imposing costs the jury may look beyond the name of the prosecutor indorsed in the indictment and impose costs on the actual prosecutor. 91PaSuper582.

333-7¾-New. It is not an abuse of discretion for the court to refuse to remit costs imposed by the jury on the prosecutor, where the evidence shows that he acted in bad faith from improper motives, and for gain. 91PaSuper582.

334-8 5PaDist&Co 67.

335-36 [b] In Oregon (1) county is liable for costs on appeal to supreme court as in case of natural persons, on reversal of judgment of lower court. 120 Or134, 249P1045, 251P761. (2) Such costs are payable in first instance by county from which appeal taken. 120 Or134, 249P1045, 251P761. [c] Amounts taxable.-120 Or134, 249P1045, 251P761.

335-39 120 Or297, 249P1098, 251P763, 252P84. See also 294Pa495, 144A428.

335-40½-New. No filing fee can be taxed where none is exacted from defendant. 120 Or297, 249P1098, 251P 763, 252P84.

337-78 [a] (2) In Wyoming, reasonable allowance for assistant to prosecuting attorney appointed under district court is recoverable from county in which indictment was found or information was filed. 40Wyo 144, 275P102. (3) Ex parte order fixing fee of such attorney, made by district court of county to which venue had been changed does not conclusively establish liability for such fee of county in which prosecution was commenced, but was only prima facie correct, and latter county should have opportunity to contest reasonableness of amount thereof. 40Wyo 144, 275P102.

338-9 318Mo 663, 300SW673.

339-36 But see 197NC627, 150SE113 (2dcase).

340-40 11PaDist&Co 207.

340-45 [c] 245Mich310, 222NW698.

341-53½-New. Exceptions to bill of costs not considered in absence of taxation by clerk. 5PaDist&Co 640.

341-64½-New. Under statutes in some jurisdictions costs on appeal are required to be taxed in the appellate court. 120 Or134, 251P761.

341-64¼-New. In some jurisdictions a cost bill tendered during the same term of court in which decision was rendered is tendered in time. 120 Or297, 252P84.

342-79 21AlaA310, 107S789.

342-86½-New. After term clerk's error in interest or costs may be remedied, but if the action of the clerk is approved of by the court, it is beyond recall. 275US70, 48SCt97, 71L ed168.

342-86¼-New. The United States supreme court has no jurisdiction after term of judgment as to costs, where the justice writing the opinion approved such judgment. 275US70, 48SCt97, 71 L ed168 (Sup. Ct. Rules, rule 29 § 3 and rule 30).

342-89 See also 112TexCr19, 13SW (2d)855 (payment enforceable only under execution where defendant convicted of felony and fine imposed).

343-96 196NC438, 146SE73. [a] In Minnesota.-164Minn289, 204NW955.

343-97 See also Fla 129S106(1stcase); 112TexCr19, 13SW(2d)855(3dcase).

343-98 202 Iowa428, 210NW435; 208 Iowa867, 226NW81; 110TexCr335, 8 SW(2d)139.

343-99 Fla 130S715; TexCommnA 16 SW(2d)283. [e] (2) Defendant, prosecuted for felony and convicted of misdemeanor, cannot under Texas statutes be imprisoned one day for every dollar of costs and fees imposed. 111TexCr 426, 15SW(2d)14. (3) Defendant unable to pay fine or costs will be allowed credit of only one dollar per day in jail, though county has no poor farm. 111 TexCr431, 15SW(2d)16. (4) One sentenced to imprisonment for misdemean' or may be kept for such further time beyond term of sentence as will discharge costs at rate of dollar per day. 111TexCr431, 15SW(2d)16. [g] Where costs in county court include justice's fees contingent on conviction (1) detention for nonpayment on conviction on appeal from justice is illegal. 111 TexCr203, 13SW(2d)371. (2) Where sentence was previously suspended during good behavior court is unauthorized to render judgment imposing sentence for defendant's failure to pay costs. 196NC438, 146SE73.

344-6½-New. One adjudged to enter into a peace bond cannot be ordered imprisoned for nonpayment of costs after affirmance on appeal. 221MoA64, 290SW103.

344-6¾-New. Payment of costs in such case is governed by a statute merely directing judgment for costs against defendant upon affirmance of conviction. 221MoA64, 290SW103.

344-6¼-New. In a proceeding not strictly criminal, to authorize imprisonment for nonpayment of costs, legislative intent should clearly appear. 221 MoA64, 290SW103.

345-21 [a] 23AlaA528, 128S464(2d case).

345-24 See also 23AlaA129, 122S183 (1stcase).

345-40 193NC583, 137SE724.

347-60 175Ark388, 299SW388 (while governor may remit costs due state, he has no power to remit costs which belong to private individuals or court officers).

COTTON

350-86 [b] Other definitions.-129Kan 332, 282P757. [c] Is not "grain" under ordinary acceptation of term. 129 Kan332, 282P757.

COUNTER

354-66 215Ky394, 285SW188.

COUNTERFEITING

358-50 42F(2d)854.

360-83 Resemblance of bills is test of similitude. 44F(2d)48. [a] Plates made from photographs of original bills.-44F(2d)48.

360-91½-New. Altering a war savings certificate with stamp attached by obliterating the post office and registration number with intent to defraud constitutes the offense of altering a security of the United States. 24F(2d)392.

361-27 [b] Possession of counterfeit foreign securities is offense under federal statute. 12F(2d)631.

367-39 [a] Defect in form held not ground for holding indictment insufficient. 22F(2d)593.

367-50 [a] 8F(2d)870.

369-73 42F(2d)854.

371-29 22F(2d)593.

376-32 [a] (4) 12F(2d)631; 44F(2d) 48. (5) To warrant jury's finding attorney had no authority to indorse draft for refund of taxes. 42F(2d)854. [b] (4) 15F(2d)619.

377-56 15F(2d)619. [a] Evidence held sufficient.-12F(2d)631.

377-60 20F(2d)795 (evidence held sufficient).

377-73½-New. Sentence under a general statute relative to counterfeiting gold or silver coins of the United States held authorized under indictment. 20 F(2d)908.

COUNTERSIGN

378-21 Webster New Int. D. [quot 29 Ariz504, 243P407, 411].

COUNTIES

388-2 168Ark1108, 273SW707; 67CalA 328, 227P664; 141Miss701, 105S541; 115Nebr506, 213NW826; 252NY437, 169NE637; 194NC137, 138SE614; 194 Wis397, 216NW509. [a] (1) 217Ala 458, 116S662. (3) Counties are civil and political divisions of state created and organized for more convenient administration of government, and are invested with such powers as are essential to welfare and protection of public

within their boundaries. 190NC96, 129SE184. [b] (2) 175Ark90, 1SW(2d)554. (12) County is subdivision of state, body politic and corporate, with certain definite and fixed powers and duties. 74Mont152, 240P812. (13) County is body politic and corporate, acting through board of commissioners. 194NC137, 138SE614. (14) Other instances. Ill 172NE50.

388-3 134Wash568, 236P280.

388-5 102CalA767, 283P385; Fla 127S486(2dcase); 326 Ill 535, 158NE116, 54ALR777; 203 Iowa71, 212NW337; 205 Iowa987, 213NW528; 225Ky112, 7SW(2d)839; 240Mich584, 216NW450; 169 Minn79, 210NW626; 141Miss701, 105S541; 76Mont150, 245P962; 78Mont235, 253P1100; 115Nebr506, 213NW826; 190NC96, 129SE184 (every county a body politic); 55ND45, 212NW236, 51ALR296; 134Wash568, 236P280; 136 Wash25, 239P8; 143Wash326, 255P371, 373 [citCJ].

389-6 136Wash25, 239P8.

389-7 205Cal111, 270P201; 67CalA328, 227P664; CalA 289P678; Fla 126S308; 78Mont235, 253P1100; 191NC761, 133SE395; 191NC780, 133SE164; 39 OklACR312; 119 Or127, 248P151, 154 [citCJ].

389-7½-New. or instrumentality, 190NC96; 129SE184.

389-8 Fla 126S308; 228Ky80, 14SW(2d)398; 161Tenn236, 30SW(2d)268; 119 Or127, 248P151, 154 [citCJ]; 155 Tenn212, 292SW462; 134Wash568, 236P280; 143Wash326, 255P371.

389-9 67CalA328, 227P664; 84CalA577, 258P991; 83Colo468, 266P501; 203 Iowa71, 212NW337; 169Minn145, 210NW635; 141Miss701, 105S541; 76 Mont150, 245P962; 118 Or568, 247P815 (mere auxiliary of state government); 119 Or127, 248P151; 134Wash568, 236P280; 143Wash326, 255P371.

390-25 190NC96, 129SE184 (every county a body corporate); 194NC137, 138SE614.

391-26 [a] **In Tennessee.**-152Tenn442, 278SW71.

391-27 42 Ida738, 248P456, 49ALR1057; 326 Ill 535, 158NE116, 54ALR777.

391-30½-New. A county is a body politic and corporate. 76Mont150, 245P962.

391-31 75Mont207, 243P573.

392-33 32F(2d)868; 78Mont235, 253P1100; 51Nev114, 269P607, 609 [citCJ]; 190NC96, 129SE184; 194Wis397, 216NW509.

392-34 39 OklACR312.

393-40 141Miss701, 105S541; 134Wash568, 236P280.

393-41 134Wash568, 236P280.

395-74½-New. Generally existence of a county may be regarded as continual notwithstanding any change in officers by whom its corporate functions are to be exercised. 190NC96, 129SE184.

396-92 TexCivA 7SW(2d)648.

396-95½-New. A county cannot enter on land of another county as the proprietor unless title or right of possession has been acquired. 215Ala640, 112S243.

396-95⅓-New. A statute providing for the union of a new and an old parish in elections and requiring the latter's sheriff to furnish the former's sheriff with a list of taxpayers does not show an intent to create the former parish entirely from the latter. 164La378, 113S883.

396-97 32F(2d)130; 319Mo1085, 7SW(2d)695; 319Mo1093, 7SW(2d)698 (boundary line held not changed by avulsion).

396-3 164La378, 113S883. [a] **Common-law rule as to avulsion** held not affected by statute fixing boundary in middle of stream. 318Mo991, 2SW(2d)582.

396-4 See also 320Mo500, 8SW(2d)912.

396-5½-New. Gradual shifting of boundary line would be accomplished only where banks of river were gradually built up on one side or eroded on the other. 101NJEq572, 138A99.

396-5⅓-New. Closing main river branch naturally or artificially, as result of accretion or avulsion, does not shift boundary. 101NJEq572, 138A99.

397-9 [a] **Where county is on sea, its boundary is three miles off shore.**-136 Wash25, 239P8.

397-9½-New. A description of a boundary line as parallel with the coast refers to the general coast line regardless of bays and inlets. 200Cal235, 252P722.

397-9⅓-New. A county boundary line fixed as the middle of the main channel of a river does not change when the river suddenly abandons its course and seeks a new channel. 321Mo995, 15SW(2d)834.

397-10 215Ala640, 112S243; 34Ariz59, 267P601 (court is authorized only to determine where legislature fixed boundary line).

397-11 TexCivA 7SW(2d)648.

397-16½-New. Statute correcting illegality in establishment of boundary held valid, where boundary had been acquiesced in for many years. 116Tex277, 288SW805.

397-16⅓-New. A statute excluding lands from two counties in redefining boundaries thereof is unconstitutional. 27F(2d)410.

398-38½-New. An unauthorized survey of county lines is a subject matter of validation by statute, effective from its origin. TexCivA 7SW(2d)648.

398-40 TexCivA 4SW(2d)610 (illegal where surveyed under orders of commissioner's court instead of county court of respective counties).

398-48 TexCivA 4SW(2d)610 (adoption of surveyor's reports held insufficient).

398-48½-New. Survey of part of disputed boundary is valid where not prohibited by statute. TexCivA 4SW(2d)610.

398-49 215Ala640, 112S243, 244 [citCJ]. [b] **Court of equity in either county** has right to determine disputed question of fact regarding county boundary line. Ala 128S158. [c] **Courts of complaining county** may take jurisdiction of suit. Ala 128S158.

398-52 [b] **Usage and long acquiescence** of counties in boundary line claimed to be true boundary line becomes justiciable question. Ala 128S158.

398-54 See also 218Ala527, 119S215.

399-60 215Ala640, 112S243.

399-61 34Ariz59, 267P601; TexCivA 7SW(2d)648.

399-63 319Mo1246, 6SW(2d)594.

399-65 34Ariz59, 267P601 (statute construed).

399-68 TexCivA 7SW(2d)648.

399-69 TexCivA 7SW(2d)648.

399-69½-New. A statute adopting established boundaries validates them from the date of their establishment. TexCivA 7SW(2d)648.

399-70½-New. Under a statute constituting a certain county a separate special police district excluding cities and villages, such exclusion includes not only existing cities and villages but those subsequently coming into existence. 225AppDiv822, 232NYS477.

399-76 See also 22AlaA316, 115S291.

399-78 215Ala640, 112S243; TexCivA 7SW(2d)648. [c] **Adverse possession despite establishment.**-TexCivA 4SW(2d)610.

399-78½-New. Boundary line established by commissioners on ground and recognized for many years held true boundary, although error made in call. 116Tex277, 288SW805.

399-78⅓-New. Paper boundaries should not prevail over long recognized physical boundaries. 101NJEq572, 138A99.

399-78¼-New. As between two counties, long acquiescence in the assertion of a particular boundary and exercise of jurisdiction over the territory within it should be conclusive on the question of jurisdiction. 321Mo995, 15SW(2d)834.

399-78⅕-New. The rule has been applied where the boundary line was originally fixed as the middle of the channel of a river which has changed its course. 321Mo995, 15SW(2d)834.

400-79 225AppDiv1, 232NYS273; TexCivA 7SW(2d)648.

400-81½-New. A county line which has been located and acquiesced in for many years, should not be changed, unless expressly required by law, although incorrect. TexCivA 7SW(2d)648.

400-82 TexCivA 7SW(2d)648.

401-1½-New. 49ND151, 190NW549.

402-6½-New. The applicability of particular statutes to the merger and destruction of existing counties and the creation of a new county composed of the territory in whole or in part of such counties to be destroyed has been considered. 49ND151, 190NW549.

402-22½-New. Where separate petitions are presented, one requesting the submission of a question of detachment of townships from a county and one requesting the submission of a question of formation of a new county, each petition must be considered separately. 49ND151, 190NW549.

402-24 TexCivA 7SW(2d)648.

405-71½-New. Proceedings establishing the boundaries of a county, are binding equally on all counties affected, as well as the public generally, although without their consent, unless lines were not placed on the ground in a position "sufficiently special and well ascertained" and a county line, once run, marked and established in division of county, cannot, although incorrect, be held indefinite. TexCivA 7SW(2d)648.

409-9 73Mont371, 236P548 (state invalid).

409-10 73Mont371, 236P548 (provisions mandatory).

410-27½-New. Nor does it include bridges. 73Mont371, 236P548.

410-29½-New. Statute providing that in determining value of property in creation of new steel bridge constructed in use for less than ten years shall be taken into consideration is unconstitutional, such bridges being property of the state. 73Mont371, 236P548.

411-53½-New. New county cannot assume indebtedness under the contract of old county for road work, where not authorized by plan defined in constitution and statute. 89Fla510, 104S105.

412-56 89Fla510, 105S105 (it is sufficient if legislature makes suitable provision for ascertaining proportion of indebtedness of new county).

412-73⅓-New. Petition for settlement held insufficient. 168Ga813, 149SE219.

415-19 Nebr 232NW579; TexCivA 7SW(2d)648; 134Wash75, 234P1040 (redistricting not mandatory).

415-21 170Ark71, 278SW652.

415-27 [a] (1) 125Kan379, 264P84; 38OklACR641 (implied power to alter more than once in three years). See also 146Wash449, 263P735. (4) Redistricting should be done on basis of last official census. 125Kan379, 264P84. (5) Different parts of city may be placed in different districts provided city wards are not divided or voting precincts interfered with. 125Kan379, 264P84. (6) Statute allowing supervisors to change boundaries of district is permissive. 93CalA490, 269P743. [b] **Objections** that new division is inconvenient, or that nominee, without vested right to office, would be deprived of election by change, or that one precinct would not get a full share of public funds, are insufficient to compel annulling of order of change. TexCivA 10SW(2d)590.

415-31 146Wash449, 263P735 (redistricting held arbitrary).

415-33 49ND1040, 194NW704. [a] **Notice of application for reapportionment of justices' districts** must be given by posting at places required by statute. 210Ky776, 276SW847. [b] **Time for change of boundaries.**-County commissioners may not change boundaries of districts at time other than that prescribed by statute. SD 227NW572 (where statute provided for change of boundaries at regular meeting in January, 1920, and every four years thereafter).

415-34 [b] **Petition to redistrict county** (1) need not contain definite proposal of changes. 49ND1040, 194NW

704. (2) Word "Congressmen," used in connection with requirement of number of voters who must sign petition, means representatives in house of representatives and number of votes for such office is basis for determining sufficiency of petition. 49ND1040, 194NW704.

416-40 146Wash449, 263P735 (by mandamus).

416-41½-New. The equality of representation required by a statute giving boards of supervisors power to change boundaries of supervisional districts but requiring that such districts shall be as nearly equal in population as may be is a fundamental requirement of representative form of government prevailing in states. 195Cal676, 235P445.

416-41⅓-New. Practical equality of population of such districts is not a local matter but is vital part of structure of government established in counties and must be adhered to in order to maintain consistency throughout the state. 195Cal676, 235P445.

416-41¼-New. The constitutional reservation of the initiative power to the electors of counties does not authorize any legislation by the electors in contravention of a statute requiring that supervisorial districts shall be as nearly equal in population as may be, passed by the legislature under its constitutional power to provide a uniform system of county governments. 195Cal676, 235P445.

416-41½-New. The fact that such statute does not mention the electors of a county but refers only to the board of supervisors in limiting the power to change the boundaries of supervisorial districts is immaterial. 195Cal676, 235P445.

416-41⅔-New. Where supervisorial districts are practically equal in population at the time an ordinance establishing their boundaries is passed, subsequent inequalities resulting from movement of population will not render the ordinance invalid. 195Cal676, 235P445.

416-41¾-New. An ordinance changing the boundaries of supervisorial districts which provides for gross inequalities in population is not justified by the fact that it would result in less inequality than presently exists, and that the county should be redistricted so as to avoid present inequalities. 195Cal676, 235P445.

416-51 [a] **Legislature has power to** classify counties according to population. 119Or264, 240P233.

418-71½-New. Kind of government county may have does not depend on similarity or difference between county in question and other counties, but solely on type of government citizens desire. 217Ky305, 289SW312.

419-97 102CalA767, 283P385; 161Tenn236, 30SW(2d)268.

419-98 220Ala231, 124S523; 70CalA526, 233P810; 79CalA780, 251P324 (only have powers expressly conferred on or delegated to them); Fla126S308; 76Mont150, 245P962; 83Mont1, 268P555; 86Mont377, 283P758; 115Nebr506, 213NW826; 252NY437, 169NE637; 190NC96, 129SE184; 55ND45, 212NW236, 51ALR296; 119Or127, 248P151; 159Tenn290, 17SW(2d)908; 134Wash568, 236P280 (not inferred that powers granted supersede general laws). See 225Ky112, 7SW(2d)839. [a] (2) The implied powers are such as are necessarily or reasonably implied from those expressly granted or those essential to exercise those expressly conferred. 196NC184, 145SE28. [c] (1) 70CalA526, 233P810; 161Ga743, 131SE882 (crushing and selling rock to public). (3) Manufacture and sale of poison barley to farmers and landowners is not private commercial enterprise where financial profit not object or result but measure adopted to protect health of people of county and prevent injury to, and destruction of, their property from existing evil. 70CalA526, 233P810. [d] **Construction of statutes defining powers.**-159Tenn290, 17SW(2d)908.

420-1 [a] (3) County may adopt such reasonable measures to suppress public evil as it may deem necessary to make its action effective. 70CalA526, 233P810. (4) Whether county has gone beyond limitation of its police powers in doing certain acts depends on circumstances of each case. 70CalA526, 233P810. (5) It is not unreasonable exercise of police power for county to aid its farmers and landowners in combatting common nuisance such as ground squirrels. 70CalA526, 233P810.

420-3 [a] **Where there is conflict of authority between borough and county,** authority of county is superior. 297Pa140, 146A557.

420-3½-New. Ohio general code is effective upon compliance therewith to create special taxing district composed of two or more counties for special purpose of construction of joint improvement. 114OhSt642, 151NE752.

420-3⅓-New. Under some constitutions the legislature may authorize counties to levy and collect assessments for local improvements on property benefited. 122Okl116, 251P748.

420-6 86CalA421, 260P961; IndA169NE364; 58ND407, 226NW536; 140Okl63, 282P882.

402-6½-New. Decisions as to conditions precedent and matters as to the proceedings are given below. [a] **Conditions precedent.-TexCivA** 7SW(2d)648. [b] **Presumptions.-TexCivA** 7SW(2d)648. [c] **Weight and sufficiency of evidence.-TexCivA** 7SW(2d)648. [d] **Findings.-TexCivA** 7SW(2d)648.

420-8 Fla126S308.

420-9 94CalA382, 271P568; 102CalA767, 283P385; Fla126S353; 326Ill535, 158NE116, 54ALR777; Iowa222NW378; 225Ky112, 7SW(2d)839; 141Miss701, 105S541, 546 [quotCJ]; 83Mont1, 268P555; 190NC96, 129SE184; 191NC780, 133SE164; 55ND45, 212NW236, 51ALR296; 299Pa390, 149A655; 148SC229, 146SE12; Wash287P675; Wash291P321. [a] (2) Legislature can exercise absolute power, unless restricted by organic law, over counties' political rights and privileges, which, therefore, are not within constitutional prohibitions against retroactive laws and laws impairing vested rights. TexCivA 7SW(2d)648. [b] (2) Statute authorizing state tax commission to equalize assessments of citizens of state for state revenue purposes is not violative of any right of local self-government. 213Ky445, 281SW472. [f] (1) 216Ky475, 287SW913. (2) Statute held not to impair obligation of contracts of fiscal court which had levied maximum tax and entered into contracts to extent of revenue. 216Ky475, 287SW913. [g] **In Missouri.**-309Mo595, 274SW749. [h] **In Tennessee.**-152Tenn442, 278SW71. [i] **Extent of delegation of legislative functions.**-67CalA328, 227P664. [j] **Mandatory statute** shutting out exercise of discretion is not for that reason in conflict with constitution. 191NC780, 133SE164. [k] **Legislature in carrying out public improvement** may exempt from assessment lands belonging to certain public bodies. 198Cal753, 247P897. [l] **Public policy.**-55ND45, 212NW236, 51ALR296. [m] **Debts due county.**-156Miss396, 125S416. [n] **Legislature is without power to relieve one county from obligations** which it imposes on all others. 102CalA767, 283P385.

420-9½-New. Where the constitution authorizes a county to legislate upon a certain matter under a freeholders' charter, such legislation is exclusive and supersedes all inconsistent legislative acts on the same matters, 78CalA780, 251P324.

420-9⅓-New. but a general law or act applies where there is no provision in such charter or legislation thereunder. 78CalA780, 251P324.

420-9¼-New. The legislature determines what county offices are required, so that laws providing for additional offices are presumed required by legislative determination of public convenience within constitutional provision; its regulation of compensation of county surveyors is subject to constitutional requirements; and it may place the burden of maintaining dependent classes on political subdivisions or itself share the burden. 94CalA382, 271P568.

421-12 141Miss701, 105S541, 546 [cit CJ].

421-12½-New. Where local option statute has been adopted by a county amendment of the statute by legislation does not require readoption of the statute by county to make amendment effective. 120Kan273, 243P311.

421-14 102CalA767, 283P385.

421-15 [a] **Power to make changes.**-50Nev173, 254P696.

421-19 195Cal676, 235P445; 67CalA328, 227P664 (provision construed). [a] **Statutes enacted in exercise of power.**-195Cal676, 235P445.

421-21 67CalA328, 227P664; CalA270P697.

421-22 67CalA328, 227P664.

421-24½-New. The constitutional reservation of initiative powers to the electors of counties does not authorize any legislation by the electors of a county in contravention of any statute passed by the state legislature under the authority of the constitutional provision requiring the establishment of a uniform system of county governments. 195Cal676, 235P445.

421-24⅓-New. The fact that the constitutional reservation of initiative powers to the electors of counties applies alike to all counties is not alone sufficient to satisfy the constitutional requirement of uniformity of county governments and any alteration of a component part of a system of county governments in any one or more counties by the electors thereof would constitute a deviation from the uniform system commanded by the constitution. 195Cal676, 235P445.

421-26 177Ark474, 7SW(2d)13.

428-41 166Ga612, 144SE21. [c] **Statute not providing for election notice or procedure held constitutional.**-Ariz292P603.

429-59½-New. The legislature in legislating on the removal of county sites is not bound by the findings of the secretary of state as to the result of an election for removal. 166Ga612, 144SE21.

431-82 121Kan191, 246P504.

431-84 121Kan191, 246P504.

431-87 [a] **Filing of proof of service of notice** is not jurisdictional. 175Minn486, 221NW870.

433-6 [a] (1) 121Kan191, 246P504. (10) 121Kan191, 246P504 (assessment rolls).

434-43 174Minn397, 219NW458 (voters first giving notice of intention to circulate petition are entitled to first consideration by county board).

437-97½-New. Election to remove the county seat, held before expiration of the prescribed period for holding previous election on the same question, is void. TexCommnA 18SW(2d)587.

437-1 121Or4, 252P552. [a] **Who may give notice.**-170Ark597, 280SW650.

438-4½-New. A statutory requirement that a pamphlet containing the full title and text of an initiative measure to be voted upon shall be mailed to each voter in the county is mandatory and a failure to comply therewith renders the election a nullity. 121Or4, 252P552.

438-5 240Mich115, 215NW33; TexCivA11SW(2d)227.

438-10½-New. Irregularities in an election do not prevent the use of funds deposited by citizens as required by statute to pay the expenses of the election. 170Ark597, 280SW650.

438-20 240Mich115, 215NW33; TexCivA280SW873.

439-21 240Mich115, 215NW33.

439-22 But see TexCivA280SW873.

439-22½-New. Ballots not bearing the judge's signature have been held valid. TexCivA280SW873.

439-22⅓-New. The question of removal of a county seat is not a special question within a constitutional provision, requiring such questions to be printed

on a single ballot with constitutional amendments to be submitted. 240Mich 115, 215NW33.

439-25 86Colo 249, 281P117 (where voters passed test before registration committee, election is valid).

439-27 See also Ariz 292P603.

440-42½-New. That illegal votes were cast is not sufficient to invalidate an election where, after deducting the number of illegal votes from the total number of votes cast, the prevailing location received the statutory percentage of the legal votes cast. TexCivA 280SW 873.

440-51 240Mich115, 215NW33.

441-68 TexCivA 11SW(2d)227.

442-78 86Colo 249, 281P117.

442-93 TexCivA 11SW(2d)227.

442-97½-New. A complaint in an election contest, alleging that judges and others attempted to influence voters, is insufficient where there is no allegation that any voters were improperly influenced. TexCivA 280SW873.

442-97¼-New. Plea of an elector, contesting an election, in that it was impossible to separate the qualified voters from the unqualified, held insufficient where it was not based on fraud or error and failed to name a single qualified voter denied the right to vote or an unqualified one voting. 86Colo 249, 281P117.

443-17½-New. Fair election will not be set aside for failure of statute to provide procedure where county board supplied omissions. Ariz 292P603.

444-20 [c] **Statute prohibiting application for another election within five years** does not deprive subsequent legislature of power to fix different period. TexCivA 11SW(2d)227.

444-22 [a] In Texas.-CivA 297SW689.

444-33 217Ala268, 115S422 (submission to voters held advisory).

444-35 126Kan9, 266P657 (necessity of vote of people).

445-43 Ariz 292P603.

445-53 [a] **County business** as used in statute providing county commissioner exercise power and jurisdiction over all county business should be given a broad and liberal construction. TexCivA 275 SW137.

445-54 [a] **"Governing body"** of county as used in constitutional provisions does not include superior courts. 194 Cal 146, 228P19.

445-55 315Mo 568, 287SW445.

446-56 Utah 268P783 (offices coördinate with sheriff).

446-60 98Fla26, 123S527 (not judicial officers).

447-75 315Mo 568, 287SW445. [c] **Commissioners' courts** are courts of general jurisdiction. TexCivA 21SW(2d) 571.

447-78 See also 190NC96, 129SE184. [b] (2) Justices of county court quarterly session represent county. 152Tenn 442, 278SW71.

447-79 93Fla796, 112S630; Fla 127S 486(2dcase).

447-84 170Ga800, 154SE388(2dcase).

447-87 [a] **County commissioners have no vested property** or contract right to office of which they cannot be deprived by legislature. 190NC96, 129SE184.

447-88 211Ky391, 277SW469.

447-88½-New. having same powers as other members of "fiscal court," 211Ky 391, 277SW469.

447-95 [b] **Construction of statute.**-168Ga659, 148SE735.

448-96 See also 225Ky641, 9SW(2d) 1006.

448-97 TexCommnA 288SW182.

448-2 Mont 288P1018.

448-2½-New. Where the statute abolishes the office of a sole commissioner and creates in lieu a board of commissioners, the board and the sole commissioner had the same jurisdiction and powers. 166Ga616, 144SE107.

448-3 [a] **Election of county officers without designating choices for different terms** held invalid. 152Md481, 137A294.

448-8½-New. One appointed county commissioner by the clerk of the superior court, taking oath of office, and entering on the discharge of his duties, is a de facto officer. 35F(2d)301.

449-20 [b] In Montana.-80Mont1, 257P 1029.

450-35½-New. **Contest petition held sufficient** if signed by qualified voters of county, although not necessarily of district where fraud was perpetrated. 5PaDist&Co 139.

450-41 [b] **State legislator** may qualify by resigning state post. 5PaDist&Co 705.

450-45 78Mont308, 254P187.

450-46 78Mont308, 254P187.

450-48 78Mont308, 254P187.

451-54½-New. Where members of police jury are disqualified, they act as de facto members. 160La325, 107S126.

451-54⅓-New. Naming person as member of board of commissioners of roads and revenues in act creating board is not conclusive as to eligibility to office. 170Ga687, 153SE773.

451-57 [a] (2) Montana constitution, providing for election of one commissioner every two years for term of six years, extends to all counties and is to be effectuated in new counties as early in their existence as possible. 80Mont 1, 257P1029. (3) Such provision is so construed that at all times there shall be left on each board two experienced men. 80Mont1, 257P1029. (4) Commissioners under such plan are entitled to hold office for full term. 80Mont1, 257 P1029.

451-59½-New. Under statute in some jurisdictions, refusal or neglect of elected county commissioner to file his oath or bond within prescribed time creates vacancy. 78Mont308, 254P187.

452-73 81Colo 198, 254P778.

452-77 Kan 292P396.

452-81½-New. The right of county commissioners to pass a resolution fixing the terms for commissioners to be elected in a new county, after having passed a resolution for election, is immaterial, where not raised until after election of commissioners. 80Mont1, 257P1029.

452-81⅓-New. A statute, providing that commissioners elected at a special election for the creation of new counties shall hold office until the next general election, has no effect upon a special election held prior to its enactment. 80Mont1, 257P1029.

452-81¼-New. No vacancy is created in full term office by death before general election of one elected supervisor at primary election. Cal 292P265.

453-83 Iowa 223NW39 (conduct held willful under statute). [d] **County officers** are not subject to impeachment. 35Wyo 108, 247P699. [e] **Sufficiency of service of citation.**-33NM527, 270P797. [f] **Negligence in permitting county funds to be overdrawn** warrants removal of members of county court. WVa 153SE238. [g] **Action for removal on accusation of grand jury** is special proceeding. 137 Okl 272, 278P1106.

453-89 152Tenn442, 278SW71 (misconduct of another member is no excuse in proceeding for removal for failure to attend meetings); 35Wyo 108, 247P699.

453-93 [a] **Misconduct of county commissioner** in making unauthorized payment is ground for removal, though term of associate commissioners had expired before action was brought. 35Wyo 92, 247P721.

453-94 [a] **Charge that defendant unlawfully paid** unitemized account for services for which no fees were allowed held insufficient. 35Wyo 108, 247P699.

453-95 [c] **Petition should be sufficiently explicit** to give defendant notice of what he is required to answer. 35Wyo 108, 247P699. [d] **Allegations that defendant failed to advertise** bids for roads, bridges, and purchase of supplies held too general. 35Wyo 108, 247P699. [e] **Charge that defendant had been guilty** "of numerous acts of misconduct and malfeasance in office" held too general. 35Wyo 108, 247P699.

453-96 135 Okl 278, 276P468.

453-1 [a] 35Wyo 92, 247P721.

453-2 132 Okl 212, 270P37 (joint accusation against entire membership of board is permissible).

453-3 [a] **Action may be brought** to remove one commissioner alone for misconduct. 35Wyo 92, 247P721, 725 [quot CJ].

453-4 206 Iowa1349, 221NW923 (insufficient to show willful misconduct or corruption); 137 Okl 272, 278P1106 (instruction in action for removal on accusation of grand jury held to place unlawful burden on defendant).

453-6 But see 137 Okl 272, 278P1106. [b] **Defendant is entitled to judgment** on pleadings as to paragraphs which were too general. 35Wyo 108, 247P699.

453-8 35Wyo 108, 247P699 (defendant where jurat to claim was not signed by county clerk may show claim was sworn to before proper officer).

453-8½-New. Electors seeking removal of a supervisor will not be taxed with all costs in an unsuccessful removal proceeding, where they did not act without probable cause. 206 Iowa1349, 221NW 923.

453-8⅓-New. In a proceeding against a county commissioner barred on collection of illegal fees from the county, an instruction that the commissioner cannot collect per diem and expenses for his personal services as a day laborer on highways, is prejudicial, where the evidence shows that defendant, while supervising construction, when occasion required, performed manual labor in connection with his work. 84Mont61, 274P148.

453-8¼-New. Instructions in such proceedings have been held erroneous as depriving defendant of the defense of good faith. 84Mont61, 274P148.

453-8⅕-New. Tender of resignation by a commissioner to the clerk of the superior court is, on acceptance, final. 35 F(2d)301.

453-8⅙-New. A county commissioner cannot be convicted on proof of acts of other commissioners performed without his knowledge or consent. 137 Okl 272, 278P1106.

454-11 81Mont31, 261P607 (inspection of roads); 95PaSuper423 (repeal of statutes).

454-12 95PaSuper423.

454-16 211Ky391, 277SW469.

454-17 Ill 172NE720. [b] 254 IllA331.

455-22 [a] (3) Nebraska statute construed as authorizing, in certain counties, per diem allowance, without mileage, while directing road work, payable only from district road fund, excluding motor vehicle license fees. Nebr 231NW 29

455-24 231Ky514, 21SW(2d)838 (statute held not repealed).

455-28 170Minn293, 212NW445. [b] In Texas.-CivA 289SW749.

456-40 Nev 279P937.

456-44 But see 148Miss182, 114S264.

456-46 74Mont152, 240P812 (county commissioners, acting while in sessions, executive officers of county, with powers and duties definitely fixed by statute).

456-47 309Mo 595, 599, 274SW749 [cit CJ]; 190NC96, 129SE184, 187 [citCJ]; 194NC137, 138SE614. [a] **Member of board is bound to meticulous care** in administration of office and handling public property. 206 Iowa1349, 221NW 923. [b] **Agreement with insolvent county depositary** waiving interest on deposit and providing for acceptance of conveyance of property and assumption of mortgage thereon held authorized. Minn 230NW891.

456-48 309Mo 595, 599, 274SW749 [cit CJ]; 190NC96, 129SE184, 187 [citCJ] (instrumentality or quasi agency to supervise and control institutions and finances). [a] In Tennessee.-152Tenn 442, 278SW71.

456-49 222Ky292, 300SW921; 309Mo 595, 599, 274SW749 [citCJ]; 191NC780, 133SE164. [a] TexCivA 275SW137; TexCivA 281SW593. [b] (6) Includes control and management of public institutions for detention, care, and education of delinquent and dependent children. 309Mo 595, 274SW749. (7) Proper to give term broad and liberal construction to carry out legislative intent. TexCivA 275SW137. (8) Meaning extended to any and all business of particular county and any other business of such county connected with business

of any other county within jurisdictions of commissioner's court under constitution and laws. **TexCivA** 275**SW**137. (9) County business refers to matters that are of public concern to people of county. **TexCivA** 275**SW**137. [c] **In Oregon.**–118 **Or**47, 244**P**535. [d] **Board cannot be deprived of its statutory powers.**–93**Fla**796, 112**S**630.

456–51 190**NC**96, 129**SE**184, 187 [cit CJ]; 194**NC**137, 138**SE**614; **TexCivA** 4 **SW(2d)**283.

456–53 217**Ala**458, 116**S**662; 163**Ga**293, 135**SE**911; 160**La**325, 107**S**126.

456–54 191**NC**780, 133**SE**164. See also 195**NC**783, 143**SE**871.

457–55 191**NC**780, 133**SE**164. [a] **Matters not reviewed.**–142**Miss**146, 105**S**774.

457–58½–New. Special and local laws validating expenditures by the county not authorized by law are invalid. 142 **Miss**146, 105**S**774.

457–58½–New. In Arkansas, a county court is the general fiscal agent of county, with power to do all things necessary for the preservation of its funds. 171**Ark**576, 286**SW**873.

457–58¼–New. County can only speak through county court or fiscal court. 233**Ky**299, 25**SW(2d)**730.

457–58½–New. Members of county court must exercise ordinary diligence to keep informed of condition of funds subject to their disposal. **WVa** 153**SE**238.

457–60 [a] **Statute is not void** as conferring on commissioners' court authority to transact other than county business, where it provides for organization of levee districts and therefore only confers jurisdiction on court to act in reference to matters that are of public concern to people of county. **TexCivA** 275**SW**137. [b] **Statute creating levee improvement districts** is not violative of Texas Constitution as imposing duties on commissioner's court not constituting county business. **TexCivA** 3 **SW(2d)**888.

457–61 See also 95**Fla**457, 116**S**78.

457–63 70**CalA**438, 233**P**409; 93**Fla**796, 112**S**630; 85 **IndA**287, 149**NE**94; 85 **IndA**281, 151**NE**831; 200 **Iowa**1318, 206 **NW**660; 225**Ky**641, 9**SW(2d)**1006; 162 **La**614, 110**S**873; 156**Md**408, 144**A**640; 141**Miss**701, 105**S**541 (power defined by institution cannot be changed by legislature); 83**Mont**1, 268**P**555; 133**Misc** 496, 233**NYS**110; 19 **OhA**454; 154**Tenn** 576, 290**SW**2; 118**Tex**279, 15**SW(2d)** 535; **TexCivA** 264**SW**520; **TexCivA** 275 **SW**473; **TexCivA** 281**SW**593; **TexCivA** 284**SW**310; **TexCivA** 26**SW(2d)**405; 148**Va**299, 138**SE**485; 134**Wash**568, 236 **P**280 (no power to grant franchise for construction of toll bridge as part of primary state highway). [e] **Fraudulent representations** are not within authority of board to make and are not binding on county. 85 **IndA**281, 151**NE** 831. [f] **County commissioners' court** is not vested with any general police power. **TexCivA** 23**SW(2d)**840.

457–64 70**CalA**438, 233**P**409; 48 **Ida** 447, 282**P**864; 244 **IllA**370; 85 **IndA** 287, 149**NE**94; 200 **Iowa**1318, 206**NW** 660; 83**Mont**130, 269**P**396; 50**ND**788, 198**NW**116, 32**ALR**82; 19 **OhA**454; 148 **Va**299, 138**SE**485. [a] **Authority to lease portion of courthouse to private parties is not implied** from statutory power to purchase real estate, or to build and repair, or to make orders concerning county property as deemed expedient or to have care of county property. 200 **Iowa**1318, 206**NW**660.

458–65 85 **IndA**287, 149**NE**94.

458–67 83**Mont**130, 269**P**396, 401 [quot CJ].

458–68½–New. County commissioners cannot directly assume powers and duties delegated by statute to other county officers. 153**Wash**399, 280**P**31, 67 **ALR**668.

458–70 85 **IndA**281, 151**NE**831; 84**Mont** 413, 276**P**667; 154**Tenn**576, 290**SW**2.

458–71 85 **IndA**281, 151**NE**831.

458–76 128**Me**108, 146**A**10 (board is court); 315**Mo** 568, 287**SW**445; 66**Utah** 184, 240**P**454.

458–78 38 **OklACR**411.

458–79 108**TexCr**653, 2**SW(2d)**270. But see 244 **IllA**137.

458–84½–New. Where title of county to land and its right to sell it are in dispute, such question cannot be determined by the county court. 315**Mo** 568, 287**SW**445.

458–84½–New. A temporary injunction in such case restraining the county court from selling the land pending determination of title is not an interference with the exercise of a judicial function. 315**Mo** 568, 287**SW**445.

458–84¼–New. Commissioners' court must judicially notice matters it is required to pass on. **TexCommnA** 2**SW (2d)**433.

459–85 160**La**325, 107**S**126.

459–91 [a] (3) Under Oklahoma statute, where officer neglects or refuses to render true accounts, it is duty of county commissioners to adjust accounts according to best information they can obtain, and ascertain balance due county and order suit therefor. 131 **Okl** 227, 268**P**274.

459–94 83**Mont**130, 269**P**396, 401 [quot CJ].

459–96 **Mont** 285**P**195. See also 12**LaA** 382, 125**S**514.

460–98 76**Mont**150, 245**P**962.

460–99 76**Mont**150, 245**P**962.

460–1 76**Mont**150, 245**P**962 (has discretionary power as to mode of exercise of power); 86**Mont**377, 283**P**758. [a] **Board may select any appropriate method** or course of procedure in its discretion. 81**Mont**31, 261**P**607.

460–2 35**F(2d)**301; 48 **Ida**447, 282**P** 864; 227**Ky**663, 13**SW(2d)**1012; 55**ND** 377, 213**NW**848; 56**ND**571, 218**NW**637; 133 **Okl** 263, 271**P**1041. See also 12**LaA** 382, 125**S**514. [c] **County judges** can act for and bind county only when sitting as county court. 315**Mo** 1233, 288 **SW**48.

460–3 233**Ky**823, 27**SW(2d)**427; 12 **LaA**382, 125**S**514; 153**Miss**583, 121**S**271 (purchases exceeding one hundred dollars); 56**ND**571, 218**NW**637.

460–7 81**Mont**31, 261**P**607 (appointment may be oral or otherwise). [a] **Single member can bind county under authority conferred by board** only where board has authority to confer authority. 56**ND**571, 218**NW**637.

460–8½–New. **Grant by county commissioners** of permit to locate cemetery to one of its members or to a company in which he is financially interested is against public policy. 160**Ga**216, 127**SE** 652.

460–10 35**F(2d)**301; 196**NC**184, 145**SE** 28; 56**ND**571, 218**NW**637, 639 [citCJ]. [a] **Justices of county court** are required to attend quarterly sessions of county unless excused for reasonable grounds. 152**Tenn**442, 278**SW**71.

461–12½–New. Actions of a de facto commissioner at a meeting regularly held is binding on the county. 35**F(2d)** 301.

461–20 [a] **Statute is not mandatory** in sense that proceedings may be judicially found void for abuse of discretion in fixing subsequent meeting days. **Ind** 172**NE**119.

461–21½–New. Meetings for transaction of business under revenue law, at which boards of supervisors may continue in sessions as long as business may require, are such only as are specially designated by law for transactions of such business. 141**Miss**412, 106**S**631.

462–40 [a] **It is illegal** for justices of peace to combine to prevent quorum of county court. 152**Tenn**442, 278**SW**71.

462–42 [a] **In Oregon.**–128 **Or**339, 273 **P**716.

462–46 216**Ky**33, 287**SW**228.

462–48 126**Kan**378, 268**P**102 (disposal of courthouse of value not exceeding five hundred dollars).

462–49½–New. Owning property adjoining proposed jail and court house site does not disqualify member from voting to purchase land. 104**WVa**64, 138**SE**730.

462–50 200 **Ind**319, 163**NE**263; **Ind** 172 **NE**119; 51**SD**336, 213**NW**952.

463–63 51**SD**336, 213**NW**952.

463–64 51**SD**336, 213**NW**952.

463–67 141**Miss**412, 106**S**631.

463–68 141**Miss**412, 106**S**631.

463–70 See also 177**Ark**671, 8**SW(2d)** 434.

463–72 See also 177**Ark**671, 8**SW(2d)** 434.

463–75 171**Ark**1145, 287**SW**593; 234**Ky** 364, 28**SW(2d)**37 (omission to sign order is immaterial where order not required).

464–83 234**Ky**364, 28**SW(2d)**37.

464–86 171**Ark**1145, 287**SW**593.

464–87 171**Ark**1145, 287**SW**593.

465–94 But see 197**Wis**4, 220**NW**393.

465–96 84**CalA**532, 258**P**717; 90**CalA** 709, 266**P**604. [a] (10) Board cannot vote public funds to private charitable organization to be dispensed according to its judgment. 142**Miss**146, 105**S**774.

466–7 84**CalA**532, 258**P**717; **TexCivA** 264**SW**520.

466–9 142**Miss**468, 107**S**757; 148**Miss** 182, 114**S**264; 75**Mont**369, 243**P**1093; 77**Mont**498, 251**P**548, 550 [citCJ]; 55 **ND**377, 213**NW**848.

466–10 141**Miss**72, 106**S**83; 142**Miss** 468, 107**S**757; 315**Mo** 1233, 288**SW**48; 75**Mont**369, 243**P**1093; **TexCommnA** 27 **SW(2d)**144(2dcase). But see 77**Mont** 498, 251**P**548, 550 [citCJ].

466–12 149**Md**461, 131**A**776; 142**Miss** 696, 107**S**753; 148**Miss**182, 114**S**264. [a] **Requisites and extent of rule.**–149 **Md**461, 131**A**776.

466–13 48 **Ida**447, 282**P**864; 154**Miss** 787, 122**S**762; 55**ND**377, 213**NW**848. [b] **Promise to pay necessary to constitute account stated** is decision required to be entered of record. 55**ND** 377, 213**NW**848.

466–14 77**Mont**498, 251**P**548; **TexCivA** 28**SW(2d)**1107.

467–21 141**Miss**72, 106**S**83.

467–22 75**Mont**369, 243**P**1093.

467–30½–New. Strict legal technicality cannot be required of boards of supervisors. 156**Miss**560, 126**S**192.

467–36½–New. In Kentucky a member of the fiscal board to participate in correction of minutes must be present at the meeting of the board. 216**Ky**33, 287**SW**228.

467–37 326 **Ill** 179, 157**NE**200; 127**Me** 42, 141**A**95; 194**NC**380, 139**SE**767. [b] **Effect of intervening statute.**–194**NC**380, 139**SE**767.

468–48 **IndA** 165**NE**265.

468–55 [b] **Where minute entry required by law to be made was not mode,** quære, is oral testimony admissible to show that board acted in particular way on given subject. 75**Mont** 369, 243**P**1093.

468–55½–New. , or to vary or contradict the record. 75**Mont**369, 243**P**1093.

468–57 77**Mont**498, 251**P**548; **TexCivA** 28**SW(2d)**1107.

469–61 173**Ark**1121, 295**SW**1.

469–64 **TexCivA** 11**SW(2d)**648. [c] **Suit to enjoin parish from disregarding protests of ten per cent of registered voters against ordinance.**–**LaA** 128**S**544.

469–66 162**La**614, 110**S**878. [b] **Grant of power to legislature** to enact general and uniform laws as to specific matters limits power of counties to pass ordinances which would have effect of destroying uniformity of legislation with reference to such matters. 195**Cal** 686, 235**P**450.

469–67 162**La**614, 110**S**878.

469–68 98**Fla**1166, 125**S**375.

469–72 **TexCivA** 10**SW(2d)**229.

469–74 [a] **Failure to enter resolution in auditor's minutes** as required by statute does not invalidate resolution where there is some record of it. **Minn** 230**NW**891.

470–80½–New. Under some statutes, an ordinance authorizing expenditure of money must be read on at least two separate days. **IndA** 165**NE**265 (statute mandatory).

470–81 **TexCivA** 275**SW**719.

470–82 169**La**691, 125**S**856. See also **IndA** 165**NE**265.

470–83 [a] **Certificate of registrar of voters** cannot be disregarded in determining sufficiency of petition for referendum. 169**La**691, 125**S**856.

470–84½–New. Statutes provide for the procedure applicable to submission of initiative measures. 121 **Or**4, 252**P**552.

470–93½–New. Under some statutes failure to publish resolution does not render it invalid. **Minn** 230**NW**891.

470–96½–New. An ordinance will not be presumed to be invalid. 195**Cal** 676, 235**P**445.

470–96½–New. Where the charter of a county is silent as to the powers of the board of supervisors in the matter of the passage of emergency ordinances,

the county is governed in that respect by general law. 197Cal 529, 241P869.

470-96¼-New. In order to bind a county there must be formal action on the part of the commissioners as a board. 55ND377, 213NW848.

470-96½-New. Submission of question to voters on petition of protest. 170 La644 (computation of time).

470-96¾-New. Power of electorate in adoption of initiative ordinances cannot extend beyond power possessed by county board. CalA 291P892.

470-99 Ind 172NE119.

471-7 [a] **Nunc pro tunc order annulling resolution** defining boundaries of commissioner's district is invalid if made without notice or hearing and after one of commissioners has been succeeded by another who did not participate in passage of original resolution. 39 OklACR219 (where there is no showing that records do not speak truth).

471-11 Ind 172NE119.

471-15½-New. Statutes, outlining the procedure for vacating the final order or judgment of the court, have no application to fiscal court orders. 230Ky316, 19SW(2d)994.

471-17 Contra 44 Ida192, 255P1095.

471-18 163Ga293, 135SE911; 153Miss 583, 121S271; 315Mo 737, 287SW312.

472-19 98Fla26, 123S527, 533 [citCJ].

472-25 TexCivA 28SW(2d)921 (authority of de facto members).

472-27 244 IllA137; 211Ky391, 277SW 469.

472-27½-New. An action of county commissioners on purely judicial questions does not preclude the persons aggrieved from resorting to the courts for the protection of constitutional or legal rights. 98Fla26, 123S527, 533 [citCJ].

473-30½-New. A later resolution by the quarterly county court covering the same subject operates as a repeal of an earlier resolution. 159Tenn290, 17SW (2d)908.

473-32½-New. The determination of a county board that facts exist necessitating an ordinance taking effect immediately on passage is not conclusive on the court which may itself determine such facts. 197Cal 529, 241P869.

473-32¾-New. An emergency ordinance must state the particular emergency, the existence of which is required to enable the board of supervisors to enact the ordinance as an emergency one and to have it go into effect at once. 197Cal 529, 241P869.

473-36 53SD47, 220NW135.

473-37 114 Okl 246, 246P376; 38 Okl ACR641; 51SD131, 212NW626.

473-39 38 OklACR641; 51SD131, 212 NW626.

474-42 51SD131, 212NW626.

474-44 [a] **Acts of commissioners' court** beyond its jurisdiction or in clear abuse of discretion are reviewable. Tex CivA 21SW(2d)571.

474-47½-New. If action of board is not otherwise appealable, existence of fraud on the part of the board will not make it so. 51SD131, 212NW626.

475-53 SD 230NW224 (appeals by person aggrieved and by state's attorney for taxpayers are separate).

475-55 114 Okl 246, 246P376; 53SD47, 220NW135 (taxpayer not aggrieved).

475-59 [a] **In South Dakota.**-53SD47, 220NW135.

475-70 217Ky243, 289SW289.

476-82 217Ky243, 289SW289.

476-92½-New. No statement of costs need be filed on county attorney's appeal. 217Ky243, 289SW289.

476-92¾-New. Filing petition and copy of fiscal court order in clerk's office, with instructions not to issue summons, does not institute appeal. 217Ky243, 289SW 289.

476-92¼-New. Motion to dismiss appeal for reasons not appearing on face of record or insufficiently appearing therein is properly overruled. MoA 277 SW615.

476-92½-New. Certification of cause by county court for interest or prejudice of majority of court is not dependent on filing of affidavit of interest or prejudice but on fact of interest or prejudice, and its refusal to certify is prima facie correct. MoA 277SW615.

476-93 44 Ida192, 255P1095.

477-5 See also 82Mont126, 266P387, 393 [citCJ].

477-13½-New. Findings of fact by county commissioners affirmed by the trial court on hearing de novo will not be disturbed on appeal unless against the preponderance of evidence or unless the board has acted arbitrarily or capriciously. 145Wash551, 261P90.

478-30½-New. County commissioners are disqualified by their pecuniary interest adverse to the county from taking any official action in an action instituted against them and their bondsmen for illegal expenditure of public funds. 127 Okl 113, 261P368.

478-30¾-New. A resolution passed by county commissioners directing the county attorney to dismiss an appeal from a judgment adverse to the county in such action is void. 127 Okl 113, 261 P368.

478-31 [c] **County commissioners do not exercise judicial or quasi-judicial function** where after passage of resolution determining existence of casual deficiency they insert in note executed by them false recital that it was within amount county could borrow to meet such deficiency. 35GaA55, 132SE249.

478-32 [a] **Ordering payment of county funds for authorized purpose.**-34Ariz 347, 271P720. [b] **Conspiracy to defraud.**-34Ariz347, 271P720.

478-33 144 Okl 33, 289P298. See also 145Wash122, 259P34.

478-34 34Ariz347, 271P720.

478-38 26 OhNPNS195 (not liable for nuisance at connection of sewer with city sewer).

479-41 144 Okl 33, 289P298.

479-47½-New. In some jurisdictions holder of drainage district bonds issued by county board of supervisors cannot have judgment thereon against board. Iowa 229NW711.

479-50½-New. County commissioners are not liable for the death of a road employee from the negligence of a foreman not alleged to have been incompetent where they were not personally present and participating in the work. 138 Okl 110, 280P456.

479-60½-New. Whether land was purchased by supervisors in good faith for a county jail after a bona fide appraisal is a question for the jury. 34Ariz347, 271P720.

481-82 3Del 334, 138A280.

481-83 314Mo 144, 283SW700, 701 [quotCJ].

481-91 152Tenn566, 280SW27.

481-96½-New. county commissioner of district, 213Ala201, 104S432.

481-99½-New. a levy court commissioner, 3Del 334, 138A280.

482-8½-New. A commissioner of roads and revenues is a county officer. 170Ga 687, 153SE773.

482-12 See also 157Tenn39, 6SW(2d) 560.

482-13½-New. clerks of municipal courts, 78CalA780, 251P324.

482-15 [g] **Persons held officers and not employees.**-153Tenn34, 12SW(2d) 532 (delinquent poll tax collector).

483-27 244NY406, 155NE688.

483-35 TexCommnA 273SW833.

483-36 246NY115, 158NE42.

483-45 152Tenn258, 277SW71. See also NJSup 152A175(2dcase).

483-47-48 [c] **Statute authorizing comptroller to appoint necessary clerks** does not authorize appointment of additional employee designated as field clerk who was in fact investigator with other duties. 294Pa385, 144A288.

484-51 170Ga800, 154SE388(2dcase). [c] (3) County surveyor in particular county. CalA 270P697.

485-70½-New. Where the city and county of San Francisco has not exercised power under constitution to control the office of a probation officer, the penal code provision controlling the office was not superseded and the charter provision relating to retirement does not apply to such officer. 201Cal 470, 257P501.

485-70¾-New. California Const. art xi § 7½ was designed to furnish to counties the same measure of authority conferred upon cities or cities and counties by § 8½ thereof. 201Cal 470, 257P501.

485-71 [b] **Selection of officers in new counties** is within inherent power of legislature to provide in such manner as they deem most appropriate, within spirit of constitution, in absence of constitutional provision for filling vacancies. 80Mont1, 257P1029.

485-78 Cal 285P311 (charter provisions inconsistent with constitutional provisions are governed by latter).

485-81 [c] **Policy of law** is to preserve uniformity of time for election of elective county officers throughout state. Cal 285P311.

485-82½-New. Holders of certificates of deposit requiring a bank to pay interest are depositors entitled to share in a dividend on the bank's insolvency. TexCivA 11SW(2d)547.

486-90 70CalA738, 234P845 (board of supervisors is not obliged to employ county surveyor to prepare plans for construction of bridge); 216Ky33, 287 SW228; 283Pa345, 129A92 (where court could not appoint additional employee); TexCommnA 273SW833.

486-92 165Ga374, 141SE295 (court of ordinary may appoint county police officers); 317Mo 1283, 300SW459 (appointment of county counsellor).

486-94 144 Okl 288, 291P504.

486-4½-New. Officers may be named in legislative act. 216Ala136, 112S317.

486-8 315Mo 405, 285SW1007 (probation officer); 32 Oh382, 168NE210. [b] **In Tennessee.**-158Tenn34, 12SW(2d)532.

486-8½-New. Under constitutional provision that no county office created by the legislature shall be filled otherwise than by the people or the county court, appointment by the legislature of county officers for the term extending beyond the next general election is invalid. 152 Tenn605, 279SW1041.

487-9 85CalA706, 259P1021.

487-10½-New. In making an appointment of employees, officers, or agents the county court acts ministerially only when the appointment does not depend on the finding of facts. 315Mo 737, 287 SW312.

487-10¾-New. Special statutes in some jurisdictions provide that county commissioners may in their discretion abolish the office of county treasurer and instead appoint a bank or a trust company as financial agent. 194NC436, 140 SE38.

487-10¼-New. But such statutes do not contemplate that treasurership or financial agency of a county shall be farmed out or let to the highest bidder. 194NC436, 140SE38.

487-32 30Hawaii887.

488-33 290Pa517, 139A151.

488-37 [b] **Payment of poll-tax essential to constitute "elector"** unless he became of age after tax was assessed. 172 Ark1009, 291SW420.

488-38 170Ga687, 153SE773.

488-39 [b] **Eligibility of county assessor for county treasurer's office** which took over assessor's duties. Wash 291 P321.

488-47 190NC336, 130SE25 (board is liable for losses on failure to comply with statute).

488-50 GaA 155SE95 (indemnifying bond)

489-57 [c] **Position of signature.**-Tex CivA 293SW234.

489-61½-New. Affidavit as to financial worth held not part of obligation of bond. TexCivA 293SW234.

491-8 170Ga800, 154SE388(2dcase).

492-12 See also 170Ga800, 154SE388 (2dcase).

492-16 317Mo 1283, 300SW459 (appointment in excess of power).

492-22 [a] **Confirmation of appointment** has been held not limitation intended as to time. Utah 290P358 (2d case).

492-24 180Ark746, 22SW(2d)393; Utah 290P358(2dcase).

493-30 80Mont1, 257P1029 (holding over general election).

493-35 3Del 15, 129A691; 48Nev64, 227P588 (county clerk appointed by county commissioners to fill vacancy holds office till next general election for county officers and not biennial general election if occurring before four-year term expires).

493-36 See also 3**Del** 15, 129**A**691.

494-48 [a] (2) Offices of new county created from portion of old, under special election, pursuant to statute providing for creation of county and election of officers are not vacant where filled by act creating them. 80**Mont**1, 257**P** 1029.

494-54½-New. Statute vacating state office upon sentence of incumbent to penitentiary is valid as applied to county office in view of constitutional provision making persons convicted of infamous crime incapable of holding office, notwithstanding statutory provisions for renewal by impeachment. 20**AlaA** 645, 104**S**892.

494-54⅓-New. Constitutional provision declaring office vacant on conviction of officer for malfeasance imports verdict of guilty and court's judgment thereon. **WVa** 153**SE**587.

494-54¼-New. Failure of person elected to qualify creates vacancy. 144 **Okl** 288, 291**P**504.

494-60 CalA 291**P**889 (charter construed).

494-62½-New. General law applies if system of civil service has not been set up by county. **CalA** 291**P**889.

494-62⅓-New. Statute abolishing offices of county park commissioners has been held merely to abolish offices of incumbents. **NJSup** 152**A**175(2dcase).

494-63 Utah 290**P**358(2dcase).

495-64 Utah 290**P**358(2dcase).

495-69 28**Hawaii**733; 123**Kan**432, 256 **P**172; 217**AppDiv**16, 215**NYS**690. [a] **Absence without leave,** assigned as cause for summary discharge, held insufficient where recording clerk was ill. 217**App Div**16, 215**NYS**690. [b] **County commissioner's acts of misconduct as** malfeasance during former term are not ground for removal. 35**Wyo** 108, 247**P** 699. [c] **Notice of illness** of recording clerk, telephoned to another employee in office, held sufficient. 217**AppDiv**16, 215**NYS**690. [d] **Corrupt intent is not an essential ingredient** of malfeasance or maladministration in office. 28 **Hawaii**733. [e] **Change of assessments** after posting and after books left board's custody without giving statutory notice is held not sufficient ground for removal. 3**Del** 583, 140**A**701.

495-70 28**Hawaii**733.

495-74½-New. paying more for an article purchased than asked for by the person having the article to sell; 123**Kan** 432, 256**P**172.

495-78 [a] 35**Wyo** 108, 247**P**699.

495-78½-New. "Cause" for removal of county bond trustees is determined by the circumstances of each case. 3**Del** 583, 140**A**701 (character of office and qualifications necessary).

495-78⅓-New. "Sufficient cause" for removal means legal cause of substantial nature directly affecting interests of public; 3**Del** 583, 140**A**701.

495-78¼-New. it must be cause showing officer is not fit or proper person to hold office. 3**Del** 583, 140**A**701.

495-87½-New. Under a statute making it unlawful for county officers to become interested in contracts with the county, such contracts subject such officers to the hazard of removal. 159**Tenn**442, 19 **SW(2d)**254.

495-89 235**Ky**681, 32**SW(2d)**21; **NJ Sup** 136**A**420; **Utah** 290**P**358(2dcase). [b] **Action to remove county commissioner** is treated procedurally as civil case. 35**Wyo** 108, 247**P**699.

495-90 235**Ky**681, 32**SW(2d)**21. [a] 35**Wyo** 108, 247**P**699. [b] **Specifications of information held sufficient** in impeachment proceeding against member of county board. 216**Ala**275, 113**S**300.

496-92 [b] 35**Wyo** 108, 247**P**699.

496-93½-New. In some jurisdictions the proceeding for removal is commenced by the filing in the circuit court of a verified petition signed by specified number of citizens and voters of county. 28**Hawaii**733 (less than statutory number of petitioners cannot maintain proceeding).

496-94 [a] **Nature of proceeding.**–126 **Okl** 103, 258**P**750. [b] **Sufficiency of petition.**–126 **Okl** 103, 258**P**750. [c] **Degree of proof.**–126 **Okl** 103, 258**P**750. [d] **Trial.**–126 **Okl** 103, 258**P**750. [e] **Sufficiency of evidence.**–126 **Okl** 103, 258 **P**750.

496-95 NJSup 147**A**642 (complaint, being sworn to by nontaxpayer, did not prevent removal of secretary). [b] **Governor's letter** directing action for removal need not designate particular acts of misconduct or malfeasance. 35 **Wyo** 108, 247**P**699. [c] **Time for performance of services** for county by regular employee held sufficiently stated. 35 **Wyo** 108, 247**P**699. [d] **Information on which governor must act** in directing removal must be something substantial and ordinarily reliable in form to be preserved. 35**Wyo** 108, 247**P**699. [e] **Words "or otherwise"** in Wyoming statute following provision that governor shall direct action for removal on verified written complaint of qualified voters are not to be construed by rule of "ejusdem generis." 35**Wyo** 108, 247**P** 699.

496-98 [a] 120**Kan**733, 245**P**150 (county attorney).

496-99 See also **NJSup** 147**A**642.

496-1 [a] **Governor's direction to bring action** for removal carries presumption that he has acted in accordance with statute, so far as initial pleading is concerned. 35**Wyo** 108, 247**P**699.

496-3 [b] **No right to jury trial** exists on appeal under statute requiring appellate court to act in "summary proceeding." 3**Del** 583, 140**A**701. [c] **Matter is tried de novo** in appellate court. 3**Del** 583, 140**A**701. [d] **Record of lower court is binding** on appellate court. 3**Del** 583, 140**A**701.

496-8½-New. Under some statutes, the only proper party to bring suit to oust an officer is a defeated candidate or a prosecuting attorney, not private citizens generally. 172**Ark**1012, 291**SW**422.

496-8⅓-New. Whether proper proceedings were taken on dismissal of county employee could not be inquired into collaterally. **NJSup** 136**A**420.

496-8¼-New. County employee, wrongfully dismissed, may have removal set aside in direct proceedings. **NJSup** 136 **A**420.

496-11 177**Ark**752, 7**SW(2d)**973; 165 **Ga**374, 141**SE**295; 232**Ky**428, 23**SW(2d)** 607; 318**Mo** 248, 300**SW**493; 73**Mont** 363, 236**P**248 (county is not chargeable with expense not imposed by law); 123 **Or**57, 261**P**77; 123 **Or**301, 261**P**81; 152 **Tenn**258, 277**SW**71 (statute held constitutional). [a] **Validity of statute** that fines and costs for violating laws are payable to municipality within county or to state is immaterial in determining validity of statute providing for payment of fee from costs or county fund to officer arresting violator of act. 225 **Ky**112, 7**SW(2d)**839.

497-12 123 **Or**57, 261**P**77. [a] **Salary or day, week, or monthly wage,** lawfully fixed by county commissioners has been held to amount to specified fee allowed by law. 35**Wyo** 108, 247**P**699.

497-20 82**Colo** 466, 261**P**4 (de facto appointee of de jure office is entitled to compensation for services rendered).

497-23½-New. Constitutional provisions in some jurisdictions require the legislature to provide suitable compensation for all officers. 143**Miss**821, 107 **S**659.

497-23⅓-New. Such constitutional provision is violated by statute which provides that salaries fixed by the act for certain constitutional officers shall remain in force only until a certain date in the absence of valid law providing compensation for them. 143**Miss**821, 107**S**659.

497-25 123 **Or**57, 261**P**77.

498-26 290**Pa**310, 138**A**858 (county officer is not forbidden by constitution from retaining for his own use fees and commissions received by him for services rendered as agent of state).

498-27 123 **Or**57, 261**P**77.

498-29 210**Ky**51, 275**SW**1.

498-32 200**Cal** 201, 252**P**324.

498-33 CalA 270**P**697; **Fla** 129**S**861; 123 **Or**301, 261**P**81; 6**PaDist&Co** 484.

498-35 327 **Ill** 11, 158**NE**418; 210**Ky** 51, 275**SW**1.

498-38 Mass 164**NE**815.

499-56 [a] **Statute held not repealed.**–179**Ark**984, 19**SW(2d)**1020.

499-57 290**Pa**310, 138**A**858 (statute held constitutional).

499-66 See also 156**Miss**171, 125**S**705 (1stcase).

500-69 But see **CalA** 270**P**697.

500-71 [a] **In Mississippi.**–139**Miss**552, 104**S**459.

500-80½-New. Reducing salary of county surveyor within three months of election, by county board, is ineffective under statutes in some jurisdictions. 70 **Utah**156, 258**P**1016.

500-80⅓-New. Where a county surveyor's compensation is fixed by statute, it can only be changed in like manner. 84**Mont**38, 274**P**296.

500-80¼-New. Salary of officer once determined and not limited to particular term remains so until changed. 236**Ky** 63, 32**SW(2d)**554.

501-91 139**Miss**552, 104**S**459.

501-98 177**Ark**249, 6**SW(2d)**283 (statute held not repealed).

501-2 TexCivA 271**SW**132.

501-4 179**Ark**1110, 20**SW(2d)**184 (where making and delivery of abstract of assessment book is inseparable, clerk is not entitled to fees for making abstract); 201**Cal** 602, 258**P**49 (not entitled to fee for filing protests against formation of bridge and highway district); 232**Ky**428, 23**SW(2d)**607.

502-11½-New. A county clerk is eligible to the position of purchasing agent of a county by appointment of the board of supervisors and may receive compensation agreed to be paid him for his services in such position. 200 **Cal** 201, 252**P**324.

502-13 5**PaDist&Co** 126.

502-14 290**Pa**310, 138**A**858; 297**Pa**526, 147**A**613.

502-19 TexCivA 273**SW**894 (statutory provision).

502-20 290**Pa**310, 138**A**858 (hunting license fees).

503-21 290**Pa**310, 138**A**858 (not entitled to fees for issuing dog license or fishing licenses); 8**PaDist&Co** 528; 10 **PaDist&Co** 232.

503-24 TexCivA 11**SW(2d)**648.

503-25 TexCivA 11**SW(2d)**648.

503-28 MoA 277**SW**615; **TexCommnA** 29**SW(2d)**1000; **TexCivA** 275**SW**719 (order fixing commissions at twelve hundred dollars held repealed by subsequent orders fixing limit of commissions for particular ensuing years); **TexCivA** 11**SW(2d)**648. [a] **Reduction of percentage.**–**TexCivA** 11**SW(2d)**648. [b] **Where commissions are not fixed by commissioners' court,** county treasurer is entitled to maximum fees provided by statute. **TexCivA** 11**SW(2d)**648.

503-29 MoA 277**SW**615 (remedy of county treasurer is by appeal).

503-31 [a] **TexCivA** 275**SW**719.

503-31½-New. In some jurisdictions power to fix the salary of the county treasurer is delegated to the county court. 315**Mo** 701, 287**SW**430.

503-31⅓-New. An order of the county court arbitrarily reducing the salary of the county treasurer is properly enjoined. 315**Mo** 701, 287**SW**430.

504-47½-New. County treasurer is entitled to fees for tax warrants issued by him, although payment is made after he has left office. 132**SC**355, 128**SE**45.

504-48 68**CalA**91, 228**P**549 (statute fixing salary of county surveyor in county of forty-first class at nine hundred dollars per annum held repealed by omission of provision from amendment of statute); **CalA** 270**P**697. [a] **Presumptions as to matters considered by legislature in fixing salary.**–207**Cal** 732, 279 **P**992(3dcase). [b] **Statute held constitutional.**–207**Cal** 732, 279**P**992(3dcase).

504-55 [a] **County superintendent of health.**–112 **Okl** 33, 239**P**567.

504-61 73**Mont**363, 236**P**248 (county attorney held to have power to bind county for necessary services of stenographer employed by day).

504-62½-New. Amounts collected from whatever source more than sufficient to pay salary of sheriff and deputies belong to county. 210**Ky**51, 275**SW**1.

504-62⅓-New. Former agents, not reappointed, cannot continue work and bind the county for salaries. 180**Ark** 272, 21**SW(2d)**178.

504-63 97PaSuper47.
505-64 200Cal 201, 252P324.
505-67 165Ga374, 141SE295.
505-83½-New. Determination by court. 6PaDist&Co 248.
505-83½-New. Where deputy receives fees from state in addition to salary from the county, the court will consider such element in fixing salary. 6PaDist &Co 250.
506-85 81Colo 315, 255P453. But see 211Ky409, 277SW506. Contra 5PaDist &Co 535.
506-85½-New. Statutes have been construed as not preventing a county surveyor from presenting a claim for the reasonable rental value of a transit procured and used by him when the county failed to provide him with one. 84 Mont38, 274P296.
506-87 123 Or57, 261P77; 123 Or301, 261P81.
506-88 [a] (2) Act makes no provision for meals and lodging at county seat. 6PaDist&Co 693. [c] **County commissioner is not entitled to payment of mileage** incurred in going from home to office and return. 6PaDist&Co 693.
506-91 123 Or301, 261P81; 6PaDist &Co 693; TexCivA 285SW691.
506-92 123 Or57, 261P77.
506-94½-New. A county officer, whose compensation with necessary clerk hire is fixed at a certain sum to include both salary and expenses, is entitled to receive the entire sum, while one whose salary is fixed in one sum, and another amount provided for his expenses, is entitled only to receive his salary and actual expenses not to exceed limitation. 320 Ill 454, 151NE271.
506-94½-New. In action to recover for office expenses petition must allege obligation of county to pay for the same. TexCivA 285SW691.
506-94¼-New. Under some statutes the expense of the premium on the official bond of a county trustee is not a charge on the general county revenue but only on excess fees over maximum salary. 156Tenn411, 1SW(2d)1011.
506-97 [c] **County board in fixing salaries** need not hear evidence before making order. 42 Ida811, 248P465.
506-98 But see 12PaDist&Co 354.
506-1 [a] **Discretion held not abused.**-44 Ida192, 255P1095.
507-3 [a] **Though aggregate allowances made by fiscal court are scarcely more than sufficient if enough to pay sheriff his salary** and compensation due his deputies, all other amounts collected by him from whatever source would be due county. 210Ky51, 275SW1.
507-5 42 Ida811, 248P465 (court on appeal can only determine whether bond abused its discretion).
507-6 50Nev237, 255P1073.
507-15 But see 96PaSuper475; 8PaDist &Co 162.
507-19½-New. In Kentucky fiscal court is without authority to allow sheriff for certain expenses of deputies. 211Ky 409, 277SW506 (sheriff's duty to pay his own expenses).
507-19½-New. Evidence held not to show that meeting of commissioners, when fixing salaries, was unlawfully held and order appealed from invalid. 44 Ida192, 255P1095.
507-19¼-New. The district court, on appeal from an order fixing salaries, must make findings and conclusions and remand matter with directions. 44 Ida 192, 255P1095.
507-19½-New. County commissioners may fix salaries of county officials without hearing evidence. 44 Ida192, 255P 1095.
507-22 94PaSuper152 (treasurer's deputy).
507-23 [a] (6) Under statute salary and office expenses of county trustee must be derived from fees and emoluments of office. 156Tenn411, 1SW(2d) 1011.
508-24 TexCivA 271SW132 (fees collected in delinquent tax cases).
508-25 73Mont363, 236P248 (services of stenographer directed to be paid as contingent expenses necessarily incurred for use and benefit of county).
508-42½-New. Recovery on quantum meruit is not defeated by excessive estimates as to the probable cost of services and issuance of warrants therefor which were not presented, paid or liquidated, TexCivA 10SW(2d)229.
508-42½-New. nor by the fact that checks given for services were not paid out of current funds available, nor by irregularities in employment. TexCivA 10SW(2d)229.
508-45 315Mo 405, 285SW1007. [a] **Auditors, whose employment did not conform to statute,** could recover only on quantum meruit. TexCivA 28SW (2d)921.
509-47 [a] **Evidence held admissible.**-See also 84Colo 559, 272P658.
509-50 TexCivA 10SW(2d)229.
509-50½-New. Officer, discharged without complaint having been lodged, cannot recover wages without first having discharging officer's action reversed. NJSup 136A420.
509-50½-New. Question of necessity of approval by county board of appointment of officer cannot be considered in an action to recover salary. 82Colo 466, 261P4.
509-50¼-New. A county official knowing that his superior had ordered him laid off cannot recover for services during that period. 84Colo 559, 272P658.
509-50½-New. A county official cannot recover upon bills for services not stating the indebtedness in manner provided by statute. 84Colo 559, 272P658.
509-50¼-New. Acceptance by a county surveyor of less than was due him on a liquidated demand for his services during his term of office under a mutual mistake of the parties concerned does not prevent his recovery of the balance due him. 84Mont38, 274P296.
509-50½-New. Complaints in actions to recover the rental value of necessary equipment procured and used by a county surveyor have been held sufficient. 84Mont38, 274P296.
509-50¼-New. Where recovery for services is had, refusal of the court to cancel warrants issued under contract for the services is error. TexCivA 10 SW(2d)229.
509-51 18 OhA519.
509-54 18 OhA519.
509-55 210Ky51, 275SW1.
509-57 210Ky51, 275SW1.
509-59 210Ky51, 275SW1.
509-64½-New. A county cannot recover back a sum paid the court's treasurer for services of which it avails itself. 219Ky174, 292SW816.
509-69½-New. In a suit by a taxpayer to recover for the county the commissions and other fees received by the sheriff for collection of taxes in excess of salary, it is not necessary for plaintiff to file a list of taxable property returned by state or county officers and of other taxable property coming into the hands of the sheriff where only an accounting is asked of moneys actually collected. 210Ky51, 275SW1.
509-69½-New. In such suit commissions paid by the state to the sheriff for collecting state revenues should be taken into consideration with those earned as county officer. 210Ky51, 275 SW1.
509-75½-New. Evidence held sufficient to show that defendant was acting as county commissioner, 240 IllA68.
509-75½-New. and to show that defendant received proceeds of certain warrants issued in payment of his claims for such services. 240 IllA68.
510-79 Fla 126S308.
510-80 Fla 126S308.
510-83 19 OhA454.
510-84 19 OhA454.
510-88 140 Okl 247, 282P1090.
510-88½-New. Officering of special taxing district, created for construction of public improvement in two counties, by incumbent officers of such counties, constitutes such officers, while engaged in such construction, officers of such district as distinguished from and in addition to their respective county offices. 114 OhSt642, 151NE752.
510-88½-New. Where the constitution is silent on the subject, the legislature has the power to prescribe duties, powers, and privileges of county officers. 136SC439, 134SE387.
510-8 [a] **Duties in reference to record of proceedings of county and state boards of equalization** are wholly ministerial. Mo 23SW(2d)108.
511-12½-New. Duty to adjust tax books according to the report of the state board of equalization is mandatory. Mo 23SW(2d)108.
511-15 251 IllA357; Utah 280P1065.
511-18 251 IllA357 (examination of record before proper countersignature is ministerial act); 225Ky556, 9SW(2d) 523.
511-20 78Mont156, 252P805.
511-23 12LaA382, 125S514; 118Nebr 817, 226NW460, 65ALR804 (statutory directions and limitations must be complied with by all dealing with county treasurer); 131 Okl 114, 267P1053 (investment of sinking funds). See also 53SD511, 221NW246. [b] **Authority of legislature** to impose duties on county treasurer to collect city taxes held undoubted. 78Mont156, 252P805.
511-24 See also 194NC436, 140SE38.
511-25 137Misc555, 244NYS96.
511-27 [b] **School district funds.**-125 Okl 243, 257P318.
511-30½-New. He must collect public revenues substantially in the manner provided by statute. 204 Iowa965, 216 NW122.
511-32½-New. Where taxes are paid under protest to the county treasurer it is his duty to hold intact the money so paid. 121 Okl 108, 247P996.
511-32½-New. There is no contractual relation between county treasurer and school districts as to school moneys which he holds in his custody merely in obedience to statute. 80CalA131, 251P 679.
511-32¼-New. A statute, requiring the county treasurer to keep school funds separate from any other funds, excludes the right to make a general deposit in a bank. 219Ala609, 123S202.
512-41½-New. An action cannot be maintained against a county treasurer for amounts growing out of or in connection with the settlement required to be made with the county court until the county court has examined and passed upon such accounts. 172Ark797, 290SW957.
512-41½-New. An action may be brought against a county treasurer to recover school moneys wrongfully paid out on void warrants whether or not his accounts have been passed upon by the county court. 172Ark797, 290SW 957.
512-48 202 Iowa1346, 212NW131.
513-67½-New. Auditor cannot receive notices to bind county. TexCivA 31SW (2d)868.
513-76 [b] **County purchasing agent is not agent of state** but is appointee of board of supervisors. 137Misc555, 244NYS96. [c] **Jurisdiction of county purchasing agent** over purchases for county. 137Misc555, 244NYS96.
513-77 251 IllA357 (countersignature of county orders). [b] **In California.**-83CalA764, 257P203.
513-79 117 Or406, 244P317, 318 [cit CJ].
513-80½-New. The board may assign a clerk to the duty of investigating claims against the county, although outside of his clerical duties. 32 OhA 382, 168NE210.
513-82 81Colo 315, 255P453; 204 Iowa 965, 216NW122; Nebr 231NW701 (crediting treasurer's fees to general county fund); 131 Okl 227, 268P274; 296Pa 271, 145A843. [a] (5) Other illustrations. 81Colo 315, 255P453; 193Wis 274, 213NW676. [b] **That county commissioners knew of treasurer's misappropriation** will not relieve treasurer from liability. 296Pa271, 145A843.
514-92 131 Okl 227, 268P274. [a] Contra 53SD514, 221NW247. [b] **Commissioners are not required to cause treasurer's removal** before it can compel him to account for county money lost

through his violation of law. 53SD514, 221NW247.

514-1½-New. But it is not necessary for county trustee to hold fees from several offices intact until expiration of term for purpose of making up deficiency in salary for any year during term. 152Tenn258, 277SW71.

515-24 135 Okl 278, 276P468; 297Pa 526, 147A613. [a] **Invasion of jurisdiction of county court.**–In statute creating office of county auditor to aid county court in auditing accounts is not unconstitutional as invading jurisdiction of county court in its control over disbursements and auditing. 168Ark449, 270SW609. [b] **County treasurer** is within scope of audit of books and accounts of county officers and offices authorized by special act. 135SC348, 132 SE673. [c] **Invasion of executive function.**–135SC348, 132SE673. [d] **Act authorizing audit by certified public accountant** or accountants held sufficiently complied with by employment of firm of accountants, one member of which was duly registered. 135SC348, 132SE 673.

515-25 [a] (2) In Pennsylvania county auditors have jurisdiction to examine accounts of county commissioners and may surcharge them with amount found not to have been legally expended. 14PaDist&Co 36.

516-31½-New. Requisites and sufficiency of comptroller's report. 297Pa 526, 147A613.

516-31⅓-New. The county comptroller may be compelled to audit an account on his neglect or refusal. 297Pa526, 147A613.

516-31¼-New. Proper surcharge must be result of auditing, settling, and adjusting account. 14PaDist&Co 36.

516-32 211Ky391, 277SW469; 159 Tenn175, 17SW(2d)17.

516-32½-New. , and taxpayers are not estopped from maintaining suit for accounting. 240 IllA340.

516-33 297Pa526, 147A613.

516-35 159Tenn175, 17SW(2d)17.

516-38 49ND1026, 194NW385 (evidence held to show no settlement as to moneys lost through unauthorized deposits).

516-39 296Pa271, 145A843; 297Pa526, 147A613.

516-40 178Ark361, 12SW(2d)1; 159 Tenn175, 17SW(2d)17.

516-41 219Ky349, 293SW543. [a] **Formal release of surety** cannot be attacked in absence of fraud or mistake. 153Va362, 149SE531.

517-44½-New. Where settlement is had on a first bond released prior to execution of a second bond, it is presumed that the defalcations subsequently discovered occurred during the period the second bond was in effect. 153 Va362, 149SE531.

517-45 297Pa526, 147A613.

517-48 [a] 296Pa271, 145A843 (not from time of ascertaining official's wrongful appropriation). [b] (2) County entitled to appeal under some circumstances. 296Pa271, 145A843. (3) Showing of misappropriation by official will entitle county to appeal. 296Pa271, 145A843 (where treasurer made no report of money misappropriated). (4) County debarred from right only by laches prejudicing treasurer's defense. 296Pa271, 145A843.

517-49 But see 14PaDist&Co 36.

517-49½-New. In an action to surcharge accounts of the county treasurer for errors and fraud, not discovered until more than two years after settlement, the chancery court is the proper forum. 171Ark492, 286SW867.

517-49⅓-New. Unintentional errors by the county treasurer in accounting, resulting in loss to the county, are a legal fraud which may be corrected by the county court within two years after settlement. 171Ark492, 286SW867.

517-49¼-New. A taxpayer's action to surcharge and correct accounts of the county treasurer for the benefit of the county is in effect the same as an action by the county or state for use of the county. 171Ark492, 286SW867.

517-49⅙-New. Appeal from surcharge will be sustained where there is nothing in record to sustain surcharge. 14 PaDist&Co 36.

517-53 127 Okl 113, 261P368.

517-55 [a] **Validity of statutes.**–90 CalA519, 265P1032.

517-64 136 Okl 103, 276P715.

517-65 225Ky556, 9SW(2d)523.

517-68 [b] **False tax certificate.**–Minn 232NW339.

517-72 [b] **In Utah.**–5F(2d)34.

517-73 74Mont152, 240P812; 136 Okl 103, 276P715.

517-74½-New. Some statutes impose personal liability on an officer for debts incurred by him in excess of the constitutional limitation. 113 Okl 119, 239 P904.

518-74⅓-New. County officers using ordinary care in selection of subordinates, properly instructing them, and exercising ordinary care to see that they perform their duties are not liable under the rule of respondeat superior for their negligence. 156Tenn389, 2SW(2d)94, 57ALR1029.

519-82 153Va362, 149SE531.

519-83½-New. A county treasurer's bond is construed in connection with the Depositary Act in determining the liability of the treasurer and his sureties for loss of funds by failure of a bank not designated as depositary, 34Wyo 189, 242P319.

519-87 131 Okl 114, 267P1053; 129 Or 248, 275P917.

519-89 [b] **Items for which liable.**–(1) 142Miss146, 105S774.

519-94½-New. negligently permitting excessive deposit in bank becoming insolvent; 55ND495, 214NW617 (state bonding fund liable as surety for excess of authorized deposit).

519-99½-New. County supervisors are not liable on their bond for allowance to objects authorized by law, although made irregularly. 142Miss146, 105S774 (by divided court). [a] **Item for which not liable.**–142Miss146, 105S774.

520-1 GaA 155SE95; Ida 286P598.

520-6 [a] **Items for which not liable.**–142Miss146, 105S774.

520-12½-New. County clerk and surety are estopped by the clerk's record of fees collected. 81Colo 315, 255P453.

520-12⅓-New. Sureties are not liable for misappropriation of money received for public road purposes. 148Va299, 138SE485.

520-12¼-New. A county treasurer's bond is not liable for defaults and official misconduct of tax collector. 48 Ida 465, 285P459.

520-12⅙-New. Issuance of check by county treasurer as tax collector to himself as treasurer held not to constitute transfer of funds so as to render bond liable. 48 Ida465, 285P459.

520-14 128 Okl 151, 261P947; 140 Okl 12, 282P125 (county treasurer and his surety held not liable for school district funds paid by county treasurer in good faith to de facto treasurer of school district who had not given bond). [a] **Measure of care required.**–128 Okl 151, 261P947.

521-19 219Ala609, 123S202 (bank not public depositary); 49ND1026, 194NW 385 (bank not public depositary). [a] **In Montana.**–84Mont207, 274P850. [b] **What constitutes "receipt of public moneys."**–219Ala609, 123S202.

521-23 125 Okl 243, 257P318; 128 Okl 151, 261P947. [a] **Where designated depositary fails after expiration of bond** and before giving of new bond, county treasurer and his bondsmen are not liable for loss occasioned provided he exercised good faith and reasonable care and diligence in care and protection of funds. 128 Okl 151, 261P947. [b] **In Montana.**–83Mont308, 271P710; 84 Mont207, 274P850.

521-24 52ND225, 202NW651; 128 Okl 151, 261P947. See also 53SD511, 221 NW246.

521-26 194NC436, 140SE38.

521-29 31F(2d)547.

522-33½-New. Treasurer's bond is liable for shortage and interest from date of ascertainment of shortage and demand. 143Wash372, 255P119.

522-33⅓-New. Where a bank acting as the fiscal agent of a county is not required by statute to pay interest on county funds in its hands, surety cannot be held for failure of the bank to pay interest. 194NC436, 140SE38.

522-33¼-New. although the bank went beyond the requirements of the law and agreed to pay interest. 194NC436, 140 SE38.

522-37½-New. A surety on the bond of a county treasurer is not liable for money which is legally borrowed by the county but which goes into the hands of the county treasurer. 163Ga840, 136 SE907.

522-37⅓-New. A judgment rendered against a county treasurer is controlling on the question of liability of the sureties on his bond until set aside. 164 Ga9, 137SE558.

522-37¼-New. That an application for a bond stated that funds would be deposited with a named bank, contrary to designation of any other bank as depositary, without action or deposits thereunder, cannot subject the surety, during the second term of office, to liability on the bond. 219Ala609, 123S202.

522-37⅙-New. In a suit on a third bond, it is immaterial whether part of the liability should be imposed on the second bond where the sureties on two bonds are identical with the exception of one on the second bond alone who is insolvent. 153Va362, 149SE531.

522-40 MoA 290SW1019, 1021 [quot CJ].

522-43 TexCivA 283SW267. [a] **Receipt of drainage district funds.**–Tex CivA 283SW267.

523-50 194NC436, 140SE38.

523-52 219Ala609, 123S202.

524-72 149SC402, 147SE444.

524-87½-New. A surety is not released by the departure of the county treasurer from the state. 129 Or248, 275P 917.

524-89½-New. Jurisdiction.–296Pa225, 145A817(1stcase).

525-99½-New. , nor that order to pay over be made. 178Ark361, 12SW(2d)1.

525-1½-New. Under some statutes the county auditor need not join in the execution of a claim against the state bonding fund on the bond of a county treasurer. 55ND623, 214NW916.

525-7 But see 159Tenn175, 17SW(2d) 17.

526-17 159Tenn175, 17SW(2d)17.

526-18 127 Okl 113, 261P368.

526-22 131 Okl 227, 268P274 (suit instituted by county attorney in name of county).

526-23 129 Or248, 275P917.

526-31 53SD514, 221NW247. [a] (2) Loss of deposits in excess of statutory amount. 53SD514, 221NW247. [b] **Sufficient allegations.**–54ND131, 209NW 362; 55ND623, 214NW916.

526-32 [b] **Petition held to state cause of action.**–225Ky556, 9SW(2d)523.

526-38 54ND131, 209NW362; 55ND 623, 214NW916 (filing of claim within sixty days of acquisition of knowledge of default held sufficiently alleged).

527-44 [a] **Allegations held insufficient** to show that fiscal agent of county received bonds under color of its office so as to impose duty of accounting therefor and to render surety liable for failure. 194NC436, 140SE38.

527-49 See also 53SD514, 221NW247.

527-56½-New. Where pleading alleged nonpayment to county and proof of nonpayment to road district, variance bars recovery. TexCivA 288SW544.

527-56⅓-New. A bill to surcharge and falsify accounts made by a county trustee and to recover a balance claimed due filed within six years from the termination of the trustee's term of office has been held not to disclose laches. 159 Tenn175, 17SW(2d)17.

527-60½-New. It is incumbent on surety relying on fraud in inducing the bond to allege it in answer and put assured on notice. 143Va291, 130SE411.

528-66 [a] **City's act was not ratification, waiver, or estoppel** when it filed claim against insolvent bank for money wrongfully turned over and employed counsel to prosecute claim. Iowa 231 NW428.

528-76½-New. County commissioners' knowledge of the county treasurer's deposits of county funds in violation of law is no defense to an action on the treasurer's bond. 53SD51¼, 221NW246.
528-77 81Colo 315, 255P453; 43 Ida 489, 253P847; 225Ky556, 9SW(2d)523. [b] **Evidence held sufficient.**-55ND623, 214NW916; 140 Okl 12, 282P125.
528-77½-New. No presumption arises against sureties on a second bond that moneys received, which came into the principal's possession under a former bond, were in his hand when the second bond was approved. 219Ala609, 123S 202.
529-92½-New. Evidence has been held sufficient to show that no settlement had been made between a county treasurer and the county commissioners or between the treasurer and his successor in office on a basis of acceptance of unauthorized deposits as cash. 49ND1026, 194NW385.
529-92½-New. Evidence held to show that treasurer failed to exercise reasonable diligence in withdrawing excess deposit after reduction of maximum authorized deposit. Iowa 230NW308.
529-98½-New. Nonsuit in an action against a surety is properly granted where the county treasurer has accounted for more than lawful funds of county. 36GaA605, 137SE414.
529-98½-New. The question whether the county treasurer has exercised good faith and reasonable care in reference to county funds deposited with a designated depositary which has failed is generally one for the jury. 128 Okl 151, 261P947.
529-99 214Ala661, 108S580.
529-7 [a] **Evidence.**-219Ala142, 121S 504(2dcase). [b] **Amount of recovery.**-219Ala142, 121S504(2dcase).
530-23½-New. Incurring or authorizing indebtedness in excess of the constitutional limitation. 113 Okl 119, 239 P904.
531-41 209Ky32, 272SW40 (peremptory instruction for accused).
531-46 TexCivA 30SW(2d)348. [a] (6) Other instances. Kan 292P765.
532-47 234Ky364, 28SW(2d)37.
532-48 Cal 290P444; 84CalA532, 258P 717; 326 Ill 535, 158NE116, 54ALR777.
532-53½-New. A public highway may be a state road but as to the part running through the county it may also be a county road. 91Fla118, 107S146.
532-53⅓-New. Parks may be appropriate to county government as well as to municipalities. 96Fla128, 117S799.
532-54 46 Ida668, 270P311; 127Kan 754, 275P379.
532-59½-New. or by purchase, 127Kan 754, 275P379.
533-79 217Ala458, 116S662; 164Ga402, 138SE777.
534-82 164Ga402, 138SE777; 166Ga 612, 144SE21.
534-84 9PaDist&Co 319.
535-88 98Fla112, 123S523(1stcase).
535-90½-New. An offer by a certain community to donate financial and other aid toward the erection of a public building, conditioned on erection in that community, is not contrary to public policy and, if accepted, does not constitute a ground for equitable interference. 58 ND407, 226NW536.
535-97½-New. Court house for county cannot be erected on territory not wholly within limits of city existing at time of establishment of county seat. 216Ala 514, 113S524.
535-2 129 Okl 246, 264P615.
536-10½-New. County authorized to issue warrants to strengthen sea wall by warrants instead of bonds. TexCommnA 300SW15.
536-11 See also 96Fla128, 117S799.
536-15 Cal 290P444.
536-16 Cal 290P444. [c] **Public improvement** under general law of state, scope of which transcends boundaries by one of several municipalities, ceases to be municipal affair and is subject to regulation by state. 198Cal 753, 247P 897.
536-17 TexCivA 275SW449. See also TexCivA 26SW(2d)457.
537-25½-New. Fiscal courts are required by statute to furnish without charge offices to county school superintendents. 226Ky633, 11SW(2d)702.
537-25¼-New. Failure of the legislature to provide for discontinuance of maintenance of offices for a county school superintendent by the fiscal court is construed as an intention not to change existing conditions. 226Ky633, 11SW(2d)702.
537-27 176Ark1030, 5SW(2d)302; 169 Ga313, 150SE158(2dcase); 200 Iowa 1318, 206NW660 (to private parties); 117Nebr66, 219NW851 (general power in board under statute); 154Tenn576, 290 SW2. But see 165Ga713, 141SE910.
537-28 [b] **Courthouse yard.**-154Tenn 576, 290SW2.
538-41 Cal 290P444; 117Nebr66, 219 NW851 (ninety-nine-year lease not equivalent to sale of property). [c] **Sale of county lands for school purposes** is within power and discretion of county court to determine. 315Mo 568, 287SW 445. [d] **County bridge no longer required for public use** can be disposed of only under statute providing for sale and disposition of unnecessary county property. 67Utah567, 248P811. [e] **Purposes for which property may be transferred.**-Cal 290P444.
538-42 160La360, 107S731.
538-43 163Ga293, 135SE911; 169Ga 313, 150SE158(2dcase).
538-44 117Nebr66, 219NW851. [a] **Option of lessee to purchase real estate** in case of contemplated sale is held not operative to avoid lease, no sale being involved. 117Nebr66, 219NW851.
538-48 174Ark1167, 298SW1006.
538-53 126Kan170, 267P1; 76Mont150, 245P962; TexCivA 30SW(2d)348. [a] (1) 76Mont150, 245P962. [b] **Sale on installment plan** of ranch owned by county in its proprietary capacity is not authorized in Montana when sale must be made for cash under statute. 76Mont 150, 245P962. [c] **Statute prescribing mode of sale construed** to apply to all property owned by county. 76Mont150, 245P962.
540-84 124Kan705, 261P831; 124Kan 712, 261P834 (both cases holding that contract to insure road employees is valid); 292Pa304, 141A27.
540-85 177Ark268, 6SW(2d)288 (county court); 223Ky597, 4SW(2d)382. [b] **Leasing buildings.**-Mont 288P1018.
540-87 But see 81Colo 315, 255P453.
540-89 7F(2d)33; TexCivA 280SW289.
540-91 177Ark268, 6SW(2d)288 (not judge of county court); 227Ky663, 13 SW(2d)1012; 196NC184, 145SE28; TexCivA 26SW(2d)470. See also 223Ky597, 4SW(2d)382. [a] **County cannot contract except through its fiscal court acting as a body** and speaking through its records. 229Ky381, 17SW(2d)260(1st case). [b] **County contracts are contracts of county board,** not of individual members. Mont 288P1018.
540-91½-New. Under a statute commissioners of roads and revenues are not bound by contracts made by county boards of education. 168Ga697, 148SE 740.
540-91⅓-New. Statutes providing a budget system do not contemplate restrictions upon the contracting powers of county officers except that the amount contracted for during the fiscal year shall not exceed the budget. 48 Ida447, 282P864.
540-91¼-New. A resolution of a parish police jury has been considered sufficient to revoke the authority of the sheriff for the parish. 11LaA211, 123S 426.
540-93 178Ark454, 12SW(2d)10; 81 Colo 315, 255P453; 169Ga313, 150SE158 (2dcase); 37GaA243, 139SE573; 85 IndA 281, 151NE830; 227Ky663, 13SW(2d) 1012; La 130S341; 75Mont207, 243P 573; 122 Okl 107, 251P606; 38 OklACR 411; TexCivA 281SW593; TexCivA 27 SW(2d)653(1stcase); Utah 269P129, 130 [quotCJ]. [b] **Contract by county to advertise for sale realty sold to county for delinquent irrigation district taxes** is void under some statutes. Utah 269P 129. [c] **Statute restricting certain contracts** to one year held inapplicable to lease of courthouse building. Colo 293 P349.
541-94 180Ark272, 21SW(2d)178; Colo 293P349 (statute construed); Ind 159 NE831; 122 Okl 107, 251P606; TexCivA 280SW289, 291 [citCJ]; TexCivA 281 SW593.
541-95 85 IndA281, 151NE831; 76Mont 150, 245P962; 122 Okl 107, 251P606.
541-95½-New. or any fraudulent representations of members of board; 85 IndA281, 151NE831.
541-96 246NY400, 159NE184.
541-99 37GaA243, 139SE573; 85 IndA 281, 151NE831; 227Ky663, 13SW(2d) 1012; 75Mont207, 243P573; 38 OklACR 332. But see 10LaA389, 120S135.
541-1 But see 10LaA389, 120S135.
542-2 206Cal 445, 274P750; CalA 267P 141; Colo 293P349; Mont 288P1018 (lease extending beyond terms of office held valid); 292Pa494, 141A291 (employment of additional counsel in litigation); TexCommnA 11SW(2d)305; 150Wash626, 274P704.
542-3 See also 33 OhA501, 170NE33.
542-7 170Ark1004, 282SW367; 181Ark 659, 27SW(2d)95; 37GaA243, 139SE573; 49ND111, 190NW308 (funds held available); 35 OhA118, 171NE837 (necessity of binding contract with trust company to furnish funds); 38 OklACR332; Tex CivA 281SW593. [b] (2) Sufficiency of fund for purchase of property. CalA 288 P450. [e] **In Oklahoma.**-38 OklACR332. [f] **In Ohio.**-28 OhA8, 162NE430.
543-8 173Ark755, 293SW34.
543-10 170Ark1004, 282SW367.
543-14 123Kan480, 256P121 (county attorney).
543-19 [a] **In absence of fraud,** contract has been held not void on ground that cost of courthouse was exorbitant. 177Ark671, 8SW(2d)434.
543-20 168Ark229, 269SW588 (holding agreement of county judge pursuant to resolution of county court to pay road improvement district one-half cost of proposed improvement was valid and authorized contract); 152Md566, 137A 358.
543-23 [b] **Estoppel.**-284Pa138, 130A 401.
543-25 [b] **Payable in installments.**-177Ark671, 8SW(2d)434.
544-29 37GaA243, 139SE573.
544-32½-New. Creation by legislature of commission to acquire site for county building and sell county property is constitutional. 216Ala136, 112S317.
544-32½-New. Quorum court may determine whether a courthouse shall be built, also the cost and manner of payment, and thereafter the county court proceeds without further order of the quorum court. 174Ark1167, 298SW1006.
544-32¼-New. The county court may select and purchase a site for a courthouse and the quorum court passes upon the time of construction and the amount and manner of payments. 174Ark1167, 298SW1006.
544-32⅓-New. The county has power to contract for building a courthouse and spread out payments over a series of years, where revenues are sufficient. 175 Ark90, 18SW(2d)554.
544-32¼-New. A board had power to enter into a contract by which the board advanced money to a state highway commission in construction of state highways located in the county. 195NC783, 143SE871.
544-32½-New. Statutes authorized county court to contract to acquire from landowner right of way for state highway. 132 Or374, 284P830.
544-33 122 Okl 107, 251P606.
544-33½-New. Power is not delegable.-122 Okl 107, 251P606.
544-34 7PaDist&Co 145.
545-39 118Tex288, 15SW(2d)538.
545-41½-New. and supplies for other county officers generally; 122 Okl 107, 251P606.
545-44 122 Okl 107, 251P606. [b] (1) 153Miss583, 121S271. But see 307Mo 10, 169SW395. (3) Sheriff has no authority to order goods for use in courthouse or at poor farm. 307Mo 10, 169SW395.
545-47½-New. Purchase of a tractor to be used on county roads is a current expense of county. 36GaA172, 136SE90.
545-47⅓-New. Where power to contract for supplies for several county of-

ficers is conferred on the board of supervisors, contracts made by other officers are unenforceable. 122 **Okl** 107, 251**P**606.

545–47¼–New. Establishment of an addressograph division in the office of a county superintendent of public service is within the county commissioners' statutory powers. 332 **Ill** 519, 164**NE**15.

545–47½–New. A county board may require a county treasurer to procure supplies including duplicate tax receipts through the addressograph division in the office of the superintendent of public service. 332 **Ill** 519, 164**NE**15.

545–50 115 **Or**409, 237**P**961, 963, 40 **ALR**1362 [quotCJ].

545–51 **CalA** 270**P**697; 333 **Ill** 384, 164 **NE**827; 86**Mont**377, 283**P**758 (county assessor); **Mont** 285**P**195; 196**NC**184, 145**SE**28. [a] [5] See also **Mont** 285**P** 195. (9) Tax ferret cannot be employed to assist state's attorney. 50**ND** 788, 198**NW**116, 32**ALR**82. (10) Commissioners' court has no power to contract for making of abstract of property assessed for delinquent taxes, duty being imposed on tax collector. **Tex CivA** 281**SW**593.

546–52 50**ND**788, 198**NW**116, 32**ALR** 82.

546–53 283**Pa**345, 129**A**92 (where method of securing engineer is provided by statute). [b] **Board of auditors may contract only for such services as are** chargeable against county. 235**Mich**163, 209**NW**163 (under statutes for preservation of public health). [c] **Statutory authority to contract with persons to assist in discovery of property not listed and assessed** applies only to property omitted from assessment. 135 **Okl** 186, 274**P**876.

546–54 171**Ark**1145, 287**SW**593; 220**Ky** 678, 299**SW**209 (distributing agent of fiscal court); 83**Mont**130, 269**P**396; 153 **Wash**399, 280**P**31, 67**ALR**668. See also 11**PaDist&Co** 307; **TexCivA** 29**SW(2d)** 456 (power of county judge). [a] (3) 170**Ark**1004, 282**SW**367. (18) To hire party to cruise and estimate timber on patented lands in aid of taxation. 70 **CalA**438, 233**P**409. (19) To make cruise and estimate of timber on patented lands and to make topographical survey and report on such patented lands to enable board intelligently to perform duties as board of equalization. 70**CalA** 438, 233**P**409. (20) To employ agents to build roads including supervisor of construction. **TexCommnA** 11**SW(2d)**305. (21) To contract with abstract company for information to assist county clerk. 83**Mont**130, 269**P**396. (22) Board has power to employ specialists to revalue real estate and report details of improvements to aid board in performing duties as board of equalization. 86**Mont** 377, 283**P**758.

547–55 70**CalA**438, 233**P**409. [c] **Computation held correct.**–235**Ky**100, 29**SW** (2d)611.

576–57 164**Ga**117, 137**SE**776; 165**Ga** 153, 140**SE**351.

576–58 176**Ark**889, 1**SW(2d)**998.

576–61 225**Ky**556, 9**SW(2d)**523; 235 **Ky**100, 29**SW(2d)**611.

577–69 [c] **Supplies furnished under prior oral agreement.**–113 **Okl** 119, 239**P** 904.

577–72 [a] **Unfunded floating indebtedness** must be considered. 235**Ky**100, 29 **SW(2d)**611.

577–73 199**Cal** 251, 248**P**910, 912 [cit CJ].

577–76 33**NM**340, 267**P**72 (not applicable to indebtedness to state); 113 **Okl** 119, 239**P**904.

577–77 [a] **Funded indebtedness.**–235 **Ky**100, 29**SW(2d)**611.

577–78 252**NY**437, 169**NE**637 (indebtedness must be for county purposes).

578–85 229**Ky**733, 17**SW(2d)**1018.

578–87 252**NY**437, 169**NE**637.

578–88 178**Ark**652, 11**SW(2d)**444; 207 **Cal** 1, 276**P**570; 312**Mo** 549, 279**SW**692; 252**NY**437, 169**NE**637. [c] **Debt will not be declared invalid** because of mere error of judgment. 312**Mo** 549, 279**SW** 692.

579–94 [a] **Indebtedness incurred without constitutional authority** cannot be considered. 235**Ky**100, 29**SW(2d)**611.

579–3½–New. A provision forbidding payment of interest by counties is not violated by a contract for construction of a courthouse. 177**Ark**798, 9**SW(2d)** 39.

580–15½–New. It is the policy of the law that revenues for the necessary expense of government shall not be dissipated for nonessential conveniences before expenses imposed by law are met or provided for. 113 **Okl** 119, 239**P**904.

580–15⅓–New. A contract with an attorney for a contingent fee does not create a debt within the constitutional limitation. 43 **Ida**382, 251**P**1054.

580–15¼–New. Quorum court is authorized to contract for the construction of a courthouse to be paid for in installments, although the total cost could not be appropriated in one year, 174**Ark** 1167, 298**SW**1006.

580–15½–New. and warrants may be issued for the total cost on acceptance of the building. 174**Ark**1167, 298**SW** 1006.

580–17 194**NC**358, 139**SE**698 (may authorize finding bonds for valid existing debt without submission).

580–18 116**Nebr**648, 218**NW**429 (necessity of compliance with statute); 113 **Okl** 119, 239**P**904; 136 **Okl** 85, 276**P**474. [b] **"Single purpose"** within constitutional prohibition against incurring indebtedness for single purpose to amount exceeding stated sum without election means single entity complete itself. **Mont** 288**P**1018.

580–19 113 **Okl** 119, 239**P**904.

580–20 **Mont** 288**P**1018 (lease with option to purchase obligating county to maximum rental less than statutory amount); 194**NC**358, 139**SE**698; 197**NC** 314, 148**SE**470. [a] (8) North Dakota statutes are construed not to require submission to vote of people of questions of erecting and repairing county building. 54**ND**220, 209**NW**225.

581–22 [a] (1) See also 179**Ark**79, 14 **SW(2d)**250.

581–26½–New. Legislative authority to take over a certain highway keep up and levy tax therefor not invalid as creating a debt without submission to popular vote. 190**NC**128, 129**SE**154. [a] **Employment of nonlicensed architect** is valid. **CalA** 267**P**141.

547–58 181**Ark**1046, 29**SW(2d)**268 (appointment, not appealed from, precludes contention it was unnecessary); 43 **Ida** 382, 251**P**1054, 1055 [citCJ]; 124**Misc** 893, 210**NYS**122 (conduct of condemnation proceedings); 292**Pa**494, 141**A**291. See also 117**Tex**547, 8**SW(2d)**666. See also 142**Wash**54, 252**P**102.

547–59 43 **Ida**382, 251**P**1054, 1055 [cit CJ].

547–63 [b] **Tax ferret.**–50**ND**788, 198 **NW**116, 32**ALR**82. [c] **Attorney cannot recover** for advise to board as to prospective questions or procurement of enactment of new laws. 220**Ala**437, 125**S** 653.

548–67 181**Ark**1046, 29**SW(2d)**268 (determination of necessity of employment not reviewed in absence of abuse of discretion).

548–70 181**Ark**1046, 29**SW(2d)**268 (school funds in insolvent bank).

548–70½–New. Where it is the duty of the county attorney to advise and assist the board of county commissioners where they act on behalf of a township in the issuance of road improvement bonds, a contract with an attorney for legal services in connection therewith to be performed independently of the county attorney is ultra vires and void. 119 **Okl** 261, 250**P**123.

548–72 181**Ark**1046, 29**SW(2d)**268 (right to subject school funds recovered to proportionate share of fee). [a] (1) 43 **Ida**382, 251**P**1054, 1056 [citCJ]. (2) Contingent fee of twenty per cent of amount recovered for aid in prosecuting suits to recover from bondsmen deposits in closed banks has been held not unreasonable. 43 **Ida**382, 251**P**1054, 1057 [citCJ]. (3) Contract for contingent fee is not invalid as giving control of law suits to attorneys. 43 **Ida**382, 251**P** 1054.

548–90 [a] **Contracts for work, portions of which do not involve technical skill,** must be submitted to competitive bidding where amount involved is in excess of statutory limit. **TexCivA** 281 **SW**593.

549–92 283**Pa**582, 129**A**635; **TexCivA** 280**SW**861.

549–94 81**Colo** 315, 255**P**453; 33 **OhA** 501, 170**NE**33 (temporary lease of real estate); **TexCivA** 280**SW**861; **TexCivA** 4**SW(2d)**283, 287 [citCJ] (contracts not of competitive nature); **TexCivA** 10**SW (2d)**229; **TexCivA** 20**SW(2d)**342(1st case) (contracts requiring expert knowledge, skill, and experience, and of personal character); **TexCivA** 20**SW(2d)** 822 (employment of attorneys). [a] (1) See also **TexCommnA** 11**SW(2d)**305. (12) Other illustrations. 81**Colo** 315, 255**P**453; **TexCivA** 280**SW**289; **Tex CivA** 280**SW**861.

549–97 **TexCivA** 280**SW**861.

549–97½–New. County may provide for work incidental to that covered by original contract without advertising for bids. 283**Pa**582, 129**A**635.

549–97⅓–New. A statute providing for the letting of contracts for printing of every kind contemplates that all persons equally qualified to do the work shall be given an opportunity to bid for it. 35 **Ariz**26, 274**P**163.

549–97¼–New. A statute requiring a call for bidders on county buildings, and giving the contract to the lowest and best responsible bidder, must be construed to secure for the taxpayers equipment desired under actual competition, and to protect those representing the county from unjust and unfair criticism. 35**Ariz**180, 276**P**4.

549–98 156**Miss**560, 126**S**192 (order need not set out details of giving of notice and publication). [a] **Sufficient compliance with statute shown.**–156**Miss** 560, 126**S**192.

549–1 207 **Iowa**627, 223**NW**390. [a] **Contents of notice.**–35**Ariz**180, 276**P**4.

549–4 [a] (2) **Kan** 292**P**765.

550–8 35**Ariz**26, 274**P**163.

550–9 [b] **Filing of plans and specifications.**–35**Ariz**180, 276**P**4. [c] **Change in plans and specifications.**–35**Ariz**180, 276 **P**4. [d] **Provisions tending to stifle competition.**–35**Ariz**180, 276**P**4.

551–22 7**PaDist&Co** 190.

551–29 **IndA** 169**NE**364.

551–32 49**ND**111, 190**NW**308 (contract properly let). [a] **Matters considered.**–49**ND**111, 190**NW**308.

551–34 97**PaSuper**47 (contract need not be awarded in every case).

551–37 170**Ga**574, 153**SE**353.

552–45½–New. Where aye and nay vote of county commissioners and record thereof on journal are essential to the validity of the contract, failure in this regard is not cured by signatures of the commissioners on minutes to a resolution adopting the contract. 19 **OhA**255.

552–50½–New. Court order, reciting offer to sell and unqualified acceptance and directing payment out of county funds, constitutes purchase contract. **TexCommnA** 27**SW(2d)**144(2dcase).

552–51 123**Kan**480, 483, 256**P**121 [quot CJ].

552–52 123**Kan**483, 256**P**121, 123 [quot CJ]. [a] (3) Order of county board reciting necessity for bridge and ordering that county will pay or contribute to work not exceeding stated sum after competition and approval of work does not constitute contract. 315**Mo** 1233, 288**SW**48.

552–53 154**Wash**480, 282**P**840 (statute requiring contracts employing attorneys to be in writing held not to apply to special attorney for diking district).

552–54 164**Ga**117, 137**SE**776; 169**Ga** 313, 150**SE**158(2dcase); 170**Ga**368, 152 **SE**903(1stcase).

553–55 7**F(2d)**33.

553–60 156**Miss**560, 126**S**192.

553–66 5**PaDist&Co** 220.

553–69½–New. **Comptroller's consent** held unnecessary. 5**PaDist&Co** 220.

553–71 [a] **Sufficient notice of prohibited contract.**–11**LaA**211, 123**S**426.

553–73 180**Ark**828, 23**SW(2d)**264. [a] (3) Contracts by county supervisor as owner of newspaper and printing plant for printing, advertising, and supplies is void. 90**CalA**519, 265**P**1032. [b] **Statute authorizing bringing of action by party without joining person bene-**

filed does not apply to county judge who filed claim in court for rent due his sisters for land. 180Ark828, 23SW(2d) 264. [c] **County's lease** of building held not to amount to donation or benevolence. **Colo** 293P349.

553–74 118Tex288, 15SW(2d)538; **Tex CommnA** 11SW(2d)305. [a] **Statutes prohibiting officers from being interested in contracts.**–203Cal 100, 262P1095.

553–75 176Ark222, 2SW(2d)1101 (valid, in absence of fraud or collusion, regardless of price); **TexCommnA** 11 SW(2)305.

554–76 **TexCommnA** 11SW(2d)305.

554–79 180Ark828, 23SW(2d)264; 115 Or409, 40ALR1362 (contract providing that compensation for special services should be fixed by county judges after rendition of services is valid).

554–80 **Colo** 293P349.

554–81½–New. County supervisors may employ anyone thought to be competent to do particular work. 206Cal 445, 274 P750 (unlicensed architect may be employed to prepare plans for bridge).

554–81⅓–New. Invalidity of a provision for interest in warrants given for the preparation of an abstract of county property does not affect validity of the contract in other respects. 118Tex279, 15SW(2d)535.

554–81¼–New. Under statutes an ultra vires contract of a county is void as to the part in excess of jurisdiction. 35 Ariz403, 279P257.

554–81⅕–New. County's leasing of courthouse building from American Legion is not invalid on ground that county was entering partnership. **Colo** 293 P349.

554–81⅙–New. Lease of courthouse building was not void because there was no appropriation providing for rentals for full term. **Colo** 293P349.

554–81⅐–New. Provision of lease to county held too indefinite to be enforceable. **Colo** 293P349.

554–84 81Colo 315, 255P453; 219Ky 174, 292SW816; 118 Or568, 247P815 (fee of coroner's physician who conducted post mortem at request of deceased's relatives); 132 Or374, 284P830; 154Tenn494, 290SW387, 388 [quotCJ].

554–86 154Tenn494, 290SW387, 388 [quotCJ]. [a] (3) Arbitration agreement and award for additional damages for land taken for right of way for highway held not binding on county, where there was no order of fiscal court sitting as body authorizing or ratifying award. 229Ky381, 17SW(2d)260(1stcase).

555–90 181Ark659, 27SW(2d)95; 100 CalA135, 280P140 (return of money illegally paid under void contract cannot be waived); 225Ky437, 9SW(2d)48; 246NY400, 159NE184; 154Tenn494, 290 SW387, 388 [quotCJ]. See also 196NC 184, 145SE28. [b] **Illegal part of contract** which is ultra vires cannot be ratified by performance and acceptance by board of supervisors. 35Ariz403, 279P 257.

555–90½–New. Payments made by a board of supervisors for work done under a void road work contract do not constitute ratification of the contract, so as to enable the contractor to recover thereunder. 153Miss459, 121S133.

555–91 206Cal 445, 274P750; **CalA** 267 P141 (employment contract not terminable at will of county in absence of provision).

556–11 [a] (3) Contract for employment of construction engineer of bridge construed. 70CalA738, 234P845. (4) Other instances. 226Ky640, 11SW(2d) 710.

556–13 70CalA438, 233P409; 154Tenn 494, 290SW387, 388 [citCJ].

556–14 154Tenn494, 290SW387, 388 [citCJ].

557–23½–New. Counties and municipalities hiring an attorney to prosecute an action in their behalf are bound by contracts made with the attorney. 205Cal 111, 270P201.

557–23⅓–New. Contract of county board construed in light of existing law. **Mont** 285P195.

557–23¼–New. Contract held to recite consideration contrary to actual consideration. **La** 130S341.

557–31½–New. ; or that construction of highway was under exclusive control of state highway commission. 132 Or 374, 284P830.

557–34 70CalA738, 234P845.

557–35 70CalA738, 234P845 (in approving contract board of supervisors may take into account reasonable value of engineering services in preparing plans for bridge); **TexCivA** 8SW(2d)1107.

557–36½–New. Where a bridge cannot be completed under plans and specifications prepared by the county, and contractor, upon discovery thereof, after considerable work, notifies the county, and where the county then engages another contractor to complete the structure, there is a breach of contract by the county by reason of the difference in the conditions represented in the plans and specifications and the actual conditions under the bed of the river. 163Ga929, 137SE247.

557–36⅓–New. Under statute, a printer furnishing blanks under contract may charge the full rate for a less number than the minimum fixed by law as basis rate. 84Mont413, 276P667.

557–36¼–New. A county notifying a supervisor of construction work before completion that his services were no longer needed is liable for agreed compensation. **TexCommnA** 11SW(2d)305.

557–36⅕–New. **Assignment of contract.** Although contract calls for personal services, county accepting performance by assignee is bound. **Ala** 128S379.

557–36⅙–New. Assignment of contract with county, not necessarily personal in character, is valid. **Ala** 128S379.

557–37 See also **TexCommnA** 17SW(2d) 781.

558–43½–New. By executing a bond as surety, under statute, the terms of the statute become part of the obligation, and such statute is therefore to be read into the bond. **TexCivA** 8SW(2d)1107.

558–45 162Ga388, 134SE100; 102NJL 616, 133A479; 104NJL475, 141A663 (sureties liable for material furnished on order of contractor's corporate successor organized by him whether or not his contract was assigned to it). See also **NJ** 137A884. [i] **Claims to which bond is applicable.**–192NC403, 135SE 123. [j] **Interest on claims.**–102NJL616, 133A479.

558–47 162Ga388, 134SE100.

558–49 102NJL616, 133A479.

558–52 [i] 102NJL616, 133A479.

559–61 34GaA305, 129SE290 (under statute). [b] **It is not essential to county's liability under statute** that work contracted for shall have been completed. 34GaA305, 129SE290.

559–63½–New. Voluntary act of state or municipal subdivision performing service in which other may be interested does not bring one so performing within bonding statutes enacted for benefit of other. 292Pa304, 141A27.

559–63⅓–New. Surety on bond for delivery of gravel not reciting true consideration held discharged. **La** 130S 341.

559–63¼–New. Bond for delivery of gravel is governed by ordinary rules as to suretyship. **La** 130S341.

559–63⅕–New. Political subdivisions can avail themselves of bonding laws enacted to protect state only by their writings. 292Pa304, 141A27.

559–65 206Cal 445, 274P750; **CalA** 267 P141; 36GaA611, 137SE918; 124Kan 712, 261P834; **Mont** 285P195. See also 225Ky556, 9SW(2d)523. But see 105 WVa314, 142SE440.

559–74½–New. Taxpayers' appeal from the county court's order allowing claims for road work conferred jurisdiction on the circuit court. 174Ark377, 295SW 363.

559–76 147Wash678, 267P436. See also 89Fla510, 105S105.

559–77 70CalA738, 234P845 (county liable on implied contract on abandonment of work); 89Fla510, 105S105 (demurrer to declarations in action against county on common counts should be overruled); 35GaA144, 132SE449. [b] **In Missouri.**–315Mo 1233, 288SW48.

560–79 227Ky663, 13SW(2d)1012; 315 Mo 1233, 288SW48.

560–82 56ND571, 218NW637.

560–94 133 Okl 263, 271P1041. [c] **Evidence held insufficient.**–206Cal 445, 274 P750; **CalA** 267P141; 307Mo 10, 169 SW395.

561–95½–New. The burden of proving facts in mitigation of damages is on the county. **CalA** 267P141.

561–96 [a] **Parol evidence of contract with county through county court** is inadmissible. 315Mo 1233, 288SW48.

561–2½–New. Instructions in action against county for supplies ordered by sheriff held erroneous. 307Mo 10, 169 SW395.

561–5½–New. In an action against a county for breach of contract for construction of a bridge, the contractor may recover only the value of materials furnished and work done on the bridge up to the time the project was abandoned, less the amount paid under the contract. 163Ga929, 137SE247.

561–5⅓–New. But the contractors cannot recover entire profits they would have made if they had completed the contract. 163Ga929, 137SE247.

561–5¼–New. For breach of an employment contract an employee is entitled to the contract price less the cost of performance. **CalA** 267P141.

561–15½–New. An engineer hired to prepare plans and superintend construction of a bridge is entitled to damages for the contract price less the cost of performance on the county's repudiation of the contract. 206Cal 445, 274P 750.

561–15⅓–New. It is no defense in a county's action on a contractor's bond that the county supervisor was a stockholder in the company contracting to furnish supplies to the county. 198Wis 56, 223NW575(2dcase).

561–15¼–New. A county is not required to give a bondsman notice of the principal's default in order to maintain an action on a bond securing performance of contract by the contractor. 198Wis 56, 223NW575(2dcase).

561–25 [b] **Practice stated.**–142Miss490, 107S877.

562–36½–New. Evidence has been held sufficient to sustain a judgment for a materialman suing on a contractor's bond for material furnished in building a county sanitarium. 87 IndA162, 158 NE625.

562–36⅓–New. Delivery of materials necessary for work raises presumption that they were used for purpose for which they were delivered. **NJSup** 151 A470.

562–36¼–New. Proof that materials were delivered at site of sewer construction to person in charge is sufficient proof of delivery. **NJSup** 151A470.

562–38 76CalA290, 245P444; 169Ga 492, 150SE681, 66ALR793 (payment of premium on commissioner's bond); 228 Ky80, 14SW(2d)398; 79Mont323, 256P 386; 194NC723, 140SE712; 122 Okl 268, 254P710; 38 OklACR88.

562–40 144Miss704, 111S143.

562–42 See also 119 Oh117, 162NE394. [b] (2) Special act may empower county to pay from general funds of county for injury for which no legal liability exists. 119 Oh117, 162NE394.

563–46 [a] (6) Statute imposing expenses of maintaining public patients in state hospitals for insane on county of commitment or residence is violative of constitutional provision that institutions for benefit of insane shall be established and supported by state. 122 Okl 268, 254P710.

563–49 [a] **Making of abstract** of property delinquent for taxes in county business must be compensated from county, not state, funds. **TexCivA** 297 SW1055.

563–49½–New. In Ohio state's claim for expenses for dependent minor, committed to the care of board of state charities of juvenile court, may be charged to county from which he was committed or transferred, whether commitment is temporary or permanent. 113 OhSt692, 150NE80.

563–49⅓–New. County commissioners may be authorized by statute to pro-

vide for maintenance of poor at expense of county. 190NC96, 129SE184.

563-50 [b] **Telephone rental** and long distance calls. Ark 31SW(2d)144.

563-59½-New. Expense for clerical assistance to a county school commissioner in taking the census in school districts has been held a proper claim against the county. 244Mich241, 221 NW299.

563-61 19 OhA454.

564-63 19 OhA454 (postage to enable county treasurer to send statements of taxes to taxpayers).

564-67 Ala 128S362(2dcase).

564-85 251NY156, 167NE204. [a] (1) 251NY156, 167NE204. (4) Statute held not limited in application to costs and expenses incurred in removal proceedings. 251NY156, 167NE204. [b] **Appointment of commissioner to hear charges against officer** did not constitute adjudication that charges were based on probable cause, and dismissal of charges did not adjudicate lack of probable cause. 251NY156, 167NE204.

565-93 [a] **Imposition of burden.**-225 Ky112, 7SW(2d)839.

565-94 203 Iowa567, 213NW258.

565-95 203 Iowa567, 213NW258.

566-14 [c] **Office for solicitor of city court.**-165Ga489, 141SE298.

566-29 56ND737, 219NW303 (per diem cost of maintaining panel of jurors not sitting is held under circumstances on change of venue chargeable to county from which case was transferred).

567-35 [b] **County board of education** may contract with justice of peace to teach school. 152Tenn566, 280SW27.

567-36 233Ky432, 25SW(2d)1015.

567-39 80Mont20, 257P1041 (more than one attorney may be appointed and each is entitled to compensation).

567-43½-New. , of detectives hired to investigate and catch violators of Volstead Act. 125Misc658, 211NYS705.

568-48 [a] **Funds available.**-81CalA 590, 254P648.

568-53 See also 56ND737, 219NW303.

568-62 169Minn79, 210NW626; 25 OhA440, 158NE278; 39 OklACR312; 115Tex449, 283SW139; TexCommnA 288SW1067.

569-63 161Ga743, 131SE882; 42 Ida 738, 248P456, 458 [citCJ] 49ALR1057; 200 Iowa1318, 206NW660; Iowa 232 NW682; 261Mass99, 158NE329; 169 Minn79, 210NW626; 39 OklACR312; 115Tex449, 283SW139.

569-65½-New. County is not liable for negligence in executing a wholly unauthorized contract. 200 Iowa1318, 206 NW660.

569-66 CalA 290P540. See also Oh 171NE857.

569-69 [a] (4) County knowingly operating defective steam shovel in removing gravel and road material sold by it is liable to owner of adjoining premises for damage caused by sparks escaping from engine. 192Wis646, 212 NW295. [b] **Where county embarks on industrial enterprise,** it assumes same liabilities that would devolve on individual or corporation. 297Pa185, 146 A567, 64ALR1542.

569-69½-New. There is a distinction between the liability of a county for corporate acts and that of chartered municipal corporations. 242Mich277, 218NW683.

570-71 200 Iowa251, 202NW521 (drainage improvement); Iowa 232NW 682 (making road improvements); 39 OklACR312. [d] **Damages to health of persons** on account of construction and maintenance of public road cannot be recovered against county. 115Tex449, 283SW139.

570-71½-New. Where construction work is properly performed according to plans and specifications, without negligence of the contractor, the county is liable for injury to adjoining property resulting from such construction. 100 CalA173, 279P1057.

570-71⅓-New. Where a contractor departs from plans and specifications or performs work negligently, resulting in injury to adjacent property, he is responsible in damages. 100CalA173, 279 P1057.

570-72 297Pa185, 146A567, 64ALR 1542; TexCommnA 288SW1067. But see CalA 283P977. [a] (10) For injury to convict working in county's stone quarry. 161Ga743, 131SE882. [b] **Under statutes in some jurisdictions** injured person has remedy. CalA 284P 731.

570-78½-New. A county is liable where private property has been taken by county authorities for the benefit of the public or as an incident to the performance of an undertaking by the county authorized by statute. 37GaA 290, 140SE45.

570-79 TexCivA 4SW(2d)289.

570-80 [b] In Hawaii.-30Hawaii44.

571-82 164Ga177, 137SE919; 200 Iowa 1318, 206NW660; 120Kan659, 245P162; 126Kan6, 266P655; 113 Okl 280, 241 P752; 152Tenn141, 273SW557; 156 Tenn298, 1SW(2d)528; 115Tex449, 283 SW139; TexCivA 299SW303 (special road statute held not to impose liability); TexCivA 16SW(2d)338. [f] (6) County is not liable for injuries to convict due to negligence of prison employee. 164Ga177, 137SE919. [i] **Exception to rule** is recognized where land is wrongfully taken by county officers without payment of compensation. 113 Okl 280, 241P752; 113 Okl 285, 241P 758. [j] **Negligent acts of employees in carrying out provisions of an unauthorized lease** of rooms in courthouse for private purposes. 200 Iowa1318, 206 NW660. [k] **Petition in prisoner's action** against county for injuries held insufficient. 164Ga177, 137SE919. [l] **County not liable** for keeping prisoner at work full period of sentence, where claimed deduction for good behavior was not applicable. 164Ga177, 137SE 919. [m] **Owner of land** cannot recover against county for trespass in appropriating his property for road purposes. 218Ky819, 292SW501.

572-86½-New. However, a county may be liable for special damages. 164Ga 177, 137SE919.

572-86⅓-New. Liability of county contractor see Ala 130S805.

573-10 [a] (3) Statute giving remedy to citizen hindered in or injured because of exercise of constitutional or legal rights refers to political rights and does not make county liable for injury by mob not occasioned by exercise of such rights. 132SC347, 128SE 728.

573-12 But see 132SC347, 128SE728.

573-18 114 Oh642, 151NE752 (anticipation of collection of assessments).

573-20 [a] **Expenditure limited to budget for current year** or from money on hand from source other than taxes for such year. 35Ariz403, 279P257.

573-25 TexCommnA 300SW15. See also 225Ky641, 9SW(2d)1006. [f] **In North Carolina.**-190NC96, 129SE184.

574-26 34NM306, 281P29 (new county may be authorized to incur obligations to enable it to function without violating constitutional provision).

574-31½-New. Pledging faith and credit of special taxing district, created for construction of public improvement in two counties, to payment of bonds of such district issued and sold in anticipation of collection of district assessments, is not pledging faith and credit of one county for another. 114 Oh642, 151NE752.

574-31⅓-New. Statutes authorizing cancelation of unused county bonds do not violate constitutional provision. 140 Okl 63, 282P882.

574-32 113 Okl 119, 239P904. [a] (3) Purpose of amendment No. 11 Constitution of Arkansas is not to limit the amount of county debt but merely to prevent the creation of a debt calling for a payment in any one year of a sum greater than the income of the county for that year, taken in connection with its routine current expenses. 169Ark 152, 273SW389, 41ALR782. [b] **Provisions must be strictly enforced.**-136 Okl 85, 276P474.

574-36 [a] Mont 286P125(2dcase).

575-42 175Ark90, 1SW(2d)554; 136 Okl 85, 276P474.

575-43 174Ark107, 294SW381; 175 Ark76, 298SW1002; 38 OklACR332. See also 100CalA135, 280P140.

575-50 175Ark76, 298SW1002.

575-53½-New. Constitutional amendments prohibiting contracts in excess of revenues for year is not intended to obstruct administration of county affairs. 175Ark76, 298SW1002.

575-53⅓-New. Claims against county are allowable if not exceeding revenue for year in which they were incurred. 175Ark76, 298SW1002.

575-55 Mont 286P125(2dcase); TexCommnA 288SW182 (issuing road warrants payable out of current funds, in amount not beyond counties' right of reasonable expectation, does not create debt within constitutional prohibition).

575-56 169Ark152, 273SW389, 41ALR 782; 174Ark107, 294SW381; 100CalA 135, 280P140 (invalid contract incurring indebtedness exceeding limit cannot be validated by subsequent agreement); 312Mo 549, 279SW692. [b] **In Oklahoma.**-(1) 113 Okl 119, 239P904.

581-28 TexCivA 1SW(2d)730 (contract held not to violate constitutional provision). [a] (7) Contract for payment out of collection of delinquent taxes. 118Tex279, 15SW(2d)535. (8) Appropriation of funds within immediate control of county for payment therefor. TexCommnA 27SW(2d)144(2dcase).

581-30½-New. Warrants not to be paid out of current funds of year of issuance are a debt within such provisions. TexCivA 291SW628.

581-30⅓-New. Warrants bearing interest and payable out of funds of future years cannot be construed as creating a debt upon current fund payable in future years. TexCivA 291SW628.

581-34 9PaDist&Co 139; TexCommnA 294SW516; TexCivA 288SW849. [b] **Transactions not creating debts within provision.**-TexCommnA 294SW516. [c] **Issuance of time warrants** subsequent to purchase, and delivery of goods, does not render void obligation which was valid when made. TexCommnA 294SW 516.

581-34½-New. Constitutional limitations on the state's power to incur indebtedness do not apply to counties. 142 Okl 92, 285P832.

581-35 326 Ill 535, 158NE116, 54ALR 777.

581-36 326 Ill 535, 158NE116, 54ALR 777; Ill 172NE50; 319Mo 963, 5SW (2d)378, 382 [quotCJ]. [a] (8) County is not entitled to challenge validity of subsequent statute depriving it of interest on deposits of public moneys given it under Code (1924) §§ 4319, 5548, 5651, 7404. Iowa 222NW378. [b] **Operation under budget system.**-52 SD516, 219NW122. [c] **State's only power is to limit uses thereof** when funds pass into county treasury, excluding right to order funds paid out. Ill 172NE50.

582-38 177Ark649, 7SW(2d)328; 164 Ga9, 137SE558. See also 94CalA382, 271P568.

583-45½-New. Statutory requirement for publication of financial statement held mandatory but period mentioned held directory. 173Minn350, 217NW 371.

583-45⅓-New. Power to award for legal services rendered a county part of a public fund paid into court for the use of the county cannot be exercised, in absence of contract, statute, or some exceptional equitable reason. 205Cal 111, 270P201.

583-48 169Ark436, 276SW2, 5 [citCJ].

583-49 35Ariz541, 281P465; IndA 169 NE364; 146Wash513, 263P946 (game fund not part of general fund).

583-50 219Ala378, 122S333 (fees due sheriff for service of subpœna on grand jury witness where no indictment returned not payable from general fund). 118Tex279, 15SW(2d)535. [a] (2) 165 Ga713, 141SE910. (13) Cost of reassessment by agents of state tax commission may be repaid to tax commission fund out of general county fund. 31NM

44, 240P988. (14) Specific appropriation need not be made to defray expenses of auditing county books and officers' accounts. 170Ark1004, 282SW 369. (15) Appropriation for courthouse, payable by levies in successive years. 174Ark1167, 298SW1006.

583-51 169Ark436, 276SW2. [b] **In Arkansas.**-169Ark436, 276SW2.

583-54 169Ark436, 276SW2, 5 [citCJ].

583-57½-New. Appropriation for county courthouse segregates certain amount of general revenue therefor, but not any particular part, and diversion by county officers may be stopped by warrant holders. 175Ark90, 1SW(2d)554.

583-57¼-New. Action of the board of county commissioners in borrowing money from the general county fund to pay for bonds for which no sinking fund had been provided, which action was subsequently approved by statute, has been held not unlawful. 197NC314, 148 SE470.

584-61 NJSup 142A428. [a] (3) 309 Mo 552, 274SW552 (presumed that statutory salary of judge of circuit court as member of parole board was intended to be paid out of salary fund and it is not payable out of pauper fund).

584-65 [a] (4) 219Ala378, 122S333; 165Ga316, 140SE880; 131 Okl 41, 267 P860, 862 [citCJ]; 139 Okl 185, 281P 795. Other illustrations. 130 Okl 277, 267P270; TexCivA 281SW593. [c] (4) Purchase of automobile is proper charge against fund to be used for purpose of obtaining evidence pertaining to violation of a liquor law. 136 Wash403, 240P560. [d] **Funds raised by bond issue** under statute did not prevent their use in building bridge with necessary approaches, though fiscal court did not intend to build road of any particular length. 208Ky625, 271 SW676. [e] **Funds for road use** may be used for bridges notwithstanding the statute. 208Ky625, 271SW676.

584-66 [a] (3) Commissioners' court is without power to divert constitutional funds to create abstract, map, and plat system fund. TexCivA 281SW593. [b] **In Oklahoma.**-143 Okl 145, 288P307.

585-68 176Ark115, 2SW(2d)5.

585-71½-New. But transfer to the general fund of moneys belonging to the road fund cannot be made to pay interest on bonds antedating the statutes under which such moneys were collected. 214Ala661, 108S580.

585-78½-New. Act held unconstitutional as authorizing payments in contravention of constitutional provisions. 175Ark98, 298SW995.

585-78¼-New. Transfer of funds to current expense fund must be of funds available for current expenses. 142 Okl 8, 285P48.

585-81 [a] **Debit and credit showing required** between sinking fund and other funds. 142 Okl 19, 285P38 (liability in sinking fund not sufficient to require crediting thereof to general fund where credit not shown in statement).

585-82 178Minn484, 227NW499 (mandatory).

585-83½-New. In some jurisdictions all financial affairs are handled on a fiscal year basis. 142 Okl 8, 285P48 (constitutional provision construed not to change to calendar year basis).

585-86 178Minn484, 227NW499.

585-87 [a] **County treasurer in Oklahoma had no authority to invest sinking funds in public securities** which matured after date of obligation for which fund was created. 31F(2d)547.

586-93 219Ky349, 293SW543; 54ND 253, 209NW373.

586-3 148Va299, 138SE485, 486 [quot CJ].

586-4 148Va299, 138SE485, 486 [quot CJ].

586-5 37GaA243, 139SE573; 19 OhA18; 148Va299, 138SE485, 486 [quotCJ].

586-6 162Ga810, 134SE768, 770 [cit CJ]; 37GaA243, 139SE573; 148Va299, 138SE485, 486 [quotCJ]. [b] **Expenditure for improvement of city streets of proceeds of bonds issued for public roads** is unauthorized. 162Ga810, 134SE 768.

586-7½-New. Counties may use funds other than those derived from taxation in payments of their debts. 290Pa427, 139A136.

586-7¼-New. County is liable to drainage district for district funds deposited in general fund of county and used for benefit of county. TexCivA 5SW(2d) 620.

586-7¼-New. County is authorized to pay indebtedness existing Dec. 7, 1924 from proceeds of bonds issued for indebtedness existing before October 7. 176Ark115, 2SW(2d)5 (Acts [1927] p 591, Const. Amendm. XI).

586-7½-New. There must be express warrant of law for all disbursements of public moneys, and payments not authorized are null and void. 219Ala142, 121S504(2dcase).

586-11 See also 118Tex288, 15SW(2d) 538. [a] **Instances where appropriation not required.**-178Ark652, 11SW(2d)444.

586-15 175Ark76, 298SW1002; 323 Ill 261, 154NE97. See also 177Ark798, 9 SW(2d)39. [b] (2) Annual appropriation ordinance for payment of services and expenses "at cost and not to exceed" given sum held to accomplish purpose of statute to fix definite limit. 325 Ill 11, 155NE771. [h] **Inadequate appropriations.**-161Lal. 108S104.

587-18 123 Or301, 261P81. See also IndA 165NE265.

587-21 218Ky452, 291SW271; 114 Oh 212, 151NE47 (appropriation to each war veteran post for expense of memorial day). [b] **Fiscal court of county** may appropriate lump sum for hospital and leave its use and expenditure to discretion of others. 218Ky452, 291SW721.

587-22 175Ark76, 298SW1002.

587-23 102CalA635, 283P862 (designating fund).

587-28 219Ky174, 292SW816.

587-30½-New. An order appropriating a maximum sum for a courthouse is not invalid for not stating that maximum sum is appropriated. 174Ark1167, 298 SW1006.

587-30¼-New. Where money used for the purchase of land for a courthouse and jail was not the proceeds of current taxes, but a special fund received from the state in repayment of bonds previously issued by the county, failure to include the purchase in the budget for the current year does not make the transaction without authority of law. 34Ariz347, 271P720.

587-30¼-New. Contract for purchase of voting machines by county is void where provisions of budget law have not been complied with. Ariz 285P1034.

587-31 102CalA635, 283P862; 162Ga 810, 134SE768, 770 [citCJ]; 220Ky678, 299SW209. [a] (10) Appropriation to improve highways invalid as appropriation for state purposes despite dicta of county court. 168Ark229, 269SW588, 987. (11) Allowances made by fiscal court to sheriff should be charged to him in satisfaction of aggregate amount for himself and deputies. 210Ky51, 275 SW1. (12) County may contribute to cost of improving streets adjacent to courthouse and jail. Ala 127S904. (13) Appropriation to Community Chest as agent of fiscal court, for benefit of charities within city, is held authorized under St. § 1840. 220Ky678, 299SW209. (14) Other instances. 324 Ill 243, 154 NE896; 315Mo 560, 286SW381. [b] **Prohibition against donation or extension of credit in aid of private individuals or corporations** is not violated by statute allowing exemptions from taxation. 48 Ida618, 284P203.

587-32 [a] (7) Statute giving property owner right to damages for establishing highway, has been held not unconstitutional. 173Ark796, 293SW743. (8) For expenses of county judge in attempting to obtain restoration of federal road aid. 175Ark574, 299SW1009.

588-34 168Ark229, 269SW588 (provision against loan of credit). [a] (8) Appropriation for bridge fund is available for constructing roads under statute, and does not contravene constitution forbidding use of tax money for purpose other than that for which levied. 168Ark229, 269SW588. (9) Missouri County Farm Bureau Act. 315Mo 560, 286SW381.

588-37 IndA 169NE364; 145Wash551, 261P90. [a] **In Washington.**-145Wash 551, 261P90. [b] **Act providing for emergency appropriation has been held not repealed** by implication of Tax Law. IndA 169NE364. [c] **In Oklahoma.**-142 Okl 8, 285P48.

588-38½-New. Appropriation for street improvement from special bridge fund is not invalid because cost of improvement required appropriation of revenue for future years. 168Ark229, 269SW588.

588-40½-New. Public policy of the state is considered in determining whether appropriation in aid of agriculture is for a public purpose within the constitution. 315Mo 560, 286SW381.

588-42 TexCivA 264SW520 (advances to road contractors held prohibited loans).

588-50½-New. Appropriation to a public purpose does not require that the entire public shall be directly benefited from the object in aid of which funds are set apart, if it promoted general welfare and prosperity. 315Mo 560, 286 SW381.

588-51½-New. Under some statutes a loan by a board of supervisors out of county bond sinking funds in an amount nearly double the assessed value of the security given therefor is unauthorized and illegal. 146Miss327, 113S203.

588-51½-New. The state revenue agent has authority to sue for and recover on behalf of the county sums so loaned. 146Miss327, 113S203.

588-51¼-New. Act, authorizing bond issue for bridge over river where low-water mark on one side was boundary line, is not unconstitutional as loaning of credit by one county to another. 290 Pa427, 139A136.

589-52 125 Or197, 266P1075.

589-56 Iowa 222NW378.

590-89½-New. An excessive payment by a county for road tax to a township treasurer by county warrant is a payment to the township and the excess is held in trust for the county. 56ND505, 218NW212.

590-91½-New. A special road district is entitled to recover from a county taxes collected by the county on property within the district to which the district is entitled, although the money has been spent. 319Mo 963, 5SW(2d) 378. [a] **Limitation of time to sue.**-319Mo 963, 5SW(2d)378.

590-93 Ala 130S190.

590-94 156Miss240, 125S816.

591-99 Colo 293P349.

592-12½-New. A resolution relieving bondsmen of a county treasurer from liability for his default and directing payment by the county to the sureties of the amount paid by them to the county is violative of a constitutional provision prohibiting any grant, donation, or gratuity in favor of any person, corporation, or association. 164Ga9, 137SE 558.

592-13 190NC96, 129SE184 (authority of county commissioners).

598-4 165Ga153, 140SE351 (facts held to show valid warrant and not promissory note).

598-5 168Ark229, 269SW588 (evidence of contract); 36GaA172, 136SE90.

598-6 But see 169Ga279, 150SE151.

598-18 157Tenn71, 291SW837. [c] **Warrants held invalid only to extent** they contained provisions not authorized by statute. 19F(2d)182. [d] **County warrants held valid.**-19F(2d)182.

598-19 218Ala274, 118S409.

599-20 [a] (2) TexCivA 18SW(2d) 787.

599-22 36GaA172, 136SE90.

599-27 129 Okl 246, 264P615.

599-29 173Ark459, 293SW30; 176Ark 889, 1SW(2d)998 (exceeding revenues for fiscal year). [c] **When limit of disbursement is reached** no more warrants, scrip, or other evidences of debt can be issued; officers overdraw at their peril. 169Ark152, 273SW389, 41ALR782.

600-31½-New. Claim founded on warrant payable out of taxes, to be collect-

ed in following year, is invalid where contrary to statute. 98WVa706, 128SE925.

600-32 167Ga695, 146SE551. See also 176Ark889, 1SW(2d)998.

600-33 174Ark1167, 298SW1006.

600-34½-New. In some jurisdictions particularly in view of validating statutes, certain warrants payable from future appropriations are not invalid. 168Ark229, 269SW588.

600-34½-New. A warrant is valid, although made payable at a future date. 165Ga153, 140SE351.

600-34¼-New. A warrant issued for a past due debt and in renewal of a former warrant has been held not void because given in one year to be paid in the following year. 165Ga153, 140SE351.

600-35 [b] **Time warrants issued without order of commissioner's court** would not constitute binding or valid obligation against county. **TexCivA** 18SW(2d)787.

600-38 154Tenn494, 290SW387.

600-42 35OhA250, 172NE397.

601-54½-New. A warrant is void where issued under a contract in excess of the amount of the appropriation for general county purposes. 170Ark1004, 282SW367.

601-56 175Ark90, 1SW(2d)554.

601-63 [a] **Irregularities** preceding issuance of warrants cannot avail county against purchaser relying on their recital of everything required being done. 23F(2d)371.

602-73½-New. County road warrants, payable out of an unauthorized classification of funds, are not invalid, but may be paid from current funds legally applicable. **TexCommnA** 288SW182.

602-75 173Ark243, 292SW379; 173Ark459, 293SW30; 167Minn458, 209NW638; 74Mont54, 238P586; 154Wash140, 281P332. [b] 173Ark243, 292SW379. [c] **Face of county warrant** is notice to holder that validity depends on legality of issue. 173Ark243, 292SW379.

602-83 See also 90CalA709, 266P604.

603-90 171Ark576, 286SW873; 172Ark442, 289SW326; 173Ark243, 292SW379. [c] **In Montana.**–74Mont54, 238P586.

604-11½-New. One adversely affected by an order of the county court cancelling warrants has a right to appeal. 172Ark442, 289SW326.

604-11½-New. An order of the county court calling in warrants for reissue gives jurisdiction to cancel. 172Ark442, 289SW326.

604-11¼-New. Indorsement on warrants by a county judge has been held not sufficient to show adjudication by the county court. 172Ark442, 289SW326.

604-11½-New. Where warrants are superseded by bonds payable out of levy not yet collected, fact that warrants are not yet due is immaterial in demand for payment. 232Ky328, 23SW(2d)606.

604-12 219Ala142, 121S504(2dcase).

604-14 232Ky328, 23SW(2d)606.

604-16 **TexCivA** 283SW642.

604-17 See also **Utah** 280P1065.

605-38½-New. Warrants must be presented to county treasurer and payment made in cash or by check accepted by holder of the warrants; treasurer is not authorized to direct presentment of registered warrants at banks of county. 74Mont54, 238P586.

605-38⅓-New. A county is forbidden to agree to make payment through warrants except on cash par value basis. 19F(2d)182.

605-38¼-New. The county can recover from a bank the amount of warrants issued to fictitious persons, by reason of forged indorsements. 154Wash140, 281P332.

605-39 **Fla** 126S360.

605-41 35Ariz403, 279P257.

605-42½-New. A warrant not in renewal of a debt in existence when the constitutional amendment was adopted cannot be paid from a bond issue under such amendment. 175Ark98, 298SW995.

606-43 **TexCommnA** 288SW182 (where law creating special fund was declared invalid); **TexCivA** 282SW642; **TexCivA** 1SW(2d)730.

606-46 **TexCivA** 1SW(2d)730.

606-50 214Ala661, 108S580.

606-50½-New. Where a statute authorizes payment for an infirmary site out of a contingent fund without condition or restriction, warrants drawn for such purpose are on a parity with other warrants drawn against the same fund, 312Mo549, 279SW692.

606-50½-New. and holders of registered warrants drawn on a road fund are entitled to payment out of funds in the hands of the acting county treasurer. 214Ala661, 108S580.

606-53 See also 176Ark889, 1SW(2d)998.

606-54 142Okl242, 286P316.

606-55½-New. Failure of bank in which county funds were deposited did not relieve county from obligation to pay warrants on which payment by it was improperly refused when re-presented more than sixty days after notice. 74Mont54, 238P586.

606-55⅓-New. Amendment to statute, abolishing a fund, from which warrants were payable when issued, and providing for payment from general fund, authorized payment of the warrants from the general fund. 74Mont54, 238P586.

606-55¼-New. A warrant is not payable out of funds raised by issue of bonds to pay an existing indebtedness, when the indebtedness represented is not part of the old debt, even where the old debt was partly met by general funds of the county. 170Ark1126, 282SW963.

606-55½-New. Warrants for the construction of a courthouse payable from a general fund are not entitled to preference over other warrants. 174Ark1167, 298SW1006.

606-56 **Fla** 126S360; 118Tex279, 15SW(2d)535; 118Tex288, 15SW(2d)538.

607-57 208Ky667, 271SW1066 (state may recover interest where county judge refused to order payment until required by mandamus to act). [a] (1) 169Ga70, 149SE776.

607-58 173Ark243, 292SW379.

607-61 161Ga287, 130SE580; 154Tenn494, 290SW387. [a] **Agreement to defer payments** held to support promise by county to pay interest on warrant. 154Tenn494, 290SW387.

607-64½-New. A higher rate of interest than the legal rate must be specified in writing. 169Ga70, 149SE776.

607-66 224Ky150, 5SW(2d)901 (where county denies validity of claim).

607-67 Contra 24F(2d)761.

608-72 24F(2d)761 (or suit against treasurer on bond).

608-78 See also 80Mont102, 258P246.

608-88½-New. Statutory enactment that county treasurer might indorse county warrant, "not paid for want of funds," held to operate as provision of warrant, preventing action against county. 143Wash117, 255P949.

609-97 35GaA144, 132SE449.

609-98½-New. In some jurisdictions the statute does not begin to run against county warrants until a demand for payment is repudiated or from the time when a fund out of which they can be paid is provided. 35GaA144, 132SE449.

609-3½-New. Right of action on county warrant commences when treasurer gives notice of readiness to make payment. 143Wash456, 255P949.

609-10½-New. Petition must state a cause of action. 225Ky437, 9SW(2d)48.

609-11 [a] (8) Instances of demurrable or insufficient answers. 200Ind319, 163NE263. [b] **That county warrants are void** is no defense. **TexCommnA** 10SW(2d)718.

610-12½-New. Allegation of facts rendering warrants valid and enforceable is necessary. **TexCivA** 288SW849.

610-12⅓-New. Failure to record warrants is a matter of defense against payment. 169Ga70, 149SE776.

610-13 [a] **Plaintiff in purchasing invalid warrants must show** that he knew of consideration for which they had been issued or purchased equitable rights of company selling tractors, hence held not entitled to recover value of tractors. **TexCivA** 18SW(2d)787.

610-15 169Ga70, 149SE776 (presumed based on valid contract duly recorded); **TexCommnA** 294SW537.

610-29½-New. In general rules of evidence applicable in other actions are applied in determining sufficiency of evidence in action on warrants. **TexCivA** 291SW628.

611-36½-New. Where authority of the treasurer to pay warrants is questioned and warrants are not conceded to be legal, the bank is entitled to judgment. 216Ky232, 287SW892.

611-38 35F(2d)859 (authority to execute note carries authority to make conventional recital that necessary acts had been done).

611-44 **Fla** 126S491; 152Tenn675, 280SW692.

611-45 93Fla796, 112S630; **Fla** 126S353 (in absence of constitutional prohibition); **Fla** 126S491; 132SC314, 128SE712. [b] **Statutes authorizing issuance of county bonds** held not to require exact location of road to be set out in resolution nor that it shall appear that right of way has been secured in advance. 91Fla118, 107S146. [c] **Statute authorizing bonds for hospital** should provide that hospital is for county purposes. 95Fla893, 116S862.

611-48 171Ark576, 286SW873; **TexCivA** 271SW436. [b] **Constitutional proviso includes** districts regarded as counties for this purpose. 170Ark71, 278SW652.

611-48½-New. A constitutional amendment authorizing counties to issue bonds to meet existing indebtedness, being self-executing, debts incurred before legislative enabling act are not included. 170Ark1126, 282SW963.

611-48½-New. The amount of such bond issue is determined solely by the amount of old indebtedness in existence at the time of issue. 170Ark1126, 282SW963.

611-48¼-New. A warrant issued after such issue is not renewal of the old indebtedness. 170Ark1126, 282SW963.

612-56 152Tenn675, 280SW692.

612-56½-New. Construction. "Time of adoption" as used in amendment means time after approval at election or when amendment becomes part of constitution. 169Ark925, 277SW22.

612-56½-New. Authorization by county commissioners for a bond issue to aid a state road has been held not abuse of discretion. 91Fla118, 107S146.

612-60½-New. , or construction of roads in a contiguous county. 146Miss727, 111S840.

612-61 [d] **Statute inoperative.**–32NM309, 259P37.

612-62 97Fla59, 119S865 (purchase site and construct hospital); **TexCivA** 277SW787 (included in power to issue bonds for erection of buildings).

612-62½-New. erection of a high school building; 152Tenn675, 280SW692.

612-66 **Fla** 126S353; 234Ky686, 28SW(2d)986 (vote held to include roads subsequently designated); 43OklACR186 [reh pending]. [f] **County may issue bonds** though road has been designated as state highway. 91Fla118, 107S146. [g] **Money from bond for road construction** must be applied between places designated in order of election. 116Tex378, 292SW160. [h] **Election authorizing bond issue** for federal aid highway gave commissioners' court discretion to determine route acceptable to authorities. 116Tex378, 292SW160. [i] **In Florida.**–93Fla796, 112S630. [j] **Acquisition of rights of way.**–227Ky508, 13SW(2d)515.

613-69½-New. Joint board of two counties, constituting board of special taxing district lying in such counties, created to construct joint county improvement, has power to sell bonds of such district in anticipation of collection of assessments and pledge credit of district for payment thereof. 114Oh642, 151NE752.

613-72 **Ark** 32SW(2d)301 (statute construed); **Fla** 126S491; 225Ky99, 7SW(2d)846; 235Ky100, 29SW(2d)611; 171Minn312, 213NW914; 194NC412, 140SE34 (purpose of particular statutes stated); 130Okl152, 266P437; 52SD516, 219NW122 (county Budget Law held to authorize issuance of bonds to fund warrant indebtedness at any time between January 15 and July 1 of each year); **TexCivA** 5SW(2d)211. But see **Fla** 126S

360. [a] (1) 171Minn312, 213NW914. [c] **Validity of statutes.**–171Minn312, 213NW914.

613-73 [a] (2) Illegal floating indebtedness is not validated by funding it. 235 Ky100, 29SW(2d)611.

614-78 [a] **Judgment of board** not reviewable in absence of corrupt motives. **TexCivA** 277SW787.

614-79½-New. The purpose of the issue cannot be charged. 77CalA404, 247 P527.

614-79⅓-New. In North Carolina county, to issue bonds for erection of school without election, must act as state's administrative agent, or erection must be necessary to provide six months' term of school. 194NC768, 140SE739.

614-83 7F(2d)33. [a] **Bond issue held not bonded debt within constitutional provision.**–137SC288, 135SE153.

614-85 132SC314, 128SE712. [b] **"Bonded debt" within constitutional limitation** must be primary obligation of county secured by tax levied on property holders therein. 132SC314, 128SE712. [c] **That obligations are under seal of county has no bearing** on question whether they are notes or are bonds within limitation. 132SC314, 128SE712.

614-95½-New. If the principal of county bonds for money to be advanced is exempt from constitutional limitations on a bonded debt because of a reimbursement agreement, interest on the bonds is also exempt even though a property tax therefor may be necessary. 137SC288, 135SE153.

614-95⅓-New. If proposed county bonds for money to be advanced under a reimbursement agreement constitutes a debt within a constitutional provision, the amount of reimbursement should be offset in computing the bonded debt. 137SC288, 135SE153.

615-1 92Fla30, 109S235.

615-15 77CalA404, 247P527. [a] **On failure to commence proceeding within thirty days to test validity of bond order** as required by statute, bond ordinance will be deemed valid. 198NC440, 152SE165(2dcase).

616-19 92Fla30, 109S235; 98Fla1166, 125S375 (sufficiency).

616-22 195NC367, 142SE315 (purpose of issue).

616-24½-New. In some jurisdictions the proper publication of the notices required before the issuance of bonds is mandatory. 194NC49, 138SE433.

616-24⅓-New. Under some statutes there is a sufficient compliance with requirements relative to publication of notices where orders for the issuance of bonds are published with the statement required to be published immediately below the clerk's certificate authorizing proceedings. 194NC49, 138SE433.

616-24¼-New. Order directing "issue" made within less than thirty days of publication of indebtedness is held not to deprive quorum court of jurisdiction. 175Ark678, 300SW382.

616-27 194NC49, 138SE433; 194NC412, 140SE34; 52SD516, 219NW122 (statute authorizing county commissioners to raise money to pay outstanding warrant indebtedness without approval of electors held to prevail over prior statute); 146Val, 135SE693. [a] (6) Establishment on maintenance of schools is not necessary expense of county. 194NC49, 138SE433. (7) Popular vote necessary for erection and purchasing schoolhouses except where bonds issued to maintenance of six months' school term provided by constitution. 195NC367, 142SE 315.

617-31 195NC132, 141SE546 (bond issue for highway construction); 43 Okl ACR186 [reh pending]; 105WVa589, 148 SE674(3dcase). [a] **Issuance of bonds for expense of public schools** in performance of mandatory constitutional duty is not within statute requiring vote of people on bond issue. 198NC480, 152SE 401.

617-32 138SC468, 136SE891.

617-35½-New. A provision that only one special election shall be held in any county in any one year contained in a statute relating to elections for bonds for road construction purposes refers only to elections called pursuant to the authority conferred by the statute. 122 Or515, 259P915.

617-41 See also 225Ky432, 9SW(2d) 129. [c] **Only final date of maturity of bonds** need be stated and not different due dates of bonds issued redeemable serially each year. 199 Or127, 248P151. [d] **Petition asking that vote be taken on two designated separate propositions** for bond issues does not authorize submission by ballot as joint proposition, and election on ballot submitting single proposition for or against "courthouse and jail bonds" is void. 34NM337, 281P 33.

617-43 119 Or123, 248P167.

617-45 119 Or123, 248P167. [a] In 119 Or123, 248P167.

618-61 [a] **Signature by county judge of order of election** after election invalidates order and election. 230Ky316, 19 SW(2d)994.

618-67 227Ky508, 13SW(2d)515.

618-84 91Fla118, 107S146. [a] (5) Order naming one amount for construction of courthouse and jail is not invalid as submitting two separate unrelated propositions. **TexCivA** 277SW787.

619-91 Oh 172NE154.

619-92 229Ky45, 16SW(2d)500.

620-94 229Ky45, 16SW(2d)500.

620-99½-New. Notice of bond election contest is not defective in stating that the contest will be filed before a judge. **TexCivA** 288SW556.

620-99⅓-New. A petition and notice of a bond election contest requires an answer although grounds were subject to demurrer. **TexCivA** 288SW556.

620-99¼-New. A statement and notice which were joined should be considered together. **TexCivA** 288SW556.

620-5 [a] **Registration certificates** must be produced by voters at election. 138 SC468, 136SE891.

620-7 [a] **Evidence held sufficient** to sustain finding that election was not void for irregularities. 138 Okl 4, 280P 263.

620-11½-New. Court may declare election void only where for same reason true result cannot be determined. **Tex CivA** 277SW787.

620-11⅓-New. or sufficient number of qualified voters were denied right to vote, as would change result. **TexCivA** 277SW787.

621-14 Fla 126S491.

621-15 161La675, 109S353; 156Miss 625, 126S390(1stcase).

621-27½-New. Where board has power to issue bonds, its judgment as to necessity of issuance is not reviewable. **Tex CivA** 277SW787 (in absence of corrupt motives).

621-29 12F(2d)883.

621-30 [b] **Sufficiency of consideration.**–171Ark576, 286SW873.

621-31 12F(2d)883.

621-34 98Fla1166, 125S375. See also SC 155SE266. [a] **Bond issue for road purposes** has been held not invalid because providing for refunding old bonds issued for building roads and bridges. 220Ky698, 295SW1003.

622-41 See also SC 155SE266.

622-44½-New. the fact that they are county-wide bonds; **TexCivA** 20SW(2d) 822.

622-55 120Kan768, 245P112.

623-70 12F(2d)883.

623-75 [c] **Absence of seal from coupons** does not invalidate them where bonds are sealed. 12F(2d)883.

623-76 98Fla1166, 125S375.

623-85 [b] **Statute authorizing county to issue bonds without directing denomination** has been held inoperative. NM 255P392.

624-92 119 Or127, 248P151.

624-96½-New. , or outside the state. 84Mont285, 275P743.

624-98 But see NM 255P392.

624-2½-New. Bonds reciting on their face that they were issued pursuant to statute and attested by officers authorized to issue them are prima facie valid and admissible in evidence. 12F(2d)883.

625-3 12F(2d)883. [a] (4) 175Ark678, 300SW382.

625-5 12F(2d)883.

626-6 12F(2d)883.

626-8 93Fla470, 112S253, 262 [citCJ].

626-9 93Fla470, 112S253, 262 [citCJ].

627-11 93Fla470, 112S253, 260 [citCJ].

627-12 93Fla470, 112S253, 257 [citCJ]; 116 Tex299, 289SW381.

627-14½-New. Where the legislature validates a bond issue, it may retain control of the subject for additional or supplemental legislation, providing for submission of the validating act to the county electors. 194NC22, 138SE443.

627-14⅓-New. Such additional or supplemental legislation does not impair the obligation of contracts. 194NC22, 138 SE443.

628-26½-New. Where funding bonds are issued by a county to pay an outstanding judgment indebtedness, the judgment becomes merged in the bonds and cannot thereafter exist as a separate entity aside from the bonds. 130 Okl 152, 266P437.

628-26⅓-New. Where bonds are so issued, the failure of the judgment creditor to receive the amount of the judgment out of the proceeds of the sale of the bonds does not revive the judgment and give the creditor the right to have a tax levied to pay it. 130 Okl 152, 266 P437.

628-33 **TexCivA** 19SW(2d)951 (exclusive of commissions).

629-55½-New. Provision of enabling act that bonds shall not mature before specified date is not violated by provision in contract for interest payments prior thereto. 168Ark1084, 272SW653.

629-55⅓-New. Provision of enabling act confining amount of bonds issued to ascertained indebtedness is not violated by contract made in contemplation of converting bonds into others of a lower rate of interest equivalent to the indebtedness. 168Ark1084, 272SW653.

629-55¼-New. Under some statutes a board of county commissioners has no authority to sell bonds issued to fund a judgment. 130 Okl 152, 266P437.

629-55⅙-New. [§ 339a] 6½. **Sinking Funds.** Interest derived from sinking fund to pay compromised bonded indebtedness constitutes "property of county" and is subject to disposal by quorum court. 175Ark574, 299SW1009.

629-55⅛-New. A county is not liable for a misrepresentation of its treasurer in an advertisement of a sale of bonds where he acted outside of the scope of his authority. Okl 282P1080.

629-66 Iowa 230NW337 (sources designated in statute of 1929 held one from which road bonds authorized and issued before July 4, 1929 should be liquidated).

630-79 84Mont285, 275P743.

631-87½-New. In some jurisdictions holder of drainage district bonds issued by county board of supervisors payable solely out of special assessments cannot sue county thereon. Iowa 229NW 711.

631-92 170La562, 128S516 (suit not brought until sixty days after promulgation of result of election).

631-5½-New. , nor to allege presentation of coupons for payment. 84Mont 285, 275P743.

632-30½-New. Appeal on contest of election. Assignments not reviewable in absence of exceptions. **TexCivA** 277SW 787.

632-30⅓-New. Appellate court has no jurisdiction to review conduct of election in absence of showing that notice of contest was given. **TexCivA** 277SW 787.

632-32 86CalA421, 260P961; Fla 126 S308; 235Ky728, 32SW(2d)42; 137 Okl 222, 278P617; 161Tenn236, 30SW(2d) 268 (county court).

632-33 Ill 172NE50.

632-34½-New. If authority to assess and collect taxes is a mere incident to the main purpose of the act it does not offend against Florida constitution. 95 Fla457, 116S78.

632-35 216Ala469, 113S584; 102CalA 767, 283P385; Fla 126S308; 310Mo 587 275SW932; 161Tenn236, 30SW(2d)268 (quarterly county court). [a] **Act establishing salary system** in certain counties not invalid against constitution limiting taxing power of counties. 160Ga 657, 129SE38.

633-37 [a] **In Georgia.**–165Ga623, 142 SE288 (matters considered in computa-

tion under particular statutes).

633-37½-New. Constitutional limitation on power to incur debts is not a limitation on the taxing power of a county. 164Ga117, 137SE776.

633-38 319Mo 302, 3SW(2d)378; 113 Okl 200, 241P124.

633-39 [a] (2) Statute imposing license tax on operators of motor vehicles for hire on public highways and providing for payment of fees into state treasury and apportionment of half to state and half to counties. 199Cal 21, 248P235. [b] **Statute not invalid.**-225Ky112, 7SW (2d)839.

633-40 151SC99, 148SE726; 161Tenn 236, 30SW(2d)268. [c] **In determining county purpose,** locality of work and anticipated benefit are both considered. 91Fla118, 107S146. [d] **Limit power of county to levy taxes.**-164Ga485, 139SE 11, 53ALR1286. [e] **Rescission of levy and new levy.**-197Wis4, 220NW393.

633-40½-New. , and the imposition of the burden on the county, although it may necessitate the levying of taxes, is not an imposition of taxes by the general assembly. 225Ky112, 7SW(2d)839.

633-42 165Ga623, 142SE288 (levy of one hundred per cent of state tax for current expenses authorized).

633-43 54ND220, 209NW225. [c] **Statute limiting power of county commissioners** to levy to amount equalling county expenses with certain additions has been held not to limit power to provide for erection and repair of public buildings. 54ND220, 209NW225.

633-44 86CalA421, 260P961.

633-48 [a] **Levy of tax to pay cost of notices of resale of real estate.**-Under some statutes only discretion vested in county excise board as to levy of tax to pay cost of publication of notices of resale of real estate sold for delinquent taxes by county as agent of state is as to amount reasonably necessary for purpose. 129 Okl 145, 264P190.

633-53½-New. In some jurisdictions the legislature has no power to authorize or require a county to levy a tax for any purpose other than those specified in the constitution. 164Ga9, 137SE 558.

633-53¼-New. A tax levy to pay installments on warrants for a courthouse which were within revenue for year are not invalid. 174Ark1167, 298SW1006.

633-53¼-New. An order of the quorum court making an annual levy to pay installments due on courthouse is not invalid as not binding on future courts. 174Ark1167, 298SW1006.

634-56 86CalA421, 260P961; Fla 126 S308 (county tax means tax exclusively for county purposes); Fla 126S360; 36 GaA382, 137SE93; 36GaA386, 137SE 95; 36GaA391, 137SE98; 39 OklACR157 (levy for general road purposes as part of current expenses and other levies for current expenses must not exceed statutory limit). See also 191NC761, 133SE 395. [a] (2) Determination of county purpose. Fla 126S353. [i] **Current expenditures.**-312Mo 549, 279SW692.

634-57 Fla 126S353; 36GaA382, 137 SE93; 315Mo 430, 286SW360.

634-58 157Tenn71, 291SW837. See also 34NM306, 281P29.

634-58½-New. payment of public debt or interest thereon; 34NM306, 281P29.

634-59 165Ga153, 140SE351; 170Ga 248, 152SE567.

634-64 [b] **Permanent improvements** levy held valid. TexCommnA 300SW 15.

634-66 See also CalA 288P450.

634-67 310Mo 587, 275SW932 (roads and bridges); 197NC314, 148SE470. But see 130Kan554, 287P612.

634-68 127Kan635, 274P266; 129Kan 131, 281P931(1stcase).

634-68½-New. establishment of boys' and girls' homes; 125 Okl 164, 256P935.

634-63¼-New. free fairs; 125 Okl 164, 256P935.

634-68¼-New. treatment of tubercular patients; 125 Okl 164, 256P935.

634-68½-New. support of separate schools; 125Okl 164, 256P935.

635-72 160Ga857, 129SE542; 162Ga 810, 134SE768. [a] **General limitation to public purpose.**-118Tex207, 13SW(2d) 353.

635-73 160Ga857, 129SE542 (levy of tax to pay fees of registrars of vital statistics not authorized under power to provide for necessary sanitation); 162Ga810, 134SE768.

635-74 92Fla432, 109S331. [a] (2) "Current expenses" are included within "county purposes" under Georgia statute. 167Ga210, 144SE783.

635-79 41GaA130, 152SE261 (levy of two cents per hundred dollars for building and operating ferries held unauthorized under Civ. Code [1910] § 513 subd. 2). [d] **Liabilities must be budgeted.**-35Ariz403, 279P257 (emergencies arising from acts of God). [e] **Special levy to pay emergency liability under statute** should include total indebtedness then existing under order of state tax commission, though it is not due and warrants have not been delivered to creditor. 35Ariz403, 279P257. [f] **Erection of insane ward.**-130Kan428, 286P250.

635-83 See also 142 Okl 8, 285P48.

635-85 36GaA391, 137SE98.

635-85½-New. A tax levy for miscellaneous expenses may be made. 319 Ill 415, 150NE247.

635-85⅓-New. A county's credit may not be pledged to pay for road bonds issued for the exclusive benefit of the township. 191NC761, 133SE395.

635-85¼-New. Workmen's compensation law has been held invalid as requiring levy for unauthorized purposes. 164 Ga485, 139SE11, 53ALR1286.

635-85⅙-New. A provision for assessment to pay legal indebtedness is not limited to current expenses and bonded debt. 165Ga1, 139SE890.

635-85⅙-New. In making deduction total amount of uncollected delinquent taxes for all previous years is not surplus balance ascertained to be on hand for such years. 130 Okl 277, 267P270.

635-85⅐-New. In Oklahoma sinking fund deficit cannot be raised by ad valorem taxation in subsequent year. 143 Okl 161, 288P337.

635-86 170Ga607, 153SE741 (levy for greater amount than necessary to create surplus for another purpose is unlawful); 315Mo430, 286SW360. [f] **Discretion of county authorities.**-35GaA144, 132SE449. [g] **Levy to pay bonds and relieve interest payments** in advance held proper. 315Mo 430, 286SW360. [h] **Situation at time of levy** has been held to control test of amount within necessity. 315Mo430, 286SW360. [i] **Sinking fund.**-143 Okl 161, 288P337. [j] **Deductions.**-142 Okl 130, 285P836. [k] **Method of determining amount of levies under Oklahoma statute stated.**-142 Okl 130, 285P836.

636-87 25F(2d)964; 92Fla432, 109S 331; 162Ga172, 132SE896; 167Ga210, 144SE783; 36GaA382, 137SE93; 36GaA 386, 137SE95; 319 Ill 366, 150NE286; 319 Ill 433, 150NE288; 327 Ill 611, 159 NE228; 235Ky600, 31SW(2d)928; 125 Okl 164, 256P935; 130 Okl 277, 267P270 (unauthorized levy in excess of current expenses illegal and excess recoverable where paid under protest); 132 Okl 150, 270P5; 141 Okl 130, 284P27. [a] (8) 130 Okl 277, 267P270. (10) 130 Okl 277, 267 P270 (uncollected delinquent taxes from previous fiscal years not proper items of deduction for surplus balance of revenue ascertained to be on hand from such years). (11) In case of restriction made by statute on increase in tax for given year to ten per cent of tax levied for previous year, calculation must not exclude special tax for roads and bridges, though latter is placed in special fund which cannot be diverted to other county purposes. 310Mo 587, 275 SW932. (12) Under Kansas statute after hospital proposition has been adopted by electors a tax of two mills on the dollar may be levied annually for purchase of site, erection of buildings and support of hospital. 119Kan240, 243P282. (13) Under Const. art 8 § 4 par 1, tax to pay salaries of county agent and for educational purposes under Act (1922) p 81 is void if, when added to tax for school purposes levied under such constitutional provision, total exceeds five-mill levy therein permitted. 165Ga1, 139SE890. (14) In Oklahoma. 142 Okl 8, 285P48. [f] **Constitutional provision for road and bridge tax** in Missouri, sec. 22 of art. 10, authorizes additional tax not subject to limitation of sec 11 of the same article. 310Mo587, 275SW932. [g] **Constitution authorizing levy of taxes, and protecting all taxes levied under prior constitutional authority,** renders prior tax levies exclusive and not inclusive. 168 La477, 122S587. [h] **Items to be considered** in determining whether levy excessive. 170Ga248, 152SE567 ("other lawful charges"). [i] **Conduct of elections** permitting levy exceeding limitation. 339 Ill 300, 171NE126. [j] **Constitutional provision for authorization by majority vote of greater tax** is inapplicable until aggregate exceeds stated amount. 339 Ill 169, 171NE175 (tax held valid).

636-88 181Ark863, 28SW(2d)333 (discretion of county quorum court).

636-90 165Ga623, 142SE288 (in determining statutory amount of increase items not requiring recommendation of grand jury need not be considered); 37GaA763, 142SE301; 125 Okl 164, 256 P935.

636-91 310Mo 587, 275SW932; 317Mo 41, 295SW78; 125 Okl 164, 256P935.

636-92 310Mo 587, 275SW932; 125 Okl 164, 256P935.

636-94 [c] (1) 194NC412, 140SE34. But see 194NC781, 140SE748.

637-95 194NC781, 140SE748.

637-96 [a] (22) Levy for general road fund is part of current expense and cannot, with other levies, exceed limit for current expense. 130 Okl 277, 267P270.

637-97 86CalA421, 260P961; 36GaA 382, 137SE93; 142 Okl 8, 285P48 (levy for free fair purposes); 142 Okl 29, 285 P59 (levy made for free fair purposes); 52SD516, 219NW122 (limitation on tax levy imposed by Rev. Code [1919] § 6737 held inapplicable to bond interest and sinking fund). [a] **Special or extra taxes authorized by general assembly,** if within provisions of constitution, must be levied, collected, and paid without regard to classification. 165Ga1, 139SE890. [b] **In Oklahoma.**-142 Okl 1, 285P73.

637-98 36GaA382, 137SE93; 37GaA 766, 142SE303 (levy for current expenses in amount equal to or less than state tax); 168La477, 122S587; 54ND 220, 209NW225; 125 Okl 164, 256P935. (18) Other applications. 38GaA611, 144 SE687.

637-99 39GaA303, 147SE158; 339 Ill 169, 171NE175; 130 Okl 277, 267P270. See also 34GaA88, 128SE234.

638-1 GaA 140SE79. [a] **Additional tax held invalid** in absence of notice to voters that tax would exceed limit. 319 Ill 366, 150NE286; 319 Ill 433, 150 NE288.

638-2½-New. Where the legislature has authorized additional apportionment of tax levies for counties and such apportionment together with levies previously authorized do not exceed the constitutional limitation, such additional levies are constitutional and valid. 113 Okl 200, 241P124.

638-2⅓-New. In Oklahoma statute provides for addition, by excise board, of ten per cent for delinquent taxes. 114 Okl 240, 246P395.

638-2¼-New. Levees for unitemized, contingent, or miscellaneous expenses must be a very small proportion of the entire tax. 319 Ill 415, 150NE247.

638-2⅕-New. Extra, extraordinary, or special taxes, not essentially necessary for carrying on the ordinary functions of the government, are not to be computed in consideration of the question whether a tax levy for current expenses is excessive. 165Ga1, 139SE890.

638-2⅙-New. In some jurisdictions, additional assessment, where assessment of one hundred per cent on state tax is insufficient to pay current expenses and accumulated debt in one year, must be sufficient to pay off accumulated debt of the county in four years. 165Ga1, 139SE890.

638-2⅐-New. The question of the proper amount of taxes to be raised for cur-

rent county expenses is committed to the reasonable discretion of the county board, and courts will only interfere to prevent a clear abuse of this discretion. 331 Ill 544, 163NE355.

638-2⅛-New. Excise board cannot permit deduction from funds on hand at close of fiscal year of amount reserved for appropriation and levy based thereon is excessive. 142 Okl 1, 285P73.

638-2⅛-New. Levy based on appropriation made after deduction of an amount "reserved for appropriation" from funds on hand at close of fiscal year is excessive and void to that extent. 142 Okl 29, 285P59.

638-2⅒-New. Levy based on appropriation made after deduction of an amount "reserved for appropriation" from funds on hand at close of fiscal year is excessive and void to that extent. 142 Okl 8, 285P48.

638-2⅒-New. In some jurisdictions surplus balance of revenue for fiscal year must be deducted from amount of appropriations for subsequent year with added percentage for delinquent tax. 142 Okl 242, 286P316.

638-2½-New. Excise board may deduct from balance on hand at end of fiscal year amount sufficient to liquidate all valid unsettled contracts made during that year. 142 Okl 8, 285P48.

638-2⅓-New. In some jurisdictions existing indebtedness and expected discounts, delinquencies and exonerations are not deductible before levying tax to pay county and home demonstration agents. WVa 153SE506.

638-4 [a] (3) Fixing of tax rate for maintenance of tuberculosis sanatorium is left to fiscal court's discretion and district sanatorium trustees are not authorized to fix rate. 227Ky7, 12SW(2d)348. [c] **Advance order of court,** regarding taxes, has been held not levy till assessment. 315Mo 430, 286SW360. [d] **Levy by court has been held** conclusive as to legality in absence of abuse of discretion amounting to fraud. 315Mo 430, 286SW360.

638-7 323 Ill 261, 154NE97; Va 154SE 479. [a] **County tax levy held void** where no aye and nay vote of county commissioners was reported. 323 Ill 261, 154NE97.

638-8 Va 154SE479. (b) **In Montana.**-11F(2d)936. [c] **Sufficiency of notice.**-Va 154SE479.

638-9 [b] **Limitation on time to make local tax levies** is inapplicable where taxpayers appeal to circuit court. Va 154SE479.

638-15 86CalA421, 260P961; 165Ga1, 139SE890; 41GaA130, 152SE261; 325 Ill 11, 155NE771; 326 Ill 354, 157NE 472; 328 Ill 177, 159NE187; 227Ky7, 12SW(2d)348. [b] (26) Tax levy for bridges and rights of way are for separate purposes and each amount must be stated separately. 328 Ill 177, 159 NE187. (27) Other instances of sufficient levy. 38GaA703, 145SE668; 39 GaA75, 146SE771. [e] **Where part of item of tax levy is uncertain, indefinite, and indeterminate,** entire item is void. 37GaA599, 141SE79. [f] **Levy for road drag purposes** made against taxable property of township should be separate and distinct from levy authorized for current expenses. 130 Okl 277, 267P270.

639-16 37GaA763, 142SE301 (levy for "county purposes" by reference to specific code section); 38GaA703, 145SE 668; 39GaA303, 147SE158; 325 Ill 11, 155NE771; 328 Ill 177, 159NE187 (words in tax levy must be taken in their ordinary acceptation unless context causes them to have other meaning); 336 Ill506, 168NE294 (tax for courthouse and jail need not state specifically amount for every purpose of appropriation); 126Kan9, 12, 266P657 [quot CJ]. See also 141 Okl 130, 284P27 (levy for general fund purposes required first).

639-17½-New. A tax levied for any of the purposes authorized by statute includes all of the items included in such purpose. 35GaA144, 132SE449.

639-17⅓-New. Where an item for light and water has no definite purpose shown, evidence cannot be given to show purpose in an action for delinquent taxes. 326 Ill 354, 157NE472.

639-17¼-New. Amendment of levy to show purpose of tax cannot be made in actions to collect delinquent tax. 326 Ill 354, 157NE472.

639-17½-New. In itemizing various objects for which tax levy is made, persons to whom moneys are to be paid need not be specified in detail. 325 Ill 11, 155NE771.

639-19 157Tenn71, 291SW837.

639-20 165Ga623, 142SE288 (holding that in present case no recommendation was required as to several matters enumerated); 36GaA391, 137SE93; 37GaA599, 141SE79 (record held not to show recommendation required); 37 GaA763, 142SE301 (holding that in present case no recommendation was required). See also 36GaA382, 137SE 93. [a] **When recommendation unnecessary.**-165Ga1, 139SE890. [b] **Failure of ordinaries to present to grand jury statement of financial condition** of county for their inspection does not affect validity of tax levy. 165Ga623, 142SE 288. [c] **Presentation to foreman of grand jury of statement of financial condition of county is not necessary** where levies were lawful when made without recommendation of grand jury. 37GaA763, 142SE301.

639-21 328 Ill 97, 159NE209; 327 Ill 611, 159NE228 (proceedings submitting question held not to authorize tax in excess of constitutional limitation); 116 Nebr648, 218NW429. [e] 328 Ill 504, 160 NE82. [g] **Form of ballot.**-329 Ill 467, 160NE841.

640-28 197Wis4, 220NW393.

640-29 38GaA703, 145SE668; 41GaA 130, 152SE261 (amendment of tax levy of eighty-five cents per hundred dollars for ferries and other improvements so as to provide that two cents shall be used for ferries held merely explanation of levy).

640-29½-New. "An entire levy is not void merely because one or more of the items of the levy, in which the purpose is plainly and definitely specified, may be void. 165Ga1, 139SE890.

640-29⅓-New. It is not essential to the validity of a levy for a given purpose that a contract for such purpose should have been made therefor. 38GaA703, 145SE668.

640-30⅓-New. Assessment for local improvement against a national bank is not prohibited by federal statute. 11 F(2d)936.

640-31 165La702, 115S908.

640-32 [c] **For exclusive benefit of township.**-191NC761, 133SE395. [d] **In Georgia.**-165Ga1, 139SE890.

640-34 135 Okl 186, 274P876.

640-36½-New. Levying court has no authority to double valuations to provide for payment of judgment against county, and its doing so is an erroneous assessment. 168Ark58, 268SW849.

640-36⅓-New. Cancellation of assessment. Under statutes in some jurisdictions, the board of supervisors, upon proper application and proof, is required to direct cancellation of an assessment where a like assessment has been made by another county. 84ChlA 577, 258P991.

640-38 321Mo 35, 10SW(2d)918. [a] **Doubt as to statutory authority** is resolved against individual attempting to escape taxes and assessments legally levied. CalA 289P678.

640-40 [a] **Contract of commissioner's court to pay part of delinquent taxes collected** to persons making abstract of property and collecting taxes is valid. 118Tex279, 15SW(2d)535.

640-41½-New. County warrants must be accepted in payment of taxes. 176 Ark115, 2SW(2d)5.

641-45 [a] **In Pennsylvania.**-96 PaSuper363.

641-52 See also 37GaA763, 142SE301.

641-55½-New. A revenue agent for the state cannot sue in the name of the state for purely county taxes. 220Ky 89, 294SW815.

641-55⅓-New. A statute allowing reduction for prompt payment of county taxes in townships and boroughs cannot be extended to cities by court or county commissioners. 292Pa269, 141A37.

641-55¼-New. Purchaser of land for delinquent county taxes does not take title free from lien for delinquent irrigation district taxes or assessments. CalA 289P678.

641-55½-New. Statute directing county treasurer to collect special assessments at same time as other taxes is construed not to enjoin on treasurer duty to receive both taxes or neither. 27 OhNPNS540.

641-55⅓-New. A county sheriff is entitled to four per cent commission for collecting taxes levied. 231Ky200, 21 SW(2d)244.

641-57 114 Okl 246, 246P376.

641-58½-New. A receiver of a national bank may be estopped from asserting the invalidity of an assessment for local improvement of which he had actual notice where he stood by and permitted county commissioners to incur the expense. 11F(2d)936.

641-59 114 Okl 246, 246P376.

641-59½-New. or the sale of part of courthouse grounds for a gasoline filling station. 163Ga293, 135SE911.

641-60 35Ariz26, 274P163; 168Ark 449, 270SW609; 162Ga810, 134SE768; 326 Ill 240, 157NE235; 146Miss727, 111 S840; 131 Okl 41, 267P860. [c] **Taxpayer held not entitled to restrain payment for printing ballots** on ground that candidates were not legally nominated. 328 Ill 626, 160NE158.

641-65 TexCivA 280SW861.

642-66 66Utah184, 240P454.

642-67 Iowa 230NW337; 146Miss727, 111S840.

642-72 170Ga607, 153SE741; 246NY 400, 159NE184.

642-80½-New. Taxpayer may maintain suit in equity to compel accounting by the county clerk of illegally retained fees. 240 IllA340.

642-85 But see 73Mont165, 235P337.

642-86 181Ark863, 28SW(2d)333 (tax regularly levied cannot be enjoined even if excessive); 70CalA526, 233P810 (manufacture and sale at cost by county of poison barley for use by farmers and landowners in extermination of ground squirrels, as sanitary measure); 165Ga 713, 141SE910; 127Kan227, 273P398; 114 Okl 246, 246P376.

642-87 29Hawaii366; 49ND821, 194 NW887; TexCivA 22SW(2d)482.

643-94 123 Or57, 261P77; 123 Or67, 261P80.

643-95 168Ark58, 268SW849 (action for refund of taxes paid under erroneous assessment). [a] **In New York.**-124 Misc893, 210NYS122.

643-97 86 IndA322, 157NE472.

643-4 144 Okl 33, 289P298. [a] **Service of taxpayer's demand.**-Either by taxpayer or his attorney. 144 Okl 33, 289P 298. [b] **Time of compliance** of county commissioners served with notice is reasonable. 144 Okl 33, 289P298.

643-5½-New. In an action by taxpayer for the county to recover back amounts of commissions on taxes collected paid sheriff in excess of salary, there can be no recovery against members of fiscal court for failure to require sheriff to make statutory settlement, 210Ky51, 275 SW1.

643-5⅓-New. especially where court dismissed such claim on sustaining demurrer thereto and no appeal was taken from the judgment. 210Ky51, 275SW1.

643-5¼-New. Withdrawal from the county sinking fund of assets belonging to the city which had been erroneously placed to the credit of such sinking fund did not create an action in favor of a tax payer. 124 Okl 296, 256P42.

643-5½-New. Where a suit is for the benefit of county taxpayers, it is immaterial whether complainant was resident or elector in precinct. 326 Ill 240, 157NE235.

643-7 Ala 128S362(2dcase); 118Kan 667, 236P643 (cannot sue for court's benefit, to recover money unlawfully paid out by it); 127Kan188, 272P189 (2dcase); 73Mont165, 235P337; 49ND 384, 191NW842; 133SC420, 131SE29 (taxpayers held to have no special interest in office or salary of de facto officer to enjoin his acting as such). [a] **Mere inconvenience from relocation of public road on railroad right of way**

does not entitle taxpayer to enjoin lease contract between county commissioners and railroad company for relocation of public road on railway right of way. 127Kan188, 272P189.

643-8 168Ark449, 270SW609 (holding disbursement of funds to pay illegal salary gives taxpayer special interest); 127Kan188, 272P189(2dcase); **TexCivA** 228SW(2d)402 (taxpayer held not peculiarly injured).

644-9 See also 197Wis4, 220NW393.

644-13 75Mont328, 243P811 (no right of action in one alleging himself to be citizen, resident, and qualified elector but not alleging he is taxpayer).

644-26 See also 197Wis4, 220NW393.

644-28 **TexCivA** 271SW436 (taxpayer not attorney could intervene but could not represent others). [a] **Suit to enjoin illegal expenditure of county funds** is properly brought by taxpayer in his own right. 73CalA511, 238P1048. [b] **Suit to recover moneys illegally expended** is suit brought by taxpayer in behalf of county. 73CalA511, 238P1048.

645-31 8F(2d)576; 165Ga713, 141SE910 (when county proper party); 240 IllA340; 86 IndA214, 156NE582. [b] (1) 165Ga713, 141SE910. [d] 8F(2d)576. [f] (4) Bondholders represented by trustees made parties defendant. Fla 127S486(2dcase).

645-32½-New. Taxpayer objecting to bond issue is entitled to intervene in a proceeding to restrain the county auditor from certifying petitions to tax commission. 86 IndA214, 156NE582.

645-32½-New. The town is proper plaintiff in an action in behalf of the inhabitants to restrain a collection where the town is within statutory exemption. 165La702, 115S908.

645-35 Fla 127S486(2dcase); 124Misc893, 210NYS122 (facts, not conclusions, to be pleaded); 49ND384, 191NW842; 133SC420, 131SE29 (conclusion that no prima facie showing of right to injunctive relief not erroneous). [b] 35Ariz180, 276P4; 210Ky51, 275SW1 (as against demurrer in action against former sheriff to recover for county commissions for collecting county and state taxes); 235Ky600, 31SW(2d)928; 315 Mo781, 287SW337. [e] **Petition to recover sheriff's commissions** need not set out list of taxable property coming into hands of sheriff. 210Ky51, 275SW1. [f] **Allegations held unnecessary.**-210Ky51, 275SW1. [g] **Demurrer.**-210Ky51, 275SW1. [h] **Demand on district attorney to sue.**-73CalA511, 238P1048. [i] **Necessity of showing illegality of contract and resulting injury.**-TexCivA 280SW861. [j] **Complaint held insufficient.**-177Ark990, 8SW(2d)466. [k] **Amendment held properly allowed.**-170Ga807, 153SE741. [l] **Petition has been held insufficient.**-235Ky600, 31SW(2d)928.

645-37 210Ky51, 275SW1 (sufficient). [a] **Giving of statutory bond** should be alleged and proved. 124Misc893, 210NYS122.

646-39 [c] **Evidence held sufficient.**-177Ark798, 9SW(2d)39; 70CalA526, 233P810; 325 Ill11, 155NE771.

646-40 177Ark798, 9SW(2d)39; 331 Ill544, 163NE355. But see 175Ark90, 1SW(2d)554. [a] **Evidence held sufficient.**-To show necessity for levy of taxes to pay principal of bonds. 331 Ill544, 163NE355.

646-43½-New. Evidence held admissible. TexCivA 20SW(2d)822 (in taxpayer's suit to enjoin sale of county road bonds).

646-43½-New. Evidence held sufficient to justify the belief that funds from a sale of bonds were within the immediate control of a corporation. TexCivA 20SW(2d)822.

646-44 IndA 169NE364. [a] **Order before appearance term held not final disposition** so as to prevent amendment of petition or trial at subsequent term. 170Ga607, 153SE741.

646-45 210Ky51, 275SW1 (taxpayer not entitled to recover).

646-49½-New. County cannot complain of judgment enjoining payment of more than stated amount on contract on ground that contract must be treated as whole. 235Ky100, 29SW(2d)611.

646-49¼-New. On appeal from order fixing tax levies board of supervisors may rescind former order notwithstanding pending appeal. Va 154SE479.

646-50 34 OhA335, 171NE319.

646-52 See also 205Cal111, 270P201.

646-53 13F(2d)969; 99CalA268, 278P465; 91Fla509, 107S627, 628 [citCJ]; 121Kan428, 247P442 (claim for refund of taxes paid); **TexCivA** 282SW642. [a] (3) Claimant whose claim was partially allowed must afford board opportunity to reconsider matter before resorting to court. CalA 290P648.

647-55 180Ark828, 23SW(2d)264 (in order to file claim one must have interest in claim); 121Kan428, 247P442. [f] **Claim for refund of taxes paid under protest** must be presented for audit and allowance. 121Kan428, 247P442.

648-60 113 Okl280, 241P752 [citCyc].

648-61 84Mont285, 275P743.

648-69 35GaA144, 132SE449.

649-78 166Ga700, 144SE251.

649-81 39GaA115, 146SE351(1stcase).

649-90 [b] **Suit held not brought within time limit.**-168Ga764, 149SE44(2dcase).

649-91 Utah 281P728 (complaint held sufficient).

649-92½-New. Presentation of claim is not technically a suit. 307Mo10, 269SW395.

650-95 But see **TexCivA** 275SW845.

650-2 220Ala437, 125S653.

651-11 121Kan428, 247P442, 443 [cit CJ]. [a] **Failure to object on ground of lack of verification** constitutes waiver. 121Kan428, 247P442.

651-17½-New. Some statutes requiring presentation of claims to the county auditors as a condition precedent to suit thereon do not apply to a claim for damages by reason of negligent construction of a highway which a county auditor is forbidden to audit or approve. **TexCivA** 275SW845.

651-23 13F(2d)969; 313Mo369, 281SW396. See also 146Wash513, 263P946.

651-23½-New. An account cannot be stated as against a county by informal acquiescence in, assent to, or acknowledgment of, the account by the several members of the board of county commissioners. 55ND377, 213NW848.

651-24 146Wash513, 263P946 (statute repealed as to audit of claims presented by game commission). See also 313Mo369, 281SW396. [b] **In Iowa.**-(3) 203 Iowa572, 213NW426. (4) Statute providing that county from which criminal cause is sent on change of venue shall pay all costs consequent on such change includes attorney's fee for defending accused. 203 Iowa572, 213NW426. [e] (2) County courts act judicially in allowance of claims filed against county. 171Ark1132, 287SW398. [k] **Orders against drain fund.**-235Mich364, 209NW142. [l] **County judge has been held to have no right** to file claim against county in his own name and try case himself. 180Ark828, 23SW(2d)264. [m] **Circuit court has no original jurisdiction** to try county judge's claim against county. 180Ark828, 23SW(2d)264.

651-24½-New. or county court. 307Mo10, 269SW395.

652-27 146Wash513, 263P946 (claim against game fund is not charge against county).

652-29 179Ark373, 16SW(2d)10. [b] **Board of supervisors, in auditing claims for costs and expenses** in removal of county officer, could decide whether proceedings were brought in good faith and whether expenses were reasonable. 251NY156, 167NE204.

652-30 [b] **Board must allow all legal claims** properly chargeable to particular fund. 48 Ida447, 282P864.

653-32 118 Or568, 247P815.

653-33 118 Or568, 247P815.

653-41 219Ky174, 292SW816; 118 Or568, 247P815, 823 [citCyc&CJ]. [c] (2) 100CalA135, 280P140. [f] **Commissioners' court may not defeat just claim** when, by exercising their powers, claim can be paid. TexCivA 282SW642.

654-42 118 Or568, 247P815, 823 [citCyc&CJ]. [c] **Mere fact court deems payment of claim to be "in interest of public justice"** is not authority for payment of such claim from public funds, their right to pay claim resting upon law and not upon their judgment. 118 Or568, 247P815.

654-43½-New. The right of the county court to pay a claim may arise from the ratification of an implied contract to pay it. 118 Or568, 247P815.

654-45 251NY156, 167NE204. [d] **In removal proceedings against district attorney probable cause not raised by** attorney's speed in acting on grand jury's failure to indict. 251NY156, 167NE204.

654-47 251NY156, 167NE204.

654-48 251NY156, 167NE204. [f] **Strict rules of evidence** are not binding on board. 215AppDiv776, 213NYS223. [g] **Audit by trial court of claim for attorney's fee** for defending accused on change of venue to another county on affidavit failing to show that attorney has neither received nor contracted to receive compensation from other source is not void and cannot be collaterally attacked. 203 Iowa572, 213NW426.

655-56 [a] **Furnishing of machinery to county** is not "public work" within statute providing payment not made until inspected, accepted and entered on minutes. 156Miss560, 126S192.

655-61 173Ark755, 293SW34; 180Ark828, 23SW(2d)264; 307Mo10, 169SW395 (from county court); 80Mont20, 257P1041; 127 Okl260, 260P758. But see 66Utah184, 240P454.

656-64 178Ark666, 118SW(2d)446; 117Nebr186, 220NW240 (taxpayer).

656-65 Ida 287P688 (party held taxpayer entitled to appeal).

656-66 175Minn298, 220NW946.

656-69½-New. An appeal may be taken only from an adjudication in the form of a final judgment. 179Ark373, 168SW(2d)10.

656-70 80Mont20, 257P1041. [b] **Clerical error** in stating date of commissioner's order disallowing claim in notice of appeal held immaterial under circumstances. 44 Ida228, 256P102.

656-71 80Mont20, 257P1041. But see 178Ark666, 118SW(2d)446.

656-72 80Mont20, 257P1041.

657-73 80Mont20, 257P1041 (joining claimant in submission of case). See also 178Ark666, 118SW(2d)446.

657-78 Ida 287P688; 117Nebr186, 220NW240. [d] **Affirmative defenses are available without plea thereof** where statute makes appeal summary proceeding without pleadings. 19 OhA36 (statute of limitations held available). [e] **Prima facie case must be made** by person in whose favor claim has been allowed. Ida 287P688.

657-84½-New. An appeal taken by filing of an affidavit and transcript should not be dismissed because of absence of an order granting the appeal. 178Ark666, 118SW(2d)446.

657-85 180Ark828, 23SW(2d)264. [a] (5) 80Mont20, 257P1041.

658-93 167Ga695, 146SE551; 307Mo10, 169SW395 (county court's rejection of claim is not final determination).

658-94 13F(2d)758 (South Carolina law); 179Ark373, 16SW(2d)10; 225Ky556, 9SW(2d)523; 84Mont413, 276P667; 154Tenn494, 290SW387, 388 [cit CJ] (on direct proceedings); 66Utah184, 240P454.

658-95 154Tenn494, 290SW387, 388 [citCJ]; 66Utah184, 240P454.

659-99 225Ky556, 9SW(2d)523; **Tex CommnA** 28SW(2d)433; 66Utah184, 240P454.

659-99½-New. Mere irregularities or erroneous decisions of questions of fact in presentation or allowance of claims are not grounds for judicial interference. 66Utah184, 240P454.

659-99¼-New. Where a contract giving rise to a claim expressly provides that approval or acceptance of work shall not operate as a waiver of the contract or reserved powers, approval is not a final adjudication. 13F(2d)758.

659-99¼-New. To sustain allowance of claim dependent on amount of total taxable valuation, it will not be presumed that commissioner's court found valuation other than shown by tax rolls. **Tex CommnA** 28SW(2d)433.

660-3 121Kan428, 247P442.

660-5 307Mo10, 169SW395 (from re-

jection by county court). See also 204 Cal 31, 266P522. [c] 19 OhA36.

661-6 89 IndA277, 154NE879.

661-12 But see Ala 129S266.

662-29 76CalA672, 245P777; 127Kan 292, 273P427; 143Miss821, 108S900.

662-35 225Ky556, 9SW(2d)523; 84 Mont413, 276P667.

663-36 84Mont413, 276P667.

663-37 See also 84Mont413, 276P667.

663-40 122Kan302, 304, 252P228 [quot CJ]; 126Kan90, 267P12 (priority as between assignments); 156Miss560, 126 S192 (assignment valid without consent of county).

663-42 126Kan90, 94, 267P12 [quot CJ].

663-43 126Kan90, 94, 267P12 [quotCJ].

663-45½-New. Filing of claim against county is commencement of action thereon as respects right to subsequent assignment. 181Ark1121, 29SW(2d)682.

663-47 CalA 284P731 (abatement of nuisance); 251 IllA371; 210Ky705, 276 SW491; 234Ky618, 28SW(2d)966 (necessity of consent to suit against county); 33 OhA118, 168NE562; 118 Or568, 247P815; TexCivA 292SW585.

664-48 37GaA290, 140SE45. See also 164Ga177, 137SE919.

664-50 336 Ill 466, 168NE273 (statutes must be strictly pursued in order to give courts jurisdiction); 141Miss72, 106S83; 115 Or409, 237P961, 40ALR 1362 (suable without consent as to transactions of county business in proprietary capacity). [c] **Ordinary action at law against county to recover money due** on contract may be brought where question of fact as well as of law is presented. 115 Or409, 237P961, 40ALR 1362 (plaintiff not confined to writ of review).

665-55½-New. Suit brought by a county is subject to the ordinary rules governing procedure between private parties. 28F(2d)195.

665-60 165Ga713, 141SE910 (county alone can sue for equitable relief in its own behalf); 170Ga584, 153SE359(1st case) (suit by county commissioners not violative of constitutional requirement).

665-61 119Kan652, 240P589.

665-67 [c] **Removal of state revenue agent from control of suit** brought by him to foreclose deed of trust, security for alleged illegal loan from county, properly denied under evidence. 143 Miss484, 109S791.

665-75 336 Ill 466, 168NE273 (applicable to counties under township organization).

666-79½-New. Under code provisions permitting a plaintiff to pursue any number of consistent concurrent remedies against different persons until satisfaction is obtained from some of them, 35GaA55, 132SE249.

666-79½-New. lender of money on county's note in which commissioners not exercising judicial function inserted false recital may sue either the county or the commissioners or both in separate actions. 35GaA55, 132SE249.

666-81 251 IllA371.

666-85 TexCivA 19SW(2d)621. See also 9PaDist&Co 339.

666-85½-New. A county is subject to the same rules of evidence and legal presumptions that control in suits between private individuals. TexCivA 285 SW340.

666-85½-New. A county enjoys immunity from limitation and adverse possession. TexCivA 285SW340.

666-85¼-New. Laches cannot be imputed to a county because of its officer's negligence. TexCivA 285SW340.

666-85½-New. In an action against a county involving illegal acts of commissioners, not defended by the commissioners, the comptroller of the county may intervene. 9PaDist&Co 339.

666-87 157Miss217, 127S692 (altho joint defendant); 7PaDist&Co 46. See also 33 OhA118, 168NE562.

666-88 [c] **In Missouri.**-307Mo 10, 269 SW395.

666-89 97CalA588, 276P113(2dcase).

667-93 But see 97CalA588, 276P113(2d case).

667-95½-New. In some jurisdictions counties are subject to the rule that an action may be begun in any county in which one or more defendants resides. 144Wash505, 258P482.

667-95½-New. One suing a county has no arbitrary right to select the county in which trial should be had. 97CalA 588, 276P113(2dcase).

667-95¼-New. Action to recover on bonds issued by county for account of drainage district situated in two counties may be brought in district court of either county. 141 Okl 271, 284P634.

667-11 223Ky597, 4SW(2d)382 (sanction of contract by fiscal court). [b] (3) Petition by drainage district against county for recovery of district funds. TexCivA 5SW(2d)620. [d] **Indicating statutory liability.**-Petition must indicate that liability sought to be established comes within statute making county liable. 37GaA290, 140SE45.

667-14 13F(2d)969; 91Fla509, 107S 627.

667-16 91Fla509, 107S627.

667-18 13F(2d)969.

668-21 30Ariz245, 246P543 (pleadings may be amended at any time before expiration of time fixed for bringing actions after rejection of claim).

668-34½-New. Pleading in a suit to set aside a settlement made by a county has been held sufficient. 219Ky349, 293 SW543.

668-34¼-New. **Limitations.** Cause of action does not accrue to start limitations until rejection of claim by commissioner's court. TexCivA 4SW(2d) 289.

668-37 37GaA243, 139SE573; TexCivA 18SW(2d)787 (evidence held insufficient). [a] **Evidence insufficient** to show lease created indebtedness exceeding constitutional limitations. Colo 293P 349.

668-42½-New. The giving of a warrant by a county commissioner in payment of a tractor is ample proof of purchase thereof by the county. 36GaA172, 136 SE90.

668-42¼-New. Evidence held insufficient to sustain judgment ordering sale of real estate for delinquent special assessments. 336 Ill 248, 168NE263.

668-42¼-New. Evidence held sufficient to give the court jurisdiction of property to confirm special assessments for local improvements. 336 Ill 248, 168NE263.

668-42½-New. Those contending county has exceeded its constitutional limit of indebtedness have burden of showing such indebtedness. Colo 293P349.

668-43 191NC487, 132SE291, 44ALR 1280.

668-44 232Ky24, 22SW(2d)278.

668-49 But see TexCivA 4SW(2d)289.

669-50½-New. A successful plaintiff in an action against a county on a claim for publication of the delinquent tax list which has been disallowed by the county board is entitled to interest on the amount recovered. 114 Okl 163, 245P 584.

669-52½-New. Judgment against a county for damages arising out of taking land by the county is payable out of the general county fund. TexCivA 282SW642.

669-53 216Ky332, 287SW892; 198NC 357, 151SE880, 67ALR1304.

669-61 216Ky332, 287SW892.

670-63½-New. Mandamus does not lie to compel a police jury to provide in budget or by appropriation for payment of judgment in advance of any surplus out of revenue. 161La406, 108S787.

670-63¼-New. School funds belonging to a county of another state in transit to the treasury are not subject to execution, attachment, or garnishment. 33 OhA118, 168NE562.

670-67 142Wash54, 252P102.

670-77 114 Okl 163, 245P584.

670-78 39 OklACR157, 159 [quotCJ].

670-79½-New. In a suit for a public purpose the county will be taxed with the costs of an appeal, although judgment is affirmed. 290Pa517, 139A151.

670-80½-New. Judgment for costs against a county in favor of sureties sued on a sheriff's bond after dismissal in the circuit court should not be rendered where the sureties had paid nothing. 227Ky583, 13SW(2d)766.

COUNTY BUSINESS

672-45½-New. All business pertaining to county as corporate entity. 119 Or 264, 240P233.

672-45½-New. County business has been held not restricted to business of a county in and for which a court is created. TexCivA 285SW339.

COUNTY PURPOSE

674-83 91Fla118, 107S146.

COUPONS

676-43 [b] (8) Certificate of interest due, printed at bottom of transferable bonds, given for term of years, designed to be cut off and presented for payment when instrument is due. Webster New Int. D. [quot 117 Or374, 243P554].

COURSE

679-89 [d] **Test of course of employment** relates to time, conduct, and place. 323 Ill 377, 154NE128.

COURT COMMISSIONERS

681-8 [b] **Eligibility for office.**-168 Minn11, 209NW397.

682-15½-New. As a general rule a court commissioner should not be summarily removed without notice, especially where he has executed a bond and entered upon the discharge of his duties. 107WVa381, 148SE484.

682-17 [h] **Equity powers.**-242Mich139, 218NW664. [i] **Liability of master commissioner.**-231Ky391, 21SW(2d)479.

682-21½-New. In a suit to set aside a judgment of a court commissioner, plaintiff is entitled to decree where defendant fails to show affirmatively valid judgment and valid service of process. 232Mich532, 205NW484.

684-61½-New. The commissioner's report must set out the claims allowed or disallowed. 225Ky567, 9SW(2d)709.

684-64½-New. An amendment to a court rule relative to serving notice of appeal from the commissioner or justice's court applies only to appeals from final judgments in cases where a jury could be demanded. 248Mich676, 227 NW724.

684-64½-New. Correction of claimed defect in affidavit on appeal because defendant's attorney notarized affidavit should have been permitted. 251Mich 74, 230NW900(1stcase).

684-64½-New. General appearance by plaintiff in circuit court gave court jurisdiction of person and waived service of notice of appeal from commissioner's judgment. 251Mich74, 230NW900(1st case).

684-64½-New. Jurisdiction of subject-matter is acquired on filing of return on appeal from judgment of court commissioner. 251Mich74, 230NW900(1stcase).

COURTS

715-2 37 OklCr68, 256P758, 759 [cit CJ]. [a] (12) Court is tribunal presided over by one or more judges for exercise of such judicial power as has been conferred on it by law: it is place where justice is judicially administered. 71CalA97, 234P432. (13) Tribunal presided over by one or more judges for exercise of such judicial power as has been conferred on it by law. 71CalA 97, 234P432. (14) Other similar definitions. 37 OklCr68, 256P758, 759 [cit CJ]. [f] **Mere exercise of judicial power** does not invest functionary with aids to jurisdiction peculiar to courts of record. 38F(2d)833.

715-3 71CalA97, 234P432.

716-9 [a] **Court consists of persons** officially assembled at time and place appointed by law for administration of justice. 6F(2d)130.

716-13 TexCivA 282SW339.

717-35 214Ala260, 107S804.

718-36 91Fla927, 108S671, 674 [citCJ].

718-44 [a] 47RI 323, 133A1, 2 [citCJ].

720-50½-New. , or by its name. 88 CalA212, 263P295.

720-52 [a] **Courts of appeals** are corporate entities. 19 OhA458.

720-53 98NJEq48, 129A711.

720-54 98NJEq48, 129A711.

720-55 [f] 126 Okl 71, 258P732. [g]

District court of Rhode Island is court of record. 47RI323, 133A1.

720-57 284Pa421, 131A253.

720-59 284Pa421, 131A253.

720-60 196Wis292, 220NW197, 198 [quotCJ].

721-61 284Pa421, 131A253; 196Wis 292, 220NW197, 198 [quotCJ].

721-63 233Mich362, 206NW580, 582 [citCJ].

721-69 Man [1930] 2DomLR177, 181 [quotCJ].

723-79 271US228, 46SCt496, 70Led 920; 19F(2d)922; 194Cal146, 228P19; 71CalA421, 236P377; 71CalA701, 236P 335; 81CalA742, 254P939; CalA 285P 871(2 lcase); 93Fla611, 112S768, 775 [citCJ]; 203Iowa1277, 212NW391, 394 [citCJ perMorling,J]; 48Nev198, 228P 617; 99NJEq717, 134A298 [quotCJ]; 217AppDiv347, 217NYS50; 142Okl 258, 286P765; 116Tex1, 285SW1063, 1069 [citCJ]; TexCommnA 291SW886; TexCr 29SW(2d)771; TexCivA 30SW (2d)911; 148Va610, 139SE273; 196Wis 242, 219NW197, 199 [citCJ]. [j] 21 OhA412, 153NE225. [n] In Canada,-64QueSuper222, [1926] 3DomLR688, 46 CanCrCas48. [o] **Right to consider and determine issues, rightly or wrongly.**-32F(2d)984.

724-81 93Fla611, 112S768, 775 [citCJ]; 21OhA412, 153NE225.

725-82 52ND26, 202NW391. [b] **Similar definitions.**-26F(2d)777. [c] **Power to decide erroneously** is necessarily embraced in "jurisdiction." 96Fla110, 117S795.

725-83 71CalA421, 236P377; 328Ill 472, 160NE76.

725-83½-New. power of a court to render a particular judgment; 33Wyo 281, 238P545.

725-83½-New. the inherent power to decide the case; 145Va317, 133SE812.

725-84 TexCommnA 28SW(2d)834.

725-85 39F(2d)318; 82CalA165, 255P 272; Fla 128S258; Mo 30SW(2d)94; 99NJEq717, 134A298; 110TexCr362, 8SW(2d)674; Utah 271P225.

725-86 328Ill472, 160NE76; 124Okl 7, 253P66; 116Tex1, 285SW1063, 1069 [citCJ].

725-87 93Fla611, 112S768, 775 [citCJ]; MoA 23SW(2d)231; 122Or179, 257P 701; 117Tex113, 298SW516.

725-89 116Tex1, 285SW1063, 1069 [cit CJ].

725-91 116Tex1, 285SW1063, 1069 [cit CJ].

725-93 201Iowa516, 207NW778.

725-94 203Iowa1028, 213NW803; 116 Tex1, 285SW1063, 1069 [citCJ].

726-6 124Okl 7, 253P66; 116Tex1, 285 SW1063, 1069 [citCJ].

726-7½-New. "Jurisdiction" in statutes is sometimes construed to mean "venue." 123Or326, 262P220.

726-9 94Fla104, 113S892.

726-10½-New. Transmissal of papers to another court is not an assumption of jurisdiction. 52ND26, 202NW391.

726-14½-New. Power can be exercised only in a "judicial proceeding." 209Ky 811, 273SW531.

727-15 Ill 172NE1.

728-29 131Misc291, 227NYS174. [b] 241IllA467.

729-39 104Conn322, 133A99; 93Fla 611, 112S768; 94Fla104, 113S892; 234 IllA53; 199Ind467, 157NE721; Utah 26SP1029.

729-42½-New. Power of court, inconsistent with established right of litigant, will be denied. 216Ala272, 113S240.

729-43 91CalA37, 266P1002; 217App Div347, 217NYS50.

729-44 217AppDiv347, 217NYS50; TexCommnA 58SW(2d)754, 755 [citCJ].

729-48 194Cal146, 228P19.

729-49 194Cal146, 228P19; 71CalA 701, 236P335; 71CalA421, 236P377; 86 CalA332, 260P919, 921 [citCJ]; 203Cal 306, 265P246; 91Fla709, 109S677; 203 Iowa26, 212NW368; 168Minn139, 209 NW750, 752 [citCJ]; 48Nev198, 228P 617; 217AppDiv347, 217NYS50; 196 Wis242, 219NW197; 39Wyo379, 272P 12; Man [1929] 4DomLR969. [c] **Where court has general jurisdiction of law and equity** and subject matter and parties are subject to its jurisdiction, whether relief sought must be by law or equity does not involve power of court ordinarily to determine matter. 91Fla709, 109S677.

730-50 71CalA421, 236P377; 203Iowa 26, 212NW368; 313Mo681, 282SW389.

730-51 116Nebr366, 217NW580, 583 [citCJ]; 99NJEq717, 134A298 [quotCJ].

730-52 323Ill585, 154NE414; 317Mo 751, 297SW378; 116Nebr366, 217NW 580, 583 [citCJ]; 116Tex29, 285SW1079, 1084 [citCJ] 48ALR355; 99WVa663, 129SE708, 709 [citCJ]; 102WVa677, 136 SE202, 46ALR968. [b] Sask [1928] 3 DomLR505.

730-55 TexCommnA 291SW886; 110 TexCr362, 8SW(2d)674; 144Va692, 130 SE902; 102WVa677, 136SE202, 46ALR 968.

731-56 35OhA491, 172NE623.

731-57 TexCommnA 291SW886.

731-58 [a] **Under act of congress supplementing the National Prohibition Act,** circuit court of Hawaii has jurisdiction for offenses involving violations of that act. 27Hawaii397.

731-59 99WVa663, 129SE708, 709 [cit CJ].

731-60 [c] **Jurisdiction cannot be enlarged by statute** when fixed by constitution. 121Kan14, 246P178.

732-63 99WVa663, 129SE708, 709 [cit CJ].

732-71 CalA 273P617; Cal 293P69. See also 217AppDiv342, 217NYS176.

732-72 CalA 273P617.

732-73½-New. A court has the inherent right to function and to function efficiently. 238Mich298, 212NW968.

732-73½-New. Courts established by constitution have powers which are incidental to, or inhere in, judicial bodies, unless expressly limited by constitution. 199Wis401, 226NW385.

732-74 Cal 293P69; 222AppDiv580, 227NYS1.

732-74½-New. In the absence of statute the courts may take such steps as will promote the administration of justice. 297Pa260, 147A58.

733-77 67Utah60, 245P966 (pleading is juridical meaning investing court with jurisdiction of subject matter).

733-78 91Fla709, 109S677, 690.

733-79 116Tex1, 285SW1063, 1069 [cit CJ].

733-80 328Ill472, 160NE76; 116Tex1, 285SW1063, 1069 [citCJ].

734-85 39F(2d)318; NC 154SE620; TexCommnA 291SW886; Utah 271P225; 33Wyo 281, 238P545, 548 [citCJ]. But see 111Conn124, 149A246.

734-86 93Fla611, 112S768; 207Iowa 121, 222NW351; Or 289P511; 155Tenn 530, 296SW356.

734-88½-New. The requisites of jurisdiction consist of both fact and law. 33Wyo 281, 238P545.

734-92 40F(2d)617; 316Mo754, 291 SW454, 455 [quotCJ]; 116Nebr366, 217 NW580, 583 [citCJ]; 6PaDist&Co 21; TexCivA 297SW234. [c] **Test of court's jurisdiction** is what court can do, not what it may do. 171Ark285, 284SW770.

734-92½-New. Court may exercise jurisdiction in investigating matters, without having parties present or decision to render. 194Wis207, 216NW513.

734-93 5F(2d)608; 93Fla611, 112S768, 775 [citCJ]; 96Fla110, 117S795; 323 Ill585, 154NE414; 200Ind350, 160NE 43; 131Misc291, 227NYS174; 33Wyo 281, 238P545, 548 [citCJ (criticizing definition). [f] **Necessity therefor.**-39 F(2d)318. [g] **Jurisdiction over person does not preclude defendant** from interposing objections to subject matter. 155SC436, 152SE658.

735-94 218MoA611, 265SW991. [a] 91 Fla709, 109S677, 686 [quotCJ].

735-96½-New. Jurisdiction over subject matter relates to the right of the court to adjudicate through remedies provided by law on facts proved or admitted in favor of, or against, persons over whom the court has jurisdiction. 154Tenn134, 289SW533.

735-97 93Fla611, 112S768; 328Ill 472, 160NE76; 201Iowa516, 207NW778; 208 Iowa1226, 227NW116 (law defining its power and jurisdiction).

735-98 93Fla611, 112S768; 328Ill 472, 160NE76; 318Mo948, 2SW(2d)771, 775 [citCJ]; 322Mo654, 15SW(2d)842; 33 Wyo 281, 238P545.

735-99 91Fla709, 109S677; 313Mo 642, 285SW462; TexCivA 7SW(2d)940. [b] **Law court is not deprived of jurisdiction** in assumpsit because items are numerous where case may be one for referee. 234Mich277, 207NW890.

735-2 5F(2d)608; 91Fla709, 109S677, 686 [quotCJ entire section]; 322Mo 654, 15SW(2d)842. [a] 91Fla709, 109S677, 686 [quotCJ].

737-22 114Nebr468, 208NW141; 155 Tenn530, 296SW356.

737-23 173Ark810, 294SW401; 126Me 419, 139A313; 114Nebr468, 208NW141; 104NJL240, 141A668 (common pleas court); 283Pa573, 129A574; TexCivA 31SW(2d)314. [b] (1) 313Mo225, 281 SW762, 45ALR1223. (2) But rule is not controlling in such case where right arises under contract between employer and employee who have accepted compensation act in other state which thereby becomes part of their contract and which affords exclusive remedy. 313 Mo225, 281SW762, 45ALR1223.

738-25 6F(2d)116; 126Me419, 139A 313 (where process is served within court's territorial jurisdiction); 114 Nebr468, 208NW141.

738-32½-New. Equity suit to foreclose chattel mortgage is transitory. Ala 128 S438.

738-33 13PaDist&Co 29; 140Wash586, 250P346.

738-36 154Tenn134, 289SW533. [a] **Actions to enforce payment of workmen's compensation** are personal and inherently transitory. 154Tenn134, 289 SW533.

739-38 174Ark6, 294SW416; Fla 130S 7. [c] **Debts have no strictly legal status,** though for most purposes they are given situs of creditor. 111Conn383, 150A313.

739-39 17F(2d)87; 173Ark810, 294SW 401; 217AppDiv67, 216NYS215; 126 Misc109, 212NYS722 (rights under foreign contract may be determined by court).

739-40 173Ark810, 294SW401; 174Ark 6, 294SW416. See also 17F(2d)305.

739-41 173Ark810, 294SW401; 174Ark 6, 294SW416.

739-42 But see 125Misc417, 211NYS 270.

739-44 85CalA323, 259P374; 107Conn 174, 139A691; 225AppDiv484, 233NYS 530; 58Vt727, 6A648; EngWBl 1055, 96 Reprint621.

739-45 Conn 151A312. [b] **Where tort of railroad carrying passenger beyond destination was continuous and continued beyond limits of state,** county where tort originated did not have exclusive jurisdictions. 34GaA312, 129 SE293.

740-46 103Conn390, 130A794; 133Misc 777, 233NYS543.

741-57 103Conn390, 130A794.

741-61 126Me419, 139A313.

741-65 156SC43, 152SE721.

742-67 6F(2d)116 (action for injuries to hotel and property in Panama may be maintained in courts of Canal Zone, though intoxicating liquors were sold in hotel).

742-68 108Conn173, 143A51. [g] (3) Court of county cannot require filing in another county of disclaimer of interest in land there situated or of declaration that persons have no title. 253IllA390. [h] **Construction of foreign will** is within jurisdiction of courts of state where real property affected is located. 200Iowa672, 203NW28.

743-72 127Misc71, 215NYS265. [a] In New York.-127Misc71, 215NYS265.

744-83 [a] (2) Action properly brought in Arkansas to collect debt due for rent of premises in Texas. 179Ark 600, 17SW(2d)305.

744-88 6F(2d)559; 160Tenn1, 22SW (2d)1; 140Wash586, 250P346.

745-91 200Cal215, 252P575; 91Fla 1064, 109S225; 28Hawaii480; 255Mass 132, 150NE870; TexCivA 296SW639. [a] (3) Municipal court in summary proceedings has no jurisdiction to render judgment for rent in excess of one-thousand dollars. 131Misc45, 225NYS 662. (4) Mere demand for judgment exceeding one thousand dollars for rent in summary proceeding does not deprive

municipal court of jurisdiction. 131 Misc45, 225NYS662. [d] **Judgment entered without jurisdiction held not final judgment** good as against collateral attack. 255Mass132, 150NE870.

746-93½-New. City court has jurisdiction to determine the amount of rent due in a summary proceeding, although the amount originally claimed exceeded one thousand dollars. 221AppDiv764, 223 NYS596.

746-96 216Ala9, 112S151; 33Ariz147, 264P468; Fla 129S816; 50SD279, 209 NW650; TexCivA 299SW699; TexCivA 13SW(2d)405; TexCivA 29SW(2d)890. [a] TexCivA 29SW(2d)436. [k] (5) Action to enjoin threatened drainage assessments of from six thousand dollars to fifty thousand dollars. 270US378, 46 SCt236, 70L ed641. (6) Superior court has jurisdiction of tort action for one hundred dollars. 196NC61, 144SE515.

746-96½-New. The district court cannot grant mandamus to collect judgment where the suit in which judgment was rendered, because of the amount involved, is exclusively within the county court's jurisdiction, TexCivA 299SW699.

746-96⅓-New., and the district court is without jurisdiction to enforce judgment by injunction or prohibition to compel the issuance of execution or prevent further trial. TexCivA 299SW699.

747-97 270US45, 46SCt196, 70L ed463; 13F(2d)71; 30F(2d)202. [f] **Cases within jurisdiction.**-29F(2d)897; 30 F(2d)322; 31F(2d)466. [g] **Amount same in equity as at law.**-40F(2d)216.

749-11 16F(2d)45; 248NY243, 162NE 20.

749-14 157Miss559, 128S734 (right involved must be capable of calculation in money); TexCivA 276SW749; TexCivA 29SW(2d)436.

750-22 16F(2d)45; 134 Okl 25, 272P 414.

751-28 17F(2d)486; 21F(2d)172; 91 Fla1064, 109S225; 129Misc152, 220NYS 42; 35PortoRico 640; 35PortoRico 756; TexCivA 294SW245.

752-31 17F(2d)486.

752-32 91Fla1064, 109S225; 319Mo 337, 4SW(2d)776.

753-33 IndA 169NE346.

753-33½-New. In an action for breach of contract, where actual damages are not susceptible of proof, but only nominal damages, if any, are recoverable, the action may be dismissed for want of jurisdictional amount. 8F(2d)357.

753-34 4LaA574; 35PortoRico 248.

753-39 31F(2d)466.

753-40 5F(2d)221; 11F(2d)887; 21 F(2d)172; 37F(2d)826; 38F(2d)175; 319Mo 337, 4SW(2d)776.

754-45 [b] **Aggregate amount involved after consolidation** determines jurisdiction. 319Mo 337, 4SW(2d)776.

754-48 See also 34F(2d)666. [c] **In actions for refund of taxes paid under protest** jurisdiction is determined by amount involved. 34PortoRico 412. [d] **Future installments not due** may be included in determining jurisdictional amount. 13PortoRicoFed393.

755-59 6F(2d)922; 11F(2d)887; 13 F(2d)255; 16F(2d)744; 17F(2d)486; 18F(2d)631; 27F(2d)753; 33F(2d)487 (value of property, and collateral effect of judgment in subsequent suit, held immaterial in assessment foreclosure suit); 172Ark642, 290SW353; 99CalA 71, 277P878(1stcase); 91Fla230, 107S 528; 28Hawaii480; 130Misc770, 224 NYS414; 130Misc796, 225NYS376; 12 PortoRicoFed244; 35PortoRico 248; 156SC109, 152SE873; 52SD139, 216NW 878; 116Tex489, 294SW844; TexCivA 284SW703; TexCivA 286SW249; TexCivA 297SW234; TexCivA 298SW443; TexCommnA 29SW(2d)958; Utah 264P 968. [d] **Difference between debits and credits** alleged in complaint has been held to determine amount in controversy. TexCivA 286SW249. [e] **In determining amount claimed** as shown by contract sued on, contract insuring Georgia property of Georgia resident, dated in another state, is held Georgia contract. 27F(2d)616.

756-60 172Ark642, 290SW353; TexCivA 28SW(2d)233 (jurisdiction not dependent on prayer).

756-60½-New. Allegations of complaint control prayer for relief. 129 Misc180, 221NYS733; TexCivA 281SW 286.

756-61 267US226, 45SCt273, 69L ed 585; 172Ark642, 290SW353; NC 154SE 50; TexCivA 275SW163; TexCivA 9SW (2d)432.

757-64 19F(2d)117.

757-65 19F(2d)117; 27F(2d)753.

758-67 But see 129Misc180, 221NYS 733.

758-69 TexCivA 273SW702.

758-70 25F(2d)938; 54Miss535; 116 Tex489, 294SW844. [c] **Reasonable expectation of recovering required amount** must be basis of claim to be within court's jurisdiction. 39F(2d) 618.

759-75 See also 39F(2d)618.

759-80 16F(2d)744; 137Misc128, 241 NYS481; TexCivA 149SW747; TexCivA 294SW245; TexCivA 27SW(2d) 827(2dcase). [d] **Suit not involving jurisdictional amount** held not aided by averment that it was class suit brought on behalf of plaintiffs and other policyholders. 14F(2d)951. [e] **Amount sued for and value of property** in controversy must be alleged, and greater determines jurisdiction. TexCivA 294SW245. [f] **Where demand exceeds amount recoverable,** but amount possibly recoverable is sufficient, jurisdiction is had. 33F (2d)1007(1stcase). [g] **If petition shows on its face that recovery cannot be within jurisdictional amount** court has no jurisdiction. TexCommnA 29SW (2d)958.

759-81 16F(2d)744.

759-86½-New. Plaintiff is bound by admissions in the petition. 319Mo 337, 4SW(2d)776.

759-86⅓-New. Apparent claim on face of papers to amount in excess of jurisdictional requirement is not conclusive on question of jurisdiction. 39F (2d)618.

759-86¼-New. Evidence held insufficient to show reasonable expectation of recovering jurisdictional amount. 39F (2d)618.

759-86⅙-New. Ad damnum in declaration is prima facie evidence of amount contested, but does not estop plaintiff from showing true facts. 39F(2d)619 (1stcase).

759-86¼-New. Where plaintiff's testimony is lost by death, court cannot say there is no good faith expectation of recovering minimum jurisdictional amount. 39F(2d)869.

759-87 28Hawaii480.

759-88 14F(2d)951; TexCommnA 292 SW517.

759-90 27F(2d)753; 165Ga173, 140SE 354 (case on amended petition held within jurisdiction).

759-90½-New. Failure of a demand to contain a waiver of excess is immaterial where the amendment includes such waiver, which amendment is properly allowed. NJ 143A557.

760-91½-New. Jurisdiction of inferior court is ousted by amendment of complaint so as to claim an amount in excess of its jurisdiction. 52SD139, 216 NW878.

760-91⅓-New. Where a court obtains jurisdiction by summons served without stating the amount demanded the court may amend the complaint demanding an amount beyond its jurisdiction. 130Misc796, 225NYS376.

760-92 TexCivA 275SW163.

760-95 TexCivA 298SW443.

760-96 TexCivA 14SW(2d)367.

760-98 13F(2d)255. [a] **A motion to dismiss,** where bill alleges amount involved sufficient to give jurisdiction, admits truth of allegation. 4F(2d)915. [b] **Court may not refuse to accept as true** allegation that value of policy sought to be canceled exceeds jurisdictional minimum. 27F(2d)753.

760-98½-New. Where the petition of a railroad company in a suit to quiet title to land alleges that value for railroad purposes was in excess of three thousand dollars, evidence in support of plea to jurisdiction will not be heard. 13F(2d)254.

760-98⅓-New. Failure to substantiate an easily provable claim for a jurisdictional amount or to explain failure requires dismissal. 25F(2d)938.

760-99 6F(2d)922; 98PaSuper447. [1] **Speculative value.**-42F(2d)927.

761-1 [a] (9) In suit to enjoin interference with business amount in controversy is value of business and rights of property sought to be enforced. 4 F(2d)915. (10) Jurisdiction of suit to enjoin unfair competition depends on value of rights which plaintiff seeks to protect. 35F(2d)555. (11) Other illustrations. 7F(2d)141; 7F(2d)772. [b] **Good will.**-34F(2d)774.

762-6 14F(2d)951.

762-9 16F(2d)744.

762-14 TexCivA 294SW244; TexCivA 28SW(2d)255. [d] **Aggregate value** of attachment liens determines court to which return should be made. TexCivA 283SW862. [e] **In foreclosing laborer's lien on crops,** value of property sought to be foreclosed determines jurisdiction. TexCivA 294SW244.

763-16 TexCivA 11SW(2d)668.

763-26 34F(2d)790.

764-30 TexCivA 11SW(2d)224. [a] TexCivA 11SW(2d)224.

764-35 TexCivA 11SW(2d)668.

764-39 See also 129Misc180, 221NYS 733.

764-41 33F(2d)487 (charge held "interest"); 35PortoRico 837; TexCivA 291SW644, 645 [quotCJ]; TexCivA 29 SW(2d)890. [b] TexCivA 291SW644, 645 [quotCJ]. [d] **Claim for amount of unpaid check less than jurisdictional minimum** of county court is not brought within county court's jurisdiction by allegation seeking recovery of interest as damages for being deprived of use of money. TexCivA 15SW(2d)144(1st case).

765-42 23F(2d)371; Fla 129S816; TexCommnA 288SW148; TexCivA 272SW 216; TexCivA 281SW286; TexCivA 28 SW(2d)842.

765-42½-New. Interest in nature of penalty may be considered as part of amount in controversy. TexCommnA 288SW148.

765-43 TexCivA 281SW286; TexCivA 8SW(2d)719.

767-47 28Hawaii480; TexCivA 28SW (2d)842.

767-54 TexCivA 298SW443.

767-62 47RI 240, 132A610.

768-64 12F(2d)986; 15F(2d)637.

768-65 157Miss518, 128S574.

768-68 TexCommnA 272SW445, 447 [quotCJ].

768-69 TexCommnA 272SW445, 447 [quotCJ].

768-70 TexCommnA 272SW445, 447 [quotCJ].

768-70½-New. "Jurisdiction of suit" on contractor's bond is determined by amount of bond. TexCivA 300SW148.

768-70⅓-New. Jurisdiction of suit on bond is determined by amount demanded in original suit, though others filed claims. 157Miss518, 128S574.

768-72 [d] **Jurisdiction cannot be conferred** by improper joinder of causes of action, and improperly joined demand should be dismissed. TexCivA 294SW 320.

768-73 39F(2d)618.

770-77 NJSup 132A327, 328 [quotCJ].

770-81 21F(2d)172; Ala 130S398; 33 Ariz147, 264P468; 104Conn728, 134A 220; 245Mich185, 222NW148; 12Porto RicoFed189; 33PortoRico 350; 33Porto Rico 565; TexCivA 18SW(2d)725; TexCivA 8SW(2d)1049. [k] **Cancellation of insurance policies.**-21F(2d)172.

770-83 See also 12PortoRicoFed211.

771-89 Fla 129S816. But see Fla 129S 816.

771-91 42F(2d)927; Fla 129S816; 130 Misc583, 224NYS416. [k] **Complaint by infant and another** for full jurisdictional amount for personal injuries to infant and damages to other plaintiff for loss of infant's services plus interest is held beyond court's jurisdiction. 130Misc583, 224NYS416.

772-92 14F(2d)951. [a] 14F(2d)951.

772-95 TexCivA 293SW183. [e] **Court has no jurisdiction** of action between

codefendants where amount involved, unconnected with main action, was below jurisdiction of court. **TexCivA** 292 SW610.

773-98½-New. Where certificate holders sue officers of a society for an accounting in behalf of the society, the amount recoverable by the society, if sufficient, affords jurisdiction. 34**F(2d)** 305.

773-4 130**Misc**796, 225**NYS**376.

773-7 51**Philippine**789.

774-8 51**Philippine**789.

774-12 **TexCivA** 28**SW(2d)**842.

774-15 **NJCir** 150A228; 156**SC**109, 152 **SE**873.

774-17 245**NYS**649. [b] **A fortiori,** court has jurisdiction when amount claimed is within its jurisdiction. **Tex CivA** 284**SW**322.

774-18 **Utah** 264**P**968.

775-19 156**SC**109, 152**SE**873; **TexCivA** 277**SW**1114 (cross action).

775-23 33**PortoRico** 29, 30 [citCJ]; 35 **PortoRico** 496; **TexCommnA** 288**SW**148. [a] 33**PortoRico** 29, 30 [citCJ]. [o] **Claim not extinguished,** but merely reduced in amount, after nonperformance of compromise, held not to deprive court of jurisdiction. 33**PortoRico** 29.

776-24 35**PortoRico** 198.

776-30 28**Hawaii**480; **TexCivA** 297**SW** 878 (plaintiff suing in county court for drag line bucket and rental value thereof may amend by abandoning claim for rental value); **Ont** [1930] 4**DomLR**712; **Sask** [1928] 3**DomLR**408 (costs on application to amend claim so as to abandon excess).

777-32 96**PaSuper**298.

777-35 **TexCivA** 297**SW**878 (plaintiff cannot award by waiving portion of severable item or arbitrarily reducing alleged value of property or service to amount within jurisdiction).

777-36 See also 129**Misc**180, 221**NYS** 733.

777-40 130**Misc**770, 224**NYS**414. See also 129**Misc**180, 221**NYS**733.

777-41 136**Misc**447, 241**NYS**349; **Tex CivA** 297**SW**878; **TexCivA** 6**SW(2d)**418 (original amount stated by mistake).

778-52 13**F(2d)**500; **Fla** 130**S**7; 248 **Mich**85, 226**NW**883 (no extraterritorial force); 220**MoA**474, 274**SW**945.

778-53 273**US**119, 47**SCt**308, 71**L ed** 569; 16**F(2d)**948; 168**Ark**670, 273**SW** 7; 108**Conn**436, 143**A**568; 41**GaA**150, 152**SE**275; **Mo** 10**SW(2d)**655; 98**NJEq** 230, 130**A**463; 140 **Okl** 185, 282**P**345.

779-54 140 **Okl** 185, 282**P**345.

779-56 219**MoA**121, 272**SW**79.

779-56½-New. In the observance of principles of judicial comity the judgments of the courts of a sister state should be more respected than a statute which can have no extra territorial effect. 165**Minn**449, 206**NW**710.

779-56¾-New. Judicial county does not require courts to refuse to entertain a transitory action brought by a citizen of another state upon cause which arose in latter state merely because a statute in that state prohibits the solicitation of business or prosecuting such action without the state. 165**Minn**449, 206**NW**710.

779-56¼-New. In this respect it has been held that the act of the legislature of foreign state cannot command higher degree of consideration than the final judgment of a court of competent jurisdiction sitting in that state. 165 **Minn**449, 206**NW**710.

779-57 135**Misc**103, 236**NYS**673.

779-58 108**Conn**333, 143**A**163, 61**ALR** 846. [a] 321**Mo** 378, 11**SW(2d)**268.

779-60 15**F(2d)**171; 156**Miss**567, 126 **S**395. But see 313**Mo** 225, 281**SW**762, 45**ALR**1223.

780-63½-New. , and to suit on policy of fire insurance. 219**MoA**121, 272**SW** 79.

780-63¾-New. , and to an action for fraud giving exemplary damages. 273 **US**119, 47**SCt**308, 71**L ed**569.

780-64 246**NY**244, 158**NE**508 (tort action between nonresidents).

780-68 85**CalA**323, 259**P**374. [a] (6) **Blue Sky Law,** in its relation to validity of contracts, can have no extraterritorial effect. 32**F(2d)**725.

780-69 85**CalA**323, 259**P**374; 108**Conn** 436, 143**A**568. [b] (2) Policy of forum may be indicated by current decisions. 85**CalA**323, 259**P**374. [d] **Suit for rent held not against public policy.**–179**Ark** 600, 17**SW(2d)**305.

780-71 108**Conn**436, 143**A**568.

780-73 219**MoA**121, 272**SW**79.

781-75 16**F(2d)**948; 127**Misc**71, 215 **NYS**265. See also **OhA** 172**NE**689. [a] **Foreign statute must be examined as to rights and remedies** thereunder to determine if local court may assume jurisdiction. 127**Misc**71, 215**NYS**265. [b] **In Nevada.**–127**Misc**71, 215**NYS**265.

781-84½-New. Evidence. Court of the forum is not bound by annexed translation of foreign policy but may receive evidence as to the true meaning of the foreign text. 125**Misc**417, 211**NYS**270.

781-86 273**US**119, 47**SCt**308, 71**L ed** 569; 108**Conn**436, 143**A**568; 127**Misc** 71, 215**NYS**265; 48**RI** 357, 138**A**212. [b] **Suit to recover rent was not penal in its nature.**–179**Ark**600, 17**SW(2d)**305.

782-89 127**Misc**71, 215**NYS**265.

782-91 273**US**119, 47**SCt**308, 71**L ed** 569.

782-96 127**Misc**71, 215**NYS**265. See also 108**Conn**386, 143**A**630, 62**ALR**1323.

783-1 20**F(2d)**600; 28**F(2d)**997.

783-4 46**Philippine**472.

783-5 20**F(2d)**837; 174**Ark**943, 298 **SW**212; 39 **OklACR**267.

784-6 101**NJEq**776, 139**A**32.

784-13½-New. Florida Constitution does not limit jurisdiction of state courts to "cases" and "controversies" so as to exclude suits for declaratory judgment. **Fla** 128**S**258.

785-36 34**Ariz**13, 267**P**412; 148**Miss** 427, 114**S**887, 888 [citCJ]. [b] **In Louisiana.**–158**La**251, 103**S**757.

786-37 148**Miss**427, 114**S**887 (inquiry limited to precise conditions of grant of such power); 53**ND**609, 207**NW**436; 294**Pa**368, 144**A**274; 297**Pa**13, 146**A**262.

786-47½-New. Legislative inquiry as to whether provisions of a proposed act conflict with the constitution may be declined as too broad. 216**Ala**469, 113 **S**584.

786-53 39**F(2d)**318; 135**Misc**486, 238 **NYS**723; 154**Tenn**134, 289**SW**533; 155 **Tenn**530, 296**SW**356; 38**Wyo** 223, 266**P** 128, 130 [citCJ]. [c] **That defendant statutory trustees had no property** of corporation held not to deprive court of jurisdiction of subject matter. 78**Mont** 357, 254**P**174. [d] **Jurisdiction to adjudicate status** depends on dominion over legal situs of litigants. 46 **Ida**512, 269**P**987.

787-56 175**Minn**597, 222**NW**281; **SD** 232**NW**45.

787-59½-New. Reason must be shown for the court's abdication in disputes of suitors over whom it has jurisdiction. 20**F(2d)**362.

787-59¾-New. Potential jurisdiction arises by subjection to jurisdiction by conduct within state. 131**Misc**618, 227 **NYS**109.

787-60 168**Ga**451, 148**SE**162.

788-66 **MoA** 29**SW(2d)**236; 114**Nebr** 468, 208**NW**141; 219**AppDiv**643, 220 **NYS**685; 134**Misc**692, 236**NYS**549; 225 **AppDiv**484, 233**NYS**530; 25 **OhA**165, 157**NE**903 (rule stated). [f] **In Nebraska.**–114**Nebr**468, 208**NW**141.

789-69 165**La**1005, 116**S**488 (methods of acquiring jurisdiction); 135**Misc**715, 238**NYS**331 (foreign corporation).

789-71 **Md** 149**A**547; 238**Mich**366, 213 **NW**140; **NH** 151**A**709. But see 85**CalA** 323, 259**P**374.

789-75 238**Mich**366, 213**NW**140. [g] **Sufficiency of interest in fund.**–238**Mich** 366, 213**NW**140.

789-76 168**Ga**451, 148**SE**162.

790-77 213**AppDiv**98, 210**NYS**164.

790-78½-New. Courts of some states have jurisdiction of actions against unincorporated associations organized under laws of another state if statutory requirements exist. 137**Misc**546, 242**NYS** 722.

790-79 **NH** 151**A**709 (resident of state for purpose of litigation where it complies with statute permitting service on secretary of state); 128**Misc**138, 217 **NYS**856. [b] **In New York.**–128**Misc** 138, 217**NYS**856.

790-88 220**AppDiv**218, 221**NYS**332; 229**AppDiv**637, 243**NYS**35.

790-89 85**CalA**323, 259**P**374; 136**Misc** 349, 239**NYS**702 (statutory duty); 13 **PaDist&Co** 29. See also **Ala** 128**S**438. [a] (1) 227**AppDiv**32, 237**NYS**20. [f] (2) In exercise of sound discretion courts of state may entertain jurisdiction between nonresidents on tort committed outside state where necessities of case dictate such policy. 135**Misc**165, 237**NYS**267.

791-90 13**PaDist&Co** 29.

791-92 128**Misc**851, 220**NYS**309; 136 **Misc**349, 239**NYS**702 (where defendant corporation is doing business within state); 125 **Or**63, 266**P**248.

791-94 245**NY**570, 157**NE**861.

791-95 36**F(2d)**504; **Mo** 20**SW(2d)** 684; 220**AppDiv**218, 221**NYS**332. [b] (6) State courts have no discretion to decline jurisdiction of nonresident's action against foreign corporation under federal statute for injuries in another state. 220**AppDiv**218, 221**NYS**332. (7) That assignor of claim for breach of contract of carriage is nonresident should not affect rights of assignee to bring action in courts of state against foreign corporation. 135**Misc**715, 238 **NYS**331.

791-96 [e] (3) Under Federal Employers' Liability Act and state statutes operation of lines by foreign railroad few miles in state gives state court jurisdiction of subject matter and person of defendant in action for injuries occurring outside state. 132**Misc** 144, 228**NYS**705.

792-97 171**Minn**87, 214**NW**12, 13 [cit CJ]; **Minn** 230**NW**457; 196**Wis**451, 220 **NW**534 (court entertaining action held not to have abused discretion).

792-99 220**AppDiv**218, 221**NYS**332; 130**Misc**168, 223**NYS**401. See also 246 **NY**244, 158**NE**508. [c] (1) 128**Misc**138, 217**NYS**856. [d] **Statute.**–224**AppDiv** 764, 230**NYS**217.

792-1 222**AppDiv**833, 226**NYS**393.

792-2 128**Misc**851, 220**NYS**309; 130 **Misc**168, 223**NYS**401.

793-6 216**Ky**339, 287**SW**945. See also 144**Va**154, 131**SE**245.

793-10 **MoA** 300**SW**305.

793-18 216**Ky**339, 287**SW**945.

794-24 225**AppDiv**484, 233**NYS**530.

794-29½-New. State court can take jurisdiction against an agency of a foreign sovereign that has acted outside its authority. 98**NJEq**665, 130**A**523.

794-30 258**Mass**103, 154**NE**570.

794-31 204**Cal** 441, 268**P**635 (to determine status of res); **IndA** 149**NE**360; 229**Ky**226, 16**SW(2d)**1039; 135**Misc** 486, 238**NYS**723; **TexCivA** 294**SW**923. See also 31**F(2d)**484. [b] 319**Mo** 1093, 7**SW(2d)**698. [h] (2) **TexCivA** 20**SW (2d)**413. (4) Possession of stock certificates by domiciled pledgee gives district court jurisdiction to cite pledgee to make good her claim as against owner's judgment creditor. 166**La**626, 117**S**741. [n] **Dam across river running between two states.**–99**Vt**397, 133**A**367. [o] **Drafts in payment of debt having situs in another state** are not such property within state as to give state court jurisdiction of debt. 238**Mich**366, 213**NW** 140. [p] **Where statutory notice** was served on nonresident, court had jurisdiction of ejectment action. 108 **Conn**173, 143**A**51.

795-34 254 **IllA**552 (beneficiary's interest in spendthrift trust is property within rule); 118**Kan**308, 235**P**104; 116**Nebr**317, 217**NW**94, 56**ALR**594; **Tex CivA** 23**SW(2d)**514.

796-35 91**Fla**958, 109**S**209; 116**Nebr** 317, 217**NW**94, 56**ALR**594; 246**NY**194, 158**NE**70; 126 **Or**1, 267**P**1035; 48**RI** 441, 138**A**190; 160**Tenn**381, 25**SW(2d)** 583; **TexCommnA** 280**SW**543; **TexCivA** 5**SW(2d)**178; **TexCivA** 20**SW(2d)**413 (stock of foreign corporation). [a] (7) Superior court of Rhode Island has no jurisdiction to partition lands in Massachusetts. 48**RI** 441, 138**A**190. (8) Right in foreign real estate pledged as collateral security for note can be enforced only in state where land is

situated. 246NY194, 158NE70. (9) Where it was sought to impound part of series of notes which were property of foreign corporation and had been sent into state unindorsed as evidence of default entitling owner to collateral deposited in escrow. 25F(2d)807.

796-40 204Cal 441, 268P635; 79CalA 55, 248P1065; MoA 29SW(2d)240.

797-41 213Ala173, 104S530; 248Mich 450, 227NW811.

797-42 79CalA55, 248P1065.

797-45 213Ala173, 104S530; 219Ala77, 121S86; 169Ga710, 151SE362; 108 WVa612, 152SE6.

797-48 But see 43F(2d)705.

797-51 93Fla611, 112S768; 328 Ill 472, 160NE76; 48Philippine515, 521 [quot CJperVilla-Real,J]; 101Vt474, 144A455; Wis 231NW590; 33Wyo 281, 238P545, 550 [citCJ]. But see 338 Ill 309, 170NE 212. [c] **Mere assumption of jurisdiction.**-48Nev53, 226P1106.

797-52 MoA 273SW145; 116Tex1, 285 SW1063, 1069 [citCJ].

797-52½-New. The court acquires jurisdiction of the subject matter of a cross-action when its process is invoked by having a citation issued. 118Tex227, 138SW(2d)688.

797-53 93Fla611, 112S768, 775 [citCJ]; 328 Ill 472, 160NE76; TexCivA 286SW 629, 632 [citCJ].

797-54 93Fla611, 112S768; MoA 282 SW739; 116Tex1, 285SW1063, 1067 [citCJ]; TexCivA 286SW629, 632 [cit CJ]; Utah 284P992.

797-55 116Tex1, 285SW1063, 1069 [cit CJ].

798-60 151Miss516, 118S606(1stcase); 19 OhA458.

798-62 143 Okl 5, 286P872.

798-62½-New. The court obtains no jurisdiction of a person substituted as plaintiff on application of the original plaintiff where such person had not appeared and was not subject to the jurisdiction of the court. 118 Or416, 247P 143.

798-64 42F(2d)571; 201 Iowa516, 207 NW778; 81Mont442, 264P108; NJCirCt 150A681; 127Misc173, 215NYS332; 102 WVa317, 135SE178; Wis 231NW590.

798-65 39F(2d)318; 93Fla611, 112S 768; Ill 173NE486; Iowa 232NW118; MoA 282SW739; 55ND253, 212NW931; Tex 295SW245; 102WVa317, 135SE178.

799-66 93Fla611, 112S768; 55ND253, 212NW931.

799-68 50Nev46, 249P865; 38Wyo 223, 266P128, 130 [citCJ]; Wyo 285P146.

799-69 154Miss307, 122S368.

799-77 95US714, 24L ed565; 98US476, 25L ed237; 274US352, 47SCt632, 71L ed 1091; 54Ark137, 15SW186; 2AppDC 290; 24AppDC222; 10 Iowa575; 44Kan 231, 24P484; 143Ky10, 135SW425; 156 Ky212, 160SW1048; 4BushKy349; 2 DuvKy540; 127La718, 53S968; 106 Mass217; 220Mich504, 190NW239; 137 Minn423, 163NW781; 114Miss39, 74S 777; 99MoA425, 73SW388; 125AppDiv 545, 109NYS1058; 226AppDiv56, 234 NYS202; 5HowPrNY341; 1NYCityCt 97; 10WendNY592; 15 OhA214; 36 Okl 671, 675, 128P1091 [quotCyc]; 95 Or 590, 189P427; 8PaDist&Co 119.

800-78 116Nebr317, 217NW94, 56ALR 594.

800-79 95US714, 24L ed565; 32F(2d) 350; 73Fla305, 73S795; 53 IndA630, 100NE584, 860; 150 Iowa511, 129NW 494, 35LRANS292, AnnCas1912D680; 7KyOp350; 236Mich286, 210NW254; 122Minn396, 142NW714, AnnCas1916B 563; Mo 188SW82; 82Mont141, 265P 710; 94NJEq105, 118A347; 136NY384, 33NE228 [aff 65Hun27, 19NYS594]; 226 AppDiv56, 234NYS202; 134Misc253, 236 NYS96; 114NYS1048; 99 Okl 297, 227 P426; 95 Or590, 189P427; 211Pa313, 60A991; 211Pa473, 60A1046; 84Tex562, 19SW778, 31AmSR80; 81Tex659, 17 SW373; 78Tex192, 14SW450; 73Tex 651, 11SW869; 42TexCivA38, 94SW447; 68Wash63, 122P593.

800-86 99CalA541, 278P910; MoA 24 SW(2d)697.

801-89 32PortoRico 44; 33PortoRico 13.

801-92 93Fla611, 112S768; 50Nev282, 257P831; 160Tenn403, 23SW(2d)897.

801-93 93Fla611, 112S768; 116Nebr 317, 217NW94, 56ALR594. See also 160 La1011, 107S783.

802-94 163Ga525, 136SE545.

802-95 258Mass103, 154NE570.

802-96 93Fla611, 112S768; 82Mont 141, 265P710.

802-97 6F(2d)937; 34Ariz217, 270P 625; TexCivA 275SW478.

802-2½-New. Where both debtor and creditor are nonresidents of the state of forum, the transaction which gave rise to the deed having taken place in another state where the debt is payable, the situs of the debt is not within the state of forum, and personal service upon the debtor will not give a court of such state jurisdiction thereof. 238 Mich366, 213NW140.

802-6 274US684, 47SCt755, 71L ed1297; 8F(2d)901; 174Ark1156, 298SW505; 78CalA595, 248P715; 79CalA468, 250P 195; 82Colo 550, 262P89; 93Fla611, 112 S768; 209Ky780, 273SW542, 544 [quot CJ]; 126Me371, 138A564; 317Mo 751, 297SW378; 75Mont99, 242P425; 77 Mont214, 250P609, 611 [citCJ]; 82NH 193, 132A12; 31NM514, 247P826; 127 Misc630, 217NYS306; 224AppDiv243, 229NYS644; NC 155SE719; 118 Or260, 246P741, 747 [quotCJ]; 8PaDist&Co 717; 32PortoRico 44; 51SD315, 213NW 720; TexCivA 276SW336; 116Tex29, 285SW1079, 1084 [citCJ], 48ALR355; TexCommnA 292SW174.

804-7 274US684, 47SCt755, 71L ed 1297; 7F(2d)177; 8F(2d)901; 15F(2d) 660; 25F(2d)160 (infringement suit); 34F(2d)700; 36F(2d)876; 37F(2d)419; 39F(2d)615; 43F(2d)521; 213Ala614, 105S689; Cal 289P825; 77CalA99, 246 P86; 79CalA468, 250P195; 102Conn 529, 129A527; 93Fla611, 112S768; Fla 128S241; 160Ga535, 128SE773; 169Ga 325, 150SE424 (maritime contract); 235 IllA488; 248 IllA301; 255 IllA294; 87 IndA509, 162NE71; 201 Iowa516, 207 NW778; Kan 289P427(2dcase); 209Ky 780, 273SW542, 544 [quotCJ]; 223Ky 751, 4SW(2d)717; 159La956, 106S455; 7LaA588; 253Mass116, 148NE377; 253 Mass411, 149NE40; 247Mich52, 225NW 542; 153Miss91, 120S437; 157Miss559, 128S734; 317Mo 1141, 298SW37; Mo 30SW(2d)63; 116Nebr230, 216NW668; 50Nev153, 254P698; 82NH193, 132A12; 83NH115, 139A184; 100NJEq417, 136 A327; 216AppDiv274, 214NYS732; 127 Misc630, 217NYS306; 128Misc718, 221 NYS205; 134Misc724, 236NYS630; 129 Misc283, 221NYS462; 134Misc374, 235 NYS461; 137Misc128, 241NYS481; 136 Misc688, 242NYS207; 195NC169, 141SE 572; 32 OhA263, 167NE899; 26 OhNP NS552; 124 Okl 7, 253P66; 118 Or260, 246P741, 747 [quotCJ]; 118 Or416, 247 P143; 124 Or443, 264P432; 29SPa267, 148A110; 5PaDist&Co 213; 8PaDist& Co 121; 32PortoRico 44; 48RI 441, 138 A190; 31SD315, 213NW720; Tex CommnA 299SW213, 216 [citCJ]; Tex CommnA 29SW(2d)971; TexCivA 293 SW675, 676 [citCJ]; TexCivA 23SW (2d)748; Utah 264P968; 144Va692, 130 SE902; 103WVa69, 136SE604; Ont [1929] 2DomLR514.

806-8 74CalA580, 241P570; 104Conn 322, 133A99; 217Mo 751, 297SW378; 118 Or260, 246P741, 747 [quotCJ]; 48 Philippine515, 521 [quotCJperVilla-Real,J].

806-12 32F(2d)100. [b] 31F(2d)283.

806-13 235 IllA488; 104NJL156, 138A 875; 118 Or260, 246P441.

806-31½-New. to an attempt to confer jurisdiction of an appeal from conviction, by combining two separate judgments in one appeal; 159La956, 106S 455.

806-33 TexCivA 293SW675, 677 [cit CJ].

807-41½-New. Parties may stipulate that facts exist which give court jurisdiction. TexCommnA 4SW(2d)31.

807-42 Vt 145A872(2dcase).

807-43 CalA 246P85; 102NJL349, 133 A785, 787 [citCJ]; 5PaDist&Co 503.

807-44 19 OhA458; 48Philippine515; TexCommnA 14SW(2d)1018. [c] Consent not shown. Ont [1930] 3DomLR 146.

807-47 37GaA739, 141SE674.

808-57 213Ala614, 105S689; 173Ark 496, 292SW686, 689 [citCJ]; 79CalA 468, 250P195; 216AppDiv274, 214NYS 732; 8PaDist&Co 121; 48RI 441, 138A 190; TexCivA 23SW(2d)748.

809-59 8PaDist&Co 121.

809-65 154Tenn513, 290SW31; Tex CivA 293SW675, 677 [citCJ].

810-66 54ND14, 208NW234. See also 138 Okl 222, 280P801(2dcase).

810-67 CalA 285P871(2dcase); 35 OhA 491, 172NE623; 67Utah60, 245P966; 151Va156, 144SE447.

810-72 116Tex1, 285SW1063, 1069 [cit CJ]. [a] **Determination whether plaintiff has standing** requisite to maintenance of suit is exercise of jurisdiction. 271US228, 46SCt496, 70L ed920.

810-75½-New. If superior court has jurisdiction to entertain an action it may define right sought to be protected. 194Cal 146, 228P19.

810-75¼-New. Determination of proper parties. Court has jurisdiction to determine who are proper parties and who have such interest in the subject of an action as entitles them to litigate. 217AppDiv342, 217NYS176.

810-75¼-New. Local and extraterritorial jurisdiction. Where grant of jurisdiction is made in single sentence and jurisdiction over some of matters mentioned is necessarily local, the entire grant confers only local jurisdiction unless qualified by expression of specific intent to grant extraterritorial jurisdiction as to some matters. 81CalA 1, 253P151, 50ALR1297.

810-75½-New. Arbitrary power does not abide with courts. 142 Okl 105, 288 P463.

810-79 126 Okl 12, 257P761; 116Tex1, 285SW1063, 1070 [citCJ]; TexCivA 286 SW501.

810-80 Mo 20SW(2d)502; 127Misc496, 216NYS561; 155SC436, 152SE658 (necessity of jurisdiction of defendant and subject matter); 116Tex1, 285SW1063, 1070 [citCJ]; TexCivA 286SW501; Tex CivA 25SW(2d)164; TexCivA 26SW (2d)345.

810-84 76CalA639, 245P796; 83NH115, 139A184; 116Tex1, 285SW1063, 1068 [citCJ].

811-85 36F(2d)712; 91Fla709, 109S 677; 203 Iowa1152, 211NW423, 427 [citCJ]. TexCommnA 24SW(2d)813(3d case).

811-86 76CalA639, 245P796; 161Ga 287, 130SE580; 83Mont400, 272P525; 116Tex1, 285SW1063.

811-86½-New. Litigant may not invoke aid of court of equity and simultaneously deny court's jurisdiction to administer character of relief asked. Nebr 230NW658.

811-87 203 Iowa1152, 211NW423, 427 [citCJ].

811-88 TexCivA 299SW466.

811-90 203 Iowa1152, 211NW423, 427 [citCJ]; TexCivA 299SW466; TexCivA 21SW(2d)355.

812-92 161Ga287, 130SE580; 203 Iowa 1152, 211NW423, 427 [citCJ].

813-98 136Misc215, 239NYS347.

813-5 217AppDiv342, 217NYS176 (by statute).

813-6 [a] (10) Surrogate's court may determine as preliminary question, without jury, validity of agreement wherein next of kin agreed not to contest will. 217AppDiv342, 217NYS176.

814-14 125Me171, 132A211 (by statute); TexCivA 291SW924. [a] In Arkansas.-171Ark514, 284SW775.

815-16 See also Mass 172NE605.

815-17 193Wis132, 214NW396.

815-18 116Tex1, 285SW1063, 1068 [cit CJ]; 117Tex152, 299SW397 (where appellate court has issued an ancillary writ of mandamus directing trial of issue of insanity after conviction, it has power to supervise trial).

815-20½-New. Generally a court may approve an act which it might have authorized or directed to be done. 204 Iowa98, 214NW696.

815-20⅓-New. Application of wrong rule of law by court is erroneous exercise of jurisdiction and not acting without jurisdiction. 111Conn124, 149A246.

816-31 13F(2d)814; 81CalA742, 254P 939; 131Misc71, 225NYS775; Wash 292 P741. [a] (3) Plaintiff, having legal right to bring action where it was brought, cannot be denied right to have

it tried because of alleged unprofessional conduct of his attorneys in instituting other actions at improper places. 177Minn1, 223NW291. [b] **Decision of court that it has jurisdiction** removes any question of discretion and court must proceed to decree. 13F(2d)814.

816-41 CalA 293P128. [a] **Courts of state are not invested with discretion to refuse to entertain jurisdiction** in suit, under Federal Employers' Liability Act, against interstate railroad maintaining line in state and agent in county where suit is brought. Mo 208SW(2d)684.

816-43 219Ky242, 292SW781. [b] **Personal injury suit procured by unethical and unlawful means.**–199Wis278, 226NW297, 300 [citCJ].

817-46 225AppDiv145, 231NYS630.

817-49½-New. Although a court has jurisdiction it is not error for it to decline to exercise it where another court designated for the purpose is open to the litigant. 121Kan346, 246P516.

817-49¼-New. Courts will be slow to deprive citizens of a forum in which to present their complaints. 117Tex113, 293SW516.

817-49¼-New. Inconvenience of bringing witnesses from without state is not ground for dismissing action by foreign corporation against foreign corporation doing business in state. 131Misc71, 225NYS775.

817-49½-New. The granting of a temporary injunction before pleadings were completed, restraining defendants from pursuing litigation involving corporate rights in a foreign jurisdiction is not such assumption of jurisdiction as to preclude the court from later refusing jurisdiction because the controversy ought to be settled in the jurisdiction of corporate domicile. Mass 167NE278.

817-50 38F(2d)526; 30F(2d)826; 127Misc71, 215NYS265.

817-51 253Mass411, 149NE640. See also 220Ky755, 295SW1038.

817-54½-New. Assumption of jurisdiction by the circuit court for one county of a cause whose proper venue was in another county is an irregularity, 50SD627, 211NW450.

817-54½-New. but does not deprive the court of jurisdiction where both counties are in the same circuit. 50SD627, 211NW450.

818-71 154Tenn513, 290SW31.

818-73 79CalA55, 248P1065.

819-84 TexCivA 68SW(2d)103.

821-20½-New. Court, having jurisdiction of parties, may determine that instrument of conveyance is a mortgage, although land involved is in another state. 201Iowa20, 206NW680.

822-57 47RI314, 132A888.

822-62 See also TexCivA 78W(2d)613.

822-63 8F(2d)207.

822-64½-New. Jurisdiction once acquired cannot be defeated by defense enforceable only in another forum. Tex CivA 26SW(2d)345.

822-65 116Tex1, 285SW1063, 1069 [cit CJ].

822-66 [a] (1) TexCivA 287SW76.

823-67 212Ala574, 103S666; 147Miss67, 112S867; 116Tex1, 285SW1063, 1070 [citCJ]; TexCivA 284SW703, 704 [citCJ]. But see 51Philippine251. [a] (15) 208Cal315, 281P70; TexCivA 284SW703, 704 [citCJ]. (18) 121Kan39, 245P743. (19) 269US163, 46SCt50, 70 L ed213; TexCivA 288SW(2d)887. (23) TexCivA 284SW703. (41) Error in submitting cause to a jury. 123Or537, 262P936. [n] **Rule that jurisdiction once acquired** shall not thereafter be affected applies to particular cases and not to classes of cases. 50SD279, 209NW650. [o] **Alleged payment of note declared on in plaintiff's complaint** does not deprive court of jurisdiction to try defendant's set-off where such payment did not include costs already accrued. 99Vt421, 133A247. [s] **Filing of new suit based on same cause of action** does not deprive court of jurisdiction in pending action. Fla 129SS889.

824-68 [b] (3) Plaintiff after jurisdiction has attached may so change his pleading voluntarily that court will no longer have jurisdiction on face of pleading. 15F(2d)187. [h] County court's **permission to amend complaint** beyond court's jurisdiction is nullity and does not oust jurisdiction. 220App Div69, 220NYS621.

824-69 166La219, 116S890, 891 [citCJ].

824-71 33Wyo281, 238P545, 553 [cit CJ].

825-75 174Minn601, 218NW171 (jurisdiction held not lost).

825-84 Fla 129S889.

825-85 127Mo167, 142A377; 74Mont39, 238P597; 197Wis591, 222NW794.

825-90 270US243, 46SCt246, 70L ed565.

826-94 CalA 291P586; 51SD67, 212NW48.

826-96 82CalA165, 255P272 (cannot be restored by stipulation).

826-6 208Iowa534, 224NW586 (proper method); 154Tenn134, 289SW533.

826-11 13F(2d)13, 47ALR314; 154Tenn134, 289SW533; 145Va317, 133SE812.

827-17 168Ark459, 270SW624; 175Ark530, 18SW(2d)16; 81CalA287, 253P948; 169Ga101, 149SE786(2dcase); 242 IllA508; 87IndA136, 158NE229; 229Ky189, 16SW(2d)1036; Mass 171NE672 (default cases); 164Minn440, 205NW438; 216MoA572, 259SW518; MoA 273SW145, 147 [citCJ]; 225AppDiv484, 233NYS530; 123Okl106, 251P981; 128Okl27, 261P167; 33PortoRico863; 47RI323, 132A1; TexCommnA 24SW(2d)346; TexCommnA 15SW(2d)579; 150Wash121, 272P72. But see 34F(2d)700; TexCivA 24SW(2d)757. [f] (2) Presumption in favor of jurisdiction is same where service was by publication. 199Cal523, 250P397. [i] **Clear and convincing proof** is required to overcome presumption of jurisdiction. 199Cal523, 250P397. [j] **Generally in courts of record** court is presumed to have incidents pertaining thereto except as expressly denied by act creating court. 196Wis292, 220NW197.

829-21 322Mo654, 15SW(2d)842; MoA 279SW751; 112Okl183, 240P708.

829-22 218Ala230, 118S460; 87IndA136, 158NE229; 322Mo654, 15SW(2d)842.

829-24 47RI323, 132A1, 2 [citCJ].

830-27 200Ind196, 158NE289; 112Okl183, 240P708. See also 218Ala230, 118S460.

831-32 54SD146, 222NW690.

831-35 220Ala448, 126S110; Ill 172NE1; 75Mont147, 242P959; 124Okl7, 253P66; 118Or260, 246P741; 6PaDist&Co441, 443 [quotCJ]; 115Tex551, 285SW1084, 1089 [quotCJ]. [c] See also to same effect TexCivA 274SW1006.

832-36 317Ill231, 148NE653; 329Ill299, 160NE579; 124Okl7, 253P66; 118Or260, 246P741; 115Tex551, 285SW1084, 1089 [quotCJ]; TexCivA 5SW(2d)594, 597 [quotCJ].

832-40 153Miss796, 121S823.

832-41 322Mo654, 15SW(2d)842.

832-42 137Misc830, 245NYS69 (proof must be clear and explicit).

832-43 Md 148A246 (evidence sufficient).

832-43½-New. The presumption is not available where the record affirmatively shows the contrary. 81CalA287, 253P948.

833-44 Mass 171NE672; 153Miss91, 120S437; 316Mo372, 289SW898; Mo 28SW(2d)1008; 48Nev425, 233P40; 47RI323, 133A1; 115Tex551, 285SW1084, 1089 [quotCJ]; TexCommnA 290SW1083, 1085 [quotCJ]; 101Vt343, 143A302.

834-45 Fla 128S416; 316Mo372, 289SW898; 115Tex551, 285SW1084, 1089 [quotCJ]; TexCommnA 290SW1083, 1085 [quotCJ].

834-46 115Tex551, 285SW1084, 1089 [quotCJ].

834-47 199Ind467, 157NE721; 119Or586, 250P740; 148Va424, 139SE252, 55ALR279.

834-48 323Ill585, 154NE414.

834-51 Ill 173NE52; 313Mo642, 285SW462; 123Okl106, 251P981.

835-59 244IllA427; 133Misc280, 232NYS9.

835-62 SD 230NW22. See also Wash 28P223.

839-79 98Fla627, 125S2; 323Ill585, 154NE414.

840-83 50ND662, 197NW862.

840-84 50ND662, 197NW862.

841-86 Mass 171NE672 (default cases); 47RI323, 132A1, 2 [quotCJ]. But see Mo 280SW1043; 100WVa422, 130SE663.

841-90 Ill 173NE486.

841-93 Wash 286P666.

842-99 Ark 32SW(2d)430; 317Ill231, 148NE653 (adoption proceedings); 329Ill299, 160NE579; 334Ill619, 166NE517; 75Mont147, 242P959; 142Wash48, 251P877, 878 [quotCyc]. [g] **In adoption proceeding,** general recital in order that all persons whose presence was necessary were present at hearing is insufficient to warrant presumption that mother was present and hence had actual notice, where her written consent was absent, and record failed to disclose notice had been given her. 75Mont147, 242P959.

842-1 142Wash48, 251P877, 878 [quot Cyc].

842-3 219Ala181, 121S548; 220Ala237, 124S519 (notice to defendant); 181Ark683, 27SW(2d)106; 240Mich495, 215NW420, 421 [quotCycperBird,J]; 48Nev425, 233P40; 215AppDiv15, 213NYS77 (complaint must allege jurisdictional facts); 115Tex551, 285SW1084 [citCJ]; TexCivA 292SW651, 653 [citCJ]; TexCivA 293SW1113; TexCivA 299SW466; TexCivA 19SW(2d)71; 142Wash48, 251P877, 878 [quotCyc]. [f] **Foreclosure action in county court.**–**Pleadings must** show value. TexCivA 293SW1113.

843-4 115Tex551, 285SW1084.

843-5 Ala 128S440; 328Ill472, 160NE76; Ill 172NE1; 244IllA137; 240Mich495, 215NW420, 421 [quotCycperBird,J]; 6PaDist&Co441, 443 [quotCJ]; 142Wash48, 251P877, 878 [quotCyc].

843-8 67Utah60, 245P966.

843-14 Ill 173NE52; 86Mont33, 281P753.

844-18 277US54, 48SCt454, 72L ed781; 7F(2d)177; 39F(2d)884; Ida 291P1060; 244IllA366; 202Iowa1116, 211NW503, 504 [citCJ]; 170La953, 129S543; 243Mich517, 220NW808; 317Mo751, 297SW378; 221MoA974, 296SW193; MoA 26SW(2d)1011; 137Misc128, 241NYS481; 117Okl220, 246P373; 51SD315, 213NW720; 154Tenn134, 289SW533; Wash 286P666. [a] (2) 197NC735, 150SE510. (3) 136Okl150, 276P765. (18) 154Tenn513, 290SW31. (19) Filing motion for new trial on other grounds. 136Okl146, 276P762, 765. (20) By filing general demurrer to petition. 226Ky347, 10SW(2d)1112(2d case).

845-19 243Mich517, 220NW808; 288Pa362, 136A673; 154Tenn513, 290SW31; Utah 264P968.

845-20 23F(2d)477; 86CalA13, 260P798, 800 [quotCJ]; 171Minn475, 214NW469; MoA 272SW998; 290Pa372, 138A914; TexCivA 285SW655; TexCivA 2SW(2d)977 (amount sued for exceeding jurisdiction); 145Va317, 133SE812; Ont [1930] 3DomLR153. [h] **Failure to object** that none of the claims of interveners was for as much as three thousand dollars held waiver of objection to jurisdiction. 6F(2d)841. [i] **Objection may be made any time before final** disposition on appeal. 153Md394, 138A674.

845-21 23F(2d)674; 86CalA13, 260P798, 800 [quotCJ]; 83Colo346, 265P690; 85Colo28, 273P21; 129Kan520, 283P647; 10LaA553, 120S643; 9LaA609, 121S671; Oh 170NE866; 141Okl106, 283P1015; 141Okl105, 283P1017; 287Pa499, 135A219; 295Pa390, 145A430; TexCommnA 299SW213 (agreement held not waiver of lack of jurisdiction); TexCommnA 14SW(2d)1018; TexCivA 300SW648; Vt 145A872(2d case); 38Wyo28, 264P699. [c] 88CalA731, 264P273; 85Colo284, 275P906. [f] **Insurance company,** repudiating compromise settlement and defending without admitting liability, is estopped to claim that compromise fixed amount due on one of concurrent contracts. 27F(2d)616.

846-22 217MoA480, 268SW665. But see 215Ala550, 112S115.

846-23 154Tenn134, 289SW533.

846-24 41GaA428, 153SE237; 41GaA736, 154SE651; 41GaA701, 154SE294

(2dcase); 255 IllA294; 82Mont126, 266 P387; 31NM599, 248P1096. [a] 137 Misc1, 242NYS408.

846-25 166Ga747, 144SE256(2dcase); Utah 269P1017.

846-27 [a] 43F(2d)705. [c] 37GaA 433, 140SE408. [f] See also 321Mo 943, 13SW(2d)641. [bb] 114 Okl 72, 243P 501. [nn] **Giving bond** to prevent appointment of receiver in foreclosure proceedings. 317 Ill 501, 148NE319.

847-28 38GaA573, 144SE406; 125Me4, 130A504; 70Utah163, 259P191.

847-29 [a] **That motion or plea attacking jurisdiction contains no valid objection thereto** does not confer jurisdiction where none existed. MoA 286SW420.

847-30 MoA 11SW(2d)1070.

847-31 277US54, 48SCt454, 72L ed781; 17F(2d)841; 19F(2d)961; 32F(2d)687; 40F(2d)590; 180Ark214, 20SW(2d)874 (anytime before judgment); 327 Ill 508, 158NE814; 255 IllA294; 202 Iowa1116, 211NW503; 124Kan345, 259P793; 225 Ky246, 8SW(2d)401; 125Me4, 130A504; 309Mo 224, 274SW758; MoA 25SW(2d) 541; 117Nebr551, 221NW694; 137Misc 128, 241NYS481; 137 Okl 259, 279P346; 120 Or229, 250P876; 8PaDist&Co 121; 146SC77, 143SE546; 154Tenn134, 289 SW533. TexCommnA 272SW445; Tex CivA 293SW675. [b] **Objection may be raised** in any proceeding to enforce order made or judgment entered. 243 Mich603, 220NW766.

848-32 24F(2d)329; 213Ala614, 105S 689; 86CalA13, 260P798. [a] (18) 321 Mo 943, 13SW(2d)641. (26) **Close of** trial de novo. 33F(2d)701.

849-34 309Mo 224, 274SW758; 120 Or 229, 250P876.

850-35 Mo 30SW(2d)998.

850-37 253NY382, 171NE579, 69ALR 809; 58ND754, 227NW360; Ont [1930] 3DomLR153.

850-42 See also 49RI 269, 141A703.

850-43 31NM576, 249P242; 49RI 269, 141A703. [d] **New York City Court,** acquiring jurisdiction of parties, may take evidence and either dismiss complaint on merits or direct judgment against defendants, even though it be determined that it has no jurisdiction to render judgment affecting realty. 132Misc572, 230NYS321.

850-47 [c] **In Pennsylvania.**-12PaDist &Co 799 (time for filing petition and effect of failure to file in time).

850-51 270US580, 46SCt402, 70L ed 743; 213Ky23, 280SW469; 123 Or406, 262P833. But see TexCivA 28SW(2d) 276; TexCivA 28SW(2d)887.

850-51½-New. Jurisdiction of the subject matter is to be determined by the allegations of the complaint made in good faith and not on the existence of a sustainable cause of action. 123 Or406, 262P833.

850-53 129Misc152, 220NYS42.

851-55 [a] **Burden on plaintiff to sustain jurisdiction.**-Iowa 233NW47.

851-59 40F(2d)671; 44F(2d)214; 210 Ky575, 276SW500, 502 [citCJ]. [b] **Under Practice Act,** where in supreme court there is a dispute as to jurisdiction, dispute should be settled by taking evidence by court, referee, or jury. 129Misc152, 220NYS42.

851-60 7PaDist&Co 747, 750 [quotCJ]; 90PaSuper192, 195 [quotCJ].

851-61 123 Or406, 262P833.

851-62 40F(2d)671.

851-62½-New. Defendant served in state for tort committed outside of state may raise question of jurisdiction by answer and have issue litigated at trial. 225AppDiv484, 233NYS530.

851-62⅓-New. Merits of action cannot be considered in determining jurisdiction. 34F(2d)700.

851-62¼-New. In determining whether want of jurisdiction appears, the whole record must be consulted. CalA 279P 1004.

851-67½-New. County court cannot entertain motion to set aside judgment because act creating court is unconstitutional. 190NC471, 130SE154.

851-67⅓-New. Court holding valid commission from governor is not required to find facts on challenge to jurisdiction. 190NC841, 130SE838.

851-67¼-New. Appeal court cannot determine jurisdiction by looking to statutes for its review of judgment of the lower court. 24 OhA413, 157NE801.

851-67⅓-New. The question of jurisdiction is one of law where it does not rest on contested facts. 316Mo 372, 289 SW898.

851-67⅙-New. Under statutory provisions, plaintiff's evidence cannot be considered on demurrer ore tenus to a complaint in tort on the question of the superior court's jurisdiction. 196NC61, 144SE515.

851-67½-New. The jurisdiction of the district court cannot be attacked collaterally by answer to a call in warranty. LaA 125S518.

851-67⅓-New. Claimant's right to file mechanic's lien cannot be decided in preliminary proceeding to determine jurisdiction. 299Pa352, 149A600(1stcase).

851-67¼-New. Defendant appearing specially to object to jurisdiction may present brief. Iowa 233NW47.

851-69 270US266, 46SCt263, 70L ed 578; 34F(2d)700; 36F(2d)974; 39F(2d) 616; 42F(2d)387; 80Colo 380, 252P353; 33GaA752, 127SE825, 827 [citCJ]; 210 Ky575, 276SW500, 502 [citCJ]; 316Mo 812, 293SW760; 83NH191, 138A428; 225 AppDiv484, 233NYS530. See also 29 OhA482, 163NE718.

851-70 255Mass132, 150NE870.

851-71 39GaA221, 146SE513; 217App Div342, 217NYS176.

852-72 8F(2d)901; 22F(2d)206.

852-73 8PaDist&Co 420 (depositions of nonresident witnesses).

852-75½-New. A statute providing for preliminary determination of jurisdiction is applicable only to the question of jurisdiction over defendant or the cause of action. 296Pa225, 145A817(1st case).

852-76 97CalA588, 276P113(2dcase); 7 PaDist&Co 14.

852-77 34F(2d)700 (defendant's duty to call matter to court's attention); 253 Mass116, 148NE377; 313Mo 667, 288SW 16; 317Mo 714, 296SW775; 317Mo 1141, 298SW37; Mo 30SW(2d)63; NJCh 151 A394; 31NM576, 249P242; 117 Okl 220, 246P373; 115 Or541, 237P684, 1117, 1118, 239P193; Utah 264P968; 151Va 156, 144SE447.

852-78 40F(2d)590; 31NM576, 249P 242; 253NY17, 170NE477; 117 Okl 220, 246P373; TexCivA 28SW(2d)276.

852-82 221MoA675, 283SW727, 729 [citCJ]. [f] 81CalA287, 253P948.

853-83 81CalA287, 253P948; 80Colo 380, 252P353; 221MoA675, 283SW727, 729 [citCJ]. See also 9PaDist&Co 635. [b] IndA 158NE257 (appeal held to lie from dismissal of appeal from assessment).

853-84 222MoA426, 7SW(2d)290. [c] **Court cannot erroneously determine that petition states cause** of action against resident, thereby establishing jurisdiction over nonresident codefendant. 222 MoA426, 7SW(2d)290.

853-85 23F(2d)109; 25F(2d)95 (desire to dispose of controversy on merits cannot justify ignoring jurisdictional limitations); 218Ala235, 118S271; 164 Ga162, 137SE829, 830 [citCJ]; 153Miss 91, 120S437; 35 OhA491, 172NE623; 291Pa341, 140A626; 116Tex1, 285SW 1063; TexCommnA 277SW1053 (judgment void); TexCommnA 28SW(2d)834; TexCivA 290SW829; 101Vt343, 143A 302.

854-89 TexCivA 290SW829.

854-90½-New. Action of court of equity in proceeding with creditor's bill without necessary parties or lacking prescribed conditions is not void. 19F (2d)922.

854-90⅓-New. A statutory provision, curing technical defects or insufficiencies, does not apply to defects which go to the jurisdiction. 132Misc497, 230NYS 177.

854-96 164Ga162, 137SE829.

854-98 TexCommnA 299SW213.

854-1 79Mont499, 257P267, 268 [citCJ]; 32PortoRico 347. [b] **Dissolving null attachment bond** is proper exercise of power of control over court's own process. 32PortoRico 347.

854-2 79Mont499, 257P267, 268 [citCJ].

854-4 119 Oh596, 165NE298.

854-5 [c] **Court cannot be created by consent of parties.**-174Ark1156, 298SW 505.

855-9 244NY406, 155NE688.

855-13 20AlaA514, 104S561 (court of chancery abolished and equity or chancery jurisdiction added to or conferred on circuit courts); 21AlaA516, 109S762; 200Cal 215, 252P575. [b] (2) Legislature is not inhibited by West Virginia constitution from extending powers and jurisdiction of law courts to subjects of equity jurisdiction. 106WVal, 144SE 570. [l] **Statute requiring proclamation by governor of existence of court** based on population of county. 157Miss648, 128S878 (time creation of court effective).

856-17 200Cal 522, 254P896.

857-30 24F(2d)957 (may abolish court and establish another in its place).

857-31½-New. , or enlarge and limit its jurisdiction and powers. 127Misc141, 215NYS412.

857-38½-New. The creation of a board of conciliation of controversies before which suitors are required to appear in certain cases before institution of suit does not constitute the creation of a court within constitutional provision. 49 ND248, 191NW485.

857-46 200Cal 522, 254P896.

858-55 215Ky238, 284SW1054; 102 NJEq14, 133A762. [a] **Constitution** authorizing circuit court in county having city of twenty thousand inhabitants refers to bona fide residents within corporate limits. 215Ky238, 284SW1054.

858-55½-New. Small claims court authorized by constitutional provisions was created primarily to avoid wasteful litigation and to reduce to a minimum costs of trial in cases where the demands are small. 200Cal 215, 252P575.

858-55⅓-New. Constitutional amendment may provide for judicial council to clear dockets. 200Cal 896, 254P896.

858-55¼-New. Where a new constitutional amendment provides for certain organization of courts, prior provisions inconsistent therewith are repealed. 200 Cal 522, 254P896.

858-55⅙-New. Provisos must be read as a whole. 200Cal 522, 254P896.

858-57 168Minn147, 210NW40; 321Mo 230, 10SW(2d)519; 116Tex1, 285SW 1063, 1068 [citCJ].

859-64 114 Oh155, 151NE48.

859-71 Mass 171NE237; 308Mo 390, 272SW940; NM 258P817; 104NJL260, 140A883; 119 Oh596, 165NE298; Tex CivA 275SW494. [c] **Under state constitution organization** of courts and administration is state, not local, function. 125Misc882, 212NYS400. [d] **In Indiana.**-200 Ind178, 162NE403.

860-75 NM 258P817.

860-83 CalA 276P128.

861-90 See also TexCivA 274SW1011.

861-92 Mass 171NE237; 32NM419, 258 P817; 119 Oh596, 165NE298; 125 Okl 1, 256P340; 8PaDist&Co 119. See also 218Ala230, 118S460. But see 166Ga749, 144SE209. [b] **In Michigan.**-233Mich 356, 206NW582.

861-93 TexCivA 274SW1011.

861-95 20AlaA613, 104S554; 22AlaA 160, 113S480; 166Ga749, 144SE209.

861-97 132 Okl 33, 269P259.

861-99 119 Or264, 240P233 (county courts).

861-4 165Ga421, 141SE194; 334 Ill 465, 166NE100, 64ALR1006.

862-5 125 Okl 1, 256P340.

862-6 165Ga421, 141SE194.

862-11 322Mo 746, 18SW(2d)500.

862-27½-New. Under such provision the legislature may give such court jurisdiction of appeals from the state tax commission. 114 Oh658, 151NE760.

862-31 116Tex662, 287SW45.

863-38½-New. Where authority or jurisdiction of the appellate court is purely statutory under the permissive sanction of the constitution, its limitations can be prescribed by legislative authority. 125 Okl 1, 256P340.

863-40 [a] **County court at law** may be vested with all judicial functions theretofore conferred upon county court to exclusion of latter. TexCivA 286SW 261.

863-41 32NM419, 258P817.

863–43 TexCivA 274SW1011.
863–44 119 Or264, 240P233.
863–50 165Ga421, 141SE194.
863–52 164La186, 113S812.
863–53 See also 95CalA414, 273P150.
863–56½–New. Grant of jurisdiction to municipal court formerly lodged in superior court must be strictly construed. 81CalA1, 253P151, 50ALR1297.
864–60½–New. In Georgia the city court established in a municipality incorporated as a town is not a constitutional city court. 36GaA292, 136SE470.
864–60½–New. Subsequent chartering of municipality as a city by statute making no reference to the city court previously established by statute therein does not make the court a constitutional city court. 36GaA292, 136SE470.
864–60¼–New. A statute attempting to limit the jurisdiction of judges of the superior court as to certiorari to judgments of municipal courts is unconstitutional. 166Ga749, 144SE209.
864–60½–New. A constitution conferring the right of self-government on municipalities does not abridge the state's sovereignty over municipalities in respect of its courts. 119 Oh596, 165 NE298.
864–61 97Fla710, 122S225 (real estate commission not unconstitutional); 101 TexCr346, 276SW244 (temporary district court).
864–67 [a] 175Ark1089, 1SW(2d)548. [b] **Power of city to regulate conduct of inhabitants** (1) does not give it right to define authority of courts. 125Misc 882, 212NYS400. (2) Local law in respect to issuance of search warrant and procedure of city court on return thereof is invalid. 125Misc882, 212NYS400.
864–68 [b] **Probate court not extinguished** by combination of probate and common pleas courts. Oh 171NE595(1st case). [c] **Where probate and common pleas courts were combined,** judge of common pleas not prohibited from exercising jurisdiction of probate court because not elected as probate judge. Oh 171NE595(1stcase).
864–71½–New. Construing the constitutional provision and statutes together the legislature does not indicate an intention to deprive any judicial district of the state of benefits of summary procedure conferred by statute establishing small claims courts. 200Cal 215, 252P 575.
865–79 [a] (2) Statute making abolition of court effective in expiration of term of incumbent is in conflict with provision of constitution making it effective "whenever" majority of voters shall so determine. 113 Oh23, 148NE 357. (3) When constitution provides that court shall be combined "whenever" majority of voters shall so determine, old court ceases to exist as soon as will of voters is officially ascertained. 113 Oh23, 148NE357.
865–82 [b] (1) 129Misc680, 221NYS522. [g] **Transfer of cause to another department** is not transfer of jurisdiction of court over cause. 202Cal 272, 260P 294 (notice of trial on reassignment of cause of another department unnecessary).
865–83 129Misc680, 221NYS522.
866–87 [a] **Statute requiring transfer of suits** to courts of newly created county held not to apply where defendant became nonresident before new county was created. 33GaA752, 127SE825. [b] **Right of transfer** to courts of newly created county held waived by submitting to two trials in old county after new county was created. 33GaA752, 127SE 825.
866–91 117Tex170, 299SW230.
866–93 34PortoRico 216 (attachment effective before transfer); TexCivA 275 SW494. [d] See also 322Mo 746, 18SW (2d)500. [f] **In New York.**–129Misc82, 220NYS696.
868–24½–New. Under statute requiring papers in pending actions to be transferred to court to which such actions were transferred, it has been held that entry of judgment in the office of the clerk of original court was improper, but effective under a subsequent curative statute. 129Misc680, 221NYS522.
868–32 [a] (2) Constitution does not prohibit legislature from dividing county into judicial districts and defining power and jurisdiction of courts therein. 179Ark611, 17SW(2d)875.
868–33 122 Okl 297, 255P150; TexCivA 290SW769. See also 118Tex449, 16SW (2d)809. [e] **Under Kansas City charter** common council may change boundary lines of divisions of municipal court even during term of judge elected and serving. 218MoA217, 265SW996.
868–34 122 Okl 297, 255P150. [a] 122 Okl 297, 255P150.
869–41 [b] **Ordinance of Kansas City** changing boundaries of divisions of municipal court held not unreasonable. 218MoA217, 265SW996.
869–44½–New. It is within the power of the legislature in some jurisdictions to change a judicial district by taking a county therefrom. TexCommnA 282 SW793.
869–45 MoA 12SW(2d)523.
869–47 78CalA277, 248P304; 119Kan 407, 239P765. [a] (2) Affidavit insufficient to justify transfer to secure fair trial. 87CalA629, 262P56. [c] **Supreme court has inherent power to sit in banc.**–NJ 144A169.
869–48 78CalA277, 248P304; 85CalA63, 258P980; 220MoA812, 278SW818.
869–49 119Kan407, 239P765.
869–50 23AlaA96, 122S606; MoA 274 SW887; 86Mont442, 284P772; NJCh 149A369. [i] **Cause, assigned to one division** is not automatically transferred to assignment division on adjournment of first term. MoA 274SW887.
869–51 [b] **Judge of division of circuit court of county** before whom is pending cause transferred to that division has jurisdiction to pass on motion to remand cause to another division on ground of lack of jurisdiction in him. Mo 272SW 928.
870–57 Mo 272SW928 (order not void for failure to state case was sent by agreement of judges which judge of division to which case sent took cognizance thereof and passed on motion for new trial which was purpose for which it was sent there); 220MoA812, 278SW 818. [c] **Transfer between divisions of circuit court of city of St. Louis.**–216 MoA692, 273SW122. [d] **Where case is transferred by consent of both judges** from one division to another, division to which case is transferred acquires jurisdiction. Mo 272SW928.
870–59 [a] **Court, to which case was regularly assigned, could set aside continuance** granted by another judge and reset case for trial. 219Ala369, 122S608.
870–61 See also 86Mont442, 284P772. [a] (1) Mo 272SW928.
870–62½–New. Under some constitutional provisions each judge of a court presides over a separate section and has his own individual successor therein. 156La930, 101S269 (criminal district court of Orleans).
870–62½–New. Rules of circuit court of a county are held to permit an assignment judge to assign a case to his own division. Mo 272SW928.
870–70 122 Okl 297, 255P150.
871–74½–New. A statute providing that the county judge of a certain county shall be the judge of a county court at law and providing for the election of a judge thereof is unconstitutional. Tex CommnA 10SW(2d)984.
871–74½–New. The procedure for assignment of a judge of the court of appeals for service in a district other than that of his residence is regulated by statute. 121 Oh321, 168NE473.
871–74¼–New. The chief justice of the court of appeals is not required to evidence his assignment or designation by a written order. 121 Oh321, 168NE473.
871–76 28F(2d)788. [c] **Audit of claim of secretary of court.**–Cal 293P69.
871–77 Cal 293P69; 66Utah272, 241P 1051 (contract for employment of assistant reporter, living outside district, authorized under Utah statute).
871–77½–New. A provision that a reporter be paid traveling expenses incurred in the performance of a contract outside the county in which he resides authorizes payment of traveling expenses incurred in order to perform a duty outside the county, although part of the expense may be incurred in the county. 66Utah272, 241P1051.
871–78 [a] **Supreme court cannot coerce performance of duties** by officers appointed by lower court. 145Miss553, 110S366.
871–84 40F(2d)593. [a] **Court must be assumed to have directed report** by stenographer of case of pauper appellant, where it does not appear on whose request it was done. 229Ky733, 17SW (2d)1018.
871–85½–New. **Court officers** appointed by sheriff under authority of statute are exempt from civil service regulations. 126Misc418, 213NYS602.
871–85½–New. and may be removed by the sheriff. 126Misc418, 213NYS602 (where performing duties as sheriff may require).
871–85¼–New. Conduct of court's officer is always subject to court's control. 48RI 4, 135A50.
871–86 76CalA168, 243P894. [b] **Rejection of interpreter held error.**–157 Miss452, 128S336. [c] **That interpreter has testified or will testify in case** does not render him incompetent where otherwise unobjectionable. 157Miss452, 128S 336. [d] **That interpreter is relative of party** to proceeding or of witness does not render him incompetent. 157 Miss452, 128S336.
871–87 [a] (1) 76CalA168, 243P894. [c] **Demand for interpreter held in sufficient form.**–76CalA168, 243P894 (for complaining witness). [d] **Discretion of court.**–76CalA168, 243P894 (determination of witness' understanding of language). [e] **Oath** should be required of interpreter to interpret truly testimony of witness. 96Fla348, 118S1.
871–88 [a] **Question for court.**–96Fla 348, 118S1.
871–95 244 IllA66. [a] (3) Power of approval or disapproval, given to mayor and city council by Massachusetts statutes on appointment of probation officers, relates solely to amount of salary. 254Mass100, 149NE601. [d] 134Misc 75, 234NYS581 (appointment by sheriff of two constables to serve as attendants required under common law).
872–96 12PaDist&Co 471 [quotCJ].
872–98 [b] (2) Under New York statute, judges authorized to recommend court attendants for appointment by sheriff need not recommend names to each in-coming sheriff, but he must continue names on pay roll till removal. 134Misc75, 234NYS581.
872–99 44 Ida739, 260P164.
872–1 44 Ida739, 260P164.
872–2½–New. Persons appointed court attendants by the sheriff on recommendation of judges are not required to give a bond to the sheriff. 134Misc 75, 234NYS581.
872–6½–New. Court constables appointed by judges have been held not officers within meaning of Const. art. 2 § 20, but are merely employees. 115 Oh32, 151NE769.
872–9½–New. Qualifications of probation officers, under Massachusetts statutes, are left to the discretion of the court. 254Mass100, 149NE601.
872–10 134Misc75, 234NYS581.
873–18 254Mass100, 149NE601 (probation officers); 308Mo 227, 271SW766. [a] (2) Establishment of salary for all appointees as probation officers, under Mass. Gen. L. c 276 § 83, fixed salary of such officers subsequently appointed. 254Mass100, 149NE601. (3) Later action of city council disapproving appointment of probation officer did not affect his title to office and his right to salary. 254Mass100, 149NE601. (4) Statute reading "the salaries of the attendants of the County Court of Kings County are hereby equalized and fixed at the same amount per annum as is now paid to attendants of the Supreme Court in such county" is a permanent equalization, the word "now" not restricting operation of statute to date of its enactment. 213AppDiv519, 210NYS830. [b] **Official court reporter is county officer** within statute providing method of determining salary of county officer. MoA 294SW429.

873-20 [d] **Liability of clerk for assistant's compensation.**–6LaA118. [e] **By judge of court.**–35 OhA250, 172NE397.

873-22 [c] **Court reporter** may be required by statute to make free transcripts in workmen's compensation cases. 34Wyo 349, 244P135.

873-23 34Wyo 349, 244P135.

874-31½-New. If a probation officer whose salary has become fixed obtains necessary vouchers, his salary must be paid by the county and is recoverable in an action at law. 254Mass100, 149NE601.

874-31⅓-New. Court reporter is entitled to demand payment for preparing transcript of evidence on delivery of transcript. TexCivA 300SW968.

874-31¼-New. The court must direct the county to pay a reporter for a transcript, where it finds defendant, who asked for permission to appeal forma pauperis is unable to pay. 229Ky733, 17SW(2d)1018.

874-32 308Mo 227, 271SW766.

874-38 TexCommnA 10SW(2d)984.

875-48 147Miss851, 112S790.

875-49 Ala 128S899(2dcase); 233Ky 606, 26SW(2d)541. [b] **Term of court at common law** must have a legal beginning. 233Ky606, 26SW(2d)541.

875-53½-New. As used in constitutional provisions requiring two terms of court to be held annually at which litigants may present causes for hearing and for trial and the holding, a court term without a jury is in compliance with such constitutional provision. 51 ND98, 199NW196.

875-57 Ala 128S899(2dcase).

875-59 122 Okl 250, 254P72.

875-64 22AlaA191, 113S452.

875-65 22AlaA191, 113S452.

875-66 22AlaA191, 113S452.

876-68 [b] **Adjourned term of court of civil appeals** continues regular term. 22 AlaA191, 113S452.

877-89 168Ark751, 271SW336; 154 Miss60, 119S507 (circuit judges cannot pretermit terms).

878-92 154Miss60, 119S507; 156Miss 346, 126S40.

878-93½-New. The days upon which courts are to sit and terms to be held are matters of public concern of which public is entitled to notice, 241NY389, 150NE303.

878-93½-New. especially litigants. 241 NY389, 150NE303.

878-93¼-New. Where statute fixing term is invalid, prior statute remains in force. 221Ky487, 298SW1086.

878-93⅓-New. A statute, requiring the chairman of a county court to attend at the courthouse on the first Monday of each month and such subsequent days as may be necessary, is not limited to the days immediately succeeding the first Monday. 158Tenn166, 11SW(2d)882.

878-3 175Ark633, 300SW408; 311Mo 32, 276SW872.

880-7 100WVa253, 130SE456 (term at which resignation of justice of peace was accepted by county court and successor appointed held regular term).

880-12 41F(2d)146.

880-14 315Mo 92, 285SW972; TexCivA 284SW991.

880-17 [a] **Order of commissioner's court providing for four terms of county court** each year for civil business as well as one continuous term for criminal business held not void for failure to provide four terms for both criminal and civil business. TexCivA 284SW991.

881-26 147Miss851, 112S790, 794 [quot CJ].

881-27 35GaA665, 134SE332; 233Ky 606, 26SW(2d)541; 54ND779, 211NW 336, 339 [citCJ]; 127 Okl 295, 260P745.

881-28 201 Iowa912, 208NW505; TexCivA 4SW(2d)241 (till court overrules motion for rehearing).

881-35½-New. Extended special term does not expire with discharge of jury. TexCivA 288SW634.

881-35⅓-New. Statute making terms for transacting criminal business perpetual held amended by subsequent statute. 147Miss851, 112S790.

881-36 23F(2d)493; 54ND779, 211NW 336, 339 [citCJ]. [a] **Adjournment from day to day** does not terminate term. 54ND779, 211NW336.

882-37 54ND779, 211NW336, 339 [cit CJ].

882-39 147Miss851, 112S790.

883-48 111TexCr299, 12SW(2d)578(2d case).

883-53 See also AlaA 130S527.

883-53½-New. In New York, an extraordinary term of supreme court must be conducted in accordance with the rules of law governing all other terms of court. 241NY389, 150NE303.

883-53⅓-New. Special term for divorce suit held ended when order overruling motion for new trial is handed to clerk. TexCivA 288SW634.

883-54 [c] **"Continued" and "adjourned,"** when used in connection with ending term of court, mean one and same thing. 241NY389, 150NE303.

884-59 35GaA665, 134SE332; 215App Div683, 212NYS280. See also 241NY 389, 150NE303. [a] **Recess** held to indicate temporary suspension of proceedings. 241NY389, 150NE303. [b] **Recess over period of nine months** held to constitute abandonment of extraordinary term. 241NY389, 150NE303.

884-61½-New. But a recess over a period of nine months is an abandonment of the term bringing it to an end. 241 NY389, 150NE303 (extraordinary term).

884-68½-New. In sense in which the terms "continued" and "adjourned" are used to designate the end of a term, they mean the same thing and have the same effect. 241NY389, 150NE303.

884-68⅓-New. The term "continued without day" means "adjourned without day." 241NY389, 394, 150NE303 (indefinitely).

884-68¼-New. There is an inherent power in the court to adjourn proceedings from day to day as long as it is necessary to finish business legitimately brought before it, 241NY389, 150NE 303.

884-68½-New. unless by terms of a statute it is brought to close sooner. 241NY389, 150NE303.

884-68¼-New. It could continue in existence by proper adjournment until business pending before it had been disposed of. 241NY389, 150NE303.

884-68⅓-New. Right of court to adjourn is a power common to all courts. 102WVa327, 135SE174 (not abridged by statute).

884-68⅓-New. Under some statutes, where the circuit judge is unable to attend a term either on its opening day or on any subsequent day during the term fixed by law, he may have an order entered in the minutes recessing court to some future day. 154Miss459, 122S 744.

884-68⅓-New. Under some statutes, a circuit judge, during the progress of the business of the court, may, if the public interest so requires, enter an order on the minutes recessing court to some future day during the regular term. 154 Miss459, 122S744.

884-76 241NY389, 150NE303.

885-77 241NY389, 150NE303 (if new business is to be taken up).

885-80½-New. Notice is complied with within the statute where there is adjournment from day to day, 241NY389, 150NE303.

885-80⅓-New. or to specified future day stated in the minutes. 241NY389, 150NE303.

885-83 241NY389, 150NE303. See also 128Me307, 147A227(2dcase). [b] **Extraordinary term "continued without day"** is adjourned indefinitely and hence came to end. 241NY389, 150NE303.

885-89 30F(2d)986; 111TexCr299, 12 SW(2d)578(2dcase). [e] **Invalid extension of court term** renders indictment and trial of defendant during extension nullities. 229Ky654, 17SW(2d)738. [f] **Trial court has discretion in matter of extension of term.**–TexCr 25SW(2d)852.

885-90½-New. An adjourned term is not a new term. 102WVa327, 135SE174.

885-91 227Ky604, 13SW(2d)790; 228 Ky710, 15SW(2d)458.

886-92 133SC491, 131SE603.

886-93½-New. Adjournments to a distant day are not favored or granted except for special reasons, 102WVa327, 135SE174.

886-3 157Tenn339, 8SW(2d)477.

886-5 37F(2d)849.

887-6 37F(2d)849; 163Ga406, 136SE 448; 147Miss593, 113S348; TexCivA 286SW614; TexCivA 21SW(2d)1080 (1stcase). [h] **In New York.**–215App Div683, 212NYS280. [i] **Recess taken by court** may be deemed continuance of term. 215AppDiv683, 212NYS280. [j] 154Miss459, 122S744. [k] **Order of court attempting further to extend term till conclusion** of case after first extension of period had expired is unauthorized, and order granting new trial entered during second extended period is void. TexCivA 20SW(2d)838. [l] **Separate writing evidencing order extending term** will be considered mere memorandum of provisions of order. TexCivA 23SW(2d)757.

887-7 147Miss593, 113S348. [g] **Trial is concluded** when all judicial acts duly invoked and required by law to be done during the term and entry thereof have been completed. TexCommnA 286SW 197. [h] **Statute held to authorize extension only to dispose of case on trial.**–TexCivA 286SW614. [i] **Extension of term to pass on motion for new trial** after judgment is authorized as "in midst of trial" under statute. 118Tex 650, 23SW(2d)695.

887-8½-New. The trial judge may not continue term beyond beginning of next regularly appointed term. 215AppDiv 225, 213NYS555.

887-8⅓-New. Court has jurisdiction to try case for crime committed during extension of term. 211Ky318, 277SW 488 (though order extending term did not specify style of case to be taken up therein).

887-8¼-New. Where special term is extended until conclusion of pending trial, it has been held to end on determination of motion for new trial. TexCommnA 286SW197.

887-14 See also 225Ky749, 9SW(2d) 1099.

887-17 [a] **Indictment held valid,** though statute provided for terms in different counties on same date. TexCr 26SW(2d)246.

888-25 233Ky606, 26SW(2d)541.

889-37 147Miss851, 112S790. [a] **No term is created** by statute creating term of circuit court not taking effect till after day fixed for beginning of term. 233Ky606, 26SW(2d)541.

889-38 See also 200Cal 522, 254P896.

889-40 221Ky420, 298SW1083; 148 Miss608, 114S392; 153Tenn268, 283SW 450; 108TexCrl, 299SW422; 108TexCr 106, 299SW430. [j] **Discretion is vested in resident circuit judge,** and nonresident judge temporarily assigned is unauthorized to issue such order. Fla 127 S331. [k] **Statute** permitting presiding judge to extend term of court till conclusion of pending trial does not authorize calling of new term. TexCivA 20 SW(2d)838.

891-48½-New. Special term of court held properly called, and with jurisdiction to try defendant. 221Ky420, 298 SW1083.

891-48⅓-New. A special judge may preside at a special term. 111TexCr299, 12SW(2d)578(2dcase).

891-50 190NC841, 130SE838. [c] **Extraordinary term** called by governor under law is additional term of court appointed for time and place, to be held by justice designated. 241NY389, 150 NE303.

891-53 241NY389, 150NE303.

891-55½-New. Judge holding valid commission from governor may hear case at special term although the regular judge for the district is not unable to preside but is holding regular term. 190NC841, 130SE838.

891-63 213Ky687, 281SW831.

891-64 [a] (8) Criminal term. 169Ark 717, 276SW849. (9) Order calling for term to conduct all business properly coming before court. 148Miss608, 114S 392. [c] **Orders held insufficient.**–227 Ky604, 13SW(2d)790.

892-70½-New. An order during a special term to finish the trial of cases specified in the original order calling the special term is sufficient, without designating the style of each case. 228 Ky565, 15SW(2d)431.

892-83 227Ky223, 12SW(2d)336. [b] **Extension of special term till conclusion**

of pending trial declared to end on overruling motion for new trial and could not be continued to consider bills of exception or sign minutes at indefinite time thereafter. **TexCivA** 272SW220.

892-84 153**Tenn**268, 283SW450.

893-88 [b] **Appointing special term in adjourning order** dispenses with requirement of publication in newspaper. 153 **Tenn**268, 283SW450.

893-91 225**Ky**682, 9SW(2d)995.

893-97 200**Cal** 522, 254P896; 148**Miss** 608, 114S392; 153**Tenn**268, 283SW450; 108**TexCr**1, 299SW422. [c] **Special term constituting de facto term.**–33F (2d)68, 69 [citCJ].

894-3½-New. Trials could be continued until finished. 241**NY**389, 150**NE**303.

894-3¼-New. Motions heard before final adjournment may be disposed of after adjournment. 241**NY**389, 150**NE** 303.

894-3¼-New. But it has no authority to take up and dispose of new matter after final adjournment without day for indefinite time. 241**NY**389, 150**NE**303.

894-8½-New. Under some statutes, if the style of the case was not given in the order or notice calling special term, the court is without authority to make any order therein except by agreement of the parties. 209**Ky**343, 272SW878.

894-8⅓-New. Under other statutes in the same jurisdiction, if the style of the case is not given in the order calling, the term court has no authority to make any order in the case although agreed to by the parties. 209**Ky**343, 272SW878.

894-8¼-New. Where an order dismissing the action for want of prosecution was not entered by agreement of parties, it is immaterial under which statute the special term was called. 209**Ky** 343, 272SW878.

894-9 195**Cal** 364, 233P337; 261**Mass** 294, 158**NE**894; **TexCivA** 16SW(2d)403.

895-42½-New. A term of court in progress remains in session from day to day until completion of business, unless there is an adjournment over to a distant date. 170**Ark**1106, 282SW1002.

895-46 35F(2d)823; 175**Ark**633, 300 SW408; 122 **Okl** 86, 251P486, 490 [cit CJ].

896-47 261**Mass**294, 158**NE**894; 122 **Okl** 86, 251P486, 490 [citCJ]; **TexCivA** 16SW(2d)403.

896-48 195**Cal** 364, 233P337, 339 [cit CJ]; 137**Misc**314, 243**NYS**590; 122 **Okl** 86, 251P486, 490 [citCJ]. [c] **Taking of evidence** at unauthorized place after default in divorce proceedings does not render proceedings absolutely void or vulnerable to collateral attack. 195**Cal** 364, 233P337.

896-49 129**Misc**805, 223**NYS**76.

896-52 See also 111**TexCr**299, 12SW (2d)578(2dcase). [b] **Refusal of court** to direct trial to be held at place most convenient and accessible to county in which crime was committed held not error. 32F(2d)860.

896-54 198**Cal** 649, 246P1044.

897-59 122 **Okl** 86, 251P486, 490 [cit CJ].

898-62 122 **Okl** 86, 251P486, 490 [cit CJ]. [c] **Initiated measure adopted under initiative and referendum laws** authorizing district judges to hear and determine causes and render judgment in another county than county where cause is pending is void where constitution provides that terms of district court shall be held at county seat of respective counties. 122 **Okl** 86, 251P486.

898-64 197**Wis**140, 221NW734. [e] **Cases should be heard in open court** and not elsewhere unless upon adequate notice to all parties concerned. 232**Ky**333, 23SW(2d)545.

898-65 [c] (3) Transfer of trial of criminal case to home of invalid witness residing ten miles away held impracticable and undesirable. 163**La**609, 112S503. [h] **Sessions not requiring presence of jury** may be held at other places than places fixed for jury trial. 137**Misc**314, 243**NYS**590. [i] **Necessity for formal designation and filing with county clerk.**–137**Misc**314, 243**NYS**590.

899-68½-New. Necessity of place. Under statute allowing judges necessary expense for providing court rooms if approved by auditor of accounts, auditor's right of approval is not arbitrary in character nor a veto, but requires him to determine the necessity of a place for a court room. 99**Vt**335, 131A797.

899-83 100**Vt**387, 138A867, 869 [citCJ].

899-88 [d] (3) In Mississippi cause can be heard in vacation only in manner prescribed by statute or by consent of parties. 144**Miss**343, 109S854.

900-89 169**La**563, 125S618.

900-90 TexCivA 278SW283. [b] (10) Where under statute, court granted injunction during vacation, defendant having consented to decision on merits, he cannot object to jurisdiction on appeal. **TexCivA** 278SW283.

900-93 [a] **Final decree ordering mandatory injunction** cannot be rendered in vacation without consent of parties. 144 **Miss**343, 109S854 (what constitutes consent).

900-97 [b] (2) Court order for clerk's salary is ministerial and not judicial order. 312**Mo** 157, 279SW33.

900-99 [d] **Approval by auditor.**–99**Vt** 335, 131A797.

901-1 [c] **Housing courts.**–119 **Oh**596, 165**NE**298 (where there was minor extraterritorial jurisdiction).

901-1½-New. Legislature has power to make reasonable provisions in regard to payment of fees by litigants to help defray expenses of courts. 168**Ark**449, 270SW609 (fees on appeal).

901-9 121**Kan**14, 246P178; **Miss** 130S 53. [f] **Validation of invalid rule.**–79 **CalA**650, 250P686. [g] **Purpose of promulgating rules of practice** is to aid courts in speedy determination of causes. **Fla** 126S305.

901-10 [c] **In North Carolina.**–195**NC** 284, 141SE886. [d] 130 **Or**669, 281P840.

901-12 216**Ala**660, 114S40, 41 [citCJ]; 200**Cal** 706, 254P560; 79**CalA**650, 250P 686; 82**CalA**46, 255P248; 98**Fla**970, 124 S729; 167**Ga**451, 146SE27; 238**Mich** 298, 212NW968; 308**Mo** 390, 272SW940; 222**MoA**448, 7SW(2d)428; **NJ** 148A721, 135**Misc**101, 236**NYS**704 (fair and proper rules); 129 **Okl** 153, 263P1096; 285 **Pa**432, 132A360; **Utah** 269P1014; **Wis** 221NW503; 38**Wyo** 481, 270P1081.

901-12½-New. Rules are made to regulate procedure and facilitate business before courts. 16F(2d)977.

902-13 17F(2d)906; 216**Ala**660, 114S 40, 41 [quotCJ]; 202**Cal** 319, 260P793; 74**CalA**132, 239P427; 36**GaA**239, 136SE 281; 216**MoA**692, 273SW122; 121 **Or** 688, 257P19; 285**Pa**432, 132A360; 88**Pa Super**100; 9**PaDist&Co** 652; 156**Tenn** 529, 3SW(2d)167; **Utah** 287P929; 148 **Wash**1, 267P770, 772 [citCJ].

903-14 121 **Or**688, 257P19.

903-15 30F(2d)988; 121 **Or**688, 257P 19. [g] **Rule held unreasonable.**–216 **Ala**660, 114S40.

903-17 245**Mich**220, 222NW168; 216 **MoA**692, 273SW122; 153**Wash**379, 279P 1102.

903-18 17F(2d)906; 84**Colo** 502, 272P 9; 36**GaA**239, 136SE281. [e] 39**GaA**99, 146SE329(2dcase); 216**MoA**692, 273SW 122. [f] 285**Pa**432, 132A360. [j] **Rule requiring pleading in short by consent,** unless plaintiff gives defendant two days' notice of objection to such general pleading, has been held violation of statutory provisions. 216**Ala**660, 114S 40.

903-19 Mo 256SW460 (preserving exceptions).

904-20 See also 148**Wash**1, 267P770.

904-20½-New. The legislature may permit courts of record to make a rule requiring an appeal to be prosecuted within a shorter time than that prescribed by general statute. 79**CalA**650, 250P686.

904-24 TexCommnA 285SW601.

904-25 76**CalA**192, 244P94; 129 **Okl** 153, 263P1096; 148**Wash**1, 267P770.

904-26 76**CalA**192, 244P94.

904-30½-New. The trial court has no authority to govern the procedure in a court of appeal. 91**CalA**324, 266P963.

905-36 11**PaDist&Co** 181. [a] **Court may adopt rule for guidance of clerk in furnishing list of jurors** when struck jury is demanded. 219**Ala**676, 123S57.

904-36½-New. Rules of evidence, constituting substantive law, cannot be governed by rules of court. 153**Wash**379, 279P1102.

905-48 222**Ky**139, 300SW328.

906-64½-New. method of impaneling juries; 238**Mich**298, 212NW968.

906-69 262**Mass**527, 160NE303.

907-77 14**CustA**74; 76**CalA**192, 244P 94; **Mass** 173NE539; 150**Wash**389, 273 P200(1stcase). [d] **Statute validating existing rules.**–79**CalA**650, 250P686.

907-79 122 **Or**179, 257P701.

907-81 31F(2d)98; 99**NJEq**1, 132A 659; 148**Wash**1, 267P770 (taking of deposition of party). [c] **Rules of court will prevail over inconsistent provisions of statute.**–99**NJEq**1, 132A659. [d] **Rules of land court.**–262**Mass**527, 160NE 303. [e] **Abrogating statutes.**–153**Wash** 379, 279P1102.

907-81½-New. What the court can do by order it can do by rule. 122 **Or**179, 257P701.

907-81⅓-New. Where the court has power to extend the time for filing a transcript or abstract on appeal, it may fix one time for filing one and another time for filing the other. 122 **Or** 179, 257P701.

907-82 Cal 290P18; 102**Conn**529, 129A 527; 251**Mich**157, 231NW101; **Tex CommnA** 285SW601; 117**Tex**155, 299 SW228.

907-85 124 **Or**166, 264P356.

907-86 [b] **As dependent in nature of rules.**–308**Mo** 390, 272SW940.

908-87 See also **NJ** 151A64(2dcase).

908-90 215**Ala**61, 109S357, 358 [cit Cyc].

908-92½-New. The jurisdiction of a division of a circuit court to try a particular case which has been transferred to it in accordance with rules adopted and promulgated by the judges of the court is not affected by the fact that at the time of transfer rules have not been printed or transcribed by the clerk from his minutes upon his permanent record. 308**Mo** 390, 272SW940.

908-99 [a] **Rule is usually but not necessarily codification of existing procedure.**–40F(2d)442.

908-1 See also 86**Mont**358, 284P125. [a] 117**Tex**113, 298SW516.

908-1½-New. [§ 286a] F½. **General Practice of Courts.** Where a party has done all the law requires in a matter which is part of the proceedings in an action, neglect of officer to perform duty in completion of that proceeding should not operate to his disadvantage. 72**CalA** 241, 236P938.

908-2 124 **Or**102, 259P207.

908-3 35F(2d)71; 252 **IllA**262.

909-5 124 **Or**166, 264P356; 292**Pa**63, 140A533.

909-6 216**MoA**692, 273SW122 (cannot deprive party of right given him by law or grant right on terms more onerous than those fixed by law); 239**NY** 440, 147NE59 (failure to follow court rule does not deprive court of jurisdiction).

909-6½-New. Rules not essential to protect property rights or substantial rights of litigants must give way to rules which will not impede progress of justice. 192**Wis**585, 213NW335.

909-6⅓-New. In passing on rules court will regard substance and not form. 192**Wis**585, 213NW335.

909-7 278**US**160, 49SCt144, 73**L ed**243; 16**CustA**263; **Cal** 290P18; 76**CalA**192, 244P94; 94**Fla**899, 114S441; 234**Ky**199, 27SW(2d)959; 125**Me**494, 135A198; 74 **Mont**269, 240P365; 74**Mont**308, 240P 371; 48**Nev**459, 233P843; 129 **Okl** 153, 263P1096; 134 **Okl** 229, 273P228; 43 **OklACR**91 [reh pending]; 119 **Or**74, 248 P163; 122 **Or**297, 258P562; 124 **Or**166, 264P356; 11**PaDist&Co** 150. [a] 27F (2d)470; 28F(2d)424. [d] **Rules have effect of statutory enactment.**–129 **Okl** 153, 263P1096. [e] **Rule by supreme court** permitting evidence obtained from defendant in unlawful or illegal manner to be offered against him for offense shown or intended to be shown binds court of appeals. 22**AlaA**501, 117S616. [f] **Rule repugnant to statute.**–**Cal** 290 P18.

909-8 27F(2d)470 (must be substantially complied with); 215**Ala**280, 110 S409 (petition for mandamus denied where record and pleadings were not on transcript paper); 35**Ariz**78, 274P776 (attorneys from other counties must

notice rules); 94Fla899, 114S441; Fla 129S105; 45 Ida369, 263P988; 210Ky 51, 275SW1; 155Miss810, 125S419; 222 MoA448, 7SW(2d)428; 74Mont269, 240P 365; Nebr 228NW601; 51Nev26, 267P 497; 99NJEq328, 132A758; 191NC777, 133SE162; 194NC577, 140SE230 (rules governing appeals); 195NC478, 142SE 705; 129 Okl 153, 263P1096; 43 OklA CR91 [reh pending]; 122 Or297, 258P 562; 299Pa450, 149A695; Utah 281P 200.

909–11 16CustA263; 94Fla909, 114S 773; Fla 127S336; 197 Ind703, 151NE 3; 125Me494, 135A198; 216AppDiv608, 215NYS488; 195NC335, 142SE222; 129 Okl 153, 263P1096; 36 OklACR484; 43 OklACR91 [reh pending]; 122 Or179, 257P701; 124 Or166, 264P356; Utah 281P200. [d] **Substantial compliance with rules** held sufficient. 129 Okl 153, 263P1096.

910–12 216AppDiv608, 215NYS488; 189NC747, 128SE146 (not permitted to abandon rules of practice); 129 Okl 153, 263P1096; 43 OklACR91 [reh pending]; Or 288P401.

910–20 34NM61, 277P30 (effective date expressly provided); 87PaSuper265 (rules relative to pleadings).

910–24 [a] **In actions based on federal statute triable in state courts,** local rules of practice and procedure are applicable. 322Mo 980, 18SW(2d)62.

910–25 94Fla899, 114S441; 127 Or655, 259P420; 97PaSuper271 (construed in conjunction with each other). See also Cal 290P18.

911–27 127 Or655, 259P420; TexCivA 3SW(2d)585 (substantial compliance sufficient). [b] (16) Requiring stipulations of counsel as to practice to be disregarded unless entered on minutes of court or put in writing. 73Mont180, 235P770. (17) Authorizing chancellor to direct inspection of books, papers, or documents. NJCh 147A785(2dcase).

911–28 See also 189NC747, 128SE146.

911–31 7PaDist&Co 23; 7PaDist&Co 59.

911–32 308Mo 278, 272SW72.

911–33 308Mo 278, 272SW72; 158Tenn 278, 12SW(2d)947; 100WVa117, 130SE 94, 96 [citCJ].

911–34 100WVa117, 130SE94, 96 [cit CJ].

911–36½–New. Rules of court should be construed in harmony with statutes if possible. 94Fla909, 114S773.

912–33 265Mass310, 163NE900; NJCh 149A369 (cannot dispense with rule for purpose of acquiring jurisdiction); 194 NC577, 140SE230 (may not be abrogated by court, legislature, or parties); 195NC335, 142SE222; 195NC478, 142 SE705; 35 OhA199, 172NE411. [e] Or 280P658.

912–39 81CalA187, 253P185; Fla 126S 305; 206 Iowa766, 221NW449; 1LaA 209; 74Mont269, 240P365; 82NH403, 135A24; 103NJL23, 135A270; NJSup 142A897; 101NJEq115, 137A314; NJCh 149A369 (rule of practice); 123 Or615, 257P822; 288Pa534, 136A794. [a] (19) Other instances. 148Wash195, 268P177. [e] **Burden is on person asserting waiver** to establish it. Fla 127S336.

913–41 308Mo 390, 402, 272SW940 [cit CJ]; 123 Or615, 257P822, 825 [citCJ]; Or 280P658; 148Wash195, 268P177.

913–45½–New. The supreme court cannot waive a rule of the statutes. 206 Iowa766, 221NW449.

914–47 43 OklACR91 [reh pending]. [d] **Claim of vested rights** bona fidely acquired under established rule of property, but not in compliance with supreme court rule, is within rule and fails. 27F(2d)470.

914–49 85Colo 121, 273P1042.

914–50 195NC335, 142SE222; Or 288P 401 (rule as to form and manner of submitting requested instructions).

914–52 16CustA263.

914–53 [a] **Rules of court merely by silence do not repeal or modify a previous rule or statute,** even though not necessarily inconsistent therewith. 148 Wash410, 269P337. [b] **Supreme Court Rules, rule 6** requiring the serving and filing of abstract of record, and Remington Comp. St. are not in conflict with rules passed under Laws of 1925. 148 Wash410, 269P337.

914–64 129Misc643, 222NYS225; 6Pa Dist&Co 129. [a] **Act regulating trial** held not to repeal practice rules requiring probable injury to appear. 220Ala 683, 127S500(2dcase).

914–69 331 Ill 225, 162NE833.

915–71 Mo 272SW928.

915–76 30F(2d)953; 29Ariz51, 239P 299; 100TexCr220, 272SW480 (must be governed by law, not by sentiment). See also 321Mo 798, 12SW(2d)476. [c] **To render general rule applicable,** facts and circumstances must bring case within reason and spirit of rule. 149Va 882, 141SE829.

915–78½–New. Statute, requiring decision by court within sixty days after a question is submitted, is directory only, and does not deprive court of jurisdiction to render decision at later date. 232Mich630, 206NW359.

915–78¼–New. Amount of judgment for services in one action should bear due proportion to judgment between same parties for like services in another action. 245NY1, 156NE76.

915–78¼–New. It is the proper province of the law to determine human relationships and to modify, enlarge, and develop with changing conditions of human affairs. 117Tex229, 1SW(2d) 256, 61ALR682.

915–80 122 Okl 211, 253P500, 50ALR 1232; 6PaDist&Co 182. But see 142Va 702, 128SE364.

915–82 114Tex490, 271SW1108.

915–85 258Mass133, 154NE549.

916–89 27 ObA475, 161NE557 (in absence of direct authority covering case, court may resort to its own reasoning processes).

916–90 13F(2d)1020; 30F(2d)80 [certiorari den 279US852, 49SCt348(5th case), 73Led995]; 38F(2d)470; 215Ala 79, 109S377; 215Ala696, 109S921; 215 Ala697, 109S921; 21AlaA658, 109S923; 215Ala316, 110S476; 21AlaA316, 108S 79; 21AlaA317, 108S80; 21AlaA679, 109 S925; 21AlaA682, 109S925; 21AlaA685, 109S926; 32Ariz317, 257P989; 170Ark 366, 280SW641; 77CalA279, 246P337; 92Fla254, 109S415; 92Fla267, 109S446; 92Fla273, 109S448; 92Fla899, 110S529; 93Fla519, 112S297; 94Fla1225, 115S 529(2dcase); 94Fla1225, 115S529(3d case); 94Fla1226, 115S530; 94Fla1237, 115S540; 197 Ind204, 150NE98; 84 IndA710, 151NE142; 198 Ind574, 154 NE384; 200 Ind736, 156NE925; 85 IndA704, 154NE515; 160La72, 106S700; 126Me177, 136A817; 249Mich331, 228 NW715; 155Miss115, 124S251(2dcase); 50Nev247, 255P1076; NJSup 135A352; 191NC375, 131SE753; 191NC675, 132 SE811; 192NC549, 135SE462; 112 OhSt 493, 147NE806; 29 OhA495, 163NE923; 292Pa283, 141A52; 160Tenn477, 26SW (2d)141; TexCommnA 290SW739; Tex CommnA 15SW(2d)1033; TexCivA 283 SW638; 109TexCr67, 2SW(2d)851 (regardless of hardship in particular case); TexCr 24SW(2d)48; 100Vt227, 136A 394; 142Va702, 128SE364; 136Wash 437, 240P557; 109WVa150, 130SE124; [1927] CanSC284, [1927] 2DomLR1097, 48CanCrCas91; 58 OntL138, [1926] 1 DomLR151. [b] (2) Judgment between vendor and purchaser as to first payment made to broker is stare decisis as to broker where all facts are identical, though not res judicata. NJSup 135A352. [g] 226AppDiv149, 233NYS 434. [m] **Upon points of English law** colonial courts are bound by decisions of house of lords. Can [1927] 2DomLR 97. [n] **References in preliminary statement** are not part of opinion. 191 NC269, 132SE25. [o] **Precedents** are rarely authoritative in interpretation of wills. 128Misc769, 220NYS151; 128 Misc553, 220NYS188. [p] **In nisi prius tribunals** adherence to precedent should be rule and not exception. 130Misc 456, 224NYS210. [q] **Decisions held not conflicting.–TexCommnA** 16SW(2d) 524.

918–92 83NH439, 144A57.

918–93 235Mich606, 209NW825.

919–95 173Ark48, 291SW989.

919–99 [a] (2) Res judicata is plea in bar while stare decisis is rule of precedent. 37F(2d)137.

919–1 26F(2d)247; 28F(2d)33; 16 CustA282; 169Ark671, 277SW515; 170 Ark366, 280SW641; 77CalA279, 246P 337; 77CalA493, 246P1087; 77CalA519, 247P218; 88CalA568, 263P866; 86Colo 429, 282P876; 86Colo 553, 283P548; 105Conn192, 134A778; Del 151A831; 94 Fla1192, 115S528; 161Ga431, 131SE54; 36GaA783, 138SE286; 4HawaiiFed59; 208 Iowa1208, 227NW103; 129Kan452, 283P493(1stcase); 226Ky246, 10SW(2d) 829; 233Ky321, 25SW(2d)722; 235 Mich606, 209NW825; 170Minn479, 213 NW38, 39 [citCJ]; 154Miss21, 122S98; 313Mo 352, 281SW426; 84Mont556, 276 P938; 49Nev451, 248P893; NJSup 132 A198; 244NY373, 155NE677; 133Misc 536, 233NYS219; 52ND685, 204NW8; 54ND878, 211NW816; 118 Okl 238, 247 P39; 122 Okl 115, 251P729; 120 Okl 70, 254P496; 129 Or620, 278P572; 287Pa 64, 134A413; 45Philippine89 (interpretation of criminal statute); 140SC19, 137SE927; 150Tenn375, 264SW641; TexCivA 277SW759 (judgment giving same amount as in former identical case not excessive in view of such decision on appeal from former case); TexCivA 278SW324; TexCivA 299SW 921; TexCivA 3SW(2d)925; 142Va702, 128SE364; 146Wash257, 262P639; 147 Wash294, 266P134; 149Wash1, 270P113; 153Wash514, 280P46; Wash 290P873; 101WVa11, 131SE865; 101WVa53, 131 SE872. See also 33F(2d)548; 34F(2d) 3. [b] **Decisions on appeal from circuit and county courts** control appeals from justices' courts where applicable. TexCivA 278SW324. [c] **Refusal of writ of error by supreme court** cannot override subsequent express decision of same question in opinion of such court. Tex 30SW(2d)282.

920–2 24F(2d)463.

920–3 77CalA493, 246P1087.

920–3½–New. It is also held that a decision of a single judge is not conclusive, but it is at least as persuasive as a decision of the court of another jurisdiction. 218Ky391, 291SW367.

920–4½–New. Decision on motion before one member is not binding as a precedent. 215Ky573, 286SW793.

920–5 Ont [1929] 4DomLR351.

920–7½–New. A decision of the supreme court in banc is decisive as against the decision of one of its divisions. MoA 295SW841.

920–8 15F(2d)561; 16F(2d)868; 17 F(2d)628; 18F(2d)278; 19F(2d)472; 25F(2d)75; 25F(2d)738; 28F(2d)684 (2dcase); 28F(2d)784; 31F(2d)260; 31 F(2d)334; 34F(2d)753; 35F(2d)187 (lower courts of circuit); 40F(2d)954; 213Ala550, 105S707 (decisions of supreme court); 22AlaA502, 117S485; 21 AlaA133, 106S195; 21AlaA176, 106S394; 22AlaA67, 111S587; 22AlaA45, 111S 895; 22AlaA275, 114S786 (code provision to effect that decisions of supreme court shall govern holdings and decisions of court of appeals); 23AlaA116, 121S689; 23AlaA479, 127S257; AlaA 130S369; 86CalA355, 260P894; 68CalA 270, 228P1057; 86CalA676, 261P539; 39GaA221, 146SE513; 36GaA329, 136SE 477; 38GaA396, 144SE36; 87 IndA536, 162NE61(1stcase); IndA 172NE504; 231Ky5, 20SW(2d)1029; 231Ky637, 21 SW(2d)1030 (statute); 10LaA141, 119S 777; 170LaA483, 128S284; 308Mo 123, 272SW66; Mo 280SW45 (adopting commissioner's opinion); 316Mo 97, 289 SW922; 319Mo 733, 6SW(2d)893; 320 Mo 1234, 10SW(2d)931; 320Mo 1218, 10 SW(2d)940 (until criticized, modified or overruled); 321Mo 1126, 14SW(2d)990 (construction of statutes by supreme court constitutes "controlling authority," binding on courts of appeals); 218 MoA314, 274SW90; 219MoA482, 279SW 188 (latest supreme court decision is binding on court of appeals); 222MoA 490, 280SW724; MoA 282SW747; 220 MoA367, 286SW445; MoA 294SW444; MoA 296SW245; MoA 296SW855 (instruction); MoA 297SW980; 221MoA 1110, 298SW121; 221MoA1173, 300SW 997; 222MoA839, 6SW(2d)970; MoA 6 SW(2d)1020(1stcase); 222MoA801, 11

SW(2d)65; MoA 13SW(2d)565; MoA 17SW(2d)576; MoA 22SW(2d)897; MoA 30SW(2d)774; MoA 31SW(2d) 241; 102NJL157, 130A537; NJ 131A 387; NJPrerog 151A67; 216AppDiv 608, 215NYS488; 217AppDiv177, 216 NYS260; 130Misc456, 224NYS210 (nisi prius court cannot adopt view of two dissenting judges); 131Misc682, 227 NYS258; 222AppDiv237, 225NYS714; 133Misc369, 232NYS202; 113 Oh245, 148NE607; 26 OhA225, 158NE558; 19 OhA358; 25 OhA380, 158NE9; 35 OhA 81, 171NE846; 87PaSuper282; Tex CommnA 276SW903 (decision of court of civil appeals held not at variance with prior decision of supreme court of Texas); TexCommnA 290SW739; Tex CommnA 299SW856; TexCommnA 23 SW(2d)691; TexCivA 272SW562; Tex CivA 280SW328; TexCivA 280SW856; TexCivA 282SW884; TexCivA 284SW 676; TexCivA 285SW913; TexCivA 286SW519; TexCivA 290SW852; Tex CivA 296SW912; TexCivA 298SW447; TexCivA 299SW935; TexCivA 7SW(2d) 878 (determination as to conflict between decisions of courts of civil appeal); TexCivA 10SW(2d)151; Tex CivA 12SW(2d)625; TexCivA 15 SW(2d)191; TexCivA 16SW(2d)307; 148Va262, 138SE647; 136Wash437, 240 P557; 103WVa427, 137SE649; 106WVa 518, 146SE57. [k] (1) See also 35Porto Rico 946. (2) Though constitution provides that no statute shall be declared unconstitutional unless all but one judge of supreme court agree, lower court has refused to apply penalty held unconstitutional by five out of seven judges of supreme court. 26 OhNPNS519. [l] **Opinion of commission of civil appeals, reversing court of civil appeals** on one of two cases based on substantially identical pleading and testimony, will be followed in second case. TexCommnA 277SW620. [m] **Opinion of coördinate intermediate appellate court approved by supreme court** by refusal to grant writ of error must be followed, and contrary holding withdrawn. TexCivA 286 SW519. [n] **Only court of last resort may change rules of law.**–216AppDiv608, 215NYS488. [o] **Decision of appellate court** on questions not within its jurisdiction is not binding on parties. Tex CivA 295SW950. [p] **Prior to statutory provision,** supreme court's refusal of writ of error was not approval of holdings of court of civil appeals as to all questions presented. TexCivA 7 SW(2d)674. [q] **Refusal to take jurisdiction** may have some measure of significance. 252NY284, 169NE386.

922-9 220MoA367, 286SW445.

922-9½-New. Supreme court has power to overrule opinion rendered in former decision. 169Ark671, 277SW515.

922-11 TexCommnA 12SW(2d)1009; TexCivA 286SW612; TexCivA 9SW(2d) 458; TexCivA 23SW(2d)842. [b] **In Nebraska.**–117Nebr60, 219NW805.

922-12 35PortoRico 785.

922-13 6F(2d)21; 13F(2d)225; 18 F(2d)418; 77CalA519, 247P218; 81 CalA55, 253P187; NJ 131A387; 105 NJL114, 143A221; 132Misc554, 230NYS 614 (binding on county court); 135 Misc188, 237NYS383; 13PortoRicoFed 265; TexCivA 295SW219; TexCivA 13SW(2d)424. [f] **Supreme court** is bound by rule unquestioned for ninety-five years and followed by appellate division and highest appellate courts in other states. 132Misc786, 230NYS621.

922-15 TexCivA 280SW856. [a] **Decision of criminal court of appeals will be followed by supreme court** on unconstitutionality of statute unless clearly constitutional. 143 Okl 142, 287P1021.

922-17 27F(2d)138; 36F(2d)375; 37 F(2d)580; 13PortoRicoFed369.

922-18 22F(2d)331 (persuasive).

922-20 22F(2d)192; 22F(2d)331; 35 F(2d)197; 37F(2d)580.

923-21 37F(2d)373.

923-21½-New. Where decisions of circuit courts and district courts on important question of procedure vary, a district court is bound thereby. 17F(2d) 379.

923-21½-New. But the court will decide which line of decisions is best ground in law and reason. 17F(2d)379.

923-25 85CalA558, 259P995. See also 204Cal342, 268P342, 58ALR1176; 206 Cal389, 274P536(2dcase).

923-29 31F(2d)974; 131Misc411, 227 NYS142; 20 OhA375, 152NE393. [f] **Comity existing between state courts** does not obtain in federal courts. 7 F(2d)494.

923-30 13F(2d)225; 24F(2d)698; 29 F(2d)366 [certiorari den 279US839, 49S Ct253, 73L ed986(3dcase)]; 31F(2d)983; 221MoA67, 294SW123. [a] But see 30 F(2d)219 [certiorari granted 279US832, 49SCt419, 73L ed981(3dcase)]. [c] **Court is bound by construction placed on earlier statute** nearly identical in language with that under consideration. 153Md638, 139A446.

924-31 22F(2d)331 (persuasive); 36 F(2d)1001. [e] **For cases in which rule of comity was not followed** see 14F(2d) 1020.

924-32 22F(2d)331; 20SaskL553, [1926] 3DomLR289, [1926] 2WestWkly 422.

924-34 316Mo1014, 292SW61; 221App Div555, 224NYS617 (decision of special term of supreme court not appealed from is not binding on appellate division of same court).

925-42 113 Okl194, 240P699. [c] **Constitutionality of statutes.**–113 Okl194, 240P699.

925-46 84CalA180, 257P877; 87Colo 178, 285P1104; 168Ga710, 148SE741, 742(2dcase) [citCJ]; 35GaA425, 133SE 264; 247 IllA331; 210Ky285, 275SW 797; 169La914, 126S422; Md 150A37; 314Mo 390, 284SW455; 221MoA679, 283 SW738; MoA 16SW(2d)607; 81Mont442, 264P108; 114Nebr468, 208NW141; 51 Nev215, 273P983; NJSup 130A660; NJSup 133A396; NJCh 150A774; 20 OhA375, 152NE393; 289Pa458, 137A 630; 153SC401, 151SE67; 69Utah53, 252P280. [f] 179Ark1004, 18SW(2d) 1037. [l] 75Mont186, 243P589, 44ALR 1470.

926-48 323 Ill232, 154NE139; 210Ky 285, 275SW797; 314Mo390, 284SW455; 135Misc910, 240NYS157 (especially where writ of error to review it was dismissed by United States supreme court). [a] (2) Persuasive effect of decision of court of another state is not destroyed by fact that it was decided by divided court and was based on misconception of earlier case upon which court relied in deciding later case. 201Cal1, 255P 195.

926-50 Iowa 229NW227; 314Mo390, 284SW455; 114Nebr468, 208NW141.

926-51 215Ala352, 110S702; Minn 232 NW331; 314Mo390, 284SW455. See also 207 Iowa1351, 224NW793. [l] 75Mont 186, 243P589, 44ALR1470.

926-51½-New. The holding of a foreign court as to New York law concerning contract of that state is not a precedent fixing the law in New York. 126 Misc114, 212NYS718.

926-52 99WVa399, 129SE462.

927-58 171Ark521, 285SW5; 181Ark 1112, 29SW(2d)298; 168Ga710, 148SE 741(2dcase); 256Mass367, 152NE635; Minn 231NW239; 308Mo77, 271SW806; 313Mo225, 281SW762, 45ALR1223; Mo 21SW(2d)873; 221MoA679, 283SW738; Mont 289P1035; 131Misc842, 228NYS 330; 152Va800, 148SE831. [b] 126Me 177, 136A817.

928-59 84CalA382, 258P447, 448 [quot CJ].

928-69 Ala 128S158; 30Ariz7, 243P 606; 38GaA637, 144SE810; 38GaA773, 145SE530; 28Hawaii476; Iowa 224NW 774; 211Ky842, 278SW137; 169La914, 126S422; 220MoA1294, 290SW1014 (necessity of offer of proof on exclusion of evidence); 79Mont111, 255P722; 242NY 381, 152NE121; 127Misc410, 217NYS 303; 127Misc855, 217NYS595; 194NC 446, 140SE20 (practice and procedure); 283Pa464, 129A458; 287Pa49, 134A427; 5PaDist&Co 351; 7PaDist&Co 673; 51 SD336, 213NW952; 145Wash101, 258P 1039; 149Wash1, 270P113 (common law within state). [k] 242NY13, 150NE585. [m] **Decision of federal district court on question of commercial policy** contrary to state court of last resort, not followed by intermediate appellate court. 127 Misc855, 217NYS595. [n] **Rule applied** in case involving construction of deed. 211Ky842, 278SW137. [o] **State courts are not bound to follow federal court's interpretations** of state decisions. 211 Ky842, 278SW137. [p] **Supreme court of errors of Connecticut** is bound by decisions of federal supreme court in determining situs of property for succession tax purposes. 105Conn192, 134A 778.

929-70 168Ark565, 270SW963; 211Ky 842, 278SW137; 145Wash101, 258P1039. See also 242NY13, 150NE585. [c] **Decision of federal court construing will** under construction by state court will be recognized at least as valid precedent. 123 Or406, 262P833.

929-71 283Pa464, 129A458; 142SC125, 140SE443; 150SC29, 147SE625; 51SD 336, 213NW952. [a] (2) Rule applied to questions of commercial policy. 127 Misc855, 217NYS595.

929-72 Ariz 283P281; 181Ark356, 25 SW(2d)1048; 45 Ida112, 261P244; NJCh 150A774; 213AppDiv643, 211NYS 134; 127Misc410, 217NYS303; 287Pa49, 134A427; 51SD336, 213NW952. [a] (2) 121 Or92, 254P800, 51ALR1200.

930-74 51Nev7, 267P49 (due process).

930-75 181Ark356, 25SW(2d)1048; 222 MoA383, 5SW(2d)671 (in suit on bond given in federal court litigation).

930-77 279US340, 49SCt333, 73L ed729; 32PortoRico 766 (reversing previous holding on constitutionality of minimum wage law).

930-80½-New. **District courts** follow decision of circuit court of appeals, notwithstanding certiorari has been granted to review decree. 2F(2d)759.

930-80½-New. The circuit court of appeals will not interfere with the Porto Rico supreme court's construction of a local code after years of recognition where not clearly wrong. 30F(2d)588.

931-82 19F(2d)18; 220Ala4, 124S909; 23AlaA275, 124S911; Ark 32SW(2d) 613; 195Cal683, 235P50; 200Cal667, 254P551; 86Colo545, 283P534; 205 Iowa862, 219NW28, 60ALR986; 216Ky 611, 288SW347; 222Ky306, 300SW918; Mass 171NE234; 153Miss416, 121S116; 50Nev125, 253P671; 220AppDiv573, 222 NYS130; 127 Okl127, 260P25; 289Pa 393, 137A623; 47RI72, 129A815; 138 SC539, 137SE144; TexCommnA 25SW (2d)306; TexCivA 289SW1067; Utah 263P926; 148Va262, 138SE647; 152Va 121, 146SE298; 187Wis290, 203NW721. [a] (1) 307Mo417, 270SW691; 222MoA 383, 5SW(2d)671. [g] **Rulings of supreme court affecting rights of workers injured while repairing ships in navigable waters** may not be departed from by state courts. 216AppDiv274, 214NYS 732 (maritime law).

932-83 200Cal667, 254P551.

932-84 200Cal667, 254P551; Cal 288P 775; Iowa 228NW638; 240Mich542, 215 NW390; 50Nev125, 253P671; 135Misc 486, 238NYS723; 22 OhA165, 153NE 316; 131 Or382, 283P12. But see 242 NY13, 150NE585. [a] 78Colo320, 241 P543. [b] 51Nev7, 267P49; 132Misc 311, 229NYS783; 133Misc890, 234NYS 83. [k] **Equal protection clause.**–196 NC145, 144SE701.

933-85 28F(2d)887; 200Cal667, 254P 551; 168Ga566, 148SE385; 50Nev125, 253P671; 197NC604, 150SE190; 22 Oh A165, 153NE316; 160Tenn619, 28SW (2d)351; TexCivA 284SW310; 70Utah 265, 259P921; 151Va883, 145SE326; 147Wash630, 267P506; Wash 289P536; 198Wis265, 224NW139. [d] **Courts of state have right to construe state statutes** involving federal question, though their views conflict with rulings of federal courts. 136Misc349, 239NYS702.

933-86 CalA 288P852; 148Va262, 138 SE647.

933-87 8F(2d)883; Ala 127S805; Cal 288P775; 75CalA309, 242P895; 91Fla 612, 108S689, 46ALR870; 94Fla427, 115 S261; 242 IllA428; 244 IllA441; 208 Iowa202, 225NW357; 208 Iowa776, 226 NW133; 127Kan326, 273P451, 64ALR 322; 215Ky216, 284SW1049; 223Ky 39, 2SW(2d)1063; 229Ky365, 17SW(2d) 224; 236Mich577, 211NW111; 164Minn 234, 204NW874, 205NW375; 319Mo608, 5SW(2d)368; MoA 9SW(2d)544; 118 Nebr690, 226NW421; 133Misc630, 233

NYS301; 191NC153, 131SE670; 187Wis 290, 203NW721; 37Wyo 11, 258P576. [g] (2) Cal 288P775. [h] **Seamen's Act.**–131 Or108, 280P337.

934–88 216Ky29, 287SW18; Mich 233 NW205.

934–89 220Ala541, 126S846; 174Ark 10, 294SW357; 175Ark35, 298SW873; 180Ark562, 22SW(2d)378; 195Cal 683, 235P50; 84Colo 93, 267P1068; 202 Iowa787, 211NW364; 229Ky16, 16SW (2d)472; 233Mich384, 206NW371; 239 Mich155, 214NW99; 141Miss199, 106S 525; 220MoA989, 272SW76; 113Nebr 682, 204NW870, 41ALR446; 83NH336, 143A703; 105NJL314, 145A336; 134 Misc223, 234NYS727; 197NC319, 148 SE446; NC 154SE847; 35 OhA291, 172 NE425; 124 Or598, 265P408; 127 Or 364, 272P281 (liability of shipper for freight charges); 127 Or500, 272P895; 129 Or216, 277P107; TexCommnA 25 SW(2d)306; Utah 283P731. [e] 208 Iowa1396, 227NW407; 128Kan729, 280 P896; MoA 11SW(2d)1055; 196NC516, 146SE209. [t] **Damages recoverable for delay in delivery of baggage** of passenger in interstate trip are to be determined on federal law. 141Miss7, 105 S749.

935–90 SD 227NW74.

935–91 32F(2d)69.

935–97 19F(2d)18; 174Ark351, 295SW 717; 87Colo 115, 285P758; 231Ky354, 21SW(2d)438; TexCivA 19SW(2d)362; TexCivA 30SW(2d)360. [d] **As to questions involving local mortgages** see 203 Iowa654, 213NW422.

935–98 117Nebr161, 219NW894; Tex CommnA 288SW171; 187Wis290, 203 NW721. [a] 196NC198, 145SE227. [b] 164Minn235, 204NW874, 205NW375. [h] **Suit against receiver of insolvent national bank.**–Iowa 220NW63.

935–99 86Colo 86, 278P1022; 52SD 334, 217NW508.

936–5 275US426, 48SCt177, 72Led351; 278US496, 49SCt231, 73Led473; 219 Ala129, 121S410; Ala 129S60; 179Ark 1015, 19SW(2d)1102; 39GaA513, 147SE 795; 253 IllA450; IndA 170NE554; 223 Ky39, 2SW(2d)1063; 227Ky816, 14SW (2d)138; 234Ky276, 27SW(2d)980; 236 Mich577, 211NW111; 318Mo 123, 300SW 787; Mo 23SW(2d)142; Mo 26SW(2d) 988; MoA 20SW(2d)601; Nebr 229NW 888; 105NJL590, 147A472(2dcase); 194 NC446, 140SE20; 197NC17, 147SE698; NC 154SE682; NC 155SE459; 129 Or 169, 276P1094; Or 288P1003; 289Pa 393, 137A623; 152SC265, 149SE742; 155SC531, 152SE717; SC 155SE740; TexCommnA 272SW764; TexCommnA 288SW823; TexCivA 28SW(2d)312; Tex CivA 23SW(2d)461; TexCivA 27SW(2d) 351; Va 153SE874; Wash 291P336. [a] 234Ky504, 28SW(2d)733.

936–6 See also 35 OhA291, 172NE425.

936–7 192NC206, 133SE460.

936–8½–New. Decisions of the federal supreme court are controlling on the question whether work incident to transportation of logs on navigable waters is within the legislative jurisdiction of the state. 141Wash172, 251P130.

936–8½–New. State courts should follow the decisions of the United States supreme court in disputes as to boundaries between states. 155Miss55, 122S 747.

936–15 36GaA133, 135SE762; Iowa 232 NW445. [a] **Respectful consideration** should be given. Iowa 232NW445.

936–17 [b] **Single decision by Argentine court of appeals,** counter to universal maritime law, is not authoritative as to Argentine law. 27F(2d)795.

936–20 Cal 290P438; Ind 164NE489. [a] 213AppDiv512, 210NYS187.

936–21 [a] (2) United States court should hestitate to depart from controlling principles laid down in decisions of English house of lords in matters maritime. 37F(2d)461.

937–22½–New. It is desirable in cases of marine insurance that American and English courts should be in harmony. 14F(2d)997.

938–39 35F(2d)222; 48 Ida1, 279P298, 67ALR580; 224Ky50, 5SW(2d)484; 314 Mo 373, 284SW464; 320Mo 852, 8SW (2d)931; 322Mo 450, 17SW(2d)505.

938–41 319Mo 733, 6SW(2d)893.

938–41½–New. Fact that opinion is per curiam in no way impairs its force as a precedent. 190NC663, 130SE497.

938–41½–New. Decision of majority of court denying writ of prohibition is determination that lower court has jurisdiction whether or not majority of judges agrees on all points announced in its opinion. 308Mo 201, 271SW481.

938–45½–New. A concurring opinion may be the opinion of the court. 319 Mo 733, 6SW(2d)893.

938–47 CalA 260P337, 340 [citCJ]; 163 Ga849, 137SE264; 203 Iowa364, 212NW 705; 191NC828, 132SE657; 193NC385, 137SE137; 193NC841, 137SE427; 196 NC823, 146SE803(1stcase); 196NC823, 146SE803(2dcase).

938–49 249Mich147, 228NW723; 27 OhNPNS100 (court bound to follow decision of supreme court declaring ordinance constitutional, though four of seven judges were of contrary opinion under statute requiring concurrence of all but one judge). [b] 23AlaA284, 124 S408.

939–54 235Mich174, 209NW152.

939–57 40GaA241, 149SE432; MoA 8 SW(2d)110.

939–58 321Mo 887, 13SW(2d)648 (advisory only on question of excessiveness of damages for personal injuries).

939–59 13F(2d)723; 41F(2d)929; 220 Ky277, 295SW175, 53ALR1328; 118 Tex397, 16SW(2d)804; 256Mass426, 152 NE747; 263Mass435, 161NE619; 219 MoA271, 275SW965; MoA 28SW(2d) 678; 82Mont543, 268P495; 216AppDiv 337, 215NYS123; 123 Or79, 260P1010; 51SD432, 214NW338; TexCommnA 285 SW818; 199Wis523, 227NW35. [m] **True spirit and import of decision** must be regarded, as well as facts of individual case, ends sought to be reached, evils to be avoided, and benefits to be attained. 13F(2d)723. [n] **Decisions are not to be construed so as** to destroy their substance. 13F(2d)723.

940–60 13F(2d)723; Fla 128S4; 263 Mass444, 162NE217; 78Mont516, 255P 1043.

940–61 213Ky636, 281SW1039, 1041 [quotCJ]; Mass 167NE762; 194Wis456, 216NW144. [c] **Question of jurisdiction.**–Utah 282P785.

940–62 37F(2d)580; 169Ark97, 273SW 355, 41ALR629.

940–62½–New. A holding resting upon the express agreement of the parties as to the right to remove fixtures cannot be regarded as authority on the question. 151Wash344, 275P733.

940–70 19 OhA358.

940–74 13F(2d)723; 39GaA265, 147SE 160; 213Ky636, 281SW1039, 1041 [quot CJ].

940–75 116Tex515, 295SW910.

941–78 123 Or79, 260P1010.

941–79 13F(2d)723; 93Fla5, 112S289, 296 [citCyc]; 101NJEq252, 137A582, 52 ALR965; 123 Or79, 260P1010.

941–80 38F(2d)812; 92CalA570, 268P 699; 106Conn178, 138A159; 198 Ind 645, 154NE659; 200 Ind210, 162NE656; 224Ky107, 5SW(2d)893; Mo 296SW 372; MoA 10SW(2d)348(2dcase); MoA 32SW(2d)449; 115Nebr720, 214NW628; 99NJEq864, 132A678; 123 Or79, 260P 1010; 284Pa523, 131A371 (not bound where entirely different facts involved); TexCommnA 285SW810; 149Va829, 141 SE849. [e] **One should not be cut off under rule of stare decisis** till rights are fully adjudicated. 20F(2d)607.

941–81 13F(2d)723; 179Ark102, 14SW (2d)1101; 41 IdaS4, 238P534, 535, 41 ALR932 [citCJ]; 228Ky819, 16SW(2d) 448; MoA 13SW(2d)567; 299Pa276, 149A176; 50RI 375, 147A891; 152Va 395, 147SE211; 152Va278, 147SE223. [f] **Every will contest** must be decided on basis of peculiar circumstances involved. 228Ky83, 14SW(2d)413.

942–82 113 OhSt245, 148NE607.

942–83 284Pa523, 131A371 (similar or analogous facts must be shown).

942–83½–New. Application of old principles to new conditions or changed facts does not offend rule of stare decisis. 81Colo 344, 255P443.

942–84 220AppDiv64, 220NYS757; 134 Misc791, 236NYS518; 286Pa335, 133A 558; 291Pa458, 140A502; 292Pa37, 140 A549.

942–85 286Pa335, 133A558.

942–85½–New. A decision involving the construction of a will is controlling so far as applicable in a subsequent proceeding for distribution under the will. 240Mich661, 216NW446.

942–87 48SD467, 204NW945.

942–88 213Ky636, 281SW1039, 1041 [quotCJ].

942–93 133Misc710, 233NYS340.

943–99 81NH566, 129A117, 39ALR 1023; NH 149A321.

943–2 126Me147, 136A810.

943–8 220Ala90, 124S82 (injunction); 335 Ill 624, 167NE831; 160La854, 107S 599; 12PaDist&Co 30; 155Wash217, 283P1081. [d] **Conclusion as to fact of suicide or accident** in one case serves only as very general and loose guide in deciding similar case. 160La854, 107 S599.

944–9 154SC1, 151SE206. [e] **Dismissal of complaint for insufficiency of first cause of action** is not res adjudicata as to sufficiency of second cause of action in amended complaint. 228App Div510, 240NYS232.

944–16 23AlaA7, 121S907(2dcase); 180 Ark96, 21SW(2d)406 (construction of act of legislature by court becomes part of statute); 197Cal 139, 239P1067; 40 GaA447, 150SE201; 231Ky637, 21SW (2d)1030 (construction by highest court is part of statute); 287Pa64, 134A413; 200Wis304, 227NW387.

945–17 69CalA404, 231P371; Mo 30 SW(2d)69; NJSup 151A489; 54SD307, 223NW200.

945–18 27Ariz484, 232P56; 220Ky277, 295SW175, 53ALR1328.

945–27 176Ark474, 2SW(2d)1079 (interpretation of word in different statute); 160Ga215, 127SE847; 198 Ind645, 154NE659; 53SD590, 221NW673. [a] **Binding effect of appellate construction** depends on similarity of statute construed to statute considered. 132Misc 848, 230NYS691.

945–27½–New. Decisions as to the construction of statutes are authoritative when they deal with form of expression equivalent or closely conformable to that which forms the subject of inquiry in the case to be determined. 310Mo 258, 274SW1073.

945–33 86Colo 553, 283P548; 297Pa 498, 147A527; 152SC455, 150SE269. [g] **Ordinances.**–157Md185, 145A492.

947–38 169Ark97, 273SW355, 41ALR 629.

947–39 13PortoRicoFed393.

947–40½–New. Whenever a statute is enforced by a judgment or decree of a court, it is a judicial determination that it is valid and free from all constitutional objections. 145Va94, 133SE781.

947–40½–New. A decision only construing a statute does not require the court to sustain the statute when its constitutionality is later attacked. 51SD432, 214NW838.

947–41 268US98, 45SCt420, 69Led865; 15F(2d)184; 19F(2d)705; 218Ala203, 118S391; Cal 278P840; Cal 287P475; 69CalA404, 231P371; 100CalA567, 280P 706; 43 Ida24, 248P868; 214Ky688, 283 SW1051; 166La1035, 118S125; 9LaA 378, 119S442(2dcase); 241Mich240, 217 NW2; 248Mich376, 227NW746; Mich 233NW159; 154Miss828, 123S881(2d case) (where not mischievous in its operation and effect); 319Mo 337, 4SW (2d)776; 32NM210, 252P987, 989 [cit CJ]; 251NY12, 166NE787; 129Misc875, 224NYS77 (rule applied notwithstanding subsequent legislation); 131Misc 534, 227NYS384; 123 Or79, 260P1010; 151Wash43, 275P74; 193Wis423, 214 NW820, 54ALR419; 194Wis123, 215 NW937. [a] (33) **Invalidity of provision in policy avoiding liability if insured does not keep books whereby loss can be determined.** 214Ky688, 283SW 1051.

948–42 15F(2d)184; 154Wash617, 283 P170.

949–45 132Misc73, 228NYS116.

949–46 199Cal 318, 249P197.

949–46½–New. A law of descent is a law of property. 218Ala203, 118S391.

949-47 See also 192NC630, 134SE629.
949-49 199Cal318, 249P197; 95CalA555, 273P126; 225Ky346, 8SW(2d)425; 235Mich174, 209NW152; 121 Or116, 254P203; 123 Or79, 260P1010; 287Pa274, 135A232; 48SD544, 205NW613. [c] **Decision as to which of two statutes governs devolution of homesteads** comes within doctrine of stare decisis, and should not be lightly cast aside. 128 Or455, 275P21.
950-53 23F(2d)63; 35F(2d)203; 176 Ark139, 2SW(2d)44; 200 Iowa44, 204NW235, 40ALR603; 102NJL85, 132A106; 217AppDiv67, 216NYS215; 219AppDiv169, 218NYS446; TexCivA 273SW903.
950-54 85Colo87, 273P1030; 315Mo485, 286SW371; MoA 21SW(2d)777; 102NJL85, 132A106; 217AppDiv67, 216NYS215; Utah 270P543; Utah 273P306.
950-55 8F(2d)166; 16CustA61; 219Ala258, 121S910; 206Cal772, 276P574; 207Cal666, 279P805, 65ALR266; 97Fla650, 122S110; 145Miss887, 111S444; 80Mont228, 260P134; 54SD367, 223NW315; TexCommnA 6SW(2d)346; TexCivA 16SW(2d)426; Utah 273P306.
950-56 Mo 31SW(2d)1026; 145Va578, 134SE701.
950-58 227Ky7, 12SW(2d)348 (persuasive); 233Mich597, 208NW148; 80Mont228, 260P134; 292Pa339, 141A159; 298Pa33, 148A37. [c] **Dicta of United States supreme court** are very persuasive. 30F(2d)357 [certiorari den 279US852, 49SCt348, 73L ed995(3dcase)].
950-59 278US130, 49SCt75, 73L ed220; 6F(2d)116; 15F(2d)285; 17F(2d)379; 18F(2d)166; 36F(2d)559; 204Cal432, 268P902; 83CalA74, 256P595; GaA 155SE778; 89 IndA69, 149NE82; 200 Iowa44, 204NW235, 40ALR603; Iowa 227NW595; 221Ky217, 298SW671; 221Ky668, 299SW545; 230Ky333, 19SW(2d)980; 158La321, 104S59; 165La169, 115S447; 264Mass436, 163NE70; Mass 172NE643; 233Mich597, 208NW148; 320Mo173, 7SW(2d)340; 315Mo485, 286SW371; 316Mo694, 294SW1017; 221MoA898, 295SW1083; 80Mont228, 260P134; 82Mont30, 264P937; 247NY435, 160NE778; 216AppDiv337, 215NYS123 (matter not even dicta); 217AppDiv67, 216NYS215; 114 Oh231, 151NE122, 59ALR1368; 21 OhA438, 153NE204; 292Pa339, 141A159; 294Pa555, 144A748; 298Pa33, 148A37; 50SD261, 209NW341; Utah 270P543; Utah 277P206; Va 152SE335; Wyo 283P406. See also 13F(2d)723.
952-60 217AppDiv67, 216NYS215.
952-61 But see 41F(2d)817.
952-62 200 Iowa44, 204NW235, 40ALR603; 217AppDiv67, 216NYS215.
952-65 30F(2d)357 [certiorari den 279US852, 49SCt348, 73L ed995(3dcase)]; 46 Ida603, 269P596; 129Misc671, 222NYS355. [a] 190NC378, 130SE13.
952-66 275US331, 48SCt194, 72L ed303 (reason for court's conclusion is not mere obiter merely because another reason is more fully argued and considered); 15F(2d)412; 32NM210, 252P987; Utah 273P306. [e] **Little weight as a precedent** is attached to decisions on questions involved, but not presented to, or considered by, the court. NH 146A511.
953-69 99CalA240, 279P178; Utah 273P306; 187Wis438, 204NW473.
953-70 28F(2d)617; 102NJL85, 132A106. See also 40F(2d)679. [c] **Judicial dictum is not conclusive** but is more weighty than mere obiter. 102NJL85, 132A106.
953-71 15DelCh255, 136A149; Tex CommnA 15SW(2d)1033.
953-73 33F(2d)533.
953-74 136Wash437, 240P557.
953-75 101NJEq649, 138A569.
953-79 Mich 206NW98; 68Utah85, 249P437.
954-80 6LaA15.
954-84 115Nebr236, 212NW536 (case stating decision "too broadly" overruled).
954-86 202 Iowa954, 211NW252; 116ObSt1, 155NE791. [b] **Repeal and subsequent restoration of statute** on which decision prior to repeal was based leaves such decision in force notwithstanding repeal. 92CalA537, 268P679.
954-88 154Md195, 140A70 (applicability of approved instruction to case); 123 Or172, 261P428.
955-97 235Mich174, 209NW152.
955-98 220Ky632, 295SW976.
955-3 75CalA345, 242P885.
955-4 75CalA345, 242P885.
955-9 195NC284, 141SE886. [b] **Duty of court to adopt and follow line of opinions announcing sounder reasoning** as correct one; and this course is not forbidden by doctrine of stare decisis. 214Ky88, 282SW781.
955-10 85Colo87, 273P1030; Tex CommnA 23SW(2d)691.
956-16½-New. Where opinions of the supreme court of Texas and of a court of civil appeals differ, another court of civil appeals will follow the supreme court. TexCivA 280SW856.
956-17 214Ky88, 282SW781; 75Mont594, 244P480; TexCommnA 290SW739, 741 [citCJ].
957-19 123 Or172, 261P428; 144Wash302, 258P1.
957-20 215Ala79, 109S377; 3Del425, 138A631; 214Ky88, 282SW781; 220Ky277, 295SW175, 53ALR1328; 161La704, 109S394; Mich 233NW159; 248NY182, 161NE463 (rule of practice); 252NY394, 169NE622; 123 Or172, 261P428; 130 Or669, 281P840; 286Pa545, 134A438, 48ALR992; 32PortoRico634; 54SD367, 223NW315; 144Wash302, 258P1. [d] 47 Ida661, 279P416, 65ALR900 (positive statutes given effect). [f] 144Wash302, 258P1. [m] **Decision made without notice of statute setting statute aside** cannot be invoked under stare decisis rule. CalA 291P670.
959-21 220Ky277, 295SW175, 53ALR1328. [c] (3) Courts usually are willing to relax judicially established rules of evidence or procedure when after due trial they are found to be harmful in operation. 285Pa561, 132A810.
959-24½-New. Decision of the federal circuit court of appeals is binding on the district court even if in error as to law. 34F(2d)213.
959-27 194Wis298, 216NW502.
960-29 15F(2d)735; 43F(2d)513; 164La225, 113S825; 192NC156, 134SE401; 194Wis298, 216NW502, 504 [citCJ]. [d] (2) Affirmance by court of last resort on grounds other than constitutionality with expression that law is constitutional is not decision holding law to be unconstitutional. 228AppDiv314, 239NYS71. [i] **Failure to make proper index** does not affect recorded deed by overruling of decision that indexing is not essential. 192NC156, 134SE401. [j] **Decision overruling prior decision** has been held to destroy authority of argument on which former decision was based. 216Ala120, 112S447. [k] **Decisions overruled** by court of last resort are no longer controlling. 133Misc557, 232NYS302.
960-30 43F(2d)513; La 129S528; 192NC156, 134SE401; 194Wis298, 216NW502, 504 [citCJ]. [c] (2) Entry of judgment by supreme court in accordance with recommendation of commission of appeals whose opinion was contrary to prior opinions of supreme court will not be held to overrule or modify such opinions when opinion of commission of appeals was not expressly approved. TexCivA 284SW676.
961-31½-New. If the reasoning and conclusion of an overruled decision are valid although based upon the false premise of an invalid law, then, if such reasoning and conclusion are based upon the sound premise of a valid law, the result is a perfect structure. 194Cal49, 227P908.
961-36 8F(2d)315; 28F(2d)447; 39F(2d)479; 42F(2d)633; 35GaA19, 132SE125; Ga 155SE484; 35GaA436, 133SE348; 40GaA566, 150SE571; 122Kan805, 253P248; 219Ky169, 292SW801; 128Me462, 148A681(2dcase); 154Md675, 141A387, 58ALR634; 258Mass45, 154NE525; 318Mo761, 300SW755 (rulings on motions to suppress evidence); Mo 300SW767; 102NJEq367, 140A681; 222AppDiv627, 227NYS331; 134Misc346, 236NYS279; 138Misc32, 245NYS267; 135Misc774, 238NYS533; 136Misc615, 241NYS648 (construction of will); 197NC735, 150SE510; 57ND934, 224NW303; 120 Or427, 251P299; 121 Or44, 252P972; 295Pa571, 145A797, 63ALR1086; 296Pa579, 146A710; 141SC136, 139SE217; 143SC223, 141SE375; SD 231NW531; TexCivA 15SW(2d)126; TexCivA 19SW(2d)808; 144Va848, 130SE784; 36Wyo191, 253P858. [a] (3) Decision in scire facias proceedings sustaining validity of prior release as to alimony held res judicata and law of case on petition to revise. 258Mass45, 154NE525. (4) Court's ruling suppressing evidence. MoA 289SW663. (5) Jurisdiction. 43F(2d)254. [l] **Thus** on appeal from second judgment on same cause as to which former judgment was res judicata, this latter is law of case preventing collateral examination or amendment thereof. 215AppDiv609, 214NYS402 (till direct appeal from first judgment). [m] **Subsequent motion for judgment on pleadings** has been held properly denied where subject of motion was before court on prior motion. 227AppDiv582, 238NYS377.
962-37 165Ga185, 140SE359; Mass 167NE641; 49RI269, 141A703 (jurisdiction); 141SC136, 139SE217. [b] 230AppDiv52, 243NYS57; 35PortoRico250. [c] **Reversal without opinion** is not adoption of dissenting opinion in lower court. 40F(2d)643.
962-39 12LaA420, 125S328; 33NM365, 266P920 (rulings on challenges to jurors); 221AppDiv420, 223NYS184. [a] (3) Decision sustaining demurrer to cause of action for breach of employment contract on ground that contract was too indefinite and uncertain to be enforced does not preclude recovery on cause of action for services rendered thereunder on quantum meruit. 49Nev120, 239P396. (4) That complaint was held sufficient held not to preclude judgment on the pleadings. 131Misc479, 226NYS361.
963-40 See also 210Ky43, 275SW372 (where court of appeals is not bound by order on motion to dissolve temporary injunction).
963-40½-New. Order of one judge of court of appeals is entitled to great weight when the whole court sitting with him determines the appeal from such order. 210Ky43, 275SW372.
963-43 15F(2d)889.
963-44 106Conn475, 138A483, 54ALR361. [b] (4) It becomes law of case that petition was subject to special demurrer upon failure properly to present amendment within time fixed by order striking parts demurred to if not amended. 34GaA39, 128SE218. [c] (1) 200 Iowa293, 204NW281. But see 14F(2d)436. [g] **Decision sustaining portions of demurrer to petition** held not to sustain petition as to other grounds of demurrer. Ga 155SE324.
963-45 35GaA436, 133SE348; 35GaA460, 133SE351; Mass 166NE563.
963-46 40GaA119, 149SE70(1stcase); 40GaA172, 149SE82. See also 161Ga829, 132SE79.
963-47½-New. But ruling on demurrer to answer does not preclude hearing demurrer to amended answer setting up new affirmative defense. 49Nev342, 246P688.
963-47½-New. Overruling general demurrer to defendant's answer is not an adjudication that defendant is absolutely entitled to a verdict in its favor provided it proved its defense as laid. 34GaA192, 129SE19.
963-49 8F(2d)315; 227AppDiv582, 238NYS377; 197NC735, 150SE510.
963-50 102CalA299, 283P298; 105Conn595, 136A111. But see 22F(2d)62.
963-50½-New. **Succeeding judge** may adopt his predecessor's construction of an insurance policy without personally passing on contract. 5F(2d)71.
964-53 273US388, 47SCt385, 71L ed699; 280US420, 50SCt220, 74L ed524 (three judges); 34F(2d)808; 289Pa588, 137A799; 12PaDist&Co 471 (parties entitled to have entire court sitting in banc dispose of case). See also 21F(2d)333. [b] **Where rules provide for decision by court en banc,** single judge cannot act. 289Pa588, 137A799. [c] **Judicial Code requiring three judges where**

injunctive relief sought on ground of unconstitutionality of state statute or order of administration board. 40F(2d) 532.

964-54 NJ 144A169; 8PaDist&Co 155. But see 293Pa557, 143A189. [f] (1) See also 30F(2d)700; 30F(2d)895; Injunctions § 464. (2) Case does not arise under section unless constitutionality of state statute is directly involved. 27 F(2d)945. (3) Nor does it apply to suit to enjoin city officers from collecting taxes assessed against national bank stock under state law. 278US101, 49 SCt43, 73Led202. (4) Suit to enjoin city officers from collecting national bank tax held not to require three judges. 29F(2d)621. (5) Single judge insufficient to pass on application for interlocutory injunction to restrain condemnation proceedings by state park commissioners. 29F(2d)823. (6) Other cases not requiring convening of three-judge court. 30F(2d)306. (7) Trial judge on denial of restraining order may refuse to convene three-judge court to pass on question of interlocutory injunction. 30F(2d)306. (8) Convocation of three-judge court to consider cause involving local question depends on constitutional aspect. 30 F(2d)539. (9) Three-judge court is required upon interlocutory injunction in suit to restrain public service commission from enforcing rate order. 31 F(2d)600. (10) Bill to enjoin collection of taxes need not be heard before three judges, since assessment is not order within statute. 32F(2d)124. (11) Provision applied to enjoin enforcement of order of railroad commission. 42F(2d) 463. (12) Three judge court may determine case as one of statutory construction without deciding constitutional question. 41F(2d)774. [i] **If one of three judges is ill at home,** he may join with one of his colleagues in making effective majority by signing papers at his home. 8PaDist&Co 155. [j] **Decree sanctioned by opinion signed by two judges and concurring opinion of third** held equivalent to announcement in open court by three judges. 281US362, 50SCt299, 74Led904. [k] **Where constitutionality of statute is not questioned,** respondents are not entitled to statutory court. 41F(2d)854.

964-55 280US168, 50SCt83, 74Led353 (construction of statute); 17F(2d)857. [f] **As agent of court.**-12PaDist&Co 585 (continuing grand jury). [g] **Single judge has jurisdiction to amend decree** granting permanent injunction after hearing before three judges. 39F(2d) 176.

964-56 280US142, 50SCt70, 74Led233; 35OhA68, 171NE608 (two members of court of appeals cannot pass on errors on weight of evidence); 289Pa588, 137 A799; 292Pa389, 141A254 (court acting in banc); 95PaSuper541. [b] **Under statutory provision,** sheriff's appeal from salary board to common pleas must be heard by both judges in district. 293Pa557, 143A189.

964-57 [a] **In Ohio.**-112 Oh607, 148NE 350.

965-66 282US10, 51SCt8; 76CalA140, 243P893; 35GaA620, 134SE190; 116 Oh 732, 158NE171; 117 Oh507, 159NE564; 117 Oh622, 160NE855; 101Vt195, 142A 762 (majority of court); 146Wash27, 261P643. [c] (3) Power of court under such constitutional amendment of 1918 to act through two judges is not affected by constitutional provision authorizing court to appoint justice to act pro tempore in place of justice disqualified or unable to act. 76CalA140, 243P893. [k] **In Ohio.**-114 Oh40, 150NE422. [l] **In Florida.**-94Fla550, 114S375. [m] **To hold statute to be unconstitutional** constitution of Ohio requires concurrence of all but one of judges of supreme court, and statute is valid if more than one judge of such court holds it constitutional, after similar holding by court of appeals. 120 Oh464, 166NE 407; 120 Oh449, 166NE415. [n] **Concurrence of all but one judge of state Supreme Court to hold law unconstitutional** has been held not violative of equal protection clause of Federal Constitution. 281US74, 50SCt228, 74Led 710(2dcase).

965-66½-New. Where majority of forum vote for affirmance, but no principle of law as applicable to the case has received the sanction of the majority of the court, judgment is affirmed solely because of majority vote of quorum. 102NJL449, 133A488.

966-67 49Philippine939; Vt 148A867. See also Oh 171NE330. [d] (2) In Ohio all but one judge must concur. 281US 74, 50SCt228, 74Led710(2dcase).

966-68 Contra 12PaDist&Co 471.

966-76½-New. Views expressed in concurring opinion of single judge are not those of the court unless a majority of the court concurred therein. 316Mo 1058, 293SW770.

966-78 Fla 127S305(6thcase); 163Ga 642, 136SE794; 163Ga662, 136SE911; 163GaS49, 137SE264; 164Ga310, 138SE 671; 295Pa1, 144A735. [d] **Neither one of tribunal consisting of only two members** can perform affirmative act changing existing condition. 295Pa1, 144A735.

967-82 17F(2d)337; IndA 172NE551 (1stcase). [g] **Constitutional limitation.**-319Mo 1153, 6SW(2d)860.

967-84 218Ala334, 118S559; 100CalA 731, 281P76 (where question is one purely of determining which side may be believed); 162La981, 111S393.

967-85 29Ariz574, 243P598. [a] (2) 29Ariz574, 243P598 (motion for new trial). (3) 258Mass65, 154NE572.

968-87 TexCivA 291SW313.

968-88 196NC799, 144SE924 (in case valueless as precedent, facts are not stated, and no opinion written); 158 Tenn437, 14SW(2d)745.

968-90½-New. Findings of fact and opinion may be combined in single document. 17F(2d)337.

968-90½-New. On rehearing the appellate court will not write opinion as to matters discussed in the original opinion where such opinion is adhered to. TexCommnA 294SW537.

968-94 121Kan363, 245P1022, 46ALR 1200.

969-1½-New. Passing judgment on action already done has been held not to constitute "solemn occasion" so as to require the opinion of the supreme court. 125Me529, 133A265.

969-1½-New. When council was divided on question of sustaining charges against sheriff, and governor wishes to know if he can proceed further, "solemn occasion" has been held to exist. 125 Me529, 133A265.

969-2 IndA 172NE551(1stcase). See also TexCivA 48W(2d)257.

969-3 216Ala519, 113S535.

969-3½-New. So, where a question of public nature is involved, the appellate court will dispose of the appeal without discussion of facts. 85PaSuper122.

969-3½-New. Irrespective of whether the question is open, if the decree would be the same in any event, there is no objection to stating substantive law which supports the result. Mass 167NE 417.

969-5 75CalA434, 243P31.

969-6 130Kan313, 286P394(1stcase); 140SC123, 138SE675. [d] **On reversal and remand for new trial,** court does not discuss matters which may not arise again. 102TexCr392, 278SW206.

969-7½-New. Opinion may well state theories of counsel in the case, although it discredits one of parties. 36Wyo 166, 255P3, 52ALR91.

969-8½-New. Reason for opinion however, may be required of lower court to enable litigants to determine possibilities of appeal. 275US404, 48SCt189, 72 Led338.

969-9 215Ala319, 110S573.

969-10 213Ala398, 104S785. [a] **In reversing verdict,** court will point out insufficiency of evidence. TexCivA 295 SW320.

969-11 [a] **In sustaining verdict,** court will not discuss evidence. TexCivA 295 SW320.

969-12½-New. Federal courts restraining state officers should give reasons in opinion. 274US588, 47SCt720, 71Led 1219; 274US597, 47SCt724, 71Led1224.

969-12¼-New. Short opinion reporting the manner in which the murder case came before the court and stating the court's conclusion from the evidence after defendant pleaded guilty has been held sufficient to satisfy the court rule. 289Pa452, 137A606.

969-13½-New. Appellate court cannot order chancellor's reasoning, approved by it, set out in report of case, where it is contained in brief but not in transcript. 217Ala103, 115S30.

969-15 308Mo 201, 271SW481.

969-16 38F(2d)739 (as precedent in federal court).

969-17 196Cal 236, 237P38, 59ALR 1493.

969-18 [a] 271US9, 46SCt418, 70Led 799. [b] **Judgment of affirmance is not expression of opinion** as to propriety of suspending or staying execution of sentence. 247NY493, 161NE157.

969-19½-New. Taking note of particular provision of statute in sustaining its constitutionality as a whole is equivalent to declaring such provision constitutional. 196Cal 236, 237P38, 59 ALR1493.

970-20½-New. A divisional opinion rejected by the court in bank is thereafter no opinion. 307Mo 98, 270SW662.

970-20⅓-New. Where a majority of the appellate court actually concurs in the view, the case should be so regarded, although not shown by the opinion as reported. 162La310, 110S486.

970-20¼-New. An erroneous statement in the opinion does not affect the court's decision on the merits of the case. 31 Ariz284, 252P190.

970-20⅕-New. When a dissenting opinion does not controvert any position taken by the majority opinion it is assumed that the dissenting opinion acquiesces in the conclusions of the majority as to positions not controverted. 45SC196, 143SE31.

970-20⅙-New. Opinions of appellate tribunals are intended to reflect the court's opinion on the case presented. CalA 274P587.

970-20½-New. A case appealed and decided on the merits is impliedly held appealable. TexCivA 13SW(2d)152.

970-20⅔-New. Courts are bound by decisions and not by its remarks in opinion, 235Ky301, 31SW(2d)267.

970-21 Del 152A45.

970-22 See also Mo 289SW895.

970-22½-New. The opinion prepared by any member of the appellate court and adopted by the court is the opinion of the court itself and not of the writer alone. 214Ky736, 284SW391.

970-24½-New. In the Philippine Islands death penalty decisions are required by statute to be headed "per curiam." 50Philippine203.

970-26 217AppDiv31, 216NYS434 (affirmance without opinion); 116Tex453, 294SW835. [a] **Lower court's opinion is not necessarily adopted** by appellate court's refusal of writ of error merely adopting result. TexCivA 13SW(2d) 184.

970-26½-New. Affirmance by the court of appeals without an opinion does not mean that it has adopted the opinion of the lower court in entirety. 250NY 29, 164NE732.

970-27 214Ky736, 284SW391.

970-28 116Tex453, 294SW835; Tex CommnA 294SW195; TexCivA 22SW (2d)528.

970-28½-New. Concurrence of two judges of a division of the supreme court in certain parts of the opinion of its commissioner in case in which all four judges take part is not a decision of court as to such part of the opinion, and cannot be considered by a court of appeals in deciding a similar case. 309Mo 415, 274SW712.

970-28⅓-New. Where the supreme court adopted the judgment and not the opinion of commissioners of appeal, it is not bound by dictum in the opinion. 118Tex534, 18SW(2d)1063.

970-29 169Ark77, 273SW397; 321 Ill 192, 151NE496 (opinion construed as holding entire statute, and not one section only, unconstitutional); 218Ky 691, 291SW1054; 153Miss327, 121S144.

970-30 22F(2d)360; 169Ark920, 277

SW39; 74CalA420, 240P788; 75CalA 349, 242P1073; 85Colo 289, 275P896; 93Fla5, 112S239; 200 Iowa873, 205 NW502; 214Ky775, 283SW1067; 154 Miss381, 122S496, 63ALR1188; 77 Mont466, 251P163; 77Mont477, 251P 517; 81Mont222, 262P1039; 32NM20, 250P729; 220AppDiv704, 221NYS437; 230AppDiv332, 243NYS657; 49RI 99, 140 A3; TexCivA 10SW(2d)211; TexCivA 13SW(2d)184; 148Va860, 139SE490; 154 Wash416, 282P832; 34Wyo 98, 241P709. [a] **Sentences cannot be detached** from opinion and stretched to other circumstances with different context for which they were not intended. Mass 167NE 655.

970-30½-New. and questions of law presented by particular case; 169Ark 920, 277SW39.

970-31 269US483, 46SCt176, 70Led 368; 21AlaA469, 109S373; 75CalA349, 242P1073; 45 Ida112, 261P244; 254 IllA 334; 205 Iowa209, 217NW818; 219MoA 90, 266SW492; 80Mont574, 261P356, 60 ALR551; 32NM20, 250P729; 249NY88, 162NE593; 149Va829, 141SE849; 136 Wash694, 238P647.

970-32 15F(2d)789; 45 Ida112, 261P 244; 75Mont594, 244P480; 55ND531, 215NW81.

970-33 38F(2d)879; 169Ark77, 273 SW397; 142Va435, 129SE263, 130SE235 (should always be interpreted with reference to issues then to be decided).

970-33½-New. Interpretation of opinion must consider arguments of counsel toward which opinion is directed. 220AppDiv704, 221NYS437.

970-34 [a] **Authorities,** if possible, should be construed to support rule that verdict may not be corrected by remittitur, unless error affects definite part. TexCivA 10SW(2d)441.

970-35 45 Ida112, 261P244.

971-37½-New. Cases approved by citation in an opinion are approved only so far as they bear on the question involved in the citing case. Iowa 213NW 409.

971-37¾-New. Statement of Supreme Court, made in affirming order regarding duty of railroad to stop trains at depot or build sheds is not modification of order to build sheds. 179Ark1128, 20 SW(2d)878.

971-41 [a] **Court may set aside** its opinion previously filed. 7F(2d)855.

971-43 25 OhA175, 158NE318 (obiter dictum carried into syllabus indicates intention to declare it rule of law); 25 OhA278, 158NE94.

971-44 216Ky535, 287SW969. [a] **"Syllabus rule"** of Ohio applies only to its supreme court. 20F(2d)586. [b] **Rule that syllabi shall be pronouncements of law** does not prevent opinion being given precedential weight where not conflicting. 38F(2d)739.

971-44½-New. Syllabi of case are to be contrued together. 114Nebr432, 208 NW739, 46ALR1213.

971-48 [a] **Judicial act and record thereof distinguished.**-68CalA709, 230P 218. [b] **"Judicial records"** broadly speaking are register of actions, files, minutes, orders, decree, judgment, judgment book and docket. Ida 293P323.

971-49 [d] (2) 52ND478, 203NW679. [e] **Depositions part of record in chancery.**-178Ark443, 12SW(2d)881.

971-50 172Ark442, 289SW326; 107 Conn156, 139A683; 35 OhA418, 172NE 551(2dcase).

971-51 [a] **Courts of record speak by their records** and what is not thereby made to appear does not exist in law. 107WVa632, 149SE819.

971-52 215Ala61, 109S357, 358 [cit Cyc]; 101WVa31, 131SE638.

971-52½-New. A court must speak by its record or not at all. 101WVa31, 131 SE638.

971-52¾-New. Where the record of a court is silent as to supposed pleas or proceedings, it is the same as if they did not exist. 101WVa31, 131SE638.

971-52¼-New. Court can speak only by its records. Mo 286SW396.

972-56 Mass 169NE410.

972-57 166La512, 117S573. [a] **Reporter's notes** do not constitute court records proper. 42 Ida636, 248P19.

972-57½-New. Entries are memoranda of what takes place in court, made by authority of court. 52ND478, 203NW 679.

972-61½-New. Court's order setting jury cases and drawing juries is not void because not written in minutes until a later day of the term. 20AlaA531, 104S895.

972-61¾-New. It is not the duty of the trial judge to keep a record of the attendance and mileage fees of witnesses. 144Wash641, 258P479

972-73 Cal 291P412; 85CalA165, 259P 119; 203 Iowa572, 213NW426; 206 Iowa981, 221NW445; 37 OklCr338, 257 P1109; TexCivA 274SW179. [f] OklCr 281P597(2dcase). [l] **Nunc pro tunc entry** is entry made now of something which was actually previously done to have effect as of former date. 233Mich 140, 206NW532.

973-74 37 OklCr338, 257P1109. [c] **In criminal cases** power of court is same as in civil cases. 169Ark167, 273SW 367.

973-76 [a] **Notice to adverse party** must be given in order that court may have jurisdiction to make nunc pro tunc entry. 195 Ind265, 145NE2, 150NE407.

973-77 Ind 168NE577; 233Mich140, 206NW532; 237Mich413, 212NW69.

973-78 195 Ind265, 145NE2, 150NE 407; MoA 20SW(2d)552(1stcase); NJCir 145A334(2dcase).

973-81 37 OklCr338, 257P1109.

973-83 218Ky775, 292SW300.

973-86 TexCivA 274SW179. [e] **Clerk's minutes** authenticated by judge are evidence of proceedings of court. 42 Ida 636, 248P19.

974-87 173Ark468, 292SW675.

974-88 47RI 323, 133A1.

974-89½-New. Where there is no certificate of authentication, the court cannot consider copies of the proceedings, in the absence of agreement. 215Ala 280, 110S409.

974-97 IndA 169NE695; 121Kan474, 247P868; 136Misc215, 239NYS347; 114 Oh194, 150NE735; 156SC324, 153SE 269; 116Tex29, 285SW1079, 48ALR 355; TexCivA 7SW(2d)613. But see 21 AlaA427, 109S177. [a] **Judges have control of records** so far as essential to administration of justice. Ida 293P 323. [b] **Judge may refuse** to permit withdrawal of original judicial records. Ida 293P323.

974-97½-New. The trial court has power to protect its records from irrelevant, unimportant, or superfluous papers. 257Mass409, 153NE888.

975-10 212Ala559, 103S705; 20AlaA 412, 103S694; 20AlaA531, 104S895; 169 Ark627, 276SW361 (nunc pro tunc order held proper to show that jury were sworn as required by statute); 169 Ark979, 277SW48 (not affected by lapse of time); 68CalA709, 230P218; 72CalA 48, 236P318; 80CalA776, 252P1072 (order granting new trial); Fla 129S818; Iowa 204NW253; 200 Iowa1222, 206NW 102; 204 Iowa655, 215NW749; 124Kan 243, 257P982; 218Ky259, 291SW32; 163La51, 111S492; 163La242, 111S691; 126Me314, 138A470; 127Me167, 142A 377; Miss 121S835; 312Mo 447, 279 SW72; MoA 283SW720; MoA 29SW (2d)183; 76Mont549, 248P169, 173 [cit CJ]; Nev 286P417; 135Misc724, 238 NYS310; 137 Okl 112, 278P278; 144 Okl 52, 289P253; 89PaSuper173; 93 PaSuper183; 116Tex29, 285SW1079, 48 ALR355; TexCommnA 15SW(2d)579; 107WVa192, 147SE877, 66ALR102. [a] (2) Other instances. CalA 288P1099. [e] (2) Clerical error includes error which cannot reasonably be attributed to judicial discretion. Minn 232NW 322. [h] (1) See also NJSup 145A372d case). [n] **Unauthorized legislative control.**-116Tex29, 285SW1079, 48ALR355.

975-10½-New. or restore lost records; 169Ark979, 277SW48.

976-11 80CalA776, 252P1072; CalA 288P1099; 76Mont549, 248P169, 173 [citCJ].

976-12 20AlaA531, 104S895 (subject to statutory limitation, circuit court has full power); 68CalA709, 230P218; 80CalA776, 252P1072; CalA 288P1099; 76Mont549, 248P169; 125Misc564, 211 NYS501 (also given by statute); 116 Tex29, 285SW1079, 48ALR355; Tex CivA 7SW(2d)613.

976-14 243 IllA216; Miss 121S835; 117 Oh521, 160NE90; 117Tex205, 300 SW17; Wis 230NW713. But see 244 IllA484.

976-15 See also 200 Ind358, 163NE513.

976-17 Miss 121S835.

976-18½-New. The power to amend the record includes power to amend final judgments and decrees. 125Misc 564, 211NYS501.

976-18¾-New. State courts have power to correct errors in naturalization as well as other proceedings, in respect to clerical mistakes, 125Misc564, 211 NYS501.

976-18¼-New. as well as matters of substance. 125Misc564, 211NYS501.

976-18½-New. Record will not be corrected, to note exception, on counsel's affidavit that he uttered word "Exception" in low voice, not heard by anyone: 128Misc614, 219NYS556.

976-21 169Ark979, 277SW48.

977-22½-New. Correction of erroneous description in mortgage foreclosure records by clerk without order vitiates decree which was properly vacated. 169 Ark979, 277SW48.

977-26 200 Iowa889, 205NW500; 204 Iowa655, 215NW749; 127Me167, 142A 377; Mo 28SW(2d)1008; TexCivA 23 SW(2d)888.

977-27 126Me314, 138A470. [b] **After motion based on incorrect minutes has been ruled on court may correct minutes.** 165La822, 116S199.

977-28 [a] **Notice required if amendment in chambers.**-163La242, 111S691.

977-29 68CalA709, 230P218; 80CalA 776, 252P1072; 48 Ida221, 281P1; 76 Mont549, 248P169; 116Tex29, 285SW 1079, 48ALR355; TexCivA 7SW(2d)613.

977-31 218Ky259, 291SW32, 51ALR 281; 159La280, 105S343; 127Me167, 142A377 (so long as record of case remains incomplete); 125Misc564, 211 NYS501 (state courts may correct clerical mistakes as well as matters of substance).

977-33 159La280, 105S343.

977-35½-New. The common-law rule as to amendments of records after expiration of the term has no application to the orphans' court. 297Pa451, 147A 102.

977-36 158La755, 104S705; 159La280, 105S343; 163La51, 111S492; 163La242, 111S691.

977-38 11PaDist&Co 746.

977-40 80CalA776, 252P1072; MoA 29 SW(2d)183 (waiver of failure to verify motion); 77Mont66, 249P666; 107WVa 192, 147SE877, 66ALR102. [h] **Amendment of official entries nunc pro tunc.**-38GaA470, 144SE395.

978-41 80CalA776, 252P1072; 204 Iowa 655, 215NW749; 76Mont549, 248P169. But see 38GaA470, 144SE395; 284Pa47, 130A417. [b] **Amendment held error** where parties were sui juris and no opportunity was afforded party affected to be heard. 284Pa47, 130A417. [c] **It is better practice to give notice** to those who will be affected. 76Mont549, 248P 169.

978-44 94Fla60, 113S736; 128 Okl 97, 261P209 (evidence held insufficient to justify refusal to vacate journal entry).

978-45½-New. Evidence is unnecessary when minutes are corrected by presiding judge who knows the facts. 158La 755, 104S705.

978-47 94Fla60, 113S736.

978-48 CalA 288P1099 (court may rely on its own memory).

979-49 72CalA48, 236P318.

979-49½-New. The extent to which the judge may call upon his own recollection in determining the character of amendment is not subject to rule. 76Mont549, 248P169 (each case depends upon its own facts).

979-51 338 Ill 158, 170NE320 (necessity for note, memorandum or entry as basis for order).

979-51½-New. Order correcting minutes is not appealable. 187Wis14, 203 NW746.

979-54 262Mass555, 160NE532.

979-57 OklCr 281P597(2dcase); 144 Okl 52, 289P253.

979-57½-New. Where a party resorts

to traverse to annul terms and effect an official entry, the relief obtained results from a judgment fixing the truth as to controverted facts; whereas altering by an official in amending his own entry, under statute results, not from compulsion of the judgment establishing the fact, but from the voluntary act of the official. 38GaA470, 144SE395.

979–58 76Mont549, 248P169, 174 [cit CJ].

979–59 212Ala5, 101S666; Mass 169NE410; 315Mo 405, 285SW1007; NJ Sup 144A596; 125 Okl 212, 257P286; 37 OklCr338, 257P1109. [c] (2) Court can only speak through its minutes. 144 Miss852, 110S666. [d] (2) Where court and counsel disagree as to pertinent fact, minutes of court control. 169La251, 125 S67.

979–60 77Colo 453, 237P150; Fla 129 S818; 243 IllA216; Mass 169NE410; 144Miss852, 110S666; 76Mont549, 248P 169, 174 [citCJ]; 122 Okl 160, 252P410; 128 Okl 97, 261P209; 37 OklCr338, 257 P1109; 144Va648, 131SE230 (and no evidence will be received to add or subtract from it except under statutory permission); 101WVa31, 131SE638. [a] **Courts may not contradict** their own records. 5PaDist&Co 54.

979–62 257Mass465, 154NE67; 76Mont 549, 248P169; 125 Okl 212, 257P286; 47RI.323, 132A1; 156SC324, 153SE269; 67Utah371, 248P83; Wis 230NW713. [g] **Parol evidence** has been held not admissible to vary record of district court. 257Mass465, 154NE67. [h] **That both parties admit filing and overruling of exceptions** held insufficient, where no reference in record thereto. 215Ala280, 110S409. [i] **In case of conflict,** judgment of conviction controls as against record of conviction delivered to sheriff. 137Misc267, 241NYS745. [j] **In controversy regarding demand for jury on certain date,** court minutes control. CalA 279P474.

980–63 37 OklCr338, 257P1109.

980–69½–New. Records are primary evidence of contents. 5PaDist&Co 54.

980–75 See also 144Va648, 131SE230.

980–79 159La280, 105S343 (evidence held to show that motion for appeal was made and granted and bond and return day fixed); 308Mo 390, 272SW940.

980–84½–New. The practice of permitting the record to show the filing of a motion for new trial and affidavit for appeal when not in fact filed is improper. Mo 264SW363.

981–90 Mass 171NE672.

981–91 116Tex489, 294SW844.

981–94½–New. The county court need not vacate a former order overruling a plea in abatement where, on trial, the jury finds value above its jurisdiction. TexCivA 296SW669.

981–94¼–New. The character of a court is determined by the nature of its jurisdiction and functions, and not by its name. 95CalA414, 273P150.

982–10 199 Ind210, 156NE465; 12LaA 73, 125S483(1stcase) (court of appeals); 157Miss559, 128S734; 128Miss599, 219 NYS566. [c] **Statute held unconstitutional.**–131Misc291, 227NYS174.

982–14 125Me478, 135A33.

982–14½–New. When jurisdiction is vested by statute in a court, the contrary not appearing, such court, although of general jurisdiction as to other matters, is of special jurisdiction as to such statutory authority. 218Ala 230, 118S460.

982–15 240Mich495, 215NW420, 421 [citCJperBird,J].

983–19 95Fla885, 116S869; TexCivA 278SW314; TexCivA 8SW(2d)778 (county court has no jurisdiction of case to cancel constable's deed and remove cloud from title to land).

983–20 95Fla75, 116S28; Minn 233NW 7; TexCivA 278SW314; TexCivA 32 SW(2d)388. [d] (22) In action on note for purchase price of land. TexCivA 278SW314. (23) Suit to recover taxes paid on certain land and school land interest paid by plaintiff. TexCivA 21 SW(2d)1101. [n] (17) Suit to recover rent for use of water. 101Vt314, 143A 295. [q] **Foreclosure proceedings** are not within jurisdiction of municipal courts in Porto Rico. 29PortoRico 817.

984–21½–New. The court having jurisdiction of the amount for which suit is brought has power and authority to render judgment on a claim of defendant for a less amount than plaintiff's claim. TexCivA 283SW529.

984–23 131Misc291, 227NYS174; 224 AppDiv566, 231NYS311. [c] **Statute authorizing execution in any part of state** of process and mandates of city court of New York is invalid as contrary to Const. art 6 §§ 11, 18, as amended. 248NY445, 162NE481.

985–25 20AlaA514, 104S561; 23AlaA 432, 127S796(2dcase).

985–26 [e] **County court of Tuscaloosa County.**–21AlaA516, 109S762 (not abolished by Code [1923] § 3800).

985–27 21AlaA580, 110S476. [b] **Procedure.**–219Ala523, 122S835.

985–29 22AlaA389, 116S902. [f] 20 AlaA623, 104S576 (Birmingham municipal court). [g] 21SAla12, 117S460. [h] 20AlaA623, 104S576. [i] **Adjournments.**–219Ala465, 122S448. [j] **Jurisdiction in appeal from.**–23AlaA96, 122S 606. [k] **Discovery of assets.**–Ala 128 S610.

985–32 [a] 172Ark642, 290SW353. [e] **Appeal from county court.**–179Ark733, 17SW(2d)872. [m] **Pleading.**–179Ark 600, 17SW(2d)305.

985–34 172Ark442, 289SW326; 178Ark 454, 12SW(2d)10.

985–37 [d] **Act creating county court of common pleas** has been held not to require giving bond as prerequisite to right of appeal to circuit court. 175 Ark520, 299SW746.

985–38 172Ark996, 291SW65. [a] 178 Ark98, 13SW(2d)297(2dcase). [c] **Appeals.**–172Ark752, 290SW361. [d] **Jurisdictional amount in mayor's court.**–178Ark1127, 13SW(2d)612(1stcase).

985–41¼–New. police courts: 72CalA 356, 237P560; 84CalA303, 257P909.

985–41½–New. city justice's courts: 72 CalA356, 237P560; 200Cal 215, 252P 575.

985–41¼–New. the municipal courts, 197Cal 504, 241P874; 197Cal 539, 241P 879; 197Cal 551, 241P551; 200Cal 215, 252P575; 84CalA425, 258P164; 208Cal 279, 280P982; CalA 259P1008; CalA 261P727; 95CalA251, 272P791 (no equity jurisdiction); 95CalA414, 273P 150; 100CalA349, 279P1018. [a] **Territorial jurisdiction.**–Municipal court of Los Angeles has jurisdiction of action at law involving less than one thousand dollars brought against resident of county living outside of boundaries of city. 84CalA425, 258P164.

985–41½–New. the recorder's courts. 84CalA303, 257P909.

985–42 197Cal 504, 241P874; 207Cal 709, 280P366. [b] 200Cal 235, 252P 722. [c] CalA 285P753. [f] 197Cal 649, 242P725. [n] **Territorial jurisdiction of superior court of Santa Cruz County** has jurisdiction to enjoin violation of California laws on ship anchored in Monterey Bay, though point of anchorage is more than three and one-half miles distant from nearest low-water mark. 200Cal 235, 252P722. [o] **Appeals from municipal court.**–81CalA351, 253P951 (sufficiency of record on appeal). [p] **Certiorari.**–201Cal 108, 255 P749. [q] **Mandamus.**–CalA 276P416. [r] **Jurisdiction to foreclose mechanic's lien.**–CalA 292P499.

985–42½–New. Erratum in 1926 Anno. Text should read "In Alberta" etc. and be transferred to 1008–11½–New.

985–42½–New. A constitutional provision relating to an appeal from the municipal court does not deny equal protection. CalA 277P499.

985–42¼–New. Jurisdiction of municipal court in actions at law involving title to realty. CalA 288P26.

985–42½–New. Municipal court held without jurisdiction to declare existence of trust. CalA 288P29.

985–42¼–New. Decisions relating to municipal courts of California. CalA 292P279.

986–43 84Colo 423, 271P178; 85Colo 28, 273P21.

986–44 80Colo 499, 252P816. [i] **Construction of wills and trusts.**–80Colo 499, 252P816. [j] **Control of executors and trustees in administration of trust.**–80Colo 499, 252P816.

986–45 111Conn124, 149A246.

986–48 3Del 118, 131A320.

986–48½–New. 15DelCh455, 133A696.

986–50 91Fla30, 107S249; 98Fla996, 124S458. [b] 91Fla30, 107S249.

986–51 Fla 130S15.

986–54 164Ga805, 139SE678; 35GaA 50, 132SE141 (certiorari); 40GaA450, 150SE168; 40GaA566, 150SE571. [c] 34GaA42, 128SE585. [f] **Administration of estates.**–161Ga884, 132SE70, 44ALR 795. [g] **On appeal from appellate division of municipal court** superior court should grant rehearing where evidence would authorize verdict for either party. 36GaA548, 137SE302.

986–57 34GaA316, 129SE573 (certiorari to municipal court of Atlanta properly refused).

986–59½–New. jurisdiction of ordinary; 160Ga535, 128SE773.

986–60 168Ga81, 147SE569; 169Ga589, 150SE818; 35GaA50, 132SE111 (plea to jurisdiction); 36GaA497, 137SE277; 39 GaA297, 147SE175; 41GaA384, 153SE 85(2dcase) (equitable principles can be invoked). [z] **Amendments to pleadings.**–34GaA355, 129SE557. [aa] **Motion for new trial.**–34GaA355, 129SE557 (properly denied). [bb] **Admissibility of evidence.**–34GaA355, 129SE557. [cc] **No equitable jurisdiction.**–34GaA355, 129SE557. [dd] **Recoupment, set-off, and counterclaim.**–34GaA355, 129SE557 (has jurisdiction of defense of tort in suit on contract only where purely defensive in nature, which if sustained would result in general verdict for defendant). [ee] **Action against foreign insurance company.**–165Ga815, 142SE 851.

987–61 165Ga173, 140SE354; 165Ga 421, 141SE194 (extension of jurisdiction by legislature held valid); 166Ga 229, 142SE882; 36GaA499, 135SE494; 36GaA201, 136SE163; 37GaA101, 139 SE134 (certiorari to review judgment sustained by sufficient evidence properly overruled); 37GaA742, 142SE208; 38GaA779, 145SE533; 38GaA792, 145 SE889; 39GaA244, 146SE922; 41GaA 287, 152SE589(2dcase). [d] 35GaA284, 134SE174; 37GaA742, 142SE208; 41 GaA166, 152SE282. [e] 35GaA284, 134 SE174; 41GaA166, 152SE282; 36GaA 246, 136SE170. [j] (2) Deputy clerk has authority to take affidavit for attachment. 36GaA788, 138SE256. (3) Deputy clerk has authority to issue attachment returnable to superior courts. 36GaA788, 138SE256. [l] **Judgment for plaintiff not treated as nullity because rendered without bill of particulars demanded by defendant.**–34GaA119, 128 SE205. [m] **Suit in equity cannot be maintained** to trace specific funds. 34 GaA42, 128SE585. [n] **Pleadings same as in justice courts.**–34GaA190, 129SE6; 36GaA49, 135SE494; 36GaA246, 136SE 170. [o] **Amendments.**–36GaA49, 135SE 494 (summons amendable). (2) Dismissal of appeal by municipal judge presumed within rule not made part of record. 37GaA10, 138SE862. [p] **Judgment** without evidence to sustain it is erroneous where defendant's answer puts plaintiff upon proof. 36GaA46, 136SE170. [q] **Certiorari does not lie** to original judgments of Atlanta municipal court rendered by one judge. 36GaA82, 135SE491. [r] **Jurisdiction to establish lien on realty** for superintending construction is in Atlanta City court. 36GaA256, 136SE462. [s] **Motions for new trial.**–37GaA587, 141SE 217. [t] **Review.**–37GaA10, 138SE862. [u] **Opening, vacating, or modifying judgments.**–37GaA450, 140SE636. [v] **Time to set aside judgment.**–37GaA450, 140SE636. [w] **Motions for new trial.**–39GaA244, 146SE922. [x] **Appeals.**–169 Ga30, 149SE555(2dcase). [y] **Process.**–40GaA314, 149SE389.

987–65 36GaA289, 136SE281. [b] **Time for filing pleas.**–36GaA289, 136SE 281 (any time before judgment). [c] **Default judgments.**–36GaA289, 136SE 281. [d] **Rules.**–36GaA289, 136SE281.

987–73 39GaA614, 147SE917 (answer of garnishee). [a] **Direction of verdict.**–39GaA55, 146SE42(1stcase). [b] **Re-**

view on certiorari.–40GaA58, 148SE751, 752 [citCJ].

987-79 39GaA602, 147SE921 (opening default).

987-80 33GaA743, 127SE807 (petition for certiorari to municipal court of Savannah dismissed because not filed within three months after judgment). [b] **Petition for certiorari** held fatally defective because record failed to show application for writ within thirty days after final determination. 33GaA743, 127SE807.

987-83 [c] **May foreclose laborer's lien.**–37GaA536, 140SE920. [d] **May issue execution in foreclosure of laborer's lien.**–37GaA536, 140SE920.

987-83½-New. 36GaA147, 135SE847.

987-84½-New. , and Carrollton. 37 GaA307, 140SE41(2dcase).

987-87 36GaA497, 137SE277.

987-87½-New. Municipal courts. Petition for injunction, and to set aside judgment dismissed. 170Ga347, 152SE 899(2dcase).

987-87⅓-New. Appeals to Appellate Division. 41GaA382, 153SE206.

987-87¼-New. Direction of verdict. 41GaA420, 153SE229(1stcase).

988-92 333 Ill 190, 164NE218. [c] 329 Ill 623, 161NE115. [f] **Local improvement act** abolished jurisdiction of circuit court to compel construction work under contract and improvement ordinance. 318 Ill 463, 149NE521. [g] **Power on appeal from county court.**–188 IIIA215.

988-95 328 Ill 472, 160NE76; 244 IIIA 427. [c] 253 IIIA229. [u] **Jurisdiction in equity** (1) may be conferred by legislature. 317 Ill 159, 147NE916. (2) County courts are empowered to hear and determine injunction cases brought under state prohibition act. 317 Ill 159, 147NE916. [v] **Setting aside or modifying its orders.**–253 IIIA229.

988-98½-New. in settlement of estates of decedents, 253 IIIA229.

988-2 251 IIIA45. [k] 338 Ill 363, 170 NE210.

988-8 319 Ill 421, 150NE266; 245 IIIA 492; 248 IIIA108; 249 IIIA28; 250 IIIA 252; 252 IIIA17 (waiver of defenses by motion for directed verdict without attempting to establish defenses). [b] (2) Sections held unconstitutional. 263 Ill 471, 105NE323, 260 Ill 348, 103NE 225, 174 IIIA129; 182 IIIA313; 185 IIIA 454.

989-9 236 IIIA541; 247 IIIA136. [v] **No jurisdiction over penitentiary offenses.** 236 IIIA1.

989-10 [g] **Where pleadings in fourth class case** are founded on contract, they cannot be disregarded and verdict based upon tort. 234 IIIA403.

989-11 192 IIIA300 (further extension held void); 236 IIIA223. [a] 184 IIIA 49. [h] **Extension of time** to present statement of facts or stenographic report. 189 IIIA36. [i] **No power to enlarge time for filing bill of exceptions.**–192 IIIA360. [j] **Necessity for notice of motion where party defaults in appearing.**–337 Ill 612, 169NE747.

989-14 252 IIIA24.

989-16 236 IIIA442; 244 IIIA341; 248 IIIA297; 250 IIIA401; 253 IIIA396; 253 IIIA404; 255 IIIA479; 256 IIIA251; 256 IIIA345. [b] 248 IIIA525. [c] 244 IIIA 522. [e] 233 IIIA109; 245 IIIA492; 246 IIIA1.

990-19 189 IIIA185 (necessity of objection to sufficiency). [d] 180 IIIA256 [af 262 Ill 400, 104NE666, AnnCas 1915B89]; 189 IIIA36; 191 IIIA144. [l] 188 IIIA560 (objection for first time on appeal).

990-22 253 IIIA404.

990-23 [b] (3) Affidavit of merits denying corporate existence of plaintiff held sufficient compliance with court rule. 253 IIIA404. (4) Such affidavit held not open to objection that prosecution for perjury cannot be founded thereon. 253 IIIA404. [n] **Sufficiency to raise issue cannot be urged on review** where both parties introduced evidence on fact. 188 IIIA569.

990-24 252 IIIA262.

991-33 323 Ill 90, 153NE732; 251 IIIA 497.

991-34 [c] 185 IIIA110 (failure to object to oral charge); 193 IIIA62 [aff 272 Ill 377, 112NE70].

991-40 236 IIIA269; 236 IIIA541; 251 IIIA497. [e] **Judgment against one of joint defendants** in action of fourth class to recover damages for negligence held proper. 319 Ill 421, 150NE266.

991-43 252 IIIA24.

991-45 323 Ill 90, 153NE732; 233 IIIA 184; 236 IIIA223; 237 IIIA460; 248 IIIA90; 252 IIIA262; 252 IIIA383. [a] 253 IIIA546. [d] Time.–233 IIIA184. [e] **Time for vacating void judgments** held not controlled by thirty-day statute. 237 IIIA460.

991-47 [c] **Vacation or modification.**–329 Ill 418, 160NE742.

991-48 240 Ill 311, 88NE808; 323 Ill 90, 153NE732; 336 Ill578, 168NE661; 152 IIIA66; 152 IIIA238; 156 IIIA498; 157 IIIA345; 162 IIIA384; 162 IIIA438; 162 IIIA500; 162 IIIA600; 163 IIIA38; 163 IIIA89; 163 IIIA360; 167 IIIA400; 167 IIIA632; 169 IIIA559; 170 IIIA304; 171 IIIA597; 181 IIIA513; 182 IIIA210; 183 IIIA241; 185 IIIA171 (entry of proper judgment); 189 IIIA321; 191 IIIA 123 (necessity of disclosing statement of claim); 237 IIIA295; 244 IIIA341; 244 IIIA522; 245 IIIA492; 246 IIIA467; 252 IIIA17; 253 IIIA339. [g] 334 Ill 338, 166 NE49; 186 IIIA121; 187 IIIA41 (necessity of setting out statement of claim or affidavit of merits); 187 IIIA268; 187 IIIA312 (showing as to objections and motions); 191 IIIA606; 192 IIIA72; 192 IIIA487. [m] 263 Ill 394, 105NE328 [aff 182 IIIA1]; 180 IIIA405; 181 IIIA461; 182 IIIA27; 182 IIIA313; 188 IIIA609; 189 IIIA72 [rev on other grounds 269 Ill 608, 109NE1048]; 191 IIIA606; 192 IIIA285. [o] 187 IIIA268. [p] 185 IIIA410. [q] 180 IIIA319; 182 IIIA341; 182 IIIA375; 182 IIIA376; 183 IIIA179; 184 IIIA50 (conclusiveness of certificate); 185 IIIA312; 185 IIIA350; 187 IIIA18; 187 IIIA166; 190 IIIA109 [r] 190 IIIA124. [w] **Stenographic report.**–183 IIIA237. [x] **Propositions of law.**–182 IIIA387; 183 IIIA392. [y] **Certificate to stenographic report** held proper. 185 IIIA460. [z] **Signature to stenographic report** need not be under seal. 185 IIIA460. [aa] **Presumptions.**–187 IIIA441; 189 IIIA34; 192 IIIA57; 192 IIIA487. [bb] **Affirmance.**–192 IIIA433. [cc] **Certificate to bill of exceptions.**–334 Ill 338, 166NE49.

991-48½-New. , and writ of error. 182 IIIA313; 185 IIIA440; 192 IIIA87 (holding evidence should be abstracted).

991-52 86 IndA666, 152NE873. [c] **Powers on appeal from city court.**–IndA 169NE695.

992-53 [b] **Marion County municipal court.**–Ind 157NE463. [c] **Jurisdiction of municipal court.**–IndA 164NE715.

992-56½ 204 Iowa746, 216NW78. [a] 204 Iowa746, 216NW78; Iowa 229NW 721; 121Kan346, 246P516. [b] **Search warrants.**–202 Iowa1116, 211NW503.

992-57 200 Iowa261, 204NW439; 200 Iowa1310, 206NW604; 202 Iowa1116, 211NW232; 207 Iowa153, 222NW393; 208 Iowa417, 224NW508. [c] **Time for appearance after time fixed in notice of suit.**–201 Iowa496, 207NW589. [d] **Setting aside defaults.**–201 Iowa496, 207 NW589. [e] **Appeals.**–201 Iowa496, 207 NW589. [f] **Vacating default judgments.**–Iowa 232NW819. [g] **Setting aside orders.**–Iowa 232NW819.

992-59 [c] **Quo warranto and damages.**–120Kan332, 243P302.

992-60 127Kan598, 274P735; 130Kan 228, 285P542.

992-63 226Ky347, 10SW(2d)1112; 227 Ky79, 11SW(2d)988; 232Ky145, 22SW (2d)595. [e] **Clerk need not approve new bond tendered to circuit court** for substitution of defective bond filed on appeal from county court. 232Ky145, 22SW(2d)595.

992-70 165La304, 115S571; 6LaA154; 8LaA391. [o] **Mandamus to cancel liens.**–9LaA95, 119S94.

992-73 10LaA437, 121S351; 9LaA631, 121S779; 2LaA354; 3LaA14; 3LaA 220; 3LaA331; 3LaA535; 5LaA284(1st case); 10LaA307, 120S895; 13LaA19, 127S754; 6LaA808; 7LaA143. [b] LaA 129S555. [c] 166La624, 117S741. [e] 10LaA317, 120S544; 1LaA160. [f] **Appeals.**–9LaA366, 119S439(1stcase). [g] **Time for taking appeals.**–6LaA87. [h] **Motions for new trial.**–6LaA87.

993-79 151Md367, 134A349; Md 152A 227. [b] (3) Procedure under speedy judgment act. 151Md430, 135A182; 152 Md268, 136A636. (4) Other instances. Md 152A227.

993-80 Mass 169NE410.

993-81 253Mass411, 149NE40.

993-81½-New. 257Mass465, 154NE667.

993-83 256Mass583, 152NE882 (settlement of draft report); Mass 171NE232.

993-83½-New. , and the municipal courts. 263Mass240, 160NE820.

993-84 229Mich515, 201NW530; 235 Mich95, 209NW195 (state does not constitute one judicial district).

993-85 233Mich356, 206NW582. [b] 233Mich356, 206NW582.

993-88 233Mich356, 206NW582; 238 Mich78, 213NW204.

993-91 171Minn475, 214NW469; 171 Minn469, 214NW472; 178Minn366, 227 NW200; Minn 233NW18.

993-92 175Minn294, 221NW20; Minn 233NW18. [c] 172Minn214, 214NW780. [i] **Equitable defenses.**–172Minn214, 214 NW780.

993-95 [f] **Process may be served by publication out of this court.**–169Minn 188, 210NW874.

993-97 [d] **Forcible entry and detainer.**–178Minn282, 226NW847.

994-99 147Miss851, 112S790.

994-1¼-New. County court's equity jurisdiction is limited to cases involving amount or value not exceeding one thousand dollars. 157Miss559, 128S 734.

994-2 [e] **Jurisdiction to determine constitutional question.**–322Mo 1230, 18 SW(2d)498.

994-3 308Mo 390, 272SW940; 317Mo 484, 297SW374; 320Mo 459, 8SW(2d) 61; 321Mo 275, 10SW(2d)524 (superintending board of election commissioners); MoA 6SW(2d)1025. [f] 317Mo 828, 297SW382.

994-7 77Mont260, 250P823; 82Mont 406, 267P952; Mont 289P566. [d] **Probate powers.**–77Mont182, 250P812 (ordering delivery of real estate to devisees notwithstanding order of sale). [e] **Has original jurisdiction, under Const. art. 8 § 11 in:** (1) All cases at law and in equity. 77Mont361, 251P 137, 49ALR627. (2) All criminal cases amounting to a felony. 77Mont361, 251 P137, 49ALR627. (3) All cases of misdemeanor not otherwise provided for. 77Mont361, 251P137, 49ALR627.

994-8 [g] **Modification or vacation of judgments.**–118Nebr254, 224NW284.

994-11 114Nebr442, 207NW935 (power which legislature may confer may include functions formerly within exclusive jurisdiction of courts of chancery).

994-15 [a] 118Nebr442, 225NW119.

994-21 [i] NJDistCt 149A637. [k] 104 NJL260, 140A883.

995-23 NJCh 147A502.

995-25½-New. county quarter sessions court, 103NJL300, 136A736.

995-26½-New. In New Mexico. 32NM6, 261P816.

995-27 216AppDiv291, 215NYS43. [d] **Proper matters relating to naturalization** are for exclusive jurisdiction of supreme court. 125Misc564, 211NYS501. [e] **Appellate division** is in effect supreme court sitting in banc with all original jurisdiction and powers vested in supreme court. 222AppDiv580, 227NYS1.

995-28 216AppDiv291, 215NYS43; 224 AppDiv278, 229NYS773; 225AppDiv 484, 233NYS530.

995-29 216AppDiv291, 215NYS43.

995-34½-New. Supreme court has no jurisdiction to determine whether resident of another state whose will was there probated died testate or intestate. 131Misc129, 226NYS162.

995-36 215AppDiv15, 213NYS77.

995-40 136Misc215, 239NYS347. [d] (2) But jurisdiction, once acquired, extends to county claims and offsets on both sides, although result increases plaintiff's recovery. 129Misc180, 221 NYS733. [j] **Failure to deny jurisdic-**

tional facts does not give county court jurisdiction of action against foreign corporation. 215**AppDiv**15, 213**NYS**77. [k] **Lack of jurisdiction of person** may be waived, where court could have jurisdiction in certain instances. 215**App Div**15, 213**NYS**77. [l] **Where court is without jurisdiction in any event**, its lack of jurisdiction may not be waived. 215**AppDiv**15, 213**NYS**77. [m] **Jurisdiction is coextensive with supreme court for certain purposes**, including power to pass upon equitable defense to suit to foreclose on mortgage. 124**Misc**832, 210 **NYS**331.

996-42 130**Misc**21, 223**NYS**468. [a] 217**AppDiv**38, 216**NYS**490 ($3,666.27). [b] 129**Misc**180, 221**NYS**733.

996-44 [a] **Power of county court to review** judgment of municipal court is by appeal. 125**Misc**683, 212**NYS**127 (statute).

996-44½-New. County court has no jurisdiction of actions against foreign corporations. 215**AppDiv**15, 213**NYS**77.

996-44⅓-New. Jurisdiction of the county court is limited to cases in which defendant is resident of county. 214**App Div**671, 212**NYS**707.

996-44¼-New. Complaint in county court must allege fact of defendant's residence in the county, 214**AppDiv**671, 212 **NYS**707.

996-44⅕-New. and absence of such allegation creates presumption of residence elsewhere. 214**AppDiv**671, 212 **NYS**707.

996-45 137**Misc**1, 242**NYS**408 (waiver of irregularities). [g] **"Contract implied"** includes action on statutory obligation. 129**Misc**814, 222**NYS**233. [h] **Municipal court code** (1) permits judgment by one defendant against other at same trial. 127**Misc**496, 216**NYS**561. (2) Code authorizes court to bring in third person. 127**Misc**496, 216**NYS**561. [i] **City court of Auburn.**–135**Misc**560, 239**NYS**340; 137**Misc**1, 242**NYS**408.

996-46 [e] **Judgments.**–128**Misc**502, 220 **NYS**164. [f] **Abatement.**–128**Misc**502, 220**NYS**164.

996-49 228**AppDiv**279, 239**NYS**206. [i] **No jurisdiction to grant summary judgment.**–127**Misc**117, 216**NYS**72. [j] **Application of Civil Practice Act.**–Provision in Buffalo City Court Act that provisions of Civil Practice Act shall apply, in absence of conflict, relates only to practice and procedure, and does not give added jurisdiction. 127**Misc**17, 216 **NYS**72. [k] **Demurrer.**–127**Misc**17, 216 **NYS**72. [l] **Bill of particulars.**–131 **Misc**925, 229**NYS**287 (preclusion of testimony).

996-53 [b] **Court held to have jurisdiction of tenant's counterclaim** in lessor's summary action. 217**AppDiv**38, 216 **NYS**490.

996-62 224**AppDiv**612, 231**NYS**517; 133**Misc**482, 232**NYS**516. [b] **Jurisdiction to foreclose mechanics' liens not exceeding three thousand dollars**, under constitutional amendment of 1925, which was intended to continue jurisdiction but raise limitation, and laws of 1926. 132**Misc**572, 230**NYS**321. [c] **"Property," in constitutional amendment of 1925**, conferring jurisdiction in actions of replevin, foreclosure of mechanics' liens, and liens on personal property, where "property" involved does not exceed three thousand dollars, refers to personalty and not to realty. 132**Misc** 572, 230**NYS**321. [d] **Limitation of jurisdiction** to foreclose mechanics' liens does not apply to cases where realty involved does not exceed three thousand dollars, but merely to cases where lien claimed does not exceed three thousand dollars. 132**Misc**572, 230**NYS**321. [e] **In replevin.**–133**Misc**482, 232**NYS**516.

996-63 See also 224**AppDiv**612, 231**NYS** 517.

997-64 137**Misc**105, 243**NYS**360. [e] **Power to stay proceedings brought in violation of arbitration agreement for submission** is not conferred by statute giving court concurrent jurisdiction with supreme court in certain cases. 134 **Misc**481, 235**NYS**450.

997-67 129**Misc**166, 220**NYS**812; 129 **Misc**234, 221**NYS**266; 129**Misc**680, 221 **NYS**522; 136**Misc**365, 240**NYS**829. [k] **Writ of seizure to obtain possession of chattels.**–129**Misc**234, 221**NYS**266. [l] **Warrant of seizure in action to foreclose chattel mortgage.**–132**Misc**734, 230**NYS** 425. [m] **Joinder of issue.**–137**Misc** 382, 244**NYS**23.

997-81 137**Misc**397, 241**NYS**78.

997-85 136**Misc**447, 241**NYS**349; 137 **Misc**725, 244**NYS**437. [a] 135**Misc**212, 237**NYS**435.

997-85½-New. Motion for reargument of motion to set aside verdict and for new trial. 136**Misc**55, 239**NYS**127.

997-87 125**Misc**637, 210**NYS**598.

998-91 129**Misc**155, 220**NYS**161.

998-92 125**Misc**259, 210**NYS**618. But see 134**Misc**836, 236**NYS**588. [a] **Proof that chattels sued for are worth more than $1000**, deprives court of jurisdiction. 126**Misc**314, 213**NYS**40 (in action to recover chattels alleged worthless). [b] **In action to recover chattels worth less than one thousand dollars** court has jurisdiction even if damages for detention exceed one thousand dollars. 126**Misc**314, 213**NYS**40. [c] **In action to recover chattel** if second cause of action for one thousand dollars damages as breach of contract is another count for unlawful detention it may be disregarded. 126**Misc**314, 213**NYS**40. [d] **Court has jurisdiction in action by several plaintiffs for injuries** where total amount of separate judgments is over statutory amount. 127**Misc**543, 216**NYS**513.

998-92½-New. but if it is another independent cause of action the court has jurisdiction for amount claimed in summons, only seven hundred and fifty dollars. 126**Misc**314, 213**NYS**40.

998-94 125**Misc**259, 210**NYS**618 (in replevin action court is without power to order amendment of complaint reducing value below one thousand dollars to give it jurisdiction).

998-95 129**Misc**637, 222**NYS**244; 132 **Misc**502, 230**NYS**262.

998-96 127**Misc**611, 217**NYS**438; 128 **Misc**400, 219**NYS**683.

998-3 [b] **Equitable defense**, claiming title, to defeat landlord's claim and for dismissal of his petition, gives municipal court jurisdiction. 132**Misc**502, 230 **NYS**262.

998-8 129**Misc**234, 221**NYS**266; 133 **Misc**802, 233**NYS**570. [p] **Matrimonial cases.**–125**Misc**637, 210**NYS**598. [q] **Jurisdiction of writ of seizure** to obtain possession of chattels. 129**Misc**234, 221 **NYS**266. [r] **Summary proceeding by vendor for repossession of premises** on nonpayment of rent under sale contract is not within court's jurisdiction. 132 **Misc**502, 230**NYS**262.

999-9 135**Misc**744, 240**NYS**683.

999-14 245**NYS**98.

999-21 227**AppDiv**742, 236**NYS**657.

1000-25 [b] **In such action, fact that plaintiff relied on violation** of restriction in deed did not oust municipal court of jurisdiction. 125**Misc**840, 211**NYS** 469.

1000-26 244**NYS**332.

1000-56 130**Misc**293, 224**NYS**71.

1000-58 133**Misc**95, 231**NYS**242.

1000-59 133**Misc**95, 231**NYS**242.

1000-60½-New. Equitable lien of creditor on assets of debtor cannot be enforced in municipal court. 244**NYS**332.

1000-61 135**Misc**548, 238**NYS**569. [a] (3) Civ. Pract. Rules, rule 155 held applicable. 126**Misc**685, 214**NYS**444. [b] **Constitutionality of particular sections.**–133**Misc**706, 233**NYS**292.

1000-62 133**Misc**802, 233**NYS**570. [g] **Denial of motion without leave to renew** precludes bringing of identical motion again. 126**Misc**584, 214**NYS**104. [h] **Where issue of fact is raised by pleadings and affidavits** (1) defendant is entitled to trial thereon. 126**Misc**589, 214 **NYS**60. (2) Court cannot decide issues on motion. 126**Misc**589, 214**NYS**60. [i] **Consolidation of actions.**–135**Misc**548, 238**NYS**569.

1001-63 131**Misc**849, 228**NYS**344.

1001-64 125**Misc**161, 210**NYS**513 (where neither plaintiff nor defendant resides in district, denial of application by defendant to change venue to district of plaintiff's residence is reversible error); 135**Misc**213, 237**NYS** 374; 137**Misc**687, 243**NYS**365.

1001-65 127**Misc**543, 216**NYS**513. [c] **Civil Practice Act is incorporated into Municipal Court Act** as to joinder of parties. 127**Misc**543, 216**NYS**513.

1001-66 133**Misc**802, 233**NYS**570.

1001-67 133**Misc**577, 233**NYS**316. [b] (3) May not be ordered on showing that defendant's residence cannot be ascertained. 128**Misc**13, 217**NYS**186.

1001-68 130**Misc**503, 224**NYS**429 (filing summons and making return to warrant of seizure nunc pro tunc).

1001-71 133**Misc**211, 231**NYS**189; 133 **Misc**607, 232**NYS**519. [f] **Service of pleadings between defendants.**–133**Misc** 263, 231**NYS**643. [g] **Oral or written demurrer.**–138**AppDiv**533, 123**NYS**327; 69**Misc**618, 126**NYS**73; 62**Misc**492, 115 **NYS**217. [h] **Joinder of issue on filing answer.**–137**Misc**382, 244**NYS**23.

1001-73 [a] **Preclusion from giving evidence** for failure to file bill of particulars. 136**Misc**650, 240**NYS**360.

1001-80 127**Misc**455, 215**NYS**772. [a] **Motion to vacate notice to examine defendant before trial**, returnable in supreme court, held properly made in municipal court. 127**Misc**455, 215**NYS** 772.

1001-83 [a] (2) Warrant of seizure denied where notice of application failed to state time and place where it would be made. 128**Misc**53, 217**NYS**830.

1002-89 [c] **Stay of trial in order to show cause** served on plaintiff's counsel on day before trial in municipal court should have been disregarded by court. 126**Misc**685, 214**NYS**444 (even though there are no terms in such court).

1002-92 57**Misc**623 108**NYS**540; 61 **Misc**220, 113**NYS**550. [e] **Laches.**–133 **Misc**710, 233**NYS**331. [f] **Time in which application should be made.**–136**Misc**56, 239**NYS**128. [g] **Costs not limited to ten dollars** as condition of opening default. 136**Misc**211, 239**NYS**330.

1002-94 219**AppDiv**829, 220**NYS**544; 127**Misc**149, 215**NYS**435; 131**Misc**473, 227**NYS**357; 131**Misc**772, 227**NYS**355. [f] **Judgment prepared by attorney for unsuccessful party** and delivered by him to clerk without notice held invalidly entered. 127**Misc**149, 215**NYS**435. [g] **Provision for body execution.**–133**Misc** 267, 231**NYS**646. [h] **Notice of entry.**–133**Misc**708, 233**NYS**356.

1002-95 226**AppDiv**675, 233**NYS**221. [a] **Orders not appealable.**–133**Misc**409, 231**NYS**584.

1002-97 133**Misc**267, 231**NYS**646.

1002-1 [a] 134**Misc**767, 236**NYS**273. [e] **Judgment wrongfully entered** changed as to date to permit appeal. 127 **Misc**149, 215**NYS**435.

1002-2 219**AppDiv**829, 220**NYS**544; 133**Misc**753, 233**NYS**142. [h] **After granting or denying motion to set aside verdict**, trial court cannot entertain motion for reargument. 126**Misc**375, 213 **NYS**394.

1002-4 [d] **Municipal court judgment debtor may be examined** on return of unsatisfied execution. 128**Misc**380, 218 **NYS**675. [e] **Body execution.**–133**Misc** 267, 231**NYS**646.

1002-7 131**Misc**473, 227**NYS**357; 131 **Misc**772, 227**NYS**355.

1003-13 128**Misc**599, 219**NYS**566.

1003-16 218**AppDiv**273, 218**NYS**361.

1003-20½-New. **Special term** has jurisdiction in proceedings by city of New York to condemn lands, to sever city's claims to lands under water, and after making findings dismiss claims thereto. 215**AppDiv**204, 213**NYS**486.

1003-21 192**NC**821, 135**SE**462; 193**NC** 540, 137**SE**585.

1004-24 193**NC**540, 137**SE**585. [a] 198 **NC**269, 151**SE**249. [c] **Forsyth county court.**–190**NC**599, 130**SE**498.

1004-27 [a] 57**ND**368, 221**NW**889.

1004-30 29 **OhA**62, 163**NE**43; 121 **Oh** 401, 169**NE**450; **Oh** 170**NE**866; **OhA** 173**NE**47. [a] 15 **OhA**378. [b] 20 **OhA** 367, 152**NE**677. [c] **Transfer on error to municipal court.**–152 **OhA**677.

1004-31 118 **Oh**273, 160**NE**856; 121 **Oh** 142, 167**NE**363; 19 **OhA**23; 29 **OhA**283, 162**NE**818; 31 **OhA**512, 167**NE**486 (no equity jurisdiction); **OhA** 173**NE**47; **OhA** 173**NE**443. [a] 24**F(2d)**38; 119 **Oh**393, 164**NE**419; 33 **OhA**276, 168**NE** 856. [c] **Municipal court of Toledo.**–

22 OhA426, 154NE57. [d] **Municipal court of Columbus.**–27 OhA310, 161NE 42. [e] **Strict pleading not required in municipal courts.**–30 OhA545, 165NE 855. [f] **Appeals from municipal courts.**–30 OhA97, 164NE365. [g] **Jurisdiction of municipal court of Dayton.**–27 OhNPNS125 (limited equity jurisdiction).

1004–32 [a] **Appeals from Municipal Courts.**–34 OhA84, 170NE443.

1004–32½–New. , and Dayton municipal court. 24 OhNPNS221.

1004–32½–New. Municipal Courts.–Findings of fact and law. 34 OhA433, 171NE362.

1004–33 122 Okl 295, 254P966.

1004–34 114 Okl 72, 243P501; 119 Okl 62, 248P315; 123 Okl 193, 252P847; 127 Okl 295, 260P745; 144 Okl 101, 289 P732; Okl 292P827 (mandamus). [f] 122 Okl 160, 252P410; 41 OklACR63. [k] 118 Okl 178, 246P848; 37 OklACR 551. [q] **Construction of will and determination of rights of pretermitted children.**–37 OklACR551. [r] **Jurisdiction to annul judgments of other courts for fraud.**–37 OklACR551. [s] **Determination of heirship.**–38 OklACR253. [t] **Court of general jurisdiction.**–38 Okl ACR253; 128 Okl 27, 261P167. [u] **Determination of title to real property.**–38 OklACR253. [v] **Showing by journal of orders in vacation.**–122 Okl 160, 252P410. [w] **Jurisdiction to vacate or modify its own judgment.**–124 Okl 240, 255P700. [x] **Terms.**–127 Okl 295, 260P745. [y] **Collateral attack on judgments.**–128 Okl 27, 261P167.

1004–35 114 Okl 121, 244P436; 32 Okl ACR372; 37 OklACR698 (court of general jurisdiction). [a] (1) 112 Okl 13, 239P887; 113 Okl 265, 242P185; 119 Okl 157, 244P444; Okl 245P595; 118 Okl 178, 246P848; 121 Okl 275, 249P 924; 120 Okl 103, 250P793; 123 Okl 193, 250P847; 123 Okl 1, 251P734; 123 Okl 38, 251P1028; 122 Okl 202, 253P 300; 122 Okl 295, 254P966; 124 Okl 181, 254P972; 37 OklACR551; 38 Okl ACR253; 38 OklACR283; 40 OklACR 591 [reh pending]; 41 OklACR63; 41 OklACR85. [c] OklCr 273P369. [d] 118 Okl 178, 246P848. [h] 37 OklACR698. [i] **Collateral attack.**–119 Okl 157, 244P 444. [j] **Jurisdiction of administration proceeding transferred from federal court of Indiana Territory by virtue of Enabling Act** is not ousted by act of March 12, 1908, where no application for transfer is made, though proceeding would have been triable in another county had it been instituted since admission of state into union. 114 Okl 121, 244P436. [k] **Sale of land.**–124 Okl 170, 254P1. [l] **Removal of guardians and administrators.**–121 Okl 275, 249P924.

1004–36 119 Okl 157, 244P444; 118 Okl 178, 246P848; 37 OklACR698.

1004–38 38 OklACR283.

1004–39 38 OklACR253.

1004–39½–New. City courts have jurisdiction of cases for the detention only of real property as well as for forcible entry and detention. 132 Okl 234, 270 P52.

1004–40 118 Or260, 246P741; 132 Or1, 271P994; 131 Or162, 281P185 (striking new matter from answer). [d] **Jurisdiction.**–118 Or556, 247P806.

1004–41 119 Or586, 250P740. [c] 113 Or612, 233P567.

1004–41½–New. , and court of domestic relations, holding such court, has jurisdiction of offense of contributing to delinquency of child. 117 Or466, 242 P440.

1004–41½–New. and the municipal courts. 123 Or1, 260P1004.

1004–41¼–New. Duties of a municipal judge in enforcing ordinances are municipal. 123 Or1, 260P1004.

1004–41½–New. Duties of a municipal judge, when acting as an ex officio justice of the peace, are governmental. 123 Or1, 260P1004.

1004–42 [c] **Appeals from.**–88PaSuper 332.

1005–43 295Pa291, 145A278 (as to election of president judge); 91PaSuper 41; 91PaSuper123; 91PaSuper172.

1005–44 92PaSuper359; 93PaSuper49; 98PaSuper384; 98PaSuper447; 12Pa Dist&Co 578. [h] 92PaSuper254; 92 PaSuper359. [k] **Interlocutory orders not appealable.**–89PaSuper177. [l] **No jurisdiction to determine controversies between poor districts and determine questions as to settlement of pauper.**–91PaSuper261. [m] **Proceedings concerning dependent, delinquent, or neglected children.**–91PaSuper261. [n] **Jurisdictional amount in equity cases.**–92 PaSuper149.

1005–45 94PaSuper383; 9PaDist&Co 262.

1005–46 93PaSuper357 (writ of error on refusal of court to enter judgment on ground of sufficiency of affidavit of defense); 11PaDist&Co 752. [a] 92Pa Super363. [p] **Declaratory judgment.**–284Pa455, 131A265. [q] **Duty of prothonotary to enter judgment on warrant of attorney constituting integral part of lease.**–13PaDist&Co 56. [r] **Setting aside judgment of non pros.**–13Pa Dist&Co 86.

1005–46½–New. 284Pa455, 131A265.

1005–47 94PaSuper486.

1005–48½–New. there being decisions relating to the district and municipal courts, and appeals therefrom. 32Porto Rico 504 (change of venue); 32Porto Rico 818.

1005–48½–New. There are decisions relating to district and municipal courts. 29PortoRico 817. [a] **Municipal court** has no jurisdiction of suit to cancel mortgage, though amount thereof may be less than five hundred dollars. 32 PortoRico 818. [b] **Special proceedings in municipal courts** for claims not exceeding one hundred dollars see 32Porto Rico 504. [c] **On appeal from municipal court** trial in district court is imperatively de novo and incident of trial in former court cannot be reviewed in latter. 32PortoRico 3.

1005–48¼–New. Porto Rico municipal courts. 34PortoRico 757 (proceedings under Act No. 10 of 1921).

1005–49 [b] 48RI 144, 136A308.

1005–53 198NC575, 152SE692.

1005–54 [d] **Circuit court** has jurisdiction to issue writ of mandamus against board of veterinary examiners, though none of board resides in county. 140 SC48, 134SE527.

1005–54½–New. magistrate courts, 136 SC90, 134SE224.

1005–55 132SC45, 128SE40 (general jurisdiction concurrent with probate court are certain matters).

1005–56½–New. circuit court, 49SD102, 206NW231.

1005–57 51SD432, 214NW838. [b] 52 SD139, 216NE878. (1) 51SD144, 212 NW866. [h] **Default judgments.**–51SD 144, 212NW866. [i] **Vacating judgments.**–51SD144, 212NW866.

1005–59 158Tenn383, 13SW(2d)800, 62 ALR904.

1005–60½–New. , and city courts. 157 Tenn68, 6SW(2d)332.

1005–61 TexCommnA 277SW1053 (judgment void); TexCommnA 2SW(2d)834. [b] **County court has jurisdiction** to foreclose attachment lien on real estate. TexCivA 291SW948.

1006–62 TexCivA 6SW(2d)136 (action for rent); TexCivA 21SW(2d)1101; TexCivA 32SW(2d)388. [f] **Attachment levied in suit within jurisdiction.**–Tex CommnA 2SW(2d)834.

1006–63 116Tex489, 294SW844; Tex CivA 286SW261; TexCivA 14SW(2d) 357. [g] **Pleadings.**–TexCivA 19SW(2d) 71. [h] **Reformation of deed.**–TexCivA 20SW(2d)158.

1006–64 TexCivA 275SW163; TexCivA 280SW844; TexCivA 281SW286; Tex CivA 288SW504; TexCivA 288SW508; TexCivA 289SW751; TexCivA 296SW 967; TexCivA 298SW625; TexCivA 11 SW(2d)224; TexCivA 11SW(2d)369; TexCivA 15SW(2d)137; TexCivA 19SW (2d)71; TexCivA 20SW(2d)241 (petition must allege value of mortgaged property to be foreclosed, and pleading may be amended to show such value to be within jurisdiction); TexCivA 21 SW(2d)380 (application to enjoin execution must state value of subject matter involved); TexCivA 21SW(2d)563; TexCivA 21SW(2d)743; TexCivA 22SW (2d)147; TexCivA 23SW(2d)748; Tex CivA 24SW(2d)514; TexCivA 26SW (2d)345. [d] **Where interpleader action involved sum within jurisdiction,** claim by one defendant of $84.75 held not outside jurisdiction; jurisdiction being determined by amount put in controversy by plaintiff. TexCivA 26SW(2d) 345.

1006–65 TexCivA 280SW243; TexCivA 280SW879; TexCivA 29SW(2d)865.

1006–66 115Tex576, 285SW1060; Tex CivA 21SW(2d)30.

1006–67 TexCivA 275SW268.

1006–69½–New. attachment, Tex CommnA 2SW(2d)834.

1006–74 TexCivA 297SW503.

1006–75 118Tex526, 18SW(2d)1049; TexCivA 271SW644; TexCivA 276SW 324; TexCivA 282SW262; TexCivA 286 SW501; TexCivA 291SW311; TexCivA 18SW(2d)515. [g] **Equity powers.**–Tex CivA 286SW642. [h] **Sale in partition proceedings to infant's next of kin.**–Tex CivA 286SW642. [i] **Court of general jurisdiction.**–TexCivA 8SW(2d)187.

1006–76 TexCivA 271SW644.

1006–77 TexCivA 288SW267; TexCivA 297SW234; TexCivA 30SW(2d)814.

1006–78 TexCivA 274SW217; TexCivA 282SW262; TexCivA 298SW443 (district court has no jurisdiction of action for only nominal damages); TexCivA 4SW(2d)193; TexCivA 29SW(2d)436.

1007–79 TexCivA 5SW(2d)257.

1007–80 [b] TexCivA 21SW(2d)355. [c] TexCivA 286SW501.

1007–82 116Tex662, 287SW45.

1007–83 TexCivA 8SW(2d)741. [c] **Action on guardian's bond.**–TexCivA 19SW (2d)862.

1007–88 105TexCr416, 289SW69; Tex Cr 289SW72(3dcase); TexCr 289SW72 (4thcase); TexCr 289SW72(2dcase); TexCr 289SW72(1stcase); TexCr 289 SW73(1stcase); TexCr 289SW73(2d case). [b] **Written pleadings unnecessary.**–179Ark600, 17SW(2d)305.

1007–90 67Utah256, 247P481; Utah 264P968; Utah 268P1029; Utah 289P 132 (writ of prohibition).

1007–91 [a] Utah 264P968. [c] **Appeal dismissed** where record failed to show whether action commenced in city court had been tried there and how district court acquired jurisdiction. 67Utah501, 248P477. [d] **Action by irrigation district against water users for proportionate share of expense of maintaining ditches** (1) is not action involving title to water so as to defeat jurisdiction of city court. 66Utah300, 242P348. (2) Amount of contribution sought to be recovered in such action is not tax, impost, or toll so as to deprive city court of jurisdiction. 66Utah300, 242P348. [e] **Appeals.**–Utah 273P515.

1007–92 100Vt387, 138A867. [f] **Authority and jurisdiction.**–101Vt195, 142 A762 (only what statute confers).

1007–93 [d] **Municipal courts.**–Vt 148 A752; Vt 148A879; Vt 151A509.

1007–94 148Va610, 139SE273. [a] 145 Va317, 133SE812.

1007–98 144Wash351, 258P27.

1007–2 101WVa708, 133SE390. [c] **Mandamus.**–169Ark592, 276SW604.

1007–3 100WVa253, 130SE456.

1007–5 194Wis495, 217NW295 (violation of village ordinance); 200Wis36, 227NW253; 200Wis367, 228NW503. [c] **Costs must be paid within statutory** time to perfect record in appeal to circuit court. 195Wis1, 216NW498. [d] **Statute as to procedure on appeal** held self-executing. 195Wis1, 216NW498.

1007–8 192Wis111, 211NW652, 51ALR 1106. [c] 198Wis43, 223NW579.

1007–9 200Wis284, 227NW24.

1008–11 Alta [1928] 1DomLR644.

1008–11½–New. , and district courts. Alta [1929] 4DomLR159.

1008–13 36BC142, [1925] 3DomLR 1142.

1008–14½–New. In Canada there have been decisions relating to the jurisdiction of the exchequer court. [1925] 3 DomLR1089.

1008–15 Man [1926] 4DomLR466, [1926] 3WestWkly8. [a] Man [1927] 3 DomLR471.

1008–18 NS [1925] 3DomLR966, 44Can CrCas199.

1008–20 Ont [1925] 3**DomLR**301; 59 **OntL**331, [1926] 4**DomLR**239.

1008–23 Ont [1930] 2**DomLR**545. [c] **Juries.–Ont** [1929] 3**DomLR**279. [d] **Jury trial.–Ont** [1930] 2**DomLR**565.

1008–25 Can [1929] 3**DomLR**801.

1008–28½–New. , and districts courts. **Sask** [1925] 3**DomLR**746; **Can** [1925] 3 **DomLR**40 (mechanic's liens); 21**SaskL** 1, [1926] 4**DomLR**81, [1926] 2**WestWkly** 752.

1008–28½–New. In Saskatchewan there have been decisions relating to the district courts. [1929] 3**DomLR**337 (restoration of counterclaim after withdrawal).

1008–30 [d] 19 **OhA**404.

1008–33 76**CalA**162, 244**P**156; 77**CalA** 599, 247**P**249; 120**Kan**95, 242**P**138 (not courts of general jurisdiction); 155**Md** 1, 141**A**396; 128**Misc**714, 220**NYS**141; 286**Pa**505, 134**A**489; 101**Vt**343, 143**A** 302.

1009–34 175**Ark**530, 18**W(2d)**16. Contra **Man** [1930] 2**DomLR**177.

1009–35 189**NC**703, 128**SE**20.

1009–36 161**Ga**311, 130**SE**914; 249**Mich** 558, 229**NW**481; 189**NC**703, 128**SE**20; 113 **Okl** 265, 242**P**185; 120 **Okl** 103, 250 **P**793; 124 **Okl** 181, 254**P**972; 40 **OklACR** 591 [reh pending].

1009–37 189**NC**703, 128**SE**20; 113 **Okl** 265, 242**P**185; 40 **OklACR**591 [reh pending].

1009–38 7**Alaska**292; **Ida** 291**P**1051; 127**Kan**847, 275**P**173; 175**Minn**68, 220 **NW**406; 123 **Okl** 106, 251**P**981; 125 **Okl** 121, 256**P**918; 37 **OklACR**698.

1009–39 112 **Okl** 13, 239**P**887; 113 **Okl** 265, 242**P**185; 117 **Okl** 181, 245**P**594; 118 **Okl** 178, 246**P**848; 120 **Okl** 103, 250 **P**793; 123 **Okl** 106, 251**P**981; 124 **Okl** 181, 254**P**972; 37 **OklACR**698; 40 **OklACR**591 [reh pending].

1009–42 77**CalA**599, 247**P**249; **Nebr** 228**NW**852; 117 **Okl** 181, 245**P**594; 118 **Okl** 178, 246**P**848; 123 **Okl** 38, 251**P** 1028; 124 **Okl** 181, 254**P**972.

1009–43 98**Fla**444, 124**S**36.

1009–44 128**Misc**714, 220**NYS**144.

1009–44½–New. Probate powers are distinct from law and equity, although they may be exercised by same court as court of general jurisdiction. 201 **Iowa**884, 208**NW**281.

1009–45 44 **Ida**211, 256**P**369; 235**Mich** 201, 209**NW**83 (validity of postnuptial contract); 248**Mich**360, 277**NW**813; 25 **OhA**426, 158**NE**279; 123 **Okl** 198, 252**P** 847; 37 **OklACR**698; 8**PaDist&Co** 121; 8**PaDist&Co** 717; 13**PaDist&Co** 41; 13 **PaDist&Co** 350; **TexCivA** 272**SW**252; **TexCivA** 276**SW**324 (sales of property belonging to estates being administered). [b] **Determination of heirship and distribution of decedent's estate.–** 123 **Okl** 193, 252**P**847. [c] **Settlement, partition, and distribution of estate** are within exclusive jurisdiction of probate court in which administration is pending unless will limits jurisdiction as authorized by statute. **TexCivA** 298**SW** 643.

1009–46 8**PaDist&Co** 717.

1010–47 **TexCommnA** 29**SW(2d)**1060.

1010–48 199**Wis**273, 226**NW**306 (county court).

1010–50 77**CalA**599, 247**P**249.

1010–53 112 **Okl** 13, 239**P**887; **Okl** 246 **P**849; 123 **Okl** 38, 251**P**1028; 126 **Okl** 71, 258**P**732; 143 **Okl** 57, 287**P**414; 37 **OklACR**698; **TexCivA** 290**SW**852; **Tex CivA** 297**SW**482 (county court in probate matters cannot divest minor of interest in land); 199**Wis**273, 226**NW**306. But see 121 **Or**462, 255**P**901. [a] **In Oklahoma.–**142 **Okl** 163, 286**P**327.

1010–58 77**CalA**321, 246**P**334. [a] **Validity of agreement not to contest will** may be determined by surrogate without jury. 217**AppDiv**342, 217**NYS**176.

1010–60 217**AppDiv**342, 217**NYS**176.

1010–64 44 **Ida**211, 256**P**369; 13**Pa Dist&Co** 41; **Sask** [1929] 4**DomLR**783.

1010–65 77**CalA**321, 246**P**334; 127**Kan** 847, 275**P**173; 228**AppDiv**379, 239**NYS** 1; 11**PaDist&Co** 636. [b] **On entry of final order of distribution,** jurisdiction of probate court ends. 77**CalA**321, 246 **P**334.

1010–66½–New. but not of property of person who is alive, for to do so would violate Fourteenth Amendment of the federal constitution. 235**Mich**344, 209 **NW**177.

1011–70 125**Me**171, 132**A**211; **Mass** 170 **NE**465; **Mass** 172**NE**647; 8**PaDist&Co** 717; 13**PaDist&Co** 41.

1011–72 8**PaDist&Co** 717. [a] **Saskatchewan surrogates' court** cannot direct inquiry on footing of willful default, but such order can only be made by court of kings bench. [1930] 2 **DomLR**290.

1011–75 198**Cal** 183, 244**P**343.

1011–78 8**PaDist&Co** 717.

1011–85 220**Ala**12, 123**S**573(4thease); 77**CalA**599, 247**P**249; 89**CalA**148, 264**P** 304 (supreme court); 85 **IndA**407, 152 **NE**57; 155**Md**1, 141**A**396; 259**Mass**76, 156**NE**51; 238**Mich**679, 214**NW**320; 249 **Mich**558, 229**NW**481; 175**Minn**68, 220 **NW**406 (court of superior jurisdiction); 322**Mo** 258, 14**SW(2d)**646; 220**MoA**821, 278**SW**822; 221**AppDiv**702, 225**NYS**113; 12**PaDist&Co** 71; 132**SC**45, 128**SE**40 (such jurisdiction as general assembly may confer). [c] (2) Probate courts have jurisdiction to hear and determine all questions relating to inheritance taxes. 21 **OhA**412, 153**NE**225. [f] 168**Minn** 147, 210**NW**40. [g] **Provisions of Surrogate's Court Act must be read in light of its history and purpose.–**134**Misc**374, 235**NYS**461.

1012–86 107**Conn**281, 140**A**721; 238 **Mich**679, 214**NW**320; 80**Mont**159, 260**P** 128 (district court sitting in probate); 129**Misc**293, 221**NYS**305.

1012–87 107**Conn**281, 140**A**721; 80 **Mont**159, 260**P**128.

1012–89 141 **Okl** 24, 284**P**60 (are courts of original general jurisdiction as to probate matters). But see 286**Pa**505, 134**A**489.

1012–90 103**Conn**226, 130**A**157; 110 **Conn**150, 147**A**562; 217**AppDiv**342, 217 **NYS**176; 129**Misc**293, 221**NYS**305; 133 **Misc**30, 231**NYS**359.

1012–91 120**Kan**95, 242**P**138 (to determine whether amount of attorney's fees paid by executor were reasonable and allow them as expenses of administration); 121**Kan**346, 246**P**516; **Md** 150**A**793; 260**Mass**369, 157**NE**693; 316**Mo** 953, 292**SW**419 (to order administrator to take control of realty); 220**MoA**821, 278**SW**822; 217**AppDiv**342, 217**NYS**176; 127**Misc**288, 216**NYS**430; 128**Misc**518, 219**NYS**763; 129**Misc**293, 221**NYS**305; 131**Misc**266, 227**NYS**543 (to declare marriage void or voidable); 134**Misc**374, 235**NYS**461; 136**Misc**118, 238**NYS**749 (disposition of funds deposited with city chamberlain or state treasury); 229**AppDiv**786, 242**NYS**14; 189**NC**703, 128**SE**20 (enumerating general powers of probate court including partition); 22 **OhA**324, 153**NE**864; 13**PaDist&Co** 350; 13**PaDist&Co** 703; 187**Wis**105, 203**NW**748 (may construe will in final decree for final accounting, determine inheritance tax, and assign residue of estate); **Sask** [1929] 4**DomLR**783 (whether properties sold for less than could have been realized).

1013–92 22**F(2d)**860 (to render judgment against creditors of estate or impress equitable lien on land); 195**Cal** 354, 233**P**330 (action by heirs of deceased person to submit contract between deceased and one having fiduciary relations with deceased); 77**CalA**321, 246**P**334; 77**CalA**599, 247**P**249; 120 **Kan**95, 242**P**138 (no authority to pass upon claim of one person against another for money judgment); 136**Misc** 688, 242**NYS**207 (trusts other than testamentary trusts); 51**ND**543, 200**NW** 94 (determination of rights in property left by deceased where such right does not depend on heirship or will but upon contract). [h] **Rescission of contract to make will.–**Heirs seeking to rescind contract of testator to make will must proceed in court of equity and not in probate. 195**Cal** 354, 233**P**330. [i] **Remedy for violation of control to make will** cannot be litigated in surrogate's court but must be pursued in court of law or equity. 195**Cal** 354, 233**P**330.

1013–92½–New. The jurisdiction of the probate court to administer an estate continues until approval of final report and discharge of executor. 207 **Iowa** 20, 222**NW**564.

1014–93 34**F(2d)**18; 97**CalA**138, 275**P** 453; **Fla** 130**S**596; 246 **IllA**518; 316 **Mo** 968, 293**SW**116; 220**MoA**821, 278**SW** 822 (dictum); **MoA** 14**SW(2d)**521; **MoA** 22**SW(2d)**836; **MoA** 29**SW(2d)**240; **Nebr** 233**NW**456; 286**Pa**505, 134**A**489; 288**Pa** 398, 136**A**232. [a] (1) 27 **OhNPNS**285. (14) In absence of express statutory authority, probate courts have no jurisdiction to decree specific performance. 39**Wyo** 163, 270**P**1068. (15) Set aside return by intestate of note given by defendant. 316**Mo** 968, 293**SW**116. (16) Other instances. 136**Misc**688, 242**NYS** 207. [f] (2) Specific performance is not included in matters over which probate court is given concurrent equity jurisdiction under New York Statute. **Mass** 166**NE**836. [g] **Equitable jurisdiction of probate court under statute** is confined to trusts created by will or other instrument. **Mass** 166**NE**833.

1015–94 102**CalA**178, 283**P**331; 105 **Conn**557, 136**A**108; 98**Fla**444, 124**S**36; 236 **IllA**168; 247 **IllA**175; 253 **IllA**229; 204 **Iowa**346, 213**NW**240; **Mass** 173**NE** 514; 221**MoA**821, 278**SW**822; 222**MoA** 276, 297**SW**138; **Nebr** 233**NW**456; 99 **NJEq**S25, 134**A**646; 217**AppDiv**342, 217 **NYS**176; 127**Misc**202, 216**NYS**331; 129 **Misc**293, 221**NYS**305; 228**AppDiv**379, 239**NYS**1; 27 **OhNPNS**285; 286**Pa**505, 134**A**489; 297**Pa**451, 147**A**102; 299**Pa** 359, 149**A**658; **TexCivA** 275**SW**175. [a] (7) 288**Pa**337, 135**A**751. (8) Compel return of property to estate by equitable replevin. **Mass** 166**NE**833. (9) Relieve party from terms and effect of compromise agreement in probate proceeding, if found fraudulent. 128**Misc**788, 219**NYS**759. (10) Set aside as invalid upon proper proof, general release and withdrawal of objection to probate of will. 128**Misc**788, 219**NYS**759. [d] 189 **NC**703, 128**SE**20 (clerk of superior court exercising probate jurisdiction under statute). [o] **Probate court had no jurisdiction to compel specific performance of oral agreement** to turn certain sum over to estate and administrator. **Mass** 166**NE**836.

1016–95 125**Kan**223, 264**P**50, 54 [quot CJ]; 136**Misc**688, 242**NYS**207.

1016–95½–New. Surrogate's court is of statutory creation, having only equitable powers conferred by statute. 131**Misc** 208, 225**NYS**453.

1016–95¼–New. In New York equitable jurisdiction of surrogate's court extends to any proceeding on return of any process of such court. 131**Misc**208, 225 **NYS**453.

1016–95¼–New. Surrogate's court has equitable jurisdiction on accounting to determine validity and enforce contract to dispose of property by will. 131**Misc** 208, 225**NYS**453.

1016–95½–New. Equitable jurisdiction of surrogate's court over contracts to dispose of property by will does not impair jurisdiction of supreme court, which should not act, however, if surrogate's court has complete power. 131 **Misc**208, 225**NYS**453.

1016–97 [a] (7) Place lien on property bought by agent who wrongfully used decedent's funds. 128**Misc**288, 218**NYS** 382.

1016–2 189**NC**703, 128**SE**20 [citCJ].

1017–7 98**Fla**444, 124**S**36; 120**Kan**200, 243**P**296; 318**Mo** 948, 2**SW(2d)**771; 74 **Mont**449, 241**P**648; 219**AppDiv**594, 220 **NYS**331; 128**Misc**718, 221**NYS**205; 129 **Misc**283, 221**NYS**462; 134**Misc**724, 236 **NYS**630; 51**ND**543, 200**NW**94; 124 **Or** 443, 264**P**432; 90**PaSuper**589; 10**Pa Dist&Co** 591; **TexCivA** 290**SW**852; **Tex CivA** 297**SW**891; **TexCivA** 26**SW(2d)** 657; **Utah** 284**P**992. [f] (2) Surrogate's court has jurisdiction to determine decedent's indebtedness to executor before latter can retain proceeds of policy authorizing executor to pay himself from proceeds. 133**Misc**424, 232**NYS**675. [m] **Surrogate court's authority** to determine in discovery proceedings conflicting claims of title held jurisdictional question depending on statute. 129**Misc**283, 221**NYS**462. [n] **In California.–**201**Cal** 267, 256**P**820.

1017–8 See also 153**Wash**620, 280**P**85. [a] (3) Court of ordinary has no jurisdiction to decide conflicting claims be-

tween heir at law and administratrix of legatee involving construction of will and other intricate questions of law. 166Ga288, 142SE875.

1017-9 129Misc293, 221NYS305; 227AppDiv146, 237NYS242. [a] **Accounting proceedings.**–129Misc293, 221NYS305.

1017-10 35Ariz39, 274P173; 125Kan222, 264P50, 54 [citCJ]; 286Pa505, 134A489.

1018-19½-New. Surrogate court has jurisdiction to give proper relief to parties entitled to share in decedent's estate who have objected to sale of mortgage at reduced price where they were willing to accept undivided shares therein. 126Misc479, 214NYS167.

1018-19½-New. The probate court has jurisdiction to enforce an agreement between a decedent's mother and widow that certain real estate was the separate property of decedent and providing for its equal distribution. 44 Ida211, 256P369.

1018-19¾-New. Probate court has no jurisdiction to direct administratrix to execute deed of land under decedent's contract of sale in absence of petition for specific performance or finding supporting judgment that purchaser had complied with contract. Utah 284P992.

1018-20 126Me84, 136A459; 238Mich679, 214NW320; Minn 231NW218; Tex CommnA 280SW742.

1018-22 76CalA162, 244P156; 238Mich679, 214NW320.

1018-24 258Mass319, 154NE863; 131Or235, 282P1082 (county court sitting in probate); 291Pa421, 140A145 (bill of review).

1018-26 But see 260Mass369, 157NE693.

1018-28 154Md125, 140A87.

1018-30½-New. Under some statutes a proceeding in the probate court is in rem. TexCommnA 280SW742.

1018-30½-New. Surrogate's court having parties and subject matter before it, should at first determine its jurisdiction. 131Misc208, 225NYS453.

1018-31 See also 196Wis125, 218NW193.

1018-32½-New. Heirs may file caveat to application for year's support. 36GaA768, 138SE265.

1018-32½-New. Rule in equity court as to misjoinder and nonjoinder of parties obtains in equity court. 99NJEq825, 134A646.

1019-34½-New. In some jurisdictions, proceedings being quasi in rem, notice to parties is unnecessary unless required by statute. Ida 291P1051.

1019-42½-New. A petitioner desiring to controvert the answer should file a replication. 157Md127, 145A355.

1019-42½-New. The practice of care stated does not obtain in the orphans' court. 9PaDist&Co761.

1019-45 157Md127, 145A355; Sask [1929] 4DomLR783 (receiving evidence by affidavit held authorized).

1019-45½-New. A petitioner plainly manifesting in any manner an intention to controvert allegations of the answer should not be deprived of an opportunity to support the petition by evidence. 157Md127, 145A355.

1019-49 [b] See also 220AppDiv480, 221NYS675.

1019-50 Mass 171NE479 (fact question).

1019-51 [b] **Striking findings from record** and making other requested findings is not required under statute where judge has made voluntary findings. Mass 164NE917(2dcase).

1020-57½-New. Party may not have evidence reported as matter of right unless request is made before evidence is offered. Mass 171NE479.

1020-57½-New. Motion for appointment of commissioner to report testimony rests in discretion of probate judge. Mass 171NE479.

1020-60½-New. Where allegations of fraud in procuring settlement of claims of a beneficiary under will are denied, the court will appoint a referee to take testimony. 128Misc788, 219NYS759.

1020-64½-New. In Alabama statute as to rehearing on application within four months applies to probate courts. 213Ala33, 104S244.

1020-64½-New. The right to review is not a matter of right, but within the discretion of the court. 90PaSuper448.

1020-70½-New. Presumptions. A county court in the exercise of probate jurisdiction is a court of general jurisdiction, and entitled to same presumptions as any other court of general jurisdiction. 32 OklACR372.

1020-70½-New. Use of words "at law" after "county court" in probate proceedings held surplusage and not to invalidate judgment, notwithstanding invalidity of statute creating county court at law. TexCommnA 58SW(2d)131.

1020-70¼-New. A statute requiring the surrogate to file a decision in writing directing the decree to be entered is sufficiently complied with by his opinion reciting his conclusion with the direction to submit an order on notice accordingly. 224AppDiv616, 231NYS564.

1020-70⅓-New. Mere irregularities or failures in matters of procedure will not invalidate judgments of county courts in probate matters. TexCommnA 158SW(2d)579.

1020-70⅓-New. Final conclusion of a county court sitting in probate is a decree, not a judgment. 131Or235, 282P1082.

1020-74 261Mass82, 158NE333; 127Misc773, 216NYS620.

1020-75 175Minn524, 222NW68; 221AppDiv702, 225NYS8113; 227AppDiv801, 237NYS207; 295Pa333, 145A300; 299Pa200, 149A179. [a] 251NY39, 166NE797 (lease held not newly discovered evidence); 129Misc541, 222NYS250. [i] (1) 134Misc508, 236NYS223 (careful consideration imperative). [j] 110Conn646, 149A250. [l] (2) County courts in Oklahoma have no jurisdiction to vacate and set aside final orders without notice to interested parties. 122 Okl202, 253P300.

1021-76 See also 232 IllA156.

1021-79 But see 13PaDist&Co667.

1021-80½-New. Statute preserving concurrent jurisdiction of circuit court in chancery in probate matters does not give power to set aside judgment of probate courts, where appeal is provided. 229Mich515, 201NW530.

1021-81 175Minn524, 222NW68 (proceeding to vacate decree is direct attack).

1021-82 44 Ida211, 256P369; 204 Iowa746, 216NW78; 229Mich515, 201NW530; 313Mo642, 285SW462; 112 Okl13, 239P887; 114 Okl177, 245P632; 123 Okl106, 251P981; 124 Okl181, 254P972; 125 Okl121, 256P918; 39 OklACR191; 8PaDist&Co717. But see Okl 245P595.

1021-82½-New. An adjudication as to each step in series of different proceedings in reference to estates of deceased persons is final in its nature and not subject to review in subsequent stage of administration. 196Cal294, 237P744.

1021-83 44 Ida211, 256P369; 240Mich655, 216NW467; 32NM419, 258P817; 8PaDist&Co717. See also 41F(2d)155. [g] (2) Scope of review on appeal from orders of commissioner of probate is limited to error alleged. 41F(2d)155. [j] **Supreme court will consider evidence** and form its own conclusion but will not overthrow trial judge's findings unless clearly wrong. Mass 170NE48. [k] **Prerogative court has inherent power to control its own decree in cause pending therein on appeal.**–NJ 151A67.

1022-84 23AlaA261, 123S293 (no appeal from probate judge to circuit court); Ill 172NE770; 85 IndA407, 152NE857; 122Kan577, 253P606; 32 OhA236, 167NE896(1stcase) (common pleas court cannot review judgment of probate division thereof); 100Vt366, 137A321.

1022-85 201Cal664, 258P378; 229Mich526, 201NW533. [a] (13) 307Mo98, 270SW662 (order removing guardian of insane person). (14) Final orders in administration of estates. Nebr 231NW833. [c] See also 177Minn334, 225NW152(2dcase). [f] **Matters reviewable.**–262Mass321, 159NE919. [g] **Findings open to review.**–Mass 166NE874.

1022-86 97CalA138, 275P453; TexCivA290SW852; TexCivA 295SW206; Tex CivA 268W(2d)657. [a] **County court's jurisdiction, on appeal from probate court, is not limited** to particular questions arising in latter court, but extends to matters originally within jurisdiction of such court.. Vt 144A861.

1022-86½-New. Where it is apparent on the face of the record that the remedy pursued by appellant does not exist, motion to erase the appeal is proper. 105Conn595, 136A111.

1022-88 106Conn582, 138A815.

1022-89½-New. Defect in service of notice on petition for removal of the trustee by probate court is not open for review where the trustee appeared. 253Mass547, 149NE413.

1022-90 Fla 126S762 (findings on conflicting evidence). [b] (2) Appeal taken in name of estate is improperly taken and will be quashed. 95PaSuper221 (executor or administrator only may appeal on behalf of estate). [d] (2) Record can be corrected by stipulation reciting that judgment was rendered by default and not by agreement of parties. MoA 248W(2d)183. [n] 214Ala185, 106S848. [t] **Findings based on credibility of oral testimony** not disturbed. 289Pa579, 137A728. [u] **To sustain order** appellee may rely on any point in case even though it was not considered below. 292Pa422, 141A239. [v] **Orphans' court may reinstate appeal** after term, on good cause shown. 102NJEq133, 140A15. [w] **Dismissal of intervention.**–166Ga288, 142SE875. [x] **In Maine.**–127Me542, 141A620. [y] **Appeal on record revisory only.**–218Ala621, 119S657. [z] **Only question presented in absence of report of evidence** is whether court had power to make decree that might have been presented. Mass 165NE382. [aa] **Presumptions.**–Tex 12SW(2d)615. [bb] **Evidence must be brought up** by bill of exceptions or statement of facts and not in clerk's transcript. 150Wash522, 273P958. [cc] **On appeal from dismissal of petition** in hearing on petition and answer, allegations of petition will be taken as admitted. 157Md127, 145A355. [dd] **Where no report of evidence is made,** supreme court is bound by findings of fact of probate court. Mass 170NE384 (2dcase). [ee] **Objection not presented in superior court** comes too late in supreme court. NH 149A72. [ff] **Omission to file exception to surrogate's decision does not prevent review** in absence of separate findings of fact and conclusions of law. 253NY1, 170NE471. [gg] **Review of findings.**–Mass 171NE479; Mass 172NE74 (on reported evidence). [hh] **Dismissal of appeal** from probate court not filed in prescribed time is within discretion of court. Minn 232NW1.

1023-91 Ill 172NE770; 126Me84, 136A459; Me 151A669; 174Minn133, 218NW546; 134 Okl202, 272P480; 149SC69, 146SE677. [a] (1) 122Kan577, 253P606; 262Mass270, 159NE604; 240Mich444, 215NW413; 137 Okl235, 278P1088; 139 Okl61, 281P302 (motion for new trial unnecessary and cannot extend time to appeal); 294Pa493, 144A427; 149SC69, 146SE677. (3) 240Mich444, 215NW413. (6) Statute requiring record of proceedings in probate court to be filed in circuit court within thirty days after taking appeal is mandatory and failure to comply therewith is fatal unless waiver is shown. 237Mich676, 213NW61. [b] Me 151A669; Minn 231NW218; 113 Okl92, 239P467; 139 Okl61, 281P302. [d] 113 Okl92, 239P467. [h] (1) 218Ala621, 119S657 (supersedeas bond authorized); 113 Okl92, 239P467; 124 Okl254, 255P680 (substitution); 134 Okl99, 274P24. (2) Dismissal of appeal on failure to file bond. Kan 289P474. [m] (5) 202 Iowa1356, 212NW116. (6) In South Dakota appeal to circuit court on questions of both law and fact must be tried de novo. 53SD200, 220NW527. [n] (2) Supreme court of probate has no implied authority to consider issues not filed in probate court as grounds for appeal. 126Me84, 136A459. [o] **In Louisiana.**–158La123, 103S532. [p] **Ap-**

peal by United States probate attorney from order adjudicating incompetency of full-blood Cherokee Indian allottee and appointing guardian is properly perfected by filing statutory affidavit, bond, and notice of appeal. 113 Okl 92, 239 P467. [q] **After entry of decree in accordance with reversal by appellate division,** surrogate's court held without power to permit amendments to answer raising questions not in record pending appeal of reversal. 218AppDiv190, 218 NYS229. [r] **Report of commissioners on claims** should be included in certified copy of record. 237Mich676, 213 NW61. [s] **Notice of appeal.**–126Me84, 136A459. [t] **Exceptions** lie to admission of evidence or instructions, though jury's verdict is only advisory. 126Me 84, 136A459. [u] **Reasons of appeal.**–126Me84, 136A459. [v] **Time for filing transcript.**–156Md700, 144A257 (dismissal for failure to file in time). [w] **Fact findings not set aside on appeal** unless clearly wrong. Mass 164NE917(2dcase). [x] **Appeal effected by motion filed with clerk.**–101Vt464, 144A457. [y] **Trial de novo.**–207 Iowa109, 222NW356. [z] **Parties.**–137 Okl 235, 278P1088. [aa] **Appeals are to be determined** according to justice and equity thereof, under statute. 299Pa359, 149A658. [bb] **Failure to pay appeal fee.**–Ill 172NE770.

1023–92 [a] **Findings will not be disturbed unless clearly wrong.**–Mass 166 NE874. [b] **Decision of probate court depending on oral evidence** is not to be reversed unless clearly wrong. Mass 167NE338.

1023–92½–New. On appeal from decree as to disputed question of fact, it requires clear conviction of error to justify reversal. 214Ala185, 106S848.

1023–92⅓–New. In proceeding from orphan's court the duty of the supreme court is to enter a decree according to justice and equity after examining proceedings as a whole. 288Pa11, 135A 740.

1023–92¼–New. Where an order of the probate court was right when made, it cannot be reversed on appeal. 172Minn 231, 215NW223.

1023–92⅕–New. In Ontario appeal from surrogate court judge's order as to claim against decedent's estate lies only to judge of high court division of supreme court. Ont [1929] 4DomLR213.

1023–92⅙–New. A reviewing court cannot set aside a fact finding of a probate judge which is not plainly wrong. Mass 168NE96.

1023–92½–New. Before the probate court can certify a case to the circuit court under statute there must be a contest over a will. 248Mich360, 227NW 813.

1023–92⅛–New. Appeal from such order brought to divisional court may be treated as one to judge in capacity as judge of high court division. Ont [1929] 4DomLR213.

1023–93 Ill 172NE770; 315Mo 972, 287 SW485; MoA 29SW(2d)240 (action not changed by appeal from one at law to one in equity); 22 OhA324, 153NE 864; 122 Okl 160, 252P410; Tex CommnA 24SW(2d)819; TexCivA 283 SW297. [c] NJ 150A568. [d] In Oklahoma.–137 Okl 235, 278P1088. [e] **Failure to file appeal bond** prevents consummation of appeal. TexCivA 25SW(2d) 889.

1024–94 41GaA671, 154SE456(2dcase); 44 Ida729, 262P152; 46 Ida697, 270P 1056; 245 IllA423; MoA 282SW735. [a] In Oklahoma.–132 Okl 52, 270P87. [b] **Evidence admissible.**–132 Okl 181, 269P1074.

1024–95 TexCivA 25SW(2d)889.

1024–96 Ill 172NE770. [a] **Jurisdiction of circuit court** notwithstanding failure to pay appeal costs within statutory time. Ill 172NE770.

1024–98 237 IllA372. But see 264Mass 112, 162NE225.

1024–99 But see 41GaA671, 154SE456 (2dcase).

1024–2 44 Ida729, 262P152.

1024–4 46 Ida697, 270P1056; 248Mich 360, 227NW813; 132 Okl 181, 269P1074. See also 233Mich346, 206NW480. [b] (2) **Amendment injecting new issue** on appeal should not be allowed. 132 Okl 181, 269P1074. (3) On appeal to district court in final accounting of guardian, filing of amended account in lieu of reports filed in county court is not change of issues. 132 Okl 181, 269 P1074.

1024–6 126Me84, 136A459; 241Mich 170, 216NW396. See also 56ND60, 215 NW913.

1024–7 264Mass112, 162NE225.

1024–8 315Mo 972, 287SW485. [a] In Missouri.–A 5SW(2d)457.

1024–9 But see 315Mo 972, 287SW485.

1024–10 44 Ida729, 262P152 (judgment held proper); MoA 5SW(2d)457. But see MoA 29SW(2d)170.

1024–11½–New. Where a judgment is reversed and the mandate of the appellate court is spread of record in the journal of the lower court, the judgment of the lower court is vacated without any affirmative action on its part. 122 Okl 160, 252P410.

1024–11⅓–New. On appeal from a circuit court after trial de novo on appeal from a county court in an heirship proceeding, the only question for review is the correctness of the judgment of the circuit court. 245 IllA423.

1024–11¼–New. District court on appeal exercises like discretion as probate court as to vacation of decree on ground of mistake and inadvertence. 179Minn 315, 229NW133.

1024–11⅕–New. Under statute making it duty of probate judge on payment of fee to transmit to district court certified transcript of proceedings, probate judge may waive right to demand fee in advance. Nebr 230NW492.

1024–11⅙–New. Appeal will not be defeated by failure of probate judge through inadvertence to transmit transcript in time where appellant is not shown to have lacked diligence. Nebr 230NW492.

1025–19 [g] **Power of supreme court** may be exercised regardless of statutory omissions or declarations under Texas statute. 116Tex220, 288SW417.

1025–21 [c] **Power given legislature to provide means of appeal** cannot deprive court of jurisdiction conferred by constitution. 82CalA46, 255P248.

1025–24 [a] **Exclusive function imposed on designated courts** of deciding certain questions cannot be shifted to, nor assumed by, appellate tribunals. 300Pa422, 150A744.

1025–26 124Cal 468, 57P379.

1025–27 124Cal 468, 57P379; 6Kan500, 7AmR575; 163La1047, 113S370; 321Mo 230, 10SW(2d)519; 22ND480, 134NW 751. [d] **Supervisory jurisdiction can be taken away** only by express words or irresistible implication. 292Pa300, 141 A249.

1025–27½–New. The supreme court's supervisory jurisdiction cannot be invoked when there is another adequate remedy, whether by appeal to the supreme court or some other court. 162 La295, 110S480.

1026–31½–New. State has wide discretion in establishing its systems of courts and distributing their jurisdiction and need not adopt unifying method of appeals. 281US74, 50SCt228, 74L ed710 (2dcase).

1026–32 48RI50, 135A322. [a] **Provisions relating to appeals** must be liberally construed. TexCommnA 291 SW886.

1026–37 129Kan244, 282P732 (petition to set aside probate court's judgment for fraud of defendants, including probate judge); 78Mont92, 252P388; 78 Mont435, 254P414; 49ND27, 186NW 381; 52ND231, 202NW391; 37Wyo 516, 263P700 (plenary power to control course of litigation in trial courts). [e] In North Dakota.–52ND26, 202NW391.

1026–38 77Mont214, 250P609; 78Mont 435, 254P414.

1026–38½–New. Taking a devolutive appeal, the only appeal allowed by law from a judgment refusing to grant a preliminary injunction, does not prevent appellant's invoking the appellate court's supervisory jurisdiction by certiorari or mandamus. 168La1037, 123S705.

1026–41 215Ala447, 111S224; 218Ala 320, 118S553. [c] (2) 212Ala585, 103S 863.

1026–46 20AlaA514, 104S561. [a] **Jurisdiction or authority of supreme court is not circumscribed** or limited to such cases as are necessary to give court general jurisdiction and control of jurisdiction inferior to it and in matters over which it has final appellate jurisdiction. 20AlaA514, 104S561.

1026–48 20AlaA514, 104S561.

1027–49 20AlaA514, 104S561. [d] 213 Ala642, 106S57.

1027–51 23AlaA335, 125S203.

1027–58 [b] **It is immaterial in what court proceedings originated,** court of appeals is given final appellate jurisdiction over habeas corpus. 20AlaA514, 104 S561. [c] **Original jurisdiction to issue writs of habeas corpus** carries with it authority to determine all questions made by writ and return. 20AlaA514, 104S561.

1027–61 23AlaA524, 128S774. [a] **On certification of Supreme Court's response to question of constitutionality** vel non of statute court of appeals, within its jurisdiction, may proceed to final judgment under statute as construed. 213 Ala351, 104S906.

1027–63½–New. Court of appeals is bound by supreme court's response to question certified. 23AlaA569. 129S314.

1027–65 [a] **Since appeal from municipal court** calls for trial de novo, amendment asking payment for larger sum is permissible. 212Ala570. 103S654.

1027–70 [b] **Supreme court has original jurisdiction** of disbarment proceedings. 30Ariz407, 248P29.

1027–81 29Ariz60, 239P506 (where judge disqualified).

1027–86 175Ark253, 299SW44.

1028–96 175Ark253, 299SW44. [b] **Supreme court has no jurisdiction to issue mandamus to warden** to summons jury to inquire into sanity of prisoner. 181Ark250, 25SW(2d)21.

1028–5 175Ark253, 299SW44. [a] (11) To order lower court's stenographer to deliver transcript of notes in forma pauperis. Ark 30SW(2d)218.

1028–8 168Ark523, 271SW4 (mandamus). [b] **Appeal from county court** to circuit court is triable de novo. 173 Ark1182, 295SW725.

1029–17 100CalA334, 279P822 (exclusive jurisdiction over proceeding for cancellation of property settlement between husband and wife).

1029–27 CalA 290P140.

1029–29 Cal 292P124.

1029–30 201Cal 122, 255P815, 52 ALR 869.

1030–32 201Cal 122, 255P815, 52ALR 869.

1030–35 [c] **Application for readmission or reinstatement** of attorney at law is "cause" which supreme court may transfer to itself. 197Cal 408, 241P88; 199Cal 538, 250P390, 48ALR1232. [d] **Extent of review.**–199Cal 538, 250P390, 48ALR1232.

1030–37 10CalA206, 101P438, 440.

1030–39 98CalA306, 277P123 (advisory jurisdiction over probate court).

1030–40 [b] **Actions within jurisdiction of municipal court** are now excepted. Cal 292P497; CalA 292P498; CalA 292P499.

1031–59½–New. and they have jurisdiction in probate matters only by virtue of Code Civ. Proc. § 963 subd. 3, 70CalA127, 232P733.

1031–63 201Cal 122, 255P815, 52ALR 869.

1031–65 201Cal 122, 255P815, 52ALR 869.

1031–66½–New. A district court of appeal has original jurisdiction over applications for restoration to practice after disbarment. 199Cal 538, 250P390, 48ALR1232.

1031–67 81CalA351, 253P951.

1031–68 94CalA557, 271P540.

1031–68½–New. The superior courts have power to issue writs of habeas corpus. 201Cal 122, 255P815, 52ALR 869.

1032–79 [c] 83Colo 321, 264P1090.

1035–6 But see 111Conn715, 151A191.

1036–81½–New. Appellate powers of

supreme court should be liberally construed. 3Del 593, 140A697.

1036-87 89Fla446, 105S126.

1036-88 89Fla446, 105S126.

1036-89 [b] **While right to utilize appellate jurisdiction of supreme court is secured by constitution,** statutes regulate appellate processes and procedure, though they may not impair right. 89 Fla446, 105S126.

1037-93 90Fla844, 107S535.

1037-2 92Fla989, 111S252. [b] **"Executive powers and duties"** means duty appertaining to execution of laws as they exist. 92Fla989, 111S252.

1037-5 Fla 126S149. [b] **Jurisdiction is similar to that of court of king's bench.**–90Fla844, 107S535.

1038-23 90Fla844, 107S535.

1038-26 Ga 155SE766.

1038-34 [a] **Cases for review not within jurisdiction granted by statute.**–168 Ga316, 147SE513(1stcase).

1038-36 160Ga701, 128SE806; 162Ga 730, 134SE760; 170Ga802, 154SE188; 35GaA599, 134SE357; GaA 155SE535.

1038-37 160Ga701, 128SE806.

1038-39 170Ga401, 152SE906; 35GaA 447, 133SE476. [a] (2) Allegation that application of Workmen's Compensation Act to action by wife to recover for husband's death would be denial of due process of law and denial of equal protection of law does not raise constitutional question reviewable by supreme court where no section of any constitution is mentioned and it is not alleged that state or federal constitution would be violated. 165Ga227, 140SE353. (3) Where no constitutional question is raised, supreme court has no jurisdiction of petition for mandamus to compel trial judge to certify bill of exceptions. 166Ga614, 144SE17.

1038-41 160Ga822, 129SE98 (partition proceeding). [b] **Attachment proceedings,** alleging fraudulent conveyance of realty, grantees intervening, is within jurisdiction of supreme court, under Civ. Code (1910) § 5088. 166Ga877, 144SE 652. [c] **Dispossessory proceeding against alleged tenant** is not case respecting title to land. 170Ga483, 153 SE8.

1038-43 160Ga258, 127SE741; 164Ga 541, 139SE68; 167Ga181, 145SE47. [b] 166Ga281, 142SE862. [c] **Suit for money damages** for misrepresentations inducing sale of realty is not within appellate jurisdiction. 160Ga320, 127SE 651. [d] **Action at law** denominated "equitable action" is not within jurisdiction of supreme court. 169Ga371, 150 SE94. [e] **Case held one at law.**–170Ga 422, 152SE900; 170Ga331, 153SE4(1st case). [f] **Cases held not equity cases.**–169Ga115, 149SE699(1stcase) (case originally in equity converted to one at law); 169Ga100, 149SE705(1stcase); 170Ga237, 152SE98(1stcase); 170Ga238, 152SE108(1stcase); 169Ga876, 152SE 255. [g] **Execution** brought up for review under exception assigning error on judge's refusal to disqualify himself does not involve grant of equitable relief. 169Ga849, 151SE802(2dcase).

1038-48 [a] **Contempt proceedings** by solicitor-general for counseling presentation of petition reflecting on judge's conduct is not equity case involving extraordinary remedies within supreme court's jurisdiction. 166Ga553, 144SE 106.

1038-50 [a] 165Ga742, 142SE73 (motion to dismiss application for writ denied).

1039-51 165Ga838, 142SE147 (instructions refused to questions not of nature to require answers); 167Ga677, 146SE 317. [d] 165Ga289, 140SE753. [e] **Mixed question of law and fact not answered.**–167Ga677, 146SE317.

1039-51½-New. In case of writ of certiorari to review finding by trial court that municipal ordinance is not unconstitutional, and writ of error to review the judgment, supreme court has jurisdiction to pass upon errors alleged to have been committed in the trial. 160 Ga701, 128SE806.

1039-52 161Ga78, 129SE539; 162Ga 236, 133SE237; 162Ga350, 133SE862; 162Ga597, 134SE325; 162Ga730, 134SE 760; 164Ga637, 139SE216; 165Ga227, 140SE353; 165Ga305, 140SE760; 165Ga 366, 140SE846; 166Ga158, 142SE551; 39GaA220, 146SE500(2dcase); 169Ga 322, 150SE153; 33GaA815, 127SE905 (supreme court's transfer of case to court of appeals is equivalent to holding that suit is not one in equity); GaA 155 SE65(1stcase). [e] **On removal by amendment** of petition of equitable feature of case, writ of error should be transferred from supreme court to court of appeals. 161Ga934, 132SE664. [f] **Where only common-law relief is involved** case must be transferred to court of appeals. 165Ga305, 140SE760. [g] **Cases held within jurisdiction of court of appeals.**–167Ga900, 146SE844(2dcase). [h] **Cases held not within jurisdiction of supreme court.**–167Ga891, 147SE65. [i] **Proceedings held not "case" within constitution.**–166Ga614, 144SE17.

1039-54 35GaA413, 133SE297. See also 36GaA396, 137SE85. [d] **Jurisdiction restricted to cases at law.**–165Ga742, 142 SE73.

1039-55 165Ga113, 139SE820 (review of judgment sustaining demurrer to petition in action at law); GaA 155SE535. [f] **Appeal by claimant from judgment foreclosing chattel mortgage.**–161Ga799, 131SE900. [g] **Contempt proceedings** by solicitor-general for counseling presentation of petition reflecting on judge's conduct is within jurisdiction of court of appeals. 166Ga553, 144SE106.

1039-56 Ga 155SE753(1stcase). [a] 36 GaA292, 136SE470. [e] **City court of Fairburn.**–36GaA292, 136SE470.

1039-57½-New. Statute providing exclusive method of review of judgment of the municipal court of Macon by writ of error to the court of appeals, providing for tender of bill of exceptions within ten days from judgment, does not apply to a judgment rendered more than ten days prior to approval of the act. 36GaA52, 135SE515.

1039-57⅓-New. Where the case must be reviewed by the court of appeals, application for mandamus should be made to that court. 166Ga614, 144SE17.

1039-58 [a] (2) 36GaA433, 137SE79.

1040-62 [a] **Court of appeals has jurisdiction of questions of law** involving unambiguous constitutional provisions. 170Ga802, 154SE188.

1040-63 [a] (1) 35GaA107, 132SE411.

1040-64 166Ga680, 144SE269; 37GaA 756, 142SE183 (may limit inquiry).

1040-64½-New. Where the only issue is liability for penalty, case is for court of appeals. 165Ga305, 140SE760.

1040-65 38GaA292, 143SE786.

1040-66 [a] **Superior court cannot render final judgment** on certiorari to justice's court or municipal where issues of fact only are involved but must remand with instructions. 33GaA784, 127 SE793. [b] **Certiorari to municipal court of Atlanta.**–37GaA760, 142SE460.

1041-2 48 Ida357, 283P527.

1041-20 320 Ill 368, 151NE233; Ill 172 NE717. [c] **Supreme court has no jurisdiction** over questions involving procedural matters. 320 Ill 368, 151NE233. [d] **Appeal in quo warranto proceedings.**–Supreme court has no jurisdiction of appeal from judgment for respondent in proceedings to oust him from office of city alderman. 321 Ill 180, 151NE487. [e] **Review of judgment involving right to hold village offices** is without jurisdiction of supreme court on direct appeal. 331 Ill 287, 162NE55; 335 Ill 463, 167NE18(2dcase). [f] **Appellate jurisdiction is within control of general assembly.**–337 Ill 641, 169NE736.

1042-30½-New. Jurisdiction cannot be conferred on supreme court by erroneous statement in assignment of error, nor by assignment of error which has been waived. 328 Ill 360, 159NE805.

1042-30⅓-New. Supreme court will not assume jurisdiction on direct appeal merely to refer to former decision. Ill 173NE181.

1042-34 324 Ill 508, 155NE276; 336 Ill 205, 168NE377 (no freehold involved). [b] (3) 325 Ill 398, 156NE280. [c] **Decree foreclosing mortgage** does not give supreme court jurisdiction of appeal. Ill 173NE145(1stcase).

1042-35 [a] **Constitutional question not being involved,** supreme court has no jurisdiction of appeal. Ill 173NE181. [b] **No constitutional question being involved,** cause transferred to appellate court. Ill 173NE189. [c] **Constitutional question must be presented and fairly debatable** to give supreme court appellate jurisdiction. Ill 173NE181.

1044-46 [d] **Sufficiency of certificate.**–Appellate court need not specify in certificate questions denied important. 317 Ill 312, 148NE59.

1044-48 317 Ill 578, 148NE259 (holding that only questions of law that supreme court will consider in appeal of criminal case are those raised and decided by the appellate court).

1044-49½-New. The supreme court has no jurisdiction to review a judgment of the appellate court, in a civil proceeding, in the absence of a certificate of importance or certiorari. 327 Ill 218, 158NE354.

1044-49⅓-New. To permit direct appeal to supreme court, state's "interest" must be direct, substantial, or monetary in character. Ill 173NE153.

1045-52 329 Ill 582, 161NE56 (where costs sole subject of controversy); 330 Ill 92, 161NE87. [a] **Argument that rules of department of public health are unreasonable** is no ground for appellate jurisdiction of supreme court. 338 Ill 301, 170NE225.

1045-59 256 IllA147.

1045-68 [e] **Judgments in initiative proceedings not appealable.**–256 IllA147.

1045-71 [b] **No freehold involved** when suit to have a deed absolute on its face is declared mortgage. 324 Ill 508, 155NE 276.

1045-72 [b] (3) Appeal involving freehold in suit for specific performance. 328 Ill 365, 159NE774.

1046-77 320 Ill 44, 150NE401; 321 Ill 431, 151NE884; 328 Ill 343, 159NE787; 337 Ill 250, 169NE164(2dcase); 233 IllA 504. [a] (1) 321 Ill 177, 151NE538. (7) 329 Ill 612, 161NE137. (9) Sufficiency of indictment. 233 IllA504. (10) Reasonable search and seizure. 233 IllA504. [b] **No constitutional question involved** where pleadings do not show it and it is not raised by assignment of error. 324 Ill 483, 155NE276.

1046-78 320 Ill 44, 150NE401; 325 Ill 16, 155NE773; 328 Ill 122, 159NE205; 334 Ill 160, 165NE638; 337 Ill 250, 169 NE164(2dcase). [a] 317 Ill 590, 148NE 382; 328 Ill 122, 159NE205; 331 Ill 144, 162NE128; 332 Ill 316, 163NE707; 337 Ill 250, 169NE164(2dcase). [d] 325 Ill 625, 156NE826.

1046-79 321 Ill 177, 151NE538; 325 Ill 320, 156NE305; 325 Ill 625, 156NE826; 327 Ill 106, 158NE451. [c] 324 Ill 74, 154NE433; 328 Ill 147, 159NE217 (rule of board of education); 329 Ill 635, 161 NE106 (case involving only interpretation); 338 Ill 301, 170NE225. [e] **Where validity of ordinance is not involved,** supreme court is required to transfer cause to appellate court. 324 Ill 74, 154NE433.

1047-80 321 Ill 177, 151NE538; 325 Ill 625, 156NE826.

1047-81 317 Ill 312, 148NE59; 321 Ill 431, 151NE884; 233 IllA504; 256 IllA 147. [b] **Where case involves other questions,** in addition to constitutional issues, appellate court will review case rather than transfer to supreme court. 233 IllA504.

1047-82 317 Ill 578, 148NE259; 233 IllA504; 235 IllA518. [c] **Successful party** may raise question as by assignment of cross error in effort to sustain judgment. 317 Ill 312, 148NE59.

1047-83 320 Ill 44, 150NE401; 321 Ill 45, 151NE513; 323 Ill 606, 154NE418; 324 Ill 60, 154NE477; 338 Ill 301, 170 NE225; 339 Ill 220, 171NE140; 319Mo 337, 4SW(2d)776. [d] (12) Motion to quash search warrant alleged not to have been issued in conformity to statute, constitutionality of which is not denied. 317 Ill 639, 148NE249. (13) Motion involving construction of prohibition act and right to issue search warrant thereunder, validity of act not being questioned. 317 Ill 639, 148NE249. (14) Conviction for misdemeanor. 323 Ill 606, 154NE418. (15) Trial court not

fully admonishing defendant of effect and consequences of his plea of guilty. 324 Ill 60, 154NE477. (16) Plea constituting mere legal conclusion. 318 Ill 356, 149NE283. (17) Trial for misdemeanor and felony, as charged, and denial of motion requiring state to indicate character of prosecution. 323 Ill 606, 154NE418. (18) Attack on judgment on ground that enforcement will deprive one of constitutional right. 30 Ill 44, 150NE401; 324 Ill 200, 154NE 898. (19) Search without warrant after arrest and receiving in evidence marked money paid for liquor obtained thereby. 329 Ill 117, 160NE135. (20) Contentions that search warrant was improperly issued and was illegal. 335 Ill 447, 167NE28. (21) By appeal involving construction of search warrant. 338 Ill 170, 170NE275. [f] (2) But appellate court before which defendant in error, in effort to sustain judgment below, alleges and urges that statute on which plaintiff relies is unconstitutional, cannot eliminate question and by deciding appeal on grounds not involving any necessity for its determination defeat rule that where such issue is presented, appellate court must certify case to supreme court. 317 Ill 312, 148 NE59. [g] **Validity of act held not involved in suit.**–339 Ill 220, 171NE140.

1047–84 318 Ill 356, 149NE283; 320 Ill 44, 150NE401; 320 Ill 572, 151NE673; 324 Ill 200, 154NE898; 328 Ill 122, 159 NE205; 319Mo 337, 4SW(2d)776.

1048–85 320 Ill 44, 150NE401.

1048–86 318 Ill 356, 149NE283; 320 Ill 44, 150NE401; 328 Ill 122, 159NE205; 339 Ill 381, 171NE561.

1048–87 317 Ill 312, 148NE59; 320 Ill 572, 151NE673.

1048–90 317 Ill 312, 148NE59; 339 Ill 381, 171NE561; Ill 172NE47.

1048–91 317 Ill 639, 148NE249; 329 Ill 117, 160NE135.

1048–94 317 Ill 590, 148NE382; 318 Ill 321, 149NE238; 320 Ill 572, 151NE673; 321 Ill 177, 151NE538 (rule applied to ordinance); 327 Ill 103, 158NE441; 331 Ill 24, 162NE144; 339 Ill 220, 171NE 140.

1048–96½–New. Where no constitutional question is involved or raised, but the real complaint of appellant is based upon error in trial, the cause will be transferred to the appellate court. 324 Ill 200, 154NE898.

1048–97 318 Ill 249, 149NE232; 318 Ill 193, 149NE292; 319 Ill 351, 150NE250; 323 Ill 608, 154NE405; 323 Ill 579, 154 NE446; 324 Ill 40, 154NE450; 329 Ill 59, 160NE147; 333 Ill 489, 165NE163. [f] **Where divorce decree grants wife undivided interest in farm,** freehold is involved. 323 Ill 608, 154NE405.

1048–98 323 Ill 579, 154NE446; 234 IIIA572; 254 IIIA289.

1049–99 256 IIIA531. But see 338 Ill 309, 170NE212.

1049–1 318 Ill 193, 149NE292; 319 Ill 351, 150NE250; 322 Ill 74, 152NE582; 322 Ill 449, 153NE646; 322 Ill 528, 153 NE618; 323 Ill 622, 154NE476; 327 Ill 47, 158NE402; 329 Ill 89, 160NE154; 330 Ill 558, 162NE126; 333 Ill 523, 165 NE135; 333 Ill 489, 165NE163; 335 Ill 400, 167NE25; 338 Ill 288, 170NE193; 234 IIIA572; 246 IIIA590. [d] (1) 319 Ill 351, 150NE250; 329 Ill 89, 160NE 154. (25) 244 IIIA237. (26) Freehold is involved in appeal from decree in partition proceeding. 234 IIIA572. (27) Other instances. 333 Ill 523, 165NE135. [e] (8) 327 Ill 89, 158NE395. (12) 323 Ill 87, 153NE666. (27) Suit to declare deed to be mortgage. 318 Ill 249, 149 NE232. (28) Bill to set aside fraudulent conveyance. 323 Ill 579, 154NE 446. (29) Mortgage redemptioner's petition for writ of assistance. 324 Ill 40, 154NE450. (30) Suit for partition of real estate in which only question was court's refusal to require joinder as parties of beneficiaries claiming under agreement to devise. 323 Ill 622, 154NE 476. (31) Suit to set aside conveyance by complainant's husband where her only interest was inchoate right of dower. 318 Ill 193, 149NE292. (32) Proceeding where only relief sought is mortgage foreclosure. 329 Ill 89, 160NE 154. (33) Proceeding where title is not put in issue and there are no assignments of error respecting question. 329 Ill 89, 160NE154. (34) Action by drainage district against sanitary district for injuries to levees and ditches. 328 Ill 360, 159NE805. (35) Determination whether an instrument absolute on its face is deed or mortgage. 320 Ill 522, 151NE517. (36) Decree enjoining forfeiture of coal lease so long as payments were made. 338 Ill 288, 170NE193. (37) Other instances. 330 Ill 558, 162NE126; Ill 164NE159(1stcase); 334 Ill 40, 165 NE140; 333 Ill 489, 165NE163; 337 Ill 359, 169NE166.

1050–3 328 Ill 360, 159NE805; 329 Ill 89, 160NE154; 333 Ill 489, 165NE163; 234 IIIA572.

1051–5 322 Ill 74, 152NE582; 329 Ill 89, 160NE154 (whether freehold is involved in bill to remove cloud on title depends on nature of alleged cloud); 338 Ill 288, 170NE193.

1051–6 234 IIIA572 (where appeal involved question as to whether partition should have been decreed at all below).

1051–9 [a] (4) It does not of itself confer jurisdiction on supreme court in absence of evidence on such plea or assignment of error involving ownership. 328 Ill 360, 159NE805.

1051–11 322 Ill 528, 153NE618; 327 Ill 47, 158NE402.

1052–14 319 Ill 351, 150NE250.

1052–15 337 Ill 589, 169NE760; 248 IIIA495.

1053–18 338 Ill 345, 170NE208(1stcase).

1053–19 324 Ill 319, 155NE323.

1054–21 337 Ill 378, 169NE176.

1054–22 335 Ill 400, 167NE25.

1054–24 322 Ill 449, 153NE646.

1054–25 318 Ill 249, 149NE232; 329 Ill 601, 161NE107 (title not involved); 331 Ill 24, 162NE144; 335 Ill 129, 166NE523 (both cases holding that freehold is not ordinarily involved in foreclosure suit).

1055–26 320 Ill 522, 151NE517; 322 Ill 141, 152NE564.

1055–29 328 Ill 360, 159NE805; 234 IIIA572.

1055–30 [c] (18) Proceeding to test right to hold and execute duties of public office. 320 Ill 572, 151NE673. [d] (1) 328 Ill 343, 159NE787. (2) 317 Ill 590, 148NE382.

1056–37 339 Ill 333, 171NE183.

1057–39 317 Ill 590, 148NE382; 331 Ill 56, 162NE136; 244 IIIA137.

1057–42 217 Ill 439, 148NE242 (holding that state is "interested" only when it has direct and substantial interest in outcome).

1057–45 [c] **State has no interest in** suit on state treasurer's bond for alleged misinvestment of school funds, since no matter what outcome of such suit state as such cannot gain or lose. 317 Ill 439, 148NE242.

1058–46 317 Ill 639, 148NE249.

1058–48 318 Ill 321, 149NE238; 321 Ill 180, 151NE487; 329 Ill 117, 160NE135; 330 Ill 92, 161NE87; 339 Ill 381, 171NE 561; Ill 172NE47.

1058–49 [a] (2) Nor from order of county court sustaining legal objections to drainage district's petition to annex territory. 242 IIIA139. [c] **Circuit court has no jurisdiction** to set aside judgment of city court, on ground of fraud. 234 IIIA346.

1058–50 243 IIIA460; 244 IIIA463.

1058–57 Ind 172NE309.

1059–60 Ind 171NE665(1stcase) (suggestion in brief insufficient).

1059–62 84 IndA144, 149NE647.

1059–63 [g] (1) IndA 168NE38. (2) Where appellee's counsel stated that no constitutional question was involved if appellate court construed statute as being state wide, and court so construed statute, appellee could not, after reversal, present constitutional question so as to have case transferred to supreme court. IndA 166NE547(1stcase). [k] **Constitutional question held not presented on appeal** in suit to enjoin collection of assessment for building fence. Ind 150NE417.

1060–83 [b] **Under statute of 1925** no appeal lies direct to supreme court even where transcript was filed Oct. 1, 1924. 200 Ind732, 148NE148.

1060–89 196 Ind520, 148NE474 (Acts [1925] c 201 § 1).

1060–90 Ind 166NE285.

1061–98 200 Ind334, 163NE598 (appeal from judgment of conviction of juvenile court for contributing to minor's delinquency). [b] **Under act of 1925,** appellate court has jurisdiction of appeals from superior court of Marion county, sitting as court of claims. 89 IndA244, 162NE695.

1062–13½–New. The court has jurisdiction to issue writs of mandamus only in aid of its appellate powers and functions. 83 IndA524, 149NE373.

1062–13⅓–New. The court has jurisdiction of petition in mandamus to compel appointment of relatrix as administratrix to estate. 83 IndA524, 149NE373.

1062–13¼–New. Where decisions of the supreme court are apparently in conflict as to a determinative question of appeal, the appellate court will certify the cause to the supreme court. IndA 168NE189.

1062–13½–New. A writ of mandate is refused where no question for presentation on appeal was saved and no motion for new trial filed. Ind 168NE867 (1stcase).

1062–13⅚–New. The appellate court has jurisdiction to issue writs of mandate only in aid of appellate jurisdiction. Ind 168NE867(1stcase).

1062–14 330 Ill 234, 161NE311 (time for filing bond on appeal). [c] **General criminal jurisdiction.**–200 Ind196, 158NE289.

1062–18 85 IndA649, 155NE611.

1062–20 206 Iowa932, 221NW442(2d case) (inherent power arises only out of appellate jurisdiction).

1062–21 206 Iowa932, 221NW442(2d case).

1063–29 [c] (1) 121Kan14, 246P178. [g] **Declaratory judgments.**–121Kan14, 246P178. [h] **Prohibition.**–123Kan396, 256P152.

1063–30 120Kan332, 243P302; 127Kan 669, 274P731 (exercise discretionary). [d] **Statutory change.**–120Kan332, 243 P302. [e] **Powers of court** stated. 120 Kan332, 243P302. [f] **If action for damages is joined** with quo warranto, court has no jurisdiction. 120Kan332, 243P302. [g] **Will not assume jurisdiction** merely involving series of private controversies between corporation and its members. 127Kan669, 274P731.

1063–32 124Kan3, 256P1015.

1063–33 [a] **Action for damages.**–120 Kan332, 243P302.

1064–40 120Kan52, 242P128; 123Kan 44, 254P390; 123Kan632, 256P989. [a] (1) But see 123Kan44, 254P390. [f] (3) When propriety of judgment necessarily depends on correct interpretation of Federal Transportation Act. 127Kan326, 273P451, 64ALR322.

1064–42½–New. Where a case involves questions of federal law, an appeal will lie, although the amount involved is less than one hundred dollars. 123Kan 35, 254P379.

1064–42½–New. In such case only questions relating to the federal constitution and statutes will be reviewed. 123 Kan35, 254P379.

1064–46 [a] 120Kan200, 243P296.

1064–47 120Kan692, 245P105 (have broad powers). [a] **Only when inferior court lacks power or jurisdiction** may extraordinary remedies of injunction or prohibition be resorted to. 126Kan552, 268P813.

1064–50 212Ky286, 278SW833.

1064–51 210Ky708, 276SW812; 212Ky 286, 278SW833.

1064–54 [a] (1) 210Ky708, 276SW812; 223Ky285, 3SW(2d)641. (2) Court will not take jurisdiction of mandamus proceedings unless there is no other adequate remedy. 221Ky238, 298SW690. [b] (1) 233Ky501, 26SW(2d)43. (11) Court will not take jurisdiction of prohibition proceedings unless there is no other adequate remedy. 221Ky238, 298 SW690. (12) Court will not take jurisdiction on petition for order prohibiting judge of union quarterly court from committing petitioner to jail for failure to procure surety on peace bond. 221Ky 238, 298SW690.

1065–55 210Ky708, 276SW812; 230Ky 594, 20SW(2d)449 (writ of prohibition). [a] (2) "Inferior jurisdictions" means

inferior courts, and not administrative boards. 210Ky708, 276SW812. [d] **Where another and adequate remedy is available** by appeal or otherwise, original jurisdiction by force of writs, under Const. § 110, is not necessary. 210Ky708, 276SW812. [e] **Petition for special control** of workmen's compensation board by way of mandamus will be denied. 210Ky708, 276SW812.

1065–56 235Ky855, 31SW(2d)696; 235Ky574, 31SW(2d)910. [a] (2) Court of appeals is without jurisdiction of appeal from judgment in wife's divorce suit, in so far as it directed payments of temporary alimony, where installments of alimony due at time of appeal amounted to less than two hundred dollars. 226Ky207, 10SW(2d)815.

1066–71½–New. Court of appeals has jurisdiction of proceeding involving widow's dower right to share of royalty on oil pumped from land irrespective of amount in controversy. 214Ky467, 283SW439.

1066–80 158La1002. 105S43; 159La527, 105S608; 159La966, 106S459; 160La392, 107S236; 162La772, 111S91; 162La1083, 111S463; 163La369, 111S789; 163La374, 111S791; 164La202, 113S817; 164La630, 114S493; 164La787, 114S654; 165La426, 115S644; 166La585, 117S727; 167La327, 119S66; 167La1076, 120S862; 170La923, 129S531; La 129S727; 3LaA161; 13LaA565, 128S188. [a] 160La392, 107S236. [e] 166La647, 117S749. [g] (1) 158La1002, 105S43 (exaggerated claim for slander). [k] But see 168La1093, 123S724(1st case). [p] **Under Const. (1921) art 7 § 10,** supreme court has no jurisdiction of appeal from judgment in suit to compel defendant to accept check for twenty dollars, agreed consideration for extension of mineral lease, where only pleaded allegation as to value of plaintiff's rights under lease was that such value was not less than two thousand five hundred dollars. 167La1, 118S481. [q] **Regardless of amount,** supreme court has jurisdiction to construe its own decrees. 163La555, 112S415. [r] **Where supreme court has jurisdiction of main demand,** it will retain jurisdiction as to incidental demand, though amount is below jurisdictional amount. 163La555, 112S415. [s] **Where a thing, instead of amount, is in dispute,** value of thing determines question of amount in dispute. 159La966, 106S459. [t] **That appellant's brief requests judgment for less than two thousand dollars** does not deprive supreme court of jurisdiction where it has jurisdiction on face of pleadings. 164La787, 114S654. [u] **Award of damages equal to interest on certain sum** held to constitute "principal" within rule. 165La426, 115S644. [v] **In action of partition,** value of whole property, not share or shares of litigants, is test of jurisdiction. 168La786, 123S325. [w] **Main and incidental demand** will both be reviewed on appeal where main demand is sufficient in amount, and incidental demand shall lie to court having jurisdiction of main demand. 168La786, 123S325.

1067–91 167La1024, 120S634, 63ALR1283; 12LaA96, 125S478(1stcase).

1067–92 13LaA81, 127S12. [a] (1) 162La747, 111S82. [c] 9LaA291, 120S551(2dcase). [g] **Suit to annul sale.**–167La327, 119S66.

1067–92½–New. local improvement assessment, 159La527, 105S608 (Const. [1921] art 7).

1068–97 [a] (1) 169La1014, 126S511.

1068–1 161La278, 108S481.

1069–2 159La527, 105S608; 161La278, 108S481; 2LaA706. [e] **Appeal to supreme court from district court** is properly disallowed when question of constitutionality was raised for first time on appeal to district court. 158La262, 103S761. [f] **Constitutionality of ordinance** if raised in mayor's court can be appealed directly to supreme court. 158La262, 103S761. [g] **Time for presenting question of constitutionality.**–170La1054, 129S634.

1069–3 160La617, 107S466.

1069–4 [b] (1) 164La202, 113S817. (2) but where validity of ordinance levying special assessment is involved, lower court need not have declared act, pursuant to which it was adopted, unconstitutional. 159La527, 105S608.

1069–6 165La304, 115S571.

1069–8 [a] (2) Nature of offense charged or sentence imposed determines right to appeal to supreme court from judgment forfeiting appearance bond. 162La295, 110S480. (3) Supreme court has no jurisdiction of appeal from judgment forfeiting bond to appear for sentence after conviction of carrying concealed weapon. 162La295, 110S480.

1069–9 161La761, 109S472.

1069–10 161La761, 109S472.

1069–11 163La374, 111S791.

1069–14 165La437, 115S648; 5LaA703. [b] See also 9LaA178, 119S371. [l] **In exercising supervisory jurisdiction,** supreme court requires only that errors complained of be patent on face of record. 160La925, 107S698. [m] **Supreme court looks to substance, not form.**–163La213, 111S681. [n] **Amount involved.**–163La824, 112S799, 53ALR82. [o] **Refusal of supreme court to exercise its supervisory jurisdiction** in case where complainant has yet remedy by appeal does not establish jurisprudence. 167La683, 120S50.

1070–17 [e] **Want of written notice to respondent** of application for writ of certiorari will not cause denial of writ under court rule. 160La555, 107S425.

1070–18 163La824, 112S799, 53ALR82. [c] **Want of written notice to respondent** of application for writ of prohibition will not cause denial of writ under court rule. 160La555, 107S425.

1070–19 5LaA702.

1070–21 [h] **Injunction will not be issued** to restrain authorities from arresting and prosecuting those who violate penal statutes. 169La284, 125S125.

1071–28 159La966, 106S459; 160La749, 107S514; 160La752, 107S515; 166La1028, 118S122; 167La327, 119S66. But see 170La923, 129S531. [p] 163La796, 112S725.

1071–28½–New. The supervisory jurisdiction of the supreme court does not extend to a review of facts bearing on guilt or innocence of accused in an unappealable case. 156La891, 101S255.

1071–28⅓–New. Question of supreme court's jurisdiction of appeal in boundary dispute is concluded after affirmance as regards jurisdiction of incidental demand relating to cost. 163La555, 112S415.

1071–28¼–New. The supreme court is the final interpreter of its own decrees. 163La555, 112S415.

1071–41 159La209, 105S292.

1072–43 12LaA89, 125S318(1stcase).

1072–44 [a] **Injunction.**–1LaA195(2dcase).

1072–45 LaA 130S868.

1072–46 164La1011, 115S128; 168La391, 122S121. [a] **All civil actions of which district courts have exclusive original jurisdiction.**–13LaA68, 127S103 (judgment denying relief against city involving only fifteen dollars). [b] **No jurisdiction of homestead claim** but may consider claims of extinguishment of judgment by novation or prescription. 13LaA61, 127S108.

1072–47 165La1025, 116S496; 166La585, 117S727; 2LaA81; 11LaA297, 123S395(1stcase); 13LaA220, 127S755(2dcase) (appeal from judgment refusing to annul nonappealable default judgment). [c] **Where amount in dispute is exactly one hundred dollars,** court of appeals is without jurisdiction. 6LaA204.

1072–48 158La1002, 105S43; 163La796, 112S725; 5LaA234; 6LaA194; 6LaA564; 7LaA253; 8LaA434; 12LaA212, 125S768(1stcase); LaA 127S750. See also 3LaA49. [b] **Transferred to supreme court** as not within appellate court's jurisdiction. LaA 130S366.

1072–51 161La996, 109S814.

1072–52 159La209, 105S292; 164La844, 114S707; 9LaA178, 119S371; 1LaA139; 3LaA323; 4LaA230; 4LaA277 (no original jurisdiction to issue injunction); LaA 128S204; LaA 130S868.

1072–53 164La844, 114S707.

1072–56 8LaA209. [a] **Transfer to supreme court.**–2LaA36; 2LaA155; 2LaA584; 4LaA476; 5LaA412; 5LaA588; 6LaA194; 6LaA301; 6LaA362; 7LaA111; 7LaA178. [b] **Rehearing.**–7LaA294.

1072–56½–New. The courts of appeal have no supervisory jurisdiction over inferior courts. 159La209, 105S292.

1072–56⅓–New. The court of appeals, not having jurisdiction of the appeal, should transfer the case to the supreme court. 165La426, 115S644.

1072–56¼–New. The court of appeals has no discretion to determine whether a case without its jurisdiction should be transferred or the appeal dismissed. 165La426, 115S644.

1072–56⅕–New. Appeal to the court of appeals not having jurisdiction held taken in good faith. 165La426, 115S644.

1072–56⅙–New. Where appeal should have gone to the supreme court, instead of to the court of appeal, because exceeding its maximum jurisdiction, the appeal will not be dismissed, but the court of appeal will transfer it to the supreme court. 9LaA266, 120S101(2dcase).

1072–56⅐–New. Courts of appeal have no supervisory jurisdiction. 9LaA631, 121S779.

1072–56⅛–New. A case in which the amount involved exceeds the jurisdiction of the court of appeals will be transferred to the supreme court. 6LaA194.

1072–56⅑–New. Defamation of character is not "personal injury" within constitutional provision giving court of appeal jurisdiction where amount is over two thousand dollars. 12LaA539, 126S571.

1072–56⅒–New. In determining jurisdiction of court of appeals, main demand controls. LaA 129S423.

1072–64 160La208, 106S785; 162La350, 110S555.

1073–78 128Me108, 146A10.

1073–4½–New. A supreme court sitting in banc is not a court of original jurisdiction and cannot grant leave to amend. 125Me478, 135A33.

1073–20 Mass 169NE502 (advisory opinions are subject to re-examination when litigated).

1074–23 Mass 168NE536. [d] But see Mass 165NE904.

1074–24 [i] 261Mass523, 159NE55; 261Mass556, 159NE70.

1075–72 [c] **"Superior court," as used in statute,** means court held, whether by one or more judges, at time and place established by law. 261Mass299, 159NE51. [d] **Measure of jurisdiction** in criminal cases is jurisdiction of lower court whence complaint comes. 261Mass345, 158NE758.

1076–78 251Mich286, 232NW387.

1076–86 233Mich356, 206NW582.

1077–6 [b] **Public necessity** exists where there is illegal attempt to incorporate municipality. 165Minn369, 206NW455.

1077–13 141Miss72, 106S83 (not court of original jurisdiction). [a] (1) Miss 121S835. (3) 145Miss767, 111S357. [d] **Question of chancery jurisdiction not subject to review.**–147Miss186, 113S433.

1078–26 [c] **Appeals from county court.**–153Miss43, 120S566.

1078–27 321Mo586, 11SW(2d)1036.

1078–28 320Mo486, 8SW(2d)613.

1078–29 320Mo486, 8SW(2d)613.

1078–31 320Mo385, 7SW(2d)689; Mo 31SW(2d)1037.

1078–34 310Mo526, 275SW927. [b] Mo 9SW(2d)595. [d] Mo 9SW(2d)595.

1078–35 315Mo101, 285SW980, 46ALR1472. [b] 315Mo101, 285SW980, 46ALR1472. [d] **Failure of relator to serve printed abstract** of record as required by rules of court does not entitle respondent to judgment on merits. Mo 20SW(2d)56.

1078–36 315Mo672, 287SW396; Mo 29SW(2d)83. See also Mo 274SW373. [a] **Writ goes to question of jurisdiction** and conflict must appear on face of opinion. Mo 274SW373.

1078–37 [a] (1) Mo 19SW(2d)637 (waiver of right to complain of failure to serve answering brief in time).

1078–39 13F(2d)723; Mo 29SW(2d)83.

[b] (1) 307Mo 536, 271SW43; 322Mo 318, 18SW(2d)4. (3) May quash record of improperly constituted court of appeals without showing conflict with supreme court ruling. 317Mo 751, 297 SW378. [c] **On certiorari to quash opinion supreme court can consider** only that part of record relating to conflict, record should consist only of petition, exhibits and subsequent proceedings conflict of opinion noticed, though not suggested by relator. 307Mo 536, 271 SW43.

1079–40 13F(2d)723. [a] **Construction of its rules by court of appeals** is judicial determination with which supreme court will not interfere. 308Mo 278, 272SW72. [b] **Where court of appeals refuses to consider case of which record shows it has jurisdiction,** supreme court will by mandamus compel it to exercise such jurisdiction. 13F(2d) 723; 308Mo 278, 272SW72.

1079–42 13F(2d)723. [a] (1) MoA 20 SW(2d)7. [b] (1) 307Mo 536, 271SW43; 310Mo 367, 276SW869; 310Mo 378, 276 SW877; 316Mo 865, 293SW783; 317Mo 1208, 298SW833; 319Mo 733, 6SW(2d) 893; 322Mo 1236, 18SW(2d)21; Mo 25 SW(2d)462; Mo 26SW(2d)939. (2) Mo 20SW(2d)46. But see Mo 287SW606. (3) 307Mo 536, 271SW43; 310Mo 248, 274SW1028; 313Mo 672, 282SW694; 315Mo 22, 285SW479; 315Mo 1295, 290 SW115; 318Mo 173, 300SW812; Mo 18 SW(2d)478; 322Mo 991, 18SW(2d)487; Mo 19SW(2d)695; Mo 20SW(2d)46; Mo 26SW(2d)939; Mo 30SW(2d)100 (correctness of construction of statute cannot be determined); Mo 31SW(2d)783. (4) 318Mo 256, 300SW272; 318Mo 341, 300SW475; 318Mo 173, 300SW812; 318 Mo 274, 300SW1064. (5) Holding of court of appeals that trial court did not err in failing to submit question of partial or total loss to jury in action on fire insurance policy held in conflict with former ruling of supreme court. 307Mo 194, 270SW113; 316Mo 1041, 293 SW98; 316Mo 865, 293SW783; 317Mo 858, 297SW59. (6) Decision of court of appeals as to proximate cause of injury held to contravene decisions of supreme court. 310Mo 367, 276SW869. (7) Opinion of court of appeals as to placing no statu quo on rescission of sale held not in conflict with supreme court decision. 310Mo 386, 276SW1026. (8) Conflict with supreme court decision must appear on face of opinion attached. 308Mo 597, 274SW416. (9) Holding of court of appeals that answer not specifically alleging fraud was insufficient was held in conflict with decisions of supreme court. 310Mo 378, 276SW 877. (10) Complaint that allegations of specific acts of negligence were not specific enough will not be considered where no such question was raised in opinion of court of appeals. 308Mo 597, 274SW416. (11) It will not be ruled in certiorari that negligence alleged was not proximate cause of injury where opinion of court of appeals says it was proximate cause and supports its statement by setting out supporting evidence. 308Mo 597, 274SW 416. (12) Decision of court of appeals that it was actionable negligence for employer to furnish employee harder, stiffer, and having greater recoiling strength than wire ordinarily used, held in conflict with decisions of supreme court. 310Mo 248, 274SW1028. (13) Supreme court is limited to rulings actually made by court of appeals. 310 Mo 248, 274SW1028. (14) Decision of court of appeals as to sufficiency of evidence to sustain findings when shown on cross-examination to be based on hearsay held not to conflict with any supreme court decision. 307Mo 536, 271 SW43. (15) Decision of court of appeals construing insurance policy held not to conflict with decisions of supreme court. 316Mo 346, 289SW957. (16) In order that record of court of appeals may be quashed on certiorari, opinion must have announced general rule of law contrary to latest announcement of supreme court on subject or must have announced and applied conclusion of law contrary to conclusion of supreme court on same or similar facts. 316Mo 354, 289SW796. (17) Holding of court of appeals that recovery could not be had as for money had and received against bank refusing to pay check given for property with knowledge that draft deposited by purchaser constituted proceeds thereof without proof of agreement of bank to pay checks issued for payment held in conflict with supreme court decision. 316Mo 354, 289SW796. (18) Decision of court of appeals as to propriety of instruction on negligent keeping of mule resulting in injury to employee held not in conflict with supreme court decision. 316Mo 418, 289SW835. (19) Supreme court cannot quash opinion of court of appeals because it incorrectly decided case. Mo 26SW(2d)939. (20) Soundness of court decision construing statute will not be determined where supreme court never construed statute. Mo 28SW(2d)75. (21) Unless there is conflict, supreme court cannot quash opinion of court of appeals. Mo 19SW (2d)700, 67ALR157. (22) Supreme court cannot go outside opinion of court of appeals to ascertain evidentiary facts. Mo 19SW(2d)700, 67ALR157. (23) Supreme court cannot consider soundness of ruling of court of appeals if rule of law promulgated by it is not in conflict with former ruling of supreme court. Mo 22SW(2d)1045. (24) Authority to supervise findings and conclusions of court of appeals is limited to cases wherein it has announced principle contrary to announcement of supreme court. Mo 28SW(2d)97. (25) Supreme court cannot construe contract involved independently and declare that appellate court erred in its construction. Mo 30SW(2d)100. (26) Decisions held conflicting. Mo 19SW(2d)700, 67ALR 157; Mo 25SW(2d)92. (27) Decisions held not conflicting. Mo 19SW(2d)695; Mo 19SW(2d)700, 67ALR157; Mo 22 SW(2d)1045; Mo 31SW(2d)783. (28) Rulings held not in conflict. Mo 20SW (2d)46. (29) Opinions held not conflicting. 322Mo 360, 20SW(2d)17; Mo 26SW(2d)939. (30) Other decisions as to conflict with supreme court decisions. 313Mo 672, 282SW694; 313Mo 681, 282 SW389; 315Mo 22, 285SW479; 315Mo 1229, 288SW13; 315Mo 1332, 289SW 869; 315Mo 1295, 290SW115; 318Mo 516, 18SW(2d)103; 318Mo 387, 18SW(2d) 787; 321Mo 910, 13SW(2d)537; 321Mo 1035, 13SW(2d)1059; 322Mo 38, 14SW (2d)600; Mo 14SW(2d)978; 321Mo 1126, 14SW(2d)990; 322Mo 565, 15SW(2d) 798; 322Mo 376, 15SW(2d)815; Mo 18 SW(2d)478; 322Mo 991, 18SW(2d)487; 322Mo 1077, 18SW(2d)889; Mo 23SW (2d)112; Mo 23SW(2d)162; Mo 23SW (2d)1029; MoA 24SW(2d)678; Mo 28 SW(2d)75; Mo 28SW(2d)97; Mo 30SW (2d)46; Mo 30SW(2d)100; Mo 30SW (2d)1015. [c] 307Mo 536, 271SW43; 313Mo 672, 282SW694; 316Mo 1041, 293 SW98 (construction of new statute). [d] **Certiorari will not lie to quash opinion** of court of appeals for immaterial inconsistencies therein. Mo 25 SW(2d)462 (not province of supreme court to reconcile such inconsistencies).

1079–44 MoA 23SW(2d)190(1stcase).

1079–45 Mo 297SW967. See also Mo 288SW16. [a] 308Mo 272, 271SW768. [b] **Jurisdiction of appeal by plaintiff** is determined by facts appearing in his petition. 308Mo 272, 271SW768.

1079–47 318Mo 151, 1SW(2d)193, 58 ALR1518.

1079–50 [e] 222MoA383, 5SW(2d)671.

1079–51 310Mo 587, 275SW932; 317Mo 579, 296SW787; Mo 18SW(2d)26 (must be directly and primarily involved); Mo 23SW(2d)107 (must be primarily concerned); Mo 31SW(2d)788; MoA 11 SW(2d)1083; MoA 25SW(2d)489. [a] Mo 30SW(2d)32. [f] 318Mo 440, 300 SW486; Mo 14SW(2d)561(1stcase); Mo 18SW(2d)26; Mo 23SW(2d)107; MoA 274SW1108. [q] **Drainage benefit assessment cases** held not included. 309 Mo 18, 274SW359. [r] **Term "revenue law"** includes laws relating to disbursement of revenue and its preservation. 318Mo 440, 300SW486.

1080–52 320Mo 362, 8SW(2d)616 (quo warranto); 321Mo 858, 12SW(2d)489. [a] (3) MoA 11SW(2d)1095. (5) Constable. 310Mo 397, 276SW631. (6) County school superintendent. 317Mo 1141, 298 SW37 (title not involved). **Errata.**–[b] Words **"The term "office under this state"** includes," etc., should read: **"The term "office under this state"** does not include." 317Mo 714, 296SW775. (1) "The clerk of the mayor of a city" should read "The mayor of a city of the third class." 317Mo 714, 296SW 775. (3) Village trustee. 317Mo 714, 296SW775. [d] **In quo warranto proceedings to challenge validity of organization** of consolidated school district and to oust directors appellate jurisdiction of supreme court is exclusive. 307Mo 455, 270SW688. [e] **Title to office does not include** right to office of city attorney. Mo 31SW(2d)1037.

1080–54 Mo 273SW1059 (county must be party of record); Mo 278SW387. [d] **Where county is not party to record,** supreme court is without authority to review order denying peremptory writ of mandamus to compel judges of county court to issue warrant in favor of relator on county treasurer. Mo 19SW(2d)294(1stcase).

1080–55 317Mo 933, 297SW1 (action against organized township); Mo 31 SW(2d)201. [a] (1) 317Mo 1141, 298 SW37; 322Mo 444, 17SW(2d)342; Mo 20SW(2d)657. (3) Levee district. Mo 14SW(2d)561(1stcase). [b] (1) 307Mo 206, 270SW680; Mo 32SW(2d)72. (2) 318Mo 135, 298SW760. (3) City within county is political subdivision. Mo 8SW(2d)979. (4) Supreme court is without jurisdiction where city is not party to record in intervention proceeding by city comptroller. Mo 19SW(2d) 882. (5) City within county is not political subdivision of state. Mo 31 SW(2d)1037; Mo 31SW(2d)1038. [e] **Township** is political subdivision of state within meaning of provision. MoA 12SW(2d)763(2dcase). [f] **Organized township** is political subdivision of state. Mo 30SW(2d)32.

1081–56 309Mo 612, 274SW688; Mo 16 SW(2d)44. [a] 313Mo 667, 288SW16; 317Mo 1141, 298SW37. [b] (1) 320Mo 1190, 9SW(2d)635 (officers of board of health are state officers). (2) Commissions for blind which is not separate entity from its members. 309Mo 612, 274SW688. (3) Petition for appeal should name individual commissioners, but where defect of parties not raised suit against commission will be considered one against individual commissioners constituting it. 309Mo 612, 274 SW688. [c] (6) Circuit judge. 313Mo 667, 288SW16. (7) County superintendent of schools. Mo 9SW(2d)595. (8) Finance commissioner liquidating delinquent bank. Mo 27SW(2d)1029. [e] **When officer not party.**–Mo 27SW (2d)1029.

1081–58 MoA 283SW61.

1081–59 Mo 31SW(2d)1055; MoA 12 SW(2d)103. [a] **It is duty of court to raise jurisdictional questions sua sponte.**–318Mo 856, 1SW(2d)799. [b] **Supreme court will, sua sponte, question jurisdiction** unless it clearly appears from record. Mo 30SW(2d)63.

1081–60 [a] 309Mo 534, 275SW41 (constitutional question involved); Mo 278 SW712; Mo 278SW723.

1081–61½–New. In equity an action not involving elements sufficient to authorize jurisdiction, supreme court has duty of transferring cause. Mo 8SW(2d)979.

1081–63 Mo 3SW(2d)352(1stcase).

1081–64 309Mo 1, 273SW736; 309Mo 534, 275SW41; 312Mo 212, 278SW1030; 322Mo 1050, 17SW(2d)977.

1081–65 309Mo 1, 273SW736; 309Mo 534, 275SW41; 312Mo 212, 278SW1030; 316Mo 204, 289SW554; Mo 296SW815; 317Mo 413, 297SW63 (in misdemeanor prosecution); Mo 16SW(2d)44.

1082–66 310Mo 519, 276SW622; MoA 293SW445. [c] MoA 282SW465. [d] 309Mo 217, 274SW388; 316Mo 454, 290 SW133; Mo 4SW(2d)824; 322Mo 866, 17SW(2d)327; Mo 18SW(2d)441; Mo

258SW(2d)457; Mo 308SW(2d)143; Mo 308SW(2d)974; Mo 318SW(2d)1055; Mo 256SW741; MoA 295SW132; Tex CommnA 276SW643. [e] (16) Where in misdemeanor for transporting intoxicating liquors defense was interposed that search warrant by which evidence obtained was in violation of constitution, 309Mo 534, 275SW41, (17) Other questions. MoA 28SW(2d)139. (18) Motion for dismissal or new trial because justice of peace was without jurisdiction over criminal libel raises constitutional question requiring transfer to supreme court. MoA 278SW(2d)708(2dcase). (19) Where contention is raised that statutes, if construed as contended, would interfere with freedom of contract. MoA 28SW(2d)120. [i] **Erroneous construction of contract** does not give supreme court jurisdiction on ground that question is raised under due process provision of constitution. 316Mo454, 290SW133.

1082-68 Mo 256SW165 (mere assertion held insufficient); Mo 278SW372; 312Mo134, 278SW713; Mo 280SW1043; Mo 281SW963; Mo 289SW834; 316Mo454, 290SW133, 311Mo164, 296SW413 (raised by motion to quash search warrant); Mo 108SW(2d)44 (at earliest possible moment); Mo 238SW(2d)1013 (sufficient); Mo 318SW(2d)805; Mo 328SW(2d)79; Mo 328SW(2d)81. [b] (2) Other instances. Mo 328SW(2d)79. [c] Mo 88SW(2d)979 (general reference to constitution held insufficient); MoA 295SW132. [b] 316Mo454, 290SW133. [n] **Supreme court** has no jurisdiction on appeal from conviction of misdemeanor, in absence of constitutional question. 312Mo134, 278SW713. [v] **Question must be raised at earliest moment,** or be deemed waived. 312Mo134, 278SW713. [w] **Question not raised (ill new trial after reversal** is not raised in time to give supreme court jurisdiction. 316Mo454, 290SW133. [x] **Question relative to constitutional provision prohibiting impairment of obligation of contracts** is not raised unless state statute is mentioned. 316Mo454, 290SW133. [y] **Question raised on motion for new trial** is too late. 312Mo134, 278SW713. [z] **Unless question is raised at earliest possible moment,** it will be deemed waived. 318Mo135, 298SW760. [aa] **Necessity of keeping question alive** Mo 318SW(2d)1038. [ab] **Petition insufficient to raise question.**–Mo 318SW(2d)1038. [ac] **Where question was not expressly raised by demurrer,**–Mo 328SW(2d)79. [ad] **That statute has since been found unconstitutional in other case** does not confer jurisdiction where constitutionality was not timely raised. Mo 308SW(2d)143.

1082-69 Mo 278SW372; 312Mo134, 278SW713; 316Mo454, 290SW133; Mo 297SW953; Mo 168SW(2d)44 (amended answer held sufficient); Mo 188SW(2d)441 (assignments in motion too general, specific objection being required); Mo 318SW(2d)1038; Mo 318SW(2d)1055 (must be briefed and relied upon); Mo 328SW(2d)79. MoA 256SW111, 220MoA780, 275SW988; MoA 295SW132. [a] See also 322Mo1209, 188SW(2d)128. [c] (1) 321Mo943, 138SW(2d)641; Mo 18SW(2d)441; Mo 308SW(2d)143; 221MoA898, 295SW1083. (but see MoA 308SW(2d)160. (2) Where not raised in motion for new trial, assignment in respect of constitutional question will not be considered on appeal. Mo 248SW(2d)138. (3) Motion to transfer case to supreme court will be overruled where constitutional questions were not preserved in motion for new trial. MoA 268SW(2d)843. (4) Grounds of motion for new trial held insufficient to raise constitutional question. Mo 248SW(2d)133.

1083-69½–New. and kept alive throughout the proceeding. MoA 293SW445.

1083-70 Mo 278SW372; Mo 308SW(2d)143.

1083-71 322Mo866, 178SW(2d)327, Mo 328SW(2d)69; Mo 328SW(2d)81; MoA 78SW(2d)385.

1084-73 312Mo134, 278SW713, 321Mo580, 118SW(2d)1036; Mo 318SW(2d)1055; MoA 295SW132; MoA 138SW(2d)573. [b] 310Mo655, 276SW36. [f] 312Mo134, 278SW713. [g] **Assignment is insufficient** which cites impossible section of constitution and fails to state facts showing violation. 318Mo135, 298SW760.

1084-74 312Mo134, 278SW713; Mo 48SW(2d)324; Mo 328SW(2d)81.

1084-77 Mo 48SW(2d)824; Mo 318SW(2d)1038. [a] Mo 285SW424(2dcase).

1084-78½–New. Where the circuit court has found facts for an instruction covering constitutional questions and has given instructions on such questions and the court of appeals has transferred the case to the supreme court on the ground that a constitutional question is involved, the supreme court should not, without reviewing the facts, hold that no constitutional question is involved. 307Mo98, 270SW662.

1084-79 MoA 328SW(2d)134.

1084-80 MoA 328SW(2d)134.

1085-81 See also Mo 300SW726.

1085-82 318Mo135, 298SW760; Mo 238SW(2d)1064(1stcase).

1085-83 310Mo519, 276SW622; Mo 281SW963, 320Mo183, 68SW(2d)902 (abandoned in brief); Mo 208SW(2d)553 (point not mentioned in brief). See also Mo 285SW424(2dcase); Mo 38SW(2d)352(1stcase) (constitutional question not kept alive throughout case must be treated as abandoned). [a] **Party waiving constitutional question.**–310Mo519, 276SW622. [b] **Question will be deemed abandoned** where not briefed or argued. 318Mo135, 298SW760.

1085-86 MoA 256SW110; MoA 280SW438. [a] **If one of two joint proceedings** involves title to realty, whole case is so treated. 318Mo948, 28SW(2d)771.

1085-87 315Mo1239, 288SW38; 318Mo948, 28SW(2d)771; MoA 138SW(2d)659. [b] **Mere form of action** does not conclusively determine whether title to real estate is involved. Mo 308SW(2d)63; Mo 318SW(2d)805.

1085-88 315Mo1239, 288SW38; 318Mo948, 28SW(2d)771 (title must be in issue); Mo 308SW(2d)63; Mo 318SW(2d)805.

1085-89 315Mo1239, 288SW38; 318Mo948, 28SW(2d)771; Mo 188SW(2d)26. [a] 315Mo1239, 288SW38; Mo 292SW75; Mo 308SW(2d)1073; MoA 256SW110. [b] 318Mo948, 28SW(2d)771; 319Mo569, 18SW(2d)1062. Mo 188SW(2d)36; 322Mo1209, 188SW(2d)428; Mo 19SW(2d)648; Mo 198SW(2d)883; Mo 25SW(2d)457; Mo 298SW(2d)52; Mo 30SW(2d)605; Mo 308SW(2d)998; MoA 256SW549, 219MoA608, 283SW179; MoA 158SW(2d)860; MoA 228SW(2d)178 (dicence).

1085-90 Mo 270SW58; 315Mo1239, 288SW38, 318Mo948, 28SW(2d)771.

1086-94 318Mo948, 28SW(2d)771.

1086-95 319Mo569, 48SW(2d)1062.

1086-97 MoA 278SW810.

1086-7 319Mo599, 48SW(2d)1064.

1087-8 319Mo854, 58SW(2d)4; Mo 30SW(2d)63; Mo 318SW(2d)805 (title not involved); Mo 318SW(2d)991 (does not involve title to real estate where only question involved was whether trust deed was subsisting lien).

1087-12 320Mo310, 7SW(2d)348.

1087-13 Mo 208SW(2d)663.

1087-14 [a] (1) MoA 208SW(2d)554(1st case). (2) Where appellant claims that lower court had no right to establish road, title to realty is directly involved (MoA 228SW(2d)1057), (3) whether authority to establish road is attacked before or after judgment (MoA 228SW(2d)1057). [d] **Decree enjoining obstruction of roadway** held not to affect title or establish easement. Mo 208SW(2d)663.

1087-15 MoA 280SW76.

1087-17 [a] **Pleading and decree has been held insufficient** to show that title to realty was involved. Mo 298SW(2d)52. [b] **Pleading must pray for its removal as cloud** on title and judgment must undertake to remove cloud. Mo 298SW(2d)52.

1088-20 318Mo135, 298SW760.

1088-21 [a] **Where only question is right to condemn and damages,** title to real estate is not involved. Mo 308SW(2d)605. [b] **Generally** title is not in issue but is merely affected. Mo 308SW(2d)605.

1088-22 308Mo272, 271SW768; 317Mo122, 296SW123; 318Mo1078, 28SW(2d)707 (value of estate in will contest case); Mo 48SW(2d)824; 319Mo854, 5SW(2d)4; Mo 68SW(2d)567 (judgment conferred for three thousand dollars); 320Mo569, 88SW(2d)602; Mo 88SW(2d)973; Mo 88SW(2d)979; Mo 168SW(2d)44; Mo 308SW(2d)63; Mo 318SW(2d)1037; Mo 318SW(2d)1038. [d] (1) 308Mo272, 271SW768; 311Mo249, 278SW368; 316Mo1235, 293SW142. But see 322Mo444, 178SW(2d)342 (where parties stipulated that judgment should not exceed stated sum). (2) 318Mo476, 300SW455; Mo 78SW(2d)356 (must be shown by record and not by matters outside of it); 320Mo385, 78SW(2d)689. [i] (2) Where sustaining motion for new trial after verdict in plaintiff's favor reinstated original claim for ten thousand dollars, supreme court has jurisdiction. Mo 238SW(2d)126. [l] (2) Amendment to petition reducing amount of recovery so as to deprive supreme court of jurisdiction is not permissible. MoA 128SW(2d)108. [m] See also 311Mo249, 278SW368. [y] 317Mo122, 296SW123. [z] 317Mo122, 296SW123. [dd] **In action to compel directors to account to corporation for losses** in which plaintiff sued for himself and other stockholders, in which trial court found for defendant and refused to appoint receiver, amounts for which plaintiff sought accounting to corporation is amount involved for purpose of jurisdiction. 308Mo272, 271SW768. [ee] **Matter in question** must be money or some right value of which may be ascertained in money. MoA 277SW967. [ff] **On appeal by intervener** from judgment for plaintiff in action to recover balance due on sale of interest in oil produced from well, amount of judgment and not value of oil interest determines jurisdiction. 220MoA1004, 274SW894. [gg] **Amount of judgment** does not control when only half the amount was involved in suit. MoA 256SW558. [hh] **In cases or proceedings wherein other relief than recovery of money judgment is sought,** value of right necessarily involved, estimated in money, constitutes measure of supreme court's appellate jurisdiction. Mo 88SW(2d)973. [ii] **On appeal from judgment removing administrator,** statutory fee is measure of jurisdiction. Mo 88SW(2d)973 (court has no jurisdiction where estate is seventeen thousand dollars, and fee is five per cent maximum). [jj] **Dismissal of appeal as to one appellee** may reduce amount involved below jurisdictional amount. MoA 288SW91.

1089-25 Mo 281SW963 (where constitutional question is not preserved on appeal); 319Mo337, 48SW(2d)776; 320Mo385, 78SW(2d)689; 320Mo451, 88SW(2d)73; 320Mo486, 88SW(2d)613; Mo 198SW(2d)641; Mo 208SW(2d)69; Mo 208SW(2d)657; Mo 238SW(2d)32; Mo 248SW(2d)108; Mo 248SW(2d)116; Mo 308SW(2d)974; Mo 318SW(2d)1037, MoA 274SW491 (amount held to make case for supreme court); MoA 198SW(2d)303 (where amount reduced by exclusion of principal of several items); MoA 298SW(2d)165. See also 321Mo795, 128SW(2d)451. [c] **In proceedings for removal of guardian on ground** of his failure to inventory for certain property which he claimed as gift, where such issue is determined in his favor and amount in dispute involved more than seven thousand five hundred dollars, supreme court has jurisdiction of appeal. 307Mo98, 270SW662. [d] **Supreme court has no jurisdiction to review judgment** for seven thousand five hundred dollars. 318Mo856, 18SW(2d)799. [e] **Equity cases.**–321Mo943, 138SW(2d)641. [f] **"Amount in dispute"** is amount of judgment without subsequently accruing interest. 318Mo856, 18SW(2d)799. [g] **Determination of amount.**–321Mo943, 138SW(2d)641. [h] **Amount determined from record and evidence.**–Mo 198SW(2d)641. [i] **In determining what amount is actually in dispute supreme court will look beyond**

pleadings and examine entire record. **Mo** 24SW(2d)108. [j] **Appeal from award in workmen's compensation case** is within jurisdiction of court of appeals where employer contended maximum award permissible was six thousand dollars notwithstanding larger award. **MoA** 27SW(2d)755. [k] **Claim for damages in defendant's answer cannot be injected into case on appeal** to give supreme court jurisdiction where it was abandoned in trial court as shown by record. **Mo** 24SW(2d)108.

1090–27 320Mo 865, 8SW(2d)1001.

1090–29 [b] **That one of judges does not concur in some of language used in opinion** does not authorize transfer where all members of division concur in result. 310Mo 72, 274SW1031.

1090–30 **Mo** 25SW(2d)791 ("federal question" as used in federal constitution is interpreted as involving construction thereof or validity of statute or treaty or authority exercised thereunder). [b] **Federal question not involved** in fact that action for death of railroad employee was based on federal employers liability act. **Mo** 25SW(2d) 791. [c] **Whether violation of interstate commerce commission's regulation affords cause of action for death of one not engaged in interstate commerce** is not federal question. **Mo** 26SW(2d) 980.

1090–35 [a] **Appeals in cases in which county judges and county court are parties** where county itself is not party are within jurisdiction of St. Louis court of appeals. **MoA** 277SW615.

1090–39 312Mo 322, 279SW60; **MoA** 20 SW(2d)7 (appeal from judgment awarding mandamus directing reinstatement of city employee in office). [a] 307Mo 536, 271SW43; **Mo** 30SW(2d)974. [e] 313Mo 672, 282SW694; 313Mo 681, 282 SW389. [h] **Court of appeals is court of last resort** when it acts within its appropriate jurisdiction. 313Mo 672, 282 SW694; 313Mo 681, 282SW389. [i] **Court of appeals has jurisdiction where validity of ordinance is conceded** but particular construction would render same unconstitutional. **MoA** 30SW(2d) 157.

1090–40 220MoA702, 293SW488; **MoA** 283SW61.

1090–42 [b] **Workmen's compensation commission is not state officer** within provision depriving court of appeals of jurisdiction where state officer is party. **Mo** 27SW(2d)1026.

1090–44 **MoA** 298W(2d)165. [a] (3) Jurisdiction of court of appeals as to writs of prohibition limited to same extent as on appeal. 222MoA1236, 4SW (2d)852. (4) Constitutional question may be raised in court of appeals for first time. 222MoA1236, 4SW(2d)852.

1090–45 **MoA** 29SW(2d)236; **MoA** 32 SW(2d)142.

1090–47 309Mo 612, 274SW688; 317Mo 1208, 298SW833; 217MoA415, 266SW 765 (no jurisdiction of constitutional question); **MoA** 278SW810; **MoA** 284 SW827; **MoA** 290SW87; 222MoA383, 5SW(2d)671; **MoA** 8SW(2d)1077; **MoA** 118W(2d)66; **MoA** 20SW(2d)7. See also 318Mo 135, 298SW760; **Mo** 3SW (2d)352(1stcase). [f] **Jurisdiction of court of appeals cannot be destroyed by** sham constitutional question. 312Mo 134, 278SW713. [g] **Where constitutional questions waived.**–221MoA181, 299SW150. [h] **Actions involving title to realty.**–**MoA** 18W(2d)205. [i] **Appeals held within jurisdiction of court of appeals.**–**MoA** 13SW(2d)573.

1091–49 222MoA1236, 4SW(2d)852; **MoA** 13SW(2d)659. [c] **Necessity for construction of statute does not vest supreme court with jurisdiction** as court of appeals has jurisdiction to construe statute when construction thereof is necessary in cases within its jurisdiction. 322Mo 1209, 18SW(2d)428. [d] **If no rule of law is promulgated by court of appeals in conflict with former ruling of supreme court** on same or similar facts, court of appeals has inherent right to determine issues involved. **Mo** 22SW(2d)1045.

1091–51 [a] See also **Mo** 26SW(2d) 939.

1092–62 **TexCommnA** 23SW(2d)299 (2dcase).

1092–63 **Mo** 276SW382 (conflict held essential); 312Mo111, 278SW772; 315Mo 619, 286SW368; 318Mo 112, 298SW837 (2d case) (decision held conflicting with supreme court decision); 318Mo 693, 300 SW1071 (decisions held conflicting); 318Mo 225, 2SW(2d)621; 320Mo 526, 8 SW(2d)927; **Mo** 30SW(2d)462 (essentials of conflict); **MoA** 275SW579; **MoA** 275SW583; **MoA** 300SW833; **MoA** 2SW(2d)125; 222MoA408, 7SW(2d)279; **MoA** 22SW(2d)73; **MoA** 22SW(2d)201; **MoA** 27SW(2d)31; **MoA** 29SW(2d)725. [d] (2) To conflict, decision interpreting city charter provision need only involve similar provision of another city charter. 318Mo 963, 2SW(2d)616 (decisions held in conflict). [o] **MoA** 291SW508; **MoA** 296SW219. [p] (1) 307Mo 57, 269 SW959 (negotiability of certificate of deposit payable "in current funds"); 308 Mo 487, 272SW925 (that defendant asking and receiving instruction on humanitarian doctrine is estopped from alleging error in giving of plaintiff's instruction on same theory where evidence not challenged by defendant on such theory); **Mo** 274SW373; **Mo** 274SW391 (master's duty to servant); **Mo** 276SW382 (where no conflict appears as based on facts in opinion and some controlling decision of supreme court); 311Mo 128, 277SW 916; 311Mo 332, 278SW377; 313Mo 200, 281SW398; 313Mo 384, 282SW46; **Mo** 287SW603; **Mo** 287SW606; **Mo** 289SW 550; **Mo** 289SW583; **Mo** 292SW58; **Mo** 293SW122; **Mo** 297SW951; **Mo** 298SW 782; 317Mo 1208, 298SW833; **Mo** 3 SW(2d)731; 320Mo 1113, 9SW(2d)624; 321Mo 221, 9SW(2d)876; 321Mo 130, 9 SW(2d)953; 320Mo 1234, 10SW(2d)931; 320Mo 1218, 10SW(2d) 940; **Mo** 30SW (2d)445; **Mo** 30SW(2d)462; **Mo** 30SW (2d)466; **Mo** 31SW(2d)81; **Mo** 32SW (2d)569. (8) Ruling on effect of misstatements in insurance application prepared by agent. 316Mo 559, 291SW499. (9) Decision as to propriety of instruction. **Mo** 274SW373. (10) Decision as to propriety of failure to charge on definition of negligence. **Mo** 274SW373. (11) Decision as to propriety in form of instruction. **Mo** 274SW373. [s] 309Mo 415, 274SW712; 313Mo 246, 281SW690; 222MoA408, 7SW(2d)279. [t] **It is not necessary to show conflict** in order to quash record of court of appeals. 317 Mo 751, 297SW378 (decision held conflicting). [u] **Decisions held conflicting.**–321Mo 671, 12SW(2d)727. [v] **Ruling in action for miner's death,** permitting miner's recovery if injury took place in passageway, does not contravene previous decision to effect that miner is under duty to keep his working place safe. 320Mo 1130, 9SW(2d)596. [w] **Decision of court of appeals has been held not in conflict** with supreme court's decision. **Mo** 28SW(2d)1028. [x] **Decision conflicting** with other court of appeals. **MoA** 30SW(2d)774.

1093–64 318Mo 274, 300SW1064 (motion by counsel unauthorized).

1093–66 [a] 317Mo 751, 297SW378. [b] 316Mo 559, 291SW499.

1093–67 317Mo 1119, 298SW63; **Mo** 29 SW(2d)714; **Mo** 32SW(2d)572. [d] 313 Mo 384, 282SW46. [f] **Supreme court will not decide** point which it has never passed upon. 308Mo 109, 271SW757.

1093–68 308Mo 230, 271SW469; 311Mo 128, 277SW916; 316Mo 97, 289 SW922. [d] **Question for determination** is whether ruling or conclusion of law of court of appeals conflicts with decision or conclusion of law of supreme court. 316Mo 559, 291SW499.

1093–68½–New. And opinion of the court of appeals, following the latest decision of the supreme court, cannot and will not be quashed although upon reëxamination the supreme court concludes that such latest decision is wrong. 311Mo 128, 277SW916.

1093–69 315Mo 966, 287SW432. [a] **Decision held not in conflict with supreme court decisions,** and appellate court's jurisdiction upheld. 312Mo 322, 279SW60.

1093–70 310Mo 519, 276SW622; 317 Mo 1141, 298SW37; 318Mo 856, 18W (2d)799; 319Mo 569, 4SW(2d)1062; 319Mo 599, 4SW(2d)1064; 321Mo 943, 13SW(2d)641; **Mo** 19SW(2d)648; **MoA** 22SW(2d)178(1st case); **MoA** 32SW(2d) 134. [a] 322Mo 349, 17SW(2d)927 (supreme court has complete jurisdiction upon such transfer). [c] **Amount sued for as shown by record** determines jurisdiction of court of appeals on motion for transfer. **MoA** 299SW127. [d] **Upon transfer to supreme court,** appellant may submit case for hearing as appeal from trial court provided matters presented are properly preserved. 322Mo 349, 17SW(2d)927 (not limited to assignments and points submitted to court of appeals). [e] **Supreme court, on examining record showing that jurisdiction does not attach,** may, on its own motion, transfer cause to court of appeals. 319Mo 599, 4SW(2d)1064. [f] **Transfer on court's own motion** is proper in absence of motion to transfer. **MoA** 27SW(2d)751. [g] **Doubt regarding jurisdiction** of court of appeals in action to establish preferred demand against assets of insolvent bank in hands of finance commissioner warrants transfer. **MoA** 27SW(2d)751.

1094–71 221MoA399, 278SW88; **MoA** 284SW827; **MoA** 22SW(2d)651.

1094–73½–New. Though granting of appeal to supreme court was fully authorized at time appeal was granted, case will be transferred when question giving court jurisdiction is waived by party who raised it. 310Mo 519, 276SW 622.

1094–73¾–New. A defendant, not appealing from a judgment in his favor, is not entitled to a transfer of the cause from the court of appeals to the supreme court, on the ground that a constitutional question is involved. 222MoA1138, 14SW(2d)660.

1094–74 [h] **Presumptions on appeal from county court.**–322Mo 1230, 18SW (2d)498 (that constitutional question raised on appeal was presented and passed on in county court).

1094–86 83Mont511, 273P638. [a] (1) 78Mont435, 254P414; 83Mont511, 273 P638. (2) 76Mont143, 245P529; 77 Mont214, 250P609; 78Mont435, 254P 414; 83Mont511, 273P638 (writ held proper to vacate order for alimony). (4) 83Mont511, 273P638. (5) 77Mont214, 250P609. (6) Writ of supervisory control is authorized to prevent failure of justice by supplying means for correction of manifest error. 79Mont1, 254P 863. (7) Writ has no use when there is no error to correct. 79Mont1, 254P863. [k] **Dismissal of case by lower court after decision on appeal** before issuance of remittitur, being without jurisdiction, cannot be reviewed by writ of supervisory control. 77Mont214, 250P609. [l] **On application for writ of supervisory control or other appropriate writ,** supreme court may, where sufficient facts are before it, grant proper writ to accomplish purpose of application. 77Mont214, 250P609. [m] **Lower court must have acted within jurisdiction** in order to authorize issuance of writ of supervisory control. 77Mont214, 250P 609. [n] **Supreme court has jurisdiction to issue supervisory writ to prevent failure of justice** by supplying means for correction of manifest error committed by trial court acting within its jurisdiction, where there is no other adequate remedy and gross injustice is threatened. 85Mont215, 278P122. [o] **Actual malice of court toward litigant need not be shown** in order to establish that order made was tyrannical so as to bring case within supervisory power of supreme court. 85Mont215, 278P122. [p] **Not used to control litigants or individuals.**–83Mont511, 273P638. [q] **Proceedings to obtain writ of supervisory control.**–83Mont511, 273P638 (defendant judge presumed to have produced all available evidence). [r] **Where order or judgment is warranted by no substantial evidence,** supreme court will exercise supervisory control to correct manifest injustice where relator has no other adequate remedy. 85Mont 215, 278P122. [s] **Order adjudging guilt of contempt** is reviewable by writ

of supervisory control in proper case. 85Mont215, 278P122. [t] **Writ proper remedy.**–86Mont358, 284P125 to review error as to costs). [u] **Writ of supervisory control not denied** because appeal lies from order granting writ of assistance. Mont 292P904 (remedy by appeal inadequate). [v] **Function of writ.**–Mont 292P904.

1095–2 27Mont107, 69P829, 70P517; 74Mont488, 241P240.

1096–15 Nebr 233NW253.

1096–19 [c] **Trial in district court on issues presented below.**–118Nebr222, 224NW280.

1097–60 [c] **Question must be pending** in body propounding inquiry. NH 150 A551(1st case).

1097–62 NH 149A321. [c] 82NH561, 138A284.

1098–66 83NH91, 138A428.

1098–70½–New. On the legal side, the court is confined to review of judicial errors committed in the supreme and circuit courts. 104NJL156, 138A875.

1098–71 [c] (1) See also 103NJEq505, 143A836. (4) Supreme court has power to review questions of fact as well as of law. 103NJL28, 134A722.

1099–90 245NY611, 157NE879 (judgment of appellate division and trial term reversed and complaint dismissed on ground that uncontradicted evidence showed no consideration for note).

1099–91 245NY574, 157NE863.

1100–98 245NYS657.

1100–99 [a] 249NY122, 163NE124; 250 NY136, 164NE882.

1100–1 249NY122, 163NE124.

1100–2 [a] **Failure of sitting justice to participate in decision** is not dissent. 254NY146, 172NE271.

1100–6 241NY389, 150NE303.

1100–13 [a] **On appeal from final order** question need not be certified. 241NY 389, 150NE303.

1101–23 [a] **Court of Appeals reviews findings of fact** made by Appellate Division in reversing lower court. 254 NY186, 172NE464.

1101–25 225AppDiv895, 233NYS171; 227AppDiv821, 237NYS501. [a] (1) But see 245NY572, 157NE862.

1102–32½–New. Jurisdiction of court of appeals, will not be defeated on the ground that the decision of the lower courts might have been based on a finding of estoppel or laches, since nonresident defendants, not receiving legal notice of the pendency of the action, cannot be barred by estoppel or laches from subsequently appearing and asserting their rights. 249NY122, 163NE 124.

1102–40 [b] **Appellate division cannot hear an appeal** from its own judgment. 245NYS657.

1103–42 [b] **Final judgment means** all final determinations which could have been made by trial court. 217AppDiv 253, 217NYS762.

1103–60 [h] **Lower court by giving leave to appeal** does not confer jurisdiction in appellate term. 125Misc825, 211 NYS587.

1103–61 137Misc274, 242NYS161 (appeal from city court of Buffalo).

1104–68 189NC805, 128SE329. [c] **Jurisdiction over questions of fact** is exercised only in actions equitable in their nature and seeking relief on equitable principles. 195NC284, 141SE886.

1104–69 [c] **Certiorari.**–194NC277, 139 SE448.

1104–70 195NC291, 141SE733. See also 194NC303, 139SE613. [a] (1) 195 NC284, 141SE886; NC 153SE864. (2) Where claim presents no question of law, proceeding will be dismissed. 191 NC243, 131SE665; 195NC284, 141SE 886. (3) Whether work done in performance of highway contract was drainage ditch or borrow pit is question of fact beyond jurisdiction of supreme court to determine. 195NC284, 141SE 886. [c] **Transfer of causes to superior court.**–(1) Supreme court is not required to transfer every proceeding to enforce claim against state to superior court for trial of issues of fact by jury. 195NC284, 141SE886. [d] **Statute prescribing procedure** (1) is valid so far as it prescribes procedure for invoking original jurisdiction of supreme court (195NC284, 141SE886), (2) but is not controlling as to procedure after supreme court has acquired jurisdiction (195NC284, 141SE886).

1104–71 191NC243, 131SE665; 195NC 291, 141SE733.

1104–72 195NC291, 141SE733.

1104–73½–New. Question of constitutionality of law creating county court not properly presented by appeal from refusal of court to set aside a judgment. 190NC471, 130SE154.

1104–74 189NC805, 128SE329; 197NC 81, 147SE735. [a] **Appeals must be taken from inferior court to superior court,** and thence to supreme court. 190 NC599, 130SE498. [b] **By statute superior court can hear only matters of law** on appeal from Forsyth county court, and findings of fact are unauthorized. 190NC599, 130SE498.

1104–79 49ND27, 186NW381; 54ND 637, 210NW501. [b] 49ND1127, 194NW 745.

1105–84 [a] (2) Not issue to review action of depositors' guaranty fund commission in passing on merits of claims of alleged depositors against fund. 55ND182, 212NW829.

1105–85 [d] **Enjoining district court pending bankruptcy proceedings.**–Supreme court may stay proceedings in district court pending determination of bankruptcy proceedings in federal court commenced after district court assumed jurisdiction over property of insolvent debtor. 55ND641, 215NW87.

1105–86 54ND637, 210NW501. [e] (1) 55ND182, 212NW829. [n] (3) Writ of prohibition is appropriate means which supreme court may employ to arrest and control proceedings of district court in aid of its injunctional order. 54ND637, 210NW501.

1106–89 But see 121 Oh321, 168NE473.

1106–97 118 Oh69, 160NE452 (petition held not to present constitutional question). [a] 116 Oh736, 158NE7(3dcase); 116 Oh738, 158NE7(4thcase); 116 Oh 737, 158NE8(1stcase); 116 Oh731, 158 NE8(4thcase). [b] **To declare a statute unconstitutional** six judges must concur. 112 Oh607, 148NE350. [c] **Cases held to present no constitutional question.**–116 Oh730, 158NE7(1stcase). [d] **Procedure.**–121 Oh205, 167NE682.

1107–4 [b] **Under Seventh Amendment of constitution** adopted 1910 only original jurisdiction awarded supreme court is in mandamus, quo warranto, and habeas corpus. 118 Or556, 247P806.

1107–5 115 Oh87, 152NE185 (ouster and dissolution of corporation).

1107–9½–New. and in no other proceedings such as an administration suit, 115 Oh87, 152NE185.

1107–11 118 Oh273, 160NE856. [b] (2) Suit to enjoin public officer. 28 OhA 107, 162NE466. [c] (4) Mandamus proceeding. 115 Oh55, 152NE646. [d] **Appeal in statutory action to forfeit life estate** is without jurisdiction. OhA 172NE673.

1107–12 25 OhA153, 157NE907 (from judgments and final orders under Gen. Code § 12247).

1107–13 25 OhA153, 157NE907 (judgments and final orders of superior court of Cincinnati, under Gen. Code § 12247).

1107–14 116 Oh524, 156NE908; 25 OhA 153, 157NE907 (judgments and final orders of municipal court of Cleveland, under Gen. Code § 12247); 118 Or556, 247P806.

1107–23 [b] 119 Oh453, 164NE527. [d] **Appellate court's finding that conflict exists** is conclusive on supreme court. 118 Oh154, 160NE679.

1107–24½–New. Court derives its jurisdiction from constitution. 115 Oh87, 152NE185.

1107–25 114 Oh658, 151NE760 (statute conferring jurisdiction of appeals from state tax commission held constitutional); 34 OhA10, 170NE191(2dcase).

1107–27½–New. Municipal courts of Ohio are without power to impose a jail sentence exceeding thirty days. 25 Oh NPNS213.

1108–33 [i] **Contempt.**–125 Okl 1, 256P 340. [j] **Determination of constitutionality of statutes.**–Operative provisions of act, will not be passed upon till some action is taken thereon, and matter is properly brought before court. 134 Okl 288, 273P352.

1108–34 125 Okl 1, 256P340; 128 Okl 104, 261P553; 130 Okl 291, 267P272. [b] **Control of criminal court of appeals.**–126 Okl 37, 258P879.

1108–38 113 Okl 187, 240P700 (original jurisdiction entertained, due to public nature and importance of case and fact that no appeal was provided from action of officer against whom writ was sought); Okl 292P827. [c] **Proceeding dismissed as moot.**–138 Okl 66, 280P412. [d] **Power of supreme court under constitution** will be exercised only when questions involved are publici juris or unusual situation exists to prevent great wrong or denial of justice. 139 Okl 204, 281P803.

1108–40 121 Okl 268, 249P921; 126 Okl 37, 258P879.

1108–41 125 Okl 1, 256P340; 130 Okl 291, 267P272; 141 Okl 237, 284P1113. [a] **Proceeding dismissed as moot.**–138 Okl 66, 280P412.

1108–44 125 Okl 1, 256P340.

1108–44½–New. The supreme court is the head of the judicial system of the state and all other courts established by law are inferior to it. 126 Okl 37, 258P879.

1108–46 125 Okl 1, 256P340; 126 Okl 37, 258P879.

1108–48 125 Okl 1, 256P340; 126 Okl 37, 258P879. [a] But see 125 Okl 1, 256 P340.

1108–50 126 Okl 37, 258P879.

1108–51 126 Okl 37, 258P879. [a] **Court has no jurisdiction to issue extraordinary writs** unless it is by implication in aid of its appellate jurisdiction in criminal cases. 125 Okl 1, 256 P340.

1108–53½–New. The criminal court of appeals and its judges have not concurrent original jurisdiction with the supreme court in habeas corpus proceedings. 126 Okl 37, 258P879.

1108–53⅓–New. An original action disconnected with its appellate jurisdiction to obtain a writ of habeas corpus is not within the jurisdiction of the court of criminal appeals. 126 Okl 37, 258P879.

1109–54½–New. Judgments of the criminal court of appeals are final. 126 Okl 37, 258P879.

1109–54⅓–New. A judgment of the criminal court of appeals discharging a prisoner committed by the supreme court for contempt is void. 126 Okl 37, 258P879.

1109–54¼–New. The criminal court of appeals was not created by the constitution but by the legislature under authority of the constitution. 126 Okl 37, 258P879.

1109–55 [d] **Statute contemplates advisory opinion only where appeal has not been taken.**–OklCr 277P283.

1109–55½–New. [§ 542a] c. **District Courts.** A district court is without supervisory control over trial of cases in county court except by appeal, in the way and manner provided by constitution and statutes. 117 Okl 266, 246P456.

1109–55⅓–New. Other decisions as to jurisdiction of criminal court of appeals. 125 Okl 1, 256P340.

1109–56 [h] **In determining regularity of proceedings for organization of drainage district** supreme court is strictly appellate court. 115 Or291, 237P684, 1117, 1118, 239P193.

1109–58 [a] 120 Or177, 249P831. [a] **Court not court of original jurisdiction** cannot direct repayment of cash bail deposited with justice of peace. 123 Or 172, 261P428.

1109–66 [a] Pa 151A883.

1109–69 295Pa291, 145A278 (rights to office of president judge of municipal court of Philadelphia); 118Tex449, 16 SW(2d)809.

1109–74 294Pa385, 144A288.

1110–78 [e] (2) In proceedings to set aside fraudulent sale, determination is governed by pro rata dividend awarded creditor. 299Pa482, 149A745. (3) Two awards in same proceeding based on similar claims may be treated as one in determining jurisdiction. 299Pa482, 149

A745. [g] **Interest from date of verdict to date of judgment** (1) cannot be included in judgment so as to raise same to requisite jurisdictional amount (292 Pa142, 140A772), (2) in absence of special circumstances appearing in record warranting such course (292Pa142, 140 A772). [h] **Verdict as rendered or diminished by remittitur** will be treated as correct amount of judgment in determining jurisdiction. 292Pa142, 140A 772.

1110–79 287Pa120, 134A415. [b] **Court's certificate that amount exceeded $2,500 in one suit,** did not confer jurisdiction on Supreme Court of companion suit. 299Pa354, 149A650.

1110–81 [a] **Under Public Service Company Law** appeals relating to awards of damages by public service commissions for elimination of grade crossings and not to its authority to make awards do not lie to superior court. 85PaSuper422.

1110–85 [b] **No jurisdiction of appeal** involving right of school director to office. 94PaSuper583.

1111–92½–New. The superior court is not the proper tribunal to which to appeal from an excessive award of the public service commission in proceedings for elimination of grade crossings. 85PaSuper422 (appeal should be to court of common pleas).

1111–93 [b] **Under Public Service Company Law** trial by jury may be had on appeals to court of common pleas from awards for damages by public service commission for elimination of grade crossings. 85PaSuper422.

1111–93½–New. Jurisdiction of orphans' court is not restricted to persons and matters belonging exclusively to the county in which they are located. 291 Pa586, 139A737.

1111–6 153SC106, 149SE760. [b] **Commencement of proceedings** is by petition and rule to show cause, and not by summons. 153SC106, 149SE760.

1112–12 47SC347, 25SE130.

1112–17 [c] **Necessity that question of public concern be involved.**–Supreme court will not exercise power to call court en banc unless grave question of public concern is involved. 145SC196, 143SE31 (contention that circuit judge charged on facts held not to present such question). [d] **Necessity for constitutional question.**–To authorize calling of court en banc it must appear to three justices of supreme court that constitutional question is involved. 145SC 196, 143SE31 (contention that circuit judge charged on facts does not raise such question). [e] **Organization of court en banc.**–Court en banc is composed of justices of supreme court and all circuit judges. 145SC196, 143SE31. [f] **Privilege of calling court en banc** is not right of litigant. 145SC196, 143SE 31. [g] **Time when call made.**–145SC196, 143SE31.

1112–21 [a] **Supreme court will assume original jurisdiction** to test constitutionality of act relating to sale of gasoline by state. 48SD608, 205NW614, 43 ALR397.

1112–23 51SD357, 213NW943, 51ALR 287. [c] **Original jurisdiction should be assumed** only where interests, of state at large are directly involved, and not to protect private or local rights unless subordinate courts can give no relief. 48SD608, 205NW614, 43ALR397.

1112–27 [c] **Mandamus to superintendent of banks.**–48SD445, 205NW36.

1112–28 [a] **Action in nature of quo warranto** to determine right to office of municipal judge may be brought in original jurisdiction of supreme court. 51SD432, 214NW838.

1112–31 [c] **Where state is party and prerogative writ issues** to protect sovereignty and prerogatives of state Supreme Court has original jurisdiction. SD 232NW20. [d] **Supreme court may take original jurisdiction** of application for order restraining secretary of state from recognizing petition nominating candidate for governor. SD 232NW20.

1112–31½–New. That issues involved must eventually be decided by the supreme court may be considered in determining whether it will assume jurisdiction in the original action. 51SD432, 214NW838.

1113–34 152Tenn162, 274SW543 (constitutional question).

1113–36 [b] **Supreme court has no jurisdiction** of direct appeal from chancery court in suit for salary as county superintendent of education unless suit is maintainable as mandamus suit. 155 Tenn322, 292SW451.

1113–37 [c] **Under Acts (1925) c 100** jurisdiction will not lie if trial court considered facts, unless facts were stipulated in trial court. 155Tenn618, 299 SW779. [d] **Appeals involving review of facts.**–Decree pro confesso granting divorce to wife and vesting title to land in her by way of alimony involves review or determination of facts, within Acts (1925) c 100, and is not reviewable by supreme court. 156Tenn253, 300 SW9.

1113–39 154Tenn369, 289SW524. [b] **Questions of law.**–154Tenn369, 289SW 524. [c] **Where cause finally determined in trial court on facts only,** where all facts are stipulated, appeal lies direct to supreme court except in enumerated cases. 154Tenn369, 289SW524. [d] **In contempt proceeding for violation of injunction** wherein only questions of law are involved supreme court has jurisdiction. 160Tenn500, 26SW(2d)152.

1113–41 155Tenn342, 293SW996. [a] **Extent of jurisdiction and power.**–155 Tenn342, 293SW996.

1113–42 155Tenn342, 293SW996.

1113–43 158Tenn437, 14SW(2d)745.

1113–44 155Tenn342, 293SW996; 159 Tenn465, 19SW(2d)238.

1113–44½–New. Where jurisdiction becomes fixed in supreme court because of constitutional question it will be extended to all questions properly made by assignments of error. 160Tenn294, 23SW(2d)669.

1113–47 158Tenn50, 12SW(2d)528(1st case).

1113–49 [d] **Jurisdiction on appeal depends on method adopted in trial court,** and unless that method precludes determination in that court of the facts, appeal lies to court of appeals only. 154 Tenn369, 289SW524.

1114–54 [c] **Under Acts (1925) c 100** ejectment suits are appealable to supreme court. 152Tenn97, 275SW340.

1114–55 154Tenn187, 289SW505.

1114–59 [b] **Filing appeal bond** within statutory period in probate proceeding invests district court with jurisdiction. TexCommnA 291SW886.

1114–60½–New. Circuit court. 157Tenn 359, 8SW(2d)483.

1114–61 154Tenn187, 289SW505. [c] **Questions incidental or collateral to determination of issue of fact** do not bring case within statutory exception conferring jurisdiction on supreme court. 154 Tenn432, 289SW497.

1115–67 115Tex519, 285SW1075.

1115–68 116Tex662, 287SW45.

1115–70 TexCivA 273SW1006. [a] **Holding of court of civil appeals** held not to conflict with decisions of other courts of appeal. TexCommnA 285SW 310.

1115–73 116Tex1, 285SW1063; Tex CommnA 298SW(2d)1031. [i] **Election contest.**–Original jurisdiction to award writ of mandamus in contest for election of school trustees. TexCivA 275SW 257. [j] **Where facts which are made basis for issuance of writ are controverted in respondent's answer,** supreme court cannot grant writ. 118Tex481, 17 SW(2d)766(2dcase). [k] **Supreme Court will ordinarily decline jurisdiction to issue mandamus** until relator has applied to Court of Civil Appeals for proper relief. Tex 27SW(2d)795.

1115–76 [a] (3) Supreme court having power by mandamus to direct trial court to proceed to judgment may protect exercise of power by prohibition order. 116Tex1, 285SW1063. [b] **Injunction.**–116Tex1, 285SW1063. [c] **Inherent power.**–116Tex1, 285SW1063.

1115–78 116Tex1, 285SW1063; Tex 28 SW(2d)526. [c] **Urgent necessity required to invoke jurisdiction.**–Tex 28SW (2d)515.

1115–82 TexCivA 274SW255 (construction of statutes).

1115–83 TexCommnA 292SW525; Tex 32SW(2d)637(1stcase).

1115–84 117Tex205, 300SW17.

1116–85 TexCommnA 292SW525.

1116–86 117Tex377, 5SW(2d)965, 60 ALR665; Tex 26SW(2d)903; Tex CommnA 6SW(2d)92 (held no conflict); TexCommnA 6SW(2d)343 (apparent inconsistency in principles or their application is insufficient to create conflict); TexCommnA 24SW(2d)347. [a] 114Tex 515, 272SW437. [d] **Where no fundamental error** is involved, supreme court has no jurisdiction of question of conflict of decisions of courts of civil appeals. TexCommnA 291SW1087. [e] **Supreme court must determine** every properly presented question necessary to right disposition of case on such review. 117Tex377, 5SW(2d)965, 60ALR 665.

1116–87 Tex 32SW(2d)637; Tex CommnA 292SW525. See also Tex 32 SW(2d)637. [c] TexCommnA 292SW 525. [d] **Where no conflict exists,** court cannot decide other question. Tex CommnA 292SW525. [e] **Ruling that beneficiary and wife were competent witnesses** in proceeding to set aside probate of will held not in conflict with holding of supreme court that party to suit was incompetent. TexCivA 294 SW347.

1116–89 TexCommnA 15SW(2d)577 (supreme court has jurisdiction over law questions, arising in cases brought from court of civil appeals, involving construction or validity of statutes, except boundary, slander, and divorce cases).

1116–92 [e] **Decision will be limited to** jurisdictional question. TexCommnA 292SW525.

1116–93 TexCommnA 24SW(2d)385(1st case) (rule against certifying whole case to Supreme Court).

1116–96 116Tex1, 285SW1063; 117Tex 152, 299SW397.

1117–99 116Tex1, 285SW1063.

1117–9 116Tex1, 285SW1063; 117Tex 134, 299SW393.

1117–11½–New. The supreme court cannot, in the exercise of original jurisdiction, correct directions to a receiver given by the district court within its discretion. 116Tex220, 288SW 417.

1117–11⅓–New. Where directions by the district court to the receiver were nullities, the supreme court could exercise original jurisdiction through mandamus to prevent irreparable injury. 116Tex220, 288SW417.

1117–11¼–New. When jurisdiction of the supreme court depends exclusively on the fact that the case involves construction of the statute, the circumstances of the case must be such that the supreme court's interpretation of statute will determine the disposition to be made of the case. TexCommnA 12SW(2d)114, 63ALR435.

1117–11⅕–New. The supreme court has jurisdiction of a trespass to try title case regardless of conflict of decisions. TexCommnA 15SW(2d)1033.

1117–13 [a] **Court has only appellate jurisdiction** except in some minor respects especially declared by law. 115 Tex576, 285SW1060. [b] **Court of Civil Appeal's authority is limited** to reviewing proceedings had in trial court. Tex CivA 27SW(2d)363.

1117–14 116Tex1, 285SW1063. [d] **Jurisdiction over other district.**–116Tex 1, 285SW1063.

1117–15 [c] **Jurisdiction of appeal calling for reversal of supreme court** will be declined. TexCivA 27SW(2d)643.

1117–16 TexCivA 275SW268.

1117–17 116Tex662, 287SW45.

1117–21 TexCivA 275SW268 (appeal from judgment of county court denying writ of mandamus directed to justice of peace).

1117–22 TexCivA 276SW769.

1117–23 TexCivA 272SW216; TexCivA 276SW769; TexCivA 30SW(2d)406(1st case).

1118–26 TexCommnA 6SW(2d)343.

1118–30 TexCommnA 15SW(2d)577.

1118–33 But see TexCommnA 25SW (2d)820.

1118-38 Tex 32SW(2d)637(1stcase); TexCommnA 12SW(2d)187.
1118-39 TexCivA 16SW(2d)403. [d] **Writ will not lie** where its issuance would necessarily involve nullification or suspension of orders of another appellate court of coördinate jurisdiction, causing conflict. 115Tex519, 285SW 1075.
1118-40 115Tex519, 285SW1075; Tex 27SW(2d)795. [b] (1) TexCivA 280SW 881. [d] TexCivA 286SW954; TexCivA 20SW(2d)135; TexCivA 23SW(2d)468.
1118-40½-New. and may enforce their own judgments even in counties outside their respective districts; TexCivA 291SW605.
1119-41 115Tex519, 285SW1075.
1119-41½-New. and may issue the necessary writs to protect him in its exercise except when it would necessarily have effect to vacate an order made by another court of civil appeals; 115Tex519, 285SW1075.
1119-44 TexCivA 273SW1006. [a] Tex CivA 18SW(2d)747. [c] 117Tex180, 299 SW847.
1119-45 TexCivA 273SW1006; Tex CivA 282SW884 (opinion of supreme court on certified question is binding on court of civil appeals).
1119-46 117Tex467, 7SW(2d)524. [a] (1) TexCivA 274SW181; TexCivA 294 SW347; TexCivA 297SW913. [e] 117Tex199, 299SW862. [g] (3) Holding of court of civil appeals held not in conflict with other decisions, where other decisions involved were dictum. 117Tex68, 296SW865.
1120-48 TexCommnA 275SW996 (decision of court of civil appeals held erroneous as in conflict with holdings of similar courts); 118Tex166, 12SW(2d) 110; TexCommnA 12SW(2d)967; Tex CivA 10SW(2d)184. [c] TexCivA 275 SW273. [d] TexCommnA 13SW(2d) 68. [j] TexCivA 275SW273. [p] **After final disposition of case,** court of civil appeals is without jurisdiction to certify question. 115Tex238, 280SW 542. [q] **Conflict must be on question of law involved and determined in both cases.**-118Tex166, 12SW(2d) 110. [r] **Question must be such that supreme court's decision will control disposition of case.**-118Tex166, 12SW (2d)110. [s] **Decisions held conflicting.**-118Tex166, 12SW(2d)110. [t] **Exercise of fact-finding jurisdiction by court of civil appeals is immaterial** unless presenting conflict of decision within meaning of statute. TexCommnA 16 SW(2d)261. [u] **Decisions held not conflicting.**-TexCommnA 13SW(2d)68; Tex CommnA 13SW(2d)357. [v] **Accuracy of conflicting decisions is immaterial** in determining supreme court's jurisdiction where different facts are involved. TexCommnA 13SW(2d)357.
1120-48½-New. The supreme court may pass on a certified question only when it arises in cases over which the court of civil appeals exercises appellate jurisdiction. 115Tex513, 285SW 1079; 115Tex519, 285SW1075.
1120-49½-New. The court of civil appeals may dispose of all questions not certified to the supreme court as though no certification had been made. Tex CivA 282SW339.
1120-49⅓-New. Where questions are certified to the supreme court and the certificate is dismissed for lack of jurisdiction, the case should not be sent back on a certificate involving the same questions. TexCivA 28SW(2d)288.
1120-49¼-New. The question whether the court of civil appeals erred in striking a statement of facts not filed in time involves a fact issue exclusively within its jurisdiction. 117Tex205, 300 SW17.
1120-49½-New. Court of civil appeals cannot decide to what extent supreme court may go in deciding rights of parties. TexCivA 31SW(2d)154.
1121-52 117Tex134, 299SW393.
1121-53 TexCivA 9SW(2d)280.
1121-56 101TexCr175, 274SW610 (court will not discuss facts on trial of habeas corpus).
1121-57 117Tex134, 299SW393; 108 TexCr84, 299SW435; TexCr 27SW(2d) 805; TexCr 28SW(2d)550(1stcase). [b] **Mandamus.**-103TexCr412, 281SW208.
1121-59 TexCommnA 291SW886; Tex CommnA 29SW(2d)1060; TexCivA 283 SW297; TexCivA 288SW606. [b] (1) TexCivA 16SW(2d)836. (2) Power to restrain exercise of jurisdiction. Tex CivA 20SW(2d)222. [e] **After appeal bond is filed,** county court clerk must transmit papers within statutory period. TexCommnA 291SW886. [f] **District court has supervisory power over** probate courts only through appeal. TexCivA 300SW225.
1121-60 TexCivA 294SW267; TexCivA 31SW(2d)324. [c] (1) TexCivA 275SW 268 (criminal case). (3) County court having only appellate jurisdiction over proceedings in corporation court cannot control such proceedings by mandamus except to enforce appellate jurisdiction. TexCivA 5SW(2d)1003.
1121-62 65Utah619, 238P1114, 41ALR 433.
1121-64 Utah 279P878 (common-law writ).
1122-89 152Va747, 148SE799.
1122-95 [b] **Jurisdiction is determined by amount of plaintiff's bona fide claim,** and not amount of award excepted to. 142Va135, 128SE546.
1123-18 [c] **Jurisdiction coextensive with state** in transitory personal actions. Va 152SE539.
1123-21 144Wash135, 257P396.
1123-22 [b] **Jurisdiction is not exclusive.**-140Wash361, 249P996. [c] **When jurisdiction not entertained.**-140Wash 361, 249P996.
1123-25 142Wash44, 252P154. [b] (1) 142Wash44, 252P154. (2) Amount does not include claim for attorney's fees. 142Wash44, 252P154. (3) Prayer for interest is held not to raise amount to fulfill jurisdictional requirement. 142 Wash44, 252P154.
1123-32 140Wash433, 249P996.
1124-44 101WVa591, 133SE316.
1124-45 102WVa677, 136SE202, 49ALR 968.
1124-46 101WVa281, 132SE651 (assessment of inheritance or transfer tax).
1124-66 [c] **Certiorari.**-99WVa663, 129 SE708.
1124-67 169Ark592, 276SW604.
1125-78 [a] **Cases involving trial and disposition of questions of fact** should be presented to circuit court, not to Supreme Court. Wis 229NW643(2d case).
1125-79 [a] **In disbarment proceedings,** supreme court's original jurisdiction does not defer to statutory regulations as matter of comity. 196Wis534, 221 NW603.
1125-82 44Wis584; 187Wis1, 203NW 923.
1125-84 187Wis1, 203NW923; 197Wis 442, 222NW244.
1126-88 Wis 231NW590 (prohibition).
1126-90 [a] **Necessity and sufficiency of petition** for leave to institute original action. Wis 229NW643(2dcase). [b] **Service of copy of petition** should be made on opposite party. Wis 229NW 643(2dcase). [c] **Order to show cause** for leave to bring original action will not be granted. Wis 229NW643(2d case).
1126-92 Wis 232NW861.
1126-94 195Wis271, 218NW206.
1127-19 BC [1929] 4DomLR1085(1st case).
1127-23½-New. the supreme court of Ontario, Ont [1929] 2DomLR747(1st case).
1127-24 Man [1930] 3DomLR144.
1127-26½-New. **In Saskatchewan,** appeal lies to court of appeal from district court judgment where amount in controversy is over fifty dollars, irrespective of amount of judgment actually awarded. Sask [1925] 3DomLR 531.
1127-33 Can [1929] 2DomLR205(1st case). [a] **In determining jurisdictional amount** interest on judgment at trial from its date to date of judgment of court of appeal must be considered where interest runs on judgment at trial from its date. Can [1928] 2DomLR414.
1127-34½-New. **By the act of 10-11 Geo V c 32 the Supreme Court Act c 139 has been amended** and §§ 35-49 of that act, as set forth in § 575, are repealed and other provisions substituted.
1127-38 Alta [1930] 1DomLR783 (provincial appellate court may grant special leave to appeal in certain cases).
1127-43 Can [1930] 2DomLR937(1st case).
1128-6½-New. Discretion given provincial courts of appeal to allow appeal to supreme court of Canada may not be controlled by rules of latter court. Can [1925] 3DomLR1136.
1128-6⅓-New. Supreme court has jurisdiction of appeal from order of exchequer court dismissing motion by Crown to withdraw reference of claim by minister of railways and canals. Can [1929] 4DomLR818.
1130-6½-New. In Ontario, where there is a conflict of judicial opinion as to whether a statute is intra vires of the province, the case will be referred to an appellate division for final decision. Ont [1929] 1DomLR206.
1130-8 116Tex1, 285SW1063; TexCivA 299SW699.
1130-9 201Iowa884, 208NW281; 48RI 50, 135A322.
1130-16 23AlaA96, 122S606.
1131-22 81CalA1, 253P151, 154 [quot CJ]; 157Tenn359, 8SW(2d)483.
1131-23 [b] **Supreme Court will not accept jurisdiction over wills** unless there are obstacles preventing probate court from passing upon question involved. 128Misc714, 220NYS141.
1131-24 222AppDiv132, 226NYS108; 194Wis311, 216NW833.
1131-31 42F(2d)266; 216Ala396, 113S 260; 98CalA306, 277P123; 127Kan840, 275P174; 129Kan520, 283P647; 250 Mich641, 231NW82; 316Mo 953, 292SW 419; MoA 22SW(2d)836; 114Nebr728, 209NW614; NJPrerog 143A92; 32NM 419, 258P817; 128Misc659, 220NYS398; 132Misc916, 231NYS213; 133Misc424, 232NYS675; 130Misc378, 224NYS49; 189NC703, 128SE20 (clerk of superior court has concurrent jurisdiction in settlement of estates with superior court); 25 OhA426, 158NE279; 25 OhA32, 158 NE499; 123 Okl 193, 250P847; 132SC 45, 128SE40 (not so exclusive as to preclude inquiry by court of common pleas into matters testamentary and of administration); 139SC66, 137SE331; 144SC 509, 142SE602; 51SD124, 212NW498; 153Tenn451, 284SW365; 155Tenn461, 295SW472; TexCommnA 27SW(2d)135; TexCivA 272SW252; TexCivA 296SW 917; TexCivA 4SW(2d)302; 101Vt496, 144A691; 193Wis97, 213NW646. [c] (3) Determination of title to property claimed by representative individually where extrinsic fraud on probate court is not shown. 201Cal 267, 256P820. [d] **Foreclosure of mortgage given by decedent.**-TexCivA 280SW879. [e] **Partition.**-TexCivA 298SW643. [f] **Exclusive jurisdiction.**-Mass 167NE266. [g] **In Missouri.**-MoA 22SW(2d)836.
1132-32 Cal 289P825; 87 IndA431, 155 NE185; 322Mo 293, 15SW(2d)785; 191 NC362, 131SE752. [b] **Police courts held to have concurrent jurisdiction** with justices' courts in civil and criminal matters. 151Miss255, 117S600.
1132-35 97CalA422, 275P838(2dcase); CalA 285P332; 129Misc768, 222NYS 728; 135Misc368, 237NYS689.
1132-36 OhA 172NE626; 134SC373, 133SE35; 139SC66, 137SE331.
1132-37 99NJEq502, 134A113.
1132-38 87 IndA431, 155NE185; 320 Mo 514, 8SW(2d)597; 51SD124, 212NW 498; 155Tenn313, 292SW459; 200Wis 220, 228NW121.
1133-39 42F(2d)266; 129Kan520, 283 P647; 73Mont12, 234P1099; 51Nev437, 279P32; 32NM419, 258P817; 51ND543, 200NW94; 137 Okl 242, 279P306(2d case); TexCivA 286SW501; TexCivA 13 SW(2d)220; TexCivA 15SW(2d)182; TexCivA 16SW(2d)400.
1133-40 114Nebr442, 207NW935; 51 ND543, 200NW94; 113 Okl 265, 242P 185; 155Tenn461, 295SW472; TexCivA 287SW76; TexCivA 25SW(2d)989.
1133-41 Ariz 262P1007 (causes under two hundred dollars held concurrently

in jurisdiction of superior courts and justices of peace); 196Cal 414, 238P 687; 207Cal 215, 277P487; Cal 277P 489; CalA 292P290; 167Ga635, 146SE 442; 39GaA606, 147SE911(2dcase).

1133-41½-New. an appellate court, 116 Tex1, 285SW1063.

1133-42 168La786, 123S325.

1133-43 38F(2d)791; 228AppDiv854, 241NYS326 (Supreme and Surrogate's Courts). [a] RI 142A537.

1133-44 Mo 26SW(2d)768.

1133-45 215Ala659, 111S917; 220Ala 149, 124S202; 129Kan520, 283P647; 25 OhA426, 158NE279; 123 Okl 193, 250P 847; 118Tex386, 15SW(2d)602; Tex CivA 296SW917; TexCivA 21SW(2d) 586; TexCivA 29SW(2d)865; Tex CommnA 29SW(2d)1007; 100Vt362, 137 A334; Wash 290P870; 193Wis97, 213 NW646; 195Wis203, 217NW416.

1133-46 136Misc607, 241NYS563.

1133-48 95Fla75, 116S28.

1133-52 CalA 288P808; TexCivA 16 SW(2d)848.

1134-55½-New. in proceedings to validate assessments. 196Cal 414, 238P687 (drainage district).

1134-56 116Tex1, 285SW1063.

1134-56½-New. and writs of injunction, 116Tex1, 285SW1063.

1134-57 129Misc120, 220NYS671; 116 Tex1, 285SW1063.

1134-57½-New. On an issue of ademption, neither the court of ordinary nor the superior court on appeal had jurisdiction. 169Ga198, 149SE789.

1134-58 36F(2d)813; 173Ark48, 291 SW989; 94CalA19, 270P391; 206Cal 254, 274P326; 81Colo 92, 253P830; 82 Colo 118, 257P1077; 243 IllA55; 247 IllA358; 255 IllA403; 125Kan346, 357, 264P68 [quotCJ]; 314Mo 486, 284SW 129, 134 [citCJ]; Mo 27SW(2d)25; 220 MoA115, 279SW740; 73Mont12, 234P 1099; 129Misc694, 222NYS373 [citCJ]; 116 Oh532, 157NE15; 32 OhA343, 168 NE67 (personal injuries); 37 OklACR 551, 554 [quotCJ]; 291Pa263, 139A829; 134SC373, 133SE35; 155Tenn461, 295 SW472; 116Tex1, 285SW1063, 1070 [citCJ]; 118Tex236, 14SW(2d)793; 118 Tex227, 13SW(2d)688; TexCommnA 24 SW(2d)813(3dcase); TexCommnA 29SW (2d)1067; TexCivA 288SW1103; TexCiv A 4SW(2d)278 (though petition fails to state cause of action); TexCivA 7SW(2d) 940; TexCivA 21SW(2d)72; TexCivA 23SW(2d)535; TexCivA 26SW(2d)354; 99Vt306, 131A847; 142Va244, 128SE 524; Wash 290P870; 197Wis98, 221 NW401. See also TexCivA 286SW501. [j] **Surrogate of one county** acquiring and exercising jurisdiction to probate will, not having determined residence of testatrix not to be in such county, excludes other surrogates from taking jurisdiction. 215AppDiv790, 213NYS 325. [k] **Party invoking jurisdiction** of one court and having right of appeal to higher court cannot substitute for an appeal a second and like application to such higher court. 74CalA161, 239P 855. [l] **Priority determined as of date of filing of original petition.**–220MoA 115, 279SW740. [m] **Ancillary or incidental proceedings** are within jurisdiction of court first acquiring jurisdiction of controversy. 23Ala96, 122S606. [n] **Court's jurisdiction must be assumed** for purposes of subsequent action in another court. TexCivA 26SW(2d) 354.

1135-59 23AlaA96, 122S606; 81Colo 92, 253P830; Fla 128S416; 314Mo 486, 284SW129, 134 [citCJ]; 220MoA115, 279SW740; 51Nev253, 274P5; 37 OklACR551, 554 [quotCJ]; 44Philippine182; 134SC373, 133SE35; Tex 285 SW1063, 1070 [citCJ]; TexCommnA 24 SW(2d)813(3dcase); TexCivA 288SW 1103; 99Vt306, 131A847. See also 129 Misc768, 222NYS728. [d] **Validity of second court's action.**–116Tex1, 285SW 1063.

1136-60 314Mo 486, 284SW129, 134 [citCJ]; 37 OklACR551, 554 [quotCJ]; 116Tex1, 285SW1063, 1070 [citCJ].

1136-60½-New. Although separation action was pending in supreme court, children's court could issue warrant for arrest of husband for nonsupport. 128 Misc513, 220NYS79.

1136-61 198Cal 329, 245P176; 101CalA 49, 281P108; 128Kan430, 278P8; Kan 291P748; Oh 172NE365; 114 Okl 121, 244P436; 37 OklACR551; TexCommnA 25SW(2d)804; TexCommnA 29SW(2d) 1060; Wash 290P870. But see 137Misc 456, 244NYS397. [a] But see 143Wash 358, 255P376. [e] **Guardianship proceedings.**–113 Okl 265, 242P185.

1136-62 34F(2d)312; 215Ala131, 110S 135; 100CalA615, 280P561; 131Misc 826, 228NYS239; TexCivA 275SW175; 198Wis573, 225NW181.

1136-63 169Ga869, 152SE53(2dcase); 171Minn182, 213NW736; 135Misc833, 238NYS398; 228AppDiv379, 239NYS1; 132SC45, 128SE40 (where jurisdiction of probate court and court of common pleas is concurrent as to certain matters); Tex 299SW346; TexCivA 11SW (2d)814.

1137-66 37F(2d)117; 40GaA614, 151 SE53(2dcase); TexCivA 288SW1103.

1137-69 Colo 257P1077; 87Colo 364, 287P854.

1137-70 [b] **Where action to cancel notes and deed of trust** is commenced prior to suit by defendants for foreclosure of deed of trust, court in first suit has exclusive jurisdiction. 116Tex 1, 285SW1063.

1137-71 Fla 128S416; 291Pa263, 139 A829.

1137-72 129Misc694, 222NYS373.

1138-75 But see 101CalA110, 281P435.

1138-75½-New. Where Federal court obtained prior jurisdiction and appointed receiver, state court has no jurisdiction. 116 Oh532, 157NE15.

1138-78 142Va244, 128SE524 (where second suit is broader in scope, making complete relief possible). But see TexCivA 4SW(2d)278.

1138-79 161La825, 109S505; 170La 680, 129S128; 142Va244, 128SE524 (where court in prior suit had not obtained jurisdiction of one of parties).

1138-80 125Kan346, 264P68; TexCivA 31SW(2d)838. [h] **Action for divorce.**–161La825, 109S505.

1138-82 130Kan826, 288P593; 228 AppDiv379, 239NYS1; 26 OhNPNS552.

1138-82½-New. The rule does not apply where the case first brought is dismissed before trial. 123Kan774, 778, 256P804 [citCJ].

1139-87 169Minn273, 211NW465.

1139-91½-New. After denial of a suit because of existence of an agreement waiving rights claimed, another judge of the same district has jurisdiction to cancel the agreement. 51Nev253, 274P5.

1139-93 117Tex134, 299SW393.

1140-98 Fla 128S416; 213Ky268, 280 SW1109; 319Mo 1105, 8SW(2d)905 (where probate court had jurisdiction of decedent's realty pending will contest in circuit court, circuit court was without jurisdiction to appoint receiver); NJCh 146A663, 665 [citCJ]; 192 NC31, 133SE399; TexCivA 1SW(2d) 520; 99Vt306, 131A847. [g] **Priority as between attachments.**–192NC31, 133 SE399.

1140-99 21F(2d)236, 237 [citCJ] (rule stated but not applicable); 93CalA166, 269P180; 213Ky268, 280SW1109; 319 Mo 1105, 8SW(2d)905; 192NC31, 133 SE399; 142 Okl 140, 285P978; TexCivA 26SW(2d)281; 99Vt306, 131A847.

1140-1 104Conn206, 132A390; 48Nev 32, 226P902, 233P842; 137SC124, 134 SE530; TexCivA 285SW655; TexCivA 293SW315; 99Vt306, 131A847. But see 95Fla730, 116S648. [b] **Power to recall execution.**–48Nev32, 226P902, 233P842.

1140-2 Fla 128S416 (exclusive control).

1140-3 137SC124, 134SE530; 48SD 489, 205NW35.

1140-4½-New. Where property has been attached by successive attachments issued out of courts of concurrent jurisdiction, without personal jurisdiction, question of title must be determined in each suit in county of its origin. 192NC624, 135SE626.

1140-4½-New. Where trust property is in the possession of a circuit court and is being administered by a trustee appointed by it, one attacking the validity of the trust may not, in an independent suit in another circuit, litigate the question of the lawfulness of such possession and have a decree turning possession over to him. 241Mich146, 216NW472.

1141-7 332 Ill 427, 163NE820; Mo 19 SW(2d)626.

1141-8 [a] **District court cannot quash** search warrant issued by another court. 104TexCr293, 283SW819.

1141-10 206Cal 515, 274P977; 261 Mass209, 158NE836. [a] **Where right of appeal from injunction lies to particular appellate court,** no other appellate or trial court may set aside, annul, or vacate such injunction. 116Tex1, 285SW1063.

1141-15 See also 189NC703, 128SE20.

1141-21 16F(2d)142. See also 192NC 624, 135SE626; TexCivA 4SW(2d)278.

1142-24 243 IllA55.

1142-25 Contra 116Tex1, 285SW1063.

1142-26 15F(2d)797; 99Vt306, 131A 847.

1142-27 201 Iowa78, 203NW283; 44 Philippine182; RI 142A537; 114Tex 548, 273SW808; TexCivA 296SW958; TexCivA 1SW(2d)466 (voidable judgment); TexCivA 3SW(2d)596; TexCivA 12SW(2d)839; TexCivA 18SW(2d)711.

1142-28 TexCivA 296SW991; TexCivA 299SW699.

1142-30 Utah 268P1029. See also 115 Tex576, 285SW1060. [a] (2) Circuit court may enjoin collection of void police court judgment. 223Ky70, 2SW (2d)1049. [b] (3) Requirement that injunction to stay execution shall be returnable and tried in court where judgment was rendered is jurisdictional. TexCommnA 300SW31, 68ALR377. (4) Court is without jurisdiction to interfere with enforcement of judgment of another court on ground of improper service where judgment recited that due service was made. TexCommnA 300 SW31, 68ALR377. (5) Writ of injunction to restrain filing and recording of abstract of void judgment in another county need not be returned to court which rendered judgment. TexCivA 17 SW(2d)153. [c] **In West Virginia.**–(2) 108WVa509, 151SE704.

1142-32 But see TexCivA 18SW(2d) 711.

1143-36 TexCivA 21SW(2d)30 (inapplicable where execution is levied on property claimed by one not party to judgment).

1143-40 222Ky361, 300SW913; NJSup 147A460(2dcase); (vacation of restraining order); 44Philippine182; TexCivA 21SW(2d)380.

1143-41 Mo 15SW(2d)941; TexCivA 3 SW(2d)596; TexCivA 28SW(2d)279.

1143-43 TexCivA 3SW(2d)835. See also 115Tex576, 285SW1060. [c] **District court** may enjoin execution of judgment of another court void on its face. TexCivA 300SW225.

1143-43½-New. To what court writ returnable. TexCivA 291SW311.

1143-49 168Minn484, 210NW396, 397 [citCJ].

1143-50 33PortoRico 570, 574 [quot CJ]; TexCivA 276SW767. [a] (1) See also TexCivA 276SW767. (2) Where judgment of county court not void on its face, district court can only dismiss petition from docket of trial court. TexCivA 276SW767.

1144-52 116Tex1, 285SW1063, 1073 [citCJ].

1144-53 86Colo 587, 284P119(2dcase); 84 IndA676, 151NE26, 152NE2; 148Md 647, 129A914; Mass 165NE400; 236 Mich480, 210NW332; Mich 233NW414; 127Misc374, 216NYS278; 129Misc768, 222NYS728; 133Misc476, 233NYS120; 226AppDiv684, 233NYS338; 136Misc 695, 240NYS569; 195NC439, 142SE477; 32 OhA16, 165NE746; Or 274P516; 48 RI 50, 135A322; 152SC129, 149SE339; 116Tex1, 285SW1063, 1073 [citCJ]; 115 Tex519, 285SW1075; TexCivA 275SW 279; TexCivA 299SW699; TexCivA 300 SW225; TexCivA 14SW(2d)123; Tex CivA 21SW(2d)72; 195Wis519, 218NW 812. But see Fla 130S760; TexCivA 286 SW629. [g] 116Tex1, 285SW1063. [h] **Appellate decisions.**–TexCivA 274SW640. [i] **County court in New York** is without jurisdiction to decide motion to set aside judgment of municipal court. 125Misc683, 212NYS127. [j] **In Indiana,**

court may relieve party from judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect and supply omission in any proceedings on complaint or motion filed within two years. 84 **IndA**676, 151**NE**26, 152 **NE**2, [k] **Circuit court** may restrain, but not vacate, void judgment for costs issued by justice of peace. 197**Wis**597, 211**NW**780. [l] **Remedy in case of conflict.** 115**Tex**519, 288**SW**1075.

1144–54 170**La**828, 129**S**361.

1144–55 82**Mont**434, 268**P**512; 31 **OhA** 512, 167**NE**486; 137 **Okl** 235, 278**P**1088. [a] **Decree of conveyance** secured by fraud in state court does not warrant collateral attack in federal court. 14 **F(2d)**225.

1144–56½–New. Judge cannot review decision of another judge of same court whose powers are equal and coördinate. 189**NC**805, 128**SE**329.

1144–56½–New. Judge cannot review judgment rendered at former term on ground that it was erroneous. 189**NC** 805, 128**SE**329.

1144–57 [b] **In absence of appeal,** County Court has no jurisdiction to hear motion to set aside judgment of justice of peace. 136**Misc**215, 239**NYS**347.

1144–57½–New. A court of equity, in a suit to set aside a decree of distribution of the probate court on the ground of want of notice to an interested party, has no power to direct the probate court what action to take in the probate proceeding. 74**Mont**558, 241**P**636.

1144–57½–New. In such case the judgment of the equity court can have no further effect than to set aside the decree of the probate court, leaving the estate open for final settlement. 74**Mont** 558, 241**P**636.

1144–57¼–New. When the time of appeal to the district court from a judgment of the probate court had passed, the district court is without jurisdiction to set aside probate court orders. **Tex CivA** 300**SW**225.

1144–58 195**NC**439, 142**SE**477. [a] **Judgment awarding money to owner after levy thereon under judgment against agent** is not improper interference with orders issued as to levy by which owner was not bound. **NJ** 141**A** 575.

1144–59 [a] **Probate department.**–129 **Or**30, 273**P**17.

1144–60 206**Cal** 515, 274**P**977.

1145–64 127 **Okl** 72, 259**P**849; **TexCivA** 10**SW(2d)**438.

1145–66 99**NJEq**717, 134**A**298.

1145–67 130**Misc**21, 223**NYS**468; **Tex CivA** 12**SW(2d)**247. [d] **Legally created court.**–Where cause was at issue in superior court of Custer County at time of rendition of opinion in 114 **Okl** 193, 245**P**649, cause was pending in legally created court. 136 **Okl** 77, 276**P**490.

1145–68 **Mass** 169**NE**151. [a] (11) 130 **Misc**21, 223**NYS**468. [c] (4) Other instances. 157**Miss**559, 128**S**734.

1146–69 **Mass** 164**NE**802; 178**Minn**282, 226**NW**847. [a] (5) Lack of jurisdiction of court enjoining enforcement of judgment of another court to pass upon merits. **TexCivA** 18**SW(2d)**711. [g] **BC** [1930] 2**DomLR**1002. [j] **Transfer from law to equity side of court** is not authorized where action at law cannot be maintained because former judgment is res judicata of issues involved. 241 **Mich**15, 216**NW**407. [k] **Cases held not transferable as involving title to real estate.**–**Iowa** 229**NW**673 (forcible entry and detainer):

1147–75 133**Misc**97, 231**NYS**255; 161 **Tenn**346, 31**SW(2d)**692. [d] **Motion to transfer will prevail** over motion to dismiss. 12**LaA**539, 126**S**571.

1147–76 133**Misc**97, 231**NYS**255.

1147–77 252 **Ill**298; 162**La**1083, 111 **S**463; 316**Mo** 278, 290**SW**429. See also 36**GaA**396, 137**SE**85. [h] **Prayer for rehearing in court of appeal** is not condition precedent to lodging appeal in supreme court, after court of appeal has ordered transfer. 158**La**1083, 105**S** 85. [i] **Laches in lodging appeal in supreme court** after transfer by court of appeal held not shown where appellants immediately sought permission to file original record, and subsequent delay in securing required transcript was not attributable to them. 158**La**1083, 105**S** 85.

1148–92 125**Misc**158, 210**NYS**727; 133 **Misc**97, 231**NYS**255.

1148–93 126 **Okl** 12, 257**P**761.

1148–95 131 **Okl** 37, 267**P**628.

1148–96 [a] **Where case has been erroneously removed by certiorari to supreme court** by judge thereof on belief that such court has jurisdiction, supreme court cannot transfer case to court of appeals but must discharge writ of certiorari. 153**Tenn**349, 284**SW**359.

1148–98½–New. Death of a party to a proceeding ends the power of attorneys, and a petition to transfer the cause to the supreme court from the appellate court is a nullity. **Ind** 169**NE** 46(1stcase).

1149–11 126 **Okl** 12, 257**P**761. [d] **Motion must specify** sections or articles of constitution involved when constitutional question is ground for transfer. **MoA** 256**SW**143.

1149–13½–New. The appellate court must, of its own motion, order a record of the cause involving a freehold transferred to the supreme court. 328 **Ill** 365, 159**NE**774.

1149–14 **Ind** 162**NE**403.

1149–15 **Ala** 128**S**594 (removal of administration proceedings).

1149–17½–New. Transfer will be refused on failure to file an affidavit for trial by jury. **Mass** 169**NE**151.

1149–18 **Mass** 169**NE**151 (time for filing).

1150–20 **Mo** 272**SW**928 (transfer held regular); **TexCivA** 24**SW(2d)**79.

1150–23½–New. Where, in transferring an appeal to the supreme court under Act (1912) No. 19, no time was fixed within which the record should be lodged in the supreme court, the court of appeals will, by a supplemental order, fix such time upon formal motion by counsel for appellees. 10**LaA**211, 120**S**703 (1stcase).

1150–23⅓–New. Where a cause at issue in a court at the time it was in effect abandoned because it had no legal judge and no provision for procuring one is transferred by the court clerk of the county to the court to which all cases pending in the abandoned court are transferred by operation of law, the transfer is legal although an order of transfer was made by one purporting to act as judge of the abandoned court. 136 **Okl** 77, 276**P**490.

1150–23¼–New. The appellate court, in allowing a transfer of an appeal, has the duty of prescribing the time within which the transcript must be filed in the court to which the case was transferred. 167**La**237, 119**S**33.

1150–28½–New. A lower court decree, in a cause transferred from the appellate court, will not be affirmed merely because abstracts and briefs filed in that court have not been transferred to the supreme court, but, the briefs filed in the appellate court having been destroyed, and briefs and abstracts having been filed by both parties in the supreme court, the case will be considered on the briefs filed. 333 **Ill** 494, 165**NE**131, 65**ALR**1.

1150–33 **Cal** 292**P**637; 316**Mo** 278, 290 **SW**429; 115 **Okl** 35, 241**P**132; 144 **Okl** 275, 291**P**66; **TexCommnA** 284**SW**210; **TexCivA** 1**SW(2d)**466; **TexCivA** 10**SW** (2d)438. [n] **Court will not reëxamine** question settled by first court before transfer. **TexCivA** 3**SW(2d)**585. [o] **Discovery.**–Statements of claim and defense in king's bench to which case in county court has been transferred must be delivered before examination for discovery may take place. **Man** [1929] 1 **DomLR**1000. [p] **Transfer of case from Supreme Court** on ground no constitutional questions presented, presents no such questions before Court of Appeals. **MoA** 27**SW(2d)**447.

1151–34 [b] **Motion to affirm on certificate by one court of appeals before transfer** may be overruled by other court after transfer. **TexCivA** 283**SW**1082.

1151–38 **MoA** 6**SW(2d)**638.

1151–38½–New. The district court of appeal's right to revise, correct, and modify its opinion until transcribed in official reports is not lost by transfer of the cause to the supreme court, if resorted to, not to alter, but to uphold the judgment. **CalA** 273**P**617.

1151–38⅓–New. The action of the supreme court in transferring a case to a subordinate appellate court is conclusive as to whether the latter court had jurisdiction of the case. 89 **IndA** 424, 166**NE**545(1stcase).

1151–39 **TexCommnA** 284**SW**210.

1152–49 33**GaA**752, 127**SE**825 (judgment dismissing case by court to which case was improperly transferred held not valid dismissal of case).

1152–58 [a] **Order refusing transfer not res judicata.**–317**Mo** 714, 296**SW**775.

1152–61 [a] **Jurisdiction of courts of state** as to territory is within exclusive cognizance of judicial tribunals of that state. 6**F(2d)**237.

1152–62 26**F(2d)**912 [rev on other grounds 279**US**159, 49**SCt**282, 73**L ed** 652].

1153–63½–New. A suitor may choose his own forum, and if he makes use of legal rights, cannot be said to have fraudulently invoked jurisdiction. 25 **F(2d)**320.

1153–64 43**F(2d)**236. [a] 8**F(2d)**635. [d] **Anti-trust laws.**–220**AppDiv**624, 222 **NYS**294. [e] **Whether right, under United States constitution,** has in particular case been waived is exclusively question for state courts. **TexCivA** 298 **SW**462. [f] **Federal court of equity and state court of probate** are not courts of concurrent jurisdiction. 34**F(2d)**18.

1153–67½–New. or of divorce, 200 **Iowa** 1193, 206**NW**262.

1153–69 19**F(2d)**454; 40**F(2d)**91; 42**F** (2d)266. [a] (5) As to what constitutes will and its proper authentication under state statutes. 34**F(2d)**18. (6) Other instances. 34**F(2d)**18. (7) To adjust account of administrator. 42**F(2d)** 266.

1153–70 19**F(2d)**454.

1153–70½–New. An action for damages for personal injury by a railway postal clerk against the railroad is within the jurisdiction of the state court. 86 **IndA** 251, 157**NE**58.

1154–74 246**Mich**415, 224**NW**374; **NJCh** 149**A**353(2dcase) (suits of any nature against United States); **Or** 289**P**375 (Trading with Enemy Act).

1154–75 165**Ga**479, 141**SE**291; 320**Mo** 1208, 9**SW(2d)**925.

1154–76 213**Ky**23, 280**SW**469; 23 **OhA** 281, 154**NE**171; **TexCivA** 294**SW**967. [a] (1) 225**AppDiv**37, 232**NYS**220. (2) 213**Ky**23, 280**SW**469. (12) Of action for declaration as to plaintiff's right to make and sell articles covered by patents alleged to be denied by defendant. 213**Ky**23, 280**SW**469; **TexCivA** 297 **SW**290.

1154–78 253**Mass**144, 148**NE**467; **Tex CivA** 294**SW**967.

1154–79 271**US**127, 46**SCt**444; 70**L ed** 868; 42**F(2d)**775; 324 **Ill** 591, 155**NE** 841; 217**Ky**439, 289**SW**1094.

1154–81 102**NJL**337, 132**A**89.

1154–82 But see 280**US**379, 50**SCt**154, 74**L ed**489. [b] **State court is not deprived** of jurisdiction of suit for divorce and alimony against foreign vice consul. 280**US**379, 50**SCt**154, 74**L ed**489.

1155–83 218**AppDiv**163, 218**NYS**51. [b] **Statute applies to action by subcontractor's materialman, based on contractor's liability to furnish bond,** no bond having been furnished. 218**AppDiv** 163, 218**NYS**51.

1155–85 17**F(2d)**133.

1155–87½–New. A state court cannot determine the question whether one serving as master in a federal court should be required to return fees. 276**US**6, 48 **SCt**210, 72**L ed**441.

1155–87⅓–New. Questions respecting a canal, dam, and levee constructed by the federal government in aid of navigation are not within the jurisdiction of a state court. 90**CalA**634, 266**P**552.

1155–94 11**F(2d)**948, 48**ALR**207. [c] **Under Louisiana Workmen's Compensation Law** suit may be brought in federal court having jurisdiction of the parties 15**F(2d)**54.

1155–95 17**F(2d)**733; 22**F(2d)**642; 29 **F(2d)**296; 172**Ark**898, 291**SW**431; 220 **MoA**743, 276**SW**409; 129 **Or**620, 278**P**

572; **Or** 289P375. [c] (3) **General jurisdiction over torts. Or** 289P375.

1156-96 125 **Or**197, 266P1075.

1156-97 Or 289P375.

1156-99 8F(2d)207.

1156-2½-New. of a divorce or an allmony suit against a foreign consul; 30 F(2d)185; 119 **Oh**484, 164NE524 [certiorari granted 279US828, 49SCt265, 73 L ed979(4thcase)].

1156-3 22F(2d)206; 31F(2d)308; 127 **Kan**326, 273P451, 64**ALR**322; 125 **Or** 197, 266P1075.

1156-4 170**Ark**842, 281SW910; 178 **Minn**261, 226NW934; **Minn** 230NW457; 136NC95, 134SE247. See also 41F(2d) 219. [a] But see 279US377, 49SCt355, 73L ed747.

1156-4½-New. of actions arising under the Federal Safety Appliance Act, 292 Pa44, 140A618.

1156-97 129Misc133, 220NYS499.

1157-12 279US415, 49SCt358, 73L ed 770; 42F(2d)775; 95Fla14, 116S48; 127**Kan**326, 273P451, 64**ALR**322; 127 **Kan**577, 274P272.

1157-13 281US470, 50SCt374, 74L ed 972; 17F(2d)193; 220**Ala**605, 127S178; 264**Mass**128, 162NE324.

1158-15 138 **Okl** 156, 280P616; 40**Wyo** 350, 277P968.

1158-24 279US388, 49SCt356, 73L ed 752; 29F(2d)31 [certiorari granted 278 US597, 49SCt179, 73L ed527(3dcase)]; 40F(2d)617; 90**Cal**A630, 266P563; 213 **Ky**23, 280SW469; 131**Misc**834, 228NYS 412; 225**AppDiv**37, 232NYS220; 23 **OhA** 281, 154NE171. [b] **Injunction in action to reform contract for sale of patent rights** is within jurisdiction of state court where both parties manufacture under same letters patent under agreement from parties claiming rights under patent. 90**Cal**A276, 265P1010. [c] **Actions on contracts.-Mass** 172NE586.

1158-24½-New. of suits to set aside contracts for manufacture of patented articles for fraudulent representations, where the question whether the patents were infringements is collaterally involved; 231**Mich**251, 203NW658.

1159-31 226**Ky**347, 10SW(2d)1112.

1159-36 8F(2d)207; 145**Wash**460, 261 P115. [a] **State and federal courts** have concurrent jurisdiction to enforce seamen's rights of action established by Merchant Marine Act. 271US33, 46SCt 410, 70L ed813. [b] **Jurisdiction of suits** by injured seamen under Merchants Marine Act is not limited to federal courts. 271US33, 46SCt410, 70L ed813.

1159-36½-New. of an action to recover for injuries sustained on navigable waters; 127**Misc**677, 217NYS295.

1159-37½-New. , and of action to abate nuisance under National Prohibition Act. 103**Conn**7, 130A249.

1160-40 See also **Iowa** 220NW63.

1160-40½-New. to abate public liquor nuisances in name of United States; **Wis** 229NW657.

1160-46 [a] **Questions as to extent of state's judicial power over controversy relating to Indians** must be first submitted to state courts. 269US13, 46SCt1, 70 L ed138.

1160-47½-New. Under Trading with the Enemy Act, actions concerning either title or possession of property must be brought in federal courts. 215**Ky** 413, 285SW224.

1160-47¼-New. Federal court jurisdiction of a suit to review an award by the industrial accident board is not excluded by a state statute requiring suit in the county where the accident occurred. 24F(2d)809.

1160-48 16F(2d)800; 42F(2d)30.

1160-51½-New. Where facts of the case show that the federal court has jurisdiction, it is the duty of the court to assume jurisdiction, and the right of the litigant to choose the federal court cannot properly be denied. 29F(2d)140.

1160-52 6F(2d)285; 16F(2d)800.

1161-54 26F(2d)675.

1161-59½-New. Rule that state courts will not enjoin proceedings in federal courts nor the latter in the former is a familiar rule of comity. 99Vt306, 131A 847.

1161-59½-New. The rule of comity is one of sound public policy and should be applied in a spirit of liberality. 37**Wyo** 11, 258P576.

1161-59¼-New. United States courts have no general supervisory or appellate powers over state courts. 38F(2d)588.

1161-60 276US36, 48SCt268, 72L ed457; 279US218, 49SCt310, 73L ed669; 5F(2d) 221; 11F(2d)854; 13F(2d)708; 14F (2d)149; 14F(2d)501; 16F(2d)355; 16 F(2d)502; 16F(2d)800; 17F(2d)584; 21F(2d)172 (bill in equity to cancel insurance policy sued on in state court); 23F(2d)175; 23F(2d)208; 27F(2d)142; 33F(2d)505; 36F(2d)364; 40F(2d)282; 42F(2d)475; 42F(2d)933; 43F(2d)521 (test of exclusive jurisdiction stated); 198**Cal** 221, 244P359; 253**Mass**60, 148NE 217; 166**Minn**14, 206NW939; 142 **Okl** 82, 285P5; 38 **OklACR**74; 116**Tex**1, 285 SW1063, 1070 [citCJ] (dictum); **Tex CivA** 275SW473; **TexCivA** 297SW563; 99Vt306, 131A847. [b] (1) 41F(2d) 823. (3) 42F(2d)933. (9) In United States court, in equity, on filing of bill. 25F(2d)164.

1162-61 116**Tex**1, 285SW1063, 1070 [citCJ] (dictum).

1162-62 16F(2d)800; 43F(2d)521.

1163-63 276US36, 48SCt268, 72L ed457 (fraud on courts); 16F(2d)355; 25F (2d)164 (though commenced on same day); 316**Mo** 651, 291SW466; 38 **Okl ACR**74; 116**Tex**1, 285SW1063, 1070 [cit CJ]; **TexCivA** 275SW673.

1163-64 See also 24F(2d)541; 216**Ky** 521, 287SW981.

1163-66 17F(2d)988; 39F(2d)455.

1163-66½-New. Defendant in a federal court is not entitled to the benefit of a federal statute providing for stay of proceedings where the state court has not stayed enforcement of the statutes involved. 25F(2d)164.

1164-67 8F(2d)932; 13F(2d)617, 619 [citCJ]; 24F(2d)108; 37F(2d)225; 43 F(2d)521; **MoA** 274SW837. [a] (13) Other instances. 24F(2d)108; 31F(2d) 469; 136**Misc**812, 242NYS283.

1165-68 30F(2d)707; 42F(2d)463.

1165-72 270US587, 46SCt408, 70L ed 747 (failure of state commissions to act on schedule of rates for two years after order of state court, while telephone company was operating at loss, held to present case for equitable relief in federal court).

1165-75 22F(2d)541.

1165-76 281US470, 50SCt374, 74L ed 972; 13F(2d)708; 27F(2d)142. See also 99Vt306, 131A847.

1165-76½-New. Where both suits are in personam, they may be prosecuted until one reaches final judgment when it may be pleaded in bar. 13F(2d)708.

1165-76⅓-New. Where suit in state court is originally in personam with right to become in rem by prayer for receivership, it does not bar general jurisdiction of federal court to subsequently appoint receiver before it thus becomes suit in rem. 13F(2d)708.

1166-78½-New. The fact that a federal question may be raised in a state court suit cannot be made the basis of depriving plaintiff of the right to have the case decided in a federal court. 17F(2d) 143.

1166-78⅓-New. A proceeding before a state commission for leave to abandon a railroad because operated at a loss and an appeal to a state court from an adverse decision will not preclude a suit in a federal court to enjoin interference with proposed abandonment where neither the commission nor the state court could grant the right to abandon the road. 32F(2d)819.

1166-89 TexCommnA 290SW155, 157 [citCJ]; **TexCivA** 283SW244, 245 [cit CJ].

1168-31½-New. State cannot compel Federal prisoner to come on for trial for offense against state laws. 37F(2d) 409.

1169-36 13F(2d)708; 14F(2d)168; 14 F(2d)501; 23F(2d)381; **Ala** 129S262 (3dcase); 236**Mich**383, 210NW338; 128 **Misc**700, 219NYS176; 128**Misc**700, 219 NYS179; 99Vt306, 131A847. [h] (6) Possession by executor of decedent's estate under authority of state court does not preclude action against him individually in federal court for conversion of assets. 24F(2d)370.

1169-37 13F(2d)708; 22F(2d)541; 36 F(2d)280; 128**Misc**700, 219NYS176. [k] **State court cannot issue execution** against property which has passed free of lien into custody of federal court. 4F(2d)913.

1170-38 128**Misc**700, 219NYS176 (dictum).

1170-42 13F(2d)708; 22F(2d)541; 33 F(2d)157(2dcase); 40F(2d)91; **Fla** 128 S416; 192NC31, 133SE399; 99Vt306, 131A847. [a] (4) 18F(2d)614; 34F(2d) 312. [b] 192NC31, 133SE399. [i] **Nonresident claiming paramount right to property attached** by state court must assert right in state court, not in federal court. 192NC31, 133SE399.

1170-42½-New. , except where the federal court exercises jurisdiction to enforce supremacy of the constitution and laws of the United States. 99Vt306, 131 A847.

1171-43 14F(2d)501.

1171-44 38F(2d)212.

1171-49½-New. Possession of defendant's property by a federal court does not affect judgment in personam against him in a state court. 14F(2d)149.

1171-49⅓-New. Pending of an action in a federal court to recover for loss under a policy does not oust jurisdiction of a state court in another state to entertain attachment suits by insured's creditors. 22F(2d)541.

1171-50 13F(2d)708; 22F(2d)541.

1171-51 93**Cal**A166, 269P180.

1171-53 13F(2d)708; 100**NJEq**453, 136 A329; 128**Misc**700, 219NYS176; 128 **Misc**700, 219NYS179; 137**Misc**28, 244 NYS377; 99Vt306, 131A847.

1172-55 12F(2d)968; 13F(2d)708; 128 **Misc**700, 219NYS176; 128**Misc**700, 219 NYS179. [j] **Cancellation of judgment record.**-Where federal court is holding property through receivers, state court has no jurisdiction to cancel record judgments obtained after appointment of receivers. 12F(2d)958. [k] **Action by domiciliary receiver of foreign corporation cannot be maintained in state court** after federal court adjudication of priority of general receiver to such corporation's assets. 128**Misc**700, 219NYS 176. [l] **Restraining order issued by state court** is ineffectual to disturb property of corporation in hands of receiver appointed by federal court till after it has left receiver's hands. 25F(2d)794.

1172-56 159US36, 15SCt1018, 40L ed 67; 149US473, 13SCt1008, 37L ed815; 13F(2d)708; 23F(2d)381; 128**Misc**700, 219NYS176 (dictum); 38 **OklACR**74; 99Vt306, 131A847. [l] **In application to fix allowance** in receivership, court of chancery had no jurisdiction to fix any fees in proceeding in federal court. 102**NJEq**464, 141A313. [m] **State receivership court cannot be deprived of its jurisdiction** without its consent either by direct suit against receiver or by removal to federal court. 27F(2d) 572. [n] **Federal court receivers of corporation, not entitled to possession of** leasehold assigned to company under which state court receivers hold, are not entitled to possession though prior in time to state court receivers. **Tex CivA** 8SW(2d)285.

1173-63 [a] (2) Judgment of state court ousting foreign corporation from state and appointing trustees, made pending enforcement of mandate of federal court directing return of property in receiver's hands to corporation, requires property to be turned over to trustees appointed by state court. 25 F(2d)794.

1174-65 13F(2d)708; 24F(2d)169; 38 F(2d)68; 137**Misc**28, 244NYS377; **Tex CivA** 274SW323; **TexCivA** 280SW282. See also 24F(2d)38. [a] (1) 117**Tex** 247, 18SW(2d)609. (3) Execution on judgment of state court under state statute for current operating expenses of railroad payable by purchaser at receivership sale by federal court as condition of reincorporating held not interference with jurisdiction of federal court. 6F(2d)285. (4) Mortgagee of railroad took subject to state statute requiring purchaser at foreclosure as condition of reincorporating to pay current operating expenses accruing with

in two years of sale, but is entitled to be heard in state court before its property rights can be taken. 6F(2d)285. (5) That property of corporation is in hands of receiver appointed by federal court does not prevent institution of quo warranto proceedings by state attorney-general to oust corporation from state. 25F(2d)794. [j] **Lack of interest** will prevent granting mortgagee and receiver injunction to restrain assertion of claim against property in state court, where property was sold and mortgagee received proceeds. 27F(2d)748.

1174-66 13F(2d)708.

1174-68½-New. The purchaser of a railroad at foreclosure sale in receivership proceedings in a federal court, who is liable for death resulting from negligence of the receiver and his agents, is not entitled to an injunction restraining levy of execution on a judgment obtained in a state court. 18F(2d)481.

1175-81 16F(2d)609; 247 IllA406; Iowa 228NW32.

1175-82½-New. An injunction against a federal receiver relating to acts outside the receivership is not an interference with property in his custody. 225 AppDiv318, 233NYS63 (injunction against operating busses on certain lines beyond authority granted by franchise).

1175-90 [a] **Federal court** having jurisdiction of action against county may compel tax levy to satisfy judgment. 269US172, 46SCt66, 70L ed206.

1176-95 TexCivA 283SW244, 246 [cit CJ]. See also 40F(2d)330. [d] **Annulment on ground of newly discovered evidence.**-38F(2d)588 (petition held insufficient).

1176-96 27F(2d)304; TexCivA 283SW 244, 246 [citCJ].

1176-8 Ala 129S262(3dcase).

1177-10 99Vt306, 131A847 (rule of comity). [b] **Exception to general rule.**-99Vt306, 131A847. [c] **Stay by state court first acquiring jurisdiction.**-43F(2d)521.

1178-16 6F(2d)285; 13F(2d)708; 13 F(2d)723; 13F(2d)898; 16F(2d)502; 21F(2d)172; 22F(2d)862 (suit for injunction in order to litigate entire matter in single suit); 23F(2d)175; 34 F(2d)312 (proceedings in probate court involving pending administration of estates); 35F(2d)551; 37F(2d)504 (restraining enforcement of state decree holding municipal bonds void); 42 F(2d)933; 13PortoRicoFed56; 156SC 480, 153SE462; 99Vt306, 131A847 (rule of comity). [d] 12PortoRicoFed534. [g] (2) Such provision does not prohibit injunction against enforcement of final judgment of state court by parties thereto. 6F(2d)559. [h] **Exception to general rule.**-99Vt306, 131A847. [i] **Erroneous decision of state court** does not give federal court jurisdiction to interfere. 37F(2d)504.

1178-17 But see 6F(2d)559.

1178-18 269US42, 46SCt61, 70L ed155; 4F(2d)913; 14F(2d)149; 31F(2d)942 (in absence of fraud, accident, or mistake); 33F(2d)753 (cannot restrain enforcement of judgment unless judgment is capricious or in clear conflict with fundamental principles).

1178-20 But see 271US240, 46SCt492, 70L ed927.

1179-27 29F(2d)567.

1179-27½-New. or where a state suit seeks only judgment in personam; 19 F(2d)766.

1179-29 17F(2d)621; 19F(2d)766.

1179-30 6F(2d)285; 8F(2d)546; 12 F(2d)958; 13F(2d)898 (dictum); 19 F(2d)196; 25F(2d)164; 38F(2d)212; 43F(2d)130; 43F(2d)521; 99Vt306, 131 A847. [a] (5) Federal court will enjoin cutting through natural highway constructed with federal aid, authorized by state court without provision for replacing road bed, as interference with interstate commerce and carrying of mail. 6F(2d)160. [c] **Statute forbidding federal courts** from enjoining state court proceedings does not apply where United States is party. 6F(2d)160.

1179-31 33F(2d)667; 99Vt306, 131A 847.

1179-32 6F(2d)559; 25F(2d)252.

1179-33 19F(2d)196. [b] **Jurisdiction over subject matter.**-19F(2d)196.

1179-34 6F(2d)559; 17F(2d)621; 17 F(2d)710; 19F(2d)196; 33F(2d)749 (complaint for injunction for fraud held insufficient). [a] (1) 6F(2d)559; 15 F(2d)145. [b] **Sufficiency of evidence** to support jury's verdict cannot be considered by federal equity court, under Const. Amendm. VII. 28F(2d)493. [c] **Where enforcement of state court judgment would be inequitable,** federal court may restrain enforcement. 33F(2d)749.

1179-34½-New. or where the judgment would be subject to collateral attack because obtained through accident or mistake; 6F(2d)559.

1179-35 6F(2d)559. But see 13F(2d) 267.

1180-39 35F(2d)459 (state industrial commission). [c] **Commission's award held within its jurisdiction,** precluding federal court from enjoining enforcement thereof. 35F(2d)459.

1180-40 6F(2d)663; 42F(2d)463. [b] **Notwithstanding right to appeal to state supreme court** from findings and order of commission, telephone company may seek injunction against enforcement of inadequate rates fixed by commission. 6F(2d)663.

1181-50½-New. A federal court may enjoin proceedings in a state court to cancel a lien of judgment where the judgment was not docketed in the court where the property is situated until after a receiver of such property was appointed by the federal court. 12F(2d) 958.

1181-50⅓-New. Where a federal question is involved, the federal court may enjoin proceedings in a state court as where validity of ordinance in conflict with federal constitution is involved. 13F(2d)898.

1181-50¼-New. Congress has power to legislate over matters of conflicting jurisdiction. 16F(2d)502.

1181-50½-New. Where difference in citizenship is involved, federal court may enjoin the action in a state court, where sureties pay the amount of the bond and disclaim interest. 16F(2d) 502.

1181-50⅙-New. Plaintiff in federal court may bring ancillary action to protect its jurisdiction, and apply for interlocutory injunction in such action. 25F(2d)164.

1181-51 15F(2d)280; 15F(2d)395.

1181-53½-New. Where allowed claim discloses mutual set-off, trustee is directed to suspend further proceedings in state court to recover set-off until determination of right to set-off. 43F(2d) 748.

1181-54 92Fla818, 110S539; 114Nebr 468, 208NW141, 142 [citCJ]. [b] **Law of comity is part of common law.**-151Md 321, 134A497. [c] **Courts of each state determine** how far comity requires enforcement of contracts beyond jurisdiction of state. 220Ala344, 125S217. [d] **Particular state may by appropriate legislation** decline to observe rule of comity. 87Colo 55, 284P1021. [e] **Rule of comity should be applied in favor of court first assuming jurisdiction.**-170 La328, 129S361.

1181-55 7F(2d)470; 20F(2d)714; 92 Fla818, 110S539; Fla 130S7; 203 Iowa 430, 212NW751; 120Kan575, 244P1063, 1065 [quotCJ]; MoA 31SW(2d)250; 114Nebr468, 208NW141, 142 [citCJ]. [f] (2) Comity rule depends on whether action is transitory. Fla 130S7. [h] **Comity is not rule of law** but one of practice, convenience, and expediency. 98Vt424, 129A166.

1181-56 7F(2d)470; 87Colo 55, 284P 1021; 120Kan575, 244P1063, 1065 [quot CJ]; 156Miss567, 126S395; 114Nebr 468, 208NW141, 142 [citCJ]; 195NC143, 141SE471; 132 Or422, 285P208; 98Vt 424, 129A166. [d] **Courts are obligated to exercise rules of comity** till legislature modifies rule. 198Cal 618, 246P 796. [e] **Service of process.**-226App Div56, 234NYS202 (arbitration proceedings). [f] **Enforcement of contract as an act of comity will not be refused** merely because contract is prohibited or cannot validly be made in place of forum. 132 Or422, 285P208.

1182-57 125 Or528, 266P238, 244, 59 ALR1436 [citCJ]; 98Vt424, 129A166 (county gives claimant standing of adopted child in this state).

1182-59 7F(2d)470.

1182-62 Fla 130S7; TexCivA 31SW (2d)314. See also 88 IndA540, 164NE 713. [b] 98CalA619, 277P509(2dcase). [c] **Courts should not interfere because of dissatisfaction** of litigants with decree of court of another state. 98CalA 619, 277P509(2dcase).

1182-63 103NJEq487, 143A771.

1182-63½-New. nor that foreign courts are incompetent or unwilling to do full and complete justice; 103NJEq487, 143 A771.

1182-69 203 Iowa430, 212NW751.

1183-70 92Fla818, 110S539.

1183-70½-New. Every nation has the right to bind its own subjects to its own laws in every other place. 13F(2d)433.

1183-70⅓-New. Under the rule of comity, where statutes of two states provide similar methods for creditors of an insolvent bank in the hands of a state superintendent to present claims to the superintendent for allowance, courts of one state will not entertain jurisdiction acquired by garnishment proceedings at the instance of a resident creditor to collect his claim from a foreign bank's assets therein. 170Minn120, 212NW3.

1183-70¼-New. Creditor in a foreign cause of action is entitled to relief obtainable in a foreign court. 130Misc66, 224NYS102.

1183-70⅕-New. Threat of reprisal on parties litigant will not deter the court in doing its full duty, under the law in its operation on property, for the benefit of an infant. 103NJEq487, 143 A771.

1183-70⅙-New. Courts of the United States will give to Americans the same relief against the British owner of a British vessel which the courts of England would give to Americans. 32F(2d) 720.

1183-70⅐-New. The extent to which the law of one nation is allowed to operate within the dominion of another nation depends on comity of nations. 33 F(2d)667.

1183-70⅛-New. Courts of each state must determine how far comity requires enforcement of a foreign contract. 132 Or422, 285P208.

1183-70⅛-New. United States citizens engaging in property transactions in a foreign country subject themselves to the laws, decisions, and decrees thereof. 33F(2d)667.

1183-70⅒-New. A confiscatory statute or decree of a foreign country is not required by comity or any international law to be enforced by one of the United States against its citizens. 251NY243, 167NE430, 65ALR1490.

1183-70⅑-New. Principles of comity are not enforced for purposes of reciprocity, nor denied for purposes of retaliation. 245NYS2.

1183-75 130Misc499, 223NYS777.

1183-76 118Kan308, 235P104.

1184-78 13LaA594, 128S700.

1184-81 269US172, 46SCt61, 70L ed206; 28F(2d)869. See also 202 Iowa1, 209 NW412.

1184-82 33F(2d)967.

1184-83 213Ala173, 104S530; Ala 128 S438; 99Vt306, 131A847. But see 206 Iowa499, 221NW228. [b] (2) In action under Federal Employers' Liability Act, full faith and credit provision of federal constitution is not violated by rejection of records of court of another state showing that injunction had been obtained there prohibiting plaintiff from proceeding further. 322Mo 299, 15SW (2d)825, 65ALR599.

1185-87½-New. A court of the state where a contract, involving operations by a receiver in several states, was made may have jurisdiction of such contract. 104Conn206, 132A390.

COUSIN

1186-15 NJPrerog 151A67.

1186-21 NJPrerog 151A67.

COVENANT, ACTION OF

1192-68 [b] **Changed in Missouri by statute.**-224Mo 1, 123SW441, 26LRANS 934.

1193-77 292Pa304, 141A27.
1195-22 Fla 130S421.

COVENANTS

1209-3 83CalA391, 257P124 (covenant is agreement of covenantor only). [c] Vt 150A138.
1209-8 213Ala66, 104S5.
1209-9 213Ala66, 104S5.
1209-10 TexCivA 275SW673, 678 [cit CJ].
1209-12 [a] (3) 213Ala66, 104S5.
1209-13 130 Or148, 279P546; TexCivA 275SW673, 678 [citCJ].
1209-14 TexCivA 275SW673, 678 [cit CJ].
1210-15 TexCivA 275SW673, 678 [cit CJ]. [f] **Plaintiffs sued by grantee** for breach of warranty cannot recover from their grantor where there was no intention to warrant as to land involved. 191 Wis570, 211NW768.
1210-18½-New. In warranty clause of ordinary modern deed, various covenants are: (1) Of seizin. (2) Right to convey. (3) Against encumbrances. (4) Warranty, general or special. (5) Quiet enjoyment. (6) Further assurance. 189NC729, 128SE326.
1210-18½-New. Covenant, in deed conveying fee to streets, that names of streets remain unchanged held supported by consideration. 136Misc406, 241 NYS5.
1210-19 See also 332 Ill 136, 163NE 440. [a] **Covenant held not against public policy.**-136Misc406, 241NYS5.
1211-28 135Misc845, 240NYS38. [a] **Covenant in quitclaim deed** clearly expressed is as enforceable as one in any other form of deed. 130 Or148, 279P 546.
1211-31½-New. A covenant must be in writing. 97Fla236, 122S708.
1211-31½-New. Selling lots on assurance although verbal, that a uniform plan will be observed on sale of the remaining property binds the grantor in equity and good conscience to fulfill such assurance, and future purchasers are also bound. 134Misc733, 236NYS 194.
1211-32-33 153Tenn11, 282SW201.
1211-35 243 IllA170; Mo 26SW(2d) 598; 247NY131, 159NE886; 136Misc 406, 241NYS5; 137Misc297, 241NYS 708; 196NC782, 147SE295; 197NC344, 148SE545. [c] **Grantee's promise to keep drainage ditches open and in good order** as part of consideration for deed is properly inserted in consideration clause of deed. 130 Or148, 279P546.
1212-39 33 OhA432, 170NE23; 117Tex 439, 6SW(2d)1039, 60ALR890. [b] **Where deed contains no covenants** grantee is without remedy for eviction or incumbrance. 137Misc297, 241NYS708.
1212-40 221Ky593, 299SW201; 128 Misc16, 217NYS185; 137Misc297, 241 NYS708.
1213-50 Cal 291P184; 294Pa360, 144A 271.
1213-50½-New. An agent's conveyance of land to principal equitably entitled thereto will not be construed as carrying covenant against encumbrances. 197Cal 139, 239P1059.
1213-51½-New. As a general rule the doctrine of implied covenants has been applied to both leases and deeds of conveyance. TexCivA 276SW448.
1213-52 [d] (1) 24F(2d)338. (4) Failure of title to right of way appurtenant to land conveyed by bargain and sale deed gives grantee no right of action against grantor in absence of express warranty. 24F(2d)338. (5) Grant of oil and gas produced from realty "to have and to hold to the said grantees" conveys interest in realty subject to implied warranties under statute. 100CalA221, 279P1041. [o] (1) 126 Okl 126, 258P1046; TexCivA 20SW (2d)158.
1214-57 249Mich588, 229NW477; 128 Misc16, 217NYS185; 125 Or150, 262P 853, 57ALR311. [a] **Condition of property.**-Upon sale of land there is no implied warranty of condition of property. 128Misc16, 217NYS185.
1214-60 117Tex439, 6SW(2d)1039, 1042 [quotCJ], 60ALR890.
1216-67 33 OhA432, 170NE23.
1216-69 110Conn546, 148A549.
1216-70 28F(2d)720.
1216-71 150Md18, 132A258.
1217-95 117Tex439, 6SW(2d)1039, 1043 [quotCJ], 60ALR890.
1218-7½-New. Restrictive covenants are in the nature of an easement, constituting an interest in the land upon which they are imposed. 108Conn359, 143A245.
1218-8 30F(2d)634.
1218-12 163Ga580, 136SE785, 788 [quotCJ]. [b] **Express reservation by original grantor** of all rights and easements appurtenant to tract not expressly granted is notice to subsequent purchasers that all rights and easements not expressly granted did not pass by implication. 189NC589, 127SE697.
1218-13 30F(2d)634; 163Ga580, 136SE 785, 788 [quotCJ]; 260Mass180, 156 NE567.
1218-14 See also 125 Or150, 262P853, 57ALR311. But see 198NC31, 151SE 639.
1218-14½-New. It is no argument against restrictive covenant that land without restriction will be more valuable. 220AppDiv244, 221NYS396.
1219-16 162Ga191, 134SE446; 239Mich 234, 214NW239; 245NY77, 156NE621; 131Misc30, 226NYS258 (construed together and as whole); 101Vt384, 143A 700. [e] **Intention must be contained in express language** of covenant or be legally inferable therefrom. 219AppDiv 552, 219NYS404 (suspected intention may not be given effect). [f] **Court may not read into covenant** anything parties did not place therein. 219App Div552, 219NYS404.
1219-20 TexCivA 278SW316.
1220-26½-New. Covenants restricting use of land are strictly construed. NJSup 137A217.
1220-31 TexCivA 275SW673, 678 [quot CJ].
1220-32 TexCivA 275SW673, 678 [quot CJ]; TexCivA 278SW316 [citCJ]. [d] **Covenants as to water ditches, levees, or drains generally run with land.**-Tex CivA 278SW316. [e] **Covenant to construct and maintain flume** runs with land. TexCivA 278SW316. [f] **Covenants conferring benefit on grantor run with land.**-TexCivA 278SW316.
1220-33 TexCivA 275SW673, 678 [quot CJ].
1220-37 189NC729, 128SE326.
1220-38 189NC729, 128SE326.
1220-39 189NC729, 128SE326.
1221-53 213Ala66, 104S5.
1221-55 236Mich294, 210NW231, 232 [quotCJ].
1221-56 213Ala66, 104S5. [b] **Deed held to contain separate and distinct covenants,** as to maintenance of partition fence and use of railroad switch. 87 IndA347, 154NE882.
1221-61 215Ala412, 111S427, 431 [quot CJ]; 236Mich294, 210NW231.
1221-62 215Ala412, 111S427, 431 [quot CJ].
1221-63 215Ala412, 111S427, 431 [quot CJ]; 236Mich294, 210NW231.
1221-64 215Ala412, 111S427, 431 [quot CJ].
1221-65 215Ala412, 111S427, 431 [quot CJ].
1223-94 TexCivA 280SW911.
1223-95 TexCivA 280SW911.
1223-96 See also 156Tenn463, 2SW(2d) 409, 411 [quotCJ].
1225-22 Mo 24SW(2d)1017.
1225-32 Ga 155SE513.
1226-37 [g] **Exception of special taxes falling due "after date"** is construed in harmony with statute for date of assessment, regardless of understanding of parties. 234 IllA395.
1226-39 100NJEq328, 134A655.
1226-42 13F(2d)712; 135Misc845, 240 NYS38; 254NY268, 172NE494 (restrictions). [d] **Warranty in mortgage by son of living father's lands** warrants nothing since son has no interest therein. 49SD575, 207NW654, 44ALR1462. [e] **Lands included in deed by mistake.**-Breach of covenant does not exist where, by mutual mistake of parties in description of land conveyed, land not intended to be conveyed was included but no consideration was paid or received therefor. TexCivA 274SW220.
1227-44½-New. Where the number of acres is not specially warranted, covenants embrace only the land actually conveyed although less than that stated in the deed. 13F(2d)712.
1228-58½-New. Covenants for quiet enjoyment and of general warranty will sustain an action by a remote grantee evicted under an encumbrance although the deed also contains a covenant against encumbrancers not running with the land. 31NM325, 245P250, 45ALR 510.
1230-79 114 Oh685, 152NE5, 9 [quot CJ].
1230-80 114 Oh685, 152NE5, 9 [quot CJ].
1230-81 114 Oh685, 152NE5, 9 [quot CJ].
1230-82 114 Oh685, 152NE5, 9 [quot CJ].
1230-83 114 Oh685, 152NE5, 9 [quot CJ].
1230-96 215Ala212, 110S308; 172Ark 1128, 291SW826; 177Ark170, 6SW(2d) 36; 233Ky491, 26SW(2d)19; 117 Okl 224, 246P230.
1231-97 235Ky838, 32SW(2d)408.
1231-3 215Ala212, 110S308, 311 [quot CJ].
1231-4 172Ark1128, 291SW826; 208 Iowa759, 225NW939; 245Mich681, 224 NW436, 64ALR1477; Va 153SE667.
1233-20 36 OklACR387, 390 [citCyc].
1234-25 36 OklACR387, 390 [citCyc].
1234-34 36 OklACR387.
1234-38 Ala 128S452.
1234-45 253Mass430, 149NE146.
1235-48 118Kan682, 236P449; 126 Or 528, 270P473, 60ALR232.
1235-49 208 Iowa759, 225NW939.
1235-52 208 Iowa759, 225NW939.
1235-53 208 Iowa759, 225NW939.
1235-60 38 OklACR415.
1235-64 [b] **Restrictions cannot be extended beyond those specified** under covenant against encumbrances, defined by statute. 131Misc30, 226NYS258.
1236-67 TexCivA 285SW902.
1236-68 329 Ill 30, 160NE179.
1238-12 115Nebr789, 215NW111, 61 ALR1.
1239-23 220Ala598, 127S176.
1239-23½-New. Joining the vendor in an unsuccessful suit to eject other claimants does not waive warranty. 38 GaA671, 145SE519.
1239-24 11LaA436, 123S492 (act of sale alone is to be considered and construed with law declaring effect of general warranty).
1239-25 169Ga599, 150SE908; 40GaA 735, 151SE392; TexCivA 296SW982.
1240-41 [b] **Covenants against claims** of persons "holding through" grantor implies claims created by act of grantor. 212Ala628, 103S589.
1240-42 221Ky593, 299SW201 (holding no other warranty could be implied).
1240-43 329 Ill 30, 160NE179.
1240-49 199Wis428, 224NW98 (defining "real covenants").
1240-50 [a] **Unless deed has some element of covenant running with land,** it cannot be made basis of claim. Tex CivA 278SW316.
1240-51 218AppDiv809, 218NYS278; 101WVa253, 132SE489, 490 [quotCyc]; 60 OntL245, [1927] 2DomLR722. [a] (4) Covenant by grantee to pay proportionate share of cost of maintaining private road, rivers, and walks has been held to run with land. 218AppDiv374, 218NYS278.
1241-52 [e] **Covenant runs with land** where rights and liabilities under it pass to assignee or vendee. 92Fla375, 109S 648.
1241-55 5F(2d)908 (specific statement that covenant runs with land is not necessary); 107Conn109, 139A508, 57 ALR331; 108Conn26, 142A395; Me 149 A620; 229AppDiv250, 241NYS439 (agreement to maintain sewer held not to be covenant running with land).
1241-56 Alta [1928] 3DomLR491 (covenant that vendee will buy beer from vendor or his nominee).
1242-62 232Ky298, 22SW(2d)912.

1242–63 221MoA317, 273SW229 (title or possession held necessary).
1243–66 219AppDiv321, 219NYS684; TexCivA 22SW(2d)463. See also CalA 291P615.
1245–89 Mass 165NE419.
1245–90 41F(2d)552; 219AppDiv321, 219NYS684.
1245–97 197Cal 139, 239P1059.
1246–7 218Ala448, 118S760; Ala 128S 452; 169Ark201, 275SW709; 245 IllA 127; MoA 26SW(2d)841; 190NC108, 129SE181 (on delivery of deed); 39 OklACR308.
1246–9 169Ark201, 275SW709; 189NC 729, 128SE326.
1246–12 Ala 128S452; 39 OklACR308.
1247–14 189NC729, 128SE326.
1247–16 213Ala80, 104S415; 218Ala 448, 118S760; 169Ark1110, 278SW39; Conn 151A531; 205 Iowa1, 213NW597; 245Mich681, 224NW436, 64ALR1477; 173Minn223, 217NW101, 102 [citCJ]; NJ 151A731; 31NM325, 245P250, 45 ALR510; 189NC729, 128SE326; 23 OhA 352, 155NE403; 24 OhNPNS401; SD 228NW380; TexCommnA 291SW195. [a] (1) 213Ala80, 104S415; 205 Iowa1, 213NW597. [b] **Breach occurs immediately upon execution of deed.**–169 Ark1110, 278SW39.
1247–19 189NC729, 128SE326.
1247–22 TexCivA 287SW683.
1248–26 115Nebr789, 215NW111, 61 ALR1; 189NC729, 128SE326; 65Utah 560, 238P280.
1248–27 65Utah560, 238P280.
1248–29 169Ark201, 275SW709. [a] **Existence of prior timber deed.**–169Ark 201, 275SW709.
1249–35 Mass 168NE794. [b] (5) Covenant against conveyance to negroes has been construed as intended for personal benefit of covenantee or for benefit of land conveyed by him. 315Mo 1239, 288SW38.
1249–36½–New. Covenant to pay taxes runs with the land. 258Mass4, 154NE 190.
1249–40 253NY190, 170NE887 (covenant to do affirmative act); 123 Or377, 260P1002.
1250–48 Mass 168NE794.
1250–48½–New. A covenant in a grant of land equipped with tanks and other materials requisite for an oil and gas filling station that the grantee will use only the gas and oil of a stated company so long as the grantor acts as agent of such company runs with the land and binds the grantee's grantee although the subsequent conveyance does not contain a similar covenant. 162Ga 191, 134SE446.
1250–50 87 IndA347, 154NE882.
1251–59 See also 90PaSuper255 (covenant to build wall is not included in exception as to restrictions and easements).
1251–68 164Ga811, 139SE716; 165Ga 159, 140SE360; 128Me339, 147A419; 262Mass34, 159NE503; 245Mich252, 222 NW180; NS [1927] 1DomLR730. But see 167La791, 120S369(3dcase). [a] **Grantor may impose any restrictions on use of land not against public policy,** and equity will enforce them. 128Misc 408, 219NYS59. [b] **Construction of covenants.**–245Mich252, 222NW180.
1252–73 Contra 260Mass180, 156NE867.
1252–75 TexCivA 278SW513 (apartment house in residence district).
1252–78½–New. Covenant that grantor would not permit adjoining property to be used for butcher or poultry business is personal and terminates when grantee ceases to conduct such business. 215 AppDiv291, 213NYS446.
1252–78⅓–New. Under particular facts building restrictions are held to run with the land. 197Cal 733, 242P718.
1252–79 5F(2d)908 (covenant to pump water to reservoir on land conveyed); CalA 281P93. [b] **Sale in fee simple subject to personal obligation** of purchaser to erect single dwelling does not create servitudes of use, habitation, and usufruct. 167La791, 120S369(3dcase).
1252–82½–New. A covenant to create easement for the benefit of a lot has been held to run therewith. 174Ark248, 294 SW1006.
1252–83 123 Or377, 260P1002. [a] **Affirmative covenant** may run with land. 5F(2d)908.
1252–84 167La791, 120S369(3dcase); Mass 171NE226; 199Wis428, 224NW98. [b] **Covenant to pay rent for personalty included in lease of real estate** creates mere personal contract. Mass 171NE 226.
1253–91 123 Or377, 260P1002, 1003 [citCJ].
1253–97½–New. Sale in fee simple subject to the purchaser's obligation to erect a single residence created no lien or privilege on the property in favor of the vendor. 167La791, 120S369(3d case).
1253–99 114 Oh685, 152NE5.
1253–1 114 Oh685, 152NE5.
1253–2½–New. Grantee cannot escape obligation of affirmative covenants by abandoning the estate granted. 114 Oh 685, 152NE5.
1254–15 See also TexCivA 8SW(2d)750.
1254–16 100NJEq439, 136A301.
1254–18½–New. Unsubstantial violations of building restrictions do not prevent a lot owner from maintaining an action for injunction to prevent substantial violations of covenant. TexCivA 8SW(2d)750.
1254–19 100NJEq439, 136A301.
1254–23½–New. Covenant restricting grantor from using conveyed property as a butcher shop, so long as adjoining property was so used, terminates when the personal covenant between the grantor and adjoining owner terminated. 215AppDiv243, 231NYS446.
1254–23⅓–New. Owner having created rights to enforce restrictions cannot release or discharge such rights. 105Conn 464, 136A71.
1254–23¼–New. Grantees of a whole tract subject to a restrictive covenant in favor of the grantor against sale to negroes may convey the whole tract or any part of it free from restrictions except as against the original covenantee and one standing in his stead and in privity with him. 315Mo 1239, 288SW 38.
1254–23⅕–New. Where a restrictive covenant was omitted from the deed to a subsequent grantee, the subsequent grantee will be granted relief of removal of a restriction created by the covenant, subject, however, to reimbursement of the original grantor for loss alleged to have been sustained by him, in that he could have sold the property for a much greater price without the restrictive covenant. 103NJEq454, 143A628.
1254–25 215Ala212, 110S308; Mass 170 NE567; 254NY268, 172NE494.
1255–33 221MoA127, 294SW111.
1255–34½–New. Where a deed given to creditor by a third party contains the same covenants as a warranty deed of reconveyance subsequently given by creditor occupying position of mortgagee, such creditor mortgagee is not liable for breach of covenants. 221MoA 127, 294SW111.
1255–39 262Mass34, 159NE503; 294Pa 360, 144A271. See also Alta [1928] 1 DomLR873.
1255–40 105Conn464, 136A71; 198NC 520, 152SE496; 35 OhA44, 171NE604; TexCivA 290SW256. [a] **Community scheme held established** by deeds providing for mutual restrictions. 100 NJEq439, 136A301.
1255–41 262Mass34, 159NE503; Tex CommnA 289SW999; 59 OntL385, [1926] 4DomLR492.
1255–41½–New. That restriction might be waived by three fourths of lot owners indicates it was intended for the benefit of all. 105Conn464, 136A71.
1256–46½–New. Where the original grantee's interest has been extinguished by foreclosure, he cannot enforce a covenant in his deed to another restricting use of the property. 157Md674, 145A 483.
1256–47 315Mo 1239, 288SW38, 44 [quotCJ].
1256–48 315Mo 1239, 288SW38, 44 [quotCJ].
1256–49 218Ala270, 118S658; 174Ark 248, 294SW1006; 126Me55, 135A901; 315Mo 1239, 288SW38, 44 [quotCJ]; 220MoA1290, 290SW80; TexCivA 287 SW683; 60 OntL245, [1927] 2DomLR 722.
1256–50 Conn 151A305 (restrictions are for mutual benefit of lots).
1256–51 Conn 151A305; 128Misc408, 219NYS59; 33 OhA224, 168NE861. [b] **Right of such grantee** is not destroyed by subsequent conveyances of rest of property in scheme without such restrictions. 100NJEq439, 136A301. [c] **Burden of proof.**–33 OhA224, 168NE861.
1257–53½–New. That a deed to a firm and one of the firm's deeds to a purchaser did not contain a restriction did not destroy the scheme so as to preclude one grantee, whose deed contained the restriction, from enforcing it as against the purchaser. 218Ala270, 118S658.
1257–54 92CalA446, 268P1079; 101 CalA447, 281P703; 260Mass180, 156NE 867; 315Mo 1239, 288SW38, 44 [quot CJ].
1257–55 92CalA446, 268P1079; 315Mo 1239, 288SW38, 44 [quotCJ].
1257–56 107Conn109, 139A508, 57ALR 331; 315Mo 1239, 288SW38, 44 [quot CJ].
1257–63 [a] **But where such covenant appears,** grantee under earlier deed could enforce covenant against subsequent assignee of grantor, with notice. 100NJEq439, 136A301.
1257–64½–New. Grantee holding title in trust for one furnishing purchase money could not sue grantor's widow for breach of covenant of warranty. TexCivA 296SW637.
1257–65 220MoA1290, 290SW80; 128 Misc596, 220NYS221.
1258–82 215Ala212, 110S308; 210Ky 498, 276SW487; 190NC108, 129SE181.
1259–94 167Minn253, 208NW998, 1000 [citCyc]. See also 103WVa582, 138SE 384, 386 [citCJ]. But see 104WVa317, 140SE10, 11 [citCJ].
1259–95 167Minn253, 208NW998, 1000 [citCyc].
1259–96 See also 103WVa582, 138SE 384, 386 [citCJ].
1259–96½–New. One whose deed to a part of a tract subject to a covenant against conveyance to negroes in favor of the original grantor contained no reference to such covenant is not entitled to enforce a similar restrictive covenant in a deed to a subsequent grantee of another part of the tract. 315Mo 1239, 288SW38.
1259–97 59 OntL379, [1926] 4DomLR 582.
1260–17 219AppDiv537, 219NYS383. [b] 83CalA566, 257P199.
1261–19½–New. One not an assignee of the original covenantee nor a grantee of any land retained by him for the benefit of which a covenant against conveyance to negroes may have been made is not in privity with the covenantee so as to be entitled to enforce the covenant. 315Mo 1239, 288SW38.
1261–20 107Conn109, 139A508, 57ALR 331.
1261–28 See also 250Mich167, 229NW 600.
1261–29 103NJEq478, 143A627; NJCh 150A202 (holding municipality neither "successor or assign" within restrictive covenant); TexCommnA 3SW(2d)67.
1262–32½–New. Where infant's guardian contracted to convey whatever title she could, after obtaining a lease to sell, she was not bound by covenants in deed by intermediary grantor. 170 Ark1100, 282SW985.
1262–32⅓–New. Covenants against incumbrances not bound where grantee knew that he was a mere intermediary grantor. 170Ark1100, 282SW985.
1262–48 162Ga191, 134SE446; 164Ga 77, 137SE831; 338 Ill 412, 170NE425; 128Misc408, 219NYS59; 123 Or377, 260 P1002; TexCivA 278SW513 (injunction against grantee to enforce covenant, grantee having notice). See also Alta [1928] 1DomLR873.
1262–49 107Conn109, 139A508, 57ALR 331; 247NY131, 159NE886. [a] **Notice.**–100NJEq439, 136A301. [b] **Necessity of notice.**–MoA 23SW(2d)221.
1262–50½–New. Purchaser is bound only by restrictions in deed. 193Wis334, 214NW338.
1262–50⅓–New. A covenant of a grantee, his heirs and assigns, to keep open drainage ditches across land conveyed is binding on all persons subsequently

acquiring title. 130 **Or**148, 279**P**546 (covenant binding whether personal or running with land).

1262–50¼–New. Where life tenant and his heirs to whom property was devised joined in deed to railway without words of severance or separation of interests conveyed, obligation of covenant of warranty was joint upon which railway could recover damages for breach. 160 **Tenn**477, 26**SW(2d)**141.

1262–53 131 **Okl** 1, 267**P**650 (proper pleading, summons, and judgment against heir necessary).

1264–95 **LaA** 129**S**218. [e] **Statutory notice not writ or process.**–131 **Okl** 1, 267**P**650. [f] **Notice makes warrantors parties to suit** as between them and grantee. 131 **Okl** 1, 267**P**650. [g] **Question of grantor's liability as warrantors to grantee** may be heard at any time during same term in which recovery by plaintiff was had. 131 **Okl** 1, 267**P** 650.

1266–6½–New. A grantee desiring his grantor to defend on an action of ejectment should request him to intervene. 234**Mich**304, 208**NW**34.

1265–6½–New. Plaintiff cannot have defendant regarded as trespasser and denied right to call its vendor to defend title merely by alleging defendant is trespasser. **LaA** 129**S**218.

1265–9 168**La**881, 123**S**606; 40**Wyo** 226, 276**P**452. [b] **One acquiescing in joint judgment in favor of his vendee against him and his vendor because of encroachment** may insist on call in warranty against his vendor. 11**LaA**181, 123**S**139. [c] **Assignee of alleged grantee has no right to call grantor in warranty** when sued by one having prior title from grantor. 13**LaA**34, 127**S**114.

1266–13½–New. Where a vendor who was not called in warranty shows that he was possessed of documents which would have defeated eviction, an evicted purchaser cannot recover. 6**LaA**150.

1267–36½–New. Notice required by Philippine civil code must be given in the action against the purchaser for eviction and not in action on warranty. 51**Philippine**243.

1267–38 203 **Iowa**57, 212**NW**360, 361 [citCJ].

1268–58 190**NC**108, 129**SE**181 (according to his covenant).

1268–59 245 **IllA**127; 36 **OklACR**387.

1268–63 [a] **Right of action accrues to grantee alone** when covenant of seizin is broken. 190**NC**108, 129**SE**181.

1268–68½–New. Covenant of seizin is not broken where purchaser's title was derived from deed executed by liquidators of foreign corporation which subsequently executed confirmatory deed. 248**NY**33, 161**NE**321.

1269–72 218**Ala**597, 119**S**659.

1269–78 [b] 102**NJEq**492, 141**A**581.

1269–88 **MoA** 278**SW**830.

1269–89½–New. It is breached by the existence of a right to set aside the conveyance by life beneficiaries of trust property improperly conveyed. 215**Ala** 67, 109**S**363.

1269–93½–New. An outstanding paving lien is a technical breach of the covenant. **TexCivA** 285**SW**902.

1269–93½–New. Threat of potential lien does not constitute breach of covenant of seizin. 248**NY**33, 161**NE**321.

1270–6½–New. Where, however, land was described as acreage and grantor had laid out land in lots, blocks, and streets by unsecured plot in view of Rev. St. (1925) art 1297, he must make up the deficiency. **TexCivA** 285**SW**900.

1271–22½–New. Covenant against alienation which is not a condition is enforceable by an action for damages. **Ont** [1927] 2**DomLR**74.

1271–22¼–New. Adjoining owners may recover damages for alienation against restrictive covenant. **Ont** [1927] 2**DomLR**74.

1271–24 [b] **Encroachment of building on adjoining land** does not constitute breach of covenant against incumbrances in conveyance of land and building. 102 **NJEq**492, 141**A**581.

1271–26 130 **Or**240, 279**P**645 (covenant is not broken by prior authorization of issue of bonds which had not been sold or delivered at date of covenant).

1271–28½–New. Covenant against incumbrances is not breached where there was an invalid and unauthorized delivery of the deed in escrow. 232 **IllA**39.

1271–29½–New. Breach of covenant against encumbrances by reason of deed of trust gives covenantee no right to recover purchase money paid or damages, if he has not extinguished the encumbrance nor been disturbed thereby, but has lost land through foreclosure of another mortgage, which he assumed. 140**Miss**854, 105**S**487, 44**ALR**402.

1271–29⅓–New. , nor by lack of a deed of record conveying part of the property to defendant's grantor acquired by defendant by prescription. 253**Mass**430, 149**NE**146.

1271–29¼–New. An apparent encumbrance disclosed by probate records has been held to appear by "public record" within Massachusetts statute. 253**Mass** 430, 149**NE**146.

1271–29½–New. Where a wall encroaches on land not conveyed, a covenant against encumbrance is broken. 128**Misc**596, 220**NYS**221.

1271–29¼–New. A covenant against encumbrances is not necessarily broken by breach of contract requiring furnishing abstract of title free from material defects. 28 **OhA**361, 162**NE**722.

1272–34 118**Kan**682, 236**P**449.

1272–35 120 **Or**678, 253**P**539, 541 [cit CJ].

1272–38 **TexCommnA** 291**SW**195.

1272–38½–New. **Lien for paving** executed before conveyance is an existing lien although work is not done until after conveyance. **TexCommnA** 291**SW** 195.

1272–39 **TexCommnA** 291**SW**195.

1272–44 [a] **Where mortgagee has released mortgage,** it is not valid encumbrance on property within covenant against encumbrances even though release was not recorded when deed was executed. 28 **OhA**361, 162**NE**722.

1273–51½–New. Assignment of existing mortgage is not violation of provision in deed that property should not be mortgaged by either party without other's consent. 132**Misc**58, 228**NYS**666.

1273–51⅓–New. A purchaser compelled to pay a second mortgage given for commissions on a loan secured by a mortgage which he agreed to pay may recover from his grantor under warranty, excepting only such mortgage. 179**Ark** 609, 17**SW(2d)**313.

1273–60 78**Mont**287, 254**P**162.

1273–61 143**Wash**162, 254**P**846.

1274–68 169**Ga**599, 150**SE**908; 40**GaA** 735, 151**SE**392.

1274–73 234 **IllA**395.

1274–74½–New. Covenant is broken upon delivery of deed with local assessments outstanding. 215**AppDiv**33, 213 **NYS**339.

1274–76 213**Ala**80, 104**S**415.

1274–77 173**Ark**722, 293**SW**39; 70**Utah** 234, 259**P**406, 407 [citCJ].

1274–79 78**Mont**287, 254**P**162; 194**NC** 732, 140**SE**745; 124 **OhNPNS**401; 159 **Tenn**187, 17**SW(2d)**16; **TexCommnA** 291 **SW**195. [b] **Special levy not becoming lien** till after conveyance has been held no breach of covenant. 78**Mont**287, 254**P** 162.

1274–83 213**Ala**80, 104**S**415; **Conn** 151 **A**531; 205 **Iowa**1, 213**NW**597; 78**Mont** 287, 254**P**162; **NJ** 151**A**64(2dcase); 27 **OhNPNS**212 (assessments not levied not covered by covenant). [c] 205 **Iowa** 1, 213**NW**597.

1275–84 213**Ala**80, 104**S**415. [a] **Unmatured assessments** levied to pay bonds do not constitute breach of warranty against encumbrances. 130 **Or**240, 279 **P**645.

1275–85 195**NC**176, 141**SE**583.

1275–92 118**Kan**682, 236**P**449; 245**Mich** 681, 224**NW**436, 64**ALR**1477; 100**NJEq** 470, 135**A**550; 101**NJEq**388, 139**A**524; 35 **OhA**509, 172**NE**636.

1275–96½–New. Covenant against encumbrance is not broken by the existence of a public drainage improvement on the land. 202 **Iowa**1049, 210**NW**447.

1275–97 101**NJEq**388, 139**A**524 (dedicated street across land).

1276–99 **Wash** 291**P**474.

1276–3 245**Mich**681, 224**NW**436, 64**ALR** 1477; **NJ** 151**A**731.

1277–23 See also 90**PaSuper**255, 259 [citCJ].

1278–30 **TexCivA** 285**SW**902.

1278–32 215**AppDiv**33, 213**NYS**339 (eviction not necessary element).

1278–34 245 **IllA**127.

1280–63 **Mo** 31**SW(2d)**1059.

1280–79 36**BC**376 [1926] 2**DomLR**157 [1926] 1**WestWkly**645.

1281–81 But see 218**Ala**448, 118**S**760. [c] **Threats to take legal proceedings** do not constitute duress in removing party from premises. 136**Misc**160, 239**NYS** 337.

1282–87 [a] **Creditor accepting check,** sent in full satisfaction of account, is not entitled to recover balance of account. 172**Ark**1156, 292**SW**117.

1282–88½–New. Deduction of outstanding local assessment from price by purchaser on reselling is not an eviction. 215**AppDiv**33, 213**NYS**339.

1282–88⅓–New. One suing on such covenant must prove eviction, actual or constructive. 215**AppDiv**33, 213**NYS** 339.

1282–94½–New. Lease outstanding is breach of covenant. **MoA** 278**SW**830.

1282–96 5**PaDist&Co** 498.

1282–97 115**Nebr**789, 215**NW**111, 61 **ALR**1.

1282–98 248**Mich**45, 226**NW**667.

1283–19 6**LaA**150.

1284–27 212**Ala**628, 103**S**589; 169**Ark** 201, 275**SW**709. See also **TexCivA** 12 **SW(2d)**1085. [a] **Actual or constructive possession under prior timber deed.**–169 **Ark**201, 275**SW**709.

1285–48½–New. Where land was conveyed subject to an oil lease with warranty of title, subsequent reformation of the lease for ambiguity on its face is not ground for liability of grantor on warranty. **TexCivA** 282**SW**930.

1285–54 168**Ark**201, 269**SW**571.

1285–55 168**Ark**201, 269**SW**571.

1285–56 [b] **Subsequent assessments.**–202 **Iowa**1049, 210**NW**447.

1285–57 212**Ala**628, 103**S**589; 317 **Ill** 227, 148**NE**57; 11**LaA**436, 123**S**492 (regardless of fact that liens were recorded at time of sale); **MoA** 31**SW(2d)**94; **TexCivA** 288**SW**545. But see 169**Ga**599, 150**SE**908; 40**GaA**735, 151**SE**392. [d] **Local assessment lien arising during possession of one holding** executory contract of purchase arises "under" him, and not under owner of legal title. 212 **Ala**628, 103**S**589. [e] **Void assessment is not breach of warranty** where it never became lien. 156**Miss**220, 125**S**421. [f] **Future taxes.**–156**Miss**220, 125**S**421.

1285–58 [a] **Covenant in mortgagee's foreclosure deed** implied from words "grant, bargain, sale" does not cover lien for taxes assessed against mortgagor in possession. 212**Ala**628, 103**S**589.

1285–62½–New. Assessments necessary to maintain a drainage district are in nature of taxes to be borne by the land benefited, and grantors in a warranty deed are not liable to reimburse grantee therefor. 192**NC**652, 135**SE**781.

1286–70 [b] **It is immaterial whether contract of sale is executory or executed** when railroad right of way does not constitute breach. 235**Ky**838, 32**SW(2d)** 408.

1286–73 **Ga** 155**SE**324.

1287–75 **TexCivA** 28**SW(2d)**872.

1287–78 **TexCivA** 28**SW(2d)**872.

1287–79 **TexCivA** 13**SW(2d)**997. [b] (3) Covenant of specified acreage of tract "more or less" is breached if acreage is not near approximation to acreage covenanted for. 203**Iowa**880, 210 **NW**566.

1287–82 **TexCommnA** 293**SW**1100. [a] **Building encroaching on adjoining land.**–11**LaA**181, 123**S**139.

1287–83½–New. Failure of title to certain acreage in a larger tract in which a half interest was conveyed constituted breach of warranty as to only the half interest in such acreage. **TexCommnA** 15**SW(2d)**563.

1287–84 168**Ark**201, 269**SW**571 (erection or forced payment to remove en-

cumbrance); 173Ark341, 292SW683; 174Ark1179, 298SW494; 177Ark170, 6 SW(2d)36; 109Conn452, 146A831; 37 GaA725, 141SE670; 223Ky390, 3SW (2d)769; 115Nebr789, 215NW111, 61 ALR1; 192NC771, 136SE129; Tex CommnA 293SW1100; Va 154SE565. But see 235Ky784, 32SW(2d)340.

1288-85 248Mich45, 226NW667.

1288-86 MoA 26SW(2d)841.

1288-89 5PaDist&Co498 [citCJ].

1288-90 199Iowa1176, 201NW102 (possibility of future existence of, and claim by, contingent remainderman insufficient); 208 Iowa759, 225NW939.

1289-94 212Ala628, 103S589. [b] **Constructive eviction** occurs only when occupant submits by valid attainment to claim by title paramount. 215AppDiv 33, 213NYS339.

1289-3½-New. Occupant, although continuing in possession, ceases to hold under subordinate title, 215AppDiv33, 213NYS339.

1289-3⅓-New. and begins holding under paramount title. 215AppDiv33, 213 NYS339.

1289-3¼-New. Deduction of outstanding local assessments from price by purchaser on reselling is not an eviction. 215AppDiv33, 213NYS339.

1289-3⅙-New. Eviction brought about through fraud or collusion is not a breach of the covenant of warranty. 173Ark341, 292SW683.

1289-3⅛-New. Refusal of vendee to accept title from grantee is not constructive eviction. 5PaDist&Co 498.

1290-9 115Nebr789, 215NW111, 61ALR 1. Contra 173Ark341, 292SW683.

1291-24 232Ky59, 22SW(2d)422.

1291-32½-New. The purchaser of an undivided interest in land pending an action for partition cannot recover damages for breach of warranty after a decree in partition in which it was determined that his grantor owned the interest conveyed where the purchase money received on partition sale to the amount of the value of such undivided interest is deposited with the clerk of the court for his benefit. 117 Okl 224, 246P230.

1291-32⅓-New. A judgment for damages for obstruction of a way by construction of a railroad does not eject the railroad company from land conveyed to it for a right of way so as to entitle it to recover the amount of the judgment from the grantor under a general warranty. 217Ky601, 290SW 467.

1292-56 83CalA391, 257P124; 100CalA 221, 279P1041 (purchaser not compelled to rescind or offer to accept return of purchase price); 335 Ill 533, 167NE802. [b] TexCivA 272SW225 (remedy is not in rescission). [f] **For covenants not running with land,** remedy is action at law when adequate. 213Ala66, 104 S5.

1292-60 213Ala66, 104S5; 83CalA391, 257P124 (injunction and abatement); 155Md19, 141A710.

1293-69½-New. Proceedings provided by some statutes for recovery on warranties are special, and only the grantor or a person bound by the warranty is required to defend when served with notice. 131 Okl 1, 267P650.

1293-69⅓-New. Under such statutes a notice of pendency of an action and request to defend a warranty served on a stranger to the covenant and which so discloses on its face does not authorize an entry of judgment against such party without proper pleadings and service of summons. 131 Okl 1, 267P650.

1293-72 126 Okl 126, 258P1046.

1293-75 36BC376, [1926] 2DomLR157 [1926] 1WestWkly645.

1294-90 36BC376, [1926] 2DomLR157, [1926] 1WestWkly645.

1294-93½-New. Upon breach of a concurrent or dependent covenant by vendor of lots, vendee may rescind. 236 Mich294, 210NW231.

1294-93⅓-New. The grantor cannot maintain an action for damages until there has been an actual breach of covenant. 103NJEq454, 143A628.

1294-4 241Mich63, 216NW382; 131 Okl 279, 269P286, 287 [citCJ].

1294-8½-New. A covenant against encumbrances not running with the land creates no privity between the grantor and a remote grantee suffering eviction under an encumbrance so as to require him to remove the encumbrance before suing on a covenant for quiet enjoyment. 31NM325, 245P250, 45ALR 510.

1295-20 TexCivA 274SW220.

1295-23 6PaDist&Co606.

1296-32 36BC376, [1926] 2DomLR157, [1926] 1WestWkly645.

1296-45½-New. or that the grantor was a bona fide purchaser without notice of rights of others. 190NC108, 129SE181.

1296-52½-New. In an action for breach of covenant against encumbrances it is not a defense that plaintiff resold the property at a profit. 223AppDiv244, 228NYS308.

1296-52⅓-New. A vendor cannot assert estoppel of purchasers suing for breach by reason of a prior oil lease, although the purchasers agreed with the lessee that he might deduct the cost of the well before accounting for the oil produced. 100CalA221, 279P 1041.

1296-52¼-New. The fact that purchasers possessed rights of riparians in land, title to part of which was in the state, does not preclude recovery on warranty of title, although minimizing damages. 248Mich45, 226NW667.

1297-57 86 IndA621, 158NE916 (reformation a defense in action on covenant in deed as it originally existed).

1297-59 38 OklACR415.

1297-65½-New. That heirs of grantee have acquired title from one holding paramount title does not relieve from liability on warranty. 39 OklACR308.

1297-65⅓-New. Lot owner complaining of violation of restrictive covenant is not entitled to injunction, where he treated part of plat as not restricted. Ala 128S796.

1297-66 338 Ill 508, 170NE669 (slight violation by complainant); 100NJEq 290, 134A673. [a] **Lot owner who did not know of breach** by certain lot owners held not estopped from enjoining other lot owners. 100NJEq290, 134A 673.

1297-66½-New. , nor is the breach by another of a similar restriction contained in a deed from complainant to another purchaser, in a "neighborhood scheme." 99NJEq602, 133A754.

1297-67½-New. Grantor's failure to restrain breaches of restrictive covenants on other grantees has been held no defense in an action for breach. 128 Misc408, 219NYS59.

1297-67⅓-New. It is a defense to a suit for injunction against a breach of covenant that plaintiff has violated the same covenant. 255Mass186, 150NE 885.

1297-67¼-New. Violations of restriction by others is no defense. 338 Ill 508, 170NE669.

1297-67⅙-New. Owner of lot restricted to dwellings, though not objecting to erection of church, is not estopped to object to business building. 234Ky 318, 28SW(2d)18.

1297-68 [b] **Conveyance to grantee of property** other than that warranted in effort to make warranty good does not satisfy warranty. TexCivA 6SW(2d) 372.

1298-88½-New. Where grantee sold for less than the amount paid to an amount more than the amount sued for in an action for breach of covenant of seizin, there is no equity for defendant from sale. 190NC108, 129SE181.

1299-92 215Ala 212, 110S308; 174Ark 248, 249SW1006; 204Cal618, 269P645, 62ALR1239; 233Ky661, 26SW(2d)543. [d] **Where property conveyed contained less land than set out in deed** limitation against action on covenants of warranty and seizin ran from delivery of deed. MoA 26SW(2d)841.

1299-93 226Ky488, 11SW(2d)116.

1299-95 226Ky488, 11SW(2d)116; MoA 26SW(2d)841.

1299-97 177Ark170, 6SW(2d)36 (upon eviction). [a] **Statute applies to action against original grantor for breach of warranty of title** though covenant runs with land. 65Utah560, 238P280. [b] **Constructive eviction does not take place till discovery of outstanding title,** and statute does not begin to run till such discovery. 65Utah560, 238P 280.

1299-1 215Ala212, 110S308; 315Mo 1239, 288SW38, 44 [quotCJ].

1299-2 315Mo 1239, 288SW38, 44 [quot CJ].

1299-3 315Mo 1239, 288SW38, 44 [quot CJ].

1300-10 177Minn606, 225NW903; 65 Utah560, 238P280.

1300-19 [b] **Town can sue grantee of railroad** on covenant by grantee to perform term of contract between town and grantee railroad. 6F(2d)733.

1300-19½-New. In Philippines, where contract of sale contained express warranty against eviction and subsequent purchaser was expressly subrogated to rights thereunder, he may maintain action thereon. 51Philippine243.

1300-21 315Mo 1239, 288SW38, 44 [quotCJ].

1300-22 315Mo 1239, 288SW38, 44 [quotCJ].

1301-45 See also 251 IllA378.

1301-46 78Mont287, 254P162. [a] Conn 151A531; 203 Iowa880, 210NW566. [b] 78Mont287, 254P162.

1302-49 78Mont287, 254P162. [a] **Mere allegation that encumbrance exists** has been held legal conclusion. 78Mont287, 254P162.

1302-52 213Ala83, 104S32.

1302-64½-New. Complaint for breach of warranty deed for lands in another state is sufficient against demurrer if it states cause of action under laws of forum. 31NM400, 246P748.

1304-92 78Mont287, 254P162; 136Misc 160, 239NYS337. [f] 78Mont287, 254P 162; 66Utah194, 240P458.

1304-1½-New. Where breach is as to acreage covenanted, an allegation of mutual mistake as to the number of acres is unnecessary. 203 Iowa880, 210NW 566.

1304-2 172Ark1013, 291SW437; 37 GaA100, 139SE81 (petition demurrable); 37GaA725, 141SE670 (allegations held insufficient).

1305-7 TexCivA 20SW(2d)158.

1305-9 [a] 65Utah560, 238P280.

1307-35½-New. A petition failing to allege that alleged adverse possession by third parties of a portion of land conveyed was held under title superior to that conveyed by defendant to plaintiff does not state a cause of action. TexCivA 13SW(2d)997.

1307-38 223AppDiv244, 228NYS308. [b] **Matters of special defense** must be specifically pleaded. 165La419, 115S 641. [c] **Counterclaim.**–223AppDiv244, 228NYS308.

1307-44 [f] **Insufficient plea of estoppel.**–251 IllA378.

1308-61 Mo 31SW(2d)1059; 191Wis 570, 211NW768.

1308-62 117 Okl 224, 246P230.

1308-70½-New. Answer containing only general denial does not permit of proof of changed conditions as to restrictions. 125Misc840, 211NYS469 (no equitable defense being pleaded).

1309-81½-New. It will be presumed that the owner of land subject to restrictions has constructive notice of such restrictions. 255Mass186, 150NE885.

1309-81⅓-New. Grantee is presumed to have relied on covenants in deed. 131 Misc30, 226NYS258.

1309-81¼-New. In proceedings by a purchaser against the vendor for breach of warranty as to part of a tract sold on per acre basis, without regard to differences in quality as between various parts, it was presumed that the property was uniform in quality. Tex CommnA 15SW(2d)563.

1309-83 Ala 128S796; 245 IllA127; 205 Iowa1, 213NW597; 155Md19, 141A710; 218AppDiv240, 218NYS78; 132Misc903, 230NYS738; TexCivA 296SW982.

1310-84 215Ala185, 110S281; 205 Iowa 1, 213NW597; 208 Iowa759, 225NW 939; 218AppDiv240, 218NYS78.

1310-89 See also 109Conn452, 146A831.

1311-91 212Ala542, 103S580; Ala 128 S452; NM 291P290(1stcase); 40Wyo 226, 276P452.

1311-93½-New. The burden of demonstrating that their version of restrictive covenant is sustained by plain and

natural interpretation of its language is on covenantee. 214**AppDiv**628, 212 **NYS**430.

1311–93½–New. Where plaintiff proves creation of restriction, it is upon defendant to show that it is no longer in force. 125**Misc**840, 211**NYS**469.

1311–94 169**Ark**1110, 278**SW**39; 83 **CalA**391, 257**P**124; 222**MoA**954, 10**SW (2d)**967. [a] (6) All evidence of interference with removal of timber, in action on covenant, is admissible, even if action alleges breach because of covenantor's failure to pay taxes. 169**Ark** 1110, 278**SW**39.

1311–95 218**Ala**448, 118**S**760; 163**Ga** 471, 136**SE**440; 86 **IndA**621, 158**NE**916.

1312–3 163**Ga**471, 136**SE**440.

1312–11 215**Ala**212, 110**S**308; 234 **Ill A** 395.

1313–18 86 **IndA**621, 158**NE**916.

1313–26 [a] 120 **Or**678, 253**P**539.

1314–43 **TexCivA** 6**SW(2d)**372.

1316–61 174**Ark**248, 294**SW**1006; 107 **Conn**133, 139**A**502; 204 **Iowa**1017, 216 **NW**726; 123**Kan**477, 255**P**971; 33 **OhA** 224, 168**NE**861. [a] (23) To overcome presumption that owner of legal title was responsible for local assessment arising during possession of one having executory contract of purchase. 212**Ala** 628, 103**S**589. (24) To sustain finding that grantee was damaged by failure of warranty of title in full amount of consideration. 171 **Ark**117, 283**SW**379. (25) To sustain chancellor's finding in suit for breach of warranty that plaintiffs purchased land subject to suit pending against defendants for recovery thereof. 172**Ark**1128, 291**SW**826. (26) To show constructive eviction. 115**Nebr** 789, 215**NW**111, 61**ALR**1. (27) To show that encumbrance of prior lease was in force at time of sale. 100**CalA**221, 279 **P**1041. (28) To show right of way existed over property authorizing damages for breach of covenant against incumbrances. **Mass** 172**NE**882. (29) To sustain plea of estoppel. **Okl** 292**P**7. (30) Other instances. 244**Mich**473, 221**NW** 632; **MoA** 11**SW(2d)**71. [b] (17) To show paramount title in another in suit for breach of covenant of title. 212**Ala** 542, 103**S**580. (18) To show notice in owner of land to begin operation of prescriptive period so as to create easement amounting to breach of covenant. 218 **AppDiv**240, 218**NYS**78. (19) To show breach of covenant against encumbrances. 23**OhA**352, 155**NE**403. (20) To show general scheme or plan enabling owners of vicinal lots to enjoin violation of restrictions. **TexCommnA** 289**SW** 999. (21) Other instances. 208 **Iowa** 759, 225**NW**939; 132**Misc**903, 230**NYS** 738.

1317–65 34**F(2d)**589 (value of benefit contracted for); 220**Ala**598, 127**S**176; 239 **Ill A**280; 204 **Iowa**1017, 216**NW**726; 154**Tenn**661, 291**SW**1071, 61**ALR6**. [a] **TexCivA** 271**SW**276. [b] (2) Difference between value of land benefited as protected by restriction and without protection. **NJ** 147**A**390. [k] **Amount.**–154**Tenn**661, 291**SW**1071, 61**ALR6**. [l] **Purpose for which land was bought** held not to be considered in measure of damages. 154**Tenn**661, 291**SW**1071, 61**ALR** 6. [m] **Fair rental value of property** during period grantee was kept out of possession is recoverable. 233**Ky**491, 26 **SW(2d)**19. [n] **Damages held excessive.**–128**Me**339, 147**A**419.

1318–69½–New. On breach of covenant as to acreage sold, grantee is entitled to have the price of the shortage credited on his purchase-money mortgage. 203 **Iowa**880, 210**NW**566.

1318–72 124**Kan**33, 257**P**964; 24 **Oh NPNS**401.

1318–73 215**Ala**185, 110**S**281; 24 **Oh NPNS**401.

1318–78 36**GaA**796, 138**SE**254; 165**La** 419, 115**S**641; 219**MoA**336, 271**SW**834, 835 [citCJ]; 115**Nebr**789, 215**NW**111, 113 [quotCJ], 61**ALR1**; 132 **Okl** 14, 269 **P**289 (also expenses); 154**Tenn**661, 291 **SW**1071, 61**ALR6**; **TexCivA** 29**SW(2d)** 500; 65**Utah**560, 238**P**280.

1319–79 115**Nebr**789, 215**NW**111, 113 [quotCJ], 61**ALR1**.

1319–82 154**Tenn**661, 291**SW**1071, 61 **ALR6**. [a] **Lost profit on resale by** vendee cannot be used as measure of damages. 154**Tenn**661, 291**SW**1071, 61 **ALR6**.

1319–83 219**MoA**336, 271**SW**834, 835 [citCJ].

1319–85 See also10**LaA**582, 121**S**310.

1320–90 65**Utah**560, 238**P**280, 283 [quot CJ].

1321–4 215**Ala**212, 110**S**308; 219**MoA** 336, 271**SW**834, 835 [quotCJ]; 115**Nebr** 789, 215**NW**111, 114 [quotCyc], 61**ALR1**; 190**NC**108, 129**SE**181; 117 **Okl** 224, 246 **P**230; 114 **Okl** 217, 246**P**603; 154**SC**25, 151**SE**221; **Va** 153**SE**667. [g] **In exchange of land,** values agreed upon by parties become basis for measure of damages. 219**MoA**336, 271**SW**834.

1322–5 219**MoA**336, 271**SW**834, 835 [quotCJ].

1322–6 219**MoA**336, 271**SW**834, 835 [quotCJ].

1323–17 124**Kan**33, 36, 257**P**964 [quot CJ].

1323–18 **Ark** 31**SW(2d)**412; 115**Nebr** 789, 215 **NW**111, 114 [quotCJ], 61**ALR** 1; 160**Tenn**477, 26**SW(2d)**141 (difference between value of life estate and value of fee).

1323–19 [c] **Mineral rights and right of way.**–177**Ark**170, 6**SW(2d)**36.

1323–24 215**Ala**67, 109**S**363, 364 [cit CJ].

1323–27½–New. Railroad held entitled to recover of children of one of six grantors who predeceased life tenant one sixth of purchase price less one sixth of value of life tenant's estate. 160**Tenn** 477, 26**SW(2d)**141.

1323–28 **Mo** 31**SW(2d)**1059.

1324–29 218**Ala**448, 118**S**760; 109**Conn** 452, 146**A**831; **Iowa** 230**NW**319; 248 **NY**33, 161**NE**321.

1324–37½–New. Where a petition is limited to prayer for special damages only, and these are not recoverable, nominal damages cannot be recovered. 36**GaA** 796, 138**SE**254.

1324–37½–New. Where there was a paving lien against the property, only nominal damages can be recovered unless actual injury is shown, damages being limited to a sum necessary to discharge the encumbrance. **TexCivA** 285 **SW**902.

1324–41 215**Ala**212, 110**S**308.

1324–46 **Or** 243**P**767, 772 [citCJ]. [a] (2) Grantee suing for breach of warranty must prove amount paid for outstanding title was reasonable and necessary. **Ark** 31**SW(2d)**412.

1325–49 But see **TexCivA** 271**SW**276.

1325–50 **Ark** 31**SW(2d)**412.

1325–54½–New. That subvendee perfects his own title by purchasing outstanding interest does not affect recovery by covenantee. 215**Ala**212, 110**S**308.

1325–58 169**Ark**1110, 278**SW**39; 245 **Ill A**127; 131**Misc**30, 226**NYS**258 (restriction to use as residence; nominal damages insufficient); 120 **Or**678, 253**P** 539. [a] **Measure of damage is amount necessary to remove encumbrance,** not exceeding consideration expressed in deed. 169**Ark**1110, 278**SW**39. [b] **Purchaser of timber with covenant against incumbrances** can recover value of timber he could have cut after breach by tax sale less value of what he did cut not exceeding amount of encumbrance. 169 **Ark**1110, 278**SW**39.

1326–63 **MoA** 284**SW**197; 38 **OklACR** 415. [a] 120 **Or**678, 253**P**539.

1326–66½–New. Sums paid for rent of premises occupied by plaintiff and expense incurred for feed for team and milch cow are not recoverable. 38**Okl ACR**415.

1326–71 See also 169**Ark**1008, 277**SW** 533.

1326–71½–New. Damages do not include attorney's fees for enforcing breach. 169**Ark**1008, 277**SW**533.

1326–71¾–New. Covenantee's right of action accrues on breach, and he cannot enlarge the amount of recovery by delay until foreclosure of tax lien constituting the encumbrance. 169**Ark**1110, 278 **SW**39.

1326–73 218**Ala**448, 118**S**760; 169**Ark** 1110, 278**SW**39; 124**Kan**33, 36, 257**P**964 [quotCJ]; 215**AppDiv**33, 213**NYS**339 (on delivery of deed containing covenant against encumbrances, with local assessments outstanding); 128**Misc**596, 220 **NYS**221.

1327–80 See also 218**Ala**448, 118**S**760.

1327–80½–New. The rule that a covenantee is entitled to only nominal damages if the encumbrance adds to the value of the property does not apply where a paving lien was executed before conveyance and the work was done after the conveyance was made. **TexCommnA** 291**SW**195.

1327–84 169**Ark**1008, 277**SW**533; 169 **Ark**1110, 278**SW**39; 107**Conn**133, 139**A** 502 (payment of outstanding taxes); 203 **Iowa**57, 212**NW**360; 215**AppDiv**33, 213**NYS**339 (payment of taxes).

1327–87 169**Ark**1110, 278**SW**39.

1328–91½–New. Damages do not include loss of profits on resale. 169**Ark** 1008, 277**SW**533.

1328–92 169**Ark**1008, 277**SW**533.

1329–20 190**NC**108, 129**SE**181.

1330–22 160**Tenn**477, 26**SW(2d)**141.

1330–23 [a] **Where judgment awarded no recovery for rents and profits,** defendant's recovery of interest for breach of warranty runs only from date of judgment against him in trespass to try title. **TexCommnA** 15**SW(2d)**563.

1330–34½–New. On breach of covenant as to acreage conveyed, grantee is entitled to interest paid on the price of shortage credited on his purchase-money mortgage. 203 **Iowa**880, 210**NW**566.

1331–44 See also 154**Tenn**661, 291**SW** 1071, 61**ALR6**.

1332–57½–New. Where a lien for taxes attaches before the date of sale, and the sale contract contained no agreement for payment of taxes for the preceding year, the vendor is liable for the amount of such taxes under his warranty. 17**SArk** 274, 10**SW(2d)**358.

1332–58 154**Tenn**661, 291**SW**1071, 61 **ALR6**. Contra **TexCivA** 285**SW**902.

1332–60 233**Ky**491, 26**SW(2d)**19.

1333–79 203 **Iowa**57, 212**NW**360; 114 **Okl** 217, 246**P**603.

1333–81 36**GaA**796, 138**SE**254.

1334–6 36**GaA**796, 138**SE**254; 241**Mich** 63, 216**NW**382.

1335–13 [a] **In action for breach of warranty because of existing mortgage,** foreclosure proceedings and judgment entry therein are admissible against covenantor who had been duly vouched into foreclosure proceedings. 203 **Iowa**57, 212**NW**360.

1336–38 [a] **TexCommnA** 293**SW**1100.

1336–39 215**Ala**185, 110**S**281.

1336–40 242**Mich**381, 218**NW**662.

1337–43 **TexCivA** 14**SW(2d)**369.

1337–44 [a] (3) As to applicability to facts. 120 **Or**678, 253**P**539. [b] (1) 215 **Ala**185, 110**S**281. (2) Charge that issue was whether encumbrance existed and stating fact of prior adjudication. **NJ Sup** 136**A**606. (3) That existence of unexpired lease was breach of covenant against circumstances. 120 **Or**678, 253 **P**539. (4) Other instances. **MoA** 284 **SW**197 (encumbrance of lease). [c] **Instructions held erroneous.**–**Va** 153**SE** 667.

1337–51½–New. Finding held on immaterial matter. **TexCivA** 28**SW(2d)**872.

1338–75 215**Ala** 212, 110**S**308.

1338–76 215**Ala**212, 110**S**308.

1338–84 215**Ala**212, 110**S**308.

COVER

1339–17 82**NH**318, 133**A**340, 342 [cit CJ].

CREATE

1344–56 83**Mont**581, 273**P**1055.

CREDIBILITY

1346–8½–New. capacity for being believed. 125**Me**147, 131**A**860.

CREDIBLE

1346–14 125**Me**147, 131**A**860.

1347–36 285**Pa**251, 132**A**120.

1348–55 285**Pa**251, 132**A**120.

CREDIT

1348–57 14**F(2d)**849.

1348–59 118**Nebr**828, 226**NW**449.

1348–60 47**RI** 1, 129**A**609. See also **Or** 292**P**813.

1348–61 118**Nebr**828, 226**NW**449.

1349–70 [a] 47RI 1, 129A609.
1350–77 47RI 1, 129A609.
1350–87½–New. In the sense of creating "fictitious credit" it means the apparent possession of property on part of the debtor out of which the creditor can enforce payment of such debt by law, and not such security or payment the creditor may hope to gain by the debtor's inducing some one else to help him pay or secure it. 219MoA365, 271SW1008.
1350–87⅞–New. Credit in general sense means the capacity of being trusted. 47 RI 1, 129A609.
1350–87¼–New. Credit is confidence or trust reposed in one's ability to pay what he may promise. 47RI 1, 129A609.
1350–87⅛–New. The true test of whether a sale is on credit is whether the seller intentionally gives the buyer time within which to pay the debt. 47RI 1, 129A609.
1350–87⅛–New. Ability to make promised payments. 14F(2d)849.
1351–90 [a] (9) Other instances. 83 Mont418, 272P691.
1351–93 44Philippine126 (concession of "credit" necessarily involves granting of "loans").
1352–30 164Minn484, 206NW394 (deposit "to credit of").
1353–32 164Minn484, 206NW394.

CREDIT INSURANCE

1355–17 20F(2d)951.
1356–19 [a] **Particular provisions construed.**–98PaSuper144.
1359–58½–New. Policy covering losses arising out of sales does not cover losses resulting from delivery of merchandise on memorandum, 217 AppDiv635, 217NYS162.
1359–58⅛–New. such as an amount paid to a pawnbroker by insured to redeem merchandise so delivered, on memorandum. 217AppDiv635, 217NYS162.
1359–65 [a] **Evidence held sufficient** to show that debtor was insolvent within meaning of policy. 286Pa213, 133A229.
1360–66 [b] **Loss** may be recovered only when debtor had credit rating as provided in policy. 115 Oh684, 155NE 382.
1360–67 [d] **Rating at "date of shipment and delivery"** refers to actual delivery to buyer or carrier, not at time of manufacture. 115 Oh684, 155NE382.
1360–70½–New. Where a policy covers losses during the term of the policy on shipments prior to the term to debtors of sound financial condition on the date of premium payment, a later rider covering losses on bankruptcy of debtor having a specified rating applies only to shipments made after the date of the policy. 217AppDiv635, 217NYS 162.
1360–70⅛–New. Insurer has been held to have waived the right to deny a claim of insured for goods sold the debtor without rating in mercantile agency where the rating had been charged to a partnership and insurer accepted the change as complying with the policy. 286Pa213, 133A229.
1360–72 [b] **Losses occurring during term of policy on shipment made prior to term** held not covered in absence of showing bankrupt of sound financial condition on date of premium payment. 217AppDiv635, 217NYS162.
1364–22 [b] (5) Notice of "bankruptcy" of debtor held sufficient. 286Pa213, 133A229.
1365–37½–New. That the debt being contested by the debtor is in litigation is a good defense. 87PaSuper140.
1365–42½–New. In order to recover on bonds guaranteeing credits, persons extending the credits need not show general property in the goods advanced thereunder. 28F(2d)511.
1365–42⅛–New. Cases in which sufficiency of evidence has been determined are cited in the notes. [a] **Evidence held sufficient.**–245Mich418, 222NW699.

CREDITOR

1371–72 [a] (10) "One who gives credit in business matters, one to whom money is due." 117Nebr189, 220NW 265.
1371–73 [a] (1) TexCommnA 2SW(2d) 834.
1373–5 276US10, 48SCt209, 72Led443.
1374–23 155Tenn359, 293SW541.

CREDITORS' SUITS

1380–2 [f] (10) Petition by judgment creditor asking that landlord's lien existing in favor of debtor be enforced in his behalf by virtue of garnishment is not creditor's bill. Iowa 230NW349.
1381–5 124Kan297, 571, 259P791.
1383–16½–New. The primary purpose of a general creditors' bill is to make an equitable distribution of a common fund. 157Tenn553, 12SW(2d)370.
1383–17 19F(2d)922.
1383–19 16F(2d)236.
1384–21 DC 29F(2d)638; Mass 172NE 654. See also 261Mass409, 158NE763. [c] **In Kentucky.**–229Ky728, 17SW(2d) 1022.
1385–23 30F(2d)759.
1385–26 MoA 28SW(2d)427.
1387–42 16F(2d)32.
1387–47 124Kan297, 571, 259P791; 241Mich312, 216NW914; 249Mich234, 228NW705; 129Misc837, 223NYS458; 124 Or276, 261P432, 441 [citCJ].
1388–48 124 Or276, 261P432.
1388–54 TexCivA 299SW489.
1388–58 31F(2d)507; 81Colo 195, 254 P779; 92Fla509, 109S583; 317 Ill 251, 148NE12; 234 IllA455; 202 Iowa307, 210NW121, 48ALR603; 122Kan347, 251 P1085; 235Mich282, 209NW179; 250 Mich1, 229NW493; 225AppDiv541, 233 NYS577; 116 Okl 3, 243P160, 164 [quot CJ]; 129 Okl 222, 264P164; 124 Or276, 261P432. [e] **Where judgment is in favor of original debtor,** it is bar to creditor's suit. 37 OklACR309.
1389–64½–New. In Iowa statutory method is not exclusive. 200 Iowa1371, 206NW295.
1390–72 33Wyo 326, 239P531.
1390–73 141 Okl 277, 284P862 (debtor absconded); 124 Or276, 261P432; 33 Wyo 326, 239P531.
1390–75 20F(2d)786; 124 Or276, 261 P432.
1390–76 124 Or276, 261P432.
1390–77 200 Iowa1371, 206NW295; 33 Wyo 326, 239P531, 533 [citCJ].
1391–79 241Mich312, 216NW914; 124 Or276, 261P432.
1392–2½–New. There must be a valid judgment lien. 234 IllA455.
1393–21 See also 200 Iowa1371, 206NW 295 [citCJ]. [b] **Judgment against property of nonresident.**–In case of judgment in rem against property of nonresident, as between parties, levy upon property and service of notice by publication is sufficient basis. 200 Iowa 1371, 206NW295.
1393–24 235Mich282, 209NW179.
1394–32 122Kan347, 251P1085, 1086 [citCJ].
1394–37 124Kan297, 571, 259P791.
1394–40 122Kan347, 251P1085; 235 Mich282, 209NW179; 129Misc837, 223 NYS458; 129 Okl 222, 264P164; 124 Or 276, 261P432; 158Tenn53, 12SW(2d) 711.
1395–41½–New. or where execution would have been fruitless or would have availed no useful purpose, 124Kan 297, 571, 259P791.
1395–54 246Mich278, 224NW341. [a] **Execution in name of original corporate plaintiff** returned unsatisfied will support creditor's bill though corporation was dissolved before execution. 246Mich278, 224NW341.
1395–55 235Mich282, 209NW179.
1396–61 122Kan347, 251P1085; 129 Kan93, 281P904; 124 Or276, 261P432.
1396–64 124 Or276, 261P432.
1397–78 276US36, 48SCt268, 72Led 457; 239 IllA69; 235Mich282, 209NW 179; 247Mich522, 226NW213, 214 [cit CJ](2dcase); 129Misc837, 223NYS458; 225AppDiv541, 233NYS577. See also 200 Iowa1371, 206NW295.
1400–8 Or 291P371; 33Wyo 457, 240P 449, 453 [citCJ].
1400–11 247Mich522, 226NW213, 214 (2dcase) [citCJ].
1401–14 220Ala529, 126S102; Mass 167NE276; Mass 170NE621; Mass 172 NE654; Or 291P371. [a] **Club membership** is not property which can be reached by creditor's bill. 339 Ill 426, 171NE514.
1401–16 232 IllA456, 458 [citCJ]; 37 OklACR313.
1402–31 210Ky498, 276SW487 (liability for breach of covenant). [c] **Attorney's fees and costs** recovered in suit for breach of warranty against defendant's grantee are not recoverable in suit for breach of warranty against defendant's grantor. 214Ky505, 283SW 954.
1402–39 Mass 169NE145; Mass 172NE 654.
1403–45 225AppDiv541, 233NYS577.
1404–60 36F(2d)774(2dcase).
1404–61 [a] (6) Distributive share of absconding debtor in hands of an administrator may be reached where debtor has no property in state. 141 Okl 277, 284P862.
1404–65 But see 241Mich255, 217NW 29, 30 [citCJ] 57ALR692.
1405–69 98NJEq188, 130A811.
1405–74 98NJEq188, 130A811.
1407–11½–New. Purchaser with own funds is protected, until reimbursed to extent of payment made, even against alleged true purchaser's creditors. Ala 130S680.
1407–21 DC 38F(2d)541.
1408–39 Mass 170NE621.
1408–39½–New. Assignee of note secured by mortgage transferred by delivery without indorsement of note has sufficient interest to maintain creditor's suit in his own name. Mass 170NE621.
1403–39⅛–New. Assignee of note is not precluded from maintaining creditor's bill based thereon because maker believed that note had been indorsed rather than assigned to assignor. Mass 170NE621.
1409–59 Erratum.–"190" Ill. 440 should be "90" Ill. 440.
1409–61 122Kan347, 251P1085.
1411–81½–New. Defendant sued for amount of judgment conveyed to him by debtor's covendee may show that debtor was not owner of property. 13LaA 337, 125S507.
1411–84 [b] **Removal of administration to court of equity** not prerequisite to maintenance of creditor's bill. 220Ala 529, 126S102.
1411–87 16F(2d)236.
1412–10 234 IllA455. [a] (2) Where sale asked is of realty, minor heir, trustee, and holders of notes secured by trust deed are necessary parties. 234 IllA455. [b] **Without all necessary parties** court has not jurisdiction to entertain bill. 234 IllA455.
1415–38 Mass 170NE49.
1418–91 [b] **Refusal to prevent filing of claim** after time fixed held error. 6 F(2d)945.
1418–94 [a] **Orders fixing time for filing claims** are made primarily for safety in distribution, not as forfeiture measures. 6F(2d)945. [b] **Refusal to permit** tardy filing of claim must be based on prejudice arising from delay. 6F(2d)945. [c] **Creditor is not bound** to give notice of intent to file claim after expiration of time fixed therefor. 6F(2d)945.
1419–13½–New. Interveners cannot object to further proceedings. 16F(2d) 236.
1419–13⅛–New. On entry of a decree of reference in a creditors' suit against decedent's estate, in legal effect a decree for a general account of debts against the estate, under which creditors of the estate could prove their claims, a creditor, not made a party to the suit in a bill or by pleadings, becomes a party in a general sense, with the right to prove its demands against the decedent's estate. 151Va 101, 144SE453.
1419–16 122Kan347, 251P1085.
1420–34 Cal 292P632.
1421–38 85CalA43, 258P651; 129Misc 837, 223NYS458.
1423–56½–New. A bill against several defendants is not good where it alleges insolvency only as to one of them. 16 F(2d)32.
1428–58⅛–New. If defendant has a

cause of action against the judgment debtor, evidence of such cause of action is not admissible if it is not pleaded. 37 OklACR313.

1428-58¼-New. Reference in bill to amounts agreed to be paid in certain letter held not to preclude proof that contract was made by acceptance of modified form of offer. Mass 170NE 621.

1429-77 33Wyo 326, 239P531, 533 [cit CJ].

1429-79½-New. Admissibility of evidence. Evidence held improperly excluded. Mass 171NE724.

1429-82 93CalA166, 269P180; 205 Iowa334, 218NW49; 120Kan135, 242P 131 (evidence sufficient to sustain findings for defendants); 241Mich508, 217 NW885; 98NJEq188, 130A811. [a] **Evidence held sufficient** to show that half interest sought to be recovered from defendant by creditors was not in debtor. 13LaA337, 125S507.

1430-88½-New. Where a bill seeks to discover hidden assets and there is no testimony thereof, other property may not be subjected to creditor's claim merely on suspicion. 74CalA500, 241P 272.

1431-23½-New. In a creditors' suit against decedent's estate, the court has jurisdiction to hear and determine the question regarding which of holders of two notes secured by vendor's lien and assigned by decedent had priority as to a fund derived from the sale of land securing the notes. 151Va101, 144SE 453.

1431-23½-New. Whether there was consideration for note forming basis of suit held question of fact. Mass 170 NE621.

1431-23¼-New. Instructions held not erroneous. Ga 155SE321.

1432-49 143Va281, 129SE327 (report sufficiently clear to show judgment a lien on realty and that there was no personalty).

1433-62½-New. Trust company holding money sought to be reached held entitled to award for its charges for compensation and expenses until date of decree. Mass 170NE621.

1435-90 [d] **Statement of liens** need not be incorporated in decree. 145Va 653, 134SE675.

1436-10 See also DC 29F(2d)638.

1437-26 164Ga121, 137SE757.

1437-26½-New. while the funds raised in the proceeding remain in the custody of the court, 164Ga121, 137SE757 (intervention erroneously disallowed).

1437-31 [a] **Statutory limitation of two months** within which creditor not party to original bill may intervene is unreasonable as to nonresident intervener. 164Ga121, 137SE757.

1437-36 250NY264, 165NE286.

1438-43½-New. Where an owner conveyed personal property to a debtor after a local tax assessment thereon, a claim for taxes so assessed was properly disallowed as a preferred claim against the proceeds of sale of the debtor's property on its insolvency, the tax not being an obligation of the debtor. 28F(2d)331.

1438-43½-New. Orders barring claims against a bankrupt estate from participation in distribution are usually made in creditors' suits which involve a fund for distribution. 33F(2d)1004.

1438-49 [c] **In appointing commissioners to sell real estate** it is constant practice of courts to heed requests of creditors. 107WVa524, 149SE385, 64ALR 1536(2dcase).

1439-63 [a] **Liability of lessee and his surety for rent.**-153Va118, 149SE441.

1439-73 See also 103WVa233, 136SE 854.

1439-79 See also 103WVa233, 136SE 854.

1440-1½-New. Where defendant intended to evade the statute, he is liable personally for costs. 132Misc723, 230NYS554.

1441-11½-New. Where creditors of a husband filing a creditors' bill to set aside a deed of trust to his wife succeeded in setting aside the greater part of the amount claimed thereunder, it is improper to allow attorney's fees incurred in defending the deed of trust as a charge on the estate unencumbered against such creditors although provided for in the deed of trust. 147Miss873, 113S212.

1441-13 43F(2d)762.

1441-17¼-New. The rule does not apply to a judgment creditor of a general depositor seeking to impress a lien on funds of an insolvent bank. 232 IllA 456.

1442-23 232 IllA456; 35 OhA266, 172 NE297. [a] **Rule applied** only when receivership is that of judgment debtor's assets, or lien is on definite physical property or property segregated. 233 IllA456.

1442-34 See also 28F(2d)331.

1442-34½-New. No priority will be given a lien acquired after the entry of an order referring the cause to the commissioner to convene creditors and report debts of an insolvent debtor. 100 WVa422, 130SE663.

1442-36 232 IllA456.

1443-41 232 IllA456, 460 [citCJ].

1443-42 Or 291P371.

1443-45 232 IllA456, 460 [citCJ].

1444-64 [c] **In New Jersey.-Ch** 147A 587(2dcase).

1445-76 218Ala100, 117S672 (allegations held sufficient).

1445-83 218Ala100, 117S672. [a] **Affidavit attached to bill** held sufficient to support bill for discovery and in aid of execution under Chancery Act. 101 NJEq249, 137A403.

1447-12 Mass 172NE654; 157Tenn553, 12SW(2d)370 (prosecution of independent suits enjoined).

1447-13 [a] **Creditor whose claim has not been reduced to judgment** and who has neither general nor specific lien on debtor's property is not entitled to injunction restraining debtor from disposing of some or all of his property. 118Nebr630, 225NW776.

1448-40½-New. Injunction does not operate to segregate general funds in the hands of the judgment debtor's debtor, but only operates on conduct of the parties with reference to it. 232 IllA456.

1449-63 [b] **Jurisdictional objections to appointment** may be waived. 16 F(2d)236.

1449-64 250Mich1, 229NW493.

1449-66 31F(2d)527 (must first obtain judgment at law unless requirement is waived).

1451-99 See also NJCh 147A587(2d case).

1452-25½-New. Distribution under receivership. Distribution of assets seized under receivership is controlled by the court appointing the receiver and governed by the law of the place where the seizure takes place. 31F(2d)527.

1452-31½-New. Receiver appointed to take possession of property held entitled to compensation. 35 OhA266, 172 NE297.

CRIMINAL LAW

16 C. J.—49-2 92Fla601, 109S588, 591 [citCJ].

50-24 260Mass423, 157NE537.

50-27 27Hawaii8, 10 [citCJ].

50-33 199 Ind630, 158NE593. [a] 290 Pa136, 138A497, 53ALR1027; 33Wyo 387, 240P208, 212 [citCJ].

50-48 Wyo 293P365.

51-34 318Mo 605, 300SW823, 826 [quot CJ].

51-35 199 Ind630, 158NE593.

51-35½-New. In Louisiana, no act is crime which is not clearly and unmistakably made so by statute. 160La920, 107S698.

51-36 199 Ind630, 158NE593, 594 [quot CJ].

52-37 199 Ind630, 158NE593, 594 [quot CJ].

53-42 170Minn250, 212NW413.

54-49 75CalA471, 242P1078, 1083 [cit CJ].

55-51 69CalA466, 231P601.

55-54 199 Ind630, 158NE593; 233Mich 98, 206NW516 (it is not mere name of crime that characterizes it, but punishment therefor). [a] 201Cal 405, 257 P76. [c] **Determination of grade** of offense is not based on actual sentence imposed, but on possible one. 75Mont 547, 244P477.

55-58 120 Or254, 251P701, 50ALR81.

55-60 199 Ind630, 158NE593; 320Mo 267, 6SW(2d)934; 24 OhA154, 157NE 304.

55-63 103WVa7, 136SE402.

55-66 109TexCr551, 6SW(2d)360.

56-67 Fla 128S628; TexCr 12SW(2d) 208(1stcase); 103WVa7, 136SE402. [a] **Jones Act** does not necessarily convert misdemeanor into felony, slight violations are punishable as misdemeanors. 37F(2d)134.

56-68 [a] **Whether offense under Jones Act** is felony or misdemeanor cannot be determined before trial. 37F(2d)134.

56-69 164Ga298, 138SE229; 319Mo 440, 4SW(2d)424; 128Misc31, 217NYS 739. [a] **Offense not defined as felony** and not declared punishable by incarceration in state prison is misdemeanor. 196Cal 515, 238P359.

56-70 195Cal 325, 233P97 (crimes punishable by death or imprisonment in state's prison are felonious); 78CalA 702, 248P960; 163LaI46, 111S656; 170 La94, 127S376(1stcase); 319Mo 440, 4 SW(2d)424; 120 Okl 105, 250P519; 194 Wis391, 216NW496. [k] Contra 319Mo 440, 4SW(2d)424. [n] **In Kentucky.-** 221Ky168, 298SW376.

57-71 312Mo 68, 278SW981; 101TexCr 670, 276SW919; 109TexCr551, 6SW(2d) 360; TexCr 29SW(2d)350. [b] **Punishment may be alternative** of penitentiary or jail sentence. 108TexCr166, 300SW54.

57-72 170La91, 127S375.

57-73 [a] 71CalA357, 235P60.

57-76½-New. , and receiving stolen goods 23AlaA81, 121S2(1stcase).

57-77 [d] **In Kentucky.-**221Ky168, 298 SW376.

57-78 195Cal 325, 233P97; 329 Ill 117, 160NE135; 335 Ill 570, 167NE852.

57-78½-New. Question whether an offense is a misdemeanor depends on the punishment prescribed, not its legislative designation. 218AppDiv273, 218 NYS361.

58-82 89CalA6, 264P336.

58-83 [e] **There is no constitutional or statutory distinction** between classes of misdemeanors in some jurisdictions. 201Cal 405, 257P76.

58-83½-New. Where an offense denounced by a federal statute was not a felony at common law and is not denominated as such in the statute, it is regarded as a misdemeanor. 103WVa 7, 136SE402.

58-84 46 Ida195, 267P452; 122 Or44, 259P893.

58-85 See also 19F(2d)722, 728 [citCJ].

58-86 17F(2d)570; 42F(2d)721; 202 Cal 159, 259P750; 74CalA540, 241P401; 82CalA28, 255P205; 327 Ill 416, 158NE 680; 197 Ind625, 150NE917; 243NY 595, 154NE620; 24 OhA85, 155NE811; OhA 173NE296. But see 42F(2d)721. See also 100CalA559, 280P545. [d] 46 Philippine48. [h] **Though impossible to separate evidence relating to them** because so closely related in point of time, yet one may commit both of said crimes. 75CalA540, 241P401. [i] **Rape and lascivious conduct.-**75CalA540, 241 P401. [j] **Incest and lascivious conduct.-**82CalA389, 255P839. [k] **Offenses of burglarizing post office and stealing postal funds** therefrom constitute distinct offenses under penal code. 31 F(2d)982(1stcase).

58-87 23F(2d)126; 199Cal 1, 248P230; 82CalA459, 255P836; 197 Ind625, 150 NE917; 129Kan379, 282P583; OklCr 280P636. [h] **Transporting woman for immoral purpose or inducing such transportation** (1) in either case is single offense. 17F(2d)570. [i] **Existence of embezzlement statute** does not make void indictment under statute punishing malfeasance as one of public moneys. 199Cal 1, 248P230. [j] **Larceny or conspiracy to steal.-**327 Ill 416, 158NE680. [k] **Seizure and sale of conveyance transporting intoxicating liquor** may be prosecuted under Prohibition

Act or tariff laws at government's election. 23F(2d)126. [l] **Indictment for manslaughter** is election to prosecute for that offense though proof makes case of murder. 152Miss625, 120S751. [m] **Procuring search warrant from United States commissioner** is not election on part of government to proceed against defendant for violation of law as asserted in affidavit for warrant. 35 F(2d)584. [n] **Obstructing justice and removal of property** subject to lien are not same offense. 157Miss675, 128S875.

59-88 16F(2d)921; 327 Ill 416, 158NE 680; 169La247, 125S65.

59-90 108Conn209, 142A840.

59-91 151Md484, 135A591, 594 [quot CJ]. See also 202 Iowa958, 211NW230. [b] **Where either felony or misdemeanor punishment** may be imposed for same act, charge may be prosecuted as felony. 195Cal 325, 233P97.

59-92 15F(2d)644; 15F(2d)770; 151 Md484, 135A591, 594 [quotCJ].

59-93 108Conn209, 142A840; 151Md 484, 135A591, 594 [quotCJ].

59-95 108Conn209, 142A840; 151Md 484, 135A591, 594 [quotCJ].

59-96 151Md484, 135A591, 594 [quot CJ]. See also Qnt [1927] 3DomLR433.

59-97 151Md484, 135A591, 594 [quot CJ].

59-98 151Md484, 135A591, 594 [quot CJ].

60-3 [a] (3) Burglary. 131Misc411, 227NYS142.

60-6 164La199, 113S816, 817 [citCJ].

61-11 249Mich147, 228NW723.

61-12 21AlaA303, 107S788; 33Ariz383, 265P609; 164Ga219, 138SE213; 198 Ind 701, 153NE398, 154NE668; 170Minn 504, 212NW894; 114Nebr653, 209NW 328; 118Nebr174, 224NW18; 242NY 453, 152NE259; 127Misc244, 216NYS 442; 128Misc650, 220NYS315; Oh 173 NE441; 105TexCr650, 290SW754; 106 TexCr1, 290SW743; 100Vt404, 138A 777; 144Wash170, 257P236. See also 170Minn255, 212NW528. [f] **Degree of crime**, such as felony or misdemeanor, may be fixed by legislature. 75Mont 547, 244P477. [g] **Legislature may penalize police officer** for making search of property of citizen in violation of state or federal constitution. 106TexCr1, 290 SW743. [h] 105TexCr650, 290SW754.

61-14 [c] **Congress has wide discretion** as to classifying crimes as felonies and misdemeanors. 267US132, 45SCt 280, 69L ed543. [d] **Congress** may punish each step leading to consummation of transaction. 21F(2d)934. [e] **Statute punishing government officers** and persons acting for United States for asking, accepting, or receiving bribe held not beyond power of congress and is valid. 34F(2d)15.

61-28½-New. Congress has power to define offenses and what act shall constitute an offense. 16F(2d)59.

61-28⅓-New. Larceny of Liberty Bonds and possession thereof unaltered are not offenses against federal law. 23F(2d)226.

62-34 44Philippine437.

62-38 127Misc244, 216NYS442.

62-39 274US256, 47SCt629, 71L ed1036; 30Ariz113, 244P1020.

63-45 [e] (2) State statute may prohibit transportation without conflict with Eighteenth Amendment or National Prohibition Act. 100TexCr468, 274 SW978. (3) State statute prohibiting transportation held authorized by Eighteenth Amendment independent of validity of amendment to state constitution. 100TexCr468, 274SW978.

63-52 126 Or297, 269P864.

65-58 272US620, 47SCt200, 71L ed443; 31NM435, 246P901 (prosecution under unconstitutional statute).

65-59 272US620, 47SCt200, 71L ed443; 171Ark1188, 286SW943. [b] **Violation of statute must be plain** to warrant punishment. 272US620, 47SCt200, 71L ed 443.

65-62½-New. In Ohio all crimes are statutory. 115 ObSt350, 154NE728.

67-90 94PaSuper499.

67-96 215Ala42, 109S109.

67-98½-New. All crimes in Indiana are statutory, and prosecution should be under the particular statute by which offense is defined. Ind 166NE430.

67-3 140Wash385, 249P784, 250P469. [a] **Fine and imprisonment for offense** whose punishment is not prescribed by statute will conform to that imposed in other common law misdemeanors. 97 PaSuper181.

67-5 274US264, 47SCt597, 71L ed1040; 203 Iowa918, 210NW961; OklCr 273P 1010; 141Wash1, 250P453. See also 158La352, 104S112 (offense defined by detailing various acts constituting it).

67-6 5F(2d)546 (statute making it crime to transport stolen automobiles in interstate commerce is constitutional); 196 Ind643, 148NE146; Mo 273 SW1037 (effect of omission of word "or"). See also 164La940, 114S844 (statute denouncing possession of liquor and possession thereof for sale in same clause is not invalid).

67-7 203 Iowa918, 210NW961; 158La 352, 104S112. [d] **Legislature may describe which crimes are felonies and which misdemeanors**, but punishment on conviction characterizes result. 128Misc 31, 217NYS739.

68-8 269US385, 46SCt126, 70L ed322; 19F(2d)807; 87Colo 567, 290P271; 35 GaA404, 133SE275; 36GaA206, 136SE 284; 235Ky173, 30SW(2d)879; 249Mich 147, 228NW723 (legal certainty); Mo 30SW(2d)447; 79Mont52, 255P337; 50 Nev125, 253P671; 32NM48, 250P842; 242NY453, 152NE259; OklCr 274P485 (2dcase); 128 Or121, 270P772; Tex CivA 19SW(2d)207 (statute making it offense to operate on highway motor vehicle without adequate brakes in good working order is inoperative for indefiniteness); 106TexCr37, 289SW1072; 107 TexCr95, 295SW614; 108TexCr147, 300 SW64; 109TexCr551, 6SW(2d)360; 113 TexCr100, 18SW(2d)652; 33Wyo 387, 240P208. See also 276US505, 48SCt400, 72L ed676 (crimes against government involve construction of statute). [b] 101TexCr7, 274SW149. [g] **Act prohibiting performance of worldly employment on Sunday** is held not void for uncertainty. 290Pa136, 138A497, 53 ALR1027. [h] **Statute held not uncertain and ambiguous.**–159La872, 106S 364. [i] **Statute held not void for uncertainty.**–40F(2d)889. [j] **Statute held not unconstitutional as uncertain.**–Tex Cr 28SW(2d)169.

68-9 274US264, 47SCt597, 71L ed1040; 280US396, 50SCt167, 74L ed508(2dcase); 33Ariz170, 263P1; 73CalA548, 238P 1089; 82CalA17, 255P212 (statute denouncing unnatural copulation held not uncertain); 198 Ind198, 152NE814 (statute concerning stills held plain); Ind 165NE61; 128Kan715, 280P773; 33NM 641, 275P371 (statute regulating practice of dentistry held sufficiently certain); 128 Or121, 270P772; 150SC452, 148SE474; 109TexCr231, 4SW(2d)67 (Tick Eradication Law); 111TexCr363, 12SW(2d)790(2dcase). [c] **Statutes held sufficiently certain.**–TexCr 28SW(2d)537 (2dcase).

68-10 267US233, 45SCt295, 69L ed589 (Lever Act punishing "exacting excessive price for necessaries" held void); 108TexCr147, 300SW64; 113TexCr450, 21SW(2d)499.

68-12 243NY595, 154NE620.

68-13 274US264, 47SCt597, 71L ed1040; 118 ObSt25, 160NE473 (fortune telling).

68-14 274US264, 47SCt597, 71L ed 1040; 87Colo 567, 290P271; 198 Ind718, 153NE765; Ind 168NE692; 50Nev125, 253P671; 141Wash1, 250P453.

68-15½-New. An unconstitutional statute purporting to create a crime will not sustain a conviction. 136Miss272, 101S 366.

68-15⅓-New. Law to prevent evil may embrace more than precise evil intended. 264US256, 47SCt629, 71L ed1036.

68-15¼-New. Statute held not invalid as making intent alone criminally culpable where act must, by statute, concur with intent. 50Nev125, 253P671.

68-15⅕-New. That a penal statute requires a fact to be proved in order to convict does not make the fact so in issue indefinite or uncertain as respects the validity of the penal statute. 157 Md576, 146A797.

68-15⅙-New. Statute defining "crime" should be confined to acts which the law expressly condemns. 135Misc564, 238 NYS712.

68-16 322Mo 246, 14SW(2d)608. [b] **Statutes sufficiently defining offense.**–Statute prohibiting possession of equipment and devices for manufacture of intoxicating liquor. 100TexCr65, 271SW 926.

68-16½-New. For an act to be considered equivalent to crime statute must make it so. 35PortoRico 261.

69-17 72CalA536, 237P779; 109TexCr 551, 6SW(2d)360.

69-20 72CalA536, 237P779. [b] **Though penalty elsewhere prescribed is severe, rule applies.** 72CalA536, 237P779.

69-21 317Mo 330, 296SW370.

69-22 23AlaA213, 123S104(2dcase); 92 CalA102, 236P944 (saving clause construed); 75CalA115, 242P87; 90CalA 476, 265P1040; 196 Ind654, 149NE161; 108TexCr314, 300SW78; 109TexCr96, 3 SW(2d)439 (merely changing definition). [b] **That amendatory statute ameliorates punishment** does not change rule. 75CalA115, 242P87.

69-23 CalA 284P487 (change only to nomenclature); 56ND783, 219NW332.

69-23½-New. Prosecution subsequent to effective date of amendment to procedural statute is not "pending proceeding" and statute governs. Oh 172NE 145.

69-24 [a] **Reasonable doubt** as to whether penal provisions of statute have been repealed should be resolved against government. 23F(2d)500.

69-25 CalA 269P963; 131Misc657, 228 NYS361.

69-26 104NJL325, 140A566.

70-27 24F(2d)22; 206Cal 64, 273P779; 206Cal480, 275P219. See also 152Tenn 675, 280SW692 [citCJ].

70-28 28F(2d)805 [certiorari den 278 US658, 49SCt187, 73L ed566(1stcase)].

70-32½-New. A criminal statute cannot be repealed by failure of the enforcement authorities to prosecute and convict for its violation. 156Md459, 144A 350.

70-33 44Philippine126. [a] (1) 44 Philippine126.

70-34 250Mich349, 230NW202; 251 Mich640, 232NW349(1stcase); 93Pa Super404. But see 75CalA115, 242P87.

71-37 168La257, 121S762. [a] **In Porto Rico.**–33PortoRico 39.

71-38 250Mich349, 230NW202; BC [1927] 2DomLR269.

71-39 93PaSuper404; 104TexCr145, 282SW811; BC [1927] 2DomLR269.

72-50 198 Ind175, 152NE817; 33Porto Rico 39 (applying Pol. Code, § 386); 106TexCr626, 294SW559; 107TexCr661, 298SW596; 200Wis145, 227NW306; 200Wis267, 227NW942.

72-52 114Nebr404, 207NW928 (crime of murder exists where constitution provides all laws in force not inconsistent therewith shall continue in force till amended or repealed).

72-56 [a] **In Porto Rico.**–33PortoRico 39.

73-79 Oh 172NE367.

73-80 21AlaA18, 104S880; CalA 260P 384. [b] (1) CalA 260P384.

73-81 167La1113, 120S875.

74-85 21F(2d)889; 41F(2d)759; 43 F(2d)944; 215Ala148, 109S849; 31Ariz 522, 255P165, 53ALR231; 95CalA225, 272P755 (where fraud is essential for crime intent must be shown); 162La 719, 111S72; MoA 299SW829; 321Mo 268, 10SW(2d)521; 242NY313, 151NE 631; 247NY36, 159NE715; 194NC821, 140SE717; 44Philippine539. See also 312Mo 373, 278SW1016.

74-86 23AlaA149, 122S308.

75-88 31Ariz522, 255P165, 53ALR231; 162La719, 111S72.

75-90 197 Ind200, 150NE97.

75-92 220Ky771, 295SW1047.

76-99 27Hawaii693; 237Mich247, 211 NW650; 242NY313, 151NE631; 8Pa Dist&Co 445, 446 [quotCJ].

76-1 195Cal 445, 234P91, 101 [citCJ]; 199Cal 1, 248P230; 92Fla848, 110S522; 161Ga537, 131SE496 (statute prohibiting dancing in public place on Sunday held not violative of provision of penal code that crime or misdemeanor shall consist of act and intention or criminal negligence); 202 Iowa1318, 210NW137, 139, 49ALR1270 [citCJ]; 202 Iowa1188,

211NW850, 852 [citCJ]; 236Mich549, 211NW349; 77Mont8, 249P574; 8PaDist&Co 445, 446 [quotCJ]; 88PaSuper155; 44Philippine126; 158Tenn63, 12SW(2d)361, 61ALR1148. [b] **Where conviction under statutory offence** without proof of intent would work palpable injustice, conviction without such proof will not be upheld. NB [1927] 2DomLR565.

77-2 202Iowa1318, 210NW137, 139, 49ALR1270 [citCJ]; 236Mich549, 211NW349; 247Mich127, 225NW595; 7PaDist&Co154; 8PaDist&Co445, 446 [quotCJ]; 44Philippine126.

77-3 236Mich549, 211NW349; 7PaDist&Co743; 8PaDist&Co8, 16 [quotCJ]; 8PaDist&Co445, 446 [quotCJ]; 44Philippine126; 52ND91, 216NW858; Ont [1925] 3DomLR625.

77-4 242NY313, 151NE631; 8PaDist&Co8, 16 [quotCJ].

78-5 195Cal445, 234P91; 8PaDist&Co8, 16 [quotCJ].

78-6 8PaDist&Co8, 16 [quotCJ]; Man [1928] 2DomLR621.

78-6½-New. Word "or" is treated as surplusage, since, by such omission, the plain intent of statute is expressed. 40Ida470, 235P577.

78-7 236Mich549, 211NW349.

78-8 8PaDist&Co445, 446 [citCJ].

78-11 109Conn124, 145A761.

78-12 203Iowa929, 210NW465; 221Ky226, 298SW673; 321Mo352, 10SW(2d)928; NJ148A764.

78-17 70Utah570, 262P107.

78-18 196NC562, 146SE395.

79-19 311Mo683, 278SW695.

79-29 226Ky255, 10SW(2d)820; 32PortoRico70.

79-33 33Ariz432, 265P600.

80-37 7F(2d)605. [d] 34PortoRico5.

80-45 33Ariz432, 265P600, 602 [citCJ]; 71CalA213, 234P877; 82CalA618, 256P270.

81-53 215Ala148, 109S849; 125Kan375, 378, 263P782 [quotCJ]; 249Mich543, 229NW442; NJ148A764; 121Or141, 253P367; 103WVa641, 138SE321, 322 [quotCJ]. See also 320Ill233, 150NE631. [c] (3) In prosecution for crime, law presumes that man intends to do what he actually does. 97Fla650, 122S110. [e] **Statute raising conclusive presumption of guilty intent from deliberate commission of unlawful act** applies only where intent is not made affirmative element of crime. 82CalA618, 256P270.

81-54 103WVa641, 138SE321, 322 [quotCJ].

81-61 71CalA213, 234P877, 880 [citCJ]; 82CalA618, 256P270; 86CalA235, 260P822.

81-62 71CalA213, 234P877, 880 [citCJ]; 318Mo751, 300SW748.

81-62½-New. In a rape case, proof that the prosecutrix was selling liquor has been held incompetent to prove defendant's intent in going to her house. 168Ark590, 271SW708.

81-63 31Ariz522, 255P165, 53ALR231; 85CalA575, 259P1005; 110Conn55, 147A118; 320Ill233, 150NE631; 199Ind592, 159NE420; Ind167NE133; 125Kan375, 378, 263P782 [quotCJ]; Mass171NE458; 80Mont181, 260P138; 118Or5, 244P512; 121Or141, 253P367; 51Philippine488; TexCr29SW(2d)399.

82-65 51Philippine488.

82-72 20F(2d)269.

83-82 IndA173NE233.

83-86 149Miss274, 115S202; 316Mo169, 289SW844; MoA2SW(2d)145; 135Misc446, 238NYS616; 11PaDist&Co543; 102TexCr329, 277SW129 (having pistol in car is sufficient for violation of law against carrying pistol).

83-87 163La512, 112S400.

84-89½-New. The doctrine is fundamental that there can be no constructive offenses. 8F(2d)335.

84-89¾-New. Overt act of corrupt lobbying is not essential to violation of the Lobbyist Act, prohibiting a person employed as a legislative counsel or agent to go on the floor of either house of the legislature. 229Ky264, 17SW(2d)227, 63ALR932.

84-90 197Ind249, 150NE615 [citCJ]; 166Minn308, 207NW644; 312Mo373, 278SW1016; 242NY453, 152NE259; 158Tenn63, 12SW(2d)361, 61ALR1148; TexCr29SW(2d)777. [g] **Ignorance that possession of liquor was crime** is held no defense. 197Ind249, 150NE615.

85-1 34F(2d)318. But see 158Tenn63, 12SW(2d)361, 61ALR1148.

86-16 TexCr29SW(2d)777 (arising from lack of proper care).

86-17 195Cal445, 234P91.

86-20 78CalA37, 247P601.

87-37 27F(2d)223.

88-42 [a] 35OklCr430, 251P101.

88-44 12F(2d)852; 17F(2d)886; 19F(2d)901; 32F(2d)472; 42F(2d)68; 70CalA498, 233P816; 46Ida798, 271P578 (1stcase); 121Kan711, 249P688; 318Mo958, 2SW(2d)618 (making book); 321Mo1163, 14SW(2d)617; Mo24SW(2d)981; 74Mont523, 241P620, 621 [citCJ]; OhA172NE835; 35OklCr430, 251P101. Contra 19F(2d)891.

88-45 8F(2d)429; 12F(2d)852; 17F(2d)886; 31F(2d)42; 31F(2d)732; 33F(2d)686; 38F(2d)862; 39F(2d)390; 80CalA328, 251P823; 82Colo115, 257P347; 208Iowa1151, 226NW30; 119Kan473, 239P1105; 149Miss684, 115S705, 706 [quotCJ]; 320Mo173, 7SW(2d)340; 321Mo1163, 14SW(2d)617 (employment of private individuals to apprehend lawbreakers held proper); 74Mont523, 241P620, 621 [citCJ]; 26OhA340, 159NE575; 35OklCr430, 251P101; OklCr279P916; 49SD414, 207NW216. [b] (2) Conviction sustained where evidence showed defendant previously sold copies of same book. Mass171NE455. [d] **Drugs.**-28F(2d)608.

89-46 32F(2d)505; 33F(2d)713; 321Mo1163, 14SW(2d)617; 91PaSuper447. [a] 91PaSuper447.

89-47 19F(2d)472; 121Kan711, 249P688; 127Kan157, 272P666; 315Mo1279, 289SW792.

89-48 39F(2d)390; 43F(2d)173; 70CalA483, 233P805; 89IndA125, 166NE8; 74Mont523, 241P620; 91PaSuper447; Utah289P100.

89-49 39F(2d)390.

89-51 12F(2d)852; 17F(2d)886; 18F(2d)507; 21AlaA199, 106S681; 23AlaA100, 123S86(1stcase); 80CalA328, 251P823; 197Ind709, 151NE721; 119Kan473, 239P1105; 121Kan711, 249P688; 158La294, 105S50 (officers are within legal bounds in sending prisoners from jail to purchase liquors); 149Miss684, 115S705, 706 [quotCJ]; 315Mo1279, 289SW792; 74Mont523, 241P620, 621 [citCJ&Cyc]; 49SD414, 207NW216; Wash288P218; 154Wash336, 282P220 (police officers); 34Wyo98, 241P709 (evidence insufficient to raise issue of entrapment). See also 8F(2d)429; 105WVa499, 143SE235, 236 [citCJ].

90-52 16F(2d)568; 48Ida112, 279P616.

90-52½-New. Testimony as to purchase of liquor by prohibition agents from defendant is held not to raise issue of entrapment. 20F(2d)160.

90-52⅓-New. On question of entrapment in purchasing liquor, inquiry is limited to whether purchasers went beyond affording defendant opportunity to sell for money. 20F(2d)160.

90-52¼-New. Sale induced by prohibition agent by appeal to sympathy, pity, or friendship may raise issue of entrapment. 20F(2d)160.

90-52⅙-New. Violation of state law cannot be justified by encouragement thereto of state officer. 21AlaA274, 107S325.

90-53 16F(2d)568; 32F(2d)505; 39F(2d)390; 70CalA498, 233P816; 35OklCr430, 251P101; Wis231NW162. [b] **Bribery.-DC** 26F(2d)993. [c] **Actions of entrapper may not be imputed to accused** even if done with his knowledge and consent. 321Mo1163, 14SW(2d)617.

90-54 70CalA498, 233P816.

90-60 19F(2d)472; 22F(2d)979 (instigation through agent himself guilty); 28F(2d)681; 31F(2d)42; 32F(2d)505; 33F(2d)686; 38F(2d)862; 71CalA2, 234P438; 80CalA328, 251P823; 148Wash657, 269P848. But see 70CalA483, 233P805. See also 123Or485, 260P234, 263P77. [b] **Defense is complete.**-24F(2d)625. [c] **That accused voluntarily committed different offense** is immaterial. 24F(2d)625.

91-63 70CalA483, 233P805. See also 158La1021, 105S50; 105WVa499, 143SE235. [a] 78CalA37, 247P601; 320Mo219, 6SW(2d)877 (rule recognized).

91-64 16F(2d)568; 70CalA483, 233P805; 70CalA498, 233P816 (rule recognized); 84CalA707, 258P660; 321Mo1163, 14SW(2d)617.

91-64½-New. Guilty party is not exonerated if he independently conceived original intent and personally did every act necessary to constitute the crime. 70CalA498, 233P816.

91-67½-New. It is no defense that defendant's job depended upon his obeying orders constituting a violation of law. 23AlaA432, 127S796(2dcase).

91-69 208Ky700, 271SW1059.

91-70 23AlaA432, 127S796(2dcase); 82CalA778, 256P251, 254 [quotCJ]; 208Ky700, 271SW1059; 109TexCr443, 5SW(2d)510.

91-72 117Or153, 241P977, 978 [quotCJ].

92-84 124Kan340, 259P802, 803 [citCJ].

92-85 124Kan340, 259P802, 803 [citCJ]; 159La900, 106S374; 318Mo605, 300SW823.

92-87 173Minn473, 217NW598; TexCr25SW(2d)848.

93-88 124Kan340, 259P802, 803 [citCJ].

93-90 164La1081, 115S277.

93-93 77CalA279, 246P337; Mo281SW940; 13PaDist&Co228. [b] 35Ariz432, 280P672. [d] **Defendant, living on premises** where still was found, can have no alibi defense, though asserting still was there without his knowledge. 174Ark1179, 298SW877.

93-93½-New. The defense of alibi amounts to nothing more than a mere traverse of the material averments of the indictment or information. OklCr275P387.

93-94 Ida288P894.

93-95 48Ida688, 284P845; 35OklCr279, 250P544, 49ALR1129; 9PaDist&Co448. [a] Iowa228NW80.

94-2 [d] 128Kan665, 280P910, 66ALR1369 (attorney-general).

95-13 153Miss41, 120S449 (witness testifying for defendant is not entitled to immunity); 131Misc96, 227NYS37 (fraudulent practices in securities and commodities); 102TexCr492, 278SW432; 109TexCr8, 2SW(2d)452; 112TexCr652, 18SW(2d)156(1stcase); 94PaSuper491. See also 78CalA561, 248P990; 150Miss304, 116S598. [e] **Prosecutions on existing indictments** are also governed by statute so that person examined after indictment is protected. 131Misc96, 227NYS37. [f] **Circumstances not entitling defendant to immunity.**-94PaSuper491.

95-15 IndA168NE27.

96-17 [a] **Time when such evidence is first offered** is immaterial, providing it is fully, freely, and truthfully made, so that if first offered at trial it is sufficient to give immunity under statute. 102WVa99, 134SE595.

96-18½-New. Immunity statutes are no broader than constitutional privilege. 187Wis438, 204NW473.

96-19 29F(2d)651.

96-20 167La484, 119S523 (state must try defendant for murder when he refuses to plead "guilty without capital punishment").

96-21 5F(2d)471; 78CalA223, 248P716; 109TexCr47, 2SW(2d)853; 198Wis18, 222NW825.

96-21½-New. Promise of immunity is not void as beyond power of prosecutor. 326Ill253, 157NE181.

96-21⅓-New. But interests of state are not served by causing imprisonment of defendant after inducing him to testify against coindictees on promise of immunity. 326Ill253, 157NE181.

96-21¼-New. Testifying at succeeding term of grand jury to that in which he was indicted does not entitle defendant to immunity. 215Ky728, 286SW1040.

96-21⅕-New. An agreement of a county attorney to dismiss a pending prosecution in consideration of information concerning violations of law not connected with the offense charged is not enforceable. 103TexCr502, 281SW557.

96-21⅙-New. An offer to testify need not be made prior to the actual giving of evidence at trial. 102WVa99, 134SE595.

96-40 [c] (1) 34F(2d)967. [d] **Voluntary or involuntary witness.**-8F(2d)142.
96-41½-New. Right to immunity does not extend to witness merely producing and identifying books. 13F(2d)136.
97-42 [a] **Where testimony before grand jury contains nothing incriminating,** witness cannot claim immunity from prosecution for conspiracy to violate laws of United States. 34F(2d) 967.
97-46½-New. Defendant entitled to immunity where he was accused of conspiracy to violate prohibition amendment and subpœnaed to testify in case involving violation thereof notwithstanding one overt act occurring after trial. 15F(2d)593.
97-46⅓-New. Defendant, answering federal trade commission's questionnaire and testifying before examiner without being subpœnaed is not immune from prosecution for using mails to defraud by sale of stock. 19F(2d)823.
97-52 143Miss262, 108S709; 157Miss 645, 128S737(2dcase); 129Misc373, 222 NYS228; 161Tenn74. 29SW(2d)250; 102TexCr404. 278SW432. [c] 108Tex Cr274, 1SW(2d)308. But see 111TexCr 614, 13SW(2d)373(2dcase). [e] **Motion to dismiss indictment,** based on statutory immunity to witness before grand jury, should be granted where such witness was indicted in violation of statute. 102TexCr404, 278SW432.
97-54½-New. ,and does not apply where testimony tended to show innocence rather than guilt. 187Wis438, 204NW473.
97-56 7F(2d)594.
97-56½-New. A witness testifying before the grand jury is not entitled to immunity from prosecution unless he gives incriminating testimony and has claimed his privilege against self-incrimination. 33F(2d)1005.
97-57 123Kan62, 254P317, 319 [quot CJ].
97-58 123Kan62, 254P317, 319 [quot CJ].
97-59 123Kan62, 254P317, 319 [quot CJ]. [c] **Thus** pendency of divorce proceeding on equity side of circuit court is no defense to criminal charge of nonsupport. 21AlaA48, 105S698.
98-60 156Md459, 144A350; 101Vt300, 143A284, 59ALR1541.
98-66 12F(2d)852.
98-68½-New. It is not defense that during part of period of time covered by offense charged, it could not legally be charged. 258Mass89, 154NE586.
98-68⅓-New. Where there is no statutory excuse or justification, there is neither common-law nor unwritten law justification for the commission of a crime. 100CalA261, 279P1008.
98-70½-New. [§ 70a] 16. **Estoppel to Set up Defenses.** Estoppel is infrequently invoked in criminal cases. 75CalA 471, 242P1078.
98-70⅓-New. Estoppel, when applicable, does not differ in principle from the same rule when used in civil cases. 75 CalA471, 242P1078.
98-72 21AlaA289, 107S791.
98-86 21AlaA289, 107S791; 198Cal 601, 246P802; Cal 288P769; 228Ky664, 15 SW(2d)441 (even in absence of statute, providing for compulsory confinement of criminally insane); Md 151A409; 78 Mont560, 254P858; 23 OhA474, 156NE 219; 44Philippine204; Wash 286P833. [a] **Commitment to asylum** for felony under Philippine penal code. 44Philippine204.
98-89 99CalA224, 278P258.
98-90 20AlaA529, 104S339. [a] **Court declining to distinguish** between "insanity" and "mental irresponsibility" as used in statute. Wash 291P1093.
99-93½-New. The right to acquittal, on ground of insanity, cannot be taken from defendant or abridged by failure of her counsel to institute proceedings in the county court for her confinement in a lunatic asylum. 111TexCr419, 13SW (2d)116.
99-94 92Fla589, 109S599; 167Ga341, 145SE647; 169La520, 125S580; 44 Philippine204; TexCr 28SW(2d)133.
99-95 But see 209Ky70, 272SW26.
99-98 68CalA674, 230P178; 292Pa26, 140A611; 135Wash650, 238P617.
99-2 255Mass9, 151NE74; 44Philippine 204.
99-3 22AlaA644, 119S248; 195Cal 623, 234P890; 197Cal 306, 240P1000; 207Cal 605, 279P646; 78Mont560, 254P858.
99-4 255Mass9, 151NE74; 78Mont560, 254P858.
99-5 102CalA705, 283P821(2dcase).
99-7 [a] (4) Adult with intelligence of child from seven to nine years may be capable of committing crime. 171Ark 255, 283SW981. [b] (2) In Philippines, under penal code, imbecile is exempted. 44Philippine204.
100-8½-New. Mere weakness of mind does not preclude criminal responsibility. 105TexCr353, 288SW465.
100-8⅓-New. Constitutional or other inferiority is not a test of criminal responsibility. 257Mass391, 153NE881.
100-8¼-New. One knowing enough to plan details of and perpetrate crime is responsible therefor. 224Ky13, 5SW (2d)275.
100-9 Nebr 233NW461.
100-10 NJ 148A764.
100-12 20AlaA529, 104S339; 30Ariz 366, 247P129; 195Cal 623, 234P890; 197 Cal 306, 240P1000; 198Cal 238, 244P362 [citCJ]; 87CalA68, 261P1059; 88CalA 222, 263P306; 92Fla878, 110S547; 167 Ga341, 145SE647; 209Ky70, 272SW26; 255Mass9, 151NE74; 115Nebr320, 212 NW614; 118Nebr84, 223NY645; 102 NJL659, 133A274; NJ 148A764; 49ND 348, 191NW628; 23 OhA474, 156NE219; OklCr 279P525; OklCr 280P865; OklCr 287P816; OklCr 292P76; 121 Or141, 253P367; 284Pa311, 131A229; 105Tex Cr353, 288SW465; 109TexCr251, 4SW (2d)74; Wash 286P833; 103WVa653, 138SE318. [d] Person of nine year old mentality is not without mental capacity to commit homicide as matter of law. Wash 286P833.
101-14½-New. "Insanity" in law is such mental condition as destroys individual responsibility which means want of freedom from accountability. Wash 286P833.
101-16 92Fla878, 110S547.
101-17 TexCr 8SW(2d)176.
102-22 198Cal 238, 244P362; 206Cal 35, 273P767; 80CalA789, 252P1068; 88 CalA222, 263P306; CalA 291P434.
102-23 DC 36F(2d)548; 209Ky70, 272 SW26. [a] (3) Other statements of test. Wash 286P833. [c] But see OklCr 280P 865 [expressly overr 6 OklCr284, 118P 416, 44LRANS119]; OklCr 292P76. [d] **In order that irresistible impulse be defense** there must be clear proof of contemporaneous homicidal insanity or an habitual tendency previously evincing itself; otherwise it can be no defense. 284Pa311, 131A229.
102-25 198Cal 238, 244P362.
104-29 215Ala428, 110S908; 92Fla589, 109S599; 121 Or141, 253P367.
104-31 197Cal 306, 240P1000; 198Cal 238, 244P362.
104-37 23AlaA468, 126S896(2dcase); 326 Ill 640, 158NE403; 200 Iowa341, 204 NW215; 210Ky347, 275SW809; 234Ky 423, 28SW(2d)486; NJSup 133A46; 190 NC674, 130SE627, 42ALR1114 (furnishes no exemption from responsibility).
105-38 215Ala106, 109S846; 31Ariz522, 255P165, 53ALR231; 210Ky347, 275SW 809; 221Ky168, 298SW376; 125Me463, 134A691; Miss 107S520; 119 Oh189, 162NE802; 49Philippine163; 136Wash 620, 241P9; 143Wash281, 255P91.
106-43 256 IllA233 (truth of recitals of fact in order reviewed).
107-52 NJSup 133A46.
107-53 108TexCr291, 300SW83.
107-55 125Me463, 134A691 [citCJ]; NJSup 133A46; 193NC25, 136SE193; 136Wash620, 241P9. But see 111TexCr 476, 14SW(2d)842.
108-56 NJSup 133A46.
108-62 221Ky168, 298SW376.
108-64 206 Iowa1347, 221NW952; NJ 146A313.
109-71 119 Oh189, 162NE802.
109-74 23AlaA468, 126S896(2dcase).
111-84 NJ 148A764.
111-91 144Va594, 131SE212.
111-94 [a] **Under statute making attempt to commit offense punishable with death, other than rape,** crime punishable by confinement in penitentiary, attempt to commit murder in first degree is felony, but attempt to commit murder in second degree remains misdemeanor. 144Va594, 131SE212.
112-96½-New. Conviction of assault and battery with intent to commit felony may be had, though felony committed. 197 Ind606, 149NE430, 151NE695.
112-99 See also 12PaDist&Co 169.
112-2 23AlaA193, 122S698 [certiorari den 219Ala431, 122S699(1stcase)]; 86 CalA8, 260P558; 217Ky83, 288SW1026, 1027 [citCyc]; 319Mo 1222, 6SW(2d) 609, 611 [quotCJ]; 119 Or512, 249P172 [quotCJ]. [a] (10) BC [1929] 2DomLR 824. (13) Ark 30SW(2d)865. [b] **Any act done toward commission of crime** with intent to commit offense and which because of some interference accused is prevented from carrying out. 118Kan 618, 236P826. (1) 55ND846, 215NW 552; 144Wash367, 258P20.
112-3 74CalA440, 241P97; 118Kan256, 234P980, 981 [citCJ].
113-10 118Kan256, 234P980, 981 [quot CJ]; 319Mo 1222, 6SW(2d)609, 611 [quotCJ]; Utah 284P108; 144Wash367, 258P20. [a] **Whether a crime was committed or merely an attempt to commit** was made is for the jury. 119 Or512, 249P172.
113-11 70CalA498, 233P816; 118Kan 256, 234P980, 981 [quotCJ]; 319Mo 1222, 6SW(2d)609; 190NC319, 129SE 802, 803 [quotCJ]; 144Va594, 131SE 212. See also 146Wash585, 264P7.
113-12 144Wash367, 258P20.
113-14 73CalA495, 238P1059; 74CalA 440, 241P97.
113-16 74CalA440, 241P97; 149Miss 274, 115S202; 317Mo 276, 295SW 554, 557 [quotCJ]; Mo 12SW(2d)43; 50Nev1, 248P900; 144Va594, 131SE212 (must amount to commencement of consummation); Vt 151A562. [a] 149Miss 274, 115S202.
113-17 74CalA440, 241P97. [b] **Every completed crime** involves an attempt to commit it. 199Cal 461, 249P867.
114-18 319Mo 1222, 6SW(2d)609.
114-19 118Kan256, 234P980, 981 [cit CJ].
114-20 37GaA498, 140SE775; OklCr 283P796.
114-21 70CalA498, 233P816; 73CalA 495, 238P1059; 74CalA440, 241P97; 39 GaA664, 148SE303; 50Nev1, 248P900; 50NH245, 248, 9AmR196; OklCr 283P 796. [c] 74CalA440, 241P97. [d] 70 CalA498, 233P816.
114-22 70CalA498, 233P816; 144Va 594, 131SE212.
114-23 70CalA498, 233P816; 246NY 334, 158NE888.
115-31 149Miss274, 115S202.
116-49 73CalA495, 238P1059.
117-54 339 Ill 328, 171NE261.
117-55 36Man64, [1926] 3DomLR553, [1926] 2WestWkly319, 46CanCrCas209.
118-65 See also Vt 151A562.
118-66 319Mo 1222, 6SW(2d)609.
118-74 Vt 151A562.
119-80 105Conn757, 136A475; 317Mo 426, 297SW358.
119-84 See also 104TexCr601, 286SW 221.
120-89 103Conn138, 130A96. [b] **Statute providing that accessories may be punished** (1) as principals applies to statutory offenses. 103Conn138, 130A96. (2) Notwithstanding fact that statute creating offense enumerates persons who may be punished as accessories, such specification being construed to enlarge, rather than limit, class of persons who may be punished thereunder as accessories. 103Conn138, 130A96.
120-92 32PortoRico 355.
120-93 170Ark974, 281SW903; 163Ga 247, 135SE916; 37GaA374, 140SE528; 38GaA392, 144SE36; 218Ky782, 292SW 324, 325 [citCJ]; 160La925, 107S698; 154Miss406, 122S531(2dcase); 32Porto Rico 355; 144SC81, 142SE61; 40Wyo 162, 275P122, 64ALR420.
121-94 163Ga247, 135SE916.
121-95 163Ga247, 135SE916.
121-96 170Ark974, 281SW903; 37GaA 374, 140SE528.
121-6 23F(2d)180; 169Ark421, 275SW 758; 202Cal 159, 259P750; 75CalA365, 242P906; CalA 289P194; 103Conn138, 130A96; 97Fla648, 122S2(1stcase); 34 GaA146, 128SE692; 201 Iowa940, 208 NW351; 203 Iowa90, 212NW312; 255

Mass327, 151NE466; 234Mich95, 207NW867; 241Mich111, 216NW434; 142Miss872, 108S143; 143Miss210, 108S497; 310Mo500, 276SW625; 83Mont177, 271P449; 115Nebr833, 215NW125; 241NY138, 149NE330; 254NY255, 172NE489; OklCr 267P1040; 120Or546, 252P967; 126Or651, 269P869; 294Pa353, 144A292; 32PortoRico355. See also Mo 12SW(2d)424. [a] 143Miss210, 108S497.

122-7 32PortoRico355.

122-8 169Ark421, 275SW758.

122-9 32PortoRico355.

123-15 118Or5, 244P512.

123-20 80Mont141, 259P826, 833 [quot CJ].

123-21 Cal 265P184; MoA 285SW793; 80Mont141, 259P826, 833 [quotCJ]. [a] 229Ky459, 17SW(2d)443. [e] **Forbidden acts requiring no motive** may render master culpable. 94Fla809, 114S448. [f] **Illustrations.**–94Fla809, 114S448. [g] **Direct authorization** is not necessary. CalA 290P470.

123-22 80Mont141, 259P826, 833 [quot CJ].

123-23 80Mont141, 259P826, 833 [quot CJ].

123-24 Fla 124A827; 107TexCr425, 296SW559.

124-28 Mo 256SW1043; OklCr 290P193; 106TexCr179, 291SW540; TexCr 21SW(2d)679 (inference of participation). [c] (2) Mere fact that conspiracy is shown does not make all parties principals. TexCr 27SW(2d)231. (3) Acts making one guilty as accomplice are performed before actual offense is committed. TexCr 27SW(2d)231.

124-29 See also Mo 12SW(2d)424.

124-31 79CalA612, 250P585, 587 [cit CJ]; 96CalA373, 274P451; 126Me323, 138A474; 124Or656, 265P784; 146Wash101, 261P779 (holding common carrier agent). [c] **Instruction** that one using innocent agent was principal regardless of agent's knowledge held error. 108TexCr171, 300SW54.

125-38 152Md553, 137A339; 128Misc144, 218NYS494.

125-38½-New. Principal is not liable unless he directed agent or knowingly assented to agent's unlawful acts or representations. 80Mont141, 259P826.

125-44 98Fla687, 124S177; 37GaA188, 139SE105; 106TexCr251, 291SW908; 142Wash340, 253P126.

126-45 142Wash340, 253P126.

126-46 194Wis391, 216NW496.

126-48 193NC566, 137SE590; 194Wis391, 216NW496.

126-51 175Ark279, 298SW1021; 91Fla446, 107S331; 37GaA188, 139SE105; 210Ky359, 275SW872; 160La925, 107S698; TexCr 24SW(2d)427(2dcase). [a] **Person furnishing car** to others contemplating robbery is not principal but accessory before fact. 168La204, 121S744.

126-52 Mo 12SW(2d)424; 113TexCr657, 22SW(2d)938.

126-52½-New. To render one guilty as "aider or abettor" there must be concerted action and the crime must have been one of its incidental probable consequences. 153Va828, 149SE445.

126-53 91Fla446, 107S331; 110TexCr105, 7SW(2d)539.

127-55 165La822, 116S199, 205 [citCJ].

127-56 160La925, 107S698.

127-57 160La925, 107S698.

128-63 93CalA632, 269P951 (question for jury); 37GaA188, 139SE105; 39GaA125, 146SE327(1stcase); 225Ky83, 7SW(2d)823; 118Or5, 244P512, 521 [quot CJ]; 44Philippine38; 104TexCr163, 283SW174.

128-64 119Or15, 244P516, 521 [quot CJ].

128-66 13F(2d)961; 332Ill634, 164NE131; 313Mo71, 281SW35; 313Mo88, 280SW1023; MoA 27SW(2d)730; 50Philippine182.

128-69 83Colo289, 264P720.

128-70 123Kan290, 255P32, 33 [citCJ].

128-72 44Philippine38.

129-77 91PaSuper447.

130-87 Ark 275SW758; Fla 124A827; 37GaA188, 139SE105; 39GaA642, 148SE167(2dcase); 327Ill312, 158NE732; 217Ky485, 290SW339; 224Ky653, 6SW(2d)1082, 1084 [citCJ]; 234Ky192, 27SW(2d)971; 191NC233, 131SE574; 192NC559, 135SE451; 196NC524, 146SE139; NC 154SE604; 86PaSuper483; 52SD615, 219NW830 [quotCJ]; 104TexCr163, 283SW174; 111TexCr504, 14SW(2d)1031(1stcase); 112TexCr395, 16SW(2d)1092; 142Wash340, 253P126; 193Wis595, 214NW335. See also 14F(2d)518. [a] **Construction of statutes.**–29PortoRico824 ("counseling or aiding" commission of misdemeanor held not to require proof that offense counsel was actually committed).

131-89 21AlaA565, 110S55; 89CalA18, 264P324; 4HawaiFed386; 227Ky831, 14SW(2d)146; 235Ky454, 31SW(2d)703; NC 154SE314; SD 219NW830 [quotCJ]; Wash 288P243.

131-93 206Iowa1169, 221NW847.

131-94 210Ky359, 275SW872 (word, act, deed, or gesture); Man [1925] 3DomLR447 (some overt act of counselling is necessary).

131-96 163Ga878, 137SE378. [a] **Aider and abettor** need not be present at actual commission of crime or know details thereof. 20F(2d)574.

132-98 327Ill312, 158NE732. But see 317Mo372, 295SW734.

132-3 317Mo372, 295SW734; OklCr 289P798.

132-6 219Ala364, 122S617(2dcase); 163Ga878, 137SE378; 198Ind718, 153NE765; 210Ky359, 275SW872 (present but unconscious); 221Ky258, 298SW696; 221Ky490, 298SW1101; 317Mo372, 295SW734, 736 [citCJ]; 144SC53, 142SE31, 33 [quotCJ]; TexCr 20SW(2d)1056(2dcase); TexCr 24SW(2d)830; TexCr 27SW(2d)186(3dcase); TexCr 27SW(2d)186(2dcase); TexCr 27SW(2d)242; TexCr 29SW(2d)365; 147Va617, 136SE658; 150Va571, 142SE397; Va 152SE362; WVa 155SE661.

133-10 See also 86PaSuper483 (rape).

133-11 317Mo477, 296SW147, 149 [quotCJ].

133-12 317Mo477, 296SW147, 149 [quotCJ].

133-13 NC 154SE314; 144SC53, 142SE31, 33 [quotCJ].

133-15 34NM465, 284P113; 40Wyo162, 275P122, 64ALR420.

134-16 104TexCr163, 283SW174.

134-19 17F(2d)339, 345 [quotCJ]; 177Ark938, 9SW(2d)583; 75CalA404, 242P1067; 105Conn757, 136A475; 90Fla299, 105S834 (or aided in commission); 98Fla687, 124S177; 218Ky72, 290SW1075; 158Tenn212, 12SW(2d)375. [a] 104TexCr601, 286SW221. [c] **Accessory before fact is accomplice.**–168Ark151, 269SW46.

134-20 17F(2d)339, 345 [quotCJ]; 75CalA404, 242P1067; 241Mich111, 216NW434, 435 [citCJ]; Mo 7SW(2d)264; Mo 12SW(2d)424.

134-21 See also Mo 12SW(2d)43.

134-21½-New. The crime of being accessory before the fact to a felony is also a felony. 90Fla299, 105S834.

134-21⅓-New. An accessary before the fact cannot be convicted as principal. 325Ill578, 156NE798.

134-22 97PaSuper417; 32PortoRico355.

134-23 241Mich111, 216NW434, 435 [cit CJ].

134-23½-New. In Wisconsin, an accessary before the fact is prosecuted as an accessary. 193Wis595, 214NW335.

134-24 241Mich111, 216NW434.

135-27 171La1298736.

135-29 175Ark165, 299SW737.

135-30½-New. Offense of accessory before the fact is included in crime of which principal may be guilty. 175Ark165, 299SW737.

135-33 90Fla299, 105S834, 839 [citCyc].

135-34 313Mo71, 281SW35; 44Philippine38 (quote in support decisions of supreme court of Spain). [b] **Inference of guilt.**–44Philippine38, 54.

135-35 90Fla299, 105S834, 839 [cit Cyc]; 311Mo581, 278SW995, 999 [quot CJ]; 51ND130, 199NW187, 190 [citCJ].

135-37 90Fla299, 105S834, 839 [citCyc].

135-38 311Mo581, 278SW995, 999 [quotCJ]; 44Philippine38.

136-39 241Mich111, 216NW434; 154SC386, 151SE572.

136-42 See also Mo 12SW(2d)43. But see 44Philippine38.

136-48 See also 44Philippine38.

136-49½-New. Knowledge is necessary element to constitute accessory. Iowa 230NW379.

137-51 168Ark151, 269SW46.

137-53 91PaSuper447.

137-54 76CalA688, 245P781.

137-54½-New. Knowledge of a conspirator's withdrawal from the conspiracy may be brought home to his confederates by his acts as well as by words. 76CalA688, 245P781.

137-55 218Ky72, 290SW1075; 106TexCr354, 292SW247; TexCr 32SW(2d)652 (2dcase). [a] But see 168Ark151, 269SW46.

137-56 [e] **In Nebraska.**–114Nebr783, 210NW165. [f] **In Montana.**–83Mont177, 271P449.

138-57 316Mo169, 289SW844, 845 [cit CJ].

138-61 254Mass454, 150NE197. [a] **Where no evidence is offered to show defendant is not within this provision,** he was entitled to directed verdict under indictment charging him with being accessary after the fact. 254Mass454, 150NE197.

138-62 254Mass454, 150NE197.

138-63 254Mass454, 150NE197.

138-64 254Mass454, 150NE197.

138-65 254Mass454, 150NE197.

138-66 254Mass454, 150NE197.

138-67 254Mass454, 150NE197.

138-68 254Mass454, 150NE197.

138-69 254Mass454, 150NE197.

138-75 316Mo169, 289SW844.

138-79 Iowa 230NW379; 316Mo169, 289SW844; 114Nebr783, 210NW165.

139-87 114Nebr783, 210NW165.

139-89 316Mo169, 289SW844 (assistance held essential); 27OhA339, 161NE296 (lending money or acting as go between).

140-96 106TexCr354, 292SW247.

140-98 168Ark151, 269SW46; 160Ga678, 128SE913.

141-10 2TylerVt249. See also 85Mont428, 278P993.

141-11 See Receiving Stolen Goods § 1.

141-14 [a] **Aider and abettor** may be indicted separately as principal, without regard to real principal. 20F(2d)574.

141-16 216Ky813, 288SW752.

141-17 216Ky813, 288SW752.

141-19 163Ga406, 136SE448.

141-23 163Ga406, 136SE448.

141-26 163Ga406, 136SE448.

141-27 175Ark165, 299SW737 [citCJ].

142-30 See also 90Fla299, 105S834; 162Ga422, 134SE95.

142-31 6PaDist&Co418.

142-33½-New. One might be guilty as accessary before the fact even if he were also present and guilty as principal in the second degree. 32NM319, 255P396.

142-33⅓-New. Refusal to try principals before accessory has been held abuse of discretion. 175Ark165, 299SW737.

142-34½-New. The rule is otherwise in some jurisdictions. 162Ga422, 134SE95.

142-35 98Fla687, 124S177. [a] **One charged as accessory may be convicted by jury before principal has been sentenced,** but, before judgment of conviction may be entered against accessory, judgment of conviction must first be entered against principal. 90Fla299, 105S834.

143-43 169La468, 125S451.

143-4 But see La 129S685.

143-50 114Nebr783, 210NW165, 167 [quotCJ].

143-51 114Nebr783, 210NW165, 167 [quotCJ].

143-54 142Miss872, 108S143; 29OhA495, 163NE923; OklCr 291P143 (principal acquitted or never prosecuted).

144-55 Fla 124S827; Iowa 227NW601; 115Nebr109, 211NW613.

144-57½-New. If an accessory is not indicted for a substantive offense, but is indicted in the common-law mode, the common-law rules control as to the trial and punishment of the accessory. 98Fla687, 124S177.

144-61 25F(2d)430; 162Ga422, 134SE95; 334Ill11, 165NE178; 224Ky334, 6SW(2d)269; 142Miss872, 108S143; 113Nebr352, 204NW967, 41ALR227; 118Or5, 244P512; 104TexCr65, 282SW600. But see 294Pa353, 144A292.

144–63 118 Or5, 244P512.

144–63½–New. Agent's authority to do a criminal act will not be presumed. 80Mont141, 259P826.

144–64 23AlaA361, 125S687; 103TexCr 636, 282SW251.

145–67½–New. Evidence that one other than accused's principal might have committed offense is admissible where circumstances clearly show such guilt. 25 F(2d)430.

145–69 162Ga422, 134SE95; 114Nebr 783, 210NW165. [d] **Admissibility of record of conviction of principal is not affected** by mere error in imposing indeterminate sentence on him instead of one for definite period. 114Nebr783, 210 NW165. [e] **Records held admissible.**–Clerk's judicial record showing conviction for felony, though not yet signed by presiding judge, is admissible to prove principal offense. 114Nebr783, 210NW165.

145–70 162Ga422, 134SE95.

145–75 162Ga422, 134SE95.

146–85 25F(2d)430.

146–90 337 Ill 422, 169NE205 (evidence held insufficient).

146–92 See also Wash 292P421.

146–95 175Ark165, 299SW737; CalA 290P608.

146–97 [b] 142Miss872, 108S143.

147–4 [b] **Jurisdiction to try and convict** defendant on criminal charge is conferred on court, not upon individual. 136Misc40, 241NYS749.

147–9½–New. It is not policy of the law to permit those obviously guilty of criminal acts to escape punishment, through highly technical questions of jurisdiction. 221AppDiv315, 222NYS744.

147–9¼–New. Court may have jurisdiction, although there is no money in county treasury to pay jurors and witnesses. 175Ark1047, 1SW(2d)546.

147–9¼–New. Jurisdiction is not limited by language that is ambiguous. 136 Misc224, 241NYS127.

147–9½–New. Criminal law cannot be used to try disputed rights in and to real property. IndA 173NE233.

147–12 191NC668, 132SE664. [a] **Court's jurisdiction extends only to such** matters as law declares to be criminal. 154Wash463, 282P908.

147–15 But see 169La441, 125S442.

147–65 Conn 151A349.

147–98 Fla 124A827.

148–26 CalA 288P57; 109TexCr616, 6 SW(2d)364. [e] **Rule of comity** that jurisdiction remains till exhausted is of limited application in criminal cases. 267US80, 45SCt209, 69Led522.

148–28 140Miss524, 106S265.

148–29½–New. Pendency of preliminary proceedings in county court on warrant of arrest issued therefrom does not interfere with jurisdiction of circuit court on indictment for same crime. 21AlaA 330, 108S85.

148–29½–New. Where defendant, pending trial on a criminal charge in a court of one county, was adjudged insane and committed to the state hospital from which he escaped and committed a crime in another county, the court of the latter county may try him on such charge without waiting until after trial in the first jurisdiction. 78CalA794, 248 P1046.

148–31 109TexCr616, 6SW(2d)364.

148–32 109TexCr616, 6SW(2d)364.

148–33 But see 160Tenn97, 21SW(2d) 1039.

149–35 165La341, 115S613.

149–35½–New. Plain language is required to justify courts to construe a statute to effect that courts are deprived of jurisdiction to try persons charged with crime. 14F(2d)369.

149–35¼–New. Constitution was held not amended to authorize city recorder's court to try offenders against port commissioner's ordinances. 164La369, 113 S879.

149–35¼–New. An act passed after constitutional curtailment of the jurisdiction of the recorder's court is not an affirmation of jurisdiction conferred by statute. 164La369, 113S879.

149–36 35 OhA491, 172NE623.

149–37 113 Or523, 233P538.

150–47 218AppDiv273, 218NYS361.

151–10 TexCr 27SW(2d)545.

151–56½–New. Statutory power of a county court in a civil proceeding to punish an executor for contempt if he disobeys orders relating to property belonging to a decedent's estate does not deprive criminal courts of jurisdiction to punish an executor for embezzlement of funds in his hands as such executor. 114Nebr393, 207NW668.

151–58 127Misc244, 216NYS442.

151–61 See also 128Misc31, 217NYS739.

151–63 102NJL349, 133A785.

151–64 [a] 204Cal 241, 267P701; 72 CalA102, 236P944 (jurisdiction of grand larceny); 78CalA11, 247P917. 82CalA 602, 255P897. [h] (2) District courts exercise coördinate concurrent jurisdiction with all inferior courts. Ida 291 P703. [i] (2) County court at probate term has jurisdiction to pass judgment on person pleading guilty to misdemeanor by violating Prohibition law. 326 Ill 197, 157NE233. [j] (1) 196 Ind704, 149NE432. (2) County court at probate term. 322 Ill 390, 153NE688. [n] 160 La850, 107S597. (1) 164La369, 113S 879. (2) Jurisdiction of recorder's court of city of New Orleans does not extend to ordinance of port commissioners. 164 La369, 113S879. [q] (1) 233Mich356, 206NW582. (2) Circuit court has supervisory control over city court of Detroit in cases involving violation of municipal ordinances, but not in cases involving general criminal laws of state. 233Mich356, 206NW582. [t] (1) 240 NYS612. (3) Court of Special Sessions. 135Misc475, 239NYS122. (4) County court. 133Misc280, 232NYS9. [u] NC 154SE62. [v] (2) Jurisdiction of common pleas court considered. 35 OhA 491, 172NE623. [w] (3) County court. 111 Okl 240, 239P566; OklCr 283P259 (1stcase). [z] (1) 160Tenn530, 26SW (2d)151. [aa] (1) 104TexCr485, 284SW 957. (2) 104TexCr485, 284SW957. [ff] **In Alabama.**–23AlaA41, 120S306. [gg] 129 Or652, 278P950. [ll] **In North Dakota.**–54ND295, 209NW552. [mm] **In New Jersey.**–NJSup 140A420.

152–65 105TexCr53, 284SW953.

152–67 CalA 290P522; 220Ky95, 294 SW766. [a] (2) Jurisdiction of high grade misdemeanors committed outside of territorial limits of city but within county of Los Angeles is not in municipal court of Los Angeles but in superior court. 82CalA602, 255P897.

152–68 207Cal 544, 279P452; Cal 290P 43; CalA 290P522; CalA 290P512; 200 Ind512, 165NE57; 220Ky95, 294SW766; 246NY467, 159NE400 (county court); 113TexCr306, 21SW(2d)663; 113TexCr 613, 22SW(2d)137. [a] (2) Superior courts have no jurisdiction over misdemeanors high or low, as such jurisdiction has been given exclusively to municipal courts. 201Cal 405, 257P76. (3) Municipal court of city of Los Angeles has jurisdiction of misdemeanor of possession of liquor in violation of state law. 87CalA36, 261P1048. (4) Jurisdiction is exclusive of like jurisdiction in superior court. 81CalA1, 253P151. (5) Constitutional provision as to municipal courts does not authorize grant of jurisdiction to municipal courts over misdemeanors committed in territory of county outside limits of cities in which courts were created. 81CalA1, 253P151. [h] (2) Recorder's court of Detroit has jurisdiction equal to that of circuit court in cases involving general criminal laws of state, but in cases involving violation of municipal ordinances its jurisdiction is not equal to that of circuit court. 233Mich 356, 206NW582. (3) City court of city of Muskegon is municipal judicial forum for trial of violations of city ordinances. 236Mich618, 211NW30. [l] (1) 136Misc 224, 241NYS127; 229AppDiv281, 242 NYS348; (3) 133Misc728, 234NYS89; 133Misc280, 232NYS9. (6) City Court of Buffalo. 228AppDiv279, 239NYS206. [n] 164La186, 113S812. [p] **In Ohio.**–7 OhA 245. [q] **In Arkansas.**–177Ark294, 6SW (2d)295.

153–69 205Cal 411, 271P202; CalA 290 P512; 34GaA178, 128SE689; 37GaA149, 139SE131; 220Ky95, 294SW766. [b] **In Nebraska.**–115Nebr26, 211NW175. [c] **In South Dakota.**–50SD408, 210NW 194.

153–70 93Fla585, 112S51; 136Misc224, 241NYS127.

153–75 25F(2d)959; 36F(2d)499; Cal 290P43; 252Mass224, 147NE859 (sole jurisdiction of larceny from national bank is in states). [j] **Federal court has no jurisdiction** over criminal proceeding because of diversity of citizenship, as jurisdiction in such cases is limited to civil actions. 30F(2d)559. [m] **District court of Hawaii.**–Under act of congress, district courts of Hawaii have jurisdiction in criminal cases in which defendants are charged with violation of National Prohibition Act. 27 Hawaii237.

154–79 38F(2d)226 (statute construed); 207Cal 544, 279P452; Cal 285P312; 110 Conn482, 148A551; 120Kan692, 245P 105; 218MoA448, 279SW200; 86Mont 297, 283P430; 128Misc333, 219NYS293; 135Misc564, 238NYS712; 136Misc224, 241NYS127; 26 OhA317, 159NE854; 25 OhNPNS171. See also 111TexCr129, 12 SW(2d)216. But see CalA 290P522. [b] (3) Stockton charter creating police court and limiting its jurisdiction to matters arising within city does not abolish justice's court in city. 207Cal 544, 279P452. [c] **Recorder.**–131 Or371, 283P751. [e] **Rule does not apply** with any more peculiar potency to justices of peace in their capacity as examining magistrates than it does to other magistrates clothed by statute with power to inquire into offenses and bind over for trial. 120Kan692, 245P105. [f] **Justice court as municipal court.**–In prosecution for violation of municipal ordinances, justice court is court of municipality. 236Mich618, 211NW30. [g] **Justice of peace not disqualified by pecuniary interest.**–149Miss718, 115S879 (if disqualified judgment voidable only). [h] **Compensation of justice.**–111TexCr653, 13 SW(2d)831(1stcase). [i] **Justice may be disqualified** for charging fee. 112TexCr 38, 14SW(2d)63(1stcase). [j] **Justice of peace who waives all claims to fees** and neither claims, collects, nor attempts to collect in criminal case is not disqualified to try prosecution for misdemeanor. 111TexCr446, 14SW(2d)851(2dcase).

154–80 CalA 289P881 (holding the fact of population specified by statute gives courts criminal jurisdiction); 140Miss 524, 106S265.

154–81 194Wis229, 215NW896.

154–82 Que [1927] 3DomLR399.

154–88 159La872, 106S364; 149Miss 718, 115S879; 128Misc333, 219NYS293; 49Philippine206; 145Wash289, 259P 1077. [a] But see 81CalA1, 253P151. [d] (7) 250NY358, 165NE810. (8) 240 NYS687 (magistrate has no jurisdiction of violations of police regulations not ordinances). (9) Other limitations. 240NYS612.

155–89 [b] (2) Jurisdiction to receive complaints charging felony of failure to provide for minor child. 30Ariz591, 249P758.

155–89½–New. The word "case" in a constitutional provision conferring jurisdiction on justices of the peace has been held to include a judicial proceeding, although begun by an official in an administrative capacity. 110Conn 482, 148A551.

155–96 134Misc228, 235NYS173 (assault in third degree). [e] **In West Virginia.**–103WVa55, 136SE607.

156–5 Cal 285P312; 113 Or523, 233P 538.

156–6 29 OhA135, 163NE56.

156–7 29 OhA135, 163NE56.

156–11 NJSup 146A190(1stcase).

156–11½–New. vagrancy; 86CalA332, 260P919.

156–16½–New. Operating automobile without license. 145Wash289, 259P 1077.

156–26 172Ark1177, 288SW390; 311Mo 581, 278SW995.

156–30 103NJL275, 136A345.

156–30½–New. driving while intoxicated when made a felony; 159La872, 106 S364.

156–32 103NJL275, 136A345.

156–37½–New. 102NJL519, 134A556.

156–39½–New. City magistrate has no jurisdiction of violation of Federal Prohibition Act. 127Misc593, 217NYS486.

156-39½-New. The justice of the peace is without jurisdiction finally to hear and sentence one for gambling, unless a plea of guilty is entered or accused, in writing, agrees to submit to his jurisdiction. 25 **OhNPNS**171.

156-39¼-New. A magistrate's court of the city of New York has no jurisdiction, under city ordinance, of the misdemeanor of unlawfully operating an employment agency without a license. 132**Misc**740, 230**NYS**771.

156-39½-New. In Canada the summary jurisdiction of a magistrate under the Customs Act is not limited to cases where the value of the goods in question is less than two hundred dollars. **NS** [1928] 2**DomLR**555.

157-42 205 **Iowa**936, 218**NW**905; 114 **Nebr**676, 209**NW**236; 218**AppDiv**273, 218**NYS**361. [b] **In Philippines.**-50 **Philippine**1003.

157-42½-New. A justice of the peace has no jurisdiction of an offense where the minimum fine is greater than he has jurisdiction to impose. 144**Wash**71, 256 **P**784.

157-43 114**Nebr**676, 209**NW**236.

157-49½-New. , or where he may after hearing evidence act as committing magistrate by binding defendant over to answer in the superior court for the offense. 141**Wash**1, 250**P**453.

157-50 126**Kan**285, 268**P**96. See also 115**Nebr**366, 213**NW**339. [a] **The term "in a criminal case"** in constitutional provision limiting jurisdiction of justice of the peace refers to a single violation of law. 115**Nebr**366, 213**NW**339.

157-51½-New. "Capital offense" within meaning of statute restricting jurisdiction is one for which death penalty may be inflicted, although lesser penalty is given. 162**La**1075, 111**S**461.

158-59½-New. Justice has no authority to impose costs on defendant discharged because proceedings were unfounded. 6**PaDist&Co** 45.

158-67 13**PaDist&Co** 248.

158-68 [e] (2) 25 **OhNPNS**171. (3) Except in liquor cases, jurisdiction of justice of peace in Franklin county is limited to his own township. 25 **OhNPNS**171. [g] (4) Territorial jurisdiction is limited under Comp. L. (1917) § 1784 as amended by L. (1925) c 62 to public offenses committed within respective precincts or cities of justices. 69**Utah** 10, 251**P**1070. (5) Such statute as amended is not invalid because it creates confusion of criminal procedure. 69**Utah**10, 251**P**1070.

158-69 69**Utah**10, 251**P**1070. [a] **As to venue,** distinction exists between jurisdiction of subject matter and person. 213**Ala**139, 104**S**260, 40**ALR**285.

159-71 215**Ky**335, 285**SW**207; 141**Miss** 877, 106**S**111. [a] **In California.**-**CalA** 289**P**651.

159-74 141**Miss**877, 106**S**111 (misdemeanor); 153**Miss**593, 121**S**275. But see 105**TexCr**135, 286**SW**987.

159-74⅓-New. That defendant where complaint was filed before certain justice had right upon proper motion to have case transferred to justice precinct where offense occurred would not render trial before first justice void but merely voidable. 105**TexCr**135, 286**SW** 987.

159-76 **CalA** 289**P**651.

159-77 174**Minn**608, 219**NW**452.

159-77½-New. A sentence imposed by an alleged justice of the peace is valid if he was either a de jure or a de facto officer. 25 **OhA**339, 158**NE**552.

159-78 131**Misc**610, 227**NYS**680. [e] **In New York.**-218**AppDiv**273, 218**NYS** 361. [f] 207 **Iowa**322, 222**NW**867.

159-79 140**Misc**524, 106**S**265; 146**Miss** 808, 112**S**19; 153**Miss**593, 121**S**275 (exercise of jurisdiction by circuit court); **Mo** 1**SW(2d)**841; 116**Nebr**635, 218**NW** 432; 109**TexCr**616, 6**SW(2d)**364; 141 **Wash**1, 250**P**453. See also 10**PaDist&Co** 393. [c] 111**TexCr**54, 10**SW(2d)**728. [e] **In Kansas.**-123**Kan**774, 256**P**804. [f] 146**Miss**808, 112**S**19. [g] **In Alabama.**-21**AlaA**286, 107**S**786.

160-84 **Mont** 287**P**638.

160-85 **Mont** 287**P**638 (offenses against state laws are within exclusive jurisdiction of state courts); 127**Misc**244, 216**NYS**442.

160-86 127**Misc**244, 216**NYS**442; 200 **AppDiv**110, 221**NYS**96.

160-87 272**US**312, 47**SCt**103, 71**L ed**270, 48**ALR**1102; 9**F(2d)**188; 161**La**368, 108**S**773; **Mont** 287**P**638 (receiving stolen property belonging to United States); 127**Misc**244, 216**NYS**442. [a] (3) State court had jurisdiction under ordinance where same was concededly inoperative as to interstate commerce. 32**F(2d)**891. [b] **Pendency of federal prosecution** is held no bar to trial under state law. 272**US**312, 47**SCt**103, 71 **L ed**270, 48**ALR**1102. [c] **Arrest under state process** is held valid despite pendency of federal prosecution for same offense. 272**US**312, 47**SCt**103, 71**L ed**270, 48**ALR**1102.

161-89½-New. Under Eighteenth Amendment of federal constitution state court as well as federal court has jurisdiction of offense of possession of intoxicating liquor. 162**La**1060, 111**S**421.

161-89¼-New. Court of new federal district has jurisdiction of prosecution for crime committed in its territory before its creation from other districts. 22**F(2d)**95.

161-96½-New. State cannot punish for using mails to defraud. 244**NY**243, 155 **NE**113.

161-6½-New. State court has jurisdiction in prosecution for false swearing based on sworn application for loan from Federal Land Bank. 107**TexCr** 370, 296**SW**576.

162-8 40**F(2d)**34; 171**Minn**466, 214**NW** 279.

162-21 **CalA** 260**P**384.

162-21½-New. A state has jurisdiction to punish all persons committing offenses against its penal laws within the state unless deprived thereof by the constitution of the United States or by express legislative enactment. **CalA** 259**P**762.

163-24 22**F(2d)**437; 39**GaA**643, 148**SE** 165(2dcase). [b] **Intercepting car containing whisky, on public highway within court's jurisdiction,** gives court jurisdiction of prosecution for possessing liquors. 21**AlaA**70, 105**S**423.

163-26½-New. The court has the power to determine its jurisdiction, and whether the offense as charged was committed within its territorial jurisdiction. 219**Ala**12, 121**S**12.

163-29 217**AppDiv**514, 217**NYS**289 (dictum); 118 **Or**5, 244**P**512.

163-30 118 **Or**5, 244**P**512.

164-32 118 **Or**5. 244**P**512.

164-34 31**F(2d)**966.

164-38 But see 16**F(2d)**776.

164-46 37**GaA**164. 139**SE**87; 41**GaA** 545, 153**SE**628; 263**Mass**25, 160**NE**531; 220**MoA**632, 291**SW**184.

164-48 [b] **Temporary absence of wife.** -36**GaA**312, 136**SE**466.

164-49 197**NC**668, 150**SE**197.

165-50 But see 232**Ky**432, 23**SW(2d)** 555.

165-64 145**Va**893, 134**SE**723.

165-64½-New. The formation in one county of fraudulent intent to convert the property, followed by conversion with such intent in another county, is sufficient to give jurisdiction in county where the intent was formed. 145**Va** 893, 134**SE**723.

166-70 170**Ark**484, 280**SW**398.

168-96 24**GaA**160, 99**SE**891; 39**Mich** 545; 79**PaSuper**171.

168-96½-New. Receiving stolen goods not within jurisdiction of federal courts where acts were committed in New York. 128**Misc**176, 218**NYS**633.

168-99 [a] (3) 317**Mo** 380, 295**SW**747. [b] (2) Acts of congress granting to Iowa and Nebraska concurrent jurisdiction "on" Missouri River do not prevent Nebraska, without concurrence of Iowa, from exercising criminal jurisdiction west of boundary line in middle of channel. 118**Nebr**174, 224**NW**18. [i] **Retention of jurisdiction by state first acquiring it.**-118**Nebr**174, 224**NW**18.

169-9 19**F(2d)**387.

169-11 [a] **Under British Treaty** (1) power to arrest for importing liquor extends to distance able to be traveled in one hour from coast, not from beacon on reef in sea. 7**F(2d)**488. (2) "Possessions" as used in treaty means territorial possessions. 7**F(2d)**488. (3) Treaty contemplating proceedings for attempting to import liquor both against British vessels and British nationals thereon. 7**F(2d)**488. (4) Treaty construed to extend territorial waters of United States to one hour's travel from coast. 7**F(2d)**488.

169-11½-New. However, under "rum" treaties, nationals of another country seized on board "rum runner" beyond three-mile limit are subject to prosecution in United States. 273**US**593, 47**SCt** 531, 71**L ed**793.

170-15 [a] **Under Porto Rico organic act** federal court has no jurisdiction of common law offenses committed within harbors and navigable streams and bodies of water in Porto Rico. 13**Porto RicoFed**255. See also 243**Mich**498, 220 **NW**785.

170-18 21**F(2d)**533 (vessel moored to wharf in foreign port).

170-19 46**Philippine**729.

172-34 27**F(2d)**518.

172-39 [a] **That federal court has jurisdiction in particular case** does not of itself preclude state from having concurrent jurisdiction. **CalA** 259**P**762.

172-41 246**NY**467, 159**NE**401. [a] **Federal jurisdiction may be lost** by nonuse of land for governmental purposes. 35**F(2d)**750.

172-42 281**US**138, 50**SCt**284, 74**L ed** 761; 203**Cal** 782, 265**P**944; 246**NY**467, 159**NE**401; 111**TexCr**264, 12**SW(2d)** 796. [b] **That deed to property runs to public corporation** is immaterial as affects exclusive jurisdiction of United States where corporation is governmental agency and ground is used exclusively for military purposes. 203**Cal** 782, 265**P**944. [c] **Consent of United States to cession of exclusive jurisdiction** will be presumed. 203**Cal** 782, 265 **P**944.

173-46 23**AlaA**138, 122**S**299.

173-48 107**TexCr**276, 296**SW**520. [b] **Land occupied by corporation created by congress as national soldiers home** is not within exclusive jurisdiction of federal courts when not conveyed to, or accepted by, United States government. **CalA** 259**P**762.

173-48½-New. State's criminal jurisdiction extends to all federal forest reservations lying in the state. 22**AlaA** 444, 116**S**706.

173-48¼-New. A jury finding in a robbery prosecution cannot be the source or extension of the court's jurisdiction of offense within military reservation. 246**NY**467, 159**NE**401.

173-48¼-New. The court's jurisdiction over crime being challenged on the ground that the legislature of the state had ceded dominion over the lands where the crime was committed to the United States, the courts must construe the relevant statutes and deeds. 246 **NY**467, 159**NE**401.

173-49 But see 4**HawaiiFed**62. [b] (2) Federal district court has exclusive jurisdiction of homicide committed on stairway of building owned by government and occupied by army although upper floor is occupied by insular court. 13**PortoRicoFed**282.

173-50 [d] (2) Under federal constitution and California statute, United States has exclusive jurisdiction of offense committed on property of National Home for Disabled Volunteer Soldiers, corporation existing under laws of United States. 203**Cal** 782, 265**P**944.

173-54 [a] 15**F(2d)**84.

174-55½-New. An order prescribing the manner of dividing business between the two district judges of eastern district of Oklahoma does not affect jurisdiction of either judge to receive indictments and pleas and impose sentence. Comp. St. § 990. 15**F(2d)**84.

174-55¼-New. Prosecution in the court of a new district of a crime committed in its territory prior to the creation of the district is not in violation of United States Const. Amendm. VI. 22**F(2d)**95.

174-56 [c] **Jurisdiction of town to en-**

force its ordinances does not extend three miles beyond its corporate limits. 143Va540; 129SE257.

174–60 322 Ill 54, 152NE542; 196 Ind 704, 149NE432; 216Ky182, 286SW1042; 319Mo 440, 48W(2d)424 (order of juvenile court dismissing indictment is nullity where no jurisdiction of person is procured); 131Misc62, 226NYS689.

174–62 200 Iowa1234, 206NW119 (actual custody necessary); MoA 282SW 739. [b] **Where accused was not in court in person** and not under bail to appear, only power court had over him was to issue warrant for his arrest. 200 Iowa1234, 206NW119.

174–63 See also 273US1, 47SCt250, 71 L ed505.

174–63½–New. An unlawful arrest will not bar a prosecution upon an indictment afterward regularly found against accused. 104WVa330, 140SE55, 56ALR 257.

175–66 12F(2d)976.

175–67 132Misc741, 230NYS767; 118 Or5, 244P512.

175–68 235Mich340, 209NW81, 82 [cit CJ]; 130Misc224, 223NYS681; 118 Or5, 244P512; BC [1924] 2DomLR863; Ont [1929] 2DomLR732. But see Alta [1929] 3DomLR766. [a] (2) Court does not have actual custody of person of indicted defendant because of fact that state is holding him in confinement in penitentiary under former conviction. 200 Iowa1234, 206NW119. (3) But court has power under statute to have defendant produced before it for purpose of conferring jurisdiction over his person and for purpose of trial. 200 Iowa1234, 206NW119. (4) That under rules of board of parol no pardon or parol will be granted to prisoner if another indictment is pending against him is ground only for changing rule and not for declaring that court has jurisdiction of his person. 200 Iowa1234, 206NW 119. [b] (3) 243 IllA348.

175–70 118 Or5, 244P512.

176–77 22AlaA333, 115S419; 22AlaA 646, 119S250; 318 Ill 380, 149NE271; Ill 172NE722; NJ 129A427 (unwarranted arrest does not affect jurisdiction of police magistrate to hear case); 111 Okl 240, 239P566.

176–78 318 Ill 380, 149NE271.

176–79 318 Ill 380, 149NE271; 235Mich 433, 209NW663; 155Miss574, 124S789; 131Misc411, 227NYS142; 111 Okl 240, 239P566.

176–80 318 Ill 380, 149NE271; MoA 282SW739.

176–82 89 IndA552, 167NE155.

176–82½–New. Jurisdiction of the subject matter is determined by allegations in information or indictment. 142 Okl 258, 286P765.

176–83 318 Ill 380, 149NE271; 229Ky 654, 17SW(2d)738; 159La956, 106S455.

176–84 Ida 291P703; 207 Iowa322, 222 NW867; 158La471, 104S211; 101NJEq 540, 138A369; 131Misc411, 227NYS142; 224AppDiv243, 229NYS644; 91PaSuper 485.

176–85 NJSup 147A774(2dcase). [a] **Voluntary appearance and surrender.**–(1) Indicted defendant may voluntarily appear when advised of indictment and thereby surrender himself to officer holding warrant and to custody of court. 200 Iowa1234, 206NW119. (2) But mere record entry or appearance of accuser is insufficient to give court jurisdiction. 200 Iowa1234, 206NW119.

177–90 11F(2d)843; 11F(2d)847.

177–92 But see 6F(2d)942.

177–95½–New. Sufficient indictment and proved or admitted identity of defendant establish complete case for removal. 13F(2d)225.

177–95¼–New. Where a court is without power to transfer to a specific county in another district, and no application is made for the transfer to another district generally, motion to transfer to specific county is properly denied. 25 F(2d)430.

177–1 126Me505, 140A186.

177–2 168La281, 121S867. [j] **In Missouri.–A** 289SW661.

178–6½–New. In Ohio refusal by court of domestic relations to hear case of minor charged with felony is equivalent to exercise of discretion under Gen. Code § 1681 and to transferring case to common pleas court. 23 OhA348, 155 NE499.

178–8 168La281, 121S867.

178–19 [a] **Time of application.–MoA** 289SW661. [b] **Sufficiency of application.–MoA** 289SW661.

178–19½–New. Question of jurisdiction of police court is not presented by motion for certificate of removal. 229App Div281, 242NYS348.

179–20 109TexCr510, 5SW(2d)770; 111TexCr463, 14SW(2d)1028(1stcase); TexCr 28SW(2d)150(2dcase). [c] **In New Jersey.–Sup** 131A625.

179–36½–New. Difference in numbers placed on indictment does not affect jurisdiction on transfer. 101TexCr133, 277SW124.

180–37 [a] **Plea of former jeopardy remains** notwithstanding transfer. 70 CalA17, 232P991.

180–46 [a] **Minutes in court** to which transfer was made that defendant's plea was stated means that plea made on arraignment was stated to jury. 70CalA 17, 232P991.

181–67 218Ala250, 118S265.

181–71 [b] **Insular courts of Porto Rico** were not ousted of jurisdiction of prosecution for aggravated assault, regardless of whether defendant had or had not right to transfer to federal court by removal, habeas corpus or otherwise. 5F(2d)280. [c] **Where dispute develops at trial as to place of offense,** court of county in which indictment was found properly retains jurisdiction. 215Ky 847, 287SW21. [d] **Extradition of accused before trial** does not deprive state of jurisdiction if thereafter he comes within its custody. OklCr 292P888(2d case).

182–72 36F(2d)499.

182–82 198Cal 216, 244P355.

183–87½–New. A trial judge does not lose jurisdiction by suspending court and going into another county for a few hours during the trial of the case and before final submission to the jury where the jury is held together and no proceedings are had in his absence. 35 OklCr204, 249P968.

183–90 But see 50SD48, 208NW224.

183–93½–New. Where the court in one department orders sanity inquiry, the court in the same department to which the case has been transferred must observe such order. 77CalA752, 247P585.

183–95 95CalA571, 273P143 (court's determination as to jurisdiction cannot be collaterally attacked); 136Misc224, 241NYS127. [b] **Presumption is rebuttable.–**131Misc657, 228NYS361.

183–1 Cal 290P43; 44 Ida636, 258P553, 554 [citCJ]; 316Mo 372, 289SW898; 218 MoA448, 279SW200; NJSup 132A306. But see CalA 288P57.

184–2 27 OhA297, 161NE284.

184–4 134Misc228, 235NYS173. [a] **Question of disqualification must be raised before loss of jurisdiction.–**149 Miss718, 115S879.

184–5 273US1, 47SCt250, 71L ed505; 23F(2d)858; 89 IndA552, 167NE155; 174Minn608, 219NW452; 102NJL125, 130A614; 250NY358, 165NE810; 26 OhA317, 159NE854.

184–6 102NJL349, 133A785; 91PaSuper544.

184–7 318 Ill 380, 149NE271; 196 Ind 704, 149NE432; 229Ky654, 17SW(2d) 738; 158La471, 104S211; 174Minn608, 219NW452; 134Misc228, 235NYS173.

184–7½–New. The absence of a valid indictment or information cannot be waived. 318 Ill 293, 149NE241.

184–12 23F(2d)858; 21AlaA244, 107S 40; 86Mont147, 282P500(1stcase); NJ Sup 132A306; 134Misc228, 235NYS173.

185–13 204Cal 39, 266P518.

185–16 19F(2d)127.

185–17 33Ariz383, 265P609; La 129 S736; 261Mass294, 158NE894; 151Miss 648, 118S624 (where county is divided into two districts). But see Sask [1928] 1DomLR260.

185–19 37Wyo 372, 262P24.

186–22 16F(2d)776; 21AlaA627, 111S 195; 23AlaA83, 121S2(2dcase). [i] **University of Virginia grounds** is held not brought within territorial limits of city of Charlottesville by court order so as to deprive court of Albemarle County of jurisdiction of criminal cases arising on university grounds. 146Va296, 135SE895. [j] **Act extending Charlottesville City limits** is held not to deprive circuit court of Albemarle County of jurisdiction of criminal cases arising on grounds of University of Virginia. 146Va296, 135SE895. [k] **Under federal statutes,** denial of trial of capital offense in county where crime was committed is not ground for reversal in absence of abuse of discretion. 32F(2d) 860. [l] **Escape.–**247Mich608, 226NW 651.

186–23 [e] **"Except as herein otherwise provided"** in Pen. Code § 777 as existing prior to 1919; meant as otherwise provided in Penal Code or in same title and chapter thereof. 67CalA445, 228P 50.

186–24 [b] **In Alabama.–**214Ala285, 107S800.

187–27 [c] **Under United States judicial code** providing that trial of offenses punishable by death shall be in county where offense was committed where it can be done without great inconvenience, holding trial in county where there was United States public building rather than where offense was committed held within discretion of court. 6F(2d)134.

187–29½–New. Constitution does not guarantee trial at defendant's residence. 16F(2d)776.

187–31 [a] **Waiver not shown.–**23AlaA 446, 126S611.

187–31½–New. A defendant in a criminal case can bind himself by stipulation for a change of venue to another jurisdiction. 322Mo 234, 14SW(2d)628.

187–33 170La954, 129S541 (threats by telephone). [d] **Enticing away child.–** 84CalA6, 257P549.

187–34½–New. State capitol venue of prosecution for failure of dealer to pay tax on motor vehicle fuel. Kan 291P737.

187–35 219Ala12, 121S12; 94CalA791, 271P926; Mont 287P636 (crime committed where wife and children reside); Or 290P1094; Or 292P98. [a] (1) 318 Mo 693, 300SW1071.

187–36 [a] 130Misc155, 223NYS599.

188–37 23AlaA1, 121S9(2dcase).

188–48 83Colo 295, 264P658.

188–53 101WVa300, 132SE654 (bribery of juror). [a] **Activity of principals** in several counties to carry out bribery agreement is held not to constitute failure of proof of venue. 104TexCr210, 283SW850.

189–62 79CalA612, 250P585; 318Mo 803, 18W(2d)133, 134 [quotCJ]. [f] **Venue of embezzlement of draft** is in county where draft is transferred and delivered and not in county where it is payable. Mo 289SW553.

190–66 220Ky771, 295SW1047.

190–68 79CalA612, 250P585.

190–72 CalA 290P470; 232Ky232, 22 SW(2d)618; 66Utah319, 242P395, 396 [quotCJ], 43ALR532. But see CalA 290 P470.

191–74 66Utah319, 242P395, 397 [quot CJ], 43ALR532.

191–74½–New. Where the false pretenses were made and a check was received by mail in a county, jurisdiction of the offense of obtaining a check under false pretenses is in such county although the check was mailed from a place outside of the state. 170Ark484, 280SW398.

191–74¼–New. Where, induced by a telegram sent from without the state, money is delivered within the state to a telegraph company for transmission to defendant at a place without the state, the telegraph company is defendant's agent, and the crime of obtaining money by fraud is committed in the state where the money is delivered to the telegraph company. 66Utah319, 242 P395, 43ALR532.

191–75 66Utah319, 242P395, 397 [quot CJ], 43ALR532.

191–80 201 Iowa159, 205NW534; 232 Ky232, 22SW(2d)618.

191–85 215Ky613, 286SW696.

192–90 96Fla243, 118S22; 203 Iowa 1305, 214NW735; 105TexCr516, 289SW 54.

192–91 105TexCr516, 289SW54.

192–92½–New. Finding of deceased's

body in the county gives the court jurisdiction and warrants the jury in finding that the homicide was committed in that county. 265Mass382, 163NE251(2d case).

192-2 [a] **Court of indictment** held to have jurisdiction to try defendant, though crime extended into district of his residence. 22F(2d)702.

192-5 131Misc256, 226NYS741; OklCr 287P1055; 108TexCr311, 300SW69.

194-20½-New. The place where the false statement was made and not that of the fact as to which such statement was made determines the question of venue. 210Ky456, 276SW141.

194-24 128Misc176, 218NYS633.

194-25 12PaDist&Co 781.

194-27 [a] (1) 104TexCr438, 284SW 577. (2) 105TexCr566, 289SW404. (3) 104TexCr438, 284SW577. (6) Defendant's connection with property need not have begun in county where offense is laid in indictment. 104TexCr438, 284 SW577.

194-29 [a] **Where owner of automobile was compelled to drive defendant from one county into another** where defendant drove away with car, venue lies in either county. 49SD434, 207NW224.

195-35 100TexCr349, 272SW1113; 106 TexCr659, 294SW556.

195-35½-New. Jurisdiction of court of county where liquor sold and delivered is not affected by fact that a check in payment was given in a different county. 100TexCr349, 272SW1113.

195-35¼-New. or that prior to transfer of the liquor the parties had met and agreed on terms of sale. 100TexCr349, 272SW1113.

195-35¼-New. Venue is properly placed in county of delivery, although payment was made in another county. 106TexCr659, 294SW556.

195-47 75Miss24, 22S99. [b] **Not necessary to allege and prove the place of organization of the corporation defendant** in prosecution for violation of anti-trust laws. 214 Ill 421, 73NE770.

195-51 21AlaA339, 108S620; 79CalA 612, 250P585; 80CalA138, 251P672; 86 CalA160, 260P330; 201 Iowa159, 205 NW534; 203 Iowa1305, 214NW735, 737 [citCJ]; 250NY154, 164NE889; 221App Div315, 222NYS744; OklCr 292P571; 120 Or508, 252P951; TexCr 283SW506.

196-53 71CalA144, 234P924 (jurisdiction of offense of aiding and abetting is in county of abettor).

196-54 Miss 112S797; 37 OklACR650. [a] But see NJSup 151A365.

196-57 93CalA566, 269P939; 161Tenn 177, 298W(2d)255.

196-60 Miss 112S797.

196-64 80CalA138, 251P672; 48 Ida 335, 282P93; 201 Iowa159, 205NW534; 206 Iowa826, 221NW344.

196-65 21AlaA339, 108S620.

196-66 179Minn217, 228NW926 (triable in county from which report mailed).

196-68½-New. Embezzlement is within the rule. 79CalA612, 250P585.

197-71 86CalA95, 260P394; 130 Or132, 279P283 (statute held not unreasonable exercise of legislative discretion). [f] **In Alabama.**–21AlaA165, 106S348.

197-78 35PortoRico 404 (new district).

197-79 35PortoRico 404.

198-95 14F(2d)510.

198-96 20F(2d)273; 39F(2d)152. [c] (1) See also 23F(2d)860. (3) Conspiracy to violate Sherman Act may be tried in district where overt act took place. 273US392, 47SCt377, 71Led700, 50ALR989.

199-2 16F(2d)776; 22F(2d)702. [b] **Mere intent is not "beginning"** within statute. 23F(2d)226.

199-4 272US542, 47SCt173, 71Led398; 16F(2d)776. [a] (1) 272US542, 47SCt 173, 71Led398. (6) Prosecution for mailing nonmailable matter containing poison with intent to kill or injure another may be had in district where defendant causes delivery to be made. 28 F(2d)150. [f] **Venue of altering and possessing stolen bonds** with intent to defraud, where bonds were possessed in one district and stolen in another, cannot be laid in latter district without proof of alteration therein. 23F(2d) 226.

199-5½-New. Selection of district for trial is not for court. 16F(2d)776.

199-5¼-New. However, unnecessary selection of district other than that of accused's residence for trial is not in violation of due process. 16F(2d)776.

199-5¼-New. Federal court in Illinois has jurisdiction of offense of transporting narcotics from Illinois to Indiana. 21F(2d)934.

199-5½-New. Commission of necessary overt act confers jurisdiction on court where overt act is committed. 21F(2d) 903.

200-9 43F(2d)273.

200-10 161Tenn177, 298W(2d)255.

200-12 161Tenn177, 298W(2d)255.

201-24 71CalA144, 234P924.

201-31 237Mich481, 212NW105; 145 Miss116, 110S361; 135Misc471, 239NYS 61; 38 OklCr62, 259P168; 104TexCr 263, 283SW522; 103WVa30, 136SE503.

202-32 311Mo 391, 279SW23. [a] **Statute relating to disqualification of judge** does not provide for change of venue but merely for substitution of another judge. Mo 29SW(2d)125.

202-36 119 Or522, 250P216. [b] **In Washington.**–154Wash315, 282P70.

202-36½-New. Mere inconvenience of accused is no ground for change. 16 F(2d)776.

202-37 131 Or218, 282P228.

203-40 7Alaska276, 284 [quotCyc]; 237Mich481, 212NW105; 32NM319, 255 P396, 398 [citCJ].

203-41 230Ky707, 20SW(2d)721.

203-42 242Mich345, 218NW704.

203-50 29 OklCr324, 233P776.

203-52 33PortoRico 48.

203-53 123Kan774, 777, 256P804 [cit CJ]; 218Ky72, 290SW1075; 33Porto Rico 48; 100TexCr114, 272SW149.

203-55 168Ark1005, 272SW671; 196 Ind699, 149NE438; 198 Ind23, 152NE 171; 207 Iowa203, 222NW445; 314Mo 608, 285SW101; 32NM453, 259P616; 111TexCr140, 12SW(2d)213.

203-56 198 Ind23, 152NE171; 196 IndA39, 146NE855, 857 [citCJ]; MoA 297SW150; 54ND5, 208NW394. [b] **Statute held not repealed.**–54ND5, 208 NW394.

204-57 118Kan641, 236P855; 214Ky 620, 283SW958.

204-58 113TexCr535, 21SW(2d)503; 103WVa30, 136SE503.

204-59 22AlaA214, 114S279; 169Ark 717, 276SW849 (no abuse shown); 179 Ark1047, 20SW(2d)130; Ark 32SW(2d) 169; 69CalA257, 231P593; 83Colo 400, 265P909; 86Colo 35, 278P594, 65ALR 1260; 87Colo 507, 289P1081; 109Conn 571, 145A47; 110Conn55, 147A118; 91 Fla446, 107S331; 202 Iowa173, 209NW 458, 47ALR407; 204 Iowa1306, 214NW 743; 118Kan641, 236P855; 128Kan299, 278P1; 218Ky72, 290SW1075; 225Ky 492, 9SW(2d)132; 230Ky707, 20SW (2d)721 (discretion abused); 159La562, 105S621, 622 [quotCJ]; 161La856, 109 S516, 517 [quotCJ]; 237Mich481, 212 NW105; 242Mich345, 218NW704; 251 Mich99, 230NW931 (holding no abuse of discretion); 171Minn414, 214NW280; 313Mo 71, 281SW35; 314Mo 608, 285 SW101; Mo 30SW(2d)750; 114Nebr 404, 207NW928; 116Nebr268, 216NW 823; Nebr 227NW314; 55ND511, 214 NW800; 27 OhA297, 161NE284; 38 OklCr62, 259P168; OklCr 273P366(2d case); OklCr 288P496; 119 Or522, 250 P216; 129 Or564, 278P568, 63ALR1225; 33PortoRico 48, 50 [citCJ]; 138SC532, 137SE139; 105TexCr470, 289SW57; 107TexCr541, 298SW293; 111TexCr182, 118SW(2d)519; 112TexCr203, 17SW(2d) 813; TexCr 29SW(2d)399; 65Utah362, 237P476; Utah 276P163; 146Va296, 135SE895; 144Wash363, 258P23; 104 WVa617, 141SE7; Wis 229NW51. [a] **On motion by state** for change of venue on ground of local prejudice, it is within court's discretion whether change shall be had. 34NM254, 280P256. [b] **Discretion not abused.**–TexCr 28SW(2d) 794.

204-60 210Ky378, 275SW881; 218Ky 72, 290SW1075; 171Minn414, 214NW 280; OklCr 273P366(2dcase); 65Utah 362, 237P476.

205-62 Fla 130S273; 232Ky453, 23SW (2d)930; 233Ky545, 26SW(2d)489; 114 Nebr292, 207NW168 (court is without discretion to refuse change of venue, when facts appear showing prejudice which will prevent fair trial in county); 138SC532, 137SE139; 53SD60, 220NW 139. [b] **Facts held to require grant of application.**–114Nebr292, 207NW168.

205-62½-New. Where the evidence of the state in a criminal case shows that the offense charged in the information was not committed in the county where it is being tried, and that the court has no jurisdiction, it is the duty of the court to order the venue corrected, and direct the transfer of the cause to the proper county. 127Kan497, 274P 274.

205-64 Fla 130S273; 229Ky617, 17SW (2d)757.

205-65 225Ky492, 9SW(2d)132; 229Ky 617, 17SW(2d)757; 145Miss116, 110S 361; 131Misc664, 228NYS31; 27 OhA 297, 161NE284; 138SC532, 137SE139; 104TexCr263, 283SW522; 105TexCr262, 288SW201; 111TexCr140, 12SW(2d) 213; 111TexCr405, 13SW(2d)104; WVa 106SE503. [d] **Right to change of venue** depends on conditions existing at time of trial. 146Va296, 135SE895.

205-66 87Colo 507, 289P1081 (holding fact that deceased was of high standing in community is not in itself a ground for change); 159La562, 105S621; 27 OhA297, 161NE284; 104WVa617, 141 SE7. [a] **Right to trial by jurors removed from bias and prejudice of others.**–SD 227NW463.

205-67 228Ky561, 15SW(2d)440; 159 La562, 105S621; 161La856, 109S516; 171Minn414, 214NW280; 27 OhA297, 161NE284; 38 OklCr62, 259P168; 103 TexCr318, 280SW202; 104TexCr263, 283 SW522; TexCr 11SW(2d)172; 65Utah 362, 237P476; Wash 291P1093.

206-68 22AlaA214, 114S279; 320 Ill 495, 151NE280.

206-69 159La562, 105S621, 622 [quot CJ].

206-70 159La562, 105S621, 622 [quot CJ]; Mo 21SW(2d)758(3dcase); 137SC 360, 135SE356.

206-71 OklCr 288P496.

206-71½-New. Refusal of change of venue is not error where no jurors were selected from towns particularly complained of and there was no difficulty in obtaining an unbiased jury. 129 Or 564, 278P568, 63ALR1225.

206-72 215Ala42, 109S109; 159La562, 105S621, 622 [quotCJ]; 33PortoRico 48; 103WVa30, 136SE503; 104WVa617, 141SE7. [c] **Actual prejudice** must be shown. 33PortoRico 48.

206-73 204 Iowa1306, 214NW743; 159 La562, 105S621, 622 [quotCJ]; 33Porto Rico 48; TexCr 11SW(2d)172.

206-74 159La562, 105S621, 622 [quot CJ]; 103TexCr318, 280SW202.

206-74½-New. Tentative impression received from newspaper accounts of alleged crime cannot be made basis of change of venue. 215Ala635, 112S212.

206-75 [c] **Removal of prisoner from county jail** for fear of violence held no ground for change of venue of trial occurring two months later. 146Va296, 135SE895.

207-78 [a] **Sufficiency of evidence.**–41 GaA663, 154SE304.

207-82 TexCr 29SW(2d)375.

207-82½-New. Great expense of prosecution is not ground for change of venue on state's motion. 237Mich481, 212NW 105.

207-86 326 Ill 327, 157NE247; 26 OhA 335, 159NE481.

207-87 198 Ind23, 152NE171; 121 Or 451, 255P897. [c] **Venue statute** as relates to prejudice of judge should be literally construed. 326 Ill 327, 157NE 247. [d] 121 Or451, 255P897. [e] **Second change is not allowed** under statute. 311Mo 391, 279SW23. [f] **In Illinois.**–328 Ill 332, 159NE360.

208-89 154Wash315, 282P70.

208-94 But see 121 Or451, 255P897.

208-95 198 Ind23, 152NE171.

208-96 198 Ind23, 152NE171.

208-97 [a] (2) When change of venue is granted on personal knowledge of the court and the written statement of the commonwealth's attorney, neither petition nor notice is required. 210Ky 542, 276SW507. [c] (8) Court cannot change venue before defendant's arrest.

108TexCr551, 18SW(2d)892. [f] **Court may make order** whether or not accused consents. 100TexCr607, 272SW209.

208-98 Ill 173NE175 (divorce suit abates on death of defendant).

208-99 108TexCr551, 18SW(2d)892.

209-4½-New. Where trials under a joint indictment have been severed and the indictment has been removed to the county to which venue as to one of the defendants has been changed, the court of the county retaining jurisdiction of the prosecution against the other defendant may change venue in his case notwithstanding the absence of the indictment. 105TexCr590, 289SW691.

209-4¼-New. At common law court of general jurisdiction may transfer cause from one county to another; 126Me505, 140A186.

209-4¼-New. but not a court of inferior jurisdiction. 126Me505, 140A186.

209-5 But see 33PortoRico 48.

209-13 78CalA476, 248P981 (required by statute to be in writing and verified); 233Ky545, 26SW(2d)489; OklCr 273P 366(2dcase); 100TexCr114, 272SW149.

209-17 33PortoRico 48.

209-18 121 Or451, 255P897.

210-24½-New. Application for substitution of another judge in place of a judge deemed incompetent to try a criminal case, cannot be regarded as an application for a second change of venue. 322Mo 48, 14SW(2d)447.

210-31 198 Ind23, 152NE171. [f] **In Illinois.**–329 Ill 352, 160NE564.

210-32 336 Ill 286, 168NE332. [a] (2) No lack of diligence shown where motion made on same day rulings on motion to quash and dismiss counts in charge were made. 198 Ind23, 152NE 171.

210-33½-New. Any rule requiring motion before day of trial is inapplicable where charge on which defendant is tried did not exist until day he was tried thereon. 198 Ind23, 152NE171.

210-34 169Ark579, 275SW918; 195Wis 271, 218NW206.

210-35 See also 153Miss654, 121S284. [c] **After jury partially impaneled.**–169 Ark579, 275SW918.

211-36½-New. Where right to apply for change of venue is not exercised by or before the time it should be, the right will be held to have been waived. 169 Ark579, 275SW918.

211-37 Mo 2SW(2d)712.

211-39 210Ky542, 276SW507 (notice required only when change of venue is ordered on application of defendant or commonwealth); 318Mo 1198, 2SW(2d) 767 (denial of motion held proper in absence of notice); Mo 24SW(2d)1023.

211-48 311Mo 391, 279SW23.

212-52 See also 145Miss116, 110S361.

212-58 169Ark636, 276SW365; 170Ark 602, 280SW636; 171Ark556, 286SW819; 314Mo 673, 285SW726; 318Mo 1198, 2 SW(2d)767 (affidavit held insufficient); MoA 9SW(2d)253(1stcase); MoA 27SW (2d)726; 107TexCr541, 298SW293; Tex Cr 11SW(2d)172.

212-59 318Mo 1222, 2SW(2d)780.

212-62 [a] **Jurat.**–33PortoRico 48.

212-64 84Colo 57, 267P1066, 1067 [cit CJ]; 314Mo 684, 285SW496; 33Porto Rico 48; 103WVa743, 138SE393; 104 WVa617, 141SE7. [a] **Opinion of persons** as to state of local prejudice regarded as mere conclusion unless followed up by some specification. 33Porto Rico 48.

213-65 [a] **Affidavits held sufficient.**–MoA 297SW150.

213-66½-New. Affidavits supporting application on ground of local prejudice are insufficient where they do not show that witnesses reside in different parts of county. Mo 24SW(2d)1023.

213-67 320Mo 254, 7SW(2d)275 (requirements and sufficiency of affidavits). [b] (1) Contra 107TexCr541, 298SW 293. [c] (1) 169Ark636, 276SW365 (finding that affiants were not credible persons held warranted); 179Ark1047, 20SW(2d)130. [d] **Defendant's affidavit** alone not sufficient. 108TexCr285, 300SW75. [e] **Extent of knowledge necessary.**–179Ark1079, 20SW(2d)119; 179Ark1047, 20SW(2d)130.

213-68 171Ark556, 286SW819. [a] 170Ark602, 280SW636. [c] **In Missouri.**–314Mo 684, 285SW496.

213-69 7Alaska252.

213-70 43 Ida46, 248P442; 107TexCr 541, 298SW293.

213-71½-New. But the absence of opposing affidavits does not necessarily make showing of defendant conclusive. 119 Or522, 250P216.

213-73 [a] (1) 86Colo 35, 278P594, 65 ALR1260. [b] **Proper to strike from counter-motion for defendant** scandalous matter imputing improper motives and acts to district attorney. 32Porto Rico 367.

213-82 196 Ind699, 149NE438; 198 Ind 23, 152NE171; 32NM453, 259P616.

214-84 33GaA825, 127SE881; 41GaA 663, 154SE304; 329 Ill 352, 160NE564; 53SD60, 220NW139; 107TexCr541, 298 SW293; TexCr 28SW(2d)794; TexCr 29SW(2d)399. [b] **Consent by prosecuting attorney.**–33PortoRico 48.

214-84½-New. Trial court's reason for denying motion on ground it was too late under rules, held, on appeal, only a conclusion, in absence of record showing such rules. 198 Ind23, 152NE171.

214-85 320 Ill 495, 151NE280; 144Miss 634, 110S206.

214-86 180Ark1160, 24SW(2d)859 (discretion limited to credibility of affiants).

214-88 83Colo 400, 265P909.

214-89½-New. Jurisdiction of court, after application filed but before order made, to vacate bail bond and order accused into custody is not affected by statute requiring disqualified judge in one division of circuit court to transfer case to another division instead of granting change of venue. 307Mo 1, 269 SW380.

214-90 169Ark717, 276SW849; 180Ark 1160, 24SW(2d)859.

214-91 168Ark1005, 272SW671; 179 Ark1047, 20SW(2d)130; Ark 32SW(2d) 169; 33NM334, 266P917.

214-94 181Ark398, 26SW(2d)78 (in view of showing as to credibility of affiants, refusal of change held error). [a] **Affidavits entitled to all weight** that should be given to any affidavit whatsoever, in absence of any showing or indication of facts impeaching credibility of affiants. 33PortoRico 48.

214-94½-New. It is not an abuse of discretion to find that an affiant was not a credible person where he was not produced for examination. 179Ark1047, 20SW(2d)130.

214-95 171Ark1188, 284SW721.

214-97 168Ark1005, 272SW671; 169 Ark717, 276SW849; Ark 32SW(2d)169.

214-98 168Ark1005, 272SW671; 168 Ark1122, 273SW353. [a] **Evidence held insufficient** to warrant finding that affiants were not credible. 168Ark1005, 272SW671. [b] **Court held to have abused discretion in holding affiant not credible.**–168Ark783, 272SW674.

214-1 242Mich345, 218NW704. [c] 156 Miss612, 126S390(2dcase).

214-2 163La701, 112S655.

215-5 [b] **Motion for change of venue, though sworn to,** is not evidence on trial of issues made thereby, unless it is formally introduced in evidence. 33GaA 825, 127SE881.

215-6 33PortoRico 48.

215-8 32PortoRico 367. [b] **Error to overrule summarily motion by defendant** to summon witness for cross-examination. 32PortoRico 367.

215-11 215Ala42, 109S109; 215Ala635, 112S212; 118Kan641, 236P855; 225Ky 492, 9SW(2d)132; 38 OklCr62, 259P 168; OklCr 288P496; 53SD60, 220NW 139; 104TexCr263, 283SW522; 111Tex Cr182, 11SW(2d)519; 146Va296, 135 SE895; 103WVa30, 136SE503; 104WVa 617, 141SE7. [a] **Burden of proof is met** when necessary grounds are set out and motion is supported by requisite affidavits. 233Ky545, 26SW(2d)489. [b] **Answer to petition for change of venue** does not shift burden of proof. 232Ky453, 23SW(2d)930.

215-11½-New. Presumptions. Fact that prejudice may exist at one term of court is not evidence that it exists at subsequent terms. 159La562, 105S621.

215-12 180Ark1160, 24SW(2d)859; 214 Ky620, 283SW958; 237Mich481, 212NW 105; 145Miss116, 110S361; 33Porto Rico 48; 106TexCr663, 294SW212; 103 WVa30, 136SE503. [a] TexCr 11SW(2d) 172. [d] **Showing of actual prejudice** must be made. 33PortoRico 48.

215-13 33GaA825, 127SE881; 158La 390, 104S126; 159La562, 105S621 (existence of prejudice at one term of court is not evidence of its existence at subsequent term); 131Misc664, 228NYS31 (sufficient); 38 OklCr62, 259P168; 9Pa Dist&Co 161; TexCr 283SW820. [a] 215Ala42, 109S109; 215Ala635, 112S 212; 169Ark717, 276SW849; 320 Ill 495, 151NE280; 329 Ill 352, 160NE564; 118 Kan641, 236P855; 121Kan369, 247P 1053; 125Kan365, 263P1081; 208Ky 466, 271SW559; 159La562, 105S621 (lapse of six months from first trial, no hostility during orderly trial, twelve competent jurors); 161La856, 109S516; 38 OklCr62, 259P168; 9PaDist&Co 161; 33PortoRico 48; 34PortoRico 519; 152 SC17, 149SE348; 155SC495, 152SE738; 53SD60, 220NW139; 1s8TexCr1, 299 SW422; 146Va296, 135SE895; 104WVa 523, 140SE546. [c] **Evidence sufficient to justify change of venue on motion of prosecution.**–242Mich345, 218NW704.

216-16 208Ky466, 271SW559; 232Ky 453, 23SW(2d)930; 233Ky545, 26 SW(2d)489; 32NM453, 259P616.

216-17 33PortoRico 48.

216-18 104WVa617, 141SE7. See also 33PortoRico 48.

216-20 See also 33PortoRico 48. [a] **Uniform wording** deprives affidavits of spontaneity. 33PortoRico 48.

216-20½-New. Where petition for change of venue is in proper form, supported by two affidavits, and uncontroverted, it should be granted. 218Ky 314, 291SW383.

216-22 100TexCr607, 272SW209.

216-23½-New. A statute requiring that, in case of indictment for a felony, defendant must be present during the trial, does not apply to order for change of venue before jury is impaneled and sworn. 210Ky542, 276SW507.

216-29 113TexCr535, 21SW(2d)503.

216-31 229Ky358, 17SW(2d)201(2d case) (change to county not adjoining held erroneous).

217-35 7Alaska276; 313Mo 71, 281SW 35; 314Mo 673, 285SW726. But see 113 TexCr535, 21SW(2d)503.

217-36 314Mo 673, 285SW726.

217-41 See also 313Mo 71, 281SW35.

217-41½-New. Change from county court to nearest justice's court not authorized. 117 Okl 266, 246P456.

217-41¼-New. Federal court judge will direct a case to be heard at some other place in the district because of local prejudice. 12PortoRicoFed1.

217-43 237Mich481, 212NW105.

217-44 52ND478, 203NW679, 681 [cit CJ].

217-50 312Mo 209, 278SW668.

217-51½-New. The order does not become final until the court adjourns. 177 Ark708, 7SW(2d)980, 59ALR356.

217-53 [b] **Refusal to annul order upheld.**–177Ark708, 7SW(2d)980, 59ALR 356.

218-55 MoA 282SW739 (order does not transfer jurisdiction of person); 52ND 478, 203NW679.

218-57 [a] MoA 282SW739.

218-57½-New. In Kentucky the statute in reference to recognizance or bond for appearance applies only to change of venue on application of defendant. 210 Ky542, 276SW507.

218-63 52ND478, 203NW679 [citCJ].

219-79 Mo 31SW(2d)39.

219-91 106TexCr83, 290SW1107.

220-9 52ND478, 203NW679.

220-10 Contra 58ND82, 224NW878.

220-14½-New. But mere filing of application does not deprive court of jurisdiction, so that, after application and before order made, judge may order accused surrendered for insufficiency of bail. 307Mo 1, 269SW380.

220-15 261Mass294, 158NE894; OklCr 269P385; OklCr 273P1018(2dcase); OklCr 281P305; TexCr 29SW(2d)375. But see 58ND82, 224NW878. [e] **Case must be docketed and stand for trial** at term in which it was transferred. OklCr

269P385. [f] **Nolle prosequi.**–322Mo 234, 14SW(2d)628.

220–19 37Wyo 372, 262P24. [a] Contra 322Mo 86, 14SW(2d)436.

220–23½–New. Refusal to issue writ of certiorari for district clerk of county of original venue to perfect record is held proper where clerk appeared with records and testified. 107TexCr332, 296 SW547.

220–23¼–New. The clerk of the court to which venue is changed and to which the indictment is sent may not refuse to file the indictment because it was not sent with the other papers. 105TexCr 590, 289SW691.

220–23¼–New. The prosecuting attorney may be permitted to amend an information before the jury are sworn notwithstanding a change of venue has been taken. 322Mo 1, 16SW(2d)96.

220–23⅓–New. Procedure, practice, and pleadings that are not specially provided for are in accordance with the common law. 58ND82, 224NW878.

220–23⅓–New. Under a statute providing that the cause must be docketed and stand for trial at the first term of court after the cause has been transferred, the words "first term of court" mean the immediate term when the cause was transferred. OklCr 273P1018(2dcase).

220–23⅓–New. Until defendant voluntarily appears or is arrested and brought into transferee court, it acquires no jurisdiction to enter personal judgment against him. MoA 282SW739.

220–23⅓–New. Under statute a cause must be docketed and stand for trial at the first term of court after transfer, which means the immediate or present term. OklCr 281P305.

220–23⅓–New. First term of court in statute providing for trial thereat means immediate term when cause is transferred. OklCr 287P419.

220–23 1/10–New. Where a certified record proper shows proceedings and order for a change of venue and jurisdiction of the court to which venue was removed, such court has jurisdiction, although its own record did not show change of venue or order of removal. Mo 228SW(2d)793.

220–23 1/11–New. Change of venue, pleadings, or proceedings need not be introduced in evidence in court to which action is removed or be proved as jurisdictional necessity. 245NYS41.

221–25 TexCr 298SW(2d)375 (mistake of judge in changing venue).

221–25½–New. Statutes laying down directions to officers as to official duties on change of venue are not to be applied so as to interfere with the functioning of courts. 105TexCr590, 289 SW691.

221–25⅓–New. That the indictment of defendant and another was mailed from one county clerk to another after severance is not an irregularity depriving the court of jurisdiction. 105TexCr590, 289SW691.

221–25¼–New. In some jurisdictions statutes provide that an order granting a change shall be "ineffectual" until bond is given and not that the order shall be "void." MoA 282SW739.

221–32 231Ky510, 21SW(2d)831 (judge of circuit court); TexCr 26SW (2d)256 (motion to remand properly overruled).

221–36½–New. Under a statute providing for the remand of a case where a state of lawlessness no longer exists, such state exists when public feelings would prevent an impartial verdict. 230Ky122, 18SW(2d)953.

221–36⅓–New. Remand of a case does not constitute a second change of venue in violation of statute where the court is satisfied that the state of lawlessness existing in the county where the crime was committed no longer exists. 230 Ky122, 18SW(2d)953.

221–36¼–New. In such case it is the duty of the court to remand the case on application of either party. 230Ky 122, 18SW(2d)953.

221–39 [a] **Rule that exception must be reserved** not applicable where defendant had not been arrested. 108 TexCr551, 18W(2d)892.

221–42 104TexCr649, 285SW625; 113 TexCr650, 21SW(2d)724.

222–47 83Colo 295, 264P658.

222–49 307Mo 1, 269SW380 (refusal to grant change may be waived); 159 Tenn112, 17SW(2d)30.

222–49½–New. That an impartial jury was obtained from the city in which the case was tried and no motion was made for a jury to be summoned from another city is not conclusive on a motion for a new trial on the ground of error in denying a motion for a change of venue on the ground that the case could not be impartially tried in the city in which it was tried. 132Va783, 111SE270.

222–50 [j] **In Michigan.**–235Mich433, 209NW663. [k] 284Pa105, 130A403 (dictum).

222–50½–New. Statute of limitation is an act of grace, a surrendering by the state of its right to prosecute. 325 Ill 417, 156NE303.

222–51 325 Ill 417, 156NE303; 38 OklCr281, 260P517 [citCJ]; 44Philippine387. See also MoA 274SW86. [a] **Prescription statute relieves accused** from being tried for offense. 159La589, 105S631.

222–51½–New. Protection from prosecution under the statute of limitations is a substantive right. 27F(2d)137.

222–53 163La1035, 113S366. [a] **Statute excluding time during which defendant was not inhabitant or usually resident within state** applies to crime committed but not barred before statute took effect. 56ND499, 218NW154.

223–54½–New. A later act setting four-year period for indictment impliedly repeals earlier act setting six-year period. 288Pa29, 135A645.

223–55 23AlaA578, 129S480(2dcase); 22AlaA442, 116S507; 181Ark1138, 29 SW(2d)667; CalA 292P692; 159La589, 105S631; 163La1035, 113S366; 308Mo 538, 272SW922 (forgery three years); 38 OklCr281, 260P517 (three-year limitation for all offenses except murder); OklCr 292P888(2dcase); 88PaSuper216 (embezzlement by bank officer); 5 PaDist&Co 339; 105TexCr669, 290SW 534; 101WVa617, 133SE333. [e] (3) Corruption in office for which period of limitation is extended includes embezzlement by officer of moneys coming to him by virtue of his office. 317Mo 330, 296SW370. [k] **In Montana.**–75 Mont547, 244P477. [l] **In Arkansas.**–171Ark835, 286SW975. [m] **Conspiracy to defraud United States.**–23F(2d)420 (six year limitation held to apply).

223–55½–New. Where charge for crime is punishable either as felony or misdemeanor in the discretion of the judge under statutes, it stands as a felony charge for every purpose until judgment. 197Cal 556, 241P852.

223–55⅓–New. If judgment is rendered on charge as misdemeanor it is not retroactive as to statute of limitations against misdemeanors. 197Cal 556, 241 P852.

224–58 42F(2d)686. [d] (1) 19F(2d) 431. (3) Three-year statute applies. 272US633, 47SCt219, 71L ed451. [e] (2) Limitations as to offenses under revenue laws do not apply to indictment for perjury. 271US201, 46SCt476, 70 L ed904. [f] **Six-year statute applies** to uttering or publishing forged indorsement on check to defraud United States. 13F(2d)325.

224–65½–New. Limitations under revenue law offense statutes are held inapplicable in case of conspiracy to defraud United States. 272US633, 47SCt 219, 71L ed451.

224–65⅓–New. Limitation for prosecution of offenses against internal revenue laws was extended from two to three years by Revenue Act of 1921. 13F(2d) 923.

224–65¼–New. Prosecution for embezzlement of property and money of United States is barred by six-year statute of limitations. 20F(2d)359.

224–65⅙–New. Limitation applicable to successful defrauding of United States, whether by conspiracy or not, is six years. 24F(2d)353.

224–65⅙–New. A statute of limitations, in the Bankruptcy Act, does not apply to an indictment for conspiracy to violate the Bankruptcy Act. 30F(2d)590.

224–69½–New. Provisos for interest of limitation statutes need strict construction. 272US633, 47SCt219, 71L ed451.

225–76 38 OklCr281, 260P517, 518 [cit CJ]. [a] **In Louisiana.**–159La589, 105 S631.

225–76½–New. ; but, by statute in some states, time begins to run from the time the offense becomes known to a public officer having power to investigate and prosecute. 159La589, 105S 631 (holding plea of prescription properly overruled); 161La963, 109S778.

225–76⅓–New. Under statute providing that the period runs from the time the offense is known to proper public officer, it is not necessary that the officers know that details or even that a crime is involved. 161La963, 109S778.

225–81 Iowa 230NW425.

225–87 38 OklCr281, 260P517.

225–88 [a] **Circuit clerk,** in whose office funds ordered to be deposited, is not trustee of express trust within such a statute. 181Ark1138, 29SW(2d)667.

226–89 20F(2d)454.

226–1 69CalA501, 231P358; 87CalA65, 261P1071.

227–5 322 Ill 195, 153NE357; 335 Ill 539, 167NE823 (statute begins to run on date of last overt act).

227–8 39F(2d)152.

227–10 [e] **Conspiracy to smuggle liquors** formed before Revenue Act of 1923 is held to have been kept alive by overt acts after its enactment. 5F(2d)437. [f] **Conspiracy to violate Prohibition Act** tolled limitations. 41F(2d)26.

228–12 [b] **Mere failure to perform overt act** in furtherance of conspiracy or mere inactivity does not of itself necessarily impart withdrawal in computing limitation. 33F(2d)382.

228–14 [a] **Under will directing that fund be deposited in "circuit clerk's office,"** limitations as to embezzlement began against clerk when successor took office. 181Ark1138, 298W(2d)667.

229–25 [a] **Fleeing from justice** held to involve departure from usual place of abode or from place of offense with intent to avoid detection. 116Nebr308, 217NW87. [b] **Departure from state months after offense,** with continued correspondence, held not flight. 116 Nebr308, 217NW87.

229–27 161La963, 109S778.

229–30½–New. Defendant at large under void order suspending sentence has status of escaped prisoner and right to impose sentence is not barred by statute of limitations. 171Ark835, 286SW 975.

229–31 162La917, 111S327, 329 [citCJ].

229–32 112 Oh667, 148NE362.

229–40½–New. Limitation applicable to extradition is that of the country on which the demand is made. 12Porto RicoFed77.

230–44 121Kan547, 247P631, 632 [quot CJ]; 129Kan655, 284P384 (evidence held to show concealment of fact of embezzlement).

230–50 [e] **Introduction of earlier indictment,** in prosecution over twelve months after offense, does not bring prosecution within statutory exceptions. 23AlaA578, 129S480(2dcase).

230–51 Mo 278SW685, 686 [citCJ]. See also 302Mo 634, 259SW429.

231–52 215Ala318, 111S204; Conn 151 A349 (original complaint filed within statutory period); OklCr 292P888 (2dcase); 46Philippine380. [a] See also Fla 130S36.

231–53 [a] **Indictment charging theft of mail bag** returned within three years from date of offense to central division of southern district of Iowa, but not filed in western division until more than three years held not barred by three-year statute. 20F(2d)574.

231–54 52SD273, 217NW205.

231–55 167La279, 119S48.

231–59 OklCr 292P888(2dcase); 46 Philippine380.

231–60 159La589, 105S631 (holding issue triable by jury in any event wheth-

er court had right to pass on it or not). Contra 162La917, 111S327.

231-60½-New. Burden of proof. Where indictment negatives prescription by alleging that offense was made known to a public officer within the statutory period, the burden is on defendant to prove that it was made known beyond such time so as to be prescribed. 159La589, 105S631.

231-60⅓-New. Question for court. Court may pass on question of whether action is prescribed, before trial by means of motion to quash. 159La589, 105S631.

232-67 34GaA4, 128SE228 (indictment charging no offense).

232-69 170Ark697, 280SW657; 243 IllA427; 51Philippine415.

232-70 170Ark697, 280SW657. [a] (1) 164La752, 114S641. [b] (1) 160Ga 331, 127SE652. (3) Return of second indictment, setting out new offense, within six months after quashing of misdemeanor indictment, does not toll statute of limitations. 160Ga331, 127 SE652. (4) Second indictment alleging additional distinct facts constituting misdemeanor is barred though brought within six months and alleges that first, which charged no offense, was nol prossed for informality. 34GaA4, 128 SE228. (5) Indictment quashed on informalities in drawing grand jurors is merely voidable, and tolls statute of limitations. 40GaA87, 149SE62.

233-77 100CalA18, 279P824; 145Wash 450, 260P671. [c] **Doctrine of "once in jeopardy"** does not apply to service of sentence, but only to twice being put upon "trial" for same offense. 196Cal 515, 238P359.

233-79 257Mass535, 154NE176; OklCr 290P342(2dcase); 148Va725, 138SE483. [c] **Plea of former jeopardy is favored,** when based on common-law jeopardy. CalA 288P106.

233-84 92Fla497, 109S336; NJSup 133 A536; 38 OklCr302, 260P785; 154Tenn 66, 289SW515; 145Wash450, 260P671.

233-86 156SC324, 153SE269.

233-87 5F(2d)598 (inhibition is against double punishment for same offense, not against double punishment for one offense); 160Tenn366, 24SW (2d)886.

233-87½-New. Some state constitutions, although worded differently, have been given the same construction as that given to the federal constitution by the federal courts. 231Mich260, 203NW 882.

233-87⅓-New. Right not to be put in jeopardy second time for same offense should be as scrupulously regarded as right of trial by jury. 53ND669, 207 NW991.

233-83 OklCr 278P354.

234-92 101CalA376, 281P700; 96Fla 768, 119S380; 168Ga699, 148SE593(2d case); 169La215, 124S832; Mo 22SW (2d)809; 109TexCr450, 5SW(2d)514; 146Wash221, 262P622; 108WVa277, 150 SE736. [c] **Under statute making possession of firearms** by one convicted of felony an offense, defendant prosecuted thereunder is not again being punished for past offense. 71CalA374, 235 P81.

234-92½-New. Enactment of new murder statute does not exempt from prosecution one acquitted of murder by reduction to manslaughter. TexCr 26SW (2d)256.

235-8½-New. If the Volstead Act made two crimes out of the same act, it would be unconstitutional as putting one in double jeopardy. 214NYS778.

235-8⅓-New. Infliction of heavier penalty for second offender is not double jeopardy. 163La121, 111S621.

235-8¼-New. Statute prescribing penalty for abandonment after seduction and marriage is held not to violate constitutional provision against double jeopardy for same offense. 105TexCr1, 285SW323.

235-8⅕-New. In granting the right of appeal to a state and construing the statutes giving such right, caution must be observed not to violate the prohibition that no person shall be twice put in jeopardy for the same offense. 83 Mont327, 271P707.

235-8⅙-New. A statute providing for the regulating and registering of real estate brokers and salesmen, and creating a state real estate commission to administer the act and prescribing its powers, has been held not violative of a double jeopardy clause in the Florida constitution. 97Fla710, 122S225.

235-8⅐-New. Statutory jeopardy lacks essential elements of common-law jeopardy and bars further prosecution solely because legislature has so decreed. CalA 288P106.

235-8⅛-New. Pleas of statutory jeopardy cannot be extended to cases where legislature did not clearly intend bar to exist. CalA 288P106.

235-8⅑-New. Statutes authorizing disregard of plea of conviction for want of verification do not offend against constitutional provision. TexCr 29SW (2d)393.

235-10 272US630, 47SCt218, 71L ed446; 16F(2d)597; 25F(2d)37 (acquittal under National Prohibition Act is not bar to proceedings to abate nuisance); 123 Kan62, 254P317, 319 [citCJ]; 131Misc 401, 227NYS163; 33 OhA125, 168NE 568. [e] **Confinement in penitentiary** awaiting trial is not former jeopardy. 7F(2d)818.

235-12 19F(2d)891.

235-15 177Minn200, 224NW838. But see 160Tenn599, 28SW(2d)49.

235-17 216Ala275, 113S300, 303 [cit CJ].

235-17½-New. Committal to an insane asylum after verdict of jury cannot be pleaded as former jeopardy at trial after restoration to sanity. 20AlaA529, 104 S339.

235-17⅓-New. , nor to civil actions to abate nuisance. 272US630, 47SCt218, 71L ed446.

235-17¼-New. Proceedings to recover fine imposed are barred by dismissal of prosecution imposing fine although dismissal be erroneous. TexCivA 5SW(2d) 1003.

235-18 16F(2d)597; 40F(2d)422. Contra 17F(2d)369.

235-19 23F(2d)885; 26F(2d)706.

236-22½-New. A statute providing for the imposition of a mulct tax against property used as a liquor nuisance does not render injunction proceedings to restrain the maintenance of a liquor nuisance penal in character, within the rule that defendant cannot be put twice in jeopardy. 207 Iowa636, 223NW363.

236-25 CalA 258P656; 100CalA18, 279 P824; 3Del233, 134A692 [citCJ]; 89 Fla494, 104S783, 784 [citCJ]; Ind 168 NE692; 123Kan62, 254P317; 231Mich 260, 203NW882; 53ND669, 207NW991; 24 OhA413, 157NE801; 38 OklCr302, 260P785; 152Wash576, 278P427; Wis 232NW876. [a] (3) Other instances. 33NM365, 266P920. [b] **"Valid"** means merely voidable proceedings. La 130S 348.

237-26 130Misc821, 226NYS397; Ont [1929] 3DomLR760. [a] (1) 140Miss 524, 106S265.

237-29 CalA 288P106. [b] **That accused was required to plead to two informations** charging same crime does not invade his rights. 152Wash576, 278 P427. [c] **Failure to state in order dismissing information** that indictment was pending has been held not a bar to further prosecution. CalA 288P106.

237-35 NJSup 133A536.

237-37 Ky 25SW(2d)746; 109TexCr 403, 5SW(2d)141.

238-48 Mich 233NW412.

239-54 134Misc46, 234NYS489.

239-57 15F(2d)207; NJSup 133A536; 131Misc253, 227NYS360; OhA 172NE 694; 38 OklCr302, 260P785; 160Tenn 366, 24SW(2d)886; 112TexCr271, 16 SW(2d)237(1stcase); 112TexCr273, 16 SW(2d)237(2dcase).

239-58 NJSup 133A536; 145Wash450, 260P671.

239-60 41F(2d)44; 103NJL275, 136A 345, 348 [citCJ].

240-66 127Kan497, 274P274.

240-75½-New. Hearing before prison board as to forfeiture of credits for attempt to escape is not bar to prosecution for escape. 72CalA509, 237P799.

240-76 29F(2d)926; 21AlaA286, 107S 786; 159Tenn468, 19SW(2d)233; 105 TexCr516, 289SW54.

240-77 109TexCr616, 6SW(2d)364.

241-79 141Wash1, 250P453.

241-79½-New. Plea of former conviction is good only when both courts have jurisdiction of offense in trial of which plea is offered. 160Tenn305, 23SW(2d) 658.

241-81 78CalA421, 248P691; OhA 172 NE694; 38 OklCr302, 260P785; 160 Tenn366, 24SW(2d)886; 145Wash450, 260P671. [a] **Ignoring of charge** by grand jury is not acquittal. 41 Ida598, 242P787.

241-83 70CalA195, 232P993; 78CalA 421, 248P691; 89Fla494, 104S783, 784 [citCJ]; 162La1067, 111S423; 23 OhA 109, 155NE393; 107TexCr233, 296SW 540.

241-84 100WVa647, 131SE466 [citCJ].

241-84½-New. Evidence to show subject of former charge. Parol evidence is admissible to show subject matter of former conviction or acquittal thus curing any uncertainty in indictment. 6F(2d)530.

241-85 CalA 290P629.

241-86 17F(2d)479.

241-86½-New. On such a new trial defendant is entitled to the benefit of his acquittal on any of the counts on which he was acquitted in the former trial. 17F(2d)479.

241-89 17F(2d)462; 100WVa647, 131 SE466 [citCJ].

242-92 [b] **In Alabama.**-23AlaA119, 121S690(1stcase).

242-93 65Utah609, 239P25.

242-94½-New. Bar of former conviction is not available where plea of former conviction was not filed and other conviction had not become final at date of trial and no motion for continuance was filed. 104TexCr90, 282SW599.

243-98 But see 33F(2d)263. [d] **Burglary.**-89Fla494, 104S783. [e] **Surplusage.**-5F(2d)586.

243-2 80CalA709, 252P779; 145Wash 647, 261P397. See also 24F(2d)690, 692 [citCJ].

243-3 145Wash647, 261P397, 399 [quot CJ].

243-5½-New. Holding after conviction, that there was fatal variance in the proof, and that amendment of the indictment was improper, did not entitle defendant to discharge. 154SC1, 151SE 206.

243-6 114Nebr292, 207NW168, 169 [cit CJ].

244-8 89Fla490, 104S857.

244-16½-New. Compromise plea of guilty will come under former jeopardy clause of constitution. 130Misc821, 226 NYS397.

244-16⅓-New. Judgment on plea of guilty is as binding as judgment of guilty on jury's verdict. 130Misc821, 226NYS397.

244-16¼-New. After conviction of defendant under compromise plea of guilty as first offender he could not be resentenced as second offender for third felony not pleaded in indictment. 130 Misc821, 226NYS397.

244-16⅕-New. Plea of guilty as first offender once accepted cannot be repudiated. 130Misc821, 226NYS397.

244-16⅙-New. Where court lacks jurisdiction because written complaint is not filed, plea of guilty cannot support plea of former conviction. 109TexCr 616, 6SW(2d)364.

244-26 177Ark186, 6SW(2d)34; 166 Minn302, 207NW646; 145Wash450, 260 P671.

245-27 166Minn302, 207NW646; 38 OklCr302, 260P785; 128 Or204, 274P 303; 287Pa553, 135A316; 160Tenn366, 24SW(2d)886. [d] **It is not error** to arraign accused after impaneling of jury. 89Fla490, 104S857. [e] **Return of a new indictment in lieu of lost indictment** does not put defendant in jeopardy where jury were never discharged. 234Ky729, 29SW(2d)11.

245-32 16F(2d)62; 122 Or257, 257P 806.

245-37 23F(2d)235; 85CalA301, 259P 353; Mo 22SW(2d)809; 230AppDiv249, 243NYS613; 122 Or257, 257P806; 69 Utah268, 254P142; 141Wash1, 250P453.

246-39 122 Or257, 257P806; 69Utah 268, 254P142.

246-41 85CalA301, 259P353; 58ND82, 224NW878.

246-44 15F(2d)624; 21F(2d)868, 870, [citCJ]; 70CalA195, 232P993; 89 IndA 312, 166NE290; 191NC751, 133SE14; 50Philippine1001.
247-45 21F(2d)868, 870, [citCJ].
247-49 CalA 258P656. [b] But see CalA 258P656.
247-50 202 Iowa537, 210NW555, 557 [citCJ]. [b] See also 202 Iowa537, 210 NW555.
248-53 21F(2d)868, 870 [citCJ].
248-56 [c] (1) But see 70CalA195, 232 P993. (2) Where information is dismissed because it does not charge commission of any crime, accused has not been placed in jeopardy and subsequent prosecution is not barred. 70CalA195, 232P993. [d] (3) Plea of dismissal of action for grave misdemeanor in justice court is bar to prosecution in superior court, though defendant was not put in jeopardy. 137Wash156, 242P6.
248-58½-New. Under a statute providing that dismissal of a misdemeanor complaint is a bar to a further prosecution unless the order is explicitly made for the purpose of amending the pleading, prosecution under a complaint charging a felony filed before the dismissal of a misdemeanor complaint is not barred by such dismissal. 194Cal 1, 227P156.
248-59 21AlaA114, 105S433 (before jeopardy has attached); BC [1929] 3 DomLR772.
248-60 170Ark697, 280SW657; 194Cal 1, 227P156; 204Cal 39, 266P518; CalA 286P749; 200 Ind48, 160NE294, 295 [citCJ]. See also 7Alaska378. [f] **Dismissal of complaint charging simple assault** before jury was impaneled and sworn is not bar to subsequent prosecution for felonious assault. 194Cal 1, 227P156. [g] **In California.**-85CalA301, 259P353. [h] **Dismissal for delay in bringing defendant to trial** does not bar subsequent prosecution for same offense. Cal 292P267.
248-60½-New. The vacation by an appellate court of its order of dismissal made on trial de novo does not create double jeopardy. 29Ariz186, 239P1032.
248-60⅓-New. A dismissal of a misdemeanor charge is not a bar to another prosecution for the same offense. 29 Ariz186, 239P1032.
248-60¼-New. In Iowa dismissal of an indictment for maintaining a liquor nuisance between certain dates bars prosecution of an indictment for maintaining it before, during, and after such period. 202 Iowa168, 209NW419.
248-60½-New. Statute providing that dismissal is bar to other prosecution for same offense if it is misdemeanor applies to dismissals on motion of prosecuting attorney. Ida 289P993.
248-60⅙-New. Under such statute dismissal of prosecution for possession of intoxicating liquor is not bar to prosecution for unlawful sale, although same acts are basis of both prosecutions. Ida 289P993.
248-60⅐-New. Filing information in superior court on appeal from conviction does not constitute dismissal of complaint and bar further prosecution. Wash 290P878.
249-61 89Fla494, 104S783; 164La752, 114S641 (after verdict of acquittal); SC 155SE621.
249-64 258Mass89, 154NE586.
249-66 Miss 130S692.
249-67 39F(2d)432.
249-67½-New. Order of court dismissing complaint for want of prosecution, with consent of defendant, is no bar to subsequent prosecution, in some jurisdictions, even though trial had begun. 258Mass89, 154NE586.
249-67⅓-New. Where the court on motion excludes evidence for insufficiency and discharges defendant, its action operates as acquittal, barring further proceedings based upon the same charge. 23AlaA255, 123S275(1stcase).
249-68 78CalA421, 248P691, 692 [quot CJ]; 34PortoRico 136, 138 [citCJ].
250-70 See also 20AlaA632, 104S681.
250-71 22AlaA32, 111S762; 22AlaA24, 113S414; 204Cal 599, 269P447; 101Tex Cr598, 276SW283 (election between counts).
250-73 155Tenn266, 292SW451.
250-74 257Mass535, 154NE176; 155Tenn 266, 292SW451; 160Tenn366, 24SW(2d) 886. [c] **Declaring mistrial** after jury had retired because of loss of indictment was error and constituted former jeopardy. 156SC324, 153SE269.
250-75 20AlaA412, 103S694 (discharge because of death of juror's mother); 257Mass535, 154NE176; 231Mich260, 203NW882; NC 154SE604; 156SC324, 153SE269; 155Tenn266, 292SW451; 145 Wash450, 260P671.
250-76 20AlaA412, 103S694; 21AlaA 324, 108S86; 91Fla236, 107S267; 231 Mich260, 203NW882; 137Misc314, 243 NYS590; 38 OklCr302, 260P785; OklCr 272P1035; OklCr 273P900; 156SC324, 153SE269; 157Tenn177, 7SW(2d)46; 160 Tenn366, 24SW(2d)886; 145Wash450, 260P671 (dictum).
251-78 Contra 248NY126, 161NE444.
251-78½-New. In some jurisdictions the discharge of the jury and continuance of the case to a later date by a justice of the peace after the jury have been qualified but before they have been accepted does not sustain a plea of former jeopardy. 140Miss524, 106S265.
251-83 156SC324, 153SE269.
251-86 128 Or204, 274P303.
252-93 106TexCr593, 294SW573.
252-96 77Mont54, 249P1114; 115Nebr 838, 215NW107, 53ALR1057. [a] **Death of juror's mother** justifies discharge. 20 AlaA412, 103S694.
252-98 137Misc314, 243NYS590.
252-99 248NY126, 161NE444.
252-6 145Wash450, 260P671. [b] (1) 100WVa647, 131SE466 (after retirement to consider verdict). (2) Plea of autrefois acquit setting up facts and interposed in trial of new and proper indictment against same person for same offense should be rejected. 100WVa647, 131SE466.
253-7 But see 10PaDist&Co 275.
253-12 155Tenn266, 292SW451.
253-13 36F(2d)52; 36GaA784, 138SE 280; 38GaA366, 143SE925; 231Mich260, 203NW882.
253-16 155Tenn266, 292SW451.
253-19 231Mich484, 204NW105.
253-21 But see 85PaSuper424; 48Philippine470.
254-22 91Fla236, 107S267; 121Kan139, 245P1018; Miss 123S891; 128 Or204, 274P303 (order should affirmatively show that jeopardy has been nullified); 156SC324, 153SE269; 103WVa473, 137 SE887. [d] **That court advised acquittal** does not affect rule. OklCr 287P731.
254-27 OklCr 273P900.
254-28 17F(2d)669, 670 [citCJ]; 24F (2d)323; 258Mass89, 154NE586; 320Mo 296, 6SW(2d)915; 38 OklCr302, 260P 785; 106TexCr593, 294SW573; 145Wash 450, 260P671. See also 145Wash647, 261P397.
255-29 But see NM 290P322(2dcase).
255-30 167Ga835, 147SE35.
255-31 34NM254, 280P256.
255-33 See also 7Alaska211, 215 [cit CJ].
255-37½-New. Trial judge permitting withdrawal of juror serving on grand jury returning true bill against defendant has been held not to have abused discretion as respected plea of former jeopardy. Ill 172NE54.
255-38 21AlaA324, 108S86; 140Miss635, 105S759; 316Mo 150, 289SW822 (upon "verdict"); BC [1929] 3DomLR772.
255-38½-New. A plea of former jeopardy is available or not available under a given state of facts whether the prosecution resulted in a conviction or acquittal. 70CalA225, 233P88.
255-38⅓-New. A verdict declaring accused to be insane at the time of the commission of the crime does not operate as acquittal. 99CalA90, 277P1080.
255-38¼-New. A verdict of insanity in a robbery prosecution was not decisive of the question of insanity at the time of the carrying a concealed weapon although committed at the same time. 99 CalA90, 277P1080.
255-40 204 Iowa837, 216NW43; 220Ky 771, 295SW1047; 162La1067, 111S423; 164La752, 114S641; 257Mass590, 154 NE326; OklCr 272P1035; 120 Or444, 250P220.
256-43 91Fla938, 109S91; 128 Or204, 274P303.
256-47 15F(2d)606; 180Ark588, 22SW (2d)34; OklCr 279P519. But see 17F (2d)462; OklCr 280P1111(1stcase).
256-49½-New. Although a directed verdict of not guilty did not state that it was based on the ground of variance, it is not a bar to a prosecution under an information for a separate and distinct offense different from that charged in the first information but disclosed by the evidence given on the former trial. 70CalA476, 233P406.
256-50 See also 4HawaiiFed693 (variance).
256-51 94PaSuper491.
256-53 See also 106Conn114, 137A394.
257-56 222Ky400, 300SW887.
257-62 106TexCr575, 294SW208.
257-63 21AlaA388, 108S635; 209Ky 272, 272SW726; 128 Or204, 274P303.
257-63½-New. A subsequently imposed valid sentence, where an earlier attempted one was void, does not constitute a second jeopardy, where the verdict is valid. 128Kan784, 280P758.
257-64 294Pa353, 144A292.
257-69 [a] **In Washington.**-152Wash 686, 279P82.
258-78 3Del 233, 134A692.
258-82 OklCr 290P354.
258-83 164La329, 113S865.
258-84 TexCivA 5SW(2d)1003, 1006 [citCJ].
258-86½-New. Arrest of judgment on a count charging the sale of morphine is not a bar to conviction on another count charging conspiracy. 35F(2d)633.
259-89 15F(2d)207; 161La867, 109S 530.
259-93 5F(2d)497; 197 Ind606, 151NE 695. But see 162La1067, 111S423.
259-95 71CalA490, 235P460; 318Mo 859, 300SW1083, 1085 [citCJ]; OklCr 270P335; OklCr 271P687(2dcase); Okl Cr 290P354; 196Wis102, 219NW270, 271 [citCJ].
259-99 Wash 288P233.
260-5 238Mich625, 214NW184, 185 [quotCJ].
260-6 238Mich625, 214NW184, 185 [quotCJ]; 153Tenn441, 284SW361, 362 [citCJ]. See also 162La1067, 111S423.
260-8 CalA 284P484.
260-9 Nebr 229NW271.
261-10 OklCr 270P335 (statute not unconstitutional).
261-12 144Miss52, 109S265, 59ALR 1146; OklCr 275P361.
261-13 23AlaA578, 129S480(2dcase); 155Tenn397, 293SW755.
262-17 203 Iowa929, 210NW465.
262-18 25F(2d)294; 69CalA614, 232P 149; 75CalA74, 241P924; 78CalA451, 248P929; 78CalA702, 248P960; Mo 279 SW705; OhA 173NE253. [e] **Defendant not affected by reversal of acquittal.**-206 Iowa1347, 221NW952.
262-20 78CalA702, 248P960; 149Miss 745, 115S896; TexCr 29SW(2d)399.
263-25 88CalA222, 263P306; La 130S 348; Miss 130S697; 108TexCr499, 1 SW(2d)896. [d] **Under Porto Rican Organic Act § 2** (USCA tit 48 § 737) one whose conviction of manslaughter under indictment for murder was reversed was not subjected to double jeopardy because new trial was not limited to manslaughter. 27F(2d)253.
263-26½-New. Delay in bringing defendant to trial after reversal of a first conviction does not operate as having placed him once in jeopardy. 88CalA 222, 263P306.
263-26⅓-New. Accused cannot benefit from verdict of jury where he appealed therefrom. Nebr 229NW271.
263-26¼-New. Reversal and remand for new trial places defendant in same position as if no former trial had been had. Nebr 229NW271.
263-30 112TexCr448, 17SW(2d)49.
263-34 23F(2d)788; 24F(2d)1001; 21 AlaA324, 108S86; 162Ga263, 133SE469; 123Kan399, 256P169; 126Kan770, 271P 390; 210Ky373, 275SW883; 236Mich 333, 210NW296 [quotCJ]; 247Mich353, 225NW481(2dcase); 168Minn34, 209NW 529; 115Nebr399, 213NW743; 53ND 669, 207NW991; 103WVa55, 136SE607.
264-35 5F(2d)309; 16F(2d)57; 17F (2d)462; 29F(2d)691; 23AlaA316, 124S 668; 72CalA509, 237P799; 82CalA411, 256P273; 98Fla1184, 125S345(3dcase); 198 Ind70, 152NE277; 170La727, 129S 144; 257Mass590, 154NE326; 115Nebr 399, 213NW743; 53ND669, 207NW991; 38 OklCr11, 258P1057; OklCr 278P354;

104TexCr157, 283SW788; Utah 284P 1006; 134Wash55, 234P1049; 146Wash 101, 261P779; 147Wash426, 266P174.

264-36 71CalA490, 235P460; 80CalA 647, 252P730; 257Mass590, 154NE326; NJCh 133A519; 107TexCr204, 296SW 574.

264-37 [a] **Acquittal of larceny of property** alleged stolen from one person not bar for larceny of same property alleged stolen from another person. 21 AlaA536, 109S610.

264-38 18F(2d)472; 23AlaA438, 126S 610 (1stcase).

264-39 34F(2d)318; 181Ark94, 24SW (2d)969; 70CalA225, 233P88; 146Wash 101, 261P779.

264-40 204 Iowa1296, 210NW580; 121 Kan693, 697, 249P612 [quotCJ]; NJCh 133A519; 38 OklCr11, 258P1057; OklCr 272P1035; OklCr 275P399; OklCr 277 P953; OklCr 277P954; 101TexCr1, 274 SW596.

264-41 21AlaA536, 109S610; 121Kan 693, 697, 249P612 [quotCJ].

264-42 121Kan693, 697, 249P612 [quot CJ]; 115Nebr335, 212NW765.

264-43 121Kan693, 697, 249P612 [quot CJ].

264-44 121Kan693, 697, 249P612 [quot CJ].

264-45½-New. Failure of the court to direct the discharge of accused on acquittal does not affect the legality of a second information for a different and distinct offense. 70CalA476, 233P406.

264-45⅓-New. An acquittal on the merits on an information charging embezzlement of money is not a bar to a subsequent prosecution for the offense of embezzlement of jewelry. 70CalA 476, 233P406.

264-45¼-New. The fact that defendant was detained in custody after such verdict of acquittal and until such subsequent charge was placed against him does not entitle him to a discharge. 70 CalA476, 233P406.

264-45⅕-New. Where two or more persons are injured in their persons by a single act, there is a corresponding number of distinct offenses. 70CalA225, 233 P88.

264-45⅙-New. A statute providing that an act which is made punishable in different ways by different provisions of the statutes may be punished under either, but not under more than one, and that an acquittal or conviction under either bars prosecution for the same act under any other, is inapplicable where one act has two results, each of which is an act of violence against the person of a separate individual. 70 CalA225, 233P88.

264-46 34F(2d)318; 115Nebr399, 213 NW743; 53ND669, 207NW991, 993 [quotCJ in part].

264-47 15F(2d)365; 20F(2d)42; 21F (2d)934; 36F(2d)855; 37F(2d)846; 42 F(2d)354; AlaA 129S714(2dcase); 100 CalA18, 279P824; 335 Ill 136, 166NE 451; 124Kan245, 259P691; 210Ky373, 275SW883; 115Nebr399, 213NW743; 53ND669, 207NW991, 993 [quotCJ].

265-48 16F(2d)44; 20F(2d)574; 24F (2d)399; 24F(2d)1001; 70CalA476, 233 P406, 407 [citCJ]; 204 Iowa1296, 210 NW580; 123Kan399, 256P169; 216Ky 718, 720, 288SW671 [quotCJ]; 156La 891, 101S255; 126Me509, 140A188; 247 Mich353, 225NW481(2dcase); 168Minn 34, 209NW529; 115Nebr335, 212NW 765; 115Nebr399, 213NW743; 130Misc 821, 226NYS397; NC 154SE736(1st case); 53ND669, 207NW991; 38 OklCr 11, 258P1057; 88PaSuper451; 92Pa Super124.

266-49 24F(2d)690; 29F(2d)691; 36 F(2d)855; 70CalA476, 233P406, 408 [citCJ]; 82CalA411, 256P273; 83Colo 289, 264P720; 204 Iowa1296, 210NW 580; 123Kan399, 256P169; 216Ky718, 720, 288SW671 [quotCJ]; 226Ky386, 10SW(2d)1089; 156La891, 101S255; 257Mass590, 154NE326; 168Minn34, 209 NW529; 247NY369, 160NE643; 88Pa Super451.

266-50 80CalA647, 252P730; 82CalA 411, 256P273; 216Ky718, 720, 288SW 671 [quotCJ].

266-53 82CalA411, 256P273; 147Wash 426, 266P174.

266-56 166Minn466, 208NW189 (running blind pig and keeping place where intoxicating liquors are sold).

267-57½-New. An acquittal on an indictment charging defendant as agent with embezzlement of the proceeds of grain delivered to him is no bar to an indictment charging him as bailee with embezzlement of the same grain. Iowa 210NW500.

267-57⅓-New. To make the offenses the same, the informations need not be in identical language. OklCr 277P954.

267-58 52SD209, 217NW213.

267-60 5F(2d)712; 38 OklCr11, 258P 1057.

267-61 36F(2d)855.

267-62 147Miss85, 113S191; MoA 27 SW(2d)444.

267-66 15F(2d)365; 39GaA541, 147SE 899; 126Kan770, 775, 271P390 [citCJ]; 167La404, 119S407; OhA 172NE694; 101TexCr1, 274SW596. But see 247 Mich353, 225NW481(2dcase). [b] **Indictment charging former conviction for same offense** is held not prima facie evidence that defendant is being charged with identical offense. 106TexCr511, 293SW831.

268-67 But see 147Miss85, 113S191.

268-68 244NY413, 155NE724. [d] **Possession of intoxicating liquor** for several days has been held continuing offense and indivisible. 247Mich353, 225NW481(2dcase). **Erratum.**-Analysis line should read "Continuing Offenses." 277US424, 48SCt536, 72L ed939.

268-69 220Ky95, 294SW766; NJCh 133 A519.

268-71 202 Iowa168, 209NW419; 53 ND669, 207NW991, 993 [quotCJ].

268-72 NJCh 133A519. [a] (2) Previous conviction for practice of medicine without license not bar to subsequent prosecution for practice on another person on later date, though indictment also charged practice "on divers other days before and after said date." 133SC75, 130SE332.

269-79 MoA 27SW(2d)444 (deserting child); 103TexCr428, 280SW1069. [a] **Conviction for child desertion is a bar** to conviction of similar offense prior to it. TexCr 25SW(2d)843.

269-80 MoA 27SW(2d)444.

269-82 225Ky576, 9SW(2d)706; 168 Minn34, 209NW529 (acquittal in prosecution for deserting minor children is not bar to prosecution for nonsupport subsequent to date of desertion); 179 Minn32, 228NW337.

269-87 33NM314, 267P66.

269-90 35GaA471, 134SE141; 220Ky 95, 294SW766.

269-91 35GaA471, 134SE141.

270-96½-New. Acquittal of offense under National Prohibition Act is not bar to prosecution for other similar offenses where in first offense government did not attempt to prove offenses for which subsequent conviction had. 16F(2d)57.

270-96⅓-New. A conviction on a plea of guilty to a charge of illegal transportation on or about a stated date is a bar to a subsequent prosecution for illegal transportation on the day after the day named. 34F(2d)318.

270-97 21F(2d)868; 121Kan693, 697, 249P612 [quotCJ]; 156La891, 101S255; 38 OklCr11, 258P1057; OklCr 277P953; OklCr 277P954.

271-5 173Ark1169, 294SW15; 70CalA 225, 233P88; CalA 274P595; 121Kan 693, 697, 249P612 [quotCJ]; 115Nebr 335, 212NW765, 769 [citCJ]; 148Va 725, 138SE483; 146Wash101, 261P779.

271-6 121Kan693, 697, 249P612 [quot CJ]; 115Nebr335, 212NW765, 769 [cit CJ].

271-6½-New. Conviction of burglary in first degree does not operate as acquittal of burglary in second degree. 78 CalA451, 248P929.

271-7 121Kan693, 697, 249P612 [quot CJ].

271-9 174Ark743, 297SW826; 199Cal 78, 248P250; 70CalA225, 233P88; 37 GaA345, 140SE427; 27Hawaii271, 275 [quotCJ]; 120 Or134, 249P1045. [b] **Single trial of offenses.**-70CalA567, 234 P129.

271-10 80CalA647, 252P730.

271-12 213Ala121, 104S282; 199Cal 461, 249P867, 869 [citCJ]; 80CalA647, 252P730; 98Fla1184, 125S345(3dcase); 121Kan693, 697, 249P612 [quotCJ]; 219 Ky177, 292SW799; 238Mich625, 214NW 184; 172Minn139, 214NW785; 109Tex Cr403, 5SW(2d)141.

272-20 148Va725, 138SE483.

272-21 24F(2d)855; 77CalA477, 246P 1083; CalA 274P595; 216Ky182, 286 SW1042; 169La447, 125S444; 236Mich 333, 210NW296; 220MoA1308, 289SW 963; 158Tenn364, 13SW(2d)794; 148 Va725, 138SE483; Ont [1926] 3DomLR 771, 46CanCrCas243. [b] **In California.**-208Cal 142, 280P681.

272-22 281US202, 50SCt269, 74L ed 807 (acquittal of false entry in one book bars prosecution for false entry in another in same transaction); 7F(2d)60; 23AlaA308, 125S211; 77CalA477, 246P 1083; OklCr 275P399; 153Tenn441, 284 SW361.

273-24 281US202, 50SCt269, 74L ed807 (acquittal of false entry in book did not bar prosecution for false entry of report of condition); 5F(2d)598 (false income tax return not same offense as perjury); 17F(2d)902; 19F(2d)478; 20F(2d)42; 21F(2d)868; 26F(2d)315; 31F(2d)17; 33F(2d)142 [aff 33F(2d) 146]; 35F(2d)174; 176Ark170, 28W (2d)14; 76CalA216, 244P634; 77CalA 477, 246P1083; 99CalA90, 277P1080; 36GaA108, 135SE519; 37GaA345, 140SE 427; 4HawaiiFed607; 327 Ill 416, 158 NE680; 203 Iowa86, 210NW571; 123 Kan399, 256P169; 165La296, 115S493; 167La967, 120S614; 169La247, 125S65; 170La727, 129S144; 24 OhA85, 155NE 811; 143Va554, 130SE416, 419 [citCJ]; 103WVa44, 136SE865.

273-25 14F(2d)366; 21F(2d)868; 77 CalA477, 246P1083; 36GaA108, 135SE 519; 146Wash101, 261P779. But see 22 AlaA553, 117S612.

273-26 37F(2d)846; Man [1930] 2DomLR318.

273-27 37F(2d)378.

273-29 75CalA109, 241P913; 123Kan 399, 256P169; 24 OhA85, 155NE811.

273-29½-New. Where certain acts are prohibited by law, they may be punished as separate offenses and the consequences of such acts may likewise be punished. 65Utah609, 239P25.

273-29⅓-New. A conviction of operating a motor vehicle in a reckless manner and while under the influence of intoxicating liquor is not a bar to a prosecution for manslaughter arising out of the same transaction. 65Utah609, 239P 25.

273-29¼-New. A person is put twice in jeopardy if tried on the element of the offense for which already convicted. 19 F(2d)472.

273-29⅕-New. Plea of former conviction not sustained where several offenses were committed in one transaction, although same evidence admissible in all offenses charged. 27 OhNPNS242.

273-31 75CalA109, 241P913; 77CalA 477, 246P1083.

273-31½-New. homicide and robbery; 123Kan399, 256P169; 264Mass94, 162 NE7.

273-32½-New. vagrancy and burglary; 76CalA216, 244P634.

274-42½-New. manslaughter and failure of driver of automobile to stop and give required information and assistance after accident; 80CalA200, 251P 675.

274-43 But see 23AlaA311, 124S666.

274-44½-New. drunkenness and driving automobile while under influence of intoxicant; 160Tenn396, 25SW(2d)586.

274-61½-New. homicide committed by reckless driving of an automobile and driving an automobile while intoxicated; 159Tenn674, 21SW(2d)400.

274-62½-New. ; assault and battery and breach of the peace. 29PortoRico 590.

274-62⅓-New. A person may be convicted of burglary and whatever other offense is committed after burglarious entry. 100TexCr93, 271SW901.

274-62¼-New. An acquittal of a charge of murder in perpetrating a robbery is not a bar to a prosecution for robbery arising from the same transaction. 18 OhA471.

274-62⅕-New. , or public indecency and drunkenness; 36GaA108, 135SE519.

274-62⅙-New. or being intoxicated on the street and driving a motor car while

intoxicated; 103WVa44, 136SE865.

274-62⅛-New. stealing mailing bags and abstracting their contents. 20 F(2d)42.

274-62⅛-New. ; violation of mail fraud statute and conspiracy to violate Bankruptcy Act involving use of mail. 24F(2d)855.

274-62⅛-New. A discharge on complaint of malicious mischief and trespass is not a bar to a prosecution for unlawfully killing a dog although relating to the same occurrence. 91Pa Super37.

274-64 27Hawaii271 (conviction for assault and battery is bar to subsequent prosecution for rape arising out of same transaction).

274-67½-New. Acquittal of arson does not bar a prosecution for assault and battery, although evidence was introduced on the former trial that accused assaulted owner of building. 156La891, 101S255.

274-68 [a] **Acquittal on assault charge no bar** to prosecution for breach of peace which preceded assault. 29Porto Rico590.

275-78½-New. Sentence under court charging robbing a person of mail by putting lives in jeopardy is authorized after sentence for assault on persons in custody of such mail. 19F(2d)478.

275-83½-New. Acquittal of assault and battery is no bar to prosecution for carrying arms. 35PortoRico 282.

275-95 102NJL255, 132A231.

275-96 98Fla1184, 125S345(3dcase).

276-1 113TexCr429, 21SW(2d)1068.

276-2 See also OhA 173NE296.

276-4 169La441, 125S442 (trial in district court for assault with intent to rape does not bar prosecution in juvenile court for mere assault where district court had no jurisdiction of latter offense).

276-6½-New. A dismissal of information for assault and battery on the ground that a graver offense had been committed is not a bar to a prosecution for assault with intent to do great bodily harm based on the same transaction. 200 Iowa17, 202NW225.

276-10½-New. Acquittal of bribery has been held not a bar to a prosecution for larceny by false pretenses. 257Mass590, 154NE326.

277-15 143Wash281, 255P91, 92 [quot CJ] (dictum).

277-16 164La752, 114S641; 165La296, 115S493; 100TexCr93, 271SW901; 143 Wash281, 255P91, 92 [quotCJ].

277-17 100TexCr93, 271SW901; 143 Wash281, 255P91, 92 [quotCJ] (dictum).

277-18 36Wyo 241, 254P120.

277-19 [a] **Conviction in county of theft** is bar to prosecution in county where stolen property was taken. 144Miss690, 110S434.

277-20 154Tenn66, 289SW515, 516 [cit CJ].

277-21½-New. Where defendant charged with burglary, grand larceny, and receiving stolen goods is convicted of receiving stolen goods, he is acquitted of the others, and, on a retrial, the information should be quashed as to them. 238 Mich625, 214NW184.

277-23½-New. Defendant cannot be convicted of larceny by trick and device and of obtaining money by false pretenses where facts pleaded and established by evidence are identical for each offense. 80CalA647, 252P730.

277-25 [b] **If, under single count for conversion of public funds,** state proves two embezzlements, judgment concludes state as to both. 104TexCr315, 283SW 798.

278-28 43F(2d)890.

278-28½-New. A mistrial on a trial for conspiracy to steal is no bar to a prosecution for larceny growing out of the same act. 327 Ill 416, 158NE680.

278-33½-New. Larceny and false advertising of real property are not the same offense, being of different natures and one not including the other. 80 CalA647, 252P730.

278-33⅓-New. Acquittal of larceny of cattle by driving away or killing with intent to steal is no bar to a distinct offense of killing and failing to keep the hide of cattle unmutilated. 34NM217, 279P947.

278-39 Cal 292P965; 37GaA345, 140SE 427; 319 Ill 386, 150NE249; 89 IndA 586, 166NE447; 121Kan331, 246P508; 129Kan240, 282P726; 216Ky182, 286 SW1042; Me 152A265; OklCr 281P313 (2dcase) (possession of whisky still and possession of whisky for sale); 35Porto Rico 675; 106TexCr111, 290SW536; NS [1928] 4DomLR869. See also 99CalA 366, 278P502.

278-41 23AlaA504, 127S911; 102TexCr 492, 278SW440. [a] (4) Prosecution for sale of liquor not double jeopardy where other prosecutions were for liquor other than that found in defendant's possession. 102TexCr492, 278SW440.

278-42 26F(2d)315. See also 147Wash 426, 266P174. [a] **Conviction of unlawful possession** is not bar to prosecution for maintaining nuisance. 73CalA162, 238P802.

278-42½-New. or for unlawful possession, 16F(2d)57.

278-42⅓-New. or for unlawful sale, 16 F(2d)57.

278-42¼-New. or for possessing, 203 Iowa86, 210NW571.

279-46 150Wash664, 274P797.

279-47 24F(2d)413. But see Que [1924] 2DomLR861.

279-47½-New. having in possession and selling; 121Kan331, 246P508.

279-47⅓-New. possessing and selling; 148Miss224, 114S346.

279-47¼-New. making and selling; 315 Mo 192, 286SW12.

279-48½-New. possession and sale of intoxicating liquors and maintaining a place where intoxicating liquors are kept for sale; OklCr 273P1017.

279-55½-New. selling and possessing; 121 Or567, 256P387.

279-55⅓-New. maintaining liquor nuisance and subsequent sales at the same place; 24F(2d)690.

279-56 [a] **Prosecution for possessing still** is not barred by acquittal on charge of manufacturing intoxicating liquor. 78Colo 474, 242P633.

279-56½-New. Possession of intoxicating liquors and illegal transportation of the same may constitute distinct offenses, so that a conviction of the former will not bar a prosecution for the latter. 30Ariz113, 244P1020; 24 OhA85, 155NE811.

279-56⅓-New. Acquittal on count charging possession and transportation in violation of National Prohibition Act is not a bar to conviction for transportation of liquors imported without compliance with Tariff Act. 4F(2d)833.

279-56¼-New. maintaining a public nuisance by operating a place where liquor is kept and sold and persons congregate to buy and drink, and conspiracy to violate the National Prohibition Act. 41 OklACR191.

279-56½-New. Former conviction for possession of a still is not a bar to a prosecution for manufacturing liquors. 106TexCr111, 290SW536.

279-56¼-New. and manufacturing and possessing. 37GaA345, 140SE427.

279-56½-New. Maintaining nuisance and sale. 198 Ind364, 152NE801.

279-57½-New. Conviction of unlawful possession of liquor is not a bar to proceedings for forfeiture. 17F(2d)902.

279-58 AlaA 117S607; 210Ky768, 276 SW811; 220MoA1308, 289SW963; 115 Nebr399, 213NW743; OklCr 277P954. [b] **Conviction for public drunkenness** is bar to prosecution, based on identical facts, for driving automobile on public highway while intoxicated. 158Tenn 364, 13SW(2d)794. [c] **One convicted of manufacturing liquor** cannot, under same evidence, be convicted of possessing the same liquor. 39F(2d)903(1stcase). [d] **Prior conviction of manufacturing** liquor bars prosecution for possession, operation, and control of still. Cal 289P 839(2dcase).

279-59 115Nebr399, 213NW743.

279-61 115Nebr399, 213NW743; TexCr 24SW(2d)60(2dcase). But see 13Porto RicoFed384. [a] **Conviction for possessing intoxicating liquors** (1) is bar to prosecution for transporting same liquors. 236Mich333, 210NW296. (2) Conviction is bar to subsequent conviction for same offense, though information charged maintenance of nuisance. 73CalA183, 238P809.

279-61½-New. A conviction for keeping a place where liquor is sold in violation of law bars a subsequent prosecution for the keeping of a place where liquor is sold within a prescribed distance from designated institutions, where the facts are the same. See also 14F(2d)366.

279-61⅓-New. Conviction of driving automobile while intoxicated will not bar prosecution for transporting ardent spirits. 143Va554, 130SE416.

279-61¼-New. Conviction for violation of the liquor law is no bar to prosecution for robbery although both arose out of the same transaction. 21AlaA2, 106 S344.

279-61½-New. Conviction for possessing liquor is no bar to a prosecution for possessing a still with which the liquor was made. 214Ala62, 106S347.

279-61⅛-New. Unlawful possession and transportation held distinct offenses. 22 F(2d)141.

279-61⅙-New. Conviction for transporting liquor without proper labeling is a bar to unlawful transportation of the same liquor. 206 Iowa1058, 221NW562.

279-61⅛-New. Offenses of being intoxicated in a public place and operating an automobile on a public highway while intoxicated are separate and distinct. 89 IndA378, 165NE780.

279-61⅛-New. Acquittal for manufacturing liquor does not bar a prosecution for possessing a still. 226Ky386, 10SW (2d)1089.

279-61⅒-New. In Saskatchewan a conviction of keeping liquor for sale on a stated date based upon evidence of purchasing liquor on such date is not a bar to a subsequent prosecution for purchasing illegal quantities on other days. Sask [1928] 2DomLR325.

279-61 1/11-New. A former conviction of possession of intoxicating liquor is not a bar to a subsequent prosecution for possession of the same liquor at a subsequent time. 88PaSuper93.

279-61 1/12-New. Receipt, transportation, and possession of a quantity of liquor constitutes a single transaction, and only one punishment may be imposed if all three acts are shown as to a single quantity of liquor. 159Tenn451, 19SW(2d) 276.

279-61 1/13-New. In Prince Edward Island jeopardy for possession of spirits unlawfully manufactured or imported does not bar prosecution for possession of liquor not purchased from licensed vendor. PEI [1929] 4DomLR95.

279-61 1/14-New. Conviction for possession and manufacture of liquor is no bar to subsequent prosecution for possession of a still. CalA 282P1013.

279-66 83Colo 1, 262P906.

280-67 See also 100TexCr36, 271SW632. [a] **Trial for forgery of a check** is no bar to trial for fraudulently obtaining money on same check. 181Ark94, 24 SW(2d)969.

280-79 See also 36Wyo 368, 255P788.

280-81 6F(2d)222; 23F(2d)260; 30F (2d)482. But see CalA 286P1043(2d case); CalA 286P1044.

280-82 97CalA71, 274P1018.

280-83 5F(2d)309; 210Ky373, 275SW 883; 256Mass159, 152NE307.

280-84 20F(2d)604.

281-95 79CalA709, 250P879.

281-2 18F(2d)374; Fla 111S801; 123 Kan62, 254P317.

281-4 194Cal 63, 227P914.

281-6 154Tenn66, 289SW515.

281-7 37F(2d)378; 200 Ind7, 159NE 755, 759 [citCJ].

281-10 43F(2d)222; 41GaA455, 153SE 534. But see Oh 172NE367.

282-12 20AlaA511, 104S341; 21AlaA 421, 109S121; 220Ky95, 294SW766; 171 Minn505, 214NW479; Oh 172NE367; 131 Or371, 283P751; TexCr 32SW(2d) 360; 137Wash162, 242P363, 366, 246P 758 [quotCJ]; 108WVa31, 150SE142; 192Wis585, 213NW335.

282-13 Oh 172NE367.

282-13½-New. But a plea is effective where both offenses are against the state. 103WVa55, 136SE607.

282-14 [a] **In New York.**-128Misc176, 218NYS633.

282–15 128Misc176, 218NYS633.
282–17 272US312, 47SCt103, 71L ed 270, 48ALR1102; 6F(2d)188; 30Ariz 113, 244P1020; 158La209, 103S742 (violation of liquor law); 161La368, 108S 773; 162La1060, 111S421; 256Mass159, 152NE307; 126Misc762, 214NYS781 (violation of Volstead Act punishable as disorderly conduct in state); 128Misc 176, 218NYS633; Oh 172NE367. [a] (1) 69CalA94, 230P1001. [h] **In New York.**–128Misc176, 218NYS633. [i] **Larceny and using mails to defraud.**–256 Mass159, 152NE307.
283–27 AlaA 129S714(2dcase); 102 WVa169, 134SE740. [a] **Acquittal of automobilist on charge of manslaughter** bars prosecution for atrocious assault on other person, simultaneously injured. 103NJL412, 135A871 [rev 132A231].
283–28 [c] **Conviction of motorist for manslaughter,** based on death of boy struck by automobile, bars conviction for assault upon another boy struck at same time. 159Tenn674, 21SW(2d)400.
283–29 298Pa63, 148A45; 134Wash55, 234P1049.
284–31 10PaDist&Co 568. [a] **Criminal act may be charged as one offense,** though operating on more than one person. 170La727, 129S144. [b] **Prosecution under separate indictment** held barred by conviction of one homicide arising out of same transaction. 170La 727, 129S144.
284–31½–New. Likewise, where a person shoots at one person with intent to kill him and instead kills another person, there are two distinct offenses, although resulting from the same act, neither of which is included in the other. 70CalA225, 233P88.
284–32 AlaA 129S714(2dcase).
284–33 AlaA 129S714(2dcase).
285–52 202 Iowa162, 209NW288.
285–52½–New. Conviction of receipt of deposit in insolvent bank from one person is not bar to prosecution for receipt of deposit from another person on same day. OklCr 287P424.
285–53½–New. Where defendant is convicted on two counts, each charging obtaining money from different persons on same representation in same transaction, he is not twice convicted for the same offense. 79CalA413, 249P832.
285–53½–New. An acquittal in a prosecution for obtaining money from a specified person is not a bar to a subsequent prosecution for obtaining money from a different person at the same time by the same pretenses. 88PaSuper451.
285–54½–New. Use of mails to defraud. Acquittal of charge of using mails to defraud is not a bar to a subsequent prosecution for use of the mails to defraud, involving different subject matter and different addressees. 18F(2d) 472.
285–55 124Kan245, 259P691. [a] (4) One jointly indicted for robbery cannot plead in bar former acquittal of accomplice, despite Pen. L. § 2124 providing that jury must find that defendant was aided by accomplice. 218App Div363, 218NYS297. [d] **Conviction of one codefendant** is not defense in prosecution by other. 98TexCr255, 265SW 558.
285–59 124Kan245, 259P691.
285–62 5F(2d)598; 24F(2d)399; 78 CalA455, 248P927 (failure to prove plea is waiver); OklCr 269P1059; Okl 287 P731; 145Wash450, 260P671.
285–63 5F(2d)598; 24F(2d)399; OklCr 269P1059; OklCr287P731.
286–64 145Wash647, 261P397.
286–68 204Cal599, 269P447.
286–69 5F(2d)598; 137Wash156, 242 P6.
286–70 24F(2d)399; OklCr 287P731; 67Utah362, 248P119 (holding plea of former jeopardy is waived unless made at time of entering plea or at such other time as court may permit).
286–71 24F(2d)399, 405 [citCJ].
286–72 5F(2d)598; 24F(2d)399, 405 [citCJ].
286–73 75CalA74, 241P924.
286–73½–New. Plea of former jeopardy not waived by filing motion in arrest of judgment. 164La329, 113S865.
287–81 Criminal complaint is practically deposition only. 194Cal1, 227P156. [c] (2) Word "deposition" in warrant of commitment is equivalent to "complaint." 194Cal 1, 227P156.
287–92 102NJL489, 133A524. But see OklCr287P795.
287–96½–New. A constitutional limitation on legislative power to grant relief to accused after conviction cannot be construed as a limitation of such power before trial, since a charge of an offense is different from conviction thereof. 285Pa39, 131A650.
287–96¾–New. An act, therefor, which affords a defendant privilege of waiving summary hearing, does not violate the constitutional provision granting an appeal from a summary conviction. 285Pa39, 131A650.
287–96¼–New. Strict compliance with legislative requirements concerning commencement of a criminal action is necessary. 200 Ind548, 165NE319.
287–96½–New. A statute permitting accused to waive the right to preliminary examination is not unconstitutional. 86CalA10, 260P320.
287–96¾–New. Under statutes an investigation by a magistrate in good faith may be had in aid of a prosecution to determine whether or not a crime has been committed and, if so, by whom. SD 228NW240.
288–1 316Mo 372, 289SW898, 902 [cit CJ]; NJSup 128A891; 109TexCr616, 6SW(2d)364. [h] **In California.**–194Cal 1, 227P156. [i] **Coroner's warrant is sufficient** under statutes in some jurisdictions upon which to base preliminary hearing, though no preliminary complaint or information is filed. 49SD192, 206NW927.
288–2 NJSup 129A251; 101NJEq540, 138A369; 9PaDist&Co 519.
289–11 [a] 34 OhA354, 171NE259.
289–12 NJSup 128A888.
289–14 CalA 290P589(2dcase).
289–16 231Mich246, 203NW948 (prosecution under statute requiring permit for operation of motor vehicles for hire between fixed points). [e] **District attorney** may sign and swear to preliminary complaint. 71CalA709, 236P217. [f] **Private citizen of state or state police officer** may charge defendant before appropriate tribunal with offense against law of United States as well as offense under state law. 250NY336, 165 NE518.
289–17 [a] (3) Complaint and warrant, made out by one police officer for another officer, is not void as warrant made by police officer "for another person." 83NH339, 143A704.
290–20 See also 101Vt483, 144A684.
290–26½–New. Minneapolis Municipal Court Act authorizes clerk to enter complaint on the record against a person in custody, arrested without a warrant. 164Minn499, 205NW450.
290–31 32F(2d)793; 86Mont297, 283P 430 (sufficient to show public offense for which warrant of arrest might issue).
291–34½–New. The validity of process drawn by a de facto officer is determined by the common law, if the process contains no clause rendering it void under the circumstances of its execution. 83NH339, 143A704.
291–35 [a] **Sufficiency of jurat.**–125 Kan147, 264P40.
291–36 273US1, 47SCt250, 71L ed505.
291–44 [c] **If state's attorney signed printed form of complaint in blank,** and blank was subsequently filled out by another, in absence of state's attorney and without his knowledge or consent, warrant issued on such complaint, and trial and conviction had thereunder, were void for want of jurisdiction. 101Vt 483, 144A684.
291–46 101Vt483, 144A684.
291–51 35 OklCr430, 251P101.
291–54 89Fla477, 104S853.
292–56 OklCr 292P876.
292–57½–New. Affidavit has been held not defective for failure to set forth the district of the justice signing it. 156 Miss365, 126S38.
292–60 32F(2d)793. [e] **Complaint charging felony positive in form** is sufficient to authorize magistrate to issue warrant of arrest. OklCr 292P876.
292–61 22F(2d)702.
293–62. 32F(2d)793; 40F(2d)295 (holding sources must be definitely stated). See also 226Ky36, 10SW(2d) 471. [c] **Mere statement that official investigations** were sources of information and grounds for belief renders warrant void. 40F(2d)295.
293–65 23AlaA277, 124S393(2dcase); 194Cal 1, 227P156 (criminal complaint); 215Ky236, 284SW1051; 161La461, 109S 31; 53ND429, 206NW786; 53SD205, 220 NW518; Utah 263P86. [a] (2) Complaint need not charge elements of offense with all technical nicety of information. 71CalA709, 236P217.
294–67 32F(2d)793; 194Cal 1, 227P 156; 41 Ida353, 238P525; Utah 263P 86. [b] (2) Complaint charging that defendant violated city ordinance did not charge defendant with any crime defined by such ordinance. 133Misc728, 234NYS889. [s] 22F(2d)827. [x] **Indictment attached to complaint** must be considered to test its sufficiency. 22 F(2d)827.
295–71 194Cal 1, 227P156.
295–85 179Minn53, 228NW437 (misnomer of defendant).
295–87 194Cal 1, 227P156.
296–95½–New. Filing of formal complaint charging defendant with commission of a crime and docketing of cause by justice of peace is sufficient without docketing of complaint on which a search warrant was issued. 136Wash 374, 240P360.
296–96 71CalA709, 236P217; 162La 852, 111S257, 258 [quotCJ]; 134Misc 228, 235NYS173; OklCr 292P876; 187 Wis122, 203NW749.
296–97 9PaDist&Co 764; 9PaDist&Co 812.
296–98 228AppDiv279, 239NYS206.
296–99 53ND429, 206NW786.
296–5½–New. Objections to a complaint must be made while defendant is under the warrant of arrest. 194Cal 1, 227P156.
296–5¼–New. Any irregularity in the complaint is waived where defendant waives a preliminary hearing and is bound over, and an information is filed against him. 125Kan147, 264P40.
296–6 [a] **Motion to quash complaint on ground that affiant did not have positive knowledge of facts** should be denied where verification is positive and regular. OklCr 274P39(2dcase).
297–16 [f] (1) Contra 179Minn53, 228 NW437.
298–36½–New. An inferior court issuing an affidavit and warrant in a liquor prosecution may make the warrant returnable to the circuit court. 21AlaA 266, 107S328.
298–41 101NJEq540, 138A369. See also 243 IllA216.
298–44 But see 115Nebr26, 211NW175.
298–48 NJSup 128A891. See also NJ Sup 129A121.
298–49½–New. Defendant, against whom the prosecutor agreed to take no further action, is entitled to notice of intention to prosecute. 217Ky247, 289 SW246.
298–49½–New. , and merely arresting defendant is not sufficient notice of such intention. 217Ky247, 289SW246.
298–49¼–New. In Nova Scotia, where accused fails to appear after issuance of summons, the magistrate acquires no jurisdiction in the absence of proof of service of summons. NS [1929] 2 DomLR701.
298–49½–New. Where the only process is an unsworn statement filed by a solicitor in the circuit court, the action of the court in rendering a judgment of correction is void. 23AlaA265, 123S281(1stcase).
298–49¼–New. Search of an automobile without an affidavit or warrant does not invalidate subsequent proceedings, resulting in the issuance of an affidavit and warrant. 33 OhA273, 168NE 762.
299–53 30Ariz591, 249P758.
299–55 30Ariz591, 249P758.
299–57 237Mich413, 212NW69.
299–60 237Mich413, 212NW69. [a] **What constitutes "issuance of warrant."** –Fla 130S36 ("issue").
299–61 DC 32F(2d)963; 86Mont297,

283P430. [c] **Local magistrates are without power at common law** to issue warrant of arrest in case of violation of ordinance not constituting public offense. 86Mont297, 283P430.
300-64 22AlaA98, 112S809; 30Ariz591, 249P758.
300-65 NJSup 128A888 (issuance of warrant cannot be delegated to clerk).
300-67 38Wyo 340, 266P1056. But see OklCr 282P182.
300-69 163Ga684, 137SE31; 33Porto Rico 237.
300-72½-New. The federal court in one district has no authority to issue a writ to a marshal or to any officer of another federal district commanding him to arrest a person within the jurisdiction, but outside that of the court issuing it. 91Fla522, 107S689.
300-75½-New. Where one charged with felony in another state is arrested without a warrant, a proper warrant should be procured and charge formulated as soon as possible. 142Va667, 128SE572.
301-85½-New. In Porto Rico, when the district attorney is investigating a crime before making an arrest, he is not required to confront defendant with witnesses. 33PortoRico 237.
301-95 [a] **That evidence was illegally obtained** by search of prisoner under illegal arrest held without bearing on validity of charges. 148Miss335, 114S744.
301-96½-New. Failure of a justice to make an entry in the docket showing a finding of facts necessary for the issuance of a warrant under statute does not invalidate the warrant. 220MoA 406, 286SW733.
301-97 [a] OklCr 274P39(2dcase).
302-17 197Ind517, 151NE416; 145Va 883, 134SE544, 47ALR1084.
303-23 145Va883, 134SE544, 47ALR 1084.
303-31 22AlaA98, 112S809; 23AlaA 277, 124S393(2dcase).
303-32 218Ala257, 118S462.
303-34 22AlaA98, 112S809.
303-34½-New. Warrant returnable to judge of inferior court of tenth judicial district declared not misleading as to where defendant should appear. 20 AlaA638, 104S684.
304-35 148Miss335, 114S744.
304-42 135Misc564, 238NYS712.
304-50 148Va424, 139SE252, 55ALR 279.
305-53½-New. A warrant issued on information and belief need not set forth the source of information and the grounds of belief. 149SC346, 147SE455.
306-77 105Conn177, 134A810.
306-78 But see Mo 298SW769.
306-79 210Ky717, 276SW812; Mo 298 SW769.
306-79½-New. **In Missouri** a warrant for arrest, issued by a circuit court judge, as distinguished from a magistrate's warrant, need not recite the accusation, probable cause, supported by oath or affirmation reduced to writing, being sufficient. Mo 298SW769.
306-81 4HawaiiFed202; 208Ky54, 270 SW489; Mo 298SW769 (reference to proper information). [q] **Passing worthless check.**-98Fla523, 124S12(2d case) (warrant held defective).
307-93 [a] (6) "Offense of possessing whiskey" without alleging it was unlawful. 210Ky717, 276SW812.
308-4 89Fla477, 104S853.
308-7 89Fla477, 104S853.
309-8 [e] **Failure to indicate issuance in capacity as magistrate** does not invalidate process issued by justice of peace where signature is followed by title. 106TexCr150, 291SW232.
309-12½-New. A clerk may sign a warrant on the court's order. 237Mich413, 212NW69.
310-25 179Minn53, 228NW437; Mo 298 SW769. [e] **In Ontario.**-[1928] 4DomLR322.
310-26 Mo 298SW769, 772 [citCJ].
310-27 273US1, 47SCt250, 71L ed505; 21F(2d)828; 102NJL519, 134A556.
310-30 234Ky695, 28SW(2d)976.
310-31½-New. However, failure to object when giving bail bonds is not waiver of appearance. 273US1, 47SCt250, 71 L ed505.
310-32 173Minn95, 216NW540; 228 AppDiv279, 239NYS206. [a] **In Oklahoma.**-Cr 282P182.
311-35 107WVa693, 150SE141.
311-37 208Ky54, 270SW489.
311-40 179Minn53, 228NW437.
311-46 145Va883, 134SE544, 47ALR 1084.
312-57 OklCr 278P407.
312-58½-New. Case may be transferred from one magistrate to another, on proper grounds, although criminal code does not specifically authorize transfers. 120 Kan692, 245P105.
313-62 7F(2d)734; 120Kan731, 244P 1053; 120Kan692, 245P105; 128Kan 521, 278P761; Mo 296SW423.
313-62½-New. and to apprise accused of the sort of evidence he will have to combat on formal trial in court to which he is bound over; 120Kan692, 245P105.
313-63 120Kan692, 245P105.
313-64 120Kan692, 245P105.
313-67 120Kan731, 244P1053; OklCr 279P925(2dcase).
313-68 133Misc611, 233NYS565; 198 Wis192, 223NW450.
314-70½-New. An ex parte hearing before a court cannot be substituted for a constitutional preliminary hearing to which one charged with a felony is entitled. 140 Okl 118, 282P668.
314-72 37Wyo 372, 262P24. [c] **In Philippines.**-45Philippine173.
314-75½-New. Under some statutes the right to a preliminary examination is a substantial right. 49SD485, 207NW 466.
314-75⅓-New. Proceeding to trial without a preliminary examination as to the charge in the information alleging a prior conviction is not error. 197 Wis457, 222NW224.
314-75¼-New. Defendant is not entitled to preliminary examination where no crime is charged. 251Mich626, 232 NW402.
314-76 13F(2d)952.
314-77 23F(2d)235. But see 29F(2d) 573 (defendant, has right not to be called to answer criminal charge until some duly constituted tribunal has passed on preliminary question of whether he ought to be brought to trial).
314-84 [d] **In New Jersey.**-QuartSess 140A586.
315-98 23F(2d)235; 26F(2d)676; 315 Mo 232, 285SW712; Mo 4SW(2d)813.
317-99 86CalA10, 260P320; 322Mo 194, 14SW(2d)611; 114Nebr404, 207NW928; 57ND401, 222NW267; 58ND282, 225NW 789; 49SD485, 207NW466; 69Utah53, 252P280.
317-2 [a] But see 82CalA17, 255P212.
318-8 41 Ida353, 238P525 (accused not personally appearing may waive through codefendant).
318-10 114Nebr404, 207NW928.
318-10½-New. or that on being called for trial defendant pleaded guilty; 233 Mich112, 206NW379.
318-11 Mo 4SW(2d)813; Mo 22SW(2d) 809.
318-11½-New. Accused by filing an affidavit of prejudice against the regular county judge and requesting that a judge of another county be substituted and by appearing before him without objection waives his right to any other preliminary examination, although the examination was void by reason of want of jurisdiction of the substituted judge. 49SD485, 207NW466.
318-11⅓-New. , or on failure to move to quash information as to one of two charges. 69Utah53, 252P280.
318-11¼-New. Any act incidental to a preliminary examination may be waived. 58ND282, 225NW789.
318-14 CalA 269P320.
319-18 239Mich695, 214NW965.
319-19 120Kan754, 244P860 (magistrate should bind him over); 240Mich 53, 214NW962.
319-20 233Mich98, 206NW516; 239 Mich695, 214NW965. [a] (2) Amendment of information making no material change in charge does not entitle accused to further hearing. 311Mo 461, 278SW719.
319-22 OklCr 292P876.
319-23½-New. Where defendant waives preliminary examination on original information, it is not error to refuse to grant preliminary examination after amendment of information so as to allege former conviction. Mo 22SW (2d)809.
319-30 [d] **In Connecticut.**-110Conn 482, 148A551. [e] **Act of subpœnaing justice of peace as witness** to disqualify him as judge in preliminary hearing is not permissible. MoA 31SW(2d)248.
320-45 OklCr 277P284.
321-47 118Kan384, 234P945; Utah 263P86 (city court).
321-56 [a] **Under charter provision authorizing police judge to hold examination in absence or disability of justice of peace,** failure of complaint and warrant to recite absence or disability of justice does not divest police judge of jurisdiction (1) where amended return and affidavit of clerk show facts (240 Mich491, 215NW419) (2) or where facts are shown elsewhere in record (240 Mich495, 215NW420).
321-61 120Kan692, 245P105.
321-61½-New. A preliminary examination by a county judge outside of his county is a nullity, although the regular judge was disqualified. 49SD 485, 207NW466.
323-87 MoA 31SW(2d)248. [a] **Justice of peace has no power to send cause** to justice of peace of another township. MoA 31SW(2d)248.
323-88½-New. Examination held in office of warden of state prison is held in public in absence of showing that it was not open to public. 68CalA680, 230P180.
323-89½-New. Accused, granted a preliminary hearing under information as originally filed, is not deprived of the right to such hearing where the court permits an amendment of the information not affecting its substance. Mo 296SW423.
323-91 110Conn482, 148A551.
323-95 124Kan245, 259P691.
323-96½-New. The question whether defendant, charged with felony, had the necessary preliminary examination is to be determined, not only from the complaint and the warrant, but also from the evidence introduced. 129Kan 719, 284P357.
323-96¼-New. Irregularities of mere clerical nature are not necessarily jurisdictional. OklCr 292P876.
323-99 121Kan383, 247P843 (statute giving right to separate trial in felony cases not applicable to preliminary examinations).
323-1 198Cal 112, 243P667.
324-11 80CalA318, 250P526. [b] **Matters not constituting denial of right.**-75CalA434, 243P31.
324-16 198Cal 112, 243P667; 80CalA 318, 250P526.
325-17 80CalA318, 250P526.
325-20 114Nebr404, 207NW928.
325-30 Ida 289P607; 128Kan521, 278 P761. [a] **Confession of witness of criminal conspiracy between witness and defendant** has been held admissible. Ida 289P607.
325-35 114Nebr404, 207NW928.
326-37½-New. Accused has the right to examine a person on whose affidavit a search warrant was issued. 13F(2d) 952.
327-51 198Cal 112, 243P667; 8PaDist &Co 735.
327-59 Ariz 282P930 (required only in homicide cases).
327-62 [a] (2) Official court reporter may take testimony under statute requiring court to appoint stenographer. 33Ariz383, 265P609.
328-68½-New. A magistrate may rule on objections to the evidence. 77CalA 10, 245P1106.
328-73 See also NB [1926] 4DomLR 765.
329-82 198Cal 112, 243P667.
329-85 118 Or397, 247P146.
330-3 124Kan245, 259P691; 132Misc

391, 229NYS569; 31 OklCr314, 238P 867; OklCr 279P925(2dcase). [d] 22F (2d)826; 239Mich169, 214NW120; 239 Mich386, 214NW183; 240Mich107, 214 NW954; 241Mich67, 216NW398 (identity of accused with person previously convicted); Nebr 226NW793; 136Misc 174, 240NYS669 (for possession of revolver); OklCr 279P925(2dcase); Okl Cr 282P684 (corroborated testimony of accomplice). [e] 128Misc333, 219NYS 293. [f] **Indictment of defendant and his identification** are prima facie evidence of probable cause. 22F(2d)823. [g] **Indictment is prima facie evidence of probable cause.**–22F(2d)827. [h] **Indictment of defendant is not conclusive evidence** of probable cause. 22 F(2d)826.

331–4 22F(2d)826; 239Mich386, 214 NW183; 31 OklCr314, 238P867. [b] **Proof beyond reasonable doubt** not necessary to hold after preliminary examination. 132Misc391, 229NYS569.

331–12 22F(2d)823; 124Kan245, 259P 691; MoA 18SW(2d)562.

331–13 31F(2d)966.

332–16 But see TexCr 32SW(2d)187.

332–18 128Misc333, 219NYS293. [a] **Judgment of conviction** is founded on evidence at trial and verdict of jury and is not related to order holding defendant to answer for trial. 71CalA281, 235 P458.

332–20 128Misc333, 219NYS293. But see 71CalA281, 235P458.

332–21 22F(2d)826; 237Mich247, 211 NW650. [c] **Commitment based on judgment** of superior court is not void because magistrate on preliminary examination held defendant without probable cause. 71CalA281, 235P458.

332–23 But see 91PaSuper513.

332–23½–New. Under some statutes, where defendant is held to answer by any magistrate other than a judge of a county or municipal court, he must be held to answer in the circuit court of the proper county and not in the county court. 49SD438, 207NW222.

332–23⅓–New. Such is the rule, although the circuit court and county court have concurrent jurisdiction of the offense. 49SD438, 207NW222.

332–23¼–New. In some jurisdictions, after a justice of the peace continues a case to a definite date and defendant is discharged until then, the justice cannot enter a valid order of dismissal without defendant's consent. 140Miss 524, 106S265.

332–23⅓–New. Omission of the judge to sign an order determining the probable cause does not entitle accused to a discharge since the order may be made nunc pro tunc. 237Mich413, 212 NW69.

332–23⅙–New. An order of commitment for trial without legal or competent evidence is void. OklCr 278P400 (2dcase).

333–30½–New. Justice of peace has no authority to waive trial for misdemeanor and bind defendant over to await action of grand jury, unless charge preferred may be punished as a felony under certain conditions. 140Miss165, 105 S461.

333–31 124Kan245, 259P691.

333–31½–New. Accused may be held for the offense charged or for any other offense warranted by facts. 198Cal 112, 243P667.

333–31⅓–New. In some jurisdictions accused may be held for trial for any offense disclosed at the preliminary hearing. 48 Ida760, 285P467.

334–40 22F(2d)823 (discharge does not annul indictment or blot out offense).

334–41 NB [1928] 3DomLR237.

335–59½–New. In some jurisdictions, failure of the committing magistrate to indorse his findings and order on the preliminary complaint is not jurisdictional, and, where the proper order has been made and entered and is shown by the transcript, it is sufficient to show jurisdiction. OklCr 276P503.

335–69 49SD438, 207NW222.

335–70 49SD438, 207NW222.

336–75 But see 49SD438, 207NW222.

336–75½–New. Recital in commitment order that the magistrate found defendant "guilty as charged" has been held a sufficient indorsement of sufficient cause to believe him guilty. 69 Utah268, 254P142.

336–79 91Fla522, 107S689.

337–89½–New. What committing magistrate may have said at close of preliminary hearing cannot be taken as against formal written order holding defendant to answer for offense "in within depositions mentioned" where complaint upon which indorsement made set forth crime. 67CalA445, 228 P50.

337–95 [a] **Defective commitment** may be returned to committing magistrate for correction. 73CalA372, 238P758. [b] **Order directing filing** of amended complaint nunc pro tunc held proper. 73CalA372, 238P758. [c] **Committing magistrate** cannot correct judicial error based on his conclusions from testimony. 73CalA372, 238P758. [d] **Committing magistrate after indorsing order** of commitment cannot correct or be ordered to correct an erroneous conclusion as to crime committed. 73CalA 372, 238P758. [e] **Magistrate committing for grand larceny** cannot amend commitment by holding defendant for offense of obtaining money under false pretenses. 73CalA372, 238P758.

337–96½–New. A recital in a bond that defendant will appear in a circuit or county court does not constitute a waiver of his right to be held to answer in the court prescribed by statute. 49 SD438, 207NW222.

337–96⅓–New. That magistrate inadvertently held defendant to answer upon offense charged in complaint instead of that in depositions is immaterial. 48 Ida760, 285P467.

338–5 91Fla522, 107S689, 691 [citCJ].

338–7 20F(2d)273. [a] **Removal from District of Columbia to Nebraska held proper.**–20F(2d)273. [b] **Sufficient showing of jurisdiction.**–18F(2d)535.

338–14 7F(2d)133.

338–14½–New. The district court for the western district of Washington has no jurisdiction to try a charge of embezzlement in China as affecting removal. 14F(2d)312. [a] **Removal to China held warranted.**–14F(2d)312.

338–14⅓–New. "District," within the meaning of a removal statute, means "territorial jurisdiction." 14F(2d)312.

338–14¼–New. Only the person whom grand jurors intended to indict may be removed. 22F(2d)264.

338–14⅕–New. Removal may be had in case of indictment for refusing to answer questions of senate investigation committee. 26F(2d)272.

338–15 91Fla522, 107S689.

339–21 23F(2d)860; 26F(2d)272. [c] **Decision of court finding indictment** that it has jurisdiction is generally not open to question in removal proceedings. 5 F(2d)564. [d] **Conversely,** legal offense must be charged. 26F(2d)272.

339–23 27F(2d)230. [a] **On habeas corpus to defeat removal** presumption of guilt arises on presentation of indictment. 26F(2d)908.

339–24 271US142, 46SCt459, 70L ed875 (indictment charging conspiracy in restraint of trade held sufficient); 6F(2d) 149 (indictment good against demurrer on motion to quash cannot be held insufficient to warrant removal); 18F(2d) 535. [b] **Indictment held sufficient.**–6 F(2d)156. [c] **Court is not required to determine whether indictment is technically correct** in considering propriety of proceedings to remove petitioners to another state. 31F(2d)966. [d] **Introduction of indictment** held prima facie proof of allegations contained therein. 40F (2d)931.

339–25 6F(2d)149 (indictment under Sherman Anti-Trust Act held sufficient); 27F(2d)230. See also 27F(2d)230. [b] 8F(2d)902; 26F(2d)908; 36F(2d)315.

340–26 7F(2d)133.

340–27½–New. An indictment failing to identify accused has been held insufficient for removal. 16F(2d)828.

340–27⅓–New. Government is bound by extensive statement of facts as to overt acts. 25F(2d)941.

340–27¼–New. Sufficiency of indictment is for trial court. 26F(2d)272.

340–28 5F(2d)189; 7F(2d)734; 33F (2d)261.

340–29 [a] **Decision of trial court** overruling demurrer, though of great weight, is not conclusive in removal proceedings in another district. 6F(2d)149.

340–30 267US80, 45SCt209, 69L ed522 (discharge of prisoner by commissioner or on review in habeas corpus for insufficiency of indictment does not abridge power of trial court to order a subsequent arrest).

340–31 271US142, 46SCt459, 70L ed875; 5F(2d)189; 7F(2d)734; 8F(2d)902; 19F(2d)7; 22F(2d)702; 26F(2d)272. [b] 18F(2d)535.

340–32 6F(2d)157; 6F(2d)828; 12F (2d)915; 18F(2d)535; 19F(2d)7; 19 F(2d)22; 23F(2d)860; 35F(2d)516. Contra 6F(2d)149. [a] **Inference of identity** may be drawn from identity of name. 6F(2d)828. [b] **Indictment held insufficient** to establish probable cause. 25F(2d)941. [c] **Indictment held sufficient** to establish probable cause. 25F(2d)941. [d] **Technical faults of indictment** held not to destroy its value as sufficient evidence of probable cause. 36F(2d)315.

340–36 5F(2d)564; 6F(2d)156; 7F(2d) 133; 7F(2d)734; 8F(2d)902; 12F(2d) 915; 13F(2d)645; 18F(2d)535; 22F (2d)968; 23F(2d)860; 33F(2d)261; 36 F(2d)315; 40F(2d)931. But see 6F(2d) 149.

341–37 13F(2d)645. [d] **Court should hear proof** that defendant's health is such that removal would place his life in jeopardy. 6F(2d)149.

341–38 6F(2d)149 (defendant may rebut prima facie case shown by indictment); 35F(2d)914 (evidence inadmissible). [a] **Evidence held sufficient.**–40 F(2d)931.

341–38½–New. Prima facie evidence of probable cause made by an indictment may be overcome by its own terms. 33 F(2d)261.

341–39 271US142, 46SCt459, 70L ed875 (excluding evidence of innocence held not to invalidate order, where commissioner indicated by his finding he thought there were substantial grounds for charge); 5F(2d)564; 7F(2d)734. [a] **Testimony to merits held properly excluded.**–5F(2d)564.

341–40 6F(2d)149 (warrant should issue where doubtful questions of law and fact arise).

341–41 7F(2d)734; 23F(2d)148; 27 F(2d)230.

341–42 13F(2d)645.

341–43 12F(2d)915.

341–44 5F(2d)564 (evidence held sufficient); 6F(2d)149 (court has considerable discretion as to procedure and extent of inquiry); 27F(2d)230.

341–45 [a] **In proceeding under Sherman Anti-Trust Act** offer of defendant in removal proceedings to show that neither he nor company controlled by him did business in district to which removal is sought held properly refused. 6F(2d)149.

341–46 13F(2d)645; 18F(2d)535; 25 F(2d)941; 35F(2d)516 (rebutting evidence must be clear and convincing). [e] **Unverified averments in habeas corpus petition** do not controvert facts in indictment. 25F(2d)941. [f] **Evidence held to rebut** prima facie case of probable cause made by indictment. 25F(2d) 941. [g] **Evidence of noncomplicity.**–27 F(2d)230.

341–46½–New. Denial of guilt will not overcome a showing of probable cause to defeat defendant's removal to another district for prosecution. 19F(2d)22.

341–48 19F(2d)7; 19F(2d)22; 91Fla 522, 107S689, 691 [citCJ]. [d] **Refusal to grant continuance** on account of absent witnesses held not error. 5F(2d) 564. [e] **Evidence held insufficient** to identify defendant. 19F(2d)7. [f] **Evidence held sufficient** to identify defendant. 23F(2d)860.

341–50 91Fla522, 107S689, 691 [citCJ].

341–53 5F(2d)492; 91Fla522, 107S689, 691 [citCJ].

342-54 26F(2d)908.
342-55½-New. In a preliminary hearing, the magistrate's function is judicial. 19F(2d)22.
342-55¼-New. The defense of the statute of limitations cannot be entertained on application for removal. 33F(2d)128.
342-61 7F(2d)734; 22F(2d)968 (exclusion of defensive evidence proper); 23F(2d)860; 25F(2d)324. [b] **Order of removal,** after excluding evidence of innocence, held not to deprive defendant of right to be tried in district where crime was committed. 271US142, 46SCt459, 70 L ed875. [c] **There must be three showings** of probable cause. 40F(2d)931. [d] **Weight of conflicting evidence of guilt** is not determined on hearing as to probable cause. 40F(2d)931.
342-62 7F(2d)734; 36F(2d)315 (conclusions of commissioner held immaterial). [a] **Evidence held to show probable cause** for removal for violation of Sherman Anti-Trust Act. 7F(2d) 734.
342-63 [a] 18F(2d)535.
342-63½-New. **Evidence** held to sustain finding that accused was person intended by grand jury in indictment. 22F(2d)264.
342-63¼-New. Pertinency of questions upon which indictment for refusing to answer them is based is not for determination in removal proceeding. 26F(2d)272.
342-63¼-New. So, issue of contempt in such refusal and sufficiency of indictment are not determined in this proceeding. 26F(2d)272.
342-70½-New. Court in district to which defendant has been removed from another district may, in its discretion, although indictment is undisposed of, order him returned to answer indictment in such other district. 22F(2d)553.
343-75 6F(2d)149 (defendant's failing to introduce proof in rebuttal of government's prima facie showing cannot do so in habeas corpus proceedings); 12F(2d)915.
343-76 18F(2d)535.
343-77 33F(2d)128.
343-79 12F(2d)915.
343-82 OklCr 267P493 (indorsement of finding on complaint where defendant is held to answer). [g] **Search warrant and affidavit** need not be included in return by magistrate where examination was waived. 243 Mich 546, 220NW790.
344-85 120Kan754, 244P860; OklCr 292P876.
344-87 120Kan731, 244P1053 (allowance must be made for irregularities).
344-89 148Miss70, 114S125. [f] **Omission of finding that offense had been committed** and that there was probable cause to believe defendant guilty is not fatal to jurisdiction of circuit court where preliminary examination is waived. 120Kan754, 244P860.
344-90 120Kan731, 244P1053.
345-96½-New. In jurisdictions where the statute requires a full hearing and investigation of the facts charged, if the transcript of the justice fails to show such investigation the proceedings will be quashed. 8PaDist&Co 735.
345-6 119Kan656, 240P844 (may correct transcript to make it correspond with docket); 120Kan187, 243P318; 120Kan731, 244P1053.
Kan731, 244P1053; OklCr 267P493. [b] pro tempore of city court, not serving as such officer at hearing of plea of **Examining magistrate** who was judge abatement, may amend transcript. 120
345-8 33Ariz383, 265P609 (failure of court to appoint stenographer waived by defendant's participation); 33NM365, 266P920; 33NM370, 266P922; 250NY358, 165NE810; 57ND401, 222NW267; 10PaDist&Co 720; Wyo 285P803.
346-9 See also Mo 22SW(2d)777.
346-9½-New. Defendant who was present and assigned no reason for not proceeding at a preliminary hearing cannot afterward complain of want of notice. 69Utah268, 254P142.
346-9½-New. Irregularities in arrest are waived by waiving hearing and entering into recognizance for appearance. 13PaDist&Co 264.
346-10 8PaDist&Co 735.
346-13 [b] (6) Averment in charge that place of offense is within jurisdiction of magistrate held sufficient evidence of that fact unless contradicted. 58NS294 [1926] 1DomLR323.
346-13½-New. **Summary proceeding is essentially a criminal proceeding for a** public offense. 6PaDist&Co 45.
346-14 120Kan692, 245P105.
346-15 312Mo 600, 280SW421.
346-19 130Misc525, 224NYS596; 6Pa Dist&Co 45. [f] (2) Violations of school attendance law are summarily punishable. 5PaDist&Co 213. [g] **In New Jersey.**-102NJL74, 131A89 (legislation under police power). [h] **Carrying concealed weapons** may be punishable by summary conviction. 5PaDist&Co 331. [i] **In Pennsylvania.**-97PaSuper361.
347-21 NS [1928] 3DomLR221 (statute held not retroactive). [a] **Incest** is not triable summarily. 44QueKB308 [1928] 1DomLR299.
347-24 Can [1930] 1DomLR420 (effect of previous information laid before another magistrate and withdrawn). [b] Alta [1928] 3DomLR205.
347-25 Alta [1930] 1DomLR892 (new consent not required in certain case). [a] (6) Assault occasioning actual bodily harm. Alta [1929] 1DomLR185. [d] **In Alberta.**-[1930] 1DomLR823.
348-37 See also 11PaDist&Co 719.
348-39 12PaDist&Co 187 (fine remitted on payment of costs).
348-41 [a] See also NS [1929] 1DomLR708.
348-42 9PaDist&Co 358.
348-43 [a] (3) In Minnesota justice of peace need not advise defendant that he is entitled to have assistance of counsel. 175Minn222, 220NW611. [c] (2) Objection to failure to furnish copy is waived by appearing and giving bail. 9PaDist&Co 719.
348-44 [a] **Right to counsel** is waived by appearance and taking witness stand after statement that accused did not need counsel. OklCr 288P502.
350-79 OklCr 287P795.
350-80 131Misc62, 226NYS689.
351-84 85CalA413, 259P465; 161Ga551, 131SE288.
351-85 85CalA413, 259P465.
351-86½-New. Under the Minnesota statute the municipal court of Faribault is without power to try a person upon a criminal complaint made by a private person charging an offense beyond the jurisdiction of a justice of the peace. 164Minn328, 205NW63.
351-86¼-New. Under such statute an information for such offense must be filed by a duly constituted prosecuting officer. 164Minn328, 205NW63.
351-91 Can [1930] 1DomLR420 (sufficiency of description of informant).
351-96 [a] (2) Place need not be alleged. 21AlaA286, 107S786.
351-1 SC 155SE150. [b] **Affidavit held sufficient.**-196 Ind512, 149NE77. [c] **Warrant has been held insufficient.**-SC 155SE150.
352-2 Miss 130S102.
352-6 NJ 146A42(2dcase).
352-7 [b] **Information** which alleges violation of specific statute is fatally defective if such statute has been repealed by another to which no reference is made. 9PaDist&Co 107.
352-13 [b] **Effect of omitting "knowingly"** where it is part of statutory description of crime. 36BC327, [1926] 1DomLR732, 45CanCrCas193.
353-16 [a] **In British Columbia.**-[1930] 2DomLR422.
353-21 34PortoRico 100, 101 [citCJ].
353-23 Utah 269P1006. [b] **Affidavit signed by one person and reciting that oath was taken by another** is defective. 152Miss220, 119S189.
353-31 161Ga551, 131SE288. [a] **Failure of solicitor of city court to sign accusation** is not fatal defect. 161Ga551, 131SE288.
354-45 132Misc741, 230NYS767.
354-50 161Ga551, 131SE288 (accusation in city court); 117Kan106, 230P304. [a] **Unsigned accusation** in city court may be amended by attaching signature of solicitor of court. 161Ga551, 131SE288.
354-51 NJSup 129A121.
354-52 39GaA814, 148SE612 (amendment after hearing).
355-64 21AlaA295, 107S727.
355-66½-New. A conviction on a plea of guilty to an affidavit which can be amended cannot be set aside because of the defect. 155Miss612, 125S99(2dcase).
355-67 [d] **In Washington.**-154Wash87, 280P922(2dcase).
355-77 Sask [1929] 3DomLR944.
355-80 245Mich530, 222NW765.
355-81 See also 170La83, 127S372. [a] **Request of defendant as to principle of sufficiency of evidence** need not be maintained where trial is without jury. 169La777, 126S57.
355-81½-New. Where the case is submitted to the court as authorized by statute, he need not render a written verdict, and his findings and judgment have the force and effect of a verdict of a jury. 217MoA26, 273SW139.
355-81¼-New. Court cannot be requested to charge itself as to the facts of the case. 158La755, 104S705. [a] **Proper charge on facts.**-158La755, 104S705.
356-82 [b] **Judge need not assume establishment of certain facts** and give instructions to convict or acquit accused. 165La561, 115S751. [c] **Refusal of special charges.**-165La561, 115S751.
356-83½-New. Court is not required to charge itself on the facts. 158La869, 104S746.
356-85 217MoA26, 273SW139.
356-87 But see BC [1929] 2DomLR785.
356-87½-New. Criminal proceedings, in which accused was convicted of operating an automobile while drunk and driving at excessive speed, held not invalid because she was detained in a cell in the station house because of her condition of intoxication, rather than at the office of the magistrate. NJ 143A750.
356-87⅓-New. In Ontario a magistrate cannot try several distinct charges against several separate accused at the same time. Ont [1928] 2DomLR787.
356-87¼-New. A judge trying a criminal case without a jury is presumed to follow the law and perform his duty. 89IndA677, 166NE676.
356-87½-New. A trial judge excluding an indictment and conviction of defendant for a different offense need not charge himself not to consider such rejected evidence in making up the verdict. 168La844, 123S594.
356-87⅙-New. Defendant not notified of charge until after considerable testimony is insufficiently notified. 135Misc842, 241NYS641.
356-87⅐-New. Procedure on trial and appeal in Connecticut under statute providing for election to be tried by three judges. 110Conn549, 148A664.
356-87⅛-New. Motion to dismiss will be denied where evidence is sufficient to support charge. CalA 290P61.
356-88½-New. **Remarks of prosecuting attorney** as to a previous conviction of accused have been held not prejudicial. 89IndA677, 166NE676 (judge presumed not to be influenced by remarks).
356-91 [b] **Taking down evidence as basis for charge.**-Court is not required to have clerk take down in writing facts on which a special charge is based. 158La755, 104S705.
357-14½-New. Judge, in determining effect and sufficiency of evidence must give such weight and credit to the testimony as it is entitled to receive, in view of all facts and circumstances. 158La869, 104S746; 165La561, 115S751.
357-14⅓-New. Reception of defendant's evidence before that of the prosecution at the instance of the prosecution, without defendant's objection, is no ground for dismissal. 30Hawaii560.
357-22 [a] (3) Adjournment for more than eight days renders subsequent proceedings void where consent of parties does not appear on record. Que [1927] 3DomLR399. (4) Silence of parties cannot be construed as consent. Que [1927] 3DomLR399.
358-31 [a] **Presumption of decision as to guilt** does not arise from motion for, and denial of, new trial. CalA 289P687.
358-33½-New. A conviction before a mayor's court cannot be collaterally attacked by defendant on trial for a third offense. 27OhA297, 161NE284.

358-34 191**Wis**597, 211**NW**780. [a] **In Philippines.**-51**Philippine**201.
358-45 Wis 233**NW**82. See also 157**SC** 288, 154**SE**166. [b] **Sentence begins to run at once.**-**Wis** 233**NW**82.
358-46 21**AlaA**310, 107**S**789.
358-51½-New. Parole. Statutes in some jurisdictions confer power on police judges to grant paroles. 123**Kan** 722, 255**P**975 (statutes construed).
358-52 [c] **Judgment for costs** against complaining witness, different from judgment orally announced at close of trial, held void. 191**Wis**597, 211**NW**780.
358-53 220**MoA**406, 286**SW**733 (record sufficient); 7**PaDist&Co** 163; 9**PaDist&Co** 713; 10**PaDist&Co** 459. See also 173 **Minn**95, 216**NW**540. [c] (3) Entry sufficient. 220**MoA**406, 286**SW**733. [d] (2) Must be enough in record to show actual rendering of judgment, but language in which couched is immaterial. 220**McA**406, 286**SW**733. [j] (4) Not objectionable that record does not show that magistrate asked accused whether he had any defense. **NS** [1930] 1**Dom LR**961. [k] **Failure of justice to make docket entry showing information filed** will not invalidate judgment rendered. 220**MoA**406, 286**SW**733. [l] **In California.**-102**A**24, 282**P**406. [m] **Where complaint is against members of firm individually,** naming them, judgment against "the defendant" is void. 34 **PortoRico** 202. [n] **In Saskatchewan.**-[1930] 2**DomLR**576. [o] **In Ohio.**-35 **OhA**418, 172**NE**551(2dcase).
359-55½-New. Omission of date in record of conviction may be cured by repetition of exact date throughout proceedings. **NJ** 147**A**857.
359-56 Ont [1926] 4**DomLR**609.
359-59 See also 9**PaDist&Co** 358.
359-61½-New. In Saskatchewan magistrate should note amount of his costs in memorandum of conviction. **Sask** [1930] 2**DomLR**576.
360-62 NJ 146**A**42; **NJ** 146**A**426; 34 **PortoRico** 202.
360-63 NJ 146**A**426.
360-66 NJ 146**A**426 (where statute specifies several offenses).
360-75 220**MoA**406, 286**SW**733.
360-77½-New. or the commitment, 220 **MoA**406, 286**SW**733.
361-81 [d] 9**PaDist&Co** 358.
361-83 [a] (2) Other instances. **Ind** 168**NE**481.
361-85 But see **Ont** [1927] 3 **DomLR** 433. [a] **General finding** amounted to finding against defendant on all issues. **Ind** 170**NE**539.
361-88½-New. Judge settles facts in a trial without jury. **NJSup** 135**A**785.
361-92 Sask [1930] 3**DomLR**816.
362-93 [c] (2) Statute prohibiting imposition of less than minimum penalties is not applicable to costs. **Can** [1930] 1 **DomLR**420.
362-94 86**CalA**332, 260**P**919.
362-95 Can [1930] 1**DomLR**420.
362-95½-New. In a summary prosecution for violation of a municipal ordinance, imprisonment is authorized to be imposed in the first instance in some jurisdictions. 312**Mo** 600, 280**SW**421.
362-99 TexCr 8**SW(2d)**176.
362-99½-New. Municipal court has power to sentence on each count constituting a separate and distinct crime. 134**SC**140, 132**SE**45.
369-99½-New. Municipal court has power to impose maximum fine of one hundred dollars or thirty days' imprisonment. 134**SC**140, 132**SE**45.
362-99¼-New. Where there are two separate offences, the municipal court may impose the maximum for each one. 134**SC**140, 132**SE**45.
363-2 102**CalA**24, 282**P**406.
363-9 See also 35**Man**404, [1926] 1**Dom LR**574, [1926] 1**WestWkly**189, 45**CanCr Cas**161.
363-23 181**Ark**1146, 28**SW(2d)**335.
364-27½-New. Judgment not subject to collateral attack (126**Kan**285, 268**P**96).
364-27½-New. except for want of jurisdiction (**Kan** 220**P**299; 126**Kan**285, 268**P**96).
364-33½-New. at least where defendant himself procures delay of the execution of sentence, 120**Kan**128, 242**P**147.
364-33½-New. as where after appeal and giving bond for appearance he permits his appeal to be dismissed by failing to appear for trial. 120**Kan**128, 242 **P**147 (commitment issued year after remand to lower court).
365-60 NJSup 128**A**888.
366-77 87**Colo** 261, 286**P**859 (statutory method is exclusive); 11**PaDist&Co** 689. [b] **Court held to have power to review,** though party is not held in custody. **NJ** 149**A**61.
366-78 3**Del**479, 139**A**78.
367-79 153**Md**618, 139**A**355; 322**Mo** 746, 18**SW(2d)**500. [f] 105**NJL**73, 143**A** 825. [g] **Where settlement is not conclusively shown,** proceeding in error may stand, though it is doubtful if it could be maintained if there is inference from record of compromise. 26 **OhNP NS**476. [h] **"Convicted" means judicial determination of contested fact** under such statute. 87**Colo** 261, 286**P**859.
367-80½-New. Constitutional provision for appeal in cases in inferior courts is limitation on legislative power to vest final jurisdiction in inferior court. 3**Del** 479, 139**A**78.
367-80½-New. The rule that appeal from justice of the peace should not be denied unless clearly without right is applicable to criminal cases. 3**Del** 479, 139**A**78.
367-85½-New. Appeal is defendant's remedy when justice refuses to accept substitute plea. **Colo** 291**P**1040.
367-88 94**PaSuper**10; 5**PaDist&Co** 213; 7**PaDist&Co** 277.
367-89 13**PaDist&Co** 658.
367-90 89**PaSuper**195; 13**PaDist&Co** 658. [a] 13**PaDist&Co** 101.
367-93 89**PaSuper**195.
367-93½-New. Misdemeanors not tried summarily in quarter sessions. 5**PaDist &Co** 621.
367-93½-New. The court may reconsider its action in allowing an appeal. 13**PaDist&Co** 101.
368-99 41 **Ida**199, 239**P**279.
368-1 87**Colo** 261, 286**P**859.
368-2 Wash 287**P**13 (complaint improperly verified).
368-5 81**Mont**145, 262**P**158. See also 264**Mass**324, 162**NE**401.
368-6 But see 7**PaDist&Co** 671.
368-10 94**PaSuper**10.
368-10½-New. But in California certiorari will not lie from affirmance by superior court of conviction of misdemeanor in justice's court. 72**CalA**711, 238**P**92.
368-11 But see 86**CalA**332, 260**P**919.
368-12 Sask [1930] 3**DomLR**816.
369-23 [a] But see 10**PaDist&Co** 142.
369-26 84**Colo** 291, 269**P**905.
369-27½-New. Writ of review lies to review criminal proceedings had in superior court after appeal thereto from recorder's court where it was claimed that the superior court had no jurisdiction because the recorder had pronounced no judgment and the appeal was premature. 79**CalA**273, 249**P**871.
369-27½-New. Defendant cannot take advantage of his own wrong in procuring the issuance of void writ. **Colo** 291 **P**1040.
370-36 See also **Colo** 291**P**1040. [b] **Decision of police court on question of its jurisdiction** may be reviewed after conviction on appeal or by habeas corpus. 229**AppDiv**281, 242**NYS**348. [c] **Order denying new trial** after conviction is not appealable. **CalA** 291**P**161.
370-37 150**Miss**759, 116**S**878.
370-38 111**TexCr**653, 13**SW(2d)**831(1st case).
370-43½-New. Refusal of the mayor in a criminal proceeding under a state law to grant a change of venue on defendant's affidavit charging that he could not obtain justice before such mayor is reviewable by certiorari as constituting an "illegal action." 207 **Iowa**203, 222 **NW**445.
370-44½-New. Order to pay ten dollars per week in support of wife is fine in excess of one hundred dollars within Delaware constitution so as to permit appeal to general sessions. 3**Del** 96, 130 **A**855.
370-46 177**Ark**294, 6**SW(2d)**295; 79 **CalA**273, 249**P**871 (appeal from recorder's court); 10**PaDist&Co** 142. [g] **In Prince Edward Island.**-[1928] 1**DomLR** 803. [h] **In Ontario.**-[1930] 2**DomLR** 149.
370-46½-New. If justice of peace had no jurisdiction to try case, circuit court has no power to try it on appeal. 141 **Miss**877, 106**S**111.
371-50 [a] **Circuit court acquires jurisdiction of person and cause** when defendant gives bond for appearance and also appears in court. **MoA** 282**SW**739.
371-51 65**Utah**400, 237**P**516; **Ont** [1929] 1**DomLR**693. [b] **"Conviction"** includes sentence or order of court. 3 **Del** 93, 130**A**854. [c] **Where accused is paroled** and subsequently sentenced on violation of parole, time for taking appeal dates from such sentence. 3**Del** 93, 130**A**854.
371-52 11**PaDist&Co** 172; **NS** [1929] 1 **DomLR**654 (date of actual making of conviction and not from date of written conviction). [d] **Subsequent sentence for failure to pay fine.**-3**Del** 96, 130**A**855. [e] **Object of court rule** in limiting time of appeal where trial on appeal is de novo is disposal of case while witnesses are still available and facts fresh in their memories. 3**Del** 96, 130**A**855. [f] **In Alabama.**-23**AlaA**301, 124**S**502(2d case).
371-53 See also 9**PaDist&Co** 548.
371-54 23**AlaA**598, 129**S**491; 142**Miss** 88, 107**S**375; 150**Miss**759, 116**S**878; 114 **Nebr**4, 205**NW**575.
371-58½-New. Forfeiture should not be declared because accused was not actually in court when motion to reverse and dismiss was made. **NJ** 129**A**251.
371-58½-New. Supersedeas bond on appeal from conviction in inferior court merely suspends execution of judgment. 222**Ky**400, 300**SW**887.
372-68 21**AlaA**244, 107**S**40.
372-71 [e] **In Nova Scotia.**-[1930] 3 **DomLR**273.
372-76 Cal 285**P**696; 84**CalA**201, 257**P** 922; 200 **Ind**235, 162**NE**444; **MoA** 9**SW (2d)**820 (appeal is perfected by filing of affidavit for appeal, not by giving bond); 11**PaDist&Co** 736.
372-78 23**AlaA**225, 123**S**291(1stcase); **Alta** [1929] 1**DomLR**706 (proof of compliance may be made at any time before hearing of appeal).
372-80 NB [1928] 4**DomLR**239.
373-82 [a] **Waiver of delay.**-**Ida** 291**P** 703.
373-82½-New. or for service of the same. 65**Utah**400, 237**P**516.
373-83 [c] **Party against whom jurisdiction of appellate court is invoked** must be served with timely notice. 65 **Utah**400, 237**P**516. [d] **Notice of appeal from judgments of city or town courts** is required by some statutes to be served on attorney for adverse party or party himself if he is not represented by attorney. 65**Utah**400, 237**P**516.
373-86 See also 216**AppDiv**508, 215 **NYS**666.
373-87 80**CalA**533, 251**P**945 (statute permitting appeal by oral announcement in open court not repealed by later statute).
373-96 [a] **In Oklahoma.**-**Cr** 279**P**972 (statute held mandatory).
373-99 [a] **Allowance of appeal in discretion of court.**-94**PaSuper**470. [b] **In Canada.**-[1930] 2**DomLR**97.
373-4½-New. Under some constitutions statutes attempting to authorize appeals from summary convictions without allowance by court of record are invalid. 14**PaDist&Co** 4.
373-8 257**Mass**465, 154**NE**67; 141**Miss** 600, 106**S**827; 142**Miss**88, 107**S**375; 144 **Miss**519, 110**S**443; 144**Miss**696, 110**S** 665; 146**Miss**467, 111**S**576. [a] **Requirement jurisdictional.**-144**Miss**696, 110**S**665. [b] **"Transcript"** is copy of court's record. 200 **Ind**235, 162**NE**444. [c] **Unless record is before him,** common pleas judge cannot reverse conviction in recorders' court. **NJSup** 150**A** 239.
373-9 200 **Ind**235, 162**NE**444. [b] **Oral demand by counsel for appellant** is sufficient to require court to prepare and file transcript. 200 **Ind**235, 162**NE**444.
374-14 See also 11**PaDist&Co** 367.
374-15 145**Miss**210, 110**S**441; **NJSup** 150**A**239.
374-17 [b] **Common pleas judge must enforce recorder's compliance with law**

requiring certification of proceedings. NJSup 150A239.

374-22½-New. Where the transcript of the record is not certified in accordance with statute, the circuit court is without jurisdiction. 146Miss467, 111S576.

374-22⅓-New. In such case any judgment rendered by the circuit court is void. 146Miss467, 111S576.

374-22¼-New. In British Columbia magistrate cannot be compelled on certiorari to return transcript of depositions taken by stenographer without payment of stenographer's fees. BC [1930] 2DomLR552.

374-23 Utah 266P272 (precinct of justice sufficiently shown).

374-25 5PaDist&Co 213.

374-26 21AlaA536, 109S610; 98Fla599, 124S1 (judgment of conviction); 257Mass465, 154NE67; 5PaDist&Co 213. [c] **In Indiana.**-196 Ind512, 149NE77. [d] **Uncontradicted affidavit** is sufficient to overcome record. Wash 287P13.

374-29 5PaDist&Co 213. [d] **Execution of appeal bond** and rendition of judgment by justice of peace must be shown. 142Miss88, 107S375. [e] **Record should show judgment imposing sentence** which is required to confer jurisdiction on circuit court on appeal. 157Miss622, 128S773(2dcase).

374-29½-New. In Mississippi the transcript required to be filed is a copy of the justice of peace docket and judgment. 142Miss88, 107S375.

374-29⅓-New. Conviction will not be set aside because the record does not show the names of defendant's witnesses, where another case before the court shows that there were no witnesses. NJSup 134A843.

374-29¼-New. **Proper sentence** must be shown by record. 5PaDist&Co 213.

374-30 156Miss365, 126S38.

375-31 74CalA144, 239P707.

375-38 137Misc267, 241NYS745. [a] **District court on appeal** from mayor's court may, on proof by affidavit, correct erroneous recital in transcript as to taking of appeals. 202 Iowa372, 210NW464.

375-40½-New. Deficiency in the recorder's signature is supplied by an imprint of his seal on the original complaint and conviction on file. NJSup 134A843.

375-41 102NJL519, 134A556; 146Wash81, 261P786; 151Wash106, 275P64. [b] **Burden of showing diligence** is on appellants. Wash 287P13. [c] **Delay of six months held not sufficient** for dismissal where no jury term intervened. Wash 287P13.

375-43 169Minn272, 211NW5.

375-47 Wash 287P13.

376-52½-New. Neither prosecuting attorney nor circuit court may dismiss appeal from inferior court except by judgment on trial de novo. 222Ky400, 300SW887.

376-52⅓-New. Prosecuting attorney by failure to file motion to dismiss waives delay in prosecuting appeal. MoA 26SW(2d)1002.

376-54 [a] **Depositions may be looked at** to decide whether adjournment should be granted. 36BC327, [1926] 1DomLR732, 45CanCrCas193.

376-55 [a] **Transcript of proceedings in county court appearing of record** may be sufficient to confer jurisdiction on circuit court. 23AlaA277, 124S393(2dcase).

376-56 22AlaA131, 113S469; 23AlaA288, 124S401 (certificate of judgment and appeal bond from recorder's court need not be introduced in evidence in circuit court to give latter court jurisdiction); 94CalA641, 271P781; 98CalA552, 277P201.

376-57 23AlaA301, 124S502(2dcase); 22AlaA131, 113S469.

376-64 102NJL519, 134A556.

376-67½-New. Judgment of inferior court remains in full force pending appeal until displaced by judgment on trial de novo in circuit court. 222Ky400, 300SW887.

376-69 [a] 152Miss6, 118S349(2dcase).

376-70 23AlaA17, 121S436(2dcase) [certiorari den 219Ala127, 121S437(1st case)]; 29Ariz186, 239P1032; NJSup 143A750; 135Wash344, 237P717.

376-73 11PaDist&Co 656.

377-77½-New. No bill of exceptions is required in some jurisdictions. 79CalA273, 249P871.

377-77⅓-New. But a statement of the case is required which is the equivalent of a bill of exceptions. 79CalA273, 249P871.

377-77¼-New. except that the statement must contain the grounds upon which appellant intends to rely on appeal. 79CalA273, 249P871.

377-77⅕-New. In setting forth grounds of appeal it is not necessary to state them so fully as to include the papers and minutes required to be furnished by the justice by transmission of a copy of the docket. 79CalA273, 249P871.

377-79 152Miss6, 118S349[2dcase] (disqualification of justice because of interest); NJSup 128A888. [a] (8) Mayor, presiding in mayor's court, disqualified for pecuniary interest. 174Ark886, 298SW321. [d] **Conviction under void city ordinance will be upheld** where crime charged is covered by valid state law. 177Ark294, 6SW(2d)295. [e] **Irregularities in prosecution and in manner of taking appeal** may be waived. 23AlaA288, 124S401. [f] **In Manitoba.**-[1930] 3DomLR404.

377-80 [a] (6) On ground of bias. PrEdwIsl [1929] 1DomLR687.

377-81 Me 149A389.

377-81½-New. Defendant is estopped from alleging want of jurisdiction where he appears and participates in the trial. 8PaDist&Co 87.

377-82 NJ 129A427. But see 179Ark1094, 20SW(2d)114(2dcase); 89IndA552, 167NE155; 124Kan245, 259P691.

378-85 21AlaA337, 109S571; 87Colo261, 286P859 (burden of showing prejudice). [a] **That improper testimony did not affect result** will be presumed. TexCr 23SW(2d)729.

378-87 NJSup 129A251.

378-88 CalA 288P45; Ind 168NE579; 245NYS559.

378-89 102CalA24, 282P406 (discretion exercised in favor of appellant). See also 30Hawaii560.

378-91 Ont [1926] 4DomLR609. [b] (2) In case decided by justice on conflicting evidence judgment will not be reversed unless decision is clearly and manifestly against weight of evidence. 21OhA459, 153NE215. [c] 23AlaA391, 127S244 (statute applies only where both have equal opportunity to consider evidence). [d] **Injury must affirmatively appear** to warrant reversal on ground of evidence improperly received or rejected. TexCr 23SW(2d)729.

379-92 23AlaA391, 127S244; CalA 290P610; 40GaA499, 150SE435(1stcase); 89IndA454, 166NE675; Ind 168NE579; Ind 171NE5 (court will only determine whether finding is sustained by evidence); 35OhA37, 171NE615; NS [1930] 2DomLR213.

379-93 NJ 143A825; 34OhA384, 170NE881.

379-94 152Va941, 146SE270.

379-94½-New. On appeal from a recorder's court, the question to be determined is not whether technical rules of law and procedure were complied with, but whether substantial justice was done. 151SC90, 148SE710.

379-94⅓-New. Where no conflict appears in the testimony in a case tried to the court, failure to make findings is a mere irregularity and not reversible error. 154Wash87, 280P922(2dcase).

379-3 NJSup 143A750. See also Colo291P1040. [c] **Objection that complaint was defective** has been held to be waived where not first raised at trial. NJSup 147A774(2dcase).

379-6 NJSup 143A750.

380-8 175Minn222, 220NW611.

380-11½-New. Questions of fact not reviewed. NJSup 135A785.

380-11⅓-New. In British Columbia the question whether the magistrate took the depositions in writing is not open for examination where nothing on the face of the record suggests irregularity. BC [1929] 2DomLR785.

380-12 79CalA273, 249P871 (appeal held premature, and superior court without jurisdiction).

380-13 [a] **Ruling of court on admissibility of evidence** obtained by illegal search and seizure cannot be reviewed on writ of review of conviction of unlawful possession of intoxicating liquors. 120Or76, 249P819. [b] **Writ of review is concurrent with right of appeal** under statutes. 120Or76, 249P819.

380-14 3Del233, 134A692. [b] **Presumption exists** that justice complied with his statutory duties. 87Colo261, 286P859.

380-16 [a] **Original paper, duly filed in action, may be examined** and considered by reviewing court without reference to transcript of docket and journal entries where such papers are required by statute to accompany petition in error. 19OhA355. [b] **Failure of justice having jurisdiction of offense** to designate himself with proper official title is not admission of his want of jurisdiction and does not furnish ground for reversal of judgment. 19OhA355.

380-18 149Miss738, 115S885; 137Misc267, 241NYS745 (statement that defendant was informed of his rights). [a] (2) Where record contains only legal conclusion from unrecorded facts, appellate court cannot determine correctness of conviction. 13PaDist&Co401.

380-20½-New. Evidence is admissible to reconcile a variance between the complaint appearing in the transcript and the original complaint. 118Nebr249, 224NW278.

380-20⅓-New. Presumption exists that defendant's rights were fully protected where same attorney represents him on appeal. 87Colo261, 286P859.

380-22 105NJL73, 143A825 (discharge from custody); 133Misc257, 231NYS591; 13PaDist&Co658. [a] 36BC397, [1926] 2DomLR287, 45CanCrCas291. [b] **New trial may be ordered** by superior court on reversal of conviction in justice's court. 84CalA201, 257P922. [c] **In Pennsylvania.**-95PaSuper552. [d] **Judgment of acquittal.**-94PaSuper10. [e] **There should not be judgment of affirmance and dismissal** on same appeal. 98Fla599, 124S1.

381-25 MoA 16SW(2d)683(2dcase).

381-27½-New. Judgment of circuit court supersedes judgment in justice's court. 116Or459, 241P383.

381-27⅓-New. Where justice had jurisdiction, although the sentence was illegal the superior court should remand to the justice for legal sentence and is not authorized to dismiss and release defendant. 145Wash289, 259P1077.

381-27¼-New. On reversal of case improvidently removed to county court, justice may restore it to calendar and proceed in accordance with law. Colo291P1040.

381-28½-New. In New York after a plea of guilty in a magistrate's court, a court of special sessions cannot reverse the judgment sentencing accused to a reformatory and grant a new trial. 216AppDiv814, 215NYS337.

381-37 [c] **In New Jersey.-Sup** 128A891. [d] **In absence of record of conviction,** proceedings must be set aside. NJSup 135A789.

381-37½-New. In British Columbia a judge on certiorari may set aside part of the conviction which is bad leaving standing the part that is regular. BC [1929] 2DomLR785.

382-46½-New. Where accused pleaded guilty before a justice of the peace, thinking he was charged with a lesser offense which the caption of the complaint alleged, on certiorari being granted and judgment being reversed and cause remanded, it was held that the justice of the peace should have allowed the plea of guilty to be withdrawn instead of resentencing and re-fining accused on the plea of guilty originally entered. 136Wash51, 238P923.

382-46⅓-New. In a case tried to the court in which the court failed to make findings of fact, the cause cannot be remanded for entry of findings where the judge who heard the case is no longer on the bench. 154Wash87, 280P922(2dcase).

382-47 177Ark294, 6SW(2d)295; NJSup 132A306; 9PaDist&Co 291. [b] **Trial in circuit court** following appeal

from conviction in mayor's court is trial de novo. 22AlaA545, 117S603.

382-48 NJSup 128A853; 94PaSuper10.

382-50 3Del 96, 130A855; 149Miss718, 115S879; NS [1930] 3DomLR911. [a] **In Indiana.**–197 Ind210, 150NE103.

382-51 Mo 149A389 (superior court has every power municipal court had). [a] **On appeal from conviction on plea of guilty** case is in court for trial of every question that was raised or that defendant was not precluded from raising by plea of guilty. 41 Ida199, 239P279.

382-52 NJSup 128A888 (waiver of taking of testimony and objection to jurisdiction in lower court are not waiver of right to hearing on appeal); Wis 230 NW713.

382-55½-New. Defendant is given trial de novo in circuit court on appeal from judgment of inferior court irrespective of whether supersedeas bond is filed. 222Ky400, 300SW887.

382-57 197 Ind210, 150NE103.

382-58 198 Ind477, 154NE9; 89 IndA 52, 165NE777(2dcase).

383-62 23AlaA63, 120S468; 23AlaA 598, 129S491; 21AlaA623, 111S50; 22 AlaA288, 115S73; 23AlaA341, 125S603 (1stcase); 23AlaA478, 127S263(1st case); Me 149A339; NJSup 143A750; 192NC780, 136SE11. See also 197 Ind 210, 150NE103. But see 22AlaA654, 119 S597(1stcase). [a] See also 146Wash 632, 264P427. [d] **Record held to show that defendant was tried on appeal** on complaint different from that in lower court. 257Mass465, 154NE67. [e] **Jurisdiction of court on appeal** held to be based on complaint in district court. 257Mass465, 154NE67. [f] **Motion to quash and plea held sufficient to cause judge to compare copy of complaint with certification of record of district court** to see if copy is same as original complaint. 257Mass465, 154NE67.

383-65 192NC780, 136SE11.

383-67 [a] **In absence of complaint filed as required by statute,** or waiver appearing of record, judgment will be reversed. 21AlaA345, 108S262. [b] **Failure of record to show brief statement of complaint** signed by solicitor, or waiver by defendant, is reversible error. 21AlaA353, 108S272.

383-67½-New. On trial de novo in a district court the complaint takes the place of an indictment or information filed in such court. 41 Ida199, 239P 279.

383-67½-New. A complaint filed in an appeal charging driving a vehicle on a highway while under the influence of intoxicating liquor is not a fatal departure from the original affidavit charging the driving of an automobile while intoxicated. 23AlaA277, 124S393 (2dcase).

383-68 21AlaA259, 107S224.

383-71 127Kan640, 274P199; 214Ky 480, 283SW430; 257Mass465, 154NE67; 136Miss502, 101S576; 140Miss217, 105S 501; 147Miss85, 113S191; 150Miss302, 116S432; 150Miss542, 117S374; 118 Nebr249, 224NW278; 197NC707, 150SE 353(1stcase). [c] (2) 146Wash17, 261P 796; Wash 290P578. [f] (4) Complaint filed should be based on, and confined to, material allegations of original complaint. 22AlaA79, 112S535. (5) And solicitor cannot add averment constituting departure. 22AlaA79, 112S 535. (6) Information charging possession of whisky held no departure from affidavit charging hauling whisky. 23 AlaA341, 125S603(1stcase).

383-74 SD 225NW60.

384-83½-New. Where the record in the circuit court shows that defendant was tried there on a warrant not charging him with any offense, judgment should be arrested, although the warrant on which he was convicted before the justice charges him with an offense. 101 WVa579, 133SE329.

384-83½-New. In Alabama solicitor has right to file complaint in liquor prosecution. 21AlaA82, 105S438 (Code [1923] § 3843).

384-85 117Nebr597, 221NW706.

384-88 197 Ind173, 150NE58.

384-90 89 IndA288, 166NE287(2dcase).

384-93½-New. Upon appeal from conviction upon a plea of guilty, defendant was held entitled to show that the plea was not understandingly made. BC [1926] 4DomLR869, [1926] 3WestWkly 273.

384-94 See also NS [1930] 1DomLR 865.

385-2 [b] **Venue of justice** must be proved in circuit court. 150Miss302, 116 S432.

385-5½-New. Charge to jury that prosecution originated in county court and came to circuit court by appeal is not reversible error. 21AlaA61, 106S 52.

385-5½-New. Charge stating prosecution originated in county court and came to circuit court by appeal is not error. 21AlaA61, 106S52.

385-5¼-New. In a liquor prosecution, cross-examination by the solicitor of the judge who tried defendant on the same charge in a county court, as to whether he had convicted defendant, has been held improper. 21AlaA482, 109S888.

385-8 NJSup 132A306; NJSup 132A 325; 67Utah526, 248P486.

385-12 34PortoRico 375.

385-13 107TexCr151, 295SW1098.

386-22 91Fla522, 107S689, 691 [citCJ].

386-23 91Fla522, 107S689, 691 [citCJ]; Mo 298SW769, 772 [quotCJ].

386-27 See also NJCh 152A188.

386-27½-New. An improperly verified warrant was held to make the arrest invalid. 273US1, 47SCt250, 71Led505.

386-27½-New. Bench warrant supersedes mittimus issued by town clerk binding defendants over to certain term. 106Conn701, 139A91.

386-31½-New. A bench warrant issued by the supreme court of the District of Columbia and addressed to a marshal of such District, confers no authority upon a marshal of the United States district court for the southern district of Florida, or a sheriff of any county within such district, making arrest thereunder. 91Fla522, 107S689.

386-31½-New. A United States commissioner may issue a warrant of arrest and commit a prisoner where supported by a proper complaint. 27F(2d) 126 (complaint held sufficient).

387-35 312Mo 447, 279SW72; 117 Or 466, 242P440.

387-36 But see Ind 156NE560.

387-39 21AlaA192, 106S624; 22AlaA 167, 113S485; 70CalA334, 233P390; 331 Ill 470, 163NE411; 233 IllA331; 240 IllA279; 246 IllA248; 199 Ind546, 158 NE902; 77Mont326, 250P613; 117 Or 466, 242P440; 107TexCr78, 294SW554. See also Ind 163NE836. [c] **Written waiver of jury trial, after advice of right by court,** is inoperative where made before plea, as case stood without issue to be tried. 233 IllA331.

388-40 117 Or466, 242P440 (may appear by counsel only).

388-45 21AlaA192, 106S624.

388-46 158La713, 104S627.

388-47 126Kan285, 289 [quotCJ], 268P 96.

388-49 OklCr 275P361.

388-51 Ind 156NE560; 164La597, 114 S171. But see 158La352, 104S112.

389-55½-New. Pronouncing judgment against defendant previously arraigned without new arraignment violates no substantial right. 98CalA733, 277P896.

389-57 OklCr 269P509 (amendment affecting joint defendant only); OklCr 288P362.

389-58 217Ala519, 116S913.

389-60½-New. Where amended information is withdrawn and original information on which defendant has been arraigned is refiled, rearraignment is not necessary. 317Mo 354, 296SW397.

389-62 Mo 29SW(2d)63 (after prosecuting attorney's opening statement to jury). See also 164La423, 114S83.

389-64 Mo 289SW575.

389-68 See also OklCr 292P1048.

389-73 [b] **That arraignment, pleas of guilty, and judgment** occurred in one day did not prove deprivation of legal rights. CalA 288P873.

389-74 [d] (1) OklCr 282P692(1st case). [e] (2) Acts of counsel held not to constitute waiver. 113TexCr305, 21 SW(2d)667(1stcase).

390-77½-New. Where a plea of not guilty was entered to a charge prior to the first trial, it is not error for the trial court to deny additional time to plead prior to the retrial of the cause. OklCr 275P361.

390-80 Ind 156NE560. But see 214 AppDiv793, 210NYS470.

390-82 312Mo 447, 279SW72.

390-83 [a] **Regular or special term.**–164La423, 114S83.

390-87 CalA 288P873.

390-88 214AppDiv793, 210NYS470.

390-89 167La92, 118S703.

391-15 117 Or466, 242P440, 443 [quot CJ].

392-16 25F(2d)242; Mo 281SW32; MoA 282SW735; 34NM154, 279P66; 38 OklCr302, 260P785; 117 Or466, 242P 440, 443 [quotCJ].

392-16½-New. , or appearing for sentence after waiver by attorney by direction of accused. 197 Ind335, 149NE 444.

392-17 77Colo 546, 238P25; 159La 1093, 106S651; 312Mo 635, 281SW29; 35 OhA311, 172NE401; 117 Or466, 242P 440, 443 [quotCJ].

392-18 117 Or466, 242P440, 443 [quot CJ].

392-19 170Ark352, 280SW353; 116 Nebr73, 215NW789; 54ND779, 211NW 336; 117 Or466, 242P440.

392-20 Ark 32SW(2d)158; 199 Ind117, 155NE259; 54ND779, 211NW336; 117 Or466, 242P440.

392-21 7F(2d)531; 312Mo 447, 279SW 72; 312Mo 635, 281SW29; 322Mo 1, 16 SW(2d)96; 116Nebr73, 215NW789; Okl Cr 269P509; OklCr 287P1090; 117 Or 466, 242P440.

393-28½-New. Complaint, that defendant was not arraigned on indictment as amended, held too late, after trial and conviction. 169La626, 125S737.

393-35 254Mass556, 150NE869; 45 Philippine173. [d] **Error to coerce defendant** to plead. 45Philippine173. [e] **Right to have plea entered after introduction of evidence.**–TexCr 27SW(2d)169 (where evidence again introduced).

394-42 [a] **Motion to quash on grounds** of suppression of evidence in former proceedings and lack of speedy trial is not a plea to merits or plea of former jeopardy. 67Utah362, 248P119.

394-46 161La23, 108S111; NJSup 146 A788(1stcase) (plea of guilty).

394-49½-New. Where an entry is made by some one other than defendant, the indictment is not destroyed, but remains valid against defendant. 254Mass556, 150NE869.

394-54 76CalA419, 245P212, 217 [quot CJ].

394-55 76CalA419, 245P212, 217 [quot CJ].

394-56 But see 76CalA419, 245P212, 217 [quotCJ].

395-59 22AlaA604, 118S496.

395-71 77Mont326, 250P613.

396-81 MoA 28SW(2d)691 (facts properly pleaded).

396-88 274US220, 47SCt582, 71Led 1009; 16F(2d)670, 673 [citCJ]; 33F (2d)263 (request to withdraw plea and file demurrer to indictment was for discretion of court); 85CalA194, 259P101; 87CalA236, 261P1103; 98CalA733, 277 P896; 102CalA608, 283P389; CalA 284 P256; 87Colo 507, 289P1081; 95Fla919, 117S378; 43 Ida409, 252P177; 326 Ill 173, 157NE193; 339 Ill 558, 171NE681; 196 Ind722, 149NE436; 197 Ind335, 149 NE444; 197 Ind419, 151NE129; 200 Ind4, 161NE6 (plea of guilty); Ind 168 NE241; 89 IndA52, 165NE777(2dcase); IndA 171NE811; 158La1081, 105S71, 72 [quotCyc]; 164La423, 114S83; 170La 991, 129S612(4thcase); 233Mich462, 206 NW986, 987 [citCyc]; 245Mich578, 223 NW124; 165Minn423, 206NW952 (plea of guilty); 147Miss91, 113S193; 151 Miss566, 118S628; 33NM98, 263P502, 503 [citCJ]; 54ND871, 211NW813; 54 ND878, 211NW816; OklCr 281P160(1st case); OklCr 281P165; OklCr 288P 1001; 148Wash627, 269P798.

396-88½-New. But such discretion must be guided by law. 197 Ind335, 149 NE444.

396-89 196 Ind722, 149NE336.

396-90 43 Ida409, 252P177.

396-92 33F(2d)263 (denial of request to withdraw plea of guilty and file demurrer to indictment, not made till six months after plea, is not abuse of discretion); 34F(2d)97.

396-93 158La1081, 105S71.
396-94 158La1081, 105S71.
396-94½-New. Where a motion to withdraw a plea of guilty which does not state facts of defense is not brought to the attention of the court, it will be treated after adjournment of the terms as having been overruled. 147Miss91, 113S193.
397-95 [a] **Evidence held inadmissible.**-318Mo 1142, 4SW(2d)463. [b] **Transcript of proceedings before court** when defendant pleaded guilty is incompetent on hearing of motion to withdraw plea. 339 Ill 558, 171NE681.
397-96 339 Ill 558, 171NE681 (holding affidavit disclosed no defense).
397-98 CalA 288P873 (holding court properly denied motion to withdraw where offer of proof revealed neither facts nor witnesses). [a] **Evidence held to show** that defendant was not deaf as contended. CalA 288P873.
397-2½-New. The burden of proof is on defendant to show that confession was obtained illegally. 326 Ill 266, 157NE 218.
397-6 34F(2d)97; 180Ark633, 22SW (2d)36(1stcase); 81CalA19, 251P817; 87CalA236, 261P1103; 87CalA733, 262P 344 (denial of motion held not abuse of discretion though accused did not understand nature of charge); 325 Ill 361, 156NE372; 339 Ill 558, 171NE681; Ill 173NE148 (discretionary with trial courts); 196 Ind722, 149NE436; 165 Minn423, 206NW952; 151Miss566, 118 S628; 311Mo 540, 278SW775; 54ND 871, 211NW813; 54ND878, 211NW816; OklCr 281P165; OklCr 281P819 (within court's discretion in misdemeanor cases); 123 Or485, 260P234, 263P77; 51 Philippine820; 105WVa527, 143SE304 (matter of discretion). See also 86CalA 432, 260P912 (denial of motion held not erroneous). [b] 147Miss91, 113S193; 37 OklCr421, 258P927. [d] **Showing of innocence and of facts constituting defense** is necessary to require setting aside of plea of guilty. Miss 113S193. [e] **Discretion held not abused.**-CalA 284P256.
397-6½-New. Accused is not entitled to withdraw a plea of guilty in a murder case where the record shows that he was fully informed as to rights. 325 Ill 361, 156NE372.
397-6½-New. Accused pleading guilty in the hope of leniency may not withdraw the plea after death sentence. 325 Ill 361, 156NE372.
397-6¼-New. Defendant cannot withdraw a plea for failure to inform counsel as to circumstances under which confession was made. 325 Ill 361, 156NE 372.
397-6⅓-New. Defendants, changing to plea of guilty to attempt to rob before evidence was closed, held not entitled to withdraw latter at time of sentence. 222AppDiv256, 225NYS653.
397-7 41GaA333, 153SE90(2dcase). [c] (3) If defendant concluded that evidence was insufficient, he should have withdrawn plea of guilty. TexCr 24 SW(2d)1097. [h] **Statutory requirements are mandatory.**-43 Ida409, 252P 177.
398-8 201Cal 309, 257P71; 42 Ida785, 248P12 (abuse of discretion not shown); Ill 173NE148; Kan 291P743; 312Mo 447, 279SW72; 33NM98, 263P502; 37 OklCr421, 258P927; 136Wash51, 238P 323. [b] **Refusal to allow withdrawal** on mere conclusion of defendant in affidavit that he had good defense held not abuse of discretion. 42 Ida785, 248 P12. [c] **Lack of counsel** should be considered in determining whether refusal of withdrawal was abuse of discretion. 326 Ill 173, 157NE193. [d] **Discretion not abused.**-200 Ind4, 161 NE6.
398-9 274US220, 47SCt582, 71L ed1009; 326 Ill 173, 157NE193; 331 Ill 470, 163 NE411; Ill 173NE148; Wyo 285P153. [f] **After denial of motion to withdraw** plea of guilty, leave may be granted on fuller statement of same facts. CalA 284P256. [g] **That defendants may be found guilty** does not authorize denial of withdrawal of guilty plea. Ill 173NE 141.
398-10 274US220, 47SCt582, 71L ed 1009; 39F(2d)432; 201Cal 309, 257P71; Ill 173NE141; 197 Ind335, 149NE444; 199 Ind183, 156NE389; Ind 168NE18; 89 IndA701, 168NE28; 151Miss536, 118 S620(2dcase); 81Mont495, 263P979 (without advice of counsel); 33NM98, 263P502; 37 OklCr421, 258P927. See also 43 Ida409, 252P177. [a] Ill 173 NE148. [d] (2) 317 Ill 460, 148NE260 (when accused testified for state under implied promise). (3) 97CalA60, 274 P1005. (4) Under conflicting evidence, denial is proper. 89 IndA52, 165NE777 (2dcase).
398-11 274US220, 47SCt582, 71L ed 1009; 42 Ida785, 248P12; 339 Ill 558, 171NE681; Ill 173NE141; 81Mont495, 263P979, 981 [citCJ]; 37 OklCr421, 258 P927; OklCr 281P819; 98PaSuper464 [quotCJ]; 136Wash51, 238P923.
398-12 CalA 288P873 (holding evidence to show that defendant was not induced to plead guilty by promise of immunity); 87Colo 507, 289P1081; 151Miss566, 118S628; Mo 285SW976; 318Mo 1142, 4SW(2d)463; 54ND871, 211NW813; 54 ND878, 211NW816; 39 OklACR221; 123 Or485, 260P234, 263P77.
399-13 54ND871, 211NW813; 54ND 878, 211NW816; 123 Or485, 260P234 (where defendant shows he is guilty). See also 165Minn423, 206NW952 (where motion was made and passed on but question not raised).
399-13½-New. , or merely on the ground that he was not advised that he was entitled to counsel 196 Ind722, 149NE436.
399-13¼-New. or advised as to punishment that could follow conviction on plea. 196 Ind722, 149NE436.
399-13¼-New. Where affidavits were insufficient to establish innocence of crime, leave has been denied. 197 Ind 335, 149NE444.
399-14 85CalA194, 259P101; 87CalA 236, 261P1103; 98CalA733, 277P896; 339 Ill 558, 171NE681. See also 43 Ida 409, 252P177; Wyo 285P153. But see 197 Ind335, 149NE444; OklCr 288P611.
399-14½-New. Nor is such discretion abused by refusal to allow withdrawal where accused's attorney misrepresented that accused would be paroled on entry of plea of guilty where neither court nor prosecuting attorney had power to parole. 311Mo 540, 278SW775.
399-14⅓-New. The court is not bound by any inducement held out by the prosecuting attorney or sheriff to plead guilty. 197 Ind335, 149NE444.
399-15 84CalA382, 258P447; 326 Ill 173, 157NE193. See also 123 Or485, 260 P234, 263P77.
399-15½-New. When defendant, after entering a plea of guilty, introduces evidence of insanity at the time of the offense, it is proper for the court to enter a plea of not guilty. 106TexCr99, 291 SW242.
399-15⅓-New. Upon prosecuting attorney's motion to nolle prosequi conspiracy, indictment of two defendants does not entitle third defendant jointly indicted to withdraw his plea of guilty or to be heard on the motion. 8F(2d) 318.
399-15¼-New. The trial court has no discretion to overrule a motion to set aside a plea of guilty where defendant has been denied his constitutional right to a jury trial. Ind 168NE18.
399-15⅕-New. On petition for withdrawal of a plea of guilty to one charge, the court cannot consider a plea of guilty to another charge. 89 IndA701, 168NE 28.
399-15⅙-New. Application to withdraw plea of guilty should be made within reasonable time after entry of plea. Wyo 285P153.
399-16 Mass 171NE53 (it is too late after sitting in which sentence was imposed).
399-17 34F(2d)97; 201Cal 309, 257P 71; CalA 288P873; 89 IndA701, 168NE 28 (petition for withdrawal of plea is addressed to court's discretion); 245 Mich578, 223NW124; 81Mont495, 263P 979; 37 OklCr421, 258P927; OklCr 288 P349; 136Wash359, 240P3.
399-19 208 Iowa867, 226NW81.
399-22 90Fla133, 105S314; Fla 130S 718; Ind 169NE859; Ind 169NE861.
399-22½-New. a bill of particulars, 164 La940, 114S844.
399-24 96CalA186, 273P837; Cal 289P 634.
399-25 112 Oh667, 148NE362.
399-26 32F(2d)1004(1stcase); 35F(2d) 633; CalA 289P653 (motion to set aside count); Fla 130S6(1stcase); 197 Ind 419, 151NE129; 164La813, 114S696; Mont 293P309; 54ND779, 211NW336; OklCr 276P503. [e] **Abuse of discretion not shown.**-87CalA145, 261P740; 197 Ind419, 151NE129.
400-31 87CalA145, 261P740.
400-34 158La1081, 105S71, 72 [quot Cyc]; 255Mass317, 151NE300; 117Nebr 597, 221NW706. [a] **Right of court to proceed in misdemeanor case on trial de novo in district court in absence of original complaint** may be challenged without withdrawal of plea of not guilty. 117Nebr597, 221NW706.
400-35 158La1081, 105S71, 72 [quot Cyc].
400-35½-New. Motion to quash indictment need only be filed with permission of court and withdrawal of not guilty plea not required. 164La813, 114S696.
400-37 158La1081, 105S71, 72 [quot Cyc].
400-37½-New. Permitting withdrawal of plea of not guilty is in discretion of court and it is not reversible error as to codefendant in presence of jury. 56App DC326, 13F(2d)298.
400-37⅓-New. Overruling of plea in abatement improperly filed after plea of not guilty is held not error. 199 Ind284, 157NE280.
400-37¼-New. Denial of motion to withdraw plea for purpose of moving for change of judge and venue and to quash information held abuse of discretion. Wyo 285P992.
400-38 Me 149A148 (refusal to allow withdrawal not abuse of discretion). See also 103WVa44, 136SE865. [a] **If accused thinks he is not guilty,** he should, by court's leave, withdraw plea of nolo contendere and plead not guilty. 281US 619, 50SCt424, 74L ed1076.
400-40 Ind 156NE560. [a] **Court maintains full control** and may change, modify, or set aside upon proper showing. 92Fla592, 109S627.
400-46 216AppDiv814, 215NYS337; 137 Misc314, 243NYS590; 54ND871, 211NW 813. See also 142Miss256, 107S200, 207 [citCJ].
401-50½-New. In some jurisdictions where an information is filed against defendant on his own application under statute providing therefor stating that he desires to plead guilty, the plea cannot be taken unless defendant is represented by counsel procured by himself or appointed by the court and the court is fully satisfied that accused had his action properly considered and advised by counsel. 165Minn423, 206NW952.
401-50⅓-New. But such statute is without application where an information is filed on the initiative of the county attorney. 165Minn423, 206NW952.
401-50¼-New. Motion to withdraw plea of guilty induced by promise of immunity should be granted. 326 Ill 253, 157NE181.
401-50⅕-New. Motion for new trial after conviction retained court's jurisdiction to set aside judgment and withdraw plea of guilty. 199 Ind117, 155NE 259.
401-50⅙-New. An application to withdraw a plea of guilty addressed to the court's discretion. 199 Ind117, 155NE 259.
401-50⅐-New. It is not necessary in misdemeanor cases to give the admonition, prescribed by code for felony cases on plea of guilty. 112TexCr334, 16SW (2d)828(2dcase).
401-51 70CalA334, 233P390 (plea must be entered by defendant personally). [b] **In case of felony** plea of guilty by attorney will be considered nullity. 199 Ind117, 155NE259. [c] **Conviction entered on plea of guilty** by defendant's counsel should be set aside and defendant allowed to plead guilty. 199 Ind117, 155NE259.
401-55 197 Ind335, 149NE444; 155Miss

612, 125S99(2dcase); Utah 266P265, 266 [citCJ].

401-56 OklCr 287P811(2dcase) (statement at close of state's testimony held in effect plea of guilty).

401-60½-New. In Philippines plea of guilty need not be under oath. 51Philippine820.

401-61 274US220, 47SCt582, 71L ed 1009; 15F(2d)619; 34F(2d)97; 92Fla 592, 109S627; Ind 168NE18; 157Miss 600, 128S753 (holding plea not made under duress); Mo 285SW976; 49ND348, 191NW628 (plea held voluntary); 37 OklCr 421, 258P927; 101WVa53, 131 SE872, 873 [quotCJ]. [a] (1) 103TexCr 144, 280SW218; 108TexCr623, 28SW(2d) 249; TexCr 24SW(2d)1097. [g] **Press of supposedly impending dire results** of failure to plead guilty held alone not sufficient to require withdrawal of plea. 43 Ida409, 252P177. [h] **Refusal to permit withdrawal of plea held error on** showing it was not made voluntarily or understandingly. 43 Ida409, 252P177.

402-63 274US220, 47SCt582, 71L ed 1009; 101WVa53, 131SE872. [b] **Voluntary character of plea depends on circumstances** surrounding defendant at time plea was made. 77CalA113, 246P 110.

402-64 199 Ind183, 156NE389; 112 Oh 667, 148NE362.

402-65 331 Ill 470, 163NE411; 233 Ill A211; 112 Oh667, 148NE362. [c] **"Right to talk to counsel"** is accorded though counsel is appointed by court. 318Mo 1142, 4SW(2d)463. [d] **Failure to give defendant opportunity to talk to friend** before accepting plea does not affect validity of judgment on plea. 318Mo 1142, 4SW(2d)463. [e] **In Missouri.**–285SW 976 (judge held to have complied with statute). [f] **Statute is inapplicable to** justice's court. 87Colo 261, 286P859. [g] **Court is not required to tell defendants what their punishment will be,** when they plead guilty when arraigned without counsel. CalA 288P873.

402-66½-New. Refusal to permit withdrawal of plea of guilty is abuse of discretion where it was influenced by persons in apparent authority inducing belief that punishment would be mitigated. OklCr 288P1001.

402-67 274US220, 47SCt582, 71L ed 1009; 77CalA113, 246P110; 162Ga422, 134SE95; 41GaA466, 153SE428(3dcase); 312Mo 447, 279SW72; 320Mo 296, 6SW (2d)915 (right of defendant to complain of death sentence); 216AppDiv814, 215 NYS337; 130Misc821, 226NYS397; 229 AppDiv419, 242NYS105; 193NC747, 138 SE138; 54ND871, 211NW813; 122 Or 680, 260P233; 109TexCr392, 5SW(2d) 145.

403-70 274US220, 47SCt582, 71L ed 1009; 237 IllA325; 313Mo 66, 280SW 1033; Mo 30SW(2d)94 (commission of crime within county); NJSup 133A762; 105TexCr87, 287SW56; 105TexCr89, 287 SW55; 111TexCr191, 11SW(2d)515; TexCr 24SW(2d)1097. [d] **Pleading guilty of scheme to defraud** admitted devising of scheme and mailing of letter in executing it. 25F(2d)61. [e] **Plea of guilty to charge of robbery** conclusively admits that taking was by means of force or fear. 87CalA634, 262P50.

403-71 Mo 280SW1038.

403-73 30F(2d)681; 41 Ida199, 239P 279 [quotCJ]; 126Kan285, 289, 268P96 [quotCJ]; Mich 233NW389; NJ 147A 857.

403-73½-New. After plea of guilty, defendant may not claim prosecution was barred by limitations. NC 139SE138.

403-74 41 Ida199, 239P279 [quotCJ]; 135Misc564, 238NYS712.

403-75 41 Ida199, 239P279 [quotCJ]; 318 Ill 293, 149NE241; 318 Ill 424, 149 NE226; 334 Ill 630, 166NE529; 313Mo 66, 280SW1033; 135Misc564, 238NYS 712. See also 237 IllA325; 127Misc290, 216NYS468.

403-75½-New. Where filing of written complaint is jurisdictional requirement, plea of guilty does not confer jurisdiction. 109TexCr616, 6SW(2d)364.

404-76 41 Ida199, 239P279 [quotCJ]; 134Misc228, 235NYS173.

404-77 41 Ida199, 239P279 [quotCJ]; 134Misc228, 235NYS173 (plea of guilty, before date to which trial was adjourned, was binding on defendant); TexCr 28 SW(2d)169 (issuance of search warrant). But see 233Mich462, 206NW986.

404-78 41 Ida199, 239P279 [quotCJ]; Mo 30SW(2d)94; 216AppDiv814, 215 NYS337; 105TexCr89, 287SW55. See also 81CalA19, 251P817. [a] **State may put in evidence** all testimony material and admissible as showing guilt of accused. 113TexCr331, 21SW(2d)302.

404-79 41 Ida199, 239P279 [quotCJ]. [a] (5) Primary purpose of evidence is to enable judge or jury to determine proper punishment. 103TexCr391, 280 SW1064; 108TexCr66, 299SW241. (6) State is not barred from going into proof of fact admitted by plea. 108TexCr66, 299SW241. (7) Issue of self-defense is foreclosed where there is plea of guilty. TexCr 24SW(2d)1097.

404-80 41 Ida199, 239P279 [quotCJ]; 29 OhA467, 163NE715. But see 193 NC747, 138SE138.

404-82½-New. Plea of guilty without specifying degree is sufficient to include first degree. 193NC747, 138SE138.

404-82½-New. In defendant's plea of guilty of prostitution "under the bill of indictment" which is for seduction, quoted words did not modify effect of admission of guilt. 193NC747, 138SE 138.

404-82¼-New. A general plea of guilty of murder, first degree, forecloses any question of defendant's sanity at the time the homicide was committed. 208 Cal 123, 280P526.

404-82½-New. Defendant pleading guilty cannot, after expiration of term, deny commission of crime and offer evidence in support of denial. Mo 30SW (2d)94.

404-83 272US451, 47SCt127, 71L ed347; 76CalA419, 245P212, 217 [quotCJ]. [d] **In Minnesota.**–166Minn302, 207NW646. [e] **In Indiana.**–197 Ind335, 149NE444.

404-85 49RI 443, 144A52; 195Wis175, 217NW743.

404-86 272US451, 47SCt127, 71L ed347; 281US619, 50SCt424, 74L ed1076; 14F (2d)497; 41F(2d)519; 76CalA419, 245P 212, 217 [quotCJ]; 197 Ind335, 149NE 444; 5PaDist&Co 219; 103WVa44, 136 SE865; 197Wis446, 222NW311.

404-87 76CalA419, 245P212, 217 [quot CJ].

404-88 103WVa44, 136SE865.

404-89 103WVa44, 136SE865; 195Wis 175, 217NW743.

405-90 281US619, 50SCt424, 74L ed 1076; 103WVa44, 136SE865; 197Wis 446, 222NW311.

405-92 272US451, 47SCt127, 71L ed 347; 166Minn302, 207NW646; 103WVa 44, 136SE865 (dictum).

405-93 166Minn302, 207NW646; 12Pa Dist&Co 285 (statutory rape); 103WVa 44, 136SE865 (dictum).

405-94 166Minn302, 207NW646; 103 WVa44, 136SE865 (dictum).

405-95 [a] **But where indictment is in good form and substance,** under plea of nolo contendere, stipulation of facts is ineffective to import issue of sufficiency of indictment or question of guilt. 281 US619, 50SCt424, 74L ed1076.

405-95½-New. Note contended out of place before committing magistrate. 5 PaDist&Co 219.

405-97 273US593, 47SCt531, 71L ed 793; 19F(2d)387.

405-98 153Md204, 137A896. [f] **Question of fact as to whether offense was committed in place within exclusive jurisdiction of United States** should be submitted under plea of not guilty. 13 PortoRicoFed302.

405-1 126Kan285, 289 [quotCJ], 268 P96.

405-2 La 129S736.

405-2½-New. If plea to jurisdiction involves questions of fact which must be determined at trial on the merits, law does not require that jury be impaneled for preliminary determination of facts raised by the plea. 252Mass224, 147NE 859.

405-2½-New. Indictment may not be dismissed on plea to court's jurisdiction. 19F(2d)387.

405-2¼-New. Plea that court had no jurisdiction demurrable as not answering allegations in complaint. 21AlaA 237, 107S28.

405-6 273US593, 47SCt531, 71L ed793. [a] **Right to trial in particular division** of a federal district is waived by not pleading before jury is impanelled and going to trial on plea of not guilty. 4 F(2d)908. [b] **Failure to file plea before plea of not guilty** is held to waive former. 273US593, 47SCt531, 71L ed793.

406-8 28F(2d)424 (plea ordinarily founded on allegations of fact outside record); Fla 129S834; 199 Ind578, 159 NE154 (equivalent to motion to quash); 257Mass465, 154NE67. [c] **In prosecution for unlawfully practicing medicine by issuing prescriptions** claim that practice of osteopathy calls for use of drugs is properly submitted by plea in abatement. MoA 28SW(2d)691.

406-9 327 Ill 312, 158NE732; 259Mass 453, 156NE890; 187Wis122, 203NW749 (irregularity in preliminary complaint before justice).

406-10 [a] **Defendant can only raise question** as to presentment of grand jury and its basis upon plea in abatement. 160Tenn305, 23SW(2d)658.

406-11½-New. that an unauthorized person was present during deliberation of the grand jury; 28F(2d)424; 28 F(2d)451.

406-23 255Mass510, 152NE377. But see 21AlaA114, 105S433.

406-26 120Kan162, 242P136.

406-26½-New. Plea that information is not justified by transcript of justice of peace is properly overruled where transcript of justice has been amended to show reasonable cause and probable commission of crime alleged in information. 120Kan731, 244P1053.

406-27 [b] But see 28F(2d)424. [c] **Insufficiency of evidence** before grand jury is not ground for plea in abatement. 7F(2d)756.

406-28 78CalA561, 248P990.

406-29 [a] (1) 21AlaA554, 110S858.

406-29½-New. Plea in abatement to indictment on information and belief is insufficient. 19F(2d)842. [a] **Plea to indictment on information and belief** held properly overruled. 19F(2d)842.

406-29¼-New. Plea in abatement because charge in information did not grow out of transaction charged in complaint will not be sustained where evidence or preliminary examination would have disclosed facts charged. 193Wis 595, 214NW335.

406-29¼-New. A plea of res judicata is a plea in abatement. 37GaA151, 139SE 110.

406-29¼-New. A plea in abatement that the petit jury were improperly drawn need not be considered, such jury having nothing to do with the indictment. 200 Ind210, 162NE656.

406-29¼-New. Pleas in abatement as distinguished from motions to quash are founded on allegations of fact dehors the record. 43F(2d)135.

406-30 31NM485, 247P828.

407-32 [c] **Plea held unavailing** where record shows that preliminary examination was had. Nebr 226NW793.

407-35 [c] (2) 165Ga55, 139SE877; 38 GaA797, 145SE919(2dcase). But see 167 Ga147, 144SE782, 145SE534. [d] **Threats against foreman,** if indictment was not returned, are not ground for plea in abatement. 7F(2d)756.

407-36 AlaA 130S527 (averments held not to charge fraud); Fla 129S827.

407-37 23AlaA168, 123S237; 97Fla199, 120S330; Fla 129S834; 199 Ind540, 156NE555; 200 Ind408, 164NE260.

408-39 [a] (2) 212Ala571, 103S664. (8) Under Code (1923) § 5202, objection that grand jurors were not present when grand jury qualified cannot be raised by plea in abatement. 22AlaA93, 112S806. (9) Illegal conduct of circuit judge in drawing grand jurors' names from stack of cards containing names of veniremen, instead of box or hat, could be inquired into, under code, by plea in abatement. 23AlaA168, 123S237. (10) Under Code (1923) §§ 8630, 8637, fraud in filling jury box for grand jury may be taken advantage of by plea in abatement to indictment. AlaA 130S527. [e] **In Indiana.**–198 Ind338, 152NE273.

409-48 14F(2d)659 [citCJ]; 16F(2d) 608; 22F(2d)264; 214Ala457, 108S874;

23AlaA397, 126S180; 97Fla988, 122S567 (holding "motion to quash" improper); 327 Ill 312, 158NE732; 254Mass556, 150 NE869; 259Mass453, 156NE890. See also 126Kan371, 372, 267P997 [citCJ].

410-49 214Ala457, 108S74; 21AlaA318, 108S82; 22AlaA255, 114S475; 327 Ill 312, 158NE732.

410-51½-New. Plea of misnomer demurrable as not answering complaint. 21AlaA237, 107S28.

410-51¾-New. Disallowance of plea of misnomer after plea of not guilty is in court's discretion. 22AlaA255, 114S475.

410-53 43F(2d)135; 200 Ind210, 162 NE656; 157Tenn363, 8SW(2d)486. [b] 43F(2d)135; 21AlaA516, 109S892.

410-55 5F(2d)592; 28F(2d)424; 43 F(2d)135; 7Alaska366; 200 Ind210, 162 NE656; 200 Ind487, 164NE857; Ind 168NE22. [a] (3) Other instances. 43 F(2d)135.

411-56 43F(2d)135; 200 Ind210, 162 NE656. [c] **Insufficient pleas.**-43F(2d) 135.

411-57 7F(2d)756; 43F(2d)135; 200 Ind210, 162NE656.

411-68 7F(2d)756; 43F(2d)135.

411-71 5F(2d)592; 16F(2d)608; 157 Tenn363, 8SW(2d)486. [c] (9) Almost two years after indictment. 22AlaA290, 115S68. (10) Other instances. NC 154 SE62.

412-73 23AlaA397, 126S180.

412-75 93Fla1069, 113S96; Fla 129S 834; 199 Ind578, 159NE154; 89 IndA 288, 166NE287(2dcase); Ind 168NE 579; Ind 169NE861 (civil code followed in absence of criminal code provision); 255Mass510, 152NE377; NC 154SE62.

412-77 214Ala457, 108S74; 21AlaA318, 108S82; 327 Ill 312, 158NE732. [a] **Evidence of matter good in abatement** cannot be introduced after arraignment and plea to merits. 163Ga121, 135SE 917.

412-79 214Ala457, 108S74; Ala 129S 282; 21AlaA318, 108S82; Ind 169NE 861 (such pleas are not preceded by withdrawn plea in bar); IndA 168NE 189.

412-84 21AlaA318, 108S82; 95Fla919, 117S378; Fla 129S827.

412-85 90Fla133, 105S314; 327 Ill 312, 158NE732; 257Mass465, 154NE67; 117 Nebr597, 221NW706. [c] **Want of jurisdiction of person** is waived by plea of not guilty. 165Minn79, 205NW692.

412-88 327 Ill 312, 158NE732.

412-89 23AlaA90, 121S443(2dcase).

413-91 37F(2d)378; Fla 130S6(1st case); 37GaA195, 139SE103; Ind 168 NE692. But see Ind 168NE579. [d] **Plea in abatement to indictment not verified by oath** as required by code held demurrable. 23AlaA138, 122S299.

413-95 220Ala30, 123S231, 68ALR712.

413-96 28F(2d)424; 126Me384, 138A 625.

413-97 28F(2d)424; 37F(2d)378.

413-1½-New. If a plea is bad, neither the trial nor supreme court is bound by a statement of defects in the memorandum, or by failure to file a memorandum. 200 Ind210, 162NE656.

413-9½-New. Mistake in joining issue on replication to plea of former jeopardy, instead of demurring, does not authorize violation of defendant's right to be immune from second prosecution for same offense. 37F(2d)378.

413-13 See also 37GaA195, 139SE103.

413-13½-New. To have issue of jeopardy determined, defendant should demur to replication to such plea. 37 F(2d)378.

413-15 8F(2d)231; 163Ga121, 135SE 917; 327 Ill 312, 158NE732.

414-23½-New. Where a plea in abatement for want of a preliminary examination as to the matters charged in the information is based on the fact that the transcript of the justice recited a finding that there was reasonable cause for believing that defendant was guilty of a certain offense, whereas the information charges several offenses, the committing magistrate may testify that testimony was presented at the examination tending to show that defendant committed the several offenses charged in the information. 120Kan187, 243P 318.

414-23½-New. Defendant must prove plea in abatement by preponderance of evidence. 327 Ill 312, 158NE732.

414-23¼-New. Thus, on issue joined on plea of misnomer, defendant must prove allegations precisely by greater weight of evidence. 327 Ill 312, 158NE732.

414-23⅓-New. Allegations in replication must be proved precisely as alleged. 327 Ill 312, 158NE732.

414-23⅓-New. Thus where replication to plea of misnomer alleges defendant is as well known by one name as other, proof that he is also sometimes known by name alleged in indictment is insufficient. 327 Ill 312, 158NE732.

414-23½-New. Where replication to plea of misnomer does not amount to affirmance of any allegation of the indictment, the state is required to prove replication only by preponderance of evidence. 327 Ill 312, 158NE732. [a] **Evidence held insufficient** to show defendant was as well known by name alleged in indictment as by true name. 327 Ill 312, 158NE732.

414-23⅓-New. But where such replication does amount to affirmance of some allegation in indictment state must prove replication beyond reasonable doubt. 327 Ill 312, 158NE732.

414-23⅓-New. as where replication admits defendant's true name is that set up in plea of misnomer but alleges defendant is as well known by name charged in indictment. 327 Ill 312, 158 NE732.

414-23 1/10-New. Defendant, in a prosecution for possession of liquor, is not entitled at the hearing on a plea in abatement to go behind the record and show that the affidavit of the prosecuting attorney in applying for a search warrant was false. MoA 14SW(2d)40.

414-24 See also 21AlaA406, 108S642.

414-25½-New. Where, however, verdict of jury is against defendant, it is equivalent to verdict of guilty as it results in the same sentence. 327 Ill 312, 158 NE732 (misnomer).

414-26 See also Mo 292SW422.

414-27 120Kan754, 244P860; Mo 12 SW(2d)46.

414-31 327 Ill 312, 158NE732. But see 37GaA195, 139SE103.

414-31½-New. unless the judge passes on the plea by consent, 37GaA151, 139SE110.

414-31¾-New. in which case his finding against the plea is not different in principle from a verdict so finding. 37 GaA151, 139SE110.

414-35 21AlaA114, 105S433. [a] **Defendant entitled to separate trial on issues tendered.**-21AlaA114, 105S433.

414-36½-New. Jury is properly instructed to find for state on defendant's plea in abatement on ground of same charge pending in another county, where it appears that charge referred had been dismissed at request of prosecuting officer. 21AlaA114, 105S433.

414-36⅓-New. If jury finds against defendant on issue tendered by plea in abatement, trial proceeds. 21AlaA114, 105S433.

414-36¼-New. The same jury tries the issues under this plea. 21AlaA114, 105 S433; 21AlaA597, 110S562.

414-36½-New. Instruction requiring proof by state of its replication to plea of misnomer by preponderance of evidence instead of beyond reasonable doubt, when so required, is error. 327 Ill 312, 158NE732.

414-36⅙-New. Under a plea in abatement stating that no legal evidence was introduced before the grand jury returning the indictment, the court cannot review the competency of the evidence before the grand jury. Ind 168 NE22.

414-39 327 Ill 312, 158NE732.

414-40 327 Ill 312, 158NE732.

414-41 327 Ill 312, 158NE732. [a] **After adverse decision** on plea in abatement that twelve jurors did not vote for indictment, question cannot be raised during trial before traverse jury. 163Ga121, 135SE917.

415-52 30F(2d)939.

415-64 327 Ill 312, 158NE732.

415-65 327 Ill 312, 158NE732.

416-68 166Minn302, 207NW646, 647 [citCJ] (not deciding question).

416-73 22AlaA442, 116S507; 162La 917, 111S327; 52SD273, 217NW205. [b] **Plea is not well founded** where indictment negatives prescription, unless offense was made known to proper officer within prescriptive period. 169La 626, 125S737.

416-78½-New. It is error to exclude evidence that defendant was not a fugitive from justice, offered in support of a plea of limitation and denial of the allegation in the information. 161La963, 109S778.

416-78½-New. The plea must be decided by a judge in limine. 162La917, 111S327.

416-78¼-New. A plea of prescription entails proof that the offense was known to proper officers a year or more before prosecution. 162La917, 111S327.

416-79 204Cal 470, 268P909 (statute held not unconstitutional); 99CalA224, 278P258; 170La991, 129S612(4thcase). [b] 99CalA90, 277P1080. [c] 146Wash 202, 262P970.

416-80 56ND642, 219NW132; Ont [1927] 2DomLR539. But see TexCr 28 SW(2d)133.

416-82 98Fla1184, 125S345(3dcase).

417-84 CalA 291P434.

417-85 204Cal 470, 268P909. But see 34PortoRico 626.

417-85½-New. Pleas of not guilty and not guilty by reason of insanity present two separate and distinct issues. 23AlaA232, 123S288.

417-85½-New. Plea alleging insanity has been held plea amounting to plea in abatement. 41GaA658, 154SE297.

417-91 But see 327 Ill 312, 158NE732.

417-3 24F(2d)399; 68CalA645, 230P 193; 41 Ida598, 242P787; Minn 231NW 6; 214AppDiv804, 210NYS562; 121 Or 567, 256P387; TexCr 29SW(2d)393; 147Va671, 137SE469; Wash 288P233. See also Miss 128S891.

418-4 24F(2d)323; OklCr 269P1059.

418-5 324 Ill 285, 155NE318; 327 Ill 312, 158NE732 (dictum); Ill 172NE54; 236 IllA14.

418-15 68CalA645, 230P193 (must be set up in trial court). [a] In New York.-248NY126, 161NE444.

418-17 165Minn79, 205NW692.

419-18 35F(2d)633.

419-21 206Cal 64, 273P779; 109TexCr 26, 28SW(2d)442.

419-23 35F(2d)633.

419-24 68CalA645, 230P193 (after reversal appellate court cannot enter plea for defendant and treat cause as though such issue were presented).

419-27 202 Iowa168, 209NW419.

419-29 22AlaA604, 118S496.

419-30 35F(2d)633.

419-33½-New. Defendant may plead to merits following denial of plea of former jeopardy. 32Ariz203, 256P1055.

419-33¼-New. Where former jeopardy is claimed to have occurred after entry of a plea of not guilty, a plea of former jeopardy may be entered after the not guilty plea. 153Wash612, 280P1.

419-36 91Fla938, 109S91, 92 [citCJ].

419-37 91Fla938, 109S91.

419-38 [a] (1) OklCr 272P1035.

420-44 147Va671, 137SE469, 470 [quot Cyc]. [a] **Oral plea made when case was called for trial** held insufficient. 147Va671, 137SE469.

420-45 215Ala299, 110S474; OklCr 269 P1059; 121 Or567, 256P387. [a] (1) 215Ala299, 110S474. [b] **Pleas held insufficient.**-121 Or567, 256P387.

420-47 147Va671, 137SE469, 470 [quot Cyc].

420-48 147Va671, 137SE469, 470 [quot Cyc].

420-49½-New. In Alabama the truth of an unverified plea must appear of record. 23AlaA241, 124S507(2dcase).

420-50 [d] **Plea held insufficient.**-70 CalA17, 232P991. [e] **So-called special plea for order vacating order granting leave to file information,** and striking information from files on ground that transactions charged in information, charging conspiracy to violate Sherman Anti-Trust Law, were not transactions in interstate commerce, and that court had no jurisdiction of subject-matter

of action, have been held to be in effect argument on facts calculated to sustain former plea of not guilty. 30F(2d)939. [f] **Plea held in proper form.**–AlaA 129 S714(2dcase).

420-51 44F(2d)155; **Mo** 22SW(2d)809; **Wash** 288P233. [d] 91Fla938, 109S91; 41GaA294, 152SE616. [e] **NM** 290P322(2dcase); 121 **Or**567, 256P387; 12 **PortoRicoFed**305; 137**Wash**156, 242P6.

420-52 70**CalA**17, 232P991 (reference to prior conviction alleged in information insufficient).

421-58 103**NJL**275, 136A345; 156**SC** 324, 153SE269; 147**Va**671, 137SE469.

421-61 44F(2d)155; 21**AlaA**421, 109S 121; 92**Fla**497, 109S336; 147**Va**671, 137 SE469.

421-62 106**TexCr**111, 290SW536. [b] 91**Fla**938, 109S91. [c] **Plea erroneously dismissed.**–41**GaA**294, 152SE616.

421-63 92**Fla**497, 109S336.

421-64 106**TexCr**111, 290SW536.

422-69 **OklCr** 281P313(2dcase) (plea showing different offense should be stricken from record).

422-74 21**AlaA**324, 108S86; 12**Porto RicoFed**305.

423-76 121 **Or**567, 256P387.

423-78 **OklCr** 269P1059.

423-80 147**Va**671, 137SE469.

423-82 [c] 92**CalA**593, 268P687.

423-84 44F(2d)155; 121 **Or**567, 256P 387; 147**Va**671, 137SE469.

423-87 166**Minn**302, 207NW646. [f] **Motion to strike** is better practice. 166 **Minn**302, 207NW646.

424-88 **AlaA** 129S714(2dcase). [b] **Plea of former conviction in statutory form** is not demurrable. 23**AlaA**316. 124S668.

424-91 **AlaA** 129S714(2dcase).

424-4 125**Me**457, 134A627.

424-7 **AlaA** 129S714(2dcase).

425-14 125**Me**457, 134A627.

425-17 78**CalA**455, 248P927; 82**CalA** 411, 256P273; 327 **Ill** 312, 158NE732 (dictum); 198 **Ind**70, 152NE277; **Mo** 279SW705; **OklCr** 278P354; **OklCr** 281 P313(2dcase); 106**TexCr**111, 290SW 536; 110**TexCr**621, 10SW(2d)554. [a] 23F(2d)156; **Mo** 22SW(2d)809; 53**ND** 669, 207NW991; **OklCr** 290P342(2d case); 99**TexCr**609, 272SW187.

425-18 [c] **Evidence held insufficient** to sustain defense of former jeopardy. 198 **Ind**70, 152NE277.

425-19 198 **Ind**70, 152NE277; 198 **Ind** 364, 152NE801; 317**Mo** 284, 295SW550; 53**ND**669, 207NW991; 105**TexCr**516, 289SW54; 106**TexCr**111, 290SW536. [b] 317**Mo** 284, 295SW550; 134**Wash**55, 234P1049.

426-23 198**Cal** 112, 243P667.

426-25 312**Mo** 510, 279SW411.

426-32 20F(2d)36; 198**Cal** 112, 243P 667. [a] **Parol evidence on question whether prior acquittal was on merits** is admissible where it is doubtful from recitals of judgment dismissing case whether there was trial on merits. 140 **Miss**635, 105S759.

426-34 20F(2d)36; 25F(2d)49; 42F (2d)374; **CalA** 290P470.

427-38½-New. Evidence of a prior conviction is properly excluded where the offenses are not shown to be identical. 312**Mo** 510, 279SW411.

427-47 327 **Ill** 312, 158NE732 (dictum); **Minn** 231NW6; 53**ND**669, 207 NW991; 38 **OklCr**11, 258P1057; 101 **TexCr**1, 274SW596.

427-49 233**Ky**356, 25SW(2d)746 (evidence justifies finding of jury).

427-50 **Minn** 231NW6.

428-53 See also 198 **Ind**364, 152NE801.

428-56 21**AlaA**218, 106S893.

428-57 21**AlaA**218, 106S893; **CalA** 286 P1043(2dcase); **CalA** 286P1044.

428-59 88**PaSuper**451.

428-61 38 **OklCr**11, 258P1057; 88**Pa Super**451.

429-65 72**CalA**509, 237P799. [a] **In Texas.**–**Cr** 20SW(2d)1067.

429-66 75**CalA**109, 241P913; 38 **OklCr** 302, 260P785; **OklCr** 273P1017; 101 **TexCr**1, 274SW596; 106**TexCr**593, 294 SW573.

429-68 38 **OklCr**302, 260P785; **OklCr** 273P1017; 106**TexCr**593, 294SW573.

429-69 75**CalA**109, 241P913.

429-71 72**CalA**509, 237P799; 79**CalA** 709, 250P879; 88**PaSuper**93.

429-72 [a] **Where defendant's innocence is not involved** in sustaining plea, court simply declares he cannot be again tried for same crime. 156SC324, 153SE 269.

430-84 102**NJL**659, 133A274. [c] **Form of plea** is prescribed by statute in some jurisdictions as that "the defendant pleads that he is not guilty of the offense charged." 77**Mont**326, 250P 613.

430-88 [b] **Departure from statutory mode or form or error therein** does not render plea invalid in absence of prejudice or tendency thereto as to substantial right. 77**Mont**326, 250P613.

431-89½-New. A plea of not guilty admits the validity of the indictment or complaint. 255**Mass**317, 151NE300; 257**Mass**465, 154NE67.

431-89½-New. The complaint or affidavit charging an offense not being void, defects therein, if any, were waived by a plea of not guilty. 23**AlaA**113, 121S 498(5thcase).

431-92 77**Colo** 546, 238P25.

431-1 14F(2d)670; 215**Ky**436, 284SW 1114; 230**Ky**71, 18SW(2d)881 (supports verdict for acquittal); 190**NC**239, 129 **SE**600; 58**ND**340, 226NW525. [a] **Verdict of guilty** is finding that accused was sane when offense was committed. 146**Va**296, 135SE895. [b] **Counts subsequently added,** without objection, to bill charging murder, are under plea of guilty. **NC** 154SE604.

431-5 251**Mich**243, 231NW564 (fact of crime).

431-10 [a] **In North Carolina.**–189**NC** 799, 128SE152.

431-12 [a] 205 **Iowa**25, 215NW721. [d] See also 56**ND**642, 219NW132. [e] **Self-defense.**–**Ala** 128S786(1stcase).

432-13½-New. Right and title to office of the justice of the peace who presides at the trial cannot be challenged under a plea of not guilty where he was at least a de facto justice of the peace. **Miss** 119S207(2dcase).

432-15 126**Me**384, 138A625.

432-16 47**RI** 106, 130A804 [quotCJ].

432-21 166**Minn**302, 207NW646. [b] **Nolle prosequi in court before trial in another court** held not to make case pending in first court. 214**Ala**446, 108 S73.

432-22 **Ida** 289P993; 126**Me**384, 138A 625.

432-27 126**Me**384, 138A625.

432-28 126**Me**384, 138A625.

433-35 21**AlaA**114, 105S433; 21**AlaA** 284, 107S725; 204**Cal** 39, 266P518; 123 **Kan**665, 280P910, 66**ALR**1369; 126**Me** 484, 139A677; 89**PaSuper**266; 49**RI** 443, 144A52.

433-36 [a] (12) Pending plea in abatement, demurrer, or motion in arrest of judgment. 126**Me**384, 138A625.

433-37 214**Ala**446, 108S73; 126**Me**384, 138A625.

433-39 58**ND**82, 224NW878.

433-41 126**Me**384, 138A625.

434-44 But see 126**Me**384, 138A625.

434-47 126**Me**384, 138A625.

434-49 3**Del** 399, 138A640.

434-50 21**AlaA**284, 107S725; 123**Kan** 774, 777, 256P804 [citCJ]; **TexCommnA** 26SW(2d)174.

434-51 89**PaSuper**266; 94**PaSuper**403; 35**PortoRico** 333. [d] **In Texas.**–**Tex CommnA** 26SW(2d)174.

434-52 213**Ky**524, 281SW508.

434-57 [b] **In misdemeanor case before justice of peace,** case should be dismissed where county attorney so directs. 123**Kan**774, 256P804.

434-59½-New. A motion of the district attorney for dismissal is merely a recommendation to the court, 76**CalA**105, 243P882.

434-59½-New. and it may refuse dismissal if it differs with the district attorney as to the result that might be obtained in a trial of the case. 76**CalA** 105, 243P882.

435-60 89**PaSuper**266; 94**PaSuper**403; **TexCommnA** 26SW(2d)174.

435-66½-New. The district court has no power before trial and on motion of the prosecuting attorney to dismiss a criminal prosecution on the merits. 166 **Minn**302, 207NW646.

435-66½-New. In some jurisdictions a prosecution pending in a district court can be dismissed only by the court on its own motion or upon application of the county attorney in furtherance of justice. 37 **OklCr**68, 256P758.

435-73 80**CalA**138, 251P672. [a] **That defendant has been granted separate trial** does not affect right of court to allow discharge of one jointly indicted. 50**Philippine**182.

436-76½-New. Defendant is not entitled to a discharge for irregularities in proceedings of the court and jury. 196 **Ind**704, 149NE432.

436-77½-New. The granting of a nolle prosequi is within the discretion of the court. 224 **IllA**221.

436-78 89**PaSuper**266; 89**PaSuper**454.

436-85 39F(2d)432; 215**Ala**643, 112S 234; 21**AlaA**284, 107S725; 23**AlaA**408, 126S183(3dcase); **Ill** 172NE740; 47**RI** 106, 130A804. [g] **Effect of nolle prosequi** of counts of indictment is to relieve indictment of all questions arising on these counts. 214**Ala**273, 107S737.

436-86 21**AlaA**310, 107S789.

437-2½-New. In some jurisdictions the county attorney may dismiss a misdemeanor case pending before a justice of the peace and file an information charging the same offense in the district court. 123**Kan**774, 256P804.

437-2½-New. Such procedure is not equivalent to a change of venue. 123 **Kan**774, 256P804.

437-3 213**Ky**524, 281SW508, 510 [cit CJ]. [c] **Sufficient entry** indorsement on indictment or entry by clerk at order of attorney-general. 47**RI** 106, 130 A804.

438-9½-New. In some jurisdictions an order of dismissal must set forth the reasons for dismissal, 37 **OklCr**68, 256P 758.

438-9½-New. and must be entered in the minutes. 37 **OklCr**68, 256P758.

439-21 21**AlaA**169, 106S204.

439-23 218**Ala**250, 118S265.

439-28½-New. Motion for mistrial is within trial court's discretion. **NJSup** 139A249.

439-31 22**AlaA**323, 118S264 [certiorari den 218**Ala**250, 118S265].

439-5 23**AlaA**559, 129S323(2dcase); 76 **CalA**192, 244P94; 90**Fla**25, 105S130; 91**Fla**236, 107S267; 236**Mich**689, 211 NW35 [citCJ]; 56**ND**716, 219NW218; **OklCr** 277P670; 126 **Or**651, 269P869; 145**Va**800, 133SE764. [a] (2) Amendment does not apply to trial of criminal prosecution by state. 277**US**81, 48 SCt468, 72L ed793. [b] See also **Sask** [1929] 1**DomLR**152; **Sask** [1929] 1 **DomLR**179. [d] **U. S. Const. Amend. VI** secures right of speedy and public trial in prosecutions under federal law. 7F(2d)796. [e] **U. S. Const. art. 8, § 6** does not apply to states. 162**Ga**263, 133SE469.

440-6 17F(2d)339; 51**ND**98, 199NW 196; 10**PaDist&Co** 59. [b] **Postponement of trial in prosecution for perjury till determination of proceeding** in which perjury is charged to have been committed is violation of constitutional right. 236**Mich**689, 211NW35.

440-8 76**CalA**192, 244P94; 145**Va**800, 133SE764.

440-9 15F(2d)760. [b] 206**Cal** 35, 273 P767; 76**CalA**192, 244P94; 97**Fla**710, 122S225. [c] **Statute directory merely.**–208**Cal** 357, 281P391.

440-10 [a] (3) In Washington such statute has been held not unconstitutional. 148**Wash**627, 269P798.

440-11 236**Mich**689, 211NW35 [citCJ]. [d] **Speedy trial cannot be denied** because accused is serving sentence under another conviction. 7F(2d)796.

440-12 236**Mich**689, 211NW35.

440-14 236**Mich**689, 211NW35 [citCJ]; 145**Va**800, 133SE764.

440-14½-New. Rights fundamental in their nature which have been guaranteed by the bill of rights cannot be the subject of judicial discretion. 114**Tex** 468, 271SW379.

440-14¼-New. Much is left to the discretion of the trial court. 236**Mich**689, 211NW35.

440-14¼-New. A constitutional provision for speedy trial has been held not to forbid waiver of such right by ac-

cused. 91Fla236, 107S267.

440-14½-New. A provision securing accused a speedy trial does not require that he shall be tried except in due course of court procedure. 91Fla236, 107S267.

440-14½-New. A trial is had within the meaning of constitutional and statutory provisions even though the jury disagree and are discharged and mistrial is entered of record. 91Fla236, 107S267.

440-14½-New. The state is not responsible for failure of juries to agree upon verdicts. 91Fla236, 107S267.

440-14½-New. Litigant has a "speedy trial" when he has his case disposed of at first term of court. 160Tenn186, 22SW(2d)231.

441-21 164La423, 114S83.

441-22½-New. Statute, making it duty of judge to call special term and begin trial within ten days upon notice of danger from mob, is to be construed as directory only, 169Ark627, 276SW361.

441-22½-New. In view of public policy which it was designed to accomplish. 169Ark627, 276SW361.

441-23 164La423, 114S83.

441-30 [f] **Requiring trial to begin on day second indictment, constituting amendment to first, was returned** did not violate Cr. Code Pract. § 187, where accused was already in custody three days before day fixed for trial. 225Ky 264, 8SW(2d)390.

442-33 76Mont81, 245P526.

442-36 15F(2d)760, 761 [citCJ]; 178 Ark841, 12SW(2d)777(2dcase); 114Tex 468, 271SW379.

442-36½-New. Whenever the state's attorney concludes that prosecution should not continue, it is his duty to file a nolle prosequi or confession of errors. 224 IllA221.

442-38 170Ark143, 278SW963; Cal 285P699; 94CalA700, 271P764 (statute held not applicable); 324 Ill 70, 154NE 448; 76Mont81, 245P526; 76Mont549, 248P169; 57ND763, 224NW209; 11 PaDist&Co 340; 35PortoRico 337; 37 Wyo 372, 262P24. [d] 68CalA575, 229 P990. [e] In Illinois.-324 Ill 70, 154 NE448.

442-38½-New. , unless good cause to the contrary is shown. 76Mont549, 248 P169.

443-39 Cal 285P699; 76Mont81, 245P 526; 33PortoRico 72 (Code Cr. Proc. § 448). [c] (3) Right to be tried within statutory period is not absolute, law taking into consideration that good cause may exist to prevent holding of trial. 33PortoRico 72. [d] **Delay of eighteen months held unreasonable** in trial of misdemeanor. Cal 285P699.

443-40 299Pa198, 149A476 (continuous imprisonment necessary).

443-42 [a] **In Porto Rico.**-32PortoRico 3. [b] **Refusal to dismiss held proper.** -152Wash686, 279P82. [c] **Statute not available** after trial, conviction and sentence. 299Pa198, 149A476.

443-43 76Mont549, 248P169; OklCr 279P695; OklCr 279P976(2dcase); Okl Cr 281P316 (that delay was fault of prosecuting officer); OklCr 281P985; 33PortoRico 72. [a] **Good cause for delay** held shown. 33PortoRico 160.

443-44 76Mont81, 245P526; 76Mont 549, 248P169; OklCr 281P316; OklCr 281P985; OklCr 283P1028; 32Porto Rico 3; 33PortoRico 72. [a] **After postponement,** presumption in favor of just cause. 32PortoRico 3. [b] **On appeal** from overruling of motion to dismiss, appellate court must limit itself to record and, facts relating to motion not appearing by bill of exceptions or statement of case, ruling is presumed correct. 33PortoRico 72.

443-46 96CalA183, 273P836; 88CalA 222, 263P306; CalA 273P1084; 76Mont 81, 245P526; 33PortoRico 433. [b] **In California.**-88CalA568, 263P866 (discretion held not abused in denial of dismissal for delay in second trial).

443-49 7F(2d)796; 17F(2d)339; 20F (2d)42; 20F(2d)574; 25F(2d)90; 170 Ark143, 278SW963; 68CalA575, 229P 990; 126Me384, 138A625; 173Minn153, 216NW787; 322Mo1163, 17SW(2d)932; 51ND98, 199NW196; 13PortoRicoFed 199; 49RI443, 144A52; 67Utah362, 248 P119; 145Va800, 133SE764.

443-50 51ND98, 199NW196; OklCr 281P316; OklCr 281P985.

444-58 126Me384, 138A625.

444-62½-New. Prisoners in a penitentiary, not given opportunity to demand trials on other indictments than those under which they were convicted have been held not to have waived such right. 178Ark841, 12SW(2d)777(2dcase).

444-64½-New. A motion for discharge is necessary in order to preserve for review the question of the invasion of the right protected, statutes relating to dismissal where defendant is not brought to trial within a stated time and an objection to setting the case for trial upon a date beyond the statutory period or to a continuance to such date is insufficient. 68CalA575, 229P990.

444-64½-New. As a rule the motion must be supported by proof of the allegations on which it is based. Mo 279 SW401.

444-64¼-New. Accused need not affirmatively show prejudice by reason of delay in trial. Cal 285P699.

444-65 18F(2d)906; 199 Ind276, 157 NE97.

444-68 88CalA222, 263P306.

444-69 57ND763, 224NW209.

444-71 29F(2d)517; 86CalA585, 261P 731; 333 Ill 258, 164NE682; 121Kan 636, 249P610; Mo 279SW401; 145Wash 634, 261P391.

444-72 198 Ind364, 152NE801; 199 Ind 276, 157NE97.

445-73 208Cal 357, 281P391; 200 Iowa 636, 204NW307; 76Mont81, 245P526 (evidence held not to show consent to postponement).

445-75 Cal 289P629 (holding another 60 day period for trial of insanity plea is begun by order of appellate court remanding case). But see 81CalA577, 254P596. [c] In California.-283P119. [d] **Requirement of trial within sixty days** does not apply to hearing of insanity plea following remittitur on appeal from conviction. Cal 289P629. [e] **Delay pending appeal** does not deprive accused of right to speedy trial. Cal 289P629.

445-77 Nebr 233NW461 [quotCJ]. [b] In California.-203Cal 731, 265P947, 5 ALR1500; A 259P457.

445-79 Cal 285P699; 173Minn153, 216 NW787; 76Mont81, 245P526. [d] **On appeal** from motion overruling motion to dismiss, defendant must place appellate tribunal in same position in which trial court was by showing facts in bill of exceptions or statement of case. 33 PortoRico 72.

445-81 [a] **Laches defined.**-Mo 279SW 401.

445-83 OklCr 272P1038; 33PortoRico 433. [a] In Porto Rico.-32PortoRico 3.

445-85 [a] **Matters not excusing delay.**-Cal 285P699.

445-86 But see 10PaDist&Co 59 (arbitrary continuance). [b] **Continuances made by court on its own motion** cannot bar prosecution. Mo 279SW401.

445-89 89CalA405, 264P1105 (with other excuses).

445-90 33PortoRico 160 (intervening vacation and congestion of docket).

446-91 29F(2d)517; 33PortoRico 160. [a] **Intervening vacation of court coupled with congestion** in trial docket held good cause for delay. 33PortoRico 160.

446-93 337 Ill 84, 169NE12.

446-94 86CalA585, 261P731 (prevalence of epidemic of infantile paralysis); 87 CalA601, 262P369; Mo 279SW401 (illness of trial judge).

446-98 33PortoRico 433.

446-98½-New. that trial judge deemed it inexpedient and unnecessary to call a jury during the term at which defendant should have been tried in order to come within the limitation, 76Mont81, 245P526.

446-2½-New. or that the preliminary examination was not received promptly by the district attorney, 33PortoRico 610.

446-4½-New. Indictments returned from time to time against a defendant all charging the same offense will not excuse a failure to bring defendant to trial within the statutory period. 333 Ill 258, 164NE682.

446-5 Mo 279SW401; 76Mont549, 248 P169.

446-9 151Wash51, 274P1053.

446-10 Wash 290P992.

447-14 See also 32PortoRico 764.

447-15½-New. Regular terms of court should be held at the time fixed by law, when there is anyone awaiting trial for the commission of a public offense. 57 ND763, 224NW209.

447-18 324 Ill 70, 154NE448; 126Kan 770, 271P390; Kan 291P782; 156Miss 355, 126S43; 322Mo1163, 17SW(2d)932 (continuance to adjourned term is not continuance within statute); 145Va800, 133SE764; 100WVa70, 130SE86; 37 Wyo 372, 262P24, 28 [citCJ]. See also 107WVa550, 149SE608(1stcase).

447-19 198 Ind73, 152NE607.

447-22 337 Ill 84, 169NE12; 198 Ind 73, 152NE607. [a] **Special called term** which makes no mention of case against accused cannot be considered as one of terms specified in statute. Mo 279SW 401.

447-22½-New. Where a cause is transferred on change of venue, jurisdiction rests, as bearing on defendant's right to discharge for lack of prosecution, when the transcript was filed with the clerk. 199 Ind276, 157NE97.

447-22½-New. Defendant after change of venue is not entitled to discharge for lack of prosecution until the end of the third term after the pending term. 199 Ind276, 157NE97.

447-22¼-New. Time is computed not from time of indictment but from time same is filed so that accused can demand trial. Mo 278SW685.

447-23 32PortoRico 764 (failure to indict within sixty days from arrest). [a] In Oklahoma.-Cr 277P670.

447-25 34PortoRico 206 (under statute requiring indictment within 60 days of arrest).

448-37 32PortoRico 764 (where good cause not shown why grand jury was not impaneled within prescriptive period defendant will be discharged).

448-44 76Mont549, 248P169.

448-45 126Kan770, 271P390.

448-50 Cal 289P629 (trial on plea of insanity); 121Kan636, 249P610; 173 Minn153, 216NW787; 76Mont549, 248P 169; 145Va800, 133SE764.

448-51 17F(2d)339; 121Kan636, 249 P610; 320Mo1, 6SW(2d)562; 76Mont 549, 248P169; 121Or57, 254P198. [a] **Attorney impliedly authorized** to consent to continuance so as to waive right to speedier trial. 76Mont549, 248P169.

448-52 17F(2d)339; 81CalA577, 254P 596; CalA 283P119 (applies also to hearing on insanity plea); 200 Iowa636, 204NW307; Iowa 232NW127; 173Minn 153, 216NW787; 145Va800, 133SE764.

448-54 17F(2d)339; Wash 261P397. See also 109TexCr287, 4SW(2d)53.

449-57 94Fla32, 113S630; 329 Ill 536, 161NE76; 225Ky83, 7SW(2d)823; 137 Misc427, 244NYS342; OklCr 275P355; 298Pa169, 148A73; 33PortoRico 627. [a] **"Speedy justice"** requires prompt action governed by accused's rights. 135Misc471, 239NYS61.

449-58 94Fla32, 113S630; 331 Ill 470, 163NE411; 33PortoRico 627; 101WVa 632, 133SE371, 373 [citCJ].

449-59 92Fla477, 110S250; 94Fla469, 114S450. [b] **Reasonable opportunity to procure witnesses** is right of accused. 100Vt476, 138A741.

449-60 94Fla32, 113S630; 94Fla469, 114S450; 221AppDiv758, 222NYS594.

449-61 216Ala659, 114S839 (six days after arrest not error in absence of showing of prejudice); 94Fla469, 114S450 (one day held not sufficient); 210Ky 347, 275SW809 (denial of opportunity to consult with counsel not shown); 101 WVa632, 133SE371, 373 [citCJ]. [a] **Felony case** ordinarily should not be assigned for trial in less than ten days after plea is entered. OklCr 275P355.

449-62 23AlaA553, 129S295(1stcase) (discretion abused); 329 Ill 536, 161NE 76; 331 Ill 581, 163NE373; 294Pa156, 143A910; 33PortoRico 627; 48SD409, 205NW25.

449–64 [b] 70Utah526, 261P606. [c] 234Ky308, 28SW(2d)11. [e] (7) Accused, if under bond, is not entitled to two full days to prepare for trial after service of copy of indictment. TexCr 32 SW(2d)473.

449–66 331 Ill 470, 163NE411.

449–66½–New. Sufficiency of time given defendant before trial depends on that allowed defendant himself rather than on time given after securing attorney. 290Pa573, 139A374.

450–70 94Fla32, 113S630.

450–76 OklCr 287P758(2dcase).

450–77 5PaDist&Co 657.

450–78 94Fla32, 113S630.

450–85 50ND728, 197NW859; OklCr 282P894.

450–87½–New. Board without authority to grant franchise could not submit to people proposed application for franchise for toll bridge across navigable waters. 195Cal 686, 235P450.

451–88½–New. In prosecution under Crabbe Act a justice or mayor is not controlled by general statutes, but matter of continuance and time of trial is within court's discretion. 24 OhNPNS 17.

451–89 77Colo 546, 238P25; 36GaA657, 137SE794; 121Kan186, 246P1001; 124 Kan627, 261P844; 164La496, 114S109; 290Pa573, 139A374, 376 [citCJ].

451–90 16F(2d)704; 78CalA380, 248P 975; 36GaA111, 135SE521; Mo 29SW (2d)89; 141Wash660, 252P118.

451–91 5F(2d)471; 5F(2d)564; 14 F(2d)366; 16F(2d)704; 18F(2d)906; 21F(2d)903; 22F(2d)52; 22F(2d)803; 26F(2d)400; 32F(2d)127; 38F(2d)635; 215Ala42, 109S109; 20AlaA467, 103S 712; 22AlaA77, 112S813; 22AlaA526, 117S500; 23AlaA264, 124S282; 169Ark 1211, 278SW14; 171Ark568, 285SW13; 171Ark1188, 286SW1028; 171Ark1189, 288SW380; 173Ark1182, 291SW804; 174Ark1078, 298SW357; 179Ark20, 13 SW(2d)805; 179Ark216, 15SW(2d)312; 180Ark363, 21SW(2d)850; 195Cal 325, 233P97; Cal 289P634; 76CalA105, 243 P882; 78CalA380, 248P975; 78CalA476, 248P981; 80CalA257, 251P648; Colo 238P25; 87Colo 507, 289P1081; 91Fla 446, 107S331; Fla 128S807; 165Ga460, 141SE196 (abuse held shown); 167Ga 261, 145SE512; 36GaA111, 135SE521; 36GaA651, 137SE792; 36GaA657, 137 SE794; 36GaA762, 138SE270; 240 IllA 254; 198 Ind695, 154NE666; 118Kan 641, 236P855; 119Kan417, 239P756; 122Kan68, 250P1069; 124Kan627, 261P 844; 126Kan710, 271P316; 128Kan659, 280P780; 224Ky89, 5SW(2d)487; 227 Ky514, 13SW(2d)535; 230Ky327, 19SW (2d)964; 230Ky704, 20SW(2d)711; 232 Ky205, 22SW(2d)615; 235Ky176, 30SW (2d)898; 235Ky845, 32SW(2d)405; 159 La399, 105S410; 159La1076, 106S570; 162La590, 110S766; 164La496, 114S 109; 165La842, 116S206; 167La1113, 120S875; 168La95, 121S586; 169La22, 124S132; 169La1011, 126S510; 239 Mich386, 214NW183; 309Mo 498, 274 SW734; Mo 285SW83; 314Mo 699, 285 SW440; Mo 285SW978; 320Mo 417, 8 SW(2d)29; Mo 22SW(2d)784; Mo 30 SW(2d)750; MoA 289SW664; 114Nebr 404, 207NW928; 103NJL663, 138A575; 34NM494, 285P497; 34 OhA60, 170NE 444; OklCr 270P344; OklCr 275P398; OklCr 279P980(1stcase); OklCr 281P 982(2dcase); OklCr 283P584(2dcase); OklCr 283P809; OklCr 285P141; OklCr 286P21; OklCr 287P1047; 137SC145, 134SE885; 137SC360, 135SE356; 152SC 17, 149SE348; 155SC495, 152SE738; 105TexCr490, 288SW1075; 107TexCr 600, 298SW438; 108TexCr482, 1SW(2d) 637; 110TexCr566, 9SW(2d)742; Tex Cr 10SW(2d)723; TexCr 11SW(2d)172; 111TexCr75, 11SW(2d)512(1stcase); 111TexCr315, 12SW(2d)800; TexCr 24 SW(2d)423; TexCr 26SW(2d)639; 142 Va596, 128SE638; 143Va546, 129SE233; 145Va865, 134SE699; 151Va503, 144SE 473; 153Va877, 149SE481; 141Wash 660, 252P118; 107WVa163, 148SE127; 107WVa357, 148SE205; 193Wis482, 214 NW356. [b] **Trial court's discretion must not be arbitrarily exercised.**–Tex Cr 26SW(2d)639. [c] **Motion for continuance is addressed not to arbitrary but to sound discretion of trial court.** Va 152SE547.

452–92 210Ky566, 276SW522 (overruling motion for continuance not ground for reversal, where ample opportunity had been afforded defendant to develop his case).

452–94 16F(2d)704.

452–95 36GaA762, 138SE270; 142SC37, 140SE251.

452–96 36GaA762, 138SE270.

452–97 36GaA762, 138SE270; 193NC25, 136SE193.

452–98 [a] **Refusal of continuance** is abuse of discretion where established rules of practice of defendant's fundamental rights are disregarded. 220Ky 582, 295SW886.

453–4 78CalA476, 248P981; 190NC810, 130SE848, 851 [citCJ].

453–5 190NC810, 130SE848, 851 [cit CJ].

453–6 190NC810, 130SE848, 851 [cit CJ].

453–9 190NC810, 130SE848, 851 [cit CJ].

453–10 208Ky556, 271SW657 (where court led defendant to believe he would be tried at subsequent term); 190NC 810, 130SE848, 851 [citCJ].

453–11 190NC810, 130SE848, 851 [cit CJ].

453–12 16F(2d)704. See also 122Kan68, 250P1069.

453–15 101WVa632, 133SE371.

453–21 [a] **Statute relating to continuances** does not apply to postponements ordered because court is otherwise engaged. 99CalA280, 278P250.

453–21½–New. Where defendant consented to adjournment under the Motor Vehicle Act for less than thirty days, and was then denied a second adjournment, it was held no error. NJSup 133 A486.

454–24 [a] (1) See also 225Ky83, 7SW (2d)823.

454–25 TexCr 26SW(2d)639 (discretion not abused).

454–34 77Colo 546, 238P25.

454–37 [a] (6) 264Mass571, 163NE189. (25) 214Ala172, 106S692; 217Ala164, 115S101; 21AlaA405, 108S641; 78CalA 476, 248P981; 82CalA422, 255P552; 94 CalA628, 271P765; 228Ky561, 15SW (2d)440; 165La718, 115S914; 35Porto Rico 404; TexCr 11SW(2d)172. (27) Judge's verbal order to delay case from morning to afternoon session. 159La 1076, 106S570. (28) Facing two trials at same term. Mo 290SW1007. [b] (2) When, from circumstances brought about by conduct of adversary, defendant is deceived as to presence of witnesses, against him, or in his favor, when he announces ready for trial, he is entitled to relief. 112TexCr107, 14 SW(2d)838. (3) Disqualification of witnesses under statute. 112TexCr107, 14 SW(2d)838. [d] **No equitable grounds for continuance disclosed.**–102TexCr558, 278SW1103.

455–38 108TexCr427, 1SW(2d)619.

455–40½–New. Refusal of continuance until defendant's suit against jury commissioner to omit him from office has been disposed of has been held proper. 164La597, 114S171.

455–40½–New. Under statute, where defendant is a member of the legislature then in session, continuance may be had. OklCr 283P590.

455–42 See also 159La399, 105S410. [b] **Absence of counsel** must be unavoidable. 230Ky614, 20SW(2d)463.

455–43 [b] **In Georgia.**–160Ga509, 128 SE791.

455–44 14F(2d)366; 204Cal 109, 266P 807 (counsel warned to procure other counsel); 200 Iowa320, 204NW248; 227 Ky514, 13SW(2d)535; 159La399, 105S 410; 105TexCr634, 289SW1016. [a] **Denial of continuance held not erroneous.**–234Ky404, 28SW(2d)492.

455–45 23AlaA241, 124S507(2dcase); 41 GaA635, 154SE209; 200 Iowa320, 204 NW248; 210Ky385, 275SW819; 224Ky 89, 5SW(2d)487; OklCr 273P1016; OklCr 276P509; OklCr 286P21; 107 TexCr174, 296SW588; 111TexCr272, 12 SW(2d)568; TexCr 26SW(2d)238 (absent affidavit that absent counsel was necessary to fair trial). [f] **Court appointing counsel** who conducted case in absence of defendant's attorney held not abuse of discretion. 159La399, 105S 410.

456–47 290Pa573, 139A374.

456–48 OklCr 276P509; 109TexCr234, 4SW(2d)66.

456–48½–New. Where counsel sought, appeared and agreed to proceed refusal of continuance held proper. CalA 286P 434.

456–50 OklCr 283P590. But see 35PortoRico 109.

456–52 37 OklCr24, 255P1022.

456–53 39GaA697, 148SE304(1stcase); 168La95, 121S586; Kan 289P483; 193 Wis482, 214NW356. [a] **Where counsel personally makes motion,** court may consider physical appearance and vigor displayed in making motion to determine whether continuance should be granted. 39GaA697, 148SE304(1stcase).

456–55 109TexCr448, 5SW(2d)154.

456–56 22F(2d)803; 181Ark1035, 27 SW(2d)94.

457–57 6F(2d)975; 7F(2d)785; Kan 289P483; 215Ky360, 285SW193; 227 Ky389, 13SW(2d)273; 230Ky704, 20SW (2d)711; 165La842, 116S206; 193Wis 482, 214NW356.

457–57½–New. Refusal of continuance on account of illness of one of two attorneys is not an abuse of discretion where both were present at the trial. 179Ark 1055, 20SW(2d)120.

457–60 77Colo 546, 238P25; 118Kan 641, 236P855; Mo 22SW(2d)784 (refusal of continuance not abuse of discretion); Mo 29SW(2d)89; 118Nebr346, 225NW 42; 34 OhA60, 170NE444; OklCr 287P 782; 152SC17, 149SE348; 103TexCr 340, 280SW796; 108TexCr544, 2SW(2d) 238; TexCr 11SW(2d)172; 112TexCr4, 13SW(2d)698(2dcase); 150Wash326, 272 P964.

457–61 150Miss204, 116S612. [a] **Refusal of continuance not abuse of discretion** where court adjourned to following day on suggestion of defendant's illness and he had then recovered. 78CalA476, 248P981.

457–65 118Kan641; 236P855.

457–66 138SC24, 135SE651.

457–72½–New. Denial held proper where defendant could appear without detriment to his health. 156Miss365, 126S38.

458–73 [a] **Denial of continuance** held not error where witnesses were present and testified. 174Ark1078, 298SW357.

458–74 Fla 130S456; 162La543, 110S 749. But see 93Fla504, 112S83.

458–75 26F(2d)63; 220Ala501, 126S127 (2dcase); 21AlaA516, 109S892; 22AlaA 95, 112S811; 23AlaA166, 122S699(2d case) [certiorari den 219Ala422, 122S700 (1stcase)]; 23AlaA297, 124S402; 33Ariz 383, 265P609; 169Ark1212, 275SW660; 78CalA380, 248P975; 90Fla337, 106S 406; 92Fla699, 109S811; 200 Iowa 320, 204NW248; 119Kan417, 239 P756; 234Ky729, 29SW(2d)11; 158 La842, 104S736; 162La543, 110S749; 154Miss212, 122S398; 307Mo 291, 270 SW298; 322Mo 234, 14SW(2d)628; 114 Nebr404, 207NW928; 36 OklCr44, 253P 1027; OklCr 283P1036(2dcase); OklCr 286P349; OklCr 286P350; OklCr 290P 418; 100TexCr614, 272SW207; 107TexCr 666, 298SW591; 141Wash429, 251P855; 141Wash660, 252P118. [a] 80CalA257, 251P648. [d] **Refusing to postpone trial to take depositions of witnesses outside state** held within court's discretion and not erroneous. 38F(2d)581.

458–76 90Fla337, 106S406; 200 Iowa 320, 204NW248; 124Kan627, 261P844; 158La842, 104S736; 114Nebr404, 207 NW928. [a] (1) 26F(2d)63; 21AlaA 516, 109S892; 22AlaA95, 112S811; 169 Ark1212, 275SW660; 72CalA406, 237P 777; 78CalA380, 248P975; 80CalA257, 251P648; 90Fla337, 106S406; 92Fla 699, 109S811; 163Ga80, 135SE408; 36 GaA88, 135SE448; 119Kan417, 239P 756; 234Ky729, 29SW(2d)11; 158La 842, 104S736; 169La135, 124S670(2d case); 143Miss676, 109S710; Miss 112 S797; Mo 274SW62; 320Mo 219, 6SW (2d)877; Mo 23SW(2d)16; Mo 24SW (2d)161; 36 OklCr44, 253P1027; OklCr 286P349; OklCr 286P350; OklCr 290P 418; 100TexCr614, 272SW207; 107 TexCr666, 298SW591; 103TexCr299, 280SW783; 106TexCr593, 294SW573;

111TexCr325, 13SW(2d)86; TexCr 20 SW(2d)776; 113TexCr501, 21SW(2d) 1057(2dcase); 100Vt476, 138A741; 141 Wash429, 251P855; 141Wash660, 252P 118. (3) Where witnesses were present and testified in accused's behalf. 98 Fla152, 123S567(2dcase).

458-77 90Fla337, 106S406; 158La842, 104S736. [a] 169La749, 126S48; 307 Mo 291, 270SW298; OklCr 289P794; 99TexCr600, 271SW610; 103TexCr219, 280SW781; 112TexCr145, 15SW(2d) 634; 113TexCr634, 21SW(2d)1041; TexCr 24SW(2d)413.

458-78 99TexCr600, 271SW610; 107 TexCr70, 294SW857.

458-79 105TexCr327, 288SW458.

459-86 195Cal686, 235P450; 153Va 877, 149SE481.

459-86½-New. Refusal of continuance to enable defendant's wife to attend merely to show to the jury that she believed in his innocence has been held proper. 217Ky529, 289SW1110.

459-86¾-New. Where desired witness appeared before trial but was not used refusal of continuance is not error. 105TexCr327, 288SW458.

459-88 176Ark249, 3SW(2d)15; 72 CalA406, 237P757; 320Mo 219, 6SW(2d) 877; 109TexCr121, 3SW(2d)87; 109 TexCr361, 4SW(2d)966.

459-89 146Miss794, 112S23; 101TexCr 51; 274SW576; 102TexCr421, 278SW 197; 104TexCr593, 285SW1093; 108 TexCr218, 299SW897; TexCr 21SW(2d) 514.

459-90. TexCr 26SW(2d)275.

460-14 169La749, 126S48; 146Miss794, 112S23.

460-19 But see 169La22, 124S132.

460-20½-New. Refusal of application for continuance not error, where accused refused to accept witness tendered him, such witness being one of two absent witnesses for whom postponement had been granted. 100TexCr480, 273SW842.

460-20¾-New. , or where all witnesses named appeared during trial and were tendered to defendant. 108TexCr 28, 299SW236.

460-22 171Ark556, 286SW819; 242 Mich582, 219NW641; MoA 27SW(2d) 726; 36 OklCr44, 253P1027; 32Porto Rico 788 (applicant must show importance or necessity of witness); 100TexCr 501, 272SW191; 100TexCr395, 653, 273 SW568; 101TexCr487, 276SW240; 102 TexCr444, 278SW446; 103TexCr395, 281SW563; 103TexCr433, 281SW844; 103TexCr671, 282SW237; 104TexCr567, 285SW1094; 105TexCr430, 289SW44; 106TexCr83, 290SW1107; 106TexCr482, 293SW173; 106TexCr659, 294SW556; 107TexCr383, 296SW545; 111TexCr272, 12SW(2d)568; 113TexCr7, 18SW(2d) 176(2dcase); 141Wash660, 252P118. [a] 113TexCr506, 22SW(2d)667.

461-23 103TexCr200, 280SW221; 106 TexCr659, 294SW556.

461-25 100TexCr598, 272SW166; 105 TexCr522, 289SW392; 106TexCr539, 293SW822; 111TexCr262, 12SW(2d)563 (2dcase).

461-26 100TexCr442, 273SW845.

461-27 100TexCr395, 653, 273SW568; 113TexCr36, 18SW(2d)1074; TexCr 29 SW(2d)354. [a] **Where absent witness would testify as to count withdrawn from jury** refusal of continuance because of his absence is not erroneous. Va 152 SE547.

461-29 102TexCr444, 278SW446 (wife of accused, jointly indicted); 105TexCr 490, 288SW1075; 106TexCr361, 291SW 894.

461-30 Ind 170NE542; 320Mo 417, 8 SW(2d)29; 102TexCr444, 278SW446; 109TexCr108, 3SW(2d)91.

461-31 40GaA668, 150SE855(1stcase); 231Ky494, 21SW(2d)808 (offer to prove certain statements to witness held properly excluded from affidavit for continuance); 100TexCr600, 272SW200; 100TexCr632, 272SW195; 103TexCr200, 280SW221; 103TexCr364, 280SW804; 103TexCr542, 282SW216; 106TexCr661, 294SW215; 110TexCr156, 8SW(2d)678; TexCr 10SW(2d)723; 113TexCr583, 22 SW(2d)918. [a] (5) 104TexCr567, 285 SW1094.

462-34 102TexCr81, 277SW139 (continuance erroneously denied); 102 TexCr399, 278SW208; 102TexCr421, 278SW197; 103TexCr679, 282SW220; 104TexCr593, 285SW1093; 105TexCr 436, 289SW61; 105TexCr539, 289SW 396; 107TexCr70, 294SW857; 111 TexCr633, 13SW(2d)703; 111TexCr646, 13SW(2d)847(1stcase); 112TexCr368, 16SW(2d)815; 113TexCr36, 18SW(2d) 1074; 113TexCr578, 24SW(2d)841; TexCr 24SW(2d)1093(2dcase); TexCr 25SW(2d)841; TexCr 27SW(2d)818; TexCr 27SW(2d)820; TexCr 30SW(2d) 327. [a] (6) 101TexCr33, 274SW568; 113TexCr578, 24SW(2d)841; 101WVa 632, 133SE371 (exhumation of body). (14) 104TexCr593, 285SW1093; 109Tex Cr458, 5SW(2d)150; 109TexCr455, 5SW (2d)152. (17) Possession of intoxicating liquor. 103TexCr679, 282SW220. (18) Burglary. 106TexCr458, 293SW 172. (19) Storing intoxicating liquors for sale. 151Va503, 144SE473. (20) Possessing intoxicating liquor for sale. 113TexCr36, 18SW(2d)1074.

463-35 102TexCr399, 278SW208; 104 TexCr593, 285SW1093.

463-36 102TexCr421, 278SW197.

463-39 113TexCr583, 22SW(2d)918.

463-40 101TexCr622, 276SW921, 41 ALR1527; 102TexCr399, 278SW208; 110TexCr84, 8SW(2d)157.

463-41 106TexCr458, 293SW172.

463-43 100TexCr161, 272SW466; 101 TexCr622, 276SW921, 41ALR1527; 112 TexCr77, 14SW(2d)59(2dcase); 112 TexCr145, 15SW(2d)634 [cit 13TexA 468].

464-44 178Ark1200, 10SW(2d)369.

464-45 227Ky389, 13SW(2d)273.

464-46 TexCr 20SW(2d)776.

464-47 116Nebr723, 218NW737.

464-51 103TexCr542, 282SW216.

464-53 100TexCr537, 272SW144; 100 TexCr598, 272SW166; 105TexCr228, 288SW218.

464-54 142Va596, 128SE638 (evidence to contradict witness of state as to general reputation of defendant as violator of prohibition laws).

464-58 But see 235Ky471, 31SW(2d) 721.

465-62 177Ark812, 7SW(2d)987; 146 Miss794, 112S23; 104TexCr567, 285SW 1094; 112TexCr550, 17SW(2d)1051.

465-65 91Fla1026, 109S804.

465-73 31F(2d)908; 29Ariz523, 243P 601; 171Ark1188, 284SW721; 171Ark 1188, 285SW1; 174Ark1179, 298SW27; 174Ark1078, 298SW357; 179Ark216, 15SW(2d)312; 92Fla699, 109S811; 234 Ky441, 28SW(2d)505; 150Miss812, 117 S127; Mo 278SW1009; 314Mo 699, 285 SW440; Mo 7SW(2d)256; 320Mo 417, 8SW(2d)29; Mo 29SW(2d)89; OklCr 279P976(2dcase); OklCr 287P782; 157 Tenn363, 8SW(2d)486; 100TexCr442, 273SW845; 101TexCr182, 274SW153; 103TexCr395, 281SW563; 104TexCr 199, 283SW785; 106TexCr583, 294SW 220; 107TexCr530, 298SW287; 111 TexCr101, 10SW(2d)87; TexCr 24SW (2d)840; 143Va546, 129SE233 (must be more than merely cumulative); 150 Wash66, 272P89.

466-76 108TexCr218, 299SW897.

466-77 [a] **Continuance sought to secure testimony to support evidence of accused** should be as favorably regarded as absent testimony sought to support testimony of disinterested witness. 113TexCr36, 18SW(2d)1074.

466-78 112TexCr550, 17SW(2d)1051.

466-82 41GaA556, 153SE616(2dcase); 144Miss649, 110S216; 153Va877, 149 SE481.

467-90 TexCr 27SW(2d)168. [a] 110 TexCr142, 7SW(2d)1076 (wife).

467-91 162La666, 111S53; 102TexCr 81, 277SW139 (evidence showing state witness accomplice).

467-92 29Ariz523, 243P601; 333 Ill 554, 165NE196; 209Ky318, 272SW743 (court's discretion not abused where affidavit of absent witness admitted did not in fact contradict witness sought to be impeached); 169La1011, 126S510; Mo 271SW471; 100TexCr614, 272SW 207; 101TexCr315, 276SW247; 106 TexCr83, 290SW1107; 109TexCr531, 6 SW(2d)356; 111TexCr342, 13SW(2d) 380; 113TexCr583, 22SW(2d)918; Tex Cr 27SW(2d)202; TexCr 29SW(2d)791 (2dcase).

468-99 109TexCr578, 6SW(2d)118.

468-6 100TexCr188, 272SW486; 101 TexCr479, 276SW268.

469-7 35GaA386, 133SE518.

469-11 70CalA172, 232P751; 100TexCr 188, 272SW486; 103TexCr433, 281SW 844; 108TexCr138, 299SW902; 110Tex Cr156, 8SW(2d)678; TexCr 10SW(2d) 723; 111TexCr223, 12SW(2d)564.

469-12 106TexCr106, 291SW232; 108 TexCr218, 299SW897. [a] 106TexCr 106, 291SW232.

470-27 70CalA172, 232P751; 107Tex Cr79, 294SW860.

470-30 198 Ind695, 154NE666; 214Ky 703, 283SW1041; 220Ky686, 295SW979; 100TexCr442, 273SW845; 101TexCr96, 274SW628; 101TexCr479, 276SW268; 104TexCr199, 283SW785; 108TexCr249, 300SW55; 109TexCr361, 4SW(2d)966; TexCr 10SW(2d)723; 111TexCr151, 11 SW(2d)796; 112TexCr574, 17SW(2d) 823; TexCr 29SW(2d)354; TexCr 31 SW(2d)1073.

470-31 38F(2d)635; 169Ark498, 276 SW353; 173Ark1180, 293SW734; 174 Ark1179, 298SW27; 176Ark916, 5SW (2d)946; 180Ark363, 21SW(2d)850; 92 Fla699, 109S811; 35GaA386, 133SE518; 36GaA740, 138SE248; 214Ky787, 283SW 1063; 218Ky152, 291SW5; 234Ky441, 28SW(2d)505; 161La771, 109S485; 162 La543, 110S749; 165La653, 115S813; 171La , 129S736 (witness in federal prison outside state); 153Miss381, 120 S920; 114Nebr404, 207NW928; OklCr 271P170; 100TexCr188, 272SW486; 103TexCr590, 281SW560; 104TexCr 199, 283SW785; 106TexCr659, 294SW 556; 107TexCr600, 298SW438; TexCr 27SW(2d)220. [a] 169La22, 124S132. [c] **Where it is uncertain when, if ever, witness intends to return to state** denial of continuance based on his absence is proper. 169La1197, 126S921.

471-32 104TexCr199, 283SW785.

471-34 104TexCr371, 283SW816.

471-35 169Ark627, 276SW361; 179Ark 1064, 20SW(2d)113; 167La1113, 120 S875; 168La95, 121S586; 114Nebr404, 207NW928; 104TexCr171, 283SW831; 105TexCr327, 288SW458; TexCr 32SW (2d)454.

471-37 176Ark916, 5SW(2d)946.

472-43 See also 176Ark916, 5SW(2d) 946.

472-44 [a] **It is error to deny continuance** on the ground that witness is in hiding where there is no evidence that such is fact. 162Ga386, 133SE636.

472-49 But see 93Fla504, 112S83.

472-50 93Fla504, 112S83; 167La279, 119S48.

472-51 229AppDiv375, 241NYS731; OklCr 269P377; OklCr 273P372(2d case).

472-53 93Fla504, 112S83.

472-54½-New. Failure of defendant's affidavit to comply with statute will prevent error in refusal of permission to take deposition. 101WVa492, 133SE 106.

472-57 146Miss794, 112S23.

473-64 221Ky424, 298SW1087; 234 Ky729, 29SW(2d)11 (continuance refused).

473-64½-New. Failure to put state to admission held not abuse of discretion in absence of showing as to relevancy and possibility of obtaining absent evidence. Ala 129S282.

473-74 179Ark714, 17SW(2d)868; 225 Ky83, 7SW(2d)823.

474-77 34NM232, 280P248.

474-83 22AlaA651, 119S598(2dcase); 219Ky697, 294SW153; MoA 273SW141; 100TexCr442, 273SW845; 106TexCr482, 293SW173; 109TexCr195, 3SW(2d)811; TexCr 32SW(2d)194. [b] **Admitting that witnesses would testify as stated but not admitting truth** of such testimony did not authorize refusing continuance. TexCr 26SW(2d)244.

475-84 Fla 130S456.

475-85 50SD3, 207NW656.

475-87 232Ky205, 22SW(2d)615; Tex Cr 32SW(2d)194.

475-88 23AlaA83, 121S2(2dcase); 209 Ky318, 272SW743; 215Ky725, 286SW 1046; 215Ky731, 286SW1044; 215Ky 752, 286SW1063.

475-89 220Ala501, 126S127(2dcase) (admission of writing); 23AlaA166, 122

8699(2dcase) [certiorari den 219Ala422, 122S700(1stcase)].
475-91 See also 50SD3, 207NW656.
476-92 119Kan417, 239P756.
476-97 210Ky421, 276SW119 (affidavit read as deposition); 231Ky1, 21 SW(2d)120.
476-99 214Ky454, 283SW418.
476-4 208Ky52, 270SW455.
476-6 227Ky696, 13SW(2d)1035.
477-8 Ill 173NE467; 165La653, 115S 813; 169La22, 124S132.
477-10 167La404, 119S407; Wyo 285 P803. But see 167La1016, 120S631.
477-17 221Ky49, 297SW929.
477-20 OklCr 269P377; OklCr 273P 372(2dcase).
477-21 228Ky565, 15SW(2d)431.
478-26 94Fla522, 114S230.
478-35½-New. But where the court has expressly ruled that defendant was not entitled to ready affidavit, it is unnecessary that he should offer it in evidence at the trial. 216Ky358, 287SW924.
478-37½-New. Where defendant filed an affidavit for continuance because of absence of witnesses, and was permitted to read from the affidavit statements as to what the witnesses would testify to, failure to read the statement of evidence of some of the witnesses constituted a waiver of matter as to them. 228 Ky19, 14SW(2d)194.
478-37½-New. **Where a prosecuting attorney, to prevent a continuance, agrees to permit only the direct testimony of a** witness testifying at a former trial, he must be held to such agreement. 227 Ky696, 13SW(2d)1035.
478-42 160La667, 107S484 (admission of single sale could not be enlarged so as to show defendants were frequent purchasers). [c] **Where evidence was not objected to,** reading to jury admission made by defendant's counsel as to what evidence of witness for state would be is not error, though inadmissible if proper objection had been made. 128 Kan475, 278P767.
479-45½-New. or that defendant did not show due diligence in seeking the witness; 208Ky475, 271SW547.
479-47 50SD3, 207NW656.
479-50 94Fla522, 114S230; 108TexCr 556, 1SW(2d)903; 109TexCr58, 2SW (2d)857; 109TexCr195, 3SW(2d)811. [a] **Fact that admitted evidence is proved by another witness** does not entitle prosecution to contradict it. 109 TexCr58, 2SW(2d)857.
479-54 235Ky845, 32SW(2d)405.
479-57 119Kan417, 239P756 (province of jury to weigh testimony); 228Ky19, 14SW(2d)194.
479-58 20AlaA562, 103S916; 234Ky 729, 29SW(2d)11.
479-60 Ill 173NE467; TexCr 27 SW(2d)820.
479-61 234Ky268, 27SW(2d)946.
479-62 227Ky578, 13SW(2d)763.
480-70 234Ky268, 27SW(2d)946.
480-72 228Ky322, 14SW(2d)1077.
480-73 23AlaA166, 122S699(2dcase) [certiorari den 219Ala422, 122S700(1st case)]; 127Kan107, 272P186.
480-73½-New. The argument that a showing for witnesses is always put in at the request of defendant has been held not improper. 23AlaA166, 122S699(2d case) [certiorari den 219Ala422, 122S700 (1stcase)].
480-73½-New. The argument that an absent witness would have testified to things not stated in the affidavit has been held improper. 229Ky452, 17 SW(2d)440.
481-79 [a] **That witness appears in court** does not permit defendant to withdraw motion for continuance. 166La 924, 118S85.
481-83 109TexCr58, 2SW(2d)857.
481-84 309Mo 498, 274SW734.
481-85 309Mo 498, 274SW734.
481-86 168Ark1128, 272SW858 (denial where not shown how sick he was); 53 SD291, 220NW492; 160Tenn267, 23 SW(2d)665 (denial of continuance held error); 99TexCr600, 271SW610; 102 TexCr213, 277SW141 (witness for whom no subpœna issued who promised to attend does not justify continuance); 102 TexCr421, 278SW197. [c] **Refusal of continuance held erroneous.**-179Ark714, 17SW(2d)868; 112TexCr530, 17SW(2d) 817(3dcase).
482-97 94Fla32, 113S630; 334 Ill 516, 166NE97.
482-99 94Fla32, 113S630; 40GaA736, 151SE405; 235Ky176, 30SW(2d)898; Mo 274SW62; 103NJL663, 138A575 (twenty days after arraignment sufficient); 34NM154, 279P66; OklCr 275 P355; 95PaSuper563 (trial on day of arrest and refusal of continuance not abuse of discretion under circumstances). [a] (8) Month and a half. 210Ky 71, 275SW22. (9) Indictment in May and trial in August. 315Mo 232, 285SW 712. (10) Two months. 335 Ill 217, 167 NE1. (11) Forty-five days. 225Ky492, 9SW(2d)132. (12) Defendants out on bail for three months. 332 Ill 436, 163 NE804. [b] **That accused does not know what witnesses will be produced against him** does not require continuance in misdemeanor case. 25F(2d)231 (violation of Narcotic Act). [c] 137SC 145, 134SE885. [d] **Appointment of counsel to defend accused at time of arraignment** justifies refusal of continuance for lack of preparation notwithstanding accused was not able to employ counsel till later. 230Ky327, 19 SW(2d)964.
482-1 92Fla477, 110S250; 36GaA762, 138SE270.
482-5 [d] **Where counsel was assigned and conducted defense** with due diligence, continuance will not be granted upon ground that defendant will be able to employ own counsel on new trial. 214 Ky137, 282SW1082.
482-6 177Ark1056, 9SW(2d)314.
482-7½-New. Refusal of a continuance on showing that defendant had been denied all access to his relatives and had therefore been unable to prepare his case is not prejudicial error. 152Miss656, 120S747.
482-8 204Iowa1355, 217NW233; 210 Ky71, 275SW22; 163La386, 111S795; OklCr 275P355.
483-11 164La496, 114S109; TexCr 27 SW(2d)1102. [b] **Evidence sufficient to go to jury.** 256Mass214, 152NE60.
483-12 220Ala501, 126S127(2dcase); 33 Ariz383, 265P609; 164La496, 114S109; 155Miss662, 124S785; 103NJL64, 134A 760; 120 Or573, 253P7. [d] (5) No abuse of discretion where lack of preparation is due to defendant's fault. 162 La590, 110S766. (6) Fourteen days has been held reasonable time for preparation. OklCr 273P366(2dcase).
483-13 169La22, 124S132; Mo 30 SW(2d)750; TexCr 27SW(2d)1102. See also Mo 285SW83. [a] **Appointment of counsel for one defendant on date case was set for trial** is not sufficient ground for continuance where counsel also represented other defendant and defenses were not inconsistent. 336 Ill 111, 167NE795.
483-14 34PortoRico 443.
483-15 328 Ill 332, 159NE360; 224Ky 89, 5SW(2d)487. [a] 162La590, 110S 766; 165La653, 115S813. [c] (2) Where counsel withdrew and defendant was given reasonable time to procure other counsel, he cannot secure continuance on ground that he has just retained counsel. 150Miss756, 116S887. [d] **Recent change of counsel.**-Granting of continuance because of recent change of counsel is discretionary with court. 34 F(2d)630.
483-17 113TexCr462, 22SW(2d)922. [b] **In felony case, where numerous witnesses are to be interviewed,** refusal to grant a continuance on showing by counsel of inadequate time for preparation, is erroneous. 334 Ill 516, 166NE97.
483-18 224Ky89, 5SW(2d)487.
484-19 33Ariz383, 265P609 (denial of substantial right); 215Ky800, 287SW 17; 163La386, 111S795.
484-21 165Ga460, 141SE196 (at least one day should be allowed); 70Utah 526, 261P606 (where defendant was denied statutory right to two days to prepare for trial).
484-25 94Fla32, 113S630.
484-26 320Mo417, 8SW(2d)29. [a] See also OklCr 287P782.
484-27 321 Ill 484, 152NE500.
484-31 215Ala42, 109S109; 22AlaA526, 117S500; 256Mass214, 152NE60; 34 OhA60, 170NE444. [a] (2) Motion held properly denied where no offer was made to show press article had been read by jurors or prejudice against defendant. NJSup 136A343. [c] **Discretion not abused.**-137SC145, 134SE885. [d] **Negroes charged with killing white man** are held not entitled to continuance because of race hatred. 108TexCr285, 300 SW75.
485-32 333 Ill 200, 164NE150; 105TexCr436, 289SW61. [a] **Failure to name exact date of offense** has been held not ground for postponement. TexCr 28 SW(2d)151(2dcase).
485-33 5F(2d)471; 230Ky411, 19 SW(2d)1091, 66ALR360; 158La713, 104 S627; 104TexCr75, 282SW805; 105 TexCr325, 288SW467. [a] **Reasonable diligence would seem to require investigation** by defense of all witnesses present for purpose of ascertaining what their testimony would be. 104TexCr75, 282SW805.
485-34 158La713, 104S627; Mo 23 SW(2d)1; 104TexCr75, 282SW805. [a] **Denial not abuse of discretion.**-Mo 23 SW(2d)1 (surprise in calling defendant's case for trial on day set therefor after dismissing case against his wife which preceded it on docket).
485-35½-New. Filing information for maintaining a nuisance on the day for trial on a charge of sale of liquor has been held not to require continuance. 19F(2d)46.
485-35½-New. Denial of a continuance on substitution of an information for a quashed indictment is proper, where the information merely eliminated a defect in the indictment which charged two offenses. 318Mo 687, 1SW(2d)96.
485-36 113TexCr428, 21SW(2d)298(2d case).
485-38 32PortoRico 788 (unexpected absence of state's witness).
485-39 Mo 24SW(2d)161 (witness under subpœna).
485-41 169La191, 124S824. [b] 208 Ky601, 271SW662. [c] **Correction of typographical error as to date** was not prejudicial error, where no continuance was requested on that ground. 99CalA 224, 278P258.
485-42 154Miss446, 122S538; OklCr 280P317(1stcase); OklCr 288P362.
485-43 160La316, 107S123; Mo 270SW 347; 317Mo 276, 295SW554. But see 170 La120, 127S385. [b] **In prosecution in federal court** for offense not capital it is not error for court to refuse continuance because of indorsement of number of names of witnesses on indictment at opening of trial. 18F(2d)906.
485-44 121Kan186, 246P1001; 141 Wash358, 251P582; 144Wash446, 258P 508.
486-46 144Wash446, 258P508.
486-48 171Ark778, 286SW935.
486-48½-New. Where accused was not misled by the introduction of witnesses whom the prosecutor had promised not to call, there is no ground for continuance. 169Ark1211, 278SW14.
486-48½-New. Accused must show diligence to procure witnesses to offset surprise testimony. 169Ark1211, 278SW14.
486-49 TexCr 24SW(2d)437.
486-50 [a] **Where all defendant's witnesses** were easily accessible or had testified, continuance properly refused. Va 152SE366.
486-53 104TexCr75, 282SW805.
486-59 164La496, 114S109; MoA 27 SW(2d)726; 121 Oh292, 168NE139.
486-65 105TexCr494, 288SW1074. [a] **Fact that sheriff engaged in summoning jurors** is witness, where no bias or prejudice shown, no unqualified juror sworn, and challenges not exhausted. 100TexCr438, 273SW586.
487-67 22AlaA487, 116S414.
487-69 116Nebr125, 216NW294.
487-70 22AlaA360, 115S761; 23AlaA 70, 121S88; 154Wash29, 280P737.
487-74 See also 20AlaA481, 104S137.
487-75½-New. Refusal of continuance because of mistrial at same term is not abuse of discretion. 22F(2d)52.
487-75½-New. Reading affidavits for

change of venue in presence of jury is not ground for continuance. 155SC495, 152SE738.

487–85 104TexCr157, 283SW788.

487–92 79CalA555, 250P403; 118Kan 428, 235P843 (not error to require dependent to go to trial after four continuances); 218Ky152, 291SW5; 107TexCr538, 298SW283; 112TexCr4, 13SW(2d)698(2dcase). [b] **Abuse of discretion** not shown where accused arrested at 9:30 A. M. indicted at 1 P. M. and second continuance to confer with counsel and secure witnesses refused at 7:30 P. M. 190NC810, 130SE848.

488–93 93Fla1069, 113S96; 218Ky72, 290SW1075.

488–94 Cal 289P634; Mo 271SW471. [a] 208Ky52, 270SW455; Mo 271SW 471; TexCr 27SW(2d)205.

488–96 104TexCr199, 283SW785.

488–98 [a] **Denial held proper.**–220Ky 348, 295SW142.

488–98½–New. Where motion fails to show whether application was first or subsequent application, it will be treated as subsequent. 101TexCr670, 276SW 919.

488–98½–New. A supplemental application after overruling of prior application is treated as additional or subsequent application. 101TexCr670, 276 SW919; 108TexCr28, 299SW236.

488–98¾–New. An application showing a misnomer in a prior application based on the absence of a witness and naming the witness wanted is held not a subsequent application. 108TexCr28, 299 SW236.

488–1 110TexCr605, 10SW(2d)116(2d case).

488–2 79CalA555, 250P403 (rule of diligence is applied with increased rigidity); 104TexCr199, 283SW785; TexCr 31SW(2d)449.

488–3 79CalA555, 250P403; 40GaA 722, 151SE397; 333 Ill 200, 164NE150; 105TexCr637, 289SW1010; 109TexCr 335, 4SW(2d)555; 110TexCr65, 7SW (2d)575; 112TexCr612, 18SW(2d)625; TexCr 29SW(2d)750 (third continuance); TexCr 31SW(2d)449; TexCr 31 SW(2d)818.

488–4 229Ky139, 16SW(2d)793; 229 Ky505, 17SW(2d)421.

488–4½–New. A mere statement that diligence was used is insufficient. 101 TexCr670, 276SW919.

488–5 309Mo 498, 274SW734; 105TexCr522, 289SW392; 106TexCr593, 294 SW573.

489–6 Mo 271SW471.

489–7 218Ky152, 291SW5.

489–8 218Ky152, 291SW5; 106TexCr 593, 294SW573.

489–10 229Ky505, 17SW(2d)421.

489–11 17F(2d)877; 31F(2d)272; 168 Ark1122, 273SW353; 170Ark1194, 283 SW40; 171Ark188, 285SW1; 171Ark 1189, 288SW380; 173Ark1180, 293SW 734; 179Ark216, 15SW(2d)312; 195Cal 325, 233P97; 79CalA555, 250P403; 93 Fla1069, 113S96; 170Ga895, 154SE368; 200 Iowa320, 204NW248; 124Kan245, 259P691; 124Kan627, 261P844; 208Ky 556, 271SW657; 169La585, 125S626; 173Minn567, 218NW112; 143Miss676, 109S710; 146Miss718, 111S834; 321Mo 633, 12SW(2d)37; MoA 275SW58; 114 Nebr404, 207NW928; 36 OklCr44, 253P 1027; OklCr 271P956; OklCr 285P141; OklCr 287P1047; 99TexCr647, 271SW 389; 101TexCr670, 276SW919; 103Tex Cr395, 281SW563; 103TexCr496, 281 SW559; 103TexCr403, 281SW844; 103 TexCr590, 281SW560; 103TexCr651, 281SW1050; 103TexCr542, 282SW216; 103TexCr671, 282SW237; 104TexCr75, 282SW805; 105TexCr494, 288SW1074; 105TexCr581, 289SW409; 106TexCr589, 293SW1102; 107TexCr79, 294SW860; 107TexCr174, 296SW588; 107TexCr315, 296SW895; 108TexCr460, 1SW(2d)282; 109TexCr209, 4SW(2d)64; 109TexCr 531, 6SW(2d)356; 111TexCr4, 10SW (2d)730; 111TexCr63, 11SW(2d)322(2d case); 113TexCr428, 21SW(2d)298(2d case); 113TexCr501, 21SW(2d)1057(2d case); TexCr 23SW(2d)391; TexCr 24 SW(2d)838; TexCr 26SW(2d)204(1st case); TexCr 26SW(2d)644(2dcase); TexCr 27SW(2d)797; TexCr 29SW(2d) 354; TexCr 29SW(2d)791(2dcase); Tex Cr 32SW(2d)478; TexCr 32SW(2d)473; 141Wash660, 252P118.

490–13 114Nebr404, 207NW928; 105 TexCr581, 289SW409.

490–15 101TexCr96, 274SW628.

490–16 171Ark1188, 285SW1; 222Ky 248, 300SW625.

490–17 222Ky248, 300SW625.

490–19 101TexCr96, 274SW628; 106 TexCr646, 294SW217.

490–22 107TexCr281, 296SW518. [a] 167La1016, 120S631; 100TexCr140, 272 SW468; 104TexCr139, 282SW591; 106 TexCr458, 293SW172; 108TexCr524, 1 SW(2d)641; 110TexCr448, 10SW(2d) 92. [b] 17F(2d)877; 229Ky706, 17SW (2d)1001; 158La842, 104S736 (notice, from sheriff's return, that person with name similar to absent witness, resided in neighboring parish); Mo 285SW82; MoA 273SW141; 100TexCr395, 653, 273 SW568; 104TexCr75, 282SW805; 108 TexCr482, 1SW(2d)637; 108TexCr556, 1SW(2d)903; 110TexCr128, 7SW(2d) 579; 111TexCr95, 10SW(2d)94(2dcase); TexCr 10SW(2d)565; 111TexCr151, 11 SW(2d)796; 111TexCr476, 14SW(2d) 842; 111TexCr517, 14SW(2d)1039; 111 TexCr529, 15SW(2d)20; TexCr 20SW (2d)776; TexCr 26SW(2d)1066; TexCr 27SW(2d)220; TexCr 27SW(2d)245(2d case); 141Wash660, 252P118.

490–25 170Ark1194, 283SW40.

491–28 TexCr 27SW(2d)194.

491–30 TexCr 24SW(2d)838.

491–37½–New. Defendant who could have discovered repudiation by one witness of a former statement before trial was in no better position to demand continuance on making the discovery during the trial. 105TexCr436, 289SW 61.

491–38 180Ark613, 22SW(2d)40; Ark 30SW(2d)836; 195Cal 325, 233P97; 124 Kan245, 259P691; 146Miss718, 111S 834; OklCr 275P361; OklCr 287P818; 101TexCr68, 274SW133; 106TexCr506, 294SW202; 107TexCr538, 298SW283; 108TexCr28, 299SW236; 108TexCr482, 1SW(2d)637; 110TexCr636, 10SW(2d) 546; 113TexCr555, 23SW(2d)721; Tex Cr 32SW(2d)650(2dcase); 145Va865, 134SE699.

491–40 23AlaA74, 120S918(2dcase); 124Kan245, 259P691; 165La653, 115S 813; 322Mo 234, 14SW(2d)628; OklCr 271P956; 99TexCr647, 271SW389; 101 TexCr68, 274SW133; 103TexCr395, 281 SW563; 103TexCr496, 281SW559; 104 TexCr391, 283SW813; 104TexCr511, 284SW561; 105TexCr91, 286SW1096.

492–41 OklCr 269P385; 148Wash65, 268P133.

492–48 104TexCr511, 284SW561; 111 TexCr288, 12SW(2d)582.

492–50 TexCr 24SW(2d)423.

492–51 179Ark28, 13SW(2d)821; 219 Ky272, 292SW805; 101TexCr239, 275 SW833; 103TexCr200, 280SW221; 103 TexCr258, 280SW836; 104TexCr358, 284SW556; 106TexCr83, 290SW1107; 107TexCr281, 296SW518; 108TexCr138, 299SW902; 113TexCr620, 22SW(2d)138 (1stcase).

493–54 101TexCr239, 275SW833; 101 TexCr479, 276SW268; 103TexCr200, 280SW221; 111TexCr4, 10SW(2d)730; TexCr 23SW(2d)377; TexCr 31SW(2d) 635; 34Wyo 247, 242P812. [a] (1) OklCr 282P894; 100TexCr247, 272SW477 (issued immediately on dismissal of charge against witness, present in court, for same offense with defendant); 106 TexCr361, 291SW894. (3) 168Ark1128, 272SW858; 173Ark1182, 291SW804; 227Ky439, 13SW(2d)244; 109TexCr541, 5SW(2d)990. (6) 169Ark1212, 275SW 660; 103TexCr258, 280SW836. (7) 179 Ark216, 15SW(2d)312; 111TexCr370, 13 SW(2d)91(2dcase); 113TexCr497, 22SW (2d)462. (9) 104TexCr358, 284SW556. (14) Fourteen days after indictment. 100TexCr334, 273SW589. (15) Five months after indictment and seventeen days after commencement of term. 101 TexCr86, 273SW598. (16) Seven months after indictment filed. 106TexCr259, 291SW900. (17) One month after indictment. 171Ark1188, 285SW1. (18) Four days before trial. 112TexCr514, 17SW(2d)460.

493–56½–New. or as soon as indicted, 101TexCr33, 274SW568.

493–59 216Ky358, 287SW924.

493–60 146Miss718, 111S834; OklCr286 P811; 104TexCr511, 284SW561; 106 TexCr646, 294SW217; 108TexCr460, 1 SW(2d)282; TexCr 23SW(2d)377; Tex Cr 26SW(2d)1074. See also 154Miss60, 119S507.

493–60½–New. Issuance of additional process was not necessary where the witness had been subpœnaed and thereafter left defendant's home before the trial began, and defendant was unaware of his whereabouts. 111TexCr646, 13 SW(2d)847(1stcase).

494–65½–New. Where process is issued to a county in which witness never resided, due diligence is not shown. 111 TexCr342, 13SW(2d)380.

494–68 179Ark216, 15SW(2d)312; CalA 286P434; 93Fla504, 112S83; Okl Cr 270P344; OklCr 285P141; 108Tex Cr460, 1SW(2d)282; TexCr 26SW(2d) 1074; 38Wyo 455, 268P571.

494–72 104TexCr371, 283SW816.

494–73 78CalA476, 248P981 (residents of foreign country).

494–75 OklCr 286P811.

495–81 101TexCr479, 276SW268.

495–85 TexCr 29SW(2d)354.

495–86 52SD209, 217NW213.

495–93½–New. that defendant's employer had promised to provide counsel; 103TexCr496, 281SW559.

495–94½–New. or that attorney of defendant's own choice intrusted with the duty of securing process for witnesses was lacking in diligence. 105TexCr614, 289SW1013.

496–1 169Ark1211, 276SW863; 106Tex Cr589, 293SW1102.

496–2 195Cal 325, 233P97.

496–5 169Ark1211, 276SW863 (failure to ask for alias subpœna).

496–7 105TexCr235, 288SW191; 109 TexCr47, 2SW(2d)853.

496–8½–New. Where there is no return on attachment nor explanation therefor denial of continuance for absent witness is proper. TexCr 26SW(2d)229.

496–16 143SC63, 141SE165.

496–17 141SC207, 139SE386; 143SC63, 141SE165.

497–23 216Ala659, 114S39; 228Ky234, 14SW(2d)759; 230Ky725, 20SW(2d) 745; 158La842, 104S736 (holding that, where sheriff had made earnest and vain effort to locate witness, defendant was required to apply for continuance by affidavit); 164La496, 114S109; 321Mo 633, 12SW(2d)37.

497–23½–New. A statement of the solicitor for a city court that he was not ready for trial because of the absence of a witness has been held to constitute an application for a continuance. 35 GaA663, 134SE333.

497–24 164La496, 114S109 (formal application); 315Mo 232, 285SW712; 32 Mo 417, 8SW(2d)29; TexCr 24SW(2d) 437; TexCr 26SW(2d)208 (2dcase). [a] **Attestation.**–Application must be properly attested. 164La496, 114S109.

497–28 172Ark1177, 288SW707. Contra 80CalA257, 251P648; 230Ky250, 19 SW(2d)218; 164La496, 114S109; 32 PortoRico 788; 100TexCr614, 272SW 207; TexCr 11SW(2d)172; 111TexCr 288, 12SW(2d)582. See also 143Va546, 129SE233.

497–29 Contra 80CalA257, 251P648.

497–30 230Ky250, 19SW(2d)218.

497–33 22AlaA653, 119S596(1stcase); TexCr 31SW(2d)435. [a] **Waiver of right to delay making application.**–Where defendant's counsel voluntarily requests and is granted time to make an affidavit for continuance, he thereby waives any right to delay doing so on the ground that the sheriff had not made proper return on subpœna. 158La842, 104S736. [b] **Application should be made when case is called for trial,** where defendant wants more time to prepare. 96Fla237, 118S18. [c] **Application should be made** at or prior to time case is called for trial. 339 Ill 421, 171NE 557.

497–36 214Ky137, 282SW1082; 162La 666, 111S53; 52SD209, 217NW213 (denial held not error where diligence not shown); TexCr 31SW(2d)435.

497–38 [a] See also OklCr 279P521.

498–42 [a] (2) Where application was made morning trial commenced, denial held not error under circumstances. 102 CalA608, 283P389.

498-44 41GaA838, 155SE49.
498-49 106TexCr457, 293SW170.
498-54 171Ark1188, 286SW1028; 215Ky583, 285SW959; 230Ky614, 20SW(2d)463; Mo 295SW738; OklCr 287P846; 105TexCr436, 289SW61; 111TexCr101, 10SW(2d)87; TexCr 24SW(2d)423; TexCr 26SW(2d)225; TexCr 31SW(2d)637.
499-56 171Ark556, 286SW819; 147Miss570, 113S186; 101WVa492, 133SE106. See also 76CalA105, 243P882. [b] **Purpose of affidavit for continuance in such case** is to place before court facts to which absent witness will testify in order that court may determine value of such testimony to defendant. 101WVa492, 133SE106.
499-63 97Fla988, 122S567.
499-64½-New. Inability of a witness to attend must be shown. 151Miss750, 118S609(1stcase).
499-65 181Ark592, 26SW(2d)899; 170Ga234, 152SE482; 102TexCr558, 278SW1103; 104TexCr432, 284SW574; TexCr 26SW(2d)1070(2dcase); TexCr 32SW(2d)454. [a] **Statutory requirements are mandatory** and noncompliance good basis for refusal. 102TexCr558, 278SW1103.
499-67 TexCr 26SW(2d)225.
499-71 214Ky787, 283SW1063; 215Ky498, 285SW232; 105TexCr436, 289SW61; 107TexCr538, 298SW283; TexCr 27SW(2d)202; 101WVa492, 133SE106.
500-72 101WVa492, 133SE106.
500-77 29Ariz523, 243P601; 204 Iowa1355, 217NW233; 148Wash65, 268P133.
500-80 171Ark568, 285SW13; 172Ark1177, 288SW707; 215Ky725, 286SW1046; Mo 285SW978; 102TexCr558, 278SW1103; 105TexCr436, 289SW61; TexCr 11SW(2d)172; TexCr 32SW(2d)473; 101WVa492, 133SE106. [b] **If residence is unknown,** that must be stated. 102TexCr558, 278SW1103.
500-81 195Cal325, 233P97; 215Ky725, 286SW1046; 113TexCr384, 22SW(2d)665. [b] **Mere allegation that absent witness lived in county of trial** is insufficient to sustain application. 112TexCr422, 16SW(2d)1068.
501-84 169Ark326, 275SW667 (allegation that witness is physically unable to be present held insufficient); 169Ark340, 275SW663; 171Ark568, 285SW13.
501-86 172Ark1177, 288SW707; 39GaA546, 147SE728(1stcase); 158La842, 104S736; OklCr 269P385; OklCr 287P1108; 113TexCr497, 22SW(2d)462; TexCr 28SW(2d)554; TexCr 32SW(2d)473; TexCr 32SW(2d)650(2dcase).
501-88 29Ariz523, 243P601; 172Ark1177, 288SW707; 179Ark1064, 20SW(2d)113; 204 Iowa1355, 217NW233; 124Kan245, 259P691; 158La842, 104S736; 161La368, 108S773; 167La1113, 120S875; 147Miss570, 113S186; 314Mo699, 285SW440; 105TexCr436, 289SW61; 107TexCr538, 298SW283; 113TexCr497, 22SW(2d)462; 113TexCr384, 22SW(2d)665; 101WVa492, 133SE106. [a] **Reasonable definiteness is required** in stating such testimony. 101WVa492, 133SE106.
501-89 97Fla988, 122S567 (motion properly overruled); 89IndA344, 166NE298; 147Miss570, 113S186.
502-90 151Miss750, 118S609(1stcase); 105TexCr436, 289SW61; TexCr 25SW(2d)332; TexCr 31SW(2d)1073; 100Vt476, 138A741; 153Va877, 149SE481. [a] **Conclusion of affiant** as to materiality of facts and circumstances is not sufficient. 101WVa492, 133SE106.
502-93 29Ariz523, 243P601; 97Fla988, 122S567.
502-95 145Va865, 134SE699; 107WVa418, 148SE131.
503-3 180Ark656, 22SW(2d)172; 234Ky441, 28SW(2d)505; 317Mo313, 295SW543; Mo 23SW(2d)1; Mo 16SW(2d)35; OklCr 287P758(2dcase).
503-6 17F(2d)877; 32F(2d)127; 172Ark1177, 288SW707; 70CalA172, 232P751; 97CalA782, 276P426; 214Ky454, 283SW418; 147Miss570, 113S186; Mo 285SW978; OklCr 275P361; OklCr 287P818; 107TexCr538, 298SW283; 108TexCr118, 299SW248; TexCr 25SW(2d)332; TexCr 26SW(2d)1074.
503-7 119Kan532, 240P850; 214Ky454, 283SW418; 228Ky565, 15SW(2d)431; 158La842, 104S736; 322Mo234, 14SW(2d)628; 107TexCr281, 296SW518.
503-8 97Fla988, 122S567; 328Ill332, 159NE360; 214Ky454, 283SW418; 158La842, 104S736; 110TexCr641, 10SW(2d)721; 112TexCr422, 16SW(2d)1068. [a] **Allegations held sufficient,** notwithstanding affidavit contained also statement as to diligence which was merely conclusion. 225Ky264, 8SW(2d)390.
504-10 TexCr 28SW(2d)803 (application insufficient).
504-11 TexCr 26SW(2d)1074.
504-12 111TexCr95, 10SW(2d)94(2dcase).
504-14 TexCr 26SW(2d)1074.
504-17 29Ariz523, 243P601; 195Cal325, 233P97; 97Fla988, 122S567; OklCr 287P1108; 102TexCr558, 278SW1103; TexCr 26SW(2d)225; TexCr 26SW(2d)256. [a] **Mere statement that all facts cannot be proved by witnesses present** is insufficient; particular facts that cannot be so proved must be specified. 158La842, 104S736.
504-21 101WVa492, 133SE106.
505-23 32F(2d)127; 35F(2d)958; 169Ark340, 275SW663; 70CalA172, 232P751; 100CalA295, 279P1054; 36GaA740, 138SE248; 37GaA9, 138SE524; 37GaA520, 140SE788 (failure to state such probability held to forfeit continuance); 214Ky787, 283SW1063; 215Ky725, 286SW1046; 158La842, 104S736 (holding court not bound to accept mere statement that witness resided in parish and could be procured later when sheriff's action showed no such person could be found or lived in parish); OklCr 287P758(2dcase); OklCr 287P782; OklCr 287P818; 107WVa357, 148SE205.
505-24 171Ark568, 285SW13.
505-25 104TexCr467, 284SW546.
505-27 195Cal325, 233P97.
505-28 39GaA697, 148SE304(1stcase); 102TexCr558, 278SW1103.
505-28½-New. Motion to continue for absence of counsel must affirmatively disclose that it is not made for delay only, and that movant expects to obtain his services at next term. 160Ga509, 128SE791.
505-31 104TexCr467, 284SW546. [b] (1) 104TexCr467, 284SW546; 108TexCr418, 1SW(2d)279 (requirement is mandatory); TexCr 11SW(2d)172; 112TexCr422, 16SW(2d)1068; 113TexCr501, 21SW(2d)1057(2dcase); TexCr 24SW(2d)437. (4) Diligence in procuring absent witness, and that testimony can be obtained, must be shown. TexCr 21SW(2d)1044(2dcase).
506-33 TexCr 11SW(2d)172; TexCr 26SW(2d)217(2dcase).
506-34 104TexCr467, 284SW546; 108TexCr418, 1SW(2d)279.
506-35 104TexCr467, 284SW546; 105TexCr365, 288SW202; 108TexCr418, 1SW(2d)279. [a] **Essential element in second application** is that testimony cannot be obtained from any other source known to movant. TexCr 26SW(2d)217(2dcase).
506-36 [a] 113TexCr501, 21SW(2d)1057(2dcase); 113TexCr555, 23SW(2d)721; TexCr 24SW(2d)423.
506-38 108TexCr418, 1SW(2d)279.
506-42½-New. Where it is shown that the amendment was unnecessary, it is not error to refuse to grant a continuance. 168La322, 122S52.
506-51 111TexCr95, 10SW(2d)94(2dcase).
508-68 110TexCr448, 10SW(2d)92.
508-75 78CalA476, 248P981.
509-85 TexCr 26SW(2d)238 (continuance granted only on legal showing).
509-85½-New. The Mississippi statute relative to cross-examination on application for a continuance is not applicable to criminal cases. 152Miss708, 120S817.
509-85⅓-New. It is error to permit a district attorney to examine a defendant in a criminal case, over defendant's objection, on an application for a continuance. 152Miss708, 120S817.
509-85¼-New. A newspaper clipping offered by defendant in support of an application for a continuance after it had been overruled was properly excluded. Mo 16SW(2d)35.
509-85⅕-New. Motion for continuance is more closely examined in criminal than in civil cases. 93Fla1069, 113S96.
509-87 108TexCr482, 1SW(2d)637.
509-88½-New. Court may consider the subpœna and sheriff's return as well as the affidavit, and may take judicial notice of facts transpiring before him, in determining the application. 158La842, 104S736.
509-93 240 IllA254.
509-94½-New. Court is not bound by statements in affidavit for continuance as conclusive, even when not traversed, but may take judicial notice of all facts transpiring before him in determining its truthfulness, although such facts tend to traverse the affidavit. 158La842, 104S736.
509-95 Mo 290SW1007.
509-96 173Ark1180, 293SW734; Mo 24SW(2d)161; 104TexCr511, 284SW561; 106TexCr361, 291SW894; 109TexCr47, 28SW(2d)853; 111TexCr95, 10SW(2d)94(2dcase); 113TexCr384, 22SW(2d)665; 113TexCr555, 23SW(2d)721; TexCr 26SW(2d)204(1stcase); TexCr 26SW(2d)1066; TexCr 27SW(2d)797.
510-2½-New. In a case triable without a jury, the court may, on granting continuance, impose condition that testimony of a witness for prosecution be taken immediately. 164Minn499, 205NW450.
510-2⅓-New. Reasonable conditions may be imposed on granting continuances. 164Minn499, 205NW450.
510-3 121Kan186, 246P1001.
510-5 121Kan186, 246P1001; Mo 270SW337; 144Wash446, 258P508.
510-6 87Colo507, 289P1081; 121Kan186, 246P1001; 232Ky205, 22SW(2d)615 (thirty days held sufficient).
510-7 121Kan186, 246P1001.
510-11 96Fla237, 118S18.
510-13½-New. Overruling objection to proceeding with trial after adjournment of nineteen days is not erroneous. Nebr 231NW512.
510-15 326 Ill145, 157NE225.
511-23½-New. The overruling of an application for a continuance in the absence of defendant was not error. OklCr 275P355.
511-27 326 Ill145, 157NE225.
511-31 36GaA762, 138SE270.
511-33 332 Ill113, 163NE421; OklCr 291P986.
511-38½-New. Order for continuance, on motion of defendants, is properly set aside at their request. 210Ky554, 276SW519.
512-52 87Colo567, 290P271; 128Kan665, 280P910, 66ALR1369 (matters of public concern known to all well informed persons); 111TexCr264, 12SW(2d)796.
512-54 92Fla775, 109S809.
512-55½-New. That court takes judicial notice of fact does not preclude admission of evidence to establish fact. Or 285P1105.
512-55⅓-New. The court will not take judicial notice that a barrel and pipe with elbows are articles commonly used for manufacturing liquors. 22AlaA125, 113S625.
512-57 19F(2d)801; 22Ala115, 113S321; 21AlaA588, 110S320; 22AlaA165, 113S432; AlaA 129S720; 169Ark342, 275SW665; 198Cal534, 246P62; CalA289P881 (common knowledge within court's jurisdiction); 98Fla464, 124S27; 324 Ill363, 155NE316; 200Ind531, 165NE322; Ind 172NE902; 89IndA330, 166NE547(2dcase); 214Ky544, 283SW385; 217Ky675, 290SW511; 169LaT17, 125S865; Me 149A153(1stcase); 257Mass391, 153NE881; 238Mich543, 213NW683; 243Mich630, 220NW889; Mo 256SW456 (slump in real estate business); Mo 279SW702; 317Mo336, 295SW1076; Mo 300SW710; Mo 6SW(2d)838; Mo 11SW(2d)1020; Mo 30SW(2d)132; MoA 26SW(2d)1002; 244NY147, 155NE79; 133Misc542, 232NYS647; 53ND916, 208NW388; 119 Or674, 250P833; 101TexCr82, 274SW151; 108TexCr187, 299SW399; TexCr 20SW(2d)1063; 65Utah400, 237P516. [a] (36) That Ku Klux Klan and its members within state sustain unfriendly relations to aspirations of certain classes, including negroes. 32 OklCr60, 239P943. (37) Other matters of which judicial notice will be taken. 19F(2d)472; 19F(2d)801; 21AlaA428, 109S174;

22AlaA165, 113S482; 77CalA279, 246 P337; 84CalA58, 257P592; 324 Ill 285, 155NE318; 214Ky544, 283SW385; 160 La456, 107S304; 311Mo 391, 279SW23; 244NY147, 155NE79; 219AppDiv19, 219 NYS373; 99Vt490, 134A697, 48ALR985; 193Wis476, 214NW365. (38) That income of one hundred and fifty five dollars per month permits only modest living for husband and wife. 22AlaA115, 113S321. (39) Value of money. 80 Mont181, 260P138. (40) That names used among Americans for Chinese are frequently entirely different from those used among and by Chinese themselves. 33Ariz383, 265P609. (41) That defendant is invariably anxious to continue case and delay trial. 33Ariz383, 265P 609. (42) Other instances. 29F(2d) 462; 86CalA374, 260P826; 245Mich310, 222NW698; 318Mo 581, 300SW765; Mo 23SW(2d)1; 83NH435, 144A124; 294Pa 144, 143A904; 294Pa339, 144A534. (43) Value of currency in bills of stated denomination. OklCr 280P477. [e] (2) That there are in commonwealth's services, under department of mental diseases, persons eminent for special scientific knowledge. 257Mass391, 153NE 881. [f] **It is common knowledge** that, except in cases of isolated offenses on minor scale, prosecutions for illicitly engaging in liquor traffic are seldom brought under National Prohibition Act itself. 28F(2d)424.

513–58 175Ark391, 299SW386 (court cannot take judicial knowledge of intoxicating properties of liquors).

513–62 [a] (15) Manner of entering on books of bank transaction in which bonds were bought at discount. 315 Mo 1285, 292SW430. (16) Location of highways and farms. Iowa 221NW814. (17) That foreign whisky labels are genuine. 41F(2d)166. (18) As to deflection of bullet from human body when fired from pistol. Mo 24SW(2d)1039.

513–64 89 Ind677, 166NE676.

513–65 [a] (5) That alcohol is intoxicating liquor. 16F(2d)682.

513–67½–New. The court will not take judicial notice that all good catholics recite stations of the cross on Friday evenings in lent or of prayers used by other denominations. 161La532, 109S 56.

513–69 92CalA550, 268P651 (opium taker's need of keeping nerves stimulated is noticed).

513–75½–New. Judicial notice will not be taken that no one would drive six miles for drink of liquor. 15F(2d)929.

514–78 27F(2d)366; 318Mo 827, 1SW (2d)106. [c] **That strychnine is deadly poison** calculated to destroy human life is matter of common knowledge. 166 Ga182, 142SE676. [d] **That morphine is derivative of opium** will be judicially noticed. 82Mont456, 268P493.

514–81½–New. that picture films are highly inflammable. 23F(2d)112.

514–84 112TexCr459, 17SW(2d)42(2d case) (that cotton is combustible).

514–87½–New. The court will take judicial notice that morphine is a narcotic drug within the statutory definition. 32 OklCr247, 240P656.

514–97 AlaA 130S902.

514–99½–New. Judicial notice cannot be taken that epilepsy does or may affect the mind. 148Wash65, 268P133.

514–99⅓–New. It is common knowledge that a degree of certainty of knowledge of a crime acquired through sense of smell alone necessarily depends on the circumstances of the particular case. 34F(2d)275.

514–99¼–New. Court takes judicial notice that there are no two sets of finger prints exactly alike. OklCr 292P885 (2dcase).

514–3 227Ky389, 13SW(2d)273; 238 Mich543, 213NW683; 53ND916, 208NW 388. [c] **Other states.**–100Vt140, 135A 705. [d] **War department charts showing international boundary** location will be judicially noticed. 42F(2d)354.

514–7 34F(2d)406; 22AlaA239, 114S 423.

514–7½–New. , the distance between such cities by railroad, 83Colo 4, 262P 892.

515–9 [a] **Navigable streams** are judicially noticed. 171Ark184, 284SW38.

515–10½–New. Courts take judicial notice that a highway is a public highway. 40GaA273, 149SE292(1stcase).

515–12 NJSup 134A843.

515–13 34F(2d)952; 171Ark184, 284 SW38; 79CalA523, 250P204; 47 Ida750, 278P776 (that city was city of second class); 200 Iowa1397, 206NW280 (location of farm shown to be within certain distance of city in county will be noticed); 242Mich532, 219NW641; 316 Mo 179, 289SW954; 54ND840, 211NW 585; OklCr 287P759; 154Tenn77, 289 SW492 (Johnson City); TexCr 27SW (2d)246; TexCr 28SW(2d)541.

515–14 176Ark1203, 4SW(2d)952; 177 Ark1076, 9SW(2d)320; 79CalA523, 250 P204; Mo 300SW710, 711 [citCJ], (counties); 54ND840, 211NW585; OklCr 273P1015; 127 Or585, 272P889 (boundary of county in which court is situated); 111TexCr570, 13SW(2d)874; TexCr 27SW(2d)653(2dcase).

515–16 111TexCr264, 12SW(2d)796.

515–18 [a] (1) 213Ala325, 104S826; 22AlaA239, 114S423; 168Ark1082, 272 SW833; 79CalA523, 250P204; 86CalA 95, 260P394; 324 Ill 96, 154NE705; 333 Ill 554, 165NE196; 335 Ill 596, 167NE 786; OklCr 273P1015; 127 Or585, 272P 889 (post-office town); 101Vt491, 144A 689(2dcase); 38Wyo 135, 264P1033, 1034 [citCJ]. But see 111TexCr328, 12 SW(2d)1025. [b] (1) 228Ky526, 15SW (2d)425. [d] (3) Court will take judicial knowledge of geographical location of towns. 207 Iowa224, 222NW407, 61 ALR882. [f] (1) 108TexCr638, 2SW (2d)241. [h] (3) Location of ranch will not be judicially noticed. CalA 284P 509(2dcase). [i] **Court cannot take judicial notice** that town of Cherokee is in San Saba County or that person who lived near Cherokee lives in county. 110 TexCr258, 8SW(2d)133.

516–21 220Ky209, 294SW1046.

516–21½–New. To some extent judicial knowledge may be taken of the distance between towns. 207 Iowa224, 222NW 407, 61ALR882.

516–24 322 Ill 195, 153NE357; 316Mo 157, 289SW948; 320Mo 254, 7SW(2d) 275; Wash 286P833.

516–25 21AlaA286, 107S786; CalA 289 P881; 320Mo 236, 7SW(2d)344 (that certain county has no city of seven thousand population). [a] **Defendant's request and court's attempt to determine population** of township for jurisdictional purposes, do not prevent taking judicial knowledge of it. CalA 289 P881. [b] **That appellate court in prior case** appointed referee to determine population does not preclude court from taking judicial notice of population. CalA 289P881.

516–26 334 Ill 160, 165NE638. See also Mo 7SW(2d)256.

516–30 [a] **Location of post office** is matter of judicial notice. 171Ark184, 284SW38.

516–34½–New. Jury cannot be assumed to know names and location of homes of all citizens of county. 220Ky209, 294 SW1046.

516–36 337 Ill 636, 169NE737.

516–36½–New. The approximate time of sunset on a particular day will be judicially noticed. 30Ariz442, 247P 1101.

516–36⅓–New. Court judicially knows 11/19/24 means November 19, 1924. 213Ala264, 104S638.

517–53½–New. The court may judicially know of a similar criminal case of current history and wide publicity. 243 Mich630, 220NW889.

517–58 117 Or515, 243P766.

517–63½–New. A double barreled shot gun fired at short range. 30Ariz366, 247P129.

517–64½–New. Danger to public safety from indiscriminate carrying of deadly weapons especially by the criminally inclined is matter of common knowledge. 76CalA227, 244P930.

517–67 [b] (2) Wash 287P662.

518–69 OklCr 287P1095.

519–76 207 Iowa224, 222NW407, 61 ALR882 (chickens). [c] 153Tenn189, 281SW460.

519–79 23AlaA50, 121S502(1stcase) (bootlegger); 175Ark1169, 1SW(2d) 1006 (yearling); 249Mich543, 229NW 442.

519–80 [g] **Picture of rooster** followed by word "wagon" will not be judicially noticed by court as obscene. 109TexCr 52. 3SW(2d)84, 57ALR82.

519–83 23AlaA274, 124S123(2dcase). [e] 23AlaA511, 128S120. But see 23 AlaA511, 128S120. Contra Iowa 232NW 127. [f] **Bootlegging.–Iowa** 232NW127.

519–89 NJSup 134A843.

520–94 108TexCr270, 18SW(2d)287, [quotCyc]; 142Wash653, 254P445.

520–95 40F(2d)338 (holding it common knowledge that the Jones Act, discriminating between slight and serious violations, was the result of various degrees of violations).

520–96 200 Ind460, 164NE632; 231Ky 838, 22SW(2d)295; 317Mo 380, 295SW 747; 159Tenn473, 19SW(2d)227. [i] **Regulations.**–29PortoRico 970.

520–96½–New. Courts judicially know that the phrase "and amendments thereto" is often appended to statutory enactments, regardless of fact that no amendments exist. 125Me319, 133A738.

520–97 41F(2d)538.

520–3 21AlaA289, 107S791; 109Conn 239, 146A290; 316Mo 179, 289SW951; TexCr 20SW(2d)783; TexCr 32SW(2d) 358.

520–4 110TexCr378, 9SW(2d)348.

521–8 [a] 231Ky554, 21SW(2d)981.

521–11 22AlaA523, 117S610 (provision for reward to state witness); 148Wash 149, 268P167 (operation of Volstead Act in another state prohibiting sale of liquor).

521–12 317Mo 380, 295SW747.

524–39 [a] **In Florida.**–98Fla464, 124S 27.

524–47 22AlaA119, 113S318; 20AlaA 543, 104S46; 21AlaA374, 392, 108S763; 41 Ida422, 238P514; 147Miss507, 112S 673; 102NJL489, 133A524; 195NC481, 142SE715; 112TexCr351, 16SW(2d) 1072(1stcase); Utah 279P497 (neither supreme court nor juvenile court); 141 Wash542, 251P887.

524–48 21AlaA76, 105S424 (ordinances of county commissioners).

524–49 236Mich618, 211NW30; NJSup 133A762.

525–52 334 Ill 160, 165NE638; Mo 19 SW(2d)671. See also 315Mo 156, 285 SW718. [b] **Judicial notice is taken of war department records.**–142Wash653, 254P445.

525–53 317Mo 319, 296SW132; Mo 19 SW(2d)671.

525–57½–New. Result of referendum will be taken notice of. 69CalA94, 230 P1001.

525–59 229Ky776, 18SW(2d)290.

525–62 271US414, 46SCt585, 70L ed 1013; 6F(2d)327.

525–65 199 Ind489, 158NE480 (prosecuting attorneys); 256Mass159, 152NE 307. [b] **Board of medical examiners.**–130 Or99, 279P285. [c] **Accession to office and duration of terms.**–130 Or99, 279P285.

525–66 130 Or99, 279P285.

525–67 256Mass159, 152NE307.

525–68½–New. Courts take judicial notice of beginning and ending of terms of public officers, but not of names of particular officers occupying such offices at any given time. 141Miss289, 105S 523.

525–69 256Mass159, 152NE307.

525–71 52SD619, 219NW817; 135Wash 346, 237P994 (preparation by state auditor of uniform blank tax receipts).

525–72½–New. Court takes no judicial notice of ethics of police department. 102Conn708, 130A184.

525–72⅓–New. Courts will take judicial notice of beginning and ending of terms of public officers, but not of names of persons occupying offices at any given time. 141Miss289, 105S523.

525–72¼–New. Court cannot take judicial notice of acts of officers of sister state. 129Misc327, 220NYS529.

525–72⅙–New. Common knowledge that when bank commissioner or one of

his examiners has bank under examination he is in absolute and exclusive possession and control of all books of bank. 313Mo 114, 280SW697.

525-72½-New. Court will take judicial notice that assistant coroner is duly qualified physician. 160La47, 106S670.

525-72½-New. It is not common knowledge that government officer never lied in order to hang human being. 25F(2d)430.

525-72½-New. Judicial notice may be taken that "prohibition agents" are agents used in the field under the United States government in the enforcement of the National Prohibition Act. 34 F(2d)15.

525-72½-New. Motor vehicle department's designation of distinctive color for automobiles may be judicially noticed. CalA 288P57.

525-72½-New. The court of appeals knows judicially, under statute, that the term of notaries public terminates with that of the appointing governor. 23 AlaA365, 125S690.

525-74 Mo 19SW(2d)671. [a] **Legislative custom** to spread acts on journals and to declare reasons for emergency requiring statute to take immediate effect in acts themselves judicially noticed. 221Ky16, 297SW931.

526-77 200 Ind196, 155NE289; NJSup 134AS43; OkiCr 283P1023(2dcase) (county court). [b] **Location of judge of inferior court** of Bessemer. 20Ala 638, 104S684.

526-80 6F(2d)942.

526-81 23AlaA400, 126S181.

526-87 18F(2d)531; 164Ga128, 138SE 67; 324 Ill 70, 154NE448; 89 IndA414, 165NE555. [a] (2) Illinois court will take judicial notice that terms of Cook County criminal court commence first Monday of every month. 324 Ill 70, 154 NE448.

526-90 22AlaA98, 112S809; 245 IllA 388; 215Ky193, 284SW1023.

526-91 NJSup 134AS43. [a] **Justice of peace of sister state** will not be judicially noticed. 23AlaA197, 122S702(2d case).

526-1 167La628, 120S31 (minute clerk).

527-22 86Colo 141, 278P792; 47RI 269, 132A734.

527-24 78CalA451, 248P929; Ill 173 NE148; 221Ky239, 298SW704; 237 Mich481, 212NW105; 318Mo 761, 300SW 755. But see 111TexCr77, 11SW(2d) 316 (while court has judicial knowledge of contents of court records, including indictments, he would not have judicial knowledge of identity of parties or transactions).

528-25 106TexCr511, 293SW831. See also 78CalA451, 248P929.

528-30 [b] **In Indiana.**-196Ind509, 149 NE557.

528-31½-New. But court to which case has been transferred will take cognizance of what occurred in court which changed venue where court to which case is transferred has certified copy of such proceedings. 162Ga208, 132SE 911.

528-33½-New. Personal knowledge of judge of lower court as to facts not in evidence will not be noticed by appellate court. 196 Ind722, 149NE436.

528-35 23AlaA268, 123S292(1stcase); 21AlaA577, 110S171; 23AlaA223, 124S 117(2dcase); CalA 290P131; 94Fla252, 114S236; 327 Ill 312, 158NE732; 193 NC489, 137SE429; 116 OhSt495, 156NE 600; OkiCr 287P764; 136SC305, 132SE 824.

529-36 22F(2d)264 (identity of accused); 26F(2d)168; 216Ala218, 113S 22; 23AlaA369, 125S787; 23AlaA372, 125S790(2dcase); 23AlaA395, 126S178; 174Ark357, 295SW368; 92Fla775, 109S 809; 92Fla809, 110S253; 94Fla252, 114 S236; 327 Ill 312, 158NE732; 339 Ill 58, 170NE690; 196 Ind594, 149NE168; 215 Ky436, 284SW1114; Mo 296SW433 (confession); NJ 150A338; 18 OhA171; 126 Or238, 269P225; 5PaDist&Co 287; 136SC305, 132SE824; 137SC115, 134SE 885; 52SD321, 217NW391; 109TexCr 180, 3SW(2d)798; 187Wis463, 204NW 595. [c] **Presumption of innocence.**-199 Ind44, 154NE865.

529-37 50Nev212, 255P1002.

529-39 7F(2d)808; 21AlaA351, 108S 217; 169Ark342, 275SW665; Ind 167 NE129.

529-40 7F(2d)808; 23F(2d)3; 327 Ill 312, 158NE732; 199 Ind746, 161NE8; 132Kan559, 253P593; 125Mo301, 133A 433; 116Nebr141, 216NW173; 190NC 1[illegible], 129SE417; 191NC614, 132SE596; 197NC684, 150SE337; 116 OhSt495, 156 NE600; 123 Or521, 262P954; 5PaDist& Co 287; 136SC305, 132SE824. [a] **Defendant's remaining silent at trial** held not to reverse rule that state has burden of proof. 154SC97, 151SE233.

529-42½-New. State not required to prove by other than his own testimony that witness was on scene of homicide. 213Ala358, 104S656.

529-42½-New. Burden of showing irregularities not apparent on face on defendant. 219Ky514, 293SW1077.

529-42¼-New. State has not burden of disproving exculpatory statement of its witness brought out on cross-examination. 106TexCr482, 293SW173.

529-44 8F(2d)581; 28Hawaii350; Mo 285SW723, 724 [quotCJ]; OkiCr 287P 764; 124 Or61, 262P859.

529-47 199 Ind55, 155NE203.

530-49 215Ala318, 111S204; 325 Ill 417, 156NE303; 121Kan186, 246P1001; Miss 110S520. But see 159La589, 105S 631.

530-51½-New. On plea of not guilty, if state fails to prove venue, defendant is entitled to acquittal. 21AlaA419, 109S 114.

530-56 7F(2d)532; 22AlaA223, 114S 361; 20AlaA457, 103S902; 21AlaA419, 109S114; 21AlaA423, 109S125; 246 Mich65, 224NW383; 141Miss600, 106S 827; 151Miss512, 118S604; NJSup 143 A770; 11PaDist&Co 75.

530-61 144Miss788, 110S436; 150Miss 302, 116S432.

530-65 70CalA17, 232P991; 70CalA 362, 233P359 (defendant has burden of disproving allegation that he was not naturalized citizen of United States); 322 Ill 443, 153NE691; 116 Or416, 241P 390, 392 [quotCJ]; 187Wis463, 204NW 595. See also 196Cal404, 238P363 [quotCJ]. [a] **Introduction of evidence.**-197 Ind16, 148NE120.

530-65½-New. The principal here stated is based on the rule of "ab inconvenienti" to which any deviation from the general rule is strictly confined. 196Cal 404, 238P363.

530-65½-New. The principle is not of universal application to criminal cases and should not be applied so as to make less imperative in enforcement of law the duty of the prosecution to establish the charge. 196Cal 404, 238P363.

530-65¼-New. The legislature cannot, by mere fiat, bring an issue within the class of matters which defendant must prove as being within his particular knowledge. CalA 279P175.

531-66 19F(2d)130; 19F(2d)813; 70 CalA17, 232P991; 316Mo 252, 289SW 821; 54ND81, 208NW845, 846 [citCJ]; 101TexCr185, 274SW631.

531-72 22AlaA425, 116S413; 27 OhNP NS362.

531-72½-New. When defendant pleads not guilty and does not rely on matter of defense separate and distinct from facts constituting offense, burden does not rest on him to prove anything. 101 TexCr185, 274SW634.

531-73 Mo 285SW723, 725 [quotCJ].

531-74 165La47, 115S363; 125Mo301, 133A433; 105TexCr297, 288SW224. [a] **Burden is on party offering evidence** of experiments to show similarity of conditions. 20AlaA412, 103S694.

531-75 OkiCr 283P1037 (to raise reasonable doubt of guilt).

531-77 Mo 285SW723; OkiCr 275P 1066.

531-78½-New. The only burden resting upon defendant is to raise a reasonable doubt of his guilt. OkiCr 277P 487.

531-81 22AlaA644, 119S248; 197Cal 306, 240P1000; 208Cal123, 280P526; 88CalA222, 263P306; 314Mo 699, 285 SW110; 191NC753, 133SE81; 195NC 489, 137SE429; 289Pa284, 137A261; 44 Philippine204; 104TexCr637, 285SW 826; 106TexCr558, 293SW1104.

532-84 TexCr 20SW(2d)1051.

532-86 But see 88CalA222, 263P306.

532-90 OkiCr 292P385.

532-91 48 Ida636, 284P201.

532-92 OkiCr 292P385.

533-95 204Cal 470, 268P909.

533-3 21AlaA289, 107S791; 22AlaA 331, 115S417.

533-6 See also 206 Iowa1347, 221NW 952.

533-8 172Ark1177, 289SW478; 37GaA 632, 141SE317; Ill 172NE819; 202 Iowa 1382, 212NW137 (affirmative defense); 76Mont384, 247P158; 86PaSuper488; 13PaDist&Co 228; 136SC305, 132SE 824; 137SC145, 134SE885.

533-10 21AlaA319, 108S84; 78CalA781, 248P1029.

533-11 See also 134SC179, 131SE420 [quotCyc].

533-12 See also 134SC179, 131SE420 [quotCJ].

533-13 78CalA781, 248P1029; 207 Iowa 224, 222NW407, 61ALR882; 159La762, 106S295; 76Mont384, 247P158; 131 Misc256, 226NYS741; 119 Or404, 249P 625 [citCJ]; 207Pa160, 146A653. See also 134SC179, 131SE420 [quotCJ].

534-15½-New. The basis of inferences to support a presumption of fact is probability. 199 Ind73, 155NE196.

534-21 [a] **Presumption has slight consideration** in face of credible evidence to contrary. 7F(2d)808.

534-23 121Kan687, 247P427 (rule that one inference cannot be drawn from another held not to prevent such interpretations of evidence as to warrant conviction).

534-26 24F(2d)696; 39F(2d)782; 200 Ind111, 161NE268; 142Va479, 129SE 348 (no presumption relieves prosecution of ultimate showing of guilt beyond reasonable doubt).

534-27 Ind 168NE579; 159La762, 106 S295.

534-33 8F(2d)581; 21F(2d)511; 24F (2d)399; 44F(2d)21; 179Ark3, 138SW (2d)828; 198 Ind422, 154NE7; 199 Ind 746, 161NE8; 200 Ind411, 164NE268; Ind 171NE67; 311Mo 683, 278SW695; Mo 296SW367; Mo 300SW717; 118 Or 5, 244P512; 33Wyo 360, 239P952. [b] **Inferences may not rest upon conjectures.** 199 Ind73, 155NE196.

534-33½-New. It will not be presumed that defendant, on the day named in an information charging robbery, committed another robbery and took from the person then robbed the same amount of money that he took from the person named in the information as the person whom he robbed. 198Cal 112, 243P667.

534-33¾-New. Presumption of invalidity of search warrants does not arise because no arrests were made thereunder. 11F(2d)933.

534-33¼-New. There is no presumption that witness is telling truth. 22AlaA 121, 113S318.

534-33½-New. **There must be a reasonable connection between a fact proved** and a presumption in order to authorize a prima facie presumption. CalA 278P 252.

534-33¾-New. There must be a reasonable connection between fact and presumption which the law directs to be drawn therefrom. CalA 279P175.

534-33½-New. Facts presumed from existence of other facts must have immediate connection with such other facts. 44F(2d)21

534-33⅞-New. That no great change in weight occurs in five weeks will be presumed Colo 293P335.

534-34 [a] **Legislative presumption** will overcome presumption of innocence. 268 US178, 45SC470, 69LEd904. [b] **Presumption is rebutted** when substantial proof is made contrary to fact presumed 7F(2d)808.

534-37 11F(2d)281; 18F(2d)887; 23F (2d)659; 37F(2d)218; 21AlaA23, 105S 126 (accused of violating prohibition law); 216Ala655, 114S72; 21AlaA208, 106S894; 21AlaA277, 107S327; 21AlaA 289, 107S791; 21AlaA307, 107S720; 22 AlaA213, 111S892; 23AlaA235, 123S787; 23AlaA559, 129S323(2dcase); [c] Ark 118S, 288SW1; 198Cal112, 243P667; 70 CalA611, 234P121; 80CalA675, 252P758; 90CalA782, 266P620; 22Fla775, 109S 809; 94Fla252, 114S236; 325 Ill 246,

156NE354; 339 Ill 162, 171NE186; 198 Ind590, 154NE372; 199 Ind160, 155NE824; 122Kan559, 253P593; 116Nebr141, 216NW173; 103NJEq195, 142A822; 131 Misc521, 227NYS285; 51ND445, 200NW 20; 121 Or141, 253P367; 298Pa169, 148 A73; 5PaDist&Co 287; 45Philippine78; 45Philippine84; 32PortoRico 820 (Code Cr. Proc. § 236 Alvarez); 134SC435, 132 SE828; 157SC459, 154SE658; 103TexCr 598, 281SW869; 107TexCr326, 296SW 885; 108TexCr344, 1SW(2d)291; 109 TexCr323, 4SW(2d)564; 111TexCr60, 11 SW(2d)314; 142Va673, 128SE444; 144Va 630, 131SE204; 152Va1036, 148SE783; 143Wash313, 255P382.

535-38 21AlaA73, 105S426; 45Philippine78.

535-42 Cal 286P697; 92Fla775, 109S 809.

535-44 197NC684, 150SE337.

535-45 NJ 151A756.

535-46½-New. , or by fact that his environment at time of arrest was reprehensible and disreputable, 21AlaA307, 107S720.

535-46¼-New. or by his mere proximity to the scene of the crime at time of its commission. 122Kan559, 253P593.

535-50 335 Ill 217, 167NE1; 338 Ill 353, 170NE265.

535-54 216Ala655, 114S72; 21AlaA289, 107S791; 21AlaA360, 108S266; 22AlaA 86, 112S538; 23AlaA416, 125S398; 171 Ark1188, 285SW1; 116Nebr143, 216NW 173.

535-57 Conn 151A349; 255Mass304, 151NE297, 47ALR962; 194NC260, 139 SE374, 375 [citCJ].

535-58 171Ark1188, 285SW1; 108Conn 454, 143A561; Conn 151A349; 167La 70, 118S696; 32NH432, 135A532.

536-61 255Mass304, 151NE297, 47ALR 962.

536-62 21AlaA646, 111S318; 163Ga313, 136SE154; 338 Ill 340, 170NE219; 198 Ind590, 154NE372; 199 Ind44, 154NE 865; 198NC649, 152SE895; 198NC655, 153SE255; 121 Or141, 253P367; 45 Philippine78; 143Wash313, 255P382. See 26F(2d)908.

536-63 21AlaA646, 111S318; 198 Ind 590, 154NE372; MoA 274SW521.

536-64 23F(2d)401; 198 Ind590, 154NE 372; 297Pa160, 146A553; 152Va1036, 148NE783.

536-66 33PortoRico 627, 643 [citCJper Wolf,J,dis op].

536-68 255Mass304, 151NE297, 47ALR 962.

536-70 216Ala655, 114S72; 20AlaA553, 103S717; 21AlaA35, 104S876; 21AlaA 367, 108S401; 21AlaA646, 111S318; 22 AlaA86, 112S538; 22AlaA183, 113S648; 22AlaA107, 114S71.

536-71 NJ 149A766; 252NY86, 168NE 838; 45Philippine78; 103TexCr598, 281 SW869.

536-72 103TexCr598, 281SW869.

536-74 23F(2d)401.

536-75 21AlaA646, 111S318; 70CalA 614, 234P121; Iowa 230NW436; 116 Nebr141, 216NW173; OklCr 279P917; OklCr 287P789(2dcase); 45Philippine78; 45Philippine84; 143Wash313, 255P382. [a] 22AlaA581, 118S239.

536-77 308Mo584, 274SW466.

536-78 308Mo 584, 274SW466.

536-79 14F(2d)670.

537-83 216Ala655, 114S72.

537-83½-New. whether produced by state or defendant, 216Ala655, 114S72.

537-85 21AlaA289, 107S791.

537-87 [a] **Circumstantial evidence** not directly and independent of accomplice's testimony connecting defendant with crime is not sufficient. 38GaA361, 144 SE10.

537-88 196Wis571, 219NW278.

537-91 297Pa160, 146A553 (though alibi not completely established).

537-93 199 Ind160, 155NE824; 119 OhSt231, 163NE628; OhA 173NE201.

537-99 193NC786, 138SE134; 193NC 787, 138SE135. [a] 23AlaA521, 128S 126(2dcase).

537-99½-New. There is no presumption that one shown to have had previous good character is less likely to have violated law than one whose character is not so shown. 217Ala322, 116S706; 22 AlaA444, 116S706.

537-3½-New. The law presumes every good citizen will assist an officer to apprehend a criminal. 20AlaA540, 103S 604.

537-6 204Cal 470, 268P909; 206Cal 35, 273P767; 96CalA186, 273P837; 255Mass 369, 151NE839; 121 Or141, 253P367; 44 Philippine204; 109TexCr251, 48W(2d) 74.

538-7 336 Ill 251, 168NE292.

538-12 68CalA545, 229P987; 87CalA68, 261P1059; 165La67, 115S370; TexCr 28 SW(2d)133; Wash 286P833.

538-17 105TexCr308, 288SW444.

538-20 See also 191NC753, 133SE81.

538-21 87CalA68, 261P1059; 312Mo 373, 278SW1016; OklCr 292P385.

538-22 105TexCr353, 288SW465.

538-23 See also 191NC753, 133SE81.

539-30½-New. Order of proper authorities returning accused, who had been found insane after trial, from hospital to prison requires presumption of restored sanity and mental competency. 255Mass369, 151NE839.

539-35 155Wash491, 285P455 (jury).

539-36 98CalA552, 277P201; 197 Ind 249, 150NE615; 121Kan516, 247P430; 312Mo 373, 278SW1016; 319Mo 24, 3 SW(2d)229 (that illegal contract is unenforceable and property delivered thereunder cannot be recovered back).

539-36½-New. Justices of peace are presumed to be familiar with constitutional provisions relating to searches and seizures. 192Wis352, 212NW628.

539-38 232Ky568, 24SW(2d)276 (jury's knowledge of local geography); Mont 287P156. But see 95CalA96, 272P 304(2dcase).

539-43 13F(2d)453; 23AlaA60, 120S 467; 70CalA362, 233P359 (proof of allenship warrants presumption of its continuance); 93CalA504, 269P750; Mo 22SW(2d)779; 221MoA893, 288SW77; Mont 287P938; NJQuartSess 150A44; 102TexCr566, 280SW210; 147Va660, 137SE492.

539-44 12F(2d)453; 217Ala225, 115S 297 (insanity); 48 Ida688, 284P845; 336 Ill 324, 168NE336; Iowa 229NW 743; Mo 300SW1081 (not presumed but may be inferred from circumstances); 144Wash629, 258P501. But see 318Mo 525, 1SW(2d)137.

539-45 Mo 24SW(2d)161 (illness).

539-47 279US63, 49SCt257, 73Led615; 196Cal 344, 238P88 (in exercise of appellate jurisdiction by superior court); 86CalA791, 261P526; 94Fla32, 113S 630; 196 Ind722, 149NE436; 226Ky 36, 10SW(2d)471; 77Mont307, 250P 603; 106TexCr103, 290SW1097.

539-48 158La129, 103S534 (foreman presumed to be present where court appointed no foreman pro tempore).

539-51 7F(2d)756; CalA 28SP873.

539-55 223Ky677, 4SW(2d)683 (sufficiency of affidavit on which search warrant based); 220MoA406, 286SW733. See also 314Mo 333, 284SW433. [a] 317 Mo 413, 297SW63.

540-56 154Tenn56, 289SW532.

540-56½-New. Where an information is filed by an officer authorized by the constitution to file informations, it will be presumed that a preliminary examination of defendant was had or waived. 31NM485, 247P828.

540-57½-New. Search warrant and affidavit on which it was granted are presumed sufficient. OklCr 288P994.

540-58 104TexCr78, 282SW597.

540-59 279US63, 49SCt257, 73Led615; 5F(2d)799; 217Ala219, 115S308; 23 AlaA397, 126S180; 79CalA523, 250P 204; 83CalA190, 256P829; 94Fla32, 113S630; 170Ga638, 153SE749 (that public officers will do their duty); Ga 155SE466; Iowa 228NW1; 219Ky514, 293SW1076; 220Ky209, 294SW1046; 229Ky776, 18SW(2d)290; 151Miss225, 117S523; 314Mo 635, 285SW437; 220 MoA349, 285SW1021; 79Mont385, 256 P1071; 114Nebr404, 207NW928; 33 OhA1, 168NE550; OklCr 288P994; Okl Cr 292P888 (1stcase) (legality of search and seizure); 44Philippine192; SD 231 NW915; 106TexCr593, 294SW573; 110 TexCr529, 7SW(2d)1082; TexCr 28SW (2d)169; 103WVa148, 136SE842; 194 Wis410, 217NW283; Wyo 293P365. See also 314Mo 333, 284SW433. [a] No presumption that officers seeking to search defendant's automobile for evidence of violation of law had reason to believe defendant was violating law. 131Misc521, 227NYS285.

540-60 16F(2d)951.

540-62 84CalA382, 258P447; 113Tex Cr679, 22SW(2d)943(2dcase).

540-64 15F(2d)14; Mo 280SW702; OklCr 279P514(1stcase); 100TexCr300, 272SW495.

540-66 51Philippine201.

540-70 20AlaA547, 104S48; 75CalA 471, 242P1078; 80CalA293, 251P643; 202 Iowa1067, 208NW360; 162La299, 110S482; 166La97, 116S712; 308Mo 695, 274SW470 (failure to testify cannot be considered in passing on his demurrer to evidence); Mo 296SW433; 226AppDiv569, 235NYS386; 197NC684, 150SE337; 198NC649, 152SE895; 198 NC655, 153SE255; NC 154SE604; 53 SD146, 221NW56. [c] **Refusal of witness to testify.**-73CalA13, 238P374. [d] **In Connecticut.**-109Conn490, 146A828.

540-72 109Conn490, 146A828; 159La 762, 106S295; 315Mo 1, 285SW429, 431 [citCJ]. [b] **Failure of accused as voluntary witness to deny incriminating testimony of accomplice** may be considered in determining sufficiency of evidence. 200 Iowa652, 204NW256. [c] **In prosecution for murder, failure of defendant to testify** in own behalf on facts necessary within his knowledge could be taken into consideration by court. 109Conn124, 145A761.

540-73 NJ 151A756.

540-74½-New. Where defendant takes the stand in his own behalf, his failure to explain damaging facts is circumstance tending to show guilt. 314Mo 574, 285SW997.

540-74¼-New. A statute prohibiting consideration of defendant's failure to testify does not protect defendant who voluntarily goes on stand. 314Mo574, 285SW997.

540-74¼-New. Presumption of guilt arising from possession of stolen property must result from proved facts, not from defendant's failure to testify. 162 La299, 110S482.

540-74⅛-New. Failure of defendant to take the stand in his own defense may be considered in some jurisdictions. NJSup 142A365.

540-74⅛-New. Where accused testifies in a murder prosecution, but refrains from testifying on the subject of self-defense, the jury is warranted in drawing unfavorable inferences against him on such question by reason of such failure. 208 Iowa818, 222NW394.

541-76 75CalA471, 242P1078. [a] **That defendant offered no evidence,** but relied on presumption of innocence and weakness of state's case, is not unfavorable. 198NC655, 153SE255.

541-77 159La762, 106S295; 265Mass 45, 163NE646; 315Mo 1, 285SW429, 431 [citCJ]; Mo 300SW1081; 318Mo 525, 1SW(2d)137; 253NY330, 171NE 393; 113TexCr217, 18SW(2d)676(2d case).

541-79 51Philippine201.

541-80½-New. Failure of a party upon whom rests the burden of proof to use testimony shown by the record to be important and not unobtainable is to be given weight. 104TexCr65, 282SW 600.

541-81 41GaA476, 153SE433.

541-84 72CalA292, 237P390 (failure to call patient at sanitarium).

541-84½-New. There is no duty to call witness when nothing to refute. 259 Mass152, 156NE65.

541-85 7F(2d)295; TexCr 26SW(2d) 279 (fact undisclosed by state is not resolved against accused). See also 199 Ind73, 155NE196.

541-85½-New. Failure of prosecution to call all of the eyewitnesses raises no unfavorable presumption where sufficient number are called to prove commission of act. 51Philippine701.

541-91 121Kan587, 249P597, 599 [citCJ].

541-92 [a] **Failure of officers executing search warrant** and seizing liquor to produce warrant justifies assumption

that it was insufficient and seizure illegal. 5F(2d)965.

541-94 7F(2d)109; 202 Iowa530, 210 NW551; 231Mich559, 204NW731 (pouring out liquor to prevent seizure held prima facie evidence of intoxicating character of liquor).

542-95 196 Ind594, 149NE168. See also 34PortoRico 102.

542-99 [a] **Possession of drugs** in one district creates no presumption that purchase was in same district. 7F(2d)532; 22F(2d)918; 23F(2d)178. [b] **Proof of possession** where possession is crime charged will sustain verdict of guilty, unless innocent possession is proved. 7F(2d)808.

542-99½-New. Presumption of ownership in favor of him whose acts of control preponderate, where two or more are in apparent possession. 98Vt466, 129A306.

542-2 122Kan559, 253P593, 594 [cit CJ].

542-3 331 Ill 380, 163NE419; 244Mich 67, 216NW398.

542-4 244Mich67, 216NW398.

542-14½-New. Records required by law to be kept by all corporations for profit are presumed to be correct unless impeached. 80CalA275, 251P826.

542-15 114Nebr783, 210NW165.

542-17 169La468, 125S451.

542-20 52SD321, 217NW391 [foll 22 CalA54, 133P496].

543-30½-New. There is no room for presumption where there is positive and affirmative evidence on the subject. 146Va279, 135SE700.

543-31 36F(2d)766; 21AlaA81, 105S431 (evidence held irrelevant); 163La29, 111 S484; 146SC138, 143SE674.

543-32 56ND357, 217NW531. [a] 69 Utah268, 254P142.

543-33 99TexCr600, 271SW610.

543-34 82CalA778, 256P251; 110Conn 403, 148A350; 257Mass426, 154NE185; 116 Or451, 241P846; 100TexCr300, 272 SW495; 101TexCr580, 276SW435. [a] **That wife of prosecuting witness was pregnant** is irrelevant, in prosecution for cutting with dangerous weapon with intent to kill and murder. 159La429, 105 S429 (though admission of such evidence was probably harmless). [b] **Under plea of "not guilty by reason of insanity"** defendant may introduce much evidence not applicable to issue of general plea of not guilty. 21AlaA577, 110S171.

543-36 7F(2d)313; 25F(2d)864; 23 AlaA94, 121S446; 21AlaA449, 109S282; 21AlaA466, 109S371; 21AlaA526, 109S 612; 21AlaA653, 111S648; 22AlaA472, 116SS96; 22AlaA564, 117S801; 23AlaA 371, 125S790(1st case); 23AlaA405, 126S 185; 23AlaA432, 127S796(2dcase); 175 Ark870, 300SW451; 72CalA52, 236P 355; Ind 168NE223; 210Ky217, 275SW 689; 161La214, 108S419; 161La532, 109 S56; 252Mass450, 148NE113; 319Mo1, 2SW(2d)799; 197NC190, 148SE229(2d case); 126 Or560, 270P404; SC 155SE 109; 101TexCr577, 276SW291; 107TexCr111, 278SW901; 103TexCr395, 281 SW963; 103TexCr638, 282SW221; 101 TexCr156, 278SW878; 102TexCr64, 3 SW(2d)982; 116TexCr116, 7SW(2d)953 (evidence as to health of accused and effect of imprisonment thereon); 113Tex Cr67, 18SW(2d)1127; 113TexCr265, 20 SW(2d)426. [b] **Evidence of personal habits.**–101Vt124, 141A686 (excluded in absence of special relevancy).

543-37 4F(2d)758; 4F(2d)774; 102 Conn708, 130A184; 3Del489, 139A254; 94Fla218, 113S689; 18Ida159, 98P182; 197Ind412, 151NE150, 151NE151; Iowa 228NW303; 119Kan649, 240P568; 128 Kan314, 277P794 (not inadmissible because not conclusive); 161La827, 1098 505; 257Mass431, 154NE291; 321Mo 1163, 14SW(2d)617; 92PaSuper530; 51 Philippine825; 144SC452, 142SE725; 146SC138, 143SE674; 154SC386, 151SE 572; 101TexCr580, 276SW435; 102Tex Cr395, 278SW449 (finding of jars of liquor in creek); 101TexCr193, 281SW 581; 113TexCr604, 18SW(2d)162(2d case); TexCr 23SW(2d)391; TexCr 27 SW(2d)233; Utah 287P181. [b] **Locus in quo.**–213Ala553, 105S714. [c] **Evidence held not to be without probative force.**–104TexCr7, 282SW225. [d] **That evidence shows offense to be particularly atrocious does not render it inadmissible.** 87Colo 507, 289P1081.

543-39 11F(2d)561; 21AlaA585, 111S 43; 72CalA52, 236P355 (it is improper on cross-examination to ask defendant if he has gone under assumed names, where there is no dispute as to his real name); 43 Ida745, 254P525; 243NY 320, 153NE633; 246NY437, 159NE390; 26 OhA53, 159NE834; SC 155SE409; 99 Tex600, 271SW610; 103TexCr658, 282 SW221; 111TexCr116, 12SW(2d)218; TexCr 31SW(2d)1084.

543-40 87Colo 11, 285P157; 47 Ida162, 277P1010; 316Mo31, 292SW434; 250 NY18, 164NE1200.

543-42½-New. **Custom** evidence of habit or custom to show conduct on particular occasion is competent. 82NH133, 130A743.

543-42¾-New. That sheriff prevented defendant from securing counsel while in jail while grounds for continuance is not admissible unless relevant to fact in issue. 164Ga532, 139S56.

543-42¼-New. Falsity of evidence is no reason for excluding it. 164La107, 108 S321.

543-42½-New. Evidence not inadmissible in criminal case because jury may have found for government without it. 22F(2d)1.

543-42¾-New. The mere fact that evidence legally admissible against one of several defendants may prejudice his codefendants is no reason for its exclusion. 294Pa141, 143A901.

543-43 22AlaA329, 115S419 (action by authorities in sister state where offense committed in state of prosecution); 253 Mass509, 149NE205; Mass 172NE297; 126 Or560, 270P404; 14PaDist&Co 312; 101TexCr670, 276SW919, 103TexCr242, 280SW819.

543-44 Mo 238SW(2d)1; 119 Or522, 250 P127; 103TexCr397, 18SW(2d)305.

543-46 79Mont385, 256P1071. See also 92CalA170, 268P173.

544-50 32F(2d)644; 214Ala2, 106S 617; 22AlaA533, 118S217; 22AlaA191, 118S748; 69CalA572, 232P1116; 90Fla 25, 105S130; 101TexCr226, 276SW232. [a] **Testimony based on withdrawn exhibits** should be stricken. 337 Ill 310, 169NE743.

544-51 21AlaA164, 109S375.

544-52 103TexCr641, 299SW761.

544-53 71CalA188, 236P180 (newspaper article held admissible to connect testimony of witness with conversation with accused); 102CalA253, 282P971; 164Ga688, 138SE665; 257Mass126, 154NE185; Oh 171NE277; 99TexCr656, 271SW606.

544-54 214Ala2, 106S617; 257Mass126, 154NE185; 99TexCr656, 271SW606; 143Va510, 129SE360 (where witness could not describe a fall without also testifying to defendant's intoxicated condition). [a] (2) To show his condition at time he operated automobile. 257Mass126, 154NE185.

544-58 [a] (1) 175Ark870, 300SW451; 165La1082, 116S565. (7) Where acts or declarations which have been admitted are full and complete, evidence as to prior or later acts or declarations is not necessarily admissible. TexCr 28SW(2d) 259. (8) Though state proved res gestae statements of accused, exclusion of contradictory statements made some time later, as explanatory statements, was held not error. TexCr 98W(2d)259.

544-59 214Ala2, 106S617; 21AlaA455, 109S295; 21AlaA537, 109S895; 22AlaA 75, 112S367; 329 Ill 104, 160NE233; 210 Ky385, 275SW819; 211Ky670, 283SW 908; 219Ky789, 294SW191; 165La1087, 116S565; 167La390, 119S102; 103Tex Cr252, 280SW808; 108TexCr112, 299 SW258; TexCr 29SW(2d)352; 143 Wash31, 254P244. [a] (7) In prosecution for arson, where defendant's wife sought to give impression that she was removed from designated home to jail for intimidation, testimony as to reason for removal is held admissible. 143 Wash31, 254P244. (8) Explanation of presence of arresting officer held admissible. 175Ark1169, 299SW40.

545-60 16F(2d)134; 21AlaA557, 109S 899; 22AlaA554, 117S615; 319Mo46, 4 SW(2d)456; 87PaSuper66; 100TexCr 313, 273SW595; 103TexCr611, 28SW(2d) 259; Wyo 283P151.

545-61 TexCr 26SW(2d)202.

545-66 214Ala675, 109S613; 21AlaA 26, 104S869 (evidence of finding still not admissible where defendant not connected therewith); 21AlaA217, 107S31; 21AlaA249, 107S791; 21AlaA423, 109S 125; 22AlaA113, 113S316; 22AlaA319, 115S291; 22AlaA373, 115S519; 22AlaA 383, 115S805; 22AlaA554, 117S615; 23 AlaA549, 129S292; 175Ark1083, 3 SW(2d)23; 75CalA138, 242P54, 102 Conn708, 130A184; 416GaA838, 155SE 49; 210Ky566, 276SW622; 214Ky620, 288SW958; 222Ky393, 300SW874; 227 AppDiv506, 237NYS231; 50SD548, 210 NW980; 99TexCr543, 270SW1018; 100 TexCr654, 271SW145; 103TexCr98, 280 SW779; 106TexCr365, 296SW502; 108 TexCr614, 28W(2d)223; TexCr 28SW (2d)776; TexCr 28SW(2d)792; 113 TexCr298, 21SW(2d)512; 100Vt259, 136 A835; 33Wyo360, 239P952. See also 82Colo541, 261P661; 170La755, 129S 154; 295Pa264, 145A89. But see 101 TexCr267, 275SW837; 101TexCr220, 276SW228. [b] **Acts** held sufficiently connected with accused to be admissible. 21F(2d)932.

545-68 91Ala214, 107S360.

545-70 87Colo 11, 285P157; 257Mass 426, 154NE185.

545-72 144Va559, 131SE131 (that much of evidence for prosecution is circumstantial is no objection).

545-73 40F(2d)315; 214Ala2, 106S617; 169La751, 125S67; 314Mo662, 285SW 62; 101TexCr222, 286SW209; 107Tex Cr276, 296SW520; 107TexCr623, 298 SW567; TexCr 27SW(2d)222(2dcase).

545-81 196Wis164, 219NW349.

545-86 76CalA688, 245P781.

545-86½-New. Distinct overt acts in furtherance of such conspiracy may be proved. 76CalA688, 245P781.

545-87 199Cal 471, 250P168; 75CalA 229, 242P508; 75CalA447, 243P67, 47 Ida162, 272P1010 (evidence tending to establish plan or design admissible); 119Kan649, 240P568; 215Ky703, 286 SW1054; 165La1083, 116S565, 167La 986, 120S620; 281Pa81, 130A311. [c] **Sketches of place of crime** held admissible to show plan of escape. 284Pa85, 130A312.

545-88 213Ala169, 104S438 (on night of offense); 119Kan649, 240P568; 188 Wis68, 205NW112.

545-89 199Cal 471, 250P168.

545-90½-New. Antecedent acts are not admissible where witness fails to identify defendant. 212Ky303, 278SW1097.

545-91½-New. Evidence of facts and circumstances bearing on the acts and conduct of accused and the prosecuting witness at the time of the crime is admissible. Mo 18SW(2d)139.

546-93 327 Ill 393, 158NE712.

546-94 327 Ill393, 158NE712.

546-94½-New. malice 327 Ill 393, 158 NE712.

546-94¾-New. and deliberation and meditation. 327 Ill393, 158NE712.

546-95 101TexCr3, 276SW291.

546-95½-New. Evidence of threats and surrounding circumstances admissible to show state of feeling between deceased and defendant charged with homicide. 169Ark1188, 278SW.

546-96 201(2d)..4; 169Ark1188, 278 SW3; 32OhA124, 167NE609; 102Tex Cr579, 278SW1105. [a] **Evidence of previous business transaction** between defendant and his codefendant is admissible to show relationship between them. 69CalA558, 231P767.

546-99 20AlaA167, 103S712; 321 Ill 17, 151NE555; 101TexCr580, 276SW435; 102TexCr111, 278SW201; 106TexCr35, 290SW165. [b] **Evidence not relevant to issue and tending to prejudice jury against accused is inadmissible.**–102TexCr441, 278SW201.

546-1 103TexCr668, 281SW1073.

546-1½-New. Evidence of the relation of defendants jointly indicted is relevant to the issue of conspiracy to commit the crime. 73CalA195, 235P1059.

546-1¾-New. Evidence as to how many children deceased left is irrelevant and tends to prejudice jury against accused.

102TexCr441, 278SW201.

546-1¼-New. That a prosecuting attorney was the attorney for the widow of deceased, in a civil action for the death of deceased, has been held inadmissible in a prosecution for homicide. 23TKy 152, 218SW(2d)231.

546-1½-New. Letters are admissible against defendant as tending to show relations existing between him and codefendant. 34NM223, 279P945.

546-17 78CalA451, 248P929, 930 [cit CJ]; 102Conn708, 130A184.

546-18 179Minn301, 229NW99.

546-19 78CalA451, 248P929, 930 [cit CJ].

546-21 215Ala318, 111S204. But see 215Ala318, 111S202.

547-22 5F(2d)887; 15F(2d)762; 164Ga88, 138SE65; 163La686, 112S650; 256Mass487, 152NE746; 48Nev134, 228P582; OklCr 287P1055.

547-22½-New. Evidence that certain place was outside county but not identifying it as place of commission of crime is inadmissible. 21AlaA419, 109S114.

547-23½-New. Testimony of witness as to what church he belonged and as to whether he said prayers is irrelevant for purpose of establishing time of crime. 161La532, 109S56.

547-24 8F(2d)841, 843 [citCJ]; 21AlaA289, 107S791; 173Ark1071, 294SW66; 327 Ill 393, 158NE712; 308Mo 573, 274SW393. [a] (6) Evidence of means by which crime could be carried out is admissible. 102Conn708, 130A184. [b] **Intent is usually proved by defendant's acts.** 215Ala148, 109S849. [c] **Defendant's conduct before and after offense** may be considered. 88CalA495, 263P560.

547-27 20AlaA550, 104S50; 21AlaA534, 109S613; 23AlaA521, 128S126(2dcase); 324 Ill 375, 155NE363; 327 Ill 393, 158NE712; 334 Ill 218, 165NE619; 335 Ill 570, 167NE852; 164La423, 114S83; 253NY330, 171NE393; 100TexCr438, 273SW586; 101TexCr439, 276SW252.

547-28 23AlaA521, 128S126(2dcase); 321Mo 352, 10SW(2d)928; 79Mont343, 256P380; TexCr 26SW(2d)225; 103WVa427, 137SE649, 650 [citCJ].

547-29 320 Ill 495, 151NE280; 79Mont 343, 256P380.

547-30 327 Ill 393, 158NE712.

547-31 327 Ill 393, 158NE712.

547-32 21AlaA534, 109S613.

547-34 21AlaA534, 109S613; 206 Iowa 365, 218NW936.

547-40 244Mich622, 222NW185.

547-43 337 Ill 131, 169NE18; 212Ky 778, 280SW118; 161La827, 109S505.

548-46 34F(2d)863; 23AlaA393, 126S174(2dcase); CalA 284P988; 212Ky813, 280SW104; 102TexCr395, 278SW449. [a] (10) Evidence showing that defendant placed jars of whisky in creek, where they were found. 102TexCr395, 278SW449. (11) Finger prints held admissible. 128 Or515, 273P323. (12) Other instances. Fla 129S112. [c] **Certainty.**-143Wash288, 255P141. [d] **Witness may not identify accused from photographs.**-212Ky303, 278SW1097. [e] **Evidence held inadmissible.**-Ill 173NE139.

548-47 Mo 29SW(2d)688; 129 Okl 300, 264P885.

548-48 316Mo 122, 289SW904; 129 Okl 300, 264P885.

548-50 [a] 218AppDiv363, 218NYS297.

548-51 23AlaA497, 127S785; 251Mich 243, 231NW564 (testimony of defendant's mother improperly excluded). [b] **Evidence held inadmissible.**-317Mo 759, 297SW10.

548-52 7F(2d)818; 76CalA688, 245P781; 94Fla318, 113S689, 694 [quotCJ]; 196NC562, 146SE395; OklCr 270P90; TexCivA 273SW666, 672 [quotCJ].

548-53 94Fla318, 113S689, 694 [quot CJ].

548-53½-New. In a prosecution for bribery witness, although unable to identify defendant, may testify to conversation heard by him between offeror of bribe and another where other testimony identified such other person as defendant. 78CalA37, 247P601.

548-54 21AlaA597, 110S562; 179Minn 516, 229NW789; TexCivA 273SW666, 672 [quotCJ].

548-55½-New. Evidence of defendant's finger prints is admissible. 106Conn701, 139A91.

548-55½-New. Testimony by a stenographer that defendant, when confronted with the complaining witness, was identified as one of the men who shot him is incompetent, in the absence of a claim that death of the complaining witness was at any time anticipated by him or anyone else. 224AppDiv193, 230NYS66.

548-55¼-New. Extrajudicial identification, not being original testimony, is irrelevant. 317Mo 759, 297SW10.

548-55½-New. Proof of defendant's identification at police headquarters by photographs has been held inadmissible, especially where photographs not produced at trial. 229AppDiv790, 242NYS 178.

548-55¾-New. Evidence respecting similarity or identity of fingerprints is admissible in a proper case. Iowa 230NW536.

548-55½-New. Evidence of defendant's fingerprints is inadmissible until a reasonable foundation is laid. Iowa 226NW 46.

548-57 23AlaA197, 122S703 (in rebuttal). But see 21AlaA77, 105S429.

548-58 129Kan830, 284P424; 198NC 649, 152SE895; 35PortoRico 106; 105TexCr529, 289SW52.

549-67½-New. Admission of testimony of finding of tracks in vicinity of the criminal operation is error where the kind of tracks are not specified. 20AlaA 606, 104S551.

549-67½-New. Fingerprints. Accused's identity may be proved by correspondence of his fingerprints with those found at place of crime. OklCr 292P885 (2dcase).

549-68 91Fla446, 107S331; Fla 129S 112; Mo 7SW(2d)1001; 106TexCr394, 292SW548. [b] **Telephone conversations.**-90Fla299, 105S834.

549-73 99TexCr504, 270SW555.

549-74½-New. Evidence that a cap found near the body of deceased is similar to one which witness had seen which belonged to defendant is admissible although not positively a declaration by the witness to be the same cap. 255Mass 369, 151NE839.

549-75 199 Ind592, 159NE420; 316Mo 31, 292SW434; 321Mo 1171, 14SW(2d) 638. But see 21AlaA237, 107S828.

549-76 102TexCr444, 278SW446 (wife, indicted jointly with accused); 107TexCr276, 296SW520.

549-79½-New. Testimony that a revolver taken from defendant answered the description of a revolver previously repaired for deceased is admissible. 255 Mass369, 151NE839.

549-82 21AlaA551, 109S897; 194Cal 452, 229P40; CalA 288P838; 166Ga120, 142SE666; 199 Ind247, 155NE544, 549 [citCJ]; 203Iowa94, 212NW339; 212 Ky303, 278SW1097; 215Ky703, 286SW 1051; 224Ky370, 6SW(2d)483 (possession of incriminating evidence); 166La 793, 117S921. [a] (5) Any conduct inconsistent with innocence or tending to establish guilt may be shown. 212Ky 303, 278SW1097.

550-89 35F(2d)735. [a] (14) That accused some half hour after killing of special policeman, being himself wounded, had cursed another special policeman. 209Ky817, 273SW503. (15) Transaction between third persons. 82 Colo 541, 261P661. (16) Evidence, relating to events taking place after arrest of defendant, charged with rape, during preliminary examination of defendant and prosecutrix and her companions by prosecuting attorney and police officers. 47 Ida457, 276P39, 68 ALR1061.

550-91 NJ 148A608.

550-92 169Ark505, 275SW739; 75CalA 74, 241P924; 92CalA470, 268P473 (concealment of facts); 162La310, 110S486, 487 [citCJ]; 221AppDiv521, 224NYS 670; 297Pa326, 146A905.

550-94 23AlaA368, 125S902(2dcase).

551-8 41F(2d)166; 75CalA565, 243P 25; 212Ky303, 278SW1097 (dictum); 239Mich386, 214NW183; 191NC526, 132SE281; 101TexCr449, 276SW272. See also CalA 286P459.

551-9 34F(2d)863; 215Ala42, 109S 109; 23Ala598, 129S491; 21AlaA468, 109S387; 21AlaA551, 109S897; 21AlaA 660, 109S923; 169Ark636, 276SW365; 203Cal128, 263P226; 90CalA317, 265 P893; CalA 286P459 (as showing consciousness of guilt); 37GaA338, 140SE 396; 204 Iowa1135, 216NW642; 214 Ky578, 283SW1034; Mo 274SW35; 311 Mo 599, 278SW977, 978 [citCJ]; 312Mo 525, 290SW999; Mo 296SW128, 131 [cit CJ]; Mo 29SW(2d)89; 115Nebr158, 211NW942; 244NY196, 155NE98; 191 NC526, 132SE281, 282 [quotCyc]; 119 Or122, 249P1046; 287Pa1, 134A465; 292Pa506, 141A478; 295Pa190, 145A 85; 86PaSuper571; 46Philippine572; 101TexCr128, 274SW159; 101TexCr158, 274SW619; 101TexCr220, 276SW228; 101TexCr449, 276SW272; 101TexCr663, 276SW431; 105TexCr276, 288SW441; 105TexCr552, 289SW402; 106TexCr 556, 293SW1111; 108TexCr384, 300SW 942; 108TexCr494, 18SW(2d)630; 101 Vt491, 144A689(2dcase). See also 149 Miss262, 115S208. [a] (2) 34Ariz129, 268P611, 614 [citCJ]. (5) Flight of accused may be considered as bearing on guilty knowledge. 234Mich600, 208 NW687.

551-10 101TexCr144, 274SW577; 107 TexCr408, 296SW889.

551-11 34Ariz129, 268P611; 75CalA 74, 241P924; 311Mo 599, 278SW977, 978 [citCJ]; 108TexCr384, 300SW942.

552-21 23AlaA440, 126S608.

552-23 34F(2d)863; TexCr 20SW(2d) 776; 113TexCr324, 21SW(2d)518(2dcase). But see 43 Ida745, 254P525.

552-38 21AlaA468, 109S387.

552-38½-New. Evidence that deputy searched for defendant and failed to find him for fifteen months is held admissible in prosecution for distilling. 21AlaA468, 109S387.

552-38¾-New. Evidence that defendant's appearance bond had been forfeited is admissible to show flight. 37 GaA338, 140SE396.

552-39 108TexCr494, 18SW(2d)630.

552-39½-New. Evidence of flight is admissible, although defendant was under indictment for several offenses. 106 TexCr118, 290SW537.

552-41 33GaA825, 127SE877; 105 TexCr641, 290SW764.

552-41½-New. Evidence of defendant's flight is admissible where he immediately left the state after being discharged from arrest under a warrant alleging the wrong date of the commission of the offense. 202 Iowa153, 209 NW279.

553-42 43 Ida745, 254P525, 527 [cit CJ].

553-53 22AlaA651, 119S598(2dcase); Ala 130S69; 21AlaA551, 109S897; 22 AlaA141, 113S478; 169La947, 126S434.

553-64½-New. Testimony of accused as to a conversation with a codefendant is properly excluded where accused is given an opportunity to testify directly in explanation of flight while on the witness stand. 30NM309, 233P49.

553-65 75CalA74, 241P924; 77Colo 390, 237P151 (at time of arrest); 200 Iowa649, 203NW38; 295Pa190, 145A 85; 100TexCr156, 272SW448.

553-66 71CalA575, 236P189 (admission of evidence of use by defendant of assumed name held prejudicial error).

553-66½-New. It is proper to bring out by cross-examination of defendant that he is going under assumed name. 105TexCr169, 287SW273.

553-68 170Minn504, 212NW894.

553-69 Ill 173NE97; 170Minn504, 212 NW894; 173Minn232, 217NW104, 105 [citCJ]; 136Wash674, 241P294 [citCJ]; 107WVa490, 148SE843 [citCJ]. See also 138SC58, 135SE635.

553-71 107WVa490, 148SE843 [citCJ].

553-72 168Ark396, 270SW945; 99 CalA297, 278P449; 77Colo 390, 237P151 (giving assumed name); 163Ga313, 136 SE154; 166La793, 117S924; 105TexCr 22, 285SW616; TexCr 23SW(2d)391; 154Wash304, 282P48.

553-73 99CalA280, 278P250; 163Ga 313, 136SE154; 236Mich237, 210NW

234; 116Or509, 241P983; 295Pa190, 145A85; 101TexCr220, 276SW228; 136 Wash674, 241P294 [citCJ]. But see 210Ky536, 276SW513.

553-74 75CalA74, 241P924; 212Ky303, 278SW1097 (dictum); 295Pa190, 145 A85; 101TexCr220, 276SW228; 101 TexCr226, 276SW232; 110TexCr512, 8 SW(2d)144, 60ALR290; TexCr 23SW (2d)373; TexCr 24SW(2d)41; 101Vt 491, 144A689(2dcase). But see TexCr 23SW(2d)373. [a] **Admissible only** when affirmatively shown that accused knew of attempt to arrest him. 108 TexCr150, 300SW57. [b] **Evidence** that defendant told officer to keep hands off is admissible against objection that he was under arrest at such time. 108 TexCr150, 300SW57.

554-75 168Ark396, 270SW945; 75CalA 74, 241P924; 227AppDiv603, 235NYS 193.

554-86 212Ky303, 278SW1097.

554-88 199 Ind247, 155NE544; 163La 701, 1128655; 115Nebr148, 211NW994.

554-92½-New. That defendant soon after the commission of the offense had a pistol and threatened to shoot himself may be shown. 80Mont181, 260P 138.

554-94 31F(2d)737; 213Ala358, 104S 656; 199Cal 471, 250P168; 167Ga544, 146SE121; 321 Ill 80, 151NE529; 255 Mass304, 151NE297, 47ALR962; 115 Nebr148, 211NW994, 997 [citCJ]; OhA 173NE26; 112TexCr281, 16SW(2d)243; TexCr 25SW(2d)869.

554-95 199Cal 471, 250P168.

555-98 255Mass304, 151NE297, 47ALR 962.

555-1½-New. , or although he was also under indictment for another offense. 255Mass304, 151NE297, 47ALR962.

555-10 213Ala358, 104S656 (while in hospital).

555-14 20F(2d)289; 214Ala2, 106S 617; 23AlaA406, 127S793(2dcase); 107 TexCr293, 296SW516.

555-15 172Ark606, 289SW765; 103 TexCr 377, 280SW791.

555-17 102TexCr395, 278SW449 (effort by accused to smash whisky jars on way to jail); 103TexCr377, 280SW791.

555-18 215Ala106, 109S846; 75CalA 365, 242P906; 163Ga186, 136SE72.

555-19 21AlaA631, 111S190; 85CalA648, 259P961; CalA 286P434; 121Kan587, 249P597, 599 [citCJ]; 214Ky147, 283 SW1066; 254Mass454, 150NE197; Mass 171NE458; Mo 24SW(2d)1032; 102Tex Cr604, 278SW1104; 104TexCr378, 283 SW824; 105TexCr308, 288SW444.

555-20 121Kan587, 249P597, 599 [cit CJ].

555-21 121Kan587, 249P597, 599 [cit CJ].

555-22 20F(2d)289; CalA 286P434.

555-24 213Ala169, 104S438.

555-25 31F(2d)13; Mo 24SW(2d)1032.

555-26 23F(2d)472; 113TexCr81, 18 SW(2d)661(2dcase).

555-27 35F(2d)96; 75CalA365, 242P 906; 46 Ida8, 265P666, 668 [citCJ]; 317 Mo 319, 296SW132; 156SC363, 153SE 340; 113TexCr450, 21SW(2d)499 (that grand jury had indicted defendant for such attempted bribery held inadmissible); TexCr 31SW(2d)435.

555-28 20AlaA426, 103S707; 110Conn 55, 147A118; 227Ky710, 13SW(2d) 1046; 102TexCr604, 278SW1104.

556-32 108TexCr210, 299SW907. But see 23AlaA552, 129S312(2dcase).

556-33 121Kan587, 249P597, 599 [cit CJ].

556-35 229AppDiv240, 240NYS588; 108 TexCr210, 299SW907; TexCr 27SW(2d) 540(2dcase). See also 214Ala2, 106S617. [a] **Statements held not efforts** to suppress evidence. 214Ala2, 106S617.

556-36½-New. In the absence of showing of connection of declarant with conspiracy it is error to show he tried to suppress evidence. 214Ala2, 106S617.

556-36¼-New. One not sanctioning the procurement of false testimony by others is not bound thereby. 108TexCr210, 299SW907.

556-39½-New. Where a witness has testified that he was intimated, it is proper for the state to show the contrary. 163Ga186, 136SE72.

557-68 96CalA1, 274P361.

557-69 317Mo843, 297SW397.

557-70 CalA 290P69.

557-72 22AlaA644, 119S248; 317Mo 843, 297SW397. [b] **Duties of defendant**, revealing irrelevant facts, not admissible on issue of insanity. 312Mo 373, 278SW1016. [c] **Solvency of company with whom defendant, accused of forgery**, was connected, and which received proceeds of forgery, irrelevant on issue of insanity. 312Mo 373, 278SW 1016. [d] **Evidence of defendant's tendency to overwork** properly excluded on issue of insanity, where such evidence showed such tendency eleven years before trial. 312Mo 373, 278SW1016.

557-76 217Ala225, 115S297; 104Tex Cr637, 285SW826.

557-79 [b] (1) CalA 291P887. (2) **Where offense was committed five years before**, evidence of mental condition at time of trial held properly excluded. 102CalA705, 283P821(2dcase).

557-80 21AlaA289, 107S791.

558-97 Cal 289P629 (holding letter of accused's sister inadmissible to prove her insanity where the addressee had never met sister); CalA 283P119. [a] **Evidence held inadmissible under rule.**–CalA 283P119.

558-98 317Mo 843, 297SW397, 403 [cit CJ].

558-5½-New. A verdict of sanity in a prior hearing is admissible for consideration as the jury deem proper in a subsequent homicide trial. 31 OhA458, 166 NE701.

558-6 92Fla878, 110S547.

558-13 229Ky403, 17SW(2d)260(2d case) (to affect weight of testimony, if for no other reason). But see 41GaA838, 155SE49. [b] **Evidence of drunkenness** in murder prosecution should be limited to showing absence of malice. 221Ky 175, 298SW376.

558-14 CalA 289P918 (limiting testimony to period of three weeks before crime held not error).

558-23½-New. Witness to alibi should not be asked to state every thing said while in defendant's presence but should be asked to estimate length of time he was in defendant's company. 161La532, 109S56.

558-24 Mo 296SW391.

559-28 26F(2d)791; 23AlaA197, 122S 703; 99CalA297, 278P449; Ill 173NE 155; 232Ky613, 24SW(2d)269; 141 Wash515, 252P128; 146Wash221, 262P 622.

559-28½-New. Where accused shows his whereabouts at stated times, his whereabouts during the intervening time is a proper subject of inquiry. 103Tex Cr617, 281SW1076.

559-29 22AlaA319, 115S294; 78CalA87, 248P255; 161La532, 109S56; TexCr 31 SW(2d)435.

559-30 [a] **Question as to identity of companion** of accused is proper on cross-examination of accused on ground that companion's testimony would be material. RI 142A662.

559-30½-New. Materiality of defendant's testimony as to his whereabouts on a given date depends on whether it rebuts evidence of prosecution. 79CalA 27, 248P924.

559-30¼-New. Where no witness of prosecution fixed the date of the commission of the offense other than on one of two certain days, defendant's whereabouts several days prior thereto is immaterial. 79CalA27, 248P924.

559-30¼-New. It is not error to permit extensive examination of movements of accused within reasonable time before and after time of offense. ND 230NW1.

559-32 22AlaA34, 111S765; 22AlaA6, 113S648.

559-33 21AlaA300, 107S731.

559-36 21AlaA217, 107S31; 21AlaA307, 107S720; 195Cal 272, 232P710; 309Mo 155, 274SW734; 103TexCr148, 280SW 786; 107TexCr196, 296SW523. But see 102TexCr535, 278SW852.

559-37 21AlaA307, 107S720; 103TexCr 148, 280SW786; 113TexCr226, 18SW (2d)631. But see 161La532, 109S56.

559-38 22F(2d)52; 21AlaA307, 107S 720; 203 Iowa329, 210NW465[citCJ]; 192NC658, 135SE769. See also 148Wash 65, 268P133.

559-39 25F(2d)430 (any competent evidence).

560-40 101TexCr487, 276SW240.

560-41 20AlaA601, 104S845; 22AlaA550, 117S610; 170Ark484, 280SW398; 179 Ark1119, 20SW(2d)185; 99TexCr647, 271SW389 (not admissible unless guilt of party confessing excluded guilt of defendant); 101TexCr540, 276SW239.

560-43 23AlaA582, 129S478; 22AlaA 550, 117S610; 170Ark484, 280SW398; 71 CalA453, 236P163; 163La502, 112S396; Nev 285P503; 131 Or209, 282P233.

560-43½-New. In a prosecution for arson, evidence of breaking into another store on the block at another time was irrelevant. 264Mass368, 162NE729.

560-44 103NJL663, 138A575.

560-45 161La532, 109S56.

560-46 161La532, 109S56; 309Mo 155, 274SW734; 106TexCr399, 292SW549; 108TexCr566, 2SW(2d)227.

560-49 71CalA453, 236P163.

560-50½-New. or movements or statements of a third person on the day of the crime. 71CalA453, 236P163.

560-64 23AlaA162, 122S309 (2dcase); 23AlaA86, 122S613(1stcase) [certiorari den 219Ala395, 122S613(2dcase)]; 82 CalA98, 255P261; 39GaA541, 147SE399; 257Mass479, 154NE95; Mass 172NE97; 311Mo443, 278SW974; 318Mo 1173, 2SW (2d)777; 116 Or451, 241P846 (matter not in dispute); TexCr 20SW(2d)761; 149Wash92, 270P123, 274P712(1stcase).

561-66 169Ark505, 275SW739; Utah 279P953.

561-70 169Ark505, 275SW739.

561-73½-New. Evidence as to officer's going to defendant's sick room in night without a search warrant is immaterial. 21AlaA334, 109S116 (physical condition may be shown).

561-78½-New. If offered evidence does not tend to present some fact favorable to cause of party introducing it or to contradict fact apparently established by party it is immaterial or collateral to inquiry. 77CalA587, 247P245.

561-79 88PaSuper451. But see 104 TexCr637, 285SW826.

561-81 309Mo 520, 275SW36; 309Mo 534, 275SW41.

561-83 39GaA550, 147SE784; 173Minn 232, 217NW104, 105 [citCJ].

561-84 110Conn55, 147A118; 309Mo 520, 275SW36; 146Wash109, 261P777.

561-86 309Mo 520, 275SW36; 146Wash 109, 261P777.

562-89 86CalA100, 260P327; NJSup 137A829.

562-90 309Mo 520, 275SW36.

562-92 [a] 102Conn708, 130A184; 104 TexCr7, 282SW225.

562-93 169Ark505, 275SW739.

562-97 210Ky413, 276SW112.

562-98 32Ariz175, 256P359.

562-98½-New. The people are entitled to make out their case in chief in a prosecution for assault irrespective of whether defendant denies the assault. 194Cal 1, 227P156.

562-1 82CalA98, 255P261; 200 Ind303, 163NE229; Mo 289SW920 (effect of truth-telling serum); 113Nebr851, 205 NW572; 191NC210, 131SE577; 103Tex Cr395, 281SW563.

562-2 Mass 172NE343 (not inadmissible because it may be put to improper use); 115Nebr302, 212NW610; 113Tex Cr409, 22SW(2d)455. [d] **Locus in quo.**–213Ala553, 105S714. [e] **On seizure of British vessel** and prosecution for attempting to transport liquor by transshipment into other boats, evidence of speed of boats ordinarily used in vicinity is admissible. 7F(2d)488. [f] **Testimony as to what witness observed in mirror** is competent. 109TexCr173, 3SW(2d)802, 57ALR407. [g] **Competency depends on inherent, probative value** rather than on outside circumstances. Mass 171NE455.

562-7 Ala 130S69; 32Ariz175, 256P 359; 164Ga47, 137SE553; 35GaA585, 134SE200; 80Mont181, 260P138; 191 NC213, 131SE572; 35 OklCr279, 250P 544, 49ALR1129; 120 Or90, 250P633, 251P307; 159Tenn263, 17SW(2d)899; 103TexCr636, 282SW251; 144Wash446, 258P508. But see 102Conn708, 130A 184.

562-8½-New. , or tend to humiliate or degrade the witness. 94Fla163, 113S 699.

562-9 12F(2d)668.

562-10½-New. Testimony of the victim of a robbery that an article held to his

back by defendant felt like a gun is not incompetent as opinion evidence. 102 TexCr8, 277SW135.

562-10¼-New. Where evidence is competent for any purpose, the fact that it incidentally discloses incompetent matter is not ground for excluding it. 29 Ariz247, 240P863.

562-10¼-New. Evidence may be competent if it is incidental to other circumstantial evidence. 257Mass426, 154 NE185.

562-10½-New. Objection to admission of evidence going to question of its sufficiency, rather than its admissibility, is held properly overruled. 162La357, 110 S557.

562-10¼-New. A statement of physical facts is not rendered inadmissible because their existence was ascertained by the witness in the absence of accused. 90CalA27, 265P366.

562-12 170Ark979, 282SW5; 315Mo 242, 286SW69.

562-14 315Mo 242, 286SW69; TexCr 21 SW(2d)1044(2dcase). [a] AlaA 129S 717.

562-17 170Ark979, 282SW5.

563-22 261Mass460, 158NE902.

563-24½-New. Where witnesses for the prosecution testify that the offense was committed in one city on a certain date, defendant's evidence that he was not in another city on that date is immaterial. 79CalA27, 248P924.

563-24½-New. Requiring accused to testify that others had been convicted for same crime held error. 222Ky169, 300SW344.

563-24¼-New. Testimony of the sheriff that the witness could not be found in the county has been held competent. 23 AlaA99, 121S449.

563-25 34PortoRico 106.

563-27 252Mass450, 148NE113 (evidence excluded for lack of identification); 231Mich256, 203NW863; 179 Minn439, 229NW558; 198NC61, 150SE 628; 92PaSuper530. But see 32F(2d) 15. [a] 231Mich256, 203NW863.

563-30 22F(2d)549 (test of alcoholic content by "ebulliometer"); 70CalA465, 233P812; 90Fla272, 105S406; 164Ga 292, 138SE238; 166Ga10, 142SE160 (shells exploded in grand jury room in test of defendant's gun); Ill 172NE743; OklCr 281P820; TexCr 26SW(2d)1072. But see 227Ky404, 13SW(2d)247; 111 TexCr70, 11SW(2d)513.

563-31 90Fla272, 105S406; 101WVa 356, 132SE728.

563-32 101WVa356, 132SE728.

563-33 90Fla272, 105S406; 164Ga292, 138SE238.

563-34 164Ga292, 138SE238.

563-35 78CalA598, 248P969 (in prosecution for manslaughter by automobile).

563-36 164Ga292, 138SE238.

563-37 20AlaA412, 103S694; 194Cal 555, 229P341; 203Cal 628, 265P818; 78CalA598, 248P969; CalA 258P146 (testimony properly excluded); 90Fla 272, 105S406; 164Ga292, 138SE238; 101WVa356, 132SE728; 34Wyo 247, 242 P812. [a] (1) 20AlaA412, 103S694; 78 CalA598, 248P969; 101WVa356, 132SE 728. (2) 78CalA598, 248P969. [c] **Effect of pistol shot powder burns on paper and cloth** is not admissible to show distance at which they would be left on person's flesh. 90Fla272, 105S406 (in absence of qualified testimony that effect on flesh is same as on paper and cloth).

563-38 20AlaA412, 103S697; 164Ga 292, 138SE238; Mo 278SW(2d)16 (exclusion not error under evidence); 101 WVa356, 132SE728.

563-39 203Cal 628, 265P818; CalA 258 P146; 164Ga292, 138SE238; 101WVa 356, 132SE728; 104WVa93, 138SE664. [a] **Abuse of discretion** in admission of experiments held shown where conditions were not similar. 101WVa356, 132 SE728.

564-40 90Fla272, 105S406. [a] **Where witness was ignorant as to accuracy of testing machine,** it was error to admit his testimony as to results obtained by machine. TexCr 218SW(2d)529.

564-41 90CalA27, 265P366; 108TexCr 661, 28SW(2d)440; 101WVa356, 132SE 728.

564-41½-New. Nor need they be made pursuant to an order of the trial court in order to be admissible. 101WVa356, 132SE728.

564-45 334 Ill 218, 165NE619; 153Tenn 189, 281SW460, 462 [quotCJ]; 37BC43, [1926] 3DomLR1, [1926] 2WestWkly 481.

564-46 153Tenn189, 281SW460, 462 [quotCJ].

564-47 221Ky49, 297SW929; 143Miss 102, 108S446; 153Tenn189, 281SW460, 462 [quotCJ]. But see 196NC542, 146 SE409.

564-48 143Miss102, 108S446; 150Miss 206, 116S746; 196NC542, 146SE409; 153Tenn189, 281SW460, 462 [quotCJ].

564-49 153Tenn189, 281SW460, 462 [quotCJ].

564-50 153Tenn189, 281SW460, 462 [quotCJ].

564-51 153Tenn189, 281SW460, 462 [quotCJ].

564-52 153Tenn189, 281SW460, 462 [quotCJ].

564-53 153Tenn189, 281SW460, 462 [quotCJ].

564-53½-New. But such evidence is seldom evidence of corpus delicti. 153 Tenn189, 281SW460.

565-58 143Miss102, 108S446; 150Miss 206, 116S746; 153Tenn189, 281SW460.

565-59 143Miss102, 108S446; 150Miss 206, 116S746.

565-60 143Miss102, 108S446.

565-63 143Miss102, 108S446; 150Miss 206, 116S746.

565-64 [b] **Breeding may be shown by parol evidence.**-150Miss206, 116S746.

565-67 125Kan375, 263P782.

565-68 263Mass22, 160NE305; 298Pa 370, 148A501. [b] **Defendant is not bound by undisclosed motive of third person** which might offer defensive theory. 102TexCr506, 278SW843.

565-69 34Ariz139, 268P615; 82CalA 459, 255P836, 838 [citCJ]; 89CalA451, 265P276; 329 Ill 536, 161NE76; 125 Kan375, 263P782; 214Ky620, 238SW 958; 218AppDiv254, 218NYS249; 298 Pa370, 148A501; 87PaSuper66; 108 TexCr611, 28W(2d)259.

565-69½-New. but not where accused is simply attempting to get improper evidence before the jury, 311Mo 476, 278 SW755.

566-71 101TexCr226, 276SW232; 104 TexCr85, 282SW587.

566-72 212Ala484, 103S458; 213Ala 358, 104S656; 213Ala332, 104S834; 20 AlaA412, 103S694; 20AlaA550, 104S50; 21AlaA601, 110S913.

566-74 But see 22AlaA329, 115S420.

566-76 269US20, 46SCt4, 70LEd145; 17F(2d)271; 75CalA74, 241P924; CalA 283P848 (immunity continued on trial of issue of insanity after conviction on plea of not guilty); 254Mass520, 150NE 854; 166Minn167, 207NW317; 143Miss 757, 109S697; 115Nebr634, 214NW256; 191NC595, 132SE667; 28OhA4, 161NE 364 (ordinance requiring full report of accident by driver of automobile held invalid); 34OhA60, 170NE444; 26 OhNPN8602; 35PortoRico 617; 108 WVa494, 151SE713; 200Wis518, 228NW 895(2dcase), 69ALR348. [e] **Act making possession of opium** presumptive evidence of guilt of offense of unlawful importation held not invalid as compelling self-incrimination. 268US178, 45SCt470, 69LEd904. [f] **Statute placing burden of proof on accused to prove citizenship** held unconstitutional as applied to prosecution for possessing firearms by unnaturalized foreign born person. CalA 279P844(2dcase). [g] **Evidence held admissible under rule.**-36F (2d)53. [h] **Forfeiture proceeding** is within protection afforded by Constitution. 38F(2d)1005.

566-80 [a] **One may not refuse to use evidence available to him,** and that does not tend to incriminate him, and then complain that evidence, if sufficient to go to jury, was but slight. 29F(2d)462.

566-81 8F(2d)251; 215Ky728, 286SW 1040; 169La707, 125S862.

567-82 18F(2d)465; 247NY351, 160NE 395; 284Pa81, 130A311. [a] **Testimony as to defendant's actions out of court to show simulation of insanity in court room** is not improper as compelling defendant to be witness against himself. 203Cal144, 263P216.

567-86 166Minn167, 207NW317 (compelling production of written instrument); 143Miss757, 109S697.

567-87 19F(2d)842; 215Ala42, 109S 109; 161La240, 108S468; 242NY13, 150 NE585; 121Or57, 254P198.

567-88 34NM366, 281P474 (denial of motion to suppress liquor as evidence held not violative of either provision); 242NY13, 150NE585; 213AppDiv643, 211NYS134.

567-88½-New. A statute allowing supplementary remedy to judgment creditor with right to compel debtor to answer or be in contempt is not unconstitutional as compelling self-incrimination. 159La831, 106S321.

567-88½-New. To ask defendant if he will produce a paper, existence of which is known and needed by the prosecution, is not an invasion of his privilege against self-incrimination. 254Mass 520, 150NE854.

567-88¼-New. A constitutional provision that no person shall be compelled to testify against himself applies only against some governmental action of the state or that of some agency of the state. 121Or57, 254P198.

567-88⅛-New. Federal Act that possession of drugs shall be sufficient evidence to authorize conviction is held not in violation of self-incrimination. 13F(2d)369.

567-88⅛-New. The privilege may be waived. 35Ariz35, 274P166.

567-88½-New. A municipal ordinance requiring reports of grade crossing accidents has been held unconstitutional as compelling self-incrimination. 28 OhA178, 162NE617.

567-88⅛-New. A statute requiring any person killing a bovine animal to preserve the hide unchanged for a certain period for inspection is not a violation of a constitutional provision against self-incrimination. 34NM405, 281P481.

567-88½-New. Requiring defendant to state from whom he got his information as to facts occurring before grand jury as shown in his plea in abatement is not compelling him to incriminate himself. 160Tenn305, 23SW(2d)658.

567-90 Ill 173NE383.

567-92 5F(2d)598; 12F(2d)852; 14F (2d)582; 18F(2d)465; 73Mont177, 235 P336 (evidence discovered on search made with defendant's consent is admissible); 51ND98, 199NW196. [a] **Defendant's objection that oral testimony** of book entries was not best evidence is waived by objection to admission of books. 5F(2d)598.

567-93 49SD516, 207NW453 (intercepting attempt of defendant to draw gun and taking it from his pocket in self-defense resulting in discovery of gun is not search); 108TexCr600, 602, 2SW (2d)263.

567-94 8F(2d)251; 14F(2d)582; 43F (2d)906; 176Minn238, 222NW925; 309 Mo 89, 273SW736; 213AppDiv643, 211 NYS134; 52ND94, 202NW128; 142Va 658, 128SE459.

567-95 8F(2d)251; 249Mich619, 229 NW516; 309Mo 89, 273SW736; Wis 230 NW80. See also 12F(2d)852.

567-96 16F(2d)870; 31F(2d)747; 70 CalA271, 233P85; 89IndA424, 166NE7; 154Miss493, 122S539; 103NJL361, 137 A575; 213AppDiv643, 211NYS134; 46 RI485, 129A596.

567-97 37F(2d)80; 316Mo1, 289SW 945; Mo 14SW(2d)434; 37OklCr415, 259P150; OklCr 278P665(2dcase); OklCr 281P599; OklCr 283P262; 46RI485, 129A596; SD 227NW73 (search of premises); 108TexCr255, 299SW418; 101WVa160, 132SE366; 107WVa357, 148SE205; 40Wyo508, 281P17.

567-98 31F(2d)747; 321 Ill 484, 152 NE500; 197Ind16, 148NE420; 207Iowa 334, 221NW556; 144Miss452, 110S239; 152Miss566, 120S462; 222MoA499, 280 SW718; MoA 285SW777; 76Mont278, 246P257 (use in trial in state court of evidence procured under search warrant issued out of federal court); 46RI 485, 129A596; 106TexCr413, 292SW906; 155Wash486, 284P1016; 101WVa160, 132SE366; 193Wis204, 212NW635. See also 28F(2d)150 (articles taken from premises when accused was arrested); 112TexCr506, 17SW(2d)809.

567-99 37GaA11, 138SE587; 242NY13, 150NE585. But see **Wash** 291P1098. Contra 197 **Ind**374, 151NE98.

567-1 78CalA223, 248P716; 37GaA11, 138SE587; 242NY13, 150NE585. See also 273US95, 47SCt259, 71Led556. But see 37F(2d)80. Contra 275US310, 48SCt137, 72Led139, 52ALR1[illegible]; **OkiCr** [illegible] ([illegible]).

567-2 17F(2d)829; 36F(2d)891 (motion directed to use of articles improperly seized, should be treated as motion to suppress evidence); 77Colo 392, 236P1019; **DC** 32F(2d)953; 157Md332, 146A268; 316Mo1, 289SW945 (upon arrest of accused). [illegible] **NJSup** 134A294; 127Misc410, 217NYS303; 48ND488, 192NW91; 152Wash284, 277P856. See also 113TexCr69, 18SW(2d)659. But see 36F(2d)891; 148Miss[illegible]; **TexCr** [illegible]SW(2d)[illegible]. Contra 324 Ill66, 154NE432; 197 **Ind** 374, 151NE98; 187Wis115, 203NW760. [c] **Blackjack obtained by trespass** is not therefore excluded. 242NY13, 150NE585. [f] **In prosecution for possessing blackjack,** admission of blackjack seized with or without warrant is not violative of such constitutional provision. [illegible] [g] **Receipt of evidence unlawfully seized under search warrant not describing it** violates defendant's constitutional exemption from being compelled to give evidence against himself. 152Miss761, 118S613. [h] **Under Federal Court rule,** evidence must be suppressed, on proper application, if obtained in unlawful search. [illegible]

567-3 25F(2d)49 (checks obtained in depositions taken under order of referee in bankruptcy held admissible).

567-4 [illegible] 293SW1[illegible]; 144Miss [illegible] 110S121.

567-5 [illegible] 319, 292SW306; 144Miss 405, 110S121.

567-5½-New. The right of defendant to recover articles unlawfully seized does not preclude their admission in evidence against him. 70CalA271, 233P85.

567-6½-New. Use as evidence of books and papers of corporations of which defendant is stockholder and officer does not violate his constitutional rights. 14 F(2d)582.

567-7 35Ariz35, 274P166; 262NY387, 187NE519; 9PaDist&Co 803; 10PaDist&Co 677.

567-8 131Misc62, 226NYS689. But see **NJ** 143A750.

568-11 22AlaA644, 119S248 (no force used to induce interview); 92Fla878, 110S547; 163La701, 112S655; 116Nebr 493, 218NW137, 139 [cit CJ] (where not objected to by defendant); **Wis** 231NW634.

568-15 19Nev194, 242P582.

568-16 142SC24, 140SE258 (not error to ask accused on cross-examination about willingness to exhibit his feet).

568-18 92Fla[illegible], 110S517, 553 [cit CJ].

568-19 **Wash** 287P18.

568-20½-New. The calling of accused before the grand jury which indicted him is not ground for complaint where he was not required to testify. 171Minn [illegible] 211NW[illegible].

568-37 **Ind** 167NE129; 34NM494, 285P 197.

568-37½-New. Evidence of comparison by measurement of tracks found and feet of accused is admissible although comparison between tracks found and tracks which accused was forced to make is not. 133SC291, 130SE884.

568-38 164La[illegible], 109S[illegible].

568-48½-New. Compelling defendant accused of murder to remove his shirt to exhibit scars and to don a shirt found at the scene of the crime and to submit to inspection of the jury for the purpose of showing whether the shirt fitted him and whether rents therein corresponded with the scars does not violate his constitutional rights. 19Nev194, 242P582.

568-48¾-New. Request on cross-examination to accompany officer to point out hotel claimed by accused as place where he was at time of robbery is held not violation of rule. 141Wash515, 252P128.

568-48¾-New. Statute requiring person charged with felony to be fingerprinted before admission to bail is violation of constitutional provision. 127 Misc141, 215NYS412.

569-50 5F(2d)940 (bill of sale provided by one charged with receiving and concealing stolen automobiles is admissible); 336 **Ill** 324, 168NE336; **Ill** 172NE743. See also 165La842, 116S206.

569-57 154Md332, 140A218, 224 [quot CJ]. [a] **Requiring defendant offering himself as witness** at second trial to disclose that he did not testify on first trial is held not error. 271US494, 46SCt566, 70Led1054.

569-60 203 **Iowa**929, 210NW465.

569-62 40F(2d)363.

569-66 103TexCr603, 281SW874.

569-69 53ND182, 220NW615.

569-70½-New. Involuntary admissions of defendant in John Doe proceedings do not become competent on cross-examination. 53ND182, 220NW615.

570-73 34NM217, 279P947 (person killing bovine animal is required to preserve hide).

570-79 19F(2d)842; 44 **Ida**43, 254P 788, 52ALR463; 145Wash87, 258P1030.

570-80 277US438, 48SCt564, 72Led 944, 66ALR[illegible]; 61F(2d)569; 17F(2d) 271; 85CalA301, 259P353; 93Fla1063, 113S891, 44 **Ida**43, 254P788, 52ALR463; 89 **IndA**288, 166NE287(2dcase); , **Ind** 168NE22 (liquor discovered on arrest for speeding); 200 **Iowa**652, 204NW 256; **Miss** 130S285; 85**Mont**585, 281P 551 (witness testifying to autopsy performed by him without coroner's request); 242NY13, 150NE585; 246NY 409, 159NE379; 213AppDiv643, 211NYS 134; 130 **Or**99, 279P285; 7PaDist&Co 335, 161Tenn290, 30SW(2d)247(1st case); 100TexCr53, 271SW915; 107Tex Cr150, 295SW617; 107TexCr324, 296 SW579; 112TexCr390, 16SW(2d)1065; 113TexCr597, 21SW(2d)1061(2dcase); TexCr 31SW(2d)633; TexCr 31SW(2d) 1077(2dcase). But see 232Mich670, 206 NW337. [a] **Denial of motion to suppress evidence** as secured by illegal search is held not error where accused acquiesced in search. 137Wash162, 242 P363, 246P758.

570-80½-New. This is so whether the trespass under which evidence was obtained is private or public. 242NY13, 150NE585.

570-84 273US20, 47SCt248, 71Led520; 273US95, 47SCt259, 71Led556; 5F(2d) 488 (wrongfully secured from third person); 17F(2d)271; 19F(2d)842; 23 AlaA163, 122S604 [certiorari den 122S 604]; 44 **Ida**43, 254P788, 52ALR463; **IndA** 167NE145; **IndA** 170NE689 (unnecessary force); 200 **Iowa**652, 204NW 256; 125KanS05, 265P1109; 160La162, 106S731; 155Md195, 141A536; **MoA** 272 SW982; 117Nebr514, 221NW439; 242 NY13, 150NE585; 127Misc410, 217NYS 303; 53ND203, 205NW67; 100TexCr 218, 272SW452 (failure to give receipt for liquor taken); 100TexCr385, 272SW 453 (failure to record seizure of liquor as required by statute); 105TexCr430, 289SW44; 106TexCr384, 292SW885; 107TexCr470, 296SW882; 107TexCr465, 296SW892; 145Wash4, 258P845; 154 Wash87, 280P922(2dcase) (entry amounting merely to civil trespass); 108WVa494, 151SE713; **Wis** 230NW80. [a] 208Ky534, 271SW570; 85Mont585, 281P551. [c] **Stool pigeons.**–162La162, 106S731. [d] **Still, unlawfully obtained by federal officers,** is held admissible. 17F(2d)271. [e] **Documents wrongfully seized** from one defendant are admissible against codefendants. 7F(2d)756. [f] **Evidence held to show defendant consented to search** of premises without warrant. **TexCr** 28SW(2d)556.

570-85 7F(2d)756; 148SCt360, 146SE 116. [a] **Evidence of witness who without search warrant hid in barn** and saw defendant and others butchering cow and then arrested defendant is held admissible. 100TexCr567, 294SW210.

570-85½-New, by placing spies in adjoining cell. 259Mass128, 156NE57.

570-87 **IndA** 169NE63; 137SCt145, 134 SE885.

570-88 208Ky534, 271SW570 (by one not officer); 219Ky251, 292SW754; **Wis** 230NW80.

570-89 13F(2d)506; 74Mont166, 239P 1000 (testimony of detectives or decoys, employed to ferret out crime, is competent). [a] **Prosecution need not prove officer used automobile of distinctive color** before introducing his testimony in trial for speeding. **CalA** 288P57.

570-90 273US28, 47SCt248, 71Led520; 17F(2d)271; 33F(2d)485 (suppression refused where search and arrest had on probable cause); 21AlaA248, 108S870; 21AlaA334, 109S116; 21AlaA562, 110S 563; 21AlaA623, 111S50; 22AlaA98, 112S809; 170Ark1083, 282SW673; 171 Ark882, 286SW1013; 175Ark694, 18SW (2d)45; 176Ark153, 28SW(2d)1108; 179 Ark1119, 20SW(2d)185; 70CalA271, 233 P85; 83CalA302, 256P616; 77Colo 392, 236P1019; 93Fla1063, 113S891; 33GaA 571, 127SE156 (refusal to allow witness to answer whether he searched premises without warrant is not error); 35GaA 503, 133SE642; 35GaA501, 134SE121; 37GaA11, 138SE587 (flask of whisky); 47 **Ida**246, 273P940; 324 **Ill** 428, 155NE 337; 329 **Ill** 117, 160NE135; 336 **Ill** 421, 168NE344 (motion to suppress evidence overruled); 197 **Ind**16, 148NE420; 197 **Ind**615, 151NE728; **Ind** 165NE755; **Ind** 165NE757; **Ind** 167NE135; **Ind** 168 NE581; 204 **Iowa**667, 215NW706; 204 **Iowa**670, 215NW752; 208 **Iowa**796, 223 NW873; 208 **Iowa**1155, 225NW841(1st case); **Iowa** 229NW231; 118**Kan**775, 236P647; 212**Ky**229, 278SW574; 214 **Ky**480, 283SW430; 215**Ky**763, 286SW 1041; 215**Ky**766, 286SW1038; 224**Ky** 229, 5SW(2d)1047; 233**Ky**347, 25SW (2d)744 (offense in officer's presence); 235**Ky**325, 31SW(2d)390(1stcase); 161 **La**240, 108S468; 161**La**250, 108S471; 161**La**368, 108S773; 161**La**988, 109S 787; 162**La**357, 110S557; 155**Md**195, 141A536; **Md** 151A538; 247**Mich**536, 226NW337(1stcase) (search upon arrest for other crime); 140**Miss**279, 105S520; 146**Miss**351, 111S860; 146**Miss**685, 112S 479; 312**Mo** 202, 278SW661; **Mo** 11SW (2d)1044; **MoA** 15SW(2d)938; **MoA** 256SW143; **MoA** 284SW520; 73**Mont** 438, 236P257 (accused cannot complain of refusal to suppress evidence consisting of still and mash found in abandoned mining tunnel and seized under void warrant, where he disclaimed right to possession of tunnel or ownership of articles there found); 84**Mont**348, 275P 757; **NJSup** 132A312; **NJSup** 134A 294; **NJSup** 135A339; 103**NJL**534, 138 A203; 103**NJL**523, 138A381; **NJ** 135 A685; 34**NM**366, 281P474; **NM** 290 P738; **NM** 290P739(1stcase); 242**NY** 13, 150NE585; 213AppDiv643, 211NYS 134; 125Misc570, 211NYS767 (books unmistakably obscene within penal law); 127Misc410, 217NYS303; 132 Misc696, 230NYS152; 53ND203, 205NW 67; 55ND83, 212NW442; 19 **OhA**82; **OkiCr** 276P785; **OkiCr** 293P276(2d case); 119 **Or**422, 249P1046; 290**Pa**174, 138A679; 290**Pa**185, 138A683; 89**Pa Super**238; 89**PaSuper**435; 98**PaSuper** 460; 7**PaDist&Co** 435; 7**PaDist&Co** 619; 34**PortoRico** 225; 50**SD**272, 209 NW542; 100**TexCr**218, 272SW452; 100 **TexCr**464, 273SW604; 102**TexCr**385, 278SW430; 103**TexCr**470, 281SW545; 103**TexCr**502, 281SW557 (both cases holding that such was rule prior to statute of June 18, 1925); 103**TexCr** 578, 280SW1079; 104**TexCr**328, 281SW 873 (search and seizure made before Search and Seizure Law of 1925 became operative); 104**TexCr**42, 282SW585; 104**TexCr**238, 283SW505; 105**TexCr**365, 288SW202 (where defendant consented to search); 105**TexCr**430, 289SW44; 106**TexCr**330, 292SW550; 107**TexCr**121, 294SW1107; 107**TexCr**101, 294SW1110; 108**TexCr**337, 300SW63 (where officer saw jar sticking out of car); 109**TexCr** 177, 38SW(2d)435 (arrest not affirmatively shown illegal); 109**TexCr**127, 3 SW(2d)441 (valid search warrant); 112 **TexCr**191, 14SW(2d)845; 112**TexCr** 466, 17SW(2d)46; 112**TexCr**586, 18SW (2d)657 (irregular but legal search); 113**TexCr**142, 18SW(2d)663; **TexCr** 29 SW(2d)774; 143**Va**554, 130SE416; 145 **Wash**4, 258P845; 149**Wash**675, 272P26; **Wash** 287P57; 104**WVa**330, 140SE55. 56ALR257; 199**Wis**63, 225NW191. See also 4**HawaiiFed**73; 228**Ky**517, 15SW (2d)422; 243**Mich**609, 220NW788; 318 **Mo** 531, 300SW829; **MoA** 274SW500; 155

Tenn102, 291SW839. But see 336 Ill 458, 168NE304; 320Mo 271, 8SW(2d) 57; 37 OklCr402, 258P814; 9PaDist&Co 349. Contra 35 OklCr57, 248P349. [a] (1) 224Ky453, 6SW(2d)467; 233Mich 449, 206NW988. [b] (1) 106TexCr468, 293SW168; 106TexCr391, 293SW178. [f] (1) 161La368, 108S773; 234Mich 621, 208NW674. [g] (2) Where defendant charged with unlawful possession and sale of intoxicating liquor disclaims possession or occupancy of premises searched and ownership of liquors seized there, he may not object to use as evidence of liquors found there on ground that warrant under which officers acted was illegal. 77Mont24, 248P192. [h] 101WVa492, 133SE106. [n] 199 Ind49, 155NE209. [u] **Evidence obtained by officer making arrest of third persons upon breaking into house of defendant** prosecuted for participating in crime may be used in evidence against him. 142Miss602, 107S667. [v] **Testimony of state officers** of facts discovered without search warrant held competent. 6F(2d) 187; 105TexCr430, 289SW44. [w] **In Texas.**–102TexCr385, 278SW430. (1) 104TexCr121, 282SW600; 105TexCr568, 290SW762; 105TexCr650, 290SW754; 106TexCr1, 290SW743; 106TexCr124, 290SW539; 106TexCr144, 291SW224; 106TexCr472, 293SW169; 106TexCr669, 294SW555; 107TexCr79, 294SW860; 107TexCr130, 295SW617; 107TexCr254, 296SW531; 107TexCr250, 296SW533. (2) Statute is not applicable to evidence offered before statute went into effect. 103TexCr311, 280SW817; 103TexCr490, 281SW568. (3) Evidence obtained by search of store under warrant after arrest while transporting liquor, is admissible in prosecution for transportation and possession for sale, though defendant had been previously searched on arrest. 107TexCr24, 294SW550. (4) Evidence held to show probable cause for search and seizure without warrant, so as to render evidence admissible. 107 TexCr79, 294SW860. [x] **Evidence obtained by unlawful search of a third person** cannot be objected to by accused. 216Ky823, 288SW754. [y] **Property abandoned by accused.**–103TexCr592, 281SW1053. [z] **Failure of officers to report seizure of intoxicating liquors** does not render inadmissible testimony of officers who intercepted accused while transporting same. 103TexCr583, 281 SW1074. [aa] **Evidence that prosecutor filed information without personal knowledge,** where there was alleged unlawful search and seizure, is held properly excluded. 311Mo 664, 279SW395. [bb] **Search warrant need not be read to jury** in order to render admissible evidence obtained under valid search warrant. 103TexCr216, 280SW785. [cc] **Defendant cannot complain** of admission of evidence obtained by unlawful search of premises not under his control. 107TexCr600, 298SW438. [dd] **Threat to return with warrant if not permitted to search house** is not such as to render inadmissible evidence obtained without warrant. 109TexCr71, 2SW(2d)856. [ee] **Liquor taken over by federal officers after discovery by city officers** called to quell disturbance is admissible. 27F(2d)375. [ff] **Evidence held inadmissible to impeach warrant.**–MoA 7SW(2d)375. [gg] **Defendant cannot attack warrant** by offering evidence to controvert allegations in affidavit upon which it was granted, where testimony was heard on application for warrant. 318Mo 585, 300SW826. [hh] **Evidence of unlawful possession arising from circumstances of another dropping liquor** in presence of officer is not evidence obtained by unlawful search and seizure. MoA 289SW29. [ii] **In Texas.**–110TexCr230, 8SW(2d)165. [jj] **Evidence to controvert affirmative allegations in application for search warrant** is properly excluded. 320Mo 202, 7SW (2d)262. [kk] **Search held warranted.**–251Mich89, 231SW130. [ll] **Testimony as to what officers found while searching premises** is admissible. TexCr 20SW (2d)424. [mm] **Evidence obtained by lawful search** is admissible. 34F(2d) 952; 231Ky838, 22SW(2d)295; TexCr 20SW(2d)423; 200Wis145, 227SW306. **571–92 Ind** 166NE663 (seizure lawful); 217Ky506, 290SW344; OklCr 289 P355(1stcase). [f] 307Mo 411, 270SW 282. [i] **Validity of warrant and search may be raised by motion to suppress evidence.**–44 Ida43, 254P788, 52ALR463. **571–93** 275US192, 48SCt74, 72L ed231; 275US310, 48SCt137, 72L ed139, 52ALR 1381; 4F(2d)540 (liquor seized by state officers without warrant is admissible in federal prosecution); 4F(2d)848 (evidence whose seizure would have been justified without warrant is not inadmissible because seized under invalid warrant); 4F(2d)881; 5F(2d)364 (counterfeit stamps seized on arrest for sale of liquor may be used in evidence in prosecution for possession of such stamps); 5F(2d)672 (that prohibition agents accompanied state police on executing search warrant does not make evidence obtained inadmissible as being search made under federal authority); 5F(2d)965; 6F(2d)870; 7F(2d)756; 7F(2d)861; 8F(2d)120; 11F(2d)892; 12F(2d)771; 12F(2d)956; 13F(2d)259; 14F(2d)400; 15F(2d)623; 16F(2d)317; 17F(2d)373; 17F(2d)390; 18F(2d)442; 19F(2d)161; 21F(2d)567; 21F(2d)575; 21F(2d)592 (evidence suppressed); 22 F(2d)134; 22F(2d)742 (liquor); 24 F(2d)185; 24F(2d)479; 31F(2d)846; 32F(2d)902; 33F(2d)467 (not rendered admissible by application for suppression); 35F(2d)849; 36F(2d)316 (evidence secured by use of invalid warrant); 37F(2d)316 (admissible where arrest and search were legal); 37F(2d) 415; 37F(2d)677 (discovery of shells under illegal liquor search warrant); 37F(2d)751(1stcase) (liquor found outside held admissible); 38F(2d)246 (inadmissible against owner); 39F(2d)903 (1stcase) (evidence admissible under testimony of officers of information received of operation of still); 40F(2d) 267; 40F(2d)593 (method of preventing use of documents); 40F(2d)970; 41 F(2d)54; 7Alaska31; 94Fla134, 113S 704; 28Hawaii173; 334 Ill 200, 165NE 611; 338 Ill 52, 169NE822 (refusal to impound or return property held not to affect validity of warrant); 338 Ill 170, 170NE275; 235 IllA587; 241 IllA 439; 246 IllA248; 196 Ind562, 149NE 62; 197 Ind123, 150NE24; 197 Ind179, 150NE50; 197 Ind712, 150NE53; 197 Ind635, 151NE724; 198 Ind55, 152NE 278; 198 Ind170, 152NE721; 198 Ind 487, 154NE280; 198 Ind686, 154NE670; 199 Ind49, 155NE209; 200 Ind69, 155 NE817; 199 Ind317, 157NE657; 200 Ind397, 164NE27(1stcase); 200 Ind405, 164NE276 (affidavit for warrant not showing probable cause); 200 Ind457, 164NE314; Ind 165NE757; Ind 167NE 545; 89 IndA229, 166NE31; 204Ky740, 265SW280; 209Ky143, 272SW403 (affidavit for warrant insufficient); 212Ky 229, 278SW574; 214Ky84, 282SW762; 214Ky240, 282SW1097; 215Ky705, 286 SW1043; 216Ky270, 287SW726; 217 Ky169, 289SW212; 218Ky793, 292SW 319; 218Ky841, 292SW499; 219Ky482, 293SW984; 219Ky519, 293SW1072; 220 Ky656, 295SW987; 221Ky173, 298SW 382; 222Ky670, 1SW(2d)1072; 223Ky 381, 3SW(2d)770; 227Ky157, 12SW (2d)280; 229Ky522, 17SW(2d)453; 230 Ky767, 20SW(2d)730; 232Ky353, 23SW (2d)546; 233Ky184, 25SW(2d)77; 231 Mich661, 204NW726 (where affidavit was insufficient to authorize issuance of search warrant); 234Mich335, 207 NW818 (evidence seized under void search warrant); 235Mich646, 209NW 915; 236Mich75, 209NW944; 237Mich 215, 211NW742; 241Mich616, 217NW 797; 245Mich115, 222NW151; 245Mich 1, 222NW171; 140Miss184, 105S465, 41 ALR1129; 140Miss279, 105S520; 140 Miss737, 106S268; 141Miss615, 106S822 (evidence secured on search of defendant's home on warrant against another); 141Miss561, 106S827 (where search under void warrant issued for search of individual); 142Miss100, 107S376; 142Miss440, 107S666; 142Miss462; 107 S672 (liquor taken from bundle of clothes tied to saddle of defendant's horse on mere suspicion without warrant); Miss 107S676 (search made after return day of warrant); 142Miss882, 108S145; Miss 108S442; 144Miss405, 110S121; 144Miss551, 110S447; 145 Miss237, 110S513; 144Miss726, 111S 139; 146Miss677, 111S738; 148Miss 237, 114S343 (search without warrant); 148Miss673, 114S748; 148Miss739, 114S 825; 150Miss808, 117S115; 151Miss580, 118S413(2dcase); 152Miss209, 119S179; 155Miss390, 124S479(2dcase); 157Miss 600, 128S753; Miss 130S285; Miss 130 S696; Miss 130S741; 312Mo 202, 278 SW661; 317Mo 461, 296SW413; Mo 11 SW(2d)1044; 322Mo 69, 16SW(2d)30; 74Mont377, 240P984; 82Mont515, 268P 501 (search held not illegal); 53ND203, 205NW67 (dictum); 27 OhNPNS520 (motion to suppress); 32 OklCr203, 240 P1075; 32 OklCr274, 240P1078; 35 OklCr91, 249P354; 35 OklCr196, 249P 432; 37 OklCr396, 258P812; 37 OklCr 402, 258P814; 37 OklCr410, 259P152; OklCr 267P684; OklCr 267P1038; Okl Cr 270P1115; OklCr 272P391; OklCr 276P513; OklCr 279P361; OklCr 279P 365; OklCr 279P914; OklCr 279P917; OklCr 280P476; OklCr 280P628; OklCr 281P153(2dcase); OklCr 281P818(2d case); OklCr 282P898; OklCr 283P589 (1stcase) (affidavit, blank as to description of premises); OklCr 283P795 (search of smokehouse within curtilage of dwelling house without search warrant); OklCr 286P909 (motion to suppress evidence on ground of illegal search held properly overruled); OklCr 287P793; OklCr 287P805; OklCr 289P 782; OklCr 291P158; 14PaDist&Co 28; 154Tenn60, 289SW510; 155Tenn102, 291SW839; 155Tenn624, 299SW796 (evidence held inadmissible where affidavit insufficient); 159Tenn373, 19SW (2d)239; 159Tenn537, 20SW(2d)1045 (2dcase); 161Tenn71, 29SW(2d)247; 161Tenn306, 30SW(2d)273; 108TexCr 112, 299SW258; 108TexCr184, 299SW 642; 108TexCr174, 300SW61; 108 TexCr310, 300SW69; 108TexCr265, 300 SW936; 108TexCr528, 1SW(2d)638; 108TexCr636, 2SW(2d)253; 109TexCr1, 2SW(2d)451; 109TexCr11, 2SW(2d) 453; 109TexCr56, 2SW(2d)856 (search warrant based on insufficient affidavit); 109TexCr83, 3SW(2d)447; 109TexCr 147, 3SW(2d)448; 109TexCr233, 3SW (2d)1111; 109TexCr307, 4SW(2d)54; 109TexCr236, 4SW(2d)62; 109TexCr 275, 4SW(2d)548; 109TexCr402, 4SW (2d)966; 109TexCr408, 4SW(2d)978; 109TexCr544, 6SW(2d)117; 111TexCr 627, 13SW(2d)849; 111TexCr425, 14 SW(2d)847; 112TexCr261, 16SW(2d) 119; 112TexCr429, 17SW(2d)42(1st case); 113TexCr421, 21SW(2d)509; 113TexCr406, 21SW(2d)1061(1stcase); 113TexCr600, 21SW(2d)1066(1stcase); 113TexCr527, 22SW(2d)1069; TexCr 24SW(2d)844 (private residence); Tex Cr 24SW(2d)1096 (testimony of discoveries in house not mentioned in warrant held inadmissible); TexCr 25SW (2d)837; TexCr 25SW(2d)838; TexCr 25SW(2d)839; TexCr 26SW(2d)218 (consent to search waived warrant); TexCr 26SW(2d)273 (evidence held to show probable cause for search); TexCr 27SW(2d)180(1stcase); TexCr 27SW (2d)188; TexCr 27SW(2d)801 (search held not illegal); TexCr 27SW(2d)812; TexCr 27SW(2d)822; TexCr 28SW(2d) 160; TexCr 31SW(2d)646; TexCr 31 SW(2d)721(2dcase); 145Wash87, 258P 1030; Wash 288P923; 100WVa213, 130 SE451; 100WVa505, 130SE669 (void search warrant); 102WVa607, 135SE 908; 103WVa19, 136SE510; 103WVa 753, 138SE366; 104WVa578, 140SE533; 108WVa494, 151SE713; 188Wis275, 205 NW825; 194Wis229, 215NW896 (evidence obtained under illegal warrant); 196Wis99, 219NW281; 36Wyo 368, 255 P788; 38Wyo 455, 268P571; Wyo 286 P390. See also 274US559, 47SCt746, 71L ed1202; 212Ky229, 278SW574; 110 TexCr529, 7SW(2d)1083. But see 273 US95, 47SCt259, 71L ed556; 8F(2d) 630; 16F(2d)754; 19F(2d)934; 21 F(2d)830; 36F(2d)461; 113TexCr395, 22SW(2d)136. [c] 237Mich127, 211NW 44. [f] (1) 140Miss635, 105S759. Contra 106TexCr633, 294SE562. (2) In some jurisdictions motion to suppress evidence obtained by illegal search of defendant's residence made before testimony is offered is incorrect procedure, objection at time evidence is offered being suffi-

cient protection of defendant's rights. 106TexCr147, 291SW251. [g] (3) Defendant who consented to search under illegal warrant cannot object to introduction of evidence as obtained by unlawful search. 13 Ida314, 243P25. (4) Where accused pointed out property to sheriff after taking him to his house, sheriff's testimony is not inadmissible because he had no search warrant. 106TexCr153, 291SW237. (5) Consent by defendant to search of his premises obviates need for search warrant. 107TexCr24, 295SW290. (6) Evidence held to show consent. 107TexCr24, 295SW290. [i] 12F(2d)852. [j] (2) Evidence obtained by search without warrant is admissible where defendant consented to search. 233Mich119, 206NW988; 240Mich107, 214NW944. [k] (3) Evidence is admissible in federal court, though procured by state officer by invalid search and seizure. 18F(2d)525, 1F(2d)24. [m] 2Kky24; 2SW(2d)710. 240Mich35, 214NW944; 317Mo301, 295SW737; 37OklCr377, 253P16. 107TexCr24, 294SW50. 107TexCr279, 295SW603. 107TexCr62, 295SW52. [o] 15F(2d)196. [q] (1) 102TexCr65, 273SW261. (2) In such case evidence seized is admissible, though officer had no search warrant. 22Ariz121, 256P262. (3) Officer arresting defendant without warrant after seeing him break whisky bottles in his presence may testify to facts. 150Miss776, 116S884. [v] (2) Sheriff's erroneous return cannot affect admissibility of evidence. 124Or561, 254P1010. (3) Any omission made by police officer after search in method of returning search warrant cannot affect competency of evidence disclosed by search. 155Tenn26, 290SW1. [x] 74Mont428, 240P978; 37OklCr47, 256P79. [y] **Ground for exclusion of unlawfully seized evidence** is that government should not use knowledge wrongfully obtained against party wronged. 5F(2d)361. [z] **Affidavit inaccurate.** 210Ky610, 276SW537. [aa] **Where officer had reasonable ground for believing that felony was being committed in his presence,** articles obtained by search without warrant are admissible. 233Mich119, 206NW988; 107TexCr24, 291SW550. [bb] **Search of house sublet by defendant to others.** Evidence obtained by search of house sublet by defendant to others and which was not defendant's home is inadmissible against defendant because of invalidity of affidavit and search warrant. 234Mich202, 208NW15. [cc] **Failure of sheriff to report seizure of intoxicating liquor** and deliver it to commissioner of public safety as required by statute does not affect admissibility of liquor as evidence. 234Mich[illegible], 209NW110. [dd] **Evidence obtained by town marshal outside of corporate limits** without warrant is inadmissible where it appears that he was acting under color of office. 112Miss[illegible], 103S115. [ee] **Evidence obtained by officer under color of office** is charged with same infirmity as that illegally obtained by virtue of office. 112Miss[illegible], 103S115. [ff] **In Mississippi,** 140Miss184, 105S165, 114A.L.R.[illegible]; 141Miss192, 106S175. [gg] **Property searched must have been owned or in possession of accused** in order to render evidence obtained by search without warrant inadmissible. 18F(2d)[illegible]; 23F(2d)922 (evidence obtained by search of floor sublet by defendant to another is admissible); 44Ida656, 258P[illegible]; 112Miss 103S759. [hh] **Evidence obtained by illegal search of premises of third person** is admissible. 211Mich182, 179NW105. 307Mo411, 270SW282; 108TexCr112, 299SW[illegible]. [ii] **Success of motion to suppress** depends on question of legality of search or seizure and not on question of time when arrest was made. 317MoA548, 269SW115. [jj] **Evidence secured by arrest and search without warrant on mere suspicion** of unlawful transportation of intoxicating liquor should be suppressed on motion. 317MoA548, 269SW115. [kk] **Liquor obtained by state officers** under an unlawful search may be used as evidence in federal courts. 7F(2d)60; 7F(2d)65; 7F(2d)67; 7F(2d)887. [ll] **Evidence obtained by search of automobile based on bad reputation and suspicious conduct of defendant** should not be suppressed. 18F(2d)522. [mm] **To warrant exclusion of evidence wrongfully obtained** it was held defendant must show it belonged to him. 17F(2d)276. [nn] **Liquor seized without warrant** while being transported is admissible. 6F(2d)569. [oo] **Information acquired while unlawfully on premises** without search warrant in unsuccessful attempt to gain admittance is admissible. 6F(2d)569. [pp] **Evidence obtained by seizure of package carried by defendant during search of premises of another** is inadmissible where defendant was not first lawfully arrested. 143Miss772, 109S730. [qq] **Unlawful acts of officers executing lawful search warrant** does not make evidence obtained inadmissible. 17F(2d)811. [rr] **Narcotic order forms preserved for record and governmental inspection** in conformity to law are admissible, especially where voluntarily relinquished. 12F(2d)852. [ss] **Landlord who disclaimed ownership of interest** in property seized on rented premises cannot avail himself of insufficiency of warrant and return thereof. 15F(2d)179. [tt] **In Kentucky.**–212Ky229, 278SW574; (2) 212Ky245, 278SW620; (3) 219Ky498, 293SW981. [uu] **Where property discovered without search.**–37OklCr147, 256P70. [vv] **Accused cannot complain of illegal search of premises of stranger.**–35OklCr238, 250P142. [ww] **Where officers were admitted to premises without use of warrant** and evidence was in plain view, insufficiency of warrant does not affect admissibility of evidence. 138SC459, 136SE739. [xx] **Illegality of search warrant is immaterial** where officer saw liquor which was seized in possession of defendant. 141Wash627, 251P879. [yy] **Throwing flashlight on person** walking on street to see who he was is not unlawful search. 146Miss517, 112S686. [zz] **Where officer was on premises by virtue of valid search warrant,** articles discovered by use of his own senses and seized by him are not inadmissible because not mentioned in warrant. 124Or561, 254P1010. [aaa] **Material seized by officers lawfully in building to extinguish fire** is admissible, not having been obtained by illegal search. 237Mich247, 211NW650. [bbb] **Evidence held to have been obtained by reasonable and not unlawful search of premises.**–194F(2d)749; 197Ind212, 150NE315. [ccc] **Question as to legality of search and seizure** is for court rather than for jury. 237Mich127, 211NW44. [ddd] **Husband claiming no interest in liquor found on wife** cannot complain that her constitutional rights were invaded. 18F(2d)522. [eee] **Evidence seized in building on abandoned farm used by trespassers who did not reside there** is admissible against them. 24F(2d)701. [fff] **Evidence obtained by search of defendant's premises where he was lawfully arrested under warrant** is admissible. 224Ky117, 5SW(2d)887. [ggg] **Evidence obtained on search or seizure on information amounting to probable cause** is admissible, though search or seizure was without warrant. 149Miss219, 115S836. [hhh] **Rule not applicable** where defendant not owner or in possession of premises searched. 150Miss547, 117S511. [iii] **Where defendant admitted that he had whisky in his automobile,** whisky seized without search warrant is admissible in prosecution for illegal transportation. 317Mo304, 295SW737. [jjj] **Reasonableness of search** determines admissibility of testimony of officer searching defendant's automobile without warrant. 156Tenn303, 300SW4. [kkk] **Where affidavit for search warrant does not exhibit affiant's grounds of information and belief,** evidence obtained by search is inadmissible. 107TexCr551, 298SW596. [lll] **Evidence obtained by search of private dwelling** under warrant issued without affidavits of two credible persons, as required by statute, is inadmissible. 107TexCr553, 298SW604. [mmm] **Insufficient affidavit for search warrant.**–108TexCr351, 300SW639. [nnn] **Search of dwelling house partially devoted to business.**–108TexCr298, 18W(2d)288. [ooo] **Testimony that officer had search warrant** without proof that it was regular on its face and contained recitals showing compliance with statutory requirements is insufficient to authorize admission of evidence obtained by search of private residence. 108TexCr167, 18W(2d)300. [ppp] **Where evidence was dropped in officer's presence,** it is not obtained by unlawful search. 222MoA499, 280SW718. [qqq] **Evidence obtained on legal arrest and search without warrant** is admissible. 91PaSuper54. [rrr] **That officer thought defendant was under arrest** is not sufficient to show that arrest was made before search. Ind166NE430. [sss] **Where no record of examination of person signing complaint** on information and belief was made when search warrant was issued, record cannot be supplemented at trial so as to show probable cause. 196Wis469, 220NW650. [ttt] **Defective return of warrant** does not render evidence inadmissible. 152Miss844, 120S209. [uuu] **Probable cause for search without warrant** is not shown where officer does not disclose names of informants that defendant was handling whisky. 153Miss616, 121S278. [vvv] **Search warrant issued by unauthorized officer.**–Evidence obtained by search under search warrant issued by mayor, who was without authority because city had police justice, is inadmissible. 153Miss886, 122S199(1st case). [www] **Evidence obtained by search, with probable cause to believe** offense being committed, without warrant is admissible. 157Tenn199, 7SW(2d)805. [xxx] **Accused denying possession of automobile and intoxicating liquor therein** cannot complain of illegal search thereof without warrant. OklCr268P993. [yyy] **Truth of affidavit on which search warrant was issued** may not be questioned when evidence procured under warrant is offered. OklCr271P953. [zzz] **Motion to suppress evidence properly denied.**–Wash291P1098. [aaaa] **Evidence obtained by search without warrant, on premises in defendant's possession only for agricultural purposes,** is not illegally obtained, where operation of still could be heard and mash could be smelled for considerable distance. OklCr272P385. [bbbb] **Evidence procured on search under warrant issued on information, belief, and advice only** should be excluded on objection. OklCr273P288. [cccc] **Consent to search.**–OklCr274P694; OklCr274P890; 110TexCr274, 8SW(2d)133; 39Wyo299, 270P1065. [dddd] **Evidence voluntarily shown to officer by defendant's wife** when she summoned officer to home to protect her from husband is admissible. 159Tenn215, 17SW(2d)916. [eeee] **Evidence obtained by search of automobile without warrant of arrest or search** warrant or knowledge of officer that it contained intoxicating liquor should be excluded on timely objection. Okl274P890. [ffff] **Evidence obtained by search of automobile after legal arrest of defendant** is admissible, though search was made several hours after arrest. OklCr276P494. [gggg] **Burden of showing invalidity of search under search warrant** rests on defendant. OklCr277P947. [hhhh] **Evidence obtained on lawful arrest without warrant** is admissible, though officer had no search warrant. 152Miss298, 120S170; [iiii] **Evidence secured by search of automobile for liquor without warrant** is admissible where probable cause for search existed. 27F(2d)502. [jjjj] **Waiver of constitutional rights not shown.**–27F(2d)521. [kkkk] **Evidence obtained under valid search warrant** is admissible. Mo18SW(2d)841. [llll] **Insufficiency of application for search warrant to show probable cause** does not require reversal of conviction based on evidence obtained on search under warrant where evidence found established

probable cause. **Mo** 1SW(2d)827. [mmmm] **Motion to quash or suppress.**–24F(2d)802; 25F(2d)231; 26F(2d)769; 27F(2d)892; **DC** 26F(2d)993; 245Mich197, 222NW173; 151Miss549, 118S625; 321Mo1237, 14SW(2d)624; **OklCr** 277P950(2dcase). [nnnn] **Evidence held inadmissible to show lack of probable cause for arrest.**–**Ind** 168NE22. [oooo] **Evidence procured under search warrant directed to any officer of county** is admissible under statute providing that process shall be good though not directed to any officer. 155Miss574, 124S789. [pppp] **Truth of facts positively stated in affidavit for search warrant is not issue** in case in which evidence procured by warrant is offered. **OklCr** 282P176. [qqqq] **Where affidavit states facts sufficient to authorize warrant,** evidence obtained by search under warrant is admissible. **OklCr** 282P178(1stcase). [rrrr] Motion to suppress evidence obtained by search warrant should be overruled. **OklCr** 282P182. [ssss] **Showing as to probable cause cannot be questioned** after warrant has been executed, and evidence is admissible where affidavit and warrant are sufficient on face. **OklCr** 282P688. [tttt] **Evidence held sufficient** to show probable cause for search. **TexCr** 21SW(2d)514. [uuuu] **Where neither affidavit for search warrant nor date thereof was shown,** refusal to exclude evidence obtained under warrant was not error. 35F(2d)605. [vvvv] **Where search warrant is lost,** state must show existence of valid warrant by parol evidence. **TexCr** 21SW(2d)514 (evidence held insufficient). [wwww] **Whether return was made on search warrant** held immaterial in determining admissibility of evidence as to what officers found. 113TexCr442, 21SW(2d)739. [xxxx] **Determination of validity of search warrant** and admissibility of evidence obtained thereunder must be had in proceeding, independent of issue of guilt on motion to quash warrant and suppress evidence. **Mo** 23SW(2d)1. [yyyy] **Motion to suppress evidence properly overruled.**–**Mo** 23SW(2d)11 (liquor found in defendant's car after arrest on probable cause). [zzzz] **Evidence admissible** where affidavit for warrant sufficient on its face. **OklCr** 283P1023(1stcase). [aaaaa] **Truth of affidavit on which search warrant was issued** is not issue on trial of case in which evidence procured by such warrant is offered. **OklCr** 283P803. [bbbbb] **Evidence may be suppressed** if obtained by illegal search though property seized possessed in violation of law. **Wyo** 286P390. [ccccc] **Where affidavit shows probable cause on face,** burden is on defendant to show lack of probable cause in proceeding to quash warrant and suppress evidence. 40F(2d)309. [ddddd] **Burden of establishing illegality of search** rests on defendant objecting to introduction of evidence secured under search warrant. **OklCr** 287P808. [eeeee] **Evidence obtained by search warrant not running in name of state** as required by constitution and statute should be excluded on timely objection. **OklCr** 287P769; **OklCr** 287P781. [fffff] **Officer may testify as to things found in stolen automobile in defendant's possession when arrested.**–**OklCr** 287P842. [ggggg] **Truth of affidavit on which warrant was issued,** positively sworn to, is not issue in trial in which evidence procured under warrant is offered. **OklCr** 287P735. [hhhhh] **Refusing to permit defendant to go behind affidavit** for search warrant is proper. **TexCr** 27SW(2d)540(1stcase). [iiiii] **Defendant may not impeach affidavit** for search warrant to show lack of personal knowledge by one of searching officers. **TexCr** 27SW(2d)545. [jjjjj] **Evidence obtained by search with defendant's permission** is competent although officer had no search warrant. **Ida** 288P154. [kkkkk] **Search under search warrant is presumed legal.**–**OklCr** 287P808. [lllll] **Evidence procured by search of premises not described in search warrant** is inadmissible. **OklCr** 289P800 (1stcase). [mmmmm] **Where affidavit and search warrant are sufficient on face.**–**OklCr** 277P608; **OklCr** 277P946; **OklCr** 279P366; **OklCr** 281P322(2dcase); **OklCr** 286P806. [nnnnn] **Consent or waiver of production of search warrant obtained through deceit or coercion** is not voluntary and evidence obtained thereunder is inadmissible. 235Ky265, 30SW(2d)968. [ooooo] **Evidence obtained by federal officers** (1) by seizure unlawful under federal laws must be suppressed in prosecution in state court. **Wyo** 292P2 (intoxicating liquor obtained by federal officers under federal warrant). (2) Evidence obtained by such officers under warrants valid under federal laws must be held valid in state courts. **Wyo** 292P2. [ppppp] **Evidence is admissible against codefendants** whose constitutional rights were not infringed. 42F(2d)562.

571–93½–New. Druggist by furnishing bottles for liquor illegally seized does not waive his constitutional right to have use of liquor as evidence suppressed. 11F(2d)892.

571–94 275US106, 48SCt77, 72Led186; 16F(2d)62; 17F(2d)373; 235Mich646, 209NW915; 307Mo411, 270SW282; 311Mo391, 279SW23; 76Mont66, 244P882; 15OhA432; 24OhNPNS1; 36OklCr36, 251P614; 153Tenn162, 281SW936 (proceedings for restoration are not to determine property rights but to suppress evidence illegally obtained); 105TexCr322, 288SW467. [a] 28Hawaii173. See also 74Mont377, 240P984. [b] (3) In some jurisdictions all objections to validity of search warrant must be made by motion to suppress before trial. 235Mich360, 209NW84. [c] 23F(2d)905. [e] 237Mich127, 211NW44. [f] (1) 76Mont66, 244P882. (5) On motion to suppress evidence, all questions of validity of search should be determined. 235Mich198, 209NW74. (6) Where validity of affidavit for warrant to search private residence for intoxicating liquor is questioned, proper remedy is by motion to suppress, whether alleged defect is one of law or of fact. **Mich** 209NW939. (7) Motion to suppress evidence obtained by search warrant based on affidavit which is sufficient as matter of law is properly overruled in absence of evidence contradicting it. **Mich** 209NW939. [f] (8) Right of state to introduce evidence obtained under alleged void search warrant must be determined on motion to suppress. 77Mont8, 249P574. [h] **Mich** 209NW939. [j] (2) Motion to suppress must be made before trial. 237Mich127, 211NW44. [n] **Court may consider legality of search** on objection at trial, though no preliminary motion to suppress was made. 5F(2d)622. [o] **Failure of court to rule on motion to suppress** does not deprive defendant of right to object to admission of evidence where defendant's counsel was not entirely to blame for failure to procure ruling. 234Mich209, 207NW801. [p] **In absence of motion to suppress,** evidence procured by illegal search is admissible. 307Mo411, 270SW282. [q] **One moving to suppress evidence** as illegally obtained has burden of proving illegality. 73Mont535, 237P495. [r] **Where motion timely.**–74Mont377, 240P984. [s] **Facts stated in affidavit and complaint upon which search warrant was issued** are assumed to be true for purpose of motion to suppress evidence. 74Mont377, 240P984. [t] **In Tennessee.**–153Tenn162, 281SW936. [u] **Effect of disposition of motion to suppress.**–Where motion to suppress evidence because obtained by illegal search is made and disposed of before trial, further questioning on subject is foreclosed. 237Mich127, 211NW44. [v] **Motion to suppress evidence is not proper practice** under procedure in some jurisdictions for searching automobile without warrant. 106TexCr130, 290SW766. [w] **Evidence procured under warrant altered by deputy sheriff** should be suppressed on motion. **OklCr** 287P1044. [x] **Motions to suppress.**–**Ind** 165NE757. [y] **On motion to suppress evidence procured under search warrant,** question of truthfulness of facts stated in affidavit on which warrant was issued is not in issue. **OklCr** 283P263(2dcase). [z] **Defendant's remedy is by application to court before trial** for order suppressing evidence and directing return of property seized. **Ill** 172NE29.

571–95½–New. That evidence was obtained wrongfully against a third person is not a valid objection. 18F(2d)522.

571–95⅓–New. Evidence secured is competent where the seizure was made by state or city officers. 9F(2d)251.

571–95¼–New. Evidence seized on a search warrant is not inadmissible because the warrant was issued for the sole purpose of securing the evidence. 200Iowa669, 202NW753.

571–95⅙–New. Failure of the officer executing a search warrant to receipt for the property seized does not affect the question of the admissibility of the property as evidence. 200Iowa669, 202NW753.

571–95⅛–New. Where a motion to suppress evidence based on the invalidity of a search warrant under which it was obtained is denied, the question of the legality of the search warrant should not again be gone into on the trial. 234Mich686, 209NW157.

571–95½–New. It is within the discretion of the trial court to permit a motion to suppress to be made during the trial and to hear and determine it where defendant's counsel first learned of an illegal search after the commencement of the trial. 235Mich588, 209NW927.

571–95¼–New. An abuse of discretion by the trial court in denying such motion is ground for reversal. 235Mich588, 209NW927.

571–95⅓–New. Such motion is properly denied where defendant had knowledge of such illegal search the day following the search. 235Mich588, 209NW927.

571–95⅒–New. Where defendant makes no attempt between date of arrest and trial to suppress evidence seized by officer on arrest without a warrant, he is in no position to object to its introduction on the ground that it was unlawfully obtained. 75Mont61, 243P810 (bundle of opium which fell from, or was thrown by, defendant to floor and seized).

571–95 1/11–New. Where the court erroneously denies a motion to suppress evidence obtained by illegal search, its admission in evidence over objection constitutes reversible error. 76Mont66, 244P882.

571–95 1/12–New. A statute authorizing the giving of receipts by an officer taking intoxicating liquors into his possession is of no benefit to a person defending against a violation of the liquor law. 101TexCr68, 274SW133.

571–95 1/13–New. Use of evidence obtained by tapping private telephone wires is not objectionable as compelling defendant to be witness against himself. 277US438, 48SCt564, 72Led944, 66ALR376.

571–95 1/14–New. Evidence seized by police officers and turned over to federal officers taking no part in the seizure has been held admissible. 14F(2d)35.

571–95 1/15–New. A motion to set aside an order overruling a motion to suppress evidence because of improper jurat is properly denied where made for the purpose of correcting the jurat and the imperfect affidavit had been on file several months. 197Ind539, 151NE427.

571–95 1/16–New. Evidence of the discovery of a still and mash on a second search under the same warrant is incompetent. 197Ind539, 151NE427.

571–95 1/17–New. Evidence obtained by illegal search without warrant or subsequent search under warrant issued upon affidavit of officer making illegal search should be excluded. 221Ky535, 299SW168.

571–95 1/18–New. Defendant in a prosecution for violation of the Prohibition Act may go behind the search warrant to show knowledge of affiant of facts in the affidavit was obtained by illegal search. 221Ky535, 299SW168.

571–95 1/19–New. Where a search of a vehicle in which intoxicating liquor was found was made without a warrant, it is error for the court to refuse to permit defendant to have the officer name

his informant. 149Miss251, 115S427.

571-95½0-New. Testimony of officer inducing crime has been held without probative force. 46Philippine857.

571-95½1-New. Evidence that defendant pulled out a pistol and fired at the officers making the search without warrant has been held not obtained as a result of an illegal search and therefore is admissible. 156Tenn116, 299SW797.

571-95½2-New. Where a violation of the law is disclosed by federal officers acting alone under federal authority, their authority to make the search is not a proper inquiry in a state court. 155Tenn628, 299SW800.

571-95½3-New. But where state officers participate in the search, the state court should require production of the warrant or a certified copy thereof. 155 Tenn628, 299SW800.

571-95½4-New. 108TexCr566, 2SW(2d) 227.

571-95½5-New. Failure of officer to comply with statute as to disposition of seized property is not ground for excluding officer's testimony. 108TexCr 672, 2SW(2d)223.

571-95½6-New. Defendant cannot complain of the use of evidence obtained by the search of a house of another. 108 TexCr672. 2SW(2d)223.

571-95½7-New. Production of search warrant, regular on its face, justifies receipt of evidence resulting from search, unless warrant was issued on insufficient evidence or was otherwise void. 109TexCr6, 2SW(2d)436.

571-95½8-New. Where search warrant was not produced or its loss or contents proved, evidence obtained thereunder is inadmissible in liquor prosecution. 109TexCr6, 2SW(2d)436.

571-95½9-New. Accused is entitled to introduce evidence to show that evidence obtained by search was procured on premises other than those described in affidavit and search warrant. OklCr 287 P791.

571-95½0-New. Defendant attacking affidavit for search warrant on motion to suppress evidence must exhibit affidavit. OklCr 288P994.

571-95½1-New. Motion to suppress on ground that evidence was secured by illegal search warrant held properly denied under evidence. OklCr 289P1117 (2dcase).

571-97 37F(2d)341; 21AlaA468, 109S 387; 22AlaA39, 111S767; 161La518, 109 S51; Mass 172NE97; 148Miss250, 114S 480, 481 [citCJ]; MoA 285SW547; OklCr 285P987; 156SC509, 153SE480; 101TexCr651, 277SW116; 102TexCr385, 278SW430 (dictum); 104TexCr495, 283 SW497; 112TexCr446, 16SW(2d)1091; TexCr 28SW(2d)160; Wash 290P824.

571-99 100TexCr241, 272SW788. But see 112TexCr137, 15SW(2d)642.

571-5 86Colo35, 278P594, 65ALR1260.

571-6 See also 176Ark756, 4SW(2d)12.

571-6½-New. Evidence is inadmissible on behalf of one party which the other would not be allowed to rebut. 103 TexCr160, 280SW219.

571-7 82NH518, 136A358. See also 128 Kan564, 279P19.

571-10½-New. Testimony that defendant said in officer's presence that he had conversation held to make officer's testimony as to conversation competent. 257Mass436, 154NE271.

571-11 39F(2d)524; 20AlaA610, 104S 556; 21AlaA348, 108S262; 21AlaA455, 109S288; 21AlaA459, 109S294; 21AlaA 468, 109S337; 22AlaA34, 111S765; 172 Ark156, 287SW1026; 195Cal584, 234P 374; 79CalA127, 249P60 (where conversation is collateral or immaterial); CalA 281P443; 161Ga332, 131SE80; 227 Ky349, 13SW(2d)263(2dcase); 156Md 240, 144A252; 239Mich123, 214NW231; 148Miss250, 114S480, 481 [citCJ]; Mo 270SW378; 316Mo195, 289SW604; 123 Or173, 261P411; Nebr 227NW446(2d case); 294Pa544, 144A542; 143SC318, 141SE559; 99TexCr504, 270SW555; 99 TexCr589, 271SW385; 100TexCr364, 272SW780 (whole of examining trial testimony and written statement of witness are admissible in behalf of state where defense had introduced excerpts to impeach); 102TexCr385, 278SW430 (dictum); 103TexCr372, 280SW802; 103TexCr603, 281SW874; 103TexCr521, 281SW1050; 105TexCr19, 284SW955; 107TexCr115, 295SW190; 108TexCr77, 299SW259; 109TexCr335, 4SW(2d)555; 111TexCr32, 10SW(2d)996; 111TexCr 48, 10SW(2d)997; TexCr 26SW(2d)220; 146Wash221, 262P622. But see AlaA 129S708. [a] 102TexCr385; 278SW430. [b] **Complete hearsay story not admissible** because a part of it was recited. 128Me500, 148A747. [c] **Admission of defendant's statement to witness** does not render admissible subsequent explanatory statement made by defendant after witness left. SC 155SE409.

572-12 21AlaA455, 109S288; 217Ky 565, 290SW325; 227Ky439, 13SW(2d) 244; 173Minn473, 217NW598; Mo 270 SW378; 111TexCr21, 10SW(2d)991.

572-13 173Minn598, 218NW117.

572-14 123 Or595, 263P60; 99TexCr 589, 271SW385; 101TexCr96, 274SW 628.

572-15 123 Or173, 261P411; 123 Or595, 263P60; 103TexCr242, 280SW819; 111 TexCr476, 14SW(2d)842.

572-15½-New. or serve some useful purpose in the case. 123 Or595, 263P60.

572-16 164La813, 114S696; 316Mo 195, 289SW604; 123 Or595, 263P60.

572-17 123 Or595, 263P60.

572-18 5F(2d)592.

572-21 22F(2d)67; 177Ark355, 6SW (2d)299; 162La266, 110S417; 100 TexCr122, 272SW131; 106TexCr450, 292SW904; TexCr 27SW(2d)808.

572-23 105TexCr161, 287SW247.

572-27½-New. It is proper to refuse to permit accused to be cross-examined as to why he did not produce certain witnesses where his motion to take their depositions was denied. 71CalA251, 234 P920.

572-27¼-New. So, where defendant is not shown to have prevented attendance of state's witnesses, the state may not introduce evidence showing they could not be found after diligent search. 109 TexCr560, 5SW(2d)994.

572-30 214Ala675, 108S612; Sask [1929] 1DomLR152.

572-32 23AlaA139, 122S300; 20AlaA 629, 104S674; 21AlaA191, 106S622; 21 AlaA261, 107S226; 21AlaA491, 109S521; 21AlaA501, 109S561; 21AlaA642, 111S 320; 22AlaA93, 112S806; 22AlaA300, 115S149, 151 [citCJ]; 22AlaA440, 116S 511; 23AlaA51, 121S698; 180Ark267, 21SW(2d)172; 164La423, 114S83; 316 Mo 122, 289SW904; 318Mo 772, 300SW 807 (coffin); 120 Or573, 253P7; 100 TexCr530, 271SW620; 100TexCr218, 272SW452 (in prosecution for possession of liquor); 108TexCr199, 299SW 646; TexCr 9SW(2d)259; 110TexCr 250, 8SW(2d)127; 110TexCr460, 9SW (2d)259; TexCr 20SW(2d)1063; TexCr 27SW(2d)177; 187Wis448, 204NW486, 490, 40ALR945 [perCrownhart,J,citCJ]. [c] **Statements part of res gestæ** are admissible, though made while accused not under arrest. 106TexCr335, 272SW244.

573-33 105TexCr147, 287SW269; 187 Wis448, 204NW486, 40ALR945.

573-36 21AlaA54, 105S708; 22AlaA65, 112S178; 23AlaA26, 119S863(1stcase); 20AlaA629, 104S674; 20AlaA632, 104S 681; 21AlaA165, 106S348; 21AlaA251, 107S42; 21AlaA270, 108S617; 21AlaA 405, 108S641; 21AlaA436, 109S176; 21 AlaA566, 110S61; 21AlaA585, 111S43; 21AlaA597, 110S562; 21AlaA642, 111S 320; 22AlaA173, 114S69; 22AlaA300, 115S149, 151 [citCJ]; 22AlaA508, 117S 492; 23AlaA274, 124S123(2dcase); 23 AlaA493, 127S678; Cal 257P65 (pieces of blue print found near body of victim of homicide); 166Gal20, 142SE666; 235Ky710, 32SW(2d)43; 231Ky325, 31 SW(2d)390(2dcase); 158La791, 104S 717; 161La704, 109S394; 162La266, 110S417; 163La512, 112S400; 164La 423, 114S83; 171Minn158, 213NW735; Mo 256SW787; 316Mo122, 289SW904; 78Mont560, 254P858; OklCr 287P826; 120 Or573, 253P7; 99TexCr529, 270SW 552; 103TexCr288, 280SW789; 103 TexCr364, 280SW804; 109TexCr218, 3 SW(2d)816; 109TexCr345, 4SW(2d)542 (finding of blood under deceased's head); 111TexCr154, 11SW(2d)794(2d case); TexCr 20SW(2d)424; 141Wash 429, 251P855; 152Wash686, 279P82. [b] 218Ala40, 117S457; 143Va510, 129 SE360. [c] (2) Presence of empty bottles smelling of whisky is res gestæ in prosecution for possessing whisky. 22 Ala653, 119S596(1stcase). [d] (3) Competent to describe premises on day of sale, and in so doing it was relevant to show presence of goats there and to describe them. 23AlaA95, 121S447(2d case). [n] **Circumstances held admissible as res gestæ.**–213Ala541, 105S677. [o] **In trial for transporting spirituous liquor,** evidence of arrest of others than defendant, and search of latter's car when they drove up in it to place where automobile, driven by defendant, had stopped a few minutes before, has been held admissible as part of res gestæ. 228Ky587, 15SW(2d)467.

573-37 21AlaA456, 109S293; 23AlaA 560, 129S296; 179Ark274, 15SW(2d)405 (2dcase); 47 Ida162, 272P1010; 331 Ill 489, 163NE357; 161La704, 109S394; 169La135, 124S670(2dcase); 75Mont350, 243P587. [e] 110TexCr116, 7SW(2d) 958.

573-38 31F(2d)499; 20AlaA610, 104S 556; 201Cal618, 258P607 (depends on character of crime); 158La1011, 105S 46; 34NM65, 277P22; OklCr 287P826; 105TexCr463, 289SW38; 110TexCr116, 7SW(2d)958.

573-39 158La1011, 105S46 (no limits of time within which can be arbitrarily confined); 105TexCr463, 289SW38.

573-40 205 Iowa1024, 219NW41; 117 Nebr601, 221NW683; 137SC145, 134SE 885.

573-42 161La704, 109S394. [b] **Principal fact itself must be admissible** in order to permit introduction of res gestæ. 158La791, 104S717.

573-43 32NM500, 258P1009.

574-44 21AlaA566, 110S61; 23AlaA51, 121S698; 179Ark274, 15SW(2d)405(2d case); 75Mont350, 243P587; TexCr 26 SW(2d)236(2dcase) (statement half hour later excluded).

574-45 20AlaA610, 104S556; 158La 1011, 105S46 (events speaking for themselves through spontaneous words and acts of participants); 168La584, 122S 858; 75Mont350, 243P587; 32NM500, 258P1009; 100TexCr530, 271SW620; 105TexCr463, 289SW38. [a] **That statement is made in answer to question** will not alone take it out of rule of res gestæ. TexCr 29SW(2d)379.

574-46 164La423, 114S83 (motive); 75 Mont350, 243P587; 32NM500, 258P 1009; 100TexCr205, 272SW465. [a] **Where principal act is admitted in evidence,** statements of third person explaining and motivating act are admissible. 158La791, 104S717.

574-47 201Cal618, 258P607; 49RI397, 143A604. See also 158La1011, 105S 46.

574-48 20AlaA610, 104S556; 158La 1011, 105S46.

574-49 106TexCr628, 294SW589.

574-50 169La947, 126S434.

574-52 20AlaA610, 104S556; 99TexCr 529, 270SW552.

574-52 But see 205 Iowa1024, 219NW 41.

574-53 219Ala670, 123S50; 231Ky337, 21SW(2d)441; 105TexCr463, 289SW38; TexCr 20SW(2d)765.

574-54 [a] **Defendant drunk twenty-four hours after homicide** precludes admissibility of statements without showing continuation of drunkenness to time of homicide. 215Ala106, 109S846.

574-54½-New. Where testimony is otherwise admissible, it is immaterial whether it was part of res gestæ. 105 TexCr426, 289SW49.

574-54½-New. That statements are made in answer to questions does not of itself prevent them from being res gestæ. 103Tex674, 282SW235.

574-54¼-New. Declarant making a res gestæ statement, not being regarded as a witness, is not therefore subject to impeachment as in ordinary cases. 111 TexCr172, 11SW(2d)798.

574-56 7F(2d)818; 8F(2d)832; 13F (2d)849; 15F(2d)965; 213Ala541, 105S 677; 22AlaA353, 115S698; 196Cal154, 236P135; 82CalA98, 255P261; 3Del 489, 139A254; 90Fla659, 106S479; 165 Ga145, 139SE861; 170Ga859, 154SE 344; 326 Ill 640, 158NE403; 327 Ill 463, 158NE716; 230Ky815, 20SW(2d)

998; 216Ky110, 287SW363; 158La927, 105S16 (assault on third person which was beginning of trouble which led to homicide); 163La512, 112S400; 167La 967, 120S614; 168La95, 121S586; 229 Mich172, 200NW967; 142Miss676, 109S 710; 32Mo417, 8SW(2d)29; Mo 22SW (2d)784 (autopsies on bodies of others shot by defendant at same time as killing charged in indictment); Mo 29SW (2d)74; Mo 30SW(2d)763; 78Mont560, 254P858; 32NM83, 251P384; 49ND 228, 191NW345; OklCr 269P385; Okl Cr 275P383(2dcase); OklCr 278P663; OklCr 279P515; OklCr 279P964; 34 PortoRico 619; 52SD566, 219NW252; 101TexCr401, 276SW242; 103TexCr 418, 280SW1064; 103TexCr393, 281SW 571; 105TexCr101, 287SW53; 108TexCr 566, 28W(2d)227; 109TexCr32, 28W (2d)846; TexCr 7SW(2d)1078; 112 TexCr381, 16SW(2d)1070(2dcase); Tex Cr 20SW(2d)1051; TexCr 20SW(2d) 1057(1stcase); 113TexCr331, 21SW(2d) 302; TexCr 21SW(2d)680; TexCr 23 SW(2d)372(2dcase); 143Va554, 130SE 416; 145Wash4, 258P845; 36Wyo 368, 255P788.

575–57 13F(2d)849; 31F(2d)499; 68 CalA259, 228P376; 178Minn589, 228 NW164; 315Mo 199, 285SW984; 103 TexCr418, 280SW1064; 104TexCr473, 284SW950; 145Wash4, 258P845.

575–58 22AlaA311, 115S289; 218Ky 435, 291SW734; 230Ky738, 20SW(2d) 748; Mo 256SW787; 75Mont350, 243P 587 (prosecution of larceny for cattle).

575–61 31F(2d)499; 23AlaA54, 120S 465(1stcase); 220Ala39, 123S236; 21 AlaA191, 106S622; 21AlaA237, 107S28; 21AlaA266, 107S328; 21AlaA289, 107S 791; 21AlaA646, 111S318; 22AlaA113, 113S316; 22AlaA128, 113S467; 22AlaA 141, 113S478; 22AlaA382, 115S856; 22AlaA436, 116S506; 22AlaA566, 118S 325 [certiorari den 118S326]; 23AlaA 51, 121S698; 23AlaA140, 122S301(1st case); AlaA 129S720; 75CalA229, 242 P508; 162Ga777, 135SE187; 163Ga561, 136SE530; 159La820, 106S317; 164La 423, 114S83; 144Miss872, 110S690; Mo 296SW128 (shots fired in course of holdup); 193NC796, 138SE166; 49ND228, 191NW345; 147SC480, 145SE285; 101 TexCr106, 274SW603; 101TexCr617, 276SW926; 102TexCr511, 278SW151; 106TexCr90, 291SW238; 107TexCr276, 296SW520; 108TexCr77, 299SW259; 109TexCr177, 3SW(2d)435 (attempt to suppress evidence of crime); 110TexCr 612, 9SW(2d)1040; 145Wash638, 261P 388 [citCJ] (intoxicated condition on arrest). [a] 162Ga777, 135SE187. [b] **Evidence that accused had in his possession unusual amount of sugar at time still parts were found on his premises** is admissible as part of res gestæ. 21 AlaA31, 104S871.

575–62 21AlaA200, 106S697; 21AlaA 214, 107S29; 21AlaA227, 107S37; 21 AlaA299, 107S730; 21AlaA597, 110S 562; 22AlaA338, 115S695 (intoxication); 23AlaA359, 125S688 (conversation with witness instant before difficulty); AlaA 129S720 (immediately before and at time of arrest); 72CalA226, 237P66; 28Hawaii350; 165La718, 115S914; 171 Minn158, 213NW735; 321Mo 1163, 14 SW(2d)617; 100TexCr654, 274SW145; 101TexCr545, 276SW263; 102TexCr385, 278SW430; 102TexCr456, 278SW203; 102TexCr511, 278SW451; 102TexCr534, 278SW852; 104TexCr15, 282SW580; 104TexCr100, 283SW508; 104TexCr238, 283SW505; 104TexCr308, 283SW817; 104TexCr442, 284SW554; 104TexCr 480, 284SW592; 105TexCr51, 285SW 321; 106TexCr95, 291SW233; 106Tex Cr167, 291SW249; 107TexCr151, 295 SW1098; 107TexCr196, 296SW523; 107 TexCr236, 296SW543; 107TexCr383, 296SW545; 107TexCr596, 298SW578; 108TexCr556, 1SW(2d)903; 108TexCr 650, 2SW(2d)272; 110TexCr156, 8SW (2d)678; 113TexCr36, 18SW(2d)1074; TexCr 20SW(2d)787; TexCr 20SW(2d) 1060(2dcase); TexCr 29SW(2d)379. [d] 21AlaA255, 107S230. [e] **Statements that he owned liquor made by accused** when arrested are admissible as part of res gestæ in prosecution for violating prohibition law. 102TexCr 456, 278SW203.

575–63 214Ala117, 106S609; 21AlaA 430, 109S175; 72CalA226, 237P66; 166 Ga120, 142SE666; 28Hawaii350; 335 Ill 596, 167NE786; 230Ky250, 19SW(2d) 218; 313Mo 71, 281SW35; 294Pa190, 144A127 (self-incriminatory note); 100 TexCr530, 271SW620; 100TexCr654, 274 SW145; 103TexCr420, 281SW210; 104 TexCr100, 283SW508; 104TexCr238, 283 SW505; 104TexCr480, 284SW592; 105 TexCr374, 288SW230; 106TexCr167, 291 SW249; 106TexCr633, 294SW562; 107 TexCr465, 296SW892; 107TexCr559, 298 SW569; 108TexCr106, 299SW430; 109 TexCr142, 3SW(2d)453 (thirty minutes after); 110TexCr460, 9SW(2d)259; 112 TexCr87, 13SW(2d)893; 113TexCr104, 18SW(2d)1082; 113TexCr347, 21SW(2d) 522. TexCr 31SW(2d)818. See also 21 AlaA188, 106S510. [a] 101TexCr545, 276SW263; 105TexCr590, 289SW691. [c] 110TexCr116, 7SW(2d)958; TexCr 9 SW(2d)259. [d] **Statements of defendant after offense held inadmissible** as not of res gestæ. 23AlaA359, 125S688.

575–64 21AlaA601, 110S913; 72CalA 226, 237P66; 214Ky620, 283SW958; 100 TexCr654, 274SW145; 104TexCr442, 284 SW554; 104TexCr480, 284SW592; 105 TexCr369, 288SW227; 108TexCr561, 2 SW(2d)233; 108TexCr611, 2SW(2d)259; 110TexCr33, 7SW(2d)557; TexCr 20SW (2d)765; TexCr 29SW(2d)782.

575–65 212Ala484, 103S458 (statement some minutes after shooting excluded); 22AlaA57, 112S181; 23AlaA584, 129S 492 (holding evidence of defendant's drunkenness five or six hours after crime, is too remote); 168Ark1145, 273 SW19; 93Fla1076, 113S121; 169Ga142, 149SE887; 161La187, 108S410; 104 TexCr302, 283SW836; 104TexCr442, 284 SW554; 106TexCr167, 291SW249; 106 TexCr357, 292SW880; 110TexCr460, 9 SW(2d)259; 98Vt466, 129A306; 100Vt 259, 136A835. [b] 101TexCr19, 274SW 616 (fifteen minutes). [e] **Evidence of flight from scene of crime** four hours thereafter held not admissible as part of res gestæ. 107TexCr70, 294SW857.

576–66 165La270, 115S484; 110TexCr 410, 10SW(2d)551; TexCr 20SW(2d) 794. [a] 111TexCr372, 13SW(2d)100.

576–68½–New. That accused's statement was in answer to a question does not preclude it from taking the nature of res gestæ. 103TexCr285, 280SW581.

576–68¾–New. Evidence as to conversation between accused and prisoner whom he permitted to escape, before escape, held admissible as part of res gestæ. 159La820, 106S317.

576–69 41F(2d)215; 20AlaA412, 103S 694; 22AlaA640, 119S243(1stcase); 100 TexCr442, 273SW845; 103TexCr285, 280 SW581; 106TexCr450, 292SW904; 111 TexCr372, 13SW(2d)100; 112TexCr482, 17SW(2d)1057; TexCr 24SW(2d)404; Vt 147A682.

576–70 20AlaA412, 103S694 (failure of defendant while going to scene of homicide to refer to trouble with deceased is inadmissible).

576–72 23AlaA428, 126S420(3dcase); 194Cal 1, 227P156; 335 Ill 270, 166NE 924; 337 Ill 259, 169NE206; 231Mich 474, 204NW97; 100TexCr487, 271SW 917; 101TexCr525, 276SW281; 102 TexCr385, 278SW430.

576–73 21AlaA191, 106S622; 21AlaA 307, 107S720; 21AlaA430, 109S175; 21 AlaA517, 110S167; 22AlaA113, 113S316; 22AlaA172, 113S643; 23AlaA273, 124S 125(1stcase); 23AlaA357, 127S799; 162 Ga777, 135SE187; 313Mo 71, 281SW35; 99TexCr612, 270SW1027; 100TexCr281, 272SW784 (at time of arrest); 100TexCr 395, 653, 273SW568 (instruction of evidence coincident with arrest); 100TexCr 451, 273SW578; 100TexCr442, 273SW 845; 101TexCr9, 274SW156; 101TexCr 545, 276SW263 (statement as to ownership of mash); 101TexCr602, 276SW 707; 101TexCr617, 276SW926; 101 TexCr628, 276SW928; 102TexCr385, 278 SW430; 102TexCr511, 278SW451; 102 TexCr534, 278SW852; 103TexCr285, 280 SW581; 103TexCr410, 281SW210; 103 TexCr611, 281SW853; 104TexCr100, 283 SW508; 104TexCr238, 283SW505; 105 TexCr51, 285SW321; 106TexCr335, 292 SW244; 106TexCr500, 293SW1112; 107 TexCr13, 294SW592; 107TexCr79, 294 SW860; 109TexCr548, 5SW(2d)986; 110 TexCr77, 7SW(2d)555; 110TexCr278, 8 SW(2d)167; 110TexCr439, 10SW(2d) 384; 110TexCr410, 10SW(2d)551; 111 TexCr240, 13SW(2d)111 (offer to bribe officer); 111TexCr644, 13SW(2d)831(2d case); 111TexCr482, 14SW(2d)278; 112 TexCr355, 15SW(2d)643; 112TexCr337, 17SW(2d)48(1stcase); 112TexCr491, 17 SW(2d)829(2dcase); 113TexCr36, 18SW (2d)1074; TexCr 20SW(2d)762; TexCr 20SW(2d)770; TexCr 24SW(2d)1096; TexCr 25SW(2d)856; TexCr 26SW(2d) 211; TexCr 26SW(2d)655; TexCr 27 SW(2d)799; TexCr 29SW(2d)379. [a] **Statements made at another time** and unconnected with statement at time of arrest are inadmissible. 234Ky45, 27 SW(2d)410.

576–73½–New. Statements made to arresting officers need not comply with the formalities required in case of confessions. 103TexCr272, 280SW827.

576–74 22AlaA382, 115S856.

576–77 216Ala151, 112S761; 21AlaA 211, 106S891; 21AlaA214, 107S29; 21 AlaA378, 108S646; 164Ga250, 138SE 153; 168Ga530, 148SE386(2dcase); 222 Ky130, 300SW330; 137SC145, 134SE 885; 106TexCr628, 294SW589; TexCr 26SW(2d)220 (court may refuse to limit declarations to specific time); TexCr 27 SW(2d)164. [a] **Statement referring to defendant as "he" held not inadmissible** because not mentioning name of defendant. 169Ga613, 151SE17.

577–79 231Ky337, 21SW(2d)441; 169 La947, 126S434; 32NM500, 258P1009; 133SC491, 131SE603; TexCr 25SW(2d) 833 (statements while unconscious); Tex Cr 27SW(2d)1100.

577–82 21AlaA227, 107S37; 166Ga512, 143SE896; 166Ga758, 144SE301; Mo 24SW(2d)993; 104TexCr649, 285SW 621; 154Wash667, 283P195.

577–83 203 Iowa929, 210NW465; 234 Ky268, 27SW(2d)946; 133SC491, 131 SE603.

577–84 203 Iowa929, 210NW465.

577–85 Ala 130S175; Ark 30SW(2d) 865; 164Ga250, 138SE153; 326 Ill 104, 157NE76; 204 Iowa1360, 217NW236; 230Ky250, 19SW(2d)218; 230Ky327, 19 SW(2d)964; 234Ky729, 29SW(2d)11; 235Ky19, 29SW(2d)597; 235Ky670, 32 SW(2d)29; 158La1011, 105S46 (statement of deceased to witness five minutes after shooting while lying at place where he had been shot is admissible as part of res gestæ); 159La779, 106S302; 251 Mich322, 232NW381; 173Minn305, 217 NW120; 173Minn410, 217NW373; Minn 230NW639; 145Miss227, 110S500; Mo 22SW(2d)639; 80Mont181, 260P138; Nebr 228NW859; 33NM334, 266P917; 36 OklCr44, 253P1027; OklCr 287P782; OklCr 287P826; 34PortoRico 375; 102 TexCr389, 278SW199; 105TexCr147, 287SW269; 106TexCr642, 294SW557; 107TexCr666, 298SW591; 110TexCr250, 8SW(2d)127; 111TexCr539, 15SW(2d) 638; 112TexCr422, 16SW(2d)1068; 112 TexCr599, 18SW(2d)627; 113TexCr223, 18SW(2d)656; TexCr 23SW(2d)376(2d case); TexCr 26SW(2d)1072; TexCr 27SW(2d)1102; TexCr 32SW(2d)463; Utah 276P166; 144Wash367, 258P20; 107WVa216, 148SE4; 107WVa418, 148 SE131. [a] (2) Evidence admissible as part of res gestæ, though statement of deceased was made wholly or in part in answer to questions. 102TexCr389, 278 SW199. [c] (1) 86CalA298, 260P901 (declaration held inadmissible). (4) Question, not shown to be binding, put forty minutes after fatal shooting, answer held competent as part of res gestæ. 101TexCr86, 273SW598.

578–86 12F(2d)904.

578–88 165La842, 116S206; 150Va571, 142SE397.

578–90 111TexCr172, 11SW(2d)798.

578–92 23AlaA484, 127S262.

579–94 220Ala39, 123S236; 21AlaA214, 107S29; 174Ark899, 298SW349; 164 Ga250, 138SE153; 164La423, 114S83; 312Mo 15, 278SW742; 80Mont181, 260 P138; 100TexCr438, 273SW586; 106 TexCr628, 294SW589.

579–95 22AlaA141, 113S478; 169La707, 125S862; 29PortoRico 856 (rate of speed at which defendant drove car be-

fore reaching place of occurrence for which prosecuted for negligent manslaughter held inadmissible).

579–98 3F(2d)211; 23F(2d)472; 22Ala 638, 119S26(1stcase); 23AlaA348, 128 S359(2dcase); 20AlaA610, 104S556; 20 AlaA637, 104S686; 21AlaA214, 107S29; 21AlaA278, 107S734; 21AlaA307, 107S 720; 21AlaA459, 109S368; 22AlaA79, 112S535; 70CalA531, 233P980 (part of material conversation in which defendant joined); 77CalA472, 246P1085; CalA 290P1054; 40GaA725, 151SE410(2d case); 216Ky376, 287SW933; 235Ky78, 29SW(2d)629; 158La791, 104S717 (statement may be testified to by any competent witness who heard it); 162 La500, 110S733; 163La112, 111S617; 321Mo 870, 12SW(2d)469; Mo 24SW(2d) 993; MoA 274SW853; 103NJL88, 134 A611; 51Philippine 825; 100TexCr442, 273SW845; 102TexCr444, 278SW446; 103TexCr518, 281SW859; 103TexCr560, 281SW863; 103TexCr449, 281SW863; 103TexCr508, 281SW1054; 104TexCr 391, 283SW813; 105TexCr458, 288SW 1071; 105TexCr590, 289SW691; 106 TexCr127, 290SW1100; 106TexCr628, 294SW589; 107TexCr307, 296SW582; 108TexCr672, 2SW(2d)223; 111TexCr 262, 12SW(2d)563(2dcase); 112TexCr 291, 16SW(2d)238; 113TexCr291, 21 SW(2d)524; TexCr 24SW(2d)1096; Tex Cr 31SW(2d)1077(2dcase); 141Wash 429, 251P855; Wash 287P57. [a] **Statement part of res gestæ of search.**–158La 791, 104S717. [b] **Enumeration of goods missing,** by store owner, as evidence in burglary prosecution. 102TexCr444, 278SW446. [c] **Statement affecting or promoting act.**–Statement of by-stander affecting, or promoting doing of, some important act is admissible. 158La791, 104S717.

579–99 23AlaA107, 121S453; 21AlaA 191,106S622; 20AlaA585, 104S345; 21 AlaA214, 107S29; 21AlaA278, 107S734; 21AlaA300, 107S731; 172Ark156, 287 SW1026; 163Ga561, 136SE530; 47 Ida 760, 278P773; 163La112, 111S617; 165 La622, 115S802; 101TexCr462, 276SW 256; 103TexCr318, 280SW202; 104Tex Cr210, 283SW850; 106TexCr628, 294SW 589; TexCr 25SW(2d)875; 141Wash 429, 251P855.

579–1 214Ala2, 106S617; 21AlaA460, 109S294; 22AlaA289, 115S66; 23AlaA 82, 121S503; 194Cal 1, 227P156; 201 Cal 618, 258P607 (cries, shrieks, and groans after collapse of grand stand); 93Fla1076, 113S121; 36GaA666, 137SE 793; 202 Iowa1377, 212NW63; 203 Iowa251, 212NW475; 161La704, 109S 394; 170La398, 127S881; Mo 23SW(2d) 1; 156SC509, 153SE480; 100TexCr205, 272SW465 (statement by wife of deceased that she had told him not to go there, without giving reason); 105Tex Cr463, 289SW38.

580–2 214Ala2, 106S617; 203 Iowa251, 212NW475; 163La563, 112S486; Mo 22 SW(2d)774; 160Tenn221, 22SW(2d) 225; 111TexCr640, 13SW(2d)832.

580–5 221AppDiv331, 223NYS339.

580–6 19F(2d)421; 215Ala27, 109S161; 21AlaA191, 106S622; 23AlaA372, 125 S790(2dcase); 3Del 399, 138A640; 37 GaA386, 140SE415; 166Minn371, 208 NW129; 189NC766, 128SE354; 193NC 236, 136SE730; 33 OhA338, 169NE588; 109TexCr131, 3SW(2d)435; 143Wash 313, 255P382. But see MoA 17SW(2d) 353 (evidence as to character properly excluded before reputation has been attacked).

580–7 193NC236, 136SE730; 195NC47, 141SE468. But see 100TexCr376, 272SW 791.

580–10 16F(2d)568; 79CalA413, 249P 832; 40GaA489, 150SE432(2dcase); 229 Ky412, 17SW(2d)267; 193NC236, 136 SE730; 195NC47, 141SE468; 39 OklA CR221; 133SC491, 131SE603; 112Tex Cr337, 17SW(2d)48(1stcase). [c] **But state may not use bad reputation to** prove substance of the issue. Wash 286 P67.

580–11 195NC47, 141SE468; OklCr 279 P908(2dcase). [a] **Witness cannot be asked as to his desire to leave impression** as to guilt of accused because of certain affiliations. 102TexCr506, 278 SW843.

581–14 166Ga10, 142SE160; 233Mich 185, 206NW568; Minn 233NW307; 82 NH220, 131A598; NH 152A276; 226 AppDiv104, 234NYS567; 193NC236, 136 SE730; 194NC795, 139SE601; OklCr 287P1109; 102TexCr434, 278SW432; 107TexCr585, 298SW587; 112TexCr199, 15SW(2d)1050. [c] **Accused may put character in issue by statements to jury.**–33GaA827, 128SE217. [d] **Evidence held to put character in issue.**–147Va663, 137SE476.

581–15 14F(2d)281; 215Ala472, 110S 812; 21AlaA626, 111S195; 169Ark31, 272SW847; 76CalA558, 244P1086; 85 CalA769, 260P397; DC 41F(2d)979; 36 GaA127, 135SE492; 324 Ill 289, 155NE 271; 198 Ind170, 152NE721; 199 Ind 160, 155NE824; 216Ky98, 287SW235; 234Ky308, 28SW(2d)11; 167La324, 119 S65; 170La803, 129S209(1stcase); 233 Mich185, 206NW568; 316Mo 581, 292 SW49; MoA 281SW105; 82NH220, 131 A598; 254NY192, 172NE466; 226 AppDiv104, 234NYS567; 193NC236, 136 SE730; 193NC581, 137SE657; 194NC 795, 139SE601; 195NC47, 141SE468; 119 OhSt231, 163NE28; OhA 173NE 201; OklCr 279P700; OklCr 288P999; 89 OklACR221; 91PaSuper518; 46Philippine502; 133SC491, 131SE603; 102 TexCr434, 278SW432; 107TexCr585, 298SW587; 110TexCr413, 10SW(2d) 112; 111TexCr456, 15SW(2d)9; 147Va 663, 137SE476; 101WVa632, 133SE371; 107WVa490, 148SE843. But see 111 TexCr435, 14SW(2d)849(2dcase). [e] **Evidence of defendant's character is inadmissible** as part of state's case in chief. 102TexCr434, 278SW432. [f] **Statement to jury** can put accused's character in issue. 41GaA571, 153SE 618.

581–15½–New. Material and relevant evidence is admissible, although it may tend to put defendant's character in issue. 162Ga208, 132SE911.

581–18 33 OhA338, 169NE588.

581–18½–New. Where defendant does not elect to bring his good character in issue and his character is not attacked by the state, evidence of his reputation for truth and veracity is inadmissible. 101WVa160, 132SE366.

581–18½–New. Admissibility of evidence of prior reputation rests in court's discretion. 147Va660, 137SE492.

581–18¼–New. Rules relative to admissibility of reputation evidence held not applied as strictly in cases tried to court as in jury cases. 160La435, 107 S296.

581–19 335 Ill 604, 167NE797 (must specify time); NJ 148A725.

581–20 215Ala472, 110S812; 23AlaA 460, 126S890(2dcase).

581–21 5F(2d)319; 215Ala472, 110S 812; 226Ky36, 10SW(2d)471; 316Mo 581, 292SW49. See also 199Cal 155, 248 P504.

581–23 86Colo 35, 278P594, 65ALR1260 (hearing defendant's life story within court's discretion); 197 Ind448, 151NE 329.

582–24 169Ark31, 272SW847; 72CalA 226, 237P66, 71 [citCJ]; 332 Ill 113, 163 NE421; 89 IndA629, 167NE549; 166 Minn371, 208NW129; 49Nev386, 248P 48, 52 [citCJ]; 97PaSuper489. [a] (2) Further testimony of witness ignorant of defendant's reputation for truth, honesty and integrity, but testifying that on his business relations it was good held properly excluded. 72CalA226, 237 P66. [d] **Peace and quietude** signifies public quiet, order, and security, public tranquility, and obedience to law. However, witness who has testified as to character of accused for peace and quietude may be examined as to particular breaches of law. 168Ark1087, 273 SW374. [e] **Excluding defendant's reputation as peaceable** and law-abiding citizen is proper in incest prosecution. Md 150A278.

582–25 169Ark31, 272SW847.

582–26 Ark 30SW(2d)851; 335 Ill 604, 167NE797; 224Ky203, 5SW(2d)1067.

582–28½–New. Defendant in advancing good character is not limited to good repute but may show as a fact that he possesses a certain disposition. 173 Minn410, 217NW373.

582–29 23F(2d)756, 757 [citCJ]; 316 Mo 86, 289SW847; 117 Or466, 242P440; 104TexCr456, 284SW578; 106TexCr90, 291SW238; 142Wash7, 252P108 (dictum).

582–30 332 Ill 113, 163NE421; 195NC 47, 141SE468; 104TexCr669, 284SW965.

582–31 42F(2d)793; 23AlaA92, 121S 447(1stcase); 21AlaA29, 104S870; 21 AlaA409, 108S658; 22AlaA288, 115S67; 168Ark1087, 273SW374; 72CalA226, 237P66, 71 [citCJ]; 3Del 399, 138A640; 3Del 407, 138A643; 197 Ind448, 151NE 329; 316Mo 86, 289SW847; 82NH220, 131A598; NH 152A276; NJ 148A725; 226AppDiv104, 234NYS567; 193NC236, 136SE730; 195NC47, 141SE468; 117 Or466, 242P440; 104TexCr456, 284SW 578; 104TexCr669, 284SW965; 106 TexCr90, 291SW238; 107TexCr460, 296 SW883; 109TexCr378, 4SW(2d)973; TexCr 25SW(2d)840 (no proof of particular acts).

583–32 72CalA226, 237P66, 71 [citCJ]; 243NY134, 152NE700.

583–33 42F(2d)793; 21AlaA409, 108S 658; 22AlaA39, 111S767; 23AlaA460, 126S890(2dcase); 72CalA226, 237P66, 71 [citCJ]; 93Fla372, 112S73; 335 Ill 604, 167NE797; 243NY134, 138, 152NE 700 [citCJ]; 33 OhA338, 169NE588. [a] **Determining factor in admitting character evidence** is whether community is large enough to become acquainted with character and form general opinion of it. 243NY134, 152NE 700.

583–34 79CalA413, 249P832 (where he did business); 243NY134, 152NE700.

583–37 23AlaA268, 123S292(1stcase).

583–39 18F(2d)778; 116Nebr73, 215 NW789; 116Nebr563, 218NW416; 104 TexCr456, 284SW578; 104TexCr669, 284SW965; 113TexCr457, 21SW(2d) 1047 (fact that witness had never heard it discussed held not justification for exclusion of positive testimony as to knowledge of defendant's reputation). See also 221AppDiv331, 223NYS339.

583–41 MoA 286SW143; 104TexCr456, 284SW578.

583–43 117 Or466, 242P440; 106TexCr 450, 292SW904.

583–46 Ala 130S175; 145Va818, 133SE 683.

583–47 13F(2d)506; 103NJL18, 134A 886, 888 [citCJ]; 147Va617, 136SE658. See also 22AlaA143, 113S465.

583–48½–New. But where defendant, while testifying, has admitted the commission of a prior offense, the jury may consider this in weighing his testimony. 27F(2d)854.

583–50 71CalA402, 235P467.

584–54 103TexCr160, 280SW219.

584–55 6F(2d)121 (character witness cannot be asked on cross-examination whether he had heard that defendant had been frequently arrested for violations of National Prohibition Act).

584–59 21AlaA29, 104S870; 3Del 407, 138A643; 325 Ill 313, 156NE310; 163 La563, 112S486; Mo 24SW(2d)985; 221 AppDiv331, 223NYS339; 120 Or160, 249 P363 [citCJ]. [a] **Such evidence does not include practice or habit of violating prohibition law,** but is confined to specific traits such as honesty, violence, or chastity involved in charge. 21AlaA 29, 104S870. [b] **Witness as to negative testimony** as to reputation must be shown duly qualified to speak on that subject. 120 Or160, 249P363.

584–60 163La563, 112S486.

584–61½–New. Fact that witness had never heard defendant's reputation discussed is some evidence of his good reputation in his community. 199Cal 155, 248P504.

584–66 84Mont474, 276P436.

584–67 176Ark916, 5SW(2d) 946 (does not augment presumption of innocence); 251Mich592, 232NW357.

584–68 243NY134, 152NE700; 189NC 766, 128SE354; 191NC387, 132SE6; 5 PaDist&Co 287.

584–69 7F(2d)458; 28F(2d)150; 21 AlaA191, 106S622; 339 Ill 267, 171NE 144; 206 Iowa816, 221NW521; 92Pa Super165; 5PaDist&Co 287.

584–70 21AlaA191, 106S622; 23AlaA85, 121S4; 23AlaA403, 126S183(3dcase); 80 CalA328, 251P823.

584–72 31F(2d)19 (reputation must be shown by fair preponderance of evidence). [a] **When case not doubtful,**

proof of character is not important. 319 Ill 306, 150NE16.

585-77 21AlaA191, 106S622; 203 Iowa 1008, 213NW603.

585-78 217Ala322, 116S705; 21AlaA 191, 106S622; 22AlaA444, 116S706, 707 [citCJ]; 35Ariz432, 280P672; 47 Ida 457, 276P39, 68ALR1061; 203 Iowa 1008, 213NW603; 243NY134, 152NE 700; 189NC766, 128SE354; 5PaDist&Co 287; 111TexCr447, 14SW(2d)852; 100 WVa57, 130SE91 (evidence of good character is admissible if intent is in issue).

585-79 23F(2d)180; 23AlaA85, 121S4; 166La924, 118S85 (such testimony is unavailing as against positive evidence of guilt); 243NY134, 152NE700.

586-83½-New. The fact that a person's habits of character are such that he would be apt to do an act is not competent evidence that he did it. 50Nev 271, 257P619.

586-84 209Ky787, 273SW515; 195NC 47, 141SE468; 149Va447, 141SE118.

586-87 195NC497, 142SE588; 197NC 657, 150SE194; 198NC167, 150SE881 (1stcase).

586-87½-New. Where the state rebuts defendant's evidence of good character by showing offenses in the juvenile court, it is not error to exclude evidence of defendant's age at the time, and of the trivial character of the offenses. 149Va447, 141SE118.

586-91 198 Ind170, 152NE721; 170La 755, 129S154.

586-95 335 Ill 432, 167NE10 (where prosecution dismissed as to codefendant).

586-98 7F(2d)263; 14F(2d)281; 15F (2d)945; 17F(2d)86 [citCJ]; 20F(2d) 736; 21F(2d)511; 24F(2d)625; 27F (2d)310; 33F(2d)699; 33F(2d)820; 36 F(2d)444; 42F(2d)40; 44F(2d)163; 213Ala541, 105S677; 215Ala635, 112S 212; 21AlaA173, 106S206; 21AlaA423, 109S125; 21AlaA637, 111S314; 22AlaA 85, 112S541; 22AlaA255, 114S479; 22 AlaA300, 115S149; 23AlaA144, 122S301 (2dcase); 23AlaA376, 125S791(2dcase); 23AlaA437, 126S607(1stcase); 23AlaA 452, 126S887; 29Ariz247, 240P863; 32 Ariz182, 256P1048; 33Ariz51, 262P14; Ariz 283P711; Ariz 285P274; 170Ark 602, 280SW636; 196Cal 154, 236P135; 72CalA169, 236P979; 72CalA160, 236P 987; 76CalA178, 244P106; 76CalA558, 244P1086; 76CalA688, 245P781; 77 CalA377, 246P818; 78CalA415, 248P 693; 78CalA476, 248P981; 80CalA81, 251P688; 85CalA402, 259P458; 85CalA 580, 259P998; 86CalA497, 260P887; 88 CalA558, 263P857; 91CalA150, 266P 860; CalA 286P711; CalA 289P937; 87 Colo 307, 287P651; CalA 290P1054; 3 Del 140, 132A219; 90Fla659, 106S479; 95Fla42, 115S519, 527 [citCJ]; 95Fla 597, 116S476; 160Ga271, 127SE733; 162Ga267, 134SE36; 165Ga145, 139SE 861; 166Ga10, 142SE160; 167Ga325, 145SE449; 170Ga859, 154SE344; 36 GaA281, 136SE323; 27Hawaii693, 695 [citCJ]; 41 Ida212, 238P312; 43 Ida 745, 254P525; 45 Ida768, 265P668; 317 Ill 551, 148NE265; 319 Ill 359, 150 NE263; 321 Ill 11, 151NE676; 323 Ill 567, 154NE418; 324 Ill 55, 154NE430; 324 Ill 224, 154NE907; 324 Ill 289, 155 NE271; 324 Ill 484, 155NE329; 326 Ill 11, 156NE772; 327 Ill 463, 158NE716; 329 Ill 104, 160NE233; 334 Ill 324, 166 NE129; 335 Ill 270, 166NE924; 338 Ill 33, 169NE816; IndA 166NE603 (evidence of other crimes never admissible to prove corpus delicti); 200 Iowa317, 204NW272; 204 Iowa981, 216NW67; 122Kan552, 253P221; 217Ky565, 290 SW325; 222Ky546, 1SW(2d)961; 225 Ky671, 9SW(2d)1018; 232Ky205, 22SW (2d)615; 232Ky613, 24SW(2d)269; 235Ky710, 32SW(2d)43; 165La341, 115S613; 167La635, 120S33; 126Me136, 136A808; Md 129A275; 152Md89, 136 A46, 47 [quotCJ]; 238Mich171, 213NW 159; 171Minn137, 213NW552; 173Minn 473, 217NW598, 601 [citCJ]; Minn 231 NW225; 144Miss442, 110S114; 150 Miss159, 116S533; 154Miss653, 122S 757, 63ALR1319; Mo 285SW426, 428 [cit CJ]; MoA 282SW106; 74Mont201, 239 P1002; 79Mont343, 256P380; 113Nebr 517, 204NW74, 206NW153; 114Nebr 257, 207NW207; 116Nebr563, 218NW 416; 82NH220, 131A598; 105NJL352, 144A612; 34NM423, 282P870; 213App Div638, 219NYS73; 135Misc842, 241 NYS641; 226AppDiv676, 233NYS367; 226AppDiv104, 234NYS567; 189NC695, 128SE1 (dictum); 191NC231, 131SE 573; 52ND478, 203NW679; 56ND357, 217NW531; 119 OhSt285, 164NE51, 63 ALR595; 28 OhA248, 162NE647; 39 OklCr264, 264P643; OklCr 272P490(2d case); OklCr 279P700; OklCr 285P 142; 116 Or635, 242P603; 284Pa105, 130A403 (dictum); 285Pa232, 132A168; 295Pa190, 145A85; 88PaSuper171; 93 PaSuper365; 9PaDist&Co 699; 33Porto Rico 461; 47RI 341, 133A236; 49RI 305, 142A543; 143SC63, 141SE165; 54SD536, 223NW733; 54SD552, 223NW943; 99 TexCr634, 271SW384; 100TexCr199, 272SW471; 100TexCr566, 272SW202; 101TexCr401, 276SW242; 101Tex Cr479, 276SW268; 101TexCr580, 276SW435; 101TexCr663; 276SW 431; 102TexCr492, 278SW440; 103 TexCr465, 281SW1058; 103TexCr 671, 282SW237; 104TexCr473, 284SW 950; 106TexCr442, 292SW882; 108 TexCr106, 299SW430; 108TexCr544, 2 SW(2d)238; 109TexCr193, 4SW(2d)68; 109TexCr468, 5SW(2d)775; 111TexCr 456, 15SW(2d)9; TexCr 27SW(2d)229; TexCr 28SW(2d)550(2dcase); Utah 284 P1006; Vt 145A260; 147Va663, 137SE 476; 144Wash446, 258P508; 145Wash 4, 258P845; 150Wash466, 273P742; Wash 286P844; Wash 287P16; 187Wis 122, 203NW749; 192Wis379, 212NW 879; 33Wyo 360, 239P952; 36Wyo 368, 255P788. [e] (1) 72CalA169, 236P979. [i] **Rule extends to asking question** tending to show commission of other offense and is not confined to answering it. 85PaSuper305. [j] **Exclusion of evidence of acquittal of similar offense,** where no such testimony was elicited by state, and trial was subsequent to offense in issue, is not error. 102TexCr 492, 278SW440. [k] **Evidence held incompetent.**–215AppDiv282, 213NYS532 (no inference that this meat caused death of six dogs). [l] **Officer may testify that he found defendant in prison** and brought him back to trial where he does not intimate arrest for another crime. 324 Ill 289, 155NE271. [m] **Evidence held not showing separate offenses.**–Testimony of conversation with defendant referring to previous complaints against defendant is not objectionable as showing separate offenses where nothing is said as to nature of alleged former case. 327 Ill 305, 158NE 729. [n] **Applicability of statute** becoming effective after commission of crime but prior to indictment as regards admissibility of other like crimes. OhA 173NE206.

587-99 21AlaA637, 111S314.

587-99½-New. Rule extends to disposition to commit crime charged. 72CalA 169, 236P979.

587-99¼-New. The better rule is that an unproved charge does not tend to prove a person's guilt or affect his credibility. 5F(2d)9 (in subsequent prosecution).

587-99¼-New. Evidence that accused had been charged with the commission of another crime is not admissible against him. 20F(2d)736.

587-99½-New. Testimony tending to show a willingness to commit other distinct crimes is not admissible. 327 Ill 162, 158NE462.

587-1 32Ariz182, 256P1048; 90Fla659, 106S479; 315Mo 1285, 292SW430, 433 [quotCJ]; 191NC231, 131SE573; 294Pa 144, 143A904. See also 104TexCr522, 286SW209.

587-2 122Kan552, 253P221, 224 [quot CJ]; 315Mo 1285, 292SW430, 433 [quot CJ]; 113Nebr517, 204NW74, 206NW 153; 105WVa598, 143SE352, 353 [cit CJ].

587-3 122Kan552, 253P221, 224 [quot CJ]; 315Mo 1285, 292SW430, 433 [quot CJ].

587-4 122Kan552, 253P221, 224 [quot CJ]; 171Minn137, 213NW552; 315Mo 1285, 292SW430, 433 [quotCJ].

588-5 36GaA281, 136SE323; 122Kan 552, 253P221, 224 [quotCJ]; 315Mo 1285, 292SW430, 433 [quotCJ]; 113 Nebr517, 204NW74, 206NW153.

588-6 95Fla597, 116S476, 477 [citCJ]; 36GaA281, 136SE323; 122Kan552, 253 P221, 224 [quotCJ]; 315Mo 1285, 292 SW430, 433 [quotCJ]; Mo 22SW(2d) 635; 113Nebr517, 204NW74, 206NW 153; 116Nebr493, 218NW137; 101Tex Cr401, 276SW242.

588-7 31F(2d)732; 33F(2d)265; 338 Ill 56, 170NE14; NH 146A870; 297Pa 382, 147A79; 113TexCr207, 19SW(2d) 322.

588-8 7F(2d)867; 8F(2d)919; 13F(2d) 849; 15F(2d)991; 19F(2d)896; 20 F(2d)752; 22F(2d)1; 28F(2d)730; 31 F(2d)13; 31F(2d)426; 33F(2d)382; 35F(2d)344; 35F(2d)433; 36F(2d)444; 38F(2d)573; Ariz 285P274; Ark 30SW (2d)830; 195Cal 623, 234P890; 196Cal 154, 236P135; 201Cal 474, 259P47; 70 CalA531, 233P980; 72CalA160, 236P 987; 74CalA178, 240P502; 77CalA60, 245P811; 79CalA328, 249P231; 82CalA 98, 255P261; 85CalA514, 259P982; 86 CalA441, 260P886 (evidence of adultery with prosecuting witness in prosecution for pimping); 86CalA791, 261P526; 91CalA731, 267P570; 95CalA60, 272P 349; CalA 289P937; 87Colo 507, 289P 1081; 3Del 140, 132A219; 165Ga145, 139SE861; 167Ga325, 145SE449; 35 GaA500, 133SE877; 48 Ida760, 285P 467; 319 Ill 359, 150NE263; 323 Ill 129, 153NE596; 324 Ill 375, 155NE363; 327 Ill 463, 158NE716; 338 Ill 636, 170NE 750; Ill 173NE155; 200 Iowa1225, 206 NW250; Iowa 228NW22; Iowa 230NW 425; 119Kan649, 240P568; 122Kan552, 253P221, 224 [quotCJ]; 124Kan245, 259P691; 125Kan173, 263P1059; 126 Kan200, 268P98; 232Ky205, 22SW(2d) 615; 161La827, 109S505; 167La635, 120S33; 170La203, 127S601; 170La954, 129S541 (immaterial that defendant is under indictment for other crime); 152 Md89, 136A46; Md 150A278; 255Mass 304, 151NE297, 47ALR962; 235Mich 698, 209NW917; 172Minn106, 214NW 782; 179Minn301, 229NW99; 154Miss 653, 122S757, 63ALR1319; Mo 285SW 426, 428 [citCJ]; 316Mo602, 292SW 36; Mo 296SW423; Mo 1SW(2d)830; Mo 30SW(2d)132; Mo 30SW(2d)750 (other crime not being mentioned); Mo 30SW(2d)763; MoA 277SW354; 76 Mont421, 246P959; 78Mont560, 254P 858; NJSup 134A110; NJSup 134A175; 216AppDiv404, 215NYS301; 56ND357, 217NW531; 51ND445, 200NW20; 52 ND478, 203NW679; 21 OhA26, 152NE 788; 26 OhA53, 159NE834; 28 OhA248, 162NE647; OhA 173NE206; 26 OhNP NS406; 39 OklCr264, 264P643; OklCr 269P385; OklCr 271P172; OklCr 274P 696; OklCr 275P383(2dcase); OklCr 278P404; OklCr 279P964; OklCr 285P 142; 116 Or635, 242P603; 120 Or508, 252P951; 123 Or595, 263P60; 126 Or 118, 268P1016; 294Pa144, 143A904; 295Pa190, 145A85; 298Pa63, 148A45; 85PaSuper305 (natural development of facts rather than attempt to prove other offense); 85PaSuper142; 137SC75, 134SE514; 156SC363, 153SE340; 156SC 509, 153SE480; 54SD552, 223NW943; 102TexCr360, 278SW223; 103TexCr311, 280SW817; 103TexCr671, 282SW237; 104TexCr358, 284SW556; 105TexCr276, 288SW441; 108TexCr590, 2SW(2d)229; 109TexCr142, 3SW(2d)453; 109TexCr 195, 3SW(2d)811; 110TexCr509, 9SW (2d)265(2dcase); 111TexCr352, 12SW (2d)1035; 111TexCr372, 13SW(2d)100; 112TexCr459, 17SW(2d)42(2dcase); 113 TexCr628, 23SW(2d)354; TexCr 27SW (2d)222(2dcase); TexCr 31SW(2d)435; 147Va663, 137SE476; 142Wash7, 252P 108; 146Wash221, 262P622; WVa 155 SE669; 198Wis21, 222NW824. [k] **Part of general conversation between witness and one of defendants relating to other crimes** committed by such defendant is admissible where it tended to prove existence of conspiracy between defendants to commit offense of which they were subsequently convicted. 79CalA 328, 249P231. [l] **Grade of offense.**–Minn 231NW225.

588-9 7F(2d)594; 19F(2d)896; 21F (2d)511; 33F(2d)382; 30Ariz466, 248 P39, 41 [citCJ]; 33Ariz51, 262P14; 72 CalA160, 236P987; 80CalA151, 251P335; 90Fla659, 106S479; 46 Ida765, 271P322;

48 Ida760, 285P467; 199 Ind746, 161NE 8; 213Ky221, 280SW970; 222Ky630, 1 SW(2d)1045; 216AppDiv404, 215NYS 301; 191NC231, 131SE573; OkCr 274 P696; 120 Or508, 252P951; 88PaSuper 171; 108TexCr150, 300SW57; 110TexCr 206, 78W(2d)1086; Utah 266P716, 717 [citCJ]; 142Wash7, 252P108. [a] **That defendant had forty minutes previously drawn pistol on another held inadmissible.** 108TexCr150, 300SW57.

588–9½–New. Evidence of assault and robbery immediately following murder is admissible as showing that accused desired to secure funds for flight. 284 Pa105, 130A403.

588–9¾–New. The exception to the general rule also renders the evidence admissible in negation of the likelihood of the crime having been committed as a result of inadvertence, accident, or mistake. 76Mont421, 246P959.

588–9¼–New. Evidence which tends to prove any material fact relevant to the issue on trial. 324 Ill 375, 155NE363.

589–10 29Ariz247, 240P863; 31Ariz 357, 253P629; 32Ariz182, 256P1048; Ariz 285P274; 169Ark356, 275SW700; 79CalA357, 249P541; DC 25F(2d)546; 90Fla659, 106S479; 168Ga753, 149SE 46; 319 Ill 359, 150NE263; 324 Ill 311, 155NE321; 324 Ill 484, 155NE329; 330 Ill 532, 162NE196; Ill 173NE155; 200 Iowa317, 204NW272; 126Kan565, 268 P845; 210Ky33, 275SW369; 227Ky439, 13SW(2d)244; 228Ky234, 14SW(2d) 759; 228Ky254, 14SW(2d)773; 232Ky 613, 24SW(2d)269; 154Miss190, 122S 391; 154Miss653, 122S757, 63ALR1319; 76Mont421, 246P959; 78Mont560, 254 P858; 216AppDiv23, 214NYS517 (evidence must reasonably tend to establish identity); 189NC695, 128SE1; 191NC 231, 131SE573; OklCr 292P873; 126 Or651, 269P869; 285Pa232, 132A168; 137SC75, 134SE514; 101TexCr401, 276 SW242; 103TexCr344, 280SW795; 103 TexCr671, 282SW237; 105TexCr22, 285 SW616; 105TexCr276, 288SW441; 108 TexCr590, 2SW(2d)229; 112TexCr385, 16SW(2d)1096(2dcase). See also 163 Ga684, 137SE31. But see 317Mo 759, 297SW10.

589–11 338 Ill 636, 170NE750; 103 TexCr465, 281SW1058; 104TexCr473, 284SW950. See also 132SC362, 128SE 709. [a] **Prior sale of whisky six months back** is too remote as evidence of identity in prosecution for larceny of whisky. 216AppDiv23, 214NYS517.

589–13 15F(2d)965; 22F(2d)1; 34 F(2d)1; 42F(2d)103; 32Ariz182, 256P 1048; Ariz 285P274; 196Cal154, 236P 135; 68CalA457, 229P974; 77CalA783, 247P535; 82CalA98, 255P261; CalA 290P470; 95Fla42, 115S519, 527 [cit CJ]; 165Ga145, 139SE861; 36GaA668, 137SE860; 40GaA727, 151SE400; 40 GaA730, 151SE401; Ill 173NE467; 201 Iowa8, 206NW114; 204 Iowa981, 216 NW67; Kan 293P389; 210Ky33, 275 SW369; 211Ky667, 278SW99; 232Ky 613, 24SW(2d)269; 161La827, 109S505; 163La34, 111S486; 126Me136, 136A808; 171Minn137, 213NW552; 315Mo 1285, 292SW430, 433 [quotCJ]; 76Mont421, 246P959; 218AppDiv638, 219NYS73; 189NC695, 128SE1; 191NC231, 131SE 573; 21 OhA26, 152NE788; 32 OhA124, 167NE609; OklCr 285P987; 123 Or595, 263P60; 285Pa232, 132A168; 288Pa 29, 135A645; 85PaSuper7; 88PaSuper 216; 137SC75, 134SE514; 52SD566, 219 NW252; 147Va663, 137SE476; Wis 231NW263. See also 103Conn138, 130 A96. [c] **Remoteness of other offense** in point of time goes to weight of evidence. 196Cal154, 236P135. [d] **Rebutting inference of mistake.**–85Pa Super7.

589–14 5F(2d)598; 8F(2d)118; 77 CalA783, 247P535; 36GaA305, 136SE 476; 36GaA668, 137SE860; 123Kan 113, 254P314, 316 [quotCJ]; 171Minn 137, 213NW552; 13PaDist&Co 361. [b] **Must prove similar offenses were in fact criminal offenses.** 338 Ill 56, 170NE14.

589–15 95Fla42, 115S519, 527 [citCJ]; 324 Ill 224, 154NE909.

589–15½–New. Where evidence of other offenses is introduced to show guilty knowledge, it is unnecessary that the transactions should be identical. 32 Ariz182, 256P1048; 33Ariz51, 262P14.

589–15¾–New. Evidence of the commission of subsequent crimes is not admissible to prove guilty knowledge, in the absence of proof of a prior similar offense. 323 Ill 11, 153NE720.

589–15¼–New. Proof of a separate offense is competent where it is necessary to prove guilty knowledge. 152 Miss246, 119S178.

589–17 CalA 290P470; 162Ga267, 134 SE36; 40GaA727, 151SE400; 28Hawaii 546, 547 [quotCJ]; Nebr 226NW793; 216AppDiv23, 214NYS517; Va 152SE 366; 153Wash316, 279P735.

589–18 6F(2d)975; 8F(2d)118; 12 F(2d)904; 13F(2d)59; 13F(2d)849; 15F(2d)965; 16F(2d)704; 18F(2d) 402; 18F(2d)939; 23F(2d)561; 27 F(2d)310; 30F(2d)482; 31F(2d)42; 42 F(2d)40; 42F(2d)103; 43F(2d)944; 215Ala148, 109S849; 22AlaA220, 114S 280; 32Ariz182, 256P1048; Ariz 285P 274; 169Ark359, 275SW701; 177Ark509, 7SW(2d)802; 196Cal154, 236P135; 201 Cal568, 258P49; 95CalA225, 272P755; 68CalA457, 229P974; 78CalA395, 248P 696; 82CalA98, 255P261; 88CalA558, 263P857; 95CalA225, 272P755; CalA 291P251; 3Del140, 132A219; 165Ga 145, 139SE861; 35GaA500, 133SE877; 36GaA305, 136SE476; 36GaA668, 137 SE860; 40GaA730, 151SE401; 27Hawaii 693; 28Hawaii546, 547 [citCJ]; 48 Ida 760, 285P467; 326 Ill 11, 156NE772; 338 Ill 56, 170NE14; 339 Ill 415, 171 NE554; 200 Iowa317, 204NW272; 201 Iowa159, 205NW534, 538 [quotCJ]; 127 Kan497, 274P274; 128Kan374, 278P 57; 128Kan376, 278P58(1stcase); 210 Ky33, 275SW369; 211Ky667, 278SW 99; 216Ky718, 288SW671; 219Ky806, 294SW466; 225Ky827, 10SW(2d)279; 232Ky613, 24SW(2d)269; 160La906, 107S617; 161La827, 109S505; 126Me 136, 136A808; 252Mass465, 148NE123; 167Minn164, 208NW760; 168Minn34, 209NW529; 173Minn473, 217NW598, 601 [citCJ]; 76Mont421, 246P959; 78 Mont560, 254P858; 79Mont343, 256P 380; 115Nebr621, 214NW70; 189NC 695, 128SE1; 191NC231, 131SE573; 49 ND228, 191NW345; Oh 171NE20 (prior similar breach of mortgage held admissible in illegal sale prosecution); OklCr 285P142; OklCr 285P987; 120 Or508, 252P951; 285Pa232, 132A168 (to rebut defense of mental irresponsibility, defendant testifying in trial for murder committed in perpetration of robbery may be asked if he had not committed another robbery twenty minutes before); 288Pa29, 135A645; 88PaSuper216; 47RI 341, 133A236; 137 SC75, 134SE14; 149SC195, 146SE657; 100TexCr67, 272SW154; 101TexCr401, 276SW242; 103TexCr671, 282SW237; 104TexCr105, 283SW168; 104TexCr 189, 283SW791; 104TexCr358, 284SW 556; 104TexCr511, 284SW561; 105 TexCr22, 285SW616; 107TexCr596, 298 SW578; 111TexCr367, 12SW(2d)1027 (2dcase); 144Va630, 131SE204 (evidence of finding still near, and mash on, accused's premises is admissible in prosecution for possession); 147Va 663, 137SE476; 145Wash4, 258P845; 195Wis555, 218NW822, 824 [citCJ]; Wis 231NW263. [d] **Where different inferences may be drawn,** evidence of like offenses is admissible to show intent. MoA 7SW(2d)725.

590–19 CalA 290P470; 36GaA668, 137 SE860; 200 Iowa317, 204NW272; 161 La827, 109S505; 32NM191, 252P1003; 285Pa232, 132A168 (question showing defendant's lucid state of mind in committing robbery twenty minutes before murder for which he was on trial held not to violate Act of March 15, 1911).

590–20 17F(2d)86 [citCJ]; 324 Ill 224, 154NE909; 309Mo 534, 275SW41; 315 Mo 1285, 292SW430, 433 [quotCJ]; MoA 7SW(2d)725.

590–21 18F(2d)404; CalA 289P937; 102Conn708, 130A184; 100TexCr67, 272 SW154 (preparation); 103TexCr465, 281SW1058. [a] **Similarity alone does not make evidence admissible.**–36F(2d) 444.

590–22 12F(2d)904; 102Conn708, 130A 184; 115Nebr621, 214NW70; Nebr 226 NW793. [a] **Prior sale of whisky six months back** is too remote as evidence of intent in prosecution for larceny of whisky. 216AppDiv23, 214NYS517.

590–23 [a] **Transaction more than one year after indictment has been held so** far removed as to throw no light on intention and to be inadmissible. 12F (2d)904.

590–23½–New. Evidence to prove intent held inadmissible: Death of six dogs during certain period where only other evidence is that defendant dropped piece of meat containing strychnine. 215App Div282, 213NYS532 (in prosecution for exposing poison between certain days with intent that it be taken by dogs owned by others).

590–24 Ariz 285P274; 87Colo 507, 289 P1081; 165Ga145, 139SE861; 224Ky 160, 5SW(2d)899; 189NC695, 128SE1; 100TexCr67, 272SW154; 147Va663, 137 SE476; Va 152SE366; 187Wis122, 203 NW749.

590–25 7F(2d)263; 42F(2d)103; 213 Ala541, 105S677; 29Ariz247, 240P868; 32Ariz182, 256P1048; Ariz 285P274; 196 Cal154, 236P135; Cal 289P634; 68 CalA7, 228P376; 82CalA98, 255P261; 162Ga267, 134SE36; 165Ga145, 139SE 861; 168Ga753, 149SE46; 35GaA500, 133SE877; 36GaA305, 136SE476; 36 GaA668, 137SE860; 41GaA277, 152SE 591; 48 Ida760, 285P467; 320 Ill 495, 151NE280; 333 Ill 397, 164NE847; 200 Iowa317, 204NW272; 210Ky33, 275 SW369; 211Ky667, 278SW99; 213Ky 221, 280SW970; 217Ky565, 290SW325; 221Ky692, 299SW569; 224Ky160, 5SW (2d)899; 228Ky254, 14SW(2d)773; 229 Ky312, 17SW(2d)241; 232Ky613, 24 SW(2d)269; 161La827, 109S505; 170 La203, 127S601; 252Mass450, 148NE 113; 254Mass512, 150NE321; 76Mont 421, 246P959; 78Mont560, 254P858; 79 Mont343, 256P380; Nev 285P503; 83 NH532, 145A456; 102NJL659, 133A274; 191NC231, 131SE573; 49ND228, 191NW 345; 56ND357, 217NW531 (false entries in bank's books); 116 OhSt265, 155NE 800; 21 OhA26, 152NE788; OklCr 285 P142; OklCr 285P987; 126 Or651, 269 P869; 284Pa105, 130A403; 285Pa232, 132A168; 288Pa29, 135A647; 85PaSuper7; 87PaSuper66; 88PaSuper216; 13 PaDist&Co 361; 137SC75, 134SE514; 149SC195, 146SE657; 100TexCr67, 272 SW154; 111TexCr623, 138SW(2d)376(2d case); 112TexCr376, 16SW(2d)818(2d case); 147Va663, 137SE476; Va 152SE 366; 144Wash446, 258P508; 145Wash 4, 258P845; 187Wis122, 203NW749.

591–26 313Mo 114, 280SW697.

591–27 23 OhA237, 155NE569.

591–28 216AppDiv23, 214NYS517 (reasonably); 144Wash446, 258P508.

591–29 144Wash446, 258P508.

591–30 216AppDiv23, 214NYS517.

591–31 200 Iowa317, 204NW272; 217 Ky565, 290SW325.

591–31½–New. Evidence held inadmissible to prove motive. That six dogs died during a certain period where the only other proof is defendant's dropping of meat containing strychnine. 215App Div282, 213NYS532 (prosecution for exposing poison with intent that it be taken by dogs owned by others).

591–32 7F(2d)263; 221Ky692, 299SW 569. But see 216AppDiv23, 214NYS517.

591–33 12F(2d)904; 18F(2d)906; 20F (2d)289; 23F(2d)472; 24F(2d)905; 33 F(2d)820; 31Ariz357, 253P629; 32Ariz 182, 256P1048; 33Ariz51, 262P14 (rule held not dependent on statute); Ariz 285P274; 169Ark359, 275SW701; 171 Ark1188, 286SW933; 196Cal154, 236P 135; 199Cal471, 250P168; Cal 289P 634; 76CalA688, 245P781; 78CalA395, 248P696; 79CalA160, 248P1042; 82CalA 98, 255P261; CalA 286P434; CalA 290 P470; CalA 290P1054; 87Colo 307, 287 P651; 87Colo 507, 289P1081; 95Fla42, 115S519, 527 [citCJ]; 162Ga267, 134SE 36; 165Ga145, 139SE861; 168Ga753, 149SE46; 35GaA500, 133SE877; 36GaA 668, 137SE860; 326 Ill 11, 156NE772; 41GaA277, 152SE591; 48 Ida760, 285P 467; IndA 166NE603; 200 Iowa317, 204 NW272; 124Kan245, 259P691; 126Kan 17, 266P937; 126Kan565, 268P845; 211

Ky667, 278SW99; 232Ky613, 24SW(2d) 269; 235Ky320, 31SW(2d)393; 161La 827, 109S505; 163La34, 111S486; 252 Mass450, 148NE113; Minn 231NW225; Mo 279SW109; 72Mont306, 233P602; 76Mont421, 246P959; 114Nebr445, 208 NW126; 118Nebr281, 224NW286; 102 NJL659, 133A274; 34NM505, 285P499; 191NC233, 131SE574; 119 OhSt285, 164 NE51, 63ALR595; 35 OklCr279, 250P 544, 49ALR1129; OklCr 274P696; OklCr 275P383(2dcase); OklCr 278P663; OklCr 292P873; 285Pa232, 132A168; 288Pa29, 135A647; 88PaSuper216; 137 SC75, 134SE514; SD 229NW373; 101 TexCr401, 276SW242; 103TexCr182, 280SW798; 105TexCr276, 288SW441; TexCr 21SW(2d)680; TexCr 27SW(2d) 808; 105WVa598, 143SE352, 353 [quot CJ]; 187Wis122, 203NW749; 195Wis 416, 217NW711; 195Wis555, 218NW 822; Wis 231NW263; Wis 231NW266. See also 284Pa105, 130A403. [a] (1) 15F(2d)965; 76Mont421, 246P959. (2) Where general combination to import liquor is shown, evidence of accounts and settlements in previous liquor transactions is admissible. 13F(2d)750. [d] **Evidence must reasonably tend to establish plan.**—216AppDiv23, 214NYS517. [e] **Prior sale of whisky six months back** is too remote as evidence of plan in prosecution for larceny of whisky. 216 AppDiv23, 214NYS517. [f] **In prosecution for transporting and storing liquor,** evidence of arrest of third party who had whisky in possession, near defendant's store, is not admissible as tending to show common scheme embracing commission of related owner. 132SC362, 128SE709. [g] **That several crimes have been committed in same way** does not show system. 103TexCr555, 281SW 1070. [h] **Former acquittal on charge of other offenses** will not on subsequent trial exclude evidence of facts which were basis of former prosecution. 118 Nebr281, 224NW286. [i] **Evidence showing different system** held inadmissible. 36F(2d)444.

591-34 12F(2d)904; 13F(2d)777; 169 Ark359, 275SW701; 170Ark484, 280SW 398; 326 Ill 11, 156NE772; 211Ky667, 278SW99; 252Mass465, 148NE123; 173 Minn598, 218NW117, 118 [citCJ]; 78 Mont560, 254P858; 120 Or508, 252P951; 112TexCr67, 138SW(2d)868.

591-34½-New. That several crimes were committed at the same time or in the same way does not show system. 109TexCr193, 48SW(2d)68.

592-35 103TexCr671, 282SW237.

592-37 18F(2d)906; 23AlaA53, 120S 465(2dcase); 23AlaA60, 120S467, 21AlaA 583, 110S157; 23AlaA270, 124S123(1st case); La 129S736; 151Miss82, 117S 360; 123 Or595, 601, 263P60 [citCJ]; 154SC97, 151SE233; 136Wash691, 241 P297. [d] **Testimony of other acts** held to be of probative value. 136Wash691, 241P297. [e] **Evidence of common practice before or after date charged** is properly received where matters testified to are sufficiently near time charged to indicate intent, plan, and purpose. 87 CalA181, 261P1045. [f] **What constitutes reasonable period before or after time charged** within which evidence of continuing offense may be admitted is question for trial court. 87CalA181, 261 P1045.

592-39 [a] **Where defendant admits prior convictions,** production of record is unnecessary. 3Del 195, 133A790.

592-41 CalA 286P434 (proving series of acts); 102TexCr553, 278SW853.

592-41½-New. In some jurisdictions it is competent to interrogate defendant on cross-examination on the subject. 55 ND511, 214NW800.

592-45 20F(2d)736; 21F(2d)511; 44 Ida249, 256P523; 206 Iowa833, *221NW 493.

592-46 [a] **If proof satisfies jury** as to conspiracy to commit series of crimes, proof of meeting and agreeing is unnecessary. CalA 286P434.

592-47 20F(2d)736; 21F(2d)511 (evidence insufficient); Ariz 285P274.

592-48 28Hawaii546; 101TexCr598, 276SW283.

592-49 329 Ill 104, 160NE233. Contra 252Mass450, 148NE113 (where, on trial for homicide, defendant on direct examination admitted prior conviction for embezzlement, whereupon state introduced record of such conviction, it was held incompetent for defendant to introduce receipt for money embezzled, showing gift of it to him by victim for purpose of explaining or minimizing effect of admission and proof).

592-51 [a] **Verdict of acquittal** does not render evidence of other crime inadmissible, where relevant. 74CalA178, 240P502. [b] **Denial of defendant's offer** to prove acquittal of another offense relevant to issues was held proper when offered to prevent introduction of evidence of such other offense. 74CalA178, 240P502.

592-52½-New. Proof that defendant had been convicted has been held not erroneous for also showing sentence. 103NJL361, 137A575.

592-52¼-New. Proof that defendant has been indicted for another offense is inadmissible. 108TexCr371, 1SW(2d) 294.

592-53 196Cal 154, 236P135; 338 Ill 596, 170NE685; 167Minn164, 208NW 760; 138SC58, 135SE635.

592-60 13PaDist&Co 366 (adultery and bigamy); 101Vt30, 139A918.

593-61 46 Idn423, 267P950.

593-65 46 Idn423, 267P950.

593-68 CalA 283P881 (evidence held not objectionable as causing jury to believe defendant set other fire); 108Tex Cr106, 299SW430.

593-69 41GaA300, 152SE609 (in arson prosecution for defrauding an insurance company, policy of another company is admissible).

593-71 222Ky393, 300SW874.

593-72 112TexCr376, 16SW(2d)818 (2d case).

593-73 173Minn420, 217NW489; 322 Mo 106, 16SW(2d)205.

594-74 129Kan584, 283P495; 195NC 705, 143SE514.

594-76 44 Ida249, 256P523; 322Mo 106, 16SW(2d)205.

594-85½-New. Testimony as to another fire at defendant's house is inadmissible in the absence of a showing that defendant started it or knew of it. 90 CalA27, 265P366.

594-86 32F(2d)472; 219Ky38, 292SW 492; 318Mo 596, 300SW702; NJSup 150 A207; 109TexCr663, 7SW(2d)80; TexCr 23SW(2d)373.

594-89 49ND228, 191NW345.

594-90 49ND228, 191NW345.

595-10 85PaSuper305.

595-11 199 Ind746, 161NE8; 150Miss 159, 116S533; 149SC445, 147SE600; 109 TexCr193, 48SW(2d)68; Utah 277P972.

595-12 30Ariz442, 247P1101; Mo 285 SW83 (act done pursuant to conspiracy to rob store); 146Wash221, 262P622.

595-13 Mo 285SW83; 146Wash221, 262P622.

595-14 But see 199 Ind746, 161NE8.

595-16 82CalA98, 255P261; Mo 285 SW83; 146Wash221, 262P622; 195Wis 555, 218NW822. But see 166La806, 118 S26.

595-18 30Ariz442, 247P1101; 311Mo 452, 278SW740.

595-20 223Ky248, 3SW(2d)624.

595-22 15F(2d)965; 23F(2d)561; 24 F(2d)802; 36F(2d)1; 44F(2d)163; 98 CalA499, 277P170(2dcase); 27Hawaii 65.

595-23 8F(2d)118; 15F(2d)965; 34 F(2d)630; 36F(2d)1; 95PaSuper496; 47RI 341, 133A236.

595-24 27Hawaii65.

595-25 Oh 172NE145.

595-26 8F(2d)118; 15F(2d)965; 34 F(2d)630; 49Nev217, 242P590 (examination of juror on voir dire held not to show negligence and incompetence justifying reversal). [a] **Failure to move for change of venue** does not justify reversal in absence of showing that impartial jury could not be obtained. 49 Nev217, 242P590. [b] **Defense on wrong theory.**—That counsel defended murder prosecution on ground of intoxication and lack of intent does not show such incompetency as to require reversal in absence of showing that accused had any other defense. 49Nev217, 242P 590. [c] **That counsel elicited evidence showing motive** does not warrant reversal where state had introduced statements of accused to same effect. 49Nev 217, 242P590. [d] **Failure of counsel to examine child witness as to competency** does not warrant reversal. 49Nev217, 242P590. [e] **Failure of counsel to object to immaterial evidence** does not warrant reversal. 49Nev217, 242P590.

595-27 8F(2d)118.

596-31½-New. general history of the conspiracy, 15F(2d)965.

596-34 8F(2d)118.

596-35 43F(2d)890.

596-37 105WVa165, 141SE637, 638 [cit CJ].

596-56½-New. In a prosecution for forgery of election return certificates evidence of forgery of other certificates has been held inadmissible in the absence of evidence connecting accused with making or inducing such forgery. 229Ky776, 18SW(2d)290.

596-58 152Md89, 136A46; 315Mo 1285, 292SW430; 145Va893, 134SE723.

596-59 169Ark567, 275SW909; 85CalA 514, 259P982; 28Hawaii546; 29Hawaii 150; 125Kan365, 263P1081; 225Ky827, 10SW(2d)279; 165La47, 115S363; 174 Minn323, 219NW176; MoA 7SW(2d) 725; 50Nev27, 249P566, 571 [citCJ]; 130 Or552, 278P936; 52SD209, 217NW 213; 104TexCr315, 283SW798; 109Tex Cr62, 8SW(2d)849; Utah 279P953. See also 75CalA1, 241P928. But see 315Mo 1285, 292SW430. [d] **It is sufficient** if such evidence tends to prove defendant guilty of commission of such other crimes. 28Hawaii546. [e] **Defendant's connection with other acts sufficiently shown** to render proof of other offenses admissible as showing intent. Utah 279 P953. [f] **Defendant's connection with other acts insufficiently shown** to render proof of other offenses admissible. Utah 279P953.

597-60 85CalA697, 259P1009; 50Nev 27, 249P566, 571 [citCJ].

597-61 169Ark567, 275SW909.

597-62 50Nev27, 249P566, 571 [citCJ].

597-63 50Nev27, 249P566, 571 [citCJ].

597-64 30Ariz466, 248P39; 165La47, 115S363; 50Nev27, 249P566, 571 [cit CJ]; 88PaSuper216 (though offenses are beyond statutory period); 52SD619, 219NW817, 824 [citCJ]; 104TexCr315, 283SW798; 109TexCr62, 8SW(2d)849; 108WVa254, 150SE740.

597-69 189NC695, 128SE1 (threat to shoot).

597-70 21 OhA26, 152NE788.

597-71 252Mass465, 148NE123.

597-76 12F(2d)904; 13F(2d)777; 22 AlaA220, 114S280; 170Ark484, 280SW 398; 201Cal568, 258P49; 326 Ill 11, 156NE772; 201 Iowa159, 205NW534; 163La473, 112S303 [citCJ]; OhA 173NE 447.

598-80 170Ark484, 280SW398; 83CalA 321, 256P611; 326 Ill 11, 156NE772.

598-81 13F(2d)777.

598-83 170Ark484, 280SW398; 108Tex Cr114, 299SW263.

598-84 218Ala167, 118S233.

598-85 [b] **Cross-examination of witness respecting theft of chickens by defendant,** in prosecution for giving worthless check, is erroneous. TexCr 31 SW(2d)823.

598-86 206 Iowa833, 221NW493.

598-92 326 Ill 11, 156NE772.

598-93 326 Ill 11, 156NE772.

598-94 326 Ill 11, 156NE772.

598-96 326 Ill 11, 156NE772.

599-99 334 Ill 590, 166NE481; 160La 906, 107S617; 114Nebr257, 207NW207; 100TexCr255, 272SW473.

599-1 32Ariz182, 256P1048; 77CalA 783, 247P535; CalA 290P1054; 118Kan 771, 236P652; 211Ky667, 278SW99; 104TexCr105, 283SW168; TexCr 23SW (2d)391. Contra 109TexCr378, 4SW(2d) 973.

599-2 32Ariz182, 256P1048; 177Ark 1031, 9SW(2d)236; 320 Ill 287, 150NE 628; 334 Ill 516, 166NE97; 334 Ill 590, 166NE481; 201 Iowa8, 206NW114; 200 Iowa1225, 206NW250; 206 Iowa247, 218 NW477; 118Kan771, 236P652; 163La 34, 111S486; 313Mo 114, 280SW697;

114Nebr257, 207NW207; 32NM191, 252 P1003; 243NY166, 153NE36; 104TexCr 105, 283SW168; 106TexCr506, 294SW 202. [b] **Finding of intent to defraud on former occasions** is not essential for admissibility of evidence as to connection of accused with other forged instruments. 243NY166, 153NE36.

599-3 32Ariz182, 256P1048; 77CalA 783, 247P535; 101CalA723, 282P403; 320 Ill 287, 150NE628; 334 Ill 516, 166 NE97; 201 Iowa8, 206NW114; 200 Iowa 1225, 206NW250; 118Kan771, 236P652; 211Ky667, 278SW99; 163La34, 111S 486; 114Nebr257, 207NW207; 103Tex Cr182, 280SW798; 108TexCr255, 299 SW418; 149Wash522, 271P330.

599-4 32Ariz182, 256P1048; 171Ark 375, 284SW36; 200 Iowa1225, 206NW 250; 206 Iowa347, 218NW477; 211Ky 667, 278SW99; 163La34, 111S486; 97 PaSuper169. See also 104TexCr105, 283 SW168.

599-5 32Ariz182, 256P1048; 211Ky 667, 278SW99.

599-13 112TexCr385, 16SW(2d)1096 (2dcase).

599-14 102CalA353, 282P971 (burglary of witness' place and stealing of blank checks in question which were filled out before passed by defendant).

599-15 200 Iowa1225, 206NW250 (evidence of uttering other forged instruments both before and after offense charged is admissible if properly connected). [a] (3) 323 Ill 11, 153NE720. (6) Proof of subsequent forgery held inadmissible unless there is also proof of prior similar offense. 334 Ill 590, 166 NE481.

599-17 But see 90CalA266, 265P826.

600-21½-New. Where forgery was committed to conceal embezzlement, evidence of such embezzlement is admissible. 313 Mo 114, 280SW697.

600-22 239Mich60, 214NW165.

600-24 239Mich60, 214NW165; 36Wyo 368, 255P788.

600-25 239Mich60, 214NW165; 36Wyo 368, 255P788.

600-26 239Mich60, 214NW165; 152 Wash686, 279P82.

600-27 152Wash686, 279P82.

600-27½-New. Evidence of card playing is not inadmissible as evidence of another offense. 100TexCr67, 272SW 154.

600-30 25F(2d)430; 215Ala635, 112S 212; 22AlaA508, 117S492; 29Ariz247, 240P863; 170Ark602, 280SW636; 85 CalA580, 259P998; 96CalA430, 274P433 (evidence that defendant operated office for performance of abortions held inadmissible); DC 41F(2d)979; 160Ga 271, 127SE733; 162Ga267, 134SE36; 332 Ill 207, 163NE430; 222Ky460, 1 SW(2d)774; 225Ky671, 9SW(2d)1018; 226Ky584, 11SW(2d)410; 226Ky660, 11 SW(2d)726; 227Ky223, 12SW(2d)336; 235Ky710, 32SW(2d)43; Mo 292SW728; 39 OklCr264, 264P643; 54SD552, 223 NW943; 100TexCr399, 273SW593; 109 TexCr142, 3SW(2d)453; 144Wash446, 258P508. [b] **Evidence held not obnoxious to rule.**-333 Ill 451, 164NE840.

600-32 219Ala46, 121S38; 30Ariz448, 247P1103; Ark 30SW(2d)830; 195Cal 623, 234P890, 38ALR1186; 203Cal128, 263P226; 170Ga559, 154SE344; 172 Minn106, 214NW782; 105NJL15, 143A 811; 51ND445, 200NW20; 126 Or118, 268P1016; 294Pa339, 144A534; 108 TexCr19, 298SW601; 144Wash446, 258 P508; Wash 287P23. [a] (2) Condition of body of wife, killed in same transaction as husband, in trial for murder of husband. TexCr 26SW(2d)263.

600-34 29Ariz247, 240P863; 194Cal 555, 229P341; 195Cal 623, 234P890, 38 ALR1186 (theft of automobile in homicide robbing bank); 172Minn106, 214 NW782; 108TexCr19, 298SW601; Vt 145A413.

601-35 66Utah223, 241P314; 187Wis 122, 203NW749 (reasons for malice may be shown).

601-36 18F(2d)906; 29Ariz247, 240P 863; 30Ariz448, 247P1103; Ark 30 SW(2d)830; 199Cal 357, 249P177; DC 25F(2d)546; 163Ga267, 134SE36; Ga 154SE799; 224Ky160, 5SW(2d)899; 78 Mont560, 254P858; 79Mont343, 256P 380; 23 OhA237, 155NE569; OklCr 285 P142; 12PaDist&Co 583; 110TexCr206, 7SW(2d)1086; Vt 145A413; 144Wash 446, 258P508; 145Wash4, 258P845; Can [1928] 3DomLR822 (in rebuttal where put in issue by accused).

601-37 18F(2d)906; 81CalA226, 253P 735; 163Ga267, 134SE36; Ga 155SE11; 217Ky403, 289SW371; 252Mass450, 148 NE113; 78Mont560, 254P858; 79Mont 343, 256P380; 51ND445, 200NW20; OklCr 279P515; 285Pa232, 132A168; SD 229NW373; 66Utah223, 241P314; 145 Wash4, 258P845; Can [1928] 3DomLR 822 (in rebuttal where put in issue by accused).

601-38 218Ky703, 292SW336; 222Ky 630, 1SW(2d)1045.

601-39 199Cal 357, 249P177; 79Mont 343, 256P380.

602-60 Iowa 203NW232, 234 [citCJ]; 121Kan284, 246P1003; 231Ky372, 21 SW(2d)476.

602-63 204 Iowa1355, 217NW233.

602-66 Md 150A278.

603-77 43F(2d)890; 169Ark359, 275 SW701; CalA 289P937; Ill 172NE29; 200 Iowa317, 204NW272; Iowa 229NW 225; 144Miss442, 110S114; Mo 22 SW(2d)772; 50SW427, 210NW513.

603-79 169Ark359, 275SW701.

603-81 126Kan565, 268P845; 124 Or61, 262P859; 130 Or379, 280P335; TexCr 27SW(2d)222(2dcase).

603-82 95CalA563, 272P1103; Mo 24 SW(2d)1023; 107TexCr596, 298SW578.

603-83 43F(2d)890; 169Ark359, 275 SW701; 175Ark878, 1SW(2d)23; 40GaA 502, 150SE450(1stcase); 126Kan565, 268P845; 49ND912, 194NW335; 107 TexCr596, 298SW578; 108TexCr245, 299SW909; 142Wash530, 253P801.

603-84 40GaA502, 150SE450(1stcase); 126Kan565, 268P845; 49ND912, 194NW 335.

603-85 152Miss246, 119S178; 49ND 912, 194NW335.

603-86 33Ariz51, 262P14; 169Ark359, 275SW701; 171Ark1188, 286SW933; 82 CalA98, 255P261; 40GaA502, 150SE450 (1stcase); Iowa 229NW225; 173Minn 598, 218NW117; 76Mont351, 246P956; 130Misc105, 222NYS595.

604-87 311Mo 452, 278SW740; OklCr 27SP663.

604-92 OklCr 27SP663.

604-3 NJSup 147A496.

604-7 202 Iowa352, 209NW514.

605-12 23AlaA452, 126S887.

605-16 5F(2d)887; 8F(2d)118; 215Ala 106, 109S886; 23AlaA87, 121S442(1st case); 21AlaA173, 106S206; 21AlaA315, 108S76; 21AlaA495, 109S528; 21AlaA 637, 111S314; 22AlaA296, 115S72; 22 AlaA300, 115S149 ("caught before"); 22 AlaA364, 115S767; 22AlaA310, 115S862; 171Ark68, 283SW23; 78CalA415, 248P 693; 221Ky696, 299SW563; 228Ky587, 15SW(2d)467; 238Mich171, 213NW159; 145Miss237, 110S513; 153Miss599, 121 S292; 155Miss465, 124S488; 309Mo 520, 275SW36; 316Mo 204, 289SW554; 317 Mo 380, 295SW747; Mo 292SW52; 154 SC97, 151SE233; 157SC459, 154SE658; 50SD533, 210NW721; 101TexCr401, 276 SW242; 102TexCr81, 277SW139; 102 TexCr360, 278SW223; 104TexCr85, 282 SW587; 112TexCr133, 14SW(2d)277; 111TexCr473, 14SW(2d)1038; TexCr 26 SW(2d)216; TexCr 27SW(2d)170; Tex Cr 30SW(2d)326; 147Va585, 136SE501; 33Wyo 360, 239P952. But see 21AlaA397, 109S117; 92CalA775, 268P1082. [d] **In prosecution for possession of equipment for manufacture** evidence of possessions of liquor is admissible to show intent, and to connect defendant with offense charged. 104TexCr358, 284SW556; 22 AlaA353, 115S698. [e] **In prosecution for unlawfully possessing prohibited liquor** facts relating to still and whisky and their connection with defendant are held admissible. 22AlaA15, 112S186; 77 CalA60, 245P811; MoA 5SW(2d)647; 121 Or561, 254P1010; 103TexCr311, 280 SW817; 107TexCr24, 294SW550. [f] **On indictment charging conspiracy to manufacture liquor** evidence is admissible of United States district court's showing that beer taken from defendant's brewery had been seized and ordered destroyed by federal judge. 85 PaSuper7. [g] **Evidence of defendant's connection with still** is admissible as showing ability, means, or opportunity of possessing whisky. Utah 266P716. [h] **Evidence held admissible.**-OklCr 291P157(1stcase); SD 223NW733.

605-16½-New. In some jurisdictions in prosecutions for manufacturing intoxicating liquors evidence of an offer to sell is admissible as tending to prove the charge. 121 Or561, 254P1010.

605-16⅓-New. Testimony as to finding of whisky in defendant's house and sale is admissible in prosecution for making mash suitable for distillation of alcoholic liquor. 169Ark880, 277SW19; 102 TexCr454, 278SW427.

605-16¼-New. as is testimony of finding mash on previous search of defendant's premises or locality. 169Ark880, 277SW19.

605-16⅙-New. But evidence of whisky found in different places of defendant is not objectionable as evidencing distinct and separate offenses. 8F(2d)251; 21 AlaA114, 105S433 (such possession at one time constituting one offense).

605-16⅛-New. In a prosecution for possession, evidence of finding a large quantity of intoxicating liquor at defendant's place of business some time after the date charged is admissible to prove scienter, 37GaA331, 140SE422.

605-16½-New. to prove intent, 37GaA 331, 140SE422.

605-16⅓-New. or to prove motive. 37 GaA331, 140SE422.

605-16⅙-New. Evidence showing continuous and extended manufacture of liquor at a place where defendant was subsequently found making it was admissible where defendant denied previous operation of a still. 108TexCr678, 2SW(2d)457.

605-16 1/10-New. In a prosecution for possession of intoxicating liquors, evidence that accused was seen bottling liquors in another county is admissible as a corroborative circumstance. 40GaA 265, 149SE301.

605-16 1/11-New. In a prosecution for possession of intoxicating liquors, testimony as to previous purchases of liquor from defendant and his wife is admissible as tending to show the relation of accused to the house and to possession. Vt 147A273.

605-17 [a] (3) 144Miss825, 110S670. (6) It has no application to prosecution for manufacture of intoxicating liquor. 145Miss237, 110S513. (7) Evidence of sales subsequent to date alleged in affidavit of indictment is inadmissible. 147 Miss37, 112S591. [b] **Admissible where necessary to rebut claim of good faith,** lack of evil intent, etc. 99TexCr659, 271 SW91.

605-18 21AlaA173, 106S206.

605-19 21AlaA637, 118S314; 85Pa Super7.

605-21 TexCr 30SW(2d)326.

605-23½-New. Evidence of defendant's arrest near still on night of alleged possession of liquor is admissible. 106TexCr384, 292SW885.

605-23⅓-New. Indictment charging prior violation of the liquor law where defendant pleaded guilty and paid a fine held improperly admitted in a prosecution for storing and possessing. 154SC 97, 151SE233.

605-24 18F(2d)404; 22AlaA300, 115 S149; 67CalA442, 227P629; 93CalA77, 268P1071; 324 Ill 55, 154NE430; 227 Ky732, 13SW(2d)1026 (evidence held unnecessary); 151Miss529, 118S535(1st case); 316Mo 144, 290SW142; MoA 282SW106; OklCr 272P490(2dcase); Ont [1926] 4DomLR609.

605-25 22AlaA383, 115S855 (sale to others than alleged); 144Miss467, 110 S230; 316Mo 144, 290SW142.

605-27 33GaA571, 127SE156 (other sales need not be within period of limitation of prosecution); 36GaA668, 137 SE860; Ill 172NE64; 160La26, 106S 662; 162La471, 100S723; 102TexCr454, 278SW427; 103TexCr671, 282SW237; 104TexCr386, 283SW796. But see 18 F(2d)404. Contra 316Mo 144, 290SW 142.

605-28 103TexCr671, 282SW237.

605-29 28Ariz539, 237P950; 181Ark 592, 26SW(2d)899; 181Ark603, 27

SW(2d)99; 169La251, 125S67; 316Mo 210, 289SW953; Mo 292SW52; 101 TexCr329, 275SW713; 150Wash664, 274 P797. See also 169Ark589, 276SW577. [b] **Where issue involved is whether defendant was agent of seller,** other sales may be proved. 102TexCr553, 278SW 853.

605-30 19F(2d)896; 171Minn429, 214 NW270; 103TexCr671, 282SW237; 33 Wyo 428, 240P219.

606-31 98Vt466, 129A306.

606-33 [a] **Evidence of another sale admissible where witness told defendant to bring quart,** and he brought one pint, and later another pint. 102TexCr 553, 278SW853.

606-34 CalA 290P77.

606-39 33F(2d)265; 157Miss193, 127S 687; 320Mo 173, 7SW(2d)340; 106 TexCr29, 290SW167. See also 177Ark 1051, 9SW(2d)233(1stcase); 177Ark 1076, 9SW(2d)320.

606-40 13F(2d)453. See also 103TexCr 671, 282SW237.

606-40½-New. Evidence that accused was seen making intoxicating liquor is admissible to show that he was engaged in selling liquor unlawfully. 101TexCr 329, 275SW713.

606-40½-New. Such evidence is admissible to rebut theory of defendant that his only connection with whisky sold by him to the prosecuting witness was as agent of the latter. 101TexCr329, 275 SW713.

606-40¼-New. Testimony of commission by defendant of another distinct offense nearly year previous to present charge is not admissible. 132 Or401, 286 P149.

606-41½-New. Evidence of previous sales to the same minor is admissible. 171Minn429, 214NW270.

606-45½-New. In a prosecution for giving and furnishing liquor to a minor it is competent to show that accused gave liquor to others on the same occasion. 46 Ida765, 271P322.

606-45½-New. In a prosecution for bootlegging, evidence that defendant sold liquor is admissible to prove that he was keeping it with the intent to sell. 208 Iowa802, 226NW57.

606-46 55ND511, 214NW800; 102 TexCr553, 278SW853.

607-53 6F(2d)120; 6F(2d)522; 8F(2d) 211; 78CalA554, 248P964; 91CalA150, 266P860 (evidence of other sales held not too remote). [a] **Testimony as to sales, made within reasonable time after filing complaint in magistrate's court** but within period of information, is admissible where supplementing evidence of prior sales. 87CalA181, 261P1045.

607-53¼-New. or where it has hearing on nuisance charged; 33Wyo 428, 240 P219.

607-54 But see 6F(2d)522.

607-54½-New. Possession of still prior to time on which prosecution was laid is held admissible in corroboration of evidence tending to show possession at time charged. 21AlaA173, 106S205.

607-56½-New. , and accounts and settlements had, 13F(2d)750.

607-58½-New. In prosecution for specific act of transporting and storing liquor, evidence as to how many times accused had sold liquor to named person is not admissible. 132SC362, 128 SE709.

607-58½-New. In prosecution for transporting and storing, evidence as to place accused got liquor claimed to have been sold by him is not admissible. 132 SC362, 128SE709.

607-58¼-New. In such prosecution, evidence that named person could get liquor at defendant's place at any time is not admissible. 132SC362, 128SE709.

607-58½-New. Evidence of bottles and cans found is not inadmissible as tending to show commission of a different crime. Iowa 228NW22.

607-59½-New. Proof of sales of liquor about the time of the alleged possession for sale is admissible, 108TexCr 441, 18W(2d)633.

607-59½-New. and the state may show previous indictments for selling liquor, 108TexCr441, 18W(2d)633.

607-60 336 Ill 286, 168NE332; OklCr 278P356; SD 228NW371; 101TexCr128, 274SW159; 104TexCr432, 284SW574; 104TexCr511, 284SW561; 110TexCr529, 7SW(2d)1083; 111TexCr95, 10SW(2d) 94(2dcase); TexCr 24SW(2d)1092; TexCr 28SW(2d)800. [a] **Evidence of other whisky in containers in possession of defendant is admissible in prosecution for possession.** 23AlaA598, 129 S491.

607-61 TexCr 31SW(2d)632.

607-63 175Ark453, 299SW739; 100 TexCr193, 272SW461.

607-63½-New. On the question of unlawful possession, evidence that both before and after the date of the offense charged liquor was found in accused's possession is admissible, 35GaA575, 134 SE185.

607-63½-New. although evidence showed such possession on the day of the trial. 34GaA575, 134SE185.

607-63¼-New. Evidence of sale may be admissible to rebut defense of medicinal use. TexCr 28SW(2d)800.

607-64 Wash 287P893.

607-68½-New. Evidence that liquor was found and seized on the premises one month after the date charged is not inadmissible or proof of a subsequent offense. 144Wash370, 258P24.

607-70½-New. In a prosecution for the illegal manufacture of intoxicating liquors evidence of defendant's prior possession of a still is admissible. 109 TexCr195, 3SW(2d)811.

607-70½-New. In prosecution for specific act of storing and transporting, evidence as to how many times accused had sold liquor to named person is not admissible. 132SC362, 128SE709.

607-70¼-New. Evidence as to place accused got liquor claimed to have been sold by him is not admissible. 132SC 362, 128SE709.

607-70½-New. Evidence that named person could get liquor at defendant's place at any time is not admissible. 132 SC362, 128SE709.

607-70¼-New. [§ 1180a] g. **Possession of Liquors.** In a prosecution for illegal possession, where it appears that the liquor was found buried on vacant property adjoining defendant's home, evidence of sales of liquor by defendant on the day mentioned in the information and shortly prior thereto is admissible to show defendant's constructive possession for an illegal purpose. 70CalA444, 233P401.

607-70½-New. In a prosecution for illegal possession, evidence of other sales may be admissible when it tends to show intent. 322 Ill 353, 153NE604.

607-71 56ND678, 218NW871.

608-86 79CalA160, 248P1042 (prosecution for pimping); 82NJL229, 82A309 [aff 83NJL796, 85A1135]; 74TexCr46, 167SW40.

608-88 101TexCr639, 276SW929.

608-89 74CalA178, 240P502; 195Wis 416, 217NW711, 715 [citCJ].

608-96 NH 152A276; TexCr 27SW(2d) 191.

608-97 42 Ida517, 246P313; 115Nebr 621, 214NW70; 146Wash109, 261P777, 778 [citCJ].

608-98 72CalA421, 237P767; 73CalA 402, 238P794; 77CalA384, 246P811; 3 Del 140, 132A219, 221 [citCJ]; 199 Iowa 815, 202NW519; 126Kan493, 268P850; 218Ky591, 291SW1012; 227Ky748, 14 SW(2d)205; 115Nebr621, 214NW70; NJSup 140A396; TexCr 283SW820; 106TexCr169, 291SW554; 111TexCr48, 10SW(2d)997; 36Wyo 78, 252P1030, 1032 [citCJ]. Contra 105TexCr381, 288 SW205. [c] **Evidence of conversation with defendant in which he admitted intercourse with unnamed young girls generally** is not admissible where prosecutrix was not mentioned. 212Ky39, 278SW166.

609-99 76CalA144, 244P101; 77CalA 384, 246P811; 256Mass487, 152NE746; 115Nebr621, 214NW70.

609-1 147Miss136, 113S199; 156Miss 522, 126S197 (admitting proof of repetition of crime is reversible error); Mo 274SW18; 103TexCr652, 281SW1069.

609-2 77CalA384, 246P811.

609-8 49RI 305, 142A543.

609-11 121Kan284, 246P1003.

609-13½-New. or sodomy; 142Wash 7, 252P108.

609-15 199 Iowa815, 202NW519; 116 Or635, 242P603 (driving automobile while intoxicated, especially after accomplishment of sexual intercourse); 106TexCr349, 292SW245.

610-16 79CalA357, 249P541 (identity); 90Fla659, 106S479; 105TexCr101, 287 SW53.

610-17 21AlaA260, 107S225; 165Ga 145, 139SE861; 42 Ida517, 246P313; 45 Ida768, 265P668; 204 Iowa981, 216NW 67; 218Ky591, 291SW1012; NH 152A 276; 104TexCr429, 284SW547; 110Tex Cr371, 7SW(2d)961; TexCr 24SW(2d) 435. [b] **Other acts of intercourse admissible** to show lustful disposition of defendant. 121Kan186, 246P1001.

610-18 47 Ida457, 276P39, 68ALR1061; 216AppDiv404, 215NYS301.

610-21½-New. Testimony of prosecutrix that accused, at the time of the offense, stated that he had had similar relations with another girl, is admissible. 55ND427, 214NW43.

610-21¼-New. Evidence of a similar offense committed by a third person on another female at the same time may be admissible to establish or explain the crime charged. 88PaSuper171.

610-22 21AlaA423, 109S125; 162Ga422, 134SE95; Ind 169NE40; 201 Iowa1089, 202NW90; Iowa 230NW316; 123Kan 113, 254P314, 316 [quotCJ]; Mo 285 SW422; 322Mo 69, 16SW(2d)30; 218 AppDiv638, 219NYS73; OklCr 280P630; OklCr 286P811.

610-23 162Ga422, 134SE95; 123Kan 113, 254P314, 316 [quotCJ]; OklCr 280 P630; OklCr 286P811; OklCr 287P1083.

610-24 123Kan113, 254P314, 316 [quot CJ]; Mass 168NE796; OklCr 286P811; OklCr 287P1083.

610-25 21AlaA423, 109S125; 105TexCr 566, 289SW404.

610-32 123Kan113, 254P314.

610-35 323 Ill 567, 154NE418; 218App Div638, 219NYS73.

610-38½-New. Evidence of burglary is admissible to prove defendant's guilty knowledge and intent. 191NC231, 131 SE573.

610-38¼-New. Evidence of finding other stolen property in accused's place of business is admissible. 8F(2d)491.

611-39 75CalA138, 242P84; 76CalA688, 245P781; 319 Ill 359, 150NE263; Md 129A275; 154Miss653, 122S757, 63ALR 1319; 112TexCr261, 16SW(2d)119.

611-40 72CalA160, 236P987 (theft of car used by accused at time of robbery); 87CalA336, 262P825; 11PaDist&Co 21.

611-41 Ariz 285P274; 319 Ill 359, 150 NE263; 168La322, 122S52; Mo 25SW (2d)113; 110TexCr267, 8SW(2d)149; 135Wash353, 237P497 [citCJ].

611-42 323 Ill 129, 153NE596; Mo 22 SW(2d)635 (evidence inadmissible).

611-43 83CalA302, 256P616; 331 Ill 380, 163NE149; 338 Ill 636, 170NE750; 135Wash353, 237P497.

611-44 168La322, 122S52; Md 129A 275; 105WVa598, 143SE352, 353 [cit CJ].

611-45 264Mass94, 162NE7. But see Ariz 285P274.

611-46 34F(2d)863; 76CalA688, 245P 781; CalA 286P434; Md 129A275; Miss 126S406; 112TexCr239, 16SW(2d)130. But see Mo 22SW(2d)635.

611-49 Ariz 285P274.

611-53½-New. Evidence that accused had shot at house of prosecuting witness a week or two before shooting from ambush is admissible. 189NC695, 128 SE1.

611-55 76CalA558, 244P1086; 113Nebr 517, 204NW74, 206NW153.

611-57 12F(2d)904; 13F(2d)777; 18F (2d)906; 18F(2d)939.

611-61½-New. Transaction more than one year after indictment for using mails to defraud is too far removed to throw light on intention and is inadmissible. 12F(2d)904.

611-63 23AlaA369, 125S787; 93Fla372, 112S873; 258Mass98, 155NE8; 105TexCr 91, 286SW1096; 106TexCr593, 294SW 573.

611-64 215Ala140, 110S162; 21AlaA 539, 110S157; NJ 130A461; 103WVa 631, 138SE323; 105WVa117, 141SE622.

611-65 229Ky412, 17SW(2d)267 (parol testimony of contents of written confes-

sion); 102WVa107, 134SE599; 103WVa631, 138SE323.

611-66 93PaSuper404.

611-67 [a] **That deceased was deputy sheriff** is held properly proved by oral testimony. 162Ga208, 132SE911.

611-68 [a] **Actual liquor not best evidence of whether it was whisky.**-113 TexCr530, 22SW(2d)658.

612-69 109TexCr209, 48SW(2d)64.

612-72 21AlaA629, 111S188; 108TexCr 650, 28W(2d)272. [a] **Testimony as to presence of accused near still** not secondary evidence. 102TexCr544, 278SW 849. [b] **Evidence that liquor in still smelled** like whisky not secondary. 102 TexCr544, 278SW849.

612-75 TexCr 318W(2d)456.

612-77½-New. Photograph of accused is secondary evidence and is inadmissible to aid witness to identify accused. 212Ky303, 278SW1097.

612-79 159La820, 106S317; 107TexCr 514, 298SW296. [a] (6) Testimony of person, present when divorce was rendered, as to divorce is admissible. 319 Mo 28, 38W(2d)230.

612-81½-New. Introduction of liquor in evidence not required. 163La404, 112 S404.

612-81½-New. Parol testimony is admissible to show that the vessel was a foreign vessel. 122 Or644, 259P780.

612-81¼-New. The testimony of a witness from actual knowledge and positive recollection of a circumstance is the best evidence. 106WVa658, 146SE732.

612-83 21AlaA196, 106S696; 219Ky 272, 292SW805; 254Mass520, 150NE854; 7PaDist&Co 39; 108TexCr631, 28W(2d) 256. See also 145Va800, 133SE764. But see 166Ga563, 144SE170; TexCr 20SW (2d)421. [c] 144Wash629, 258P501. [d] **Admission of copies** of income tax reports held reversible error. 7F(2d) 155.

612-86 31F(2d)385; 23AlaA83, 121S2 (2dcase); 201Cal 290, 257P46; 144Wash 629, 258P501. [a] **In prosecution for manslaughter** by driving a motor vehicle on public highway while intoxicated, witness may testify certain road is "public highway." 35GaA241, 132SE 650.

612-87 257Mass421, 154NE91.

612-89 90Fla178, 105S401. See also 118 Or656, 247P1077.

613-91½-New. Where contents or legal effect of writing is not in issue but merely collateral, parole evidence of contents thereof is admissible. 90Fla178, 105S401.

613-91¼-New. Parole evidence, not purporting to be primary evidence of contents of writing, which forms part of conversation of witness and another, is admissible. 90Fla178, 105S401 (contents of writing not in issue).

612-91¼-New. **A license has been held not the best evidence** to show the number of pool tables in premises. 30F(2d) 518.

613-93 22AlaA572, 117S909 (divorce); 41GaA345, 152SE318; 339 Ill 381, 171 NE561; 213Ky221, 280SW970; 167La 1113, 120S875; 257Mass479, 154NE95; 318Mo 833, 18W(2d)147 (schedules in bankruptcy); 102TexCr451, 278SW212; 107TexCr444, 296SW897; 150Wash131, 272P53.

613-95 160La272, 107S107.

613-96 Ind 168NE22 (certified copy of affidavit indorsed "discharged" held properly excluded); 253Mass541, 149NE 417.

613-98 15F(2d)503; 31F(2d)846; 39 GaA116, 146SE346; 39GaA547, 147SE 798; 104NJL291, 140A287. But see 167 La484, 119S523.

613-3 101TexCr63, 274SW588.

613-4½-New. an affidavit, 15F(2d)359.

613-7 [a] **Evidence of contents held inadmissible.**-43F(2d)44.

613-9½-New. of the language of an oath administered to a witness, 8D 229 NW398.

613-10 170Ga870, 154SE351.

613-14½-New. Naturalization is a judicial act provable only by record or duly authenticated copy and not by parol. 70CalA362, 233P359.

613-14⅛-New. A member of the board of medical examiners may testify of his own knowledge of substantive fact whether accused passed the board of examiners, as against objection that records of the board are but evidence. 133 SC75, 130SE332.

613-14¼-New. Charter is best evidence of incorporation of town. 102TexCr451, 278SW212.

613-14⅛-New. Omissions in mayor's trial docket may be supplied by oral evidence. 103WVa55, 136SE607.

613-14⅛-New. Record of accused in state hospital for insane must be proved by deposition not merely by letters from officers of hospital in view of statute. 92 Fla699, 109S811.

613-14⅛-New. Coroner's testimony as to defendant's statement is not objectionable as contradictory of his written report where no report was made. 164La813, 114S696.

613-14⅛-New. Exclusion of police record of burglary is proper in prosecution for rape. Ark 30SW(2d)855.

613-15 198 Ind511, 154NE282; 145Va 883, 134SE544, 47ALR1084. [a] **Affidavit for search warrant and search warrant supported by parol evidence of filing thereof** is held competent and properly admitted in liquor prosecution. 198 Ind511, 154NE282.

613-19 215Ky722, 286SW1047; 104Tex Cr225, 283SW832.

613-19½-New. But testimony that prosecuting witness was acting under search warrant issued by federal court at time of finding whisky is admissible. 211AlaA114, 105S433 (though contents of such warrant were not offered).

613-19½-New. On proper predicate showing loss and diligence, a search warrant may be proved by parol. 109 TexCr6, 28SW(2d)436.

613-19¼-New. Testimony of a deputy sheriff as to what was done in execution of a search warrant is not objectionable as secondary evidence. 318Mo 827, 18W (2d)106.

613-19⅛-New. Warrant of arrest is best evidence that it was issued and in hands of officer. 14PaDist&Co 28.

613-24½-New. Indictment is best evidence to show incompetency of witnesses. 100TexCr159, 272SW178.

613-24½-New. Complaint filed by witness against accused in previous case cannot be proved by parol. 100TexCr 261, 272SW492.

613-24¼-New. A complaint is the best evidence of its contents and parol evidence is inadmissible. 257Mass479, 154 NE95.

614-35 171Ark778, 286SW935; Mo 274 SW47; 107TexCr514, 298SW296. But see 102TexCr451, 278SW212.

614-40 71CalA367, 235P658 (in prosecution for embezzlement of express company checks, oral evidence that company was unincorporated association held proper).

615-45 107TexCr535, 298SW284.

615-48 109TexCr430, 5SW(2d)507. See also 100TexCr172, 272SW490.

615-54 35F(2d)847.

615-54½-New. Certified copy of assignment of oil lease improperly excluded is not best evidence. 16F(2d)71.

615-55 30F(2d)679. But see 100TexCr 172, 272SW490.

615-56 77CalA745, 247P580; TexCr 24 SW(2d)39 (grantee is properly allowed to tell of deed in which his name was abbreviated).

615-60½-New. Parol evidence is admissible to prove that a mortgage was made. 257Mass421, 154NE91.

615-65 41F(2d)440; 22AlaA34, 111S 765; 37GaA195, 139SE103 (conclusion of auditor excluded as to insolvency of bank); 174Minn323, 219NW176 (entries made from temporary slips are original entries); 135Wash361, 237P723, 725 [citCJ]. But see 229Ky459, 17SW(2d)443.

615-66 17F(2d)246; 23F(2d)260; 29 F(2d)462; 96CalA1, 274P361; 165Ga 55, 139SE877; 47 Ida750, 278P776; 334 Ill 590, 166NE481; 334 Ill 635, 166 NE535; Ind 168NE579; Iowa 228NW 308 (summary of books of bank made by bank examiner in charge); 160La 525, 107S393; 317Mo 330, 296SW370; Mo 30SW(2d)59; 115Nebr350, 213NW 344; 33 OklCr125, 243P251; OklCr 282 P892; Utah 287P181; 135Wash361, 237 P723, 725 [citCJ]. But see 203Cal 510, 265P184. [a] **Government has been held not required to introduce records** from which defendants' summaries testified to were taken. 41F(2d)440.

615-68 100CalA78, 280P178; 84Colo 254, 269P907.

615-68½-New. Where inquiry is as to state of account of depositor with bank, the bank's books are not necessarily the best evidence, 135Wash361, 237P 723.

615-68⅛-New. and it is competent to show by oral testimony of anyone who knows the facts that a person has a deposit with a bank, 135Wash361, 237P 723.

615-68¼-New. or has had such a deposit and has withdrawn it, 135Wash 361, 237P723.

615-68½-New. regardless of the condition of the bank's books. 135Wash 361, 237P723.

615-68⅛-New. Oral testimony of a cashier of a bank that defendant had closed his account prior to the time of the transaction involved in the prosecution and at that time had no deposit therein under a fictitious or other name is admissible without production of books. 135Wash361, 237P723.

615-68⅛-New. The stub of a check may be received in evidence where the original is shown to have been lost. 169 Ark505, 275SW739.

615-68⅛-New. Books of account determined by court to have been fairly kept are admissible not as best evidence, but as supplementary thereto. 90Fla299, 105S834.

615-68⅛-New. In prosecution for receiving deposits knowing bank to be insolvent, books of bank were held not best evidence of insolvency, 215Ky498, 285SW232.

615-68 1/10-New. but testimony of accountants and representatives of banking department as to insolvency was admissible. 215Ky498, 285SW232.

615-68 1/11-New. Oral statements are admissible in contradiction of statements and figures in official dockets kept by defendant. 78CalA11, 247P917.

615-68 1/12-New. On material issues, testimony as to accounts other than books is admissible. 26F(2d)404.

615-68 1/13-New. In prosecution for embezzlement, accused bank cashier cannot complain of absence of books as to examination of which experts testified where he did not request production. Utah 287P181.

615-71 TexCr 29SW(2d)752 (original record).

615-72½-New. Evidence of an entry in a Bible to show age has been declared error where there was no showing of correctness of the entry or that it was made contemporaneously with birth. 101TexCr52, 273SW853.

616-73 87Cal 313, 262P75 (notes of confessions held admissible); 252Mass 450, 148NE113.

616-73½-New. , as is a memorandum made by another of his testimony. 325 Ill 410, 156NE375.

616-75 41F(2d)440; 318 Ill 114, 149NE 3; 102TexCr566, 280SW210.

616-77 200 Iowa652, 204NW256 (written telegram as received is admissible in absence of showing that written message was delivered to telegraph company for transmission); 51SD529, 215 NW692. [a] But see 200 Iowa652, 204 NW256.

616-78 But see 197NC478, 149SE735.

616-79½-New. A statute providing that where a writing is sought to be proved the original must be produced is not violated by permitting a witness to testify that he found an envelope addressed to defendant with a letter inclosed therein in certain premises. 74CalA464, 241 P275.

616-83 40GaA15, 148SE622.

616-85 14F(2d)497; 21F(2d)285; 169 Ark505, 275SW739; 180Ark397, 21SW (2d)606; 210Ky364, 275SW878; 219Ky 514, 293SW1076; 321Mo 570, 12SW(2d) 61; 115Nebr737, 214NW643; OklCr 287 P419; OklCr 287P424; 154Tenn56, 289 SW532; 107TexCr521, 298SW290; 111 TexCr677, 13SW(2d)836(2dcase).

616-86 21F(2d)32; 42F(2d)133;

F(2d)273; 23AlaA369, 125S787; 161La 867, 109S530; 104NJL51, 139A394.

616-86½-New. or has become illegible, 165Ga55, 139SE877.

616-87 71CalA500, 236P311; 74CalA 164, 240P36.

616-88 215Ala148, 109S849; 33Ariz 354, 264P1083 (insurance policies); 171 Ark58, 283SW27; 163Ga121, 135SE 917; 156Md390, 144A501; 244NY472, 155NE745; 48Philippine877; 155Tenn 628, 299SW800.

616-89 24F(2d)50; 171Ark58, 283SW 27; 71CalA500; 236P311; 254Mass520, 150NE854. See also 156Md390, 144A 501.

616-90 14F(2d)497; 20F(2d)289; 31 F(2d)846; 33Ariz354, 264P1083; 175 Ark878, 1SW(2d)23; 254Mass520, 150 NE854; 166Minn167, 207NW317.

616-91 21AlaA196, 106S696; 21AlaA 378, 108S646; 21AlaA566, 110S61; 23 AlaA369, 125S787; 200 Iowa652, 204 NW256; 219Ky514, 293SW1076; 156 Md390, 144A501; 115Nebr737, 214NW 643; 104NJL51, 139A394; 154Tenn56, 289SW532; 102TexCr451, 278SW212; 108TexCr48, 299SW254; 108TexCr499, 1SW(2d)896; 112TexCr431, 17SW(2d) 55; TexCr 31SW(2d)631; 105WVa117, 141SE622. [a] 171Ark58, 283SW27; 321 Ill 526, 152NE569; 205 Iowa373, 217 NW871; 215Ky850, 287SW22; 219Ky 514, 293SW1076; 156Md390, 144A501; 145Va883, 134SE544, 47ALR1084. [b] 21AlaA196, 106S696; 21AlaA378, 108S 646; 318 Ill 114, 149NE3; 154Tenn56, 289SW532; TexCr 31SW(2d)631.

616-91½-New. Proof of both loss and contents of the paper must be by the best evidence obtainable. 154Tenn56, 289SW532.

617-93½-New. To warrant introduction of secondary evidence, the fact of loss must be shown by testimony of an official having the custody of the papers. 154Tenn56, 289SW532.

617-93½-New. The fact that a witness destroyed cans and liquor without a court order has been held not ground for excluding testimony that the cans contained whisky. 22AlaA172, 113S 643.

617-95 [b] **Notice not necessary** when pleadings disclose that proof of paper will be necessary at trial. 260Mass 288, 157NE350. [c] **Implied notice** is sufficient. 260Mass288, 157NE350.

617-96 322Mo 106, 16SW(2d)205 (disclaimer by defendant's counsel of any knowledge of document); 149SC195, 146SE657 (primary evidence destroyed).

617-98 33Ariz354, 264P1083.

617-1 71CalA500, 236P311; 205 Iowa 30, 215NW758 (notice to produce properly admitted in evidence); Mass 172 NE343.

617-1½-New. It is optional with defendant served with notice whether he will produce instrument or not. 205 Iowa30, 215NW758.

617-3 210Ky364, 275SW878 (contents of lost search warrant); 219Ky514, 293SW1076; 260Mass288, 157NE350; 107TexCr521, 298SW290. [b] **Where evidence of contents of policy was admissible,** it was held that evidence that change was subsequently made in policy was also admissible. 254Mass520, 150NE854.

617-4 15F(2d)762; 96Fla723, 119S118. [a] 335 Ill 217, 167NE1 (copy held "original"); 111TexCr677, 13SW(2d) 836(2dcase). [c] 106TexCr593, 294SW 573. [i] **Proof of comparison of copy with original and of identity in form and contents** will be dispensed with under some circumstances. 166Minn 167, 207NW317.

617-5 But see TexCr 23SW(2d)379.

617-6½-New. Records made by a garage mechanic, kept as original records by the company, are admissible as secondary evidence where mechanics are unavailable to testify. 102WVa107, 134 SE599.

617-6½-New. Liquidating report prepared by bank examiners from original books and record of bank is secondary evidence of their contents. OklCr 287P 419.

617-7 [a] **Affidavit, instituting proceeding, or certified copy thereof,** is best evidence whether offense charged was committed before prosecution was begun. 215Ala318, 111S204.

617-8 220Ala461, 125S802; 21AlaA264, 107S323; 77CalA212, 246P95; 45 Ida73, 260P694; Ill 172NE743; 203 Iowa251, 212NW475; 164La449, 114S92; 236 Mich226, 210NW219; 58ND82, 224NW 878; 133SC491, 131SE603. [c] **Permitting assaulted party to testify that some of shots were still in him** held proper. 21AlaA264, 107S323.

617-9 203 Iowa929, 210NW465; Minn 233NW307. [a] **Old finger print card in possession of police before commission of burglary** has been held inadmissible in investigation before arresting accused. CalA 276P641.

617-10 77Colo 432, 236P1022; 203 Iowa 532, 211NW244; 116Nebr45, 215NW 564; 294Pa156, 143A910.

617-11 45 Ida73, 260P694.

617-12 77Colo 432, 236P1022; 121Kan 711, 249P688.

617-13 4F(2d)881.

618-15½-New. Experiment by a chemist, before the jury, to ascertain if spots are blood stains has been held proper. 104WVa93, 138SE664.

618-15¼-New. Prosecutrix held properly allowed to hold the baby in her arms while testifying in a prosecution for abandonment after seduction and marriage. 105TexCrl, 285SW323.

618-15¼-New. An old fingerprint card in the possession of police before the commission of the crime is inadmissible for the sole purpose of showing that accused had previously been arrested. 208Cal 295, 280P983.

618-16 16F(2d)202; Ala 130S70; 20 AlaA540, 103S604; 21AlaA261, 107S 226; 169Ark505, 275SW739; 76CalA 558, 244P1086; 77CalA212, 246P95; 77CalA738, 247P532; CalA 265P310; 110Conn403, 148A350 (imitation money not displayed or referred to at time of theft held inadmissible); 335 Ill 604, 167NE797; 203 Iowa251, 212NW475; 128Kan659, 280P780; 215Ky734, 286 SW1049; 235Ky462, 31SW(2d)712; 159La674, 106S28; 162La496, 110S732; 163La701, 112S655; 164La449, 114S 92; 165La842, 116S206; 169La1002, 126S507; 179Minn516, 229NW789; Mo 23SW(2d)22; 75Mont81, 241P1072, 1074 [citCJ]; 115Nebr302, 212NW610; NJ 140A452; NJ 148A608; 102NJL569, 134A110; OklCr 269P385; 132 Or363, 285P817; 87PaSuper25; 104TexCr567, 285SW1094; 105TexCr107, 286SW1100; 105TexCr497, 288SW1072; 108TexCr 499, 1SW(2d)896; 112TexCr254, 16SW (2d)248; Wash 287P18; 101WVa356, 132SE728. [a] **Admission of prosecuting officer's pistol,** identified as similar to one found on defendant's yacht, held not error. CalA 286P434. [b] **That article tends to arouse resentment of jury** is not ground for rejection. Ala 130S69.

618-17 22F(2d)766; 194Cal555, 229P 341 (clear, certain, and positive proof not required); 77CalA212, 246P95; 77CalA 738, 247P532; 45 Ida73, 260P694; 200 Iowa338, 202NW511; 207 Iowa760, 223 NW535 (inadmissible); 215Ky734, 286 SW1049; 160La667, 107S484; 168La 198, 121S742; 321Mo 1171, 14SW(2d) 638; 75Mont81, 241P1072, 1074 [citCJ]; 82Mont165, 266P386 (sufficient identification); 48Nev134, 228P582; ND 228 NW453; 105TexCr107, 286SW1100; 112 TexCr317, 16SW(2d)1087; 135Wash353, 237P497; 143Wash288, 255P141; 155 Wash31, 283P482 (jugs held sufficiently identified). But see 163La686, 112S650; 163La701, 112S655. [d] **Testimony as to finding article at scene of crime** is admissible as preliminary to offer of article in evidence. 82CalA389, 255P 839.

618-18 30F(2d)900; 326 Ill 104, 157NE 76; 159La674, 106S28; 165La842, 116 S206; 168La198, 121S742; 75Mont81, 241P1072, 1074 [citCJ]; Nev 285P503. [a] **Articles used in demonstration under conditions differing materially from conditions** of facts in issue held inadmissible. 203 Iowa929, 210NW465.

618-21 107WVa163, 148SE127.

618-24 [a] **Substantial accuracy is sufficient,** and exact reproduction is not necessary. Vt 145A413.

618-25 Vt 145A413.

618-27½-New. An enlarged photograph of deceased has been held admissible. 203 Iowa929, 210NW465.

618-28 16F(2d)202; 77CalA212, 246P 95; 86CalA148, 260P591; 324 Ill 484, 155NE329; 207 Iowa772, 223NW491; Mo 16SW(2d)35 (license plate); 38Wyo 462, 268P189 (rubber used by one accused of rape).

618-29 MoA 31SW(2d)559; 132 Or363, 285P817; 105TexCr497, 288SW1072; 146Wash221, 262P622.

618-29½-New. Property offered in evidence on behalf of defendant has been held properly excluded. 49ND429, 207 NW454 (syringe in rape case).

618-31 164La449, 114S92.

618-34 22F(2d)766 (code used in conspiracy); 28F(2d)150 (empty bottle and typewriter in prosecution for mailing poison with intent to kill); 214Ala 91, 106S503; 215Ala643, 112S234; 22 AlaA176, 113S644; 174Ark871, 298SW 7; Ark 32SW(2d)619; 74CalA510, 241 P267; 78CalA151, 248P542; CalA 285 P401; CalA 289P194; 106Conn345, 138 A132; 92Fla699, 109S811; 166Ga10, 142SE160 (exploded shotgun shell); 168Ga753, 149SE46; 36GaA17, 135SE 443; 327 Ill 162, 158NE462; 329 Ill 536, 161NE76; 336 Ill 412, 168NE380; Ill 172NE743; 199 Ind592, 159NE420; 167 La484, 119S523; 322Mo 234, 14SW(2d) 628; 321Mo 1171, 14SW(2d)638; Mo 25SW(2d)109; Mo 30SW(2d)763; 50 Nev212, 255P1002; NJ 148A608; 52 ND659, 204NW350; 121 OhSt280, 168 NE135; 118 Or397, 247P146; 100TexCr451, 273SW578; 101TexCr220, 276 SW228; 103TexCr364, 280SW804; 104 TexCr567, 285SW1094; 107TexCr504, 296SW513; 108TexCr19, 298SW601; 109TexCr218, 3SW(2d)816; 113TexCr 9, 18SW(2d)615; 147Va692, 137SE603; 136Wash674, 241P294; 143Wash288, 255P141; 146Wash585, 264P7. See also 69CalA257, 231P593. [a] 284Pa85, 130A312. [b] **Necessity of physical introduction in evidence.**—TexCr 276SW 694.

619-36 90Fla178, 105S401; 324 Ill 484, 155NE329; 143Wash288, 255P141. [a] 213Ala301, 104S668; 220Ala461, 125S 802; 78CalA151, 248P542; 81CalA734, 254P639 (to show availability of means); 91CalA290, 266P1000; CalA 289P194; 90Fla178, 105S401, 403 [cit CJ]; 36GaA17, 135SE443; Mo 12SW (2d)30; Nev 285P503; 103NJL18, 134 A886; 52ND659, 204NW350; 118 Or 397, 247P146; 108TexCr19, 298SW601; 136Wash674, 241P294; 143Wash288, 255P141; 150Wash475, 273P751(2d case). [b] (4) Machine guns, etc. Mo 30SW(2d)763.

619-37 101CalA238, 281P657; 210Ky 421, 276SW119, 121 [quotCJ]; 113Tex Cr9, 18SW(2d)615 (bullet admissible whether extracted before or after burial of deceased). But see Minn 233NW307.

619-38 210Ky421, 276SW119, 121 [quotCJ].

619-39 106TexCr434, 292SW877.

619-40 50Nev212, 255P1002; 108Tex Cr19, 298SW601.

619-42 78CalA151, 248P542; 109TexCr 218, 3SW(2d)816.

619-44 219Ala670, 123S50 (weapon and cartridges of defendant's implicated brother); 87CalA336, 262P825 (not positively identified as those used in commission of offense, though similar to those used); 221AppDiv26, 222NYS497.

619-45 207 Iowa760, 223NW535.

619-46½-New. In a prosecution for carrying a pistol, the pistol may be exhibited and the witness asked if it was taken from accused. 105TexCr456, 288 SW1077.

619-46¼-New. In extortion, where defendant was accused of threat to kill, a knife found in his possession is admissible in evidence. Utah 284P108.

619-47 23AlaA99, 121S449; TexCr 26 SW(2d)1072.

619-48 40GaA654, 151SE58 (evidence held sufficient).

619-49 215Ala229, 110S21; 217Ala114, 114S906; 23AlaA43, 121S432(2dcase) [certiorari den 219Ala116, 121S435(1st case)]; Ala 130S70; 22AlaA28, 111S 757; 22AlaA176, 113S644; 22AlaA382,

115SE856; 22AlaA472, 116SE896; 23AlaA 425, 126S420(3dcase); 30Ariz366, 247P 129; 172Ark23, 287SW765; 92Fla699, 109S811; 38GaA360, 144SE15; Ind 167 NE531 (bloodstained clothing); 210Ky 413, 276SW112; 221Ky226, 298SW673; 160La79, 106S701; Mich 233NW407; 113Nebr790, 205NW252; 87PaSuper25; 104TexCr583, 286SW231; 105TexCr8, 284SW961; 106TexCr593, 294SW573; TexCr 288SW(2d)554.

619-50 215Ala472, 110S812; 22AlaA33, 111S760; 172Ark23, 287SW765; 339 Ill 448, 171NE540; Mo 270SW347; 130 Nebr790, 205NW252; 105TexCr8, 284 SW961; 106TexCr593, 294SW573; 111 TexCr657, 13SW(2d)689; 113TexCr9, 18SW(2d)615; 113TexCr650, 21SW(2d) 724.

619-51 172Ark1176, 288SW925; 229Ky 312, 17SW(2d)241 (testimony held sufficient identification); 160La79, 106S 701; 169La1025, 126S514 (coat is admissible though never in clerk's possession); 130Nebr790, 205NW252; 50SD 548, 210NW980.

619-52 223Ky369, 3SW(2d)754; 226 Ky296, 10SW(2d)1094; Mo 3SW(2d) 235, 239 [quotCJ].

620-53½-New. To connect accused with illegal operation of still, overalls and boots on which fresh mash was found taken from room occupied by accused is admissible. 142Va658, 128SE459.

620-54 22F(2d)766 (coat of conspirator); CalA 289P194; 163Ga313, 136SE 154; Ga 154SE700; 207 Iowa772, 223 NW491; 316Mo 104, 289SW789 (change in character of marks on clothing held immaterial); 49Nev194, 242P582; 99 TexCr504, 270SW555; 107TexCr376, 296SW537. [a] **Evidence of identity held sufficient.**–141Wash222, 251P118.

620-55 CalA 289P194; 49Nev194, 242 P582; 33NM334, 266P917; 99TexCr 504, 270SW555.

620-56 86CalA148, 260P591 (found at place of homicide); 161La296, 108S543; 49Nev194, 242P582; 284Pa85, 130A312.

620-57 157Md75, 145A185 (evidence insufficient).

620-60 But see 111TexCr453, 14SW (2d)1029.

620-62 Ala 130S69; 166Ga10, 142SE 160.

620-63 35F(2d)605 (samples of seized liquor are admissible); 39F(2d)412; 169Ark636, 276SW365; Ark 30SW(2d) 838; 39GaA415, 147SE407 (small quantity of contents of keg of wine); 198 Ind 1, 151NE405; 198 Ind198, 152NE814; Ind 156NE560; 199 Ind546, 158NE902; 202 Iowa530, 210NW551; 203 IowaS6, 210NW571; 129Kan360, 282P735; 162 La531, 110S744; 163La329, 111S775; 163La487, 112S374; 164La1057, 115S 268; 232Mich366, 205NW95; 147Miss 29, 112S601; 315Mo 1279, 289SW792; 319Mo 1, 2SW(2d)729; 77Mont299, 250 P615; 52ND94, 202NW128; 52ND659, 204NW350; 120 Or90, 250P633, 251P 307; 49SD56, 206NW468; 102TexCr 213, 277SW141 (whisky bottle with label showing name of accused, date of seizure, amount, and names of witnesses and officer is admissible); 102TexCr 360, 278SW223; 102TexCr395, 278SW 449; 105TexCr572, 289SW1012; 106 TexCr328, 291SW1104; 111TexCr677, 13SW(2d)836(2dcase); 147Va640, 136S E495; 136Wash232, 239P553; 136Wash 374, 240P360 (articles, taken from person of defendant lawfully arrested, are admissible as evidence against him); 141Wash660, 252P118; 147Wash71, 265 P160; 151Wash262, 275P569; Wash 286P102. See also MoA 17SW(2d)353. [a] **Liquor found on premises but not involved in charge** is not admissible. 251Mich249, 231NW555.

620-64 Ga 154SE700; 202 Iowa530, 210 NW551; 207 Iowa772, 223NW491; 158 La209, 103S742 (evidence obtained by federal officers under search warrant is admissible in state court); 147Miss 29, 112S601; 77Mont299, 250P615; 58 ND773, 228NW190; 120 Or90, 250P633, 251P307; 100TexCr128, 271SW909; 101 TexCr220, 276SW228; 102TexCr501, 278SW441; TexCr 21SW(2d)668. [c] **Money found in defendant's cash register** and identified as that given by purchaser of liquor from defendant is admissible. 147Wash426, 266P174 (silver dollars).

620-65 13F(2d)632; 32F(2d)644 (explanatory though cumulative); 28Ariz 539, 237P950 (identification held sufficient); 198 Ind1, 151NE405; 198 Ind 405, 153NE890; Ind 156NE560; 200 Iowa324, 204NW273 (identification held sufficient); 200 Iowa892, 205NW517; 202 Iowa530, 210NW551; 203 Iowa192, 210NW749; 207 Iowa1033, 222NW423; 207 Iowa221, 222NW552; 160La162, 106 S731; 233Mich514, 206NW996; 147Miss 29, 112S601; 315Mo 1279, 289SW792; 52ND659, 204NW350; 120 Or90, 250P 633, 251P307; 49SD56, 206NW468; 100 TexCr128, 271SW909; 101TexCr220, 276 SW228; 102TexCr360, 278SW223; 102 TexCr395, 278SW449; 102TexCr501, 278 SW441; 108TexCr69, 299SW245; 111 TexCr482, 14SW(2d)278; TexCr 28SW (2d)148; TexCr 28SW(2d)153; 136 Wash232, 239P553; 141Wash8, 250P 349; 141Wash660, 252P118; 145Wash 638, 261P388. [a] **Objections to such evidence go to weight and not admissibility.** 102TexCr501, 278SW441. [b] **Failure of record to show where liquor exhibited came from has been held cured by evidence.** 141Wash8, 250P349. [c] **Evidence held sufficient to identify** bottles of whisky claimed to have been thrown away by accused. 198 Ind405, 153NE890. [d] **Bottle of liquor held sufficiently identified.**–105TexCr47, 285 SW316.

620-66 213Ala550, 105S721 (jug used in another prosecution); 20AlaA467, 103 S712 (labels placed on jugs and bottles by sheriff at time of seizure held admissible); 20AlaA634, 104S681; 21Ala A54, 105S708; 174Ark899, 298SW349 (to show motive for killing officer and probable aggressor); 37GaA151, 139SE 157; 198 Ind405, 153NE890; 199 Ind 617, 159NE465; Iowa 227NW589 (liquor cans); 160La162, 106S731; 176 Minn305, 223NW141; 144Miss872, 110 S690; Miss 130S687; Mo 18SW(2d)509; Mo 28SW(2d)1; 52ND659, 204NW350; 127 Or415, 272P561 (pieces of broken jug mixed with mud and moonshine); 100TexCr128, 271SW909; 150Wash131, 272P53; 154Wash405, 282P906 (bottles of liquor held sufficiently identified to be admissible); Wash 286P51.

620-66½-New. Exhibit of liquor cannot be objected to as evidence where there is no proof of tampering with it. 12Pa Dist&Co 423.

620-69 213Ala145, 104S44; 215Ala148, 109S849; 20AlaA337, 104S38 (both holding that under Act of 1915 both the genuine and disputed signatures must be in evidence); 21AlaA182, 106S393; 318 Ill 114, 149NE3; 215Ky613, 286SW696. [b] **Time for submission.**–39GaA659, 148 SE277.

621-70 71CalA181, 235P72.

621-72 4F(2d)774; 171Ark787, 286SW 1026; 318Ill 114, 149NE3; 205 Iowa25, 215NW721 (standard inadmissible if in doubt); 254Mass86, 149NE600; 51ND 445, 200NW20; 109TexCr15, 28SW(2d) 462; Wash 287P57.

621-73 213Ala145, 104S44.

621-74 205 Iowa25, 215NW721.

621-75½-New. Admissibility of handwriting specimens not otherwise in the case or material is within the discretion of the trial court. 82NH189, 131A 606.

621-76 202 Iowa150, 209NW404; 205 Iowa25, 215NW721; 215Ky613, 286SW 696; 173Minn567, 218NW112 (sufficient); 51ND445, 200NW20.

621-83 32Ariz182, 256P1048.

621-84 34NM154, 279P66; 187Wis122, 203NW749. [a] **Witness may be required to write,** which writing is competent. 121 OhSt525, 169NE839.

621-86½-New. Where it is in issue whether a typewritten letter was written by the same person who wrote other letters offered as standards of comparison and an expert witness points out, with due explanation, similarities tending to support that view, the question may be submitted to the jury although the witness did not give his own opinion on the ultimate question. 121Kan587, 249P597.

621-89 179Ark1149, 20SW(2d)886 (presence of defendant in court and testimony of witness held sufficient to show age).

621-92 113TexCr207, 19SW(2d)322.

621-93 329 Ill 536, 161NE76; 106Tex Cr539, 293SW822.

621-95 See also 112TexCr479, 17SW (2d)1064.

622-96 213Ala551, 105S709; 146SC138, 143SE674. But see 23AlaA193, 122S609. [a] **Profert of baby** is admissible to show resemblance to reputed father. 213Ala551, 105S709.

622-98 [a] **In prosecution for carnally knowing female** under eighteen, child of prosecutrix should not be permitted in courtroom during impaneling of jury. 218Ky591, 291SW1012.

622-98½-New. Exhibition of infant for purpose of identification of witnesses has been held proper in a prosecution for taking indecent liberties. 322 Ill 540, 153NE727.

622-2 215Ky734, 286SW1049.

622-11 2F(2d)922; 213Ala358, 104S 656; 22AlaA223, 114S361; 173Ark674, 293SW714; 307Mo 291, 270SW298; 191 NC210, 131SE577; 192NC189, 134SE 425; 194NC651, 140SE433; 99TexCr 647, 271SW389; 103TexCr611, 281SW 853; 108TexCr494, 18SW(2d)630. [a] (2) A statement made by one who is not under oath and is not subject to cross-examination. 124 Or61, 262P859.

622-12 7F(2d)427; 7F(2d)458; 12F (2d)904; 15F(2d)339; 23F(2d)235; 36 F(2d)903; 213Ala301, 104S668; 22Ala 223, 114S361; 218Ala656, 120S163; 23 AlaA99, 121S449; 23AlaA348, 128S359 (2dcase); 20AlaA449, 103S706; 20AlaA 457, 103S902; 21AlaA175, 106S217; 22AlaA48, 112S93; 22AlaA102, 112S898; 22AlaA259, 114S477; 22AlaA321, 115S 385; 23AlaA86, 122S613(1stcase) [certiorari den 219Ala395, 122S613(2dcase)] (testimony based on information furnished by defendant); 23AlaA521, 128 S126(2dcase); 23AlaA539, 128S589 (witness not shown to have been present); 169Ark257, 275SW325; 169Ark594, 276 SW358; 169Ark1038, 278SW45 (admission constitutes reversible error); 171 Ark655, 286SW818; 173Ark674, 293SW 714; 174Ark1103, 298SW356; 176Ark 895, 28SW(2d)67; 179Ark28, 13SW(2d) 821; 194Cal 1, 227P156; 199Cal 235, 248P906; 68CalA487, 229P896; 71CalA 138, 234P917 (hearsay evidence of declaration of child is no exception); 85 CalA433, 259P491; CalA 260P363; 88 CalA476, 263P576; 90CalA758, 266P361; 96CalA430, 274P433; CalA 283P881; 102Conn634, 129A714; 110Conn55, 147 A118; Fla 129S112; 162Ga178, 132SE 899; 166Ga563, 144SE170; 168Ga136, 147SE97; 169GaS08, 151SE493; 48 Ida 567, 283P44; 321 Ill 157, 151NE584; 333 Ill 583, 165NE155; 337 Ill371, 169 NE490; Ill 173NE135; Ill 173NE139; 198 Ind590, 154NE372; 203 Iowa929, 210NW465; 204Ky552, 265SW275; 210 Ky217, 275SW689; 226Ky732, 11SW (2d)921; 227Ky142, 12SW(2d)324; 227 Ky356, 13SW(2d)243; 231Ky308, 28SW (2d)11; 158La791, 104S717; 159La820, 106S317; 161La532, 109S56; 161La704, 109S394; 161La851, 109S515; 161La 867, 109S530; 164La813, 114S696; 166 La759, 117S820; 128Mc267, 147A191(1st case); 128Mc500, 148A747; 156Md149, 143A872; 156Md240, 144A252; 157Md 75, 145A185; 252Mass450, 148NE113; 255Mass369, 151NE839; 262Mass416, 160NE252; 149Miss817, 115S87; 153 Miss622, 121S279; 154Miss858, 123S 891; 307Mo 291, 270SW298; 317Mo 865, 297SW73; 319Mo 46, 4SW(2d)466; 321 Mo 570, 12SW(2d)61; 321Mo 553, 12SW (2d)428; Mo 14SW(2d)441; Mo 18SW (2d)8; Mo 23SW(2d)1; Mo 23SW(2d) 122; 242NY419, 152NE248; 218AppDiv 204, 218NY148; 218AppDiv638, 219 NY873; 222AppDiv70, 225NY266; 191 NC210, 131SE577; 192NC189, 134SE 425; 192NC658, 135SE769; 193NC302, 136SE729; 194NC651, 140SE433; 198 NC663, 153SE118(1stcase); 198NC704, 153SE259(3dcase); 120 OhSt597, 165NE 569; OkCr 279P933; 116 Or459, 241P 383; 118 Or397, 247P146; 124 Or61, 262 P859; Or 285P1105; 51PhilippineS25; 133SC491, 131SE603; 137SC145, 134SE 885; 138SC206, 136SE209; 143SC504,

141SE895; 144SC7, 142SE38; 156SC 509, 153SE480; 51SD529, 215NW692; 99TexCr543, 270SW1018; 99TexCr647, 271SW389; 100TexCr79, 271SW908; 100TexCr147, 272SW493 (statement by wife to accused); 100TexCr220, 272SW 480; 100TexCr334, 273SW589; 100Tex Cr557, 276SW694; 100TexCr590, 272SW 170; 101TexCr28, 274SW147; 101Tex Cr58, 273SW850; 101TexCr59, 274SW 158; 101TexCr487, 276SW240; 101Tex Cr580, 276SW435; 103TexCr205, 280 SW586; 103TexCr387, 281SW569; 103 TexCr454, 281SW548; 103TexCr502, 281SW557; 103TexCr611, 281SW853; 103TexCr449, 281SW863; 103TexCr652, 281SW1069; 104TexCr456, 284SW578; 105TexCr39, 285SW823; 105TexCr104, 287SW57; 105TexCr235, 288SW191; 105TexCr412, 289SW39; 106TexCr68, 291SW226; 106TexCr90, 291SW238; 106TexCr193, 291SW557; 106TexCr 376, 292SW891; 107TexCr36, 294SW 541; 107TexCr24, 294SW550; 106Tex Cr642, 294SW557; 106TexCr652, 294 SW571; 107TexCr151, 295SW1098; 107 TexCr408, 296SW889; 107TexCr521, 298SW290; 108TexCr223, 299SW648; 108TexCr265, 300SW936; 108TexCr576, 2SW(2d)245; 109TexCr42, 2SW(2d) 861; 109TexCr437, 5SW(2d)147; 109 TexCr518, 6SW(2d)119; 109TexCr624, 6SW(2d)369; 111TexCr89, 10SW(2d) 90(2dcase); 111TexCr52, 10SW(2d) 1001; 111TexCr134, 11SW(2d)803; 111 TexCr456, 15SW(2d)9; 112TexCr250, 16SW(2d)244; 112TexCr436, 16SW(2d) 1090; 112TexCr641, 18SW(2d)178; 113 TexCr265, 20SW(2d)426; TexCr 20SW (2d)761; TexCr 20SW(2d)766; TexCr 27SW(2d)175(2dcase); TexCr 27SW (2d)222(1stcase); TexCr 31SW(2d)812; TexCr 32SW(2d)199; 150Va588, 142SE 369; 144Wash170, 257P236; 144Wash 367, 258P20; 101WVa356, 132SE728; 104WVa93, 138SE664; 104WVa433, 140 SE139; 105WVa36, 141SE400; Wis 232 NW873. [a] (1) 191NC210, 131SE577. (4) A feeling that juror may not know how fairly to appraise their value as evidence has led to total exclusion of all hearsay statements except certain well defined classifications. 124 Or61, 262P 859. [m] **Conversations between persons not witnesses or connected with case** excluded. 99TexCr543, 270SW1018. [n] **In murder prosecution** testimony that deceased had spent the night in hotel with certain man is inadmissible as hearsay. 104TexCr15, 282SW580. [o] **Evidence of opinion of third parties** as to value of land is inadmissible. 12F(2d) 904. [p] **Hearsay rule does not apply against inquiring** into existence of probable cause. Ind 170NE539.

624-13 199Cal 235, 248P906.

624-15 199Cal 235, 248P906; 210Ky 217, 275SW689; 191NC210, 131SE577; 194NC651, 140SE433 (evidence held hearsay); 101TexCr487, 276SW240.

624-16 81CalA226, 253P735; 228Ky 842, 16SW(2d)476; 119 OhSt114, 162 NE338; 111TexCr172, 11SW(2d)798; TexCr 31SW(2d)655.

624-18 41GaA252, 152SE615 (admitted for impeachment); 159La1076, 106S570; 191NC698, 132SE785; WVa 155SE656. [b] **Evidence of what codefendant said** as to defendant's connection with crime after its commission and not in presence of defendant was held hearsay. NJSup 133A46.

624-19 8F(2d)697; 16F(2d)457; Ariz 282P930; 81CalA456, 254P281; 163Ga 186, 136SE72; 170Ga895, 154SE368; 210Ky385, 275SW819; 159La1076, 106 S570; 169La109, 124S188; Minn 231 NW225; 313Mo 98, 281SW720; 191NC 698, 132SE785; 110TexCr52, 7SW(2d) 532.

624-20 5F(2d)622; 16F(2d)457; 168 Ga136, 147SE97; 100TexCr476, 273SW 561; 39Wyo 181, 270P665, 667 [quot CJ].

624-21 28Hawaii350; Minn 231NW 225; TexCr 31SW(2d)450. See also 158 La1014, 105S47.

624-22 13F(2d)620; 23F(2d)561; 81 CalA456, 254P281 (one who heard conversation may testify to it, though not party to it); 101CalA84, 281 P404; CalA 284P709; CalA 292P538; Fla 129S112; 167Ga376, 145SE450; 39 GaA547, 147SE798(2dcase); 167La386, 119S401; 168La153, 121S607; 169La 315, 125S257; 169La777, 126S57; 170 La69, 127S368; 250Mich679, 231NW63; 101TexCr651, 277SW116 (testimony that defendant was brought in wounded on day of crime held not hearsay); 108 TexCr678, 2SW(2d)457; 109TexCr637, 6SW(2d)371 (experiment implicating accused); 111TexCr106, 10SW(2d)102; TexCr 24SW(2d)427(2dcase); 193Wis 478, 214NW337.

624-24 166Ga563, 144SE170 (where witness makes appraisal of assets of insolvent bank, he can testify as to value put upon bills receivable as one of facts upon which he bases his opinion that bank is insolvent and such evidence is not hearsay); TexCr 26SW(2d)214. See also 142Va609, 128SE555.

624-25½-New. Admission of testimony by the owner of stolen property that he recovered it from the sheriff's office has been held not hearsay when the sheriff testified that he recovered the property and the owner took charge of it. 104 TexCr55, 282SW228.

624-25¼-New. In a prosecution for bribery of a prohibition officer, testimony of the collector of revenue that unlawful withdrawals were brought to his attention is not inadmissible as hearsay. 17F(2d)339.

624-26 15F(2d)634; 23F(2d)76; 39 F(2d)312; CalA 291P887; 102Conn708, 130A184; 166Ga563, 144SE170; 40 GaA251, 149SE283; 43 Ida745, 254P 525; 333 Ill 258, 164NE682; Iowa 232 NW172; 212Ky758, 280SW106; 232Ky 404, 23SW(2d)594; 232Ky453, 23SW (2d)930; 234Ky308, 28SW(2d)11; 161 La532, 109S56; 164La813, 114S696; 170 La755, 129S154; Mo 16SW(2d)35 (police report of robbery); 114Nebr853, 211NW188; OklCr 282P892; 48Philippine994; 51SD529, 215NW692; 101 TexCr59, 274SW158; 102TexCr604, 278 SW1104; 103TexCr636, 282SW251; 108 TexCr344, 1SW(2d)291; 108TexCr615, 2SW(2d)248; 108TexCr642, 2SW(2d) 251 (recitals in affidavit and search warrant); 109TexCr408, 4SW(2d)978; 110 TexCr77, 7SW(2d)555; 110TexCr460, 9 SW(2d)259; 110TexCr548, 9SW(2d) 1032; 112TexCr261, 16SW(2d)119; TexCr 32SW(2d)474; 106WVa658, 146 SE732. But see 106TexCr593, 294SW 573. [b] **Police reports.**-102Conn708, 130A184. [c] **Book entries** in regular course of business are not hearsay. 8 F(2d)697; 106TexCr593, 294SW573.

624-28½-New. A memorandum is admissible only when the one who made it is dead, or his testimony is not available. 106WVa658, 146SE732.

625-29 150Miss296, 116S433 (testimony of deaf mute).

625-30 Ariz 282P930.

625-31 106TexCr68, 291SW226. But see 242NY419, 152NE248.

625-32 220Ala501, 126S127(2dcase); 192NC189, 134SE425; 103TexCr293, 280 SW216.

625-34 192NC189, 134SE425; 103 TexCr293, 280SW216.

625-35 192NC189, 134SE425.

625-37 206Cal 353, 274P353; 39 OklCr 119, 263P473; 105WVa370, 142SE523. [a] **Place of birth.**-Statements of defendant as to his place of birth are admissible. 70CalA362, 233P359.

625-40 See also 54ND840, 211NW585.

625-41 101TexCr52, 273SW853. [a] **Birth certificate** is admissible against objection as hearsay. TexCr 29SW(2d) 752.

625-43 101TexCr52, 273SW853.

625-44 TexCr 24SW(2d)39.

625-51 [a] **General repute** is inadmissible in absence of predicate to establish that witness was one of defendant's family. 220Ala501, 126S127(2dcase).

625-55 21AlaA629, 111S188; 94Fla229, 114S244; 166Ga10, 142SE160; Ill 173 NE139; 221Ky692, 299SW569; 158La 1014, 105S47 (where person identified was not present); 77Mont326, 250P613; NJSup 136A603; 218AppDiv635, 219 NYS1; TexCr 28SW(2d)549. [a] **Failure to identify.**-255Mass369, 151NE839.

625-55½-New. and hearsay evidence that another witness identified accused is not rendered admissible by fact that other witness had previously testified that he had identified accused, 158La 1014, 105S47.

626-56 21AlaA74, 105S428 (location of still); 111TexCr205, 13SW(2d)80.

626-57 Contra 167La484, 119S523.

626-58 101TexCr180, 274SW638 (stolen automobile).

626-59 94Fla229, 114S244.

626-67½-New. Testimony of witnesses who saw defendant in jail after crime that they recognized him as the same party another witness testified to having seen at a certain place a short time prior to the time named by the prosecutrix and that he was the same party one of witnesses had seen in his store the day of the crime is not hearsay. 101 TexCr135, 274SW586.

626-67⅛-New. Testimony of an officer that he arrested defendant because he answered the description of a negro he had orders to pick up for the alleged offense is inadmissible hearsay. 101 TexCr135, 274SW586.

626-67¼-New. Incriminatory statements are inadmissible when not admissible as a confession. 162La310, 110 S486.

626-71 20AlaA483, 103S91; 171Ark 655, 286SW818; 212Ky303, 278SW1097; 161La704, 109S394.

626-72 23AlaA228, 124S912(2dcase) (nature and use of property); 101 TexCr28, 274SW147; 102TexCr604, 278 SW1104; 110TexCr548, 9SW(2d)1032 (3d case).

626-76 194Cal 1, 227P156; 166La793, 117S921; 105TexCr369, 288SW227; 108 TexCr258, 1SW(2d)298. See also 210 Ky536, 276SW513.

626-77 23AlaA127, 123S263; 81CalA 456, 254P281; 166La793, 117S921; 167 La484, 119S523 (identification of accused); 101TexCr192, 274SW974. But see 166La759, 117S820.

626-78½-New. Statements of accused as to the place of his birth are admissible in a prosecution of an alleged foreign born noncitizen for unlawful possession of firearms. 70CalA362, 233P 359.

626-78¼-New. [§ 1242a] h. **Boundaries.** On a question regarding a county line to fix venue, hearsay evidence is admissible. 38GaA357, 143SE925.

626-80 19F(2d)322, 725 [citCJ]; 214 Ala117, 106S609; 22AlaA65, 112S178; 21AlaA631, 111S190; 22AlaA32, 111S 762; 23AlaA267, 125S60(2dcase); 23 AlaA336, 125S206; 168Ark1055, 272SW 659; 171Ark778, 286SW935; 177Ark 448, 9SW(2d)30; 195Cal 584, 234P374; 78CalA11, 247P917; 78CalA476, 248P 981; 80CalA77, 251P219; 88CalA713, 263P1036; 97CalA71, 274P1018; 97CalA 185, 275P462; 90Fla25, 105S130; 94Fla 149, 113S726; 94Fla229, 114S244; 169 Ga414, 150SE642; GaA 155SE509(1st case); 335 Ill 596, 167NE786; 199 Ind 592, 159NE420; 201 Iowa159, 205NW 534; 208 Iowa816, 225NW854; Iowa 228NW308; 216Ky573, 288SW330; 223 Ky484, 3SW(2d)1105; 227Ky528, 13SW (2d)521; 230Ky250, 19SW(2d)218; 235 Ky471, 31SW(2d)721; 236Ky74, 32SW (2d)552; 162La310, 110S486; 255Mass 304, 151NE297, 47ALR962; 262Mass185, 159NE518; 152Miss274, 119S198; Mo 271SW525; Mo 274SW383; 317Mo 319, 296SW132; 322Mo 106, 16SW(2d)205; Mo 21SW(2d)758(2dcase); Mo 29SW (2d)54; MoA 16SW(2d)648; 76Mont509, 248P201; 84Mont364, 275P750; 82NH 189, 131A606; NC 154SE314; OklCr 287P1091(2dcase); 120 Or372, 251P305; 285Pa49, 131A657; 97PaSuper417; 14 PaDist&Co 191; 137SC75, 134SE514; 54 SD391, 223NW325; 101TexCr545, 276 SW263; 101TexCr602, 276SW707; 101 TexCr651, 277SW116; 102TexCr511, 278 SW451; 103TexCr493, 281SW553; 104 TexCr105, 283SW168; 104TexCr152, 282 SW813; 104TexCr174, 283SW527; 106 TexCr95, 291SW233; 107TexCr514, 298 SW296; 111TexCr476, 14SW(2d)842; 112TexCr506, 17SW(2d)809; 112TexCr 498, 17SW(2d)821 (on cross-examination); TexCr 28SW(2d)556; 143Wash 93, 254P838; 155Wash212, 283P687. But see 22AlaA363, 115S765. [e] **Evidence of effort to obstruct justice** may always be shown against defendant. 21

AlaA631, 111S190. [f] **Declaration held inadmissible** as not being admission of guilt. 21AlaA173, 106S206. [g] **Proof of corpus delicti sufficient** to authorize proof of statements of defendant. CalA 284P485. [h] **Defendant's denial of complicity in offense** does not make admissions against interest inadmissible. Wash 291P728.

627-31 72CalA582, 237P1087; 89CalA 451, 265P276; CalA 290P102; 227Ky 528, 138SW(2d)521; 157Tenn538, 11SW (2d)879; 101TexCr192, 274SW974; Wash 291P728.

627-32 71CalA402, 235P467 (diary); 165Ga55, 139SE877; 201 Iowa159, 205 NW534. [a] 29F(2d)881; 285Pa49, 131 A657; 104TexCr105, 283SW168. [b] **Account books.**–130 Or552, 278P936 (ledger).

628-35 162La310, 110S486; TexCr 31 SW(2d)450.

628-36 329 Ill 536, 161NE76 (statement of intent held not too remote).

628-38 49SD187, 206NW925 (partial narration in third person).

628-90 75CalA181, 242P503; 78CalA37, 247P601; SD 227NW463 (tax list held inadmissible in prosecution for arson as admission of accused as to value of property).

628-90½-New. There is no rule, however, which requires that every witness to a conversation shall himself identify the participants in it. 78CalA37, 247P 601.

628-91 34F(2d)863.

628-93 202 Iowa153, 209NW279.

628-94 [a] **Admission of guilt to arresting officer** is admissible though information misstated time of commission of offense where it appears that only single offense is being prosecuted. 202 Iowa153, 209NW279.

628-95 103TexCr550, 281SW849.

628-96½-New. A statute giving accused the right to know from the arresting officer the grounds for arrest does not make conversation with him competent. 253Mass509, 149NE205.

628-99 71CalA402, 235P467.

628-1 Mass 169NE790 (alibi is no admission).

628-1½-New. A sheriff's testimony as to defendant's denial while in jail that he purchased strychnine as testified by state's witnesses held inadmissible for any purpose. 104TexCr46, 282SW242.

628-1⅛-New. In a prosecution for selling personal property on which another had a lien, any conversation between defendant and third person, not in the presence of the person from whom the property was obtained, was held inadmissible in the absence of agency being shown. 21AlaA557, 109S899.

628-1¼-New. Testimony of officers as to an admission by defendant of his connection with the crime is admissible, although inconsistent with a statement made in the presence of a stenographer and transcribed, where the officers testify that several statements were made and that they were consistent. 221Ky 268, 298SW688.

628-1⅓-New. Evidence offered by defendant to show that there was a high degree of excitement in the community after the killing has been held not admissible in a murder prosecution to shed light on defendant's incriminatory statements, where there was a sufficient predicate for their admission and no evidence conflicting with the predicate. 219Ala46, 121S38.

628-2 94Fla229, 114S244; 116Nebr141, 216NW173. See also Mo 296SW433. [a] **Disputed admission against interest** should not be given too much weight. 137Misc205, 244NYS462.

628-3 78CalA598, 248P969; 94Fla229, 114S244; 155Wash212, 283P687. But see 35F(2d)959(2dcase).

628-4 94Fla229, 114S244; Mo 256SW 314; 132 Or693, 288P215; 105TexCr458, 288SW1071. See also 84Mont364, 275P 750.

628-4½-New. The rule that admissions are generally admissible is especially true when the statement is made extrajudicially when accused is neither under arrest nor charged with crime to a person not an officer with authority to arrest. 90Fla25, 105S130.

628-5 15F(2d)619.

628-16 137SC145, 134SE885, 891 [quot CJ]. [a] **Testimony as to conversation between defendants overheard by use of detectaphone** held admissible. 137SC145, 134SE885.

628-17 137SC145, 134SE885, 891 [quot CJ].

628-19 21F(2d)903; 21AlaA309, 107S 727; 23AlaA441, 126S614; 170Ark1194, 283SW40; 80CalA77, 251P219 (voluntary character of admission may be shown); 162La310, 110S486; 114Nebr 147, 206NW748 (statements made after arrest in answer to interrogation by one connected with prosecution); 100TexCr 140, 272SW468 (admission made while under arrest is inadmissible). [c] 77 CalA113, 246P110.

629-20 19F(2d)322, 325 [citCJ]; 29 Ariz247, 240P863; 45 Ida768, 265P668; 80Mont181, 260P138; 137SC75, 134SE 514.

629-21 198Cal 454, 245P821; 203Cal 139, 263P522; 203Cal 153, 263P524; 68 CalA95, 228P417; 69CalA466, 231P601; 69CalA466, 234P374; 69CalA558, 231P 767; 78CalA598, 248P969; 78CalA476, 248P981; 81CalA484, 254P292; 86CalA 45, 260P313; 86CalA646, 261P309; 257 Mass429, 154NE189; 257Mass436, 154 NE271; 262Mass185, 159NE518; 80 Mont181, 260P138; Mont 287P933. See also 165La822, 116S199. But see 21AlaA 259, 107S801; 22AlaA363, 115S765. [c] **Preliminary hearing to determine admissibility of defendant's incriminating statement** held not subject to objection. 257Mass436, 154NE271. [d] **Admissions of guilt are presumptively voluntary.**– 203 Iowa536, 211NW213.

629-22 247NY351, 160NE395.

629-23 21AlaA339, 108S620; 23AlaA 256, 123S279; 170Ark1194, 283SW40; 70CalA465, 233P812; 82CalA62, 255P 239; 96CalA664, 274P621; 94Fla149, 113S726; 41 Ida616, 243P359; Ill 172 NE812; 203 Iowa536, 211NW213; 217 Ky539, 290SW314; 226Ky802, 11SW (2d)959; 227Ky520, 13SW(2d)533; 235 Ky462, 31SW(2d)712; 257Mass436, 154 NE271; Mass 172NE343; 76Mont509, 248P201; 52ND94, 202NW128; 52SD 582, 219NW263; 54SD267, 223NW55.

629-24 22AlaA22, 112S901; 170Ark 1194, 283SW40; 48 Ida335, 282P93; 338 Ill 596, 170NE685; 255Mass510, 152 NE377; 257Mass429, 154NE189; 257 Mass436, 154NE271; Mo 274SW35; Mo 218SW(2d)758(3dcase); 76Mont509, 248 P201; 197NC478, 149SE735; 292Pa16, 140A537; 49SD187, 206NW925; TexCr 27SW(2d)228 (verification); 193Wis204, 212NW635; 196Wis104, 219NW349; Wis 229NW51 (failure to warn defendant of his constitutional rights does not affect admissibility); 36Wyo 78, 252 P1030, 1032 [citCJ]; 39Wyo 181, 270 P665, 667 [quotCJ]. But see 106TexCr 423, 292SW881. [a] (2) After customary warning, mere asking of question or directing attention to subject of statement held not inducement or persuasion. Can [1927] 3DomLR186. [c] (2) 106 TexCr652, 294SW571. See also TexCivA 276SW707. (6) 106TexCr652, 294SW 571. (7) There are exceptions to general rule that statements made by party under arrest are not admissible. 101 TexCr531, 276SW429. (8) Party, seeking to invoke rule against admissibility, must show that testimony does not come within any of exceptions to rule. 101TexCr531, 276SW429. (9) Oral statements made by accused while he was under arrest are inadmissible unless fruits of crime were discovered thereby or unless statements are part of res gestæ. 106TexCr652, 294SW571. (10) Admission to officer unlawfully entering car held admissible. 113TexCr 433, 22SW(2d)659. [d] **Admissions made when arrested** are competent though defendant was not informed of right to counsel and warned as required in case of confessions. 132 Or693, 288 P215.

629-24½-New. Defendant's belief that arrest was for gambling did not render admissions inadmissible in a prosecution for robbery. 257Mass429, 154NE 189.

629-24⅓-New. Confession of guilt to arresting officer held prima facie voluntary. 257Mass429, 154NE189.

629-24¼-New. and failure to caution accused does not make such admission inadmissible. 257Mass429, 154NE189.

629-24½-New. Statements of defendant at a preliminary examination must be regarded as voluntary until the contrary is proved. Mo 22SW(2d)809.

629-27 7F(2d)247; 7F(2d)370; Ariz 282P481; CalA 290P887(1stcase); 264 Mass94, 162NE7; 312Mo 425, 279SW 102; 314Mo 646, 285SW474; OklCr 287 P424. But see 135Misc324, 239NYS358; 159Tenn373, 19SW(2d)239.

629-28 7F(2d)247; 312Mo 425, 279SW 102; OklCr 287P424.

629-29 Utah 290P962.

629-33 [a] **Indictment** is not "pleading of the United States," and as such admissible against it in subsequent prosecution. 23F(2d)420.

630-37 244NY472, 155NE745. But see 108WVa264, 150SE728. [a] **Documentary evidence.**–244NY472, 155NE745. [b] **That part or all of statement was in answer to questions** does not render it inadmissible. 108TexCr274, 1SW (2d)308.

630-40 108TexCr274, 1SW(2d)308.

630-41 7F(2d)324; 318Mo 843, 1SW (2d)157; Mo 22SW(2d)809.

630-42 154Md332, 140A218; TexCr 28 SW(2d)169. [a] **Cross-examination of defendant** as to what he said before judge after plea of guilty, preliminary to sentence has been held error where plea, sentence, and judgment were set aside by trial court. 174Minn590, 219 NW926.

630-43 Mo 22SW(2d)809; 105TexCr 246, 287SW1095.

630-46 197 Ind173, 150NE58; 21 OhA 26, 152NE788 (testimony before state bureau held admissible).

630-52 5F(2d)824; 77CalA10, 245P 1106; 203 Iowa929, 210NW465; Mo 22 SW(2d)809.

630-53 77CalA10, 245P1106.

630-55 [a] **Evidence that accused had pleaded guilty** held insufficient of itself to convict him. 240NY411, 148NE597.

630-56 21AlaA346, 108S261; 23AlaA 312, 125S603(2dcase); 169Ark567, 275 SW909; 179Ark346, 15SW(2d)988; 77 CalA113, 246P110; 96CalA657, 274P560; 157Miss600, 128S753 (holding plea admissible as confession of guilt on proof of corpus delicti). But see 197 Ind173, 150NE58.

631-59 274US220, 47SCt582, 71L ed 1009. [a] **Evidence that accused had previously pleaded guilty** is not of itself sufficient to convict him. 240NY 411, 148NE597.

631-60 274US220, 47SCt582, 71L ed 1009; 37F(2d)576; 173Minn293, 217NW 351; Utah 279P506.

631-61½-New. In a prosecution in a state court for larceny of bonds and conspiracy to steal bonds, submission to the jury of the question whether one or another of defendants stole the bonds was not precluded by a plea of guilty and judgment in a federal court, in a prosecution for misapplication of bonds and aiding and abetting therein; the facts charged in the prior indictment and admitted by plea of guilty were to be taken as indisputable only in case the fact of conviction became material. 252Mass224, 147NE859.

631-61½-New. Consent to plead guilty of assault with intent to rape cannot be shown when given in response to prosecuting attorney's offer of alternatives. Wyo 285P992.

631-62 7F(2d)594.

631-63 32 OhA437, 168NE238.

631-63½-New. stipulations; Minn 230 NW818.

631-64 19F(2d)421.

631-66½-New. Statements in a petition for habeas corpus are not evidence. 106 TexCr672, 294SW851.

631-67 22F(2d)67; 213Ala143, 104S 220; 214Ala2, 106S617; 20AlaA467, 103 S712; 22AlaA79, 112S535; 22AlaA178, 114S890; 23AlaA122, 122S461 [certiorari den 122S461]; 23AlaA497, 127S 785; 23AlaA546, 129S97(2dcase); 70 CalA239, 232P998; 82CalA62, 255P239; 107Conn148, 139A632; 94Fla149, 113S

726; 94Fla229, 114S244, 245 [quotCJ]; 160Ga605, 128SE747 (wife's accusation not objectionable as hearsay, immaterial, or made after homicide); 333 Ill 451, 164NE840; Ill 173NE55; 119Kan670, 240P848; 215Ky837, 287SW32; 227Ky439, 13SW(2d)244; 258Mass109, 154NE562; 264Mass314, 162NE362; 76 Mont509, 248P201, 205 [citCJ]; 194NC 459, 140SE26; 86PaSuper567; 137SC 145, 134SE885, 910 [quotCJperCothran, J]; 111TexCr570, 13SW(2d)874; Wash 288P218.

631-68 214Ala2, 106S617; 215Ala106, 109S846; 21AlaA562, 110S563; 22AlaA 501, 117S616; 174Ark743, 297SW826; 203Cal 128, 263P226; 71CalA730, 236 P214; 77CalA279, 246P337; 78CalA68, 248P261; 80CalA655, 252P666; 107 Conn148, 139A632; 94Fla229, 114S244; 242 IllA221; 223Ky484, 3SW(2d)1105; 76Mont509, 248P201, 205 [citCJ]; 35 PortoRico 817; 137SC145, 134SE885, 910 [quotCJperCothran,J]; 111TexCr 154, 11SW(2d)794(2dcase).

631-69 94Fla229, 114S244; 127Misc 300, 216NYS116; 137SC145, 134SE885, 910 [quotCJperCothran,J].

631-70 70CalA239, 232P998; 76CalA 525, 245P436; 77CalA279, 246P337; 79 CalA499, 250P203; 90CalA528, 266P 349; 94Fla229, 114S244; 324 Ill 170, 155 NE39; 203 Iowa248, 212NW465; 258 Mass109, 154NE562; 76Mont509, 248P 201; 137SC145, 134SE885, 910 [quotCJ perCothran,J].

632-71 94Fla229, 114S244; 76Mont509, 248P201, 205 [citCJ].

632-72 94Fla229, 114S244; 76Mont509, 248P201, 205 [citCJ]; 137SC145, 134SE 885.

632-72½-New. The accusatory statements are not rendered inadmissible because persons making the statements are not shown not to have been eye-witnesses. 76Mont509, 248P201.

632-73 218AppDiv638, 219NYS73.

632-74 85PaSuper7.

632-75 TexCr 20SW(2d)1060(2dcase).

632-76 29F(2d)454; 21AlaA562, 110S 563; 23AlaA552, 129S308(3dcase); 84 CalA642, 258P638 (evidence sufficient to show statements heard and understood by defendant); Cal 293P32; 261Mass 255, 158NE771; 263Mass39, 160NE315; 76Mont509, 248P201, 205 [citCJ]; 127 Misc300, 216NYS116.

632-77 21AlaA487, 109S523; 258Mass 109, 154NE562; 76Mont509, 248P201, 205 [citCJ].

632-78 76Mont509, 248P201, 205 [cit CJ].

632-79 DC 32F(2d)953.

632-81 94Fla229, 114S244; 76Mont509, 248P201, 205 [citCJ]. [a] **Statements not inadmissible because accused testifies through interpreter** or denied understanding English when there was evidence he conversed in English in colloquy between him and deceased. 76 Mont509, 248P201.

632-81¼-New. Accused must fully comprehend effect of words spoken in order to render them admissible against him. 127Misc300, 216NYS116.

632-81½-New. Before silence may be received as evidence of admission of guilt, it must appear that accused understands he is accused of a criminal act. CalA 288P95.

632-82 21AlaA201, 106S683; 21AlaA 463, 109S369; 21AlaA487, 109S523; 21 AlaA507, 109S761; 21AlaA623, 111S49; 22AlaA428, 116S415; 23AlaA552, 129S 308(3dcase); AlaA 130S676(2dcase); 77 CalA279, 246P337; 94Fla229, 114S244, 245 [quotCJ]; 324 Ill 170, 155NE39; 334 Ill 324, 166NE129; 119Kan670, 240P 848, 849 [citCJ]; 229Ky584, 17SW(2d) 697 (testimony admissible); 259Mass 152, 156NE65; 127Misc300, 216S116; 224AppDiv193, 230NYS66; 107TexCr 312, 296SW887; 111TexCr640, 13SW (2d)832. See also 203 Iowa248, 212NW 465.

633-83 21AlaA459, 109S368; 77CalA 279, 246P337; 84CalA642, 258P638 (affirmative testimony of opportunity unnecessary under circumstances); 94Fla 229, 114S244, 245 [quotCJ]; 324 Ill 170, 155NE39; 325 Ill 417, 156NE303; 333 Ill 451, 164NE840; 334 Ill 324, 166NE 129; 235Ky670, 32SW(2d)29; 127Misc 300, 216NYS116.

633-84 166Ga10, 142SE160.

633-87 107TexCr312, 296SW887.

633-89½-New. Failure of accused to explain homicide to persons making no accusation or statement calling for an explanation is not admissible. 100TexCr 215, 272SW783.

633-89¼-New. That defendant charged with murder at one time denied shooting did not render inadmissible evidence that at another time he failed to deny charge of drawing gun. 324 Ill 170, 155 NE39.

633-90 25F(2d)298; 119Kan670, 240P 848, 849 [citCJ] (dictum); Mo 292SW 52; 321Mo 570, 12SW(2d)61; 137SC145, 134SE885, 910 [quotCJperCothran,J]; 101TexCr617, 276SW926; 101TexCr639, 276SW929; 102TexCr410, 278SW210; 102TexCr454, 278SW427; 103TexCr449, 281SW863; 104TexCr589, 285SW821. [b] **Cross-examination of defendant as to silence on arrest is error.**-102TexCr 454, 278SW427.

633-91 76CalA525, 245P436; 76Mont 509, 248P201; 137SC145, 134SE885, 910 [quotCJperCothran,J]. But see 224 AppDiv193, 230NYS66.

633-92 137SC145, 134SE885, 910 [quot CJperCothran,J].

633-92½-New. Evidence of accused. Failure to deny accusations is inadmissible without sufficient foundation. 325 Ill 417, 156NE303.

634-95 7F(2d)324; 36GaA666, 137SE 793; 76Mont509, 248P201; 127Misc300, 216NYS116. But see TexCr 28SW(2d) 151(2dcase).

634-96 94Fla229, 114S244; 76Mont509, 248P201. [b] **Subsequent denial does** not render evidence of silence incompetent. 5F(2d)650. [c] **Accusatory statement is admissible** where defendant, though denying guilt, makes statement calculated to deceive or subsequently shown to be false. 84CalA642, 258P638.

634-2 239Mich695, 214NW965. See also Mo ,292SW52 (voluntary statement).

634-3 257Mass436, 154NE271; 251 Mich322, 232NW381 (after denial in presence of victim); 313Mo 98, 281SW 720; 105TexCr458, 288SW1071.

634-4 338 Ill 596, 170NE685.

634-5 256Mass487, 152NE746; 258 Mass410, 155NE448; 239Mich695, 214 NW965. See also 84CalA642, 258P638.

634-6 76CalA525, 245P436; 338 Ill 596, 170NE685; 239Mich695, 214NW 965; 313Mo 98, 281SW720.

634-7 76CalA525, 245P436.

634-8 76CalA525, 245P436.

634-15 161La867, 109S530.

634-17 19F(2d)842; 48Nev134, 228P 582.

635-18 96Fla237, 118S18; 310Mo 500, 276SW625; Mo 21SW(2d)758(3dcase); NJSup 133A415.

635-19 See also 102TexCr385, 278SW 430.

635-20 168Ark1005, 272SW671; 106 TexCr198, 291SW542. See also 102 TexCr385, 278SW430.

635-21 22AlaA185, 113S830.

635-22 CalA 281P443.

635-22½-New. Where the statement made was complete it is not rendered inadmissible because accused might have, but did not, add to it. 96Fla237, 118 S18.

635-25½-New. Proof of defendant's admissions ought to show substance thereof, and not be mere summary. 19F(2d) 322.

635-27 174Minn590, 219NW926 (details of attempted money settlement); 320Mo 445, 8SW(2d)55; 228AppDiv371, 240NYS150; TexCr 27SW(2d)228. But see 22AlaA311, 115S289.

635-28 8F(2d)732; Or 289P1063; 138 SC58, 135SE635. But see 234Ky333, 28 SW(2d)24.

636-32 215Ala229, 110S21; 216Ala151, 112S761; 21AlaA601, 110S913; 235Ky 634, 32SW(2d)16; 321Mo 553, 12SW (2d)428 (testimony held self-serving); 107TexCr635, 298SW433.

636-33 12F(2d)904; 24F(2d)802; 29 F(2d)462; 21AlaA255, 107S230; 21AlaA 455, 109S295; 21AlaA526, 109S612; 21 AlaA601, 110S913; 22AlaA90, 112S759; 22AlaA427, 117S617; 168Ark1145, 273 SW19; 176Ark398, 3SW(2d)37; 179 Ark309, 15SW(2d)389(2dcase); 179Ark 274, 15SW(2d)405(2dcase); 71CalA402, 235P467; 72CalA226, 237P66; 199CalA 513, 250P164; 82CalA389, 255P839; Fla 126S158(2dcase); 162Ga178, 132SE 899; 40GaA666, 150SE854; 337 Ill 259, 169NE206; 227Ky528, 13SW(2d)521; 234Ky192, 27SW(2d)971; 235Ky845, 32 SW(2d)405; 166La793, 117S921; 168La 454, 122S579(2dcase); 168La487, 122S 591; 169La947, 126S434; 253Mass509, 149NE205; 231Mich474, 204NW97; Mo 273SW1057; 318Mo 1222, 2SW(2d)780; 189NC766, 128SE354; 294Pa544, 144A 542; 102TexCr385, 278SW430; 105 TexCr327, 288SW458; 106TexCr642, 294SW557; 107TexCr151, 295SW1098; 112TexCr658, 18SW(2d)176(1stcase); TexCr 25SW(2d)350; TexCr 28SW(2d) 554; TexCr 31SW(2d)435; TexCr 32 SW(2d)468. [f] **Proof by state of res gestæ statements of accused** does not of itself justify introduction of self-serving declaration. TexCr 9SW(2d)259.

636-34 168La454, 122S579(2dcase); Mo 273SW1057.

637-36 72CalA226, 237P66, 68 [citCJ].

637-37 216Ala151, 112S761; 72CalA 226, 237P66.

637-56 198Cal 426, 245P426; 84CalA 685, 258P463; 219Ky789, 294SW491. [b] **Selling home brew.**-112TexCr498, 17SW(2d)821.

638-57 72CalA226, 237P66; 104TexCr 105, 283SW168.

638-59 162La310, 110S486.

638-60 78CalA598, 248P969; 101CalA 213, 281P508.

638-62 213Ala551, 105S709; 104NJL 291, 140A287.

638-70 311Mo 510, 278SW1040.

638-71½-New. or joint interest in property seized under warrant. 314Mo 646, 285SW474.

638-74½-New. An admission by defendant that he had stated that he had committed the offense charged is admissible in rebuttal of the presumption of innocence although defendant does not deny the assault. 194Cal 1, 227P 156.

638-75 26 OhNPNS406; 87PaSuper 25; 87PaSuper33.

638-76 98Fla739, 124S47.

638-78 13F(2d)849.

638-79 85PaSuper7.

638-80 13F(2d)849; 162Ga267, 134SE 36; 85PaSuper7.

638-81½-New. Admission of defendant, while testifying of a prior offense may be considered by the jury in weighing his testimony. 27F(2d)854.

639-83 126Me153, 136A908; MoA 11 SW(2d)1100; 75Mont213, 246P956 (silence when informed of unauthorized act is not ratification).

639-84 CalA 290P470; 126Me153, 136A 908; 38Wyo 72, 264P1017.

639-85 82CalA700, 256P281; CalA 290 P470; Minn 231NW225; Mo 14SW(2d) 574. [a] **Book entries made by subagents** are not admissible against defendant where he had no knowledge, custody or control of books. 203Cal 510, 265P184. [b] **Agent's books** are inadmissible against defendant in absence of proof that he knowingly and intentionally aided, advised or encouraged acts of agent. 203Cal 510, 265 P184.

639-85½-New. To establish prima facie agency evidence alone and unexplained must warrant finding of agency. 126 Me153, 136A908.

639-85¼-New. Evidence is held to justify admission of incriminatory declarations by accused's son in charge of farm alleged to be liquor nuisance. 126Me 153, 136A908.

639-89 99Vt490, 134A697, 48ALR985.

639-95 73CalA216, 238P815.

639-98½-New. By prosecuting attorney. Refusal to rule that admissions of the district attorney on supplementary motions for a new trial are binding on the court as well as on the prosecution is not error. 255Mass369, 151NE 839.

639-2 85CalA433, 259P491; 228Ky842, 16SW(2d)476; 133SC491, 131SE603, 605, 607, 609 [citCyc]; 137SC145, 134 SE885; 106TexCr628, 294SW589.

640-3 239Mich123, 214NW231; 316 Mo 256, 292SW42; 133SC491, 131SE605, 605, 607, 609 [citCyc]; 137SC145, 134 SE885. See also 52ND478, 203NW679.

640-7 21AlaA522, 109S553; 169Ark594, 276SW358; 335 Ill 217, 167NE1; 169La947, 126S434; 128Me500, 148A747; 133SC491, 131SE603; SC 155SE409.

640-9 231Ky479, 218SW(2d)809.

640-10½-New. Testimony of prosecutrix before grand jury admissible to contradict her testimony at trial excluding accused. 170Ark1143, 282SW984.

640-14 114Nebr818, 211NW16, 49ALR1[illegible].

640-15 161Ga95, 129SE221, 23Ky670, 328W(2d)29, 239Mich123, 211NW231.

640-16 But see 128Me500, 148A747.

641-20 105TexCr8, 284SW961.

641-22 317Mo759, 297SW10.

641-26 Nev 285P503.

641-30 17F(2d)741; 33F(2d)107; 33F(2d)115; 214Ala2, 106S617; 23AlaA531, 129S192; 22AlaA531, 117S502; 23AlaA116, 121S689; 35Ariz317, 277P978; 174Ark357, 295SW363; 179Ark1066, 20SW(2d)189; 36GaA666, 137SE793; 326 Ill 327, 157NE247; 337 Ill 310, 169NE243; 196 Ind594, 149NE168; 196 Ind675, 148NE193; 200 Ind7, 159NE755; 200 Iowa335, 204NW271; 217Ky518, 239SW1102, 222Ky516, 18SW(2d)961; 158La791, 104S717; 161La704, 109S394; 152Miss114, 118S710; 193NC302, 136SE729, 192NC559, 132SE774; Okl Cr 287P793 (defendant's wife); 116 Or459, 241P283; 51Philippine825; SC 155SE409; 104TexCr473, 284SW950; 105TexCr8, 284SW961; 106TexCr280, 291SW[illegible]; 106TexCr622, 291SW[illegible]; 107TexCr238, 296SW540; 107TexCr439, 296SW[illegible]; 109TexCr105, 38SW(2d)91; 111TexCr618, 13SW(2d)379; 112TexCr261, 16SW(2d)119; TexCr 24SW(2d)109(2dcase); TexCr 31SW(2d)1073. But see 214Ala2, 106S617.

642-31 218Ala40, 117S457; 174Ark357, 295SW36; 165Ga326, 140SE889; 332 Ill 170, 163NE[illegible]; 196 Ind594, 149NE168; 200 Iowa335, 204NW271, 161La704, 109S394; 319Mo16, 18SW(2d)156; 131Miss941, 229NYS261; 198NC599, 152SE774; 116 Or459, 241P383; 101TexCr487, 276SW240; 105TexCr556, 289SW407; 110TexCr413, 10SW(2d)142; 153Va905, 150SE[illegible]107.

642-35 70CalA465, 233P812 (telephone conversation in presence of accused, not denied by him, held admissible); 70CalA531, 233P980; 202 Iowa150, 209NW404 (statement held admissible); 119 Or522, 250P216; SC 155SE409; Can [1929] 1DomLR143. [a] **Statements made in defendant's presence are not evidence in themselves** but are important only to show reaction of defendant. 135Miss49, 237NYS513.

642-36 Iowa 232NW636 (statement audible to one of two defendants); 131 Misc941, 229NYS261; 299Pa50, 144A761; 144Wash446, 258P508.

642-37 144Wash446, 258P508.

642-37½-New. Statements made in presence and hearing of defendant are admissible if material as bearing on conduct of defendant. 70CalA531, 233P980.

642-38½-New. Statement of one of defendant's three children when all were present is admissible although witness could not identify child. 172Ark1176, 288SW925.

642-38¾-New. Declarations to show intention ordinarily should be accompanied by other consistent evidence. 237Pa512, 135A361.

642-38¾-New. Where reason for arrest is in issue, officer's statements to defendant could be proved by him. 155Wash486, 284P1016.

642-39 [a] **Statements in accused's presence held admissible.**-Vt 151A562.

642-44 23AlaA554, 129S482(1scase); TexCr 29SW(2d)784(1scase).

642-44½-New. , or, it seems, in his favor. 166La759, 117S820.

643-49½-New. Statements of third persons made in presence and hearing of defendant are admissible to show defendant's attitude when incriminating statements were made in his presence. 70CalA531, 233P980.

643-50 21AlaA211, 107S31, 131Md265, 134A148, 149 [citCJ], 48ALR342; 259 Mass138, 156NE257, 309Mo[illegible], 274SW734; 119 Or430, 249P1049; 160Tenn221, 228W(2d)225; 99TexCr647, 271SW389 (admissible only where admission or confession excluded guilt of defendant); 109TexCr47, 28W(2d)853; 110TexCr575, 9SW(2d)739; 110TexCr585, 10SW(2d)105; 113TexCr226, 18SW(2d)631; TexCr 25SW(2d)350 (incompetent, where state did not rely on circumstantial evidence); TexCr 26SW(2d)1064. See also 101TexCr58, 273SW850. But see 101TexCr487, 276SW240; 101TexCr540, 276SW239; 113TexCr382, 218SW(2d)1054(1stcase); TexCr 23SW(2d)376(1stcase). Contra 51Philippine825.

643-51 151Md265, 134A148, 149 [citCJ], 48ALR342. But see 51Philippine825.

643-53 230Ky707, 20SW(2d)721. [a] (1) 102TexCr506, 278SW843. (2) 196 Ind675, 148NE193. (4) 196 Ind675, 148NE193.

643-53½-New. Rule applies to witnesses warned as to threats by defendant. 102TexCr506, 278SW843.

643-56 111TexCr134, 11SW(2d)803.

644-59 200 Iowa335, 204NW271.

644-61 161La518, 109S51.

644-64 330 Ill 565, 162NE148; 101TexCr670, 276SW919. See also 110TexCr101, 7SW(2d)955.

644-66 TexCr 9SW(2d)259.

644-67 110TexCr20, 7SW(2d)528.

644-69 7F(2d)109.

644-69½-New. or received and answered by him, where responses thereto can be properly understood without them. 23F(2d)76.

644-71 213Ky501, 281SW507.

644-73½-New. An entry in a family Bible is simply a written declaration, and its admissibility in evidence is tested by the same rules which apply to other memorandums. 106WVa658, 146SE732.

644-77 6F(2d)795; 7F(2d)355; 8F(2d)251; 13F(2d)961; 16F(2d)370; 17F(2d)973; 19F(2d)850; 23F(2d)561; 35F(2d)96; 35F(2d)663; 214Ala2, 106S617; 21AlaA501, 109S561; 22AlaA128, 113S467; 22AlaA107, 114S71; 22AlaA178, 114S890; 23AlaA122, 122S461 [certiorari den 122S462]; 170Ark560, 280SW9; Cal 265P231; 90CalA317, 265P893; 163Ga186, 136SE72; 163Ga406, 136SE448; 324 Ill 375, 155NE363; 326 Ill 518, 158NE142; 333 Ill 293, 164NE692; 334 Ill 11, 165NE178; 335 Ill 539, 167NE823; 197 Ind448, 151NE329; Ind 165NE61; 204 Iowa406, 215NW258; Iowa 232NW636; 227Ky223, 12SW(2d)336; 165La270, 115S484; 168La204, 121S744; 170La314, 127S735(2dcase); 252Mass465, 148NE123; 261Mass20, 158NE260; Mo 118SW(2d)1035; Mo 22SW(2d)795; 113Nebr698, 204NW780; 114Nebr292, 207NW168; 101NJEq315, 138A586; 253NY330, 171NE393; 218App Div635, 219NYS1; 197NC113, 147SE733; 23 OhA421, 156NE159; OklCr 267P1040; OklCr 269P385; OklCr 279P964; OklCr 283P1026; 89PaSuper82; 97PaSuper328; Miss 126S406; 103TexCr636, 282SW251; 104TexCr168, 283SW173; 104TexCr210, 283SW850; 107TexCr276, 296SW520; 111TexCr464, 14SW(2d)283; 144Wash252, 258P16. [a] **In conspiracy prosecution,** where some of defendants rested without offering evidence, court properly refused to rule that subsequent evidence could not be considered against them. 32F(2d)15.

646-79 11F(2d)933.

646-80½-New. Where there are two defendants, the evidence is received on the theory that when fitted together and considered as a whole, the circumstances have probative value. 27F(2d)257.

646-81 8F(2d)593; 15F(2d)741; 85Ariz449, 280P491; 315Mo203, 285SW990.

646-83 97PaSuper417.

646-88 82CalA700, 256P281; 89PaSuper82.

646-89 252Mass465, 148NE123.

647-92 163Ga406, 136SE448; 224Ky806, 7SW(2d)237; 111TexCr534, 15SW(2d)648.

647-93 15F(2d)163. [a] **Other violations of liquor law.**-315Mo203, 285SW990 (setting up still for manufacture of liquor).

647-93½-New. the illegal manufacture of intoxicating liquor, 104TexCr168, 283SW173.

647-94 [a] **Defendant's knowledge of** value of notes sold through mails is admissible against co-conspirators. 38F(2d)406.

647-97 168La95, 121S586.

647-3 167La1003, 120S626; 221AppDiv331, 223NYS339.

647-6 33F(2d)238; CalA 284P1096; 324 Ill 375, 155NE363; 165La497, 115S728; Wis 231NW263.

647-8 113 OhSt187, 148NE834.

647-9 32F(2d)598; 113TexCr265, 20SW(2d)426.

647-9½-New. Evidence of conduct of codefendants is inadmissible to prove corpus delicti. 107TexCr276, 296SW520.

647-10 23F(2d)561; 27Hawaii65.

647-11 8F(2d)251; 34F(2d)413; 214Ala2, 106S617; CalA 277P1069; 101CalA84, 281P404; 33GaA680, 127SE891; 210Ky421, 276SW119; 227Ky142, 12SW(2d)324; 163La686, 112S650; 307Mo393, 270SW286; Mo 23SW(2d)22; 82NH189, 131A606; 119 OhSt114, 162NE388; TexCivA 17SW(2d)1087. See also 109TexCr234, 4SW(2d)66. [f] **Acquittal of some of alleged conspirators** held not to prove evidence admitted wrongly. 261Mass20, 158NE260.

648-12 316Mo576, 292SW411.

648-13½-New. Where testimony of co-conspirator is positive evidence and not a declaration, such as a conversation between himself and accused, it is admissible without proof of conspiracy. 82NH189, 131A606.

648-15 8F(2d)251; 68CalA95, 228P417; 327 Ill 162, 158NE462; 228Ky19, 14SW(2d)194.

649-16 68CalA95, 228P417; 71CalA402, 235P467; Mo 296SW128.

649-17 Cal 265P231; 68CalA95, 228P417; 71CalA402, 235P467; 170La314, 127S735(2dcase); 261Mass20, 158NE260; Mo 23SW(2d)22; 253NY330, 171NE393.

649-18 24F(2d)50.

649-19 8F(2d)251; 41GaA300, 152SE609.

649-19½-New. Where the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, a prima facie case of conspiracy need not be established before proof of acts and declarations of the conspirators. 68CalA95, 228P417.

650-20 7F(2d)355; 203Cal 510, 265P184; 327 Ill 162, 158NE462; 207 Iowa916, 223NW870; 170La314, 127S735(2dcase); Mo 23SW(2d)22.

650-25 40F(2d)315.

650-31 23F(2d)561; 100CalA113, 279P1070; 163Ga186, 136SE72; 34GaA194, 129SE9; 27Hawaii65; 324 Ill 375, 155NE363; Mo 279SW109; 109TexCr486, 5SW(2d)521; 113TexCr85, 18SW(2d)1086(2dcase); 144Wash252, 258P16.

651-32 144Wash252, 258P16.

651-33 See also 113TexCr85, 18SW(2d)1086(2dcase).

651-34 15F(2d)168; OklCr 273P1018(2dcase).

651-35 32F(2d)15; 34F(2d)863; 21AlaA309, 107S726; 21AlaA501, 109S561; 324 Ill 375, 155NE363; 126 Or651, 269P869; 106TexCr52, 290SW160.

651-36 26F(2d)847; 34F(2d)863; 199Cal 471, 250P168; 166Ga15, 142SE105. [c] **In conspiracy prosecution,** under Prohibition Law, papers in handwriting of some of conspirators, tending to show names and relations of co-conspirators, have been held competent. 32F(2d)15.

651-38 81CalA449, 253P966; CalA 265P310; 261Mass20, 158NE260. But see CalA 277P1069.

651-39 7F(2d)818.

651-40 27Hawaii65.

651-42 6F(2d)188 (admission of one defendant of knowledge of fact connected with company renders testimony of such fact admissible); 24F(2d)50.

652-47½-New. Declaration of one of conspirators that he intended to commit crime is held inadmissible to prove that defendant and he were not jointly guilty. 21AlaA309, 107S726.

652-52 173Ark674, 293SW714.

652-54 Ind 165NE61; Mo 279SW109; 227AppDiv167, 237NYS303; 113TexCr 85, 18SW(2d)1086(2dcase); 144Wash 252, 258P16.
653-55 OklCr 283P1026.
652-59 CalA 290P470.
653-60 Contra Mo 23SW(2d)22.
653-61 36F(2d)1; 39F(2d)30; 265 Mass377, 164NE239.
653-65 8F(2d)251; 13F(2d)961; 21 AlaA501, 109S561; 170Ark560, 280SW 9; 171Ark1188, 286SW931; 100CalA 113, 279P1070; 166Ga15, 142SE105; 27 Hawaii65; 200 Ind7, 159NE755; Miss 126S406; Mo 279SW109; 84Mont348, 275 P757; 107TexCr649, 298SW604; 111 TexCr464, 14SW(2d)283.
653-66 Cal 286P697; CalA 290P594; 144Wash252, 258P16.
654-68 Mo 279SW109.
654-75 232Ky613, 24SW(2d)269; 168 La95, 121S586.
654-76 Mo 286SW20.
654-77 253NY330, 171NE393.
654-78 19F(2d)850.
654-79 19F(2d)850; 20F(2d)289.
654-80 19F(2d)850; NJ 148A608.
654-82 163La686, 112S650; 167La963, 120S612; 167La1003, 120S626; 197NC 113, 147SE733.
655-83½-New. Statements not made in furtherance of the conspiracy are inadmissible. 23 OhA421, 156NE159.
655-83⅓-New. Declarations of co-conspirator surprised in operating a still are competent to show custody of still and for whom, although defendant not present. 23 OhA421, 156NE159.
655-94 16F(2d)370; 25F(2d)49; 214 Ala2, 106S617; 204 Iowa406, 215NW 258; 216Ky376, 287SW933; 135Wash 392, 237P1000, 1001, 241P966 [citCJ].
656-95 24F(2d)353; 214Ala2, 106S 617; 81CalA449, 253P966; 82CalA700, 256P281; 41GaA300, 152SE609; Mo 279 SW109; OklCr 281P305; 103TexCr318, 280SW202.
656-96 25F(2d)49; 214Ala2, 106S617; 332 Ill 207, 163NE430; 53ND486, 206 NW778; 48Philippine718. But see 23 F(2d)561.
656-97 166Ga758, 144SE301.
656-1 33F(2d)238; 124Kan208, 210, 257P739; 228Ky19, 14SW(2d)194; 252 Mass465, 148NE123.
656-5 17F(2d)741; 30F(2d)342; 214 Ala2, 106S617; 23AlaA552, 129S308(3d case); 171Ark730, 286SW809; 173Ark 674, 293SW714; 90CalA317, 265P893; 163Ga406, 136SE448; 326 Ill 518, 158 NE142; 332 Ill 207, 163NE430; 204 Iowa406, 215NW258; 223Ky374, 3SW (2d)757; 48Philippine718; 100TexCr 183, 272SW475; 106TexCr434, 292SW 877; Utah 269P515; 135Wash392, 237 P1000, 1001, 241P966 [citCJ]. [b] **Suppression of evidence by conspirators** is admissible. 214Ala2, 106S617. [c] **Question as to when conspiracy terminates** depends on facts of particular case. 111TexCr464, 14SW(2d)283.
657-7 197NC113, 147SE733.
657-7½-New. However, concerted conduct to suppress evidence is admissible. 214Ala2, 106S617.
657-8 28F(2d)965; 176Ark1205, 3SW (2d)326; Minn 231NW225; NJSup 133 A46 (where defendant was absent).
657-12 214Ala2, 106S617; 176Ark1205, 3SW(2d)326; 163Ga406, 136SE448; 166 Ga15, 142SE105; 169Ga808, 151SE493; 43 Ida459, 252P673; 215Ky786, 287SW 12; 219Ky789, 294SW491; 228Ky838, 16SW(2d)474; 233Ky471, 26SW(2d)3; 233Ky545, 26SW(2d)489; 100WVa121, 130SE81.
658-17 15F(2d)741; 88CalA222, 263P 306; 223Ky369, 3SW(2d)754.
658-18 23AlaA393, 126S174(2dcase); 35Ariz449, 280P491; 177Ark379, 6SW (2d)293; 75CalA181, 242P503; 324 Ill 311, 155NE321; 239Mich695, 214NW 965; 171Minn505, 214NW479; 113 TexCr335, 21SW(2d)675(3dcase).
659-19 239Mich695, 214NW965.
659-21 177Ark379, 6SW(2d)293.
659-29 23AlaA395, 126S178; 171Ark 282, 284SW10; 171Ark730, 286SW809; 203Cal510, 265P184; 81CalA506, 254P 630; 322 Ill 546, 153NE673; 204 Iowa 406, 215NW258; 318Mo 17, 298SW777; 197NC113, 147SE733; OklCr 280P869; 298Pa377, 148A523; 100TexCr183, 272 SW475; 100TexCr654, 274SW145; 111 TexCr534, 15SW(2d)648.
659-32 171Ark730, 286SW809.
659-32½-New. Testimony introduced for the purpose of tracing stolen property and showing the guilt of co-conspirators is not objectionable as hearsay acts and declarations in accused's absence after termination of the conspiracy. 110TexCr484, 9SW(2d)344.
659-34 23F(2d)180; 23F(2d)235; 216 Ala356, 113S67; 29Ariz247, 240P863; 317 Ill 191, 148NE67; 321 Ill 526, 152 NE569; 339 Ill 225, 171NE152; 175 Minn218, 220NW563, 61ALR970; MoA 297SW413, 414 [citCJ]; Mo 22SW(2d) 772; 114Nebr292, 207NW168; 137Miso 98, 244NYS182; 121 ObSt525, 169NE 839; 46Philippine28; 49Philippine220; 50Philippine37; 104TexCr65, 282SW 600. But see 218AppDiv635, 219NYS 1; 32 OhA433, 168NE142. [i] **Codefendant's confession is admissible to contradict or exculpate defendant.**–218 AppDiv635, 219NYS1. [j] **Codefendant's confession is not competent** in absence of evidence of conspiracy. 218 AppDiv635, 219NYS1.
660-35 216Ala356, 113S67; 23AlaA122, 122S461 [certiorari den Ala 122S462]; 68CalA95, 228P417; 307Mo 393, 270SW 286; Mo 11SW(2d)1029. See also 256 IllA493.
660-36 256 IllA493; 234Mich95, 207 NW867.
660-37 216Ala356, 113S67.
660-37½-New. Admissions by one defendant soon after arrest as to threats made by absent codefendant are admissible against defendant making the admissions. 115 Or505, 237P969.
660-37½-New. Where state by using confession of codefendant throws doubt on his guilt, jury may consider this evidence in determining guilt of accused. 104TexCr65, 282SW600.
660-38 But see 203Cal128, 263P226. Contra 216Ala356, 113S67. [a] **It must plainly appear that accomplice's conduct was fully known or his language fully understood** by defendant to draw inference from latter's silence. 23AlaA 552, 129S308(3dcase).
660-42 256 IllA493.
660-48 29Ariz247, 240P863.
660-48½-New. Admission by a coconspirator may be admissible for the purpose of impeaching him as a witness. 29Ariz247, 240P863.
660-50 181Ark314, 25SW(2d)422; 110 TexCr484, 9SW(2d)344; 100TexCr183, 272SW475.
661-51 214Ala2, 106S617.
661-52 See also 99TexCr551, 270SW 1021.
661-53 But see 100TexCr183, 272SW 475.
661-55 156Miss612, 126S390(2dcase).
661-57 See also 166Ga15, 142SE105.
661-61 214Ala2, 106S617; 173Ark674, 293SW714; Miss 130S511; 53ND486, 206NW778; OklCr 273P1012; OklCr 277P605; 89PaSuper82; 106WVa427, 145SE743(1stcase).
662-62 19F(2d)850; 40F(2d)837; 163 Ga406, 136SE448; 104TexCr55, 282SW 228. [f] (3) Where parties were acting together in commission of burglary and were in possession of fruits of crime, proof of possession of one held admissible against other. 104TexCr55, 282SW228.
662-63 19F(2d)850; 82CalA62, 255P 239; Mo 279SW109, 114 [citCJ]. [e] (2) Declaration of co-conspirator while carrying away or trying to dispose of or hide stolen property is admissible. 176Ark1205, 3SW(2d)326.
662-64 NJSup 140A317.
662-65 163Ga186, 136SE72; 163Ga406, 136SE448; 104TexCr55, 282SW228.
662-66 287Pa547, 135A313.
662-67 Mo 279SW109, 114 [citCJ].
663-73 90CalA317, 265P893; Mo 279 SW109.
663-74 113TexCr335, 21SW(2d)675(3d case).
663-75 170Ark560, 280SW9; 223Ky 369, 3SW(2d)754; 223Ky374, 3SW(2d) 757.
663-76 163Ga406, 136SE448; Mo 279 SW109, 114 [citCJ].
663-77 CalA 286P434; CalA 290P594; 163Ga406, 136SE448; 41GaA300, 152 SE609 (receipts given by co-conspirators after crime held admissible against defendant); 228Ky838, 16SW(2d)474.
663-79 Miss 130S511.
663-82 15F(2d)762; CalA 284P1096; 254Mass520, 150NE854; 169Minn205, 210NW883; 104TexCr168, 283SW173; 112TexCr158, 15SW(2d)629.
663-83 23F(2d)561; 169Minn205, 210 NW883; 111TexCr543, 15SW(2d)637.
663-86 23AlaA264, 124S282; 168La95, 121S586; 76Mont421, 246P959; 221App Div331, 223NYS339; 101TexCr149, 274 SW593. [a] (2) Association and acquaintanceship between defendant and others jointly indicted for same crime is competent. 221AppDiv331, 223NYS 339. [d] 221AppDiv331, 223NYS339.
664-88 103TexCr518, 281SW859.
664-89 113 ObSt187, 148NE834.
664-97 38F(2d)406 (letter dictated); 106TexCr462, 294SW200.
665-98 46Philippine245, 251 [quotCJ].
665-2 40F(2d)315.
665-8 104TexCr168, 283SW173.
665-9 68CalA621, 230P221; 104TexCr 168, 283SW173.
665-10 7F(2d)785; 13F(2d)961; 23 F(2d)235; 28F(2d)581; 41F(2d)598; 214Ala2, 106S617; 21AlaA300, 107S731; 218Ala40, 117S457; 22AlaA107, 114S 71; 170Ark560, 280SW9; 204 Iowa406, 215NW258; 219Ky789, 294SW491; 254 Mass520, 150NE854; 264Mass221, 162 NE308; Minn 231NW225; Mo 285SW 83 (everything done pursuant to plan is admissible); 318Mo 17, 298SW777; 114Nebr292, 207NW168; NC 154SE62; NC 154SE604; 53ND486, 206NW778; 104TexCr168, 283SW173; 107WVa357, 148SE205 (evidence held admissible).
666-11 214Ala2, 106S617.
666-14 170Ark1194, 283SW372; 166Ga 758, 144SE301; 110TexCr484, 9SW(2d) 344.
667-20 41F(2d)598; 170Ark560, 280 SW9; Cal 265P231 (testimony held not inadmissible as hearsay); 78CalA223, 248P716; 166Ga758, 144SE301; 333 Ill 293, 164NE692; 197 Ind448, 151NE 329; Ind 165NE61; 218Ky72, 290SW 1075; 165La497, 115S728; Mo 286SW 20; 317Mo 284, 295SW550; Mo 296SW 138; Mo 23SW(2d)22; 194NC260, 139 SE374; 100TexCr442, 273SW845; 110 TexCr484, 9SW(2d)344; 111TexCr378, 13SW(2d)112; 112TexCr158, 15SW(2d) 629.
667-21 43 Ida459, 252P673; 197 Ind 448, 151NE329.
667-22 197 Ind448, 151NE329.
667-23 326 Ill 518, 158NE142; Ill 173 NE104; 220Ky585, 295SW888; 307Mo 393, 270SW286; 191NC210, 131SE577; 27 OhA529, 161NE367; 104TexCr589, 285SW821; 143Va504, 129SE259; 103 WVa237, 136SE862.
667-25 103WVa237, 136SE862.
668-28½-New. But acts, conduct, statements, declarations or confessions of codefendant made in the absence of defendant and six or seven days after crime are inadmissible. 104TexCr589, 285SW821.
668-33 214Ala2, 106S617; 172Ark613, 290SW59; Mo 274SW383; Mo 278SW 726; 317Mo 276, 295SW554; 6PaDist &Co 418; 109TexCr437, 5SW(2d)147; 113TexCr160, 19SW(2d)47.
668-34 32F(2d)992; 214Ala2, 106S617; 218Ala40, 117S457; 228Ky19, 14SW(2d) 194; 161La187, 108S410.
669-39 194Cal555, 229P341 (murder in prosecution of conspiracy to rob).
669-42 171Ark568, 285SW13; 228Ky 19, 14SW(2d)194.
669-46 68CalA95, 228P417; 82CalA62, 255P239; 255Mass575, 152NE704.
669-48 215Ky786, 287SW12.
669-48½-New. Confession is evidence only against one making it unless made in the presence of another party to the act who failed to deny it. 298Pa377, 148A523.
669-49 322Mo194, 14SW(2d)611.
670-51 101TexCr540, 276SW239. See also 204Cal109, 266P807.
670-55 137SC145, 134SE885; 104Tex Cr533, 286SW204.
670-56½-New. A declaration that codefendant shot deceased is not erroneously admitted where a witness tes-

tifies to the latter's denial and the court warns the jury that the latter is not bound by the statement. 152NC17, 149 SE348.

670-58 223Ky369, 38W(2d)754; 318 Mo 647, 300SW511, 514 [cit CJ]; 221 AppDiv331, 223NYS339, 344 [cit Cyc].

670-59 [b] **Testimony that another pleaded guilty to same offense** is held inadmissible. 173Ark674, 293SW714.

670-63 311Mo581, 278SW995, 1000 [quotCJ]; Mo 256SW753; 288Pa74, 135A538, 540 [cit CJ].

670-64 311Mo581, 278SW995, 1000 [quotCJ].

670-66 249NY419, 164NE336 (confession by codefendant); 191NC210, 131 SE577.

670-67½-New. The effect of testimony as to acts and declarations of co-conspirators is for the jury. 254Mass520, 150NE854.

670-68 15F(2d)686; CalA 290P678; 212Ky50, 278SW163; 221MoA893, 288 SW77; 83Mont177, 271P449; 84Mont 348, 275P757; 85Mont428, 278P993; Mont 287P942; 50Nev1, 248P900; Okl Cr 291P143.

671-69 19F(2d)465; 23AlaA217, 123S 107(2dcase); 45Ida668, 264P875; 212 Ky50, 278SW163; 221Ky276, 298SW 693; 241NY138, 149NE330; 100TexCr 611, 272SW210; 102TexCr381, 278SW 205; 109TexCr454, 58SW(2d)145; 113 TexCr93, 18SW(2d)1081. [a] **Accomplice is one who testifies** on behalf of state and who was under law either principal accomplice or accessory to crime. 100TexCr611, 272SW210.

671-70 83Mont177, 271P449; 241NY 138, 149NE330 (as principal or accessory before fact); 100TexCr349, 272SW 1113 (one who assisted in sale of intoxicating liquors); 113TexCr93, 18 SW(2d)1081.

671-71 24F(2d)905; 220Ala30, 123S 231, 243, 68ALR712 [cit CJ]; 174Ark 835, 297SW836; 200Cal404, 253P318; 69CalA239, 230P991; 79CalA555, 250P 403; 200Iowa1394, 206NW607; 207 Iowa555, 223NW166; 212Ky778, 280 SW118; 218Ky72, 290SW1075, 1079 [cit Cyc]; 225Ky808, 10SW(2d)302; 229Ky684, 17SW(2d)697; Minn 231NW 225; 75Mont22, 241P522, 523 [cit Cyc]; 79Mont614, 257P1010, 1013 [quotCyc]; 83Mont177, 271P449; 241NY138, 149NE 330; 246NY106, 158NE38; 247NY36, 159NE715.

672-72½-New. Where accused is charged with dissuading and preventing a witness from attending court, under statute, the witness alleged to have been so dissuaded is not an accomplice. OklCr 281P600.

672-74 241NY138, 149NE330; 218 AppDiv635, 219NYS1; Utah 277P203.

672-75 212Ky50, 278SW163.

672-76 212Ky50, 278SW163.

672-77 Ark 297SW836; 30OklCr61, 234 P787; 110TexCr499, 7SW(2d)559; 110 TexCr272, 7SW(2d)561 (patient and unlicensed physician); 110TexCr503, 7 SW(2d)562. [b] **Illegal possession of drugs.** 68CalA682, 230P20.

672-78 217Ky511, 289SW1086; 229Ky 706, 17SW(2d)1001.

672-79 Minn 231NW225.

672-82 69CalA239, 230P991; 66Utah 267, 241P838, 839 [quotCJ].

672-84 79Mont614, 257P1010. [a] (2) Prosecutrix in adultery prosecution, who was fourteen years of age and with whom defendant had intercourse against her will, is not accomplice. 66Utah267, 241P838. (3) Unmarried woman under eighteen years, having no legal capacity to consent to illicit intercourse, cannot be an accomplice in adultery prosecution. 66Utah267, 241P838.

673-89 15F(2d)690; 81CalA615, 254P 614; 93CalA568, 269P969; 50Nev1, 248 P900, 903 [cit CJ]; 134SC386, 132SE 838, 839 [cit CJ]; 99TexCr543, 270SW 1018; 108TexCr253, 299SW901. Contra Sask [1930] 1DomLR973. [c] **One who purchases morphine** while acting as agent for government is not accomplice. 15F(2d)690.

673-90 50Nev1, 248P900, 903 [cit CJ].

673-91 17F(2d)723; 100TexCr451, 273 SW578.

673-93 But see Ont [1926] 4DomLR 509.

673-97 91PaSuper447. [a] Ont [1926] 4DomLR609.

674-2 71CalA788, 236P185, 81CalA 195, 253P189. [a] **Members of patient's family** assisting defendant in treatment, knowing he is not licensed physician, are accomplices. 71CalA129, 235P37.

674-3 81CalA195, 253P189, 85Mont 428, 278P993; 247NY36, 159NE715.

674-6½-New. Nor is he an accomplice merely because he agreed to help in the commission of a crime and did nothing further. 71CalA788, 236P185.

674-10 168Ark151, 269SW46 (holding mere silence in absence of duty to act will not constitute one accessory before or after fact); 69CalA239, 230P991; 212Ky782, 292SW324, 75Mont22, 241P 522, 85Mont428, 278P993, 103TexCr 282, 280SW588.

674-11 75Mont22, 241P522.

674-13 75Mont22, 241P522.

674-15 But see 110TexCr499, 7SW(2d) 559.

674-16½-New. A conspirator is an accomplice as to particular transaction before he withdraws. 221NY138, 149 NE330.

675-21 111TexCr500, 118SW(2d)853.

675-22 79CalA576, 250P588; 93CalA 590, 269P955, 221Ky276, 298SW693, 223Ky831, 18SW(2d)728, 101TexCr439, 276SW352.

675-23½-New. One having no knowledge that defendant was connected with crime or that crime had been committed is not an accomplice so as to require his testimony to be corroborated. 71 CalA788, 236P185.

675-26 CalA 290P678; 79Mont614, 257 P1010. [a] 17F(2d)67.

675-33 79CalA576, 250P588; 81CalA 195, 253P189; 85Mont428, 278P993; OklCr 292P1056, 131SC386, 132SE838, 839 [cit CJ]; 101TexCr439, 276SW252.

677-49 113TexCr401, 22SW(2d)138(2d case).

677-50 [a] 14F(2d)582. [b] **Evidence held admissible.**—220Ala39, 123S236.

677-52 34NM123, 282P870.

677-55 [b] **Evidence sufficient to support finding that defendant's employees were parties to conspiracy to fleece customers.** 221NY138, 149NE330.

677-58 But see 21AlaA384, 108S656.

677-61 241NY138, 149NE330. [a] 79 CalA295, 249P525; Cal 293P32; CalA 288P95; 207Iowa555, 223NW166; 225 Ky808, 10SW(2d)302; 110TexCr627, 10 SW(2d)720, 102TexCr284, 278SW221. [b] **Corroboration, to be sufficient, may be shown** by either direct or circumstantial evidence. 102TexCr284, 278SW221. [c] **Feigned accomplice.**—78CalA37, 247P 601.

677-62 [a] 21AlaA345, 108S269; 71 CalA788, 236P185, 81CalA195, 253P 189, 81CalA615, 254P614, 75Mont22, 241P522, 110TexCr641, 10SW(2d)21, 101TexCr439, 276SW252; 111TexCr370, 13SW(2d)91(2dcase).

677-63 69CalA239, 230P991; TexCr 32 SW(2d)652(2dcase).

678-64 69CalA239, 230P991; 71CalA 339, 235P87 (knowledge that defendant is unlicensed physician); 79CalA576, 250P588, 81CalA195, 253P189, 87CalA 177, 261P1057, 1058 [quotCJ], 212Ky 50, 278SW163; 75Mont22, 241P522; 241NY138, 149NE330, 246NY106, 158 NE38, 247NY36, 159NE715, Utah 277 P203. [b] 221NY138, 149NE330 (from which jury could find witness an accomplice, even though as employee of defendant).

678-65 81CalA615, 254P614; 50Nev1, 248P900; 107TexCr536, 281SW667.

678-67 32F(2d)424.

679-79 46Ida423, 267P950, 952 [cit CJ]; 100TexCr508, 271SW907.

679-84½-New. A person who assisted in starting the fires is an accomplice. 87CalA618, 259P961.

679-90 Minn 231NW225.

679-94 75CalA365, 242P906.

680-4 20AlaA196, 101S786.

680-7½-New. A person who temporarily stored goods stolen by burglars is not an accomplice to the crime of burglary so as to require his testimony to be corroborated. 218Ky72, 290SW1075.

680-7½-New. One who participates in the second entry but not the first entry is not an accomplice to an offense under the first entry. 90CalA528, 266P 349.

680-9 221NY138, 149NE330 (conspiracy to fleece customers).

681-30 99TexCr612, 271SW330.

681-84½-New. One who makes and sells liquor to defendants on trial for transportation is accomplice. 102TexCr 381, 278SW205.

681-85 84CalA99, 257P583. But see CalA 289P176.

681-86 204Iowa1355, 217NW233.

681-87 100TexCr70, 271SW920, 109 TexCr596, 68SW(2d)367.

681-41 Utah 291P307.

681-43 110TexCr627, 10SW(2d)720.

682-46 79CalA576, 250P588.

682-47 221Ky276, 298SW693, 85Mont 428, 278P993.

682-57½-New. One who aids in disposition and concealment of stolen property by transporting it to another county is not accomplice. OklCr 287P1055.

682-59 79CalA555, 250P403, 107TexCr 594, 298SW593.

682-60 107TexCr591, 298SW593.

682-61 271US520, 168SC603, 70Led 1113.

683-76½-New. In assault with intent to rape, the prosecutrix is not an accomplice. 47Ida760, 278P773.

683-77 200Iowa669, 202NW753; 212 Ky778, 280SW118; 322Mo69, 16SW (2d)36, 83Mont177, 271P449, OklCr 290P630. [b] **Person inserting name of defendant on stolen stock certificate** is not accomplice. 215AppDiv446, 213NYS 703.

683-78 Utah 277P203. [b] **In New York.**—214AppDiv277, 212NY877.

683-78½-New. One who aided in concealing stolen property is an accomplice. 107TexCr8, 291SW697.

683-78½-New. Where a thief and a receiver of stolen property conspired together in advance of larceny for one to steal and the other to receive, the thief is the accomplice of the receiver, and vice versa. 83Mont177, 271P449.

683-78½-New. Where defendant, charged with knowingly receiving stolen property, was an accessory before as well as after the fact in committing the theft, defendant was the principal in the theft, and he cannot be convicted on uncorroborated evidence of the corpin cipal in the theft. 83Mont177, 271P 449.

683-78½-New. One overhearing a conspiracy to break into a store and thereafter assisting in wrapping up stolen goods for the purpose of removal was an accomplice in the crime of receiving stolen goods. 228Ky98, 148SW(2d)386.

683-78½-New. A sheep herder who does not receive sheep for his own gain or to prevent the owner from repossession is not a receiver of stolen property, under statute. 85Mont428, 278P993.

683-82 163Ark1012, 261SW360, 80 CalA257, 201P618.

684-87 173Ark1182, 291SW390; 176 Ark1205, 28SW(2d)40; 45Ida665, 264 P575 [cit CJ]; 167Minn520, 208NW 223 [cit CJ], 118Mo581, 300SW760, OklCr 291P149, 31SD210, 222NW631, 99TexCr612, 271SW330; 104TexCr133, 281SW621, 108TexCr672, 28SW(2d)223, TexCr 248SW(2d)1100; 193Wis478, 214 NW337. See also 63Mo23, 221NW2nd. [c] **In prosecution for possession of liquor, possession of purchaser** does not make him accomplice of seller prosecuted for possession. CalA 260P363.

684-89 100TexCr611, 272SW210.

684-90 100TexCr611, 272SW210 (statute strictly construed). See also 100 TexCr122, 272SW131.

684-93 45Ida665, 264P875.

684-96 [b] **Son of person who watched his father** and another making whisky and sometimes assisted held accomplice. 104TexCr277, 283SW863.

684-96½-New. Under some statutes a person who rode in an automobile in which liquor was transported, although participeps criminis, is not to be treated as an accomplice of the person accused of illegal transportation. 103TexCr382, 280SW588.

684-96½-New. Under some statutes a cotransporter of intoxicating liquor is directly excluded from terms of stat-

ute naming accomplices. 100TexCr281, 272SW784.

684-96¼-New. A person who received, concealed, and stored liquor which accused is alleged to have transported after learning that it was unlawfully handled by accused is an accomplice. 103TexCr518, 281SW200.

684-96½-New. A person who traded liquor to one accused of transporting it and who assisted in loading it is an accomplice. 103TexCr97, 280SW778.

684-96¾-New. Officer purchasing whisky to entice defendant is not an accomplice. 105TexCr75, 286SW1091.

684-96⅞-New. One who was sent to still to get sacks and who was to shell corn for making it into malt was held an accomplice. 21AlaA356, 108S350.

684-96⅛-New. One who had pleaded guilty of and served time for owning and operating still is held accomplice. 21AlaA368, 108S350.

684-96 1/10-New. One who got whisky at the home of defendant accused of illegal possession and transported it for sale but did not actually sell it is not an accomplice. 104TexCr432, 284SW574.

684-96 1/10-New. The fact that a witness drank some of the whisky received by him and kept the remainder did not make him an accomplice in view of the statute. 108TexCr77, 299SW259.

684-96 1/11-New. The wife and children of one engaged in operating a still for others are not accomplices of the husband and the others. OklCr 281P810.

684-96½-New. One who aids in transporting liquor and giving samples without making sale is not an accomplice. TexCr 248SW(2d)828.

684-96 1/13-New. Person in whose shop liquor was left by seller held not accomplice in offense of transportation. Minn 232NW335.

684-97 221Ky276, 298SW693; 168La204, 121S744; Mont 286P1108.

684-99 108TexCr472, 18SW(2d)625.

684-1 Mo 279SW696; Mo 12SW(2d)424.

684-2 104TexCr476, 284SW585.

684-2½-New. Objection to testimony on such ground must be based on evidence that witness was charged with same offense. TexCr 248SW(2d)415.

684-3 168La297, 121S872. [b] **Testimony in own behalf.**-165La497, 115S728. [c] **Question as to defendant's presence** during cross-examination of codefendant is not objectionable as violating rule. 166La924, 118S85.

684-3½-New. One of several defendants jointly indicted may testify in his own behalf. 331 Ill 380, 163NE149.

685-8 102TexCr444, 273SW446; 104TexCr476, 284SW585; 109TexCr42, 2SW(2d)861.

688-24 [b] **Collateral attack on nolle prosequi.**-321Mo 1171, 14SW(2d)638.

688-57 168La204, 121S744 (statute held constitutional); 105TexCr490, 288SW1075; 109TexCr486, 5SW(2d)521.

688-58 112TexCr438, 17SW(2d)48(2d case); 112TexCr561, 17SW(2d)833(2d case).

688-60 112TexCr511, 17SW(2d)811 (2dcase).

689-70½-New. Operation of statute is not suspended where a person sought as a witness for accused has been convicted and the case is pending on appeal. 112TexCr561, 17SW(2d)833(2dcase).

689-71 112TexCr107, 14SW(2d)838.

689-78 4F(2d)758; 21AlaA434, 109S172; 98Fla1231, 125S353; 321 Ill 526, 152NE569; 196 Ind675, 148NE193; 197 Ind625, 150NE917; 119Kan658, 240P567; 124Kan208, 210, 257P739; 162La 310, 110S486; 234Mich95, 207NW867; 317Mo 276, 295SW554; 49Philippine 389; 107TexCr465, 296SW892; 110 TexCr484, 9SW(2d)344.

690-79 197 Ind323, 150NE310.

690-85 129 Okl 300, 264P885.

690-93 Mo 295SW784; 321Mo 352, 10 SW(2d)928 (convicted and sentenced accomplice); Mo 248SW(2d)1023.

691-95 OklCr 279P521. See also 90Fla 299, 105S834.

691-1 20F(2d)90; 175Ark870, 300SW 451; OklCr 287P818.

691-2 129 Okl 300, 264P885. But see 218Ala40, 117S457.

692-6 90Fla299, 105S834 (effect of conviction on credibility is for jury); 221 AppDiv331, 223NYS339.

692-9 51Philippine201.

693-15 CalA 290P678.

693-17 22AlaA307, 115S149; 74CalA 138, 239P705; CalA 290P678; Mo 300 SW815. [a] CalA 290P678.

693-17½-New. Under some statutes the dismissal of an indictment against a codefendant for such purpose is within the discretion of the court on motion of the prosecuting attorney. 68CalA457, 229P974.

693-18 But see 68CalA457, 229P974.

693-20 149Miss681, 115S776.

694-31 34GaA163, 128SE690.

694-33 124Kan405, 260P976; 162La 310, 110S486; 168La204, 121S744; 126 Mc323, 138A474; Mo 286SW20.

694-38 37F(2d)854 [certiorari den 278 US652, 49SC178, 73Led563 (8thcase)]; 208Cal 64, 280P354(2dcase); 80CalA 321, 251P949.

694-40 321 Ill 361, 152NE147. [a] **Testimony favorable to accused.**-208 IowaS18, 222NW394.

694-41 326 Ill 212, 157NE174; 32 PortoRico 355.

694-42 15F(2d)686; 24F(2d)854, certiorari den 278US652, 49SC178, 73Led 563(8thcase)]; 35F(2d)464; 317 Ill 430, 148NE255; 321 Ill 361, 152NE147; 326 Ill 212, 157NE174; 332 Ill 436, 163NE 804; 336 Ill 580, 168NE650; Ill 173NE 467; 126Mc323, 138A474; 32PortoRico 355 (entitled to very little weight).

694-44 Ill 173NE104.

694-46 27F(2d)854 [certiorari den 278 US652, 49SC178, 73Led563(8thcase)]. [a] **Testimony of accomplice** held sufficient to sustain conviction. 197Ind 323, 150NE310.

694-46½-New. Testimony of an accomplice that defendant, after inspecting burglarized premises, left his camp with a companion and that they returned later with stolen property, together with proof of possession of stolen property by defendant, has been held sufficient to show defendant to be a principal in the burglary. 104TexCr55, 282SW228.

695-47 321 Ill 361, 152NE147; 327 Ill 416, 158NE680; Mo 286SW20; Mo 289 SW831, 834[citCJ] (competency not affected).

695-50 26 OhA53, 159NE834.

695-55 24F(2d)910; 168Ark1167, 271 SW461; 90Fla299, 105S834; 324 Ill 375, 155NE363; 124Kan405, 260P976; 142 Miss456, 107S674; Mo 300SW698; Mont 286P1108; 34NM84, 278P214(1stcase). 190NC506, 130SE308; WVa 153SE196. [a] **Jury may accept testimony of accomplice** in part and reject it in part, and thus convict one defendant and acquit codefendant. Ind 166NE651; 197 NC376, 148SE450.

696-60 15F(2d)740; 20F(2d)90; 25 F(2d)90; 29F(2d)103; 31F(2d)13; 34 F(2d)1; 90Fla299, 105S834 (one charged as accessory); 93Fla1110, 113S561; 317 Ill 430, 148NE255; 318 Ill 276, 149 NE286; 321 Ill 624, 152NE520; 324 Ill 375, 155NE363; 324 Ill 516, 155NE 373; 330 Ill 532, 162NE196; 332 Ill 207, 163NE430; 332 Ill 436, 163NE804; 333 Ill 293, 164NE692; 336 Ill 580, 168 NE650; Ind 170NE786; Ill 173NE467; Ind 166NE651; Ind 167NE524; 119 Kan658, 240P567; 119Kan674, 240P 407; 123Kan743, 256P1017; 124Kan 405, 260P976, 229Ky706, 17SW(2d) 1001; 167La78, 118S699(1stcase); 126 Mc323, 138A474; 234Mich95, 207NW 867; 142Miss456, 107S674; 146Miss 815, 112S27; Mo 289SW831; Mo 300 SW501; Mo 300SW698; Mo 8SW(2d) 3; Mo 23SW(2d)22; Mo 29SW(2d)71; 115Nebr148, 211NW994; 34NM84, 278 P214(1stcase); 34NM505, 285P499 (notwithstanding criminal record); 196NC 386, 145SE679(1stcase); 292Pa16, 140 A537; 91PaSuper550; 94PaSuper535; 156SC63, 152SE825(2dcase); 48SD409, 205NW25; 152Wash65, 277P387; Wis. 230NW629; NS [1925] 2DomLR1004.

697-61 43F(2d)890.

697-63 24F(2d)82; 333 Ill 469, 165NE 235.

697-67 [a] **Other offenses relating to intoxicating liquors.**-8F(2d)145.

697-69 338 Ill 542, 170NE782; 123Kan 743, 256P1017; 124Kan405, 260P976; 234Mich95, 207NW867.

697-71 110Conn55, 147A118; 324 Ill 375, 155NE363; 324 Ill 516, 155NE373.

697-77 327 Ill 416, 158NE680; Sask [1928] 2DomLR325.

697-78 338 Ill 56, 170NE14; 124Kan 405, 260P976; 214AppDiv793, 210NYS 470. [a] **Fact that accomplice has testified truly to some material matter justifies giving credit to other parts or all of his testimony.** 332 Ill 436, 163 NE804.

698-80½-New. Conviction should not be had on unsupported testimony of an accomplice if so weak as not to be believable and to amount to no substantial evidence. 146Miss815, 112S27.

698-81 327 Ill 416, 158NE680.

698-88 23F(2d)180, 209AlaA195, 101S286 (felony); 20AlaA663, 104S838; 21AlaA309, 107S726; 21AlaA356, 108S350; 21AlaA368, 108S350; 21AlaA384, 108S656; 22AlaA364, 115S767; 23AlaA395, 126S178; 23AlaA409, 126S186; 168Ark1351, 262SW16; 168Ark1017, 272SW359; 200Cal404, 253P318; 205Cal441, 214P128; 68CalA457, 229P974; 71CalA730, 236P214; 76CalA688, 245P781; 79CalA576, 250P588; 80CalA321, 251P949; CalA 283P881; 35GaA395, 133SE284; 36GaA672, 137SE788; 36GaA751, 138SE246; 37GaA471, 140SE793; 39GaA526, 147SE727(2dcase); 41GaA570, 153SE925; 48 Ida191, 280P1038(1st case); 200 Iowa652, 204NW256; 208 IowaS18, 222NW394; 218Ky483, 291SW742; 221Ky424, 298SW1087; 168Mina 354, 210NW10; 83Mont177, 271P449; 86Mont251, 283P210, 214NA30, 155NE 584; 217AppDiv424, 216NYS723; 31 OklCr247, 238P216; OklCr 267P688; OklCr 270P339; OklCr 273P282(1st case); OklCr 274P676; 45Philippine78; 51Philippine201; 100TexCr110, 271SW 627; 100TexCr638, 274SW152; 102TexCr47, 277SW113; 102TexCr381, 278SW 205; 103TexCr97, 280SW778, 101TexCr6, 282SW233; 106TexCr179, 291SW 540; 107TexCr36, 294SW541; 107TexCr406, 296SW529; 107TexCr221, 296 SW563; 109TexCr596, 6SW(2d)367; 112TexCr489, 17SW(2d)835(1stcase); TexCr 29SW(2d)383; Sask [1930] 1DomLR973. But see Mo 12SW(2d)424. [b] **Conviction resting solely on testimony of one or any number of accomplices** cannot be upheld. 102TexCr381, 278 SW205. [i] **Rule is inapplicable** where there is other evidence sufficient to sustain conviction. 85CalA301, 259P353.

699-89 86CalA390, 260P913.

700-92 21AlaA384, 108S656; 172Ark 606, 289SW765; 200Cal404, 253P318; 36GaA672, 137SE788; 36GaA751, 138 SE246; 37GaA471, 140SE793; 108TexCr486, 18SW(2d)642.

700-93 45Philippine78 (to commit robbery and homicide).

700-95 80CalA257, 251P648.

700-96 79CalA456, 249P878.

700-98 104TexCr601, 286SW221; 107 TexCr221, 296SW563.

700-99 21AlaA621, 111S47. [a] **In Texas.**-100TexCr110, 271SW627.

700-99½-New. Illegal transportation; 102TexCr381, 278SW205.

700-99⅓-New. Illegal manufacture of intoxicating liquors; 21AlaA345, 108S269; 21AlaA356, 108S350; 104TexCr6, 282SW233.

700-99¼-New. Illegal possession of still; 21AlaA368, 108S350.

700-1½-New. Kidnapping; 23AlaA168, 123S237.

700-2 23Ala55, 120S466(2dcase); 21AlaA384, 108S656; 172Ark606, 289SW 765; 79CalA576, 250P588.

700-4½-New. Receiving stolen goods; 214AppDiv277, 212NYS77.

700-4⅓-New. Receiving stolen goods; Utah 277P203.

700-6 69CalA239, 230P991; Minn 231 NW225. [b] **Corroboration is necessary,** though accomplice was under coercion, 106TexCr321, 292SW231.

700-7 69CalA239, 230P991.

700-11 174Ark742, 297SW819; 39GaA 125, 146SE327(1stcase); 37GaA100, 138 SE920.

700-17 TexCr 258SW(2d)341.

701-20 205Cal441, 271P478; 76CalA 688, 245P481; 80CalA464, 252P633; 37 GaA471, 140SE793; OklCr 268P317;

104TexCr163, 283SW174; 111TexCr9, 10SW(2d)1004. [c] **It is not necessary to show by independent proof link between accomplice's testimony and corroborative proof.** 229AppDiv731, 241 NYS625.

701-21 20AlaA663, 104S838; 23AlaA 495, 127S683 (competency of witness); 171Ark282, 284SW10; 200 Iowa652, 204 NW256 (telegram and money sent to accomplice by accused); 103TexCr636, 282SW251; 104TexCr52, 282SW231; 108TexCr1, 299SW422; 113TexCr335, 21SW(2d)675(3dcase).

701-22 Ark 31SW(2d)952; 208Cal 64, 280P354(2dcase); 70CalA239, 232P998; 76CalA688, 245P781; 79CalA576, 250 P588; 80CalA464, 252P633; CalA 288P 788 (corroboration sufficient); CalA 288 P838 (sufficient corroboration to sustain conviction); CalA 290P470; CalA 290P608; 163Ga684, 137SE31; 37GaA 471, 140SE793; Ill 173NE278; 229Ky 98, 16SW(2d)778; 231Ky690, 22SW (2d)99; 76Mont89, 245P265; 217App Div424, 216NYS723; 229AppDiv731, 241NYS625 (proof connecting defendant with crime to jury's satisfaction); OklCr 273P1012; OklCr 274P43; Okl Cr 275P387; OklCr 287P778(2dcase); 118 Or5, 244P512; 102TexCr284, 278 SW221; 108TexCr194, 299SW414; 108 TexCr1, 299SW422; 108TexCr542, 1SW (2d)887; 112TexCr521, 16SW(2d)233; 112TexCr410, 16SW(2d)1081(3dcase); TexCr 20SW(2d)1054; TexCr 25SW (2d)850 (need not be sufficient to convict); TexCr 29SW(2d)779. [a] 76Mont 89, 245P265. [b] 217Ky403, 289SW371. [c] 209Ky318, 272SW743. [d] 217Ky 479, 290SW337; 217Ky485, 290SW339; 105TexCr539, 289SW396. [e] **Defendant's witnesses** may supply necessary corroboration. 76Mont89, 245P265. [f] **Evidence held sufficient.**-101CalA723, 282P403; 113TexCr335, 21SW(2d)675 (3dcase).

701-24½-New. The corroboration must be substantial. 168Ark1012, 272SW359.

701-24⅓-New. Evidence insufficient to corroborate testimony of accomplice. 221Ky461, 298SW1107.

701-24¼-New. The failure to recall an accomplice to reiterate testimony is immaterial and has no bearing on the question of sufficiency of corroboration of accomplice. 112TexCr410, 16SW(2d) 1081(3dcase).

701-24½-New. In determining sufficiency of corroborating testimony to connect defendant with crime, all evidence in record other than that of accomplice is to be considered. Mont 286 P1108.

701-25 21AlaA384, 108S656; 22AlaA 165, 113S482; 23AlaA104, 121S500; 23 AlaA504, 127S912(1stcase); 23AlaA555, 129S306; 168Ark1012, 272SW359; 171 Ark778, 286SW935; 175Ark1169, 299 SW360; Ark 30SW(2d)836; Ark 31 SW(2d)295; 200Cal 404, 253P318; 205 Cal 441, 271P478; 69CalA558, 231P767; 74CalA402, 240P799, 801 [quotCyc]; 76 CalA558, 244P1086; 76CalA688, 245P 781; 79CalA456, 249P878 (merely showing commission of offense or circumstances thereof is not enough under statute); 79CalA576, 250P588; 81CalA618, 254P612; 87CalA482, 262P361; 100 CalA93 279P1056; 101CalA723, 282P 403; CalA 286P459; 37GaA471, 140SE 793; 40GaA657, 150SE863(1stcase); 40 GaA738, 151SE527; 41GaA494, 153SE 432(1stcase); 41GaA570, 153SE925; 318 Ill 276, 149NE286; 200 Iowa644, 204NW213; 200 Iowa652, 204NW256; 202 Iowa242, 210NW120; Iowa 228NW 286; 221Ky461, 298SW1107; 232Ky 226, 22SW(2d)624; 169Minn205, 210 NW883; Mont 292P250; 130Misc105, 222NYS595; OklCr 268P317; OklCr 270 P339; OklCr 280P1109 (evidence sufficient if it tends to connect defendant with crime); OklCr 287P1087; 118 Or 5, 244P512; 119 Or329, 249P367; 127 Or294, 271P742; 50SD29, 208NW166 (need not be sufficient to establish guilt); 100TexCr199, 272SW471; 104 TexCr6, 282SW233; 104TexCr163, 283 SW174; 105TexCr465, 288SW1080; 106 TexCr556, 293SW1111; 107TexCr476, 296SW888; 108TexCr194, 299SW414; 113TexCr182, 18SW(2d)629; 113TexCr 50, 19SW(2d)60; TexCr 20SW(2d)780; TexCr 25SW(2d)341; TexCr 29SW(2d) 770(2dcase); 70Utah529, 261P804; Utah 277P203; Utah 277P972. See also OklCr 292P1058. [h] **Where there was no evidence to establish paternity of child,** fact that prosecuting witness in incest case gave birth to child is not corroborative evidence. 199 Iowa1221, 203NW232. [i] **Corroborative evidence need not connect defendant with commission of crime,** but is sufficient if it tends to do so. 76Mont89, 245P265. [j] **That more than one accomplice testifies** does not change rule. 23AlaA496, 129S305. [k] **Evidence tending to connect defendant with crime is sufficient** corroboration although it is not conclusive of every element of offense. CalA 289P176.

702-26 25F(2d)459; 38GaA361, 144SE 10; 108TexCr486, 1SW(2d)642.

702-27 74CalA402, 240P799; 37GaA 471, 140SE793; 41GaA494, 153SE432 (1stcase); 200 Iowa652, 204NW256; 75 Mont22, 241P522; OklCr 274P676; 119 Or329, 249P367; 34PortoRico 252; 104 TexCr163, 283SW174; 108TexCr486, 1 SW(2d)642. [a] CalA 290P655. [d] **Impeachment of testimony of accomplice.**-137Miss221, 102S282.

702-27½-New. Corroboration of an accomplice of his own connection with the crime is not proof of defendant's connection therewith. 80CalA321, 251P 949.

703-28 23AlaA217, 123S107(2dcase).

703-29 20AlaA195, 101S286; 21AlaA 345, 108S269; 21AlaA384, 108S656; 23 AlaA477, 127S254; 168Ark1012, 272SW 359; 71CalA730, 236P214; 81CalA618, 254P612; Iowa 228NW286; 231Ky690, 22SW(2d)99; 233Ky471, 26SW(2d)3; 86Mont251, 283P210; OklCr 287P778 (2dcase). See also 169Minn205, 210NW 883.

703-29½-New. Sufficient corroboration of accomplice as to fact of theft in prosecution for receiving stolen goods. Tex Cr 28SW(2d)804.

703-30 200 Iowa652, 204NW256; 208 Iowa818, 222NW394.

703-31 200 Iowa652, 204NW256.

704-32 22AlaA165, 113S482.

704-33 118 Or5, 244P512.

704-35 208Cal 64, 280P354(2dcase); 69 CalA558, 231P767; 70CalA239, 232P 998; 80CalA81, 251P688; 80CalA464, 252P633; 200 Iowa644, 204NW213; 200 Iowa652, 204NW256; 203 Iowa90, 212 NW312; 205 Iowa1374, 219NW405; Iowa 228NW286; 76Mont89, 245P265; 86Mont251, 283P210; Mont 286P1108; 130Misc105, 222NYS595; OklCr 287P 1087; 118 Or5, 244P512; 120 Or573, 253P7; 111TexCr205, 13SW(2d)80.

704-36 200 Iowa652, 204NW256; 120 Or573, 253P7.

704-37 87CalA177, 261P1057, 1058 [quotCJ]; 324 Ill 375, 155NE363; 200 Iowa644, 204NW213; 200 Iowa652, 204 NW256; 205 Iowa1374, 219NW405; Iowa 229NW255; Mo 256SW1043; OklCr 274P43; OklCr 287P778(2dcase); 120 Or573, 253P7. [a] **Exhibit identified by accomplice** is not inadmissible because corroborative evidence does not extend to it. 200 Iowa652, 204NW256.

705-40 70CalA239, 232P998; 80CalA 81, 251P688; 93CalA356, 269P721; 76 Mont89, 245P265; 86Mont251, 283P210; OklCr 270P339; 91PaSuper571; 102 TexCr284, 278SW221; 110TexCr503, 9 SW(2d)335.

705-41 23AlaA409, 126S186; 80CalA81, 251P688; 84CalA10, 257P555; 80Colo 430, 252P341; 37GaA471, 140SE793; 202 Iowa242, 210NW120; 203 Iowa90, 212NW312; Iowa 229NW255; 76Mont 89, 245P265; 86Mont251, 283P210; Mont 286P1108; OklCr 270P339; OklCr 287P778(2dcase); 126 Or579, 269P884; 91PaSuper571; 102TexCr284, 278SW 221; 103TexCr636, 282SW251; 105 TexCr574, 289SW684; 107TexCr221, 296 SW563; 111TexCr9, 10SW(2d)1004; 111TexCr570, 13SW(2d)874; TexCr 25 SW(2d)341.

705-42 194Cal 452, 229P40; 79CalA576, 250P588; 87CalA482, 262P361; CalA 288P788; 232Ky226, 22SW(2d)624; 86 Mont251, 283P210; 102TexCr284, 278 SW221; 107TexCr221, 296SW563; 108 TexCr1, 299SW422.

706-43 69CalA558, 231P767; 74CalA 402, 240P799.

706-44 205Cal 441, 271P478; 74CalA 402, 240P799, 801 [quotCyc]; 37GaA 471, 140SE793.

706-47 69CalA558, 231P767; 82CalA 700, 256P281; 26 OhA53, 159NE834; 101TexCr439, 276SW252.

706-49 208Cal 64, 280P354(2dcase); 69 CalA558, 231P767; 74CalA138, 239P705; 80CalA464, 252P633; CalA 289P176; 200 Iowa652, 204NW256; Mo 295SW 784; 119 Or641, 250P744, 745 [citCJ]; 101TexCr439, 276SW252.

706-53 172Ark1176, 288SW915; 70CalA 239, 232P998; 200 Iowa652, 204NW256 (effort to get witness out of state); 119 Or641, 250P744, 745 [citCJ].

707-54 70CalA239, 232P998; 93CalA 356, 269P721; 119 Or641, 250P744, 745 [citCJ]; 106TexCr556, 293SW1111.

707-56 172Ark1176, 288SW915; 70 CalA239, 232P998; 71CalA730, 236P214 [quotCJ]; 87CalA482, 262P361, 365 [quotCJ].

707-56½-New. contradictory statements made by defendant as to aliases by which he had been known and as to his whereabouts since the time the crime was committed may furnish sufficient corroboration; 70CalA239, 232P998.

707-66 74CalA402, 240P799; 79CalA 576, 250P588 (dictum).

707-67 79CalA576, 250P588.

707-68 119 Or329, 249P367, 368 [quot CJ]; 107Tex221, 296SW563.

707-69 171Ark568, 285SW13; 172Ark 1176, 288SW915; 119 Or329, 249P367, 368 [quotCJ]; 107TexCr221, 296SW563. [b] (3) Other instances. 205 Iowa1374, 219NW405 (finding of defendant's key ring in pocket of automobile).

707-70 119 Or329, 249P367, 368 [quot CJ].

707-72 119 Or329, 249P367, 368 [quot CJ].

708-80 180Ark656, 22SW(2d)172 (witness and defendant seen together on truck used to transport stolen cattle).

708-75 172Ark1176, 288SW915.

708-76 OklCr 274P676; 104TexCr163, 283SW174.

708-80 22AlaA165, 113S482.

708-81 205 Iowa1374, 219NW405.

708-83 Iowa 230NW555.

708-84½-New. Defendant's driving an alleged accomplice to a place near that of the robbery does not justify conviction in the absence of showing that defendant knew the criminal intent of the accomplice, acted with him in the criminal enterprise, and was present for the purpose of participating therein. 104TexCr163, 283SW174.

708-86½-New. Possession by defendant and the person actually committing the crime of each other's hats is not sufficient corroboration of an accomplice. 104TexCr163, 283SW174.

708-86⅓-New. In a prosecution for manufacturing intoxicating liquor, evidence that defendant's wife broke fruit jars smelling of whisky and that fruit and sugar were found in the garage is admissible to corroborate the accomplice although defendant was not present when search was made. 105TexCr465, 288SW1080.

708-87 79CalA541, 250P406; 79CalA 576, 250P588; 104TexCr55, 282SW228; 104TexCr58, 282SW230; 105TexCr574, 289SW684; TexCr 25SW(2d)850; 70 Utah529, 261P804.

709-88½-New. Evidence of possession is of little or no value unless conscious, personal possession, amounting to an express or implied assertion of ownership, is proved. 70Utah529, 261P804.

709-88⅓-New. That stolen articles were found at place where accomplice testified he and defendant hid them is not sufficient corroboration. 23AlaA496, 129 S305.

709-90 200 Iowa652, 204NW256 (effort to conceal stolen property).

709-98 23AlaA477, 127S254.

709-2 120 Or573, 253P7.

710-5 225Ky808, 10SW(2d)302. Contra 87Colo 307, 287P651.

710-8 But see 110TexCr503, 7SW(2d) 562 (testimony of chief of police as to conversation with co-conspirator).

710-14 76Mont89, 245P265.

711-19 70CalA239, 232P998.

711-20½-New. or extend to every ma-

terial point. 51ND130, 199NW187.

711-21 208Cal 64, 280P354(2dcase); 68 CalA457, 229P974; 75CalA718, 243P 485; 76CalA688, 245P781; 79CalA576, 250P588; 82CalA62, 255P239; 84CalA 10, 257P555; 87CalA482, 262P361; 99 CalA682, 279P211; 217Ky403, 289SW 371; Ky 298SW693; 168Minn354, 210 NW10; 76Mont89, 245P265; Mont 286 P1108; Mont 287P214; 130Misc105, 222 NYS595; 51ND130, 199NW187; OklCr 280P1109; 118 Or5, 244P512; 120 Or 573, 253P7; 105TexCr465, 288SW1080; 107TexCr646, 298SW597; TexCr 10SW (2d)723; 111TexCr570, 13SW(2d)874; 70Utah529, 261P804; Utah 277P972.

711-21½-New. sufficient to establish a prima facie case of guilt, 76Mont89, 245 P265.

711-21⅓-New. beyond a reasonable doubt, 105TexCr465, 288SW1080.

711-22 221Ky276, 298SW693.

711-23 172Ark1176, 288SW915; 208Cal 64, 280P354(2dcase); 70CalA239, 232P 998; 74CalA138, 239P705; Cal 293P32; 76CalA688, 245P781; 79CalA576, 250P 588; 84CalA10, 257P555; 86CalA84, 260P391; 88CalA508, 263P821; 92CalA 550, 268P651; 93CalA356, 269P721; 94 CalA150, 270P712; CalA 288P95; 40 GaA217, 149SE292(2dcase); Iowa 228 NW286; 76Mont89, 245P265; Mont 286 P1108; 130Misc105, 222NYS595; 118 Or 5, 244P512; OklCr 273P1012; OklCr 279P920; 110TexCr627, 10SW(2d)720; 106TexCr85, 290SW1092; 110TexCr503, 9SW(2d)335; 113TexCr182, 18SW(2d) 629; TexCr 26SW(2d)208(2dcase); TexCr 32SW(2d)478.

711-24 21AlaA621, 111S47; 70CalA239, 232P998; 76CalA688, 245P781; 79CalA 576, 250P588; 82CalA62, 255P239. [b] **Corroboration as to some material fact or facts** may warrant jury in inferring that accomplice speaks truth as to all. 51ND130, 199NW187.

712-26 205Cal 441, 271P478; Cal 293 P32; Cal 293P32; Cal 293P32; 70CalA 239, 232P998; 74CalA402, 240P799; 81 CalA618, 254P612; 87CalA482, 262P 361; CalA 288P95; 41GaA494, 153SE 432(1stcase); 83Mont177, 271P449; 70 Utah529, 261P804; Utah 277P972.

712-27½-New. Corroborating evidence must be believed beyond reasonable doubt to support conviction. 23AlaA 409, 126S186.

712-28 119 Or329, 249P367. [a] **Corroboration must be substantial.**-168Ark 1012, 272SW359.

712-29 21F(2d)889; 177Ark938, 9SW (2d)583; 208Cal 64, 280P354(2dcase); 119 Or329, 249P367. [a] **If corroborating testimony is sufficient to sustain defendant's conviction** it is sufficient to support accomplice's testimony. 233Ky 471, 26SW(2d)3.

712-30 31F(2d)13; 22AlaA307, 115S 149; 35Ariz317, 277P978; 169Ark289, 273SW11; 169Ark770, 276SW858; 172 Ark1176, 288SW915; 175Ark120, 298SW 867; 177Ark1056, 9SW(2d)314; Ark 31 SW(2d)295; 68CalA457, 229P974; 70 CalA239, 232P998; 75CalA365, 242P906; 75CalA718, 243P485; 76CalA688, 245P 781; 79CalA502, 250P202; 79CalA499, 250P203; 79CalA576, 250P588; 80CalA 257, 251P648 (infamous crime against nature); 80CalA138, 251P672; 80CalA 321, 251P949; 80CalA464, 252P633; 82 CalA62, 255P239; 82CalA700, 256P281; 84CalA10, 257P555; 85CalA648, 259P 961; 87CalA177, 261P1057; 87CalA482, 262P361; 88CalA508, 263P821; 90CalA 528, 266P349; 92CalA550, 268P651; 94 CalA150, 270P712; 95CalA60, 272P349; 99CalA682, 279P211; 100CalA113, 279P 1070; CalA 285P386; CalA 286P459; 35 GaA395, 133SE284; 334 Ill 487, 166NE 62; 196 Ind675, 148NE193; 200 Iowa 652, 204NW256; 202 Iowa242, 210NW 120; 205 Iowa1374, 219NW405; 207 Iowa219, 222NW389; 124Kan405, 260P 976; 212Ky778, 280SW118; 217Ky403, 288SW371; 218Ky72, 290SW1075; 221 Ky268, 298SW688; 221Ky276, 298SW 693; 221Ky487, 298SW1086; 225Ky808, 10SW(2d)302; 228Ky98, 14SW(2d)386; 167La547, 119S869; 168Minn354, 210 NW10; 169Minn205, 210NW883; 173 Minn598, 218NW117; 176Minn175, 222 NW906; 148Miss696, 114S816; Mo 24 SW(2d)1020; 76Mont89, 245P265; 86 Mont251, 283P210; Mont 286P1108; 130 Misc105, 222NYS595; 51ND130, 199NW 187; OklCr 267P869 (robbery); OklCr 286P813(2dcase); OklCr 287P778(2d case); OklCr 292P1058; 119 Or329, 249 P367; 120 Or573, 253P7; 127 Or294, 271 P742; 292Pa16, 140A537; 157Tenn648, 11SW(2d)868; 100TexCr664, 274SW 582; 101TexCr154, 274SW608; 101 TexCr439, 276SW252; 103TexCr493, 281 SW553; 103TexCr506, 281SW1060; 104 TexCr210, 283SW850; 105TexCr465, 288 SW1080; 107TexCr646, 298SW597; 110 TexCr503, 7SW(2d)562; 110TexCr503, 9SW(2d)335; TexCr 10SW(2d)723; TexCr 25SW(2d)341; TexCr 25SW(2d) 850; TexCr 26SW(2d)208(2dcase); TexCr 26SW(2d)251(2dcase); TexCr 26 SW(2d)276(1stcase); TexCr 26SW(2d) 635; 37Wyo 478, 263P616.

713-31 21AlaA384, 108S656; 23AlaA55, 120S466(2dcase); 23AlaA395, 126S178; 23AlaA477, 127S254; 168Ark1012, 272 SW359 (sodomy); 68CalA457, 229P974; 74CalA402, 240P799; 79CalA456, 249P878; 80CalA81, 251P688; 81 CalA618, 254P612; CalA 286P459; CalA 288P95; 36GaA303, 136SE336; 318 Ill 276, 149NE286; 327 Ill 416, 158 NE680 (no corroboration at all); Iowa 228NW286; Iowa 230NW555; 233Ky 471, 26SW(2d)3; OklCr 287P764; 45 Philippine78; 100TexCr199, 272SW471; 100TexCr638, 274SW152; 101TexCr 626, 276SW695; 106TexCr85, 290SW 1092; 106TexCr179, 291SW540; 108 TexCr571, 28W(2d)235; 111TexCr449, 14SW(2d)1031(1stcase); 113TexCr185, 19SW(2d)43; TexCr 28SW(2d)166; TexCr 29SW(2d)770(2dcase); 70Utah 529, 261P804; Utah 277P203; WVa 153 SE496.

713-32 220Ala30, 123S231, 68ALR712; 79CalA576, 250P588; Iowa 228NW286; Iowa 230NW555; 76Mont89, 245P265; 86Mont251, 283P210.

714-33 71CalA402, 235P467; 79CalA 576, 250P588; 82CalA700, 256P281; 221Ky424, 298SW1087.

714-34 22AlaA364, 115S767; 35Ariz 317, 277P978; 169Ark770, 276SW858; 177Ark938, 9SW(2d)583; 71CalA402, 235P467; 79CalA576, 250P588; 35GaA 395, 133SE284; 163Ga684, 137SE31; 36 GaA751, 138SE246; 40GaA738, 151SE 406(1stcase); 200 Iowa652, 204NW256; 205 Iowa1374, 219NW405; 219Ky806, 294SW466; 148Miss696, 114S816; Mo 256SW1043; 76Mont89, 245P265; 86 Mont251, 283P210; Mont 286P1108.

715-50½-New. Where testimony of accomplice is attacked evidence corroborating his testimony as to minor facts not connecting accused with crime is admissible. WVa 153SE496.

715-2 165Ga326, 140SE889; Ill 172NE 812; 210Ky645, 276SW560; 80Mont181, 260P138. [a] NJ 148A776. (1) OklCr 288P359. (5) 195Cal 584, 234P 374. (6) 321 Ill 32, 151NE507. (13) In criminal law "confession" is acknowledgment of criminal act charged, or of facts which constitute crime. 90 Fla25, 105S130. [b] **Admitting on cross-examination** of having pleaded guilty held as evidence of confession. 240NY411, 148NE597.

715-3 198Cal 454, 245P821; 165Ga326, 140SE889; 210Ky645, 276SW560; 55 ND194, 212NW857.

715-4 198Cal 454, 245P821.

715-5 23AlaA127, 123S263; 29Ariz247, 240P863; 195Cal 584, 234P374; 79CalA 541, 250P406; 81CalA484, 254P292; 91 CalA50, 266P561; 165Ga326, 140SE889; 323 Ill 133, 153NE615; 262Mass185, 159 NE518; 224AppDiv193, 230NYS66; 137 SC75, 134SE514.

715-6 14F(2d)582; 29Ariz247, 240P 863; 137SC75, 134SE514. [a] **Defendant's statement relating to future rather** than past events held inadmissible as confession. 23AlaA359, 125S688.

715-7 198Cal 454, 245P821.

715-9 80Mont181, 260P138.

716-13½-New. Evidence that accused wanted a witness to make an affidavit that he would not appear against him is not a confession. 21AlaA155, 106S 797.

716-13⅓-New. Impeaching incriminatory statements, not clearly shown to have been made when making an inadmissible confession, will be considered no part thereof, although made at or about the same time. 162La310, 110 S486.

716-13¼-New. Statements as to other crimes made in the course of a confession are relevant where they tend to show the motive of the crime in question. 106TexCr222, 291SW558.

716-15 199Wis269, 225NW933. [b] **Statements made by accused as witness upon legal examination** cannot be given as evidence against him, under some statutes. 107WVa591, 149SE674 (investigation of destruction of building by fire, conducted by fire marshal or his deputy, held "legal examination").

716-16 107TexCr196, 296SW523. [b] **Statement to officer detailing crime** held confession requiring preliminary evidence of admissibility. 24 OhA225, 157 NE301.

716-28½-New. A plea of guilty which is subsequently withdrawn is admissible if voluntarily made. 12F(2d)904.

716-32 29Ariz247, 240P863; 79CalA 541, 250P406; 86CalA646, 261P309; 93 CalA81, 269P177; CalA 287P533; 321 Ill 32, 151NE507; 200 Ind405, 164NE 276, 277; MoA 278SW825; 218AppDiv 266, 218NYS469; 137SC75, 134SE514; 107TexCr230, 296SW520. [a] 100Tex Cr590, 272SW170.

716-33 79CalA541, 250P406 (intent). But see 166La924, 118S85. [a] **In trial for robbery with firearms,** defendant's statements to officers, immediately after search of automobile wherein stolen money was found, were inculpatory so far as showing that he owned automobile, and confession, if he was under arrest. 110TexCr512, 8SW(2d)144, 60 ALR290.

716-33½-New. An admission of having committed a similar crime elsewhere, contained in a confession, does not render the latter inadmissible as a confession. 297Pa382, 147A79.

717-34 321 Ill 32, 151NE507. [a] 321 Ill 32, 151NE507; Ill 172NE812. [c] **Objection that prosecution has not laid proper predicate** has no relevancy to exculpatory statements made by accused. 168La161, 121S609. [d] **Voluntary character.**-331 Ill 268, 162NE839.

717-35 168GaA282, 147SE519.

717-36 101TexCr251, 275SW335.

717-37 165Ga326, 140SE889; Ill 172 NE812.

717-39 12F(2d)904; 15F(2d)958; 15 F(2d)965; 25F(2d)49; 32F(2d)860; 215AlaA314, 110S478; 22AlaA59, 112S 182; 216AlaA356, 113S67; 21AlaA339, 108S620; 21AlaA457, 109S366; 22AlaA 176, 113S644; 32Ariz195, 256P1053; 170Ark1193, 281SW13; 170Ark1193, 283SW29; 177Ark1034, 9SW(2d)238; 194Cal555, 229P341; 198Cal 454, 245P 821; 195Cal 584, 234P374; 72CalA160, 236P987 (admissible); 77CalA113, 246 P110; 80CalA151, 251P335; 81CalA 752, 254P666; CalA 287P533; 56App DC326, 13F(2d)298; 90Fla317, 105S 843; 90Fla659, 106S479; 98Fla98, 123 S523(2dcase) (compulsion, of whatever character, excludes confession); 36GaA 84, 135SE765; 319 Ill 359, 150NE263; 319 Ill 606, 150NE347; 325 Ill 232, 156 NE274; 333 Ill 397, 164NE847; 336 Ill 324, 168NE336; 337 Ill 333, 169NE169; 226Ky529, 11SW(2d)437; 230Ky725, 20SW(2d)745; 163La512, 112S400; 167 La484, 119S523; 150Md278, 132A624; 155Md474, 142A497; 255Mass304, 151 NE297, 47ALR962; 235Mich393, 209 NW99; 143Miss757, 109S697; 150Miss 206, 116S746; Miss 130S502; 312Mo 91, 278SW715, 717 [citCJ]; Mo 278SW 987; 316Mo 86, 289SW847; 80Mont 181, 260P138; 114Nebr404, 207NW928; 102NJL134, 130A642; 104NJL512, 141 A85; 254NY170, 172NE458; 191NC 297, 131SE735; 50ND927, 198NW698, [citCJ]; 52ND478, 203NW679; OklCr 288P359; 121 Or141, 253P367; 124 Or 61, 262P859; 284Pa99, 130A302; 284 Pa311, 131A229; 101TexCr124, 274SW 591; 105TexCr413, 289SE45; 106Tex Cr558, 293SW1104; 108TexCr317, 300 SW79; TexCr 24SW(2d)413; TexCr 31SW(2d)818; 100WVa36, 129SE763; 104WVa523, 140SE546; 108WVa254,

150SE740; Alta [1928] 4DomLR795. [a] (1) 319 Ill 606, 150NE347. [b] (2) It proceeds from spontaneous operation of party's mind free from influence of any extraneous cause. 143Miss757, 109 S697. [c] **Voluntary extrajudicial confession held admissible.**–96Fla237, 118S 18. [d] **Confession by several defendants.**–Ill 172NE743.

718-41 90Fla317, 105S843; 90Fla659, 106S479. But see 143Miss757, 109S697.

718-42 155Md474, 142A497; 80Mont 181, 260P138; 101TexCr651, 277SW 116 (confession voluntary in view of interpreter's testimony as to circumstances under which made).

718-43 90Fla659, 106S479; 155Md474, 142A497.

718-44 See also 87CalA313, 262P75.

718-44½-New. The corpus delicti must be proved before a confession is admissible. 199 Ind55, 155NE203.

718-44½-New. That a statement made by a person accused of assault was made before the death of the person assaulted does not affect its admissibility in a prosecution for the homicide. 99TexCr529, 270SW552.

718-44¼-New. Where finding of the body and its condition clearly indicates homicide, admission of a confession connecting accused therewith is warranted. 287Pa512, 135A301.

718-44½-New. Failure of other police, present when confession was made, to testify does not render testimony of police officer as to confession inadmissible. Mo 295SW575.

718-44¾-New. The confession of each of several defendants is not inadmissible for tending to incriminate others, not assenting to it, but is to be confined to its maker. 168La837, 123S 591.

718-45 316Mo 256, 292SW42; 285Pa 49, 131A657. See also 74CalA276, 240P 43. [a] **Sufficient proof of corpus delicti** to authorize admission of confession. 23AlaA231, 123S281(2dcase); 297Pa326, 146A905.

718-45½-New. Corpus delicti need not be proved beyond a reasonable doubt as the basis for introduction of a confession. 90Fla659, 106S479.

718-45⅓-New. If in discretion of court the evidence already before jury is prima facie sufficient to show commission of the crime, the confession should be admitted, if voluntary. 90Fla659, 106S479.

718-45¼-New. Without legal testimony to prove corpus delicti, a confession is inadmissible. 23AlaA255, 123S 280.

718-45⅕-New. A confession designating the place where stolen goods may be found is not inadmissible because codefendants have revealed the location of such place. 113TexCr632, 21SW(2d) 1045.

719-48 OklCr 273P366(2dcase). [a] **Confession extorted by mental disquietude, induced by unlawfully holding accused without communication,** is violative of due process and inhibited by right of accused to have assistance of counsel. 246Mich680, 225NW501.

719-52 284Pa311, 131A229; 102TexCr 17, 277SW124.

719-53 80Mont181, 260P138, 144 [cit CJ].

719-54 5F(2d)622; 6F(2d)134; 215 Ala27, 109S161; 216Ala659, 114S39; 170Ark1193, 281SW13; Cal 287P337; 90Fla659, 106S479; Fla 130S582; 322 Ill 54, 152NE542; 197 Ind583, 151NE 403; 235Ky466, 31SW(2d)718; 166La 43, 116S588; 150Md278, 132A624; Mo 278SW681; 316Mo 86, 289SW847; 80 Mont181, 260P138, 144 [citCJ]; 102 NJL134, 130A642; OklCr 273P366(2d case); OklCr 273P1015; 294Pa156, 143 A910; 34PortoRico 785; 159Tenn245, 17SW(2d)919; 100TexCr537, 272SW 144; 101TexCr72, 273SW858; 35Man 461, [1926] 4DomLR771, [1926] 1West Wkly178.

720-58 103TexCr465, 281SW1058; 105 TexCr470, 289SW57.

720-59 See also 100TexCr255, 272SW 473 (facts held to show statement was made while under arrest).

720-60½-New. One who reported to sheriff in obedience to the latter's direction was under "custody" within statute imposing conditions on admissibility of confession in such case. 106TexCr 167, 272SW456.

720-60¼-New. It is not necessary that arrest be in formal words; it may appear from surrounding facts. 100TexCr 167, 272SW456.

720-60¼-New. Nor is it necessary for arresting officer to be bodily present at all times to keep accused in "legal custody." 100TexCr167, 272SW456.

720-63 297Pa326, 146A905.

720-66 334 Ill 324, 166NE129.

720-71 216Ala659, 114S39; Cal 287P 337; 90Fla317, 105S843; 90Fla659, 106 S479; 319 Ill 606, 150NE347; 197 Ind 583, 151NE403; 165La67, 115S370; 246 NY409, 159NE379; OklCr 273P366(2d case); 284Pa311, 131A229; 297Pa326, 146A905; 101WVa136, 132SE375, 379 [quotCJ]; 104WVa523, 140SE546, 549 [quotCJ]; 35Man461, [1926] 4DomLR 771, [1926] 1WestWkly178.

720-72 90Fla659, 106S479; 284Pa311, 131A229; 101WVa136, 132SE375, 379 [quotCJ]; 104WVa523, 140SE546, 549 [quotCJ].

720-73 101WVa136, 132SE375, 379 [quotCJ]; 104WVa523, 140SE546, 549 [quotCJ].

720-74 90Fla659, 106S479; 101WVa 136, 132SE375, 379 [quotCJ]; 104WVa 523, 140SE546, 549 [quotCJ].

720-75 98Fla739, 124S47; 312Mo 91, 278SW715, 717 [citCJ]; 101WVa136, 132SE375, 379 [quotCJ].

721-76 34 OhA69, 170NE444 (condemning "third degree" methods).

721-78½-New. Self-incriminatory statement, made when defendant's will was free, is not inadmissible because of previous severe questioning. 69CalA 257, 231P593.

721-79 220Ky334, 295SW154.

721-83 215Ala27, 109S161; 319 Ill 606, 150NE347; 316Mo 86, 289SW847, 849 [citCJ]; 50ND927, 198NW698 [citCJ]; 284Pa105, 130A403 (detective telling accused it would be better to tell truth); 108WVa681, 152SE633.

721-84 337 Ill 333, 169NE169. See also 50ND927, 198NW698 [citCJ].

721-85 86CalA646, 261P309; 127Kan 716, 275P139; 80Mont181, 260P138; 50ND927, 198NW698 [citCJ].

721-88 80Mont181, 260P138. See also, 137SC7, 133SE823.

721-88½-New. Such advice following confession does not render it inadmissible. 124 Or61, 262P859.

721-89 218Ky571, 291SW745.

721-90 21Ala27, 109S161; Kan 289P 409.

721-92 337 Ill 333, 169NE169 (any degree of influence amounting to duress).

721-93 192NC594, 135SE535.

722-95 See also Ark 30SW(2d)865.

722-98 110TexCr512, 8SW(2d)144, 60 ALR290; 101WVa136, 132SE375.

722-99 101WVa136, 132SE375.

722-1 Ark 30SW(2d)830; 153Wash 316, 279P735.

722-5 143Miss757, 109S697.

722-8 166La924, 118S85; 145Miss116, 110S361.

723-9 180Ark79, 20SW(2d)618; 325 Ill 245, 156NE354; 143Miss757, 109S 697; 145Miss116, 110S361; 307Mo 393, 270SW286; 197NC478, 149SE735. [a] **Illustrations.**–307Mo 393, 270SW286.

723-10 325 Ill 245, 156NE354; 145Miss 116, 110S361.

723-12 156Md240, 144A252; 109TexCr 142, 3SW(2d)453.

723-12½-New. If confessions are admissible, it is error to exclude evidence showing how they were extorted. 307 Mo 393, 270SW286.

723-13 NJSup 133A415; 101TexCr 251, 275SW835.

723-15 156Md240, 144A252; 103TexCr 636, 282SW251.

723-20 326 Ill 640, 158NE403; 224App Div193, 230NYS866. See also 294Pa339, 144A534.

723-21 337 Ill 310, 169NE243; 224 AppDiv193, 230NYS866.

723-21½-New. A confession is admissible, although it suggests the commission of other offenses than that for which defendant is being prosecuted, where the statement is so worded that it is impossible to segregate such other offenses. 101TexCr467, 276SW270.

724-22 72CalA160, 236P987; 85CalA 228, 259P117; 319 Ill 606, 150NE347; 330 Ill 516, 162NE133; 162La500, 110S 733; 142Miss335, 107S373. But see 143 Miss757, 109S697; Miss 124S766(1st case); 157Miss193, 127S687; 316Mo 86, 289SW847, 849 [citCJ]; 246NY409, 159 NE379; OklCr 273P1015; 124 Or61, 262 P859; 289Pa498, 137A683.

724-22½-New. Nor does failure to inform accused of his constitutional right to remain silent render confession inadmissible. 72CalA160, 236P987.

724-24 162La500, 110S733.

724-25 289Pa498, 137A683.

724-25½-New. A statement that the confession will not be used against defendant warrants striking of the confession from the record. 15F(2d)965.

724-25⅓-New. In New York testimony of magistrate as to statements made by defendant are inadmissible where code provisions as to warning have not been complied with. 221AppDiv500, 224NYS 667.

724-31 Mo 270SW347; 103TexCr303, 280SW784; 103TexCr465, 281SW1058; 104TexCr3, 282SW224; 104TexCr4, 282SW242; 105TexCr413, 289SW45; 106TexCr633, 294SW562; 112TexCr52, 14SW(2d)67; 113TexCr417, 21SW(2d) 304; TexCr 27SW(2d)215. See also 110TexCr410, 10SW(2d)551.

724-32 104TexCr46, 282SW242; 110 TexCr512, 8SW(2d)144, 60ALR290. But see 111TexCr372, 13SW(2d)100.

724-33 100TexCr144, 272SW185; 100 TexCr635, 273SW849; 103TexCr303, 280 SW784; 103TexCr465, 281SW1058; 104TexCr46, 282SW242; 111TexCr522, 15SW(2d)13. See also 101TexCr154, 274SW608.

724-33½-New. where accused was not warned, testimony of conversations with father is not admissible. 100TexCr635, 273SW849.

724-34 104TexCr46, 282SW242.

724-35½-New. A confession is admissible without warning where secreted property is found as a result of the confession. 102TexCr360, 278SW223.

724-35⅓-New. The purpose of the statute is to prevent the prosecution from using against accused a verbal statement made by accused to prove his guilt. 104TexCr46, 282SW242.

724-35¼-New. Defendant's statements to officers, immediately after they searched his automobile and found stolen money, that he would drive his car back to town is admissible as against the contention that statutory requirements as to confessions were not complied with. 110TexCr512, 8SW(2d)144, 60ALR290.

725-38 TexCr 21SW(2d)1044(2dcase).

725-40 TexCr 29SW(2d)793 (holding confession reciting grand jury warned defendant is erroneously admitted where district attorney warned in grand jury's presence). [a] **Grand jury nor group of people is "person"** that can warn party making confession. TexCr 29SW(2d) 793.

725-42½-New. An admission in evidence of the confession of accused, reciting that the confession was made to the county attorney after being warned, but not naming the party from whom the warning was received, was reversible error. 112TexCr586, 18SW(2d)657.

725-43 77CalA483. 247P221; 319Ill 606, 150NE347; 163La701, 112S655.

725-45 15F(2d)965; 220Ala461, 125S 802; 168Ga554, 148SE400; 41GaA341, 152SE916; 319Ill 359, 150NE263; 251Mich542, 232NW384; Miss 109S872; 146Miss811, 112S370; 108TexCr317, 300SW79; 108WVa705, 152SE745.

725-46 83Colo 4, 262P892.

726-48 333 Ill 397, 164NE847; 146 Miss811, 112S370; 80Mont181, 260P 138; 52ND478, 203NW679; 128 Or49, 273P381; 100TexCr412, 273SW602. [a] (5) Detective's promise to befriend accused in case confession is made does not vitiate confession. 284Pa105, 130 A403. (6) Heading in written confes-

sion, after asserting its voluntary character, containing words, "And knowing that it may be used for or against," does not render confession inadmissible as made in hope of gain. 285Pa49, 131A657.

726-49 49Nev386, 248P48; 168La161, 121S609.

726-50 100CalA93, 279P1056; 334 Ill 200, 165NE611.

726-53 316Mo 576, 292SW411; 52ND 478, 203NW679 (statement held not promise); 105TexCr169, 287SW273.

726-55½-New. by a promise to let defendant out of jail on bond, 146Miss811, 112S370.

726-59 NM 290P322(2dcase). [a] (5) Promise to drug addict to administer drug. NM 290P322(2dcase).

727-61 108WVa254, 150SE740 (assistant commissioner of banking held one in authority in relation to officer of state bank).

727-62 310Mo 576, 292SW411. [c] **Evidence held to show no "sweating"** of accused so as to bar his statements. 212Ky245, 278SW620. [d] **Confession made under assurance** that it cannot be used in criminal proceeding against person confessing is not voluntary. 108 WVa254, 150SE740.

727-64½-New. Actual relations between the parties is a controlling factor. 104TexCr543, 286SW218.

727-76 127Kan716, 275P139. See also 104TexCr543, 286SW218. [a] **Mere presence of person in authority** does not render confession involuntary. 104 TexCr543, 286SW218.

728-77 143Miss757, 109S697.

728-78 15F(2d)965; 220Ala461, 125S 802; 319 Ill 359, 150NE263; 319 Ill 606, 150NE347; 325 Ill 245, 156NE354; 167 La484, 119S523; 251Mich542, 232NW 384; 145Miss116, 110S361; Miss 130S 498; 244NY307, 155NE584; 254NY170, 172NE458; 52ND478, 203NW679 (no threats or force used); OklCr 289P358; 103TexCr465, 281SW1058; 110TexCr 159, 8SW(2d)947; 145Wash161, 259P 21; 108WVa705, 152SE745.

728-81 145Miss116, 110S361.

728-83 [a] 83Colo 4, 262P892.

728-89½-New. A confession induced by official threat of the prosecution is involuntary. 19F(2d)823. [a] **Rule applied** to documents furnished to federal trade commission. 19F(2d)823.

728-90 98Fla98, 123S523(2dcase); 210 Ky350, 275SW805; 309Mo 155, 274SW 734; 254NY170, 172NE458; OklCr 289 P358. [b] **Where, after unprovoked attack is made on accused,** he tells officers he would make statement if they would not beat or kill him, his statement is coerced and involuntary and inadmissible. 312Mo 91, 278SW715.

728-92 102NJL134, 130A642.

728-94 161La1010, 109S819.

728-95 161La1010, 109S819.

728-96½-New. A confession the day after an officer beat accused is inadmissible. 107TexCr504, 296SW513.

728-97 316Mo 86, 289SW847. But see 169Ga182, 149SE871. [a] **Evidence held not to show mob violence** to have caused fear. 316Mo 86, 289SW847.

729-3 195Cal 584, 234P374, 380 [quot CJ]; 83Colo 4, 262P892.

729-4 195Cal 584, 234P374, 380 [quot CJ]; 93CalA711, 270P237; OhA 172NE 555; 128 Or49, 273P381.

729-5 195Cal 584, 234P374, 380 [quot CJ].

729-6 But see 336 Ill 324, 168NE336.

729-8 See also 251Mich542, 232NW384.

729-13 [a] **Evidence held admissible.**-50Nev212, 255P1002.

729-14 Cal 287P337.

729-15½-New. Evidence of mental incapacity which is too remote should not be admitted. 285Pa49, 131A657.

729-15¾-New. So also such evidence which is too indefinite should not be admitted. 285Pa49, 131A657.

730-33 Ariz 282P930 (testimony at hearing before juvenile court).

730-34 But see 100TexCr637, 273SW 859.

730-37½-New. Evidence that the justice was not holding an examining court as required by statute at the time of taking accused's statement should be admitted. 112TexCr441, 17SW(2d)59.

731-38 108TexCr274, 18W(2d)308.

731-40 49ND348, 191NW628.

731-44 23AlaA441, 126S614.

731-45 23AlaA441, 126S614.

731-45½-New. Statements made in an investigation before a county judge conducted not to establish the guilt of the witness of transporting or possessing liquor but to identify the person who was supplying him and others with liquor are not protected by so called anti-sweating statutes. 210Ky456, 276SW 141.

731-47 220Ala461, 125S802; 80Mont 181, 260P138; 101TexCr158, 274SW619; 101TexCr474, 276SW250; 103TexCr488, 280SW1068; 106TexCr222, 291SW558; 109TexCr503, 5SW(2d)516; 110TexCr 68, 7SW(2d)535; 110TexCr512, 8SW (2d)144, 60ALR290 (entire confession held admissible); 110TexCr410, 10SW (2d)551; TexCr 12SW(2d)208(2dcase); TexCr 24SW(2d)48; TexCr 29SW(2d) 756(3dcase). See TexCr 7SW(2d)1078. [b] **One who makes such confession through persuasion or fear** cannot prevent its receipt where, in connection therewith, he states facts and circumstances which are found to be true and conduce to establish his guilt. 106TexCr 222, 291SW558.

731-48 But see 106TexCr222, 291SW 558; TexCr 24SW(2d)413.

731-49 104TexCr567, 285SW1094; 108 TexCr499, 18W(2d)896; 112TexCr231, 15SW(2d)1042. See also 294Pa156, 143 A910. But see 100TexCr487, 271SW917; 100TexCr183, 272SW475.

731-50 83Colo 4, 262P892.

731-50½-New. stolen property, 83Colo 4, 262P892.

731-52 110TexCr68, 7SW(2d)535.

731-53 104TexCr567, 285SW1094.

731-55 80Mont181, 260P138; 103TexCr 488, 280SW1068; 108TexCr657, 2SW (2d)264; 110TexCr241, 8SW(2d)124 (entire confession held admissible).

731-56½-New. Testimony as to accused's oral admissions made while accused was not under arrest and where stolen goods were found as a result thereof has been held admissible. 107 TexCr425, 296SW559.

732-60 OklCr 271P959.

732-63 7F(2d)466; 15F(2d)958; 78 CalA395, 248P696 (confession of conspirators); 333 Ill 397, 164NE847; OklCr 293P271 (signing codefendant's confession); 106TexCr68, 291SW226. See also 23F(2d)547. [c] **Oral and written.**-15F(2d)958.

732-64 Mo 296SW433; NJ 148A776, 779 [quotCJ].

732-64¼-New. or that introductory statement, as to its being voluntary, was not dictated by him, 163La686, 112S650.

732-65 Alta [1929] 1DomLR279.

732-66 87CalA313, 262P75; NJ 130A 461.

732-67 163La686, 112S650.

732-70 Colo 293P335; NJ 148A776.

732-72½-New. That a confession does not state the name of the victim nor the place of commission of the crime does not render it inadmissible where it otherwise appears that the crime involved in the prosecution was the one under discussion at the time the confession was made. 75CalA138, 242P84.

732-72⅓-New. That a confession was not dated does not render it inadmissible. 106TexCr68, 291SW226.

732-72¼-New. A confession is not rendered inadmissible because the victim of the crime is designated by a name not his true name where the names are idem sonans, Mo 279SW401.

732-72½-New. or because the name of the victim is not spelled as it is in the indictment. Mo 279SW401.

732-72¾-New. A confession is not inadmissible because it contains proof of other crimes which were omitted when the confession was presented to the jury. Mo 22SW(2d)639.

732-72⅞-New. A wife's written confession will not be excluded because it might implicate the husband in an offense prosecuted against her where he is not on trial and she has not been called as a witness. 94PaSuper419.

732-74 100TexCr334, 273SW589 (statute does not require witnesses to signature); 104TexCr3, 282SW224; 106TexCr432, 292SW897; 106TexCr652, 294 SW571; 108TexCr346, 300SW935. [b] 100TexCr334, 273SW589; 100TexCr523, 272SW205; 104TexCr543, 286SW218; 105TexCr634, 289SW1016; 112TexCr 231, 15SW(2d)1042. [j] **Verbal confession admissible** when it leads to discovery of secreted property connected with offense. 102TexCr415, 278SW216; 102 TexCr360, 278SW223; 106TexCr152, 291SW237.

732-74½-New. If the formalities are not complied with the confession may still be admissible, but not unless in connection with it accused makes statements of facts or circumstances that are found to be true which conduce to establish his guilt. 105TexCr634, 289 SW1016.

732-74¼-New. Such as the finding of secreted or stolen property or the instrument with which he states the offense was committed. 105TexCr634, 289SW1016; 108TexCr33, 299SW242.

732-76 [a] **Statements by accomplice,** identical to, and intermingled with, confession, do not make confession inadmissible. 110TexCr512, 8SW(2d)144, 60ALR290.

732-83 165La842, 116S206.

733-87 21Ala27, 109S161; 337 Ill 333, 169NE169; Mo 278SW987.

733-88 215Ala27, 109S161; 20AlaA195, 101S286; 22AlaA173, 114S69; 23AlaA 38, 120S301(1stcase) (general objection does not obviate necessity of proof); 23AlaA299, 124S406(2dcase); 23AlaA 441, 126S614; 180Ark448, 21SW(2d) 616 (state has burden of proof of voluntary character of confession if question is raised); 85CalA228, 259P117; 100 CalA93, 279P1056; 90Fla659, 106S479; 319 Ill 606, 150NE347; 337 Ill 333, 169 NE169; 167La484, 119S523; 155Md474, 142A497; Miss 102S771; 80Mont181, 260 P138; 24 OhA225, 157NE301; 128 Or49, 273P381; 100WVa36, 129SE763 (confession after arrest to persons in authority); 101WVa136, 132SE375.

733-89 22AlaA172, 113S643; 170Ga859, 154SE344; 202 Iowa1188, 211NW850.

733-90 90Fla317, 105S843; 90Fla659, 106S479; 29Hawaii441; 319 Ill 606, 150 NE347; 202 Iowa1188, 211NW850; 308 Mo 573, 274SW393.

733-93 319 Ill 606, 150NE347.

733-94 197 Ind575, 150NE371; 204 Iowa828, 216NW31; 168La161, 121S 609; 265Mass166, 165NE467; Mo 278 SW681. But see Mo 32SW(2d)596. [a] **Voluntary testimony in trial of another** does not come within rule requiring preliminary examination to determine voluntary character of confession. Ill 172 NE812.

733-95 46Philippine28; 104WVa523, 140SE546.

733-97½-New. The time and place of the confession need not be proved to establish its voluntary character. 77 CalA483, 247P221.

733-97¼-New. The burden of proof showing that no improper inducement was made is on the prosecution. 104 TexCr543, 286SW218.

733-97¼-New. The judge, on defendant's objecting to admission of confession as not voluntary, must hear evidence on such question. 246NY409, 159 NE379.

733-99 194Cal 555, 229P341; Mo 32 SW(2d)596. [b] **Truth of confession** is not element in determining whether made voluntarily. 235Mich393, 209NW 99.

733-1 23AlaA416, 125S398; 75CalA138, 242P84; 77CalA483, 247P221. See also 145Miss116, 110S361.

733-2 But see 319 Ill 606, 150NE347.

733-3 See also Ariz 282P930.

734-6½-New. Evidence as to defendant's acts, appearance, and conduct at the times when confessions were made and between such times is admissible. 106TexCr68, 291SW226.

734-6¼-New. If accused attacks the presumption that the confession was voluntary, the state necessarily has the right to sustain the presumption by rebuttal. 204 Iowa828, 216NW31.

734-8 220Ala461, 125S802; Ill 172NE743. [a] **Acts of persons other than one to whom confession was made** not directed to obtaining confession and having no relation to confession are not admissible to show that defendant had been illy used on night preceding confession. 150Miss206, 116S746.

734-10 22AlaA34, 111S765; 246Mich680, 225NW501; 307Mo393, 270SW286; 24OhA225, 157NE301; 137SC145, 134SE885.

734-11 284Pa105, 130A403. [a] **In Pennsylvania.**–284Pa105, 130A403.

734-12 191NC659, 132SE603; 198NC517, 152SE632(1stcase).

734-13 81CalA752, 254P666; 251Mich322, 232NW381 (secret fear); 191NC659, 132SE603.

734-15 218Ala40, 117S457; 23AlaA213, 123S104(2dcase); 194Cal555, 229P341; 137SC145, 134SE885; 100TexCr545, 272SW157; Utah 287P909. But see 265Miss166, 165NE467.

734-17½-New. It is also held that the court unsolicited may receive preliminary proof of the voluntary character of a confession. 334 Ill 324, 166NE129.

734-19½-New. The exclusion of a question immaterial in itself is not reversible error where counsel is given express permission to ask further questions, to be ruled upon in their order. 194Cal555, 229P341.

734-20 [a] 6F(2d)134; 15F(2d)965; 22F(2d)804; 215Ala27, 109S161; 215Ala314, 110S478; 217Ala225, 115S297; 218Ala40, 117S457; 22AlaA638, 119S26 (1stcase); 23AlaA532, 128S468; 21AlaA188, 106S510; 21AlaA261, 107S226; 175Ark264, 298SW993; 206Cal353, 274P353; Cal 287P337; Cal 292P459; 77CalA113, 246P110; 77CalA483, 247P221; 80CalA151, 251P335; 80CalA257, 251P648; 85CalA228, 259P117; 93CalA711, 270P237; CalA 291P214; 83Colo4, 262P892; 90Fla659, 106S479; 166Ga218, 142SE898; 170GaS70, 154SE351; 319 Ill 606, 150NE347; 321 Ill 397, 152NE149; Ill 172NE743; 202Iowa1188, 211NW850; 127Kan716, 275P139; 226Ky529, 11SW(2d)437; 161La1010, 109S819; 163La641, 112S514; 168La161, 121S609; 168La454, 122S579(2dcase); 168La837, 123S591; 155Md474, 142A497; 265Miss166, 165NE467; 142Miss335, 107S373; 150Miss228, 116S435; Mo 274SW43; 309Mo155, 274SW734; Mo 278SW681; 314Mo612, 286SW29; 316Mo157, 289SW948; Mo 18SW(2d)23; 322Mo1239, 18SW(2d)71; 80Mont181, 260P138; 49Nev386, 248P48; 240NY411, 148NE597; 121Or141, 253P367; 285Pa49, 131A657; RI 144A141; 50RI171, 146A415(2dcase); 137SC145, 134SE885; 103TexCr403, 281SW844; 103TexCr636, 282SW251; 110TexCr128, 7SW(2d)579; TexCr 26SW(2d)263; Utah 266P272; 146Va296, 135SE895. [b] 325Ill 232, 156NE274; 220Ky334, 295SW154; 160La9, 106S656; 167La484, 119S523; 143Miss757, 109S697; 312Mo91, 278SW715; Mo 32SW(2d)596; 106TexCr604, 296SW513.

734-21 12F(2d)904; 319 Ill 606, 150NE347.

734-22 319 Ill 606, 150NE347.

734-23 143Miss757, 109S697; 145Miss116, 110S361.

734-24 321 Ill 397, 152NE149.

734-25 20AlaA629, 104S674; 21AlaA40, 104S886; 21AlaA188, 106S510; 22AlaA258, 114S479; 95CalA711, 273P99.

735-26 337 Ill 333, 169NE169.

735-26½-New. Where the officer to whom a confession was made has testified fully as to all that was done by him in the matter, it is not necessary that it be shown that an officer who assisted in bringing accused back to the jurisdiction after flight, did not in any way induce accused to make the statement. 195Cal584, 231P374.

735-27 38GaA365, 143SE904.

735-29 49ND348, 191NW628. [a] **That facts stated in confession are in accord with testimony of eyewitnesses** who had not communicated their knowledge to officer to whom confession was made is circumstance tending to prove that confession was not obtained by coercion. 309Mo155, 274SW734.

735-31 79CalA709, 250P879; 87CalA313, 262P75; 329 Ill 278, 160NE575; 199Iowa842, 201NW75; 251Mich322, 232NW381; 316Mo157, 289SW948; 285Pa49, 131A657; 133SC99, 130SE511 (properly admitted); Utah 287P909.

735-31½-New. Testimony of accused that his confession was untrue and that he signed it to get out of jail is insufficient to show involuntary character of confession. 103TexCr403, 281SW844.

735-31¾-New. In some jurisdictions the mere fact that a confession was not induced by promise or threat is insufficient; voluntary character must be established in fact. 12F(2d)904.

735-31¼-New. Statements made by accused, as part of a confession, as to its voluntary character, are not decisive. 90Fla659, 106S479.

735-31½-New. Statement by defendant contradicting making of confession freely is no reason for exclusion thereof. 38GaA365, 143SE904.

735-32 285Pa49, 131A657. See also 21AlaA38, 104S881.

735-34 215Ala314, 110S478; 32Ariz195, 256P1053; Ariz 282P930; Ark 30SW(2d)830; 194Cal555, 229P341; 80CalA252, 251P682; 195Cal584, 234P374; 72CalA160, 236P987; 75CalA138, 242P84; 81CalA752, 254P666; 85CalA228, 259P117; 93CalA711, 270P237; 90Fla659, 106S479; 319 Ill 606, 150NE347; 321 Ill 47, 151NE555; 324 Ill 516, 155NE373; 210Ky524, 276SW550; 153Md431, 138A338; 257Miss429, 154NE189; 142Miss335, 107S373 (conflicting evidence); 145Miss116, 110S361; 148Miss764, 114S827 (on conflicting evidence); 152Miss48, 118S354; 80Mont181, 260P138; 102NJL134, 130A642; 50ND927, 198NW698 [cit CJ]; OklCr 288P359; 137SC145, 134SE885; 101WVa136, 132SE375; 104WVa523, 140SE546. But see 12F(2d)904. [c] 90Fla659, 106S479; 319 Ill 606, 150NE347. [d] **Admission of voluntary confession** is not erroneous though preliminary examination is made in presence of jury. 92Fla699, 109S811. [e] **Fact of voluntary nature** may be proved by other evidence beside that of cautioning accused. 289Pa498, 137A683. [f] **Time of determining admissibility.**–Court should decide question whether confession is admissible when it comes up on trial. 319 Ill 606, 150NE347.

735-35 25F(2d)430; 32Ariz195, 256P1053; Ariz 282P930; 195Cal643, 234P898; 195Cal584, 234P374; 72CalA160, 236P987; 77CalA113, 246P110; 80CalA252, 251P682; 81CalA752, 254P666; 83Colo4, 262P892; 93CalA711, 270P237; 337 Ill 333, 169NE169; OklCr 273P1015; 137SC145, 134SE885, 892 [quot Cyc]; 108WVa681, 152SE633.

735-36 80CalA252, 251P682; 110Conn549, 148A664; 337 Ill 333, 169NE169; 251Mich542, 232NW384.

735-37 90Fla659, 106S479; 319 Ill 606, 150NE347; 333 Ill 397, 164NE847.

735-38 Ark 30SW(2d)830; 195Cal584, 234P374.

735-40 337 Ill 333, 169NE169; 145Miss116, 110S361 (at any stage in proceedings). But see 80CalA252, 251P682.

735-40½-New. The conduct of an officer will be rigidly scrutinized in deciding whether confessions made to one having the party in custody are free and voluntary or are influenced by threats or other inducements. See also 90Fla659, 106S479.

735-40¼-New. No accurate and absolute standard by which the character of a confession may be measured and tested can be established. 50ND927, 198NW698.

735-40¾-New. The particular circumstances of each case must control. 50ND927, 198NW698.

735-40⅛-New. Including defendant's age, disposition, mentality, education, experience, and the treatment he was subjected to. 50ND927, 198NW698. See also 104TexCr543, 286SW218.

735-40⅛a-New. If convinced that whether confession is voluntary should go to jury, the court may submit testimony of accused on the question under proper instructions without first hearing the testimony without jury. 284Pa105, 130A403.

735-40⅛-New. Error in admission of confession before proof of voluntary character may be cured by subsequent proof of such voluntary character. 21AlaA339, 108S620.

735-40⅛-New. Appointment of a commission to investigate the question whether the confession of a seventeen-year-old boy accused of murder was voluntarily and understandingly made is improper. 127Kan412, 273P490.

735-41 77CalA212, 246P95.

735-42 109TexCr101, 3SW(2d)90; 199Wis269, 225NW933.

742-45 41F(2d)440; 21AlaA127, 106S70 (naked confession of itself inadmissible); 21AlaA299, 107S730; 70CalA362, 233P359; 77CalA212, 246P95; 78CalA151, 248P542; 96Fla768, 119S380; 48Ida335, 282P93 (sufficient corroboration); 219Ky498, 293SW981; 150Md278, 132A624; 308Mo664, 274SW21; Mo 274SW24; 313Mo98, 281SW720; 316Mo256, 292SW42; 113Nebr790, 205NW252; 211AppDiv861, 208NYS234; 285Pa49, 131A657; 99TexCr643, 271SW97; 112TexCr459, 17SW(2d)42(2dcase); 102WVa421, 135SE393. See also 254NY170, 172NE458.

736-46 38F(2d)573; 23Ala593, 129S484(3dcase); 21AlaA127, 106S70; 22AlaA436, 116S507; 177Ark1034, 9SW(2d)238; 73CalA13, 238P374; 70CalA362, 233P359; 77CalA212, 246P95; 78CalA151, 248P542; 81CalA484, 254P292; CalA 290P1075; 93Fla238, 112S70; 39GaA7, 145SE903; 39GaA570, 147SE724 (1stcase); 150Md278, 132A624; 146Miss718, 111S834; 157Miss600, 128S753; 313Mo98, 281SW720; 316Mo256, 292SW42; 319Mo46, 4SW(2d)456; Mo 6SW(2d)881; MoA 293SW486; OklCr 287P764; OklCr 287P835; OklCr 288P359; 285Pa49, 131A657; TexCr 20SW(2d)762; 155Wash212, 283P687; 102WVa421, 135SE393. [c] 99TexCr643, 271SW97. [h] **As to independence of evidence,** rule cannot be unequivocally applied to every kind of offense. 313Mo98, 281SW720 (trial of bank cashier for embezzlement). [i] **Evidence of marks of bullet holes** and finding of bullet in victim's automobile is admissible to corroborate confession of robbery. 102TexCr415, 278SW216. [j] **Evidence of finding of remnants of papers at point of crime** is admissible to corroborate confession. 102TexCr415, 278SW216.

736-47 323 Ill 37, 153NE702; Mich 233NW360; 285Pa49, 131A657; 294Pa156, 143A910; 99TexCr643, 271SW97; 104TexCr173, 282SW1118. See also 21AlaA18, 104S880.

736-48 22F(2d)799; 21AlaA299, 107S730; 169Ark294, 275SW336; 313Mo98, 281SW720; 102TexCr415, 278SW216.

736-49 41F(2d)495; 311Mo510, 278SW1040; 101TexCr635, 276SW907 (sufficient corroboration); 109TexCr301, 4SW(2d)58; 102WVa421, 135SE393. [a] **Testimony of defendant as to place of** birth is sufficient proof of corpus delicti to corroborate his confession. 70CalA362, 233P359.

736-50 169Ark294, 275SW336; 180Ark448, 21SW(2d)616; 72CalA386, 237P770 (signature to another's confession sufficient without corroboration); 81CalA484, 254P292; CalA 290P678; 87ColoS4, 285P766; 152Miss602, 120S569; 37GaA822, 142SE199; 150Md278, 132A624; 157Miss193, 127S687; Mo 295SW575, 576 [quotCJ]; OklCr 288P359; 285Pa49, 131A657; 109TexCr301, 4SW(2d)58; 228AppDiv670, 238NYS306; 102TexCr17, 277SW124. [b] (1) 150Md278, 132A624.

737-51 22F(2d)799; 72CalA292, 237P390; 81CalA484, 254P292; 82CalA465, 255P777; 157Miss193, 127S687; 313Mo98, 281SW720; MoA 293SW486; Mo 22SW(2d)639; 113Nebr790, 205NW252; 109TexCr136, 3SW(2d)445; 102WVa421, 135SE393. [a] (1) 69CalA267, 231P377; 78CalA151, 248P542; Mich 233NW360; Mo 22SW(2d)639; OklCr 288P359; 288Pa74, 135A538; TexCr 20SW(2d)762; TexCr 25SW(2d)620. (2) 81CalA671, 254P597; 82CalA465, 255P777; 85CalA306, 259P361; 338 Ill 590, 170NE703 (to establish corpus delicti); Mont 288P186; 148Miss764, 114S827; 285Pa49, 131A657; 94PaSuper419 (embezzlement). [b] (1) 316Mo242, 292

SW42; Mo 6SW(2d)881. (2) 21AlaA 299, 107S730; 177Ark1034, 9SW(2d) 238; OklCr 287P835; 109TexCr136, 3 SW(2d)445. [c] **Fact that suicide is possible conclusion,** and is not excluded from facts which are consistent with felonious killing, does not prevent admission of confession. 285Pa49, 131A 657. [d] **Prima facie proof** is sufficient. CalA 289P194.

737-52 69CalA267, 231P377; 70CalA 531, 233P980; 74CalA341, 240P291; 78 CalA151, 24SP542. [a] **Circumstances capable of innocent construction** can be introduced in light of defendant's admissions. 113Nebr790, 205NW252.

737-53 313Mo 98, 281SW720.

737-53½-New. Testimony as to money found on accomplice admissible to corroborate confession, 102TexCr13, 277SW 138.

737-53⅓-New. as is testimony of money found in room of accomplice shortly after robbery. 102TexCr8, 277SW135.

737-53¼-New. Proof of crime need not be by evidence wholly free of confession. 102TexCr415, 278SW216.

737-53⅙-New. When confession is corroborated by extraneous facts, the state may prove it and such facts although the confession was procured by improper means. 215Ala42, 109S109.

737-54 67CalA631, 228P405; 74CalA 341, 240P291; 77CalA212, 246P95; 86 CalA8, 260P558; 316Mo 256, 292SW42; 97PaSuper417. But see Mont 283P186. [a] **Confession erroneously admitted** absent proof of corpus delicti. 38F(2d) 573.

737-55 77CalA212, 246P95. [a] **Uncorroborated extrajudicial confessions** should be withdrawn from jury by instructions. 308Mo 664, 274SW21.

737-62½-New. nor that he was retained in the employ of the bank after his confession; 313Mo 114, 280SW697 (cashier).

738-64 100TexCr24, 271SW81; 101TexCr251, 275SW835; 113TexCr616, 21SW (2d)737.

738-65 100TexCr24, 271SW81; 142 Wash673, 253P1074.

738-69 321 Ill 397, 152NW149; 142 Miss335, 107S373; 110TexCr432, 10SW (2d)109.

738-72 94PaSuper419.

738-73 90Fla659, 106S479.

738-76 198Cal 426, 245P426; 94CalA 635, 271P576; 110Conn549, 148A664; 142Miss335, 107S373; 24 OhA225, 157 NE301; 285Pa49, 131A657; 94PaSuper 419; 14PaDist&Co 191; 34PortoRico 809 (jury may credit part and reject part); 103TexCr403, 281SW844; 112 TexCr459, 17SW(2d)42(2dcase); 152 Wash365, 278P149; 101WVa136, 132 SE375. [a] **Confession of codefendant held not to overcome prima facie case** of defendant's guilt based on unexplained possession. 130Kan497, 287P 599. [b] **Confession is direct evidence.**-GaA 155SE509(1stcase).

738-81 35F(2d)344 (records of drug sales by physician); 256Mass159, 152 NE307 (treaty); 112TexCr470, 17SW (2d)1053; TexCr 23SW(2d)379.

738-82 29F(2d)462; 30F(2d)22 (map made by war department); 228Ky477, 15SW(2d)261; 112TexCr147, 15SW(2d) 619(2dcase).

739-83 156La881, 101S252.

739-84 [b] **Incorporating on report** by public officer something not required to be incorporated therein did not make it admissible as public writing. 74Mont 126, 238P603.

739-85½-New. Whether records kept by the war department are public or private records has been held a question for the court. 142Wash653, 254P445.

739-86 23AlaA363, 125S685; 78CalA11, 247P917; 33 OklCr125, 243P251; 52SD 619, 219NW817; 142Wash653, 254P445. But see 32F(2d)116; 217Ky675, 290SW 511; 217Ky688, 290SW514. [c] (2) Cash books of recorder are admissible though not kept pursuant to statutory requirements. 78CalA11, 247P917. [f] **War department records** kept pursuant to law are admissible. 142Wash653, 254P445 (identification unnecessary). [g] **Showing that records were required to be kept** is condition precedent to admission of death certificates. 317Mo 843, 297SW397. [h] **Record on rogues' gallery photograph** is not competent evidence to show that person represented by photograph was burglar. 110 Conn55, 147A118.

739-87 38F(2d)406; 118Nebr184, 223 NW951; TexCr 27SW(2d)233. [c] **Clearance papers** are competent evidence of destination of vessel. 122 Or644, 259 P780. [d] **Entry papers** are competent evidence of port from which vessel came. 122 Or644, 259P780.

739-90 72CalA561, 237P780 (copy of judgment of conviction filed by warden of state prison); 20 OhA461, 152NE678; TexCr 21SW(2d)733.

739-91 Mo 274SW19; 112TexCr470, 17 SW(2d)1053 (compliance held). [b] **Copies of deeds** held admissible. 20 OhA 461, 152NE678.

740-95½-New. Only the admissible portion of a document should be offered or received. 16F(2d)704.

740-98 117Ark448, 9SW(2d)30; 142 Wash653, 254P445. [a] **Where seal of office is required** document from such office must be under seal. 157Miss797, 128S557.

740-99 261Mass510, 159NE599.

740-2 177Ark448, 9SW(2d)30; 98CalA 206, 276P578. See also 52SD619, 219 NW817.

740-2½-New. Papers purporting to be prison records not proved to be such and unsigned are inadmissible. 165La 822, 116S199.

740-3 TexCr 29SW(2d)752 (holding it unnecessary that certificate identify infant as defendant as it may be shown by other evidence).

740-5 80Mont181, 260P138. [c] **Record of former conviction admissible** in prosecution as second offense, but record should be read to jury and not simply introduced, or it will not support conviction as second offense in absence of other evidence of former conviction. 93 Fla516, 112S47.

740-6 33 OhA338, 169NE588; 105TexCr281, 288SW213; Wash 287P23. [a] (3) Judgment roll in action to annul marriage of defendant is admissible to qualify former wife to testify. 80Mont 181, 260P138. (4) Such judgment roll is admissible in its entirety to show jurisdiction. 80Mont181, 260P138. [c] **Warrant and affidavit** held admissible only to show offense predated prosecution. 22AlaA66, 111S452.

740-8 [b] (7) Bench docket showing conviction "for the offense of possessing alcoholic liquors," but not stating it was unlawful possession, is inadmissible to show former conviction. 92Fla711, 109S807. (8) Criminal docket of county court is admissible to show former conviction in action for second offense. 93 Fla516, 112S47. (9) Bench docket is inadmissible if minute book is available to show judgment of court. 92Fla711, 109 S807. [d] (1) Contra 14F(2d)670; 14 PaDist&Co 210. [h] (1) 14F(2d)670. (2) 19F(2d)69; 49RI 482, 144A150; 50 RI 171, 146A415(2dcase). (3) Search warrant supported only by affidavit based upon information and belief is inadmissible. 160Ga744, 128SE909. [k] **Letters written by prosecuting witness to district attorney** discussing what legal remedies might be brought to enable prosecuting witness to get possession of automobile taken by defendant bailee are inadmissible on ground of public policy. 122 Or537, 259P427.

741-11 102CalA787, 283P830 (variation in spelling of defendant's name held not to render inadmissible judgment of conviction where identity was shown by other evidence).

741-18 93Fla516, 112S47; 325 Ill 57, 155NE838; 107TexCr208, 296SW593; 107TexCr357, 296SW596; 148Wash701, 269P1051.

741-19 264Mass94, 162NE7.

741-22 [a] **Testimony of justice** as to prior convictions before him held admissible. 115Nebr65, 211NW179.

741-24½-New. An uncertified and unsigned copy of a transcript of a former trial is not competent for any purpose unless it is proved to be correct by the oath of a witness. 210Ky217, 275SW 689.

741-24⅓-New. Permitting prosecution to show by order book of circuit court that deceased was appointed prohibition officer before he was killed by accused in resisting arrest is proper. 143 Va592, 130SE398.

741-24¼-New. Exclusion of record is not error where the party was not aggrieved thereby. 126Mo384, 138A625.

741-26 See also 208Ky601, 271SW662.

741-27 102TexCr566, 280SW210.

741-28 216Ala408, 113S257.

741-29 21AlaA253, 107S41; 21AlaA 274, 107S325; 21AlaA286, 107S786; 22 AlaA131, 113S469; 47 Ida750, 278P776; 321Mo 870, 12SW(2d)469; 119 Or522, 250P216.

741-31 22AlaA421, 116S410.

741-33½-New. Under statute making copy of ordinance certified by mayor prima facie evidence in prosecution for its violation, place of signature is immaterial, and the copy is not rendered inadmissible by failure to sign at bottom in compliance with another statute. 190NC768, 130SE619.

741-33¼-New. Under statute making copy of ordinance certified by mayor prima facie evidence in prosecution for its violation mayor may certify by adopting authorized signature of his name by notary. 190NC768, 130SE619.

741-33¼-New. In Canada regulations, under statute, may be proved by the production of a copy printed by the king's printer, but they are not produced where not in any way put in evidence although in the possession of the crown counsel. Sask [1929] 1DomLR194.

741-38 177Ark448, 9SW(2d)30; 71CalA 500, 236P311 (minutes of I. W. W. meetings held sufficiently proved to be authentic); 72CalA406, 237P757; 43 Ida 580, 253P618; 215Ky613, 286SW696; 165La47, 115S363; 170La755, 129S154; 79Mont385, 256P1071; 221AppDiv79, 222NYS616; 192NC150, 134SE413; 149 Wash60, 270P132. See also 76CalA91, 243P478. [a] **Use by defendant on stand,** and reference to them by other witnesses sufficiently identifies books for testimony as to contents. 38F(2d)3. [b] **Evidence held sufficient.**-Wash 290P 329.

742-40 149Wash60, 270P132. [a] **In Kansas.**-129Kan686, 284P402.

742-41 21AlaA339, 108S620; 165Ga55, 139SE877 (originals or certified copies properly admitted); 319Mo 46, 48SW(2d) 456; 23 OhA288, 155NE502. [a] 29F (2d)462; 37F(2d)74; 215Ala148, 109S 849; 101CalA84, 281P404; 149SC195, 146SE657; 108TexCr255, 299SW418. [c] **Preliminary proof held insufficient.**-192NC150, 134SE413.

742-42 177Ark1076, 9SW(2d)320.

742-43½-New. A church directory showing that a certain clergyman was the only one of that name may not be shown by a church directory not shown to have been made under the sanctity of law. 192Wis379, 212NW879.

742-43⅓-New. In a prosecution for conspiracy to conceal a bankrupt's property, admissibility of evidence of his financial statement by the bankrupt was not affected by the fact that a copy of the letter requesting the statement was not produced. 25F(2d)49.

742-43¼-New. Defendant's writings of street preacher's talks are admissible as showing mental attitude. Wash 287P 57.

742-45 26F(2d)400; 41F(2d)193 (carbon copies of letters); 85CalA648, 259 P961; 319Mo 28, 3SW(2d)230; 104Tex Cr105, 283SW168. [a] **The sufficiency of proof of authenticity** of a letter, to justify admission rests with discretion of trial judge. 38F(2d)406.

742-46 35F(2d)454; 226Ky584, 11SW (2d)410.

742-47 216Ky430, 287SW949; 52ND 478, 203NW679; 104TexCr122, 282SW 240. [a] 208 Iowa1233, 227NW166; 121 Kan587, 249P597; 319Mo 28, 3SW(2d) 230; 284Pa81, 130A311; 290Pa271, 138 A836; 112TexCr254, 16SW(2d)248. [b] 104TexCr122, 282SW240. [d] **Either direct or circumstantial evidence** may be used to establish authorship. 208 Iowa1233, 227NW166.

742-48 22AlaA583, 118S242; 227Ky 710, 13SW(2d)1046; 104TexCr408, 284 SW588.

742-49 216Ala475, 113S393; 22AlaA

427, 117S617; 33 OklCr125, 243P251.

742-50 82NH518, 136A358; 33 OklCr 125, 243P251. [a] **Defendant's admission of authenticity** of letters written by third persons did not render them competent. 121 OhSt525, 169NE839.

742-53 See also 319Mo 28, 3SW(2d)230.

743-61 Va 154SE368.

743-65 [a] **Authenticity sufficiently shown.**–Mo 279SW109.

743-66 38F(2d)450 (copies of telegrams admissible); 198Cal 776, 247P 884.

743-67 192NC150, 134SE413.

743-72 38F(2d)450 (book account admissible); Miss 130S295; 221AppDiv79, 222NYS616. [a] **Books kept by company** controlled by defendant held properly admitted in prosecution for use of mails to defraud. 7F(2d)867. **Books of bankrupt held admissible** on trial of bankrupt's secretary for false swearing as to matters contained in them. 34F(2d) 741. [b] **In Illinois.**–320 Ill 287, 150NE 628.

743-72 [c] **Books of corporation** held admissible. 44F(2d)134.

743-73 26F(2d)400 (books held properly admitted); 84Colo 254, 269P907; 115Nebr350, 213NW344. [a] **Manner in which defendant's books were kept** might affect their value as evidence, but not their competency, as against defendant in prosecution for using mails to defraud by sending false property statements to mercantile credit concerns and others induced thereby to sell to defendant on credit. 29F(2d)462.

743-74 8F(2d)24 (records admissible in prosecution for fraudulent use of mails); 38F(2d)406.

743-76 17F(2d)246; 143SC63, 141SE 165.

743-77 9F(2d)697; 38F(2d)406 (showing that books were kept to record business done, is sufficient foundation); 98 CalA206, 276P578; CalA 290P470; 43 Ida580, 253P618 (when properly identified); 179Minn217, 228NW926; 311Mo 391, 279SW23; 81Mont145, 262P158; 82 NH189, 131A606 (record of presence and absence of employee); 221AppDiv79, 222 NYS616; OklCr 287P419. [a] **Illustrations.**–216AppDiv209, 215NYS56 (in fact stock was not on hand). [b] **Entries should be made contemporaneously** or as part of system of entries. 106TexCr593, 294SW573.

743-78 221AppDiv79, 222NYS616.

743-80 81Mont145, 262P158; 244NY 472, 155NE745; OklCr 287P419; 106 TexCr593, 294SW573. But see 311Mo 391, 279SW23. [a] (2) See also 8F(2d) 24. (3) Shipping records of manufacturer are admissible in evidence though entries were not made by or under supervision of witness who identifies them. 311Mo 391, 279SW23. [b] **Though invoice identified by witness was not made by him,** it is admissible where he helped to make it. Mo 285SW1000.

743-80½-New. or where he is in charge of the records although he does not personally make the entry, 82NH189, 131A 606.

743-80⅓-New. , or upon proof of his handwriting in case of his death or absence from the county. OklCr 287P419.

743-81 174Minn323, 219NW176; 179 Minn217, 228NW926.

743-83 221AppDiv79, 222NYS616.

743-84½-New. nor to entries made from information furnished by others where there was no one designated to keep the records; 255Mass369, 151NE839.

743-85½-New. Corporate books are admissible to show transactions by directors without proof of correctness by the person making them. 244NY472, 155NE 745.

743-85⅓-New. Where testimony of identification is based in part on unsworn hearsay evidence, books of account are inadmissible. 33F(2d)115.

743-86½-New. Books of a third person are not conclusive evidence for or against defendant. 118 Or5, 244P512.

743-86⅓-New. Minutes of I. W. W. meeting held sufficiently proved to be such to be admissible. 71CalA500, 236 P311.

743-86¼-New. Note book taken at arrest from accused of owning still, showing entries for ingredients and materials for manufacture of liquor is admissible as circumstance to connect accused with illegal operation of still found near his property. 142Va658, 128SE459.

743-86½-New. Books used against corporate officers must be shown to have been accurately kept. 17F(2d)246.

743-86⅙-New. Where the person who made book entries is not available as a witness, his habit or custom of making proper and accurate entries should be proved. 106TexCr593, 294SW573.

743-86⅐-New. Defendant's ledger, reconstructed by his trustee in bankruptcy, dependent for its accuracy on a statement made at the request of the trustee by the former employer of defendant who did not testify, has been held incompetent. 243NY589, 154NE 617.

743-86⅛-New. Books of account must be shown by competent evidence to be true. 33F(2d)107 (books held inadmissible where identified as incomplete only by auditor).

743-86⅑-New. Original ledger sheet from records of bank showing account of depositor is admissible against him to establish overdrafts. 108WVa639, 152 SE326.

743-86⅒-New. In a prosecution of the manager of a corporation for misusing the mails to defraud the books of the corporation are admissible to show how much money was received and where it went. 33F(2d)115.

743-91 82NH189, 131A606; 111TexCr 205, 13SW(2d)80.

743-91½-New. A hotel register sheet, not identified by the custodian, is inadmissible. 33F(2d)33.

743-92 255Mass369, 151NE839 (information furnished by others).

744-8½-New. A copy of the church record of the date of birth is properly excluded where there was no offer to show requirements or custom of the church as to registration. 82NH189, 131A606.

744-8⅓-New. Copy of record of baptism which is not authenticated as a public document as required by statute nor verified by a witness as a copy of a private document is inadmissible in criminal prosecution against an alien. 80CalA783, 252P1061.

744-10 56ND642, 219NW132.

744-10½-New. Garage records are admissible, if original. 102WVa107, 134SE 599.

744-11 7F(2d)818 (photograph of deceased conspirator); 20F(2d)289; 214 Ala24, 106S617; 32Ariz175, 256P359; 171Ark297, 284SW734 (photograph of deceased, though not necessary, held not prejudicial where not of character to influence passions of jury); Ark 31SW (2d)527; 199Cal 471, 250P168; Cal 265 P231; Cal 286P998; Cal 291P582; 87 CalA724, 262P795; CalA 289P194 (the tending to awaken feeling of horror and indignation in minds of jury); Colo 293 P335; 110Conn55, 147A118; 90Fla337, 106S406; Fla 129S112; 215Ky613, 286 SW696; 230Ky387, 19SW(2d)1086; 158 La471, 104S211; 265Mass382, 163NE 251(2dcase); 281SW940; 115Nebr737, 214NW643; 50Nev271, 257P619; 82 NH133, 130A743; 103NJL663, 138A 575; 191NC378, 131SE743; 53ND916, 208NW388; 35 OhA324, 172NE434; 289 Pa284, 137A261, 263 [citCJ] (use for location of wounds by physician who performed autopsy); RI 136A8; 143 Wash313, 255P382; 144Wash367, 258P 20; 144Wash446, 258P508; 146Wash 221, 262P622; 154Wash383, 282P216; Wash 287P18 (photomicrographs of saplings). [d] **Admission and use of photographs** rests largely in discretion of judge. 289Pa284, 137A261. [e] **Admissibility of photograph** depends on whether it would be useful to permit witness to make his description clearer. 82NH518, 136A358. [f] **Photograph held inadmissible.**–In prosecution for killing one claimed to be disorderly, photograph of deceased showing him to be sober, pleasing, and well dressed is inadmissible. 215Ky585, 286SW689. [g] **Where photograph shows object inadmissible in evidence.**–Photograph showing locality of crime may be received in evidence though it shows object which is inadmissible where court limits purpose of admission and excludes object when offered and jury views locality. 82CalA389, 255P839. [h] **Excluding part of photograph** showing object which had been exhibited to jury held proper. 232Ky691, 24SW(2d) 564.

745-12 115Nebr737, 214NW643; 191 NC378, 131SE743; 295Pa190, 145A85; 143Wash313, 255P382. [a] **Photograph held not true representation of thing which it purports to represent.**–191NC 378, 131SE743. [b] **Admission of photographs is discretionary.**–154Wash383, 282P216.

745-13 Mo 12SW(2d)46. [a] **Photographer** is qualified to prove exhibit. 82 NH518, 136A358.

745-18 NJSup 146A351 (1stcase). See also 78CalA476, 248P981.

745-19 See also 128 Or515, 273P323; 295Pa190, 145A85 (photograph in rogues' gallery).

745-19½-New. It is no objection to the admissibility of a photograph that it is enlarged, showing the subject or object magnified, where this does not have a tendency to mislead. 82NH133, 130A 743.

745-19⅓-New. Whether enlarged photograph is admissible is within court's discretion. 82NH133. 130A743.

745-19¼-New. That a photograph was marked out of the presence of the jury does not destroy its admissibility. 161 La532, 109S56.

745-19⅕-New. A witness explaining the method of identification by photograph is not subject to an objection that he was lecturing. 161La532, 109S56.

745-19⅙-New. A photograph of deceased as affecting defendant's testimony as to deceased's bad character has been held not admissible. 50Nev271, 257P 619.

745-19⅐-New. Admitting a photograph is harmless where the witness' testimony covers what the photograph intended to show. 137SC360, 135SE356.

745-19⅛-New. In Canada it is held proper in identifying accused to show the witness several photographs without a suggestion asking him to select accused but improper to show a single photograph. Man [1926] 3DomLR717, [1926] 2WestWkly513, 46CanCrCas257.

745-19⅑-New. The place where the picture is kept held irrelevant to the issue. 317Mo 759, 297SW10.

745-19⅒-New. Excluding lewd pictures is not error, absent theory as to admissibility. Wash 287P23.

745-20 115Nebr737, 214NW643.

745-20½-New. Talking moving picture, properly authenticated, of an occurrence under investigation is admissible in evidence. 13PaDist&Co332 (where taking of confession of accused was photographed).

745-20⅓-New. But motion picture of reconstructed scene is inadmissible. 13 PaDist&Co 332.

745-21 15F(2d)916; 26F(2d)168; 198 Cal 776, 247P884; 226Ky460, 11SW(2d) 125; 232Ky613, 24SW(2d)269; 148Miss 531, 114S343 (map of scene of homicide); 119 Or409, 243P72.

745-22 21AlaA655, 111S649; 23AlaA 434, 126S604(2dcase); 284Pa81, 130A 311; 284Pa85, 130A312.

745-23 327 Ill 162, 158NE462; 337 Ill 413, 169NE210; RI 136A8.

745-28 44F(2d)155; 22AlaA371, 115S 770. [c] (1) 143Wash88, 254P456. [e] (3) Auditor's testimony that he knew signatures of officers attached to stock certificate, and that they were genuine, authorized admission of certificate in evidence. 31F(2d)385. (5) Marriage certificate does not prove itself. 72CalA 406, 237P757. (6) Marriage certificate is not admissible without proof of signature and authority of person performing marriage. 72CalA406, 237P757. [f] 46 Ida8, 265P666. (2) Check dated day before larceny, delivered day after is admissible. Iowa 233NW110. [h] (2) In liquor prosecution, excluding copy of lease of premises signed only by lessee has been held error, since fact that copy was signed only by lessee did not make it incompetent. 31F(2d)289(2dcase). [z] **Invoices.**–100TexCr664, 274SW582. [aa] **Bank's report** to state finance commissioner is admissible against cashier

in prosecution for receiving deposit with knowledge of insolvency of bank, to his knowledge thereof, where he assisted in preparation of report. 311Mo 414, 279 SW76. [bb] **Time records** by person other than witness held inadmissible on alibi issue. 199Cal 471, 250P168. [cc] **Testimony describing records kept by defendant** in furtherance of scheme to defraud in use of mails is admissible. 8F(2d)24. [dd] **Deed to other land offered to show that certain line of defendant's place was straight line** held inadmissible, where no evidence was offered tending to show that any line of such other land constituted boundary of defendant's lands. 197 Ind599, 150NE 408. [ee] **Letters admissible** to show date. 107TexCr115, 295SW190. [ff] **Deed in escrow is admissible** as evidence of defendant's possession as vendee of premises on which liquor was found. 38Wyo 140, 265P25. [gg] **Report of physician is inadmissible** as substitute for his oral testimony as to intoxicated condition of defendant. 93PaSuper404. [hh] **Listing of bonds in business publication** is admissible where reports of such organ were shown to be recognized as authentic. 47 Ida785, 280P1039. [ii] **United States Pharmacopoeia classification** held not conclusive on question whether ginger extract was fit for beverage purposes. 35 OhA37, 171NE 615. [jj] **Anonymous publication** identified by some one hundred witnesses of defendant and relating to conspiracy is admissible. 97PaSuper202.

746–31 15F(2d)619; 81CalA398, 253P 773; CalA 290P470.

746–32 314Mo 333, 284SW433; MoA 17 SW(2d)353: NJQuartSess 150A44; 100 TexCr172, 272SW490 (evidence that certified copy of deed is not correct inadmissible).

746–33 [a] **Oral evidence of fraud in procurement of writings.**–251Mich359, 232NW358.

746–35 164La449, 114S92; 195NC537, 143SE3.

747–43½–New. An omission in the proces verbal of the coroner which fails to show that the coroner's jury were sworn may be corrected by oral proof. 161La187, 108S410.

747–43½–New. Where omitted by the coroner's report, the cause of death may be established by parol. 161La187, 108 S410.

747–43¼–New. In a prosecution for forgery of a deed, the state was properly permitted to elicit from an attesting witness testimony as to whether he attested the signatures, by mark, of the grantors whose names appeared on the deed, and as to whether he took their acknowledgments. 22AlaA531, 117S502.

747–44 Ga 155SE28.

747–47 273US392, 47SCt377, 71Led 700, 50ALR989; 15F(2d)339; 26F(2d) 1; 30F(2d)518; 214Ala476, 108S349; 215Ala276, 110S407; 217Ala164, 115S 101; 23AlaA99, 121S449; 20AlaA412, 103S694; 20AlaA606, 104S551 (testimony inadmissible in prosecution for possessing a still); 21AlaA323, 108S80; 21AlaA455, 109S295; 21AlaA460, 109S 294; 21AlaA526, 109S612; 21AlaA577, 110S171; 22AlaA66, 111S452; 22AlaA 75, 112S367; 22AlaA84, 112S461; 22 AlaA469, 116S893; 23AlaA85, 121S4; 23AlaA79, 121S6; 23AlaA446, 126S611; 23AlaA537, 128S587; 169Ark353, 275 SW662; 76CalA91, 243P878; 79CalA 328, 249P231; 96CalA215, 273P1087; 89Fla353, 104S447; 36GaA272, 136SE 466; 166Ga182, 142SE676; 235 IllA587; Ind 169NE676; 202 Iowa150, 209NW 404; 206 Iowa1178, 221NW804; 215Ky 722, 286SW1047; 223Ky93, 28W(2d) 1026 (what witness understood by another's statement); 228Ky106, 14SW (2d)390; 229Ky400, 17SW(2d)262; 231 Ky554, 21SW(2d)981; 235Ky670, 32 SW(2d)29; 162La287, 110S424; 163La 112, 111S617; 166La759, 117S820; 167 La635, 120S33; 156Md149, 143A872; 256Mass491, 152NE737; 257Mass198, 153NE793; 144Miss551, 110S447; 318 Mo 833, 1SW(2d)147 (insolvency); 321 Mo 352, 10SW(2d)928; Mo 22SW(2d) 772; Mo 23SW(2d)1; MoA 279SW749; 83NH532, 145A456; 246NY467, 159NE 401; 224AppDiv546, 231NYS557; 51 ND445, 200NW20; 120 Or372, 251P305; 126 Or560, 270P404; SC 144SC7, 142SE 38; 156SC509, 153SE480; 49SD56, 206 NW468; 49SD356, 207NW153; 49SD 572, 207NW539; 100TexCr220, 272SW 480 (physician cannot testify crime of rape is impossible without rendering victim unconscious by blow or anesthetic); 101TexCr158, 274SW619; 101 TexCr329, 275SW713; 102TexCr579, 278SW1105; 103TexCr443, 281SW567; 103TexCr679, 282SW220; 104TexCr442, 284SW554; 104TexCr456, 284SW578; 106TexCr90, 291SW238; TexCr 292SW 609; 107TexCr36, 294SW541; 106 TexCr642, 294SW557; 107TexCr174, 296SW588; 111TexCr116, 12SW(2d) 218; 112TexCr554, 18SW(2d)163; TexCr 27SW(2d)236; TexCr 31SW(2d) 815; 37Wyo 478, 263P616. [a] (1) 217 Ala219, 115S308; 22AlaA329, 115S420; 23AlaA255, 123S280; AlaA 130S674; 87 CalA5, 261P531; CalA 290P655; 329 Ill 104, 160NE233; 334 Ill 635, 166NE535; 338 Ill 56, 170NE14; 339 Ill 328, 171NE 261; Iowa 230NW536; Iowa 232NW 172; 166La43, 116S588; 156Md459, 144 A350; 157Md75, 145A185 (not objectionable); Mo 23SW(2d)22; 34NM108, 277P966; 287Pa512, 135A301; 50SD 548, 210NW980; 101TexCr33, 274SW 568 (main issue); 101TexCr214, 274SW 572; 103TexCr387, 281SW569; 104 TexCr456, 284SW578; 109TexCr213, 3 SW(2d)808; 109TexCr471, 5SW(2d) 509; 113TexCr130, 19SW(2d)52; TexCr 24SW(2d)417; TexCr 29SW(2d) 772; 100Vt259, 136A835. See also Mo 285SW1000. But see 85CalA228, 259P 117. (3) In prosecution for embezzlement, parol expert evidence is admissible to explain book entries. 195NC537, 143SE3. (4) In prosecution for rape, it is error to permit justice of peace, who examined and committed defendant to testify that he found defendant guilty beyond doubt. 34NM108, 277P966. (5) Asking question which did not call for conclusion by witness has been held not objectionable. TexCr 31SW(2d)438. [g] (2) That defendant was reckless driver. 22AlaA85, 112S541. [i] **Justification for homicide.**–105TexCr451, 288 SW1082.

747–48 96CalA430, 274P433; 161La 827, 109S505; Mass 165NE413.

747–48½–New. A physician may testify as to consistency of the condition of the body of deceased with the result of using instruments to produce an abortion. 253Mass509, 149NE205.

747–48½–New. Opinion evidence is received whenever the trial court finds that it will be helpful to the jury. 82 NH518, 136A358.

748–49 216Ala218, 113S22; 217Ala164, 115S101; 21AlaA503, 109S558; 22AlaA 84, 112S461; Ariz 282P481; 179Ark 207, 14SW(2d)1115; 77CalA745, 247P 580; 80CalA77, 251P219; 35GaA386, 133SE518; GaA 155SE103; 200 Iowa 17, 202NW225; 202 Iowa450, 209NW 468; 202 Iowa1377, 212NW63; 161La 827, 109S505; 30NM309, 233P49; SD 228NW395; 104TexCr423, 284SW571; Vt 145A413; 144Va559, 131SE131 (dictum); 104WVa433, 140SE139. [c] **Where relevant to issues,** opinion evidence by nonexpert has been held admissible. 161La827, 109S505. [d] **Witness may testify as to what he saw in mirror** without qualifying as expert. 109TexCr 173, 3SW(2d)802, 57ALR407.

748–50 7F(2d)867; 13F(2d)506; 219Ala 674, 123S55; 21AlaA397, 109S117; 21 AlaA491, 109S521; 22AlaA84, 112S461; 22AlaA120, 113S494; 22AlaA566, 118S 325; 33Ariz354, 264P1083; 203Cal 153, 263P524; 70CalA465, 233P812, 815 [cit CJ]; 81CalA226, 253P735; 86CalA148, 260P591; 91CalA298, 266P1020; Colo 269P907; Colo 293P335; 98Fla152, 123S567(2dcase); 166Ga563, 144SE170; 45 Ida73, 260P694; 338 Ill 237, 170NE 303; 339 Ill 78, 170NE690; Ill 172NE 743; 232Ky453, 23SW(2d)930; 161La 827, 109S505; 166La924, 118S85; 128 Me500, 148A747; 157Md332, 146A268; 255Mass369, 151NE839; 261Mass281, 158NE840; 168Minn401, 210NW402; 172Minn226, 215NW189; 313Mo 98, 281 SW720; Mo 29SW(2d)150; 117Nebr 514, 221NW439 (that certain mixture is mash); 192NC80, 133SE404; 197NC 478, 149SE735; 117 Or515, 243P766 (physician's testimony that wound was serious); 52SD619, 219NW817; 111 TexCr285, 12SW(2d)576; 100TexCr205, 272SW465 (sheriff and peace officer held qualified to testify as to place of entrance and exit of bullet from appearance of body); 104TexCr567, 285SW 1094; 109TexCr213, 3SW(2d)808; 110 TexCr52, 7SW(2d)532; 112TexCr305, 16 SW(2d)539(2dcase); TexCr 27SW(2d) 1098; TexCr 29SW(2d)754 (whether hide from stolen animal had any Brahma in it is for expert testimony); 150Wash 89, 272P89; 100WVa180, 130SE102 (physical ability of defendant to copulate); 104WVa523, 140SE546; 193Wis 482, 214NW356. [a] (1) 208Ky707, 271 SW1055; 172Minn226, 215NW189. [i] 204 Iowa1360, 217NW236. [o] (2) Where inquiry relates to conclusion to be drawn from knowledge of facts depending upon professional or scientific knowledge or skill, expert's testimony as to conclusions may be best evidence. 21AlaA348, 108S262. (3) Physician may be asked as to effect of bruises or wounds on body of deceased. 192NC80, 133SE404. (4) As to what kind of instrument was used to make wounds. 192NC80, 133SE404. [q] **That cuts on neck** had been made with stroke from left to right may be testified to by physician performing autopsy. 82NH518, 136A358. [r] **Source of facts.**–334 Ill 590, 166NE481. [s] **Characters on slips containing record of wagers on horse races** are proper subject of expert testimony. 85CalA406, 259P481. [t] **Solvency.–Iowa** 228NW308. [u] **Expert may explain former testimony** taken in connection with testimony of another expert. SC 155SE409.

748–51 212Ala484, 103S458; 215Ala 229, 110S21; 22AlaA66, 111S452; 22 AlaA561, 117S614; 70CalA465, 233P812; 81CalA226, 253P735; 98CalA423, 276P 1030; 168Ga470, 148SE139; 324 Ill 428, 155NE337; 199 Ind10, 154NE870; 204 Iowa1355, 217NW233; 225Ky384, 9 SW(2d)107 (what impression on shirt indicated); 228Ky106, 14SW(2d)390; 155Md474, 142A497; 156Md459, 144A 350; 196NC129, 144SE698(2dcase); 287 Pa512, 135A301; 50SD548, 210NW980; 99TexCr627, 271SW87; 103TexCr679, 282SW220; 106TexCr305, 292SW218; 109TexCr213, 3SW(2d)808; 112TexCr 301, 16SW(2d)823; TexCr 32SW(2d) 461; 144Va559, 131SE131 (exclusion of answer as to whether accused under hypnotic influence of another not error); 135Wash240; 237P502 (how blood stains got on knife); 105WVa298, 142SE254. [a] 27 OhA272, 161NE37; 103TexCr679, 282SW220. [c] **Possibility of performing operation in manner testified to.**–204 Iowa1355, 217NW233.

748–51½–New. Where a term is not used in a technical sense, expert testimony is not admissible to explain it. 287Pa512, 135A301.

748–51⅓–New. It is not error to exclude expert testimony to show that brief form autopsy reports did not show death from the cause assigned. 287Pa 512, 135A301.

748–51¼–New. Questions to an expert witness suggesting the answer desired are improper. 287Pa512, 135A301.

748–52 216Ala218, 113S22; 144Va559, 131SE131.

748–53 163Ga121, 135SE917; 35GaA386, 133SE518; 37GaA611, 141SE319; 337 Ill 371, 169NE190; 215Ky707, 286SW 1067; 165La474, 115S661; 317Mo 865, 297SW73.

748–54 23AlaA73, 120S917(1stcase); 318 Ill 114, 149NE3; 161La827, 109S505; 156Md390, 144A501; 112TexCr71, 13 SW(2d)859; 151Wash312, 275P706. See also 166Ga563, 144SE170. But see 33PortoRico 15. [a] (3) But see 112 TexCr498, 17SW(2d)821. (4) Expert may state facts forming basis of opinion, 256Mass165, 152NE241. [b] (1) 105TexCr138, 286SW988. (3) Nev 285 P503. (5) 85Mont585, 281P551 (testifying to autopsy). (14) Undertaker of nineteen years' experience is properly qualified as expert to testify that wounds crushed deceased's skull and in his opinion caused death. 104TexCr567, 285SW1094. (15) Qualification of Phy-

sician does not depend on whether licensed to practice, but on training and experience. 338 Ill 596, 170NE685. (16) Not sufficiently shown. 339 Ill 78, 170 NE690. (17) Experienced consulting criminologist is competent to testify that bones are human bones though he states on cross examination that he has no knowledge of anatomy. Nev 285P503. (18) Doctor in chemistry and head of school chemistry department is qualified to testify concerning effects of wood alcohol in human stomach. Ill 172NE64. [c] **Experts decipering slips containing wagers on horse races** are not disqualified because of inability to decipher figures on back of slips relating to different subject matter. 85CalA406, 259P481. [d] **Refusal to permit cross-examination as to qualification of experts** held error. 19F(2d)897. [e] **Where no question as to witness' qualification appears,** permitting him to testify as expert is in court's discretion. 255Mass369, 151 NE229.

749-54½-New. In prosecution for embezzlement, testimony of expert about shortage as reflected by accused's checking account is objectionable where witness does not state how he arrived at figures. Utah 287P181.

749-55 74(2d)567; 21AlaA235, 107S791; 33Ariz23, 262P4; 85CalA406, 259P481; Ill 172NE743; 262Mass185, 159NE518; Mo 293SW648; Mo 22SW(2d)809; 85Mont585, 281P551; Nebr 226NW793; Nev 285P503; 82NH133, 130A743; 35 OhA463, 172NE555; 131 Or455, 282P560; 106TexCr413, 292SW906; 101Vt124, 141A686. [a] **Witness held qualified.**-131 Or455, 282P560 (to give opinion as to mash).

749-56 34F(2d)86; 21AlaA601, 110S913; 339 Ill 78, 170NE690; 161La827, 109S605; 165La842, 116S206; 261Mass281, 158NE840; 172Minn226, 215NW189; 173Minn567, 218NW112; Mo 289SW648; 142Wash653, 254P445; Wash 287P23; 104WVa523, 140SE546.

749-56½-New. It is both the right and the duty of the opposing party to cross examine as to the qualifications of the witness. 33Ariz23, 262P4.

749-56¾-New. In a prosecution for manufacture of intoxicating liquors where officers testified that they had seen mash before an objection that they were not qualified to testify that a barrel contained mash goes to the weight and not to the admissibility of their testimony. 161TexCr451, 276SW237.

749-56¼-New. If a witness has such knowledge about a matter as to make his opinion about it helpful to the trier in his duty to find the facts his opinion is to be received, whether it is helpful is a question of fact. 82NH133, 130A743.

749-56⅛-New. The trial court has discretion as to the admission of some conclusions. 273US392, 47SCt377, 71 LEd700, 56ALR929.

749-56½-New. Excluding testimony of one having no knowledge of the facts is not error. 326 Ill 104, 157NE76.

749-56½-New. In a proceeding to determine sanity, on cross-examination of defendant's expert, the question whether an affidavit for change of venue was the product of an insane mind has been held error. 326 Ill 327, 157NE247.

749-56⅛-New. No exception lies to a ruling admitting such evidence, if it would aid the jury. 82NH493, 136A268.

749-56⅝-New. It cannot be held as matter of law that the knowledge of a chemist as to the probable position of a person from whose wounds blood may have flowed is more reliable than that of the jury having all of the facts and circumstances before them. 81 CalA226, 253P735.

749-56⅞-New. Testimony of an investigator as to the direction from which blood on premises and on the clothing of the victim of a homicide must have come and as to the relative position of certain markings is inadmissible where based on observation made several months after the homicide and after an attempt to remove the blood stains had been made. 81 CalA226, 253P735.

749-56 1/11-New. It is the duty of the district attorney to select able and unprejudiced experts to testify without partiality or bias against defendant. 272Mass369, 151NE839.

749-56 1/12-New. Defendant contending that state's witness was not qualified to testify that what he purchased from defendant was whisky should have shown disqualification by cross-examination or otherwise. 23AlaA162, 122S369(2dcase).

749-56 1/13-New. It is improper to ask a witness his opinion as to the credibility of the testimony of another witness or whether he thinks such other witness was mistaken. 34NM112, 278P216.

749-56 1/14-New. Expert witness may be asked as to fees paid or promised him in excess of legal fees provided by statute for ordinary witnesses. 118Nebr 346, 225NW42.

749-56 1/15-New. Minutes of the state board of election commissioners showing the board's findings as to forgery of election return certificates have been held to be incompetent in prosecution, being no more than expressions of individual member's opinion concerning a matter about which the board had no right to speak. 229Ky776, 18SW(2d)250.

749-56 1/16-New. Admissible expert evidence is rightfully excluded on cross-examination where the questions are improperly put. 109Conn394, 146A837.

749-57 20AlaA457, 103S902 (location of state line); 33Ariz354, 264P1083; 77CalA745, 247P580; 80CalA77, 251P219; 36GaA674, 137SE854; Iowa 228NW266; Iowa 229NW231; 235Ky670, 32SW(2d)29; 160La667, 107S484; 168La976, 123S645 (wounds); 169La777, 126S57; 239Mich244, 214NW192; Mo 20SW(2d)529(1stcase); 27 OhA166, 161NE221; 137S0145, 134SE885; Tex Cr 26SW(2d)918; TexCr 31SW(2d)638; Wash 288P243. [b] **Conduct, manner, and demeanor** of another may be testified to by use of words characterizing same. 96Fla307, 118S13.

749-58 335 Ill 217, 167NE1; 58ND773, 228NW190 (whether house is single or duplex). [a] **Existence of still** may be testified to by noncexpert witness. 32 Portoriico 69.

749-60 23AlaA83, 121S2(2dcase); 23AlaA288, 124S401; 34Ariz139, 268P615; 168Ark1145, 273SW19; 167Ga261, 145SE512; 203 Iowa532, 211NW244; 204 Iowa118, 214NW710; 263Mass39, 160NE315; 317Mo865, 297SW73; 103NJL88, 134A611; 113TexCr506, 22SW(2d)667; 98Vt466, 129A306.

749-61 219Ala674, 123S55; 20AlaA570, 104S140; 40GaA548, 150SE444; 262Mass416, 160NE252; 239Mich244, 214NW192; 313Mo98, 281SW720; 50ND927, 198NW698 (negative testimony as to threats or promises inducing confession, offered to lay foundation for introduction of confession); 105TexCr291, 288SW226; 105TexCr327, 288SW458; 107TexCr165, 295SW622; 98Vt466, 129A306.

749-62 98Vt466, 129A306.

749-64 22AlaA353, 115S698; 219Ala282, 122S45; 20AlaA601, 104S837; 21AlaA471, 109S757; 204 Iowa118, 214NW710; 259Mass152, 156NE65; 50Nev433, 264P697; 101TexCr192, 274SW974; 104TexCr649, 285SW621; 106TexCr68, 291SW226; 98Vt466, 129A306.

749-64½-New. Whether statement offered is one of fact or opinion depends on consideration of its terms when viewed in light of surrounding circumstances. 235Ky670, 32SW(2d)29.

749-64¼-New. Where doubt arises as to whether statement is one of fact or of opinion, doubt should be resolved in favor of accused. 235Ky670, 32SW(2d)29.

749-65 101TexCr220, 276SW228; Tex Cr 26SW(2d)918. [a] **Opinion of witness is admissible in criminal case** providing it is not merely speculative, but must involve knowledge which may or may not amount to certainty. 112 TexCr301, 16SW(2d)823.

749-66 109Conn124, 145A761; 38GaA362, 144SE51; 338 Ill 56, 170NE14; 113TexCr75, 19SW(2d)41; TexCr 24SW(2d)417.

750-68 231Mich256, 203NW863, 864 [citCJ]. See also 34PortoRico 375.

750-68½-New. Refusal to permit mother to state whether she thought prosecutrix mistaken in her testimony as to her age, not erroneous. NJSup 130A723.

750-69 CalA 291P434; 108TexCr204, 299SW407; TexCr 31SW(2d)815. See also SC 155SE409.

750-75 19F(2d)506; 21AlaA339, 108S620; 170Ga895, 154SE368; 40GaA10, 148SE769; 120Kan172, 243P266; 215Ky613, 286SW696; 45Philippine9; 100TexCr626, 272SW167; 144Wash341, 258P13; 187Wis122, 203NW749. See also 165La47, 115S363.

750-76 318 Ill 114, 149NE3; 173Minn567, 218NW112.

750-77 21AlaA182, 106S393; 175Ark1170, 298SW1019; 43 Ida180, 250P239; Iowa 233NW110 (holding inspection and conclusions by expert proper); 254Mass86, 149NE600; 173Minn567, 218NW112; Minn 231NW411; 100TexCr61, 271SW912; 187Wis122, 203NW749 (reasons for conclusion may be given).

750-80 45Philippine9. [a] **Exact coincidence** between two signatures is absolute proof that one or the other is forgery. 45Philippine9. [b] **Physical condition of writer** as bearing on genuineness of signature see 45Philippine9.

750-81 121Kan383, 247P843.

750-81½-New. Jury may itself make comparison of documents. 254Mass86, 149NE600.

750-81⅓-New. An expert may testify as to the genuineness of a signature to a lost or destroyed will although his testimony is based on comparison of photographic copies of such signature and signatures in the handwriting of deceased where the will was lost or destroyed after the photographs were made. 195Wis416, 217NW711.

750-81¼-New. An expert may testify that disputed documents were signed by defendant on comparison with documents admittedly signed by him. 22 F(2d)66.

750-81½-New. Evidence based wholly on comparison of hands is in the nature of circumstantial evidence. 118 Nebr346, 225NW42.

750-82 94Fla318, 113S689, 694 [citCJ]; Fla 129S112; 160La162, 106S731; 316Mo213, 292SW721, 727 [citCJ]; OklCr 290P936 (opinion of witness without knowledge excluded); Tex CivA 273SW666, 672 [quotCJ]; 101TexCr135, 274SW586.

750-83 170Ark786, 281SW11; 76CalA688, 245P781; 94Fla318, 113S689, 694 [quotCJ]; 179Minn516, 229NW789 (defendant); Mo 292SW721, 727 [citCJ]; Mo 296SW391, 396 [citCJ]; 295Pa190, 145A85; TexCivA 273SW666, 672 [quotCJ]; 106TexCr520, 293SW568; 110TexCr87, 7SW(2d)567; 113TexCr314, 21SW(2d)728; Vt 145A413. But see 174Ark1179, 298SW27.

750-84 214Ala2, 106S617; 22AlaA533, 118S231; 175Ark1169, 299SW360; 77CalA745, 247P580; 94Fla318, 113S689 [citCJ]; IndA 16SNE612; 160La162, 106S731; 164La449, 114S92; 254Mass520, 150NE854; 255Mass369, 151NE839 (weapon, testified to by one who had repaired it); 316Mo213, 292SW721, 727 [citCJ]; Mo 128SW(2d)39; 50Nev271, 257P619; Nev 285P503; NJSup 132A338 (permitting witness to give conclusions as to what was liquor was held not error where witness showed considerable knowledge about liquors); 22 OhA512, 154NE172; Tex CivA 273SW666, 672 [quotCJ]; 106TexCr293, 292SW234; 107TexCr276, 296SW520; 113TexCr124, 18SW(2d)1070; TexCr 25SW(2d)870; TexCr 27SW(2d)233; Utah 289P100. [d] **Evidence as to identity of object held incompetent.**-21AlaA315, 108S878. [e] **Identity by comparison.**-207 Iowa624,

223NW362 (bottle containing liquor).

751-85 94Fla318, 113S689, 694 [citCJ].

751-86½-New. A witness called to identify accused need not have seen his face. 76CalA688, 245P781.

751-86⅓-New. The existence of peculiarities about the back and shoulders of accused may constitute sufficient legal foundation to qualify the victim of the crime, who did not see his face, to identify him. 76CalA688, 245P781.

751-86¼-New. A witness may not give his opinion as to the similarity of tracks with those of accused where the common standard of measurement was not used and no peculiarity was shown, 107 TexCr408, 296SW889.

751-86⅙-New. but the witness may describe the tracks. 107TexCr408, 296 SW889.

751-87 198 Ind284, 152NE166; 317 Mo 413, 297SW63; 142Wash463, 253P 645. [a] **Chemist's testimony as to alcoholic content of liquor** held not inadmissible under statute requiring "all" liquors seized to be preserved. 106 TexCr346, 292SW246.

751-88 21AlaA550, 109S900; 22AlaA 178, 114S890; Ark 30SW(2d)838; 198 Ind284, 152NE166; 89 IndA293, 166NE 292; IndA 169NE338; Iowa 232NW 127; 158La1021, 105S50 (chemical analysis is not exclusive method of ascertaining intoxicating character of liquor which may as well be established by nonexpert opinion); 160La26, 106S 662, 665 [quotCJ]; 163La329, 111S775; 150Md278, 132A624; MoA 256SW143; 52ND659, 204NW350; 53ND203, 205 NW67; 102TexCr501, 278SW441; 102 TexCr537, 278SW434; 112TexCr635, 18SW(2d)162; TexCr 31SW(2d)456; 141Wash660, 252P118. [c] 106TexCr 29, 290SW167. [d] **Witness held competent** who had drunk intoxicating liquor, and knew its effects, taste, and smell. 53ND203, 205NW67. [e] **Objection to opinion evidence as to intoxicating qualities of liquor** goes to weight and not admissibility of evidence. 102TexCr501, 278SW441. [f] **Officers having experience in enforcing Prohibition Law** may testify as to kind of liquor which they discovered. Mo 22SW(2d)1050.

751-89 28Ariz539, 237P950; 254Mass 512, 150NE321; 106TexCr127, 290SW 1100; 113TexCr142, 18SW(2d)663.

751-90 28Ariz539, 237P950; Ark 30 SW(2d)838.

751-91 21AlaA439, 109S182; Ind 156 NE560; 89 IndA293, 166NE292; 160La 26, 106S662, 665 [quotCJ]; 163La525, 112S404; 150Md278, 132A624; 318Mo 1198, 28SW(2d)767 (corn whisky); 320 Mo228, 7SW(2d)259 (hooch, moonshine, and corn identified by taste and smell); MoA 15SW(2d)931; 47RI371, 133A444; 102TexCr537, 278SW434; 110TexCr136, 7SW(2d)548; 112TexCr149, 15SW(2d) 624. See also 318Mo 1233, 3SW(2d)365. [d] **Smell.**–102TexCr537, 278SW434. [e] **Opinion as to liquor being whisky** may be based upon appearance, smell, or taste. 102TexCr537, 278SW434. [f] **Analysis of fluid** is not necessary. 102Tex Cr537, 278SW434.

751-91½-New. That liquor has been destroyed does not render testimony that the liquor was whisky inadmissible. 35GaA663, 134SE333.

751-92½-New. , or that it smelled or tasted like alcohol. 201 Iowa1, 206NW 281.

751-92⅓-New. Lay witnesses may be permitted to identify moonshine whisky from their ordinary experience in tasting or smelling it, and convictions based on such proof will be upheld. Mo 11SW (2d)1024.

751-93 22AlaA84, 112S461.

751-93½-New. Witness permitted to state that twelve bottles contained whisky, although he tasted and smelled only one, that he had not tasted all going to the weight and not admissibility of his testimony. 100TexCr128, 271SW 909.

751-93⅓-New. Sheriff, after qualifying, may testify that articles found were suitable to be used in manufacture of whisky. 21AlaA31, 104S871.

751-93¼-New. A witness cannot testify that apparatus is a still, where he had never seen a still in his life but based opinion on "what they say." 21AlaA 175, 106S217.

751-93⅙-New. Allowing the state's attorney to ask a witness to smell liquor and say what kind it was has been held not error. 160La435, 107S296.

751-93⅛-New. It is permissible for the district attorney to cross-examine a witness, who testified that liquor was alcohol, as to whether corn whisky was not practically pure alcohol. 160La435, 107S296.

751-93½-New. Exclusion of cross-examinations of a chemist for the apparent purpose of showing that alcohol was not usable as a beverage without dilution held not prejudicial. 19F(2d)901.

751-93¼-New. The court's exclusion of a question whether a prohibition agent regarded himself as an expert in identifying grain alcohol has been held not prejudicial. 19F(2d)901.

751-95 22AlaA67, 111S587; 176Ark173, 2SW(2d)17; 71CalA239, 234P69; 91Fla 214, 107S360; 166Ga561, 144SE109; Ind 167NE531; 200 Iowa483, 203NW806; 201 Iowa575, 207NW608; 203 Iowa251, 212NW475; 162La266, 110S417; 261 Mass281, 158NE840; 216MoA644, 271 SW875 (intoxication of witness); 120 Or 652, 253P371, 372 [citCJ]; 144SC452, 142SE725; 52SD566, 219NW252; 160 Tenn396, 25SW(2d)586 (basis of conclusion held unnecessary); 100TexCr76, 271SW922; 106TexCr524, 293SW821; 106TexCr621, 294SW580; TexCr 298 SW575; 107TexCr571, 298SW580; 110 TexCr220, 7SW(2d)543; 111TexCr14, 10 SW(2d)1003; 111TexCr367, 12SW(2d) 1027(2dcase); 111TexCr482, 14SW(2d) 278; 111TexCr493, 14SW(2d)1032; 112 TexCr147, 15SW(2d)619(2dcase); Tex Cr 20SW(2d)1063. See also 166Ga561, 144SE109.

751-96½-New. witness may testify that one drink of whisky from defendant's jug made him drunk. 216MoA644, 271 SW875.

751-96⅓-New. The sufficiency of the foundation for opinion evidence of nonexpert witnesses, that defendant was under the influence of intoxicating liquor, is a matter largely for the trial court. 176Minn164, 222NW909.

751-99 217Ala225, 115S297; 22AlaA 331, 115S417; 205Cal 596, 271P1074 (evidentiary value); 89Fla439, 105S137; 92Fla878, 110S547; 205 Iowa1130, 217 NW225; 165La474, 115S661; 146Miss 547, 112S705; 312Mo 373, 278SW1016; 314Mo 699, 285SW440; 101TexCr94, 274 SW136; 104TexCr253, 283SW844; 105 TexCr470, 289SW57; 107TexCr649, 298 SW604; 113TexCr26, 19SW(2d)317 (objection to foundation laid went to weight, rather than admissibility, of evidence); TexCr 20SW(2d)794; Wash 291 P1093; 103WVa653, 138SE318. But see 284Pa311, 131A229 [criticising 109Pa 262]. [a] 213Ala358, 104S656. [b] **Testimony of lay witness limited** to impression at time he made observation. 312Mo 373, 278SW1016. [c] **Cross-examination** of witness on irrelevant facts held properly excluded and no abuse of court's discretion. 312Mo 373, 278SW 1016. [d] **In Pennsylvania.**–284Pa311, 131A229. [e] **Actual or apparent mental condition.**–317Mo 843, 297SW397. [f] **Improper cross-examination.**–208 Iowa 127, 224NW537. [g] **Question as to why they had not placed man in asylum** is proper in cross-examination. TexCr 26 SW(2d)233.

751-1 216Ala356, 113S67, 70 [citCJ]; 219Ala282, 122S45; 21AlaA289, 107S 791; 21AlaA577, 110S171; 22Ala644, 119S248; 176Ark88, 2SW(2d)50; Ark 30SW(2d)830; 284Pa311, 131A229; 34 PortoRico 626 (insufficient); 101TexCr 94, 274SW136; 104TexCr253, 283SW 844; 105TexCr470, 289SW57; TexCr 27 SW(2d)210; TexCr 30SW(2d)486; Tex Cr 31SW(2d)812; Wash 291P1093; 103 WVa653, 138SE318. [b] (1) 102CalA 608, 283P389. [g] **Witness not competent.**–78Mont560, 254P858. [h] **Working with defendant twelve years.** Wash 291 P1093.

752-2 Ark 30SW(2d)830; 92Fla878, 110S547; 205 Iowa1130, 217NW225; 205 Iowa1028, 219NW17; 208 Iowa127, 224 NW537; 163La701, 112S655; 146Miss 547, 112S705; 126 Or560, 270P404; 161 Tenn23, 28SW(2d)993; TexCr 8SW(2d) 176; 110TexCr406, 10SW(2d)566; Wash 287P23; Wash 291P1093. See also 29 PortoRico 961. [d] **That defendant's case was as bad as any sheriff ever had in jail** not admissible on issue of insanity. 213Ala358, 104S656. [e] **In Pennsylvania.**–284Pa311, 131A229.

752-3 104TexCr253, 283SW844.

752-4 213Ala358, 104S656; 146Miss 547, 112S705; 314Mo 699, 285SW440; 321Mo 621, 12SW(2d)27; 161Tenn23, 28 SW(2d)993.

752-5 219Ala282, 122S45; Ark 30SW (2d)830; 126Mo376, 138A562; 126 Or 560, 270P404; 284Pa311, 131A229; 104 TexCr253, 283SW844; TexCr 31SW(2d) 812.

752-6 [b] **Other questions properly excluded.**–78Mont560, 254P858.

752-8 104TexCr253, 283SW844. [a] **Testimony that defendant** when not in presence of jury acted "all right" held not objectionable as passing on defendant's sanity. 104TexCr253, 283SW844.

752-8½-New. State permitted to show on cross-examination that witness in jail at same time testifying to defendant's insanity had pleaded insanity in his own case. 213Ala358, 104S656.

752-8⅓-New. Where facts testified to are insufficient to support an opinion as to defendant's mentality, testimony of a lay witness thereon is properly excluded. 284Pa311, 131A229.

752-8¼-New. There is a distinction between a lay witness' stating that he observed nothing in the conduct or speech of the individual under inquiry leading to the opinion that he is not of normal mind, and his stating that such individual is insane. 284Pa311, 131A229.

752-9 See also 29PortoRico 961.

752-11 Cal 289P629; CalA 283P119.

752-12 213Ala358, 104S656; 219Ala282, 122S45; 102CalA608, 283P389; CalA 291P887 (opinion as to sanity at time of crime and at time of trial); 92Fla878, 110S547; 284Pa311, 131A229; Wis 231 NW634 (testimony as to sanity at time of trial as affecting competency of testimony as to sanity at subsequent time); Wis 232NW866. [a] **Necessity for showing qualification.**–TexCr 31SW(2d) 812. [b] **Calling of experts held not mandatory** under statute in absence of written notice by defendant. 35 OhA 324, 172NE434.

752-13 87CalA295, 261P1114; 193Wis 482, 214NW356.

752-15 213Ala358, 104S656; 163Ga43, 135SE410; 193Wis482, 214NW356.

752-16 163Ga43, 135SE410; 203Iowa 1305, 214NW735.

753-17 336 Ill 251, 168NE292; 203 Iowa 1305, 214NW735.

753-18 255Mass9, 151NE74, 44ALR579.

753-22 284Pa311, 131A229; 109TexCr 251, 4SW(2d)74 (physician in charge of asylum).

753-23 284Pa311, 131A229.

753-26 But see 22AlaA644, 119S248.

753-28 Contra 82NH493, 136A268.

753-28½-New. or unsound on a particular subject. 163Ga43, 135SE410.

753-30 163Ga43, 135SE410; 284Pa311, 131A229.

753-30½-New. Testimony of psychologist as to results of intelligence tests and opinion based thereon held proper rebuttal. 23OhA474, 156NE219.

753-30⅓-New. A question which seeks a psychiatrist's opinion as to defendant's mental age, offered to establish that he is entitled to an instruction of incapacity, is properly excluded. Mass 167NE354.

753-30¼-New. Liberal right of cross-examination should be accorded. OklCr 292P76.

753-32 21AlaA378, 108S646; 203Cal 153, 263P524 (calibre of bullet); 70CalA 465, 233P812; 100CalA113, 279P1070 (number which had appeared on revolver, and from which number had been scratched off); CalA 292P693; Ill 172 NE743; 230Ky411, 19SW(2d) 1091, 66 ALR360; 255Mass369, 151NE839 (similarity between revolvers); 35 OhA463, 172NE555; 33PortoRico 825; 147Wash 411, 266P163. [a] 22AlaA36, 111S763. See also 222Ky99, 300SW357. [b] See also 199 Ind10, 154NE870. [f] **Sheriff may state how** far pistol would burn or fire clothing, after qualifying. 214Ky

147, 282SW1066. [g] **Opinion of doctor as to location of fatal wound** from pistol shots as being one that came out at certain part of body is admissible. 21AlaA 378, 108S646. [h] **Permitting witness on rebuttal** to substantiate his authority is proper. 230Ky411, 19SW(2d)1091, 66 ALR360.

753-35½-New. A witness who has qualified as to his knowledge of how whisky is made can testify as an expert that the still which he described was suitable for making whisky. 22AlaA353, 115S698.

753-35¼-New. A qualified witness may testify that whisky could be manufactured with articles found on premises of defendant in prosecution for illegal manufacture of intoxicating liquors. 101 TexCr220, 276SW228.

753-35¼-New. A qualified witness may testify that liquor could be manufactured with instruments exhibited to him. 101TexCr226, 276SW232.

753-35½-New. A nonexpert witness is incompetent to testify that apparatus is a still. 235 IllA587.

753-35¼-New. A sheriff who had testified to observation of stills is competent to say that a still was sufficient to manufacture liquor. 102TexCr546, 278SW 848.

753-35½-New. A prohibition agent having many years' experience in stills is qualified to testify as to still places. 21AlaA208, 106S874.

753-35¼-New. A physician who performed the autopsy cannot state the probable position of deceased at the time the fatal shot was fired, without showing special qualifications. 199 Ind10, 154NE70.

753-35½-New. An expert may testify that articles found on defendant's premises are fit for use in the manufacture of intoxicating liquor. MoA 299SW821.

753-35½-New. A medical expert may testify from the appearance of a wound as to the distance between the muzzle of a revolver and the bullet's first contact with the body. 33PortoRico 48.

753-35½-New. A qualified witness may testify that an article has been used. 22AlaA577, 117S911.

753-35½-New. In a prosecution for assault with a dangerous weapon, a flashlight, testimony of a state's witness regarding the length and weight of the flash light used is competent as a general description of the instrument used as the weapon. 127 Or565, 273P338.

753-35½-New. Permitting an expert locksmith to testify and demonstrate concerning a lock and key is within the court's discretion. 110Conn55, 147A118.

753-44½-New. But opinion as to good character, it seems, may be stated if based on fact. 221AppDiv331, 223NYS 339.

753-49 215Ala27, 109S161; 219Ala282, 122S15; 89Fla139, 105S137; 166Ga512, 143SE896; 200 Iowa483, 202NW806; 261 Mass281, 158NE840; 83NH532, 145A456.

753-50 21AlaA551, 109S897.

754-51 21AlaA156, 106S685; ND 232 NW473.

754-53 82NH518, 136A358.

754-54 216Ala336, 113S64; 110TexCr 159, 8SW(2d)947.

754-55 317Mo843, 297SW397; NJSup 147A727; 110TexCr220, 7SW(2d)543.

754-56 89Fla439, 105S137; 203 Iowa 929, 210NW465; 166La793, 117S921. But see 33PortoRico 825; 103TexCr318, 280SW202. See also 99TexCr589, 271 SW385. [a] **Evidence held inadmissible.–Iowa** 228NW75 (testimony of wife to show husband's impotency).

754-57 335 Ill 217, 167NE1.

754-58½-New. Prosecutrix is allowed to testify that she resisted with all her power. 107TexCr174, 296SW588.

754-58¼-New. If a witness knows it to be a fact, he may testify that defendant in a prosecution for vagrancy is able to work. 23AlaA127, 123S263.

754-59 22AlaA39, 111S767; 264Mass 221, 162NE308; 100TexCr590, 272SW 170.

754-59½-New. Questions calling for an opinion by witness on matter to be determined by judge from law and facts are incompetent. 21AlaA81, 105S431.

754-60½-New. Testimony that officers smelled whisky on premises is admissible. TexCr 29SW(2d)774.

754-61½-New. But it has been held error to permit an unqualified witness to testify as to whether the contents of a receptacle smelled of intoxicating liquor. 21AlaA181, 106S390.

754-62 31F(2d)846.

754-62½-New. The witnesses may testify from a sense of smell that the receptacle contained intoxicating liquor. 199 Ind158, 154NE865; 191NC528, 132 SE151.

754-62½-New. Permitting witness to testify that jar smelled like whisky, without having qualified, is error. 21 AlaA77, 105S429.

754-62¼-New. Testimony of a police officer in a liquor prosecution that at the time of search he saw men drinking beer in defendant's store held admissible, where he did not pretend to testify to its alcoholic content, but characterized it as beer by its smell. One familiar with the characteristics of beer may identify it by its odor. 49RI 397, 143A604.

754-62½-New. Although a person cannot describe the odor, if he is familiar with the smell of dynamite and its fumes, he may testify. 333 Ill 397, 164 NE847.

754-62½-New. Knowledge of a crime may be acquired through sense of smell alone. 34F(2d)275.

754-62½-New. Testimony of a witness that he identified the contents of a jug as moonshine through the sense of smell is admissible. Mo 23SW(2d)1.

754-64 214Ala2, 106S617.

754-67 159La820, 106S317.

754-68½-New. Tenant living below may testify that no noise was heard from apartment above before shot was fired, where defendant claimed deceased assaulted and knocked her down. 99 TexCr589, 271SW385.

754-69 40GaA225, 149SE178 (witness giving facts on which opinion is based). But see Mo 23SW(2d)122. [b] **Physician** may testify from observation of wound as to distance from which bullet, resulting in killing, was fired. 33Porto Rico 48.

764-72 Iowa 228NW80 (experienced driver of automobile); 156Md149, 143A 872; 108TexCr457, 18SW(2d)627.

754-73 22AlaA16, 111S897.

754-75½-New. Admission of testimony that a ruler placed in a depression would point in a given direction has been held not error. 104TexCr550, 286SW224.

754-78 137SC75, 134SE514; 101TexCr 525, 276SW281 (where no measurement or comparison was made).

754-78½-New. Where witness was acquainted with footprints of accused, his inference will be admitted. 137SC75, 134SE514.

754-80½-New. or as to comparison of tracks of automobile tires with the tread on certain tires. ND 228NW453.

755-81 137SC75, 134SE514.

755-83 166Ga512, 143SE896; 113TexCr 591, 23SW(2d)731(2dcase).

755-84 21AlaA585, 111S43.

755-85 But see 22AlaA649, 119S511.

755-86½-New. In larceny of cattle witness who stated that he followed tracks of horse and cattle discovered by him leading toward defendant's place may be asked why he followed them. 75Mont 350, 243P587 (calls for fact and not conclusion).

755-87 174Ark391, 295SW361; 101Vt 124, 141A686. But see Iowa 230NW536; 154Miss653, 122S757, 63ALR1319. [b] **Expert cannot be asked** to state ultimate fact of similarity of fingerprints. Iowa 226NW46. [c] **Evidence of qualification.–OklCr** 292P885(2dcase).

755-88 23AlaA140, 122S303.

755-92 Ill 173NE383; 230Ky725, 20 SW(2d)745; 108TexCr576, 2SW(2d)245; 111TexCr205, 13SW(2d)80; 101Vt124, 141A686.

755-94 33Ariz23, 262P4 (personal property); 202 Iowa242, 210NW120; Iowa 232NW172; 318Mo833, 1SW(2d)147; Mo 20SW(2d)529(1stcase) (witness held sufficiently qualified to testify to value of insolvent bank's paper and amount of worthless paper held by it); TexCr 25SW(2d)621 (not admissible without showing of qualification); 142Wash653, 254P445. [a] 317Mo865, 297SW73. [b] **Credibility of expert.–NJSup** 130A437. [c] **Hearsay evidence** of opinions of experts as to value is inadmissible. 12F (2d)904. [d] **To qualify nonexpert to testify as to value of land** he must have intimate acquaintance with conditions and values in community in which property is situated. 318Mo833, 1SW(2d) 147. [e] **Value of notes.–318Mo** 833, 1 SW(2d)147.

755-95 7F(2d)867; 80CalA252, 251P 682; 165Ga55, 139SE877 (market value of notes); 47 Ida785, 280P1039 (effect on value of bonds by reason of not being quoted in financial publication); Iowa 230NW865 (value of land outside of state); 235Ky734, 32SW(2d)38; 161La 827, 109S505; Mo 22SW(2d)809; 142 Wash653, 254P445. [e] **Witness in prosecution for arson** may testify to value of goods in store after fire. 104 TexCr244, 283SW846. [f] **Bank examiner,** in charge of bank for purpose of liquidation, is competent to testify as to value of its assets and liabilities. Iowa 228NW308.

755-95½-New. Evidence held inadmissible. In a prosecution for the use of mails to defraud in oil stock promotion, opinion evidence of whether the literature overstated the value of the land has been held inadmissible. 12F(2d) 904.

755-97 174Ark391, 295SW361; 45 Ida 73, 260P694; Ill 172NE743; 161La532, 109S56; Mo 273SW1037; MoA 273SW 141; 112TexCr498, 17SW(2d)821; 150 Wash66, 272P89. [a] **Expert's testimony not based on best known scientific methods** held incompetent. 222Ky546, 1SW(2d)961.

755-1 213Ala358, 104S656; 168Ark 1145, 273SW19 (question excluded where answer would be mere repetition of former testimony); 109Conn124, 145 A761. See also 29PortoRico 961.

755-3 180Ark241, 22SW(2d)47; 161La 827, 109S505; 127 Or565, 273P338; 34 PortoRico 626 (questions held objectionable). [a] **Hypothetical question held proper.–75CalA428, 243P52.** [b] **Exclusion of hypothetical question** held proper where its purpose was to prove matters provable by other evidence. 75CalA428, 243P52. [c] **Question held properly excluded in discretion of trial judge** as not containing elements essential to make answer helpful to jury. 257Mass198, 153NE793. [d] **Question held not hypothetical.–166La**43, 116S 588.

755-4 126Me177, 136A817; 316Mo 195, 289SW604; 29PortoRico 961; 108TexCr 1, 299SW422. [f] **Question may embody any material and supported fact.–** 205 Iowa1130, 217NW225.

756-5 92Fla1094, 111S245; Mo 19SW (2d)671 (question substantially covering facts held sufficient); 127 Or565, 273P338.

756-6 176Ark88, 2SW(2d)50.

756-7 338 Ill 596, 170NE685; 205 Iowa 1130, 217NW225; 210Ky421, 276SW 119.

756-7½-New. In some jurisdictions experts may express opinions on a hypothetical question if not based on mere abstract questions of science or mere speculative data. 161La827, 109S505.

756-7½-New. "What was said in nature of threat" held not objectionable. 21 AlaA601, 110S913.

756-7¼-New. In a prosecution involving alleged fraud, questions may be as general as defendant's representations. 27F(2d)575.

756-8 338 Ill 596, 170NE685; 312Mo 373, 278SW1016; 316Mo 195, 289SW 604. [a] **Both state and defendant** may form hypothetical questions on own theory of case on evidence they deem worthy of credit. 312Mo 373, 278SW 1016.

756-9 215Ala42, 109S109; 176Ark88, 2SW(2d)50; 81CalA484, 254P292 (objection to question already answered properly sustained). [a] **Limitation of cross-examination** held not abuse of discretion. 131 Or455, 282P560.

756-9½-New. Expert testimony not based on a hypothetical question or matter in the expert's knowledge is

erroneously admitted. 218AppDiv204, 218NYS148.

756-9¼-New. Cross-examination cannot serve the purpose of introducing illegal or irrelevant evidence which would not be received if introduced by the party directly examining. 215Ala42, 109S109.

756-9¼-New. The court's instruction to an expert witness to consider all undisputed facts in both defendant's and prosecuting attorney's hypothetical questions cures omissions in the latter's questions. 176Ark88, 2SW(2d)50.

756-11 255Mass9, 151NE74, 44ALR579; 167Minn164, 208NW760 (objection that opinion was alone based on hearsay held not valid); 193Wis482, 214NW356.

756-12 193Wis482, 214NW356.

756-13 193Wis482, 214NW356.

756-15 SC 155SE409.

756-16 SC 155SE409; 193Wis482, 214NW356.

756-17 193Wis482, 214NW356.

756-22 236Mich226, 210NW219.

756-25 74CalA178, 240P502. [b] **Evidence held sufficient** to warrant (1) conviction for unlawful possession of whisky. 22OhA512, 154NE172. (2) Finding that liquor was potable as beverage. 171Minn520, 214NW652.

756-26 70CalA465, 233P812 (experiments); 166Ga563, 144SE170; 121Kan587, 249P597; NJSup 147A496 (expert may be cross-examined and evidence offered in rebuttal).

756-28 13F(2d)596; 70CalA465, 233P812 (experiments); 100CalA245, 279P819; 165Ga55, 139SE877; 166Ga563, 144SE170; 121Kan587, 249P597; 311Mo581, 278SW995; 115Nebr277, 212NW606; Nebr 226NW793; 284Pa311, 131A229; 35PortoRico 533.

756-29 84Colo 254, 269P907; 146Wash509, 263P951.

756-30 176Ark88, 2SW(2d)50; 100TexCr626, 272SW167 (sufficient acquaintance established).

757-32 115Nebr277, 212NW606.

757-33 [a] **Pertinent facts developed by nonexpert** are competent. 222Ky546, 1SW(2d)961.

757-35 23AlaA507, 128S115(1stcase); 34GaA140, 128SE588 (burden of one accused of violation of statute not sustained by mere opinion or conclusion).

757-36½-New. Where witnesses testified that a still and coil smelled like sour mash, an objection that they were not qualified as experts went to the weight of the testimony rather than its admissibility. 105TexCr138, 286SW988.

757-36½-New. A regular physician's diagnosis, disclosing the internal condition of a patient which threatens his life, may not be negatived by the patient's testimony that he was unconscious of it, felt well, and was apparently well. 206Iowa971, 221NW592.

757-37 202Cal159, 259P750; Iowa 233NW110.

757-38 100TexCr61, 271SW912.

757-41 165Ga55, 139SE877.

757-43 87CalA634, 262P50 (on hearing to determine degree of offense after plea of guilty); 55ND842, 215NW536; 103TexCr658, 282SW221; 111TexCr547, 15SW(2d)18(2dcase); TexCr 27SW(2d)820; 136Wash232, 239P553. [a] 223Ky616, 4SW(2d)416. [c] **Surprise.**-136Wash232, 239P553. [d] **In absence of consent of accused,** testimony of witness on former trial cannot be read. 234Ky268, 27SW(2d)946.

757-44 168Ark783, 272SW674 (testimony before grand jury); 170Ark1143, 282SW984; 178Ark1117, 13SW(2d)597; 136Wash232, 239P553.

757-45 214Ala2, 106S617; 22AlaA315, 115S291; 33NM370, 266P922 (under statute declaratory of common law); OklCr 287P752; 39OklACR231. [b] 33Ariz383, 265P609; 72CalA292, 237P390; 81CalA528, 254P585; 83CalA190, 256P829 (due diligence shown); 89CalA405, 264P1105; 167Ga326, 145SE654. [c] **Reproduction of testimony should be confined** to instances in which due administration of justice demands it. TexCr 30SW(2d)330.

757-49 127Me234, 142A857.

757-50 5F(2d)133; 77CalA10, 245P1106; 78CalA561, 248P990; 127Me234, 142A857; 30NM309, 233P49; 34NM223, 279P945. [d] **Whole evidence including cross-examination** held admissible. 77CalA10, 245P1106. [e] **Cross-examination to substantive part of testimony of witness.**-77CalA10, 245P1106.

758-51 127Me234, 142A857; 55ND842, 215NW536.

758-52 127Me234, 142A857; 55ND842, 215NW536; 49SD551, 207NW535; 111TexCr547, 15SW(2d)18(2dcase). [b] **Where there is such difference in issues** as to suggest or make proper or desirable different line of cross-examination, testimony taken at preliminary examination is inadmissible. 49SD551, 207NW535.

758-53 5F(2d)133; 127Me234, 142A857; OklCr 288P496; 117Or515, 243P766; 104TexCr495, 283SW497; 68Utah551, 251P362.

758-55 219Ala46, 121S38; 22AlaA131, 113S469; 23AlaA163, 122S604 [certiorari den 122S605]; 33Ariz383, 265P609; 72CalA292, 237P390 (evidence held insufficient to show that witness testifying at preliminary trial could not with due diligence be found within state); 77CalA10, 245P1106; 78CalA277, 248P304; 78CalA561, 248P990; 87CalA629, 262P56; 100CalA82, 279P826; 100CalA785, 281P81; 128Kan726, 280P777; 167La484, 119S523; 127Me234, 142A857; 120Or297, 252P84; 120Or652, 253P371; 99TexCr618, 271SW92; 102TexCr566, 280SW210; 104TexCr210, 283SW850; 110TexCr220, 7SW(2d)543; TexCr 29SW(2d)782 (holding testimony inadmissible where letter from absent witness was unsigned); 68Utah551, 251P362. [b] See also 33Ariz383, 265P609. [e] **Absence beyond court jurisdiction** must be shown by competent evidence, not by affidavit. 30Ariz458, 248P36. [f] **Affidavit of sheriff** that he is informed and believes witness is beyond court's jurisdiction has no probative force. 30Ariz458, 248P36. [g] **In California.**-77CalA10, 245P1106. [h] **Circumstantial evidence as to absence.**-102TexCr566, 280SW210; 108TexCr404, 1SW(2d)318. [i] **Declarations of absent witness** as to present and future residence, destination, and intention as to return are admissible as original evidence and are not mere hearsay. 120Or652, 253P371; 108TexCr404, 1SW(2d)318. [j] **Testimony that witness did not know where absent witness was** has been held not sufficient basis for admission of testimony of absent witness. 21AlaA528, 109S610. [k] **Fact that witness had been served with subpœna** before he left jurisdiction does not render his testimony on former trial incompetent. 78CalA561, 248P990. [l] **Defendant should give satisfactory explanation why nonresident's deposition was not taken** besides showing him to be unavailable. 111TexCr547, 15SW(2d)18(2dcase). [m] **Testimony as to nonresidence or absence based on statements of others** is not incompetent as hearsay. OklCr 287P1110. [n] **In British Columbia.**-[1930] 2DomLR647.

758-56 170Ark722, 280SW983. But see TexCr 30SW(2d)330. [a] **Sufficiency of showing.**-170Ark722, 280SW983.

758-57 23AlaA99, 121S449; 23AlaA73, 120S917(2dcase); 33Ariz383, 265P609 (issuance of subpœna day before trial is not negligence); 77CalA10, 245P1106; 78CalA561, 248P990; 78CalA426, 248P1021 (due diligence held shown); 84CalA707, 258P660 (question for court); 91CalA44, 266P581; 167Ga326, 145SE654; 129Kan376, 282P588(2dcase); 167La484, 119S523; 239Mich105, 214NW130; 30NM309, 233P49 (showing held sufficient); 33NM370, 266P922; 55ND842, 215NW536; OklCr 276P791; OklCr 278P393; 141Wash429, 251P855; 150Wash664, 274P797; Wis 224NW734. [a] (2) Where nothing was done till day of trial when continuance was granted and bench warrant was issued and there was no showing as to what was done under process. CalA 254P580. [b] **It is essential** to show that some effect was made to locate witness within state. 72CalA292, 237P390. [c] **Showing held sufficient.**-82CalA62, 255P239; 141Wash429, 251P855. [d] **Due diligence** held not to mean search in every county in state. 78CalA426, 248P1021. [e] **Question of diligence is left to sound discretion of court** based on facts and circumstances before it. 78CalA561, 248P990 (discretion not abused). [f] **Burden of showing diligence to secure attendance of witness** rests on prosecution. CalA 254P580. [g] **Showing of attempt to procure attendance is unnecessary** where it is shown that witness was outside of state at time of trial. 81CalA528, 254P585. [h] **"Diligence" is relative term** and its application in each particular case depends upon circumstances. 82CalA62, 255P239. [i] **Sufficient showing of diligence.**-90CalA27, 265P366.

758-57½-New. To show intent, disposition, or willfulness of defendant, former evidence is admissible. 168Minn34, 209NW529.

758-57½-New. Where a witness refuses to testify on the ground that his answers might incriminate him, his testimony on a former trial between the same parties may be given. 21AlaA417, 109S119.

758-60 [a] **Where defendant's wife voluntarily testified** at preliminary examination, her testimony could be proved by others upon her assertion of statutory privilege. Ala 129S21.

758-62 89IndA225, 166NE11; 127Me234, 142A857; 253Mass65, 147NE833.

758-62½-New. or that the sheriff had not been diligent in subpœnaing the absent witness while within the jurisdiction; 68Utah551, 251P362.

759-64 84CalA707, 258P660 (deposition held admissible).

759-66½-New. That evidence given at a former trial refers to physical objects which are not produced on the present trial does not render such evidence inadmissible. 161Ga332, 131SE80.

759-66½-New. Such is the rule, although the state does not account for their absence. 161Ga332, 131SE80.

759-66¼-New. In such case accused may introduce such objects in evidence. 161Ga332, 131SE80.

759-66½-New. A statute authorizing admission of testimony taken at a former trial where the witness is dead or beyond jurisdiction is not in conflict with a constitutional provision giving accused the right to be confronted with witnesses against him. 68Utah551, 251P362.

759-66¼-New. Admissibility in a subsequent proceeding of stenographic notes of testimony in the former proceeding depends on the oath to be taken in the subsequent proceeding. 34F(2d)741.

759-67 Ill 172NE812; 101TexCr96, 274SW628; 111TexCr476, 14SW(2d)842. [c] **Exculpatory statements not binding on state.**-101TexCr96, 274SW628.

759-71½-New. Where accused does not take the stand, his testimony at a former trial is not admissible. 112TexCr61, 13SW(2d)872.

759-72 21AlaA417, 109S119; 176Ark104, 2SW(2d)55; 77CalA146, 246P157; 253Mass65, 147NE833; SD 229NW398. But see OklCr 287P1091(2dcase). [a] **Witness must be shown to be qualified** to testify. 23AlaA51, 121S698.

759-73 21AlaA528, 109S610; 253Mass65, 147NE833.

759-74 21AlaA528, 109S610.

759-75 33Wyo 360, 239P952.

759-76 5F(2d)133; 78CalA426, 248P1021; 209Ky823, 273SW520 (where accused is permitted to read either stenographic notes or his own affidavit as to substance of certain testimony found, as result of previous appeal, to have been wrongfully excluded, and to elect former method, he cannot complain that transcript contains in addition to questions and answers other matter, such as objections of counsel, rulings of court, avowals of expected answer, etc.); 127Me234, 142A857; 262Mass416, 160NE252; 245Mich229, 222NW149; 93PaSuper508; 104TexCr495, 283SW497.

759-77 21AlaA573, 110S169; 78CalA426, 248P1021; 83CalA190, 256P829; 210Ky385, 275SW819; 245Mich229, 222NW149; 39OklACR231; 110TexCr220,

78W(2d)543; 33Wyo 360, 239P952.

759-79 OklCr 278P393 (proof of predicate held insufficient). [a] In West Virginia.-103WVa631, 138SE323.

759-81 SD 225NW398.

759-82 210Ky217, 275SW689.

759-83 103WVa631, 138SE323; 33Wyo 360, 239P952.

759-84½-New. Testimony of a witness on the examining trial is not admissible in the absence of showing that the document offered as containing such testimony is correct and contains all of such testimony. 105TexCr550, 289SW681.

759-84½-New. The official stenographer may testify after refreshing his memory by reading his notes. 120 Or 652, 253P371.

759-84¼-New. A witness may not be asked if prior testimony was the same, but the attorney should ask the witness to restate testimony. 165Ga326, 140SE 439.

759-84½-New. Testimony of a witness given on a former trial may be proved by the bill of exceptions prepared and presented by defendant on appeal from a conviction had thereon. 22AlaA223, 114S261 (defendant held not entitled to deny correctness of bill presented by him).

759-84½-New. Testimony of the state's assistant solicitor from personal recollection as to the correctness of the report of the testimony as contained in such bill is sufficient to warrant its introduction in evidence. 22AlaA223, 114 S261.

759-84½-New. In some jurisdictions testimony of nonresident witness at preliminary examination in homicide case is inadmissible when not signed by him and certified by magistrate. Mo 248SW (2d)993.

759-85 CalA 290P121; 96Fla553, 119 S145; 219Ky621, 294SW189; 228Ky 551, 158SW(2d)429; 246NY262, 158NE 615; 250NY185, 164NE900; OklCr 290 P352; 50Philippine203. [f] Conviction based solely on book entries as to which proper foundation was not laid cannot be sustained. 221AppDiv79, 222NYS 516. [g] Conviction cannot be based on evidence discovered by unlawful search of automobile. 40F(2d)267. [h] Conviction based solely on evidence obtained by unauthorized search and seizure and admitted over objection will be reversed. OklCr 290P344.

759-86 [b] Testimony is undisputed where reasonable minds could draw but one conclusion from it. 174Ark1035, 298 SW332.

759-87 85CalA269, 259P123; 85CalA 423, 259P491 (statements of prosecutrix not part of res gestæ). See also 199Cal 235, 248P906.

759-87½-New. Evidence as distinguished from proof may be false and of no probative value. 162La719, 111S72.

759-87½-New. Defendant cannot be convicted upon evidence obtained by unlawful search of his person without a warrant for his arrest. OklCr 277P 250(1stcase).

759-88 102CalA787, 283P830 (improbability of some testimony immaterial where evidence supports information); 49Philippine28. [a] 89 IndA229, 166NE 31, 242NY419, 152NE245; 102TexCr 33, 277SW130 (to support verdict); 104 TexCr7, 282SW225; 106TexCr520, 293 SW568; 136Wash674, 241P294. [c] Defendant cannot be acquitted under both of two inconsistent charges, where evidence justifies conviction under either. 73CalA334, 238P770.

759-89 307Mo487, 271SW477; 103Tex Cr474, 281SW555. See also 146Miss753, 112S167. [a] Evidence by defendant supplementing state's evidence must not be contradictory thereto. 308Mo 560, 274SW70.

759-89½-New. Accused's testimony is substantive evidence of his guilt or innocence. 189NC766, 128SE354.

760-90 Mo 296SW433 (all facts and circumstances must be considered); Mo 298W(2d)67.

760-91½-New. Corroborative testimony alone need not establish guilt of accused, testimony of accomplice being of some value. 106TexCr520, 293SW568.

760-91½-New. Suspicion of guilt from evidence cannot sustain conviction. 103 WVa377, 137SE534.

760-91¼-New. Facts cannot be established by merely not believing witnesses who deny them. 104Conn493, 133A671.

760-91½-New. Conviction of possessing intoxicating liquor solely on evidence obtained by unlawful search is based on insufficient evidence and should be reversed. 324 Ill 66, 154NE432; 107 TexCr553, 298SW604.

760-91½-New. Verdict for possession of liquor sustained only by evidence procured by the use of a void search warrant is contrary to law. 198 Ind 496, 154NE278.

760-91⅞-New. The statement of accused to the jury after argument by counsel should not be regarded as evidence since not given under oath and not subject to cross-examination. 255 Mass9, 151NE74, 44ALR579.

760-91⅞-New. The weight of accused's testimony as to his purpose in bringing deceased and the slayer together is for the jury. 104TexCr65, 282SW600.

760-91⅞-New. Where prosecution elects between counts, sufficiency of evidence must be measured by its relevancy to a count submitted. 109TexCr74, 38W(2d) 443.

760-91 1/10-New. To present error on the ground of insufficiency of evidence, complete failure of evidence on a material issue must be shown. Ind 166NE651.

760-91 1/11-New. Slight evidence is sufficient to prove negative averments. CalA 286P448.

760-91 1/12-New. Jury must consider whole evidence. Utah 290P727.

760-92 31F(2d)568; 179Ark3, 13SW (2d)828; 93CalA711, 270P237; 97CalA 253, 275P518; 196 Ind594, 149NE168; 162La719, 111S72; Mass 171NE458; 232Mich443, 205NW154 (testimony in March, 1924, that sale of liquor was made Oct. 17 justifies inference of sale on Oct. 17, 1923); Mont 287P928; 197 NC25, 147SE618; 98Vt466, 129A306. [a] Jury may consider defendant's false testimony as evidence of guilt. Mass 172NE97.

760-93 19F(2d)322; 25F(2d)49; 262 Mass408, 160NE271; 247Mich308, 225 NW552(2dcase).

760-94 23AlaA294, 124S399(1stcase); 230Ky761, 20SW(2d)742; Minn 233NW 309(2dcase); Mo 25SW(2d)79; Mo 32 SW(2d)596; SD 230NW850.

760-95½-New. The jury cannot assume that, because defendant did not testify to the truth, the truth must be contrary to his testimony. 141Wash165, 251P 126.

760-95½-New. Where different inferences may be drawn from a given transaction, accused is entitled to the most favorable inference. 15F(2d)816; 116 Nebr273, 216NW820.

760-95¼-New. Where either a favorable or unfavorable inference may be drawn from a circumstance, the jury may not adopt an inference unfavorable to accused where favorable inference is reasonable under all the evidence in the case. 104WVa586, 140SE532.

760-96 6F(2d)786; 20AlaA565, 104S45 (jury must have no reasonable doubt as to truth); AlaA 129S712; 168Ark1168, 271SW451; 169Ark221, 275SW327; GaA 155SE774(1stcase); 89 IndA152, 166NE20; 208Ky527, 271SW563; 208 Ky531, 271SW584; 160La190, 106S779; 313Mo 88, 280SW1023; 61 OntL497, [1928] 1DomLR619 (accomplice). [d] Fact may be as firmly established by one or two witnesses as by entire community. 20AlaA540, 103S604.

760-97 CalA 260P363; 91Fla370, 107S 922; 32PortoRico 353; NB [1929] 1 DomLR763. But see 39GaA484, 147SE 403(1stcase). [a] Convictions upon testimony of evasive witness, "uncorroborated and bearing upon its face the insignia of its own untrustworthiness," cannot stand. 32PortoRico 353.

760-98½-New. Testimony of defendant. Jury is not bound to accept as true testimony of defendant, as to what took place when he and deceased were alone together, especially when he is contradicted on other points. 210Ky594, 276 SW545.

760-98½-New. A statute providing that a crime punishable by death shall be proved by two witnesses is satisfied by two witnesses testifying to different facts which concur to prove the crime. 106Conn701, 139A91.

760-1 16F(2d)563; 89 IndA283, 166NE 264. See also 32PortoRico 140.

760-2 [a] Law presumes witness is telling truth and not falsehood. OhA 172NE835.

760-4 331 Ill 608, 163NE453; 30 OhA 87, 163NE583.

760-6½-New. The trial judge may consider the interest of defendants in passing upon credibility of their testimony. 162La719, 111S72.

760-6½-New. Witnesses employed by the state need not necessarily be disbelieved. NJSup 139A427.

760-6¼-New. Witnesses employed by the state need not necessarily be corroborated. NJSup 139A427.

760-6⅛-New. The trial court need not accept as true every assertion of a witness merely because not contradicted. 92CalA628, 268P923.

760-6⅛-New. Even though uncontradicted, jury are not required to accept defendant's evidence. Va 153SE821.

760-9 208Ky695, 271SW1044 (facts in evidence admitted or undenied by defendant in his testimony are taken as true).

760-11 21AlaA449, 109S282; 90Fla779, 107S242; 100TexCr114, 272SW149; 100 TexCr368, 272SW781 (reconciliation of conflicts for jury); 108TexCr614, 28W (2d)223. [a] Testimony of accused is presumed true and jury must reconcile other conflicts if possible, with presumption of innocence. 21AlaA449, 109S282.

760-12 21AlaA407, 108S645; Ariz 282 P481 (not bound to believe defendant's exculpatory statement); 176Ark1203, 4 SW(2d)947; 71CalA550, 236P158; 109 Conn124, 145A761; 90Fla779, 107S242; Fla 124S445; 215Ky436, 284SW1114; 228Ky254, 14SW(2d)773; 228Ky307, 14 SW(2d)1065; Mass 169NE790; 313Mo 436, 282SW22; 315Mo 232, 285SW712; 320Mo 319, 6SW(2d)857; Mo 22SW(2d) 797; 100TexCr114, 272SW149; 102Tex Cr501, 278SW441; 105TexCr72, 286SW 1093; 106TexCr593, 294SW573; 145 Wash227, 259P395; Wash 287P57; Wash 290P703. But see 208Ky707, 271 SW1055. [b] Jury may reject testimony of defendant and interested persons where evidence is conflicting. 102Tex Cr501, 278SW441.

761-13 319Mo 46, 4SW(2d)456.

761-14 109Conn124, 145A761; MoA 284SW520 (jury may disregard testimony submitted by defendant); Mont 287P214; 35 OhA324, 172NE434; 92Pa Super381.

761-16½-New. Jurors may not disbelieve a witness through caprice 321 Ill 181, 151NE485.

761-16⅛-New. or for any reason they may deem sufficient 321 Ill 181, 151NE 485.

761-16¼-New. without regard to proper and necessary considerations in making the determination. 321 Ill 181, 151 NE485.

761-17 22AlaA88, 112S542; 39GaA568, 147SE777(1stcase); 39GaA642, 148SE 167(2dcase); 214Ky216, 282SW1089; 232Ky691, 248SW(2d)564; 234Ky302, 28 SW(2d)19; 233Mich284, 206NW538. [b] 208Ky531, 271SW584. [c] Test of legal sufficiency of evidence is whether or not there is evidence of substantial nature tending to establish material issues of case. 168Ark1168, 271SW451. [d] Number of witnesses is unimportant if testimony given is of substantial weight. 168Ark1168, 271SW451.

761-23 34GaA230, 129SE10.

761-25 37GaA126, 138SE913. See also 36GaA88, 135SE512.

762-26 37GaA126, 138SE913.

762-29½-New. Positive statements of witnesses favorable to accused are not binding on the jury, who may consider circumstances which speak more positively than words of witnesses. 229Ky 776, 18SW(2d)290.

762-31 195Cal445, 234P91; 199Cal 235, 248P906; 78CalA380, 248P975; 84 Colo 254, 269P907; 42 Ida210, 245P74,

75 [citCJ]; 205 Iowa1047, 218NW616; 124Kan119, 257P726; 204Ky718, 265 SW285; 208Ky695, 271SW1044; NC 127SE601; 198NC649, 152SE895; 100 TexCr122, 272SW131; 103TexCr242, 280SW819; TexCr 26SW(2d)1064 (encouraging another to commit crime); Utah 279P953 (collateral acts). [a] (1) 203 Iowa90, 212NW312; 314Mo 662, 285 SW62. [b] Where main facts are proved by inference from other facts, case rests wholly on circumstantial evidence. 108 TexCr308, 300SW74.

762-31½-New. If the main fact is proved as a matter of inference from other facts in evidence, the case rests wholly, in a legal sense, upon circumstantial evidence. 100TexCr346, 272SW 797.

762-32 32F(2d)644; 44F(2d)131; 21 AlaA179, 106S391; 22AlaA183, 113S 648; 180Ark408, 21SW(2d)186; 195Cal 445, 234P91; 199CalA235, 248P906; 78 CalA380, 248P975; 90Fla255, 105S829; 90Fla816, 107S245; 35GaA347, 133SE 268; 35GaA401, 133SE314; 42 Ida210, 245P74, 75 [citCJ]; 200 Ind292, 163 NE95; 203 Iowa90, 212NW312; 207 Iowa624, 223NW362; 212Ky212, 278 SW611; 217Ky155, 289SW208; 235Ky 781, 32SW(2d)351; 164La89, 113S777; NJSup 134A294; 196NC542, 146SE409; 51ND445, 200NW20; 51Philippine523.

762-33 42 Ida210, 245P74, 75 [citCJ]; Iowa 233NW110.

762-34 42 Ida210, 245P74, 75 [citCJ]; 46 Ida561, 270P417, 419 [citCJ]; 79 Mont614, 257P1010.

763-35 79Mont614, 257P1010; 108Tex Cr210, 299SW907.

763-36 [a] Where defendant was only eyewitness his uncontradicted statement may be disregarded when other circumstances warrant it. 84CalA168, 257P 903.

763-38 104WVa545, 140SE531.

763-39½-New. Proof of possession of the means of committing and offense is not alone sufficient to show that the offense was committed. 210Ky398, 276 SW125; 215Ky278, 284SW1071.

763-39¾-New. In the case of circumstantial evidence, all available avenues likely to reveal the truth should be explored. 104TexCr65, 282SW600.

763-41 CalA 286P434; 120 Or372, 251 P305. But see MoA 286SW422.

763-42 75CalA565, 243P25; 104WVa 586, 140SE532.

763-44 75CalA565, 243P25.

763-46 75CalA565, 243P25.

763-47 104WVa586, 140SE532.

763-47½-New. Unexplained presence at the scene of the crime may be deemed a circumstance tending to show complicity. 93CalA632, 269P951.

763-48 180Ark408, 21SW(2d)186; 42 Ida219, 245P77 [quotCJ]; 100TexCr 212, 272SW450 (testimony of accused and wife as to purpose in possession of weapon not conclusive on state). [a] Presumption in criminal case cannot be given greater weight than in civil case. 7F(2d)808.

763-49 180Ark408, 21SW(2d)186; 42 Ida219, 245P77 [quotCJ].

763-50 42 Ida219, 245P77 [quotCJ]; 152Va973, 146SE260.

763-51 42 Ida219, 245P77 [quotCJ]; Iowa 233NW110; OklCr 281P166.

763-52 42 Ida219, 245P77 [quotCJ].

763-53 42 Ida219, 245P77 [quotCJ]; 330 Ill 532, 162NE196; 67Utah325, 247 P497; 152Va973, 146SE260.

764-54 7F(2d)28; 8F(2d)6; 15F(2d) 929; 16F(2d)410; 18F(2d)887; 29 F(2d)225; 38F(2d)573; 39F(2d)782; 40F(2d)837; 41F(2d)166; 41F(2d)193; 44F(2d)21; 23Ala91, 121S445; 21AlaA 277, 107S327; 22AlaA243, 114S892; 22 AlaA290, 115S68; 175Ark453, 299SW 739; 179Ark1153, 15SW(2d)976; 199 CalA235, 248P906; 95CalA680, 273P 583; 90Fla719, 107S246; 90Fla816, 107 S245; 91Fla214, 107S360; 97Fla1059, 122S704; 98Fla877, 124S444; Fla 128 S486; 164Ga92, 137SE768; 165Ga55, 139SE877; 34GaA155, 128SE686; 34 GaA198, 128SE920; 35GaA197, 132SE 409; 35GaA401, 133SE314; 35GaA584, 134SE204; 36GaA210, 136SE112; 36 GaA211, 136SE286; 36GaA281, 136 SE323; 36GaA304, 136SE539; 36 GaA600, 137SE574; 36GaA643, 137 SE794; 36GaA638, 137SE840; 37 GaA123, 138SE916; 37GaA159, 139 SE160; 37GaA477, 140SE772; 37GaA 361, 140SE779; 37GaA373, 140SE792; 37GaA482, 141SE87; 37GaA606, 141 SE431; 40GaA524, 150SE452(1stcase); 42 Ida210, 245P74, 75 [citCJ]; 45 Ida73, 260P694; 196 Ind594, 149NE 168; 199 Ind44, 154NE865; Ind 165NE 560; 208Ky695, 271SW1044; 210Ky 336, 275SW807; 212Ky212, 278SW611, 614 [citCJ]; 217Ky155, 289SW208; 217 Ky427, 289SW676; 217Ky705, 290SW 693; 228Ky591, 15SW(2d)429; 230Ky 698, 20SW(2d)722; 151Miss549, 118S 625; 153Miss1, 120S206; 152Miss597, 120S570; 310Mo 500, 276SW625 [quot Cyc]; 311Mo 683, 278SW695; Mo 6SW (2d)912(3dcase); Mo 18SW(2d)6; Mo 22SW(2d)781; Mo 25SW(2d)79; Mo 32SW(2d)596; MoA 286SW135; MoA 13SW(2d)1107; 77Mont382, 251P143; 78Mont35, 252P376; 84Mont255, 274P 1060; 37 OklCr396, 258P812; OklCr 275 P401(2dcase); OklCr 277P605; OklCr 287P1045; OklCr 292P1056; 116 Or615, 241P843; 14PaDist&Co 229; 51Philippine523; 50SD548, 210NW980; 54SD 611, 224NW228; 100TexCr509, 272SW 204; 111TexCr147, 12SW(2d)1217; 111 TexCr546, 15SW(2d)12(2dcase); 113Tex Cr155, 18SW(2d)650; TexCr 20SW(2d) 792; 113TexCr412, 22SW(2d)456(2d case); TexCr 29SW(2d)760; 145Va848, 133SE755; 146Va279, 135SE700; Va 152SE362; 144Wash252, 258P16; 101 WVa242, 132SE490; 101WVa611, 133 SE320; 103WVa377, 137SE534; 104 WVa545, 140SE531; 105WVa124, 141 SE633; 106WVa309, 145SE607; WVa 155SE537; Ont [1930] 1DomLR716. [a] (2) 32F(2d)1002; 90Fla255, 105S 829 (circumstantial evidence entirely consistent with innocence cannot support verdict of guilty); 212Ky212, 278 SW611, 614 [citCJ]; 116 Or451, 241P 846; Or 290P1096; 142Va673, 128SE 444. [c] (1) 74CalA666, 241P598. (2) But to give due weight to presumption of innocence does not require that jurors blind their eyes and shackle their reason in viewing evidence and in judging defendant's intentions. 74CalA366, 241P598.

765-55 42 Ida210, 245P74, 75 [citCJ]; Utah 279P953.

765-56 42 Ida210, 245P74, 75 [citCJ].

765-57 7F(2d)808; 164Ga92, 137SE 768; 43 Ida564, 253P842; 120 Or372, 251P305, 306 [quotCJ].

765-58 42 Ida210, 245P74, 75 [citCJ]; 120 Or372, 251P305, 306 [quotCJ].

765-59 42 Ida210, 245P74, 75 [citCJ]; 120 Or372, 251P305, 306 [quotCJ].

765-60 163Ga43, 135SE407; 164Ga92, 137SE768; 35GaA364, 133SE105; 36 GaA214, 136SE92; 36GaA209, 136SE 96; 36GaA787, 138SE287; 42 Ida210, 245P74, 75 [citCJ]; 46 Ida561, 270P 417, 419 [citCJ]; 79Mont614, 257P1010; Nev 285P503; OklCr 275P405; OklCr 287P1095; 120 Or372, 251P305, 306 [quotCJ]; 100TexCr657, 274SW574; 67 Utah325, 247P497.

765-61 46Philippine395; 101WVa611, 133SE320; Wyo 283P406 (opportunity not circumstance).

765-62 [a] (2) Evidence held insufficient to show flight. 40Wyo 128, 274P 1074(2dcase).

765-64 203 Iowa929, 210NW465, 472 [citCJ] (dictum); Mo 25SW(2d)79 (offer to pay for stolen cattle held not to supply missing link).

765-65 21AlaA231, 106S889; 203 Iowa 929, 210NW465, 472 [citCJ] (dictum). See also 90Fla255, 105S829.

766-67 34Wyo 247, 242P812, 818 [cit CJ].

766-68 203 Iowa929, 210NW465, 475 [citCJ].

766-69 203 Iowa929, 210NW465, 475 [citCJ].

766-70½-New. Inferences drawn need not be only necessary inferences, but only need be reasonable and possible. 255Mass510, 152NE377.

766-71½-New. But bloodhound evidence must be corroborated. 153Tenn 189, 281SW460.

766-73 22AlaA112, 113S86; 90Fla719, 107S246; 41GaA333, 153SE679(2dcase); 48 Ida439, 282P489; Mo 289SW558; 78 Mont35, 252P376; 46Philippine395; 101WVa611, 133SE320.

766-74 16F(2d)410; 96Fla59, 117S 699; 97Fla648, 122S2(1stcase); 196 Ind594, 149NE168.

766-75 90Fla816, 107S245; 96Fla59, 117S699; 47 Ida1, 272P495.

766-76 15F(2d)929; 16F(2d)410; 21 F(2d)939; 33F(2d)107 (should exclude any reasonable hypothesis of innocence); 42F(2d)205; Ark 298SW20, 22 [quotCJ]; 94CalA628, 271P765; 90Fla 75, 105S140; 90Fla255, 105S829 (such proof is all law requires); 90Fla816, 107S245; 91Fla214, 107S360; 96Fla59, 117S699; 97Fla1059, 122S704; 34GaA 238, 129SE5; 34GaA238, 129SE111 (must exclude every reasonable hypothesis save guilt to sustain conviction); 41GaA322, 152SE920(2dcase); 261Mass 255, 158NE834; 78Mont35, 252P376; 116Nebr141, 216NW173; 198NC649, 152 SE895; 104TexCr244, 283SW846; 108 TexCr511, 18SW(2d)888; 110TexCr279, 8SW(2d)173; 113TexCr212, 18SW(2d) 1068; 144Va669, 131SE227; 153Wash 323, 279P578; 108WVa453, 151SE432.

766-77 16F(2d)410; 90Fla75, 105S140; 90Fla719, 107S246; 90Fla816, 107S245; 91Fla214, 107S360; 316Mo 204, 289SW 554; 78Mont35, 252P376; 110TexCr279, 8SW(2d)173; 40Wyo 128, 274P1074(2d case).

766-78 15F(2d)929; 22AlaA89, 112S 540; 178Ark1200, 10SW(2d)853; 181 Ark336, 25SW(2d)752; 35GaA584, 134 SE204; 37GaA482, 141SE87; 47 Ida1, 272P495; 196 Ind594, 149NE168; 208 Ky707, 271SW1055; 210Ky494, 276SW 158; 220Ky836, 295SW1029; 227Ky 205, 12SW(2d)288; 229Ky765, 17SW (2d)1021; 235Ky751, 32SW(2d)331; 235Ky781, 32SW(2d)351; 148Miss227, 114S347; 311Mo 683, 278SW695; 314 Mo 662, 285SW62; 316Mo 204, 289SW 554; Mo 289SW558; Mo 6SW(2d)912 (3dcase); 321Mo 548, 11SW(2d)1033; MoA 278SW825; 78Mont35, 252P376; 83Mont177, 271P449; Nev 290P732; 51 Philippine523; 51Philippine842; 105 TexCr246, 287SW1095; 110TexCr279, 8SW(2d)173; 142Va673, 128SE444; 144 Va630, 131SE204; 144Va669, 131SE227; 145Va848, 133SE755; 101WVa611, 133 SE320; 104WVa545, 140SE531; 104 WVa586, 140SE532; 108WVa208, 150 SE602; 40Wyo 128, 274P1074(2dcase); Sask [1927] 3DomLR679.

766-79 90Fla816, 107S245; OklCr 287 P1045. But see 121Kan587, 249P597, 599 [citCJ].

767-80 121Kan587, 249P597, 599 [quot CJ]; 137SC145, 134SE885. See also 199 Ind44, 154NE865.

767-87 13F(2d)369; 15F(2d)740; 22 AlaA223, 114S361; 21AlaA361, 108S 398; 22AlaA316, 115S291; 23AlaA446, 126S611; 78Colo 3, 237P1114 (showing town as place of offense sufficient); 34 GaA148, 128SE784 (where there was evidence that crime was committed in county of trial); 41GaA836, 155SE100; 316Mo 213, 292SW721; 113Nebr517, 206 NW153. [a] 154Miss862, 123S892. [e] (5) Evidence based on survey is not overcome by general reputation of location of county line. 22AlaA316, 115S 291. (6) Other instances. TexCr 31 SW(2d)633. [i] 22F(2d)804; 25F(2d) 242; 26F(2d)168; 43F(2d)273; 20AlaA 457, 103S902; 21AlaA266, 107S328; 23 AlaA1, 121S9(2dcase); 23AlaA260, 123 S283(2dcase); 168Ark167, 269SW355; 168Ark1082, 272SW833; 169Ark353, 275SW662; 176Ark1203, 48SW(2d)952; 177Ark1076, 9SW(2d)320; 180Ark656, 22SW(2d)172; Ark 30SW(2d)819; 68 CalA575, 229P990; 84CalA6, 257P549; 84CalA707, 258P660; 86CalA95, 260P 394; 88CalA495, 263P560; 94CalA164, 270P747; 170Ga895, 154SE368; Ga 154 SE332; Ga 155SE670; 44 Ida739, 260P 164; 321 Ill 80, 151NE529; 333 Ill 554, 165NE196; 335 Ill 596, 167NE786; 337 Ill 161, 169NE9; 203 Iowa536, 211NW 213; 208 Iowa122, 222NW6; 121Kan 866, 250P281; 129Kan155, 281P886; 130Kan668, 288P551; 210Ky71, 275SW 22; 210Ky421, 276SW119; 210Ky456, 276SW141; 215Ky613, 286SW696; 228 Ky526, 15SW(2d)426; 232Ky568, 24SW (2d)276; 236Ky68, 32SW(2d)550; 170 La954, 129S541; 153Miss710, 121S147; 154Miss640, 122S760; 156Miss316, 126

S12; 307Mo411, 270SW282; 312Mo490, 279SW405; 316Mo213, 292SW721; Mo 23SW(2d)11; Mo 25SW(2d)113; 217MoA26, 273SW139; 82Mont110, 265P5; 113Nebr856, 205NW569; 58ND327, 226NW505; 26OhA335, 159NE481; OklCr 287P759; OklCr 292P1058; 117Or466, 242P440; Or 289P1063; 298Pa10, 147A834(2dcase); 49SD429, 207NW454; 105TexCr147, 237SW269; 112TexCr115, 14SW(2d)271; TexCr 26SW(2d)251(2dcase); 153Wash60, 279P123; 103WVa144, 136SE835; Wis 231NW162; 34Wyo218, 242P802. [j] 150Miss302, 116S432; 110TexCr258, 8SW(2d)133. [n] **Evidence held insufficient as to venue.**–41GaA320, 152SE854(1stcase); 325Ill334, 156NE342. [o] **Crime committed on insular highway constituting dividing line between judicial districts in Porto Rico.**–34PortoRico378 (evidence insufficient to establish place of commission of crime).

768–88½–New. On the issue of venue, the jury may consider evidence adduced after overruling of a motion for peremptory instruction by the court. 220Ky209, 294SW1046.

768–89 79CalA523, 250P204; OklCr 283P1026.

768–90 22AlaA223, 114S361.

769–91 32F(2d)130; Ala 114S361; 21AlaA419, 109S114; 23AlaA400, 126S181; Ark 30SW(2d)819; 78CalA151, 248P542; 79CalA523, 250P204; 324Ill96, 154NE705; 333Ill554, 165NE196; 203Iowa333, 210NW934, 212NW550; 210Ky71, 275SW22; 232Ky568, 24SW(2d)276; 141Miss600, 106S827; 143Miss365, 108S809; 154Miss704, 123S854(1stcase); 221MoA114, 294SW117; 29OhA268, 163NE39; OklCr 283P1026; OklCr 292P571; Or 289P1063; 105TexCr147, 287SW269; 153Wash60, 279P123; Wis 231NW162.

769–93 93Fla1110, 113S561; Wis 231NW162.

769–94 79CalA523, 250P204.

769–95½–New. The circumstances must be absolutely inconsistent with any other reasonable hypothesis. 141Miss600, 106S827.

769–95½–New. Circumstantial evidence to prove venue must be consistent with the theory sought to be proved and inconsistent with any other reasonable theory. 154Miss704, 123S854(1stcase).

769–95¼–New. Where state omits to prove venue specifically, jury may infer it from evidence on both sides. Or 289P1063.

769–96 21AlaA266, 107S328; 21AlaA497, 109S530; 22AlaA316, 115S291; 93Fla1110, 113S561; 333Ill554, 165NE196; 203Iowa333, 210NW934, 212NW550; 220Ky771, 295SW1047; OklCr 292P571; OklCr 292P1058; 103WVa144, 136SE835. [c] **Quantum of proof required to sustain venue is not extensive.** 215Ky613, 286SW696.

770–97 22AlaA223, 114S361; 325Ill334, 156NE342; 117Or466, 242P440; Or 289P1063.

770–98 324Ill96, 154NE705; Ind 166NE439; Mo 300SW710; 58ND792, 228NW199; 148Wash664, 269P1046; 38Wyo135, 264P1033. [b] 154Miss704, 123S854(1stcase).

770–99 80CalA647, 252P730.

770–1 23AlaA400, 126S181; 97Fla23, 119S393; OklCr 283P1026.

770–2 39GaA686, 148SE304(2dcase).

770–3 87CalA601, 262P369; 210Ky71, 275SW22. See also Ga 154SE799.

770–3½–New. Testimony that crime was committed on certain farm at certain distance from certain city in county proves venue. 200Iowa1397, 206NW280.

770–4 220Ky209, 294SW1046. [a] **Where constable of county of trial testified that he arrested defendant at place of homicide,** which had not been proved to be in that county, held sufficient to justify finding that offense was committed in that county. 220Ky209, 294SW1046.

770–9 169Ark589, 276SW577 (sufficient); 221Ky257, 298SW688. [b] **Evidence held sufficient.**–TexCr 27SW(2d)200.

771–11 23AlaA578, 129S480(2dcase). [b] 215Ala318, 111S204; 21AlaA479, 109S887; 169Ark589, 276SW577; 40GaA651, 151SE52 (year not stated); 34NM465, 284P113 (nonresidence tolling statute). [c] **Evidence held insufficient.**–3F(2d)382 (to show defendant's participation in conspiracy to defraud by use of mails within three-year period of limitations for prosecution of such offenses).

771–11¼–New. Evidence that the witness had not seen accused within the jurisdiction is not proof that he was not a resident within the state within the limitation period. 325Ill417, 156NE303.

771–16 242IllA221.

771–20 22AlaA84, 112S461; 214Ky760, 285SW237, 238 [quotCJ].

771–21 214Ky760, 285SW237, 238 [quotCJ]; OklCr 287P764.

771–23 77CalA738, 247P532; 81CalA484, 254P292. See also 82CalA465, 255P777.

771–24 77CalA738, 247P532; 84CalA99, 257P583; 96CalA632, 274P601.

771–25 Mo 6SW(2d)881 (not an element).

771–26 22AlaA84, 112S461; 23AlaA484, 127S262; 81CalA484, 254P292 (sufficient); CalA 256P132; 35GaA393, 133SE274; 41GaA501, 153SE377; 28Hawaii350; 327Ill312, 158NE732; 204Iowa1160, 216NW616; 235Ky462, 31SW(2d)712; Mo 300SW698 (may be sufficiently proved by testimony of accomplice); 103WVa377, 137SE534. [a] **Evidence held sufficient.**–96CalA664, 274P621; 318Mo633, 1SW(2d)109.

772–27 21AlaA299, 107S730; 196Cal404, 238P363; 70CalA362, 233P359; 70CalA519, 234P110; 71CalA138, 234P917; 73CalA214, 238P814; 74CalA341, 240P291; 74CalA636, 241P406; 78CalA151, 248P542; CalA 256P132; 90Fla25, 105S130 (must be established prima facie by proof aliunde any confession); 35GaA393, 133SE274; 204Iowa1160, 216NW616; 150Md278, 132A624; 231Mich607, 204NW742; 153Miss622, 121S279; 316Mo256, 292SW42; 80Mont181, 260P138, 142 [citCJ]; 109TexCr136, 3SW(2d)445. See also 28Hawaii350, 366 [quotCJ]. [b] (3) Evidence aside from admissions held sufficient. 203Iowa536, 211NW213.

772–27½–New. which must be established by independent evidence before such extrajudicial statements are admissible, 196Cal404, 238P363.

772–28 86CalA8, 260P558; 28Hawaii350, 366 [quotCJ]; Ill 172NE812; 121Kan866, 250P281; 234Mich590, 208NW675; 316Mo55, 289SW890; 320Mo248, 6SW(2d)839; 80Mont181, 260P138; 109TexCr136, 3SW(2d)445; 155Wash212, 283P687. But see 80CalA783, 252P1061. [a] **Evidence held sufficient to corroborate admission.**–12F(2d)631.

772–29 70CalA362, 233P359; 78CalA151, 248P542; 28Hawaii350, 366 [quotCJ]. [a] **Corroboration of defendant's testimony** is not necessary. TexCr 24SW(2d)420.

772–30 21AlaA299, 107S730; 78CalA151, 248P542.

772–30½–New. Corpus delicti may be proved by testimony of defendant voluntarily becoming a witness and testifying to facts which tend to prove it. 70CalA519, 234P110.

772–30½–New. Proof of locus of crime is not necessary to establish corpus delicti. 287Pa512, 135A301.

772–30¼–New. The corpus delicti may be sufficiently proved by testimony of accomplices to warrant the introduction of admissions and confessions of defendant. 80CalA464, 252P633.

772–30½–New. Testimony of accomplices, sufficiently corroborated, may be sufficient to prove the corpus delicti. 80CalA464, 252P633.

772–30¼–New. In some jurisdictions, except in homicide cases, the corpus delicti need not be proved beyond a reasonable doubt by evidence independent of confession. 80Mont181, 260P138.

772–31 8F(2d)581; 21AlaA299, 107S730; 23AlaA256, 123S279; 78CalA151, 248P542; 80CalA783, 252P1061; 81CalA484, 254P292; 87Colo84, 285P766; 90Fla659, 106S479; 96Fla59, 117S699; 28Hawaii350; 324Ill101, 154NE463; 331Ill268, 162NE839; 334Ill218, 165NE619; 146Miss718, 111S834; 313Mo98, 281SW720; 316Mo55, 289SW890; 318Mo633, 1SW(2d)109; MoA 279SW749; 80Mont181, 260P138; 132Or693, 288P215; 109TexCr136, 3SW(2d)445; 108WVa330, 150SE754. [b] **Death may be proved by direct or circumstantial, but not by mere hearsay, evidence.**–23AlaA484, 127S262.

772–32 71CalA138, 234P917 (carnal abuse of child).

773–34 37GaA518, 140SE777; 109TexCr136, 3SW(2d)445; 103WVa377, 137SE534. [c] 234Mich203, 208NW45.

773–35 AlaA 129S785(2dcase); 71CalA138, 234P917; 28Hawaii350, 366 [quotCJ]; 327Ill312, 158NE732; 332Ill436, 163NE804; 191NC698, 132SE785; 132Or693, 288P215. [a] **State must establish guilt by evidence of substantive character,** matters of conjecture merely being insufficient. 170Ark1143, 282SW984.

773–36 28Hawaii350, 366 [quotCJ]; 324Ill101, 154NE463; 337Ill643, 169NE772.

773–37 29F(2d)225; 21AlaA285, 107S724; 96Fla356, 118S204; 327Ill312, 158NE732; 339Ill415, 171NE554 (need not prove motive); 198Ind502, 154NE273; 142SC24, 140SE258; 102TexCr402, 278SW213; Utah 289P100; Wyo 283P406.

773–37½–New. Submission of sufficient evidence to show all the elements of the crime charged makes a prima facie case against accused. 297Pa160, 146A553.

773–41 21AlaA285, 107S724; 21AlaA289, 107S791; 23AlaA559, 129S323(2dcase) (guilty scienter); 81CalA484, 254P292; 327Ill312, 158NE732; 334Ill549, 166NE35; 189NC545, 127SE579; 191NC698, 132SE785; 126Or238, 269P225; 145Va848, 133SE755.

773–42 22AlaA107, 114S71; 162La719, 111S72; 118Nebr828, 226NW449. [c] **That defendant was not incapacitated to form felonious intent** by reason of intoxication held not shown. 200Ind366, 163NE593(2dcase).

773–43 13F(2d)327. [a] 8F(2d)561.

773–44 333Ill469, 165NE235; 339Ill263, 171NE143; Ill 173NE357; 162La357, 110S557; 295Pa190, 145A85.

774–48 13F(2d)327; 21AlaA306, 107S725; Ind 173NE229; 79Mont385, 256P1071.

774–49 21AlaA373, 108S631; 327Ill312, 158NE732; 330Ill565, 162NE148; 198Ind175, 152NE817; Mo 295SW575; 77Mont326, 250P613; OklCr 276P240(2dcase). [a] 134SC386, 132SE838, 839 [citCJ]. [c] 22AlaA126, 114S130; 169Ark359, 275SW701; 76CalA688, 245P781; 78CalA598, 248P969; 218AppDiv635, 219NYS1; 221AppDiv245, 222NYS607; 45Philippine137; 49SD434, 207NW224.

774–51 76CalA688, 245P781; 221Ky253, 298SW683; 221Ky599, 299SW203, 204 [quotCJ]. See also 143Wash288, 255P141.

774–52 205Iowa1047, 218NW616.

774–55 OklCr 292P885(2dcase).

774–59 [a] 100TexCr43, 271SW913. [c] (3) Evidence held sufficient to establish foundation for bloodhound evidence. Mo 289SW562.

774–60 202Iowa1195, 211NW702.

775–61 22AlaA89, 112S540; 92Fla477, 110S250; 327Ill312, 158NE732; 332Ill436, 163NE804; 134SC386, 132SE838, 839 [citCJ]; 103TexCr441, 281SW555. [c] **Name of defendant** must be proved beyond reasonable doubt. 327Ill312, 158NE732. [d] **Identification need not be made positively** by any number of witnesses. 93CalA711, 270P237. [e] **Evidence insufficient** to show that defendant's name was other than as stated in indictment. 23AlaA397, 126S180.

775–62 See also 77CalA477, 246P1083. [a] 49SD414, 207NW216. [b] **Evidence held not to establish defense.**–CalA 284P224(1stcase). [c] **Evidence held not to show entrapment.**–Wis 231NW162.

775–63 199Ind280, 157NE98. [a] **Evidence held insufficient** to show entrapment. 39F(2d)390.

775–64 276US413, 48SCt373, 72Led632 (evidence held not to show entrapment

to purchase morphine); 200 Iowa341, 204NW215 (intoxication); 222Ky248, 300SW625. [a] **Evidence held not to show** that accused was so drunk as to be incapable of forming criminal intent at time of alleged attempt to break and enter bank. 320 Ill 111, 150 NE647. [b] **Evidence held insufficient to show entrapment.**–35F(2d)344; 95 CalA140, 272P608.

775–65 Miss 102S771. [a] **Evidence held to show** defendant's mistake of fact arose from his lack of proper care. Tex Cr 29SW(2d)777.

775–66 [a] Contra **Miss** 102S771.

775–68 [a] 33F(2d)443; 197Cal 306, 240P1000; **CalA** 290P69; **Mont** 292P 1109; **Nebr** 228NW253(2dcase) (embezzlement); 49ND348, 191NW628. [b] 228Ky664, 15SW(2d)441. [c] **Certificate of state hospital** reciting that defendant was discharged as recovered was merely prima facie evidence of defendant's mental condition at time of trial. 97CalA321, 275P815. [d] **Finding that insanity continued, and commitment to hospital for insane** of defendant found not guilty by reason of insanity, has been held not to preclude state from inquiring into his sanity on trial of another charge of crime. 22 AlaA644, 119S248.

775–72½–New. Defendant previously declared insane by prior physician in accordance with standards and tests of experts is not exempt from responsibility for subsequent criminal acts. 191 NC753, 133SE81.

775–72¾–New. Such declaration is no more conclusive than that of an expert witness at the trial. 191NC753, 133SE 81.

775–73 197Cal 306, 240P1000; 68CalA 674, 230P178 (only circumstance to be considered by jury); 80CalA789, 252P 1068; **OklCr** 292P385. [a] 80CalA789, 252P1068 (medical evidence admissible).

775–74½–New. Refusal to instruct that accused was insane is not error where failure to procure formal adjudication of sanity on discharge from a hospital resulted from oversight. 33F(2d) 443.

775–76 197Cal 306, 240P1000; 68CalA 545, 229P987; 68CalA674, 230P178; 88 CalA222, 263P306; **Mont** 292P1109; **NJ** 147A453; 103WVa653, 138SE318.

776–77 21AlaA289, 107S791; 23AlaA 232, 123S288; 23AlaA223, 124S117(2d case); 193NC489, 137SE429; 197NC547, 149SE845; **TexCr** 28SW(2d)133.

776–78 92Fla589, 109S599; 92Fla878, 110S547; 336 Ill 251, 168NE292; 126 Or560, 270P404.

776–79 21AlaA289, 107S791.

776–80 109TexCr251, 4SW(2d)74.

777–83 Mo 300SW501; **Mo** 11SW(2d) 1020; 131Misc941, 229NYS261; **TexCr** 300SW944; 108TexCr440, 1SW(2d)633 (alibi not proved). [a] (1) 324 Ill 322, 155NE310; 212Ky791, 280SW111; 106 TexCr593, 294SW573. [c] 41GaA577, 153SE622; 323 Ill 129, 153NE596; 324 Ill 322, 155NE310; 326 Ill 263, 157NE 210; 221AppDiv245, 222NYS607; 111 TexCr21, 10SW(2d)991; **TexCr** 24SW (2d)407; **TexCr** 28SW(2d)138.

777–84 321 Ill 526, 152NE569; 167La 1113, 120S875.

777–86 203Cal 153, 263P524; 205 Iowa 25, 215NW721; 207 Iowa224, 222NW 407, 61ALR882; 208 Iowa831, 224NW 557; 49Nev194, 242P582; 94PaSuper 535. [a] 234Mich85, 207NW805; 237 Mich654, 212NW958; 49SD434, 207NW 224. [b] **If, allowing for slight inaccuracy,** evidence of alibi could be true without preventing defendant's presence at crime, a conviction is justified. Mo 30SW(2d)763.

777–87½–New. Although frequently characterized as a defense, an alibi is not such in the strict meaning of the word. 236Mich595, 211NW23.

777–87¾–New. Accused is not required fully to establish an alibi to have at least the benefit thereof so far as it goes in rebuttal of proofs of prosecution. 236 Mich595, 211NW23.

777–87¼–New. The jury, in considering the defense of an alibi, is not limited to the alibi defense alone but must consider such question in connection with all of the evidence in the case. 198 Cal 112, 243P667.

777–87½–New. Where the state is required to show that defendant was present at the time and place of the commission of the crime, defendant may meet such evidence by merely controverting it, or may go farther and attempt to prove affirmatively that it was impossible that he could have been present. 207 Iowa 224, 222NW407, 61ALR882.

777–88 76Mont384, 247P158; 13PaDist &Co 228; 137SC145, 134SE885.

777–89 175Ark64, 297SW828 (evidence held insufficient); 199Cal 471, 250P168 (evidence held insufficient to raise reasonable doubt); 41GaA378, 153SE76 (2dcase); **Mo** 296SW391 (jury have right to disbelieve evidence).

777–90 174Ark871, 298SW7; 78CalA 781, 248P1029; **Fla** 128S485; 37GaA 350, 140SE428; **Ill** 172NE819; 199 Ind 280, 157NE98; **Ind** 168NE456; 207 Iowa212, 220NW110; 207 Iowa224, 222 NW407, 61ALR882; **Mo** 281SW940; **Mo** 289SW590; 76Mont384, 247P158; 254 NY170, 172NE458; 131Misc256, 226NYS 741; 18 OhA471; 297Pa160, 146A553; 300Pa16, 150A94; 137SC145, 134SE885; 108TexCr329, 300SW61. But see 133SC 67, 130SE337. [a] 18 OhA471. [b] **Evidence held insufficient.**–Ill 173NE474.

777–91 172Ark1177, 289SW478; 256 Ill A493; 205 Iowa25, 215NW721; 236Mich 595, 211NW23.

778–92 205 Iowa25, 215NW721; 207 Iowa212, 220NW110; 136SC305, 132SE 824. See also 86PaSuper488; 48Philippine718; 49Philippine94.

778–92½–New. The defense of an alibi is strong in proportion to the number of witnesses. 106TexCr380, 292SW884.

778–93 179Ark1066, 20SW(2d)189; 214 Ky88, 282SW781; 108TexCr367, 300SW 938. See also 316Mo 115, 289SW862.

778–93½–New. Acquittal on a charge in an indictment does not furnish a basis for conviction of a lesser degree of crime which evidence does not show defendant committed. 246NY262, 158NE 615.

778–96 14F(2d)426; 37F(2d)248; 39 F(2d)782; 42F(2d)937; 215Ala229, 110 S21; 216Ala218, 113S22; 23AlaA235, 123S287; 21AlaA239, 107S34; 21AlaA 277, 107S327; 21AlaA306, 107S725; 21 AlaA351, 108S271; 23AlaA266, 123S283 (1stcase); 23AlaA369, 125S787; 23AlaA 372, 125S790(2dcase); 23AlaA501, 127 S910; 23AlaA511, 128S120; 169Ark342, 275SW665; 68CalA457, 229P974; 80Cal A675, 252P758; 81CalA484, 254P292; 98CalA423, 276P1030; 104Conn493, 133 A671; 3Del 227, 134A172; 92Fla775, 109 S809; 94Fla252, 114S236; 97Fla330, 120 S846(2dcase); 41GaA378, 153SE76(2d case); 326 Ill 216, 157NE211; 327 Ill 312, 158NE732; 332 Ill 436, 163NE804; 334 Ill 549, 166NE35; 335 Ill 570, 167 NE852; Ill 172NE740; 200 Ind440, 164 NE267; Ind 166NE661; Ind 168NE456; Iowa 229NW143; 123Kan62, 254P317; 217Ky513, 289SW1087; 144Miss410, 110 S208; 148Miss53, 113S445; 78Mont35, 252P376; 79Mont385, 256P1071; 79 Mont417, 256P1082; 84Mont255, 274P 1060; Mont 287P942; Nebr 230NW504 (felonious intent in larceny case); NC 127SE601; 193NC489, 137SE429; NC 155SE451; 51ND445, 200NW20; 21 OhA459, 153NE215; 29 OhA419, 163 NE634; Or 285P1105; 292Pa579, 141A624; 5PaDist&Co 287; 44Philippine192; 51Philippine842; 32Porto Rico 820 (Code Cr. Proc. § 236); 134SC 435, 132SE828; 136SC305, 132SE824; 137SC145, 134SE885; TexCr 29SW(2d) 760; 144Va630, 131SE204 (presumed innocent until guilt proved beyond reasonable doubt); 152Va1036, 148SE783; 153Va857, 149SE471; 101WVa611, 133 SE320.

778–96 [o] 204 Iowa417, 215NW256. [u] 146Va279, 135SE700. [v] **Presumption of innocence.**–21AlaA360, 108S266. [w] **Conviction based upon mere conjecture or suspicion** cannot be sustained. 211Ky771, 278SW104. [x] **Doubt must not be capricious.**–215Ala148, 109S849. [y] **Reasonable doubt exists** where juror hesitates between two conclusions and then is mentally reluctant to conclude as to which conclusion is correct after considering evidence from all angles. 292Pa579, 141A624. [z] **Evidence as consistent with innocence as with guilt** will not sustain conviction. 36F(2d)16.

779–97 [a] **Conjecture or suspicion of guilt.**–5F(2d)971; TexCr 29SW(2d)365.

779–98 7F(2d)357; 21AlaA79, 105S425 (jury need not be convinced beyond all doubt); 21AlaA562, 110S563; 104Conn 493, 133A671; 109Conn124, 145A761; 321 Ill 361, 152NE147; 321 Ill 590, 152 NE564; 327 Ill 312, 158NE732; 332 Ill 436, 163NE804; 335 Ill 263, 167NE43; 335 Ill 379, 167NE96(2dcase); 208Ky 707, 271SW1055; 251Mich243, 231NW 564; 78Mont35, 252P376; 198NC655, 153SE255; 69Utah444, 256P109; 153Va 984, 151SE132. [a] 15F(2d)929; 29F (2d)225; 23AlaA135, 122S186; 23AlaA 235, 123S287; 23AlaA537, 128S587; 23 AlaA571, 129S311(1stcase); CalA 292P 675; 96Fla660, 118S919; 39GaA557, 147 SE922(1stcase); 204 Iowa1360, 217NW 236; 217Ky278, 289SW285; 227Ky100, 12SW(2d)329(2dcase); 314Mo 662, 285 SW62; 317Mo 299, 296SW121; Mo 22 SW(2d)647; MoA 294SW452; MoA 2 SW(2d)145; MoA 2SW(2d)146 (no matter how strong); MoA 8SW(2d)1084; 78 Mont35, 252P376; 80Mont141, 259P826; 84Mont255, 274P1060; 190NC684, 130 SE854; 198NC649, 152SE895; OklCr 279P362; OklCr 282P372; 100TexCr 509, 272SW204; 112TexCr270, 16SW (2d)239; 152Va1036, 148SE783; 141 Wash165, 251P126; 153Wash323, 279P 578; 104WVa586, 140SE532; 40Wyo 95, 275P112. [b] (1) 80CalA675, 252P758; 76Mont278, 246P257 (synonymous with "reasonable doubt"); Ont [1926] 4Dom LR609. [d] MoA 294SW452; 78Mont35, 252P376; 80Mont141, 259P826; OklCr 278P359; OklCr 282P372; 100TexCr 509, 272SW204. [h] 202 Iowa352, 209 NW514. [k] 109Conn124, 145A761. [s] **There must be substantial evidence** to sustain verdict or judgment in criminal case. 19F(2d)7. [t] **Where evidence would have justified either verdict of guilty or not guilty,** it is not against weight of evidence. 251Mich243, 231NW 564. [u] **If from lack of evidence** jury entertain reasonable doubt of guilt, defendant must be acquitted. Iowa 230NW 522.

780–99½–New. If the evidence produced is compatible with either guilt or innocence, the jury must acquit. 5F(2d)45.

780–99¾–New. The quantum of proof of what is evidence of the ultimate fact does not change in moving from civil to criminal side of the court. 13F(2d)327.

780–3 215Ala453, 111S34.

780–4 21AlaA156, 106S685; 21AlaA366, 108S268.

780–6 220Ala461, 125S802; 20AlaA606, 104S551; 68CalA457, 229P974; 121Kan 587, 249P597, 599 [quotCJ]; Mo 11SW (2d)1037; NH 135A532. [a] 47 Ida750, 278P776. [d] (2) Other acts of embezzlement than one relied on for conviction need not be proved beyond reasonable doubt. 306Mo 675, 268SW71.

781–7 112TexCr61, 13SW(2d)872.

781–8 13F(2d)596; CalA 285P386; 113 TexCr591, 23SW(2d)731(2dcase).

781–9 Mo 22SW(2d)802.

781–10 99TexCr580, 272SW173; 107 TexCr585, 298SW587; 113TexCr404, 22 SW(2d)454(1stcase); TexCr 29SW(2d) 371. [b] **Other portions of confession may be used to disprove truth** of exculpatory statements. TexCr 26SW(2d) 231.

781–11 92PaSuper381; 107TexCr376, 296SW537.

781–12 80Mont130, 259P507.

781–12½–New. Where the prosecution introduces an affidavit of a state's witness, made before trial, it is evidence for all purposes the same as if defendant had introduced it to impeach a state's witness by showing statements in conflict with his oral testimony. 80Mont 130, 259P507.

781–12¾–New. That pass book was offered in evidence by district attorney does not preclude his showing that entry therein was false. 169La377, 125S277.

782–16½–New. Docketing the offense by abbreviation is not invalid. 22AlaA 60, 112S96.

782–19 [a] **In Montana.**–84Mont364, 275P750.

782 31 165La705, 1138565

782 32½-New. Unnecessary rearraignment and service of amended indictment does not automatically set aside the trial date. 165La721, 1138565.

782 33 [illegible]Ga663, 1138533; 101TexCr 1, 274SW506.

782 35½ New. Where conviction on one of two indictments for rape was reversed on appeal, was remanded, and remained docketed during the trial of the other indictment, but was not referred to in the presence of the jury, defendant was not prejudiced by allowing it to remain on the docket. 101TexCr1, 274SW506.

782 35½-New. The court before which information is brought is not chargeable with notice that a grand jury had found an indictment. 91Fla1026, 1076804.

782 34 [illegible]CalA506, 251P630.

782 35 [illegible] 12 F(2d)737; 16F(2d)923; 60CalA257, 231 P[illegible]; 251Mass[illegible]; 150NE321; 116 Nebr604, [illegible]NW414; 35Pa[illegible]; 94Pa[illegible]; 94Pa[illegible]; 97Pa[illegible]; 13PaDistCo537, 146Wash 626, 264P15. See also 167La967, 1208 614. [c] Defendant was not entitled to severance or have other defendant tried first where they were indicted separately for offense growing out of same transaction, when district attorney announced intention to try one for sale of intoxicating liquor and other for possession. 113 TexCr210, 188SW(2d)648.

782 36 [a] 16F(2d)921; 80CalA275, [illegible]; [illegible]CalA104, 255P134 (proceedings under indictment to which demurrer was sustained and under indictment returned on same facts held properly consolidated).

782 37 6F(2d)56; 13F(2d)727, 19F (2d)193; 38F(2d)237; 100CalA509, 280 P379(2dcase); ND 165NE257; Oh 172 NE146. [d] Consolidation of two offenses held not to prevent conviction and punishment for both. 19F(2d)193. [e] Statute allowing more than one punishment held not unconstitutional. 19F (2d)193.

782 38 13PaDistCo517.

782 39 16La[illegible], 1[illegible]64; 254Mass 512, 150NE321; NJSup 147A486; Ala [illegible]; [illegible]

782 41 Cal 289P634; 254Mass512, 150 NE321.

782 41½-New. Whether public prejudice against defendant would be intensified by joinder of indictments was a matter in which the court was entitled to exercise its own judgment. 69CalA[illegible], [illegible].

782 43½ New. Defendants who are separately indicted cannot be tried jointly in absence of consent or waiver. [illegible]LA161 [illegible](dcase).

782 44½-New. 18 300(a) 1½. Indictment Charging Distinct Offenses in Successive Counts. Where offenses of the same general nature are committed against different persons, defendant may be put to trial on all counts at the same time. [illegible]Cal 1[illegible] 263P[illegible].

782 44½ New. [8 300(b)] 4½. Separate Trials upon Different Counts. Ordering separate trials upon different counts is matter of discretion with court after demurrer to information is waived or overruled. Wash [illegible].

782 50 [illegible] 298SW[illegible]; 108 TexCr[illegible] 298SW[illegible]. [c] Relief of defendant's attorneys that codefendant would be convicted capitally does not show abuse of discretion in not trying defendant first pursuant to agreement with codefendant's attorneys. 101TexCr 664, 277SW116. [d] Defendant first named in indictment held properly tried first. 171Ark[illegible] 298SW[illegible].

784 54 100TexCr241, 272SW788 (no error in overruling motion to hear separate homicide indictments according to number).

784 56 [e] Where case against other defendant was dismissed after severance, and he refused to testify, it was held that refusal to postpone till question of his guilt was settled was not error. 105 TexCr[illegible] 290SW[illegible].

784 59 100TexCr[illegible] 2[illegible]SW[illegible].

784 60½-New. Statute directing that defendants shall be tried in the order in which their names appeared on the joint indictment is directory only and disregard thereof is not fatal to conviction. 169Ark717, 276SW849.

784 62½-New. Statutes regulating an order of separate trials are merely directory in some jurisdictions. 170Ark 1073, 282SW680; 177Ark186, 6SW(2d) 34.

784 64 22AlaA124, 113832[illegible]; 75CalA [illegible] 243P[illegible]; 327 Ill 312, 158NE732; 164La597, 1148171.

784 65 100CalA509, 280P379(2dcase). See also 133SC238, 130SE641.

785 68 7F(2d)[illegible]; 16F(2d)342; 17F (2d)12, 19F(2d)542; 23F(2d)170; 33F (2d)517, 25F(2d)430, 29F(2d)24; 29 F(2d)444 [certiorari den 279US834, 49 SC[illegible]253(4dcase), 73LEd983]; 39F(2d) 312; 41F(2d)193; 195Cal272, 232P710; 304Cal109, 266P807; Cal 285P704; 72 CalA160, 236P987; 75CalA365, 242P 906; 75CalA104, 242P1067; 75CalA565, 243P25; 75CalA134, 243P31; 76CalA 105, 243P882; 81CalA449, 253P966; 90 CalA27, 265P366; 91CalA189, 266P972; 95Fed2, 115SE519, 522 [citCJ]. 319 Ill 606, 150NE347; 325 Ill 245, 156NE354; 326 Ill 518, 158NE142; 327 Ill 312, 158 NE732, 329 Ill 352, 160NE361 (discretion in denying separate trial not abused); 331 Ill 380, 163NE149; 332 Ill 476, 163NE798; Ill 172NE743; IndA 167NE[illegible](2dcase); 212Ky[illegible]15, 278SW 620, 160La[illegible]9, 1078833, 165La204, 121 8744; 103NJL663, 138A575; NJ 146A 313, NJSup 137A593, 246NY409, 159 NE379; 246NY491, 159NE408 (denial of motion for separate trial did not deprive defendant of fair trial); 249NY 419, 164NE336; 93PaSuper323; 152SC 17, 149SE348; 106TexCr289, 291SW 1107; 150Wash82, 272P80; Wash 290 P992; 195Wis555, 218NW822; Wis 231 NW263. See also NJ 150A367. [e] Court during term may set aside order of severance and try parties jointly. 145 Miss66, 1118131. [d] Question presented by motion for separate trials is whether jury can properly weigh testimony upon various issues which may arise. 249NY419, 164NE336. [e] Where each of defendants is charged with prior convictions, denial of separate trial is not abuse of discretion. Wash 286P67. [f] Discretion not abused.-254 NY16, 171NE890. [g] Court's ruling on motion for severance must be viewed in light of showing at time of making of motion. 41F(2d)193. [h] Where severance will operate as continuance, motion is properly denied. TexCr 30SW(2d) 327.

785-69 260US167, 46SC68, 70LEd216; 195Cal643, 231P898 (statute declaratory of common law); 132Misc318, 228 NY8731. [a] Court not shown to have abused discretion in denying separate trial. Wash 286P69.

785-71½-New. Where a motion to sever was granted, following an indictment of father and son for murder, and the father was ordered tried first, a motion at the time of the father's third trial to reverse order of the trial was held properly denied. 104TexCr495, 283SW497.

785-71½-New. After a joint indictment and severance, the case of each defendant becomes a separate and distinct legal entity. 105TexCr590, 289SW691.

785-71½-New. In some jurisdictions the right to sever is statutory. 105Tex Cr590, 289SW691.

785-71½-New. Denial of severance has been held proper where it would necessarily have resulted in continuance. 105 TexCr590, 289SW1076.

785 71½-New. In New Jersey the right of defendants jointly indicted for murder to severance is governed by the common law. 103NJL663, 138A575.

785 72 21AlaA190, 106SE612, 176Ark 870, 300SW451; 214Ky147, 282SW 1066, 164La597, 1118171; 239Mich695, 214NW[illegible].

785 73 35PortoRico575.

785 74 15F(2d)196, 164La597, 1148 171. [b] No abuse of discretion for refusal of trial court to grant separate trials. 15F(2d)496.

785 76 [a] Particular cases requiring granting of motion. Fla 130S35(1st case).

785 77 75CalA104, 242P1067; 95Fla 42, 115S519, 522 [citCJ], 164La597, 114 8171. But see 108La837, 1238591; 152 SC17, 149SE348.

786-78 76CalA688, 245P781; 326 Ill 518, 158NE142.

786-79 132Misc318, 228NY8731.

786-83 195Wis555, 218NW822 (refusal of severance held not abuse of discretion).

786-84 See also 34PortoRico 809. [a] Severance denied where codefendant was fugitive from justice. 104TexCr171, 283 SW831.

786-84½-New. ; change of counsel by one of defendants during the trial necessitated by the withdrawal of counsel; 48ND409, 205NW25.

786-84½-New. that one defendant had represented other defendants as attorney; 19F(2d)842.

786-84¼-New. that defendants jointly informed against for engaging in liquor traffic occupied separate apartments in the same house; 58ND773, 228NW190.

786-85 TexCr 248W(2d)830.

786-85½-New. Mere greatness in number of defendants is no ground for granting separate trials were no complicated issues or questions are presented to the jury. 327 Ill 312, 158NE732.

786-85½-New. It is not a ground for severance that the defense of alibi by each defendant would be supported by different evidence. 167La379, 1198263.

786-85¼-New. That defendant was epileptic absent showing that he suffered under strain by joint trial did not show discretion abused by denial of separate trial. Wash 286P69.

787-89 324Mo589, 128W(2d)87 (requiring defendant to be tried alone held not error); 105TexCr299, 288SW223.

787-93 75CalA365, 242P906; 95Fla 42, 115S519; 50Nev212, 255P1002. See also 195Cal643, 234P898. But see Wash 286P69. [c] Facts held not to constitute ground for separate trial.-50Nev 212, 255P1002. [d] Prior conviction of one defendant of same offense for which both are indicted will not necessarily entitle them to separate trials. 153 Wash60, 279P123.

787-94 33F(2d)238.

787-95 75CalA565, 243P25.

787-1 112TexCr107, 148SW(2d)838. [b] Refusal of severance held error.-104TexCr228, 283SW507. [c] Where defendants charged with same crime in different courts.-Texas statute determining relation of different district courts in Bexar County was not intended to deprive one charged with offense in such county of right to severance merely because another is charged with same crime in different court. 104TexCr283, 284SW564(2dcase).

787-4 168La204, 1218744; 168La297, 1218872.

787-5 25F(2d)430; 325 Ill 245, 156NE 354; Ill 172NE743; 246NY491, 159NE 408; 220AppDiv697, 222NYS456. But see 100CalA509, 280P379(2dcase).

787-6 72CalA160, 236P987, 989 [citCJ]; 325 Ill 245, 156NE354; 339 Ill 225, 171 NE152; Ill 172NE743.

787-6½-New. But such ground does not of itself entitle defendant to a separate trial. 72CalA160, 236P987.

788-7 23F(2d)547; 75CalA404, 242P 1007; 95CalA259, 272P816; Ill 172NE 743, 246NY409, 159NE379.

788-9 195Cal643, 234P898 (confession by moving defendant more damaging than confession complained of, and evidence amply sufficient to convict all defendants); 74CalA371, 240P526; Ill 172 NE743; 249NY419, 164NE336. See also 332 Ill 476, 163NE798.

788-9½-New. More existence of confessions and probability of their introduction in evidence do not necessarily require separate trials of persons jointly indicted. 249NY419, 164NE336.

788-13 202Iowa534, 210NW542.

788-14 IndA 165NE781(1stcase); 212 Ky245, 278SW620; OklCr 279P366. [b] Evidence held to show no abuse of discretion.-212Ky245, 278SW620.

788-16 212Ky245, 278SW620.

788-17 16F(2d)342; 326 Ill 518, 158 NE142; 327 Ill 312, 158NE732.

788-21 319 Ill 606, 150NE347; TexCr 278W(2d)815(2dcase). [b] Controlling factors in determination of motion.-(1) 132Misc318, 228NYS731.

788-22 76CalA688, 245P781; Wis 231 NW263. [c] Motion for severance must

be determined on state of facts as set out in motion or as otherwise shown at time motion is passed on. 167La379, 119S263. [f] **Affidavit on information and belief** that codefendant made confession implicating him has been held sufficient. 339 Ill 225, 171NE152.

789-23½-New. Grounds advanced at the time of the application are the sole consideration. 326 Ill 518, 158NE142.

789-24 132Misc318, 228NYS731 (in discretion of court); 48SD409, 205NW 25.

789-25 [a] **Motion made when case is called for trial** is timely. 339 Ill 225, 171NE152.

789-28 Wis 229NW51.

789-31 48SD409, 205NW25.

789-35 210Ky554, 276SW519; 140Miss 640, 105S769 (proceeding with joint trial after grant of severance).

789-39 Wash 286P833. See 102NJL 659, 133A274.

789-40 198Cal 601, 246P802; 68CalA 674, 230P178 (where showing is not sufficient to create doubt, refusal of trial on insanity issue is not erroneous); 95 CalA92, 272P786; CalA 283P848 (statute held constitutional); 98Fla1184, 125 S345(3dcase); 333 Ill 169, 164NE156 (issue cannot be raised after verdict); Iowa 231NW337; 125Kan218, 263P1071 [quotCJ]; Kan 291P954; 163La686, 112S650; 163La701, 112S655; 169La520, 125S580 (statute held in conflict with prior procedure); 292Pa26, 140A611; 113TexCr395, 22SW(2d)136; TexCr 27 SW(2d)805; 135Wash650, 238P617 (even though there is plea that accused is sane at time of trial). [g] **Inherent power** to have question as to insanity at time of trial determined is vested in trial court, even though accused was sane when offense was committed. 135 Wash650, 238P617. [h] **Statute** in Washington does not make provision for determination of mental condition at time of trial where accused was sane when offense committed. 135Wash650, 238P617. [i] **Erroneous failure to try issue** renders trial on merits a nullity. 77CalA752, 247P585. [j] **Deputy district attorney** held required to remind court of order for such separate trial. 77CalA752, 247P585. [k] **Waiver.**-77 CalA752, 247P585. [l] **In Iowa.**-205 Iowa1130, 217NW225. [m] **Commission to test mentality** need not be appointed unless court or attorney for commonwealth believes it necessary to confine accused to insane hospital. 146Va296, 135SE895. [n] **Court properly proceeded with trial** for carrying concealed weapons, in which defendant made no suggestion that he was then insane, without waiting final determination of proceedings in robbery prosecution, arising out of same transaction, as to present sanity. 99CalA90, 277P1080. [o] **Court may not pronounce sentence without taking evidence on issue of insanity,** where trial on issue of defendant's sanity is severed from that presented by plea of not guilty. 99CalA 224, 278P258. [p] **In California.**-204 Cal 470, 268P909. [q] **Duty of counsel for state and counsel for accused** to disclose knowledge of accused's mental disability to court. Kan 291P954. [r] **Time for raising issue of insanity.**-Kan 291P954.

790-41 197Cal 306, 240P1000; 75CalA 561, 243P36; 198Cal 601, 246P802; 83 CalA55, 256P450; 78Mont560, 254P858; 292Pa26, 140A611; 146Va296, 135SE 895; 135Wash650, 238P617 (dictum); Wash 286P833. [a] (1) 78Mont560, 254 P858. (3) Existence of doubt under statute means any doubt that may be created in mind of trial court arising from consideration of all facts and circumstances which situation may disclose. 197Cal 306, 240P1000. (4) Doubt must be founded on substantial grounds showing existence of reason to believe that claim of insanity is genuine and not simulated. 197Cal 306, 240P1000. (5) Whether accused's mental condition as exhibited during trial was assumed or real is for court to decide in its sound discretion. 197Cal 306, 240P1000. [c] (1) See also 78Mont560, 254P858. (3) Refusal to appoint commission to inquire into defendant's mental condition held not abuse of discretion. 292 Pa26, 140A611. [d] 83CalA55, 256P 450. [f] **Where no doubt of accused's sanity exists** in mind of court, it is proper to refuse trial of issue. 75CalA561, 243P36. [g] **By some statutes,** where reasonable doubt exists as to sanity, court is under mandate to grant inquiry. Iowa 231NW337.

790-42 163La701, 112S655. But see Tex Cr 26SW(2d)249. [b] **Under statutes** preliminary trial held mandatory. 77 CalA752, 247P585. [c] **Court has discretionary power** to commit accused to department of criminal insane pending determination of mentality. 146Va296, 135SE895.

790-43 163La701, 112S655; 292Pa26, 140A611.

790-44 169La520, 125S580 (statute held not violative of constitutional provisions respecting jury trial). See also 83CalA55, 256P450. [b] (2) Statute making determination of commission final is unconstitutional as depriving courts of jurisdiction. 168La958, 123 S639, 67ALR1447(2dcase). (3) Conclusiveness on state does not render statute unconstitutional. 169La520, 125S580. [f] **Accused's request that certain alienist be placed on commission** has been held properly refused. 163La686, 112 S650. [g] **Construction of statutes.**-292 Pa26, 140A611.

790-45 165La67, 115S370; 110TexCr 326, 7SW(2d)589, 60ALR1403. [a] **Statutory five-day notice need not be given accused** when remanded to probate court to determine issue of insanity. Kan 291P954. [b] **Additional hearing on insanity issue by district court of its own motion** is not error although accused found not feeble-minded by probate court. Kan 291P954.

790-46 198Cal 601, 246P802. [a] (3) Refusal of trial court to submit special issue of insanity to jury is not abuse of discretion where no motion for submission made. 197Cal 306, 240P1000. (4) Under statute question whether doubt is sufficient to require trial court to submit issue is largely in discretion of court. 197Cal 306, 240P1000. (5) Trial judge has duty to suspend trial or judgment until issue is determined. 198Cal 601, 246P802. [c] **In Virginia.**-146Va296, 135SE895.

790-46½-New. In Louisiana act governing examination and commitment of insane persons is inapplicable to criminal prosecution involving defense of insanity. 162La737, 111S79.

790-46⅓-New. On issue of present insanity judge is exclusive judge of sufficiency and credibility of evidence but supreme court may review his findings. 162La737, 111S79.

790-46¼-New. Judge may pass on evidence himself or appoint lunacy commission. 162La737, 111S79.

791-47 Fla 130S456; TexCr 27SW(2d) 805. [b] **Question not submitted.**-135 Wash650, 238P617.

791-51½-New. Examination of defendant to ascertain sanity does not require him to give evidence against himself. 92Fla878, 110S547.

791-51⅓-New. Examination must be made fairly and impartially. 92Fla 878, 110S547.

791-51¼-New. Presence of counsel for accused or notice to him is held not necessary. 92Fla878, 110S547.

791-51⅕-New. In some jurisdictions it is proper for a circuit court in which defendant has been indicted to refuse to transfer the case to the chancery court to determine the question of insanity. 151Miss883, 119S805.

791-53 99CalA224, 278P258. [c] **Duty of raising question** whether defendant was insane at time of trial rested on defendant and his counsel, under statute relating to insanity. 333 Ill 169, 164NE156.

791-54 125Kan218, 263P1071; 163La 701, 112S655.

791-55 163La701, 112S655.

791-55½-New. Verdict of guilty, where sanity was argued by counsel but question was not separately raised, is final on issue of defendant's sanity. 198Cal 601, 246P802.

791-55⅓-New. In some jurisdictions a motion by counsel is insufficient to require the court to halt the trial but defendant must present an affidavit or offer witnesses to prove insanity or inability to conduct defense. 151Miss883, 119S805.

791-56 163La701, 112S655, 661 [citCJ]; 165La67, 115S370. See also 204Cal 470, 268P909. But see 102CalA608, 283P 389.

791-60 165La67, 115S370.

792-65 14PaDist&Co 191.

792-66 Iowa 231NW337 (conclusiveness on defendant).

792-68 TexCr 27SW(2d)805. [a] Md 151A409. [c] **But trial court's reservation of question until after verdict** is held not error. 163La701, 112S655.

792-69 [a] **Accused, remanded to probate court for examination** and found not feeble-minded, cannot appeal from decision of probate court to district court. Kan 291P954.

792-73 Iowa 231NW337.

792-75 206Cal 64, 273P779.

792-76 CalA 290P1076. [a] **In Florida.**-Fla 130S456.

792-78½-New. Under California statute, on a trial of issue of insanity after verdict, defendant has the burden of proving insanity by a preponderance of evidence. 206Cal 259, 274P63(2dcase).

793-81 332 Ill 436, 163NE804; 101Tex Cr491, 276SW287; TexCr 20SW(2d) 765. [b] 213Ala264, 104S638. [c] **Substantial compliance with statute** is sufficient. 22AlaA556, 117S761.

793-91 [a] **Only where substitution is made without motion** is defendant entitled to copy of new indictment. TexCr 27SW(2d)178.

793-93 [a] **Procuring postponement of trial is not waiver** of right to demand copy of indictment. 111TexCr402, 13 SW(2d)110. [b] **Fact that accused could have examined original indictment or demanded copy earlier** does not constitute waiver of right to demand copy. 111TexCr402, 13SW(2d)110. [c] **Right of accused to demand copy of indictment may be waived** by previous words or conduct, but waiver must be made by himself, since attorney cannot waive right for him. 111TexCr402, 13SW(2d) 110.

793-94 332 Ill 436, 163NE804; 152Miss 133, 118S906; 101TexCr491, 276SW287; 111TexCr402, 13SW(2d)110. [a] **That copy of venire was delivered more than one day before time set for trial** does not obviate necessity for demand for copy of indictment by written motion as required by statute. 152Miss133, 118S 906.

793-99 [b] **In Porto Rico.**-275US106, 48SCt77, 72Led186.

794-1 213Ala264, 104S638. [f] **In Texas.**-101TexCr491, 276SW287. [g] **Where service properly made** further service is unnecessary though case is refixed for another session of court. 165La822, 116 S199.

794-8 154Miss60, 119S507.

794-12 154Miss60, 119S507.

794-16 30Ariz159, 245P356, 358 [quot CJ].

794-17 30Ariz159, 245P356, 358 [quot CJ]; 109TexCr164, 3SW(2d)804 (omission of docket number). [c] **Service of uncertified copy** is sufficient compliance with constitutional requirement. 109 TexCr164, 3SW(2d)804. [d] **Where actual literal copy of indictment was served** on defendant refusal to quash because certified copy not served is not erroneous. TexCr 26SW(2d)271.

795-30 30Ariz159, 245P356; 207Cal 73, 276P1006; 165La822, 116S199.

795-31½-New. Waiver also arises from making motion to quash and for change of venue. 169Ark717, 276SW849.

795-33 22AlaA93, 112S806; 113TexCr 305, 21SW(2d)667(1stcase) (only accused himself may waive).

795-34½-New. An objection to failure to serve a copy of the indictment is waived by failure to reserve an exception to the overruling of the objection and by pleading after being presented with the original indictment. 22AlaA 93, 112S806.

795-36 18F(2d)906.

795-37 235Mich475, 209NW584; 244 Mich258, 221NW307. But see 318Mo

1233, 3SW(2d)365. [f] But see 18F(2d) 906. [h] 18F(2d)906. [j] **Provision in statute for indorsement is directory.**–169 Ark1211, 278SW14. [k] **Codefendant discharged after beginning of trial.**–322 Mo 234, 14SW(2d)628.

795–38 52ND478, 203NW679.

795–39 52ND478, 203NW679.

796–41½–New. or of the codefendant under a joint indictment; OklCr 279P 690.

796–48 Mo 285SW412; 52ND478, 203 NW679; OklCr 282P695.

796–51 237Mich507, 212NW86; 315Mo 242, 286SW69.

796–54 118Kan641, 236P855; 237Mich 507, 212NW86; 312Mo 490, 279SW405; Mo 289SW562; Nebr 233NW461; 152 Wash686, 279P82. See also Kan 291P 742; OklCr 279P708.

796–55 121Kan703, 249P595; 127Kan 497, 274P274; 244Mich258, 221NW307; 311Mo 476, 278SW755 (witness to rebut unexpected evidence of defendant); 315 Mo 242, 286SW69; 318Mo 542, 300SW 699; 321Mo 870, 12SW(2d)469; 85 Mont585, 281P551 (at beginning of trial); 116Nebr363, 217NW591; 50Nev 27, 249P566, 569 [citCJ]; 52ND53, 203 NW679; 37 OklCr47, 256P70; OklCr 282P695; 34Wyo 218, 242P802.

797–56 241Mich67, 216NW398; 318Mo 542, 300SW699.

797–57 237Mich507, 212NW86; 241 Mich67, 216NW398; 311Mo 476, 278SW 755; 317Mo 284, 295SW550; 317Mo 276, 295SW554; 49SD187, 206NW925; 135 Wash276, 237P507; 152Wash686, 279P 82.

797–57½–New. or where no affidavit of surprise is filed; 311Mo 476, 278SW755.

797–57¼–New. or where testimony of such witness is not objected to when offered; 311Mo 476, 278SW755.

797–58 118Kan641, 236P855; 121Kan 703, 249P595; 241Mich67, 216NW398; 116Nebr363, 217NW591 (adding name of sheriff); 37 OklCr47, 256P70; 135 Wash276, 237P507.

797–60 312Mo 490, 279SW405; 50Nev 27, 249P566; 152Wash686, 279P82.

797–63 144Wash236, 257P385. [a] **Codefendant.**–OklCr 273P1012. [b] OklCr 274P43.

797–64 See also 143Wash88, 254P456.

797–67 206 Iowa365, 218NW936; 230 Ky411, 19SW(2d)1091, 66ALR360 (error in first name).

797–71 GaA 155SE511(2dcase); 332 Ill 436, 163NE804; 334 Ill 218, 165NE619; 312Mo 212, 278SW1030; Mo 18SW(2d) 834; MoA 300SW318; 35PortoRico 787; 169Ark1211, 278SW14; 103WVa148, 136 SE842. [b] **Prosecuting attorney.**–322 Mo 234, 14SW(2d)628.

798–73 52ND478, 203NW679; ND 229 NW569.

798–74 47 Ida246, 273P940; 229Ky63, 16SW(2d)496; 310Mo 500, 276SW625; Mo 289SW895; TexCr 24SW(2d)41.

798–76 316Mo 122, 289SW904; 321Mo 564, 12SW(2d)445.

798–77½–New. Under stipulation that testimony of witness in another case may be used on trial, testimony may be read, although witness' name was not indorsed on indictment. SD 229NW395.

799–78 200 Iowa660, 204NW278; 202 Iowa1382, 212NW137; 128Kan475, 278 P767; Kan 291P742; 244Mich258, 221 NW307. [b] **Rule applied,** even where rebuttal witness might have been called in chief. 202 Iowa1382, 212NW137.

799–80 147Wash71, 265P160.

799–83 332 Ill 436, 163NE804; 144Wash 236, 257P385.

799–84 332 Ill 436, 163NE804.

799–87 OklCr 292P571 (in capital cases).

799–88 144Wash236, 257P385; 150 Wash82, 272P80.

799–88½–New. After mistrial service of new list is not required. OklCr 292P 571.

800–92 145Wash634, 261P391.

800–93 206 Iowa365, 218NW936.

800–94 OklCr 271P170.

800–96 [b] (2) Omission of post-office addresses is immaterial where defendant knew addresses and witnesses testified at preliminary trial. OklCr 287P 1091(2dcase). [c] **Statement of incorrect residence** is immaterial where no confusion resulted therefrom. 206 Iowa 365, 218NW936. [c] **That witness changed address after service of list** does not prevent state from using him as witness. OklCr 292P571.

800–97 [a] 206 Iowa365, 218NW936.

800–1 318 Ill 114, 149NE3; Mo 274SW 19.

800–5 Mo 285SW82; 103TexCr258, 280 SW836.

800–6 204 Iowa1135, 216NW642.

801–13 214Ala172, 106S692, 694 [quot CJ]. [a] (2) Rule is founded upon public policy that encourages citizen to give aid in detection and punishment of crime. 214Ala172, 106S692.

801–14 214Ala172, 106S692, 694 [quot CJ].

801–20 Wash 287P18; 198Wis388, 223 NW861. But see CalA 284P487.

801–22 232Ky479, 23SW(2d)937.

801–24½–New. And defendant is not entitled to inspection of a document in the hands of the district attorney not admissible in evidence. 245NY24, 156 NE84.

801–25½–New. Unless required to do so by the court, counsel have the right to refuse to disclose evidence which they expect to introduce on trial of cause. 100WVa699, 131SE710.

801–25½–New. But if counsel state their intention in regard to evidence which they expect to introduce at trial, the opposing party will ordinarily be warranted in relying thereon. 100WVa 699, 131SE710.

801–25¼–New. Where a statute entitled accused to an inspection and copy of documents, the application therefor must be timely and on notice and in the manner prescribed by statute for the presentation of motions and applications for orders and must show that the document contains material evidence. 70 CalA191, 232P985.

801–25⅓–New. Such statute does not entitle defendant to an inspection and copy of statements made by witnesses to the district attorney not claimed to be admissible in evidence in the absence of supporting testimony of the stenographer who transcribed them. 70CalA191, 232P985.

801–25⅓–New. Notice by the state that it has a dying declaration is not a condition precedent to the admission of such declaration in evidence. 103TexCr 279, 280SW594.

801–25½–New. Accused has a right to examine a written statement given by a witness to the prosecuting attorney where it may be material to his defense. 317Mo 319, 296SW132.

801–25⅓–New. It is not error for the court to refuse to permit accused to inspect written statements made by himself or by another where such statements are not used as evidence and the witness is present in court and testifies. 128Kan317, 277P1019.

801–25⅓–New. Denial of a motion to compel a county attorney to furnish defendant with statements of a state witness, made in the office of the county attorney, in order to enable counsel further to examine the witness, to show a variance with present testimony, has been held not erroneous. 84Mont348, 275P757.

801–25 1/10–New. Burden is on party applying for order to produce evidence under statute to bring himself within terms of statute by alleging facts identifying papers called for so that court may determine materiality. Mo 25 SW(2d) 459 (application held insufficient).

801–25 1/11–New. Accused in prosecution for forgery may, under statute, have inspection of and make copies of writings to prepare for defense. 27 OhNPNS460.

801–25 1/12–New. Refusal to permit township treasurer charged with embezzlement to examine papers relating to disbursement of township funds when produced held not error. Mo 30SW(2d)59.

801–26 167La413, 119S401. But see 318Mo 531, 300SW829.

801–26½–New. In prosecution for transportation of whisky, refusal to grant defendant's request that state produce alleged intoxicating liquor in its possession for purpose of analysis was held error. 160La811, 107S583.

801–27 109TexCr541, 5SW(2d)990 (label on whisky bottle). See also Iowa 227NW601; 99TexCr517, 270SW1022; 111TexCr570, 13SW(2d)874.

801–28 26F(2d)487; 252Mass450, 148 NE113; 261Mass299, 159NE51. But see 47 Ida195, 273P952. [e] **Motion should not be granted** unless court is convinced it is made in good faith for purpose of moving to dismiss indictment on legal grounds. 126Misc254, 213NYS591.

802–29 179Ark1066, 20SW(2d)189.

802–36 28F(2d)424.

802–38½–New. that no preliminary examination was held, 126Misc254, 213NYS 591.

802–38¼–New. or that the case is unusual are no grounds for granting the motion. 126Misc254, 213NYS591.

802–38¼–New. The sole ground on which inspection may be granted is to enable defendant to move to set aside the indictment for reasons specified in the statute. 126Misc254, 213NYS591 (Code Cr. Proc. § 313).

802–41 CalA 291P226. [b] **In Philippines.**–51Philippine201.

802–42½–New. Accused held not entitled to examine private memoranda of prosecuting attorney. 37F(2d)343.

802–46 202 Iowa150, 209NW404 (service of notice on one of defendant's attorneys sufficient under statute).

802–47 200 Iowa660, 204NW278 (when testimony of such witness is not objected to because in rebuttal, admission is not objectionable).

802–49½–New. [§ 2040a] 10½. **Notice of Defendant's Witnesses.** In some jurisdictions statutes require defendant, within specified number of days after service on him of list of prosecution's witnesses, to file with clerk and serve upon prosecuting attorney a list of witnesses which defendant intends to use at the trial. 144Wash236, 257P385.

802–49¼–New. Additional names may be added to such list at any time before trial as the court may by order permit. 144Wash236, 257P385.

803–51 332 Ill 436, 163NE804. [d] **Substantial compliance** with statutes is sufficient. 22AlaA556, 117S761.

803–53 [a] **Failure to serve list** forty-eight hours before calling members as tales jurors in another section of court is not error. 170La630, 128S658.

804–70 [a] 25F(2d)546.

804–80 165La842, 116S206.

805–91 154Miss60, 119S507.

805–92 154Miss60, 119S507.

805–98 332 Ill 436, 163NE804; 152Miss 133, 118S906.

805–99 Mo 281SW960.

805–1 20AlaA481, 104S137; 110TexCr 128, 7SW(2d)579. [b] **Amendment of irregularity.**–110 TexCr128, 7SW(2d) 579.

806–4 23AlaA584, 129S492; 21AlaA22, 104S866; 21AlaA611, 110S694; 22AlaA 549, 117S605; 23AlaA116, 121S689; 23 AlaA460, 126S890(2dcase); 77CalA29, 245P769; CalA 290P69; 229Ky776, 18 SW(2d)290; 116Nebr440, 218NW83; 224AppDiv193, 230NYS66; 118 Or77, 245P1074, 46ALR1173; 133SC491, 131 SE603. But see 106TexCr193, 291SW 557. [a] **Presence of armed guards outside courthouse** for protection of defendant does not deprive him of fair trial. NC 154SE741.

806–4½–New. Accused is deprived of his right before an impartial jury where the jury is overawed or coerced by outside influence. 21AlaA220, 107S35.

806–6 19F(2d)202; 27F(2d)137; 22 AlaA36, 111S763; 79CalA76, 249P20; CalA 293P72; 94Fla469, 114S450; 317 Ill 603, 148NE281; 322 Ill 546, 153NE 673; 325 Ill 337, 156NE378; 331 Ill 581, 163NE373; 337 Ill 259, 169NE206; 225 Ky744, 9SW(2d)1088; 145Miss116, 110 S361; 312Mo 655, 280SW1040; 320Mo 389, 8SW(2d)20; MoA 7SW(2d)375; 115Nebr634, 214NW256; 116Nebr141, 216NW173; 246NY100, 158NE35; 250 NY185, 164NE900; 135Misc324, 239 NYS358; NC 154SE741; 26 OhA329, 157NE421; 53SD60, 220NW139; 144 Wash236, 257P385; 145Wash44, 258P 826; 149Wash452, 271P89; 199Wis615,

227NW258. [a] (1) 145Wash44, 258P826. (2) "Fair trial" means assurance of impartial jury, learned judge, and witnesses who can testify without fear and intimidation. 145Miss116, 110S361. (3) It is legal right of defendant to have case conducted in all material things in substantial conformity to law. 77CalA29, 245P769. (4) It is trial conducted in accordance with usual rules of procedure by impartial judge and jury in atmosphere of judicial calm. Mo 296SW391. [d] **Record held to show that defendant did not have fair trial.**–19F(2d)202. [e] **Exhibiting to witness** photograph of accused, having his criminal record on reverse side, which was not put in evidence, furnishes no basis for assignment of error. 202Iowa729, 210NW903. [f] **Fair trial includes** counsel, compulsory attendance of witnesses, and reasonable time to prepare defense. 94Fla469, 114S450. [g] **Assault committed on defendant out of presence of court** during overnight continuance and not made foundation for contempt proceedings elsewhere cannot be treated by court as attempt to obstruct justice. 82CalA389, 255P839. [h] **Failure to advise defendant skillfully conducting his own defense** as to his right to request instructions is no error. Mo 292SW440. [i] **Refusal to hear motion after close of evidence and arguments** is not denial of constitutional trial where nature of motion is not disclosed. 100CalA509, 280P379(2dcase).

806–7 335Ill379, 167NE96(2dcase); 89IndA330, 166NE547(2dcase); Iowa 228NW353; 312Mo655, 280SW1040; 224AppDiv415, 231NYS153; 196NC797, 147SE301(1stcase); 26OhA329, 157NE421; Va 152SE547; Wash 275P385.

806–7½–New. It is not judicial fairness to allow state to show substance and effect of conversations but require defendant to prove the very language used, 312Mo655, 280SW1040.

806–7¾–New. nor to sustain objections made by the state but overrule objections made by defendant upon identical grounds to the same character of examination. 312Mo655, 280SW1040.

806–8 120OhSt44, 165NE573. [a] (2) Code Cr. Proc. § 388 as amended, prescribing order of trial, does not deprive judge of power to control and vary order, where to do so would facilitate justice. 246NY262, 158NE615. [b] **Where method of procedure depends on nature of offense,** indictment on which trial is had rather than verdict will govern in determining rules applicable. 264Mass324, 162NE401.

806–9 16F(2d)29; 36GaA83, 135SE513; 167La190, 118S884; 259Mass128, 156NE57; 246Mich459, 224NW605; 76Mont222, 246P250; 114Nebr28, 206NW16; 103NJL18, 134A886; 50ND927, 198NW698; 57ND900, 225NW319; 147SC82, 144SE839; 107TexCr600, 298SW438 (refusal to have deceased's baby removed from inside courtroom railing held not error); Wash 291P1093; 194Wis387, 216NW483. [a] (1) 112TexCr381, 16SW(2d)1070(2dcase). (2) In prosecution for carrying pistol, placing pistol in view of jury after identifying it is not error. 105TexCr456, 288SW1077.

806–11 221AppDiv245, 222NYS607. [a] **Judge should exercise patience in endeavoring to speed up trial.**–CalA 286P514.

806–12 210Ky71, 275SW22; 172Minn226, 215NW189.

806–13½–New. Permitting appearance before jury and questioning person claimed to have influenced accused to determine whether to put her on stand may not be prejudicial to accused. 144Va559, 131SE131.

806–13¾–New. Both the court and counsel must be guided by the rules of practice in regard to what the record should contain. 76Mont222, 246P250.

806–13¾–New. Where both are in doubt as to an anomalous situation, the matter must be left to the sound legal discretion of the court, 76Mont222, 246P250.

806–13⅞–New. which should be exercised liberally. 76Mont222, 246P250.

806–13⅞–New. Permitting attorney interested in bankruptcy proceedings to sit with and advise district attorney in prosecution for concealing assets proper. 19F(2d)421.

806–13½–New. May permit special counsel to assist in prosecution of criminal case. 324Ill289, 155NE271.

806–13⅛–New. Procedure in force at time of trial is controlling. 106TexCr136, 291SW545.

806–13⅛–New. In a prosecution for transporting liquor, bringing liquor into court is not error, no improper use being made thereof. 105TexCr374, 288SW230

806–13⅛–New. Failure of defendant's trial counsel, claimed by him to have been incompetent and negligent, to object to testimony or to make proper objections to trial court's instructions at any stage of proceeding does not constitute per se absence of fair trial. 203Iowa94, 212NW339.

806–13⅛–New. Where defendant is in danger court may have militia in and around court room. 192NC20, 133SE190.

806–13⅛–New. Presence of attorney assisting prosecution is held not error. 253Mass516, 149NE198.

806–13⅛–New. Statute providing that rules of pleading and practice in civil actions shall govern in criminal cases refers to such rules as are declared by the civil code. 199Ind401, 156NE548.

806–13⅛–New. Allowing time for examination of evidence and discovery of truth is not error as long as the trial is kept within a reasonable compass. 230Ky411, 19SW(2d)1091, 66ALR360.

806–13⅛–New. No one should be convicted on a criminal charge by means of an appeal to the race issue. 155Miss306, 124S361.

806–13⅛–New. Proceeding begun as criminal case must be determined by criminal rules except where civil rules and practice are same. Colo 291P1040.

806–13⅛–New. Conducting hearings on probation and sentence in other cases in jury's presence within judge's discretion. CalA 291P872.

806–14½–New. A contention that the court erred in a larceny prosecution in refusing to have a portion of the record read at the request of counsel for defendant has been held without merit, where the request related to a matter of little importance, and was an appeal to the discretion of the court. 84Mont364, 275P750.

806–16 174Ark859, 296SW716.

806–17 71CalA380, 235P60 (objection held trivial based upon fact that, in view of statute forbidding reading of portion of indictment alleging prior conviction, district attorney started to read such portion, but was interrupted by court); 108TexCr187, 299SW399.

807–26 [a] **Defendants in liquor conspiracy case were not denied any right of public trial** by ruling of court placing in secret files affidavit made by one conspirator before internal revenue collector, permitting it only to be seen by jury and counsel. 31F(2d)19.

807–27 23AlaA559, 129S323(2dcase); 206Cal35, 273P767; 90Fla25, 105S130; Utah 269P480, 483 [citCJ]; 144Wash446, 258P508. [c] 144Wash446, 258P508. [d] **What is meant by public trial** under constitution must be determined by recourse to common law as it existed when constitution was adopted. Utah 269P480.

807–27½–New. Generally, in criminal cases all judicial business must be transacted in open court. Iowa 226NW925.

807–28 168Ga470, 148SE139.

807–30 165La842, 116S206; 155Miss547, 124S650 (exclusion under statute in trial for rape or attempt); 308Mo573, 274SW393, 396 [citCJ]; 102NJL134, 130A642.

807–31 144Wash446, 258P508.

808–32 168Ga470, 148SE139 (exclusion of children); 167La92, 118S703.

808–33½. Spectators, excluded during the absence of the jury, may be readmitted to the court room. 168Ga470, 148SE139.

808–34 [a] **Exclusion constituting denial of public trial.**–Utah 269P480. [b] **Construction of constitutional provision for public trial.**–Utah 269P480. [c] **Statutes authorizing judge to exclude certain persons** must yield to kind of public trial guaranteed by state constitution. Utah 269P480.

808–38 20AlaA601, 104S845 (courts have wide discretion as to taking charge of witnesses for contempt).

808–40½–New. State has no right to deny to defendant's counsel access to witness for defense who is confined in jail. 73Mont187, 235P703.

808–40¾–New. It is not error to permit the state's medical witness to sit near the jury box where he does nothing to influence any juror. 48Ida636, 284P201.

808–40¾–New. Prosecutor's asking defendant's witness if he were charged with felony and on denial arresting him illegally is erroneous. TexCr 26SW(2d)204(2dcase) (particular facts determine effect of illegal arrest).

808–42 76CalA168, 243P894.

808–42½–New. In every court rests inherent power to call interpreters for witnesses under proper circumstances, 76CalA168, 243P894.

808–42¾–New. and it is the duty of the court to call an interpreter whenever such circumstances arise. 76CalA168, 243P894.

808–42¾–New. Interpretation of testimony is proper to be resorted to whenever the necessity exists. 96Fla348, 118S1.

808–43 76CalA168, 243P894; NJSup135A658, 659 [citCJ]. Compare 96Fla348, 118S1. But see 30Ariz159, 245P356. [a] **Witnesses, speaking exclusively or more naturally language alien to that used** by tribunal, may constitute one of classes of persons for whom such necessity, that is, necessity of interpretation, exists. 96Fla348, 118S1. [b] **Appointment held properly refused.**–170La755, 129S154.

809–45 33Ariz383, 265P609. [c] **Teacher of deaf mutes** is incompetent to act as interpreter for deaf mute who has not attended school and with whose signs teacher is not familiar. 51Philippine385.

809–50½–New. Interpreter's oath that he properly interpreted and translated confession is sufficient to authorize admission. 101TexCr651, 277SW116 (though interpreter not sworn).

809–50¾–New. Where an interpreter taking a confession from accused was properly sworn on the trial of the case, and testified that he correctly interpreted statements of accused at the time the confession was taken, it was immaterial that the interpreter was not sworn at the time accused made the confession. 110TexCr68, 7SW(2d)535.

809–52 [a] **Failure to take oath.**–285Pa49, 131A657.

809–53 260Mass233, 157NE538. [a] **Matters to be transcribed.**–OklCr 274P688.

809–54 163La8, 111S472. [a] (2) Where all material evidence has been taken by stenographer, at defendant's request, court may excuse him until recalled, even though defendant contends he should remain in attendance. 260Mass233, 157NE538.

809–55 29F(2d)444 [certiorari den 279US834, 49SCt253, 73LEd983(4thcase)].

809–58½–New. Duties of official stenographer beyond statutory requirements are largely within trial court's discretion. 108TexCr583, 28SW(2d)242.

809–58¾–New. and refusal of court to require that examination of jurors be taken down is not abuse of discretion. 108TexCr583, 28SW(2d)242.

810–63 19F(2d)850; 222Ky614, 1SW(2d)1060; 151Md456, 135A189; 237Mich247, 211NW650; 102NJL94, 131A292; 105TexCr590, 289SW691; 101Vt124, 141A686.

810–68 201Iowa575, 207NW608 (demonstrations in court as to appearance of

automobile lights properly excluded).

810–68½–New. In a prosecution for murder by poison it is in the discretion of the court whether to allow an examination of the internal organs of deceased. 82**Colo** 205, 258**P**226.

810–74 NJSup 136**A**603.

810–74½–New. It is not error to dismiss case against codefendant in the presence of the jury. 100**TexCr**480, 273 **SW**842.

810–75 215**Ala**635, 112**S**212; 68**CalA** 758, 230**P**191.

810–77 81**CalA**226, 253**P**735. [a] **Misconduct is sufficient to authorize granting mistrial** if it might have influenced verdict. 21**AlaA**220, 107**S**35.

811–79 215**Ala**635, 112**S**212; 114**Nebr** 13, 205**NW**574; 32**NM**319, 255**P**396.

811–81 Kan 291**P**745; 210**Ky**71, 275 **SW**22 (commotion in court room due to escape from jail of other prisoners while commonwealth's attorney making closing argument); 161**La**518, 109**S**51; 32 **NM**319, 255**P**396.

811–83 48**SD**636, 205**NW**666 (where prosecutrix in prosecution for rape made during recess improper remarks to defendant, inquiry should be made of each juror as to whether he heard them, and asking jurors who heard them to hold up their hands held not to cure error).

811–85 105**TexCr**281, 288**SW**213.

811–87 [a] But see 21**AlaA**220, 107**S**35.

811–89 192**NC**20, 133**SE**190.

811–90 SC 155**SE**409 (overcrowded courtrooms).

811–90½–New. Ordering person not of counsel removed from counsel table, but not from court room, is held no abuse of trial judge's discretion in the preservation of peace and order in court room. 103**NJL**18, 134**A**886.

811–93 100**TexCr**90, 272**SW**163.

811–94 [a] **But withdrawal of juror not permitted** after remarks immediately withdrawn. **NJSup** 137**A**712.

812–97 246**Mich**459, 224**NW**605.

812–99 56**ND**334, 217**NW**519, 521 [quot CJ].

812–4 167**Ga**326, 145**SE**654; 208 **Iowa** 863, 226**NW**19; 104**TexCr**400, 284**SW** 222.

812–4½–New. No error for court to leave jury in box with officer during his absence preparing charge. **TexCr** 24**SW(2d)**1100.

812–5 35**F(2d)**689. [a] **Absence not waived** by failure to object to absence at time judge left room. 56**ND**334, 217 **NW**519.

813–22 92**Fla**1062, 111**S**725; 336 **Ill** 404, 168**NE**321; 216**Ky**220, 287**SW**704; 226**Ky**47, 10**SW(2d)**447; 163**La**146, 111 **S**656; 151**Md**456, 135**A**189, 195 [quot CJ]; 191**NC**378, 131**SE**743; 128 **Or**204, 274**P**303; 102**TexCr**498, 278**SW**437; 143 **Va**592, 130**SE**398. But see 137**Misc**314, 243**NYS**590.

814–24 336 **Ill** 404, 168**NE**321.

814–26 163**La**51, 111**S**492.

814–29 143**Va**592, 130**SE**398 (dictum).

814–30 216**Ky**220, 287**SW**704; 103**WVa** 743, 138**SE**393.

815–32 128 **Or**204, 274**P**303.

815–36 191**NC**378, 131**SE**743.

815–33 [a] **On order of mistrial** when a defendant was temporarily absent, court may strike out recess order and repeat proceedings in presence of all defendants. **NC** 154**SE**604.

815–39 100**WVa**501, 130**SE**655 (argument on instructions). [a] **Absence during portion of argument held not ground for reversal**, where proceedings were stayed as soon as absence was discovered and irregularity waived. 168 **La**487, 122**S**591.

815–41 174**Ark**391, 295**SW**361; 336 **Ill** 404, 168**NE**321; 200 **Iowa**1250, 206**NW** 260; 170**La**991, 129**S**612(4thcase); 151 **Md**456, 135**A**189, 196 [quotCJ]; **Mont** 293**P**309; **NJ** 137**A**718; 191**NC**378, 131 **SE**743; 192**NC**533, 135**SE**345; 143**Va** 592, 130**SE**398 (dictum); 100**WVa**501, 130**SE**655. [a] (5) Where all that was said and read to jury on their return for advice as to testimony stricken out had been given in presence of defendant and his counsel during trial. 236 **Mich**237, 210**NW**234.

815–41½–New. Court may temporarily suspend trial and consider proposed instructions without presence of accused. 143**Va**592, 130**SE**398.

815–42 100**WVa**501, 130**SE**655.

815–43 See also **Mont** 287**P**938.

815–43½–New. Where witness refusing to testify was called into chambers at recess and afterward testified, it was not error, although neither defendant nor his attorney was present in chambers. **Wash** 291**P**728.

815–44 173**Ark**1172, 294**SW**397; 199 **Ind**129, 154**NE**802; 124 **Or**61, 262**P**859, 860 [citCJ]; 103**TexCr**454, 281**SW**548; **Wash** 290**P**230. [a] (6) 108**TexCr**285, 300**SW**75. (11) Where one juror had been called to the box before defendant was brought into court room. 124 **Or** 61, 262**P**859. [f] **Time trial begins.**– 210**Ky**542, 276**SW**507.

816–57 226**Ky**850, 10**SW(2d)**827; 9 **PaDist&Co** 258, 260 [quotCJ]. [b] **Matters not constituting violation of right.**–147**Miss**428, 112**S**594. [c] **No error in defendant being in remote position** from jury when he did not object. 169**La**707, 125**S**862.

816–58 [a] **Right may be waived.**–33 **PortoRico** 48.

816–59 288**Pa**74, 135**A**538, 540 [citCJ]; 33**PortoRico** 48; **Wash** 287**P**57.

816–60 34**F(2d)**863.

816–61 165**La**758, 116**S**176; 33**Porto Rico** 48.

816–63 216**Ky**220, 287**SW**704; 175**Minn** 573, 222**NW**277; 56**ND**716, 219**NW**218; 102**TexCr**498, 278**SW**437. [c] **Where defendant came into courtroom just as jury was leaving under order to amend verdict,** and was present when jury returned verdict, he was sufficiently present at rendition of verdict, under rule. 102**TexCr**498, 278**SW**437.

817–65 226**Ky**47, 10**SW(2d)**447.

817–68 226**Ky**47, 10**SW(2d)**447.

817–69 191**NC**378, 131**SE**743.

817–71 191**NC**378, 131**SE**743.

817–73 Kan 291**P**782; 226**Ky**144, 10 **SW(2d)**639; 56**ND**716, 219**NW**218, 220 [citCJ]; 46**Philippine**403; 113**TexCr** 493, 22**SW(2d)**666. [b] **Facts not showing waiver.**–177**Minn**283, 225**NW**82.

818–78 336 **Ill** 404, 168**NE**321; 206 **Iowa**1250, 206**NW**260, 261 [citCJ]; 163 **La**146, 111**S**656; 191**NC**378, 131**SE**743.

818–80 [a] **Acquiescence by presence at time of waiver.**–163**La**146, 111**S**656.

818–81 6**F(2d)**897; 98**CalA**1, 276**P**595; 34 **OklCr**366, 246**P**653; 158**Tenn**370, 13 **SW(2d)**793. [c] **Where both fine and imprisonment may be imposed,** defendant has right to be present with counsel, and trial and conviction in his absence is invalid. 158**Tenn**370, 13**SW (2d)**793. [d] **Discharge of defendant** is not warranted by fact that verdict was received in his absence, defendant being entitled merely to new trial. 197**NC** 548, 149**SE**860.

818–84 [a] **In New York.**–224**AppDiv** 664, 229**NYS**76 (statute inapplicable where accused confined in state institution for insane).

818–86 158**Tenn**370, 13**SW(2d)**793.

818–87 [c] **Waiver cannot be made** by counsel in absence of accused. 34 **OklCr** 366, 246**P**653.

818–88 213**Ky**202, 280**SW**970; 225**Ky** 135, 7**SW(2d)**836; 191**NC**378, 131**SE** 743.

819–89 197**NC**548, 149**SE**860.

819–96 See also 167**Ga**326, 145**SE**654.

819–98 OklCr 287**P**429.

819–1½–New. No unreasonable restraint may be exercised over defendant during the trial. 49**SD**434, 207**NW** 224.

819–1⅓–New. The reasonableness of the restraint of defendant during the trial is within the discretion of the trial court. 49**SD**434, 207**NW**224.

819–1¼–New. Trial court has discretion to commit defendant to marshal's custody for absenting himself from court room during trial. 23**F(2d)**472.

819–3 [a] **Knowledge as basis of discretion** in refusing prisoner's request that irons be removed during trial need not come only from trial evidence. 199 **Ind**592, 159**NE**420.

819–5 199 **Ind**592, 159**NE**420, 423 [cit CJ].

819–6 156**SC**63, 152**SE**825(2dcase); 49 **SD**434, 207**NW**224.

820–9½–New. [§ 2075a] [4½]. **Counsel for Prosecution.** Special counsel may appear in criminal prosecutions as assistant to solicitor with consent of court. 214**Ala**172, 106**S**692.

820–12 23**AlaA**553, 129**S**295(1stcase); 176**Ark**916, 5**SW(2d)**946; 94**Fla**469, 114 **S**450; 216**AppDiv**508, 215**NYS**666; 221 **AppDiv**577, 224**NYS**529; 135**Misc**324, 239**NYS**358; 137**Misc**427, 244**NYS**342; 189**NC**799, 128**SE**152; 117 **OhSt**114, 157 **NE**488, 54**ALR**1220; 121 **Or**141, 253**P** 367, 370 [citCJ&Cyc]; 109**TexCr**455, 5 **SW(2d)**152. [b] (5) Accused has right to advise with counsel before and after being called to plead. 233**Mich**462, 206 **NW**986. (6) Right of being heard by counsel includes right to examine jurors. 160**La**655, 107**S**479. (7) Defendant is not entitled to counsel when being questioned by district attorney or police officers as to his willingness to confess. 121 **Or**141, 253**P**367. (8) Where accused had absconded, he ceased to be in actual or constructive custody of court, and had no authority to appear either by his own counsel or by counsel substituted for him by surety on his bail bond. 95**CalA**524, 273**P**66. [c] 23**F(2d)**892. [f] (2) Party can have but one attorney of record. 99 **NJEq**480, 134**A**558. [i] **Misdemeanor cases** are within constitutional guaranty. 113 **OhSt**512, 150**NE**74, 42**ALR**1151 (prosecution under Crabbe Act for unlawful possession of intoxicating liquor). [j] **Request for counsel implies request for time to procure counsel.**–216 **AppDiv**508, 215**NYS**666. [k] **All counsel employed by defendant** need not be heard in order that constitutional right be not infringed. 176**Ark**916, 5**SW(2d)** 946. [l] **Substituted counsel** will not be recognized by federal district court of Porto Rico in misdemeanor case where fees of original counsel are not paid or secured. 13**PortoRicoFed**339.

820–13 [d] **By whom information given.**–121 **Or**141, 253**P**367.

821–14 [a] **Where it was announced that accused was represented by counsel who was absent,** but record contained no evidence of it, and where no evidence tending to show innocence of accused was available, he was not prejudiced by action of trial court in proceeding without counsel. 92**PaSuper**48.

821–15 Ind 168**NE**18; 165**Minn**423, 206 **NW**952 (substantial compliance with statute).

821–16 33 **OhA**260, 169**NE**310; 111**Tex Cr**570, 13**SW(2d)**874. [a] **Court's ruling that defendant must either conduct own defense** personally or through counsel and abide by his election is not abuse of discretion. **Cal** 289**P**634.

821–18½–New. Accused take risk of refusing to follow counsel's advice. 199 **Ind**183, 156**NE**389.

821–18⅓–New. It is error to refuse permission to defendant's counsel to argue evidence before jury where general affirmative charge for state has been given but not reversible error where accused's testimony showed guilt conclusively. 21**AlaA**334, 109**S**116.

821–18¼–New. Refusing accused right to question witness when he is represented by counsel, is not error. **Mo** 289 **SW**637.

821–18⅕–New. An attempt of counsel engaged in a joint defense to withdraw after some testimony has been taken has been held not to be too late where the attempt was made as soon as counsel ascertained that defendants required separate counsel. **CalA** 281**P**443.

821–19 246**Mich**680, 225**NW**501; 117 **OhSt**114, 157**NE**488, 54**ALR**1220; 121 **OhSt**292, 168**NE**139; 105**TexCr**198, 287 **SW**251. [a] (4) While confined in penitentiary, injunction may be employed to enforce right. 117 **OhSt**114, 157**NE** 488, 54**ALR**1220. [b] **At counsel's request.**–117 **OhSt**114, 157**NE**488, 54**ALR** 1220. [c] **Right of private consultation on matters not connected with pending case** is not guaranteed by constitution.

85Mont215, 278P122. [d] **Right is limited to transaction of legitimate business.**–85Mont215, 278P122. [e] **Defendants jointly indicted** do not have right to joint consultation with attorneys. 156SC63, 152SE825(2dcase).

821–20 127Kan412, 273P490; 85Mont215, 278P122; 117 OhSt114, 157NE488, 54ALR1220. [a] 117 OhSt114, 157NE488, 54ALR1220. [b] (2) Warden permitting attorney to consult with prisoner through window fitted with mesh screen with guard standing outside glass door where he can see but not hear what is said furnishes opportunity for private consultation. 85Mont215, 278P122.

821–23 CalA 290P1083; 162La590, 110S766; 151Miss781, 119S298; 49ND348, 191NW628; 121 Or141, 253P367, 370 [citCJ&Cyc]. See also 32PortoRico 149. [b] **Defendants with adverse defenses** may waive independent counsel. Cal 285P704.

821–25 160La655, 107S479; 117 OhSt 114, 157NE488, 54ALR1220; 121 Or141, 253P367, 370 [citCJ&Cyc]; 196Wis113, 219NW380; Man [1928] 1DomLR731. [b] **Appeals.**–117 OhSt114, 157NE488, 54ALR1220.

821–28 23AlaA378. 125S793; 91CalA 649, 267P366; TexCr 24SW(2d)55.

822–32 104TexCr583, 286SW231.

822–34½–New. Objection to competency of counsel chosen by defendant is untenable where proof is conclusive and no error is shown. 324 Ill 96, 154NE 705.

822–35 80Mont20, 257P1041; 104TexCr 117, 282SW227; 106TexCr513, 293SW 1107; TexCr 26SW(2d)1070(2dcase) (capital felony). [c] (3) Counsel, appointed to represent defendant charged with murder had duty to appeal if they considered that course essential to protect his rights. 294Pa495, 144A428. [d] (2) Assignment after plea of not guilty has been held sufficient. OklCr 270P339. (3) Trial court's appointment of attorney for defendant in capital case before day of arraignment has been held not reversible error. 111TexCr507, 14SW(2d)1042. [h] **To prepare application for suspended sentence,** mandatory for court to appoint counsel before submitting request to jury. 106TexCr 513, 293SW1107. [i] **Statute relating to suspension of sentence held to require** court to appoint counsel to prepare and present application. 106TexCr513, 293 SW1107. [j] **In Mississippi.**–143Miss 686, 109S715. [k] **Statute contemplates that advice of attorney,** appointed to prepare and present application for suspended sentence, be available to accused touching admissibility of evidence. 112 TexCr650, 18SW(2d)171. [l] **No particular formula is required** in assignment of counsel for defendant. 250NY 452, 166NE163(2dcase). [m] **In Texas.**–110TexCr60, 7SW(2d)1082.

822–38 222Ky484, 1SW(2d)779 [cit CJ]; 162La590, 110S766; 165La653, 115S813; Mo 292SW440; 318Mo 628, 300SW743. [c] **Defendant's statement that she was unable to employ attorney,** and that she wanted to plead guilty and ask for suspended sentence, rendered it obligatory on court to appoint attorney. 112TexCr650, 18SW(2d)171. [d] **In misdemeanor case** court is not required to furnish counsel even on request. TexCr 26SW(2d)652. [e] **Time of request.**–Ind 173NE326.

822–39 222Ky484, 1SW(2d)779.

822–39½–New. Inexperience of additional counsel appointed at request of defendants is not prejudicial, where additional time was given to prepare defense and counsel announced they were ready for trial. 327 Ill 162, 158NE462.

822–40 80Mont20, 257P1041.

823–45 163La386, 111S795.

823–46 5PaDist&Co 263.

823–47 121 OhSt292, 168NE139. [c] **Compelling defendant to be represented** by lawyers also defending one with inimical interest held erroneous. CalA 281P443.

823–49 [a] (2) Court may properly permit state's counsel to make opening statement and to open and close argument without regard to fact that defendant had admitted killing deceased and defended on theory that at time of act he was insane. TexCr 8SW(2d)176.

823–50 SC 155SE849.

823–53 Fla 128S494. [a] **Court may permit opposing attorney** to reply to new material matter brought out on closing argument where opening argument was waived or makes only pretended one. Fla 128S494.

823–53½–New. Where district attorney waives opening argument, defense is precluded from answering his argument if latter merely answered arguments of defense, 159La435, 105S440.

823–53½–New. in absence of showing that waiver was a disadvantage to defense. 159La435, 105S440.

823–56 Fla 128S494.

823–58½–New. Counsel opening argument and refusing fairly to open case should not be permitted to reply to opposing counsel. Fla 128S494.

823–59 90Fla381, 106S741; Fla 128S 494. [g] **Where accused did not testify or produce any witness in his behalf but offered written document executed by third party** which formed no part of state's case, he was held not entitled to closing argument. 90Fla381, 106S741.

824–63 204Cal470, 268P909.

824–67 90Fla25, 105S130 (time of assembling left to sound discretion of trial court).

824–67½–New. Although court should not unduly speed trial, taking several days or two weeks to dispose of simple case, disposable in day or two, does not aid administration of criminal law. 221 AppDiv245, 222NYS607.

824–68 161Ga332, 131SE80. [b] **Submission of murder case to jury at about midnight** has been held not abuse of discretion. 230Ky815, 20SW(2d)998.

824–69 [a] 161Ga332, 131SE80.

824–72 106Conn701, 139A91 (illness of juror); 90Ela25, 105S130 (recesses of court within discretion of trial court). [f] **There is no difference,** in so far as necessity of showing diligence, materiality, etc., are concerned, between an application for postponement and one for continuance. 111TexCr315, 12SW (2d)800.

825–73 21AlaA611, 110S696; 162La299, 110S482; 48Nev405, 233P523; 103NJL 88, 134A611; 107TexCr332, 296SW547. [g] **Withdrawal of counsel.**–48SD409, 205NW25. [h] **Time to procure new counsel.**–168La855, 123S597. [i] **Refusal of further adjournment** after adjournment of twenty-six days on account of illness of juror held not abuse of discretion. Nebr 227NW314.

825–80 176Ark1003, 5SW(2d)322; 161 La167, 108S324; 48Nev405, 233P523 (refusal of adjournment of two hours to enable defense to get witnesses together to have them put under rule held not erroneous).

825–84½–New. , or to give defendant opportunity to obtain certified copy of judgment of conviction of principal state witness as a felon where the fact was elicited from him by defendant. 101TexCr63, 274SW588.

825–85 168Ark1122, 273SW353; 171 Ark778, 286SW935; 176Ark916, 5SW (2d)946; 143Miss676, 109S710; 111Tex Cr315, 12SW(2d)800.

826–86 See also 329 Ill 536, 161NE76.

826–87 161La988, 109S787 (refusal of delay of thirty minutes to find witnesses supposed to have driven in town from another state during the trial, and by whom it was expected to prove alibi, held no error in absence of giving names or showing witnesses would come in thirty minutes or reasonable time, or would prove the alibi).

826–94 19F(2d)62; 87CalA5, 261P531; 90CalA590, 266P295; CalA 290P594; 97 Fla908, 122S525; 200 Iowa306, 204NW 218; 235Ky735, 32SW(2d)51; 259Mass 453, 156NE890; 76Mont509, 248P201; 84Mont348, 275P757; 48Nev134, 228P 582; 196NC562, 146SE395; 26 OhA340, 159NE575; OklCr 278P665(2dcase); 47 RI 269, 132A734; Wash 287P57. But see 199 Ind146, 155NE819; 106TexCr 328, 291SW1104. Contra 109TexCr380, 5SW(2d)139, 61ALR318. [b] (1) 200 Iowa306, 204NW218. [d] 23AlaA35, 120S301(2dcase) (allowing jury to view auto in which deceased rode held error). [h] **Where defendant's consent** to view public street where homicide committed was narrowed to particular matters as to which testimony was conflicting, refusal to allow view held not abuse of discretion. 200 Iowa306, 204NW218. [i] **Constitutionality of statutes.**–147Miss428, 112S594. [j] **Discretion held not abused.**–259Mass453, 156NE890. [k] **Permission to view automobile held error.**–41GaA486, 153SE 380.

826–96 186Wis648, 203NW343 (where sheriff and prohibition officer accompanied jury).

826–98½–New. The court need not accompany the jury on view. 47RI 269, 132A734.

826–1½–New. Inspection by jury of still unlawfully seized is prejudicial. 235 IllA587.

826–1½–New. Order to make forcible entry into building cannot be complained of by defendant who has disclaimed any control over building. 47 RI 269, 132A734.

827–2 259Mass453, 156NE890; 261 Mass294, 158NE894.

827–6 257Mass198, 153NE793; OklCr 278P665(2dcase) (view not "receiving evidence"); 47RI 269, 132A734.

827–7 261Mass294, 158NE894.

827–10½–New. That doors were opened not within strict directions of the court was not prejudicial. 186Wis648, 203 NW343.

827–10½–New. Taking jar of homebrew away by prohibition officer during view was not prejudicial. 186Wis648, 203NW 343.

827–13 23AlaA470, 127S255; 337 Ill 333, 169NE169; 312Mo 655, 280SW1040, 1043 [quotCJ]. [d] **Ordering prosecuting witness and defendants into custody** and raising bail of latter, after questioning witness, all in presence of jury, held error. 322 Ill 546, 153NE673. [e] **Judge's laughing, talking, and fraternizing with state witnesses** as jury returned to court is not erroneous. Wash 286P51.

827–14 73CalA580, 239P82; CalA 293P 72; 47 Ida281, 274P108; 322 Ill 546, 153NE673; 312Mo 655, 280SW1040, 1043 [quotCJ]; 53ND931, 208NW566; 113 OhSt450, 149NE551; 31 OklCr317, 238P871; 136Wash582, 240P897. But see 316Mo 31, 292SW434.

827–15 23AlaA460, 126S890(2dcase); 71CalA575, 236P189; 80CalA81, 251P 688; 321 Ill 47, 151NE555; 250Mich679, 231NW63; 173Minn158, 217NW146; 312Mo 655, 280SW1040, 1043 [quotCJ].

827–16 194Wis385, 216NW488. See also 21AlaA644, 111S426.

827–17 245NYS245. [a] **Trial judge may interrupt** examination of witness by counsel, to clear up points, but counsel ordinarily should have fair opportunity to examine his client or his witness, subject to rules of evidence. 243 NY588, 154NE616.

827–18 33Ariz383, 265P609; 94CalA55, 270P468; 206Cal 35, 273P767; 71CalA 402, 235P467; 72CalA406, 237P757 (expressions of impatience); 78CalA455, 248P927; Iowa 229NW231; 219Ky205, 292SW835; 151Md118, 134A166; 307Mo 291, 270SW298; 117Nebr601, 221NW 683; NJ 135A552; 220AppDiv528, 221 NYS760; 245NYS245; 116 Or509, 241P 983; 142SC17, 140SE256; TexCr 295 SW574; TexCr 27SW(2d)196(2dcase); 153Va909, 150SE407; Wash 290P230. See also 33PortoRico 195. [a] (5) Where prosecuting attorney had remarked in argument that certain witness had been induced to participate in crime by accused and that therefore he should not prosecute such witness, remark of judge, in overruling objection thereto, to effect that prosecuting attorney had right to make such argument held not prejudicial error. 168Ark1122, 273SW353. (6) Judge's suggestion to prosecutor of necessity of proving venue. 324 Ill 322, 155NE310, (7) Improper remarks by court in course of argument by defendant's counsel have been held not prejudicial error, in view of court's statement, in explanation thereof, that he meant no more

by them than defendant's counsel agreed was law of case. 156Md240, 144A252. (8) Other instances. Cal 286P998. [h] **Judge is not controlled by private conversation with defendant's attorney** during adjournment that he would submit issue of murder or not guilty and his charge submitting issue of manslaughter is not by reason thereof unfair. 220 AppDiv528, 221NYS760. [i] **Sentencing and admonishing others than defendant** out of jury's presence not error. 324 Ill 322, 155NE310. [j] **Declaring defendant's bond forfeited** after jury retired is trivial. Mo 289SW557. [k] **Allowing preacher to announce meeting** in midst of trial is not prejudicial. 232Ky 590, 24SW(2d)280.

828-19 126Kan565, 567, 268P845 [cit CJ]; 240Mich59, 214NW935. [b] **Allusion to class of cases pending** is improper. 240Mich59, 214NW935.

828-20 78CalA380, 248P975.

828-22 31F(2d)908.

828-22½-New. Remarks of the court to defendant in the absence of the jury do not constitute reversible error. 103 TexCr433, 281SW844.

828-22¾-New. Remarks of a juror do not constitute error of trial court. 75 CalA657, 243P64.

828-22¾-New. Statements of judge during trial are not evidence. 106TexCr 361, 293SW1108.

828-23 [c] (2) Conversation by judge with attorney not employed in case may not be prejudicial. 101TexCr77, 273SW 855 (though unwarranted).

828-25 Mo 22SW(2d)787.

828-26 165La67, 115S370.

828-27 22AlaA108, 113888; 22AlaA583, 1188242 [certiorari den 218Ala166, 118 S248]; 172Ark76, 287SW586; 68CalA 95, 228P417; 70CalA531, 233P980 (opinion as to disputed facts); 72CalA 124, 236P934; 108Conn454, 143A561; Mo 279SW109; 80Mont181, 260P138; Mont 289P1037; 117Nebr601, 221NW 683; 144Va544, 131SE207 (adverse comment on verdict in another case not prejudicial in view of court's statement to jury). [a] **It is duty of court to** give such instruction on timely request. 73CalA580, 239P82.

829-28 21AlaA644, 111S426.

829-29 333 Ill 397, 164NE847; 129Kan 207, 282P723.

829-31 215Ala635, 112S212; 20AlaA 543, 104S46; 72CalA124, 236P934; 165 La842, 116S206; 316Mo 157, 289SW948; 106TexCr652, 294SW571. [a] (4) Statement that all participating in robbery wherein one is killed are equally guilty of murder. 207Cal 507, 279P145.

829-34 24F(2d)325 (personal altercation); 25F(2d)258 (prejudice by disrespect to counsel not shown); 21AlaA 559, 110852; 31Ariz427, 254P467; 171 Ark203, 284SW28; 94CalA55, 270P468; 75CalA265, 242P606; 75CalA642, 243P 461; 77CalA231, 246P147; 77CalA438, 246P1072; 78CalA380, 248P975; 85 Colo 442, 276P983; 237 IllA178; Mo 1 8SW(2d)834; Mo 18SW(2d)37 (counsel continually interposing unwarranted objections); NJSup 139A422; SC 155SE 409; Va 152SE547 (correction of counsel); 141Wash324, 251P589, 590 [cit CJ]; 143Wash464, 255P910. But see 72CalA124, 236P934. [c] (1) 20AlaA 606, 104S551. (3) Warning defendant's counsel from further asking leading questions is not prejudicial. 112TexCr 211, 168SW(2d)536. [d] (3) Statement on sustaining objection to defendant's question that "this is improper and prejudicial in this case" is not harsh treatment of defendant's counsel. 230 Ky250, 19SW(2d)218. [f] (2) Trial judges may not control counsel in determining what exceptions may be taken or manner of taking them. 22AlaA424, 116S409. [g] **Continuous fault finding.**–334 Ill 412, 166NE40. [h] **Improper cross-examination.**–Mo 18SW(2d)834. [i] **Counsel should move for mistrial** if considering statement by court to him as prejudicial to accused. Ga 154SE700.

830-35 23AlaA416, 125S398.

830-37 237 IllA178; Mo 256SW787.

830-38 69CalA214, 230P997; 73CalA 580, 239P82; 81CalA113, 252P1063; 334 Ill 11, 165NE178; 216Ky430, 287 SW949; 173Minn158, 217NW146; OklCr 276P518.

830-40 OklCr 287P1049.

830-41 312Mo 655, 280SW1040. [b] **Telling counsel to take stand if he wishes to testify** held not prejudicial. 169 La939, 126S431.

830-44½-New. Remarks of trial judge on law will not work reversal unless prejudicial to right results. 104TexCr 637, 285SW826.

830-44¾-New. Court directing counsel to sit down while examining witnesses is held not abuse of discretion. 107 TexCr365, 296SW552.

830-44¾-New. Any implied censure against the county attorney is not prejudicial. 129Kan827, 284P616.

830-45 25F(2d)258.

830-47 75CalA657, 243P64.

830-48½-New. or to adverse counsel, ND 229NW7.

830-49 ND 229NW7.

830-50 227Ky404, 13SW(2d)247.

830-52 8F(2d)841, 843 [citCJ]; CalA 276P641; 166Ga758, 144SE301; 126 Kan578; 153SC25, 150SE321. See also 32PortoRico 140. [b] **Statements of judge as to seeing witness talking during recess in violation of instruction** constitutes misconduct where judge is not witness. 208Cal 295, 280P983.

830-55 104TexCr391, 283SW813.

830-56 8F(2d)841, 843 [citCJ]; 77Colo 432, 236P1022.

831-59½-New. or who persistently makes voluntary, unresponsive statements or answers to questions; 8F(2d) 841.

831-61 121Kan507, 247P635; Va 152 SE547. [a] **Not prejudicial.**–243Mich 539, 220NW789.

831-62 153SC25, 150SE321 (judge's telling witness not to guess held not error); 104TexCr391, 283SW813.

831-65½-New. The admission of hearsay evidence of the instructions of the court to the witness in the absence of the jury is error. 100TexCr183, 272SW 475.

831-66 25F(2d)258; 23AlaA83, 121S 2(2dcase); 100CalA587, 280P708 (where defendant has no attorney); 37GaA 520, 140SE788 (examination held proper); 256 IllA233; 201 Iowa1, 206NW 281 (judge may question witness to secure pertinent answers, to enable him to rule on evidence, and where witness hesitates); 126Kan578, 270P610; 50ND 927, 198NW698; 31 OklCr317, 238P871; 294Pa573, 144A743; 298Pa10, 147A834 (2dcase); 93PaSuper348; 33PortoRico 881; 153SC487, 151SE64 (question held not improper); 156SC509, 153SE480; 142Va649, 128SE514, 516 [quotCJ]. [c] **Great latitude in examining witnesses** is allowed trial court. 153Va909, 150 SE407.

831-67 47RI 245, 132A547; 142Va649, 128SE514, 516 [quotCJ].

831-67½-New. Questions may be asked for purpose of clarifying testimony. 324 Ill 96, 154NE705; Miss 108S733.

831-69 331 Ill 489, 163NE357; 332 Ill 120, 163NE438; 198 Ind45, 152NE161 (should not garble witness' statement to give it inference plainly not intended by him); 51ND875, 201NW342 (conduct of judge held not unfair); 35PortoRico 886; 47RI 245, 132A547. But see 161 Ga640, 131SE682.

831-70 22AlaA373, 115S849; 322 Ill 546, 153NE673; 326 Ill 327, 157NE247; 83NH435, 144A124; 31 OklCr317, 238P 871; TexCr 21SW(2d)529.

831-71 166Ga758, 144SE301.

831-72 168Ga457, 148SE157; 334 Ill 412, 166NE40.

831-73 322 Ill 473, 153NE710; MoA 78SW(2d)375; 147SC82, 144SE839.

831-74 15F(2d)359; 22F(2d)934; 216 Ala475, 113S393; 33Ariz354, 264P1083; 175Ark870, 300SW451; 201Cal 290, 257 P46 (where jury was not informed of contents of letter rejected); 68CalA95, 228P417; 199CalA513, 250P164; 86 CalA791, 261P526; 161Ga640, 131SE 682 (remark by trial court that "you seem to be fishing anyhow" without merit as ground for new trial, though not approved by appellate court); 163 Ga206, 135SE748; 319 Ill 306, 150NE 16; 334 Ill 11, 165NE178; 338 Ill 596, 170NE685; 230Ky250, 19SW(2d)218 (remarks held not to constitute harsh treatment of counsel); 119 Or430, 249P 1049; 142SC17, 140SE256; 159Tenn112, 17SW(2d)30; 104TexCr619, 286SW214; 105TexCr212, 287SW250; 49Vt202, 24 AmR124; 141Wash660, 252P118; 141 Wash515, 252P128; 145Wash117, 259P 29. [d] **Sustaining objection of accused on erroneous ground of his right to refuse to give evidence against himself** does not deny him any constitutional right. 146SC138, 143SE674.

832-75 215Ky613, 286SW696.

832-76 163Ga206, 135SE748; 40GaA 546, 150SE460; 319 Ill 306, 150NE16; 166La924, 118885; Mo 29SW(2d)688; 104TexCr619, 286SW214; 109TexCr339, 4SW(2d)565; 199Wis63, 225NW191. [a] **Court's remark on statements not being considered as evidence** held not to have prevented defendant from testifying. Ind 169NE676.

832-77 15F(2d)339; 175Ark264, 298 SW993; 312Mo 655, 280SW1040; 104 TexCr447, 284SW568.

832-78 175Ark752, 2SW(2d)36, 40 [quotCJ].

832-82 28Hawaii350. [a] (1) Ariz 282 P930; 101Vt124, 141A686.

832-83 25F(2d)430; 22AlaA373, 115S 849; 69CalA214, 230P997; 162Ga208, 132SE911; 166Ga645, 144SE193; 327 Ill 152, 158NE386; 331 Ill 581, 163NE 373; Ill 172NE29; 206 Iowa397, 220 NW13; 167La70, 118S696; 246Mich680, 225NW501; 31 OklCr317, 238P871; 39 OklCr402, 266P495; OklCr 287P813; OklCr 287P1049; 104TexCr447, 284SW 568; 106TexCr165, 291SW250; Va 152 SE547 (conduct indicating his opinion on controverted facts); Va 152SE556; 103WVa237, 136SE862; 194Wis385, 216 NW488. But see 25F(2d)258. [a] (1) 172Ark613, 290SW59; 177Ark892, 9SW (2d)21; 180Ark873, 23SW(2d)627; Ill 173NE55; Kan 291P745; 165La67, 115 S370; 154Miss862, 123S892; 307Mo 291, 270SW298; Nebr 229NW271; OklCr 280P865; 153SC25, 150SE321 (judge's statement that he did not mean to elicit favorable answer held not error where judge meant to say that witness did not understand question); SC 155SE409; 107TexCr365, 296SW552; 113TexCr546, 228SW(2d)676; 142Wash539, 253P811; 148Wash82, 268P130; 150Wash326, 272 P964. (8) Court's inquiry as to residence of defendant's father. 324 Ill 322, 155NE310. [d] **Court should not express opinion on evidence directly,** indirectly, explicitly, or by innuendo. 103WVa237, 136SE862.

833-85 69CalA214, 230P997; 73CalA 580, 239P82; 78CalA488, 248P986; 101 TexCr430, 276SW286 (remark held not expression of opinion); 104TexCr447, 284SW568; TexCr 24SW(2d)417; 103 WVa237, 136SE862; 194Wis385, 216NW 488. [a] **Comments, even in jest,** on testimony, at expense of accused, should not be made by court in presence of jury. 108WVa5, 150SE144.

833-86½-New. nor does it apply to a statement of an undisputed fact; 146 Miss237, 111S303.

833-87 172Ark76, 287SW586.

833-88 162Ga208, 132SE911; 215Ky 613, 286SW696.

833-89 33PortoRico 195.

833-92 23AlaA470, 127S255.

833-93 But see 214AppDiv804, 210NYS 522.

833-93½-New. Remark that "state is fair" as to question asked is held not comment on evidence. 141Wash515, 252 P128.

833-93½-New. In a prosecution for manufacturing intoxicating liquor remark refusing to allow liquor to go to jury room because it was very poisonous is not error. 119 Or341, 249P635.

833-93¼-New. Suggestions to a counsel, as to how the incompetency in the evidence may be corrected, are not improper. 150SC341, 148SE184.

833-93½-New. It is not error for court to comment on failure of defendant relying on alibi to call witnesses to corroborate his testimony that he was at place some distance from scene of crime at time it was committed. 93PaSuper 57.

833–94 23AlaA460, 126S890(2dcase); 35Ariz321, 278P63; 170Ark979, 282SW5; 73CalA580, 239P82; 78CalA488, 248P986; 94Fla149, 113S726; 159La779, 106S302; 80Mont181, 260P138; 193NC754, 138SE136; 193NC796, 138SE166; 103TexCr456, 281SW858; 103TexCr655, 281SW1062; 103TexCr674, 282SW235; 104TexCr447, 284SW568; 105TexCr563, 289SW385; 106TexCr165, 291SW250; 106TexCr190, 292SW227; 142Va649, 128SE514; 104WVa433, 140SE139. [a] 168Ark1122, 273SW353; 78CalA488, 248P986; 163Ga186, 136SE72; 319 Ill 306, 150NE16; Ill 173 NE55; 126Me177, 136A817; 253Mass509, 149NE205; 265Mass114, 163NE741; 146Miss237, 111S303; 50Nev212, 255P1002; 192NC20, 133SE190; 110TexCr52, 7SW(2d)532; 110TexCr241, 8SW(2d)124; 110TexCr267, 8SW(2d)149; 153Va909, 150SE407. [b] **Where depositions of two witnesses are read,** instruction referring to one as to legal effect thereof is not objectionable as equivalent to instruction to disregard. 215Ky613, 286SW696. [c] **Remarks held objectionable.**–170Ark979, 282SW5.

833–95 78CalA488, 248P986; 94Fla149, 113S726; 40GaA125, 149SE79; 334 Ill 412, 166NE40; 193NC754, 138SE136; 113 OhSt450, 149NE551; 105TexCr395, 289SW40; 110TexCr616, 9SW(2d)1035(2dcase).

833–95 [a] 169Ga814, 152SE76; 333 Ill 258, 164NE682; 335 Ill 570, 167NE852; 107TexCr365, 296SW552; 110TexCr52, 7SW(2d)532.

833–96 119 Or341, 249P635. See also 170Minn441, 213NW34.

834–98 22F(2d)776; 36F(2d)699. [b] **Comments should be impartial.**–12F(2d)717.

834–98½–New. Judge may state to jury his findings as to preliminary facts required to be found by him. 253Mass509, 149NE205.

834–99 NJ 130A461.

834–1 15F(2d)686; 175Ark752, 2SW(2d)36, 40 [quotCJ]; 69CalA214, 230P997; 71CalA575, 236P189; 78CalA488, 248P986; 97CalA501, 275P961; 94Fla149, 113S726; 334 Ill 412, 166NE40; 129Kan830, 284P424; 39 OklCr402, 266P495; OklCr 287P1049; OklCr 287P1070; 104TexCr85, 282SW587; 111TexCr601, 13SW(2d)378; 142Va649, 128SE514; 103WVa237, 136SE862. But see Sask [1929] 2DomLR300. [a] 13F(2d)451; 216Ala342, 113S391; 203Cal144, 263P216; 79CalA488, 250P190; GaA 155SE511(2dcase); 229Ky139, 16SW(2d)793; NJSup 136A805.

834–2½–New. Remark by court that witness was deputy sheriff, in response to objection that witness was not put under rule, is not error as reflecting on credibility. 21AlaA415, 109S122.

834–3 14F(2d)833; 14F(2d)835; 68CalA94, 230P1001; 141Miss49, 105S851.

834–6 229Ky139, 16SW(2d)793.

834–6½–New. For a judge to disparage defendant's statement not under oath, which the jury are authorized to believe in preference to sworn testimony, deprives defendant of a substantial right. 40GaA125, 149SE79.

834–8 6F(2d)809; 320Mo209, 7SW(2d)269 (remarks held not improper comment). [d] **Questions by court** to defendant testifying at second trial as to failure to offer himself as witness at first trial held competent and relevant. 271US494, 46SCt566, 70L ed1054. [e] **Remarks held not objectionable.**–294Pa544, 144A542. [f] **Remark held not comment on defendant's failure to testify.**–34F(2d)282.

834–9 [a] **Exception to remark of judge that defendant was not obliged to produce evidence to assist government** is held without merit. 254Mass520, 150NE854.

835–15 See also 144Va544, 131SE207.

835–15½–New. The action of the court in commending the jury on the rendition of a verdict of guilty in a homicide prosecution before trial of the issue of insanity by the same jury has been held prejudicial and ground for new trial. 206Cal259, 274P63(2dcase).

835–16 207Cal73, 276P1006.

835–17 143Miss421, 108S899. [c] **Refusal of request by district attorney** to commit witness for contempt held not reversible error. 143Miss421, 108S899.

835–18 68CalA758, 230P191; 103TexCr129, 280SW824, 825.

835–18½–New. Error in threat to punish defense counsel for contempt cured by charge to disregard it. 104TexCr637, 285SW826.

835–19 104TexCr637, 285SW826.

835–24 150SC449, 148SE472; TexCr 24SW(2d)41 (in absence of jury). See also 41F(2d)449. [a] **Where commitment is made without knowledge of jury,** there is no prejudicial error. 96PaSuper76.

835–26 Fla 130S273; 247Mich602, 226NW337(2dcase); 39 OklCr402, 266P495; OklCr 287P1070 (direction to county attorney to hold witness); 111TexCr601, 13SW(2d)378. [a] (1) 141Miss49, 105S851. [d] **Where it was not shown that jurors knew** of issuance of warrant and arrest of witness, verdict could not be disturbed. 167La628, 120S31.

835–29½–New. Not improper for court to direct sheriff to hold witness until county attorney could draw complaint against him for violation of law. 121Kan516, 247P430.

835–29¼–New. Where a witness, while testifying, admits commission of a crime punishable in the state, it is not a mistrial for the court to order him committed into the custody of the sheriff. 58ND792, 228NW199.

835–29¼–New. Sentence of state's witness in jury's presence after guilty plea to accusation arising from same offense as defendant's has been held to require mistrial. 41GaA458, 153SE536(2dcase).

836–34 8F(2d)9; 175Ark1083, 3SW(2d)23; 72CalA124, 236P934; 92Fla1062, 111S725; 162Ga777, 135SE187; 337 Ill 333, 169NE169; 337 Ill 290, 169NE214; 222Ky695, 2SW(2d)378; 234Ky268, 27SW(2d)946; 165La380, 115S627; 148Miss229, 114S352; NJSup 137A712; NM 290P322(2dcase); 197NC576, 150SE25(2dcase); 58ND732, 227NW230 (permitting qualified attorney to assist state's attorney in trial of criminal action); OklCr 282P903; 288Pa74, 135A538; 86PaSuper483; 47RI245, 132A547; SD 232NW909; 103WVa148, 136SE842. But see 30F(2d)25; 201Cal618, 258P607. But see 40GaA125, 149SE79. [g] **Request for instruction as to improper remarks** should be made where effect may be removed by admonition to jury. 73CalA580, 239P82.

836–34½–New. A point once saved by exceptions is saved for all purposes of the case unless waived, 76Mont222, 246P250.

836–34½–New. especially where counsel is advised by the court that his objection upon a point would go to every proceeding in the cause. 76Mont222, 246P250.

836–34¼–New. Objection to expressions and statement of court as prejudicial to defendant in toto is sufficient although some matters were more prejudicial than others. 24F(2d)512.

836–37 272US542, 47SCt173, 71L ed398. [a] **Constitution held merely to guarantee common-law right.**–272US542, 47SCt173, 71L ed398.

836–39 72CalA292, 237P390 (right is deemed most substantial one); 103Conn511, 131A429; 215Ky725, 286SW1046; 163La146, 111S656; 244NY196, 155NE98; 39 OklACR233; 133SC491, 131SE603; 137SC145, 134SE885; 49SD551, 207NW535; 106TexCr354, 292SW247; TexCr 30SW(2d)330; 142Va577, 128SE633; 142Va596, 128SE638. [a] (1) 133SC491, 131SE603; 137SC145, 134SE885. (3) Object is to provide person who is being tried for public offense full opportunity for cross-examination. 78CalA561, 248P990. [e] **Constitutional guaranty not violated** by statute permitting proof of defendant's general reputation as violator of prohibition laws in prosecution for violation thereof. 142Va577, 128SE633; 142Va596, 128SE638. [f] 77CalA10, 245P1106.

836–42 215Ky725, 286SW1046.

837–44 103Conn511, 131A429; 338 Ill 128, 170NE240; 30NM309, 233P49; 120 OhSt97, 165NE569; 133SC491, 131SE603, 605, 607, 609 [citCyc]; 137SC145, 134SE885.

837–44½–New. Failure to provide an interpreter on request of a defendant who does not understand English but who is represented by counsel does not violate the right to meet witnesses face to face. 30Ariz159, 245P356.

837–53½–New. Not error to permit state to proceed with testimony where defendant in misdemeanor late in returning after noonday adjournment. 215Ky725, 286SW1046.

837–54 103Conn511, 131A429; 167La413, 119S410; 49RI482, 144A150; 106TexCr593, 294SW573; TexCr 26SW(2d)639 (deed); 142Wash653, 254P445.

837–56 103Conn511, 131A429; 208Ky538, 271SW566 (plat); 117 OhSt568, 159NE831; 142Wash653, 254P445.

838–58 103WVa653, 138SE318. [b] (1) OklCr 282P370. (2) Affidavit and search warrant reciting possession by defendant of intoxicating liquors and reputation of defendant as seller are inadmissible as independent evidence. OklCr 270P858(2dcase). (3) Reading of affidavit for search warrant to jury was invasion of right granted defendant to meet witnesses face to face. 228Ky691, 15SW(2d)444. [c] **Certificate of registry of death** is inadmissible to prove death. 161La620, 109S143.

838–59 320 Ill 287, 150NE628; 232Ky404, 23SW(2d)594; 244NY196, 155NE98.

838–59½–New. Admission of book entries made in regular course of business by third person who cannot be produced does not violate the constitutional guaranty. 85PaSuper7.

838–59¼–New. Refusal to compel state to deliver to defendant letter written by defendant shortly before homicide is held not error. 105TexCr470, 289SW57.

838–64 163La146, 111S656; 137SC145, 134SE885.

838–66 137SC145, 134SE885.

838–67½–New. Under some statutes defendant has a right to apply for permission to take depositions of nonresident witnesses only after issue of fact has been joined. OklCr 269P377.

838–68 113TexCr1, 18SW(2d)179.

839–74 22AlaA223, 114S361; 77CalA10, 245P1106; 81CalA528, 254P585; 239Mich105, 214NW130; Mo 285SW995, 996 [quotCJ]; 30NM309, 233P49, 53 [quotCJ]; 221AppDiv577, 224NYS529; OklCr 276P515; OklCr 278P393; OklCr 289P1111; 39OklACR233; 120 Or652, 253P371; 102TexCr566, 280SW210; 108TexCr404, 1SW(2d)318; 110TexCr220, 7SW(2d)543. [b] 81CalA528, 254P585.

839–76 78CalA561, 248P990; 127Me234, 142A857; 320Mo1, 6SW(2d)562; 49ND912, 194NW335. See also 34NM223, 279P945.

839–78 OklCr 276P515.

839–79 30NM309, 233P49.

839–80 39 OklACR233.

839–82 30NM309, 233P49.

840–87 Mo 285SW995.

840–89½–New. The use of an interpreter at a trial is in the discretion of the judge. 7PaDist&Co611.

840–92 31Ariz427, 254P467; 30Hawaii697; 215Ky725, 286SW1046; 225Ky135, 7SW(2d)836; 163La146, 111S565; 133SC491, 131SE603, 605, 607, 609 [cit Cyc]. See also 165La758, 116S176. [a] **Statutes.**–248NY255, 162NE24 (facts held not to show waiver).

841–95 Ariz 252P467.

841–96 137SC98, 135SE641.

841–97 7F(2d)355; 33F(2d)396 (though defendant is minor); 83CalA236, 256P569; 137SC98, 135SE641.

841–1 23F(2d)472; 21AlaA261, 107S226; 171Ark658, 285SW367; 177Ark742, 9SW(2d)15; 197CalA200, 239P1080; 94CalA7, 270P398; 78CalA598, 248P969; 82CalA28, 255P205; 38GaA365, 143SE904; 333 Ill 397, 164NE847; 203Iowa929, 210NW465; 218Ky72, 290SW1075; 228Ky674, 15SW(2d)463; 168La903, 123S614; 317Mo475, 296SW137; MoA 298SW1044; OklCr 292P1058; 298Pa10, 147A834(2dcase); 100TexCr516, 271SW906; 101TexCr59, 274SW158;

111TexCr21, 108SW(2d)991; 151Wash 557, 276P857.

841-2 101TexCr59, 274SW158; TexCr 278SW(2d)165.

841-3 Cal 230P1080; 101TexCr59, 274 SW158.

841-4 85Colo 442, 276P983.

842-9 OklCr 271P956.

842-11 [b] **Refusal to separate witness, after testifying,** from other witnesses where witnesses had been put under rule, is held not error. 215Ky193, 284SW1023.

842-16 23F(2d)547; 171Ark658, 285 SW367; Iowa 227NW601; 228Ky674, 158W(2d)463; 100TexCr516, 271SW906.

842-17 Utah 269P480.

842-18 156SC63, 152SE825(2dcase); Utah 269P480.

843-23 218Ky72, 290SW1075; 102Tex Cr13, 277SW138 (admission of testimony not error).

843-24 83CalA302, 256P616. See also 78CalA598, 248P969.

843-26 246Mich429, 224NW387; 102 TexCr13, 277SW138.

843-28 22AlaA129, 113S469; 100Tex Cr516, 271SW906.

843-29 333 Ill 397, 164NE847.

843-37 105TexCr8, 284SW961.

843-38 161La1010, 109S819; 105Tex Cr8, 284SW961; 106TexCr528, 293SW 827; 106TexCr570, 294SW205; 108Tex Cr566, 28W(2d)227; 109TexCr258, 4 SW(2d)56. [c] **Court may enforce rule** by ordering witnesses to retire, ejecting them, or fining them for contempt on disobedience. 171Ark658, 285SW367.

843-40 142Wash417, 253P450.

844-41½-New. Permitting witnesses to testify who have heard other testimony before rule excluding them was called for is within discretion of court. 155Tenn549, 296SW20.

844-43 142Wash417, 253P450.

844-44 219Ala46, 121S38; 334 Ill 11, 165NE178; 218Ky72, 290SW1075; 165 La47, 115S363; 168La161, 121S609; 168 La903, 123S614; 235Mich393, 209NW 99; 144Miss437, 110S119; 114Nebr404, 207NW928; 100TexCr415, 273SW573; 104TexCr567, 285SW1094; 151Wash 557, 276P857.

844-45 50Nev212, 255P1002, 1009 [cit CJ].

844-47 317Mo 475, 296SW137; 50Nev 212, 255P1002, 1009 [citCJ].

844-48 165La842, 116S206; 100TexCr 415, 273SW573.

845-51 115 OhSt350, 154NE728 (witness not under subpœna).

845-52 21AlaA261, 107S226; 164La813, 114S696; Mo 285SW1000; 103TexCr 508, 281SW1054; TexCr 27SW(2d)797.

845-54 105TexCr266, 288SW200.

845-54½-New. or where at the time of the order there was nothing to indicate that the order referred to him. 114Nebr 404, 207NW928.

845-57 109Conn124, 145A761.

845-58 15F(2d)965; 161La368, 108S 773; 166La836, 118S38; 170La630, 128 S658; 259Mass128, 156NE57. But see 127Mo197, 142A728. [c] **Accused cannot compel calling of particular witness.** 98Fla881, 124S445. [d] **Prosecution's failure to call witness first mentioned in assignment of errors** and not required to be produced is not erroneous. 250Mich334, 230NW196.

845-60 15F(2d)168; 68CalA186, 228P 733 [citCJ]; 167La1050, 120S853; 300 Pa375, 150A649.

845-62 300Pa375, 150A649.

846-65½-New. The prosecution is not required to produce as exhibits all objects or documents referred to in, or the existence of which may have been suggested by, the testimony in the case. 68CalA186, 228P733.

846-65¼-New. In a prosecution for receiving a stolen automobile the state is not required to produce the stolen property. 256Mass214, 152NE60.

846-65¼-New. A search warrant under which evidence introduced was obtained must be produced on demand at the trial. 230Ky391, 20SW(2d)75 (waiver).

846-66 [a] **Positive duty.**-127Mo197, 142A728.

846-67 15F(2d)965.

846-69 91Fla682, 108S842, 845 [quot CJ]; 322 Ill 473, 153NE710; 108TexCr 645, 18SW(2d)1095. See also 90Fla25, 105S130.

846-72 20F(2d)269. [c] **Defendants could not complain** where they refused to take advantage of court's offer to call and cross-examine witnesses named on indictment but not called. 338 Ill 636, 170NE750.

846-75 237Mich654, 212NW958.

846-80 [a] (4) It is duty of prosecutor to have subpœnas issued for material witnesses whose names are indorsed in information and to use such other means as are at hand to secure their presence. 240Mich75, 215NW5. (5) Where members of state police force whose names were indorsed on information and who are material witnesses fail to appear, prosecutor does not show due diligence by showing request to their superior officer to have them present. 240Mich75, 215NW5. [a] (6) In prosecution for driving while intoxicated, eyewitnesses to accident need not be called, but only as to intoxication. 250Mich334, 230NW196.

847-81 91Fla682, 108S842; 167La279, 119S48.

847-83 166La836, 118S38.

847-88 91Fla682, 108S842, 845 [quot CJ].

847-94 72CalA526, 237P786; 142Miss 456, 107S674.

848-99½-New. and this is the rule in absence of statute. 72CalA526, 237P 786.

848-2 111TexCr570, 13SW(2d)874.

848-3 142Miss456, 107S674 (accomplice); 115 OhSt542, 155NE189; 152 Wash365, 278P149.

848-3½-New. There is no rule of law justifying the court in seeking to compel a witness for either side to talk to counsel for the other side if the witness is unwilling to do so. 100TexCr664, 274SW582.

848-3¼-New. A witness who is not placed under bond, or who is so placed and gives bail, is free to talk to anyone he wishes. 152Wash365, 278P 149.

848-3¼-New. A witness detained under bond should be placed as nearly as possible in the same condition as he would be if unrestrained, and persons desiring to speak to him should not be subjected to limitations or embarrassment. 152 Wash365, 278P149.

848-5½-New. It is not error for the court to refuse to direct a state's witness to go in company with other persons and point out the place where the witness found a still in order that the persons accompanying him may testify as to the location and surroundings. 105 TexCr673, 290SW540.

848-6 165La380, 115S627.

848-8½-New. Defendant is not denied proper process to secure attendance of his witnesses where his definite request for attendance of a certain witness was granted and such witness testified for defendant at the trial. 67CalA445, 228 P50.

848-8¼-New. Nor is he denied such process where during the trial he suggests that other witnesses are desired by him properly to make his defense but makes no demand for any particular witnesses. 67CalA445, 228P50.

848-10½-New. The court may permit the state to recall defendant for further cross examination. Miss 107S385.

848-10¼-New. Denial of defendant's request that she be recalled for further examination by the state is not error. Miss 107S385.

848-20 [c] **Rule no longer prevails in** Louisiana. 169La109, 124S188.

849-21 262Mass185, 159NE518.

849-23 35GaA388, 133SE273; 35GaA 383, 133SE311; 36GaA585, 137SE413; 36GaA741, 138SE258.

849-23½-New. The jury may believe the statement in part and reject it in part. 36GaA741, 138SE258.

849-27 166Ga296, 143SE371.

849-46 39GaA475, 147SE400(1stcase).

850-47 39GaA71, 146SE774.

850-51 16F(2d)830; 216Ala475, 113S 393; AlaA 129S706; 82CalA389, 255P 839; CalA 292P675; Ga 154SE700; 339 Ill 448, 171NE540; 216Ky98, 287SW235; 222Ky248, 300SW625; 161La532, 109S 56; 74Mont269, 240P365; 104NJL512, 141A85; 156SC363, 153SE340; 107TexCr 444, 296SW897. [c] See also 324 Ill 516, 155NE373. [d] **Jury should be retired on defendant's request,** where facts to establish probable cause for search without warrant are uncontroverted. 112TexCr533, 17SW(2d)1050.

850-52 92Fla699, 109S811; 38GaA648, 145SE106; 44 Ida43, 254P788, 52ALR 463; 323 Ill 530, 154NE410; 168La153, 121S607; OklCr 279P365 (duty of court to exclude jury); OklCr 287P791; 104 TexCr185, 283SW520; 106TexCr321, 292 SW231; TexCr 29SW(2d)769; 101Vt5, 139A769; Wis 232NW866. [a] **Jury should have been excluded** while court heard testimony on probable cause. TexCr 21SW(2d)514.

850-53 90CalA27, 265P366; 251Mich 542, 232NW384. [a] **In Illinois.**-329 Ill 278, 160NE575.

850-54 44 Ida43, 254P788, 52ALR463; 321 Ill 397, 152NE149; 323 Ill 530, 154 NE410; 325 Ill 232, 156NE274; 334 Ill 324, 166NE129; Ill 172NE812. But see 102TexCr415, 278SW216. [a] **Refusal to dismiss jury while hearing evidence on voluntary character of confession** held error. 323 Ill 530, 154NE410. [b] **Where no question was raised as to voluntary character of defendant's statement,** it was admissible without preliminary hearing out of jury's presence. 335 Ill 217, 167NE1. [c] **Taking evidence before jury after prima facie showing before court** is proper practice. 33 F(2d)699.

850-54½-New. Reading of statement of codefendant in the presence of the jury has been held error. 196 Ind534, 149 NE59.

850-55 204 Iowa1135, 216NW642; 101 TexCr651, 277SW116. [a] **Thus** refusal to permit defendant to question interpreter as to confession in jury's absence is not error. 101TexCr651, 277SW116.

850-56½-New. It is not error for the court to refuse to retire the jury and permit a witness called by the prosecution to relate the entire transaction in the absence of the jury for the purpose of defendant's bill of exceptions where both defendant and the court knew what the testimony would be. 103TexCr205, 280 SW586.

850-56¼-New. Where an objection to the evidence is on the ground of the absence of a search warrant or on the ground of insufficiency of evidence to show probable cause, the court should hear evidence on admissibility out of hearing of the jury. 155Miss386, 124S 364.

850-60½-New. Rules of evidence should not be rigidly adhered to when they would be subversive of ends of truth and justice. 230Ky411, 19SW(2d)1091, 66 ALR360.

851-64 See also 97Fla290, 120S561.

851-66 206 Iowa365, 218NW936; TexCr 32SW(2d)471.

851-68 20AlaA412, 103S697; 72CalA 226, 237P66; 318 Ill 388, 149NE273; 317 Mo 330, 296SW370; Mo 2SW(2d)756; Mo 14SW(2d)441; Mo 24SW(2d)1020; 103NJL663, 138A575; 34NM22, 276P 291; 43 OklACR321 [reh pending]; 49 SD429, 207NW454; Vt 145A413. [c] **Question must not be too general.**-22 AlaA17, 111S899. [d] **Time of making offer.**-IndA 169NE338. [e] **Court not required to listen to argument as to relevancy of evidence.**-SC 155SE409.

851-69 212Ala606, 103S468; 21AlaA371, 108S625; Colo 258P226; 229Ky139, 16 SW(2d)793; 311Mo 391, 279SW23; 313 Mo 436, 282SW22; Mo 2SW(2d)755; Mo 6SW(2d)903; Mo 23SW(2d)122; 38 OklCr34, 259P173; OklCr 292P867; 43 OklACR321 [reh pending]; Or 289P 1053; 101TexCr670, 276SW919; Vt 145 A413; Wyo 288P18.

851-70 212Ala606, 103S468; 22AlaA 652, 119S594(3dcase); 20AlaA412, 103 S697; 21AlaA371, 108S625; 43 OklACR 321 [reh pending]; 116 Or451, 241P846.

851-71 199 Ind489, 158NE480.

851-74 AlaA 129S787. [b] **Harmful and illegal evidence** should be excluded. 226AppDiv104, 234NYS567.

851-75 101Vt30, 139A918; Vt 147A 682.

851-75½-New. Exclusion of question

held proper where question does not indicate that answer would be relevant or material. 22AlaA17, 111S899.

851-75⅓-New. An offer of proof, which follows an exception to a ruling sustaining objection to a question, presents nothing to the court for action. 199 Ind 489, 158NE480.

851-75¼-New. A trial judge should not anticipate an offer of evidence and by thus acting attempt to close the door to such offer being placed regularly in the record. 295Pa264, 145A 89.

851-75½-New. Refusal of opportunity to produce witnesses to contradict prosecuting witness is not error in absence of offer of proof. Or 289P1053.

851-76 22AlaA17, 111S899; 82Colo 205, 258P226; OklCr 292P875; 101Tex Cr158, 274SW619 (insufficient showing as to time); 101TexCr670, 276SW919. See also 29Hawaii90.

851-77 22AlaA17, 111S899.

852-78 21AlaA528, 109S560; 168Ark 1145, 273SW19; 295Pa264, 145A89.

852-82 Vt 145A413.

852-83 295Pa190, 145A85; Vt 147A 682.

852-85 See also 22AlaA66, 111S452.

852-86 72CalA226, 237P66; 41 Ida616, 243P359; 264Mass221, 162NE308; 32 NM319, 255P396; 113TexCr265, 20SW (2d)426. But see 205 Iowa849, 216NW 710.

852-87 32NM319, 255P396.

852-93 8F(2d)815; 17F(2d)69; 24F (2d)910; 25F(2d)90; 36F(2d)1 (evidence held properly admitted); 41F (2d)193 (written statement properly limited to two defendants was admissible); 75CalA365, 242P906; 85CalA670, 259P 1019; 39GaA829, 148SE618(2dcase); 321 Ill 254, 151NE870; 214Ky280, 283 SW84; 76Mont421, 246P959; NJ 150 A367; 156SC509, 153SE480; 103TexCr 636, 282SW251.

853-94 214Ky280, 283SW84.

853-95½-New. Refusing instruction that jury should disregard evidence which was admissible against one defendant is erroneous. Wash 286P69.

853-96 25F(2d)430; 30F(2d)342; 31F (2d)19; Ark 30SW(2d)865; 72CalA160, 236P987; 80CalA151, 251P335 (confession admitted in evidence with proper instruction); 82CalA465, 255P777 (evidence properly limited); 85CalA670, 259P1019; 319 Ill 359, 150NE263; 321 Ill 254, 151NE870; 323 Ill 37, 153NE 702; Ill 172NE743; 200 Ind149, 162NE 51; 214Ky280, 283SW84; 165La497, 115S728; 166La924, 118S85; 175Minn 218, 220NW563, 61ALR970; 103TexCr 636, 282SW251; 108TexCr285, 300SW 75; Wis 229NW51. [c] **Instructions** held sufficiently to protect defendant. 319 Ill 606, 150NE347.

853-98 8F(2d)593.

853-99 8F(2d)593.

853-2 23F(2d)260 (whether conspiracy charged or not); 203Cal 510, 265P 184. But see 23F(2d)551. [b] **Instructions held proper.**-13F(2d)961.

853-6 203Cal 510, 265P184; 227Ky 223, 12SW(2d)336.

854-7 16F(2d)451; 19F(2d)801; 29 Ariz247, 240P863; 181Ark1035, 27SW (2d)94; 3Del 127, 131A567; 46 Ida456, 268P1; 200 Ind149, 162NE51; 221Ky 474, 298SW1096; 226Ky584, 11SW(2d) 410; 312Mo 673, 280SW1026, 44ALR 848; 115Nebr838, 215NW107, 53ALR 1057; 149SC367, 147SE310; 101TexCr 267, 275SW837; TexCr 25SW(2d)860; TexCr 26SW(2d)260(2dcase). [a] (3) Refusal to strike rebuttal testimony of firearms expert is not error in view of court's caution to jury limiting such testimony. 230Ky411, 19SW(2d)1091, 66ALR360.

854-7½-New. and caution jury to limit its consideration to the purpose stated, 312Mo 673, 280SW1026, 44ALR848.

854-8 TexCr 20SW(2d)772.

854-9 214Ky458, 283SW427; Minn 230 NW639; 106TexCr29, 290SW167.

854-10 214Ky544, 283SW385; 106Tex Cr29, 290SW167; 108TexCr72, 299SW 403; 111TexCr38, 11SW(2d)169; Tex Cr 29SW(2d)395. But see 111TexCr 367, 12SW(2d)1027(2dcase). [a] 224Ky 334, 6SW(2d)269. [b] **In prosecution for arson, evidence of fire insurance on property** need not be limited by instruction for purpose of showing motive since such evidence is necessary for conviction under statute. 214Ky544, 283SW385.

855-12 38F(2d)406; 198Cal 426, 245P 426; CalA 289P667; 157Md75, 145A 185; 103TexCr340, 280SW796; 111 TexCr447, 14SW(2d)852; 112TexCr385, 16SW(2d)1096(2dcase); TexCr 29SW (2d)782 (holding charge unduly restrictive).

855-13 162La500, 110S733.

855-14 6F(2d)120; 13F(2d)847; 19F (2d)801; 215Ala472, 110S812; 215Ala 619, 112S157; 22AlaA324, 115S418; 23 AlaA395, 126S178; 177Ark1193, 9SW (2d)327; 178Ark1167, 13SW(2d)603; 86CalA298, 260P901; 164Ga95, 137SE 824; 322 Ill 473, 153NE710; 219Ky62, 292SW478; 219Ky490, 293SW982; 224Ky126, 5SW(2d)889; 227Ky83, 11 SW(2d)996; 227Ky578, 13SW(2d)763; 229Ky358, 17SW(2d)201(2dcase); 259 Mass388, 156NE712; 247Mich583, 226 NW231; 171Minn515, 213NW923; 115 Nebr94, 211NW605; OklCr 273P1012; OklCr 287P1099; 108TexCr484, 1SW (2d)881; 111TexCr642, 13SW(2d)697 (2dcase); Sask [1929] 3DomLR593. [a] (2) Limiting evidence to impeachment of prosecutrix only is improper. 92CalA6, 267P906. [c] **Failure to charge.**-219Ky490, 293SW982. [d] **Where court withdraws admissible testimony** affecting defendant's credibility defendant cannot complain of its reception, though effect is not effaced by charge. 179Minn187, 228NW615.

855-15 13F(2d)847; 164Ga95, 137SE 824; 259Mass388, 156NE712.

855-16 221Ky420, 298SW1083.

855-18 90CalA317, 265P893; 217Ky 99, 288SW1047; 228Ky151, 14SW(2d) 387; TexCr 26SW(2d)915.

855-19 214Ky458, 283SW427.

855-20 76CalA91, 243P878; 229Ky 505, 17SW(2d)421; 318Mo 679, 300SW 687.

856-23 37GaA331, 140SE422; 208Ky 601, 271SW662; 223Ky65, 2SW(2d) 1055; 232Ky613, 24SW(2d)269; 235 Mich594, 209NW815; 309Mo 534, 275 SW41; 72Mont306, 233P602; 82Mont 170, 266P400; 84Mont348, 275P757; 114 Nebr257, 207NW207; 50Nev27, 249P 566; 119 OhSt285, 164NE51, 63ALR595; 39 OklCr264, 264P643; 123 Or595, 263P 60; 89PaSuper142; 101TexCr479, 276 SW268 (evidence held properly limited); 103TexCr671, 282SW237; 104Tex Cr293, 283SW819; 110TexCr413, 10SW (2d)112. [a] **Where former conviction was material allegation,** held no error in refusing instructions to limit admissibility to determine punishment alone. 338 Ill 128, 170NE240.

856-24 176Ark1203, 3SW(2d)1002; 177 Ark885, 7SW(2d)969; 220Ky368, 295 SW159; 131 Or455, 282P560; 105Tex Cr451, 288SW1032; 154Wash405, 282P 906.

856-24½-New. to showing identity of accused, 103TexCr671, 282SW237.

856-25 179Ark1079, 20SW(2d)119; 202 Iowa352, 209NW514; 207 Iowa219, 222 NW389; 208Ky601, 271SW662; 223Ky 65, 2SW(2d)1055; 116 OhSt265, 155 NE800.

856-27 181Ark94, 24SW(2d)969; 106 TexCr222, 291SW558; 113TexCr642, 21 SW(2d)727. [a] **Where evidence of other offenses forms part of res gestæ,** instruction is unnecessary. TexCr 29SW (2d)395.

856-29 294Pa339, 144A534; 108TexCr 72, 299SW403.

856-29½-New. The court need not limit the effect of evidence which is res gestæ. 110TexCr183, 8SW(2d)162.

856-30 TexCr 29SW(2d)399.

856-30½-New. Where state confined itself to certain state instruction, permitting conviction on evidence of acts three years preceding is improper. 199 Iowa1221, 203NW232.

856-30⅓-New. Although the jury cannot convict on any other act than the one selected by the state, similar acts before and after may be considered. 199 Iowa1221, 203NW232.

856-30¼-New. Where testimony relative to separate occurrences was in effect only as to a single transaction, an instruction was not necessary. 227Ky748, 14SW(2d)205.

856-31 82Colo 541, 261P661; 82Colo 589, 263P19; 47 Ida760, 278P773; 144 SC452, 142SE725. [b] 20F(2d)754. [c] **Trial court is judge of both form of questions and their materiality.**-101Tex Cr63, 274SW588.

856-32 15F(2d)163; 82Colo 589, 263P 19. [a] **Admission of evidence admissible when received does not become erroneous** simply because later the evidence becomes immaterial. 101Vt124, 141A686.

857-38½-New. In a prosecution for assault with a knife the court may permit a witness to use a pencil to illustrate how the knife was held. 48SD430, 205NW31.

857-39 161La375, 108S776.

857-42½-New. Testimony of witnesses on insanity plea in criminal case must be reduced to writing. 162La737, 111S 79.

857-43 156La881, 101S252; 160La168, 106S733. [a] (3) Under such act defendant is not entitled to have testimony of state taken down on motion for new trial. 158La755, 104S705. (4) Defendant held not entitled to have expert testimony as to whether liquor sold by him was fit for beverage purposes reduced to writing. 160La168, 106S733. (5) Refusal to order entire testimony offered by state to be taken in writing held not error. 163La329, 111S775.

857-45½-New. Refusal to permit filing of evidence which had been reduced to writing without authority of court held not error. 163La329, 111S775.

857-54 103TexCr603, 281SW874. But see 208Ky538, 271SW566.

857-55 [c] **Confessions in foreign language may be interpreted to jury** in language they can understand or transcription submitted for their convenience. 87CalA313, 262P75.

857-57½-New. Offer of photograph in evidence to which objection was overruled constitutes an admission in evidence. 43 Ida180, 250P239.

857-57⅓-New. To read a document to a judge or jury in the presence of the adverse party who has had opportunity to inspect it is to place it in evidence, without physically handing it to the judge. 156La881, 101S252.

858-67½-New. The fact that the jury may have seen the exhibits in the court room prior to their being offered in evidence is harmless where it appears that the exhibits were subsequently during the trial, properly identified and received in evidence. 105TexCr634, 289 SW1016.

858-67⅓-New. It is not error that jars of whisky were brought into the court room by the sheriff, during voir dire, there being no showing that they were other than those connected with the offense of defendant. 102TexCr395, 278 SW449.

858-67¼-New. Action of prosecuting attorney in counting stolen goods and throwing them on floor before jury during process of identification and before offering them in evidence held not prejudicial. 163La641, 112S514.

858-67½-New. In a prosecution for the unlawful giving away of intoxicating liquors, evidence of jugs and liquors they contained are admissible notwithstanding the search warrant under which they were obtained was not introduced. 197 Ind193, 150NE99.

858-67⅙-New. At mental examination of defendant, it has been held no abuse of discretion of the court to permit the district attorney and the county health officer to be present. 106TexCr222, 291 SW558.

858-67⅐-New. In a prosecution for violation of the prohibition law, exhibit by prosecuting officer to a witness of bottles supposed to contain liquor alleged to have been purchased from defendant, with memoranda thereon to that effect, is not error. 37GaA151, 139 SE157.

858-67⅛-New. In a prosecution for possessing and manufacturing liquor in which the sheriff testified that he had possession of a search warrant, the

court may permit him to identify it. 200 **Ind**283, 163**NE**91.

858–67½–New. In a prosecution for unlawful possession of liquor, the court should permit only containers identified as containing intoxicating liquor to be shown to the jury. 318**Mo** 531, 300 **SW**329.

858–67½–New. Where introduction of search warrant and return thereon was opposed, submitting them to court but not introducing in evidence is proper. **TexCr** 288**SW(2d)**553.

858–67¼–New. The court's refusal to have a magistrate's minutes marked for identification after refusal to permit their use in cross-examining a material state witness held error. 228**AppDiv**705, 238**NYS**515.

858–67½–New. District attorney need not offer written statements of witness made before trial not shown to witness to refresh his memory and as to which he did not testify. 35**PortoRico** 533.

858–68 335 **Ill** 539, 167**NE**823 (legality of search); 89 **IndA**592, 167**NE**568 (except where knowledge of evidence is first learned of by defendant during introduction thereof); **Mich** 209**NW**939; 76**Mont**66, 244**P**882 (evidence obtained by search of defendant's home). But see 106**TexCr**633, 294**SW**562.

858–70 32**PortoRico** 134. [b] **Error to refuse inspection** by defendant before questioning witness regarding document shown to him. 32**PortoRico** 134.

858–71 165**La**1082, 116**S**565, 567 [cit CJ].

858–71½–New. Permitting jurors to smell liquor in evidence declared improper but not harmful. 100**TexCr**512, 271**SW**625.

858–71¼–New. A written statement signed by accused is a private paper and subject to defendant's demand for production only when used by the state in some way by which its contents become an issue. 104**TexCr**423, 284**SW**571.

858–71¼–New. Defendant is not entitled to production of such statement where the state does not exhibit it nor ask any question in reference to an oral statement made by defendant. 104**TexCr**423, 284**SW**571.

858–72 [b] **Evidence not placed in custody of clerk** admissible after proper identification. 160**La**79, 106**S**701.

858–73½–New. Exhibits identified, but not offered in evidence, should not be examined by jury. 36**F(2d)**738.

858–74½–New. Relevant exhibits are admissible on trial of indictment, although they have not been before the grand jury. 202 **Iowa**146, 209**NW**403.

858–74½–New. or if before the grand jury they have not been returned or preserved and identified as required by law. 202 **Iowa**146, 209**NW**403.

858–77 13**F(2d)**844.

858–84½–New. Nature of testimony given by defendant's wife, at inquest after homicide, offered to sustain wife after state's testimony that defendant requested that she talk to no one, is properly excluded where request was not communicated to her. 105**TexCr**494, 288**SW** 1074.

858–84¼–New. The court had a right to reserve its ruling on a motion to suppress until a hearing of the evidence on trial. 31**F(2d)**438.

858–84¼–New. The practice obtaining in federal courts of suppressing testimony on a showing in advance that it is incompetent does not prevail in the Texas courts. **TexCr** 13**SW(2d)**114.

858–84½–New. The effect of a motion to exclude evidence obtained by a search of the premises and of a motion to require the commonwealth to produce an affidavit and search warrant was the same as if defendant had objected to the introduction of evidence in the first instance. 228**Ky**517, 15**SW(2d)**422.

859–87 189**NC**766, 128**SE**354; 193**NC** 754, 138**SE**136; 104**TexCr**15, 282**SW**580; **TexCr** 291**SW**229. But see 105**TexCr**299, 288**SW**223.

859–89½–New. Failure to withdraw evidence is not error where objection goes to weight rather than competency. 102 **TexCr**395, 278**SW**449.

859–89¼–New. Disclaimer by prosecutor of intent to elicit statement made by witness without being asked about matter constitutes withdrawal, 171**Ark**672, 285**SW**377.

859–91 174**Ark**1179, 298**SW**27; 89**CalA** 451, 265**P**276; 333 **Ill** 397, 164**NE**847; 206 **Iowa**859, 220**NW**95; 229**Ky**139, 16 **SW(2d)**793; **NJSup** 145**A**734; 34**NM** 458, 283**P**907; 116 **Or**451, 241**P**846; 49 **RI** 482, 144**A**150 (defendant could not, by making admission that officers lawfully raided his premises, deprive state of right to prove fact by introducing search warrant in evidence); 104**Tex Cr**637, 285**SW**826. [a] **Improper admission of cumulative evidence** held not to deprive defendant of fair trial. **Okl Cr** 282**P**375.

859–93 257**Mass**473, 154**NE**260; 116 **Or** 451, 241**P**846.

859–93½–New. Admission of cumulative evidence is in the discretion of the trial court. 70**CalA**92, 232**P**724.

859–95 175**Ark**1083, 3**SW(2d)**23.

859–96 110**TexCr**84, 8**SW(2d)**157.

859–99 79**CalA**413, 249**P**832; 214**Ky** 422, 283**SW**420.

859–3 218**Ky**189, 291**SW**1.

859–4 But see 20**AlaA**572, 104**S**141.

859–7 41**F(2d)**26 (discretion not abused); 41**F(2d)**449; 80**CalA**328, 251**P** 823; 118**Kan**629, 236**P**816; 106**TexCr** 652, 294**SW**571.

860–8 218**Ky**189, 291**SW**1.

860–9 106**TexCr**46, 290**SW**163.

860–9½–New. or does not contest it. 118**Kan**629, 236**P**816.

860–15 121**Kan**762, 250**P**296.

860–16 316**Mo**144, 290**SW**142; **OklCr** 290**P**193.

860–17 94**Cal** 420, 271**P**203; 73**CalA**402, 238**P**794; 82**Mont**170, 266**P**400, 404 [cit CJ]. See also 105**TexCr**128, 287**SW**51. But see 316**Mo** 144, 290**SW**142.

860–19½–New. In case of failure of the commonwealth to elect on which act it will rely, the law elects the act concerning which evidence is first introduced. 221**Ky**474, 298**SW**1096.

860–20 213**Ala**170, 104**S**440; 93**CalA** 568, 269**P**969; 199 **Iowa**815, 202**NW**519; 121**Kan**762, 250**P**296; 222**Ky**310, 300 **SW**866; 125**Me**358, 133**A**912; 316**Mo** 144, 290**SW**142; 113**Nebr**517, 206**NW** 153; **OklCr** 280**P**314; **OklCr** 290**P**349(2d case); 110**TexCr**641, 10**SW(2d)**721; 101 **TexCr**114, 274**SW**981 (state should elect between two acts relied on in prosecution for statutory rape); 111**TexCr**345, 13**SW(2d)**98; 112**TexCr**307, 17**SW(2d)** 56(2dcase); 112**TexCr**563, 17**SW(2d)** 1075; **TexCr** 20**SW(2d)**764; **TexCr** 27 **SW(2d)**191.

860–21 But see 36**GaA**668, 137**SE**860.

861–22 213**Ala**170, 104**S**440.

861–24 22**AlaA**422, 116**S**411; 72**CalA** 421, 237**P**767; 205 **Iowa**849, 216**NW**710; 82**Mont**170, 266**P**400; 115 **Or**505, 237**P** 969; 107**TexCr**326, 296**SW**885; 111**Tex Cr**613, 13**SW(2d)**373(1stcase); 111**Tex Cr**509, 13**SW(2d)**853(2dcase).

861–25 35**GaA**381, 133**SE**302 (in misdemeanor cases); 36**GaA**668, 137**SE**860; 54**SD**267, 223**NW**55.

861–27½–New. Where an information charges specific offenses in several counts and the evidence tends to prove several separate and distinct offenses, the court, on motion of defendant, should require the prosecuting attorney to elect upon which particular criminal transaction he relies for conviction in each particular count. 121**Kan**762, 250**P** 296.

861–27¼–New. Where the judge confines the jury to one transaction, denial of a motion to require an election is not error. 130 **Or**552, 273**P**936 (embezzlement).

861–28 47 **Ida**281, 274**P**108; 121**Kan** 762, 250**P**296; 100**TexCr**122, 272**SW**131; 113**TexCr**642, 21**SW(2d)**727; 113**TexCr** 628, 23**SW(2d)**354.

861–29 205 **Iowa**430, 216**NW**610 (bootlegging); 125**Me**358, 133**A**912; **TexCr** 24**SW(2d)**420; **TexCr** 24**SW(2d)**1092.

861–29½–New. Where charge is for possession of stills, state need not elect one still from among several of a unit. 23 **AlaA**493, 127**S**678.

861–30 22**AlaA**554, 117**S**615; 94**Cal** 420, 271**P**203; 92**CalA**376, 268**P**419; 199 **Iowa**815, 202**NW**519; 124**Kan**61, 257**P** 951; 116**Nebr**268, 216**NW**823 (rape); 120 **Or**573, 253**P**7.

861–32 177**Ark**1124, 9**SW(2d)**574; 169 **Minn**205, 210**NW**883.

861–33 202 **Iowa**352, 209**NW**514 (crime of lewd and lascivious acts not continuing offense so as to dispense with necessity of election). [a] **Where prosecution is predicated on assertion that conspiracy was continuous,** held not error to refuse to require election, when instructing acquittal, if found not continuous. 37 **F(2d)**203.

862–37½–New. In a prosecution of a public officer for failure to account monthly, in which the evidence tends to show such failure for each of a series of months, accused may compel the state to elect upon which monthly transaction it will rely. 200 **Iowa**627, 204**NW**441.

862–38 99**CalA**702, 279**P**228.

862–41 99**CalA**702, 279**P**228.

862–42 37**GaA**359, 140**SE**386; **124 Or** 61, 262**P**859, 860 [cit CJ].

862–43 53**ND**222, 205**NW**234.

862–44 116**Nebr**268, 216**NW**823; 52**ND** 478, 203**NW**679.

862–49 [a] **TexCr** 27**SW(2d)**191.

863–55 **Kan** 292**P**931; **TexCr** 27**SW** **(2d)**191.

863–56 73**CalA**402, 238**P**794.

863–57 69**CalA**558, 231**P**767; **Mo** 300 **SW**722; **OklCr** 290**P**349(2dcase); 100 **TexCr**451, 273**SW**578; 100**TexCr**476, 273**SW**561.

863–58 73**CalA**402, 238**P**794; 231**Ky**541, 21**SW(2d)**830; 82**Mont**170, 266**P**400; **OklCr** 280**P**314; **OklCr** 290**P**349(2d case).

863–75½–New. The order of proof does not change an election once made. 70 **Utah**586, 262**P**113.

863–78 48 **Ida**760, 285**P**467; **OklCr** 268 **P**329.

864–80 6**F(2d)**188; 13**F(2d)**591; 21 **F(2d)**903; 24**F(2d)**303; 21**AlaA**378, 108 **S**646; 34**Ariz**139, 268**P**615; 170**Ark**1194, 283**SW**372; 179**Ark**1064, 20**SW(2d)**113; 202**Cal** 154, 259**P**442; 68**CalA**615, 229**P** 1000; 70**CalA**531, 233**P**980; 87**CalA**313, 262**P**795; 89**CalA**451, 265**P**276; **Colo** 293 **P**335; 90**Fla**25, 105**S**130; 90**Fla**178, 105 **S**401; 164**Ga**47, 137**SE**553; 319 **Ill** 606, 150**NE**347; 324 **Ill** 11, 154**NE**451; 335 **Ill** 432, 167**NE**10; 198 **Ind**427, 154**NE**5; 200 **Iowa**660, 204**NW**278; 222**Ky**484, 1 **SW(2d)**779; 232**Ky**453, 23**SW(2d)**930; 160**La**579, 107**S**433; 252**Mass**465, 148**NE** 123; 257**Mass**421, 154**NE**91; 260**Mass** 303, 157**NE**354; **Mo** 281**SW**960; 321**Mo** 633, 12**SW(2d)**37; **Mo** 18**SW(2d)**28; **Mo** 29**SW(2d)**54; **Mo** 29**SW(2d)**156; 114 **Nebr**28, 206**NW**16; 50**ND**927, 198**NW** 698; 57**ND**652, 223**NW**705; 57**ND**900, 225**NW**319; 7**PaDist&Co** 707; 33**Porto Rico** 15; 103**TexCr**508, 281**SW**1054; 112 **TexCr**67, 13**SW(2d)**868; **TexCr** 20**SW** **(2d)**1051; 142**Va**658, 128**SE**459; **WVa** 153**SE**583; 34**Wyo** 218, 242**P**802, 805 [citCJ]. But see 169**La**291, 125**S**127.

864–82 21**F(2d)**903; 38**F(2d)**573; 227 **Ky**142, 12**SW(2d)**324; 232**Ky**52, 22**SW** **(2d)**418; 169**La**1025, 126**S**514 (right to rebut on demand not denied); **NJSup** 137**A**829; 33**PortoRico** 15.

864–86 See also 167**La**1003, 120**S**626.

865–87 22**AlaA**29, 111**S**759; 22**AlaA**277, 114**S**789; 91**CalA**781, 267**P**593 (extrajudicial admissions). See also 74**CalA** 276, 240**P**43.

865–88 But see 70**CalA**531, 233**P**980; 244**Mich**622, 222**NW**185.

865–89 70**CalA**531, 233**P**980 (order of proof discretionary with trial court).

865–90 194**Cal** 1, 227**P**156; 70**CalA**531, 233**P**980; 77**CalA**212, 246**P**95; 90**Fla**25, 105**S**130.

865–91 202**Cal** 154, 259**P**442; 77**CalA** 212, 246**P**95; **CalA** 290**P**1054; 90**Fla**25, 105**S**130 (where corpus deliciti was afterward established and there was no subsequent motion to strike); 93**Fla**238, 112**S**70; 334 **Ill** 218, 165**NE**619; 142**Va** 658, 128**SE**459. Contra 74**CalA**276, 240**P** 43. [a] To same effect 93**Fla**238, 112**S** 70. [b] (2) In prosecution for embezzlement evidence of admissions by accused bank cashier of shortage may be admitted before establishment of corpus delicti. **Utah** 287**P**181. (3) In prosecution for possession of firearm as alien, defendant's admission as to place of birth is inadmissible where there is no prima facie proof of corpus delicti. **CalA** 279**P**175.

865–92 90**Fla**25, 105**S**130.

865–92½–New. Technical error in pre-

maturely admitting proof of a confession is cured by subsequent additional prima facie proof of corpus delicti, independent of the confession which would have justified its admission. 90Fla25, 105S130.

865-93 34Wyo 218, 242P802.

865-95 101TexCr267, 275SW837.

865-98 172Ark846, 290SW599; 201Cal 290, 257P46; 94CalA7, 270P398; 318 Ill 316, 149NE236; TexCr 24SW(2d)439.

866-99 5F(2d)592; Ark 29SW(2d)1079 (2dcase); 90Fla25, 105S130 (may be conditionally admitted and later stricken if not properly connected up); 257Mass 421, 154NE91; NJSup 130A437; 101 TexCr267, 275SW837.

866-2 See also 260Mass303, 157NE354; 33PortoRico 15.

866-8½-New. Admitting evidence procured under search warrant without the introduction of the search warrant and affidavit is not an abuse of discretion when the validity of the warrant was not in question. 198 Ind427, 154NE5.

866-10 Mo 274SW24; TexCr 28SW(2d) 794.

866-12 166Ga512, 143SE896.

867-18 328 Ill 446, 159NE807.

867-19 See also 21AlaA346, 108S261.

867-21 85CalA514, 259P982; 210Ky 385, 275SW819 (testimony in prosecution for murder as to sobriety of deceased); 228Ky254, 14SW(2d)773; 161 La863, 109S519; 309Mo 498, 274SW734; 104TexCr189, 283SW791. [a] (3) Other instances. 232Ky613, 24SW(2d)269. [c] **Accusation of another.**-294Pa156, 143A910.

867-24 17F(2d)246.

867-25 8F(2d)251; 16F(2d)568; 17 F(2d)236; 22AlaA651, 119S598(2d case); 170Ark1194, 283SW372; 179Ark 1121, 20SW(2d)177(1stcase); 199Cal 155, 248P504; 199Cal 513, 250P164; 80 CalA275, 251P826; 82CalA778, 256P 251; 86CalA791, 261P526; 94CalA777, 271P1103(1stcase); 110Conn55, 147A 118; 97Fla650, 122S110; 164Ga47, 137 SE553; 43 Ida180, 250P239; 328 Ill 446, 159NE807; 128Kan459, 278P746(1st case) (held not to conflict with evidence in chief); 210Ky385, 275SW819; 215 Ky752, 286SW1063; 215Ky809, 287SW 4; 221Ky226, 298SW673; 228Ky151, 14SW(2d)387; 229Ky385, 17SW(2d) 219, 64ALR263; 159La589, 105S631 (holding objection to rebuttal testimony properly overruled); 160La661, 107S 481; 160La667, 107S484; 161La827, 109 S505; 164La167, 113S805; 166La21, 116S579; 166La891, 118S73; 166La924, 118S85; 167La982, 120S619; 263Mass 39, 160NE315; 149Miss412, 115S552; 154Miss671, 122S766(2dcase); 309Mo 498, 274SW734; Mo 281SW960; 48Nev 405, 233P523; 283Pa564, 129A582; 33 PortoRico 15; 137SC58, 135SE635; 159 Tenn297, 17SW(2d)913; 99TexCr529, 270SW552; 100TexCr415, 273SW573; 102TexCr444, 278SW446 (rebuttable by accomplice, of defendant's evidence that he had purchased goods, in prosecution for receiving stolen goods); 103TexCr 508, 281SW1054; 105TexCr1, 285SW 323; 106TexCr188, 291SW552; 107Tex Cr196, 296SW523; TexCr 29SW(2d)364; 143Va489, 129SE252; 147Wash411, 266 P163, 165 [quotCJ]; 148Wash701, 269P 1051; Wash 287P23. [d] **Where defense puts in evidence intimacy of deceased with accused's wife,** prosecution may put in evidence relations of deceased's fiance to accused's wife. 162 Ga777, 135SE187. [e] **Evidence inadmissible.**-212Ky303, 278SW1097.

867-26 17F(2d)236; 159La589, 105S 631; 151Miss51, 117S353.

867-27 21AlaA191, 106S622; Cal 293P 32; CalA 288P95; 162Ga777, 135SE 187; 100TexCr235, 272SW777; 102Tex Cr579, 278SW1105; 104TexCr583, 286 SW231; 136Wash582, 240P897 (letters). [a] (4) Other evidence held inadmissible. 75CalA657, 243P64. [b] **Evidence held admissible.**-113TexCr124, 18SW (2d)1070.

867-28 16F(2d)568; 36F(2d)1; 137SC 7, 133SE823. [a] (2) Where defense is alibi, evidence as to former statement of accused as to his whereabouts on night of robbery is proper in rebuttal. 91Pa Super518. (3) Evidence disproving proof of such former statement is not admissible. 91PaSuper518.

868-30 215Ky847, 287SW21. Contra 176Minn562, 223NW917.

868-31 224AppDiv193, 230NYS66.

868-33 165La622, 115S802; TexCr 283 SW811.

868-33½-New. Evidence of unlawful seizure is not admissible to rebut defendant's testimony in cross-examination. 269US20, 46SCt4, 70Led145.

868-34 21AlaA240, 106S896; 170Ark 1194, 283SW372; 171Ark184, 284SW38; 179Ark207, 14SW(2d)1115; 85Colo 442, 276P983; 164Ga47, 137SE553; 43 Ida 180, 250P239, 244 [citCJ]; 324 Ill 11, 154NE451; 227Ky142, 12SW(2d)324; 166La891, 118S73; 166La924, 118S85; Mo 6SW(2d)903; 322Mo 194, 14SW(2d) 611; 102NJL134, 130A642; 122 Or537, 259P427; 106TexCr567, 294SW210; Tex Cr 27SW(2d)198(2dcase); 136Wash582, 240P897.

868-35 102NJL134, 130A642; 129 Or 564, 278P568, 63ALR1225; 136Wash 582, 240P897; 147Wash411, 266P163, 165 [quotCJ].

868-36 170Ark1194, 283SW372; 164Ga 47, 137SE553.

868-38 136Wash582, 240P897. [a] (1) 153Va954, 151SE286. (2) Defendant may rebut only new matter adduced by state. 74CalA371, 240P526.

868-39 12F(2d)925.

868-40 4F(2d)774; 8F(2d)251; 17 F(2d)246; 21F(2d)32; 21AlaA289, 107 S791; 22AlaA304, 115S146; 170Ark 1061, 282SW684; 172Ark156, 287SW 1026; 174Ark1180, 297SW830; 110Conn 55, 147A118; 92Fla980, 111S124, 53 ALR250; 164Ga47, 137SE553; 324 Ill 11, 154NE451; 328 Ill 446, 159NE807; 203 Iowa532, 211NW244; 202 Iowa1382, 212NW137; Iowa 221NW796(1stcase) (though excluded on defendant's cross-examination); Iowa 232NW636; 120 Kan221, 243P280; 216Ky376, 287SW 933; 222Ky630, 18SW(2d)1045; 223Ky 831, 4SW(2d)728; 227Ky142, 12SW(2d) 324; 232Ky52, 22SW(2d)418 (discretion not abused); 169La1025, 126S514; Mo 281SW960; Mo 7SW(2d)1001; 322 Mo 194, 14SW(2d)611; Mo 273SW409; 50Nev212, 255P1002, 1009 [citCJ]; 53 ND931, 208NW566; 57ND652, 223NW 705; 106TexCr593, 294SW573; 113Tex Cr9, 18SW(2d)615; 36Wyo 78, 252P 1030. See also 321Mo 633, 12SW(2d)37. [d] (2) Admission of testimony of state's witness in rebuttal is not error where it is practically the same as defendant's testimony. 179Ark1199, 20 SW(2d)128. [e] **Admitting evidence in rebuttal properly admissible in chief** held not abuse of discretion. 324 Ill 11, 154NE451.

869-43 4F(2d)774; 205 Iowa30, 215 NW758; 167La628, 120S31; 169La1025, 126S514; Mo 273SW409.

869-46 173Ark713, 293SW19; 210Ky 524, 276SW550; 217Ky511, 289SW1086; 226Ky127, 10SW(2d)609; Mo 273SW 409; 123 Or521, 262P954; WVa 153SE 583 (where prejudicial).

869-47 123 Or521, 262P954 (application to trial judge required).

869-48 195Cal 295, 232P974 (rebuttal testimony, after defendant testified he shot in self-defense, that witness had never seen deceased carry weapon held inadmissible); 210Ky524, 276SW550; 227Ky349, 13SW(2d)263(2dcase). [a] **That evidence shows motive and malice** does not make it inadmissible, if it is in explanation and rebuttal of defendant's testimony. 210Ky524, 276SW550.

870-51 12F(2d)925.

870-52 162Ga777, 135SE187; 227Ky 528, 13SW(2d)521.

870-53 See also 144SC452, 142SE725.

870-54 [c] **Matter attributed to defendant may be shown** to have been performed by another. 213Ala358, 104S656.

870-54½-New. Evidence in rebuttal, to show that defendant knew what he was doing and was not actuated by insane impulse, is not inadmissible, because it also indicates malice and supplies a motive for the crime. 210Ky524, 276SW 550.

870-57 168La322, 122S52; Mo 278SW 681; Mo 295SW788; 50Nev212, 255P 1002, 1009 [quotCJ]. [e] **Evidence admissible.**-50Nev212, 255P1002.

870-58 202 Iowa1382, 212NW137.

870-59 202 Iowa1382, 212NW137; 233 Mich615, 208NW27.

870-60 210Ky385, 275SW819; 99Tex Cr529, 270SW552; 143Va510, 129SE 360.

870-65 176Ark1003, 5SW(2d)322; 72 CalA160, 236P987; 47 Ida246, 273P940 (to prove prior conviction); 205 Iowa 587, 218NW266 (after submission of case to court on trial without jury); 160La 579, 107S433; 163La25, 111S483; 167 La628, 120S31; 153Miss654, 121S284; 108TexCr655, 28W(2d)439; 151Wash 557, 276P857 (before ruling on motion to dismiss); 33Wyo 428, 240P219. [a] (1) 127 Or585, 272P889. [c] **Recalling witness.**-108WVa273, 151SE186.

870-65½-New. Whether case shall be reopened or not rests ordinarily in the sound discretion of the court. 146Miss 547, 112S705.

871-66 173Ark1172, 294SW397; 205 Iowa587, 218NW266.

871-67 228Ky151, 14SW(2d)387.

871-69 46Philippine734.

871-72 12F(2d)925; 180Ark1168, 20 SW(2d)305(1stcase); 73CalA649, 238P 1075; 63CalA557, 269P961; 103Conn 138, 130A96 (and defendant has moved to dismiss); Iowa 228NW353; 160La 579, 107S433; 168La87, 121S583; 46 Philippine28; 101TexCr77, 273SW855; 101TexCr315, 276SW247; 106TexCr593, 294SW573; 107TexCr465, 296SW892.

871-73 21AlaA653, 111S648; 179Ark 1064, 20SW(2d)113; 73CalA649, 238P 1075; 237Mich247, 211NW650.

872-75 7F(2d)313; 150Wash66, 272P 89.

872-76 213Ala550, 105S721; 120Kan 221, 243P280; 129Kan155, 281P886 (permitting juror to ask witness questions); 228Ky151, 14SW(2d)387; 146 Miss547, 112S705; 148Miss680, 114S 750; Mo 300SW1069; 127 Or585, 272P 889 (before final submission); 103Tex Cr674, 282SW235; 108TexCr655, 28W (2d)439; Wash 286P42 (before argument). [a] **Refusing to admit defendant's evidence,** which, if believed, would warrant acquittal, is error. TexCr 27 SW(2d)818.

872-77 163Ga121, 135SE917; 107TexCr 465, 296SW892.

872-78 336 Ill 580, 168NE650 (permitting state to prove after defense rested, that railroad from which defendant was alleged to have stolen was corporation held error).

872-79 23AlaA63, 120S468; 23Ala582, 129S478; 22AlaA95, 112S811; 204 Iowa 417, 215NW256; Mo 29SW(2d)54; 104 TexCr257, 282SW807; 105TexCr281, 288 SW213; 109TexCr108, 38W(2d)91. [a] (6) Refusal to allow defendant's witness to testify in answer to county attorney's challenge not abuse of discretion. 104 TexCr257, 282SW807.

873-80 144Va553, 131SE196 (courts have discretion to permit introduction of new testimony after argument); 38 Wyo 135, 264P1033. Contra 163La25, 111S483.

873-81 See also Mo 285SW1000.

873-83 23F(2d)420; 23AlaA219, 123S 109; 173Ark1172, 294SW397; 168Ga 753, 149SE46; 144Va553, 131SE196.

873-85 167La982, 120S619.

874-91 85PaSuper305. [a] **Persons having no interest** in premises searched cannot complain of admission of evidence secured by unlawful search. 144 Miss551, 110S447. [b] **Where evidence is relevant,** defendant cannot complain of its admission. 197 Ind575, 150NE371.

874-91½-New. or to evidence of former conviction where there was no proof of former conviction submitted on preliminary examination. 233Mich98, 206NW 516.

874-92 106TexCr633, 294SW562.

874-93 107TexCr247, 296SW558.

874-93½-New. A wife may object, on offer of evidence against her, to evidence secured by an illegal search of her home, although it is owned by her husband. 142Miss100, 107S376.

874-95 161La518, 109S51. [a] 56ND 678, 218NW871, 875 [citCycperBurr,J]. [b] **Defendant disclaiming ownership** and possession of suitcase containing liquor cannot complain of testimony

based on its unlawful search and seizure. 140Miss367, 105S846.

874-95½-New. Nor can defendant complain of admission of evidence obtained by illegal search of another's property. Miss 107S384.

874-96 14F(2d)888; Cal 257P65; CalA 290P102.

874-97 14F(2d)888.

874-98½-New. Only the owner of the premises may object to the evidence obtained by an unlawful search. 198 Ind 440, 154NE4.

874-98⅓-New. Defendant denying ownership of premises searched cannot object to legality of search. 209 Ind69, 155NE817.

874-98¼-New. Defendant, claiming no interest in the liquor seized, cannot object to its introduction in evidence on the ground of unlawful seizure. 14F (2d)35.

874-98½-New. Defendant cannot complain of the illegality of a search of premises in the possession and control of another, or of the admission of evidence obtained thereby. 110TexCr548, 9SW(2d)1032(3dcase).

874-99 13F(2d)136; Ala 129S282; AlaA 129S713(2dcase); 76CalA688, 245 P781; CalA 235P401; 166Ga182, 142 SE676; Ind 166NE439; 89 IndA588, 166NE446(2dcase); 158La927, 105S16 (and cannot be complained of as depriving party of right to have jury retired where witness permitted to testify without objection); 167La1085, 120 S865; 126Me177, 136A817; 149Md128, 131A29; 154Md694, 139A825; 244Mich 622, 222NW185; 143Miss347, 108S721; 147Miss180, 113S179; 153Miss1, 120S 206; Mo 278SW1009; 315Mo 203, 285 SW990; 316Mo 122, 289SW904; Mo 285 SW978; Mo 14SW(2d)449; MoA 5SW (2d)95; 48Nev134, 228P582; 32NM500, 258P1009; 47RI 245, 132A547; 101Tex Cr239, 275SW833; 105TexCr629, 290 SW543; 106TexCr66, 290SW1104; 107 TexCr357, 296SW596; 107TexCr535, 298SW284; TexCr 20SW(2d)421; Tex Cr 31SW(2d)439; 145Wash87, 258P 1030. See also 146Miss351, 111S860. But see 337 Ill 310, 169NE243. [b] (1) 31F(2d)71. (2) Objection, first made by request for instruction that jury disregard testimony is too late. 31F(2d)19. [c] (1) Mo 18SW(2d)457. [f] Where motion to suppress evidence obtained as result of search was rightly denied, there was no error in admitting evidence over like objection renewed at trial. 150 Wash197, 272P719. [g] **Motion to suppress evidence** as having been seized under illegal search warrant not made till opening of trial of charge of unlawful possession of liquor held too late. 73 Mont272, 235P716. [h] **Basis of rule** requiring application before trial for return of evidence unlawfully seized is that court will not stop to try collateral issues. 269US20, 46SCt4, 70L ed 145. [i] **Motion to exclude evidence before it is offered** will not be considered. 107TexCr54, 295SW604. [j] **If facts as to unlawful seizure** of evidence are uncontroverted, application for return before trial is unnecessary. 269US20, 46 SCt4, 70L ed145. [k] **Motion to suppress evidence** should be made before trial. 243Mich546, 220NW790; 149 Wash675, 272P26. [l] **Objection at close of state's case.**-Okl 274P894(2d case). [m] **Ground of objection must be stated at time of making objection** to introduction of evidence. 150SC449, 148 SE472. [n] **Motion for return of property or suppression of evidence unlawfully seized or procured** must be timely made. 89 IndA592, 167NE568 (rule held not to deprive accused of constitutional right). [o] **Objection comes too late** to testimony of search when no preliminary motion before trial, to suppress evidence of warrant claimed to be invalid, was made. IndA 170NE89. [p] **Objection when counsel offers to read particular exhibit** is timely where general objection had previously been made to entire line of testimony. Iowa 232NW 172.

874-1 [b] **Objection to evidence procured by search warrant** on ground of illegal search, made two years after plea of not guilty was entered and after trial was postponed, held too late. 5 F(2d)9.

874-3 28F(2d)663; 21AlaA378, 108S 646; 21AlaA487, 109S523; 21AlaA568, 110S57; 22AlaA90, 112S759; 22AlaA 310, 115S862; 22AlaA422, 116S411; 23 AlaA299, 124S406(2dcase); Cal 257P65; 92CalA683, 26SP915; 196 Ind534, 149 NE59; 207 Iowa624, 223NW362; 225 Ky590, 9SW(2d)723(2dcase); 167La 1080, 120S864; 149Md128, 131A29; Mo 281SW960; 316Mo 122, 289SW904; 317 Mo 408, 297SW368; Mo 289SW570; Mo 2SW(2d)755; Mo 6SW(2d)903; 48Nev 134, 228P582; NJSup 134A294; 104 NJL288, 140A297; 35PortoRico 617.

875-5 22AlaA90, 112S759; 196 Ind534, 149NE59; 164La813, 114S696; 315Mo 203, 285SW990; 82NH133, 130A743.

875-5½-New. Objection to evidence obtained by unlawful search is ineffectual when raised for first time when such testimony is offered during progress of trial. 46 Ida20, 265P671; 311 Mo 391, 279SW23.

875-6 216Ala151, 112S761.

875-7½-New. Motion to suppress evidence procured by unlawful search made before the offer of such evidence is premature. 106TexCr116, 290SW1095.

875-7⅙-New. Where defendants know of the unlawful search and seizure long before the trial, an objection at the trial to introduction of evidence seized comes too late. 15F(2d)179.

875-7¼-New. A motion to suppress testimony prior to offering thereof in regular course of trial is premature. 105TexCr385, 288SW213.

875-7⅓-New. Refusal to suppress evidence obtained under a search warrant, after introduction of a part without objection, is not erroneous, where defendant had knowledge that the search had been made and evidence obtained. 47 Ida246, 273P940.

875-7½-New. Petition for the suppression as evidence of intoxicating liquors could properly be maintained where an information was pending, as the petition had no function after dismissal of the information. 32F(2d)873.

875-7⅞-New. A motion to suppress, made immediately after the jury were sworn, has been held timely. 26F(2d) 769.

875-7⅛-New. Motions offered before trial, for the suppression of evidence as to finding of liquor, should not be passed on. 112TexCr538, 17SW(2d) 1060.

875-7⅛-New. An application to file an amended motion to suppress evidence, when most of the government's case is given, is for the trial court's discretion, and denial thereof is not error. 26F(2d) 769.

875-7 1/10-New. Evidence under search warrant. Where defendant, with knowledge of facts, fails before trial to suppress a search warrant, or sheriff's return or evidence obtained on execution of the warrant, evidence is properly received on an objection to its introduction at the trial. 89 IndA560, 167NE345 (1stcase).

875-7 1/11-New. Where defendant, with knowledge of facts, does not question the validity of the warrant before trial, he waives the right to do so or to object to evidence procured thereunder. 89 IndA555, 167NE345(2dcase).

875-7 1/12-New. Motion to prevent use of illegally obtained documents may be made before indictment or information. 40F(2d)593.

875-7 1/13-New. Failure to move to suppress on ground of entrapment before commencement of trial must be deemed to be waiver of objection. 40F(2d)968.

875-7 1/14-New. Objection to evidence procured by unlawful search and seizure must be raised before trial. 335 Ill 539, 167NE823.

875-8 [a] **Showing necessary to permit ruling on objections** to evidence gathered in search, may be made by introducing affidavit and search warrant. TexCr 26SW(2d)267(2dcase).

875-8½-New. Objections to competency of stenographer. 285Pa49, 131A657.

875-10 110TexCr416, 10SW(2d)113. See also 209Ky143, 272SW403.

875-11 107TexCr559, 298SW569.

875-13 255Mass327, 151NE466.

875-14 214Ky205, 282SW1090.

875-17½-New. Admissibility of evidence cannot be raised by objection to prosecutor's comment thereon in argument. 109TexCr543, 5SW(2d)1001.

875-17⅓-New. A statement in an affidavit for a search warrant as to knowledge of certain facts cannot be challenged on a motion to quash or objection to the testimony, but only in some direct proceeding against the affiants. 110TexCr99, 7SW(2d)953.

875-17¼-New. Sufficiency of an affidavit to procure a search warrant may be challenged by a motion or by objection to the evidence. OklCr 271P953.

875-17⅙-New. A purported plea in abatement which fails to ask for exclusion is insufficient as a motion to suppress evidence. Ind 168NE22.

875-18 336 Ill 421, 168NE344 (general objection goes only to materiality); 146 Wash109, 261P777. [b] **General objection sufficient** to exclude a confession in absence of proper predicate for its introduction. 23AlaA441, 126S614.

875-19 30F(2d)482; 213Ala301, 104S 668; 21AlaA211, 106S891; 21AlaA324, 108S86; 21AlaA528, 109S560; 22AlaA 310, 115S862; 23AlaA197, 122S703; 73 CalA334, 238P770; 90Fla799, 105S834; 162Ga777, 135SE187; 35GaA575, 134SE 185; 36GaA668, 137SE860; 38GaA748, 145SE526; 39GaA676, 148SE305; 40 GaA232, 149SE158; 41GaA556, 153SE 616(2dcase); Ill 172NE812; 198 Ind 198, 152NE814; 160La525, 107S393; Iowa 230NW522; Iowa 230NW865; 127 Me234, 142A857; 257Mass426, 154NE 185; 168Minn401, 210NW402; Mo 281 SW960; 316Mo 195, 289SW604; 316Mo 31, 292SW434; Mo 6SW(2d)903 (reputation); 115Nebr659, 214NW302; 82NH 220, 131A598; 82NH518, 136A358; 196 NC397, 145SE773; 32 OhA437, 168NE 238; 123 Or595, 263P60; 101TexCr192, 274SW974; 104TexCr649, 285SW621; 106TexCr506, 294SW202; 113TexCr 235, 20SW(2d)202; TexCr 27SW(2d) 217(2dcase); 136Wash20, 238P903; 101 WVa632, 133SE371; WVa 153SE583. But see 114Nebr292, 207NW168. [b] (1) Mo 278SW1009; Mo 285SW1000; Tex Cr 27SW(2d)217(2dcase). [c] 136 Wash20, 238P903. [d] Mo 285SW978.

876-20 Ala 130S169(1stcase)(repetitious testimony); 73CalA334, 238P770; 90 Fla299, 105S834; 317Mo 759, 297SW10; 317Mo 759, 297SW10; TexCr 27SW(2d) 183(2dcase); Utah 279P506.

877-22½-New. Objection to impeaching evidence of incriminating statements is held sufficient to require state to prove they were voluntary. 162La310, 110S 486.

877-22⅓-New. Where the testimony of several witnesses at a preliminary hearing is offered, sufficiency of preliminary evidence of the absence of witnesses from the jurisdiction must be attacked by objection to the admission of the testimony of each particular witness. 93 PaSuper508.

877-24 21F(2d)409; 215Ala497, 111S 212.

877-27 29PortoRico 961.

877-28 11F(2d)927; 18F(2d)407 (objection held sufficient); 38F(2d)406 (held sufficiently specific); 219Ala83, 121 S72, 63ALR560; 21AlaA433, 109S172; 21AlaA436, 109S176; 23AlaA368, 125S 902(2dcase); 32Ariz200, 256P1054; Ga 155SE38; 36GaA668, 137SE860; 38GaA 731, 145SE525; 39GaA676, 148SE305; 205 Iowa430, 216NW610; 165La47, 115 S363; 169La291, 125S127 (objection held inappropriate); 127Me234, 142A 857; 307Mo 393, 270SW286 (objection to hearsay evidence held sufficient); 311 Mo 391, 279SW23; 316Mo 195, 289SW 604; 316Mo 31, 292SW434; MoA 17SW (2d)353; 114Nebr59, 205NW939; 115 Nebr659, 214NW302; 82NH220, 131A 598; 29PortoRico 961; 35PortoRico 828 (though evidence clearly impertinent); 49RI 482, 144A150; 105TexCr436, 289 SW61; 106TexCr633, 294SW562; 108 TexCr210, 299SW907; 112TexCr586, 18 SW(2d)657; 136Wash20, 238P903. [b] 113TexCr58, 18SW(2d)641. [c]

Assignment of error on admission of evidence must show not only in what respect evidence was objectionable, but that objection was urged at time of its admission. 39GaA676, 148SE305.

877-29 11F(2d)927; 38F(2d)406; 22 AlaA77, 112S813; 22AlaA319, 115S294; 170Ark1061, 282SW684; 86CalA30, 260 P389; 169Ga613, 151SE17; 337 Ill 290, 169NE214; IndA 168NE192; Miss 130 S695; NJSup 134A294; OklCr 273P366 (2dcase); 123 Or595, 263P60. [a] (6) Objection that typewritten translations of notes of confessions detail other crimes. 87CalA313, 262P75.

878-33 [b] "**Successful party, however, needs no other support** than the action of the court itself." 29PortoRico 961, 966.

878-34½-New. Exception to certain portion of testimony allowed to stand does not raise question whether court has commented on testimony by instructing jury to disregard all testimony of certain witnesses with stated exception. 142Wash539, 253P811.

878-34⅓-New. In a prosecution for possession of whisky for sale, objection to introduction of bottles on ground that one bottle contained grain alcohol and not whisky, is held without merit where proof was that it contained corn whisky. 160La435, 107S296.

878-34¼-New. The trial court is not required to cast about for tenable grounds of objections to the evidence. 219Ala254, 122S610.

878-35 15F(2d)916; 23AlaA592, 129S 482; 97Fla908, 122S525; 161Ga332, 131 SE80; 162Ga777, 135SE187; 163Ga43, 135SE410; 166Ga160, 142SE685; 34 GaA146, 128SE686; 35GaA580, 134SE 184; 37GaA11, 138SE587; 39GaA550, 147SE784; 40GaA125, 149SE79; 40GaA 544, 150SE447(1stcase); Ind 169NE676; 145Miss215, 110S589; 308Mo 573, 274 SW393; 242NY13, 150NE585; 287Pa 512, 135A301; 158Tenn531, 14SW(2d) 735; 100TexCr389, 273SW575; 103TexCr 252, 280SW808; 103TexCr272, 280SW 827; 104TexCr378, 283SW824; 105 TexCr436, 289SW61; 106TexCr78, 290 SW1105; 106TexCr68, 291SW226; 106 TexCr169, 291SW554; 108TexCr576, 2 SW(2d)245; 109TexCr26, 2SW(2d)442; 109TexCr104, 3SW(2d)99; 111TexCr372, 13SW(2d)100; 111TexCr640, 13SW(2d) 832; TexCr 26SW(2d)277; 108WVa277, 150SE736.

878-36 145Miss215, 110S589; TexCr 26 SW(2d)277.

878-37 15F(2d)916; 242NY13, 150NE 585; 103TexCr272, 280SW827.

878-38 217Ky565, 290SW325; 317Mo 865, 297SW73; 114Nebr292, 207NW168. But see 33F(2d)382. [a] **Overruling defendant's demurrer to evidence at close of government's case** is waived by failing to present demurrer at close of all evidence. 42F(2d)793.

878-39½-New. General objection to line of testimony stipulated to stand as against all similar testimony is sufficient to make objection applicable to specific exhibit. Iowa 232NW172.

878-42 324 Ill 516, 155NE373. But see 319Mo 28, 3SW(2d)230.

878-43 NH 147A409; 53SD438, 221NW 53.

879-46½-New. The court's ruling on objections to evidence is not final until final judgment. 319 Ill 606, 150NE347.

879-46⅓-New. Objection that defendant's witness was charged with same defense does not establish fact, or warrant exclusion of testimony. 108TexCr640, 2SW(2d)251.

879-46¼-New. A ruling excluding evidence which is correct when made cannot be made erroneous by what transpires afterward. 88CalA302, 263P345.

879-46⅕-New. The court need not sustain an objection to evidence until the evidence is presented to the court so as to determine its relevancy and materiality. 110TexCr512, 8SW(2d)144, 60ALR 290.

879-46⅙-New. The court, on sustaining an objection to a question, need not instruct the jury to disregard the question in the absence of request. 229Ky 262, 16SW(2d)1040.

879-46⅐-New. Defendant cannot complain that evidence was not excluded, where the line of interrogation was not pursued after objection. 154Miss36, 122S187.

879-46⅛-New. Where objections to questions are sustained, nothing is left for the appellate court to review. 23 AlaA264, 124S282.

879-46⅑-New. Error cannot be predicated on ground of single erroneous question to which objection made and sustained. 233Ky407, 25SW(2d)1022.

879-47 94CalA55, 270P468; 83CalA463, 256P876; 84CalA99, 257P583, 584 [cit CJ]; 189NC766, 128SE354 (discretionary with court). See also 208Ky615, 271 SW684.

879-48 29Ariz523, 243P601; Cal 293P 32.

879-48½-New. , where a witness answers a question after an objection has been sustained, 35 OklCr279, 250P544, 49ALR1129.

879-49 79CalA413, 249P832. [a] 22 AlaA583, 118S242.

879-50 22AlaA583, 118S242; 229Ky 139, 16SW(2d)793; 101NJEq61, 137A 827; 47RI 245, 132A547; 137SC145, 134 SE885; 109TexCr240, 3SW(2d)806; 70 Utah570, 262P107. [b] **Answer held responsive to question.**-263Mass39, 160NE 315.

879-53 20AlaA457, 103S902.

879-54 [c] **Notice of withdrawal** is held insufficient. 76CalA688, 245P781; 34NM 494, 285P497.

879-56 21AlaA237, 107S28; 21AlaA371, 108S625; 29Ariz523, 243P601; 73CalA 402, 238P794; 90CalA472, 265P976; 96 CalA373, 274P451; 39GaA21, 145SE904; Ill 173NE97; 202 Iowa428, 210NW435; 255Mass327, 151NE466; Mo 29SW(2d) 686; MoA 272SW1097; NJSup 135A 339; 32NM500, 258P1009; 34NM494, 285 P497; 137SC145, 134SE885; 100TexCr 566, 272SW202; TexCr 29SW(2d)754; TexCr 32SW(2d)455(2dcase); 153Wash 473, 279P734; Wash 288P243.

879-56½-New. , nor can he raise question of admissibility if no objection was made in first place. 82NH189, 131A606.

880-57 21AlaA419, 109S114; 195Cal 295, 232P974.

880-59 See 264Mass314, 162NE362.

880-60 See also 83CalA463, 256P876.

880-61 Iowa 229NW231; 264Mass314, 162NE362; 32NM48, 250P842; 141Wash 96, 250P945.

880-63½-New. A general motion to strike out a document from evidence is not an objection to admissibility of evidence as to genuineness of signature. 5F(2d)45.

880-63⅓-New. When defendant answers favorably to himself question by his counsel, sustaining objection, but not striking out answer, it was held not error. 90Fla779, 107S242.

880-63¼-New. An exception to a refusal to strike from evidence something which was never in the evidence is improper. 254Mass520, 150NE854.

880-63⅕-New. Where only a portion of the report which was admissible was admitted, motion to strike out was properly overruled. 161La1010, 109S819.

880-63⅙-New. Where a proper foundation is laid for the introduction of certain evidence, and upon cross-examination facts are elicited tending to show the evidence incompetent, it is within the sound discretion of the court to sustain or overrule a motion to strike it out. 118Nebr267, 224NW274.

880-66½-New. Reinstatement.-Where it was the state's theory that defendant, accused of grand theft, had conspired with another to obtain possession of stock certificates and convert them into cash, testimony regarding a visit of defendant and such other at the ranch of another than the prosecuting witness has been held properly reinstated after being stricken, since, where a party's guilt depends on intent, purpose, design, or guilty knowledge, collateral facts in which he bore the principal part may be examined. 95CalA242, 272P794.

880-68 21AlaA526, 109S612; 35Ariz420, 279P256; 97CalA501, 275P961; 126Me 376, 138A562; 169Minn513, 211NW463; 32NM48, 250P842; 195NE327, 141 SE883. [a] **Overruling of motion to strike out part of affidavit** for search warrant, attached by clip, did not constitute abuse of discretion. 112 TexCr628, 18SW(2d)158. [b] **Refusal to strike out** hearsay testimony of physician held error. 334 Ill 341, 166NE65. [c] **Refusal to strike out evidence of offenses on which state has elected not to proceed** is proper where evidence is admissible in relation to offense elected. 48 Ida760, 285P467. [d] **Refusal to strike out testimony held erroneous.**-CalA 288P95. [e] **Refusal to strike out testimony held prejudicial.**-234Ky268, 27 SW(2d)946.

880-70½-New. or where objection goes solely to the weight of the testimony, CalA 258P146.

880-71 [a] (3) Refusal of defendant on cross-examination to give name of lady with whom he stated he was at time of commission of offense is ground for striking out his testimony. 80CalA293, 251P643.

880-72 [a] **Reputation evidence** based solely on specific conduct properly stricken on motion. 90Fla361, 106S75. [b] **Where evidence, when taken with other evidence, tends to prove** material fact, it should not be stricken. 95Fla 919, 117S378.

880-73½-New. Refusal to strike out testimony on ground that state's theory made out case of larceny rather than of receiving stolen money is held not error where defendant's own theory excluded larceny. 153Md431, 138A338.

880-73⅓-New. A motion to strike testimony on the ground that the information was filed more than the prescribed time after commitment is properly denied. 91CalA298, 266P1020.

880-74 NJ 137A829; 32NM500, 258P 1009; 85PaSuper305 (where objection, also, was sustained). [a] **Refusal to strike dying declaration** that trouble arose from old grudge held harmless error in view of conviction for manslaughter only. 192NC723, 135SE859.

881-79 32F(2d)15; 176Ark578, 3SW (2d)962; 34NM65, 277P22; 103TexCr 126, 280SW223.

881-81 35F(2d)605; 26F(2d)773; 22 AlaA39, 111S767; 32Ariz200, 256P1054; 73CalA334, 238P770; 204 Iowa1355, 217 NW233; 208 Iowa842, 226NW371; 257 Mass198, 153NE793; 257Mass419, 154 NE179; Mo 248SW(2d)1046; ND 228 NW453. [a] Iowa 232NW636.

881-82 32Ariz200, 256P1054.

881-83 48Nev134, 228P582.

881-84 48Nev134, 228P582.

882-88½-New. Where neither objection nor motion to strike out was made, question of admissibility cannot be raised. 82NH189, 131A606.

882-88⅓-New. It is not error for the court to strike an illegal answer to an illegal question, although the question was not objected to. 21AlaA323, 108S 80.

882-89 22AlaA583, 118S242 [certiorari den, 218Ala166, 118S248]. [a] **Motion to suppress evidence** of automobile's contents made at opening of trial of liquor transportation case on grounds that no search warrant had been issued and that defense counsel had been retained on eve of trial is held not timely, where defendant was previously represented by counsel. 141Wash302, 251P 586. [b] **Motion to suppress evidence at time of compliance with bond for appearance** is not too late. 42F(2d)103.

882-92 NJSup 134A294; OklCr 280P 851(2dcase); 117 Or430, 244P538; 89 Ind304, 166NE289; MoA 17SW(2d)353; 33PortoRico 15.

882-93 113TexCr486, 22SW(2d)458 (upon submission of one count defendant should request withdrawal of evidence on another count).

882-95 32F(2d)15.

882-97 76CalA688, 245P781; 117 Or 430, 244P538; 99Vt473, 134A585.

882-1 104TexCr121, 282SW600.

882-2 34PortoRico 519.

882-3 32F(2d)15; 36F(2d)1; 22AlaA 472, 116S896; 23AlaA127, 123S263 (other grounds waived by specifying certain ground); 318Mo 1233, 3SW(2d)365; ND 228NW453; Wash 290P824.

882-6½-New. Where it is desired that

answers to a particular question be stricken, they should be specified. 72 CalA52, 236P355.

882-7 [b] **Motion for directed verdict** on ground that officer making search and seizure had no warrant and no reasonable cause for making seizure is equivalent to motion to exclude evidence obtained. 4F(2d)817.

882-9 15F(2d)916; 20F(2d)795; 23 AlaA532, 128S468; 21AlaA495, 109S 528; 22AlaA583, 118S242 [certiorari den 218Ala166, 118S243]; Cal 265P231; 70 CalA189, 232P747; 78CalA37, 247P601; 78CalA554, 248P964; 81CalA159, 253P 183; 162Ga208, 132SE911; 34GaA176, 128SE683; 46 Ida561, 270P417; Ind 168NE22; Ind 169NE676; 89 IndA535, 166NE26; Mass 172NE343; 115Nebr 225, 212NW426; 284Pa105, 130A403; 93PaSuper508; 100WVa180, 130SE102; 34Wyo 84, 241P707. See also Iowa 228 NW308. But see 91CalA189, 266P972. [a] 92PaSuper404.

883-10 15F(2d)916; 23AlaA592, 129S 482(2dcase); 95CalA711, 273P99; 34 GaA176, 128SE683; 217Ky403, 289SW 371; 111TexCr570, 13SW(2d)874; Utah 276P166.

883-15 Mo 285SW1000. But see 194NC 42, 138SE342. But see 116 Or509, 241P 983.

883-18 337 Ill 371, 169NE190 (ruling that qualified testimony held denial of motion to strike it); 228Ky151, 14SW (2d)387; 34NM108, 277P966 (with admonition to jury to disregard it). [a] **Ruling held sufficiently to rebuke witness.**–MoA 289SW664. [b] **Request to discharge jury** should be made if counsel believes court's admonition does not remove prejudicial effect. 232Ky691, 24 SW(2d)564.

883-23½-New. The court is not required to strike nonresponsive answer of witness when it is competent testimony. 201 Iowa575, 207NW608 (as to intoxication).

883-23½-New. Evidence which has been stricken cannot be considered even though clearly admissible. 41F(2d)157.

883-24 243 IllA348.

883-26 219Ky287, 292SW789; 149Md 128, 131A29. Contra 7F(2d)455.

883-27 104TexCr637, 285SW826.

883-27½-New. Error in ruling on motion to strike out and disregard evidence should be called to attention of court by exception. 17F(2d)12.

884-36 32 OhA433, 168NE142.

884-38 18F(2d)522; 149Md128, 131A 29.

884-49 15F(2d)916; 222Ky99, 300SW 357; 113TexCr257, 20SW(2d)196(2d case).

884-51 CalA 290P1054.

885-58½-New. Where accused refused to submit to arrest, disarmed officer, and compelled him to leave the premises, he cannot be heard to say that he was under arrest or any other form of restraint. TexCivA 276SW232.

885-58⅓-New. An objection to evidence is not waived by introduction, by the objector, of similar evidence but not on the same question, especially when brought out in cross-examination of the adverse party's witness. 101WVa356, 132SE728.

885-58¼-New. Defendant, not questioning validity of arrest before trial, could not question admissibility of evidence on ground of illegality of arrest. 20F(2d)382; 20F(2d)383.

885-58½-New. Error in receiving evidence of other offenses is not waived by a statement expressing the opinion that the error is incurable by reason of which the trial judge did not limit the consideration of the evidence in discharge. 104TexCr429, 284SW547.

885-58⅚-New. Where incompetent evidence was admitted over objection, defendant by later testifying upon a different defense, does not waive objection. 214Ky240, 282SW1097.

885-58⅞-New. By voluntarily submitting books to examination, right to object to evidence of contents of such books is waived. 12F(2d)727.

885-58⅞-New. Where defendant on cross-examination admitted that contents of affidavit were substantially as proved by incompetent testimony, he waived the error. 217Ky539, 290SW 314.

885-58⅛-New. Defendant does not waive objection to impeachment by the people of its own witness by demanding that the district attorney testify as to the impeaching statement. 81CalA 226, 253P735.

885-58 1/10-New. Accused who invited officer to search him is estopped to object to evidence because arrest was without warrant. 26F(2d)241.

885-58 1/11-New. After overruling of a motion to suppress on the ground that it was without merit, defendant cannot shift his ground, without showing a lack of knowledge of facts, and urge a different reason for exclusion of evidence. 89 IndA621, 166NE620.

885-58 1/12-New. Admission of incompetent testimony is waived by failure to move for discharge of the jury after an instruction by the court to the jurors to disregard testimony. 89 IndA494, 165NE921(1stcase).

885-58 1/13-New. Correction of misstatements of evidence must be requested before the jury retires, and is too late after the verdict. 87PaSuper33.

885-58 1/14-New. Defendant's acquiescence in the prosecution's demand that the entire evidence at the coroner's inquest be read is not an abandonment of the offer of testimony as impeaching. 86CalA298, 260P901.

885-58 1/15-New. Changing form of question without objection is a waiver of right to ask the question in the original form. 180Ark241, 22SW(2d)47.

885-60 24F(2d)782 (objection waived); 31F(2d)737; Ind 166NE439; 89 IndA 592, 166NE444; 89 IndA606, 166NE445; 89 IndA588, 166NE446(2dcase); 89 IndA586, 166NE447.

885-62 334 Ill 218, 165NE619.

885-63 7F(2d)355; 23AlaA384, 125S 898; 29Ariz523, 243P601; 32Ariz200, 256P1054; 171Ark297, 284SW734; 174 Ark950, 298SW323; 177Ark294, 6SW (2d)295; 43 Ida180, 250P239; 319 Ill 606, 150NE347; 337 Ill 342, 169NE165; 200 Ind43, 161NE265; Iowa 232NW636; 212Ky24, 278SW549; 214Ky458, 283 SW427; 214Ky475, 283SW431; 215Ky 2, 284SW82; 232Ky613, 24SW(2d)269; 143Miss347, 108S721; 146Miss351, 111 S860; 150Miss228, 116S435; Mo 292 SW440; 321Mo 553, 12SW(2d)428; Mo 24SW(2d)1023; Mo 24SW(2d)1032; 115 Nebr833, 215NW107, 53ALR1057; 51 Nev82, 269P489 (exhibits); 119 Oh231, 163NE28; OklCr 285P847; OklCr 290 P934; 290Pa271, 138A836; 295Pa190, 145A85; 33PortoRico 15; 153SC175, 150 SE614(1stcase); 99TexCr589, 271SW 385; 108TexCr332, 1SW(2d)301; 109 TexCr323, 4SW(2d)564; 113TexCr265, 20SW(2d)426; TexCr 27SW(2d)175 (2dcase); TexCr 29SW(2d)381(2dcase); 147Wash315, 265P742; 103WVa404, 137 SE746. See also 84Mont348, 275P757. But see 40F(2d)295. [a] CalA 285P 386. [b] **Thus** failure to object to evidence of repeated acts of intercourse makes it competent for jury to base conviction. 21AlaA125, 106S67. [c] **Defendant is estopped to contradict** immaterial or prejudicial testimony not objected to. 113TexCr265, 20SW(2d) 426.

885-66 115Nebr833, 215NW107, 53ALR 1057.

885-69 243Mich546, 220NW790.

885-70¼-New. Where a motion to suppress evidence was made and denied at the opening of the trial and no exception was saved, defendant is not entitled to raise the question later. 18F(2d) 522.

885-70¼-New. Where petition to suppress evidence is denied and denial excepted to, party does not lose benefit of exception by failure to object to evidence when offered at trial. Wyo 286P 390.

885-71 86CalA148, 260P591 (failure to renew motion to strike testimony).

885-71½-New. Where defendant objects to the first question in the line of interrogation, and an objection is overruled, and exceptions taken, the objection applies to subsequent questions along that line asked the same or any other witness, and defendant need not continue to object after each question. 227Ky528, 13SW(2d)521.

885-73 Mo 270SW273. But see 146 Miss505, 112S685.

886-74 22CalA255, 114S475; 162La471, 110S723. [b] 23AlaA456, 127S252(1st case); 41GaA226, 152SE599.

886-76 222Ky670, 1SW(2d)1072; 161 La532, 109S56.

886-77 37F(2d)677 (defendant's later testimony on evidence objected to, held not a waiver).

886-79 86CalA30, 260P389.

886-81½-New. Where objection to testimony is sustained when made, admission of other testimony of the same character is not prejudicial. Mo 300SW 706.

886-82 42F(2d)636; 21AlaA22, 104S 866 (statement of prosecuting attorney prejudicial error); 21AlaA266, 107S 328; 176Ark916, 5SW(2d)946; 76CalA 105, 243P882; 77CalA29, 245P769; 80 CalA675, 252P758; CalA 293P72; 94Fla 318, 113S689; 317 Ill 603, 148NE281; 325 Ill 245, 156NE354; 331 Ill 581, 163 NE373; 209Ky263, 272SW721; 217Ky 565, 290SW325; 237Mich481, 212NW 105; 147Miss17, 112S601; 32Mo 417, 8 SW(2d)29; MoA 7SW(2d)375; 116Nebr 141, 216NW173; 93PaSuper323; 148SC 64, 145SE632; TexCr 29SW(2d)769 (holding it proper for district attorney to state that testimony before grand jury showed witness to be implicated in transaction); 103WVa237, 136SE862; 195Wis166, 217NW653. [a] 113TexCr 142, 18SW(2d)663. [d] **Statements by prosecutor to jury held not improper.**–That every red-blooded citizen in state envies jury the opportunity they have to serve state. 106Conn345, 138A132. [e] **Where trial court, after husband of defendant was called as witness,** interfered and told defendant's counsel he need not object, reversible error did not result. 247Mich335, 225NW552(1st case). [f] **Duty of protection** of person from unfounded accusations rests on him. 27F(2d)137.

886-83 94Fla318, 113S689.

886-85 94Fla318, 113S689.

887-88 103WVa237, 136SE862.

887-91 319Mo 46, 4SW(2d)456; 103 WVa237, 136SE862.

887-93 22AlaA428, 116S415; 325 Ill 313, 156NE310; 325 Ill 337, 156NE378; 34Wyo 90, 241P705.

887-94½-New. Function of a district attorney is in a measure, judicial, requiring him to see that the commonwealth's case is fully and fairly presented. 290Pa573, 139A374.

887-97 81CalA113, 252P1063 (should not disregard rulings of court); 237 Ill A178; OklCr 276P518.

887-97½-New. Chief obligation of counsel is to aid in administering justice, the success of his client being secondary. 25F(2d)357.

887-99 160La26, 106S662; 189NC799, 128SE152; 113 OhSt512, 150NE74, 42 ALR1151. [b] **Refusal to permit defendant to address the jury,** at conclusion of evidence, is violative of constitutional right to be heard by himself or counsel. 21AlaA357, 108S265.

887-7 189NC799, 128SE152.

887-8 22F(2d)803; 219Ala46, 121S38; 23AlaA166, 122S699(2dcase) [certiorari den 219Ala422, 122P700(1stcase)]; 174 Ark743, 297SW826; 175Ark1170, 1SW (2d)46; 176Ark916, 5SW(2d)946; 180 Ark290, 21SW(2d)176; 95CalA259, 272 P816; 97Fla621, 121S797; 160La470, 107S309; 170La507, 128S293; 254Mass 520, 150NE854; Mass 165NE413; 102 NJL94, 131A292; 53ND95, 204NW969; 129 Or564, 278P568, 63ALR1225; 156SC 509, 153SE480; 52SD582, 219NW263; 150Wash66, 272P89; 99WVa694, 129SE 748. [c] **Granting mistrial** for comments by attorney held largely within discretion of court. 284Pa159, 130A317.

888-10 22AlaA345, 115S693. [a] Wash 290P701.

888-11 318 Ill 388, 149NE273.

888-14 216Ala336, 113S64.

888-15½-New. Where it does not appear that either of two defendants was represented by counsel who does not represent the other and they have waived their right to sever, and be tried separately, the court may treat the case

as one trial and may refuse to permit four attorneys to argue the case for defendants. 161Ga332, 131SE80.

888-16 22F(2d)803; Mo 25SW(2d)113.

888-17 39GaA128, 146SE340. [b] **"Counsel for prosecution"** within statute prescribing order of argument, includes assistant attorney general or counsel privately employed to assist prosecuting attorney. Mo 25SW(2d) 113.

888-19 138SC167, 136SE222.

888-21 174Ark1180, 297SW830; 90 CalA590, 266P295 (where no request made for additional time); 128Kan374, 278P57; 215Ky585, 286SW689; 216Ky 376, 287SW933; 158La927, 105S16; Mo 296SW128; Mo 25SW(2d)113; TexCr 31SW(2d)435.

888-24 174Ark1180, 297SW830; TexCr 31SW(2d)435. [a] (4) 28F(2d)663. (10) CalA 291P872 (court permitting interruption). (12) 153Va954, 151SE286. (16) In homicide prosecution, one hour, although defendant had two attorneys. 215Ky585, 286SW689. (17) Limitation of argument to one hour is not abuse of discretion where case was short and time allowed was not consumed. 108 TexCr339, 18SW(2d)295.

888-24½-New. Where time is not consumed, limitation is not error. 161Ga 332, 131SE80.

889-27½-New. Accused who does not ask for more time for argument or except to ruling fixing limit waives error if any. 219Ky287, 292SW789.

889-29½-New. A refusal to extend the time allowed by law for argument is not erroneous where counsel fails to state that he could not do justice to the case in the time prescribed. 161Ga332, 131 SE80.

889-31 [a] **Reading of indictment and statement of case to jury by hired counsel** for state in presence of commonwealth's attorney has been held not improper. 227Ky249, 12SW(2d)289.

889-32 199Cal 471, 250P168; 49Nev75, 236P1100.

889-34½-New. Where, upon conclusion of the opening argument by the state, defendant waives the argument, the court in its discretion may permit counsel for the state further to argue the case. OklCr 280P473(2dcase).

889-40 206Cal 29, 273P568; 95CalA563, 272P1103; 49Nev75, 236P1100 (not evidence of any character).

889-41½-New. Counsel's opening statement is subject to the discretion of the trial court. 123 Or521, 262P954.

889-41⅓-New. The trial judge may, in his discretion, supervise the opening statement so that it will serve that purpose which the law intended. 123 Or 521, 262P954.

889-42 214Ala172, 106S692; 199Cal 471, 250P168; 333 Ill 397, 164NE847; 199 Ind160, 155NE824; 126Me136, 136A 808; 49Nev75, 236P1100; 39 OklCr264, 264P643; OklCr 271P172; 123 Or521, 262P954. [a] **By saying he had other facts in addition** to those outlined which he would not state, district attorney did not make opening statement objectionable as withholding facts. 170La507, 128S293. [b] **Demurrer to opening statement overruled.-Kan** 291P950.

890-45 35F(2d)605; 214Ala172, 106S 692; 180Ark197, 20SW(2d)872; 200 Iowa483, 203NW806; 219Ky806, 294 SW466; 210Ky413, 276SW112; 126Me 136, 136A808; 321Mo 662, 12SW(2d)34; Mo 24SW(2d)1023; 221MoA592, 283SW 468; 79Mont343, 256P380; 49Nev75, 236P1100; 103NJL534, 138A203; 55ND 194, 212NW857; 70Utah586, 262P113. [a] **Statement as to fast driving** just prior to collision of defendants' car containing liquor and another car was not prejudicial. 27F(2d)94. [b] **Case should be fairly stated** so as to give defendant's counsel fair opportunity to answer. Fla 129S771.

890-45½-New. and conclusions to be drawn therefrom. 200 Iowa483, 203NW 806.

890-46 214Ala172, 106S692; 174Ark 743, 297SW826; 199Cal 471, 250P168; 199Cal 610, 250P659; 206Cal 29, 273P 568; 84CalA168, 257P903; 86CalA791, 261P526; 170La630, 128S658; 238Mich 332, 213NW104; Mo 18SW(2d)423; Mo 24SW(2d)1032; 221MoA592, 283SW468; 49Nev75, 236P1100; 55ND194, 212NW 857; 155Wash80, 283P671.

890-47½-New. So statement that accused's wife participated in assault is not error where defendant did not object and court later ruled offenses distinct and withdrew consideration of any assault not made by accused. 312 Mo 15, 278SW743.

890-47⅓-New. Error in the opening statement may be eliminated by exclusion of testimony on the subject and instruction to disregard. 321Mo 662, 12 SW(2d)34.

890-50½-New. but not instruct as to the law of the case. 200 Iowa483, 203 NW806.

890-51 123 Or521, 262P954 (cannot read penalty from statute).

890-52 Contra 123 Or521, 262P954.

890-52½-New. , nor threaten dire consequences if verdict of guilty is not rendered. 221Ky696, 299SW563.

890-53 33F(2d)820; 214Ala172, 106S 692; 332 Ill 120, 163NE438; 49Nev75, 236P1100; 39 OklCr264, 264P643; 48 SD636, 205NW666 (opening statement should not contain damaging facts with which prosecutor knows he cannot convict defendant).

890-54 199 Ind160, 155NE824; 221Ky 148, 298SW385; 39 OklCr264, 264P643.

890-54½-New. , nor character or reputation of defendant's witnesses. 212 Ky303, 278SW1097.

890-55 [a] **Prior conviction charged in indictment** may be referred to in some jurisdictions. 104WVa231, 139SE742.

890-60½-New. A statement of the prosecuting attorney in explanation of the absence of persons whom the state had intended to use as witnesses is not objectionable as an attempt to testify or introduce hearsay testimony when made in good faith. 169Ark356, 275SW700.

890-60⅓-New. In dealing with opening statement of facts to be proved, court may consider whether proposed proof is illegal. 214Ala172, 106S692.

890-60¼-New. and may question counsel as to whether such proof will be forthcoming. 214Ala172, 106S692.

890-60⅙-New. Referring to defendant as "otherwise known as Koolack" is not error where defendant admitted in examination that she was known by that name. NJSup 134A175.

890-60⅛-New. Statements, based on facts expected to be proved or legitimate inferences therefrom, are proper. 290Pa 573, 139A374.

890-60½-New. Failure to mention confession is no cause for mistrial on ground of surprise. Mo 278SW987.

890-62 OklCr 292P875.

891-67 19F(2d)202; 200 Iowa483, 203 NW806, 807 [citCJ]; 49Nev75, 236P 1100; 100TexCr147, 272SW493. [a] **Contents in general.-110TexCr**308, 7SW (2d)1091. [b] 21AlaA35, 104S876.

891-68½-New. A statute giving a right has been held not mandatory. 110Tex Cr308, 7SW(2d)1091.

891-69 49Nev75, 236P1100. [a] **Opening statement by defendant's counsel does not constitute evidence and is not binding** and therefore failure to make good such statement should not be argued. CalA 292P500.

891-69½-New. The character and extent of statement are subject to the control of the trial court. 110TexCr 308, 7SW(2d)1091.

891-71 200 Iowa483, 203NW806, 807 [citCJ].

891-72 49Nev75, 236P1100.

891-77 118 Or656, 247P1077, 1080 [cit CJ].

891-77½-New. Counsel for defendant should not refer in his opening statement that others with defendant at the time of the homicide were acquitted. 295 Pa264, 145A89.

891-77⅓-New. Sustaining objection to part of opening statement held not error. Kan 291P745.

891-78 But see 246NY262, 158NE615.

891-79 200 Iowa483, 203NW806 [cit CJ].

891-79 See also 246NY262, 158NE615.

891-81 But see 110TexCr308, 7SW(2d) 1091.

891-83 83CalA370, 257P92; 97Fla650, 122S110; 230Ky830, 20SW(2d)981; 234 Ky333, 28SW(2d)24; 127Me197, 142A 728; 246Mich429, 224NW387; 179Minn 502, 229NW801; MoA 7SW(2d)375; 111 TexCr640, 13SW(2d)832; 198Wis180, 223NW419. [a] **Cross-examination held proper.-97CalA**205, 275P851. [b] **Cross-examination held improper.-97CalA**205, 275P851.

891-85 127Me197, 142A728.

891-86 31F(2d)682; 72CalA611, 237P 824 (asking defendant's counsel to produce certain contracts, which he voluntarily did, held not to compel defendant to testify against himself); 77CalA 29, 245P769; 327 Ill 223, 158NE436; 229 Ky617, 17SW(2d)757; OklCr 279P525 (calling wife to testify against husband); 53SD60, 220NW139 (evidence not incompetent); 100TexCr316, 273SW 862; 113TexCr637, 21SW(2d)1042; 69 Utah181, 253P204; 33Wyo 360, 239P 952. See also 100TexCr592, 272SW175. But see 337 Ill 300, 169NE182.

892-90½-New. or to refer to an object by a word of designation used by the witness. 207 Iowa624, 223NW362.

892-91½-New. Or in showing a photograph of the alleged accomplice to witnesses where it was not shown to the jury and was excluded when offered in evidence; 79CalA27, 248P924.

892-93½-New. There is no rule of law or practice which requires the prosecutor to argue evidence and state to the jury what he claims from it. 233Mich98, 206NW516.

892-94 75CalA1, 241P928; 156Ga285, 119SE614.

892-95⅙-New. Production of the injured person as a witness is not misconduct, although his condition necessitates that he be brought into the court room on a stretcher. 69CalA201, 230P982.

892-96 99TexCr589, 271SW385.

892-98 99TexCr589, 271SW385.

892-99 22AlaA79, 112S535; 197Cal 200, 239P1080; 76CalA558, 244P1086; 77 CalA29, 245P769; 317 Ill 603, 148NE 281; 199 Iowa1073, 203NW257 (as to character of witness); 202 Iowa431, 210 NW423; 209Ky263, 272SW721 (incompetent questions); 210Ky385, 275SW 819; 210Ky524, 276SW550; 165La758, 116S176; OklCr 280P636; 133SC491, 131SE603; 49SD406, 207NW482; 106 TexCr99, 291SW242; 111TexCr640, 13 SW(2d)832; 147Va709, 137SE528. [a] **Cross-examination of defendant.-39 Okl** Cr402, 266P495.

892-1 209Ky263, 272SW721; 210Ky 385, 275SW819; 133SC491, 131SE603.

892-2 71CalA453, 236P163; Iowa 221 NW814; 210Ky385, 275SW819; 179 Minn502, 229NW801; 226AppDiv569, 235NYS386; 133SC491, 131SE603; 48 SD636, 205NW666; 100TexCr144, 272 SW185; 100TexCr223, 272SW458; 100 TexCr518, 272SW164; 111TexCr361, 12 SW(2d)1031.

892-3 33F(2d)107; 71CalA453, 236P 163.

892-5 14F(2d)281; 21AlaA419, 109S 114; 71CalA453, 236P163; 77CalA29, 245P769; 92CalA470, 268P473; 210Ky 385, 275SW819; 167Minn234, 208NW 653; MoA 286SW143; 50Nev256, 256P 793, 52ALR1015; 133SC491, 131SE603; 100TexCr144, 272SW185.

893-7 198Cal 728 247P907; 68CalA95, 228P417; 69CalA201, 230P982; 199Cal 513, 250P164; 199Cal 610, 250P659; 83 CalA370, 257P92; CalA 291P872; 69 Utah181, 253P204; 141Wash8, 250P349. [a] **Mistrial will not be ordered** where court sustains objections to questions, unless it clearly appears that rights of adverse party were so prejudiced as to render fair trial matter of grave doubt. 22AlaA353, 115S698. [b] **Cross-examination of character witnesses held not misconduct.-100CalA**639, 280P999.

893-8½-New. Questions to defendant are held not injurious as impressing jury he had made statements admitting guilt. 105TexCr426, 289SW49.

893-8⅓-New. Misconduct is not shown by withdrawal of questions to which objections are made. Minn 231NW225.

893-9 94Fla163, 113S699; 127 Or415, 272P561. [a] **Questions held not improper.-156SC509,** 153SE480.

893-12 22AlaA529, 117S497.

893-13 [a] **Exceptions held without merit.-156SC509,** 153SE480.

893-14 317Mo 354, 296SW397.

893-16½-New. It is error for the court

to refuse instruction to county attorney that conviction of defendant for felony more than fifteen years ago is too remote for inquiry. 99TexCr655, 271SW609.

893-16½-New. It was within the discretion of the judge to allow counsel to argue reasons for objection to the evidence, and such discretion was not abused where defendant's rights were fully protected by granting exceptions. 49RI397, 143A604.

893-19 [a] **State's closing argument** should be limited to reply. 192Wis22, 211NW668.

893-30 32F(2d)992; 23AlaA86, 122S613 (1stcase) [certiorari den 219Ala395, 122S613(2dcase)]. [a] **Prosecutor should not comment** on defense counsel's request to submit case without argument. 212Ky112, 278SW568. [b] **District attorney's argument** accounting for absence of certain check apparently mentioned in argument for defendant did not amount to misconduct. 99CalA224, 278P258.

893-31 317Mo413, 297SW63. [a] 110TexCr512, 8SW(2d)144, 60ALR290. [b] **Propriety of argument should be determined** with reference to evidence to which it is addressed. 95Fla997, 117S381.

893-32 42F(2d)636; 213Ala541, 105S677; 80CalA31, 251P343; 209Ky51, 272SW11; 231Ky152, 21SW(2d)231 (reviewing court is restricted to meaning expressed by language used); 231Ky337, 21SW(2d)441; Mass171NE16; Miss107S385 (remarks held not to require charge that jury disregard them); 147Miss575, 113S185; 155Miss629, 125S115; 311Mo461, 278SW719 (statement not ground for reversal); 221AppDiv26, 222NYS497; OklCr279P515; 86PaSuper483; 299Pa547, 149A696; 156SC509, 153SE480; 99TexCr529, 270SW552; TexCr11SW(2d)172; 113TexCr247, 20SW(2d)431 (evidence adduced should be considered in determining effect of prosecutor's argument); 145Wash4, 258P845; Wash288P218. [d] **Remarks held not improper.**–21AlaA82, 105S438 (in prosecution for possession of prohibited liquors). [e] **Reading speech of defendant's counsel when district attorney in state case,** which was pertinent as argument in any criminal case, held not to have injured defendant or detracted from his counsel's argument. 159La589, 105S631. [f] **District attorneys are entitled to argue their cases** to the jury with same latitude as counsel for defense. 168La297, 121S872. [g] **Defendant's failure to substantiate counsel's opening statement** may be argued on by district attorney. CalA292P500.

894-33 20AlaA532, 103S479; 79CalA464, 249P1089; 97Fla621, 121S797; 318Ill388, 149NE273; 316Mo31, 292SW434.

894-34 20AlaA604, 104S280 (anecdote of solicitor in argument not improper); 80CalA31, 251P343; 232Ky453, 23SW(2d)930; 169La1002, 126S507; 107TexCr600, 298SW438.

894-35 7F(2d)469; 21AlaA248, 108S870; 70CalA17, 232P991; 123Kan743, 256P1017; 165La270, 115S484; Mo30SW(2d)750; 104TexCr240, 283SW802.

894-36 14F(2d)366; 213Ala541, 105S677 (argument, no matter how severe, if confined to inferences finding support in evidence is not error); 21AlaA266, 107S328; 21AlaA474, 109S385; 22AlaA384, 115S857; 77CalA29, 245P769; 83CalA34, 256P455; 318Ill388, 149NE273; 326Ill327, 157NE247; 212Ky24, 278SW549; 216Ky317, 287SW898; 237Mich481, 212NW105; 141Miss772, 105S758; 50Nev256, 256P793, 52ALR1015; 245NYS692; 295Pa50, 144A761; 101TexCr633, 276SW923; 102TexCr8, 277SW135 (comments proper or not prejudicial); 103TexCr428, 280SW1069; 105TexCr107, 286SW1100; TexCr27SW(2d)171; 153Va954, 151SE286. [b] **Illustration.**–213Ala551, 105S709 (in prosecution for seduction). [c] **Conviction should not rest even slightly upon dereliction of counsel** but be grounded upon acts committed by defendant. CalA292P500.

894-37 100TexCr11, 271SW380 (court may not sanction statements by prosecuting attorney as to law of case nullifying charge already given).

894-37½-New. Familiarity with jury on part of counsel by patting on the knee is improper. 21AlaA33, 104S878.

894-38 21AlaA248, 108S870; 177Ark742, 9SW(2d)15; 80CalA31; 251P343; 225Ky413, 9SW(2d)53; 230Ky250, 19SW(2d)218; 225Ky576, 9SW(2d)706; 226Ky127, 10SW(2d)609; 235Ky454, 31SW(2d)703; 163La701, 112S655; 237Mich481, 212NW105; 171Minn414, 214NW280. [b] **Exhorting to convict** is not error. 21AlaA79, 105SW425.

894-39 159La589, 105S631 (holding that reading by district attorney of fragments of speech by defendant's counsel when he was district attorney was not prejudicial).

894-39½-New. In a prosecution of one of two men caught at still, solicitor's statement to jury that other was already convicted is held improper argument. 21AlaA352, 108S351.

894-39⅓-New. Reference of county attorney in argument to jury to fact that accused testified at previous trial is held not comment on result of such trial. 104TexCr495, 283SW498.

894-39¼-New. In a cross-examination, question whether witness filed affidavits to secure new trial after previous trial is held not comment on result of trial. 104TexCr495, 283SW498.

894-39⅙-New. In introducing evidence of witness at former trial, since deceased, reference to statement of facts "used in Court of Criminal Appeals" is held not comment on result of former trial. 104TexCr495, 283SW497.

894-39⅙-New. Remarks of the prosecuting attorney in an argument will be considered and construed in reference to the evidence. 43OklACR321 [reh pending].

894-39⅐-New. It is improper for the attorney-general to refer to counsel for defendant as having been paid for their services and therefore interested. 159Tenn112, 17SW(2d)30.

894-39⅛-New. A tacit admission of the state's counsel in running an argument does not arise to the dignity of a specific admission. 87CalA181, 261P1045.

894-39⅑-New. An argument berating the defense of an alibi is highly improper. 317Mo759, 297SW10.

894-39⅒-New. All arguments of counsel must be appraised in the light of the entire record and verdict. 113TexCr188, 19SW(2d)319.

894-40 194Cal1, 227P156 (remarks at time of passing on application for probation and pronouncing sentence).

894-43 But see 94Fla318, 113S689. [b] **Dramatic display of blood-stained clothing of victim of homicide** which was improperly received in evidence is improper. Mo270SW347.

894-45 75CalA642, 243P461; 38GaA360, 144SE15.

894-46 165Ga326, 140SE889; 102NJL94, 131A292; 147Va692, 137SE603.

894-50½-New. Trial court has discretion to prevent abuse of exhibition of weapon in argument, and the appellate court will not interfere in the absence of abuse. 147Va692, 137SE603.

894-51 100TexCr600, 272SW200. (4) Holding baby, in seduction prosecution, and exhibiting it to jury, saying "this might happen in your house by other men going to your home and seducing your daughters," held proper as natural remark growing out of evidence. 213Ala551, 105S709.

895-53 179Ark206, 15SW(2d)396(1st case).

895-54 329Ill352, 160NE564. [a] **Prosecutor in closing argument** can only tell jury his recollection of testimony. 21AlaA639, 111S202.

895-55 21AlaA639, 111S202.

895-58 154Wash575, 283P167.

895-61 See also Mo295SW547.

895-71½-New. or to comment on the fact that defendant is pleading insanity; 219Ala282, 122S45.

895-72 213Ala541, 105S677 (reading facts of case on former trial generally improper).

895-73 213Ala541, 105S677 (reading facts of other cases improper). See also 161Tenn23, 28SW(2d)993.

895-75½-New. It is not error to limit argument of counsel for defendant where he attempts to read from books and papers relating to mistakes in identification in other cases where there was no evidence in the record regarding the other cases to which counsel was referring. 75CalA657, 243P64.

895-75¼-New. It is proper to refuse to allow defendant's counsel to refer to and argue on another case facts of which are involved. 260Mass303, 157NE354.

895-75¼-New. It is error for the state's solicitor to read an excerpt from the indictment charging prior conviction of a similar crime. 22AlaA300, 115S149.

896-85 26F(2d)791; 34F(2d)406; 35F(2d)454; 217Ala225, 115S297; 216Ala336, 113S64; 20AlaA599, 104S555; 21AlaA304, 107S719; 21AlaA339, 108S620; 21AlaA474, 109S385; 21AlaA487, 109S523; 21AlaA534, 109S613; 22AlaA172, 113S643; 22AlaA345, 115S693; 22AlaA566, 118S325 [certiorari den 218Ala180, 118S326]; 22AlaA627, 118S766(1stcase); 173Ark450, 292SW699; 175Ark396, 299SW391; 177Ark892, 9SW(2d)21; Cal257P65; 69CalA558, 231P767; 75CalA74, 241P924; 75CalA181, 242P503; 77CalA44, 246P97; 77CalA438, 246P1072; 77CalA738, 247P532; 199Cal513, 250P164; 80CalA31, 251P343; 84CalA58, 257P592; 88CalA222, 263P306; 89CalA405, 264P1105(sole basis); 90CalA317, 265P893; 92CalA470, 268P473; 93CalA632, 269P951; 102CalA608, 283P389; 164Ga490, 139SE5; 169Ga142, 149SE887; 37GaA485, 140SE773; 38GaA360, 144SE15; 321Ill254, 151NE870; 321Ill380, 152NE215; 321Ill624, 152NE520; 331Ill380, 163NE149; Ill173NE97; 203Iowa954, 210NW448; 122Kan524, 253P551; 127Kan7, 272P169; 208Ky98, 270SW451; 212Ky24, 278SW549; 215Ky837, 287SW32; 221Ky148, 298SW385; 222Ky695, 2SW(2d)378; 224Ky13, 5SW(2d)275; 229Ky312, 17SW(2d)241; 231Ky152, 21SW(2d)231; 231Ky337, 21SW(2d)441; 232Ky205, 22SW(2d)615; 235Ky462, 31SW(2d)712; 160La79, 106S701; 161La532, 109S56; 162La340, 110S497; 165La270, 115S484; 165La758, 116S176; 169La109, 124S188; 170La630, 128S658; 153Md431, 138A338; 229Mich172, 200NW967; 233Mich284, 206NW538; 239Mich386, 214NW183; Mich233NW430; 175Minn607, 222NW280; Minn231NW12; 147Miss575, 113S185; 151Miss617, 118S447; Mo271SW471 (failure to cross-examine); 309Mo498, 274SW734; 310Mo500, 276SW625; Mo278SW681; 311Mo599, 278SW977; Mo279SW109; 313Mo615, 285SW392; 316Mo995, 292SW70; 316Mo31, 292SW434; 317Mo413, 297SW63; 320Mo319, 6SW(2d)857; Mo12SW(2d)46; 322Mo246, 14SW(2d)608; Mo23SW(2d)136 (remark held not statement that defendant must prove innocence); Mo24SW(2d)1032; 83NH435, 144A124; 58ND700, 227NW224 (may make reasonable comment on alleged statements of defendant denied by him); ND229NW569; OklCr273P369; OklCr277P287; 149SC125, 146SE684; 156SC509, 153SE480; 159Tenn112, 17SW(2d)30; 99TexCr572, 271SW99; 100TexCr334, 273SW589; 100TexCr451, 273SW578; 101TexCr86, 273SW598; 101TexCr474, 276SW250; 103TexCr126, 280SW223; 104TexCr240, 283SW802; 104TexCr338, 283SW840; 107TexCr58, 294SW852; 107TexCr676, 298SW594; 108TexCr106, 299SW430; 108TexCr462, 1SW(2d)283; 108TexCr655, 2SW(2d)439; 109TexCr543, 5SW(2d)1001; 110TexCr432, 10SW(2d)109 (right to analyze confession); TexCr20SW(2d)423; TexCr23SW(2d)391; TexCr24SW(2d)404; TexCr32SW(2d)194; 101Vt105, 141A596; 143Va489, 129SE252 (expression of opinion as to conduct of witness at time of affray); 143Va510, 129SE360; 145Wash4, 258P845; 99WVa694, 129SE748; Wyo285P803. [b] (3) Remark that evidence warranted filing of information held not error. 90Fla178, 105S401. [n] **Whether arguments presented by attorney were reasonable inferences from testimony** may be determined by jury. 160La79, 106S701. [o] **Statements in defendant's confession.**–97CalA238, 275P511. [p] **Prosecuting attorney has right**

to analyze testimony, urge jury on reason to reject it, and point out, if possible, its inapplicability, but should not indulge in invective, ridicule, injection of his belief, and innuendoes. 246Mich 429, 224NW387. [q] **Statements held within evidence.**–Wyo 285P803.

897–86 219Ala46, 121S38; 21AlaA474, 109S385; 22AlaA345, 115S693; Cal 257P65; 77CalA438, 246P1072; 37GaA485, 140SE773; 235Ky462, 31SW(2d)712; Mo 300SW504; 99TexCr647, 271SW389; 106TexCr197, 291SW550; 107TexCr571, 298SW580; 145Wash4, 258P845.

897–87 21AlaA266, 107S328; 21AlaA474, 109S385; 21AlaA491, 109S521; 23AlaA27, 122S804(2dcase) [certiorari den 219Ala504, 122S805]; 69CalA558, 231P767; 70CalA531, 233P980; 77CalA438, 246P1072; 321 Ill 380, 152NE215; 208Ky98, 270SW451; 229Ky305, 17SW(2d)238; 148Miss696, 114S816; 147S C514, 145SE404; 99TexCr647, 271SW389; 104TexCr257, 282SW807; 105TexCr218, 288SW209. [a] **Remark that defendant "had to deny it or plead guilty"** held within bounds of legitimate comment. 21AlaA81, 105S431 (in speaking of defendant's testimony).

897–88 But see 22AlaA529, 117S497 (conclusion of solicitor and invasion of province of jury).

897–88½–New. Criticism by solicitor in argument of showings that were made for absent witnesses, and which were admitted by state held improper. 21AlaA352, 108S351.

897–88¾–New. Prosecuting attorney's use, in argument, of descriptive terms used by physicians testifying is not error. 105TexCr235, 288SW191.

897–89 215Ala224, 110S23; 168La281, 121S867; 311Mo461, 278SW719; 109TexCr543, 5SW(2d)1001.

897–91 97CalA501, 275P961; 102Conn708, 130A184 (but not reversible error); 217Ky565, 290SW325; 221Ky474, 298SW1096; 235Ky710, 32SW(2d)43; 157Md332, 146A268; Minn 233NW307; 101TexCr639, 276SW929. See also 31Ariz427, 254P467. [b] **Argument based on illegal evidence as to family affairs of** accused is held ground for reversal. 22AlaA36, 111S763.

897–92 NH 146A503; 152Wash365, 278P149.

897–93 22AlaA65, 112S178; 217Ala398, 116S418; 22AlaA648, 119S512; 20AlaA603, 104S444; 21AlaA449, 109S282; 21AlaA491, 109S521; 21AlaA495, 109S528; 21AlaA505, 109S564; 22AlaA39, 111S767; 169Ark1173, 278SW15; 70CalA143, 232P772; 77CalA29, 245P769; 77CalA384, 246P811; 81CalA226, 253P735; 81CalA456, 254P281; 91CalA189, 266P972; CalA 292P500; 93Fla504, 112S83; 93Fla756, 112S608; 166Ga251, 142SE866; 36GaA656, 137SE797; 317 Ill 603, 148NE281; 318 Ill 388, 149NE273; 321 Ill 380, 152NE215; 203 Iowa451, 212NW757; 208Ky98, 270SW451; 215Ky843, 287SW34; 217Ky565, 290SW325; 222Ky169, 300SW344; 225Ky340, 8SW(2d)422; 227Ky404, 13SW(2d)247; 229Ky708, 17SW(2d)999; 230Ky199, 18SW(2d)1005; 165La67, 115S370; 169La109, 124S188; 246Mich429, 224NW387; 141Miss772, 105S758; 143Miss694, 109S732; 147Miss17, 112S601; 151Miss361, 118S137; 153Miss290, 120S445; Mo 274SW54; 317Mo759, 297SW10; 322Mo246, 14SW(2d)608 (argument held justified under evidence); Mo 18SW(2d)8; Mo 23SW(2d)1 (evidence held to justify argument of prosecuting attorney); 115Nebr143, 212NW35; 50Nev256, 256P793, 52ALR1015; 83NH532, 145A456; 221AppDiv351, 223NYS339; 197NC624, 150SE18; 22 OhA304, 153NE865; 35OhA539, 172NE618; OklCr 284P74; 100TexCr144, 272SW185; 100TexCr545, 272SW157; 101TexCr633, 276SW923; 104TexCr480, 284SW592; 104TexCr556, 286SW239; 109TexCr314, 4SW(2d)557; 111TexCr361, 12SW(2d)1031; 111TexCr473, 14SW(2d)1038; 112TexCr261, 16SW(2d)119; TexCr 20SW(2d)781; 113TexCr288, 21SW(2d)508; TexCr 26SW(2d)643; TexCr 26SW(2d)649; TexCr 27SW(2d)246; TexCr 27SW(2d)540(2dcase); TexCr 27SW(2d)813(2dcase); TexCr 29SW(2d)764(2dcase); 101Vt30, 139A918; 147Va709, 137SE528; 150Va605, 143SE740; 153Va846, 149SE414; 149Wash452, 271P89; 38Wyo72, 264P1017. [a] 51SD529, 215NW692; 104TexCr556, 286SW239. [b] **Refusal by judge to strike such argument creates** prejudicial error. 169Ark1173, 278SW15. [c] **Argument held sustained by evidence.**–244Mich622, 222NW185. [d] **Inference sustained by evidence.**–111TexCr328, 12SW(2d)1025.

898–94 315Mo1, 285SW429.

898–95 324 Ill 131, 154NE715; 50Nev256, 256P793, 52ALR1015; 100TexCr178, 272SW782; 106TexCr190, 292SW227; 110TexCr644, 10SW(2d)719.

898–96 81CalA226, 253P735; 229Ky708, 17SW(2d)999; 229Ky776, 18SW(2d)290; 230Ky82, 21SW(2d)115; 50Nev256, 256P793, 52ALR1015; 51SD529, 215NW692; 100TexCr580, 272SW173; TexCr 27SW(2d)187.

898–97 36GaA123, 135SE757; 101TexCr72, 273SW858; 107TexCr596, 298SW578; TexCr 20SW(2d)778; 113TexCr354, 22SW(2d)662; TexCr 26SW(2d)649.

898–98 23AlaA338, 125S207; 72CalA582, 237P1087; 77CalA384, 246P811; 83CalA34, 256P455; 166Ga512, 143SE896; 316Mo31, 292SW434; Mo 14SW(2d)449; 82NH189, 131A606.

898–98½–New. Such comments to court in arguing admissibility of evidence are not error. 101Tex651, 277SW116 (jury hardly would take such arguments as evidence).

898–99 125Kan83, 262P499; 227Ky500, 13SW(2d)511. See also 92CalA470, 268P473.

899–2 102Conn708, 130A184; 319Mo46, 4SW(2d)456; 81Mont145, 262P158; 107TexCr614, 298SW426.

899–3½–New. The error is not reversible in view of the evidence where in ruling on the objection court stated to jury what the evidence was. 21AlaA373, 108S631.

899–3¾–New. It is improper for the prosecuting attorney to make a statement of facts not in the evidence. 148Miss696, 114S816.

899–4 26F(2d)400; 35F(2d)25; 23AlaA537, 128S587; AlaA 130S531; 36GaA656, 137SE797; 322 Ill 54, 152NE542; 147Miss17, 112S601; 319Mo46, 4SW(2d)456; Nebr 232NW575; 133SC99, 130SE511, 513 [citCyc] (reference to result in another case in support of case against defendant); 99TexCr616, 270SW1029; 100TexCr157, 272SW454 (stating that state would have shown reputation of deceased if permitted by law); 107TexCr439, 296SW580; 110TexCr401, 10SW(2d)542; TexCr 26SW(2d)643. See also 206Cal64, 273P779.

899–6 163La701, 112S655; 198Wis180, 223NW419.

899–8 23AlaA549, 129S292 (only when relevant); AlaA 129S720; 89CalA615, 265P349; 227Ky528, 13SW(2d)521; 230Ky830, 20SW(2d)981; 166La924, 118S85; 143Miss694, 109S732; 83NH435, 144A124; ND 229NW569; 133SC99, 130SE511, 512, 513 [citCJ&Cyc]; 104TexCr63, 281SW871.

899–9 25F(2d)430.

899–10 21AlaA46, 104S889 (reference to reason for so many murders in county not beyond bounds of proper argument); 22AlaA556, 117S761; 23AlaA549, 129S292 (petty thieving); 212Ky24, 278SW549.

899–12 171Ark658, 285SW367; 80Colo430, 252P341; 227Ky223, 12SW(2d)336; 104TexCr533, 286SW204. [a] **Where witness had stated that he did not like defendant,** statement by prosecutor that latter was not permitted to show reason for dislike held not error. 231Ky152, 21SW(2d)231.

899–13 319Mo46, 4SW(2d)456; 149Wash452, 271P89. [a] **Held not prejudicial.**–23F(2d)235.

899–14 246Mich429, 224NW387; 143SC318, 141SE559; 103WVa237, 136SE862.

900–15 335 Ill 596, 167NE786; 212Ky303, 278SW1097; 317Mo759, 297SW10; 108TexCr221, 299SW645; 112TexCr214, 16SW(2d)126(3dcase); Va 154SE508; 103WVa237, 136SE862; 108WVa5, 150SE144. [a] (1) 168Ark1122, 273SW353 (that on account of his youth, no prosecutor of one of witnesses for prosecution is intended); 111TexCr482, 14SW(2d)278. (2) Statement that witnesses for defendant in liquor case come from nest of moonshiners and sympathizers not error where not prejudicial departure from evidence. 142Va609, 128SE555. (3) Other instances. TexCr 28SW(2d)153; 153Va954, 151SE286. [b] **Remarks held reversible error.**–Remarking to witness for accused "you are telling a nice story." 321 Ill 11, 151NE676.

900–17 97Fla621, 121S797; 255Mass369, 151NE839 (defendant a witness); Mass 168NE796; 23 OhA474, 156NE219; TexCr 29SW(2d)749.

900–18 237 IllA178.

900–19 199Cal513, 250P164; 39GaA102, 146SE334; Mo 278SW681; 107TexCr58, 294SW852; 108TexCr285, 300SW75.

900–22 NH 147A409.

900–24 But see 113TexCr354, 22SW(2d)662.

900–24½–New. or to refer to the relationship existing between accused and his witnesses, 199 Iowa1206, 200NW205.

900–27½–New. District attorney's argument that he knew state's witness and believed his testimony is erroneous. 109TexCr578, 6SW(2d)118.

901–30 109TexCr58, 2SW(2d)857 (contradicting admission made).

901–33 159La762, 106S295; NJSup 142A365.

901–34 90Fla317, 105S843; 208Ky734, 271SW1042; 197NC684, 150SE337; 100TexCr24, 271SW81; 100TexCr34, 271SW898.

901–35 6F(2d)809; 35F(2d)689; 22AlaA495, 117S398; 23AlaA493, 127S681; 170Ark709, 280SW982; 72CalA160, 236P987; 80CalA50, 251P244; 81CalA226, 253P735; 325 Ill 337, 156NE378; 326 Ill 145, 157NE225; 197 Ind448, 151NE329; 199 Ind160, 155NE824; 208Ky734, 271SW1042; 158La1045, 105S59; 165La270, 115S484; 237Mich481, 212NW105; Miss 130S908; Mo 18SW(2d)837; Mo 14SW(2d)574; 198NC649, 152SE895; 198NC655, 153SE255; NC 154SE604; 35OhA539, 172NE618; OklCr 268P325; 90PaSuper473; 90PaSuper485; 100TexCr24, 271SW81; 103TexCr418, 280SW1064; 103TexCr399, 281SW565; 103TexCr572, 281SW1082; 104TexCr476, 284SW585; 105TexCr224, 288SW198; 106TexCr85, 290SW1092; 110TexCr271, 8SW(2d)165; 113TexCr45, 19SW(2d)316; TexCr 27SW(2d)192; TexCr 30SW(2d)310; 101WVa466, 132SE869; 104WVa396, 140SE338; 108WVa264, 150SE728. [a] **But in Ohio** under constitutional provision counsel may comment on failure of accused to testify before petit jury. Oh 171NE26.

901–36 124Kan533, 261P600; 150Wash411, 273P182; 101WVa466, 132SE869.

901–37 101TexCr162, 274SW579.

902–41 83CalA302, 256P616 (rule not applicable to failure to deny accusatory statement calling for reply); 100TexCr178, 272SW782. See 224AppDiv193, 230NYS66.

902–41½–New. When defendant, conducting his defense, explains his failure to testify, comment by the prosecuting attorney is proper. 90PaSuper473; 90PaSuper485.

902–41¾–New. Objection to a statement by defendant's counsel that defendant was refused the right to take the stand has been held properly sustained where not in accordance with the facts. 169La109, 124S188.

902–45 19F(2d)431; 219Ky205, 292SW835; 238Mich332, 213NW104; 151Miss617, 118S447; 308Mo695, 274SW470; TexCr 7SW(2d)1078, 1079.

902–46 22AlaA90, 112S759; 105Conn115, 134A228.

902–47 88CalA476, 263P576.

902–49½–New. Cross-examination on incriminating matters not covered by defendant's testimony is not necessary condition precedent to comment on failure to testify. 19F(2d)431.

902–51 213Ala358, 104S656; 170Ark709, 280SW982; 80CalA50, 251P244; 326 Ill 145, 157NE225; 104TexCr476, 284SW585. But see 137SC58, 135SE635; 142Wash653, 254P445.

902–52 80CalA50, 251P244; 103TexCr

572, 281SW1082; 106TexCr85, 290SW 1092; 108TexCr373, 1SW(2d)289; 109 TexCr471, 5SW(2d)509; TexCr 23SW (2d)370 (2dcase).

902-54 OklCr 268P325.

902-54½-New. to state in a homicide case that a party was here and did not speak referring to another's previous remark that one party is dead and cannot speak; 158La1045, 105S59.

903-57 31F(2d)385; GaA 155SE681; 167Minn164, 208NW760 (remarks not improper); 101TexCr651, 277SW116 (statement held not to refer to defendant's failure to testify); 111TexCr93, 10SW(2d)101; TexCr 26SW(2d)218 (reading court's instruction on defendant's right not to testify is not improper reference). [a] (2) That defendant does not deny certain fact. 320Mo 202, 7SW(2d)262. [c] **Where defendant admits fact,** prosecutor's comment on defendant's failure to testify to certain defense before grand jury, held not improper. TexCr 24SW(2d)403.

903-58 14F(2d)582; 21AlaA644, 111S 426; 173Ark450, 292SW699; 80Colo 430, 252P341; 101TexCr28, 274SW147; 107TexCr58, 294SW852; 110TexCr432, 10SW(2d)109; 111TexCr205, 13SW(2d) 80; 113TexCr87, 19SW(2d)57; 113Tex Cr357, 23SW(2d)382(2dcase); 104WVa 396, 140SE338. [a] (1) 167La330, 119 S67; 100TexCr530, 271SW620. (7) Other remarks held not improper. 216 Ala356, 113S67; 80Colo 430, 252P341; 146Miss547, 112S705; 193Wis204, 212 NW635. (8) Where district attorney immediately explained that he did not refer to defendant but to accomplice. 111TexCr205, 13SW(2d)80.

903-59 35F(2d)689; 319 Ill 359, 150 NE263; Mo 256SW814; 311Mo 599, 278 SW977; 315Mo 1, 285SW429; 316Mo 31, 292SW434; 159Tenn388, 19SW(2d) 313; 105TexCr128, 287SW51; 107Tex Cr58, 294SW852; 108TexCr106, 299SW 430; 108TexCr373, 1SW(2d)289; Tex Cr 24SW(2d)825.

903-60 316Mo 31, 292SW434; 107Tex Cr58, 294SW852.

903-61 5F(2d)471; 8F(2d)9; 174Ark 891, 298SW359; 177Ark742, 9SW(2d) 15; 69CalA558, 231P767; 80CalA50, 251P244; 87CalA601, 262P369; 100 CalA587, 280P708; 80Colo 430, 252P 341; 90Fla317, 105S843; 331 Ill 380, 163NE149; 203 Iowa954, 210NW448; 205 Iowa853, 216NW756; 165La270, 115S484; 142Miss71, 107S281; OklCr 277P1037; 159Tenn388, 19SW(2d)313; 105TexCr128, 287SW51; 105TexCr497, 288SW1072; 107TexCr58, 294SW852; 108TexCr457, 1SW(2d)627; 108TexCr 556, 1SW(2d)903; 113TexCr81, 18SW (2d)661(2dcase); TexCr 20SW(2d)782; 153Va890, 149SE459; 104WVa396, 140 SE338. But see 111TexCr58, 11SW(2d) 318; 112TexCr65, 14SW(2d)280(1st case); TexCr 28SW(2d)139.

904-62 213Ala358, 104S656.

904-63 329 Ill 352, 160NE564; 203 Iowa954, 210NW448.

904-64 220AppDiv697, 222NYS456.

904-64½-New. and other incriminating circumstances. Mo 18SW(2d)10.

904-67½-New. Comment on testimony concerning defendant given by other witnesses is not precluded by defendant's failure to testify. 173Ark450, 292 SW699.

904-67¾-New. Statement that defendant cannot be required to take the stand in his own behalf is not an improper comment. 109TexCr581, 6SW(2d)120.

904-70 79CalA357, 249P541; 102Conn 708, 130A184; 338 Ill 631, 170NE678; 199 Iowa1206, 200NW205 (witness not available to state); 216Ky724, 288SW 680; 159La762, 106S295; 167La963, 120S612; 255Mass369, 151NE839; 237 Mich481, 212NW105; 316Mo 31, 292SW 434; 321Mo 589, 12SW(2d)87 (coindictee); 32NM48, 250P842; 159Tenn 388, 19SW(2d)313; 105TexCr614, 289 SW1013; 106TexCr506, 294SW202; 107 TexCr666, 298SW591.

904-71 161La532, 109S56; 165La842, 116S206; 167La963, 120S612; Mo 1SW (2d)837; 107TexCr666, 298SW591.

904-72 Mo 271SW471.

904-73 79CalA160, 248P1042; 209Ky 51, 272SW11; 315Mo 1, 285SW429; 318 Mo525, 1SW(2d)137; Mo 14SW(2d) 574; 48Nev134, 228P582; TexCr 25SW (2d)332.

905-74 78CalA476, 248P981 (on defense of insanity); CalA 290P102; 315 Mo 1, 285SW429. [c] **Corroborating testimony.**–109TexCr108, 3SW(2d)91.

905-76 319 Ill 359, 150NE263.

905-77 21AlaA352, 108S351; 22AlaA 257, 114S477; 112TexCr561, 17SW(2d) 833(2dcase).

905-78 21AlaA505, 109S564; 80CalA 328, 251P823; 321 Ill 380, 152NE215 (rule stated); 140Miss597, 105S747; 34 OhA13, 170NE188 (defendant has no duty to prove self innocent). [a] 127 Kan471, 274P197.

905-79 [a] **Argument that absence of witnesses** was due to defendant's unwillingness to testify is improper. 38 F(2d)573.

905-84 ObA 173NE201.

905-85 36GaA665, 137SE913.

905-87 [a] **Refusing to permit defendant's counsel to comment upon absence of officer** present at time of arrest is erroneous. 157SC459, 154SE658.

905-88 97Fla650, 122S110.

905-92 140Miss597, 105S747.

905-93 86CalA791, 261P526.

906-94 39 OklCr324, 264P631; 102Tex Cr385, 278SW430; 104TexCr669, 284 SW965; 107TexCr666, 298SW591; 109 TexCr283, 4SW(2d)47 (not error to tender wife of accused as witness); 113 TexCr591, 23SW(2d)731(2dcase).

906-95 102TexCr385, 278SW430. [a] **Comments on failure of wife to testify,** which amount to unsworn testimony by prosecutor to what she would have testified, are reversible error. 102TexCr 385, 278SW430.

906-96 112TexCr332, 16SW(2d)814.

906-97 Mo 1SW(2d)837; Mo 14SW (2d)574.

906-99 86CalA791, 261P526.

906-2 204 Iowa1135, 216NW642; 100 TexCr480, 273SW842. See also 321Mo 589, 12SW(2d)87. But see 129 Okl 300, 264P885.

906-5 [a] 109TexCr275, 4SW(2d)548.

906-7 21AlaA495, 109S528; 72CalA 160, 236P987 (where defendant has not testified); 77CalA377, 246P818; 321 Ill 11, 151NE676; 329 Ill 278, 160NE 575; 203 Iowa451, 212NW757; 208Ky 98, 270SW451; 218Ky721, 292SW307; 243Mich534, 220NW702; 177Minn363, 225NW278; 317Mo 413, 297SW63; MoA 256SW125; 221AppDiv331, 223 NYS339; OklCr 276P513; 105TexCr 301, 288SW232; 110TexCr401, 10SW (2d)542; 111TexCr640, 13SW(2d)832; 111TexCr456, 15SW(2d)9; 112TexCr 275, 16SW(2d)253; TexCr 27SW(2d) 229; 196Wis104, 219NW349. See also 327 Ill 305, 158NE729. [a] **Statement held not objectionable.**–CalA 283P881. [b] **Statements held proper as res gestæ.**–Mo 22SW(2d)784.

906-8 77CalA384, 246P811; 77CalA 738, 247P532; 79CalA160, 248P1042; 170Ga859, 154SE344; Ind 168NE692; 208Ky98, 270SW451; 230Ky250, 19SW (2d)218; 159La820, 106S317; 157Md 635, 147A599(2dcase); 316Mo 42, 289 SW811; 106TexCr506, 294SW202; 107 TexCr54, 295SW604; 111TexCr249, 12 SW(2d)572; TexCr 27SW(2d)808.

907-9 CalA 284P1096 (held no misconduct in view of instructions limiting effect of testimony); 100TexCr545, 272 SW157.

907-10 100TexCr545, 272SW157; 113 TexCr26, 19SW(2d)317; 113TexCr188, 19SW(2d)319; TexCr 24SW(2d)435; TexCr 29SW(2d)350.

907-11½-New. Refusal to permit defendant's counsel to comment on former trial of another offense is held not error. 257Mass590, 154NE326.

907-11¾-New. In a prosecution for violation of the Prohibition Law it is error for the prosecuting attorney to read to the jury the portion of the indictment charging prior conviction. 22 AlaA300, 115S149.

907-16 21AlaA266, 107S328; 203Cal 144, 263P216; 318 Ill 388, 149NE273. But see 22AlaA350, 115S701; Mo 296 SW391. [c] **Attempt to distract jury.**–104TexCr619, 286SW214.

907-17 215Ala224, 110S23; 91CalA788, 267P718 (statements of accused out of court); 318 Ill 388, 149NE273; 321 Ill 380, 152NE215; 239Mich386, 214NW 183; 311Mo 461, 278SW719 (failure of accused to make explanation to police when arrested); 311Mo 599, 278SW977; NH 147A409; 101TexCr154, 274SW608 (that he led an expedition of crime); 106TexCr452, 292SW904. [c] **Argument held proper.**–213Ala541, 105S677. [d] **Thus,** query as to why defendant carried weapons to scene of crime held not prejudicial. 101TexCr651, 277SW 116 (where no question from record that defendant had pistols at scene of homicide).

907-18 But see 111TexCr366, 12SW (2d)1027(1stcase).

907-19 227Ky212, 12SW(2d)305; 101 TexCr479, 276SW268.

907-20 168Ga136, 147SE97; 145Wash 4, 258P845. Contra 321 Ill 11, 151NE 676. [a] **Calling defendant "Italian gangster"** held not prejudicial under evidence. Mo 30SW(2d)763.

907-20½-New. It is not improper in a murder trial to refer to the perpetrator of the homicide as a demon in human form. 316Mo 904, 292SW714.

907-21 21AlaA459, 109S368; 22AlaA 90, 112S759; 87Colo 44, 285P162; 102 Conn708, 130A184; 97Fla908, 122S525; 329 Ill 186, 160NE192; Ill 173NE383; 229Ky207, 16SW(2d)1016; 166La924, 118S85; 168La161, 121S609; 321Mo 662, 12SW(2d)34; Mo 18SW(2d)423; 190NC506, 130SE308 (evidence of previous familiar relations between accused and wife of deceased held to justify argument as to motive); 100TexCr209, 272SW455 (reference to pendency of charge of bigamy against accused); 101TexCr598, 276SW283; 106TexCr 219, 291SW547; TexCr 28SW(2d)153; 135Wash377, 237P727; 145Wash4, 258 P845.

907-22 23AlaA511, 128S120; 202Cal 159, 259P750; 72CalA292, 237P390; 36 GaA665, 137SE913; 210Ky385, 275SW 819; 229Ky776, 18SW(2d)290; 32Mo 417, 8SW(2d)29; 101TexCr267, 275SW 837; 109TexCr663, 7SW(2d)80; 110 TexCr269, 8SW(2d)117; 110TexCr413, 10SW(2d)112; 111TexCr642, 13SW (2d)697(2dcase); TexCr 23SW(2d)381; TexCr 25SW(2d)347; 103WVa237, 136 SE862; 104WVa93, 138SE664. But see 21AlaA574, 110S165. [c] **Remarks held not improper.**–193NC786, 138SE134; 193NC787, 138SE135.

908-24 21AlaA519, 109S764; 72CalA 292, 237P390 (it is misconduct to characterize defendant as an habitual criminal whose soul was beyond redemption); 321 Ill 380, 152NE215 (inference that accused was official "bouncer" not improper in view of evidence). But see 235Ky454, 31SW(2d)703.

908-24½-New. Other comments held improper. 19F(2d)202; 212Ky303, 278 SW1097, 1099; 104WVa93, 138SE664.

908-27½-New. In a prosecution for murder, an argument that defendant had been away, had been in the army, and had been bumming, has been held not improper under defendant's testimony. 335 Ill 217, 167NE1.

908-28 105TexCr252, 288SW220.

908-32 101TexCr514, 276SW233. But see 174Ark743, 297SW826. [b] **Referring to previous conviction** not ground for reversal where court requested jury to disregard their remark. 21AlaA214, 107S29.

908-36 101TexCr514, 276SW233.

908-39 214Ala172, 106S692; 22AlaA 440, 116S511.

908-40 20AlaA591, 104S347; 168Ark 339, 270SW498; 69CalA558, 231P767; 81CalA226, 253P735; 38GaA360, 144SE 15; 317 Ill 603, 148NE281; 156Md149, 143A872; Mo 278SW681; 313Mo 71, 281SW35; MoA 256SW534 (reason for rule); MoA 281SW107; 221AppDiv331, 223NYS339; 51SD209, 213NW21; 152 Wash365, 278P149. See also 31Ariz427, 254P467.

908-44 20AlaA591, 104S347; 21AlaA 530, 109S611; 22AlaA368, 115S766; CalA 290P102; 90Fla178, 105S401 (remark that evidence warranted filing of

information held not error); 38GaA360, 144SE15; 322 Ill 434, 153NE639; 327 Ill 463, 158NE716; 331 Ill 380, 163NE 149; 333 Ill 397, 164NE847; 166La924, 118S85; Mo 278SW681; 313Mo 71, 281 SW35; 290Pa573, 139A374; 156SC509, 153SE480; 104TexCr533, 286SW204; 104TexCr619, 286SW214; 108TexCr19, 298SW601; 110TexCr40, 7SW(2d)541; Wash 288P218. [a] TexCr 11SW(2d) 172.

908-44½-New. Use of expression "I now speak with feeling" in murder prosecution is not error. 161La532, 109 S56.

909-45 105TexCr252, 288SW220.

909-46 20F(2d)129; 25F(2d)430; 32 F(2d)107; 21AlaA33, 104S878; 21AlaA 266, 107S328; 21AlaA320, 108S83; 23 AlaA544, 129S303(2dcase); AlaA 129S 787; 168Ark793, 271SW451 (twenty-two years without being naturalized); 81CalA226, 253P735; 82Colo 233, 259P 1038; 93Fla504, 112S83; 36GaA656, 137SE797; 321 Ill 157, 151NE584; 324 Ill 131, 154NE715; 325 Ill 337, 156NE 378; Ind 166NE654; 203 Iowa451, 212 NW757; 217Ky565, 290SW325; 163La 392, 111S798; 254Mass520, 150NE854; 243Mich534, 220NW702; 147Miss17, 112S601; MoA 300SW318; 245NYS692; 197NC729, 150SE353(2dcase); 32 OklCr 203, 240P1075 (comment on fact that accused is foreigner); 100TexCr30, 271 SW920; 100TexCr313, 273SW595; 101 TexCr633, 276SW923; 103TexCr668, 281SW1073; 106TexCr558, 293SW1104; 109TexCr142, 3SW(2d)453; 111TexCr 539, 15SW(2d)638; 113TexCr26, 19SW (2d)317; 113TexCr247, 20SW(2d)431; TexCr 24SW(2d)47; TexCr 32SW(2d) 194; 153Va846, 149SE414. See also 21 AlaA38, 104S881. [a] **Trial court must control trial,** so that adverse sentiments may not be so prominent as to create prejudice against defendant. 219 Ala46, 121S38.

909-47 42F(2d)636; 128Kan564, 279P 19.

909-49 See also 193Wis204, 212NW 635.

909-49½-New. by stating that the people of the county will not be satisfied with any penalty less than life or death; 210Ky421, 276SW119.

909-51 19F(2d)921; 22AlaA121, 113S 318; 218Ala40, 117S457; 21AlaA234, 109S189; 22AlaA56, 112S98; 80CalA 675, 252P758; 84CalA58, 257P592; 163 La392, 111S798; 147Miss575, 113S185; 226AppDiv104, 234NYS567; 38 OklCr 62, 259P168; 101Tex633, 276SW923; 112TexCr275, 16SW(2d)253. [a] (1) 22AlaA74, 112S177; 79CalA464, 249P 1089; 155Wash644, 285P665. [b] **Remarks on nationality of Jewish defendant** held not justified by questions of his counsel on voir dire examination relating to the subject. 80CalA675, 252P 758.

909-52 215Ala224, 110S23; 219Ala46, 121S38; 21AlaA211, 106S891; 175Ark 1170, 1SW(2d)46; 209Ky10, 272SW1; 219Ky806, 294SW466; 222Ky695, 2SW (2d)378; 161La1010, 109S819; 147Miss 593, 113S348; 317Mo 413, 297SW63; 295Pa50, 144A761; 111Tex272, 12SW (2d)568; 101TexCr182, 274SW153; 103 TexCr395, 281SW563; 104TexCr63, 281 SW871; 106TexCr387, 292SW887; 107 TexCr606, 298SW431 (addressing jurors by name in closing argument); 111Tex Cr567, 15SW(2d)21(2dcase); 113TexCr 247, 20SW(2d)431.

909-53 217Ala164, 115S101; 21AlaA 188, 106S510; 209Ky51, 272SW11; 219 Ky806, 294SW466; 321Mo 589, 12SW (2d)87; Mo 25SW(2d)113; Mo 30SW (2d)132; 99TexCr616, 270SW1029; 110 TexCr65, 7SW(2d)575.

909-57 103TexCr103, 280SW200 (death penalty). See also Mo 22SW(2d)784.

909-58 105TexCr254, 288SW196.

909-59½-New. Argument that if jury suffered defendant to escape they would make themselves responsible is proper. 75CalA74, 241P924.

910-60 208Cal 385, 281P606; 166Ga 251, 142SE866.

910-61½-New. Where evidence justified comments on threats of defendant, reference thereto was not prejudicial. 199 Iowa1068, 203NW240.

910-61¼-New. Remark by solicitor that "they would sell their country and Constitution to make a dollar," although extravagant, will not justify reversal. 21AlaA165, 106S349.

910-61¼-New. Not error where district attorney told jury that they had power to acquit but that he did not think they had any moral or legal right to do so. 104TexCr90, 282SW599.

910-61⅓-New. Comparing homicide case to assassination of Presidents Garfield, Lincoln, and McKinley is not improper. 215Ky613, 286SW696.

910-61⅙-New. Statement that motion for mistrial was "buncombe" is held objectionable as prejudicial to defendant and tending to ridicule his counsel. 22 AlaA79, 112S535.

910-61⅐-New. Remark that protection thrown around criminals by the law makes criminals held not prejudicial. 215Ky802, 287SW10.

910-61⅛-New. An argument of the state's attorney in referring to the fact that defendant, in case he was honest and had made his first mistake, could get probation, has been held erroneous. 333 Ill 200, 164NE150.

910-62 13F(2d)594; 21AlaA266, 107S 328; 317 Ill 603, 148NE281; 213Ky356, 281SW164; 221Ky696, 299SW563; 229 Ky776, 18SW(2d)290; 254Mass520, 150 NE854; 317Mo 354, 296SW397; 32Mo 417, 8SW(2d)29; Mo 30SW(2d)132; 100 TexCr313, 273SW595; 108WVa230, 150 SE729.

910-63 339 Ill 73, 170NE726.

910-64 82Colo 205, 258P226; 321 Ill 380, 152NE215 (denouncing defendant's wickedness is proper); 322 Ill 434, 153 NE639; 338 Ill 636, 170NE750; 208 Iowa122, 222NW6; 151Miss617, 118S 447; Mo 23SW(2d)136; 290Pa573, 139 A374; 103TexCr352, 281SW202; 104 TexCr63, 281SW871; TexCr 26SW(2d) 918. [a] (8) 104TexCr619, 286SW214. See also 75CalA74, 241P924. (12) A bandit. 101TexCr651, 277SW116. (13) A fence. 327 Ill 194, 158NE431. (14) A thief and crook. 112TexCr231, 15SW (2d)1042. (15) Large and influential bootlegger. 34F(2d)406. (16) That defendant and others "gang-mobbed" prosecuting witness. 107TexCr614, 298 SW426. (17) Other abusive language held not erroneous. 14F(2d)366; CalA 285P1066; 121Kan711, 249P688; 312 Mo 212, 278SW1030; 53ND95, 204NW 969; 131 Or209, 282P233; 104TexCr 329, 283SW828.

910-66 110TexCr109, 7SW(2d)566.

910-66½-New. Defense lawyer should not abuse witnesses. 237 IllA178.

910-67 Mo 23SW(2d)139; 106TexCr 108, 290SW904.

910-68 318 Ill 388, 149NE273; 322 Ill 434, 153NE639; 230Ky611, 20SW(2d) 466; 231Ky152, 21SW(2d)231; 313Mo 71, 281SW35; 316Mo 115, 289SW862; 316Mo 31, 292SW434; Mo 30SW(2d) 132; 104TexCr329, 283SW828; 108Tex Cr46, 299SW240; TexCr 11SW(2d)172; 34Wyo 90, 241P705, 707 [citCJ]. See also Wyo 285P803.

911-69 322 Ill 434, 153NE639; 316Mo 31, 292SW434; MoA 299SW821; 104 TexCr374, 283SW839. But see 168Ga 409, 148SE144; 105TexCr8, 284SW961.

911-70 88CalA575, 265P322; 316Mo 31, 292SW434.

911-70½-New. It is not error to urge the jury to rid the country of such brutes as defendant where the crime was revolting. 318 Ill 388, 149NE273.

911-72 163La392, 111S798; 245NYS 692.

911-73 [a] **Comment to Jury** on statement, not objected to at time, in district attorney's closing argument held improper. 192Wis452, 211NW773.

911-74 16F(2d)29; 35F(2d)689; 40 F(2d)363; 215Ala21, 109S114; 216Ala 356, 113S67; 23AlaA407, 127S246(2d case); 175Ark396, 299SW391; 180Ark 290, 21SW(2d)176; Ark 30SW(2d)855; Cal 286P998; 70CalA130, 232P752; 75 CalA138, 242P84; 84CalA58, 257P592; 94CalA297, 271P132; 94CalA341, 271P 205; 100CalA344, 279P1022; CalA 291 P251; CalA 291P872; 80Colo 430, 252P 341; 109Conn394, 146A837; 94Fla318, 113S689; 320 Ill 495, 151NE280; 321 Ill 624, 152NE520; 337 Ill 625, 169NE749; 200 Iowa483, 203NW806; 230Ky611, 20 SW(2d)466; 231Ky152, 21SW(2d)231; 161La827, 109S505; 166La21, 116S579; 166La836, 118S38; 167La390, 119S402; 167La1113, 120S875; 168La297, 121S 872; 244Mich622, 222NW185; 140Miss 597, 105S747; 149Miss262, 115S208; 155Miss629, 125S115; 309Mo 498, 274 SW734; 315Mo 242, 286SW69; 317Mo 354, 296SW397; Mo 300SW1081; Mo 23SW(2d)139; MoA 7SW(2d)432; MoA 11SW(2d)1094(2dcase); OklCr 281P 305; 285Pa97, 131A667; 298Pa10, 147 A834(2dcase); 300Pa375, 150A649; 92 PaSuper530; 52SD91, 216NW858, 859 [citCJ]; 52SD582, 219NW263, 266 [cit CJ]; 54SD417, 223NW337; 108TexCr 457, 1SW(2d)627; 100TexCr349, 272 SW1113; 100TexCr459, 273SW864; 100 TexCr528, 272SW138; 101TexCr154, 274SW608; 101TexCr251, 275SW835; 101TexCr598, 276SW283; 104TexCr90, 282SW599; 104TexCr178, 283SW517; 104TexCr371, 283SW816; 107TexCr 609, 298SW429; 108TexCr19, 298SW 601; 108TexCr255, 299SW418; 110Tex Cr512, 8SW(2d)144, 60ALR290; TexCr 8SW(2d)176; 111TexCr14, 10SW(2d) 1003; 113TexCr501, 21SW(2d)1057(2d case); 113TexCr357, 23SW(2d)382(2d case); 68Utah557, 251P364; 142Va609, 128SE555 (especially where mild and inoffensive); 150Wash479, 273P731. [a] (4) 104TexCr178, 283SW517. (9) 320 Ill 495, 151NE280. (10) Prosecutor may state possibility of parole in answer to stricture on severity of penalty. 80Colo 430, 252P341. (11) Where defense counsel ask why state has not produced certain witnesses, prosecuting attorney may refer to failure of defense to produce them. 321 Ill 380, 152NE215.

912-75 163La392, 111S798; Miss 130S 908.

912-76 80CalA675, 252P758.

912-77 95Fla775, 116S618.

912-78 213Ala541, 105S677; CalA 290 P102; Ill 173NE383; 198 Ind502, 154 NE273. See also 321 Ill 80, 151NE529.

912-81 74CalA164, 240P36; TexCr 26 SW(2d)649.

912-85 200 Iowa483, 203NW806; Mass 170NE924.

912-86 213Ala541, 105S677; 217Ala 398, 116S418; 22AlaA297, 116S417. [c] **Reading of law not to be encouraged,** though not necessarily prejudicial. 24 F(2d)910.

912-88 Ill 173NE383.

912-89½-New. It is not an abuse of discretion for the court to require the law to be read to the court and not to the jury. 35GaA388, 133SE273.

912-90 Ill 173NE383.

912-91 23AlaA140, 122S303; 333 Ill 104, 164NE138.

913-94 23AlaA140, 122S303; 333 Ill 104, 164NE138.

913-96½-New. It is not error to refuse to allow defendant's attorney to recite from memory facts in court of appeals reports in criminal cases similar to case being tried. 37GaA148, 138SE923.

913-98 95Fla775, 116S618.

913-1 213Ala541, 105S677.

913-4 23AlaA555, 129S306; 169Ark 342, 275SW665; 168Minn263, 209NW 881; 221AppDiv331, 223NYS339; 110 TexCr432, 10SW(2d)109.

913-5 168Minn263, 209NW881; 322Mo 106, 16SW(2d)205.

913-8 [a] **In prosecution for gaming where question as to repeal of statute has been raised and decided,** refusal to allow defendant's counsel to argue such repeal is proper. 157Md332, 146A 268.

913-9 100TexCr11, 271SW380; TexCr 25SW(2d)339(2dcase) (depriving defendant of benefit of charge).

913-11 13F(2d)594; 23AlaA456, 127S 252(1stcase); 94Fla318, 113S689; 203 Iowa451, 212NW757, 759 [citCJ].

914-12 12F(2d)668; 119Kan649, 240P 568; 126Kan664, 271P283; 168Minn 444, 210NW286; 316Mo 31, 292SW434; Mo 292SW440; 118Nebr591, 225NW766. [b] **Exceptions should be taken to allowance of argument** by solicitor to jury

rather than to argument itself. **NH** 146 A503.

914-13 13**PaDist&Co** 448.

914-15 143**Va**531, 129**SE**351. [a] **Comments on failure accused to testify.**–90**Fla**317, 105**S**843.

914-16 214**Ala**172, 106**S**692; 143**Va**531, 129**SE**351 (motion to set aside verdict and grant new trial).

914-19 168**Minn**444, 210**NW**286; 90 **PaSuper**473; 90**PaSuper**485.

914-20 8**F(2d)**815; 109**Conn**394, 146**A** 837 (when made or at close of argument); 94**Fla**318, 113**S**689, 694 [citCJ]; 148**Miss**696, 114**S**816; 107**TexCr**58, 294 **SW**852; 113**TexCr**142, 18**SW(2d)**663. See also 215**Ky**837, 287**SW**32.

914-21 94**Fla**318, 113**S**689, 694 [citCJ].

914-22 243**Mich**534, 220**NW**702; 111 **TexCr**95, 10**SW(2d)**94(2dcase).

914-27 27**Hawaii**28; 9**PaDist&Co** 448.

914-30 214**Ala**172, 106**S**692; **Mo** 271 **SW**471; 316**Mo** 904, 293**SW**1051; **Mo** 300**SW**1069; **TexCr** 26**SW(2d)**233; **TexCr** 27**SW(2d)**213. See also 137**SC**58, 135**SE**635. [a] **Mo** 271**SW**471; 316**Mo** 904, 293**SW**1051. [c] **Exceptions held too general.**–156**SC**509, 153**SE**480.

915-31 8**F(2d)**815; 91**Fla**682, 108**S**842; 94**Fla**318, 113**S**689; 83**NH**435, 144**A**124. See also 13**F(2d)**594. [a] **Method of presenting objections and saving exceptions to argument of prosecuting attorney** held without defect. 254**Mass**520, 150**NE**854.

915-33 107**TexCr**571, 298**SW**580.

915-34 219**Ala**282, 122**S**45; 107**TexCr** 571, 298**SW**580.

915-38½-New. Where statement to which former objection was sustained is repeated, defendant must again object and take exception if overruled. 148**Miss**696, 114**S**816.

915-38¼-New. Necessity for motion for mistrial. **Miss** 130**S**908.

915-40 12**F(2d)**668; 35**F(2d)**941; 72 **CalA**292, 237**P**390; 75**CalA**138, 242**P**84; 76**CalA**558, 244**P**1086; 79**CalA**514, 249 **P**1090; 86**CalA**160, 260**P**330; 87**Colo** 44, 285**P**162; **Fla** 130**S**582; 119**Kan**649, 240**P**568; 164**La**496, 114**S**109; 167**La** 1113, 120**S**875; 168**Minn**444, 210**NW** 286; **Mo** 8**SW(2d)**3; 43 **OklACR**321 [reh pending]; 104**TexCr**518, 284**SW** 582; 105**TexCr**32, 285**SW**328; 108 **TexCr**655, 28**W(2d)**439; **TexCr** 29**SW (2d)**395; 135**Wash**361, 237**P**723 (where objection to opening statement of prosecuting attorney to jury was sustained). [b] **Propriety of remarks** of prosecuting attorney in final argument not considered where there was no request for admonition to jury. 72**CalA**292, 237**P** 390.

915-41 72**CalA**292, 237**P**390; 73**CalA** 580, 239**P**82; 105**TexCr**32, 285**SW**328.

915-43½-New. Error cannot be predicated on failure of trial court to instruct jury that statements made by counsel should not be considered evidence where no request was made for instruction covering such point. 67 **CalA**623, 228**P**369.

915-43¾-New. Failure of prosecution to make fair opening statement to jury should be met by motion to the court and not by instruction to jury. 108 **WVa**630, 152**SE**203.

915-45 19**F(2d)**202; 94**Fla**318, 113**S** 689; 94**Fla**163, 113**S**699; **GaA** 155**SE** 103; 321 **Ill** 380, 152**NE**215; 326 **Ill** 216, 157**NE**211; **Md** 152**A**107(1stcase); 50 **Nev**256, 256**P**793, 52**ALR**1015; 24 **OhA** 312, 157**NE**800; **SC** 155**SE**409; **TexCr** 25**SW(2d)**1098; 195**Wis**532, 218**NW**720. See also 137**SC**58, 135**SE**635. [b] **No ground for reversal** where court orders remarks disregarded. 326 **Ill** 145, 157 **NE**225.

916-46 94**Fla**318, 113**S**689.

916-47 32**F(2d)**505; 21**AlaA**22, 104**S** 866 (motion for mistrial improperly overruled); 21**AlaA**234, 109**S**189; 22 **AlaA**300, 115**S**149; **Ark** 30**SW(2d)**840 (1stcase); **Ark** 30**SW(2d)**855; 70**CalA** 143, 232**P**772; 81**CalA**226, 253**P**735; 81 **CalA**456, 254**P**281; 88**CalA**476, 263**P** 576; 94**Fla**318, 113**S**689; 325 **Ill** 337, 156**NE**378; 127**Kan**107, 272**P**186; 128 **Kan**564, 279**P**19; 158**La**1045, 105**S**59; **Mo** 270**SW**337; 32**Mo** 417, 8**SW(2d)**29; 114**Nebr**13, 205**NW**574; 24 **OhA**312, 157 **NE**800; 284**Pa**159, 130**A**317; 7**PaDist &Co** 564; 110**TexCr**413, 10**SW(2d)**112; 107**TexCr**332, 296**SW**547; 107**TexCr**221, 296**SW**563; 111**TexCr**636, 13**SW(2d)** 696; 113**TexCr**634, 21**SW(2d)**1041; 147 **Va**617, 136**SE**658, 660 [citCJ]; 143 **Wash**370, 255**P**122; 194**Wis**387, 216**NW** 483. [b] **In prosecution for vagrancy refusal to instruct jury** not to consider state attorney's remark that purpose of question was to prove that woman was prostitute has been held error. 112 **TexCr**641, 18**SW(2d)**178.

916-48 215**Ky**837, 287**SW**32; **Mo** 278 **SW**681; 316**Mo** 115, 289**SW**862; **MoA** 158**SW(2d)**865(2dcase).

916-49 143**Va**531, 129**SE**351.

916-50 22**AlaA**300, 115**S**149; 320**Mo** 288, 6**SW(2d)**866; 300**Pa**375, 150**A**649 (withdrawal of juror). But see 318**Mo** 843, 1**SW(2d)**157. [a] **Ga** 155**SE**11; 295**Pa**50, 144**A**761. [c] 40**GaA**544, 150 **SE**447. [d] **Motion to discharge jury and enter mistrial necessary.**–151**Miss** 702, 118**S**431.

916-52 **MoA** 7**SW(2d)**375 (overruling of objection held erroneous where jury were left with impression that they could consider matter which had been properly ruled out); 81**Mont**145, 262**P** 158. [a] **Ruling that argument was proper** and overruling objection held prejudicial. 243**Mich**630, 220**NW**889.

916-54 23**F(2d)**678; 21**AlaA**404, 108**S** 635; 21**AlaA**482, 109**S**888; 180**Ark**656, 22**SW(2d)**172; **Mo** 285**SW**422 (as to jury disregarding remarks); **Mo** 289**SW** 570. See also 21**AlaA**513, 109**S**763.

916-55 130**Ark**290, 21**SW(2d)**176; 309 **Mo** 498, 274**SW**734; **Mo** 285**SW**422; **Mo** 289**SW**895; **Mo** 8**SW(2d)**49; **Mo** 16 **SW(2d)**35.

916-56 **Mo** 274**SW**54.

916-57 **Mo** 296**SW**128; **MoA** 289**SW** 664. See also **Mo** 300**SW**1069.

916-58 299**Pa**547, 149**A**696.

916-59½-New. Prosecuting attorney should not be rebuked for urging on the jury the duty of inflicting statutory punishment. 313**Mo** 71, 281**SW**35.

916-59⅓-New. Trial judge need not act on an objection to the argument which is a reasonable inference from the testimony. 160**La**79, 106**S**701.

916-59¼-New. Sustaining objection is tacit approval of the remark objected to. 163**La**392, 111**S**798.

916-59½-New. Ruling that the court would hear questions on cross-examination of defendant, which were objected to as not within the limits of direct examination, held not error where the objections were sustained. 105**Conn** 115, 134**A**228.

916-59⅔-New. Methods and manners used by examining counsel, which partake of the "third decree," should be promptly stopped. 21**AlaA**505, 109**S**564.

916-59½-New. The trial judge has large discretion in determining whether the prosecutor's remark in his argument is prejudicial to defendant's case. **Mo** 18**SW(2d)**8.

916-59¼-New. Admissions, by counsel, as to what the law is are not binding on the court. 169**La**247, 125**S**65.

916-59½-New. Whether remarks of counsel are improper and whether they necessitate a reprimand of counsel or discharge of the jury rests largely in the court's discretion. **Mo** 23**SW(2d)** 139.

916-60 22**AlaA**121, 113**S**318; 158**La** 1045, 105**S**59.

916-63 But see 158**La**1045, 105**S**59.

916-64 105**TexCr**327, 288**SW**458.

916-65 13**F(2d)**594; 18**F(2d)**850; 216 **Ala**336, 113**S**64; 75**CalA**494, 242**P**1088; 77**CalA**29, 245**P**769; 86**CalA**298, 260**P** 901 (prejudicial misconduct); **CalA** 292 **P**500; 317 **Ill** 603, 148**NE**281; 324 **Ill** 131, 154**NE**715; 213**Ky**356, 281**SW**164; **Mo** 19**SW(2d)**883; **OklCr** 276**P**513; 88 **PaSuper**171; **SD** 224**NW**946; 100**TexCr** 528, 272**SW**138; 103**TexCr**418, 280**SW** 1064; 103**TexCr**572, 281**SW**1082; 104 **TexCr**637, 285**SW**826; 107**TexCr**439, 296**SW**580; 111**TexCr**419, 13**SW(2d)** 116; 112**TexCr**216, 15**SW(2d)**1052; **TexCr** 24**SW(2d)**47; **TexCr** 28**SW(2d)** 168; **TexCr** 29**SW(2d)**395 (facts and circumstances must be considered); 105 **WVa**298, 142**SE**254; 33**Wyo** 360, 239**P** 952.

917-66 22**AlaA**121, 113**S**318; 75**CalA** 494, 242**P**1088; 75**CalA**642, 243**P**461; 80**CalA**328, 251**P**823; 167**Ga**452, 145**SE** 879(2dcase); 337 **Ill** 259, 169**NE**206; 224**Ky**160, 5**SW(2d)**899; 158**La**1045, 105**S**59; **MoA** 256**SW**125; 111**TexCr**361, 12**SW(2d)**1031; 153**Va**846, 149**SE**414. [c] 317 **Ill** 603, 148**NE**281.

917-67 8**F(2d)**593; 13**F(2d)**564; 13**F (2d)**975; 24**F(2d)**910; 27**F(2d)**519; 31 **F(2d)**385; 34**F(2d)**413; 34**F(2d)**630; 35**F(2d)**598(2dcase); 41**F(2d)**193; 215 **Ala**42, 109**S**109; 215**Ala**453, 111**S**34; 216**Ala**356, 113**S**67; 22**Ala**223, 114**S**361; 23**AlaA**63, 120**S**468; 219**Ala**46, 121**S**38; 23**AlaA**584, 129**S**492; 21**AlaA**487, 109**S** 523; 22**AlaA**22, 112**S**901; 22**AlaA**350, 115**S**701; 23**AlaA**264, 124**S**282; **AlaA** 130**S**531; 29**Ariz**523, 243**P**601; **Ariz** 283**P**711; 170**Ark**1194, 283**SW**372; 173 **Ark**450, 292**SW**699; 176**Ark**170, 2**SW (2d)**14; 179**Ark**1199, 18**SW(2d)**335; 180**Ark**656, 22**SW(2d)**172; 196**Cal** 19, 235**P**721; 197**Cal** 200, 239**P**1080; 208 **Cal** 385, 281**P**606; 70**CalA**191, 232**P**985; 74**CalA**371, 240**P**526; 75**CalA**74, 241**P** 924; 75**CalA**439, 242**P**876; 76**CalA**558, 244**P**1086; 78**CalA**167, 248**P**289; 79 **CalA**127, 249**P**60; 79**CalA**464, 249**P** 1089; 89**CalA**615, 265**P**349; 92**CalA**118, 267**P**733; 102**CalA**787, 283**P**830; **CalA** 288**P**788; **CalA** 289**P**212; 86**Colo** 35, 278**P**594, 65**ALR**1260; 87**Colo** 6, 284**P** 341; 106**Conn**260, 137**A**762; 110**Conn** 55, 147**A**118; 91**Fla**682, 108**S**842; 164 **Ga**128, 138**SE**67; 166**Ga**213, 142**SE**895; 168**Ga**296, 147**SE**504; 47 **Ida**785, 280**P** 1039; 335 **Ill** 596, 167**NE**786; 338 **Ill** 636, 170**NE**750 (sustaining objection held sufficient); 197 **Ind**419, 151**NE**129; 208 **Iowa**1233, 227**NW**166; 121**Kan**762, 250**P**296; 126**Kan**375, 377, 267**P**1095 [citCJ]; 214**Kan**458, 283**SW**427; 220 **Ky**585, 295**SW**883; 232**Ky**691, 24**SW (2d)**564 (even though repeated); 235**Ky** 340, 31**SW(2d)**383; 161**La**532, 109**S**56; 161**La**758, 109**S**414; 161**La**827, 109**S** 505; 161**La**1010, 109**S**819; 162**La**299, 110**S**482; 164**La**449, 114**S**92; 166**La**21, 116**S**579; 166**La**43, 116**S**588; 166**La** 924, 118**S**85; 169**La**291, 125**S**127; 264 **Mass**368, 162**NE**729; 239**Mich**386, 214 **NW**183; 251**Mich**99, 230**NW**931; 172 **Minn**208, 215**NW**206; 144**Miss**437, 110**S** 119; 148**Miss**229, 114**S**352; 156**Miss**612, 126**S**390(2dcase); **Mo** 281**SW**32; 313**Mo** 71, 281**SW**35; 315**Mo** 203, 285**SW**990; **Mo** 289**SW**895; **Mo** 14**SW(2d)**449; 322 **Mo** 69, 16**SW(2d)**30; **Mo** 18**SW(2d)**23; **Mo** 24**SW(2d)**1023; **Mo** 24**SW(2d)**1032; **Mo** 30**SW(2d)**132; 73**Mont**205, 235**P**702; **Nebr** 226**NW**793; 189**NC**766, 128**SE**354; 53**ND**931, 208**NW**566; 22 **OhA**304, 153 **NE**865; 24 **OhA**312, 157**NE**800; 33 **OhA** 1, 168**NE**550; 43 **OklACR**321 [reh pending]; **Or** 292**P**98; 285**Pa**97, 131**A**667; 93**PaSuper**404; 95**PaSuper**496; 96**Pa Super**76; 7**PaDist&Co** 531; 13**PaDist &Co** 361; 34**PortoRico** 519; 137**SC**145, 134**SE**885; 49**SD**476, 207**NW**475; 100 **TexCr**528, 272**SW**138; 101**TexCr**185, 274**SW**634; 101**TexCr**479, 276**SW**268; 101**TexCr**635, 276**SW**907; 103**TexCr**318, 280**SW**202; 103**TexCr**268, 280**SW**595; 104**TexCr**100, 283**SW**508; 104**TexCr**329, 283**SW**828; 104**TexCr**637, 285**SW**826; 105**TexCr**107, 286**SW**1100; 105**TexCr** 301, 288**SW**232; 105**TexCr**426, 289**SW** 49; 105**TexCr**470, 289**SW**57; 106**TexCr** 305, 292**SW**218; 106**TexCr**482, 293**SW** 173; 107**TexCr**332, 296**SW**547; 107**Tex Cr**307, 296**SW**582; 108**TexCr**253, 299 **SW**901; 108**TexCr**556, 1**SW(2d)**903; 108**TexCr**544, 2**SW(2d)**238; 109**TexCr** 20, 2**SW(2d)**437; 109**TexCr**512, 5**SW (2d)**769; 110**TexCr**68, 7**SW(2d)**535; 113**TexCr**247, 20**SW(2d)**431; **TexCr** 21 **SW(2d)**733; 113**TexCr**546, 22**SW(2d)** 676; 113**TexCr**659, 23**SW(2d)**356; **Tex Cr** 29**SW(2d)**395; 146**Wash**187, 262**P** 146; 146**Wash**221, 262**P**622; 148**Wash** 57, 268**P**139; **Wash** 286**P**69; **WVa** 153 **SE**496; 193**Wis**204, 212**NW**635; 195 **Wis**532, 218**NW**720; 34**Wyo** 90, 241**P** 705, 707 [citCJ]; **Wyo** 285**P**803. But see 165**La**758, 116**S**176. [c] **Direction to jury held adequate** to correct any erroneous effect of prosecuting attorney's argument. 85**CalA**670, 259**P**1019; 254 **Mass**520, 150**NE**854. [d] **Extent of reprimand** for improper remarks of prosecuting attorney is largely in dis-

cretion of trial court. 313Mo 71, 281 SW35.

918-68 20F(2d)795; 175Ark1115, 1SW (2d)553; 75CalA181, 242P503; 166Ga 512, 143SE896; 165La822, 116S199; 320 Mo 288, 6SW(2d)866; 321Mo 633, 12SW (2d)37; MoA 15SW(2d)865(2dcase); 191NC122, 131SE370 (improper remark held not to require reversal in view of prompt correction by court striking statement apology of counsel and cautionary instruction); OklCr 280P851(2d case); SD 232NW909; 104TexCr637, 285SW826; Va 152SE547. But see 83 NH419, 143A594.

919-69 90CalA738, 266P361; 161La 532, 109S56; 83NH536, 145A262; 34 NM465, 284P113.

919-69½-New. Sustaining objection to improper remarks is sometimes sufficient, although the court refuses to reprimand the attorney. Mo 23SW(2d)139.

919-70 199Cal 471, 250P168; 107TexCr 307, 296SW582.

919-71 24F(2d)910; 164Ga128, 138SE 67; 166Ga517, 143SE900; 337 Ill 300, 169NE182; 227Ky142, 12SW(2d)324; 166La924, 118S85; 166Minn453, 208NW 415; Wash 286P51. [b] **Statements supporting questions objected to held proper.**–166La924, 118S85.

919-72 170Ark1194, 283SW372; 74 CalA371, 240P526; 79CalA127, 249P60; 90CalA590, 266P295; 36GaA127, 135SE 492; 46 Ida8, 265P666; Ind 171NE1; 206 Iowa384, 220NW32 (prejudicial error); 166La924, 118S85; Mo 285SW 422; 189NC766, 128SE354; 112TexCr 71, 13SW(2d)859; TexCr 26SW(2d)915; Wash 286P69; 33Wyo 360, 239P952.

919-73 121Kan762, 250P296.

919-74 167La1050, 120S853; 156Md 459, 144A350.

919-75 179Ark318, 16SW(2d)2; 95 CalA259; 272P816; 100CalA344, 279P 1022; 164La449, 114S92; 111TexCr151, 11SW(2d)796.

919-76 32F(2d)598; 179Ark647, 17SW (2d)307; 87CalA68, 261P1059; 47 Ida 785, 280P1039 (misstatement of evidence cured by having testimony read to jury); 229Ky207, 16SW(2d)1016; 235Ky 78; 29SW(2d)629; 156Md459, 144A350; 148Miss696, 114S816; 54SD375, 223NW 320; 54SD514, 223NW722.

919-77 313Mo 71, 281SW35; Mo 29SW (2d)60.

919-78 8F(2d)219; 148Miss229, 114S 352; 312Mo 635, 281SW29; 285Pa97, 131A667.

920-79 83CalA34, 256P455; 239Mich 386, 214NW183; 107TexCr307, 296SW 582; 112TexCr590, 18SW(2d)627; Tex Cr 26SW(2d)233. But see CalA 292P 500.

920-80 106Conn260, 137A762; 161La 532, 109S56; 164La449, 114S92 (court need not mention that accused had been acquitted); Mass 164NE923; 321Mo 564, 12SW(2d)445; 101TexCr635, 276 SW907; 112TexCr168, 15SW(2d)623; 146Wash221, 262P622; 152Wash111, 277P388; 152Wash686, 279P82; Wash 286P51; 104WVa231, 139SE742 (reference to former conviction).

920-81 13F(2d)975; 32F(2d)505; 34 F(2d)110; 99CalA147, 277P870; 39GaA 828, 148SE618(1stcase); 162La266, 110 S417; 165LaS42, 116S206; 168La297, 121S872; Mo 23SW(2d)16; 111TexCr 493, 14SW(2d)1032; 112TexCr466, 17 SW(2d)46.

920-81½-New. In appealing to fears of jury; Mo 30SW(2d)132.

920-82 322Mo 69, 16SW(2d)30; 101 TexCr635, 276SW907.

920-83 8F(2d)219; 8F(2d)832; 32F (2d)472; 21AlaA585, 111S43; 86CalA 45, 260P313; Ind 166NE654; 161La 532, 109S56; SC 155SE409; Utah 277P 972; 155Wash491, 285P455; 195Wis 166, 217NW653.

920-84 23AlaA493, 127S681; 89 IndA 31, 165NE562; 103TexCr418, 280SW 1064; 113TexCr45, 19SW(2d)316.

921-87 143Miss347, 108S721; 79Mont 52, 255P337.

921-88 169Ga814, 152SE76 (statute construed).

921-89 273US593, 47SCt531, 71L ed 793; 14F(2d)670; 16F(2d)951; 20AlaA 543, 104S46; 35Ariz432, 280P672; 69 CalA94, 230P1001; 165Ga210, 140SE 625; 47 Ida328, 274P805, 62ALR195; 200 Iowa652, 204NW256; 206 Iowa390, 220NW328; 128Me404, 148A141; 249 Mich147, 228NW723; 34NM454, 283P 906; 193NC754, 138SE136; 196NC562, 146SE395; 112TexCr533, 17SW(2d) 1050; 113TexCr142, 18SW(2d)663; Tex Cr 27SW(2d)173. [d] **Questions of fact not bearing on issue of guilt** held for court. 162La917, 111S327. [e] **Question of whether motion to withdraw plea of guilty and substitute therefor plea of not guilty and to vacate judgment** are for court. 98CalA733, 277P 896.

921-91 169Ark717, 276SW849; 69CalA 94, 230P1001; 165Ga210, 140SE625; 193NC754, 138SE136.

921-91½-New. Law, in criminal cases, consists of the constitution and statutes, as interpreted by the supreme court. 198 Ind502, 154NE273.

921-91½-New. That defendant's witnesses desired to change testimony previously given does not require court to withdraw juror and postpone trial. Ill 173NE155.

921-92 198 Ind502, 154NE273; 151Md 87, 133A399; 151Md484, 135A591; 153 Md431, 138A338; 220MoA251, 284SW 167; SC 144SE6. [b] 198 Ind502, 154 NE273. [c] **Right of jury to determine law does not give them right to make law.**–198 Ind502, 154NE273.

922-94 See also 33GaA818, 128SE224.

922-95 198 Ind502, 154NE273. [a] 327 Ill 162, 158NE462.

922-96 But see 197 Ind463, 150NE365.

922-97 198 Ind502, 154NE273.

922-98 196 Ind22, 145NE572.

922-3 14F(2d)497; 16F(2d)197; 18 F(2d)507 (entrapment); 21AlaA516, 109S892; 22AlaA67, 111S587; 35Ariz 432, 280P672; 177Ark892, 9SW(2d)21; 204Cal 470, 268P909; CalA 286P434; 87Colo 44, 285P162; 35GaA364, 133SE 351; 37GaA94, 139SE95; 37GaA166, 139SE101; 37GaA475, 140SE772; 38 GaA436, 144SE145(2dcase); 40GaA504, 150SE449(2dcase); 41GaA305, 152SE 601(2dcase) (where circumstantial evidence is involved); 41GaA364, 153SE91 (1stcase); 41GaA577, 153SE776(2d case); 42 Ida319, 245P685; 200 Iowa 306, 204NW218; Iowa 232NW684; 214 Ky147, 282SW1066; 222Ky840, 2SW (2d)1044; 225Ky731, 9SW(2d)1087; 231Ky152, 21SW(2d)231; 158La799, 104S720; 239Mich390, 214NW950; 150 Miss787, 117S119 (flight and explanation); Mo 271SW525; 245NY227, 157 NE94; 218AppDiv254, 218NYS249; 194 NC260, 139SE374; NC 154SE314; 118 OhSt397, 161NE211; OklCr 285P989; 121 Or141, 253P367; 297Pa160, 146A 553; 86PaSuper5; 156SC63, 152SE825 (2dcase); 102TexCr506, 278SW843; 111TexCr89, 10SW(2d)90(2dcase); 113 TexCr142, 18SW(2d)663; 147Va624, 136SE765; 142Wash612, 254P234. [e] **Question as to truth of facts assumed in hypothetical question** is for jury. 205 Iowa1130, 217NW225.

923-4 Mo 296SW391.

923-7 291Pa40, 139A493.

923-8 [c] **Mixed question of law and fact** is one depending for solution on both law and fact. 162La917, 111S327.

923-9 157Tenn105, 6SW(2d)556. [a] (5) Whether statute included offense charged. 27Hawaii587.

923-18 See also TexCr 32SW(2d)204.

923-25 20AlaA626, 104S777 (there being conflicting evidence); 28Hawaii350; 251Mich243, 231NW564 (commission of crime). [a] Contra 107TexCr376, 296 SW537.

924-27 22AlaA223, 114S361; 20AlaA 457, 103S902; 21AlaA497, 109S530; 22 AlaA316, 115S291; 23AlaA432, 127S796 (2dcase); 80CalA647, 252P730; 41GaA 836, 155SE100; 200 Iowa1397, 206NW 280 (positive testimony not necessary to take question to jury; fair inference is sufficient); 203 Iowa333, 210NW934; 203 Iowa333, 212NW550; 220Ky77, 294 SW803; 221MoA114, 294SW117. [b] **Place of commission of crime** is for jury. 220Ky77, 294SW803.

924-28 La 129S736.

924-29 162Ga208, 132SE911.

924-31 22AlaA554, 117S615; 74CalA 540, 241P401; 41GaA577, 153SE622; 191NC834, 133SE168; TexCr 31SW(2d) 630(3dcase) (influences bearing upon mind of accused).

924-34 18F(2d)939; 44F(2d)45; 215 Ala316, 110S476; 169Ark1212, 275SW 660; 169Ark359, 275SW701; 79CalA 207, 249P18; 85CalA301, 259P353; 88 CalA222, 263P306; 93CalA711, 270P 237; Fla 129S112; 205 Iowa1024, 219 NW41; 221Ky599, 299SW203; 230Ky 593, 20SW(2d)454; 251Mich243, 231NW 564; 179Minn516, 229NW739; Mo 274 SW47; 318Mo 742, 300SW680 (regardless of defense of alibi); 49SD434, 207 NW224, 225 [citCJ]. But see 92Fla477, 110S250.

924-35 16F(2d)568; 19F(2d)891; 109 TexCr433, 5SW(2d)149. [a] 208Ky700, 271SW1059. [b] 19F(2d)891.

924-36 68CalA259, 228P868; 72CalA 160, 236P987; 77CalA279, 246P337; 79 CalA207, 249P18; 93CalA711, 270P237; CalA 289P194; Fla 128S485; Ill 173 NE97; 221Ky283, 298SW699; 167La 986, 120S620; 167La1003, 120S626; Mich 207NW815; Mo 11SW(2d)1020; Mo 23SW(2d)122; 49Nev194, 242P582; 32NM83, 251P384; 192NC318, 135SE32; 112TexCr211, 16SW(2d)536; 100WVa 418, 130SE607; 191Wis652, 211NW785.

925-42½-New. In Louisiana, on demand for a jury trial on the issue, the right to have the question decided in limine is waived. 163La1093, 113S546.

925-43 23AlaA438, 126S610(1stcase); 204 Iowa1296, 210NW580; 53ND669, 207NW991; 27 OhNPNS242 (when offense is punishable by fine only).

925-48 7Alaska356; 94CalA235, 270P 996; Wash 288P233.

925-49 53ND669, 207NW991.

925-52 136Wash620, 241P9.

925-54 Ont [1927] 2DomLR539.

925-56 56ND642, 219NW132.

925-57 21AlaA289, 107S791; 87CalA 295, 261P1114; 96CalA1, 274P361; CalA 291P434; 92Fla589, 109S599; 314 Mo 699, 285SW440; 193NC489, 137SE 429; 147Wash540, 266P185; 193Wis 482, 214NW356; Ont [1927] 2DomLR 539. See also Ga 154SE337.

926-58 23AlaA223, 124S117(2dcase); CalA 284P709; 146Wash202, 262P970.

926-61½-New. Motive is to be considered by jury. Mo 278SW669.

926-61½-New. Evidence of motive is not alone sufficient to take case to jury. 223Ky645, 4SW(2d)675.

926-61¼-New. Where evidence was insufficient to show motive of desire for insurance money in a prosecution for murder, refusal of instructions withdrawing evidence from the jury is error. 116Nebr141, 216NW173.

926-62 273US593, 47SCt531, 71L ed 793; 5F(2d)604; 14F(2d)670; 80CalA 138, 251P672; Fla 129S112; 164Ga292, 138SE238; 199 Ind746, 161NE8; 203 Iowa929, 210NW465; 225Ky109, 7SW (2d)847; 166La924, 118S85; 153Md 431, 138A338; 235Mich144, 209NW57; 162Minn9, 201NW913; 143Miss347, 108 S721; 146Miss351, 111S860; 153Miss 755, 121S481; 316Mo 268, 289SW657; 220MoA251, 284SW167; 74Mont269, 240 P365; 104NJL512, 141A85; 102NJL 530, 133A861; 191NC378, 131SE743; 191NC659, 132SE603; 192NC150, 134 SE413; 196NC562, 146SE395; 119 Oh 285, 164NE51, 63ALR595; 132 Or363, 285P817; RI 147A876; 142Wash653, 254P445. [a] **No abuse of discretion found** where court refused request that witness' notes become exhibits and be taken to jury room, it not appearing that jury would gain information of value. 33F(2d)713.

926-63 267US505, 45SCt417, 69L ed 761; 273US593, 47SCt531, 71L ed793; Conn 142A857; 97Fla61, 119S791; 46 Ida561, 270P417; 161La518, 109S51; 167La1085, 120S865; 153Md431, 138A 338; 237Mich127, 211NW44; 246Mich 524, 224NW364; 144Miss726, 111S139; 146Miss303, 111S362; 76Mont509, 248P 201; 82NH518, 136A358; 191NC378, 131SE743; 191NC659, 132SE603; Okl Cr 287P791; OklCr 288P359; 120 Or160, 249P363; 161Tenn71, 29SW(2d)247; 107 TexCr285, 296SW542; 108TexCr265, 300 SW936; TexCr 21SW(2d)514; TexCr 26SW(2d)202 (probable cause for search); TexCr 32SW(2d)476; 142 Wash653, 254P445; 101WVa356, 132

SE728 (experiments). [d] **Probable cause.**—111TexCr337, 12SW(2d)804; 111 TexCr300, 12SW(2d)1018; 111TexCr 242, 13SW(2d)97; 111TexCr245, 13SW (2d)95; 111TexCr509, 13SW(2d)553(2d case).

926-64 101CalA213, 281P508; 224Ky 453, 6SW(2d)467; 231Ky838, 22SW(2d) 295; 264Mass564, 163NE168; 48Nev 134, 228P582 (weight of testimony as to identification of article held for jury); 105TexCr365, 288SW202; 105TexCr568, 290SW762; 107TexCr649, 298SW604; 108TexCr265, 300SW936; 110TexCr553, 9SW(2d)1043; 113TexCr484, 22SW(2d) 459; 143Va489, 129SE252 (whether threat by accused referred to deceased may be referred to jury). [a] **Before considering bloodhound evidence,** jury must find that dogs are capable of tracing human beings. Mo 289SW562.

926-66 316Mo 268, 289SW637 (interpreter); 33PortoRico 48. But see 166 La924, 118S85.

926-66½-New. Parties are entitled to have the judge definitely decide all questions relating to the admissibility of evidence, and to admit or reject it accordingly. 191NC659, 132SE603.

926-67 21AlaA457, 109S366; 21AlaA 562, 110S563; 23AlaA299, 124S406(2d case); 175Ark264, 298SW993; 73CalA 13, 238P374; Cal 287P337; 72CalA386, 237P770; 72CalA391, 237P772; 75CalA 138, 242P84; 80CalA151, 251P335; 85 CalA228, 259P117; 83Colo 4, 262P892; Colo 293P335; 110Conn549, 148A664; 44 Ida396, 257P370; 47 Ida457, 276P39, 68ALR1061; 319 Ill 606, 150NE347; 321 Ill 397, 152NE149; 210Ky350, 275 SW805; 155Md474, 142A497; 222Mass 465, 148NE123; 157Miss193, 127S687; Mo 12SW(2d)30; Mo 32SW(2d)596; 80 Mont181, 260P138; 104NJL512, 141A 85; 24SNY118, 161NE441; 254NY170, 172NE458; 50ND927, 198NW698; Okl Cr 273P1015; OklCr 288P359; 118 Or 397, 247P146; 289Pa498, 137A683; 133 SC99, 130SE511; 137SC145, 134SESS3; 157SC459, 154SE658; 101TexCr651, 277 SW116; 104TexCr232, 283SW857; 108 TexCr317, 300SW79; 108TexCr561, 2 SW(2d)233; TexCr 28SW(2d)1084(2d case); 101WVa136, 132SE375.

927-68 248NY118, 161NE441; 105Tex Cr169, 287SW273.

927-69 33F(2d)699; 73CalA13, 238P 374; 75CalA138, 242P84; 80CalA151, 251P335; 87CalA313, 262P75; 204 Iowa 1135, 216NW642; Iowa 230NW513; 252Mass465, 148NE123; 142Miss335, 107S373; Mo 278SW694; 114Nebr404, 207NW928; 128 Or49, 273P381 (mixed question of law and fact); 297Pa326, 146A905; 133SC99, 130SE511; 100Tex Cr523, 272SW205; 102TexCr415, 278 SW216; 107TexCr504, 296SW513; 109 TexCr281, 4SW(2d)46; 109TexCr224, 4SW(2d)69; TexCr 24SW(2d)413; Tex Cr 26SW(2d)1072; 148Wash65, 268P 133. See also Ariz 282P930; 251Mich 542, 232NW384.

927-70 7F(2d)466; 12F(2d)904; 25F (2d)430; 23AlaA281, 123S281(2dcase); 80CalA151, 251P335; 83Colo 4, 262P 892; DC 32F(2d)947; 204IowaN28, 216 NW31; 205 Iowa592, 218NW273; 226 Ky529, 118W(2d)437; 230Ky815, 20SW (2d)998; 252Mass465, 148NE123; Mo 274SW43; 246NY409, 159NE379; 133SC 99, 130SE511 (in case of conflict cannot be held involuntary as matter of law); 137SC145, 134SE885, 892 [quotCyc]; 157 SC459, 154SE658; 101TexCr651, 277SW 116; 102TexCr415, 278SW216; 104Tex Cr232, 283SW857; 104TexCr543, 286 SW218; 106TexCr222, 291SW558; 110 TexCr474, 9SW(2d)355; 111TexCr249 12SW(2d)572; 111TexCr555, 15SW(2d) 11; 112TexCr335, 16SW(2d)825. [b] **Evidence held sufficient** to go to jury on voluntary character of confession. 106 TexCr222, 291SW558; 110TexCr374, 7 SW(2d)1089.

927-71 30F(2d)340; 32F(2d)992; 75 CalA138, 242P84; 80CalA151, 251P335; 319 Ill 606, 150NE347; 321 Ill 397, 152 NE149; 333 Ill 397, 164NE847; 216Ky 832, 288SW768; 142Miss335, 107S373; 157Miss193, 127S687; Mo 12SW(2d)30; 254NY170, 172NE458; OklCr 288P359; 128 Or49, 273P381; 101WVa136, 132SE 375; 104WVa623, 140SE546. [a] **Where defendant waives preliminary determination,** effect of promises, threats, or abuse in obtaining confession is for jury. 34 OhA60, 170NE444.

927-72 321 Ill 397, 152NE149; OklCr 287P775; OklCr 288P359.

927-72½-New. Whether statements by accused, claimed to be admissions, were actually made is for the jury; 28 OhCA 545.

927-72¼-New. as is also the question of whether they amounted to an admission of guilt. 219Ky789, 294SW491.

927-72¼-New. Jurors justified in view of evidence in finding defendant's admission referred to a particular time. Mo 271SW525.

927-72½-New. The weight of accused's failure to deny accusation of crime as an admission is for the jury. 193Wis204, 212NW635.

927-72¾-New. When defendant makes an equivocal reply to an accusation, whether or not it amounted to an admission of the truth of the charge is a question for the jury. 264Mass314, 162 NE362.

927-72½-New. Whether or not defendant heard or understood the statements made by the prosecuting witness, and was thus afforded an opportunity to reply, is a question for the jury. 84CalA 642, 258P638.

927-72½-New. It is for jury to say from whole conversation whether statement made by defendant was admission against interest. OklCr 287P1091(2d case).

927-73 22F(2d)799; 109TexCr301, 4 SW(2d)58.

928-75½-New. Whether or not defendant heard another's statement is for the jury. 21AlaA487, 109S523.

928-76 23AlaA409, 126S186; 76Mont 89, 245P265.

928-76½-New. Whether a witness is an accomplice may be a question of law or fact depending on the circumstances of the particular case. 220Ala30, 123S 231, 68ALR712.

928-77 200Cal 404, 253P318; 102TexCr 535, 278SW852; 110TexCr499, 9SW(2d) 333(1stcase).

928-78 200Cal 404, 253P318; Cal 265P231; 75CalA404, 242P1067; 75 CalA718, 243P485; 81CalA618, 254P 612; 82CalA700, 256P281; 98CalA225, 276P625; CalA 290P678; 221Ky461, 298SW1107; OklCr 283P796; 117 Or 466, 242P440.

928-79 23AlaA217, 123S107(2dcase); 168Ark151, 269SW46; Ark 318W(2d) 295; 200Cal 404, 253P318; 208Cal 64, 280P354(2dcase); Cal 293P32; 69CalA 239, 230P991; 71CalA339, 235P87; 71 CalA402, 235P467; 75CalA404, 242P 1067; 87CalA177, 261P1057; 92CalA 778, 269P465; 93CalA568, 269P969; CalA 290P655; CalA 290P678; 36GaA 736, 138SE251; Iowa 229NW255; 223 Ky808, 10SW(2d)302; 228Ky257, 14SW (2d)767; 229Ky584, 17SW(2d)697; 235 Ky5, 29SW(2d)646; 221MoA893, 288 SW77; 75Mont22, 241P522; 241NY138, 149NE330; 246NY106, 158NE38; 113 OhSt187, 148NE834; 35PortoRico 886; 99TexCr465, 270SW558; 100TexCr496, 272SW181; 106TexCr240, 291SW904; 107TexCr623, 298SW567; 108TexCr1, 299SW422; 111TexCr517, 14SW(2d) 1039; 112TexCr245, 16SW(2d)127; 113 TexCr93, 18SW(2d)1081; TexCr 25SW (2d)617; TexCr 28SW(2d)801; TexCr 29SW(2d)779. [c] **Error for court to hold witness not an accomplice as matter of law,** under the evidence. 241NY 138, 149NE330.

928-80 93CalA590, 269P955; Ill 173NE 467; 123Kan743, 256P1017; 264Mass 217, 162NE337; 108TexCr1, 299SW422; TexCr 25SW(2d)850. [a] 292Pa16, 140 A537.

928-81 220Ala30, 123S231, 68ALR712; 177Ark938, 9SW(2d)583; 179Ark216, 15 SW(2d)312; 86CalA390, 260P913; 165 Ga326, 140SE889; 36GaA672, 137SE 788; 41GaA570, 153SE925; 229Ky584, 17SW(2d)697; 231Ky690, 22SW(2d)99; 167La986, 120S620; 76Mont89, 245P 265; 126 Or579, 269P884; 152Tenn281, 277SW992. [c] **If court finds evidence** other than that given by accomplice, case must go to jury. 23AlaA409, 126 S186.

929-83 248Mich678, 227NW748.

929-83½-New. The question whether acts done after the commission of the crime were done in pursuance of the original conspiracy is a question for the jury. 90CalA317, 265P893.

929-85 196NC562, 146SE395.

929-86 2F(2d)922; 5F(2d)224; 16F (2d)830; 19F(2d)139; 22F(2d)766 (sufficiency of evidence to identify exhibits); 213Ala333, 104S830; 214Ala172, 106S692; 23AlaA262, 123S277(2dcase); 220Ala544, 126S848; 20AlaA640, 104S 687; 21AlaA319, 108S84; 21AlaA373, 108S631; 21AlaA457, 109S366; 21AlaA 551, 109S897; 21AlaA660, 109S923; 21 AlaA561, 110S53; 21AlaA562, 110S563; 21AlaA646, 111S318; 22AlaA176, 113S 644; 22AlaA311, 115S289; 22AlaA407, 116S900; 22AlaA545, 117S603; 22AlaA 609, 118S500; 23AlaA104, 121S500; 23 AlaA116, 121S689; 23AlaA100, 123S86 (1stcase); 23AlaA335, 125S203; 23AlaA 496, 129S305; 32Ariz470, 260P188; 168 Ark1082, 272SW833; 169Ark221, 275SW 327; 169Ark505, 275SW739; 170Ark 936, 282SW4; 170Ark979, 282SW5; 170 Ark1061, 282SW684; 171Ark1188, 285 SW1; 172Ark244, 288SW904; 172Ark 398, 288SW926; 172Ark1176, 289SW 469; 173Ark1054, 294SW390; 174Ark 1180, 295SW401; 174Ark1180, 299SW 3; 174Ark871, 298SW7; 175Ark1170, 299SW1019; 175Ark1047, 18W(2d)546; 176Ark1205, 4SW(2d)948; 180Ark1167, 20SW(2d)858; Ark 32SW(2d)169; 195 Cal 272, 232P710; 195Cal 295, 232P974; 74CalA402, 240P799; 75CalA642, 243P 461; 77CalA279, 246P337; 78CalA46, 247P593; 80CalA138, 251P672; 99CalA 515, 278P1056(2dcase); CalA 285P586; CalA 289P194; CalA 292P693; 77Colo 445, 236P1009; DC 41F(2d)976; 91Fla 446, 107S331; 164Ga292, 138SE238; 39 GaA550, 147SE784; 35GaA364, 133SE 351; 36GaA585, 137SE413; 37GaA94, 139SE95; 37GaA166, 139SE101; 42 Ida 319, 245P685; 47 Ida162, 272P1010; 329 Ill 278, 160NE575; 335 Ill 263, 167NE 43; 336 Ill 399, 168NE806; 338 Ill 353, 170NE265; 338 Ill 542, 170NE782; Ill 172NE728; Ill 172NE740; Ill 173NE 104; Ill 173NE128; Ill 173NE357; 199 Ind540, 156NE555; Ind 172NE176; 200 Iowa320, 204NW248; 202 Iowa1067, 208 NW360; 203 Iowa918, 210NW961; 204 Iowa187, 214NW531; 119Kan417, 239 P756; 125Kan83, 262P499; Kan 291P 950; 210Ky494, 276SW158; 217Ky403, 289SW371; 225Ky444, 9SW(2d)47; 227 Ky129, 12SW(2d)297; 227Ky100, 12SW (2d)329(2dcase); 227Ky831, 14SW (2d)146; 228Ky830, 16SW(2d)478; 230 Ky624, 20SW(2d)442; 234Ky842, 29SW (2d)561; 235Ky340, 31SW(2d)383; 235 Ky670, 32SW(2d)29; 158LaS69, 104S 746; 160La667, 107S484; 163La641, 112 S514; 164La449, 114S92; 167La982, 120 S619; 168La153, 121S607; 153Md431, 138A338; 255Mass304, 151NE297, 47 ALR962; 255Mass369, 151NE839; 261 Mass281, 158NE840; 262Mass408, 160 NE271; 233Mich185, 206NW568; 241 Mich111, 216NW434; 162Minn9, 201NW 913; Miss 107S890; 149Miss262, 115S 208 (flight); 156Miss612, 126S390(2d case); Mo 274SW54; Mo 274SW62; Mo 278SW709; 313Mo 88, 280SW1023; 314 Mo 333, 284SW433; 314Mo 662, 285SW 62; Mo 18W(2d)139; Mo 18W(2d)153; 318Mo 1198, 2SW(2d)767; 320Mo 389, 8SW(2d)20; Mo 23SW(2d)1; Mo 29SW (2d)60; Mo 29SW(2d)71; 216MoA644, 271SW875; MoA 279SW749; 220MoA 251, 284SW167; MoA 284SW520; 74 Mont269, 240P365; 76Mont351, 246P 956; 76Mont574, 248P179; 114Nebr 445, 208NW126; 118Nebr149, 223NW 808(1stcase); 118Nebr517, 225NW479; Nebr 232NW575; 49Nev194, 242P582; NH 146A870; 243NY134, 152NE700; 243NY320, 153NE433; 189NC156, 126 SE500; 190NC684, 130SE534 (probative force for jury); 190NC868, 129SE 808; 191NC213, 131SE572; 193NC246, 136SE715; 193NC796, 138SE166; 194 NC260, 139SE374; 196NC526, 146SE806 (1stcase); 196NC710, 146SE806(2d case); 197NC684, 150SE337; 198NC 649, 152SE895; NC 154SE730; 53ND 203, 205NW67; 53ND931, 208NW566; 55ND194, 212NW857; 38 OklCr34, 259 P173; OklCr 276P498(2dcase); OklCr

277P263(3dcase); OklCr 277P282(1st case); OklCr 277P688; OklCr 282P885 (2dcase); OklCr 287P813; OklCr 287 P1103; OklCr 288P987(2dcase); OklCr 292P393; OklCr 292P883(2dcase); 116 Or451, 241P846; 117 Or179, 242P1116; 123 Or490, 262P950; 126 Or651, 269P 869; 132 Or363, 285P817; 132 Or627, 287 P681; 284Pa81, 130A311; 284Pa85, 130A 312; 290Pa271, 138A836; 86PaSuper567; 146SC138, 143SE674, 51SD529, 212NW 864; 52SD619, 219NW817 (official records); SD 228NW395; 100TexCr85, 271 SW923; 100TexCr530, 271SW620; 101 TexCr651, 277SW116; 102TexCr506, 278 SW843; 102TexCr524, 278SW444; 102 TexCr537, 278SW434; 103TexCr126, 280 SW223; 105TexCr456, 288SW1077; 105 TexCr487, 288SW1078; 106TexCr269, 291SW910; 107TexCr40, 294SW545; 107TexCr51, 294SW546; 106TexCr593, 294SW573; 107TexCr631, 298SW436; 108TexCr480, 1SW(2d)627; 109TexCr 124, 3SW(2d)88; 110TexCr296, 8SW (2d)186; TexCr 12SW(2d)1017; TexCr 28SW(2d)541; Utah 289P100; Utah 290P727; 153Va828, 149SE445 (circumstantial evidence); Va 153SE684; 136 Wash20, 238P903; 144Wash341, 258P 13; 99WVa694, 129SE748; 100WVa 418, 130SE607; 102WVa234, 134SE919; 104WVa1, 138SE732. [a] (1) 47 Ida 1, 272P495; 323 Ill 61, 153NE705. See also 144Va559, 131SE131. [b] 167Minn 234, 208NW653. [e] **Evidence held sufficient** to make question for jury on issue of whether witness was accomplice. 241NY138, 149NE330. [f] **Weight to be given to evidence of trailing by bloodhounds is for jury.** 150Miss206, 116S 746.

930–87½–New. A prima facie case by the state requires the court to submit the issue of defendant's guilt to the jury. Mo 12SW(2d)51.

930–88 24F(2d)325; 38F(2d)779; 213 Ala333, 104S830; 214Ala91, 106S503; 21 AlaA551, 109S897; CalA 292P693; 103 Conn138, 130A96 (instruction that jury to draw no inferences from evidence received without objection properly refused); 229Ky646, 17SW(2d)751; 263 Mass39, 160NE315; 238Mich332, 213 NW104; 140Miss265, 105S514; 100WVa 418, 130SE607; 100WVa652, 131SE706, 46ALR1528.

930–89 80CalA252, 251P682; Mo 29SW (2d)150. [a] **Function of jury is to make inferences and deductions from** circumstantial evidence. 97Fla1059, 122 S704.

930–90½–New. Before jury should consider accusatory statements made in presence of accused and not denied, it must believe that specific charge against accused was heard and understood. 76 Mont509, 248P201.

930–92 78CalA46, 247P593; 82Colo 589, 263P19; 94Fla656, 114S429; 39GaA 550, 147SE784; 199 Ind540, 156NE555; 167La279, 119S48.

930–93 5F(2d)224; 5F(2d)488; 8F(2d) 697; 14F(2d)398; 14F(2d)497; 16F(2d) 563; 16F(2d)830; 19F(2d)139; 23F (2d)235; 24F(2d)325; 25F(2d)1; 26F (2d)1; 38F(2d)779; 39F(2d)19; 44F (2d)165; 213Ala333, 104S830; 21AlaA 155, 106S797; 22AlaA121, 113S318; 23 AlaA100, 123S86(1stcase); 21AlaA35, 104S876 (consideration to be given impeaching circumstances as to testimony for jury); 21AlaA316, 108S79; 21AlaA 457, 109S366; 21AlaA534, 109S613; 21 AlaA562, 110S563; 22AlaA141, 113S478; 23AlaA104, 121S500; 23AlaA416, 125S 398; AlaA 129S712; 32Ariz470, 260P 188; 35Ariz420, 279P256; Ariz 282P481; Ariz 282P930; 168Ark1167, 271SW461; 168Ark1168, 273SW1031; 169Ark221, 275SW327; 169Ark1212, 278SW1; 170 Ark560, 280SW9; 170Ark936, 282SW4; 170Ark1061, 282SW684; 170Ark1193, 281SW13; 171Ark297, 284SW734; 171 Ark1188, 285SW1; 171Ark1187, 285SW 359; 171Ark762, 286SW937; 171Ark 1118, 287SW400; 172Ark244, 288SW 904; 172Ark1176, 288SW915; 173Ark 1054, 294SW390; 171Ark705, 295SW 380; 174Ark1180, 298SW3; 174Ark871, 298SW7; 175Ark264, 298SW993; 175 Ark1170, 298SW1019; 175Ark391, 299 SW386; 175Ark1047, 1SW(2d)546; 175 Ark752, 2SW(2d)36; 176Ark1205, 2SW (2d)40; 176Ark1205, 4SW(2d)948; 177 Ark91, 5SW(2d)716; 177Ark549, 7SW (2d)2; 177Ark605, 7SW(2d)315; 177 Ark1193, 9SW(2d)240; 177Ark1124, 9 SW(2d)574; 178Ark1121, 13SW(2d)606; 179Ark94, 14SW(2d)261; 179Ark1153, 15SW(2d)976; 179Ark1199, 20SW(2d) 128; 180Ark1167, 20SW(2d)625; 180 Ark1167, 20SW(2d)858; 180Ark408, 21 SW(2d)186; 180Ark588, 22SW(2d)34; 180Ark656, 22SW(2d)172; 180Ark1160, 24SW(2d)859; 180Ark1081, 24SW(2d) 971; 181Ark1035, 27SW(2d)94; 181 Ark813, 27SW(2d)989; 181Ark1146, 27 SW(2d)996(1stcase); Ark 32SW(2d)169; 194Cal 1, 227P156; 195Cal 272, 232P 710; 195Cal 445, 234P91; 199Cal 610, 250P659; Cal 257P65; 204Cal 84, 266P 536; 204Cal 470, 268P909; 70CalA465, 233P812; 72CalA160, 236P987 (alibi); 72CalA526, 237P786; 74CalA402, 240P 799; 74CalA464, 241P275; 75CalA222, 242P506; 76CalA144, 244P101; 78CalA 46, 247P593; 78CalA415, 248P693; 79 CalA488, 250P190; 79CalA541, 250P 406; 80CalA243, 251P699; 82CalA126, 255P233; 83CalA370, 257P92; 84CalA 642, 258P638; 93CalA141, 269P194; 97 CalA185, 275P462; CalA 289P194; CalA 290P102; CalA 293P72; 77Colo 445, 236 P1009; 86Colo 401, 282P252; 87Colo 44, 285P162; DC 41F(2d)976; 90Fla844, 107S530; 98Fla483, 124S5(2dcase); 34 GaA173, 128SE591; 162Gal, 132SE418; 164Ga47, 137SE553; 164Ga292, 138SE 238; 167Ga376, 145SE450; 34GaA222, 129SE7; 35GaA397, 133SE281; 35GaA 364, 133SE351; 37GaA94, 139SE95; 37 GaA166, 139SE101; 37GaA324, 140SE 391; 39GaA568, 147SE777(1stcase); 40 GaA444, 150SE429; 41GaA333, 153SE 79(2dcase); 45 Ida668, 264P875; 47 Ida 162, 272P1010; 47 Ida760, 278P773; 318 Ill 316, 149NE236; 321 Ill 254, 151NE 870; 321 Ill 397, 152NE149; 321 Ill 590, 152NE564; 321 Ill 594, 152NE516; 324 Ill 322, 155NE310; 326 Ill 216, 157NE 211; 326 Ill 540, 158NE222; 329 Ill 278, 160NE575; 333 Ill 293, 164NE692; 335 Ill 263, 167NE43; 336 Ill 399, 168NE 306; 336 Ill 421, 168NE344; 338 Ill 353, 170NE265; 338 Ill 636, 170NE750; 339 Ill 421, 171NE557; Ill 172NE728; Ill 172NE740; Ill 173NE128; Ill 173NE 357; Ill 173NE474; 199 Ind89, 155NE 257; 199 Ind126, 155NE551; 199 Ind 540, 156NE555; 199 Ind617, 159NE465; Ind 166NE651; Ind 169NE466; 89IndA 578, 166NE618; 199 Iowa842, 201NW 75; 200 Iowa320, 204NW248; 202 Iowa 1067, 208NW360; 202 Iowa352, 209NW 514; 204 Iowa1355, 217NW233; 208 Iowa831, 224NW557; 208 Iowa1049, 226 NW770; 128Kan475, 278P767; 208Ky 466, 271SW559; 208Ky695, 271SW1044; 210Ky494, 276SW158; 212Ky24, 278SW 549; 212Ky112, 278SW568; 212Ky778, 280SW118; 212Ky791, 280SW111; 214 Ky147, 282SW1066; 214Ky228, 282SW 1060; 214Ky475, 283SW431; 214Ky 689, 283SW1030; 216Ky317, 287SW 898; 217Ky403, 289SW371; 221Ky148, 298SW385; 222Ky840, 2SW(2d)1044; 223Ky233, 3SW(2d)629; 225Ky282, 8 SW(2d)406; 225Ky713, 9SW(2d)1080; 225Ky731, 9SW(2d)1087; 226Ky255, 10 SW(2d)820; 227Ky439, 13SW(2d)244; 227Ky404, 13SW(2d)247; 227Ky831, 14 SW(2d)146; 228Ky128, 14SW(2d)375; 228Ky587, 15SW(2d)467; 228Ky684, 15 SW(2d)473; 229Ky63, 16SW(2d)496; 229Ky87, 16SW769; 230Ky624, 20SW (2d)442; 230Ky593, 20SW(2d)454; 230 Ky589, 20SW(2d)455; 230Ky680, 20SW (2d)710; 232Ky171, 22SW(2d)586; 232 Ky568, 24SW(2d)276; 233Ky9, 24SW (2d)946; 233Ky820, 27SW(2d)80; 234 Ky842, 29SW(2d)561; 235Ky340, 31SW (2d)383; 235Ky322, 31SW(2d)391; 235 Ky462, 31SW(2d)712; 235Ky845, 32 SW(2d)405; 161La167, 108S324; 163 La641, 112S514; 126Me323, 138A474; 254Mass86, 149NE600 (credibility of expert in handwriting); 255Mass369, 151 NE839; 233Mich284, 206NW538; 251 Mich243, 231NW564; Miss 107S890; 143Miss352, 108S727; 152Miss48, 118S 354; 154Miss862, 123SE892; 156Miss 612, 126S390(2dcase); 307Mo 365, 270 SW291; Mo 274SW50; Mo 274SW54; 313Mo 98, 281SW720; Mo 281SW 960; 314Mo 662, 285SW62; 316Mo 104, 289SW789; 316Mo 72, 289SW871; Mo 285SW426; Mo 292SW728; Mo 295SW 788; Mo 300SW473 (alibi); 318Mo 751, 300SW748; Mo 1SW(2d)139; 318Mo 1198, 2SW(2d)767; 320Mo 389, 8SW(2d) 20; Mo 18SW(2d)23; 322Mo 1239, 18 SW(2d)71; Mo 22SW(2d)642; Mo 23SW (2d)22; Mo 24SW(2d)1039; Mo 29SW (2d)60; Mo 29SW(2d)150; Mo 29SW (2d)156; 216MoA644, 271SW875, 878 [quotCJ]; 74Mont166, 239P1000 (credibility of detectives); 76Mont351, 246P 956; 76Mont384, 247P158; 76Mont574, 248P179; 85Mont585, 281P551; Mont 293P309; 115Nebr148, 211NW994; 115 Nebr621, 214NW70; 116Nebr73, 215NW 789; 118Nebr149, 223NW808(1stcase); Nebr 228NW253(2dcase); 104NJL512, 141A85; 34NM494, 285P497; 243NY 381, 153NE813; 244NY147, 155NE79; 245NY227, 157NE91; 223AppDiv248, 228NYS24; 191NC213, 131SE572; 193 NC246, 136SE715; 196NC562, 146SE 395; 53ND203, 205NW67; 55ND194, 212NW557; 58ND191, 225NW318; 58 ND832, 227NW560; 115 Oh542, 155NE 189; 35 OhA324, 172NE434; OklCr 269 P788(2dcase); OklCr 274P696; OklCr 276P791; OklCr 276P498(2dcase); Okl Cr 277P263(3dcase); OklCr 277P282(1st case); OklCr 277P688; OklCr 278P411; OklCr 279P356; OklCr 279P936; Okl Cr 281P166; OklCr 281P167; OklCr 281P594; OklCr 282P896; OklCr 283P 578; OklCr 283P1029(1stcase); OklCr 287P813; OklCr 287P846; OklCr 288P 987(2dcase); OklCr 291P143; OklCr 292 P393; OklCr 292P883(2dcase); 117 Or 179, 242P1116; 123 Or490, 262P950; 295Pa50, 144A761; 47RI 341, 133A236; 50SD479, 210NW732; 51SD529, 212NW 864; 54SD375, 223NW320; 157Tenn 403, 8SW(2d)371; 100TexCr530, 271SW 620; 100TexCr220, 272SW480 (justified in disregarding testimony of witness); 100TexCr309, 272SW795; 101TexCr85, 273SW848; 102TexCr537, 278SW434; 102TexCr524, 278SW444; 102TexCr506, 278SW843; 103TexCr126, 280SW223; 103TexCr205, 280SW586; 103TexCr264, 280SW813; 103TexCr566, 281SW1080; 103TexCr636, 282SW251; 104TexCr127, 283SW512; TexCr 287SW265; 105Tex Cr456, 288SW1077; 105TexCr487, 288 SW1078; TexCr 291SW229; 106TexCr 235, 291SW564; 106TexCr269, 291SW 910; 107TexCr40, 294SW545; 107Tex Cr51, 294SW546; 106TexCr593, 294SW 573; 106TexCr615, 294SW561; 107 TexCr631, 298SW436; 108TexCr282, 1 SW(2d)312; 108TexCr480, 1SW(2d)627; 109TexCr2, 2SW(2d)459; 109TexCr124, 3SW(2d)88; 110TexCr109, 7SW(2d)566; 110TexCr296, 8SW(2d)186; TexCr 12 SW(2d)1017(1stcase); 111TexCr570, 13 SW(2d)874; 113TexCr108, 18SW(2d) 637(2dcase); TexCr 27SW(2d)242; 113 TexCr48, 19SW(2d)61(2dcase); TexCr 20SW(2d)761; TexCr 24SW(2d)403; TexCr 24SW(2d)824; TexCr 26SW(2d) 246; TexCr 28SW(2d)541; TexCr 28 SW(2d)817; TexCr 31SW(2d)822; Tex Cr 32SW(2d)357; Utah 290P727; 142Va 602, 128SE454; 151Va556, 145SE336; 153Va828, 149SE445; Va 153SE684; 136 Wash20, 238P903; 141Wash358, 251P 582; 143Wash93, 254P838; 147Wash 361, 265P736; 153Wash280, 279P607; 188Wis68, 205NW412; 191Wis652, 211 NW785; 192Wis391, 212NW662; 34Wyo 90, 241P705; 40Wyo 162, 275P122, 64 ALR420. [a] 199TexCr612, 270SW1027. [b] 21AlaA316, 108S79. [d] 321 Ill 526, 152NE569. [k] **Paid informers.**–21AlaA 316, 108S79. [l] **Blackmailers.**–21AlaA 316, 108S79. [m] **Coconspirators.**–NJ Sup 140A317.

931–94 16F(2d)563; Mo 279SW701; 118Nebr517, 225NW479; 244NY147, 155 NE79; 35 OhA324, 172NE434; OklCr 269P788(2dcase); 103TexCr636, 282SW 251. [a] **Jury may determine** whether proof, though uncontradicted, establishes fact relied on to rebut a presumption. 234Mich600, 208NW687. [b] **Jury are not empowered** to disregard testimony of accused, when unimpeached, solely because it comes from one accused of crime. Va 152SE362.

931–94½–New. 104TexCr608, 286SW 228.

931–94¼–New. or any interested party. 104TexCr608, 286SW228.

931–95 15F(2d)195; 16F(2d)563; 22 AlaA123, 113S320; 20AlaA547, 104S48; 172Ark1176, 288SW915; 177Ark885, 7 SW(2d)969; 194Cal 1, 227P156; 68 CalA758, 230P191; 74CalA464, 241P 275; 92CalA550, 268P651; 102CalA688,

283P388; 36GaA771, 138SE275; 37GaA 160, 142SE306; 326 Ill 216, 157NE211; 333 Ill 469, 165NE235; 336 Ill 580, 168 NE650; 210Ky330, 275SW808; 216Ky 832, 288SW768; 228Ky106, 14SW(2d) 390; 234Ky734, 298SW(2d)13; Mo 18 SW(2d)53; MoA 286SW744; 115Nebr 621, 214NW70; NJSup 140A317; 244 NY147, 155NE79; 29 OhA419, 163NE 634; 53SD257, 220NW473; 100TexCr 288, 273SW571; 100TexCr419, 273SW 566; 100TexCr474, 273SW607; 100Tex Cr485, 273SW601 (accused and wife); 102TexCr524, 278SW444; 105TexCr222, 288SW210; 106TexCr397; 292SW545; 108TexCr225, 299SW644; 108TexCr460, 18W(2d)282; 110TexCr176, 4SW(2d) 549; 338 Ill 56, 170NE14; 206 Iowa629, 221NW59; 219Ky482, 293SW984; 220 Ky191, 294SW1042; 158La209, 103S 742; 162La867, 111S262; 167La967, 120 S614; Mo 274SW24; 309Mo155, 274SW 427; Mo 278SW1009; Mo 7SW(2d) 1001; MoA 281SW123; MoA 291SW 151; MoA 293SW445; 130Misc371, 224 NYS5; 219AppDiv196, 219NYS184; 39 OklCr264, 264P643; 118 Or5, 244P512; 142SC37, 140SE251; 104TexCr374, 283 SW839; 111TexCr144, 12SW(2d)225(2d case); Va 131SE202 (refusal of instruction assuming fact which was question for jury held proper); 150Va588, 142SE 369; 101WVa356, 132SE728. See also 312Mo 373, 278SW1016. [b] **Assuming falsity of defendant's testimony** held error of law. 245NY227, 157NE94; Tex Cr 8SW(2d)156; 110TexCr525, 9SW (2d)337; TexCr 26SW(2d)246; Tex Cr 31SW(2d)440; Utah 290P727 (especially where circumstances attending crime and conduct thereafter render testimony improbable); 153Va828, 149 SE445; 141Wash222, 251P118; 141 Wash165, 251P126; 192Wis391, 212NW 662. [b] 99TexCr569, 270SW1025. [c] (2) Jury need not believe defendant's testimony. TexCr 31SW(2d)439. [f] **Jury may reject testimony of defendant, even if uncontradicted.**–102Tex Cr524, 278SW444. [g] **It was within province of jury to disbelieve defendant's testimony** in murder prosecution in whole or in part. 97Fla1059, 122S 704. [h] **Conduct of accused as witness** is measured by same standard as other witnesses. 253NY330, 171NE393. [i] **Jury are not required to accept as true** defendant's explanation of possession of liquor. TexCr 31SW(2d)440.

931-96 177Ark885, 7SW(2d)969; 76 CalA144, 244P101; 80CalA243, 251P699; 85CalA228, 259P117; CalA 291P626; 197 Ind606, 149NE430, 151NE695; 202 Iowa1067, 208NW360; 241Mich696, 217 NW781; 216Mo 72, 289SW871; 318Mo 751, 300SW748; 318Mo 843, 18W(2d) 157; Mo 29SW(2d)58; Mo 29SW(2d) 156; 115Nebr621, 214NW70; 98Pa Super566; 112TexCr402, 16SW(2d)822.

931-97 312Mo 373, 278SW1016; Mo 12 SW(2d)39; 243NY320, 153NE433; 35 OhA324, 172NE434; 144Wash341, 258 P13.

931-1 21AlaA407, 108S645; CalA 285 P586.

931-1½-New. Even though a witness is corroborated by several witnesses, the jury may disregard his testimony. 172Ark1176, 28SSW915.

931-2 21AlaA407, 108S645; 76CalA144, 244P101; CalA 260P363; Fla 128S628; 316Mo 104, 289SW789.

931-3 14F(2d)497; 70CalA17, 232P991 (testimony of police officers as to reputations acquired from their activities in police department is admissible); 105 TexCr308, 288SW444; 106TexCr387, 292SW887; 105WVa298, 142SE254 (defendant); 192Wis391, 212NW662. [a] **Where disinterested witness,** who is in no way discredited by other evidence, testifies from knowledge to fact which is not in itself improbable, or in conflict with other evidence, witness is to be believed, and fact testified to is to be taken as legally established. 111Tex Cr245, 13SW(2d)95.

931-4 14F(2d)497.

931-4½-New. The whole testimony of the witness, both direct and cross-examination, should be considered together. 202 Iowa1067, 208NW360.

931-4½-New. , and whether or not he has been corroborated or contradicted by other facts in case. 175Ark391, 299 SW386.

931-4¼-New. The jury may consider, as affecting the weight of defendant's testimony, his admission, while testifying, of a prior offense. 27F(2d)854.

931-4½-New. As a general rule, full credit must be given to statements of a witness, unless his testimony has been discredited in some manner recognized by law. 159Tenn297, 17SW(2d)913.

931-5 22AlaA47, 112891; 20AlaA547, 104848; 20AlaA511, 104834; 20AlaA 591, 104S347; 21AlaA211, 106S891; 21 AlaA256, 107S222; 21AlaA269, 108S75; 21AlaA482, 109S888; 21AlaA658, 109S 923; 22AlaA48, 112893; 22AlaA27, 112 S221; 22AlaA140, 114S73; 22AlaA552, 117S612; 23AlaA81, 121S2(1stcase); 23 AlaA147, 122S307; 23AlaA123, 122S465 [certiorari den 219Ala359, 122S466]; 23AlaA223, 124S117(2dcase); 170Ark 495, 280SW6; 171Ark762, 286SW937; 172Ark398, 288SW926; 173Ark1181, 295 SW54; 180Ark1167, 20SW(2d)858; 180 Ark267, 21SW(2d)172; 181Ark1035, 27 SW(2d)94; 72CalA160, 236P987 (alibi); 72CalA421, 237P767; 76CalA144, 244P 101; 78CalA46, 247P593; 78CalA442, 248P1061; 79CalA265, 249P213; 79 CalA295, 249P525; 89CalA18, 264P324; 96CalA373, 274P451; 97CalA537, 275P 1017; CalA 285P386; 111Conn719, 149 A213(2dcase); 90Fla178, 105S401; 94 Fla656, 114S429; 97Fla701, 122S2(1st case); Fla 127S342; 37GaA386, 140SE 415; 39GaA676, 148SE305; 41GaA567, 153SE609(2dcase); 318 Ill 316, 149NE 236; 328 Ill 602, 160NE125; 332 Ill 476, 163NE798; 339 Ill 263, 171NE143; 205 Iowa1028, 219NW17; Iowa 231NW319; Iowa 233NW110; 208Ky695, 271SW 1044; 221Ky461, 298SW1107; 224Ky 502, 6SW(2d)502; 229Ky264, 17SW(2d) 227, 63ALR932 (evidence held for jury in prosecution for violation of Lobbyist Act); 230Ky593, 20SW(2d)454; 230 Ky589, 20SW(2d)455; 230Ky840, 20SW (2d)1005; 231Ky473, 21SW(2d)799; 234Ky544, 28SW(2d)732; 158La869, 1048746; 255Mass369, 151NE839; 263 Mass39, 160NE315; 149Miss262, 115S 208; 149Miss212, 115S399; 154Miss742, 1238867; 317Mo 477, 296SW147; Mo 18SW(2d)23; Mont 286P1108; 114Nebr 783, 210NW165; 116Nebr73, 215NW789; Nebr 230NW438 (weight for jury); NJ Sup 136A295; 214AppDiv793, 210NYS 470; OklCr 269P788(2dcase); OklCr 279P356; OklCr 279P358(2dcase); Okl Cr 285P990; OklCr 287P730; OklCr 287P846; OklCr 292P871; 87PaSuper 25; 153SC7, 150SE315; 157Tenn383, 8 SW(2d)479; 100TexCr376, 272SW791; 104TexCr100, 283SW511; 105TexCr325, 288SW212; 105TexCr456, 288SW1077; 106TexCr455, 292SW891; 106TexCr605, 294SW566; 108TexCr480, 18W(2d)627; TexCr 26SW(2d)1074; 142Va602, 128SE 454; 143Wash221, 255P89; 149Wash 38, 270P103; 155Wash486, 284P1016 (cause of arrest); Wash 288P218; 105 WVa585, 143SE348; 40Wyo 162, 275P 122, 64ALR420.

931-6 78CalA46, 247P593; 158La869, 1048746; 29 OhA135, 163NE56.

931-7 21AlaA407, 108S645; 324 Ill 190, 154NE900; 105TexCr456, 288SW1077.

931-8 170Ark1061, 282SW684; 79CalA 295, 249P525; 37GaA505, 140SE774; 324 Ill 190, 154NE900; 212Ky791, 280 SW111; 212Ky778, 280SW118; 158La 869, 1048746.

931-98 20AlaA664, 104S865 (though jury has not right to capriciously set aside evidence even of defendant, it has the right to determine the weight of his evidence and that of his witnesses); 21 AlaA407, 108S645; 171Ark1118, 287SW 400; 74CalA464, 241P275; 94Fla656, 114S429; 321 Ill 181, 151NE485; 210Ky 494, 276SW158; 140Miss897, 105S757; 76Mont384, 247P158; 145Va838, 133SE 761; Va 152SE362; 195Wis181, 217NW 697 (uncontradicted testimony). [b] **Contradictory statements of illiterate witness** do not alone warrant jury in disregarding testimony when contradictions are seemingly due to peculiarities of expression. 49Nev194, 242P582.

931-99 But see 171Ark1118, 287SW400.

932-10 326 Ill 540, 158NE222.

932-12 93CalA259, 269P671; 35GaA 497, 134SE121; 166Ga160, 142SE685; 38 GaA643, 145SE95; GaA 155SE774(1st case); 167La279, 119848.

932-13 219Ala674, 123S55; 34GaA173, 128SE591 (evidence affords basis for verdict, though witness shown to have made statements directly contrary); 316 Mo104, 289SW789; Mo 12SW(2d)51; 321Mo 553, 12SW(2d)428; 80Mont130, 259P507; 105TexCr325, 288SW212; 111 TexCr278, 12SW(2d)574; 188Wis68, 205 NW412.

932-14 21AlaA407, 108S645; 23AlaA416, 125S398; 23AlaA395, 126S178; 32Ariz 470, 260P188; 108Conn53, 142A470; 35 GaA497, 134SE121; 166Ga160, 142SE 685; 39GaA484, 147SE403(1stcase); 200 Ind343, 163NE262; 210Ky330, 275SW 808; Miss 130S730; MoA 279SW733; 315 Mo232, 285SW712; Mo 289SW575; 316Mo 104, 289SW789; 82Mont170, 266P400; 115Nebr391, 213NW347; 157Tenn403, 8SW(2d)371; Wash 288P218; 188Wis 68, 205NW412; Wis 230NW629. [b] (2) Whether testimony is corroborated is question of fact for jury. Ida 291P313.

932-16 38GaA682, 145SE478(1stcase).

932-16½-New. In federal courts whether discredited witness on whom prosecution relies is sufficiently corroborated to take case to jury is question of law for court. 13PortoRicoFed180.

932-17 16F(2d)830; 21AlaA373, 108S 631; 21AlaA646, 111S318; 23AlaA104, 121S500; 23AlaA262, 123S277(2dcase); 78CalA395, 248P696; 203 Iowa918, 210 NW961; 314Mo 662, 285SW62; 318Mo 1149, 28W(2d)758; 197NC25, 147SE 618; 53ND931, 208NW566; 69Utah268, 254P142.

932-18 217Ky801, 290SW702.

932-19 23AlaA168, 123S237 (scintilla rule applied); 23AlaA369, 125S693(2d case); 175Ark1169, 299SW40; 28Hawaii350; 254NY170, 172NE458; 197NC 684, 150SE337; SC 155SE849; 142Wash 463, 253P645. [a] 86PaSuper571. [b] 32F(2d)644; 23AlaA91, 121S445; 23 AlaA379, 125S788.

933-21 214AppDiv21, 210NYS768; 197 NC25, 147SE618; NC 154SE604; Wash 288P243. [a] (3) Other instances. NJ 148A776.

933-22 214AppDiv21, 210NYS768.

933-27 21AlaA646, 111S318.

933-28 68CalA674, 230P178; 196NC 542, 146SE409.

933-29 196NC100, 144SE555; 108Tex Cr489, 18W(2d)639.

933-30 200Cal 404, 253P318; 94Fla656, 114S429; 249Mich147, 228NW723; Tex Cr 32SW(2d)476; 145Va800, 133SE764.

933-34 21AlaA507, 109S761; 89 IndA 52, 165NE777(2dcase). [d] **Judge not bound by jury's recommendation requested by him.**–159Tenn432, 19SW(2d) 260 (misdemeanor case).

933-36 228Ky842, 16SW(2d)476; 294 Pa156, 143A910; 105TexCr19, 284SW 955.

933-37 105TexCr19, 284SW955.

933-38 153Tenn198, 281SW462.

934-42 [a] **Effect is to discharge jury.**–97PaSuper157.

934-42½-New. In North Carolina motion to dismiss, under Comp. St. § 4643, is in effect demurrer to the evidence. 192 NC704, 135SE775.

934-44 308Mo 695, 274SW470 (where defendant has elected to testify, court on demurrer to evidence may draw inferences from failure to explain incriminating circumstances); 221MoA358, 273SW 247; 221MoA358, 273SW247. See also Mo 278SW685; Mo 280SW48; Mo 18SW (2d)423; 14PaDist&Co 229; 93PaSuper 339; 97PaSuper157. [b] **Right to be heard on demurrer to evidence is waived** by defendant's offering evidence after overruling of same. Mo 285SW419.

934-46 153Md431, 138A338.

934-50½-New. The quality and weight of evidence may be called in question by a demurrer to the evidence at the close of the commonwealth's case. 93PaSuper 193.

934-50½-New. Defendant, upon overruling of his demurrer, waives the right to insist on error therefor by offering evidence in his own behalf instead of standing on his demurrer. 314Mo 567, 284SW806.

934-50¼-New. On overruling of demur-

rer and introduction of evidence by defendant, jury decides case on all evidence. Mo 278SW982.

934-53 196NC129, 144SE698(2dcase).

934-58 21AlaA468, 109S387; 126Kan200, 268P98; 126Kan578; Mo 274SW35; Mo 278SW663; 313Mo88, 280SW1023; OklCr 280P317(2dcase). [b] 312Mo15, 278SW743.

934-58½-New. Waiver of demurrer. Defendant waives his demurrer filed at the close of the state's evidence by introducing evidence in his own behalf. 318 Mo687, 18W(2d)96.

934-58¼-New. Waiver. When defendant introduces evidence after demurrer is overruled, he waives right to be heard on demurrer. 316Mo243, 289SW852.

934-60 22AlaA442, 116S507; 235Ky5, 29SW(2d)646 (misnomer of owner of burglarized storehouse). [b] **Affirmative charge on bad count** does not affect good count. 20AlaA631, 104S676. [c] **Admissibility of evidence** is not challenged by requested peremptory instruction in defendant's favor, since such instruction relates only to sufficiency of evidence. 215Ky2, 284SW82. [d] **Necessity of motion.-Mass** 171NE16.

935-65½-New. Request for an affirmative charge cannot be made to take the place of a plea of misnomer. 21AlaA318, 108S82.

935-65¾-New. Where facts do not constitute crime, court should direct verdict of acquittal. 222Ky120, 300SW368.

935-65¼-New. At common law, the trial judge had the right to give a peremptory instruction in a criminal proceeding. 47Ida117, 272P695.

935-67 88CalA222, 263P306. [a] (2) nor because he believes guilt not established (169La289, 125S126).

935-68 39F(2d)325; 42F(2d)636; 42F(2d)835; 43F(2d)288; 43F(2d)890; 21AlaA22, 104S866. See also 21AlaA40, 104S886; 21AlaA309, 107S727; 21AlaA299, 107S730; 21AlaA460, 109S294; 21AlaA662, 109S923; 23AlaA557, 129S310(1st case); AlaA 129S718; 173Ark906, 293SW1010; 47Ida117, 272P695; 232Ky232, 22SW(2d)618; 126Me484, 139A677; Miss 116S545; 151Miss580, 118S413(2d case); NC 154SE604; 115Oh350, 154NE728; 35OklCr91, 249P354; OklCr 267P867; OklCr 279P704. [c] (2) Other instances where defendant entitled to instructed verdict in his favor. 34NM465, 284P113.

935-68½-New. or is wholly insufficient to sustain a verdict of guilty; 144Miss273, 109S707.

935-69 23AlaA385, 125S795(1stcase).

935-71 23AlaA91, 121S445; 125Me516, 133A433; 105NJL15, 143A811.

935-72 21AlaA384, 108S656; 22AlaA333, 115S420; 233Ky471, 26SW(2d)3.

935-72½-New. or where the evidence consists solely of uncorroborated testimony of discredited witness, 13PortoRicoFed180.

936-74 16F(2d)410.

936-74½-New. , or unless there is no substantial evidence of facts which exclude every hypothesis but that of guilt. 14F(2d)888.

936-75 13F(2d)596; 14F(2d)12; 14F(2d)497; 18F(2d)465; 20AlaA467, 103S712; 20AlaA626, 104S777; 21AlaA177, 106S218; 21AlaA260, 107S225; 21AlaA269, 108S75; 21AlaA320, 108S83; 21AlaA270, 108S617; 21AlaA460, 109S294; 21AlaA463, 109S369; 21AlaA468, 109S387; 21AlaA562, 110S563; 21AlaA597, 110S562; 21AlaA611, 110S694; 22AlaA65, 112S178; 22AlaA183, 113S648; 22AlaA487, 116S414; 22AlaA407, 116S900; 22AlaA415, 116S903; 22AlaA392, 117S398; 22AlaA545, 117S603; 23AlaA109, 121S906(2dcase) [certiorari den 219Ala233, 121S907(1stcase)]; 23AlaA86, 122S613(1stcase) [certiorari den 219Ala395, 122S613(2dcase)]; 23AlaA267, 125S60(2dcase); 23AlaA487, 127S795; 23AlaA501, 127S910; 23AlaA521, 128S126(2dcase); 179Ark199, 18SW(2d)375; 180Ark588, 22SW(2d)34; 74CalA510, 241P267; 75CalA447, 243P67; 42Ida319, 245P85; 208Ky531, 271SW584; 213Ky701, 281SW806, 215Ky360, 285SW193; 226Ky433, 11SW(2d)86; 227Ky404, 13SW(2d)247; 229Ky305, 17SW(2d)238; 229Ky459, 17SW(2d)443; 254Mass86, 149NE600; 260Mass423, 157NE537; 239Mich283, 214NW98; Miss 113S219; 312Mo411, 278SW1036; Mo 296SW152; NJSup 133A73; 102NJL569, 134A110; 103NJL534, 138A203; 34NM154, 279P66; 118Oh227, 160NE702; 118Oh514, 161NE536; OklCr 273P1014(2dcase); OklCr 279P920; 119Or583, 250P738; 120Or372, 251P305; 120Or546, 252P967; 122Or377, 257P699; 122Or537, 259P427; 126Or651, 269P869; 126Or579, 269P884; 9PaDist&Co448; 35PortoRico817; 138SC293, 136SE215; 104TexCr312, 283SW809; 104TexCr468, 284SW564; TexCr 291SW229; 106TexCr605, 294SW566; 107TexCr571, 298SW580; 107TexCr676, 298SW594; Utah 266P261, 263 [quotCJ]; 144Wash363, 258P23; 103WVa473, 137SE887. [b] See also 34PortoRico626. [c] **Sufficiency of evidence** to establish fact relied on to rebut presumption should be submitted to jury unless it is so direct, positive, and credible, that, if disregarded, verdict would be set aside. 234Mich600, 208NW687. [d] **Court does not consider weight of evidence** or credibility of witnesses on defendant's motion for directed verdict. Utah 266P261. [e] **If court finds there is substantial evidence of guilt** sufficient to support conviction, case should go to jury. Utah 266P261.

936-76½-New. where evidence in prosecution is sufficient to create prima facie case, 21AlaA173, 106S205.

936-77 15F(2d)168; 20AlaA412, 103S697; 20AlaA562, 103S916; 20AlaA631, 104S676; 20AlaA626, 104S777; 21AlaA32, 104S884; 21AlaA94, 105S703 (general affirmative charge properly denied); 21AlaA172, 106S71 (affirmative charge properly refused on conflicting evidence sufficient to support conviction); 21AlaA140, 106S203; 21AlaA237, 107S828; 21AlaA264, 107S323; 21AlaA286, 107S786; 21AlaA269, 108S75; 21AlaA324, 108S86; 21AlaA394, 108S650; 21AlaA419, 109S114; 21AlaA433, 109S171; 21AlaA431, 109S179; 21AlaA234, 109S189; 21AlaA459, 109S294; 21AlaA610, 110S694; 215Ala406, 110S799; 22AlaA67, 111S587; 21AlaA653, 111S648; 22AlaA644, 119S248; 23AlaA390, 128S129(1st case); 125Me516, 133A433; 127Or565, 273P338.

936-77½-New. Evidence must be viewed most favorably to the party against whom direction is asked. 13F(2d)596.

936-77¾-New. , or where, although the evidence is incomplete, the statute permits the jury to find accused guilty of an attempt, without any special count in the indictment for attempt. 22AlaA574, 117S910.

936-78 But see 86CalA542, 261P756.

936-79½-New. Failure to prove venue when not called to the court's attention does not make refusal of general charge error. 215Ala453, 111S34.

936-79¾-New. Defendant need not call the court's attention to variance as to the victim's name as a condition to request an affirmative charge. 21AlaA177, 106S218.

936-79¼-New. Sufficiency of evidence to take guilt to the jury must be determined from the record at the close of the evidence. 19F(2d)224.

936-79⅝-New. Variance between allegation and proof is not ground for acquittal unless material and prejudicial. 123Or490, 262P950.

936-79⅞-New. Evidence held not to show entrapment requiring instruction to acquit. Mo 23SW(2d)1.

936-79⅞-New. Motion for directed verdict is equivalent to demurrer to evidence. 132Or693, 288P215.

936-80 21AlaA463, 109S369. But see 19F(2d)472.

936-81½-New. Charging out of one count at request of defendant operates as acquittal of charge contained in that count. 21AlaA22, 104S866.

936-82 21AlaA22, 104S866; 21AlaA309, 107S727; 21AlaA299, 107S730; 125Me516, 133A433. See also 21AlaA377, 108S643.

936-83 8F(2d)919; 90Fla337, 106S406; 92Fla809, 110S253; 44Ida173, 258P551; 46Ida423, 267P950; 126Me484, 139A677; 103NJL523, 138A381; NJSup 140A435. [a] **No abuse of discretion in denying motion** is shown where denial is without comment of any kind. 8F(2d)919.

936-84 39GaA693, 148SE282(1stcase); 40GaA622, 150SE869(2dcase); 41GaA570, 153SE925; GaA 155SE797(2dcase); 44Ida173, 258P551; 46Ida423, 267P950.

937-85 87PaSuper193.

937-86 Utah 266P261.

937-87 47Ida117, 272P695; OklCr 287P731; 49SD456, 207NW456.

937-89 91CalA50, 266P561; 46Ida8, 265P666; 49SD456, 207NW456; 50SD32, 208NW164. See also 79CalA295, 249P525.

937-90 49SD456, 207NW456.

937-90½-New. The question of instructing the jury to acquit involves the state's evidence only, and defendant's evidence cannot be considered unless the state admits its truth. Mo 23SW(2d)1.

937-92 19F(2d)472; 220Ala260, 125S384; 242Mich16, 217NW758; 115Nebr65, 211NW179; 58ND340, 226NW525; 113OhSt450, 149NE551, 554 [citCyc]; 88PaSuper93.

937-95 [b] **Affirmative charge for state** is of very doubtful propriety. 21AlaA360, 108S266.

937-96 238Mich540, 213NW695.

937-3 102NJL255, 132A231.

938-6 42F(2d)835.

938-15 But see 193NC754, 138SE136.

938-18 5F(2d)133; 5F(2d)940; 5F(2d)966; 7F(2d)357; 7F(2d)469; 7F(2d)818; 8F(2d)251; 8F(2d)266; 13F(2d)599; 15F(2d)32; 18F(2d)522; 22F(2d)776; 26F(2d)202; 27F(2d)94; 35F(2d)25; 312Mo15, 278SW743; 34NM22, 276P291; 34NM65, 277P22; NM 290P789; NM 290P792; 89PaSuper188.

939-20 89PaSuper188. [a] 207Iowa1033, 222NW423.

939-24½-New. Although a motion for a directed verdict which was made at the close of the state's testimony was not renewed at the close of all the testimony, defendant may raise the question of sufficiency of evidence to sustain the verdict on a motion for a new trial. 207Iowa1033, 222NW423.

939-27 [a] **Motion properly denied.-NC** 154SE662.

939-28½-New. Motion to dismiss under Cal. Penal Code § 1385 is discretionary. 70CalA271, 233P85.

939-32½-New. Motion to dismiss implies denial of all guilt and must be denied if any phase of evidence tends to establish criminal responsibility. 190NC674, 130SE627, 42ALR1114.

939-32¼-New. A district court has no power before trial and on motion of the prosecuting attorney to dismiss a criminal prosecution on the merits. 166Minn302, 207NW646.

939-32¼-New. Where by statute the jury is the judge of law and facts, a police judge in a fourth class city cannot dismiss prosecution in a case tried to jury before him. 220MoA251, 284SW167.

939-32½-New. A motion to dismiss in a prosecution for manslaughter on the ground that the corpus delicti was not proven, raised only the sufficiency of the evidence. 99CalA178, 277P1060.

939-32¾-New. Motion to dismiss is equivalent to demurrer to evidence. 132Or693, 288P215.

939-33 CalA 290P678; 196NC725, 147SE7. [a] **Whether there is any evidence to sustain allegations of indictment** and not whether it be true or whether jury should believe it, is question presented by such motion. 196NC542, 146SE409. [b] **Nonsuit properly denied** where there is any evidence to support verdict. 117Nebr556, 221NW689. [c] **Statute serves same purpose** as is accomplished by Consol. St. § 567 in civil actions. 190NC684, 130SE854.

939-34 18NC565, 127SE601; 192NC766, 136SE121; 194NC42, 138SE342; 196NC50, 144SE518; 196NC129, 144SE698(2dcase); 196NC562, 146SE395; 198NC649, 152SE895; 198NC728, 153SE410.

939-34½-New. On defendant's motion to nonsuit evidence is taken in light most favorable to state and it is entitled to every reasonable intendment and in-

ference from evidence. 190NC684, 130SE854.

939-35 195NC242, 141SE736.

939-36 126Me484, 139A677.

939-36½-New. Presentation of evidence by defendant after denial of his motion for nonsuit is waiver of the motion as such. 35PortoRico 251.

939-37 21AlaA14, 105S712; 214Ala91, 106S503; 20AlaA412, 103S697; 21AlaA 261, 107S226; 21AlaA255, 107S230; 21 AlaA551, 109S897; 22AlaA107, 114S71; 39GaA412, 147SE408; 232Mich46, 204 NW763; 82Mont170, 266P400; 190NC 239, 129SE600; 100TexCr43, 271SW 913.

939-37½-New. Stating that proper principles of law were enunciated in a former decision held not error. 257Mass 473, 154NE260.

939-39 17F(2d)696; 19F(2d)202; 19 F(2d)813; 102Conn708, 130A184; 105 Conn757, 136A475; 161Ga166, 129SE 772; 176Minn175, 222NW906; NJ 130A 461; 102NJL134, 130A642; NJSup 134 A290; NJ 150A367; 128Misc68, 217NYS 662; 29 OhA419, 163NE634; 287Pa1, 134A465; 292Pa16, 140A537; 292Pa579, 141A624; 89PaSuper308; 89PaSuper 387; 89PaSuper439; 7PaDist&Co 709; 13PaDist&Co 361; 14PaDist&Co 312. But see 58Vt457, 3A195.

940-40 8F(2d)849; 8F(2d)919; 12F (2d)683; 15F(2d)479; 15F(2d)496; 17 F(2d)225; 20F(2d)795; 41F(2d)162. But see 13F(2d)53. [b] (2) Expression of opinion omitting favorable evidence held error. 17F(2d)225.

940-41 12F(2d)683.

940-42 105Conn757, 136A475; 298Pa 63, 148A45. [a] **Charges held proper.**-NJ 150A367.

940-43 8F(2d)849; 8F(2d)919; 12F (2d)683; 15F(2d)479; 15F(2d)496; 17 F(2d)225; 39F(2d)782; 332 Ill 113, 163 NE421. See also 103Conn138, 130A96.

940-44 12F(2d)852.

940-44½-New. In Alabama, the court may not charge on effect of evidence unless requested in writing. 22AlaA536, 117S607.

940-45 8F(2d)849; 12F(2d)683; 15F (2d)479; 15F(2d)496.

940-45½-New. Notwithstanding the court's instruction that its opinion is advisory only and not binding, an additional charge, in response to inquiry by the jury, that in the court's opinion accused was guilty, is inopportune and calculated unduly to influence the jury. 8F(2d)849.

940-46 22AlaA121, 113S318; 21AlaA 360, 108S266; 21AlaA491, 109S521; 170 Ark495, 280SW6; 172Ark983, 291SW85; Ark 31SW(2d)527; 194Cal 1, 227P156; 71CalA402, 235P467; 76CalA188, 244P 114; 79CalA464, 249P1089; 202Cal 81, 259P332 (effect of intoxication in homicide case); CalA 286P1061; CalA 289P 212; 34GaA233, 128SE917; 160Ga769, 129SE102 (instruction held not intimation of opinion); 36GaA84, 135SE765; 41GaA572, 153SE782; 45 Ida760, 265P 24; 237 IllA178; 330 Ill 516, 162NE133; 332 Ill 113, 163NE421; 162La299, 110S 482; 162La867, 111S262; 167La190, 118 S884; 169La289, 125S126; 253Mass509, 149NE205; 148Miss680, 114S750; 153 Miss620, 121S281; 307Mo 365, 270SW 291; Mo 273SW1069; Mo 278SW669 (as to motive); Mo 48W(2d)813; 74Mont 166, 239P1000; 82Mont530, 268P507 (request properly refused); 214AppDiv 822, 211NYS282; 190NC177, 129SE417; 190NC498, 130SE163; 191NC378, 131SE 743; 197NC352, 148SE547; 58ND191, 225NW318; 137SC145, 134SE885; 158 Tenn273, 12SW(2d)946; 100TexCr424, 274SW137; 102TexCr444, 278SW446; 103TexCr233, 280SW832; 104TexCr257, 282SW807; 104TexCr408, 284SW588; 106TexCr434, 292SW877; 107TexCr322, 296SW569; 107TexCr559, 298SW569; 108TexCr92, 299SW249; 108TexCr1, 299 SW422; 109TexCr2, 2SW(2d)459; 110 TexCr105, 7SW(2d)539; 112TexCr61, 13SW(2d)872; 111TexCr570, 13SW(2d) 874; 143Va579, 130SE389 (request taking from jury question of weight to be given evidence); 142Wash539, 253P811; 144Wash446, 258P508; 101WVa356, 132 SE728; 104WVa217, 139SE704; 104 WVa433, 140SE139. See also 33GaA818, 128SE224. But see 244Mich603, 222NW 201. [a] **Instruction not erroneous.**-110 TexCr241, 8SW(2d)124. [b] **Reference to evidence** is not forbidden. Wash 291 P728.

941-47 23AlaA433, 126S606; 23AlaA 452, 126S887 (charge held error); 23 AlaA468, 126S896(2dcase) (instruction held not to violate rule).

941-48½-New. although in some jurisdictions court may charge that certain witness was accomplice of accused. 71 CalA402, 235P467.

941-49 But see 252Mass158, 147NE553.

941-51 43F(2d)288; 244Mich603, 222 NW201; 251NY375, 167NE505; 110 TexCr648, 10SW(2d)727.

941-52 TexCr 32SW(2d)202.

941-55 194Cal 1, 227P156; 173Minn 567, 218NW112.

941-56 23AlaA135, 122S611 [certiorari den 219Ala380, 122S612]; 103TexCr502, 281SW557.

941-56½-New. that certain facts are no evidence of innocence of defendant; Mo 18SW(2d)8.

941-58 Miss 130S693.

941-59½-New. or to state that there is no direct evidence on particular fact. 21AlaA14, 105S712 (charge properly refused as invading province of jury).

941-59⅓-New. That jury need not waste its time discussing the question as it has already been judicially determined. 214AppDiv822, 211NYS282.

941-59¼-New. ; or to charge that the jury have no right to guess at a conclusion. MoA 294SW121.

941-60½-New. **Other charges on weight of evidence.** 22AlaA95, 112S811; 22 AlaA353, 115S698; 22AlaA366, 115S 763; 35GaA368, 133SE266; 154Miss 523, 122S750; 318Mo 833, 1SW(2d)147; 115 OhSt350, 154NE728; 103TexCr531, 281SW562; 104TexCr442, 284SW554; 104TexCr408, 284SW588; 107TexCr554, 298SW600; 144Wash446, 258P508.

941-60⅓-New. Charge that material and competent evidence must be had to prove fact, without presumptions, held properly refused. 161La296, 108S543.

941-60¼-New. No court or judge may say as a matter of law that defendant's evidence is false. 245NY227, 157NE94.

941-61 84CalA168, 257P903; 136Wash 499, 240P676.

941-62 172Ark44, 287SW598; 79CalA 295, 249P525; 80CalA138, 251P672; 92 CalA245, 267P942; 95CalA659, 273P 110; 166Ga10, 142SE160; 167Ga544, 146 SE121; 169Ga414, 150SE642; 169Ga 826, 151SE805; 41GaA635, 154SE209; Ga 154SE906; Ga 155SE329; GaA 155SE362; 47 Ida750, 278P776; 199 Ind196, 156NE403; 200 Ind112, 161NE 565; 204 Iowa1306, 214NW743; 209Ky 817, 273SW503; 160La661, 107S481; Mo 256SW762; 309Mo 155, 274SW427; 314Mo 673, 285SW726; 135SC412, 133 SE824; 148SC495, 146SE418; 152SC17, 149SE348; 153SC487, 151SE64; 156SC 363, 153SE340; 54SD391, 223NW325 (as to admissions); 100TexCr451, 273 SW578; 111TexCr671, 13SW(2d)704; TexCr 32SW(2d)191(2dcase); 136Wash 499, 240P676.

942-63 23AlaA379, 125S788; 177Ark 605, 7SW(2d)315; CalA 290P1082; 163Ga186, 136SE72; 163Ga878, 137SE 378; 165Ga55, 139SE877; 166Ga758, 144SE301; Ga 154SE700; 321 Ill 594, 152NE516; 199 Ind196, 156NE403; 200 Ind483, 164NE626; 167La1085, 120S 865; Mo 20SW(2d)529(1stcase); 195 NC496, 142SE583; 93PaSuper348; 143 SC318, 141SE559; 146SC275, 143SE817.

942-64 See also 168Ark534, 270SW968.

942-65 100TexCr288, 273SW571.

942-66 CalA 284P733; 161La867, 109 S530; 111TexCr256, 12SW(2d)585.

942-67 TexCr 27SW(2d)220 (intoxicating quality of beer).

942-69 151SC90, 148SE710.

942-70 170Ga234, 152SE482.

942-71 29F(2d)103; 23AlaA468, 126S 896(2dcase); 35GaA476, 133SE748.

942-74 [a] **Charge to consider evidence and return verdict** commensurate with crime is not prejudicial as judge's view crime was committed. 299Pa547, 149A 696.

942-74½-New. , or form of verdict if jury should find defendant not guilty. 35GaA500, 133SE877.

942-75 243Mich688, 220NW714.

942-76 163Ga313, 136SE154; 41GaA 429, 153SE227(1stcase); 198NC655, 153 SE255 (instructing on "admission" of accused who offered no testimony was not error).

942-78 CalA 286P493.

942-78½-New. , or that there could be better or fairer evidence. 168Ark1122, 273SW353.

943-79½-New. A substantial restatement of code relative to credibility of defendants' testimony not expression of opinion as to truthfulness. 160Ga520, 128SE756.

943-79½-New. Charge that "Under the State of South Carolina we have this man here charged with violating the law" is not prejudicial as indicating the court's opinion that defendant should be convicted. 138SC459, 467, 136SE739.

943-79¼-New. Instruction to disregard all testimony of certain witnesses with a stated exception is not a comment on the testimony. 142Wash539, 253P811.

943-79⅓-New. An instruction has been held not a comment on the evidence where the court referred to evidence in the abstract and not particular evidence in the case. 146Wash101, 261P 779.

943-79⅙-New. Other illustrations of charges not on weight of evidence. 34 NM486, 285P490.

943-79⅐-New. Other illustrations of instructions not on weight of evidence. Wash 291P728.

943-81 24F(2d)50; 251NY375, 167NE 505; Contra 5F(2d)592.

943-84 195Cal 295, 232P974; 239Mich 60, 214NW165; 98PaSuper13; 47RI 483, 134A20; 144SC452, 142SE725. See also 297Pa382, 147A79.

943-86 13F(2d)53; 21AlaA35, 104S876 (charge properly refused); 21AlaA319, 108S84; 21AlaA436, 109S171; 22AlaA 290, 115S68; 32Ariz212, 257P27; 198 Cal 776, 247P884; 96CalA632, 274P601; 332 Ill 113, 163NE421; 339 Ill 480, 171 NE544; 203 Iowa918, 210NW961; 203 Iowa1008, 213NW603; Mo 274SW62; NJSup 131A675; 122 Or148, 257P826; 102TexCr429, 278SW204 (instruction as to transportation of intoxicating liquor); TexCr 29SW(2d)759. TexCr 29 SW(2d)791(2dcase). See also 106Conn 260, 137A762; 102TexCr563, 278SW846. [b] **Instructions held proper.**-Iowa 230 NW425.

943-88 167Ga452, 145SE879(2dcase).

944-95 86CalA329, 260P825; 200 Ind 557, 159NE545; 164La89, 113S777.

944-1 79CalA576, 250P588; 200 Ind 557, 159NE545; 107TexCr546, 298SW 422.

944-2 198Cal 776, 247P884; CalA 284 P733.

944-2½-New. or that circumstantial evidence is to be considered in all cases; 198 Ind261, 151NE731.

944-3 79CalA576, 250P588.

944-5 175Ark1169, 299SW1004.

944-6 88PaSuper190.

944-9 21AlaA360, 108S266(dictum); 23 AlaA135, 122S611 [certiorari den 219 Ala380, 122S612]; Mo 29SW(2d)71; 192 NC253, 134SE850; TexCr 32SW(2d)194 (2dcase). [a] **Instruction held sufficient.**-229Ky98, 16SW(2d)778. [b] **Instruction is not objectionable as directing verdict** merely because in given case jury follow instructions and apply them to admitted facts under which but one verdict can be returned. 90CalA657. 266P558.

944-10 79CalA697, 250P869.

945-11 See also 33GaA818, 128SE224; 189NC799, 128SE152; 142Va649, 128 SE514.

945-12 AlaA 129S785(2dcase).

945-13 12F(2d)852; 22F(2d)468 (indirect direction); 213Ala550, 105S721; 218Ala442, 118S654; 80Mont130, 259 P507; 219AppDiv196, 219NYS184; 104 TexCr178, 283SW517.

945-14 21AlaA360, 108S266.

945-18 162Ga267, 134SE36; 327 Ill 50, 158NE457; 253Mass458, 149NE140; 151 Miss156, 117S520; 113TexCr518. 22SW (2d)930.

945-20 38F(2d)584; 113TexCr53, 19SW (2d)44; 113TexCr160, 19SW(2d)47; 100 WVa543, 131SE11.

945-22 22AlaA121, 113S318; 21AlaA

408, 108S650; 21AlaA481, 109S891; 22 AlaA86, 112S538; 219Ala407, 122S633; 220Ala544, 126S848; Mo 281SW437; 104TexCr178, 283SW517; TexCr 28SW (2d)808(2dcase).

945-23 21AlaA468, 109S387; 23AlaA 237, 123S290.

945-24 214Ala91, 106S503; 23AlaA226, 127S245(2dcase).

946-27 Mo 29SW(2d)71.

946-28 103NJL361, 137A575; NJSup 132A289; 285Pa49, 131A657; 291Pa40, 139A493; 292Pa579, 141A624; 297Pa 326, 146A905. [a] **Instruction held not erroneous.**–Ariz 283P711.

946-29 285Pa49, 131A657; 143Va609, 130SE777 (instruction on first degree murder applicable to evidence held not invasion of province of jury to pass on plea of self-defense or question of manslaughter).

946-30 285Pa49, 131A657.

946-32 214Ala273, 107S737; 291Pa40, 139A493; 133SC230, 130SE752 (instruction taking lesser degree from jury by restricted definition); Va 152SE366. [a] **Charge as to self-defense held erroneous** as invading province of jury. 214Ala273, 107S737.

946-33 82CalA98, 255P261.

946-33½-New. , or for lower degree where evidence would not justify it. 169 Ark717, 276SW849.

946-34 See also 296Pa332, 145A855.

946-35 167Ga376, 145SE450.

946-40½-New. Instruction that there is no disputed or contradictory testimony held not error under evidence. 132 Or627, 287P681.

947-45 179Ark1084, 20SW(2d)118; 97 CalA185, 275P462.

947-47 137SC371, 135SE364. But see Iowa 223NW554. [a] **Instructions held erroneous or properly refused.**–Iowa 223 NW554.

947-49 100TexCr28, 274SW147.

947-54 23AlaA226, 127S245(2dcase); Miss 130S692; Wash 286P69.

947-63 75Mont22, 241P522, 523 [cit CJ]; 113TexCr335, 21SW(2d)675(3d case).

948-68 79CalA576, 250P588.

948-69 See also 193NC796, 138SE166.

948-72 233Mich505, 207NW141; 312 Mo373, 278SW1016; TexCr 20SW(2d) 772; TexCr 32SW(2d)648.

948-73 312Mo373, 278SW1016; 112 TexCr659, 18SW(2d)181.

948-75 244NY196, 155NE98; 103Tex Cr566, 281SW1080.

948-77 163La563, 112S486; 167La190, 118S884; 155Miss706, 125S109.

948-86 OklCr 288P1075.

948-87½-New. Instruction on presumption of innocence has been held not comment on character of accused as bad. 71CalA402, 235P467.

948-89 168Ga575, 148SE500.

948-90 100TexCr334, 273SW589. [b] **It is error** to refuse to instruct jury must determine whether confession admitted in evidence is not voluntarily made. 73CalA13, 238P374.

949-95 227Ky578, 13SW(2d)763; 144 Miss298, 109S731; 107TexCr472, 296 SW881.

949-96 4F(2d)772; 19F(2d)202; 42 F(2d)623; 213Ala691, 106S134; 21AlaA 264, 107S323; 21AlaA415, 109S122; 21 AlaA460, 109S294; 22AlaA350, 115S701; 169Ark335, 275SW671; 171Ark297, 284 SW734; 172Ark240, 288SW384; 194 Cal 1, 227P156; 73CalA372, 238P758; 198Cal 717, 247P576; 95CalA242, 272P 794; 95CalA659, 273P110; 100CalA785, 281P81; 162Ga267, 134SE36; 163Ga 176, 135SE735; 168Ga136, 147SE97; 43 Ida713, 254P217; 326 Ill 358, 157NE 171; 326 Ill 216, 157NE211; 332 Ill 113, 163NE421; 333 Ill 469, 165NE235; 337 Ill 259, 169NE206.

950-97 43 Ida713, 254P217; 219Ky319, 292SW806.

950-98 73CalA372, 238P758; 94CalA 635, 271P576; 204 Iowa1135, 216NW 642; 104WVa396, 140SE338.

950-1 79CalA366, 249P543; 162Ga777, 135SE187; 202 Iowa150, 209NW404; 204 Iowa1135, 216NW642; 219Ky505, 293SW1085; 239Mich123, 214NW231; 311Mo 630, 279SW135; 321Mo 1171, 14 SW(2d)638; 103NJL266, 137A529; 247 NY36, 159NE715; TexCivA 276SW707; 106TexCr605, 294SW566.

950-3 20AlaA540, 103S604; 21AlaA375, 108S639; 21AlaA437, 109S181; 30Ariz 442, 247P1101, 1103 [citCJ]; 78CalA 455, 248P927; 78CalA451, 248P929; 89 CalA132, 264P314; 102Conn634, 129A 714; 36GaA736, 138SE251; 197 Ind575, 150NE371; 248Mich553, 227NW708; Mo 256SW1043; 311Mo 630, 279SW135; MoA 277SW354; NJSup 140A27; 37 OklCr338, 257P1109; OklCr 277P687(2d case); 104TexCr522, 286SW209; 106 TexCr127, 290SW1100; Wash 290P824. [a] **Calling jury's attention to fact** that testimony of commission of crime is uncontradicted by evidence is proper. 251 Mich243, 231NW564. [b] **Fact that testimony is uncontradicted** by evidence does not warrant charge that offense is established beyond reasonable doubt. 251Mich243, 231NW564.

951-4 111TexCr48, 10SW(2d)997. See also 172Ark156, 287SW1026.

951-5 213AppDiv331, 210NYS535.

951-7 34Ariz139, 268P615 (characterizing defendant's acts as assaults); Tex Cr 27SW(2d)198(1stcase). [a] 196Cal 191, 237P25; 307Mo 487, 271SW477.

951-8 AlaA 129S785(2dcase); 34GaA 581, 129SE798; 332 Ill 113, 163NE421; 208Ky556, 271SW657; Mo 29SW(2d) 120; OklCr 282P682. [a] 41GaA379, 153SE202; Mo 270SW275; 307Mo 487, 271SW477; 116Nebr287, 216NW807; 108TexCr187, 299SW399.

951-9 43 Ida713, 254P217. [a] **Instructions held not objectionable.**–313Mo 114, 280SW697.

951-10 Mo 296SW433.

951-12½-New. that some person was an accomplice in the case, 321Mo 553, 12SW(2d)428.

952-13 170Minn72, 211NW958.

952-13½-New. or which assumes that a statement was a dying declaration; 75CalA642, 243P461.

952-14½-New. Charge stating that jury would have no difficulty in finding that death occurred by reason of force applied from outside was held not error where there was no question that shots resulting in death were fired by other than deceased. 284Pa105, 130A 403.

952-16 30Ariz159, 245P356; 32Ariz 212, 257P27; 169Ark345, 275SW666; Ark 30SW(2d)865; 94CalA635, 271P 576; 95CalA242, 272P794; 96Fla749, 119S513(1stcase); 162Ga777, 135SE187; 168Ga731, 149SE23; 42 Ida319, 245P 685; 325 Ill 578, 156NE798; 326 Ill 358, 157NE171; 327 Ill 50, 158NE457; Ind 171NE1; 128Kan293, 278P20; 228Ky 765, 15SW(2d)525; Mo 256SW1043; 309 Mo155, 274SW427; Mo 278SW694; 311 Mo 414, 279SW76; MoA 27SW(2d)726; 50Nev1, 248P900; NJ 150A367; 105Tex Cr198, 287SW251; 104WVa396, 140SE 338. See 38GaA362, 144SE51. [a] **Facts held not assumed.** Mo 21SW(2d) 758(3dcase); 108TexCr291, 300SW83.

952-18 162Ga777, 135SE187; 330 Ill 562, 162NE140; 148Miss680, 114S750; 100TexCr28, 274SW147. [a] **Instructions held not erroneous.**–318Mo 596, 300 SW702.

952-19 Ill 173NE474; Mo 21SW(2d) 758(3dcase); SD 229NW398; 150Va 588, 142SE369.

952-20 96CalA1, 274P361; 307Mo 487, 271SW477; NC 154SE402.

952-21 32Ariz212, 257P27.

952-22 163Ga878, 137SE378.

952-23 95CalA659, 273P110; 97CalA 537, 275P1017.

952-24 31Ariz427, 254P467; CalA 278 P252; 200 Ind483, 164NE626.

953-26½-New. Instruction using expression "blunt instrument" is not error where evidence shows that deceased's skull was broken in V-shape, and the jury may draw its own conclusion as to the means used. 215Ky613, 286 SW696.

953-26½-New. An instruction defining "threat" as a threat to kill, accompanied by the showing of a deadly weapon, is not improper because assuming that the pistol is a deadly weapon. 108Tex Cr631, 2SW(2d)256.

953-27 144SC452, 142SE725.

953-29 142SC37, 140SE251.

953-30 12F(2d)683; 81CalA30, 253P 162; NJSup 132A289; NJSup 133A415; NJSup 137A893. [b] **Instruction that most of evidence is undisputed** is not rendered erroneous by reason of discrepancies as to immaterial matters. 242Mich532, 219NW641.

953-34½-New. The court is not required to repeat in full the testimony of all of the witnesses. 92PaSuper381.

953-35 79CalA576, 250P588; 82CalA 98, 255P261; 168Minn263, 209NW881; OklCr 292P376; 144Wash381, 258P32. But see 20AlaA426, 103S707; 23AlaA 261, 123S293(2dcase). Contra 21AlaA 585, 111S843.

953-36 21AlaA633, 111S191; 22AlaA 86, 112S538; 238Mich15, 213NW135; 322Mo106, 16SW(2d)205.

954-39 12F(2d)683; 13F(2d)591.

954-41 54SD417, 223NW337 (instruction not violating rule).

954-42 107TexCr307, 296SW582; 108 TexCr285, 300SW75; 108TexCr413, 1 SW(2d)315.

954-48 215Ala148, 109S849; AlaA 129 S785(2dcase).

954-49 [a] **It is error** to instruct jury that question whether confession was voluntary is for court, and that court has determined in favor of admissibility. 73CalA13, 238P374. [b] **Charge that burden is on state** to prove possession of complete still and to acquit if any essential part is missing properly refused as invading province of jury. 21AlaA468, 109S387.

954-53 12F(2d)683; 30F(2d)590; 22 AlaA556, 117S761; 105Conn757, 136A 475; 244Mich603, 222NW201; NJSup 136A805; 287Pa1, 134A465; Sask [1929] 2DomLR300. [a] **Calling attention to contradiction** without more, not error. 32PortoRico 143.

954-56 12F(2d)852; 18F(2d)896; 22 AlaA163, 113S623; 22AlaA288, 115S73; 200 Ind483, 164NE626; 55ND194, 212 NW857; 47RI 483, 134A20; 103WVa 380, 137SE536. [b] 317Mo 293, 295SW 743; Mo 296SW423; 192NC209, 133SE 456; 32PortoRico 143.

955-58 Miss 130S112(2dcase).

955-59 See also 21AlaA35, 104S876.

955-60 99CalA409, 278P885.

955-61 81Colo 113, 253P827; 315Mo 232, 285SW712.

955-62 Cal 289P634; 71CalA402, 235P 467; 87CalA482, 262P361. [b] See also NJ 135A552.

955-66 85CalA402, 259P458; 95CalA 140, 272P608; 72Mont306, 233P602.

955-67 87Colo 188, 285P1102.

956-83½-New. Instruction to disregard unsavory reputation of witness is erroneous. 171Ark1118, 287SW400.

956-84 22AlaA288, 115S73; 22AlaA 432, 116S503.

956-86 12F(2d)683. But see 154Miss 640, 122S760.

957-89 104WVa217, 139SE704.

957-90 104WVa217, 139SE704.

957-99 [a] **Merely stating contradiction in testimony,** not error. 32Porto Rico 143. [b] **Instructions properly refused.**–23AlaA579, 129S312(3dcase).

957-2 CalA 260P946; 82Mont170, 266P 400.

957-13 But see 97CalA501, 275P961 (use of "must" held erroneous).

957-14 But see Mo 279SW705.

958-15 Mo 278SW665; Mo 279SW705; OklCr 269P323; 89PaSuper244.

958-20 22AlaA163, 113S623; 20AlaA 553, 103S717; 79CalA464, 249P1089; 97CalA501, 275P961; 332 Ill 476, 163NE 798; 162La299, 110S482. [a] **Instructions held not erroneous.**–OklCr 287P 424.

958-21 162La299, 110S482; 265Mass 119, 163NE855. See also 37GaA386, 140 SE415.

958-22 204Cal 582, 269P427, 59ALR 1480 (effect of conviction); 98WVa138, 126SE587, 588 [quotCJ].

958-24 254 IllA120.

958-25 218Ala527, 119S215; 21AlaA 116, 105S435 (charge also stating that defendant's testimony was to be fairly and impartially considered as that of any other witness); 27Hawaii109, 119 [citCJ].

959-31 See also 150Miss539, 117S844.

959-32 20AlaA553, 103S717.

959-35 [a] **Instructions held not erroneous.**–328 Ill 602, 160NE125.

959-38 23AlaA168, 123S237, 248 [cit Cyc].

959-39 213Ala333, 104S830; 22AlaA

59. 112S182; 20AlaA591, 104S347; 23 AlaA168, 123S237; 218Ky737, 292SW 315; 264Mass368, 162NE729; 90Pa Super496. See also 121AlaA35, 104S 876.

959-42 177Ark605, 7SW(2d)315; Ind 171NE192; 255Mass327, 151NE466.

960-44½-New. It is improper for the court to charge as to the sufficiency of the presumption arising from unexplained possession of recently stolen property to sustain a conviction. 169 Ark359, 275SW701.

960-45 137SC75, 134SE514, 520 [citCJ].

960-47 40GaA235, 149SE169.

960-50 307Mo 365, 270SW291.

960-55½-New. An instruction that the jury could consider the fact, if it was a fact, that defendant escaped from the officers and his explanation thereof, may be proper under the evidence. 243 Mich489, 220NW678.

960-57 172Ark240, 288SW384; 199 Ind 592, 159NE420; 151Md484, 135A591; 171Minn173, 213NW923; 104NJL288, 140A297; 34NM217, 279P947; 294Pa 544, 144A542; 192Wis452, 211NW773. [b] **Instructions held not erroneous.**-163 Ga43, 135SE410.

960-58 21AlaA491, 109S521; 22AlaA 556, 117S761; 170Ark1192, 281SW369; 194Cal 1, 227P156; 203Cal 128, 263P 226; 70CalA92, 232P724; 78CalA395, 248P696.

960-59 72CalA102, 236P944.

960-60 84CalA642, 258P638.

960-61 170Ark1192, 281SW369.

960-62 [a] **Instruction that jury "should weigh the instructions as you weigh the evidence"** has been held erroneous. Ind 171NE192.

960-63 78CalA395, 248P696.

960-64 21AlaA486, 109S759; 78CalA 395, 248P696.

960-65 78CalA395, 248P696.

960-66 78CalA395, 248P696. [a] **Instruction that law enforcement in county depends on outcome of trials,** held erroneous as impliedly requiring convictions. 180Ark1160, 24SW(2d)559.

960-67 78CalA395, 248P696.

960-69½-New. It is not improper to instruct that, although good of society requires crime be surely and promptly punished, it is equally important that the innocent be protected. 202 Iowa352, 209NW514.

960-69¼-New. An instruction that the jury should not take into consideration cases that had been reversed by the supreme court is held error. 198 Ind 502, 154NE273.

960-69¾-New. An instruction that a juror's oath imposed no obligation to doubt, where no doubt would exist without oath, is not error. 328 Ill 446, 159 NE807.

960-70 200 Ind557, 159NE545.

960-72 79CalA101, 248P1078; 163Ga 43, 135SE410; 165Ga210, 140SE625; 206 Iowa390, 220NW328 (instruction permitting jury to construe statute so as to prevent evasion is erroneous); 316Mo 66, 289SW910; 137SC145, 134SE 885. [b] **Instructions held proper.**-318 Mo 751, 300SW748.

961-73 SD 231NW915; 192Wis347, 212 NW631.

961-75 236Mich672, 211NW39.

961-81 80CalA328, 251P823 (fraternal affiliations); 91CalA44, 266P581; 119 Kan868, 241P688 (instruction held proper); 58ND792, 228NW199 (instruction that juror's attitude toward Prohibition Law should not influence him held not improper).

961-82 119Kan868, 241P688.

961-83 21F(2d)409; 22F(2d)468; 170 Ark1061, 282SW684; 172Ark240, 288 SW384; 175Ark1170, 299SW757; 198 Cal 426, 245P426; 36GaA83, 135SE513; 40GaA548, 150SE444.

961-85 22F(2d)468; 23AlaA271, 124S 121(2dcase); 172Ark240, 288SW384; 115Nebr737, 214NW643.

961-86 21AlaA486, 109S759.

961-87 172Ark240, 288SW384.

962-91 87Colo 532, 289P1078.

962-1 144SC452, 142SE725.

962-6 30Ariz448, 247P1103; 169Ark 717, 276SW849; 174Ark472, 295SW397; 79CalA76, 249P20; 79CalA373, 249P 536; Ga 155SE11; 41GaA661, 154SE 377; 318 Ill 332, 149NE266; 331 Ill 489, 163NE357; 121Kan670, 249P623; 124 Kan405, 260P976; 217Ky278, 289SW 285; 235Ky5, 29SW(2d)646; 160La904, 107S616; 168Minn263, 209NW881; Mont 293P309; OklCr 267P682; 105 TexCr68, 286SW1088. See also MoA 293 SW87. But see MoA 279SW221. [a] **Purpose of charge** is to explain law. 292Pa579, 141A624. [b] **Court is required to give only general instructions** covering law applicable to facts of case. 178Ark181, 10SW(2d)4(1stcase). [c] **Instructions which have become standardized by long approval of appellate courts** should be given by trial court where practicable. 95CalA680, 273P583. [d] **Law of case involves** only elements of offense charged. Mo 24SW(2d)1032.

963-15½-New. Special charge, although given on request, is entitled to same consideration as general charge and is a part of the law of the case. 100Tex Cr11, 271SW380.

963-17 21AlaA597, 110S562; 79CalA 373, 249P536; 167Ga549, 146SE185; 235Ky466, 31SW(2d)718; 235Ky735, 32 SW(2d)51; 318Mo 705, 300SW707; Mo 29SW(2d)120; 84Mont364, 275P750; 115Nebr65, 211NW179; 194NC459, 140 SE26; OklCr 273P284; 112TexCr406, 16SW(2d)1086; 102WVa99, 134SE595. [e] **Immunity.**-102WVa99, 134SE595.

963-18 21AlaA423, 109S125; 87CalA 724, 262P795 (on proper request); 165 La497, 115S728; 84Mont364, 275P750; Nebr 233NW452; 116 Or509, 241P933; 111TexCr534, 15SW(2d)648 (deceased's correct name).

963-18½-New. Question as to prior conviction should not be submitted to jury, if it is not properly alleged in indictment. 210Ky571, 276SW533.

963-19 Mo 23SW(2d)7.

963-20 Cal 293P32.

963-21 72CalA102, 236P944.

963-23 OklCr 280P851(2dcase).

963-24½-New. Where court confines charge to one count on which state elects to stand, failure to charge defendant could be convicted only on that count not error. Vt 151A562.

963-25 326 Ill 104, 157NE76; 165La 842, 116S206.

963-26 21AlaA278, 107S734; 23AlaA 330, 125S201(1stcase); 37GaA160, 142 SE306; 333 Ill 104, 164NE138; 336 Ill 294, 168NE325; 210Ky350, 275SW805; 314Mo 608, 285SW101; Mo 29SW(2d) 120; 192NC658, 135SE769; OklCr 290 P193; 133SC185, 130SE646 (instruction in joint prosecution held not sufficiently to state law in view of material distinction between defenses charged); Utah 279P950.

964-27 162Ga277, 133SE255.

964-29 See also 189NC799, 128SE152.

964-30 21AlaA278, 107S734.

964-31 162Ga277, 133SE255; 33GaA 818, 128SE224 (correct statement of law not error because of failure to give other appropriate instructions in same connection); 35GaA383, 133SE311; 37 GaA119, 138SE924; 37GaA611, 141SE 319; 40GaA225, 149SE177; 249Mich 543, 229NW442.

964-32 162Ga1, 132SE418; 162Ga277, 133SE255. [a] It is not necessary that each instruction should contain a finding or declare the limit of the punishment. 309Mo 155, 274SW427.

964-32½-New. An instruction should ordinarily be complete in itself. 101 WVa492, 133SE106.

964-32¼-New. But it may be supplemented by reference to a paper which is before the jury. 101WVa492, 133SE 106.

964-32¼-New. Court may confine jury to particular count in indictment, instructing it to disregard others. 102 TexCr546, 278SW848.

964-32½-New. The court is not required to embody all the law applicable to the case in one instruction. 205 Iowa25, 215NW721.

964-32¾-New. The court need not state all of the law involved in the case in a single paragraph of the instructions. Iowa 227NW589.

964-34 58ND832, 227NW560; 108Tex Cr187, 299SW399. See also 221MoA592, 283SW468.

964-38 194Cal 1, 227P156; 41GaA618, 154SE201; 41 Ida616, 243P359; 327 Ill 50, 158NE457; 327 Ill 162, 158NE 462; 189NC639, 127SE689; 195NC242, 141SE736; 104TexCr174, 283SW527; TexCr 28SW(2d)166; 151Va533, 145SE 307. [a] **When instructions on state's theory of case** correctly stated applicable provisions of law, they may be given, though they have no application to case on theory of defense. 333 Ill 451, 164NE840. [b] **Converse instructions for defendant are unnecessary** where converse of state's instruction is clearly submitted. Mo 30SW(2d)750.

964-39 201 Iowa10, 206NW635 (defendant not entitled to complain that instructions present inconsistent defenses, if he has made such defenses); 110TexCr648, 10SW(2d)727.

964-40 21AlaA423, 109S125; 169Ark 567, 275SW909 (when instructions based on theory that embezzler was laborer were given, refusal to submit question whether embezzler was a tenant on farm from which cotton was taken held erroneous); 309Mo 155, 274 SW734; 105TexCr39, 285SW823; 143 Va579, 130SE389 (where instruction sets forth theory of commonwealth, defendant entitled to have his view presented). [a] (2) But where judge correctly states elements of crime affirmatively and directs jury to acquit if such facts are not proved beyond reasonable doubt, instruction is not open to exception that it fails to state converse. 100TexCr352, 273SW588. [b] **Converse held sufficiently submitted.**-Mo 30SW(2d)750.

964-41 21AlaA574; 110S165; 78CalA 781, 248P1029; 200 Iowa1394, 206NW 607; OklCr 267P869; 100TexCr399, 273SW593; Ill 173NE383.

964-45 105TexCr39, 285SW823.

965-47½-New. It is not error to explain commonwealth's contention, where done in such a manner as to show that court was not expressing its own views. 284Pa255, 131A184.

965-47¼-New. In the absence of a request for more definite instructions, a charge that defendant was indicted for the offense and has filed a plea of not guilty has been held sufficient. 37GaA 386, 140SE415.

965-47¼-New. Failure to give converse instructions is not error where defendant offers none. Mo 30SW(2d)132.

965-47½-New. Instruction concluding "and unless you so find you will acquit" is in effect converse instruction. Mo 30SW(2d)132.

965-48 Ga 154SE700; Iowa 223NW 554.

965-49 21AlaA165, 106S349; 285Pa49, 131A657; 292Pa579, 141A624.

965-50 49RI 397, 143A604.

965-56 194NC459, 140SE26.

965-57 194NC459, 140SE26; 198NC459, 152SE153(1stcase).

965-60 194NC459, 140SE26; 300Pa16, 150A94.

965-63 But see 190NC506, 130SE308.

965-63½-New. Under some statutes the charge must contain a statement of the evidence in plain and correct manner. 189NC799, 128SE152.

965-65 199 Ind280, 157NE98; Mont 293P309.

965-67 23AlaA431, 126S495(3dcase); 200Cal 404, 253P318; 69CalA94, 230P 1001; 206 Iowa354, 220NW77 (requiring jury to construe statutes); 51SD 209, 213NW21. [a] 164Ga292, 138SE 238. [b] **Instruction held not violative of rule.**-168Ga753, 149SE46.

966-69 23AlaA348, 128S359(2dcase).

966-74 219Ala364, 122S617(2dcase) (aid and abet); 23AlaA348, 128S359(2d case); 21AlaA165, 106S349; AlaA 129 S795; 96CalA186, 273P837; 198 Ind45, 152NE161; 210Ky71, 275SW22 (sudden affray); 213Ky356, 281SW164; 311Mo 630, 279SW135, 140 [citCJ]; 104TexCr 550, 286SW224; 106TexCr357, 292SW 880; 110TexCr263, 8SW(2d)184. See also 257Mass198, 153NE793; 167Ga452, 145SE879(2dcase). [b] **Definition in another instruction.**-210Ky518, 276SW 497. [c] **Court's explanations** must correctly state law. AlaA 129S795.

966-77 161Ga166, 129SE772; 53ND 916, 208NW388; 283Pa564, 129A582; 136Wash603, 241P4. See also Mo 256 SW1043. [c] **Instruction defining**

"jointist" is held not erroneous for failure to define words "aids or assists" used in definition of "jointist." 136 **Wash**603, 241P4.

966-78 29F(2d)103; 87CalA5, 261P 531; 169Ga142, 149SE887; 45 Ida92, 260P697; 204 Iowa414, 214NW596; 207 Iowa1033, 222NW423; 124Kan405, 260 P976; 223Ky248, 3SW(2d)624; 235Ky 471, 31SW(2d)721; 249Mich543, 229NW 442; Mich 233NW210; Mo 256SW740; 316Mo 179, 289SW954; 317Mo 268, 295 SW741; 317Mo 413, 297SW63; 320Mo 280, 6SW(2d)849 ("sell" and "give away" whisky); Mo 30SW(2d)750; MoA 281SW105; OklCr 287P1053; OklCr 288P374; 142SC24, 140SE258; 103TexCr171, 280SW213; 103TexCr252, 280SW808; 106TexCr127, 290SW1100; 111TexCr48, 10SW(2d)997; 136Wash 603, 241P4. [a] (28) "Accident." 204 Iowa414, 214NW596. (29) "Aid" and "abet." 124Kan405, 260P976. (30) "Accomplice." 124Kan405, 260P976. (31) In prosecution for drunkenness, definition of terms used in statute need not be given. 108TexCr597, 18W(2d) 894. (32) Under influence of intoxicating liquor. OklCr 277P280. (33) Under influence of intoxicating liquor. OklCr 287P809. (34) Steal. OklCr 287P1110. (35) Circumstantial evidence. Mo 30SW(2d)132.

967-79 68CalA487, 229P896; Ida 290P 722; 119Kan670, 240P848.

967-82 119Kan670, 240P848. See also Mo 12SW(2d)53.

967-84½-New. Where definition does not appear elsewhere, instruction may be properly refused which does not define "felony" or "felon." 326 Ill 104, 157NE76.

967-84¾-New. An instruction defining "felonious" as no lawful color of right or excuse for an act charged is proper when requested. 179Ark309, 15SW(2d) 389(2dcase).

967-89 314Mo 612, 286SW29.

967-90 16F(2d)434.

967-92 137SC145, 134SE885; 294Pa 353, 144A292; 144SC121, 142SE236. [b] See also 31F(2d)846. [c] **Decisions in other cases should never be read as such.**-251Mich359, 232NW358.

968-93 76CalA188, 244P114; 251Mich 359, 232NW358; 137SC145, 134SE885.

968-94 137SC145, 134SE885.

968-95 Ariz 283P711 (statutory definitions of offenses); 171Ark620, 286SW 871, 48ALR1189; 175Ark1169, 299SW 1004; 179Ark1, 13SW(2d)820; 179Ark 647, 17SW(2d)307; 198Cal 728, 247P 907; 75CalA672, 243P476; 95CalA259, 272P816; 160Ga899, 129SE436 (excerpt quoted substantial compliance with statute); 164Ga677, 139SE349; 168GaA282, 147SE519; 333 Ill 451, 164NE840; 243 IllA467; Ind 169NE466 (partial quotation held sufficient); Iowa 230NW522; 265Mass128, 163NE758; Mo 278SW709; 116Nebr582, 218NW386, 58ALR1322; 131 Or455, 282P560; 290Pa573, 139A 374; 103TexCr258, 280SW836; 111Tex Cr130, 12SW(2d)211; 112TexCr203, 17 SW(2d)813; TexCr 27SW(2d)164; Tex Cr 32SW(2d)202. See also 168Ga731, 149SE23; 36GaA660, 137SE787. [b] Instruction erroneous in quoting part of statute ending "all provisions of act shall be liberally construed," as construction is for court alone. 338 Ill 128, 170NE240.

968-96 110TexCr420, 10SW(2d)119.

968-98 Contra Iowa 230NW522.

968-98½-New. An instruction setting out the statute on which the prosecution is based substantially in the language of the statute is proper. OklCr 277P688.

968-99 203Cal 628, 265P818; 200 Iowa 483, 203NW806; 211Ky766, 278SW134 (unlawful possession); Minn 233NW 307; 143Miss1, 108S287; 318Mo 672, 300SW752 (instruction is not error because converse thereof is not given); 221MoA592, 283SW468; OklCr 273P 1027; OklCr 289P787. [d] **Definition of unlawful possession** becomes unnecessary where only question is proof of possession necessarily unlawful. 211Ky 766, 278SW134. [e] **Application to facts.**-It is not error for court to fit definition to facts in case as evidence tends to show such facts to be. 57ND 652, 223NW705.

968-1 MoA 9SW(2d)808(1stcase).

968-2 143Miss1, 108S287; Miss 150S 112(2dcase) (instruction referring jury to indictment for element of crime has been held not error). But see 99CalA 280, 278P250; Mo 30SW(2d)132. [a] (2) Instruction held proper. Ga 155SE 670. [d] **Instructions held not violative of rule.**-Mo 270SW337.

968-2½-New. The court may make more concise and clear the statements of indictment, and need not follow its exact language. 25F(2d)49.

968-3 88CalA575, 263P862; 41GaA268 152SE619; Ida 288P894; 338 Ill 353, 170NE265; 242 IllA221; 238Mich485, 213NW717, 718 [citCJ]; Mo 25SW(2d) 109; OklCr 277P286; 285Pa49, 131A 657; 105TexCr363, 288SW233; 143Va 531, 129SE351; 188Wis268, 205NW820.

968-4 317Mo 284, 295SW550; Nev 282 P1024; 103TexCr304, 280SW811; 105 TexCr386, 288SW225; TexCr 29SW (2d)367. [a] **Effect of statute cannot be increased or diminished** by instruction. 41F(2d)654.

ence to self-defense, which is defined in

969-7½-New. An unnecessary reference another instruction, is not error. 210 Ky518, 276SW497.

969-7¾-New. If statute, in defining offense, does not refer to self-defense, definition of self-defense need not be included. 210Ky518, 276SW497.

969-8 [b] **Selling and possessing liquor.**-There was no error where court instructed jury that accused could not be guilty of offense of selling liquor, charged in one count, without also being guilty of possessing liquor, charged in another count. 39GaA680, 148SE283 (1stcase).

969-10 [a] **Failure to instruct jury** they could only convict on one of two counts held error. TexCr 25SW(2d) 852.

969-11 NJErr&App 148A776.

969-12 41F(2d)193.

969-15 113TexCr142, 18SW(2d)663. [a] (2) Refusal to withdraw testimony from jury in absence of request for election held proper. TexCr 23SW(2d) 726(2dcase).

969-16½-New. Instruction to convict if accused possessed either of two revolvers is error as permitting jury to find generally on evidence relating to two separate crimes. 216AppDiv240, 214 NYS537.

969-16¾-New. In prosecution for embezzlement and larceny in separate counts, where count for larceny was abandoned an inadvertent reference to such count by court in his charge is of no importance. 234Mich574, 208NW 682.

969-16¼-New. An instruction, setting out an indictment with instructions to disregard a count which had been dismissed, has been held not error where defendant did not object to sending indictment to jury. 199 Ind18, 154NE 867.

969-16½-New. Where an indictment charges alternative phases of an offense, under a statute creating only one offense, and an election is not required, the jury must be charged that only one conviction can be had. MoA 279SW199.

969-16¾-New. Where a crime defined by statute may be committed in a number of different ways, it is proper to define the crime as committed, if done in the manner shown by the evidence in the case, disregarding the remainder of the statutory definition which can have no application under the evidence. 58 ND82, 224NW878.

969-20 207 Iowa212, 220NW110. [a] **It is sufficient if prosecution proves offense was committed within period of limitation** and it is not error to so instruct jury. 335 Ill 61, 166NE462.

969-21 36GaA307, 136SE461; 202 Iowa732, 210NW913; 208 Iowa831, 224 NW557; 126Kan582, 585 [citCJ]; 221 Ky257, 298SW688; 229Ky403, 17SW (2d)260(2dcase); 318Mo 742, 300SW 680; 132 Or627, 287P681 (sufficient); 104TexCr210, 283SW850. [b] **Instructions held misleading.**-Mo 22SW(2d) 645.

969-22 100TexCr177, 272SW185 (charge of acquittal if possession was before Nov. 14, 1921).

969-22½-New. An instruction limiting finding as to commission of the offense to a particular date is properly refused because accused might be convicted of acts complained of at any time within the statutory period prior to indictment. 142Va658, 128SE459 (possession or operation of still).

969-22¾-New. Such instruction is properly refused where only one offense was proved. 85CalA306, 259P361.

969-23 Iowa 230NW425.

969-23½-New. or that exact time of commission need not be proved, 118 Kan641, 236P855.

969-24 79CalA27, 248P924; 40GaA725, 151SE410(2dcase); 206 Iowa1169, 221 NW847 (within three years held not erroneous in view of evidence); MoA 281 SW62.

969-25½-New. or that state is not required to prove offense committed on particular date named in information. 119Kan670, 240P848.

969-25¾-New. An instruction that it was immaterial whether the offense occurred on one or the other of two dates has been held unobjectionable in the light of the evidence. 70Utah586, 262P 113.

969-27 97CalA185, 275P462; 335 Ill 61, 166NE462; 111TexCr161, 12SW (2d)215. See also 318Mo 1233, 3SW (2d)365. But see 23AlaA572, 129S316.

969-27½-New. Defendant is entitled to an instruction, where warranted by the evidence, and where there is evidence of more than one offense, telling the jury that they must find from the evidence that the offense was committed on the date shown in the proof. 142Miss 602, 107S667 (modification adding "or prior thereto" error).

970-29 155Tenn624, 299SW796.

970-29½-New. An instruction that defendant should be acquitted if the jury are not convinced that the crime was committed at the time fixed by the state's witnesses is properly refused. 22AlaA317, 116S110.

970-30 22AlaA102, 112S898; 23AlaA 432, 127S796(2dcase); 27Hawaii 65.

970-31 21AlaA423, 109S125.

970-32 OklCr 282P690.

970-33 207 Iowa212, 220NW110; Okl Cr 282P690.

970-34 54ND768, 210NW971.

970-38 [a] **Where defense is suicide,** failure to instruct as to showing necessity to prove corpus delicti is held not error. 107TexCr376, 296SW537.

970-42 See also 81CalA484, 254P292.

970-42½-New. An instruction, in effect requiring proof of corpus delicti beyond any reasonable doubt before extrajudicial statements, admissions, or confessions may be considered at all, is properly refused. 198Cal 426, 245P426.

970-45 199 Ind55, 155NE203.

970-51 169Ga613, 151SE17.

970-54 NH 146A503; 188Wis268, 205 NW820 (on request). But see 316Mo 86, 289SW847. [d] **Feloniously or with felonious intent.**-Mo 22SW(2d)1049 (not necessary).

971-57 168Ga731, 149SE23 (threats); 125Kan375, 263P782.

971-59½-New. In a murder prosecution, an instruction referring to another instruction for definitions of "willful," "premeditated," "malice," and "malice aforethought" is not error. Mo 23SW (2d)22.

971-61 15F(2d)816; 24F(2d)525 (entrapment); 214Ala273, 107S737; 220 Ala544, 126S848; 174Ark472, 295SW 397; 203Cal 510, 265P184; CalA 290P 504; 166Ga10, 142SE160; 36GaA83, 135SE513; 324 Ill 131, 154NE715; 333 Ill 512, 165NE168; 204Ky748, 265SW 339; 217Ky94, 288SW1051; 219Ky151, 292SW741; 229Ky60, 16SW(2d)498; 149SC367, 147SE310; 109TexCommnA 521, 5SW(2d)993; 101TexCr33, 274SW 568; 101TexCr177, 274SW607 (request erroneously refused); 101TexCr185, 274SW634; 102TexCr421, 278SW197; 102TexCr456, 278SW203; 102TexCr

579, 278SW1105; 103TexCr150, 280SW 584; 103TexCr98, 280SW779; 103Tex Cr223, 280SW815; 103TexCr518, 281 SW859; 103TexCr560, 281SW863; 103 TexCr598, 281SW869; 103TexCr580, 281SW1071; 105TexCr116, 287SW53; 106TexCr72, 290SW1099; 107TexCr504, 296SW513; 108TexCr267, 300SW934; 109TexCr278, 4SW(2d)52; 109TexCr 314, 4SW(2d)557; 109TexCr624, 6SW (2d)369; 110TexCr456, 7SW(2d)530; 112TexCr33, 13SW(2d)843; 111TexCr 447, 14SW(2d)852; 112TexCr222, 15 SW(2d)1045; 113TexCr16, 18SW(2d) 1078; TexCr 27SW(2d)186(3dcase); TexCr 27SW(2d)186(2dcase); TexCr 29SW(2d)352; TexCr 29SW(2d)387(2d case); TexCr 29SW(2d)759; TexCr 29 SW(2d)777 (holding testimony negativing guilty knowledge not an affirmative defense); TexCr 32SW(2d)466; 150 Wash466, 273P742. [b] 100TexCr361, 272SW193. [g] 78CalA37, 247P601. [h] 70CalA498, 233P816 (instruction sufficient in prosecution for attempt to murder). (3) 81CalA528, 254P585. [j] **Standpoint of defendant.**–105TexCr268, 287SW1097. [k] **Instruction held sufficient.**–112TexCr419, 16SW(2d)828(3d case). [l] **Entrapment.**–33F(2d)686; 48 Ida112, 279P616; Mo 23SW(2d)1 (sufficient). [m] **Justification.**–40GaA123, 149SE51. [n] **Election of defenses.**–Okl Cr 292P867.

971-64 36GaA119, 135SE518; 217Ky 94, 288SW1051; 231Ky139, 21SW(2d) 139; 105TexCr116, 287SW53; 110Tex Cr648, 10SW(2d)727; 113TexCr153, 18 SW(2d)1080(1stcase).

971-65 225Ky827, 10SW(2d)279; 226 Ky186, 10SW(2d)646.

971-66 41GaA299, 152SE597 (charge not erroneous).

971-67 324 Ill 131, 154NE715. See also 106TexCr642, 294SW557.

971-68½-New. Defendant is entitled to instruction applicable not only to state of facts testified to by him but any other which might legitimately be found. 324 Ill 131, 154NE715.

971-70 217Ky94, 288SW1051. See also 101TexCr185, 274SW634.

971-70½-New. Claim of defense need not be set forth in detail. 290Pa573, 139A374.

971-70¾-New. Defendant is entitled to any instruction properly phrased which presents the converse of any instruction given in behalf of the state. 322Mo 1180, 18SW(2d)67.

972-75 22AlaA262, 114S631; 22AlaA 173, 114S69; 22AlaA107, 114S71; 32 Ariz200, 256P1054; 71CalA402, 235P 467 (instruction correct); 110Conn403, 148A350 (reading statute held insufficient); 37GaA781, 141SE917; 38GaA 452, 144SE140(1stcase); 206 Iowa 1169, 221NW847; Iowa 228NW307 (instruction held proper); 130Kan668, 288 P551; 230Ky656, 20SW(2d)484, 66ALR 1297; 230Ky680, 20SW(2d)710; 313Mo 88, 280SW1023; 313Mo 71, 281SW35; Mo 29SW(2d)54; 84Mont364, 275P750 (instructions held not erroneous); 29 OhA495, 163NE923; 120 Or508, 252P 951; 105TexCr26, 285SW329; 108Tex Cr208, 299SW413; 108TexCr291, 300 SW83; 111TexCr288, 12NW(2d)582; 111TexCr242, 13SW(2d)97; 112TexCr 231, 15SW(2d)1042; 112TexCr395, 16 SW(2d)1092; 112TexCr203, 17SW(2d) 813; TexCr 24SW(2d)427(2dcase); TexCr 29SW(2d)769; 142Wash340, 253 P126. [c] **Instruction on principals held proper.**–CalA 243P67; 100TexCr 557, 276SW694. [d] **Instructions held erroneous.**–56ND875, 219NW574. [e] **Instructions erroneous or unnecessary.**–27F(2d)569; 110TexCr292, 8SW(2d) 121. [f] **Instruction held properly refused.**–33F(2d)238. [g] **Evidence held sufficient** to justify instruction on defendant's accomplicity. 132 Or627, 287 P681. [h] **Instruction held proper.**–41 GaA635, 154SE209.

972-76 327 Ill 463, 158NE716.

972-77 327 Ill 463, 158NE716; 338 Ill 636, 170NE750 (evidence sufficient for charge); 206 Iowa397, 220NW13 (evidence sufficient); 128Kan317, 277P 1019; 105TexCr374, 288SW230; TexCr 27SW(2d)221 (instruction properly omitted); 101WVa356, 132SE728. [b] 106TexCr127, 290SW1100.

972-78 See also 79CalA328, 249P231.

972-79 103TexCr98, 280SW779.

972-81 112TexCr395, 16SW(2d)1092.

972-82 100TexCr496, 272SW181; 112 TexCr546, 17SW(2d)1066(2dcase).

973-83 102TexCr579, 278SW1105. See also 320Mo 389, 8SW(2d)20; 32Mo 417, 8SW(2d)29.

973-84 103TexCr214, 280SW812; 106 TexCr462, 294SW200; 108TexCr540, 1 SW(2d)1094.

973-84½-New. Instruction that jury could not convict principal in second degree without convicting principal in first degree not erroneous where general charge instructed jury could find principal in first degree guilty and principal in second degree not guilty. 160 Ga899, 129SE436.

973-84½-New. Instructions that accessary before the fact must have been absent at the time of the offense are held not erroneous where the indictment did not allege his absence. 32NM319, 255 P396.

973-84¼-New. An instruction that all acting together with common intent and purpose in the commission of a crime are equally guilty is correct. 315Mo 232, 285SW712.

973-84½-New. Where an indictment charges defendant jointly with another, the court must instruct as to state's burden of fastening the guilt on the particular defendant. 216Ala218, 113S 22.

973-84½-New. An instruction has been held not erroneous as authorizing conviction of defendant of burglary on the belief that co-defendants in the indictment not on trial committed the breaking. 221Ky283, 298SW699.

973-85 23AlaA131, 122S617(1stcase); 71CalA402, 235P467 (instructions correct); Mont 287P933 (instruction stating substance of statute). [a] (1) 76 Mont351, 246P956.

973-87½-New. In some jurisdictions it is unnecessary to define the words "aid" or "abet." 124Kan405, 260P976.

973-87¾-New. On a trial of defendants jointly indicted it is error to refuse an instruction as to the meaning of "accessory after the fact" where there is evidence that one of the defendants was only an accessory after the fact. 165 La497, 115S728.

973-89½-New. Codefendants. Defendants tried together are held entitled to separate instructions after preparation of separate instructions for one defendant. 217Ky278, 289SW285.

973-89¾-New. The court must instruct the jury with reference to testimony affecting each defendant prosecuted jointly and see that the rights of each defendant are properly safeguarded. 132 Misc318, 228NYS731.

973-89¼-New. An instruction authorizing the joint punishment of codefendants, and not requiring a separate finding as to each defendant is erroneous. 318Mo 705, 300SW707.

973-91 216Ala356, 113S67; 21AlaA623, 111S49; Fla 130S456; 56ND642, 219 NW132; 100TexCr16, 271SW616.

973-93 162Ga777, 135SE187.

973-94 76CalA645, 245P450; Colo 293 P335; 162Ga777, 135SE187; 167Ga341, 145SE647 (where defendant introduces no evidence, but relies solely on own statement); 157Miss615, 128S770(2d case); 109TexCr392, 5SW(2d)145.

973-4 198Cal 238, 244P362.

974-8 [b] **Requested instruction refused** as too broad. 213Ala358, 104S656.

974-9 [d] **Instruction on presumption of insanity** from continuity of condition is held properly refused, on evidence. 312Mo 373, 278SW1016.

974-11 312Mo 373, 278SW1016; Sask [1929] 2DomLR279. [a] (1) 312Mo 373, 278SW1016. (4) Other instances. 48 Ida636, 284P201; TexCr 20SW(2d)794.

975-17½-New. Failure to charge that verdict might be "not guilty by reason of insanity" is held not prejudicial, where the jury was instructed to acquit if defendant was insane. 289Pa 284, 137A261.

975-19 Ga 154SE337. [a] **Instruction held erroneous** where court charged jury not to consider evidence of insanity as excuse for crime, but to consider all evidence with it under test. 143 Wash34, 254P463.

975-20 Ga 154SE337.

975-25 244NY147, 155NE79; 108TexCr 291, 300SW83. [a] **Instruction held** adequately to protect defendant's rights. 108TexCr291, 300SW83.

975-26 Mo 22SW(2d)635.

975-27 244NY147, 155NE79. But see 143Wash281, 255P91.

976-30 Ga 155SE478; 125Me463, 134 A691; 234Mich88, 207NW865; Mo 278 SW726.

976-33 [a] **Instructions held erroneous.**–206 Iowa1347, 221NW952; 319 Ill 306, 150NE16. [a] **Instruction held proper.**–OklCr 287P820.

976-36 136Wash620, 241P9.

976-42 22F(2d)740; 172Ark1177, 289 SW478; 165Ga290, 140SE754; 37GaA 55, 138SE525; 37GaA520, 140SE788 (charge held proper); 205 Iowa25, 215 NW721; 207 Iowa212, 220NW110; 250 Mich72, 229NW475; 103TexCr580, 281 SW1071. [a] **Erroneous instructions.**–256 IllA493.

976-43 20AlaA565, 104S45; 93CalA77, 268P1071; CalA 291P701; 25 OhA273, 157NE813; 106TexCr423, 292SW881; 109TexCr430, 5SW(2d)507; 112TexCr 52, 14SW(2d)67; 100WVa180, 130SE 102.

977-44 198Cal 112, 243P667; 83CalA 62, 256P561; 86CalA298, 260P901; Mo 25SW(2d)113; Mo 30SW(2d)132; 70 Utah224, 259P326. See also 221Ky599, 299SW203. But see 100CalA428, 280P 169.

977-45 32F(2d)116; 35Ariz432, 280P 672; 163Ga186, 136SE72; 35GaA578, 134SE183; 37GaA158, 139SE99; 121 Kan331, 246P508; 103TexCr160, 280SW 219; TexCr 24SW(2d)427(2dcase); Que [1926] 4DomLR991.

977-47 Cal 265P231; 146Miss237, 111 S303.

977-48 323 Ill 11, 153NE720; 205 Iowa 25, 215NW721.

977-49 198Cal 112, 243P667; 93CalA 711, 270P237; 144Wash446, 258P508.

977-52 23AlaA448, 126S612; 199Cal 471, 250P168; 86CalA298, 260P901 (instruction properly refused); 93CalA 711, 270P237; 37GaA55, 138SE525; 234 Mich85, 207NW805; 103NJL663, 138A 575; 111TexCr570, 13SW(2d)874. [b] 125Kan608, 265P1099. [c] **In trial for capital offense court should also** explain to jury how accused's evidence tends to sustain alibi. 300Pa16, 150A 94.

977-53 22F(2d)740; 21AlaA319, 108S 84; 204Cal 109, 266P807; 78CalA781, 248P1029, 1030 [quotCJ]; 83CalA12, 256P299; 90CalA683, 266P813; 163Ga 304, 136SE49; 163Ga313, 136SE154; 37GaA55, 138SE525; 37GaA520, 140SE 788; 321 Ill 594, 152NE516; 206 Iowa 390, 220NW328(sufficient); Kan 291P 950; 309Mo 155, 274SW427; 105NJL 549, 147A395; OklCr 270P90; 300Pa16, 150A94; 97PaSuper489; 106TexCr402, 292SW893; 113TexCr642, 218SW(2d) 727; 144Wash446, 258P508. See also 236Mich595, 211NW23. [a] 163Ga304, 136SE49; 123 Or521, 262P954. [e] **Instruction to acquit if accused's testimony is "supported" by all other evidence and leaves reasonable doubt held** proper. 133SC67, 130SE337. [f] **Instruction held sufficient.**–19F(2d)620. [g] **Instructions held sufficient.**–35Ariz 432, 280P672.

978-54 22F(2d)740.

978-58 Iowa 226NW46 (instruction held misleading). [b] 198Cal 112, 243P 667.

978-59 119 Or404, 249P625. [a] **Instructions held not erroneous.**–Mo 30SW (2d)132.

978-60 119Or404, 249P625. Contra 136 SC305, 132SE824.

978-61 254NY170, 172NE458. See also 323 Ill 37, 153NE702.

978-64 24F(2d)303 (instruction as to alibi not covering entire time held erroneous). Contra 327 Ill 463, 158NE716; 26 OhA53, 159NE834. But see 333 Ill 258,164NE682; 333 Ill 624, 165NE141; 334 Ill 324, 166NE129.

978-66 106Conn260, 137A762; Ill 172 NE806. But see 51ND695, 200NW778.

979-75 69CalA214, 230P997; 74CalA

345, 240P56; Ind 168NE456; 236Mich 595, 211NW23; 51ND695, 200NW778, 779 [citCJ]; 119 Or404, 249P625.

979–76 235Mich469, 209NW564.

979–77 110Conn403, 148A350; 207 Iowa212, 220NW110; 207 Iowa224, 222 NW407, 61ALR882; 235Mich469, 209 NW564; 297Pa160, 146A553.

979–80 81CalA126, 251P958; 92CalA 534, 268P701 (no evidence of good character); Mo 256SW1043; Mo 273SW 1060; Mo 284SW799(2dcase); Mo 295 SW791; 193NC246, 136SE715.

980–82 20F(2d)376; 22AlaA32, 111S 762; 80CalA328, 251P823; Mo 7SW (2d)253; Mont 293P309; Utah 291P 307. [c] **Instructions properly refused.**–22AlaA564, 117S801; 22AlaA557, 117 S804.

980–83 37GaA827, 142SE306; 47 Ida 457, 276P39, 68ALR1061; 67Utah325, 247P497. Contra 23F(2d)48.

980–84 Mo 284SW799(2dcase); Mo 24 SW(2d)985.

980–85½–New. Not error to instruct on subject of good character where accused has put reputation for whisky making in issue by statement to jury. 33GaA 827, 128SE217.

980–86 27F(2d)322. [a] **Instruction held sufficient.**–27F(2d)257.

980–87 89CalA615, 265P349. [a] 84 CalA58, 257P592; 169Ga142, 149SE887; 125Kan608, 265P1099; 167Minn74, 208 NW528; 118Nebr346, 225NW42; 49Nev 386, 248P48; 58ND82, 224NW878; Utah 279P953; Utah 291P307. [b] 23 F(2d)48; 217Ala322, 116S705; 22AlaA 444, 116S706; 80CalA328, 251P823; 324 Ill 224, 154NE909; 92PaSuper165.

981–90 23AlaA85, 121S4; Utah 279P 953.

981–92 118Kan629, 236P816.

981–94 20AlaA540, 103S604; 170Minn 72, 211NW958.

981–95 168Ark731, 271SW338; 171Ark 1189, 287SW578; 37GaA382, 140SE406; 93PaSuper446. [a] 202 Iowa1188, 211 NW850.

981–96 171Ark1189, 287SW578; 86 Colo 35, 278P594, 65ALR1260; 37GaA 382, 140SE406; 333 Ill 397, 164NE847; 118Kan629, 236P816; 49Nev386, 248P 48.

981–99 35Ariz432, 280P672 (instruction held erroneous where evidence is in sharp conflict); 214AppDiv304, 210 NYS522.

982–2 19F(2d)202; 21AlaA234, 109S 189; 22AlaA17, 111S899; 23AlaA372, 125S790(2dcase); 73CalA580, 239P82; 80CalA328, 251P823; Iowa 223NW554; 167Minn74, 208NW528. But see 47 Ida 457, 276P39, 68ALR1061; 251Mich592, 232NW357. [a] 205 Iowa220, 217NW 812; 89PaSuper222.

982–3 13F(2d)59; 14F(2d)75; 21AlaA 234, 109S189; 156Miss612, 126S390(2d case).

982–5 But see Minn 231NW225. [b] (1) 33GaA818, 128SE224.

982–6 215Ala619, 112S157.

982–8½–New. It is error to instruct that evidence of defendant's bad character may be considered as corroborative of testimony of the state's witness where defendant testified in his own behalf but introduced no evidence of good character. 193NC236, 136SE730.

982–8½–New. A charge that threats may indicate bad character held not objectionable as placing defendant's character in issue. 168Ga731, 149SE23.

982–10 195NC47, 141SE468.

983–13 112TexCr550, 17SW(2d)1051; TexCr 24SW(2d)413 (presumption, by statute, of use of weapon); 150Wash 671, 274P711. [b] **Instruction to jury that malice aforethought is presumed** against defendant held good where homicide is proved by evidence. 27 Hawaii28. [c] **Instruction properly refused.**–151Wash262, 275P569. [d] **Failure to instruct held immaterial.**–35F(2d) 941. [e] Instructions held not erroneous. 23AlaA579, 129S312(3dcase).

983–15 22AlaA93, 112S806.

983–16 16F(2d)778.

983–21 316Mo 647, 291SW118; 141 Wash101, 250P950. [b] **Instruction requiring jury to believe beyond reasonable doubt facts necessary to repel presumption of possession.** 219Ky482, 293 SW984.

983–25 113TexCr501, 21SW(2d)1057 (2dcase).

983–27 20F(2d)376; 23F(2d)401; 21 AlaA367, 108S401; 23AlaA521, 128S126 (2dcase); 23AlaA568, 129S298; 171Ark 307, 284SW751; Conn 151A349; 164Ga 128, 138SE67; Ind 163NE710; Ind 168 NE692; 255Mass304, 151NE297, 47ALR 962; 316Mo 66, 289SW910; 82NH432, 135A532; OhA 173NE26; 143Va504, 129SE259; 143Wash313, 255P382. [a] 31F(2d)846; 20AlaA559, 103S917; 22 AlaA86, 112S538; 171Ark307, 284SW 751; Cal 291P582; 81CalA207, 253P 338; 84CalA642, 258P638; 95CalA659, 273P110; 108Conn454, 143A561; 164 Ga128, 138SE67; 166Ga10, 142SE160; 166Ga115, 142SE681; 170Ga895, 154SE 368; 324 Ill 190, 154NE900; 331 Ill 581, 163NE373; 332 Ill 222, 163NE694; Ill 173NE155; 261Mass281, 158NE840; 316Mo 66, 289SW910; Mo 285SW400; Mo 18SW(2d)10; MoA 16SW(2d)648; 113Nebr790, 205NW252; OklCr 277P 247(2dcase); 153Wash379, 279P1102; 191Wis652, 211NW785; 200Wis145, 227 NW306. (2) Refusal to charge that failure of prosecution to point out, or defendant to name, guilty agent, and thereby vindicate innocence is error. 143Va540, 129SE257. [b] (1) 22AlaA 86, 112S538; 22AlaA107, 114S71; 22 AlaA581, 118S239 [certiorari den 218 Ala169, 118S241]; 102CalA787, 283P 830; 96Fla723, 119S118; 214Ky422, 283SW420; 317Mo 865, 297SW73. (5) Requested instruction that it is theory of law that it is better to let guilty man go free than to convict innocent man is properly refused. 120Kan221, 243P280. [d] **Instruction on reasonable doubt** not equivalent to one on presumption of innocence. 37F(2d)74. [e] **Instruction has been held not to deny** defendant presumption of innocence. Ga 155SE38.

984–28 [b] **Instruction is mandatory in felony cases.**–311Mo 664, 279SW395. [c] **Instruction is not mandatory in misdemeanor cases.**–311Mo 664, 279SW395.

984–31 22AlaA107, 114S71; 70Utah224, 259P326.

984–36 204Cal 582, 269P427, 59ALR 1480; CalA 260P946; 255Mass304, 151 NE297, 47ALR962; TexCr 27SW(2d) 229; 101Vt491, 144A689(2dcase). [a] **Withdrawal of instruction** on presumption of innocence is held error. 311Mo 664, 279SW395. [b] **Necessity of charging jury on presumption of innocence applicable to whole case** is not obviated by statute making possession of intoxicating liquor sufficient to overcome presumption of innocence, in absence of other proof of lawful possession. 111TexCr17, 10SW(2d)1008.

984–37 32NM500, 258P1009.

984–38 23F(2d)401; 264Mass324, 162 NE401; 143Va504, 129SE259.

984–39 195NC242, 141SE736; 57ND89, 220NW843; 57ND900, 225NW319. But see 189NC799, 128SE152.

984–40 Conn 151A349.

984–40½–New. The court need not charge the jury not to be influenced by the number of counts, where there are only a few counts. 27F(2d)257.

984–41 23AlaA502, 127S909; 194Cal 1, 227P156; 68CalA457, 229P974; 76CalA 91, 243P878; 78CalA598, 248P969; 79 CalA20, 248P1027; 79CalA295, 249P525; 88CalA302, 263P345; 88CalA558, 263 P857; 228Ky674, 15SW(2d)463; Mo 26SW(2d)781; Mo 30SW(2d)132; 141 Wash337, 251P290.

985–43 326 Ill 104, 157NE76; 204 Iowa 1296, 210NW580; 112TexCr164, 15SW (2d) 626(2dcase); 150Va611, 143SE641; 196Wis446, 220NW190.

985–44 But see 109TexCr361, 4SW(2d) 966; 113TexCr407, 21SW(2d)672(1st case).

985–45 82CalA489, 255P781; 51SD277, 213NW504.

985–48 198Cal 776, 247P884; CalA 284 P1066; 37GaA382, 140SE406; 338 Ill 631, 170NE678; 204 Iowa1135, 216NW 642; 142Miss110, 107S418; 50ND270, 195NW567. [a] 194Cal 1, 227P156; 168 Ga470, 148SE139; 37GaA382, 140SE406; GaA 155SE775(1stcase); 29Hawaii90; 127Kan510, 274P209; 149Miss262, 115 S208; 274SW35. [b] 307Mo 365, 270 SW291. [d] 202Cal 527, 261P1009. [e] (1) 195Cal 272, 232P710.

985–49 316Mo 647, 291SW118.

985–52 136Wash620, 241P9.

986–58 But see 21AlaA551, 109S897.

986–59 27Hawaii109, 119 [citCJ].

986–64 34F(2d)12; 22AlaA128, 113S 467; 23AlaA521, 128S126(2dcase); 220 Ky191, 294SW1042; 54ND840, 211NW 585; 136SC305, 132SE824; TexCr 20 SW(2d)772; 153Va846, 149SE414 (to elevate offense to murder in first degree). See also 189NC799, 128SE152. [a] 37 GaA520, 140SE788; 41GaA556, 153SE 616(2dcase). [b] (1) 102Conn708, 130 A184; 327 Ill 162, 158NE462; 191NC 614, 132SE596. (2) 21AlaA15, 105S714.

986–65 22AlaA290, 115S68; 338 Ill 56, 170NE14; 136SC305, 132SE824. But see 81CalA199, 253P169.

986–69 19F(2d)923; 20AlaA660, 104S 771; 56ND334, 217NW519; TexCr 25 SW(2d)343.

986–70 79CalA295, 249P525; 37GaA 520, 140SE788; 199 Ind746, 161NE8; 100TexCr501, 272SW191.

987–71 109TexCr251, 4SW(2d)74.

987–71½–New. On showing that defendant had been adjudged insane but had been restored to sanity, it is error to refuse a charge that the burden of proving sanity is on state. 109TexCr 251, 4SW(2d)74.

987–73 19F(2d)923; 208Cal 433, 281P 618; 339 Ill 480, 171NE544; 199 Ind 280, 157NE98; Ind 166NE661; Ind 167 NE129; 162La299, 110S482; 251Mich 367, 232NW404; 318Mo 833, 18SW(2d) 147; 196NC393, 145SE772; 35 OklCr 238, 250P142; OklCr 274P487; OklCr 287P750; OklCr 293P269; SC 155SE 409; 49SD532, 207NW465; TexCivA 271SW383; 100TexCr406, 273SW597; 100TexCr584, 272SW139; 105TexCr260, 288SW204; 109TexCr85, 3SW(2d)97. [a] 22F(2d)934; 163Ga121, 135SE 917; 164Ga128, 138SE67; Okl 287P 419; 297Pa160, 146A553; 105TexCr 470, 289SW57; 102WVa619, 135SE905. [b] **Instructions held erroneous.**–OklCr 283P1037.

987–74 23F(2d)3; 31F(2d)19; 34F(2d) 12; 42F(2d)623; 22AlaA434, 116S504; 169Ga425, 150SE579; 46 Ida646, 270P 140; 210Ky410, 276SW127; Mo 30SW (2d)132; 213AppDiv331, 210NYS535; 191NC614, 132SE596; OklCr 279P917; 285Pa77, 131A655; 103TexCr297, 280 SW580; 103TexCr657, 281SW1066; 104 TexCr298, 283SW810; 104TexCr493, 284SW581; 110TexCr445, 10SW(2d)98 (2dcase); Wash 290P824. See also 143 Va609, 130SE777. [a] (1) Ala 130S677 (1stcase); 163Ga186, 136SE72; 210Ky 410, 276SW127; 34NM486, 285P490; 35 OklCr279, 250P544, 49ALR1129; Okl Cr 287P429; 51SD277, 213NW504; 108 TexCr489, 18SW(2d)639. (3) Instruction is not prejudicial for failure to state specifically that self-defense need not be proved beyond a reasonable doubt where it required jury to give defendant benefit of any reasonable doubt. 285Pa77, 131A655. (4) Charge that, if jury finds large quantity of liquor, there is "burden of explanation" on defendant held not error where rest of charge showed burden on state to prove guilt beyond reasonable doubt. 125Me301, 133A433.

987–75 217Ala225, 115S297; 23AlaA 127, 123S263 [certiorari den 220Ala38, 123S265]; 179Ark94, 14SW(2d)261; 40 GaA360, 149SE429; NJ 148A608; 287 Pa512, 135A301; 136SC305, 132SE824; 137SC145, 134SE885; 100TexCr167, 272 SW456 (where instructions as whole show that if on whole case jury entertains reasonable doubt, defendant entitled to acquittal); 100TexCr202, 272 SW460 (charge that burden on defendant to show transportation of liquor for lawful purpose accompanied by charge to acquit if jury had reasonable doubt); 100TexCr609, 272SW187; 151 Va533, 145SE307. But see 101TexCr55, 273SW856. [a] (1) 213Ky356, 281SW 164; 218Ky836, 292SW497; 226Ky460, 11SW(2d)125; 104TexCr346, 283SW835. (3) 208Cal 433, 281P618. (6) Charge that burden of proving manufacture of intoxicating liquor was for medicinal purposes is erroneous where it fails to apply doctrine of reasonable doubt and to instruct as to amount of proof necessary to discharge burden. 101TexCr

501, 276SW259. (7) **Failure to apply** doctrine of reasonable doubt to affirmative defense is reversible error. 104Tex Cr298, 283SW810. (8) Requiring defendant in larceny prosecution to prove beyond reasonable doubt that stolen property was worth less than twenty dollars. 218Ky836, 292SW497. (9) In prosecution for murder, instruction that burden of proof under plea of self-defense was first upon defendant to establish elements set out to reasonable satisfaction of jury, has been held to place too great a burden on defendant. 23AlaA77, 121S1. (10) Unqualified instruction that burden of proving alibi rests on accused is too broad. 152Va 1014, 148SE821. (11) Other instances. 23AlaA467, 127S251(1stcase). (12) Instruction not objectionable on this ground. TexCr 32SW(2d)648. [c] 205 Iowa30, 215NW758 (omitting words "by preponderance of the evidence").

988–78 23AlaA594, 129S485; 21AlaA41, 104S886; 21AlaA566, 110S61; 22AlaA 66, 111S452; 22AlaA128, 113S467; 22 AlaA129, 113S469; 23AlaA266, 123S283 (1stcase) (charge held erroneous); AlaA 129S714(2dcase); 27Hawaii65; 326 Ill 366, 157NE215; 197 Ind193, 150 NE99; 201 Iowa4, 206NW584 (requirement not obviated by instruction defining reasonable doubt); 207 Iowa1345, 224NW594; 220Ky80, 294SW828; 250 Mich72, 229NW475; 316Mo 66, 289SW 910; MoA 16SW(2d)648; MoA 31SW (2d)559; 118Nebr267, 224NW274; 189 NC538, 127SE599; OhA 173NE26; 102 TexCr421, 278SW197; 105TexCr44, 285 SW614; 105TexCr351, 288SW464; 113 TexCr439, 22SW(2d)674; TexCr 29SW (2d)759. See also 20AlaA197, 101S287. [a] Statements of defendant's counsel in argument may not deprive defendant of instruction to acquit if jury has reasonable doubt. 251Mich243, 231NW564.

988–80 213Ala358, 104S656; 21AlaA 270, 108S617; 34Ariz144, 268P617; 168 Ark433, 270SW537; 68CalA457, 229P 974; 75CalA1, 241P928; 78CalA598, 248 P969; 80CalA783, 252P1061; 88CalA 302, 263P345; 37GaA55, 138SE525; Ind 171NE1; Mo 23SW(2d)16; Mo 25SW (2d)113; Mo 26SW(2d)781; 82NH518, 136A358; 93PaSuper360; 93PaSuper 446; 40Wyo 184, 276P458.

989–85 69CalA457, 229P974; 121Kan 514, 247P429; 143Miss365, 108S809; Mo 30SW(2d)132. [b] **Omission from main instruction** is not error where case was submitted "under these instructions" and another instruction required finding beyond reasonable doubt. Mo 285SW1000.

989–87⅓–New. A charge on an affirmative defense should couple therewith the law of reasonable doubt. 103TexCr518, 281SW859.

989–88 103WVa355, 137SE751.

989–89 329 Ill 514, 161NE60; 332 Ill 207, 163NE430; 254 IllA120; 215Ky827, 287SW23; 241Mich67, 216NW398; ND 229NW363. See also 324 Ill 224, 154NE 909. But see 21AlaA486, 109S759. [a] 103WVa355, 137SE751.

989–90 See also 103WVa355, 137SE751.

989–91 20F(2d)376, 378 [citCJ]; 20 AlaA195, 101S286; Wash 290P992.

989–92 199Cal471, 250P168; 116Nebr 582, 218NW386, 58ALR1322 (not erroneous). [a] (6) Other instances. 93Pa Super360. [c] **Instructions held not objectionable.**–207 Iowa334, 221NW556.

990–93 163Ga313, 136SE154.

990–98 [a] (4) A far-fetched or chimerical doubt or doubt hatched up for purpose of acquittal. Ark 30SW(2d) 851.

990–3 Ind 173NE229; 82NH518, 136A 358; 103TexCr598, 281SW869. [a] 13 F(2d)53; Ala 129S282; 20AlaA565, 104 S45; 22AlaA66, 111S452; 22AlaA185, 113S830; 23AlaA521, 128S126(2dcase); 30Ariz366, 247P129; 171Ark297, 284SW 734; 175Ark1170, 299SW755; Cal 291 P582; 105Conn757, 136A475; 164Ga 128, 138SE67; 37GaA511, 140SE787; 162Ga422, 134SE95; 41GaA252, 152SE 615; 27Hawaii28; 199 Ind247, 155NE 544; 200 Ind112, 161NE565; Ind 166 NE304; Ind 171NE1; 203 Iowa929, 210 NW465; 207 Iowa224, 222NW407, 61 ALR882; Iowa 230NW425; 125Kan608, 265P1099; 222Ky99, 300SW357; 233 Mich615, 208NW27; 311Mo 391, 279SW 23; MoA 256SW523; Mo 18SW(2d)10; Mo 23SW(2d)22; Mo 24SW(2d)1020; 114Nebr404, 207NW928; 103NJL361, 137A575; 189NC616, 127SE675; 192NC 766, 136SE121; 195NC242, 141SE736; NC 154SE62; 57ND89, 220NW843; 58 ND792, 228NW199; Or 292P98; 89Pa Super454; 92PaSuper404; 96PaSuper 351; 97PaSuper283; 29PortoRico 961; 33PortoRico 825; 137SC58, 135SE635; 103TexCr258, 280SW836; TexCr 30SW (2d)331; 101Vt124, 141A686; 142Va 609, 128SE555; 145Wash644, 261P385; 101WVa356, 132SE728; 193Wis482, 214 NW356; 215Ala643, 112S234; 218Ala 66, 117S400; 21AlaA348, 108S262; 21 AlaA631, 111S190; 22AlaA444, 116S 706; 22AlaA392, 117S398; 23AlaA382, 125S899; 23AlaA579, 129S312(3dcase); 171Ark297, 284SW734; 317 Ill 430, 148 NE255; 336 Ill 404, 168NE321; 197 Ind 193, 150NE99; 199 Ind196, 156NE403; 202 Iowa173, 209NW458, 47ALR407; 203 Iowa1305, 214NW735; 155Miss574, 124S789; 311Mo 391, 279SW23; 318Mo 833, 1SW(2d)147; Mo 30SW(2d)750; 122 Or504, 259P917; 89PaSuper363; 158Tenn273, 12SW(2d)946; 101TexCr 55, 273SW856; 147Va692, 137SE603 (as to each juror); 106WVa72, 144SE884. [d] **Instruction giving state benefit of doubt is erroneous.**–SC 155SE409.

991–4 215Ala497, 111S212; 23AlaA419, 126S414. [a] **Instruction properly refused.**–MoA 16SW(2d)648.

991–5 23AlaA336, 125S206; 22AlaA564, 117S801; 22AlaA28, 111S757; AlaA 129 S712; 331 Ill 581, 163NE373. [a] 108 Conn454, 143A561; Ga 154SE332; 233 Mich185, 206NW568; 234Mich88, 207 NW865; 97PaSuper78.

991–6 5F(2d)45.

991–7 171Ark297, 284SW734; 37GaA 520, 140SE788; 27Hawaii65; 337 Ill 413, 169NE210; 162La471, 110S723; 142Miss110, 107S418 (instruction that jury may convict if they "only" believe defendant guilty beyond reasonable doubt not erroneous); 89PaSuper363; 137SC391, 135SE361; TexCivA 271SW 383; 105TexCr44, 285SW614. [a] **Instruction held sufficient.**–5F(2d)45.

992–8 95CalA659, 273P110; CalA 286P 476; 214Ky216, 282SW1089; 21Ky485, 290SW339; 221Ky253, 298SW683; 226 Ky660, 11SW(2d)726. [a] **Giving of correct additional instruction** amplifying such definition is not error. 94CalA 543, 271P552.

992–9 162Ga208, 132SE911; Ga 154SE 799; 202 Iowa173, 209NW458, 47ALR 407; 140Miss265, 105S514; Mo 256SW 1043; Mo 23SW(2d)11; ND 229NW363; 108TexCr258, 1SW(2d)298; 103WVa 355, 137SE751.

992–10 NJSup 130A437.

992–12 22AlaA95, 112S811; 22AlaA581, 118S239 [certiorari den 218Ala169, 118S 241]; 70CalA465, 233P812.

992–14 21AlaA562, 110S563; 22AlaA95, 112S811; 111TexCr144, 12SW(2d)225 (2dcase).

992–15½–New. In the submission of defensive matter it is not proper for the court to instruct the jury that they must believe the testimony upon which defendant relied beyond a reasonable doubt. 101TexCr96, 274SW628.

992–15½–New. Instruction requiring the jury to be reasonably satisfied and to believe certain facts concerning issue of self-defense is prejudicial error. 21 AlaA41, 104S886.

993–18 215Ala276, 110S407.

993–20 21AlaA464, 109S375; 21AlaA 551, 109S897.

993–21 219Ala83, 121S72, 63ALR560; 315Mo 156, 285SW718.

993–22 23AlaA241, 124S507(2dcase).

993–23 213Ala576, 105S583; 215Ala 497, 111S212; 21AlaA266, 107S328.

993–24 120Kan499, 243P1060; 190NC 506, 130SE308 (and not suggested by ingenuity of counsel or jury or prompted by merciful inclination or sympathy).

993–24 5PaDist&Co 287.

994–27 11F(2d)875; 23AlaA594, 129S 485; 22AlaA102, 112S898; 23AlaA521, 128S126(2dcase); 175Ark391, 299SW 386; 199Cal 471, 250P168; 94CalA420, 271P203; 164Ga128, 138SE67; 89 IndA 307, 166NE262; Mo 274SW28; 104NJ L291, 140A287; 197NC576, 150SE25(2d case); 139SC539, 138SE352. See also 190NC684, 130SE854, 856 [citCJ&Cyc]. But see 21AlaA43, 105S696.

994–28 175Ark1170, 299SW755; 331 Ill 268, 162NE839; 76Mont278, 246P257. But see 100WVa98, 130SE100.

994–29 31F(2d)229; 213Ala530, 105S 705; 172Ark176, 290SW54.

994–30 21AlaA551, 109S897; 164Ga128, 138SE67. But see 137SC371, 135SE364.

994–31 21AlaA594, 110S479; 21AlaA 551, 109S897; 23AlaA237, 123S290.

994–32 21AlaA551, 109S897; 22AlaA 323, 118S264.

994–33 21AlaA38, 104S881; 21AlaA551, 109S897.

994–35 5F(2d)967; 11F(2d)875; 27 F(2d)854; 79CalA101, 248P1078; 48Nev 358, 232P778, 235P645. See also 190NC 684, 130SE854, 856 [citCJ&Cyc].

995–36 21AlaA29, 104S870; Iowa 230 NW425.

995–37 105Conn757, 136A475.

995–39 120Kan499, 243P1060 (suggesting conscientious agreement to jury held not error).

995–40 See also 237 IllA211.

995–44 215Ala42, 109S109; 21AlaA165, 106S349; 21AlaA313, 108S77; 23Ala 265, 123S281(1stcase); 23AlaA237, 123S 290; Wyo 283P406.

996–45 Ill 173NE155; 292Pa579, 141A 624; 5PaDist&Co 287; 153Va909, 150SE 407; 103WVa482, 138SE117. But see 88 PaSuper227. [b] **Instruction that reasonable doubt is cne "upon which you would be willing to act in any matter of highest concern to you"** is held not erroneous. 171Ark271, 284SW17.

996–46 But see 22AlaA556, 117S761 (holding that such charge is not improper); 178Minn589, 228NW164.

996–47 33F(2d)896; 148SC495, 146SE 418.

997–50½–New. Where killing was admitted, refusal of instruction that jury could not convict on suspicious facts merely is not error. 215Ala453, 111S 34.

997–50½–New. An instruction to acquit if the jury had a reasonable doubt of defendant's guilt, although there may be no probability of guilt, is held properly refused. 21AlaA551, 109S897.

997–51 21AlaA615, 110S696.

997–52 22AlaA59, 112S182; 22AlaA341, 115S700; 23AlaA521, 128S126(2dcase). Contra 21AlaA255, 107S230; 21AlaA481, 109S891; 21AlaA557, 109S899; 21AlaA 481, 109S891. [a] But see 23AlaA336, 125S206. (3) Instruction that there was reasonable probability of innocence, jury should acquit, held properly refused. 21AlaA15, 105S714. [b] (3) Charge that, although there might not be probability of innocence, reasonable doubt might exist, entitling defendant to an acquittal is held properly refused. 21 AlaA481, 109S891. [c] 216Ala342, 113S 391. [d] 22AlaA101, 112S810; 22AlaA 353, 115S698. [e] **Probable probability.**–21AlaA445, 109S888. [f] **Instruction that jury must believe guilt to exclusion of every probability of innocence** is properly refused. 22AlaA101, 112S810. [g] **Instruction that if facts can be reconciled with defendant's innocence it is** insufficient to sustain conviction is improperly refused. 23AlaA594, 129S485.

997–53 23AlaA582, 129S478; 108TexCr 473, 1SW(2d)626. Contra 21AlaA551, 109S897.

997–54 216Ala342, 113S391; 22AlaA 290, 115S68.

997–56 237 IllA178.

997–56½–New. , or that the jury should acquit "if there is a probability of defendant's innocence," where not predicated on the whole evidence. 22AlaA173, 114S69.

997–59 Mo 274SW28.

997–60 See also 22AlaA380, 115S853. But see 23AlaA265, 123S281(1stcase).

997–61 Ill 173NE155; 200 Ind400, 164 NE267; 204 Iowa130, 214NW708; 208 Iowa842, 226NW371; 292Pa579, 141A 624. [c] 327 Ill 152, 158NE386. [d] **Instructions held sufficient.**–199 Iowa1206, 200NW205 (as embracing consideration of lack of evidence); 205 Iowa849, 210 NW710. [e] **Error to charge in effect that jury could convict** if convinced of guilt beyond reasonable doubt from lack of evidence. Iowa 230NW522.

997-62 23AlaA582, 129S478; 244NY 147, 155NE79. But see 23AlaA70, 121S8.
997-63 21AlaA165, 106S349; 204 Iowa 130, 214NW708, 709 [quotCJ]; 205 Iowa 30, 215NW758. Iowa 228NW353; Iowa 231NW392. See also 324 Ill 224, 154NE 909. [a] 204 Iowa417, 215NW256. [b] **Instruction held proper.**–That reasonable doubt is such doubt as, after entire comparison and consideration of all evidence, leaves minds of jurors in such condition that they cannot say they feel abiding conviction to moral certainty of truth of charge. 118Nebr267, 224NW 274.
998-64 140Miss265, 105S514. [a] **Instructions** that "if the jury believe beyond a reasonable doubt from the evidence, in this case," but omitting "or want of sufficient evidence," is not reversible error. 140Miss265, 105S514. (2) Omitting words "from the evidence" after words "reasonable doubt" held not erroneous. 223Ky484, 3SW(2d)1105.
998-65 21AlaA517, 110S167; 105Conn 757, 136A475; 327 Ill 50, 158NE457 (instruction held proper); 237 IllA178; Mo 271SW471. [a] 329 Ill 352, 160NE564; 229Ky153, 16SW(2d)509(2dcase); 82 NH432, 135A532; 143Va479, 129SE348. [b] 338 Ill 128, 170NE240; 292Pa579, 141A624.
998-66 215Ala453, 111S34; 218Ala145, 117S801; 22AlaA570, 117S908; 219Ala 670, 123S50; 22AlaA102, 112S898; 23 AlaA579, 129S312(3dcase); 237 IllA178; Mo 271SW471; 317Mo 413, 297SW63; MoA 31SW(2d)559.
998-68 215Ala497, 111S212; 21AlaA30, 104S875 (properly refused); 21AlaA38, 104S881; 21AlaA165, 106S349.
998-70 41 Ida616, 243P359; 317 Ill 430, 148NE255 (distinguishing between material elements of crime and links in chain of circumstances); 82NH432, 135 A532.
998-71 324 Ill 224, 154NE909; 254 IllA 199.
998-72 22AlaA290, 115S68. But see 22 AlaA564, 117S801; 22AlaA557, 117S804 (in both of which requested charge which amounts to asking jury to predicate verdict for defendant on their disbelief of his evidence may properly be refused).
999-73 23AlaA70, 121S8; 237 IllA178.
999-75 15F(2d)686; 15F(2d)741; 19 F(2d)465; 23AlaA217, 123S107(2dcase); 75CalA404, 242P1067; 317 Ill 430, 148 NE255; 207 Iowa555, 223NW166 (whether required or not); 212Ky50, 278SW163; 235Ky5, 29SW(2d)646; 235 Ky794, 32SW(2d)333; 221MoA893, 288 SW77; OklCr 275P355; OklCr 287P 1110; 106TexCr354, 292SW247; 109Tex Cr454, 5SW(2d)145; 111TexCr500, 14 SW(2d)853; 111TexCr539, 15SW(2d) 638; 113TexCr124, 18SW(2d)1070; 113 TexCr93, 18SW(2d)1081. [a] Court should instruct jury that persons jointly indicted are accomplices as matter of law. 108TexCr171, 300SW54.
999-76 But see Mo 295SW547.
999-77 103TexCr542, 282SW216; 112 TexCr395, 16SW(2d)1092; TexCr 31 SW(2d)640(2dcase). But see 189NC799, 128SE152.
999-78 71CalA402, 235P467; 71CalA 730, 236P214.
999-79 175Ark1169, 299SW8; 68CalA 682, 230P20; 40GaA489, 150SE432(2d case); 219Ky88, 292SW756; 223Ky831, 4SW(2d)728 (eyewitness); 232Ky613, 24SW(2d)269; Mo 23SW(2d)152; OklCr 267P869 (request properly refused); 35 PortoRico 817; 101TexCr401, 276SW 242; 102TexCr535, 278SW852; 103 TexCr205, 280SW586; 105TexCr39, 285 SW823; 106TexCr49, 290SW182; 111 TexCr570, 13SW(2d)874; 111TexCr539, 15SW(2d)638. See also 100TexCr281, 272SW784. [e] **Instruction as to purchaser's testimony** is not required in prosecution for possessing and transporting liquor. 110TexCr217, 8SW(2d) 139.
999-84 220Ky640, 295SW983; 107 TexCr276, 296SW520. [a] 5F(2d)471; 19F(2d)801; 204 Iowa1355, 217NW233; 227Ky439, 13SW(2d)244; 95PaSuper 305; 104TexCr210, 283SW850; 108 TexCr33, 299SW242; 111TexCr9, 10SW (2d)1004; 111TexCr570, 13SW(2d)874. [b] 15F(2d)686; 27F(2d)854; 23AlaA 409, 126S186; 204Cal 84, 266P536; 200 Cal 404, 253P318; 86CalA390, 260P913; 71CalA402, 235P467; 75CalA404, 242P 1067; 339 Ill 480, 171NE544; 233Ky 184, 25SW(2d)77; 322Mo 69, 16SW(2d) 30; 214AppDiv793, 210NYS470; 104 TexCr174, 283SW527; 106TexCr49, 290 SW182; 109TexCr486, 5SW(2d)521.
1000-86 15F(2d)686; 24F(2d)814; Mo 29SW(2d)71; Mo 29SW(2d)89; Man [1930] 3DomLR301. But see 140Miss 640, 105S769. [a] 27F(2d)310; 94Pa Super535. [b] In Oregon.–120 Or297, 252P84. [c] **Instruction held erroneous.**–Man [1930] 3DomLR301.
1000-88 But see 338 Ill 56, 170NE14.
1000-90 69CalA239, 230P991 (instruction held proper); 71CalA402, 235P467 (instruction correct); 75CalA404, 242P 1067; 113 OhSt187, 148NE34; 105 TexCr356, 288SW453; TexCr 27SW(2d) 211(2dcase). [d] **Failure to charge that witness is accomplice, where testimony is undisputed, is held error.**–75CalA 404, 242P1067. [e] **Instructions held correct.**–85Mont428, 278P993.
1000-92 202 Iowa242, 210NW120. See also 75CalA718, 243P485.
1000-92½–New. , or where covered by instruction already given. Mont 287P 214.
1000-95 234Ky552, 28SW(2d)790 [cit CJ].
1000-96 119Kan674, 240P407; 264 Mass217, 162NE337 (discretion of court); 214AppDiv793, 210NYS470; 29 OhA419, 163NE634; 292Pa16, 140A537; [1926] CanSC539, [1926] 3DomLR649; NS [1925] 2DomLR1004; Sask [1926] 4DomLR811. [a] 71CalA788, 236P185; 110Conn55, 147A118; 3Del 490, 139A 254; 124Kan405, 260P976. [b] 327 Ill 152, 158NE386 (contradictory and misleading); TexCr 29SW(2d)776. [c] **Suborned and suborner are not such accomplices** in perjury as to require instruction on necessity of corroboration. 234Ky153, 27SW(2d)702.
1001-98 71CalA402, 235P467 (instruction correct); 75CalA404, 242P1067; 79 CalA295, 249P525; 83CalA370, 257P92; 235Ky5, 29SW(2d)646; 103TexCr548, 281SW200; 104TexCr210, 283SW850. [a] 75Mont22, 241P522 (properly refused). [d] **Instruction held erroneous.**–170Minn72, 211NW958.
1001-99 103Conn138, 130A96.
1001-2 75CalA404, 242P1067; 104 TexCr26, 282SW245. [a] 75CalA404, 242P1067; 110Conn55, 147A118; 103 Conn138, 130A96 (within statutory authority of court, in form); 50Nev1, 248 P900; OklCr 279P356; 91PaSuper571; 100TexCr664, 274SW582; 104TexCr26, 282SW245. [b] 22AlaA507, 117S486; 169Ark567, 275SW909; 75CalA404, 242 P1067; 119 Or15, 244P516; 105TexCr 465, 288SW1080.
1001-3 179Ark216, 15SW(2d)312; 104 TexCr26, 282SW245. [a] 22AlaA507, 117S486; 100TexCr664, 274SW582. [b] 81CalA618, 254P612; 40GaA657, 150SE 863(1stcase).
1001-5 75CalA404, 242P1067. But see 71CalA339, 235P87.
1002-6 68CalA457, 229P974; 105TexCr 465, 288SW1080.
1002-7½–New. Charge that jury should apply test of exclusion in determining sufficiency of corroboration is properly refused. 105TexCr465, 288SW1080.
1002-8 103TexCr636, 282SW251; TexCr 30SW(2d)310. [a] 103TexCr636, 282 SW251.
1002-10½–New. Failure to charge on law of accomplice testimony is held not error where the alleged accomplice was cotransporter of intoxicating liquor with accused. 103TexCr542, 282SW216.
1002-12 35GaA497, 134SE121; 36GaA 114, 135SE518; 37GaA829, 142SE202; 52ND478, 203NW679.
1002-14 170Ga859, 154SE344; 162La 465, 110S721.
1002-14½–New. or where an instruction on the subject is not formulated and presented to the court. Mo 23SW(2d)152.
1002-15 78CalA426, 248P1021; Mo 278 SW987.
1002-16 83CalA302, 256P616; 164Ga 490, 139SE5; 39GaA116, 146SE346; 168 Ga575, 148SE500; 54SD391, 223NW325. [c] **Instruction that stipulation** that bonds were stolen does not cover knowledge of stealing is held proper. 7F(2d) 355. [d] **Admissions** are held to warrant charge to find defendant guilty. 191NC834, 133SE168.
1002-17 32Ariz195, 256P1053; 163Ga 313, 136SE154; 164Ga128, 138SE67; 165Ga326, 140SE889; 202 Iowa1188, 211 NW850; 309Mo 498, 274SW734; TexCr 20SW(2d)787.
1002-18 164Ga128, 138SE67; 165Ga 326, 140SE889; 38GaA740, 145SE474 (1stcase); 323 Ill 133, 153NE615; 219 Ky406, 293SW975; 229Ky499, 17SW (2d)403; 100TexCr535, 272SW147.
1002-19 309Mo 498, 274SW734.
1002-21 102TexCr415, 278SW216. [a] 32Ariz195, 256P1053; 166Ga115, 142SE 681 (admissions); 35GaA170, 132SE 272; 36GaA84, 135SE765; 199 Ind55, 155NE203; 127Kan716, 275P139; 142 Miss335, 107S373; 309Mo 155, 274SW 734; 114Nebr404, 207NW928; 105 TexCr228, 288SW218; 109TexCr224, 4 SW(2d)69; 112TexCr459, 17SW(2d)42 (2dcase). [b] 22AlaA59, 112S182; CalA 256P132; 92CalA371, 268P472; 168Ga 530, 148SE386(2dcase); Ga 154SE700; 127Kan716, 275P139; 235Mich393, 209 NW99; 142Miss335, 107S373; 101TexCr 124, 274SW591; 103TexCr403, 281SW 844.
1003-23 300Pa125, 150A290(2dcase).
1003-24 102TexCr415, 278SW216. But see Mo 271SW525; 321 Ill 397, 152NE 149.
1003-25 294Pa190, 144A127; 102TexCr 415, 278SW216.
1003-26 210Ky350, 275SW805; 102 TexCr415, 278SW216. [c] 74CalA341, 240P291.
1003-29½–New. It is duty to charge jury to disregard alleged confession where challenged after admission. 114 Nebr404, 207NW928.
1003-30 23F(2d)547; 93CalA711, 270P 237. [a] **Instructions held erroneous.**–168Ga530, 148SE386(2dcase).
1003-31 168Ga575, 148SE500.
1003-32 Ark 30SW(2d)830; 73CalA 13, 238P374; 204 Iowa1135, 216NW642; 226Ky529, 11SW(2d)437; 257Mass436, 154NE271; 142Miss335, 107S373; 321 Mo 870, 12SW(2d)469; 50ND927, 198 NW698; 157SC459, 154SE658; 104Tex Cr543, 286SW218; 104TexCr567, 285 SW1094; 112TexCr52, 14SW(2d)67; 112TexCr586, 18SW(2d)657; TexCr 24 SW(2d)413 (error not to submit issue); Utah 287P909. [a] **Instructions held not erroneous.** 257Mass436, 154NE271.
1003-33 215Ala314, 110S478; 22AlaA 59, 112S182.
1004-34 50ND927, 198NW698 (instruction sufficient).
1004-35 75CalA138, 242P84; 161Ga 166, 129SE772; Ga 154SE799; 219Ky 789, 294SW491; 50ND927, 198NW698. [a] 76CalA91, 243P878; Ga 154SE799; 109TexCr443, 5SW(2d)510. [b] Iowa 227NW601.
1004-36 168Ga575, 148SE500.
1004-37 313Mo 71, 281SW35; 116Nebr 141, 216NW173. But see 78CalA426, 248 P1021; 95CalA659, 273P110; 101CalA 744, 282P413. [c] 206 Iowa859, 220NW 95 (properly refused). [f] **Jury may be instructed that probative force of accusatory statements** made in accused's presence and undenied by him is not great and should be received with caution. 76Mont509, 248P201.
1004-38 Iowa 230NW425.
1004-40 313Mo 71, 281SW35; 316Mo 86, 289SW847; MoA 281SW123. [b] **Instructions held erroneous.**–CalA 285 P401.
1004-41 77CalA279, 246P337; 80CalA 655, 252P666; 162La465, 110S721. [c] **Instruction held not erroneous** as irrelevant or prejudicial. 160Ga605, 128SE 747.
1004-43 But see 76Mont509, 248P201.
1005-45 101TexCr96, 274SW628 (exculpatory matter included in testimony on former trial of another introduced by state); 104TexCr65, 282SW600; 110 TexCr432, 10SW(2d)109. [a] **Requested charges embracing proposition that burden was on state to prove falsity of such statements** were properly refused, proper pronouncement being that state is bound thereby unless shown by evidence to be untrue. 110TexCr432, 10 SW(2d)109. [b] **Instructions held not**

erroneous.–Mo 22SW(2d)639.

1005–47 103TexCr479, 281SW206; 104TexCr669, 284SW965.

1005–47½–New. or the matter introduced by the state does not amount to a confession, 101TexCr96, 274SW628.

1005–47¾–New. or where confession was only used in rebuttal, 104TexCr619, 286SW214.

1005–49 103TexCr479, 281SW206; 110TexCr432, 10SW(2d)109.

1005–54 14F(2d)75; 32Ariz212, 257P 27; 164Ga128, 138SE67; 198Ind614, 154NE370; 235Ky182, 30SW(2d)484; 312Mo 212, 278SW1030; 316Mo 213, 292SW721; 101TexCr267, 275SW837; 102TexCr524, 278SW444; 108TexCr199, 299SW646. [a] (1) 14F(2d)659; 21AlaA557, 109S899; 77CalA60, 245P811; 86CalA298, 260P901; 160Ga520, 128SE756 (limiting jury to consideration of evidence of prosecutrix's unchastity if satisfactory to them); 321Ill 143, 151NE563; Ill 172NE806; 210Ky524, 276SW550; 165La67, 115S370; 168La204, 121S744; 244NY196, 155NE98; 101TexCr598, 276SW283; 143Wash313, 255P382. (2) Instruction limiting evidence of defendant's reputation to serious conflict in testimony. 143Wash313, 255P382. (3) Instruction confining jury's consideration of reputation of deceased for quarrelsomeness to serious conflict in testimony. 143Wash313, 255P382. [b] 32Ariz212, 257P27; 170Ark484, 280SW398; 177Ark885, 7SW(2d)969; 177Ark1051, 9SW(2d)233(1stcase); DC 35F(2d)877; 89IndA552, 166NE7; 129Kan360, 282P735; 227Ky249, 12SW(2d)289; 322Mo 69, 16SW(2d)30; 103TexCr364, 280SW804; 187Wis122, 203NW749 (evidence of another offense). [d] 208Ky601, 271SW662. [f] **Instructions held sufficient** to protect defendant against conviction for more than one offense. 102TexCr524, 278SW444. [g] **Other offenses to show motive.**–33OhA185, 168NE848.

1005–55½–New. It is error to instruct jury to consider testimony of absent witness read from affidavit for continuance as if witness were present. 325Ill 225, 156NE281.

1005–59 194Cal1, 227P156; 203Iowa 1305, 214NW735; 204Ky718, 265SW285 (reference to facts and "circumstances" proved by evidence). See also 75CalA1, 241P928. But see 166Ga512, 143SE896. (objectionable on ground that question whether statements were part of res gestae was question of law to be determined by court). [a] 176Ark217, 2SW(2d)11; 166Ga10, 142SE160; 37GaA520, 140SE788; Mo 278SW726; Mo 289SW829; Mont 289P1037; 82NH518, 136A358; 153Va909, 150SE407. [b] 21AlaA270, 108S617; 23AlaA226, 127S245 (2dcase); 68CalA645, 230P193; 162La465, 110S721; 157SC459, 154SE658; 105TexCr494, 288SW1074; TexCr 25SW(2d)1105. [e] **Bloodhounds.**–153Tenn189, 281SW460. [f] **Court need not make every conceivable comment** on evidence and weight thereof. 101Vt30, 139A918.

1006–60 20AlaA591, 104S347 (charge that jury must consider facts and circumstances surrounding arrest of accused properly refused); 199Ind196, 156NE403. [b] 201Iowa368, 207NW393. [d] **Refusal of request** to instruct that jury must consider all evidence held not prejudicial. 73CalA334, 238P770.

1006–62 21AlaA81, 105S431 (requested instruction held misleading); 23AlaA221, 123S286; 68CalA645, 230P193.

1006–65 20AlaA540, 103S604.

1006–67½–New. Instruction that law takes judicial notice that whisky is intoxicating is proper in liquor prosecution. 143Miss365, 108S809.

1006–67¾–New. It is not the duty of the court to enumerate all facts which the ingenuity of counsel may conceive and instruct that they have no bearing on the issue. 80CalA321, 251P949.

1006–69 37GaA520, 140SE788.

1007–73 34GaA230, 129SE10; 34GaA238, 129SE11.

1007–79 13F(2d)844; 39GaA114, 146SE322; 203Iowa192, 210NW749; Mo 270SW337; 317Mo 361, 296SW125; 193NC754, 138SE136; 136Wash499, 240P676. Wash 288P218. But see 166Ga512, 143SE896. [e] **Form of instruction** is held proper where defendant apparently satisfied therewith. 13F(2d)844.

1007–80 See also 32NM319, 255P396.

1007–81 13F(2d)453; 164Ga128, 138SE67.

1007–82 Ill 172NE29; 107TexCr285, 296SW542.

1007–83 113TexCr395, 22SW(2d)136 (instruction to disregard testimony of officers without including county attorney who testified held error).

1007–84 180Ark711, 22SW(2d)1012; TexCr 26SW(2d)251(2dcase) (where evidence was uncontroverted).

1007–85 161La704, 109S394; 257Mass 479, 154NE95.

1007–90½–New. Where the court instructed the jury to disregard a question asked defendant as to a former indictment, failure to state that defendant had been acquitted is not error. 164La449, 114S92.

1007–90¾–New. The record in an abatement proceeding being evidence tending to impeach testimony of defendant and his witnesses in a prosecution for maintaining a liquor nuisance, his requested instruction that it should not be considered as evidence for any purpose was properly denied. 97CalA185, 275P462.

1007–90¼–New. It is not error for the trial judge to refuse to give an instruction directing the jury not to consider exhibits not received in evidence. 118Nebr184, 223NW951.

1007–90⅛–New. In a prosecution for possession of liquor for the purpose of sale involving the issue as to whether defendant consented to search during which evidence was obtained, an instruction as to defendant's consent to the search has been held sufficient. 112TexCr87, 13SW(2d)893.

1008–92 See also 94CalA4, 270P377. [b] **Duty of jury to acquit if they reasonably can.**–140Miss265, 105S514.

1008–94 79CalA366, 249P543; 106Conn 260, 137A762; 37GaA511, 140SE787.

1008–97 [a] 160Ga899, 129SE436.

1008–99 But see Ill 172NE819.

1008–1 20AlaA565, 104S45 (refusal to charge that evidence of one witness insufficient if jury have reasonable doubt). But see 41GaA661, 154SE377.

1008–2½–New. The statutory instruction regarding the value of the testimony of one witness is sufficient in the absence of evidence requiring further instruction on the subject. 120Or90, 250P633, 251P307.

1008–4 13F(2d)777; 30F(2d)485; 22AlaA183, 113S648; 23AlaA322, 124S745; AlaA 137SE413; 169Ark880, 277SW19 (instruction held proper); 39GaA128, 146SE340; 39GaA137, 146SE349 (2dcase); 33GaA695, 817, 127SE657; 36GaA653, 137SE912; 37GaA503, 140SE777; 40GaA662, 151SE120; 41GaA659, 154SE376; GaA 155SE774(2dcase); 338Ill 636, 170NE750 (evidence held to form basis for charge); 203Iowa1305, 214NW735; 315Mo 156, 285SW718; 316Mo 229, 289SW845; 316Mo 55, 289SW890; Mo 296SW128; 118Nebr346, 225NW42 (refusal of request is error); Nebr 230NW587; Nebr 233NW452 (refusal held erroneous); OklCr 275P401(2dcase); OklCr 287P727(1stcase); OklCr 287P1045; 87PaSuper25; 137SC391, 135SE361; 99TexCr554, 270SW1020; 99TexCr653, 271SW607; 100TexCr140, 272SW468; 100TexCr300, 272SW495; 100TexCr346, 272SW797; 100TexCr496, 272SW181; 100TexCr545, 272SW157; 103TexCr223, 280SW781; 104TexCr114, 282SW594; 104TexCr417, 284SW559; 104TexCr420, 284SW545; 105TexCr401, 288SW1084; 106TexCr205, 291SW901; 106TexCr351, 292SW238; 106TexCr384, 292SW885; 106TexCr413, 292SW906; 106TexCr524, 293SW821; 106TexCr564, 293SW1101; 107TexCr324, 296SW579; 107TexCr315, 296SW895; 108TexCr208, 299SW413; 108TexCr308, 300SW74; 108TexCr511, 1SW(2d)888; 108TexCr530, 1SW(2d)1093; 110TexCr42, 7SW(2d)97; 110TexCr269, 8SW(2d)117; 110TexCr276, 8SW(2d)118; 110TexCr306, 8SW(2d)143; 110TexCr548, 9SW(2d)1032(3dcase); 112TexCr222, 15SW(2d)1045; 112TexCr431, 17SW(2d)55; TexCr 20SW(2d)781; 113TexCr484, 22SW(2d)459; 113TexCr354, 22SW(2d)662; 113TexCr462, 22SW(2d)922; TexCr 23SW(2d)371; TexCr 24SW(2d)829; TexCr 24SW(2d)1093(1stcase); TexCr 25SW(2d)860; TexCr 26SW(2d)202; TexCr 26SW(2d)265; TexCr 32SW(2d)461; NS [1930] 3DomLR312. But see 223Ky762, 4SW(2d)419. [a] 113TexCr382, 21SW(2d)1054(1stcase). [b] (2) In such case refusal to charge that state's case rests solely on circumstantial evidence is error. 205Iowa1043, 218NW939.

1008–5 175Ark1169, 1SW(2d)1006; 68CalA457, 229P974; 86CalA298, 260P901; 203Iowa918, 210NW961.

1009–6 13F(2d)777; 23F(2d)156; 34F(2d)406 (inclusion of circumstantial evidence does not require instruction on theory that case is based upon circumstantial evidence); 40F(2d)164; 40F(2d)338 (where undisputed facts were inconsistent with innocence); 20AlaA454, 103S912; 21AlaA653, 111S648; 169Ark345, 275SW666; 171Ark759, 286SW944; 172Ark983, 291SW85; 174Ark1078, 298SW357; 175Ark120, 298SW867; 176Ark916, 5SW(2d)946; 177Ark549, 7SW(2d)2; 160Ga593, 128SE796; 160Ga899, 129SE436; 34GaA178, 128SE689; 36GaA17, 135SE443; 36GaA582, 137SE412; 38GaA368, 144SE9; 38GaA360, 144SE14; 40GaA265, 149SE301 (where state's case does not depend entirely upon circumstantial evidence); 40GaA662, 150SE919; 40GaA736, 151SE405; 43Ida564, 253P842; Ida 290P722; 325Ill 337, 156NE378; Ill 173NE55; 199Ind489, 158NE480; 200Ind557, 159NE545; Iowa229NW231; 118Kan620, 236P849; 120Kan177, 243P326; 120Kan314, 243P265; 214Ky544, 283SW385; 161La296, 108S543; 170Minn504, 212NW894 [citCJ]; Mo 256SW1043; Mo 270SW360; Mo 270SW375; Mo 281SW960; Mo 285SW445; 315Mo 156, 285SW718; Mo 285SW723; 316Mo 229, 289SW845; 316Mo 55, 289SW890; Mo 292SW422; 317Mo 388, 295SW82; 317Mo 336, 295SW1076; Mo 296SW128; 317Mo 865, 297SW73; Mo 30SW(2d)132; Mo 30SW(2d)763; MoA 281SW123; MoA 8SW(2d)1075(2dcase); 82Mont165, 266P386; 53ND931, 208NW566; 35OklCr279, 250P544, 49ALR1129; OklCr 275P1070(2dcase); OklCr 276P791; OklCr 280P851(2dcase); OklCr 281P818(1stcase); OklCr 282P179; OklCr 287P727(2dcase); OklCr 288P351(3dcase); 137SC391, 135SE361; 159Tenn674, 21SW(2d)400; 99TexCr504, 270SW555; 99TexCr534, 270SW1017; 100TexCr98, 272SW134; 100TexCr195, 272SW469 (though intent inferred from circumstances); 100TexCr512, 271SW625; 100TexCr545, 272SW157; 100TexCr557, 276SW694; 100TexCr649, 274SW564; 101TexCr267, 275SW837; 101TexCr346, 276SW244; 101TexCr401, 276SW242; 101TexCr545, 276SW263; 103TexCr315, 280SW591; 103TexCr364, 280SW804; 104TexCr328, 281SW873; 104TexCr168, 283SW173; 104TexCr308, 283SW817; 104TexCr420, 284SW545; 105TexCr19, 284SW955; 105TexCr26, 285SW329; 105TexCr39, 285SW823; 105TexCr224, 288SW198; 105TexCr522, 289SW392; 106TexCr127, 290SW1100; 106TexCr95, 291SW233; 106TexCr524, 293SW821; 107TexCr623, 298SW567; 107TexCr559, 298SW569; 107TexCr571, 298SW580; 108TexCr48, 299SW254; 108TexCr245, 299SW909; 108TexCr448, 1SW(2d)625; 109TexCr177, 3SW(2d)435; 109TexCr218, 3SW(2d)816; 109TexCr258, 4SW(2d)56; 109TexCr224, 4SW(2d)69; 109TexCr403, 5SW(2d)141; 109TexCr448, 5SW(2d)154; 110TexCr456, 7SW(2d)530; 110TexCr460, 9SW(2d)259; 110TexCr460, 9SW(2d)259; 110TexCr430, 10SW(2d)108; 111TexCr205, 13SW(2d)80; 111TexCr226, 13SW(2d)87; 112TexCr341, 16SW(2d)1098; 112TexCr307, 17SW(2d)56(2dcase); 113TexCr608, 21SW(2d)1063; 113TexCr583, 22SW(2d)918; TexCr 26SW(2d)251(2dcase); TexCr 27SW(2d)194; TexCr 27SW(2d)221; TexCr 28SW(2d)138; TexCr 28SW(2d)148; TexCr 28SW(2d)537(2dcase); TexCr 28SW(2d)804; TexCr 29SW(2d)

77[7] (holding evidence to be direct); TexCr 31SW(2d)647. [a] 100TexCr195, 272SW469; 110TexCr230, 8SW(2d)165. [f] **Accomplice.**–110TexCr306, 8SW(2d) 143 [g] **Where evidence is positive,** instruction on circumstantial evidence is properly refused. 34F(2d)406. [h] **Instruction dealing with sole reliance on circumstantial evidence** is properly refused where state did not rely entirely thereon. 181Ark661, 27SW(2d)783. [i] **Facts held not to call for charge on circumstantial evidence.**–Ida 290P722.

1009–7 169Ark286, 273SW1035; 37GaA 632, 141SE317; 321 Ill 397, 152NE149; 329 Ill 352, 160NE564; 332 Ill 476, 163 NE798; 202Iowa1067, 208NW360.

1009–7½–New. Where there is no circumstantial evidence in case, instruction thereon is error. 325 Ill 225, 156NE281.

1009–8 32F(2d)992; CalA 292P654; 199 Ind55, 155NE203; 316Mo 229, 289 SW845; Mo 289SW961 (prosecution for larceny); 321Mo 870, 12SW(2d)469; 100 TexCr195, 272SW469 (that defendant killed deceased); 105TexCr374, 288SW 230; 108TexCr131, 299SW408; 109 TexCr251, 4SW(2d)74; 110TexCr460, 9 SW(2d)259; 110TexCr460, 9SW(2d)259; TexCr 12SW(2d)208(2dcase); 113TexCr 535, 21SW(2d)503; 113TexCr395, 22 SW(2d)136; TexCr 24SW(2d)427(2d case). [a] **Instruction held required in** prosecution for burglary where defendant's statements amount at most to confessions of theft. 109TexCr42, 2SW (2d)861.

1009–8½–New. Claim that defendant's admissions were made through fear does not warrant charges on circumstantial evidence. 105TexCr374, 288SW230.

1009–8½–New. But if there is doubt whether the alleged statement amounted to a confession, an instruction should be given. 109TexCr251, 4SW(2d)74.

1010–10 106TexCr55, 289SW161; 110 TexCr456, 7SW(2d)530.

1010–12½–New. Where the state makes out a case without resorting to circumstantial evidence, a charge on circumstantial evidence is unnecessary. 317Mo 284, 295SW550; 317Mo 276, 295SW554.

1010–12⅔–New. The necessity for an instruction on circumstantial evidence depends on the facts of each particular case. 107TexCr623, 298SW567.

1010–13 166Ga512, 143SE896; 48 Ida 439, 282P489. [a] (1) 36GaA762, 138 SE245. [b] (1) 113TexCr98, 18SW921.

1010–14 33GaA680, 127SE891; 36GaA 653, 137SE912. [a] (1) 194Cal 1, 227P 156; 163Ga186, 136SE72; 166Ga758, 144SE301; GaA 155SE775(1stcase); 45 Ida73, 260P694; 48 Ida439, 282P489; 321 Ill 397, 152NE149; 203 Iowa929, 210 NW465; 173Minn368, 217NW378; 49 Nev386, 248P48; 322Mo 1173, 18SW(2d) 19; 58ND82, 224NW878; ND 228NW 453; 119 Or641, 249P635; 29PortoRico 961; 137SC145, 134SE885; 139SC539, 138SE352; 156SC63, 152SE825(2dcase); 49SD532, 207NW465; 100TexCr368, 272 SW781; Utah 279P953; 147Va692, 137 SE603; 136Wash106, 238P920; 101WVa 356, 132SE728; 104WVa617, 141SE7. [b] (1) 22AlaA290, 115S68; 23AlaA70, 121S8; 86CalA298, 260P901; 336 Ill 251, 168NE292; Ind 253P842; 150Miss206, 116S746; OklCr 277P401(2dcase); OklCr 287P1045; 105TexCr470, 289SW57.

1010–15 21AlaA437, 109S181; 36GaA 653, 137SE912.

1010–16 [a] 166Ga512, 143SE896.

1011–17 32F(2d)127. [a] **Instructions held erroneous.**–330 Ill 532, 162NE196.

1011–19 53ND931, 208NW566.

1011–20 213Ala169, 104S438 (request properly refused as misleading); 166 Ga758, 144SE301 (not misleading); 53 ND931, 208NW566; 54SD417, 223NW 337; 113TexCr98, 18SW(2d)921(2d case). [a] 329 Ill 352, 160NE564. [b] **Instructions held not vague and confusing.**–166Ga512, 143SE896; Ga 154SE 332.

1011–20½–New. Court may properly charge that the state relied on circumstantial evidence for a conviction. 100 TexCr657, 274SW574.

1011–21 337 Ill 259, 169NE206.

1011–23 49SD532, 207NW465.

1011–25 7F(2d)28; 13F(2d)777; 23 AlaA419, 126S414; 176Ark916, 5SW(2d) 946 (only where evidence is wholly circumstantial); 163Ga313, 136SE154; 36 GaA653, 137SE912; 45 Ida73, 260P694; 118Nebr360, 224NW855; OklCr 267P 494; 288Pa74, 135A538; 98PaSuper586; Utah 289P100. [a] 165Ga55, 139SE877; 45 Ida73, 260P694; 48 Ida439, 282P489. [b] 43 Ida564, 253P842; 48 Ida335, 282 P93 (where evidence is direct and corroborated). [d] **Requests improperly refused.**–Wyo 283P151.

1012–26 13F(2d)777; 45 Ida73, 260P 694. [a] 45 Ida73, 260P694.

1012–27 13F(2d)777; 48 Ida439, 282P 489.

1012–27½–New. , or when the state does not rely entirely upon circumstantial evidence. 177Ark509, 7SW(2d)802.

1012–28 215Ala42, 109S109; 22AlaA 648, 119S512. See also 213Ala169, 104S 438.

1012–30 82CalA700, 256P281.

1012–34 [a] (3) Other instances. 48 Ida439, 282P489.

1012–36 200 Ind557, 159NE545.

1012–36 142Wash653, 254P445.

1012–39 94Fla469, 114S450; Nev 282P 1024; 195Wis181, 217NW697. [b] 199 Iowa815, 202NW519.

1012–40 22AlaA517, 117S608; 39GaA 577, 147SE776(1stcase); Mo 218SW(2d) 758(3dcase). But see 189NC799, 128SE 152.

1012–41 337 Ill 413, 169NE210; Mo 21 SW(2d)758(3dcase); MoA 281SW123; 109TexCr116, 3SW(2d)94. [b] **Cautionary instructions as to credibility are within discretion of court.** 312Mo 373, 278SW1016. [c] **Cautionary instructions as to credibility must be based on evidence.**–312Mo 373, 278SW1016.

1013–42 160Ga593, 128SE796; 166Ga 160, 142SE685; 35GaA497, 134SE121; 308Mo 695, 274SW470; 101Vt30, 139A 918.

1013–43 237 IllA178; Wyo 288P13.

1013–46 72CalA102, 236P944; 321 Ill 181, 151NE485; 204 Iowa137, 214NW 531; 32NM500, 258P1009.

1013–50 [a] (1) 23AlaA29, 119S864 (1stcase); 99CalA409, 278P885; 105 Conn757, 136A475; 162Ga78, 132SE 393; 163Ga206, 135SE748; 166Ga160, 142SE685; 37GaA632, 141SE317; 41 GaA618, 154SE201; 333 Ill 624, 165NE 141; Iowa 223NW554 (child witnesses); 124Kan405, 260P976; Mo 270SW 275; 312Mo 373, 278SW1016; Mo 20 SW(2d)529(1stcase); 283Pa468, 129A 453; 94PaSuper531; 53SD205, 220NW 518; 101Vt124, 141A686. (2) 162Ga78, 132SE393. [b] 21AlaA234, 109S189; 23 AlaA419, 126S414; 23AlaA579, 129S312 (3dcase); 321 Ill 181, 151NE485; 325 Ill 337, 156NE378; Mo 2SW(2d)756; 116Nebr563, 218NW416; 53SD205, 220 NW518; 69Utah268, 254P142.

1013–51 21AlaA631, 111S190; 34NM 423, 282P870 (requested instruction properly refused).

1013–52 22AlaA547, 117S606.

1013–53 163Ga206, 135SE748; 27 Hawaii28; Ida 291P313.

1014–54 37GaA520, 140SE788; 37GaA 507, 140SE791; 242Mich532, 219NW 641.

1014–56 55ND194, 212NW857, 860 [cit CJ]; 53SD205, 220NW518, 520 [quot CJ].

1014–57 17F(2d)12; 96CalA183, 273P 836; 46 Ida8, 265P666; 55ND194, 212 NW857; 103WVa380, 137SE536.

1014–59 [a] But see 21AlaA532, 109S 611.

1014–60 21AlaA95, 105S705 (witness testifying contradictorily).

1014–65½–New. A substantially correct instruction is not erroneous because it is largely in words of preponderance of the evidence rule in the code, where the jury duly instructed as to reasonable doubt and determination of issues by preponderance of evidence not intimated. 160Ga520, 128SE756.

1014–65½–New. It is proper to instruct that the jury may discard testimony of a witness showing malice or anger toward defendant. 21AlaA95 105S705.

1014–67 116Nebr73, 215NW789, 792 [citCJ].

1014–68 144Wash370, 258P24.

1014–69 116Nebr73, 215NW789, 792 [citCJ]; 117Nebr531, 221NW420(2d case). [a] 22AlaA523, 117S610; 91Pa Super447; 144Wash370, 258P24. [b] (1) 86Colo 35, 278P594, 65ALR1260. [d] **Detectives regularly employed by city.**–118Nebr267, 224NW274. [e] **County sheriffs and their deputies** are not within rule relative to scrutinizing testimony of detectives. 118Nebr812, 226 NW438.

1015–72 246Mich429, 224NW387. [a] 176Ark88, 2SW(2d)50; Iowa 230NW 865.

1015–80 22AlaA432, 116S503; 175Ark 391, 299SW386; 163Ga206, 135SE748; 37GaA520, 140SE788; 327 Ill 305, 158 NE729 (instruction held erroneous); 248Mich553, 227NW708; Mo 273SW 1060; 315Mo 232, 285SW712; 316Mo 66, 289SW910. See also Mo 318SW(2d) 39. [c] (1) 33GaA682, 127SE668; 53 ND558, 207NW226. (2) 74Mont166, 239P1000; 191Wis652, 211NW785. (3) Court may, if facts seem to require it, caution jury by general instruction to consider whether interest of witness is apparent and if it is, to weigh testimony accordingly. 74Mont166, 239P 1000. (4) Instruction must be general in character, not single out particular witness and call attention of jury to circumstances evincing his interest. 74 Mont166, 239P1000. [e] (2) Instruction that testimony of witnesses for defendant and prosecution, jointly indicted with defendant, be scrutinized, is held proper where all confessed. 17F (2d)66. [h] **Instruction may direct consideration of character,** though there is no direct evidence on question. Mo 270 SW275.

1016–83 327 Ill 305, 158NE729.

1016–85 105Conn757, 136A475, 477 [quotCJ]; 167Ga326, 145SE654; 40GaA 265, 149SE301 (contradictory statements); 316Mo 213, 292SW721. [a] 163Ga206, 135SE748; 163Ga313, 136SE 154; 36GaA645, 137SE795; 46 Ida456, 268P1; 203 Iowa929, 210NW465; 316 Mo 213, 292SW721. [b] (1) 218Ala527, 119S215; 105Conn757, 136A475; 200 Iowa636, 204NW307; 206 Iowa629, 221 NW59; 106TexCr205, 291SW901. (2) Bad in form. 23AlaA363, 125S685.

1017–94 23AlaA241, 124S507(2dcase).

1017–95 218Ala527, 119S215.

1017–96½–New. Where charge refers to defendant's interest and states that there is testimony impeaching his veracity, defendant is entitled to charge that his testimony cannot be capriciously rejected. 21AlaA407, 108S645.

1017–96½–New. Where a witness was asked as to his previous conviction for a felony, and admitted it, the court should instruct the jury that such evidence only goes to the credibility and weight of his testimony. 208 Iowa1049, 226NW770.

1017–98 317Mo 276, 295SW554; 115 Nebr535, 213NW839. [c] **Whenever evidence is conflicting,** it is discretionary with court to give instruction. Mo 270 SW275. [d] **Instruction held warranted.**–Mo 289SW645; Mo 289SW829.

1017–99 Ala 127S514. But see 309Mo 155, 274SW734; Mo 289SW645. [a] **Instruction in prosecution for murder as to effect to be given by jury to testimony** of any witness that they believed had sworn falsely, etc., held not erroneous, because omitting words "willfully" or "knowingly." 149Wash440, 271P64.

1017–3 21AlaA165, 106S349; 23AlaA 427, 126S497(1stcase); 23AlaA387, 127 S800(2dcase); 156Miss612, 126S390(2d case); 157Miss800, 128S764 (holding instruction erroneous for disjunctive connection of theories on which testimony could be disregarded).

1017–4 21AlaA31, 104S871.

1017–7 Mo 270SW275; 115Nebr535, 213NW839.

1017–8 23AlaA241, 124S507; 23AlaA 221, 123S286; Kan 291P945; Mo 270 SW275; 309Mo 155, 274SW734; 309Mo 498, 274SW734; MoA 11SW(2d)1100 (in view of evidence); 105WVa549, 143

SE307. [c] **Instructions held sufficient.**–124Kan405, 260P976.

1018–9 Ind 171NE192 (instruction held not erroneous).

1018–12½–New. A charge that, if the jury believed from the evidence that the state's witness testified falsely on a preliminary trial, this would justify the jury in disbelieving her testimony on the trial, and in that event the jury should acquit, has been held properly refused. 22AlaA636, 118S911.

1018–14 34GaA222, 129SE7. But see 192Wis391, 212NW662.

1018–15 54SD375, 223NW320.

1018–19 26F(2d)461; 20AlaA540, 103S604; 68CalA758, 230P191; 337 Ill 333, 169NE169.

1018–20 39GaA462, 147SE402(1stcase); 200 Iowa483, 203NW806. But compare 172Ark156, 287SW1026. [b] 37GaA165, 139SE132.

1018–21 TexCr 31SW(2d)453.

1019–23 131Ark1145, 29SW(2d)670 (holding instruction discretionary); Ark 31SW(2d)527; 68CalA610, 230P13. [a] **Thus it is not error to refuse such charge where it tends to mislead jury to disregard interest of defendant in weighing his evidence.** 213Ala555, 105S664.

1019–24 79CalA20, 248P1027; 141Wash 337, 251P290.

1019–25½–New. An instruction on the credibility of witnesses is within the discretion of the court. Mo 292SW440.

1019–26 [a] 41F(2d)598; 163Ga313, 136SE154; 165Ga210, 140SE625; Ga 155SE38; 35GaA388, 133SE273; 41GaA618, 154SE201; 338 Ill 353, 170NE265; Ill 172NE806; Ill 173NE155; Ill 173NE474; 200 Iowa483, 203NW806; 204 Iowa137, 214NW531; Iowa 229NW255; Mass 169NE790; 246Mich459, 224NW605; 294Pa190, 144A127. [b] 43 Ida 459, 252P673; 100TexCr95, 271SW629.

1019–27 20AlaA660, 104S771.

1019–28 20AlaA606, 104S551. [b] **Instruction held not erroneous** as tending to confuse jury. 160Ga520, 128SE756.

1019–29 200 Iowa483, 203NW806; Miss 130S112(2dcase); 187Wis122, 203NW749.

1019–30 170Ga886, 154SE363; 35GaA388, 133SE273; 38GaA452, 144SE140 (1stcase); 300Pa375, 150A649.

1019–31 137Wash297, 242P36.

1019–32 332 Ill 222, 163NE694; 30 OhAS9, 164NE64(1stcase).

1019–33 89CalA615, 265P349; 330 Ill 516, 162NE133; Iowa 228NW307; 105 WVa298, 142SE254; 187Wis122, 203NW749.

1020–34 21AlaA696, 111S647; 200 Iowa 483, 203NW806; NJ 150A367.

1020–36 187Wis122, 203NW749.

1020–38 165Ga210, 140SE625 (instruction held not violative of rule). [a] **Instruction that no greater presumption attaches to defendant's testimony than to that of other witnesses** is improper in prosecution for rape where only conflicting testimony is that of prosecutrix. 90CalA354, 265P891.

1020–39 20AlaA606, 104S551. But see CalA 289P212.

1020–39½–New. Instructions directing consideration of witness' ill will or prejudice against defendant are properly refused. 326 Ill 104, 157NE76.

1020–40 28Hawaii546; 146Wash391, 263P180.

1020–41 21AlaA87, 105S700; 218Ala 527, 119S215; 21AlaA19, 104S872; 21 AlaA278, 107S734; 102Conn708, 130A 184; 326 Ill 104, 157NE76; 200 Iowa 483, 203NW806; 204 Iowa1131, 216NW 704; 207 Iowa212, 220NW110; 82NH 518, 136A358; NC 154SE604; 53ND 558, 207NW226; 141Wash337, 251P 290; 187Wis122, 203NW749. But see 21AlaA283, 107S721. [a] 20AlaA562, 103S916; 21AlaA256, 107S222; 21AlaA 283, 107S721; 79CalA101, 248P1078; 324 Ill 224, 154NE909.

1021–43 20AlaA540, 103S604. But see 21AlaA19, 104S872.

1021–44 255Mass9, 151NE74, 44ALR 579. [b] 168Ga731, 149SE23; 35GaA 383, 133SE311; 255Mass9, 151NE74, 44 ALR579.

1021–45 168Ga731, 149SE23. [a] 169 Ga142, 149SE887; Ga 155SE28. See also 160Ga520, 128SE756. [c] 38GaA 356, 144SE9.

1021–46 [a] (2) Charge that defendant's statement was not evidence and that in considering case, jury must differentiate between sworn testimony and statement not under oath is held proper. 255Mass9, 151NE74, 44ALR579.

1021–46½–New. Where defendant has been sworn as a witness, a charge as to the right of defendant to make an unsworn statement and as to its weight and effect is neither necessary nor proper. 163Ga878, 137SE378.

1021–48 7F(2d)458; AlaA 129S714(2d case); 46 Ida456, 268P1 (instruction held not erroneous); Ida 291P313; 149 Miss412, 115S552.

1021–49 101WVa703, 133SE379.

1021–50 101WVa703, 133SE379.

1021–51 Ida 291P313.

1021–51½–New. Where defendant admitted his testimony was false, charge that such false testimony together with other testimony might warrant inference of guilt is proper. 137SC75, 134SE 514.

1021–52 22AlaA380, 115S853; 85CalA 672, 259P1020; 202 Iowa1067, 208NW 360; 151Miss617, 118S447; Mo 273SW 1058; 52ND659, 204NW350 (without request); 104TexCr628, 286SW234. But see 172Ark156, 287SW1026. [a] 6F (2d)809; 96Fla68, 117S694; 112TexCr 203, 17SW(2d)813. [c] 130Misc371, 224 NYS5. [d] 52ND659, 204NW350. [e] **That instruction is given on court's own motion** does not render it erroneous. 169Ark326, 275SW667. [f] In Ohio.–171 NE26.

1022–53 154Wash667, 283P195 (instruction properly refused where defendant testified). See also 189NC799, 128 SE152. But see 155Wash80, 283P671. [a] 324 Ill 428, 155NE337. [b] (3) Other instances. Oh 171NE26.

1022–54 200 Iowa892, 205NW517; 128 Kan712, 280P754; 153Wash379, 279P 1102.

1022–55 Mo 22SW(2d)809.

1022–56 7F(2d)865; 173 Ark1115, 295 SW29; 169Ark326, 275SW667; 206 Iowa816, 221NW521; 53SD446, 221NW 56; 150Wash411, 273P182; 104WVa 330, 140SE55, 56ALR257. But see 99 CalA515, 278P1056(2dcase).

1022–57 75CalA447, 243P67; 108Conn 454, 143A561; 36Wyo 466, 256P1040.

1022–57½–New. It is not error for the court to charge that no inference of guilt could be drawn from defendant's failure to testify where no request for such instruction is made. 5F(2d)45.

1022–57½–New. Constitutional immunity from comment on failure to testify does not apply where accused voluntarily testified. 19F(2d)421.

1022–57¼–New. Statement that certain circumstances were not explained cannot be regarded as comment on failure to testify. NB [1926] 4DomLR765.

1022–57½–New. It is perhaps the better rule for the judge to say nothing upon the point unless requested. 20 F(2d)782.

1022–58 164Ga128, 138SE67.

1022–59 19F(2d)421.

1022–60 NJSup 136A597.

1022–61 20AlaA547, 104S48; 162La 299, 110S482. [a] (1) 7F(2d)865; 199 Cal471, 250P168.

1023–63 NJ 150A361; NJ 151A756.

1023–66 12F(2d)683; 32F(2d)602.

1023–67 6F(2d)809; 105NJL352, 144 A612; 61OntL497, [1928] 1DomLR619. [a] But see 324 Ill 484, 155NE329.

1023–69 100TexCr415, 273SW573.

1023–70 36F(2d)899 (witness just as available, in control of government).

1023–71½–New. Refusal of requested charge that failure to produce evidence raises no presumptions against accused is not error. 164Ga128, 138SE67.

1023–71½–New. If state makes improper use of failure of accused to call a codefendant in his behalf court should instruct that such failure cannot properly be considered against accused. 203 Iowa1008, 213NW603.

1023–72 71CalA181, 235P72 (rule held inapplicable). But see 258Mass410, 155 NE448.

1023–77 36GaA103, 135SE758; 192NC 490, 135SE324; 285Pa49, 131A657; Utah 290P962; 141Wash132, 250P951.

1023–78 See also 320Mo 327, 7SW(2d) 273.

1023–79 36GaA103, 135SE758; 218Ky 798, 292SW467; 167Minn74, 208NW528; Mo 23SW(2d)87; 244NY147, 155NE79; 192NC533, 135SE345; NC 153SE605; 35 OhA539, 172NE618. But see 91CalA 44, 266P581.

1024–80 36GaA111, 135SE521; 44 Ida 636, 258P553; Ill 172NE64 (may instruct); 163La750, 112S708; 168Minn 444, 210NW286; 171Minn173, 213NW 923; 141Miss841, 105S784, 105S789; 142Miss110, 107S418; 116Nebr600, 218 NW401 [disappr 44Nebr643, 62NW 1090]; 55ND846, 215NW552; Utah 276 P166. But see OklCr 289P788.

1024–80½–New. Court should charge that jury has right to fix degree of crime but need not reiterate such right in every part of the charge. 285Pa49, 131A657.

1024–81 41GaA836, 155SE100. [a] **Instruction held proper.**–41GaA621, 154SE 287(1stcase).

1024–83 [a] **Charge as a whole, held sufficient.**–289Pa284, 137A261.

1024–85½–New. Statement of the contentions or of certain phrases of the evidence accompanied with mere enunciation of a legal principle is not sufficient. 192NC533, 135SE345.

1024–85¼–New. Where an information charges both a completed crime and an attempt, the court if required to submit both charges should instruct the jury first to consider the consummated crime and to consider the charge of attempt only if they find defendant not guilty of consummated crime. 144Wash367, 258 P20.

1024–85¼–New. An instruction that an offense of the nature charged constituted a crime of high misdemeanor is erroneous. 93CalA77, 268P1071.

1024–86 35Ariz432, 280P672; 93CalA 62, 268P1078; 27Hawaii28; Ida 288P 894; Ill 173NE383; 203 Iowa918, 210 NW961; 206 Iowa373, 220NW106; 207 Iowa744, 223NW548; 125Kan111, 263P 1051; 128Kan659, 280P780; 232Ky214, 22SW(2d)629; 163La750, 112S708; 237 Mich654, 212NW958; 170Minn343, 212 NW588; 80Mont181, 260P138; Utah 279P55; Alta [1930] 4DomLR462.

1025–91 37GaA338, 140SE396; 200 Iowa636, 204NW307; 209Ky10, 272SW1.

1025–93 200 Iowa636, 204NW307.

1025–96 316Mo 55, 289SW890; 320Mo 288, 6SW(2d)866; Mo 29SW(2d)135; 102NJL94, 131A292; OklCr 275P387; SC 155SE409; 103TexCr304, 280SW811; 111TexCr381, 12SW(2d)1024. [a] 163 Ga878, 137SE378; 316Mo 55, 289SW 890; 102NJL94, 131A292. [b] 95CalA 257, 272P797; 160Ga520, 128SE756 (that all defendants should receive equal punishment). [f] **Where parole may be granted** if life imprisonment is imposed by jury but not if death is imposed, it is not error to charge to such effect. 102 NJL94, 131A292.

1026–99 308Mo695, 274SW470 (it is not error to instruct jury in case of conviction to assess only punishment fixed by statute for offenses). See also OklCr 290 P931.

1026–1 318Mo 1222, 2SW(2d)780; OklCr 280P862(2dcase). [a] (2) Mo 285 SW976.

1026–5 108TexCr69, 299SW245 (instruction held not more inclusive than statute and not prejudicial); 112TexCr 332, 16SW(2d)814.

1026–7 323 Ill 540, 153NE727; 200 Ind 460, 164NE632; 200 Iowa892, 205NW 517; 200 Iowa884, 205NW518; 204 Iowa130, 214NW708; 204 Iowa118, 214 NW710; 317Mo 293, 295SW743; 31NM 436, 246P897. But see 206 Iowa816, 221 NW521.

1026–8 200 Ind460, 164NE632; Ind 166 NE661; 118Nebr267, 224NW274; 284 Pa311, 131A229.

1026–9 164Ga88, 138SE65; 325 Ill440, 156NE375; 116Nebr582, 218NW386, 58 ALR1322 (proper to omit provision as to penalty).

1026–10 Mo 29SW(2d)89.

1026–10½–New. It is error to charge that if defendant is convicted court will not impose maximum punishment. 221

AppDiv139, 222NYS683.

1026-10½-New. The jury should be instructed as to their authority under mandatory statute to recommend the place of punishment. 78CalA702, 248P960.

1026-13 31NM436, 246P897; 191NC378, 131SE743, 746 [citCJ].

1027-15 [a] 160Ga250, 127SE742; 161Ga332, 131SE80; 41GaA378, 153SE76 (2dcase). [c] **Instructions held erroneous.**-SC 155SE408; SC 155SE409.

1027-16 90Fla105, 105S840.

1027-17 31NM436, 246P897 (jury should not be instructed as to limits of punishment). [a] 161Ga332, 131SE80; 163Ga43, 135SE410; Ga 155SE11; 40GaA508, 150SE455; 324 Ill 190, 154NE900; 34NM217, 279P947.

1027-18 161Ga332, 131SE80.

1027-19 96Fla318, 117S859. See also 168Ga765, 149SE49.

1027-19½-New. In a murder prosecution, failure of the court to charge that the jury could find a verdict of manslaughter, with a recommendation to mercy of the court, has been held not prejudicial error, there being no statute providing for a verdict of that kind, although it is customary of most circuit judges so to charge, the punishment imposed being very lenient. 146SC275, 143SE817.

1027-20 169Ga468, 151SE34 (instruction submitting several verdicts and directing one of jury to select verdict held proper); 150SC341, 148SE184.

1027-22 148 Miss1, 113S627; 159Tenn451, 19SW(2d)276 (general verdict held proper); 106TexCr615, 294SW561. But see 103TexCr103, 280SW200. [a] Ga 154SE337; 199 Ind122, 155NE549. [b] See also CalA 258P656.

1027-25 93CalA557, 269P961 (form held not to limit jury's findings). But see 292Pa506, 141A476. [c] **Failure to submit form of verdict of not guilty** held not erroneous in view of testimony showing unlawful homicide had been committed. 22 OhA304, 153NE865. [d] **Form held sufficient.**-Wis 229NW44.

1027-27½-New. In a prosecution for possession of certain articles used in the manufacture of intoxicating liquor the court should instruct the jury that, in a verdict of guilty, they should specify the articles of which they find defendant had possession. 217MoA524, 269SW410.

1027-27½-New. Where the facts are few and simple and the legal effect is certain, the court does not err in refusing to instruct that the jury may find a special verdict if doubtful as to their legal effect. 78CalA455, 248P927.

1027-28 39GaA592, 148SE17(1st case); 142SC37, 140SE251 (charge on form of verdict held not confusing); 150SC452, 148SE474. See also 335 Ill 432, 167NE10; 316Mo 144, 290SW142. [a] **Where two counts grow out of same occurrence,** court should instruct that jury may find defendant guilty on either count but not on both. 87PaSuper66. [b] **Instructions held not misleading or confusing.**-197 Ind575, 150NE371. [c] **Instructions held not erroneous.**-200 Ind112, 161NE565.

1027-28½-New. ; but an instruction permitting the jury to return an omnibus verdict without evidence to sustain it is improper; 198 Ind61, 152NE274.

1028-34 218Ky721, 292SW307; Mo 23SW(2d)183; 134SC386, 132SE838. [a] 163Ga878, 137SE373; 134SC386, 132SE838; 138SC421, 136SE736.

1028-35 [b] **Instruction on joint defendant's right not** to incriminate himself held proper. 41GaA300, 152SE609.

1028-41 213Ala390, 104S773; 20AlaA660, 104S771.

1028-42 213Ala390, 104S773; 20AlaA660, 104S771; 21AlaA255, 107S230; 21AlaA378, 108S646; 90Fla779, 107S242; 151Wash610, 276P862.

1028-43 90Fla779, 107S242.

1028-44 90Fla779, 107S242; Ind 168NE692; Mo 274SW28. Contra 213Ala390, 104S773; 20AlaA660, 104S771; 21AlaA489, 109S521.

1028-45 213Ala169, 104S438 (properly refused as covered by oral instructions); 22AlaA564, 117S801; 80CalA328, 251P823; 199 Ind746, 161NE8; 100WVa213, 130SE451. Contra 213Ala390, 104S773; 20AlaA660, 104S771. [a] **Instructions held erroneous or properly refused.**-213 Ala169, 104S438. [b] **Defendant is entitled** to instruction requiring unanimous verdict. 23AlaA496, 129S305.

1028-46 79CalA20, 248P1027; 79CalA519, 250P211; 86Colo35, 278P594, 65ALR1260; 104NJL325, 140A566, 567 [citCJ]. [a] **Cautionary instruction on request.**-49SD456, 207NW456.

1029-48 96CalA632, 274P601. [b] **Instructions held proper.**-SD 228NW240.

1029-49 4F(2d)781; 49SD456, 207NW456. But see 153Va909, 150SE407.

1029-50 22AlaA62, 112S184; 21AlaA486, 109S759; 55AppDC306, 5F(2d)267; 143Va510, 129SE360; 153Va954, 151SE286; 100WVa213, 130SE451. See also 49SD456, 207NW456.

1029-52 5F(2d)471; 20AlaA457, 103S902.

1029-54½-New. No error in refusing to charge that each juror is entitled to his own conception of what a reasonable doubt is. 21AlaA165, 106S349.

1029-54½-New. It is error to refuse to charge, on request, that defendant is entitled to the individual opinion of the jurors. 80CalA328, 251P823.

1029-55 20AlaA606, 104S551; 21AlaA551, 108S987; 49SD456, 207NW456.

1029-56 90Fla779, 107S242.

1030-58 But see Ind 166NE304.

1030-60 53ND916, 208NW388.

1030-61½-New. It is not error to instruct the jury that they have a right to take into consideration matters of common knowledge. 53ND916, 208NW388.

1030-66 22AlaA556, 117S761; 160Ga593, 128SE796; 163Ga80, 135SE408; 137Wash297, 242P36.

1030-70 252Mass158, 147NE553.

1030-71 23AlaA378, 125S793. [a] 105Conn757, 136A475; 165Ga210, 140SE625; 320Mo319, 6SW(2d)857. [d] **Instruction that court had intimated to counsel what he was going to charge the jury and notwithstanding counsel had seen fit to argue case to jury** has been held erroneous as virtual instruction not to consider argument, and as impairment of constitutional right to representation by counsel, although counsel did argue. 189NC799, 128SE152. [e] **Instruction that it is business of counsel to make their side appear best** side but that court and jury are under different obligations, is not approved. 189NC799, 128SE152.

1030-72 Mo 30SW(2d)59; 33 OhA1, 168NE550 (sufficient compliance with statute).

1030-73 Mo 278SW718; 33 OhA1, 168NE550 (charge at conclusion of evidence).

1030-74 But see 27 OhA272, 161NE37; 29 OhA495, 163NE923.

1030-75 39GaA826, 148SE608(2dcase); Mo 278SW718; 29PortoRico 961 (right of court to recall jury is clear and reversal proper only where it is found that additional instructions have prejudiced defendant).

1031-77½-New. Incorporating in charge statement as to duty of juror is not erroneous. 102Conn708, 130A184.

1031-81 141Wash337, 251P290.

1031-83 See also 78CalA395, 248P696.

1031-84 20AlaA467, 103S712 (elliptical charge refused); 21AlaA615, 110S696; Mo 285SW1000; 316Mo213, 292SW721 (charge held not erroneous for duplicity). [a] (1) 333 Ill 451, 164NE840; 101TexCr33, 274SW568.

1031-86 317Mo 348, 295SW754.

1031-87 35F(2d)454; 89CalA545, 265P355; 34GaA144, 128SE924; 41GaA371, 153SE101; 197 Ind491, 151NE382; Mo 285SW422; NJSup 147A496; 192NC766, 136SE121; 50ND270, 195NW567; OklCr 287P419.

1031-88 175Ark453, 299SW739; 78CalA442, 248P1061; 91CalA44, 266P581; 91CalA774, 267P587; CalA 290P102; 160Ga769, 129SE102; 36GaA83, 135SE413; 324 Ill 160, 154NE907; 198 Ind198, 152NE814; 224Ky370, 6SW(2d)483. But see CalA 291P701 (alibi); 321 Ill 157, 151NE584.

1031-89 42 Ida319, 245P685; 50ND270, 195NW567. See also Ga 154SE906. [b] **Omission of words** "prima facie," as contained in statute, held not reversible error. 104TexCr556, 286SW239. [c] **Words interpolated in instruction purporting to be in language of statute** held not to prejudice defendant. 326 Ill 104, 157NE76.

1031-91½-New. Where instructions are correct it is immaterial whether they are given in the language of the court or in that of counsel. 326 Ill 104, 157NE76.

1031-91½-New. Where the evidence is close or conflicting, the jury should be accurately instructed. 324 Ill 294, 155NE301.

1031-91¼-New. A constitutional provision requiring the use of English in judicial proceedings is not violated by the use of the term "prima facie" in an instruction, 80CalA159, 251P315.

1031-91½-New. which is defined by statute and readily understood by a person of common understanding. 80CalA159, 251P315.

1031-95 GaA 155SE786(2dcase); 324 Ill 70, 154NE448; 332 Ill 49, 163NE367; 124Kan405, 260P976; 214Ky228, 282SW1060; Mo 30SW(2d)59; 82Mont170, 266P400; Mont 293P309; 48Nev134, 228P582; 49ND726, 193NW310 (statute held mandatory); OklCr 275P390; 100TexCr11, 271SW380; 103TexCr456, 281SW858 (in felony cases). But see Ill 172NE743.

1032-96 124Kan405, 260P976.

1032-97 233Ky244, 25SW(2d)378; 48Nev134, 228P582; 49ND726, 193NW310; 53ND879, 207NW1000.

1032-98 106TexCr539, 293SW822 (not error to refuse to give same instruction in writing).

1032-98½-New. The length of a cautionary instruction has been held to necessitate that it be reduced to writing. 174Ark472, 295SW397.

1032-98½-New. Reference on the margin of instructions to supreme court decisions held erroneous. 324 Ill 294, 155NE301.

1032-1 174Ark472, 295SW397; 198 Ind405, 153NE890. See also 77CalA434, 246P822. [b] 315Mo 1279, 289SW792. [c] **Statutory requirement held mandatory,** when written instructions are requested. 169La684, 125S854.

1032-5 97CalA179, 275P482 (does not include colloquy between court and counsel); 82Mont170, 266P400. [a] **In Missouri.**-315Mo 1279, 289SW792.

1032-6 200 Ind557, 159NE545; 82Mont170, 266P400. 33NM449, 269P331; 101WVa632, 133SE371. See also Mont 293P309.

1032-7 197 Ind491, 151NE382; 120Kan172, 243P266; 82Mont170, 266P400; 101TexCr267, 275SW837; 102WVa462, 135SE594.

1032-7½-New. or answers by the court to questions of the jury relative to punishment attending certain verdicts. 101WVa632, 133SE371.

1033-9½-New. Written instructions may be amended by interlineations on discovery of any omission before the case is submitted to a jury. 314Mo 684, 285SW496.

1033-10 198 Ind360, 153NE772; 198 Ind405, 153NE890. But see 113TexCr357, 23SW(2d)382(2dcase).

1033-12 315Mo 232, 285SW712 (printed or hectographed).

1033-15½-New. Instruction to ignore oral part of charge has been held not to cure error in failing to give entire charge in writing. 169La684, 125S854.

1033-18 198 Ind360, 153NE772.

1034-26 [c] **Several instructions constituting single charge** may be signed as such. 97CalA179, 275P482.

1034-37 21AlaA517, 110S167.

1034-38 21AlaA310, 107S789. See also Mo 274SW43.

1034-41 34GaA176, 128SE683; 205Iowa858, 216NW759; 309Mo 155, 274SW734.

1034-43 41 Ida616, 243P359; 229Ky87, 16SW(2d)769; 108TexCr258, 18SW(2d)298.

1034-46 163La563, 112S486 (holding delivery of charge pari passu with evidence not required); 116 Or509, 241P983.

1035-50 324 Ill 101, 154NE463; 122 Or 444, 252P975.

1035-51 324 Ill 101, 154NE463; 324 Ill 224, 154NE909; Iowa 223NW554; 122 Or444, 252P975.

1035-54 23AlaA486, 127S264; 169Ark 1212, 278SW1; 171Ark1187, 285SW 356; 172Ark156, 287SW1026; 172Ark 244, 288SW904; 168Ga611, 148SE531; 324 Ill 170, 155NE39; 327 Ill 162, 158 NE462; 332 Ill 295, 163NE668, 62ALR 274; 171Minn380, 214NW265; 150Miss 206, 116S746; 322Mo 69, 16SW(2d)30; 122 Or148, 257P826; 104TexCr178, 283 SW517; 109TexCr224, 4SW(2d)69. See also Mo 289SW557; 107WVa118, 148 SE131. [a] (2) Instruction that provocation by words would not make intentional killing manslaughter held proper though not including self defense in view of other charges. 324 Ill 170, 155NE39. (3) Instructions on malice in murder prosecution held not improper for not including self defense when latter issue was separately covered. 324 Ill 170, 155NE39.

1035-56 WVa 153SE308; WVa 153SE 496.

1035-57 169Ark1212, 278SW1; 41GaA 299, 152SE597; 41GaA635, 154SE209; 319Mo 28, 3SW(2d)230; 105NJL270, 141A872; 33NM187, 262P929; 122 Or 148, 257P826; 104TexCr178, 283SW 517; 105TexCr600, 289SW689; 153Va 954, 151SE286. But see 104TexCr442, 284SW554.

1035-57½-New. and a like rule applies to an instruction on self defense. 210 Ky378, 275SW881.

1036-58 82CalA778, 256P251; 164Ga 677, 139SE349; 41GaA333, 153SE79(2d case); 199 Ind647, 158NE477; Mont 289P1037.

1036-59½-New. Failure to instruct that one defendant may be innocent though another was guilty of liquor violation is not error where implied by another instruction. Iowa 232NW636.

1036-62 12F(2d)852; 19F(2d)202; 212Ala571, 103S664; 215Ala316, 110S 476; 22AlaA59, 112S182; 216Ala356, 113S67; 23AlaA582, 129S478; 20AlaA 412, 103S697; 20AlaA540, 103S604; 20 AlaA517, 104S48; 21AlaA64, 106S52 (instruction properly refused); 21AlaA 255, 107S230; 21AlaA269, 108S75; 21 AlaA278, 107S731; 21AlaA415, 109S 122; 21AlaA481, 109S891; 21AlaA551, 109S897; 21AlaA655, 111S649; 22AlaA 93, 112S806; 22AlaA102, 112S898; 22 AlaA290, 115S68; 22AlaA570, 117S908; 22AlaA581, 118S239 [certiorari den 218 Ala169, 118S241]; 22AlaA609, 118S500; 23AlaA415, 121S499(1stcase); 23AlaA 378, 125S793; 23AlaA421, 126S416(1st case); 23AlaA448, 126S612; 23AlaA 502, 127S909; 23AlaA576, 129S320(1st case); AlaA 130S374; 171Ark203, 284 SW28; 172Ark398, 288SW926; 172Ark 983, 291SW85; 174Ark472, 295SW397; 175Ark61, 297SW828; 174Ark800, 297 SW854 (held argumentative); 175Ark 1169, 299SW40; 175Ark453, 299SW 739; 176Ark916, 5SW(2d)946; 80CalA 275, 251P826; 82CalA126, 255P233; 93CalA141, 269P194; 101CalA302, 281 P660; 160Ga520, 128SE756; 161Ga332, 131SE80; 169Ga142, 149SE887; 36GaA 84, 135SE765; 41GaA333, 153SE79(2d case); 47 Ida457, 276P39, 68ALR1061; 317 Ill 130, 148NE255; Ill 173NE467; 199 Ind18, 154NE867; Iowa 223NW 564; Iowa 229NW255; 214Ky122, 283 SW420; 140Miss265, 105S514; 317Mo 413, 297SW63; 57ND230, 221NW25; 104TexCr257, 282SW807; 107TexCr 322, 296SW669; Utah 287P909; Utah 291P307; 143Wash93, 251P838; 144 Wash446, 258P508. But see 65 Vt66, 25A905. [a] (1) 19F(2d)131; 29F(2d)103; 172Ark156, 287SW1026; 179Ark216, 15SW(2d)312; 160Ga 605, 128SE747; 33GaA818, 128SE 224; 38GaA362, 144SE51; 203 Iowa 929, 210NW465 (charging on duty of jury); 233Mich98, 206NW516; 241 Mich182, 216NW408; 168Minn381, 210 SW108; 168Minn401, 210NW402; 170 Minn441, 213NW34; 144SC452, 142SE 725; 153SC487, 151SE664. [c] **Instructions held erroneous on this ground.**-19 F(2d)202.

1036-63 12F(2d)683.

1036-65 16F(2d)434; 17F(2d)225; 215 Ala106, 109S846; 215Ala224, 110S23; 215Ala497, 118S212; 220Ala461, 125S802; 20AlaA412, 103S697; 20AlaA445, 109 S888; 20AlaA540, 103S604; 21AlaA35, 104S876 (charge referring to one of three defendants and not showing which is misleading); 21AlaA549, 105S700 (instruction properly refused); 21AlaA 234, 109S189; 21AlaA269, 108S75; 21 AlaA278, 107S734; 21AlaA300, 107S731; 21AlaA323, 108S80; 21AlaA557, 109S 899; 21AlaA577, 110S171; 21AlaA653, 111S648; 22AlaA579, 118S49; 23AlaA 493, 127S678; 23AlaA387, 127S800(2d case); 172Ark398, 288SW926; 174Ark 800, 297SW54 (held misleading); 68 CalA457, 229P974; 68CalA645, 230P193 (instruction is misleading which refers to other instructions not given); 72CalA 421, 237P767; 73CalA334, 238P770; 78 CalA554, 248P964; 79CalA373, 249P536; 94Fla163, 113S699; Ga 154SE337; 40 GaA222, 149SE149(2dcase); 334 Ill 341, 166NE65; 336 Ill 294, 168NE325; Ill 172NE819; Iowa 223NW554; 320Mo 389, 8SW(2d)20; OklCr 275P390; 118 Or5, 244P512; 126 Or560, 270P404; SC 155SE409; 48SD430, 205NW31; 101 TexCr33, 274SW568; 103WVa148, 136 SE842 (dictum); 105WVa520, 143SE 230; 40Wyo 174, 276P172. [a] 30Ariz 466, 248P39; Ariz 283P711; 179Ark 216, 15SW(2d)312; 75CalA181, 242P 503; 163Ga176, 135SE735; 37GaA511, 140SE787; 38GaA362, 144SE51; 196 Ind258, 148NE143; 232Mich46, 204NW 763; 313Mo 114, 280SW697; Mo 29 SW(2d)71. [c] **Instructions held misleading and confusing.**-143Wash34, 254 P463.

1037-67 17F(2d)225. See also 103 WVa148, 136SE842.

1037-68 16F(2d)434; 215Ala453, 111S 34; 20AlaA630, 104S677; 101Vt300, 143A284, 59ALR1541.

1037-69 212Ala181, 103S458; 20AlaA 640, 104S687; 21AlaA279, 108S616; 21 AlaA591, 110S412; 103NJL523, 138A 381.

1037-70 21AlaA30, 104S875.

1037-71 35F(2d)454; 73CalA372, 238 P758; 82CalA28, 255P205; 94Fla163, 113S699.

1038-76 16F(2d)434; 19F(2d)202; 174Ark156, 294SW385; 43 Ida713, 254 P217; 337 Ill 290, 169NE214; 203 Iowa 1008, 213NW603; Iowa 230NW379; Mo 30SW(2d)132; OklCr 274P487; 126 Or 560, 270P404; 106TexCr462, 294SW 200; 108TexCr540, 18SW(2d)1094; 150 Va588, 142SE369; 101WVa356, 132SE 728. [b] (1) 172Ark156, 287SW1026; 179Ark1055, 20SW(2d)120; 180Ark408, 21SW(2d)186; 69CalA239, 230P991; 82 CalA700, 256P281; 95CalA659, 273P 110; 166Ga160, 142SE685; 200 Ind393, 163NE835; 200 Ind380, 165NE522; Ind 169NE466; Iowa 230NW425; Iowa 241 NW531; Mass 169NE790; 141Miss18, 106S443; 307Mo 352, 270SW310; 308 Mo 695, 274SW470; 311Mo 414, 279SW 76; Mo 8SW(2d)3; Mo 29SW(2d)71; 83Mont556, 274P840; 84Mont364, 275P 750; 85Mont428, 278P993.

1038-79 23AlaA348, 128S359(2dcase); 326 Ill 366, 157NE215; 198 Ind61, 152 NE274; 199 Ind746, 161NE8; 140Miss 265, 105S514; Mo 271SW471; Mo 29 SW(2d)144; 51ND695, 200NW778; OklCr 278P356; SC 155SE409; 100 TexCr218, 272SW452 (purpose of possession in prosecution for possession of liquor); 100TexCr545, 272SW157; 101TexCr377, 276SW291; 107TexCr247, 296SW558; 108TexCr588, 18SW(2d)890; TexCr 32SW(2d)202; 103WVa148, 136 SE842 (dictum); 40Wyo 174, 276P172.

1038-80 41F(2d)162; 216Ala655, 114S 72; 20AlaA426, 103S707; 21AlaA196, 106S696; 21AlaA217, 107S31; 21AlaA 261, 107S226; 21AlaA278, 107S734; 21 AlaA269, 108S75; 21AlaA134, 109S172; 21AlaA633, 111S191; 22AlaA648, 119S 512; 23AlaA382, 125S899; 168Ark1055, 272SW659; 170Ark786, 281SW11; 176 Ark916, 5SW(2d)946; 194CalA1, 227P 156; 75CalA499, 243P478; 160Ga520, 128SE756; 41 Ida616, 243P359; 43 Ida 459, 252P673; 47 Ida457, 276P39, 68 ALR1061; 324 Ill 428, 155NE337; 327 Ill 152, 158NE386; Iowa 223NW554; 129Kan360, 282P735; 223Ky65, 2SW (2d)1055; 162La299, 110S482; 257Mass 198, 153NE793; Mo 271SW471; Mo 296SW433; 320Mo 389, 8SW(2d)20; 51ND695, 200NW778; 58ND82, 224NW 878; 300Pa16, 150A94; 100TexCr664, 274SW582; 107TexCr559, 298SW569; 108TexCr92, 299SW249; 109TexCr497, 5SW(2d)526; 113TexCr570, 24SW(2d) 56; TexCr 25SW(2d)347; TexCr 32SW (2d)202; 144Va559, 131SE131; 150Va 588, 142SE369; 101WVa356, 132SE728; 104WVa217, 139SE704; 105WVa549, 143SE307; WVa 153SE111. See also 83 CalA62, 256P561. [b] 221Ky283, 298 SW699.

1039-81 100TexCr424, 274SW137; 101 WVa356, 132SE728.

1039-82 31F(2d)423; 216Ala655, 114 S72; 140Miss265, 105S514; 101TexCr 377, 276SW291; 111TexCr570, 13SW (2d)874.

1039-83 140Miss265, 105S514.

1039-83½-New. Instructions which single out the testimony of particular witnesses for comment should not be given. 323 Ill 34, 153NE707.

1039-84 21AlaA261, 107S226; 178Ark 181, 10SW(2d)4(1stcase); 199Cal 361, 249P186; 71CalA339, 235P87; 92CalA 534, 268P701; 43 Ida459, 252P673; 326 Ill 366, 157NE215; 328 Ill 446, 159NE 807; 330 Ill 516, 162NE133; 333 Ill 469, 165NE235; 162La299, 110S482; 252 Mass465, 148NE123; 101WVa703, 133 SE379, 380 [cit CJ]. [a] (1) 83CalA62, 256P561; 333 Ill 200, 164NE150 (where similar instructions were given as to other witnesses); 252Mass465, 148NE 123; MoA 281SW123.

1039-84½-New. or of the prosecuting witness, 55ND194, 212NW857.

1039-84¾-New. or to the credibility of a prosecuting witness, 92CalA534, 268 P701.

1040-85 27F(2d)257; Mo 256SW1043.

1040-86 22AlaA49, 112S94; 23AlaA576, 129S320(1stcase); 175Ark453, 299SW 739; 192Wis452, 211NW773.

1040-87 175Ark1170, 299SW757; 149 Miss817, 115S887.

1040-88 12F(2d)683; 95CalA659, 273P 110; 162Ga267, 134SE36; 164Ga677, 139SE349; 37GaA511, 140SE787; 169 Ga384, 150SE558; 167La635, 120S83; Mo 29SW(2d)144 (capitalizing certain words); Mo 29SW(2d)150; Mont 289P 1037.

1040-89 203 Iowa918, 210NW961; 221 Ky433, 298SW1078; Mo 273SW733; MoA 281SW123; 72Mont306, 233P602; Nev 290P732.

1040-91 177Ark1039, 9SW(2d)233(2d case); 103WVa355, 137SE751. [a] **Instruction to scrutinize evidence of defendant and his relatives before accepting it,** was not error because not extended to all witnesses. 190NC810, 130 SE848.

1040-93 Iowa 230NW565..

1040-95 162Ga573, 134SE169; Iowa 228NW1.

1040-96 89CalA132, 264P314.

1040-98 86CalA768, 261P512.

1040-98½-New. Instruction presenting commonwealth's view of evidence, where defendant's view also presented. 143Va 579, 130SE389.

1040-98¼-New. Instruction mentioning defendant's name more often than appellant's name has been held not error. 324 Ill 428, 155NE337.

1041-4 33PortoRico 195.

1041-12 16F(2d)406; 32Ariz212, 257 P27; 41GaA568, 153SE620; 321 Ill 143, 151NE563; 327 Ill 312, 158NE732; 331 Ill 636, 163NE352; 199 Ind18, 154NE 867; 50Nev256, 256P793, 795 [cit CJ], 52ALR1015; OklCr 282P682; 122 Or 975, 252P975; 138SC421, 136SE736; 103TexCr182, 280SW798; 105TexCr494, 288SW1074.

1041-13 220Ala260, 125S384 (erroneous instruction held not abstract); 20 AlaA630, 104S677; 21AlaA31, 104S871 (instruction on credibility of witness abstract where evidence of other witnesses establishing guilt of accused); 21AlaA35, 104S876; 21AlaA38, 104S881; 21AlaA40, 104S886; 80CalA243, 251P 699; 321 Ill 143, 151NE563; 326 Ill 358, 157NE171; 327 Ill 312, 158NE732; 199 Ind18, 154NE867; 122 Or444, 252P975; 126 Or238, 269P225; 99WVa711, 129SE 715.

1041-14 21AlaA247, 107S42; 21AlaA 255, 107S230; 21AlaA278, 107S734; 21 AlaA300, 107S731; 175Ark453, 299SW 739; 194Cal 1, 227P156; CalA 293P72; 37GaA334, 140SE513; 320 Ill 553, 151 NE535; 321 Ill 143, 151NE563; 324 Ill 484, 155NE329; 333 Ill 469, 165NE235; 119Kan743, 241P110; 166La759, 117S 820 [certiorari den 49SCt34(13thcase)]; 122 Or444, 252P975; 103TexCr214, 280 SW812; 107TexCr425, 296SW559; 101 WVa632, 133SE371; 105WVa549, 143 SE307. [a] (1) 32F(2d)742; 83CalA 62, 256P561; 309Mo 155, 274SW427; Mo 30SW(2d)132.

1041-15 22AlaA121, 113S318; 20AlaA 540, 103S604; 21AlaA196, 106S696; 21 AlaA255, 107S230; 21AlaA264, 107S323; 21AlaA278, 107S734; 21AlaA279, 108S 616; 21AlaA300, 107S731; 21AlaA464, 109S375; 21AlaA481, 109S891; 21AlaA 493, 109S527; 21AlaA551, 109S897; 21 AlaA591, 110S412; 21AlaA653, 111S648; 21AlaA655, 111S649; 22AlaA104, 112S 898; 22AlaA380, 115S853; 22AlaA418, 116S910; 23AlaA115, 121S499(1stcase); 23AlaA122, 122S461 [certiorari den 219 Ala361, 122S462]; 23AlaA123, 122S465 [certiorari den 219Ala359, 122S466(1st case)]; 23AlaA135, 122S611 [certiorari den 219Ala380, 122S612]; 23AlaA261, 123S293(2dcase); 23AlaA378, 125S793; 23AlaA387, 126S498; AlaA 129S714(2d case); AlaA 130S374; AlaA 130S527; 172Ark156, 287SW1026; 172Ark398, 288 SW926; 68CalA457, 229P974; 74CalA 510, 241P267; 79CalA373, 249P536; 83 CalA302, 256P616; 97CalA664, 275P 1010(2dcase); 92Fla337, 106S406; 41 GaA333, 153SE79(2dcase); 327 Ill 312, 158NE732; Ill 173NE467; Ind 167NE 531; 235Ky349, 31SW(2d)380; 161La 135, 108S312; 162La266, 110S417; 162 La471, 110S723; 164La449, 114S92; 167 La279, 119S48; 257Mass198, 153NE793; 317Mo 413, 297SW63; 100TexCr50, 271 SW628; 107TexCr571, 298SW580; 113 TexCr62, 18SW(2d)172. [b] **Refusal to charge instruction not abstract is error.** 23AlaA79, 121S6.

1042-16 122 Or444, 252P975.

1042-16½-New. Defendant's admission is direct evidence as regards an instruction on circumstantial evidence. 107Tex Cr134, 295SW608.

1042-16¾-New. A case in which one or more facts must be proved by circumstantial evidence, not one requiring a charge on circumstantial evidence. 107 TexCr134, 295SW608.

1042-17 16F(2d)406; 74CalA135, 239P 412; 338 Ill 353, 170NE265; 202 Iowa 1188, 211NW850; 114Nebr121, 206NW 21; 101WVa356, 132SE728. [a] **Instruction not objectionable** on ground that allegations of indictment were not followed. 113TexCr233, 20SW(2d)206. [b] **Instructions held applicable to pleadings.**-Mo 23SW(2d)179.

1042-18 323 Ill 11, 153NE720; 331 Ill 581, 163NE373; 114Nebr121, 206NW21; OklCr 289P787; 112TexCr33, 13SW(2d) 843; TexCr 27SW(2d)187; 40Wyo 174, 276P172.

1042-19 32F(2d)472; CalA 293P72; 331 Ill 581, 163NE373; 336 Ill 294, 168 NE325; 199 Ind18, 154NE867; 199 Ind 196, 156NE403; Ind 166NE430; 218Ky 788, 292SW343; 101WVa356, 132SE728.

1042-20 8F(2d)251; 214Ala117, 106S 609; 7Ariz491, 232P398; 180Ark711, 22SW(2d)1012; 69CalA201, 230P982; 327 Ill 312, 158NE732; 196 Ind529, 149 NE51; 199 Ind397, 155NE609; 32Mo 417, 8SW(2d)29; Mo 30SW(2d)750; 111 TexCr95, 10SW(2d)94(2dcase).

1042-21 199 Ind196, 156NE403.

1042-22 102TexCr546, 278SW848.

1042-24 103TexCr580, 281SW1071.

1042-25 Cal 265P231; OklCr 280P314 (instruction in rape prosecution, where court failed to require election between acts, instruction permitting conviction from proof of any of such acts, is prejudicial).

1043-27 87Colo 84, 285P766; 34GaA 194, 129SE9; 230Ky656, 20SW(2d)484, 66ALR1297.

1043-31 OklCr 277P247(2dcase); OklCr 287P1083; 105TexCr508, 289SW398.

1043-32 218Ala527, 119S215; 331 Ill 489, 163NE357; 335 Ill 424, 167NE20; 89Fla212, 103S636; 162Ga208, 132SE 911; 163Ga43, 135SE410; 164Ga53, 137 SE784; 33GaA683, 127SE656; 35GaA 471, 134SE141; 36GaA84, 135SE765; 234Ky842, 29SW(2d)561; 296Pa332, 145A855; 100TexCr50, 271SW628. [a] **Refusal of instruction confining jury to express testimony** by witnesses is proper. 38F(2d)581.

1043-35 23F(2d)472; 21AlaA615, 110 S696; 32Ariz212, 257P27; Ariz 283P 711; 175Ark453, 299SW739; 96CalA503, 274P393; CalA 274P988; CalA 290P 470; 97Fla621, 121S797; 163Ga304, 136 SE49; 324 Ill 484, 155NE329; 327 Ill 312, 158NE732; 329 Ill 182, 160NE190; 331 Ill 434, 163NE437; Iowa 229NW701; 219Ky319, 292SW806; 234Ky531, 28 SW(2d)774; 226Ky144, 10SW(2d)639; 75Mont274, 243P566; 118Nebr265, 224 NW318; 48Nev405, 233P523; NJSup 131A675; OklCr 282P682; 33PortoRico 856; 101TexCr185, 274SW634; 104Tex Cr168, 283SW173; 104TexCr368, 283SW 834; 106TexCr158, 291SW892; 107Tex Cr397, 296SW582; 112TexCr395, 16SW (2d)1092; 101Vt300, 143A284, 59ALR 1541; 153Va954, 151SE286; 144Wash 367, 258P20; 148Wash657, 269P848. [a] 75CalA181, 242P503; 168Ga530, 148SE386(2dcase); 168Ga575, 148SE 500; MoA 27SW(2d)726. [c] 162Ga 208, 132SE911; Ind 169NE676; 225Ky 827, 10SW(2d)279; Mo 7SW(2d)1001. [d] **Instruction in accord with issues on any state of evidence** will not be held erroneous. 318Mo 611, 300SW691. [e] **Instruction held erroneous.**-23AlaA594, 129S485.

1043-36 27F(2d)94; 213Ala143, 104 S220; 20AlaA626, 104S777 (reasonable doubt because of promise of immunity to state witness when no evidence of such promise); 215Ala42, 109S109; 22 AlaA324, 115S418; 23AlaA382, 125S899; 23AlaA400, 126S181; 70CalA271, 233P 85; 78CalA426, 248P1021; CalA 288P 788; 160Ga365, 127SE732; 162Ga777, 135SE187; 167Ga452, 145SE879(2d case); 35GaA205, 132SE272; 39GaA7, 145SE903; 39GaA71, 146SE774; 39GaA 415, 147SE407; 39GaA518, 147SE727 (3dcase); 46 Ida787, 271P578(2dcase); 201 Iowa10, 206NW635; 210Ky359, 275 SW872; 225Ky596, 9SW(2d)720; 159 La435, 105S440; 159La589, 105S631; 164La449, 114S92; 249Mich543, 229NW 442; 311Mo 443, 278SW974; 312Mo 373, 278SW1016; Mo 278SW987; Mo 278SW 1009; 318Mo 17, 298SW777; Mo 25SW (2d)113; 48Nev405, 233P523; NJSup 131A675; OklCr 287P419; 138SC421, 136SE736; 151SC379, 149SE108; 156 SC526, 153SE490 (as denial of jury trial); 100TexCr98, 272SW134; 100Tex Cr415, 273SW573; 103TexCr272, 280 SW827; 104TexCr168, 283SW173; 104 TexCr174, 283SW527; 105TexCr91, 286 SW1096; 105TexCr107, 286SW1100; 105TexCr629, 290SW543; 107TexCr425, 296SW559; 107TexCr307, 296SW582; 108TexCr33, 299SW242; 108TexCr1, 299SW422; 109TexCr258, 48SW(2d)56; 111TexCr245, 13SW(2d)95; 111TexCr 673, 13SW(2d)842(2dcase); 113TexCr 62, 18SW(2d)172; 113TexCr297, 21SW (2d)507; TexCr 27SW(2d)182; 101Vt 300, 143A284, 59ALR1541; 142Wash 463, 253P645; 143Wash464, 255P910. [a] **Charge on circumstantial evidence** is justified only when state relies on circumstantial evidence alone. 105TexCr 107, 286SW1100.

1043-37 20AlaA454, 103S912; 21AlaA 255, 107S230; 21AlaA551, 109S897; 22 AlaA16, 111S897; 23AlaA576, 129S320 (1stcase); 30Ariz448, 247P1103, 1106 [citCJ]; 72CalA421, 237P767; 76CalA 648, 245P461; 78CalA442, 248P1061; 80CalA328, 251P823; CalA 288P95; 163 Ga878, 137SE378; 321 Ill 128, 151NE 505; 323 Ill 37, 153NE702 (instruction on circumstantial evidence); 327 Ill 312, 158NE732; 329 Ill 182, 160NE190; 331 Ill 489, 163NE357; 331 Ill 581, 163NE 373; 333 Ill 451, 164NE840; 337 Ill 290, 169NE214; 338 Ill 128, 170NE240; 199 Ind18, 154NE867; 200 Iowa772, 205NW 325; 205 Iowa220, 217NW812; 207 Iowa 224, 222NW407, 61ALR882; Iowa 230 NW536; Iowa 233NW55; 219Ky319, 292 SW806; 225Ky663, 9SW(2d)1001; 234 Mich569, 208NW685, 686 [citCJ]; 241 Mich111, 216NW434; 143Miss243, 108 S731; 149Miss239, 115S433; Mo 274 SW24; Mo 279SW696; NJSup 131A675; 118 Or397, 247P146; 33PortoRico 856; 100TexCr389, 273SW575; 109TexCr180, 3SW(2d)798; 109TexCr345, 4SW(2d) 542; 110TexCr294, 8SW(2d)120; 112 TexCr59, 14SW(2d)276; 112TexCr395, 16SW(2d)1092; 113TexCr646, 21SW (2d)1049; 101Vt124, 141A686; 153Va 909, 150SE407; 101WVa356, 132SE728 (inference of malice from act); 107WVa 335, 148SE202.

1045-38 234Mich569, 208NW685, 686 [citCJ].

1045-39 31F(2d)499; 31F(2d)902; 35 F(2d)454; 215Ala276, 110S407; 22AlaA 113, 113S316; 23AlaA529, 128S461; 20 AlaA454, 103S912; 20AlaA540, 103S 604; 21AlaA255, 107S230; 21AlaA310, 107S789; 21AlaA378, 108S646; 21AlaA 551, 109S897; 21AlaA517, 110S167; 21 AlaA573, 110S169; 21AlaA631, 111S 190; 22AlaA85, 112S541; 22AlaA545, 117S603; 22AlaA552, 117S611; 22AlaA 564, 117S801; 22AlaA557, 117S804; 23 AlaA123, 122S465 [certiorari den 219 Ala359, 122S466(1stcase)]; 23AlaA299, 124S406(2dcase); 23AlaA579, 129S312 (3dcase); 176Ark640, 3SW(2d)679; 179Ark344, 15SW(2d)987; 179Ark346, 15SW(2d)988; Ark 30SW(2d)851; 69 CalA267, 231P377; 72CalA102, 236P 944; 76CalA597, 245P466; 78CalA426, 248P1021; 78CalA781, 248P1029; 78 CalA442, 248P1061; 79CalA328, 249P 231; 80CalA328, 251P823; 80CalA275, 251P826; 81CalA398, 253P773; 82CalA 126, 255P233; 98CalA40, 276P401; 102 CalA787, 283P830; 90Fla844, 107S530; 162Ga777, 135SE187; 168Ga530, 148SE 386(2dcase); 37GaA9, 138SE524; 37 GaA343, 140SE425; 48 Ida558, 283P 529; 48 Ida688, 284P845; Ida 290P 722; 333 Ill 258, 164NE682; 333 Ill 397, 164NE847; 339 Ill 415, 171NE554; 200 Iowa636, 204NW307; 202 Iowa1067, 208NW360; 159La589, 105S631; 164 La449, 114S92; 167La279, 119S48; 170 La812, 129S212(1stcase); Mass 167NE 354; 233Mich615, 208NW27; 144Miss 793, 110S517; 314Mo 585, 285SW97, 47 ALR783; Mo 23SW(2d)152; 75Mont 274, 243P566; 80Mont181, 260P138; 114Nebr17, 205NW559; Nebr 227NW 446(2dcase); Nev 233P49; 48Nev405, 233P523; NH 146A503; 50ND270, 195 NW567; 118 Or397, 247P146; 131 Or 314, 282P105; 53SD205, 220NW518; 99TexCr659, 271SW91; 100TexCr424, 274SW137; 104TexCr368, 283SW834; 104TexCr417, 284SW559; 104TexCr283, 284SW564; 104TexCr619, 286SW214; 106TexCr605, 294SW566; 106TexCr621, 294SW580; 110TexCr240, 8SW(2d)183; 111TexCr205, 13SW(2d)80; 112TexCr 4, 13SW(2d)698(2dcase); 111TexCr671, 13SW(2d)704; 112TexCr147, 15SW(2d) 619(2dcase); 113TexCr447, 21SW(2d) 1055; 113TexCr546, 22SW(2d)676; Utah 272P635; Utah 289P100; 153Va 909, 150SE407; 142Wash463, 253P645; 101WVa356, 132SE728; 104WVa536, 140SE536; WVa 153SE496; Wyo 288P 13.

1046-40 159La589, 105S631. [a] **Where indictment was under statute** relative to assisting prisoners to escape, but proof shows escape was frustrated, it was held that instructions should not have been under felony, but under misdemeanor charge. 221Ky168, 298SW 376.

1046-41 130Misc105, 222NYS595.

1046-42 But see 104WVa536, 140SE 536 (definition properly refused). [a] NJSup 131A675.

1046-45 22F(2d)740 (alibi); 78CalA 442, 248P1061 (where evidence was uncontroverted); 167Ga544, 146SE121; 41GaA421, 153SE222; 145Miss227, 110 S500; 128 Or158, 273P720; TexCr 24 SW(2d)420. [a] 160Ga605, 128SE747 (on admission by silence).

1046-46 [a] **Evidence held not to warrant instruction.**-160Ga520, 128SE756.

1046-47 204Cal109, 266P807; 72CalA 102, 236P944; 78CalA455, 248P927 (on plea of former jeopardy); 82Colo 233, 259P1038; GaA 155SE509(1stcase); 222Ky614, 1SW(2d)1060; NJSup 136A 603; 101TexCr44, 273SW861; 108Tex Cr384, 300SW942; TexCr 26SW(2d) 918; TexCr 31SW(2d)456; 101WVa

356, 132SE728 (evidence must be substantial).

1046-48 241Mich111, 216NW434.

1046-49 See also 226Ky437, 11SW(2d) 111.

1046-50 213Ala358, 104S656.

1047-55½-New. Where defendant's guilt does not depend on testimony of a single witness, an instruction is properly refused which directs an acquittal hypothesized on that theory. 20AlaA 606, 104S551.

1047-55½-New. Where there is evidence of a fact on which a correct instruction is requested, it is not error to give such instruction although there is other evidence strongly negativing the fact. 103WVa605, 138SE202.

1047-55¼-New. A charge on circumstantial evidence is not required where defendant confessed. 107TexCr504, 296 SW513.

1047-55½-New. The state is entitled to instructions based on its testimony although contradicted by defendant's testimony. 322Mo 69, 16SW(2d)30.

1047-56 323 Ill 567, 154NE418; 199 Ind746, 161NE8.

1047-57 See also 85PaSuper305.

1047-58 193NC246, 136SE715.

1047-59 80CalA293, 251P643.

1047-60 321 Ill 143, 151NE563; 327 Ill 312, 158NE732; 315Mo 232, 285SW712; OkiCr 273P284; 50RI 356, 147A878 (instruction properly refused); 103Tex Cr182, 280SW798; 104TexCr442, 284SW 554; TexCr 21SW(2d)684; TexCr 25 SW(2d)1105. [b] **Refusal to charge held not error.**-109TexCr398, 5SW(2d) 144.

1047-64 16F(2d)778; 21AlaA585, 111S 43; Ga 155SE38; Mo 278SW676.

1047-65 13F(2d)756; 16F(2d)778; 28 F(2d)681; 213Ala301, 104S668; 215Ala 453, 111S34; 218Ala40, 117S457; 20 AlaA412, 103S697; 20AlaA426, 103S 707; 21AlaA266, 107S328; 21AlaA304, 107S719; 21AlaA415, 109S122; 21AlaA 423, 109S125; 22AlaA107, 114S71; 22 AlaA290, 115S68; 23AlaA33, 120S304 (2dcase); 76CalA648, 245P461; 163Ga 388, 136SE144; 164Ga677, 139SE349; 167Ga544, 146SE121; 37GaA334, 140 SE513; 339 Ill 480, 171NE544; 200 Ind 7, 159NE755; Ind 173NE324; 202 Iowa 173, 209NW458, 47ALR407; 207 Iowa 322, 222NW867; 225Ky808, 10SW(2d) 302; 311Mo 476, 278SW755 (self-defense in assault case); 318Mo 742, 300 SW680; 318Mo 611, 300SW691; 115 Nebr77, 211NW200; 190NC177, 129SE 417; 194NC409, 139SE774; 196NC64, 144SE534(2dcase); 119 Oh250, 163NE 202; 300Pa16, 150A94 (instruction held inadequate); 104TexCr493, 284SW 581; TexCr 25SW(2d)343; 147Wash 555, 266P196. [a] 198Cal776, 247P 884; 79CalA295, 249P525; 93CalA590, 269P955; 95CalA659, 273P110; 108 Conn53, 142A470; 163Ga43, 135SE410; Ga 154SE906; 35GaA497, 133SE747 (instruction held not to eliminate prisoner's statement from consideration); 198 Ind679, 154NE489; 200 Ind557, 159 NE545; 200 Ind7, 159NE755; 251Mich 99, 230NW931; 144Miss778, 110S225; Mo 270SW273; Mo 278SW676; 312Mo 373, 278SW1016; 313Mo 98, 281SW720; Mo 7SW(2d)1001; Mo 12SW(2d)46; 322Mo 1239, 18SW(2d)71; Mo 25SW (2d)79; Mo 30SW(2d)132; 51Nev322, 274P922; NJSup 132A198; 148SC495, 146SE418; 149SC367, 147SE310; 107 WVa418, 148SE131.

1048-66 6F(2d)199; 213Ala301, 104S 668; 215Ala316, 110S476; 21AlaA633, 111S191; 22AlaA59, 112S182; 220Ala 544, 126S848; 20AlaA549, 103S478; 20 AlaA426, 103S707; 20AlaA547, 104S48; 20AlaA591, 104S347; 21AlaA81, 105S 431 (requested instruction properly refused as abstract, where there was evidence connecting defendant with crime); 21AlaA15, 105S714; 21AlaA255, 107S 230; 21AlaA277, 107S327; 21AlaA266, 107S328; 21AlaA304, 107S719; 21AlaA 339, 108S620; 21AlaA434, 109S172; 21 AlaA481, 109S891; 21AlaA585, 111S43; 22AlaA107, 114S71; 22AlaA366, 115S 763; 22AlaA547, 117S606; 23AlaA213, 123S104(2dcase); 23AlaA378, 125S793; 181Ark1011, 28SW(2d)1055; 198Cal 426, 245P426; 80CalA293, 251P643; 95CalA 242, 272P794; CalA 291P872; 200 Ind 7, 159NE755; 159La820, 106S317; 143 Miss312, 108S723; Mont 287P214; NJSup 145A229(2dcase); 103TexCr474, 281SW555; 108TexCr604, 2SW(2d)252; 144Va559, 131SE131. [a] **Requested instruction on presumption of innocence which omitted statutory presumption of guilt,** from finding of intoxicating liquors on premises properly refused. 143 Va504, 129SE259.

1048-67 327 Ill 162, 158NE462; 216Ky 317, 287SW898; 322Mo 69, 16SW(2d)30. [a] **Instruction in homicide case** that jury "may" return one of three verdicts authorized on conviction of murder does not exclude them from returning manslaughter verdict. 142Miss110, 107 S418.

1048-68 17F(2d)462; 312Mo 373, 278 SW1016. [a] **It is not error** to omit charge on circumstantial evidence where conviction does not wholly rely on it. 171Ark705, 285SW380; 161Ga166, 129 SE772.

1048-69 23AlaA382, 125S899; Mass 167 NE354 (where instructions refer to fragmentary parts of evidence); 107TexCr 134, 295SW608.

1049-71 33F(2d)713 (construed with reference to conceded facts of case); 34 GaA194, 128SE819; OkiCr 287P842; 153Va954, 151SE286; 136Wash603, 241 P4; 102WVa234, 134SE919; 105WVa 346, 143SE88.

1049-72 42 Ida319, 245P685.

1049-77½-New. , or where the instruction is supplemented by reference to another paper which is before the jury. 102WVa421, 135SE393.

1049-78 42 Ida319, 245P685; 225Ky 163, 7SW(2d)1066; 103NJL663, 138A 575.

1049-80 22AlaA84, 112S540.

1049-81 147Miss593, 113S348.

1049-82 271US104, 46SCt442, 70Led 857; 274US328, 47SCt650, 71Led1077; 5F(2d)224; 12F(2d)717; 16F(2d)830; 18F(2d)522; 18F(2d)529; 18F(2d)532; 25F(2d)708; 32F(2d)540; 35F(2d)96; 36F(2d)743; 215Ala2, 109S287; 215Ala 229, 110S21; 215Ala570, 110S63; 22 AlaA146, 113S625; 217Ala519, 116S913; 21AlaA116, 105S435; 21AlaA188, 106S 510; 21AlaA324, 108S86; 21AlaA491, 109S521; 21AlaA557, 109S899; 22AlaA 144, 113S474; 22AlaA125, 113S625; 22 AlaA418, 116S910; 23AlaA135, 122S611 [certiorari den 219Ala380, 122S612]; 23 AlaA270, 124S123(1stcase); 23AlaA468, 126S896(2dcase); 30Ariz366, 247P129; 32Ariz212, 257P27; 33Ariz51, 262P14; 33Ariz383, 265P609; Ariz 283P711; 169 Ark421, 275SW758; 170Ark1193, 278SW 648; 171Ark203, 284SW28; 172Ark244, 288SW904; 179Ark94, 14SW(2d)261; 70CalA519, 234P110; 71CalA402, 235P 467; 74CalA440, 241P97; 75CalA642, 243P461; 78CalA395, 248P696; 78CalA 442, 248P1061; 79CalA366, 249P543; 79CalA502, 250P202; 79CalA576, 250P 588; 87CalA33, 261P530; CalA 267P 387; 93CalA632, 269P951; 94CalA635, 271P576; 95CalA659, 273P110; CalA 292P693; 108Conn454, 143A561; 93Fla 756, 112S608; 94Fla163, 113S699; 95 Fla775, 116S618; 161Ga332, 131SE80; 162Ga422, 134SE95; 163Ga878, 137SE 378; 164Ga298, 138SE229; 165Ga55, 139SE877; 165Ga210, 140SE625; 165Ga 326, 140SE889; 170Ga886, 154SE363; 34GaA194, 128SE819; 34GaA232, 128 SE917; 35GaA108, 132SE781; 35GaA 375, 133SE105; 35GaA399, 133SE266; 35GaA366, 133SE270; 35GaA397, 133 SE314; 36GaA124, 135SE511; 36 GaA582, 137SE640; 36GaA672, 137SE 788; 36GaA741, 138SE258; 37GaA31, 138SE527; 37GaA119, 138SE924; 37 GaA155, 139SE81; 37GaA79, 139SE82; 37GaA160, 139SE132; 37GaA632, 141SE 216; 40GaA510, 150SE432(1stcase); 41 Ida616, 243P359; 42 Ida319, 245P685; Ida 289P609; Ida 291P313; 321 Ill 380, 152NE215; 324 Ill 190, 154NE900; 324 Ill 170, 155NE39; 324 Ill 294, 155NE301; 326 Ill 324, 157NE167; 326 Ill 145, 157 NE225; 327 Ill 50, 158NE457; 327 Ill 312, 158NE732; 331 Ill 268, 162NE839; 331 Ill 380, 163NE149; 332 Ill 476, 163 NE798; Ill 173NE55; 200 Ind393, 163 NE835; 200 Ind483, 164NE626; Ind 168 NE458; 204 Iowa414, 214NW596; 204 Iowa1306, 214NW743; 205 Iowa25, 215 NW721; 208 Iowa863, 226NW19; Iowa 230NW425; Iowa 230NW522; 121Kan 514, 247P429; 121Kan549, 247P639; 126Kan129, 266P939; 126Kan803, 271P 280; 208Ky538, 271SW566; 209Ky318, 272SW743; 219Ky834, 294SW790; 221 Ky424, 298SW1087; 223Ky826, 4SW (2d)1109; 229Ky87, 16SW(2d)769; 229 Ky305, 17SW(2d)238; 235Ky462, 31SW (2d)712; 161La518, 109S51; 265Mass 119, 163NE855; 232Mich46, 204NW763; 233Mich185, 206NW568; 234Mich85, 207 NW805; 238Mich485, 213NW717; 239 Mich60, 214NW165; 240Mich107, 214 NW954; 240Mich98, 215NW62; 167 Minn74, 208NW528; 168Minn341, 210 NW45; 169Minn349, 211NW305; Minn 232NW335; 140Miss671, 106S95; 143 Miss365, 108S809; 144Miss634, 110S206; 144Miss793, 110S517; 147Miss593, 113S 348; 151Miss617, 118S447; Mo 256SW 1043; 309Mo 155, 274SW427; 312Mo 373, 278SW1016; 312Mo 635, 281SW29; Mo 281SW32; 315Mo 242, 286SW69; 318Mo 611, 300SW691; Mo 300SW785; 319Mo 28, 3SW(2d)230; Mo 11SW(2d) 1020; Mo 30SW(2d)132; Mo 30SW(2d) 750; MoA 273SW141; MoA 31SW(2d) 559; 114Nebr59, 205NW939; 115Nebr 225, 212NW426; 115Nebr277, 212NW 606; 48Nev405, 233P523; 102NJL388, 132A93; NJ 135A895; NJSup 143A 142; 192NC80, 133SE404; 193NC489, 137SE429; 194NC121, 138SE518; 198 NC629, 152SE890; 50ND927, 198NW 698; 52ND659, 204NW350; 21 OhA33, 153NE109; 21 OhA403, 153NE218; 30 OhA379, 165NE98; OhA 173NE26; OhA 173NE300; 35 OkiCr279, 250P544, 49ALR1129; 33 OkiCr100, 242P270; 38 OkiCr62, 259P168; OkiCr 268P732; OkiCr 269P509; OkiCr 273P1024; OkiCr 278P358; OkiCr 283P790; OkiCr 288P489; OkiCr 292P82; 118 Or5, 244 P512; 119 Or641, 250P744; 122 Or444, 259P893; 284Pa255, 131A184; 285Pa 49, 131A657; 285Pa97, 131A667; 289 Pa284, 137A261; 291Pa40, 139A493; 291Pa319, 139A836; 291Pa291, 139A 851; 294Pa544, 144A542; 294Pa573, 144A743; 295Pa50, 144A761; 97PaSuper 169; 97PaSuper283; 49RI 397, 143A 604; 137SC145, 134SE885; 144SC452, 142SE725; 146SC275, 143SE817; 147 SC325, 145SE194; 150SC341, 148SE184; 155SC432, 152SE677; 54SD245, 222NW 681; 99TexCr572, 271SW99; 99TexCr 618, 271SW92; 103TexCr566, 281SW 1080; 104TexCr178, 282SW517; 105 TexCr600, 289SW689; 106TexCr528, 293SW827; 108TexCr489, 1SW(2d)639; 108TexCr597, 1SW(2d)894; 109TexCr 154, 3SW(2d)814; 109TexCr345, 4SW (2d)542; 111TexCr130, 12SW(2d)211; 111TexCr561, 15SW(2d)7; TexCr 30SW (2d)331; TexCr 32SW(2d)468; Utah 279P950; 142Va602, 128SE454; 144Va 594, 131SE212; 136Wash603, 241P4; 143Wash34, 254P463; 143Wash288, 255 P141; 144Wash363, 258P23; 149Wash 131, 272P53; 102WVa234, 134SE919; 103WVa605, 138SE202; 104WVa396, 140SE338; 104WVa523, 140SE546; 104 WVa617, 141SE7; 107WVa418, 148SE 131; 107WVa350, 148SE194; 199Wis 615, 227NW258; 36Wyo 532, 257P2.

1050-83 42 Ida319, 245P685; 234Mich 88, 207NW865; 284Pa255, 131A184; 285Pa97, 131A667; 136Wash499, 240P 676.

1050-84 271US104, 46SCt442, 70Led 857; 274US328, 47SCt650, 71Led1077; 5F(2d)224; 16F(2d)830; 18F(2d)522; 18F(2d)532; 215Ala2, 109S287; 22AlaA 74, 112S177; 22AlaA144, 113S474; 30 Ariz366, 247P129; 32Ariz212, 257P27; 33Ariz51, 262P14; 172Ark244, 288SW 904; 198Cal 238, 244P362; 198Cal776, 247P884; 199Cal471, 250P168; 203Cal 139, 263P522; 70CalA519, 234P110; 195Cal584, 234P374; 74CalA440, 241P 97; 75CalA642, 243P461; 78CalA395, 248P696; 78CalA223, 248P716; 78CalA 442, 248P1061; 79CalA366, 249P543; 79CalA502, 250P202; 79CalA576, 250P 588; 81CalA207, 253P338; 82CalA489, 255P781; 86CalA768, 261P512; 89CalA 132, 264P314; 102CalA787, 283P830; CalA 284P733; CalA 286P493; 84Colo 442, 276P983; 103Conn138, 130A96; 105Conn757, 136A475; 108Conn209, 142 A840; 94Fla163, 113S699; 95Fla775, 116S618; 161Ga332, 131SE80; 162Ga

208, 132SE911; 163Ga43, 135SE410; 163Ga878, 137SE378; 164Ga298, 138SE229; 164Ga677, 139SE349; 165Ga55, 139SE877; 165Ga210, 140SE625; 34GaA172, 128SE699; 34GaA232, 128SE917; 35GaA241, 132SE650; 35GaA259, 132SE780; 35GaA468, 132SE781; 35GaA223, 132SE782; 35GaA375, 133SE105; 35GaA399, 133SE266; 35GaA366, 133SE270; 35GaA397, 133SE314; 162GaA422, 134SE95; 35GaA477, 134SE141; 35GaA584, 134SE144; 36GaA124, 135SE511; 36GaA114, 135SE518; 36GaA306, 136SE331; 36GaA582, 137SE640; 36GaA672, 137SE788; 36GaA741, 138SE258; 36GaA769, 138SE288; 37GaA31, 138SE527; 37GaA119, 138SE924; 37GaA155, 139SE81; 37GaA79, 139SE82; 37GaA160, 142SE306; 41 Ida616, 243P359; 42 Ida319, 245P685; 48 Ida439, 282P489; Ida 289P993; 321 Ill380, 152NE215; 324 Ill 170, 155NE39; 324 Ill 445, 155NE299; 327 Ill 312, 158NE732; 329 Ill 352, 160NE564; 329 Ill 536, 161NE76; 331 Ill 636, 163NE352; 332 Ill 222, 163NE694; 337 Ill 493, 169NE321; 338 Ill 353, 170NE265; Ill 173NE112; Ind 169NE466; 199 Iowa1228, 201NW49; 200 Iowa636, 204NW307; 201 Iowa10, 206NW635; 202 Iowa732, 210NW913; 204 Iowa414, 214NW596; 205 Iowa1028, 219NW17; 208 Iowa796, 223NW873; Iowa 230NW522; 119Kan670, 240P848; 121Kan514, 247P429; 124Kan219, 257P719; 209Ky318, 272SW743; 210Ky378, 275SW881; 219Ky834, 294SW790; 168La925, 123SE21 (reasonable doubt); 233Mich185, 206NW568; 233Mich505, 207NW141; 234Mich85, 207NW805; 239Mich60, 214NW165; 240Mich107, 214NW954; 240Mich98, 215NW62; 244Mich644, 222NW174; 168Minn341, 210NW45; 169Minn349, 211NW305; 141Miss18, 106SE443; 142Miss787, 107SE663; 143Miss365, 108SE809; 144Miss793, 110SE517; 147Miss593, 113SE348; 149Miss406, 115SE215; 149Miss223, 115SE429; 312Mo 373, 278SW1016; 311Mo 414, 279SW76; 317Mo 348, 295SW754; 318Mo 611, 300SW691; Mo 24SW(2d)1020; Mo 30SW(2d)132; MoA 31SW(2d)559; Mont 289P1037; 114Nebr59, 205NW939; 115Nebr225, 212NW426; 117Nebr304, 220NW292; 117Nebr556, 221NW689; Nebr 230NW438; 48Nev405, 233P523; 82NH518, 136A358; 103NJL361, 137A575; NJ 150A358; NJSup 136A206; NJSup 143A142; NJSup 147A49; 34NM533, 285P486; 34NM486, 285P490; 192NC80, 133SE404; 192NC766, 136SE121; 193NC489, 137SE429; 194NC121, 138SE518; 50ND927, 198NW698; 52ND659, 204NW350; 57ND89, 220NW843; 58ND792, 228NW199; 21 OhA33, 153NE109; 21 OhA403, 153NE218; 30 OhA379, 165NE98; 35OkiCr279, 250P544, 49ALR1129; 38OkiCr62, 259P168; OkiCr 268P732; OkiCr 269P509; OkiCr 271P263; OkiCr 273P376; OkiCr 277P254(2dcase); OkiCr 277P601(2dcase); OkiCr 277P687 (2dcase); OkiCr 278P358; OkiCr 279P930(1stcase); OkiCr 281P160(2dcase); OkiCr 281P820; OkiCr 282P901; OkiCr 283P260; OkiCr 286P806; OkiCr 287P419; OkiCr 287P747; OkiCr 287P778 (2dcase); OkiCr 287P792; OkiCr 287P815; OkiCr 287P822; OkiCr 288P357 (2dcase); OkiCr 288P374; OkiCr 288P494; 118 Or5, 244P512; 122 Or444, 259P893; 131 Or411, 282P226; 284Pa255, 131A184; 285Pa97, 131A667; 289Pa284, 137A261; 291Pa291, 139A851; 292Pa26, 140A611; 94PaSuper531; 97PaSuper78; 98PaSuper282; 33PortoRico 48; 134SC329, 133SE31; 152SC17, 149SE348; 101TexCr617, 276SW926; 103TexCr566, 281SW1080; 104TexCr550, 286SW224; 105TexCr363, 288SW233; 105TexCr600, 289SW689; 108TexCr597, 1SW(2d)894; 109TexCr564, 5SW(2d)982; 143Va479, 129SE348; 136Wash603, 241P4; 141Wash96, 250P945; 143Wash34, 254P463; 143Wash288, 255P141; 144Wash363, 258P23; Wash 290P702; 102WVa234, 134SE919; 104WVa396, 140SE338; 105WVa346, 143SE88; 36Wyo 532, 257P2. See also 168Ark932, 272SW648.

1052–85 218Ala660, 120S148.

1052–87½–New. An incorrect oral charge cannot be cured by a written charge. 215Ala2, 109S287.

1052–89 25F(2d)708; 31F(2d)71; 23AlaA565, 129S297; 23AlaA579, 129S312 (3dcase); 23AlaA577, 129S323(1stcase); 172Ark244, 288SW904; 195Cal 295, 232P974; 79CalA519, 250P211; 105Conn757, 136A475; DC 25F(2d)546; 162Ga1, 132SE418; 43 Ida564, 253P842; 326Ill 104, 157NE76; 331 Ill 268, 162NE839; 337 Ill 462, 169NE195; Ill 172NE64; Ill 173NE155; 198 Ind244, 152NE164; 199 Ind247, 155NE544; 206 Iowa859, 220NW95; 208Ky735, 271SW1079; 208Ky775, 271SW1084; 224Ky259, 6SW(2d)233; 144Miss634, 110S206; 321Mo 1171, 14SW(2d)638; Mo 31SW(2d)39; NJSup 137A829; 222AppDiv787, 225NYS308; 194NC260, 139SE374; 284Pa311, 131A229; 97PaSuper78; 137SC145, 134SE885; 150SC341, 148SE184; 100TexCr107, 271SW928; 104TexCr26, 282SW245; 106TexCr528, 293SW827; 107TexCr435, 295SW606; 108TexCr274, 1SW(2d)308; 112TexCr554, 18SW(2d)163; 113TexCr659, 23SW(2d)356; 136Wash603, 241P4; 36Wyo 78, 252P1030.

1053–90 79CalA101, 248P1078; 118Nebr360, 224NW855; 25 OhA273, 157NE813; 109TexCr113, 3SW(2d)101.

1053–92½–New. Failure to give special form of verdict proposed by defendant does not constitute error where instructions given were so clear and full that the possibility that the jury would have rendered a special verdict if instructed as to their discretion in the matter is remote. 69CalA174, 230P972.

1053–93 8F(2d)472; 16F(2d)830; 22F(2d)504; 24F(2d)625; 26F(2d)168; 41F(2d)682; 215Ala2, 109S287; 219Ala46, 121S38; 21AlaA375, 108S639; 22AlaA324, 115S418; 23AlaA379, 125S788; 32Ariz212, 257P27; 33Ariz383, 265P609; Ariz 283P711; 180Ark448, 21SW(2d)616; 180Ark363, 21SW(2d)850; 180Ark1136, 24SW(2d)317; 180Ark1123, 24SW(2d)331; Ark 29SW(2d)1079 (2dcase); Ark 30SW(2d)851; 203Cal153, 263P524; 205Cal 29, 270P196; 94CalA420, 271P203; 207Cal507, 279P145; 208Cal64, 280P354(2dcase); 68CalA214, 228P671; 73CalA372, 238P758; 74CalA178, 240P502; 75CalA642, 243P461; 76CalA91, 243P878; 78CalA395, 248P696; 78CalA561, 248P990; 78CalA442, 248P1061; 79CalA502, 250P202; 79CalA541, 250P406; 79CalA576, 250P588; 80CalA200, 251P675; 80CalA783, 252P1061; 82CalA489, 255P781; 83CalA370, 257P92; 85CalA258, 258P1111; 87CalA33, 261P530; CalA 267P387; 92CalA245, 267P942; 93CalA632, 269P951; 94CalA192, 270P715; 95CalA659, 273P110; CalA 274P988; 98CalA502, 277P121; 99CalA682, 279P211; CalA 286P493; CalA 291P853; 105Conn757, 136A475; 108Conn53, 142A470; 109Conn394, 146A837; 92Fla1094, 111S245; 163Ga43, 135SE410; 166Ga160, 142SE685; 166Ga201, 142SE739; 167Ga326, 145SE654; 37GaA79, 139SE82; 38GaA701, 145SE499; 39GaA412, 147SE408; 40GaA222, 149SE149(2dcase); 40GaA360, 149SE429; 40GaA548, 150SE444; 43 Ida564, 253P842; 48 Ida251, 281P7(1stcase); 318 Ill 316, 149NE236; 324 Ill 190, 154NE900; 324 Ill 445, 155NE299; 326 Ill 145, 157NE225; 329Ill 352, 160NE564; 330 Ill 532, 162NE196; 332 Ill 410, 163NE784; 332 Ill 476, 163NE798; 333 Ill 258, 164NE682; 333Ill 293, 164NE692; 335 Ill 217, 167NE1; 335 Ill 570, 167NE852 (reasonable doubt); 337 Ill 131, 169NE18; Ill 173NE55; Ill 173NE128; Ill 173NE155; 240 IllA261; 197 Ind491, 151NE382; 200 Ind483, 164NE626; 200 Ind380, 165NE522; Ind 171NE192; IndA 166NE603; 199 Iowa1068, 203NW240 (as to necessity of independent corroborative testimony in rape); 202 Iowa173, 209NW458, 47ALR407; 202 Iowa348, 209NW474; 203 Iowa929, 210NW465; 204Iowa417, 215NW256; 207 Iowa212, 220NW110; 208 Iowa842, 226NW371; Iowa 230NW865; Kan 292P931; 209Ky318, 272SW743; 212Ky791, 280SW111; 219Ky834, 294SW790; 221Ky202, 298SW675; 221Ky219, 298SW707; 221Ky599, 299SW203; 227Ky223, 12SW(2d)336; 229Ky305, 17SW(2d)238; 164La423, 114S83; 166La859, 118S46; 247Mich260, 225NW540; 251Mich99, 230NW931; 171Minn158, 213NW735; 171Minn222, 213NW920; 143Miss352, 108S727; 143Miss365, 108S809 (reasonable doubt); 144Miss380, 109S871; 144Miss649, 110S216; 147Miss593, 113S348; 149Miss223, 115S429; Miss 119S355; 154Miss60, 119S507; 315Mo 232, 285SW712; 315Mo 242, 286SW69; Mo 11SW(2d)1020; 84Mont474, 276P436; 114Nebr13, 205NW574; 50Nev1, 248P900; 105NJL352, 144A612; 105NJL549, 147A395; NJSup 136A206; NJSup 147A49; NJSup 150A207; 130Misc105, 222NYS595; 192NC35, 133SE161; 192NC80, 133SE404; 195NC242, 141SE736; 50ND270, 195NW567, 570 [citCJ]; 119 Oh231, 163NE28; 285Pa97, 131A667; 295Pa264, 145A89; 133SC167, 130SE747; 143SC340, 141SE605; 147SC325, 145SE194; 148SC196, 145SE799; 150SC341, 148SE184; 155SC432, 152SE677; 156SC375, 153SE344; 50SD29, 208NW166; 54SD245, 222NW681; 100TexCr261, 272SW492; 101TexCr617, 276SW926; 102TexCr517, 278SW840; 103TexCr566, 280SW1080; 103TexCr572, 281SW1082; 104TexCr485, 284SW957; 108TexCr92, 299SW249; 108TexCr48, 299SW254; 109TexCr564, 5SW(2d)982; 110TexCr178, 8SW(2d)510; 112TexCr419, 16SW(2d)828(3dcase); 112TexCr554, 18SW(2d)163; TexCr 20SW(2d)772; TexCr 21SW(2d)1044(2dcase); TexCr 26SW(2d)915; 67Utah325, 247P497; Utah 266P272; Utah 280P1046; 100Vt32, 134A636; 99Vt490, 134A697, 48ALR985; 143Va554, 130SE416 (instructions correct when read with instruction on reasonable doubt); 144Va594, 131SE212 (omission of "beyond reasonable doubt" not misleading in view of other instructions); 152Va1014, 148SE821; 153Va909, 150SE407; Va 154SE508; 136Wash603, 241P4; 141Wash273, 251P280; 143Wash288, 255P141; 150Wash66, 272P89; 103WVa605, 138SE202; 187Wis448, 204NW486, 40ALR945; 197Wis295, 222NW247; 36Wyo 532, 257P2.

1054–94 318Mo 611, 300SW691 (sufficient instruction). [a] **Express withdrawal of former erroneous charge not essential.** 100Vt32, 134A636.

1054–95 164La423, 114S83.

1054–96 16F(2d)434; 71CalA213, 234P877; 326 Ill 145, 157NE225; 205 Iowa1321, 217NW814; 117Nebr719, 222NW628; 25 OhA273, 157NE813.

1054–97 16F(2d)434; 17F(2d)225; 23F(2d)401; 204Cal 582, 269P427, 59ALR1480; CalA 260P946; 93CalA77, 268P1071; 324 Ill 294, 155NE301; MoA 256SW496; 55ND761, 215NW277; 40Wyo174, 276P172.

1054–98 16F(2d)434; 42F(2d)210; 215Ala2, 109S287; 71CalA213, 234P877; Ga 154S337; 34GaA233, 128SE917; 46Ida646, 270P140; 321 Ill 380, 152NE215; 199 Ind18, 154NE867; 199 Ind247, 155NE544; 202 Iowa1188, 211NW850; 234Mich419, 208NW458; 316Mo647, 291SW118; MoA 272SW697; NC155SE451; 97PaSuper510.

1055–1 234Mich419, 208NW458.

1055–3 218Ky836, 292SW497.

1055–4 143Miss1, 108S287.

1055–7 22AlaA319, 115S294 (error cured); 34GaA233, 128SE917; 197 Ind640, 151NE689; 199 Ind18, 154NE867; 105NJL549, 147A395; 108TexCr187, 299SW399.

1055–8 321 Ill 397, 152NE149; 33NM365, 266P920; 107TexCr297, 296SW570; 107TexCr208, 296SW593; 107TexCr357, 296SW596. [a] 204 Iowa130, 214NW708. [c] **Instruction to disregard former instruction** cures erroneous misstatements of fact therein. NJSup 131A99.

1055–11 203 Iowa155, 212NW382; 83NH419, 143A594.

1055–13 27Ariz491, 232P398; 162Ga7, 132SE624; Ill 173NE112; 163La750, 112S708; 164La496, 114S109; 312Mo140, 279SW99; 116Nebr45, 215NW564; 196NC386, 145SE679(1stcase). [b] **In Alabama.**–21AlaA423, 109S125. [c] **In Oregon.**–131 Or455, 282P560.

1056–14 31F(2d)682; 203Cal 703, 265P914; CalA 258P656; 37GaA84, 139SE94; 205 Iowa1321, 217NW814; 316Mo42, 289SW811; 316Mo 55, 289SW890; 316Mo 31, 292SW434; 115Nebr77, 211NW200; 115Nebr391, 213NW347; 116Nebr141, 216NW173; 118Nebr281, 224NW286; 87PaSuper66. [b] **Where defendant is charged with separate offenses requiring independent proof,** court should instruct as to each offense though instructions are not requested. 203Cal 703, 265P914. [c] **Where defend-**

ant is charged in different counts with violation of alternative phases of statute, court, of its own motion must charge that jury must agree on at least one of alternative charges in order to convict. 203Cal 703, 265P914.

1056–15 CalA 258P656; 215Ky800, 287 SW17; Mo 292SW440.

1056–17 MoA 256SW512; 102TexCr 329, 277SW129; TexCr 31SW(2d)1080 (2dcase).

1056–20 12F(2d)742; 21F(2d)283; 28 F(2d)965; 39F(2d)414; 215Ala576, 105 S583 (mode of retreat); 35Ariz420, 279 P256; Ariz 285P274; 175Ark752, 2SW (2d)36 (reasonable doubt); 178Ark928, 12SW(2d)909; 203Cal 703, 265P914; 68CalA95, 228P417; 77CalA375, 246P 815; 89CalA132, 264P314 (lesser offense); 90CalA683, 266P813; 93CalA 568, 269P969; 94CalA696, 271P751; 84 Colo 166, 268P536 (as to forms of verdict); DC 41F(2d)976; 160Ga899, 129 SE436; 163Ga684, 137SE31; 164Ga128, 138SE67; 166Ga201, 142SE739; Ga 155 SE38; 36GaA114, 135SE518; 36GaA 288, 136SE324; 36GaA668, 137SE860; 36GaA639, 138SE83; 37GaA55, 138SE 525; 37GaA119, 138SE924; 37GaA382, 140SE406; 37GaA632, 141SE317; 41 GaA421, 153SE222; 42 Ida319, 245P685; 44 Ida636, 258P553; 325 Ill 57, 155NE 838; 328 Ill 602, 160NE125; 198 Ind 590, 154NE372; 200 Iowa483, 203NW 806; 205 Iowa849, 216NW710; 205 Iowa 858, 216NW759; Iowa 230NW379; Iowa 232NW636; 121Kan549, 247 P639; 123Kan19, 254P333; 126Kan 799, 271P291; 128Kan712, 280P754; 166La759, 117S820; 238Mich485, 213 NW717; 240Mich489, 215NW345; 171 Minn173, 213NW923; 147Miss171, 113 S177; Mo 270SW375; Mo 279SW705; Mo 281SW32; 315Mo 242, 286SW69; 315Mo 1279, 289SW792; 316Mo 42, 289 SW811; 316Mo 1, 289SW945; 316Mo 179, 289SW954; 316Mo 31, 292SW434; Mo 296SW128; 322Mo 246, 14SW(2d) 608; Mo 29SW(2d)156; MoA 281SW62; 115Nebr65, 211NW179; 115Nebr391, 213NW347; 116Nebr45, 215NW564; 118Nebr267, 224NW274; 118Nebr517, 225NW479; 50Nev1, 248P900; NJ 130 A461; 52ND478, 203NW679; OklCr 278 P357; 131SC438, 128SE409; 137SC58, 135SE635; 138SC459, 136SE739; 153 SC7, 150SE315; SC 155SE409; 154Tenn 95, 290SW25; 159Tenn112, 17SW(2d) 30; 103TexCr182, 280SW798; 104TexCr 522, 286SW209; 154Wash304, 282P48; Wash 286P65. See also 192NC80, 133 SE404. [c] **Recapitulation of evidence,** if desired in final charge, must be requested. 192NC80, 133SE404.

1057–21 163Ga684, 137SE31; 164Ga 128, 138SE67; 36GaA288, 136SE324; 37 GaA382, 140SE406; 198 Ind590, 154NE 372; 238Mich485, 213NW717; 315Mo 1279, 289SW792; 58ND82, 224NW878; 94PaSuper330 (on reasonable doubt); 133SC67, 130SE337.

1057–22 37GaA511, 140SE787.

1057–24 68CalA95, 228P417; 79CalA 295, 249P525 (accomplice); 95CalA659, 273P110; 162Ga267, 134SE36; 37GaA 507, 140SE791; 37GaA160, 142SE306; 207 Iowa1033, 222NW423; 119Kan670, 240P848; Kan 291P745; 235Mich594, 209NW815; 241Mich67, 216NW398; 311 Mo 630, 279SW135, 140 [citCJ]; 315Mo 156, 285SW718; 316Mo 179, 289SW954; 318Mo 1233, 3SW(2d)365; MoA 16SW (2d)653; 105NJL266, 144A875; NJSup 151A376; 53ND916, 208NW388; 55ND 846, 215NW552; OklCr 274P39(2d case); 132 Or627, 287P681; SD 229NW 395; 136Wash603, 241P4; 34Wyo175, 242P411. But see 198 Ind45, 152NE161 ("transport" of liquor).

1057–25 37GaA84, 139SE94; 106TexCr 285, 292SW222.

1057–26 97CalA179, 275P482; CalA 291P434; 160Ga899, 129SE436; 167Ga 282, 145SE458; 170Ga461, 153SE31; Ga 155SE38; Ga 154SE906; 36GaA668, 137SE860; 36GaA639, 138SE83; 37GaA 55, 138SE525; 37GaA350, 140SE428; 37GaA611, 141SE319; 41GaA618, 154 SE201; 205 Iowa430, 216NW610; 312 Mo 140, 279SW99; Mo 281SW437; 316 Mo 55, 289SW890; 316Mo 1, 289SW945; OklCr 277P284; 100TexCr28, 271SW 622; 103TexCr679, 282SW220; 107Tex Cr432, 295SW603; 107TexCr276, 296SW 520.

1058–28 34GaA175, 128SE585; 119Oh 189, 162NE802; 137SC75, 134SE514; 111TexCr605, 13SW(2d)366.

1058–29 162Ga267, 134SE36; 35GaA 574, 134SE185; 49Nev184, 242P316.

1058–32 35GaA578, 134SE183; 36GaA 207, 136SE103; 36GaA668, 137SE860; 37 GaA55, 138SE525; 37GaA350, 140SE 428; GaA 155SE342(2dcase); 119Kan 658, 240P567 (where full instructions on law of case are given); 120Kan376, 244 P225; 121Kan331, 246P508; 123Kan19, 254P333; 126Kan200, 268P98; Mo 270S W273; 312Mo 140, 279SW99; 316Mo 1, 289SW945; Mo 295SW788; 321Mo 564, 12SW(2d)445; 149SC125, 146SE684.

1058–33 165Ga290, 140SE754; 37GaA 610, 141SE85.

1058–35½–New. Coercion. Where there is substantial evidence thereof, the court should instruct on the question. 208Ky700, 271SW1059.

1058–37 5F(2d)650; 181Ark1145, 29 SW(2d)670; Cal 289P634; 68CalA95, 228P417; 75CalA365, 242P906; 91CalA 298, 266P1020; 162Ga267, 134SE36; 164Ga128, 138SE67; 167Ga341, 145SE 647; Ga 154SE337; 35GaA191, 132SE 236 (presumption that everything in residence of married woman is in possession of her husband); 35GaA583, 134SE186 (burden of proof and presumption of innocence); 37GaA520, 140SE788; 39GaA 642, 148SE167(2dcase); 40GaA217, 149 SE292(2dcase) (where state does not rely solely on evidence of accomplice); 44 Ida636, 258P553; 44 Ida739, 260P164 (corroboration); 335 Ill 432, 167NE10; Ind 170NE542; 126Kan200, 268P98; 227Ky512, 13SW(2d)508; 235Ky182, 30 SW(2d) 484; 302Mo 638, 259SW787 (credibility of witness jointly indicted with defendant on trial); 315Mo 242, 286 SW69; 316Mo 42, 289SW811; 316Mo 1, 289SW945; 316Mo 31, 292SW434; 317 Mo 413, 297SW63; Mo 292SW440; Mo 295SW547; Mo 11SW(2d)1020; 322Mo 106, 16SW(2d)205; Mo 18SW(2d)37 (credibility of witnesses); 78Mont560, 254P858; 115Nebr65, 211NW179; 82 NH518, 136A358; 83NH532, 145A456; 104NJL512, 141A85; 196NC386, 145SE 679(1stcase); NC 154SE402; 52ND478, 203NW679; 88PaSuper216; 155SC495, 152SE738; 157Tenn403, 8SW(2d)371; 99TexCr465, 270SW558.

1059–38 21F(2d)409; 32F(2d)540; 33 F(2d)265; 30Ariz466, 248P39; 76CalA 91, 243P878; 88CalA 222, 263P306; 199 Iowa842, 201NW75; 126Kan784, 271P 296; 216Ky110, 287SW363; 230Ky250, 19SW(2d)218; 230Ky815, 20SW(2d)998; 235Mich594, 209NW815; 250Mich206, 229NW421; Mass 172NE343; 315Mo 1279, 289SW792; Mo 292SW440; Mo 18 SW(2d)37; 78Mont560, 254P858; 114 Nebr257, 207NW207; Nev 285P503; 49 ND677, 193NW148; 88PaSuper216; Tex Cr 25SW(2d)875, 68ALR1186 (question raised too late).

1059–39 28F(2d)150; 161Ga166, 129SE 772; 162Ga13, 132SE388; 162Ga573, 134SE169; 35GaA396, 133SE263 (where facts from which inference of guilt or innocence could be drawn are shown by direct evidence); 35GaA662, 134SE183; 35GaA667, 134SE340 (case not dependent entirely on circumstantial evidence); 36GaA207, 136SE103; 37GaA823, 142SE 195; 38GaA368, 144SE9; 38GaA681, 145SE476(1stcase); 38GaA701, 145SE 499; GaA 145SE521; 40GaA542, 150SE 438(2dcase); 40GaA548, 150SE444; 41 GaA333, 153SE79(2dcase); 41GaA634, 154SE214; 206 Iowa397, 220NW13; 124 Kan208, 210, 257P739; 127Kan510, 274 P209; 128Kan712, 280P754; 170Minn 504, 212NW894; 316Mo 1, 289SW945; 35 OklCr238, 250P142; OklCr 276P791; OklCr 277P684; OklCr 280P851(2dcase); 107TexCr88, 294SW548; 37Wyo 155, 259P810; 38Wyo 140, 265P25.

1059–40 162Ga13, 132SE388; 39GaA 119, 146SE347; 119Kan509, 240P955; 170Minn504, 212NW894.

1059–42 7F(2d)458; 12F(2d)852; 33 F(2d)443; 213Ala576, 105S583; 22AlaA 557, 117S804; 219Ala364, 122S617(2d case); 68CalA186, 228P733; 71CalA181, 235P72; 71CalA239, 235P69; 74CalA 138, 239P705; 75CalA365, 242P906; 75 CalA657, 243P64; 77CalA375, 246P815; 87CalA33, 261P530; 100CalA235, 279P 1067; CalA 289P667; 98Fla881, 124S 445; Fla 126S158(2dcase); 160Ga899, 129SE436; 161Ga166, 129SE772; 162Ga1, 132SE418; 163Ga684, 137SE31; 164Ga 128, 138SE67; 166Ga1, 141SE903; 166 Ga160, 142SE685; 166Ga698, 144SE254; 167Ga318, 145SE456; 168Ga530, 148SE 386(2dcase); 168Ga575, 148SE500; Ga 154SE337; 34GaA232, 128SE917; 34GaA 228, 129SE12; 35GaA583, 134SE186; 36 GaA279, 136SE468; 36GaA668, 137SE 860; 36GaA673, 137SE798; 37GaA55, 138SE525; 37GaA611, 141SE319; 39 GaA10, 145SE907(2dcase); 39GaA412, 147SE408; 168Ga296, 147SE504; 40GaA 225, 149SE177; 40GaA225, 149SE178; 196 Ind258, 148NE143; 198 Ind590, 154 NE372; 200 Ind483, 164NE626; Ind 166 NE654; Ind 168NE692; Ind 170NE542; 200 Iowa636, 204NW307; 203 Iowa929, 210NW465; 230Ky250, 19SW(2d)218; 259Mass152, 156NE65; 238Mich485, 213 NW717; 247Mich260, 225NW540; Mich 233NW336; 168Minn381, 210NW108; 172Minn208, 215NW206; Mo 256SW 740; Mo 279SW133; 314Mo 599, 285SW 733; 316Mo 31, 292SW434; Mo 20SW (2d)529(1stcase); MoA 282SW1043; MoA 16SW(2d)648; 74Mont126, 238P 603; 82Mont170, 266P400; 118Nebr267, 224NW274; 105NJL266, 144A875; NJ Sup 140A404; NJSup 144A310; NH 146 A503; 194NC260, 139SE374; 195NC242, 141SE736 (more fully defining manslaughter); 54ND840, 211NW585; 57 ND89, 220NW843; ND 229NW7 (instruction in language of statute); 34 OhA60, 170NE444; OklCr 279P515; OklCr 282P689; OklCr 283P579(2dcase); 285Pa232, 132A168; 95PaSuper305; 96 PaSuper155; RI 141A607; 136SC68, 134SE213; 138SC293, 136SE215; 138SC 421, 136SE736; 144SC118, 142SE238; 153SC7, 150SE315; 153SC175, 150SE614 (1stcase); 157SC459, 154SE658; SD 229 NW395; 100TexCr295, 273SW582; 101 TexCr96, 274SW628; Utah 284P108; Wyo 285P803. See also 28F(2d)150.

1060–43 40GaA722, 151SE397; 200 Iowa483, 203NW806; 294Pa353, 144A 292.

1060–44 198 Ind590, 154NE372; 203 Iowa929, 210NW465.

1060–44½–New. It is not error to omit instructions on a minor degree of the offense in the absence of a request, especially where not necessary under the evidence. 54ND840, 211NW585.

1060–46 78CalA167, 248P289; 164Ga 128, 138SE67. See also 90Fla86, 105S 144.

1061–47 21AlaA201, 106S683; 195Cal 295, 232P974; 96CalA215, 273P1087; DC 41F(2d)976; 164Ga128, 138SE67; 326 Ill 518, 158NE142; Ill 172NE819. [c] **Statutory definition** of accomplice, if desired, must be specifically requested. 71CalA788, 236P185.

1061–49 164Ga128, 138SE67; Mo 23 SW(2d)152.

1061–51 164Ga128, 138SE67.

1061–54 17F(2d)696.

1061–55½–New. Defendant, tendering a wholly unjustifiable number of instructions, is in no position to complain of error in refusing to give certain instructions. 331 Ill 581, 163NE373.

1061–57 177Ark1108, 9SW(2d)800.

1061–61 21AlaA437, 109S181; AlaA 129S785(2dcase); CalA 291P853; Fla 128S494; 160Ga565, 128SE679; 160Ga 899, 129SE436; 161Ga166, 129SE772; 163Ga43, 135SE410; 163Ga312, 136SE 134; 163Ga313, 136SE154; 163Ga684, 137SE31; 164Ga95, 137SE824; 169Ga 142, 149SE887; 169Ga425, 150SE579; 169Ga455, 150SE587; 170Ga810, 154SE 229; Ga 155SE670; 35GaA583, 134SE 186; 36GaA279, 136SE468; 36GaA582, 137SE412; 36GaA673, 137SE798; 37 GaA380, 140SE425; 37GaA520, 140SE 788; 38GaA365, 143SE904; 38GaA360, 144SE14; 38GaA362, 144SE51; 39GaA 812, 148SE631; 40GaA503, 150SE434 (2dcase); 40GaA548, 150SE444; 40GaA 508, 150SE455; 40GaA511, 150SE466; 40GaA725, 151SE410(2dcase); 41GaA 300, 152SE604(1stcase); 41GaA379, 153 SE202; 41GaA430, 153SE220; 41GaA 634, 154SE214; GaA 155SE382; GaA 155SE511(1stcase); 322Mo 69, 16SW (2d)30; 82Mont170, 266P400 (on re-

turn of jury for further instructions); 115Nebr65, 211NW179; 118Nebr517, 225NW479; 190NC862, 129SE582; 192 NC490, 135SE324; OklCr 274P1094; OklCr 280P851(2dcase); 104TexCr485, 284SW957. See also 34GaA175, 128SE 585. But see 37GaA165, 139SE132.

1062–62 200 Ind572, 165NE313.

1062–64 15F(2d)696; 17F(2d)696; 169Ga884, 150SE558; 256Mass452, 152 NE739; 9PaDist&Co 448; 101TexCr 144, 274SW577 (before charge is read to jury). [a] 14F(2d)562; 15F(2d) 696; 39F(2d)897; TexCr 283SW811; 110TexCr178, 9SW(2d)352.

1062–65 181Ark665, 27SW(2d)781; 34 ObA536, 171NE407.

1062–66 39F(2d)897.

1062–68 89Fla336, 103S642; 259Mass 128, 156NE57; 259Mass152, 156NE65; 115Nebr65, 211NW179; 103NJL663, 138A575; 100TexCr195, 272SW469.

1062–68½–New. not until after closing of evidence and court's charge; 70CalA271, 233P85.

1062–72½–New. In some jurisdictions requested instructions submitted any time before the charge is given to the jury should be considered by the court, 124Kan405, 260P976.

1062–72½–New. and should be given or refused on their merits. 124Kan405, 260P976.

1062–75 17F(2d)696; 181Ark665, 27 SW(2d)781; NJSup 151A376; 151SC 150, 148SE701(1stcase).

1063–80½–New. Objections are waived unless made before verdict is rendered. 186Wis648, 203NW343.

1063–80½–New. In some jurisdictions the proper time to make a request is when the evidence is concluded. 118 Nebr517, 225NW479.

1063–84 104TexCr42, 282SW585.

1063–85 273US392, 47SCt377, 71L ed 700, 50ALR989; 4F(2d)833; 5F(2d)45; 5F(2d)471; 5F(2d)901; 5F(2d)940; 7 F(2d)598; 8F(2d)561; 8F(2d)919; 12 F(2d)683; 13F(2d)53; 14F(2d)75; 14 F(2d)888; 16F(2d)116; 17F(2d)339; 20F(2d)269; 20F(2d)289; 20F(2d)754; 21F(2d)285; 21F(2d)889; 22F(2d)280; 22F(2d)760; 23F(2d)180; 23F(2d)470; 23F(2d)472; 24F(2d)910; 25F(2d) 231; 25F(2d)967; 26F(2d)400; 26F (2d)791; 27F(2d)322; 29F(2d)444 [certiorari den 279US834, 49SCt253, 73 L ed983(4thcase)]; 30F(2d)584; 31F (2d)19; 31F(2d)846; 34F(2d)1; 35F (2d)689; 36F(2d)1; 38F(2d)3; 39F (2d)782; 40F(2d)164; 40F(2d)315; 41 F(2d)157; 41F(2d)162; 42F(2d)812; 212Ala484, 103S458; 212Ala571, 103S 664; 213Ala169, 104S438; 213Ala301, 104S668; 213Ala358, 104S656; 213Ala 691, 106S134; 214Ala91, 106S503; 214 Ala117, 106S609; 214Ala172, 106S692; 214Ala476, 108S349; 215Ala27, 109S 161; 215Ala42, 109S109; 215Ala224, 110S23; 215Ala276, 110S407; 215Ala 316, 110S476; 215Ala453, 111S34; 215 Ala497, 111S212; 21AlaA653, 111S648; 22AlaA108, 113S88; 22AlaA123, 113S 320; 22AlaA124, 113S321; 216Ala342, 113S391; 217Ala225, 115S297; 22AlaA 648, 119S512; 22AlaA651, 119S598(2d case); 23AlaA26, 119S863(1stcase); 23 AlaA63, 120S468; 23AlaA43, 121S432 (2dcase) [certiorari den 219Ala116, 121 S435(1stcase)]; 23AlaA92, 121S447(1st case); 23AlaA182, 122S298; 220Ala544, 126S848; 23AlaA348, 128S359(2dcase); 23AlaA529, 128S461; 23AlaA528, 128S 464(1stcase); 23AlaA532, 128S468; 23 AlaA582, 129S478; 23AlaA594, 129S 485; 20AlaA412, 103S697; 20AlaA426, 103S707; 20AlaA450, 103S901; 20AlaA 454, 103S912; 20AlaA457, 103S902; 20 AlaA467, 103S712; 20AlaA543, 104S46; 20AlaA547, 104S48; 20AlaA549, 103S 478; 20AlaA550, 104S50; 20AlaA553, 103S717; 20AlaA562, 103S916; 20AlaA 591, 104S347; 20AlaA600, 104S351; 20 AlaA630, 104S677; 20AlaA660, 104S 771; 21AlaA31, 104S871; 21AlaA35, 104S876; 21AlaA18, 104S880; 21AlaA 40, 104S886; 21AlaA111, 105S427; 21 AlaA114, 105S433; 21AlaA87, 105S700; 21AlaA95, 105S705; 21AlaA14, 105S 712; 21AlaA64, 106S67; 21AlaA165, 106S348; 21AlaA181, 106S392; 21AlaA 188, 106S510; 21AlaA196, 106S696; 21 AlaA200, 106S697; 21AlaA214, 107S829; 21AlaA240, 106S896; 21AlaA248, 108S 870; 21AlaA255, 107S230; 21AlaA261, 107S226; 21AlaA264, 107S323; 21AlaA 270, 108S617; 21AlaA277, 107S327; 21 AlaA278, 107S734; 21AlaA279, 108S 616; 21AlaA289, 107S791; 21AlaA300, 107S731; 21AlaA304, 107S719; 21AlaA 309, 107S726; 21AlaA310, 107S789; 21AlaA313, 108S77; 21AlaA319, 108 S84; 21AlaA323, 108S80; 21AlaA346, 108S261; 21AlaA351, 108S271; 21 AlaA357, 108S270; 21AlaA372, 108 S633; 21AlaA378, 108S646; 21AlaA 391, 108S641; 21AlaA407, 108S645; 21 AlaA409, 108S658; 21AlaA415, 109S 122; 21AlaA434, 109S172; 21AlaA445, 109S888; 21AlaA457, 109S366; 21AlaA 460, 109S294; 21AlaA464, 109S375; 21 AlaA474, 109S385; 21AlaA495, 109S 528; 21AlaA497, 109S530; 21AlaA516, 109S892; 21AlaA517, 110S167; 21AlaA 548, 109S896; 21AlaA551, 109S897; 21 AlaA559, 110S52; 21AlaA562, 110S563; 21AlaA570, 110S63; 21AlaA573, 110S 169; 21AlaA591, 110S412; 21AlaA597, 110S562; 21AlaA601, 110S913; 22AlaA 66, 111S452; 22AlaA63, 111S583; 22 AlaA67, 111S587; 21AlaA655, 111S649; 22AlaA17, 111S899; 22AlaA49, 112S94; 22AlaA86, 112S538; 22AlaA93, 112S 806; 22AlaA95, 112S811; 22AlaA102, 112S898(1stcase); 22AlaA104, 112S898 (2dcase); 22AlaA22, 112S901; 22AlaA 131, 113S469; 22AlaA144, 113S474; 22 AlaA126, 114S130; 22AlaA304, 115S146; 22AlaA324, 115S418; 22AlaA353, 115S 698; 22AlaA366, 115S763; 22AlaA379, 115S851; 22AlaA376, 115S852; 22AlaA 434, 116S504; 22AlaA415, 116S903; 22 AlaA418, 116S910; 22AlaA508, 117S 492; 22AlaA526, 117S500; 22AlaA545, 117S603; 22AlaA547, 117S606; 22AlaA 557, 117S804; 22AlaA577, 117S911; 22 AlaA581, 118S239 [certiorari den 218Ala 169, 118S240]; 22AlaA609, 118S500; 22 AlaA644, 119S248; 23AlaA40, 120S308; 23AlaA73, 120S917(2dcase); 23AlaA83, 121S2(2dcase); 23AlaA126, 121S905 (2dcase); 23AlaA147, 122S307; 23AlaA 122, 122S461 [certiorari den 219Ala361, 122S462]; 23AlaA213, 123S104(2dcase); 23AlaA200, 123S283(2dcase); 23AlaA 237, 123S290; 23AlaA121, 123S895(1st case); 23AlaA273, 124S125(1stcase); 23AlaA378, 125S793; 23AlaA382, 125S 899; 23AlaA400, 126S181; 23AlaA404, 126S183(2dcase); 23AlaA412, 126S188; 23AlaA463, 127S250; 23AlaA412, 127S 791(1stcase); 23AlaA414, 127S801; AlaA 129S712; AlaA 130S374; AlaA 130S527; AlaA 130S531; 28Ariz539, 237P950; 29Ariz247, 240P863; 29Ariz 523, 243P601; 30Ariz466, 248P39; 168 Ark339, 270SW498; 168Ark731, 271SW 338; 169Ark225, 273SW13; 168Ark 1145, 273SW19; 169Ark286, 273SW 1035; 169Ark421, 275SW758; 169Ark 1212, 277SW26; 169Ark1212, 278SW1; 169Ark1211, 278SW14; 170Ark1192, 177Ark595, 281SW369; 170Ark1194, 282SW676; 170Ark1194, 283SW372; 171Ark203, 284SW28; 171Ark307, 284 SW751; 171Ark1188, 285SW1; 171Ark 568, 285SW13; 171Ark1187, 285SW356; 171Ark705, 285SW380; 171Ark556, 286 SW819; 171Ark768, 286SW939; 171 Ark1189, 287SW578; 172Ark23, 287SW 765; 172Ark156, 287SW1026; 172Ark 244, 288SW904; 172Ark983, 291SW85; 173Ark1180, 293SW734; 174Ark1179, 297SW827; 175Ark64, 297SW828; 174 Ark800, 297SW854; 174Ark899, 298SW 349; 175Ark1170, 298SW1019; 175Ark 391, 299SW386; 175Ark453, 299SW739; 175Ark1169, 299SW1004; 175Ark1047, 1SW(2d)546; 175Ark752, 2SW(2d)36; 176Ark88, 2SW(2d)50; 176Ark640, 3 SW(2d)679; 176Ark654, 3SW(2d)980; 176Ark771, 4SW(2d)9; 176Ark916, 5SW (2d)946; 177Ark549, 7SW(2d)2; 177 Ark708, 7SW(2d)980, 59ALR356; 177 Ark1108, 9SW(2d)800; 179Ark1, 13SW (2d)820; 179Ark216, 15SW(2d)312; 179Ark309, 15SW(2d)389(2dcase); 179 Ark344, 15SW(2d)987; 179Ark1199, 18 SW(2d)335; 180Ark197, 20SW(2d) 872; 180Ark613, 22SW(2d)40; 180Ark 1136, 24SW(2d)317; 181Ark661, 27SW (2d)783; Ark 29SW(2d)1079(2dcase); Ark 30SW(2d)817(1stcase); Ark 30SW (2d)819; Ark 30SW(2d)838; Ark 30SW (2d)851; 194Cal 1, 227P156; 194Cal 555, 229P341; 195Cal 295, 232P974; 198Cal 534, 246P62; 199Cal 78, 248P 250; 203Cal 144, 263P216; Cal 265P 231; 205Cal 29, 269P628(2dcase); 94 CalA4, 270P377; 94CalA55, 270P468; 207Cal 73, 276P1006; 207Cal 312, 277P 1041; 208Cal 295, 280P983; Cal 287P 337; Cal 289P629; 68CalA7, 228P376; 68CalA457, 229P974; 68CalA487, 229 P896; 68CalA610, 230P13; 69CalA201, 230P982; 70CalA130, 232P752; 70CalA 465, 233P812; 71CalA150, 234P905; 71 CalA181, 235P72; 71CalA213, 234P877; 71CalA402, 235P467; 71CalA628, 235P 737; 71CalA730, 236P214; 72CalA102, 236P944; 196Cal 191, 237P25; 72CalA 226, 237P66; 72CalA565, 237P568; 72 CalA570, 237P793; 73CalA334, 238P 770; 74CalA135, 239P412; 74CalA510, 241P267; 75CalA38, 241P892; 75CalA 1, 241P928; 75CalA115, 242P87; 75 CalA439, 242P876; 75CalA404, 242P 1067; 75CalA421, 243P39; 75CalA642, 243P461; 76CalA91, 243P878; 76CalA 144, 244P101; 76CalA645, 245P450; 77 CalA104, 246P84; 77CalA384, 246P811; 78CalA167, 248P289; 78CalA415, 248P 693; 78CalA223, 248P716; 78CalA598, 248P969; 79CalA20, 248P1027; 78CalA 442, 248P1061; 79CalA328, 249P231; 79CalA373, 249P536; 79CalA519, 250P 211; 79CalA605, 250P578; 80CalA77, 251P219; 80CalA257, 251P648; 80CalA 200, 251P675; 80CalA243, 251P699; 80 CalA321, 251P949; 80CalA783, 252P 1061; 81CalA113, 252P1063; 81CalA 199, 253P169; 81CalA398, 253P773; 81CalA752, 254P666; 82CalA126, 255 P233; 82CalA389, 255P839; CalA 256 P132; 83CalA463, 256P876; 84CalA10, 257P555; 86CalA235, 260P822; 86CalA 298, 260P901; 87CalA724, 262P795; 88 CalA502, 263P836; 88CalA558, 263P 857; 88CalA575, 263P862; 89CalA405, 264P1105; 89CalA451, 265P276; 89 CalA545, 265P355; 90CalA186, 265P 525; 90CalA366, 265P978; 91CalA150, 266P860; 92CalA245, 267P942; 92CalA 729, 268P927; 93CalA478, 269P670; 93 CalA497, 269P702; 93CalA590, 269P 955; 94CalA85, 270P706; 94CalA297, 271P132; 94CalA628, 271P765; 95CalA 242, 272P794; 95CalA259, 272P816; 95 CalA631, 273P48; 95CalA659, 273P110; 95CalA680, 273P583; 96CalA215, 273P 1087; 97CalA291, 275P474; 97CalA664, 275P1010(2dcase); 97CalA537, 275P 1017; 97CalA692, 276P156(1stcase); 98 CalA40, 276P401; CalA 276P641; 99 CalA409, 278P885; 100CalA279, 279P 1046; 100CalA785, 281P81; 101CalA 302, 281P660; 101CalA744, 282P413; CalA 283P119; 102CalA527, 283P129; 102CalA493, 283P292; CalA 285P386; CalA 288P880; CalA 288P1095; CalA 290P102; CalA 290P493; CalA 290P 600; CalA 291P887; 82Colo 205, 258P 226; 82Colo 541, 261P661; 84Colo 254, 269P907; 86Colo 35, 278P594, 65ALR 1260; 87Colo 507, 289P1081; 103Conn 138, 130A96; 108Conn454, 143A561; (DC) 41F(2d)976; 90Fla299, 105S 834; 90Fla337, 106S406; 90Fla381, 106 S741; 90Fla779, 107S242; 91Fla446, 107S331; 93Fla232, 111S635; 93Fla 756, 112S608; 95Fla775, 116S618; 160 Ga593, 128SE796; 160Ga605, 128SE747; 160Ga769, 129SE102; 161Ga332, 131SE 80; 162Ga13, 132SE388; 163Ga12, 135 SE421; 163Ga176, 135SE735; 164Ga 128, 138SE67; 164Ga298, 138SE229; 164Ga467, 139SE877; 165Ga210, 140SE 625; 165Ga326, 140SE889; 166Ga189, 142SE674; 166Ga563, 144SE170; 166 Ga758, 144SE301; 167Ga277, 145SE452; 168Ga530, 148SE386(2dcase); 169Ga 142, 149SE887; 170Ga886, 154SE363; Ga 155SE11; 36GaA672, 137SE788; 36GaA743, 138SE253; 37GaA507, 140 SE791; 37GaA611, 141SE319; 39 GaA415, 147SE407; 39GaA412, 147 SE408; 40GaA15, 148SE622; 40GaA 251, 149SE283; 41GaA346, 152SE911 (2dcase); 41GaA333, 153SE79(2dcase); 41GaA379, 153SE202; 41GaA568, 153SE 620; GaA 155SE378; 41GaA618, 154 SE201; 41GaA635, 154SE209; 28Hawaii187; 29Hawaii90; 41 Ida616, 243P 359; 43 Ida564, 253P842; 44 Ida173, 258P551; 44 Ida671, 258P1075; 45 Ida 73, 260P694; 45 Ida760, 265P24; 47 Ida 162, 272P1010; 47 Ida328, 274P805, 62 ALR195; 47 Ida760, 278P773; 48 Ida 335, 282P93; 48 Ida439, 282P489; Ida

288P894; Ida 290P722; 318 Ill 114, 149 NE3; 319 Ill 306, 150NE16; 322 Ill 434, 153NE639; 324 Ill 11, 154NE451; 324 Ill 375, 155NE363; 326 Ill 104, 157NE76; 326 Ill 324, 157NE167; 328 Ill 631, 160NE121; 332 Ill 207, 163NE130; 333 Ill 104, 164NE138; 333 Ill 258, 164NE682; 333 Ill 451, 164NE840; 333 Ill 397, 164NE847; 333 Ill 583, 165NE155; 335 Ill 596, 167NE786; 336 Ill 251, 168NE292; 336 Ill 580, 168NE650; 339 Ill 225, 171NE152; Ill 172NE806; Ill 173NE128; Ill 173NE97; Ill 173NE357; Ill 173NE383; Ill 173NE467; 237 Ill178; 197 Ind463, 150NE365; 197 Ind599, 150NE108; 197 Ind119, 151NE129; 197 Ind491, 151NE382; 199 Ind55, 155NE203; 199 Ind196, 156NE403; 199 Ind217, 156NE513; 199 Ind489, 158NE480; 199 Ind746, 161NE8; 200 Ind440, 164NE267; 89 IndA31, 165NE560; 89 IndA344, 166NE298; Ind 167NE531; Ind 168NE458; Ind 168NE692; Ind 169NE676; Ind 173NE229; Ind 173NE453; 200 Iowa636, 204NW307; 202 Iowa1067, 208NW360; 202 Iowa352, 209NW514; 203 Iowa329, 210NW911; 202 Iowa732, 210NW913; 203 Iowa918, 210NW961; 204 Iowa137, 214NW531; 204 Iowa130, 214NW708; 204 Iowa1135, 216NW642; 207 Iowa760, 223NW535; Iowa 227NW589; Iowa 229NW255; 118Kan641, 236P855; 120Kan221, 243P280; 121Kan549, 247P639; 123Kan62, 254P317; 124Kan208, 210, 257P739; 126Kan200, 268P98; 208Ky478, 271SW518; 208Ky641, 271SW669; 219Ky475, 293SW974; 224Ky13, 58W(2d)275; 225Ky827, 10SW(2d)279; 229Ky584, 17SW(2d)697; 233Ky820, 27SW(2d)80; 235Ky182, 30SW(2d)484; 235Ky454, 31SW(2d)703; 158La1045, 105S59; 159La135, 105S440; 160La579, 107S433; 160La757, 107S564; 161La518, 109S51; 161La532, 109S56; 162La266, 110S417; 162La471, 110S723; 165La67, 115S370; 165La270, 115S184; 167La1050, 120S853; 126Me376, 138A562; 255Mass510, 152NE377; 259Mass152, 156NE65; 260Mass303, 157NE354; 261Mass281, 158NE840; 262Mass185, 159NE518; 262Mass180, 159NE633; 263Mass89, 160NE315; 264Mass368, 162NE729; 264Mass378, 162NE733; 229Mich172, 200NW967; 233Mich98, 206NW516; 233Mich185, 206NW568; 233Mich615, 208NW27; 244Mich622, 222NW185; 248Mich553, 227NW708; 168Minn263, 209NW881; 173Minn598, 218NW117; 176Minn349, 223NW452(4thcase); 178Minn589, 228NW164; 179Minn1, 228NW171; 140Miss671, 106S95; 141Miss418, 106S443; 142Miss787, 107S663; Miss 107S768; 144Miss793, 110S517; Miss 111S864; 149Miss678, 115S777; 150Miss539, 117S344; 153Miss622, 121S279; Miss 130S502; Mo 256SW753; Mo 256SW1043; 307Mo 365, 270SW291; Mo 270SW337; Mo 271SW471; Mo 271SW525; Mo 274SW24; Mo 274SW28; Mo 274SW62; Mo 274SW383; 309Mo 155, 274SW734; 309Mo 498, 274SW734; 310Mo 500, 276SW625; Mo 278SW663; 312Mo 15, 278SW743; Mo 278SW1009; 312Mo 373, 278SW1016; 311Mo 391, 279SW23; 312Mo 324, 279SW30; Mo 280SW1044; Mo 281SW940; Mo 281SW785; 315Mo 242, 286SW69; Mo 289SW562; 316Mo 111, 289SW564; 315Mo 1279, 289SW792; 316Mo 252, 289SW821; 316Mo 150, 289SW822; 315Mo 1259, 289SW865; 315Mo 1320, 289SW935; 312Mo 525, 290SW999; 316Mo 213, 292SW721; 317Mo 284, 295SW550; 317Mo 276, 295SW554; 317Mo 293, 295SW743; 317Mo 413, 297SW63; 318Mo 1222, 28W(2d)780; 319Mo 28, 38W(2d)230; 318Mo 1233, 38W(2d)365; Mo 88W(2d)49; 322Mo 69, 16SW(2d)30; 322Mo 106, 16SW(2d)205; Mo 188W(2d)23; Mo 19SW(2d)671; Mo 23SW(2d)122; Mo 23SW(2d)136; Mo 248W(2d)1027; Mo 29SW(2d)120; Mo 29SW(2d)135; Mo 29SW(2d)686; Mo 30SW(2d)763; Mo 30SW(2d)59; Mo 30SW(2d)132; MoA 276SW1034; MoA 281SW123; MoA 294SW121; MoA 299SW125; MoA 299SW828; MoA 16SW(2d)648; 72Mont306, 233P602; Mont 243P566; 76Mont549, 248P169; 79Mont385, 256P1071; 82Mont165, 266P386; 84Mont474, 276P436; Mont 287P214; Mont 287P933; Mont 289P1037; 113Nebr755, 204NW513; 115Nebr225, 212NW426; 116Nebr73, 215NW789; 116Nebr268, 216NW823; Nebr 227NW446 (2dcase); Nev 233P49; 82NH518, 136A358; 102NJL134, 130A642; 103NJL361, 137A575; NJSup 137A829; NJSup 139A249; 104NJL10, 139A417; NJSup 140A248; NJSup 147A496; 32NM83, 251P384; 32NM500, 258P1009; 34NM65, 277P22; 34NM112, 278P210; 34NM214, 279P561(1stcase); 34NM486, 285P490; 34NM494, 285P497; 243NY166, 153NE36; 189NC616, 127SE675; 197NC576, 150SE25(2dcase); NC 154SE28; 50ND270, 195NW567; 52ND659, 204NW350; 54ND779, 211NW336; 113 ObSt187, 148NE834; 21 ObA417, 153NE245; 27 OhA272, 161NE37; 37 OklCr47, 256P70; 37 OklCr415, 259P150; 38 OklCr62, 259P168; OklCr 273P1024; OklCr 275P1067; OklCr 276P509; OklCr 277P287; OklCr 279P707; OklCr 280P851 (2dcase); OklCr 281P820; OklCr 282P476(1stcase); OklCr 283P583; OklCr 283P790; OklCr 283P1029(1stcase); OklCr 286P808; OklCr 286P911; OklCr 287P419; OklCr 287P752; OklCr 287P820; OklCr 287P1095; OklCr 288P357 (2dcase); OklCr 288P388; OklCr 292P1053; 118 Or5, 244P512; 117 Or430, 244P538; 119 Or522, 250P216; 119 Or641, 250P744; 122 Or444, 252P975; 121 Or561, 254P1010; 122 Or377, 257P699; 122 Or148, 257P826; 122 Or377, 259P298; 122 Or537, 259P427; 126 Or651, 269P869; 126 Or560, 270P404; 130 Or379, 280P335; 283Pa468, 129A453; 283Pa564, 129A582; 287Pa512, 135A301; 287Pa547, 135A313; 291Pa319, 139A836; 294Pa156, 143A910; 297Pa382, 147A79; 33PortoRico 825; 137SC98, 135SE641; 143SC318, 141SE559; 147SC514, 145SE404; 155SC495, 152SE738; 48SD430, 205NW31; 49SD463, 207NW470; 49SD365, 207NW539; SD 219NW252; 53SD435, 221NW53; 53SD529, 221NW253(2dcase); SD 228NW240; SD 232NW909; 99TexCr527, 270SW552; 99TexCr572, 271SW99; 99TexCr612, 270SW1027; 99TexCr618, 271SW92; 100TexCr54, 271SW902; 100TexCr81, 271SW914; 100TexCr165, 272SW449; 100TexCr193, 272SW461; 100TexCr218, 272SW452; 100TexCr415, 273SW573; 100TexCr424, 274SW137; 100TexCr501, 272SW191; 100TexCr530, 271SW620; 100TexCr575, 272SW172; 100TexCr664, 274SW582; 101TexCr44, 273SW861; 101TexCr77, 273SW855; 101TexCr96, 274SW628; 101TexCr158, 274SW619; 100TexCr468, 274SW978; 101TexCr251, 275SW835; 101TexCr474, 276SW250; 101TexCr479, 276SW268; 101TexCr487, 276SW240; 101TexCr491, 276SW287; 101TexCr514, 276SW233; 101TexCr598, 276SW283; 102TexCr8, 277SW135; 102TexCr13, 277SW138; 102TexCr389, 278SW199; 102TexCr444, 278SW446; 102TexCr501, 278SW441; 102TexCr563, 278SW846 (intent); 102TexCr566, 280SW210; 103TexCr364, 280SW804; 103TexCr377, 280SW791; 103TexCr474, 281SW555; 213Ky675, 281SW819; 103TexCr534, 281SW864; 103TexCr562, 281SW1078; 103TexCr679, 282SW220; 104TexCr100, 283SW508; 104TexCr157, 283SW788; 104TexCr168, 283SW173; 104TexCr171, 283SW831; 104TexCr174, 283SW527; 104TexCr178, 283SW517; 104TexCr225, 283SW832; 104TexCr302, 283SW836; 104TexCr408, 284SW588; 104TexCr432, 284SW574; 104TexCr468, 284SW564; 104TexCr561, 286SW236; 104TexCr619, 286SW214; 105TexCr26, 285SW329; 105TexCr64, 286SW237; 105TexCr68, 286SW1088; 105TexCr107, 286SW1100; 105TexCr327, 288SW458; 105TexCr396, 288SW1087; 105TexCr426, 289SW49; 105TexCr529, 289SW52; 105TexCr436, 289SW61; 105TexCr581, 289SW409; 105TexCr503, 289SW411; 105TexCr600, 289SW689; 105TexCr465, 288SW1080; TexCr 291SW229; 106TexCr147, 291SW251; 106TexCr351, 292SW238; 106TexCr528, 293SW827; 107TexCr32, 294SW541; 106TexCr538, 294SW584; 107TexCr13, 294SW592; 107TexCr58, 294SW852; 107TexCr95, 295SW614; 107TexCr376, 296SW537; 107TexCr425, 296SW559; 107TexCr307, 296SW582; 107TexCr160, 296SW883; 107TexCr530, 298SW287; 107TexCr666, 298SW591; 107TexCr676, 298SW594; 107TexCr661, 298SW596; 108TexCr46, 299SW240; 108TexCr48, 299SW254; 108TexCr1, 299SW422; 108TexCr339, 18W(2d)295; 108TexCr448, 18W(2d)625; 108TexCr597, 18W(2d)894; 108TexCr561, 28W(2d)233; 109TexCr389, 48W(2d)979; 109TexCr486, 58W(2d)521; 110TexCr87, 78W(2d)567; 110TexCr122, 78W(2d)960; 110TexCr557, 98W(2d)736; 110TexCr605, 108W(2d)116(2dcase); 111TexCr130, 12SW(2d)211; 111TexCr7, 15SW(2d)7; 112TexCr227, 16SW(2d)122(2dcase); 112TexCr374, 16SW(2d)821; 112TexCr335, 16SW(2d)825; 112TexCr419, 16SW(2d)828(3dcase); 112TexCr450, 17SW(2d)50(2dcase); 112TexCr370, 17SW(2d)61; 112TexCr658, 18SW(2d)176(1stcase); 113TexCr257, 20SW(2d)196(2dcase); 113TexCr265, 20SW(2d)426; TexCr 20SW(2d)761; TexCr 20SW(2d)768; 113TexCr447, 21SW(2d)1055; 113TexCr384, 22SW(2d)665; TexCr 23SW(2d)388; TexCr 23SW(2d)391; TexCr 24SW(2d)404; TexCr 26SW(2d)244; TexCr 26SW(2d)1072; TexCr 27SW(2d)182; TexCr 27SW(2d)208; TexCr 28SW(2d)541; TexCr 28SW(2d)551; TexCr 28SW(2d)804; TexCr 29SW(2d)346 (2dcase); TexCr 29SW(2d)352; TexCr 31SW(2d)440; TexCr 31SW(2d)453; 65Utah415, 237P941; 66Utah223, 241P314; 67Utah325, 247P497; 69Utah268, 254P142; Utah 269P480; Utah 279P953; 101Vt5, 139A769; 142Va644, 128SE463; 143Va489, 129SE252; 149Va447, 141SE118; 153Va909, 150SE407; 141Wash337, 251P290; 143Wash15, 253P1073; 143Wash88, 254P456; 143Wash93, 254P838; 145Wash638, 261P388; 148Wash310, 268P874; 151Wash114, 275P75; 155Wash80, 283P671; Wash 286P69; Wash 286P848; Wash 287P22; Wash 290P824; 99WVa711, 129SE715; 101WVa356, 132SE728; 101WVa477, 133SE679; 104WVa536, 140SE536; 104WVa523, 140SE546; 104WVa617, 141SE7; 105WVa346, 143SE88; 106WVa262, 145SE389; 107WVa163, 148SE127; 107WVa350, 148SE194; 40Wyo184, 276P458. See also 90Fla86, 105S144. But see 97CalA501, 275P961; 100CalA428, 280P169. [b] 20AlaA425, 104S443; 142Va658, 128SE459. [c] (5) Refusal of charge that accomplice's testimony should be weighed with great caution held not error in view of given charges. 214Ala172, 106S692. [d] **Rule applied.**–21AlaA111, 105S427; 21AlaA87, 105S700. [e] **Requested charge held not covered by oral charge.**–21AlaA597, 110S562.

1066–86 21F(2d)285; 214Ala476, 108S349; 215Ala453, 111S34; 22AlaA655, 119S597(2dcase); 21AlaA111, 105S427; 21AlaA114, 105S433; 21AlaA240, 106S896; 21AlaA270, 108S617; 21AlaA300, 107S731; 21AlaA319, 108S84; 21AlaA323, 108S880; 21AlaA445, 109S888; 21AlaA516, 109S892; 21AlaA548, 109S896; 23AlaA278, 124S391; 23AlaA539, 128S589; 79CalA519, 250P211; 80CalA243, 251P699; 90Fla337, 106S406; 91Fla446, 107S331; 318 Ill 316, 149NE236; 318 Ill 388, 149NE273; 324 Ill 375, 155NE363; Mo 274SW28; 316Mo 111, 289SW564; 118 Or5, 244P512; 103TexCr364, 280SW804; 104TexCr302, 283SW836; 104TexCr616, 286SW223; 105TexCr396, 288SW1087; 110TexCr193, 8SW(2d)161; 110TexCr178, 8SW(2d)510.

1066–88½–New. A statute restricting the extent to which an instruction on the presumption of innocence and reasonable doubt need be given does not preclude the right to an instruction covering a defense such as an alibi. 100CalA428, 280P169.

1066–89 21F(2d)889; 24F(2d)905; 35F(2d)96; 36F(2d)1; 214Ala117, 106S609; 23AlaA83, 121S2(dcase); Ala 129S282; 20AlaA540, 103S604; 21AlaA14, 105S712 (abstract instruction); 21AlaA2, 106S345; 21AlaA278, 107S734; 21AlaA351, 108S271; 22AlaA173, 114S69; 23AlaA448, 126S612; 23AlaA539, 128S589; 29Ariz523, 243P601; 169Ark594, 276SW358 (instruction not technically correct); 171Ark799, 286SW981; 172Ark23, 287SW765; 174Ark886, 298SW321; 70CalA130, 232P752; 74CalA135, 239P412; 74CalA138, 239P705; 74CalA178, 240P502; 78CalA167, 248P

289; 78CalA223, 248P716; 78CalA442, 248P1061; 80CalA275, 251P826; 81CalA 126, 251P958; 81CalA558, 254P298; 90 CalA317, 265P893; 95CalA140, 272P 608; CalA 290P1054; CalA 291P701; CalA 292P684; 160Ga593, 128SE796; 164Ga128, 138SE67; 166Ga189, 142SE 674; 168Ga843, 149SE145(2dcase); 37 GaA380, 140SE425; 45 Ida92, 260P697; 317 Ill 430, 148NE255; 318 Ill 114, 149 NE3; 237 IllA178; Ind 173NE229; 120 Kan221, 243P280; 161La532, 109S56; 165La270, 115S484; 165La822, 116S 199; 254Mass520, 150NE854; 255Mass 510, 152NE377; 238Mich15, 213NW136; 238Mich485, 213NW717; 141Miss18, 106S443; Miss 111S864; 149Miss684, 115S705; 312Mo 373, 278SW1016 (request for charge on defense of insanity amounting to comment on evidence); Mo 281SW940; 316Mo 252, 289SW821; 82Mont165, 266P386; 116Nebr90, 215 NW785; 103NJL275, 136A345; 34NM 465, 284P113; NM 290P792; 118 Or5, 244P512; 117 Or430, 244P538; 118 Or 637, 247P783; 120 Or90, 250P633, 251 P307; 100TexCr649, 274SW564; 101 TexCr598, 276SW283; 102TexCr415, 278SW216; 102TexCr563, 278SW846; 103TexCr580, 281SW1071; 105TexCr 516, 289SW54; 107TexCr58, 294SW852; 107TexCr559, 298SW569; Utah 276P 166; 101WVa356, 132SE728.

1067–90 217Ala225, 115S297; 78CalA 13, 238P374; 78CalA223, 248P716.

1067–91 5F(2d)901, 902 [citCJ]; 70 CalA315, 233P362; 317 Ill 430, 148NE 255; 243NY519, 154NE588.

1067–92 214Ala172, 106S692; 215Ala 453, 111S34; 21AlaA278, 107S734; 70 CalA130, 232P752; 78CalA223, 248P 716; 316Mo 252, 289SW821; 283Pa564, 129A582.

1067–93 77CalA434, 246P822; 97CalA 537, 275P1017.

1067–95 41F(2d)162 (holding request for charge, though inaccurate, to be sufficient to require appropriate instruction).

1067–97 172Ark61, 287SW747; 173Ark 1180, 293SW734; 175Ark120, 298SW 867; 175Ark1083, 3SW(2d)23; 175Ark 1169, 1SW(2d)1006; 179Ark625, 17SW (2d)317; 78CalA442, 248P1061; 79CalA 373, 249P536; 84CalA58, 257P592; 84 CalA707, 258P660; 165Ga326, 140SE 889; 36GaA645, 137SE795; 322 Ill 434, 153NE639; 327 Ill 162, 158NE462; Ill 173NE357; 199 Ind55, 155NE203; Iowa 223NW554; 234Mich282, 207NW920 (argumentative instruction properly modified); Miss 130S502; 314Mo 684, 285SW496; 119 Or409, 243P72; 118 Or 637, 247P783; 121 Or561, 254P1010; 283Pa564, 129A582; 107TexCr620, 298 SW424; 142Va602, 128SE454. [b] (5) Proper to insert word "reasonable" before word "theory" in instruction to acquit on circumstantial evidence if there is any theory on which accused may be innocent. 142Va577, 128SE633. [d] **Court may reject all instruction** and instruct in its own words if it does so accurately in regard to all rules of law involved. 326 Ill 104, 157NE76.

1068–98 81CalA126, 251P958; 47 Ida 457, 276P39, 68ALR1061; 327 Ill 162, 158NE462; 120Kan221, 243P280; 143 Va579, 130SE389 (dictum); 103WVa30, 136SE503.

1068–99 82CalA618, 256P270; 102Tex Cr415, 278SW216; 107WVa60, 146SE 887.

1068–1 318 Ill 332, 149NE266. [a] **Remarks held not to constitute improper modification.**–144SC452, 142SE725.

1068–2 107TexCr46, 294SW595.

1068–2½–New. Where erroneous instruction is on a vital point, the court should charge thereon. 143Va579, 130 SE389 (holding failure to do so reversible error).

1068–2¾–New. In modifying instruction, no part should be left so as to be legible to jury. 339 Ill 480, 171NE544.

1068–3 14F(2d)888; 16F(2d)116; 20F (2d)754; 21F(2d)889; 30F(2d)590; 31 F(2d)19; 174Ark1179, 298SW877; 68 CalA7, 228P376; 78CalA167, 248P289; 36GaA645, 137SE795; 40GaA15, 148SE 622; 326 Ill 104, 157NE76; 200 Iowa 636, 204NW307; 254Mass320, 150NE7; 103NJL663, 138A575; 116 Or509, 241P 983; 122 Or148, 257P826; 122 Or444, 259P893; 100TexCr11, 271SW380; 65 Utah362, 237P476; 66Utah223, 241P 314; Utah 289P100; 152Wash65, 277P 387.

1068–4 106TexCr446, 292SW901.

1069–6 218Ala47, 118S51.

1069–8 216Ala475, 113S393; 100WVa 98, 130SE100.

1069–10½–New. Statement that instruction was requested by defendant is not reversible error. 32Ariz182, 256P 1048.

1069–12 33F(2d)684; 22AlaA66, 111S 452; 22AlaA243, 114S892; 73CalA580, 239P82; 75CalA499, 243P478; 93CalA 448, 269P549; 94Fla469, 114S450; 98 Fla881, 124S445; 36GaA645, 137SE795; 243Mich300, 220NW777; 196NC714, 146 SE858; 102TexCr421, 278SW197; 105 TexCr265, 287SW1099; 106TexCr162, 291SW225; 106TexCr236, 291SW1105; 106TexCr285, 292SW222; TexCr 25SW (2d)333; TexCr 32SW(2d)652(2dcase).

1070–24 93CalA62, 268P1078.

1070–26 See also 21AlaA289, 107S791.

1070–27 101Vt124, 141A686 (error should be called to attention of court). But see 227Ky557, 138SW(2d)769.

1070–29 200 Ind370, 163NE594; 130 Kan762, 288P736; 168La487, 122S591; 82NH133, 130A743; OklCr 276P494; RI 142A662; 101TexCr96, 274SW628. See also 28F(2d)150. [d] **In California.**–74CalA164, 240P36. [e] **Failure to give written instruction in misdemeanor case** is waived if no objection is made at that time. 214Ky703, 283SW1041.

1070–30 180Ark280, 218SW(2d)183; 169 La939, 126S431; 34NM447, 283P904; 194NC459, 140SE26; 159Tenn674, 21 SW(2d)400; 104TexCr608, 286SW228; TexCr 20SW(2d)762; 37Wyo 155, 259 P810. [a] **Reasonable opportunity to correct** incomplete or otherwise erroneous instruction must be given court by specific objection seasonably made. 166 La759, 117S820. [b] **Modification must be requested.**–152SC17, 149SE348.

1070–31½–New. Where instructions are changed in response to written objections and accused is not satisfied with the change, he should file further written objections thereto. 111TexCr1, 10SW (2d)725.

1070–31¾–New. Where the offense was committed before the statute changing punishment became effective, but the trial was had afterward, the trial court's charge under the old law without exception does not amount to an election to be tried under the old law. 111TexCr381, 12SW(2d)1024.

1070–32 101TexCr267, 275SW837; Utah 290P962.

1070–33 137SC98, 135SE641.

1071–40 23F(2d)235; 44F(2d)170(1st case); 216Ala342, 113S391; Fla 130S 718; 165La842, 116S206; 167La827, 120 S382; 169La684, 125S854; La 129S 684; 83NH435, 144A124; ND 228NW 413; 97PaSuper566; 107TexCr635, 298 SW433; 111TexCr352, 12SW(2d)1035. [a] OklCr 272P488(2dcase); 107TexCr 58, 294SW852. [d] **Failure to give sufficient time** for consideration of charge is not error in absence of request for further time. TexCr 8SW(2d)176.

1071–42 But see Iowa 226NW925 (court cannot pass on exceptions in vacation).

1071–43 100Vt32, 134A636. See also 194NC459, 140SE26.

1071–45 106TexCr471, 293SW171.

1071–45½–New. An objection not made until after entry of judgment and adjournment of court for the term comes too late. 151Va533, 145SE307.

1071–46 169Ark770, 276SW858 (general objection held insufficient).

1071–47 106TexCr376, 292SW891; 107 TexCr46, 294SW595; TexCr 24SW(2d) 404; TexCr 24SW(2d)412; TexCr 27 SW(2d)182.

1071–49 274US328, 47SCt650, 71Led 1077.

1071–50 274US328, 47SCt650, 71Led 1077; 13F(2d)122; 17F(2d)12; 22 F(2d)679; AlaA 129S714(2dcase); 169 Ark345, 275SW666; 171Ark203, 284SW 28; 180Ark363, 21SW(2d)850; 181Ark 331, 25SW(2d)769; 327 Ill 50, 158NE 457; 202 Iowa352, 209NW514; 207 Iowa 831, 221NW817; 32PortoRico 355; 34 PortoRico 505; 101TexCr96, 274SW 628; 105TexCr353, 288SW465; 107Tex Cr58, 294SW852; 107TexCr121, 294SW 1107; TexCr 27SW(2d)236 (written objection to particular charge held sufficient); TexCr 31SW(2d)1080. See also 86PaSuper483. [b] (2) Objection to oral instructions. 214Ky228, 282SW1060.

1072–51 274US328, 47SCt650, 71Led 1077; 7F(2d)111; 17F(2d)12; 23F(2d) 235; 23F(2d)305; 27F(2d)310; 35 F(2d)847; 216Ala475, 113S393; 169Ark 770, 276SW858; 170Ark1192, 281SW 369; 177Ark605, 7SW(2d)315; 162Ga 267, 134SE36; 41GaA478, 153SE374; Iowa 223NW873; 265Mass166, 165NE 467; NJSup 145A229(2dcase); 32 PortoRico 355 (merely saying "I except to the instructions" is not compliance with law); 99TexCr618, 271SW92; 102 TexCr524, 278SW444; 109TexCr564, 5 SW(2d)982; TexCr 26SW(2d)1072; TexCr 27SW(2d)236; Utah 291P307; Vt 147A273. [a] (1) 98Vt466, 129A 306. (5) 30F(2d)518. (11) That charge is on weight of evidence. 102 TexCr524, 278SW444. (12) That charge did not cover law in case and did not affirmatively present defense. 111TexCr 559, 15SW(2d)619(1stcase). (13) Other instances. 169La939, 126S431. [c] **Exception held sufficient.**–TexCr 25 SW(2d)345.

1072–52 171Ark255, 283SW981.

1072–53 198 Ind360, 153NE772 (bill held sufficiently to show separate exception).

1072–54 13F(2d)122; TexCr 27SW(2d) 236 (question held not properly raised). [a] **Exceptions held sufficient.**–Wash 293 P280.

1072–55 91Fla512, 107S632; TexCr 28 SW(2d)822(2dcase) (reasons assigned held insufficient).

1073–60½–New. Subject to certain statutory limitations, the conduct of trial proceedings and the handling of juries rests very largely in the sound discretion of the trial court. 321Mo 540, 11 SW(2d)1040.

1073–61 164Ga88, 138SE65.

1073–65 164Ga88, 138SE65.

1073–65½–New. or a baseball game; 224Ky370, 6SW(2d)483.

1073–69 164Ga88, 138SE65.

1073–70½–New. A barber shop is permissible. 220Ky348, 295SW142.

1074–94 219Ala46, 121S38; 236Mich 237, 210NW234.

1074–97 SD 228NW240; SD 228NW 251.

1075–10 215Ky613, 286SW696; 232Ky 226, 22SW(2d)624.

1075–14 221MoA358, 273SW247. [b] **In Texas.**–100TexCr81, 271SW914.

1075–15 102WVa462, 135SE594. [a] **Reason of rule.**–102WVa462, 135SE594.

1075–16 83Colo 400, 265P909 (mere separation not ground for reversal); SC 155SE599.

1075–18 199 Ind225, 156NE549.

1075–19 170Ark560, 280SW9; 165La 497, 115S728; 168La925, 123S621; 170 Minn504, 212NW894; OklCr 288P489.

1076–20 170Ark560, 280SW9; 180Ark 1123, 24SW(2d)331; 195Cal 272, 232P 710; 126 Or560, 270P404; SC 155SE 599. Contra Mo 19SW(2d)883. [a] **Discretion has been held not abused.**–SC 155SE599.

1076–21 128Kan564, 279P19 (prejudice and bitter feeling against defendant in county).

1076–22 195Cal 272, 232P710.

1076–25 230Ky840, 20SW(2d)1005. [c] **Consent may be implied.**–Mo 18SW(2d) 834. [d] **Failure to object at time court permits jury to separate at recess** justifies court in assuming that defendant consents. Mo 18SW(2d)834.

1076–27 199 Ind225, 156NE549.

1077–31 Wash 290P992.

1077–33 TexCr 26SW(2d)233.

1077–35 Ark 30SW(2d)822.

1077–36 227Ky223, 12SW(2d)336; 169 La595, 125S629; 149Miss412, 115S552 (permitting juror to answer call of nature); 318Mo 1179, 3SW(2d)369; Mo

24SW(2d)1020; 106TexCr553, 293SW 570.

1077–37 217Ky403, 289SW371; 150Miss 296, 116S433; Mo 23SW(2d)87; 103 TexCr156, 280SW578; 152Wash155, 277 P377.

1077–38 155Tenn266, 292SW451. [a] But see 224Ky370, 6SW(2d)483 (within sheriff's sight and hearing).

1077–43 224Ky370, 6SW(2d)483.

1078–46 44 Idaho739, 260P164.

1078–46½–New. There is no separation of the jury constituting a violation of defendant's rights where some of the jurors, while inspecting the room where the crime was committed, went onto a porch a few feet away while others remained in a hall leading thereto. 147 Miss428, 112S594.

1078–46½–New. Separation in barber shop is permissible. 220Ky348, 295SW 142.

1078–48 168La925, 123S621; Mo 300 SW820; TexCr 28SW(2d)794 (statute prohibiting separation in felony case inapplicable).

1078–54 45 OklACR313. [a] (3) In Michigan. 240Mich41, 214NW948; 241 Mich182, 216NW408.

1078–56 Minn 232NW335 (taking women members to hotel for night); Nebr 226NW793 (occupying separate hotel rooms at night).

1079–58 86CalA148, 260P591; 100TexCr464, 273SW604.

1079–58½–New. Defendant consenting to separation of jury after final submission and before commencement of deliberations cannot thereafter object to such separation. OklCr 283P266.

1079–69 14F(2d)582.

1079–71 [c] **Temporary cessation of proceedings for purpose of hearing motion** during which time jury are requested to retire to jury room is not adjournment, within statute which requires admonition to be given at each adjournment. 57ND652, 223NW705. [d] **Admonition only required before adjournment.**–231Ky152, 21SW(2d)231.

1080–77 See also 79CalA207, 249P18. [a] **Information given by juror to jury** is "new and other testimony" within statute authorizing new trial. TexCr 26SW(2d)262.

1080–78 164La883, 114S721; Me 151A 9 (juror riding to court with sheriff); 101Vt229, 143A311, 62ALR1464. [a] (1) Kan 292P931 (consulting his business accounts to settle in juror's own mind material controverted fact). (2) Where juror's misconduct would vitiate verdict, court properly discharged him. 155Tenn 266, 292SW451. [b] **Deputy sheriff** obtaining evidence is a party adverse to defendants within statute as to gratuity to jurors. Me 151A9. [c] **Statement of jurors** in deliberations held prejudicial error. Iowa 231NW450.

1080–79 CalA 292P693; 179Minn301, 229NW99 (taking jury to theatrical performance); 142Miss484, 107S755 (remark of one bailiff to another); Mo 30 SW(2d)763; 115Nebr225, 212NW426; 52SD582, 219NW263; 104TexCr661, 285 SW617; 107TexCr281, 296SW518; 107 TexCr307, 296SW582; TexCr 21SW(2d) 527; Wash 286P848; Wash 292P107 (2dcase). [a] **That juror read definition of terms from dictionary** held not to affect verdict. Nebr 232NW781.

1080–81½–New. Jury has right to discuss testimony in jury room and each juror is entitled to express his opinion. 108TexCr672, 28SW(2d)223.

1080–81½–New. That a juror during deliberation of the jury called defendant a dirty skunk does not constitute misconduct where the juror's state of mind was produced by consideration of the evidence alone. 208 Iowa849, 225 NW847.

1080–87 19F(2d)202; 84CalA58, 257P 592; 107TexCr319, 296SW600.

1081–92 Ga 154SE799; 31NM620, 249 P1003, 1007 [quotCJ]; 106TexCr124, 290SW539; Wash 292P107(2dcase).

1081–92½–New. , or that have reference to merits of case or relate to facts or claims of either side of case. 167 Minn216, 208NW761.

1081–92½–New. or where a juror makes a statement to one not a member of the jury who does not respond. 106TexCr553, 293SE570.

1081–96 Ga 154SE799; 108TexCr550, 18SW(2d)892.

1081–97 But see 194Cal555, 229P341.

1081–98 OklCr 284P651.

1081–99 Ga 154SE799; 224Ky370, 6 SW(2d)483; OklCr 284P651.

1081–2½–New. , or where the jury were not shown to have been influenced by the article. 27F(2d)575.

1081–5 164La883, 114S721; 170La991, 129S612(4thcase); 12PortoRicoFed182; 100TexCr569, 272SW183; 153Va846, 149 SE414. [a] **Sheriff occupying hotel room with juryman.**–It is misconduct for sheriff to occupy hotel room with juryman though case is not discussed between them. SD 224NW946. [b] **In Missouri.**–19SW(2d)883.

1081–7 165La842, 116S206; 106TexCr 504, 293SW1110.

1081–8 194Cal555, 229P341.

1081–9 99CalA224, 278P258.

1081–9½–New. It is the duty of the sheriff and his deputies to assist the trial court in handling juries and to act as the court's messengers in communicating with the jury while they are deliberating. 321Mo 540, 11SW(2d) 1040.

1082–13 170La507, 128S293.

1082–14 118Kan629, 236P816; 135 Wash667, 238P617. But see 101Vt229, 143A311, 62ALR1464.

1082–23½–New. As affecting the penalty, it was held that the jury could find as a matter of common experience that property willfully destroyed had a certain value. 257Mass379, 154NE76.

1082–24 22AlaA428, 116S415. [b] 317 Mo 336, 295SW1076. [d] **Discussion of failure of accused** to testify is error. 106TexCr122, 290SW1096. [e] **Jury are entitled to avail themselves of knowledge** which comes from ordinary human experience and observation. 110 TexCr430, 10SW(2d)108.

1082–25 CalA 292P500.

1082–26 20AlaA457, 103S902; 140Miss 265, 105S514. [a] 218Ky189, 291SW1.

1082–29 201 Iowa368, 207NW393.

1082–30 22AlaA154, 113S602; 115Nebr 143, 212NW35; 115Nebr350, 213NW344; 110TexCr341, 8SW(2d)136; TexCr 26 SW(2d)262.

1082–30½–New. But in some jurisdictions the jury may disregard evidence and acquit or convict of a lower degree than warranted. 169Ark717, 276SW849.

1082–32 103TexCr242, 280SW819. [a] **Application of own knowledge and experience** in considering testimony. Ill 173NE86.

1082–32½–New. Where a fact is susceptible of interpretation consistent with the innocence of defendant, the jury cannot arbitrarily adopt another interpretation which incriminates him. 146Va279, 135SE700.

1083–37 165La657, 115S814; 101TexCr434, 276SW289.

1083–38 321Mo662, 12SW(2d)34; 101 TexCr434, 276SW289.

1083–43 84CalA642, 258P638; 45 Ida 73, 260P694; 113Nebr698, 204NW780; 50Nev271, 257P619. [a] (1) 108TexCr 187, 299SW399. (2) Not ground for new trial that indictment taken by jury when they retired contained count withdrawn, defendant not objecting at time. 100 TexCr295, 273SW582. (3) Where "affidavit" contains several counts all but one of which are dismissed, it is not error to permit jury to take pleading to jury room after caution to disregard counts dismissed. 196 Ind258, 148 NE143. [d] **Affidavit, basis of prosecution,** if admitted as evidence, may be taken to jury room. 21AlaA639, 111S 202.

1083–44 33F(2d)713; 213Ala555, 105 S664; 23AlaA63, 120S468; 21AlaA539, 110S157; 90Fla844, 107S530; 113Nebr 698, 204NW780; 284Pa255, 131A184, 185 [citCJ]; 92PaSuper139.

1083–46 321 Ill 143, 151NE563 (evidence which had been withdrawn). See also 205 Iowa30, 215NW758.

1083–47 170La151, 127S395.

1083–48 [a] **Exhibits should be sent to jury** in form offered unless both sides consent to sealing unread parts. 7F(2d) 271.

1083–48½–New. It is not error to refuse to allow a written sworn statement of accused to be sent out with the jury where it was a mere repetition of defendant's testimony on trial and therefore immaterial. 284Pa255, 131A184.

1083–48½–New. The jury are permitted to take grand jury notes to the jury room in a homicide case. 21AlaA 534, 109S613.

1083–50 260Mass233, 157NE538.

1084–55 113Nebr698, 204NW780. [a] (3) Dying declaration reduced to writing and signed by deceased, and introduced in evidence by state, should not be sent to jury while deliberating on verdict which they should render, over objection of defendant. 167Ga452, 145SE879(2d case).

1084–62 Mo 24SW(2d)1020.

1084–63 70CalA465, 233P812 (no requirement that physical delivery of instructions be made before retirement of jury); 113Nebr698, 204NW780. [b] **Tearing up and mutilating written "given" charges** requested by defendant is misconduct. 23AlaA35, 120S 301(2dcase).

1084–67 [a] **In Missouri.**–30SW(2d)59.

1084–68½–New. In Alabama, the statute requires that given charges be taken by the jury to the jury room. 21 AlaA621, 111S47.

1085–69 33 OhA319, 169NE463.

1085–73 24F(2d)525 (liquor purchased); 213Ala555, 105S664 (pistol); 22 AlaA176, 113S644; 90Fla844, 107S530; 45 Ida73, 260P694; 247Mich698, 226NW 710 (without defendant's consent); Mo 278SW704; 113Nebr698, 204NW780; 113TexCr9, 18SW(2d)615; 142Wash 653, 254P445.

1085–74 See also Mont 287P938.

1085–76½–New. But physical delivery of exhibits to jury need not be made in courtroom before they retire. 70CalA 465, 233P812.

1085–76½–New. Permitting the jury to take the gun with which a killing was done into the jury room is not reversible error where it was secured before the jury began deliberations. 163La 484, 112S373.

1085–76¼–New. , or which contain label with data written thereon by police department as to the charge and names of witnesses. 321 Ill 143, 151NE 563.

1085–78½–New. Where the question of whether certain liquid was whisky was a controverted issue, the court has been held to err in permitting the jury to take it to the jury room. 104TexCr193, 283SW511.

1085–79 See also 166Ga517, 143SE900; 230Ky411, 19SW(2d)1091, 66ALR360.

1085–81 But see 107TexCr600, 298SW 438.

1085–82 77Colo 432, 236P1022 (may examine and smell); 121Kan711, 249P688; Mo 285SW403(1stcase); Mo 21SW(2d) 758(3dcase) (permitting jurors to smell bottles); 153SC487, 151SE64; 147Va709, 137SE528. See also MoA 273SW141; 105WVa281, 142SE250 (undisputed evidence sufficient to render it unnecessary for jurymen to taste liquor). But see 101TexCr346, 276SW244. Contra 4 F(2d)881; 21AlaA439, 109S182; 101 TexCr68, 274SW133. [a] Contra 21 AlaA526, 109S612.

1085–85 39 OklCr173, 264P226.

1086–89 104TexCr633, 283SW172, 1072; TexCr 23SW(2d)372(2dcase).

1086–90 102TexCr511, 278SW451.

1086–93 115Nebr350, 213NW344; 100 TexCr569, 272SW183.

1086–94 129Kan588, 283P630, 67ALR 1520; 101TexCr130, 274SW588; 105 TexCr212, 287SW250; TexCr 25SW(2d) 339(2dcase). See also 22AlaA154, 113S 602. But see 112TexCr198, 17SW(2d) 821. [a] **Verdict reversed where jurors all seemed to know fact of offense** outside of evidence, and this knowledge affected penalty returned. 102TexCr401, 278SW195.

1086–96 108TexCr104, 299SW402.

1086–96½–New. The fact that the jury in determining sentence considered that, if defendant conducted himself properly in the penitentiary, he could serve a two-year sentence in fifteen months, is not

reversible error. 106TexCr130, 290SW 766.

1086-97 106TexCr124, 290SW539.

1086-98½-New. Arguments on the general advisability of law enforcement and deterrent sentences are proper. 100 TexCr464, 223SW604.

1086-98¾-New. When not in violation of a rule against stating facts not in evidence, jurors may use their experience of life by way of illustration and argument applicable to the case merely to aid their fellow jurors in arriving at a correct verdict. 115Nebr 350, 213NE344.

1086-98¼-New. Where a juror called defendant "crooked," which statement was based upon the evidence, it was held not misconduct. 107TexCr307, 296SW 582.

1086-99 106TexCr124, 290SW539; Tex Cr 25SW(2d)339(2dcase).

1087-4 163La612, 111S612; 290Pa573, 139A374.

1087-5 105TexCr98, 286SW1094.

1087-6 108TexCr473, 1SW(2d)626. But see 111TexCr159, 12SW(2d)227(1st case).

1087-7 126Kan17, 266P937; 223Ky393, 3SW(2d)764; TexCr 26SW(2d)225 (finding that verdict did not violate statute, held justified).

1087-8 TexCr 26SW(2d)225.

1087-11 17F(2d)696, 698 [citCJ]; 31F (2d)245; 36F(2d)738; 214Ala476, 108S 349; 170Ark1192, 281SW369; 83Colo 295, 264P658 (additional written instruction proper); Mo 278SW718.

1087-12 90CalA528, 266P349.

1088-17½-New. It is improper for the court to instruct the foreman of the jury alone. 170Ark1192, 281SW369.

1088-17¾-New. Error in instructing the jury foreman alone is cured by repeating the instruction in open court before the verdict in the presence of the jury and of counsel. 170Ark1192, 281 SW369.

1088-18 124Kan245, 259P691.

1088-21 22F(2d)468; 32F(2d)128; 79 CalA76, 249P20; 80CalA252, 251P682; 115 Oh283, 152NE667; OklCr 275P390; 106TexCr618, 294SW588.

1088-22 87CalA510, 262P442 (proper instruction on circumstantial evidence). [a] Preparation of such instructions should be in presence of counsel without jury's hearing. Mont 293P309.

1088-23 82Mont170, 266P400.

1088-27 177Ark605, 7SW(2d)315.

1088-28 Fla 126S159(2dcase) (duty of jurors to ask instructions); 200 Ind417, 164NE273; 321Mo 540, 11SW(2d)1040. [a] (2) As to maximum penalty for second degree murder. 79CalA76, 249P20 (not misleading). (3) Court's statement to jury to rely on its own recollection held within discretion. 109Conn394, 146A837.

1088-29½-New. or they may be instructed as to the effect of a verdict; 48 Ida558, 283P529.

1088-32 171Ark180, 283SW353; Ark 30SW(2d)838; 205 Iowa373, 217NW 871; Wis 232NW866.

1088-34 40Wyo 174, 276P172.

1088-36 See also Mo 256SW769. [a] Explaining instructions, in addition to reading them, not approved but not error in absence of prejudice to defendant. 230Ky250, 19SW(2d)218.

1088-37 [a] Court's reluctance to reread instructions held not prejudicial. CalA 286P493.

1089-40 29Hawaii441.

1089-42 37GaA816, 142SE216 (may recharge jury in full).

1089-45 82Mont170, 266P400; OklCr 275P390. [c] Information containing no element of instruction on matter of law may be imparted to jury without being reduced to writing. 82Mont170, 266P 400.

1089-51 172Ark983, 291SW85; 179Ark 189, 14SW(2d)1113.

1089-53 82CalA98, 255P261 (though no exception ordered); 163Ga176, 135SE 735.

1089-54 [a] Additional instructions should be given only in presence of, or after notice to, counsel for both parties in some jurisdictions. OklCr 275P390.

1089-55 But see 70CalA465, 233P812.

1089-57 131 Or455, 282P560 (court's statement of recollection of evidence is not prejudicial if erroneous, though such method is not commendable). See also 256Mass452, 152NE739. [a] Judge may decline to state his recollections as to part of testimony when jurors' question calls for judge's finding on incident referred to. 131 Or455, 282P560.

1090-58 44 Ida739, 260P164; 46 Ida 561, 270P417; 131 Or455, 282P560 (in discretion of judge whether he shall depend on his own recollection or have reporter read notes); 110TexCr455, 10SW (2d)90(1stcase); 195Wis170, 217NW 651. [b] NJ 148A764. [c] Judge may refuse jurors' request to have testimony read where he believes it would give undue prominence to part of testimony. 131 Or455, 282P560. [d] Where court has portion of evidence read at jurors' request, it may caution against imparting undue importance thereto, or direct reading of other parts. 131 Or455, 282P560.

1090-64 See also 44 Ida739, 260P164.

1090-69 273US583, 47SCt478, 71L ed 787; 172Ark983, 291SW85; Wis 229NW 83. See also 315Mo 219, 285SW739. But see 120Kan499, 243P1060.

1090-70 273US583, 47SCt478, 71L ed 787; 172Ark983, 291SW85; 118Kan629, 236P816.

1090-71 23AlaA140, 122S303; 181Ark 603, 27SW(2d)99; 118Kan629, 236P 816; 321Mo 553, 12SW(2d)428; Wis 229NW83.

1090-74½-New. Questioning jury as to division of opinion is error. 272US448, 47SCt135, 71L ed345.

1090-75 [c] But see 159La769, 106S 298.

1091-83 76CalA715, 245P792; 115 Oh 283, 152NE667; 34PortoRico505 [quot CJ]. [a] 87Colo 23, 284P779; 120Kan 499, 243P1060.

1091-84 35Ariz321, 278P63; 195Wis 170, 217NW651 (caution against stubbornly refusing to listen to fellow jurors).

1091-86 20AlaA457, 103S902; 36GaA 83, 135SE513; 40GaA645, 150SE849(4th case); 115 Oh283, 152NE667; 142Wash 653, 254P445; 146Wash583, 264P12; 195Wis170, 217NW651. [b] Urging jury to agree after twenty-two hours of deliberation held proper.-36GaA83, 135 SE513.

1091-88 94CalA687, 271P777; 115 Oh 283, 152NE667; 142Wash653, 254P445.

1091-89 272US448, 47SCt135, 71L ed 345; 22F(2d)966 (whether evenly divided); 91PaSuper518. But see 168Ark731, 271SW338.

1091-90 8F(2d)472; 180Ark278, 21SW (2d)176; 120Kan499, 243P1060.

1091-91 4F(2d)781 (holding it error to ask foreman whether preponderance of individual jurors was one way or the other, answer being that there was preponderance); 7F(2d)598; 22F(2d)468; 23AlaA271, 124S121(2dcase); 179Ark 189, 14SW(2d)1113; 180Ark1160, 24SW (2d)859; 81CalA417, 253P964; 333 Ill 554, 165NE196; 222Ky510, 1SW(2d) 976; 242Mich523, 219NW631; 6Pa Dist&Co 392, 393 [citCJ]. [c] Statements not amounting to coercion.-136 Wash499, 240P676. [d] Remarks held not error.-6PaDist&Co 392.

1091-92 22F(2d)468; 35Ariz321, 278P 63; 222Ky510, 1SW(2d)976; 53ND879, 207NW1000. See also 321Mo 553, 12SW (2d)428. [a] (5) Where judge informed jury on Saturday that he intended to go to his home and remain absent till Monday, and jury reached verdict of guilty shortly thereafter. 155Miss648, 124S 803.

1091-92½-New. A trial judge should not state to the jury, expressly or by implication, how long he intends to keep them together. 155Miss648, 124S803.

1092-95 17F(2d)696; 171Ark180, 283 SW353; 171Ark297, 284SW734; 179 Ark189, 14SW(2d)1113; 179Ark1199; 18SW(2d)335; 76CalA715, 245P792; 90CalA528, 266P349; 36GaA83, 135SE 513; 333 Ill 554, 165NE196; 250Mich 206, 229NW421; 317Mo 293, 295SW743 (statements not amounting to coercion); Mo 300SW504; 136Wash499, 240P676. See also 23AlaA140, 122S303.

1092-95½-New. That sick juror agreed to conviction to escape confinement in jury room does not of itself show coercion. 130Kan474, 287P261.

1092-96 5F(2d)819; 227Ky223, 12SW (2d)336; 155Miss648, 124S803; 146SC 275, 143SE817. [a] 223AppDiv248, 228 NYS24. [c] Deliberation from Saturday noon to 2 P. M. Sunday afternoon insufficient to infer coercion. 326 Ill 496, 158NE149. [d] Refusing discharge after reported disagreements where jury were out less than two days is not abuse of discretion. 227Ky223, 12SW(2d) 336.

1092-1 94PaSuper491.

1093-2 [b] Jury must have reported to court inability to agree.-Okl 273P900.

1093-5 231Mich484, 204NW105; 157 Tenn177, 7SW(2d)46 (court should act with caution).

1094-9 See also 167Ga835, 147SE35.

1094-12 OklCr 277P280.

1094-13 Ill 172NE740; 231Mich484, 204NW105. [c] Matter rests in discretion of court.-233Mich29, 206NW522.

1094-15½-New. or because jurors have an erroneous view as to testimony submitted. 233Mich29, 206NW522.

1094-18 42F(2d)254 (publication of articles concerning defendant in public press); 110Conn55, 147A118; 218Ky 360, 291SW749. [b] Relationship of witness to person jointly indicted.-36 GaA784, 138SE280.

1095-28 [b] Improper or unwarranted discharge has legal effect of acquittal. 128 Or204, 274P303.

1095-28½-New. Discharge of a jury on account of the publication of newspaper articles dealing with the case during the course of the trial is in the sound discretion of the trial court. 27F(2d) 575.

1096-43 338 Ill 340, 170NE219 (improper cross-examination).

1096-45½-New. Necessity for motion to withdraw. Where defendant feels prejudice arising from improper question, and answer has not been removed by sustaining of his objection and ordering answer expunged, he must move for withdrawal of jurors. 85PaSuper 305.

1096-45¾-New. And if he fails to move he will be considered satisfied with favorable ruling or answer, and the court will not withdraw a juror of its own motion. 85PaSuper305.

1096-45¼-New. And if verdict is adverse, defendant cannot ask withdrawal of juror after verdict or reversal on appeal. 85PaSuper305.

1096-46 40F(2d)909; Ga 155SE11.

1096-48 40F(2d)909; 322 Ill 384, 153 NE729 (improper question as to former plea of guilty).

1096-49 179Ark507, 16SW(2d)991; 79 CalA207, 249P18; 35GaA398, 133SE744; Ill 172NE812; 222Ky840, 2SW(2d)1044; 234Ky192, 27SW(2d)971; 165La822, 116 S199 (questioning and arguing with witness); Wash 292P107(2dcase). See also Mo 12SW(2d)51. But see 167Ga 835, 147SE35. [b] Duty to except in presence of jury.-31F(2d)245.

1096-51 79CalA207, 249P18; 164Ga88, 138SE65; 227Ky435, 13SW(2d)267; 168La618, 122S869.

1096-52 107TexCr319, 296SW600.

1097-56 156SC324, 153SE269.

1097-62 197Ind606, 151NE695.

1097-63 156SC324, 153SE269.

1097-67 NJ 140A457 (clerk cannot receive verdict unless authorized by judge).

1097-71½-New. Reception of verdict by judge other than one presiding during trial held not error. 87Colo 11, 285 P157.

1097-76½-New. Where a nonresident judge is assigned in the trial of a particular case, he may receive a verdict within the time as extended by order of the chief justice. OklCr 279P525 (where order of extension was not recorded by clerk of court).

1098-78 156SC324, 153SE269.

1098-80 [a] Failure of jury to respond to clerk's inquiry if verdict read is then verdict is immaterial where no disagreement is reported. 69CalA511, 231P596.

1098-83½-New. Verdict of guilty must be honest conclusion of all the jurors. 49SD456, 207NW456.

1098-86 162Ga161, 132SE769, 770 [cit CJ]; 142M'ss256, 1078200.

1098-87 166Ga213, 142SE895; 166Ga 218, 142SE898; 195NC502, 142SE779. See also 140Miss597, 1058747.

1098-88 221Ky700, 299SW568.

1098-89 La 129S684.

1098-89½-New. Where, after a verdict has been received in the presence of all of the jurors, it becomes impossible for the jury to be polled, the court does not thereby lose power to record and render judgment on the verdict. 140Miss 597, 105S647.

1098-89¾-New. Defendant may not examine each juror as to supposed misconduct after polling of the jury. 111Tex Cr182, 118SW(2d)519.

1098-90 [b] **Reading and recording before poll is held not error.** 292Pa26, 140A611.

1098-91 166Ga213, 142SE895; 166Ga 218, 142SE898.

1098-93 166Ga213, 142SE895; 166Ga 218, 142SE898; 366GaA639, 138SE383; 161Miss489, 122S533.

1098-94 166Ga213, 142SE895; 166Ga 218, 142SE898.

1099-2 151Md456, 135A189, 195 [cit CJ].

1099-4 153Md201, 137A896.

1099-11 22AlaA281, 123S392(2dcase).

1099-13 90Fla779, 1078242; 105TexCr 123, 289SW41.

1099-18 94Fla143, 1148237 [cit CJ]. See also Mo 256SW745.

1099-20½-New. Verdict of guilty on first indictment bad, where there was but one indictment. 19AlaA635, 1048679.

1099-20¾-New. Verdict agreeing to penalty of one year in penitentiary held insufficient as omitting essential requirement that jury either find defendant guilty or not guilty. 105TexCr423, 289SW41.

1099-20¾-New. Recital of evidence and evidentiary facts should be avoided. 109Conn124, 145A761.

1099-20⅞-New. The verdict need not be framed under strict rules of pleading, or after technical form, any words which convey an idea to common understanding being sufficient. Utah 273P969.

1099-21 31Ariz357, 253P629; 317Mo 840, 297SW34; Mo 28SW(2d)784 (general verdict held in approved form).

1100-27 106TexCr539, 293SW822.

1100-27½-New. In such cases, forms for all verdicts permissible should be given. 106TexCr539, 293SW822. [a] **In case of aggravated assault,** court need not furnish form for simple assault. 106TexCr539, 293SW822.

1100-28 209Ky277, 272SW726, 727 [cit CJ] (dicium); 162La500, 1108733.

1100-30 105TexCr423, 289SW41.

1100-31½-New. Failure of jury to write their verdict on indictment is not error. 170Ark1194, 282SW676.

1100-37 [a] **Effect of stipulation.**-Iowa 232NW127.

1100-39½-New. It is always within the province of the jury to return a special verdict finding facts constituting the offense. Mo 148SW(2d)424.

1100-40 21AlaA615, 1108696; 96Fla68, 1178694.

1100-41 209Ky272, 272SW726, 727 [cit CJ]; Mo 278SW706, 707 [cit CJ].

1100-42 20AlaA549, 1038478 (only foreman need sign verdict); 96Fla68, 1178694. See also Mo 278SW706. [a] (2) 107TexCr13, 294SW592. (3) 167 La1080, 1208864. (5) That member of petit jury wrote word "foreman" after signature held harmless. 215Ky827, 287 SW23. (6) Verdict signed "John Veach, Foreman" held not objectionable. 317Mo293, 295SW743. (7) That term "foreman," appeared above, and not below, signature of foreman of jury, did not vitiate verdict. 167La982, 1208619.

1101-46 75CalA138, 242P84, 161La 620, 1098148; 167La635, 120S33; 101 TexCr544, 276SW261, 106TexCr501, 289 SW1008. [c] **Abbreviations.**-TexCr 287 SW51.

1101-47 75CalA421, 243P39; 33Ill 169, 164NE156 (court should have disregarded finding as to insanity as surplusage); 337Ill290, 169NE214; 87Pa Super110. [a] (3) Where jury, with verdict assessing punishment, hands to court separate document recommending pardon after stated period of good behavior, such document is properly rejected as beyond power of jury. 101TexCr94, 274SW136. (4) Where jury fixes extra punishment, judge may disregard this and fix proper sentence. 21AlaA 439, 109S182. (5) Other instances. 83 CalA34, 250P455. [d] **Part of verdict fixing punishment** may be treated as surplusage. 23AlaA81, 121S2(1stcase).

1101-49 22AlaA148, 113S479; 31Ariz 357, 253P629; 94Fla143, 1148237; 196 Ind671, 149NE347.

1101-50 96Fla68, 1178694.

1101-51 31Ariz357, 253P629; 169Ark 332, 275SW659; 94Fla60, 1138736; 96 Fla68, 1178694; 334Ill211, 165NE693, Ind 171NE585; 126Kan799, 271P291; 158La799, 1048720; Mo 300SW1106; 153Va987, 151SE151. [a] Mo 228SW (2d)777.

1102-53 22AlaA148, 113S479; 153Va 987, 151SE151.

1102-54 144Wash598, 258P484.

1102-55 215Ky827, 287SW23; 158La 799, 1048720 (words "as charged" supply omission); Mo 248SW(2d)1010; Okl Cr 282P178(2dcase); 144Wash367, 258 P484.

1102-56 WVa 153SE308. [a] **In larceny prosecution,** interrogatory in respect of value of property is not erroneous for failure to use term "market value." Iowa 230NW379.

1102-56½-New. In Texas, where accused pleads guilty and asks for suspended sentence, defendant's reputation only is in issue and proof of other offenses is improper on trial of the special issue. 106TexCr442, 292SW882.

1102-57 Md 151A409; Wash 286P833 (special finding held not repugnant to general verdict).

1102-58 31Ariz357, 253P629; 6PaDist &Co 537. [a] (1) 31Ariz357, 253P629. (2) Verdict finding defendant guilty as charged with statement of what verdict was based on and recommendation for leniency is not imperfect special verdict justifying acquittal. 195Cal 325, 233P 97. (3) Verdict finding defendant guilty of "falsely personating another in bail bond as charged in information" is not special. 318Mo687, 1SW(2d)96.

1102-59 195Cal 325, 233P97 (if finding of jury is consistent with verdict of guilty, it is not special verdict).

1102-60 Md 151A409; Mo 298SW(2d) 67; 197NC691, 150SE330(1stcase). [b] Mo 298SW(2d)67.

1103-64 5F(2d)497.

1103-68 21AlaA240, 106S894; 31Ariz 357, 253P629; 68CalA645, 230P193; 70 CalA315, 233P362; 94Fla143, 1148237; 121Kan167, 246P685, 686 [quotCJ]; 316 Mo150, 289SW822; 320Mo327, 7SW (2d)273; NJ 141A24; TexCr 328SW(2d) 356(1stcase). See also 170La991, 1298 612(4thcase); 32PortoRico 324. [a] (1) 176Ark398, 3SW(2d)37; 128Kan 784, 280P758; La 129S736; 172Minn 139, 214NW785; Mo 278SW668; Mo 280 SW48; Mo 284SW799(1stcase). (6) Guilty of having still in possession under indictment charging setting up and possessing still and still worm. 168Ark 167, 269SW355. (7) "Guilty of cutting with intent to kill as charged." 158La 713, 1048627. (8) Other instances. 94 CalA635, 27P576; 96Fla657, 1188815 (2dcase); 142Miss256, 107S200 (verdict of "not guilty"); Mo 292SW39; 318Mo 592, 300SW685; Mo 300SW722; Mo 2 SW(2d)784; Mo 7SW(2d)278; Mo 31 SW(2d)39; 87PaSuper110. [b] (9) 21AlaA240, 106S894; 194NC690, 140SE 621; 32PortoRico 324. (10) Guilty of misdemeanor with recommendation of mercy on charges in two counts of larceny and conversion of automobile. 37 GaA144, 139SE100. (11) Other instances. 333Ill169, 164NE156; 320Mo 327, 7SW(2d)273. [c] **In Pennsylvania.**-294Pa144, 143A904. [d] **Other verdicts held not responsive.**-Okl 273P 284.

1103-68½-New. , but it need not follow the exact language of the indictment. 158La799, 1048720.

1103-69 121Kan167, 246P685, 686 [quotCJ]; 197NC248, 148SE249(1st case); 110TexCr105, 78SW(2d)539.

1103-70 22AlaA170, 113S646; 31Ariz 357, 253P629; 158La799, 1048720; Mo 278SW733; 312Mo373, 278SW1016; Mo 7SW(2d)1001; Mo 18SW(2d)16(1st case).

1103-75 215Ky827, 287SW23; 50ND 715, 197NW881, 883 [citCJ]; 285Pa289, 132A370.

1103-77 215Ky827, 287SW23; 167La 635, 120S33 (codefendants); 316Mo150, 289SW822; Nebr 230NW438 (where name and word "defendant" appear in caption).

1103-83 94Fla60, 1138736.

1104-91 321Ill624, 152NE520; 221 MoA592, 283SW468. [a] (1) 134SC386, 132SE838. (5) Other instances. Mo 284SW799(2dcase). [c] **Verdicts may be for different degrees of same crime** for separate defendants. 37GaA94, 139 SE95.

1104-92 But see 215Ky827, 287SW23.

1104-97 18F(2d)906; 168Ark580, 271 SW330; 45Ida720, 264P875, 876 [cit CJ]; NJSup 132A198; 143Wash39, 254 P460, 461 [quotCJ].

1104-98 143Wash39, 254P460, 461 [quotCJ].

1104-99 143Wash39, 254P460, 461 [quotCJ].

1104-1 29F(2d)76 [certiorari den 279 US836, 49SCt250, 73LEd983(9thcase)] (such verdict is inconsistent); 143Wash 39, 254P460, 461 [quotCJ].

1104-2 143Wash39, 254P460, 461 [quot CJ].

1105-3 6F(2d)574; 143Wash39, 254P 460, 461 [quotCJ].

1105-3½-New. A defendant who charged admission for seeing a pugilistic encounter between two others may be convicted of violation of the federal statute relating to engaging in a pugilistic encounter for money, although participants in the encounter are acquitted. 18F(2d)811.

1105-3¾-New. If one conspirator attempting to escape imprisonment is guilty of murder in first degree, coconspirators are equally guilty. 254NY 255, 172NE489.

1105-4 41GaA377, 153SE77(1stcase); 196 Ind671, 149NE347; 106TexCr434, 292SW877.

1105-5 20AlaA634, 104S681; 81CalA 752, 254P666; 118Kan635, 236P820.

1105-6 97Fla806, 122S218; 162Ga316, 134SE54; 34GaA174, 128SE586 (where evidence did not support one count); 37GaA339, 140SE405; 38GaA355, 144 SE629; 339Ill73, 170NE726; Ill 173NE 104; Mich 233NW412; MoA 288SW 969; 105TexCr650, 290SW754; 106Tex Cr462, 294SW200; TexCr 31SW(2d) 818. But see NC 155SE257. [c] **Under statute permitting consolidation** in single indictment of offenses of same grade and punishable alike, verdict and sentence as for separate counts held not improper. 189NC516, 127SE590.

1105-7 [a] **Offenses arising out of same transaction.**-35GaA652, 134SE202.

1105-8 But see 162Ga316, 134SE54. [b] **General verdict under indictment** charging several offenses will be sustained where sentence is no greater than imposed for one offense. 20AlaA 426, 103S707.

1105-9 See also 23AlaA210, 128S102 (1stcase).

1105-10½-New. Where one count is stricken, verdict of "guilty as charged in complaint" is not erroneous. 21AlaA 82, 105S438.

1105-10¾-New. Rule applies where larceny and burglary are charged in one count. 311Mo452, 278SW740.

1105-10¼-New. Where demurrer is sustained to second count of indictment containing three counts, and a verdict of guilty is found only on the first and second counts, sentence on the third count must be reversed. 15F(2d)916.

1105-11 20AlaA426, 103S707; 202Cal 159, 259P750; 232IllA342; 146Miss66, 111S850; Mo 270SW284; 315Mo1320, 289SW935; 105TexCr132, 286SW989; TexCr 31SW(2d)437; TexCr 31SW(2d) 1075(2dcase). [a] **General finding of guilty means guilty as indicted.** 285 Pa289, 132A370.

1105-12 43F(2d)890; 36GaA190, 136

SE107; 39GaA411, 147SE404(1stcase); 232 IllA342; 89 IndA192, 166NE25.

1105–13 197 Ind16, 148NE420.

1106–14 7F(2d)259; 20AlaA426, 103S 707; 21AlaA24, 104S867 (verdict of guilty referable to either of two counts, one charging manufacture of prohibited liquors and other possession of still); CalA 286P1044; Fla 128S814; Mo 29 SW(2d)71; 193NC786, 138SE134; 193 NC787, 138SE135. [a] **General verdict** will be referred to highest grade of offense charged where different offenses or different species of same offense are joined in different counts in same indictment. 152Tenn281, 277SW892.

1106–16 CalA 292P520; 316Mo 144, 290SW142 (four counts); 111TexCr 524, 158SW(2d)635(2dcase); 112TexCr 274, 16SW(2d)132(1stcase).

1106–16½–New. If two counts state precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count. 199Cal 78, 248P250.

1106–16⅓–New. But where under the statutes there is an element in one offense which is not in the other offense, acquittal on one count will not operate as acquittal on the other count, 199 Cal 78, 248P250.

1106–16¼–New. and in such case the jury may be justified under the evidence in rendering a verdict of acquittal on one count and a verdict of conviction on the other count. 199Cal 78, 248P250.

1106–16½–New. An information may charge consummated bribery in one count and an attempt to bribe in another, and accused may be convicted of either offense as the jury may find, 245Mich229, 222NW149.

1106–16⅔–New. Acquittal under one count, where the same offense is charged in more than one count, may cause reversal of conviction under another. 100CalA559, 280P545.

1106–17 20AlaA426, 103S707; 21AlaA 629, 111S188; 37GaA594, 141SE84; 322 Ill 353, 153NE604; 197 Ind16, 148 NE420; 199 Ind247, 155NE544; 200 Ind69, 155NE817; 197 Ind16, 164NE 93; 155Miss662, 124S785; 220AppDiv 498, 222NYS24; 195NC537, 143SE3; 101TexCr336, 275SW829; 108TexCr 169, 300SW56.

1106–18 Contra 55AppDC306, 5F(2d) 267.

1106–19 256 IllA415; 89 IndA192, 166 NE25.

1107–22½–New. Where only one of several counts in an indictment is submitted to the jury, a general verdict of guilty is sufficiently responsive. 104 TexCr633, 283SW172, 1072.

1107–25 16F(2d)197; 25F(2d)871; 198Cal 112, 243P667; 198 Ind277, 151 NE725; 130Kan306, 286P399; MoA 275SW59; MoA 31SW(2d)559.

1107–28 22F(2d)410; 72CalA102, 236 P944; 35GaA590, 134SE328; 118Kan 635, 236P820; 121Kan711, 249P688; 255Mass317, 151NE300; Mo 300SW684 (verdict responsive to specified count); 320Mo 228, 7SW(2d)259; 77Mont387, 250P976; 198NC41, 150SE635; 108Tex Cr590, 2SW(2d)229; 150Wash136, 272 P48. See also 31F(2d)682. [a] **Where verdicts are not necessarily inconsistent,** acquittal on one count is not in effect acquittal on another. 90CalA186, 265P525. [b] **Counts charging mayhem and assault.**–90CalA186, 265P525.

1107–30 4F(2d)881 (verdict of guilty on one count cannot be based on evidence in other counts in which verdict of not guilty has been directed); 22 AlaA104, 113S85; 177Ark605, 7SW(2d) 315; 100TexCr152, 272SW211 (verdict defective for uncertainty).

1107–31 333 Ill 150, 164NE154; 221 AppDiv485, 224NYS163.

1107–32 19F(2d)46; 215Ala616, 110S 798; 22AlaA113, 113S316; 21AlaA26, 104S869; 21AlaA31, 104S878; 21AlaA 18, 104S880; AlaA 107S323; 21AlaA 422, 109S124; 21AlaA423, 109S125; 21 AlaA431, 109S179; 21AlaA588, 110S 320; 22AlaA390, 115S858; 22AlaA516, 117S498; 23AlaA355, 125S901; 23AlaA 501, 127S910; 196 Ind671, 149NE347; 200 Ind112, 161NE565; 238Mich625, 214NW184; Mich 233NW412; 318Mo 742, 300SW680; 318Mo 672, 300SW752; Mo 278SW(2d)16; 190NC684, 130SE854; 285Pa289, 132A370; 92PaSuper124; 94 PaSuper525; 153Tenn441, 284SW361; 100TexCr533, 271SW624. See also 92 CalA94, 267P764. [a] **Failure to render verdict** on one of two indictments tried together is not acquittal of those charges in first which were also contained in second indictment. 74CalA 178, 240P502 [quotCJ].

1108–33 Mo 289SW938; 77Mont387, 250P976; 190NC634, 130SE854 (failure to find guilty on one count held not to vitiate verdict on other); 113TexCr244, 20SW(2d)198. See also 4HawaiiFed616.

1108–35 See also 94PaSuper525.

1108–35½–New. An acquittal of the felony of transporting intoxicating liquors does not result in an acquittal of the misdemeanor of possession charged in a separate count. 312Mo 425, 279SW 102.

1108–35⅓–New. To be sustained, verdict of conviction on one or more counts must be supported by evidence other than facts pleaded in support of counts on which there was acquittal. 22F(2d)547.

1108–36 18F(2d)509; 22F(2d)547; 207Cal 605, 279P646; 75CalA16, 241P 591, 592 [citCJ]; 83Colo 1, 262P906; 95Fla404, 116S12; 36GaA668, 137SE 791; 38GaA366, 143SE925; 221AppDiv 485, 224NYS163. [a] 254Mass198, 150 NE164. See also 256 IllA493. [b] (4) Other instances. 84Colo 166, 268P536. (5) Verdicts finding defendants guilty of robbery and of robbery with dangerous weapon are held not inconsistent. 328 Ill 446, 159NE807. (6) Verdict on prosecution against several, under indictment containing several counts, is not inconsistent from legal standpoint, because, while each of four defendants was convicted on two counts, only two of them were convicted on same count. 29F(2d)76 [certiorari den 279US836, 49 SCt250, 73Led983(9thcase)]. (7) Conviction for theft by fraudulent procuring of deeds is not repugnant to conviction for theft of proceeds of loan obtained under false claim of title. 96 CalA186, 273P837. [c] **Verdict inconsistent.**–75CalA16, 241P591.

1108–37 4F(2d)772 (acquittal of charge of possession of intoxicating liquor not inconsistent with conviction on charge of state); 5F(2d)132; 7 F(2d)59; 7F(2d)615; 7F(2d)785; 16 F(2d)197; 16F(2d)951; 25F(2d)871; 26F(2d)168; 26F(2d)773; 31F(2d)289 (1stcase); 31F(2d)436; 31F(2d)902; 177Ark1, 5SW(2d)355; 199Cal 461, 249 P867; 79CalA328, 249P231 (forgery and embezzlement); 102CalA29, 282P 813; CalA 291P251; 89 IndA132, 166 NE14; 118Kan635, 236P820; 120Kan 516, 243P1057; 121Kan881, 250P284; 255Mass317, 151NE300; 247NY369, 160 NE643; 120 Oh62, 165NE566; 152 Wash155, 277P377. See also 27F(2d) 648; 76CalA715, 245P792; 35GaA590, 134SE328. [a] **Evidence that defendant is guilty of** greater offense than charged will not prevent verdict of guilty of lesser offense included within crime charged. 199Cal 461, 249P867. [b] **Conviction of contributing to delinquency** of minor by sodomy held not inconsistent with acquittal of sodomy in view of conviction of attempt to commit it. 199Cal 461, 249P867.

1108–37½–New. Acquittal on charge of selling liquor does not necessarily carry with it acquittal on charge of possession. 8F(2d)211.

1108–37⅓–New. A finding that facts constituted the consummated crime precludes a conviction of an attempt. 144 Wash367, 258P20.

1108–37¼–New. A verdict is not inconsistent that is consistent with itself. 29F(2d)76 [certiorari den US 49SCt250 (9thcase)].

1108–38 87PaSuper285.

1108–40 74CalA178, 240P502.

1108–43 [c] **Verdict in favor of prosecution on plea of former acquittal is erroneous** where prosecution introduced no evidence to show prior convictions were reversed on appeal. 78CalA451, 248P929.

1108–46 Md 151A409.

1109–48 22AlaA148, 113S479; 94Fla 143, 114S237.

1109–51 232 IllA342.

1109–52 180Ark627, 22SW(2d)395(2d case); Mo 270SW378; Mo 279SW141; 317Mo 319, 296SW132; Mo 300SW719; 318Mo 712, 300SW738; 318Mo 751, 300 SW748.

1109–53 94Fla143, 114S237; Mo 290 SW1007, 1009 [quotCJ].

1109–53½–New. A verdict of acquittal on a plea of not guilty imparts an acquittal of the offense charged in the indictment. 70CalA476, 233P406.

1109–57 68CalA308, 229P63.

1110–61 MoA 293SW796.

1110–67 97CalA238, 275P511; 49Nev 354, 246P530, 531 [citCJ].

1110–69 209Ky51, 272SW11.

1110–71 195Cal 325, 233P97; Cal 290 P582; 93Fla1076, 113S121; 159La769, 106S298; 285Pa49, 131A657; 196Wis 446, 220NW190 (does not show compromise verdict). [e] **Statement, "owing to insufficient evidence,"** contained in jury's letter to judge recommending mercy, cannot affect validity of conviction. 285Pa49, 131A657.

1110–73 168Ark1122, 273SW353; 159 La712, 106S123; 159La769, 106S298; 170La991, 129S612(4thcase); 33NM212, 263P515. [a] (2) Court may decline to receive verdict with recommendation of suspension of sentence. 111TexCr352, 12SW(2d)1035. [b] **Act providing that court may suspend sentence on recommendation of jury** held not to make suspension mandatory on judge when recommendation is made. 159La712, 106S 123.

1111–74 195Cal 325, 233P97; Cal 290P 582; CalA 285P856(2dcase); 159La769, 106S298; 154Miss489, 122S533; 191NC 378, 131SE743; 103TexCr413, 281SW 544.

1111–78 218Ala428, 118S739(1stcase); Ariz 282P930 (court determines severity within statutory limits). [a] (3) On conviction for petit larceny, it was held that court could add term at hard labor in addition to fine imposed by jury. 22 AlaA27, 112S221. (4) On appeal from conviction in mayor's court for violation of prohibition ordinance, jury may, under some statutes, impose sentence of hard labor. 22AlaA407, 116S900. [b] **In North Carolina.**–191NC378, 131 SE743. [c] **Court has authority to add imprisonment** to fine assessed by jury. 23AlaA535, 128S467.

1111–79 23AlaA116, 121S693(1stcase).

1111–80 219Ala7, 121S423.

1111–81 23AlaA72, 121S692(1stcase).

1111–82 Cal 290P582; 321 Ill 390, 152 NE212; 334 Ill 241, 165NE693.

1111–83½–New. Jury does not fix time when incarceration begins. Mo 278SW 711.

1111–84 23AlaA72, 121S692(1stcase).

1111–84½–New. A verdict providing for imprisonment and omitting prescribed fine is invalid. 104TexCr485, 284SW 957.

1111–85 CalA 285P856(2dcase); 316Mo 210, 289SW953; Mo 285SW723 (several defendants); Mo 285SW995; Mo 292SW 27; Mo 14SW(2d)441; Mo 22SW(2d) 793; Mo 23SW(2d)11; MoA 279SW221; OkiCr 238P224 (under statute, if defendant requests it, jury must assess punishment or say by their verdict that they are unable to do so); OkiCr 287P 759; OkiCr 290P420(2dcase) (in absence of request to have jury assess punishment). [a] (2) Verdict of guilty stating lack of agreement as to punishment. Mo 22SW(2d)793. [b] **Where jury cannot agree on punishment,** court may prepare blank verdict for them and then fix punishment. Mo 3SW(2d)235.

1111–86 311Mo 461, 278SW719 (assessment sufficient); 101TexCr71, 274SW 566.

1111–88 214Ala675, 108S612; 76CalA 144, 244P101; 198 Ind241, 151NE615. [a] (2) Failure, in prosecution for rape of female under eighteen, to instruct jury as to its authority under mandatory statute to recommend place of punishment is reversible error. 78CalA702, 248P960.

1112–90 Ariz 282P930.

1112–92 But see 317Mo 268, 295SW741,

1112-92½-New. Use of the word "determine" instead of "recommend" in naming the place of imprisonment does not invalidate the verdict. 90CalA472, 265P976.

1112-97 160Ga365, 127SE732; 37GaA195, 139SE103; 198Ind73, 152NE607; OklCr 282P371 (verdict not void for uncertainty).

1112-2 But see 157Tenn648, 11SW(2d)868.

1112-4 Mo 296SW152.

1112-4½-New. Under statute authorizing jury to assess punishment within maximum and minimum terms, they may include fractional parts of year. 105TexCr627, 289SW1015.

1113-15 169Ark332, 275SW659; 83CalA34, 256P455; 101TexCr535, 276SW275; 110TexCr285, 7SW(2d)578. [b] **While punctuation may be disregarded,** it is aid to interpretation when correctly used. 12F(2d)742.

1113-16 336 Ill 286, 168NE332.

1113-17 321 Ill 80, 151NE529; 337 Ill 290, 169NE214; 120 Or90, 250P633, 251P307; 101TexCr535, 276SW275. See also Mo 280SW1038.

1113-18 169Ark332, 275SW659; 37GaA94, 139SE95; 321 Ill 80, 151NE529; 336 Ill 286, 168NE332; Ind 171NE585; Md 151A409; 318Mo 687, 1SW(2d)96; OklCr 280P857; 120 Or90, 250P633, 251P307; 101TexCr535, 276SW275; 105TexCr423, 289SW41; Utah 273P969.

1113-19 31Ariz357, 253P629; DC 32F(2d)945; 285Pa289, 297, 132A370 [cit CJ]; 150SC452, 148SE474.

1113-20 101TexCr471, 276SW236 (charge); 110TexCr285, 7SW(2d)578. But see 34Ariz372, 271P872.

1113-21 109Conn124, 145A761; 93Fla993, 112S892; 215Ky827, 287SW23; OklCr 280P857.

1113-22 30Hawaii816; 215Ky827, 287SW23; Mo 278SW711; 101TexCr471, 276SW236; 101TexCr535, 276SW275; 105TexCr423, 289SW41. [b] **Particular verdicts construed.**-103NJL361, 137A575.

1113-22½-New. But verdict of guilty does not establish guilt in absence of valid indictment or information 318 Ill 293, 149NE241.

1113-24 But see 96CalA1, 274P361.

1113-25 Iowa 228NW353; 77Mont57, 249P571.

1113-26 But see 103WVa658, 138SE316. Contra 77Mont57, 249P571.

1113-26½-New. Where an additional fact aggravating the crime is an essential element, a general verdict of guilty carries affirmative finding on all facts necessary to authorize judgment. 324 Ill 55, 154NE430.

1113-26¼-New. Judgment of guilty is presumed to negative all pleas made in the defense presented. 30F(2d)416.

1113-27 337 Ill 290, 169NE214.

1113-31½-New. A verdict which is full and complete and responsive to the issues is conclusive upon the state, 142Miss256, 107S200.

1113-31¾-New. and the trial court is without power to require the jury to return to their room further to deliberate upon the matter. 142Miss256, 107S200.

1113-31¼-New. The trial judge has no right to set aside a verdict of acquittal, regularly rendered and received, after submission upon written instruction as to form of verdict, 142Miss256, 107S200.

1113-31⅝-New. although counsel for state and defendant may have agreed on verdict of guilty with life sentence, 142Miss256, 107S200.

1113-31¼-New. where jury were not parties to such agreement. 142Miss256, 107S200.

1113-33 19AlaA635, 104S679; 162La500, 110S733.

1114-36 230Ky656, 20SW(2d)484, 66ALR1297; 89PaSuper173; 103TexCr103, 280SW200; 112TexCr343, 16SW(2d)1074; 113TexCr223, 18SW(2d)656; TexCr 30SW(2d)331.

1114-37 113TexCr442, 21SW(2d)739. [b] **In Virginia.**-153Va987, 151SE151.

1114-39 105TexCr126, 286SW1099. [b] (2) **Motion to amend verdict as to material matter, filed after discharge of jury and separation, held properly overruled.** 89IndA125, 166NE8.

1114-39½-New. Where verdict is improper in form, court may mould it into proper form. 8PaDist&Co 763.

1114-39⅓-New. In some jurisdictions, with a motion to the trial court to correct the finding in a case tried to the jury, there must be filed exceptions to the finding as made. 108Conn454, 143A561.

1114-39¼-New. The finding in a case tried to jury need not be corrected, where changes are not necessary in order fairly to present errors claimed to have been made by the trial court. 108Conn454, 143A561.

1114-39⅝-New. It is the judge's duty to reform a formally defective verdict. 153Va987, 151SE151.

1114-40 [b] **Written verdict** may be amended orally. 162La500, 110S733.

1114-41 35GaA660, 134SE193.

1114-42 5F(2d)598; 76CalA144, 244P101; 36GaA648, 137SE798; 197Ind606, 151NE695; OklCr 292P374.

1114-43 76CalA144, 244P101; 36GaA648, 137SE798; 163La495, 112S377.

1114-43½-New. and such suggestions need not be in writing. 197Ind606, 151NE695.

1114-45 35F(2d)553; 93CalA568, 269P969; 95Fla775, 116S618; 35GaA235, 133SE281; 35GaA236, 133SE282; 36GaA308, 136SE459; 36GaA648, 137SE798; 39GaA680, 148SE283(1stcase); (error is not cured); 197Ind606, 151NE695; 254Mass390, 150NE181; 196NC692, 146SE801(2dcase); 31OklCr212, 238P224 (and if jury verdict is not in form, court may, with proper instructions as to law, direct them to reconsider it); OklCr 273P375 (duty of court).

1115-47 163La495, 112S377.

1115-49 40GaA508, 150SE455; 195NC618, 143SE1 (verdict rendered under misconception of instructions).

1115-50 162Ga161, 132SE769.

1115-51 But see 162Ga161, 132SE769.

1115-51½-New. The jury should be properly instructed on the return of an illegal verdict and not discharged until they return a legal one. 153Va987, 151SE151.

1115-52 162Ga161, 132SE769; 197Ind606, 151NE695. But see OklCr 278P404.

1115-54 OklCr 278P404; 102TexCr531, 278SW439. [a] **Recall of jury for further deliberation after discharge** vitiates verdict as they had lost their identity as jury. 102TexCr531, 278SW439.

1115-55 36GaA308, 136SE459.

1115-55½-New. It has been held that recalling jury after the filing and recordation of a verdict and having it rerender the verdict has no effect on the legality of the trial and conviction. 94Fla783, 114S523.

1115-57 198Ind73, 152NE607; Ind 171NE585.

1116-59 103WVa658, 138SE316, 317 [citCyc]. But see 89PaSuper173; 89PaSuper230.

1116-62½-New. Where the jury have rendered a verdict of not guilty, defendant is entitled to have the same received and recorded, 103WVa658, 138SE316.

1116-62¼-New. nor is the verdict vitiated by failure to read it to the jury as recorded. 178Minn564, 227NW893.

1116-68 [a] **Erasure of verdict** on poll of jury, some of whom repudiate verdict of not guilty as their verdict, is within power of court to direct. 162Ga161, 132SE769.

1116-70 [b] **Motion to set aside verdict is not proper remedy** for failure of court to direct bailiff to notify defendant out on bail and his attorney of agreement of jury. 175Minn573, 222NW277.

1116-71 CalA 286P176; MoA 274SW496; OklCr 278P404; OklCr 280P477 (objection not definitely pointing out defect).

1116-76½-New. Defendant, who did not except to the court's refusal to accept the verdict, but took chances on a more favorable verdict, cannot complain because the verdict as finally received and recorded was less favorable than the verdict first tendered. 196NC692, 146SE801(2dcase).

1116-76¼-New. [§ 2613a] L½. **Findings by Court in Trial without Jury.** Facts which are admitted or undisputed should be found. 107Conn630, 141A660.

1116-79 85CalA413, 259P465.

1116-81 5F(2d)598 (objection to evidence as unlawfully obtained may be waived); 28F(2d)898; 162Ga777, 135SE187; 27Hawaii65; 165La705, 115S909; 131Misc411, 227NYS142; 224App Div243, 229NYS644; 134Misc228, 235NYS173; 134Misc604, 236NYS214; OklCr 278P665(2dcase) (view of place of crime); TexCr 27SW(2d)178; Wash 287P57.

1117-83 162Ga777, 135SE187; 165La842, 116S206.

1117-84 5F(2d)622 (exception to denial of directed verdict waived by introduction of evidence); 5F(2d)628 (motion for directed verdict waived by introduction of evidence); 14F(2d)886; 15F(2d)494; 15F(2d)503; 23F(2d)472; 30F(2d)482 [certiorari den 279US855, 49SCt351, 73Led997(6thcase)]; 31F(2d)737; 35F(2d)941 (error in denying motion to dismiss); 36F(2d)871; 82Colo233, 259P1038; 87Colo84, 285P766; 162Ga777, 135SE187; 201Iowa575, 207NW608 (reference by state to defendant's right to testify is waived by defendant becoming witness in his own behalf); 225Ky590, 9SW(2d)723(2dcase); 229Ky249, 16SW(2d)1058; 126Me484, 139A677; 156Md149, 143A872; 314Mo567, 284SW806; 196NC692, 146SE801(2dcase) (denial of motion for judgment as of nonsuit); OklCr 286P21; 108TexCr379, 18SW(2d)306. But see 105NJL159, 143A768. [g] **Offering evidence** is considered abandonment of motion for directed verdict. 22F(2d)679. [h] **By offering testimony** in own defense accused waived demurrer to government's evidence and risked strengthening government's case. 39F(2d)414.

1117-85 218Ala250, 118S265; 162Ga777, 135SE187. [a] **Object of exception** is to challenge attention for alleged error. 7F(2d)455.

1117-86 135Wash361, 237P723 (failure to object at proper time).

1117-86½-New. Statements by defendants' attorney that he would not pursue inquiry further is not waiver of ruling excluding question, where he objected and saved exceptions. 176Ark895, 2SW(2d)67.

1117-86¼-New. Defendant does not waive his right to be tried on transgression named in the information, and no other, by failing to ask instructions which would present to the jury the issues raised by the information, rather than foreign issues. 207Iowa322, 222NW867.

1117-86¾-New. A demurrer to the evidence at the close of the trial is abandoned by introducing evidence. Mo 300SW706.

1117-86⅛-New. A public fundamental right, exercise of which is requisite to jurisdiction to try, condemn, and punish, is binding on the individual and cannot be disregarded. 134Misc604, 236NYS214.

1117-87½-New. Where the evidence was conditionally admitted, defendants' failure to request an instruction to the jury to disregard the evidence is not a waiver of right to claim error. 143SC63, 141SE165.

1117-87¼-New. Exception to denial of defendant's motion for discharge for lack of evidence has been held waived by subsequent introduction of evidence by the state. NH 146A503.

1117-95 Ind 166NE771; 317Mo759, 297SW10 (statute not retroactive).

1117-97 89IndA608, 167NE540(1st case); TexCr 24SW(2d)1097 (plea of guilty).

1117-99 200Ind4, 161NE6; 200Ind27, 161NE269; Ind 168NE241; Mass 171NE53.

1117-99½-New. Purpose of motion for new trial is to call the attention of the trial court to matters and rulings occurring during progress of trial which movant contends constitutes reversible error, so as to give the trial court opportunity to correct its errors. 312Mo673, 280SW1026, 44ALR848.

1118-23 BC [1928] 4DomLR825.

1119-28 Mo 30SW(2d)750.

1119-30 169Ga814, 152SE76 (statute construed).

1119-31 [a] **After sentence on plea of guilty of manslaughter** county court is without jurisdiction to grant new trial. 196**Wis**113, 219**NW**380.

1119-34 8**F(2d)**711; 8**F(2d)**919; 12**F(2d)**670; 16**F(2d)**370; 17**F(2d)**462; 19**F(2d)**813; 20**F(2d)**752; 26**F(2d)**798; 30**F(2d)**900; 35**F(2d)**941; 39**F(2d)**30; 174**Ark**859, 296**SW**716; 89**CalA**132, 264**P**314; 99**CalA**32, 277**P**1102; 77**Colo** 432, 236**P**1022; 87**Colo** 507, 289**P**1081; 163**Ga**684, 137**SE**31; 34**GaA**188, 129**SE**21; 36**GaA**674, 137**SE**854; 37**GaA**376, 140**SE**406; 119**Kan**417, 239**P**756; 212**Ky** 159, 278**SW**567; 166**La**1010, 118**S**116; 168**La**948, 123**S**636(1stcase); 153**Md**613, 139**A**289; 254**Mass**320, 150**NE**7; 254**Mass**390, 150**NE**181; 254**Mass**556, 150**NE**869; 255**Mass**369, 151**NE**839; 256**Mass**214, 152**NE**60; 257**Mass**1, 152**NE**745; 257**Mass**419, 154**NE**179; 259**Mass**128, 156**NE**57; 260**Mass**303, 157**NE**354; 261**Mass**281, 158**NE**840; 261**Mass**299, 159**NE**51; **Mass** 164**NE**923; 167**Minn**348, 209**NW**30; 172**Minn**372, 215**NW**514; 312**Mo** 15, 278**SW**743, 746 [quot CJ]; **Mo** 12**SW(2d)**39; 115**Nebr**277, 212**NW**606; 102**NJL**388, 132**A**93; 34**NM** 494, 285**P**497; 217**AppDiv**424, 216**NYS** 723; 189**NC**766, 128**SE**354; 194**NC**749, 140**SE**806; 57**ND**900, 225**NW**319; 24**OhA**212, 157**NE**400; 35 **OklCr**279, 250**P**544, 49**ALR**1129; **OklCr** 277**P**688; **OklCr** 283**P**1036(1stcase); **OklCr** 293**P**271; 38 **OklACR**593; 291**Pa**319, 139**A**836; 294**Pa**544, 144**A**542; 297**Pa**382, 147**A**79; 85**PaSuper**7; 85**PaSuper**320; 87**PaSuper** 193; 8**PaDist&Co** 763; 33**PortoRico** 48; **SC** 114**SE**6; 134**SC**179, 131**SE**420; **SD** 208**NW**164; 100**TexCr**537, 272**SW**144; 101**TexCr**434, 276**SW**289; **TexCr** 118**SW(2d)**172; 113**TexCr**555, 23**SW(2d)**721; **TexCr** 24**SW(2d)**840; **TexCr** 26**SW(2d)** 1064; **TexCr** 31**SW(2d)**1073; 100**Vt**476, 138**A**741; 101**Vt**483, 144**A**684.

1120-35 181**Ark**813, 27**SW(2d)**989; 312**Mo** 15, 278**SW**743, 746 [quotCJ]; **TexCr** 31**SW(2d)**1073; **Wash** 292**P**1107.

1120-37 128**Kan**756, 280**P**769; 194**NC** 749, 140**SE**806.

1120-40½-New. Where presiding judge dies while motion for new trial is pending, granting of motion is within discretion of court where trial was had. 261**Mass**299, 159**NE**51.

1120-41 199**Cal** 240, 248**P**908; 227**Ky** 792, 13**SW(2d)**1053. [c] **After appeal has been taken from order denying new trial,** trial court can neither reconsider motion nor consider similar one unless appeal was premature. 199**Cal** 240, 248**P**908. [d] **Motion for new trial allowance** held error notwithstanding failure to render final judgment. 215**Ky** 743, 286**SW**1065.

1120-42 222**Ky**840, 2**SW(2d)**1044.

1120-46 But see 129**Kan**120, 281**P**910.

1121-53½-New. Extraordinary motions for a new trial are not favored. 36**GaA** 217, 136**SE**92.

1121-57 Ind 171**NE**585; 137**Misc**466, 244**NYS**431. [a] (2) Failure to notify prosecuting attorney of time of trial is held not error at law occurring at trial because not challenged. 199 **Ind** 489, 158**NE**480.

1121-59 54**ND**136, 208**NW**947. [a] 32**OhA**5, 166**NE**594.

1121-61 [a] (2) 199**Cal** 240, 248**P**908.

1121-64 84**CalA**661, 258**P**432; 155**Miss** 648, 124**S**803; **NC** 154**SE**604. [b] (7) But where notes of official reporter were stolen, new trial has been held properly denied. 333 **Ill** 397, 164**NE**847. (8) Inaccuracies in official stenographic record of trial are not ground for new trial. 91**PaSuper**17.

1122-65 215**Ala**635, 112**S**212; 36**GaA** 659, 137**SE**913; 37**GaA**379, 140**SE**640; 41**GaA**565, 153**SE**780; 169**La**753, 126**S** 49; 172**Minn**372, 215**NW**514; 104**TexCr** 471, 284**SW**584.

1122-67 22**AlaA**52, 112**S**92; 37**GaA**382, 140**SE**406.

1122-68 CalA 291**P**614; 37**GaA**382, 140**SE**406; 46 **Ida**561, 270**P**417; 80**Mont** 181, 260**P**138; 98**PaSuper**34. [a] **Where guilt of defendant is clearly and conclusively established** and there is no good reason to believe that upon second trial jury could, or would, with reason and propriety arrive at any other verdict than that of guilt, new trial will not be granted except for fundamental error. **OklCr** 276**P**518.

1122-70 36**GaA**660, 137**SE**863; 37**GaA** 379, 140**SE**640; 37**GaA**505, 140**SE**774. [a] (2) Denial of new trial on ground that defendant was adjudged insane after sentence is not error in absence of positive showing that defendant was of unsound mind during trial. 92**CalA**6, 267**P**906.

1122-70½-New. New trial will not be granted on technical exception not affecting merits. 192**NC**533, 135**SE**345.

1123-73 318**Mo** 619, 300**SW**793.

1123-74 72**CalA**543, 237**P**769 (void sentence is not ground for new trial); 40**GaA**507, 150**SE**451(1stcase). [b] 162**Ga** 267, 134**SE**36; 39**GaA**26, 145**SE**911; 47**Ida**162, 272**P**1010.

1123-76½-New. In some jurisdictions reasons for granting new trial may be based upon either facts or law. 114 **Oh** 299, 151**NE**182.

1123-76⅓-New. New trial will not be granted on possibility of obtaining new witnesses. 224**Ky**89, 5**SW(2d)**487.

1123-77½-New. Where a motion for a new trial for insanity is presented, it was held that the trial judge may determine in his discretion whether there is sound ground for such defense and whether it would produce a different result in new trial. 257**Mass**391, 153**NE** 881.

1123-78½-New. If result of trial was just and would have been reached without error, new trial should not be ordered. **CalA** 289**P**212.

1123-79½-New. Insanity of accused at time of trial is ground. 135**Wash**650, 238**P**617.

1123-79⅓-New. A verdict finding defendant guilty of bigamy on a plea of guilty will not be set aside on a showing that an attorney was employed by defendant to bring suit for divorce against his first wife where it does not appear that such divorce was granted or that defendant had ground for believing that it had been granted. 104**TexCr**471, 284**SW**584.

1123-79¼-New. Unfriendly attitude held not shown. 216**Ala**356, 113**S**67.

1123-79⅕-New. It has been held that refusal to direct a verdict is never ground for new trial. 39**GaA**673, 148**SE**360(2dcase).

1123-79⅙-New. In jurisdictions where motions in arrest have been abolished, points which might have been saved in such motion must be saved in motion for new trial. **Mo** 25**SW(2d)**101(2d case).

1123-80½-New. On denial of a motion for a new trial for newly discovered evidence of a murderer's insanity, a motion of his codefendants, who took no part in the killing but who were found guilty under another statute, for a new trial on the ground of his insanity was held properly denied. 257**Mass**391, 153**NE** 881.

1123-82 35**F(2d)**941; 22**AlaA**146, 113**S** 625; 216**Ky**665, 288**SW**295; 257**Mass** 391, 153**NE**881; 261**Mass**299, 159**NE**51 (failure to submit list of witnesses); **Mo** 281**SW**960; **Mo** 8**SW(2d)**49; 108**TexCr**638, 2**SW(2d)**241; **TexCr** 27**SW(2d)** 208. [d] **Sufficiency of evidence** cannot be first urged in motion for new trial. 7**F(2d)**357.

1123-84 [a] **Consent to trial without jury in felony case.**-98**CalA**702, 277**P** 747 (under constitution).

1123-86 257**Mass**391, 153**NE**881; **Mich** 233**NW**389. [a] (1) But see **Ont** [1929] 1**DomLR**343. (4) New trial will not be granted on ground of insanity not pleaded at trial where there is insufficient showing to indicate fresh evidence warranting new trial. **NS** [1930] 4**DomLR**129.

1124-87 41**GaA**459, 153**SE**382; 146**SC** 138, 143**SE**674. [b] **Motion for mistrial.**-37**GaA**628, 141**SE**220(2dcase). [c] **Overruling motion for a new trial** for local prejudice is not abuse of discretion where no motion for change of venue was made. 34**NM**458, 283**P**907.

1124-87½-New. Lack of diligence alone may defeat petition.* 100**Vt**476, 138**A** 741.

1124-88½-New. or where defendant pleaded guilty, 233**Mich**112, 206**NW**370.

1124-89 Fla 129**S**827.

1124-91 104**TexCr**263, 283**SW**522.

1124-92 235**Ky**176, 30**SW(2d)**898; 102**TexCr**421, 278**SW**197; 106**TexCr**458, 293**SW**172; **TexCr** 24**SW(2d)**437; 100**Vt**476, 138**A**741. [a] **On motion for new trial,** trial court may review denial of continuance. 113**TexCr**555, 23**SW(2d)** 721.

1124-93 230**Ky**704, 20**SW(2d)**711; **Tex Cr** 26**SW(2d)**244 (denial held not error).

1124-95½-New. failure to inform defendant of names of material witnesses; 332 **Ill** 436, 163**NE**804.

1124-97 Mo 281**SW**960.

1124-7½-New. Failure to notify the prosecuting attorney of the county to which the cause came on change of venue of time of trial is not ground for a new trial. 199 **Ind**489, 158**NE**480.

1124-7⅓-New. Failure to require prosecuting attorney to qualify is not ground for new trial. 199 **Ind**489, 158**NE**480.

1125-13½-New. A new trial in order that new issues may be formed will be granted only in very extreme case. 199 **Ind**247, 155**NE**544.

1125-13⅓-New. Defendant against whom prosecutor agreed to take no further action and against whom judgment was entered by default was held entitled to a new trial in the absence of notice of intention to prosecute. 217**Ky**247, 289**SW**246.

1125-15 OklCr 288**P**611; **NS** [1928] 2**DomLR**748.

1125-16 242**Mich**44, 217**NW**782; 49**ND** 348, 191**NW**628.

1125-18 245**Mich**578, 223**NW**124. See also 80**CalA**528, 251**P**941.

1125-22 40**GaA**712, 151**SE**393; 41**GaA** 313, 152**SE**907(1stcase); 41**GaA**834, 155**SE**104; **GaA** 155**SE**362.

1125-23 108**TexCr**182, 299**SW**411.

1125-25 89**Fla**400, 104**S**858; 34**GaA** 182, 129**SE**6; 199 **Ind**630, 158**NE**593. See also 37**GaA**195, 139**SE**103. [a] (1) 41**GaA**352, 152**SE**914. (2) Whether facts pleaded constitute public offense should be presented by motion to quash or motion in arrest of judgment. 199 **Ind**630, 158**NE**593.

1125-25½-New. The insufficiency of the indictment is not ground for a new trial. 210**Ky**401, 276**SW**123.

1126-33 Mo 24**SW(2d)**1027; 50**SD**564, 210**NW**988.

1126-34 [a] **Mo** 24**SW(2d)**1027. [b] **Where trial amendment was made** to conform to variance of proof, defendant held entitled to new trial. 169**La** 191, 124**S**824.

1126-36 100**Vt**431, 138**A**733; 100**WVa** 699, 131**SE**710, 711 [citCJ] (should be granted as readily in criminal as in civil case).

1127-38 But see **NJSup** 135**A**510; 54**ND**136, 208**NW**947.

1127-39 113**TexCr**640, 21**SW(2d)**738 (abuse not shown).

1127-40 209**Ky**394, 272**SW**909.

1127-40½-New. Unless it appears probable that a different verdict would have been rendered, except for the surprise, a new trial will not be granted. 77**Colo** 445, 236**P**1009.

1127-46 [a] (4) 218**Ky**540, 291**SW**779.

1128-53 221**Ky**253, 298**SW**683; 100**WVa**699, 131**SE**710, 711 [citCJ]. [b] **Testimony of witnesses whose names are indorsed on indictment** cannot furnish basis of claim of surprise. 221**Ky**253, 298**SW**683.

1128-55 169**Ark**356, 275**SW**700; 127**Kan**107, 272**P**186.

1128-61 100**WVa**699, 131**SE**710, 711 [citCJ]. [b] **If statement of counsel** for prevailing party misleads his opponent to latter's prejudice, it will generally be ground for new trial. 100**WVa**699, 131**SE**710.

1128-61½-New. Only where there has been some fraud or misrepresentation withholding knowledge of alleged newly discovered evidence can defendant obtain a new trial on the ground of surprise. 104**TexCr**75, 282**SW**805.

1128-63½-New. Defendant cannot complain that he was surprised at testimony of witness for prosecution where he gave similar testimony. 221Ky253, 298SW683.

1128-65 77Colo445, 236P1009; 231Ky152, 21SW(2d)231; 233Ky407, 25SW(2d)1022; 100WVa699, 131SE710.

1129-67 169Ark356, 275SW700; 221Ky253, 298SW683.

1129-68 165Ga460, 141SE196.

1129-69 [a] (2) Where defendant pleading guilty in less than half hour after arrest made no motion for continuance or time to employ and confer with counsel, held insufficient cause for new trial. 197NC285, 148SE244(1st case).

1130-75 See also 87PaSuper285.

1130-83 [b] **Where court refuses to make record of remarks of state's counsel** in argument of motion and orders any remarks taken down to be stricken out, defendant may be entitled to new trial. 38Wyo72, 264P1017 (slighting remarks).

1130-85 223AppDiv248, 228NYS24 (examination of witness by judge).

1130-87 145Wash4, 258P845.

1130-88 80CalA623, 252P635; 39GaA21, 145SE904; 41GaA321, 152SE913; OklCr275P351; 50SD564, 210NW988; 145Wash4, 258P845. [a] (6) Permitting jury to take to jury room articles in evidence to aid in deliberations is not ground for new trial, unless they received testimony therefrom prejudicial to defendant. 90Fla844, 107S530.

1130-88½-New. On a trial of separate indictments for assault with intent to commit robbery, and for assault with intent to commit first degree murder, the withdrawal of the indictment for assault with intent to rob does not entitle defendant to a new trial after conviction on the other indictment. 154Tenn95, 290SW25.

1131-89½-New. Failure to advise defendant of privilege to make unsworn statement to jury where he was not witness and did not desire to make statement; 257Mass1, 152NE745.

1131-91½-New. that another attorney without objection by defendant assisted the county attorney at the trial; 176Minn305, 223NW141.

1131-92½-New. second examination of a juror, as to his competency, in the presence of fellow jurors; 37GaA156, 139SE156.

1131-96 212Ky159, 278SW567.

1131-8½-New. It is not an abuse of discretion for the trial court to grant a new trial to a defendant whose motion for a separate trial had been refused although consented to by the prosecuting attorney. 49ND453, 207NW469.

1131-8½-New. New trial not granted because parties made up statement of facts after death of reporter before transcription of facts. 145Wash4, 258P845.

1132-15 324Ill322, 155NE310; 207Iowa334, 221NW556.

1132-17 219Ky55, 292SW482; 221Ky181, 298SW381; 153SC365, 150SE800. But see 100TexCr632, 272SW195.

1132-19 213Ky203, 280SW970; 155Tenn325, 292SW849. See also 212Ky159, 278SW567.

1132-21½-New. Where defendant on the day of trial became ill and was confined to bed, he was entitled to a new trial, even though he did not inform the court of his illness. 216Ky510, 287SW989.

1132-22 199Ind546, 158NE902.

1132-28 99TexCr465, 270SW558; 104TexCr471, 284SW584.

1133-30 92PaSuper48.

1133-34 [a] (3) That defendant would be able to employ counsel. 214Ky787, 283SW1063.

1133-36 104TexCr471, 284SW584.

1133-37 113TexCr389, 22SW(2d)304 (2dcase).

1133-43 20AlaA649, 104S913 (irregularities in drawing venire cannot be raised for first time on motion for new trial if defendant knew, or in exercise of diligence could have known, of them).

1134-52 Mo 23SW(2d)57.

1135-57½-New. That juror on panel acted in place of one chosen and called has been held ground for a new trial. 59OntL342, [1926] 4DomLR880.

1135-58 [c] **Too many challenges allowed state** when relied upon must be clearly proved, and when evidence is conflicting as to whether state actually challenged peremptorily more than proper number, determination of trial judge will not be overturned. 252Mass465, 148NE123.

1135-65 [a] **Ignorance of defendant and counsel that jurors were not sworn** till after verdict held not sufficient reason for granting new trial, unless exercise of ordinary diligence could not have discovered existence of fact. 168Ga611, 148SE531.

1136-81 165Ga210, 140SE625.

1137-97½-New. That a witness who testified against accused was an unpardoned convict is ground for a new trial where the disqualification of the witness was not known to accused until after the trial and lack of diligence is not shown. 103TexCr665, 281SW1063.

1137-11 98PaSuper34.

1137-12 318Mo1233, 8SW(2d)365.

1137-18 101TexCr149, 274SW593; 113TexCr276, 21SW(2d)673; TexCr 24SW(2d)1090(2dcase); TexCr 24SW(2d)1090(2dcase); TexCr 24SW(2d)1090(2dcase); TexCr 29SW(2d)782. [a] (3) Refusal of continuance to procure witness to sustain alibi, on production of affidavit showing what witness would testify, though cumulative, is ground for new trial. 100TexCr161, 272SW466. (4) Refusal to grant new trial for want of testimony of witness to sustain alibi held error. 105TexCr644, 290SW166.

1137-19 234Ky531, 28SW(2d)774; 106TexCr149, 291SW247.

1138-21 119Kan490, 239P1109; 106TexCr659, 294SW556.

1138-25 101TexCr178, 274SW607 (where accused admitted testimony was probably not within knowledge of absent witness); 103TexCr470, 281SW545; 106TexCr149, 291SW247.

1138-26 119Kan490, 239P1109; 121Kan703, 249P595; 126Kan129, 266P939; 146Miss718, 111S834; 101TexCr178, 274SW593 (diligence shown); 103TexCr126, 280SW223; 103TexCr242, 280SW819; 106TexCr589, 293SW1102; 141Wash355, 251P273. [a] (6) Where no subpœna for witness was issued because of his promise to be present. 141Wash355, 251P273. [c] **Reliance on production of witnesses by prosecution.**—127Kan160, 272P110.

1138-27 121Kan703, 249P595.

1138-28 119Kan490, 239P1109; 121Kan703, 249P595; 126Kan129, 266P939; TexCr 27SW(2d)653(2dcase); 141Wash355, 251P273; 146Wash187, 262P146. [b] (2) Defendant held entitled to new trial where his witness was ill, evidence of guilt wholly circumstantial and application for continuance denied. 112TexCr563, 178SW(2d)1075.

1138-29 106TexCr575, 294SW208; TexCr 21SW(2d)502.

1138-30 107TexCr530, 298SW287; 109TexCr458, 5SW(2d)150; 109TexCr455, 5SW(2d)152.

1138-32 146Miss718, 111S834; 103TexCr126, 280SW223; 103TexCr264, 280SW813; 106TexCr589, 293SW1102; 108TexCr28, 299SW236; 108TexCr118, 299SW248. But see 103TexCr470, 281SW545.

1139-33 101TexCr139, 274SW567; 106TexCr589, 293SW1102.

1139-35 106TexCr659, 294SW556.

1139-36 103TexCr126, 280SW223. [a] (1) 106TexCr106, 291SW232. (2) Court has not discretion in passing upon truth or falsity of desired testimony. 105TexCr644, 290SW166.

1139-37 100TexCr188, 272SW486 (to be determined by sound discretion). But see 113TexCr392, 22SW(2d)141.

1139-39 113TexCr497, 22SW(2d)462.

1139-40 106TexCr659, 294SW556.

1139-40½-New. or where defendant did not request a subpœna for an absent witness; 111TexCr296, 12SW(2d)794.

1139-42 147Miss570, 113S186; 111TexCr223, 12SW(2d)564; 100TexCr537, 272SW144; 103TexCr126, 280SW223; 106TexCr659, 294SW556; 112TexCr604, 17SW(2d)1066(1stcase).

1139-43 [a] **In absence of showing that absent testimony will probably produce more favorable verdict,** denial of new trial for refusal of continuance will not be reversed. TexCr 26SW(2d)244.

1139-44 103TexCr264, 280SW813.

1139-52½-New. On motion for a new trial for the absence of a witness, the truth of the testimony is not a question for the trial court. 106TexCr380, 292SW884.

1139-52½-New. Where a second application for a continuance on the ground of absence of a witness failed to state that the witness' testimony could not be procured from any other source, denial of the application is not ground for a new trial. 108TexCr418, 18SW(2d)279.

1139-52½-New. Attitude of trial judge toward showings of absent witnesses tending to impress jury that facts therein are fabricated entitled defendant to new trial. 23AlaA460, 126S890(2dcase).

1139-55 163Ga121, 135SE917; 234Ky45, 27SW(2d)410 (remark held not prejudicial); OklCr292P1053.

1139-56 40GaA123, 149SE51; 165La842, 116S206.

1139-57 39GaA537, 147SE786; 39GaA676, 148SE305; GaA155SE511(2dcase).

1139-58 47Ri371, 133A444.

1140-61 [b] (3) Prejudicial remarks are not ground for new trial in absence of motion for mistrial. 35GaA189, 132SE263. (4) Where judge violates Civ. Code (1910) § 4863 as to expressing opinion as to guilt of accused, new trial must be granted. 40GaA125, 149SE79.

1140-63 37GaA350, 140SE428(1stcase).

1140-68 Wash 290P230. [a] **That large number of his requests were denied** and objections overruled does not indicate court's prejudice to defendant. 87Colo507, 289P1081.

1140-70 [b] (4) Publication of newspaper article tending to create unfavorable atmosphere toward defendant does not require new trial where court cited those in charge of offending paper and issued injunction and case was not close. 195Wis416, 217NW711. [c] **Necessity of motion for change of venue.**—165La497, 115S728.

1141-72 AlaA 129S787; 36GaA656, 137SE797; TexCr 24SW(2d)47.

1141-73 AlaA 129S787; 36GaA656, 137SE797; 203Iowa451, 212NW757; 227Ky212, 12SW(2d)305; OklCr282P903; 111TexCr601, 13SW(2d)378. [a] (3) Opening statement not confined to reference to competent evidence. 115Or505, 237P969.

1141-74 203Iowa451, 212NW757; 148Va531, 129SE351.

1141-74½-New. The fact that objections to the argument are not specific or persistent is not ground for denying a new trial when the argument in question was flagrantly and knowingly improper. 203Iowa451, 212NW757.

1141-75 But see 143Va531, 129SE351.

1141-76 110Conn55, 147A118; 168Ga731, 149SE23; 166La759, 117S820; Mo 18SW(2d)423; 100TexCr220, 272SW480; 112TexCr185, 15SW(2d)615. But see 21AlaA494, 109S526.

1141-77 93Fla756, 112S608; 36GaA604, 137SE576; 312Mo15, 278SW743, 746 [citCJ]; 196NC397, 145SE773; 14Pa Dist&Co210; 159Tenn112, 17SW(2d)30; 107TexCr58, 294SW852.

1142-78 93Fla756, 112S608; 40GaA733, 151SE396; 252Mass465, 148NE123; 312Mo15, 278SW743, 746 [citCJ]; NC154SE604; 49ND228, 191NW345.

1142-85 85PaSuper7.

1142-86 85PaSuper7.

1142-87 85PaSuper7.

1143-96 203Iowa451, 212NW757.

1143-98 164Ga490, 139SE65.

1143-1 99WVa694, 129SE748.

1143-4 OklCr268P325. But see 107TexCr58, 294SW852.

1143-6 But see 31NM620, 249P1003.

1143-11½-New. Where prosecuting attorney shows he is unable to locate witness whose name was indorsed on information, and defendant did not at trial raise question of failure to produce witness, new trial will not be granted for failure of prosecutor to produce witness. 235Mich475, 209NW584.

1143-12 22AlaA79, 112S535. But see 36GaA671, 137SE789.

1143-14 161Ga640, 131SE682 (sustaining objection sufficient without rebuke); 234Ky45, 27SW(2d)410 (holding not warranting new trial in absence of objection).

1144-26½-New. Purposeful misconduct of district attorney in soliciting ambiguous answer from expert witness is ground for new trial where prejudicial to defendant. 255Mass369, 151NE839.

1144-30 See also 176Minn442, 223NW769.

1144-32 203 Iowa451, 212NW757.

1144-34½-New. Cross-examination of defendant's witness as to defendant's connection with another crime is not ground for new trial where objection was sustained and jury properly instructed. Mo 24SW(2d)1027.

1145-36 314Mo 699, 285SW440, 444 [quotCJ].

1145-37 Ind 156NE1; 170Minn197, 212NW203; 49Nev217, 242P590, 595 [cit CJ]; 57ND645, 223NW698, 64ALR434; 150Wash475, 273P751(2dcase).

1145-38 [b] **Evidence held to show defense conducted in lawyerlike manner.**–Ill 173NE383.

1145-39 314Mo 699, 285SW440, 444 [quotCJ]; 49Nev217, 242P590, 595 [cit CJ].

1145-40 203 Iowa94, 212NW339; Minn 231NW12; 49Nev217, 242P590, 595 [cit CJ]; 220AppDiv528, 221NYS760; Tex Cr 26SW(2d)652.

1145-41 49Nev217, 242P590, 595 [cit CJ].

1145-41½-New. to his failure to move for a change of venue, 49Nev217, 242P590.

1145-42 49Nev217, 242P590, 595 [cit CJ].

1145-50 56ND716, 219NW218. [b] **New trial properly denied.**–CalA 291P701.

1145-50½-New. Fraud or betrayal by counsel is ground for a new trial. 170 Minn197, 212NW203 (fraud not shown).

1145-51 36GaA772, 138SE448; IndA 171NE208 (overruling motion to suppress evidence); 150Md278, 132A624.

1146-52 39GaA547, 147SE798(2dcase); 203 Iowa333, 210NW934; 203 Iowa333, 212NW550; 173Minn420, 217NW489; 318Mo 581, 300SW765. [a] (5) 147Miss 171, 113S177. [b] (6) Where evidence is admitted temporarily over objection, and no further objection or motion to strike out is made, admission of evidence does not constitute ground for new trial. 35GaA347, 133SE269.

1146-53 33Ariz383, 265P609; 163Ga 186, 136SE72; 164Ga151, 138SE52; 164 Ga128, 138SE67; 164Ga292, 138SE238; 37GaA151, 139SE157.

1147-58 37GaA628, 141SE220(2dcase); 38GaA744, 145SE667; 40GaA265, 149SE 301.

1147-60 254Mass320, 150NE7; 154 Tenn95, 290SW25; BC [1928] 1DomLR 506.

1147-62 [a] **State's withdrawal of evidence previously admitted over defendant's objection** is not cause for granting new trial. 40GaA232, 149SE158.

1147-64 166Ga15, 142SE105.

1147-65 173Minn420, 217NW489.

1147-67 9PaDist&Co 542.

1148-68 162Ga178, 132SE899; 6PaDist &Co 810.

1148-69 113TexCr642, 21SW(2d)727.

1148-71 See also 33Ariz354, 264P1083.

1148-72 41GaA345, 152SE918.

1148-73 19F(2d)232.

1148-82 [b] **Further instructions** in absence of counsel. 32 OhA133, 165NE 596.

1148-86 191NC378, 131SE743; Can [1928] 1DomLR268. [f] **Conflicting instructions** on material point warrant granting of new trial. 193NC12, 135SE 165.

1149-87 41GaA478, 153SE374; 167La 190, 118S884; 168La1135, 123S807(2d case); TexCr 28SW(2d)135. [b] (1) 108TexCr114, 299SW263; 112TexCr517, 17SW(2d)807; TexCr 25SW(2d)875, 68 ALR1186.

1149-91 36GaA83, 135SE513; 36GaA 668, 137SE860; 36GaA639, 138SE83; 36GaA769, 138SE286; 37GaA31, 138SE 527; 37GaA151, 139SE157; 37GaA382, 140SE406; 37GaA350, 140SE428(1st case); 37GaA376, 140SE527(2dcase); 40 GaA272, 149SE291(1stcase).

1149-92 36GaA668, 137SE860; 36GaA 769, 138SE286; 36GaA769, 138SE288; 37GaA31, 138SE527; 37GaA382, 140SE 406. [c] **Charge is to be considered contextually** and not disjointedly in passing upon its correctness. 192NC225, 133 SE158.

1150-93 161Ga421, 131SE163; 37GaA 151, 139SE157; 170Ga461, 153SE31; 36 GaA83, 135SE513; 37GaA382, 140SE 406; 40GaA622, 150SE923; OklCr 275 P1067. [e] **Giving instruction to fix punishment** without request therefor will not require verdict to be set aside where punishment fixed was not excessive. OklCr 290P931.

1150-97 93Fla97, 111S514; 169Ga425, 150SE579; 37GaA382, 140SE406; 41 GaA834, 155SE104.

1150-98 163Ga176, 135SE735; 40GaA 225, 149SE178.

1151-5 164Ga95, 137SE824; 35GaA165, 132SE261; Mo 6SW(2d)898(2dcase); 194NC459, 140SE26. [c] (1) 35GaA192, 132SE263. (2) 35GaA189, 132SE263.

1151-6 168Ga457, 148SE157; 170Ga 294, 152SE572; 34GaA38, 128SE218; 39GaA7, 145SE903; 321Mo 1163, 14SW (2d)617; MoA 281SW105; MoA 281SW 107. [a] (3) 160Ga512, 128SE743. (13) 160Ga512, 128SE743. (20) On bad character of deceased in homicide case in which there was evidence touching bad character. 160Ga512, 128SE743. (21) Where judge did not abuse discretion. 40GaA274, 149SE324.

1152-8 105TexCr98, 286SW1094.

1152-12 126Me136, 136A808.

1152-13½-New. Failure to instruct on lower degree of crime charged where warranted by evidence is ground for a new trial. 141Wash132, 250P951.

1152-14 164Ga95, 137SE824; 165La 497, 115S728; 146Wash391, 263P180. But see CalA 292P654.

1152-18 161Ga332, 131SE80 (new trial must be granted where juror was disqualified).

1152-20 202Cal 81, 259P332. See also 105TexCr57, 284SW952. But see 129 Kan686, 284P402.

1152-21 49SD406, 207NW482.

1152-22 16F(2d)709; 33Ariz354, 264P 1083; 161Ga332, 131SE80; 166Ga218, 142SE898; Mont 292P250; 102TexCr 517, 278SW840; 113TexCr247, 20 SW(2d)431; 100Vt32, 134A636. [a] **Where no injury shown,** new trial will be denied. 111TexCr21, 10SW(2d)991. [b] **Denial held not abuse of discretion.**–295Pa190, 145A85.

1153-24 37GaA371, 140SE402.

1153-25 OklCr 286P808; 110TexCr512, 8SW(2d)144, 60ALR290.

1153-25½-New. The fact that a juror heard part of the testimony in the trial of a co-conspirator for the same homicide held no ground for a new trial. 215 Ky244, 286SW790.

1153-26 105TexCr57, 284SW952.

1153-27 322Mo 1, 16SW(2d)96; 14Pa Dist&Co 71; 106TexCr175, 291SW240.

1153-28 105TexCr104, 287SW57.

1153-29 See also 16F(2d)709.

1154-35 AlaA 129S787; 202Cal 81, 259 P332, 336 [quotCJ]; Ind 168NE458; 14 PaDist&Co 71; 159Tenn667, 21SW(2d) 390; TexCr 26SW(2d)261. [a] (2) Contribution by juror to fund for employing special prosecuting counsel. AlaA 129S787. [b] **Where juror previously aided officers** in liquor raids, new trial was necessary. 112TexCr267, 16SW(2d) 235. [c] **Prejudice not cured by recall and instruction of jury.**–14PaDist&Co 71.

1154-36 202Cal 81, 259P332, 336 [quot CJ]; Mo 274SW28; Mo 278SW992; 9 PaDist&Co 145; 101TexCr114, 274SW 981. [e] **Refusal of new trial held not abuse of discretion.**–234Ky531, 28 SW(2d)774. [f] **New trial properly denied** where testimony of single witness is explicitly denied by juror under oath. Mo 248SW(2d)1039.

1155-37 163La686, 112S650, 652 [quot CJ]; 163La701, 112S655, 658 [citCJ]. [a] (2) 159Tenn667, 21SW(2d)390 (in absence of showing that he was hostile to defendant and maliciously got on jury to injure him). [c] **Denying new trial on ground of bias** held not abuse of discretion. 39F(2d)30.

1155-38 [a] **Granting of motion on such ground** is within sound discretion of trial court. 33PortoRico 48.

1155-39 165La822, 116S199; 118Nebr 267, 224NW274; OklCr 293P271; 9Pa Dist&Co 145.

1155-42 202Cal 81, 259P332; TexCr 31 SW(2d)641.

1156-43 227Ky500, 13SW(2d)511.

1156-44 [b] **Remarks of juror** held not to show prejudice. 326 Ill 145, 157NE 225. [c] **Grimaces and facial expressions** of displeasure at exhibits does not show prejudice. Wash 286P42.

1156-45 112TexCr341, 16SW(2d)1098.

1156-46 224Ky269, 6SW(2d)248.

1156-53 14PaDist&Co 312; WVa 155 SE313. But see 164Ga53, 137SE784; 37 GaA371, 140SE402; NC 155SE609. [a] (3) **Relationship by affinity** between juror and victim of homicide is not ground for new trial where relation was terminated by death or divorce. Miss 118S 708. [d] 109TexCr88, 38SW(2d)455 (unknown to juror). [g] **That juror was half brother to deputy sheriff** who swore out warrant is not ground for new trial where he had no interest in prosecution. 148SC196, 145SE799. [h] **No injury shown** where there was no showing that refusal of court to purge jury as to relationship left anyone so related. 41 GaA321, 152SE913.

1157-55 40GaA515, 150SE431(2dcase); 41GaA421, 153SE222.

1157-56½-New. or the relationship between wife of juror and wife of prosecutor, 34GaA133, 128SE687.

1157-58 112TexCr203, 17SW(2d)813.

1157-62 35GaA591, 134SE342 (before verdict); MoA 208SW(2d)599.

1157-68 Man [1929] 1DomLR699. [a] (3) New trial not granted where juror had been adjudged insane but evidence on present sanity is conflicting. 102 TexCr517, 278SW840.

1157-70 116Nebr512, 218NW129; 102 TexCr517, 278SW840. [b] **Application for compensation for mental disability** during war does not render juror incompetent. TexCr 11SW(2d)172.

1157-72 22AlaA65, 112S178; 35GaA 580, 134SE184; 145Va825, 133SE753.

1158-73½ 22AlaA65, 112S178; 35GaA 580, 134SE184.

1158-73½-New. Where defendant did not know of prior service of a juror as a grand juror, a new trial should be granted. 221Ky217, 298SW671.

1158-83 107TexCr297, 296SW570; Tex Cr 8SW(2d)176.

1158-85 159La674, 106S28.

1158-87 49SD406, 207NW482.

1159-88 216Ala275, 113S300, 305 [cit CJ].

1159-96 219Ala674, 123S55; 180Ark 1123, 248SW(2d)331; 327 Ill 162, 158NE 462.

1159-98 But see BC [1925] 2DomLR 803.

1159-99 OklCr 272P1033 (irrespective of financial interest of sheriff).

1159-5 202Cal 81, 259P332; 106TexCr 175, 291SW240.

1159-6 176Minn604, 224NW144.

1160-16 210Ky685, 276SW575.

1160-17 100TexCr107, 271SW928; 105 TexCr104, 287SW57.

1160-20 23AlaA35, 120S301(2dcase); MoA 289SW969; 104TexCr193, 283SW 511; 108TexCr206, 299SW643; 110Tex Cr341, 8SW(2d)136.

1160-22 65Utah415, 237P941.

1161-25 23AlaA191, 122S603.

1161-26 [a] (1) 188Wis68, 205NW412. (2) Conduct of juror and sheriff in riding together in latter's automobile to dance after adjournment of court and before close of prosecutor's argument requires granting of new trial though case was not mentioned and no attempt was made to influence juror's conduct. 188 Wis68, 205NW412. (3) Conduct of sheriff or other state officer who was active in procuring evidence must be regarded as conduct of opposite party within rule. 188Wis68, 205NW412. [b] **Evidence held insufficient to show**

improper influence.–216Ky216, 287SW 722.

1161–27 255Mass369, 151NE839; 264 Mass264, 162NE349; 115Nebr277, 212 NW606; Nebr 226NW793; Nebr 232 NW781; 106TexCr567, 294SW210; 108 TexCr672, 28SW(2d)223; 109TexCr15, 2 SW(2d)462; TexCr 27SW(2d)177; Utah 272P635.

1161–28 Ill 172NE743; 165La842, 116 S206; Mo 285SW400.

1161–29 75CalA657, 243P64; 264Mass 264, 162NE349; 9PaDist&Co 419, 420, 421 [quotCyc]; SD 229NW395; Wash 286P42 (facial expression of displeasure is not misconduct sufficient to require new trial). [a] 23AlaA191, 122S603; 23 AlaA201, 123S99(2dcase); 142Wash673, 253P1074. [c] **Action of jury in tearing up and mutilating written "given" charges** requested by defendant, and using them for scratch pad purposes, has been held not such misconduct as to make denial of new trial error. 23AlaA 35, 120S301(2dcase). [d] **Returning verdict in fifteen minutes** without recommendation, in case involving voluminous and contradictory evidence, held not ground for new trial. 168GaA731, 149SE23.

1161–30 50SD530, 210NW722.

1161–31 320 Ill 495, 151NE280; 252 Mass465, 148NE123. [a] (1) See also 50SD530, 210NW722. (10) Statement of juror before trial that he would hang one proved guilty of murder if evidence warranted it held not ground for new trial. 320 Ill 495, 151NE280. (11) That four jurors played cards during deliberations. 142Wash673, 253P1074.

1161–32–35½–New. It is not misconduct for jurors to decline to talk with defendant's counsel while he is preparing a motion for new trial. 129Kan360, 282 P735.

1162–37 164Ga151, 138SE52; 35GaA398, 133SE744; OklCr 292P76; 9PaDist&Co 145; 9PaDist&Co 419, 420, 421 [quot Cyc].

1162–37½–New. This was a statement made before the juror was selected. 215 Ky162, 284SW1035.

1162–40 216Ala218, 113S22; 176Ark 1049, 5SW(2d)293; 144SC53, 142SE31; SD 228NW251; 107TexCr319, 296SW 600; TexCr 27SW(2d)813(2dcase).

1162–41 31F(2d)272; AlaA 130S527; Ariz 282P481; 92CalA729, 268P927; CalA 290P93; 165Ga55, 139SE877; 215 Ky613, 286SW696; 254Mass556, 150NE 869; 31NM620, 249P1003; 9PaDist&Co 419, 420, 421 [quot Cyc]; SD 229NW 395; 106TexCr553, 293SW570. [d] (2) Receiving evidence, from persons not witnesses after agreement and verdict of guilty, that accused had been convicted on former trial. TexCr 283SW820.

1163–41½–New. 111TexCr21, 10SW (2d)991.

1163–44 9PaDist&Co 419, 420, 421 [quotCyc].

1163–45 19F(2d)62; 92CalA729, 268P 927.

1163–50 31NM620, 249P1003; TexCr 26SW(2d)233 (state must negative harmful remarks and call persons in question to testify).

1163–52½–New. persons related to the prosecutor, 165Ga55, 139SE877.

1164–55 9PaDist&Co 145.

1164–56 106TexCr446, 292SW901.

1164–66 85PaSuper7.

1165–68 13F(2d)961; 261Mass20, 158 NE260; 85PaSuper7.

1165–69 85PaSuper7.

1165–70 40F(2d)820; 85PaSuper7.

1165–74 85PaSuper7.

1165–80 9PaDist&Co 161.

1165–82 [c] (1) But see 8F(2d)692.

1166–83 See also SD 228NW251.

1166–96 [a] (3) Waiter bringing food. TexCr 26SW(2d)233.

1166–97 102WVa462, 135SE594.

1167–96 [b] Ariz 282P481.

1167–3 86CalA148, 260P591; 44 Ida 739, 260P164; Ill 172NE743; Mo 19SW (2d)883; 186Wis648, 203NW343 (where separation occurred during inspection and view). [b] 102WVa462, 135SE594.

1167–4 34NM494, 285P497; 105TexCr 296, 288SW207; 107WVa350, 148SE194. [c] (1) 23AlaA101, 121S450; AlaA 130 S527. [f] **That during deliberations priest administered sacrament of communion to juror** in room shut off from presence of other jurors, but not shown to have influenced jury in their deliberations, has been held not to require new trial. 31F(2d)385. [g] **Separation without knowledge of officer** in charge, in capital case, held to call for new trial. Mo 19SW(2d)883.

1168–6 SD 228NW240.

1169–11 Mont 292P250.

1169–12 Mo 274SW28.

1170–24 145Miss66, 111S131.

1170–28 Contra 254 IllA199.

1170–30 33Ariz354, 264P1083; Utah 272P635.

1170–38 [a] (5) Using pistol and enacting homicide after retirement held not ground for new trial. 107TexCr 600, 298SW438.

1171–41 23AlaA201, 123S99(2dcase).

1171–43 8F(2d)919; 181Ark1011, 28 SW(2d)1055; 111TexCr226, 13SW(2d) 87.

1171–44 8F(2d)919.

1171–45 168Ga470, 148SE139.

1171–48 23AlaA201, 123S99(2dcase).

1172–58 34NM6, 275P770.

1172–59 145Miss699, 110S508.

1172–66 20F(2d)752; 27F(2d)502; 203 Iowa929, 210NW465; 125Kan142, 263P 1052; 126Kan670, 271P289; 129Kan 360, 282P735; 104TexCr95, 282SW595; 107TexCr600, 298SW438; 108TexCr510, 18W(2d)882; 111TexCr21, 10SW(2d) 991; TexCr 26SW(2d)649 (extraneous discussion held to require new trial); TexCr 32SW(2d)194; 68Utah557, 251P 364. [a] (8) Where discussion of jurors which was objected to was not heard by only juror who was for acquittal. 104TexCr95, 282SW595. [d] 101TexCr201, 274SW622. [g] **Where statute makes such conduct ground for new trial,** error is not cured by evidence of some jurors that verdict was not affected thereby. 113TexCr567, 24 SW(2d)432. [h] **Misconduct held prejudicial.**–TexCr 27SW(2d)1100.

1173–67 103TexCr242, 280SW819; 104 TexCr495, 283SW497; 107TexCr43, 294 SW549; 109TexCr15, 2SW(2d)462; 110 TexCr243, 8SW(2d)153. [a] (7) Reference in jury room to former trial of accused held not to warrant reversal, where knowledge thereof was received by jurors during trial or prior thereto. 104TexCr495, 283SW497. (8) Juror's comment on defendant's failure to call or account for absence of witness, in whose presence defendant testified that forged check was delivered to him, is not misconduct warranting new trial. 109TexCr15, 2SW(2d)462.

1173–68 22AlaA154, 113S602; 101Tex Cr639, 276SW929; 104TexCr95, 282SW 595; 108TexCr104, 299SW402; 108Tex Cr367, 300SW938; 111TexCr21, 10SW (2d)991; 113TexCr567, 24SW(2d)432; TexCr 27SW(2d)190; TexCr 29SW(2d) 763; TexCr 29SW(2d)781; TexCr 29 SW(2d)784(2dcase) (presumption of prejudice); TexCr 31SW(2d)822. [a] (10) Untrue statement by juror that defendant had been convicted in federal court. 101TexCr201, 274SW622 (juror deemed not impartial).

1174–69 108TexCr367, 300SW938. [a] **Information by juror is "new and other testimony"** within statute relating to new trial. TexCr 27SW(2d)190.

1174–70 102TexCr517, 278SW840; 110 TexCr512, 8SW(2d)144, 60ALR290.

1174–71 100TexCr78, 271SW624; 100 TexCr228, 272SW451; 101TexCr82, 274 SW151; 105TexCr233, 288SW454.

1174–74½–New. Juror's discussion of previous offenses by accused is ground for a new trial where evidence thereof was brought to their attention during their retirement. 103TexCr527, 281SW 573.

1174–76 108TexCr92, 299SW249.

1174–77 103TexCr242, 280SW819.

1174–78½–New. A juror's statement that he found empty bottles held to be against the statute prohibiting receiving of evidence by the jury after it retires. 105TexCr233, 288SW454.

1174–78¾–New. Denial of new trial, on the ground that the jury compared revolver cartridges possessed by a juror with others taken from defendant and admitted as exhibits, is not erroneous. 255Mass369, 151NE839.

1175–2½–New. That the sheriff took the jury in a murder prosecution for a drive through townships bordering on the county in which the murder was committed and into such county, although instructed by the court not to summon any special jurors from such county, is not ground for a new trial where the jurors were not permitted to separate and did not have any communication with any persons in such townships. 312Mo 411, 278SW1036.

1175–2½–New. That the officers in charge of the jurors exchanged places several times without being newly sworn is not ground for a new trial when they were properly sworn and admonished when first officiating. 215Ky613, 286 SW696.

1175–2¾–New. Failure of the court to order the jury kept together, where there is a feeling in the county against defendant to which the county attorney referred, is ground for new trial. 128 Kan564, 279P19.

1176–4½–New. Publication of a newspaper report as to the division of the jury, alleged to have been based on a statement of the sheriff, does not require reversal, where the officer denied circulating the report, and it was not shown that he obtained his information from any of the jurors. 227Ky223, 12 SW(2d)336.

1176–10 22AlaA52, 112S92. [b] **If association or person exercises silent and invisible means to secure verdict,** new trial should be granted. 21AlaA539, 110 S162.

1176–12 215Ala635, 112S212, 215 [cit CJ]; 219Ala282, 122S45.

1176–18 125Kan142, 263P1052.

1177–21 109TexCr554, 5SW(2d)996, 997 [citCJ].

1177–22 109TexCr554, 5SW(2d)996, 997 [citCJ].

1177–28 223Ky393, 3SW(2d)764.

1177–28½–New. Where a verdict is what is known as a quotient verdict, a new trial will be granted. 22AlaA305, 115S146.

1177–28¾–New. "Quotient verdict" is ground for a new trial. 22AlaA305, 115 S146.

1177–30 36GaA668, 137SE791. [a] (2) Where verdict is so inconsistent that it cannot be amended or moulded into form by court, new trial must be granted. 6PaDist&Co 710.

1177–38½–New. Acquittal and convictions of joint defendants. Inconsistent or irrational verdicts acquitting one and convicting the other of two joint defendants is no ground for a new trial on application of the convicted defendant or the state. 6F(2d)574.

1177–38¾–New. A new trial must be granted where an accusation contains two counts, one charging possession of whisky and one charging sale of whisky, both arising out of the same transaction, and a general verdict of guilty is rendered on evidence justifying a conviction of possession only. 162Ga316, 134SE54.

1177–38¼–New. Defendant, acquitted of a major offense, should not be granted a new trial for technical irregularity in the form of the verdict. 149Va 457, 141SE115.

1177–41 166Ga213, 142SE895; 166Ga 218, 142SE898; 36GaA639, 138SE83.

1178–49 175Minn573, 222NW277; 197 NC548, 149SE860.

1178–51 32 OhA133, 165NE596. See also 169Ga384, 150SE558.

1178–54 34GaA155, 128SE686; 34GaA 218, 128SE914.

1178–61 21AlaA320, 108S83; 161La 173, 108S326. [c] **No question is presented by specification** in motion for new trial that verdict is contrary to evidence. 89 IndA89, 165NE760(1st case).

1178–63 85CalA241, 259P76; 165Ga 290, 140SE892; 34GaA218, 128SE914; 36GaA651, 137SE792; 36GaA674, 137SE 854; 36GaA598, 137SE857; 36GaA670, 137SE915; 37GaA334, 140SE513; 37

GaA382, 140SE524; 198 Ind502, 154NE 273; 199 Ind630, 158NE593 ("contrary to evidence" not within statutory grounds); 204 Iowa833, 216NW29; 226 Ky433, 11SW(2d)86; 230Ky761, 20SW (2d)742; 234Ky27, 27SW(2d)394; 76 Mont421, 246P959 (stated grounds presenting sufficiency of evidence for determination); 104WVa217, 139SE704. But see 198 Ind284, 152NE166. [c] 39GaA411, 147SE404(1stcase).

1179-64 200 Ind53, 161NE271; 155 Tenn266, 292SW451.

1179-65 21AlaA460, 109S294; 204 Iowa833, 216NW29; 75Mont350, 243P 587 (no substantial evidence).

1179-66 89CalA1, 264P302; GaA 155 SE373. See also 35GaA499, 133SE880. [c] **Where evidence that others than defendants committed acts charged,** denial of motion for new trial is erroneous. 23AlaA464, 127S256.

1179-67 164Ga92, 137SE768; 34GaA 231, 128SE818; 35GaA256, 132SE645; 36GaA657, 137SE794; 37GaA18, 138SE 525; 37GaA123, 138SE916; 37GaA159, 139SE160; 37GaA361, 140SE779; 37 GaA373, 140SE792; 37GaA341, 140SE 900; 37GaA494, 141SE86; 37GaA482, 141SE87; 38GaA751, 145SE768; 38GaA 692, 145SE890; 39GaA557, 147SE922 (1stcase); 116Nebr1, 215NW459; 52 ND197, 201NW858, 859 [citCJ]; 142Va 673, 128SE444. See also 22AlaA183, 113S648.

1179-67½-New. or does not exclude every reasonable hypothesis save that of defendant's guilt. 37GaA504, 140SE 762.

1179-69 36GaA626, 137SE791; 35GaA 197, 132SE272; 139SC315, 137SE739; 155Tenn266, 292SW451; Utah 266P 261.

1180-70 22AlaA432, 116S503; 92Fla 809, 110S253; 35GaA661, 134SE203; 37GaA333, 140SE524; 37GaA471, 140 SE793; 167La880, 120S583(2dcase); 127Me521, 145A11; 245NY621, 157NE 883; 91PaSuper566. [b] 165La47, 115 S363. [e] **Identity of accused.**-98Fla 874, 124S446.

1180-71 92Fla878, 110S547; OklCr 276P240(2dcase).

1180-72 80CalA658, 252P729; 163Ga 878, 137SE378; 37GaA156, 139SE158; 40GaA144, 148SE924(1stcase); 41GaA 567, 153SE609(2dcase); Mo 296SW391; 75Mont350, 243P587; 76Mont384, 247P 158 (insufficiency of evidence); 57ND 335, 221NW887; OklCr 275P385; 139 SC315, 137SE739; TexCr 17SW(2d) 1068; 152Wash120, 277P458. [a] **Rule not applied where crime so revolting** that circumstances related to jury may have been sufficient to turn right-minded men against accused. 76Mont384, 247P158. [b] **No abuse held.**-Wis 229NW633.

1180-73 23AlaA488, 128S358(2dcase); 170La630, 128S658.

1180-74 77CalA285, 246P342; 87Colo 44, 285P162; 162Ga208, 132SE911; 163 Ga43, 135SE407; 163Ga37, 135SE439; 163Ga391, 136SE276; 164Ga88, 138SE 65; 165Ga302, 140SE885; 165Ga326, 140SE889; 166Ga201, 142SE739; 166 Ga274, 143SE118; 39GaA102, 146SE 334; 35GaA167, 132SE245; 35GaA168, 132SE395; 35GaA248, 132SE778; 35GaA 248, 132SE779; 35GaA257, 132SE779; 35GaA255, 132SE779; 35GaA258, 132 SE780; 35GaA243, 132SE780; 35GaA 255, 132SE781; 35GaA403, 133SE104; 35GaA403, 133SE104; 35GaA399, 133 SE266; 35GaA399, 133SE287; 35GaA 381, 133SE302; 35GaA503, 133SE642; 35GaA394, 133SE655; 35GaA483, 133 SE749; 35GaA495, 133SE877; 35GaA 496, 133SE877; 35GaA495, 133SE878; 35GaA497, 134SE121; 35GaA593, 134 SE144; 35GaA584, 134SE144; 35GaA 591, 134SE144; 35GaA666, 134SE181; 35GaA662, 134SE183; 35GaA587, 134 SE201; 35GaA590, 134SE202; 35GaA 667, 134SE202; 35GaA590, 134SE328; 35GaA667, 134SE340; 35GaA582, 134 SE340; 35GaA594, 134SE341; 35GaA 661, 134SE352; 35GaA589, 134SE354; 36GaA130, 135SE495(2dcase); 36GaA 109, 135SE495(3dcase); 36GaA83, 135 SE513; 36GaA119, 135SE515; 36GaA 129, 135SE516(1stcase); 36GaA128, 135 SE516(2dcase); 36GaA114, 135SE518; 36GaA115, 136SE89; 36GaA214, 136SE 92; 36GaA210, 136SE96; 36GaA212, 136SE99; 36GaA218, 136SE112; 36GaA 601, 137SE575; 36GaA604, 137SE576; 36GaA648, 137SE798; 36GaA662, 137 SE853; 36GaA654, 137SE862(1stcase); 36GaA650, 137SE862(3dcase); 36GaA 651, 137SE863(1stcase); 36GaA660, 137 SE863(4thcase); 36GaA654, 137SE 863(5thcase); 36GaA653, 137SE912; 36GaA664, 137SE915; 36GaA668, 137 SE860; 36GaA676, 137SE791; 36 GaA677, 137SE864; 36GaA736, 138 SE251; 36GaA771, 138SE275; 36 GaA799, 138SE283; 36GaA750, 138 SE286; 36GaA746, 138SE287; 37 GaA32, 138SE528; 37GaA121, 138SE 921; 37GaA115, 139SE116; 37GaA83, 139SE132(3dcase); 37GaA124, 139SE 133(5thcase); 37GaA160, 139SE133(1st case); 37GaA160, 139SE132(2dcase); 37GaA160, 142SE306(2dcase); 37GaA 161, 139SE133(2dcase); 37GaA164, 139 SE135; 37GaA338, 140SE396; 37GaA 378, 140SE640; 37GaA633, 141SE432; 37GaA805, 142SE311(3dcase); 37GaA 816, 142SE216; 37GaA821, 142SE464; 37GaA822, 142SE199; 37GaA822, 142 SE312(1stcase); 37GaA823, 142SE312 (3dcase); 37GaA823, 142SE312(4th case); 37GaA827, 142SE306(1stcase); 37GaA829, 142SE202; 37GaA832, 142 SE311(1stcase); 37GaA832, 142SE312 (2dcase); 39GaA412, 147SE408; 39GaA 547, 147SE898(2dcase); 39GaA573, 147 SE909(2dcase); 40GaA444, 150SE429; 89 IndA590, 166NE300; 207 Iowa1033, 222NW423; 163La8, 111S472; 164La 167, 113S805; 233Mich670, 207NW832; 316Mo115, 289SW862; 316Mo55, 289 SW890; ND 230NW1; OklCr 277P685; OklCr 279P910(2dcase); 136SC31, 134 SE209; 106TexCr78, 290SW1105; Tex Cr 32SW(2d)197(1stcase); 103WVa355, 137SE751. See also 36GaA113, 136SE 111. [a] 236Mich672, 211NW39; 100 WVa418, 130SE607.

1180-74½-New. , or some evidence. 34 GaA146, 128SE692.

1180-75 111Conn719, 149A213(2dcase); 163Ga561, 136SE530; 39GaA116, 146SE 346; 36GaA97, 135SE519; 39GaA406, 147SE402(2dcase); 39GaA568, 147SE777 (1stcase); 338 Ill 353, 170NE265; OklCr 278P358.

1181-76 100WVa418, 130SE607. But see 85Mont553, 281P757.

1181-78 35GaA495, 134SE125 (some evidence authorizing verdict); OklCr 275 P405.

1181-81¼-New. The fact that a majority of the jury was at one stage of its deliberations in favor of acquittal places no obligation or duty on the court to grant a new trial. 202 Iowa189, 209NW 287.

1181-84 OklCr 274P696.

1181-85 [a] (1) Iowa 230NW425. (3) 204 Iowa1355, 217NW233.

1182-86 257Mass391, 153NE881.

1182-88 14F(2d)360; 32Ariz470, 260P 188; 87CalA295, 261P1114; CalA 288P 106; CalA 288P832; 77Colo 445, 236P 1009; 163Ga391, 136SE276; 337 Ill 643, 169NE772; 199 Ind235, 157NE1; 199 Ind489, 158NE480; Iowa 230NW425; 160La470, 107S309; 166La1010, 118S 116; 255Mass369, 151NE839; 257Mass 391, 153NE881; 264Mass264, 162NE349; 265Mass133, 163NE865(1stcase); Mass 165NE2; 166Minn300, 207NW623; 170 Minn197, 212NW203; 171Minn515, 213 NW923; 176Minn305, 223NW141; Minn 232NW111; 73Mont187, 235P703; Mont 286P1108; 217AppDiv424, 216NYS723; 131Misc647, 228NYS571; 190NC848, 129 SE145; NC 154SE402; 49ND376, 191 NW482; 50ND927, 198NW698; 55ND 846, 215NW552; 36 OklCr148, 252P 1106; OklCr 274P1092(2dcase); OklCr 274P1094; OklCr 283P1026; OklCr 287 P1091(2dcase); OklCr 287P1106; OklCr 289P1111; OklCr 289P790; OklCr 292P 371(2dcase); OklCr 292P883(2dcase); 121 Or141, 253P367; 133SC294, 130SE 888; 50SD32, 208NW164; 53SD22, 219 NW882; 101TexCr434, 276SW289; 109 TexCr372, 5SW(2d)137; 109TexCr506, 5SW(2d)520; 112TexCr606, 18SW(2d) 632; 198Wis247, 223NW833; 198Wis 551, 224NW477. [c] 257Mass391, 153 NE881. [d] **No abuse of judicial discretion** in refusal of motion. 257Mass391, 153NE881. [e] **Refusal held erroneous.**-TexCr 25SW(2d)613.

1182-90 20F(2d)752; 77Colo 445, 236P 1009; 96Fla307, 118S813; 168Ga611, 148 SE531; 41GaA836, 155SE100; 318 Ill 157, 149NE27; 230Ky24, 18SW(2d)287; 166Minn300, 207NW623; 73Mont187, 235P703; 86Mont251, 283P210; Mont 287P933.

1182-91 92CalA628, 268P923; 122Kan 68, 250P1069; 245NYS245.

1182-92 32F(2d)128; 68CalA186, 228P 733; 77Colo 445, 236P1009; 96Fla307, 118S813; 199 Ind55, 155NE203; 199 Ind 235, 157NE1; 227Ky212, 12SW(2d)305; 160La470, 107S309; 155Tenn325, 292 SW849; 113TexCr22, 18SW(2d)1087; 100Vt476, 138A741; 152Va955, 146SE 281; Va 153SE684.

1183-95 41GaA366, 153SE203(1stcase).

1183-99 22AlaA146, 113S625; 22AlaA 344, 115S704; 73Mont187, 235P703; TexCr 28SW(2d)549. [a] **New trial** properly denied. 137SC75, 134SE514. [b] **Rules should not be relaxed** where evidence at trial raises no grave doubt as to defendant's guilt. 96Fla307, 118 S813.

1183-3 TexCr 28SW(2d)802.

1183-4 112TexCr655, 18SW(2d)170(2d case).

1183-5½-New. Evidence unquestionably newly discovered does not always require a new trial. 257Mass391, 153NE 881.

1183-5⅓-New. A trial judge on motion for a new trial for newly discovered evidence has a right to examine defendant's mental capacity in the light of a report of the department of mental diseases upholding his criminal responsibility. 257Mass391, 153NE881.

1183-6 169Ark356, 275SW700; 181Ark 813, 27SW(2d)989; 318 Ill 157, 149NE 27.

1183-16½-New. Evidence obtained from public records held not newly discovered evidence, warranting a new trial. 19F (2d)130.

1183-16⅓-New. Evidence as to occurrences at the trial in the presence of the court and jury does not warrant a new trial. 222Ky248, 300SW625.

1183-17 174Ark859, 296SW716; 228Ky 257, 14SW(2d)767 (that state's witness is guilty). [c] **Evidence sufficient.**-TexCr 28SW(2d)817.

1183-18 170Minn197, 212NW203.

1183-19 170Minn197, 212NW203; 313 Mo 615, 285SW392.

1184-21 160La47, 106S670.

1184-24 199 Ind55, 155NE203; 313Mo 615, 285SW392.

1184-26 198 Ind491, 154NE276.

1185-28 198 Ind491, 154NE276. [a] (3) Defendant not pleading insanity cannot obtain new trial for newly discovered evidence thereof, especially where proposed witnesses were present at trial, and one of them, as well as defendant, testified without objection on such subject. 198 Ind491, 154NE276.

1185-30 169Ark356, 275SW700; 83Colo 341, 265P97; 90Fla299, 105S834 (new trial not granted in absence of showing that defendant did not know of existence of evidence); 41GaA635, 154SE209; 326 Ill 540, 158NE222; 245 IllA100; 225Ky 282, 8SW(2d)406; 233Ky407, 25SW(2d) 1022; 164La167, 113S805; 55ND194, 212NW857; 14PaDist&Co 312; 101 TexCr434, 276SW289; 103TexCr252, 280 SW808; 104TexCr152, 282SW813; 100 Vt476, 138A741; 145Va534, 133SE658.

1185-31 See also 144Va553, 131SE196.

1186-35 101TexCr26, 276SW279; 103 TexCr252, 280SW808; 106TexCr27, 290 SW174.

1186-36 219Ky101, 292SW753; 108 TexCr659, 2SW(2d)455; 112TexCr412, 16SW(2d)1083; 112TexCr317, 16SW(2d) 1087.

1186-37 55ND194, 212NW857. [b] (2) Other instances. 55ND194, 212NW857.

1186-41 108TexCr669, 2SW(2d)268.

1187-49 41GaA481, 153SE381(2dcase).

1187-52 163Ga391, 136SE276; 99 TexCr572, 271SW99.

1187-53 163Ga391, 136SE276; 202 Iowa534, 210NW542; 120Kan376, 244P 225 (witness whose name was indorsed on information); 163La51, 111S492;

103TexCr377, 280SW791; 104TexCr75, 282SW805; 109TexCr108, 3SW(2d)91.

1187-55 168Ga611, 148SE531; 209Ky848, 273SW477; 99TexCr572, 271SW99 (it is only in exceptional cases that evidence coming from witness present at trial is regarded as newly discovered). But see 105TexCr543, 289SW686.

1187-57 108TexCr532, 1SW(2d)883.

1183-59 174Ark1179, 298SW27; GaA 155SE531.

1188-63½-New. Where doctors were unwilling to swear that accused was insane, their subsequent letter that they thought him insane is no basis for a new trial. 163La512, 112S400.

1188-64 17F(2d)973; 235 IllA349; 137SC75, 134SE514.

1188-65 7F(2d)259; 17F(2d)973; 125Me515, 132A521. [c] **Refusal of new trial held error.**-152Va955, 146SE281.

1189-66 17F(2d)973; 36GaA217, 136SE92; 124Kan509, 260P634; 166Minn300, 207NW623; 106TexCr118, 290SW537.

1189-67 126Kan670, 271P289. [c] **Motion granted.**-38OklACR593.

1189-68 126Kan114, 268P842; 233Mich38, 206NW339, 341 [quotCJ]; 126Kan670, 271P289.

1189-69 17F(2d)973; 176Ark1206, 2SW(2d)61; 124Kan509, 260P634 [quot CJ]; 126Kan414, 268P842; 233Mich38, 206NW339, 341 [quotCJ]; Minn 231NW225. [a] (4) In prosecution for statutory rape charged to have been committed by defendant on his thirteen-year old daughter, motion based on her affidavit denying truth by her testimony on trial is properly denied where statements in affidavit lack corroboration, are improbable, and are contradicted in counter affidavits, and prosecutrix contradicted herself on vital points on hearing of motion. 233Mich38, 206NW339.

1189-70 17F(2d)973; 86Colo141, 278P792; 37GaA161, 139SE119; 37GaA627, 141SE221; 166Minn300, 207NW623; 92PaSuper530, 535 [quotCJ]; 92PaSuper541.

1190-76 Mont 287P933; 137SC75, 134SE514.

1190-79 92PaSuper530, 535 [quotCJ].

1191-90 104TexCr492, 284SW549.

1191-3 [b] **Witness incompetent by statute.**-100TexCr211, 272SW778.

1191-4 16F(2d)370.

1191-6 22AlaA125, 113S625; 23AlaA488, 128S358(2dcase) (holding mere statement that evidence was unknown is insufficient showing); 115Nebr225, 212NW426; 105TexCr674, 290SW176; 113TexCr22, 188SW(2d)1087; TexCr 31SW(2d)456; Va 153SE684. [a] **Defendant's counsel, knowing desire of government's witness to recant,** should inform prosecutor promptly. 39F(2d)52.

1191-7 16F(2d)370; 32F(2d)128; 23AlaA488, 128S358(2dcase); 169Ark356, 275SW700; 174Ark859, 296SW716; 175Ark1170, 299SW757; Ark 20SW(2d)128; 180Ark873, 23SW(2d)627; Ark 30SW(2d)838; 97CalA782, 276P426; CalA 289P667; 90Fla299, 105S834; 96Fla307, 118S813; 96Fla243, 118S822; 162Ga78, 132SE632; 163Ga391, 136SE276; 36GaA129, 135SE520; 41GaA373, 153SE99(1stcase); 318 Ill157, 149NE27; 326 Ill540, 158NE222; 337 Ill643, 169NE772; 199 Ind235, 157NE1; 202 Iowa534, 210NW542; 120Kan172, 243P266; 128Kan475, 278P767; 208Ky655, 271SW701; 212Ky47, 278SW160; 215Ky613, 286SW696; 215Ky748, 286SW1068; 227Ky212, 12SW(2d)305; 230Ky704, 20SW(2d)711; 231Ky463, 21SW(2d)800; 160La470, 107S309; 166La1010, 118S116; Mo 278SW733; 315Mo219, 285SW739; Mo 19SW(2d)628; 77Mont62, 249P573; 85Mont585, 281P551; 86Mont251, 283P210; 115Nebr225, 212NW426; 34NM65, 277P22; 245NYS245; 50ND270, 195NW567; OklCr 283P1026; OklCr 289P1111; 43 OklACR329; 94PaSuper586; 13PaDist&Co 228; 149SC494, 147SE595; 53SD22, 219NW882; 159Tenn422, 19SW(2d)231; 159Tenn674, 21SW(2d)400; 99TexCr572, 271SW99; 101TexCr26, 276SW279; 103TexCr140, 280SW583; 103TexCr252, 280SW808; 103TexCr626, 281SW1067; 105TexCr91, 286SW1096; 106TexCr515, 293SW571; 107TexCr609, 298SW429; 108TexCr323, 300SW59; 108TexCr320, 300SW65; 108TexCr511, 1SW(2d)888; 109TexCr372, 5SW(2d)137; 109TexCr506, 5SW(2d)520; TexCr 11SW(2d)172; 112TexCr92, 14SW(2d)63(2dcase); TexCr 29SW(2d)762; TexCr 31SW(2d)456; 100Y1431, 138A733; 152Va955, 146SE281; 152Va1014, 148SE821; Va 154SE508.

1193-8 160La470, 107S309.

1193-9 202Cal527, 261P1009; 199 Ind235, 157NE1. [a] (12) Evidence as to physical condition that could be relieved by whisky. TexCr 31SW(2d)811 (2dcase). [c] 202Cal527, 261P1009. (2) No lack of diligence when new evidence is admission of prosecutor made subsequent to trial. 125Me515, 132A521.

1193-10 22AlaA317, 116S110; 36GaA129, 135SE520; 326 Ill540, 158NE222; 199 Ind489, 158NE480; 202 Iowa534, 210NW542; 215Ky613, 286SW696; 238Mich259, 213NW151; 320Mo228, 7SW(2d)259; Mo 18SW(2d)474; 77Mont62, 249P573; Mont 286P1108; OklCr 292P371(2dcase); RI 142A662; 141Wash355, 251P273.

1193-11 32F(2d)128; 35F(2d)454; 163Ga391, 136SE276; 209Ky848, 273SW477; 170La1050, 129S633; Mo 24SW(2d)1023; 104TexCr572, 286SW226; 105TexCr631, 289SW1006; 105TexCr674, 290SW176; 109TexCr506, 5SW(2d)520; 111TexCr511, 14SW(2d)274; 113TexCr48, 19SW(2d)61(2dcase).

1194-12 163Ga391, 136SE276; 318 Ill157, 149NE27; 215Ky613, 286SW696; 158La713, 104S627; 167La279, 119S48; 169La947, 126S434; 238Mich259, 213NW151; 104TexCr572, 286SW226; 112TexCr92, 14SW(2d)63(2dcase); 112TexCr335, 16SW(2d)825; TexCr 31SW(2d)811(2dcase). [a] (1) 99TexCr572, 271SW99; 109TexCr2, 2SW(2d)459. (5) 103TexCr252, 280SW808.

1194-13 MoA 289SW969.

1194-13½-New. or where the newly discovered evidence was not available; 22AlaA146, 113S625.

1194-14 339 Ill480, 171NE544 (where defendant did not know certain witnesses would be called).

1194-15 113TexCr605, 21SW(2d)1046. [a] 73Mont187, 235P703 (defendant's counsel prevented by sheriff from interviewing witness in jail). But see Mo 19SW(2d)628. [b] **Evidence in possession of state,** which cannot be found and produced, renders denial of new trial prejudicial error. 121Oh147, 167NE385.

1195-27 12F(2d)670; 162Ga78, 132SE632; 145Va834, 133SE658.

1195-28 12F(2d)670; 248Mich520, 227NW687.

1195-29 163Ga391, 136SE276.

1195-31 TexCr 28SW(2d)802 (low mentality).

1195-32 169Ark356, 275SW700; Del 129A254; 318 Ill157, 149NE27; Iowa 230NW425; 231Ky152, 21SW(2d)231; Mont 292P250; 50SD32, 208NW164; 135Wash276, 237P507; Wash 292P1107.

1196-37 12F(2d)670; 26F(2d)246; 32F(2d)128; 23AlaA488, 128S358(2dcase); 169Ark1212, 277SW26 (evidence immaterial); CalA 288P873; 96Fla307, 118S813; 36GaA124, 135SE511; 36GaA129, 135SE520; 327 Ill393, 158NE712; 199 Ind235, 157NE1; 121Kan329, 246P507, 48ALR81; 210Ky833, 275SW812; 215Ky436, 284SW1114; 219Ky745, 294SW507; 224Ky13, 5SW(2d)275; 259Mass128, 156NE57; 217AppDiv424, 216NYS723; 131Misc647, 228NYS571; 245NYS245; 52SD104, 216NW863; 103TexCr242, 280SW819; 105TexCr674, 290SW176; 108TexCr323, 300SW59; 112TexCr92, 14SW(2d)63(2dcase); 113TexCr22, 18SW(2d)1087; 145Va834, 133SE658; 152Va955, 146SE281; 198Wis247, 223NW833.

1197-38 198 Ind491, 154NE276. See also 90Fla299, 105S834. [c] **New issues.**-198 Ind491, 154NE276. [d] **Belief in defendant's innocence** is not such newly discovered evidence as to justify new trial. Ind 171NE5.

1197-39 217Ky513, 289SW1087.

1197-40 109TexCr314, 4SW(2d)557 (hold material).

1197-41 174Ark1179, 298SW27.

1198-42 89CalA132, 264P314; 210Ky347, 275SW809; 210Ky833, 275SW812.

1198-45 [a] 202Cal527, 261P1009 (alibi); 208Ky615, 271SW684; 100TexCr220, 272SW478.

1198-47 41GaA366, 153SE203(1stcase); 41GaA635, 154SE209; 103TexCr626, 281SW1067; TexCr 18SW(2d)1087.

1199-50 30F(2d)900; 174Ark1179, 298SW27; 223Ky566, 4SW(2d)362; 227Ky100, 12SW(2d)329(2dcase); 229Ky519, 17SW(2d)434; 154Miss671, 122S766(2dcase); 106TexCr130, 290SW766; 112TexCr92, 14SW(2d)63(2dcase).

1199-52 33NM259, 263P754, 757 [quot CJ].

1199-55 169Ark883, 277SW36.

1199-56 12F(2d)670; 16F(2d)370; 24F(2d)82; 30F(2d)900; 32F(2d)128; 39F(2d)30 (merely corroborative); 20AlaA529, 104S339; 21AlaA216, 106S894; 21AlaA565, 110S55; 22AlaA154, 113S602; 22AlaA125, 113S625; 32Ariz470, 260P188; Ariz 282P930; 169Ark883, 277SW36; 174Ark871, 298SW7; 174Ark1179, 298SW27; 179Ark1199, 20SW(2d)128; Ark 30SW(2d)838; 67CalA623, 228P369; 68CalA758, 230P191; CalA 262P428; CalA 288P832; 77Colo445, 236P1009; 90Fla299, 105S834 (in part cumulative); 94Fla522, 114S230; 96Fla307, 118S813; 98Fla1184, 125S345(3dcase); 161Ga640, 131SE682; 162Ga78, 132SE632; 162Ga777, 135SE187; 163Ga12, 135SE421; 163Ga557, 136SE550; 166Ga512, 143SE896; 168Ga611, 148SE531; 168Ga670, 148SE589; Ga 155SE11; 35GaA349, 133SE350; 36GaA207, 136SE103; 36GaA282, 136SE332; 36GaA307, 136SE461; 37GaA162, 139SE90; 39GaA810, 148SE601(2dcase); 40GaA145, 148SE923(2dcase); 40GaA274, 149SE324; 40GaA666, 150SE869(1stcase); 40GaA731, 151SE240(2dcase); 41GaA836, 155SE100; GaA 155SE511(2dcase); GaA 155SE785(2dcase); 318 Ill157, 149NE27; 327 Ill393, 158NE712; 337 Ill84, 169NE12; 199 Ind55, 155NE203; 199 Ind235, 157NE1; 199 Ind489, 158NE480; Ind 171NE5; 122Kan68, 250P1069; 126Kan670, 271P289; 127Kan160, 272P110; 128Kan475, 278P767; Kan 291P782; 208Ky504, 271SW568; 210Ky150, 275SW630; 210Ky670, 276SW571; 212Ky791, 280SW111; 215Ky748, 286SW1068; 219Ky777, 294SW480; 222Ky248, 300SW625; 230Ky327, 19SW(2d)964; 233Ky407, 28SW(2d)1022; 235Ky462, 31SW(2d)712; 158La244, 103S755; 158La471, 104S211; 161La167, 108S324; 163La51, 111S492; 167La390, 119S402; 170La1050, 129S633; 167Minn348, 209NW30; 171Minn345, 214NW262; Miss 112S175; Mo 278SW733; Mo 300SW723; 72Mont306, 233P602; 77Mont62, 249P573; 85Mont585, 281P551; 86Mont251, 283P210; Mont 286P1108; 131Misc647, 228NYS571; 245NYS245; 50ND927, 198NW698; 55ND846, 215NW552; OklCr 274P1094; OklCr 287P1106; 13PaDist&Co228; 94PaSuper586; 137SC75, 134SE514; 157Tenn403, 8SW(2d)371; 100TexCr626, 272SW167; 103TexCr226, 280SW597; 103TexCr252, 280SW808; 109TexCr437, 5SW(2d)147; TexCr 11SW(2d)172; 112TexCr92, 14SW(2d)63(2case); 113TexCr22, 18SW(2d)1087; TexCr 28SW(2d)171; 192Wis452, 211NW773. See also 134SC179, 131SE420. [c] 112TexCr521, 17SW(2d)462(1stcase).

1201-57 16F(2d)370; 217Ala212, 115S223; 180Ark1167, 20SW(2d)858; 67CalA623, 228P369; 94Fla522, 114S230; 39GaA669, 148SE298; 222Ky248, 300SW625; OklCr 291P152; 103TexCr252, 280SW808.

1201-58 37GaA162, 139SE90; 198 Ind253, 151NE697; 210Ky670, 276SW571; 219Ky777, 294SW480; 221Ky258, 298SW696; 230Ky24, 18SW(2d)287; 337 Ill84, 169NE12 (to authorize new trial evidence must be conclusive); 171Minn345, 214NW262; TexCr 27SW(2d)226. [b] 229Ky584, 17SW(2d)697; 230Ky24, 18SW(2d)287.

1201-59 [a] **Abuse of discretion not shown.**-Ind 171NE192.

1201-60 199 Ind235, 157NE1; 33NM259, 263P754, 757 [quotCJ]; 137SC75, 134SE514.

1201-63 162Ga78, 132SE632; 36GaA303, 136SE333; 170La1050, 129S633.

1202-68 162Ga777, 135SE187; 215Ky748, 286SW1068; Miss 112S175; 73

Mont187, 235P703. [a] (2) Ariz 282P 930; 77Mont62, 249P573; 137SC75, 134 SE514.

1202–69 199 Ind235, 157NE1; MoA 289 SW969; 73Mont187, 235P703. [a] (5) Where conviction of robbery was placed on advice and encouragement to others to commit robbery, and defendant testified in his own behalf, that he did not know anything of contemplated robbery, and did not know what transpired after he left, at certain place, two other persons charged with robbery, evidence of one of such persons, describing in detail what transpired, and stating that after defendant turned back they walked on until he was out of sight, then turned back and committed robbery as they had planned to do, was not merely cumulative. 73Mont187, 235P703. (6) Other instances. 339 Ill 480, 171NE544.

1202–69½–New. Refusal of new trial to procure testimony held not error where testimony would have been in conflict with that of accused. 155Tenn325, 292 SW849.

1202–70 19F(2d)813; 40F(2d)820; 22 AlaA317, 116S110; 32Ariz470, 260P188; Ariz 282P930; 169Ark340, 275SW663; 169Ark1212, 277SW26 (evidence impeaching); 169Ark883, 277SW36; 174 Ark1179, 298SW27; 175Ark1169, 299 SW360; 179Ark1170, 15SW(2d)1000; 77Colo 445, 236P1009; 90Fla299, 105S 834; 94Fla522, 114S230; 96Fla307, 118 S13; 160Ga899, 129SE436; 161Ga640, 131SE682; 162Ga777, 135SE187; 163 Ga561, 136SE530; 166Ga512, 143SE896; 168Ga670, 148SE589; 35GaA349, 133 SE350; 35GaA587, 134SE201; 36GaA 282, 136SE332; 36GaA307, 136SE461; 36GaA315, 136SE798; 36GaA602, 137 SE573; 36GaA647, 137SE796; 37GaA 162, 139SE90; 39GaA475, 147SE400 (1st case); 39GaA406, 147SE402(2dcase); 39GaA547, 147SE798(2dcase); 39GaA 810, 148SE601(2dcase); 40GaA274, 149 SE324; 40GaA712, 151SE393; 41GaA 322, 152SE920(2dcase); 41GaA478, 153 SE374; 41GaA568, 153SE620; 41GaA 635, 154SE209; 339 Ill 480, 171NE544; 199 Ind55, 155NE203; 199 Ind235, 157 NE1; Ill 173NE467; 127Kan160, 272 P110; 129Kan120, 281P910; 208Ky655, 271SW701; 210Ky150, 275SW630; 210 Ky573, 276SW512; 223Ky566, 48W(2d) 362; 226Ky318, 10SW(2d)1099; 226 Ky437, 11SW(2d)111; 226Ky584, 11SW (2d)410; 227Ky212, 12SW(2d)305; 227 Ky500, 13SW(2d)511; 230Ky327, 19SW (2d)964; 230Ky387, 19SW(2d)1086; 158 La244, 103S755; 162La471, 110S723; 171Minn503, 214NW474; 149Miss817, 115S887; 154Miss858, 123S891; 72Mont 306, 233P602; 85Mont585, 281P551; 86 Mont251, 283P210; 48Nev358, 232P778, 235P645; 131Misc647, 228NYS571; 245 NYS245; 55ND194, 212NW857; OklCr 274P1094; 94PaSuner403; 137SC75, 134 SE514; 48SD430, 205NW31, 33 [citCJ]; 50SD479, 210NW732; 103TexCr226, 280 SW597; 109TexCr541, 58W(2d)990; 111 TexCr275, 12SW(2d)579; 111TexCr342, 13SW(2d)380; 112TexCr92, 14SW(2d) 63(2dcase); 113TexCr22, 18SW(2d) 1087; TexCr 28SW(2d)153; 143Va489, 129SE252; 154Wash409, 282P907; WVa 153SE111; 196Wis111, 219NW272. See also 103TexCr578, 280SW1079. But see 230Ky704, 20SW(2d)711. [d] 34GaA 174, 128SE589 (witness' affidavit of falsity of testimony). [e] 34GaA174, 128SE 589. [f] **Contradictory evidence.**–73 Mont187, 235P703.

1204–71 20F(2d)752; 169Ark1212, 277 SW26; 94Fla522, 114S230; 48Nev358, 232P778.

1204–73 175Ark878, 1SW(2d)23; 94 Fla522, 114S230. [a] (1) 112TexCr 606, 18SW(2d)632.

1204–77 171Minn503, 214NW474.

1204–78 171Minn503, 214NW474.

1204–79 DC 32F(2d)953.

1204–80 48SD430, 205NW31, 33 [cit CJ].

1204–82 170Ark1192, 280SW367; 72 Mont306, 233P602; 78Mont87, 252P320; 9PaDist&Co 565; 103TexCr242, 280SW 819. [b] 101CalA306, 281P666.

1205–83 Ariz 282P930; 210Ky150, 275 SW630; 48SD430, 205NW31, 33 [citCJ]; 112TexCr92, 14SW(2d)63(2dcase).

1205–84 36GaA217, 136SE92; 210Ky150, 275SW630; 36 OklCr148, 252P1106; 106 TexCr118, 290SW537.

1205–86 170Ark1192, 280SW367; 171 Minn515, 213NW923; 36 OklCr148, 252 P1106.

1205–87 235 IllA349; 199 Ind235, 157 NE1; 221Ky258, 298SW696; 133SC 294, 130SE888 (refusal of new trial error); 101TexCr63, 274SW588; 112Tex Cr595, 18SW(2d)622(2dcase); TexCr 29 SW(2d)373. [a] (1) 33NM259, 263P754, 756 [quotCJ].

1205–89½–New. Motion will not be granted because after trial the prosecuting witness expressed regret as to the result of the trial. Mo 300SW723.

1205–90 36GaA647, 137SE796.

1205–92 292Pa16, 140A537.

1206–94 84CalA707, 258P660; 199 Ind 55, 155NE203; 121Kan687, 247P427; 126Kan710, 271P316; 259Mass128, 156 NE57; 170Minn197, 212NW203; 173 Minn420, 217NW489; 108TexCr323, 300 SW59; TexCr 29SW(2d)762. Contra 106 TexCr413, 292SW906. [a] (2) Affidavits stating certain conclusions as to evidence without showing means of knowledge has been held not to warrant new trial. Minn 231NW411. [b] (3) 241 Mich696, 217NW781 (convict serving sentence). [c] (2) Motion held properly denied where newly discovered witnesses were defendant's sons. 163La 18, 111S481. [h] (1) 168Minn341, 210 NW45.

1206–95 32F(2d)127; 22AlaA317, 116S 110; 97CalA782, 276P426; 92CalA628, 268P923; 77Colo 445, 236P1009; 96Fla 307, 118S13; 160Ga899, 129SE436; 162 Ga208, 132SE911; 166Ga218, 142SE898; 36GaA124, 135SE511; 36GaA129, 135SE 520; 36GaA214, 136SE182; 36GaA307, 136SE461; 36GaA645, 137SE913(1st case); 36GaA659, 137SE913(2dcase); 36 GaA664, 137SE915; 40GaA145, 148SE 923(2dcase); 327 Ill 393, 158NE712; 197 Ind599, 150NE408; 199 Ind489, 158 NE480; Ind 167NE524; Ind 171NE5; 204 Iowa1355, 217NW233; 121Kan369, 247P1053; 126Kan710, 271P316; 212 Ky791, 280SW111; 215Ky613; 286SW 696; 215Ky748, 286SW1068; 216Ky 216, 287SW722; 221Ky219, 298SW707; 227Ky792, 13SW(2d)1053; 229Ky519, 17SW(2d)434; 230Ky387, 19SW(2d) 1086; 230Ky611, 20SW(2d)466; 161La 167, 108S324; 163La18, 111S481; 166 La1010, 118S116; 168La807, 123S332 (2dcase); 126Me323, 138A474; 241Mich 687, 217NW766; 173Minn567, 218NW 112; Minn 232NW111; 320Mo228, 7 SW(2d)259; Mo 18SW(2d)474; 72 Mont306, 233P602; 217AppDiv424, 216 NYS723; 245NYS245; 55ND846, 215 NW552; OklCr 283P1026; OklCr 289P 1111; 283Pa392, 129A93; 92PaSuner 541; 13PaDist&Co 228; 14PaDist&Co 312; 103TexCr242, 280SW819; 108Tex Cr323, 300SW59; 109TexCr411, 4SW (2d)976; TexCr 11SW(2d)172; 113Tex Cr22, 18SW(2d)1087; TexCr 24SW(2d) 427(2dcase); 113TexCr490, 22SW(2d) 664; TexCr 28SW(2d)158 (probable effect of newly discovered evidence is primarily for judge); 152Va955, 146SE 281; 198Wis551, 224NW477. [d] (1) 55ND194, 212NW857. [d] (3) 152Va 1014, 148SE821. [e] (3) Order of commitment to insane asylum held not sufficient. 68CalA674, 230P178.

1206–95½–New. Evidence must be conclusive to justify a new trial. 318 Ill 157, 149NE27.

1208–97 23AlaA332, 125S201(2dcase); 36GaA645, 137SE913; 228Ky128, 14SW (2d)375; 230Ky24, 18SW(2d)287; 231 Ky463, 21SW(2d)800; 235Ky478, 31 SW(2d)719; 73Mont187, 235P703; 133 SC294, 130SE888 (text is whether affidavits would lead any reasonable mind to inference that evidence would probably change result); 111TexCr68, 11SW (2d)324. See also Ont [1929] 1DomLR 282. [a] 100TexCr514, 271SW899.

1209–6½–New. In some jurisdictions the only office of a motion for a new trial is to bring to the attention of the court errors occurring during the trial which do not otherwise appear of record and for which a new trial may be granted. 210Ky401, 276SW123.

1209–7 190NC133, 129SE410; 12PaDist &Co 331. See also 36GaA662, 137SE853. [c] **Court has been held to lose jurisdiction** to grant new trial on entry of judgment and lapse of two years. Me 149A 626(1stcase).

1209–8 [a] **Power of appellate court to grant new trial** or rehearing ought to be used only in extraordinary circumstances. 38F(2d)465.

1209–9 193NC847, 137SE705.

1209–11 39F(2d)52 (where appeal is pending).

1210–13 127Me487, 144A383(1stcase).

1210–14 76Colo 603, 234P169.

1210–18 165La842, 116S206.

1210–20½–New. Under some statutes a judge who did not preside at trial may hear motion for new trial. 261Mass299, 159NE51.

1210–20½–New. In case of illness of the trial judge presiding at the trial the question of whether another judge should hear motion for a new trial depends on the facts and is to be decided in the exercise of judicial discretion. 261Mass299, 159NE51.

1210–20¼–New. Where the presiding trial judge had been ill for many months pending motion for a new trial, another judge did not exceed his rights in hearing motion. 261Mass299, 159NE51.

1210–22 25F(2d)242; Mo 30SW(2d) 750.

1210–27 127Me487, 144A383(1stcase); 195Wis416, 218NW830.

1210–29 [b] **Where new trial is denied at trial term,** jurisdiction to grant new trial thereafter is vested solely in appellate court. 222Ky840, 2SW(2d)1044.

1210–35 127Misc502, 217NYS60.

1210–38 90Fla272, 105S406 (within four days after rendering of verdict); 261 Mass20, 158NE260; 246Mich282, 224NW 607(1stcase). [d] **In Florida.**–90Fla272, 105S406. [e] **Statute is remedial** in character. 255Mass369, 151NE839.

1211–39 20AlaA604, 104S280; 21AlaA 384, 108S656; CalA 288P873; 89Fla336, 103S642; 119Kan564, 240P416; 261Mass 12, 158NE167; Mich 232NW397(1st case); Mo 256SW743 (after judgment); Mo 18SW(2d)10; 137Misc466, 244NYS 431; 57ND636, 223NW583.

1211–44 16F(2d)370; 39F(2d)52 (one year after bill of exceptions settled held too long).

1211–50 176Ark1049, 5SW(2d)293; 90 Fla272, 105S406; Ind 166NE771; 222 Ky840, 2SW(2d)1044; 227Ky831, 14 SW(2d)146; 120 Oh44, 165NE573; 31 OhA185, 165NE368. [a] (2) That jury renders verdict on next to last day of term is immaterial. 227Ky792, 13SW (2d)1053. [g] **Extraordinary motions for new trial are not favored.**–Ga 155 SE676.

1212–51 [d] **Common pleas court cannot entertain** motion for new trial for new evidence, when motion is filed at term subsequent to one in which verdict was rendered and judgment entered. 32 OhA5, 166NE594.

1212–55 [a] **Motion after affirmance above** rests within discretion of trial judge. 40GaA91, 149SE59.

1212–58 [b] **Extraordinary motions are not favored.**–162Ga78, 132SE632. [c] **Extraordinary causes are causes out of ordinary in human affairs.**–162Ga78, 132 SE632.

1212–62 238Mich485, 213NW717; 34 Wyo102, 241P715 (order for extension held to show it was granted for good cause shown). [d] **In Florida.**–90Fla 272, 105S406.

1213–69 94CalA641, 271P781; 98CalA 552, 277P201; 208 Iowa867, 226NW81 (judgment on plea of guilty); 157La 597, 102S683; 169La585, 125S626; 170 La1063, 129S637; 261Mass12, 158NE 167; Mo 300SW674; MoA 294SW422.

1213–70 [a] **Where death sentence is commuted to life imprisonment** defendant must move on new evidence within year after judgment. 137Misc466, 244 NYS431.

1213–73 37F(2d)330. [c] **In Massachusetts.**–165NE2.

1213–75 Mo 289SW569.

1214–80 MoA 294SW422.

1214–83 196 Ind499, 149NE50; 196 Ind 512, 149NE77.

1214–90 54ND136, 208NW947. See also 127Misc502, 217NYS60.

1215–94½–New. The taking of an ap-

peal does not extend the time for moving for a new trial. 54ND136, 208NW947.

1215–98 24 OhA212, 157NE400.

1215–99 24 OhA212, 157NE400.

1215–14½–New. A motion for a new trial is not a pleading. 24 OhA212, 157NE400.

1215–14⅓–New. When it appears from witnesses recantation that injustice has been done, the United States attorney should join in application for new trial. 39F(2d)52.

1216–16 245Mich578, 223NW124. [a] Mo 286SW20.

1216–19½–New. Timely amended motion for a new trial making no reference to grounds set out in the original motion constitutes an abandonment of such original motion. 312Mo 673, 280SW1026, 44ALR848.

1216–19⅓–New. But a timely supplemental motion which directs the court's attention that movant was not abandoning such original grounds is not an abandonment of such grounds. 312Mo 673, 280SW1026, 44ALR848.

1216–20 Mo 286SW20; Mo 128SW(2d) 424

1216–22 [a] **Supplemental motion on ground of newly discovered evidence** held timely when made while original motion remained undetermined and within thirty days after discovery of new facts. 78Mont87, 252P320.

1216–24 223Ky665, 48SW(2d)685.

1217–33½–New. In an extraordinary motion for a new trial a rule nisi may be moved for without previous notice. 162Ga78, 132SE632.

1217–40 [c] (3) Requirement of notice of extraordinary motion is complied with when opposite party is served with copy of motion and rule nisi twenty days before time of hearing under rule nisi. 162Ga78, 132SE632.

1217–42 165Ga326, 140SE889; 122Kan626, 252P905.

1217–44 16F(2d)370; 36GaA660, 137SE787; 170Ga294, 152SE572; 36GaA672, 137SE787; 36GaA650, 137SE862(2dcase); 36GaA650, 137SE862(3dcase); 36GaA651, 137SE863; 36GaA772, 138SE448; 165Ga326, 140SE889; 39GaA16, 145SE892(1stcase); 168Ga296, 147SE504; 41GaA290, 152SE596(2dcase); 41GaA321, 152SE913; 41GaA571, 153SE618; GaA 155SE362; 197 Ind419, 151NE129; 198 Ind253, 151NE697; 124Kan245, 259P691; 214Ky454, 283SW418; 227Ky528, 13SW(2d)521; 307Mo 365, 270SW291; Mo 292SW19; 318Mo 672, 300SW752; Mo 28SW(2d)712; MoA 299SW821; 85PaSuper320. [b] (2) Ground will not be considered if reference to record is necessary to determine alleged error. 39GaA558, 147SE908. [e] 36GaA209, 135SE926; 37GaA628, 141SE220(2dcase). [f] **Each ground must be complete** within itself. 38GaA362, 144SE51. [g] **Incomplete statement.**–167Ga326, 145SE654. [h] **Defendant held not entitled to new trial** on ground not stated. CalA 285P1073.

1217–45 82Colo 233, 259P1038; 164Ga500, 139SE223; 36GaA120, 135SE516; 36GaA97, 135SE519; 36GaA113, 136SE111; 36GaA660, 137SE787; 36GaA676, 137SE791; 36GaA650, 137SE862(2dcase); 36GaA650, 137SE862(3dcase); 36GaA651, 137SE863(1stcase); 36GaA654, 137SE863(3dcase); 36GaA654, 137SE863(5thcase); 36GaA664, 137SE915; 36GaA770, 138SE262; 36GaA771, 138SE275; 36GaA769, 138SE336; 36GaA772, 138SE448; 37GaA378, 140SE378; 37GaA386, 140SE528(2dcase); 37GaA386, 140SE640(4thcase); 165Ga326, 140SE889; 37GaA486, 140SE925; 37GaA627, 141SE221; 159La562, 105S621; 161La827, 109S505; 161La863, 109S519; MoA 296SW825. [d] **Averment that evidence is insufficient to support conviction** assumes want of any substantive evidence. Mo 295SW786.

1218–46 37GaA356, 140SE526(1stcase); 37GaA375, 140SE526(3dcase); 37GaA378, 140SE378; 37GaA386, 140SE528(2dcase); 37GaA386, 140SE640; 37GaA627, 141SE221.

1218–47 165Ga326, 140SE889; 37GaA375, 140SE526(3dcase); 37GaA378, 140SE526(4thcase); 37GaA386, 140SE528(2dcase); 37GaA386, 140SE640(4thcase); 37GaA627, 141SE221.

1218–49 197 Ind210, 150NE103; 199 Ind546, 158NE902.

1218–49½–New. , or that defendant had not been arraignd or entered a plea. 197 Ind210, 150NE103.

1218–53½–New. Every ground of a motion for a new trial should be complete in itself and understandable without reference to another part of the record. 34GaA146, 128SE686; 35GaA497, 133SE747; 35GaA471, 134SE141; 35GaA577, 134SE184; 35GaA574, 134SE185; 37GaA93, 139SE88; 37GaA509, 140SE776.

1218–53⅓–New. Where exceptions were not taken nor supported by proof, an unverified motion will not be considered. 37GaA507, 140SE791.

1218–53¼–New. Irregularity in drawing venire. On motion for new trial on ground that venire was irregularly drawn there must be allegation and proof that defendant did not know the facts and could not by due diligence have ascertained them, 20AlaA649, 104S913.

1218–53⅕–New. , and under some statutes there must be allegation and proof of fraud. 20AlaA649, 104S913.

1218–53⅙–New. Where motion for a new trial had been presented and denied, and defendant, on the day sentence was pronounced, presented an affidavit alleging facts warranting a new trial, but, before sentence, being asked if he had any cause to urge why sentence should not be pronounced, he replied in the negative, grounds tendered in the affidavit are waived. 122Kan626, 252P905.

1218–53⅐–New. Reliance on the complaint as to misreception of the evidence and giving and refusing of instructions generally is insufficient under some statutes. MoA 298SW1047.

1218–56 Mo 286SW20.

1218–58½–New. Motion is fatally defective where it fails to allege incompetency of jury was unknown to defendant until after verdict. 159La674, 106S28.

1218–58⅓–New. Defendant must allege and prove that juror was legally incompetent. 159La674, 106S28.

1218–58¼–New. that fact was unknown to defendant until after verdict, 159La674, 106S28.

1218–58⅕–New. that juror was questioned on the point and answered he was competent. 159La674, 106S28.

1218–59 35GaA579, 134SE178 (allegation insufficient as conclusion).

1218–60 See also 110TexCr60, 7SW(2d)1082 (sufficient time to employ counsel shown).

1218–61 37GaA115, 139SE116.

1218–61½–New. A ground of a motion for a new trial based on such refusal is insufficient where it also fails to show the names of the witnesses or where they resided, that they had been subpœnaed, or that movant expected to have their testimony at the next term. 37GaA115, 139SE1116.

1218–63 Ga 155SE28.

1218–64 169Ark1188, 278SW3; 168Ga470, 148SE139; Ga 155SE38; 41GaA277, 152SE591; GaA 155SE103; GaA 155SE797(1stcase). [a] (3) That court permitted state to put character of defendant in issue where evidence objected to was not admitted for that purpose. 169Ark1188, 278SW3. (4) Motion not naming witness whose testimony was objected to held insufficient. 39GaA825, 148SE607(1stcase).

1218–65 171Ark672, 285SW377; 36GaA770, 138SE262. But see Mo 256SW787. [a] (5) That court erred in admitting incompetent, irrelevant, and immaterial evidence and in rejecting competent, relevant, and material evidence. MoA 293SW87.

1218–66 170Ga294, 152SE572; 36GaA770, 138SE262; GaA 155SE362; Mo 300SW785; 29PortoRico 961.

1219–67 160Ga769, 129SE102 (evidence not set out in substance or otherwise); Ga 155SE28; 35GaA497, 133SE747; 35GaA577, 134SE184; 36GaA741, 138SE258; 36GaA770, 138SE262; 37GaA520, 140SE788; 38GaA362, 144SE51; 41GaA618, 154SE201; 41GaA634, 154SE214. [a] (6) 35GaA497, 133SE747. [d] **Joint specification** going to testimony of all witnesses properly overruled where one or more may testify. GaA 147SE718; 89 IndA564, 166NE158(2dcase).

1219–68 34GaA38, 128SE218; 36GaA770, 138SE262; 39GaA13, 145SE918.

1219–71 162Ga138, 132SE755; 36GaA741, 138SE258; 39GaA676, 148SE305; 40GaA444, 149SE921(1stcase).

1219–72 168Ga672, 148SE586; 37GaA628, 141SE220; 40GaA666, 150SE854.

1219–74 Ga 155SE28 (must show answer).

1219–75 315Mo 219, 285SW739.

1219–76 34GaA38, 128SE218 (objection to certain testimony part of which was not objectionable); 34GaA146, 128SE686.

1219–77½–New. Error occurring before trial cannot be assigned as error occurring at trial. 199 Ind284, 157NE280.

1219–81 41GaA286, 152SE593(1stcase); GaA 155SE797(1stcase); 316Mo 150, 289SW822; 316Mo 115, 289SW862. [a] (5) Other instances. 41GaA321, 152SE913. [b] **Specifications of error in giving instructions numbered 1 to –** held to be only specification of error as to instruction No. 1. 197 Ind218, 150NE311.

1220–82 GaA 155SE797(2dcase). [c] (3) That the "court erred in giving instruction No. ———." MoA 296SW825.

1220–85 316Mo 115, 289SW862.

1220–86 314Mo 684, 285SW496.

1220–89 40GaA10, 148SE769.

1220–92 39GaA699, 148SE282(2dcase).

1220–93 40GaA10, 148SE769.

1220–94 See also 302Mo 638, 259SW787.

1220–97 35GaA574, 134SE185; 38GaA357, 143SE925; 38GaA388, 144SE50; 41GaA371, 153SE101. [a] 35GaA574, 134SE185. [b] (2) In general. Ga 154SE700.

1220–97½–New. , and show that the requested instructions were pertinent and applicable to facts of case. 35GaA574, 134SE185.

1220–99 41GaA379, 153SE202.

1220–1 316Mo 150, 289SW822; Mo 296SW128. [c] (4) That court erred in failing to recite statute. 40GaA225, 149SE178 (not alleging written request, statute part of law of state or instructions requested adapted to facts).

1221–2 36GaA209, 135SE926.

1221–4 See also 168Ga731, 149SE23.

1221–4½–New. Ground giving no reason why failure to instruct was prejudicial and not alleging prejudice is defective. 36GaA209, 135SE926.

1221–6 40GaA10, 148SE769 (injury not shown); 85PaSuper320.

1221–8 16F(2d)370; 214Ky454, 283SW418; Mo 6SW(2d)900; 36 OklCr148, 252P1106; 85PaSuper320.

1221–9 322Mo 1239, 18SW(2d)71. [a] (2) Ground in motion for new trial that "court has discovered new evidence," material in defense, which defendant did not know of before trial, held insufficient. 214Ky454, 283SW418.

1221–10 100TexCr501, 272SW191.

1221–12 [b] **Motion not showing exception to rule** that new evidence cannot be claimed from witness present at trial has been held properly overruled. 112TexCr586, 18SW(2d)657.

1221–13 105TexCr161, 287SW247.

1221–14 36 OklCr148, 252P1106; 113TexCr591, 23SW(2d)731(2dcase). [a] **Names of associates of witness** must be given in affidavit in support of witness upon whose evidence new trial is sought. 34GaA235, 128SE817.

1221–17 50SD533, 210NW721.

1221–19 37GaA377, 140SE427; 212Ky47, 278SW160; 209Ky203, 272SW423; 219Ky592, 293SW1057; 231Ky463, 21SW(2d)800; 148Miss425, 114S747; Mo 300SW723; 322Mo 1239, 18SW(2d)71; OklCr 274P1092(2dcase); OklCr 286P808. [a] **Time of discovery of evidence** must be disclosed. OklCr 274P1094. [b] **Showing as to reasonable diligence** held not to warrant rehearing or new trial for newly discovered evidence. 38F(2d)465.

1221–19½–New. must allege and prove that evidence was unknown at trial, 217Ala410, 116S112.

1221–20 37GaA377, 140SE427; 40GaA10, 148SE769; 109TexCr372, 5SW(2d)

137; 111TexCr342, 13SW(2d)380.

1221-20½-New. Affidavit should state evidence was not known at trial, and was discovered since trial. 212Ky47, 278SW160.

1221-20¾-New. Mere conclusions are insufficient. 16F(2d)370.

1221-22 106TexCr550, 293SW575; TexCr 29SW(2d)394(1stcase).

1221-23 160La47, 106S670.

1221-25 36GaA650, 137SE862; 37GaA 382, 140SE406; 37GaA510, 140SE798; 40GaA508, 150SE455 (ground for new trial not approved by judge will not be considered). [a] **Approval must be unqualified to be sufficient.** 37GaA382, 140 SE406.

1222-28 37GaA382, 140SE406.

1223-51 39GaA32, 146SE36(1stcase).

1223-68 23AlaA493, 127S678; 168Ga 470, 148SE139; 41GaA834, 155SE104; 169La595, 125S629; 255Mass369, 151NE 839 (willful misconduct of district attorney); 143Miss686, 109S715; 13 PortoRicoFed410; 108TexCr28, 299SW 236; 100Vt431, 138A733. [b] **Burden to prove that newly discovered material evidence will likely change result** is on defendant. 112TexCr606, 18SW(2d)632. [c] **Allegations in motion are not self-proving.**-98Fla370, 123S735 (no proof).

1223-69½-New. Statements in motion for a new trial on information and belief must be accepted as correct in the absence of denials or contradictions. 199 Ind235, 157NE1.

1223-69¾-New. Newly discovered evidence. Not presumed good citizen would withhold evidence he knows to be important. Mont 287P933.

1224-71 [a] (3) 116Nebr512, 218NW 129.

1224-78 103TexCr156, 280SW578; 109 TexCr554, 5SW(2d)996; 111TexCr395, 13SW(2d)114.

1224-82½-New. The burden is on the state to show that the jury's receipt of additional testimony after retirement did not affect the fairness of the trial. 111TexCr21, 10SW(2d)991.

1224-84 195Cal 272, 232P710.

1225-92 164Ga151, 138SE52.

1225-93 94Fla318, 113S689; 97Fla 908, 122S525; Fla 126S158(2dcase); Mo 23SW(2d)22; 113TexCr7, 18SW(2d)176 (2dcase). See also Mo 296SW391.

1225-94 36GaA651, 137SE792; 248 Mich553, 227NW708 (denial of motion based on unsigned affidavit held not abuse of discretion); Miss 130S117; 317Mo408, 297SW368; 107TexCr121, 294SW1107.

1226-97 See also 94Fla318, 113S689.

1226-97½-New. It is common practice to serve affidavits on the adverse party. 135Wash482, 238P11.

1226-4 219Ky55, 292SW482.

1226-6 119Kan490, 239P1109; 146Miss 718, 111S834; 147Miss24, 112S590; 157 Miss642, 128S772; 160Tenn267, 23SW (2d)665 (absence of affidavits held not to preclude error in refusing continuance); 106TexCr659, 294SW556. [b] (1) 147Miss24, 112S590; 103TexCr200, 280SW221; 106TexCr659, 294SW556. (2) 147Miss24, 112S590. (3) On motion for new trial based on denial of continuance to secure witness, affidavit of witness is not essential. 106TexCr646, 294SW217.

1226-7 119Kan490, 239P1109; 106Tex Cr659, 294SW556.

1226-12 See also 37GaA371, 140SE402.

1226-18 225Ky282, 8SW(2d)406; 151 Miss539, 118S610; 152Miss723, 120S 838; 23 OhA237, 155NE569. [b] **Affidavit that defendant did not know that jurors were not put on voir dire,** and that it could not have been known in exercise of ordinary care, states such improbable conclusion that facts on which it is based should be stated. 168Ga611, 148SE531.

1227-20½-New. Affidavits as to what occurred in the jury room are unnecessary. 247Mich583, 226NW231.

1227-25 56ND716, 219NW218 (intoxication).

1227-37 35PortoRico 106; 111TexCr 395, 13SW(2d)114.

1227-39 197 Ind685, 150NE409.

1227-40 [a] (2) Affidavit merely stating that persons in jury room were overheard to make certain statements was held not sufficiently definite to charge misconduct. 197 Ind685, 150NE409.

1228-42 [a] **Affidavit of accused as to excitement within hearing and view of jury room** and claim of prejudicial effect on jury should be considered by court. 100TexCr1, 271SW613.

1228-43 35GaA398, 133SE744; 215Ky 162, 284SW1035.

1228-46 78CalA167, 248P289.

1228-47 95CalA563, 272P1103.

1228-50½-New. Affidavit by juror cannot be altered by counsel's mere declaration that affiant intended to say something entirely different than contained in affidavit. 78CalA167, 248P289.

1228-52 160Ga830, 129SE102; 36GaA 307, 136SE461; 36GaA651, 137SE792; 209Ky787, 273SW515; 214Ky475, 283 SW431; 219Ky38, 292SW492; Mo 24 SW(2d)1023 (motion does not prove itself); 112TexCr586, 18SW(2d)657; Tex Cr 32SW(2d)465.

1228-53 [a] (4) Affidavit insufficient. 70CalA465, 233P812.

1228-54 175Ark878, 1SW(2d)23; 337 Ill 413, 169NE210; 214Ky475, 283SW 431; Mo 279SW702; 103TexCr252, 280 SW808.

1229-55 199 Ind489, 158NE480; 169La 251, 125S67 (affidavit held insufficient). [a] (2) It is within trial court's discretion to find that affidavit of experts as to defendant's mental irresponsibility were unreliable in view of judge's opportunity to observe defendant's demeanor as witness and conduct in court room. 257 Mass391, 153NE881. (3) **Denial of new trial not abuse of discretion** where affidavit does not show relation testimony would have to evidence on which conviction was had. 26F(2d)798.

1229-56 222Ky99, 300SW357 (alleged newly discovered evidence contradicted by state's evidence held not to require new trial).

1229-57 220Ky311, 295SW153; 100Tex Cr626, 272SW167; 103TexCr268, 280 SW595; TexCr 32SW(2d)465.

1229-58 108TexCr556, 18SW(2d)903.

1229-60 70CalA465, 233P812; 103Tex Cr268, 280SW595.

1229-61 175Ark878, 1SW(2d)23; 88 CalA575, 263P862; 162Ga777, 135SE 187; GaA155SE103; 214Ky787, 283SW 1063; Mo 279SW702.

1230-64 See also CalA 262P428.

1230-65 160Ga830, 129SE102; 35GaA 349, 133SE350; 35GaA364, 133SE351; 36GaA282, 136SE332; 36GaA664, 137SE 853; 37GaA827, 142SE306(1stcase); 214 Ky787, 283SW1063.

1230-66 168Ga611, 148SE531; 160Ga 830, 129SE102; 34GaA174, 128SE589 (must give names of associates). 34GaA 172, 128SE699; 35GaA349, 133SE350; 35GaA364, 133SE351; 35GaA499, 133SE 656; 35GaA579, 134SE178; 36GaA129, 135SE520; 36GaA282, 136SE332; 36GaA 303, 136SE333; 36GaA315, 136SE798; 36 GaA602, 137SE573; 36GaA647, 137SE 796 (names of associates held essential); 36GaA673, 137SE798; 36GaA664, 137SE 853; 37GaA93, 139SE88; 37GaA162, 139 SE90; 37GaA115, 139SE116; 37GaA827, 142SE306(1stcase); 39GaA475, 147SE 400(1stcase); 39GaA547, 147SE798(2d case); 40GaA145, 148SE923(2dcase); 40 GaA91, 149SE59; 40GaA274, 149SE 324. [b] **Extraordinary motion for new trial** is especially within rule. 34GaA 174, 128SE589. [c] **Insufficient statements.**-35GaA349, 133SE350; GaA 134SE 178.

1230-67 160Ga830, 129SE102; 35GaA 349, 133SE350; 35GaA364, 133SE351; 36GaA664, 137SE853; 37GaA827, 142SE 306(1stcase).

1230-68 160Ga830, 129SE102; 35GaA 349, 133SE350; 35GaA364, 133SE351; 36GaA664, 137SE853; 37GaA827, 142SE 306(1stcase); 39GaA825, 148SE607(1st case).

1230-69 160Ga830, 129SE102; 35GaA 349, 133SE350; 35GaA364, 133SE351; 36GaA664, 137SE853; 37GaA827, 142SE 306(1stcase).

1230-70 35GaA364, 133SE351; 217Ky 801, 290SW702; 154Miss671, 122S766 (2dcase); Mo 23SW(2d)122; 100TexCr 626, 272SW167; 103TexCr268, 280SW 595; 103TexCr252, 280SW808.

1230-73 88CalA575, 263P862; 35GaA 364, 133SE351; 36GaA278, 136SE329; 199 Ind489, 158NE480 (diligence held not presumed; it must be proved); 212 Ky791, 280SW111; 217Ky801, 290SW 702; 220Ky311, 295SW153; 154Miss 671, 122S766(2dcase); Mo 29SW(2d) 144; 100TexCr626, 272SW167; 103Tex Cr252, 280SW808; TexCr 32SW(2d)465; Wash 292P1107.

1230-74 168Ga747, 149SE42 (affidavit held insufficient); 236Ky74, 32SW(2d) 552; Mo 23SW(2d)122; OklCr 286P 811. [a] (2) Other instances. TexCr 28 SW(2d)171. [d] **Diligence sufficiently shown.**-133SC85, 130SE340.

1231-75 36GaA673, 137SE798; 212Ky 791, 280SW111; 219Ky592, 293SW1057; 100Vt431, 138A733. [a] (3) Statement that new evidence was not known before trial and could not have been discovered. 39GaA672, 148SE287(1stcase).

1231-76 36GaA673, 137SE798; Mont 287P933 (not required to show inquiry of every person residing at place of offense).

1231-81 35GaA349, 133SE350; 210Ky 566, 276SW522; 215Ky220, 284SW993; 219Ky592, 293SW1057; 219Ky777, 294 SW480; 220Ky311, 295SW153; 223Ky 566, 4SW(2d)362.

1232-83 170Ga234, 152SE482; 35GaA 349, 133SE350; 36GaA217, 136SE92; 219Ky777, 294SW480.

1232-84 209Ky203, 272SW423.

1232-85 35GaA349, 133SE350; 36GaA 217, 136SE92; 219Ky592, 293SW1057; 219Ky777, 294SW480.

1232-90 35GaA349, 133SE350.

1232-91 170Ga234, 152SE482; 33GaA 602, 127SE793; 35GaA349, 133SE350; 36GaA217, 136SE92.

1232-93 33GaA602, 127SE793; 35GaA 349, 133SE350.

1232-95 CalA 288P873; 37GaA128, 139SE81; 209Ky203, 272SW423; 216 Ky849, 288SW740; 221Ky253, 298SW 683; 221Ky268, 298SW688; 160La47, 106S670; 151Miss51, 117S353; 157Miss 642, 128S772; 315Mo219, 285SW739; 36 OklCr148, 252P1106; 48SD409, 205 NW25; 101TexCr434, 276SW289; 103 TexCr377, 280SW791; 104TexCr302, 283SW836; 111TexCr342, 13SW(2d) 380.

1232-96 37GaA128, 139SE81; 101Tex Cr434, 276SW289.

1233-97 Mo 19SW(2d)628 (specifying time when witnesses were at scene of crime).

1233-97½-New. and state also that affiant will testify to such facts in case of new trial, 50SD29, 208NW166.

1233-3 34GaA174, 128SE589 (such affidavit not cause for new trial). See also 103TexCr578, 280SW1079.

1233-3½-New. A motion for a new trial on the ground that codefendants have admitted that their testimony on the trial was false and that the moving defendant was not guilty cannot be granted in the absence of affidavits of such codefendants. 48SD409, 205NW25.

1233-3¾-New. It is not error to deny a new trial on the ground that a witness for the prosecution admitted that his testimony was false where the affidavit of the retracting witness is not produced. 173Ark1172, 294SW397.

1233-7 See also 316Mo86, 289SW847.

1233-9½-New. Where affidavits were filed three weeks after the time allotted by law, they were held to be properly rejected. 197 Ind685, 150NE409.

1233-10 35GaA349, 133SE350.

1234-13 But see 150Miss787, 117S119.

1234-14½-New. Failure to serve counter affidavits within time prescribed after service of affidavits as to misconduct of jurors will not prevent consideration in absence of prejudice. SD 229NW 395.

1235-33 176Minn604, 224NW144; 100 TexCr501, 272SW191.

1235-34 146Miss718, 111S834; 100Tex Cr501, 272SW191. But see 168Ga470, 148SE139. [c] **Testimony of defendant's counsel** held to show no lack of diligence in not knowing of newly discovered evidence at time of trial. TexCr 26SW(2d) 651.

1235-37 TexCr 11SW(2d)172.

1235-44½-New. , or evidence that state's attorney made no retraction of the remark objected to, where it is conceded that the remark was not withdrawn. 166La836, 118S38.

1236-50 27F(2d) 502; 39F(2d)30; 22

AlaA329, 115S420; 33Ariz354, 264P1083 (notwithstanding statute); Ark 30 SW(2d)838; 195Cal 584, 234P374 (except where verdict is reached by resort to chance); 81Colo 113, 253P827; 83 Colo 162, 262P1009; 197 Ind16, 148NE 420; 197 Ind685, 150NE409; 197 Ind 16, 164NE93; 206 Iowa615, 220NW59; 125Kan142, 145, 263P1052 [citCJ]; 214 Ky544, 283SW385; 229Ky153, 16SW(2d) 509(2dcase); 160La193, 106S780; 163 La98, 111S612; 171Minn503, 214NW 474; 175Minn174, 220NW547; 154Miss 489, 122S533; 320Mo 228, 7SW(2d)259; Mo 23SW(2d)22; 77Mont62, 249P573; Mont 292P250; 36 OklCr148, 252P 1106; OklCr. 275P351; 298Pa363, 148 A508; 50SD32, 208NW164; 101TexCr 144, 274SW577; 109TexCr609, 5SW(2d) 982; TexCr 32SW(2d)472; 196Wis446, 220NW190. See also 88Fla135, 101S273. [a] (1) 33Ariz354, 264P1083. (2) Other reasons. 77Mont62, 249P573.

1237-51 130Kan762, 288P736; 163La 98, 111S612; 36 OklCr148, 252P1106; 136Wash495, 240P674. See also 88Fla 135, 101S273.

1237-51½-New. , except under statutes in some jurisdictions in cases where a verdict is arrived at by means other than a fair expression of opinion by the jurors. 77Mont62, 249P573.

1237-53 176Ark1203, 4SW(2d)4; 36 OklCr148, 252P1106.

1237-56 36 OklCr148, 252P1106.

1237-57 TexCr 21SW(2d)527. [a] **Jurors may not impeach verdict** by affidavits that they did not understand or were misled by charge. 138SC167, 136 SE222.

1237-58½-New. , or that juror did not intend to convict defendant on certain counts. 130Kan474, 287P261.

1237-59 101TexCr144, 274SW577. [a] **That juror was influenced by anything except law and testimony** may not be shown by affidavit or testimony. OklCr 275P351.

1237-60½-New. that verdict was result of chance. Mo 23SW(2d)22.

1237-62 206Cal 235, 273P789; 125Kan 142, 145, 263P1052 [citCJ]; Mich 233 NW192 (2dcase); 171Minn503, 214NW 474; 36 OklCr148, 252P1106; 196Wis 446, 220NW190. [d] **That jury returning first degree murder verdict were unable to obtain information** concerning punishment for second degree. 298Pa 363, 148A508.

1237-63 130Kan762, 288P736; 171Minn 503, 214NW474.

1237-65 33Colo 162, 262P1009; 89 IndA 293, 166NE292.

1237-66 178Minn564, 227NW893; 118 Nebr267, 224NW274.

1238-74 171Minn503, 214NW474. [b] **That juror, who believed defendant not guilty,** consented to verdict of guilty in order to go to his home for medical treatment cannot be shown by such juror. 118Kan628, 236P824.

1238-81 120Kan376, 244P225.

1238-83½-New. It cannot be shown that jurors in arriving at their verdict acted upon a misapprehension of the law believing that the court had discretion in fixing the punishment at life imprisonment in case of a verdict of murder in the first degree. 195Cal 584, 234P374.

1238-83½-New. A juror is not competent to impeach the verdict by affidavit or testimony that the verdict was rendered because the jurors believed that the judges had power to suspend the sentence. 36 OklCr148, 252P1106.

1238-84 Fla 126S158(2dcase); 36 Okl Cr148, 252P1106.

1239-87 120Kan376, 244P225.

1239-88 120Kan376, 244P225.

1239-92 97CalA253, 275P518.

1239-96 But see 22AlaA154, 113S602.

1239-99 39F(2d)30; 23AlaA281, 124S 392(2dcase); AlaA 130S527; 102CalA 688, 283P388; 41GaA478, 153SE374; 46 Ida561, 270P417; 89 IndA293, 166NE 292; 205 Iowa373, 217NW871 (matter inhering in verdict); Iowa 231NW450; 214Ky544, 283SW385; 234Ky302, 28 SW(2d)19; OklCr 287P765; OklCr 275P351; 122 Or504, 259P917; 100Tex Cr295, 273SW582; 39Wyo 157, 270P415. [c] **Rule applies to erroneous judgment of jurors based on proper evidence,** but not to improper reception of evidence of jury to prejudice of accused. 101Tex Cr639, 276SW929. [d] **Objection is not waived by failure of prosecuting attorney to obtain ruling thereon after denial** of new trial. 46 Ida561, 270P417.

1239-99½-New. Verdict may not be impeached by affidavits as to matters which necessarily inhere in the verdict. 204 Iowa828, 216NW31.

1239-2 180Ark627, 22SW(2d)395(2d case).

1240-5 100TexCr295, 273SW582 (statutory modification of rule). See also 22 AlaA154, 113S602.

1240-6 Fla 126S158(2dcase).

1240-8 202Cal 81, 259P332.

1240-10 36 OklCr148, 252P1106.

1240-12 250Mich679, 231NW63.

1240-14 46 Ida561, 270P417; 214Ky 544, 283SW385.

1240-15 See also 104TexCr168, 283SW 173.

1240-16 See also 104TexCr168, 283SW 173.

1240-18 88Fla135, 101S273; Fla 126 S158(2dcase); 245NYS245.

1241-19 See also 33GaA818, 128SE224.

1241-21 But see 88Fla135, 101S273.

1241-23½-New. Affidavits of jurors are incompetent to show that they were not influenced by instructions given to them in the absence of defendant after they had retired. 172Ark983, 291SW85.

1241-24 199Cal 361, 249P186; CalA 285P1073; 83Colo 400, 265P909; 89IndA 293, 166NE292; 129Kan207, 282P723; 178Minn564, 227NW893; 34NM22, 276 P291; OklCr 290P931; 154Wash409, 282P907; Wash 290P989; WVa 144 SE7. [a] **Defendant's affidavit** as to statements made by one juror to another in jury room is necessarily hearsay. 101 TexCr94, 274SW136.

1241-25 [b] **Ex parte affidavit** contradictory to testimony of witness in open court is not treated as worthy of belief. 7F(2d)247.

1241-26 160Tenn681, 28SW(2d)338.

1241-27 152Va955, 146SE281.

1241-29 [c] Rule that courts are not required to believe unreasonable story, even though not contradicted, merely because sworn to by a witness, applies with equal if not greater force to a statement in ex parte affidavits filed in support of motion for new trial. 119Kan 469, 239P996.

1241-29½-New. So, an affidavit of a person other than defendant in support of a motion, although undisputed, need not be accepted by the trial judge as true. 255Mass369, 151NE839.

1242-31 111TexCr81, 11SW(2d)321; 111TexCr281, 12SW(2d)581.

1242-34 170Ga234, 152SE482 (evidence that absence was prevented by prosecution held insufficient); TexCr 11SW(2d) 59(2dcase).

1242-34½-New. propriety of granting new trial because of absence of witnesses. 119Kan490, 239P1109.

1242-35 21AlaA216, 106S894; 257Mass 391, 153NE881; Mont 287P933 (exercise of reasonable diligence shown); 111 TexCr275, 12SW(2d)579. [b] 21AlaA 216, 106S894; 36GaA602, 137SE573; 39 GaA29, 145SE901(2dcase); 326 Ill 540, 158NE222; 119Kan469, 239P996; 215 Ky220, 284SW993; 257Mass391, 153NE 881; 53SD22, 219NW882.

1242-37½-New. false testimony of state's witnesses. Wyo 283P151.

1242-38 313Mo 615, 285SW392; 67 Utah325, 247P497.

1242-39 Mich 233NW192(2dcase); Minn 231NW225.

1242-41 [a] **Evidence insufficient to show that epileptic defendant was not mentally present during trial.** Wash 286P69.

1242-47 OklCr 279P964 (permitting separation).

1242-47½-New. communication of trial court to the jury, 103TexCr242, 280SW 819.

1242-48 176Minn604, 224NW144.

1242-48½-New. hostile demonstrations of audience, 202 Iowa1067, 208NW360.

1242-49½-New. Credibility of affiants and weight of their statements is for the trial judge. 255Mass369, 151NE839.

1242-49⅓-New. Affidavit held insufficient to prove loss of exception. 100Vt, 431, 138A733.

1242-49¼-New. Where there is serious doubt as to whether injury to defendant has resulted, a new trial should be granted. 109TexCr88, 3SW(2d)455.

1242-49½-New. Where there is evidence that the testimony of both parties, on motion for new trial, was collusive, the trial court has been held not to have abused its discretion in refusing motion. TexCr 17SW(2d)1068.

1242-49½-New. Erroneous admission of prejudicial evidence subsequently excluded should be seriously considered on motion for new trial. 23AlaA359, 125 S688.

1242-49½-New. Newly discovered evidence held sufficiently material to entitle defendant to a new trial. TexCr 22SW(2d)937(2dcase).

1242-49⅔-New. Evidence held to show that no abuse resulted from jury's separation for night. 23AlaA565, 129S297.

1242-49⅔-New. Defendant must satisfy court that he neither knew nor by diligence could have secured new testimony at former trial. TexCr 28SW(2d) 546(2dcase).

1242-50 90Fla844, 107S530; 214Ky 544, 283SW385; 33PortoRico 48; 159 Tenn667, 21SW(2d)390. [d] **Disqualification based on heat displayed by jurors in jury room** held not sufficiently shown. 214Ky544, 283SW385. [e] **Refusal of new trial on ground of juror's alleged misconduct** in concealing acquaintance with accused and family on his voir dire held not abuse of discretion. 214Ky544, 283SW385. [f] **Disqualification held not sufficiently shown.** -166La43, 116S588.

1242-51 165Ga210, 140SE625; 224Ky 370, 6SW(2d)483.

1242-53 210Ky637, 276SW524.

1243-56 162Ga78, 132SE632; 168Ga 338, 147SE386(1stcase); 168Ga611, 148 SE531.

1243-58 [b] 165Ga210, 140SE625; 168 Ga611, 148SE531; 170Ga234, 152SE482; 40GaA615, 150SE869(3dcase); 203 Iowa 929, 210NW465; 114Nebr404, 207NW 928.

1243-59 [a] 101TexCr114, 274SW981. [b] 40GaA736, 151SE405; 203 Iowa929, 210NW465; 114Nebr404, 207NW928; 103TexCr318, 280SW202; 112TexCr355, 15SW(2d)643; 113TexCr659, 23SW(2d) 356.

1243-62 255Mass369, 151NE839; Tex Cr 21SW(2d)527; TexCr 31SW(2d)641; TexCr 32SW(2d)476.

1243-63 170Ga234, 152SE482; Iowa 228NW266; 114Nebr404, 207NW928; 104TexCr95, 282SW595; 104TexCr168, 283SW173; 105TexCr318, 287SW249, 287SW1099. [a] 208 Iowa1143, 226 NW16.

1243-64 79CalA207, 249P18.

1243-65 Mont 292P250. [a] (1) 111 TexCr35, 10SW(2d)1006. (2) In general. 176Ark1049, 5SW(2d)293. [b] 214Ky787, 283SW1063; 255Mass369, 151NE839; 50SD530, 210NW722; 105 TexCr233, 288SW454; 108TexCr92, 299 SW249; 112TexCr293, 16SW(2d)246; 112TexCr444, 17SW(2d)56(1stcase); 113TexCr112, 18SW(2d)643.

1243-65½-New. sleeping of juror during taking of testimony, 68Utah551, 251 P362.

1243-68 [b] 105TexCr318, 287SW249, 287SW1099; 111TexCr359, 13SW(2d) 93(1stcase).

1243-69 [b] 79CalA207, 249P18; 202 Iowa534, 210NW542; 100TexCr464, 273 SW604; 104TexCr495, 283SW497; Tex Cr 27SW(2d)236; 39Wyo 157, 270P415. [c] **Affidavit of juror that he was influenced by remark of another juror,** made from personal knowledge, held insufficient. 142Wash7, 252P108.

1243-72 [a] Mo 23SW(2d)22.

1244-76 [b] 180Ark627, 22SW(2d)395 (2dcase). [c] **Statements of jury as to their own misconduct** will be given little weight. 105TexCr233, 288SW454.

1244-78 104TexCr95, 282SW595; 142 Wash7, 252P108.

1244-81 223Ky665, 4SW(2d)685.

1244-83 Mo 271SW525.

1244-88 [a] **Hearing in banc.**-294Pa 144, 143A904.

1244-89 150Miss787, 117S119; 133SC 294, 130SE888 (refusal to consider affidavits error); TexCr 24SW(2d)840.

1244-90 106TexCr550, 293SW575.

1244-91½-New. Statement that burden of proof is upon movants to show truth of material allegations set forth in motion is not confusing when followed by statement that important factor was credibility of witnesses. 259Mass128, 156NE57.

1244-91⅓-New. The trial judge hearing motion for a new trial may rely on his own knowledge of what took place at the trial. 259Mass128, 156NE57.

1244-91¼-New. The trial judge on hearing is not bound by an agreement of counsel on occurrences at the trial which conflicts with his own knowledge. 259Mass128, 156NE57.

1244-91½-New. Statement that the court must find that defendants established by a fair preponderance of evidence the truthfulness of a third person's confession offered as newly discovered evidence is not error where it is shown that the court did not regard the truthfulness of the confession as decisive. 259Mass128, 156NE57.

1245-92 Mich 233NW192(2dcase). [a] In Minnesota.-174Minn194, 218NW887.

1245-93 127Misc502, 217NYS60; TexCr 27SW(2d)231.

1245-97 But see Iowa 226NW925.

1245-3½-New. After imposition of sentence. Where defendant's motion for a new trial made before sentence was then denied, the court has jurisdiction to reconsider and determine the motion after imposing sentence, although an appeal has already been taken, where the same term has not expired and actual service of the sentence has not been begun. 127Misc502, 217NYS60.

1245-5 [b] **Circumstances not calling for continuance.**-158La755, 104S705.

1245-8 22AlaA214, 114S279; 285Pa49, 131A657; 193Wis204, 212NW635.

1245-9 120Kan221, 243P280; 285Pa49, 131A657; 193Wis204, 212NW635.

1245-10 285Pa49, 131A657; 101TexCr 12, 274SW599.

1245-11 120Kan221, 243P280.

1245-11½-New. Refusal to continue a motion for a new trial on an oral application to permit securing of affidavits is not an abuse of discretion where neither the names of the proposed affiants nor the substance of the proposed affidavits is disclosed and no grounds for belief that they can be obtained are shown. 87CalA208, 261P1072.

1246-15 100TexCr537, 272SW144; 106 TexCr361, 293SW1108. [a] **Refusal to grant continuance** should be considered on hearing for new trial. TexCr 26SW (2d)639.

1246-16 325 Ill 337, 156NE378.

1246-16½-New. A question which might be raised by exceptions is not open on motion for a new trial. 255 Mass317, 151NE300.

1246-21 But see 168Ga470, 148SE139.

1246-22½-New. Accused has a right to cross-examine a witness examined orally against him. 135Wash482, 238P11.

1246-22⅓-New. Witnesses should not be examined orally without giving notice to the accused. 135Wash482, 238 P11.

1246-22¼-New. Question asked a juror as to matters considered by the jury outside of the court's charge and testimony has been held not reversible error as leading and not germane. 105 TexCr497, 288SW1072.

1246-26 Mo 30SW(2d)750; 160Tenn 681, 28SW(2d)338 [citCJ].

1247-32 See also 81CalA484, 254P292.

1247-40 120Kan221, 243P280 (where defendant refused to argue motion).

1247-41 [b] **Affidavits held to show** guilt conclusively. 145Wash634, 261P 391.

1247-45 161Ga332, 131SE80; 257Mass 391, 153NE881; 167Minn348, 209NW30; 24 OhA212, 157NE400; 85PaSuper320. [b] **Finding of court** for impartiality of juror is final in absence of abuse. 41 GaA375, 153SE201(1stcase).

1247-45½-New. Defendant has an absolute right to have all the grounds of his motion passed upon. 76Mont421, 246P959.

1247-46 167Minn348, 209NW30.

1247-47 But see 113TexCr684, 21SW (2d)1041.

1247-47½-New. Such a motion should be scrutinized with care in order to prevent fraud and imposition on court. 119Kan469, 239P996.

1247-48½-New. The court may accept the truth of affidavits of the prosecuting attorney as against those presented by defendant's attorney as to his excuse for absence from the trial. 213Ky524, 281SW508.

1247-48⅓-New. A motion is properly dismissed where depositions in support thereof are vague and insufficient. 85 PaSuper320.

1247-48¼-New. A statement of the trial judge that the jury had convicted and the court would not disturb the verdict held not disapproval of verdict. 155Tenn266, 292SW451.

1247-48⅕-New. After pronouncing sentence a new trial may be granted if, on hearing of motion, the court is satisfied that defendant has been prejudiced. 24 OhA212, 157NE400.

1247-48⅙-New. Denial of motion on the ground of misconduct of a juror carries with it also denial of a supplemental motion on the same ground. 255 Mass369, 151NE839.

1247-48⅐-New. State of facts and logical expectation of verdict must be considered. 100Vt476, 138A741.

1247-48⅛-New. Writing of judge ruling on motion for new trial has been held a decision and ruling of the court, although termed a "memorandum." Mass 165NE2.

1247-48⅑-New. Overruling motion amounted to implied finding that testimony was not newly discovered. TexCr 28SW(2d)546(2dcase).

1247-50 112TexCr612, 18SW(2d)625. But see 100TexCr223, 272SW458; 113 TexCr578, 24SW(2d)841.

1248-52½-New. Probable truth of the facts in an affidavit of an absent witness is not for the court's decision. 106 TexCr458, 293SW172; 109TexCr458, 5 SW(2d)150; 109TexCr455, 5SW(2d)152.

1248-52⅓-New. The court cannot pass on the truthfulness of an affidavit of an absent witness attached to a motion for a new trial, since the court, under such circumstances, is not the judge of its probable truth. 110TexCr142, 7 SW(2d)1076.

1248-55⅓-New. Whether jury during deliberation received prejudicial information outside of evidence is question of fact. 130Kan474, 287P261.

1248-55⅕-New. Finding that defendant was not prejudiced because juror, related to prosecutrix, served is conclusion of law, not fact finding. NC 155SE609.

1248-58 337 Ill 643, 169NE772; 170La 1050, 129S633.

1248-59 167Minn348, 209NW30. [a] **Question of fact** on conflicting affidavits is for court. 167Minn348, 209NW30.

1248-60 TexCr 28SW(2d)546(2dcase).

1248-66 But see 133SC294, 130SE888.

1248-66½-New. Statement in denial of motion for a new trial for newly discovered evidence as to criminal responsibility that defendant was not insane was held a sufficient reason for denial of motion. 257Mass391, 153NE881.

1248-67 [a] **Trial court is not bound to give full faith and credit** to verdict of jury which is not supported by direct evidence. 99CalA32, 277P1102. [b] **Where claim of insufficiency of evidence is based on capacity of complaining witness,** no objection having been made to competency of witness, neither jury nor judge has been held precluded from considering testimony in light of surrounding circumstances, and judge must, on motion for new trial, consider manner in which questionable witness testified. 99CalA32, 277P1102 (capacity unchallenged in season).

1249-70½-New. Where a judge in vacation had no jurisdiction to pass on a motion, his action in overruling the motion is a nullity, and the motion is not passed on. Iowa 226NW925.

1249-72 But see 176Minn86, 222NW 575.

1249-72½-New. Where all of evidence is not equally applicable to defendants jointly indicted, it is not error as matter of law to sustain motion for new trial as to one and overrule it as to another. 114 Oh299, 151NE182.

1249-72⅓-New. On a motion by one of several codefendants for a new trial the merits of movant's claim should be determined solely by the record as affecting him and not by consideration and comparison with any codefendant. 163 Ga878, 137SE378.

1249-74 [a] See also 34GaA148, 128SE 685.

1249-75½-New. Where pending motion for new trial and before it is heard defendant escaped and has not been recaptured, it is not error to refuse to hear motion and to dismiss it. 162Ga42, 132 SE417.

1249-76 But see 32Ariz203, 256P1055.

1249-77 167La1048, 120S772; 255Mass 369, 151NE839.

1249-81½-New. Order granting new trial at term subsequent to that permitted by statute is void and ineffective. 222Ky840, 2SW(2d)1044.

1249-81⅓-New. Surplusage in order may be disregarded. 148Miss702, 114S 883.

1249-95½-New. but not where charges are embodied in independent counts upon which separate verdicts were rendered and new trial is granted only on one count. 71CalA490, 235P460.

1250-6 80CalA528, 251P941.

1250-15 [a] But see Ont [1928] 4Dom LR831.

1251-2 [a] In Missouri.-2SW(2d)712.

1251-3 316Mo 150, 289SW822; Mo 25 SW(2d)101(2dcase); Mo 29SW(2d)113; Mo 300SW501. [a] **Statute abolishing remedy.**-Mo 289SW831.

1251-4 194NC620, 140SE434.

1251-5 5F(2d)129; 8F(2d)266; 19F (2d)62, 63 [citCJ]; 21AlaA310, 107S 789; 73CalA372, 238P758 (misconduct of district attorney); Fla 124S827; 164 La102, 113S781; 165La47, 115S363; 165 La822, 116S199; 167La880, 120S583(2d case); 169La559, 125S617; 126Me384, 138A625; Me 151A427; 148Miss 560, 114S340; 196NC771, 147SE305; 104 NJL291, 140A287; 7PaDist&Co 707; 13 PaDist&Co 115; 92PaSuper53; 101WVa 579, 133SE329.

1251-6 19F(2d)62, 63 [citCJ]; 21AlaA 310, 107S789.

1251-7 21AlaA310, 107S789; 73CalA 372, 238P758; 160La503, 107S386; 148 Miss560, 114S340; Mo 289SW565.

1251-8 21AlaA310, 107S789; 89 IndA 27, 165NE558(2dcase).

1251-9 148Miss560, 114S340.

1251-11 73CalA372, 238P758 (information). [b] **Record consists of indictment, plea and issue, and verdict.**-92Pa Super53. Sufficiency of information raised by motion in arrest was considered, though not challenged in brief, 307Mo 500, 271SW55.

1251-23½-New. Where a witness on whose affidavit of newly discovered evidence a new trial is granted is dead, his affidavit cannot be used on the new trial. 162Ga78, 132SE632.

1252-14 206 Iowa981, 221NW445. [c] **Statute stating that grounds must be read with statute prohibiting conviction of higher offense.**-231Ky505, 21SW (2d)828.

1252-15 169Ark340, 275SW663; 196 Ind 704, 149NE432; 198 Ind253, 151NE697; 27 OhA59, 160NE718.

1252-16 169Ark340, 275SW663; 77CalA 780, 246P461; 196 Ind704, 149NE432; 198 Ind693, 154NE671.

1252-17 31F(2d)19; CalA 291P434.

1253-22 Fla 129S827.

1253-25 13PaDist&Co115.

1253-26 13PaDist&Co 115.

1253-31 22AlaA644, 119S248; 196 Ind 704, 149NE432; 207 Iowa319, 222NW 866; 81Mont19, 261P876; 67Utah325, 247P497.

1253-37 Ind 173NE453; 159La777, 106 S301. [c] **Allowing defendant to file motion to quash does not operate as withdrawal of plea of not guilty** so as to make subsequent trial without issue

joined as ground for arrest of judgment. 158La1081, 105S71.

1253-39 126Me384, 138A625.

1254-50 35F(2d)633; 148Miss560, 114S340.

1254-60 43F(2d)1007.

1255-65 73CalA372, 238P758 (misconduct of district attorney); 165LaS42, 116S206. But see La 130S865.

1255-70 5F(2d)129; 164La102, 113S781; 92PaSuper53; 11PaDist&Co 552, 553 [citCJ]; 14PaDist&Co 161.

1255-72 154Md694, 139A825; 127Me521, 145A11.

1255-74 19F(2d)62; 158La300, 103S821; 165La47, 115S363; 93PaSuper193; 7PaDist&Co 118; 9PaDist&Co 754. But see Wash 288P918.

1255-76 19F(2d)62.

1255-77 92PaSuper53; 6PaDist&Co 217; 11PaDist&Co 552, 553 [citCJ].

1255-79 164La102, 113S781.

1256-84 159La562, 105S621.

1256-85 97Fla1059, 122S704; 159La 562, 105S621.

1256-93 92Fla483, 109S417; 92Fla262, 109S463; 97Fla650, 122S110; Fla 124 S827; Fla 126S760; 54ND871, 211NW813; 54ND878, 211NW816. But see 19 F(2d)202. [c] **Motion not favored.**–92 Fla262, 109S463. [d] **Where defendant has not attacked indictment till after second conviction** and till statute of limitations has prevented reindictment, motion in arrest of judgment on ground of insufficiency of indictment to charge offense should be sustained only where court is free from any doubt. 29F(2d) 204.

1256-94 12F(2d)765; 16F(2d)451; 20 F(2d)752; 31F(2d)19; 92Fla262, 109S 463; 92Fla846, 110S527; 97Fla650, 122 S110; 35GaA667, 134SE193; 40GaA617, 150SE917(2dcase); 197 Ind680, 151NE 827; Ind 172NE902; NC 154SE402; 54 ND768, 210NW971; 13PortoRicoFed65.

1256-95 16F(2d)451; 19F(2d)202; CalA 288P880; 71CalA2, 234P438; 88 CalA609, 264P318; 92Fla262, 109S463; 36GaA268, 136SE821; 197 Ind680, 151 NE827; 209Ky15, 272SW24; 159La840, 106S324; 151Md438, 135A161; 54ND 871, 211NW813; 54ND878, 211NW816; 13PortoRicoFed65; 13PortoRicoFed 117; 101TexCr471, 276SW236. [a] (6) Error in indorsement of date of filing of indictment is not ground for motion to quash. 13PortoRicoFed65.

1257-96 197 Ind680, 151NE827.

1257-97 94Fla268, 113S707.

1257-98 See also 33NM370, 266P922. Contra 107TexCr474, 296SW894.

1257-98½-New. Objection to sufficiency of affidavit to information is properly presented by motion in arrest. 251 IllA 425.

1257-99 [a] (3) Uncertainty in affidavit can only be questioned by motion to quash, in view of Burns' St. Annot. (1926) § 2326. 198 Ind693, 154NE671.

1257-1 77CalA780, 246P461; 89Fla494, 104S783; 91Fla938, 109S91; 92Fla483, 109S417; 94Fla1175, 115S510; 37GaA 819, 142SE464; 318 Ill 293, 149NE241; 196 Ind704, 149NE432; Ind 168NE481; 210Ky465, 276SW135; Me 151A427; 191NC700, 132SE795; 55ND120, 212NW 832; 135Wash621, 238P635. [d] **Only ground in Kentucky** for arrest of judgment is that facts in indictment do not constitute public offense. 217Ky8, 288 SW1059. [e] **Motion in arrest for informal or imperfect allegations** should not prevail unless indictment fails to allege crime. Fla 126S760.

1257-2 196 Ind704, 149NE432; 199 Ind 630, 158NE593.

1258-3 34F(2d)399; 92Fla262, 109S 463; 92Fla980, 111S124, 53ALR250; Fla 126S760; 197 Ind680, 151NE827; 198 Ind718, 153NE765, 768 [citCJ]; 121 Kan549, 247P639; 123Kan200, 268P98; 53ND429, 206NW786; 54ND871, 211 NW813; TexCr 22SW(2d)309; TexCr 25SW(2d)332.

1258-5 181Ark492, 26SW(2d)900(1st case); 199 Ind630, 158NE593. See 17 F(2d)462.

1258-6 92Fla262, 109S463; 35GaA667, 134SE193.

1258-8 77CalA780, 246P461; 135Wash 621, 238P635.

1258-9 47 Ida246, 273P940 (ambiguity and uncertainty); 47 Ida281, 274P108.

1258-9½-New. , or moved to quash, 92 Fla483, 109S417.

1258-10 105WVa480, 143SE151, 152 [citCJ].

1258-16 16F(2d)451; 19F(2d)202; 54 ND878, 211NW816.

1259-20 16F(2d)451; 24F(2d)796; 47 Ida416, 275P1112; 124Me359, 129A226; 54ND878, 211NW816; 100TexCr626, 272SW167.

1259-22½-New. Where indictment defectively charges defendant with both crime of principal and accessary, a motion in arrest is not available to defendant who has been convicted as accessary and who raised no such question before verdict. 32NM319, 255P396.

1259-22¼-New. An objection of misjoinder of counts in an indictment cannot first be raised by motion in arrest. 34NM454, 283P906.

1259-31 197 Ind680, 151NE827.

1259-32 251 IllA425 (rule applicable to informations). But see 197 Ind680, 151 NE827.

1259-34½-New. but the fact that the crime was committed a time before the indictment, short of the limitation period, is no ground for arrest. 6F(2d) 522. [a] **In prosecution for maintaining liquor nuisance** fact that defendant severed connection with premises before filing of information short of limitation period is not ground for arrest of judgment. 6F(2d)522.

1260-41 197 Ind680, 151NE827.

1260-50 167La703, 120S57(2dcase); TexCr 25SW(2d)332.

1260-52 9PaDist&Co 754.

1260-56 108TexCr66, 299SW241. See also 329 Ill 576, 161NE83.

1261-57 31F(2d)245.

1261-72 217Ky8, 288SW1059; 108Tex Cr647, 28W(2d)271.

1261-76 94Fla60, 113S736; 39GaA575, 147SE775(2dcase).

1262-78 13F(2d)975; 19F(2d)62.

1262-80 92PaSuper53.

1262-81 92PaSuper53.

1262-84½-New. Where no objection to the manner of polling the jury was urged at the time, nor was any evidence offered on motion for a new trial to overcome the presumption of its legality, a complaint that the jury were not polled in the manner provided by statute is not reviewable under defendant's motion in arrest of judgment. 167La 982, 120S619.

1262-91 318 Ill 188, 149NE269.

1262-1 [a] **Where defendants specifically convicted on one count,** motion on other counts is unavailing. NC 154SE 604.

1263-6 161Ga492, 131SE503.

1263-10 But see 191NC700, 132SE795. [b] **Verification.**–101TexCr333, 275SW 831.

1263-20 31F(2d)245; 98CalA552, 277 P201; 94Fla60, 113S736; Fla 124S827; 47 Ida246, 273P940; Mo 256SW743; MoA 278SW1073; 100Vt259, 136A835. [a] **Motion in arrest of judgment after judgment** raises no question for review. 100Vt259, 136A835.

1263-22 Mo 289SW569.

1263-24 See also Mo 289SW804. [a] (2) Although court had denied motion in arrest made before sentence, it may reconsider and determine same after it imposes sentence, though appeal has been taken, where done in same term and before sentence is actually begun to be served. 127Misc502, 217NYS60.

1263-25 [b] **In Maine.**–Me 151A542.

1264-33 Mo 289SW565.

1264-41½-New. A motion, based on newly discovered evidence, without disclosing the character of the evidence or the name of the witnesses, not supported by the witnesses' affidavits or accounting for their absence, is insufficient. Mo 289SW565.

1264-42 14PaDist&Co 161.

1264-48½-New. If motion in arrest is for insufficiency of information, only question raised is whether information charges any offense under the law. 217 MoA396, 266SW738.

1264-48¼-New. A question which might be raised by exceptions at trial is not open on motion in arrest of judgment. 255Mass317, 151NE300.

1264-48¼-New. Motion in arrest of judgment is addressed to the sound discretion of the trial judge. 260Mass303, 157NE354.

1264-48⅛-New. Whether gambling with chips constitutes a banking game within the meaning of the statute is not a matter that can be settled under a motion in arrest of judgment. 168La 807, 123S332(2dcase).

1265-72 164La329, 113S865.

1266-1 [a] (5) 169Ark410, 275SW737. (6) Judgment formally pronounced by court or judge after conviction awarding punishment. 22AlaA534, 117S603. (7) Judgment is court's determination or sentence of law. 109Conn239, 146A 290.

1266-6 97PaSuper202.

1266-8 84Colo 166, 268P536; 109Conn 239, 146A290.

1266-10 TexCr 27SW(2d)186(1stcase).

1266-13 104WVa231, 139SE742. [a] **Other definitions.**–128Me523, 149A153 (2dcase); 135Misc809, 240NYS91.

1267-17 224AppDiv3, 229NYS492; 24 OhA208, 156NE924, 925 [quotCJ].

1267-19 24 OhA208, 156NE924, 925 [quotCJ].

1267-21½-New. Upon return of verdict of acquittal the right in the accused person to an acquittal becomes absolute and the court must receive and act upon it. 142Miss256, 107S200.

1267-21¼-New. It is the duty of the judge from such verdict returned into court and directed filed by it to enter a discharge of defendant. 142Miss256, 107S200.

1267-22 22AlaA167, 113S485; 23AlaA 318, 127S497; 95Fla775, 116S618; 191 NC378, 131SE743; 55ND313, 213NW 484; 109TexCr24, 28W(2d)461; 111Tex Cr639, 13SW(2d)702(2dcase). [a] **Jury's verdict is made effective only by judgment** of court adopting findings. Fla 129S106(2dcase).

1267-26 But see 191NC378, 131SE743.

1267-27½-New. Judgment of court cannot be created by waiver where no such judgment exists. 157SC332, 154 SE225.

1267-27⅓-New. Sealed sentence is not judgment of court until opened and read to defendant. 157SC332, 154SE225.

1267-31½-New. Under statute judges, magistrates, and mayors of municipalities not having police courts, have no power to sentence females over sixteen years of age to imprisonment in county jail or workhouse except for periods of less than thirty days or remand in default of fine and costs or both, and a sentence that will confine for longer period is unlawful and void. 24 OhNP NS120.

1267-32½-New. Statement of circumstances and information, relating to the crime and defendant, is required in some states to be filed by the judge. 52ND 52, 203NW676.

1268-37 85PaSuper396; 109TexCr616, 6SW(2d)364. [a] **Where crime was committed in another county,** it is error to impose sentence. 85PaSuper396 (adultery).

1268-38 117Nebr692, 222NW47.

1268-45½-New. Court sitting in special sessions and not as magistrate is not precluded from imposing workhouse sentence. 126Misc612, 214NYS447.

1268-45⅓-New. Waiver. Defendant invoking jurisdiction of court in motion for leave to change plea cannot question jurisdiction of the court to pass judgment upon him on plea of guilty. 54 ND871, 211NW813.

1268-45¼-New. Loss of jurisdiction. Judge does not lose jurisdiction by ordering defendant to appear before another judge for sentence, who is disqualified for prejudice, but retains jurisdiction to pass sentence when defendant is returned by sheriff. 54ND 871, 211NW813; 54ND878, 211NW816.

1269-50 54ND871, 211NW813; 54ND 878, 211NW816.

1269-50½-New. Where a superior court, during regular session, recessed at noon until the following morning, the receiving of a plea of guilty and

sentencing defendant during the afternoon in chambers in the courthouse where court officials are present is not illegal. 35GaA665, 134SE332.

1269–51 206Cal307, 274P523.

1269–52 13F(2d)530; 216AppDiv223, 215NYS116. [e] **In New York.**–216App Div223, 215NYS116 (where case is remanded for investigation before sentence).

1269–53 **Mich** 233NW192(2dcase).

1269–56½–New. Under some statutes, the warden of the penitentiary and the board of charities fix certain indeterminate sentences. 51SD540, 215NW697.

1269–60½–New. A statute requiring a sentence imposing the death penalty to be signed by all members of the court has been construed to mean all members of the court at the time the case is heard and decided. 50Philippine735.

1270–73 See also 124Kan627, 261P844.

1270–75 35F(2d)863 (after plea of guilty, refusal to permit filing of affidavit showing unlawful search held not error); 54ND871, 211NW813; 103WVa 44, 136SE865, 867 [quotCJ] (dictum). See also 142Miss256, 107S200, 207 [cit CJ].

1270–76 272US451, 47SCt127, 71Led 347; 103WVa44, 136SE865, 867 [quot CJ].

1271–77 41F(2d)519; **Mo** 280SW1038; 54ND871, 211NW813; 112TexCr334, 16 SW(2d)828(2dcase); 103WVa44, 136SE 865, 867 [quotCJ]. See also 142 Miss 256, 107S200, 207 [citCJ].

1271–78 103WVa44, 136SE865, 867 [quotCJ].

1271–82 97CalA60, 275P838(1stcase). [c] **Jury cannot be impaneled to hear evidence** and fix time of punishment unless otherwise expressly provided by statute in some jurisdictions. 155Tenn 181, 290SW969.

1271–82½–New. A judgment cannot be rendered on a plea of guilty made for defendant by his counsel where the statute requires such plea to be made by defendant personally in open court. 70 CalA334, 233P390.

1271–82⅓–New. Privilege of having witness examined after plea of guilty held waived where neither defendant nor state asked for examination. 326 Ill 266, 157NE218 (waiver by minor defendant).

1271–82¼–New. Judgment entered on plea of guilty is not "judgment nil dicit." 100Vt214, 136A387.

1271–82⅕–New. A court is not confined to the imposition of a small fine in sentencing one who is permitted to enter a plea of nolo contendere. 197Wis446, 222NW311.

1271–82⅙–New. It is the duty of the court to appoint a time for pronouncing judgment. **OklCr** 283P581.

1271–84½–New. Written jury waiver is not essential to warrant judgment on a plea of guilty. 233 IllA608.

1271–86 201 Iowa940, 208NW351; 112 Oh667, 148NE362 (recommendation to mercy); 109TexCr101, 3SW(2d)90.

1271–89 112 Oh667, 148NE362 (where plea of not guilty is withdrawn and plea of guilty substituted after all evidence is in, court is not obliged to rehear evidence in order to determine whether mercy should be extended).

1271–92 [a] **Extrajudicial confessions are admissible** to determine degree after plea of guilty. **CalA** 287P533.

1271–92½–New. A judgment entry of murder in the first degree on supported findings, after a plea of guilty to an information charging, among other necessary averments, a willful, deliberate, and premeditated killing without any averment that the killing was perpetrated in the commission of a burglary will not be invalidated by an unnecessary finding that the parties at the time of the killing were engaged in burglarizing an office building, an offense technically unknown to the law. 201 Iowa 940, 208NW351.

1272–1 See also 29F(2d)744(2dcase).

1272–1½–New. Introduction of evidence is solely to enable jury to fix penalty. 109TexCr392, 5SW(2d)145.

1272–4 36GaA639, 138SE83, 84; 12 PaDist&Co 331.

1272–5 15F(2d)931; 22AlaA119, 113S 318. [b] **Time of imposing sentence** is discretionary. 6F(2d)105.

1272–6 7F(2d)104; 15F(2d)931; 169 Ark932, 277SW5; 243 IllA378; **Ind** 168 NE692; **Ind** 170NE433; 223Ky468, 3 SW(2d)1101; 178Minn626, 228NW173; **OklCr** 283P581; **OklCr** 288P394; 154 Tenn47, 289SW526. See also 80CalA 528, 251P941.

1273–7 34F(2d)423 (fine on one count under plea of guilty, and later imposition of sentence under other count). See also 22AlaA119, 113S318.

1273–8 217AppDiv428, 216NYS765 (dictum).

1273–9 230Ky589, 20SW(2d)455. [a] **Where court fails to enter judgment at trial term** on verdict which remains matter of record, judgment should be entered thereon within reasonable time thereafter. 209Ky272, 272SW726.

1273–10½–New. In some jurisdictions the court may lose jurisdiction to pronounce sentence through lapse of time. 15F(2d)931.

1273–10⅓–New. Defendant may be sentenced in a subsequent case for the term imposed in a former case where he became as to the latter case an escape by reason of removal to another county. 21AlaA387, 108S630.

1273–10¼–New. Continuing the judgment over defendant's objection has been held error since defendant should be enabled to preserve his rights by appeal. 192NC668, 135SE771.

1273–10⅙–New. Defendant may waive right to object to continuance of judgment. 192NC668, 135SE771.

1273–10⅙–New. Under certain conditions judge has power to continue prayer for judgment without defendant's consent. 192NC668, 135SE771.

1273–10⅐–New. Judgment may be continued or suspended on terms on defendant's express or implied consent. 192NC668, 135SE771.

1273–10⅛–New. Indefinite postponement of sentence with no order of continuance or other action of court until five terms after conviction deprives the court of jurisdiction then to impose sentence. 15F(2d)931.

1273–10⅑–New. Under statutes, judgment on a verdict of guilty must be pronounced by the court in regular session, and not by a judge in vacation. **Iowa** 226NW925 (presence of defendant does not give judge jurisdiction to pronounce judgment in vacation).

1273–11 [b] 6F(2d)577.

1273–11½–New. But an indefinite postponement of sentence after plea of guilty with no order of continuance causes loss of jurisdiction. 15F(2d)931.

1273–12 [a] **Iowa** 226NW925. [c] **In Rhode Island.**–49RI 443, 144A52.

1273–12½–New. Conviction of defendant made before return day on plea of guilty is valid. 134Misc228, 235NYS 173.

1273–12⅓–New. Deferring sentence of one pleading guilty does not violate a statute providing for sentence after verdict or finding. 153Wash110, 279P 573.

1273–13½–New. Where the court loses jurisdiction by delay in imposing sentence, the prisoner's consent thereto is immaterial and does not revest jurisdiction. 15F(2d)931.

1273–15½–New. Defendant, who voluntarily agrees to delay imposition of sentence, cannot thereafter be heard to complain, notwithstanding his right to have sentence imposed within a reasonable time after conviction or plea. 49RI 443, 144A52.

1273–17 15F(2d)931; **OklCr** 283P581. [a] **Sentence entered after recognizance is not void.**–106TexCr550, 293SW575.

1273–17½–New. Where defendant, who was convicted, was released on his own recognizance and failed to return for sentence, the court could sentence him at a subsequent term. 23AlaA149, 122S 806(1stcase) [certiorari den 219Ala511, 122S806(2dcase)].

1273–18 136Misc40, 241NYS749 (under statute).

1274–22 7F(2d)104; **Mo** 278SW711; **Mo** 78SW(2d)278; 106TexCr550, 293SW 575.

1274–23 **Mo** 278SW711. See also 25 F(2d)242. [a] **Sentence may be postponed** for purpose of hearing and deciding motion for new trial. 36F(2d)738. [b] **As long as motion for new trial is pending and undisposed of,** court does not lose jurisdiction to impose sentence. 36F(2d)743.

1274–24 **Ind** 167NE531.

1274–27 See also 316Mo179, 289SW954. [b] **In Ohio.**–24 OhA212, 157NE400.

1274–31 [a] **In Michigan.**–283Mich485, 213NW717.

1275–43 101CalA376, 281P700; 265 Mass436, 165NE22. [d] **In California.**–102CalA787, 283P830.

1275–47½–New. Statutes authorizing the court in certain cases to postpone pronouncement of final sentence have been held constitutional. 170Ark621, 280SW1005, 44ALR1193.

1275–47⅓–New. Where the time for pronouncing judgment as provided by statute had not elapsed at the time sentence was pronounced, the trial court did not lose jurisdiction to pronounce judgment by reason of continuances. 98 CalA733, 277P896.

1276–50 199Cal240, 248P908.

1276–57 50SD48, 208NW224.

1276–58 50SD48, 208NW224.

1277–66 50SD48, 208NW224.

1277–70½–New. The district judge had no authority to postpone the imposing of sentence because of defendant's so-called plea of immunity. 167La484, 119 S523.

1277–70⅓–New. Prayer for judgment may not be continued over defendant's objection. 198NC728, 153SE410.

1277–71 208 Iowa1238, 226NW916.

1277–72 **CalA** 288P873.

1277–75 **Mo** 285SW90.

1278–80 23F(2d)561. But see 318Mo 705, 300SW707.

1278–81 22AlaA31, 111S760.

1278–90 19F(2d)193; 19F(2d)842; 20 F(2d)42; 31F(2d)982; 324 Ill 261, 155 NE34; 114Nebr132, 206NW731 (separate sentence on each count on which there is a conviction better practice); 132SC199, 128SE882.

1278–92 7F(2d)259.

1278–92½–New. Where defendant was convicted of separate offenses charged under separate counts of the same indictment, the court's imposition of one sentence representing the total punishment which could have been inflicted for each offense by way of separate cumulative sentences is not jurisdictional error. 132SC199, 128SE882.

1278–92⅓–New. Cumulative sentences may be imposed on several counts in one indictment. 6F(2d)640.

1278–92¼–New. Where the court directs the jury to state in the verdict under which count, if either, they convicted, a single judgment on the general verdict condemning defendant on both counts is erroneous. 105TexCr650, 290 SW754.

1278–92⅕–New. Where matter of both counts was involved in a single transaction, judgment was modified so that sentence could be pronounced on one count. 36Wyo 356, 255P786.

1278–92⅙–New. A plea of guilty to three counts of an indictment charging violations of the internal revenue law about or on a certain date authorized imposition of the maximum penalty upon each one of the three counts, hence a sentence of three years was within the competency of the court and not excessive. 30F(2d)681.

1278–92⅐–New. Where, under statute, each count of information charges a separate offense, judgment is separate as to each count. 336 Ill 286, 168NE 332.

1278–92⅛–New. Where defendant pleads guilty to each of several counts, judgment is not rendered void by not sentencing defendant under each count. 254 IllA209.

1278–93 12F(2d)852; 292Pa501, 141A 287. [a] **Sentence and probation.**–32 CalA370, 257P92 (judgment void).

1278–95 6F(2d)640; 19F(2d)193.
1279–96 326 Ill 481, 158NE134. But see 6F(2d)640.
1279–99 See also 273US392, 47SCt377, 71L ed700, 50ALR989.
1279–1 290Pa530, 139A195.
1279–2 See also 33F(2d)71.
1279–3 336 Ill 286, 168NE332.
1279–4 21AlaA545, 109S895.
1279–8½–New. Where a general verdict of guilty, sentence and judgment may be postponed until the other indictments pending against defendant are tried. 21AlaA497, 109S530.
1279–9 17F(2d)236.
1279–10 273US392, 47SCt377, 71L ed 700, 50ALR989; 8F(2d)265; 17F(2d) 236; 109TexCr474, 6SW(2d)353.
1279–11 273US392, 47SCt377, 71L ed 700, 50ALR989; 8F(2d)265; 14F(2d) 596; 33F(2d)238.
1280–12 24F(2d)796.
1280–12½–New. Sentence based on count voluntarily dismissed is void. 16 F(2d)566.
1280–13 273US392, 47SCt377, 71L ed 700, 50ALR989; 7F(2d)881.
1280–17 7F(2d)804; 14F(2d)366; 74 CalA125, 239P419; 316Mo 144, 290SW 142; 152Tenn281, 277SW892; 159Tenn 428, 19SW(2d)248; 107TexCr620, 298 SW424. But see 35F(2d)934.
1280–20 15F(2d)369; 36F(2d)155; 152Tenn281, 277SW892, 893 [quotCJ]. But see 14F(2d)505. [c] **Burglary and larceny** are distinct offenses which may be charged as two offenses separately or jointly in different counts in same indictment. 74CalA138, 239P705.
1280–20½–New. Where separate and distinct crimes arise out of the same transaction and are charged in different counts, defendant found guilty may be given separate sentences on each count. 14F(2d)564.
1280–20¼–New. In Philippines, where defendant is found guilty of complex offense of abduction with violence and rape, punishment should be for graver crime in maximum degree. 51Philippine105.
1280–22 290Pa534, 139A197.
1281–29 14F(2d)886; 15F(2d)644; 26 F(2d)554; 74CalA125, 239P419; 81 CalA752, 254P666; Mo 280SW1038, 1039 [citCyc]; 290Pa534, 139A197; 292 Pa501, 141A287; 132SC199, 128SE882, 886 [citCJ].
1281–30 102NJL318, 133A403; 292Pa 501, 141A287.
1282–31 7F(2d)319; 31F(2d)982(1st case); 102NJL318, 133A403.
1282–34 16F(2d)870.
1282–40 16F(2d)59; 16F(2d)62; 17 F(2d)236.
1282–44 290Pa530, 139A195.
1283–53 Wash 286P833. [a] **Evidence held to show** that rule and order to show cause why sanity hearing should not take place was served on defendant. 160La340, 107S131. [b] **Rule and order to show cause** as to sanity hearing held not misleading. 160La340, 107S131. [c] **Denial of continuance** for absent witness on sanity hearing not erroneous. 160La340, 107S131. [d] **Evidence held not to show** that defendant was insane. 160La340, 107S131.
1283–58½–New. Question on petition is existence of doubt as to accused's ability to distinguish right from wrong. 25 F(2d)549.
1283–60 25F(2d)549.
1284–61½–New. The court must, on petition for inquisition, consider the fact that insanity was not thought of during the trial, nor suggested by accused's demeanor as a witness. 25F(2d)549.
1284–62 181Ark895, 28SW(2d)708 (power of legislature); 155Miss810, 125 S419; 77Mont66, 249P666. [a] **Statute should be liberally construed,** being remedial in its nature. 181Ark58, 24 SW(2d)953.
1284–66 [a] **Discovery of defendant's insanity two weeks after trial,** at state hospital, where it was not permanent or habitual, raises no presumption of its existence two weeks prior to commitment to hospital. 197Cal 306, 240P 1000. [b] **There is no abuse of discretion** in court's conclusion, before pronouncing judgment on accused, returned to court as same after confinement in state hospital less than thirty days, that accused was then sane based in part by inquiries made by court pursuant to statute. 197Cal 306, 240P1000.
1284–67 155Miss810, 125S419.
1284–67½–New. Where proceeding is to determine sanity, guardian ad litem cannot be compelled to file petition for change of venue. 326 Ill 327, 157NE 247.
1284–67⅓–New. Guardian ad litem should resign so as to permit appointment of impartial guardian. 326 Ill 327, 157NE247.
1284–67¼–New. Appointment of defendant's attorney as guardian is not necessary, provided guardian appointed has ability and inclination to represent defendant. 326 Ill 327, 157NE247.
1284–67⅓–New. Court's refusal to remove guardian who refused to sign petition for change of venue in sanity proceedings held error. 326 Ill 327, 157NE 247.
1284–67⅙–New. It is error to permit showing that defendant had refused examination by doctors. 326 Ill 327, 157NE247.
1284–67⅕–New. After a verdict of sanity the court should enter judgment regularly, finding defendant sane. 326 Ill 327, 157NE247.
1284–68 Wash 286P833.
1284–71 77Mont66, 249P666. [b] **Petition should be verified.**–326 Ill 327, 157 NE247. [c] **Overruling motion for change of venue** held error where prejudice of judge is alleged. 326 Ill 327, 157NE247. [d] **Proceeding to determine sanity after conviction** is civil suit. 326 Ill 327, 157NE247.
1284–72 326 Ill 327, 157NE247.
1284–73 78CalA497, 248P683; 77Mont 66, 249P666.
1284–74 198Cal 238, 244P362; 78CalA 497, 248P683.
1285–77 78CalA497, 248P683 (refusal held not abuse of discretion).
1285–78 77Mont66, 249P666.
1285–79½–New. But under some statutes to warrant a judge in calling the jury there must be a doubt in his mind as to defendant's sanity. 77Mont66, 249 P666.
1285–80½–New. Judgment finding defendant has become insane after conviction raises a presumption of continued incanity until the contrary is legally established. 326 Ill 327, 157NE 247.
1285–80⅓–New. The criminal court in Cook County determines the sanity of a defendant in an asylum located in another county where the conviction raises a presumption of continued insanity until the contrary is legally established. 326 Ill 327, 157NE247.
1285–80¼–New. Failure to demur or otherwise attack sufficiency of complaint waives formal defects. 326 Ill 327, 157 NE247.
1285–94½–New. Under some constitutions a fine in excess of fifty dollars cannot be imposed except by a jury. 152Tenn184, 274SW12.
1285–96 22AlaA239, 114S423.
1285–98½–New. Whether defendant is not insane or otherwise incapable of being substantially benefited by the institution to which he may be committed, warranting an indeterminate sentence, is for the court to decide before imposing the sentence. 251NY428, 167NE 575.
1286–99 249NY302, 164NE106; 112 Oh 667, 148NE362.
1286–5 320Mo 296, 6SW(2d)915.
1286–8 89 IndA52, 165NE777(2dcase).
1286–9 [a] **Court could demand payment of fine** as condition of suspending sentence. 35F(2d)323.
1286–11 15F(2d)931; 169Ark932, 277 SW5; MoA 297SW445. Contra 82NH 459, 135A530.
1287–14 15F(2d)931.
1287–15 169Ark932, 277SW5 (or verdict of guilty rendered); 82NH459, 135 A530; 90PaSuper416.
1287–15½–New. on such conditions as he shall see fit, 169Ark932, 277SW5.
1287–16½–New. It has been held that the power to suspend sentence, under the common law, was inherent in courts of superior criminal jurisdiction. 125 Misc538, 211NYS401.
1287–16⅓–New. The power to suspend sentence, however, is a power to postpone the imposition of a sentence and not to suspend execution after sentence has been pronounced. 125Misc538, 211 NYS401.
1287–16¼–New. Under its power to suspend sentence the court may suspend prison sentence and impose fine. 125 Misc538, 211NYS401 (where statute fixes penalty of fine and imprisonment).
1287–17 [a] (4) Judgment, held objectionable, which contained prayer for judgment conditioned on payment of fine and not violating prohibition laws. 198NC728, 153SE410. [b] **Statute recognizes power of court but limits it** by terms on which suspension can endure. 82NH459, 135A530.
1288–20½–New. On application for suspension of sentence, admission of evidence of other offenses is error, since application merely places general reputation of accused in issue. 100TexCr 255, 272SW473.
1288–20⅓–New. A suspension of sentence simply postpones the judgment of the court temporarily or indefinitely. 217AppDiv428, 216NYS765.
1288–29 35F(2d)323; 171Ark620, 286 SW871, 48ALR1189; 217AppDiv428, 216NYS765. See also 125Misc538, 211 NYS401 (holding no new powers have been conferred by such statute, power being inherent under common law). [c] (3) Even after sentence pronounced. 163La242, 1118691. [e] (5) Persons entitled to benefit of suspended sentence law. 107TexCr13, 294SW592. [l] **On conviction of crime committed before commission of crime for which prior conviction was had,** sentence may not be suspended. 135Wash458, 238P9, 240 P565. [m] **In New York.**–125Misc538, 211NYS401. [n] **Retroactive effect.**–15 F(2d)931. [o] **Proviso against suspension after imprisonment commenced.**–217AppDiv428, 216NYS765. [p] **Granting probation on one count and sentence to imprisonment on another** is unauthorized where information contains only one charge of conspiracy in two counts. 82CalA73, 255P244. [q] **Deferred sentence does not operate as suspended sentence** under statute. 153 Wash110, 279P573. [r] **In Arkansas.**–180Ark382, 21SW(2d)603. [s] **In California.**–CalA 290P891.
1289–30 171Ark620, 286SW871, 48ALR 1189.
1289–30½–New. A statute providing that no person over twenty-five years of age who is convicted of certain offenses shall be entitled to the benefit of the Suspended Sentence Law is not unconstitutional. 106TexCr669, 294SW 555.
1289–31 Ariz 293P23; 24 OhA146, 156 NE916; 50SD48, 208NW224. [a] **In Texas.**–110Cr190, 8SW(2d)169.
1289–31½–New. Failure of court to declare sentence it suspends does not avoid a judgment. 125Misc538, 211NYS 401 (Code Cr. Proc. § 470–a).
1289–31⅓–New. Statute prohibiting suspension of statute is not unconstitutional. 24 OhA146, 156NE916.
1289–31¼–New. The legislature may make the grant of a suspended sentence dependent upon proof that accused has not been convicted of a felony in any jurisdiction. 105TexCr586, 289SW682.
1289–33 7F(2d)590; 35F(2d)323 (probation may be granted where execution of sentence has not begun); 97CalA228, 275P489; 98CalA40, 276P401; CalA 290 P891; 237Mich504, 212NW70; 217App Div428, 216NYS765; 111TexCr370, 13 SW(2d)91(2dcase); 197Wis446, 222NW 311. See also 125Misc538, 211NYS401. [e] **Proviso against suspension or interruption of sentence after imprisonment is commenced,** contained in statute, renders invalid clause in indeterminate sentence providing for suspension and probation prior to termination of minimum term fixed by sentence. 217App Div428, 216NYS765. [f] **Discretion is vested in court** to admit person to probation. 98CalA723, 277P745; 98CalA 733, 277P896; 335 Ill 424, 167NE20.

[g] **Defendant cannot collaterally attack former conviction** of felony on ground that he was juvenile at time of such conviction. 111TexCr370, 13SW(2d)91(2dcase). [h] **It will be presumed**, in support of former judgment of conviction, that court had before it facts authorizing its rendition. 111TexCr370, 13SW(2d)91(2dcase). [i] **Application for probation may be considered only before judgment.**–87CalA482, 262P361. [j] **Under federal statute** experienced lawyer convicted of abetting and assisting another to bribe prohibition agent was not entitled to probation. 27F(2d)335. [k] **Under Federal Probation Act** providing five years as maximum period, including extension, period of probation is not limited by maximum sentence imposable. 34F(2d)423.

1289–33½–New. The payment of fine in whole or by installments is sometimes made a proper condition to be required of a person on probation. 125Misc538, 211NYS401.

1289–33½–New. It is within the power of the legislature in providing a uniform system of probation to lodge discretion in the court to impose a fine as a condition of probation. 237Mich504, 212NW70 (fine does not constitute sentence).

1289–34 7PaDist&Co 75. [a] **Probation Act** is entitled to liberal construction. 7F(2d)590. [b] **Much latitude allowed district judges** in enforcement of Probation Act. 35F(2d)323. [c] **Probation Act held remedial** and entitled to liberal construction. 35F(2d)323.

1289–37 101CalA84, 281P404 (discretion of court).

1289–38 CalA 289P909 (effect of dismissal of former charge); 237Mich504, 212NW70. [a] **Discretion in referring request for probation to probation officer** under statute is legal and not arbitrary discretion. 87CalA482, 262P361. [b] **Probation officer's report** showing defendant's thirteen arrests justifies denial of probation application. CalA 289P909. [c] **Granting or refusing to allow defendant to apply**, or granting or refusing probation, is within court's discretion. CalA 289P909. [d] **On order denying probation matter** becomes res judicata. CalA 289P909.

1289–38½–New. It is within the power of the legislature to give the court power to revoke the probation and impose sentence. 237Mich504, 212NW70.

1289–33½–New. Where probation is revoked for violation of its terms, sentence may be imposed notwithstanding the convicted person had already paid a fine as a condition of probation. 237Mich504, 212NW70.

1289–42½–New. In California public officials embezzling funds must be denied probation. CalA 267P387.

1289–43½–New. Release on probation rests in the discretion of the court. CalA 240P802; 317Ill 33, 147NE396.

1289–43½–New. Court's order that application be referred to probation and parol officers of county sufficient. 317Ill 33, 147NE396.

1289–43¼–New. The court is not permitted to grant probation unless satisfied there is reasonable ground to expect petitioner may be reformed and interest of society subserved. 317Ill 33, 147NE396.

1289–43½–New. Court having parties and subject matter before it and authority to render judgment there is no violation of the bill of rights guaranteeing a fair and impartial trial. 317Ill 33, 147NE396.

1289–43¼–New. A federal statute specifically authorized placing of prisoners upon probation has been held to authorize such action after expiration of the term of conviction. 7F(2d)590.

1289–43½–New. Where the benefit of suspended sentence is by statute denied person over given age, age at trial, not when offense was committed, controls. 100TexCr279, 272SW489.

1289–43½–New. Under the California statute a superior court has power to hear and determine an application for probation, although applicant was convicted on a plea of guilty of robbery, which the court found to be robbery in the second degree, and the court is given information that applicant was armed with a loaded revolver at the time of commission of the crime. 75CalA148, 242P81 (discretion of court).

1289–43½–New. Where defendant convicted of felony is placed on probation, some statutes contemplate that he shall be at large and not in confinement while he conforms to the terms of the probation. 79CalA659, 250P714.

1289–43½₀–New. In such case a requirement of the order that he be kept in the psychopathic ward of the county farm is illegal. 79CalA659, 250P714.

1289–43½₁–New. Refusal to permit filing of application for probation solely because defendant had not pleaded guilty is error. 87CalA482, 262P361.

1289–43½₂–New. After the probation period, accused is entitled to discharge. 26F(2d)275.

1289–43½₃–New. An agreement between the attorney-general and defendant that sentence should be deferred during defendant's good behavior has been held within the authority of the attorney-general. 49RI 443, 144A52.

1289–43½₄–New. In placing defendant on probation, court cannot order him to vacate his home. Mich 232NW397(1st case).

1289–45 100TexCr279, 272SW489 (instruction authorizing recommendation of suspension if evidence showed accused under twenty-five years of age not objectionable for failure to state quantum of proof required); 107TexCr75, 294SW1112. [c] 100TexCr541, 271SW915. [d] **Question of need of defendant's help by his mother**, being put in issue by conflicting testimony, became properly debatable in jury room, where defendant, pleading guilty, applied for suspended sentence. 112TexCr444, 17SW(2d)56(1stcase).

1289–47 101TexCr535, 276SW275 (verdict construed as not recommending suspension of sentence).

1289–47½–New. Failure of the court to inform defendants, not represented by counsel, of right, held error. 107TexCr75, 294SW1112.

1289–48 108TexCr194, 299SW414.

1289–50 108TexCr194, 299SW414.

1289–51 [a] **Court should not withdraw matter of suspension** of sentence from jury's discretion. 112TexCr446, 16SW(2d)1091.

1290–56½–New. Refusal to submit to jury application for suspended sentence in a liquor case, wherein accused admits that he is over twenty-five years of age at the time of trial, is not error. 111TexCr388, 13SW(2d)106.

1290–56½–New. Refusal to submit application of person over twenty-five years of age, in a liquor case, is not error. TexCr 24SW(2d)1092.

1290–57½–New. It is error to exclude testimony of reputation on an application for suspended sentence. 107TexCr330, 296SW573.

1290–57½–New. Conviction for manslaughter cannot be reversed because the jury did not give accused a suspended sentence. 105TexCr60, 285SW321.

1290–59 101TexCr52, 273SW853.

1290–61 105TexCr126, 286SW1099.

1290–62½–New. Continuance to procure evidence will not be granted where evidence bears only on question of guilt. 109TexCr32, 2SW(2d)846.

1290–63 14F(2d)5.

1290–65 108TexCr194, 299SW414.

1290–68 106TexCr90, 291SW238; 113TexCr457, 21SW(2d)1047. [a] **That defendant has not testified** does not render evidence as to general reputation inadmissible. 106TexCr90, 291SW238. [b] **Inquiry as to defendant's reputation may embrace time of trial.**–113TexCr457, 21SW(2d)1047.

1290–69 106TexCr90, 291SW238.

1290–70 101TexCr584, 276SW705; 106TexCr570, 294SW205; 106TexCr618, 294SW588; 109TexCr301, 4SW(2d)58; 113TexCr207, 19SW(2d)322; TexCr 25SW(2d)840. [a] (1) 107TexCr460, 296SW883. [b] (13) 101TexCr377, 276SW291. (18) 103TexCr114, 280SW209. (25) Testimony that accused had been married and divorced is inadmissible. 103TexCr114, 280SW209. (26) Evidence of defendant's threatening manner toward witness held inadmissible on issue of suspended sentence in prosecution for assault with intent to murder. 105TexCr8, 284SW961. (27) Evidence of independent prior crime held not admissible. 107TexCr460, 296SW883. [d] 104TexCr456, 284SW578; 106TexCr90, 291SW238; 109TexCr32, 2SW(2d)846; 109TexCr560, 5SW(2d)994. [e] **Rules regarding proof of general reputation of one accused of crime** have not been changed by Suspended Sentence Law. 106TexCr90, 291SW238. [f] **Proof must be limited** to general reputation as peaceable and law-abiding citizen. 106TexCr90, 291SW238. [g] **Character witnesses** may not be cross-examined as to what they have heard relative to offense for which accused is on trial. 106TexCr618, 294SW588.

1290–73½–New. Prosecution may prove case, although defendant has pleaded guilty and applied for suspended sentence. 109TexCr32, 2SW(2d)846.

1291–74 [b] **Use of expression "admission of guilt"** is not commended. 103TexCr465, 281SW1058.

1291–77 26F(2d)243; MoA 283SW61; 90PaSuper416; 151Wash694, 277P83; 197Wis446, 222NW311. [c] **Where solicitor is given right to issue mittimus** implication is that power is not to be used for new violation of law. 82NH459, 135A530. [d] **Conviction of felony in federal court.**–Under Texas statute, defendant given suspended sentence in state court may be sentenced under state court judgment upon conviction of felony in federal court before expiration of probationary term. 105TexCr586, 289SW682.

1291–78 90PaSuper416; 50SD48, 208NW224.

1291–79 See also 43 Ida775, 254P519.

1291–81½–New. If court erred in prescribing an improper condition in suspending sentence, it may revoke such order and impose proper sentence. 125Misc538, 211NYS401.

1291–83 43 Ida775, 254P519, 520 [cit CJ].

1291–86 26F(2d)243.

1292–95 35F(2d)323. [b] **Nonpayment of fine imposed as condition of probation** may justify revocation of order. 98CalA723, 277P745. [c] **Court cannot impose sentence after expiration of probationary period.**–35 OhA553, 172NE703.

1292–99 MoA 283SW61.

1292–99½–New. The court may, on revocation of probation, modify its original order and impose any punishment it might have pronounced at time of conviction. 125Misc538, 211NYS401.

1292–99½–New. The court had power to inquire in a summary way into the conduct of defendant, placed on probation under suspended judgment, and to impose sentence without a formal trial of issue whether defendant had violated conditions of his probation. 197Wis446, 222NW311.

1292–2 92Fla1062, 111S725; 100WVa501, 130SE655 (in felony case); Wis 229NW44.

1293–3½–New. Defendant's constitutional rights violated by court in determining sentence from information concerning defendant received in chambers in the absence of defendant or his counsel. 131SC420, 127SE840.

1293–4 170La1063, 129S637.

1293–8 OklCr 283P581.

1293–9½–New. A statute permitting the trial court to reimpose sentence in the absence of defendant where judgment imposing a death sentence has been affirmed after being stayed on appeal is not unconstitutional. 198Cal 30, 243P420.

1293–13 140Wash675, 250P55.

1294–33 171Minn246, 213NW900.

1294–35 31F(2d)229; 284Pa105, 130A403.

1295–38 23AlaA144, 122S301(2dcase).

1295–39 34NM499, 285P501 (though defendant pleaded guilty without benefit of counsel).

1295–41 Mo 278SW711; 119Oh314,

164NE232. [a] (1) Mo 29SW(2d)63.
1295-43 Mo 285SW976.
1295-44 Mo 273SW739.
1295-45 Mo 273SW739.
1296-51 Mo 278SW711. See also 284 Pa105. 130A403.
1296-53 316Mo 179, 289SW554. [a] **Purpose of statute is to obviate remand** for allocution alone. 316Mo 179, 289SW 954.
1297-62 [a] **In Iowa.**–200 Iowa483, 203 NW806.
1297-77 160Tenn681, 28SW(2d)338 [cit CJ].
1297-78 39 OklCr264, 264P643; 35 PortoRico 161; 138SC24, 135SE651; 160Tenn267, 23SW(2d)665.
1297-79 See also 138SC24, 135SE651.
1298-80½-New. It is the duty of the court to ascertain from all available sources such information as will enable the court to pass sentence justly and intelligently. 55ND313, 213NW484.
1298-80⅓-New. The court is not bound by statements made by defendant on examination before it. 55ND313, 213 NW484.
1298-88 See also 332 Ill 583, 164NE 185.
1298-93 332 Ill 583, 164NE185.
1298-97 46Philippine392. [b] (1) 49 Philippine385; 49Philippine423. (2) 51 Philippine105. (5) 46Philippine838. (12) 46Philippine392. (17) 51Philippine 963 (not proved). (25) 51Philippine 933. (32) Unlawful aggression. 51 Philippine846. [d] (1) 49Philippine475. (4) 51Philippine393. (7) 51Philippine 846. (11) 51Philippine963 (disregard of age not shown). (13) 49Philippine 793. (15) 46Philippine739. (18) 51 Philippine201. (28) 51Philippine99; 51Philippine967. (33) Abuse of superior strength. 51Philippine105. (34) Aggravating circumstance of treachery cannot be considered against principal who was not present and left methods to discretion of others. 51Philippine 201. (35) Abuse of superior strength. 51Philippine670. (36) Qualifying circumstance of premeditation cannot be considered where victim was not person whom defendant intended to kill. 51Philippine967. [e] (1) 49Philippine 192; 49Philippine212; 49Philippine 689; 49Philippine996. (3) That accused lived in same house with female raped. 51Philippine817. [f] 51Philippine 99 (evidence insufficient to show treachery); 51Philippine201; 51Philippine 385 (abuse of superior strength not shown); 51Philippine670. [g] (1) 51 Philippine105. [l] 51Philippine406.
1300-16 55ND313, 213NW484. [b] **Court is not required to take testimony** concerning character and habits of defendant, though it may, if it so desires. 149Wash670, 272P62. [c] **Questions which relate to matter of place and time of defendant's punishment,** such as age, sex, and previous conviction, can be decided on hearing before trial judge without jury. 249NY 302, 164NE106. [d] **Where defendant enters plea of guilty as to felony,** judge should conduct inquiry and take testimony if necessary to determine whether defendant is liable for additional penalty under statute. 249NY302, 164 NE106.
1301-20 21AlaA594, 110S479; 87Colo 261, 286P859; CalA 289P687.
1301-23 153Va987, 151SE151.
1301-25 Md 151A409.
1301-31 OhA 173NE253.
1302-33 [a] **Judgment must conform to indictment** and be supported by proof. TexCr 25SW(2d)1098.
1302-35½-New. Sufficiency of plea. Where trial is had on issue joined by plea, which counsel for defendant considered sufficient, the plea is sufficient to support the judgment. 77Mont326, 250P613.
1302-37 But see 98Fla185, 122S565.
1302-39 6PaDist&Co 390.
1302-41 214Ala593, 108S536; 23AlaA 304, 124S506; 21AlaA610, 110S694; 23 AlaA210, 123S102(1stcase); 23AlaA318, 127S497; Ariz 282P930; Iowa 229NW 183; MoA 288SW969; OklCr 275P 1067; 111TexCr197, 11SW(2d)518; TexCr 31SW(2d)818; 144Wash367, 258 P20; 106WVa32, 144SE574. [a] (1) 21 AlaA434, 109S172. (2) Immaterial difference in wording between verdict and judgment held not error. 36F(2d)699. [c] **Judgment declaring defendant guilty of forgery in first degree held reversible error,** on verdict finding defendant guilty as charged in indictment. 21AlaA72, 105S428 (in prosecution for obtaining money by false pretenses). [d] **Sentence to convict to road force** on conviction of driving automobile while intoxicated is proper, though verdict fixed punishment at stated term of imprisonment in jail and fine. 147Va624, 136SE765. [e] **Judgment held valid.**– 23AlaA318, 127S497.
1302-44 21AlaA376, 108S645; 202Cal 165, 259P943; 220Ky328, 295SW164; 160Tenn267, 23SW(2d)665; 109TexCr 378, 4SW(2d)973; 144Wash367, 258P 20. [e] **Judgment of guilty as charged in indictment** related only to count on which verdict found defendant guilty. 23AlaA355, 125S901.
1303-46 92CalA417, 268P382.
1303-50½-New. Remanded for new trial. 220Ky328, 295SW164.
1303-51 80CalA321, 251P949; 254Mass 390, 150NE181.
1303-52 332 Ill 207, 163NE430; Iowa 229NW183; 121Kan167, 246P685, 687 [quotCJ]; TexCr 32SW(2d)356(1st case); TexCr 32SW(2d)356(2dcase).
1303-53 97Fla617, 121S787; 121Kan 167, 246P685, 687 [quotCJ].
1303-54 121Kan167, 246P685, 687 [quotCJ]; 131Misc657, 228NYS361.
1303-54½-New. But finding of value cures failure to state value in information required to make offense a felony. 118Kan629, 236P816.
1303-55½-New. Several counts. If sentence is authorized under any count of the indictment, it is sufficient. 6F (2d)573.
1303-56 269US360, 46SCt156, 70L ed309; 12F(2d)742, 743 [citCJ]; 15F(2d)840, 841 [citCJ]; 21AlaA594, 110S479; 22 AlaA280, 115S79; 23AlaA338, 125S207; 23AlaA318, 127S497; Fla 128S811; 67 Utah456, 248P135. [b] (6) Sentence for costs held too indefinite where imposing sentence of hard labor for "to ——days to pay the costs at 75 cents per day." 22AlaA15, 112S186; 21AlaA 594, 110S479. [c] (3) To "serve five years on each count at federal prison at Atlanta, Ga., and they shall be served consecutively." 20F(2d)574.
1304-60 12F(2d)742, 743 [citCJ]. [a] **Where sentence is ambiguous and doubtful,** it should be construed to favor liberty to individual. 168Ga688, 148SE590.
1304-60½-New. A sentence is not indefinite or uncertain because judge fails to file statement of circumstances and information provided for by statute. 52ND52, 203NW676.
1304-61½-New. Failure of the court to fix the period of probation required by statute does not of itself invalidate a sentence. 125Misc538, 211NYS401.
1304-61⅓-New. Such omission is subject to correction. 125Misc538, 211NYS 401.
1304-65 206 Iowa635, 220NW41.
1304-66½-New. But where term is not stated it must appear definitely what crime accused was convicted of in order that the statutory provision as to term may be read into the judgment. 318 Ill 388, 149NE273.
1304-67 29F(2d)852; OklCr 282P478; OklCr 289P360.
1304-68 198NC507, 152SE391(2dcase).
1304-69 [c] Utah.–284P323.
1304-69½-New. Pronouncing sentence without adding words "or until he is otherwise legally discharged" is incomplete and erroneous. 27 OhNPNS252.
1305-78 [b] **Where mode of execution changed after sentence** defendant must be resentenced by court. 216Ala659, 114S39.
1306-88½-New. But judgment is insufficient if the place is not designated as provided in the statute. 318 Ill 388, 149NE273.
1306-89 [a] **Provision ordering defendant into custody of sheriff** is erroneous where judgment correctly orders imprisonment in town jail. 152Miss148, 119S156. [b] **In Illinois.**–335 Ill 570, 167NE852.
1306-90 290Pa530, 139A195, 196 [quot CJ].
1306-95 42F(2d)721.
1306-97 19F(2d)127, 129 [quotCJ]; 19F(2d)193; 122Kan207, 251P176.
1307-1 269US360, 46SCt156, 70L ed 309. [c] **Separate sentences on two counts** to run "consecutively" impose successive, not concurrent, sentences. 7F(2d)319.
1307-2½-New. Order in which counts are named in sentence does not determine which sentence is to be first served. 14F(2d)505.
1307-2⅓-New. Where sentence indicated the total number of years of imprisonment it was held to indicate successive terms of imprisonment. 15F (2d)40.
1307-3 75Mont30, 241P616 (judgment held cumulative and not uncertain because not specifying order in which sentences were to be served); 132SC 199, 128SE882. [a] **Determination of question** is judicial one. 329 Ill 398, 160 NE748.
1307-4 4F(2d)884, 887 (sentence for six months imprisonment on each of three counts "said sentences of imprisonment to run consecutively" held to be imprisonment for term of six months only); 6F(2d)167 (two sentences running concurrently are not void); 7F (2d)319; 15F(2d)840, 841 [citCJ]; 329 Ill 398, 160NE748; 132SC199, 128SE 882.
1307-5 15F(2d)840, 841 [citCJ].
1307-7 97CalA537, 275P1017. [b] **In Oklahoma.**–37 OklCr285, 257P1112. [c] **In California.**–265P231.
1307-7½-New. Under some statutes a court may provide in sentences that they shall run concurrently. OklCr 279 P711.
1307-9 68CalA545, 229P987; 207 Iowa 212, 220NW110; 217AppDiv428, 216 NYS765. [a] 28Hawaii268; 164La1051, 115S187. [b] **In South Dakota.**–51SD 540, 215NW697.
1307-14 321 Ill 390, 152NE212. [a] **Under Inferior Criminal Courts Act** of New York an indeterminate sentence is to be considered for maximum term of three years. 6F(2d)233.
1307-15½-New. But where jury fixes punishment, judge need not specify penalty in judgment. 68CalA545, 229P987.
1307-16 144Wash511, 258P318. [a] **Failure to fix maximum term of imprisonment** renders sentence irregular but not void. 144Wash511, 258P318.
1307-17 [b] **In California.**–84CalA267, 257P881.
1308-20½-New. Failure of clerk to file statutory statement as to facts and circumstances of crime does not require prisoner's discharge at end of minimum term. 52ND471, 203NW676.
1308-20⅓-New. Provision of indeterminate sentence for minimum of five years, "suspending sentence" after less than three years, is invalid as mere surplusage. 217AppDiv428, 216NYS765.
1308-20¼-New. Under some statutes no reference need be or should be made to a minimum or maximum period. 204 Iowa667, 215NW706.
1308-20⅕-New. and sentence to the effect that accused be imprisoned in the penitentiary according to law is sufficient. 204 Iowa667, 215NW706.
1308-22 Cal 265P231; 101TexCr645, 276SW906.
1308-24 100TexCr652, 273SW604.
1308-26 Wis 232NW866. [a] **Sentence held fatally defective for indefiniteness.**– Utah 284P323.
1308-28 94CalA639, 271P757.
1308-28½-New. Under common law, when a fine is imposed, the practice is to include in the judgment an order sentencing the prisoner to jail until the fine is paid. 125Me432, 134A561.
1308-30 198Cal 221, 244P359 (sentence of payment of fine "or in default, of payment of said fine that he be punished by imprisonment for the term of six months" held not void because of imprisonment provision). But see 164Ga 188, 138SE52.

1308–31 But see 22AlaA60, 112S96.
1309–44 147Va624, 136SE765. [d] **In Louisiana.**–158La249, 103S757.
1309–47 But see 329 Ill 223, 160NE582.
1311–74 [a] **In Porto Rico.**–32Porto Rico 822.
1311–78 215Ky335, 285SW207 [citCJ]; 126Me330, 138A547, 551 [citCJ]; 308 Mo 695, 274SW470. [b] **Fine and imprisonment.**–215Ky335, 285SW207. [c] **Sentence for less than minimum term** is not void. Nebr 231NW510.
1311–79 Ind 158NE574; 126Me330, 138 A547, 551 [citCJ].
1311–81 Ind 158NE574, 577 [citCJ].
1311–82 199 Ind501, 158NE572, 577 [citCJ].
1312–86 24F(2d)796; 30F(2d)187; 204 Cal 84, 266P536; 70CalA770, 234P338; 3Del 425, 138A631, 632 [citCJ]; 45 Ida 168, 260P1095; 46 Ida142, 267P227; 199 Ind501, 158NE572; 159La222, 105S297; 231Mich340, 204NW83; 146Wash114, 261P775. Contra 128Kan784, 280P758. [b] **When defendant has begun to discharge part of excessive minimum sentence,** he may apply for relief notwithstanding expiration of time to appeal. 146Wash114, 261P775.
1312–87 3Del 425, 138A631, 632 [cit CJ]; 199 Ind501, 158NE572.
1313–88 46 Ida142, 267P227; 199 Ind 501, 158NE572, 575 [citCJ].
1313–89 115Nebr119, 211NW619; 285 Pa289, 132A370. [a] **Void sentence of fine and imprisonment** is not affected by payment of fine. 115Nebr119, 211NW 619.
1313–90 [a] **Until legally declared void,** such a sentence is in force. 97PaSuper 141.
1313–92½–New. Where defendant pleaded "non vult" to indictment as a whole, sentence is valid if it does not exceed that which may lawfully be imposed for such offense; correct practice is to sentence on court containing highest offense. NJSup 129A154.
1313–93 23AlaA318, 127S497; 162Ga 210, 132SE911.
1313–96½–New. Sentence of female defendant "to work on state farm or on such other works as the authorities of said state and farm shall direct" and pay fine on payment of which farm sentence should be suspended is construed to be for payment of fine and to labor and confinement in woman's prison on state farm, in lieu of a chain gang sentence. 161Ga462, 131SE168.
1313–96½–New. That portion of such sentence subjecting female to work "on such other works as the authorities of said state and farm shall direct" is construed as sentencing defendant to do such work as may be required of a female convict sentenced to labor and confinement in woman's prison on and at such farm. 161Ga462, 131SE168.
1313–96¼–New. Where defendant was sentenced to the chain gang for six months and an additional sentence to serve six months was suspended with a provision for discharge from custody on payment of a fine and costs, payment of the fine and costs does not discharge defendant from the suspended part of the sentence. 162Ga55, 132SE533.
1313–96½–New. Judgment that defendants be confined for stated minimum and maximum terms and that capias issue at future term if defendants have failed to pay certain sums is not void as an alternative or suspended judgment. 194 NC277, 139SE448.
1313–3 80CalA528, 251P941; 165Ga 174, 140SE350; 46 Ida142, 267P227; 290Pa530, 139A195, 196 [quotCJ].
1313–3½–New. Imposition of punishment on an unnecessary part of the judgment may be surplusage. Ind 168 NE481.
1314–4 [a] **Necessity for legal action.**–169Ark410, 275SW737.
1314–5 29F(2d)979; 35F(2d)734; 42 F(2d)40; 170Ark621, 280SW1005, 1006 [citCJ&quotCyc], 44ALR1193; 114Nebr 653, 209NW328; NJ 130A470; 103NJL 153, 134A746; 295Pa379, 145A535; 12 PortoRicoFed111; 49SD398, 207NW 161; 49SD365, 207NW163.
1314–9 49SD365, 207NW163.

1314–10½–New. But trial court cannot amend, alter, or modify judgment after it has become judgment of appellate court. 72CalA174, 236P985.
1314–10¼–New. Trial court cannot amend, alter, or modify judgment after appeal notice filed and judgment becomes final by dismissal by court order or operation of law. 72CalA174, 236P 985.
1314–10¼–New. After sentence of imprisonment for a fixed term, based necessarily on a previous determination that the offender lacked capacity to benefit by correctional treatment, and indeterminate sentence under the Parole Commission Law is improper. 251NY428, 167NE575.
1314–12 15F(2d)68, 69 [citCJ]; 35F (2d)734; 37F(2d)330; 30Ariz265, 246P 550, 551 [citCJ]; 170Ark621, 280SW 1005, 1006 [citCJ&quotCyc], 44ALR 1193; 161Ga466, 131SE170 (order revoking parole); 261Mass12, 158NE167; Nebr 231NW510; 251NY428, 167NE575 (where original sentence is within jurisdiction of court, court cannot treat it as void and impose new sentence); 37 OklCr285, 257P1112, 1113 [citCJ]; OklCr 273P288; TexCr 32SW(2d)658. See also Ariz 293P23.
1315–15 But see 33F(2d)906.
1315–16 37 OklCr285, 257P1112.
1315–17 164La1051, 115S187; 150Miss 504, 117S119.
1315–19 Mo 280SW1038, 1039 [quotCJ perBlair,J].
1315–25 37 OklCr285, 257P1112, 1113 [citCJ]; 88PaSuper87. But see 110 TexCr503, 9SW(2d)335. [d] **Statute applicable to Allegheny workhouse** does not give authority to change sentence after term at which it was pronounced. 88PaSuper87.
1316–30 30F(2d)187. But see 8F(2d) 711.
1316–30½–New. Where the court improperly changed the sentence after the term at which it was imposed, it may, before the expiration of the term, correct its mistake and order that the original sentence be imposed. 88 PaSuper87.
1316–31 But see 178Minn626, 228NW 173.
1316–33 37 OklCr285, 257P1112, 1113 [citCJ].
1316–43 217Ala60, 114S798 (entry of sentence on trial docket held sufficient); 22AlaA167, 113S485; 84Colo 166, 268P 536; 92Fla494, 109S453; 36GaA39, 138 SE83 (dictum); 37 OklCr285, 257P1112; 156Tenn451, 28SW(2d)705; 103WVa658, 138SE316. [a] **Finality of judgment before entry.**–37 OklCr285, 257P1112. [b] **Time of expiration** of stay of execution is conclusively settled by journal entry of proceedings. 122Kan204, 251P 407. [c] **Clerk's duly authenticated notations of plea entered and sentence imposed** on original papers and docket may stand as adequate evidence of judgment, but judgment file, signed by judge or clerk of court, is proper evidence of rendition and terms of judgment. 109Conn239, 146A290. [d] **Generally there is no competent evidence of rendition of judgment** till entry thereof in record. Fla 129S106(2dcase). [e] **Journal entry of sentence** is not final judgment and does not bind court. Wash 290P873.
1317–45 89PaSuper142.
1317–52 [a] **Judgments, held invalid,** not entered till nineteen months after trial, where minutes of day of trial not signed due to court's disapproval of verdict. 154Tenn47, 289SW526.
1317–53½–New. Although the clerk should forthwith prepare the judgment file, delay in doing so will not invalidate it as an adequate record of judgment it enbodies. 109Conn239, 146A290.
1317–55 21AlaA504, 109S563; 122Kan 204, 251P407. But see 220MoA825, 278 SW1047.
1317–56 20AlaA412, 103S694.
1317–57 See also 148Wash270, 268P869.
1317–58½–New. Judgment file consists of writing of judgment for record, with the history of the steps leading thereto, after its rendition. 109Conn239, 146A 290.
1317–60 [a] **Judgment file may be prepared from clerk's entries** on original papers and docket when judgment was rendered and signed by clerk. 109Conn 239, 146A290.
1317–64 220MoA825, 278SW1047; 154 Tenn47, 289SW526; 101TexCr336, 275 SW829.
1318–65 See also 220MoA825, 278SW 1047.
1318–73 21AlaA427, 109S177. See also 220MoA825, 278SW1047.
1318–75 98Fla985, 124S725; 153Tenn 198, 281SW462.
1318–77 154Tenn47, 289SW526.
1318–82 [a] **Rule cannot be changed** merely because crime charged is misdemeanor. Fla 129S106(2dcase).
1318–85 21AlaA522, 109S553; Fla 129 S106(2dcase). [a] **Recital held insufficient to constitute sentence.**–TexCr 28 SW(2d)133(1stcase).
1318–86 194NC738, 140SE728. [a] **Court's adjudication of guilt will not be implied** on a direct attack, from mere imposition of sentence. Fla 129S 106(2dcase). [b] **No particular form is necessary.**–Fla 129S106(2dcase).
1318–86½–New. A judgment containing no adjudication of guilt of the crime charged is invalid. 98Fla206, 123S755 (1stcase).
1318–87 [a] (4) Other instances. 135 Misc475, 239NYS122. [b] (5) In homicide case. 22AlaA167, 113S485.
1318–88 97Fla232, 120S360(1stcase). But see 220MoA825, 278SW1047. [c] (2) Record of conviction of violating New Jersey Medical Practice Act need not set out evidence in form of conviction set out by statute. NJ 141A591. [a] **Must be certain and consistent.**–AlaA 130S767.
1319–89 213Ala264, 104S638; 214Ala 457, 108S74. See also 243 IllA216. [a] **Essential part of judgment** is the punishment and amount thereof. OklCr 289 P360. [b] **Provision in sentence that imprisonment "should begin to run at once"** is surplusage where court can only fix term and law determines beginning and termination. Fla 128S814. [c] **Essential portion of "sentence"** is kind and amount of punishment. Fla 128S814. [d] **Consecutive sentence held sufficiently definite.**–42F(2d)43.
1319–90 68CalA545, 229P987; Fla 129 S106(2dcase).
1319–91 But see 249NY302, 164NE106.
1319–92 See also 23AlaA182, 122S298 (judgment is defective which does not show number of days' work necessary to pay costs). [b] **Judgment providing imprisonment in default** of payment of fine is not fatally uncertain because no provision is made for defendant in case part of fine is paid, though judgment in such form is more appropriate. 73CalA 78, 238P112.
1319–96½–New. Fixing of date of execution is no part of judgment and may be regulated by statute; 198Cal 601, 246 P802.
1319–97½–New. Failure to fix place of imprisonment held not to void sentence. 22AlaA126, 113S466.
1319–97¼–New. A direction as to the time for execution of sentence is no part of the judgment. 169Ark410, 275 SW737.
1319–97¼–New. A sentence of imprisonment not exceeding one year imposed under a statute providing for punishment not exceeding one year is to be construed as a sentence for one year. 65Utah609, 239P25.
1319–97½–New. Judgment providing that defendant be imprisoned in "state farm" conforms to verdict that defendant be imprisoned in "penal farm." 198 Ind241, 151NE615.
1319–97¼–New. Notations of plea and sentence on an original complaint and docket are entries, made when judgment is entered, to preserve accurately and put on immediate public record the court's acts. 109Conn239, 146A290.
1319–98 16F(2d)608.
1320–99 16F(2d)608.
1320–2 See also 148Wash270, 268P869.

1320-3 21AlaA522, 109S553.

1320-4 90Fla105, 105S840 (adjudging accused to be guilty of rape and directing that he be electrocuted until he is dead is sufficient where judgment is otherwise substantially in conformance with statute).

1320-5 86CalA148, 260P591; 75Mont 30, 241P616; 129 Or652, 278P950.

1320-7 Contra 20AlaA450, 103S901.

1320-10½-New. Bench notes showing waiver of special venire may be sufficient irrespective of judgment entry. 23AlaA 297, 124S402.

1320-11 [b] **Fine.**-153Tenn198, 281SW 462. [c] **Judgment speaks verdict** as against contention of omission in verdict. 113TexCr380, 22SW(2d)658.

1321-16 22AlaA333, 115S420; AlaA 130S767; 68CalA545, 229P987; 318 Ill 388, 149NE273; NJ 146A42(2dcase); 35 OhA418, 172NE551(2dcase).

1321-22 68CalA308, 229P63.

1321-23½-New. Where the record shows separate and distinct names used to designate the injured party named in the indictment, the judgment is void for uncertainty and inconsistency. 22AlaA193, 114S14.

1321-24 21AlaA584, 110S323; 122Kan 207, 251P176; NJ 146A42(2dcase).

1322-28 232 IllA342; 157Miss600, 128 S753 (holding that judgment setting out verdict of jury finding defendant guilty as charged was not invalid).

1322-29 151Miss46, 117S369.

1322-33 148Wash270, 268P869 (on plea of guilty judgment cannot be entered by clerk on oral announcement by court). See also 46Philippine22.

1322-33½-New. The clerk's notations of plea entered and sentence imposed on the original papers and docket need no particular authentication. 109Conn 239, 146A290.

1322-38 16F(2d)608; 243 IllA216; 316 Mo179, 289SW954.

1322-39 94Fla60, 113S736; Fla 129S 827; 170Ga525, 153SE360(2dcase); 200 Iowa889, 205NW500; 158Tenn404, 14 SW(2d)51(2dcase); TexCr 30SW(2d) 327; TexCr 30SW(2d)329. [d] **Recital in judgment sentencing accused to county jail that, by his consent, sentence shall be served in penitentiary** is nullity and may be expunged during term without notice to accused. 200 Iowa889, 205NW500.

1323-40 16F(2d)608; 36F(2d)366; 39 F(2d)208 (at any time during the suspended sentence); 94Fla60, 113S736; 214Ky394, 283SW400; 224Ky124, 5SW (2d)881 (name of defendant); 151Miss 46, 117S369; Miss 130S513. See also 200Ind358, 163NE513.

1323-41 [a] (1) 39F(2d)208; 94Fla60, 113S736; 151Miss46, 117S369; OklCr 283P268; OklCr 287P801; 54SD382, 223NW323; 105TexCr218, 288SW209. (4) Other instances. 206 Iowa981, 221 NW445. [b] **Though defendant has begun sentence,** judgment may be corrected. 98Fla853, 124S455. [c] **Where record of conviction does not conform to verdict,** county attorney may apply for nunc pro tunc order directing clerk to correct record. OklCr 287P740.

1324-42 21AlaA388, 108S635.

1324-44 85CalA165, 259P119.

1324-44½-New. The rule that all judgments, decrees, or other orders of court are in its control and may be set aside or vacated during the term applies to criminal cases except when the constitutional provision against double jeopardy forbids and subjects to a time limitation in some jurisdictions. 29Ariz 186, 239P1032.

1324-44⅓-New. A code provision that a dismissal shall be a bar to any other prosecution for the same offense does not deprive the trial court of power to vacate an order of dismissal made through fraud, excusable neglect, or mistake. 29Ariz186, 239P1032.

1324-44¼-New. After the expiration of term of court and of longest term of imprisonment imposed on four indictments, the court cannot without any record evidence amend the judgment nunc pro tunc by amending the judgment so that sentences may run consecutively. 5F(2d)6.

1324-44⅙-New. Where judgment of conviction is void for uncertainty, the court has power to render valid a judgment at the same term on notice. Utah 284P318.

1324-48 But see 72CalA174, 236P985.

1324-49 200 Iowa889, 205NW500.

1324-50 154Tenn47, 289SW526.

1324-52 164Ga242, 138SE72; 151Miss 46, 117S369; 154Tenn47, 289SW526.

1324-55 OklCr 283P268; OklCr 287P 740; OklCr 287P801.

1324-56½-New. Erroneous judgment. A judgment sentencing defendant to the penitentiary, who procured his release from a house of reform by proof that he was over eighteen, without opportunity to be heard on the question of age, has been held erroneous. 214Ky394, 283SW 400.

1324-56⅓-New. A judgment sentencing defendant to the penitentiary, who was released from a house of reform, without giving credit for time served, has been held erroneous. 214Ky394, 283SW 400.

1324-59 21AlaA388, 108S635; 164Ga 242, 138SE72; 154Tenn47, 289SW526.

1324-60 21AlaA388, 108S635.

1325-66 Miss 130S513.

1325-73 326 Ill 173, 157NE193; Ill 173 NE141; IndA 160NE28 (petition to vacate judgment is addressed to court's discretion); 223Ky665, 48SW(2d)685; 136Wash359, 240P3; 196Wis113, 219 NW380. [a] (7) Where judgment is unexecuted. 326 Ill 266, 157NE218. (8) Where misapprehension of consequences of plea is shown. 326 Ill 173, 157NE193. [b] (8) Nor of incompetency of attorney for misconduct. 16F(2d)670. (9) Because punishment was greater than he expected. 326 Ill 173, 157NE193. (10) Judgment on plea of guilty will not be vacated on ground that defendant was never committed by magistrate. CalA 283P976. (11) Other instances. 39F (2d)336; 38Wyo 135, 264P1033. [c] **Where motion is based on fraud or irregularity,** every reasonable intendment will be made in support of judgment. 136Wash359, 240P3. [d] **Denial of motion** held not abuse of discretion. 16 F(2d)670; 200 Ind27, 161NE269. [e] **Matter rests in discretion of court.**-200 Ind27, 161NE269. [f] **Showing of fraud or irregularity** is essential to set aside judgment. 146Wash312, 262P964.

1326-74 Mo 300SW491; 196Wis113, 219NW380. [a] 165Ga779, 142SE100 (motion made after term). [f] **Where there was conviction for one offense** and judgment was for another, judgment should be set aside. 21AlaA192, 106S 624. [g] **On failure of defendant to plead to one count,** judgment on general conviction must be set aside. 21AlaA 192, 106S624. [h] **Court has wide discretion** in setting aside default judgments. 218Ky540, 291SW779. [i] **Where sentence inadvertently imposed on bad count of information** sentence should be set aside. 38F(2d)635.

1326-76 326 Ill 266, 157NE218; TexCr 31SW(2d)809; TexCr 31SW(2d)811(1st case).

1326-77½-New. Defendant who had sentence declared illegal may not after resentence have original sentence reinstated as valid. 126Misc612, 214NYS 447 (though second sentence be invalid and unjust).

1326-77⅓-New. An affidavit supporting a motion for withdrawal of a plea of guilty after judgment has been held insufficient to support an allegation that the confession was secured by illegal means. 326 Ill 266, 157NE218.

1326-77¼-New. Defendant, who pleaded guilty to driving an automobile while intoxicated, believing the charge was breach of the peace, could not have the judgment set aside under a statute relating to judgments entered on default. 100Vt214, 136A387.

1326-77⅕-New. Although the court had denied a motion for a new trial made before sentence, it has jurisdiction to hear and determine the motion, vacate the judgment, and grant a new trial after sentence is imposed, although an appeal has been taken, when done in the same term and before actual service of sentence is begun. 127Misc502, 217 NYS60.

1326-77⅙-New. All judgments entered at a term may be vacated on a subsequent day of the same term. 158Tenn 404, 14SW(2d)51(2dcase).

1326-77⅐-New. That the grand jury which presented the indictment was not legally drawn or qualified is not ground for setting aside a judgment where no motion was made to set aside the indictment. 100CalA233, 279P1031.

1326-78 13F(2d)527; 35F(2d)323; 36 F(2d)499 (insufficient allegation in indictment held not to avoid judgment); 33Ariz383, 265P609; 326 Ill 266, 157NE 218; 336 Ill 244, 168NE323; Mass 171 NE53; Mo 280SW1038; Mo 30SW(2d) 94. [a] **Perfected appeal divests trial court of jurisdiction** to vacate judgment of conviction. 33Ariz383, 265P609. [b] **Error as to place of commission** of offense is no ground for setting aside conviction and sentence on plea of guilty on application at subsequent term. Mo 30SW(2d)94. [c] **Modification for errors of law held unauthorized.**-36F(2d) 499.

1326-79 [a] **For purpose of postponing sentence** court is without jurisdiction to set aside judgment sentencing defendant to term in penitentiary after commitment has been issued and defendant has served part of sentence. 170 Ark621, 280SW1005, 44ALR1193.

1326-79½-New. The statute empowering the court to suspend sentence and put defendant on probation has been held not to authorize the court to eliminate or modify the sentence after expiration of the term. 13F(2d)527.

1326-79⅓-New. Right to vacate conviction is in equity court after term. 36 F(2d)499.

1326-80 294Pa156, 143A910.

1326-81 35GaA660, 134SE187.

1326-83 [a] **In Arizona.**-33Ariz383, 265 P609.

1326-83½-New. Statutes providing for relief against judgments for mistakes, inadvertence, and excusable neglect are exclusive. 146Wash114, 261P775.

1326-84 195Cal 249, 232P457, 36ALR 1435; 89CalA225, 264P346; 90Fla844, 107S535, 538 [citCyc]; 92Fla740, 110S 259; 326 Ill 266, 157NE218; 199 Ind 183, 156NE389; Mo 30SW(2d)94; Tex Cr 27SW(2d)805; TexCr 29SW(2d)771. [f] **Writ of error and writ of error coram nobis distinguished.**-195Cal 249, 232P457, 36ALR1435. [g] **Purpose of writ was to bring into the record fact unknown to court,** which, if known, would have resulted in different judgment. 250Mich377, 230NW180. [h] **Error of fact in issue and adjudicated at time of rendition of judgment** cannot be corrected on writ. Mo 30SW(2d)94. [i] **Matters in issue.**-Mo 30SW(2d)94. [j] **Relief against judgment on ground of fraud** cannot be obtained on error coram nobis. Mo 30SW(2d)94.

1326-85 95Fla289, 116S470; 336 Ill 244, 168NE323. [a] **Errors of law** may not be corrected by writ of error coram nobis. 195Cal 249, 232P457, 36ALR 1435.

1326-86 195Cal 249, 232P457, 36ALR 1435.

1326-87 200 Iowa687, 205NW522 (writ of coram nobis is not available in Iowa); 261Mass12, 158NE167; Mass 171NE53; 250Mich377, 230NW180.

1326-88 200Cal 730, 254P893.

1326-89 [a] (2) There is no limitation of time within which writs of error to supreme court from circuit courts may be sued out in criminal cases. 90 Fla844, 107S535. [b] **Petition denominated application for writ of coram nobis** is too late after conviction becomes final. TexCr 29SW(2d)771. [c] **In Missouri.**-Mo 30SW(2d)94.

1326-89½-New. Writ of error coram nobis will not lie to correct a judgment after it has been affirmed by a higher court on writ of error. 195Cal 249, 232 P457, 36ALR1435.

1326-89⅓-New. To authorize a writ, it must appear that the judgment attacked is prima facie valid. 98Fla206, 123S755 (1st case).

1326-90 90Fla844, 107S535; 117Nebr 320, 220NW281, 282 [citCJ], 58ALR 1283.

1327-91 See also 90Fla844, 107S535. [a] 195Cal 249, 232P457, 36ALR1435.

1327-95 91Fla927, 108S671; 95Fla289, 116S470. [a] **Where conviction has been affirmed on appeal,** trial court cannot entertain application for writ. 92Fla 740, 110S259.

1327-96½-New. nor to correct irregularities occurring at the trial; 195Cal 249, 232P457, 36ALR1435.

1327-97 90Fla844, 107S535; 200 Ind 469, 164NE625(2dcase); 200 Iowa687, 205NW522 (writ not granted because of insanity of prosecuting witness).

1327-97½-New. nor for misconduct of the jury; 195Cal 249, 232P457, 36ALR 1435.

1327-97½-New. nor for newly discovered evidence going to the merits of the issues tried. 91Fla927, 108S671.

1327-98½-New. nor for misconduct of the court or an officer thereof; 195Cal 249, 232P457, 36ALR1435.

1327-98½-New. nor to challenge the legality of the jury accepted by accused, after conviction and affirmance; 95Fla 289, 116S470.

1327-99 90Fla844, 107S535.

1327-99½-New. ; nor after verdict, denial of new trial and sentence, to restore the case to the status upon arraignment, so that defendant may plead guilty, where the motion is without merit in law or fact. 200Cal 730, 254P893.

1327-1 90Fla844, 107S535; 95Fla289, 116S470; 117Nebr320, 220NW281; 58 ALR1283; TexCr 27SW(2d)805.

1327-2½-New. A writ may not be invoked where the petitioner is a party to the fraud, causing error. 89CalA210, 264P343.

1327-2½-New. A writ should not be granted where another remedy exists. 98Fla206, 123S755(1stcase).

1327-3 Contra 94Fla32, 113S630.

1327-5 [a] 195Cal 249, 232P457, 36ALR 1435. [f] **Application for writ should make full disclosure of specific facts** showing prima facie grounds for writ. 92Fla740, 110S259.

1327-8 [a] **Competency of jurors to impeach verdict.**–Jurors are legally disabled to impeach their verdict by affidavits, testimony, or extrajudicial statements except in cases provided by statute in case of so-called chance verdicts. 195Cal 249, 232P457, 36ALR1435.

1327-8½-New. In denying a motion to dismiss an amended petition for a writ, the court is not bound to issue the writ. 89CalA219, 264P343.

1327-8½-New. Judgment in coram nobis proceedings showing on its face that relief granted was unauthorized is void. Mo 30SW(2d)94.

1327-10 16F(2d)566; 78Mont114, 252P 803, 805 [citCJ].

1327-11 134Misc228, 235NYS173. [a] **Clerk cannot control effect of sentence** by changing time of issuing mittimus. 329 Ill 398, 160NE748.

1327-13 16F(2d)566; Mo 300SW491; 78Mont114, 252P803, 805 [citCJ]; 134 Misc228, 235NYS173. [a] (2) Call for mittimus by prosecutor held administrative, not judicial, act. 82NH459, 135 A530. [b] **Whether prisoner may be held at hard labor** is necessarily determined by judgment entry. 199 Iowa 782, 202NW831.

1327-17 199 Iowa782, 202NW831, 833 [citCJ].

1328-35½-New. After affirmance of conviction on appeal or fresh warrant of commitment must issue; Ont [1925] 3 DomLR1126.

1328-35½-New. otherwise defendant must be released on habeas corpus. Ont [1925] 3DomLR1126.

1328-37 [a] **Records must show conviction** and sentence of accused. 92Fla 494, 109S453.

1328-43½-New. Where a justice of the peace, after sentencing defendant to pay a fine or serve a stated term in jail, discharges accused on payment of part of the fine and furnishing a bond for the remainder, he cannot thereafter issue a commitment. Utah 277P401.

1328-44 16F(2d)566, 567 [citCJ].

1328-45 16F(2d)566, 567 [citCJ]. [a] **Mittimus cannot vary or contradict judgment.**–16F(2d)566.

1329-47 16F(2d)566, 567 [citCJ]; 171 Minn36, 213NW56.

1329-51½-New. Formal commitment is not necessary, and, if necessary, can be supplied at any time. 134Misc228, 235NYS173.

1329-55 92Fla494, 109S453.

1329-57 105WVa527, 143SE304 (substantial statement held sufficient). [a] 134Misc228, 235NYS173. [d] **Sex perversion.**–84CalA267, 257P881.

1329-58 124 Okl 241, 255P154.

1329-59 [a] **Where court failed to direct additional imprisonment on failure to pay fine,** part of commitment inserted by clerk for additional imprisonment is void. 42F(2d)43.

1329-61 124 Okl 241, 255P154.

1329-68 46 Ida112, 268P8; 134Misc 228, 235NYS173. But see Ont [1925] 3 DomLR1126.

1329-68½-New. The warden of a state penitentiary may properly refuse to recognize mittimus committing a prisoner to a county jail on conviction of a crime punishable in a county jail but containing a recital that, with the consent of accused, the sentence should be served in the penitentiary. 200 Iowa 889, 205NW500.

1329-68½-New. The service by the sheriff of an illegal commitment does not satisfy the judgment. 200 Iowa889, 205NW500.

1330-70 NJSup 131A620; NJSup 132 A306; Wis 233NW82.

1330-74 200 Iowa889, 205NW500; NJ Sup 131A620.

1330-82 208 Iowa867, 226NW81.

1331-5 32 OklCr388, 241P349. [a] **Such resentence is not a new judgment.**–32 OklCr388, 241P349.

1331-8 113Nebr768, 205NW296, 297 [citCJ].

1331-11 198Cal 601, 246P802; 168GaA 274, 147SE524(2dcase).

1331-11½-New. or other cause, 113 Nebr768, 205NW296.

1331-13 163Ga106, 135SE481.

1332-21 169Ark932, 277SW5; 98CalA 40, 276P401; 162Ga55, 132SE533.

1332-24 But see 19F(2d)537.

1332-26½-New. But stay is not probation so as to prevent imprisonment after expiration of period of sentence. 72 CalA374, 237P406.

1332-28½-New. Permission given by the clerk of the justice's court under direction of the justice for a person convicted of vagrancy to return on the next day and commence serving his sentence amounts to no more than a stay of execution and does not affect the validity of the sentence or commitment. 70CalA170, 232P757.

1332-28½-New. Neither a magistrate nor a sheriff can release persons who become ill while serving sentence. 151 Md553, 135A367, 49ALR1303.

1332-28¼-New. The district court has been held to have acted within its discretion and power under the Federal Probation Act in setting aside an order of probation and entering sentence. 14F(2d)5.

1332-28½-New. Under the Probation Act the district court has the power to suspend the imposition as well as the execution of the sentence. 14F(2d)5.

1332-28½-New. Much latitude is allowed district judges in enforcement of the Probation Act. 14F(2d)5.

1332-29 310Mo 274, 275SW536; 77 Mont66, 249P666. [e] **In Missouri.**–307 Mo 40, 269SW385. [f] **In Maine.**–126 Me330, 138A547.

1332-30 MoA 297SW445 (statute mandatory); 77Mont66, 249P666.

1333-39½-New. The pendency of such appeal in the United States court does not stay enforcement of another judgment of conviction in another prosecution in state court for similar but separate and distinct offense from that involved in proceeding in federal court. 167Minn343, 209NW24.

1333-40 168Ga274, 147SE524(2dcase).

1333-48 19F(2d)826; 35F(2d)594; 36 F(2d)366; 37F(2d)330; 30Ariz265, 246 P550, 551 [citCJ]; 169Ark932, 277SW 5, 6 [citCJ]; 179Ark200, 14SW(2d) 1112; 161Ga462, 131SE168; 162Ga55, 132SE533; 162Ga443, 133SE923; 170 Ga64, 152SE97; 170Ga368, 153SE25(1st case); Ga 155SE466; 38GaA386, 144 SE49; 206 Iowa414, 220NW313 (during good behavior on condition of payment of costs); Iowa 232NW798; 225 Ky318, 8SW(2d)389; 151Md553, 135A 1367, 49ALR1303; 309Mo 465, 274SW 731; MoA 297SW445; 24 OhA146, 156 NE916; 35 OhA491, 172NE623; 51SD 415, 214NW812; 70Utah296, 259P1044, 54ALR1463. [a] **Order staying execution permanently is void.**–309Mo 465, 274SW731. [b] **But the court is held authorized in conditioning sentence** on payment of damage done by defendant in prosecution for drunkenness. 41GaA 364, 152SE921.

1334-49 35 OhA491, 172NE623.

1334-50 35 OhA491, 172NE623. [a] **Power to exercise discretion as to enforcement of punishment pronounced by court** is vested in governor. 169 Ark932, 277SW5.

1334-51½-New. Statute giving court right to suspend pronouncement of sentence does not give it power to stay execution. 169Ark932, 277SW5.

1334-51½-New. Such statute does not give power to suspend execution of sentence pronounced prior to its passage. 169Ark932, 277SW5.

1334-51¼-New. After commencement of service of sentence, the court has no power to place the prisoner on probation. 25F(2d)93.

1334-52 223Ky468, 3SW(2d)1151.

1334-54½-New. The mere fact that punishment has already been received by defendant in a federal court does not entitle him as matter of law to suspension of the sentence for the same offense in a state court. 142Wash528, 253P796.

1334-54½-New. A suspension of sentence is not obligatory and is only conditioned upon observance of the law. 82 NH459, 135A530.

1334-55 194NC277, 139SE448.

1334-57 25F(2d)723 (up to time of actual commitment); 111Conn281, 149A 840 (statute construed); 196 Ind335, 148NE406; 221MoA146, 297SW711 (stay without bond held void); 247 NY493, 161NE157; 217AppDiv428, 216 NYS765; 129Misc120, 220NYS671; 148 Wash270, 268P869. See also Can [1926] 4DomLR935. [g] **In Montana.**–73Mont 541, 237P525. [h] **Statute for suspension of sentence** is designed to afford first offenders opportunity to reform and should be liberally construed. 73Mont 541, 237P525. [i] **In New York.**–129 Misc120, 220NYS671. [j] **Evidence held sufficient** to warrant suspension of sentence to some defendants and to deny same to others. 25F(2d)723. [k] **Court is not relieved of duty to appoint counsel** to present application for suspended sentence by fact that there is no attorney in court. 108TexCr62, 299SW 234. [l] **In Utah.**–70Utah296, 259P1044, 54ALR1463. [m] **Purpose of law permitting suspension of sentence** is reformatory. 70Utah296, 259P1044, 54 ALR1463. [n] **In California.**–208Cal 622, 283P931. [o] **Statute necessarily becomes part of judgment entry.**–Iowa 232NW798.

1334-58 73Mont541, 237P525; 100Vt 197, 136A24.

1334-60 8PaDist&Co 269. [a] (5) Judge before whom conviction is had cannot parole accused in vacation, but only while sitting as court. 309Mo 465, 274SW731. (6) Discharge from parole at expiration of term of sentence is not obligatory. 315Mo 672, 286SW396. (7) Granting of parole is not part of trial. 317Mo 811, 297SW30. (8) Parole Law, as part of penal code, becomes part of judgment. 317Mo 811, 297SW30. [b] 97NJEq555, 129A624. [c] **In Pennsylvania.**–6PaDist&Co 342. [d] **Retroactive effect.**–15F(2d)931.

1335-61 But see 317Mo 811, 297SW30; 73Mont541, 237P525.

1335-62½-New. A parole is not a pardon or a limited pardon. 97NJEq555, 129A624.

1335-62½-New. Parole is a prison regulation. 97NJEq555, 129A624.

1335-62¼-New. The court of pardons has power in effect to grant a parole, by bestowing upon a convict a limited pardon with such conditions annexed as are

incident to a parole. 97NJEq555, 129A 624.

1335-62⅛-New. Discretion given to judges to release prisoners on parole is founded on good reason after due hearing and not to be influenced by impulse, prejudice, caprice, or popular clamor. 6PaDist&Co 333.

1335-62½-New. In granting a parole under some statutes, the trial court is authorized to make reasonable conditions and restrictions. 128Kan434, 278 P14 (conditions held reasonable).

1335-62½-New. Ordinarily one accepting the terms of a parole is deemed to have agreed to the conditions named therein. 128Kan434, 278P14.

1335-63 24F(2d)664; 247NY493, 161 NE157; 217AppDiv428, 216NYS765; 135Misc475, 239NYS122. [c] **In Arizona.**-30Ariz265, 246P550. [d] **Counties having no probation officer.**-196 Ind335, 148NE406. [e] **Federal Probation Act** gives court power to place on probation defendants who have not actually commenced service of their sentence. 19 F(2d)537. [f] **Facts not warranting admission to probation.**-36F(2d)824. [g] **Particular statutes construed.**-37 F(2d)858; 170Ga64, 152SE97; 135 Misc809, 240NYS91. [h] **Circumstances of crime and defendant's character** do not deprive court of jurisdiction to hear and determine application on its merits. CalA 284P484. [i] **Construction of particular statutes.**-43F(2d)329.

1335-64 162Ga327, 133SE843.

1335-65 111Conn281, 149A840; 36GaA 602, 137SE572; 24 OhA146, 156NE916. [a] **Thus** United States district attorney has no power to grant probation, even in same term of court, after beginning of service of sentence, under Probation Act, 18 USCA §§ 724-727. 275US347, 48SCt146, 72Led309. [b] **Court knowing of previous conviction of felony** cannot place defendant on probation in violation of statute. CalA 280 P203. [c] **Order of probation requiring service of portion of sentence** as condition of probation is void. 43F(2d)329.

1335-68 126Me330, 138A547.

1335-69½-New. Under Federal Probation Act, the trial court retains control of the judgment after the expiration of the terms in which it was rendered. 14 F(2d)622.

1335-69⅓-New. The act is remedial and should be liberally construed. 14 F(2d)622.

1335-69¼-New. The Probation Act empowers the court to admit defendant on probation after service of sentence has commenced. 14F(2d)622.

1335-71 8F(2d)759; 15F(2d)268; 15 F(2d)697; 17F(2d)129; 17F(2d)777; 208Cal 688, 284P449; 208Cal 692, 284P 451(istcase); 162Ga327, 133SE843; 217 AppDiv428, 216NYS765; 100Vt197, 136 A24.

1335-71½-New. Oral remarks to sheriff while sentencing defendant to watch after her and if he had further trouble with her to take her to the chain-gang cannot be construed as placing defendant on probation under statutes. 161 Ga462, 131SE168.

1335-71⅛-New. A probationer who has violated rules prescribed for his conduct may be brought before the court without warrant by probation officer while in his custody or the court may order arrest and, after due examination, revoke leave to serve sentence outside of a place of detention. 160Ga494, 128SE746.

1335-71¼-New. Under some statutes the court has no authority to suspend execution of sentence without admitting defendant to probation. 70CalA643, 234 P109.

1335-71⅓-New. Under such statutes suspension of sentence is not authorized except as an incident to the granting of probation. 70CalA643, 234P109.

1335-71⅙-New. Such statutes contemplate that defendant while on probation and conforming to the terms thereof shall be at large and not in confinement. 70CalA643, 234P109.

1335-71⅐-New. Under such statutes an order suspending execution of judgment directing that defendant shall be remanded to custody of the sheriff and shall be returned into court at the expiration of a stated period and stating that application for probation is denied is not an order admitting defendant to probation and is void. 70CalA643, 234 P109.

1335-71⅛-New. In such case the judgment is not satisfied by the expiration of the period of suspension. 70CalA 643, 234P109.

1335-71⅑-New. In such case the trial court, after the expiration of the period of suspension, may order that defendant be taken into custody and compelled to submit to the term of imprisonment imposed by the judgment. 70CalA643, 234 P109.

1335-71⅒-New. A defendant requesting a parole after sentence and accepting conditions thereof cannot, after violation of parole, complain of its conditions. 129Kan739, 284P365.

1335-72 36GaA602, 137SE572; 83NH 173, 139A580; 135Misc475, 239NYS122; 53ND389, 206NW230; 70Utah296, 259P 1044, 1046 [quotCJ], 54ALR1463; 100 Vt197, 136A24; 147Wash169, 265P175; 155Wash158, 283P678(istcase) (between minimum and maximum periods); 39 Wyo 40, 270P152, 153 [citCJ]. 35 OhA 491, 172NE623; 10PaDist&Co504. [b] **Sentence on violation of suspended sentence** held not invalid on ground its period terminated after expiration of original sentence. 135Misc475, 239NYS 122.

1335-73 83NH173, 139A580; 247NY 493, 161NE157; 70Utah296, 259P1044, 1046 [quotCJ], 54ALR1463.

1335-73½-New. The power to revoke a suspension of sentence is not lost by lapse of a period of time greater than the maximum time for which accused might have been sentenced. 54ND164, 209NW211.

1335-74 180Ark382, 21SW(2d)608 (suspension of sentence for liquor offense could be revoked where subsequently still and mash were found on premises); NJSup 136A199; 194NC271; 139SE436; 70Utah296, 259P1044, 1046 [quotCJ]; 54ALR1463. [a] **At end of term of imprisonment** accused need no longer submit to probation officer's observation. 196 Ind335, 148NE406. [b] **Defendant not subject to arrest under** same judgment absent violation of terms of probation. CalA 284P940.

1335-76½-New. An order revoking parole of a probationer without notice and opportunity to be heard is void. 160Ga494, 128SE746.

1335-76⅓-New. A probationer who has not served original sentence is not entitled to discharge on habeas corpus pending complaint by probation officer of violation of rules of probation. 60 Ga494, 128SE746.

1335-76¼-New. A parole cannot lawfully be revoked as a mere matter of caprice. 162Ga327, 133SE843.

1335-77 Iowa 232NW798; 70Utah296, 259P1044, 1048 [CJperCherry,J], 54ALR 1463; 100Vt197, 136A24. But see 196 NC438, 146SE73; 136SC302, 132 SE613. [b] **Where defendant had been acquitted** in both state and federal courts on matter involved, it was held that imposition of sentence was improper. 136SC302, 132SE613.

1335-77½-New. Some statutes provide for a hearing on the question as to violation of the conditions of a parole. 162 Ga327, 133SE843.

1335-77⅓-New. On such hearing the judge is the sole judge of the credibility of the witnesses. 162Ga327, 133SE843.

1335-77¼-New. Under such statutes the judge is not authorized to withdraw a parol in the absence of sufficient evidence to authorize a finding that one or more of the conditions of the parol had been violated. 162Ga327, 133SE843.

1335-77⅕-New. In some jurisdictions, however, the statute does not point out the method of procedure. 70Utah296, 259P1044, 54ALR1463.

1335-77⅙-New. The court in a case of first impression has held that a person whose sentence has been suspended without limitation is entitled to a hearing upon the question of whether or not he has complied with the conditions imposed; 70Utah296, 259P1044, 54ALR, 1463.

1335-77⅐-New. that such hearing must be according to some well recognized and established rules of judicial procedure; 70Utah296, 259P1044, 54ALR 1463.

1335-77⅛-New. that defendant is entitled to have filed either an affidavit, motion, or other written pleading setting forth facts relied on for revocation of suspension; 70Utah296, 259P1044, 54 ALR1463.

1335-77⅑-New. that defendant should be given opportunity to answer or plead to the charge made; 70Utah296, 259P 1044, 54ALR1463.

1335-77⅒-New. that a hearing should be had upon the issues joined; 70Utah 296, 259P1044, 54ALR1463.

1335-77⅑-New. and that defendant as well as the state be given the right of cross-examination. 70Utah296, 259P 1044, 54ALR1463.

1335-77⅓-New. In some jurisdictions, under constitutional provision, defendant has the right to be informed of the accusation against him in a proceeding to enforce a suspended judgment, 194 NC271, 139SE436.

1335-77⅓-New. and a charge that he has not been of good behavior or has violated the criminal law, without specifying the nature or cause of the accusation, does not warrant the court in sentencing him under suspended judgment. 194NC271, 139SE436.

1335-79 169Ark932, 277SW5 (imprisonment for one year after void stay of execution of sentence for one year, where prisoner at large for one year proper); 70CalA643, 234P109; 161Ga462, 131SE 168; 162Ga443, 133SE923; Ga 155SE 466; 151Md553, 135A367, 368, 49ALR 1303 [citCJ]; 51SD415, 214NW812, 814 [quotCJ].

1336-80 162Ga443, 133SE923; 51SD 415, 214NW812, 814 [quotCJ].

1336-81 162Ga443, 133SE923; 51SD 415, 214NW812, 814 [quotCJ].

1336-82 46 Ida142, 267P227 (after term specified in judgment has expired); 51 SD415, 214NW812, 815 [quotCJ].

1336-83 171Ark784, 286SW948; 51SD 415, 214NW812.

1336-85 51SD415, 214NW812.

1336-86 171Ark784, 286SW948; 180 Ark382, 21SW(2d)608 (in absence of statute limiting time to revoke suspension, sentence is satisfied only by suffering thereof).

1336-88 161Ga462, 131SE168; 151Md 553, 135A367, 368, 49ALR1303 [citCJ].

1336-89 151Md553, 135A367, 49ALR 1303; 221MoA146, 297SW711; 51SD 415, 214NW812; Man [1927] 1DomLR 964, [1927] 1WestWkly101.

1336-90 36Wyo 159, 253P667, 669 [citCJ].

1337-92 69CalA520, 231P590 (on suspension of sentence for felony court cannot remand defendant to sheriff's custody to work at county road camp).

1337-93 41F(2d)704.

1337-94 24F(2d)664; 36F(2d)366. [c] **Suspension of judgment** does not suspend operation of final judgment beyond term of imprisonment fixed thereby. 196 Ind335, 148NE406.

1337-96 100Vt197, 136A24.

1337-97 196 Ind335, 148NE406. See also 165Ga190, 140SE356.

1337-98 24F(2d)664; 100Vt197, 136A 24.

1337-99 OklCr 288P503. But see 170 Ga632, 153SE762.

1337-1 But see 36F(2d)366.

1337-1½-New. Method of revocation of probation is prescribed by the probation statutes in some jurisdictions. 161Ga 466, 131SE170.

1337-1⅓-New. Such method of revocation of probation is conclusive. 161 Ga466, 131SE170.

1337-1¼-New. It cannot be dispensed with by provision in original sentence declaring breach of rules prescribed by court shall ipso facto work revocation. 161Ga466, 131SE170.

1337-1⅕-New. Where defendant fails to observe rules of probation imposed by court, he may be brought before the court without warrant at any time prior

to final disposition of his case, 161Ga 466, 131SE170.

1337-1⅙-New. or the court may issue a warrant directing that he be arrested and brought before it, 161Ga466, 131SE 170.

1337-1⅐-New. whereupon after due examination the court may revoke its leave to probationer to serve his sentence outside the confines of the chain-gang, jail, or other place of detention. 161 Ga466, 131SE170.

1337-1⅛-New. Examination thus provided requires notice to and opportunity for probationer to be heard as to whether parole shall be revoked. 161 Ga 466, 131SE170.

1337-1½-New. Order revoking parole in his absence made without notice and opportunity to be heard is null and void. 161Ga466, 131SE170; 165Ga190, 140SE356.

1337-1 1/10-New. No formal hearing is necessary to revoke a probation. 231 Mich656, 204NW801.

1337-1 1/11-New. ; but it is better practice for the trial judge to fix a day for a hearing and give defendant an opportunity to be heard. 231Mich656, 204 NW801.

1337-1½-New. Where defendant appeared at a hearing and made no objection to an adjournment but agreed to be present on the day fixed, he will be deemed to have consented to the adjournment. 231Mich656, 204NW801.

1337-1⅓-New. The filing of a petition to revoke a probation within probation period gives the court jurisdiction to revoke the probation. 231Mich656, 204 NW801.

1337-1¼-New. Such jurisdiction is not lost by an adjournment to a reasonable date, although such date is subsequent to the expiration of the probation period. 231Mich656, 204NW801.

1337-1⅕-New. The purpose of the statute authorizing court to suspend sentence is to give accused an opportunity to earn release from imprisonment by good behavior. 196 Ind335, 148NE406.

1337-1⅙-New. Power to place on probation can only be exercised before the beginning of execution of sentence. 14 F(2d)202.

1337-1⅐-New. Granting of parol does not vacate the sentence imposed, but simply suspends execution of the punishment. 129Kan739, 284P365.

1337-1⅛-New. On revocation of parole, temporary suspension of sentence ends and the original sentence immediately becomes effective without other action. 129Kan739, 284P365.

1337-3 181Ark895, 28SW(2d)708; 93 Fla590, 112S87; 136Wash133, 238P983. [b] (1) **Trial court may inquire into sanity,** though conviction has been affirmed. 93Fla590, 112S87.

1337-4 108TexCr121, 299SW433 (sentence should be stayed and trial on issue ordered). [c] **In Washington.**-136 Wash133, 238P983.

1337-5 93Fla291, 111S720, 721 [citCJ]. [a] **Trial court has power to stay execution** though prisoner is committed in another circuit unless control has been assumed by appellate court. 93Fla291, 111S720. [b] **Application for stay should be by proper person** and supported by affidavits. 93Fla291, 111S720.

1337-8 198Cal 601, 246P802.

1337-10½-New. If found sane the prisoner should be remanded for execution. 93Fla291, 111S720.

1337-10⅓-New. Inquisition is not required on mere suggestion of insanity. 181Ark250, 25SW(2d)21.

1337-11 Contra 117Tex134, 299SW393.

1337-12½-New. Circuit court may review warden's action refusing to call jury to inquire into defendant's insanity. 181Ark250, 25SW(2d)21.

1338-14 93Fla291, 111S720, 721 [cit CJ].

1338-14½-New. Inquiry as to sanity after judgment is collateral and has no reference to validity or enforceability of judgment. 93Fla590, 112S87.

1338-15 93Fla590, 112S87.

1338-17 93Fla590, 112S87.

1338-18 93Fla590, 112S87.

1338-19 93Fla590, 112S87.

1338-22½-New. The trial court's determination of a convict's present sanity, after sentence, is not reviewable. 93Fla 590, 112S87.

1338-23 163La512, 112S400; 77Mont 66, 249P666; 108TexCr121, 299SW433 (court in which defendant was convicted has exclusive jurisdiction to try issue). [b] (2) Where defendant is in penitentiary awaiting execution, trial court is unauthorized to inquire into question of sanity arising after judgment. 181 Ark58, 24SW(2d)953. (3) If first jury disagree, it is warden's duty to call another jury to secure verdict on question of defendant's sanity. 181Ark250, 25 SW(2d)21.

1338-25 77Mont66, 249P666.

1339-38 CalA 284P709 (fourth offenders); CalA 284P1070; 168Ga699, 148SE 593(2dcase); 217Ky123, 288SW1036; 165La341, 115S613, 616 [citCJ]; 169La 215, 124S832; 109TexCr450, 5SW(2d) 514, 515 [citCJ]. [a] **Only court wherein defendant was twice convicted has jurisdiction to sentence as for second offense.** 169La215, 124S832.

1339-39 Kan 291P782; Mo 18SW(2d) 474; 285Pa289, 132A370 (statute held not repealed).

1339-40 18F(2d)573; 196Wis469, 220 NW650.

1339-42 Ida 290P387; 54ND768, 210 NW971; 196Wis469, 220NW650. [a] **Second offense is punished** and not first. Ida 290P387.

1339-43 [a] **Additional punishment for second offender inflicted for second offense** to which greater degree of criminality attaches. 135Misc67, 236NYS 619.

1339-46½-New. A statute authorizing increased punishment for second violation of Prohibition Law is not in conflict with statute authorizing punishment for first offense. Ida 290P387.

1339-47 206Cal 307, 274P523; 200 Iowa660, 204NW278; Iowa 230NW379; 217Ky123, 288SW1036; 165La341, 115 S613, 616 [quotCJ]; 115Nebr119, 211 NW619; 224AppDiv3, 229NYS492; 152 Wash389, 277P998. [b] **Allegation "did then and there sell intoxicating liquor"** held not to charge bootlegging or offense punishable as second or subsequent offense. 115Nebr119, 211NW619.

1339-47½-New. Amendment of statute held not bar to arrest and conviction for third offense although first and second offenses were committed prior to adoption of amendment. Nebr 230NW503.

1339-47⅓-New. Proceeding, after conviction, to determine whether defendant had previously been convicted of another felony, is criminal. 229AppDiv378, 242NYS692.

1339-48 168Ga699, 148SE593(2dcase).

1339-48½-New. A city ordinance providing for punishment for first, second, and third offenses, means first, second, and third convictions. 23 OhA299, 155 NE498.

1339-49 205Cal 534, 271P902; 203 Iowa327, 210NW922; 127Kan166, 272P 132; 169La543, 125S587(3dcase); 233 Mich98, 206NW516; 175Minn508, 221 NW900; Mo 18SW(2d)474; 114Nebr 257, 207NW207; 244NY451, 155NE737 (Baumes Act); 109TexCr450, 5SW(2d) 514, 515 [citCJ].

1339-51 109TexCr450, 5SW(2d)514, 515 [citCJ].

1340-52 205Cal 534, 271P902; 169La 215, 124S832; 128 Or515, 273P323.

1340-53 Ida 290P387; 175Minn508, 221NW900.

1340-56 96Fla768, 119S380.

1340-57 128 Or515, 273P323.

1340-58 127Kan166, 272P132.

1340-63 24F(2d)100; 26 OhA329, 157 NE421; 193Wis126, 213NW645. [a] **In Kentucky.**-221Ky239, 298SW704.

1340-64 25F(2d)348 (imprisonment for over year cannot be imposed for maintaining nuisance, though second offense, under national Prohibition Act); 163La 121, 111S621; 165La341, 115S613, 617 [quotCJ]; 151Wash61, 275P60. [g] **In Louisiana.**-159La222, 105S297 (Acts [1921] No. 39 § 3); 163La121, 111S 621. [h] **In California.**-69CalA466, 231 P601. [i] **In New York.**-220AppDiv528, 221NYS760. [j] **In Kentucky.**-217Ky 123, 288SW1036. (2) 216Ky255, 287SW 717. [g] **In Ohio.**-A 172NE701.

1341-65 128 Or515, 273P323.

1341-66 35F(2d)580; 216Ky608, 299 SW320; 165La341, 115S613. [a] 135 Wash609, 238P638. [d] **Conviction for violation of state prohibition law will not** support charge of second violation of subsequently enacted prohibition ordinance providing increased penalty for subsequent offenses. 144Va640, 131SE 229. [e] **In Nebraska.**-115Nebr65, 211 NW179.

1341-68 TexCr 28SW(2d)818.

1341-70½-New. Convictions obtained under a statute which provides that, when a person is once convicted of a named offense, an increased penalty shall be imposed for subsequently committed offenses, are available to the state on a subsequent conviction under a duly enacted codification of such statute. 200 Iowa660, 204NW278.

1341-70⅓-New. Judgment of conviction on a plea of nolo contendere constitutes a prior conviction. 195Wis175, 217NW743.

1341-70¼-New. Jury do not retry former case and indictment in such case is concluded by prior judgment. 231Ky 327, 21SW(2d)471.

1341-70⅕-New. Punishment under previous sentence is unnecessary under some statutes. 135Misc809, 240NYS91.

1341-72 OhA 173NE267.

1341-73 207Iowa552, 223NW153. But see 219Ky319, 292SW806. [b] **In Kentucky.**-218Ky839, 292SW505.

1341-73½-New. Prior offense need not have been committed within statutory period for returning indictment for subsequent offense. 120Kan220, 242P1016.

1341-73⅓-New. Accused may be convicted of a second offense, although the former offense was committed more than the statutory limitation period before the commission of the second offense. 36Man349, [1927] 1DomLR1150, [1927] 1WestWkly353.

1341-73¼-New. That limitation has run against first offense is immaterial in prosecution for second offense. Ida 290P387.

1341-74½-New. A second offense need not have been within one year in the absence of statute so requiring. 106 WVa194, 145SE269.

1341-75 41F(2d)215; 136Misc25, 242 NYS68. [b] **In New Jersey.**-104L288, 140A297. [c] **Mandatory life sentence required** only after three prior convictions separated sufficiently to offer opportunity for reformation. 136 Misc25, 242NYS68.

1341-80 200 Iowa660, 204NW278 (failure to fix appeal bond does not affect finality of judgment); 221Ky239, 298 SW704; 254NY249, 172NE487; 224 AppDiv3, 229NYS492; 135Misc809, 240 NYS91 (suspension of sentence does not affect finality of judgment); 24 OhA 208, 156NE924, 925 [quotCJ]; 108 TexCr282, 1SW(2d)312; 104WVa231, 139SE742. See also 134Misc468, 235 NYS629; 134Misc786, 236NYS432. But see 124Kan464, 260P661; 137Misc352, 244NYS557; 128 Or515, 273P323. [b] **Matters not affecting finality of judgment.**-200 Iowa660, 204NW278, 280 [cit CJ]. [c] **Effect of suspension of sentence.**-108TexCr282, 1SW(2d)312. [d] **Effect of appeal.**-221Ky239, 298SW704.

1342-82 244NY243, 155NE113. [a] **Conviction can have no effect beyond limits** of state where judgment was rendered. 244NY243, 155NE113.

1342-82½-New. Some statutes providing for increased punishment on conviction within the state after conviction in any other state, government, or country apply only where the first conviction was for an offense which would constitute a felony if committed in the state where the second conviction is obtained. 69CalA94, 230P1001.

1342-82⅓-New. Convictions under federal laws have been held under "repeater" statute. 193Wis126, 213NW645.

1342-83 113TexCr194, 20SW(2d)416.

1342-84 135Misc67, 236NYS619; 146 Wash221, 262P622.

1342-84½-New. That sentence was suspended on former conviction after plea

of guilty does not affect second conviction and judgment. 200 Iowa660, 204 NW278.

1342-85 Utah 269P1006, 1007 [quotCJ].

1342-85½-New. As validity of former judgment of conviction is not affected by failure to fix amount of appeal bond later conviction for third offense is not improper in such case. 200 Iowa660, 204NW278.

1342-86 Utah 269P1006, 1008 [quotCJ].

1342-89 78CalA503, 248P946, 947 [cit CJ]; 95CalA92, 272P786; 226Ky683, 11SW(2d)696(1stcase); OklCr 287P 1068; 45Philippine167; Wis 231NW162 (holding that, where three prior convictions must be established and only two are charged, statute is inapplicable). [a] **Statute allowing amendment of information to include prior convictions** held not ex post facto. 101CalA 376, 281P700.

1342-90 [a] **Appropriate form of allegation in Philippines.**-45Philippine167. [b] **Formal or technical plea not required,** but where it is sought to enforce provisions of act authorizing increased punishment of habitual delinquent, some allegation or reference to act in information is necessary. 45Philippine167.

1342-92½-New. Where defendant is arraigned on a charge containing an allegation of a prior conviction, he is not required to state that he has suffered a prior conviction of an offense other than the one charged. 70CalA 489, 233P413.

1342-92¼-New. Accused when arraigned on a charge containing an erroneous allegation of a prior conviction is not required to state that he has suffered a prior conviction of an offense other than the one charged. 70CalA 489, 233P413.

1342-92¼-New. The state must show that the first offense was committed after the act went into effect. 215Ky769, 286SW1059.

1342-92½-New. Failure to offer evidence in support of an allegation of a prior conviction does not affect the validity of conviction of the offense charged. 18F(2d)573.

1342-92½-New. Under some statutes making a first violation a misdemeanor and a second a felony, the court, on defendant's motion, should require the prosecution to elect to prosecute on the misdemeanor charge only where the indictment does not allege that the second offense occurred after the act took effect. 221Ky239, 298SW704.

1342-92½-New. Demurrer is unnecessary to raise question of previous conviction antedating statute, and it may properly be raised by objection to certified transcripts when offered in evidence. 207 Iowa552, 223NW153.

1342-92¾-New. A statute regulating procedure in prosecutions on information is inapplicable to informations charging a prior offense only to increase the punishment for a subsequent offense. 175Minn508, 221NW900.

1342-92½-New. Such statute is not repealed by a subsequent statute prescribing increased punishment for subsequent offenders. 175Minn508, 221NW900.

1342-92½-New. Where a second offense has been, by statute, raised to a felony, all subsequent violations are likewise felonies under an indictment averring former conviction. 108WVa 277, 150SE736.

1342-93 207Cal 366, 278P857; CalA 286 P749; 69Utah444, 256P109, 110 [quot CJ].

1342-94 14F(2d)35; 35F(2d)941; 40 F(2d)609; Cal 292P267; 168Ga699, 148SE593(2dcase); 40GaA228, 149SE 153(1stcase); 44 Ida636, 258P553 [cit CJ]; Iowa 230NW379; 221Ky184, 298 SW378; 163La552, 112S414; 233Mich 98, 206NW516; 102NJL318, 133A403; OklCr 287P1068; 53SD521, 221NW250; 160Tenn664, 28SW(2d)635; 69Utah444, 256P109, 110 [quotCJ]; 147Va709, 137 SE528. [a] **State must prove that prior offense was committed after passage of act** to authorize conviction of felony of second offense. 221Ky184, 298SW378. [b] **Where judgment on former conviction was suspended,** burden is on state to show that suspension was revoked. 108TexCr282, 18W(2d)312. [c] **Presumption as to validity of former conviction.**-Utah 269P1006. [d] **Defendant can waive necessity of proof** that previous conviction was for sale of intoxicating liquors. 40F(2d)609.

1343-95 170La5, 127S345(2dcase); 114 Nebr257, 207NW207; 69Utah444, 256P 109, 110 [quotCJ].

1343-98 135Misc809, 240NYS91.

1343-2 207 Iowa334, 221NW556; 231 Ky327, 21SW(2d)471. [a] **Regularity of prior judgment presumed.**-231Ky494, 21SW(2d)808.

1343-3 226Ky802, 11SW(2d)959.

1343-4½-New. Where state abandons its course of obtaining increased punishment, defendant has the burden of proving that a previous conviction alleged in the indictment was for the same offense. 106TexCr511, 293SW831.

1343-4½-New. After showing conviction, the state need not prove the official character of the justice of the peace before whom the previous conviction was had. 129Kan175, 281P872.

1343-5 124Kan464, 260P661; Mo 22 SW(2d)809; 114Nebr257, 207NW207; 69Utah181, 253P204; Va 153SE821 (record of prior conviction); Wash 286P 102; 102WVa619, 135SE905. But see 208 Iowa811, 225NW852. [d] **Evidence that accused, in prosecution for murder,** when apprehended, was escaping from state prison, where he was serving life sentence for murder, held admissible as bearing on question of punishment. 199 Cal 451, 249P859.

1343-6½-New. , or because of the rule excluding evidence of a different independent crime, although of the same nature. 168Ga699, 148SE593(2dcase).

1343-7 165La341, 115S613, 616 [citCJ].

1343-11½-New. After admission of prior conviction, admission of evidence of defendant's bad reputation for selling liquor is not error. 221Ky166, 298SW 389.

1343-12 116Nebr18, 216NW556. Contra 124Kan464, 260P661.

1344-14 169La215, 124S832.

1344-17 13F(2d)975; 207 Iowa334, 221 NW556; 213Ky323, 280SW1094; 105 WVa117, 141SE622. [a] **Certified copies of judgments held admissible.**-100 CalA464, 280P184.

1344-18 321 Ill 143, 151NE563; 200 Iowa660, 204NW278; 216Ky220, 287SW 704; 219Ky482, 293SW984; Mo 18SW (2d)474; Mo 23SW(2d)1; 76Mont526, 248P215; 69Utah181, 253P204. See also 93Fla516, 112S47. [a] **Preliminary steps.**-324 Ill 55, 154NE430.

1344-19 See also 100CalA397, 280P137. [a] **Admission of defective commitment is no error** where defendant had waived defect by serving imprisonment. 100 CalA397, 280P137.

1344-21 43F(2d)906; 204 Iowa670, 215 NW752; 156La881, 101S252 (not necessary to produce certified copies, though permitted by statute); 33 OhA 338, 169NE588 (docket entries and evidence that docket was made from papers in case held admissible); OklCr 283P1023(2dcase); 147Wash426, 266P 174.

1344-22 69Utah181, 253P204.

1344-22½-New. Admission of a void indictment and record of conviction thereunder is prejudicial error. 318 Ill 380, 149NE271.

1344-23 226Ky802, 11SW(2d)959; 228 Ky819, 16SW(2d)448. But see 35F(2d) 580.

1344-24½-New. Oral evidence is admissible to show the date of commission of a misdemeanor relied upon as a prior offense. 210Ky350, 275SW807.

1344-24½-New. Evidence given at the former trial is not admissible. 209Ky 181, 272SW428.

1344-24¼-New. Other evidence of prior conviction. 217Ky255, 289SW299; Mass 155NE8; 147Va678, 137SE478.

1344-24½-New. It is not necessary that the entire record be introduced in evidence in order to prove the prior conviction, but such conviction may be proved by the verdict of the jury and the judgment, sentence, and commitment, properly identified, or by other competent evidence. Okl 274P893.

1344-24¼-New. Record of a prior conviction on a different date from that alleged in the indictment has been held admissible. 24F(2d)890.

1344-24½-New. In Canada a previous offense cannot be proved by production of a certificate of conviction in the absence of statutory provision therefor. Man [1929] 1DomLR220.

1344-24¼-New. Under some statutes a certificate of the warden is prima facie evidence of the prison status of a person on trial for a subsequent offense. 169La215, 124S832.

1344-24½-New. Prior conviction on information not charging liquor violation held not admissible. 338 Ill 128, 170NE 240.

1344-25½-New. Testimony that a witness as a guard took defendant to the penitentiary where he was sent for robbery is admissible. Mo 23SW(2d)1.

1344-25½-New. Testimony as to identity is admissible. Mo 23SW(2d)1.

1344-30 231Ky327, 21SW(2d)471.

1344-31 231Ky327, 21SW(2d)471 (indictment incompetent except where necessary to show character of offense).

1344-33 221Ky166, 298SW389. But see 40F(2d)609.

1344-34 150Wash121, 272P72.

1345-37 70CalA489, 233P413. [a] **In other jurisdictions,** however, under different statutes, court is not required during trial to keep from jury all knowledge of prior conviction admitted by defendant in his plea. 77Mont54, 249 P1114.

1345-37½-New. The effect of statutes in some jurisdictions, where defendant admits prior convictions, is to permit knowledge thereof to go to the jury. 76 Mont526, 248P215.

1345-37½-New. Testimony of accused on witness stand that he has been convicted of felony goes only to credibility and is not considered proof of prior offense. 207Cal 366, 278P857.

1345-39 Iowa 230NW379; 26 OhA329, 157NE421; Utah 266P265 (insufficient); 146Va279, 135SE700. [a] 26F(2d)315; Cal 270P379; 207Cal 366, 278P857 (extrajudicial admission of defendant); 69 CalA466, 231P601; 72CalA561, 237P 780; 89CalA18, 264P324; CalA 270P 1010; 99CalA306, 278P492; CalA 284 P709; CalA 284P988; CalA 286P502; CalA 290P1083; 92Fla1038, 111S285; 120Kan220, 242P1016; 124Kan179, 260 P617; 130Kan532, 287P231; 215Ky769, 286SW1059; 222Ky218, 300SW596; 231 Ky494, 21SW(2d)808; MoA 286SW744; 118Nebr812, 226NW438; 221AppDiv245, 222NYS607; 229AppDiv378, 242NYS 692; 58ND792, 228NW199; OklCr 286 P351; OklCr 287P1065; 134Wash166, 235P9; 150Wash121, 272P72; 106WVa 194, 145SE269 (possession of moonshine liquor); 108WVa692, 152SE749. [b] **Evidence held insufficient.**-Iowa 230NW 379; 218Ky839, 292SW505; 26 OhA329, 157NE421; 147Va709, 137SE528. [c] **Identity of offense.**-15F(2d)945. [d] **Evidence held insufficient to support allegations of previous conviction.**-96Fla 553, 119S145; 97Fla23, 119S393; 227 Ky51, 11SW(2d)1000(1stcase).

1345-40 118Kan616, 236P808 (evidence sufficient in liquor case). [b] 146Wash 221, 262P622. [d] **Prior conviction must be established by proper evidence.**-324 Ill 55, 154NE430. [e] **Evidence held insufficient** to sustain prior conviction. 324 Ill 55, 154NE430. [f] **Evidence held sufficient:** (1) To sustain conviction. 337 Ill 290, 169NE214. (2) To go to jury. 231Ky327, 21SW(2d)471.

1345-41½-New. The docket of a probate court not disclosing that the criminal complaint charged a crime committed within the county in which the court was established is insufficient to show the jurisdiction of the court. 44 Ida636, 258P553.

1345-42 124Kan464, 260P661; 69Utah 181, 253P204; 108WVa692, 152SE749.

1345-42½-New. Record of previous conviction is conclusive on accused. 27 OhA297, 161NE284.

1345-43 OklCr 276P794; 149Wash670, 272P62.

1345-44½-New. Where a prior conviction was affirmed on appeal, proof of the judgment of affirmance is sufficient without proof of all of the steps taken in the trial court leading up to the final judgment on appeal. 37 **OklACR** 602, 244P461.

1345-44¾-New. In some jurisdictions the statutes impose upon the prosecuting attorney the duty of introducing the record of the first conviction. 104 **WVa**231, 139**SE**742 (has no discretion).

1345-45 120**Kan**220, 242**P**1016; 69**Utah** 444, 256**P**109.

1345-46 24**F(2d)**890; 120**Kan**220, 242 **P**1016; 175**Minn**516, 221**NW**903.

1345-47 204 **Iowa**116, 214**NW**490; 204 **Iowa**670, 215**NW**752; 206 **Iowa**390, 220 **NW**328. [a] **Evidence held insufficient.**–204 **Iowa**116, 214**NW**490.

1345-48 **Mo** 29**SW(2d)**71; 134**Wash** 166, 235**P**9 (oral testimony of identity competent, as against objection that it contradicted a written record). [a] **Evidence held sufficient** to identify accused. 230**Ky**732, 20**SW(2d)**731.

1345-51 Contra 193**Wis**126, 213**NW**645.

1345-51½-New. Admission by defendant to witness that he had served terms in prison has been held sufficient to show prior conviction. **CalA** 286**P**502.

1345-53½-New. Defendant held unable to escape lengthened term of imprisonment, in absence of applicable statute of limitations, because conviction of prior offenses was not brought promptly to court's attention. 229**AppDiv**378, 242**NYS**692.

1346-54 36**F(2d)**944; 42 **Ida**785, 248**P** 12 (doubt expressed by court as to whether sentence could be imposed for offense charged held to have had no effect on defendant's understanding of nature of act in pleading guilty); 197 **Wis**446, 222**NW**311.

1346-57 But see 245**Mich**396, 223**NW** 67. [a] **In New York.**–224**AppDiv**179, 229**NYS**131.

1346-60½-New. Defendant knowingly pleading guilty as to a prior conviction must stand the consequences of prior convictions. 244**NY**451, 155**NE** 737.

1346-60½-New. Where sentence provided by statute for successive offenses is mandatory, there should be no intimation by the district attorney of a lower sentence on a plea of guilty. 244 **NY**451, 155**NE**737.

1346-61 206 **Iowa**390, 220**NW**328; 170 **La**5, 127**S**345(2dcase); **OklCr** 287**P** 1068; 102**WVa**619, 135**SE**905, 906 [cit CJ].

1346-63 85**CalA**413, 259**P**465.

1346-66 41**F(2d)**215; 102**WVa**619, 135 **SE**905, 906 [citCJ].

1348-73 [a] 140**Wash**385, 249**P**784.

1347-74 96**Fla**768, 119**S**380 (ancillary proceeding); 251**Mich**626, 232**NW**402 (no further preliminary examination is required on filing of supplemental information charging prior conviction). [b] (3) Under Pen. L. §§ 1941–1943, as amended by L. (1926) c 457, trial may be had after sentence or conviction upon information filed by district attorney. 244**NY**451, 155**NE**737 (statute constitutional). [d] **In New York.**–218**App Div**862, 219**NYS**95.

1347-76 **Man** [1927] 3**DomLR**455. But see **Man** [1930] 3**DomLR**743.

1347-82½-New. Statutory requirement that the court inform a convicted felon of the right to trial of the truth of a charge of previous conviction cannot be disregarded. 223**AppDiv**123, 227**NYS** 417.

1347-83 14**F(2d)**35; 35**F(2d)**605; 44 **Ida**636, 258**P**553. [a] 44 **Ida**636, 258**P** 553. [b] **Evidence held insufficient to go to jury** in prosecution for being persistent violator of Prohibition Law. 69**Utah**266, 254**P**141.

1347-83½-New. On conflicting evidence it is a question for the jury as to whether a prior conviction was had before or after the adoption of the statute providing for increased punishment in case of prior convictions. 210**Ky**350, 275**SW** 807.

1347-83½-New. Prior conviction is a question of fact for the jury. 69**Utah** 144, 256**P**109.

1347-83¼-New. The court must construe the record of former conviction. 14**F(2d)**35.

1347-83½-New. On introduction of former indictment as proof of prior conviction the court properly stated to the jury what the record disclosed. 14**F(2d)** 35.

1347-83⅛-New. Evidence to establish former conviction must be submitted to jury. 207 **Iowa**334, 221**NW**556.

1347-83½-New. Question of former conviction is for the jury. **Mo** 23**SW** (2d)1.

1347-83¼-New. Statute relating to second offense of selling liquor near school held to authorize issue of fact regarding verity of record of first conviction and identity of accused. 160**Tenn**664, 28 **SW(2d)**635.

1347-91 308**Mo** 695, 274**SW**470; **Mo** 29 **SW(2d)**71; **Mo** 29**SW(2d)**698; 54**ND** 768, 210**NW**971; 136**Wash**453, 240**P**562; 106**WVa**194, 145**SE**269. [c] **Instructions held proper.**–231**Ky**327, 21**SW(2d)**471; **TexCr** 290**SW**537; 136**Wash**453, 240**P** 562. [d] **Instruction held improperly refused.**–229**AppDiv**378, 242**NYS**692. [e] **Invading jury's province.**–**OklCr** 287**P** 1068.

1347-93 206 **Iowa**390, 220**NW**328.

1347-94 8**F(2d)**113; 218**Ky**841, 292**SW** 499; 219**Ky**319, 292**SW**806; 115**Nebr** 65, 211**NW**179; 54**ND**768, 210**NW**971; 69**Utah**444, 256**P**109. [b] 44 **Ida**636, 258 **P**553.

1347-95 [a] **Submitting question of defendant's guilt** of possessing liquor held proper though there was no evidence of previous offense since law went into effect. 218**Ky**839, 292**SW**505.

1348-97½-New. Although the statute does not require the court to submit special findings of prior convictions to the jury, it is not error for the court to do so. 136**Wash**453, 240**P**562.

1348-97½-New. The manner in which issues of a prior conviction and defendant's alleged identity with the person convicted on a previous trial should be presented to the jury is discretionary with the trial judge. 8**F(2d)**113.

1348-97¼-New. The court should instruct that, on finding of the present offense without finding a prior conviction, the jury should convict only of the present offense. 69**Utah**444, 256**P** 109.

1348-97½-New. Where an indictment failed to charge a felony, submitting a felony charge thereunder is error. 216 **Ky**608, 288**SW**320.

1348-97⅛-New. Submitting the issue of a felony for a third offense in possessing liquor has been held erroneous where the indictment failed to show the dates of the former offenses. 217**Ky** 255, 289**SW**299.

1348-97½-New. An instruction is not objectionable because it does not inform the jury that conviction must be based on the evidence. 207 **Iowa**334, 221**NW**556.

1348-97½-New. An instruction authorizing conviction of a subsequent offense on failure of the state to establish a former conviction is proper. 129**Kan** 719, 284**P**357.

1348-99 8**F(2d)**113; 77**CalA**780, 246**P** 461; 53**ND**429, 206**NW**786. [b] **Form of verdict submitted** should require direct answer to question whether charge of former conviction is true or untrue. 88**CalA**212, 263**P**295. [c] **Verdict of guilty as to alleged prior offense** is insufficient to support conviction as second offense. 88**CalA**212, 263**P**295.

1348-99 77**CalA**780, 246**P**461; 324 **Ill** 55, 154**NE**430. But see **DC** 32**F(2d)** 945; 150**Wash**121, 272**P**72. Contra 93 **Fla**516, 112**S**47. [a] **Single form of verdict held improper** as withdrawing issue of previous conviction. 324 **Ill** 55, 154**NE**430. [b] **Verdict must be taken as based** on testimony establishing suspended sentence ripened into executed judgment, where indictment alleged that sentence was suspended. 229**AppDiv** 385, 242**NYS**625.

1348-1 13**F(2d)**975; 232 **IllA**341; 144 **Wash**598, 258**P**484.

1348-1½-New. An implied finding as to prior convictions and imprisonments cannot be regarded as broader than the language of the charge on such subjects in the indictment itself. 285**Pa** 289, 132**A**370.

1348-2 213**Ky**323, 280**SW**1094.

1348-3 See also 67**Utah**362, 248**P**119.

1348-5 **CalA** 288**P**800 (holding finding of prior convictions insufficient); 136 **Wash**453, 240**P**562. [b] **Submitting form of verdict** held not error. **Wash** 286**P**102.

1348-5½-New. A general finding of guilty supports a sentence for a second offense by a court trying the facts. 324 **Ill** 55, 154**NE**430.

1348-5¼-New. A verdict finding defendant guilty of the second offense is sufficient to sustain a conviction as for a first offense, although it is insufficient on the question of a prior conviction. 88**CalA**212, 263**P**295.

1348-5¼-New. Addendum added by the jury to the form of verdict given them by the court is not erroneous where it merely makes the verdict more emphatic. 337 **Ill** 290, 169**NE**214.

1348-5⅛-New. Finding that defendant is guilty as charged is proper where second offense is not distinguished into degrees. 34**PortoRico** 80.

1348-6 [b] **Though not necessary for jury to find charge of prior conviction was true,** where admitted, if it does so find, defendant cannot complain. 76 **Mont**526, 248**P**215.

1348-8 [a] **Punishment held not too severe.**–**CalA** 286**P**749 (successive convictions).

1348-8½-New. Without a finding that defendant has suffered previous convictions, sentence of imprisonment, except as alternative for a fine, is unauthorized under National Prohibition Act. **CalA** 288**P**800.

1348-9 51**Philippine**857. [a] **In New York.**–244**NY**451, 155**NE**737.

1349-13½-New. A defendant may not be sentenced under an habitual criminal act where the verdict finds him guilty under the count charging the subsequent offense but not guilty under the counts charging prior convictions and imprisonments. 285**Pa**289, 132**A**370.

1349-13⅛-New. Where an affidavit is insufficient as the basis for conviction for a third offense, the case will be remanded for sentence in the first offense. 23 **OhA**299, 155**NE**498.

1349-13¼-New. In case of conviction on both of two counts, one charging the offense and other a second offense, there can be but one sentence. 8**F(2d)** 113.

1349-13⅛-New. Docket number of proceeding to sentence. 169**La**215, 124**S** 832.

1349-13⅛-New. In Philippines court has no discretion to refrain from imposing additional penalty in case falling under terms of statute. 51**Philippine** 857.

1349-15 232 **IllA**341.

1349-21 **Cal** 292**P**267; 92**CalA**775, 268 **P**1082 (judgment sufficient).

1349-22½-New. **In New York, under the Baumes Law,** commitment to life imprisonment is defective for failure to disclose proceedings showing a fourth conviction of felony on which the commitment was based. 134**Misc**468, 235 **NYS**629.

1349-23 87**CalA**751, 262**P**1117(3dcase).

1349-24 206**Cal** 307, 274**P**523; 168**La** 807, 123**S**332(2dcase); 231**Mich**271, 203 **NW**864.

1350-32 110**Conn**298, 147**A**825; 136 **Misc**25, 242**NYS**68; 152**Wash**389, 277**P** 998. [a] 85**CalA**165, 259**P**119; 110**Conn** 403, 148**A**350; 206 **Iowa**390, 220**NW** 328; 130**Kan**497, 287**P**599; 179**Minn** 532, 229**NW**787 (indeterminate sentence); **Mo** 26**SW(2d)**937 (life imprisonment for first degree robbery after conviction of grand larceny); **ND** 230 **NW**735; 102**WVa**619, 135**SE**905; 195 **Wis**175, 217**NW**743; **Wis** 231**NW**162.

1350-32 [f] **In New York.**–216**AppDiv** 240, 214**NYS**537. [g] **Statute is permissive rather than compulsory** when it prescribes punishment in cases where defendant has been previously convicted. **Wis** 231**NW**162.

1350-37 See also 204 **Iowa**116, 214**NW** 490.

1350-38½-New. A claim that information is defective in not alleging that former conviction has become final is without merit where defendant's counsel in his brief makes a statement which shows such fact. 158**La**755, 104**S**705.

1350-33½-New. This is true, also, where the penalty imposed for the second offense did not exceed the limit for the first offense. 158**La**755, 104**S**705.

1350-38¼-New. Conviction for second offense cannot be sustained where no proof of first offense submitted at preliminary examination. 233**Mich**98, 206 **NW**516.

1350-38⅙-New. Where, because of failure to prove that a previous conviction was for a felony, sentence as for second conviction is improper, the appellate court may correct the sentence. 220**AppDiv**528, 221**NYS**760.

1350-33⅙-New. Such resentence, however, does not prevent the filing of an information to adjudicate the question whether accused should be punished as for a second felony. 220**AppDiv**528, 221 **NYS**760.

1350-33 1/7-New. An objection that no evidence was introduced in support of an allegation of a prior conviction cannot be raised for the first time on appeal. 18**F(2d)**573.

1350-38⅛-New. Where defendant was erroneously adjudged an habitual criminal in a prosecution for burglary, judgment will be modified on appeal by striking the erroneous portion therefrom. 78**CalA**503, 248**P**946.

1350-38 1/9-New. Evidence that a witness saw defendant asleep in an orchard with sacks full of stuff and a knife beside him is not prejudicial to defendant convicted as a fourth offender. 109**TexCr** 26, 28**SW(2d)**442.

1350-38 1/10-New. Where evidence was sufficient to warrant conviction of a principal offense charged in information and also of the enhanced offense caused by three prior convictions charged therein, judgment reciting defendant's guilt of the principal offense, without mentioning the prior convictions does not require reversal, but cause will be remanded, with instructions to enter a proper and sufficient judgment. 150**Wash**121, 272**P**72.

1350-33 1/11-New. One convicted of a second offense cannot, for the first time on appeal, object to the absence of former conviction. 207 **Iowa**334, 221 **NW**556.

1350-38½-New. Admission in evidence of information to prove prior conviction is not subject of complaint where there is no objection made and defendant's counsel admits such conviction. 34**F(2d)** 406.

1350-38 1/13-New. Harmless error. Defendant, in a second offender proceeding, cannot complain of trial by jury not required by statute where found guilty by jury and judge. 169**La**215, 124**S** 832.

1350-38 1/14-New. Failure to allege the number of the earlier indictment held immaterial where the first case was sufficiently identified. 231**Ky**327, 21 **SW(2d)**471.

1350-38 1/15-New. Error in instructions held harmless where evidence of guilt is clear. 337 **Ill** 290, 169**NE**214.

1350-38 1/16-New. Erroneous admission of evidence held not cured by instruction to disregard. 35**F(2d)**580.

1350-38 1/17-New. Point that complaint charged second offense not raised before magistrate or in circuit court until after jury were sworn came too late. 251 **Mich**253, 231**NW**557(1stcase).

1350-38 1/18-New. Admitting over objection proof of previous conviction of misdemeanor as basis for increased punishment in prosecution for transporting whisky is prejudicial error. **Mo** 298**SW(2d)**159.

1350-38 1/19-New. That one count improperly charged prior conviction has been held harmless error where properly charged in another count. **Va** 153**SE** 821.

1350-40 [a] (1) 22**AlaA**545, 117**S**603; 92**Fla**601, 109**S**588.

1350-41 219**AppDiv**19, 219**NYS**373.

1351-46 199**Cal** 361, 249**P**186; 79**Mont** 52, 255**P**337; 219**AppDiv**19, 219**NYS** 373; 191**NC**378, 131**SE**743; 12**Porto RicoFed**114; 151**Wash**694, 277**P**83. But see 12**PortoRicoFed**162.

1351-49 21**AlaA**310, 107**S**788; 164**Ga** 219, 138**SE**213; 245 **IllA**100; 170**Minn** 504, 212**NW**894; 114**Nebr**653, 209**NW** 328. [b] **That statute provides inconsistent maximum penalties** does not render it invalid. 242**Mich**491, 219**NW** 724.

1351-50 [a] **Statute held not repealed by subsequent act.**–165**La**341, 115**S**613.

1351-51 [a] **Act increasing penalty repeals earlier provision.**–250**Mich**349, 230 **NW**202.

1351-53 170**Minn**504, 212**NW**894.

1351-60 167**La**1085, 120**S**865.

1351-61 38 **OklCr**350, 261**P**978.

1352-63½-New. New York "Baumes Law" imposing life sentence on fourth offenders is within police power of the legislature. 219**AppDiv**19, 219**NYS**373.

1352-63⅓-New. A constitutional provision fixing the minumum punishment and not fixing the maximum punishment is not a limitation on the power of the legislature to fix a maximum punishment. 38 **OklCr**350, 261**P**978.

1352-63¼-New. or to declare the offense a felony. 38 **OklCr**350, 261**P**978.

1352-67½-New. A constitutional provision that an amendment of any criminal statute shall not affect punishment of prior offenses is applicable to a statute prescribing the penalty of death by hanging for murder. 92**Fla**601, 109 **S**588.

1353-84 193**NC**290, 136**SE**709, 710 [cit CJ].

1353-85 116 **Oh**512, 157**NE**69, 71 [cit CJ].

1353-88 116 **Oh**512, 157**NE**69, 71 [cit CJ].

1353-89 74**CalA**353, 240**P**296.

1353-91 160**Tenn**267, 23**SW(2d)**665.

1353-93 134**Wash**48, 234**P**1021.

1353-95 322 **Ill** 390, 153**NE**688; 329 **Ill** 453, 160**NE**836.

1353-96 [a] 329 **Ill** 453, 160**NE**836; 329 **Ill** 501, 160**NE**839; 171**Minn**158, 213**NW** 735; 124 **Or**322, 263**P**903, 56**ALR**661.

1353-97 321 **Ill** 45, 151**NE**513.

1353-98 150**Wash**121, 272**P**72.

1353-3 110**Conn**482, 148**A**551; 245 **IllA** 119; 231**Mich**409, 204**NW**140.

1353-6 326 **Ill** 324, 157**NE**167; 231 **Mich**409, 204**NW**140 (provision is not applicable to sterilization of feeble-minded persons, not criminals, for purpose of preventing procreation); **Pa** 151**A**801. [b] **Object** of Tennessee constitution in prohibiting judges to lay fines over fifty dollars is to prevent imposition of unreasonable fines. 153**Tenn**198, 281**SW** 462. [c] **Constitutional provision held inapplicable to civil proceedings.**–**Pa** 151 **A**801. [d] **Courts cannot declare law invalid because of severity** unless within constitutional provision. **Wash** 291**P** 728.

1354-14 58**ND**327, 226**NW**505 ("cruel" relates to form and "unusual" to frequency).

1354-15 21**F(2d)**283; 30**F(2d)**984; 326 **Ill** 324, 157**NE**167; 127**Kan**157, 272**P** 666; 165**La**380, 115**S**627.

1355-20 245 **IllA**119; 114**Nebr**653, 209 **NW**328.

1355-21½-New. A statute providing for condemnation of vehicles in which intoxicating liquor is transported does not prescribe cruel or unusual punishment. 170**Minn**349, 212**NW**591.

1355-24 96**Fla**768, 119**S**380; 247**Mich** 127, 225**NW**595.

1355-28 [a] (6) 15**F(2d)**190; 41**F(2d)** 193. (7) Concurrent sentence of five years for violation of Narcotic Act, 21 **F(2d)**283. (8) Other instances. 39**F(2d)** 312. [b] (2) Other instances. 23**AlaA** 535, 128**S**467. [c] (3) 102**CalA**24, 282 **P**406. [f] (2) Statute providing for regulating and registering of real estate brokers and salesmen, and creating state real estate commission to administer act. 97**Fla**710, 122**S**225. [k] (4) Fine of five hundred dollars and imprisonment for ten months is not cruel and unusual under statute providing for one thousand dollars fine and one year's sentence for maintaining place to sell liquors. 203 **Iowa**192, 210**NW**749. [o] (2) Forfeiture of double amount won in gambling game. **Mass** 172**NE**84. [q] (5) Life imprisonment for bank robbery or attempt thereat. 170**Minn**504, 212**NW** 894; 171**Minn**158, 213**NW**735. [r] (5) Two years' imprisonment in penitentiary for selling or giving away liquor. 320 **Mo** 280, 6**SW(2d)**849. (6) Five years for sale of intoxicating liquor. 320**Mo** 173, 7**SW(2d)**340. [s] (2) Restricting diet to bread and water. 114**Nebr**653, 209**NW**328; 114**Nebr**661, 209**NW**330. [w] (1) 190**NC**133, 129**SE**410. (7) Other instances. 197**NC**285, 148**SE**244(1st case). [z] (2) Cadena temporal for arson of public building. 46**Philippine**745. [ee] 159**La**888, 106**S**369. [ff] 146**Wash** 202, 262**P**970. [gg] (2) Statute imposing minimum but not maximum term of imprisonment for robbery while armed with dangerous weapon does not provide cruel and inhuman punishment. 108 **WVa**642, 152**SE**195. [jj] (2) Fine of five hundred dollars and six months in jail for violation of liquor law, with parole of jail sentence during good behavior. 113 **Or**523, 233**P**538. (3) Imprisonment for twenty years for aiding prisoner to escape. 124 **Or**322, 263**P** 903, 56**ALR**661. [ll] 162**La**1060, 111**S** 421. [nn] 322 **Ill** 390, 153**NE**688. [oo] **Mississippi.**–136**Miss**505, 101**S**576; 142 **Miss**342, 107**S**372. [pp] **Virginia.**–145 **Va**872, 134**SE**656. [qq] **North Dakota.**– 55**ND**313, 213**NW**484; 58**ND**327, 226 **NW**505.

1357-31½-New. Banishment for period of probation has been held void as contrary to public policy. 251**Mich**187, 231 **NW**95.

1357-32 207**Cal** 507, 279**P**145; 325 **Ill** 361, 156**NE**372; 199 **Ind**247, 155**NE**544; 316**Mo** 86, 289**SW**847 (for rape).

1357-34½-New. The place of execution may be designated without violation of due process. 164**Ga**204, 138**SE**206.

1357-34⅓-New. Punishment of death for murder in the first degree is not in conflict with a constitutional provision that the penal code shall be founded on principles of reformation. 199 **Ind**247, 155**NE**544.

1357-35 90**Fla**105, 105**S**840 (electrocution); 121 **Or**141, 253**P**367.

1357-39 96**Fla**768, 119**S**380.

1357-39½-New. A statute requiring life imprisonment for a fourth conviction of a felony is not oppressive or arbitrary despite the fact that the court has no discretion. 219**AppDiv**19, 219**NYS**373.

1357-43½-New. Statute authorizing sterilization of mental defectives by vasectomy and salpingectomy is not unconstitutional as imposing cruel and unusual punishment. 143**Va**310, 130**SE**516, 51**ALR**855.

1357-43½-New. A statute authorizing sterilization of mental defectives under prescribed conditions is a violation of the constitutional provision against cruel and unusual punishment. **Utah** 276**P** 921.

1358-53 73**CalA**78, 238**P**112, 113 [quot CJ].

1358-54 73**CalA**78, 238**P**112, 113 [quot CJ].

1358-59 73**CalA**78, 238**P**112, 113 [quot CJ].

1358-63 [k] (2) Forfeiture of double amount won in gambling. **Mass** 172**NE** 84. [ee] 73**CalA**78, 238**P**112. [ff] **Other instances.**–36**F(2d)**967.

1359-68 67**Utah**456, 248**P**135 (statute held not invalid as failing to limit penalty in view of other statutory provisions). [c] **Statute punishing misdemeanors by fine not less than two hundred dollars** and not less than ninety days in jail held not in conflict with statute limiting punishment to six months in jail or three hundred dollars fine. 67**Utah**456, 248 **P**135.

1360-71 168**La**87, 121**S**583; 36**Wyo** 406, 256**P**336.

1360-73 249**NY**302, 164**NE**106.

1360-74 92**Fla**601, 109**S**588. [a] **Where statute provides inconsistent maximum penalties,** it will be construed as provid-

ing for lesser of the two. 242Mich491, 219NW724.

1360-76 198Wis551, 224NW477.

1360-76½-New. The punishment of a crime committed after the enactment and before the taking effect of a statute increasing the punishment is governed by the prior law. 302Mo 634, 259SW429.

1360-79½-New. Amendment of statute made to provide punishment to conspiracy to violate such statute does not indicate an assumption by the legislature that prior to such amendment a violation of the main statute could not be made basis of charge of conspiracy under the penal code. 197Cal 556, 241 P852.

1360-79¼-New. Statute as to punishment must be construed as to purpose and effect. 244NY243, 155NE113.

1360-79¼-New. The offense of murder committed prior to the taking effect of the statute changing the definition of "murder," should be tried and punished in all things under the old law, whether prosecution had been instituted or whether the case was pending either for murder or manslaughter. 111TexCr308, 12SW(2d)801.

1361-90½-New. Agreement of county attorney fixing extent of punishment should be approved where defendant has acted upon it and surrendered statutory and constitutional rights. OklCr 287P839.

1361-91 91CalA287, 266P995; 171Minn 36, 213NW56.

1361-95 22AlaA126, 113S466; 22AlaA 263, 114S631; 90CalA349, 265P863; 97 CalA505, 275P982; 37GaA385, 140SE 403; La 129S684; 157Md372, 146A242; 318Mo 679, 300SW687; Mo 18SW(2d) 48; MoA 283SW61; 114Nebr661, 209 NW330; 115Nebr634, 214NW256; 48 Nev405, 233P523; 131Misc657, 228NYS 361; 191NC378, 131SE743; Oh 173NE 441; 88PaSuper233; 49Philippine225. See also Mo 18SW(2d)28. [d] **One sentenced under indeterminate sentence law,** enacted after commission of offense, which may increase the minimum punishment, theretofore impossible, has a right to be resentenced under original statute. 113 OhSt379, 149NE384. [e] **Defendant cannot complain** of punishment less than statute provides. 89 IndA496, 167NE140. [f] **Statutes applicable.-OklCr** 282P1110.

1361-96 91CalA287, 266P995; 37GaA 385, 140SE403.

1361-96½-New. Where an act of conspiracy was committed before terms of statute itself made offense punishable, penalty must be found if at all in statute defining and punishing criminal conspiracy. 197Cal 556, 241P852.

1361-97½-New. Where the capacity to benefit by an alternative system of punishment applying to first-class cities, does not exist, courts must impose the same form of punishment used throughout the state. 251NY428, 167NE575.

1361-97¼-New. Repeal of statute by act increasing punishment before defendant was charged with offense did not relieve him from punishment. Mo 26SW(2d)937.

1361-98½ TexCr 28SW(2d)559.

1362-98⅙ 21AlaA190, 106S511; 200 Iowa884, 205NW518; 113 OhSt379, 149NE384 (defendant has right to be sentenced by law at time offense was committed).

1362-98⅛ 31Ariz465, 254P477.

1362-5 90CalA349, 265P863; 44 Ida 671, 258P1075; 114Nebr661, 209NW 330; 114Nebr659, 209NW332; 115Nebr 634, 214NW256; 104WVa118, 139SE 474.

1362-9 49SD483, 207NW484.

1362-12 272US451, 47SCt127, 71L ed 347; 21F(2d)283; 24F(2d)782; 37 F(2d)330; 22AlaA286, 115S65; 204Cal 470, 268P909; 161Ga462, 131SE168; 142Miss342, 107S372; 318Mo 705, 300 SW707; 318Mo 1142, 4SW(2d)463; Mo 19SW(2d)671; 114Nebr653, 209NW328; 30NM309, 233P49, 56 [quotCJ]; 190 NC133, 129SE410; 55ND313, 213NW 484; 34 OhA536, 171NE407; 117 Or430, 244P538; 46Philippine252; 137SC364, 135SE360; 138SC24, 135SE651. See also 251NY428, 167NE575.

1363-14½-New. Any attempt by the court to deprive defendant of statutory allowances for good conduct and eligibility for parole are inoperative. 14 F(2d)596.

1363-16 91CalA516, 267P370.

1363-18 Iowa 230NW394.

1363-19 317 Ill 191, 148NE67; 200 Iowa1232, 206NW133; Wis 232NW866.

1363-20 191NC378, 131SE743; 142 Wash528, 253P796.

1363-21 76Mont526, 248P215, 218 [cit CJ]. [a] **In New York.**-224AppDiv227, 230NYS198. [b] **Defendant's good conduct pending appeal** is matter of executive clemency. IndA 171NE811.

1363-22 22AlaA286, 115S65; 190NC 133, 129SE410.

1363-23 76Mont526, 248P215, 218 [cit CJ].

1363-27 205 Iowa1047, 218NW616; 33 PortoRico 889.

1363-29½-New. The court may consider a plea of nolo contendere. 272 US451, 47SCt127, 71L ed347.

1363-29⅓-New. Sentence previously imposed on defendant in federal court for the same offense should be considered. 142Wash528, 253P796 (possessing narcotic drugs).

1364-34 See also 160Tenn267, 23SW (2d)665.

1364-36 [a] **Confession of offense by plea of guilty** subjects party charged to same punishment as though tried and found guilty by verdict. Ga 155SE 466.

1364-38 [a] (25) Three years for second offense under liquor laws. 211Ky 766, 278SW134. (26) Eight to fifteen years for carnally knowing stepdaughter. 142Wash7, 252P108. (27) Penitentiary sentence as punishment for unlawful possession of narcotic drugs is not necessarily excessive. 204 Iowa 667, 215NW706. (28) Punishment within limit prescribed for first offense where defendant was convicted as second offender. MoA 16SW(2d)653. [b] (9) Sentence for one year in penitentiary for operating automobile while intoxicated held excessive and reduced to fine of one thousand dollars and, in default of payment, to imprisonment in county jail for three hundred days. 200 Iowa 483, 203NW806. (10) Sentence of forty years imprisonment for manslaughter in first degree. 38 OklCr34, 259P173. (11) Additional punishment of forbidding driving of automobile without provision therefor in statute. 37GaA385, 140SE403. (12) Fifteen years for embezzlement. OklCr 272P485(2dcase). (13) Fifteen hundred dollars for obstructing travel across ford through erection of bridge. 231Ky554, 21SW (2d)981. (14) Imprisonment of seventeen-year-old boy for two years for assault with dangerous weapon. OklCr 287P792 (reduced to one year). (15) Five years for forgery in second degree. OklCr 287P788(2dcase). (16) Two years' imprisonment for embezzlement of eighty-two dollars and fifty cents. OklCr 290P1113.

1364-39 39GaA26, 145SE911; 211Ky 766, 278SW134; 318Mo 628, 300SW743.

1364-42 115Nebr557, 213NW809.

1364-43 115Nebr557, 213NW809.

1366-71 198 Ind718, 153NE765.

1366-72 46Philippine245.

1366-74 212Ky178, 278SW595 (dictum).

1366-76 [a] **In absence of affirmative showing** that accused was under seventeen when crime was committed, court's assumption of jurisdiction and sentence to reformatory is presumed valid. 212 Ky178, 278SW595.

1366-78½-New. Under the Ohio statute, municipal courts are without power to sentence a female over sixteen years of age to jail or the workhouse on conviction of misdemeanor or delinquency, and imprisonment in jail for default in payment of a fine cannot exceed thirty days. 25 OhNPNS213.

1366-81 [a] **Defendant, guilty of violating two statutes,** one denouncing possession of apparatus for manufacturing intoxicating liquor and other denouncing manufacture or attempt to manufacture whisky or brandy, is subject to only one punishment. 159Tenn245, 17SW(2d)919. [b] **If two separate acts constitute but single crime,** double sentence cannot be imposed. CalA 292P 520.

1366-83 114Nebr280, 207NW29 (statute requiring restitution of twofold value of property stolen and imposing fine is single punishment).

1366-84½-New. A single offense cannot be divided in order to inflict double punishment. 99CalA682, 279P211.

1367-89 273US1, 47SCt250, 71L ed505; 6F(2d)144; 14F(2d)886; 18F(2d)477; 22F(2d)948; 26F(2d)246; 27F(2d)94. [a] **Where counts charge same offense,** sentence under both of them constitutes double punishment. 37F(2d)846. [b] **Where conviction for importation includes every element** charged in conspiracy count, sentence on both counts is double punishment. 42F(2d)354.

1367-95½-New. The question of double punishment is not raised under an indictment charging violation of the National Prohibition Act and the Revenue Act. 17F(2d)877.

1367-95⅓-New. Conviction of conspiracy to commit a crime based on the same overt acts charged as a substantive offense does not present a case of "double punishment." 25F(2d)959.

1367-95¼-New. Sentence to life imprisonment for fourth offenders held discretionary. 130Misc821, 226NYS397.

1367-95⅕-New. Judgment on one count based on the same evidence as another count subjects defendant to double punishment. 26F(2d)63.

1367-95⅙-New. The offenses of purchase, possession, and sale of the same quantity of morphine are separate offenses, and subject to separate penalties. 32F(2d)240.

1367-95½-New. Double punishment does not result where sentences run concurrently and longest one is valid. 37 F(2d)846.

1367-98 25F(2d)348 (under National Prohibition Act, for maintaining nuisance); 35GaA248, 132SE783. But see 23AlaA125, 121S904; 245 IllA94; 245 IllA100.

1367-2½-New. , or impose imprisonment for a limited time proportioned to the amount of the fine. 77Mont74, 249P664.

1367-3 67Utah456, 248P135.

1368-4 35PortoRico 546.

1368-9 164Ga188, 138SE52.

1368-17 [b] **In California.**-69CalA520, 231P590.

1368-23 23AlaA384, 125S898.

1369-24 21AlaA313, 108S77; 73CalA 260, 238P731; 76CalA101, 244P113; 28 Hawaii268; 200 Iowa1232, 206NW133, 42ALR1496; 208 Iowa1205, 227NW165; 97NJEq555, 129A624 (minimum of fifteen years in new law in life sentence); 217AppDiv428, 216NYS765; 216NYS 893; 52ND52, 203NW676; 51SD540, 215NW697; TexCr 20SW(2d)1058(1st case) (flat sentence of fifty years held improper); TexCr 32SW(2d)465; Utah 284P323. [l] **Sentence fixing minimum at term greater than minimum provided by statute** is erroneous under some statutes. 48Nev405, 233P523. [m] **Indeterminate sentence is sentence for maximum term.**-75CalA146, 241P910. [n] **Word "offense"** held to be used as generic term, including both felonies and misdemeanors. 116Oh512, 157NE69. [o] 115Nebr818, 215NW104. [p] **Period of time defendant would serve** in penitentiary was dependent on subsequent action taken by board of parole. 208 Iowa 1233, 227NW166. [q] **Period of probation must be provided** in sentence for same maximum and minimum term. 23 AlaA369, 125S693(2dcase).

1369-25 71CalA281, 235P458; 83CalA 302, 256P616.

1369-26½-New. Under some statutes, where conviction is for a felony for which no definite term is imposed by law sentence must be for an indeterminate term limited only by the minimum and maximum term fixed by law for the offense. 48Nev405, 233P523.

1369-26⅓-New. Under such statutes it is error to fix a minimum term greater than the minimum prescribed by stat-

ute. 48Nev405, 233P523.

1369-26¼-New. At the end of his minimum sentence a convict has only the right to request from the proper officers the mitigation of his sentence by parole or discharge, 32Ariz502, 260P199.

1369-26⅓-New. but has no absolute right to discharge until the end of the maximum period less such time for good conduct as may be given under the statute. 32Ariz502, 260P199.

1369-27 73CalA260, 238P731; 84CalA 186, 257P880; 44 Ida713, 260P160.

1369-28 97CalA238, 275P511; 109Tex Cr517, 5SW(2d)774; 111TexCr424, 14 SW(2d)1027(2dcase). [d] (2) Prior convictions for jostling are convictions for disorderly conduct tending to breach peace so as to authorize indeterminate sentence for two years. 126Misc609, 214 NYS257 (Pen. L. §§ 720-725; L. [1915] c 579, as amended L. [1916] c 287). (3) Indeterminate sentence may be imposed on conviction of illegally practicing medicine. 251NY428, 167NE575.

1370-29 167La635, 120S33; 167La863, 120S480(1stcase); 217AppDiv428, 216 NYS765; 194NC622, 140SE435. [a] **In New York.**-223AppDiv35, 227NYS373.

1370-34 132Misc196, 229NYS281.

1370-34½-New. Error in deciding whether defendant is entitled to an indeterminate sentence does not render the sentence void for lack of jurisdiction. 251NY428, 167NE575.

1370-35 110Conn403, 148A350; 44 Ida 713, 260P160 (statute construed to provide for and determine maximum duration of sentences in certain cases); 244 NY243, 155NE113. [a] **Statute held mandatory.**-251NY428, 167NE575.

1370-35½-New. In Texas the statute is held to be mandatory. TexCr 2SW(2d) 270.

1370-37 6F(2d)640; 7F(2d)796; 16 F(2d)921; 32F(2d)240; 35F(2d)934; 120Kan187, 243P318; 132Misc197, 229 NYS188, 190 [citCJ]; 132SC199, 128SE 882, 886 [citCJ]. See also 7Alaska197, 198 [citCJ].

1370-38 132Misc197, 229NYS188.

1370-39 160Tenn97, 21SW(2d)1039.

1371-41½-New. The circuit court of appeals has no power to modify a cumulative sentence on charges of substantive crime and conspiracy to commit it. 14F(2d)561.

1371-41⅓-New. Single sentence for three convictions held valid. 5PaDist &Co 97.

1371-42 Nebr 230NW586.

1371-45½-New. However, where a prisoner has served sufficient time to fulfill a valid sentence for escape, he may be released on habeas corpus where the prior sentence was invalid. 203 Iowa 352, 212NW701.

1371-46 38 OklACR646.

1371-47 [a] (1) 198Cal 221, 244P359 (Pen. Code §§ 105, 669 are only instances in which sentences may be made cumulative); 87CalA36, 261P1048. (6) Provisions apply only to offenses punishable as crimes in California and not to other acts not so punishable though punishable as crimes in other jurisdictions. 201Cal 360, 257P439, 53ALR615. (7) Specifically Pen. Code §§ 105, 669 and all other sections referring to concurrent and consecutive sentences contemplate only crimes and punishments under laws of state of California. 201Cal 360, 257P439, 53ALR615. (8) Where defendant is convicted of arson and of burning insured property before sentence is pronounced on him for either, sentences must operate consecutively. 203Cal 587, 265P231. [b] (5) Sentence that accused be hanged for rape immediately after sentence to hang for another rape is not error. 320Mo 296, 6SW(2d) 915 (successive sentences of death). [f] **In Louisiana.**-168La648, 123S111. [g] **In Philippines.**-50Philippine823 (statute applied). [h] **In Nebraska.**-231NW807.

1372-49 35F(2d)734 (service of sentence begins when prisoner is delivered into custody of prison officer); 201Cal 360, 257P439, 53ALR615; 122Kan204, 251P407; 177Minn338, 225NW154; 118 Or626, 247P807. [a] **Where prisoner was released from state prison and resentenced to county jail** on habeas corpus, sentence began on first commitment and continued up to time of removal to county jail where original judgment was not vacated. 202Cal 341, 260 P542. [b] **In Alberta.**-Sask [1930] 2 DomLR576.

1372-51 201Cal 360, 257P439, 444, 53 ALR615 [quotCJperPreston,J]; Mo 278 SW711.

1372-53½-New. Where a person while serving a sentence in a county jail is duly committed to a state hospital for the insane and there confined, the time runs on his sentence while so confined in the latter institution. 176Minn572, 224NW156, 62ALR244.

1372-53⅓-New. Where judgment and sentence are amended to speak the truth, the time served under the original sentence is part of the amended sentence. 98Fla853, 124S455.

1372-53¼-New. Sentence for designated number of years means continuous sentence. 42F(2d)788.

1372-57 145Wash686, 261P795.

1372-57½-New. Under Canadian statutes term begins to run from date of conviction in case of sentences for violation of dominion statutes or common-law crimes. Sask [1930] 2DomLR576.

1372-58 225AppDiv623, 234NYS21. But see 229AppDiv378, 242NYS692.

1372-60 132Misc63, 229NYS536; 132 Misc197, 229NYS188.

1372-65 See also 100CalA478, 280P179.

1373-72 [b] (2) Where illegal sentence was pronounced, cause was remanded for resentence, the sentence to commence as of date of judgment appealed from. 136Wash132, 238P922.

1373-72½-New. Time served in hospital, whether within the prison or elsewhere, may be counted against the prisoner's sentence. 163La46, 111S491.

1373-73 42F(2d)788; 171Ark835, 286 SW975. [a] (2) Defendant who has violated his parole is not entitled to have time he was at large counted in computing time he has already served, where he accepted his parole on condition that if he violated parole he should serve out remainder of term. 308Mo 302, 272 SW931. [b] **Consent of sheriff or county attorney,** or both, without authority of court, that defendant shall leave county before expiration of stay of execution and remain at large cannot relieve him from serving full time after being taken into custody. 122Kan204, 251P407.

1373-74 171Ark835, 286SW975; 70 CalA170, 232P757; CalA 292P142; 133 Misc538, 232NYS603; OklCr 282P478; OklCr 289P360 (where time elapses without imprisonment); 101Vt510, 144 A678. [a] **Time that paroled prisoner is at large** ordinarily counts same as time served within prison. CalA 292P 142. [b] **Time served on misdemeanor charge in county jail by paroled prisoner** from state prison after revocation of parole cannot be counted on previous sentence to state prison. CalA 292P 142.

1373-75 169Ark410, 275SW737; 171 Ark835, 286SW975; 70CalA170, 232P 757; 35GaA190, 132SE242; 307Mo 40, 269SW385 (holding that, where parole is terminated within period of sentence, time while at large under parole cannot be counted as part of time he is to remain in prison); MoA 297SW445; 227 AppDiv464, 238NYS216; OklCr 282P 478. But see 42F(2d)788.

1373-75½-New. A prisoner rearrested after violation of the conditions of a parole granted after his commitment is not entitled to have the time during which he was at large counted in computing the time which he has served where the parole provides that he shall serve out the remainder of his sentence if he violates the conditions of the parole. 308Mo 302, 272SW931; 130Misc 748, 226NYS98 (parole is not constructive imprisonment).

1373-75⅓-New. Where, before expiration of sentence, parole is revoked, but before the prisoner can be retaken he is convicted under federal law, the parole board has jurisdiction to require the prisoner's return to the penitentiary under the original sentence. 34F(2d)96.

1373-75¼-New. Sentence of year is completed where convict served part of time on probation and remainder in chain gang. 170Ga64, 152SE97.

1373-77 163La46, 111S491; 151Md553, 135A367, 49ALR1303.

1373-78 See also 42F(2d)788. But see Ga 155SE768. Contra 151Md553, 135A 367, 49ALR1303.

1373-79 25F(2d)300; AlaA 130S315; 54ND178, 208NW977; 54ND193, 209NW 231; TexCr 27SW(2d)159(1stcase); Ont [1925] 3DomLR1126.

1373-79½-New. or habeas corpus proceedings, 220MoA406, 286SW733.

1373-80½-New. , or accepted an improper or insufficient bail bond, 54ND 178, 208NW977; 54ND193, 209NW231.

1373-80⅓-New. or did not issue or enter a certificate of probable cause. 54 ND193, 209NW231.

1374-81 143Miss765, 109S789.

1374-84 42F(2d)788; 163La46, 111S 491; 151Md553, 135A367, 368, 49ALR 1303 [citCJ]; 248NY46, 161NE326. [a] **Applicability of code relating to escapes** to term of paroled prisoner serving another sentence after suspension of parole. CalA 292P142.

1374-85 151Md553, 135A367, 368, 49 ALR1303 [citCJ]. See also 42F(2d)788.

1374-89 But see NS [1928] 1DomLR 624.

1374-90 5F(2d)6; 6F(2d)640; 29F (2d)852; 42F(2d)43 (intention of court governs); 201Cal 360, 257P439, 444, 53 ALR615 [quotCJperPreston,J]; 329 Ill 398, 160NE748; 290Pa534, 139A197; 134SC140, 132SE45. But see 12F(2d) 706. [b] (2) Where sentences under different counts are not ordered to run concurrently, sentences operate consecutively. CalA 292P520. [c] **In Oklahoma.**-Cr 282P478. [d] **In Wisconsin.**-229NW44. [e] **Where one sentence is to penitentiary and other sentence to county jail,** sentences cannot be served concurrently. TexCr 27SW(2d)204(1st case).

1374-91 21F(2d)934. [d] **Though there is doubt as to order of service** because not specified, sentences "to run consecutively" are sufficiently certain to prevent concurrence. 6F(2d)640.

1374-92 [a] **Statute permitting court in its discretion to impose concurrent sentence** does not repeal statute providing for successive sentences. 169Ark883, 277SW36.

1374-95 Mo 300SW491.

1374-95½-New. Separate sentences of one year under three different counts, which sentences are not concurrent, cannot be treated collectively. 34F(2d)279.

1374-96 29F(2d)852; 198Cal 221, 244P 359 (statute relating to imprisonment of person convicted of more than one offense held not to apply where federal court sentenced to imprisonment and state court to fine with alternative of imprisonment); 165Ga472, 141SE202; 231Ky750, 22SW(2d)126. See also 201 Cal 360, 257P439, 53ALR615. [a] **After suspending execution** of state sentence pending imprisonment by federal authorities, accused may be imprisoned under state sentence. 198Cal 221, 244P359.

1374-96½-New. Penitentiary sentence to commence after expiration of prior sentence to term in jail and until certain fine is paid does not begin until such sentence in jail is served and fine is paid. 142Miss352, 107S380.

1374-97 See also Mo 300SW491.

1374-97½-New. Discretion of trial court to make sentences run concurrently not to be disturbed by appellate court. 169Ark883, 277SW36.

1374-97⅓-New. By federal statute, successive sentences are merged into a single cumulative term. 14F(2d)202.

1374-97¼-New. Imposition of cumulative sentences is within the discretion of the court. 14F(2d)280.

1374-97⅕-New. Judgment imposing a sentence aggregating seventy-seven years and fifteen thousand dollars fine was held, by a provision for cumulation, to provide a maximum of fifteen years imprisonment and ten thousand dollars fine. 14F(2d)596.

1374-97⅙-New. Where defendant's original sentence was stayed and he was put on probation, such sentence remained in force after revocation of stay, and after discharge from sentence for second crime for which he was sentenced and committed. 177Minn338, 225 NW154.

1374-97⅐-New. Where sentences run

concurrently, defendant must serve until all have terminated. 177Minn338, 225NW154.

1374-97½-New. Statutes in some jurisdictions have abrogated the common-law rule permitting two or more sentences to be served concurrently and require that they be served consecutively. 177Minn338, 225NW154.

1374-98 OkiCr 282P478.

1374-98½-New. Under some statutes a convict whose parole was revoked and was thereafter committed to the penitentiary on conviction of another crime must serve his sentence under the later commitment after expiration of sentence under the earlier commitment. 322 Mo 857, 17SW(2d)939.

1375-4 See also 6F(2d)640.

1375-15 214Ala675, 108S612; 22AlaA 126, 113S466; 22AlaA642, 119S245(2d case); 23AlaA211, 123S104(1stcase) (sentence held erroneous); 68CalA522, 229P984 (low-grade misdemeanor prisoner cannot be imprisoned elsewhere than in county jail); 93CalA152, 269P 181; Ill 173NE75; 236 IllA1; 89 IndA 424, 166NE7; 171Minn36, 213NW56; 293Pa18, 141A723; 53SD521, 221NW 250; Utah 284P318 (imprisonment in county jail unauthorized on conviction of violating city ordinance which prescribed imprisonment in city jail). [e] 257Mass379, 154NE76. [f] **Imprisonment in penitentiary held mandatory** under statute. 236 IllA1. [g] **Court may not impose jail sentence** under statute declaring penalty to be imprisonment in penitentiary. 202 Iowa428, 210NW435. [h] **In Pennsylvania.**–91 PaSuper540 (statute held not repealed by implication). [i] **Held to constitute felony punishable by imprisonment in penitentiary.**–34F(2d)279. [j] **In New Mexico.**–34NM458, 283P907. [k] **For offense of attempted burglary.**–75CalA 146, 241P910. [l] **For offense of burglary.**–75CalA150, 241P924. [m] **Defendant sentenced to training school not in existence** is entitled to release subject to confinement in school if established. TexCr 31SW(2d)827.

1376-16½-New. Sentence by the court of one county to the workhouse of another county held proper under some statutes. 290Pa530, 139A195.

1376-18½-New. Female pleading guilty to indictment for misdemeanor may be sentenced in discretion of judge to labor and confinement in woman's prison on state farm under statutes in some jurisdictions. 161Ga462, 131SE168.

1376-18½-New. Sentence of a person convicted in a federal court for violation of a state statute to imprisonment in a federal penitentiary is erroneous. 18F(2d)906.

1376-18¼-New. Statutes requiring the jury to recommend the place of imprisonment upon conviction of certain crimes are mandatory. 78CalA702, 248P960.

1376-18½-New. Statute held not to authorize the court to commit to the county jail one convicted of violating a city ordinance prescribing imprisonment in the city jail. Utah 284P318.

1376-18⅓-New. There is no difference between workhouse and jail in relation to confinement under sentence or in default of fines and costs in criminal cases. 27 OhNPNS31.

1376-18½-New. Whether one convicted of receiving stolen property should be imprisoned in penitentiary or county jail depends entirely on value of property. Ill 172NE29.

1376-19 70CalA65, 232P719; 295Pa 379, 145A535; 194Wis408, 216NW522 (misdemeanor).

1376-21 334 Ill 241, 165NE693.

1376-23 90PaSuper489; 90PaSuper495.

1376-26 13F(2d)287; 25F(2d)348 (under national Prohibition Act, for maintaining nuisance). [a] **Sentence to penitentiary of Leavenworth** for term of not more than one year cannot be imposed under act of March 2, 1895. 34F(2d) 279. [b] **Sentence under several counts** may aggregate one sentence of more than year. DC 35F(2d)877.

1376-27 13F(2d)827.

1377-31½-New. The federal statute requiring a violation thereof to be punished in a district in or through which the motor vehicle transporting liquor has been transported or removed refers to venue and not to place of punishment. 18F(2d)572.

1377-31⅓-New. Federal statutes authorizing imprisonment of federal prisoners in state institutions have not been superseded, and federal sentence in a state penitentiary is lawful. 22F(2d) 169.

1377-33 27F(2d)94.

1377-33½-New. , or federal penitentiary. 13F(2d)827.

1377-40 256Mass539, 152NE914. [a] **In Ontario.**–[1930] 1DomLR648.

1377-41 215Ky220, 284SW993.

1377-44½-New. There is no presumption that it was the legislative purpose, in establishing a reformatory for women, to prevent sending thereto women found guilty under general laws. 256 Mass539, 152NE914.

1377-44⅓-New. By statute, sentence to a reformatory is indeterminate. 256 Mass539, 152NE914.

1377-44¼-New. Where statute providing for imprisonment of women in reformatory does not by positive terms require the courts to sentence such offenders to reformatories, such statute will not preclude imprisonment of women in the state penitentiary. 151Wash694, 277P83.

1377-49½-New. Release from a state penitentiary under state parole of a prisoner serving concurrent federal and state sentences does not authorize his transfer to a federal penitentiary. 22 F(2d)169.

1378-62 136Wash132, 238P922.

1378-65 25F(2d)300; 220MoA406, 286 SW733. [a] **Delay in enforcing sentence** does not operate to annul judgment of court. 23AlaA356, 127S797(2dcase). [b] **Expiration of time after sentence without imprisonment** is not an "execution" of sentence. Fla 128S814.

1378-67½-New. Where execution of sentence has been delayed, it has been held that superior court may prescribe new period of punishment. 198NC507, 152SE391(2dcase).

1378-72 164Ga219, 138SE213. [a] **Electrocution.**–90Fla105, 105S840.

1379-74½-New. Statutes in some jurisdictions require defendant to be confined in state prison pending execution of sentence of death imposed upon him. 197Cal 611, 241P886.

1379-76 66Utah15, 239P476.

1379-79½-New. On affirmance of conviction of murder in the first degree, a new date for execution is fixed arbitrarily by statute. 191NC378, 131SE 743.

1379-81½-New. Statute held properly to designate the place of execution. 164 Ga204, 138SE206; 164Ga219, 138SE213 (state prison farm).

1379-93 Contra 93Fla332, 111S518.

1379-95 [a] **Statutory provision for** execution by any warden in named prison held constitutional. 164Ga219, 138 SE213.

1379-96 See also 164Ga219, 138SE213.

1379-1 164Ga204, 138SE206.

1380-8 95PaSuper102.

1380-9 [e] 153Md431, 138A338.

1380-12½-New. Courts have inherent power to direct that property taken from one charged with crime, or detained as evidence, be returned to the owner or otherwise disposed of when no longer required for the purposes of justice. 109 Conn316, 146A491.

1380-12⅓-New. Provision in sentence for restitution, not authorized by law, is of no legal force. 40GaA145, 149SE 64.

1380-16 [a] **Property held as evidence** cannot be taken from court's custody without its consent so long as it is needed as evidence. 165La1025, 116S 496.

1380-17½-New. Right to return of money taken for use or evidence in prosecution for conspiracy to bribe. 39 F(2d)237.

17 C. J.—11-3 [a] **In New Jersey.**–103 NJL266, 137A529.

11-3½-New. Extraordinary remedy will not be granted where adequate remedy by appeal exists. Wash 289P25.

11-4 195Cal 249, 232P457, 36ALR1435.

11-6 326 Ill 327, 157NE247.

12-12 [a] **Writ of error in criminal** cases, not capital, is a matter of right in federal courts. 4F(2d)802.

12-29 195Cal 249, 232P457, 36ALR 1435. [a] **In Massachusetts.**–252Mass 224, 147NE859.

13-34 168La161, 121S609. But see 252 Mass224, 147NE859.

13-40 94Fla32, 113S630; 252Mass224, 147NE859.

13-41 94Fla32, 113S630; 252Mass224, 147NE859.

13-44 31Ariz389, 254P225, 226 [citCJ]; 83Mont327, 271P707.

13-45 31Ariz389, 254P225, 226 [citCJ]; 94Fla32, 113S630; 33NM222, 264P956; 117 Oh102, 157NE388.

13-46 20AlaA595, 104S346; 31Ariz389, 254P225, 226 [citCJ]; 94Fla32, 113S 630; 83Mont327, 271P707; 33NM222, 264P956; 117 Oh102, 157NE388.

13-47 21AlaA201, 106S683; 215Ky244, 286SW790; 230Ky71, 18SW(2d)881; 244Mich643, 222NW159; Mo 300SW 1106; 214AppDiv804, 210NYS562; 117 Oh102, 157NE388; TexCr 27SW(2d)805.

13-48 117 Oh102, 157NE388.

13-49 40F(2d)969 (nature of appeal). [a] **Appeal is proper procedure** for bringing record of criminal trial to the circuit court of appeals, congress having abolished writ of error. 30F(2d)518. [b] **Construction of statute** authorizing appeal where constitutional question is involved. 297Pa498, 147A527.

13-50 TexCr 27SW(2d)805; TexCr 29 SW(2d)771 (writ of error only in matter of forfeited bail bonds).

14-52 See also 117 Oh102, 157NE388. But see OkiCr 275P408; OkiCr 283P 269.

14-53 20AlaA595, 104S346 (statutes as to appeals are to be construed liberally in favor of party seeking redress).

14-54 106Conn114, 137A394, 395 [cit CJ]; 286Pa296, 297, 133A795.

14-55 265Mass436, 165NE22.

14-58½-New. Writ of review or prohibition will be denied where there is adequate and speedy remedy by appeal. Wash 289P25.

14-63 31Ariz389, 254P225.

14-64 31Ariz389, 254P225; TexCr 29 SW(2d)771.

14-65 42F(2d)26; Mo 300SW1106. [b] **Right of appeal accruing before effective date of law reducing time for appeal** is not ended automatically in absence of express provision. 57ND230, 221NW25.

15-83 194NC277, 139SE448.

15-84 98Fla599, 124S1.

15-85 194NC738, 140SE728.

15-91 22AlaA280, 115S79.

15-92 NJSup 152A208.

16-93½-New. Third person furnishing cash bail is entitled to certiorari to review action of court in applying such bail to payment of fine. 50SD276, 209 NW539.

16-95 NJSup 132A336. [a] **Mere errors of procedure, even resulting in an erroneous, as distinguished from an illegal or void, judgment,** may not warrant issuance of writ of certiorari. 90 Fla84, 105S142.

16-98 194NC738, 140SE728. But see 194NC715, 140SE727.

16-2½-New. and not to the fault of the party or his agent, 194NC715, 140 SE727.

16-4 96Fla77, 117S698.

16-5 NJSup 152A208.

16-7 90Fla84, 105S142 (common-law writ of certiorari cannot be made to serve purpose of appellate proceeding); Iowa 232NW411; 244Mich643, 222NW 159; NB [1928] 1DomLR271.

17-12 98Fla599, 124S1; 50SD48, 208 NW224; 51SD415, 214NW812.

17-21 [b] (2) Party is entitled to certiorari only when failure to perfect is due to act of court or its officers. 195 NC335, 142SE222. (3) When state excepts to extension of time for filing statement of case on appeal, defendant must apply for certiorari, if statement cannot be completed within time originally prescribed. 195NC335, 142SE 222. (4) Writ may be granted where it appears on face of record that verdict of guilty was not responsive to indictment. 197NC475, 149SE680(1st case).

19-35 [b] (2) **In trials for felony, oth-**

er than murder and manslaughter, practice depends on discretion of trial judge. 264Mass324, 162NE401.

19-38 28Hawaii156.

19-40 [m] (2) Final judgments are not reviewable on certificate, but by writ of error. 102WVa83, 134SE464.

20-52 [a] **Appellant may abandon appeal** and take another appeal giving another statutory notice. Ind 171NE380.

20-53 214Ala242, 107S49.

20-56 147Wash169, 265P175.

21-66 But see 32F(2d)472.

21-69 329 Ill 217, 160NE134.

21-74½-New. The state may prosecute a single appeal where several defendants jointly indicted are convicted by jury in one verdict and the court made one order granting motion in arrest made upon individual notices. 90CalA 594, 266P337.

21-75 Mo 273SW1039; MoA 272SW 700; 229AppDiv281, 242NYS348; 121 Or297, 254P798.

22-77 [c] (4) 157La360, 102S429. [d] (4) Where constitutional question is involved, misdemeanor case is appealable to supreme court. 316Mo 204, 289SW 554. (5) Appellate jurisdiction of misdemeanor committed in Boone County is in Kansas City court of appeals. Mo 24SW(2d)988. [f] (3) Court of appeals has no jurisdiction to entertain error proceedings direct from judgment of justice of peace. 117 Oh470, 159NE591. [h] (2) 108TexCr450, 18SW(2d)612.

22-78 TexCr 27SW(2d)805. [a] 233 Mich362, 206NW580; 310Mo 274, 275 SW536; Mo 278SW723; MoA 272SW 700; 244NY307, 154NE584; 128Misc 364, 219NYS669; Can [1927] 3DomLR 193; Can [1928] 2DomLR779.

23-80½-New. Appellate court has jurisdiction for all purposes in the absence of constitutional or statutory limitations. 31Ariz389, 254P225.

23-81 Utah 284P333 (on its own motion). [a] **Supreme court takes notice on its own motion** of lack of jurisdiction of appeal. 170La1054, 129S634.

23-90 14F(2d)360.

23-95 254Mass190, 150NE172; 114 Nebr676, 209NW236; 121 Or297, 254P 798 (dictum). But see Md 151A409. [a] **Measure of jurisdiction** of appellate court is jurisdiction of lower court. 261 Mass345, 158NE758.

24-97 CalA 289P881.

24-1 37GaA94, 139SE95.

24-3 37GaA94, 139SE95.

24-6 248NY182, 161NE463.

24-8 319Mo 440, 4SW(2d)424; MoA 291SW1119.

24-9 42F(2d)448; 91Fla481, 107S638; 125Me463, 134A691; 312Mo 68, 278SW 981; Mo 289SW569; Mo 292SW415; 319Mo 440, 4SW(2d)424. [a] **Where jury has discretion to dispense with penitentiary imprisonment,** court has jurisdiction of offense otherwise felony. 312Mo 68, 278SW981.

24-11 Mo 256SW460; Mo 256SW743. See also MoA 293SW484. [a] (1) 91Fla 481, 107S638. (2) Where portion of information which purports to charge second offense, which is felony, is defective, and which may be regarded as surplusage, leaving sufficient charge of first offense which is misdemeanor, and verdict is guilty and sentence is within penalty for misdemeanor, trial and conviction will be regarded as for misdemeanor. 91Fla481, 107S638.

25-13 But see MoA 27SW(2d)726. [a] (1) Mo 256SW743. (5) Where record proper shows conviction of felony, court of appeals has no jurisdiction. MoA 282SW736.

25-14 160La191, 106S779; 161La761, 109S472; 162La870, 111S263; 163La 435,112S37; 164La376, 113S882; 106 TexCr140, 290SW1094; 113TexCr400, 22 SW(2d)454(2dcase); TexCr 31SW(2d) 434(2dcase).

25-16½-New. In some jurisdictions, the appellate jurisdiction depends on the punishment which may be imposed for the offense charged, although a less punishment be imposed. 302Mo 634, 259 SW429.

25-17 117Nebr350, 220NW578, 579 [cit CJ]. But see 128Misc364, 219NYS669.

26-27 But see MoA 256SW529.

26-30 [a] **Final judgment** as affects review must be upon merits. Ill 157NE 249.

26-31 16F(2d)345; 78CalA421, 248P 691; 93Fla590, 112S87; 96Fla77, 117S 698; 164Ga219, 138SE213; IndA 169 NE54(1stcase); 125Kan360, 361, 264P 38 [quotCJ]; 125Me457, 134A527; 252 Mass224, 147NE859 (no final judgment can be entered within rule while exceptions are pending); 253Mass172, 148NE 570; MoA 27SW(2d)753; 24 OhA413, 157NE801; OklCr 276P506; 156Tenn 343, 1SW(2d)527; 109TexCr24, 2SW (2d)461; TexCr 8SW(2d)183; TexCr 11SW(2d)320(2dcase); 69Utah282, 254 P147. [b] (1) 37GaA151, 139SE110.

27-33 But see 32PortoRico 92.

27-35 36F(2d)315; CalA 289P909; 41 GaA470, 153SE430(1stcase); 41GaA658, 154SE297; 220Ky77, 294SW803; 224 AppDiv664, 229NYS76; 229AppDiv281, 242NYS348; 98PaSuper591; 153Tenn 162, 281SW936 (order supporting evidence illegally obtained); 136Wash232, 239P553. [b] (1) 155Tenn467, 295SW 66. (19) 34GaA201, 129SE12. (34) Denying motion for directed verdict. 136 Wash232, 239P553. (35) Where nolle prosequi was entered, no appeal lies from antecedent interlocutory orders. 155Tenn467, 295SW66. (36) Suppressing evidence in prosecution for grand larceny. 150Wash456, 273P532. (37) Making absolute rule to strike off nolle prosequi. 91PaSuper484. [c] **Order to suppress evidence** illegally obtained is interlocutory and not final. 153Tenn 162, 281SW936; 155Tenn467, 295SW 66. [d] **Order denying motion to suppress evidence** is interlocutory and not final. 24F(2d)309.

28-36 170La111, 127S382 (court's finding on juvenility vel non is reviewable); 153Wash612, 280P1 (determination adverse to defendants, of plea of former jeopardy, may be corrected by appeal).

28-38 278US221, 49SCt118, 73Led275; 167La350, 119S252(2dcase).

28-39 43F(2d)911. [a] **Action of trial court in granting or refusing bill of particulars** is reviewable in court of appeals, and subject to correction if discretion is abused. 228Ky477, 15SW (2d)261.

28-42½-New. Writ of error will not lie to review an order for removal of defendant from one federal district to another for trial. 18F(2d)535.

29-52 34GaA150, 128SE587 (when based solely on ground impartial jury cannot be obtained); 207 Iowa203, 222NW445.

29-60 194Cal 1, 227P156; 78CalA421, 248P691; 169Minn514, 211NW469; 104 NJL268, 140A21; 214AppDiv804, 210 NYS562. See also 125Kan360, 264P38.

30-67 252Mass224, 147NE859; 116 Nebr712, 218NW590.

30-68 IndA 168NE34(1stcase); Mo 7 SW(2d)253; Mo 21SW(2d)758(1stcase); Mo 21SW(2d)758(2dcase); 75Mont397, 243P1081; 156Tenn451, 2SW(2d)705; 104TexCr582, 286SW214.

30-69 98Fla208, 123S736(1stcase) (mere imposition of sentence held not sufficient).

30-70 98Fla468, 123S922(1stcase); 98 Fla469, 123S922(2dcase).

30-72 156Tenn451, 2SW(2d)705.

30-74½-New. A certiorari proceeding to review the ruling of the trial court threatening to proceed to trial is premature where a plea of former jeopardy has not been presented to, or disposed of by, the court. 153Wash612, 280P1.

31-78 160La1053, 108S87; Mo 21SW (2d)758(1stcase); Mo 21SW(2d)758(2dcase); 97PaSuper202; 101TexCr68, 274 SW133; 101TexCr483, 276SW277; 104 TexCr407, 284SW576; 104TexCr582, 286 SW214; 106TexCr1, 290SW165; 106 TexCr124, 290SW539; 106TexCr127, 290 SW1100; 109TexCr551, 6SW(2d)360; TexCr 25SW(2d)857(1stcase); TexCr 27 SW(2d)186(2dcase); TexCr 28SW(2d) 133(1stcase).

31-79 [a] (1) 105TexCr186, 287SW 261; 106TexCr124, 290SW539; 109Tex Cr288, 4SW(2d)547.

31-83 29F(2d)694; 36F(2d)699; 253 Mass172, 148NE570.

31-85 83NH173, 139A580.

31-89 103TexCr589, 281SW1072.

31-92 [a] (1) 112TexCr173, 15SW(2d) 1049. (8) Where order was entered defaulting defendant and his surety in contempt proceedings, such order is not sentence or final judgment. 253Mass 172, 148NE570.

32-99 98PaSuper464.

32-2 TexCr 27SW(2d)186(1stcase); TexCr 27SW(2d)186(2dcase).

32-8½-New. Judgment, although void for want of jurisdiction, is final judgment appealable under statute. Iowa 226NW925.

32-11 22AlaA333, 115S419.

32-14½-New. or for any reason, 23 AlaA265, 123S281(1stcase).

33-17 105WVa527, 143SE304. But see 23AlaA162, 122S309(1stcase). Contra 302Mo 634, 259SW429.

33-20 48Philippine751, 755 [citCJ].

33-29 29F(2d)740(1stcase); CalA 284 P484 (reviewable on appeal from final judgment); 234Ky112, 27SW(2d)666 (overruling motion for extension of time to file bill of exceptions); 197NC627, 150SE113(2dcase); TexCr 29SW(2d) 771. [a] (3) Order revoking parole. 162Ga327, 133SE843. (4) Order vacating previous order setting aside judgment of conviction. Ind 166NE771. (5) Order refusing to grant defendant extension of time to file statement of case. 33PortoRico 329. [b] **Order quashing indictment** returned "not true bill" and reserving to prosecution right to submit new indictment to another grand jury held not an order after judgment. 32PortoRico 92. [c] **Orders held appealable.**-162Ga327, 133SE843.

33-30 198Cal 601, 246P802; 32Porto Rico 92 (Code Cr. Proc. § 347). [a] (2) See also 201Cal 309, 257P71. (5) Order denying motion to vacate judgment of conviction. 100CalA91, 279P1030. [b] (8) Order revoking permission to serve term outside of chain gang. 35GaA190, 132SE242. (9) Order revoking suspension of sentence to state farm. 36GaA 602, 137SE572. (10) Other instances. 91CalA527, 267P120; 265Mass436, 165 NE22; OklCr274P38.

34-31½-New. Order overruling certiorari is held final order subject to review. 164Ga419, 138SE897.

34-31⅓-New. Writ of error is properly brought to review decision of federal district court denying application for suspension of execution of sentence, final because of ground on which refusal was based. 15F(2d)268.

34-31¼-New. An order denying defendant's motion for the return of beverages illegally seized made after dismissal of a prosecution under the Liquor Law is not reviewable. 155Tenn467, 295SW 66.

34-33 198Cal 601, 246P802.

34-36 198Cal 601, 246P802. See also 32 OklCr388, 241P349.

34-45 87CalA724, 262P795; CalA 284P 224(1stcase).

34-49 194Cal 1, 227P156; 72CalA102, 236P944; 73CalA357, 238P725; 75CalA 365, 242P906; 75CalA447, 243P67; 82 CalA389, 255P839; CalA 259P762.

34-50 194Cal 1, 227P156.

35-52 14F(2d)111.

35-53 151Md438, 135A161; 157Md407, 146A238; 121 Or202, 253P1042; 286Pa 296, 133A795.

35-55 [b] (1) 199Cal 240, 248P908; 74 CalA666, 241P598. [e] (3) Principles governing review of civil trials on general motion are applicable to criminal appeals. 128Me404, 148A141.

35-56½-New. In some jurisdictions a bill of exceptions will not lie to a judgment overruling a motion for new trial where the only trial had was on issues raised by plea in abatement. 37GaA 151, 139SE110.

35-56¼-New. Defendant is entitled to consideration of an appeal from an order denying a new trial, although the appeal from judgment was perfected before the order was entered. 85Mont585, 281 P551.

36-60½-New. If conclusions of trial judge granting new trial were inconsistent with verdict of jury upon consideration of testimony, order granting new trial is not appealable. 139SC315, 137SE739.

36-63 TexCr 27SW(2d)805; TexCr 29 SW(2d)349(2dcase).
36-64 93Fla590, 112S87, 90 [citCJ]; 108TexCr84, 299SW435.
36-65 97CalA321, 275P815.
36-66 93Fla590, 112S87.
36-67 198Cal 601, 246P802. [a] **Such order** affects no substantial rights where statute gives prison warden right to initiate insanity proceedings on probable cause. 198Cal 601, 246P802.
36-73½-New. In proceedings to determine convicted defendant's sanity, order fixing date for execution is held final order. Ill 157NE249.
37-82 But see 24 OhA413, 157NE801.
37-83 125Kan360, 361, 264P38 [quot CJ].
37-86 See also 87CalA482, 262P361.
37-88½-New. [§ 3306a] (10) **Order Revoking Parole.** Order revoking a parole and directing that defendant serve a term in the chain gang is not subject to review on a bill of exceptions. 36GaA215, 136SE323.
37-90 Md 150A261(1stcase). [c] **In New Brunswick.**-[1928] 1DomLR539.
37-93 [d] **On petition for certiorari to review judgment of court of appeals,** supreme court does not review testimony or facts. 21AlaA539, 110S162. [e] **In Canada.**-[1928] 2DomLR254.
38-97 Ariz 285P285(1stcase); 228App Div112, 239NYS165; 51ND842, 200NW 1010. [b] **Under Nova Scotia Temperance Act** appeal lies to supreme court in bank from judgment of county court judge sitting in appeal from decision of magistrate. [1930] 2DomLR213.
38-98 Utah 292P205. Contra NS [1930] 1DomLR924. [d] (4) Where fine in county court does not exceed one hundred dollars on appeal from inferior court judgment, no appeal lies to court of criminal appeals. 103TexCr115, 280 SW776 (appeal from corporation court of city of El Paso). [e] (2) See also Utah 284P333. (3) Provision of Comp. L. (1917) § 1717, as amended, permitting appeals from district court in cases originating in city court, where amount in controversy exceeds one hundred dollars, applies to civil cases only. Utah 282P785. (4) Under constitution and L. (1919) c 34 jurisdiction of supreme court in cases appealed to district court from city court is limited to cases where validity or constitutionality of statute or ordinance is involved. Utah 282P 785. (5) Statute held not unconstitutional. Utah 284P1006.
39-6½-New. The provision of the Pennsylvania statute that a judgment of the court of common pleas shall be final on proceedings removed to it by certiorari does not apply to summary convictions. 91PaSuper37.
39-13 209Ky832, 273SW511.
39-13½-New. By statute in Ontario no appeal lies from summary judgment. Ont [1927] 2DomLR960, 47CanCrCas 339.
39-17 Mich 233NW229.
39-18 [a] (1) 160La1053, 108S87. (5) State has no appeal from order granting defendant's motion for continuance. 160La1053, 108S87.
40-19. 106Conn114, 137A394; 203 Iowa 694, 213NW220; 33NM222, 264P956. See also 25F(2d)93.
40-20 83Mont327, 271P707.
40-22 [a] 30Ariz265, 246P550.
40-25½-New. Some statutes grant to the state the right to reserve for appellate review any adverse ruling which the official prosecutors deem of sufficient importance to the proper administration of justice to bring to the court's attention for authoritative determination. 121Kan233, 247P114.
40-25½-New. Under such statutes the state may reserve a question for review where a new trial is granted on defendant's motion. 121Kan233, 247P114.
40-26 77CalA780, 246P461. [a] (1) 49 ND148, 190NW817. (2) Under some statutes state may appeal from order dismissing information and discharging defendant for want of jurisdiction of offense. 204Cal 39, 266P518.
41-31 83Mont327, 271P707; 137Wash 288, 242P31.
41-36 24 OhA413, 157NE801.
41-39 Mo 18SW(2d)457; 69Utah282, 254P147; 102WVa83, 134SE464. [a] (1) 160La1053, 108S87. [b] (3) Order granting new trial is not kindred to one quashing indictment. 93PaSuper111.
42-43 29Hawaii827. [i] In Utah.-69 Utah282, 254P147. [j] 239Mich169, 214 NW120.
43-46 156Tenn343, 1SW(2d)527.
43-51 92PaSuper53. [a] (1) 160La 1053, 108S87.
43-52 Mo 18SW(2d)457; 69Utah282, 254P147; Wash 288P918.
44-61 93PaSuper111.
44-65 [a] 223Ky665, 4SW(2d)685.
44-68 49ND148, 190NW817.
44-69 270US9, 46SCt185, 70Led449; 20F(2d)287; 20F(2d)288; AlaA 129S 711(1stcase); AlaA 129S787; 142Miss 256, 107S200; 94PaSuper10; 98PaSuper 595.
45-72 [a] (2) But in such case no appeal for certification of law is provided for. 230Ky71, 18SW(2d)881. [d] In Pennsylvania.-92PaSuper159.
45-73 202 Iowa146, 209NW403 (reversal not permitted). [b] (4) State may appeal for certification of law in felony and misdemeanor cases which might involve imprisonment as punishment, even though there cannot be reversal. 230Ky71, 18SW(2d)881.
45-74 49ND148, 190NW817, 818 [cit CJ]; 54ND47, 209NW657.
46-82 153Va935, 151SE293.
46-85 121 Or297, 254P795.
46-89 Iowa 228NW67; Iowa 228NW 308.
46-90 157Miss619, 128S743.
46-91 [a] **Only where law question is distinctly unmixed** with decision on facts will appeal lie. 157Miss619, 128 S743.
47-3 247NY189, 159NE906.
47-13 See also 86PaSuper569. [a] **Ordinarily, an appeal** does not lie from conviction on plea of guilty. 101WVa 53, 131SE872.
47-16½-New. In Louisiana, there is no right of appeal where fine is less than three hundred dollars and jail sentence less than six months. 160La925, 107 S698.
47-16½-New. Accused, although he pleaded guilty, may appeal from an illegal indeterminate sentence. 164La1051, 115S187.
48-23 92PaSuper581.
48-26 70CalA271, 233P85; 92PaSuper 581.
48-28 124Kan573, 261P569; 191NC 571, 132SE570.
48-30 124Kan573, 261P569 (service of part of sentence); 175Minn222, 220NW 611, 612 [citCJ].
48-31½-New. Defendant may question the sufficiency of the indictment although he pleaded guilty. 22F(2d)393.
48-31½-New. Where accused has given formal notice in writing of his election not to appeal and is forthwith taken to the penitentiary and his term begins to run, very special reasons must be shown to justify hearing of an appeal. Alta [1929] 1DomLR842.
48-36½-New. **Acceptance of commutation of sentence** precludes accused from prosecuting an appeal from the judgment. 107TexCr659, 298SW585.
48-37 TexCivA 275SW268, 270 [quot CJ].
49-38 TexCivA 275SW268, 270 [quot CJ].
49-39 TexCivA 275SW268, 270 [quot CJ].
49-40 TexCivA 275SW268, 270 [quot CJ].
49-41 TexCivA 275SW268, 270 [quot CJ].
49-43 CalA 288P20.
50-48 4F(2d)804; 6F(2d)145; 7F(2d) 357; 12F(2d)742; 16F(2d)782; 18 F(2d)254; 18F(2d)850; 18F(2d)939; 19F(2d)46; 21F(2d)283; 24F(2d)82; 26F(2d)551; 32F(2d)602; 214Ala172, 106S692; 20AlaA627, 104S674; 21AlaA 260, 107S225; 21AlaA262, 107S228; 21 AlaA304, 107S719; 21AlaA626, 111S195; 22AlaA184, 113S650; AlaA 130S767; 169Ark340, 275SW663; 170Ark560, 280 SW9; 177Ark431, 7SW(2d)769; Ark 30 SW(2d)833; 87CalA68, 261P1059; 102 Conn658, 129A724; 164Ga219, 138SE 213; 169Ga613, 151SE17; 321 Ill 594, 152NE516; 206 Iowa397, 220NW13; 207 Iowa742, 223NW546; 124Kan219, 257P719; 126Kan565, 567, 268P845 [citCJ]; 127Kan166, 272P132; 128Kan 284, 276P818; 215Ky752, 286SW1063; 231Ky479, 21SW(2d)809; 234Ky189, 27SW(2d)967; 158La713, 104S627; 234 Mich88, 207NW865; 234Mich621, 208 NW674; 235Mich198, 209NW74; Miss 114S353; 148Miss621, 114S390; Miss 114S403; Mo 281SW437; 316Mo 268, 289SW637; 316Mo 243, 289SW852; 318 Mo 827, 18W(2d)106; Mo 18W(2d)830; MoA 279SW221; NJ 150A555; NJSup 129A480; NJSup 131A675; NJSup 132 A325; NJSup 133A519; 32NM319, 255 P396; 34NM22, 276P291; 34NM486, 285P490; 50ND728, 197NW859; 119Oh 349, 164NE359; OklCr 268P329; OklCr 271P956; OklCr 286P910 (absence of defendant when sentence pronounced not shown by record); 85PaSuper305 (withdrawal of juror not asked for at trial); 87PaSuper193; 91PaSuper559; 44Philippine591; 46Philippine252; 137 SC145, 134SE885; 103TexCr129, 280SW 824, 825; 108TexCr623, 28W(2d)249; 109TexCr296, 4SW(2d)40; 112TexCr 297, 16SW(2d)234; 112TexCr567, 18 SW(2d)672; TexCr 24SW(2d)425(2d case); TexCr 25SW(2d)858; 100Vt 476, 138A741; 101Vt30, 139A918; 147 Va624, 136SE765; 100WVa18, 129SE 707. [b] **Plea of former jeopardy will be deemed abandoned** where no affirmative evidence was given in support of it, no request was made for its submission to jury, and no objection or exception was made to failure of court to submit it. 39 OklCr16, 262P706. [c] **Subparagraphs of petition for certiorari, containing facts not verified** by answer of trial judge, raise no question for consideration of either superior court or court of appeals. 39GaA389, 146SE915. [d] **Though errors are clearly prejudicial** generally appellate court will not consider them if not called to attention of trial court. 38F(2d)584.
50-48½-New. To reserve a question for review on appeal by the state all that is necessary for the state to do is to make proper objections and exceptions, and it need not do more than should be done by defendant. 129Kan830, 284P424.
50-48½-New. Constitutional questions not presented before the superior court may not be considered by the supreme court. 298Pa319, 148A311.
51-50 39F(2d)325; 161La104, 108S 229; 168La807, 123S332(2dcase); 312 Mo 447, 279SW72; 137SC145, 134SE 885; 99TexCr641, 270SW1030. [a] **While judgment of appellate court must rest on error saved** it may look to record for like errors to accentuate error preserved. Va 152SE547.
51-51 21F(2d)939; 92Fla1062, 111S 725; 137SC145, 134SE885.
51-52 17F(2d)704; 18F(2d)850; CalA 281P443.
51-53 133SC491, 131SE603; 137SC145, 134SE885.
51-54 15F(2d)929; 19F(2d)202; 21F (2d)283; 24F(2d)696; 40F(2d)820.
51-55 4F(2d)901.
51-56½-New. Defendant who pleads guilty is in the same position as to matters reviewable as if found guilty by verdict. 24F(2d)796.
51-61 26F(2d)245; 32F(2d)602; 22 AlaA239, 114S423; 96CalA373, 274P 451; 321 Ill 526, 152NE569; 165La705, 115S909; Md 151A409; 144Miss778, 110 S225; 316Mo 1152, 295SW568; Mo 300 SW815; 32NM189, 252P987; 241NY 128, 149NE221 (court of appeals in New York can consider only errors presented by exception in trial court where appellate division unanimously affirmed conviction); 294Pa144, 143A904; 104 TexCr661, 285SW617; TexCr 26SW(2d) 652; 147Va624, 136SE765; 197Wis457, 222NW224. [d] **Fact that objections made and overruled have tendency to prejudice jury** against party making them is not justification for review of points not raised by proper objection. 86Colo 35, 278P594, 65ALR1260; Md 151A409.
51-63 21AlaA244, 107S40; 254Mass390, 150NE181; 264Mass264, 162NE349;

104TexCr615, 285SW1090.

51-64 AlaA 1308531 (objection as to venue); 169Ark340, 275SW603; 324 Ill 29, 154NE640; 326 Ill 518, 158NE142; 214Ky422, 283SW420; 317Mo 475, 296 SW137 (names of witnesses not indorsed on information); Mo 280SW575; Mo 268SW(2d)937 (error in denying preliminary hearing); 51Philippine965.

52-66 Mo 298SW(2d)63.

52-68 Ind 173NE753, 214Ky423, 233 SW1?0, 24NM154, 279P66; 35 OhA311, 173NE101.

52-70 290Pa174, 138A679.

52-74½-New. Authority of trial court and regularity of proceedings by which it tried indictment cannot be raised for first time on appeal. NJSup 131A625.

52-75 OkCr 272P965.

52-78 TexCr 288SW(2d)513.

52-78½-New. Venue. If crime charged was committed in county other than that of trial, the attention of trial court must be directed to that point. 21 AlaA231, 108S61.

53-79 TexCr 298SW(2d)375; Sask [1928] 1DomLR260.

53-80 11TexCr619, 285SW624.

53-80½-New. Failure of prosecution to put in evidence certified copy of petition and order for change of venue cannot be objected to for first time on appeal. 162Ga208, 132SE911.

53-82½-New. The question of venue cannot be raised for the first time on appeal. 22AlaA229, 111S123.

53-82¼-New. A contention that no sufficient showing was made upon which to base an order continuing the trial is not available on appeal where the record shows no objection on that ground. 80CalA257, 251P615.

53-83 24F(2d)399, 78CalA702, 248P960; 39GaA641, 148SE168; 320Mo 296, 68SW(2d)915. OkCr 282P731, 135SC75, 130SE332 (manner of presentation held sufficient to warrant review, though not in proper manner); 67Utah302, 248P149.

54-85 1F(2d)384; 21AlaA295, 107S797; 164Ga275, 138SE151, 164Ga219, 138SE213, 317Ill639, 148NE249, Ind 166NE757; 167Ia1055, 150S563; 318 Mo 619, 300SW793; Mo 300SW820; Mo 300SW1100; 319Mo 440, 18SW(2d)471; 320Mo 565, 8SW(2d)1001; NJSup 133A519, 2?1AppDiv1, 222NYS162. [b] **Rule held inapplicable** where constitutional inquiry relates to legality of court. 21AlaA295, 107S727.

53-86 4F(2d)884 (constitutionality of statute authorizing omission of allegation from information, being curable by verdict, is not considered when raised for first time on appeal); 31Ariz317, 252P1018; 326 Ill 136, 156NE451; 161 Ia678, 109S146.

53-88½-New. Proceedings originating in justice's court. Objection that on appeal from justice to circuit court there was no transcript of record of proceedings in justice's court may be raised for first time on appeal from circuit court. 144Miss696, 110S665.

53-90 11F(2d)801; 16F(2d)14; 18F(2d)939; 19F(2d)739; 42F(2d)793, 21AlaA201, 106S65; 22AlaA77, 112S813; 23AlaA414, 127S801; 190Cal610, 250P659, 73CalA102, 238P791, 77CalA217, 216P96, 83CalA302, 256P616, 98CalA499, 277P170(2dcase); 102CalA608, 283P389 (inclusion in brief of commitment excluded precludes objection); CalA 288P873; 317Ill521, 148NE303; Ill 173NE355; 198Ind358, 151NE697; 206Iowa635, 220NW11, 121Kan329, 246P50; 48ARR81; 125Kan110, 263P787, 126Kan371, 267P997; 21?Ky159, 278SW567, 162La52, 111S?01, 163La61, 111S192; 261Mass309, 158NE832, 175Minn475, 221NW651(2dcase); 150Miss302, 116S432 (failure of affidavit to charge venue); 152Miss13, 118S356; 151Miss640, 118S626, 156Miss572, 126S476(1scase); 322Mo 234, 14SW(2d)628; 104NJL40, 139A117, OkCr 282P389; OkCr 292P856, 32PortoRico 737, 34PortoRico 117, 35PortoRico 580, 107TexCr111, 295SW600, 109TexCr101, 38W(2d)90, 63Utah268, 2?4P142; 33Wyo 428, 240P219; 37Wyo 372, 262P24. See also 145Va853, 134S16 726. [a] (3) Misnomer of magistrate in information is held not so material as to authorize defendant to raise point for first time on appeal. 69Utah268, 254P142. [f] (3) Absence of clerk's filing indorsement on indictment cannot be made ground of objection for first time on appeal. 155Miss726, 125S103. [h] (2) Objection that verification was taken by officer not authorized to administer oaths cannot be first made on appeal. 31NM199, 235P501. [i] **Improper preliminary examination** as ground for attack on information cannot be urged after arraignment, plea of guilty and judgment. CalA 288P873.

54-91 39F(2d)325; 237 IllA325; 216 Ky608, 288SW320; Mo 289SW640; 318 Mo 1068, 28W(2d)589; MoA 17SW(2d)577; 33PortoRico 764; 109TexCr591, 6SW(2d)357; TexCr 228SW(2d)309.

55-92 7?1(2d)15, 164CalA114, 243P898; 318 Ill 293, 149NE241; 318 Ill 615, 149NE579; 237 IllA325; Iowa 227NW830, 210Ky466, 276SW135, 161Ia104, 108S239; Mo 188SW(2d)10; 120OrI77, 219P31, 33PortoRico 764; 112TexCr 15, 138SW(2d)563, Utah 290P962.

55-94 21F(2d)513, 22F(2d)393; 27F(2d)80; 23AlaA288, 124S840; 197 Ind 179, 150NE50; 199 Ind180, 156NE164; NJSup 132A?06, 37Wyo 418, 263P616.

55-98 25F IllA314.

55-98½-New. Where no objection was made by defendant to order permitting amendment of indictment by striking out name of one of two alleged victims, there is nothing to review. 143Miss676, 109S716.

55-98¼-New. Where no demand was made for more specific bill of particulars, and defendant went to trial on bill of particulars furnished, he cannot complain on appeal. 324 Ill 224, 154 NE909.

55-98¼-New. Objection to the amendment of an information cannot be made for the first time on appeal. 168Ia364, 150S867.

55-99 25F(2d)581; 34F(2d)86; 22AlaA126, 114S130; 176Ark771, 48W(2d)9, 202Cal409, 261P303; 69CalA609, 231P1014, 78CalA495, 248P696, 81CalA?34, 253P310, 92Fla43, 109S303; 325 Ill 65, 155NE362, 327 Ill194, 158NE431; 327 Ill 312, 158NE732; 333 Ill 551, 165NE196; Ill 173NE319; Ill 173NE?00; 200 Ind561, 163NE316, 65ALR980, 123Kan791, 266P37; Minn 231NW225; 312Mo 510, 279SW411; 317Mo 276, 295SW551, 250NY?58, 165NE810, 109TexCr556, 58W(2d)908 (as to venue); TexCr 31SW(2d)445(2dcase). [a] **Request for general charge** held insufficient to raise question. 23AlaA341, 125S603 (2dcase).

55-1 See also 148Miss718, 114S815.

55-2 But see TexCr 27SW(2d)653(2d case).

56-5 8F(2d)265; 24F(2d)796; 201 Iowa16, 206NW792; 212Ky159, 278SW567, 50Philippine771; 113TexCr?ito, 24SW(2d)492; 69Utah3, 252P280. [c] **Where defendant failed to appear below,** and conviction is sustained because of unsatisfactory explanation, duplicity in indictment is treated as if waived by failure to demur. 212Ky159, 278SW567. [d] **Objection to misjoinder of counts charging felony and misdemeanor** may be raised and preserved by demurrer on motion for new trial. 317Mo 380, 295 SW747.

56-6½-New. Misjoinder of counts cannot be raised for the first time on appeal. 320Mo 228, 7SW(2d)259.

56-11 104NJL288, 140A297 (motion to quash or to arrest judgment); Wyo 284P764. See also 318Mo 1233, 3SW(2d)365; 318Mo 1179, 8SW(2d)369 (objection insufficient).

56-14 217Miss583, 226NW231 (reception of evidence secured in night search under warrant not commanding such search at night requires reversal, though not objected to).

56-15 108TexCr672, 28SW(2d)223.

56-16 5F(2d)45 (alleged hearsay evidence); 5F(2d)312 (objection that motion to quash was unverified cannot be raised for first time on appeal); 5F(2d)622; 7F(2d)759; 7F(2d)531, 7F(2d)594; 13F(2d)11; 13F(2d)975; 15F(2d)503; 16F(2d)370; 17F(2d)69; 19F(2d)421; 32F(2d)992; 33F(2d)382; 35F(2d)25; 36F(2d)855; 39F(2d)75; 42F(2d)721; 42F(2d)793; 23AlaA584, 129S492; 21AlaA201, 106S683; 21AlaA200, 106S697; 21AlaA260, 107S225; 21AlaA289, 107S791; 21AlaA301, 107S719; AlaA 1148281; 22AlaA310, 115S562; 22AlaA421, 116S410; Ariz 282P481; 173Ark1054, 294SW390; 175Ark928, 128W(2d)909; 179Ark318, 16SW(2d)22; 180Ark148, 21SW(2d)616; 180Ark241, 22SW(2d)47; Ark 31SW(2d)952, 198Cal776, 247P884; 199Cal610, 250P659; 203Cal557, 265P231; 68CalA95, 228P417; 68CalA575, 229P990; 69CalA166, 231P601; 71CalA181, 235P72; 71CalA550, 236P158; 72CalA52, 236P355; 72CalA160, 236P987; 72CalA611, 237P824; 73CalA78, 238P112; 78CalA11, 247P917; 78CalA476, 248P981; 79CalA709, 250P879; 81CalA309, 253P940 (confession); 83CalA190, 256P829; 85CalA648, 259P961; 85CalA670, 259P1019; 87CalA336, 262P825; 92CalA547, 268P674; CalA 284P487; CalA 285P866; CalA 289P667; 82Colo 205, 258P226; 106Conn260, 137A762; 106Conn345, 138A132; 106Conn701, 139A91; 163Ga684, 137SE231; 166Ga563, 144SE170; 169Ga613, 151SE17; 36GaA17, 135SE143; 30Hawaii198; 321 Ill 590, 152NE564; 325 Ill 361, 156NE372; 325 Ill 578, 156NE798; 327 Ill 162, 158NE462; 333 Ill 624, 165NE141; 338 Ill 631, 170NE678; 338 Ill 596, 170NE685; Ill 172NE728; 199 Ind578, 159NE154; 199 Ind653, 160NE41; 89 IndA27, 165NE558(2dcase); 89 IndA124, 165NE916(2dcase); 89 IndA312, 166NE290; IndA168NE633; IndA 169NE?35; IndA 171NE208; 203 Iowa333, 210NW934, 212NW560; Iowa 229NW231; 208Ky695, 271SW1041, 210Ky610, 276SW537, 210Ky333, 275SW813; 211Ky218, 282SW1096, 211Ky458, 283SW427; 211Ky475, 283SW431; 215Ky613, 286SW696; 216Ky?13, 288SW330; 221Ky178, 298SW390; 221Ky287, 298SW656; 221Ky276, 298SW693, 221Ky433, 298SW1078; 227Ky222, 128W(2d)336; 227Ky710, 13SW(2d)1046; 228Ky722, 15SW(2d)435; 229Ky262, 16SW(2d)1040; 232Ky426, 23SW(2d)566; 234Ky153, 27SW(2d)702; 234Ky224, 27SW(2d)957(2dcase); 235Ky19, 29SW(2d)597; 15?La589, 105S631, 150Md687, 133A847; 151Md456, 135A189, 153Md131, 138A338; 234Mich88, 207NW865; 234Mich621, 208NW674; 244Mich644, 222NW174; 250Mich72, 229NW475; 251Mich228, 231NW?73; Mich 233NW407; 167Minn164, 208NW760; 111Miss115, 106S264; 146Miss685, 112S479; 147Miss24, 112S590; 147Miss180, 113S179; Miss 113S219; 148Miss621, 114S390; 154Miss653, 122S767, 63ALR1319; 154Miss671, 122S766(2dcase); 156Miss365, 126S38; Miss 130S498; 307Mo 487, 271SW477; Mo 273SW733; 309Mo 520, 275SW36; Mo 278SW726; Mo 278SW1014; 311Mo 114, 279SW76; Mo 281SW799(2dcase); Mo 285SW83; Mo 289SW570; 316Mo 268, 289SW637; 316Mo 243, 289SW852, 316Mo 995, 292SW70; Mo 296SW423; 317Mo 408, 297SW368; 318Mo 542, 300SW699; 318Mo 843, 18W(2d)157; 319Mo 1, 28W(2d)729; 318Mo 1185, 28W(2d)731; 318Mo 1233, 38W(2d)365; 320Mo 228, 7SW(2d)259; 322Mo 369, 15SW(2d)760; Mo 16SW(2d)35; 322Mo 106, 16SW(2d)205; Mo 18SW(2d)23; Mo 23SW(2d)22; 220MoA290, 286SW432; MoA 58SW(2d)95; Mont 28SP186; 48Nev405, 233P523; 49Nev217, 242P590 (rule applicable in capital cases); 82NJL189, 131A606; 102NJL94, 131A292; NJ 151A737(2dcase); NJSup 129A480; NJSup 132A289; NJSup 132A338; NJ 131A290; 103NJL523, 138A381; 32NM188, 252P997; 32NM319, 255P396; 32NM500, 258P1009; 34NM464, 283P906; 190NC862, 129SE382; OkCr 287P1091(2dcase); 295Pa190, 145A85; 298Pa363, 148A508; 133SC67, 130SE337; 156SC509, 153SE480; SC 155SE849; 49SD361, 207NW160 (admissibility of evidence not considered in absence of objection or motion to strike it out); 99TexCr551, 270SW1021 (that evidence did not show venue); 99TexCr617, 271SW389; 101TexCr315, 276SW247; 101TexCr580, 278SW435; 103TexCr433, 281SW844; 105TexCr138,

286SW988; 105TexCr629, 290SW543; 106TexCr290, 292SW216; 107TexCr3, 294SW588; 108TexCr101, 299SW238; 109TexCr101, 3SW(2d)90; 111TexCr 45, 10SW(2d)999; 111TexCr359, 13SW (2d)93(1stcase); TexCr 18SW(2d)640; TexCr 21SW(2d)514; 113TexCr632, 21 SW(2d)1045; TexCr 24SW(2d)824; TexCr 28SW(2d)546(2dcase); TexCr 31SW(2d)439; 141Wash515, 252P128; 143Wash31, 254P244; 143Wash93, 254 P838; 143Wash166, 254P851; 146Wash 442, 263P602; Wash 290P329; 100WVa 18, 129SE707; 100WVa180, 130SE102; 103WVa605, 138SE202; 38Wyo 462, 268 P189 (exhibit not properly identified); Wyo 292P2; Man [1928] 3DomLR224. But see Mo 285SW412. [b] 153Md431, 138A338. [c] (1) 80CalA655, 252P666. See also 315Mo 203, 285SW990. [f] (2) Objection not made till after question had been answered and examination had been continued is insufficient. MoA 5 SW(2d)95. [k] **Responsive answers** without objection cannot be objected to on appeal. 21AlaA15, 105S714.

56-16½-New. An objection to admission of evidence made for the first time on motion for new trial comes too late and will not be reviewed. 158La866, 104S744.

56-16¾-New. Failure of court sua sponte to notice and exclude improper questions may amount to abuse of discretion in conduct of trial, which will warrant review in absence of objection. 133SC67, 130SE337.

56-16¼-New. But admission of evidence calculated to influence the jury where the court's instruction emphasized the importance of such evidence is reversible error even without objection. 215AppDiv270, 213NYS449.

58-17 13F(2d)975; 21AlaA493, 109S 527; 72CalA124, 236P934 (sufficient); 78CalA426, 248P1021; 36GaA668, 137 SE860; 37GaA97, 139SE694; 37GaA160, 142SE306; 203 Iowa94, 212NW339; 143 Miss676, 109S710; Mo 289SW807; 109 TexCr26, 28W(2d)442; 150Wash475, 273P751(2dcase). [e] **Supreme court** is not required to discover grounds for exclusion of evidence. 160La199, 106 S782.

58-20 27F(2d)94; 68CalA575, 229P 990; Iowa 228NW75 (what was expected to be proved by witness must be shown); 228Ky106, 14SW(2d)390; 228 Ky623, 15SW(2d)516; 146Miss685, 112 S479; Mo 278SW726; Mo 278SW1009 (proof must be offered); 311Mo 391, 279 SW23; Mo 285SW1000; Mo 238W(2d) 122; 102NJL94, 131A292; 294Pa144, 143A904; 111TexCr367, 12SW(2d)1027 (2dcase); 38Wyo 462, 268P189 (sufficiency of offer of evidence).

58-20½-New. Offer of proof is necessary to preserve question of exclusion of evidence for review. 311Mo 391, 279 SW23.

58-21 See also NJSup 129A480.

58-22 227Ky249, 12SW(2d)289.

58-23 See also Mo 11SW(2d)1010(1st case).

58-24 5F(2d)622; 71CalA453, 236P 163; CalA 284P1096; Iowa 230NW865; 221Ky268, 298SW688; 264Mass535, 163 NE158; 32NM500, 258P1009; TexCr 25 SW(2d)875.

58-25 168Ark731, 271SW338; 232Ky 691, 24SW(2d)564; 168La855, 123S597.

58-26 22AlaA220, 114S280; Mo 29SW (2d)71; Wash 290P329.

58-27 23AlaA73, 120S917(1stcase); 49 Nev386, 248P48; 103WVa404, 137SE 746.

58-27½-New. , or that court propounded leading questions. 215Ky827, 287 SW23.

58-29½-New. that an improper question was propounded to a witness; 32 NM500, 258P1009.

59-31 Mo 19SW(2d)671.

59-33½-New. to the asking of leading questions; 77CalA587, 247P245.

59-34 338Ill596, 170NE685.

59-35 71CalA550, 236P158; 48Nev358, 232P778, 235P645.

59-36 80CalA623, 252P635.

59-37 80CalA655, 252P666; 316Mo 31, 292SW484; NJSup 129A480; SC 155 SE409; 154Wash412, 282P485.

59-37½-New. that accused's witnesses were improperly cross-examined; WVa 153SE308.

59-39½-New. , or that evidence obtained by illegal search was admitted. 153Miss593, 121S275.

59-39¾-New. Objection to cross-examination to be available on appeal must be urged in trial court. CalA 286P711.

59-39¼-New. Assignment of error in exclusion of questions without merit where counsel withdrew them on court stating they were repetitious. 43F(2d) 44.

59-41 5F(2d)17 (where only evidence introduced was by government); 7F (2d)357; 13F(2d)126; 16F(2d)782; 19 F(2d)62; 26F(2d)315; 29F(2d)103; 35 F(2d)154; 39F(2d)75, 39F(2d)112; 23 AlaA94, 121S446; 20AlaA549, 103S478; 22AlaA101, 112S810; 169Ark324, 274 SW1; 235Mich336, 209NW64; Miss 114 S403; 307Mo 487, 271SW477; 33NM370, 266P922; 53ND203, 205NW67, 68 [cit CJ]; 120 Or177, 249P831; 132 Or223, 283P753; 149Va464, 141SE125. [a] (1) 15F(2d)929; 23AlaA104, 121S500 (request for affirmative charge and motion to exclude evidence). (3) Request for directed verdict essential to raise question, in absence of motion for new trial. 53ND203, 205NW67. (4) Demurrer to evidence at close of prosecution's case and motion for directed verdict at close of all evidence properly presents for review question of sufficiency of evidence. 15F(2d)929. [f] **Ruling must be properly invited.**-21AlaA434, 109S172. [g] **Appellate court cannot discharge accused** where binding instructions were not requested in trial court. 91PaSuper566.

59-45 155Miss726, 125S103.

59-46 20F(2d)752; 26F(2d)168; 22 AlaA536, 117S607; 121Kan566, 250P 281; 151Miss548, 118S820(1stcase); 137Wash297, 242P36.

59-48 7F(2d)532; 151Miss512, 118S 604.

59-49 5F(2d)963 (insufficiency of evidence cannot be raised for first time by motion for new trial).

60-51 7F(2d)357; 8F(2d)919; 15F (2d)929; 30F(2d)678.

60-52 76CalA114, 243P898; CalA 260 P363; NM 252P974. [a] 213AppDiv 331, 210NYS535.

60-53 163Ga43, 135SE410; 335Ill 217, 167NE1.

60-56 72CalA124, 236P934; 227Ky153, 12SW(2d)308. [a] **Predicating error on denial of motion to strike,** renewed in motion for new trial held insufficient to obtain review. 39F(2d)75.

60-57 277US81, 48SCt468, 72LEd793; 8F(2d)9; 17F(2d)704; 34F(2d)86 (qualifications of interpreter); 20AlaA 601, 104S845; 22AlaA360, 115S761; 23 AlaA393, 126S174(2dcase); 69CalA609, 231P1014; 78CalA277, 248P304; CalA 288P1095; CalA 290P102; 90Fla381, 106S741; 93Fla172, 111S351; 324 Ill 29, 154NE408; 328 Ill 631, 160NE121; 233 IllA608; Kan 292P931 (presence of infant of illicit relation); 157Md635, 147A599(2dcase); Miss 114S403; 151 Miss781, 119S298; Miss 130S117; 316 Mo 243, 289SW852; 22 OhA357, 153NE 902; 35 OhA324, 172NE434; 103TexCr 626, 281SW1067; 105TexCr222, 288SW 210; 107TexCr51, 294SW546; TexCr 24 SW(2d)48; TexCr 25SW(2d)862; 144 Va559, 131SE131 (appearance of person claimed to have influenced accused before jury who desired to observe her personality); 151Wash218, 275P558 (failure to offer proof where opening statement unduly limited). But see 218 AppDiv204, 218NYS148.

60-59 216Ala659, 114S39.

60-61 21AlaA500, 109S558; 149Miss 219, 115S436; PrEdIsl [1929] 2DomLR 289 (bias of trial judge).

61-62 [a] Mo 18SW(2d)423. [c] **If not made till motion for new trial,** objection to appointment of person to represent commonwealth in case is too late. 210Ky518, 276SW497.

61-63½-New. Complaint that an election between transactions was not required cannot be first made on appeal. 110TexCr217, 8SW(2d)139.

61-65 80CalA275, 251P826 (separate indictments).

61-71 198Ind480, 154NE10.

61-72 26F(2d)551; 26F(2d)903; 171 Ark778, 286SW935; 178Ark980, 13SW (2d)25; 203Cal139, 263P522; 97CalA 253, 275P518; CalA 287P543; 90Fla 381, 106S741; 129Kan686, 284P402; 164La597, 114S171; 166La759, 117S 820; 244Mich644, 222NW174; OklCr 287P1108; 283Pa468, 129A453; 160 Tenn258, 23SW(2d)656; 100TexCr560, 272SW130; 105TexCr63, 285SW952; 107TexCr51, 294SW546. [a] **Time of objection.**-34F(2d)630.

61-72½-New. the summoning of jurors on open venire by an officer who was a material witness, 38 OklACR120.

61-72¾-New. voir dire examination, 243Mich546, 220NW790.

61-74 23F(2d)235. [a] **Time of objection.**-210Ky518, 276SW497.

61-76 227Ky190, 12SW(2d)285.

61-77 26F(2d)315; 226Ky660, 11SW (2d)726; 170La507, 128S293 (objection to charge requested by juror after retirement); 147Misc180, 113S179; 151 Miss539, 118S610; Mo 271SW471; 104 TexCr518, 284SW582. [a] **Where reversal is sought on ground of misconduct of jurors,** it must affirmatively appear that both defendant and his counsel were ignorant thereof till after trial. Mo 271SW471.

61-77½-New. refusal to permit documents to be sent out with jury, 284Pa 255, 131A184.

61-77¾-New. inspection of the whole check, only part being in evidence, 83 Colo 154, 262P1015.

61-81½-New. the organization of the grand jury which found the bill of indictment, 168La153, 121S607.

61-82 13F(2d)844. [a] **Necessity for requesting repetition of testimony.**-13 F(2d)844.

61-82½-New. that prejudicial instructions were given to grand jury in presence of jury which tried defendant, 214 Ky86, 282SW777.

61-84 199Cal610, 250P659.

62-88 170Ark560, 280SW9; 83Colo 400, 265P909; 315Mo1, 285SW429.

62-89½-New. A suggestion to the court that the jury should not be permitted to view the scene of the crime because of absence of preliminary proof that the surrounding conditions were the same is not equivalent to an objection for the purpose of review. 48Nev134, 228P582.

62-89¾-New. It is reversible error to permit juror to ask defendant improper questions affecting his citizenship and nativity, although no objection was made. 220MoA290, 286SW432.

62-89¼-New. Waiver of the jury in a felony case will be noticed whether or not raised. 316Mo 596, 292SW32.

62-89⅛-New. Failure of defendant accused of a felony to object to the jury of eleven at the trial does not preclude an objection on appeal. 221Ky823, 299 SW983.

62-90 90CalA472, 265P976; 82Colo 349, 259P508; 215Ky827, 287SW23; 254 Miss390, 180NE181; OklCr 280P857; OklCr 287P1091(2dcase); 120 Or90, 250 P633, 251P307; 113TexCr172, 19SW (2d)63 (action of court in striking recommendation for suspended sentence from verdict); 149Va467, 141SE115; 36Wyo 241, 254P120. But see 318Mo 1185, 28W(2d)731.

62-91 36F(2d)944; CalA 286P476; 169 La585, 125S626 (as to time when sentence pronounced); Miss 114S403. Contra 117Nebr692, 222NW47 (where sentence is void).

62-93 32F(2d)893; 41F(2d)741; 23 AlaA162, 122S309(2dcase); 194Cal1, 227P156; 207Cal597, 279P145; 71 CalA339, 235P87; 72CalA124, 236P934 (objection or request that jury be instructed to disregard is necessary); 95 CalA680, 273P583; 96CalA503, 274P 393; CalA 276P641; 101CalA84, 281P 404; 102CalA353, 282P971; CalA 286 P514; CalA 293P72; 160Ga199, 127 SE608; 41GaA378, 153SE92(2dcase); 336 Ill 421, 168NE344; 337 Ill 259, 169 NE206; 89 IndA344, 166NE298 (must be shown by record); Iowa 230NW513; 119Kan658, 240P567; Mo 271SW471; 316Mo 243, 289SW852; Mo 238W(2d) 122; Mo 298W(2d)144; Mont 289P

1037; 113Nebr755, 204NW513; 51ND 875, 201NW342; 39 OkiCr173, 264P226; 160Tenn273, 23SW(2d)662; 105WVa36, 141SE400. But see CalA 293P72. [c] **In North Dakota.**–50ND927, 198NW698. [d] **Any misconduct of trial judge in commenting on facts** is not reversible error, where counsel did not call it to court's attention at time. 97CalA537, 275P1017.

62–94 12F(2d)668; 15F(2d)970; 17 F(2d)704; 19F(2d)472; 27F(2d)854; 27F(2d)856; 214Ala172, 106S692; 219 Ala670, 123S50; 20AlaA565, 104S45; 21 AlaA352, 108S351; 21AlaA534, 109S 613; 22AlaA239, 114S423; 23AlaA407, 127S246(2dcase); 169Ark498, 276SW 353; 199Cal610, 250P659; 201Cal341, 257P65; 202Cal154, 259P442; 208Cal 385, 281P606; Cal 285P704; 69CalA 558, 231P767; 70CalA444, 233P401; 72 CalA318, 237P53; 75CalA138, 242P 84; 78CalA87, 248P255; 78CalA167, 248P289; 78CalA554, 248P964; 79CalA 464, 249P1089; 79CalA514, 249P1090; 79CalA713, 250P873; 80CalA675, 252 P758 (assignment of misconduct and request to admonish jury is necessary basis for complaint in appellate court); 83CalA370, 257P92; 85CalA670, 259P 1019; 86CalA45, 260P313; 86CalA30, 260P389; 90CalA317, 265P893; 96CalA 503, 274P393; 96CalA430, 274P433; CalA 285P1073; CalA 290P93; CalA 291P887 (right to reply to argument); 86Colo 35, 278P594, 65ALR1260; 86Colo 406, 282P257; 110Conn55, 147A118; 93Fla172, 111S351; 94Fla318, 113S 689; 337 Ill 84, 169NE12; Ill 173NE 97; Ind 166NE654; Ind 167NE531; 203 Iowa192, 210NW749; Iowa 232NW 172; 119Kan649, 240P568; 123Kan201, 254P378; 123Kan399, 256P169; 125 Kan496, 264P1064; 129Kan686, 284P 402; 216Ky849, 288SW740; 235Ky 734, 32SW(2d)38; 161La532, 109S 56; 161La827, 109S505; 164La496, 114 S109; 165La497, 115S728; 165La842, 116S206; 169La377, 125S277; 169La 1197, 126S921; 248Mich553, 227NW 708; 251Mich99, 230NW931; 168Minn 401, 210NW402; Miss 107S385; 151 Miss361, 118S137; Mo 256SW787; 309 Mo 498, 274SW734; Mo 278SW676; 311 Mo 452, 278SW740; Mo 279SW702; Mo 284SW801; 313Mo 615, 285SW392; 315 Mo 242, 286SW69; Mo 296SW84; 317 Mo 413, 297SW63; 317Mo 408, 297SW 368; Mo 18SW(2d)837; Mo 48SW(2d) 813; Mo 8SW(2d)49; 322Mo 1239, 18 SW(2d)71; Mo 21SW(2d)758(3dcase); Mo 23SW(2d)152; Mo 27SW(2d)16; Mo 29SW(2d)150; Mo 30SW(2d)132; 73 Mont205, 235P702; 115Nebr320, 212NW 614; 48Nev358, 232P778, 235P645 (objection not made till close of argument held too late for review); NJ 134A 290; 34NM6, 275P770; 190NC506, 130 SE308; 50ND728, 197NW859; 22 OhA 357, 153NE902; 23 OhA474, 156NE219; 34 OhA60, 170NE444; OkiCr 270P90; OkiCr 273P1018(2dcase); OkiCr 277P 1038; OkiCr 281P810; OkiCr 289P786; OkiCr 290P193; 300Pa125, 150A290(2d case); 156SC509, 153SE480; SD 227 NW571; 100TexCr600, 272SW200; 104 TexCr661, 285SW617; 106TexCr219, 291SW547; 108TexCr17, 298SW572; 109TexCr58, 28W(2d)857; TexCr 88W (2d)176; 113TexCr142, 18SW(2d)663; TexCr 25SW(2d)350; TexCr 25SW(2d) 611; TexCr 27SW(2d)185; TexCr 27 SW(2d)200 (improper argument held not requiring reversal in absence of request for special charge); TexCr 31 SW(2d)652; 68Utah551, 251P362; 135 Wash361, 237P723; 146Wash221, 262 P622; 147Wash426, 266P174; Wash 286P51 (opening statement). [a] See also 110TexCr193, 8SW(2d)161 (remarks of prosecutor are not reviewable ordinarily in absence of request for instructions to disregard). [b] 50ND728, 197 NW859; 50SD32, 208NW164. [c] **Subsequent motion to discharge jury** is insufficient to preserve question of misconduct of prosecuting attorney in argument not objected to at time. 318Mo 843, 18W(2d)157.

64–95 35F(2d)689; 80CalA675, 252P 758; 94Fla318, 113S689; 161La827, 109 S505; 108TexCr457, 18W(2d)627; 110 TexCr193, 8SW(2d)161. [a] **Remarks held not too prejudicial.**–TexCr 25SW (2d)350.

64–95½–New. Assignment of misconduct and request for instruction to jury to disregard objectionable statements are ordinarily necessary upon which to predicate complaint of misconduct. 72 CalA124, 236P934.

64–95½–New. , or the remarks were approved by court. 19F(2d)202.

64–97½–New. , to coaching of witness by person in audience, 318Mo1233, 3 SW(2d)365.

64–98 [a] **Objection to manner of examining witnesses** must be made at trial. 7F(2d)867.

64–3 271US104, 46SCt442, 70Ledd57; 7F(2d)259; 7F(2d)357; 13F(2d)126; 14F(2d)925; 15F(2d)970; 16F(2d)231; 18F(2d)778; 22F(2d)1; 31F(2d)568; 32F(2d)130; 36F(2d)738; 22AlaA146, 113S625; 22AlaA125, 113S625; 169Ark 421, 275SW758; 169Ark1212, 278SW 360; 180Ark408, 21SW(2d)186; Ark 31 SW(2d)952; 109Conn394, 146A837; 319 Ill 606, 150NE347; 197Ind419, 151NE 129; 198Ind614, 154NE370; 200Ind 572, 165NE313; 203Iowa929, 210NW 465; Iowa 230NW394; 124Kan219, 257 P719; 227Ky249, 12SW(2d)289; 161La 496, 114S109; 149Md298, 131A452; 157 Md635, 147A599(2dcase); 168Minn401, 210NW402; 172Minn139, 214NW785; 173Minn567, 218NW112; 179Minn516, 229NW789; 144Miss778, 110S225; 311 Mo 452, 278SW740; 316Mo 72, 289SW 871; 76Mont526, 248P215; Mont 287P 933; 48Nev134, 228P582 (oral instructions); 33NM187, 262P929 (inadvertent omission in instruction); 34NM486, 285 P490; 196NC387, 145SE784; 198NC629, 152SE890; NC 155SE258; OkiCr 270P 335; OkiCr 287P846; OkiCr 292P1053; 118 Or397, 247P146; 284Pa159, 130A 317; 300Pa125, 150A290(2dcase); 98 PaSuper347; 100TexCr295, 273SW582; 100TexCr412, 273SW602 (signature); 101TexCr19, 274SW616; 101TexCr96, 274SW628; 101TexCr123, 274SW565; 101TexCr462, 276SW256; 103TexCr636, 282SW251; 104TexCr152, 282SW813; 104TexCr378, 283SW824; 104TexCr618, 285SW1090; 105TexCr228, 288SW218; 105TexCr389, 288SW1085, 106TexCr197, 291SW550; 107TexCr46, 294SW595; 107TexCr470, 296SW882; 107TexCr666, 298SW591; TexCr 300SW938; TexCr 1 SW(2d)294; 109TexCr101, 3SW(2d)90; 109TexCr74, 3SW(2d)443 (motion for new trial held insufficient); 112TexCr 59, 14SW(2d)276; 112TexCr517, 17SW (2d)807; 113TexCr273, 20SW(2d)201; TexCr 20SW(2d)788; TexCr 20SW(2d) 1054; TexCr 25SW(2d)865; TexCr 27 SW(2d)823; TexCr 28SW(2d)546(2d case); TexCr 31SW(2d)435; TexCr 31 SW(2d)825(2dcase); 149Va457, 141SE 115; 153Va909, 150SE407; 103WVa144, 136SE835; Alta [1930] 4DomLR462; 61 OntL645, [1928] 2DomLR736. [a] 100TexCr575, 272SW172. (13) 264Mass 485, 162NE900. [b] **Defendant must tender instruction on elements making up crime of burglary** to lay foundation for attack on instruction covering elements. Ind 166NE649. [c] **Written objection is necessary.** 110TexCr190, 8 SW(2d)169.

65–5 107TexCr357, 296SW596.

65–5½–New. or submits grade of crime which defendant deemed should not be submitted. 167Minn74, 208NW528.

65–6 190NC506, 130SE308.

65–8 216Ky608, 288SW320; 170La630, 128S658 (holding error must be shown).

65–10 [d] (1) 99TexCr572, 271SW99. (2) 105TexCr91, 286SW1096; 105TexCr 389, 288SW1085; 112TexCr514, 17SW (2d)460. (3) 105TexCr91, 286SW1096. [f] **In Colorado.**–82Colo 589, 263P19. [j] 85Mont428, 278P993.

65–11 273US392, 47SCt377, 71Ledd700, 50ALR989; 21F(2d)283; 21AlaA111, 105S425; 48Ida439, 282P489; 203Iowa 929, 210NW465; 124Kan219, 257P719; 124Kan556, 261P846; 163La750, 122S 708; 164La496, 114S109; 311Mo 452, 278SW740; 316Mo 72, 289SW871; MoA 274SW496; MoA 281SW105; NJSup 129A480; 99TexCr572, 271SW99; Tex Cr 21SW(2d)301; 113TexCr589, 22SW (2d)936. But see 112TexCr245, 16SW (2d)127

66–12 39F(2d)897; TexCr 295SW574.

66–15 8F(2d)561; 15F(2d)841; 15F(2d)970; 21F(2d)283; 27F(2d)569; 29F(2d)103; 35F(2d)454; 35F(2d)598; 40F(2d)820; 43F(2d)358(2dcase); 30 Ariz366, 247P129; 68CalA575, 229P 990; 69CalA511, 231P596; 78CalA138, 248P541; 81CalA126, 251P958 (trait of honesty of defendant); 86CalA130, 260 P321; CalA 290P102; CalA 290P678; 93Fla372, 112S73; 43 Ida724, 254P210; 198 Ind614, 154NE370; 203 Iowa929, 210NW465; 124Kan556, 261P846; 215 Ky748, 286SW1068; 219Ky697, 294SW 153; 221Ky268, 298SW688; 232Ky426, 23SW(2d)556; 164La496, 114S109; 170 La507, 128S293; Mass 169NE418; 251 Mich228, 231NW573; 147Miss171, 113 S177; 157Miss669, 128S885(2dcase); Mo 256SW1043; Mo 289SW831; 316 Mo 55, 289SW890; 317Mo 336, 295SW 1076; 318Mo 548, 300SW678; Mo 48W (2d)813; Mo 24SW(2d)1032; 116Nebr 45, 215NW564; 34NM423, 282P870; 49 ND677, 193NW148; 57ND89, 220NW 843; 119 Oh189, 162NE802; OkiCr 274P1094; OkiCr 282P689; OkiCr 283 P579(2dcase); OkiCr 292P371(2dcase); 289Pa284, 137A261; 98PaSuper347; 34PortoRico 382; 138SC421, 136SE736; 138SC459, 136SE739; 10TexCr40, 274 SW580; 105TexCr60, 285SW321; 105 TexCr81, 286SW1086; 106TexCr116, 290SW1095; 106TexCr207, 292SW223; 107TexCr88, 294SW548; TexCr 295 SW574; 108TexCr33, 299SW242; 108 TexCr477, 18W(2d)644; 109TexCr411, 48W(2d)976; 111TexCr65, 11SW(2d) 320(3dcase); 111TexCr367, 12SW(2d) 1027(2dcase); 112TexCr615, 18SW(2d) 168; TexCr 20SW(2d)1067; 113TexCr 462, 22SW(2d)922 (in absence of special charge or exception to omission of charge); 113TexCr589, 22SW(2d) 936; TexCr 26SW(2d)263; TexCr 26 SW(2d)631; TexCr 27SW(2d)242; 153 Wash280, 279P607; 148Wash402, 269P 3; Wash 291P1098 (circumstantial evidence). See also 133SC83, 130SE514. But see 103TexCr150, 280SW584. [a] (18) In absence of request for special instruction, failure to limit corroborative evidence in charge cannot be assigned as error, though objection made. 190NC506, 130SE308. (19) Effect of impeaching testimony need not be covered by instructions in absence of request. 199 Iowa1228, 201NW49. (20) Charge applicable to theft generally not embracing theft of lost property. 101TexCr40, 274SW580. (21) Failure to comply with statute requiring court to charge that testimony of accomplice ought to be viewed with distrust. 120 Or297, 252P84. [l] **Failure to define words** "negligence," "measure of care," and "proximate cause" is not error in absence of request. 195Cal 325, 233P97.

67–16 99CalA280, 278P250; 93Fla372, 112S73; 198 Ind614, 154NE370; Mo 270SW273; OkiCr 269P323; 34Wyo 175, 242P411.

67–17 4F(2d)908.

67–18 105TexCr80, 285SW321.

67–23 138SC421, 136SE736.

67–26½–New. If omitted instruction involves the law of the case, defendant may predicate error on omission, if motion for new trial complains of it, although he failed to offer instruction at the trial. 321Mo 1163, 14SW(2d)617 (failure to instruct on entrapment).

67–26¼–New. Failure of the trial court to give to the jury instructions involving the law of the case is preserved by complaint on motion for a new trial, as distinguished from alleged error in failure to instruct on collateral matters. 322Mo 194, 14SW(2d)611.

67–27 Ind 165NE757; 207Iowa322, 222NW867; 141Miss877, 106S111; 140 Miss712, 106S280; 141Miss600, 106S827 (venue jurisdictional); 144Miss696, 110 S665; 154Miss704, 123S85(1dcase) (failure to prove venue); 101NJEq640, 138A369; 119 Oh349, 164NE359; Or 241P831. But see 33AlaA290, 124S398.

67–29 La 129S736; 102NJL349, 133A 785; 117 Oh481, 159NE594, 57ALR284.

68–31 67Utah526, 248P186 (failure to object to jurisdiction to pronounce judgment more than ten days after verdict of guilty held waiver).

68–32 28F(2d)150.

68-33½-New. Where a special judge was appointed by the governor to try a murder case, defendant's challenge to organization of court, first made in assignment of errors, is unavailing where the judge's acts were conclusive as to the public and rights of third parties. 194NC459, 140SE626.

68-34 274US328, 47SC650, 71Led1077; 219AlaA254, 122S610; 21AlaA611, 110S694; 21AlaA611, 110S696; 172Ark44, 287SW598; 78CalA426, 248P1021; 84Colo166, 268P536; 39GaA547, 147SE798(2dcase); 40GaA247, 148SE281; 197Ind.99, 150NE408; 203Iowa94, 212NW339; 121Kan866, 250P281; 124Kan505, 260P629; 165La842, 116S206; 188La925, 123S621; 127Me234, 142A857; 144Miss266, 109S722; 311Mo391, 279SW23; Mo 289SW831; 48Nev405, 233P523; 102TexCr415, 278SW216; TexCr292SW609; 107TexCr58, 294SW852; 107TexCr676, 298SW594; 111TexCr400, 13SW(2d)109; TexCr 328SW(2d)648; 101Vt483, 144A684; Vt 147A682; 147Va678, 137SE478; 150Va671, 142SE397; 103WVa144, 136SE835; 103WVa148, 136SE842. [a] (20) Rulings on admissibility of evidence. 21AlaA172, 106S71. [d] 319Mo28, 8SW(2d)230; TexCr 118SW(2d)172. [1] **General objection to** admission of evidence is not sufficient where real ground of objection is that proper foundation for admission was not laid. 198Cal776, 247P884. [m] **When language of objection is clouded in meaning,** it will be construed agreeably to ruling when it is not unreasonable so to do. 198Ind389, 153NE773.

69-35 172Ark44, 287SW598; CalA 284P733; 44Ida739, 260P164; Iowa 228NW1; 163La25, 111S483; 166La924, 118S85; 318Mo592, 300SW685; 77Mont387, 250P976; 34NM112, 278P210; 102TexCr415, 278SW216; 107TexCr46, 294SW595; 107TexCr58, 294SW852; 150Va611, 143SE641 (statement of grounds held sufficient). But see 178Ark212, 10SW(2d)366 (in absence of specific objection to instruction, appellate court can only pass on general objections). [a] (2) 199Ind489, 158NE480. (17) Failure to give special charge requested must be specified expressly. 102TexCr415, 278SW216.

69-36 171Ark282, 284SW10.

69-37 157Md635, 147A599(2dcase).

69-38 20AlaA454, 103S912; 21AlaA204, 106S683; 21AlaA507, 109S561; 201Cal341, 257P65; 78CalA426, 248P1021; 37GaA158, 139SE90; 37GaA97, 139SE94; 37GaA386, 140SE415; 39GaA415, 147SE407; 39GaA574, 147SE778(1st case); 197Ind599, 150NE408; 142Miss440, 107S666 (evidence obtained by illegal search); 307Mo487, 271SW477; Mo 28SW960; 48Nev405, 233P523; 153SC487, 151SE64; 103TexCr395, 281SW563; 103TexCr614, 281SW1068; 101Vt124, 141A686 (hearsay); 103WVa148, 136SE842.

70-39 166Ga160, 142SE685; 225Ky177, 7SW(2d)1052; 101TexCr86, 273SW598; 103TexCr614, 281SW1068; 104TexCr253, 283SW844; 104TexCr329, 283SW828; 106TexCr78, 290SW1105; 106TexCr642, 294SW557; 110TexCr481, 9SW(2d)342.

70-40 20AlaA454, 103S912.

70-42 83Colo219, 263P412; 166Ga517, 143SE900; 329Ill514, 161NE60; 205Iowa1028, 219NW17; 127Me234, 142A857; 147Miss118, 112S868; Mo 273SW733; Mo 279SW109; 76Mont351, 246P956; 106TexCr642, 294SW557. See also Mo 300SW767.

70-43 22AlaA77, 112S813; 171Ark1188, 286SW933; 37GaA386, 140SE415; 169Ga613, 151SE17; 39GaA547, 147SE798(2dcase); Ind 156NE560; 199Ind546, 158NE902; Iowa 229NW231; 147Miss118, 112S868; Miss 130S695; Mo 273SW733; 318Mo843, 18SW(2d)157; MoA 279SW221; MoA 300SW318; 32NM48, 250P842; 32NM83, 251P384; OkiCr 289P1111; 106TexCr642, 294SW557.

71-44 307Mo500, 271SW55. [a] **Under general objection** it cannot be contended that proper foundation for admission of telegrams was not laid. 198Cal776, 247P884.

71-44½-New. Objection to sufficiency of evidence to sustain conviction must be to testimony necessary to establish guilt. 311Mo510, 278SW1040.

71-44½-New. Objection to admission of letters on hearing to impound them before trial does not save objection that they were privileged communications when offered for comparison with synonymous letters. 318Ill114, 149NE3.

71-45 20AlaA337, 104S38.

71-46½-New. Appellate court may consider objection that proof does not sustain verdict of guilty where defendant objected to introduction of any evidence before same was admitted upon the ground that information did not charge public offense. 74CalA666, 241P598.

71-46½-New. Appellant's complaint that he was misled into entering pleas of guilty does not raise the issue that the district attorney acted improperly. 108TexCr623, 28SW(2d)749.

71-46½-New. Unauthenticated objections to charge cannot be considered. 113TexCr162, 22SW(2d)922.

71-47 5F(2d)622; 16F(2d)370; 33F(2d)382; 36F(2d)859; 21AlaA200, 106S697; 21AlaA474, 109S385; 168Ark731, 271SW338; 73CalA78, 238P112; 201Cal341, 257P65; 69CalA466, 231P601; 71CalA181, 235P72; 71CalA550, 236P158; 72CalA52, 236P355; 75CalA499, 243P478; 76CalA683, 245P781; 83CalA463, 256P876; 92CalA547, 268P674 (confession); 106Conn260, 137A762; 197Ind463, 150NE365; 199Ind578, 159NE154; 208Ky695, 271SW1044; 215Ky583, 285SW959; 126Me153, 136A908; 311Mo391, 279SW23; 316Mo243, 289SW852; Mo 300SW706; 102NJL318, 133A403; 32NM500, 258P1009; 196NC710, 146SE806(2dcase); OkiCr 287P1094(2dcase); 298Pa363, 148A568; 99TexCr647, 271SW389; 106TexCr290, 292SW216; 110TexCr512, 8SW(2d)144, 60ALR290; Utah 276P163; 143Wash166, 254P851; 150Wash475, 273P751; 198Wis18, 222NW825. But see 218AppDiv204, 218NYS148. [b] 20AlaA549, 103S878. [c] 197Ind599, 150NE408. [d] **Defendant failing to move for discharge of jury cannot complain on appeal of incompetent evidence subsequently withdrawn.** 218Ky435, 291SW731. [j] **Admissibility of evidence** admitted over objection after denial of motion to suppress is held properly before appellate court. 197Ind374, 151NE98. [k] **In absence of motion to suppress testimony** as to matters discovered by illegal search question whether constitutional rights of defendant were violated by admission of testimony cannot be considered. 311Mo391, 279SW23. [l] **Motion to quash search warrant and suppress evidence obtained thereunder** is not available on appeal when not made till after evidence had been admitted without objection. 23F(2d)905. [m] **Admission of testimony only partly admissible** is not reversible error where objection was to whole testimony. 105TexCr276, 288SW441. [n] **Motion to exclude answer has been held unnecessary** under some statutes in order to predicate error on court's erroneous ruling requiring accused to answer question as to former conviction for liquor misdemeanor. 23AlaA78, 121S3. [o] **Sufficiency of affidavit and search warrant** can only be raised by timely motion to suppress evidence in absence of objection to introduction at trial. OkiCr 280P479.

71-47½-New. or to instruct jury to disregard it; 110TexCr512, 8SW(2d)144, 60ALR290.

71-47½-New. or where there was no statement of what the evidence anticipated would be; 110TexCr512, 8SW(2d)144, 60ALR290.

71-48 84CalA58, 257P592; 96CalA632, 274P601; Mo 298SW(2d)150; 115Oh136, 152NE628 (motion to exclude unnecessary where objection to evidence is made).

71-49 21AlaA501, 109S561; 108TexCr464, 18SW(2d)285; 70Utah570, 262P107.

71-51½-New. In some jurisdictions error cannot be assigned on an unresponsive answer to a question in the absence of a request for an instruction to the jury to disregard it. 34F(2d)398.

71-52 137SC7, 133SE823.

71-56 See also 222Ky670, 18SW(2d)1072.

71-57 15F(2d)970; 21AlaA639, 111S202; 21AlaA261, 107S226; 21AlaA266, 107S328; 21AlaA430, 109S175; 21AlaA494, 109S526; 22AlaA193, 114S14; 22AlaA239, 114S423; 22AlaA418, 116S910; 161La827, 109S505; 48Nev358, 232P778, 235P645; OkiCr 275P405; OkiCr 277P1038; OkiCr 281P810; OkiCr 286P811. But see AlaA 130S531.

72-58 18F(2d)850; 41GaA574, 153SE613; 157Md635, 147A599(2dcase); 148Miss229, 114S352; 149Miss262, 115S208; 149Miss741, 115S889; 151Miss361, 118S137.

72-59 But see 143Va531, 129SE351.

72-60 Mo 289SW859.

72-60½-New. or order him to desist. 119Kan649, 240P568.

72-62 15F(2d)970; 20AlaA565, 104S45; 201Cal341; 257P64; 72CalA124, 236P934; 79CalA464, 249P1089; 86Colo35, 278P594, 65ALR1260; Ind 167NE531; 119Kan649, 240P568; 161La827, 109S505; 19Nev386, 248P48; 43OkiACR321 [rch pending]; 101TexCr185, 274SW634; 108TexCr17, 298SW572; 110TexCr116, 7SW(2d)958; 141Wash270, 251P289; 154Wash29, 280P73; 155Wash191, 283P15.

72-63 110TexCr371, 7SW(2d)961.

72-63½-New. An error cannot be predicated on admission of evidence where no request to change was made in connection therewith. 106Conn345, 138A132.

72-63½-New. Where defendant complains of improper arguments, he must have requested the trial court at some convenient time to restrain or correct the language complained of. 150SC449, 148SE173.

72-63¼-New. In absence of request that court take necessary corrective measures, judgment will not be reversed for misconduct of counsel in absence of abuse of discretion by court. 34NM486, 283P490.

72-64 90CalA472, 265P976.

72-65 5F(2d)17 (sufficiency will not be considered where no motion for directed verdict); 6F(2d)224; 6F(2d)801; 7F(2d)263; 7F(2d)357; 7F(2d)467; 8F(2d)593; 14F(2d)827; 15F(2d)929; 18F(2d)404, 22F(2d)806; 23F(2d)260; 24F(2d)204; 34F(2d)86; 34F(2d)110; 35F(2d)598(2dcase); 36F(2d)738; 37F(2d)341; 43F(2d)86; 43F(2d)890; 21AlaA181, 106S390; 21AlaA262, 107S228; 21AlaA312, 107S734; 21AlaA315, 108S76; 21AlaA434, 109S172; 21AlaA479, 109S386; 21AlaA610, 110S694; 22AlaA101, 112S810; 22AlaA310, 115S862; 102Conn658, 129A724; NJ 134A290; NJ Sup 140A396; 120Or177, 249P831; 93PaSuper193; 135SC387, 133SE900; 136SC31, 134SE209; 142SC69, 140SE250; 147SC329, 145SE192. See also 248NY182, 161NE463; 133SC67, 130SE337. But see 43F(2d)890; 31NM620, 249P1003; 138SC155, 135SW799. [c] **Demurrer to evidence at close of prosecution's case** and motion for directed verdict at close of all evidence properly raises and preserves for review question of sufficiency of evidence. 15F(2d)929. [d] **Only question for review is whether there is any substantial evidence in record to sustain conviction** absent motion. 40F(2d)609.

72-67 13F(2d)126. [a] **Motion to dismiss for lack of evidence** held insufficient to raise question of insufficiency of evidence at conclusion of defendant's evidence. 43F(2d)86.

72-68½-New. Where case was submitted to the judge of an inferior court to pass on questions of fact, the court of appeals may review sufficiency of the evidence even in the absence of a motion to dismiss. 248NY182, 161NE463.

72-69 See also 8F(2d)265.

72-70 [a] (1) 21AlaA262, 107S228; 23AlaA393, 126S174(2dcase).

72-72 200Ind548, 165NE319; Md 151A409.

72-73 317Mo9, 295SW71, 58ALR652 (motion in arrest held sufficient to raise question of sufficiency of facts in information to charge crime).

72-74 36F(2d)959; 201Cal309, 257P

71 (failure of indictment to state public offense); Md 151A409; 33Wyo 428, 240 P219 (insufficiency of indictment).

72-74½-New. A bare motion to dismiss is insufficient to raise the question of the sufficiency of indictment. 5F(2d) 45 (in prosecution for conspiracy to defraud government of customs duties by fraudulent withdrawal of liquor from warehouse with forged permits).

72-77 332 Ill 167, 163NE399; 339 Ill 421, 171NE557; 217Ky479, 290SW337; 217Ky485, 290SW339; 227Ky190, 12SW (2d)285; 227Ky557, 13SW(2d)769; 318 Mo 672, 300SW752; Mont 287P214 (on amendment of information); 108TexCr 90, 299SW246.

72-77½-New. Validity of judgment cannot be considered on appeal where no motion was made to modify or strike out part of the judgment. 89 IndA424, 166NE7.

73-79½-New. Where face of record shows sentence unauthorized by law, it will be set aside, although no motion made. 13F(2d)325.

73-79⅓-New. Where general charge, predicated on failure of proof as to venue, was not requested by defendant, claim that venue was not sufficiently proved is held without merit. 21AlaA 266, 107S328.

73-79¼-New. In the absence of a request to require an election defendant in a prosecution for rape may not complain that the jury was not confined to consideration of one act of intercourse. 143Miss722, 109S727.

73-79⅕-New. Where defendant failed to move for change of venue, contention as to public feeling will not be considered on appeal. 217Ky479, 290SW337.

73-79⅙-New. Where defendant failed to move for change of venue, contention as to public feeling will not be considered on appeal. 217Ky485, 290SW339.

73-79½-New. Assignment that court erred in making finding and judgment in the absence of defendant and attorney is concluded by recital in judgment in the absence of motion to correct or modify. 199 Ind134, 155NE610.

73-79¼-New. A motion for a peremptory instruction is insufficient to take the place of an objection to testimony. 221Ky287, 298SW686.

73-79⅛-New. Overruling an objection that defendant was not granted a preliminary hearing is error for which an appropriate motion must be filed supported by the evidence. Mo 289SW788.

73-79⅒-New. Reversal not required where no motion made to discharge jury because juror conversed with hotel proprietor, sheriff being nearby. 234Ky 192, 27SW(2d)971.

73-79 1/11-New. Where no motion to quash search warrant or suppress evidence obtained thereunder was offered before trial, objection at trial to sufficiency of warrant is too late. Mo 22SW (2d)795.

73-79 1/12-New. Absent request for directed verdict conviction will not be reversed for insufficiency of proof of venue. 40F(2d)636.

73-79 1/13-New. Necessity of motion for mistrial. Miss 130S908.

73-80 15F(2d)503; 15F(2d)929; 16 F(2d)231; 20AlaA627, 104S674; 21AlaA 479, 109S386; 22AlaA77, 112S813; 23 AlaA384, 125S898; AlaA 130S169(2d case); 174Ark1180, 297SW830; 78CalA 554, 218P964; 93Fla172, 111S351; 203 Iowa192, 210NW749; 214Ky544, 283SW 385; 164La813, 114S696; 127Me234, 142A857; 150Miss206, 116S746; Mo 285 SW1000; 102NJL94, 131A292; NJSup 132A338; 133SC67, 130SE337; 153SC 487, 151SE64; 103TexCr129, 280SW824, 825; 107TexCr43, 294SW549; 100WVa 180, 130SE102. [a] (1) See also 315Mo 203, 285SW990. (9) Alleged misconduct of commonwealth's attorney is held not reviewable where no ruling was obtained on motion to exclude evidence objected to. 214Ky544, 283SW385. (10) Objection not heard by court because made in undertone is insufficient. 316Mo 904, 293SW1051.

73-81 93Fla172, 111S351; 316Mo 904, 293SW1051; MoA 274SW496; OklCr 273P1018(2dcase); 131 Or455, 282P560; 47RI 245, 132A547.

74-82 21F(2d)939.

74-87 21AlaA114, 105S433; 143Miss 676, 109S710.

74-87½-New. Where the records do not show that the motion to quash was called to the attention of the court or that there was any action thereon, it will be presumed that the motion was waived. 156 Tenn68, 299SW1049, 55ALR915.

74-88½-New. The refusal of the trial court to hear a motion to suppress evidence may be deemed equivalent to a denial of the motion. 234Mich209, 207 NW801.

74-88⅓-New. An unsustained objection by the state to the opening statement on behalf of accused presents no question for review. 200 Iowa483, 203 NW806.

74-88¼-New. Failure of the trial court to strike out testimony is not ground for reversal where decision was reserved on motion to strike out and the motion was not renewed nor again called to the attention of the court. 115Nebr225, 212 NW426.

74-88⅕-New. Evidence in support of motion. 94Fla149, 113S726.

74-88⅙-New. Error cannot be predicated on failure to instruct the jury to disregard an improper question where no ruling on the requested instruction was secured. 148Miss680, 114S750.

74-88½-New. Motions for arrest and new trial must be submitted to, and passed on by, the trial court. Iowa 226 NW925.

74-88⅛-New. Defendant not objecting to postponement of ruling on admissibility of evidence until close of his testimony cannot complain of ruling on appeal. 298Pa363, 148A508.

74-90 273US77, 47SCt300, 71Led545; 7F(2d)357; 8F(2d)265; 21F(2d)283; 22F(2d)977; 27F(2d)323; 27F(2d)519; 41F(2d)44; 42F(2d)451; 21AlaA262, 107S228; 21AlaA266, 107S328; 21AlaA 304, 107S719; 22AlaA27, 112S221; 22 AlaA258, 114S479; 22AlaA334, 115S692; 22AlaA591, 118S505; 174Ark1180, 297 SW830; 93Fla172, 111S351; 43 Ida564, 253P842; Ill 233A608; 200 Ind287, 163 NE93; 200 Iowa1394, 206NW607; 203 Iowa94, 212NW339; 206 Iowa1178, 221 NW804; 216Ky573, 288SW330; 218Ky 435, 291SW734; 163La473, 112S303; Md 151A409; 257Mass1, 152NE745; 264 Mass324, 162NE401; 234Mich621, 208 NW674; 312Mo 209, 278SW668; Mo 289SW589; 316Mo 243, 289SW852; Mo 300SW815; Mo 24SW(2d)1008; 102 NJL94, 131A292; 240NY411, 148NE 597; 241NY128, 149NE221; 248NY182, 161NE463; 130Misc105, 222NYS595; 22 OhA357, 153NE902; 29 OhA200, 163NE 496; OklCr 271P956; 120 Or177, 249P 831; 99TexCr641, 270SW1030; 103Tex Cr200, 280SW221; 107TexCr43, 294SW 549; Va 152SE547. See also 90Fla86, 105S144; 83NH435, 144A124. [c] **Misconduct of juror** cannot be considered on appeal where no exception is taken during trial. 89 IndA486, 165NE919. [f] **Approval of exception by trial court** must be shown. 110TexCr220, 7SW (2d)543. [g] **Exception subsequently withdrawn** presents nothing for review. Mo 1SW(2d)139.

75-92 23AlaA273, 124S125(1stcase); 221Ky433, 298SW1078; 33Wyo 428, 240 P219 (insufficiency of indictment).

75-93 23F(2d)659; 99TexCr641, 270 SW1030.

75-94 143Va531, 129SE351 (court's duty to remand for new trial where on whole case accused did not have fair trial); Wyo 283P406.

75-95½-New. where a motion for a new trial containing the ground that the verdict is contrary to law was overruled and exception was noted; 29 OhA200, 163NE496.

75-96 21F(2d)939; 209Ky734, 273SW 489 (illegal jury consented to in felony case).

75-99½-New. Any act of court itself may be reviewed by a mere exception. 19F(2d)472.

75-1 4F(2d)901; 15F(2d)929; 40F (2d)820. [a] **Rule held not applicable** where record does not indicate unjust result. 27F(2d)323. [b] **Review should not be had unless failure of justice would otherwise result.** 27F(2d) 519.

75-2 130Misc371, 224NYS5; 214App Div804, 210NYS522.

75-3½-New. Under statute providing that motions in writing made in the circuit court, and rulings thereon, become part of the record on appeal, exception to ruling on motion to dismiss appeal need not be reserved. 21AlaA201, 106S 683.

75-3⅓-New. Where error is so seriously prejudicial that admonishing jury cannot cure it exception is unnecessary. CalA 286P514.

75-5 7F(2d)355; 89 IndA293, 166NE 292 (must be shown by record); 308Mo 651, 274SW419; NJ 130A446.

75-7 21AlaA114, 105S433.

76-21 7F(2d)104; 15F(2d)194; 21Ala A591, 110S412; 22AlaA99, 112S813; 22 AlaA22, 112S901; 22AlaA170, 113S646; 22AlaA392, 117S398; 43 Ida724, 254P 210; 339 Ill 263, 171NE143; 260Mass 97, 156NE679; Mo 11SW1015; 111Tex Cr169, 11SW(2d)797. See also 22AlaA 154, 113S602. [d] **Exception duly made.**-197 Ind123, 150NE24.

76-25 223Ky566, 4SW(2d)362; 318Mo 672, 300SW752; 101TexCr645, 276SW 906. [c] **Where defendant tried case with jurors despite claim of unfavorable atmosphere,** he could not complain of denial of continuance. 33 OhA1, 168NE 550.

76-29½-New. Where application for continuance is withdrawn on agreement of state to admit truth of absent witness' evidence defendant cannot complain of refusal to grant continuance. TexCr 26SW(2d)244.

77-32½-New. Irregularities in selecting juries are waived by permitting a jury to be impaneled without objection. 165La822, 116S199.

77-33 [a] (3) Rule making it unnecessary to except to admission or rejection of testimony as basis for review is applicable only to judicial action or rulings thereon. 102NJL94, 131A292. [b] (2) Conviction will be reversed on admission of evidence calculated to influence jury where court emphasized importance of such evidence in instructions, even in absence of exception. 215 AppDiv270, 213NYS449.

77-34 4F(2d)884; 5F(2d)622; 6F(2d) 224; 7F(2d)313; 7F(2d)467; 13F(2d) 451; 13F(2d)506; 16F(2d)563; 27F (2d)94; 33F(2d)382; 21AlaA155, 106 S797; 22AlaA638, 119S26(1stcase); 23 AlaA584, 129S492; 21AlaA18, 104S880; 21AlaA193, 106S622; 21AlaA201, 106S 683; 21AlaA289, 107S791; 21AlaA304, 107S719; 21AlaA468, 109S387; 22AlaA 48, 112S93; AlaA 114S281; 22AlaA317, 116S110; 23AlaA426, 126S417; 177Ark 1194, 293SW1041; 175Ark1170, 298SW 1019; 179Ark318, 16SW(2d)2; 77Colo 432, 236P1022; 89Fla336, 103S642; 97 Fla908, 122S525. [g] **Refusal to strike out testimony** will not be reviewed, if no exception is taken to court's ruling. 42 Ida319, 245P685; 43 Ida459, 252P673; 43 Ida564, 253P842; 43 Ida762, 254P518; 337 Ill 161, 169NE 9; 205 Iowa592, 218NW273; 208Ky 695, 271SW1044; 210Ky833, 275SW813; 214Ky544, 283SW385; 219Ky287, 292 SW789; 222Ky89, 300SW365; 228Ky 623, 15SW(2d)516; 229Ky403, 17SW (2d)260(2dcase); 232Ky426, 23SW(2d) 556; 127Me234, 142A857; 149Md128, 131A29; 153Md431, 138A338; Mass 165NE2; 150Miss206, 116S746; Mo 256 SW753; Mo 285SW422; Mo 289SW570; 317Mo 319, 296SW132; 318Mo 1185, 2 SW(2d)731; Mo 3SW(2d)235(hearsay); Mo 23SW(2d)122; MoA 281SW105; Mo 31SW(2d)39; 220MoA290, 286SW432; NJSup 130A723; 193NC246, 136SE715; 292Pa210, 140A898; 298Pa370, 148A 501; 298Pa363, 148A508; 46RI 485, 129A596; 49SD56, 206NW468; 100Tex Cr53, 271SW915; 104TexCr661, 285SW 617; 105TexCr211, 287SW257; 107Tex Cr3, 294SW588; TexCr 18SW(2d)640; 146Wash442, 263P602; 100WVa180, 130 SE102; 103WVa605, 138SE202; 33Wyo 346, 239P526, 41ALR717. See also Mo 12SW(2d)39. [h] **Admission of secondary evidence** without sufficient predicate held not ground for complaint in

absence of exception. 22AlaA220, 114 S280.

77-34½-New. especially where evidence was objected to and motion was made to strike it out. 43 Ida459, 252P 673.

78-36 MoA 300SW318.

78-37 Iowa 230NW865.

78-38½-New. Erroneous ruling in excluding answer to certain question to which exception was noted may be reviewed, although court made no ruling on order of proof and no exception was taken to court's refusal to permit it. 314Mo 635, 285SW437.

78-38¼-New. In some jurisdictions failure to except to the reception of evidence in capital cases does not preclude review thereof. 43 Ida459, 252P 673.

78-38¼-New. Defendant not excepting to postponement of ruling on admissibility of evidence cannot complain on appeal. 298Pa363, 148A508.

78-41 5F(2d)17; 5F(2d)943; 15F(2d) 929; 24F(2d)204; 22AlaA360, 115S763; 248NY182, 161NE463.

78-47 15F(2d)929.

78-49 83Colo 400, 265P909 (denial of request that jury be kept together); 151 Miss781, 119S298; 316Mo 243, 289SW 852; 248NY182, 161NE463.

79-52½-New. or improperly limiting scope of argument, 103TexCr626, 281SW 1067.

79-54½-New. or imposing an improper condition for exclusion of witnesses under the rule. OklCr 271P956.

79-57 13F(2d)451.

79-60½-New. Bill of exceptions in prosecution for rape to refusal to permit issue of baptismal record to show age of female is insufficient not showing contents of record or facts showing error. 104TexCr577, 285SW826.

79-61 8F(2d)472; 35F(2d)633 (statement not considered on appeal where no exception taken or prejudice shown); 36F(2d)699; 23AlaA459, 127S252(2d case) (colloquy between court and witness); 72CalA124, 236P934 (exception or request to jury to disregard); 75 CalA428, 243P52; 337 Ill 259, 169NE 206; Mo 280SW48; 39 OklCr173, 264P 226. See also Mo 18SW(2d)37.

79-62 75CalA428, 243P52; Mont 289 P1037.

79-63 316Mo 243, 289SW852.

79-64 22AlaA579, 118S849; 72CalA124, 236P934.

79-66 291Pa319, 139A836.

79-69 See also 15F(2d)294.

79-71 167La484, 119S523.

79-73 4F(2d)765; 27F(2d)854; 38 F(2d)406; 20AlaA565, 104S45; 21AlaA 534, 109S613; 22AlaA418, 116S910; 91 Fla682, 108S842; 93Fla172, 111S351; 94Fla318, 113S689; 97Fla908, 122S525; Ind 166NE654; Ind 167NE531; 199 Iowa1209, 203NW20; 203 Iowa192, 210 NW749; 207 Iowa555, 223NW166; 169 La377, 125S277; 169La1197, 126S921; 157Md635, 147A599(2dcase); 251Mich 99, 230NW931; 173Minn232, 217NW 104; 311Mo 452, 278SW740; 315Mo 242, 286SW69; Mo 295SW784; Mo 296 SW84; Mo 296SW391; 322Mo 1239, 18 SW(2d)71; Mo 23SW(2d)122; MoA 281SW105; 22 OhA357, 153NE902; Okl Cr 273P1018(2dcase); OklCr 275P405; 299Pa547, 149A696 (argument of counsel); 104TexCr661, 285SW617; 108 TexCr17, 298SW572; TexCr 8SW(2d) 176; TexCr 25SW(2d)350; TexCr 29 SW(2d)395; 141Wash270, 251P289; 154Wash29, 280P737; 34Wyo 218, 242 P802.

80-74 94Fla318, 113S689.

80-77 273US77, 47SCt300, 71L ed545; 6F(2d)574; 7F(2d)357; 7F(2d)458; 7 F(2d)467; 11F(2d)966; 12F(2d)742; 13F(2d)453; 14F(2d)925; 15F(2d)841; 15F(2d)970; 17F(2d)12; 18F(2d)906; 19F(2d)850; 21F(2d)283; 22F(2d)948; 25F(2d)708; 27F(2d)569; 27F(2d)854; 29F(2d)103; 30F(2d)482 [certiorari den 279US855, 49SCt351, 73L ed997 (6thcase)]; 32F(2d)126; 32F(2d)130; 34F(2d)398; 35F(2d)454; 35F(2d)598; 37F(2d)867; 40F(2d)820; 41F(2d)215; 22AlaA124, 113S321; 216Ala475, 113S 393; 219Ala567, 122S683; 20AlaA562, 103S916; 20AlaA604, 104S280; 21AlaA 266, 107S328; 21AlaA394, 108S650; 21 AlaA481, 109S891; 21AlaA591, 110S 412; 23AlaA70, 121S8; 23AlaA463, 127 S250 (court's method of reading instructions); 177Ark1194, 293SW1041; 82Colo 349, 259P508; DC 32F(2d)953; 89Fla336, 103S642; 93Fla372, 112S73; 28Hawaii350; 200 Iowa649, 203NW38 (where exceptions were not filed within statutory period and no extension appears); 201 Iowa4, 206NW584; 205 Iowa592, 218NW273; 206 Iowa354, 220 NW77; 208 Iowa796, 223NW873; 208 Iowa831, 224NW557; Iowa 229NW231; 124Kan219, 257P719; 227Ky190, 12SW (2d)285; 170La630, 128S658; 149Md 298, 131A452; 264Mass485, 162NE900; 148Miss680, 114S750; 311Mo 452, 278 SW740; Mo 22SW(2d)784; MoA 256 SW512; MoA 281SW105; 48Nev134, 228P582 (oral instructions not deemed excepted to); 82NH133, 130A743; NJ Sup 129A480; 33NM370, 266P922; 130 Misc105, 222NYS595; 192NC80, 133SE 404; OklCr 270P335; OklCr 280P317 (2dcase); 34PortoRico 457; 54SD245, 222NW681; SD 225NW61; SD 227NW 571; 99TexCr572, 271SW99; 100TexCr 195, 272SW469; 100TexCr288, 273SW 571; 100TexCr295, 273SW582; 103Tex Cr252, 280SW808; 103TexCr264, 280 SW813; 104TexCr152, 282SW813; 104 TexCr157, 283SW788; 105TexCr60, 285 SW321; 104TexCr567, 285SW1094; 104TexCr522, 286SW209; 105TexCr81, 286SW1086; 105TexCr389, 288SW1085; 105TexCr608, 290SW179; 106TexCr116, 290SW1095; 106TexCr150, 291SW232; 106TexCr167, 291SW249; 106TexCr207, 292SW223; 107TexCr10, 294SW586; 107TexCr115, 295SW190; 108TexCr92, 299SW249; 108TexCr111, 299SW640; 108TexCr270, 1SW(2d)287; 108TexCr 555, 1SW(2d)890; 108TexCr611, 2SW (2d)259; 109TexCr411, 4SW(2d)976; 111TexCr1, 10SW(2d)725; 111TexCr 605, 13SW(2d)366; 112TexCr52, 14SW (2d)67; 112TexCr322, 16SW(2d)537 (1stcase); 112TexCr517, 17SW(2d)807; 112TexCr615, 18SW(2d)168; 113TexCr 273, 20SW(2d)201; TexCr 20SW(2d) 788; 113TexCr518, 22SW(2d)930; 113 TexCr589, 22SW(2d)936; 113TexCr608, 21SW(2d)1063; TexCr 27SW(2d)538; TexCr 27SW(2d)815(2dcase); TexCr 28SW(2d)804; TexCr 29SW(2d)395; 69Utah181, 253P204; Utah 286P645; 153Wash398, 279P591(1stcase); 34Wyo 175, 242P411. But see 103TexCr150, 280SW584. [g] **Setting out refusal of special charges in motion for new trial** is insufficient to present question for review in absence of exceptions. 106 TexCr167, 291SW249.

81-78 37F(2d)74; 22AlaA48, 112S93. [a] (1) 48Nev134, 228P582.

81-80 TexCr 26SW(2d)644(2dcase). But see 107TexCr101, 294SW1110. [b] In Texas.-104TexCr470, 284SW587.

81-81 284Pa159, 130A317.

82-82 23F(2d)48; 38F(2d)584 (jury clearly misdirected); 43 Ida766, 254P 520; TexCr 20SW(2d)1067.

82-84 TexCr 20SW(2d)1067; TexCr 26 SW(2d)648.

82-85 128Me404, 148A141.

82-86½-New. or where the instruction constituted an indirect infringement on a constitutional right, 218Ala363, 118S 506(1stcase).

82-93½-New. In Idaho, giving of inconsistent instruction for state raises question despite absence of exception. 43 Ida766, 254P520.

82-95 See also 233 IllA608.

82-96 20AlaA454, 103S912 (that judgment does not show that jury were properly sworn cannot be first raised on appeal); 82Colo 349, 259P508; Md 151A 409.

83-97 14F(2d)5; 254Mass390, 150NE 181; OklCr 287P1091(2dcase); 111Tex Cr172, 11SW(2d)798.

83-98½-New. If objection to verdict is that it is insufficient to support a judgment, it is not necessary to save an exception. 120 Or90, 250P633, 251P307.

83-99 [k] 35Wyo 41, 246P241. [l] In Porto Rico.-35PortoRico 309.

83-1 173Minn232, 217NW104; 107Tex Cr606, 298SW431.

84-2 40GaA541, 150SE446.

84-3 106TexCr116, 290SW1095.

84-12 274US328, 47SCt650, 71L ed 1077; 14F(2d)827; 39F(2d)412; 215 Ala224, 110S23; 21AlaA277, 107S327; 21AlaA642, 111S317; 328 Ill 631, 160NE 121; 199 Ind540, 156NE555; 201 Iowa 10, 206NW635; 204 Iowa1133, 216NW 678; 165La67, 115S370; 165LaS42, 116S206; NJSup 145A229(2dcase); 33NM187, 262P929; 191NC826, 132 SE564, 196NC387, 145SE784; 97Pa Super566; 104TexCr619, 286SW214; 107TexCr54, 295SW604; 108TexCr 441, 1SW(2d)633; TexCr 27SW(2d) 213; TexCr 28SW(2d)804; 100Vt476, 138A741; 101Vt416, 144A193; 153 Va954, 151SE286. See also 272US448, 47SCt135, 71L ed345. [i] **Exception to refusal of motion to withdraw juror** will not warrant review of instructions. 299Pa547, 149A696. [j] **Exception to remarks of trial judge** held to save question of prejudicial character for review. Ind 172NE176.

85-15 TexCr 26SW(2d)277.

85-16½-New. An exception to prejudicial remarks of counsel, to which the court sustained an objection, furnishes no basis for an assignment of error to the failure of the court to administer an appropriate and adequate reprimand. 322Mo 234, 14SW(2d)628.

85-17 165Ga302, 140SE885; 104TexCr 283, 284SW564.

85-18 82NH133, 130A743.

85-19 102NJL134, 130A642 (not reviewable by ordinary writ of error resting on bill of exceptions if there is legal evidence to support findings).

85-21½-New. Reason for objection stated in brief cannot be considered when it differs from one stated in record. Ind 156NE560.

85-23 165Ga302, 140SE885. [a] **Exception to exclusion of witness** not stating witness would have qualified is not properly presented. NC 154SE604.

86-29 14F(2d)827; 21AlaA277, 107S 327; 264Mass324, 162NE401. See also 27F(2d)854. [d] In New Jersey.-103 NJL266, 137A529.

86-31 118 Or5, 244P512.

86-32 201 Iowa1089, 202NW90.

86-33 But see 203 Iowa90, 212NW312.

86-34 28F(2d)150; 35GaA385, 133SE 282; 206 Iowa397, 220NW13; 109TexCr 361, 4SW(2d)966; Utah 291P307.

86-37 107TexCr54, 295SW604.

86-37½-New. An exception that an instruction failed to limit the purpose of the testimony is too general in failing to point out the evidence which the court failed to limit in the instruction. 101 TexCr598, 276SW283.

86-37¼-New. An exception to the court's charge as on the weight of the evidence is too general. 101TexCr598, 276SW283.

86-40½-New. An exception that a charge was confusing brings the matter up for review where confusion consisted in the absence of any evidence upon which to base the charge and left the jury at a loss to know how to appropriate and apply the charge. 101TexCr185, 274SW634; 108TexCr274, 1SW(2d)308.

86-40¼-New. Objections to instructions will be disregarded, unless they specify part objected to and grounds of objection. 202 Iowa348, 209NW474.

86-40¼-New. Nonspecific exceptions to instructions will be disregarded. 202 Iowa352, 209NW514.

86-40½-New. Exceptions to charge by reference only are insufficient. 21AlaA 642, 111S317; 22AlaA304, 115S146.

86-40½-New. Exception that qualifies itself is insufficient. 107TexCr79, 294 SW860.

86-40½-New. Exception to charge must call attention to particular part of record. 104TexCr567, 285SW1094.

86-40½-New. In some jurisdictions general exceptions to a charge present only basic or fundamental errors. 92 PaSuper121.

86-40½-New. An exception to an instruction not specific enough to point out the error complained of so as to enable the court to correct it and not coupled with tender of a proper instruction is insufficient. 34NM112, 278P210.

86-40½-New. Exceptions in general terms to the refusal of requested in-

structions, for which no grounds appear in the record, cannot be considered. 151Va510, 144SE361.

86-40½-New. In the absence of a request for correct and fuller instructions, error cannot be predicated on a general exception to the instruction, objectionable only for not being more specific. Utah 279P953.

86-41 [d] 118Nebr249, 224NW278. [e] **In Tennessee.**-158Tenn264, 12SW(2d) 951.

87-43 35F(2d)959(2dcase); 21AlaA 262, 107S228; 22AlaA125, 113S625; 168 Ark167, 269SW355; 176Ark398, 3SW (2d)37; 77Colo 445, 236P1009; 164Ga 88, 138SE65; 35GaA497, 133SE747; 38 GaA362, 144SE51; 198 Ind39, 152NE1; 198 Ind480, 154NE10; 199 Ind484, 158 NE241; 200 Ind292, 163NE95; Ind 166 NE654; Ind 169NE861; 124Kan245, 259P691; 127Kan166, 272P132; 128 Kan284, 276P818; 214Ky572, 283SW 1032; 223Ky25, 2SW(2d)1035; 160La 199, 106S782; 160La228, 106S837; Mo 256SW461 (necessity to present constitutional question); Mo 273SW739; 312 Mo 411, 278SW1036; 315Mo 1, 285SW 429; 314Mo 699, 285SW440; 314Mo 646, 285SW474; 316Mo 55, 289SW890; 316 Mo 878, 292SW29; 316Mo 1152, 295SW 563; 318Mo 663, 300SW673; 318Mo 766, 300SW1073; 321Mo 662, 12SW(2d)34; 322Mo 1239, 18SW(2d)71; Mo 19SW (2d)628; Mo 22SW(2d)797; Mo 23SW (2d)136; Mo 24SW(2d)980; Mo 24SW (2d)1003; Mo 29SW(2d)71; MoA 272 SW1097; MoA 274SW485; MoA 299 SW821; MoA 300SW521; 116Nebr635, 218NW432; 53ND203, 205NW67; 55 ND683, 215NW157; 24 OhA212, 157NE 400; OklCr 268P998(3dcase); OklCr 275P659; 137SC364, 135SE360; 155 Tenn68, 299SW1049, 55ALR915 (error in failing to quash indictment); TexCr 24SW(2d)425 (2dcase); 34Wyo 112, 241 P701. [g] **In Kentucky.**-210Ky401, 276 SW123. [h] **Motion for new trial** is not required of commonwealth on appeal from judgment of acquittal. 220Ky771, 295SW1047. [i] **Where issue of age is first raised on appeal,** fact that court did not advise defendant of statutory provision and appoint counsel to apply for suspended sentence does not authorize reversal. 104TexCr197, 282SW1118. [j] **Review of evidence may extend no further** than to determine whether there is any substantial evidence to sustain verdict. 79Mont614, 257P1010. [k] **Error in denying preliminary hearing.**-Mo 26SW(2d)937. [l] **Degree of manslaughter** is for jury and will not be disturbed in absence of motion for new trial. 23AlaA348, 128S359(2dcase).

87-44 21AlaA646, 111S318; 168Ark 167, 269SW355; 36GaA672, 137SE787; 39GaA812, 148SE608(1stcase); 41GaA 290, 152SE596(2dcase); 41GaA375, 153 SE201(1stcase) (holding that ground requiring reference to other parts of record is incomplete); 334 Ill 526, 166NE 74; 197 Ind575, 150NE371; 197 Ind419, 151NE129; 200 Ind458, 163NE260(1st case); Ind 167NE524 (errors occurring on trial of issues formed by plea in abatement); 203 Iowa94, 212NW339; 124Kan245, 259P691; 125Kan110, 263P 787; 215Ky827, 287SW23; 219Ky697, 294SW153; 230Ky387, 19SW(2d)1086; 161La696, 109S391; 163La481, 112S 372; 165La47, 115S363 (motion on ground that verdict is contrary to law and evidence presents nothing for review); 165La380, 115S627; 255Mass 369, 151NE839; Mo 274SW17; 312Mo 411, 278SW1036; 315Mo 1, 285SW429; Mo 289SW646; Mo 289SW788; Mo 289 SW859; 316Mo 55, 289SW890; Mo 292 SW56; 316Mo 571, 292SW78; 315Mo 1326, 292SW413; Mo 295SW788; Mo 296SW391; 318Mo 663, 300SW673; 318 Mo 742, 300SW680; 318Mo 596, 300SW 702; 318Mo 619, 300SW793 (detailed specification is required); 318Mo 531, 300SW829; Mo 300SW1106; 319Mo 40, 2SW(2d)765; 318Mo 1198, 2SW(2d)767; 318Mo 1173, 2SW(2d)777; 320Mo 248, 6 SW(2d)839; 320Mo 288, 6SW(2d)866; Mo 6SW(2d)900; Mo 7SW(2d)264; 320 Mo 254, 7SW(2d)275; Mo 8SW(2d)49; Mo 12SW(2d)46; Mo 19SW(2d)628; Mo 29SW(2d)686; MoA 295SW481; MoA 296SW219; MoA 2SW(2d)138; 55ND 683, 215NW157; 58ND282, 225NW789; 151SC90, 148SE710; 113TexCr223, 18 SW(2d)656. See also 321Mo 352, 10SW (2d)928. [e] 311Mo 630, 279SW135; Mo 300SW1106. [f] Mo 256SW753. [g] 316Mo 904, 292SW714. [h] 35GaA244, 132SE782; 35GaA245, 132SE919; 35 GaA388, 133SE273; 37GaA106, 139SE 120. [m] **Motion on ground that verdict is contra law and evidence** presents no question of law reviewable by supreme court. 159La399, 105S410; 162La471, 110S723; 162La872, 111S264. [n] **Ground that "verdict is contrary to law"** presents nothing for consideration. 38 GaA351, 144SE148. [o] **Special ground will not be considered,** for it is not complete and understandable without reference to other parts of record. 38GaA 744, 145SE667. [p] **Special grounds, not complete and understandable within themselves,** cannot be considered by appellate court. 40GaA272, 149SE291 (1stcase). [q] **Special grounds which are mere elaborations of general grounds** warrant no separate consideration. 40 GaA511, 150SE466. [r] **Grounds for new trial, not complete and understandable** within themselves, present nothing for review. 41GaA504, 153SE535.

88-45 Ind 166NE654.

88-46 164Ga88, 138SE65; 166Ga512, 143SE896; Ga 155SE28 (portion approved will be considered); Ga 155SE 329; 34GaA234, 128SE918; 35GaA167, 132SE245; 35GaA347, 133SE268; 36 GaA583, 137SE639; 37GaA112, 139SE 112; 37GaA829, 142SE202; 38GaA664, 145SE100(1stcase); 39GaA415, 147SE 407; 39GaA784, 148SE600(1stcase); 39 GaA678, 148SE602; 40GaA10, 148SE 769; 40GaA224, 149SE154; 40GaA444, 150SE429; 40GaA712, 151SE393; 41GaA 838, 155SE49; 41GaA838, 155SE82. [a] (1) 39GaA678, 148SE602. (4) Approval must be unqualified. 35GaA167, 132 SE245; 37GaA112, 139SE112. [c] **Ground expressly disapproved** will not be considered. 34GaA234, 128SE918. [d] **Special ground for new trial not unqualifiedly** approved by trial cannot be considered. 41GaA321, 152SE913.

88-48½-New. Each special ground must be complete and understandable within itself. 34GaA234, 128SE918; 34 GaA144, 128SE924; 35GaA347, 133SE 269; 35GaA388, 133SE273; 36GaA209, 135SE926; 36GaA582, 137SE412; 36 GaA741, 138SE258; 36GaA784, 138SE 280.

88-48⅓-New. When grounds for a motion for a new trial are so incomplete as to require reference to brief of evidence, they will not be considered. 35 GaA347, 133SE269.

88-48¼-New. No question of fact or complaint of procedure other than those questions occurring during the trial is presented in a motion for a new trial. 101TexCr544, 276SW261.

88-48½-New. A motion for a new trial cannot be used to incorporate anything into the record or any exceptions to anything occurring at the trial. 169 Ark324, 274SW1.

88-48⅙-New. Defendant waives error in denying continuance by motion for new trial without assigning such action as reason. 326 Ill 290, 157NE205.

88-48⅐-New. Alleged error in denial of motion to suppress evidence is held not reviewable where assigned as error occurring at instead of before trial. 199 Ind284, 157NE280.

88-48⅛-New. Where an amended motion for a new trial was filed in time and contained all assignments of error set out in the original motion, only assignments in the amended motion will be considered. Mo 279SW702.

88-48⅑-New. A ground of a motion for a new trial requiring reference to other parts of the record will not be considered. 38GaA449, 144SE138.

88-48 1/10-New. Generally the trial court's adverse ruling on a motion for a new trial submitted without argument presents nothing for review. 128Kan 293, 278P20.

88-49 180Ark241, 22SW(2d)47.

88-50 177Ark1042, 9SW(2d)243; 314 Mo 699, 285SW440.

88-51 210Ky401, 276SW123. See also 317Mo 9, 295SW71, 58ALR652.

88-54 Mo 300SW815; MoA 294SW422. But see 21AlaA434, 109S172.

88-55 199 Ind578, 159NE154 (motion to quash indictment).

88-56 199 Ind578, 159NE154; Ind 169 NE861 (where no trial of issues on plea); 120Kan754, 244P860. But see Ind 167NE531.

88-56½-New. In Georgia motion for a new trial will not be considered by the reviewing court, where the ground is not complete and understandable within itself. 34GaA194, 129SE9; 36GaA582, 137SE412; 36GaA741, 138SE258; 36 GaA784, 138SE280; 37GaA829, 142SE 202.

88-57 20 OhA141, 153NE160.

89-58 147Miss593, 113S348; Mo 256 SW743; Mo 273SW739; 316Mo 591, 292 SW63; Mo 300SW674; Mo 24SW(2d) 988; MoA 12SW(2d)512(1stcase); Wis 231NW168 (evidence reviewed though motion for new trial was not made till after judgment).

89-59 Mo 285SW1000.

89-60½-New. Where motion for new trial was not filed before entry of judgment, supreme court cannot consider bill of exceptions or record proper. Mo 22 SW(2d)793.

89-63 21AlaA434, 109S172; 169Ark335, 275SW671; 177Ark355, 6SW(2d)299; 37GaA386, 140SE415 (evidence held not inadmissible for any reason assigned); 39GaA589, 147SE791(1stcase); 329 Ill 101, 160NE138; 196 Ind640, 149NE163; 197 Ind419, 151NE129; 199 Ind726, 160 NE346; 89 IndA117, 165NE773; 89 IndA706, 168NE26(1stcase); 126Kan 685, 271P269; 215Ky748, 286SW1038; Mo 273SW1069; Mo 278SW1009; Mo 279SW109; Mo 296SW138; Mo 300SW 501; Mo 300SW673(1stcase); Mo 300 SW723; 318Mo 712, 300SW738; 318Mo 628, 300SW743; 318Mo 751, 300SW748; 318Mo 772, 300SW807; Mo 300SW320; Mo 300SW1069; 318Mo 766, 300SW1073 (general objection held insufficient); Mo 1SW(2d)827; Mo 2SW(2d)753; Mo 2 SW(2d)756; 319Mo 28, 3SW(2d)230; 320Mo 228, 7SW(2d)259; 320Mo 209, 7 SW(2d)269; 320Mo 389, 8SW(2d)20; Mo 11SW(2d)1010(1stcase); Mo 12 SW(2d)30; Mo 19SW(2d)628 (general assignment insufficient); Mo 22SW(2d) 772 (assignments insufficient); Mo 23 SW(2d)22; Mo 24SW(2d)1032; MoA 281SW115; MoA 7SW(2d)432; 159 Tenn422, 19SW(2d)231; 101WVa632, 133SE371; 102WVa462, 135SE594; 103 WVa361, 137SE749; 103WVa355, 137 SE751; 108WVa237, 151SE176. See also 318Mo 679, 300SW687; Mo 300SW 719; Mo 12SW(2d)25; 29PortoRico 961. [a] 37GaA386, 140SE415. [d] **Sufficiency of grounds.**-37GaA195, 139SE103. [e] **General assignment is sufficient** where evidence when offered was not material or relevant for any purpose. 317 Mo 759, 297SW10. [f] **Statement of grounds.**-322Mo 194, 14SW(2d)611. [g] **Assignments held too general.**-Mo 18 SW(2d)474. [h] **What objection was made to evidence** when it was offered must be shown in grounds for new trial, complaining of admission of evidence. 40GaA271, 149SE299. [i] **Refusal to suppress evidence should be assigned as irregularity,** not as error of law. IndA 168NE717(1stcase).

89-64 329 Ill 101, 160NE138; 103WVa 361, 137SE749; 103WVa355, 137SE751.

89-65 171Ark1136, 287SW590; 166Ga 512, 143SE896; 166Ga517, 143SE900; 34GaA180, 128SE586; 37GaA520, 140 SE788; 38GaA351, 144SE148; 38GaA 748, 145SE526; 39GaA26, 145SE911; 39 GaA812, 148SE608(1stcase); 40GaA10, 148SE769; 40GaA712, 151SE393; 125 Kan496, 264P1064; 126Kan17, 266P 937; 127Kan7, 272P169; 127Kan174, 272P189(1stcase); 127Kan481, 274P223; Mo 285SW400; 317Mo 272, 295SW96; 317Mo 268, 295SW741; 317Mo 293, 295 SW743; 317Mo 354, 296SW397; 317Mo 840, 297SW34; Mo 300SW698; Mo 1 SW(2d)139; 318Mo 623, 1SW(2d)151; Mo 1SW(2d)833; Mo 1SW(2d)834; 320 Mo 189, 6SW(2d)883; 320Mo 327, 7 SW(2d)273; 320Mo 417, 8SW(2d)29; Mo 8SW(2d)49; 321Mo 870, 12SW(2d)469;

322Mo 194, 14SW(2d)611; 322Mo 1239, 18SW(2d)71; Mo 22SW(2d)777; Mo 22 SW(2d)797; Mo 29SW(2d)686; MoA 17 SW(2d)353. See also 317Mo 759, 297 SW10; 321Mo 662, 12SW(2d)34. [b] (1) 35GaA666, 134SE181. (2) 36GaA 282, 136SE332. (4) Exceptions to admission of documentary evidence cannot be considered where the evidence is not incorporated in grounds of motion for new trial and is not attached thereto as exhibits. 34GaA234, 128SE918. (5) Motion to rule out objectionable evidence must also appear. 36GaA282, 136 SE332. [c] **General statement that court erred in admission and exclusion of evidence** does not raise question on appeal. 171Ark1136, 287SW590; 317 Mo 336, 295SW1076. [d] **Name of witness whose testimony was admitted** over counsel's objection must be stated. 38GaA362, 144SE51.

89-65½-New. Grounds of motion should show materiality of excluded testimony. 36GaA741, 138SE258.

89-65¼-New. without necessity of examining other parts of record. 34GaA 234, 128SE918.

89-65¼-New. The name of the witness whose testimony is admitted must be set out. 36GaA582, 137SE640.

89-65½-New. Objection made at the time of admission must be set out. 36 GaA282, 136SE332.

89-65¼-New. The materiality of the evidence must be shown. 36GaA784, 138 SE280.

89-65⅓-New. The name of the witness whose testimony was excluded must be set out. 34GaA144, 128SE924.

89-65½-New. The ground of a motion for a new trial complaining of the admission of evidence must show who the witness was. 36GaA741, 138SE258.

89-65½-New. Such ground must show that the admission of the evidence was prejudicial to complainant. 36GaA741, 138SE258.

89-65 1/10-New. Harmful effect of evidence admitted should appear. 166Ga 517, 143SE900.

89-65 1/11-New. Ground of a motion for a new trial, assigning error on admission of evidence, will not be considered unless the evidence is sufficiently set forth so that admissibility can be determined without reference to other parts of the record. 166Ga517, 143SE900.

89-67 20AlaA606, 104S551; 21AlaA262, 107S228; 21AlaA312, 107S734; 21AlaA 315, 108S76; 21AlaA493, 109S527; 22 AlaA101, 112S810; 22AlaA310, 115S 862; 23AlaA186, 122S305; 82Colo 233, 259P1038; 329 Ill 101, 160NE138; 218 Ky540, 291SW779; 236Mich632, 211NW 23; Mo 292SW19; 318Mo 581, 300SW 765; 53ND203, 205NW67; 58ND282, 225NW789; 49SD392, 207NW160; 49 SD456, 207NW456. [d] **Motion for new trial on ground that verdict is contrary to law and evidence** presents nothing for review. 162La340, 110S497; 317Mo 313, 295SW543. [e] **Motion based on overruling of demurrer to evidence** sufficiently presents ground. 317Mo 372, 295 SW734. [f] **Assignment that verdict is against weight of evidence** is insufficient where not stating that court abused discretion in overruling motion on such ground. 318Mo 581, 300SW765. [g] **Assignments held too general.**—Assignment that verdict is against evidence and against law under evidence is too general, vague, and indefinite. MoA 5SW (2d)95. [h] 85Mont138, 277P961(1st case).

89-68½-New. Recitals of fact therein contained are not evidence on appeal of truth thereof when motion is denied by the trial court. 90Fla136, 105S316.

89-68⅓-New. Motions relating to matters in pais are not self-supporting. 90 Fla136, 105S316.

89-68¼-New. It must appear whether witness, asked an expert medical opinion on subject of insanity, had qualified as a mental expert or not. 163Ga43, 135 SE410(2dcase).

89-68⅓-New. Where no motion for new trial was made, court will not pass on sufficiency of evidence to sustain plea of insanity. 21AlaA289, 107S791.

89-68⅙-New. A special ground of a motion for a new trial complaining of the court's refusal to rule out all the evidence regarding a dying declaration is defective for failure to state the name of any witness by whom the dying declaration was proved, or the substance of such declaration. 38GaA648, 145SE106.

89-68½-New. A ground of a motion for a new trial based on refusal of the court to rule out evidence not showing that any reason was given the court why such evidence should be ruled out, or that the court's attention was directed to such evidence after it was conditionally retained, cannot be considered. 38GaA648, 145SE106.

89-68½-New. Reasons for inadmissibility of evidence not affirmatively shown to have been urged and passed on at the trial cannot be considered on review. 38GaA731, 145SE525.

89-68¼-New. The court will not refer to the brief of evidence for the purpose of completing an incomplete assignment of evidence. 38GaA351, 144SE148.

89-70 40F(2d)820; 22AlaA125, 113SE 625; 169Ark1188, 278SW3; 171Ark 1189, 287SW578; Ark 318SW(2d)952; 82Colo 233, 259P1038; Fla 130S718; 196 Ind509, 149NE57; 124Kan219, 257 P719; 221Ky276, 298SW693; 233Ky 184, 25SW(2d)77; 235Ky594, 31SW(2d) 940(1stcase); 169La109, 124S188; MoA 256SW496; Mo 256SW1043; Mo 270 SW347; Mo 274SW54; 312Mo 411, 278 SW1036; Mo 285SW469; 315NW242, 286SW69; Mo 289SW831; 316Mo 55, 289SW890; Mo 292SW440; 317Mo 388, 295SW82; 317Mo 372, 295SW734; Mo 295SW791; 317Mo 336, 295SW1076; Mo 296SW138; Mo 300SW673; Mo 300SW 712; 318Mo 813, 18SW(2d)143; 320Mo 189, 6SW(2d)883; Mo 8SW(2d)3; 320 Mo 417, 8SW(2d)29; Mo 14SW(2d)449; 322Mo 1, 16SW(2d)96; Mo 22SW(2d) 797; Mo 23SW(2d)1; Mo 29SW(2d) 113; MoA 256SW523; 216MoA644, 271 SW875; MoA 299SW821; OklCr 290P 340(2dcase); 154Tenn95, 290SW25; 145 Wash654, 261P383; 103WVa144, 136SE 835. See also Mo 12SW(2d)30. [c] **Error in instructing jury orally** will not be considered when not presented in motion for new trial. OklCr 287P804.

90-75 171Ark1136, 287SW590; Fla 130 S718; 40GaA232, 149SE158; 312Mo 411, 278SW1036; Mo 279SW401; 316Mo 150, 289SW822; 316Mo 995, 292SW70; 315Mo 1326, 292SW413; 317Mo 313, 295 SW543; 317Mo 268, 295SW741; 317Mo 840, 297SW34; 318Mo 553, 300SW694; 318Mo 672, 300SW752; 318Mo 772, 300 SW807; Mo 300SW1069; 318Mo 766, 300SW1073; Mo 18SW(2d)833; Mo 1 SW(2d)834; 319Mo 1, 2SW(2d)729; Mo 2SW(2d)753; Mo 2SW(2d)756; Mo 4 SW(2d)813; 320Mo 228, 7SW(2d)259; 320Mo 389, 8SW(2d)20; 320Mo 417, 8 SW(2d)29; 320Mo 271, 8SW(2d)57; 321 Mo 662, 12SW(2d)34; Mo 12SW(2d)51; 321Mo 870, 12SW(2d)469; Mo 14SW(2d) 441; Mo 14SW(2d)449; Mo 19SW(2d) 628; Mo 19SW(2d)671; Mo 25SW(2d) 113; Mo 29SW(2d)58; MoA 7SW(2d) 725; MoA 17SW(2d)353; 103WVa144, 136SE835. [a] (4) 171Ark1136, 287SW 590. (7) Assignment that instruction does not properly state law is insufficient. 322Mo 194, 14SW(2d)611. [b] (3) Other instances. 318Mo 647, 300 SW511; Mo 14SW(2d)449. [c] **Unless all instructions challenged are erroneous,** motion challenging them is unavailable. Ind 170NE786.

91-76 171Ark1136, 287SW590; 166Ga 200, 143SE369; 39GaA577, 147SE776 (1stcase); 41GaA290, 152SE596(2d case); 41GaA323, 152SE924(1stcase) (complaint of instructions against law and evidence, without setting out evidence is insufficient); 41GaA371, 153SE 91(2dcase); Mo 270SW360; 312Mo 411, 278SW1036; Mo 279SW401; Mo 285 SW445; 314Mo 684, 285SW496; 316Mo 150, 289SW822; 316Mo 995, 292SW70; 315Mo 1326, 292SW413; Mo 295SW535; 317Mo 293, 295SW743; 317Mo 336, 295 SW1076; Mo 296SW155; 317Mo 354, 296SW397; 317Mo 426, 297SW358; Mo 297SW388; 318Mo 679, 300SW687; Mo 300SW698; Mo 300SW719; 318Mo 712, 300SW738; 318Mo 628, 300SW743; 318 Mo 751, 300SW748; Mo 300SW820; 318 Mo 859, 300SW1083; 318Mo 623, 18SW (2d)151; Mo 7SW(2d)256; 320Mo 209, 7SW(2d)269; Mo 7SW(2d)1001; 320 Mo 271, 8SW(2d)57; Mo 12SW(2d)51; 322Mo 194, 14SW(2d)611; Mo 29SW(2d) 67; Mo 29SW(2d)686. See also Mo 12 SW(2d)28. [a] (1) MoA 294SW448. (8) Motion for new trial is not considered on appeal where charge requested was too defective. 34GaA222, 129SE7. (9) Other instances. Mo 29SW(2d)67.

91-76½-New. and ground of motion should show that the requested instructions were pertinent and applicable to the facts of the case, 35GaA574, 134SE 185.

91-76⅓-New. and grounds failing to state that the requests were presented to the judge before the jury retired are too defective to be considered by the appellate court. 34GaA179, 128SE587.

91-77 36GaA784, 138SE280; 40GaA 624, 150SE871; 41GaA430, 153SE223; MoA 296SW440. [a] 36GaA582, 137SE 640.

91-77½-New. Ground of a motion for a new trial, based on failure to charge on the law of alibi, is insufficient where it does not set forth the evidence requiring the charge. 37GaA106, 139SE120.

91-79 197 Ind419, 151NE129; Iowa 232NW172; 209Ky10, 272SW1; 217Ky 99, 288SW1047; 220Ky348, 295SW142; 232Ky226, 22SW(2d)624; 314Mo 662, 285SW62; 314Mo 574, 285SW997; 318 Mo 766, 300SW1073; 318Mo 525, 18SW (2d)137; Mo 22SW(2d)639; Mo 22SW (2d)797; Mo 24SW(2d)1032; MoA 2SW (2d)138; OklCr 277P259. [d] **Remarks not set forth with particularity** cannot be considered. 317Mo 319, 296SW132. [e] **Where ground of motion does not state what ruling was made** by court on motion to declare mistrial for language used by solicitor general, or whether or not court rebuked him and instructed jury not to consider improper remarks, ground is insufficient. 37GaA93, 139SE 88.

91-80½-New. A ground of a motion for a new trial, based on improper arguments, does not raise any question for consideration where it does not appear that a motion for a mistrial was made in connection therewith. 38GaA357, 144 SE129(1stcase).

91-82 175Ark264, 298SW993; 39GaA 415, 147SE407; 197 Ind575, 150NE371; 119Kan658, 240P567; 124Kan245, 259P 691; Mo 300SW501; 320Mo 209, 7SW (2d)269.

91-84 210Ky833, 275SW812; 223Ky 566, 4SW(2d)362; 224Ky158, 5SW(2d) 902; 235Ky336, 31SW(2d)381; Miss 124S436; Mo 22SW(2d)797; 111TexCr 296, 12SW(2d)794. [a] **Sufficiency of motion.**—TexCr 10SW(2d)723.

91-85 Ind 165NE753.

91-85½-New. in sustaining of plea in abatement, 159Tenn689, 21SW(2d)631.

91-91 199 Ind117, 155NE259.

91-94½-New. , or misconduct of trial judge. 210Ky378, 275SW881.

91-94⅓-New. Error in overruling motion to suppress evidence must be specified as irregularity and not as independent error. 196 Ind640, 149NE163.

91-95½-New. for failure to deliver a copy of the information to accused, 77 Colo 546, 238P25.

92-97½-New. for disqualification of a juror because of having expressed an opinion. 152Miss723, 120S838.

92-98 255Mass369, 151NE839; 321Mo 662, 12SW(2d)34.

92-99 198 Ind480, 154NE10.

92-1 Ind 165NE753.

92-1½-New. Ground of motion that there is a fatal variance between the indictment and the proof is entirely too indefinite, vague, and incomplete to be considered. 317Mo 313, 295SW543.

92-1⅓-New. The sufficiency of the return of the police judge will not be reviewed where the question is not raised by motion for a new trial. 234Mich95, 207NW867.

92-1¼-New. Error in refusing a separate trial to a defendant jointly charged with others is reviewable without a motion for a new trial prefaced by a notice of intention to move therefor. 49SD453, 207NW469.

92-1½-New. Issue of sufficiency of in-

formation is raised by motion for new trial charging error in overruling objections to introduction of any evidence under information. 314Mo646. 285SW474.

92-1½-New. Assignments of error for the improper conduct of the trial judge will not be considered where they do not particularly point out the acts and conduct complained of. **Mo** 1SW(2d)139.

92-1½-New. A motion for a new trial is not necessary to review a ruling of the trial court granting a motion to quash a count of an information on the ground of variance. 118Nebr249, 224NW278.

92-2 219Ala282. 122S45; 329 Ill 101, 160NE138; 162La719, 111S72. [d] **Question of fact** conflicting evidence on alleged misconduct of jury declared binding on appellate court. 100TexCr 660, 273SW852. [e] **In Georgia.**-170Ga 294, 152SE572.

92-6½-New. Necessity for exception to ruling on motion. 260Mass97, 156NE679.

92-10 200Wis151, 227NW243.

93-23½-New. Where defendant in a criminal case excepts directly to the overruling of a demurrer to the accusation, and the court immediately signs and certifies the bill of exceptions, it is not error for the judge to proceed with the trial of the case without waiting for the appellate court to pass upon the validity of the demurrer. 39GaA559, 147SE714.

93-26 94Fla32, 113S630; 223Ky665, 48W(2d)685; 235Ky763, 32SW(2d)334; **Mo**A 9SW(2d)820; **OkCr** 283P271; **TexCr** 9SW(2d)1038(1stcase) (necessity of recognizance). [d] Right of appeal includes right to have from appellate tribunal all writs which are necessary or proper to complete exercise of jurisdiction set in motion by perfecting of appeal. 95CalA42, 272P321.

93-26½-New. Title of proceedings is not changed by removal by certiorari. 104NJL268, 140A21.

93-26¼-New. Circuit court after appeal does not lose jurisdiction to compel stenographer to fulfill ministerial duties. **Ark** 31SW(2d)968(1stcase).

94-31 94PaSuper10 (only attorney-general or district attorney). See also 244 Ill261.

94-41 101CalA394, 281P697; 169Ga435, 150SE551(1stcase); **OkCr** 272P487(2dcase); **OkCr** 275P407; **OkCr** 279P910(1stcase); **OkCr** 279P930(2dcase); **OkCr** 281P151(2dcase); **OkCr** 282P369(2dcase); **OkCr** 287P751; **OkCr** 287P1066(2dcase); **OkCr** 292P1042; 154Tenn83, 289SW498; **TexCr** 10SW(2d)545(1stcase); 37Wyo188, 260P173 [cit CJ]. [b] **Appellate court will not assume defendant is dead and abate action on mere suggestion** of death without evidence thereof. 23AlaA486, 127S264.

95-47 Ind 171NE380; 222Ky840, 2SW(2d)1044. See also 166LaS14, 118S29. [b] 153Md700, 138A329. [g] **In Alabama.**-20AlaA595, 104S346. [h] **In California.**-68CalA632, 230P22. [i] **In Minnesota.**-174Minn194, 218NW887. [j] **In Ohio.**-116 Oh312, 156NE191. [k] **In Oklahoma.**-Cr 273P374; **Cr** 279P913(2dcase). [l] **Where writ of error is not filed** within three months, under USCA tit 28 § 230, parties are not before reviewing court as matter of right. 27F(2d)80.

95-48 30F(2d)306; 201Cal309, 257P71; **CalA** 289P909; 166LaS14, 118S29; 153Md700, 138A329; 318Mo596, 300SW702; 322Mo254, 14SW(2d)558; **MoA** 27SW(2d)1070; 133Misc732, 234NYS231; **NC** 154SE628(1stcase); **OkCr** 273P372(1stcase); **OkCr** 274P1097(1stcase); **OkCr** 275P358; **OkCr** 275P397; **OkCr** 278P397; **OkCr** 279P918(2dcase); **OkCr** 279P975(2dcase); **OkCr** 281P322(1stcase); **OkCr** 281P986(1stcase)(misdemeanor); **OkCr** 283P1029; **OkCr** 283P1034(2dcase); **OkCr** 283P1035(1stcase); **OkCr** 287P726(1stcase); **OkCr** 287P787(1stcase); **OkCr** 287P787(2dcase); **OkCr** 287P834(1stcase); **OkCr** 289P783(1stcase); **OkCr** 289P1117(1stcase); **OkCr** 290P197(1stcase); **OkCr** 291P144(2dcase); **OkCr** 293P276(1stcase); 94PaSuper344; 34PortoRico843 (time runs from date of filing transcripts in courts to which appeal taken); 65Utah400, 237P516 (crime held jurisdictional); 33Wyo420, 240P207. See also **OkCr** 283P589(2dcase). [c] **Time of appeal is determined** by service of notice of appeal on prosecuting attorney. **Ind** 171NE380.

95-49 318Mo596, 300SW702 (good cause shown); 109TexCr518, 6SW(2d)119 (clerk's illegal demand for fee). But see 317Mo284, 295SW550. [b] 98CalA552, 277P201. [c] **Ignorance of court rule** in failing to file application stating grounds of appeal in time held no excuse by appellant's reliance on fact that rule making similar provisions had been repealed. 96CalA381, 274P401(1st case).

95-50 SC 155SE849.

95-52½-New. nor by the court where neither the case on appeal nor briefs were filed within the statutory time; 227AppDiv629, 236NYS78(1stcase).

96-53 30F(2d)306.

96-57 [a] **OkCr** 278P665(1stcase).

96-59 33Wyo420, 240P207.

96-62½-New. Delay of two years held no ground for refusing to entertain an appeal based on a wrongful admission of the prisoner's wife as a witness against him. 41NB516, 14DomLR825, 22CanCrCas124.

96-62⅓-New. An order extending the time to make and serve a case-made does not automatically extend the time within which to file an appeal. **OkCr** 273P372(1st case); **OkCr** 273P374; **OkCr** 278P397.

96-62¼-New. Time limited for appeal does not begin to run until seasonable motion for new trial is disposed of. 37F(2d)692.

96-62⅕-New. Order extending time to serve case-made does not automatically extend time to file appeal. **OkCr** 283P589(2dcase).

96-65 153Md700, 138A329.

96-66 153Md700, 138A329.

96-67 230Ky71, 18SW(2d)881. [c] **Time for perfecting appeal.**-235Ky763, 32SW(2d)334.

96-69 106TexCr550, 293SW575.

97-70 106Conn114, 137A394. [f] **In Mississippi.**-150Miss823, 117S261.

97-72½-New. Suspension of judgment does not render it any less a final judgment for the purpose of determining the time within which to appeal. 150Miss823, 117S261.

97-75½-New. An appeal taken more than sixty days before the present term of the supreme court is returnable thereat. **Mo** 285SW101.

97-77 89CalA290, 264P519; 90CalA69, 265P508; **CalA** 284P516 (time for presentation). But see 207Cal450, 278P1025. [a] (1) 99NJEq480, 134A558. (2) 99NJEq480, 134A558. [b] 99NJEq480, 134A558. [c] 99NJEq480, 134A558. [d] 90CalA69, 265P508. [e] **Failure to file application stating grounds of appeal in time** requires dismissal of appeal. **CalA** 265P879. [f] **Presentation of petition for writ of error, assignments of error, and proposed citation** to deputy clerk of district court within three months allowed by statute, to apply for writ of error did not constitute application therefor. 30F(2d)308. [g] **Particular statutes construed.**-**CalA** 285P1069. [h] **In New Jersey.**-**NJ** 150A555.

98-81 NJSup 149A124; **OkCr** 279P980(2dcase); **OkCr** 290P340(2dcase); 144Va559, 131SE131 (cannot be considered).

98-82½-New. , and application for transcript which fails to state the grounds of appeal or points relied on will result in dismissal of appeal. 78CalA615, 248P714.

98-84 93Fla585, 112S51. [a] **Sufficient statement of grounds and points relied on.**-67CalA758, 228P367.

98-86 194NC715, 140SE727. [e] **Petition.**-194NC715, 140SE727.

98-92 36GaA208, 136SE109.

98-93½-New. In some jurisdictions a petition for certiorari to review the judgment of a police or recorder's court, unless a pauper's affidavit is made, must affirmatively allege the filing, approval, and acceptance of the required bond and a certified copy of the bond together with a certificate of filing, approval, and acceptance should be annexed. 37GaA607, 141SE318.

98-93¼-New. Under the New York Code where one appeal has been allowed to appellate part of special sessions, application for further appeal to court of appeals should be made to a judge of appeal court directly. 219App Div352, 220NYS5.

98-93¼-New. An application for appeal from the appellate division to the court of appeals may be made to a justice of either of these courts. 219App Div352, 220NYS5.

98-93½-New. Writ of error to supreme court of New Jersey on ex parte application will be denied by chancellor where on such application and cursory review by him the errors complained of do not present fairly arguable case. 99NJEq480, 134A558.

99-99 [c] **Ground of appeal held necessitating leave.**-[1925] **CanSC**525, [1925] 3**DomLR**887. [d] **In New York.**-245NY563, 157NE858. [e] **In British Columbia.**-**Can** [1930] 2**DomLR**97.

99-1 See also 261Mass12, 158NE167.

99-13 250NY358, 165NE810.

99-15 250NY358, 165NE810.

99-17 194NC715, 140SE727.

99-19½-New. In New York, application for certificate permitting appeal from order of appellate division must be made within thirty days after entry. 245NY75, 156NE187.

99-19½-New. In case judge to whom application is made is unable to decide matter within such time, appeal must be taken after certificate granted forthwith. 245NY75, 156NE187.

99-19¼-New. The granting of the writ removes the case to the appellate court. 30F(2d)308.

99-19⅕-New. Where an order for leave to appeal has been improperly made, the proper practice is to move to vacate the order, and not to wait until argument of appeal to raise the point. 250NY358, 165NE810.

100-23 [a] 36GaA208, 136SE109. [g] **In Iowa.**-202 Iowa440, 210NW443. [h] **Filing cost bond as conferring jurisdiction.**-235Ky763, 32SW(2d)334.

100-24 [b] (2) In absence of recognizance or appeal bond approved as required by Court Code, court of criminal appeals is without jurisdiction to pass on merits of case. 112TexCr130, 14SW(2d)273.

100-30½-New. Convicted defendants have right to appeal as matter of course without giving bond. **Wash** 289P25.

101-32 315Mo68, 292SW707. [a] **Court may require stenographer** to furnish transcript free to appellant in forma pauperis. 220Ky690, 295SW997. [b] **In Missouri.**-285SW509. [c] **Stenographer, acting by consent,** can be required to furnish transcript free. 220Ky690, 295SW997.

101-38 [a] (3) But unless recognizance is entered in term of conviction, appeal bond should be executed. **TexCr** 26SW(2d)635.

101-40 105NJL73, 143A825.

101-48 [d] (9) 112TexCr130, 14SW(2d)273.

102-56 TexCr 32SW(2d)467. [a] (9) Where record does not show that judge fixed amount of bond at time of execution, his subsequent approval was ineffectual, bond was unenforceable, and appeal properly ordered dismissed unless defendant should file new bond within time fixed by order. 100TexCr358, 273SW584.

103-68 101TexCr577, 276SW697; 101TexCr667, 276SW698. [a] 101TexCr577, 276SW697; 101TexCr667, 276SW698.

103-68½-New. In some jurisdictions, where a bond not containing a condition required by statute has been acted upon and approved in good faith, it may be amended after the expiration of six months from the taking of the appeal so as to make it conform to law. 149Miss198, 115S342.

103-72 226Ky744, 11SW(2d)932; 103TexCr233, 280SW824, 825; 104TexCr117, 282SW227; 110TexCr148, 8SW(2d)159; **TexCr** 21SW(2d)517. [b] **In**

Texas.–104TexCr117, 282SW227.

103–77 [a] (5) Where insufficient affidavit of indigence filed. TexCr 23 SW(2d)728(2dcase).

104–82½–New. Diligence in having a stenographer make out and deliver a statement of facts must appear where accused is unable to pay for the transcript of testimony or give security therefor. 110TexCr631, 10SW(2d)556.

104–82½–New. Neither the appellate court nor the trial court has authority to order a statement of facts prepared gratis, if accused is able to give security for payment of a transcript of the testimony. 110TexCr631, 10SW(2d)556.

104–84 18F(2d)689.

104–87 35Ariz453, 281P37 (defendant is entitled to transcript, though affidavit is not served on county attorney); 160Ga365, 127SE732; 104TexCr117, 282SW227. [d] **Affidavit must be filed during trial term.**–103TexCr233, 280SW824, 825. [e] **Affidavit must be "entitled in the cause" or otherwise affirmatively show** on its face its relation thereto in order to relieve plaintiff in error or his attorney from payment of costs. 36GaA751, 138SE246. [f] **Hearing on affidavit.**–35Ariz453, 281P37.

104–90 160Ga365, 127SE732. [a] **Procuring by defendant and counsel** of fee for prosecuting appeal is held not to show arbitrary possession to appeal in forma pauperis, entitling stenographer to fee for transcript. 220Ky690, 295SW997.

104–93½–New. An affidavit that accused is unable to pay for the transcript is insufficient where it does not show that he is unable to give security therefor. 110TexCr631, 10SW(2d)556.

104–93½–New. An affidavit of inability to pay for the transcript of testimony must contain all requirements laid down in the statute. 110TexCr631, 10SW(2d)556.

104–94 OklCr 269P511. [c] (4) Appellate court is without jurisdiction of misdemeanor case in absence of notice of appeal. TexCr 26SW(2d)236(1st case). (5) Court of criminal appeals need not be specifically named. TexCr 20SW(2d)783. [d] **Purpose of notice.**–NB [1928] 1DomLR539. [e] **In California.**–208Cal506, 282P384.

104–95 195NC458, 142SE474; OklCr 291P992; 104TexCr606, 286SW230; 104TexCr607, 285SW831; 106TexCr550, 293SW575; 110TexCr603, 9SW(2d)1042 (2dcase); 111TexCr395, 13SW(2d)114; 113TexCr182, 18SW(2d)629; TexCr 18SW(2d)1086(1st case); TexCr 20SW(2d)1047; TexCr 23SW(2d)382(1st case); TexCr 27SW(2d)231; TexCr 31SW(2d)1076; TexCr 32SW(2d)461; 65Utah400, 237P516. [a] (6) In Texas copy of docket entry in record is insufficient notice of appeal. TexCr 26SW(2d)241(2dcase). (7) Other instances. TexCr 32SW(2d)461. [d] **Court of criminal appeals acquires no jurisdiction** where no notice of appeal is given it by appellant. 111TexCr275, 12SW(2d)579.

105–96 65Utah400, 237P516.

105–3½–New. Notice of appeal cannot be withdrawn after expiration of term. 108TexCr120, 299SW246.

105–5 See also **Ont** [1927] 3DomLR639.

105–8½–New. Notice of appeal must be served on the party sought to be brought within the jurisdiction of the appellate court. 65Utah400, 237P516.

105–9 89IndA470, 166NE777; OklCr 282P694(1stcase). [e] **Appeal from New York court of special sessions.**–Notice to district attorney by service of copy of affidavit on which appeal was based is held not essential. 216AppDiv508, 215NYS666.

106–12 OklCr 282P694(1stcase).

106–13 OklCr 287P802(1stcase); OklCr 291P992; OklCr 291P985.

106–17 OklCr 279P524.

106–22½–New. Filing of individual motions in arrest of judgment by defendants tried and convicted under one judgment does not necessitate separate appeals by the state. 90CalA594, 266P337 (one notice of appeal held sufficient).

106–22½–New. Notice of appeal by the state from an order granting arrest of judgment is sufficient although the court clerk made an incomplete minute notation of the appeal. 90CalA594, 266P337.

106–22¼–New. Notice of appeal not specifying the grounds of the appeal is not insufficient where it is not shown that respondents were misled. 90CalA594, 266P337.

107–32 261Mass12, 158NE167.

107–34 OklCr 291P985.

107–36½–New. Writ of error returnable sixteen days after it was issued and dated has been held void. 94Fla1156, 115S530.

107–36¼–New. Lodgment of a writ of error in the clerk's office removes the cause, and deprives the trial court of further jurisdiction. 24F(2d)796.

107–38½–New. After removal, notice of motion to quash indictment should be given prosecutor of the pleas. 104NJL268, 140A21.

107–41 217Ala486, 116S908. [b] (3) Appeal from conviction in murder case automatically gives accused right to suspension of execution of death sentence till appeal has been determined. OklCr 277P283. (4) Statute relating to stay bond on conviction for misdemeanor does not authorize giving of such stay bond on conviction for felony. OklCr 289P356. [f] **Convicted defendant may give** either supersedeas bond or bail bond. 42F(2d)26. [g] **Circuit court of appeals may by rule prescribe forms of** supersedeas and of bail bonds. 42F(2d)26.

107–42 87CalA393, 262P474; 235Ky763, 32SW(2d)334; 54ND178, 208NW977; 54ND193, 209NW231; 105TexCr586, 289SW682, 684 [citCJ]. But see 36F(2d)475. [b] **In Missouri.**–310Mo274, 275SW536.

107–43 217Ala486, 116S908; 198Cal601, 246P802; 124Kan464, 260P661; Miss 130S506; Mo 278SW711. See also 197Cal611, 241P886. But see 21AlaA388, 108S635. [e] **Stay does not set aside judgment.** 124Kan464, 260P661.

108–44 22AlaA474, 116S907 (law question must be reserved); 77CalA366, 246P815; 39Wyo40, 270P152. [g] **Failure to file appeal in time** precludes stay. 77CalA366, 246P815.

108–46 21AlaA201, 106S683; 201Cal122, 255P815, 52ALR869; 73Mont541, 237P525.

108–47 73Mont541, 237P525.

108–48 But see 199Cal240, 248P908. [b] **After dismissal of appeal for lack of sentence** and filing of motion by defendant to reinstate appeal, trial court had no authority to pronounce sentence. 110TexCr112, 7SW(2d)1075.

108–49 [a] (1) 199Cal240,248P908. (3) Under Code (1923) § 3251 where appeal is taken direct to supreme court and court of appeals, trial court retains jurisdiction for purpose only of granting motion for new trial and of enforcing its judgment where appeal is dismissed before judgment in appellate court. 21AlaA201, 106S683.

108–52 198Cal601, 246P802.

109–54½–New. Effect of transfer of cause. Trial court is divested of jurisdiction only as to matters contested on appeal. 159La765, 106S296.

109–54¼–New. After conviction and appeal state trial judge has jurisdiction to permit whisky to be loaned to federal authorities for use in federal prosecution. 159La765, 106S296.

109–54¼–New. Order allowing appeal in express terms operates as supersedeas as to imprisonment imposed by judgment. 41F(2d)49.

109–55½–New. Where an appeal bond has been given, sentence cannot be enforced on a certificate of the clerk that no appeal has been perfected within the time allowed therefor. 33Wyo314, 239P288.

109–55½–New. In such case the question whether there has been a default is always a judicial question and sentence cannot be executed without a court order. 33Wyo314, 239P289.

109–56 [c] **Appellant desiring appeal** with suspension of judgment must elect when judgment is rendered. 20AlaA595, 104S346.

109–63 95CalA42, 272P321; 95CalA70, 272P328.

109–64 [a] **InVirginia.**–145Va848, 133SE755.

109–66 197Cal611, 241P886 (not required to stay execution of death penalty pending appeal from conviction); 198Cal601, 246P802; 74CalA790, 241P897; 98CalA731, 277P895; 74Mont217, 239P775. [c] **Certificate of reasonable doubt in capital case** is required to stay that part of judgment appealed from which requires detention in state prison pending infliction of death penalty. 197Cal611, 241P886.

109–66½–New. Power and duty, in the proper case, of the appellate court in criminal cases to issue writs of probable cause, not being dependant on a statute, did not deprive them thereof. 95CalA42, 272P321.

109–70 54ND178, 208NW977; 54ND193, 209NW231.

109–70½–New. Application to the appellate court for writ of probable cause and stay of execution pending appeal from conviction, rather than for writ of mandate to compel issuance of writ of probable cause by the trial court, is the proper remedy. 95CalA42, 272P321.

109–71 72CalA196, 236P929; 74CalA790, 241P897; 78CalA451, 248P929; 95CalA42, 272P321; 95CalA70, 272P328; 98CalA731, 277P895; 74Mont217, 239P775. [a] (1) 78CalA451, 248P929.

109–71½–New. , and appeal is not frivolous or vexatious. 72CalA88, 236P929 (1st case); 72CalA196, 236P929(2dcase).

109–72 127Misc300, 216NYS116.

110–73 128Misc68, 217NYS662.

110–74 72CalA88, 236P929; 128Misc68, 217NYS662. [a] (20) Where serious question of law is involved. 127Misc300, 216NYS116. (21) Where district attorney attempted to discredit accused, his attorney in a former proceeding made certain admission which was false. 127Misc300, 216NYS116. (22) On exclusion of evidence. 74CalA790, 241P897.

110–76½–New. where serious question of law is involved, 127Misc300, 216NYS116.

110–79 NJQuartSess 140A563; 128Misc68, 217NYS662; 130Misc105, 222NYS595. [a] **Reasonable doubt must be founded on substantial error.**–128Misc68, 217NYS662.

110–82 [a] (2) Where trial court erroneously refuses to issue certificate of probable cause, court of appeals has legal power and it is its duty to grant relief. 78CalA451, 248P929.

110–83 72CalA196, 236P929(2dcase); 72CalA88, 236P929(1stcase) (duty of court of appeals to grant certificate when trial court erroneously refuses). See also 98CalA731, 277P895.

111–99 [a] **Effect on original warrant.**–Man [1925] 3DomLR361.

111–1 95CalA42, 272P321.

111–5½–New. [§ 3384a] C½. **Effect of Proceedings for Review on Jurisdiction of Lower Court.** 102WVa169, 134SE740.

111–7 Ind 172NE176 (provisions of criminal code must be followed); 223Ky677, 48W(2d)683; 173Minn610, 216NW533; NJ 141A24; NJSup 147A738; 109TexCr71, 28W(2d)856 (duty of accused's counsel); 111TexCr381, 12SW(2d)1024. [d] **In Pennsylvania.**–292Pa395, 141A289.

111–11 133Misc538, 232NYS603.

111–16 173Minn610, 216NW533.

112–20 312Mo340, 279SW98.

112–22½–New. Motions and rulings required to be made part of bill of exceptions do not become part of record by inclusion therein by clerk. 326Ill216, 157NE211.

112–24 213Ala143, 104S220 (order for special venire).

112–29 20AlaA625, 104S775; 22AlaA267, 114S674; 91Fla481, 107S638; 227Ky710, 13SW(2d)1046.

112–30½–New. A showing of jurisdiction in the trial court is necessary to give the appellate court cognizance of the case on appeal. 103TexCr139, 280SW585.

112–31 23AlaA333, 125S204(2dcase)

[illegible] 141Miss600. 106 [illegible] show that transcript [illegible] of peace was in circuit court [illegible]

112-33 103TexCr139, [illegible] Tex [illegible]

112-35 [illegible] Ind [illegible]

112-36½-New. [illegible] record on appeal [illegible] court shows that [illegible] 22AlaA [illegible]

112-37 [illegible] 111NE[illegible]

112-51 [illegible] TexCr[illegible] TexCr[illegible] TexCr [illegible] 2d [illegible]

112-60½-New. [illegible] of [illegible]

114-61 [illegible] 111NE[illegible]

114-63 [illegible] 111Sec7. But see [illegible]

114-73½-New. [illegible] Ind [illegible]

114-76 [illegible] 116S314; [illegible] AlaA [illegible] Minn [illegible] TexCr [illegible] 2d [illegible] TexCr [illegible] 24[illegible] Mo [illegible]

115-80 TexCr [illegible] 2d [illegible]

115-82 [illegible] 111NE[illegible] La [illegible]

116-95 [illegible] 111NE[illegible] 147 Ind [illegible] NE.

116-97 IndA [illegible] MoA [illegible] 117 [illegible]

117-39 [illegible] 111S7[illegible]

117-4 [illegible]

118-16 [illegible] 111NE[illegible]

118-19 [illegible] Presumed that on examination [illegible] PortoRico [illegible]

118-28 [illegible] Ky [illegible]

118-32½-New. [illegible] Mo [illegible]

118-33 [illegible] 111NE[illegible]

118-36 [a] **Record held sufficient.**–Tex Cr 32SW(2d)[illegible]

119-52 92Fla[illegible] 111S[illegible] Ill [illegible] 111NE[illegible] 16[illegible] La [illegible] MoA [illegible] 22 Fla[illegible] 111S[illegible] (3) 147Wash411, 266 P[illegible]

120-54 [illegible] 111S[illegible]

120-56 [illegible] 111S[illegible]

120-57 [illegible] 111S[illegible]

120-58 [illegible] 111S[illegible]

120-64 [illegible] TexCr [illegible] 2d [illegible] TexCr[illegible] 271SW[illegible] TexCr[illegible] 271SW[illegible]

120-64½-New. [illegible] be considered un- [illegible] 562, 23[illegible]SW385

120-65½-New. In some jurisdictions [illegible] charges should [illegible] corporated in record proper. [illegible] AlaA[illegible]

120-66 21AlaA270; [illegible] 21AlaA [illegible] Ky[illegible] TexCr[illegible] 2d[illegible] 105TexCr29, 285SW312; 106 TexCr[illegible] 2[illegible]SW[illegible] 108TexCr629, 2 SW(2d)267; 109TexCr67, 2SW(2d)851. [c] **In absence of notation of exception in refusal to special charge** [illegible] in separate [illegible] not be considered. 105TexCr295, [illegible] SW[illegible] [d] **Charges must be marked refused and signed by trial judge.** 23 AlaA547, 129S99(1st case).

120-67½-New. The record must show that objections and exceptions to the court's charge were presented to the court. 107TexCr673, 295SW[illegible]6.

120-67⅓-New. Exceptions to instructions must appear in the record in order to obtain review of the instruction. 105TexCr389, 288SW1085.

120-67¼-New. Where refusal of proper instruction is assigned as error, the absence of another instruction on the same subject should affirmatively appear in the record. 142Va594, 129SE [illegible]

120-67½-New. Abstract is sufficient which shows motion for new trial on ground of error in giving instructions, overruling of motion, exception, and assignment of error thereon. 326 Ill 104, 157NE76.

120-67½-New. Court on appeal cannot consider refusal of special charge not showing presentation before reading of main charge and argument. 106TexCr 440, 292SW900; 108TexCr629, 2SW(2d) 267.

120-67½-New. Indorsement by judge on refused special charges that charges were "refused, to which defendant excepted," does not show that charges were timely presented. 108TexCr629, 2SW(2d)267.

120-67⅛-New. Record must show that objections to the charge were presented to the court before the charge was read to the jury. 109TexCr67, 2SW(2d)851.

121-69 But. see 312Mo447, 279SW72. [a] **Where certified record shows recognized practice followed** omission from printed docket, entry may be immaterial. 300Pa375, 150A649.

121-74 23AlaA547, 129S299(1stcase) (reversed and remanded); 35GaA664, 134SE181; 37GaA18, 138SE526; Ill 173 NE97; NJ 147A227(1stcase) (failure to show application to chancellor for writ of error to supreme court).

121-75 TexCr 291SW231.

121-80 91Fla512, 107S632; 98Fla185, 122S565 (writ of error quashed and cause remanded); Fla 129S106(2dcase); 173Minn610, 216NW533; 322Mo 188, 14 SW(2d)439 (in record proper and not bill of exceptions); 116Nebr712, 218 NW590; 103TexCr542, 282SW216; 106 TexCr124, 290SW539; TexCr 291SW 231; TexCr 293SW1110; 110TexCr112, 7SW(2d)1075; 111TexCr4, 10SW(2d) 730; 111TexCr511, 14SW(2d)274; Tex Cr 26SW(2d)1070(2dcase); TexCr 27 SW(2d)186(2dcase); TexCr 28SW(2d) 140. [b] **In absence of sentence in record,** appeal cannot be considered on its merits. TexCr 8SW(2d)183.

121-81 91Fla512, 107S632; 35GaA570, 134SE335; 150Miss823, 117S261; 75 Mont397, 243P1081; OklCr 276P506; 103TexCr542, 282SW216; 106TexCr124, 290SW539; TexCr 291SW231; 106Tex Cr468, 293SW168; 106TexCr550, 293 SW575; TexCr 293SW1110; 108TexCr 218, 299SW897; 109TexCr484, 5SW(2d) 513; 109TexCr581, 6SW(2d)120; Tex Cr 11SW(2d)320(2dcase); TexCr 12SW (2d)[illegible](1stcase); 111TexCr288, 12SW (2d)582; 111TexCr356, 13SW(2d)99; 111TexCr388, 13SW(2d)106; 111TexCr 639, 13SW(2d)702(2dcase); TexCr 14 SW(2d)59(1stcase); TexCr 14SW(2d) 851(1st case); TexCr 16SW(2d)122(1st case); TexCr 16SW(2d)541(1st case); 112TexCr533, 17SW(2d)1050; 112Tex Cr641, 18SW(2d)178; 113TexCr182, 18 SW(2d)629; TexCr 20SW(2d)1064(2d case); TexCr 27SW(2d)186(1st case); TexCr 31SW(2d)1084.

122-82 225Ky60, 7SW(2d)512; 75 Mont397, 243P1081; OklCr 281P990.

122-83 75Mont397, 243P1081.

122-87 TexCr 291SW231; 106TexCr 621, 294SW580; 108TexCr335, 300SW 70; 109TexCr484, 5SW(2d)513; 110Tex Cr603, 9SW(2d)1042(2dcase); TexCr 9SW(2d)1109(1stcase); TexCr 10SW (2d)732; 111TexCr388, 13SW(2d)106; 111TexCr456, 15SW(2d)9; TexCr 16SW (2d)1085; TexCr 17SW(2d)1071; Tex Cr 28SW(2d)140; TexCr 31SW(2d)1084; TexCr 31SW(2d)1077(1stcase).

122-95 208Ky538, 271SW566 (plat should be part of record); Mo 256SW 460 (certificate of judge as to court rule not part of record); TexCr 20SW(2d) 788 (error apparent on face of record is not necessarily fundamental); 101Vt 416, 144A193. [c] **Necessary papers to be included in record** in Mississippi stated see 144Miss1, 108S725. [d] **Statement of what judge knows apart from evidence introduced cannot be considered.** 196Ind722, 149NE436. [e] **Statement of trial court at time of denial of new trial** is not properly part of record. 203Cal153, 263P524. [f] **Speeches of counsel must be accompanied by special order of trial court** to become part of record. 299Pa547, 149A696.

122-96 GaA 155SE383(3dcase).

122-97 92Fla878, 110S547; GaA 155SE 383(3dcase).

123-98½-New. But the trial judge has the right to complete record by signing rulings. 259Mass128, 156NE57.

123-99 [a] (2) Order for special venire naming defendant and stating his presence, though in transcript, sufficiently showed defendant's presence. AlaA 129 S785(1stcase). [c] (2) Appeal is not dismissed because record fails to show that defendant had ever been convicted or sentenced for crime. 308Mo 651, 274SW419. [d] (2) Minutes of court part of judgment roll on appeal considered part of record, though added after refusal of motion urged as error. 76 Mont549, 248P169. [e] (2) Preliminary examination of jurors is not part of record. 102NJL569, 134A110. [h] **In New York.**–213AppDiv482, 210NYS363. [i] **In South Carolina.**–147SC325, 145SE 194.

123-2 TexCr 26SW(2d)213 (certified copy of docket entry).

123-3 34PortoRico 685.

123-3½-New. The entire return by a magistrate to the district court of a preliminary hearing is part of record of trial on indictment growing out of such hearing. 202 Iowa450, 209NW468.

123-3⅓-New. The verdict is part of the record proper. 94Fla60, 113S736.

123-3¼-New. Record on appeal should not be incumbered by irrelevant matter not necessary to the decision. 80Mont 181, 260P138.

123-3½-New. The trial judge should eliminate all useless and irrelevant matter before certifying to the correctness of the record. 80Mont181, 260P138.

123-3½-New. It is not proper practice to review on one record convictions of two defendants jointly charged but tried before different judges, although the stenographer's minutes of one of the trials was lost. 241Mich696, 217NW781.

123-3½-New. On appeal from a judgment on a plea of guilty, the judgment roll is a necessary part of the record. 54SD424, 223NW340.

123-11 Ind 168NE692. [a] **Affidavit may be considered on appeal,** where referred to in bill of exceptions. 113Tex Cr555, 23SW(2d)721.

124-17 96Fla307, 118S13.

124-20½-New. Affidavits presented after judgment and adjournment of term are not considered part of the record. 153Va846, 149SE414.

124-21 [a] 198Ind364, 153NE775 (recitals of fact in motion require proof); Ind 168NE460. [b] **Motion for new trial** not properly presented cannot be considered on appeal. 23AlaA126, 121S905 (1stcase).

124-22 21AlaA206, 106S621; 91Fla512, 107S632; 318 Ill 227, 149NE230; 323 Ill 61, 153NE705; 335 Ill 424, 167NE20; 196 Ind643, 148NE146; 147Miss593, 113S 348; 308Mo 651, 274SW419 (motion to quash search warrant and suppress evidence, though set out in record proper, not considered unless incorporated in bill of exceptions); Mo 278SW723; Mo 300SW767; Mo 21SW(2d)758(3dcase) (motion to suppress search warrant and sheriff's return); 100TexCr448, 273SW 842; 102TexCr563, 278SW846.

125-23 323 Ill 37, 153NE702. See also 33PortoRico 72. [a] **Exhibit attached to motion for new trial** cannot be considered in passing on plea of former jeopardy, unless properly before appellate court. 100 TexCr464, 273SW604.

125-23½-New. and such motions and rulings may be stricken from record where not in bill of exceptions or stenographic report. 318 Ill 227, 149NE230.

125-24 23AlaA368, 125S902(2dcase); Mo 285SW736.

125-25 102TexCr563, 278SW846.

125-27 169La109, 124S188 (considered on appeal without bill of exceptions); 312Mo 340, 279SW98.

125-29 312Mo 340, 279SW98. [b] **Ind** 168NE460.

125-30 7F(2d)259; 21AlaA206, 106S 621; 91Fla512, 107S632; 94Fla60, 113S 736; 210Ky518, 276SW497; 147Miss 593, 113S348; 315Mo 156, 285SW718; 316Mo 904, 292SW714; 100TexCr385, 272SW453. See 96Fla307, 118S13 (motion for new trial is not part of record). See also 148Wash82, 268P130. [b] 34 Wyo 102, 241P715.

126-31 92Fla809, 110S253; 94Fla149, 113S726.

126-31½-New. , or a motion to make more specific. 312Mo 340, 279SW98.

126-32 Mo 273SW739; 308Mo 651, 274 SW419.

126-35 MoA 27SW(2d)1070 (information). [a] But see 315Mo 156, 285SW 718.

126-36 But see 102WVa169, 134SE740.

126-39 23AlaA288, 124S401. See also 168La487, 122S591.

126-41 34Wyo 102, 241P715.

126-44 89 IndA530, 167NE143; 229Ky 356, 17SW(2d)201(1stcase); 229Ky305, 17SW(2d)238; 231Ky425, 21SW(2d)651 (1stcase); 165La47, 115S363; 101TexCr 7, 274SW149; 153Va838, 149SE464 (in absence of identification).

126-45 [f] **In Pennsylvania.**-5PaDist& Co 761. [g] **In Kentucky.**-227Ky631, 13 SW(2d)788. [h] **In Porto Rico.**-34Porto Rico 687.

127-49½-New. Questions asked by jurors are not part of evidence at trial. 34PortoRico 519.

127-50 219Ala670, 123S50; 91Fla502, 107S640; 200 Iowa341, 204NW215; 215 Ky613, 286SW696; 217Ky99, 288SW 1047; 223Ky211, 3SW(2d)631; 146Miss 285, 111S378; 322Mo 1173, 18SW(2d)19; 102NJL569, 134A110; 100TexCr385, 272 SW453; 110TexCr116, 7SW(2d)958; TexCr 7SW(2d)1078. [b] **Attorney's improper statements should be immediately reduced to writing** and noted by stenographer and judge's ruling noted. 300Pa375, 150A649.

127-52 35Ariz420, 279P256; 214Ky88, 282SW781; 218Ky721, 292SW307; Mo 11SW(2d)1037.

127-53 [a] (1) 21AlaA270, 108S617.

128-54 43 Ida724, 254P210; 317 Ill 576, 148NE255; 198 Ind73, 152NE607; Ind 167NE125; Ind 171NE197; Ind 172NE 176 (special bill of exceptions); Mo 270 SW378; 315Mo 156, 285SW718; Mo 300 SW767; Mo 23SW(2d)22; MoA 16SW (2d)653; 100TexCr202, 272SW460 (exceptions noted on request or formal bill); 100TexCr376, 272SW791 (refused charges not considered in absence of bill of exceptions to refusal or notation on refused charges that exception was reserved); 103TexCr648, 281SW1065; 105 TexCr29, 285SW312; 107TexCr88, 294 SW548; 107TexCr54, 295SW604; 101 WVa123, 132SE368.

128-57 22AlaA277, 114S789.

128-60 108TexCr104, 299SW402.

129-66 TexCr 27SW(2d)823 (extension of time for presenting bill of exceptions).

129-75 76Mont421, 246P959. [a] **Memorandum giving reasons for court's ruling** on motion for new trial and discussing law and facts is part of record for purpose of review. 121Kan852, 249P 742. [b] **This rule has no application** where it appears from minute entry that court ruled on only one of several grounds upon which motion for new trial was based. 76Mont421, 246P959.

129-75½-New. **In Michigan** party appealing is entitled on request to have in writing the reasons given by trial judge for denying motion for new trial for purpose of incorporating same in bill of exceptions. 236Mich595, 211NW23.

129-76 169Ark1173, 278SW15; 94Fla 32, 113S630; 94Fla149, 113S726; Mo 270SW284; 314Mo 635, 285SW437. [a] (1) 315Mo 1276, 288SW18; Mo 18SW (2d)491; 322Mo 1199, 18SW(2d)492. (4) Bill of exceptions is included in certificate, though under separate cover where certificate indicates intention to include bill in record, both having been filed at same time. 314Mo 635, 285SW 437. (5) Where bill is filed in vacation, entry of record furnishes no record of filing, but clerk's indorsement on bill is certification of fact that it was filed, and identifies bill as the one filed. 314 Mo 635, 285SW437. [d] **Purpose of bill of exceptions.**-94Fla149, 113S726. [e] **Unless filed by court order,** bill of exceptions is not part of record and absence of such order prevents its consideration on appeal. 225Ky273, 8SW (2d)382. [f] **Bill of exceptions properly authenticated together with common-law record constitute complete record** and plaintiff cannot supplement it by his own affidavit. 335 Ill 432, 167NE10. [g] **Must be properly made part of record.**-235Ky10, 29SW(2d)580.

129-77½-New. **Bills of exception not in record proper** will not be considered where the absence is not the fault of the officer of the lower court. 109TexCr517, 5SW(2d)774.

129-77¾-New. A bill of exceptions should be considered, when it fairly appears from the transcript and attendant circumstances that it is the one approved by the trial court and ordered to be filed. 307Mo 365, 270SW291.

129-78 25F(2d)231; 94Fla32, 113S630; 35GaA578, 134SE188 (bill of exceptions not tendered to judge within required time); 38GaA435, 144SE142(1stcase); Ind 166NE153(2dcase); Ind 172NE176 (special bill of exceptions); Ind 172NE 904; 226Ky850, 10SW(2d)827; 235Ky 10, 29SW(2d)580; 312Mo 340, 279SW98; 315Mo 1276, 288SW18; Mo 18SW(2d) 491; 322Mo 1199, 18SW(2d)492; 108Tex Cr590, 2SW(2d)229; 113TexCr217, 18 SW(2d)676(2dcase); TexCr 20SW(2d) 766; 101WVa123, 132SE368. [b] 89 IndA45, 165NE770; 89 IndA58, 165NE 771(2dcase). [c] (2) Cannot be shown by bill, only by order book. 199 Ind520, 157NE49. [f] (3) Only original bills containing evidence can be certified to appellate court without copying. IndA 168NE598. [k] 199 Ind520, 157NE49. [l] **Trial docket entry,** showing allowance of sixty days after notice of appeal for filing bills of exception, which was not carried into court minutes, cannot be considered by appellate court in order to permit review of bills of exception. 111TexCr237, 16SW(2d)251.

129-79 92Fla878, 110S547; 312Mo 340, 279SW98. [a] **Rule applied to motions for new trial,** in arrest of judgment and to make more specific. 312Mo 340, 279 SW98.

130-81 101TexCr49, 273SW849; 101Tex Cr49, 273SW855.

130-83½-New. Defendant cannot except to disallowance of a bill of exceptions. 265Mass436, 165NE22.

130-84 13F(2d)11; 16F(2d)872; 17F (2d)769; 36F(2d)743; 38F(2d)635; 43 F(2d)353; 22AlaA650, 119S598(1st case); 218Ala658, 120S147; 20AlaA467, 103S712; 20AlaA638, 104S684; 21AlaA 168, 106S203; 21AlaA170, 106S207(1st case); 21AlaA170, 106S207(2dcase); 21 AlaA183, 106S394; 23AlaA77, 120S918 (1stcase); 174Ark180, 298SW501; 176 Ark578, 3SW(2d)962; 181Ark1145, 26 SW(2d)576(1stcase); Ark 30SW(2d) 833; 92Fla809, 110S253; 43 Ida724, 254 P210; 317 Ill 576, 148NE255; 332 Ill 436, 163NE804; 332 Ill 583, 164NE185; 336 Ill 244, 168NE323; Ill 171NE919 (1stcase); 232 IllA342; 198 Ind253, 151 NE697; Ind 164NE259(2dcase); 214Ky 544, 283SW385; 215Ky613, 286SW696; 217Ky99, 288SW1047; 218Ky435, 291 SW734; 222Ky840, 2SW(2d)1044; 227 Ky439, 13SW(2d)244; 232Ky590, 24SW (2d)280; 234Ky635, 28SW(2d)953(1st case); 158La495, 104S303; 163La473, 112S303; 164La813, 114S696; 165La 497, 115S728; 165La559, 115S750; 168 La939, 123S633(1stcase); 237Mich481, 212NW105; 150Miss552, 117S529; 152 Miss656, 120S747; Mo 256SW460; Mo 278SW711; 315Mo 1276, 288SW18; 317 Mo 413, 297SW63 (disqualification of trial judge); Mo 300SW684; 318Mo 998, 2SW(2d)747; Mo 18SW(2d)16(2d case); Mo 29SW(2d)63; MoA 272SW 1061; MoA 282SW465; 222MoA597, 292 SW1061; MoA 295SW495; NJ 130A 446; 102NJL94, 131A292; 99TexCr639, 271SW392; 99TexCr640, 271SW622; 100TexCr53, 271SW915; 100TexCr385, 272SW453; 100TexCr609, 272SW187; 101TexCr48, 273SW848; 101TexCr132, 273SW860; 101TexCr94, 274SW136; 101TexCr119, 274SW144(1stcase); 101 TexCr119, 274SW144(2dcase); 101 TexCr166, 274SW572; 101TexCr544, 280SW213; 102TexCr566, 280SW210; 104TexCr15, 282SW580; 104TexCr232, 283SW857; 105TexCr29, 285SW312; TexCr 288SW218; TexCr 288SW1114 (2dcase); TexCr 288SW1114(3dcase); TexCr 288SW1115(1stcase); TexCr 288 SW1115(2dcase); TexCr 288SW1115 (3dcase); TexCr 288SW1116(3dcase); TexCr 288SW1116(4thcase); TexCr 288 SW1116(5thcase); TexCr 288SW1117 (1stcase); TexCr 288SW1117(5thcase); TexCr 288SW1117(6thcase); TexCr 288 SW1118; 106TexCr68, 291SW226; TexCr 291SW248; TexCr 291SW549(1st case); TexCr 291SW549(2dcase); TexCr 291SW896; 106TexCr539, 293SW 822; TexCr 293SW1107(1stcase); TexCr 293SW1111; TexCr 293SW1116 (2dcase); TexCr 293SW1116(3dcase); TexCr 293SW1118(6thcase); 107TexCr 38, 293SW1118(5thcase); TexCr 293SW 1118(3dcase); TexCr 293SW1118(1st case); TexCr 294SW548(1stcase); 107 TexCr88, 294SW548(2dcase); TexCr 294SW851(1stcase); 106TexCr672, 294 SW851(2dcase); 107TexCr504, 296SW 513; TexCr 296SW547; TexCr 299SW 401; TexCr 299SW406; 108TexCr199, 299SW646; 108TexCr240, 299SW904; 108TexCr265, 300SW936; TexCr 300SW 938; 108TexCr363, 300SW941; TexCr 1SW(2d)294; 108TexCr606, 2SW(2d) 261; 109TexCr265, 4SW(2d)42; 109 TexCr301, 4SW(2d)58; 109TexCr479, 5 SW(2d)510; 109TexCr465, 5SW(2d) 521; 109TexCr517, 5SW(2d)774; 109 TexCr632, 6SW(2d)365; TexCr 8SW (2d)117; TexCr 8SW(2d)161; TexCr 8SW(2d)176; TexCr 8SW(2d)182; 110 TexCr573, 9SW(2d)1033; 110TexCr631, 10SW(2d)556; 111TexCr281, 12SW(2d) 581; 111TexCr296, 12SW(2d)794; 112 TexCr57, 13SW(2d)860; 112TexCr191, 14SW(2d)845; 111TexCr461, 14SW(2d) 1041; 111TexCr507, 14SW(2d)1042; 112TexCr185, 15SW(2d)615; TexCr 16 SW(2d)126(2dcase); TexCr 16SW(2d) 242(2dcase); TexCr 17SW(2d)817(1st case); 112TexCr530, 17SW(2d)817(2d case); TexCr 17SW(2d)819; TexCr 17 SW(2d)1047; TexCr 17SW(2d)1071; TexCr 18SW(2d)167(1stcase); 113 TexCr223, 18SW(2d)656; TexCr 20SW (2d)1050; TexCr 20SW(2d)1055; TexCr 20SW(2d)1056(1stcase); TexCr 20SW(2d)1058(1stcase); TexCr 20SW (2d)1059(1stcase); TexCr 20SW(2d) 1059(2dcase); TexCr 20SW(2d)1059 (4th case); TexCr 21SW(2d)675(1st case); TexCr 21SW(2d)736; TexCr 21 SW(2d)1070(2dcase); TexCr 23SW(2d) 372(1stcase); TexCr 24SW(2d)408(2d case); TexCr 24SW(2d)419; TexCr 25 SW(2d)857(2dcase); TexCr 26SW(2d) 241(3dcase); TexCr 26SW(2d)260(1st case); TexCr 26SW(2d)634(1stcase); TexCr 26SW(2d)642(1stcase); TexCr 26SW(2d)642(2dcase); TexCr 26SW (2d)642(3dcase); TexCr 26SW(2d)644 (1stcase); TexCr 27SW(2d)196(1st case); TexCr 27SW(2d)219(1stcase); TexCr 28SW(2d)157; TexCr 28SW(2d) 546(1stcase); TexCr 28SW(2d)562; TexCr 28SW(2d)807(1stcase); TexCr 28SW(2d)807(2dcase); TexCr 28SW (2d)809; TexCr 28SW(2d)810(1stcase); TexCr 28SW(2d)811(1stcase); TexCr 29SW(2d)756(1stcase); TexCr 29SW (2d)756(2dcase); TexCr 29SW(2d)761; TexCr 30SW(2d)329; TexCr 31SW(2d) 643(1stcase); TexCr 31SW(2d)640(1st case); TexCr 31SW(2d)656; TexCr 31 SW(2d)657(1stcase); TexCr 31SW(2d) 657(4thcase); TexCr 31SW(2d)658(1st case); TexCr 31SW(2d)658(2dcase); TexCr 31SW(2d)658(3dcase); TexCr 31 SW(2d)659(1stcase); TexCr 31SW(2d) 825(1stcase); TexCr 31SW(2d)826(2d case); TexCr 31SW(2d)1071(2dcase); TexCr 31SW(2d)1071(3dcase); TexCr 31SW(2d)1075(1stcase); TexCr 31SW (2d)1079(2dcase); TexCr 31SW(2d) 1080(1stcase); TexCr 31SW(2d)1081; TexCr 31SW(2d)1082(1stcase); TexCr 31SW(2d)1084(1stcase); TexCr 31SW (2d)1087(1stcase); TexCr 31SW(2d) 1089(1stcase); TexCr 31SW(2d)1089 (2dcase); TexCr 32SW(2d)182(1st case); TexCr 32SW(2d)189(1stcase); TexCr 32SW(2d)189(2dcase); TexCr 32 SW(2d)190(1stcase); TexCr 32SW(2d) 190(2dcase); TexCr 32SW(2d)190(3d case); 147Va624, 136SE765; 34Wyo 102, 241P715. But see 264Mass564, 163NE

168; 158Tenn264, 12SW(2d)951; TexCr 26SW(2d)277. [j] **Bill of exceptions** unknown at common law. 94Fla32, 113S 630. [k] **Rule not strictly adhered to** where death penalty is imposed. 107 TexCr504, 296SW513. [l] **Where no bill of exceptions** (1) only question is sufficiency of evidence. 107TexCr88, 294 SW548; 107TexCr329, 296SW599. (2) Court can review only record proper on appeal. 312Mo 27, 278SW725. [m] **Abolition of bill of exceptions** is held to apply to civil cases only. 103NJL266, 137A529. [n] **Bill of exception embracing motion for new trial** adds nothing to strength thereof. 106TexCr27, 290SW 174. [o] **Whether indictment supports verdict** is only question reviewable in absence of bill. 225Ky273, 8SW(2d) 382.

132-85 101TexCr48, 273SW848; 105 TexCr159, 287SW269; TexCr 27SW(2d) 196(1stcase); TexCr 27SW(2d)219(1st case); TexCr 31SW(2d)640; TexCr 31 SW(2d)643; TexCr 31SW(2d)656; TexCr 31SW(2d)657; TexCr 31SW(2d) 658; TexCr 31SW(2d)659; TexCr 31 SW(2d)1071; TexCr 31SW(2d)1075; TexCr 31SW(2d)1079; TexCr 31SW(2d) 1080; TexCr 31SW(2d)1081; TexCr 31 SW(2d)1082; TexCr 31SW(2d)1084; TexCr 31SW(2d)1087; TexCr 31SW(2d) 1089; TexCr 32SW(2d)182; TexCr 32 SW(2d)189; TexCr 32SW(2d)190; TexCr 32SW(2d)650(1stcase); 147Va 624, 136SE765.

132-86 22AlaA263, 114S631; 174Ark 1180, 298SW501; 181Ark895, 28SW(2d) 708; 232 IllA342; 215Ky613, 286SW 696; 226Ky296, 10SW(2d)1094; 159La 589, 105S631; 160La755, 107S516; 160 La756, 107S516; 162La852, 111S257; 163La476, 112S304(1stcase); 163La477, 112S304(2dcase); Mo 256SW745; Mo 285SW(2d)424(1stcase); Mo 289SW904; Mo 22SW(2d)789 (review limited to record proper); MoA 295SW509; Or 249 P623; 99TexCr640, 271SW622; 101 TexCr86, 273SW598; 101TexCr119, 274 SW144(1stcase); 101TexCr119, 274SW 144(2dcase); 101TexCr132, 273SW860; 104TexCr151, 282SW1118; 104TexCr 277, 282SW1118; 104TexCr282, 282SW 1118; TexCr 283SW811; TexCr 287SW 1114; TexCr 288SW1114; TexCr 288 SW1115(1stcase); TexCr 288SW1115 (2dcase); TexCr 288SW1115(3dcase); TexCr 288SW1116(3dcase); TexCr 288 SW1116(4thcase); TexCr 288SW1116 (5thcase); TexCr 288SW1117(1stcase); TexCr 288SW1117(6thcase); TexCr 288 SW1118; TexCr 290SW541; TexCr 290 SW1114(1stcase); TexCr 290SW1114 (4thcase); TexCr 290SW1115(1stcase); TexCr 290SW1115(2dcase); TexCr 290 SW1115(5thcase); TexCr 290SW1116 (5thcase); TexCr 290SW1116(6thcase); TexCr 290SW1116(7thcase); TexCr 290SW1117(1stcase); TexCr 290SW 1117(2dcase); TexCr 294SW851(1st case); 106TexCr672, 294SW851(2dcase); TexCr 28W(2d)263; TexCr 28W(2d) 455; TexCr 28W(2d)457; TexCr 5SW (2d)982; TexCr 8SW(2d)117; TexCr 8SW(2d)161; TexCr 8SW(2d)176; TexCr 8SW(2d)182; TexCr 10SW(2d) 116(1stcase); TexCr 12SW(2d)215; TexCr 12SW(2d)223(1stcase); TexCr 12 SW(2d)566(1stcase); TexCr 12SW(2d) 1036(1stcase); TexCr 13SW(2d)119(1st case); 111TexCr604, 13SW(2d)368(1st case); TexCr 13SW(2d)369(2dcase); TexCr 13SW(2d)698(1stcase); TexCr 13SW(2d)701(1stcase); TexCr 13SW (2d)853(1stcase); TexCr 13SW(2d)855 (1stcase); TexCr 15SW(2d)12(1stcase); TexCr 15SW(2d)18(1stcase); TexCr 15 SW(2d)616(1stcase); TexCr 16SW(2d) 126(2dcase); TexCr 16SW(2d)131; 112 TexCr297, 16SW(2d)234; TexCr 16 SW(2d)241(2dcase); 112TexCr230, 16 SW(2d)242(1stcase); TexCr 16SW(2d) 541(2dcase); TexCr 16SW(2d)1077(1st case); TexCr 24SW(2d)425(1stcase); TexCr 32SW(2d)457; 147Va624, 136SE 765. [c] **Where appeal to court of appeals is upon record only**, regularity of proceedings in such record is only question presented. 23AlaA77, 120S918(1st case). [d] **In Kentucky.**–235Ky10, 29 SW(2d)580.

132-87 38F(2d)554 (stipulation of facts signed by counsel); 230Ky624, 20SW (2d)442; 232Ky590, 24SW(2d)280; 234 Ky189, 27SW(2d)967 (motion for new trial); 102TexCr501, 278SW441; 105 TexCr147, 287SW269; 108TexCr664, 2 SW(2d)274; 110TexCr542, 9SW(2d) 347; 110TexCr575, 9SW(2d)739; 110 TexCr605, 10SW(2d)116(2dcase); 113 TexCr351, 21SW(2d)669; TexCr 23SW (2d)731(1stcase). [c] 160La47, 106S 670. [d] 312Mo 411, 278SW1036. [j] **In Texas.**–104TexCr232, 283SW857. [k] **Motion for new trial** cannot be substituted for bill of exception. 104TexCr 661, 285SW617. [l] **Objection to admission of evidence is no substitute of bill.** –102TexCr501, 278SW441. [m] **Entry on minutes** of reservation of bill of exceptions to overruling of motion for new trial cannot be considered in absence of formal bill of exceptions. 165La559, 115 S750. [n] **Recitals in motion for new trial** are not sufficient. 96Fla68, 117S 694. [o] **Motion for new trial cannot be regarded as substitute for bill of exceptions** with reference to matters which can only be reviewed when presented by bill of exceptions. 111TexCr149, 11 SW(2d)794(1stcase). [p] **Matters which should be presented by bill of exception** reserving complaint to rulings of court during trial may not be brought forward on appeal by complaints asserted in motion for new trial. 111TexCr275, 12SW (2d)579. [q] **Literal transcript of all proceedings at trial** is not sufficient in absence of bill of exceptions. 38F(2d) 631; 38F(2d)632; 38F(2d)633; 38F(2d) 634(1stcase); 38F(2d)634(2dcase).

132-88 218Ala658, 120S147; 94Fla1192, 115S528.

132-90 225Ky713, 9SW(2d)1080; 110 TexCr456, 7SW(2d)530.

132-93½-New. All exceptions must be preserved in the bill of exceptions. 307 Mo 365, 270SW291.

132-93¾-New. Matter reviewable only on bill of exceptions will not be considered after striking out of bill. 318 Ill 394, 149NE422.

132-93¼-New. If bill of exceptions is stricken from record only errors assigned and argued on record aside from bill are left for review. 318 Ill 188, 149 NE269.

132-93⅓-New. Exceptions to a charge of the court in writing, duly approved, certified, and filed, should be considered on appeal, notwithstanding no separate bills of exceptions brought forward the complaints of the charge thus evidenced. 111TexCr559, 15SW(2d)619(1stcase).

132-94 218Ala658, 120S147; 220Ala 425, 125S664; 21AlaA29, 104S875; 21 AlaA499, 109S557; 23AlaA438, 126S610 (1stcase); Ind 170NE613; 169La109, 124S188; TexCr 24SW(2d)404. [a] **Supreme court can only determine** whether certain instructions were given or refused by examination of bill of exceptions. 179Ark244, 15SW(2d)323.

132-94½-New. to error in denying preliminary hearing; Mo 26SW(2d)937.

133-96 26F(2d)202; 41 Ida598, 242P 787.

133-97 31F(2d)754; 36F(2d)738; 37F (2d)344; 43F(2d)358(2dcase); 317 Ill 576, 148NE255; 89 IndA530, 167NE143; 159La589, 105S631; 168La454, 122S579 (2dcase); 169La141, 124S672; 125Me 319, 133A738; Mo 300SW706; MoA 278 SW1073; 100TexCr195, 272SW469; 100 TexCr385, 272SW453; 101TexCr123, 274 SW565; 102TexCr501, 278SW441; 106 TexCr528, 293SW827; 107TexCr88, 294 SW548; 107TexCr3, 294SW588; 108 TexCr332, 18W(2d)301; 108TexCr379, 18W(2d)306 (evidence obtained in violation of law); 108TexCr664, 2SW(2d) 274; 110TexCr114, 7SW(2d)551; 110 TexCr199, 7SW(2d)586; 110TexCr542, 9SW(2d)347; TexCr 18SW(2d)640; TexCr 26SW(2d)267(2dcase); TexCr 31 SW(2d)439; 103WVa148, 136SE842; 103WVa361, 137SE749; 103WVa355, 137SE751; 108WVa237, 151SE176.

133-97½-New. offer of proof and ruling thereon, 318 Ill 421, 149NE231.

133-98 112TexCr71, 13SW(2d)859.

133-99 84Ala6, 4S283; 196 Ind509, 149 NE57; 196 Ind576, 149NE49.

134-1 95Mo 85, 8SW409; 321Mo 1171, 14SW(2d)638; Mo 24SW(2d)1008.

134-3 312Mo 134, 278SW713; Mo 292 SW415; TexCr 28SW(2d)537(2dcase).

134-3½-New. or on a motion to exclude all evidence, 21AlaA168, 106S203.

134-6 Mo 292SW27.

134-7 37GaA150, 139SE154.

134-9 181Ark1146, 27SW(2d)996(1st case); 315Mo 1276, 288SW18; 318Mo 672, 300SW752; Mo 22SW(2d)793; 99 TexCr465, 270SW558; 100TexCr195, 272SW469; 100TexCr241, 272SW788 (manslaughter); 101TexCr86, 273SW 598; 101TexCr346, 276SW244; 109Tex Cr180, 3SW(2d)438 (recital in minutes insufficient); 110TexCr145, 8SW(2d) 140; 110TexCr575, 9SW(2d)739; TexCr 20SW(2d)768 (denying application for postponement); 113TexCr351, 21SW (2d)669; 113TexCr608, 21SW(2d)1063; 113TexCr409, 22SW(2d)455; 113TexCr 587, 22SW(2d)943(1stcase); TexCr 25 SW(2d)332; TexCr 31SW(2d)653.

134-10 Mo 292SW415; Mo 22SW(2d) 809.

135-13 Mo 285SW737.

135-13½-New. or to alleged error in refusing to suppress evidence; 196 Ind 649, 149NE162.

135-17 196 Ind649, 149NE162; MoA 296SW440; 113TexCr506, 22SW(2d) 667.

135-18 109TexCr556, 5SW(2d)998 (as to venue); 112TexCr92, 14SW(2d)63(2d case).

135-20 225Ky713, 9SW(2d)1080. See also TexCr 31SW(2d)653.

135-21 215Ky613, 286SW696.

135-22½-New. error in permitting special counsel for state to consume disproportionate time in argument; 146 Miss285, 111S378.

135-23 215Ky613, 286SW696; 236Ky 68, 32SW(2d)550; TexCr 31SW(2d)641.

135-28 220Ala425, 125S664; 20AlaA 195, 101S286 (even when appearing in record proper); 20AlaA550, 103S479; 21AlaA29, 104S875; 21AlaA168, 106S 203; 23AlaA438, 126S610(1stcase); 89 Fla39, 103S617; 36GaA123, 135SE520; Ind 170NE433; 159La768, 106S298; 316Mo 72, 289SW871; Mo 7SW(2d)278; 101TexCr123, 274SW565 (grounds in motion for new trial not preserved by separate bills at time error occurred); 107TexCr606, 298SW431; 34Wyo 112, 241P701. See also 112TexCr521, 17SW (2d)462(1stcase).

136-32 But see 21AlaA29, 104S875.

136-34 160La372, 105S420 (court constrained to notice fatal error in verdict).

136-35 234Ky112, 27SW(2d)666; 318 Mo 693, 300SW1071.

136-38½-New. Error in refusing a separate trial to a defendant jointly charged with others is reviewable without a settled record. 49SD453, 207NW469.

136-38½-New. It is not necessary to incorporate in bill of exceptions objection and exception to verdict as insufficient to support judgment. 120 Or90, 250P633, 251P307.

136-38¼-New. Subpœna should not be included in a bill of exceptions in the absence of a ruling necessitating preservation. Mo 285SW101(1stcase).

136-39 218Ala658, 120S147; 22AlaA 424, 116S409; 181Ark1146, 25SW(2d) 20; 221Ky276, 298SW693; 223Ky402, 3SW(2d)775; 232Ky590, 24SW(2d)280; 167La1016, 120S631; 167La1050, 120S 853; 168La297, 121S872; 169La55, 124 S143(2dcase); 125Me457, 134A627; 125 Me463, 134A691; 100TexCr241, 272SW 788 (each bill must stand or fall by own allegations, and matters stated as objections must be shown true by bill itself); 100TexCr318, 272SW484; 100 TexCr389, 273SW575; 100TexCr553, 271SW631; 100TexCr660, 273SW852; 101TexCr531, 276SW429 (necessary to state answers given to questions claimed to be objectionable); 101TexCr545, 276 SW263; 101TexCr598, 276SW283; 103 TexCr285, 280SW581; 103TexCr182, 280SW798; 103TexCr617, 281SW1076; TexCr 283SW811; 104TexCr225, 283SW 832; 104TexCr232, 283SW857; 104Tex Cr356, 284SW548; 104TexCr391, 283SW 813; 104TexCr567, 285SW1094; 104 TexCr649, 285SW621; 104TexCr661, 285SW617; 105TexCr166, 287SW260; 105TexCr497, 288SW1072; 106TexCr27, 290SW174; 106TexCr116, 290SW1095; 106TexCr75, 290SW1103; 106TexCr78, 290SW1105; 106TexCr455, 292SW891;

106TexCr539, 293SW822; 107TexCr42, 293SW1117; 106TexCr626, 294SW559; 107TexCr79, 294SW860; 107TexCr383, 296SW545; TexCr 296SW547; 107TexCr357, 296SW596; 107TexCr559, 298SW569; 108TexCr19, 298SW601; 108TexCr106, 299SW430; 108TexCr464, 1SW(2d)285; 108TexCr332, 1SW(2d)301; 108TexCr404, 1SW(2d)318; 108TexCr441, 1SW(2d)633; TexCr 1SW(2d)1095; 109TexCr26, 2SW(2d)442; 110TexCr206, 7SW(2d)1086; 110TexCr190, 8SW(2d)169; 110TexCr484, 9SW(2d)344; 110TexCr616, 9SW(2d)1035(2dcase); 111TexCr285, 12SW(2d)576; 111TexCr372, 13SW(2d)100; 112TexCr194, 15SW(2d)1043; 112TexCr325, 16SW(2d)826; 112TexCr390, 16SW(2d)1065; 113TexCr142, 18SW(2d)663; 113TexCr257, 20SW(2d)1961(2dcase); TexCr 20SW(2d)794; 113TexCr501, 21SW(2d)1057(2dcase); 113TexCr506, 22SW(2d)667 (must be complete in itself); TexCr 26SW(2d)244; TexCr 26SW(2d)645; TexCr 26SW(2d)651 (bill held insufficient); TexCr 29SW(2d)339; TexCr 31SW(2d)435; TexCr 31SW(2d)438; TexCr 32SW(2d)191(2dcase); 147Va671, 137SE469. [a] 99TexCr589, 271SW385; 100TexCr530, 271SW620. [b] 106TexCr78, 290SW1105. [c] (5) Bill of exceptions to refusal of trial court to instruct verdict of not guilty is insufficient where it states no facts upon which it may be appraised. 106TexCr75, 290SW1103. (6) Error in excluding evidence as to disorderly conduct of person slain during year preceding homicide is not presented where bill does not show nature of conduct nor defendant's knowledge thereof. 106TexCr78, 290SW1105. [d] **Bill of exception** to exclusion of evidence making it plain that defendant offered to prove his allegation held sufficient, though bill should ordinarily set out evidence. 108TexCr228, 300SW86. [e] **Matters not necessary as basis for bill.**–167La1080, 120S864. [f] **Verbatim copy** of everything that occurred at trial does not constitute bill of exceptions authorizing review. 34F(2d)1. [g] **Where requested charges bear notation over trial judge's signature** that they were presented before main charge was read, were refused, and excepted to, more formal bills of exception are unnecessary. TexCr 24SW(2d)404. [h] **Bill of exceptions must show that process was issued** and placed in hands of proper officer where refusal of continuance was alleged as error. TexCr 26SW(2d)217(2dcase). [i] **Bill held sufficient.**–Me 152A265.

136-40 107TexCr383, 296SW545. [a] 219Ala254, 122S610. [b] **Bill of exceptions complaining of argument alluding to defendant's failure to testify** is not sufficient since it does not certify that defendant did not testify. TexCr 26SW(2d)244.

137-41 160La26, 106S662; 101TexCr598, 276SW283; 103TexCr182, 280SW798. But see 105TexCr497, 288SW1072; 136Wash620, 241P9.

137-43 91Fla1026, 109S804; 101TexCr545, 276SW263; 109TexCr40, 2SW(2d)860.

137-44 13F(2d)756; 18F(2d)850; 22AlaA424, 116S409; 23AlaA237, 123S290; AlaA 130S531; 335Ill424, 167NE20; 335Ill415, 167NE49; 240IllA76; Ind 172NE904; 163La701, 112S655; 165La380, 115S627; 166La91, 116S710; 168La618, 122S869; 170La507, 128S293; 127Me327, 143A170; Mo 273SW739; 311Mo531, 279SW134; 316Mo72, 289SW871; 115Nebr535, 213NW839; 120Or90, 250P633, 251P307; 47RI245, 132A547; 102TexCr444, 278SW446; 102TexCr563, 278SW846; 104TexCr63, 281SW871; 105TexCr374, 288SW230; 105TexCr327, 288SW458; 105TexCr501, 289SW1008; 107TexCr46, 294SW595; 107TexCr79, 294SW860; 107TexCr383, 296SW545; 108TexCr332, 1SW(2d)301; 108TexCr444, 1SW(2d)617; 108TexCr600, 602, 2SW(2d)263; 109TexCr481, 5SW(2d)518; 109TexCr663, 7SW(2d)80; TexCr 26SW(2d)277 (prompt objection to testimony); TexCr 26SW(2d)651; TexCr 27SW(2d)169; TexCr 28SW(2d)143; TexCr 31SW(2d)825(2dcase); TexCr 32SW(2d)471; 103WVa361, 137SE749; 103WVa355, 137SE751. [a] (2) Error in allowing amendment to information must appear in bill of exceptions. 308Mo651, 274SW419. [f] 101TexCr68, 274SW133. [g] 102TexCr618, 280SW772; 103TexCr182, 280SW798; 110TexCr206, 7SW(2d)1086. [m] **Evidence admitted.**–101TexCr663, 276SW431. [n] **Involved bill, confusing and prolix,** not considered. 102TexCr444, 278SW446. [o] **Bill must contain objections to ruling on motion for continuance,** or it will not be considered. 102TexCr563, 278SW846. [p] **Bill in narrative form held sufficient.** 108TexCr228, 300SW86. [q] **Error involved in denial of new trial** must be manifested by presentation of particular points. 109TexCr207, 3SW(2d)807. [r] **Bill not showing that judge was asked to rule** and exception taken presents nothing for review. 169La377, 125S277. [s] **Certificate of trial judge must show necessity** of bill of exception in question and answer form in order to receive consideration. TexCr 28SW(2d)1084(1st case). [t] **Literal transcript of trial proceedings** is not bill of exceptions required. 43F(2d)353.

138-45 160La47, 106S670; 125Me457, 134A627; 106TexCr78, 290SW1105; 107TexCr521, 298SW290; 110TexCr557, 9SW(2d)736; TexCr 27SW(2d)228.

138-46 5F(2d)963; 18F(2d)850; 216Ala7, 111S227; 22AlaA154, 113S602; 219Ala674, 123S55; 21AlaA696, 111S647; 22AlaA99, 112S813; 22AlaA360, 115S761; 22AlaA392, 117S398; 23AlaA200, 123S94(1stcase); 23AlaA237, 123S290; 23AlaA278; 124S391; 23AlaA415, 127S239; 196Ind675, 148NE193; 222Ky840, 2SW(2d)1044 (objection and exception); 163La701, 112S655; 307Mo365, 270SW291; Mo 270SW337; 308Mo651, 274SW419; Mo 278SW669; 312Mo411, 278SW1036; 315Mo1276, 288SW18; Mo 279SW133; 316Mo72, 289SW871; Mo 24SW(2d)980; 47RI245, 132A547; 101TexCr462, 276SW256; 101TexCr377, 276SW291 (bill held sufficient); 103TexCr200, 280SW221; 103TexCr538, 281SW564; 105TexCr211, 287SW257; 108TexCr101, 290SW238; 108TexCr413, 1SW(2d)315; 109TexCr67, 2SW(2d)851; 109TexCr139, 3SW(2d)434; 113TexCr247, 20SW(2d)431; 34Wyo112, 241P701; 34Wyo102, 241P715 (bill held sufficient to show exception to denial of motion for new trial). [b] **Bill of exceptions which fails to show that written objections were timely presented** as required by statute may not be considered. 100TexCr291, 272SW787.

138-46½-New. Error cannot be predicated on cross-examination where the bill of exceptions does not show that any objection was made thereto. 169Ark324, 274SW1.

138-47 168La932, 123S624; 169La939, 126S431; 100TexCr530, 271SW620; 104TexCr63, 281SW871; 104TexCr283, 284SW564; 106TexCr116, 290SW1095; 106TexCr633, 294SW562; 108TexCr576, 2SW(2d)245; 109TexCr296, 4SW(2d)40; 110TexCr490, 9SW(2d)333. But see 47RI245, 132A547. [c] (4) Bill of exceptions complaining that court failed to charge law applicable to facts is insufficient where no reason is shown. 101TexCr430, 276SW286. (5) Bill of exception, where directed against whole of admitted evidence, part of which is admissible. 108TexCr576, 2SW(2d)245. [f] (1) 140Miss265, 105S514 (contest of statement must be set out). (2) Bill must show what was said when objection was made to improper argument of counsel. 143Miss318, 108S722. (3) Should show request to judge for instruction with reference to remark. 168La976, 123S645.

138-48 312Mo411, 278SW1036; 100TexCr530, 271SW620; 100TexCr504, 271SW899; 101TexCr545, 276SW263; 101TexCr491, 276SW287; 103TexCr285, 280SW581; 103TexCr182, 280SW798; 103TexCr279, 280SW594; 103TexCr496, 281SW559; 103TexCr562, 281SW1078; 104TexCr356, 284SW548; 104TexCr358, 284SW556; 106TexCr75, 290SW1103; 106TexCr152, 291SW237; 106TexCr293, 292SW234; 106TexCr455, 292SW891; 107TexCr559, 298SW569; 108TexCr19, 298SW601; 108TexCr320, 300SW65; 108TexCr441, 1SW(2d)633; 108TexCr678, 2SW(2d)457; 109TexCr40, 2SW(2d)860; 109TexCr209, 4SW(2d)64; 109TexCr272, 4SW(2d)78; 109TexCr246, 4SW(2d)82; 111TexCr534, 15SW(2d)648; 113TexCr442, 21SW(2d)739; TexCr 26SW(2d)251(2dcase) (certificate of trial judge as to truth of objections). [a] 106TexCr75, 290SW1103.

138-49 47RI245, 132A547; 103TexCr285, 280SW581; 103TexCr291, 280SW779; 103TexCr508, 281SW1054; 103TexCr562, 281SW1078; 103TexCr617, 281SW1076; 104TexCr358, 284SW556; 105TexCr629, 290SW543; 106TexCr75, 290SW1103; 107TexCr559, 298SW569; 107TexCr676, 298SW594; 108TexCr404, 1SW(2d)318; 110TexCr409, 10SW(2d)559(1stcase); 111TexCr372, 13SW(2d)100; 111TexCr424, 14SW(2d)1027(2dcase); TexCr 24SW(2d)412.

138-51 [a] **Objections to statements of prosecuting attorney.**–140Miss265, 105S514.

138-51½-New. Only such parts of trial proceedings as bear on specified errors of law should be brought into the record by bill of exceptions. 8F(2d)231.

138-52 See also 319Mo28, 3SW(2d)230; 76Mont509, 248P201.

139-54½-New. A defective bill of exceptions in its utmost legal effects is to be treated only as a general demurrer, and so every reasonable intendment must be indulged in, in favor of that which is objected to. 99TexCr517, 270SW1022; 99TexCr551, 270SW1021; 99TexCr589, 271SW385; 100TexCr54, 271SW902; 100TexCr361, 272SW193; 100TexCr553, 271SW631; 101TexCr44, 273SW861.

139-54⅓-New. A bill of exceptions in question and answer form will not be considered. 100TexCr592, 272SW175; 101TexCr7, 274SW149; 101TexCr28, 274SW147; 101TexCr46, 274SW150; 101TexCr133, 274SW199; 102TexCr395, 278SW449; 102TexCr618, 280SW772; 106TexCr642, 294SW557.

139-54¼-New. A bill of exceptions which is multifarious, duplicitous, and argumentative, and states no reason why testimony objected to was not admissible, is insufficient. 103TexCr291, 280SW779.

139-54⅙-New. Complaint in motion for new trial will not serve as bill of exceptions. 101TexCr663, 276SW431.

139-54¼-New. Testimony in bill of exceptions should be in narrative form. 93Fla1057, 113S98.

139-54½-New. Appellate court cannot consider objections and exceptions to main charge refused by trial court and refused judge's approval. 106TexCr440, 292SW900.

139-54⅛-New. Where objection was as to questions asked by prosecuting attorney concerning statements of accused, bill of exceptions complaining thereof was defective in not certifying as fact that defendant was not under arrest. 105TexCr426, 289SW49.

139-54⅓-New. Defendant held not required to raise question of number of jurors by bill of exceptions where number shown by record. 221Ky823, 299SW983.

139-54 1/10-New. A bill of exceptions in question and answer form is not proper. 105TexCr276, 288SW441.

139-54 1/11-New. Presentation of written objections to a charge before it was read to the jury must be shown by a bill of exceptions. 109TexCr67, 2SW(2d)851.

139-54 1/12-New. Unauthenticated order overruling motion to quash is not bill of exception. TexCr 28SW(2d)537(2dcase).

139-55 [c] (2) Anything other than evidence and matters connected therewith cannot be made part of original bill of exceptions. Ind 172NE176. [f] (2) 100TexCr395, 653, 273SW568; 100TexCr415, 273SW573; 101TexCr7, 274SW149; 101TexCr28, 274SW147; 101TexCr46, 274SW150; 101TexCr133, 274SW149; 101TexCr617, 276SW926. (4) Bill of exceptions in question and answer form will not be considered in

appeal. 104TexCr168, 283SW173; 104 TexCr163, 283SW174; TexCr 283SW 811; 105TexCr212, 287SW250; 106Tex Cr402, 292SW893.

139-56 36F(2d)738; 94Fla32, 113S630. [a] 34Wyo 102, 241P715.

139-57 22AlaA349, 115S697; 22AlaA424, 116S409; 23AlaA351, 125S799(1stcase); 94Fla32, 113S630; MoA 295SW509; 104 NJL291, 140A287; 100TexCr195, 272 SW469 (bill in question and answer form, not shown to have been specially authorized, held not in compliance with statute); 100TexCr261, 272SW492 (bill in question and answer form not considered); 100TexCr259, 272SW464 (bill in question and answer form not considered where statute requires narrative form); 104TexCr608, 286SW228; 105TexCr63, 284SW955; 106TexCr570, 294SW205; 108TexCr664, 2SW(2d)274; 109TexCr421, 5SW(2d)149; 110TexCr 122, 7SW(2d)960; 111TexCr388, 13SW (2d)106; 113TexCr659, 23SW(2d)356; TexCr 30SW(2d)330. See also 23AlaA 107, 121S453. [a] **Bill held sufficient.**– 47RI 245, 132A547. [b] **Approval by judge** of bill in question and answer form in absence of showing is not presumed where statute requires narrative form except when in opinion of judge questions and answers are necessary. 100TexCr259, 272SW464.

139-59 MoA 272SW982.

139-60 38GaA453, 144SE145(1stcase); 149Md128, 131A29; 100TexCr592, 272 SW175; 101TexCr86, 273SW598; 101 TexCr439, 276SW252 (single bill of exceptions to testimony of five witnesses is multifarious and need not be considered); 104TexCr157, 283SW788; 106TexCr27, 290SW174.

139-61 35F(2d)837; 35F(2d)905; 167 La330, 119S67; Mo 278SW1009; Tex Cr 31SW(2d)438; TexCr 32SW(2d) 182.

139-62 16F(2d)457; 324 Ill 533, 155NE 270; 240 IllA76; 159La840, 106S324; 161La296, 108S543; 161La827, 109S 505; 163La1093, 113S546; 125Me457, 134A627; Mo 22SW(2d)793 (search warrant and all evidence and affidavits relating to application and warrant); MoA 272SW992; 100TexCr455, 273SW 565; 102TexCr501, 278SW441; 100Tex Cr609, 272SW187; 102TexCr604, 278SW 1104; 103TexCr285, 280SW581; 103 TexCr182, 280SW798; 104TexCr38, 282 SW225; 104TexCr567, 285SW1094; 105 TexCr291, 288SW226; 105TexCr393, 288SW1087; 106TexCr593, 294SW573; 108TexCr101, 299SW238; 108TexCr92, 299SW249; 108TexCr187, 299SW399; 108TexCr320, 300SW65; 108TexCr499, 1SW(2d)896; 109TexCr435, 5SW(2d) 146; 109TexCr556, 5SW(2d)998; 110 TexCr499, 7SW(2d)559; 111TexCr419, 13SW(2d)116; 112TexCr390, 16SW(2d) 1065; 112TexCr498, 17SW(2d)821; Tex Cr 26SW(2d)273. [a] (1) 261Mass292, 158NE782. (4) Certificate of trial judge that bill of exceptions in question and answer form was necessary for appellate court's understanding of matters involved. 100TexCr664, 274SW582. [b] (4) 101TexCr606, 276SW713. (5) 101 TexCr606, 276SW713; 108TexCr413, 1 SW(2d)315. (6) Bill of exceptions in question and answer form. 109TexCr 487, 5SW(2d)518. See also TexCr 20 SW(2d)768. (7) Bill in question and answer form, without certificate of judge showing necessity of such form. TexCr 20SW(2d)770; TexCr 26SW(2d)1086; TexCr 27SW(2d)219(2dcase). But see TexCr 27SW(2d)207. (8) Other bills held insufficient. 111TexCr281, 12SW (2d)581; 111TexCr370, 13SW(2d)91(2d case); 111TexCr372, 13SW(2d)100; 111 TexCr378, 13SW(2d)112; 112TexCr87, 13SW(2d)893; 111TexCr476, 14SW(2d) 842; 112TexCr149, 15SW(2d)624; 112 TexCr188, 15SW(2d)640; 111TexCr534, 15SW(2d)648. [c] (2) 104TexCr38, 282 SW225. [h] (2) References to transcript held insufficient to incorporate it as part of bill of exceptions. 34Wyo 102, 241P 715. [k] (1) 104TexCr205, 282SW812; 106TexCr55, 289SW161. (2) 103TexCr 268, 280SW595; 102TexCr618, 280SW 772; 104TexCr152, 282SW813. [m] 101 TexCr582, 276SW709; 105TexCr494, 288 SW1074; 106TexCr642, 294SW557. [n] 8F(2d)231; 101TexCr606, 276SW713; 105TexCr396, 288SW1087; 105TexCr 494, 288SW1074. [q] **Where search warrant alleged defective** is not incorporated in bill of exceptions and matters on which claimed defects were based are not certified by judge as in fact existing, bill is defective. 105Tex Cr393, 288SW1087; 108TexCr332, 1SW (2d)301. [r] **Question and answer form** not considered unless judge's certificate shows necessity therefor. 109TexCr47, 2SW(2d)853. [s] **Bills of exception in question and answer form** will not be considered. 110TexCr243, 8SW(2d)153; 110TexCr190, 8SW(2d)169; 112TexCr 194, 15SW(2d)1043; 112TexCr514, 17 SW(2d)460; 112TexCr468, 17SW(2d) 47; 113TexCr142, 18SW(2d)663; Tex Cr 32SW(2d)476. [t] **Evidence brought up should not be limited to count** on which defendant was convicted where other offenses are charged and evidence is not confined to one count. 38F(2d) 554. [u] **Inadmissible portions of dying declaration not separated** from those admissible renders bill defective. 113 TexCr621, 24SW(2d)52.

140-63 180Ark873, 23SW(2d)627; 161 La827, 109S505; 165La47, 115S363 (must contain question objected to, grounds of objection, and court's reasons for overruling it); 105TexCr119, 286SW1104; 105TexCr211, 287SW257; TexCr 24SW(2d)1092.

140-63½-New. Evidence not written out and incorporated in bill of exceptions when signed by the trial judge cannot be considered. Mo 270SW284.

140-64 161La827, 109S505; 125Me457, 134A627.

141-65 [c] (2) Under this statute, trial judge is without authority to compel prosecuting attorney to make up bill of exceptions for defendant. 160La661, 107S481. (3) Reference in bills of exceptions to pages of separate volume for testimony taken by accused's stenographer is not compliance with act. 161 La827, 109S505. (4) Defendant may attack record of testimony to bill of exceptions to determine whether special charges were appropriate to issues. 166 La842, 118S40.

141-67 100TexCr128, 271SW909 (bill of exception insufficient where showing question but not answer).

141-68 101TexCr377, 276SW291 (bill held sufficient); 113TexCr81, 18SW(2d) 661(2dcase).

141-69 102TexCr395, 278SW449 (who elicited testimony); 103TexCr279, 280 SW594; 103TexCr617, 281SW1076; 106 TexCr633, 294SW562; TexCr 32SW(2d) 648.

141-70 163La1093, 113S546; 118 Or 397, 247P146; 100TexCr476, 273SW 561; 101TexCr439, 276SW252; 102Tex Cr501, 278SW441; 103TexCr279, 280 SW594; 103TexCr534, 281SW864; 107 TexCr32, 294SW541; 107TexCr43, 294 SW549; 106TexCr633, 294SW562; 106 TexCr618, 294SW588; 108TexCr590, 2 SW(2d)229; TexCr 32SW(2d)657.

141-71 118 Or397, 247P146; 102TexCr 501, 278SW441; 103TexCr279, 280SW 594; 103TexCr534, 281SW864; 103Tex Cr562, 281SW1078; 106TexCr593, 294 SW573; 107TexCr585, 298SW587; 110 TexCr97, 8SW(2d)148.

141-72 108TexCr381, 1SW(2d)314.

141-73 Mo 25SW(2d)113; 104TexCr 152, 282SW813; 107TexCr535, 298SW 284.

141-74 6F(2d)105 (evidence alleged to have been unlawfully obtained must appear in bill of exceptions to be reviewable); 104TexCr152, 282SW813; 104 TexCr567, 285SW1094; 109TexCr573, 6SW(2d)115.

141-75 TexCr 32SW(2d)470.

141-76 101TexCr540, 276SW239; 110 TexCr499, 7SW(2d)559.

141-77 101TexCr540, 276SW239; 107 TexCr43, 294SW549; 108TexCr464, 1 SW(2d)285.

141-79 101TexCr86, 273SW598.

141-80 103TexCr620, 281SW852.

141-82 107TexCr32, 294SW541; 103 WVa361, 137SE749; 103WVa355, 137 SE751.

142-84 113TexCr81, 18SW(2d)661(2d case).

142-86 108TexCr590, 2SW(2d)229.

142-86½-New. The overruling of an objection to a question asked on cross-examination is not presented for review where the bill of exceptions does not show the answer. 103TexCr617, 281SW 1076.

142-87½-New. Where cause was submitted on briefs, an indorsement of an agreement between counsel that the bill is a correct bill is binding. 22AlaA407, 116S900.

142-87⅓-New. A bill of exceptions, which embraces under the same complaint both admissible and inadmissible evidence, is not sufficient. 110TexCr 509, 9SW(2d)265(2dcase).

142-87¼-New. Bills of exception in question and answer form, cannot be considered in absence of trial court's certificate that such form is necessary. TexCr 26SW(2d)238; TexCr 28SW(2d) 812.

142-89 21AlaA270, 108S617; Ind 171 NE301.

142-90 221Ky700, 299SW568.

142-91 Ind 172NE176; 89 IndA117, 165 NE773.

142-91½-New. Instructions can be made part of record only by proper bill of exceptions. 198 Ind614, 154NE370.

142-92 94Fla32, 113S630.

142-99 159La768, 106S298.

142-6½-New. In the absence of a certificate of court that qualifications of a bill were excepted to, the appellate court will not consider such fact as true. 109 TexCr209, 4SW(2d)64.

142-7 37GaA332, 140SE426. [b] **Upon agreement** of district attorney and defendant as to truths of bill, it was established as filed. Mass 171NE81.

142-8 37GaA332, 140SE426.

143-18 41F(2d)57(1stcase); 23AlaA 584, 129S492 (indorsements held sufficient to show bill properly presented); 21AlaA628, 111S193; 23AlaA385, 125S 791; 181Ark1145, 26SW(2d)576(1st case); 93Fla599, 112S561; 94Fla32, 113 S630; 41GaA581, 153SE610(1stcase); 200 Ind125, 160NE673; 213Ky509, 281 SW498; 160La26, 106S662; 160La47, 106S670; 164La940, 114S844; 146Miss 285, 111S378; Miss 128S891; Mo 256 SW462; Mo 285SW91; Mo 285SW432; Mo 289SW569; Mo 292SW27; MoA 256 SW514; 220MoA349, 285SW1021; MoA 282SW736; 101NJL546, 129A198; 33 PortoRico 114 (Code Cr. Proc. § 298); 101TexCr142, 274SW576 (reversal where each authentication due to absence of regular judge and want of authority of special judge); 105TexCr96, 286SW 1103; 105TexCr374, 288SW230; 106 TexCr65, 290SW175; 105TexCr608, 290 SW179; 106TexCr165, 291SW250; 106 TexCr193, 291SW557; 106TexCr259, 291SW900; 106TexCr458, 293SW172; 106TexCr482, 293SW173; 107TexCr 383, 296SW545; 107TexCr465, 296SW 892; 107TexCr631, 298SW436; 107Tex Cr571, 298SW580; 108TexCr314, 300 SW78; 109TexCr67, 2SW(2d)851; 109 TexCr450, 5SW(2d)514; 111TexCr165, 12SW(2d)210(1stcase); 113TexCr265, 20SW(2d)426; TexCr 21SW(2d)668; TexCr 23SW(2d)391; TexCr 25SW(2d) 339(2dcase); TexCr 26SW(2d)918; Tex Cr 27SW(2d)208; TexCr 27SW(2d)213; TexCr 27SW(2d)217(2dcase); TexCr 27 SW(2d)228; TexCr 27SW(2d)236; Tex Cr 28SW(2d)172; TexCr 28SW(2d)794; TexCr 29SW(2d)399; TexCr 31SW(2d) 653; TexCr 32SW(2d)464; TexCr 32 SW(2d)470; TexCr 32SW(2d)657; 101 WVa123, 132SE368; 101WVa579, 133 SE329. See also 34GaA140, 128SE588. [a] 37F(2d)344; 21AlaA628, 111S193. [c] (1) 100TexCr553, 271SW631; 100 TexCr592, 272SW175; 100TexCr523, 272SW205; TexCr 20SW(2d)794. (3) Objections to modifications will not be considered unless properly certified by judge. 107TexCr635, 298SW433. (4) Notation of defendant's attorneys following judge's signature to bill of exceptions and qualification thereof, but not verified by judge, held insufficient as exception to qualification. 107TexCr 631, 298SW436. (5) Statement of

ground of objection is not certificate of judge that facts therein are true. 109 TexCr481, 5SW(2d)518. (6) Bill of exceptions refused by judge has no place in record. 110TexCr296, 8SW(2d)186. (7) Exceptions to charge must be verified in order to be considered. 110Tex Cr337, 8SW(2d)174. [d] 106WVa216, 145SE275. [o] (2) This is so also where judge certifies that matter did not occur as stated. 100TexCr476, 273 SW561. [p] **It is trial court's duty,** if party to cause shall reduce his exception to writing, to allow exception and sign it. 333Ill397, 164NE847. [q] **Only circuit judge himself trying prosecution for murder could authenticate bill of exceptions** by defendant who was convicted, and neither official stenographer nor clerk of such court has such authority. 179Ark244, 15SW(2d)323. [r] **Qualifications of bill are ineffectual** unless over signature of trial judge. TexCr 25SW(2d)339(2dcase). [s] **Mere statement of ground of objection** is not certificate that facts were true. TexCr 26SW(2d)645.

144-23 Mo 18SW(2d)16(2dcase); 33 PortoRico 114. [a] 33PortoRico 114, 122 [citCJ].

144-24 [a] **In Porto Rico.**-33PortoRico 114.

144-25½-New. Bill of exceptions approved by successor of trial judge cannot be considered where the record does not disclose the death of the trial judge or any reason why he did not approve it. 107TexCr39, 294SW544.

144-26 See also NJSup 135A510.

144-27½-New. The certificate of the trial judge on the document in record, denominated "objections and exceptions to the court's charge," signifying that such objections were overruled and exceptions noted, does not authenticate such exceptions as presented in the time and manner required by law so as to preserve any question for review. 112 TexCr230, 16SW(2d)242(1stcase).

144-27¼-New. When the judge has signed a certificate to a bill of exceptions, he has exhausted his power in that regard, and cannot add a supplementary certificate explanatory of the first, and such secondary certificate cannot be considered by the court of appeals. 39GaA32, 146SE36(1stcase).

144-27¼-New. Refusal by judge of a bill of exception does not take it from the consideration of the appellate court where there is no qualification, explanation, or substitution. 113TexCr188, 19 SW(2d)319.

144-27½-New. Where a motion is heard in the county where the information was filed and then a change of venue is granted, all questions relating to the motion must be preserved in a bill of exceptions emanating from the circuit court that heard the motion. Mo 22SW(2d)793.

144-28 100TexCr464, 273SW604; 104 TexCr308, 283SW817; 105TexCr81, 286 SW1086; TexCr 27SW(2d)817. See also TexCr 32SW(2d)182; TexCr 32SW (2d)184; TexCr 32SW(2d)185. [c] **Bill of exceptions will be considered without qualification** excepted to where trial court fails to file proper bill. 109TexCr 113, 3SW(2d)101. [d] **Qualification of bill of exceptions** in manner to show no error cannot be considered where excepted to. 109TexCr113, 3SW(2d)101.

144-30 318Ill421, 149NE231.

144-34 162Ga78, 132SE632.

144-35 165La67, 115S370.

145-36½-New. Nor need he state per curiam to bill before formal bill is presented for signature, and refusal to dictate per curiam to stenographer was proper. 166La924, 118S85.

145-39½-New. Mandamus will not be allowed to compel the signing of a second bill of exceptions on extraordinary motion for new trial after affirmance of final judgment where the petition shows that the motion is without merit. 40 GaA91, 149SE59.

145-40 94Fla32, 113S630; 235Ky340, 31SW(2d)383; 146Miss285, 111S378; 102TexCr531, 278SW439; 104TexCr228, 283SW507; 106TexCr193, 291SW557; TexCr 298SW575. [c] (1) 104TexCr228, 283SW507; 113TexCr265, 20SW(2d) 426. (4) 100TexCr234, 272SW793; 107 TexCr75, 294SW1112. [d] (3) Other instances. TexCr 24SW(2d)48." [f] **Bystander's bill considered,** though not presented to court. 102TexCr531, 278 SW439. [g] **Where bill approved by by-standers** but judge failed to sign, it cannot be considered though it appears at length in transcript. 94Fla32, 113S 630. [h] 152Miss656, 120S747. [i] **Who may sign.**-155Miss745, 124S761 (4thcase).

145-44 47RI245, 132A547.

145-45½-New. Where exceptions are not filed within time allowed by law, petition to establish their truth cannot be considered. 255Mass227, 151NE68.

145-46 254Mass520, 150NE854; 171 Minn515, 213NW923; 47RI245, 132A 547; 102TexCr492, 278SW440; 106Tex Cr167, 291SW249; 106TexCr455, 292 SW891; TexCr 27SW(2d)226 (qualification is binding on appellate court); TexCr 32SW(2d)455(2dcase). But see 106TexCr198, 291SW542; 109TexCr234, 48W(2d)66; 112TexCr563, 17SW(2d) 1075. [b] 104TexCr480, 284SW592; 107TexCr596, 298SW578. [c] 104Tex Cr480, 284SW592; TexCr 298SW575. [d] 254Mass520, 150NE854; 101TexCr 346, 276SW244; 108TexCr48, 299SW 254; 109TexCr218, 3SW(2d)816. [g] **Qualification of bill** is held merely aid to appellate court. 107TexCr79, 294 SW860. [h] **Appellant need not file qualified bill.**-TexCr 298SW575. [i] **Bill of exception, qualified by court, must be considered in light of judge's qualification,** where exception thereto, appearing over name of defendant's attorney and under name of trial judge, was not certified by judge as being made. 111TexCr607, 13SW(2d)376(1st case); TexCr 13SW(2d)872. [j] **Federal rule.**-26F(2d)870. [k] **Matters considered** in determining whether qualification was justified. TexCr 24SW(2d) 425(2dcase). [l] **Qualification accepted by appellant controls** reviewing court. TexCr 27SW(2d)177. [m] **Qualification not signed by court** will not be considered. TexCr 28SW(2d)794.

146-48 106TexCr152, 291SW237; 106 TexCr193, 291SW557.

146-50 112TexCr563, 17SW(2d)1075. See also 113TexCr122, 18SW(2d)618. [a] **Judge's duty to make sure bill of exceptions** states correctly all facts of trial essential to present question of law. 254Mass520, 150NE854.

146-51 104TexCr480, 284SW592; 106 TexCr240, 291SW904; 106TexCr593, 294SW573; 107TexCr75, 294SW1112; TexCr 298SW575; 107TexCr596, 298 SW578. [a] **Qualification, added to bill over objection of appellant,** will not be considered. 107TexCr75, 294SW1112. [b] **Trial court's substitute bill** is binding on appellate court. TexCr 24SW (2d)48.

146-53 TexCr 298SW575. See also 102 TexCr492, 278SW440.

146-57 165La67, 115S370.

146-57½-New. Where bill qualified over appellant's objection, the qualification may be disregarded. 105TexCr 563, 289SW385; TexCr 298SW575; 107 TexCr596, 298SW578.

146-57½-New. The trial judge cannot qualify a bill of exceptions by a statement of matters known personally to him which transpired out of the court room and not during the trial. 108Tex Cr28, 299SW236.

146-57¼-New. Qualified bill is conclusive in absence of exceptions thereto. 102TexCr492, 278SW440; 106TexCr618, 294SW588.

146-57½-New. Question whether paragraph in first bill of exceptions is wrongfully there cannot be raised by a second bill of exceptions. 254Mass520, 150NE854.

146-57⅙-New. To correct mistake in exceptions, the proper course is to move to discharge exceptions as allowed and move before trial judge for correction. 257Mass465, 154NE67.

146-57⅐-New. If excepting party is unwilling to amend bill of exceptions after its disallowance by judge, his remedy is to petition for establishment of exceptions. 254Mass520, 150NE854.

146-57⅛-New. The trial court's qualification of a bill of exceptions becomes a part of it. 103TexCr508, 281SW1054.

146-57⅙-New. Truth of independent exceptions separately stated may be established. 260Mass297, 157NE343.

146-57 1/10-New. Where false statements are blended with true statements, judge need not sift out truth from falsehood. 260Mass297, 157NE343.

146-57 1/11-New. Proceedings to establish exceptions are strictissimi juris and one attempting to set aside judge's certificate must conform to governing principles. 260Mass297, 157NE343.

146-57 1/12-New. Where appellant is given notice of a proposed correction of the bill of exception and fails to appear, it is too late on appeal to question such correction. 106TexCr222, 291SW 558.

146-57 1/13-New. Exceptions to judge's qualification of bill. 106TexCr103, 290 SW1097; 106TexCr99, 291SW242; 107 TexCr19, 294SW564; 107TexCr79, 294 SW860; 107TexCr115, 295SW190; 109 TexCr8, 2SW(2d)452.

146-57 1/14-New. Where the trial judge filed copies of bills qualified over appellant's objection, instead of filing bills in lieu of bills objected to, the appellate court may consider the bills found in the record or hold that appellant has been deprived of his bills in toto. Tex Cr 298SW575.

146-57 1/15-New. Where a bill of exceptions is filed for the purpose of bringing forward an exception to a qualification placed on a prior bill of exceptions, the prior bill must be treated without qualification. 108TexCr19, 298SW601.

146-57 1/16-New. Qualification as to matter which occurred in open court is properly part of the bill. 108TexCr28, 299SW236.

146-57 1/17-New. Exception to judge's action qualifying a bill of exceptions must be verified by the trial court to be considered properly in record. 108Tex Cr590, 2SW(2d)229.

146-57 1/18-New. A statement under the court's signature to a bill of exceptions that defendant objects to the court's qualification is not an exception which the reviewing court can consider. 108 TexCr590, 2SW(2d)229.

146-57 1/19-New. The court cannot consider a bill of exception where exception to its rejection was not authenticated. 108TexCr590, 2SW(2d)229.

146-57 1/20-New. If a bill of exceptions does not clearly show what occurred at the trial, appellant's only remedy is to correct it by a bystander's bill of exceptions, or by application to the appellate court to require the circuit judge to sign a true bill of exceptions, under Const. § 110. 227Ky439, 13SW (2d)244.

146-57 1/21-New. In the prosecution of a capital offense, qualifications to a bill of exceptions over the objection of accused cannot be considered. 111TexCr 77, 11SW(2d)316.

146-57 1/22-New. The trial judge has no right to explain, modify, or qualify a bill of exceptions save with the consent of defendant, and the reviewing court must presume under statute that the trial judge's qualification of the bill of exceptions is assented to unless the contrary appears over the certificate of the trial judge. TexCr 11SW(2d)172.

146-57 1/23-New. In valuing a bill of exceptions, the reviewing court must take note of the explanation of the trial judge accompanying the bill unless it be shown over the signature of the judge that the qualification was made against the protest of defendant or his counsel, under statute. TexCr 11SW (2d)172.

146-57 1/24-New. Where qualifications appended by the trial judge to bills of exceptions were excepted to by appellant, they will not be considered on appeal. 111TexCr218, 12SW(2d)1015.

146-57 1/25-New. Qualification properly excepted to cannot be considered. Tex Cr 26SW(2d)225.

146-58 220MoA349, 285SW1021. [b] 213Ky509, 281SW498. [c] **Marginal**

memorandum must be made on bill in some jurisdictions referring to book and page where order of filing of bill was made. 314Mo 635, 285SW437. [d] **Filing must be by direction or with knowledge** of trial court. TexCr 27SW(2d) 205.

146-59 89 IndA604, 166NE256; 213Ky 509, 281SW498; 223Ky677, 4SW(2d) 683; 312Mo 340, 279SW98; 100TexCr 660, 273SW852; 109TexCr311, 4SW (2d)45. [a] Mo 6SW(2d)881.

146-60 Ind 171NE197; 312Mo 340, 279SW98; 315Mo 1276, 288SW18; Tex Cr 31SW(2d)1084.

146-61 312Mo 340, 279SW98.

146-62 Ind 171NE197.

146-63 TexCr 27SW(2d)538 (bills of exceptions without file mark, though in record, will not be considered). [a] **Absence of file marks** on bill of exceptions precludes its consideration. 113 TexCr608, 21SW(2d)1063.

146-63½-New. Order showing filing. Where filing of bill is not shown by order of court, only question presented is whether indictment is sufficient to support conviction. 210Ky362, 275SW871.

146-63¾-New. Proof of an oral announcement is not sufficient evidence upon which to base an order for a nunc pro tunc entry of time for filing bills of exceptions as of the date motion for a new trial was overruled. 89 IndA113, 165NE784.

146-64 199 Ind520, 157NE49; 265Mass 436, 165NE22; 100TexCr575, 272SW 172 (where no extension of time has been granted, bills of exceptions must be filed within thirty days after judgment); TexCr 26SW(2d)213. [a] Contra 117 Oh102, 157NE388. [b] **In Ohio.** –117 Oh102, 157NE388 (statute construed). [c] **Filing must be after bill is signed.**–199 Ind520, 157NE49. [d] **Before appeal.**–165La559, 115S750. [e] **Bills of exception not presented and filed** till two days after expiration of limit designated in original order is too late, under Cr. Code arts 542, 543, 545, but appeal will not be dismissed on such account, other matters properly appearing in record being considered. 167La798, 120S372. [f] **Formation and selection of jury.**–110TexCr308, 7SW (2d)1091.

146-65 94Fla32, 113S630; 337 Ill 636, 169NE737; 240 IllA76; 197 Ind680, 151 NE827; 198 Ind477, 154NE9; Ind 172 NE904; IndA 167NE550(2dcase); Mo 300SW767; 101TexCr149, 274SW593; 101TexCr333, 275S831; 102TexCr496, 278SW435; 105TexCr15, 284SW960; 105TexCr374, 288SW230. See also 225 Ky273, 8SW(2d)382. But see 110Tex Cr636, 10SW(2d)546. [a] (2) Leave to file bill, containing evidence to be filed after term, must be given at time of ruling on motion for new trial. 199 Ind520, 157NE49. (3) Leave to file bill of exceptions can be granted only at time motion for new trial is overruled, and such leave, given three days after overruling of motion for new trial, was void. 89 IndA45, 165NE770. [d] 34 Wyo 112, 241P701. [e] **In Indiana.**–198 Ind698, 154NE669. [f] **Certificate of clerk is sufficient** to show date of final adjournment of term, in absence of contrary showing. 37F(2d)692. [g] **Bill must be filed thirty days after denial of new trial,** in absence of extension. Tex Cr 27SW(2d)807.

146-65½-New. or within the time allowed by the court. 197 Ind680, 151NE 827.

147-66 [a] **Statute is mandatory,** and compliance therewith is indispensable to jurisdiction to settle bill. 82Mont456, 268P493. [b] **Stipulation of counsel that bill may be considered as presented in time** is ineffectual to reinvest court with jurisdiction to settle bill once lost by failure to present it within statutory time. 82Mont456, 268P493.

147-66½-New. The court's failure to sentence defendant on conviction did not affect defendant's right to file exceptions or deprive the judge of jurisdiction to pass upon the exceptions. 265Mass 436, 165NE22.

147-67 214Ala99, 106S508; 21AlaA198, 106S681; 217Ala95, 114S904; 21AlaA 215, 106S876; 21AlaA499, 109S557; 91 Fla79, 107S416; 40GaA712, 151SE393; 28Hawaii455; 197 Ind680, 151NE827; 89 IndA113, 165NE784; 89 IndA552, 166NE27; 158La495, 104S303; 161La 827, 109S505; 105TexCr74, 286SW1094; 107TexCr571, 298SW580; 145Va880, 134 SE567; 149Va464, 141SE125; 150Va 602, 143SE696. [e] **In Alabama.**–21Ala A174, 106S72. [f] **Bill held filed within proper time.**–23AlaA593, 129S484(1st case).

147-67½-New. , or tendered. 35GaA 395, 133SE266; 35GaA380, 133SE294; 35GaA664, 134SE181; 161La827, 109S 505; 82Mont456, 268P493.

147-68 23AlaA581, 129S303(1stcase); 169Ark1212, 276SW357; 169Ga15, 149 SE650; 170Ga842, 154SE374(1stcase); 34GaA141, 128SE687 (bill tendered more than twenty days after judgment); 36 GaA100, 135SE509; 38GaA353, 144SE 10; 39GaA594, 147SE794; 39GaA640, 148SE104; 39GaA641, 148SE166(1st case); 39GaA644, 148SE170; 39GaA825, 148SE607(2dcase); 39GaA693, 148SE 284(1stcase); 40GaA163, 148SE921(1st case); 40GaA554, 150SE452(2dcase); 40GaA624, 150SE871; 41GaA658, 153SE 379(1stcase); GaA 155SE781(1stcase); 337 Ill 358, 169NE164(1stcase); 337 Ill 636, 169NE737 (untimely bill will be stricken on motion); 240 IllA76; 196 Ind684, 149NE441; 197 Ind680, 151NE 827; 89 IndA414, 165NE555; 228Ky 730, 15SW(2d)421; 234Ky198, 27SW (2d)957(1stcase); 161La827, 109S505; 165La559, 115S750; 153Md700, 138A 329; 144Miss551, 110S447; 156Tenn 610, 4SW(2d)349; 157Tenn202, 7SW (2d)806; 99TexCr512, 270SW1018; 99 TexCr589, 271SW385; 102TexCr496, 278SW435; 103TexCr311, 280SW817; 103TexCr506, 281SW1060; 104TexCr 238, 283SW505; 104TexCr400, 284SW 222; 104TexCr604, 286SW221; 105Tex Cr15, 284SW960; 105TexCr209, 287SW 246; TexCr 287SW1114; 105TexCr325, 288SW212; 105TexCr374, 288SW230; 105TexCr578, 289SW391; 105TexCr612, 289SW403; TexCr 289SW404; 105Tex Cr581, 289SW409; 105TexCr640, 289 SW1011; 106TexCr146, 291SW236; Tex Cr 291SW237; 107TexCr628, 298SW 434; 107TexCr571, 298SW580; 108 TexCr240, 299SW904; 108TexCr316, 300 SW67; 108TexCr272, 300SW940; 108 TexCr499, 1SW(2d)896; 109TexCr318, 4SW(2d)552; 109TexCr320, 4SW(2d) 971; 109TexCr377, 4SW(2d)973; 109 TexCr410, 5SW(2d)137; 109TexCr450, 5SW(2d)514; 109TexCr288, 5SW(2d) 770; 109TexCr473, 110TexCr57, 7SW (2d)527; 110TexCr120, 8SW(2d)142; 110TexCr572, 9SW(2d)1042; TexCr 10 SW(2d)85; 110TexCr634, 10SW(2d)544; TexCr 10SW(2d)548(1stcase); 110Tex Cr381, 10SW(2d)990; TexCr 11SW(2d) 319(1stcase); TexCr 11SW(2d)512(2d case); 111TexCr331, 12SW(2d)805; 111 TexCr341, 12SW(2d)1017(2dcase); Tex Cr 12SW(2d)1022(2dcase); 111TexCr 410, 13SW(2d)368(2dcase); 111TexCr 612, 13SW(2d)372(2dcase); 111TexCr 511, 14SW(2d)274; 111TexCr439, 14SW (2d)1026; 111TexCr438, 15SW(2d)8; 111TexCr237, 16SW(2d)251; 112TexCr 502, 17SW(2d)811(1stcase); 112TexCr 482, 17SW(2d)1057; 113TexCr5, 18SW (2d)624; 113TexCr261, 20SW(2d)199; 113TexCr273, 20SW(2d)201; 113TexCr 233, 20SW(2d)206; 113TexCr601, 21SW (2d)1052(1stcase); 113TexCr406, 21SW (2d)1061(2dcase) (bill not considered where additional time not granted by court); 113TexCr615, 21SW(2d)1065 (1stcase); 113TexCr678, 22SW(2d) 1072; TexCr 24SW(2d)404; TexCr 24 SW(2d)839; TexCr 25SW(2d)338; Tex Cr 25SW(2d)620; TexCr 25SW(2d)864; TexCr 26SW(2d)240; TexCr 26SW(2d) 246; TexCr 27SW(2d)191; TexCr 27 SW(2d)546(2dcase); TexCr 27SW(2d) 811; 234Ky635, 28SW(2d)953(1st case); TexCr 28SW(2d)1086; TexCr 31 SW(2d)812; TexCr 32SW(2d)455(1st case); TexCr 32SW(2d)458(2dcase); TexCr 32SW(2d)464; TexCr 32SW(2d) 652(1stcase). [b] (2) Or by failure of court reporter to prepare short transcript. 110TexCr120, 8SW(2d)142. [c] 41GaA602, 154SE291. [d] **Bill not filed will be stricken** on commonwealth's motion. 235Ky10, 29SW(2d)580. [e] **Bills duly filed** are entitled to consideration on appeal. TexCr 26SW(2d) 240. [f] **Bills filed too late.**–TexCr 28 SW(2d)794.

148-69 111TexCr165, 12SW(2d)210(1st case). [b] GaA 155SE781(1stcase).

148-69½-New. Where defendant's bill of exceptions in a criminal case was filed before expiration of the fifteenth day of the next regular term of court within which he was granted leave to file it, the commonwealth's motion to strike the bill on the ground that it was filed after time fixed by the court will be denied, although the clerk's transcript of the record erroneously stated that the bill of exceptions was tendered on the sixteenth day of such term. 226Ky831, 11SW(2d)925.

148-70 36F(2d)899; 199 Ind520, 157 NE49; 105TexCr539, 289SW396; Tex Cr 28SW(2d)794 (diligence shown). [a] (3) Certificate of judge that bill was presented on certain date is properly part of record. 199 Ind520, 157NE49.

148-71 101TexCr149, 274SW593; 109 TexCr311, 4SW(2d)45. [a] (2) Omission of court reporter to take papers to judge in another county. 113TexCr5, 18SW(2d)624. (3) Burden cannot be placed on judge or clerk for failure to file bills of exception in time. 112Tex Cr502, 17SW(2d)811(1stcase).

148-72 See also 112TexCr598, 17SW (2d)1062.

148-73 193Wis204, 212NW635. But see 37F(2d)692.

148-73½-New. In Georgia a bill of exceptions must be tendered within twenty days for the date of the judgment overruling the motion for a new trial. 37GaA119, 138SE915; 37GaA118, 138 SE920; 37GaA609, 141SE83.

148-73¼-New. To give the appellate court jurisdiction, a bill of exceptions must be tendered within the prescribed number of days from rendition of judgment complained of. 37GaA18, 138SE 526.

148-73¾-New. In Texas extension of time to file bill of exceptions and statements of fact must be from the date of giving notice of appeal. 108TexCr240, 299SW904.

148-74 32F(2d)237; 167La798, 120S 372; 238Mich485, 213NW717; 157Tenn 202, 7SW(2d)806; 108TexCr316, 300 SW67; 108TexCr528, 1SW(2d)638; Tex Cr 23SW(2d)387; TexCr 27SW(2d)823 (extension should be within thirty days allowed by law or within time named in original order, if any). See 225Ky 273, 8SW(2d)382. [a] (2) Pending appeal, trial court is without authority to make nunc pro tunc order extending time. TexCr 29SW(2d)755. [f] **Further extension of time only to file statement of fact** is not applicable to bill of exceptions. 110TexCr471, 9SW(2d)341.

149-76 337 Ill 636, 169NE737 (no extension on oral testimony or proof of mistake).

149-78 152Tenn424, 278SW57; 156 Tenn610, 4SW(2d)349; 157Tenn202, 7 SW(2d)806; TexCr 291SW237; 108Tex Cr316, 300SW67; 112TexCr492, 17SW (2d)833(1stcase); 113TexCr62, 18SW (2d)172; TexCr 20SW(2d)421; 113Tex Cr615, 21SW(2d)1065(1stcase); TexCr 28SW(2d)1084(1stcase); Wyo 284P764. But see 99TexCr512, 270SW1018.

149-79 199 Ind520, 157NE49; 152Tenn 424, 278SW57; 108TexCr401, 1SW(2d) 613.

149-80 Ill 171NE919(1stcase); 240 IllA 76; 255Mass227, 151NE68; 108TexCr 379, 1SW(2d)306; 109TexCr318, 4SW (2d)552; 112TexCr287, 16SW(2d)232 (2dcase); 111TexCr237, 16SW(2d)251; TexCr 23SW(2d)728(2dcase); TexCr 28 SW(2d)1086. See also 113TexCr217, 18 SW(2d)676(2dcase). But see 158Tenn 404, 14SW(2d)51(2dcase).

149-83 89 IndA50, 165NE784; TexCr 25SW(2d)619; TexCr 27SW(2d)824.

149-83½-New. Order book entry showing that court granted ninety days in which to perfect appeal does not show extension of time to present bill of exceptions. 198 Ind698, 154NE669.

149-85 234Ky112, 27SW(2d)666.

149-86 [e] (2) Bill of exceptions in

absence of court order filing bill, which purported to be filed during vacation can be stricken. 235Ky476, 31SW(2d) 714.

149–86½–New. It must be filed in open court and not in vacation, although time is extended. 225Ky273, 8SW(2d)382.

149–87 [a] (2) Where bill shows on its face that it was filed after expiration of statutory time, record must affirmatively show that additional time for filing was granted by court order. 82Mont 456, 268P493.

149–90 TexCr 32SW(2d)455(1stcase). [a] **Order extending time is void** if made after time for filing has expired. 37 F(2d)692; TexCr 25SW(2d)338.

150–95 28Hawaii455; 152Tenn424, 278 SW57; 108TexCr661, 28W(2d)440; TexCr 27SW(2d)171; TexCr 32SW(2d)464; TexCr 32SW(2d)652(1stcase). [b] 28 Hawaii455. [c] **Order extending time is void** where entered after statutory period had expired. TexCr 29SW(2d)755.

150–96 110TexCr381, 10SW(2d)990; 111TexCr165, 12SW(2d)210(1stcase); 111TexCr331, 12SW(2d)805; 111Tex Cr410, 13SW(2d)368(2dcase); 112Tex Cr37, 13SW(2d)846(1stcase); 112Tex Cr39, 13SW(2d)852.

150–98½–New. A statute regulating the time for taking appeals and permitting execution on judgment after thirty days from entry, unless the appeal is taken, does not include an order allowing additional time in which to file a bill of exceptions. 158Tenn404, 14SW(2d)51 (2dcase).

150–98⅓–New. Court cannot extend time by nunc pro tunc order. TexCr 28SW(2d)794.

150–99 152Va941, 146SE270. [a] (1) 20AlaA585, 104S345. (2) Bill of exceptions signed within ninety days from judgment overruling motion for new trial is in time. 215Ala406, 110S799.

150–4½–New. An order extending the time for preparation and presentation of bill of particulars for thirty days from and after completion of transcript of evidence is not void for uncertainty. 28Hawaii189.

150–5 OklCr 283P271; OklCr 291P144 (1stcase); 101TexCr166, 274SW572; 103 TexCr358, 280SW1065; 105TexCr497, 288SW1072; TexCr 288SW1114(2d case); TexCr 288SW1114(3dcase); Tex Cr 288SW1115(1stcase); TexCr 288SW 1115(2dcase); TexCr 288SW1115(3d case); TexCr 288SW1116(1stcase); Tex Cr 288SW1116(3dcase); TexCr 288SW 1116(4thcase); TexCr 288SW1116(5th case); TexCr 288SW1117(1stcase); TexCr 288SW1117(5thcase); TexCr 288 SW1117(6thcase); TexCr 288SW1118; TexCr 291SW896; TexCr 293SW1107; TexCr 293SW1111; TexCr 293SW 1116(2dcase); TexCr 293SW1116(3d case); TexCr 293SW1118(1stcase); Tex Cr 293SW1118(3dcase); TexCr 293SW 1118(6thcase); 106TexCr672, 294SW 851(2dcase); TexCr 294SW851(1st case); TexCr 4SW(2d)74 (defects in instructions); 109TexCr632, 6SW(2d) 365; TexCr 20SW(2d)1059(3dcase); TexCr 20SW(2d)1070(1stcase); TexCr 25SW(2d)339(1stcase); TexCr 31SW (2d)1076; TexCr 31SW(2d)1079(1st case). [d] **Defendant is not excused from failure to file statement of facts,** on appeal, by virtue of failure of trial judge to prepare and file statement under code, where statement of facts submitted by defendant was not certified. 111TexCr 393, 12SW(2d)570.

151–6 But see TexCr 32SW(2d)200. [b] **Where defendant filed affidavit of inability to pay, failure of court to order delivery of statement** held to require reversal. 113TexCr373, 22SW(2d)932 (inability of stenographer to prepare statement held not to excuse refusal).

151–10 105TexCr497, 288SW1072.

151–11 34PortoRico683 (leave to change transcript of stenographer's notes of evidence into statement of case will not be granted on appeal when right not exercised in time).

152–12 TexCr 8SW(2d)117; TexCr 8 SW(2d)161; TexCr 8SW(2d)176; TexCr 8SW(2d)182; TexCr 23SW(2d) 372(1stcase).

152–12½–New. **Bills of exceptions cannot be appraised without statement of facts.** TexCr 23SW(2d)728(2dcase).

152–14 105TexCr348, 287SW1100; TexCr 288SW218; 108TexCr661, 28W (2d)440. [a] **In absence of statement of facts,** appellate court cannot consider bill of exceptions to introduction of testimony and argument not supported by testimony. 112TexCr280, 16SW(2d)231.

152–15 112TexCr16, 13SW(2d)862.

152–17 99TexCr638, 271SW97; 103 TexCr129, 280SW824, 825; 105TexCr 347, 288SW198; 105TexCr393, 288SW 1087; TexCr 290SW175; TexCr 290SW 182; TexCr 290SW534; TexCr 291SW 223; TexCr 292SW887; 113TexCr398, 22SW(2d)460(1stcase); TexCr 27SW (2d)815(2dcase); TexCr 29SW(2d)766. [a] **In absence of statement of facts,** court cannot appraise exceptions to court's charge. 112TexCr230, 16SW (2d)242(1stcase); TexCr 16SW(2d)242 (2dcase).

152–18 103TexCr590, 281SW560; 105 TexCr74, 286SW1094; 112TexCr438, 17 SW(2d)48(2dcase).

152–19 OklCr 287P1066(1stcase).

152–21½–New. or a claim by prosecution that defects in indictment were cured by testimony; 135Wash621, 238 P635.

152–24 [c] (3) Court rule precludes consideration of statement of facts by reference to matters that are not set forth in detail or in substance in statement itself. 112TexCr643, 18SW(2d) 671.

152–30 100TexCr234, 272SW793; 100 TexCr253, 272SW794 (stricken out on motion); 101TexCr483, 276SW277; 101 TexCr495, 276SW438; 101TexCr503, 276SW259; 103TexCr268, 280SW595; 105TexCr534, 289SW388; 108TexCr199, 299SW646; 113TexCr373, 22SW(2d) 932; 113TexCr543, 22SW(2d)939; TexCr 29SW(2d)790(2dcase). [a] 101 TexCr495, 276SW438. [c] **Transcript of questions and answers before examining magistrate,** which was introduced in evidence, may be inserted in statement of facts though not in narrative form. 103TexCr268, 280SW595.

153–31 TexCr 32SW(2d)476.

153–34½–New. The taking of exceptions to instructions may be sufficiently shown by the statement of facts. 136 Wash620, 241P9.

153–34⅓–New. A matter assigned as error in the motion for a new trial and in the petition in error but not shown by the case-made to be true cannot be considered. OklCr 277P947.

153–35 106TexCr37, 289SW1072; TexCr 21SW(2d)513.

153–35½–New. In Louisiana, there is no statute requiring district attorney to file statements of facts or to subscribe to one. 163La8, 111S472.

153–36 34PortoRico681; 101TexCr142, 274SW576; 103TexCr264, 280SW813; 103TexCr358, 280SW1065; 105TexCr55, 285SW322; 105TexCr393, 288SW1087; 106TexCr88, 290SW768; 107TexCr7, 294SW557; 107TexCr329, 296SW599; 109TexCr135, 3SW(2d)438; 109TexCr 480, 5SW(2d)517; TexCr 13SW(2d)844; TexCr 21SW(2d)513; 113TexCr603, 21 SW(2d)1044(1stcase); 113TexCr398, 22 SW(2d)460(1stcase); 113TexCr436, 22 SW(2d)919 (statement of ground of objection in bill of exception is not judge's certificate of truth of facts); TexCr 25 SW(2d)832(1stcase); TexCr 27SW(2d) 158; TexCr 27SW(2d)545; TexCr 28 SW(2d)155; TexCr 28SW(2d)172; TexCr 31SW(2d)639. [d] (i) OklCr 269P507(2dcase) (requirement is mandatory). [h] **Where trial judge dies,** his successor may approve. 107TexCr 329, 296SW599. [i] **In Porto Rico.–33 PortoRico** 114.

153–38 94Fla32, 113S630; 101TexCr 133, 274SW149; 103TexCr590, 281SW 560; 105TexCr209, 287SW246; 108 TexCr499, 18W(2d)896. [b] **Statement of facts approved by trial judge** within ninety days after adjournment but more than thirty days after judgment without order for extension beyond thirty-day period is entitled to consideration under statute. 100TexCr575, 272SW172. [c] **Proper diligence held not shown.–TexCr** 28SW(2d)155. [d] **Negligence of clerk with whom statement was left to be presented for approval is chargeable to party so leaving statement.** TexCr 28SW(2d)155.

153–39 34PortoRico808 (statement of case).

153–41½–New. A statement of facts approved by successor of trial judge cannot be considered where the record does not disclose the death of the trial judge or any reason why he did not approve it. 107TexCr39, 294SW544.

154–43½–New. In some jurisdictions a statement of facts not authenticated by the signature of the trial judge cannot be considered. TexCr 291SW249.

154–44 101TexCr142, 274SW576 (regular judge absent and special judge without authority).

154–50½–New. A statement of facts agreed to by counsel and approved by the presiding judge and duly filed will be considered, although the copy reaching the court of criminal appeals does not bear a certificate of the judge's approval. 103TexCr264, 280SW813.

154–50⅓–New. The appellate court is unauthorized to compel the clerk to file a statement of facts on a showing of negligence of counsel for accused. TexCr 299SW247.

154–51 OklCr 291P987(2dcase).

155–60 OklCr 274P38.

155–65 98CalA552, 277P201; TexCr 287SW1114; 105TexCr386, 288SW225; 108TexCr661, 28W(2d)440; 110TexCr 120, 8SW(2d)142; 110TexCr148, 8SW (2d)159; 112TexCr466, 17SW(2d)46; 113TexCr261, 20SW(2d)199; 113TexCr 615, 21SW(2d)1065(1stcase); TexCr 27 SW(2d)811; TexCr 32SW(2d)186; 154 Wash663, 283P182. [a] **Where accused files copy of statement filed in another case,** appellate court may examine record itself for errors. MoA 284SW823.

155–68 204Cal678, 269P529(1stcase); 113TexCr62, 18SW(2d)172.

155–69 OklCr 283P263(1stcase); 100 TexCr364, 272SW780 (statement of facts on motion for new trial filed after adjournment); 101TexCr46, 274SW150; 101TexCr133, 274SW149; 101TexCr439, 276SW252; 102TexCr277, 278SW214; 104TexCr150, 282SW804; 104TexCr291, 283SW808; 104TexCr384, 283SW807; 105TexCr347, 288SW198; 104TexCr463, 284SW561; 104TexCr603, 286SW234; 104TexCr604, 286SW221; 105TexCr61, 284SW951; 105TexCr78, 286SW1102; 105TexCr172, 287SW264; 105TexCr209, 287SW246; 105TexCr318, 287SW249, 1099; 105TexCr348, 287SW1100; 105Tex Cr410, 288SW1084; 105TexCr578, 289 SW391; TexCr 289SW404; 105TexCr640, 289SW1011; 106TexCr146, 291SW236; TexCr 291SW237; 106TexCr175, 291SW 240; 106TexCr214, 291SW549; 107 TexCr628, 298SW434; 108TexCr124, 299SW258; 108TexCr272, 300SW940 (excusable delay not shown); 108TexCr 463, 1SW(2d)629; 108TexCr626, 2SW (2d)265; 109TexCr243, 4SW(2d)61; 109TexCr300, 4SW(2d)547; 109TexCr 318, 4SW(2d)552; 109TexCr320, 4SW (2d)971; TexCr 5SW(2d)990; 110 TexCr120, 8SW(2d)142; TexCr 9SW (2d)737(1stcase); 110TexCr572, 9SW (2d)1042(1stcase); 110TexCr634, 10SW (2d)544; 111TexCr331, 12SW(2d)805; 112TexCr598, 17SW(2d)1062; 113 TexCr5, 18SW(2d)624; 113TexCr261, 20SW(2d)199 (from date motion for new trial was overruled); 113TexCr601, 21SW(2d)1052(1stcase) (sufficient filing); TexCr 21SW(2d)1070(2dcase); TexCr 27SW(2d)544(2dcase); TexCr 27SW(2d)807; TexCr 27SW(2d)811; TexCr 27SW(2d)824; TexCr 28SW(2d) 1084(1stcase); TexCr 29SW(2d)346(1st case); TexCr 29SW(2d)767(2dcase); TexCr 31SW(2d)445(1stcase); TexCr 31SW(2d)639; TexCr 32SW(2d)478(1st case); 153Wash398, 279P591(1stcase). [a] (1) 111TexCr410, 13SW(2d)368(2d case); 111TexCr612, 13SW(2d)372(2d case); 112TexCr14, 13SW(2d)701(2d case); 111TexCr651, 13SW(2d)840(2d case); 112TexCr175, 15SW(2d)616(2d case); 112TexCr170, 15SW(2d)625; TexCr 16SW(2d)126(1stcase); 112 TexCr279, 16SW(2d)236(1stcase). (4) Court cannot allow filing more than ninety days after notice of appeal, though within ninety days after adjournment of term. 105TexCr490, 288

SW1075. [c] 107TexCr88, 294SW548. [d] **Trial judge's order, made without notice to parties,** extending time to file statement of case on appeal held void. 195NC335, 142SE222. [e] **Statement of facts not filed in time prescribed by law** cannot be considered. 112TexCr279, 16 SW(2d)236(2dcase). [f] **Statutory time for filing statement of fact** cannot be shortened by court order. 111TexCr 515, 14SW(2d)850.

156-70 111TexCr410, 13SW(2d)368.

156-72 [a] **In Porto Rico.**–33PortoRico 585. [b] **Diligence held insufficient.**–111TexCr515, 14SW(2d)850.

156-73 108TexCr124, 299SW258; 108 TexCr401, 18SW(2d)613; 109TexCr410, 5SW(2d)137; **TexCr** 31SW(2d)445(1st case).

156-74 106TexCr175, 291SW240.

156-75 [a] (2) Statement of facts considered where trial judge certified that parties failed to agree and that he prepared and ordered clerk to file statement. 105TexCr671, 290SW181.

156-79 103TexCr118, 280SW215; 104 TexCr479, 284SW586; 105TexCr552, 289SW402; **TexCr** 291SW237; 112Tex Cr14, 13SW(2d)701(2dcase); 113Tex Cr615, 21SW(2d)1065(1stcase); **TexCr** 27SW(2d)217(1stcase); **TexCr** 28SW (2d)1084(1stcase); **TexCr** 29SW(2d)346 (1stcase); **TexCr** 32SW(2d)458(2dcase). [a] **Beyond term.**–103TexCr118, 280SW 215.

156-81 33PortoRico 585.

156-83 108TexCr661, 2SW(2d)440; 109 TexCr318, 4SW(2d)552. [a] **Order extending time,** not shown to be entered in time, was held ineffectual. **TexCr** 25 SW(2d)846.

157-86 108TexCr401, 1SW(2d)613.

157-88 318 Ill 188, 149NE269; 321 Ill 380, 152NE215; 235 IllA587. But see **MoA** 284SW823. [d] **In Georgia.**–163Ga 684, 137SE31.

157-89 329 Ill 101, 160NE138.

157-90 163Ga684, 137SE31.

157-93 318 Ill 188, 149NE269; 329 Ill 101, 160NE138; 329 Ill 173, 160NE186; 233 IllA504; 235 IllA587; **Mo** 18SW(2d) 491. [d] **Court will not search record to sustain assignments.**–233 IllA504.

157-94½-New. Abstract must show what judgment was rendered. 318 Ill 188, 149NE269.

157-96 220MoA556, 287SW796.

157-99½-New. Where record discloses defendant's presence at time of verdict and sentence, it is immaterial that abstract of record does not affirmatively make such disclosure. 324 Ill 29, 154NE 408.

157-99¾-New. Matters in the abstract of the record proper to which a certificate of the clerk was appended were properly before the court for review. **Mo** 18SW(2d)491.

157-99¼-New. State's additional abstract and denial of correctness of defendant's abstract will be accepted where record is not certified. **Iowa** 232NW636.

157-1 [a] **Under new rules,** plaintiff in error may cause to be incorporated only parts of record which he desires. 94 Fla264, 114S241.

157-2 181Ark895, 28SW(2d)708; 312 Mo425, 279SW102; 312Mo626, 280SW 703; **Mo** 281SW960; 316Mo66, 289SW 910; 318Mo611, 300SW691; **MoA** 296 SW440; **OklCr** 283P271; **TexCr** 32SW (2d)476. [a] (2) Application for transcript must state grounds of appeal. 81 CalA312, 253P747 (not aided by notice of appeal). [c] **OklCr** 291P144(1stcase). [d] **In Texas.**–112TexCr546, 17SW(2d) 1066(2dcase).

158-4 199Cal610, 250P659; 89 IndA 552, 166NE27; **Mo** 24SW(2d)980; **MoA** 256SW572; **MoA** 282SW737; **TexCr** 28 SW(2d)801; **TexCr** 32SW(2d)197(2d case). [a] (2) It need not show order of court for special venire. 23AlaA274, 124S123(2dcase). [b] (2) Pen. Code § 1246, as amended by St. (1927) p 1047 § 1, operated to render all statutes relating to time and manner of making record in force on Jan. 1, 1927 effective till promulgation of rules by judicial counsel. 88CalA415, 263P841. (3) Provision of Pen. Code § 1247, requiring presentation of application to trial court stating grounds of appeal and designating portions of reporters' notes to be transcribed, remained effective after enactment of such statute of 1927. 88CalA 415, 263P841. (4) Failure to comply with such provision requires dismissal of appeal. 88CalA415, 263P841. [f] (3) Failure to apply for transcript within five days after notice of appeal requires dismissal of appeal under mandatory statute. 81CalA422, 253P961. [g] (2) 108TexCr424, 1SW(2d)320; 112Tex Cr368, 16SW(2d)815; 112TexCr301, 16 SW(2d)823; 113TexCr678, 22SW(2d) 1072 (caption must show date of adjournment); **TexCr** 31SW(2d)1082(2d case). (3) Where caption failed to reflect correct date of adjournment of court, appeal is dismissed. **TexCr** 18 SW(2d)614(2dcase); 112TexCr676, 18 SW(2d)619; **TexCr** 18SW(2d)654; 113 TexCr81, 18SW(2d)661(2dcase). (4) Appeal dismissed where caption does not state date of adjournment of trial court. 100TexCr480, 273SW842. (5) Caption must show date of adjournment. **Tex Cr** 29SW(2d)365. (6) Where trial was held March 15 and caption showed court convened thereafter, appeal will be dismissed. **TexCr** 29SW(2d)774. [i] **Willful or negligent disobedience of rules** may result in refusal to consider transcript. 74Mont269, 240P365. [j] **Mere ignorance of rules** will not in general excuse infraction thereof. 74Mont269, 240 P365. [k] **Inexperience of appointed counsel in appellate procedure** may justify relaxation of rules where prejudicial error is apparent. 74Mont269, 240P365. [l] **Omission of date trial term began** from the caption does not warrant dismissal of appeal. 100TexCr485, 273SW 601. [m] **In Missouri.**–285SW509 (rule applies to one granted leave to appeal as poor person). [n] 262Mass408, 160NE271. [o] **Where failure to comply with court rule** is not due to bad faith and is not prejudicial, dismissal is not required. 36F(2d)657. [p] **In Virginia.**–152SE547. [q] **In Indiana.**–171 NE301.

158-5 98Fla1231, 125S353.

158-7 224Ky124, 5SW(2d)881 (except evidence); 312Mo340, 279SW98; 312 Mo425, 279SW102; 315Mo1276, 288SW 18; 318Mo523, 300SW716; **Mo** 24SW (2d)980; **MoA** 276SW1030; **MoA** 294 SW730(2dcase); **MoA** 295SW477; **MoA** 27SW(2d)753 (short form transcript is not available in case of final judgment); **MoA** 27SW(2d)1070 (short form transcript is not available in criminal cases). See also **MoA** 288SW792. [c] **Transcript need not show** orders of court as to date of trial or for special venue. 214Ala519, 108S536. [d] **Motion to make all testimony part of transcript is properly** denied where made for purpose of having evidence reviewed in connection with overruled motion for new trial on ground that verdict was contrary to law and evidence. 165La584, 115S759. [e] **In Missouri.**–316Mo66, 289SW910; **A** 27 SW(2d)753.

158-8 318Mo523, 300SW716. See also **MoA** 277SW937.

158-8½-New. Statute requiring that transcript shall contain copy of judgment is complied with where transcript contains minute entry of order appealed from sustaining demurrer of accused to information. 75Mont547, 244P477.

158-9 97CalA321, 275P815.

158-12 89 IndA604, 167NE542(1st case). [a] **Bill of exceptions** is only original part of record of trial court authorized to be used in transcript on appeal. **Ind** 171NE301. [b] **Reporter's transcript of evidence** is only original document that may properly be made part of record on appeal. **Ind** 172NE 176.

158-13½-New. Testimony not referred to in, nor attached to, bill of exceptions is properly omitted from transcript. 165 La341, 115S613.

158-15 106TexCr1, 290SW165.

158-15½-New. A separate transcript for each defendant is unnecessary where an appeal by writ of error is taken by several defendants. 224 IllA221.

158-15⅓-New. In Missouri appeal cannot be perfected by filing short form transcript containing certified copy of judgment and order allowing appeal without showing offense. **MoA** 27SW (2d)708(1stcase).

158-16 97Fla367, 120S844; 220MoA 349, 285SW1021; 100TexCr63, 272SW 148; 100TexCr64, 272SW148; 112TexCr 179, 15SW(2d)641. See also 94Fla149, 113S726. [d] **Abstract of record** certified by clerk properly before court. **Mo** 22SW(2d)793.

158-17 15F(2d)168; 198 Ind484, 154 NE3; **NJ** 141A575; **NJSup** 137A844; 104NJL291, 140A287; **TexCr** 28SW(2d) 155; **TexCr** 28SW(2d)172. [a] **Statement in opinion** that record is substantially correct does not supply lack of judge's certificate. 91PaSuper17.

158-18 90CalA594, 266P337; 97CalA 321, 275P815; 220Ky771, 295SW1047.

159-19 220Ky771, 295SW1047.

159-20 196 Ind433, 148NE403; 54SD 424, 223NW340; **TexCr** 20SW(2d)785 (1stcase). [b] **In New Jersey.**–Sup 131 A625. [c] **Appellate court has jurisdiction to review conduct of cause,** which has proceeded to judgment, only on record certified to it by duly constituted authority. 97Fla367, 120S844.

159-21 91PaSuper17.

159-26 NJSup 131A625. [a] (2) Other instances. 322Mo1199, 18SW(2d)492. [b] **Certification held insufficient.**–112 TexCr179, 15SW(2d)641.

159-27 Mo 24SW(2d)1003; **MoA** 282 SW737. [b] **Bill of exceptions under separate cover** filed at same time is within clerk's certificate attached to record proper which indicated intention to certify entire record including such bill of exceptions. 314Mo635, 285SW437.

159-28 IndA168NE598.

159-30½-New. The clerk is not required to repeat in his certificate matters furnished and certified to in the transcript. CalA 265P879.

159-34 39GaA663, 148SE309(1stcase); 234Ky162, 27SW(2d)693; 311Mo473, 278SW970 (clerk may refuse to file where not offered in time); **MoA** 30SW (2d)773; **OklCr** 281P598; **OklCr** 290P 1110(1stcase). [d] **In Florida.**–94Fla60, 113S736.

159-35 90Fla379, 106S126; 200 Ind 398, 161NE1; 89 IndA154, 165NE917 (2dcase); 89 IndA311, 166NE251; 89 IndA470, 166NE777; 224Ky402, 6SW (2d)489; 311Mo473, 278SW970; **MoA** 30SW(2d)773; 194NC715, 140SE727; 194NC738, 140SE728; **OklCr** 275P354 (1stcase); **OklCr** 277P254(1stcase); **OklCr** 277P601(1stcase); **OklCr** 287P 725; 117 Or214, 243P87; 105TexCr74, 286SW1094. [a] (3) Appeal perfected on last day held filed in time. **OklCr** 287P811(1stcase). (4) Other instances. 200 Ind398, 161NE1. [b] **Prosecutor may move to dismiss** in trial court or move in appellate court where transcript was not filed within six months. **MoA** 30SW(2d)773.

160-37 90Fla379, 106S126; 230Ky589, 20SW(2d)455; 318Mo843, 1SW(2d)157; **MoA** 256SW529; **MoA** 30SW(2d)773; 113TexCr265, 20SW(2d)426. [b] **Appellant has burden of showing good cause** for delay. **MoA** 30SW(2d)773.

160-39 **MoA** 30SW(2d)773.

160-42 221AppDiv471, 224NYS140.

160-47 38GaA745, 145SE533. [a] **Appellant must see** that clerk performs duty. **MoA** 30SW(2d)773.

160-47½-New. Statute relating to the time and manner of making up and filing the record on appeal was not intended to be repealed until rules contemplated should be promulgated and adopted by the judicial council provided for in the constitution, since the preparation and filing of a statement is a necessary step, not only in the perfection of a criminal appeal, but is the proper presentation of the record on such appeal. **Cal** 273P795.

160-47⅓-New. A defendant at large on bail is not in custody within the meaning of a statute requiring the justice to deliver the transcript to the clerk of the appellate court if defendant is in custody. 117 Or214, 243P87 (record held to show that defendant was not in custody when appeal was allowed).

160-47¼-New. **In New York,** court has jurisdiction to determine motion, after

expiration of ninety days from filing notice of appeal, to extend time for filing record and appellant's points. 219App Div461, 219NYS610.

160-48 33F(2d)713.

161-58 35F(2d)580.

161-63 21AlaA231, 106S889; 21AlaA 339, 108S620; AlaA 130S317; 169Ark 1173, 278SW15; 88CalA245, 262P1115; 87CalA751, 262P1117(3dcase); 88CalA 617, 264P322; 106Conn701, 139A91; 163Ga121, 135SE917; 163Ga684, 137SE 31; 339 Ill 381, 171NE561; 233 IllA608; 243 IllA216; 198 Ind547, 154NE388; Ind 156NE560; 158La1045, 105S59; 160La470, 107S309; 161La827, 109S 505; 161La1010, 109S819; 162La500, 110S733; 163La794, 112S724; 163La 1093, 113S546; 164La423, 114S83; 165 La474, 115S661; 165La561, 115S751; 257Mass465, 154NE67; 234Mich419, 208 NW458; 238Mich485, 213NW717; Mo 270SW284; 312Mo 447, 279SW72; 317 Mo 354, 296SW397; 221MoA358, 273SW 247 (in absence of brief or argument); 221MoA358, 273SW247; 102NJL659, 133A274; 103NJL128, 134A664; 193NC 845, 137SE657; OhA 172NE338; OklCr 272P385; OklCr 285P990; OklCr 286P 806; OklCr 287P1095; 285Pa97, 131A 667; 152Tenn424, 278SW57; 104TexCr 358, 284SW556; 105TexCr268, 287SW 1097; 105TexCr379, 288SW468; 108 TexCr175, 299SW641; 108TexCr265, 300SW936; 108TexCr494, 1SW(2d)630; 109TexCr108, 3SW(2d)91; 110TexCr 646, 10SW(2d)724; 112TexCr532, 17SW (2d)831(1stcase); 113TexCr628, 23SW (2d)354; TexCr 26SW(2d)267(2dcase); TexCr 27SW(2d)192; TexCr 29SW(2d) 381(2dcase); 101Vt124, 141A686; 34 Wyo 218, 242P802. See also 210Ky542, 276SW507; 158La1021, 105S50. [a] (2) Record is conclusive in considering trial judge's overruling of motion for change of venue on ground that jurors were sworn on voir dire before motion. 198 Ind23, 152NE171. [b] **Recitals in judgment control** as to what verdict of jury was. 151Miss46, 117S369 (conflicting indorsement on back of indictment not considered). [c] **Record may be contradicted** only by other matter of record. 233 IllA608. Record must be corrected before appellate court will consider it. 102NJL659, 133A274. [d] **Court's records, certified by clerk,** import verity, and are alone evidence of what they contain. 97Fla367, 120S844.

161-64 TexCr 32SW(2d)200.

161-65 TexCr 24SW(2d)425(2dcase).

161-66 21AlaA231, 106S889; 169Ark 1173, 278SW15 (affidavits); 333 Ill 258, 164NE682; 198 Ind253, 151NE697; 226 Ky119, 10SW(2d)612; 164La423, 114S 83; 312Mo 447, 279SW72; 81Mont145, 262P158; 197NC350, 148SE546; 197NC 352, 148SE547; 107TexCr383, 296SW 545; 107TexCr174, 296SW588; 113Tex Cr261, 20SW(2d)199; TexCr 24SW(2d) 417; 152Wash365, 278P149. [a] **Verity of bill of exceptions** as settled and signed by trial judge may not be assailed by affidavit or presentation of original transcript. 234Mich419, 208NW458. [b] **Bill of exceptions is frivolous** where it complains that jury list was not served on defendant and per curiam shows that he was served. 164La423, 114S83.

161-70 169Ark1173, 278SW15; 333 Ill 397, 164NE847; 339 Ill 258, 171NE128; Ind 168NE577; 159La779, 106S302; 257Mass465, 154NE67; 220MoA349, 285 SW1021.

162-71 103NJL128, 134A664; 100Tex Cr560, 272SW130.

162-73 See also 42F(2d)40.

162-74 158La842, 104S736 (statements as to what evidence established in support of ruling excluding evidence not taken down); 159La589, 105S631; 160 La272, 107S107; 160La470, 107S309; 160La667, 107S484; 160La757, 107S 564; 161La532, 109S56; 161La827, 109 S505; 164La167, 113S805; 165La270, 115S484; 165La842, 116S206; 167La 967, 120S614; 167La1080, 120S864; 168La1115, 123S800; 169La315, 125S 257; 239Mich695, 214NW965; 220MoA 349, 285SW1021; 100TexCr128, 271SW 909 (acceptance by accused of judge's qualification is binding); 103TexCr171, 280SW213; 104TexCr467, 284SW546; 106TexCr593, 294SW573; 107TexCr389, 296SW605; 108TexCr657, 2SW(2d)264; 108TexCr655, 2SW(2d)439; 110TexCr 512, 8SW(2d)144, 60ALR290; 110Tex Cr575, 9SW(2d)739; 111TexCr300, 12 SW(2d)1018; 111TexCr601, 13SW(2d) 378; 112TexCr390, 16SW(2d)1065; Tex Cr 28SW(2d)551. [a] **Court's failure to instruct of own motion relative to argument of prosecuting attorney** is held not error where it appeared from judge's per curiam to bill of exceptions that substance of argument as a whole was not to that effect. 160La470, 107S309. [b] **Judge's assertion on motion for new trial** that determination was made "after hearing the defendant" embodied in defendant's bill of exceptions has been held binding on defendant, since defendant should have set forth relevant facts if he desired to contest truth thereof. Mass 165NE2. [c] **Where facts are not taken down by clerk or official stenographer,** and properly certified copy attached to bill of exceptions, judge's per curiam is controlling. 161La827, 109S505. [d] **Court of criminal appeals is bound by statement in bill of exception** that evidence raised certain issue. 112TexCr52, 14SW(2d)67.

162-76 [a] 106TexCr593, 294SW573.

162-76½-New. Also where judge's statement is to effect that evidence shows that defendant's contentions are not supported by the evidence. 161La 532, 109S56.

162-76⅓-New. Motion for trial will be denied when trial judge's statement shows facts did not occur. 161La532, 109S56.

162-77 100TexCr183, 272SW475; 103 TexCr216, 280SW785; 103TexCr311, 280SW817; 104TexCr26, 282SW245; 104TexCr661, 285SW617; 105TexCr291, 288SW226; 105TexCr614, 289SW1013; 109TexCr283, 4SW(2d)47; 110TexCr 193, 8SW(2d)161; 111TexCr378, 13SW (2d)112; 111TexCr419, 13SW(2d)116; 112TexCr239, 16SW(2d)130; 112TexCr 343, 16SW(2d)1074; TexCr 24SW(2d) 60(2dcase); TexCr 25SW(2d)350; Tex Cr 27SW(2d)817 (bill, as qualified, held insufficient); TexCr 28SW(2d)1084(2d case); TexCr 32SW(2d)358. But see TexCr 21SW(2d)733. [a] **Where trial court certifies** that argument of district attorney was without evidence to support it and was prejudicial, conviction must be reversed. 113TexCr569, 24SW (2d)427(1stcase).

162-78 99TexCr529, 270SW552; 101 TexCr158, 274SW619; 101TexCr635, 276SW907; 102TexCr604, 278SW1104; 103TexCr311, 280SW817; 103TexCr420, 281SW210; 104TexCr205, 282SW812; 104TexCr308, 283SW817; 104TexCr661, 285SW617; 105TexCr516, 289SW54; 106TexCr88, 290SW768; 106TexCr394, 292SW548; 110TexCr193, 8SW(2d)161; TexCr 26SW(2d)236(2dcase); TexCr 28 SW(2d)1084(2dcase). [a] **Appellant has a clear right to relieve himself of the situation** (1) by having court certify that he objected and excepted to qualification. 104TexCr205, 282SW812. (2) Then if trial court files no bill of exceptions of its own, bill as originally prepared by appellant will be considered without court's qualification thereto. 104 TexCr205, 282SW812. (3) But appellate court must accept qualifications as true in absence of objection. 104TexCr 205, 282SW812.

162-79 180Ark1160, 24SW(2d)859.

162-81½-New. Facts shown on trial of motion to quash indictment, as stated by judge, control in absence of evidence from record. 159La589, 105S631.

162-81⅓-New. A case must be heard on exceptions as established. 257Mass 465, 154NE67.

162-81¼-New. Bill of exceptions to admission of testimony is held to manifest no error in view of trial judge's statement in signing it and statement of facts showing that statement in reference to testimony was not true. 104Tex Cr26, 282SW245.

162-81⅕-New. Court is bound by bill of exception and will take no cognizance of what appears in motion for new trial. 216Ky317, 287SW898.

162-81⅙-New. Judge's qualification of bill of exceptions that certain evidence did not go to jury does not answer error in permitting cross-examination as to offenses not involving moral turpitude. 106TexCr439, 292SW901.

162-81⅐-New. A statement of the trial judge that a juror was not examined as to relationship controls the statement in the brief. 164La597, 114S171.

162-82 23AlaA90, 121S443(2dcase); 210 Ky71, 275SW22; 162La287, 110S424; 163La794, 112S724; 163La1093, 113S 546; 164La423, 114S83; 165La47, 115S 363 (per curiam statement which contradicts bill is controlling); 169La315, 125S257; 244Mich258, 221NW307; 150 SC449, 148SE472; 102TexCr492, 278SW 440. See also 34Ariz144, 268P617. But see 91Fla1026, 109S804. But see MoA 256SW514. [c] **Where there is conflict of dates** relating to authenticity of bill of exceptions, date certified by trial judge is controlling. 200Ind125, 160NE 673.

162-83 101TexCr377, 276SW291; 106 TexCr169, 291SW554; 107TexCr151, 295SW1098; 111TexCr345, 13SW(2d) 98; TexCr 29SW(2d)392; TexCr 31SW (2d)440. See also 113TexCr122, 18SW (2d)618. [b] **Court need not consult statements of facts** to verify judge's qualification to bill of exceptions. 102 TexCr492, 278SW440.

163-84½-New. Bills of exceptions, being a part of the record under statute, prevail over recitations in order, whenever there is any conflict as to the facts. 152Va941, 146SE270.

163-87 160Ala316, 107S123; 227Ky 528, 13SW(2d)521; 158La713, 104S627; 158La755, 104S705; 158La1045, 105S59 (statement in bill of exceptions held to control statement in brief as to remark of counsel at trial); 161La532, 109S56; Mo 256SW814; TexCr 3SW (2d)435. See also 168La948, 123S636 (1stcase).

163-88 But see 19BC261, 16DomLR126, 22CanCrCas304, 27WestLR108, 5West Wkly1303.

163-88½-New. But it is held otherwise as to record made by deputy clerk employed by defendants. 161La532, 109S 56.

163-91 See also Can [1930] 2DomLR 945.

163-93½-New. The certified clerk's transcript prevails over a recital in an order directing the phonographic reporter to transcribe his notes as to the date of the filing of the application stating the grounds of appeal. CalA 265P879.

163-93¼-New. Where there is a conflict between an instruction objected to and the bill of exceptions, the latter controls. 210Ky71, 275SW22.

163-93¼-New. In case of conflict between the bill of exceptions on file in the clerk's office and the printed record, the bill of exceptions must control. 234Mich 419, 208NW458.

163-93⅓-New. In case of conflict between bill of exceptions per curiam and clerk's record, latter controls. 159La 779, 106S302.

163-93⅕-New. Where record indicates that motion for severance may have been filed on either of two dates, appellate court will determine which is more probable. 104TexCr228, 283SW507.

163-93½-New. A bill of exceptions qualified by a statement contradicted by the judge's charge will be considered. 107TexCr444, 296SW897.

163-96 233 IllA53; 34Wyo 102, 241P 715.

163-98 235Ky476, 31SW(2d)714 (motion to strike case from docket proper); 318Mo 523, 300SW716; 113TexCr342, 21 SW(2d)670(2dcase) (conflict as to date of adjournment of trial term).

163-2 111TexCr272, 12SW(2d)568.

163-5½-New. The district attorney may agree to waive timely signing of a bill of exceptions. 166La814, 118S829.

163-8½-New. Record is liberally considered on appeal to permit decision upon merits where the death penalty has been assessed. 109TexCr440, 5SW(2d) 157.

163-10½-New. Substitutions and corrections. Where no order amending transcript appears of record, attempted substitution is treated as nullity. 169 **Ark**503, 275SW895.

164-13 213**AppDiv**674, 210NYS21 (stenographic notes). [a] **Appeal dismissed** unless loss shown to be without fault of defendant or counsel and that copy could not be supplied. **OklCr** 292P 1055.

164-14 34F(2d)441; 41F(2d)193.

164-16 39**Ga**A834, 148SE756; 233 **Ill**A 608; 225**Ky**461, 9SW(2d)136 (filing by commonwealth of supplemental record); 30**Mo** 695, 274SW470; 316**Mo** 995, 292 SW70; **Mo** 18SW(2d)491; 87**PaSuper** 585; 34**PortoRico** 420 (amendment of judgment so as to specify offense); 34 **PortoRico** 431 (amendment of judgment to specify offense); 102**TexCr**563, 278 SW846; 103**TexCr**540, 281SW857. [b] **Bill of exceptions** may be amended on proper showing. **Mo** 270SW284. [i] **Defects in transcript must be raised by motion to amend,** not by motion for rehearing. 102**TexCr**563, 278SW846. [j] **Formal order to correct record** is unnecessary in order that omitted bill of exceptions may be considered. 110**TexCr** 116, 7SW(2d)958. [k] **Prior judgment of affirmance need not be set aside** in order that court may consider substitute bill on motion for rehearing. 110 **TexCr**116, 7SW(2d)958. [l] **Amendments applying to matter of perfecting appeal.**–195**Ky**763, 328SW(2d)334.

164-16½-New. But supplemental record not verified by presiding judge and contradicting record that bears his approval cannot be considered by appellate court. 153**Tenn**198, 281SW462.

164-17 [a] **Sufficiency of showing of fraud on trial court.**–**TexCr** 308SW(2d) 310.

164-17½-New. A defendant in a criminal case, who runs away or is defaulted, and who is not sentenced, cannot invoke aid of law to correct errors in record. 253**Mass**172, 148NE570.

164-17¼-New. A statement filed in the trial court, signed by the judge, not constituting part of the record of the trial court, cannot be used to correct the transcript of record on appeal. 198 **Ind**484, 154NE3.

164-17¾-New. Attaching affidavits to motion for rehearing is not authorized method of correcting record. 106**TexCr** 515, 293SW571.

164-19 163**Ga**684, 137SE31 (brief of evidence); 161**La**827, 109S505; 50SD32, 208NW164; 111**TexCr**511, 148SW(2d) 274.

164-20 169**Ark**503, 275SW895 (to amend record to conform to facts); 161**La**827, 109S505; 163**La**51, 111S492. [c] **In Arkansas.**–169**Ark**503, 275SW895.

165-21 26F(2d)870; 152**Tenn**424, 278 SW57 (supreme court will not remand to correct clerical error on unsupported motion of party to cause); **TexCr** 31 SW(2d)1075(2dcase).

165-23 29F(2d)444 [certiorari den **US** 49SCt253(4thcase)]; 165**Ga**287, 140SE 752; 38**Ga**A437, 144SE135(1stcase); 48 **Nev**358, 232P778, 235P645; 189**NC**538, 127SE599; 109**TexCr**251, 4SW(2d)74.

165-24 **NJ** 135A546; 119 **Or**618, 249P 635; 99**TexCr**512, 270SW1018.

165-25 **Conn** 151A349.

165-25½-New. The trial court, after granting a special bill of exceptions to rulings made during the course of the trial, may, before the expiration of the term, amend or revoke it. 140**Miss**597, 105S747.

165-25¼-New. Court of appeals may treat as done what should have been done without waiting for formal nunc pro tunc correction of record proper. 220**McA**349, 285SW1021.

165-26 35F(2d)849; 165**Ga**287, 140SE 752; 155**Wash**80, 283P671. But see 23 **AlaA**299, 124S406(2dcase). [a] **Evidence in brief thereof** held not subject to substitution on appeal record. 165**Ga** 287, 140SE752.

165-31 207**Cal** 172, 277P320; 106**TexCr** 169, 291SW554.

165-34 But see **NJSup** 133A412 (error in printing date of exhibit held shown by photostatic copy attached to brief).

165-40 107**TexCr**635, 298SW433.

166-42 22**AlaA**105, 113S87.

166-46½-New. or to show presentment of indictment, 106**TexCr**593, 294SW573.

166-48 154**Wash**322, 282P55 (bill cannot be supplemented).

166-52 198 **Ind**484, 154NE3; 99**TexCr** 512, 270SW1018. [b] **Court of criminal appeals is not authorized to issue writ of certiorari** commanding clerk of trial court to forward perfect transcript of record and corrected judgment of trial court's action in overruling motion for new trial. 111**TexCr**511, 148SW(2d)274.

166-54 22**AlaA**515, 117S499; 108**TexCr** 647, 28SW(2d)271. [a] **Application is denied** when not accompanied by certified copy of necessary papers. **TexCr** 278SW (2d)807.

166-55 113**TexCr**265, 20SW(2d)426; **TexCr** 248SW(2d)48.

166-56½-New. Where matters omitted would avail appellant nothing writ will not issue. **Ala** 128S169.

166-58 38F(2d)554. See also **TexCr** 26 SW(2d)1076(2dcase) (immaterial matters).

166-61 But see 100**TexCr**361, 272SW 193.

166-61½-New. When original bill may be copied in transcript, certiorari to require clerk to copy such bill will be refused. **Ind** 171NE301.

167-73½-New. Certiorari may be denied for inconsistent allegations in an application for a writ. 98**Fla**599, 124S1.

167-73¼-New. Record as established by return sufficient to show circuit court had jurisdiction. 20**AlaA**637, 104S686.

167-74 159**La**1093, 106S651; 165**La**657, 115S814; **La** 129S684; 44**AppDiv**6, 60 NYS436, 14**NYCr**167. [b] **Remand of cause** is not necessary on remand of record in some jurisdictions. 119 **Oh**162, 162NE429.

167-75½-New. , or where the motion made therefor was abandoned; 162**La** 500, 110S733.

167-76 108**TexCr**647, 28SW(2d)271.

167-76½-New. Where a bill of exceptions contains errors of fact, the proper procedure to correct them is by motion to remand to the trial court for resettlement. 234**Mich**419, 208NW458.

167-77 13F(2d)756; 15F(2d)372; 22 **AlaA**368, 115S766; 44 **Ida**739, 260P164; 339 **Ill** 225, 171NE152 (record must show what was done to all defendants convicted); **Kan** 289P483 (record of trial court); 161**La**335, 108S663; 166**La**653, 117S752; 147**Miss**171, 113S177; 318**Mo** 628, 300SW743; **MoA** 256SW572; 81 **Mont**145, 262P158; 33**NM**573, 272P565; 121 **Oh**292, 168NE139; **OhA** 173NE300; **OklCr** 287P424; **OklCr** 287P839; 33 **PortoRico** 72; 34**PortoRico** 519; 99 **TexCr**659, 271SW91; 103**TexCr**112, 280 SW222; 105**TexCr**497, 288SW1072; **TexCr** 208SW(2d)423; **TexCr** 278SW(2d) 226; **TexCr** 278SW(2d)224; **TexCr** 27 SW(2d)236; **TexCr** 278SW(2d)245(2d case); **TexCr** 31SW(2d)645; 33**Wyo** 428, 240P219 (exceptions). [a] **Defendant's case is in supreme court on strict writ of error** where they attempted to have entire record reviewed under statute but did not specify reasons for reversal. **NJSup** 135A339.

167-78 86**CalA**432, 260P912; 40**GaA** 156, 149SE96; 41**GaA**574, 153SE613; 198 **Ind**484, 154NE3; 168**La**939, 123S 633(1stcase); 153**Md**700, 138A329; 168 **Minn**26, 209NW489; **MoA** 274SW1097; **Mo** 287SW943; **Mo** 300SW706; **NJSup** 135A339; 103**TexCr**112, 280SW222; 105 **TexCr**497, 288SW1072; **TexCr** 294SW 220; 107**TexCr**438, 296SW886; 109 **TexCr**40, 28SW(2d)860 (complaining of all supposed errors held insufficient). [a] **Reviewing court may not speculate,** but must pass on record as it comes before it. 21**AlaA**72, 105S428.

167-78½-New. Matters properly stricken from record cannot be considered. 318 **Ill** 227, 149NE230.

167-78¼-New. Notation signed by district attorney qualifying bill of exceptions not signed by trial judge will not be considered. 105**TexCr**198, 287 SW251.

167-79 217**Ky**518, 289SW1102; 161**La** 250, 108S471; **MoA** 308SW(2d)631(1st case); **OklCr** 293P278 (where case-made is defective); **TexCr** 278SW(2d)198(2d case); **TexCr** 278SW(2d)236; 109**TexCr** 218, 38SW(2d)816; **TexCr** 168SW(2d) 242; **TexCr** 318SW(2d)653. [a] **Record is appellate court's only source of judicial knowledge.** **NC** 154SE604.

167-79½-New. Where the reviewing court is not referred to a statement of facts by any recital in the bill of exceptions on an appeal from a conviction of murder, it is not called upon to go to the statement of facts in aid of the bill. 111**TexCr**182, 118SW(2d)519.

167-80½-New. nor will such assignment be considered where the record does not show that the motion was ever presented to or acted upon by the trial court or that any exception was reserved; 107**TexCr**43, 294SW549.

168-84½-New. Grounds of motion for directed verdict must appear in record, for appellate court to review ruling. 87 **Colo** 188, 285P1102.

168-84¼-New. To ascertain the setting and determine the probable effect of matters complained of on appeal, examination of the statement of facts is permissible. 112**TexCr**370, 17SW(2d)61.

168-84¼ It is the duty of the appellate court to consider all questions apparent upon the record or reserved by a bill of exceptions that are properly presented. 217**AlaA**410, 116S112.

168-84½-New. In the absence of order of court filing purported bill of exceptions in which reference was made to a bill of evidence, the only question before the court is the sufficiency of the indictment. 213**Ky**509, 281SW498.

168-84¾-New. The denial of a motion to suppress evidence obtained by search of defendant's home is not reviewable where the record does not contain the testimony of the state's witnesses adduced at the hearing of the motion. 76 **Mont**66, 244P882.

168-84⅞-New. Record proper and bill of exceptions may be sufficiently presented to warrant passing on merits, although matters ordinarily required to be brought up by bill of exceptions are also set out at length in the record proper. 315**Mo** 156, 285SW718.

168-84⅞-New. To require consideration, bill of exceptions must be explanatory to such a degree that court may determine from it alone whether ruling complained of is erroneous. 104**TexCr** 38, 282SW225.

168-85 5F(2d)943; 23**AlaA**339, 125S 382 (demurrer not appearing in record); 226**Ky**296, 108SW(2d)1094; 234**Ky**544, 288SW(2d)732; 312**Mo** 134, 278SW713; 103**NJL**246, 136A164; 105**TexCr**297, 288 SW224; **TexCr** 248SW(2d)45; 147**Va**678, 137SE478. [a] **Where document called "transcript of evidence" could not be considered by court of appeals,** because not complying with code, nothing was left for reviewing court's consideration except sufficiency of indictment. 227 **Ky**631, 13SW(2d)788.

168-86 100**CalA**113, 279P1070; **MoA** 299SW821; 103**TexCr**651, 281SW1050; 111**TexCr**45, 10SW(2d)999.

168-87 21**AlaA**270, 108S617; 307**Mo** 365, 270SW291; 311**Mo** 510, 278SW1040 (must be in bill of exceptions); 147**Va** 671, 137SE469. See also 200 **Ind**4, 161 NE6. [b] **Plea of former jeopardy** cannot be sustained on appeal where former indictment is not part of record. 156 **Tenn**599, 48SW(2d)351.

168-88 **Mo** 285SW412. See also **Ill** 172 NE812.

168-89 **Mo** 280SW1044; 309**Mo** 89, 273 SW736.

168-90 200 **Ind**56, 160NE345; 229**Ky** 87, 16SW(2d)769; **Mo** 278SW665; 312 **Mo** 15, 278SW743; **SD** 229NW398; **Utah** 266P272; 147**Va**678, 137SE173. [a] (1) **MoA** 296SW219. (2) 35**PortoRico** 109. (5) Where motion not contained in bill of exceptions. **Mo** 228SW(2d)787. (6) Where motion not in record. **Mo** 268SW (2d)937. [c] **Oral motion to quash indictment is reviewable** where record shows reduction to writing before jury charge and entry of order overruling it. 108**TexCr**77, 299SW259. [d] **Minutes of court** have been held sufficient. **TexCr** 288SW(2d)537(2dcase).

168-91 312**Mo** 15, 278SW743.

168-91½-New. In the absence of the evidence where the information does not indicate whether each of the offenses al-

leged in two counts grew out of the same act or transaction, the court on appeal cannot say that the two counts were based upon one continuous criminal act. 75Mont30, 241P616.

168-91½-New. In determining question of misnomer, court must pass on original indictment as it was without words added after the trial. 21AlaA406, 108S642.

168-91¼-New. The record need not affirmatively show the full number of persons required on the grand jury or voting on an indictment in the absence of a motion to quash the indictment or challenge to array. 329 Ill 576, 161NE83.

168-91⅓-New. To pass on variance between letter as pleaded and proved, copy of exhibit should be in record. 42F(2d)40.

168-92 323 Ill 37, 153NE702; Mo 256SW753; 320Mo 327, 7SW(2d)273 (record held incomplete).

168-93 215Ala42, 109S109; 169Ark1212, 275SW332; 323 Ill 129, 153NE596; 209Ky59, 272SW29; 144Miss634, 110S206; 152Miss43, 118S369; 100TexCr609, 272SW187; 104TexCr495, 283SW498; 110TexCr258, 8SW(2d)133.

168-96 323 Ill 37, 153NE702; 335 Ill 61, 166NE462; 209Ky59, 272SW29; 220Ky686, 295SW979; 226Ky318, 10SW(2d)1099; 318Mo 1185, 2SW(2d)731; Mo 24SW(2d)1008; 315Mo 1276, 288SW18; 109TexCr168, 3SW(2d)459; 111TexCr101, 10SW(2d)87; TexCr 27SW(2d)217 (2dcase).

169-97 150Miss204, 116S612; 105TexCr490, 288SW1075; 111TexCr4, 10SW(2d)730; 113TexCr555, 23SW(2d)721.

169-97½-New. , or any order or judgment overruling a motion for continuance. 101TexCr645, 276SW906.

169-98 156Md149, 143A872; 105TexCr322, 288SW467; TexCr 31SW(2d)648. [a] **Facts constituting surprise** must be shown. 177Ark91, 5SW(2d)716.

169-1 177Ark91, 5SW(2d)716.

169-1½-New. The refusal of a continuance is not reviewable where neither the motion therefor nor any reference thereto appears in the record otherwise than in a motion for a new trial. 169Ark293, 274SW10.

169-1⅓-New. Refusal of continuance to secure attendance of witness is not ground for reversal where record does not show defendant offered to read affidavit during trial so as to afford the court an opportunity to make ruling. 216Ky26, 287SW20.

169-2 335 Ill 415, 167NE49; 196 Ind509, 149NE57; Ind 165NE560; 205 Iowa853, 216NW756; 228Ky432, 15SW(2d)273; 162La287, 110S424; 150Miss787, 117S119; Mo 256SW753; 314Mo 612, 286SW29; Mo 289SW788; 316Mo 31, 292SW434; 101TexCr346, 276SW244; 104TexCr11, 282SW233; 105TexCr78, 286SW1102; 108TexCr499, 1SW(2d)896; TexCr 20SW(2d)424; TexCr 28SW(2d)812; TexCr 29SW(2d)346(2dcase).

169-3 94Fla149, 113S726; 317Mo 413, 297SW63; 100TexCr114, 272SW149; 101TexCr346, 276SW244; 106TexCr482, 293SW173; 111TexCr223, 12SW(2d)564.

169-3½-New. The motion itself is no evidence of facts asserted therein. 94Fla149, 113S726.

169-4 166Ga645, 144SE193; 209Ky832, 273SW511; 101TexCr12, 274SW599; TexCr 28SW(2d)554.

169-5 196 Ind509, 149NE57; 164La597, 114S171.

169-7½-New. Statement that each juror was permitted, over objection, to state that he would not let unsavory reputation of a witness influence him is not sufficient to show that court ruled that only such persons were competent. 171 Ark1118, 287SW400.

169-7⅓-New. A motion to quash the panel of jurors and to discharge them is not subject of review where it is not set out or called for in the bill of exceptions, although it is set out in the record proper. 312Mo 411, 278SW1036.

169-7¼-New. Where the names of jurors comprising the completed jury do not appear in the record, the appellate court cannot pass on the qualification of jurors. 147Miss171, 113S177.

169-7⅕-New. Review of undisputed facts relating to competency of jurors does not require bill of exceptions to recite that it contains all evidence. 160Tenn258, 23SW(2d)656.

169-8 14F(2d)881; 20F(2d)328; 23AlaA10, 119S243(2dcase); 175Ark752, 2SW(2d)36; 78CalA167, 248P289; 209Ky59, 272SW29; 214Ky458, 283SW427; 214Ky544, 283SW385; 215Ky613, 286SW696; 227Ky249, 12SW(2d)289; 161La368, 108S773; 313Mo 615, 285SW392; 316Mo 31, 292SW434; Mo 22SW(2d)802; Mo 24SW(2d)1032; 118 Or397, 247P146; 287Pa512, 135A301; 100TexCr553, 271SW631; 107TexCr444, 296SW897; 108TexCr494, 1SW(2d)630; 112TexCr191, 14SW(2d)845; 112TexCr185, 15SW(2d)615; 113TexCr506, 22SW(2d)667 (permitting cross-examination of defendant's character witness as to previous arrest of defendant where bill did not show reply as to charge against him); TexCr 32SW(2d)361; TexCr 31SW(2d)632; 142Wash417, 253P450. [b] **Surprise in calling witness whose name did not appear on list furnished** cannot be claimed where affidavits are conflicting and bill of exceptions silent. 230Ky411, 19SW(2d)1091, 66ALR360. [c] **Bill of exceptions held insufficient.**-TexCr 28SW(2d)153. [d] **Trial of defendant according to provisions of new code of criminal procedure,** not yet in force at time of trial, is not ground for reversal, where it was not shown in what way procedure differed from method prevailing prior to adoption of code. 167La547, 119S869. [e] **Court may look to record** to gauge relevancy of objection. Va 152SE547.

170-11 215Ky613, 286SW696.

170-12 14F(2d)881; 20F(2d)328; 33F(2d)65; 33Ariz354, 264P1083; 179Ark1198, 18SW(2d)914; 69CalA596, 231P1001; 195Cal 325, 233P97; 78CalA167, 248P289; 80CalA50, 251P244; CalA 283P881; CalA 288P788; 97Fla908, 120S525; 324 Ill484, 155NE329; 339 Ill 258, 171NE128; 201 Iowa1089, 202NW90; 200 Iowa341, 204NW215; 202 Iowa722, 210NW904; 208 Iowa818, 222NW394; 208Ky538, 271SW566; 209Ky59, 272SW29; 209Ky787, 273SW515; 212Ky758, 280SW106; 214Ky125, 282SW775; 214Ky544, 283SW385; 215Ky613, 286SW696; 215Ky722, 286SW1047; 215Ky752, 286SW1063; 216Ky26, 287SW20; 224Ky13, 5SW(2d)275; 227Ky831, 14SW(2d)146; 229Ky207, 16SW(2d)1016; 229Ky312, 17SW(2d)241; 230Ky207, 18SW(2d)995; 231Ky152, 21SW(2d)231; 232Ky10, 22SW(2d)298; 232Ky590, 24SW(2d)280; 235Ky340, 31SW(2d)383; 235Ky734, 32SW(2d)38; 167Minn216, 208NW761; 168Minn401, 210NW402; 172Minn208, 215NW206; 143Miss318, 108S722; 146Miss285, 111S378; Mo 256SW753; Mo 278SW669; Mo 279SW109; 315Mo232, 285SW712; 316Mo 31, 292SW434; Mo 300SW815; 318Mo 1185, 2SW(2d)731; 318Mo1173, 2SW(2d)777; Mo 11SW(2d)1010(1stcase); Mo 12SW(2d)53; Mo 18SW(2d)474; Mo 22SW(2d)802; Mo 23SW(2d)1; 81Mont145, 262P158; 114Nebr853, 211NW188; 48Nev358, 232P778, 235P645; NJSup136A343; 53ND520, 206NW784; OklCr279P363; OklCr 287P733; OklCr 287P842; OklCr 287P1067; OklCr 289P786; 292Pa210, 140A898; SD 232NW909; 99TexCr572, 271SW99; 100TexCr598, 272SW166; 100TexCr202, 272SW460; 100TexCr480, 273SW842; 101TexCr26, 273SW851; 101TexCr154, 274SW608; 101TexCr598, 276SW283; 103TexCr590, 281SW560; 105TexCr272, 288SW207; 105TexCr497, 288SW1072; 105TexCr501, 289SW1008; 106TexCr586, 194SW221; 109TexCr32, 2SW(2d)846; 110TexCr68, 7SW(2d)535; 110TexCr296, 8SW(2d)186; 113TexCr62, 18SW(2d)172; 113TexCr122, 18SW(2d)618; 113TexCr247, 20SW(2d)431; TexCr 20SW(2d)785(2dcase) (bill of exceptions held insufficient); TexCr 23SW(2d)391; TexCr 27SW(2d)217(2dcase); TexCr 31SW(2d)634; 142Wash417, 253P450; Wash 287P23. [a] **Where statement of prosecutor did not appear,** refusal of court to rebuke therefor cannot be sustained as error. 180Ark290, 21SW(2d)176.

170-12½-New. To alleged misconduct of counsel. 217Ky99, 288SW1047; 223Ky233, 3SW(2d)629 (facial expressions, manner, and bearing).

170-13 214Ky544, 283SW385; 165La270, 115S484; 168Minn401, 210NW402. [a] **Bill of exceptions to assignment** presenting special charges requesting withdrawal of argument, and containing trial judge's statements that facts were improperly stated and all requested charges given, shows no reversible error. 106TexCr378, 292SW546.

170-13½-New. As assignment of error on the failure of the prosecuting attorney to make an opening statement is not tenable where the record does not affirmatively show that he failed to do so or that the attention of the trial court was called to such question in the motion for a new trial. 217MoA26, 273SW139.

170-14 23AlaA188, 122S306; 87CalA208, 261P1072; 98CalA499, 277P170(2d case); 260Mass233, 157NE538; Mo 256SW753; 49Nev386, 248P48; 101TexCr46, 274SW150. But see 106TexCr361, 293SW1108.

170-15 210Ky378, 275SW881 (party relying on misconduct of judge must include such misconduct in bill of exceptions); 47RI 483, 134A20.

170-16 Ind 170NE542; 215Ky613, 286SW696; 223Ky402, 3SW(2d)775; TexCr 20SW(2d)770 (assignment of error that jury were permitted to taste liquor held unsupported by showing that court ruled that they might sample it).

170-17 106TexCr118, 290SW537; 108TexCr444, 1SW(2d)617; 113TexCr506, 22SW(2d)667.

170-18 214Ky458, 283SW427; 215Ky613, 286SW696.

170-20 318Mo 542, 300SW699.

170-22 85CalA789, 260P303.

170-25 TexCr 31SW(2d)639.

170-26 85CalA306, 259P361; 318Mo712, 300SW738; 147SC480, 145SE285.

170-30 33Ariz354, 264P1083; 69CalA609, 231P1014 (deprivation of right of counsel and cross-examination of witnesses at preliminary examination); 91CalA516, 267P370; DC 32F(2d)947; 335 Ill 432, 167NE10; 209Ky59, 272SW29; 232Ky171, 22SW(2d)586 (misconduct of juror); 264Mass94, 162NE7; 30Mich435, 203NW87 (where record fails to show improper remarks of counsel which are denied by him and trial court, alleged error will not be considered); Mo 28SW(2d)777; 318Mo 679, 300SW687 (mere charge of jury's passion or prejudice not shown by record); 114Nebr404, 207NW928 (admonition to jury on adjournment sufficiently shown in transcript though not in bill of exceptions); 118 Or397, 247P146 (error in permitting questions on cross-examination not reviewable in absence of direct examination); 101TexCr346, 276SW244 (permitting witness to testify after close of evidence); 104TexCr619, 286SW214; 105TexCr405, 289SW73; 109TexCr195, 3SW(2d)811 (separation of jury); 109TexCr272, 4SW(2d)78 (refusal to permit impeachment of witness showing that predicate has been laid).

171-31 274US328, 47SCt650, 71Led1077; 5F(2d)503; 15F(2d)194; 17F(2d)339; 32F(2d)644; 38F(2d)613; 20AlaA547, 104S48 (bill of exceptions should show meaning of gestures used by witness and word "indicating" should not be used in substitution therefor); 21AlaA270, 108S617; 21AlaA479, 109S386; CalA 291P837; 106Conn701, 139A91; 98Fla482, 123S916(1stcase); 198Ind484, 154NE3; 198 Ind477, 154NE9; 200 Ind125, 160NE673; Ind 170NE539; Ind 171NE585; Ind 172NE904; 89 IndA624, 167NE563(1stcase); 160La26, 106S662; 160La667, 107S484; 161La167, 108S324; 167La1085, 120S865; 169La141, 124S672; 242Mich532, 219NW641; 244Mich258, 221NW307; 307Mo 365, 270SW291; Mo 279SW705; 316Mo 111, 289SW564; MoA 282SW465; MoA 293SW485; MoA 16SW(2d)648; 102NJL388, 132A93; 103NJL246, 136A164; NJSup140A404; 33NM540, 273P919; 118 Or397, 247P146; 32PortoRico 143; 32Por-

teRico 149; 100TexCr54, 271SW902; 100TexCr76, 271SW922; 101TexCr567, 285SW1094; 108TexCr499, 18W(2d)896; 109TexCr40, 28W(2d)866; 101TexCr172, 273SW1116; TexCr 290SW1115; TexCr 290SW1116; 106TexCr378, 292SW546; 106TexCr384, 292SW885; 106TexCr618, 294SW388; 107TexCr345, 296SW525; TexCr 28SW(2d)53; 110TexCr11, 7SW(2d)95; 111TexCr272, 12SW(2d)568; 112TexCr92, 14SW(2d)63(2dcase); 111TexCr476, 14SW(2d)842; 111TexCr520, 14SW(2d)855; 111TexCr543, 15SW(2d)637; 112TexCr299, 16SW(2d)816; 198Wis176, 223NW416. [a] **Court cannot determine pertinency** of cross-examination where facts proved on direct examination are not shown. 106TexCr378, 292SW546. [b] **Where record shows no attempt to make certain proof,** assignment that defendant was not permitted to make it cannot be considered. 79CalA328, 249P231. [c] **Bill of exceptions itself** must manifest error of which complaint is made. TexCr 25SW(2d)870.

171-32 338 Ill 128, 170NE240 (motion to suppress and return evidence); 318 Mo 761, 300SW755; TexCr 32SW(2d)182.

171-34 316Mo 111, 289SW564 (questions not connected with evidence); 33 PortoRico 995(2dcase); 33PortoRico 997.

171-36 21AlaA479, 109S386; 329 Ill 101, 160NE438; 197 Ind705, 151NE829; 161La731, 148S636; 150Miss756, 116S887; MoA 256SW540; MoA 282SW465; NJSup 132A312; NJSup 140A435; 160 Tenn[illegible], 23SW[illegible]656.

172-37 26F(2d)241; 21AlaA286, 107S786; 338 Ill 177, 170NE218; 88 IndA445, 164NE508; 261Miss292, 158NE782; 111TexCr285, 12SW(2d)576; 111TexCr623, 13SW(2d)376(2dcase); 111TexCr731, 15SW(2d)648; 106WVa262, 115SE389; 23Wyo110, 26[illegible].

172-39 32F(2d)893; 197 Ind705, 151NE829. See also 159Tenn537, 20SW(2d)1045(2dcase).

172-41 200 Ind165, 162NE234.

172-42 225Ky461, 9SW(2d)136; 229Ky634, 17SW(2d)432(2dcase); Utah 283P437(1stcase).

172-43½-New. Where the record does not show ruling on motion to suppress evidence, a question in regard to it cannot be raised. 199 Ind481, 158NE241.

172-44 15F(2d)811; 20F(2d)783; 20AlaA[illegible]; 102S902; 169Ark257, 275SW[illegible]; 170Ark3[illegible]; 280SW353; 170Ark119, 283SW12; 172Ark23, 287SW765; 172Ark156, 287SW1026; 175Ark170, 299SW354; 175Ark752, 28W(2d)36; 176Ark895 28W(2d)67; 77CalA375, 246P815; 88CalA302, 263P345; 197 Ind218, 150NE311; 198 Ind70, 152NE277; 198 Ind177, 154NE69; 203 Iowa251, 212NW475; 214Ky205, 282SW1090; 222Ky89, 300SW365; 231Ky463, 21SW(2d)800; 234Ky135, 27SW(2d)683; 126Me351, 138A527; 254Miss620, 150NE854; 261Miss221, 162NE308; 154Miss862, 123S892; Mo 285SW400; 309Mo498, 274SW734; 315Mo 232, 285SW712; Okl Cr 287P816; 43 OklACR321 [reh pending]; 100TexCr180, 273SW842; 100TexCr185, 273SW601; 101TexCr12, 274SW599; 101TexCr31, 274SW135; 101TexCr86, 273SW598; 101TexCr491, 276SW387; 101TexCr670, 276SW919; 102TexCr553, 278SW853; 102TexCr604, 278SW1104; 103TexCr620, 281SW852; 104TexCr672, 286SW226; 105TexCr91, 286SW1096; 105TexCr460, 287SW152; 106TexCr207, 292SW223; 106TexCr506, 294SW202; 107TexCr32, 294SW541; TexCr 295SW574; 107TexCr614, 298SW426; 108TexCr576, 28W(2d)245; 109TexCr108, 38W(2d)91; 109TexCr272, 48W(2d)78; 109TexCr394, 58W(2d)135; 110TexCr220, 7SW(2d)548; 110TexCr186, 7SW(2d)548; 110TexCr374, 7SW(2d)1089; 110TexCr296, 8SW(2d)186; 111TexCr313, 12SW(2d)795; 112TexCr521, 16SW(2d)233; 113TexCr75, 19SW(2d)41; TexCr 24SW(2d)48; TexCr 25SW(2d)350; TexCr 27SW(2d)817; TexCr 28SW(2d)138; TexCr 28SW(2d)554; TexCr 29SW(2d)381(2dcase); TexCr 29SW(2d)749; 101Vt65, 139A569; 144Va559, 131SE131; 147Va624, 136SE766. [b] (1) 317Mo 330, 296SW370. [c] **Rule does not apply** where it is manifest what answer would have been. 143Va579, 130SE389. [d] **Exclusion of post card.**–100TexCr98, 272SW134. [e] **Expected answer may be shown in record** by avowal of counsel or answer given by witness in absence of jury. 147Va624, 136SE765.

173-45 195Cal272, 232P710; 161La335, 108S663; 316Mo 268, 289SW637; 43 OklACR321 [reh pending]; 101TexCr86, 273SW598; 111TexCr313, 12SW(2d)795; TexCr 29SW(2d)749; TexCr 31SW(2d)449. [b] 82Colo 205, 258P226; 309Mo 498, 274SW734; Mo 22SW(2d)795; 39 OklCr324, 264P631.

173-46 21AlaA152, 106S341; 21AlaA316, 108S79; 71CalA181, 235P72; 81CalA449, 253P966; 85CalA672, 259P1020; Ill 173NE155; 161La335, 108S663; 127Me487, 144A383(1stcase); Mo 289SW645; 38 OklCr34, 259P173; 43 OklACR321 [reh pending]; 101TexCr12, 274SW599; 101TexCr333, 275SW831; 104TexCr358, 284SW556; 109TexCr113, 3SW(2d)101; 111TexCr570, 13SW(2d)874; 113TexCr646, 21SW(2d)1049; TexCr 24SW(2d)828; TexCr 26SW(2d)638; TexCr 31SW(2d)1072; 101Vt124, 141A686.

173-47 CalA 284P1096; 169La707, 125S862 (court's findings must be accepted where testimony is not in record); Mo 296SW391; NJSup 132A312; 49SD56, 206NW468; 54SD391, 223NW325; 101TexCr86, 273SW598; 101TexCr333, 275SW831; 101TexCr637, 285SW326; 105TexCr460, 289SW152; 105TexCr605, 289SW386; 105TexCr614, 289SW1013; 106TexCr482, 293SW173; 108TexCr240, 299SW904; 109TexCr296, 4SW(2d)40; 109TexCr331, 4SW(2d)553 (affidavit and search warrant); 111TexCr476, 14SW(2d)842; TexCr 28SW(2d)794.

173-47½-New. An assignment of error to the exclusion of evidence will not be reviewed where no sufficient part of the record is set out to show what the objection was and why the ruling was prejudicial. 49SD56, 206NW468.

173-47½-New. Alleged error in excluding evidence cannot be considered where the record does not show such exclusion. 74CalA115, 240P1019.

173-48 22AlaA383, 115S855 (improper questions and answers); 196 Ind433, 148NE403; 89 IndA564, 166NE158(2dcase); Ind 167NE135; Ind 168NE581; 209Ky59, 272SW29; 160La26, 106S662; 160La456, 107S304; 161La827, 109S505; 259Miss388, 156NE712; Mo 285SW400; 318Mo 611, 300SW691; Mo 300SW785; 320Mo 288, 6SW(2d)866; 102NJL134, 130A642 (manifest wrong or injury); 38 OklCr34, 259P173; 118 Or397, 247P146; 100TexCr54, 271SW902; 100TexCr67, 272SW154; 100TexCr220, 272SW480; 100TexCr176, 273SW561; 101TexCr46, 274SW150; 103TexCr112, 280SW222; 103TexCr182, 280SW798; 103TexCr534, 281SW864; 104TexCr567, 285SW1094; 105TexCr107, 286SW1100; 106TexCr116, 290SW1095; 106TexCr68, 291SW226; 106TexCr528, 293SW827; 107TexCr32, 294SW541; 106TexCr618, 294SW588; 107TexCr521, 298SW290; 108TexCr1, 299SW422; 109TexCr67, 28W(2d)851; 110TexCr186, 7SW(2d)548; 110TexCr345, 7SW(2d)571; 110TexCr159, 8SW(2d)947; 110TexCr484, 9SW(2d)344; 111TexCr63, 11SW(2d)322(2dcase); 111TexCr342, 13SW(2d)380; 112TexCr191, 14SW(2d)845; TexCr 20SW(2d)794; 113TexCr646, 21SW(2d)1049; 113TexCr462, 22SW(2d)922; TexCr 23SW(2d)729; TexCr 24SW(2d)396; TexCr 24SW(2d)439; TexCr 27SW(2d)208; TexCr 30SW(2d)326. [a] **In absence from record of statement of facts,** appellate court cannot appraise bills of exception complaining of admission of evidence. 112TexCr9, 13SW(2d)706. [b] **Bills of exception to admission of evidence disclosed no error** where record showed that not all evidence adduced was reduced to writing and trial judge stated in per curiam that evidence showed defendant's control of premises. 167La1010, 120S629.

173-48½-New. the question eliciting it, 160La26, 106S662.

173-49 IndA 171NE208; 209Ky59, 272SW29; 160La26, 106S662; 168La903, 123S614; 102NJL134, 130A642 (admission of confession); 102NJL388, 132A93; 100TexCr128, 271SW909; 100TexCr501, 272SW191; 101TexCr377, 276SW291 (bill of exceptions held sufficient); 103TexCr493, 281SW553; TexCr 24SW(2d)825; TexCr 31SW(2d)630(3dcase).

173-50 CalA 284P1096; 102NJL388, 132A93; 101TexCr86, 273SW598; 101TexCr63, 274SW588; 101TexCr12, 274SW599; 101TexCr154, 274SW608 (showing held sufficient); 101TexCr628, 276SW928; 103TexCr112, 280SW222; 103TexCr377, 280SW791; 104TexCr185, 283SW520; 104TexCr281, 283SW790; 105TexCr641, 290SW764; 106TexCr68, 291SW226; 107TexCr521, 298SW290; 108TexCr1, 299SW422; 108TexCr106, 299SW430; 108TexCr258, 18W(2d)298; 108TexCr381, 18W(2d)314; 110TexCr52, 7SW(2d)532; 111TexCr38, 11SW(2d)169; TexCr 20SW(2d)772; TexCr 28SW(2d)1084(2dcase). [a] 101TexCr606, 276SW713. [c] **If evidence admitted might be competent under any state of facts** appellant must affirmatively show that state of facts which would render it competent did not exist at time it was introduced. 197 Ind448, 151NE329. [d] **Exception to court's permitting additional evidence** by state after announcement that state rested was not error in absence of showing abuse of discretion. 110TexCr243, 8SW(2d)153.

173-50½-New. that it was objected to, 141Miss115, 106S264.

173-50¾-New. objection or exception to particular evidence when given, 82 Colo 233, 259P1038.

173-51 21AlaA378, 108S646; 85Colo 442, 276P983; 89 IndA89, 165NE760(1stcase); 89 IndA103, 165NE772(2dcase); 209Ky59, 272SW29; 126Me376, 138A562. But see 152MdS9, 136A46; Mo 278SW669; Mo 278SW712; 316Mo 31, 292SW434; 100TexCr54, 271SW902; 100TexCr660, 273SW852; 101TexCr501, 272SW191; 104TexCr152, 282SW813; 108TexCr332, 18W(2d)301; 113TexCr235, 20SW(2d)202; TexCr 30SW(2d)326; 103WVa148, 136SE842. [c] **Mere statement of ground of objection** to admission of testimony in bill of exception, containing no verifying facts, is not certificate of judge that facts on which objection was based are true, but merely shows that such objection was made, and hence is insufficient. 111TexCr285, 12SW(2d)576. [d] **Objection to search warrant** cannot be considered where bill of exceptions did not certify that search warrant was not exhibited. 112TexCr586, 18SW(2d)657.

173-51½-New. Error in the admission of evidence of an alleged witness will not be reviewed where the record does not show that he was a witness. 199 Ind484, 158NE241.

173-51¾-New. Nor will refusal to suppress evidence be considered if evidence is not shown. 196 Ind640, 149NE163.

173-51¼-New. Where an answer is meaningless because uncompleted, error will not be considered unless record also shows that answer was completed and how. 160La26, 106S662.

174-52 21AlaA378, 108S646; CalA 284P1096; 158La471, 104S211; 163La34, 111S486; 168La903, 123S614; MoA 296SW440; 101TexCr501, 272SW191; 101TexCr55, 273SW856; 101TexCr154, 274SW608; 103TexCr682, 282SW219; 104TexCr378, 283SW824; 106TexCr165, 291SW250; 106TexCr589, 293SW1102; 106TexCr589, 293SW1102; 107TexCr444, 296SW897; 108TexCr583, 28W(2d)242; TexCr 7SW(2d)1086; 110TexCr159, 8SW(2d)947; 112TexCr149, 15SW(2d)624; 112TexCr625, 17SW(2d)1059; TexCr 21SW(2d)733; 113TexCr535, 22SW(2d)1071; TexCr 23SW(2d)372(2dcase); TexCr 27SW(2d)538 (where prejudice was not shown); TexCr 27SW(2d)1098; TexCr 31SW(2d)450; TexCr 31SW(2d)630(3dcase); TexCr 31SW(2d)1072; 101Vt124, 141A686; 153Va838, 149SE464; 103WVa148, 136SE842. [a] **Statement held insufficient.**–106TexCr589, 293SW1102.

174-53 103TexCr534, 281SW864; 106TexCr68, 291SW226; 106TexCr626, 294SW559; 107TexCr623, 298SW567; 107TexCr666, 298SW591; 108TexCr225, 299SW644; 108TexCr381, 18W(2d)314;

109TexCr40, 2SW(2d)860; 110TexCr 321, 5SW(2d)772; 112TexCr470, 17SW (2d)1053.

174–54 88CalA302, 263P345; 88CalA 575, 263P862; 100CalA605, 280P554(2d case); 38GaA674, 145SE468; 332 Ill 113, 163NE421; 169La939, 126S431; Mo 256SW753; Mo 270SW337; Mo 300SW 758; 32PortoRico 149; 52ND619, 219 NW817; 101TexCr606, 276SW713 (judgment of county court); 106TexCr391, 293SW178; 110TexCr409, 10SW(2d)559 (1stcase); 112TexCr466, 17SW(2d)46. See also TexCr 29SW(2d)774.

174–54½–New. where such document itself is not evidence, NJ 130A461.

174–55 7F(2d)309; 97CalA253, 275P 518; Mo 285SW1000. See also AlaA 129 S706. [a] **Refusal to admit papers and book** alleged by defendant to have been read by her and her husband shortly before husband was shot, could not be reviewed by appellate court, where such papers and book were not before court. 219Ala83, 121S72, 63ALR560.

174–55½–New. Error in excluding exhibit cannot be reviewed where record does not show that exhibit was offered in evidence. SD 229NW398.

174–56 229Ky646, 17SW(2d)751; 316 Mo 268, 289SW637; 105TexCr63, 284SW 952; 113TexCr142, 18SW(2d)663.

174–58½–New. The reviewing court must look to the finding and not to printed record of the testimony to determine the correctness of the rule admitting the exhibit. 110Conn403, 148A350.

174–58½–New. Where a bill of exceptions, complaining of admission of evidence, recited many facts clearly admissible, and made no separate complaint as to other testimony, it showed no error. 111TexCr160, 12SW(2d)205(2d case).

174–58¼–New. Nor is error shown where bill of exceptions was silent concerning the nature of the alleged defect in the form of the affidavit. 104TexCr 42, 282SW585.

174–58⅓–New. Evidence objected to at hearing will not be held incompetent where record fails to disclose that witness has no personal knowledge of facts. 137SC7, 133SE823.

174–59 15F(2d)194; 15F(2d)372; 15 F(2d)770; 16F(2d)231; 215Ala224, 110 S23; 23AlaA107, 121S453; 23AlaA577, 129S486; 20AlaA550, 103S479; 20AlaA 601, 104S845; 21AlaA170, 106S207(2d case); 21AlaA170, 106S207(1stcase); 21AlaA183, 106S394; 21AlaA187, 106S 509; 21AlaA487, 109S523; 22AlaA255, 114S475; 22AlaA304, 115S146 (exception by reference only insufficient); 22 AlaA388, 115S858; 201Cal 290, 257P46; DC 32F(2d)953; 89Fla336, 103S642; 321 Ill 380, 152NE215; 324 Ill 533, 155 NE270; 328 Ill 332, 159NE360; 326 Ill 290, 157NE205; 326 Ill 145, 157NE225; 198 Ind614, 154NE370; 199 Ind697, 160. NE293; Ind 171NE197; Ind 171NE301; 200 Iowa306, 204NW218; 202 Iowa722, 210NW904; 125Kan608, 265P1099; 224 Ky269, 6SW(2d)248; 226Ky850, 10SW (2d)827; 232Ky590, 24SW(2d)280; Mo 270SW378; Mo 278SW971; Mo 285SW 101(1stcase); Mo 285SW412; Mo 295 SW791; Mo 23SW(2d)22; Mo 24SW (2d)1006; Mo 26SW(2d)937; 82Mont 456, 268P493; 190NC858, 129SE450; 99 TexCr572, 271SW99; 100TexCr385, 272 SW453 (must be shown by bill of exceptions); 103TexCr648, 281SW1065; 105 TexCr29, 285SW312; 105TexCr268, 287 SW1097; 107TexCr88, 294SW548; 107 TexCr208, 296SW593; 108TexCr111, 299SW640; 108TexCr227, 299SW898; 113TexCr646, 21SW(2d)1049; 113Tex Cr608, 21SW(2d)1063; 147Va648, 136 SE598 (instructions not properly identified); Wash 286P833 (not considered without entire record).

175–60 13F(2d)750; 157Miss548, 128S 579 (must be marked by clerk); Mo 23 SW(2d)22.

175–60½–New. and excepted to; 108 TexCr77, 299SW259.

175–61 108TexCr413, 18W(2d)315.

175–61½–New. and by which side, 22 AlaA133, 114S68.

175–62 100TexCr193, 272SW461; 102 TexCr277 278SW214 (failure of record to show time instructions were requested obviates review); 104TexCr232, 283 SW857; 105TexCr98, 286SW1094; 105 TexCr608, 290SW179; 105TexCr648, 290SW178; 107TexCr121, 294SW1110; 108TexCr77, 299SW259; 111TexCr249, 12SW(2d)572; 113TexCr518, 22SW(2d) 930; TexCr 26SW(2d)267(1stcase).

175–63 100TexCr193, 272SW461; 102 TexCr277, 278SW214; 111TexCr500, 14 SW(2d)853; 111TexCr543, 15SW(2d) 637.

175–64 199 Iowa1068, 203NW240 (as to prosecutrix's illicit relations with other men). [a] **Without showing expression of personal opinion,** refusal of instruction not to consider opinion of prosecutor held justified. 337 Ill 161, 169 NE9.

175–65 103TexCr318, 280SW202.

175–66½–New. Where judge in his per curiam fails to state nature of requested charge but merely states that it was covered in the general charge it has been held error. 159La779, 106S302.

175–67½–New. Objections to instructions given cannot be considered, if it does not appear that they were ever presented to the court. 101TexCr386, 276 SW132.

175–68 105TexCr374, 288SW230.

175–69 321Mo 598, 12SW(2d)426. See also Mo 23SW(2d)1. [a] **Error not reversible without showing refusal to use** instructions as modified by court. 157 Miss548, 128S579.

175–70 Va 154SE363.

176–72 29F(2d)454; 23AlaA438, 126S 610(1stcase); 321 Ill 380, 152NE215 (in abstract); 338 Ill 177, 170NE218; 49ND 187, 206NW925; 101TexCr430, 276SW 286; 147Va648, 136SE598; 152Va1002, 147SE231. [b] **When, in criminal case, it is not affirmatively shown by bill of exceptions that it contains all instructions given,** no question is presented to supreme court on giving or refusing of instructions. 333 Ill 104, 164NE138; 200 Ind420, 164NE269.

176–74 125Kan111, 263P1051; 147Va 648, 136SE598.

176–76½–New. Assignment of error as to the giving and refusing of instructions may be considered, although a motion for a new trial is not contained in the bill of exceptions. 335 Ill 424, 167 NE20.

176–78 274US328, 47SC650, 71Led 1077; 6F(2d)105; 32F(2d)893; 21AlaA 479, 109S386; 22AlaA255, 114S475; 22 AlaA469, 116S893; 80CalA293, 251P 643; 36GaA301, 136SE332; 259Mass 152, 156NE65; 103NJL266, 137A529; 21 OhA512, 153NE755; 32PortoRico 143; 100TexCr501, 272SW191; 101Tex Cr19, 274SW616; 101TexCr598, 276SW 283; 103TexCr648, 281SW1065; 104 TexCr116, 282SW591; 104TexCr470, 284SW587; 105TexCr61, 284SW951; 105TexCr386, 288SW225; 105TexCr393, 288SW1087; TexCr 288SW1116; TexCr 290SW1116; TexCr 32SW(2d)465. See also 213Ala551, 105S711. [c] **In absence of facts proved,** court of criminal appeals cannot consider objection to charge on ground that it contained no instruction as to circumstantial evidence. TexCr 13SW(2d)108(1stcase).

177–79 81CalA449, 253P966.

177–82½–New. Where statement of facts containing evidence cannot be considered because not approved by trial judge, refusal of requested special charge cannot be reviewed. 105TexCr 393, 288SW1087.

177–83 243Mich539, 220NW789.

177–84½–New. Refused charges which are in no way affected by the fact that all evidence does not appear in the bill of exceptions may be reviewed. 213Ala 551, 105S711.

177–85 21AlaA111, 105S427 (where bill of exceptions failed to set out motion for new trial); 22AlaA27, 112S221; 23AlaA 237, 123S290; 23AlaA486, 127S264; 23 AlaA520, 128S126(1stcase); 23AlaA554, 129S309; 91Fla512, 107S632; 329 Ill 101, 160NE138; 335 Ill 61, 166NE462; 338 Ill 177, 170NE218; 160La47, 106S 670; 167La404, 119S407; 312Mo 340, 279SW98; MoA 289SW654; 99TexCr 572, 271SW99; 109TexCr40, 2SW(2d) 860; 34Wyo 112, 241P701.

177–86 21AlaA208, 106S874; 22AlaA 379, 115S851; 91Fla512, 107S632; 329 Ill 101, 160NE138; Ind 168NE460; 99 TexCr572, 271SW99; 34Wyo 112, 241P 701.

177–87 99TexCr572, 271SW99. [a] 236 Mich595, 211NW23.

177–88 21AlaA187, 106S509; 21AlaA 387, 110S168; 169Ark1212, 276SW860 (if ground was failure to allow continuance, record must show motion therefor was presented to trial court); 167 Ga271, 145SE517, 63ALR179; 36GaA 668, 137SE860; 36GaA770, 138SE262; 326 Ill 104, 157NE76 (abstract held sufficient); 227Ky129, 12SW(2d)297 (remarks of counsel); 229Ky305, 17SW (2d)238; 150Miss787, 117S119; Mo 1 SW(2d)139; 319Mo 40, 2SW(2d)765; 320Mo 248, 6SW(2d)839; 102TexCr496, 278SW435; 110TexCr47, 7SW(2d)565; 110TexCr399, 10SW(2d)567; Wash 290 329. [a] (1) 34GaA176, 128SE683; 34 GaA146, 128SE686; 35GaA515, 133SE 649; 35GaA476, 133SE748; 35GaA577, 134SE184; 35GaA574, 134SE185; 36 GaA668, 137SE860. (2) 35GaA476, 133 SE748. [b] (1) 160La548, 107S402; 160La661, 107S481; 161La867, 109S530. (2) Bill of exceptions, which merely sets up grounds of motion for new trial, and recites that they were overruled, and that defendant objected, is insufficient. 111TexCr63, 11SW(2d)322(2d case. [c] (2) Special ground of motion to review rule on admission of testimony must mention name of witness. 35GaA 476, 133SE748. [e] **Assertion of fact contained as ground for motion** must appear in record elsewhere than in motion itself, or appellate court will not consider it. 93Fla372, 112S73. [f] **Where motion is on general grounds only,** there is raised only contention that verdict is contrary to law because without evidence to support it. 163Ga43, 135SE407.

177–88½–New. and that an exception was reserved to the ruling; 214Ala284, 107S806.

178–89 [a] **Bill merely complaining of overruling of motion for new trial** presents nothing for review. 109TexCr207, 3SW(2d)807.

178–89½–New. Assignment of error in the overruling of a motion for a new trial presents nothing for review when it does not appear that the instructions were made a part of the record and appellant's brief does not show that a bill of exceptions containing the evidence was filed. 89 IndA106, 165NE777(1st case).

178–90 98Fla482, 123S916(1stcase); 36 GaA770, 138SE262; 162La641, 110S888; 164La1057, 115S268; 100TexCr98, 272 SW134; 101TexCr63, 274SW588; 111 TexCr149, 11SW(2d)794(2dcase); 144 Va551, 131SE141 (nor identified or certified by trial judge).

178–90½–New. In the absence of a recital in a bill of exception that it contains all or substantially all the evidence, denial of motion for new trial based upon insufficiency of evidence will not be reviewed. 21AlaA257, 108S 270.

178–90⅓–New. Denial of new trial sought on grounds that verdict is contrary to law and evidence and that instructions were erroneously refused presents no question of law for consideration, where evidence and requested instructions and exception to ruling do not appear in record. 15F(2d)376.

178–91 212Ky39, 278SW166; 316Mo 72, 289SW871; 105TexCr211, 287SW 257; 106TexCr515, 293SW571; 111Tex Cr621, 13SW(2d)834; TexCr 31SW(2d) 456.

178–93 178Ark1200, 10SW(2d)499; Ind 168NE458; 89 IndA552, 167NE155; 214 Ky454, 233SW418; 252Mass465, 148NE 123; 100TexCr385, 272SW453; 102Tex Cr496, 278SW435; TexCr 32SW(2d)467.

178–94 163Ga43, 135SE410.

178–95½–New. Statement of fact in motion for new trial is held not self-supporting. 90Fla555, 106S415.

178–95⅓–New. A bill of exceptions to the overruling of a motion for new trial, on the ground that the evidence convinced the trial judge of defendant's guilt beyond a reasonable doubt, is unavailing, it presenting only a question of fact as to the guilt or innocence of defendant, as to which the supreme

court has no jurisdiction. 167La1048, 1208772.

178-95½-New. Exception to overruling of motion on ground that verdict was contrary to evidence presents nothing for review. 161La214, 1088419.

178-95½-New. A bill of exceptions complaining of the overruling of a motion for a new trial, which contained only matters developed upon the trial in its regular course, presented nothing for review. 112TexCr281, 16SW(2d) 243.

178-95¼-New. Allegations in a motion for a new trial not supported by the record do not warrant reversal. 318 Mo 827, 18SW(2d)106.

178-96 89Fla309, 1038628 (motion in arrest of judgment evidenced only by bill of exceptions not considered); 312 Mo 340, 279SW98.

178-97 338 Ill 177, 170NE218 (grounds must be properly presented).

179-99½-New. Matters complained of in amendment to record allowed on motion in arrest of judgment held reviewable on writ of error. 104NJL291, 140 A287.

179-1 316Mo 210, 289SW953. But see 100TexCr652, 273SW604.

179-1½-New. Where the record shows that defendant, before pleading guilty, was admonished by the court as to the effect of such plea, and the punishment which might be inflicted, it was not necessary that the record should affirmatively show that the court heard witnesses as to matters in mitigation or aggravation of the offense, as provided for by statute. 332 Ill 583, 164NE185.

179-2 6F(2d)144 (refusal to direct restoration of property seized under search warrant); 7F(2d)469; 14F(2d)606; 23 AlaA168, 126S896(2dcase), 33Ariz354, 264P1083; 33Ariz383, 265P609, 621 [citCJ]; 170Ark1194, 283SW372; 174 Ark1078, 298SW357; 79CalA357, 249P 541; 82CalA159, 255P261; CalA 267P 383; 100CalA639, 280P999; 198Ind 360, 153NE772; Ind 172NE904; 215Ky 583, 285SW959; 235Ky325, 31SW(2d) 390(2dcase); 168La95, 121S586; 173 Minn610, 216NW533; 157Miss619, 128S 743; 307Mo 411, 270SW282; MoA 28 SW(2d)691; 104NJL291, 140A287; 193 NC845, 137SE657; 194NC459, 140SE 26; 25OhA273, 157NE813; OkiCr 284 P306; OkiCr 291P152; 298Pa63, 148A 45; 87PaSuper585; 54SD245, 222NW 681; 156Tenn610, 48SW(2d)349; 99 TexCr561, 271SW104; 100TexCr652, 273SW604; 104TexCr384, 283SW807; 104TexCr232, 283SW857; 107TexCr19, 294SW564; 107TexCr151, 296SW1098; 108TexCr424, 18SW(2d)320; 109TexCr 517, 58W(2d)774; 111TexCr565, 15SW (2d)632(1stcase); TexCr 26SW(2d)208 (2dcase); TexCr 27SW(2d)215; 154 Wash409, 282P907; Wash 290P329. [b] **Where record shows no complaint** of proceedings below, judgment will be affirmed. 110TexCr281, 8SW(2d)169. [c] **Court of criminal appeals cannot look to appellant's brief** to supplement bill of exceptions not sufficiently full to manifest error in ruling complained of. 111TexCr313, 12SW(2d)795.

179-3 29Ariz523, 243P601; 32Ariz470, 260P188; 33Ariz383, 265P609; 203Cal 139, 263P522; 85CalA269, 259P123; 90 CalA683, 266P813; 98Fla1231, 1258 353; 199Ind134, 155NE610; Ind 172 NE904; 208Iowa1238, 226NW916; 208 Iowa1233, 227NW166; 127Kan412, 273 P490; 161La335, 108S663; 161Miss 671, 128S766(2dcase), 157Miss548, 128 S559 (denying other's notes); Mo 270SW 284; Mo 285SW412; 315Mo 232, 285 SW713; 316Mo 210, 289SW953; 77 Mont307, 250P603; OkiCr 279P363; 54 SD245, 222NW681; 99TexCr572, 271 SW99; 99TexCr561, 271SW104, 101 TexCr358, 284SW556; 104TexCr386, 283SW796; 106TexCr536, 294SW221, 111TexCr378, 13SW(2d)112; TexCr 31 SW(2d)812; TexCr 32SW(2d)464; 155 Wash80, 283P671 (affidavits on motion to suppress evidence); 36Wyo 241, 254 P120.

179-4 170Ark1194, 283SW372; 32GaA 644, 148SE170. [c] **Insanity of main witness** may properly be investigated and considered by parole and pardoning power of state, but is not within proviso of appellate court in passing on errors of law. Iowa 203NW36. [d] **In Philippines.**-45Philippine159.

179-6 23AlaA265, 123S281(1stcase).

180-8½-New. Under some statutes a motion, pleading proceeding, document, or other matter, not exhibited by a bill of exceptions, shall be considered by the appellate court as though properly exhibited, if it appears in the transcript and is authenticated. 96Fla307, 118S 73.

180-9 But see 45Philippine159.

180-10 96CalA503, 273P393.

180-13½-New. Where statute provides that petition in error shall be accompanied by transcript of docket and journal entries and any original papers filed in the action, an original paper duly filed in an action may be examined and considered by reviewing court without reference to transcript of docket and journal entries. 19OhA355.

180-14½-New. When no extension of time to file exceptions to instructions appears of record, appellant may not supply such essential record by an allegation in his abstract that his exceptions were filed "within the time fixed by the court." 200Iowa649, 203NW38.

180-16 35F(2d)689; 36F(2d)738; 38 F(2d)106; 11F(2d)11; 21AlaA179, 109 S836; 94CalA55, 270P468; 89Fla400, 1048853; 10GaA229, 119SE375(2d case); GaA 155SE784(2dcase); 199 Ind 578, 159NE154; Ind 166NE753; 163La 476, 112S304(1stcase); 163La477, 112 S301(2dcase); 168La929, 123S633(1st case); NJ 133A516; NJSup 132A289; NJ Sup 133A73; 103NJL266, 137A529; NJ Sup 137A844; 106TexCr397, 292SW546. But see 4F(2d)901. [a] **In Texas.**-101 TexCr63, 274SW588. [b] **It is improper** to assign useless assignments of error. 7F(2d)158.

180-17 21AlaA211, 106S891; 23AlaA 265, 123S281(1stcase); 23AlaA297, 124 S406(1stcase); 321Mo 598, 12SW(2d) 426; Mo 18SW(2d)509; MoA 275SW 565; MoA 279SW210; MoA 286SW744; MoA 288SW969. [b] (1) 21AlaA211, 106S891. (2) 23AlaA23, 119S694(2d case); 21AlaA479, 109S386. (3) It is permissible to assign errors in criminal case. 21AlaA211, 106S891. (4) Assignment of errors does not preclude court from considering all questions apparent on record. 21AlaA211, 106S891. (5) Assignment of errors does not preclude court from considering all questions reserved by bill of exceptions. 21 AlaA211, 106S891. [c] **In Texas.**-104 TexCr15, 282SW580. [d] **Where error is so prejudicial that it cannot be cured by admonishing jury,** assignment of error is unnecessary. CalA 286P514.

180-18 17F(2d)69; 7F(2d)393; 25 F(2d)242; 27F(2d)323; 28F(2d)586; 39F(2d)1; 40F(2d)820; 11F(2d)11, 23AlaA77, 142S813; 74CalA102, 235P 467; 76CalA508, 211P1086; 79CalA164, 249P1089; 81CalA612, 238P638; 85 CalA670, 259P1019; 92Fla699, 109S 811; 166GaA698, 144SE251, 11GaA299, 152SE597; 11GaA300, 152SE604(1st case); 11GaA313, 152SE590(1stcase), 260Mass303, 157NE354; 261Mass281, 158NE840; 261Mass261, 162NE319; 261Mass324, 162NE401; 234Mich95, 207NW867; NJ 141A575; NJSup 131A675; NJSup 134A290; 103NJL 534, 138A203; NJSup 149A124; OkiCr 290P1113; 67Utah325, 247P 497; Va 152SE547. [a] (1) 32F (2d)126; 34F(2d)398. (5) 33F(2d)582 (1case); 42F(2d)721; 85CalA670, 259 P1019; Iowa 232NW684; 101WVa632, 133SE371. (7) 168Ga747, 149SE42; 34PortoRico443. (9) Improper questioning by state. 71CalA453, 236P163; 76CalA558, 244P1086. (10) Error in refusing to direct verdict. 35Wyo41, 246 P241. (11) Statements of district attorney constituting misconduct which defendant requested court to admonish jury to disregard. 77CalA14, 246P97. (12) Failure of arraignment and plea not called to attention of trial court. 92 Fla648, 109S805. (13) Error on final judgment rendered. 37GaA150, 139SE 154. [b] **No reversal** unless fundamental error committed. 29PortoRico 961 (failure to make specifications of errors in admission and exclusion of evidence).

181-20 16F(2d)704; 17F(2d)67; 25 F(2d)231; 70AlaA627, 104S641, 78 CalA488, 248P986; 158La244, 103S755.

181-21 21F(2d)939; Ariz 285P282 (conviction of violation of repealed statute held fundamental error); 92Fla809, 110S253; 85PaSuper365, 29PortoRico 261.

181-22 24F(2d)696; 85PaSuper305 (sentence exceeding statutory maximum). [b] **Rule permitting consideration of radical errors** cannot be invoked generally as a substitute for proper assignments of error. 36F(2d)738.

181-25½-New. Rule applies in case of life imprisonment. 143Miss199, 108S 719.

181-25½-New. Everything material to appeal may be considered under specification that verdict was not sustained by evidence. 198Ind496, 154NE278.

181-26 NJ 130A446 (in absence of certificate of entire record of trial, plaintiff in error is confined to his bill of exceptions).

181-28 110TexCr324, 7SW(2d)550. [b] **In Missouri.**-317Mo 268, 295SW741.

181-29 14F(2d)366; 32F(2d)126; 36 F(2d)738; 91Fla1189, 116S601; 289Pa 20, 136A861; 48PaSuper394; 87PaSuper66; 89PaSuper188; 156SC63, 152SE 825(2dcase). [a] **In Pennsylvania.**-289 Pa20, 136A861.

181-35 11F(2d)57(1stcase); 110TexCr 573, 9SW(2d)1033.

181-35½-New. Counsel should not repeat assignments of error. 19F(2d)813.

181-35¼-New. Large number of assignments should not be made unless necessary. 23F(2d)260.

181-35¼-New. Assignments of error referring to more than one bill of exceptions will be disregarded. 98PaSuper34.

181-37 79CalA323, 237P63; 98CalA 733, 277P896; 35GaA497, 133SE747.

181-38 7F(2d)357; 7F(2d)553; 12 F(2d)852, 16F(2d)297; 23F(2d)470; 77F(2d)373, 29Ariz316, 243P601; 170 Ark1083, 282SW673; 180Ark290, 21SW (2d)176, 77CalA83, 217P291; 78CalA 395, 218P696; 86CalA514, 259P982; CalA 290P413; 109Conn29, 145A21; 3 Del190, 139A754; 90Fla381, 106S711; 98Fla1231, 125S353 (mere recitals on motion to quash not enough); 165Ga 302, 140SE885 (assignments must be complete, without reference to record); 35GaA497, 133SE747; 35GaA578, 134 SE183; 39GaA665, 148SE281; 40GaA 712, 151SE393; 41GaA372, 153SE93(2d case); Ind 169NE466; 89IndA91, 165 NE769; IndA 166NE775(2dcase), 202 Iowa212, 210NW120; 204Iowa70, 215 NW752; 205Iowa373, 217NW871, 206 Iowa384, 220NW32; 207Iowa851, 221 NW817; 207Iowa221, 222NW562; 208 Iowa1391, 227NW11(1stcase); 212Ky 39, 278SW166; 166La21, 116S579; 315 Mo156, 285SW718; 316Mo49, 289SW 856; 316Mo66, 289SW910; Mo 295SW 784; Mo 296SW128; 318Mo827, 18SW (2d)106; 319Mo28, 38W(2d)230, Mo 8SW(2d)49; Mo 12SW(2d)2; Mo 24 SW(2d)1032; 217MoA26, 243SW139; MoA 9SW(2d)256; MoA 31SW(2d)539; NJ 130A416, NJ 133A516; 101NJL3, 140A566; NJ 113A810; NJ 116A50; NJSup 129A480; NJSup 131A62; NJ Sup 132A198; NJSup 132A289, 103 NJL246, 136A161, NJSup 137A14; NJSup 13A802, 103NJL247, 138A203; 196NC387, 145SE481, 89PaSuper188; 34PortoRico206, TexCr 7SW(2d)908. [b] (1) 317Mo 108, 295SW368. (3) 161 La331, 108S661, 161La332, 108S661. (5) "Error apparent on the record" 90Fla381, 106S711. (16) That verdict is against law and evidence. 212Ky39, 278SW166. (17) Other instances. 181 Ark314, 28SW(2d)1[illegible]. CalA 285P1073. [c] **In Missouri.** 31Mo284, 295SW450.

181-38½-New. Assignments of error as to charge, pointing out no particular error, present nothing for review. 103 NJL246, 136A161.

182-39 4F(2d)881 (court will review conviction unsupported by evidence without assignment); 30Ariz366, 247P 129; 34Ariz363, 271P725.

182-41 90Fla779, 107S242; 94Fla149, 113S726; 95Fla433, 116S839; 316Mo 49, 289SW856; **NJSup** 136A805; 103NJL 266, 137A529; 89PaSuper188; 89Pa Super249.

182-43 3F(2d)265; 161La332, 108S 661; Mo 285SW1000; **NJSup** 132A198.

182-44 77CalA483, 247P221; 95CalA 711, 273P99; 102CalA608, 283P389 (unsupported by argument or citation of authorities); 198 Ind253, 151NE697; 8D 229NW395.

182-47 180Ark290, 218W(2d)176; 89 Fla400, 104S858; 92Fla1062, 111S725; 94Fla149, 113S726; 44 Ida739, 260P164; 335 Ill 432, 167NE10; 198 Ind253, 151 NE697; NJSup 132A289; 118 Or397, 247 P146; 89PaSuper339; 34PortoRico 443. [a] (3) Assignment that district attorney committed error in stating in his opening that he intended to prove two other similar offenses but that no effort was made to prove them is not supported by record where it appears that attempt was made to prove one of such offenses. 67CalA623, 228P369.

183-48 89Fla400, 104S858.

183-50 199 Ind489, 158NE480; 89 IndA494, 165NE921(1stcase); 315Mo 156, 285SW718; 316Mo 144, 290SW142; 322Mo 69, 16SW(2d)30; 49SD356, 207 NW153.

183-55 308Mo 651, 274SW419 (assignment that statute is unconstitutional not considered unless constitutional question is referred to in motion to quash); NJ 130A446. See also Ind 165NE757. [a] **Proof of allegation of error** must be included. 174Ark296, 295SW53.

183-56½-New. Assignment of error that motion to quash indictment was overruled must not be vague. 312Mo 134, 278SW713.

183-58 Mo 285SW412; 94PaSuper353 (language of counsel or statement of court); 33PortoRico 881. [a] **Failure to assign misconduct** of judge will not affect rights of injured party where harmful result cannot be obviated by retraction or instruction. 71CalA575, 236 P189.

183-59 201Cal 341, 257P65; 76CalA688, 245P781; 199 Ind489, 158NE480; Mo 8SW(2d)49; 104TexCr616, 286SW223.

183-62 89 IndA486, 165NE919; 251 Mich228, 231NW573; 318Mo 647, 300 SW511; 318Mo 605, 300SW823; Mo 18 SW(2d)474; NJSup 137A893. See also Mo 292SW39. [a] (1) Mo 285SW416. (7) In admitting evidence of other offenses over objection. 27F(2d)310.

183-63 5F(2d)471; 12F(2d)727; 16 F(2d)704; 80CalA655, 252P666; NJSup 132A289; NJSup 137A893; 35Porto Rico 106.

183-64 4F(2d)804; 30F(2d)482 [certiorari den 279US855, 498Ct351, 73Led 997(6thcase)]; 33F(2d)238; 33F(2d) 485; 35GaA578, 134SE183 (documentary evidence); 89 IndA225, 166NE11.

183-65 16F(2d)704; 32NM48, 250P 842.

183-65½-New. or if that is impracticable, what he desired to prove; 32NM 48, 250P842.

183-66 88Fla135, 101S273.

183-67 87PaSuper66. [a] **Overruling of a motion to suppress evidence** cannot be made independent assignment of error. IndA 171NE208.

183-69 16F(2d)704.

184-70 87PaSuper66.

184-71 22AlaA296, 115S72.

184-72½-New. The question of the insufficiency of the evidence cannot be reviewed where the assignments of error do not specify the particulars wherein the evidence was insufficient. 49SD406, 207NW482.

184-74 99Fla222, 126S281.

184-77 12F(2d)852; 78CalA395, 248P 696; 95CalA711, 273P99; 200 Ind370, 163NE594; Mo 278SW1009; Mo 289SW 575; 316Mo 49, 289SW856; 316Mo 66, 289SW910; Mo 296SW84; 318Mo647, 300SW511; 318Mo 605, 300SW823; Mo 18SW(2d)153; Mo 48SW(2d)813; 115 Nebr391, 213NW347 (failure to instruct on defense of alibi); NJSup 137A893. [a] (1) 12F(2d)852; 78CalA395, 248P 696; 40GaA225, 149SE177. (3) 12F(2d) 852. (21) Error in giving "instructions 1 to — inclusive" entitles appellant only to review of No. 1. 178Ark928, 12SW (2d)909. (22) Other instances. 181Ark 314, 25SW(2d)422; 207 Iowa916, 223NW 870; Mo 285SW419. (23) "Refusing to charge as requested." NJSup 137A893. (24) That court did not charge defendant's contentions. 162Ga267, 134SE36. (25) That court failed to instruct on all law involved. 316Mo 66, 289SW910. (26) That court erred in giving certain numbered instructions. 317Mo 319, 296 SW132.

185-80 42F(2d)203; 104NJL325, 140A 566; 89PaSuper249.

185-85 78CalA395, 248P696.

185-88 IndA 167NE550(2dcase); 316 Mo 49, 289SW856; 103NJL266, 137A529.

185-89 103NJL266, 137A529.

185-91 89 IndA564, 166NE158(2dcase).

185-93 49SD356, 207NW153.

185-94 Mo 285SW412.

185-95 4F(2d)804; 200 Ind531, 165NE 322. But see Mo 28SW(2d)589.

185-96½-New. Court is constrained to notice fatal error patent on face. 159 La429, 105S420 (even in absence of assignment of error).

185-99 39GaA642, 148SE167(2dcase); 198 Ind253, 151NE697; 199 Ind484, 158 NE241 (ruling on motion to quash affidavit); 199 Ind578, 159NE154; 204 Iowa1306, 214NW743; 206 Iowa347, 218 NW477; 161La331, 108S661; 161La332, 108S661; 161La335, 108S663; 107Tex Cr606, 298SW431 (record insufficient). [a] **Causes improperly assigned in motion for new trial** will be disregarded. 199 Ind630, 158NE593.

185-99½-New. Trial error must be brought to the attention of the appellate court by assigning as error denial of motion for new trial. 125Kan110, 263 P787.

185-3 [a] 39Wyo 325, 271P17.

186-4 [b] **Assignments after submission** of cause or urged only in supplemental brief do not operate as proper assignment and argument thereof. 214 Ala532, 108S355.

186-19 198 Ind689, 154NE659; 143 Miss199, 108S719; Utah 285P645. [a] In Alabama.–22AlaA341, 115S700. [b] **No duty rests on appellate court to search record and authorities** to find reasons to sustain judgment. Utah 285P 645.

186-22 81CalA478, 253P1115; 86CalA 97, 260P390 (appeal deemed abandoned and rule not changed by accused's lack of means); 101CalA143, 281P395; CalA 285P864; CalA 286P1068(1stcase); CalA 288P114(1stcase); CalA 292P1010(2d case); 316Mo 977, 292SW60; OklCr 269 P788(1stcase); OklCr 290P341; OklCr 290P342(1stcase); 52SD240, 216NW948; 52SD237, 216NW949; 52SD251, 217NW 195; SD 233NW278; 112TexCr171, 15 SW(2d)622.

186-23 20AlaA539, 103S480; 169Ark 293, 274SW10; 90CalA534, 265P1115; 143Miss199, 108S719; OklCr 267P867.

186-24 213Ala534, 105S704; 23AlaA 415, 127S239; 34Ariz370, 272P99; Mo 274SW356; Mo 278SW726; Mo 295SW 786; Mo 300SW684; 221MoA358, 273 SW247; 221MoA358, 273SW247; MoA 274SW496; MoA 275SW565; MoA 279 SW210; MoA 284SW520; MoA 286SW 744; MoA 288SW969; MoA 15SW(2d) 865(2dcase); OklCr 267P681; OklCr 269P1104; OklCr 270P861. [a] In Missouri.–4 272SW1061.

187-25 179Ark1199, 18SW(2d)335; Mo 278SW726; 318Mo 628, 300SW743; Mo 300SW1069; Mo 18SW(2d)139. See also 168Ark1055, 272SW659; Mo 285SW400.

187-26 41 Ida105, 237P702; OklCr 267 P678; OklCr 268P997; OklCr 268P998; OklCr 269P328(2dcase); OklCr 269P 508(1stcase); OklCr 269P787(2dcase); OklCr 271P262; OklCr 271P959; OklCr 272P1037; OklCr 273P280(1stcase); OklCr 273P1009; OklCr 273P1014(1st case); OklCr 273P1018(1stcase); OklCr 273P1029(1stcase); OklCr 275P1075(1st case); OklCr 276P1117(1stcase); OklCr 276P1117(2dcase); OklCr 276P1117(3d case); OklCr 276P1118(1stcase); OklCr 276P1118(2dcase); OklCr 276 P1118(3dcase); OklCr 277P247(1st case); OklCr 277P278(1stcase); OklCr 277P952(1stcase); OklCr 277P956(1st case); OklCr 278P353; OklCr 278P 360; OklCr 279P976(1stcase); OklCr 280P1111(2dcase); OklCr 280P1114(1st case); OklCr 280P1114(2dcase); OklCr 280P1114(3dcase); OklCr 280P1114(4th case); OklCr 280P1115(1stcase); OklCr 280P1115(2dcase); OklCr 280P1115(3d case); OklCr 280P1115(4thcase); OklCr 280P1116(1stcase); OklCr 280P1116(2d case); OklCr 280P1116(3dcase); OklCr 280P1116(4thcase); OklCr 280P1116(5th case); OklCr 280P1117(1stcase); OklCr 280P1117(2dcase); OklCr 280P1117(3d case); OklCr 280P1117(4thcase); OklCr 280P1118(1stcase); OklCr 280P1118(2d case); OklCr 280P1118(3dcase); OklCr 280P1118(4thcase); OklCr 280P1119(1st case); OklCr 280P1119(2dcase); OklCr 280P1119(3dcase); OklCr 281P984(1st case); OklCr 281P988; OklCr 282P95 (1stcase); OklCr 283P259(2dcase); OklCr 283P270(2dcase); OklCr 285P 848; OklCr 287P789(1stcase); OklCr 287P803(2dcase); OklCr 287P840(1st case); OklCr 287P1064(1stcase); OklCr 287P1064(2dcase); OklCr 287P1086(1st case); OklCr 287P1086(2dcase); OklCr 288P1064(1stcase); OklCr 288P1064(2d case); OklCr 288P610(2dcase); OklCr 288P990(1stcase); OklCr 288P990(2d case); OklCr 288P991(1stcase); OklCr 288P991(2dcase); OklCr 288P997(1st case); OklCr 288P997(2dcase); OklCr 289P355(2dcase); OklCr 289P361(1st case); OklCr 289P785; OklCr 292P81 (1stcase); OklCr 292P81(2dcase); OklCr 292P394; OklCr 292P1064(1stcase).

187-28 32Ariz111, 256P111. See also Utah 285P645.

187-32 197 Ind703, 151NE63. [a] **Willful or negligent disobedience of rules** may result in refusal to consider brief. 74Mont269, 240P365. [b] **Excuses for failure to comply with rules.**–74Mont269, 240P365.

187-32½-New. Briefs should not argue matters having no basis in the testimony. Fla 128S1.

187-35 216Ky823, 288SW754.

187-37 89 IndA132, 166NE14.

187-33 230Mich278, 203NW135 (language in briefs must be respectful).

187-43 177Ark1194, 293SW1041; 154 Miss512, 122S529(1stcase); Mo 6SW (2d)838; 35PortoRico 309.

187-46 199 Ind489, 158NE480; Ind 170 NE348 (assignment of error not sustained).

187-48 89 IndA304, 166NE289.

188-49 177Ark1194, 293SW1041.

188-51 35PortoRico 817; 194Wis391, 216NW496.

188-52 230Ky207, 18SW(2d)995.

188-54 31F(2d)229; 70CalA225, 233P 88; 86CalA514, 259P982; 196 Ind499, 149NE650; 197 Ind218, 150NE311; 197 Ind603, 151NE609; 199 Ind40, 156NE 555; 199 Ind565, 158NE923; Ind 164 NE272; Ind 169NE466; Ind 170NE613; IndA 166NE775(2dcase); 230Ky207, 18 SW(2d)995; MoA 256SW143 (must set out remarks of counsel complained of); Okl 275P1070; OklCr 292P379; 101Vt 300, 143A284, 59ALR1541. [b] In California.–102CalA647, 283P368.

188-57 Ind 170NE613; 227Ky212, 12 SW(2d)305; 227Ky389, 13SW(2d) 273; 235Ky407, 258SW(2d)1022; 35 PortoRico 575. See also CalA 290P102.

188-60 42F(2d)733; 162Ga777, 135SE 187; 40GaA554, 150SE442(1stcase); Ill 172NE47; 199 Ind565, 158NE923; 199 Ind578, 159NE154; 200 Ind292, 163NE 95; 200 Ind370, 163NE594; IndA 171 NE311; 217Ky18, 288SW995; 221Ky 681, 288SW(2d)977; 169La191, 128S824 (bills of exception not mentioned in brief not considered); 244Mich346, 221 NW302; Mo 289SW859; 318Mo 525, 1 SW(2d)137; Mo 18SW(2d)830; MoA 289 SW664; 193NC846, 137SE926.

188-61½-New. The reviewing court must consider assignments appearing in a motion for a new trial although not briefed. Mo 18SW(2d)37.

188-61½-New. Although appellant's brief contains no assignments of error, the appellate court may examine the record and affirm the judgment where it finds no error. 43 Ida579, 253P1116.

188-65 CalA 291P600; 198 Ind342, 151 NE823; IndA 169NE535 (objections must be set out); 233Ky785, 26SW(2d) 46; 54SD391, 223NW325.

188-66 197 Ind218, 150NE311; 198 Ind

342, 151NE823; 200 Ind292, 163NE95; Ind 165NE753; 89 IndA486, 165NE919; Ind 169NE466; 89 IndA468, 165NE783; OklCr 292P379.

188-66½-New. Admissibility of evidence was not presented for review where "points and authorities" did not point out where exception could be found in the evidence. IndA 169NE339.

188-66¼-New. A specification of error in the admission or rejection of evidence is required under some rules to quote in full the substance of the evidence admitted or rejected. 74Mont269, 240 P365.

188-67 CalA 291P600; 198 Ind342, 151 NE823; 200 Ind292, 163NE95; Ind 169 NE676; IndA 167NE550(2dcase).

189-68 197 Ind703, 151NE3; 197 Ind 603, 151NE609 (reference to pages of record insufficient).

189-72 70CalA225, 233P88; 90CalA738, 266P361; 198 Ind342, 151NE823 (point out place in bill of exceptions where found); 231Ky479, 21SW(2d)809; 221 MoA114, 294SW117.

189-73 198 Ind342, 151NE823.

189-76 177Ark1194, 293SW1041; 97 CalA664, 275P1010(2dcase); 198 Ind 342, 151NE823 (instruction or substance thereof); 198 Ind718, 153NE765; 89 IndA89, 165NE760(1stcase); 89 IndA 49, 165NE771(3dcase); 50SD32, 208NW 164.

189-79 162Ga777, 135SE187.

189-80 Ind 169NE46(2dcase); IndA 168NE715(2dcase).

189-81 225Ky731, 9SW(2d)1087.

189-85 177Ark91, 5SW(2d)716; 70CalA 225, 233P88; CalA 259P361; CalA 283 P830; 198 Ind689, 154NE659; 89 IndA 37, 165NE556; 212Ky178, 278SW595; 154Miss512, 122S529(1stcase); 32Porto Rico 705. [b] 200 Ind163, 162NE49. [c] In Porto Rico.–32PortoRico 705, 706. [d] Grounds for motion for new trial must be discussed in brief, or they are waived. 212Ky178, 278SW595.

189-86 70CalA225, 233P88; 85CalA 789, 260P303; 48 Ida558, 283P529; 101 Vt30, 139A918.

189-87 23AlaA299, 124S406(2dcase); 75CalA181, 242P503; 79CalA328, 249 P231; 85CalA413, 259P465; 162Ga777, 135SE187; 38GaA448, 144SE133(2d case); 89 IndA486, 165NE919; 230Ky 725, 20SW(2d)745; 99Vt490, 134A697, 48ALR985. [a] Questions not discussed deemed without merit. TexCr 21SW (2d)514.

190-89½-New. Counsel for state will not be allowed to take inconsistent attitudes in his brief. 79Mont385, 256P 1071.

190-91 75CalA181, 242P503; 79CalA 328, 249P231; 85CalA306, 259P361; 85 CalA413, 259P465; 85CalA789, 260P 303; 94CalA696, 271P751; 99CalA593, 278P898(1stcase); 102CalA787, 283P 830; CalA 287P543; 196 Ind499, 149 NE650; 196 Ind509, 149NE57; 196 Ind 704, 149NE432; 197 Ind703, 151NE3; 197 Ind603, 151NE609; 198 Ind342, 151 NE823; Ind 164NE272; Ind 167NE531; IndA 167NE145; 204 Iowa1306, 214NW 743; 154Miss512, 122S529(1st case); OklCr 287P804; OklCr 292P379; 34 PortoRico 477.

190-94 But see 316Mo 72, 289SW871.

190-98 97CalA608, 275P1010(1stcase); 107TexCr151, 295SW1098.

190-5 33Wyo 420, 240P207.

190-8½-New. In Georgia, failure to serve brief is no ground for dismissal. 37GaA385, 140SE103.

190-10 22AlaA341, 115S700.

190-11 [a] (1) CalA 288P713. (3) Where state appealed but failed to file brief in time, appeal will not be dismissed on defendant's motion, but case will be placed on calendar for oral argument. 80CalA658, 252P729. (4) If points and authorities are on file at time notice of motion is returnable, that fact is sufficient answer to motion under court rules. 80CalA658, 252P729. (5) If appellant fails to appear at time set for argument, judgment is affirmed. 80CalA658, 252P729. [g] See also 52 SD240, 216NW948; 52SD237, 216NW 949. [i] In Oregon.–245P117. [j] In United States.–26F(2d)81.

191-21½-New. Appeal will be dismissed where motion for reconsideration of order overruling motion for extension of time to file brief is not accompanied by brief and failure to do so is not excused. 35PortoRico 515.

191-24½-New. While appellant may file brief on application for rehearing in a criminal case, although no brief was filed on original submission, counsel should direct the court's attention to errors insisted on in the brief to be considered on the original hearing. 23AlaA 101, 121S451(2dcase).

191-27 104TexCr136, 282SW1118; 104 TexCr137, 282SW1118; 104TexCr138, 282SW1118; TexCr 288SW1115; TexCr 288SW1116; TexCr 288SW1117(2d case); TexCr 288SW1117(3dcase); Tex Cr 288SW1117(4thcase); TexCr 288SW 1117(7thcase); TexCr 288SW1118(6th case); TexCr 288SW1118(1stcase); Tex Cr 288SW1118(5thcase); TexCr 288SW 1119; TexCr 289SW405; TexCr 1SW (2d)282; 108TexCr424, 1SW(2d)320. See also 106TexCr154, 291SW539. [a] (2) OklCr 273P1118(2dcase). [b] Tex Cr 290SW1114(5thcase); TexCr 290SW 1114(3dcase); TexCr 290SW1115(3d case); TexCr 290SW1115(7thcase); TexCr 290SW1116(3dcase); TexCr 290 SW1116(1stcase); TexCr 290SW1117 (3dcase); TexCr 290SW1117(4thcase).

191-28 See also 294Pa141, 143A788(1st case). [b] (2) Motion by defendant who had appealed from county court to circuit court, to dismiss appeal, was properly dismissed, in absence of statute authorizing defendant to dismiss. 21 AlaA201, 106S683. (3) Perfected appeal to circuit court not dismissible. Code §§ 3250–3251 not being applicable. 22AlaA60, 112S96. [c] **Withdrawal of bill of exceptions.**–34GaA201, 129SE12.

191-29½-New. An application of defendant to withdraw his affidavit stating that he desired his appeal dismissed will be denied where his motion to dismiss was made under delusive hope of a pardon. 105TexCr616, 290SW1097.

191-30 109TexCr510, 5SW(2d)774.

191-32 81CalA312, 253P747; 93Fla599, 112S561.

192-33 167La350, 119S252(2dcase).

192-37 207 Iowa318, 222NW843(1st case).

192-38½-New. Appeal not perfected by filing timely bill of exceptions will not be dismissed in the absence of a motion by attorney-general. 314Mo 599, 285SW 733.

192-38½-New. especially where delay was not due to defendant's fault. 314 Mo 599, 285SW733.

192-38¼-New. Court's discretion to dismiss appeal on its own motion, notwithstanding failure to file motion to dismiss at least five days before case was called for argument, as required by rule, should not be exercised to prejudice of one appealing from conviction of first degree murder. 156Md240, 144A 252.

192-41 169Ga15, 149SE650; 156Md240, 144A252.

192-42 105TexCr497, 288SW1072.

192-46 [a] **Attorney-general.**–322Mo 254, 14SW(2d)558

192-49½-New. Motion to dismiss bill of exceptions for failure to file certificate is without merit where not sworn to or supported by proof. 34GaA140, 128SE 588.

192-52 165La304, 115S571; 33NM222, 264P956 (appeal not authorized by law); TexCr 16SW(2d)1081(1stcase).

192-54 [a] 155Miss364, 123S882 (overruling prior contrary holdings of prior cases).

192-55 102TexCr382, 278SW429.

193-57 Ind 173NE323.

193-63 102TexCr382, 278SW429.

193-64 35Ariz24, 274P168.

193-68½-New. Appeal will be dismissed as moot where new trial for newly discovered evidence is granted pending appeal. OklCr 288P351(1st case).

193-69 82CalA411, 256P273; 41GaA 470, 153SE430(1stcase) (premature appeal); 157Md387, 146A241; 196NC16, 144SE300(1stcase).

193-70 OklCr 270P860(2dcase); OklCr 277P601(1stcase); OklCr 282P480(2d case); OklCr 287P758(1stcase). But see 157Md635, 147A599(2dcase).

193-71 198NC308, 151SE621.

193-73 OklCr 274P39(1stcase).

193-73½-New. or failed to file sufficient transcript, MoA 27SW(2d)1070.

193-75 157Md387, 146A241.

193-77 34GaA141, 128SE687; 337 Ill 358, 169NE164(1stcase).

193-78 See also 245NY564, 157NE858. Contra 37GaA385, 140SE403.

193-83 See also TexCr 31SW(2d)644; TexCr 31SW(2d)645.

194-84 101TexCr182, 274SW153; 100 TexCr654, 274SW145; 109TexCr465, 5 SW(2d)521.

194-84½-New. , or failure to obtain permission. 245NY563, 157NE858.

194-85 But see 113TexCr378, 22SW(2d) 660 (where transcript caption fails to show date of trial court's adjournment of term at which conviction had, appeal may be dismissed).

194-86 OklCr 287P803(1stcase) (failure to certify transcript as full, true, and correct); 87PaSuper585. [a] **Motion to dismiss appeal may be conditionally denied** to permit appellant to print and serve complete copy of judgment roll or to have case signed and settled. 213 AppDiv482, 210NYS363.

194-91 [a] **Appeal dismissed** for failure of record to show any trial or judgment in court appealed from. 106TexCr 375, 292SW545.

194-92 104TexCr407, 284SW576; 106 TexCr190, 292SW227; 106TexCr244, 292SW228.

194-92½-New. Where transcript fails to show that final judgment was entered on verdict; MoA 27SW(2d)753.

194-94 TexCr 291SW898; TexCr 291 SW906; TexCr 292SW227; 106TexCr 378, 292SW546 (court cannot appraise merits of motion for continuance without statement of facts); TexCr 295SW 1097.

194-99½-New. Failure to file supplemental motion for new trial on ground of newly discovered evidence within proper time is not good ground for dismissing cause or striking bill of exceptions. 34Wyo 112, 241P701.

194-99¼-New. or because counsel failed to certify on bill of exceptions that appeal from misdemeanor case was on good grounds and in good faith as required by rule of court. 36GaA121, 135SE494.

194-2 [a] For want of demurrer, motion to quash, bill of exception, motion in arrest of judgment, assignment of errors, and where there was no appearance for accused nor brief filed in his behalf. 161La423, 108S794.

194-3½-New. Where record did not at first contain application for reporter's notice required to be made under the statute but it was afterward filed and added to record on appeal, motion to dismiss appeal for failure to file such application will be denied. 74CalA666, 241P598.

194-3¼-New. An appeal, not docketed within the prescribed time, is held docketed and dismissed. 139NC555, 51 SE911.

194-3¼-New. Failure of brief to set forth clear statement of facts is no ground for dismissal. MoA 272SW710.

194-4 OklCr 267P681; OklCr 269P787 (1stcase); 52SD95, 216NW860; TexCr 292SW227.

195-12 21AlaA190, 106S512; 21AlaA 391, 108S631; 198Cal 453, 245P1112; 198Cal 593, 246P1116; 201Cal 474, 259P 47, 48 [citCJ]; 232Ky331, 23SW(2d) 550; 160La756, 107S516; NJSup 135A 518; 26 OhA53, 159NE834; Okl 267P 1043; Okl 274P895(1stcase); 31 OklCr 311, 238P865; OklCr 272P485(1stcase); OklCr 272P490; OklCr 275P654; OklCr 276P235(2dcase); OklCr 277P251(2d case); OklCr 277P263(2dcase); OklCr 277P597; OklCr 279P912; OklCr 279 P913(1stcase) (last two of which cases relating to appeal by fugitive from justice); OklCr 281P313(1stcase); OklCr 287P788(1stcase); OklCr 287P1051; OklCr 288P989(2dcase); OklCr 288P993 (1stcase); OklCr 289P800(2dcase); Okl Cr 290P349(1stcase); OklCr 290P1110 (2dcase); 101TexCr173, 273SW1117; 101TexCr174, 273SW1118; 102TexCr 407, 278SW211; 103TexCr308, 280SW 824; 104TexCr578, 286SW222; 105Tex Cr399, 289SW40; 106TexCr103, 290SW 1097; 107TexCr640, 298SW585; TexCr 300SW60; 109TexCr510, 5SW(2d)774;

TexCr 9**SW(2d)**1039(1stcase); **TexCr** 12 **SW(2d)**1227(2dcase); 111**TexCr**437, 14 **SW(2d)**848(2dcase); **TexCr** 15**SW(2d)** 618; **TexCr** 16**SW(2d)**1096(1stcase); **TexCr** 29**SW(2d)**388; **TexCr** 29**SW(2d)** 891(2dcase) (recapture held immaterial); 34**Wyo** 175, 242**P**411, 412 [citCJ]. [c] **Where accused was brought back from another state for sentence** and was within jurisdiction of appellate court when appeal initiated and hearing on appeal occurred, dismissal was not allowed. 135**Wash**650, 238**P**617. [d] **Mere fact that defendant has given bail bond and is represented by counsel** does not relieve him from the consequences of his escape and concealment. 121 **Or** 202, 253**P**1042. [e] **It is within discretion of court** (1) to hear or not to hear appeal of a prisoner who escapes pending appeal. 121 **Or**202, 253**P**1042. (2) Facts held to show attempt rather than completed escape. 108**TexCr**101, 299**SW**238.

195–13 99**TexCr**610, 271**SW**623; 103 **TexCr**308, 280**SW**824; **TexCr** 288**SW** 1118(2dcase); 105**TexCr**388, 288**SW** 1118(3dcase); 105**TexCr**399, 289**SW**40; **TexCr** 8**SW(2d)**121; 112**TexCr**135, 13 **SW(2d)**847(1stcase); **TexCr** 15**SW(2d)** 617(1stcase); **TexCr** 15**SW(2d)**1041(1st case); **TexCr** 16**SW(2d)**1081(2dcase); **TexCr** 28**SW(2d)**549(1stcase). [f] **Escape after affirmance.–TexCr** 8**SW(2d)** 121.

196–17 Contra 149**Miss**514, 115**S**592.

196–19 198**Cal** 593, 246**P**1116; 232**Ky** 331, 23**SW(2d)**550 (appellate court should set reasonable time for surrender).

196–21½–New. Power of the supreme court to reinstate appeal should be exercised only when denial will work palpable injustice. 201**Cal** 474, 259**P**47.

196–21¼–New. The court may look into the record and briefs filed and consider the merits of appeal before finally ruling on a motion to reinstate. 201**Cal** 474, 259**P**47.

196–21¼–New. Where the record presents nothing which would justify reversal of conviction, reinstatement will be denied. 201**Cal** 474, 259**P**47.

196–26 21**F(2d)**968.

196–27 75**CalA**679, 243**P**451; 245**NY** 564, 157**NE**858; **NC** 155**SE**255(1stcase). [a] **Where error appears on face of record,** appeal will be docketed but not dismissed. 197**NC**691, 150**SE**330(1stcase). [b] **Whether appeal should be dismissed** depends on whether time between appeal and motion to dismiss was unreasonable. **Wash** 287**P**13.

196–31 75**CalA**365, 242**P**906; 33**Porto Rico** 329.

196–31½–New. Where any question presented by bill of exceptions is rendered moot by record, showing accusation against defendant was nol prossed. 35**GaA**256, 132**SE**646.

196–32½–New. or nolle prosequi actually entered, 89**PaSuper**266.

196–33 104**TexCr**407, 284**SW**576.

196–38 **OklCr** 272**P**490(1stcase).

196–39 See also **OklCr** 281**P**318(2d case).

196–42½–New. On appeal by state involving moot question not presenting on the argument any new or novel proposition of law where new trial would not follow, a reversal appeal will be dismissed. 75**Mont**28, 241**P**623.

196–42½–New. That defendant's motion to vacate judgment of conviction was presented to the trial court too late is not ground for dismissal of appeal from an order denying the motion. 100 **CalA**91, 279**P**1030.

196–42¼–New. Appeal to dismiss robbery sentences could not be dismissed because such sentences ran concurrently with life sentence. **Wash** 289**P**41.

197–45 72**CalA**174, 236**P**985; 158**La** 240, 103**S**753; 161**La**423, 108**S**794. [a] **Appeal dismissed** for record's failure to show that sufficient notice of appeal might not be reinstated on affidavit's showing proper notice. 108**TexCr**335, 300**SW**70.

197–46 72**CalA**174, 236**P**985; 98**CalA** 552, 277**P**201. [a] **On dismissal of appeal** district court is reinvested and supreme court divested of jurisdiction. 73**Mont**541, 237**P**525.

197–46½–New. , and such judgment becomes final judgment of appellate court. 72**CalA**174, 236**P**985.

197–50 154**SC**23, 151**SE**214(1stcase) (appeals of more than one defendant should be heard at one time). [c] **Oral argument** will be denied where defendant has briefed case so thoroughly that nothing would be gained. 200 **Ind**7, 159**NE**755.

197–53 110**TexCr**573, 9**SW(2d)**1033.

197–55 [a] **Appellate court may enlarge** on time for argument to prevent dismissal. 253**NY**318, 171**NE**77.

197–56½–New. Under some statutes an appeal from a conviction in the county court on appeal from a conviction in a municipal court or a court of a justice of the peace, although returnable at the next term of the circuit court, is not triable until the stenographer's transcript becomes part of the records or the time therefor has expired. 148**Miss** 363, 114**S**627.

197–56½–New. Under some statutes an appealing defendant not brought to trial before the end of the third term of court is entitled to be discharged. 117**Nebr**350, 220**NW**578.

197–65 **Ind** 169**NE**531 (where no serious question is presented, request for oral argument will be denied); 230 **Mich**278, 203**NW**135 (argument of counsel must be respectful). See also 36 **GaA**672, 137**SE**737; 197 **Ind**606, 151**NE** 695; **Ind** 168**NE**241; **Ind** 168**NE**577.

197–65½–New. Petition for oral argument will be denied where the case on appeal has been thoroughly briefed and questions involved clearly stated, so that nothing could be gained by oral argument. 200 **Ind**583, 164**NE**315.

198–70½–New. Continuance of case by court simply gives it place on docket and hearing on record proper where appellant files transcript of record proper only. 317**Mo** 473, 278**SW**970.

199–88 53**ND**756, 208**NW**556. [a] **Equally divided court.**–289**Pa**20, 136**A** 861. [b] ***Power of court*** is inherent upon petition of either party in absence of statutory prohibition. 53**ND**756, 208 **NW**556. [c] **Error in transcript** presented on original hearing is not ground for reversal on rehearing where evidence shows defendant's guilt beyond reasonable doubt and that he was properly convicted. 87**CalA**601, 263**P**544.

199–89 85**Mont**553, 281**P**757; 100**Tex Cr**480, 273**SW**842. [a] **Second rehearing will be entertained** as it is the first rehearing on the merits. **TexCr** 24**SW (2d)**404.

199–91½–New. Second motions for rehearing should not be requested except on rare and extraordinary occasions, in which point can be made that some fact or principle of law has been overlooked. 110**TexCr**503, 9**SW(2d)**335.

199–91⅓–New. Where appellant, requesting leave to file a second motion for rehearing, presents a matter which was not specifically called to the attention of the trial court, the request will be denied. 111**TexCr**486, 16**SW(2d)**228(2d case).

199–91¼–New. The strict rule enforced against second motions for rehearing will not be applied, where the motion is in fact a first motion in so far as it complains of the disposition of the case on its merits. 113**TexCr**62, 18**SW(2d)** 172.

199–91⅕–New. Court cannot grant a rehearing that omitted matters may be inserted in minutes of the trial court's order. 99**TexCr**512, 270**SW**1018.

199–91⅙–New. Omissions in transcript are not ground for rehearing. 102**Tex Cr**563, 278**SW**846.

199–91⅐–New. Where a bill of exceptions shows ample evidence to support verdict, court will not grant rehearing after judgment of affirmance based on absence of recital that all evidence was contained in bill, although vital part of bill had been omitted. 21**AlaA**357, 108 **S**270.

199–91⅛–New. Withdrawal of motion for rehearing is in effect abandonment of appeal, leaving judgment in legal effect as if no appeal was prosecuted. 106**TexCr**154, 291**SW**539.

199–91⅑–New. Judgment affirming conviction will be withdrawn in such case, without regard to pardon of accused, validity of which may be determined by habeas corpus. 106**TexCr**154, 291**SW** 539.

199–93 103**TexCr**364, 280**SW**804.

199–95 121**Kan**687, 247**P**427.

199–96½–New. The court has power, and, it is its duty while retaining jurisdiction, to correct error in its decisions, which crept in, because of a mistaken assumption of fact, or misinterpretation of evidence. 53**ND**756, 208**NW**556.

199–2 92**Fla**1062, 111**S**725; **Ind** 165 **NE**315; 84 **IndA**559, 151**NE**705; 200 **Iowa**652, 204**NW**256; 121**Kan**687, 247**P** 427; 34**NM**465, 284**P**113; 53**ND**756, 208 **NW**556; 54**ND**779, 211**NW**336; 105**Tex Cr**516, 289**SW**54; 106**TexCr**289, 291**SW** 1107; 109**TexCr**473, 110**TexCr**57, 7**SW (2d)**527. [b] **Application of rule to particular case** is within discretion of court. **Ala** 130**S**533.

199–4 69**CalA**574, 232**P**174 (supreme court is not included to grant hearing to enable presentation of arguments which should have been presented to district court of appeal).

199–14 **Mo** 281**SW**943.

200–19 205**Cal** 29, 270**P**196.

200–21 53**ND**756, 208**NW**556.

200–25½–New. or escaped, **TexCr** 8**SW (2d)**121.

200–26 22**AlaA**74, 112**S**177.

200–29 105**TexCr**616, 290**SW**1097. But see **TexCr** 30**SW(2d)**316.

200–30 110**TexCr**512, 9**SW(2d)**358, 60 **ALR**290. [a] **Amended motion filed without leave after term** will not be considered. **TexCr** 20**SW(2d)**782.

200–33 53**ND**756, 208**NW**556. [a] **Appeal court** is without authority to reinstate cause after adjournment of regular term. 22**AlaA**191, 113**S**452.

200–33½–New. Where judgment was affirmed because record showed motion for new trial was filed in vacation and no error appeared in record, court upon its own motion in furtherance of justice will grant hearing where corrected transcript shows motion for new trial was filed within four days after verdict during recess of court. 314**Mo** 662, 285 **SW**62.

200–34 [a] **By whom made.**–22**AlaA** 341, 115**S**700.

200–35 105**TexCr**193, 287**SW**254; **Tex Cr** 20**SW(2d)**782 (motion held too general); **TexCr** 31**SW(2d)**1080(2dcase). [a] **When appellee files no brief** application may be stricken. 23**AlaA**474, 127 **S**253.

200–36 107**TexCr**221, 296**SW**563. [b] **Ex parte affidavit** of state witness cannot be considered. 107**TexCr**221, 296 **SW**563.

200–38 **TexCr** 287**SW**55; 110**TexCr**503, 9**SW(2d)**335; 110**TexCr**512, 9**SW(2d)** 358, 60**ALR**290; 112**TexCr**554, 18**SW (2d)**163; 113**TexCr**535, 22**SW(2d)**1071 (court will not write on questions presented in original rehearing unless it agrees with contentions therein).

200–38½–New. Where a statement of facts and bills of exception were filed more than ninety days after giving notice of appeal from conviction of assault with intent to murder, defendants, pleading legal excuse for failure to file within the authorized time, had the burden of showing it in connection with a motion for rehearing. 110**TexCr**572, 9**SW(2d)**1042(1stcase).

200–40 **Iowa** 203**NW**36. See also 81 **Mont**145, 262**P**158. [a] **Appellate court with or without suggestion has right to search record on petition for rehearing** to sustain action of affirming conviction. **IndA** 167**NE**144. [b] **Appellee by failing to point out defect in record in original brief on merits** did not waive defect and was entitled to rely thereon on rehearing. **IndA** 167**NE**144.

201–46½–New. Where it appears on rehearing that a bill of exceptions was not filed within the statutory time, judgment rendered will be withdrawn and the bill of exceptions dismissed. 169**Ga**15, 149**SE**650.

201–46⅓–New. The question, whether

the notary who took defendant's affidavit was disqualified because he was defendant's attorney, not raised when the affidavit was filed, nor brought to the trial court's attention, could not be raised by the state for the first time on motion for rehearing. 112TexCr9, 13 SW(2d)706.

201-48½-New. Withdrawal of motion for rehearing has been granted on appellant's request, although his accompanying application to dismiss appeal was denied. 105TexCr497, 288SW1072.

201-50 111TexCr275, 12SW(2d)579; TexCr 27SW(2d)204(1stcase). But see 41GaA602, 154SE291.

201-53 52ND81, 202NW131.

201-57 100TexCr480, 273SW842; 109 TexCr288, 5SW(2d)770; 112TexCr479, 17SW(2d)1064. [a] **Correction of record so as to make it contain final judgment** justifies reinstatement of appeal. 112TexCr533, 17SW(2d)1050.

201-60 109TexCr473, 110TexCr57, 7SW (2d)527; TexCr 31SW(2d)434(1stcase); TexCr 31SW(2d)644.

201-64½-New. Effect of motion to withdraw appeal. TexCr 31SW(2d)434 (1stcase).

202-68 79Mont46, 254P872; 81Mont 145, 262P158 (statute construed). [b] (6) Selection of bystanders after jury wheel was empty is not reviewable. 217 Ky8, 288SW1059; 235Ky449, 31SW(2d) 697.

202-69 22AlaA599, 118S234; 326 Ill 518, 158NE142; 317 Ill 191, 148NE67; 335 Ill 570, 167NE852; 338 Ill 33, 169 NE816; Ill 172NE743; 216Ky98, 287 SW235; 252Mass450, 148NE113 (as it was not legal duty of trial judge to indorse his approval on request of defendant to war department for papers which could be furnished or withheld in discretion of department, his refusal to indorse was not reviewable error); 215AppDiv683, 212NYS280 (will pass on conduct of trial). [a] **Supreme court will not inquire** into extent of punishment of one defendant as compared with others. 18NC565, 127SE601. [b] **Power of court of criminal appeals** extends no further than to determine whether evidence supports the verdict and whether proper legal procedure was followed at trial. 105TexCr19, 284SW 955.

202-70½-New. Reviewing court cannot consider complaint as to irregularity in summoning of jury. 234Ky308, 28SW (2d)11.

202-70¾-New. Where a bill of exceptions reserved to overruling of motion for new trial was based only on a complaint of the action of the court in the admission and rejection of testimony, it presented nothing to the appellate court for review. 112TexCr628, 18SW (2d)158.

202-70¾-New. Propositions of law submitted at trial serve no purpose on review. 240 IllA112.

202-70½-New. Error in selecting jury is not reviewable under statute. 215 Ky731, 286SW1044.

202-71 22AlaA336, 115S697; 23AlaA 313, 124S670; 199Cal 240, 248P908; 206Cal 112, 273P32; 107Conn630, 141A 660; 207 Iowa219, 222NW389; Miss 113S218; Mo 19SW(2d)671; Mo 296SW 433; 113Nebr755, 204NW513; 119 Oh 189, 162NE802; Utah 287P909 (not tried de novo). See also Mo 281SW960. [a] **If local prejudice relied on as ground for change of venue exists,** it should appear from examination of jurors to require reversal. 86Colo 35, 278 P594, 65ALR1260.

202-72 85 IndA596, 152NE853; 113 Nebr755, 204NW513.

202-72½-New. Conversely, every ruling below, properly saved by exception, must be considered on appeal. 214Ala 603, 108S543.

202-74½-New. A juror's affidavit must be disregarded in determining what misconduct warrants reversal. 90CalA 683, 266P813.

202-74¼-New. On appeal from a conviction of felony, the court must examine the record proper including information and verdict. Mo 22SW(2d) 777.

202-74¼-New. Errors committed in insanity hearing cannot be considered on appeal from conviction, where decision in sanity hearing is not appealable. TexCr 31SW(2d)812.

202-76 22AlaA474, 116S907; 102CalA 493, 283P292; 36GaA654, 137SE863; 200 Ind575, 165NE314; Iowa 203NW 36; 161La250, 108S471; 169La595, 125 S629; 162La353, 110S556; 164La737, 114S636; 255Mass369, 151NE839; 48 Nev358, 232P778, 235P645; 152SC17, 149SE348. [c] 162La353, 110S556. [d] **Motion for new trial.**-158La755, 104S 705. [e] **Validity of statute** under which prosecution is had presents question of law. 162La353, 110S556. [f] **Simple legal questions** need not be discussed. 23AlaA329, 125S64(2dcase).

202-77 70CalA465, 233P812; 159La 840, 106S324; 160La121, 106S716; 160 La168, 106S733; 164La737, 114S636; 167La379, 119S263 (denial of severance); 250NY358, 165NE810. But see 252NY346, 169NE408(2dcase). [d] **On review of denial of motion for new trial** exceptions complaining of court's ruling which involve questions of fact present nothing for review. 255Mass369, 151NE839.

202-80 [a] **Prescription.**-168La807, 123S332(2dcase).

203-81 23F(2d)470; 200Cal 404, 253P 318; 99CalA178, 277P1060(2dcase); 160 La121, 106S716; 164La737, 114S636.

203-82 4F(2d)804; 158La791, 104S 717; 159La840, 106S324; 162La353, 110S556. [a] **In Louisiana.**-158La869, 104S746. [b] **Where circumstances are such as to reasonably justify inference of guilt,** as found by jury, fact that inference of innocence might likewise be reasonably drawn therefrom does not present question of law for review. 96 CalA102, 273P843.

203-83 94CalA543, 271P552.

203-83½-New. Overruling of motion for new trial on ground verdict is contrary to law and evidence presents no question of law for review. 158La791, 104S717.

203-83¼-New. On appeal by state after acquittal, constitutionality of statute involved is only question before appellate court. 216Ala391, 113S254.

203-85 271US620, 46SCt603, 70Led 1118; 13F(2d)453; 11F(2d)925; 15 F(2d)634; 15F(2d)953; 20F(2d)785; 214Ala2, 106S617; 22AlaA113, 113S316; 22AlaA134, 113S622; 21AlaA272, 107S 322; 21AlaA585, 111S43; 195Cal 445, 234P91; 70CalA567, 234P129; 100CalA 278, 279P1015 (where question raised on appeal becomes moot, case will not be considered); 164Ga53, 137SE784; 164 Ga57, 137SE765; 164Ga509, 139SE37; 37GaA94, 139SE95; 164Ga677, 139SE 349; 165Ga287, 140SE752; 165Ga265, 140SE847; 36GaA772, 138SE148; 37 GaA361, 140SE524; 328 Ill 602, 160NE 125; 199 Ind550, 159NE149; 200 Ind 483, 164NE626; 202 Iowa638, 210NW 774; 203 Iowa694, 213NW220; 130Kan 754, 288P761 (collateral attack); 162La 299, 110S482; 169La291, 125S127; 152 Md93, 136A47; 253Mass541, 149NE417; 239Mich123, 214NW231; 169Minn205, 210NW883; 169Minn214, 210NW1001; 142Miss104, 107S381; 314Mo 333, 284 SW433; 316Mo 195, 289SW604; 102NJL 71, 130A805; NJSup 133A536; 221 AppDiv77, 222NYS647; 194NC336, 139 SE668; 192NC123, 132SE151; 49ND148, 190NW817; 51ND17, 209NW657; 124 Okl 241, 255P154; OklCr 279P519; 155 SC407, 152SE667; 101TexCr11, 283SW 233; 104TexCr46, 282SW242; 108TexCr 566, 28W(2d)227; 110TexCr321, 5SW (2d)772; TexCr 25SW(2d)853; 100Vt 373, 137A465; 136Wash1, 238P609; 145 Wash44, 258P826; 194Wis385, 216NW 488. See also 20AlaA572, 104S141. [a] **On state's appeal** only matters having value as precedent may be determined. 203 Iowa694, 213NW220. [b] **Where evidence sustains conviction under conspiracy count** and sentence is less than could have been imposed thereunder, sufficiency of evidence as to substantive offenses is immaterial. 15F(2d)953. [c] **Merits of motion in arrest of judgment,** based on same defects as motion to quash indictment which was not well taken, need not be considered. Fla 123 S820.

203-87 22AlaA222, 114S261; 21AlaA 200, 106S682; 163Ga304, 126SE49; 164 Ga509, 139SE37; 165Ga145, 139SE361; 164Ga677, 139SE349; 165Ga240, 140SE 625; 165Ga287, 140SE752; 166Ga15, 142SE105; 36GaA309, 136SE330, 37 GaA382, 140SE524; 196 Ind534, 149NE 59; 198 Ind686, 154NE670; 199 Ind546, 158NE902; 202 Iowa173, 209NW458, 47 ALR407; 202 Iowa638, 210NW774; 217 Ky565, 290SW325; 162La299, 110S482; 316Mo 195, 289SW604; 192NC236, 136 SE730; 194NC336, 139SE668; 106 TexCr106, 291SW232; 104WVa433, 140 SE139. [a] **Where question not likely to arise on retrial,** it will not be considered. 21AlaA127, 106S70.

203-88 11F(2d)966; 35F(2d)25; 35 F(2d)663; 38F(2d)630(2dcase); 38 F(2d)632; 86Colo 35, 278P594, 65ALR 1260; DC 35F(2d)377; 224AppDiv766, 229NYS724; 103TexCr607, 281SW848.

203-88½-New. Where conviction is sustained on one ground, other alleged error need not be considered. 233 IllA 504.

203-89 222Ky400, 300SW887. See also 214Ala2, 106S617.

203-89½-New. The propriety of cross-examination relating to a count of an indictment which was dismissed on defendant's motion will not be considered. 33F(2d)509.

203-89¼-New. Objection to question withdrawn and not answered will not be considered. 161La827, 109S505.

203-89¼-New. Although appellate court did not reverse ruling of lower court granting new trial, its opinion is law and binding. 215Ky743, 286SW 1065.

203-90 21AlaA272, 107S322; 124 Okl 241, 255P154; TexCr 32SW(2d)460. [a] (2) Where legislature cured defects in statute held unconstitutional at trial by enactment of statutes subsequent thereto, questions on appeal as to rulings on unconstitutionality of statute is held to have become moot. 21AlaA 272, 107S322.

203-90½-New. Where a statute is held unconstitutional on one ground, other grounds on which it is attacked need not be considered. 143Miss745, 109S724.

203-92 22AlaA134, 113S622; 99CalA 37, 277P1082; 204 Iowa186, 214NW 675; 79Mont385, 256P1071; 34NM112, 278P249; 220AppDiv498, 222NYS24; 130Misc612, 225NYS182; Vt 115A413; 143Wash281, 255P94. [b] **Instructions not excepted to must be accepted as law** in determining the sufficiency of the evidence. 41F(2d)193.

203-93 35GaA666, 134SE340.

203-94 239Mich123, 214NW231. [a] TexCr 25SW(2d)848.

203-96 36GaA217, 136SE92.

203-97 198Cal 426, 245P426; 87Colo 188, 285P1102; 36GaA301, 136SE829; 259Mass128, 156NE57; 239Mich123, 214 NW231; 75Mont350, 243P587; 78Mont 87, 252P320; 35PortoRico 122; 51Philippine34; 110TexCr371, 7SW(2d)961; 144Wash236, 257P385; 144Wash699, 257P387; Wis 229NW633.

203-97½-New. In determining whether the trial court erred in restricting cross examination, the appellate court must view the situation as it appeared to the trial court. 107TexCr19, 294SW 561.

204-98 [d] **On compulsory appeal because of sentence of death** for first degree murder, in view of plea of guilty, inquiry will be limited to search for fundamental irregularities in the proceedings and to a possible abuse by the court of its discretion in determining the punishment. 29F(2d)740(2dcase). [e] **In Maine.**-128Me101, 148A144. [f] **On appeal from order denying new trial made before sentence** objection that sentence is excessive cannot be raised. 172Minn139, 214NW785.

204-2½-New. On appeal specifications of error not mentioned under "points and authorities" in the brief have been held waived. IndA 169NE338.

204-3 [b] **On writ of error** in absence of bill of exceptions, only defects in indictment which are good on motion in arrest of judgment will be available.

4F(2d)889. [c] **In New Jersey.–Sup** 131A625.

204–6 94Fla32, 113S630; 324 Ill 363, 155NE316.

204–10 [a] 260Mass369, 157NE693.

204–12 [b] NJSup 136A295.

204–13 18F(2d)254; 261Mass12, 158 NE167. [b] **Sufficiency of conviction on entire evidence** not considered on review by assignment of error. NJSup 135A 339.

204–13½–New. "Record," indictment, and judgment can be considered to determine sufficiency of indictment. 15 F(2d)977.

204–13⅓–New. In some jurisdictions a writ of error when issued brings before the appellate court for review matters which might have been brought up by appeal. 312Mo 447, 279SW72.

204–15 [a] (3) On review of proceedings of juvenile court only questions reviewable were alleged illegal acts or want of jurisdiction of judge of district court acting as judge of juvenile court. Iowa 227NW136. [b] **In California.–196Cal** 344, 238P88. [c] **If inspection of record shows want of jurisdiction,** judgment will be quashed. 98Fla523, 124S12(2dcase).

205–16 245Mich202, 222NW102.

205–18 281US389, 50SCt344, 74L ed 923; 196Cal 344, 238P88; 84CalA201, 257P922; 86CalA332, 260P919; 67Utah 526, 248P486.

205–19 196Cal 344, 238P88.

205–20 48RI 265, 137A222; 36Wyo 257, 254P488. [a] **Refusal to direct verdict** may be considered on whole case as certificate under statute. NJSup 136 A295.

205–22 36Wyo 257, 254P488. [a] **On reservation of constitutional questions,** supreme court cannot dismiss action or vacate reservations. 36Wyo 257, 254P 488.

205–25 15F(2d)977; 80Mont181, 260P 138; 196NC164, 145SE23; 109TexCr 335, 4SW(2d)555; 111TexCr419, 13SW (2d)116; TexCr 31SW(2d)450. [a] (2) Facts and reasons stated in affidavit of prejudice against judge are to be considered by reviewing court. 22F(2d) 605. [b] 20AlaA627, 104S674. [c] **Exception to motion to dismiss in criminal case,** under statute, renewed by defendant after introduction of his own evidence, does not confine appeal to state's evidence alone, and conviction will be sustained under the second exception, if there is any sufficient evidence on whole record of defendant's guilt. 196 NC562, 146SE395. [d] **Whether error in denying continuance determined from facts** proved at trial. 100TexCr614, 272 SW207. [e] **In New Jersey.–Sup** 131A 625. [f] **Where special demurrer was overruled without requiring bill of particulars,** record may be resorted to to ascertain whether prejudice resulted. 15F(2d)977. [g] **Where defendant went on with proof after overruling of demurrer to evidence,** court will consider all evidence in passing on propriety of ruling. 317Mo 894, 296SW141.

205–28 118Kan784, 236P641 (original evidence not received). See also 248NY 159, 161NE455.

205–29 23AlaA440, 126S608; Kan 291 P751; 148Miss764, 114S827; 109TexCr 296, 4SW(2d)40. [a] 76CalA688, 245P 781; 113TexCr421, 21SW(2d)509. [b] **Abuse of discretion in refusing to grant separate trials** must be determined only on basis of showing made when demand was presented, not on what transpired afterward. 195Cal 272, 232P710.

205–30 206 Iowa1169, 221NW847; 231 Ky463, 21SW(2d)800; 245Mich115, 222 NW151.

205–31 112TexCr604, 17SW(2d)1066 (1stcase). [b] **In California.–79CalA** 357, 249P541.

206–32 22AlaA319, 115S294. But see 200 Ind43, 161NE265. [a] (3) Stenographer's transcript of evidence taken in motion for new trial, not authenticated by judge, is not considered in review of refusal to grant new trial. TexCr 283 SW811.

206–33½–New. In considering admissibility of testimony, it is indispensable that appellate court consider purpose of its introduction and particular point to be proved thereby. 238Mich171, 213NW 159.

206–34 [a] **In determining if demurrer to evidence** or nonsuit should have been granted only inculpatory evidence need be considered. NC 154SE604.

206–34½–New. The reviewing court must look at the question of admissibility of evidence in the same light in which the issue presented itself in the lower court at the time such evidence was offered and excluded. 112TexCr 470, 17SW(2d)1053.

206–34¼–New. Admission of evidence is reviewed in the light of circumstances at the time of objection and ruling. 168 Ark731, 271SW338.

206–36 194Cal 1, 227P156; 87CalA724, 262P795; CalA 289P909; 32PortoRico 92 (Code Cr. Proc. § 363); TexCr 27 SW(2d)805. [b] **Order refusing convicted defendant, after trial, leave to apply for probation** because he did not plead guilty, and without considering merits, is reviewable on appeal from judgment. 87CalA482, 262P361.

206–38 5F(2d)497; 194Cal 1, 227P156; 169La559, 125S617 (only matters on face of papers considered).

206–40½–New. , or order forfeiting bail on nonappearance of defendant. 70CalA 271, 233P85.

206–41 But see 158La755, 104S705; 158 La791, 104S717. [b] **In Louisiana.–159** La674, 106S28.

206–42 47 Ida246, 273P940.

206–43 70CalA271, 233P85.

206–45½–New. Error is not assignable, on appeal from judgment of conviction, because of requiring excessive bail. 25 F(2d)90.

206–45⅓–New. The question of jurisdiction involved on a prior appeal from judgment will not be considered on subsequent appeal from an order vacating bail. 57ND508, 222NW651.

206–45¼–New. On appeal from judgment only, inquiry limited to whether verdict sustained by substantial evidence. Mont 292P717.

206–45½–New. Supplementary proceedings. Refusal of trial court after conviction to order inquiry into defendant's sanity is not reviewable on appeal from conviction. 284Pa311, 131A229.

206–45¼–New. Questions involving sufficiency of evidence to justify verdict may be reviewed only on appeal from an order denying a new trial, 81Mont 145, 262P158.

206–45⅛–New. unless the record discloses that there is no evidence even remotely to prove the elements of the crime charged. 81Mont145, 262P158.

206–47¼–New. An appeal from an order dismissing an action because it is not brought to trial within the statutory period does not bring up for review an order suppressing evidence five months before. 150Wash456, 273P532.

206–47⅛–New. Pendency of another cause involving similar issues is not considered on appeal. 22AlaA160, 113S480.

206–47½–New. Court will not look to another case to determine any fact not appearing in the particular case under review. 143Miss312, 108S723.

207–49 218Ala427, 118S595. [a] **In Utah.–292P**249.

207–50 217Ala68, 114S794 (matters not considered in opinion of intermediate court); 219Ala254, 122S610; 149Miss 738, 115S885. [a] **What record must show.–94PaSuper**10.

207–51 220Ala78, 124S118; 217Ala410, 116S112; 317 Ill 578, 148NE259; 318 Ill 179, 149NE9; 91PaSuper37. [a] 22 AlaA162, 114S67 (supreme court reviewing decision of court of appeals on question of fact, on certiorari, will look only to facts stated in the opinion of that court).

207–56 214Ala2, 106S617; 218Ala427, 118S595; 219Ala364, 122S617(2dcase); 220Ala30, 123S231, 68ALR712; 338 Ill 479, 170NE689 (mixed question of law and fact); 119 OhSt39, 162NE106; 91 PaSuper17. [a] **Supreme court looks to findings** only as to tendencies of evidence. 214Ala2, 106S617.

207–57 214Ala2, 106S617; 217Ala398, 116S418; 95Fla400, 115S825.

207–58 214Ala2, 106S617; 218Ala167, 118S233.

207–61½–New. In the absence from the record of a judgment of the intermediate court establishing a lone record of the justices, it will be presumed that such record was not established. 140Miss712, 106S280.

207–61½–New. On appeal from judgment dismissing appeal from conviction for misdemeanor before a justice of the peace for want of an appeal bond, the supreme court cannot consider assignments of error as to the construction of the statute defining the offense charged. 157Tenn532, 11SW(2d)854.

207–61¼–New. Where on appeal ruling is reversed, other questions or rulings theretofore foreclosed are not reopened. 214Ala242, 107S49.

207–61½–New. In Arizona appellate court, on appeal from superior court in cases originating in justice court will consider only validity of statutes involved. 31Ariz389, 254P225.

207–62 245NY227, 157NE94.

207–64 241NY128, 149NE221.

207–66½–New. Where the appellate judgment erred in reversing conviction on stated ground, it is necessary for the court of appeals to consider other questions of law which might have justified reversal. 247NY36, 159NE715.

207–63 Cal 289P629; 76CalA192, 244P 94; CalA 283P119; 203 Iowa918, 210 NW961; 214Ky218, 282SW1096; 215 Ky193, 284SW1023; 218Ky115, 290SW 1059; 225Ky413, 9SW(2d)53; 228Ky 307, 14SW(2d)1065; 230Ky704, 20 SW(2d)711; 239Mich253, 214NW186; Mo 285SW87; 106TexCr642, 294SW557; 107TexCr666, 298SW591; 68Utah551, 251P362; 141Wash148, 251P115; 147 Wash169, 265P175. [a] (2) Determination that information sufficient as against demurrer is conclusive on same question on appeal from retrial, though additional points raised in support of demurrer. 76CalA192, 244P94. (3) Holding of supreme court that averment as to second offense should have been stricken from information becomes law of case on retrial. 239Mich253, 214NW 186.

203–69 235Ky319, 31SW(2d)387.

203–74 200 Iowa652, 204NW256.

203–76 216Ky57, 287SW210; 144Miss 778, 110S225. See 17F(2d)86.

203–77 28F(2d)695; CalA 290P678; 44 Ida739, 260P164.

203–78 22F(2d)672; 24F(2d)353 (instruction); 171Ark40, 283SW25; 79 CalA576, 250P588; 219Ky834, 294SW 790; Mo 278SW982; 316Mo 252, 289SW 821; 316Mo115, 289SW862.

203–79 4F(2d)884; 4F(2d)908; 8F(2d) 593; 80CalA605, 251P321; 83CalA302, 256P616; 170La120, 127S385; 141Wash 324, 251P589.

209–83½–New. Prosecution cannot contend motion in arrest was not timely, on defendant's appeal. Wash 288P236.

209–85 19F(2d)127; 19F(2d)901; 27 F(2d)713; 31F(2d)229; 214Ala457, 108 S74; 23AlaA63, 120S468; 22AlaA418, 116S910; 32Ariz203, 256P1055; 168Ark 167, 269SW355 (consolidation of cases); 169Ark498, 276SW353 (remarks of prosecuting attorney concerning failure of appellant to testify in civil action not reversible error when invited by evidence elicited by appellant); 171Ark40, 283SW25; 175Ark453, 299SW739; 70 CalA271, 233P85 (continuing hearing on demurrer where defendant is fugitive from justice); 78CalA421, 248P691; 78 CalA380, 248P975; 79CalA127, 249P60; 79CalA295, 249P525; 94CalA297, 271P 132; 162Ga777, 135SE187; 35GaA175, 132SE243; 41GaA618, 154SE201; 200 Iowa889, 205NW500; 125Kan496, 264P 1060; 216Ky549, 288SW740; 226Ky 660, 11SW(2d)726; 229Ky505, 17 SW(2d)421; 167La1113, 120S875; 264 Mass94, 162NE7; 245Mich229, 222NW 149; Mich 233NW192(2dcase); 178 Minn69, 225NW925; 144Miss104, 109S 727; 149Miss262, 115S208; Mo 256SW 787; 312Mo373, 278SW1016; Mo 285 SW83; 317Mo 313, 295SW543; 318Mo 761, 300SW755; 321Mo 1171, 14SW(2d) 638; Mo 29SW(2d)688; 79Mont343, 256 P380; 116Nebr90, 215NW785; 103NJL

383, 135A894(assenting to ruling on trial now complained of); 104NJL512, 141A 85; 128Misc68, 217NYS662; 35 OhA311, 172NE401; OklCr 287P820; 49RI 386, 143A413; 148SC360, 146SE116; 49SD 485, 207NW466; 52SD582, 219NW263; 100TexCr234, 272SW793; 104TexCr438, 284SW577; 107TexCr19, 294SW564; 110TexCr341, 8SW(2d)136; 150Va33, 142SE402; 151Va533, 145SE307; 193 Wis595, 214NW335. [a] 87CalA482, 262P361. [b] **Parties are bound by facts to which they agree.**–128 Misc68, 217NYS662.

209–85½–New. , or conduct of his counsel. 94Fla318, 113S689.

209–86 22AlaA583, 118S242; 78CalA 421, 248P691; 78CalA380, 248P975; 94 Fla783, 114S523; 164La167, 113S805; Mo 24SW(2d)981.

209–87 See also 223AppDiv248, 228NYS 24.

210–89 TexCr 288SW1116; 109TexCr 101, 3SW(2d)90; TexCr 32SW(2d)197 (1stcase). But see 216AppDiv508, 215 NYS666. [a] (2) Where defendant received lowest penalty. 109TexCr101, 3 SW(2d)90.

210–92½–New. On a plea of guilty, the sufficiency of evidence is not open to question unless the facts affirmatively show innocence or that there is no legal evidence. 103TexCr391, 280SW1064.

210–92½–New. Defendant appealing from a judgment of conviction as final may not complain that the minutes of the lower court show the pendency of a motion for a new trial. 144Miss104, 109 S727.

210–92¼–New. Defendant is not precluded from assigning error because judgment was rendered on the verdict of eleven jurors by the fact that, on advice of counsel, he consented to excusing a sick juror and to continuance of the trial before eleven jurors. 194NC 318, 139SE433.

210–94 73CalA13, 238P374; 77CalA434, 246P822; 78CalA395, 248P696; 84CalA 58, 257P592; 162Ga777, 135SE187; 40 GaA232, 149SE158; 319 Ill 606, 150NE 347; Ind 166NE661; 212Ky778, 280SW 118; 314Mo 599, 285SW733; 321Mo 553, 12SW(2d)428; 322Mo 1239, 18SW(2d) 71; 116Nebr90, 215NW785; 103NJL88, 134A611; 104NJL10, 139A417; SD 228 NW395; 100TexCr474, 273SW607 (instructions complained of more favorable than those given at his request); 106 TexCr251, 291SW908; TexCr 11SW(2d) 172.

210–95 34Ariz139, 268P615; 71CalA 239, 235P69; 78CalA395, 248P696; 41 Ida616, 243P359; 323 Ill 61, 153NE705; 329 Ill 352, 160NE564; 331 Ill 636, 163 NE352; 143Miss722, 109S727; 154Miss 523, 122S750; Mo 256SW1043; Mo 31 SW(2d)39; 138SC421, 136SE736; 101 TexCr267, 275SW837; 101TexCr645, 276SW906; 112TexCr604, 17SW(2d) 1066(1stcase); 143Va609, 130SE777 (cannot complain of error invited by granted requests for instructions on same subject). [a] **Where court amended charge to meet defendant's exception,** defendant could not complain of charge as amended. 113TexCr112, 18 SW(2d)643.

211–96 129Kan155, 281P886; 309Mo 498, 274SW734; 128Misc68, 217NYS 662; 105TexCr189, 287P256; 151Wash 420, 276P88.

211–96½–New. , or where the evidence to which an instruction was directed was first brought out by defendant and was uncontradicted. 321 Ill 181, 151NE485.

211–99 But see 169Ga468, 151SE34 (defendant cannot invoke charge substantially given and, after conviction complain that charge was without evidence to support it).

211–1 163Ga121, 135SE917; 169Ga583, 151SE15; MoA 281SW62; 88PaSuper 216.

211–2 171ArkH88, 286SW931; TexCr 31SW(2d)1084.

211–2½–New. Failure of defendant to request an instruction correctly stating the testimony required to establish the charge does not estop him from complaining of the failure of the state to obtain such instruction. 154Miss21, 122 S98.

211–2⅓–New. Accused, denying possession of stolen property, cannot complain of failure to give special instruction on the possession of recently stolen property. OklCr 276P791.

211–4 15F(2d)196; 25F(2d)867; 33F (2d)238; 34F(2d)741; 43F(2d)273; 217Ala398, 116S418; 22AlaA193, 114S 14; 22AlaA178, 114S890; 169Ark498, 276SW353; 174Ark899, 298SW349; 175 Ark453, 299SW739; 71CalA181, 235P 72; 73CalA74, 238P142; 73CalA402, 238 P794; 75CalA672, 243P476; 79CalA328, 249P231; 101CalA744, 282P413; 102 CalA29, 282P813; 85Colo 442, 276P983; 90Fla299, 105S834; 168Ga765, 149SE 49; 46 Ida765, 271P322; 327 Ill 162, 158 NE462; 332 Ill 222, 163NE694; 235Ky 340, 31SW(2d)383; 206 Iowa365, 218 NW936; 165La842, 116S206; 168Minn 341, 210NW45; 316Mo 243, 289SW852; 322Mo 106, 16SW(2d)205; MoA 282SW 1043; MoA 289SW664; 76Mont526, 248 P215 (prior conviction admitted by defendant); NJSup 133A415; 103NJL663, 138A575; 283Pa327, 129A86; RI 136A 8; 149SC439, 147SE441; 49SD427, 206 NW576; 54SD375, 223NW320; 101Tex Cr333, 275SW831; 108TexCr77, 299SW 259; 109TexCr32, 2SW(2d)846 (confession); 111TexCr570, 13SW(2d)874; 112TexCr92, 14SW(2d)63(2dcase); 112 TexCr337, 17SW(2d)48(1stcase); 112 TexCr546, 17SW(2d)1066(2dcase); 113 TexCr142, 18SW(2d)663; 113TexCr335, 21SW(2d)675(3dcase); 113TexCr462, 22 SW(2d)922; TexCr 27SW(2d)164; 135 Wash295, 237P730; 152Wash284, 277 P856; 103WVa427, 137SE649; 36Wyo 466, 256P1040. [a] **Where defendant requested submission of testimony,** he cannot complain thereof. 231Ky527, 21SW (2d)840. [b] **Where defendant's counsel agreed** to admission, he cannot complain of error. TexCr 25SW(2d)849.

211–4½–New. or with his consent, 172 Minn208, 215NW206.

211–4⅓–New. or with his consent and not objected to, 21AlaA384, 108S656.

211–4¼–New. or where he withdrew objection to its admission, 312Mo373, 278 SW1016.

211–5 14F(2d)925; 33Ariz354, 264P 1083; 172Ark613, 290SW59; 72CalA 421, 237P767; 79CalA328, 249P231; 82 Colo 205, 258P226; 163Ga304, 136SE 49; 329 Ill 278, 160NE575; 168Minn341, 210NW45; Miss 113S219; 314Mo 699, 285SW440; 316Mo 157, 289SW948; 221 MoA114, 294SW117; Mont 293P309 (deficiencies of state's proof supplied by him); 218AppDiv363, 218NYS297; RI 133A649; 153SC25, 150SE321; 106TexCr 328, 291SW1104; 106TexCr628, 294SW 589; 108TexCr253, 299SW901; 109Tex Cr624, 6SW(2d)369; 110TexCr371, 7SW (2d)961; 111TexCr32, 10SW(2d)996; 111TexCr45, 10SW(2d)999; 147Wash 411, 266P163 (expert testimony); 33 Wyo 428, 240P219.

211–6 13F(2d)451; 20AlaA622, 104S 837; 21AlaA415, 109S122; 22AlaA319, 115S294; 78CalA68, 248P261; 208 Iowa 1321, 227NW124; 209Ky832, 273SW 511; 164La813, 114S696; 232Mich1, 204 NW742; 33 OhA338, 169NE588; 106Tex Cr628, 294SW589; 110TexCr345, 7SW (2d)571; 112TexCr446, 16SW(2d)1091.

211–7 152Miss656, 120S747; RI 133A 649; 36Wyo 466, 256P1040.

211–7½–New. , or where he assists the district attorney in bringing out the facts in detail. 154Miss653, 122S757, 63 ALR1319.

211–8 89CalA451, 265P276; Mo 30SW (2d)132. See also 38Wyo 140, 265P25. [a] **Exclusion on defendant's motion** of testimony previously admitted is not ground for new trial. 163Ga121, 135SE 917.

211–8½–New. , or has moved to strike similar evidence introduced by the other side. 320Mo 417, 8SW(2d)29.

211–9 But see 264Mass221, 162NE308.

211–10½–New. Defendant cannot complain that bankruptcy schedules were admitted without proof of oath where his attorney admitted attestation in the presence of defendant who remained silent. 36F(2d)461.

211–10½–New. Objection to admission of evidence is treated as abandoned where accused causes such evidence to be repeated on cross-examination and voluntarily develops it by bringing out further details of the transaction. 90 Fla299, 105S834.

211–10¼–New. Where accused waived the objection that his statement was not given freely and voluntarily, he cannot complain that it was not shown that such statement was made freely and voluntarily. 68CalA95, 228P417.

211–10⅓–New. Defendant's exception to introduction by prosecution of only parts of a letter is not available on appeal as accused could have offered remainder of letter. 21AlaA339, 108S620.

211–10⅙–New. Where defendant's counsel consented that certified copy of prior conviction might be offered as an exhibit, error cannot be predicated on receipt in evidence of certified copy identified by clerk of court as correct. 54 ND768, 210NW971.

211–12 164Ga59, 137SE762; 228Ky688, 15SW(2d)475; 161La532, 109S56; 254 Mass520, 150NE854; 316Mo 213, 292SW 721; 82NH518, 136A358; 52SD91, 216 NW858.

211–14 Mo 292SW19.

212–16 194NC738, 140SE728 (appeal from death sentence). See also 77Mont 307, 250P603.

212–17½–New. Under stipulation admitting sufficiency of evidence to sustain conviction question of sufficiency of evidence is not before court. OklCr 287 P1053.

212–18 276US505, 48SCt400, 72Led 676; 7F(2d)111; 12F(2d)904; 14F(2d) 827; 29F(2d)651; 39F(2d)782; 213Ala 264, 104S638; 214Ala532, 108S355; 20 AlaA543, 104S846; 22AlaA131, 113S469; 22AlaA422, 116S411; Ariz 282P930; 68 CalA575, 229P990; 77CalA146, 246P 157; 70CalA271, 233P85; 84CalA168, 257P903; 96CalA215, 273P1087; 96 CalA373, 274P451; 88Fla135, 101S273; 89Fla212, 103S636; 95Fla433, 116S39; 97Fla908, 122S525; 163Ga121, 135SE 917; 163Ga186, 136SE72; 163Ga313, 136SE154; 170Ga870, 154SE351; Ga 155SE11; 33GaA602, 127SE793; 34GaA 180, 128SE586; 35GaA391, 133SE650; 35GaA496, 133SE877; 35GaA471, 134 SE141; 35GaA593, 134SE329; 36GaA 209, 210, 136SE96; 36GaA274, 136SE 468; 36GaA315, 136SE798; 36GaA602, 137SE573; 37GaA158, 139SE90; 37GaA 153, 139SE134; 37GaA632, 141SE216; 38GaA343, 143SE909; 38GaA687, 145 SE672; 39GaA546, 147SE728(1stcase); 41GaA290, 152SE596(2dcase); 326 Ill 197, 157NE233; 196 Ind509, 149NE57; 196 Ind704, 149NE432; 197 Ind685, 150 NE409; 197 Ind419, 151NE129; 198 Ind 73, 152NE607; 198 Ind643, 154NE2; 199 Ind578, 159NE154; 199 Ind653, 160NE 41; 197 Ind16, 164NE93; 89 IndA486, 165NE919; Ind 166NE651; Ind 167NE 531; Ind 170NE786; 202 Iowa352, 209 NW514; 204 Iowa1135, 216NW642; 206 Iowa397, 220NW13; 206 Iowa384, 220 NW32; 208 Iowa796, 223NW873; 210Ky 378, 275SW881; 210Ky449, 276SW160; 214Ky454, 283SW418; 214Ky544, 283 SW385; 215Ky585, 286SW689; 216Ky 541, 287SW972; 226Ky437, 11SW(2d) 111; 227Ky190, 12SW(2d)285; 227Ky 100, 12SW(2d)329(2dcase); 227Ky528, 13SW(2d)521; 236Ky68, 32SW(2d)550; 160La47, 106S670; 170La314, 127S735 (2dcase); 170La488, 128S286; Me 149A 148; 155Md474, 142A497; 254Mass86, 149NE600; 254Mass520, 150NE854; 255 Mass317, 151NE300; 257Mass473, 154 NE260; 259Mass152, 156NE65; 260 Mass303, 157NE354; 264Mass94, 162NE 7; Mass 165NE29; 265Mass166, 165NE 467; 233Mich670, 207NW832; 142Miss 342, 107S372; 147Miss694, 112S785; 153Miss696, 122S199(2dcase); 154Miss 489, 122S533; 311Mo 510, 278SW1040; 316Mo 213, 292SW721; 317Mo 398, 295 SW739; 317Mo 477, 296SW147; 317Mo 426, 297SW358; Mo 300SW501; 318Mo 548, 300SW678; Mo 300SW706; 318Mo 705, 300SW707; Mo 300SW722; 318Mo 568, 300SW732; Mo 11SW(2d)1029; MoA 288SW961; 82NH189, 131A606; NJ 143A810; NJSup 133A412; 103NJL 275, 136A345; 193NC846, 137SE926; 52ND478, 203NW679; 54ND779, 211 NW336; OklCr 275P1070(1stcase); 120 Or177, 249P831; 294Pa339, 144A534;

50RI 148, 146A407; 50RI 171, 146A415 (2dcase); SD 229NW395; Utah 269P 480; 101Vt30, 139A918; Vt 145A413; 136Wash603, 241P4; 136Wash603, 241P4; 152Wash284, 277P856. But see 21AlaA528, 109S560; 22AlaA418, 116S910; Mo 300SW815.

213-19 20AlaA639, 104S685; 223Ky566, 4SW(2d)362.

213-24 20F(2d)782 (under Cir. Ct. App. Rules, rule 20); 22AlaA131, 113S469; Ind 170NE541; Ind 170NE613; 214Ky454, 283SW418; 54ND779, 211NW336.

213-27 70CalA271, 233P85; 70CalA465, 233P812; 77CalA146, 246P157; 75CalA181, 242P503; 90Fla299, 105S834 (statement in brief of assignment of error and ruling upon which it is based held not sufficient); 197 Ind363, 151NE4; 197 Ind419, 151NE129; 197 Ind603, 151NE609; 200 Ind37, 161NE267; 198 Ind643, 154NE2; Ind 170NE541; Ind 171NE197; IndA 171NE208; 214Ky544, 283SW385.

213-28 90Fla299, 105S834 (unless so glaring as to need no demonstration).

213-30 272US312, 47SCt103, 71Led 270, 48ALR1102; 18F(2d)850; 19F(2d)813; 214Ala519, 108S536; 215Ala619, 112S157; 21AlaA539, 110S157; 23AlaA464, 127S256; 30Ariz113, 244P1020; 177Ark1194, 293SW1041; 175Ark752, 2SW(2d)36; 178Ark1129, 13SW(2d)586; 195Cal445, 234P91; 71CalA251, 234P920; 77CalA745, 247P580; 77CalA752, 247P585; 79CalA366, 249P543; 85CalA672, 259P1020; 88CalA245, 262P1115; 87CalA751, 262P1117(3dcase); 90CalA657, 266P558; 93CalA650, 269P980; 94CalA700, 271P764; 97CalA321, 275P815 (order finding defendant insane); CalA291P224; 92Fla1062, 111S725; 93Fla1069, 113S96; 44Ida739, 260P164; 47Ida117, 272P695 (direction of acquittal); 196 Ind649, 149NE162; 197 Ind606, 149NE480, 151NE695; 198 Ind364, 153NE775; 198 Ind643, 154NE2; 199 Ind615, 159NE550; 200 Ind4, 161NE6; 200 Ind53, 161NE271; 200 Ind156, 162NE49; Ind 170NE433; Ind 172NE904; Ind 173NE326; Ind 173NE453; 200 Iowa889, 205NW500; 208Ky538, 271SW566; 212Ky178, 278SW595; 217Ky99, 288SW1047; 223Ky677, 4SW(2d)683; 225Ky273, 8SW(2d)382; 230Ky387, 19SW(2d)1086; 235Ky734, 32SW(2d)38; 257Mass535, 154NE176; 155Miss612, 125S99(2dcase); 318Mo611, 300SW691; 320Mo280, 6SW(2d)849; 76Mont549, 248P169; 84Mont364, 275P750; 190NC866, 129SE583; OklCr 279P525 (prejudice of trial judge not presumed); 87Pa Super585; 33PortoRico72; 33Porto Rico627, 643 [citCJperWolf.J.dis op]; 35PortoRico122; 101TexCr252, 276SW252; 101TexCr483, 276SW277; 101TexCr670, 276SW919; 104TexCr283, 284SW564; 104TexCr649, 285SW621; 105TexCr119, 286SW1104; TexCr 290SW541; 106TexCr78, 290SW1105; 106TexCr103, 290SW1097; 108TexCr90, 299SW246; 108TexCr77, 299SW259; 108TexCr177, 299SW420; 108TexCr106, 299SW430; 108TexCr381, 1SW(2d)314; 110TexCr596, 9SW(2d)1038(2dcase); 111TexCr38, 11SW(2d)169; 111TexCr570, 13SW(2d)874; 111TexCr534, 15SW(2d)648; 112TexCr182, 15SW(2d)1039; 112TexCr376, 16SW(2d)818(2dcase); 113TexCr265, 20SW(2d)426; TexCr 24SW(2d)41; TexCr 26SW(2d)645; TexCr 27SW(2d)236; TexCr 27SW(2d)817; TexCr 32SW(2d)184; 147Wash315, 265P742; Wash 286P833. [a] **Any matters which might have been presented,** which would have authorized judgment of conviction will be presumed where evidence has not been brought up on appeal. 99CalA366, 278P502. [b] **Presumption exists of good faith** of regular and special judge at all times. TexCr 24SW(2d)396. [c] **Where conviction was reversed with instructions to set aside indictment,** trial court is presumed to have set it aside in connection with resubmission of case to grand jury. 83CalA742, 257P445.

214-31 272US312, 47SCt103, 71Led 270, 48ALR1102; AlaA 106S341; 171Ark1118, 287SW400; 198Cal112, 243P667; 208Cal357, 281P391; 77CalA745, 247P580; 77CalA752, 247P585; 87CalA68, 261P1059; 196 Ind512, 149NE77; 197 Ind606, 149NE430, 151NE695; IndA 173NE233; 217Ky99, 288SW1047; 219Ky55, 292SW482; 231Ky132, 21SW(2d)150; 235Ky340, 31SW(2d)383; 162La471, 110S723; 169La135, 124S670(2dcase); 126Mel36, 136AS08; Mo 281SW960; MoA 274SW500; MoA 7SW(2d)375; 80Mont181, 260P138; 49Nev386, 248P48; 53ND222, 205NW234; OklCr 277P947; OklCr 277P950(2dcase); OklCr 292P879; 116 Or459, 241P383; 44 Philippine192; 153SC25, 150SE321 (fairness of trial judge assumed); 156Tenn610, 4SW(2d)349; 101TexCr670, 276SW919; 103TexCr182, 280SW798; 104TexCr11, 282SW233; TexCr 288SW444; 105TexCr433, 289SW39; TexCr 290SW175; TexCr 290SW176; 106TexCr78, 290SW1105; 108TexCr240, 299SW904; 108TexCr555, 1SW(2d)890; 113TexCr172, 19SW(2d)63; TexCr 20SW(2d)1054; TexCr 20SW(2d)1064; 148Wash627, 269P798; 39Wyo299, 270P1065. [a] **Statutory enactment of rule** held valid. 214Ala593, 108S536.

215-32 21AlaA524, 108S554; 177Ark91, 5SW(2d)716; 195Cal445, 234P91; 198Cal112, 243P667; Cal 287P337; CalA 265P890; 102CalA29, 282P813 (error cannot be anticipated); 94Fla32, 113S630; 94Fla264, 114S241; 196 Ind722, 149NE436; 197 Ind606, 149NE430, 151NE695; 200 Ind37, 161NE267; 212Ky178, 278SW595; 217Ky99, 288SW1047; 219Ky55, 292SW482; 219Ky745, 294SW507; 223Ky826, 4SW(2d)1109; 241Mich597, 217NW749; Mo 281SW960; 318Mo712, 300SW738; 80Mont181, 260P138; 190NC858, 129SE450; OklCr 280P865; OklCr 292P879; 103TexCr182, 280SW798; 104TexCr283, 284SW564; 104TexCr356, 284SW548; 106TexCr399, 292SW549; 101Vt5, 139A769. [b] **Mere suspicion of error is insufficient** as error needs affirmative showing. 212Ky178, 278SW595. [c] **Mere recital of grounds of opposition** will not overcome presumption, as to rulings on evidence. TexCr 20SW(2d)794.

215-33 23AlaA29, 120S299; 76CalA715, 256P792; 89CalA219, 264P343; 85Colo442, 276P983; 92Fla1062, 111S725; 45Ida92, 260P697; 48Ida558, 283P529; 332Ill436, 163NE804; 332Ill583, 164NE185; 196 Ind512, 149NE77; 197 Ind606, 149NE430, 151NE695; 198 Ind364, 153NE775; 199 Ind44, 154NE865; 167La1010, 120S629; 259Mass388, 156NE712; Mo 300SW673; 190NC858, 129SE450; OklCr 268P993; OklCr 287P842; 159Tenn297, 17SW(2d)913; 106TexCr103, 290SW1097; 110TexCr484, 9SW(2d)344; 111TexCr570, 13SW(2d)874; 112TexCr390, 16SW(2d)1065; 113TexCr388, 21SW(2d)1064. [a] (3) Transcript of record must be brought to appellate court by defendant and attorney. 92Fla1062, 111S725. [b] **Rule applies to verdicts resting on circumstantial evidence.**–199 Ind44, 154NE865.

215-34 32F(2d)540; 219Ala254, 122S610; 21AlaA378, 108S646; 79CalA366, 249P543; 45Ida92, 260P697; 47Ida785, 280P1039; Ind 164NE272; 212Ky178, 278SW595; OklCr 287P804; SD 228NW240; 111TexCr116, 12SW(2d)218; TexCr 27SW(2d)169; 101Vt300, 143A284, 59ALR1541.

215-35 97Fla23, 119S393; 41GaA571, 153SE618.

215-35½-New. One convicted below comes to the appellate court under a presumption of guilt. 153Tenn319, 283SW986.

215-35¼-New. Cases are not reversed on speculation. 105TexCr470, 289SW57.

215-36 40F(2d)636; 208Ky538, 271SW566.

215-37 Mo 24SW(2d)985. [b] **Approval of verdict by trial court is necessary to create presumption of guilt** requiring defendant to show preponderance of evidence necessary for reversal. 157Tenn7, 4SW(2d)957 (statement of court held not approval of verdict).

215-37½-New. The reviewing court will indulge no presumption against the validity of acts of the district court, which acts are within the power conferred on them by statute. 112TexCr546, 17SW(2d)1066(2dcase).

215-38 84IndA559, 151NE705. See also 91CalA516, 267P370.

215-39 IndA 171NE208.

215-40 87CalA751, 262P1117(3dcase); 92Fla1062, 111S725; 108TexCr28, 299SW236.

216-42 198 Ind156, 152NE803; 89 Ind A156, 165NE916(1stcase); 112TexCr628, 18SW(2d)158. [a] **Issuance of search warrant.**–Iowa 232NW684.

216-43 194Cal1, 227P156; 77CalA745, 247P580; 83CalA502, 256P616; Mo 12SW(2d)51; SD 228NW240 (John Doe proceeding). [a] (3) Where transcript fails to show recognizance, prisoner is presumed in custody. 102TexCr563, 278SW846.

216-44 20AlaA601, 104S837; 22AlaA93, 112S806; CalA 73CalA402, 238P794; 245 IllA334; 168La1135, 123S807(2dcase). [d] **Order for grand jury.**–Mo 31SW(2d)39.

216-45 TexCr 27SW(2d)200.

216-46 163Gal21, 135SE917. [b] **Grand jury foreman** will be presumed to have performed his duties in regular manner. CalA 265P310.

216-47 71CalA176, 235P51; 199 Ind540, 156NE555; 108TexCr249, 300SW55; 112TexCr574, 17SW(2d)823. [a] **Failure to serve copies** of indictment and jury list are presumed to have been waived in absence of objection. 20AlaA581, 104S341.

216-49 [b] **Special counsel representing people before grand jury** will be presumed to have used only proper means in obtaining information. CalA 265P310.

216-50 77CalA427, 245P998; 99CalA37, 277P1082; CalA 290P74; 200 Ind501, 165NE60.

216-51 AlaA 130S902; 35PortoRico393 (that defective averment cured by proof); 112TexCr459, 17SW(2d)42(2dcase); 112TexCr546, 17SW(2d)1066(2dcase); 40Wyo404, 278P563. [a] (3) That statutory notice was given to parent of minor child convicted of crime. 90Fla136, 105S316.

217-52 [a] **Appellate court presumes latest of two** indictments certified to it by clerk is a true copy. 156Miss772, 126S476(1stcase).

217-54 MoA 277SW943; 106TexCr511, 293SW831.

217-56 Mo 281SW960.

217-57 81CalA449, 253P966.

217-58 94Fla32, 113S630; 94Fla32, 113S630; 318Mo628, 300SW743; 320Mo296, 6SW(2d)915; 214AppDiv793, 210NYS470. See also 129 Or652, 278P950.

217-58½-New. . or as to correctness of order for sanity inquiry. 77CalA752, 247P585.

217-59½-New. Presumption as to particular matters. 214Ala172, 106S692, 215Ala635, 112S212; 163La51, 111S492; 257Mass391, 153NE881; 235Mich620, 209NW915; 245NY143, 156NE644.

217-59¾-New. Case presumed presented by state on any theory of which proofs were reasonably susceptible. 71CalA453, 236P163.

217-59¼-New. Where the court trying a case was one of general jurisdiction, the appellate court, in the absence of a showing to the contrary, must assume that the case was tried by a lawful jury. 230Ky387, 19SW(2d)1086.

217-60 102TexCr437, 278SW215.

217-61 39F(2d)412; 153Md431, 138A338; 315Mo242, 286SW69; 319Mo28, 3SW(2d)230; 103TexCr617, 281SW1076; 105TexCr96, 286SW1103. See also 56ND716, 219NW218. [a] (3) 106TexCr251, 291SW908. (5) That offer of prosecuting attorney in opening statement to prove attempted intimidation of prosecuting witness was made in good faith. 115 Or505, 237P969.

217-61⅓-New. that jurors were not influenced by prosecuting attorney's mere statement of something they already knew; 314Mo585, 285SW97, 47ALR783.

217-62 219Ala46, 121S38; 83Colo162, 262P1009; 112TexCr74, 13SW(2d)864; TexCr 29SW(2d)371; 108WVa230, 150SE729. [a] (3) Closing argument of state presumed proper as reply argument, when so denominated by trial court. 192Wis22, 211NW668.

217-63 161La758, 109S414; 152Wash111, 277P388. [a] **Exceptions to rule**

are recognized in very extreme cases, such as appeal to race prejudice and unfavorable comment on accused's failure to testify. 166La924, 118S85.

217-63½-New. Exception to misquoting testimony held without merit in view of presumption jury remembered testimony. 156SC509, 153SE480.

217-63¼-New. It will not be assumed that the court did not perform its duty in reprimanding counsel for use of abusive epithets and admonish the jury relative thereto. 13F(2d)850.

217-64 94Fla264, 114S241; 219Ky697, 294SW153; 240NY411, 148NE597; 116 Or459, 241P383; 34Wyo 90, 241P705. See also 92Fla648, 109S805.

218-67 254 IllA209.

218-72 Contra 224 IllA515; 233 IllA 608.

218-73½-New. Where the record shows that a plea of guilty was entered by an attorney, it will be presumed that he was employed by defendant and was authorized to enter such plea. 155Miss 612, 125S99(2dcase).

218-73¼-New. It will be presumed that accused would have admitted a prior conviction at his arrangement if it had been correctly charged, thereby excluding reference thereto. 70CalA489, 233P413.

218-73¼-New. It cannot be presumed that the indictment was read and that defendant pleaded thereto when the contrary affirmatively appears by the bill of exceptions. 107TexCr78, 294SW554.

218-73½-New. Where the record showed that the court entertained a motion to quash, which was overruled, defendant was presumed to have withdrawn plea of not guilty for purpose of such motion. 198 Ind541, 154NE384.

218-75 100TexCr464, 273SW604.

218-77 108TexCr499, 18W(2d)896.

218-80½-New. Where a record does not show ruling on pleas in abatement, it will be presumed that they were not called to the attention of the court. 214 Ala273, 107S737.

218-80¾-New. Overruling plea of pendency of another suit raises the presumption that dismissal of other suit was entered. 108TexCr499, 18W(2d) 896.

218-80¼-New. Where the evidence heard on issues formed by plea in abatement and reply is not in the record by bill of exception, the court may assume that the plea in abatement is properly denied because the facts alleged were disproved. Ind 167NE531.

218-81½-New. Supreme court assumes withdrawal of plea of guilty and filing of plea in abatement with court's permission was justified. Ind 169NE861.

218-82 110TexCr345, 78W(2d)571; Wyo 285P153.

218-83 20AlaA601, 104S837; 215Ky 193, 284SW1023; 215Ky756, 286SW 1058; 101TexCr346, 276SW244; 112 TexCr459, 17SW(2d)42(2dcase). [a] (1) 215Ky193, 284SW1023. (3) Where record does not show that statute was strictly complied with relating to entry in book of commissioners and oath of judge appointed, it will be presumed that officers did their duty. 215Ky193, 284SW1023.

219-84 88CalA245, 262P1115; 87CalA 751, 262P1117(3dcase); 93Fla232, 111S 635; 233 IllA13; 212Ky178, 278SW595; 214Ky88, 282SW781; 227Ky710, 18SW (2d)1046; 231Ky132, 21SW(2d)150; 216 Ky573, 288SW330; 168La281, 121S867; 133Misc538, 232NYS603; 33PortoRico 72. [a] **Adverse ruling on motion to dismiss** for failure to prosecute within proper time, presumed correct in absence of showing in record of facts on which ruling based. 33PortoRico 72.

219-85 86CalA432, 260P912.

219-86 [b] **Case is presumed** to have been set for date on which it is tried. 219Ky55, 292SW482.

219-86½-New. The supreme court cannot infer on reviewing conviction that the terms of county court were held in June and December of each year. 329 Ill 195, 160NE116.

219-86½-New. An agreement to try a case before a special judge will not be presumed. 105TexCr342, 288SW450.

219-87 86Colo 35, 278P594, 65ALR 1260.

219-88 95Fla775, 116S618; 104TexCr 649, 285SW625; Wash 286P833. [d] Va 152SE366.

219-89 111TexCr611, 13SW(2d)697(1st case); 107TexCr42, 293SW1117; TexCr 31SW(2d)633.

219-90 94CalA700, 271P764.

219-91 20AlaA601, 104S837; 90Fla25, 105S130 (no presumption that continuance on application of state over defendant's objection is denial of right to speedy and public trial); 94Fla32, 113 S630; 215Ky752, 286SW1063; 223Ky 402, 3SW(2d)775; 226Ky318, 10SW(2d) 1099; 231Ky1, 21SW(2d)120; Mo 279 SW401; 32PortoRico 3; 33PortoRico 72; 159Tenn674, 21SW(2d)400; 105TexCr 327, 288SW458; 109TexCr121, 3SW(2d) 87; 111TexCr275, 12SW(2d)579; TexCr 26SW(2d)225; TexCr 26SW(2d)639; TexCr 29SW(2d)791(2dcase). [b] 111 TexCr315, 12SW(2d)800; 105TexCr522, 289SW392; 113TexCr555, 23SW(2d)721.

219-92 214Ala593, 108S536; OklCr 286 P910; Wash 286P69; Wash 286P833.

219-92½-New. 159La1093, 106S651 (but this presumption will not attach where trial is continued over period of three days).

220-93 94Fla783, 114S523; Mo 3SW (2d)235; 53ND222, 205NW234.

220-97½-New. Where a case was tried in defendant's absence, the adjudication that he was in default must be presumed to be based on facts then existing which supported the judgment. 155Miss292, 124S358.

220-99 15F(2d)977; 214Ala519, 108S 536; 155SC495, 152SE738; SD 231NW 915; 108TexCr177, 299SW420.

220-1 227Ky223, 12SW(2d)336; 309 Mo 155, 274SW734; 317Mo 284, 295SW 550; 33PortoRico 48. [b] To like effect see 33PortoRico 48.

220-3½-New. that the jurors were persons of intelligence; 71CalA453, 236P 163.

220-4 15F(2d)977.

220-5 Ala 128S786(1stcase); 33Ariz 383, 265P609; 178Ark980, 13SW(2d)25; 90Fla381, 106S741; 41 Ida616, 243P 359; 43 Ida762, 254P518; 46 Ida423, 267P950; 213Ky190, 280SW1086; 255 Mass369, 151NE839 (as to statutory questions); Mo 20SW(2d)529(1stcase); Mo 23SW(2d)87; Nebr 226NW793; 100 TexCr114, 272SW149. [b] 101TexCr 439, 276SW252. [c] **Query of jurors by prosecuting attorney** as to whether they would be influenced by unsavory reputation of state's witness will be presumed to have been asked to enable him to exercise his peremptory challenges advisedly. 171Ark1118, 287SW400.

221-6 163La51, 111S492.

221-8½-New. Conclusively presumed change of venire unwarranted, where impartial jury was in fact obtained. Va 152SE366.

221-8½-New. Conduct of juror is presumed to injure defendant where, during deliberation to jury, he stated to other members before agreement on penalty that accused had been convicted in federal court which was untrue. 101TexCr 201, 274SW622.

221-8¼-New. In the absence of a bill of exceptions showing the falsity of facts recited by the trial court as to an agreement in regard to impaneling a struck jury at defendant's request, the facts recited must be taken as true. 169 Ark348, 275SW669.

221-8½-New. Where it appears that one juror was prejudiced, it will be presumed that the whole body was contaminated thereby. 161Ga332, 131SE 80.

221-17 331 Ill 608, 163NE453.

221-18 173Ark1172, 294SW397; 225Ky 461, 9SW(2d)136. See also Mo 300SW 820.

221-18½-New. Presumption that jurors performed their duty is not overcome by fact that trial court permitted them to separate and go to their homes overnight. OklCr 287P842.

221-19 93CalA650, 269P980; 165La 215, 115S464. See also 156Tenn610, 4 SW(2d)349.

222-22 115Nebr838, 215NW107, 61 ALR1.

222-23½-New. **Presumption is that jury were asked if verdict was theirs,** where minutes did not show fact. 156 SC324, 153SE269.

222-24 13F(2d)451; 13F(2d)591; 43F (2d)358(2dcase); 73CalA13, 238P374 (voluntary confession); 77CalA113, 246 P110; 78CalA426, 248P1021; 163Ga186, 136SE72; 332 Ill 113, 163NE421; 335 Ill 590, 167NE857; 196 Ind665, 149NE 348; Ind 173NE229; 225Ky292, 8SW (2d)379; MoA 16SW(2d)653; 76Mont 66, 244P882; 102TexCr501, 278SW441; 99TexCr647, 271SW389; 100TexCr501, 272SW191; 101TexCr63, 274SW538; 101 TexCr670, 276SW919; 101TexCr628, 276 SW928; 103TexCr490, 281SW568; 103 TexCr617, 281SW1076; 104TexCr38, 282 SW225; 104TexCr46, 282SW242; 104 TexCr152, 282SW813; 104TexCr572, 286SW226; 105TexCr47, 285SW316; 105TexCr96, 286SW1103; 105TexCr119, 286SW1104; 106TexCr118, 290SW537; 106TexCr259, 291SW900; 106TexCr391, 293SW178; 106TexCr528, 293SW827; 106TexCr615, 293SW1118; 106TexCr 593, 294SW573; 107TexCr13, 294SW 592; 107TexCr151, 295SW1098; 107 TexCr357, 296SW596; 107TexCr559, 298SW569; 107TexCr579, 298SW573; 108TexCr131, 299SW408; 108TexCr240, 299SW904; 108TexCr404, 1SW(2d)318; 108TexCr576, 2SW(2d)245; 110TexCr 345, 7SW(2d)571; 110TexCr460, 9SW (2d)259; 110TexCr529, 7SW(2d)1083; 110TexCr97, 8SW(2d)148; 110TexCr 190, 8SW(2d)169; 110TexCr484, 9SW (2d)344; 110TexCr401, 10SW(2d)542; 111TexCr182, 11SW(2d)519; 111TexCr 116, 12SW(2d)218; 111TexCr272, 12SW (2d)568; 111TexCr313, 12SW(2d)795; 111TexCr372, 13SW(2d)100; 111TexCr 623, 13SW(2d)376(2dcase); 111TexCr 570, 13SW(2d)874; 112TexCr199, 15 SW(2d)1050; 113TexCr235, 20SW(2d) 202; TexCr 20SW(2d)794; TexCr 24SW (2d)412; TexCr 27SW(2d)198(2dcase); TexCr 28SW(2d)155; TexCr 31SW(2d) 630(3dcase); TexCr 32SW(2d)182; TexCr 32SW(2d)185; TexCr 32SW(2d) 470; 141Wash515, 252P128; 199Wis 269, 225NW933. [d] **Where motion to suppress evidence is not set out in record and action of trial court was not challenged,** overruling such motion must be presumed justified. 89 IndA621, 166 NE620. [e] **Refusing request to excuse jury pending argument as to admissibility of evidence** is presumed within discretion of court. CalA 292P675.

222-25 78CalA426, 248P1021; 83CalA 190, 256P829; 259Mass388, 156NE712; 259Mass388, 156NE712; 118 Or397, 247 P146; 104TexCr583, 286SW231; 141 Wash515, 252P128. [a] 214Ala675, 108 S612; 180Ark448, 21SW(2d)616 (where court instructed on voluntary character, presumption exists that jury found confession voluntary); 81CalA752, 254P 666; Mo 12SW(2d)30.

222-26½-New. that trial judge in ruling testimony admissible without comment approved of purpose stated by counsel. 238Mich171, 213NW159.

222-28 159La820, 106S317; 113TexCr 436, 22SW(2d)919; TexCr 24SW(2d) 427(2dcase).

222-28½-New. or that more specific proof was not required; 103WVa404, 137SE746.

222-31½-New. It is presumed that jurors know that sustaining objection to question means that such matter is not to be considered by them. 71CalA453, 236P163.

222-32 34Wyo 218, 242P802 (statement of witness that he gave check to "that man over there" is presumed to refer to defendant).

222-33 CalA 265P310.

223-34½-New. Averments in motion to suppress evidence are not accepted as true where the evidence is shown. 196 Ind640, 149NE163.

223-34½-New. Upon defendant's motion to quash and suppress evidence, facts set forth in motion must be accepted as true where nothing appears to contrary. 198 Ind487, 154NE280.

223-34¼-New. Evidence under counts barred by limitations is not presumed

harmful where otherwise admissible. 288Pa29, 135A645.

223-34½-New. In the absence of an authenticated bill of exceptions the court will not assume evidence went to the jury over defendant's objection. 107 TexCr137, 294SW1109.

223-34¼-New. In the absence of a showing to the contrary it will be presumed that a question eliciting testimony objected to was proper. 107Tex Cr649, 298SW604.

223-34½-New. Where hearing on admissibility of confession was before the court alone, the appellate court must presume that the trial court was not influenced by hearsay testimony admitted on such hearing over objection. Ariz 282P930.

223-35 110TexCr220, 7SW(2d)543; Tex Cr 20SW(2d)770. But see Mo 12 SW(2d)39.

223-36 47 Ida457, 276P39, 68ALR1061. See also 129La589, 105S631.

223-37 49Nev217, 242P590.

223-37½-New. In the absence of objection it will be presumed that defendant was satisfied that a youthful witness was competent. 91CalA684, 267P390.

223-37¼-New. Only where a witness is rejected on the ground of incompetency is it presumed that the witness would have been rejected no matter how material the evidence might have been. 175 Ark752, 2SW(2d)36.

223-38 31F(2d)911; 35F(2d)580; 41 F(2d)144; 21AlaA652, 111S606; 22 AlaA257, 114S478; 35Ariz420, 279P256; 170Ark1083, 282SW673; Ark 30SW(2d) 865; 74CalA510, 241P267; 80CalA167, 251P327 (considered in strongest light); CalA 281P443; CalA 290P618; 331 Ill 501, 163NE371; 333 Ill 169, 164NE 156; 232 IllA342 (where there is no bill of exceptions); Ind 173NE229; 215 Ky585, 286SW689; 222Ky670, 1SW(2d) 1072; 225Ky273, 8SW(2d)382; 169La 626, 125S737; 126Me136, 136A808; 316 Mo 204, 289SW554; 316Mo 185, 289SW 619; Mo 29SW(2d)150; 248NY182, 161NE463; 91PaSuper550; 103TexCr 590, 281SW560; 104TexCr579, 286SW 222; TexCr 288SW444; 105TexCr617, 290SW541; 106TexCr345, 292SW229; 106TexCr547, 293SW826; 112TexCr203, 17SW(2d)813; TexCr 23SW(2d)729; TexCr 29SW(2d)779; TexCr 32SW(2d) 650(2dcase); 146Wash202, 262P970 (as to insanity). [c] **Premises searched claimed by prosecution to be public.** Rooming house will be presumed to be such in fact in absence of abstract of testimony. 170Ark1083, 282SW673. [d] **Defendant testifying in rape prosecution** presumably would have denied all matters charged by complaining witness, if he could truthfully do so. 191Wis652, 211NW785. [e] **Refusal of affirmative charge** will be presumed warranted by evidence. 21AlaA611, 110S694.

223-38½-New. Where evidence is not brought up, it will be presumed that if present it will support findings. 215 Ky220, 284SW993.

223-39 196 Ind686, 148NE411; 200 Ind 112, 161NE565. [b] **Where testimony is subject to two constructions** it must be assumed that judge and jury adopted that which supported verdict. 87Colo 84, 285P766.

223-40 20F(2d)795; Ariz 283P711; 170 Ark1192, 280SW367; 170Ark1061, 282 SW684; 171Ark1187, 285SW359; 173 Ark4, 291SW808; 173Ark713, 293SW 19; Ark 298SW20; 175Ark1170, 298 SW1019; 175Ark232, 298SW1028; 176 Ark1203, 3SW(2d)292; 180Ark408, 21 SW(2d)186; 68CalA95, 228P417; 72 CalA102, 236P944 (when uncontradicted); 80CalA31, 251P343; 90CalA657, 266P558; 196 Ind686, 148NE411; 197 Ind550, 150NE762, 151NE401; 198 Ind 277, 151NE725; 198 Ind643, 154NE2; 198 Ind440, 154NE4; 200 Ind1, 161NE5 (regarded most favorably to state); 200 Ind53, 161NE271; Ind 166NE651; 224 Ky653, 6SW(2d)1082; 229Ky459, 17 SW(2d)443; 140Miss889, 105S742; 149 Miss741, 115S889; 311Mo 581, 278SW 995; 313Mo 615, 285SW392; Mo 4 SW(2d)813; Mo 22SW(2d)649; Mo 22SW(2d)802; MoA 296SW825; MoA 27SW(2d)730; 77Mont382, 251P143; 285Pa49, 131A657; 298Pa165, 148A65. See also 83CalA236, 256P569. [a] 175 Ark1169, 299SW40; 75CalA447, 243P67. [c] 198 Ind141, 152NE830. [d] **If all circumstances are not admitted,** it is assumed they are such as jury would have found, viewed most favorably to the government. 38F(2d)779. [e] **On motion to nonsuit** evidence is considered in light most favorable to prosecution. NC 154SE604.

223-40½-New. , and the court will assume that the jurors believed witnesses for the prosecution. 72CalA102, 236P 944.

223-41 175Ark1047, 1SW(2d)546; 68 CalA95, 228P417; CalA 288P20; Ill 170NE786; 197 Ind204, 150NE98; 197 Ind491, 151NE382; 197 Ind550, 150NE 762, 151NE401; 197 Ind663, 151NE722; 198 Ind277, 151NE725; 198 Ind407, 151 NE616; 198 Ind679, 154NE489; 198 Ind695, 154NE666; 198 Ind701, 154NE 668; 199 Ind180, 156NE161; 199 Ind 182, 156NE389; 199 Ind481, 157NE100; 199 Ind653, 160NE41; 199 Ind700, 160 NE291; 199 Ind697, 160NE293; 200 Ind156, 162NE49; 200 Ind370, 163NE 594; 200 Ind496, 163NE596; 89 IndA 569, 166NE294; 89 IndA326, 166NE296; Ind 167NE531; Ind 169NE531; Ind 171NE1; Ind 171NE197; 89 IndA19, 165NE695; 89 IndA152, 166NE20; 89 IndA561, 166NE21(1stcase); IndA 167 NE548 (in determining whether evidence sustains finding of guilty, only evidence favorable to state is considered); IndA 169NE883(1stcase); 167La78, 118S699 (1stcase); 311Mo 581, 278SW995; 318 Mo 766, 300SW1073; MoA 11SW(2d) 1100. [a] **Must give highest probative value** to evidence supporting verdict. 181Ark1145, 29SW(2d)670.

223-41½-New. In light most favorable to state, 172Ark1176, 288SW925; 175 Ark878, 1SW(2d)23.

223-42 170Ark936, 282SW4; 171Ark 1188, 287SW178; 172Ark244, 288SW 904; 179Ark1153, 15SW(2d)976; 75 CalA115, 242P87; 80CalA167, 251P327 (conflicting evidence disregarded); 87 CalA177, 261P1057; 80CalA257, 251P 648; CalA 290P678; 197 Ind204, 150NE 98; 199 Ind284, 157NE280; 77Mont382, 251P143; 104TexCr263, 283SW522. [a] **State's evidence must be viewed in most favorable light.**-180Ark267, 21SW(2d) 172.

223-42½-New. When evidence to support verdict contains same evidence on every essential fact necessary to support verdict, latter must be sustained and contradictory evidence cannot be considered. 197 Ind606, 149NE430, 151NE 695.

223-42⅓-New. Every legitimate inference that may reasonably be drawn from the state's testimony tending to implicate accused should be indulged. 313 Mo 615, 285SW392.

223-42¼-New. Appellant must show that some material element of crime is not supported by evidence. 196 Ind499, 149NE50.

223-42⅕-New. Every inference which the jury could legitimately have drawn from the evidence will be indulged. 311 Mo 581, 278SW995; 201Cal 568, 258P49.

223-42⅙-New. Appellate court reviewing motion for directed verdict will not weigh evidence but consider only legal sufficiency to go to jury. 16F(2d)1001.

223-42½-New. It will be presumed that the action of the trial court in refusing to direct a verdict of not guilty was proper. 106TexCr75, 290SW1103.

223-42⅛-New. To determine whether or not a verdict of guilty is sustained by sufficient evidence, the court is limited to the portion of the evidence most strongly tending to prove defendant's guilt. Ind 166NE654.

223-42⅑-New. That jury accepted all legitimate inferences from evidence will be presumed. 198NC682, 153SE155.

223-44 18F(2d)404; 20F(2d)269; 25 F(2d)242 (caution to jurors as to effect of publication); 29F(2d)881; 34 F(2d)863; 35F(2d)905; 41F(2d)440; 215Ala229, 110S21; 170Ark1083, 282SW 673; 171Ark1118, 287SW400; 179Ark 1158, 16SW(2d)468; 102Conn634, 129A 714; 196 Ind675, 148NE193; 199 Ind 89, 155NE257; 124Kan119, 257P726; 124Kan496, 260P618; 228Ky257, 14 SW(2d)767; 126Me153, 136A908; 254 Mass512, 150NE321; 257Mass459, 154 NE177; 257Mass426, 154NE185; Mass 169NE418; 190NC858, 129SE450; 196 NC710, 146SE806(2dcase); 197NC25, 147SE618; NC 154SE741; 118 Or397, 247P146; 159Tenn507, 19SW(2d)228; 159Tenn451, 19SW(2d)276; TexCr 288 SW454; TexCr 31SW(2d)1080(2dcase); 104WVa396, 140SE338. [b] **Illustrations.**-190NC684, 130SE854. [c] **Good reason for repeating instructions** will be presumed. CalA 286P493.

224-45 7F(2d)111; 169Ark1212, 278 SW360; 94CalA7, 270P398; DC 32 F(2d)947; 254Mass320, 150NE7; Mass 171NE472; 105TexCr456, 288SW1077; 107TexCr535, 298SW284; 108TexCr480, 1SW(2d)627; 113TexCr172, 19SW(2d) 63. [b] **Presumed that accused approved instruction** in absence of objections. TexCr 24SW(2d)411.

224-46 197 Ind606, 149NE430, 151NE 695; 200 Ind420, 164NE269.

224-47 197 Ind606, 149NE430, 151NE 695; 118 Or397, 247P146; 135Wash295, 237P730.

224-48 197 Ind606, 149NE430, 151NE 695; 200 Ind420, 164NE269; 208 Iowa 796, 223NW873.

224-49 54SD391, 223NW325.

224-50½-New. The appellate court will assume that the jurors were reasonably intelligent and understood and appreciated the issue being tried, and that erroneous instruction had no persuasive influence. Ind 166NE661.

224-50⅓-New. It will be presumed that the jury followed instructions. 255 Mass304, 151NE297, 47ALR962.

224-50¼-New. It will not be presumed that trial judge, by unjudicial manner and by emphasis upon certain words, gave coercive effect to expressions otherwise proper. 12F(2d)683.

224-50⅕-New. Except in extreme cases prejudicial effect on jury of improper remarks will be presumed harmless on instructions to disregard. 161La758, 109S414.

224-50⅙-New. That all objections to instructions given were urged below is presumed. 316Mo 31, 292SW434.

224-51 198 Ind39, 151NE132; 316Mo 66, 289SW910; 318Mo 611, 300SW691.

224-52 8F(2d)478; 203 Iowa155, 212 NW382; 103NJL266, 137A529.

224-53 198 Ind39, 151NE132.

224-53½-New. In the absence of a recital in a bill of exceptions that it contains in substance all evidence, the court will presume that sufficient evidence was given to warrant refusal of affirmative charge. 21AlaA357, 108S 270.

225-54 197 Ind606, 149NE430, 151NE 695; 107TexCr127, 295SW927.

225-55½-New. where verdict does not affirmatively appear to be against weight of evidence; 92Fla878, 110S547.

225-56 But see 21AlaA46, 104S889.

225-57 20F(2d)269; 21AlaA318, 108S 82; 21AlaA487, 109S523; AlaA 130S 525; 102CalA647, 283P368; 197 Ind 606, 149NE430, 151NE695; 163La563, 112S486.

225-58 174Ark886, 298SW321; 198 Ind39, 151NE132; 21 OhA512, 153NE 755; 101TexCr47, 273SW604. See also 75CalA642, 243P461.

225-61½-New. In the absence of statement of facts it will be presumed that special charges were properly refused. 104TexCr491, 284SW554.

225-63½-New. Where the record shows refusal of the court to instruct the jury to disregard improper remarks, there is no presumption that the court did so instruct the jury. 199 Ind 160, 155NE824.

225-63⅓-New. The refusal of a special charge relative to a former plea will be presumed proper in the absence of showing to the contrary. 103TexCr468, 281SW546.

225-63¼-New. Requested instructions submitted to the court at a time before the charge is given should be regarded on appeal as having been considered

and refused by the trial court. 124Kan 405, 260P976.

225-63½-New. It will be presumed that a statement required by statute was made by the court or waived where defendant's requested instructions were given and it does not appear that such fact was called to the trial court's attention, or requested. 23AlaA 140, 122S303.

225-64 104TexCr447, 284SW568.

225-65½-New. In the absence of a contrary showing, every presumption will be indulged as to the impartiality of the trial judge in the manner of the delivery of his charge. 170Ark1192, 281SW369.

225-67 78CalA554, 248P964; 80CalA 200, 251P675; 105Conn757, 136A475; 162La266, 110S417. See also 324Ill 190, 154NE900.

225-68 79CalA576, 250P588.

225-70 33F(2d)107; 21AlaA642, 111S 320; 170Ark1194, 282SW676; 171Ark 1188, 286SW1028; 198Cal 112, 243P 667; 76CalA192, 244P94; 79CalA576, 250P588; 99CalA366, 278P502; 90Fla 555, 106S415; 94Fla32, 113S630; 97 Fla621, 121S797; 324Ill 55, 154NE430; 167La982, 120S619; 153Md204, 137A 896; Mo 278SW706; 312Mo 373, 278 SW1016; MoA 292SW450; 189NC766, 128SE354; 53ND222, 205NW234; Okl Cr 278P357; OklCr 278P404; OklCr 280P857; TexCr 32SW(2d)357; Wash 286P833; 36Wyo 241, 254P120. [d] **Presumed that where clerical error appeared in spelling name of juror,** trial court was not imposed upon and knew individual. 312Mo 373, 278SW1016.

226-72 14F(2d)497; 42F(2d)721; 203 Cal 587, 265P231; 75CalA565, 243P25; 75CalA718, 243P485; 78CalA46, 247P 593; 83CalA463, 256P876; 88CalA222, 263P306; 95CalA259, 272P816; 95CalA 711, 273P99; 99CalA297, 278P449; CalA 286P434; CalA 292P693; 47 Ida 328, 274P805, 62ALR195; Ind 171NE 192; Iowa 228NW353; 228Ky151, 14 SW(2d)387; 128Me404, 148A141; 261 Mass20, 158NE260; Mass 169NE790; 236Mich672, 211NW39; 237Mich481, 212NW105; 309Mo 155, 274SW734; 82 NH518, 136A358; 110TexCr605, 10SW (2d)116(2dcase); TexCr 32SW(2d)357; Wash 286P51; 103WVa605, 138SE202.

226-73 215Ky717, 286SW1053; 309Mo 155, 274SW734; 321Mo 662, 12SW(2d) 34; 103WVa605, 138SE202.

226-73½-New. that jury were fair-minded men, desiring only to do duty; 215Ala619, 112S157.

226-74 14F(2d)497; 202Cal 159, 259P 750; 86CalA791, 261P526; 241Mich111, 216NW434; 309Mo 155, 274SW734; Wash 286P833. But see 34Ariz372, 271 P872.

226-74½-New. The court must assume that the jurors believed testimony of witnesses for the prosecution. 72CalA 102, 236P944.

226-74¾-New. Where statute forbidding conversations with juror is violated, there is a presumption of injury. 107TexCr319, 296SW600.

226-75 See also Mo 12SW(2d)39.

226-75½-New. Where a finding is based on two counts and only one is sustained by evidence, judgment based on counts will be affirmed. 200Ind69, 155NE817.

226-76 321Ill 380, 152NE215.

226-77 16F(2d)872; 102CalA29, 282P 813; CalA 289P694; 321Ill 380, 152NE 215; 197Ind606, 149NE430, 151NE695; 152Miss148, 119S156; 157Miss615, 128 S770(2dcase); Mo 30SW(2d)750; 189 NC766, 128SE354; 149SC84, 146SE695. [a] **From recitals in commitment,** court cannot infer proper judgment has been rendered. CalA 289P687.

226-78 See also 87CalA482, 262P361.

226-78½-New. A judgment is presumed valid in the absence of a contrary showing. 329Ill 223, 160NE582.

226-79 50Philippine9.

226-81 Mo 289SW569.

226-83 232IllA342 (prior offense presumed proved beyond reasonable doubt).

226-83½-New. that defendant had been found guilty of a first offense, of which the court had jurisdiction, to warrant sentence; 233IllA13.

226-83¾-New. that sentence was based on verdict of guilty; 21AlaA648, 111S 320.

226-86½-New. that sufficient cause appeared for not pronouncing judgment at definite time fixed therefor; OklCr 288P394.

226-87½-New. Presumed that conviction was based on only one of several offenses charged, where defendant failed to raise question below. 212Ky159, 278 SW567.

226-91 [a] **Judgments of trial courts** are presumed correct. 157Miss615, 128 S770(2dcase).

226-91½-New. It is presumed that defendant was given a hearing on court's denial of writ of error coram nobis, in the absence of record. 89CalA219, 264 P343.

226-91¾-New. The court assumes that the trial court found every fact supported by evidence necessary to sustain judgment. 318Mo 225, 2SW(2d)621.

226-91¼-New. In the absence of showing to the contrary, it will be presumed that the trial court had a legal reason for changing the place of confinement from the county jail of the county of trial to the county jail of another county. 200Iowa889, 205NW500.

226-91½-New. Where writ of error was issued nearly a year after the date of the judgment, it will be presumed, in the absence of a contrary showing in the record, that defendant was in the penitentiary pursuant to judgment and sentence in the interval. 312Mo 447, 279SW72.

226-91¾-New. Death sentence will not be declared without justification until transcript of verdict is certified by trial court. NJ 135A546.

226-91⅞-New. Presumption is that execution of aggregate of imprisonments or fines is intended in absence of showing that several sentences are to be executed cumulatively. 117Ohio393, 159 NE372.

226-91⅛-New. That sentence was in accord with intention of court will be presumed. CalA 286P476.

226-91⅛-New. It will be presumed that judge recited in judgment actual verdict returned by jury. Mo 24SW (2d)1003.

227-92 See also 202Cal 159, 259P750.

227-96½-New. Where there is a general finding against defendant on two counts, one of which is sustained by the evidence and the other not so sustained, a judgment not specifying on which count it is based will be presumed to be based on the count sustained by the evidence. 200Ind528, 164NE271; 89 IndA91, 165NE769.

227-96½-New. If under any view of the evidence verdicts on several counts are consistent the presumption is that the jury took that view. 84Colo 166, 268P536.

227-96¼-New. The court on appeal from conviction on two counts, one for manufacturing, and the other keeping for sale, intoxicating liquor, may not assume that the state claimed conviction on both counts for the same liquor, but must regard the two counts as charging separate and distinct offenses. 108Conn 454, 143A561.

227-97 99CalA32, 277P1102.

227-98 213Ala551, 105S709; 99CalA 32, 277P1102; 153Md204, 137A896; 57 ND900, 225NW319; 22OhA357, 153NE 902; OklCr 283P1026; OklCr 287P1091 (2dcase); OklCr 289P790; 99TexCr 572, 271SW99; 100TexCr607, 272SW 209; 100TexCr364, 272SW780 (where statement of facts was not considered because filed too late); 102TexCr496, 278SW435; 105TexCr47, 285SW316; 106TexCr378, 292SW546; 106TexCr 577, 294SW207; 107TexCr121, 294SW 1107; 109TexCr39, 2SW(2d)863; 109 TexCr380, 5SW(2d)139, 61ALR318; 109TexCr536, 5SW(2d)996; 110TexCr 68, 7SW(2d)535; 110TexCr345, 7SW (2d)571; 110TexCr573, 9SW(2d)1033; TexCr 12SW(2d)1023(1stcase); 111Tex Cr652, 13SW(2d)846(2dcase); 111Tex Cr565, 15SW(2d)632(1stcase); 111Tex Cr567, 15SW(2d)632(2dcase); 112Tex Cr521, 17SW(2d)462(1stcase); 112Tex Cr203, 17SW(2d)813; 112TexCr543, 17 SW(2d)829(1stcase); TexCr 24SW(2d) 423; TexCr 24SW(2d)1090(2dcase); TexCr 25SW(2d)849; TexCr 26SW(2d) 273; TexCr 27SW(2d)169; TexCr 27 SW(2d)200; TexCr 27SW(2d)245(2d case); TexCr 28SW(2d)171; TexCr 29 SW(2d)791(2dcase); TexCr 31SW(2d) 812; TexCr 32SW(2d)454; TexCr 32 SW(2d)467. See also 90Fla25, 105S130. [a] (1) 112TexCr521, 16SW(2d)233. (2) Cannot be ground for new trial as it must be presumed that trial court did its duty and had before it sufficient evidence to warrant its action. 22OhA 357, 153NE902. (3) It will not be presumed that affidavits attached to motion were not considered or were alone considered. 109TexCr39, 2SW(2d)863. (4) Other instances. TexCr 26SW(2d) 208(2dcase). [b] **Presumption that order overruling motion and grounds for new trial was made before judgment and sentence** is not overcome by clerk's entry in order book of judgment and sentence before entering order overruling motion and grounds for new trial. 227Ky792, 13SW(2d)1053. [c] **Where motion recites that evidence was heard,** implication is that evidence justified order. 113TexCr512, 22SW(2d)934(2d case) (rule relaxed where injustice manifest). [d] **Rule may be relaxed** in exceptional cases. TexCr 24SW(2d)1090 (2dcase).

227-6½-New. If it does not appear that indictment against a codefendant was finally nollied, it will be presumed that grant of new trial to him was based upon questions of fact. 114Oh299, 151 NE182.

227-6⅛-New. Exhibits made part of motion for new trial will be presumed to have been considered, and appellate court will consider them where record does not show that evidence was heard on the motion. 101TexCr63, 274SW588.

227-6¼-New. In the absence of counter-affidavits, it will be presumed that prosecutor made agreement, alleged as ground for new trial, to take no further action. 217Ky247, 289SW246.

227-8 33F(2d)713; 69CalA609, 231P 1014; 198Ind547, 154NE388. [c] **Supreme court** deciding motion for rehearing will assume instruction correct as set out in state's brief where no reply brief is filed. 198Ind547, 154NE388.

227-9½-New. Presumption is that dismissal of appeal was proper in the absence of a bill of exceptions or opinion. 178Ark77, 10SW(2d)30.

228-10 109TexCr325, 4SW(2d)563.

228-14½-New. The reviewing court cannot presume that the appeal is frivolous. 36F(2d)475.

228-16 37GaA18, 138SE526.

228-18 See also Mo 274SW18.

228-19½-New. Bills of exception are presumed true. TexCr 29SW(2d)373.

228-19⅝-New. that court did not permit filing of bill of exceptions not properly authenticated and in proper condition; 220MoA349, 285SW1021.

228-20 See also TexCr 29SW(2d)371. [a] **Presumed qualifications were made with consent of accused or counsel** unless contrary appears over certificate of trial judge. TexCr 28SW(2d)1084(2d case).

228-22 110TexCr631, 10SW(2d)556.

228-22½-New. It is presumed that a ruling of the trial court, qualifying a bill of exceptions, was correct in the absence of contrary evidence. 110TexCr 490, 9SW(2d)333.

228-22¾-New. A clerk is presumed to have discharged duty and in the absence of a marginal memorandum of the filing of the bill thereon the bill is presumed to have been filed in vacation and therefore the record proper could not show it was filed. 314Mo 635, 285SW437.

228-22¼-New. Error of court would have been made to appear in bill of exceptions, if there had been error. 171 Ark1118, 287SW400.

228-22⅛-New. It will be presumed that refusal of the trial judge to sign a special bill of exceptions was because he conceived that it did not fairly state the facts. 155Miss745, 124S761(4th case).

228-24 273US77, 47SCt300, 71Led545;

19F(2d)62; 30F(2d)590; 23AlaA457, 126S895; 170Ark1194, 283SW372; 72CalA479, 237P801 (admission to bail pending appeal in felony case); 78CalA 497, 248P683 (clear case of abuse must appear); CalA 286P467; 170Ga895, 154SE368 (recommendation to mercy); 37GaA359, 140SE386; 37GaA592, 141SE 216 (refusal to set aside verdict and judgment); 198 Ind427, 154NE5; 214Ky544, 283SW385; 153Md204, 137A896; 254Mass512, 150NE321; Mo 29SW(2d)156; 102NJL388, 132A93; 103NJL 663, 138A575; 197NC62, 147SE673; 126Or651, 269P869; 87PaSuper193; 104TexCr185, 283SW520; 104TexCr263, 283SW522; 105TexCr281, 288SW213; TexCr 25SW(2d)852; 153Wash110, 279P573; Wash 286P42; Wash 286P69; 103WVa44, 136SE865; 104WVa617, 141SE7. But see 244Mich258, 221NW307. [e] **Finding of trial judge in favor of competency of juror** will not be reversed, in absence of abuse of discretion, though evidence offered by state is that alone of juror whose impartiality is attacked. 168Ga611, 148SE531.

228-25 22AlaA526, 117S500; 249NY 419, 164NE336.

228-26 See also 133SC294, 130SE888.

229-31 19F(2d)813; 21F(2d)285; 44F(2d)134; 95Fla42, 115S519; 329 Ill 352, 160NE564; Ill 172NE64; 210Ky564, 276SW521; 218Ky72, 290SW1075; 194NC336, 139SE608; 29PortoRico 856; 33PortoRico 217; 47RI 341, 133A236; 100WVa213, 130SE451. [a] 156Md149, 143A872.

229-32 214Ala457, 108S74; Fla 130S718; 164La423, 114S83 (discretion is reviewable for abuse); 100TexCr464, 273SW604. [a] 214Ala457, 108S74. [b] **Discretion is not arbitrary** but subject to review, 164La423, 114S83.

229-32½-New. or demurrer 54ND779, 211NW336.

229-32½-New. in refusing to grant permission to withdraw a plea of not guilty and move to set aside the indictment, OklCr 276P503.

229-32¼-New. in allowing a plea of guilty to be withdrawn after continuance to another term for sentence, OklCr 281P160(1stcase).

229-33 34F(2d)97; 180Ark592, 22SW(2d)36(1stcase); 85CalA194, 259P101; 87CalA236, 261P1103; CalA 288P873; 196 Ind722, 149NE436; 200 Ind4, 161NE6; 200 Ind27, 161NE269; Ind 168NE241; 89 IndA52, 165NE777(2dcase); 165Minn423, 206NW952; 151Miss566, 118S628; 33NM98, 263P502; 54ND871, 211NW813; 54ND878, 211NW816; Utah 262P964; Wyo 285P153 (discretion not absolute). See also 43 Ida409, 252P177; 103WVa44, 136SE865. [c] (1) 312Mo 447, 279SW72. (2) See also 81Mont495, 263P979. (4) Where trial judge refused to allow defendant to have counsel and denied permission to withdraw plea of guilty, judgment will be reversed and defendant will be given opportunity to plead anew. 233Mich 462, 206NW986.

229-34 37GaA359, 140SE386; 334 Ill 385, 166NE38; 27 OhA391, 161NE344.

229-39½-New. The court's approval of an indictment on information presented by the district attorney is reversible only for flagrant abuse of discretion. 87 PaSuper66.

229-39½-New. Ruling on bill of particulars is discretionary. 273US77, 47SCt300, 71L ed545.

229-39¼-New. In the absence of abuse of power, the appellate court will not interfere where permission is granted by the trial court to amend the information. 169La377, 125S277.

229-39½-New. Denial of acquittance for variance subject to review. Mo 31SW(2d)39.

229-40 20F(2d)376; 229Ky87, 16SW(2d)769; 104NJL10, 139A417; 40Wyo 404, 278P563.

230-42 104NJL10, 139A417.

230-43 23F(2d)788; 231Ky1, 21SW(2d)120; 167La190, 118S884 (second or subsequent motions); Me 149A389; NJ 130A446; 103NJL246, 136A164; NJSup 131A625; NJSup 132A235; 104NJL10, 139A417; 91PaSuper110. [f] 232Ky 453, 23SW(2d)930.

230-46 215Ky589, 286SW785.

231-56½-New. A decision of the court on a motion to set aside an information on the ground that the proof at the examining trial is insufficient to establish the commission of crime will be reviewed to determine whether the court abused its discretion. OklCr 279P925(2dcase).

231-58 41F(2d)49 (matter of bail and terms of bail bond); 48SD646, 205NW708.

231-58½-New. refusal to permit withdrawal of plea, 164La813, 114S696.

231-59 83CalA40, 256P440; TexCr 27SW(2d)167.

231-60 CalA 288P708.

231-63 19F(2d)842; 26F(2d)24; 195 Cal 623, 234P898; 75CalA365, 242P906; 75CalA434, 243P31; 76CalA688, 245P781; 90CalA27, 265P366; 95Fla42, 115S519; 326 Ill 518, 158NE142; 327 Ill 312, 158NE732; 329 Ill 352, 160NE564; 331 Ill 380, 163NE149; 332 Ill 476, 163NE798; 103NJL663, 138A575; NM 290P738; 246NY409, 159NE379; 249NY419, 164NE336; OklCr 279P366. See also NJ 150A367.

231-64 85PaSuper253.

231-65 Ill 172NE743; 153Wash60, 279P123.

231-67 35GaA663, 134SE333; OklCr 287P758(2dcase); 218Ky360, 291SW749; 33PortoRico 627.

231-68 35GaA663, 134SE333.

231-69 121 Or57, 254P198.

231-70 5F(2d)564 (record of removal proceedings to another federal district held to present nothing reviewable).

231-71 146Va296, 135SE895; 135Wash 650, 238P617(dictum). [b] **Refusal to pass on question** is ground for interference by appellate court. 135Wash 650, 238P617.

231-72½-New. Committing jurors to custody of sheriff. 104WVa617, 141SE7.

232-75½-New. Application to set aside judgment and withdraw plea of guilty is addressed to discretion of trial judge. 199 Ind117, 155NE259.

232-75½-New. A motion to quash an indictment is addressed to the discretion of the trial court. 15F(2d)14.

232-77 22AlaA214, 114S279; 179Ark 1047, 20SW(2d)130; 109Conn571, 145A47; 110Conn55, 147A118; 91Fla446, 107S331; 33GaA825, 127SE881; 41GaA663, 154SE304; 204 Iowa1306, 214NW743; 210Ky378, 275SW881; 218Ky72, 290SW1075; 221Ky49, 297SW929; 225Ky492, 9SW(2d)132; 232Ky453, 23SW(2d)930; 233Ky545, 26SW(2d)489; 159La562, 105S621; 161La856, 109S516; 242Mich 345, 218NW704; 141Miss841, 105S784; Mo 30SW(2d)750; 114Nebr404, 207NW928; 116Nebr268, 216NW823; 55ND 511, 214NW800; 27 OhA297, 161NE284; 38 OklCr62, 259P168; OklCr 273P366 (2dcase); OklCr 288P496; OklCr 292P383; 33PortoRico 48; 99TexCr627, 271SW87; 104TexCr495, 283SW497; 104TexCr263, 283SW522; 108TexCr 551, 1SW(2d)892; 110TexCr560, 9SW(2d)360; 112TexCr203, 17SW(2d)813; TexCr 28SW(2d)794; TexCr 29SW(2d)399; TexCr 31SW(2d)653; 65Utah 362, 237P476; Utah 276P163; Wash 291P1093; 104WVa523, 140SE546. [b] 107TexCr541, 298SW293. [d] (3) 22AlaA214, 114S279. [e] **Abuse not shown.**—Wis 229NW51.

233-78 69CalA257, 231P593; 33GaA 825, 127SE881; 41GaA663, 154SE304; 171Minn414, 214NW280; 104TexCr263, 283SW522; 108TexCr1, 299SW422.

233-79 114Nebr404, 207NW928.

233-80 198 Ind23, 152NE171; 214Ky 620, 283SW958. [a] **Where evidence leads to conclusion that prejudice would render impartial trial improbable,** trial court is without discretion to refuse application. 111TexCr182, 11SW(2d)519.

233-81 Wis 229NW51. [b] **If jury is obtained without difficulty** and no showing is made that defendant exhausted his peremptory challenges, these facts should be considered by appellate court. 33PortoRico 48. [c] **Principal thing** to be considered on appeal is whether defendant had in fact fair and impartial trial. 33PortoRico 48.

233-83 5F(2d)564; 14F(2d)366; 18F(2d)906; 21F(2d)903; 22F(2d)52; 20AlaA467, 103S712; 20AlaA649, 104S913; 21AlaA266, 107S328; 21AlaA405, 108S641; 21AlaA486, 109S759; 22AlaA 95, 112S811; 22AlaA77, 112S813; 23AlaA412, 126S188; 173Ark1182, 291SW804; 176Ark916, 5SW(2d)946; 177Ark 812, 7SW(2d)987; 178Ark1200, 10SW(2d)369; 179Ark216, 15SW(2d)312; 195 Cal 325, 233P97; 76CalA105, 243P882; 78CalA476, 248P981; 77Colo 546, 238P25; 79CalA555, 250P403; 90Fla337, 106S406; 91Fla446, 107S331; 94Fla143, 114S237; Fla 130S912; 35GaA662, 134SE183; 35GaA577, 134SE184; 36GaA306, 136SE331; 36GaA740, 138SE248; 37GaA520, 140SE788; 38GaA448, 144SE133(2dcase); 332 Ill 113, 163NE421; 240 IllA254; 198 Ind695, 154NE666; 202 Iowa173, 209NW453, 47ALR407; 204 Iowa1355, 217NW233; 119Kan417, 239P756; 128Kan659, 280P780; 218Ky72, 290SW1075; 227Ky514, 13SW(2d)535; 224Ky89, 5SW(2d)487; 235Ky176, 30SW(2d)898; 159La399, 105S410; 162La 590, 110S766; 164La496, 114S109; 167La1113, 120S875; 168La95, 121S586; 169La135, 124S670(2dcase); 141Miss 289, 105S523; Miss 105S767; 307Mo 291, 270SW298; Mo 285SW978; 320Mo 417, 8SW(2d)29; Mo 22SW(2d)784; Mo 30SW(2d)750; MoA 273SW141; MoA 275SW58; MoA 27SW(2d)726; 113Nebr 871, 205NW572; 114Nebr404, 207NW928; 103NJL663, 138A575; 34NM494, 285P497; OklCr 270P344; OklCr 275P398; OklCr 279P980(1stcase); OklCr 281P982(2dcase); OklCr 283P584(2dcase); OklCr 283P809; OklCr 285P141; OklCr 286P21; OklCr 286P349; OklCr 286P350; OklCr 287P782; OklCr 287P1047; OklCr 290P418; 290Pa573, 139A374; 86PaSuper427; 91PaSuper513; 34Porto Rico 447; 137SC145, 134SE885; 156SC63, 152SE825(2dcase); 106TexCr 575, 294SW208; 106TexCr593, 294SW573; 107TexCr600, 298SW438; 108TexCr482, 1SW(2d)637; 111TexCr95, 10SW(2d)94(2dcase); TexCr 11SW(2d)172; 111TexCr75, 11SW(2d)512; 111TexCr 315, 12SW(2d)800; TexCr 27SW(2d)1102; TexCr 30SW(2d)327; 142Va596, 128SE638; 143Va546, 129SE233; 145Va 865, 134SE699; 153Va877, 149SE481; Va 152SE547; 141Wash429, 251P855; 141Wash660, 252P118; 144Wash363, 258P23; 144Wash446, 258P508; 107WVa163, 148SE127; 107WVa357, 148SE205; 193Wis482, 214NW356; 37Wyo 372, 262P24; PrEdIsl [1929] 2DomLR 289. [a] **Where application for continuance does not conform to statute,** trial judge's action in overruling it is not reviewable on appeal. TexCr 11SW(2d)172.

234-84 91Fla446, 107S331.

234-85 90Fla337, 106S406.

234-86 193Wis482, 214NW356.

234-87 78CalA476, 248P981; 77Colo 546, 238P25; OklCr 287P782.

234-88 137SC145, 134SE885.

235-89 121Kan186, 246P1001; 144 Wash446, 258P508. [a] (3) Correction of incomplete transcript of record after change of venue is not such surprise as to require continuance. 308Mo 695, 274SW470.

235-90 91Fla446, 107S331; 329 Ill 536, 161NE76; 34NM154, 279P66; 137SC 145, 134SE885; TexCr 11SW(2d)172; 111TexCr482, 14SW(2d)278.

235-91 22AlaA95, 112S811; 23AlaA297, 124S402; 76CalA105, 243P882; 78CalA 476, 248P981; 36GaA740, 138SE248; 37GaA520, 140SE788; 218Ky72, 290SW1075; 158La842, 104S736; 162La543, 110S749; Miss 105S767; 307Mo 291, 270SW298; 322Mo 234, 14SW(2d)628; MoA 275SW58; 114Nebr404, 207NW928; Okl Cr 283P1036(2dcase); 104TexCr199, 283SW785; 105TexCr228, 288SW218; 106TexCr593, 294SW573; 107TexCr530, 298SW287; 107TexCr666, 298SW591; 141Wash429, 251P855; 141Wash660, 252P118; WVa 138SE202. [a] (1) 21AlaA 486, 109S759.

236-92 94Fla143, 114S237; 165Ga460, 141SE196; 240Mich75, 215NW5; OklCr 269P785(1stcase); 33PortoRico 627; TexCr 11SW(2d)172; 107TexCr70, 294SW857; 111TexCr75, 11SW(2d)512(1stcase). [a] (1) 307Mo 291, 270SW298; 107TexCr70, 294SW857. (4) Overruling defendant's motion for continuance for sheriff's failure to summon witnesses is

held error. 220Ky582, 295SW886.

236-93 53SD450, 221NW44; 112TexCr 77, 14SW(2d)59(2dcase).

236-95 20AlaA601, 104S845 (arrest of witness for contempt); 22AlaA360, 115 S761; 70CalA271, 233P85 (dismissal); 82Colo 205, 25SP226; 90Fla25, 105S130; 161La167, 108S221; 167La108S, 120S 865; 251Mass536, 150NE80; 237Mich 247, 211NW650; 111Nebr28, 200NW16; NC 151SE741; 50ND927, 198NW698; 194Wis387, 216NW483. [b] Trial court's action in ordering mistrial is subject to review by supreme court. 157 Tenn177, 7SW(2d)16.

237-6 90Fla25, 105S130; 161La167, 108S324; 48SD409, 205NW25.

237-9 87CalA5, 261P531; 76Mont509, 248P201.

237-9½-New. making of experiments in the presence of the jury, 237Mich247, 211NW650.

237-16 [a] 199Ind592, 159NE120.

237-20 77Colo 516, 238P25; 226Ky584, 11SW(2d)410; 229Ky139, 16SW(2d) 793; 161La532, 109S56; 148Miss621, 114S390; 148SC360, 146SE116. [c] (2) 103NJL64, 134A760. (3) 233Ky533, 26 SW(2d)23; 213Ky190, 280SW1086.

238-21 178Ark980, 13SW(2d)25; 161 Ga332, 131SE80; 164Ga53, 137SE784; 208Ky556, 271SW657; 211Ky458, 283 SW427; 230Ky815, 20SW(2d)998; 161 La532, 109S56; 148Miss621, 114S390; 84Mont364, 275P750; 287Pa539, 135A 310. [a] (7) No abuse of discretion where in murder case court refused to discharge juror already impaneled and permit his examination as to suspended sentence because suspended sentence has no application to murder. 104TexCr15, 282SW580.

238-22 168Ark528, 270SW974; 137SC 58, 135SE635.

238-23 78CalA476, 24SP981.

238-24 168Ark528, 270SW974; 161Ga 332, 131SE80; 164Ga53, 137SE784.

238-26 177Ark186, 6SW(2d)34; 68CalA 487, 229PS96; 161Ga332, 131SE80; 35 GaA515, 133SE649; 163Ga121, 135SE 917; 164Ga53, 137SE784; 203 Iowa929, 210NW465; 205 Iowa853, 216NW756; 205 IowaS58, 216NW759; 126KanS03, 271P280; 161La556, 109S516; 152Miss 723, 120S838; 171Minn380, 214NW265; 317Mo 319, 296SW132; 73Mont240, 235 P712; 116NebrS12, 218NW129 (insanity); 32NM158, 252P1002; 96PaSuper 76; 109TexCr88, 3SW(2d)455; TexCr 31SW(2d)648. [a] (2) Mo 285SW416. (3) Court has no right to refuse to accept as true statements made by good citizens under oath touching their qualification as jurors. 107TexCr541, 298SW 293. (4) Nor to believe that trial judge was moved in overruling challenges by other than proper motive. 107TexCr 541, 298SW293. [c] (3) But qualification is not determined de novo on record on appeal from denial of new trial on ground of disqualification of juror. 118 Kan784, 236P641. (4) Overruling motion for new trial on alleged ground of disqualification of juror by false testimony as to opinion is not reviewable. 78Kan784, 236P641. [d] (1) 209KyS32, 273SW511; 209Ky787, 273SW515; 223 Ky824, 48SW(2d)1109; 225Ky275, 8SW (2d)115; 232Ky500, 23SW(2d)940. (3) 209KyS32, 273SW511 (Cr. Code Pract. § 281 is constitutional).

239-27 15F(2d)977; 164GaS3, 137SE 784; 155MissS629, 125S115. But see Conn 151A325. [a] (2) Sustaining challenge of venireman who had conscientious scruples against inflicting death penalty. 76Mont509, 248P201.

240-29 220Ky318, 295SW142.

240-31 164GaS3, 137SE784; 161LaS56, 109S516; 103TexCr485, 281SW855. [c] Failure of defendant, who claims juror was disqualified because evidence of his guilt was introduced in former case in which juror sat, to show by transcript what evidence was introduced in former case justifies court in holding that abuse of discretion to holding juror fit to serve was not shown. 73Mont240, 235P712.

240-33 19F(2d)127; 2sF(2d)430; 34 Ariz129, 268P611 (propriety of allowing repetition of testimony); 170Ark1194, 283SW372; 82Colo589, 263P19; 164 Ga292, 138SE238; 319 Ill 606, 150NE 347; 202 Iowa450, 209NW468, 471 [cit CJ]; 203 Iowa929, 210NW465, 473 [cit CJ]; 203 Iowa532, 211NW244; 158La 713, 104S627; 167LaS8, 118S869(1st case); 264Mass368, 162NE729; 349Mo 28, 3SW(2d)230; 74Mont269, 240P365; 50Nev212, 255P1002; 30NM309, 233P 49; 104TexCr185, 283SW520; TexCr 291SW229; 106TexCr652, 294SW571; 109TexCr127, 3SW(2d)441. 142Wash 653, 254P445. [b] (2) Court held not to have abused its discretion in refusing to allow defendant to impeach an impeaching witness. 79CalA113, 249PS32.

241-34 175Ark120, 298SW867; 104TexCr185, 283SW520.

241-35 34Ariz129, 268P611; 256Mass 165, 152NE241; 104TexCr185, 283SW 520.

241-39 238Mich543, 213NW683.

241-39½-New. motions to suppress evidence made during the trial, 235Mich 588, 209NW927.

241-44 7F(2d)867; 22AlaA99, 112S 813; 199CalA235, 24SP906; 161Ga292, 138SE238; 321 Ill 397, 152NE149; 163 La525, 112S404; 102NJL659, 133A274; 35 OhA463, 172NE555; 31 OkiCr317, 238 PS71; 117 Or179, 242P1116.

241-45 22AlaA99, 112S813; CalA 284P 485; 164Ga292, 138SE238; 214Ky88, 282SW781; Mo 295SW788; 99TexCr 504, 270SW555; 101TexCr12, 274SW 599; 106TexCr310, 292SW240; 103Tex Cr163, 280SW829. But see 113TexCr 439, 22SW(2d)674.

242-47 29F(2d)172 [certiorari den 279 US849, 49SCt346, 73Led992(3dcase); 31 F(2d)438; 200 Ind579, 164NE274; 167 La967, 120S614; 172Minn106, 214NW 782; 149Miss251, 115SW427; 142Wash 653, 254P445; 101WVa356, 132SE728. [a] (13) On prosecution for illegal transportation of liquor, whether automobile was searched after arrest. 198 Ind701, 154NE668. (14) Timely service of search warrant so as to render evidence secured admissible. 144Miss726, 111S 139. [b] Inferences from undisputed facts may be drawn by trial court and its decision not be disturbed unless contrary inference is only reasonable one. 83Colo 4, 262PS92.

242-48 5F(2d)133; 72CalA292, 237 P390; 82CalA62, 255P239; 83CalA190, 256PS29; 87CalA629, 262P56; Conn 142 A857; 120 Or652, 253P371; 108TexCr 404, 18SW(2d)318.

242-49 74Mont269, 240P365; 107TexCr 649, 298SW604.

242-51 21AlaA457, 109S366; 32Ariz 195, 256P1053; 195Cal623, 234PS90; 195Cal584, 234P374; 75CalA138, 242P 84; 91CalA649, 267P366; 102CalA647, 283PS68; CalA 291P214; 83Colo 4, 262 PS92; 90Fla659, 106S479; 319 Ill 606, 150NE347; 321 Ill 397, 152NE149; 333 Ill 397, 164NE847; 199 Ind55, 155NE 203; 168La454, 122S579(2dcase); 142 Miss335, 107S373; 148Miss764, 114S827 (on conflicting evidence); 80Mont181, 260P138; 102NJL659, 133A274; NJSup 134A283; 104NJL512, 141A85; 50ND 927, 198NW698; 128Or49, 273P381; 110TexCr128, 7SW(2d)579; Wash 287 P18 (refusing inspection to defendant's counsel, held not prejudicial); 108WVa 681, 152SE633.

243-52 101WVa356, 132SE728.

243-53 31F(2d)86; 85CalA106, 259P 481; 85Mont585, 281P551; Nebr 226 NW793; 117 Or179, 242P1116; 101Vt 124, 141A686; 104WVa523, 140SE546.

243-54 142Wash653, 254P445.

243-55 48Nev358, 232P778, 235P645.

243-56 332 Ill 436, 163NE801; 334 Ill 218, 165NE619. [a] Claim of what witnesses would have testified to if procured at government's expense is not to be considered. 5F(2d)231.

243-58 21AlaA378, 108S646; 170Ark 1194, 283SW372; 173Ark713, 293SW19; 179Ark1064, 20SW(2d)113; 202Cal154, 259P412; 73CalA649, 238P1075; 90Fla 178, 105S401 (unless discretion is clearly abused); 164Ga47, 137SE553; 198 Ind427, 154NE5; 222Ky484, 1SW(2d) 779; 164La423, 114S83; 155Md474, 142 A497; 321Mo 633, 12SW(2d)37. Mo 29 SW(2d)156; 114Nebr28, 206NW16; 50 ND927, 198NW698; 142Va658, 128SE 459; 147Va692, 137SE603.

244-59 170Ark1194, 283SW372; 164Ga 47, 137SE553; 199 Iowa1221, 203NW232 (after state had rested); 105TexCr281, 288SW213.

244-60 170Ark1061, 282SW684.

244-62 Mo 6SW(2d)908; 122 Or537, 259P127.

244-63 174Ark1180, 297SW830; 85 Colo442, 276P983; 164Ga47, 137SE553; 36GaA741, 138SE258; 120Kan221, 243P 280; 222Ky630, 1SW(2d)1045; 50Nev 212, 255P1002; 123 Or521, 262P954; 157Tenn383, 8SW(2d)479; 106TexCr 567, 294SW210; 106TexCr593, 294SW 573.

244-64 166La891, 118S73; 166La924, 118S85.

244-65½-New. or denying defendant's request that his cross examination of certain witness be postponed until after evidence of corpus delicti has been established, 70CalA531, 233P980.

244-66 36GaA741, 138SE258; 164La 423, 114S83; 165La1082, 116S565; 101 TexCr315, 276SW247; 106TexCr593, 294SW573. But see 22AlaA364, 115S 767. [a] 161La851, 109S515.

244-67 12F(2d)925; 22AlaA95, 112S 811; 173Ark1172, 294SW397; 73CalA 649, 238P1075; 164Ga47, 137SE553; 337 Ill 643, 169NE772; 222Ky484, 1SW (2d)779; 237Mich247, 211NW650; 146 Miss547, 112S705; 101TexCr346, 276 SW244; 101TexCr315, 276SW247.

244-68 12F(2d)683; 21AlaA214, 107S 29; 21AlaA637, 111S314; 70CalA92, 232 P724 (repetition of questions); 230Ky 250, 19SW(2d)218; 161La851, 109S515; 254Mass520, 150NE54; 115Nebr621, 214NW70; 82NH189, 131A606; 34NM 112, 278P210; 50ND927, 198NW698 (propriety of examination); 57ND900, 225NW319; 106TexCr528, 293SW827; TexCr 24SW(2d)435. [c] (3) But accused's testimony must be rendered fairly intelligible to jury if practicably possible, and appellate court may interfere when it appears that so-called interpreters were not capable of interpreting. 96Fla348, 118S1.

245-70 21AlaA504, 109S563; 197Cal 200, 239P1080; 91Fla682, 108S842; 163 Ga186, 136SE72; 42 Ida517, 246P313; 202 Iowa1067, 208NW360; 165La822, 116S199; 256Mass452, 152NE739; Mo 278SW1014; 103NJL383, 135A894; NJ Sup 133A415; NM 292P609; 191NC528, 132SE151; 52ND659, 204NW350; 116 Or635, 242P603; 117 Or430, 244P538; 106TexCr621, 294SW580. [a] 45 Ida760, 265P24.

245-71 4F(2d)884; 34F(2d)86; 20AlaA 626, 104S777; 21AlaA637, 111S314; 23 AlaA419, 126S114; 197Cal200, 239P 1080; 69CalA127, 230P974; 82Colo 205, 258P226; 208 Iowa1139, 226NW186; 120Kan221, 243P280; 252Mass465, 148 NE23; 254Mass520, 150NE54; Mass 171NE451; 234Mich419, 208NW458; 236Mich226, 210NW219; 239Mich105, 214NW130; 240Mich98, 215NW62; 115 Nebr621, 214NW70; 82NH189, 131A 606; NJSup 133A415; 53ND669, 207 NW991; 126Or560, 270P404; 101Tex Cr267, 275SW837; 141Wash270, 251P 289; Wash 291P1093; 99WVa694, 129 SE748. [b] (4) 82NH189, 131A606. [c] 127KanS32, 275P166(1stcase). [g] Abuse of discretion.—20AlaA626, 104S 777.

246-72 21AlaA637, 111S314; 82Colo 205, 258P226; 327 Ill 162, 158NE462; 200 Ind417, 164NE273; 121Kan516, 247 P430; 169La559, 125S617; 252Miss465, 148NE123; 234Mich419, 208NW458; 237Mich181, 212NW105; 239Mich105, 214NW130; 76Mont351, 246P956; 115 Nebr621, 214NW70; 33NM540, 273P 919; 49ND228, 191NW345; 20OhA461, 152NE678; 99TexCr569, 270SW1025; 101TexCr267, 275SW837; 141Wash270, 251P289.

246-73 21AlaA637, 111S314; 120Kan 177, 243P326; 120Kan221, 243P280; 121Kan516, 247P430; 255Mass575, 152 NE704; 239Mich105, 214NW130; 115 Nebr621, 214NW70; 50ND927, 198NW 698 (cross-examination for impeachment purposes); 53ND669, 207NW991; 135 Wash377, 237P727; 141Wash270, 251P 289. [a] 122 Or504, 259P917.

246-75 Ariz 283P711; 171Ark658, 285 SW367.

246–76 177Ark742, 9SW(2d)15; 78 CalA598, 248P969.

246–77 334 Ill 11, 165NE178; 317Mo 475, 296SW137; 106TexCr570, 294SW 205. [b] **Refusal to allow defendant's witness to testify violating exclusion order, but permitting state's witness, also violating order, to testify,** has been held not to require reversal, where there was no controversy over testimony of defendant's witness, whereas testimony of state's witness concerned matters which were in dispute. 334 Ill 11, 165 NE178.

247–82 213Ala541, 105S677.

247–82 175Ark1170, 1SW(2d)46; 160 La470, 107S309; 316Mo 42, 289SW811; 52ND95, 204NW969; 156SC509, 153SE 480; 52SD582, 219NW263; 103WVa 641, 138SE321. [b] 213Ala541, 105S677 (revised only when abused). [e] **Permitting district attorney in opening argument** to jury to read brief stenographic notes of former trial which had been used by witness in giving his testimony. 123 Or521, 262P954.

247–85 128Kan374, 278P57; Mo 296 SW128; Mo 25SW(2d)113.

247–88 97CalA537, 275P1017; 214Ky 544, 283SW385; TexCr 118SW(2d)172; TexCr 26SW(2d)225. [a] 106TexCr567, 294SW210.

247–88½–New. In Kentucky, court of appeals will not review trial court's alleged error in allowing a juror, who had formed an opinion, to sit on the case, in view of Cr. Code § 281. 214Ky787, 283 SW1063.

248–89 170Ark560, 280SW9.

248–90 165La497, 115S728; Nebr 226 NW793.

248–91 [a] 284Pa255, 131A184.

248–93 170Ark1192, 281SW369.

248–93½–New. allowing testimony of a witness to be read to the jury at their request on returning to court during their deliberations, 230Mich278, 203NW 135.

248–95 Ga 155SE11 (grant of mistrial); 231Mich484, 204NW105 (pending trial); NM 290P322(2dcase); 233Mich29, 206 NW522; 155Miss648, 124S803. See also 295Pa50, 144A761.

248–97 78CalA442, 248P1061; 166Ga 563, 144SE170; 44 Ida173, 258P551; 46 Ida423, 267P950; 103NJL523, 138A381; NJ 130A446. See also 102NJL388, 132 A93.

248–98 103NJL18, 134A886; 152SC17, 149SE348. [e] (2) Matter of discretion, reviewable only for abuse and impairment of substantial right. 102NJL530, 133A861.

248–1 7F(2d)259; 13F(2d)392.

248–3 5F(2d)966; 8F(2d)711; 15F(2d) 369; 15F(2d)372; 19F(2d)62; 19F(2d) 813; 20F(2d)795; 26F(2d)798; 30 F(2d)900; 35F(2d)941; 41F(2d)193; 43F(2d)273; 22AlaA162, 114S67; 174 Ark859, 296SW716; 174Ark1179, 298 SW27; 181Ark813, 27SW(2d)989; 203 Cal587, 265P231; 68CalA186, 228P733; 68CalA674, 230P178; CalA 262P428; 89 CalA132, 264P314; 93CalA241, 269P 698; 99CalA32, 277P1102; 83Colo107, 262P918; 91Fla693, 108S556; 163Ga 684, 137SE31; 165Ga258, 140SE366; 35 GaA347, 133SE269; 35GaA487, 133SE 656; 36GaA94, 135SE512; 36GaA299, 136SE335; 36GaA284, 136SE336; 36 GaA283, 136SE332; 36GaA604, 137SE 576; 36GaA674, 137SE854; 37GaA17, 138SE527; 37GaA376, 140SE406; 37 GaA506, 141SE62; 40GaA274, 149SE 324; 199 Ind117, 155NE259; 119Kan 417, 239P756; 126Kan710, 271P316; 213Ky524, 281SW508; 158La400, 104 S185; 161La532, 109S56; 166La1010, 118S116; 170La1050, 129S633; 153Md 613, 139A289; 157Md407, 146A238; 254Mass320, 150NE7; 254Mass390, 150 NE181; 255Mass369, 151NE839; 256 Mass165, 152NE241; 257Mass419, 154 NE179; 259Mass128, 156NE57; 260 Mass303, 157NE354; 241Mich67, 216 NW398; 243Mich489, 220NW678; 170 Minn197, 212NW203; 172Minn372, 215 NW514; Mo 286SW20; 75Mont350, 243 P587; 116Nebr45, 215NW564; 102NJL 388, 132A93; 217AppDiv424, 216NYS 723; 55ND846, 215NW552; 57ND335, 221NW887; 57ND900, 225NW319; 35 OklCr279, 250P544, 49ALR1129; OklCr 277P688; OklCr 283P1036(1stcase); OklCr 293P271; 126 Or560, 270P404; 85PaSuper7; 85PaSuper320; 86PaSuper427; 89PaSuper249; 93PaSuper111; 8PaDist&Co 763; 133SC294, 130SE888; 146SC255, 143SE511(1stcase); 54SD 375, 223NW320; 100TexCr537, 272SW 144; 101TexCr251, 275SW835; 101Tex Cr434, 276SW289; 103TexCr593, 281SW 865; 104TexCr628, 286SW234; 106Tex Cr361, 293SW1108; 106TexCr575, 294 SW208; 106TexCr577, 294SW207; 108 TexCr672, 2SW(2d)223; 109TexCr372, 5SW(2d)137; 109TexCr506, 5SW(2d) 520; 109TexCr620, 6SW(2d)363; Tex Cr 11SW(2d)172; 112TexCr92, 14SW (2d)63(2dcase); 113TexCr555, 23SW (2d)721; TexCr 24SW(2d)840; TexCr 28SW(2d)158; TexCr 28SW(2d)546(2d case); 151Va545, 145SE377; 195Wis 375, 218NW185; Wis 229NW633. [e] (3) Where ruling of trial judge on motion for new trial raises only question of fact nothing is presented for review. 160La269, 107S106. [f] (3) Action of the trial court is entitled to great weight. 215Ky244, 286SW790.

250–4 75Mont350, 243P587.

250–5 209Ky394, 272SW909; 313Mo 615, 285SW392; 73Mont187, 235P703; 91PaSuper566.

250–9 199 Ind489, 158NE480; 170Minn 197, 212NW203; 171Minn158, 213NW 735; 116Nebr45, 215NW564; 50SD32, 208NW164.

250–10 119Kan417, 239P756; 100Tex Cr537, 272SW144; 103TexCr264, 280SW 813.

250–13 90Fla844, 107S530; 165Ga210, 140SE625; 163Ga684, 137SE31; 166Ga 218, 142SE898; 170Ga859, 154SE344; 35GaA577, 134SE181; 38GaA436, 144 SE127; 215Ky244, 286SW790; 224Ky 370, 6SW(2d)483; Mont 292P250; 33 NM573, 272P565; 35 OklCr279, 250P 544, 49ALR1129; 101TexCr336, 275SW 829; 106TexCr615, 294SW561; 109Tex Cr88, 3SW(2d)455. [a] (1) 167Ga 286, 145SE445; 38GaA206, 143SE778; 38GaA664, 145SE100(1stcase); 227Ky 212, 12SW(2d)305. [c] 109TexCr88, 3 SW(2d)455.

250–14 102CalA688, 283P388; 35GaA 398, 133SE744; 130Kan762, 288P736; 115Nebr277, 212NW606; 85PaSuper7 (reading newspapers); 85PaSuper320; 100TexCr364, 272SW780; 101TexCr336, 275SW829; 103TexCr232, 280SW588; 103TexCr242, 280SW819; 104TexCr 423, 284SW571; 105TexCr318, 287SW 249, 1099; 105TexCr522, 289SW392; 106TexCr615, 294SW561; 109TexCr554, 5SW(2d)996; Utah 272P635. [a] 50 SD530, 210NW722. [b] (2) Where newspaper articles read by jurors during trial did not refer to any previous misconduct of defendants, or discredit any material witness or misstate the evidence and could not have affected verdict, denial of new trial will not be reversed. 85PaSuper7. [e] 8F(2d)919. [f] 100TexCr364, 272SW780.

252–15 90CalA683, 266P813; 35GaA 347, 133SE269; 264Mass264, 162NE349; Nebr 232NW781; 31NM620, 249P1003; 104TexCr628, 286SW234. [a] 199 Ind 489, 158NE480. [c] (1) 106TexCr361, 293SW1108.

252–16 21AlaA95, 105S705 (overruling motion for new trial held proper where sufficient evidence to support verdict); 89CalA1, 264P302; 93CalA216, 269P 724; 100CalA397, 280P137 (conflicting evidence as to identity of defendant as same one formerly convicted); 91Fla 693, 108S556; 94Fla268, 113S707; 161 Ga640, 131SE682; 163Ga878, 137SE378; 34GaA141, 128SE587; 34GaA234, 128SE 918; 34GaA144, 128SE924; 35GaA366, 133SE270; 162Ga422, 134SE95; 36GaA 209, 210, 136SE96; 36GaA207, 136SE 103; 36GaA218, 136SE112; 36GaA208, 136SE182; 36GaA664, 137SE915; 36 GaA674, 137SE854; 36GaA740, 138SE 248; 36GaA739, 138SE287(1stcase); 36 GaA739, 138SE287(2dcase); 37GaA119, 138SE924; 37GaA162, 139SE90; 37GaA 165, 139SE94; 37GaA166, 139SE101; 37GaA163, 139SE126(3dcase); 37GaA 163, 139SE126(1stcase); 37GaA120, 139 SE129(2dcase); 37GaA107, 139SE129(3d case); 37GaA160, 139SE131; 37GaA162, 139SE133; 37GaA156, 139SE156; 37 GaA324, 140SE391; 37GaA376, 140SE 406; 39GaA568, 147SE777(1stcase); 41 GaA567, 153SE609(2dcase); 158La244, 103S755; 158La249, 103S757, 1611A 296, 108S543; 163La502, 112S396; 165 La270, 115S484; 165La653, 115S813; 231Mich687, 204NW731; 76Mont384, 247 P158; NC 155SE257; OklCr 274P696; 8PaDist&Co 763; 152SC17, 149SE348 (where there is any evidence at all upon which verdict could be based); 147Va 624, 136SE765. [a] (1) 165Ga290, 140 SE892 (where evidence was held insufficient); 36GaA626, 137SE791; 37GaA 116, 139SE109; 37GaA361, 140SE779; OklCr 276P240(2dcase). (2) Where circumstantial evidence does not exclude every hypothesis save that of guilt, it is error to deny new trial. 36 GaA643, 137SE794. [c] In Oklahoma.–Cr 275P385. [d] In Louisiana.–158La 1081, 105S71.

252–17 32Ariz470, 260P188; 173 Ark1172, 294SW397; 68CalA186, 228P 733; 68CalA758, 230P191; 87CalA295, 261P1114; 92CalA628, 268P923; CalA 288P106; CalA 288P832; 77Colo445, 236P1009; 162Ga208, 132SE911; 167Ga 280, 145SE453; 33GaA680, 127SE891; 35GaA349, 133SE350; 35GaA577, 134 SE191; 35GaA582, 134SE202; 36GaA 303, 136SE333; 36GaA315, 136SE798; 36GaA582, 137SE640; 39GaA13, 145SE 918; 39GaA810, 148SE601(2dcase); 199 Ind489, 158NE480; 158La244, 103S755; 160La470, 107S309; 252Mass450, 148NE 113; 255Mass369, 151NE839; 265Mass 133, 163NE865(1stcase); 233Mich38, 206NW339; 166Minn300, 207NW623; 170Minn197, 212NW203; 171Minn515, 213NW923; 313Mo 615, 285SW392; 217 AppDiv424, 216NYS723; NC 154SE402; 49ND376, 191NW482; 50ND927, 198NW 698 (abuse of discretion not shown); OklCr 283P1026; OklCr 287P1091(2d case); OklCr 289P790; OklCr 289P 1111; OklCr 292P371(2dcase); OklCr 292P883(2dcase); 121 Or141, 253P367; 85PaSuper320; 92PaSuper541; 50SD 32, 208NW164; 53SD22, 219NW882; 101TexCr434, 276SW289; 108TexCr323, 300SW59; 113TexCr48, 19SW(2d)61(2d case); TexCr 24SW(2d)427(2dcase); TexCr 29SW(2d)762; TexCr 32SW(2d) 454; 151Va545, 145SE377; 198Wis247, 223NW833. See also 134SC179, 131SE 420. [a] 202Cal527, 261P1009 (alibi).

252–17½–New. In reviewing a motion for new trial on the ground of insufficiency of evidence the appellate court will consider only such evidence as tends to prove defendant's guilt. 199 Ind1, 154NE801.

253–20½–New. Bill of exceptions to overruling of mere formal motion for new trial is held to present nothing for review. 160La902, 107S616.

253–20½–New. On appeal from order denying new trial appellate court sits only as reviewing tribunal and not as court of original jurisdiction. Mont 286 P1108.

253–22 40GaA91, 149SE59.

253–24 285Pa49, 131A657.

253–33 153Md613, 139A289; 260Mass 303, 157NE354.

254–35 201Cal568, 258P49; 37GaA 106, 139SE120; 245 IllA145; 130Kan 759, 288P735; 203 Iowa251, 212NW475; 165La380, 115S627; 142Miss342, 107S 372; 55ND313, 213NW484; 51Philippine933 (in absence of abuse); 145Va 872, 134SE565; 141Wash337, 251P290; 142Wash528, 253P796; 36Wyo 111, 253 P14; 36Wyo 532, 257P2. See 145Va838, 133SE761. [d] **Excessive sentence held reviewable,** despite plea of guilty. 216 AppDiv508, 215NYS666.

254–36 34 OhA536, 171NE407; 36Wyo 532, 257P2. But see 21AlaA539, 110S 157.

254–39 74CalA401, 240P802; 87CalA 482, 262P361; 87CalA783, 262P803; Ind A 171NE811; 252NY387, 169NE619; 85PaSuper47. [a] **Court may consider abuse of discretion** in trial court's refusal to permit filing of probation application. 87CalA482, 262P361.

254–41 Ark 30SW(2d)865; 214Ky111, 282SW766; 320Mo 288, 6SW(2d)866; 320Mo 271, 8SW(2d)57; OklCr 292P 393; 105TexCr19, 284SW955; 110Tex

Cr639, 10SW(2d)559(2dcase); TexCr 18 SW(2d)640.

254–44 91PaSuper582.

254–44½–New. Discretion of trial court in suspending sentences and paroling defendants is reviewable under statutes in some jurisdictions. 50SD48, 208NW224.

254–47 105TexCr374, 288SW230.

254–51 8F(2d)815; 13F(2d)392; 18F(2d)509; 23AlaA115, 121S499(1stcase); 171Ark1188, 284SW721; 173Ark1054, 294SW390; 179Ark1199, 18SW(2d)375; 194Cal 1, 227P156; 68CalA588, 229P983; 70CalA489, 233P413; 71CalA694, 236P208; 76CalA192, 244P94; 77CalA113, 246P110; 80CalA31, 251P343; 91CalA290, 266P1000; Fla 128S628 (holding appeal court to be at greater disadvantage than trial court in passing on sufficiency); 35GaA364, 133SE351; 37GaA324, 140SE391; 41GaA375, 153SE92(1stcase); 338 Ill 117, 170NE232; 204Iowa137, 214NW531; 121Kan507, 247P635 (competency of witness); 230Ky24, 18SW(2d)287; 232Ky568, 24SW(2d)276; 158La799, 104S720; 158La869, 104S746 (effect of evidence and sufficiency of proof); 161La135, 108S312; 161La172, 108S325; 161La296, 108S543; 161La368, 108S773; 161La755, 109S413; 162La241, 110S336; 162La242, 110S336; 162La543, 110S749; 163La473, 112S303; 163La525, 112S404; 164La737, 114S636; 165La380, 115S627; 168La855, 123S597; 172Minn226, 215NW189; 146Miss540, 112S681; Mo 19SW(2d)628; 79Mont385, 256P1071; 248NY255, 162NE24; 254NY373, 173NE227; 222AppDiv54, 225NYS149; 189NC766, 128SE354; 55ND194, 212NW857; OklCr 292P871; 297Pa160, 146A553; 133SC53, 130SE123; 151SC90, 148SE710 (excessiveness of fine); 104TexCr263, 283SW522; TexCr 288SW441; 105Tex Cr487, 288SW1078; TexCr 24SW(2d)1097; TexCr 32SW(2d)194; 142Va639, 128SE456; Va 153SE821; 99WVa694, 129SE748. See also 168La807, 123S332(2dcase); 152SC17, 149SE348. But see GaA 155SE531. [a] **In California.**–68CalA588, 229P983. [b] **Unless trial court erred as to law,** verdict cannot be disturbed. 198NC61, 150SE628.

255–52 8F(2d)697; 8F(2d)815; 13F(2d)11; 13F(2d)327; 13F(2d)596; 13F(2d)599; 17F(2d)236; 18F(2d)906; 20F(2d)795; 21F(2d)425; 22F(2d)806; 41F(2d)654; 44F(2d)134; 21AlaA648, 111S320; 23AlaA116, 121S689; 23AlaA440, 126S608; 33Ariz354, 264P1083; 170Ark1193, 283SW29 (where jury properly instructed); 172Ark1177, 288SW707; 175Ark1170, 299SW755; 177Ark885, 7SW(2d)969; 177Ark1193, 9SW(2d)327; 178Ark1200, 10SW(2d)853; 179Ark1158, 16SW(2d)468; 180Ark1081, 24SW(2d)971; 181Ark185, 25SW(2d)766; Ark 31SW(2d)528; 195Cal445, 234P91; 94CalA4, 270P377; 68CalA545, 229P987; 72CalA570, 237P793; 75CalA642, 243P461; 78CalA11, 247P917; 80CalA31, 251P343; 77CalA158, 246P132; 86CalA148, 260P591; 90CalA590, 266P295; 90CalA657, 266P558; 91CalA684, 267P390; 100CalA295, 279P1054; 102CalA353, 282P971; CalA 288P20; CalA 290P678; 92Fla873, 110S528; 98Fla1101, 125S355; Fla 130S277; 34GaA188, 129SE21; 35GaA364, 133SE351; 40GaA504, 150SE449(2dcase); GaA 155SE777(1stcase); 197Ind463, 150NE365; 198 Ind1, 151NE405; 199 Ind44, 154NE865; 199 Ind55, 155NE203; 199 Ind700, 160NE291; 200Ind48, 160NE294; 200 Ind43, 161NE265; 200 Ind53, 161NE271; 200 Ind283, 163NE91; 200 Ind458, 163NE260(1stcase); 89 IndA569, 166NE294; Ind169NE531; 89 IndA307, 166NE262; 89IndA578, 166NE618; 206 Iowa347, 218NW477; 207 Iowa224, 222NW407, 61ALR882; Iowa 228NW308; 130Kan813, 288P731; 217Ky688, 290SW514; 227Ky411, 13SW(2d)277; 231Ky1, 21SW(2d)120; 231Ky527, 21SW(2d)840; 234Ky842, 29SW(2d)561 (any evidence to support verdict); 156La891, 101S255; 158La203, 103S740; 158La237, 103S752; 158La300, 103S821; 158La535, 104S317; 158La674, 104S612; 158La791, 104S717; 158La869, 104S746; 158La873, 104S747 (holding that supreme court has no power to pass upon sufficiency of evidence); 159La779, 106S302; 159La888, 106S369; 160La121, 106S716; 160La190, 106S779; 160La197, 106S781; 160La548, 107S402; 160La850, 107S597; 160La904, 107S616; 161La167, 108S324; 161La296, 108S543; 161La755, 109S413; 161La755, 109S413; 162La357, 110S557; 162La471, 110S723; 162La531, 110S744; 162La641, 110S888; 163La11, 111S473; 163La487, 112S374; 163La525, 112S404; 163La641, 112S514; 164La737, 114S636; 165La163, 115S445; 165La561, 115S751; 165La584, 115S759; 165La822, 116S199; 165La842, 116S206; 167La330, 119S467; 167La827, 120S382; 168La297, 121S872; 169La55, 124S143(2dcase); 169La377, 125S277; 170La203, 127S601; 170La507, 128S293; 264Mass368, 162NE729; 172Minn226, 215NW189; 311Mo 391, 279SW30; Mo 285SW419; 315Mo 1326, 292SW413; Mo 295SW575; 317Mo 426, 297SW358; Mo 300SW501; 318Mo 548, 300SW678; 318Mo 742, 300SW680; 318Mo 581, 300SW765; Mo 1SW(2d)139; 318Mo 1233, 3SW(2d)365; Mo 14SW(2d)449; Mo 22SW(2d)802; Mo 29SW(2d)156; MoA 295SW481; MoA 299SW83; 76Mont574, 248P179; 79Mont614, 257P1010; Mont 286P1108; 115Nebr158, 211NW942; 49Nev386, 248P48; Nev 290P732; 104NJL512, 141A85; NJSup 135A339; 103NJL523, 138A381; 250NY185, 164NE900; 254NY373, 173NE227; 193NC246, 136SE715; 196NC129, 144SE698(2dcase); OklCr 269P1061; OklCr 283P1035(2dcase); OklCr 287P774; OklCr 287P813; OklCr 288P353; OklCr 288P357(2dcase); OklCr 288P987(2dcase); OklCr 292P883(2dcase); 113 Or149, 231P926; 122Or148, 257P826; Or 290P1096; 300Pa375, 150A649; 51SD179, 212NW864; 105TexCr487, 288SW1078; 109TexCr116, 3SW(2d)94; 113TexCr108, 18SW(2d)637(2dcase); 113TexCr263, 20SW(2d)200; TexCr 29SW(2d)750; TexCr 31SW(2d)439; Utah 279P950; 142Va639, 128SE456; 137Wash162, 242P363, 246P758; 152Wash593, 278P164; 99WVa694, 129SE748; 102WVa107, 134SE599; 102WVa234, 134SE919; 104WVa427, 140SE147. See 158La799, 104S720. [a] **Judgment of guilty on indictment charging two counts** will not be reversed if sustained by evidence under either count. 41F(2d)44. [b] **Theory that verdict of second degree established jury's doubt of guilt,** where evidence, if believed, warranted capital verdict, does not warrant reversal. Ala 128S599(2dcase). [c] **It may be duty of intermediate court in reviewing case upon weight of evidence** to determine whether verdict or judgment is supported by degree of proof which character of case requires. 121 Ob562, 170NE355(2dcase). [d] **In Louisiana.**–158La869, 104S746.

255–52½–New. The court of criminal appeals endeavors to place a reasonable, sane, and sensible construction on verdicts. 110TexCr285, 7SW(2d)578.

255–52¾–New. The reviewing court has only to decide after considering the sufficiency of the evidence whether the jury were warranted in believing beyond a reasonable doubt that defendant was guilty. 124Mo378, 130A129 (on appeal to presiding justice from denial of new trial).

255–53 15F(2d)965; 21F(2d)409; 24F(2d)353; 22AlaA311, 115S289; 32Ariz153, 256P1117(1stcase); 32Ariz150, 256P1117(2dcase); 32Ariz152, 256P1118; 168Ark1168, 271SW451; 175Ark1169, 299SW40; 177Ark885, 7SW(2d)969; 179Ark647, 17SW(2d)307; 201Cal 568, 258P49; 70CalA489, 233P413; 79CalA328, 249P231; 81CalA381, 253P938; 92CalA593, 268P687; 94CalA85, 270P706; CalA 271P112; 90Fla555, 106S415; 94Fla268, 113S707; 35GaA385, 133SE103; 162Ga777, 135SE187; 163Ga336, 136SE268; 34GaA133, 128SE687; 34GaA221, 128SE818; 36GaA99, 135SE448(2dcase) (verdict authorized by evidence); 35GaA680, 134SE448; 36GaA128, 135SE448(4thcase); 36GaA122, 135SE496; 36GaA128 135SE516; 36GaA129, 135SE520; 36GaA111, 135SE521; 36GaA310, 136SE330; 36GaA282, 136SE332; 36GaA303, 136SE333; 36GaA286, 136SE334; 36GaA280, 136SE335(1st case); 36GaA306, 136SE335(4th case); 36GaA299, 136SE335(5thcase); 36GaA296, 136SE336(1stcase); 36GaA284, 136SE336(2dcase); 36GaA266, 136SE460; 36GaA305, 136SE476; 36GaA297, 136SE815; 36GaA283, 136SE832; 36GaA605, 137SE576(3dcase); 36GaA597, 137SE576(4thcase); 36GaA751, 138SE246; 37GaA176, 139SE135; 37GaA475, 140SE772; 37GaA823, 142SE195; 38GaA436, 144SE145(2dcase); GaA 155SE788; 44 Ida298, 256P1118; 197 Ind169, 150NE56; 198 Ind695, 154NE666; 204 Iowa135, 214NW568; 205 Iowa1043, 218NW939; Iowa 228NW75; Iowa 231NW385; Iowa 233NW110; 130Kan762, 288P736; 208Ky531, 271SW584; 215Ky717, 286SW1053; 229Ky312, 17SW(2d)241; 311Mo 391, 279SW30; Mo 279SW702; Mo 11SW(2d)1011; MoA 279SW749; 79Mont343, 256P380; Mont 286P1108; 117Nebr377, 220NW599; Nebr 233NW461; 49Nev184, 242P316; 193NC846, 137SE926; 58ND792, 228NW199; 33 OhA273, 168NE762; OhA 173NE300; OklCr 268P1116; OklCr 272P1031; OklCr 275P655; OklCr 277P282(1stcase); OklCr 279P982(1stcase); OklCr 280P855; OklCr 281P166; OklCr 281P167; OklCr 282P896; OklCr 283P1029(1stcase); OklCr 285P987; OklCr 288P500; 121 Or57, 254P198; 85PaSuper316; 88PaSuper171; 88PaSuper451; 91PaSuper513; 35PortoRico404; 155Tenn325, 292SW849; 100TexCr649, 274SW564; 100TexCr664, 274SW582; 102TexCr558, 278SW1103; 105TexCr126, 286SW1099; 105TexCr460, 287SW152; 110TexCr318, 7SW(2d)564; 153Va954, 151SE286; 142Wash57, 252P530; 144Wash446, 258P508; 152Wash488, 278P173; 38Wyo 140, 265P25. See also 75CalA222, 242P506.

255–54 32Ariz152, 256P1118; 203Cal139, 263P522; 89Fla493, 104S782; 90Fla779, 107S242; 95Fla264, 116S8; 34GaA235, 128SE817; 35GaA474 133SE655; 35GaA585, 134SE200; 36GaA129, 135SE495(1stcase); 36GaA130, 135SE495(2dcase); 36GaA306, 136SE331; 37GaA153, 139SE134(5thcase); 37GaA153, 139SE134(6thcase); 28Hawaii471; Iowa 230NW394; 172Minn226, 215NW189; 115Nebr505, 214NW11; NJSup 146A351(1stcase); 51SD179, 212NW864; 104TexCr355, 284SW222.

255–54½–New. where circumstances make out prima facie case requiring explanation which defendant failed to make: 79Mont614, 257P1010.

255–55 35Ariz420, 279P256; 35Ariz449, 280P491; Ariz 282P930; 172Ark1177, 288SW707; 173Ark1054, 294SW390; 176Ark725, 3SW(2d)977; 176Ark1203, 4SW(2d)947; 177Ark885, 7SW(2d)969; 177Ark1193, 9SW(2d)240; 178Ark1200, 10SW(2d)853; 179Ark1199, 18SW(2d)335; 180Ark907, 23SW(2d)615; 181Ark185, 25SW(2d)766; Ark 31SW(2d)528; 195Cal445, 234P91; 68CalA95, 228P417; 68CalA588, 229P983; 79CalA488, 250P190; 82CalA465, 255P777; 97CalA56, 274P1003; CalA 290P610; 89Fla154, 103S417; 91Fla693, 108S556; 92Fla999, 111S277; 93Fla172, 111S351; 96Fla356, 118S204; 36GaA94, 135SE512; 37GaA166, 139SE101; 44 Ida396, 257P370; 200 Ind48, 160NE294; Ind168NE481; 122Kan65, 251P411; 311Mo 391, 279SW23; 313Mo 615, 285SW392; 315Mo 232, 285SW712; 315Mo1326, 292SW413; Mo 292SW728; 318Mo 17, 298SW777; 318Mo 751, 300SW748; Mo 18SW(2d)153; 319Mo 40, 2SW(2d)765; 320Mo 248, 6SW(2d)839; 320Mo 389, 8SW(2d)20; Mo 12SW(2d)46; Mo 18SW(2d)474; Mo 24SW(2d)985; 222MoA499, 280SW718; 222MoA499, 280SW718; MoA 293SW486; MoA 27SW(2d)730; 48Nev358, 232P778, 235P645; Nev 285P503; 32NM17, 250P634; 32NM83, 251P384; 33NM365, 266P920; 34NM454, 283P906; NM 290P739(1st case); NM 290P792; 49ND228, 191NW345; 38OklCr34, 259P173; OklCr 283P270(1stcase); OklCr 287P1060(2dcase); 107TexCr332, 296SW547; 136Wash20, 238P903; 143Wash99, 254P454; 151Wash610, 276P862. [b] **Oregon constitution** forbids supreme court to interfere with verdict supported by material evidence. 116 Or509, 241P983.

255–55½–New. Where jury would not

have been warranted to return any verdict but guilty on evidence, such verdict will not be disturbed. 233 IlA504.

255–56 18F(2d)465; 74CalA510, 241P267; 74CalA464, 241P275; 93CalA334, 269P726; 86Colo 110, 278P604; 90Fla 324, 105S841 (unless no substantial evidence to support verdict); 338 Ill 542, 170NE782; 170La203, 127S601; 153 Miss737, 121S297; 154Miss742, 123S 867; OklCr 277P687(2dcase); OklCr 288P991(2dcase); TexCr 26SW(2d) 631. See also Ill 173NE278.

255–57 321 Ill 594, 152NE516; 323 Ill 580, 154NE427; 324 Ill 101, 154NE463; 324 Ill 190, 154NE900; 324 Ill 170, 155 NE39; 328 Ill 631, 160NE121; 332 Ill 222, 163NE694; 332 Ill 476, 163NE798; 333 Ill 451, 164NE840; 335 Ill 379, 167 NE96(2dcase); 335 Ill 604, 167NE797; Ill 173NE97; Ill 173NE128; Ill 173NE 467; MoA 293SW498; Nebr 228NW253 (2dcase).

255–57½–New. unless there is grave doubt as to sufficiency of evidence; 318 Ill 276, 149NE286.

255–58 90Fla136, 105S316; 90Fla324, 105S841 (unless clearly wrong); 204 Iowa828, 216NW31; 229Ky459, 17SW (2d)443; 118 OhSt397, 161NE211 (unless contrary to evidence); 30 OhA379, 165NE98; 145Va818, 133SE683; 101 WVa611, 133SE320; 108WVa453, 151SE 432. [a] **Unless evidence introduced under plea of guilty affirmatively shows innocence of accused,** verdict will not be set aside on appeal. 111TexCr191, 11SW(2d)515.

255–58½–New. unless the verdict is so defective that judgment cannot be passed; 110TexCr285, 7SW(2d)578.

255–59 21AlaA648, 111S320; 106Conn 701, 139A91; 92Fla873, 110S528; 92Fla 873, 110S547; 94Fla252, 114S236; 95 Fla115, 116S72; 321 Ill 594, 152NE516; 324 Ill 170, 155NE39; 326 Ill 518, 158 NE142; 330 Ill 532, 162NE196; 330 Ill 562, 162NE140; 335 Ill 263, 167NE43; 337 Ill 290, 169NE214; Ill 173NE104; 209Ky395, 272SW909; 209Ky787, 273 SW515; 212Ky24, 278SW549; 214Ky 86, 282SW777; 214Ky689, 283SW1030; 215Ky613, 286SW696 (palpably); 215 Ky751, 286S1063; 215Ky772, 286SW 1057; 215Ky847, 287SW21; 215Ky797, 287SW7; 216Ky216, 287SW722; 216 Ky286, 287SW721; 216Ky317, 287SW 898; 216Ky698, 288SW688; 216Ky787, 288SW742; 217Ky403, 289SW371; 217 Ky688, 290SW514; 218Ky189, 291SW 1; 219Ky475, 293SW974; 221Ky148, 298SW385; 222Ky99, 300SW357; 223 Ky569, 4SW(2d)365; 224Ky158, 5SW (2d)902; 224Ky269, 6SW(2d)248; 225 Ky210, 7SW(2d)1038; 228Ky19, 14SW (2d)194; 228Ky526, 15SW(2d)425; 229Ky168, 16SW(2d)766; 234Ky302, 28SW(2d)19; 235Ky340, 31SW(2d) 383; 235Ky391, 31SW(2d)622; 235Ky 634, 32SW(2d)16; 235Ky781, 32SW (2d)351; 236Ky74, 32SW(2d)552; 237 Mich247, 211NW650; 102NJL94, 131A 292; NJ 146A313; 20 OhA528, 153NE 301; 26 OhA340, 159NE575; OhA 172 NE838; OhA 173NE300; 105TexCr487, 288SW1078 (against weight of evidence); 107TexCr376, 296SW537; 142 Va639, 128SE456. See also 235Ky325, 31SW(2d)390(2dcase); 34 OhA384, 170 NE881. But see 210Ky747, 276SW834. [a] **Verdict will be held flagrantly against evidence** only when so against truth as to shock conscience of court. 217Ky688, 290SW514; Ky 20SW(2d) 442. [b] **To be flagrantly against evidence** verdict must be unsupported by any evidence. 232Ky10, 22SW(2d)298.

256–60 74CalA510, 241P267; 75CalA 642, 243P461; 79CalA488, 250P190; 80 CalA31, 251P343; 87CalA336, 262P825.

256–60½–New. unless all the substantial evidence is as consistent with innocence as with guilt; 14F(2d)888; 26F (2d)1.

256–61 35GaA364, 133SE351; 200 Ind 1, 161NE5; 212Ky778, 280SW118; OklCr 275P385; OklCr 276P498(2d case); OklCr 277P259; OklCr 277P263 (3dcase); OklCr 277P688; Okl 279P 358(2dcase); OklCr 280P1105; 149SC 195, 146SE657.

256–62 33F(2d)265; 23AlaA188, 122 S306; 168Ark1168, 273SW1031; Ark 298SW20; 175Ark1170, 298SW1019; 201Cal568, 258P49; 74CalA556, 241P 279; 88CalA505, 263P856; CalA 284P 988; 93Fla97, 111S514; 93Fla1110, 113 S561; 97Fla367, 120S844; 98Fla874, 124S446; Fla 128S628; Fla 130S35(1st case); 163Ga878, 137SE378; 35GaA 564, 134SE204; 36GaA582, 137SE412; 36GaA582, 137SE640; 37GaA380, 140 SE425; 39GaA569, 147SE793(1stcase); 41GaA364, 153SE91(1stcase); 41GaA 429, 153SE227(1stcase); 199 Ind540, 156NE555; 204 Iowa828, 216NW31; 210Ky366, 275SW873; 230Ky207, 18 SW(2d)995; 162La719, 111S72; 167 La853, 120S476; 256Mass387, 152NE 380; Nev 290P732; OklCr 269P782(1st case); OklCr 279P930(1stcase); OklCr 287P756(1stcase); OklCr 287P774; Or 290P1093; Or 290P1094; 101TexCr553, 276SW279; 103TexCr542, 282SW216; 111TexCr677, 13SW(2d)836(2dcase); 112TexCr131, 13SW(2d)856(1stcase); 112TexCr365, 16SW(2d)1084; TexCr 24SW(2d)835; 147Va624, 136SE765; 200Wis636, 229NW54 (credible evidence).

256–63 38F(2d)779; 20AlaA581, 104S 341; 20AlaA601, 104S845; 21AlaA373, 108S631; 99CalA178, 277P1060(2d case); 92Fla873, 110S528; 211Ky766, 278SW134; OklCr 274P696; OklCr 278 P411; OklCr 279P936; OklCr 281P594; OklCr 291P143; OklCr 292P871.

256–64 17F(2d)236; 75CalA447, 243P 67; Iowa 229NW143; 108TexCr452, 18SW(2d)283.

256–65 18F(2d)509; 93Fla1076, 113S 121; OklCr 270P860.

256–65½–New. when it may be said that reasonable men may have concluded as jury did; 90Fla779, 107S242.

256–66 43F(2d)890; 77CalA375, 246P 815; 284Pa159, 130A317.

256–66½–New. unless the trial court abused its discretion; Mo 12SW(2d)51.

256–66⅓–New. unless the verdict appears so against the truth as to shock the court's conscience; 221Ky226, 298 SW673.

256–67 22F(2d)806; 21AlaA629, 111S 188; 74CalA510, 241P267; 76CalA144, 244P101; 87CalA336, 262P825; 106 Conn701, 139A91; 108Conn454, 143A 561; 90Fla178, 105S401 (wrong or unjust); 91Fla693, 108S556; 92Fla878, 110S547; 93Fla172, 111S351; 94Fla 1040, 114S779; 328 Ill 602, 160NE125; 334 Ill 218, 165NE619; Ill 173NE357; 197 Ind193, 150NE99; 202 Iowa352, 209 NW514; 208 Iowa1321, 227NW124 (evidence insufficient to show verdict result of passion or prejudice); 210Ky 366, 275SW873; 216Ky813, 288SW752; 223Ky233, 3SW(2d)629; 223Ky831, 4 SW(2d)728; 224Ky381, 6SW(2d)457 (mistake or passion); 226Ky255, 10SW (2d)820; 226Ky437, 11SW(2d)111; 227 Ky129, 12SW(2d)297; 227Ky418, 13 SW(2d)250; 227Ky792, 13SW(2d)1053; 228Ky307, 14SW(2d)1065; 228Ky591, 15SW(2d)429; 228Ky722, 15SW(2d) 435; 229Ky249, 16SW(2d)1058; 229Ky 534, 17SW(2d)432(2dcase); 229Ky646, 17SW(2d)751; 230Ky24, 18SW(2d) 287; 161La755, 109S413; Mo 279SW 701; Mo 279SW702 (imposition of two years' imprisonment for manslaughter is held not to show passion or prejudice); Mo 285SW723; Mo 291SW1078 (2dcase); 315Mo1305, 292SW45; Mo 292SW422; 317Mo284, 295SW550; Mo 295SW784; Mo 296SW391; 317Mo408, 297SW368; 319Mo1, 2SW(2d)729; Mo 18SW(2d)28; Mo 23SW(2d)136 (manslaughter verdict based on sufficient evidence held not result of passion or prejudice); 102NJL94, 131A292; 105 NJL618, 147A636; NJSup 132A198; 243NY589, 154NE617; OklCr 279P356; OklCr 279P362; OklCr 279P980(2dcase); OklCr 287P733; OklCr 288P 359; 35PortoRico 787; 105TexCr529, 289SW52; 103WVa404, 137SE746. See also 90Fla324, 105S841; 318Mo619, 300 SW793; 320Mo173, 7SW(2d)340. [b] **Prejudice or passion not shown.–Mo** 289 SW575. [c] **Sentence of five years for rape by force shows absence of prejudice.** 317Mo894, 296SW141. [d] **Assessment of minimum punishment by jury refutes charge of prejudice.** Mo 2SW(2d)756.

256–67½–New. , or that jury was influenced by considerations other than evidence, 90Fla178, 105S401.

256–67⅓–New. or unless there is no tangible evidence, and conviction is based on suspicion or conjecture. 211 Ky771, 278SW104.

256–67¼–New. , or unless it is so clearly against the weight of evidence as to show that it is the result of mistake, passion, or partiality. 102NJL94, 131 A292.

256–67⅙–New. ; unless it clearly appears that such verdict is the result of mistake, passion, prejudice, or partiality. 105NJL352, 144A612.

257–68 8F(2d)697; 18F(2d)778; 194 Cal 1, 227P156; 48 Ida193, 280P678(1st case); 199 Ind44, 154NE865; 200 Ind 43, 161NE265; 200 Ind53, 161NE271; 89 IndA578, 166NE618; 228Ky830, 16 SW(2d)478; 128Me404, 148A141; 247 Mich308, 225NW552(2dcase); 146Miss 540, 112S681; 311Mo391, 279SW23; Mo 296SW391; 80Mont141, 259P826; 85Mont581, 281P351; Mont 292P1109; OklCr 279P704. [a] (1) 81CalA381, 253P938. [f] (1) 23F(2d)48; 39F(2d) 325; 42F(2d)636. [g] (2) In testing sufficiency of evidence to support conviction supreme court views it in light most favorable to state. 171Ark1187, 286SW932. [i] (1) 202 Iowa352, 209 NW514. [m] (1) See also NJ 140A449. [n] 153Tenn319, 283SW986. [o] (2) Where testimony of state witnesses shows inherent improbabilities and is open to suspicion, it is duty of court to scrutinize record carefully. 327 Ill 152, 158NE386. [p] **In Texas.–Cr** 11 SW(2d)172.

261–69 146Miss540, 112S681.

261–70 [c] **In rape prosecution** uncorroborated testimony of prosecutrix should be carefully scrutinized, but cannot be rejected. 104TexCr368, 283SW 834.

261–71 20AlaA664, 104S865 (applying rule that court of appeals cannot substitute itself for jury, though stating that if it had authority it would render verdict for defendant on evidence); 22 AlaA323, 118S264; Iowa 231NW385; 209Ky395, 272SW909; 136Wash20, 238 P903; 142Wash57, 252P530; 188Wis 68, 205NW412; 192Wis22, 211NW668.

261–72 8F(2d)697; 171Ark203, 284SW 1028; 68CalA95, 228P417; 74CalA464, 241P275; 95Fla401, 116S11; 199 Ind 38, 154NE872; Mo 285SW419; 105 TexCr534, 289SW388.

261–73 147Va624, 136SE765.

262–75 [a] (5) Where issue of guilt depends on sharply disputed questions of fact, court of appeals, in reviewing conviction, must examine trial judge's rulings to determine whether defendants have been deprived by such ruling of opportunity to present their case fairly for impartial consideration of jury. 250 NY185, 164NE900.

262–76 21AlaA539, 110S157; 77CalA 158, 246P132; CalA 260P363; 94Fla 639, 114S528; 96Fla660, 118S919; 339 Ill 267, 171NE144 (reviewing court will reverse where evidence is unsatisfactory or preponderates in favor of accused); 234Ky842, 29SW(2d)561; 235Ky78, 29 SW(2d)629; 161La167, 108S324; 161 La296, 108S543; 164La737, 114S636; Miss 109S741; 80Mont141, 259P826; 84 Mont255, 274P1060; 114Nebr147, 206 NW748 (where evidence insufficient to sustain verdict); 32NM219, 252P994; 127Misc593, 217NYS486; 127Misc594, 217NYS488; OklCr 276P508; OklCr 279P692(2dcase); OklCr 283P1035; OklCr 288P363; OklCr 289P780; OklCr 292P395; 105TexCr487, 288SW1078; 101WVa611, 133SE320. [b] 196NC562, 146SE395. [c] See also Mo 285SW422. [e] 85CalA433, 259P491. See also OklCr 282P369(1stcase). [f] **Where undisputed physical facts** leave verdict without credible support, verdict will not be allowed to stand. 145Va853, 134 SE726. [g] **Court more readily interferes** with criminal verdict as being contrary to evidence than in civil actions under same circumstances. Iowa 233NW110.

263–77 161La167, 108S324; 197NC25, 147SE618. [a] **Verdict of guilty if not supported by entire record** may be set

aside. **Iowa** 233NW110.

263-78 Ind 168NE577.

263-78½-New. Where prima facie case is made out under statute and no evidence is introduced in opposition thereto, the court will not weigh the evidence. 235Mich206, 209NW87.

263-78¼-New. Where there is a conviction on two charges and evidence supports one charge but not other, judgment will not be reversed if the sentence is not greater than might be imposed on either charge. 22F(2d)549.

263-73¼-New. In determining whether the verdict is manifestly against the weight of evidence, the degree of proof required should be considered. 20 OhA 528, 153NE301.

263-73½-New. The appellate division, reviewing a conviction, should not only pass on the law but also on the facts, and state its conclusion. 252NY346, 169 NE408(2dcase).

263-79 21AlaA648, 111S320; 32Ariz 195, 256P1053; 172Ark284, 288SW388; 107Conn630, 141A660; 109Conn490, 146 A828; 161Ga332, 131SE80; 319 Ill 359, 150NE263; 197 Ind685, 150NE409; 198 Ind1, 151NE405; 89 IndA152, 166NE20; 158La555, 104S366; 160La316, 107S 123; 161La172, 108S325; 167La386, 119S401; 168La618, 122S869; 259Mass 128, 156NE57; NJSup 135A785; NJSup 143A749; 33NM334, 266P917 (on motion for change of venue); NM 290P 744; 194NC749, 140SE806; 22 OhA310, 153NE757; OkCr 274P682; 32 PortoRico 131; 103TexCr118, 280SW 215; 111TexCr85, 108SW(2d)383; 112 TexCr33, 138SW(2d)843; TexCr 20SW (2d)1047; TexCr 31SW(2d)1075(2d case); TexCr 32SW(2d)194; 107WVa 324, 148SE208. [a] (4) Appellate court will not review findings of facts affecting degree of punishment. 156La891, 101S255 (character of accused). (5) Finding on conflicting evidence as to whether accused was absent from courtroom when verdict returned. 35GaA594, 134SE352. (6) Finding of trial court that liquid is fit for beverage purposes is controlling on review as against any other authority. 159La451, 105S451. (7) Determination of a conflict in testimony at hearing of motion to suppress evidence is matter within province of trial court with whose findings supreme court will not interfere. 77Mont299, 250P615. (8) Ruling on motion to withdraw plea of guilty on conflicting evidence. 200 Ind4, 161NE6. [c] (2) Refusal to give instruction advising jury to acquit under Comp. St. § 8963 is not reversible error, and is not reviewable in appellate court. 48 Ida335, 282 P93. [f] (7) Supreme court will not review testimony of witnesses as undisputed facts where district judge has refused to accept and give credit to testimony. 162La719, 111S72. (8) Judgment of justice of peace on questions of fact arising from conflicting testimony should not be interfered with, unless clearly contrary to evidence. 29 OhA135, 163NE56. [h] 101TexCr336, 275SW829. See also 171Minn515, 213 NW923. [i] (1) 101TexCr336, 275SW 829. (2) Holding that juror not disqualified for bias not disturbed. 162Ga 43, 135SE410. [i] **In Porto Rico.**-32 PortoRico 131. [k] **Question of law** whether evidence sustains decision may be reviewed by court of appeals. 248 NY182, 161NE463. [l] **On motion for new trial.**-130Kan474, 287P261.

263-80 22AlaA557, 117S614; 197 Ind 550, 150NE762, 151NE401; 199 Ind540, 156NE555; 158La869, 104S746; 158La 1021, 105S50 (under constitution supreme court is without authority to review evidence to determine its sufficiency vel non to convict); 160La121, 106S 716; 162La719, 111S72; NJSup 135A 785; 21 OhA459, 153NE215; 112TexCr 293, 16SW(2d)246. [a] (2) When supported by substantial evidence court's finding as to voluntariness of confession will not be disturbed. 72CalA386, 237P 770; 72CalA391, 237P772.

264-85 199 Ind89, 155NE257; 164La 543, 114S151; 259Mass128, 156NE57.

264-86 21AlaA617, 110S913; TexCr 32 SW(2d)194.

264-87 146Va267, 135SE710.

264-87½-New. Supreme court can review questions of fact decided by trial judge which do not relate to guilt or innocence of defendant. 160La340, 107 S131.

264-87¾-New. Manifest error of trial court in ignoring defendant's logical and convincing evidence requires reversal. 34PortoRico 277.

264-88 17F(2d)236; 18F(2d)404; 24 F(2d)413; 44F(2d)51; 71CalA500, 236 P311; 76CalA216, 244P634; 86CalA 133, 260P806; 93CalA497, 269P702; 86 Colo 387, 281P745; 96Fla768, 119S380; 98Fla1101, 125S355; 43 Ida762, 254P 518; 318 Ill 157, 149NE27; 325 Ill 410, 156NE375; 335 Ill 415, 167NE49; 335 Ill 379, 167NE96(2dcase); 232 IllA277 (criminal case not reversible because only complaining witness testifies and is contradicted by defendant); 197 Ind 335, 149NE444; 197 Ind575, 150NE371; 198 Ind141, 152NE830; 200 Ind48, 160 NE294; 200 Ind400, 163NE834; Ind 168NE481; Ind 171NE1; 121Kan186, 246P1001; 210Ky685, 276SW575; 225 Ky413, 9SW(2d)53; 86Mont569, 284P 549; 217AppDiv424, 216NYS723; 58ND 832, 227NW560; 115 Oh542, 155NE189; 37 OklCr282, 257P1114; OklCr 269P782 (1stcase); 157Tenn383, 8SW(2d)479; 100TexCr657, 274SW574; 103TexCr 578, 280SW1079; 106TexCr222, 291SW 558; 107TexCr40, 294SW545; 107 TexCr51, 294SW546; 110TexCr109, 7 SW(2d)566; TexCr 20SW(2d)768; 113 TexCr493, 22SW(2d)666; 136Wash20, 238P903; Wash 286P51.

264-88½-New. The reviewing court has no right to interfere with the jury's exercise of its discretion in determining which evidence to believe, where the evidence is conflicting. 151Va533, 145SE307.

264-89 14F(2d)398; 18F(2d)939; 19 F(2d)739; 21F(2d)32; 28F(2d)800; 21 AlaA454, 109S281; 22AlaA599, 118S234; 30Ariz466, 248P39; 33Ariz51, 262P14; 35Ariz202, 276P321; Ariz 282P481; Ariz 283P711; 171Ark184, 284SW38; 171 Ark188, 287SW172; 173Ark1181, 295 SW54; 174Ark742, 297SW819; 179Ark 309, 15SW(2d)389(2dcase); 179Ark 1155, 19SW(2d)1009; 181Ark1035, 27 SW(2d)94; Ark 30SW(2d)851; Ark 30 SW(2d)855; 200Cal 404, 253P318; 206 Cal 353, 274P353; 68CalA610, 230P13; 71CalA500, 236P311; 72CalA570, 237P 793; 72CalA414, 237P796; 73CalA78, 238P112; 73CalA492, 238P1051; 74 CalA402, 240P799; 75CalA439, 242P 876; 198Cal 112, 243P667; 76CalA216, 244P634; 76CalA597, 245P466; 77CalA 60, 245P811; 198Cal 534, 246P62; 77 CalA113, 246P110; 77CalA375, 246P 815; 79CalA160, 248P1042; 79CalA265, 249P248; 79CalA295, 249P525; 79CalA 713, 250P873; 80CalA151, 251P335; 80 CalA257, 251P648; 80CalA623, 252P 635; 81CalA113, 252P1063; 81CalA199, 253P169; 82CalA62, 255P239; 83CalA 190, 256P829; 84CalA661, 258P432; 84CalA612, 258P638; 87CalA68, 261P 1059; 87CalA629, 262P56; 89CalA132, 264P314; 91CalA684, 267P390; 95CalA 259, 272P816; 99CalA280, 278P250; 100CalA355, 280P136(1stcase); 101CalA 213, 281P508; CalA 291P161; CalA 291 P434; CalA 292P538; CalA 292P675; 77Colo 445, 236P1009; 77Colo 546, 238 P25; 87Colo 290, 287P647; 109Conn 490, 146A828; 110Conn348, 148A385; 90Fla178, 105S401; 90Fla142, 105S816; 90Fla317, 105S843 (finding of trial court as to whether confession voluntary presumed correct); 90Fla337, 106S406; 90 Fla779, 107S242; 93Fla756, 112S608; 98Fla385, 123S811; Fla 128S267; 160 Ga830, 129SE102 (where verdict amply supported by evidence); Ga 155SE676; 35GaA108, 132SE781; 35GaA569, 134SE 340; 36GaA93, 135SE493; 36GaA94, 135SE512; 43 Ida762, 254P518; 44 Ida 396, 257P370; 45 Ida37, 260P167; 318 Ill 157, 149NE27; 318 Ill 179, 149NE9; 321 Ill 80, 151NE529; 321 Ill 594, 152 NE516; 322 Ill 190, 152NE566; 324 Ill 294, 155NE301; 326 Ill 540, 158NE222; 329 Ill 278, 160NE575; 334 Ill 526, 166 NE74; 337 Ill 300, 169NE182; 339 Ill 263, 171NE143; Ill 172NE740; Ill 173 NE97; Ill 173NE278; Ill 173NE357; 196 Ind316, 148NE197; 197 Ind599, 150 NE408; 197 Ind468, 151NE332; 198 Ind 277, 151NE725; 199 Ind1, 154NE801; 199 Ind182, 156NE389; Ind 168NE241; Ind 168NE458; 202 Iowa352, 209NW 514; Iowa 228NW80; 121Kan186, 246 P1001; 129Kan207, 282P723; 211Ky 766, 278SW134 (even if defendant's evidence would have sustained contrary conclusion); 211Ky117, 282SW1066; 220Ky348, 295SW142; 221Ky162, 298 SW383; 221Ky381, 6SW(2d)157; 229 Ky87, 16SW(2d)769; 229Ky159, 16SW (2d)775; 231Ky479, 21SW(2d)809; 233 Ky407, 25SW(2d)1022; 234Ky27, 27SW (2d)394; 235Ky325, 31SW(2d)390(2d case); 235Ky462, 31SW(2d)712; 162La 719, 111S72; 163La952, 113S159; 151 Md118, 134A166; 234Mich282, 207NW 920; 170Minn518, 212NW7; 172Minn 226, 215NW189; 143Miss438, 108SS10; 145Miss328, 110S666; 146Miss303, 111S 362; 146Miss322, 111S564; Miss 111S 864; 148Miss696, 114S816; 154Miss858, 123SS91; Mo 278SW709; Mo 285SW 723; Mo 11SW(2d)1014; Mo 22SW(2d) 777; MoA 279SW733; MoA 285SW777; 221MoA37, 297SW713; 76Mont384, 247 P158; 77Mont74, 249P664; 85Mont585, 281P551; 113Nebr755, 204NW513; 115 Nebr148, 211NW994; 115Nebr277, 212 NW606; 118Nebr149, 223NW808(1st case); Nebr 232NW781; Nev 282P 1024; 33NM5, 261P808; 33NM540, 273 P919; 190NC850, 129SE145; 190NC866, 129SE583; 58ND700, 227NW224; 21 OhA459, 153NE215; 23 OhA237, 155NE 569; 31 OklCr319, 238P870; 37 OklCr 282, 257P1114; OklCr 267P494; OklCr 268P996; OklCr 268P1114; OklCr 269P 782(1stcase); OklCr 269P1061; OklCr 270P860; OklCr 271P956; OklCr 276P 499; OklCr 276P791; OklCr 277P282 (2dcase); OklCr 277P687(1stcase); Okl Cr 278P356; OklCr 279P973; OklCr 279P982(2dcase); OklCr 280P626; Okl Cr 280P634; OklCr 280P859; OklCr 281P812; OklCr 281P988; OklCr 282P 1113; OklCr 283P578; OklCr 283P583; OklCr 285P989; OklCr 285P990; OklCr 287P429; OklCr 287P756(1stcase); Okl Cr 287P846; OklCr 288P996; 39Okl ACR225; 43 OklACR329; 116 Or451, 241P846; 91PaSuper17; 34PortoRico 275; 34PortoRico 403; 35PortoRico 325; 53SD257, 220NW473; 100TexCr 501, 272SW191; 101TexCr167, 274SW 615; 101TexCr529, 276SW283; 101Tex Cr134, 276SW289; 101TexCr369, 276SW 296; 103TexCr121, 280SW579; 103Tex Cr578, 280SW1079; 103TexCr611, 281 SW853; 103TexCr663, 281SW1061; 103 TexCr614, 281SW1068; 103TexCr542, 282SW216; 104TexCr205, 282SW812; 104TexCr495, 283SW497; 104TexCr263, 283SW522; 104TexCr280, 283SW793; TexCr 288SW191; 105TexCr673, 290SW 540; 106TexCr361, 293SW1108; 106 TexCr593, 294SW573; 109TexCr88, 3 SW(2d)455; 110TexCr49, 7SW(2d)542; 110TexCr345, 7SW(2d)571; 111TexCr 278, 12SW(2d)574; 111TexCr341, 12SW (2d)1017(2dcase); TexCr 20SW(2d) 1047; TexCr 20SW(2d)783; TexCr 24 SW(2d)1090(1stcase); TexCr 26SW(2d) 217(2dcase); TexCr 26SW(2d)648; Tex Cr 27SW(2d)183(2dcase); TexCr 27SW (2d)196(2dcase); TexCr 32SW(2d)458 (1stcase); TexCr 32SW(2d)172; 143 Va510, 129SE360; 147Va636, 136SE564; 147Va663, 137SE176; 151Va522, 145SE 358; 141WashS, 250P349; 142Wash417, 253P450; 146Wash142, 263P602; 147 Wash540, 266P185; 103WVa404, 137SE 746; 103WVa355, 137SE751; 104WVa 427, 140SE147; 105WVa585, 143SE348; 40Wyo162, 275P122. [a] **Evidence against accused alone considered.**-74 CalA464, 241P275. [b] **Unless clearly against evidence or influenced by passion or prejudice,** verdict on conflicting evidence will not be disturbed. OklCr 292P393.

264-89½-New. or the verdict is not flagrantly against the evidence. 210Ky 685, 276SW575. [a] **That witnesses on one side were more numerous than on other** does not show verdict flagrantly against evidence. 219Ky175, 293SW974.

267-90 177Ark1039, 9SW(2d)233(2d case); 178Ark1199, 10SW(2d)25; 71 CalA500, 236P311; 76CalA192, 241P94; 231Ky542, 29SW(2d)561; 136Wash20, 238P903.

267-92 229Ky486, 17SW(2d)401; 315 Mo 232, 285SW712. See also 113TexCr

104; 18SW(2d)1082.

267-92½-New. Where a single question before the appellate court is sufficiency of evidence, it is only necessary for it to determine whether the verdict is so palpably against the weight of evidence as to indicate that it was based upon passion and prejudice. 320 Ill 233, 150 NE631.

267-92½-New. New trial should be awarded where net result of evidence is inconclusive. Fla 130S456.

267-93 32Ariz152, 256P1118; 34Ariz 144, 268P617; 91CalA298, 266P1020; CalA 292P693; 36GaA90, 135SE493; 36 GaA124, 135SE496; 36GaA296, 136SE 330; 36GaA299, 136SE806; 37GaA485, 140SE773; 41GaA305, 152SE601(2d case); Ill 143NE463; 323 Ill 61, 153NE 705; 197 Ind491, 151NE382; 199 Ind 126, 155NE551; 200 Ind292, 163NE95; 89 IndA293, 166NE292; 89 IndA578, 166 NE618; IndA 169NE698; 215Ky613, 286SW696; 311Mo 391, 279SW23; 79 Mont614, 257P1010; 31NM620, 249P 1003, 1006 [quotCJ]; 242NY419, 152NE 248; OklCr 269P380; OklCr 285P985; OklCr 292P873; 104WVa427, 140SE147. [b] **Unless essential link in chain of circumstances** is wanting, verdict will not be disturbed. 199 Ind44, 154NE865. [c] **It is duty of appellate court** to reverse conviction when all substantial evidence is as consistent with innocence as with guilt. 21F(2d)508.

267-94 Fla 128S628; 215Ky613, 286SW 696; Mo 300SW473; 31NM620, 249P 1003, 1006 [quotCJ]; OklCr 287P1095.

267-95 31NM620, 249P1003, 1006 [quot CJ].

267-96 221Ky162, 298SW383; 229Ky 459, 17SW(2d)443; 31NM620, 249P1003, 1006 [quotCJ].

267-97 31NM620, 249P1003, 1006 [quot CJ].

267-98 IndA 169NE698; Miss 114S831; 31NM620, 249P1003, 1006 [quotCJ].

267-99 6F(2d)575; 8F(2d)697; 12F (2d)761; 13F(2d)506; 17F(2d)462; 18 F(2d)404; 20F(2d)795; 21F(2d)828; 32 F(2d)607; 38F(2d)779; 23AlaA37, 121 S435(2dcase) [certiorari den 219Ala155, 121S436(1stcase)]; 21AlaA260, 107S225; 22AlaA545, 117S603; 33Ariz51, 262P14; 168Ark580, 271SW330; 172Ark1177, 288 SW707; 177Ark885, 7SW(2d)969; 177 Ark1193, 9SW(2d)327; 178Ark1200, 10 SW(2d)853; 179Ark1158, 16SW(2d)468; 181Ark185, 25SW(2d)766; Ark 31SW (2d)528; 199Cal 357, 249P177; 204Cal 84, 266P536; 68CalA545, 229P987; 72 CalA570, 237P793; 73CalA492, 238P 1051; 74CalA402, 240P799; 76CalA192, 244P94; 76CalA216, 244P634; 77CalA 113, 246P110; 79CalA207, 249P18; 79 CalA295, 249P525; 80CalA243, 251P699; 82CalA126, 255P233; 86CalA130, 260P 321; 89CalA132, 264P314; 90CalA590, 266P295; 96CalA215, 273P1087; 101CalA 744, 282P413; 102CalA527, 283P129; CalA 284P733; CalA 292P693; 89Fla 493, 104S782; 90Fla317, 105S843 (credibility of conflicting evidence as to whether confession voluntary for trial court, unless error is manifest); 90Fla 555, 106S415; 90Fla779, 107S242; 98 Fla385, 123S811; Fla 128S628; Fla 130S277; 164Ga47, 137SE553; 35GaA 364, 133SE351; 37GaA324, 140SE391; 37GaA475, 140SE772; 39GaA812, 148SE 631; 39GaA676, 148SE305; 40GaA504, 150SE449; 41GaA567, 153SE609(2d case); 43 Ida762, 254P518; 320 Ill 111, 150NE647; 324 Ill 322, 155NE310; 326 Ill 540, 158NE222; 337 Ill 300, 169NE 182; 196 Ind531, 149NE59; 197 Ind606, 149NE430, 151NE695; 199 Ind44, 154 NE865; 200 Ind48, 160NE294; 200 Ind 303, 163NE229; Ind 168NE481; Ind 169NE531; 121Kan186, 246P1001; 210 Ky366, 275SW873; 212Ky24, 278SW 549; 214Ky86, 282SW777; 215Ky847, 287SW21; 217Ky99, 288SW1047; 217 Ky529, 289SW1110; 221Ky253, 298SW 683; 221Ky276, 298SW693; 222Ky742, 28W(2d)370; 223Ky484, 3SW(2d)1105; 223Ky566, 4SW(2d)362; 224Ky124, 5 SW(2d)881; 224Ky158, 5SW(2d)902; 224Ky269, 6SW(2d)248; 224Ky502, 6 SW(2d)502; 225Ky660, 9SW(2d)992; 228Ky128, 14SW(2d)375; 228Ky307, 14 SW(2d)1065; 232Ky10, 22SW(2d)298; 232Ky613, 24SW(2d)269; 233Ky407, 25 SW(2d)1022; 156La891, 101S255; 163 La641, 112S514; 146Miss540, 112S681; Mo 292SW422; Mo 300SW501; 318Mo 548, 300SW678; Mo 300SW723; Mo 1 SW(2d)139; 318Mo 843, 1SW(2d)157; Mo 24SW(2d)989; MoA 295SW481; 76 Mont384, 247P158; Mont 286P1108; 217 AppDiv424, 216NYS723; 193NC246, 136 SE715; 29 OhA419, 163NE634; 33 OhA 1, 168NE550; 37 OklCr282, 257P1114; 38 OklCr34, 259P173; OklCr 267P686; OklCr 269P1061; OklCr 287P774; Okl Cr 287P813; OklCr 288P353; OklCr 288 P357(2dcase); OklCr 292P883(2dcase); Or 290P1096; 285Pa49, 131A657; 91Pa Super17; 51SD179, 212NW864; 153Tenn 319, 283SW986; 155Tenn325, 292SW 849; 99TexCr534, 270SW1017; 100Tex Cr50, 271SW628; 100TexCr657, 274SW 574; 103TexCr542, 282SW216; 104Tex Cr100, 283SW508; 104TexCr608, 286SW 228; TexCr 288SW441; 107TexCr40, 294 SW545; 107TexCr51, 294SW546; 106 TexCr593, 294SW573; 108TexCr672, 2 SW(2d)223; 110TexCr109, 7SW(2d)566; 110TexCr87, 7SW(2d)567; 113TexCr263, 20SW(2d)200; 113TexCr388, 21SW(2d) 1064; 142Va602, 128SE454; 142Va639, 128SE456; 136Wash20, 238P903; 145 Wash117, 259P29; 102WVa107, 134SE 599; 102WVa234, 134SE919; 103WVa 404, 137SE746; 103WVa355, 137SE751; 38Wyo 98, 264P1011; 40Wyo 162, 275 P122; 36Man95, [1927] 1DomLR740, [1926] 3WestWkly550; NB [1929] 1 DomLR763.

269-1 CalA 290P610; 197 Ind550, 150 NE762, 151NE401; 200 Ind458, 163NE 260(1stcase); 35PortoRico 560.

269-2 168Ark1168, 271SW451; 73CalA 492, 238P1051; 332 Ill 476, 163NE798; 223Ky826, 4SW(2d)1109; 225Ky660, 9 SW(2d)992; 208Ky531, 271SW584; 210 Ky366, 275SW873; 213Ky190, 280SW 1086; 216Ky541, 287SW972; 217Ky99, 288SW1047; 225Ky731, 9SW(2d)1087; 227Ky190, 12SW(2d)285; 227Ky212, 12 SW(2d)305; 227Ky100, 12SW(2d)329 (2dcase); 227Ky792, 13SW(2d)1053; 227Ky831, 14SW(2d)146; 228Ky128, 14SW(2d)375; 228Ky254, 14SW(2d)773; 228Ky587, 15SW(2d)467; 229Ky403, 17 SW(2d)260(2dcase); 230Ky212, 18SW (2d)976(1stcase); 233Mich284, 206NW 538 (verdict against defendant not against great weight of evidence, though he produced greater number of witnesses); 143Miss312, 108S723; 149Miss262, 115S208; 217AppDiv424, 216NYS723; OklCr 279P915; 100TexCr88, 271SW 621; 104TexCr100, 283SW508. [a] (2) 103WVa355, 137SE751.

269-2½-New. Where defendant is convicted, uncontradicted testimony of prosecution's witnesses must be taken as true. 72CalA102, 236P944.

269-4 27F(2d)713; 21AlaA260, 107S 225; 199Cal 357, 249P177; 70CalA465, 233P812; 77CalA113, 246P110; 91CalA 516, 267P370; 93CalA435, 269P687; 93 CalA334, 269P726; 214Ky86, 282SW 777; 100TexCr657, 274SW574; 113Tex Cr217, 18SW(2d)676(2dcase); 103WVa 404, 137SE746.

269-5 25F(2d)90.

269-6 214Ky86, 282SW777; Mo 2SW (2d)756; 111TexCr9, 10SW(2d)1004. [a] (1) Ariz 282P930.

269-8 324 Ill 322, 155NE310; 76Mont 384, 247P158; 106TexCr269, 291SW 910; Va 154SE512.

269-8½-New. Where testimony bears the impress of truth, the supreme court will not interfere with the conviction as against the weight of evidence. 313Mo 88, 280SW1023.

269-8¼-New. Mere numerical superiority of witnesses against finding is not ground for reversal, if there is substantial evidence supporting judgment. 214 Ky216, 282SW1089.

269-8¼-New. Judgment of judge as to credibility of witnesses is not subject to reversal. 160La190, 106S779.

269-8½-New. The appellate court will not interfere where defendant's witnesses are contradicted by the physical facts and circumstances. 152Miss728, 120S 837.

269-9 23AlaA135, 122S611 [certiorari den 219Ala380, 122S612]; 79CalA207, 249P18; 92CalA628, 268P923; 100CalA 344, 279P1022 (as to whether confession was voluntary); CalA 286P434; 90Fla 337, 106S406; Ind 166NE649; 167La 880, 120S583(2dcase); 167La982, 120S 619; 168La87, 121S583; 163La1093, 113 S546; 156Md459, 144A350; 311Mo 391, 279SW23; 102TexCr537, 278SW434; Tex Cr 21SW(2d)527. [a] (10) 205 Iowa592, 218NW273. (11) Whether whisky can be identified by smell. 102TexCr537, 278SW434. [c] **Reasonable doubt.**-5 F(2d)224.

270-10 171Ark282, 284SW10; Kan 289 P483; 220Ky209, 294SW1046; 153Miss 654, 121S284; OklCr 279P975(1stcase) (case reversed on record where no evidence of venue); 104WVa523, 140SE546. But see 22AlaA316, 115S291.

270-12 73CalA495, 238P1059; 92CalA 615, 26SP672.

270-16 170Ark1193, 283SW29; 68CalA 545, 229P987; 68CalA674, 230P178; 96 CalA1, 274P361; CalA 284P709; 86Colo 406, 282P257; 98Fla1184, 125S815(3d case); 36GaA266, 136SE460; 209Ky70, 272SW26; 102NJL659, 133A274; 103 TexCr663, 281SW1061.

270-17 195Cal 584, 234P374; 74CalA 510, 241P267; 79CalA207, 249P18; 83 CalA12, 256P299; 87CalA336, 262P825; 88CalA222, 263P306; CalA 288P1095; 326 Ill 540, 158NE222; 205 Iowa1024, 219NW41; 167La73, 118S697(1stcase); 168La844, 123S594; 311Mo 391, 279SW 23; 313Mo 88, 280SW1023; Mo 23SW (2d)179; 295Pa50, 144A761; 153Tenn 139, 281SW924; 110TexCr190, 8SW(2d) 169; TexCr 28SW(2d)171. [a] **Where evidence of identity is not satisfactory,** conviction will be reversed. 92Fla873, 110S528.

270-18 170Ark1193, 282SW983; 76 CalA188, 244P114; CalA 288P106; 90 Fla337, 106S406; 90Fla844, 107S530; 94Fla1138, 115S43; 113TexCr291, 21SW (2d)524; 99WVa711, 129SE715; 104 WVa1, 138SE732.

270-19 79CalA207, 249P18; 79CalA295, 249P525; 81CalA113, 252P1063; 89 CalA132, 264P314; 336 Ill 399, 168NE 306; Mo 278SW663; 317Mo 336, 295SW 1076; Mo 296SW391.

270-20 165Ga258, 140SE366 (jury assessment of capital punishment held not reviewable); 211Ky766, 278SW134 (degree of punishment for second violation of prohibition law); MoA 281SW 105 (maximum penalty).

271-23 89Fla351, 104S600; 245NY621, 157NE883; 112TexCr20, 13SW(2d)889.

271-25½-New. Reversal should be awarded where the evidence of a material fact is so lacking as to indicate that the jury were not governed by the evidence. 98Fla1101, 125S355.

271-26 74CalA402, 240P799, 801 [quot Cyc]; 325 Ill 337, 156NE378. See also 80CalA81, 251P688; 58ND400, 226NW 534.

271-27 74CalA402, 240P799; 101CalA 306, 281P666; 36GaA672, 137SE788.

271-28 200Cal 404, 253P318; 69CalA 239, 230P991; 81CalA615, 254P614; 50 Nev1, 248P900.

271-31 35Ariz321, 278P63; 83Colo 4, 262P892; 46 Ida646, 270P140; 208 Iowa849, 225NW847; 172Minn106, 214 NW782; 121 Or57, 254P198; 297Pa326, 146A905; 103TexCr358, 280SW1065; 104TexCr423, 284SW571; 106TexCr615, 294SW561.

271-36 129Kan120, 281P910.

271-37 109TexCr6, 2SW(2d)436.

271-37½-New. The decision of the trial court in determining whether preliminary evidence is sufficient prima facie proof of conspiracy so as to render a conspirator's declarations admissible is subject to review. 144Wash252, 258P 16.

271-37½-New. The determination of the jury on the question whether acts done by conspirators after the commission of the crime were done in pursuance of the original conspiracy is conclusive if supported by any evidence. 90CalA317, 265P893.

271-37¼-New. Jury's verdict as to voluntary character of confession is conclusive. OklCr 288P359.

271-38 92Fla878, 110S547; 120 Or90, 250P633, 251P307.

271-40 98Fla385, 123S811.

271-40½-New. That the jury on the second trial assessed a longer term of imprisonment than the first jury did does not prove the existence of prejudice. 318Mo 843, 1SW(2d)157.

271-41 20AlaA529, 104S339; 195Cal 445, 234P91; 198Cal 717, 247P576; 203

Cal 153, 263P524; 204Cal 470, 268P909; 76CalA216, 244P634; CalA 262P428; 87 Colo 38, 284P779; 106Conn701, 139A 91; 110Conn403, 148A350; 90Fla25, 105S130 (preponderance of evidence against verdict must convince appellate court that it is wrong and unjust, allowing all reasonable presumptions for its correctness); 93Fla372, 112S73; 94 Fla783, 114S523; 95Fla997, 117S381; 163Ga878, 137SE378; 39GaA125, 146SE 327(1stcase); 169Ga391, 150SE554; 34 GaA141, 128SE587 (will not be disturbed when supported by any evidence); 34GaA170, 128SE694; 34GaA 148, 128SE784 (verdict supported by evidence and approved by trial judge affirmed); 34GaA194, 128SE819; 34 GaA144, 128SE924; 34GaA237, 129SE 11; 34GaA192, 129SE20; 34GaA188, 129SE21; 35GaA167, 132SE245; 35GaA 169, 132SE246; 35GaA205, 132SE251; 35GaA190, 132SE254; 35GaA189, 132 SE263; 35GaA193, 132SE271; 35GaA 205, 132SE272; 35GaA244, 132SE782; 35GaA245, 132SE919; 35GaA388, 133SE 104; 35GaA357, 133SE105; 35GaA395, 133SE268; 35GaA397, 133SE281; 35 GaA365, 133SE295; 35GaA383, 133SE 311; 35GaA397, 133SE314; 35GaA386, 133SE518; 35GaA398, 133SE744; 35 GaA477, 134SE141; 35GaA577, 134SE 181; 35GaA578, 134SE183; 35GaA575, 134SE185; 35GaA581, 134SE186; 35 GaA502, 134SE197; 35GaA575, 134SE 198; 35GaA576, 134SE201; 35GaA594, 134SE341; 35GaA680, 134SE448; 36 GaA114, 135SE492; 36GaA93, 135SE 493(1stcase); 36GaA90, 135SE493(2d case); 36GaA120, 135SE516; 36GaA120, 135SE758; 36GaA209, 210, 136SE96; 36 GaA218, 136SE112; 36GaA296, 136SE 330; 36GaA294, 136SE336; 163Ga684, 137SE31; 36GaA597, 137SE576; 36GaA 582, 137SE640; 36GaA676, 137SE915; 36GaA664, 137SE853; 36GaA674, 137 SE854; 36GaA664, 137SE915; 36GaA 762, 138SE245; 36GaA770, 138SE267; 36GaA750, 138SE286; 36GaA769, 138SE 336; 37GaA13, 138SE527(1stcase); 37 GaA12, 138SE527(4thcase); 37GaA119, 138SE924; 37GaA162, 139SE90; 37GaA 165, 139SE94; 37GaA94, 139SE95(1st case); 37GaA174, 139SE95(2dcase); 37 GaA166, 139SE101; 37GaA163, 139SE 126(3dcase); 37GaA163, 139SE126(1st case); 37GaA120, 139SE129(2dcase); 37GaA107, 139SE129(3dcase); 37GaA 160, 139SE131(2dcase); 37GaA166, 139 SE131(1stcase); 37GaA162, 139SE133; 37GaA156, 139SE156; 37GaA376, 140 SE406; 37GaA380, 140SE425; 37GaA 475, 140SE772; 37GaA509, 140SE776; 37GaA511, 140SE787; 37GaA507, 140 SE791; 37GaA594, 141SE84; 37GaA 781, 141SE917; 38GaA436, 144SE145 (2dcase); 38GaA355, 144SE218(1st case); 38GaA752, 145SE484(2dcase); 38GaA733, 145SE486(1stcase); 38GaA 740, 145SE503(1stcase); 38GaA761, 145 SE525; 39GaA527, 147SE727(1stcase); 39GaA577, 147SE776(1stcase); 39GaA 676, 148SE301(2dcase); 39GaA673, 148 SE360(2dcase); 39GaA678, 148SE602; 39GaA834, 148SE606(1stcase); 39GaA 825, 148SE607(1stcase); 40GaA164, 148 SE921(3dcase) (court of appeals is absolutely without authority to control verdict which has approval of judge); 40GaA144, 148SE924(1stcase); 40GaA 123, 149SE51; 40GaA141, 149SE157; 40GaA271, 149SE299; 40GaA503, 150SE 434(2dcase); 40GaA552, 150SE435(2d case); 40GaA505, 150SE651(2dcase); 40GaA644, 150SE864; 41GaA299, 152 SE597; 41GaA285, 152SE600(1stcase); 41GaA313, 152SE907(1stcase); 41GaA 375, 153SE92(1stcase); 41GaA429, 153 SE227(1stcase); 41GaA571, 153SE618; 41GaA577, 153SE776(2dcase); 41GaA 567, 153SE777(2dcase); 41GaA608, 154 SE204(1stcase); 41GaA658, 154SE215 (2dcase); GaA 155SE536(1stcase); GaA 155SE772; 331 Ill 608, 163NE453; 196 Ind316, 148NE197; 89 IndA304, 166NE 289; Ind 166NE651; 214Ky689, 283NW 1030; 221Ky49, 297SW929; 163La512, 112S400; 163La701, 112S655; 169La 315, 125S257; 231Mich687, 204NW731; 233Mich284, 206NW538; 234Mich282, 207NW920; 167Minn234, 208NW653; 171Minn187, 213NW740; 173Minn391, 217NW343 (issue of credibility between criminals); Mo 273SW1069; Mo 278 SW1014; 313Mo 615, 285SW392; 317 Mo 477, 296SW147 (conclusive); Mo 19 SW(2d)628; Mo 22SW(2d)795; 76Mont 384, 247P158; 86Mont569, 284P549; 58 ND732, 227NW230; TexCr 289SW406; 109TexCr620, 6SW(2d)363; 112TexCr 343, 16SW(2d)1074; 147Va692, 137SE 603; 153Va828, 149SE445; 153Va909, 150SE407; 145Wash117, 259P29; 100 WVa418, 130SE607; 102WVa234, 134SE 919; 103WVa355, 137SE751. [b] 161 Ga305, 130SE819; 38GaA347, 143SE 922; 38GaA345, 143SE923; 38GaA436, 144SE127. [c] **Approval of judge, refusing new trial, must be affirmed,** no error of law appearing. 41GaA375, 153 SE226.

272–42. 130Kan762, 288P736.

272–43 93Fla372, 112S73; 37GaA486, 140SE795; 227Ky100, 12SW(2d)329(2d case); 313Mo 615, 285SW392; 76Mont 384, 247P158; OklCr 279P362; OklCr 289P780. See also Mont 287P933.

272–44 34GaA173, 128SE591 (reviewing court powerless to interfere when supported by slight evidence); 128Kan 756, 280P769.

272–46½–New. A statement by the trial judge in passing on a motion for a new trial that the evidence would have justified a verdict either way is not sufficient ground for setting aside the conviction as not supported by evidence. 77Colo 546, 238P25.

272–46¼–New. A verdict approved by the trial court can be disturbed only when it can be said as matter of law that there is no evidence to support it. 201Cal 341, 257P65.

272–2 4F(2d)908; 15F(2d)977; 31F (2d)902; 35F(2d)553; 36F(2d)738; 38 F(2d)406; 39F(2d)208; Ala 130S169 (1stcase); 23AlaA393, 126S174(2dcase); 168ArkT10, 271SW326; 169Ark225, 273 SW13; Ark 276SW583 (errors cured by defendant's own testimony); 171Ark40, 283SW25; 171Ark271, 284SW17; 178 ArkI121, 13SW(2d)606; 83CalA463, 256 P876; 94CalA397, 271P361; 94Fla163, 113S699; 162Ga327, 133SE843; 163Ga 186, 136SE72; 36GaA83, 135SE513; 39 GaA526, 147SE806(1stcase); 40GaA732, 151SE240(1stcase); 46 Ida561, 270P 417; 318 Ill 332, 149NE266; 329 Ill 536, 161NE76; 335 Ill 424, 167NE20; 338 Ill 33, 169NE816; 197 Ind16, 148 NE420; 124Kan533, 261P600; 126Kan 664, 271P283; 215Ky244, 286SW790; 234Ky842, 29SW(2d)561; 222Ky130, 300SW330; 161La827, 109S505; 164 La813, 114S696; 167La1010, 120S629; 168La153, 121S607; 168La976, 123S645 (appeals in criminal cases are granted only to rectify any injury caused by rulings of trial judge); 255Mass369, 151NE839; 171Minn414, 214NW280; 172Minn130, 214NW778; 144Miss778, 110S225; Miss 128S891; Mo 284SW 785; 316Mo 252, 289SW821; Mo 1SW (2d)153; Mo 3SW(2d)235; Mo 7SW (2d)256; NJ 148A776; 103NJL18, 134 A886; 250NY185, 164NE900; NC 154 SE604; OklCr 283P805; 290Pa271, 138 A836; 33PortoRico 48; 142SC17, 140 SE256; 100TexCr476, 273SW561; 104 TexCr495, 283SW497; 107TexCr95, 295 SW614; 109TexCr249, 4SW(2d)39; Tex Cr 118SW(2d)172; TexCr 24SW(2d)48; TexCr 26SW(2d)267(2dcase); TexCr 31 SW(2d)435; 146Va296, 135SE895; Va 152SE547; 144Wash446, 258P508; 105 WVa36, 141SE400; WVa 155SE313. [f] **It is injury that results from error** that warrants reversal, and not fact of error. 94Fla163, 113S699. [g] **Errors relating to count** on which there was no conviction held immaterial. 138SC 293, 136SE215. [h]**Subsequent events during trial may cure error in ruling.**– 101Vt124, 141A686. [i] **Evidence should be examined** before error adjudged harmful or harmless. 153Va 987, 151SE151.

272–2½–New. The record must be free from prejudicial error to sustain a conviction, where the evidence was not such that the jury could not reasonably have acquitted. 332 Ill 120, 163NE438.

273–5 15F(2d)965; 19F(2d)756; 214 Ala117, 106S609; 214Ala2, 106S617; 20 AlaA412, 103S697; 22AlaA101, 112S 806; 207Cal 450, 278P1025; 77Colo 432, 236P1022; 82Colo 589, 263P19; 92Fla 997, 110S65; 197 Ind16, 164NE93; 225 Ky655, 9SW(2d)990; 165La718, 115S 914; 167La635, 120S33; 240Mich59, 214NW935; 224AppDiv546, 231NYS 557; OklCr 275P1070(1stcase); OklCr 287P765; 43 OklACR329; 143Va510, 129SE360; 152Va1036, 148SE783 (those who violate the law should not be permitted to escape their just deserts by resort to technicalities); 152Va1014, 148 SE821; 105WVa370, 142SE523; 193 Wis204, 212NW635; [1925] CanSC 525, [1925] 3DomLR887.

273–6 30F(2d)25; 171Ark40, 283SW 25; 75CalA138, 242P84; 33 OklCr436, 244P206; 110TexCr359, 7SW(2d)558.

273–7 206Cal 81, 273P575; 334 Ill 200, 165NE611; Mo 1SW(2d)153.

273–8 21AlaA486, 109S759; 217Ky518, 289SW1102; NC 154SE402; 100TexCr 476, 273SW561; 143Va510, 129SE360.

273–9 161La827, 109S505; 161La945, 109S771; 318Mo 687, 1SW(2d)96.

273–10 20F(2d)129; TexCr 20SW(2d) 764. See also 221AppDiv331, 223NYS 339.

273–11 See also 221AppDiv331, 223NYS 339.

273–11½–New. Failure to observe plain mandate of statute cannot be said to be unprejudicial as a matter of law. 21 AlaA621, 111S47.

273–12 Miss 130S110; 101WVa703, 133 SE379; 38Wyo 72, 264P1017.

274–15 22AlaA500, 117S487.

274–15½–New. Materiality and prejudicial character of given fact must be measured by relation to entire case. 109 TexCr361, 4SW(2d)966.

274–17 8F(2d)803; 16F(2d)457; 40F (2d)636; 79CalA366, 249P543; 83CalA 190, 256P829; 93CalA650, 269P980; 88Fla135, 101S273; 94Fla32, 113S630; 163Ga186, 136SE72; 35GaA471, 134SE 141; 321 Ill 80, 151NE529; 199 Ind44, 154NE865; 167Minn216, 208NW761; 76Mont549, 248P169; 77Mont307, 250P 603; 189NC766, 128SE354; 104TexCr 619, 286SW214. See also Or 249P623.

274–18 16F(2d)457; 21F(2d)889; 93 Fla1069, 113S96; 94Fla32, 113S630; 167Minn216, 208NW761; 32NM189, 252 P987; 49ND417, 192NW85; 107TexCr 101, 294SW1110.

274–20 21AlaA505, 109S564; 218App Div254, 218NYS249; 196NC542, 146SE 409; 107TexCr554, 298SW600; 108Tex Cr499, 1SW(2d)896. See also 110TexCr 308, 7SW(2d)1091. But see 153Va954, 151SE286.

274–21 22AlaA428, 116S415; TexCr 24 SW(2d)1096.

274–21½–New. The state, on appeal from judgment of dismissal, must show error resulting in miscarriage of justice. 102CalA549, 283P378.

274–22 29Ariz247, 240P863; 198Cal 176, 247P884; 199Cal 155, 248P504; 71 CalA181, 235P72; 75CalA642, 243P461; 79CalA76, 249P20; 79CalA366, 249P 543; 80CalA257, 251P648 (continuance after jury impaneled); 84CalA58, 257P 592; 90CalA317, 265P893; 91CalA516, 267P370; 92CalA470, 268P473; CalA 290P470; 92Fla1062, 111S725; 39GaA 662, 148SE290; 41GaA571, 153SE618; 44 Ida173, 258P551; 200 Ind125, 160NE 673; Ind 173NE453; 89 IndA496, 167 NE140; 121Kan844, 250P233; 219Ky 745, 294SW507; 222Ky742, 2SW(2d) 370; 227Ky792, 13SW(2d)1053; 230 Ky250, 19SW(2d)218; 158La927, 105S 16 (erroneous ruling will not warrant reversal in absence of showing of resultant injury or prejudice); 161La332, 108S661; 164La167, 113S805; 126Me 351, 138A527; 254Mass520, 150NE854; 80Mont181, 260P138; 287Pa512, 135A 301; 108TexCr544, 2SW(2d)238; 111 TexCr63, 11SW(2d)322(2dcase); 111 TexCr154, 11SW(2d)794(2dcase); 112 TexCr355, 15SW(2d)643; 113TexCr188, 19SW(2d)319; 113TexCr427, 21SW(2d) 298(2dcase); TexCr 27SW(2d)228; 101 Vt30, 139A918; 135Wash361, 237P723 (prosecuting attorney's opening statement to jury); 144Wash446, 258P508; 108WVa254, 150SE740; 195Wis540, 218 NW714. But see CalA 284P487. [b] (2) Must appear from record that incompetent questions on cross-examination of defendant were asked for evident purpose of taking unfair advan-

tage of him. **OklCr** 285P987.

275-24½-New. A conviction will not be reversed unless defendant was deprived of substantial rights or there was a miscarriage of justice. 230**Mich** 278, 203NW135.

275-26 195**Cal** 295, 232P974; 197 **Ind** 463, 150NE365; 200 **Ind**43, 161NE265; 166**La**21, 116S579; 116**Nebr**563, 218NW 416; 108**TexCr**550, 1SW(2d)892; **Tex Cr** 23SW(2d)380; **Utah** 279P506; 100 **WVa**150, 130SE124. But see 89 **IndA** 486, 165NE919; 89 **IndA**494, 165NE921 (1stcase). [c] **For reversal** prejudice in fact to defendant need not be shown, it being sufficient that the erroneous evidence might have prejudiced defendant. 224**AppDiv**193, 230NYS66.

275-27 201**Cal** 341, 257P65; 71**CalA** 181, 235P72 (refusal to strike answer as not responsive); 83**CalA**463, 256P876; **IndA** 171NE208; 126Me153, 136A908. See also 163**La**435, 112S37.

275-28 26F(2d)185. [a] **Where evidence of guilt is close,** defendant must be given benefit of trial errors. 224**App Div**193, 230NYS66.

275-32½-New. On the court's withdrawal of evidence improperly admitted and an admonition to the jury it is presumed that no prejudice resulted. 222 **Ky**695, 2SW(2d)378.

275-32¼-New. Doubt as to the prejudicial character of inadmissible testimony must be resolved in favor of accused. 168**La**584, 122S858.

275-33 But see 23**AlaA**78, 121S3.

275-35 But see **Cal** 289P629.

275-38 4F(2d)884; 18F(2d)507; 161 **La**532, 109S56; 38 **OklCr**34, 259P173.

275-39 72**CalA**582, 237P1087; **NC** 154 SE741.

276-40 101**WVa**703, 133SE379. [b] **Whether prejudice resulted** from charge requires examination of entire charge. 7F(2d)865. [c] **Where case was submitted to jury on two theories, one of which was erroneous,** and appellate court cannot say on which theory conviction was based, judgment will be reversed. 76**CalA**648, 245P461.

276-42 114 **Oh**299, 151NE182.

276-43 233**Mich**222, 206NW562. [a] **But if neither court nor counsel noticed erroneous fact statement,** it is presumed jury did not either. **Cal** 286P1025.

276-46½-New. Statute requiring affirmance unless misdirection of jury affirmatively appears to have resulted in miscarriage of justice covers case of refusal to direct. 237**Mich**481, 212NW 105.

276-50 234**Ky**45, 27SW(2d)410; 142**SC** 17, 140SE256 (statement not prejudicial).

276-56 [a] (2) Improper question to which objection was sustained will be presumed not to have influenced jury. 223**Ky**393, 3SW(2d)764.

276-57 161**La**827, 109S505; 166**La**43, 116S588; **MoA** 9SW(2d)256.

277-59½-New. Where there is any doubt as to harmful effects of district attorney's conduct, it is resolved in defendant's favor. 100**TexCr**518, 272SW 164.

277-59⅓-New. It is presumptively prejudicial to call attention to defendant's failure to testify. 170**Ark**709, 280 SW982.

277-61 170**La**991, 129S612(4thcase); 101**TexCr**639, 276SW929 (receiving evidence); 113**TexCr**567, 24SW(2d)432; **TexCr** 25SW(2d)339(2dcase); **TexCr** 27SW(2d)190; **TexCr** 29SW(2d)763. But see 89 **IndA**486, 165NE919. [a] **Until misconduct is shown,** there is no presumption for state to rebut. 106 **TexCr**553, 293SW570. [b] **Presumption not rebutted** by juror's conclusion that he was not influenced. 113**TexCr**302, 21SW(2d)516.

277-62 216**Ala**218, 113S22; 101**TexCr** 639, 276SW929.

277-63 Okl 273P1024; **OklCr** 280P 639; 45 **OklACR**313; **TexCr** 26SW(2d) 233. But see 180**Ark**1123, 24SW(2d) 331.

277-71 180**Ark**627, 22SW(2d)395(2d case).

277-72½-New. Where the court sent the sheriff to the jury room to ask how soon the jury would report, injury to defendant held not presumed. 106 **TexCr**504, 293SW1110.

277-72¼-New. Where the jurors were permitted to separate, misconduct of some of them during the time they were separated is not presumed prejudicial unless a statute prohibiting separation was violated. 144**Wash**311, 258P12.

277-72¼-New. Where defendant consented to separation of the jury for the night, no presumption of prejudice arises from the fact that one of them viewed the premises alone, in the absence of showing that he saw anything different from what was seen by the others. 144**Wash**311, 258P12.

277-74 [d] (3) Prejudice will be presumed from error in overruling challenge to juror for cause, if juror is excluded by peremptory challenge of defendant and he exhausts his peremptory challenges. 201 **Iowa**1352, 208NW308. (4) Mere fact that qualified juror may be improperly excluded by court is not within itself sufficient grounds for reversal. 111**TexCr**182, 11SW(2d)519. [k] **Mo** 14SW(2d)449. [v] 208 **Iowa** 1238, 226NW916 (presumption rebutted). [w] **Fact that juror could not read or write English** would cause injury must be made to appear. 113 **TexCr**7, 18SW(2d)176(2dcase). [x] **To justify reversal for leading questions** prejudice must be shown. 201 **Iowa**575, 207NW608; 104**TexCr**619, 286SW214. [y] **Delay in trial.**-169**Ark**627, 276SW 361. [z] **Questions.**-215**Ky**797, 287SW7.

278-75 275**US**106, 48**SCt**77, 72**L ed**186; 8F(2d)219; 16F(2d)563; 35F(2d)958; 220**Ala**268, 125S606; 20**AlaA**481, 104S 137 (error in not drawing regular venire for week of trial); 169**Ark**627, 276SW 361; 171**Ark**40, 283SW25; 194**Cal** 1, 227 P156; 83**CalA**55, 256P450; 85**CalA**301, 259P353; 88**CalA**222, 263P306; 102 **CalA**29, 282P813; 200 **Ind**125, 160NE 673; 214**Ky**422, 283SW420; 234**Ky**729, 29SW(2d)11; 164**La**597, 114S171; 240 **Mich**59, 214NW935; 244**Mich**258, 221 NW307; 154**Miss**60, 119S507; 155**Miss** 662, 124S785; 317**Mo** 361, 296SW125; **OklCr** 287P758(2dcase); 109**TexCr**503, 5SW(2d)516; 112**TexCr**482, 17SW(2d) 1053; **TexCr** 32SW(2d)361; 142**Wash** 612, 254P234; 154**Wash**575, 283P167. See also 161**La**988, 109S787. [b] **Refusal to deliver confession to defendant's attorney** cured by delivery later with permission to introduce it. 110**TexCr** 68, 7SW(2d)535.

279-76 29F(2d)187 (search warrant).

279-76½-New. to denial of motion to require sheriff to return money taken from accused on arrest; 171**Ark**40, 283 SW25.

279-77 92**Fla**648, 109S805; 214**Ky**422, 283SW420.

279-78½-New. to failure to enter formal plea after amendment of information; **OklCr** 287P1076; **OklCr** 287P 1080.

279-79 14F(2d)833; 85**CalA**413, 259P 465; **Mo** 278SW706; 243**NY**519, 154NE 588.

279-79½-New. to refusal to grant defendant time to examine amended information; **OklCr** 287P1080.

279-86½-New. to incarceration of defendant with directions to allow no one to visit him save his attorney without sheriff's order; 171**Ark**40, 283SW25.

279-87½-New. to failure to hold special term of court within period designated by statute upon notice of danger from mob; 169**Ark**627, 276SW361.

279-87⅓-New. to order extending term of court before expiration thereof; 166 **La**924, 118S85.

279-91 154**Miss**60, 119S507.

279-94½-New. or without notice; 104 **TexCr**533, 286SW204.

279-94⅓-New. order of trying cases; 106**TexCr**482, 293SW173.

279-95 33F(2d)699. [b] **Prejudicial error.**-95**Fla**42, 115S519.

279-95½-New. to refusal to appoint insanity expert on statutory motion; 87 **CalA**724, 262P795.

280-97½-New. to discharge of one defendant, charged as jointist where jury were instructed to disregard evidence of his offense; 142**Wash**612, 254P234.

280-99 52**SD**582, 219NW263.

280-3½-New. If number of jurors is not reduced below that required by statute, it is reversible error for court to draw additional names not on list served on defendant. 20**AlaA**481, 104S137.

280-4½-New. Refusal to grant defendant's request for time to plead and prepare for trial as required by statute is reversible error. 221**AppDiv**758, 222 **NYS**594.

280-4⅓-New. Denial of a motion to suppress evidence alleged to have been obtained by illegal search is not ground for reversal. 105**TexCr**629, 290SW543; 105**TexCr**617, 290SW541.

280-4¼-New. Failure to make return of summons issued for witness held not reversible error. 146**Miss**718, 111S 834.

280-4⅕-New. An action of the court in overruling an application to disqualify the trial judge as a material witness is prejudicial error. **OklCr** 279P927.

280-4⅙-New. Failure to order postponement where counsel was appointed for defendant on the day of trial is not ground for reversal where no postponement was requested and no prejudice is shown. 159**Tenn**674, 21SW(2d)400.

280-4⅐-New. Refusal to quash panel of jurors summoned after statutory affidavit of prejudice is erroneous. **Nebr** 233NW452.

280-5 8F(2d)803; 176**Ark**104, 2SW (2d)55; 94**Fla**32, 113S630; 109**TexCr** 168, 3SW(2d)459 (no willful disregard of statute); 162**WVa**462, 135SE594.

280-8½-New. Unnecessary reference in certificate of grand jury held harmless error. 170**Ga**638, 153SE749.

280-8½-New. Refusal to require the state to elect the count on which it should rely held not error where only counts submitted charged perjury before the grand jury. 107**TexCr**389, 296 SW605.

280-9 150**Wash**664, 274P797.

280-10 Mo 285SW1000; 318**Mo** 542, 300SW699.

280-11 Mo 29SW(2d)135.

281-15 See also **Mo** 29SW(2d)71.

281-15½-New. One who pleaded guilty and against whom state used no witnesses cannot predicate error on failure to indorse names of witnesses on information. 34NM499, 285P501.

281-15½-New. Judgments of conviction reversed for admission of testimony of witness whose name did not appear on information. 34**PortoRico** 262.

281-15¼-New. Prejudice from indorsing on information, after jury were sworn, names known to the district attorney before the trial, is cured by granting defendant's motion for continuance to prepare to meet the testimony of additional witnesses. 50**Nev**27, 249P566.

281-15⅕-New. An order permitting indorsement even after trial has commenced does not constitute reversible error. 50**Nev**27, 249P566.

281-16 22**AlaA**77, 112S813; 170**Ark**352, 280SW353; 171**Ark**1188, 285SW1; **Cal** 289P634; 170**Ga**895, 154SE368; 218**Ky** 189, 291SW1; 221**Ky**268, 298SW688; 163**La**512, 112S400; **Mo** 6SW(2d)903; 32 **OhA**133, 165NE596; 37 **OklCr**47, 256 P70; 105**TexCr**198, 287SW251; **TexCr** 11SW(2d)172; **TexCr** 25SW(2d)323. [d] **Reversible error.**-**OklCr** 283P590 (defendant or counsel member of legislature in session).

281-17 208**Ky**556, 271SW657.

281-17½-New. Certiorari to review denial of motion for continuance will not issue where judge in his return denied making any promise to grant it. 159**La** 187, 105S284.

281-18 33**Ariz**383, 265P609; 171**Ark** 1188, 285SW1; 214**Ky**454, 283SW418; 218**Ky**189, 291SW1; 226**Ky**296, 10SW (2d)1094 (cumulative testimony); 234 **Ky**441, 28SW(2d)505; 234**Ky**729, 29 SW(2d)11; 320**Mo** 417, 8SW(2d)29; 103 **TexCr**533, 282SW232; 109**TexCr**663, 7 SW(2d)80. [b] **Entire record is to be examined** to determine whether denying continuance to secure witness is error. 106**TexCr**646, 294SW217.

281-19 327 **Ill** 194, 158NE431; 101**Tex Cr**96, 274SW628; 103**TexCr**533, 282SW 232.

281-20 171**Ark**1188, 285SW1; 218**Ky** 189, 281SW1; 33**NM**370, 266P922; 105 **TexCr**522, 289SW392; 107**TexCr**530,

298SW287; TexCr 27SW(2d)205. [a] (4) Denying continuance to procure absent witness' testimony that defendant did not sell or attempt to sell intoxicating liquors to prosecuting witness held not prejudicial error where other witnesses testified to same facts. 171Ark 1188, 285SW1.

281-22 91Fla1026, 109S804.

281-24 218Ky189, 291SW1.

281-24½-New. where the witness was a character witness; 103TexCr496, 281 SW559.

281-29 100TexCr368, 272SW781; 106 TexCr593, 294SW573; 107TexCr666, 298SW591; 109TexCr663, 7SW(2d)80.

281-30 108TexCr28, 299SW236.

282-36 [a] 101TexCr96, 274SW628.

282-38 229Ky452, 17SW(2d)440; 101 TexCr96, 274SW628 (where testimony material and probably true, though diligence lacking); 107TexCr70, 294SW 857; 112TexCr77, 14SW(2d)59(2dcase); 113TexCr276, 21SW(2d)673; 108WVa 715, 152SE743.

282-42 170Ark352, 280SW353.

282-45 231Ky1, 21SW(2d)120.

282-46 224Ky13, 5SW(2d)275.

282-49 193Wis482, 214NW356.

282-50 152Miss708, 120S817; Miss 130 S697; 53SD450, 221NW44; 107WVa 357, 148SE205.

282-51 113TexCr535, 21SW(2d)503.

282-52 86Colo 35, 278P594, 65ALR 1260; 144Miss634, 110S206.

283-55 8F(2d)732; 14F(2d)888; 18F (2d)465; 19F(2d)813; 42F(2d)812; 194 Cal 1, 227P156; Cal 284P1105(1stcase); 70CalA444, 233P401; CalA 285P660; 318Mo 712, 300SW738; MoA 299SW821; MoA 8SW(2d)1073(2dcase); OklCr 292 P1048.

283-56 CalA 290P61; 199 Ind727, 160 NE449; 151Miss229, 117S517 (using "would" for "did"); 52SD619, 219NW 817. [a] **Appellate court "will not scrutinize** with a judicial microscope complaints filed in the municipal court by a policeman or a private citizen, when no substantial injustice appears to have been done." 32PortoRico 705.

283-59 [a] **Variance as to date between indictment and proof** which is not harmful to defendant is not reversible error. 141Miss289, 105S523.

283-61½-New. unnecessary allegations not read to the jury and treated as surplusage by the court; 32F(2d)598.

283-67 19F(2d)813. See also Mo 11 SW(2d)1024.

283-68 217Ky539, 290SW314.

283-69 21AlaA431, 109S179; 21AlaA 491, 109S521.

283-70 42F(2d)812.

284-71 13F(2d)591.

284-72 See also 88CalA591, 264P263.

284-72½-New. Erroneous joint indictment is harmless where defendant is separately tried. 312Mo 15, 278SW743.

284-72¼-New. An error in the trial for two offenses joined in information is not ground for a new trial as to the lesser offense where the punishment therefor runs concurrently with the greater. 145 Wash672, 261P639.

284-73 5F(2d)671; 7F(2d)865; 326 Ill 379, 158NE103.

284-76½-New. Insufficiently charging elements of the offense under a certain statute is harmless, where defendant was not convicted under such act. Mo 16SW(2d)35.

284-76¼-New. Conviction in circuit court will be reversed where only instrument filed as information was filed in justice's court before waiver of preliminary examination. Mo 24SW(2d) 1003.

284-76¼-New. Where record does not show necessity for use of copy of indictment at trial, and that court directed the clerk to furnish such copy, its use is reversible error. 21AlaA188, 106S 510.

284-78 15F(2d)977; 17F(2d)723; 19F (2d)46; 20F(2d)289; 20F(2d)559; 32F (2d)602; 40F(2d)751; 23AlaA316, 124 S668; 32Ariz203, 256P1055; 109Conn 571, 145A47; 318 Ill 388, 149NE273; 319 Ill 596, 150NE280; 198 Ind253, 151NE 697; 199 Ind247, 155NE544; 234Ky544, 28SW(2d)732; 164La423, 114S83; 254 Mass556, 150NE869; Mo 29SW(2d)686; MoA 31SW(2d)559; 254NY16, 171NE 890; TexCr 32SW(2d)191(2dcase) (failure to require election of count at proper time); 147Va678, 137SE478. [a] (2) Permitting signing of indictment after filing thereof held not prejudicial to defendant. 213Ala555, 105S664. (3) Accused held not prejudiced by irregularity of indictment in alleging prior conviction in second count. 147Va678, 137 SE478. (4) Failure to copy indictment under which previous conviction was had held not prejudicial where accused was fully informed. 147Va678, 137SE 478.

284-80 20F(2d)359; 21AlaA423, 109S 125; 22AlaA390, 115S858; 118Kan635, 236P820. See also 21AlaA26, 104S869.

284-83 212Ala559, 103S705; 219Ky60, 292SW471.

284-86 22AlaA654, 119S597(1stcase); Ind 169NE859 (overruling plea in abatement); 165La341, 115S613; 56ND875, 219NW574. [a] **Filing information charging murder** where defendant committed for manslaughter. CalA 292P 684.

284-87½-New. The rule is applicable to a ruling vacating plea to indictment entered by some one by mistake. 254Mass 556, 150NE869.

284-89 Cal 289P634; 164La423, 114S 83.

284-89½-New. or to permit a defendant to withdraw his plea of not guilty and file a plea of former jeopardy, 70CalA 225, 233P88.

284-90½-New. or for refusal to allow withdrawal of plea of nolo contendere to substitute plea of guilty. 103WVa44, 136SE865.

284-90¼-New. or to permit defendant to withdraw a plea of not guilty and file a motion to quash venire, where the motion is filed and passed on, 165La 842, 116S206.

284-90¾-New. or other preliminary plea, 164La423, 114S83.

284-93 22 OhA472, 53NE873. [a] **Substitution in record** of "re-entered" for "withdrawn" in statement that plea of not guilty was withdrawn held not prejudicial error. 22 OhA472, 153NE 873.

284-93½-New. , or for ordering defendant to plead at once on arraignment. 164La423, 114S83.

285-97½-New. Overruling in part, and sustaining in part, demurrer to separate count, so as in effect to amend indictment, is reversible error. 17F(2d) 479.

285-98 214Ky578, 283SW1034.

285-4 15F(2d)977; 19F(2d)813; 25F (2d)430; 21AlaA266, 107S328; 79CalA 373, 249P536; 35GaA399, 133SE287; 214Ky480, 283SW430; 215Ky278, 284 SW1071; 103WVa148, 136SE842. But see 22AlaA369, 115S769. [a] **Overruling demurrer held prejudicial.**-23AlaA 440, 126S609.

285-7 See also Utah 280P1046.

285-8½-New. where error was cured by permission to strike objectionable feature from complaint. 21AlaA550, 109S 900.

285-9 103WVa148, 136SE842.

285-12 22F(2d)760.

285-14½-New. Where an indictment is fatally defective in failing to allege an essential element of the offense, it is reversible error to overrule a demurrer thereto. 210Ky469, 276SW139.

285-16 240Mich53, 214NW962; 102 TexCr444, 278SW446.

285-17 125Kan791, 266P37; 159La589, 105S631 (overruling plea of prescription where issue could have been submitted to jury); OklCr 281P166 (refusing to permit defendant to take evidence on motion identifying transcript at preliminary hearing as correct); 156Tenn 509, 3SW(2d)159. But see 22AlaA360, 115S761.

285-18 328 Ill 332, 159NE360.

285-20 159La589, 105S631; 102TexCr 444, 278SW446.

285-21 116Nebr1, 215NW459, 461 [cit CJ]; NJ 151A781.

286-23 156SC363, 153SE340.

286-24 See also TexCr 28SW(2d)537 (2dcase).

286-25½-New. Error in refusing, on new trial, to quash the information as to counts of burglary and grand larceny of which defendant had been acquitted, by his conviction of the offense of receiving stolen goods, constitutes prejudicial error. 238Mich625, 214NW184.

286-25¼-New. Refusal to receive evidence in support of a motion to quash an indictment on a statutory ground is prejudicial error. 56ND875, 219NW574.

286-26 TexCr 20SW(2d)1067.

286-30½-New. or a count in an information not included in the warrant, 240Mich53, 214NW962.

286-30¼-New. or matter provable without averment, 80CalA138, 251P672.

286-36 19F(2d)813; 21F(2d)285.

286-37 15F(2d)686; 19F(2d)813; 21F (2d)285; 95Fla42, 115S519; 215Ky 278, 284SW1071; 169La447, 125S444; 145Va865, 134SE699.

286-39½-New. Failure to require a bill of particulars after overruling special demurrer is not prejudicial where affidavits accompanying information set out with particularity the acts complained of. 15F(2d)977.

286-41 13F(2d)558; 31F(2d)752; 92 CalA376, 268P419; 227Ky732, 13SW (2d)1026; 104TexCr139, 282SW591; 99 Vt275, 131A798; 143Wash99, 254P454; 34Wyo 84, 241P707. [a] 142Miss602, 107 S667 (incest). But see 125Kan791, 266 P37. [b] **Where sentences are concurrent,** prosecution of two offenses, one of which was under law enacted after crime, held harmless. 143Wash99, 254P 454.

286-42 21AlaA507, 109S561.

287-44 71CalA550, 236P158; 154Miss 190, 122S391; 101TexCr619, 276SW918. [b] **Refusal to require election** between counts for transporting and possessing liquor held not reversible error where court requested jury to specify on which count they convicted. 106TexCr328, 291 SW1104.

287-45 320Mo 202, 7SW(2d)262.

287-47 71CalA550, 236P158; 150Miss 441, 116S813; Mo 292SW27; 101TexCr 462, 276SW256 (verdict returned on count charging lesser offense); 99Vt275, 131A798.

287-47½-New. where, on defendant's motion, a verdict was rendered for him on other counts, 99Vt275, 131A798.

287-49 15F(2d)970. See also DC 32F (2d)963.

287-49½-New. Narrowing of issues of each count at the beginning of the trial held not prejudicial. 13F(2d)558.

287-52 21AlaA639, 111S202; 79CalA 605, 250P578; 80CalA138, 251P672 (correction of clerical errors); CalA 277P 1069; 202 Iowa450, 209NW468, 471 [cit CJ]; 202 Iowa1377, 212NW63; 204 Iowa 977, 216NW271 (refusal to strike out immaterial amendment harmless); 158 La209, 103S742; 126Me509, 140A188; 154Miss446, 122S538; Mo 22SW(2d) 809; 312Mo 425, 279SW102; Mo 29SW (2d)58; 54ND768, 210NW971; OklCr 287P1053; 156SC509, 153SE480; 107 TexCr24, 294SW550. [a] **Where accused was fully informed as to charge against her,** failure to state quantity of liquor in indictment was not error. 230 Mich211, 203NW92.

287-52½-New. Failure to file formal amendment after granting of motion to amend is not prejudicial. 202 Iowa450, 209NW468.

287-53 168Ark580, 271SW330; 204 Iowa977, 216NW271.

287-54 89 IndA617, 167NE631; 103NJL 246, 136A164.

287-56½-New. In a prosecution under the nuisance clause of the Intoxicating Liquor Law an amendment after the commencement of the trial so as to describe premises entirely different from those which defendant was originally charged with keeping constitutes reversible error. 119Kan757, 241P119.

287-56¼-New. An allowance of an amendment of a complaint in matters of substance by a circuit court on appeal from a justice's court constitutes prejudicial error. SD 225NW60.

287-56¼-New. Amendment of an indictment as to whom the parties defrauded was held not prejudicial to defendant where it was permissible by statute and defendant did not ask for a

postponement. 159La840, 106S325.

287-58½-New. Error in amending an indictment to charge the same offense on another date held not cured by an instruction that defendant was charged with a single offense. 103NJL519, 138A370.

287-58 16F(2d)406; 31F(2d)902; 75CalA115, 242P87; 75CalA404, 242P1067; 322Ill195, 153NE357; 119Kan446, 239P981; 141Miss289, 105S523; 152Miss885, 120S211; 153Miss290, 120S445; OklCr 288P362; 111TexCr14, 10SW(2d)1003. [b] 317Mo276, 295SW554.

287-58½-New. Failure of proof as to certain counts does not justify reversal where the sentence is justified under conviction on another count amply sustained. 25F(2d)242.

287-60 39Ga286, 145SE654.

287-61 18F(2d)850; 22AlaA434, 116S504; 29Ariz318, 241P511; 205Cal596, 271P1074; 207Cal172, 277P320; 82CalA389, 255P839; 83CalA55, 256P450; 87CalA5, 261P531; 90Fla142, 105S816 (will not reverse for irregularities which do not deprive defendant of any material right or prejudice his case); 198Ind253, 151NE697; 129Kan686, 284P402; 215Ky54, 284SW401; 212Ky87, 278SW623; 255Mass304, 151NE297, 47ALR962; Mass 165NE2; Mo 279SW705; 318Mo1198, 2SW(2d)767; 114Nebr28, 206NW16; NC 154SE62; ND 229NW7; OklCr 285P987; 52SD582, 219NW263; 101TexCr346, 276SW244; 102TexCr498, 278SW437; 104TexCr315, 283SW798; 104TexCr358, 284SW556; 111TexCr311, 12SW(2d)571; 111TexCr644, 13SW(2d)831(2dcase); 111TexCr570, 13SW(2d)874; 144Wash446, 258P508; Wash 287P57.

287-61½-New. , or where the errors were merely technical errors of procedure. 89Fla493, 104S782.

288-62 TexCr 26SW(2d)1070(2dcase).

288-63½-New. , in appointing counsel to assist the prosecuting attorney after the jury has been impaneled. 49SD187, 206NW925.

288-64½-New. in admonishing grand jury to help enforce law in presence of petit jury. 212Ky87, 278SW623.

288-66½-New. in refusing to advance argument on motion to suppress evidence so as to determine validity of search warrant before the trial began; 238Mich401, 213NW715.

288-67 [a] **Failure to enter on minutes** order setting aside order of severance is not ground for reversal. 145Miss66, 111S131.

288-77 163La435, 112S37.

289-84 96CalA373, 274P451.

289-84½-New. in reading superseded count of indictment to jury; 100TexCr147, 272SW493.

289-87½-New. in sending out jury during admission of evidence on voluntary nature of confession. 102TexCr415, 278SW216.

289-89½-New. permitting additional witness to be indorsed on information during trial; 116Nebr363, 217NW591.

289-90½-New. in permitting reference to a second count in the indictment after election by the state to stand on the first count; 113TexCr142, 18SW(2d)663.

289-91½-New. In failure of court reporter to take down argument of prosecuting attorney; 79CalA295, 249P525.

289-95½-New. In passing to jury bottle shown to contain intoxicating liquor sold by accused, in liquor case. 77Colo432, 236P1022.

289-98½-New. in refusal to exclude from jury impression from viewing bullet hole in automobile which had been altered after shooting, where change was fully explained to them; 143Va579, 130SE389.

289-99½-New. in permitting demonstration before jury; Mont 289P1037.

289-4½-New. Proceedings in the absence of accused will not require reversal if harmless. 165La822, 116S199 (when voluntary).

289-4½-New. Permitting jurors to smell bottle claimed to have contained intoxicating liquor is not ground for reversal where harmless. 101TexCr346, 276SW244.

289-4¼-New. A ruling made in the absence of defendant is not ground for reversal where defendant could not have been prejudiced thereby. 173Ark1172, 294SW397.

289-4½-New. Refusal to require the prosecuting attorney to elect on what transaction disclosed by the evidence he would rely to support a particular count is not reversible error where defendant was not misled or handicapped. 121Kan762, 250P296.

289-4½-New. An order vacating the courtroom and requiring all persons searched, made out of jury's presence, is not prejudicial error. 192NC20, 133SE190.

289-5 22AlaA500, 117S487; 338Ill56, 170NE14. [b] **Circumstances that jury disagreed in first trial and required several hours to decide before conviction on present trial** will be considered in determining whether error in conduct of trial is of sufficient importance to require new trial. 242NY419, 152NE248.

289-9½-New. permitting jury to view scene of crime. 109TexCr380, 5SW(2d)139, 61ALR318.

289-11½-New. The doctrine of harmless error cannot be extended to denial of trial by the jury. 220Ala260, 125S384.

289-11½-New. Where evidence on a vital question is close, errors must result in reversal, in absence of sufficient reason for disregarding them. 218AppDiv363, 218NYS297.

289-13 8F(2d)803; 19F(2d)897; 31F(2d)19; 23AlaA584, 129S484(2dcase); 22AlaA133, 114S68; 29Ariz247, 240P863; 199Cal155, 248P504; 87CalA5, 261P531; 77Colo546, 238P25; 208Iowa1139, 226NW186; 161La827, 109S505; 164La423, 114S83; 165La215, 115S464; 257Mass379, 154NE76; 148Miss621, 114S390; 155Miss323, 124S362; 312Mo411, 278SW1036; Mo 2SW(2d)755; 320Mo254, 7SW(2d)275; NJ 151A781; SC 155SE409; SD 231NW915; 110TexCr560, 9SW(2d)360; TexCr 31SW(2d)648; 70Utah586, 262P113; 153Va877, 149SE481. [a] (28) Failure to draw regular venire. 20AlaA581, 104S341. (29) Where more than thirty names were on jury list; there is no reversible error because of number of names. 20AlaA581, 104S341. (30) Failure of board of supervisors to place on jury list names of nearly two thirds of qualified jurors in violation of statute, where record shows affirmatively all jurors who tried case were legally qualified and tried it fairly and impartially. 29Ariz318, 241P511. (31) Other instances. OklCr 291P139.

290-14 320Ill553, 151NE535; 155Miss323, 124S362; 8PaDist&Co 61.

290-18½-New. Error in putting defendant on trial for murder without special venire held cured by entry of nolle prosequi before case went to jury. 22AlaA24, 113S414.

290-20 170Ark1193, 283SW29; 103NJL88, 134A611.

290-21 214Ala117, 106S609; 215Ala497, 111S212; 21AlaA474, 109S385; 169Ark348, 275SW669; 170Ark1193, 283SW29; 206Cal81, 273P575; 70CalA271, 233P85; 85CalA789, 260P303; 94Fla783, 114S523; 335Ill596, 167NE786; 200Ind7, 159NE755; 128Kan374, 278P57; 148Miss621, 114S390; 155Miss323, 124S362; Mo 23SW(2d)87; 103NJL64, 134A760; 295Pa190, 145A85; 107TexCr95, 295SW614; 107TexCr504, 296SW513; 107TexCr332, 296SW547; 112TexCr355, 15SW(2d)643; 104WVa1, 138SE732. [a] (8) Allowance of challenge of juror by state after panel had been tendered and accepted but prior to swearing of jury in chief. 90Fla142, 105S816. (9) That juror was not qualified elector. 141Miss115, 106S264. (10) Where juror answered to name when there was slight irregularity as to initials. 214Ala117, 106S609. (11) Where part of venire from which jury was selected had previously served as grand jurors, but none of such grand jurors had served on trial of case against defendant. 22AlaA567, 117S906. (12) That juror was related in sixth degree to witness for state. 160Tenn681, 28SW(2d)338. [c] (1) 200Iowa483, 203NW806. [e] 209Ky823, 273SW520; OklCr 285P985. [h] **Where evidence demanded verdict,** fact that juror was related to party within prohibited degree will not require new trial. 35GaA579, 134SE178.

291-22 107TexCr95, 295SW614; TexCr 28SW(2d)813.

291-23 155Miss323, 124S362.

291-26 5F(2d)604; 198Cal534, 246P62; 79CalA76, 249P20; 87CalA724, 262P795; 88CalA558, 263P857; CalA 270P1010; SC 155SE409; 103TexCr485, 281SW855; 105TexCr78, 286SW1102; 108TexCr408, 18SW(2d)615; Wis 231NW634. [a] (2) 170Ark1193, 283SW29. (5) 198Cal534, 246P62. (9) Failure to ask question as to conviction of crime. 283Pa468, 129A453. (10) Refusal to permit defendant, in prosecution for murder, to examine prospective jurors as to whether they would compromise upon verdict and find defendant guilty of lesser offense, so long as they had reasonable doubt of his guilt, is not prejudicial where question was asked of and answered by eight of jurors who were accepted and defendant expressed no desire further to interrogate other four jurors. 198Cal534, 246P62. [b] **Refusal of permission to examine jurors** has been held prejudicial. TexCr 29SW(2d)735.

291-27 198Cal534, 246P62; 103TexCr485, 281SW855.

291-27½-New. Requiring defendant to examine jury before state on voir dire is not reversible error. 199Ind401, 156NE548.

291-27½-New. Denial of right to examine juror for cause is prejudicial error. Nebr 230NW440.

292-28 230Ky815, 20SW(2d)998; 320Mo1, 6SW(2d)562; 35ObA539, 172NE618; 103TexCr377, 280SW791.

292-29 Mo 289SW788.

292-30 See also 101TexCr12, 274SW599.

292-33 22OhA78, 153NE233. See also 168Ark528, 270SW974.

292-33½-New. Refusal to retire unexamined jurors pending examination of others is not ground for reversal where it does not appear examination developed anything harmful to accused. 100TexCr147, 272SW493.

292-34 23AlaA29, 120S299.

292-35 78CalA685, 248P954; 200Iowa483, 203NW806; 169La109, 124S188; 227AppDiv167, 237NYS303.

292-36½-New. Under Alabama statute state may waive disqualification of juror who would not convict on circumstantial evidence. 21AlaA474, 109S385.

292-38 164La813, 114S696; 155Miss629, 125S115; Mo 300SW1069; 105TexCr78, 286SW1102; 108TexCr499, 1SW(2d)896; TexCr 31SW(2d)818.

292-40 NJ 151A781; 246NY409, 159NE379; 112TexCr618, 18SW(2d)167(2dcase).

292-40½-New. Sustaining erroneous challenge by state is not cause for reversal. 161La532, 109S56.

292-41 68CalA615, 229P1000; 68CalA738, 230P21; 78CalA476, 248P981; 47Ida750, 278P776; 200Iowa483, 203NW806.

293-42 47Ida750, 278P776.

293-47 15F(2d)359; 42F(2d)623; 338Ill367, 170NE227; 102NJL388, 132A93; 103NJL64, 134A760; SD 232NW26 (challenge to panel); 101TexCr12, 274SW599; 107TexCr95, 295SW614. But see 166Ga192, 142SE666. [d] 317Mo319, 296SW132. [e] **Prejudicial error.-OklCr** 281P987(2dcase) (where jurors had served in trial of same charge on same evidence against same defendant). [f] **Reversible error.-OklCr** 283P1027.

293-47½-New. Overruling a challenge to the array is not reversible error, unless defendant's substantial rights were impaired. 335Ill415, 167NE49.

293-48 36GaA274, 136SE468; 329Ill352, 160NE564; 335Ill415, 167NE49; 245IllA158; 245IllA388; 223Ky424, 3SW(2d)1080; 161La686, 109S388; 161La886, 109S516; 164La423, 114S83; 164La813, 114S696; 79Mont385, 256P1071; 102NJL388, 132A93; 103NJL663,

138A575; NJ 151A781; 58ND554, 226 NW601; 32 OklCr379, 240P753; OklCr 279P976(2dcase); OklCr 292P376; 107 TexCr70, 294SW857; 109TexCr88, 3 SW(2d)455; 112TexCr203, 17SW(2d) 813; 68Utah557, 251P364.

293-49 163Ga186, 136SE72, 75 [cit Cyc]; 225Ky275, 8SW(2d)415; TexCr 11SW(2d)172.

294-50 198 Ind277, 151NE725; 107Tex Cr70, 294SW857; 109TexCr342, 4 SW(2d)551.

294-53 161La856, 109S516; 104TexCr 207, 283SW787. [c] **Appellant must show that he comes within rule by showing that incompetent juror was accepted.** 43 Ida762, 254P518.

294-54 201 Iowa1352, 208NW308; 161 La856, 109S516.

294-57 199Cal 155, 248P504.

294-58 196Cal 19, 235P721; 78CalA 685, 248P954; 189NC639, 127SE689 (holding that defendant after exhaustion of panel must challenge another juror); 104TexCr207, 283SW787. [a] **Erroneous disallowance of challenge for cause** is not prejudicial, though peremptory challenges are thereby exhausted where it does not appear that defendant desired to use additional peremptory challenge. 196Cal 19, 235P721.

295-61 109TexCr443, 5SW(2d)510.

295-63 13F(2d)591; 33F(2d)443; 36 F(2d)699; 215Ala106, 109S886; 21AlaA 378, 108S646; 23AlaA274, 124S123(2d case); 23AlaA438, 126S610(1stcase); 31 Ariz427, 254P467; 174Ark1180, 297SW 830; 199Cal 155, 248P504; 80CalA623, 252P635; 201Cal 341, 257P65; 207Cal 507, 279P145; 78CalA330, 248P975; 87 CalA208, 261P1072; 68CalA95, 228P 417; 68CalA615, 229P1000; 68CalA738, 230P21; 71CalA402, 235P467; 73CalA 580, 239P82; 75CalA365, 242P906; 75 CalA404, 242P1067; 75CalA499, 243P 478; 77CalA231, 246P147; 77CalA438, 246P1072; 199Cal 610, 250P659; 88 CalA617, 264P322; CalA 288P1095; 86 Colo 35, 278P594, 65ALR1260; 87Colo 11, 285P157; 163Ga206, 135SE748; 36 GaA657, 137SE794; Ind 172NE176; 200 Iowa483, 203NW806; Iowa 206NW620; 208 Iowa1151, 226NW30; 119Kan564, 240P416; Kan 292P793; 166La43, 116S 588; L67La1050, 120S853; 170La630, 128 S658; 154Md332, 140A218; 155Md474, 142A497; 264Mass564, 163NE168; Mass 171NE16; Mich 233NW192(2dcase); 173 Minn567, 218NW112; 316Mo 157, 289SW 948; 102NJL569, 134A110; 49Nev386, 248P48; 53ND429, 206NW786; 53ND 879, 207NW1000; 53ND931, 208NW566; OklCr 285P142; OklCr 292P570; 86Pa Super202; 49RI 482, 114A150; 155SC495, 152SE738; 156SC509, 153SE480; 53SD 438, 221NW53; 159Tenn507, 19SW(2d) 228; 100TexCr424, 274SW137; 101TexCr 430, 276SW286; 102TexCr501, 278SW 441; 103TexCr129, 280SW824, 825; 103 TexCr655, 281SW1062; 106TexCr506, 294SW202; 107TexCr546, 298SW422; 108TexCr413, 1SW(2d)315; 108TexCr 583, 2SW(2d)242; 111TexCr493, 14SW (2d)1032; 112TexCr185, 15SW(2d)615; 113TexCr305, 21SW(2d)667(2dcase); TexCr 24SW(2d)417; 101Vt124, 141A 686; Va 152SE547; 141Wash660, 252P 118. [a] **Presumption of prejudice must be raised to warrant reversal.** Wash 286 P51.

295-64 31Ariz427, 254P467; 75CalA404, 242P1067; 75CalA365, 242P906; 77CalA 231, 246P147; 77CalA438, 246P1072; 242Mich491, 219NW724; Mo 292SW422; NJSup 133A415; OklCr 276P518; Va 152SE547.

295-67 168Ark1122, 273SW353.

295-68 215Ala106, 109S886; 96CalA 503, 274P393; TexCr 23SW(2d)382(2d case).

295-70 290Pa573, 139A374.

296-74 35F(2d)633; 82CalA602, 255P 897; 100CalA235, 279P1067; 204 Iowa 137, 214NW531; Mo 29SW(2d)156; 50 ND927, 198NW698; 35PortoRico 886; 151SC90, 148SE710; 151SC379, 149SE 108; 153SC25, 150SE321; 110TexCr267, 8SW(2d)149; 113TexCr343, 21SW(2d) 529; Va 152SE547.

296-74½-New. interruptions of counsel for accused in examination of his client; 243NY588, 154NE616.

296-75½-New. remarks as to necessity of interpreters for particular witnesses; 102NJL569, 134A110.

296-78 141Wash660, 252P118.

296-79 CalA 286P514.

296-81½-New. Requiring defense counsel in jury's hearing to state his nonconsent to their separating over night. 22 AlaA49, 112S94.

296-89 See also 100TexCr476, 273SW 561.

296-92 35F(2d)689; 231Ky152, 21SW (2d)231.

296-92½-New. Remark, in answer to defendant's objection, that a "defendant had denied" fact, not prejudicial remark on weight of evidence. 102TexCr501, 278SW441.

296-92½-New. Mere intimation of opinion on merits of case does not of itself constitute ground for reversal. 245NY227, 157NE94.

296-92¼-New. expression of opinion as to whether there was any contradiction in the testimony of a witness. 323 Ill 540, 153NE727.

296-94 OklCr 292P1053.

296-96½-New. Rebuking jurors for statements on preliminary examination held not ground for reversal. 103NJL 64, 134A760.

296-97 CalA 290P678; 121Kan507, 247 P635 (not reversible error for court during temporary recess in absence of jury to admonish half-witted hysterical female prosecutrix in rape case touching her duty as witness).

296-98½-New. where the statement while made in presence of jury was not directed to it; 141Wash337, 251P290.

296-98½-New. where court corrected misstatement when it was called to its attention; 141Wash337, 251P290.

296-98¼-New. where the court in its charge corrected erroneous remark by making clear the issues that were to be determined; 141Wash337, 251P290.

296-99 32F(2d)130; 215Ala106, 109S 886; 31Ariz427, 254P467; 68CalA95, 228P417; 71CalA339, 235P87; 75CalA 499, 243P478; 199Cal 513, 250P164; 95 CalA680, 273P583; 100CalA235, 279P 1067; 87Colo 6, 284P341; 87Colo 11, 285 P157; 222Ky248, 300SW625; 80Mont 181, 260P138.

297-1 71CalA181, 235P72 (error in remark of judge that there was conflict in defendant's testimony cured by instruction that jury must disregard any expressions of opinion).

297-1½-New. Remarks of the judge to the panel of jurors summoned at the beginning of the term at which defendant was convicted have been held not so prejudicial as to require reversal. OklCr 279P932.

297-3 15F(2d)686; 170Ark979, 282SW 5; 175Ark752, 2SW(2d)36; 73CalA580, 239P82; 95Fla433, 116S39 (denunciation of lawyers as necessary evil); 321 Ill 47, 151NE555; 322 Ill 546, 153NE673; 331 Ill 581, 163NE373; 334 Ill 11, 165NE 178; 212Ky87, 278SW623; 312Mo 655, 280SW1040; OklCr 287P1049 (rebuking counsel in presence of jury); 149SC445, 147SE600; 105TexCr395, 289SW40; 110 TexCr616, 9SW(2d)1035(2dcase); NB [1928] 2DomLR598.

297-5 113 ObSt450, 149NE551; 31 Okl Cr317, 238P871; 105TexCr395, 289SW 40.

297-6 22AlaA373, 115S849; 31 OklCr 317, 238P871.

297-9 170Ark979, 282SW5; Ind 172NE 176; 212Ky87, 278SW623; 142Va649, 128SE514.

297-9½-New. where the language of the court is calculated to discredit defendant as a witness; 69CalA94, 230P1001.

297-11½-New. or that no legal defense had been introduced by defendant; 78 CalA488, 248P986.

297-11⅓-New. where a proper judicial attitude was not maintained but on the contrary undue partisanship was frequently manifested by the judge. 312 Mo 655, 280SW1040.

297-12 See also 230Ky250, 19SW(2d) 218.

297-12½-New. Where the court maintains a hostile attitude toward accused throughout the trial; 321 Ill 47, 151NE 555.

297-16 39 OklCr402, 266P495.

297-18½-New. Remarks addressed to counsel by the court may be prejudicial, 80Mont181, 260P138.

297-20 23F(2d)561; 34F(2d)741; 35F (2d)174; 217Ala398, 116S418; 22AlaA 128, 113S467; 171Ark180, 283SW353; 170Ark1194, 283SW372; 180Ark267, 21 SW(2d)172; 194Cal 1, 227P156; 72CalA 160, 236P987; 72CalA582, 237P1087; 77CalA438, 246P1072; 199Cal 513, 250 P164; 86CalA45, 260P313; 87CalA68, 261P1059; 87CalA336, 262P825; CalA 285P1066; 102Conn708, 130A184; 106 Conn260, 137A762; 94Fla318, 113S689; 164Ga128, 138SE67; 321 Ill 80, 151NE 529; 322 Ill 434; 153NE639; 324 Ill 289, 155NE271; Ill 172NE743; Ill 173 NE474; 119Kan509, 240P955; 218Ky 189, 291SW1; 221Ky158, 298SW374; 221Ky148, 298SW385; 228Ky234, 14SW (2d)759; 230Ky411, 19SW(2d)1091, 66 ALR360; 232Ky211, 22SW(2d)627; 160 La456, 107S304; 161La827, 109S505; 164La496, 114S109; 165La842, 116S206; 166La924, 118S85; 167La1003, 120S626; 153Md431, 138A338; 171Minn158, 213 NW735; 151Miss361, 118S137; Mo 270 SW375; 309Mo 498, 274SW734; 311Mo 510, 278SW1040; 314Mo 585, 285SW97, 47ALR783; 320Mo 288, 6SW(2d)866; Mo 25SW(2d)113; Mo 30SW(2d)132; 53ND931, 208NW566; 43 OklACR321 [reh pending]; 300Pa125, 150A290(2d case); 156SC509, 153SE480; 101TexCr 369, 276SW296; 102TexCr389, 278SW 199; 104TexCr518, 284SW582; 107Tex Cr32, 294SW541; 107TexCr453, 296SW 602; 108TexCr393, 18SW(2d)292; 111 TexCr388, 13SW(2d)106; TexCr 26SW (2d) 231; TexCr 29SW(2d)339; 141 Wash270, 251P289; 145Wash4, 258P 845.

298-21 25F(2d)864; 25F(2d)871; 214 Ala117, 106S609; 214Ala172, 106S692; 21AlaA419, 109S114; 21AlaA501, 109S 561; 21AlaA486, 109S759; 22AlaA334, 115S692; 22AlaA517, 117S608; 22AlaA 550, 117S610; 31Ariz427, 254P467; 173 Ark450, 292SW699; 176Ark916, 5SW (2d)946; 199Cal 471, 250P168; 201Cal 290, 257P46; Cal 291P582; 70CalA519, 231P767; 70CalA143, 232P772; 75CalA 439, 242P876; 76CalA91, 243P878; 77 CalA438, 246P1072; 88CalA222, 263P 306; 96CalA503, 274P393; CalA 289P 212; CalA 292P500; 80Colo 430, 252P 341; 82Colo 233, 259P1038; 91Fla502, 107S640; 94Fla318, 113S689; 97Fla650, 122S110; 318 Ill 157, 149NE27; 322 Ill 54, 152NE542; 327 Ill 50, 158NE457; 327 Ill 393, 158NE712; 327 Ill 305, 158 NE729; 333 Ill 200, 164NE150; 337 Ill 625, 169NE749; 208 Iowa122, 222NW6; Iowa 232NW127; 125Kan83, 262P499; 126Kan685, 271P269; 127Kan160, 272P 110; Kan 291P945; 210Ky421, 276SW 119; 212Ky24, 278SW549; 212Ky112, 278SW568; 215Ky843, 287SW34; 216 Ky573, 288SW330; 227Ky212, 12SW (2d)305; 229Ky207, 16SW(2d)106; 231Ky479, 21SW(2d)809; 160La470, 107S309; 161La827, 109S505; 161La 1010, 109S819; 169La377, 125S277; 237Mich481, 212NW105; 246Mich459, 224NW605; Miss 112S175; 317Mo 354, 296SW397; 319Mo 1, 2SW(2d)729; 322 Mo 1173, 18SW(2d)19; Mo 23SW(2d) 1; Mo 25SW(2d)113; Mo 29SW(2d)60; 49Nev386, 248P48; 82NH518, 136A358; 83NH435, 144A124; 49ND228, 191NW 345; ND 229NW569; 39 OklCr119, 263 P473; OklCr 273P369; OklCr 273P1018 (2dcase); OklCr 277P287; OklCr 279P 515; OklCr 282P903; OklCr 283P270 (1stcase); OklCr 292P868; 43 OklACR 321 [reh pending]; 300Pa375, 150A649; 52SD582, 219NW263; 100TexCr592, 272 SW175; 101TexCr182, 274SW153; 101 TexCr267, 275SW837; 101TexCr598, 276 SW283; 103TexCr318, 280SW202; 103 TexCr352, 281SW202; 104TexCr368, 283 SW834; 104TexCr408, 284SW588; 105 TexCr32, 285SW328; 105TexCr516, 289 SW54; 105TexCr614, 289SW1013; 107 TexCr345, 296SW525; 107TexCr559, 298 SW569; 107TexCr663, 298SW598; 108 TexCr92, 299SW249; 108TexCr48, 299 SW254; 108TexCr452, 1SW(2d)283; 110TexCr321, 5SW(2d)772; 110TexCr 65, 7SW(2d)575; 110TexCr401, 10SW (2d)542; TexCr 11SW(2d)172; 111Tex Cr169, 11SW(2d)797; 111TexCr493, 14 SW(2d)1032; 111TexCr539, 15SW(2d) 638 (determination of harmful effect);

113TexCr62, 18SW(2d)172; TexCr 31 SW(2d)638; TexCr 32SW(2d)358; 147 Va709, 137SE528; 150Va605, 143SE740; Wash 287P3; 194Wis387, 216NW483; 196Wis104, 219NW349. [a] Alleged prejudicial argument must be appraised in light of entire record and of penalty assessed. TexCr 31SW(2d)449.

298-22 21AlaA655, 111S649; AlaA 129 S797; 31Ariz427, 254P467; 201Cal 290, 257P46; 201Cal 474, 259P47; 72CalA160, 236P987 (improper questioning); 76Cal A525, 245P436; 199Cal 610, 250P659; 80CalA675, 252P758; 81CalA484, 254P 292; 82CalA389, 255P839; 86CalA768, 261P512; 92CalA470, 268P473 (improper question); 93CalA497, 269P702; 93 CalA590, 269P955; CalA 288P788; Cal A 290P920; 82Colo 205, 258P226; 46 Ida561, 270P417; Iowa 228NW266; 120 Kan314, 243P280; 235Ky78, 29SW(2d) 629; 237Mich481, 212NW105; 167Minn 234, 208NW653; 173Minn305, 217NW 120; 179Minn301, 229NW99; Miss 130 S729; 309Mo 155, 274SW734; 317Mo 408, 297SW368; 322Mo 1171, 14SW(2d) 638; OklCr 276P518; OklCr 278P665 (2dcase); OklCr 280P1112; 292Pa506, 141A476; 102TexCr437, 278SW215; TexCr 20SW(2d)421; 150Wash66, 272P 89. [a] (55) Inflammatory argument against bootleggers in prosecution for manufacturing intoxicating liquors. 105TexCr32, 285SW328.

298-23 31F(2d)13; 214Ala117, 106S 609; 214Ala172, 106S692; 22AlaA640, 119S246; 23AlaA511, 128S120; 171Ark 180, 283SW353; 171Ark271, 284SW17; 76CalA525, 245P436; CalA 290P920; 215Ky847, 287SW21; 222Ky169, 300 SW344; 227Ky528, 13SW(2d)521; 166 La924, 118S85; 167La1050, 120S853; 170La507, 128S293; 236Mich692, 211 NW42; 143Miss787, 109S799; 321Mo 589, 12SW(2d)87; Mo 29SW(2d)60; 49 Nev75, 236P1100; 45 OklACR433; Okl Cr 284P74; 287Pa512, 136A301; 105 TexCr516, 289SW54; 110TexCr512, 8 SW(2d)145, 60ALR290; TexCr 11SW (2d)172; 112TexCr28, 13SW(2d)840(3d case); 112TexCr216, 15SW(2d)1052; Wash 287P3; 33Wyo 360, 239P952. [a] (17) 104TexCr533, 286SW204. (21) 104TexCr240, 283SW802. (23) 207Cal 312, 277P1041. [a] (36) Statement of frequency of offense in neighborhood where prosecution was for confederating to intimidate another. 212Ky24, 278SW 549. (37) Reference to defendants as "gang of outlaws." 212Ky24, 278SW 549. (38) Prosecutor's remarks that defense had offered to waive final argument. 212Ky112, 278SW568. (39) Reference in argument to another case constituting reference to current event of common and public notoriety for purpose of illustration that good reputation does not insure good character of questionable propriety but not reversible error. 133SC99, 130SE511. (40) Stating that jury could look at person claimed to have influenced accused, and permitted to appear before jury, and see that she could not influence anybody. 144Va559, 131SE131. (41) District attorney referring to defendant's counsel as Markovitz where it had been changed to Marks held not prejudicial. 284Pa105, 130A403. (42) Opening statement of prosecuting attorney containing reference to incompetent evidence which he would introduce not prejudicial where made in good faith. 115 Or505, 237P969. (43) Reply to interrupter to effect that accused denied certain fact with remark that accused could not be expected to admit it because it hurt him. 209Ky832, 273SW511. (44) Remark that he would not prosecute youthful witness who, it was alleged, had been lead to participate in crime by accused. 168Ark1122, 273SW353. (45) Refusal of defendant's attorney to use insanity defense, where witnesses in court were in no position to testify thereto. 102TexCr437, 278SW215. (46) Statements in opening statement not supported by proof. Mo 24SW(2d) 1032.

298-23½-New. Whether an argument was prejudicial to defendant must be decided on the merits as disclosed by attendant circumstances. 215Ala42, 109 S109.

298-23¾-New. Where the record does not show that remarks were made, no error is presented. 105TexCr152, 287 SW265.

299-24 35F(2d)174; 21AlaA2, 106S344; 72CalA160, 236P987 (improper question); 77CalA438, 246P1072; 84CalA58, 257P592; 80Colo 430, 252P341; 329 Ill 186, 160NE192; 89 IndA677, 166NE676; 315Mo 203, 285SW990; 250NY185, 164 NE900; 231AppDiv7, 245NYS692; 290 Pa573, 139A374; 100TexCr592, 272SW 175; 106TexCr305, 292SW218; 106Tex Cr450, 292SW904; 107TexCr559, 298 SW569; 108TexCr457, 1SW(2d)627; 109TexCr249, 4SW(2d)39; 110TexCr68, 7SW(2d)535; 111TexCr169, 11SW(2d) 797; 111TexCr567, 15SW(2d)21(2d case); 113TexCr142, 18SW(2d)663; 113 TexCr288, 21SW(2d)508; 113TexCr546, 22SW(2d)676; TexCr 31SW(2d)449; 194Wis387, 216NW483.

299-25 176Ark756, 4SW(2d)12; 77Cal A438, 246P1072; 79CalA464, 249P1089; 327 Ill 68, 158NE362; 329 Ill 278, 160 NE575; 209Ky787, 273SW515; 216Ky 724, 288SW681; Mo 23SW(2d)139; 101 TexCr192, 274SW974; 106TexCr188, 291SW552; 108TexCr590, 2SW(2d)229.

299-25½-New. where remarks were mere conclusions warranted by the evidence; 161La827, 109S505.

299-26 Miss 112S175.

299-29 313Mo 71, 281SW35; 49Nev75, 236P1100 (verdict for less offense than that charged).

299-30 [a] **Characterizing defendant in examining witness** as "three time loser" held not prejudicial where same remark had previously been made without objection by police officer on cross-examination by defendant's counsel. 72CalA292, 237P390.

299-30½-New. , or except where misconduct is gross or in extreme cases. 161La827, 109S505.

299-30¾-New. A preliminary statement that accused's wife participated in the assault is not error where defendant did not object, and the court later ruled the offenses distinct and withdrew consideration of any assault not made by accused. 312Mo 15, 278SW743.

299-30¼-New. Where the issue of guilt is close and the verdict large, the effect of improper argument is more likely to be regarded as erroneous, and such argument is appraised in the light of the entire record. 113TexCr26, 19SW(2d) 317.

299-31 21AlaA214, 107S29; 31Ariz427, 254P467; 169Ark498, 276SW353; 170 Ark1194, 283SW372; 172Ark61, 287SW 747; 176Ark916, 5SW(2d)946; 179Ark 206, 15SW(2d)396(1stcase); 199Cal 471, 250P168; 72CalA160, 236P987 (improper questioning); 70CalA92, 232P724; 76CalA558, 244P1086; 77CalA384, 246 P811; 82CalA389, 255P839; CalA 290 P93; CalA 290P470; 106Conn260, 137 A762; 94Fla163, 113S699; 164Ga128, 138SE67; 169Ga142, 149SE887; 318 Ill 157, 149NE27; 201 Iowa8, 206NW114; 126Kan607; 210Ky524, 276SW550; 214 Ky458, 283SW427; 215Ky802, 287SW 10; 161La827, 109S505; 164La496, 114 S109; 237Mich481, 212NW105; 239Mich 386, 214NW183; Miss 112S175; Mo 295 SW547; Mo 24SW(2d)1027; 227AppDiv 167, 237NYS303; 53ND931, 208NW566; 43 OklACR321 [reh pending]; 49SD476, 207NW475; 100TexCr592, 272SW175; 101TexCr479, 276SW268; 105TexCr281, 288SW213; 105TexCr327, 288SW458; 107TexCr345, 296SW525; 107TexCr559, 298SW569; 109TexCr298, 4SW(2d)41; 109TexCr301, 4SW(2d)58; 143Va531, 129SE351; 147Va709, 137SE528; 145 Wash4, 258P845; Wash 291P728; 194 Wis387, 216NW483.

299-31½-New. , or to consider only the evidence admitted. 72CalA526, 237P 786.

299-32 318 Ill 157, 149NE27; 327 Ill 305, 158NE729; 333 Ill 397, 164NE847; 109TexCr339, 4SW(2d)565.

300-33 176Ark916, 5SW(2d)946.

300-34 76CalA216, 244P634; 322 Ill 434, 153NE639.

300-37 49Nev75, 236P1100; 102TexCr 389, 278SW199; 111TexCr249, 12SW (2d)572.

300-38 102TexCr389, 278SW199.

300-39 227Ky223, 12SW(2d)336.

300-41 14F(2d)281; 19F(2d)921; 33 F(2d)820 (opening statement); 21AlaA 320, 108S83; 21AlaA352, 108S351; 21 AlaA505, 109S564; 23AlaA403, 126S183 (3dcase); 23AlaA456, 127SE252(1st case); 23AlaA511, 128S120; 169Ark372, 275SW665; 169Ark1173, 278SW15; 77CalA29, 245P769; 77CalA377, 246P 818; 80CalA675, 252P758; CalA 293P 72; Fla 128S494; Fla 129S771; 202 Iowa431, 210NW423; 221Ky696, 299 SW563; 224Ky160, 5SW(2d)899; 225 Ky585, 9SW(2d)715; 163La392, 111S 798; 164La496, 114S109(dictum); 165 La341, 115S613; 232Mich620, 206NW 541 (injection of incompetent evidence after repeated rulings excluding same); 141Miss772, 105S758; 147Miss17, 112 S601; 147Miss575, 113S185; Mo 18SW (2d)53; MoA 7SW(2d)375; 50Nev256, 256P793, 52ALR1015; 33 OklCr62, 259 P168; 39 OklCr264, 264P643; OklCr 289P796; 133SC491, 131SE603. See also 148SC64, 145SE632 (using juror as exhibit); 101TexCr514, 276SW233; 103 TexCr668, 281SW1073; 106TexCr108, 290SW904; 106TexCr558, 293SW1104; 109TexCr578, 6SW(2d)118 (notwithstanding instruction to disregard argument); 112TexCr214, 16SW(2d)126(3d case); 113TexCr26, 19SW(2d)317; 113 TexCr188, 19SW(2d)319; TexCr 25SW (2d)347; TexCr 27SW(2d)159(2dcase); TexCr 27SW(2d)171; TexCr 29SW(2d) 395; 33Wyo 360, 239P952 (conduct). [a] 100TexCr178, 272SW782.

300-42 22AlaA428, 116S415; 104TexCr 556, 286SW239.

300-43 19F(2d)921; 21AlaA22, 104S 866; 21AlaA320, 108S83; 21AlaA352, 108S351; 169Ark1173, 278SW15; 75 CalA642, 243P461; 81CalA226, 253P 735; 325 Ill 337, 156NE378; 221Ky213, 298SW676; 147Miss17, 112S601; 153 Va846, 149SE414.

300-45 21AlaA320, 108S83; 75CalA 642, 243P461; 225Ky744, 9SW(2d) 1088; 147Miss575, 113S185.

300-46 25F(2d)864; 250NY185, 164 NE900.

301-49 22AlaA495, 117S398; 81CalA 226, 253P735; OklCr 289P796; 51SD 516, 215NW495; 103TexCr418, 280SW 1064; 103TexCr399, 281SW565; 110 TexCr395, 10SW(2d)564; 101WVa466, 132SE869; 108WVa264, 150SE728.

301-52 226AppDiv569, 235NYS386; 103TexCr418, 280SW1064; 103TexCr 572, 281SW1082.

301-54 146Miss547, 112S705. [a] (6) Comment on failure to testify illustrated. Inquiry by counsel for state whether instruction concerning effect of defendant's failure to testify was given at request of defendant is not prejudicial error. 34Wyo 218, 242P802.

302-55 80CalA50, 251P244; 124Kan 533, 261P600; 218Ky360, 291SW749; Mo 1SW(2d)837; OklCr 283P258(1st case).

302-56 72CalA160, 236P987; 124Kan 533, 261P600.

302-60½-New. Where defendant's brother after being dismissed testified that he fired fatal shot, remarks of counsel to effect that he should have testified before when ably answered by defendant's counsel did not constitute reversible error. 230Mich278, 203NW 135.

302-61 72CalA160, 236P987; Mo 23 SW(2d)152.

302-62 OklCr 278P665(2dcase).

302-64 155Miss306, 124S361.

302-64½-New. Insolvent behavior on stand and in manner of answering on cross-examination by accused's counsel; 77Colo 432, 236P1022.

302-65½-New. The persistence of a witness in repeating testimony which had been stricken out is not ground for reversal where defendant was not prejudiced. 68CalA758, 230P191.

303-66 339 Ill 421, 171NE557; 34 OhA 60, 170NE444; 143Va531, 129SE351.

303-67 215Ky722, 286SW1047.

303-67½-New. The rule is otherwise where the court refused to clear the

court room or admonish the jury. 81 CalA226, 253P735.

303-74 [a] **No presumption of prejudice.** 106TexCr504, 293SW1110.

303-75½-New. Sheriff's illegal arrest of witness in court room after he denied that he was charged with felony is prejudicial error. TexCr 26SW(2d)204 (2dcase).

303-76 174Ark1180, 297SW830; 158 La927, 105S16.

303-78½-New. or where defendant counsel disregards order and consumes greater time. NJSup 130A437.

303-79½-New. Refusal of the court to permit defendant's counsel to argue the case at the close of the evidence constitutes reversible error. 113 OhSt512, 150 NE74, 42ALR1151.

303-83 5F(2d)546 (unanswered question to codefendant testifying for state, whether he had committed other crimes held not prejudicial to accused); 20 AlaA550, 104S50 (permitting witness to be cross-examined as whether he told truth harmless error); Ark 32SW(2d) 158; 70CalA531, 233P980 (refusing to interrupt direct examination of witness to allow cross-examination by defendant); 87Colo 6, 284P341; 223Ky762, 4 SW(2d)419; 159La589, 105S631 (asking witness to tell what she knew about case held not prejudicial); 161La532, 109S56; 161La863, 109S519; 155Tenn 549, 296SW20; 151Wash557, 276P857.

303-84 20AlaA604, 104S280 (exclusion of meaningless answer given by accused held harmless); 161La532, 109S56; 152Miss656, 120S747; TexCr 28SW(2d) 810(2dcase) (negative answer).

303-85 See also TexCr 31SW(2d)443.

303-86½-New. Violation of the rule that competency of an opinion witness should first be shown is not prejudicial where competency is later shown. 33 Ariz23, 262P4.

304-93½-New. It is prejudicial error to refuse to allow defendant to lay foundation for impeachment of state's witness in regard to material issue. 210 Ky536, 276SW513.

304-93⅓-New. Error in permitting the state to contradict its own witness, without a showing required by statute was not prejudicial, where the evidence secured thereby was beneficial to defendant. 84Mont348, 275P757.

304-93¼-New. Where the prosecuting attorney notified a witness during his cross-examination that he expected to contradict his evidence by another person, failure to call such person as a witness was held not prejudicial. 137SC 58, 135SE635.

304-93½-New. Error in refusing to allow impeachment of own witness may be unavailable. CalA 286P476.

304-95 CalA 284P252; 245NY401, 157 NE509. [a] (3) Refusal to permit defendant to cross-examine physician to whom dying declaration had been made, as to deceased's mental condition, where deceased had made contradictory statements, held reversible error. 245NY401, 157NE509. (4) Refusal to permit cross-examination of state witness concerning his testimony before grand jury as to exculpatory statement by defendant. 245NY401, 157NE509. (5) Refusal to permit defendant's counsel, who had grand jury minutes, to show that state witness testified differently before grand jury. 245NY401, 157NE509.

304-96 20F(2d)782; 41GaA493, 153SE 383. See 27F(2d)569.

304-98 15F(2d)359.

304-2½-New. Sustaining an objection to the question whether a witness was not held for perjury is not prejudicial, since only his conviction would effect his credibility. 102NJL94, 131A292.

305-8 215Ala619, 112S157; 210Ky542, 276SW507; 92PaSuper404.

305-15½-New. Whether error in admitting evidence for purpose of contradiction, without proper foundation, is prejudicial, depends upon the facts of each case and the materiality and importance of the evidence in question. 210Ky542, 276SW507.

305-16 19F(2d)756; CalA 286P1087; 335 Ill 590, 167NE857; 245Mich229, 222NW149; Mo 298SW(2d)156.

305-17 162La465, 110S721; 113TexCr 543, 22SW(2d)939 (where witness had given immaterial testimony); 197Wis 295, 222NW247.

306-23 215Ala619, 112S157.

306-26 83CalA222, 263P306; 46 Ida 561, 270P417.

306-30 Cal 289P634; 335 Ill 432, 167 NE10; 217Ky99, 288SW1047; 252Mass 465, 148NE123; 114Nebr28, 206NW16; 157Tenn383, 8SW(2d)479; 101TexCr 430, 276SW286.

306-31 112TexCr67, 13SW(2d)868.

306-32 72CalA582, 237P1087; 217Ky 99, 288SW1047; 227Ky142, 12SW(2d) 324; 143Miss532, 108S733; Mo 6SW (2d)903.

306-33 70CalA531, 233P980.

307-34 93CalA174, 269P176.

307-43 [a] **Refusal held not reversible error.**-Mich 232NW397(1stcase).

307-43½-New. Where proffered evidence tended to show defendant guilty of the degree of crime of which he was convicted, error, if any, in refusing to reopen during argument was cured by verdict. 105TexCr281, 288SW213.

307-44 12F(2d)727; 19F(2d)813; 32 F(2d)130; 33F(2d)699 (hearing evidence in jury's presence as to voluntary character of confession); 21AlaA165, 106S348; AlaA 114S281; 23AlaA571, 129S311(1stcase); 28Ariz539, 237P950; 201Cal 341, 257P65; Cal 289P634; 77 CalA146, 246P157; 79CalA541, 250P 406; 99CalA702, 279P228; 46 Ida423, 267P950; 327 Ill 312, 158NE732; 334 Ill 385, 166NE38; 200 Ind125, 160NE 673 (overruling motion to suppress evidence); 200 Ind528, 164NE271; 210Ky 456, 276SW141; 215Ky54, 284SW401; 219Ky287, 292SW789; 225Ky275, 8SW (2d)415; 165La718, 115S914; 149Md 298, 131A452; 157Md407, 146A238; 246Mich524, 224NW364; 146Miss685, 112S479; 152Miss885, 120S211; Mo 289SW905; 114Nebr28, 206NW16; 54 ND840, 211NW585; OklCr 275P655; OklCr 292P385; 101TexCr430, 276SW 286; 105TexCr276, 288SW441; 136 Wash232, 239P553; 136Wash674, 241 P294. [d] **Court's determination of probable cause for search without warrant** in presence of jury is not reversible error, where dismissal of jury was not requested. 112TexCr533, 17SW (2d)1050. [e] **Test for determining** prejudicial effect of error. 227Ky142, 12SW(2d)324. [f] **Refusal of counsel's application,** where no request made, for court appointed to interview accused's companions in jail where testimony cumulative has been held not prejudicial. 115 Oh542, 155NE189.

307-45 19F(2d)813; 22AlaA124, 113S 321; 21AlaA165, 106S348; 327 Ill 312, 158NE732; 215Ky193, 284SW1023; 228Ky765, 15SW(2d)525; 136Wash 232, 239P553.

307-46 [a] **Test for determining** admissibility of defendant's testimony. 111TexCr193, 11SW(2d)516.

307-50 334 Ill 590, 166NE481.

307-54 101Vt5, 139A769.

307-54½-New. or that apparel was in such a position that the jury could see it while the state was trying to have it admitted in evidence; 47 Ida760, 278P 773.

308-57½-New. Permitting witness to tell what she knows about case without specific interrogations is not prejudicial to accused. 159La589, 105S631.

308-57⅓-New. Oath of stenographer. The fact that the stenographer did not take statutory oath, if error, is harmless. 285Pa49, 131A657.

308-57¼-New. In a prosecution for mutilation of public records in connection with embezzlement, failure to introduce the mutilated record in evidence is not reversible error where it was treated by all parties as properly introduced. 78CalA11, 247P917.

308-57⅕-New. Rightful admission of evidence in support of count then in case cannot be retroactively transformed into prejudicial error merely because appellate court later decides count insufficient. 20F(2d)785.

308-57⅙-New. Error in overruling motion for return of articles in evidence held not to authorize reversal. 316Mo 602, 292SW36.

308-59 21AlaA211, 106S891; 23AlaA 572, 129S316; 199Cal 471, 250P168; 70 CalA92, 232P724; 78CalA302, 248P263; 92CalA470, 268P473; 94CalA248, 270P 998; 163Ga206, 135SE748; 42 Ida219, 245P77; 213Ky190, 280SW1086; 215 Ky756, 286SW1058; 166La924, 118S 85; 167La1010, 120S629; 169La291, 125S127; 103NJL361, 137A575; NJSup 134A183; 283Pa327, 129A86; 156SC 509, 153SE480; 49SD463, 207NW470; 101TexCr369, 276SW296; 106TexCr 450, 292SW904; 107TexCr345, 296SW 525; TexCr 31SW(2d)638; 136Wash20, 238P903; 145Wash227, 259P395. [a] **Overruling objection to leading question** held not prejudicial error. 21AlaA125, 106S67.

308-60 78CalA302, 248P263; 320 Ill 111, 150NE647; 165La842, 116S206; 101TexCr545, 276SW263; 103TexCr 433, 281SW844. See also 74Mont201, 239P1002. [a] **Where on overruling objection to question, question was not answered,** but succeeding question was answered without objection, bill of exceptions is without merit. 159La674, 106S28.

308-61 217Ala164, 115S101; 22AlaA 469, 116S893; AlaA 129S720; NJSup 135A339; 101TexCr545, 276SW263.

308-63 29F(2d)239 [certiorari den 279 US849, 49SCt346, 73L ed993(5thcase)]; 21AlaA468, 109S387; 159La820, 106S 317; 160La435, 107S296; 149Md128, 131A29; 238Mich15, 213NW135; Mo 281SW960; Mo 30SW(2d)132; NJSup 134A183; NJSup 135A339; 190NC133, 129SE410; 100TexCr202, 272SW460 (question not answered); 105TexCr19, 284SW955; TexCr 29SW(2d)754.

308-66 216Ala7, 111S227; 21AlaA495, 109S528; 21AlaA513, 109S763; 171Ark 762, 286SW937; 175Ark120, 298SW 867; 68CalA259, 228P868; 337 Ill 300, 169NE182; 161La827, 109S505; 163La 473, 112S303; 314Mo 662, 285SW62; 100TexCr202, 272SW460; 105TexCr436, 289SW61; 108TexCr326, 300SW67; Utah 290P727.

309-67 23AlaA572, 129S316; 53SD529, 221NW253; 105TexCr605, 289SW386.

309-68 21AlaA472, 109S384. See 166 Ga512, 143SE896.

309-69 160La525, 107S393; TexCr 8 SW(2d)176. See also 21AlaA378, 108S 646.

309-70 Ala 129S475; 21AlaA211, 106S 891; 21AlaA494, 109S526; 23AlaA475, 127S788; 172Ark156, 287SW1026; Ark 31SW(2d)527; 78CalA302, 248P263; 79 CalA506, 250P208; 232Ky691, 24SW (2d)564; 166La891, 118S73; 82NH518, 136A358; NJSup 134A183; NJSup 144 A310; 99TexCr561, 271SW104; 101Tex Cr545, 276SW263; 105TexCr276, 288 SW441; TexCr 8SW(2d)176; 113TexCr 247, 20SW(2d)431; 135Wash153, 237P 292; 135Wash309, 237P726; 154Wash 304, 282P48.

309-71 21AlaA472, 109S384; 23AlaA 29, 120S299; NJSup 134A294. [a] 99 TexCr580, 272SW173.

309-73 201Cal 474, 259P47; 166La924, 118S85; 151Md456, 135A189; 48SD430, 205NW31.

309-75 21AlaA211, 106S891.

309-77½-New. and the state went no farther in the matter; 135Wash309, 237 P726.

309-78 21AlaA211, 106S891; 169La 315, 125S257 (fact proved without dispute).

309-80 176Ark1204, 4SW(2d)908; 232 Ky691, 24SW(2d)564.

309-81 218AppDiv363, 218NYS297.

309-82 89 IndA683, 167NE138 (questions to character witnesses); 215Ky 689, 286SW1076; 103NJL361, 137A575; 218AppDiv363, 218NYS297; 107TexCr 345, 296SW525.

309-83 47 Ida785, 280P1039.

309-85½-New. So, refusal to suppress evidence illegally seized is not prejudicial where it was not offered during the trial. 6F(2d)522.

309-85⅓-New. Refreshing a witness' memory by showing the transcript of his testimony before the grand jury is harmless where the witness failed to remember the facts and no substantial

change in the testimony resulted. 78 CalAl1, 247P917.

309-86 23AlaA135, 122S611 [certiorari den 219Ala380, 122S612]; 43 Ida180, 250P239.

309-89½-New. Objection made after question is answered is too late, and, in absence of motion to strike out, held no error. NJSup 135A339.

309-90 21AlaA513, 109S763; 23AlaA 140, 122S301(1stcase); CalA 288P113; 102Conn708, 130A184; 43 Ida180, 250P 239, 243, 244 [citCJ]; 320 Ill 111, 150 NE647; 321 Ill 390, 152NE212; 322 Ill 434, 153NE639; 337 Ill 413, 169NE210; 199 Ind247, 155NE544; 215Ky717, 286 SW1053; 223Ky93, 2SW(2d)1026; 223 Ky393, 3SW(2d)764; 226Ky660, 11SW (2d)726; 227Ky528, 13SW(2d)521; 229 Ky63, 16SW(2d)496; 170Minn343, 212 NW588; 170Minn441, 213NW34; 173 Minn305, 217NW120; 314Mo 662, 285 SW62; 23 OhA474, 156NE219; 35 Okl Cr279, 250P544. 49ALR1129; OklCr 286 P815; 85PaSuper305 (defendant abiding by ruling and not asking withdrawal of juror); 138SC96, 136SE29; 49SD 406, 207NW482; 103TexCr340, 280SW 796; 105TexCr552, 289SW402; 107Tex Cr236, 296SW543; 112TexCr385, 16SW (2d)1096(2dcase); TexCr 27SW(2d)540 (2dcase); TexCr 29SW(2d)769; 143 Wash31, 254P244; Wash 291P1093.

310-91 See also 321 Ill 390, 152NE212.

310-92 49SD406, 207NW482.

310-93 23AlaA584, 129S492; 210Ky 524, 276SW550; 164La449, 114S92; 85 PaSuper305 (orders question expunged); 109TexCr15, 2SW(2d)462; TexCr 25SW(2d)870.

310-94 But see 101TexCr315, 276SW 247.

310-95 215Ala635, 112S212; 22AlaA 140, 114S73; CalA 284P1096; 331 Ill 380, 163NE149; 153SC25, 150SE321; 106TexCr593, 294SW573; 107TexCr174, 296SW588; TexCr 24SW(2d)48; 144Va 559, 131SE131 (where there could have been but one answer to question).

310-96 80CalA623, 252P635; 107TexCr 174, 296SW588.

310-97 22AlaA533, 118S231; 80CalA 623, 252P635; 82CalA389, 255P839.

310-3 215Ala635, 112S212; 199 Ind 592, 159NE420; 173Minn391, 217NW 343 (refusal to require witness declining to answer to testify held not prejudicial).

310-6 122 Or537, 259P427; 35Porto Rico 817.

310-7 22AlaA140, 114S73; 158La927, 105S16 (answered in negative).

311-11 143Wash281, 255P91.

311-12 174Ark1179, 298SW27; 49SD 429, 207NW454; 106TexCr593, 294SW 573.

311-14 22AlaA102, 112S898; 49SD429, 207NW454; 68Utah557, 251P364.

311-20 106Conn260, 137A762; 48 Ida 636, 284P201; 254Mass520, 150NE854; Mo 274SW19; 314Mo699, 285SW440; 54ND840, 211NW585; 156SC509, 153 SE480; 108TexCr46, 299SW240. See also 136Wash20, 238P903.

311-21 208Ky504, 271SW568.

311-22 45 Ida768, 265P668 (allowed under statute); 208Ky504, 271SW568; 229Ky580, 17SW(2d)706(2dcase); 215 Ky797, 287SW7; 159La820, 106S317; 254Mass520, 150NE854; Mont 289P 1037; 52ND659, 204NW350; 53ND95, 204NW969; 53ND916, 208NW388; 54 ND840, 211NW585; OklCr 282P686; 101TexCr63, 274SW588; 104TexCr669, 284SW965; 106TexCr621, 294SW580; 113TexCr291, 21SW(2d)524; TexCr 32 SW(2d)648.

311-23 165La822, 116S199; 53ND95, 204NW969.

311-24 76CalA91, 243P878.

312-26 7F(2d)867.

312-27 22AlaA638, 119S26(1stcase); 21 AlaA384, 108S656; 106Conn260, 137A 762.

312-28 SC 150SE321.

312-29 104TexCr669, 284SW965.

312-39 Wash 286P51.

312-42 53ND95, 204NW969.

312-44 273US392, 47SCt377, 71L ed700, 50ALR989; 275US106, 48SCt77, 72L ed 186; 20F(2d)289; 26F(2d)551; 28F (2d)663; 30F(2d)640; Ala 127S790; 22 AlaA88, 112S542; 23AlaA29, 120S299; AlaA 123S293(2dcase); AlaA 129S720; Ark 30SW(2d)836; Ark 32SW(2d)619; 78CalA380, 248P975; 79CalA306, 249P 240; CalA 286P176; CalA 290P93; CalA 290P102; 102Conn708, 130A184; 337 Ill 161, 169NE9; Ill 172NE743; Ill 173NE155; 200 Ind343, 163NE262; 215 Ky193, 284SW1023; 230Ky250, 19SW (2d)218; 234Ky681, 28SW(2d)977; 160 La435, 107S296; 161La532, 109S56; 163La112, 111S617; 164La449, 114S92; 166La924, 118S85; 167La635, 120S33; 169La109, 124S188; 149Md298, 131A 452; 157Md75, 145A185; 254Mass520, 150NE854; 262Mass416, 160NE252; 154 Miss21, 122S98; Mo 289SW788; Mo 289 SW895; 82Mont530, 268P507; 115Nebr 621, 214NW70; 50Nev271, 257P619; 53 ND558, 207NW226; 35PortoRico 617; 53SD488, 221NW91; 102TexCr444, 278 SW446; 105TexCr119, 286SW1104; 106 TexCr207, 292SW223; 106TexCr387, 292SW887; TexCr 28SW(2d)800; Tex Cr 29SW(2d)339; TexCr 29SW(2d)367; TexCr 29SW(2d)787; Va 154SE508; 142Wash7, 252P108; 151Wash306, 275 P717; 154Wash412, 282P485. [a] **Permitting questions by state** to contradict state witness or in nature of cross-examination, does not present reversible error. 264Mass368, 162NE729. [b] **Excluding question** where witness had already testified to matter excluded is not erroneous. 21AlaA79, 105S425. [c] **Cross-examination as to previous arrest,** though improper, was held not prejudicial. 5F(2d)9. [d] **Attempt to shut out improper testimony** answered in negative is ordinarily not error. 106TexCr 207, 292SW223.

313-45 19F(2d)352; 41F(2d)54; 42 F(2d)793; 171Ark589, 285SW18; 93 CalA169, 269P197; 332 Ill 113, 163NE 421; Mass 171NE451; 55ND269, 213 NW355; 93PaSuper360; 101TexCr162, 274SW579; 105TexCr405, 289SW73; TexCr 29SW(2d)356; TexCr 29SW(2d) 390; TexCr 29SW(2d)778; 70Utah296, 259P1044, 54ALR1463; 147Va585, 136 SE501.

313-45½-New. Where a witness died before cross-examination, receiving his evidence was held prejudicial. 133SC 491, 131SE603.

313-46 13F(2d)564; 34F(2d)863; 194 Cal 1, 227P156; 194Cal 555, 229P341; 77CalA587, 247P245; 78CalA554, 248P 964; 79CalA682, 250P698 (question calling for impeachment of witness); 81CalA484, 254P292; 87CalA208, 261P 1072; 128Kan459, 278P746(1stcase) (where court reversed its attitude and set aside limitation); 168La976, 123S 645; 254Mass520, 150NE854; 237Mich 481, 212NW105; 244Mich622, 222NW 185; 236Mich226, 210NW219; 220MoA 317, 286SW403; 115Nebr621, 214NW 70; 120 Or372, 251P305; 294Pa544, 144 A542; 89PaSuper269; 137SC58, 135SE 635; 111TexCr21, 10SW(2d)991; 113 TexCr75, 19SW(2d)41; 69Utah304, 254 P1003. See also 21AlaA346, 108S261.

313-47 Cal 257P65; 78CalA476, 248P 981; 87CalA65, 261P1071; 321 Ill 526, 152NE569; 335 Ill 596, 167NE786; 229 Ky139, 16SW(2d)793; 230Ky250, 19SW (2d)218; Mich 233NW192(2dcase); 33 NM540, 273P919.

313-48 15F(2d)369; 23AlaA382, 125S 899; Ariz 282P481; Cal 257P65; 48 Nev405, 233P523; 103NJL663, 138A 575; 34NM454, 283P906; OklCr 273P 366(2dcase).

313-48½-New. or later testified nothing was said on subject: Utah 287P909.

313-54 Ala 130S175; Ill 173NE155.

313-55 Iowa 228NW75.

313-57 76CalA144, 244P101.

314-58 79CalA127, 249P60.

314-59 327 Ill 162, 158NE462; 339 Ill 101, 170NE712; 76Mont351, 246P956; 108TexCr544, 2SW(2d)238; 112TexCr 211, 16SW(2d)536.

314-63½-New. Where the parties were given a full opportunity to present evidence relating to the issues, refusal to permit a question was harmless. 22 AlaA579, 118S849.

314-65 245NY401, 157NE509; 33Porto Rico 179.

314-68½-New. Unduly restricting cross-examination of the seduced prosecutrix, conviction being based on her evidence, required a reversal. 225Ky 261, 8SW(2d)386.

314-68⅓-New. Exclusion of a question on cross-examination on a material issue of an expert as to a blood stain is reversible error. 236Mich226, 210NW 219.

314-68¼-New. The exclusion of cross-examination as to an intention entertained by a witness at one time to kill accused is not cured by proof of the mere hostility of the witness. 33NM 159, 262P532.

314-68⅓-New. Excluding a question to affect the credibility of a witness is not harmless error because answered in the negative, where the parties considered the question as unanswered. 145Wash 250, 259P711.

314-68⅙-New. Limitation of cross-examination of an accomplice as to whether he had been arrested or prosecuted for the crime under investigation is prejudicial error. 53ND183, 204NW983.

314-68⅐-New. as is also the attitude of trial court excluding inquiry as to whether such accomplice testifying for the state had received promise of immunity or leniency. 53ND183, 204NW 983.

314-68⅛-New. Prejudicial error to deprive defendant of opportunity to show bias of witness on cross-examination. 35PortoRico 257.

314-68⅑-New. Refusal to permit cross-examination of state's witness in respect to number of times he had been convicted of felonies has been held reversible error. Nebr 230NW846.

314-68⅒-New. It is reversible error to refuse defendant in prosecution for rape right to cross-examine prosecutrix as to prior acts of misconduct for purpose of impeachment. 34NM507, 285P500.

314-69 273US392, 47SCt377, 71L ed700, 50ALR989; 7F(2d)867; 31F(2d)499; 21AlaA357, 108S265; 74CalA464, 241P 275; 75CalA74, 241P924; 78CalA380, 248P975; 79CalA20, 248P1027; 85CalA 697, 259P1009; 41 Ida616, 243P359; 203 Iowa532, 211NW244; Iowa 232NW636; 210Ky421, 276SW119; 215Ky837, 287 SW32; 223Ky233, 3SW(2d)629; 234Ky 268, 27SW(2d)946; 149Md298, 131A 452; 156Md149, 143A872; 176Minn562, 223NW917; Mo 284SW801; 127 Or415, 272P561; 143SC318, 141SE559; 103 TexCr586, 281SW1075; 105TexCr101, 287SW53; 106TexCr628, 294SW589; 107TexCr465, 296SW892; 112TexCr307, 17SW(2d)56(2dcase); TexCr 25SW(2d) 870; 68Utah551, 251P362; 135Wash 333, 237P706 (reading from medical work to defendant's expert who agreed with statements read); 148Wash149, 268P167; Wash 291P1093. [a] **Marking for identification** of memoranda not intended as evidence is improper, but not reversible error. 102Conn708, 130A 184.

314-70 CalA 290P470; 203 Iowa532, 211NW244; 227Ky710, 13SW(2d)1046; 149Md298, 131A452.

315-72 Cal 257P65; 215Ky843, 287SW 34; 112TexCr307, 17SW(2d)56(2dcase); 112TexCr659, 18SW(2d)181.

315-73 30F(2d)518; 78CalA380, 248P 975.

315-74½-New. or in behalf of the prosecution, 75CalA74, 241P924.

315-76 196NC397, 145SE773.

315-77 273US392, 47SCt377, 71L ed700, 50ALR989; 23F(2d)756; 215Ala570, 110S63; 217Ala212, 115S223; 22AlaA 310, 115S862; 29Ariz523, 243P601; 168 Ark710, 271SW326; 172Ark613, 290SW 59; 76CalA91, 243P878; 201Cal 290, 257P46; Cal 257P65; 251Mich228, 231 NW573; Mo 23SW(2d)122; 133SC67, 130SE337 (not abuse of discretion to exclude in absence of objection); SC 155SE409; 101TexCr192, 274SW974; 101TexCr333, 275SW831; 103TexCr 340, 280SW796; 103TexCr182, 280SW 798; 103TexCr586, 281SW1075; TexCr 25SW(2d)345; 69Utah181, 253P204; 141Wash337, 251P290.

315-79 22AlaA353, 115S698; 215Ky 837, 287SW32; 223Ky233, 3SW(2d) 629; 131 Or224, 282P237; 105TexCr119, 286SW1104.

315-81 273US392, 47SCt377, 71L ed700, 50ALR989; 22Ala648, 119S512; 83

Colo 219, 263P412; 215Ky837, 287SW22; 162La473, 112S203.

315-83½-New. when the question was not answered; 103TexCr508, 281SW1054.

315-84 [illegible]

316-87 142Wash7, 252P102; [illegible]

316-91 [illegible]

316-92 [illegible] 2d) [illegible] 235P [illegible]

316-93 [illegible] 2d) [illegible] examination of defendant); MoA 78W (2d) [illegible]

316-94½-New. If improper cross-examination of defendant probably prejudiced the jury, it would be the duty of the appellate court to reverse conviction. [illegible] (2d) [illegible]

316-98 [illegible] 1158246; 156Md 149, 143A272; [illegible] (2d) [illegible]

316-1 15F(2d)163 (arrests in general).

316-6 212Ala652 (1926)162; Iowa 222 [illegible] 1 Md [illegible] 2 [illegible] 112TexCr199, 158W(2d)1059; [illegible] Wash 265, 272P149.

317-6 [illegible] 1158535.

317-6½-New. Where the prosecuting attorney withdrew a question objected to on cross-examination while the court was considering the objection, no error can be imputed thereto. 136SC68, [illegible]

317-7 225Ky845, 328W(2d)405.

317-16 [illegible] 1Led 792; 7F(2d)385; 12F(2d)872; 13F(2d) 750; 14F(2d)925; 15F(2d)503; 17 F(2d)722; 17F(2d)745; [illegible] (2d) [illegible] 1 Ala [illegible] 22AlaA552, 104 S838; 21AlaA211, 1068891; AlaA 107 828; 21AlaA300, 107873; 21AlaA409, 1078659; 21AlaA423, 1078755, 22AlaA 120, 1128494; 22AlaA274, 1148786; 22 AlaA207 1158?7; 22AlaA [illegible] 22AlaA551, 1?0s 637; 23AlaA544, 12982932(2dcase); 23 AlaA467 [illegible] Ark [illegible] 174Ark257, 295SW268; 181Ark603, 27 SW(2d)99; 207Cal 507, 279P115; 70 CalA [illegible] 2d) [illegible] 2d) [illegible] CalA [illegible] 2d) [illegible] CalA [illegible] 2d) [illegible] CalA [illegible] 2d) [illegible] CalA [illegible] 2d) [illegible] CalA [illegible] 2d) [illegible] 249P526; 79CalA541, 250P406; 80CalA 783, 252P1061; 82CalA778, 256P251; 83CalA100, 258P229; 85CalA465, 266P 876; 86CalA646, 261P309; 87CalA313, 262P76; 87CalA328, 262P[illegible] CalA [illegible] CalA [illegible] 90 CalA [illegible] 2d) [illegible] 93CalA437 [illegible] 2d) [illegible] 99CalA 762 [illegible] 100CalA164, 1?0P1?1 CalA [illegible] CalA [illegible] 3Colo 215 [illegible] (Colo)11 285P157; 106 Conn[illegible] 13A[illegible] 3Del [illegible] 1Ga [illegible] 161Ga[illegible] 1?1SE[illegible] 162Ga[illegible] 1?5SE 187; 163GaA3, 1?5SE410; 163GaA21, 1?5SE917; 163Ga186, 1?6SE?72; 163Ga 684, 1?7SE?31; 164Ga292, 1?8SE238; 166 Ga182, 142SE676; 166GaA517, 143SE?00; 166Ga?20, 1?4SE?[illegible] 1?6Ga [illegible] 1?4SE?[illegible] Ga 1?5 SE?11 [illegible] GaA?17, 1?4SE?29 [illegible] 1?4SE200, 36GaA?84, 1?5SE?80, 37 GaA165, 1?9SE94; 27GaA152, 1?9SE 124; 27GaA?86, 1408SE415; 40GaA15, 1488SE622 (permitting reading of part of circular where court permitted defendant to read remainder of circular); 41GaA?18 1548SE?01; 41Ida618, 242P [illegible] 42Ida24, 245P77; 46Ida20, 285 P671; 47Ida785, 280P1029; Ida 288 P294; 218Ill 232, 140NE266; 218Ill 157, 149NE27; 324Ill 21, 154NE446; 326 Ill 216, 157NE211; 326Ill 145, 157NE 225; 326Ill 518, 158NE142; 326Ill 540, 158NE222; 327Ill 312, 158NE732; 329 Ill 272 [illegible] 331Ill 501, 163NE [illegible] 332Ill 112, 163NE[illegible] 333Ill 350, [illegible] 335Ill 529, 167NE223; 336 Ill [illegible] 168NE[illegible] 336Ill 321, 168NE [illegible] 338Ill 33, 169NE[illegible] 339Ill 448, 171NE[illegible] Ill 172NE[illegible] Ill 172NE 139; 197Ind463, 150NE365; 199Ind 247, 155NE544; 199Ind484, 158NE241; 29IndA424, 166NE7; IndA 168NE192; 201Iowa159, 205NW534; 202Iowa532, 211NW244; 206Iowa347, 218NW477; 209Iowa[illegible] [illegible] Iowa 227NW589; 119Kan757, 241P119; 120Kan376, 244P225; 123Kan112, 254 P214; 124Kan245, 259P691; 126Kan 752, 271P208; 128Kan274, 278P57; 128 Kan475, 278P767 (evidence of conviction of felony in another state); Kan [illegible] 2?8Ky421 [illegible] 212 Ky?00, 280SW106; 214Ky280, 283SW 24; 214Ky422, 283SW420; 214Ky662, 283SW999; 215Ky585, 286SW689; 217 Ky?[illegible] 2?8SW116 [illegible] 2?3SW 1?6; 2?9Ky?45, 294SW[illegible] 226Ky 715, 295SW1067; 221Ky283, 298SW 695; 221Ky735, 299SW726; 222Ky374, 28SW(2d)757; 222Ky234, 148W(2d)759; 220Ky207, 188W(2d)995; 230Ky250, 19 8W(2d)218; 230Ky815, 208W(2d)998; 231Ky152, 218W(2d)231; 231Ky494, 218W(2d)808; 232Ky426, 238W(2d) [illegible] 232Ky613, 248W(2d)265; 232Ky [illegible] 248W(2d)[illegible] 21?Ky [illegible] 2?3Ky?[illegible] 31SW(2d)399(2dcase); 161La532, 109856; 161La827, 109 8505; 162La229, 1118775; 164La423, 114883; 165La87, 1158370; 165La 497, 115?728; 165La822, 1158862; 167La1080, 1208864; 168La903, 1238 614; 168La976, 1238645; 169La109, 124 [illegible]8; 156Md390, 144A591; 252Mass 450, 14[illegible] 253Mass327, 15[illegible] 466, 2?5Mass421, 1548SE91; Mass 168 SE736, 236Mich237, 210NW234; 241 Mich[illegible]7, 217NW766; 147Miss428, 112 S?54; Miss 1128?57; 149Miss171, 1158 2?4, 1?[illegible]Miss143, 1188716; 155Miss 629, 1258115; Miss 1308697; 307Mo 500, 2718SW55; Mo 2788SW718; 311Mo 461, 2788SW719; Mo 2858SW83; 314Mo 608, 2858SW101; 316Mo 150, 2898SW822; 316 Mo 122, 2898SW564; 322Mo 128, 148W (2d)439; Mo 158W(2d)35; Mo 258W (2d)169; Mo 278W(2d)16; Mo 308W (2d)132; MoA 299SW821; MoA 148W (2d)515; 76Mont509, 248P201 (changed condition of locus of crime); 80Mont 181, 260P128; Mont 293P309; 114Nebr 59, 205NW939; 114Nebr783, 210NW165; 48Nev124, 228P582; 49Nev75, 236P1160 (conviction of lesser degree of crime); 49Nev194, 242P522; 52NH120, 131A605; 82NH532, 145A456; 105NJL270, 144A 872; NJSup 136A343; NJSup 144A310; NJSup 150A207; 32NM48, 250P42; 34 NM423, 282P870; 242NY13, 150NE[illegible]; 2?1App[illegible]5, 22NYS47[illegible]; 197NC 20, 1?3SE190; 53ND79, 207NW1066; ND 2?9NW1; ND 2?3NW473; 22OhA357, 153NE902; 33OhCr166, 212P270; Okl Cr 276P339; OklCr 213P1012; OklCr 277P2822(2dcase); OklCr 282P686; Okl Cr 282P690; OklCr 292P1023(2dcase); OklCr 295P847; OklCr 2[illegible]P[illegible]; OklCr 2[illegible]P[illegible]; OklCr 2[illegible]P[illegible]; OklCr 277 P1102; OklCr 282P262; OklCr 2[illegible] 496; OklCr 292P1045(2dcase); OklCr 296P418; 117Or515, 243P766; 119Or 430, 249P1049; 119Or674, 250P833; 121 Or561, 254P1010; 284Pa159, 130A317; 287Pa512, 135A301; 292Pa506, 141A 476; 300Pa125, 150A290(2dcase); 37Pa Super33; 91PaSuper110; 33PortoRico 48, 50 [illegible]CJ); 33PortoRico 48, 63[illegible] CJ); 35PortoRico 533; 136SC68, 134SE 213; 142SC17, 140SE256; 144SC452, 142 SE725; 48SD409, 205NW25; 49SD187, 206NW325; 49SD572, 207NW539; 52 SD619, 219NW817; 159Tenn297, 17SW (2d)913; 99TexCr551, 270SW1021; 99 TexCr582, 271SW618; 100TexCr261, 272SW492; 100TexCr430, 273SW842; 101TexCr531, 276SW429 (testimony in liquor case that defendant gave his permission to search of premises); 102TexCr389, 278SW199; 102TexCr415, 278SW276 (admission of confession, where jury was sent out during predication of its voluntary nature); 103TexCr272, 280SW827; 103TexCr655, 281SW1062; 103TexCr636, 282SW251; 104TexCr391, 283SW213; 104TexCr377, 283SW816; 104TexCr649, 285SW521; 104TexCr649, 285SW625; 105TexCr152, 287SW265; 105TexCr72, 288SW207; 105TexCr396, 288SW1027; 105TexCr426, 289SW49; 105TexCr600, 289SW639; 105TexCr590, 289SW691; 106TexCr68, 291SW226; 106 TexCr621, 294SW530; 106TexCr624, 294SW595; 107TexCr101, 294SW1110; 107TexCr535, 298SW224; 107TexCr46, 298SW439; 107TexCr?2, 18SW(2d)312; 109TexCr251, 4SW(2d)966; 110TexCr 52, 7SW(2d)552; 110TexCr122, 7SW (2d)560; 110TexCr480, 9SW(2d)259; 110TexCr566, 9SW(2d)742; 110TexCr 612, 9SW(2d)1040; 111TexCr605, 13SW (2d)396; 112TexCr152, 15SW(2d)629; 112TexCr178, 15SW(2d)646; 113TexCr 215, 1SW(2d)654 (affidavit and search warrant); 113TexCr267, 19SW(2d)322; TexCr 20SW(2d)1063; 113TexCr331, 21 SW(2d)362; 113TexCr324, 21SW(2d)518 (2d case); 113TexCr291, 21SW(2d)524; 113TexCr642, 21SW(2d)727; TexCr 23 SW(2d)320; TexCr 24SW(2d)39; Tex Cr 24SW(2d)1096; TexCr 25SW(2d) 350; TexCr 25SW(2d)429; TexCr 26 SW(2d)1066; TexCr 27SW(2d)295; Tex Cr 28SW(2d)151(2dcase); TexCr 28SW (2d)551; TexCr 28SW(2d)754; TexCr 31SW(2d)449; TexCr 31SW(2d)1073; TexCr 32SW(2d)204; 62Utah551, 251P 362; 63Utah364, 224P1002; Utah 276P 183; Utah 276P166; 191Vt124, 141A 626; Vt 151A552; 145Va318, 133SE 6?2; 147Va553, 137SE176; 136Wash1, 238P609; 136Wash232, 239P553; 143 Wash31, 254P244; 143Wash166, 254P 851; 144Wash446, 258P508; 146Wash 442, 263P602; 150Wash475, 273P751; 151Wash512, 276P529; Wash 286P102; 102Wva482, 138SE117; 108Wva92, 150 SE269; WVa 154SE866; 188Wis68, 205 NW412; 196Wis104, 219NW349; 198 Wis180, 223NW419; Ont [1930] 1 DomLR489 (confession). See also 205 Iowa 30, 215NW758. [c] Where state does not raise question of fact as to which witness testified, admission of such evidence is not prejudicial. 159La674, 106 S82 (where both state and defendant used evidence). [f] Evidence held not prejudicial.—That witness was prohibition officer. 21AlaA114, 105S433 (in prosecution for violation of Prohibition Act); 143Wash166, 254P851. [g] Permitting showing that defendants and their witnesses are foreigners is harmless where prosecuting attorney tells jury that foreigners are entitled to equal rights with citizens. 327Ill 312, 158 NE732. [h] Documentary evidence.—47 Ida785, 280P1029.

318-11 273U853, 47SCt531, 71Led 793 (cumulative evidence); 75CalA495, 243P478; 195Ind509, 150NE403; 149 Md[illegible], 134A29; 154Miss36, 122S187; 33PortoRico 12, 56 [illegible]CJ); 102TexCr 415, 278SW216; 103TexCr381, 280SW 782; 110TexCr160, 9SW(2d)259; TexCr 27SW(2d)20. See also 90Fla324, 105S841.

318-12 26F(2d)847; 20AlaA662, 1048 S38; 30Ariz266, 247P129 (evidence to effect that deponent knew nothing about matter in question). 218Ky72, 290SW 1075; 225Ky340, 8SW(2d)422; 167La 547, 1198869. [a] Where error was in favor of defendant, he may not complain of want of opportunity to present defense. 213AlaA534, 105S704.

318-13 23F(2d)561; 30Ariz466, 248P 39; 199Cal78, 248P250; 71CalA181, 235P72; 3Del229, 134A630; 321Ill 204, 153NE92; 206Ind557, 159NE515, 125 Kan33, 262P199; 214Ky2?0, 2?3SW34; 219Ky505, 293SW1085; 226Ky715, 295 SW1067; Mo 274SW43; 137Tenn618, 11 SW(2d)868; 105TexCr323, 2?5SW218; 111TexCr623, 13SW(2d)776(2dcase); TexCr 27SW(2d)543; 143Wash166, 254 P851. [a] (2) 90Fla324, 105S841 (where evidence leaves no reasonable doubt of guilt).

318-13½-New. or, in some jurisdictions, where it clearly appears that verdict would probably not have been different, had ruling of court been changed to meet defendant's objections; 20AlaA 570, 104S140.

318-14 214Ala2, 106S617; 21AlaA211, 106S891; 23AlaA395, 126S178; 181Ark665, 27SW(2d)781; 78CalA138, 248P541; 208 Iowa816, 225NW854; 119Kan509, 240P955; NJ 130A461; 126 Or560, 270P404; 100TexCr255, 272SW473.

319-15 219Ala282, 122S845; 200 Iowa483, 203NW806; 210Ky421, 276SW119; 319Mo28, 38SW(2d)230; 321Mo870, 12SW(2d)469; 100TexCr309, 272SW795 (where not connected with any contention and accused given lowest term); 100TexCr480, 273SW842; 109TexCr42, 28SW(2d)861; TexCr 78W(2d)1078 (age and family relations of deceased); 113TexCr506, 22SW(2d)667; TexCr 25SW(2d)323.

319-16 31F(2d)426; 214Ky280, 283SW84; 136SC68, 134SE213; 110TexCr101, 7SW(2d)955.

319-17 136SC68, 134SE213; 113TexCr142, 18SW(2d)663 (search warrant).

319-18 117 Or515, 243P766; 108TexCr270, 18SW(2d)287.

319-19 30F(2d)518; 200 Iowa483, 203NW806; 108TexCr631, 2SW(2d)256; 112TexCr87, 13SW(2d)893; 36Wyo78, 252P1030.

319-19½-New. where defendant's counsel cross-examined at length on the same subject; 82Colo 233, 259P1038.

319-20 See also 79CalA127, 249P60.

319-22 8F(2d)120; 8F(2d)711; 14F(2d)88; 37F(2d)677; 22AlaA57, 112S181; 217Ala219, 115S308; 21AlaA173, 106S206; 21AlaA254, 107S223; 22AlaA259, 111S477; 22AlaA338, 115S695; 22AlaA472, 116S896; 23AlaA416, 125S398; 23AlaA156, 127S252(1st case); 169Ark31, 272SW847 (reputation of accused as quarrelsome); 171Ark282, 284SW10; 203Cal510, 265P184; 75CalA199, 243P478; 77CalA263, 246P344; 77CalA377, 246P818; 80CalA81, 251P688; CalA 290P655; CalA 293P72; 95Fla42, 115S519 (other offenses); 95Fla767, 116S647; 43 Ida459, 252P673; 43 Ida745, 254P525; 45 Ida73, 260P694; 320 Ill287, 150NE628; 321 Ill47, 151NE555; 323 Ill530, 154NE410; 323 Ill567, 154NE418; 324 Ill11, 154NE451; 332 Ill120, 163NE438; 338 Ill56, 170NE14; Ill172NE29 (refusal to grant hearing as to legality of search); Ill 173NE135; 235 IllA587; 197 Ind123, 150NE24; 197 Ind179, 150NE50; 197 Ind712, 150NE53; 197 Ind173, 150NE58; 198 Ind487, 154NE280; 204Ky552, 265SW275; 212Ky303, 278SW1097; 213Ky727, 281SW1006; 220Ky59, 291SW795; 221Ky211, 298SW672; 222Ky546, 18SW(2d)961; 227Ky809, 14SW(2d)136, 62ALR133; 228Ky691, 15SW(2d)444; 234Ky333, 28SW(2d)24; 160La906, 107S617; 167La324, 119S65; 170La398, 127S881; 253Mass541, 149NE417; 231Mich273, 203NW862; 231Mich256, 203NW863; 238Mich171, 213NW159; 173Minn23, 216NW316; 179Minn502, 229NW801; 145Miss247, 110S503; 146Miss505, 112S685; 151Miss862, 119S796; 311Mo521, 278SW971; 315Mo1259, 289SW865; 317Mo759, 297SW10; Mo 18SW(2d)53; 116Nebr563, 218NW416; 118Nebr113, 223NW673; 104NJL512, 141A85; NJSup 138A310; 242NY419, 152NE248; 243NY273, 153NE72; 243NY320, 153NE433; 243NY381, 153NE843; 254NY192, 172NE466; 216AppDiv23, 214NYS517; 218AppDiv635, 219NYS1; 222AppDiv70, 225NYS266; 229AppDiv731, 241NYS723; 33OhA185, 168NE848; 32OkiCr203, 240P1075; OkiCr 270P558(2dcase); OkiCr290P344; OkiCr 291P150; OkiCr 291P152; 94PaSuper595; 133SC491, 131SE603; SD 227NW463; 99TexCr600, 271SW610; 100TexCr387, 272SW798; 101TexCr617, 276SW926 (silence under arrest); 103TexCr674, 282SW235; 104TexCr3, 282SW224; 104TexCr193, 283SW511; 105TexCr413, 289SW45; 105TexCr470, 289SW57; 106TexCr144, 291SW224; 106TexCr99, 291SW242; 107TexCr36, 294SW541; 107TexCr233, 296SW540; 107TexCr439, 296SW580; 107TexCr585, 298SW587; 108TexCr210, 299SW907; 108TexCr642, 28SW(2d)251; 109TexCr83, 38SW(2d)447; 109TexCr275, 48SW(2d)548; 109TexCr327, 48SW(2d)550; 111TexCr199, 12SW(2d)223 (2dcase); 111TexCr456, 15SW(2d)9; 112TexCr219, 15SW(2d)1018; 113TexCr85, 18SW(2d)1086(2dcase); TexCr 25SW(2d)347; TexCr 27SW(2d)215; TexCr 27SW(2d)229; TexCr 29SW(2d)768; Utah 269P515; 144Wash170, 257P236; 102WVa607, 135SE908; 104WVa93, 138SE664; 187Wis115, 203NW760; 36Wyo368, 255P788. But see 23F(2d)561. [c] **Illustration.**-21AlaA38, 104S881. [d] **Evidence as to interest of alibi witness** erroneously admitted on cross-examination is ground for reversal. 21AlaA217, 107S31. [e] **Prejudicial testimony,** introduced by prosecution, creating incurable error, is not rendered less harmful because unsolicited. 106TexCr349, 292SW245.

319-23 171Ark282, 284SW10.

319-24 77CalA263, 246P344; 45 Ida73, 260P694; 327 Ill223, 158NE436; 103TexCr212, 280SW597; 100WVa150, 130SE124.

319-25 87CalA5, 261P531; 45 Ida73, 260P694.

319-26 5F(2d)887; 100CalA93, 279P1056; 94Fla134, 113S704; 45 Ida73, 260P694; 89 IndA463, 166NE883; 220Ky334, 295SW154.

320-29 110Conn403, 148A350. See also 320 Ill287, 150NE628.

320-30 30Ariz458, 248P36; 243NY273, 153NE72; 109TexCr518, 6SW(2d)119.

320-31 21AlaA254, 107S223; 89CalA526, 265P285; 145Miss247, 110S503; 101TexCr154, 274SW608.

320-33 [d] 256 IllA493.

320-33½-New. or other inculpatory statements; 101TexCr154, 274SW608.

320-34 77Colo390, 237P151; 238Mich171, 213NW159; 99TexCr600, 271SW610; 109TexCr510, 58SW(2d)774. [b] 145Miss247, 110S503.

320-34½-New. where the effect of the evidence is to increase the penalty imposed, 210Ky571, 276SW533.

320-35 7F(2d)757.

320-36 7F(2d)28; 8F(2d)118; 18F(2d)407; 21AlaA495, 109S528; 170Ark602, 280SW636; 67CalA442, 227P629; 72CalA124, 236P934; 77CalA377, 246P818; 80CalA81, 251P688; 85CalA402, 259P458; 85CalA580, 259P998; 90CalA266, 265P826; 77Colo390, 237P151; 41Ida212, 238P312; 199Ind716, 161NE8; 200Iowa317, 204NW272; 206Iowa1169, 221NW847; 229Ky617, 17SW(2d)757; 165La341, 115S613; Md 150A278; 238Mich171, 213NW159; 144Miss442, 110S114; 144Miss825, 110S670; 311Mo521, 278SW971; 317Mo380, 295SW747; Mo 296SW423; 318Mo596, 300SW702; Mo 298SW(2d)159; 116Nebr563, 218NW416; 118Nebr113, 223NW673; 216AppDiv23, 214NYS517 (where evidence used in summation by district attorney); 224AppDiv193, 230NY866; 116 Or635, 242P603; 33PortoRico461; 154SC97, 151SE233; 52SD566, 219NW252; 54SD552, 223NW948; 103TexCr212, 280SW597; 103TexCr136, 280SW775; 103TexCr555, 281SW1070; 104TexCr429, 284SW547; TexCr 26SW(2d)216; TexCr 27SW(2d)207; 195Wis181, 217NW697. [g] **Permitting cross-examination** as to indictment for another crime is reversible error. 4F(2d)908.

320-37 42 Ida517, 246P313; 108TexCr106, 299SW430.

320-38 20F(2d)786; 200 Iowa317, 204NW272.

321-40½-New. Admission of evidence of failure of accused to explain a homicide to persons under circumstances not calling for an explanation is reversible error. 100TexCr215, 272SW783.

321-41½-New. or of resistance of requisition from another state. 212Ky303, 278SW1097.

321-42½-New. or where evidence obtained without lawful search warrant was admitted; 235 IllA587.

321-43½-New. or where evidence of preparatory acts was admitted without identification of accused. 212Ky303, 278SW1097.

321-44½-New. Admission of illegal testimony in a jury case vitiates the verdict. 162La465, 110S721.

321-45 5F(2d)46, 5F(2d)546; 21AlaA334, 109S116; 72CalA52, 236P355; 72CalA582, 237P1087; 74CalA178, 240P502; 80CalA783, 252P1061; 91CalA44, 266P581; CalA 286P434; 77Colo432, 236P1022 (clear and convincing evidence); 94Fla163, 113S699; 38GaA392, 144SE336; 11GaA498, 133SE631(1st case); 321 Ill624, 152NE520; 89 IndA683, 167NE138; 208Ky695, 271SW1044; 210Ky488, 276SW498; 220Ky334, 295SW154; 221Ky170, 298SW379; 235Mich360, 209NW84; 240Mich35, 214NW944; 179Minn439, 229NW558; Mo 300SW706; 22 OhA357, 153NE902; OkiCr 275P1073; OkiCr 286P349; 294Pa339, 144A534; 46Philippine28; 50Philippine37; 54SD552, 223NW943; 111TexCr260, 12SW(2d)586; 99TexCr551, 270SW1021; 101TexCr663, 276SW431; 105TexCr633, 289SW1015; 108TexCr394, 18SW(2d)296; 113TexCr1, 18SW(2d)179; 113TexCr9, 18SW(2d)615; 113TexCr384, 22SW(2d)665; TexCr 28SW(2d)135; TexCr 28SW(2d)153; Utah 277P972; 143Va546, 129SE233; 143Va554, 130SE416; 152Va1014, 148SE821; 155Wash80, 283P671; 187Wis122, 203NW749; 195Wis166, 217NW653; Wis 229NW51; 35Wyo41, 246P241. [a] 317 Ill39, 147NE400; 100TexCr43, 271SW913.

321-47 5F(2d)940; 7F(2d)567; 8F(3d)692, 11F(2d)12, 11F(2d)582; 17F(2d)216; 19F(2d)739; 25F(2d)231; 29F(2d)454; 36F(2d)559; 37F(2d)311; 38F(2d)406; 213AlaA38, 101S656, 213Ala301, 104S668; 214Ala117, 106S620; 20AlaA570, 104S140; 21AlaA14, 105S712; 23AlaA393, 126S174(2dcase); 169Ark257, 275SW325; 169Ark1035, 278SW45; 203Cal144, 263P216; 207Cal73, 276P1006; 68CalA259, 228P868; 68CalA615, 229P1000; 68CalA621, 230P221; 69CalA466, 231P601; 70CalA531, 233P980; 71CalA128, 234P917; 73CalA330, 238P372; 75CalA421, 243P39; 76CalA625, 245P136; 77CalA116, 246P157; 78CalA138, 248P541; 78CalA415, 248P693; 78CalA455, 248P927; 79CalA101, 248P1078; 79CalA555, 250P403; 84CalA612, 258P638; 87CalA510, 262P442; 91CalA788, 267P718; 97CalA253, 275P518; 98CalA40, 276P401; 107Conn148, 139A632; 163Ga43, 135SE410; 37GaA594, 141SE84; 39GaA128, 146SE340; 40GaA265, 149SE301; 11GaA159, 153SE382; 43 Ida180, 250P239; 47 Ida750, 278P776; Ida 288P154; 321 Ill181, 151NE485; 321 Ill526, 152NE569; 322 Ill54, 152NE542; 324 Ill428, 155NE337; Ill 173NE139; 197 Ind599, 150NE408; 199 Ind481, 157NE100; 200Ind557, 159NE545; 200 Ind303, 163NE229; 89 IndA496, 167NE140; 201 Iowa159, 205NW534; 205 Iowa1024, 219NW41; 210Ky33, 275SW369; 210Ky833, 275SW812; 215Ky360, 285SW193; 215Ky589, 286SW785; 215Ky707, 286SW1067; 215Ky717, 286SW1053; 218Ky72, 290SW1075; 221Ky148, 298SW385; 235Ky162, 31SW(2d)712; 163La135, 112S37; 157Md75, 145A185; 232Mich310, 205NW188; 233Mich670, 207NW832; 244Mich679, 222NW122; 180Minn221, 230NW639; Mo 271SW525; Mo 289SW829; 316Mo55, 289SW890; 316Mo157, 289SW948; Mo 29SW(2d)74; 80Mont181, 260P138; 49Nev194, 242P582; 103NJL18, 134A886; 215AppDiv446, 213NYS703; 195NC242, 141SE736; 49ND648, 192NW974; OkiCr 272P493; OkiCr 290P1109; 292Pa579, 141A624; 35PortoRico109; 137SC145, 134SE885; 149SC195, 146SE657; 100TexCr281, 272SW784 (other uncontradicted evidence); 100TexCr291, 272SW787; 100TexCr241, 272SW788 (testimony as to established fact not in issue); 102TexCr389, 278SW199; 102TexCr501, 278SW441; 103TexCr318, 280SW202; 104TexCr52, 282SW231; 104TexCr649, 285SW621; 106TexCr207, 292SW223; 106TexCr450, 292SW904; 106TexCr621, 294SW580; 107TexCr330, 296SW573; 107TexCr174, 296SW588; 107TexCr521, 298SW290; 107TexCr609, 298SW429; 108TexCr106,

239SW430; 108TexCr408, 18W(2d)615; 102TexCr199, 18W(2d)356, 109TexCr301, 48W(2d)58; TexCr 78W(2d)1078; TexCr 88W(2d)176; 110TexCr160, 98W(2d)259; 111TexCr328, 128W(2d)1025; 111TexCr618, 138W(2d)379; 113TexCr58, 188W(2d)641; TexCr 208W(2d)776; 113TexCr501, 218W(2d)1057(2d case); 113TexCr516, 228W(2d)676; 113TexCr136, 228W(2d)919; 113TexCr533, 228W(2d)921; TexCr 27W(2d)538; TexCr 31SW(2d)650; TexCr 32SW(2d)360; 101Va 139Va769; 142Va609, 128SE655; 143Va489, 129SE252; 152Va1014, 148SE821; 155Wash80, 283P671; Wash 296P129; 106WVa658, 146SE732; 193Wis1, 214NW337; 194Wis387, 216NW13; 199Wis3, 225NW191; Wis 232NW53; 33Wyo360, 239P952; 34Wyo90, 211P695; 35Wyo11, 216P241. [a] **Admission of prosecuting witness' clothing** is not prejudicial where he testified clothing was same as worn by him at time of difficulty, and exhibited wound to jury. 229Ky580, 17SW(2d)706(2dcase) (prosecution for shooting and wounding another with intent to kill).

321-47½-New. or volunteered by appellant. 169Ark1038, 278SW45.

322-48 23F(2d)260; 217Ala225, 115S39; MoA 129SW(2dcase); 177Ark379, 6SW(2d)293; 204Cal109, 266P807; 78CalA302, 218P763; 36CalA799, 136SE506; 36CalA752, 137SE412; 89IndA635, 166NE626; 200Iowa660, 204NW278; 124Kan482, 260P655; 210Ky353, 275SW866; 212Ky758, 280SW106; 230Ky732, 20SW(2d)731; 164La813, 114S696; 255Mass369, 151NE839; 171Minn513, 213NW46; 316Mo457, 289SW948; MoA 7SW(2d)432; 221AppDiv26, 222NYS497; 221AppDiv521, 224NYS676; 51ND510, 211NW585; 49RI482, 144A150; 136SC68, 134SE213; 50SD533, 210NW721; 102TexCr566, 280SW210; 105TexCr381, 288SW205; 106TexCr25, 290SW765; 106TexCr165, 291SW551; 106TexCr207, 292SW223; 106TexCr310, 292SW240; 107TexCr115, 295SW190; 107TexCr19, 299SW601; 108TexCr631, 2SW(2d)256; 109TexCr32, 2SW(2d)846; 109TexCr168, 3SW(2d)459; 109TexCr275, 4SW(2d)518; 109TexCr581, 6SW(2d)120; 110TexCr371, 7SW(2d)961; 110TexCr445, 10SW(2d)98(2dcase); 111TexCr4, 10SW(2d)730; 112TexCr115, 14SW(2d)271; 111TexCr552, 15SW(2d)646; 112TexCr376, 16SW(2d)518(2dcase); 112TexCr374, 16SW(2d)821; 112TexCr538, 17SW(2d)1060; TexCr 20SW(2d)764; TexCr 21SW(2d)668; TexCr 26SW(2d)236(2dcase); TexCr 26SW(2d)645; TexCr 27SW(2d)174; TexCr 29SW(2d)399. Vt 147A682; 103Va482, 138SE117. Wyo 28SP13.

322-49 30Hawaii308, 313 [quotCJ]. [a] **Error not deemed harmless** where other testimony might not be believed. 36F(2d)591.

322-49½-New. Evidence which might have been admitted. Improper introduction of a photograph of deceased showing him of a disposition contrary to that claimed by other witnesses is not prejudicial. 215Ky585, 286SW689.

322-51 216Ala7, 111S227; 217Ala225, 115S297; 72CalA160, 236P987; 79CalA555, 250P403; 80CalA138, 251P672; 100CalA82, 279P826; 337Ill413, 169NE210; 200Iowa644, 204NW213; 161La827, 109S505; 127Mo231, 142A551; 168Md382, 144A497; NJSup 145A4; 197NC576, 150SE25(2dcase); NC 156SE567(1stcase); 123Or621, 262P954; 35PortoRico787; 105TexCr64, 286SW237; 136Wash1, 238P609, 610 [citCJ].

322-52 21F(2d)109; 72CalA160, 236P987; CalA 285P101; 328Ill494, 160NE86; 207Iowa624, 223NW362; 124Kan482, 260P655; 230Ky250, 19SW(2d)218; 255Mass369, 151NE839; 49RI397, 143A604; 50SD533, 210NW721; 101TexCr479, 276SW268; 103TexCr416, 281SW209; 106TexCr207, 292SW223; 110TexCr359, 7SW(2d)568; 110TexCr241, 8SW(2d)124; 110TexCr378, 9SW(2d)348; TexCr 20SW(2d)794.

323-54 214Ala117, 106S620; 23AlaA60, 120S467; 72CalA160, 236P987; 223Ky616, 4SW(2d)416; 165LaS22, 116S199; Mo 285SW1000; 322Mo69, 16SW(2d)30; 82NH189, 131A606; 218AppDiv363, 218NYS297; 197NC576, 150SE25(2dcase); 33PortoRico195; 102TexCr389, 278SW199; 103TexCr636, 282SW251; 107TexCr521, 298SW290; 144Wash446, 258P508; Wash 286P102. But see 37F(2d)677. [a] (5) Where witness inadvertently misstated name of defendant in testifying to threats, but correctly stated it on next answer. 159La972, 106S461. [d] **Error not cured.**-Mo 18SW(2d)423.

323-55 218Ala656, 120S163.

323-56 78CalA302, 248P263; 34GaA163, 128SE690; 124Kan482, 260P655; 54ND840, 211NW585; 106TexCr207, 292SW223; 109TexCr613, 6SW(2d)359; 111TexCr48, 10SW(2d)997; 112TexCr289, 16SW(2d)241(1stcase); 112TexCr676, 18SW(2d)619; TexCr 31SW(2d)823; 101Vt105, 141A596; 193Wis204, 212NW635.

323-57 175Ark878, 18W(2d)23; 334Ill590, 166NE481; Mo 285SW1000.

323-58 DC 32F(2d)953.

324-62 31F(2d)544; 38F(2d)406; 172Ark613, 290SW59; 72CalA160, 236P987; 108Conn53, 142A470; 89Fla261, 103S630; 215Ky837, 287SW32; 229Ky403, 17SW(2d)260(2dcase); 152Miss143, 118S716; 152Miss195, 119S176; 22OhA357, 153NE902; 298Pa363, 148A508; 102TexCr389, 278SW199; 103TexCr636, 282SW251; 107TexCr115, 295SW190; 108TexCr603, 2SW(2d)248; 109TexCr47, 2SW(2d)853; 109TexCr168, 3SW(2d)459; 109TexCr275, 4SW(2d)548; 109TexCr398, 5SW(2d)144; 109TexCr435, 5SW(2d)146; 110TexCr90, 7SW(2d)551; 110TexCr199, 7SW(2d)586; 110TexCr539, 9SW(2d)353; 110TexCr612, 9SW(2d)1040; 110TexCr416, 10SW(2d)113; 111TexCr193, 11SW(2d)516; 111TexCr156, 12SW(2d)210(2dcase); 112TexCr261, 16SW(2d)119; 112TexCr284, 16SW(2d)240; 112TexCr466, 17SW(2d)46; 112TexCr654, 18SW(2d)170(1stcase); TexCr 18SW(2d)640; 113TexCr69, 18SW(2d)659; TexCr 20SW(2d)766; TexCr 20SW(2d)1060(2dcase); 113TexCr543, 22SW(2d)939; TexCr 27SW(2d)180(1stcase). But see 103TexCr668, 281SW1073. [b] (1)-121 Or141, 253P367.

324-63 225Ky340, 8SW(2d)422; MoA 108SW(2d)320; 36OklCr44, 253P1027; 112TexCr188, 15SW(2d)640; 111TexCr552, 15SW(2d)646; 113TexCr501, 21SW(2d)1057(2dcase); 113TexCr371, 22SW(2d)140; TexCr 27SW(2d)236. [a] (1) 78CalA451, 248P929.

324-64 31F(2d)902; 172Ark613, 290SW59; CalA 283P881; 102NJL134, 130A642.

324-65 92CalA550, 268P651.

324-68 15F(2d)503; 16F(2d)870; 18F(2d)404; 30F(2d)590; 20AlaA604, 104S280; 22AlaA220, 114S280; 22AlaA304, 115S146; AlaA 130S374; 170Ark1061, 282SW684; 77CalA434, 246P822; 78CalA415, 248P693; 82CalA28, 255P205; 88CalA508, 263P821; 89CalA405, 264P1105; CalA 290P77; 108Conn53, 142A470; 48Ida688, 284P845; 317Ill191, 148NE67; 324Ill21, 154NE446; 339Ill448, 171NE540; 200Iowa644, 204NW213; 206Iowa347, 218NW477; 215Ky589, 286SW785; 215Ky613, 286SW696; 215Ky717, 286SW1053; 215Ky734, 286SW1049; 224Ky224, 5SW(2d)1056; 227Ky710, 13SW(2d)1046; 166La924, 118S885; 260Mass288, 157NE350; 264Mass485, 162NE900; 286Mich692, 211NW42; 251Mich322, 232NW381; 145Miss227, 110S500; 145Miss237, 110S513; 152Miss48, 118S354; 152Miss885, 120S211; Miss 130S112(1stcase); Miss 130S285; Miss 130S687; Mo 273SW1060; 316Mo86, 289SW847; 319Mo55, 289SW890; Mo 296SW152; Mo 6SW(2d)903; Mo 30SW(2d)59; Mo 30SW(2d)132; Mont 288P186; 218AppDiv363, 218NYS297; 218AppDiv635, 219NYS1; 49ND648, 192NW974; 53ND916, 208NW388; OhA 173NE26; 35OklCr279, 250P544, 49ALR1129; 36OklCr14, 253P1027; OklCr 275P398; OklCr 287P846; 131Or314, 282P105; 287Pa512, 135A304; 155SC132, 152SE677; 52SD209, 217NW213; SD 229NW398; 101TexCr128, 274SW159; 101TexCr192, 274SW974 (appears without controversy); 101TexCr369, 276SW296; 101TexCr617, 276SW926; 106TexCr68, 291SW226; 106TexCr626, 294SW559; 107TexCr101, 294SW1110; 109TexCr307, 4SW(2d)54; 110TexCr68, 7SW(2d)535; 110TexCr77, 7SW(2d)555; 110TexCr33, 7SW(2d)557; 110TexCr499, 7SW(2d)559; TexCr 8SW(2d)176; 111TexCr95, 10SW(2d)94(2dcase); 111TexCr311, 12SW(2d)571; 111TexCr249, 12SW(2d)572; 111TexCr388, 13SW(2d)106; 111TexCr404, 13SW(2d)369(1stcase); 111TexCr633, 13SW(2d)703; 111TexCr570, 13SW(2d)874; 112TexCr352, 16SW(2d)1082; 112TexCr341, 16SW(2d)1098; 112TexCr538, 17SW(2d)1060; 113TexCr58, 18SW(2d)641; TexCr 20SW(2d)423; 113TexCr343, 21SW(2d)529; TexCr 23SW(2d)727; TexCr 24SW(2d)433; TexCr 24SW(2d)836; TexCr 24SW(2d)838; TexCr 24SW(2d)1096; TexCr 27SW(2d)799; TexCr 28SW(2d)134; TexCr 28SW(2d)143; TexCr 28SW(2d)553; TexCr 29SW(2d)779; TexCr 31SW(2d)440; Utah 276P163; 136Wash1, 238P609; Wis 231NW266; Wis 232NW866. See 38GaA392, 144SE36. But see 171Ark68, 283SW23; 217Ky565, 290SW325; Md 129A275; 155Miss390, 124S479(2dcase). [c] (2) Evidence of statement when arrested is harmless, where matter of same effect is shown by voluntary confession. 110TexCr512, 8SW(2d)144, 60ALR290. [e] (2) Where defendant, tried separately, admits every material allegation of indictment and jury is not called upon to fix penalty or grade of crime, erroneous admission of confession of codefendant is not prejudicial error. 317Ill191, 148NE67. [f] **Rule inapplicable** in prosecution for manufacturing intoxicating liquor where defendant, though he admits all facts derived from search, denies having any connection with manufacture of liquor being manufactured by other persons at time warrant for search was served. 145Miss237, 110S513.

325-69 216AppDiv209, 215NYS56 (facts not seriously disputed or contested).

325-70 141Miss611, 106S817.

325-72 5F(2d)224; 11F(2d)966; 12F(2d)852; 17F(2d)12; 19F(2d)139; 19F(2d)756; 23F(2d)420; 23F(2d)470; 33F(2d)263; 36F(2d)859; 213Ala358, 104S656; 216Ala475, 113S393; 22AlaA314, 115S290; 23AlaA220, 123S285(2dcase); 172Ark61, 287SW747; 199Cal610, 250P659; 94CalA55, 270P468; 72CalA160, 236P987; 77CalA434, 246P822; 79CalA306, 249P240; 85CalA769, 260P397; 43Ida180, 250P239, 243, 244 [citCJ]; 327Ill162, 158NE462; 199Ind617, 159NE465; 202Iowa1195, 211NW702; 121Kan383, 247P843; 210Ky610, 276SW537; 219Ky777, 294SW480; 234Ky404, 28SW(2d)492; 159LaS20, 106S317; 233Mich284, 206NW538; 173Minn543, 217NW683; Mo 270SW375; NJ 135A552; 34NM533, 285P486; 143Va579, 130SE389; OklCr 287P807; 144SC121, 142SE236; 103TexCr416, 281SW209; 104TexCr100, 288SW508; 105TexCr322, 288SW467; 106TexCr290, 292SW216; 107TexCr453, 296SW602; 109TexCr361, 4SW(2d)966; 111TexCr106, 10SW(2d)102; TexCr 26SW(2d)1066; TexCr 26SW(2d)1072; Utah 284P108; 133Wash30, 233P12; 145Wash4, 258P845; 150Wash466, 273P743; 104WVa396, 140SE338; 36Wyo466, 256P1040. [a] (5) In prosecution for unlawfully carrying pistol, error in admitting officer's testimony as to defendant's denial, while under arrest, that he had pistol, held cured by withdrawal from jury. 104TexCr100, 283SW508.

326-73 94Fla163, 113S699; Iowa 232NW636.

326-76 12F(2d)852; 19F(2d)756; 53ND95, 204NW969; 106TexCr99, 291SW242.

326-77 12F(2d)852; 35F(2d)905; 85CalA769, 260P397; 332Ill120, 163NE438; 334Ill341, 166NE65; 143SC63, 141SE165; 48SD636, 205NW666; 106TexCr321, 292SW231; 107TexCr554, 298SW600; 111TexCr83, 11SW(2d)323; TexCr 20SW(2d)1065.

326-80 12F(2d)852; 13F(2d)750; 14F(2d)497; 15F(2d)945; 19F(2d)756; 34F(2d)630; 20AlaA529, 104S339; 23

AlaA387, 126S498; 168Ark783, 272SW 674; 169Ark498, 276SW353; 171Ark 180, 283SW353; 180Ark241, 22SW(2d) 47; Ark 29SW(2d)1079(2dcase); 199Cal 610, 250P659; Cal 265P231; 69CalA 596, 231P1001; 77CalA434, 246P822; 99 CalA 515, 278P1056(2dcase); 82Colo 233, 259P1038; 39GaA547, 147SE798(2d case); 39GaA826, 148SE608(2dcase); 47 Ida281, 274P108; 324 Ill 322, 155NE 310; 331 Ill 268, 162NE839; 204 Iowa 1296, 210NW580; 205 Iowa849, 216NW 710; 206 Iowa1169, 221NW847; Iowa 232NW636; 121Kan186, 246P1001 (withdrawal and instruction to disregard); 209Ky203, 272SW423; 212Ky 28, 278SW141 (evidence of codefendant); 215Ky717, 286SW1053; 218Ky 836, 292SW497; 220Ky715, 295SW1067; 159La589, 105S631; 165La584, 115S759; 167La413, 119S410; 255Mass304, 151NE 297, 47ALR962; 230Mich403, 203NW112; 230Mich124, 203NW141; 239Mich695, 214NW965; 152Miss48, 118S354; 151 Miss539, 118S610; 143Miss210, 108S497; Mo 281SW960; 316Mo 243, 289SW852; 316Mo 122, 289SW904; Mo 30SW(2d) 132; MoA 288SW961; 81Mont145, 262P 158; NJ 135A552; 34NM533, 285P486; 251NY66, 167NE173; OklCr 269P391; 298Pa63, 148A45; 137SC145, 134SE885; 137SC58, 135SE635; 54SD267, 223NW 55; 100TexCr43, 271SW913; 100TexCr 480; 273SW842; 103TexCr490, 281SW 568; 104TexCr281, 283SW790; 105Tex Cr19, 284SW955; 105TexCr107, 286SW 1100; 105TexCr522, 289SW392; 105Tex Cr590, 289SW691; 106TexCr328, 291SW 1104; 106TexCr558, 293SW1104; 107 TexCr631, 298SW436; 107TexCr600, 298SW438; 110TexCr460, 9SW(2d)259; 112TexCr92, 14SW(2d)63(2dcase); 113 TexCr235, 20SW(2d)202; TexCr 29SW (2d)381(2dcase); TexCr 32SW(2d)648; 145Wash4, 258P845; 145Wash227, 259P 395; 104WVa396, 140SE338; 108WVa 237, 151SE176; 194Wis387, 216NW483; 198Wis176, 223NW416. [b] **Refusal to strike till close of trial is not prejudicial** where instruction to disregard is then given. 15F(2d)945.

326-80½-New. Where defendant made no specific objection or motion to exclude testimony. 143Miss210, 108S497.

326-81 121Kan186, 246P1001; 255 Mass304, 151NE297, 47ALR962; 145 Wash227, 259P395.

326-82 171Ark180, 283SW353.

326-83 105TexCr19, 284SW955.

327-84 101TexCr619, 276SW918.

327-87 212Ky28, 278SW141.

327-90 [c] **Instruction held to have had desired effect.**-159La589, 105S631.

327-92½-New. Prohibition of further testimony as to the matter, and a statement by the court in the presence of the jury that evidence already admitted is irrelevant, has been held equivalent to an instruction to disregard. 160La525, 107S393.

327-92¾-New. Error in admitting evidence applicable to two counts is not cured by failure to submit one count to jury. 109TexCr11, 2SW(2d)453.

327-93 12F(2d)852 (evidence of volume of sales of narcotics as compared with other companies in prosecution under Harrison Narcotic Law); 19F(2d)756; 35F(2d)905; 22AlaA552, 117S612; 23 AlaA428, 126S420(3dcase); 72CalA124, 236P934; 96CalA430, 274P433; 220Ky 59, 294SW795; 192NC150, 134SE413; 48SD636, 205NW666; 100TexCr566, 272 SW202; 102TexCr379, 278SW428; Tex Cr 26SW(2d)240 (unsworn statement in argument of counsel); 145Wash227, 259 P395.

327-96 269US20, 46SCt4, 70Led145 (improper admission as to one defendant does not require reversal as to others); 4F(2d)432; 16F(2d)451; 22F(2d) 1; 23F(2d)561; 34F(2d)863; 36F(2d) 441; 215AlaA497, 111S212; 171Ark762, 286SW937; 175Ark120, 298SW867; 177 Ark355, 6SW(2d)299; 179Ark647, 17 SW(2d)307; 206Cal 353, 274P353; 76 CalA525, 245P436; CalA 286P434; 166 Ga563, 144SE170; 200 Ind149, 162NE51; 125Kan83, 262P499; 225Ky461, 9SW (2d)136; 228Ky254, 14SW(2d)773; 256 Mass387, 152NE380; 236Mich8, 209NW 935 (instruction to disregard changed appearance of party in photograph); 312Mo 15, 278SW743; Mo 26SW(2d)781; MoA 274SW110; 76Mont549, 248P169; 53ND520, 206NW784; 22OhA357, 153 NE902; 103TexCr636, 282SW251. [b] (1) 13F(2d)750.

328-1 28F(2d)147; 231Ky412, 21SW (2d)651(2dcase); Miss 130S511.

328-3 36GaA672, 137SE787.

328-6 5F(2d)546 (jury instructed to imply nothing from unanswered question to codefendant testifying for government); 8F(2d)932; 13F(2d)750; 15 F(2d)965; 23F(2d)235; 23AlaA359, 125 S688; 78CalA68, 248P261; 44 Ida671, 258P1075; 47 Ida281, 274P108; 126 Kan375, 267P1095; 312Mo 15, 278SW 743; Mo 281SW960; 318Mo 843, 1SW (2d)157; NJSup 137A829; 34NM65, 277 P22; 34NM458, 283P907; 131 Or224, 282P237; 104TexCr391, 283SW813; 104 TexCr329, 283SW828; 108TexCr187, 299 SW399; 108TexCr157, 300SW48; 109 TexCr503, 5SW(2d)516; 142Wash539, 253P811; 104WVa396, 140SE338. [b] **Confession** properly received under testimony admitted at time but subsequently rendered inadmissible by other testimony is not prejudicial where court strikes it out and instructs jury to disregard it, though few days have intervened. 15F(2d)965.

329-10 15F(2d)965.

329-11 142Wash539, 253P811.

329-12 94Fla163, 113S699.

329-12½-New. Whether striking an instruction cures error depends on circumstances. 82Colo 233, 259P1038.

329-14 OklCr 288P999.

329-15 MoA 5SW(2d)647; 103TexCr 674, 282SW235.

329-18 8F(2d)737; 75CalA29, 241P 596; 125Kan83, 262P499; 215Ky734, 286SW1049; 216Ky376, 287SW933; 216 Ky541, 287SW972; 36 OklCr44, 253P 1027; 105TexCr281, 288SW213; 106Tex Cr68, 291SW226; 106TexCr558, 293SW 1104; 107TexCr196, 296SW523; 107Tex Cr383, 296SW545.

330-20 8F(2d)211; 8F(2d)737; 22 F(2d)293; 25F(2d)866; 23AlaA407, 127 S246(2dcase); 166Ga160, 142SE685; 125 Kan83, 262P499.

330-21 213Ala170, 104S440; 105TexCr 631, 289SW1006; 107TexCr101, 294SW 1110; 113TexCr646, 21SW(2d)1049; 113TexCr611, 21SW(2d)1052(2dcase); 143Va554, 130SE416. [a] (4) Error if any in admitting conversation between witness and defendant's assistant following alleged false imprisonment held harmless in view of light sentence imposed by jury. 104TexCr485, 284SW 957.

330-21½-New. or where evidence of guilt was conclusive and it was not jury's duty to pass on penalty. 321 Ill 93, 151NE596.

330-22 24F(2d)639; 27OhA166, 161NE 221.

330-23 See also 125Kan83, 262P499.

330-24 TexCr 32SW(2d)199.

330-25½-New. [§ 3671a] gg. **Evidence Sufficient as To Show Violation of Municipal Ordinance.** Conviction by municipal judge for liquor violation which on record might be under municipal ordinance with sufficient evidence will not be disturbed. 93Fla585, 112S51.

330-27 17F(2d)246; 68CalA457, 229P 974; 75CalA421, 243P39; 160La162, 106S731; 156Md390, 144A501; 178Minn 437, 227NW497; 82NH189, 131A606; 290Pa271, 138A836; 106TexCr384, 292 SW885.

330-29 Colo 293P335.

330-31 CalA 290P470.

330-32 82NH189, 131A606; 102NJL 134, 130A642; SC 155SE849.

330-34 323 Ill 530, 154NE410; 143Miss 102, 108S446 (admission of evidence of trailing by blood hounds without proper preliminary proof that they were pure bred, tested and found reliable). See also 100TexCr489, 272SW141.

330-36 21AlaA54, 105S708; 218Ala40, 117S457; 23AlaA336, 125S206; 23AlaA 406, 127S793(2dcase) (evidence later becoming relevant); 75CalA421, 243P39; 208 Iowa127, 224NW537; 210Ky524, 276SW550; 160La316, 107S123; 149Md 128, 131A29; 234Mich106, 207NW879; 154Miss190, 122S391; 135Wash392, 237 P1000, 241P966 (evidence erroneously admitted in direct examination may be rendered competent as rebuttal testimony). [a] (1) 8F(2d)251; 71CalA 402, 235P467. (7) Admission of acts done in pursuance of conspiracy before establishment of conspiracy is not reversible error which conspiracy later established. 71CalA402, 235P467. [b] (1) 93Fla233, 112S70. [d] **Admissions.**-194Cal1, 227P156.

331-37 [a] **Admission of evidence held prejudicial and reversible error.**-90Fla 272, 105S406.

331-39 21AlaA471, 109S757; 23AlaA 321, 124S744; 23AlaA438, 126S610(1st case); 69CalA558, 231P767; 86CalA148, 260P591; 334 Ill 635, 166NE535; 204 Iowa1296, 210NW580; 217Ky518, 289SW 1102; 229Ky400, 17SW(2d)262; 232Ky 453, 23SW(2d)930; 233Ky533, 26SW (2d)23; 254Mass520, 150NE854; 239 Mich590, 214NW950; 315Mo 232, 285 SW712; 53ND931, 208NW566; 123NC 361, 133SE24; 103TexCr679, 282SW 220; 104TexCr408, 284SW588; 105 TexCr138, 286SW988; TexCr 25SW(2d) 611; TexCr 25SW(2d)862; TexCr 27 SW(2d)183(2dcase); 68Utah557, 251P 364; Utah 289P100; 101Vt124, 141A 686; 153Wash316, 279P735. [a] **Permitting witness to state before cross-examination that he had an opinion** without stating what it was is not prejudicial. 101Vt124, 141A686. [b] **Allowing witnesses neither alienists nor friends of accused to describe his actions and conduct held not error,** though their opinions were admissible on issue of insanity. 102CalA608, 283P389.

331-40 49SD572, 207NW539.

331-41 22AlaA353, 115S698; 239Mich 590, 214NW950; 49ND228, 191NW345; 104TexCr408, 284SW588; TexCr 26SW (2d)214.

331-45 21AlaA199, 106S682; 205 Iowa 604, 218NW145; Iowa 228NW80; 144 Miss447, 110S124.

331-46 22AlaA491, 118S248; 105TexCr 291, 288SW226; Utah 287P181.

331-52 254Mass520, 150NE854; 49SD 572, 207NW539.

332-54 21AlaA200, 106S682; 227Ky 142, 12SW(2d)324; 317Mo 865, 297SW 73; 107TexCr408, 296SW889.

332-56 17F(2d)339, 344 [quotCJ]; 217 Ala212, 115S223; 75CalA439, 242P876; 119Kan670, 240P848; 221Ky276, 298 SW693; 307Mo 291, 270SW298; 307Mo 500, 271SW55; 322Mo 69, 16SW(2d)30; Mo 31SW(2d)39; 137SC145, 134SE885; 53SD488, 221NW91; 39Wyo 181, 270P 665.

332-59 28Hawaii350; 335 Ill 217, 167 NE1; 200 Ind557, 159NE545; 214Ky 228, 282SW1060; 171Minn513, 213NW 46; Mo 14SW(2d)574; SC 155SE849; 112TexCr504, 17SW(2d)462(2dcase); 113TexCr81, 18SW(2d)661(2dcase); TexCr 26SW(2d)645; 105WVa36, 141 SE400. [a] 101TexCr180, 274SW638.

332-60 35PortoRico 194.

332-61 137SC145, 134SE885.

332-62½-New. or where the testimony was volunteered and there was no request to have statement withdrawn. 100TexCr541, 271SW915.

332-64 15F(2d)634; 22Ala223, 114S 361; 81CalA226, 253P735; 165Ga326, 140SE889; 321 Ill 157, 151NE584; 337 Ill 310, 169NE243; 220Ky585, 295SW 888; 128Me500, 148A747; NJSup 133A 46; 242NY419, 152NE248; 218AppDiv 635, 219NYS1; 191NC210, 131SE577; 193NC302, 136SE729; 194NC651, 140 SE433; 119 Oh114, 162NE388; 133SC 491, 131SE603; 105TexCr463, 289SW 39; 107TexCr36, 294SW541; 109TexCr 408, 4SW(2d)978; 111TexCr348, 13SW (2d)102; 112TexCr436, 16SW(2d)1090; Vt 147A682; 104WVa93, 138SE664. [b] **Admission of hearsay evidence that another witness had identified accused,** not rendered harmless by fact that other witness had previously testified that he had identified accused, its probable effect being to support previous testimony. 158La1014, 105S847.

332-65 OklCr 288P610(1stcase).

332-67 Mo 29SW(2d)113; 105TexCr 463, 289SW39.

332-68 242NY419, 152NE248.

332-71 68CalA487, 229P896.

332-72 162La465, 110S721.

332-74 164La167, 113S805.

333-78 175Ark1047, 1SW(2d)546; 195 Cal 445, 234P91; 95CalA711, 273P99; 78CalA476, 248P981; 81CalA648, 254P

628; 157Md635, 147A599(2dcase); 238 Mich15, 213NW135; 53ND916, 208NW 388; ND 228NW453; 126 Or560, 270P 404; 33PortoRico 195; 105TexCr218, 288SW209; 136Wash674, 241P294; Wash 286P51. [a] Error held prejudicial.–226Ky683, 118SW(2d)696(1st case).

333-79 103NJL663, 138A575.

333-81 195Cal 115, 231P91; 100CalA 113, 279P1070; 53ND916, 208NW388; 33PortoRico 195; 35PortoRico 194.

333-82½–New. Where on cross-examination matter moved to be struck out is substantially repeated by the witness. 35PortoRico 620.

333-84 8F(2d)919; TexCr 208W(2d) 1065 (motion taken under advisement).

333-93 199Cal 145, 248P504; Cal 257P 65; 46 Idaho61, 270P117; 238Mich543, 213NW683; 315Mo 199, 285SW984; 34PortoRico 626; 105TexCr47, 285SW 316.

333-89 Md 151A409.

333-90 50ND927, 198NW698.

333-93 151Wash218, 275P658.

333-95 14F(2d)801; 20F(2d)90; 29 F(2d)162; 211Ala173, 106S692; Ala 130S175; 21AlaA552, 110S563; 22AlaA 440, 110S511; 195Cal 295, 232P974 (refusal to allow witness, who had stated another witness's reputation for truth was bad, to state whether he would believe him under oath held harmless error); 203Cal 128, 263P226; 206Cal 353, 274P353; 71CalA181, 235P72; 72CalA 52, 236P355; 75CalA9, 241P931; 75 CalA404, 242P1067; 78CalA698, 248P 969; 79CalA273, 249P231; 199Cal 513, 250P161; 80CalA31, 251P343; 80CalA 487, 262P361; 82CalA451, 265P276; 92 CalA105, 268P139; CalA 290P600, 93 Ph1053, 113S891; 35GaA199, 133SE656; 37GaA94, 138SE924; 39GaA836, 148SE 610; 40GaA515, 150SE431(2dcase); 47 Idaho157, 276P39, 68ALR1061; 48 Idaho439, 282P489; 48 Idaho88, 284P845; 318 Ill 167, 149NE6[illegible]; 323 Ill 540, 155NE737; 335 Ill 539, 167NE823; 199 Ind592, 159 NE420; 199 Iowa1228, 201NW49; 118 Kan641, 236P855; Kan 289P483; Kan 292P931; 209Ky395, 272SW909 (evidence on point remotely material); 213 Ky659, 281SW529; 216Ky724, 288SW 680; 222Ky248, 300SW625; 229Ky103, 17SW(2d)260(2dcase); 229Ky580, 17 SW(2d)706(2dcase); 234Ky45, 27SW (2d)410 (holding no prejudice in exclusion); 234Ky135, 27SW(2d)683; 162 La717, 111S72; 166La924, 118S885; 168 La95, 121S586; 128Me267, 147A191(1st case); 236Mich226, 210NW219; 171 Minn222, 213NW920; 176Minn305, 223 NW141; 176Minn349, 223NW[illegible](4th case); 153Miss654, 121S281; [illegible]Miss 548, 128S579; Mo [illegible]SW[illegible] (not prejudicial where all circumstances were before jury); Mo [illegible]SW727; 317Mo 293, 295SW743; 322Mo 194, 14SW(2d) 611; 80Mont181, 260P138; 85Mont428, 278P993; 114Nebr783, 210NW165; Nebr [illegible]NW781; 49Nev386, 246P18; 103NJL583, 135A894; 103NJL663, 138 A575; NJ 113A515(dicta); 34NM158, 283P907; ND 230NW1; 38OkiCr34, 259P173; OkiCr 285P985; OkiCr 285P 987; OkiCr 287P1103; 123 Or521, 263P 951, 287Pa512, 135A301; 141SC452, 11[illegible]S75; 49SD429, 207NW454; 50SD 37, 208NW164; 109TexCr131, 8SW(2d) 1[illegible]; 111TexCr176, 11SW(2d)812; 113 TexCr124, 18SW(2d)1070; 113TexCr 317, 21SW(2d)622; TexCr 27SW(2d) 210, TexCr 28SW(2d)813; 69Utah304, 2[illegible]P1003; 111Va559, 131SE131 (exclusion of opinion of lay witness harmless where jury was in as good or better position to draw conclusions); Wash 290P701; 108WVa98, 150SE369; 34 Wyo 247, 242P812; 40Wyo 184, 276P 458; Wyo 292P2; Wyo 293P365.

334-96 194Cal 555, 229P341 (question as to voluntary character of confession); 72CalA582, 237P1087; 92CalA470, 268 P473; 90Pla324, 105S841; 33Wyo 428, 240P219.

334-96½–New. or overwhelming weight of the testimony including his own, 145 Miss252, 110S515.

334-99 Ala 130S175; 21AlaA304, 107S 719, 168Ark710, 271SW326, 80CalA 623, 252P935; 97CalA253, 275P518; 86 Colo 35, 278P594, 65ALR1260; 319 Ill 300, 150NE16; 324 Ill 322, 155NE310; 210Ky670, 276SW571; 215Ky843, 287 SW34; 234Ky45, 27SW(2d)410; 158La 713, 104S627; 311Mo 443, 278SW974; 189NC766, 128SE354; 119 Or320, 245P 360; 50SD533, 210NW721; 100TexCr 376, 272SW791 (incapable of affecting question of accused's guilt or innocence); 101TexCr192, 274SW974; 110 TexCr153, 8SW(2d)150.

334-2 CalA 286P476; 209Ky566, 273 SW30; 192NC723, 135SE859. See also 75CalA9, 241P931.

334-3 100TexCr241, 272SW788 (rejection of evidence tending to reduce verdict to manslaughter where verdict was for manslaughter).

334-4 213Ala410, 104S840; 21AlaA646, 111S318; 169Ark594, 276SW358; 176 Ark595, 28W(2d)67; 89CalA451, 265P 276; 90Fla659, 106S479; Ill 172NE54 (establishing defense double jeopardy); 198 Ind590, 154NE372; 201 Iowa1233, 207NW393; 210Ky444, 276SW137; 217 Ky608, 290SW498; 234Ky628, 28SW (2d)964; 160La661, 107S481; 161La 518, 109S61; 166Minn371, 208NW129; 148Miss250, 114S480; 314Mo 635, 285 SW437; 316Mo 195, 289SW604; 74Mont 269, 240P365; 79Mont385, 256P1071; 118Nebr828, 226NW149; 218AppDiv 251, 218NYS249; 26ObA53, 159NE834; 45Philippine84; 137SC145, 134SE885; ND 225NW214; 100TexCr387, 272SW 798; 101TexCr628, 276SW928; 104Tex Cr195, 283SW516; 104TexCr480, 284 SW592; 107TexCr444, 296SW897; Tex Cr 298SW575; 107TexCr596, 298SW 678; TexCr 299SW(2d)347; Wash 287 P887; 100WVa180, 130SE102; 107WVa 216, 148SE4.

334-5 221AppDiv331, 223NYS339; 45 Philippine84 (testimony in support of defendant's); 108TexCr472, 18SW(2d) 625; 153Va974, 151SE154.

334-6 22AlaA128, 113S467; 141Miss 630, 106S817; 148Miss250, 114S480; 155Miss731, 126S824(2dcase); 316Mo 195, 289SW604; 104TexCr195, 283SW 516; 111TexCr48, 10SW(2d)997; 69 Utah304, 254P1003; 41Wyo 72, 283P 151.

334-7 [a] 321 Ill 32, 151NE507.

334-7½–New. Where the court excluded evidence on the ground of irrelevancy with permission to introduce later if it became relevant, it is not reversible error where no effort was made to introduce it later. 160Ala316, 107S123.

335-9 14F(2d)75; 20F(2d)604; 30F (2d)679; 217Ala519, 116S910; Ala 127 S790; 20AlaA412, 103S694; 20AlaA588, 104S550; 172Ark23, 287SW765; 175 Ark1083, 3SW(2d)23; 195Cal 295, 232 P974; 71CalA339, 235P87; 72CalA226, 237P66; 75CalA404, 242P1067; 78Cal A380, 248P975; 79CalA249, 249P212; 85CalA672, 259P1020; 96CalA1, 274P 361; 40GaA123, 148SE51; 321 Ill 559, 152NE352; 324 Ill 322, 155NE310; 199 Ind592, 159NE420; Kan 289P483; 215 Ky613, 286SW696; 215Ky843, 287SW 34, 216Ky724, 288SW680; 219Ky745, 294SW507; 222Ky89, 300SW365; 227 Ky710, 13SW(2d)1046; 126Me351, 138 A527; 231Mich256, 203NW863; MoA 294SW448; NJSup 147A727; 245NYS 245; 53ND558, 207NW226; 38OkiCr 34, 259P173; 148SC196, 145SE799; 103 TexCr242, 250SW819; 104TexCr358, 284SW556; 107TexCr151, 295SW1098; 107TexCr444, 296SW897; 109TexCr414, 5SW(2d)503; 110TexCr460, 9SW(2d) 259; 113TexCr112, 18SW(2d)643; Tex Cr 298SW(2d)392; 150Va571, 142SE397; 149Wash452, 271P89; Wash 290P336. [c] Error not cured by cross-examination.–81CalA456, 254P281 (prosecution for murder).

335-10 79CalA249, 249P212; 82CalA 389, 255P839; NJSup 130A437; OkiCr 284P651; 50SD533, 210NW721; 50SD 479, 210NW732; 103TexCr242, 280SW 819; 143Va579, 130SE389.

335-11 214Ala305, 107S797; 29Ariz 247, 240P863; 168Ark932, 272SW648; 80CalA623, 252P635; 323 Ill 540, 153NE 727; 215Ky613, 286SW696; 230Ky840, 20SW(2d)1005; MoA 277SW354; 250 NY185, 164NE900; 110TexCr499, 7SW (2d)559.

335-11½–New. An exception to refusal to permit witness to be asked question presents no question on appeal, where answer to such question was fully given in colloquy between counsel and court. 21AlaA74, 105S428.

335-13 15F(2d)841; 43F(2d)890; 20 AlaA412, 103S694; 21AlaA445, 109S183; Ariz 283P711; 176Ark249, 3SW(2d)15; 72CalA561, 237P780; 72CalA582, 237P 1087; 79CalA249, 249P212; 79CalA328, 249P231; 199Cal 513, 250P164; 80CalA 31, 251P343; 81CalA752, 254P666; 82 CalA465, 255P777; 83CalA34, 256P455; 92CalA683, 268P915; Ind 166NE654; 215Ky756, 286SW1058; 163La34, 111 S486; 154Md332, 140A218; Mass 157 NE50; 262Mass180, 159NE633; 237 Mich481, 212NW105; 251Mich322, 232 NW381; 145Miss252, 110S515; Mo 278 SW1009; 315Mo 232, 285SW712; Mo 12SW(2d)30; Mo 26SW(2d)781; 80 Mont181, 260P138; 58ND532, 227NW 560; OhA 173NE206; 137SC145, 134SE 885; 155Tenn138, 290SW978; 101Tex Cr377, 276SW291; 106TexCr593, 294SW 573; 107TexCr115, 295SW190; 107Tex Cr614, 298SW426; 108TexCr320, 300SW 65; 108TexCr561, 2SW(2d)233; 110 TexCr359, 7SW(2d)558; 110TexCr250, 8SW(2d)127; 111TexCr32, 10SW(2d) 996; 147Wash166, 265P166. [a] (2) Mo 26SW(2d)781.

336-14½–New. Where court refusing to permit custodian of testimony on former trial to read the contradictory testimony read it to the jury himself, there is no reversible error. 209Ky395, 272 SW909.

336-16 5F(2d)799; 40GaA15, 148SE 622; Me 151A439; 262Mass416, 160NE 252; 103NJL383, 135A894; 131 Or411, 282P226; 107TexCr24, 294SW550.

336-17 12F(2d)761; 22AlaA644, 119S 248; 79CalA249, 249P212; 87CalA65, 261P1071; CalA 286P502; 129Kan207, 282P723; 229Ky403, 17SW(2d)260(2d case); 231Ky152, 21SW(2d)231; 161 La518, 109S51; 164La813, 114S696; 265 Mass382, 163NE251(2dcase); Mo 23SW (2d)22; NJSup 147A727; 243NY166, 153NE36; OkiCr 270P344; 298Pa560, 148A501; 137SC58, 135SE635; 153SC 25, 150SE321; 113TexCr188, 19SW(2d) 319.

336-21 [a] Illustrations.–21AlaA116, 105S435 (where defendant was entitled to have intoxication of deceased clearly established and it is undisputed that deceased provoked difficulty).

336-22 [a] Error in excluding question asked on cross-examination of people's witness is not cured by testimony of defendant as to fact sought to be elicited. 198Cal 534, 246P62.

337-27 Ala 130S175; 20AlaA457, 103S 902; 21AlaA289, 107S791; 22AlaA17, 111S899; 22AlaA48, 112S93; 176Ark88, 2SW(2d)50; 70CalA315, 233P362; 72 CalA226, 237P66; 75CalA181, 242P503; 75CalA642, 243P461; 78CalA380, 248P 975; 80CalA167, 251P327; 100CalA78, 280P178; 82Colo 541, 261P661; 96Fla 307, 118S13; 329 Ill 536, 161NE76; 206 Iowa397, 220NW13; 218Ky703, 292SW 336; 165La67, 115S370; 166La924, 118 S85; 167La484, 119S523; 150Md687, 133A847; 317Mo 843, 297SW397; 103 NJL383, 135A894; 243NY166, 153NE 36; 50ND927, 198NW698 (opinion evidence); 53ND558, 207NW226; ND 228 NW453; 153SC25, 150SE321; 100Tex Cr114, 272SW149; 101TexCr329, 275 SW713; 104TexCr308, 283SW817; Tex Cr 292SW609; 107TexCr444, 296SW 897; 113TexCr142, 18SW(2d)663; 149 Va447, 141SE118. See also 99TexCr569, 270SW1025.

337-28 21AlaA507, 109S561; 22AlaA 140, 114S73; 263Mass22, 160NE305; Mo 6SW(2d)903; 76Mont278, 246P257.

337-29 92CalA683, 268P915; Utah 276 P166.

337-33½–New. Where officer, stated circumstances under which he was acting, it was not error to refuse question as to his ground for arrest. 230Mich 484, 203NW93.

337-33¼–New. Error in excluding testimony of witness in prosecution for cheating is only partially cured by permitting witness to testify later to the same transaction. 218AppDiv254, 218 NYS249.

337-35 21AlaA577, 110S171; 82Colo 541, 261P661; 207 Iowa1345, 224NW

594; 126Kan607; 161La532, 109S56; 53ND558, 207NW226; OklCr 284P306; 49SD456, 207NW456; 155Tenn138, 290 SW978. [a] (6) Refusal to admit record showing defendant's six years' service in navy not prejudicial where admitted throughout trial he was sailor in good standing. 135Wash333, 237P 706.

338-38 See also 84CalA58, 257P592.

338-39½-New. or by an instruction that deceased is presumed to have had knowledge; 79CalA101, 248P1078.

338-43 NJSup 139A52.

338-44 21AlaA646, 111S318; 202 Iowa 1188, 211NW850.

338-46½-New. Erroneous submission of issue, increasing punishment, is prejudicial. 210Ky571, 276SW533.

338-46½-New. Submission of the issue of guilt or innocence of defendant, along with the issue of his insanity at the time of commission of the crime, and of his insanity at the time of trial, is harmless where the jury correctly found that defendant was not insane. 151Miss883, 119S805.

338-46¼-New. Defendant cannot complain of error in the submission of a count to the jury charging storing of liquor, where the evidence warranted its submission and the jury acquitted defendant on such count. 149SC371, 147 SE314.

338-49½-New. Failure to submit to the Jury a question as to whether the confession was voluntary is prejudicial although the confession was introduced in rebuttal where the confession was effective to impeach defendant. 223Ky 381, 3SW(2d)770.

338-49½-New. Failure to submit a disputed issue of fact to the jury constitutes reversible error. 100TexCr448, 273SW563.

338-51 164Ga250, 138SE153.

338-54½-New. Defendant was not harmed by submission to jury of question of fact, with proper instructions, which law required to be decided by court as preliminary to admission of evidence. 253Mass65, 147NE833.

338-55 Utah 287P909 (submission on intoxication not established held prejudicial though evidence on other issues supported conviction).

338-55½-New. Submission to jury of question whether witness was accomplice is reversible error. 200Cal 404, 253P318.

339-58 Mo 4SW(2d)813.

339-59½-New. Refusal to direct acquittal if money stolen was not over fifty dollars held harmless where conviction was for theft of less than fifty dollars. 105TexCr405, 289SW73.

339-60 7F(2d)867; 39F(2d)312; Ala 130S901; 103NJL534, 138A203.

339-60½-New. In some jurisdictions it is never reversible error to refuse to direct a verdict. 35GaA399, 133SE266; 35GaA398, 133SE744.

339-60¼-New. , or where sentence did not exceed that authorized under one count. 25F(2d)967.

339-61½-New. It has been held not prejudicial error to tell the jury that court could not direct a verdict except to acquit, where defendant had moved for direction of acquittal, and the court explained that it could not itself determine the case when the evidence was conflicting. 49RI 397, 143A604.

339-61½-New. Refusal to direct a verdict on one indictment is not ground for reversal of sentence on the other. 93PaSuper404 (murder and driving automobile while intoxicated).

339-61¼-New. Refusal of trial court to advise acquittal is not reversible error. 50SD32, 208NW164.

339-61½-New. In jurisdictions where court may only advise but cannot direct acquittal refusal to advise cannot be said to be prejudicial for the reason that the jury may disregard the advice. 49SD456, 207NW456.

339-61⅛-New. Erroneous refusal to direct a verdict of acquittal where there is no evidence other than that of accomplice to connect defendant with the crime is reversible error. Iowa 228NW 286.

339-61⅞-New. Other instances of harmless error in refusing to direct verdict. Miss 128S891.

339-62 5F(2d)133; 220Ky209, 294SW 1046.

339-64 274US328, 47SCt650, 71L ed 1077; 12F(2d)873; 16F(2d)457; 31F (2d)902; 32F(2d)424; 41F(2d)173; 43 F(2d)358(2dcase); 214Ala117, 106S620; 21AlaA457, 109S366; 31Ariz427, 254P 467; 169Ark326, 275SW667; 170Ark 1193, 278SW648 (charge to scrutinize defense of alibi carefully); 171Ark203, 284SW28; 195Cal 272, 232P710; 71CalA 402, 235P467; 202Cal 154, 259P442; 100CalA295, 279P1054; 68CalA186, 228 P733; 68CalA758, 230P191; 68CalA 742, 230P197; 69CalA169, 230P667; 71 CalA339, 235P87; 74CalA415, 240P 1019; 75CalA447, 243P67; 75CalA718, 243P485; 77CalA60, 245P811; 82CalA 489, 255P781; 93CalA77, 268P1071; 96 CalA503, 274P393; 82Colo 539, 263P19; Colo 293P335; 106Conn260, 137A762; 88Fla135, 101S273; 90Fla361, 106S75 (instruction not prejudicial); 94Fla149, 113S726; 98Fla609, 123S912; 34GaA 232, 128SE917; 34GaA234, 128SE918; 36GaA99, 135SE448; 36GaA83, 135SE 513; 36GaA307, 136SE461; 36GaA784, 138SE280; 29Hawaii150; 42 Ida319, 245P685; 46 Ida765, 271P322; 48 Ida 112, 279P616; 318 Ill 332, 149NE266; 319 Ill 306, 150NE16; 321 Ill 380, 152 NE215; 324 Ill 101, 154NE463; 325 Ill 578, 156NE798; 327 Ill 463, 158NE716; 327 Ill 305, 158NE729; 328 Ill 602, 160 NE125; 335 Ill 596, 167NE786; 337 Ill 290, 169NE214; 338 Ill 596, 170NE685; Ill 173NE112; 198 Ind39, 151NE132; 198 Ind614, 154NE370; Ind 168NE692; 203 Iowa536, 211NW213; 204 Iowa1135; 216NW642; 121Kan339, 246P989; 124 Kan556, 261P846; 126Kan799, 271P 291; 210Ky421, 276SW119; 214Ky422, 283SW420; 219Ky834, 294SW790; 225 Ky781, 10SW(2d)285; 226Ky173, 10 SW(2d)643; 228Ky688, 15SW(2d)475; 234Ky531, 28SW(2d)774; 255Mass575, 152NE704; 256Mass387, 152NE380; 233Mich98, 206NW516; 237Mich127, 211 NW44; 242Mich491, 219NW724; 243 Mich688, 220NW714; 175Minn516, 221 NW903; 139Miss529, 104S358; 150 Miss133, 116S532; Miss 130S730; Miss 130S692; Mo 278SW1009; 312Mo 373, 278SW1016; Mo 284SW799(2dcase); Mo 285SW83; 314Mo 635, 285SW437; 316 Mo 252, 289SW821; 316Mo 66, 289SW 910; 318Mo 813, 1SW(2d)143; Mo 1SW (2d)153; Mo 23SW(2d)1; Mo 23SW (2d)7 (failure to define "assault"); Mo 29SW(2d)135; MoA 277SW354; 80 Mont181, 260P138; 116Nebr125, 216NW 294; 116Nebr629, 218NW421; NJ 135A 94; NJSup 132A198; NJSup 135A339; 32NM319, 255P396; 216AppDiv209, 215 NYS56 (instruction held not unduly prejudicial); 245NYS245; 192NC253, 134SE850; NC 155SE258; 52ND659, 204NW350; 43 OklACR329; OklCr 263 P1114; OklCr 273P1012; OklCr 273P 1014(2dcase); OklCr 275P1067; OklCr 277P254(2dcase); OklCr 280P317(2d case); OklCr 287P419; OklCr 287P816; OklCr 287P842; OklCr 289P1113; OklCr 292P376; 126 Or651, 269P869; 295Pa 50, 144A761; 88PaSuper190; 94Pa Super535; 32PortoRico 355; 137SC75, 134SE514; 51SD277, 213NW504; SD 229 NW373; 103TexCr182, 280SW798; 103 TexCr223, 280SW815; 103TexCr272, 280 SW827; 103TexCr403, 281SW844; 104 TexCr26, 282SW245; 105TexCr281, 288 SW213; TexCr 291SW223; 106TexCr 169, 291SW554; 106TexCr520, 293SW 568; 106TexCr539, 293SW822; 108Tex Cr291, 300SW83; 109TexCr224, 4SW (2d)69; 113TexCr45, 19SW(2d)316; TexCr 24SW(2d)420; TexCr 27SW(2d) 222(2dcase); TexCr 29SW(2d)404; Tex Cr 31SW(2d)1080(2dcase); TexCr 31 SW(2d)633; TexCr 32SW(2d)358; 100 Vt32, 134A636; 143Va609, 130SE777; Wash 286P102; 102WVa234, 134SE919; 103WVa191, 136SE861; 104WVa231, 139SE742; Wis 231NW634; 37Wyo 478, 263P616. [a] 26F(2d)791. [f] (2) Instruction as to date of offense, is unnecessary where date agreed upon, but not prejudicial. 34NM423, 282P870. [h] 307Mo 487, 271SW477. [p] Stating that premeditation might be "express" or "tacit" is harmless error, it being shown later that court was thinking about malice. 32PortoRico355. [q] Taking judicial notice of ethics of police department in charge not reversible error. 102Conn708, 130A184. [r] Instructions held not prejudicial.–199 Iowa 1068, 203NW240. [s] Where instructions throw greater burden on state, they do not prejudice defendant. 312 Mo 373, 278SW1016. [t] Misstating name of one of two defendants, in charge, where jury could not be misled, held harmless. NJSup 135A339. [u] Instruction not more prejudicial to defense than to state is harmless. 327 Ill 305, 158NE729. [v] Charge as to effect of other convictions though erroneous not ground for reversal. 108TexCr291, 300SW83. [w] Instruction considered as whole.–326 Ill 379, 158NE103.

340-65 Ariz 283P711; 198Cal 728, 247 P907; 67CalA674, 228P68; 79CalA127, 249P60; 83Colo 289, 264P720; 90Fla 324, 105S841; 38GaA253, 143SE776; 39 GaA662, 148SE290; 41GaA470, 153SE 434(2dcase); 28Hawaii546; 327 Ill 50, 158NE457; 327 Ill 463, 158NE716; 327 Ill 312, 158NE732; 198 Ind244, 152NE 164; 199 Ind647, 158NE477; 89 IndA 110, 165NE779; 209Ky184, 272SW430; Mo 23SW(2d)11; 243NY588, 154NE 616; OklCr 289P783(2dcase); 51SD277, 213NW504; 136Wash453, 240P562; 102 WVa421, 135SE393; 106WVa289, 145 SE634; 196Wis446, 220NW190.

340-66 126Me223, 137A244, 53ALR 241; 319Mo 28, 3SW(2d)230; NJ 135A 94; OklCr 276P791; 187Wis448, 204 NW486, 40ALR945 (different result must have probably resulted if instruction not given).

340-68 14F(2d)659; 15F(2d)494; 16F (2d)406; 19F(2d)923; 28F(2d)548; 220 Ala260, 125S384; 21AlaA256, 107S222; 22AlaA95, 112S811; 206Cal 235, 273P 789; 43 Ida766, 254P520; 318 Ill 332, 149 NE266; 324 Ill 70, 154NE448; 324 Ill 294, 155NE301; 338 Ill 56, 170NE14; 198 Ind502, 154NE273; 199 Ind567, 159NE 145; 200 Iowa772, 205NW325; Iowa 230 NW436; 214Ky216, 282SW1089; 226Ky 460, 11SW(2d)125; 231Ky541, 21SW (2d)830; 235Ky320, 31SW(2d)393; 167 La855, 120S477; 126Me223, 137A244, 53 ALR241; 232Mich46, 204NW763; 250 Mich573, 231NW126; 154Miss21, 122S 98; 320Mo 389, 8SW(2d)20; 320Mo 417, 8SW(2d)29; 219AppDiv196, 219NYS 184; 189NC538, 127SE599 (requiring defendant to prove innocence beyond reasonable doubt); 193NC236, 136SE 730; 51ND695, 200NW778; OklCr 290 P195; 119 Or404, 249P625; 96PaSuper 63; 49SD532, 207NW465; 104TexCr 127, 283SW512; 104TexCr346, 283SW 835 (requiring defendant in assault case to establish self-defense beyond a reasonable doubt); TexCr 20SW(2d)785 (2dcase); TexCr 25SW(2d)347; TexCr 27SW(2d)1098; 101Vt300, 143A284, 59 ALR1541; 150Va611, 143SE641; 136 Wash620, 241P9; 143Wash34, 254P463; 106WVa72, 144SE884.

341-69 16F(2d)406; 232Mich29, 204 NW747.

341-71 4F(2d)901 (erroneous instruction as to presumption of guilt from possession of unstamped narcotics leading jury to believe that such possession permits verdict of guilty of purchasing not in or from original stamped packages held reversible error); 46 Ida646, 270P140; 219AppDiv196, 219NYS184.

341-75 143Va540, 129SE257.

341-80½-New. Giving of oral instructions held reversible error. 324 Ill 70, 154NE448.

341-82 175Ark279, 298SW1021; 78 CalA395, 248P696; 169Ga367, 150SE100 (1stcase) (uncompleted sentence); OklCr 275P387; OklCr 283P1033 (oral explanations not materially altering written instructions). [a] Reference to supreme court decisions on margin no ground for reversal if only error in record. 324 Ill 294, 155NE301.

341-83 181Ark331, 25SW(2d)769; 75 CalA365, 242P906; 164Ga59, 137SE762; Ill 173NE112; 223Ky211, 3SW(2d)631; Mo 279SW705; 318Mo 687, 1SW(2d)96; 156SC375, 153SE344; 157Tenn446, 9SW (2d)702.

341-83½-New. are long and involved, 327 Ill 50, 158NE457.

341-84 12F(2d)873; 18F(2d)529; 77 CalA60, 245P811; 82CalA489, 255P781; 92CalA371, 268P472; 164Ga59, 137SE762; 34GaA144, 128SE924; 35GaA476, 133SE748; 36GaA115, 136SE89; 39GaA574, 147SE778(1stcase); 41GaA834, 155SE104; 319 Ill 386, 150NE249; 321 Ill 397, 152NE149; 323 Ill 61, 153NE705 (instruction omitting to state essential material facts); 324 Ill 101, 154NE463; 200 Iowa1394, 206NW607; 202 Iowa732, 210NW913; 204 Iowa130, 214NW708; 205 Iowa849, 216NW710; 218Ky72, 290SW1075; 126Mc363, 138A566; Mo 270SW275; 312Mo 490, 279SW405; 318Mo 687, 18SW(2d)96; 116Nebr125, 216NW294; 118Nebr267, 224NW274; 189NC565, 127SE601; 50ND270, 195NW567; 21OhA403, 153NE218; 93PaSuper446; TexCr 283SW820; 109TexCr394, 58W(2d)135; 100Vt259, 136A835; 104WVa231, 139SE742 (omitting word "wilfully").

341-85 240Mich98, 215NW62; 168Minn401, 210NW402.

341-86 224Ky269, 68W(2d)248; 147SC325, 145SE194.

341-87 47 Ida750, 278P776; 103NJL663, 138A575.

341-88 36GaA115, 136SE89; 51SD277, 213NW504.

342-90 70CalA519, 234P110; 165Ga326, 140SE889; 168Ga672, 148SE586; 321 Ill 397, 152NE149; 197 Ind491, 151NE382.

342-91 70CalA519, 234P110; 75CalA365, 242P906; 163Ga7, 132SE624; 335 Ill 61, 166NE163; 197 Ind491, 151NE382; NJSup 135A339; 116Nebr125, 216NW294; 53ND429, 206NW786; Utah262P113.

342-92 221AppDiv150, 223NYS133.

342-92½-New. That the jury returned a verdict in a lesser degree than the testimony would have sustained does not justify an inference that the jurors were misled by an instruction defining the degrees of the crime. 68CalA742, 230P197.

342-94 40F(2d)837; 20AlaA426, 103S707; 23AlaA339, 125S382; 31Ariz427, 254P467, 473 [citCJ]; 171Ark255, 283SW981; 172Ark240, 288SW384; 195Cal325, 233P97; 68CalA259, 228P868; 69CalA475, 231P572; 71CalA181, 235P72; 74CalA371, 240P526; 75CalA222, 242P506; 81CalA122, 252P1067; 81CalA456, 254P281; CalA 274P988; 100CalA550, 280P[illegible]; 102CalA[illegible], 283P830; CalA 290P479; CalA 292P[illegible]; 97Fla1059, 122S704; 166Ga561, 144SE109; 321 Ill 80, 151NE529; 321 Ill 128, 151NE505 (instruction on flight); 321 Ill 397, 152NE149; 325 Ill 578, 156NE798; 327 Ill 463, 158NE716; 327 Ill 312, 158NE732; 335 Ill 424, 167NE20; 338 Ill 23[illegible], 170NE303; 338 Ill 636, 170NE[illegible]; Ill 173NE[illegible]; Ill 173NE112; 199 Ind634, 158NE177; 89 IndA288, 166NE287(2dcase); Ind 168NE692; 204 Iowa1355, 217NW233; 119Kan743, 241P110; 124Kan556, 261P846; 226Ky831, 11SW(2d)925; 237Mich424, 212NW97; 240Mich489, 215NW315; 148Minn69, 225NW925; Mo 274SW43; Mo 18SW(2d)37; MoA 14SW(2d)515; 10NJL266, 111A75; 119Ohi231, 163NE28, 21OhA26, 152NE788; 21OhA26, 152NE788; 122Or444, 252P975; 122Or444, 259P893; 126Or238, 269P225; 144SC7, 142SE638; 49SD556, 206NW468; 104TexCr358, 258SW566; 109TexCr345, 48W(2d)642; 112TexCr395, 16SW(2d)1092; TexCr 20SW(2d)788; TexCr 20SW(2d)1049; TexCr 27SW(2d)222(2dcase); 143Va609, 130SE777 (error in instruction as to burden placed on accused as to self-defense not prejudicial where self-defense not involved); 141Wash148, 251P115; 144Wash370, 258P21; 151Wash575, 283P167.

342-95 122Or444, 252P975.

342-96½-New. Where defendant fails to produce sufficient evidence to raise a reasonable doubt of sanity, he cannot complain of alleged errors in instructions on insanity. OkiCr 279P525.

342-97 30Ariz448, 247P1103; 175Ark453, 299SW739; 70CalA315, 233P362; 76CalA648, 245P461; CalA 293P72; 98Fla985, 124S725; 162Ga178, 132SE899; 37GaA334, 140SE513; 198Ind502, 154NE273; 202Iowa1188, 211NW850; Iowa229NW701; 220Ky313, 295SW142; 237Mich424, 212NW97; NJSup 150A224 (1stcase); 197NC657, 150SE194; 122Or377, 259P298; 300Pa16, 150A94; 104TexCr127, 283SW512; 104TexCr669, 284SW965; 111TexCr539, 15SW(2d)638; 36Wyo532, 257P2.

343-98 229Ky617, 17SW(2d)757; 308Mo664, 274SW21 (instruction assuming conspiracy erroneous where there is no substantial evidence thereof); Mo 279SW696; 104TexCr127, 283SW512.

343-98½-New. Instructions based on repealed law. 33Wyo346, 239P526, 41ALR717.

343-99 335 Ill 466, 166NE925.

343-3 70CalA498, 233P816; 202Iowa1188, 211NW850; 234Mich419, 208NW458; OkiCr 283P1037.

343-4 [1927] CanSC112, [1927] 1DomLR1147.

343-6 114Nebr783, 210NW165.

343-7 135Wash240, 237P502.

343-8 310Mo500, 276SW625.

343-10 175Ark64, 297SW828; 87CalA724, 262P795; 92CalA245, 267P942; 200Ind557, 159NE545; 124Kan556, 261P846; 222Ky95, 300SW353; 237Mich127, 211NW44. [b] Where party not entitled to instruction, whether or not explanation as to meaning of probability of innocence was correct is immaterial. 213Ala555, 105S664.

343-12 100CalA149, 279P1040; 215Ky360, 285SW193; NJSup 133A46; 151NC90, 148SE710; 111TexCr249, 12SW(2d)572. But see TexCr 328SW(2d)474. [c] Reversible error may result from instructing in effect that "a doubt to justify an acquittal must be reasonable." 202Iowa173, 209NW458, 463, 47ALR407.

343-13 80CalA200, 251P675; 218Ky236, 291SW40; 131Or411, 282P226. [c] Failure to define term "sudden affray."–210Ky71, 275SW22. [d] Failure to define "felon" or "felony."–326 Ill104, 157NE76.

343-15 79CalA576, 250P588; 95CalA659, 273P110; Ill 173NE112; 208Ky556, 271SW657; Mo 118SW(2d)1020; 21OhA403, 153NE218; 54SD375, 223NW320.

343-16 79CalA576, 250P588; 202Iowa150, 209NW404; 208Ky556, 271SW657; 237Mich127, 211NW44; Mo 256SW1043; 307Mo487, 271SW477; 54SD375, 223NW320; 103TexCr403, 281SW844.

344-19 93Fla777, 112S62; 44Ida636, 258P553; 225Ky808, 10SW(2d)302; 161La686, 109S388; 102NJL659, 133A274; 219AppDiv196, 219NYS184.

344-20 219AppDiv196, 219NYS184.

344-20½-New. Charge assuming falsity of defendant's testimony justifies reversal. 245NY227, 157NE94.

344-21 [a] Instruction held not to assume defendant's guilt.–289Pa284, 137A261.

344-26 96CalA157, 273P854; 339 Ill480, 171NE544; 82Mont170, 266P400; 219AppDiv196, 219NYS184; 104TexCr442, 284SW554; 113TexCr53, 19SW(2d)44; Can [1929] 1DomLR143.

344-27 205Cal596, 271P1074; 71CalA402, 235P467; 106Conn260, 137A762; NJ 151A756; 29OhA419, 163NE634; 104WVa433, 140SE139.

344-29½-New. A charge that jury should convict if it believed particular testimony is erroneous where there is conflict of evidence. 213Ala550, 105S721.

344-32 328 Ill446, 159NE807.

344-33 95CalA60, 272P349; 43Ida564, 253P842; 315Mo232, 285SW712.

344-34 328 Ill446, 159NE807; 198Ind244, 152NE164; Ind 167NE524; 222Ky840, 28W(2d)1044 (favorable to accused).

344-35 74CalA440, 241P97; 307Mo487, 271SW477.

344-36 74CalA440, 241P97; 307Mo487, 271SW477; 105TexCr107, 286SW1100. But see 93Fla777, 112S62.

344-36½-New. Where evidence is undisputed on an issue it is not error to fail to instruct on it. 307Mo487, 271SW477.

344-36¼-New. or where the jury must necessarily have found the fact upon the issue omitted. 74CalA371, 240P526.

344-37 NJSup 133A46. [a] Omission of reference to knowledge of owner as element of offense is not harmful where lack of knowledge is unquestioned. 209Ky184, 272SW430 (operation of vehicle without knowledge and consent of owner).

344-37½-New. Instructions ignoring issue held prejudicial error. 21AlaA437, 109S181; 104TexCr46, 282SW242.

344-38 241Mich687, 217NW766; 315Mo203, 285SW990; 223AppDiv248, 228NYS24 (error cured by rereading testimony at counsel's request). [b] Prejudicial error.–Alta [1929] 1DomLR815.

345-39½-New. Failure of judge to state all the evidence in commenting thereon held no cause for reversal, if no material evidence is withdrawn from jury. 103NJL383, 135A895.

345-41 172Ark156, 287SW1026; 164Ga677, 139SE349; Mo 24SW(2d)1032; 103NJL383, 135A895; 138SC293, 136SE215.

345-42 335 Ill570, 167NE852; 198Ind39, 151NE132, 134 [citCJ]; 200Iowa892, 205NW517; 200Iowa884, 205NW518; 204Iowa670, 215NW752 (error in submitting unsupported issue of former conviction); 206Iowa365, 218NW936; 229Ky580, 17SW(2d)706(2dcase); 312Mo212, 278SW1030; 314Mo599, 285SW733; 317Mo413, 297SW63; 102NJL388, 132A93; 55ND511, 214NW800; OkiCr 275P387; OkiCr 275P1073; 145Va865, 134SE699; 153Va954, 151SE286; 105WVa298, 142SE254.

345-43 323 Ill540, 153NE727; 324 Ill311, 155NE321; 198Ind39, 151NE132, 134 [citCJ].

345-44 Mo 29SW(2d)135.

345-45 215Ky689, 286SW1076.

345-46 See also Mo 292SW440.

345-49 204Iowa130, 214NW708; 204Iowa118, 214NW710; 147Va678, 137SE478. See 96Fla318, 117S859.

345-50 157Tenn124, 6SW(2d)326.

345-51½-New. An instruction that the court could mitigate the punishment, in its discretion, is reversible error, where court could not grant probation under the circumstances. 206Cal235, 273P789.

345-51¼-New. Instruction, that if defendant is convicted, court will not impose maximum sentence is prejudicial error. 221AppDiv139, 222NYS683.

345-51¼-New. Where the court submits a smaller penalty than prescribed by law, to which defendant objects, and the jury assess a smaller penalty, the cause will be reversed. OkiCr 280P862 (2dcase).

345-51⅓-New. Judgment will be reversed where instructions over defendant's exception submit less penalty than prescribed by law and jury assesses such lesser penalty. OkiCr 288P371(2dcase).

345-52½-New. It is reversible error to instruct the jury that it is the exclusive province of the court to determine the punishment, where the jury is by statute given the right to determine whether imprisonment shall be in the state or county jail. 95CalA257, 272P797.

345-54 But see 197Wis295, 222NW247.

345-55 27Hawaii28.

345-55½-New. Error in submitting forms of verdict for both acquittal and conviction, not prejudicial, is not ground for complaint. 110TexCr230, 8SW(2d)165.

345-55⅓-New. Error in submitting written forms of verdict to the jury is not reversible error where defendant was not prejudiced thereby. 103TexCr103, 280SW200.

345-55¼-New. Fact that judge's signature had been inadvertently placed on two of five forms of verdict submitted to jury is not so prejudicial as to require reversal where the judge carefully explained the use of the forms. 200Cal730, 254P893.

345-56 92Fla878, 110S547; 203Iowa192, 210NW749; 169La55, 124S143(2dcase); 320Mo389, 8SW(2d)20; 111TexCr17, 10SW(2d)1008; 136Wash106, 238P920. [a] Including superfluous precautionary words held harmless. 326Ill104, 157NE76. [b] Explanation that

ordinarily defendant's testimony is not put before grand jury held not prejudicial to defendant's seeking to ascertain whether jurors were prejudiced. 104 TexCr244, 283SW846.

346-57 13F(2d)625; 23AlaA81, 121S2 (1stcase); 96Fla751, 119S517(1stcase); 330 Ill 516, 162NE133; 332 Ill 207, 163 NE430; 332 Ill 476, 163NE798; 230Ky 250, 19SW(2d)218; 111TexCr226, 13SW (2d)87. [a] 160Ga899, 129SE436.

346-58 31Ariz427, 254P467; 102Conn 708, 130A184; 327 Ill 305, 158NE729; 157Miss800, 128S764; TexCr 29SW(2d) 367.

346-60 20F(2d)782; 22F(2d)280.

346-61 136Wash106, 238P920. [a] **Instruction to draw only inferences** which guarded judgment of ordinary person would make held harmless. 198 Ind261, 151NE731.

346-61½-New. on value of expert testimony; 92Fla878, 110S547.

346-63 31Ariz427, 254P467.

347-71½-New. where instruction was favorable to defendant; 92Fla878, 110 S547.

347-72 23AlaA379, 125S788.

347-74 321 Ill 181, 151NE485; 151Miss 837, 119S303(1stcase). [b] 168Minn305, 210NW12. [c] (1) OklCr 287P750. [e] **Failure to charge on circumstantial evidence.**-113TexCr130, 19SW(2d)52. [f] **Withdrawal and instructions to disregard** necessary instruction is prejudicial. Mont 293P309.

347-75 7F(2d)553; 202 Iowa1188, 211 NW850; 126Me223, 137A244, 53ALR 241; 114 Oh299, 151NE182.

347-75½-New. But it is cured by its withdrawal and giving correct instruction. 215Ala619, 112S157.

347-77 22F(2d)504; 22AlaA418, 116S 910; 79CalA502, 250P202; 42 Ida319, 245P685; 221Ky202, 298SW675; 320 Mo 319, 6SW(2d)857; 189NC616, 127 SE675; 194NC121, 138SE518; 50ND 270, 195NW567, 570 [citCJ]; 14PaDist &Co 210; 100Vt32, 134A636; Wis 232 NW866.

347-78 164La813, 114S696.

347-79 40GaA360, 149SE429; 326 Ill 379, 158NE103; 240 IllA261; 203 Iowa 192, 210NW749; 208Ky556, 271SW657; 235Mich620, 209NW915; 308Mo 683, 273 SW1062. [c] (2) Erroneous instruction that burden of proving alibi is on accused is harmless in light of other instructions 152Va1014, 148SE821.

347-79¼-New. as where jury is instructed that immaterial part of statute read to jury did not apply to case. 169Ark770, 276SW858.

347-81 106Conn260, 137A762.

348-85 267US432, 45SCt345, 69L ed699, 37ALR1407; 214Ala117, 106S620; 75 CalA1, 241P928; 97CalA179, 275P482; CalA 287P362; 37GaA374, 140SE528; 42 Ida219, 245P77; 324 Ill 190, 154NE900; Ill 172NE64; 198 Ind39, 151NE132; 198 Ind491, 154NE276; 197 Ind16, 164 NE93; 230Ky589, 20SW(2d)455; 312 Mo 140, 279SW99; 317Mo 293, 295SW 743; 79Mont343, 256P380; 295Pa264, 145A89; 105TexCr281, 288SW213; 143 Va489, 129SE252; 103WVa148, 136SE 842; 103WVa191, 136SE861. [c] **Erroneous instruction** as to accomplice's testimony cured where other evidence sufficient to sustain verdict. 108TexCr 169, 300SW56.

348-86 21AlaA264, 107S323; 85CalA 575, 259P1005; 90CalA186, 265P525; 87Colo 84, 285P766; 331 Ill 636, 163NE 352; Mo 274SW54; 314Mo 673, 285SW 726; 194NC121, 138SE518; 101TexCr 462, 276SW256; 106TexCr280, 291SW 896.

348-87 75CalA1, 241P928; 39GaA826, 148SE608(2dcase); 41GaA299, 152SE 597; 199 Ind617, 159NE465; 200 Ind 112, 161NE565; Mo 16SW(2d)35; 142 SC24, 140SE258; 100TexCr165, 272SW 449; 104TexCr225, 283SW832.

348-88 213Ala576, 105S583; 214Ala 117, 106S620; 21AlaA264, 107S323; 174 Ark886, 298SW321; 180Ark1123, 24SW (2d)331; 94CalA635, 271P576; 98Fla 609, 123S912; 46 Ida456, 268P1; 331 Ill 636, 163NE352; 216Ky376, 287SW 933; 216Ky541, 287SW972; 233Ky356, 25SW(2d)746; 79Mont343, 256P380; 192NC80, 133SE404; 101TexCr462, 276 SW256; 104TexCr178, 283SW517; 103 WVa191, 136SE861; 103WVa482, 138SE 117; 104WVa1, 138SE732; 108WVa 630, 152SE203; WVa 153SE308. [a] (1) 104WVa1, 138SE732.

348-89 92CalA778, 269P465; 42 Ida 219, 245P77; 142Miss872, 108S143; Mo 256SW769; 113Nebr517, 204NW74, 206 NW153; 284Pa99, 130A302. [e] 197 Ind16, 148NE420. [f] **Verdict sustained by evidence.**-90Fla361, 106S75. [g] **Where jury found that killing resulted from unlawful act,** instructions defining "manslaughter" as lawful act negligently done is not error. 194NC121, 138SE518. [h] **Where evidence clearly supports verdict,** error, if any, in instructions, is immaterial. 312Mo 140, 279SW99. [i] **Instruction as to right to impose fine in excess of fifty dollars** is not prejudicial where lesser fine was in fact imposed. 155Tenn549, 296 SW20. [j] **Erroneous instruction as to penalty.**-Utah 284P108.

349-91½-New. Error in construction not cured by verdict convicting of highest offense. 190NC177, 129SE417.

349-93 21F(2d)932; 25F(2d)3; 41 F(2d)215 (as to prior conviction); 214 Ala117, 106S609; 215Ala570, 110S63; 21AlaA95, 105S705; 23AlaA85, 121S4; 30Ariz466, 248P39; 171Ark203, 284SW 28; Ark 30SW(2d)855; 68CalA95, 228 P417; 68CalA621, 230P221; 69CalA 174, 230P972; 78CalA167, 248P289; 78 CalA426, 248P1021; 78CalA731, 248P 1029; 79CalA127, 249P60; CalA 258P 146; 86CalA791, 261P526; 87CalA482, 262P361; CalA 262P428; 88CalA502, 263P836; 95CalA659, 273P110; 97CalA 537, 275P1017; CalA 286P176; CalA 288P880; CalA 291P872; CalA 290P 678; 105Conn757, 136A475; 88Fla135, 101S273; 93Fla372, 112S73; 98Fla609, 123S912; 160Ga899, 129SE436; 35GaA 168, 132SE731; 40GaA511, 150SE466; 42 Ida319, 245P685; 45 Ida92, 260P697; 47 Ida457, 276P39, 68ALR1061; 325 Ill 57, 155NE838; 326 Ill 104, 157NE76; Ind 151NE129; 205 Iowa1043, 218NW 939; 129Kan827, 284P616; 208Ky504, 271SW568; 210Ky71, 275SW22 (failure to define term "sudden affray"); 223Ky 484, 3SW(2d)1105; 225Ky802, 10SW (2d)286; 226Ky173, 10SW(2d)643; 161 La135, 108S312; 237Mich481, 212NW 105; 240Mich489, 215NW345; Mo 284 SW785; 315Mo 1320, 289SW935; 322 Mo 106, 16SW(2d)205; Mo 24SW(2d) 1006; 80Mont181, 260P138; NJ 135A 94; 249NY179, 163NE553; OklCr 274P 1094; 285Pa232, 132A168; 292Pa16, 140A537; 101TexCr462, 276SW256; 101 TexCr619, 276SW918 (withdrawal of court on which instruction requested); 102TexCr284, 278SW221 (failure to instruct that certain witnesses were accomplices); 103TexCr340, 280SW796; 104TexCr26, 282SW245; 104TexCr60, 282SW239; 104TexCr283, 284SW564; 105TexCr396, 288SW1087; 105TexCr 508, 289SW398; TexCr 291SW223; 106 TexCr133, 291SW230; 107TexCr8, 294 SW597; 108TexCr566, 2SW(2d)227; 110TexCr420, 10SW(2d)119; 112TexCr 395, 16SW(2d)1092; 112TexCr621, 18 SW(2d)160; TexCr 21SW(2d)527; TexCr 22SW(2d)944; TexCr 25SW(2d) 869; TexCr 28SW(2d)793(2dcase); 152 Wash155, 277P377; Wash 287P893; 199Wis63, 225NW191; Wis 231NW266; 37Wyo 155, 259P810.

349-94 27Hawaii28; 45 Ida92, 260P 697; 210Ky685, 276SW575; 162La719, 111S72; 322Mo 69, 16SW(2d)30.

350-95 21AlaA95, 105S705 (instructions correct but abstract under evidence); 78CalA426, 248P1021; 34GaA 178, 128SE689 (failure to charge on circumstantial evidence); 220Ky128, 294SW1062; 108TexCr444, 1SW(2d) 617.

350-96 199 Iowa842, 201NW75; 161La 135, 108S312; Mo 256SW740; 110Tex Cr478, 9SW(2d)352; 153Va954, 151SE 286.

350-97 14F(2d)596; 68CalA487, 229P 896; 84CalA6, 257P549; 96CalA1, 274 P361; 90Fla324, 105S841 (where evidence leaves no reasonable doubt of guilt); 157Miss624, 128S770(1stcase); 159Tenn263, 17SW(2d)899; 102WVa 421, 135SE393.

350-98 166Ga563, 144SE170; 38GaA 388, 144SE50; 41GaA470, 153SE434(2d case); 236Mich405, 210NW235.

350-98½-New. or warranted a conviction. 162Ga267, 134SE36.

350-99 289Pa498, 137A683.

350-1 95CalA680, 273P583; 45 Ida92, 260P697.

350-2 100TexCr412, 273SW602.

350-5½-New. Before refusal of special charge can be held reversible error, it must appear that charge has support in testimony and presents issue which, if decided in favor of defendant, will justify acquittal. 104TexCr533, 286SW204.

350-5¼-New. Refusal of instruction is not error where the subject matter thereof was fully covered by another instruction. 199 Ind129, 154NE802.

350-7 17F(2d)529; 32F(2d)116; 32 F(2d)602 (that defendant's wife cannot testify for him); 216Ala151, 112S761; 22AlaA128, 113S467; 36GaA645, 137SE 795; 41GaA493, 153SE430(2dcase); 323 Ill 567, 154NE418; 338 Ill 56, 170NE14; 200 Ind440, 164NE267; 255Mass304, 151NE297, 47ALR962; 146Miss659, 111 S752; Mo 29SW(2d)120; 32NM191, 252P1003; 31 OhA347, 166NE418; 35 OhA539, 172NE618; 35PortoRico 888; 103TexCr225, 280SW585; 105TexCr68, 286SW1088; 107TexCr8, 294SW597; 108 TexCr171, 300SW54; 111TexCr137, 12 SW(2d)221; 111TexCr381, 12SW(2d) 1024; Wash 290P992; 106WVa501, 146SE628.

350-9 216Ala151, 112S761; Mo 256 SW1043.

350-11 113TexCr153, 18SW(2d)1080; 135Wash301, 237P511.

350-14½-New. or to instruct as to the necessity of corroboration where corroboration is necessary; NB [1928] 2 DomLR598.

350-15 17F(2d)529; 101TexCr177, 274 SW607; 109TexCr433, 5SW(2d)149; 110TexCr383, 10SW(2d)548(2dcase); 113TexCr16, 18SW(2d)1078.

350-18 210Ky449, 276SW160.

350-20 16F(2d)370; 22F(2d)280; 29 F(2d)103; 21AlaA152, 106S341; 68CalA 457, 229P974; 84CalA642, 268P638; 86 CalA768, 261P512; 45 Ida92, 260P697; 219Ky490, 293SW982; 228Ky234, 14 SW(2d)759; 113Nebr790, 205NW252; 149SC232, 146SE875; 157Tenn421, 7 SW(2d)50; 102TexCr415, 278SW216; 106TexCr207, 292SW223.

351-21 308Mo 695, 274SW470.

351-22 219Ky490, 293SW982.

351-23 16F(2d)370; 203Cal 510, 265P 184; 220Ky128, 294SW1062; 229Ky 459, 17SW(2d)443; Cal 286P1025.

351-26 35GaA192, 132SE263; 316Mo 1, 289SW945; 110TexCr569, 9SW(2d)740.

351-27 [a] **Where crime was without doubt committed, and defendant's agency shown,** it is not reversible error to fail to charge on need of corroboration to convict on confession. 102TexCr415, 278SW216.

351-29 80CalA200, 251P675; 95CalA 711, 273P99.

351-32 Miss 128S769.

351-41 23F(2d)48; 36GaA645, 137SE 795; 146Miss659, 111S752; 142Wash57, 252P530; 154Wash667, 283P195.

351-42 TexCivA 293SW628.

351-44 22AlaA128, 113S467; 22AlaA 129, 113S469; 220Ky80, 294SW828.

352-45 224Ky126, 5SW(2d)889.

352-48 35GaA192, 132SE263; 36GaA 584, 137SE413; 104TexCr420, 284SW 545; 104TexCr454, 284SW221; 110 TexCr276, 8SW(2d)118. See also NS [1930] 3DomLR312.

352-52 71CalA213, 234P877; 105Conn 757, 136A475; 91Fla446, 107S331; 162 Ga267, 134SE36; Mo 256SW496; 101 TexCr336, 275SW829.

352-54 21AlaA503, 109S558; Mo 278 SW982.

352-55 20AlaA201, 101S288; 20AlaA 642, 104S778; 21AlaA459, 109S294; 91 Fla446, 107S331; 197 Ind419, 151NE 129; 101TexCr462, 276SW256.

352-55½-New. , or where the count to which the instruction was applicable was dismissed. 197 Ind419, 151NE 129.

352-56 220Ky368, 295SW159.

352-57 47 Ida162, 272P1010; 121Kan 576, 586, 249P617 [citCJ]. But see NC 153SE605.

352-60 243Mich534, 220NW702.

352-61 21F(2d)285; 22F(2d)280; 213 Ala591, 106S134; 214Ala117, 106S609; 21AlaA95, 105S705; 21AlaA15, 105S714; 22AlaA581, 118S239; 170Ark1193, 282 SW983; 173Ark1115, 295SW29; 75CalA 38, 241P892; 87Colo 507, 289P1081; 93 Fla372, 112S73; 42 Ida319, 245P685 (requested instructions substantially covered by those given); 326 Ill 379, 158NE 103; 326 Ill 518, 158NE142; 197 Ind 463, 150NE365; 198 Ind614, 154NE370; 252Mass465, 148NE123; 265Mass428, 163NE758; 237Mich481, 212NW105; Miss 111S864; NJ 135A94; 105NJL 352, 144A612; NJSup 132A289; 298Pa 370, 148A501; 100TexCr476, 273SW 561; 104TexCr178, 283SW517; 105 TexCr101, 287SW53. See also 90Pa324, 105S841.

353-62½-New. Error in failing to give affirmative charge on an issue is not ground for reversal where a special charge on such issue was given at defendant's request. 101TexCr462, 276 SW256.

353-62½-New. Delay in instructing jury as to purpose and effect of impeaching evidence until case is submitted and jury is called back for proper instruction on the matter is not prejudicial. 210Ky554, 276SW519.

353-62¼-New. Error in failing to instruct that if there is a reasonable doubt as to the degree of the offense committed defendant shall be convicted of the lower degree only is not cured by an instruction on reasonable doubt required by statute. 210Ky449, 276SW 160.

353-64 319 Ill 359, 150NE263.

353-65 72Mont306, 233P602; 142Va 602, 128SE454.

353-68 SC 155SE409. [i] **Refusal of special charge** held not reversible error, unless record shows charge was presented after closing of evidence and before main charge. 107TexCr609, 298SW 429.

353-70 172Ark983, 291SW85; 200 Iowa 1250, 206NW260, But see 292Pa418, 141A946.

353-71 200 Iowa1250, 206NW260.

353-72½-New. It is reversible error for the judge to go into the jury room and instruct the jury as to the law or the evidence, or the form of the verdict to be rendered by them. OklCr 275P390.

353-72¾-New. Refusal of court to submit its charge to defendant's counsel for examination before being read as required by statute has been declared error. 100TexCr563, 272SW153.

353-74 198 Ind360, 153NE772 (judgment reversed where evidence of guilt not conclusive); 198 Ind405, 153NE890; 214Ky228, 282SW1060; 169La684, 125 S854; 242Mich523, 219NW631.

353-75 Mo 308W(2d)59; 82Mont165, 266P386; 53ND879, 207NW1000. But see 233Ky244, 25SW(2d)378.

354-82 199Cal 610, 250P659; 44 Ida 739, 260P164; 115Nebr277, 212NW606; 150NC341, 148SE184.

354-84 272US448, 47SCt135, 71Led345; 20F(2d)289; 11F(2d)193; 171Ark730, 286SW809; Ark 308W(2d)865; 68CalA 686, 230P23; 90CalA683, 266P813; 205 Iowa373, 217NW871; 116Nebr277, 212 NW606; 104TexCr633, 283SW172, 1072; 111TexCr414, 138W(2d)108(2dcase); 112TexCr203, 17SW(2d)813. But see 111TexCr21, 10SW(2d)991. [b] (1) 23 AlaA201, 123S99(2dcase). Contra 113 TexCr302, 21SW(2d)516. (16) Casual comment in jury room on possibility of deduction of time accused had spent in jail from sentence imposed and mention of a previous conviction which jurors testified was not subject of general discussion and did not influence verdict. 100TexCr364, 272SW780. (17) Reference to failure of accused to testify, where it did not appear that it entered into consideration of jurors. 104TexCr 633, 283SW172, 1072. (18) Concealment of fact that prior to trial juror had wagered that defendant would be electrocuted, where juror claimed he had forgotten incident. 23 OhA237, 155NE569. (19) Where verdict was for lowest penalty and facts are sufficient to support it. 104TexCr95, 282SW595. (20) Jurors reading newspaper accounts of matters leading up to indictment. 20F(2d)289. (21) Remark made by juror based on hearsay and not stated as fact or as within his knowledge. 124Kan496, 260P618. (22) Action of some of jurors in viewing damaged automobile in prosecution for driving automobile while intoxicated. OklCr 287P1053. (23) Other instances. OklCr 291P145. [f] **Prejudicial error.**–135 Wash295, 237P730. (2) 109TexCr133, 3 SW(2d)444. [g] **Complaint for misconduct of jurors** must be shown by bill of exceptions as facts verified by trial judge. TexCr 283SW811. [h] **Contract held improper.**–105TexCr186, 287SW261. [i] **Judge's action in leaving jury** without means of communicating with him when instructing clerk to discharge them at certain time did not require reversal. 23F(2d)156. [j] **Improper remarks of juror held not to require reversal,** where evidence showed that they did not affect verdict. 167La 390, 119S402. [k] **Prejudice shown.**–111 TexCr35, 10SW(2d)1006 (receiving testimony during deliberation). [l] **Facts warranting reversal.**–233Ky533, 26SW(2d)23. [m] **Errors held prejudicial.**–TexCr 24SW(2d)836. [n] **Reception of prejudicial testimony after retirement** ordinarily works reversal. TexCr 26SW(2d)649.

354-84½-New. Where the trial court heard evidence as to alleged misconduct of jurors, its decision will not be reversed in the absence of abuse of discretion. 105TexCr318, 287SW249, 1099.

354-84¼-New. Reviewing court is not warranted in saying what juror's right to discuss testimony should be. 108 TexCr672, 28SW(2d)223.

354-84¼-New. Permitting jury to smell of whisky, if error, is harmless where there is no controversy as to character of liquor. 108TexCr566, 2 SW(2d)227.

354-86 22AlaA582, 118S241; 90CalA27, 265P366; 102CalA688, 283P388; 333 Ill 104, 164NE138; Ind 171NE585; 207 Iowa334, 221NW556; 103TexCr158, 280 SW784; 199Wis615, 227NW268.

354-87 197Wis454, 222NW245.

355-91 36F(2d)738.

355-94 326 Ill 379, 158NE103.

355-98½-New. It is prejudicial error to permit the jury in a prosecution for possession of intoxicating liquors for the purpose of sale to taste and smell the liquor for the purpose of determining whether or not they think it is intoxicating. 101TexCr68, 274SW133

355-99 Ark 30SW(2d)822; 128Kan475, 278P767. But see 42 Ida544, 246P304.

355-2 152Miss723, 120S838; TexCr 26 SW(2d)638.

355-7 173Ark1172, 294SW397; 86CalA 130, 260P321.

355-8 84CalA58, 257P592; OklCr 287 P826; 106TexCr124, 290SW539.

355-10 93CalA650, 269P980; 170La991, 129S612(4thcase); 175Minn174, 220NW 547; 52SD615, 219NW830.

356-12 31Ariz357, 253P629; 124Kan 479, 260P617; 209Ky51, 272SW11; 221 MoA592, 283SW468; 151Va556, 145SE 336.

356-13 40F(2d)820; 41F(2d)682; 21 AlaA140, 106S203; 172Ark240, 288SW 384; 176Ark1206, 2SW(2d)87; 207Cal 605, 279P646; 75CalA74, 241P924; 88 CalA222, 263P306; CalA 284P484; 198 Ind73, 152NE607; 197 Ind16, 164NE 93; 124Kan479, 260P617; 243Mich534, 220NW702; 317Mo 268, 295SW741; 221 MoA592, 283SW468; NC 153SE605; Tex Cr 25SW(2d)850; TexCr 31SW(2d)641. [a] 75CalA74, 241P924. [b] 197 Ind663, 151NE722.

356-13½-New. Erroneous verdict of a jury does not constitute legal error. NJ 130A446.

356-14 75CalA365, 242P906.

356-15 [a] **Sealed verdict.**–Iowa 232NW 127.

356-16 102TexCr498, 278SW437.

356-20½-New. Where punishment after conviction of two counts can be properly imposed as to the offense in the first count, the propriety of the other count is immaterial. 26F(2d)797.

356-20¼-New. Verdict of guilty on each of two counts and fixing punishment at certain number of days in county jail requires reversal for uncertainty as to whether punishment fixed was intended for each count or both. 101TexCr71, 274SW566.

356-20¼-New. In New York unanimous affirmance of conviction by appellate division is conclusive on court of appeals that defendant made fraudulent representations, knowing them to be false and induced prosecuting witness to part with his money. 241NY128, 149NE221.

356-20½-New. Where appellate court cannot tell on which of two grounds general verdict was found, it must be set aside if one of the grounds is insufficient. 216AppDiv240, 214NYS537.

356-22 7F(2d)244; 20F(2d)325; 215 Ky335, 285SW207; 254Mass390, 150NE 181; 155Miss298, 124S353(2dcase); 189 NC516, 127SE590; 54ND178, 208NW 977; 54ND193, 209NW231; 35Porto Rico 253. [a] (9) Omission of words "as charged in the information." 72CalA 565, 237P568.

356-23½-New. It has been held reversible error to enter judgment for manufacturing liquor, where the indictment only charged the possession thereof. 22 AlaA500, 117S487.

356-24 153Tenn198, 281SW462; 154 Tenn105, 289SW363, 53ALR821.

356-25 14F(2d)606; 80CalA605, 251P 321; 103Conn138, 130A96; Mo 285SW 412; Mo 285SW976.

356-26 Iowa 206NW620.

356-26½-New. Defendant, convicted of manslaughter, cannot complain of extension of the term to consider matters in a motion for a new trial and in the jurors' affidavit. 110TexCr243, 8SW(2d) 153.

356-26¼-New. That judgment was pronounced without appreciable interval after verdict so that defendant had no opportunity to move for new trial requires reversal. Mo 24SW(2d)1003.

356-28 279US263, 49SCt268, 73Led692; 14F(2d)925; 16F(2d)872; 21AlaA504, 109S563; 21AlaA591, 110S412; 78CalA 685, 248P954; 101CalA376, 281P700; 85Colo 479, 277P1(2dcase); 231Ky527, 21SW(2d)840; 157Md75, 145A185; Mo 273SW1069; 102NJL318, 133A403; NC 155SE257; Va 152SE547. But see 27 OhNPNS252. [e] 14F(2d)925. [f] **Where, upon application for suspended sentence,** defendant was not represented by counsel, upon preparation thereof by such counsel as required by statute conviction will be reversed. 112TexCr541, 17SW(2d)1063.

356-28½-New. Even if the various counts stated only one offense, there was no prejudicial error in imposing separate sentences. 33F(2d)713.

357-29 See also 80CalA605, 251P321. [a] **Sentence of seventy-five years** in penitentiary for rape affirmed on appeal, no error being shown. TexCr 291SW 898.

357-29½-New. Where the sentences under separate counts are to run concurrently, sentence, if proper under any count, must be affirmed. 20F(2d)901.

357-29¼-New. **Where sentences on separate counts run concurrently,** and judgment under certain counts was proper, a shorter sentence under other counts is not harmful. 25F(2d)90.

357-29¼-New. Sentence in excess of that which might be authorized under the first count in an indictment is not prejudicial where the other count in the indictment covers it. 13F(2d)369.

357-29½-New. Suspension of sentence, subject to call by prosecutor, held not prejudicial to defendant. 82NH459, 135 A530.

357-29¾-New. The circuit court of appeals, when the question arises as to an unjust result, will not ignore error not justifying reversal except for sentence. 17F(2d)529.

357-29½-New. Where the penalty imposed is no greater than that authorized by law, one sentenced to pay a fine, and to serve a term of imprisonment with a provision for parole on payment of the fine, cannot, after procuring his release from custody upon his tacit acceptance of the terms of the parole, assert the invalidity of the provision for his probation. 162Ga327, 133SE843.

357-29½-New. Failure to find because of immateriality facts established by evidence which defendant requested is not ground for relief on appeal where they could not affect result. 107Conn630, 141 A660.

357-29½-New. Where timely objection is made to irregular proceedings for revocation of suspension of sentence, failure to sustain objection is prejudicial to defendant. 70Utah296, 259P 1044, 54ALR1463.

357-31 79CalA295, 249P525 (modification of record by court); 94CalA238, 270P1000; 98Fla206, 123S755(1stcase);

357-32 230Ky572, 20SW(2d)441(1st case).

357-32½-New. The court's failure to find defendant's age before sentence to reformatory held not reversible error. 199 Ind117, 155NE259.

357-34 80CalA528, 251P941; 36GaA 656, 137SE797; 292Pa16, 140A537.

357-35 170Ga810, 154SE229; 210Ky 637, 276SW524 (ground for reversal that jurors in homicide case were related by consanguinity or affinity to deceased); 97PaSuper489.

357-36 99CalA32, 277P1102; 36GaA83, 135SE513; 337 Ill 161, 169NE9; 197 Ind16, 148NE420; Iowa 206NW620; 254Mass390, 150NE181; Mass 165NE2; 106TexCr550, 293SW575.

357-40 51SD415, 214NW812; 105TexCr 522, 289SW392.

357-40½-New. It is reversible error to examine a witness orally or a motion for a new trial without giving notice of hearing to accused. 135Wash482, 238 P11.

357-40¼-New. Denial of new trial is not reviewable by writ of error, either at common law or under statute. 103 NJL383, 135A894.

357-40¼-New. Representation of counsel on motion. Permitting former district attorney to represent commonwealth in opposing motion for new trial as special assistant district attorney is not prejudicial, although his appointment was irregular. 255Mass369, 151 NE839.

358-46 21AlaA482, 109S888; 21AlaA 562, 110S563; 171Ark655, 286SW818; 72CalA102, 236P944; 92Fla878, 110S 547; 164Ga728, 139SE352; 198 Ind261, 151NE731; 200 Iowa313, 202NW212; 214Ky4, 282SW185; 214Ky422, 283SW 420; MoA 158W(2d)931; Mo 29SW(2d) 54; 21 OhA33, 153NE109; 35 OhA311, 172NE401; 105TexCr132, 286SW989; 110TexCr52, 7SW(2d)532; 110TexCr 560, 9SW(2d)360. [a] (11) Statement of prosecuting attorney. 49Nev75, 236 P1100. (12) Remarks of district attorney. 49Nev75, 236P1100.

358-50½-New. Defendant could not complain that the indictment went further in charging the crime than the statute required. 220Ala268, 125S606.

358-50½-New. Defendant cannot complain that he could have been charged with, and convicted of, the higher offense included in the same acts. OklCr 280P630.

358-52 21AlaA264, 107S323; 21AlaA 629, 111S188; 22AlaA176, 113S644; Cal 292P459; 78CalA476, 248P981 (tending to support defendant's claim of insanity); 84CalA99, 257P583; 77Colo 432, 236P1022; 164Ga292, 138SE238; 36GaA 266, 136SE460; 167La635, 120S33; 49 Nev75, 236P1100 (evidence favorable to accused); 48SD409, 205NW25; 105 TexCr436, 289SW61.

359-53 105TexCr436, 289SW61.

359-59 21AlaA562, 110S563; AlaA 129 S706; 45 Ida760, 265P24; 170Minn441, 213NW34. See also 81Mont145, 262P 158.

359-64 32F(2d)540; 41F(2d)654; 176 Ark1206, 2SW(2d)87; 70CalA476, 233P 406; 75CalA365, 242P906; 75CalA672, 243P476; 93CalA590, 269P955; 105 Conn757, 136A475; 89Fla212, 103S636; 92Fla878, 110S547; 161Ga332, 131SE 80; 163Ga878, 137SE378; 164Ga728, 139SE352; Ga 155SE329; 39GaA662, 148SE290; 41GaA565, 153SE780; 41 Ida616, 243P359; 338 Ill 237, 170NE 303; 197 Ind491, 151NE382; 197 Ind 575, 150NE371; 198 Ind261, 151NE731; 205 Iowa430, 216NW610; 205 Iowa604, 218NW145; 208 Iowa1143, 226NW16; Iowa 229NW231; 119Kan743, 241P110; 120Kan387, 243P1026; 129Kan155, 281 P886; 210Ky150, 275SW630; 210Ky 413, 276SW112; 214Ky4, 282SW185; 214Ky422, 283SW420; 219Ky406, 293 SW975; 223Ky211, 3SW(2d)631; 163 La609, 112S503; 169Minn298, 211NW 334; 149Miss171, 115S217; 308Mo 683, 273SW1062; 309Mo 155, 274SW734; 312Mo 510, 279SW411; 313Mo 71, 281 SW35; 313Mo 615, 285SW392; 314Mo 599, 285SW733; 315Mo 1279, 289SW 792; 317Mo 276, 295SW554; 320Mo 319, 6SW(2d)857 ("accident"); Mo 7SW(2d) 1001; Mo 30SW(2d)59; Mo 30SW(2d) 132; MoA 279SW733; 76Mont421, 246 P959; 241NY128, 149NE221; 50ND927, 198NW698; 54ND768, 210NW971; 21 OhA33, 153NE109; OklCr 292P1053; 118 Or5, 244P512; 297Pa160, 146A553 (defining reasonable doubt); 29Porto Rico 961 (instruction as to second-degree murder); 139SC539, 138SE352; 103TexCr282, 280SW588; 110TexCr128, 7SW(2d)579; 147Va624, 136SE765; 187Wis122, 203NW749. [c] (1) 70CalA 498, 233P816. [f] **Instructions held favorable to defendant.**-197 Ind575, 150 NE371.

360-65 163Ga878, 137SE378; 202 Iowa 1188, 211NW850; 214Ky4, 282SW185; 214Ky422, 283SW420; 146Miss540, 112 S681; Mo 279SW133; 312Mo 510, 279 SW411; 318Mo 813, 1SW(2d)143; 54ND 768, 210NW971; 298Pa370, 148A501; 147Va624, 136SE765.

360-66 202 Iowa732, 210NW913; Mo 30SW(2d)750.

360-67 26F(2d)769; 105Conn757, 136A 475; 214Ky4, 282SW185; 214Ky232, 282SW1065; 214Ky422, 283SW420; La 129S736; 156Miss612, 126S390(2dcase); 316Mo 647, 291SW118.

360-68 313Mo 615, 285SW392; 109Tex Cr213, 3SW(2d)808.

360-71 319Mo 28, 3SW(2d)230; NJSup 134A294.

361-74 75CalA365, 242P906.

361-74½-New. which limits effect of evidence to one defendant only; 76Mont 421, 246P959.

361-76 40GaA15, 148SE622.

361-81 23AlaA339, 125S382; 168Ark 932, 272SW648; 200 Iowa313, 202NW 212; Iowa 223NW554; 222Ky99, 300 SW357; 148Miss1, 113S627.

361-82 46 Ida20, 265P671; OklCr 267 P869.

361-82½-New. , or confined the issue of guilt to a lesser offense. 91CalA44, 266 P581.

361-86 Ida 288P894; 155Miss298, 124 S353(2dcase); Mo 25SW(2d)109; 54ND 840, 211NW585; 101TexCr462, 276SW 256.

361-88 210Ky413, 276SW112; 54ND 840, 211NW585.

361-91 70CalA476, 233P406; 164Ga 292, 138SE238.

361-93 72CalA102, 236P944 (verdict more favorable than evidence warrants); 328 Ill 602, 160NE125; 89 IndA132, 166 NE14; Iowa 223NW554; 105TexCr395, 289SW40; 106TexCr500, 293SW1112. [a] (2) Where punishment of defendant, convicted under statute, requiring punishment by both fine and imprisonment, was limited to imprisonment, he cannot complain. 16F(2d)119.

362-94 169Ark421, 275SW758; 68CalA 742, 230P197; 72CalA102, 236P944; 76 CalA558, 244P1086; 81CalA113, 252P 1063 (robbery); 92CalA593, 268P687; 97CalA71, 274P1018; Iowa 223NW554, 316Mo 115, 289SW862; 49Nev194, 242P 582, 586 [quotCJ]; 133Misc733, 234NYS 233; 159Tenn245, 17SW(2d)919; 106 TexCr500, 293SW1112.

362-95½-New. In prosecution on three counts defendant cannot complain of wrongful acquittal on two of the counts. 72CalA102, 236P944.

362-96 92CalA417, 268P382; 92Fla 1062, 111S725; 35GaA235, 133SE281; 35GaA236, 133SE282; 200 Ind551, 165 NE316, 65ALR980; 153Tenn319, 283 SW986; 105TexCr468, 288SW1081; 197 Wis446, 222NW311. [a] (3) Verdict and judgment fixing punishment at thirty days confinement where statute required not less than one month which under statute means calendar month unless otherwise expressed. 142Va596, 128SE638.

362-99 17F(2d)67, 69 [quotCJ]; 76 CalA525, 245P436; 307Mo 291, 270SW 298; 49SD485, 207NW466; 52SD91, 216NW858; 157Tenn383, 8SW(2d)479.

362-3 171Ark762, 286SW937; 169Ga 468, 151SE34; 114Nebr17, 205NW559; 144Wash425, 258P29.

362-4 [b] **More favorable instructions.**-100TexCr474, 273SW607.

362-4½-New. Although defendant requested an erroneous instruction assuming the existence of a presumption that did not exist, he may complain of the refusal of an instruction properly limiting the effect of such presumption. 144Wash425, 258P29.

362-5 235Ky588, 31SW(2d)940. [a] **Affirmance or reversal of cases is not discretionary** with court of criminal appeals which is bound by precedents, legislative enactments, and constitutional provisions. 113TexCr378, 22SW(2d) 660.

363-8½-New. Where judgment is void because sentence not authorized by statute appellate court can impose proper sentence. 72CalA543, 237P769.

363-9 32F(2d)449 (effect of and proceedings on new trial). [a] (4) MoA 297SW124(1stcase). (8) To pass upon entire motion for new trial where court has failed to pass on all grounds. 76 Mont421, 246P959.

363-10 24F(2d)82.

363-10½-New. Court need not discuss alleged errors urged on behalf of a defendant who has escaped and is a fugitive from justice. 78CalA451, 248 P929.

363-13 180Ark588, 22SW(2d)34; Iowa 228NW308 (direction of verdict of acquittal).

363-15 179Ark384, 16SW(2d)1.

363-17 172Ark480, 289SW324.

363-19½-New. Certiorari. On certiorari to review affirmance of a judgment of conviction the court issuing the writ will neither affirm nor reverse the judgment, nor try the case upon its merits. 90Fla84, 105S142.

363-19¼-New. On certiorari to review affirmance of a judgment of conviction, if on review of transcript and bill of exceptions, it appears that judgment or proceedings are not in accordance with essential requirements of law, judgment will be quashed, otherwise certiorari will be quashed. 90Fla84, 105S 142.

363-23 5F(2d)940; 213Ala264, 104S 638; 21AlaA190, 106S512; 21AlaA207, 106S872; 32Ariz70, 255P1118; 177Ark 1195, 9SW(2d)235(1stcase); 94CalA222, 270P968; 100CalA481, 280P176(1st case); CalA 281P411(2dcase); 102CalA 271, 282P826(1stcase); CalA 284P1095 (1stcase); CalA 292P1082(1stcase); 89 Fla39, 103S617; 36GaA128, 135SE448; 36GaA130, 135SE495; 41 Ida105, 237P 702; 317 Ill 423, 148NE243; 325 Ill 307, 156NE369; 197 Ind16, 148NE420; Iowa 233NW57(1stcase); 214Ky578, 283SW 1034; 221Ky433, 298SW1078; 159La 1064, 106S566; Mo 274SW356; Mo 285 SW101; 316Mo 977, 292SW60; Mo 6 SW(2d)841; MoA 256SW514 (bill of exceptions not signed); MoA 289SW 348; NJSup 137A829; 190NC443, 129 SE814; OklCr 274P894(1stcase); Okl Cr 274P895(2dcase); OklCr 274P900 (1stcase); OklCr 274P902(1stcase); OklCr 274P902(2dcase); OklCr 274P 1092(1stcase); OklCr 275P383(1stcase); OklCr 278P209(2dcase); OklCr 278P 400(1stcase); OklCr 278P402; OklCr 280P473(1stcase) (no brief or oral argument); OklCr 283P579(1stcase); Okl Cr 283P582; OklCr 283P584(1stcase); OklCr 283P586(1stcase) (appeal from misdemeanor as included in felony charged); OklCr 283P1034(1stcase) (no brief); OklCr 286P23; OklCr 287P1075 (1stcase); OklCr 287P1075(2dcase); Okl Cr 288P365(1stcase); OklCr 288P368; 99TexCr641, 270SW1030; 101TexCr166, 274SW572; 102TexCr277, 278SW214 (no bill of exceptions or objections to charge); 104TexCr579, 286SW222; 104 TexCr603, 286SW234; 105TexCr128, 287SW51; TexCr 287SW1111(3dcase); TexCr 287SW1111(4thcase); TexCr 287 SW1111(6thcase); TexCr 287SW1112 (1stcase); TexCr 287SW1112(6thcase); TexCr 287SW1113(7thcase); TexCr 287

SW1113(9thcase); TexCr 287SW1114 (2dcase); TexCr 287SW1114(3dcase); TexCr 287SW1114(4thcase); 105TexCr 208, 287SW1114(5thcase); TexCr 287 SW1114(6thcase); TexCr 287SW1115 (2dcase); TexCr 287SW1115(3dcase); TexCr 287SW1115(4thcase); TexCr 287 SW1115(5thcase); TexCr 287SW1115 (6thcase); TexCr 287SW1115(7thcase); TexCr 287SW1115(8thcase); TexCr 287 SW1116(1stcase); TexCr 287SW1116 (2dcase); TexCr 287SW1116(3dcase); TexCr 287SW1116(5thcase); TexCr 287 SW1117(1stcase); TexCr 287SW1117 (2dcase); TexCr 287SW1117(3dcase); TexCr 287SW1117(4thcase); TexCr 287 SW1117(5thcase); 105TexCr549, 289SW 412; TexCr 290SW175; TexCr 290SW 176; 106TexCr219, 291SW547; 108Tex Cr647, 28W(2d)271; TexCr 28W(2d) 455; TexCr 5SW(2d)990; TexCr 12SW (2d)205(1stcase); TexCr 13SW(2d)855 (2dcase); 112TexCr45, 13SW(2d)887; 112TexCr431, 17SW(2d)55; TexCr 17 SW(2d)1072(1stcase); TexCr 22SW(2d) 461; TexCr 29SW(2d)383.

364-27 126Kan15, 266P938.

364-28 73CalA113, 237P1117; 81CalA 526, 254P291; 85CalA312, 259P1119(1st case); 85CalA311, 259P1119(3dcase); 95CalA258, 272P754; 98CalA63, 276P 393; OklCr 272P1037.

364-23½-New. where no brief was filed and the cause was ordered submitted on the record. 73CalA113, 237P1117.

364-28¼-New. and the evidence is sufficient to sustain conviction. 73CalA 113, 237P1117.

364-28¼-New. and no error is discovered in the record. 73CalA113, 237P 1117.

364-28½-New. that no brief was filed and no appearance was made on call for oral argument. 81CalA253, 253P 1115(4thcase); 81CalA251, 253P1115 (5thcase); 81CalA252, 253P1116(1st case); 81CalA253, 253P1116(2dcase); 81CalA250, 253P1116(3dcase).

364-30 See also 118 Or684, 247P1119.

364-35 See also 35GaA256, 132SE646.

364-36 21AlaA664, 109S923; 22AlaA 307, 115S149; 68CalA620, 229P1114; 90 Fla86, 105S144 (where proceedings in pais complained of on writ of error were not excepted to); 90Fla324, 105S841; 92Fla125, 109S305; 94Fla318, 113S689; 94Fla163, 113S699; Fla 130S912; 33 GaA825, 127SE877; 35GaA252, 132SE 781; 35GaA568, 134SE178; 35GaA680, 134SE448; 196 Ind722, 149NE436; Iowa 220NW127(1stcase); Iowa 220NW 129(2dcase); 126Kan635, 271P269; 126 Kan752, 271P308; Kan 289P409; 222 Ky840, 28W(2d)1044; 223Ky211, 3SW (2d)631; 231Ky473, 21SW(2d)799; 158 La240, 103S753; Miss 107S385(1stcase); Miss 107S385(3dcase); 307Mo 500, 271 SW55 (improper confession of error by state will not require reversal); 114 Nebr33, 206NW18; 114Nebr404, 207 NW928; NJSup 149A346; 197NC376, 148SE450; 34 OklCr52, 244P451; OklCr 268P732; OklCr 269P507(1stcase); OklCr 276P235(1stcase); OklCr 276P 239(2dcase); OklCr 276P242(1stcase); OklCr 276P242(2dcase); OklCr 280P862 (1stcase); OklCr 281P154(1stcase); OklCr 281P157(1stcase); OklCr 281P 160(1stcase); OklCr 281P320; OklCr 290P927(2dcase); OklCr 290P1108; OklCr 292P82; 297Pa326, 146A905; 101TexCr670, 276SW919; 104TexCr479, 284SW586; TexCr 293SW1116; 107 TexCr42, 293SW1117; TexCr 293SW 1118(1stcase); TexCr 293SW1118 (3d case); TexCr 293SW1118(6thcase); 107 TexCr38, 293SW1118(5thcase); TexCr 20SW(2d)770; 113TexCr570, 24SW(2d) 56; TexCr 24SW(2d)60(2dcase); TexCr 24SW(2d)396; TexCr 24SW(2d)427(2d case). [b] **On indictment specifically charging manslaughter conviction of manslaughter on verdict of guilty as charged will be affirmed,** where evidence is legally sufficient to support verdict and no prejudicial errors appear. 90 Fla39, 105S113. [c] **Appeal from intermediate appellate court.**–119 Oh162, 162 NE429.

365-41 99Fla1350, 126S751; 99Fla545, 126S765; Fla 130S915; 160Ga199, 127 SE608; 162Ga307, 134SE41; 163Ga336, 136SE268; 168Ga359, 147SE761; 169 Ga808, 151SE493; 169Ga832, 151SE810; 237Mich481, 212NW105; 238Mich540, 213NW695; 238Mich401, 213NW715; 142Miss256, 107S200; 196NC246, 145 SE236(1stcase); 89PaSuper277; 198 Wis42, 223NW408(1stcase). But see 95 Fla131, 116S818.

365-45 Mo 29SW(2d)686.

365-46 89PaSuper339; Sask [1925] 2 DomLR1000 (upon appeal from sentence court can only exercise its best judgment and after careful consideration reduce or increase sentence accordingly).

365-54 323 Ill 28, 153NE597, 49ALR 490. See 90Fla844, 107S535.

365-57½-New. In Missouri a division of the supreme court may set aside a judgment of conviction during the judgment term. 317Mo 759, 297SW10.

365-57½-New. Affirmance of judgment void for want of jurisdiction does not change its character. CalA 290P512.

365-58 160La1, 106S653.

365-59 40F(2d)338; 199Cal 235, 248P 906; 77Colo 432, 236P1022 (cannot modify excessive sentence); 201 Iowa 758, 206NW634. [a] **Jones Act** proviso discriminating between slight and serious violations of prohibition law is not requirement by which appellate court can judge sentences excessive. 40F(2d) 338.

366-60 12F(2d)742; 32F(2d)128; 208 Cal 387, 281P609; 74CalA125, 239P419; CalA 286P459; CalA 289P653; CalA 290P608; CalA 292P654; 43 Ida180, 250P239; 147Miss91, 113S191; Mo 29 SW(2d)686; 114Nebr28, 206NW16; 114 Nebr33, 206NW18; 48Nev405, 233P523; 217AppDiv252, 217NYS763; 38 OklCr34, 259P173; OklCr 278P403; OklCr 279P 934(1stcase); 44Philippine224; 44Philippine275; 45Philippine84; 35Porto Rico 253; 35PortoRico 546 (specification of offense); 152Tenn281, 277SW 892 (sentence imposing cumulative punishment on two counts modified so as to apply to count carrying highest punishment); 157Tenn105, 6SW(2d)556; 99TexCr638, 271SW97 (verdict of guilty as charged, there being no such offense under law, will be reformed so as to adjudge accused guilty of receiving stolen property of value of more than fifty dollars); 99TexCr642, 271SW380; 100TexCr114, 272SW149; 100TexCr533, 271SW624; 100TexCr609, 272SW187; 100TexCr657, 274SW574 (where by oversight defendant was not given benefit of indeterminate sentence law); 101 TexCr138, 274SW602; 101TexCr182, 274SW153; 101TexCr471, 276SW236; 101TexCr483, 276SW277; 101TexCr503, 276SW259; 101TexCr514, 276SW233; 101TexCr619, 276SW918 (reformation to correspond to verdict where error patent on face of record); 103TexCr118, 280SW215; 103TexCr315, 280SW591; 103TexCr151, 280SW777; 103TexCr364, 280SW804; 103TexCr468, 281SW546; 103TexCr542, 282SW216; TexCr 286SW 1090; TexCr 288SW465; 105TexCr322, 288SW467; 105TexCr379, 288SW468; 105TexCr550, 289SW681; 105TexCr673, 290SW540; 107TexCr546, 298SW422; TexCr 28W(2d)270; 109TexCr207, 3SW (2d)807 (place of imprisonment); 109 TexCr517, 5SW(2d)774; TexCr 8SW (2d)156; 110TexCr525, 9SW(2d)837; 111TexCr95, 10SW(2d)94(2dcase); 110 TexCr620, 10SW(2d)100; 110TexCr620, 10SW(2d)101(1stcase); 111TexCr197, 11SW(2d)518; 112TexCr14, 13SW(2d) 701(2dcase); 111TexCr677, 13SW(2d) 836(2dcase); 112TexCr45, 13SW(2d) 887; 112TexCr122, 14SW(2d)282; 111 TexCr524, 15SW(2d)635(2dcase); 112 TexCr274, 16SW(2d)132(1stcase); Tex Cr 20SW(2d)770; TexCr 20SW(2d) 1050; TexCr 20SW(2d)1055; 113TexCr 296, 21SW(2d)518(1stcase); 113TexCr 433, 22SW(2d)659; 113TexCr527, 22SW (2d)1069; TexCr 26SW(2d)256; TexCr 26SW(2d)267(2dcase); TexCr 28SW (2d)153; TexCr 28SW(2d)554; TexCr 31SW(2d)826(2dcase); 36Wyo 111, 253 P14; 60OntL334, [1927] 2DomLR1142. But see TexCr 31SW(2d)818. [b] **Unnecessary use of word "unlawfully"** does not require amendment of judgment. 101TexCr483, 276SW277. [c] **Recital of prior conviction.**–160Tenn664, 28SW (2d)635.

366-61 6F(2d)575; 24F(2d)796; Ariz 282P930; 81CalA199, 253P169; 43 Ida 180, 250P239; 336 Ill 286, 168NE332; 200 Iowa483, 203NW806; Miss 113S218; Miss 114S353; 153Miss48, 120S571; 153 Miss593, 121S275; 117Nebr548, 221NW 953; 48Nev405, 233P523; 217AppDiv 252, 217NYS763; 38 OklCr34, 259P173; OklCr 269P391; OklCr 267P864; OklCr 267P1057; OklCr 269P328(1stcase); OklCr 269P385; OklCr 269P1063; Okl Cr 277P670; OklCr 279P915; OklCr 279P916; OklCr 280P627; OklCr 281 P812; OklCr 288P995; OklCr 292 P570; OklCr 292P1050; 123 Or521, 262P954; 44Philippine275; 122Tenn 281, 277SW892; 155Tenn549, 296 SW20; 100TexCr188, 272SW486; 101 TexCr163, 273SW1116 (sentence reformed so as to give prisoner benefit of indeterminate sentence); 101TexCr386, 276SW432 (sentence reformed to conform with indeterminate sentence law); 101TexCr645, 276SW906; 103TexCr542, 282SW216; 106TexCr457, 293SW170; 107TexCr530, 298SW287; TexCr 27SW (2d)811; 40Wyo 184, 276P458; 60 OntL 334, [1927] 2DomLR1142. See also 7 Alaska197, 200 [citCyc].

366-61½-New. The jury's verdict assessing punishment within the maximum prescribed by statute cannot be changed on appeal. Mo 292SW39.

366-63 22AlaA184, 113S650; 208 Iowa 796, 223NW873; 115Nebr302, 212NW 610.

367-64 207 Iowa212, 220NW110; 208 Iowa867, 226NW81 (where defendant contends that long period of confinement might undermine his health).

367-66 205 Iowa595, 218NW144; Iowa 221NW779 (2dcase); OklCr 290P349 (2dcase).

367-67 115Nebr302, 212NW610.

367-71 BC [1928] 1DomLR1038; Man [1928] 3DomLR201; Que [1928] 2Dom LR751.

367-72 44Philippine66; 44Philippine 275 (decreasing punishment, necessary element having been erroneously considered an aggravating circumstance); 45Philippine137. [a] 44Philippine66 (larceny); 44Philippine224; 45 Philippine137.

367-74 21AlaA494, 109S526; 150Miss 302, 116S432; OklCr 282P480(1stcase).

367-75 See also 140Miss165, 105S461.

367-76 318 Ill 293, 149NE241; 318 Ill 424, 149NE226; 26 OhA329, 157NE421; 62 OntL336, [1928] 3DomLR688.

367-78½-New. failure to enter plea as disclosed by record. 233 IllA331.

367-79½-New. judgment on plea of guilty without sufficient advice; 233 IllA 211.

367-82 124Kan556, 261P846; 218App Div204, 218NYS148; 224AppDiv193, 230NYS66; 105TexCr650, 290SW754; 106TexCr1, 290SW743; Can [1928] 3 DomLR822.

367-83 93Fla504, 112S83.

367-84 114Nebr147, 206NW748 (insufficient to sustain verdict); 127Misc593, 217NYS486; 127Misc594, 217NYS488.

367-84½-New. failure of state to prove that the offense charged was committed within period of limitations. Miss 113 S520.

367-84½-New. or of former conviction in prosecution for second offense; 26 OhA329, 157NE421.

367-84¼-New. conviction based solely on evidence obtained by unlawful search and seizure; OklCr 279P698.

367-85½-New. refusal of the court to allow cross-examination of a witness; 84Colo 403, 270P869.

367-85¼-New. private communication of judge with jury without consent of accused. 135Wash667, 238P617.

367-86 75CalA642, 243P461.

367-87 124Kan556, 261P846; 221App Div331, 223NYS339.

367-88 Can [1928] 3DomLR822 (omitting warning as to uncorroborated evidence of accomplice).

367-89 12F(2d)717; 124Kan556, 261P 846; 321Mo598, 12SW(2d)426; 221App Div331, 223NYS339.

367-90½-New. Absence of defendant when instructions are argued and acted upon by court. 100WVa501, 130SE655.

367-94 105NJL281, 145A1. But see 80 CalA81, 251P688.

367-95 TexCr 27SW(2d)185.

367-95½-New. Absence of preliminary examination is ground for reversal where right to examination was not waived. 49SD485, 207NW466.

367-95⅓-New. A judgment of conviction may be reversed where it appears that meritorious exceptions were taken and that without fault of defendant or his counsel he was deprived of bill of exceptions. 107TexCr571, 298SW580.

367-95¼-New. To warrant reversal on such ground motion to reverse must be verified by affidavit and must show diligence. 107TexCr571, 298SW580.

367-95½-New. Where conviction is based solely on evidence obtained by unreasonable search and seizure, admitted over timely objections and exceptions, judgment will be reversed. OklCr 280P475.

367-97½-New. inconsistent verdict on different counts. 120Kan516, 243P1057.

367-98½-New. or the fact that certain witnesses, whose names had not been indorsed on the indictment, were permitted to testify where there was no motion for a continuance; 118Kan629, 236P816 (communication of judge with jury).

367-2½-New. failure of defendant's attorney to call defendant as witness or argue case before jury; 180Minn435, 231NW12.

367-3½-New. That the trial court expunged nugatory matter from the judgment and changed the place of imprisonment from one county to another is not ground for reversal. 200 Iowa 889, 205NW500.

367-3¼-New. By statute in some jurisdictions a conviction will not be reversed for insufficiency of evidence of venue. 307Mo 411, 270SW282.

367-3¼-New. A conviction must be reversed where the evidence is insufficient to sustain a conviction of the degree of the crime of which defendant was convicted, although it is sufficient to sustain a conviction of a lower degree. 199 Cal 235, 248P906.

367-3½-New. Where conviction is had on several counts where one only is proper, the appellate court will not sustain one conviction and annul others, but will reverse all convictions and remand for new trial. 12F(2d)852.

367-3⅓-New. Under Massachusetts statute, reversing judgment of district court by one justice and reporting it to full bench is proper. 256Mass539, 152 NE914.

368-4 11F(2d)933.

368-4½-New. Death of trial stenographer and inability to read his notes held under facts shown not to require reversal. 22F(2d)364.

368-5 273US392, 47SCt377, 71Led700, 50ALR989; 5F(2d)224; 7F(2d)458; 8F(2d)24; 12F(2d)873; 14F(2d)833; 14F(2d)925; 15F(2d)14; 15F(2d)965; 16F(2d)62; 16F(2d)457; 16F(2d)563; 16F(2d)704; 18F(2d)411; 18F(2d)507; 19F(2d)756; 19F(2d)813; 19F(2d)850; 20F(2d)289; 20F(2d)328; 21F(2d)32; 27F(2d)575; 28F(2d)548; 28F(2d)681; 28F(2d)965; 29F(2d)701; 30F(2d)590; 31F(2d)229; 33F(2d)713; 35F(2d)794; 36F(2d)743; 36F(2d)903; 37F(2d)346 (1stcase); 38F(2d)406; 43F(2d)44; 43F(2d)86; 217Ala398, 116S417; 20AlaA581, 104S341; 20AlaA588, 104S550; 20AlaA613, 104S554; 21AlaA644, 111S426; 22AlaA376, 115S852 (homicide); 22AlaA440, 116S511; 22AlaA299, 116S512; 23AlaA10, 119S243(2dcase); AlaA 130S374; 29Ariz247, 240P863; 29Ariz318, 241P511; 30Ariz159, 245P356; 30Ariz366, 247P129; 31Ariz427, 254P467; 32Ariz203, 256P1055; 33Ariz383, 265P609; 169Ark225, 273SW13; 194Cal1, 227P156; 73CalA13, 238P374; 76CalA91, 243P878; 198Cal776, 247P884; 93CalA42, 269P630(1stcase); Cal 289P629; 67CalA658, 228P1115; 68CalA95, 228P417; 68CalA487, 229P896; 68CalA621, 230P221; 69CalA169, 230P667; 69CalA524, 231P612; 70CalA444, 233P401; 71CalA339, 235P87; 72CalA292, 237P390; 75CalA138, 242P84; 75CalA428, 243P52; 75CalA620, 243P63; 77CalA146, 246P157; 77CalA384, 246P811; 77CalA438, 246P1072; 78CalA37, 247P601; 78CalA685, 248P954; 79CalA101, 248P1078; 79CalA76, 249P20; 79CalA127, 249P60; 79CalA328, 249P231; 79CalA373, 249P536; 79CalA413, 249P832; 79CalA519, 250P211; 79CalA605, 250P578; 80CalA675, 252P758; 81CalA456, 254P281; 82CalA422, 255P552; 82CalA778, 256P251; 83CalA62, 256P561 (failure to impose sentence within prescribed time); 84CalA6, 257P549; 84CalA58, 257P592 (no miscarriage of justice); 85CalA77, 259P75; 85CalA406, 259P481; 85CalA697, 259P1009; 86CalA45, 260P313; 86CalA646, 261P309; 86CalA768, 261P512; 87CalA5, 261P531; 87CalA601, 262P369; 88CalA222, 263P306; 88CalA713, 263P1036; 88CalA591, 264P263; 88CalA609, 264P318; 89CalA405, 264P1105; 89CalA615, 265P349; 91CalA516, 267P370; CalA 267P387; 92CalA470, 268P473; 92CalA610, 268P702; 99CalA147, 277P870 (as to admission of evidence); CalA 283P119; CalA 285P401; CalA 289P215; CalA 290P77; 77Colo432, 236P1022; 82Colo589, 263P19; 83Colo289, 264P720; 84Colo254, 269P907; 106Conn701, 139A91; 94Fla318, 113S689; 94Fla163, 113S699; Fla 129S112; 42Ida319, 245P685; 43Ida180, 250P239; 44Ida173, 258P551; 318Ill388, 149NE273; 321Ill484, 152NE500; 322Ill353, 153NE604; 200Ind165, 162NE234; 89IndA421, 165NE557(1stcase); 200Iowa889, 205NW500; 203Iowa929, 210NW465; 204Iowa837, 216NW43; 206Iowa1178, 221NW804; Iowa 227NW601; 118Kan629, 236P816 (judge communicating with jury); 119Kan417, 239P756; 121Kan339, 246P989; 123Kan399, 256P169; 124Kan219, 257P719; 124Kan119, 257P726; 124Kan344, 259P697; 124Kan479, 260P617; 126Kan664, 271P283; Kan 293P389; 210Ky217, 275SW689; 210Ky685, 276SW575; 214Ky578, 283SW1034; 215Ky717, 286SW1053; 215Ky837, 287SW32; 216Ky216, 287SW722; 216Ky317, 287SW898; 216Ky724, 288SW681; 217Ky688, 290SW514; 221Ky49, 297SW929; 221Ky158, 298SW374; 222Ky840, 2SW(2d)1044; 225Ky655, 9SW(2d)990; 226Ky119, 10SW(2d)612; 227Ky520, 13SW(2d)533; 228Ky819, 16SW(2d)448; 230Ky207, 18SW(2d)995; 230Ky624, 20SW(2d)442; 232Ky500, 23SW(2d)940; 234Ky45, 27SW(2d)410; 235Ky462, 31SW(2d)712; 169La291, 125S127; 245Mich455, 223NW70; 169Minn298, 211NW334; 176Minn562, 223NW917; 150Miss441, 116S813 (failure to instruct); Mo 270SW375; 312Mo15, 278SW743; 318Mo687, 1SW(2d)96; 317Mo865, 297SW73; 319Mo40, 2SW(2d)765; 75Mont81, 241P1072 (overruling objections to unimportant leading questions); 76Mont351, 246P956; 80Mont181, 260P138; 51Nev82, 269P489; 103NJL88, 134A611; NJ 135A94; 104NJL512, 141A85; NJ 151A781; NJSup 147A641(2dcase); 245NY143, 156NE644; 215AppDiv446, 213NYS703 (where guilt overwhelmingly established); 221AppDiv331, 223NYS339; 137Misc267, 241NYS745; 50ND270, 195NW567, 570 [citCJ]; 52ND659, 204NW350; 53ND520, 206NW784; 53ND756, 208NW556; 54ND178, 208NW977; 54ND193, 209NW231; 57ND89, 220NW843; 43OklACR329; 38OklCr34, 259P173; OklCr 279P707; OklCr 279P968; OklCr 279P980(1stcase); OklCr 280P639; Okl Cr 280P1112; OklCr 282P375; OklCr 287P424; OklCr 287P1053; OklCr 289P783 (2dcase); OklCr 292P383; OklCr 292P76; 119Or441, 249P1103; 120Or90, 250P633, 251P307; 122Or257, 257P806; 124Or61, 262P859; 126Or651, 269P869; 126Or560, 270P404; 126Or651, 270P756; 130Or552, 278P936 (indictment more specific than required by law); 131Or224, 282P237; 54SD552, 223NW943; 153Tenn139, 281SW924; 155Tenn266, 292SW451; 100TexCr98, 272SW134; 100TexCr609, 272SW187; 100TexCr316, 273SW862; 101TexCr96, 274SW628; 101TexCr158, 274SW619; 101TexCr462, 276SW256; 103TexCr182, 280SW798; 103TexCr403, 281SW844; 104TexCr26, 282SW245; 104TexCr283, 284SW564; 104TexCr518, 284SW582; 104TexCr556, 286SW239; 105TexCr132, 286SW989; 105TexCr396, 288SW1087; 106TexCr133, 291SW230; 106TexCr278, 291SW903; TexCr 295SW574; 107TexCr389, 296SW605; 108TexCr424, 1SW(2d)320; 109TexCr345, 4SW(2d)542; 110TexCr353, 7SW(2d)569; 110TexCr214, 8SW(2d)164; 111TexCr671, 13SW(2d)704; 112TexCr74, 13SW(2d)864; 112TexCr517, 17SW(2d)807; 112TexCr554, 18SW(2d)163; TexCr 28SW(2d)135; 69Utah53, 252P280; 136Wash453, 240P562; 136Wash453, 240P562; 194Wis410, 217NW283; 196Wis104, 219NW349. But see TexCr 24SW(2d)48. [a] See also 245NY401, 157NE509. [b] (1) 29Ariz318, 241P511. See also 195Cal623, 234P890. [b] (7) Errors resulting in miscarriage of justice. 75CalA84, 241P935; 236Mich226, 210NW219. (8) Errors not resulting in miscarriage of justice. 74CalA345, 240P56; 74CalA371, 240P526; 77CalA44, 246P97; 81CalA113, 252P1063; 81CalA30, 253P162 (where evidence of guilt overwhelming). (9) Constitutional provision requiring affirmance unless record shows such miscarriage of justice as to work conviction of innocent person, is mandatory. 81CalA113, 252P1063. [b] (10) Where errors committed do not result in miscarriage of justice, judgment will not be reversed because of such errors. 96Fla243, 118S822. [g] **Prosecutors should conduct trials as** faithfully as if constitutional provision saving conviction where errors would probably not have changed result did not exist. 73CalA13, 238P374. [h] **Error held harmless.**–216AppDiv319, 214NYS577. [i] **Rule held not to impair right of defendant to fair and impartial trial.**–155Tenn266, 292SW451. [j] **Questions relating to evidence.**–79CalA413, 249P832.

369-6 4F(2d)884 (permitting defendant to be cross-examined as to prior conviction of violations of National Prohibition Act held reversible error); 7F(2d)458; 21F(2d)690; 23F(2d)76; 23AlaA150, 123S250, 255 [citCJ]; 73CalA13, 238P374; 198Cal534, 246P62; 199Cal451, 249P859 (constitutional provision denying right of reversal for errors "in matter of procedure" was not designed to repeal guaranties accorded to persons accused of crime by other parts of constitution); 201Cal618, 258P607; 207Cal47, 276P1003; 208Cal295, 230P983; 208Cal433, 281P618; Cal 289P830; Cal 293P32; 69CalA214, 230P997; 69CalA475, 231P572 (conviction reversed where court cannot determine whether defendant would have been convicted but for errors on trial court); 69CalA548, 231P588; 70CalA567, 234P129 (reversal required, if verdict might have been different, had not errors of trial court occurred); 71CalA213, 234P877; 71CalA575, 236P189; 73CalA213, 238P814; 73CalA580, 239P82; 75CalA84, 241P935; 76CalA178, 244P106; 76CalA648, 245P461; 80CalA675, 252P758; CalA 254P580; 81CalA506, 254P630; 82CalA618, 256P270; 85CalA580, 259P998; 86CalA497, 260P887; 86CalA298, 260P901; 86CalA390, 260P913; 92CalA6, 267P906; 93CalA77, 268P1071; 97CalA205, 275P851; CalA 276P641; CalA 278P252; 100CalA18, 279P824; CalA 285P916; CalA 293P72; 318Ill293, 149NE241; 208Iowa851, 226NW61; Iowa 228NW353; 212Ky303, 278SW1097; 215Ky722, 286SW1047; 235Ky5, 29SW(2d)646; 79Mont46, 254P872; 81Mont145, 262P158; 116Nebr577, 218NW384; 117Nebr440, 220NW826; 245NY401, 157NE509; 218AppDiv204, 218NYS148; 221AppDiv758, 222NYS594; 221AppDiv331, 223NYS339; 135Misc564, 238NYS712; 53SD182, 220NW615; 54SD552, 223NW943; 152Tenn184, 274SW12; 100TexCr211, 272SW778 (where in circumstances affirmance would be injustice to accused); TexCr 30SW(2d)331; 188Wis68, 205NW412.

369-7 29Ariz318, 241P511; 208Iowa867, 226NW81 (court will correct error in requiring payment of costs as part of punishment, though not objected to); 221AppDiv331, 223NYS339.

369-8 69CalA214, 230P997; 75CalA642, 243P461; 76CalA178, 244P106; 79CalA76, 249P20.

369-9 312Mo 15, 278SW743.

369-10 73CalA372, 238P758. [a] **In California.**-199Cal 451, 249P859.

369-11 80CalA328, 251P823; 187Wis 605, 205NW320.

369-12 69CalA214, 230P997; 69CalA 548, 231P588; CalA 288P95; 187Wis 605, 205NW320. See also 221AppDiv 331, 223NYS339.

369-12½-New. Where the record contains no evidence as to the guilt of defendant whose counsel pleaded guilty for him, the appellate court cannot determine that substantial justice was done. 70CalA334, 233P390.

369-13 90Fla59, 105S140 (fatal variance between allegata and probata); 231Mich484, 204NW105 (as to admission of evidence); 234Mich558, 208NW754; Miss 118S376(2dcase); 55ND489, 214NW503 (in light of decision of U. S. supreme court involving similar questions filed since appeal). See also 100 TexCr211, 272SW778.

369-15 32Ariz111, 256P111.

369-20 234Mich558, 208NW754.

369-21 [a] **In Washington.**-135Wash 667, 238P617.

369-22 142Miss88, 107S375 (judgment on appeal from justice of peace court before transcript filed requires reversal).

369-24 338 Ill 237, 170NE303.

369-26 97Fla23, 119S393; 321 Ill 594, 152NE516; 327 Ill 162, 158NE462; 335 Ill 217; 167NE1; Ill 173NE112; Ind 156NE1; 49Nev217, 242P590; 113Tex Cr378, 22SW(2d)660 (negligence).

369-27 321 Ill 594, 152NE516. See also 38F(2d)554. But see 218AppDiv204, 218NYS148.

369-29 94CalA696, 271P751.

370-31 112TexCr9, 13SW(2d)706. See also 101TexCr142, 274SW576.

370-36 68CalA457, 229P974; 326 Ill 481, 158NE134; 312Mo 202, 278SW661; 116Nebr635, 218NW432. See also 140 Miss592, 105S480; 136Wash132, 238P 922.

370-39 37F(2d)677 (conspiracy).

370-40 23F(2d)3.

370-40½-New. Where the circuit court of appeals reverses conviction on some of several counts whereby a reduction in the term of imprisonment ensues, it has no power to grant the district court power to modify the sentence where its term has expired. 8F(2d) 711.

370-40¼-New. Error, requiring reversal of conviction of one of two conspirators, carries reversal as to the other. 19F(2d)73.

370-41 135Wash682, 239P207.

370-45 315Mo 7, 285SW489; MoA 286 SW422; 198NC260, 151SE261.

370-46½-New. and must direct exoneration of bail; 221AppDiv776, 223NYS 466.

370-48 21AlaA233, 107S36; 22AlaA 646, 119S250; 92CalA323, 268P417; 316 Mo 179, 289SW954; 45Philippine84; 156Tenn451, 28W(2d)705.

371-49 272US549, 47SCt169, 71Led 403; 146Miss66, 111S850; Miss 111S860 (1stcase); 146Miss351, 111S860(2d case); Miss 111S862(1stcase); Miss 111 S862(2dcase); 148Miss70, 114S125; 148 Miss74, 114S126; 318Mo 1185, 28W(2d) 731; 144Wash511, 258P318. [b] **Severity of original sentence** will not be considered where case is reversed for irregularity of sentence and remanded for proper sentence. 144Wash511, 258 P318.

371-51 30F(2d)25; 217Ala212, 115S 223 (where at time of determining appeal method of punishment had been changed); 23AlaA182, 122S298; 20 AlaA613, 104S554; 21AlaA404, 108S 635; 22AlaA263, 114S631(1stcase); 22 AlaA268, 114S631(2dcase); 22AlaA299, 115S72; 23AlaA384, 125S898; 207Cal 366, 278P857; 99Fla1275, 128S814; Fla 129S106(2dcase); 35GaA248, 132SE 783; 318 Ill 388, 149NE273; 339 Ill 73, 170NE726; 254 IllA209; 251Mich187, 231NW95; 146Miss66, 111S850; Miss 111S860(1stcase); 146Miss351, 111S 860(2dcase); Miss 111S862(1stcase); Miss 111S862(2dcase); 148Miss70, 114 S125; 148Miss74, 114S126; Miss 114S 529; 149Miss749, 115S893; 150Miss504, 117S119 (where after sentence law under which it was made was held unconstitutional); 81Mont19, 261P876; 115Nebr535, 213NW839; 116Nebr287, 216NW807; 116Nebr604, 218NW414; 102NJL318, 133A403; 105NJL281, 145 A1; NJSup 149A355; 32NM319, 255 P396; NC 154SE402; 119 Oh314, 164 NE232; OklCr 275P1067; OklCr 279 P929; 85PaSuper305; 131SC420, 127 SE840; 49ND398, 207NW161; 135Wash 333, 237P706; 136Wash132, 238P922; 35Wyo 41, 246P241; BC [1930] 1Dom LR991. [a] **It is unnecessary to reverse with directions to sentence** defendant under each of several counts where sentence imposed is proper under one count. 254 IllA209. [b] **Remand for correction of sentence** held not warranted. 339 Ill 73, 170NE726.

371-52½-New. where new law had changed execution of death sentence from hanging to electrocution, 217Ala 60, 114S798 (time set for sentence by hanging having expired).

371-53 23AlaA144, 122S301(2dcase).

371-54 OklCr 290P342(2dcase).

371-56½-New. to sustain a demurrer to the indictment, 210Ky401, 276SW 123.

371-57 152Wash365, 278P149.

371-62 TexCr 30SW(2d)316.

371-64 100Vt380, 138A736.

371-66 100Vt380, 138A736.

372-67 51Philippine923; 100Vt380, 138A736.

372-68½-New. A case is not remanded with direction to enter the proper verdict where the record does not warrant such order. 37GaA94, 139SE95.

372-68¼-New. Judgment without allocution may be set aside and cause remanded that judgment may be entered regularly. 316Mo 591, 292SW63

372-69 Cal 289P629 (issues to be retried); Miss 130S513; 195Wis364, 218 NW184 (record showing plain miscarriage of justice).

372-70 CalA 283P119; Mo 256SW456 (may be ordered though indictment insufficient without amendment).

372-73 DC 38F(2d)535; 234Mich569, 208NW685.

372-75 7F(2d)259; 144Wash511, 258P 318.

372-78½-New. of lack of proof of former conviction submitted at preliminary examination, on conviction as second violator. 233Mich98, 206NW516.

372-81 Miss 114S380; 101Vt483, 144A 684.

372-82 246NY437, 159NE390; 20 OhA 528, 153NE301; 200Wis636, 229NW54.

372-83 234Mich569, 208NW685; Sask [1930] 1DomLR617.

372-84½-New. of defective verdict; 78 CalA702, 248P960.

372-87 213AppDiv674, 210NYS21; OklCr 281P315(2dcase).

372-89 190NC848, 129SE145.

372-90½-New. In reversing an order refusing to direct a verdict, the appellate court exercises discretion in remanding the case for such direction or for a new trial, and the latter course is preferred where there is a palpable defect in the state's cause. 134SC226, 132SE610.

373-92 92CalA593, 268P687; NC 153 SE923 (force and effect of verdict of not guilty). [a] **Reversal for trial on insanity issue** has been held not a reversal without ordering a new trial. Cal 289 P629.

373-93 98CalA480, 277P170(1st case). But see CalA 283P119.

373-94 43 Ida724, 254P210, 212 [cit CJ].

373-99½-New. Decision on former appeal reversing lower court on admission of evidence is law of case. 222 Ky130, 300SW330.

373-1 216Ala336, 113S64; CalA 284P 940. [b] **Procedendo.**-205 Iowa826, 218 NW572.

373-3 205 Iowa826, 218NW572, 574 [citCJ]; 217Ky99, 288SW1047. [a] **Trial court's attention must be called** to failure of mandate of appellate court to be filed in order that error be available on subsequent appeal. 217Ky99, 288SW1047. [b] **Necessity of procedendo to restore jurisdiction to trial court.**-205 Iowa826, 218NW572.

373-6½-New. Where trial court failed to comply with statute respecting insanity hearing after verdict and before judgment, reviewing court should remand case with directions. OklCr 292 P385.

373-12½-New. A case will be remanded for pronouncement under a new law. 216Ala356, 113S67.

373-12¼-New. Some statutes providing for transmission of a certified copy of the supreme court's decision are directory only and clerk's failure to transmit the same does not detract from the supreme court's judgment or procedendo. 205 Iowa826, 218NW572. [a] **Construction of statutes.**-Statute providing for transmission of certified copy of decision must be construed in harmony with supreme court's authority and practice under constitution to issue procedendo. 205 Iowa826, 218NW 572.

373-13 76CalA192, 244P94. [b] **In California.**-76CalA192, 244P94.

373-16½-New. Mandate will not be stayed to permit defendant to apply for certiorari to federal supreme court for review of decision affirming conviction where the petition for certiorari fails to present a federal question. 103 TexCrA318, 280SW202.

374-21 96CalA409, 274P611; CalA 284 P940; 205 Iowa826, 218NW572. [a] **Trial court has jurisdiction after affirmance** for all further proceedings consistent with mandate. 144 Okl 295, 290 P1098(2dcase).

374-23½-New. Where an order of the appellate court grants defendant the privilege of applying to the circuit judge for a writ of error coram nobis, this limits the right to apply to a circuit judge indicated by the order. 91 Fla927, 108S671.

374-23¼-New. To make application to such judge necessarily implies requesting him to hear and determine the application. 91Fla927, 108S671.

374-24 [a] **On retrial after reversal of** conviction for second degree murder nolle prosequi order should be entered as to first degree. 213Ala121, 104S282.

374-31 72CalA174, 236P985; 96CalA 409, 274P611; 106WVa32, 144SE574.

374-31½-New. or amend 72CalA174, 236P985.

374-32 See also CalA 280P202. But see CalA 284P940.

374-34 But see 247NY493, 161NE157.

374-35 Wash 286P833.

374-36 108TexCr142, 299SW437. [a] **New trial held not premature** though held in same town in which mandate of reversal was filed. 218Ky360, 291SW 749.

374-39 214Ky620, 283SW958; 215Ky 302, 284SW1080; 220Ky715, 295SW 1067; 225Ky600, 9SW(2d)717.

374-40 213Ky265, 280SW1104; 214Ky 620, 283SW958.

374-44 215Ky302, 284SW1080.

374-45 214Ky620, 283SW958.

374-46 213Ky265, 280SW1104; 215Ky 302, 284SW1080; 218Ky360, 291SW 749; 220Ky715, 295SW1067.

374-48 But see CalA 283P119.

374-53 214Ky680, 283SW1002.

375-55 114Nebr132, 206NW731; 115 Nebr119, 211NW619; 131SC420, 127SE 840; 53SD521, 221NW250. But see 178 Minn626, 228NW173. [a] **Changing method of execution.**-NM 290P322 (2dcase).

375-55½-New. In case of excessive sentence, where possible, the case should be remanded to the judge who passed sentence for resentence. 15F (2d)40.

375-56 198Cal 601, 246P802.

375-58½-New. Where the prisoner is absent, an order on mandate, after reversal of the same, and affirmance of the other counts, imposing service of a specified term, cannot be treated as a sentence. 6F(2d)640.

375-58¼-New. Where, after one of several counts is reversed, the court imposes sentence of the original term less time for one count, the order will be held to be a valid sentence for the

decreased term. 6F(2d)640.

375-59 53ND756, 208NW556. [a] **Errors on ground that part of trial took** place Saturday afternoon and that grand jury was illegally drawn are not jurisdictional and should have been presented in appeal from judgment. 71CalA 176, 235P51. [b] **On affirmance, when remittitur** reaches lower court, it must make all orders necessary to carry judgment into effect. 198Cal 601, 246P802. [c] **Supreme court may grant leave to apply to trial court for writ of error coram nobis.**–92Fla740, 1108259. [d] **Jurisdiction of trial court upon affirmance and remittitur** is merely to order execution of judgment. 198Cal 601, 246 P802.

375-60 22AlaA191, 113S452; Mo 281 SW943. [b] **After final adjournment,** court of appeals has no power over its records and its judgments are conclusive. 22AlaA191, 113S452. [c] **Notice by clerk of appeal court** is ministerial and not affecting judgment itself. 22 AlaA191, 113S452.

375-61 121Kan368, 247P117.

375-62 216Ala356, 113S67; 117Tex 134, 299SW393.

375-63 216Ala356, 113S67.

375-66 53ND756, 208NW556. [a] **During judgment term** division of appellate court may set aside judgment affirming conviction. 317Mo759, 297SW 10.

375-68½-New. **In Manitoba** since original warrant of commitment is exhausted, not suspended, when accused is released on bail pending appeal, the appellate judge may, on affirmance, issue a new warrant. [1925] 3DomLR361.

375-68⅓-New. In such case the new warrant may be for full term of sentence, without crediting time partially served prior to release on bail, since such credit may be otherwise provided for. Man [1925] 3DomLR361.

375-68¼-New. It is not necessary to recall the mandate in order for the appellate court to pass upon a cost bill. 120 Or297, 249P1098.

375-69 20F(2d)741.

375-70 231Ky696, 22SW(2d)95.

375-71 48Philippine713. [a] (2) 202 Iowa725, 210NW957. (4) Under statutes district court, on conviction for petit larceny after appeal from probate court, may properly enter money judgment for fine and costs against defendant's sureties. 48 Ida251, 281P7(1st case). [c] (6) Where sentence of fine and imprisonment was imposed, and appeal bond is conditioned to perform judgment, surrender of accused by surety does not satisfy bond. 202 Iowa725, 210NW957. (7) Where supersedeas bond is simply covenant that defendant will perform judgment on appeal and judgment of appellate court is that if fine and costs are not paid or replevied they shall be worked out, there is no breach so long as defendant is ready and willing to satisfy judgment by imprisonment. 222Ky193, 300SW606.

375-72 [a] (1) 132 Okl 283, 270P8.

376-73 231Ky696, 22SW(2d)95.

376-81½-New. In some jurisdictions the trial court acts within its jurisdiction in an action on an appeal bond on receipt of the supreme court's procedendo. 205 Iowa826, 218NW572.

376-86½-New. Allegations of answer held insufficient to constitute defense. 42F(2d)26.

376-95½-New. An order forfeiting an appeal bond given on appeal from a conviction under a void ordinance should be reversed. 124 Okl 60, 253P999.

CROPS

378-1 [b] **Crops are matured** whenever they have reached such stage of maturity that they no longer draw sustenance from soil. 202 Iowa381, 210NW444.

379-2 Utah 272P633.

379-3 Utah 272P633.

379-5 24F(2d)553; 207Cal 373, 278P 863; 204 Iowa401, 213NW769; 120Kan 725, 244P861; 124Kan618, 261P590; 258Mass157, 154NE580 (chattels); 80 Mont593, 261P278; 81Mont1, 261P289; 50PhilIppine512; 136 Wash214, 239P556, 557 [citCJ]. See also TexCivA 25SW (2d)246. But see 38 OklACR38. [a] **Such crops may be encumbered.**–136 Wash214, 239P556. [b] **Act declaring** growing crops personalty has been held not retroactive. GaA 155SE355.

379-6 101CalA712, 282P420; 166Minn 58, 206NW948. Contra 80Mont593, 261 P278.

379-7 204 Iowa401, 213NW769. [a] (1) 24F(2d)552 (sale on execution or assignment for creditors); 130 Or424, 278 P981. (2) Bankruptcy of owner of land effects severance. 24F(2d)553.

379-8 37GaA350, 140SE390; 204 Iowa 401, 213NW769; 120Kan725, 244P861; 166Minn58, 206NW948. [a] **Growing crops** before maturity are considered as being realty. TexCivA 297SW520.

380-11½-New. Natural products of soil, such as grass and trees with growing fruit, are part of realty. 24F(2d) 553.

380-17 44 Ida332, 257P31, 54ALR1527; 77Mont451, 251P527. [a] 43 Ida755, 254P1054[citCJ].

380-18 44 Ida332, 257P31, 54ALR1527. [b] (3) 44 Ida332, 257P31, 54ALR1527.

380-19 44 Ida332, 257P31, 54ALR1527.

380-20 44 Ida332, 257P31, 33 [quotCJ] (dictum).

380-21 44 Ida332, 257P31, 33, 54ALR 1527 [quotCJ].

380-22 44 Ida332, 257P31, 33 [quot CJ].

380-23 CalA 279P165 (grape crop); 44 Ida332, 257P31, 33, 54 ALR1527 [quot CJ].

381-31 201 Iowa327, 207NW372; 124 Kan618, 261P590; 52ND918, 204NW 887, 889 [quotCJ]; 55ND100, 212NW 521, 522 [citCJ]; 116Tex337, 291SW 219. See also 24F(2d)553. [b] **In Georgia.**–163Ga276, 136SE62.

381-32 52ND918, 204NW887, 889 [quot CJ]; 53ND621, 207NW1003.

381-33 124Kan618, 261P590; 52ND 918, 204NW887, 889 [quotCJ]; 53ND 621, 207NW1003, 1005 [quotCJ]; 115 Or456, 239P98, 101 [citCJ]; 135Wash 214, 239P556. [b] 136Wash214, 239P 556. [c] **Deed taken with knowledge of prior sale of crop** held not to carry crop as matter of law. 136Wash214, 239P 556.

381-33½-New. A contract between a bank and a tenant farmer touching their respective interests in a crop of wheat to be grown from seed wheat furnished by the bank whereby the bank risks its seed wheat against the tenant's labor and agrees to sell its interest in the crop to him for the reasonable value of the seed wheat is not lacking in consideration. 128Kan132, 276P70.

381-34 120Kan725, 244P861 (vendor of land as willful trespasser); 81Mont1, 261P288, 291 [quotCJ]; 36Wyo 392, 256 P80, 82, 83, 57ALR578 [citCJ].

381-36 197Cal 716, 242P483; 48 Ida80, 279P1097; 81Mont1, 261P288, 291 [cit CJ]; 36Wyo 392, 256P80, 82, 57ALR 578 [quotCJ]. [a] **Physical possession determines ownership** of crop raised on land held adversely. 81Mont1, 261P288. [b] **Trespasser harvesting crops** is liable to owner for value of use and possession of land. 197Cal 716, 242P483.

382-40 [a] (1) 86Colo 166, 279P51 (distinguished from "tenant"). (4) 4LaA 345; 111 Okl 299, 239P637, 638 [citCJ &Cyc].

382-42 [a] **"Cropper's contract" defined.**–4LaA345. [b] **In Porto Rico.**–33 PortoRico 91. [c] **Contract construed as not merely of employment.**–207Cal 600, 279P664, 64ALR1412.

382-43 14F(2d)917; 81Mont1, 261P 288; 111 Okl 299, 239P637.

382-45 127 Okl 153, 260P60.

382-46 127 Okl 153, 260P60, 66 [quot CJ].

382-47 127 Okl 153, 260P60, 66 [quot CJ].

383-48 169Ark567, 275SW909; 36GaA 360, 136SE824; 37GaA477, 140SE778; 4LaA345, 348 [citCJ&quotCyc]; 127 Okl 153, 260P60, 66 [quotCJ]; 132SC 254, 128SE715; 146SC123, 143SE663; Sask [1929] 4DomLR900. But see 169 Ark622, 276SW371. Contra 28Cal 35, 60 P462.

383-49 15F(2d)181; 29 OhA357, 163 NE587.

383-51 [a] **In Porto Rico.**–33PortoRico 91. [b] **Continuance after death of tenant.**–207Cal 600, 279P664, 64ALR1412.

383-51½-New. Where a contract shows intention that the parties are to be tenants in common, either one may maintain an action for value of his interest against the person converting the crop. 169Ark622, 276SW371.

383-51⅓-New. In an action by an owner for conversion of a crop by a cropper and purchaser from him, it is no defense that the time for asserting the landlord's lien has expired. 169Ark622, 276SW 371.

383-51¼-New. Averments in the complaint that the contract provided that title to the crop was to be one half in owner and one half in the cropper alleged sufficiently that they were tenants in common of the crop. 169Ark622, 276 SW371.

383-51⅕-New. Evidence held sufficient to sustain finding of jury that crop was raised by defendant and not by his wife. 164Minn526, 205NW452.

383-51⅙-New. A contract clause prohibiting assignment is not violated by involuntary assignment by operation of law. 207Cal 600, 279P664, 64ALR1412.

383-51⅐-New. The presumption is that the party making the cropping contract intended to bind his executors and administrators. 207Cal 600, 279P664, 64 ALR1412.

383-55 TexCivA 272SW263.

383-66 127 Okl 153, 260P60, 66 [quot CJ].

383-70½-New. In an action for an accounting and a share of crops the owner may be credited with interest on a note to a bank for the balance between advances made and the amount realized on the crop only up to the date when he should have settled with plaintiff and not to the date of filing suit. 30Ariz 197, 245P354.

383-71 169Ark567, 275SW909. [c] **Statute held not applicable** to turpentine industry. 90Fla582, 107S354.

384-74 39GaA224, 146SE648(2dcase).

384-76½-New. Where the landlord sells the crop and settles in full with the cropper out of the proceeds, the cropper's lien is satisfied. 36GaA360, 136 SE824.

384-76⅓-New. In such case the purchaser acquires no title to the crop from the cropper. 36GaA360, 136SE824.

CROSSING

385-24 74Mont236, 239P1037, 1040 [quotCJ]; TexCivA 281SW259, 263 [cit CJ].

385-24½-New. As used in a statute relating to the duty of drivers at a crossing the word "crossing" refers to the intersection of a highway and a railroad or of two highways. 74Mont236, 239P1037.

385-24⅓-New. **Intersection.** The place at which a road is or may be crossed or passed over. Cent. D. [quot TexCommnA 290SW729].

385-24¼-New. **Grade crossing.** A place at which a country road crosses a railroad on the same level. Cent. D. [quot TexCommnA 290SW729].

CROSSWALK

386-37½-New. A structure specifically adapted to the use of pedestrians, whether placed at the street intersections or anywhere between them. 16MoA404, 406.

CROWD

386-42 [a] **The word is indefinite,** and difference in time and place may shape its meaning. 245NY401, 157NE508.

CRUDE

387-73 167Minn333, 209NW17.

387-73½-New. or unfinished. 167 Minn333, 209NW17.

387-78½-New. **Crude cotton seed oil** is mill run oil pressed from cotton seed. 176Ark601, 3SW(2d)673.

CRUEL

388-5½-New. Merciless, pitiless, or inhuman. 24 OhNPNS603.

388-5⅓-New. Malicious act inflicting

severe pain or threatening danger to the life or health of another. 24 OhNPNS 603.

CRUELTY

389-14 324 Ill 207, 155NE28.

CUILIBET LICET JURI PRO SE INTRODUCTO RENUNCIARE

390-55 [a] Alta [1925] 3DomLR459.

CUJUS EST SOLUM, EJUS EST USQUE AD COELUM ET AD INFEROS

391-67 148Va437, 139SE308, 55ALR 1376.

CULPABLE

397-2 219AppDiv646, 221NYS847.
397-3 154Tenn389, 285SW558.
397-11 168Ark927, 271SW974 (culpable negligence chargeable where some inquiry had been made).
397-13½-New. Culpable negligence implies the failure to perform some duty. 154Tenn389, 285SW558

CUMULATIVE

401-72 40F(2d)827 (as used in statute).

CUPOLA FURNACE

402-89 [a] A "cupelo" is vessel in which iron is reduced to molten mass. TexCivA 297SW630.

CURRENT

408-87 208Ky464, 271SW549 (running along).

CURRENT EXPENSES

408-8 NJSup 129A465 [citCJ]; 112 OhSt590, 148NE95, 98 [quotCJ]. [b] NJSup 129A465.
408-9 112 OhSt590, 148NE95, 98 [quot CJ].
408-10 112 OhSt590, 148NE95, 98 [quot CJ]; TexCivA 287SW673.
408-11 112 OhSt590, 148NE95, 98 [quot CJ].
408-12 112 OhSt590, 148NE95, 98 [quot CJ].
409-13 112 OhSt590, 148NE95, 98 [quot CJ].
409-14 112 OhSt590, 148NE95, 98 [quot CJ].

CURRENT FUNDS

409-18 219MoA34, 269SW955.

CURRENT PRICE

410-40 See also 32NM518, 260P411, 55 ALR261.

CURRENT YEAR

417-57 324 Ill 85, 154NE438. [c] (4) "Current year" means year between times for certification of taxes to county clerk. 324 Ill 85, 154NE438.

CURTESY

413-1 129Misc356, 221NYS449.
414-18½-New. Inchoate right of curtesy vesting prior to enactment of statute is unaffected thereby. NJCh 152 A9.
414-29 123Kan131, 254P407; 319Mo 1001, 5SW(2d)74, 76 [citCJ].
415-32 See also 298Pa33, 148A37. [c] (2) L. (1921) p 119, abolishing curtesy, impliedly repealed Rev. St. (1919) § 320. 319Mo 1001, 5SW(2d)74; 320Mo 519, 8 SW(2d)71. (3) Statute abolishing curtesy and granting widower same share in wife's real estate as widow takes in real estate of deceased husband applies to all widowers and not merely to those who could have curtesy. 319Mo 1001, 5 SW(2d)74.
415-33 See also 123Kan131, 254P407.
415-35 Vt 145A410.
415-44½-New. The rights of a husband in land conveyed to his wife after the wife's death must be determined by the law governing at the time of the conveyance. 228Ky538, 15SW(2d)454.
415-44½-New. Failure to adjudge the husband his curtesy rights in one half of the property, after adjudging that it belonged to his wife, was error. 228Ky 171, 14SW(2d)384.
416-61 Mo 23SW(2d)91.
417-66 Mo 23SW(2d)91. But see 98NJ Eq90, 129A749.
417-67 [a] In Missouri.–23SW(2d)91.
418-69 161Tenn172, 29SW(2d)254.
418-71 213AppDiv367, 210NYS682. [b] In Iowa.–208 Iowa1359, 227NW341(2d case).
419-77 217Ky258, 289SW275. [f] Conditional conveyance to wife.–213AppDiv 367, 210NYS682.
420-87 213AppDiv367, 210NYS682.
421-92 197NC604, 151SE190. [b] Evidence held sufficient.–176Ark786, 4SW (2d)897.
422-5 Mo 23SW(2d)91; 49RI 117, 140 A467; 161Tenn172, 29SW(2d)254; 146 Va109, 135SE676. [a] In Kentucky.–215Ky5, 284SW101.
422-6 [n] Where wife is infant.–129 Misc356, 221NYS449.
423-11½-New. No curtesy attaches where the husband died, without children, before the wife's suit involving conveyance of a ninety-nine-year lease. NJCir 139A435.
423-12 215Ky5, 284SW101; NJCh 147 A814.
423-18 332 Ill 280, 163NE692.
424-27 149Md109, 131A40, 42 [citCJ].
425-41 161Tenn172, 29SW(2d)254. [b] (2) Husband of daughter who died before widowed mother had no curtesy in daughter's interest in reversion of widow's homestead and dower. 161Tenn 172, 29SW(2d)254.
428-84½-New. Under some statutes a tenant by the curtesy may hold, occupy, and enjoy the mansion house and curtilage without charge until his curtesy is assigned. 106WVa703, 147SE26.
429-92-93 [c] In Kentucky.–215Ky5, 284SW101.
429-94 See also 98NJEq90, 129A749. [d] Gross sum in lieu of curtesy.–98 NJEq90, 129A749.
431-23 152Tenn329, 278SW967.
431-24 100NJEq193, 135A351.
432-30 NJCh 147A814.
432-32 See also Man [1927] 3DomLR 550.
432-35 99NJEq254, 132A224.
433-46 173Ark828, 293SW735.
433-47½-New. A husband executing a quitclaim deed may thereby waive curtesy interest in land designated in a trust instrument executed by his wife. 131 Or71, 278P586.
433-49 But see 49RI 117, 140A467.
433-54 122 Or620, 260P206, 59ALR707. See also 146Va109, 135SE676.
434-59 [e] In Pennsylvania.–298Pa33, 148A37.
434-64 [a] (2) Evidence held insufficient to show husband left or abandoned wife so as to forfeit right of dower. Ill 173NE84. (3) Word "leave" implies willful departure with intent to remain away and not temporary absence with intention of returning. Ill 173NE84. (4) Adultery and voluntarily leaving are both necessary and either one without other is insufficient. Ill 173NE84.
435-76½-New. His right of curtesy attaches to the fund in lieu of the land, and this fund should be held by the court until curtesy either becomes consummate by the death of the wife, or becomes extinguished by the death of the husband, and only the income disposed of in the meantime. 98NJEq90, 129A749.
436-94½-New. Equity will entertain bill for accounting brought by the husband, where the answer substantially admits his title but formally denies it. NJ 135A874.
436-4½-New. In a suit by a tenant by curtesy for an accounting, proof that one defendant receiving returns acted for others justifies decree against all. NJ 135A874.

CURTILAGE

437-3 22AlaA39, 111S767; 36 OklCr 401, 254P985; 120 Or643, 253P533, 535 [citCJ]. [a] (1) 111TexCr288, 12SW (2d)582. [b] (11) Filling station and park. 36 OklCr401, 254P985.
438-5 120 Or643, 253P533, 535 [citCJ].
438-9 22AlaA39, 111S767.
438-11 120 Or643, 253P533, 535 [cit CJ].
438-13 36 OklCr401, 254P985, 986 [cit CJ].
438-18 36 OklCr401, 254P985, 986 [cit CJ].
438-20 OklCr 288P369.
438-25 36 OklCr401, 254P985, 986 [cit CJ].
438-26 120 Or643, 253P533, 535 [cit CJ].
438-28 214Ala675, 108S612.
438-29 214Ala675, 108S612.

CUSTODY

441-76½-New. One who reports to the sheriff in accordance with the latter's direction is under "custody" within the statute imposing conditions on admissibility of confessions in such case. 100 TexCr167, 272SW456.

CUSTOMARY

442-90 14F(2d)985. [a] "Customarily" means same as "habitually." 93Fla261, 111S637.

CUSTOMS AND USAGES

446-1 220AppDiv293, 222NYS11, 13 [citCJ].
446-4 22F(2d)317 (general understanding).
447-9 [a] (8) Other statements. 32 F(2d)555.
449-28 220AppDiv293, 222NYS11, 13 [quotCJ]. [a] 171Minn205, 214NW17 [quotCJ]; 293Pa343, 143A5.
450-36 10LaA401, 119S779.
450-42 7F(2d)893; 177Ark60, 5SW (2d)729; 232 IllA450; 221MoA1056, 296 SW263; 294Pa585, 144A765.
451-47 77Colo 356, 236P1023; 220App Div491, 222NYS38; 21 OhA444, 153NE 313.
452-48 7F(2d)893; 74CalA734, 241P 945; 77Colo 356, 236P1023; 221MoA 1056, 296SW263; MoA 14SW(2d)701; TexCommnA 278SW188; Sask [1927] 3 DomLR812.
453-55 220AppDiv293, 222NYS11, 13 [quotCJ].
454-63 46Ark210, 55AmR577; 30Minn 319, 15NW308; MoA 14SW(2d)701; Can [1929] 4DomLR161. [d] Locality must be defined to prove custom. 232 IllA450.
455-64 74CalA734, 241P945; 77Colo 356, 236P1023; 30Minn319, 15NW308; TexCommnA 278SW188 (custom must be well-known).
455-67½-New. In the absence of agreement to the contrary, the custom at the place of delivery controls. 136Miss563, 101S294.
455-68 181Ark587, 26SW(2d)1110; 123 Or243, 261P701, 703 [quotCJ].
457-89 101Ala368, 13S491.
458-95 CalA 286P1068(2dcase); TexCivA 283SW555.
458-96 21AlaA5, 105S161; 74CalA734, 241P945; 100CalA606, 280P711 (person not engaged in trade); 77Colo 156, 234P1055; 108Conn521, 143A902; 120 Kan373, 243P1041; 6LaA773; 103NJL 83, 134A771; 129Misc406, 221NYS321; TexCivA 273SW676; TexCivA 290SW 802; TexCivA 5SW(2d)816, 820 [cit CJ]; TexCivA 14SW(2d)313. [b] (18) Charge for hauling pipes. 100CalA606, 280P711.
459-97 7F(2d)893; 74CalA734, 241P 945; 77Colo 156, 234P1055; 77Colo 356, 236P1023; 318 Ill 345, 149NE284; MoA 14SW(2d)701; 103NJL83, 134A771; 129 Misc406, 221NYS321; 223AppDiv155, 227NYS602; TexCivA 289SW164; TexCivA 5SW(2d)816.
460-98 100CalA606, 280P711 (local custom); 120Kan373, 243P1041; 129Misc 406, 221NYS321, 323 [quotCJ].
460-1 77Colo 156, 234P1055.
460-3 334 Ill 281, 165NE793.
461-11 TexCivA 289SW155, 157 [cit CJ]; 146Va641, 132SE840, 842 [quot CJ].
462-13 120Kan373, 243P1041.
462-15 318 Ill 345, 149NE284; 242 IllA 466.
462-20 17F(2d)311, 316 [quotCJ].
463-27 TexCivA 3SW(2d)482 (binding where principal has knowledge).
464-32 105Conn33, 134A223; TexCivA 11SW(2d)644.
464-36 TexCivA 283SW555.
465-50 21AlaA5, 105S161.
467-55 [a] (5) Patient is not bound by custom of physicians, of which he was unaware, to consider patient's ability to pay in determining amount

of fee. TexCivA 5SW(2d)816.

467-56 245 IllA586.

467-56½-New. Leases. Custom to close agricultural leases on November 1, if known, to parties is presumed to be part of lease. TexCivA 277SW796.

467-57 TexCivA 290SW251.

467-58 74CalA734, 241P945.

467-59 7F(2d)893; 74CalA734, 241P 945; 222AppDiv293, 222NYS11, 13 [quotCJ].

467-60 7F(2d)893; 77Colo 356, 236P 1023; 123Kan310, 255P52; 221MoA 1056, 296SW263; 290Pa274, 138A843; TexCivA 290SW251; TexCivA 297SW 244; Sask [1927] 3DomLR812.

469-66 30F(2d)349.

471-70 21F(2d)907; 77Colo 356, 236P 1023; 165Ga366, 140SE761; 166Ga563, 144SE170; 123Kan310, 255P52; 128 Kan50, 276P69; Mass 166NE837; Mass 173NE428; 172Minn58, 214NW918, 61 ALR474; 82NH482, 136A136; 126Misc 874, 215NYS225; 117 Okl 87, 246P868; 133SC458, 131SE620; TexCommnA 271 SW886; TexCommnA 285SW257; Tex CivA 297SW244.

474-75 261Mass94, 158NE346, 54ALR 1215.

475-83 261Mass94, 158NE346, 54ALR 1215; 123 Okl 133, 252P61, 63 [quot CJ]; TexCommnA 285SW257. [a] (2) Custom that machine shop, making special machines not to be marketed, shall not make similar machine for another customer, held unenforceable as unreasonable and against public policy. 261Mass94, 158NE346, 54ALR1215.

475-84 77Colo 356, 236P1023; 44 Ida 157, 255P643, 644, 53ALR191 [citCJ]; 123 Okl 133, 252P61, 63 [quotCJ]; 36 OklACR645, 646 [quotCJ]; 126 Okl 103, 258P750; 126 Or560, 270P404; 8Pa Dist&Co 579; TexCommnA 285SW257. [a] (16) 197NC499, 150SE38. (26) Jumping and riding freight trains. 36 OklACR645. (27) Factors. 156Tenn 229, 299SW1039.

476-85 167Ga555, 146SE173; 251 IllA 378; 196 Ind396, 148NE405; 309Mo 458, 274SW755 (ordinance); 123 Okl 133, 252P61, 63 [quotCJ]; 126 Okl 103, 258P750; 36 OklACR645, 646 [quotCJ]; 129 Or36, 276P262, 63ALR1133; 156 Tenn229, 299SW1039; TexCivA 9SW (2d)478. [a] Proof of custom repugnant to statute properly excluded.–38F(2d) 968.

476-86 123 Okl 133, 252P61, 63 [quot CJ].

476-88 123 Okl 133, 252P61, 63 [quot CJ].

476-90 118Nebr817, 226NW460 [quot CJ], 65ALR804.

476-91 118Nebr817, 226NW460 [quot CJ], 65ALR804; 126 Okl 103, 258P750.

477-99 146Va641, 132SE840.

478-7½-New. Owner's use of realty cannot be restricted by any custom short of prescriptive right. 22F(2d) 317.

479-17 25F(2d)684; TexCivA 283SW 555.

480-18 175Ark699, 300SW412.

481-36½-New. The custom and usage of trade and business with respect to notes payable on demand and bearing on the reasonableness of the time of negotiating such instruments is admissible on the issue whether a demand note was transferred before maturity. 113 Okl 147, 240P79.

481-36¾-New. Evidence which shows a bank's custom in dealing with papers transferred to it has been held admissible. 49RI 18, 139A466.

481-42 16F(2d)698.

485-96 215Ala363, 110S801, 803 [cit CJ].

485-99 But see TexCivA 26SW(2d) 308.

486-12½-New. A custom not to rent premises to negroes may be implied in a lease. 215Ala363, 110S801.

486-14 32F(2d)834.

487-22 222Ky183, 300SW633.

487-23 82NH482, 136A136.

487-24 222Ky183, 300SW633; MoA 4 SW(2d)486.

488-33 46Ark210, 55AmR577; 30Minn 319, 15NW308; 79Minn38, 81NW538; 223AppDiv155, 227NYS602; TennChA 62SW218.

489-35 264Mass249, 162NE347; Tex CivA 3SW(2d)482 (real estate broker).

490-47 318 Ill 345, 149NE284; Tex CivA 283SW634.

490-54 80CalA263, 251P683 (place of inspection of perishable goods); Tex CivA 283SW634.

490-56 TexCivA 283SW634.

491-60 12LaA625, 125S757 (delivery of car by driving it from another city, which is customary and usual thing to do).

492-83 23AlaA507, 128S116(2dcase); Vt 150A148.

492-84 16F(2d)698; 22F(2d)317 (custom); 35F(2d)907; 215Ala363, 110S 801; 204Cal 225, 267P693; 205Cal 764, 272P1052; 195Cal 655, 235P438; CalA 263P532; 93CalA370, 269P710; 98CalA 517, 277P183; 101CalA482, 281P1036; 165Ga366, 140SE761; 324 Ill 346, 155 NE343; 200 Iowa572, 203NW935, 205 NW205 [citCJ]; 115 Okl 176, 241P781; 132SC398, 129SE199; 133SC458, 131SE 620; TexCivA 274SW299; TexCivA 273 SW527, 530 [citCyc]; Va 138SE840; 200Wis181, 227NW875.

493-85 8F(2d)162; 33Ariz474, 266P 3; 177Ark60, 5SW(2d)729; 204Cal 225, 267P693; 195Cal 655, 235P438; CalA 286P1068(2dcase); 165Ga366, 140SE 761; 318 Ill 345, 149NE284; 324 Ill 346, 155NE343; 200 Iowa572, 203NW935, 205NW205 [citCJ]; Mo 281SW686; 114 Nebr584, 208NW742; 133Misc312, 232 NYS171; TexCivA 289SW155; TexCivA 297SW244; Va 138SE840; 200Wis181, 227NW875.

495-86 215Ala363, 110S801; 195Cal 655, 235P438; TexCivA 289SW155; 194 Wis520, 217NW298.

495-87 MoA 27SW(2d)1052; 114Nebr 584, 208NW742; 144 Okl 219, 291P116; Vt 150A148.

495-88½-New. The same meaning that a descriptive term in a sale order would have to merchants is ascribed to it by courts. 245NY305, 157NE148.

495-88½-New. The general trade meaning of expressions is controlled by express contract of the parties. 100CalA 606,280P711.

496-91 MoA 272SW1017; TexCivA 14 SW(2d)313. See also 177Ark1141, 9SW (2d)553.

497-97 36 OklACR639.

497-98 8F(2d)162; 8F(2d)601; 26F (2d)895; 35Ariz232, 276P523(2dcase); 93CalA370, 269P710; 100CalA606, 280 P711; CalA 288P437; 324 Ill 346, 155 NE343; IndA 168NE242; 12LaA625, 125S757; TexCivA 278SW527, 530 [cit Cyc]; TexCivA 290SW802; TexCivA 10 SW(2d)749.

498-3 See also 37Wyo 448, 263P960, 963 [citCJ]. [c] (30) Handle. 263Mass 15, 160NE297.

498-9 35F(2d)907.

499-19 332 Ill 370, 163NE825; 200 Iowa572, 203NW935, 205NW205; 240 NY223, 148NE328. [a] (10) Scrapped copper. 151Md392, 135A166.

499-22 16F(2d)698; 215Ala363, 110S 801; 204Cal 225, 267P693; 195Cal 655, 235P438; TexCivA 278SW527, 530 [cit Cyc].

500-23 33GaA674, 128SE76 (compensation for storing and handling); 215 AppDiv617, 213NYS468, 474 [quotCJ]; TexCivA 278SW527. But see TexCivA 294SW612.

500-24 114Nebr584, 208NW742; Tex CivA 294SW612.

501-25 16F(2d)698.

501-28 47 Ida578, 277P431.

501-32 221MoA1056, 296SW263, 268 [citCJ].

502-33 221MoA1056, 296SW263, 268 [citCJ].

502-35 177Ark663, 7SW(2d)336; 219 MoA211, 269SW665.

503-40 98CalA75, 276P383. [a] (29) "Shipment from the Orient, 75 cases in April." 324 Ill 346, 348, 155NE343, (30) "Wool waste" as permitting delivery of goods having not more than one per cent of extraneous matter. 18F(2d) 635.

503-47 195Cal 655, 235P438.

504-67 200 Iowa572, 203NW935, 205 NW205.

504-68 258Mass282, 154NE769.

504-68½-New. , of "package: usual," 195Cal 655, 235P438.

505-96 [b] Customary commission is recoverable by broker procuring sale where not specified in contract. 232Ky 503, 23SW(2d)945, 68ALR1481.

506-3 [b] Evidence held inadmissible.–127 Or320, 272P273.

506-5 230Ky235, 18SW(2d)1001 (indemnity bond).

507-28½-New. Evidence of a universal custom of agents to issue renewal policies may be admissible. 132SC398, 129 SE199.

507-29 41GaA794, 154SE809.

508-34 [a] In construction of deed conveying timber, evidence held to show no definite custom that timber included only trees eighteen inches in diameter and upward eighteen inches above ground. 7F(2d)689.

508-35½-New. But the deed will not be construed in the light of custom repugnant to established law. 77Colo 356, 236P1023.

508-46 8F(2d)162; 8F(2d)506; 8F (2d)704; 13F(2d)105; 17F(2d)478; 20 F(2d)212; 20F(2d)635; 26F(2d)895; 36F(2d)942; 38F(2d)52; 35Ariz232, 276P523(2dcase); 172Ark1177, 289SW 472; 176Ark601, 3SW(2d)673; 177Ark 164, 6SW(2d)2; 181Ark841, 28SW(2d) 56; 181Ark1055, 29SW(2d)291; 195 Cal 655, 235P438; 73CalA262, 238P752; 80CalA609, 252P733; 96CalA304, 273P 1091(1stcase); 99CalA438, 278P880; 33 GaA625, 127SE669; 33GaA642, 127SE 892; 37GaA278, 139SE920; 47 Ida578, 277P431; 200 Iowa572, 203NW935, 205 NW205; 200 Iowa1349, 206NW610; 123 Kan310, 255P52; 218Ky497, 291SW737; 169La1006, 126S508; 154Md171, 140A 64, 70 [quotCJ]; 264Mass249, 162NE 347; 176Minn355, 223NW298(1stcase); Mo 281SW686; 114Nebr584, 208NW742, 745 [quotCJ]; 114Nebr600, 209NW254; 114Nebr560, 210NW101; NJSup 142A 761; 213AppDiv357, 210NYS686; 126 Misc373, 213NYS387; 126Misc874, 215 NYS225; 134Misc211, 236NYS68; 129 Misc406, 221NYS321; 193NC780, 138SE 131, 53ALR1404; 115 Okl 176, 241P781; Okl 293P188; 132 Or145, 285P214; 285 Pa337, 132A189; 285Pa426, 132A287; 117Tex377, 5SW(2d)965, 60ALR665; TexCommnA 296SW487; TexCivA 274 SW299; TexCivA 290SW251; TexCivA 290SW802; 104WVa458, 140SE323; BC [1929] 4DomLR400. [b] (1) 114Nebr 584, 208NW742. (2) 114Nebr584, 208 NW742.

511-47 MoA 27SW(2d)1052; 104WVa 458, 140SE323.

512-51 114Nebr584, 208NW742; Tex CivA 299SW348.

512-54 114Nebr584, 208NW742.

512-54½-New. Repugnancy to implied agreement. Custom and usage may not contradict implied agreement between parties. 126Misc874, 215NYS225.

512-55 74CalA591, 241P897.

512-58 104WVa458, 140SE323 (word defined by statute). [a] (10) "Ton." 104WVa458, 140SE323.

513-60 114Nebr560, 210NW101.

513-63 20F(2d)212; 127 Or655, 272P 275.

513-66 26F(2d)895; 74CalA591, 241P 897; 80CalA609, 252P733 (realty); 33 GaA625, 127SE669 (automobiles); 114 Nebr584, 208NW742. [a] (4) 200 Iowa 1349, 206NW610.

515-73 33GaA642, 127SE892; 126Misc 874, 215NYS225.

515-76 153Wash23, 279P120.

515-77 17F(2d)478; TexCivA 290SW 251; 104WVa458, 140SE323. [a] (7) Contract for employment as firemen on ship limiting hours cannot be changed by custom obtaining on vessel, and custom cannot justify exacting more than contract time. 17F(2d)478.

516-79 213AppDiv357, 210NYS686.

516-87 169La1006, 126S508.

516-95 93CalA370, 269P710; 230Mich 524, 203NW103 (to meet action for price); 317Mo 524, 297SW404; MoA 16 SW(2d)624; 73Mont219, 236P250; 123 Or243, 261P701.

517-96 101CalA482, 281P1036; 234 IllA576; Mo 281SW686; MoA 27SW (2d)1052; 118Nebr817, 226NW460, 65 ALR804; 126Misc874, 215NYS225; 36 OklACR645, 646 [quotCJ]; 126 Or621, 270P781; 8PaDist&Co 413; TexCivA 290SW802; 147Wash390, 266P178. See

also 200 **Iowa**572, 203**NW**935, 205**NW** 205. But see 35**F(2d)**907. [b] **Evidence held inadmissible** where custom not pleaded. 38**F(2d)**968.

517–97 220**MoA**556, 287**SW**796.

517–98 234 **IllA**576; 230**Mich**524, 203 **NW**103; **Mo** 20**SW(2d)**888; **TexCivA** 13 **SW(2d)**467.

517–99 **MoA** 27**SW(2d)**1052.

517–1 230**Mich**524, 203**NW**103.

518–3 220**MoA**1062, 282**SW**86 (meaning of word "pigs").

518–6 290**Pa**274, 138**A**843; 8**PaDist& Co** 413.

518–8 234 **IllA**576. [c] (3) As to custom of contractors to rely on engineer's estimates without making independent investigation. 73**CalA**262, 238**P**752. (4) As to custom in fur trade. 234 **IllA**576.

518–9 118**Nebr**817, 226**NW**460, 65**ALR** 804.

518–10 [b] (5) Other allegations of custom held sufficient. 36 **OklACR**639.

519–16 **Mo** 281**SW**686, 690 [citCyc].

519–19 **TexCivA** 13**SW(2d)**467.

519–21 150**Miss**272, 116**S**294; 103**NJL** 83, 134**A**771; 132**Misc**704, 230**NYS**482.

519–23 116**Nebr**456, 218**NW**92.

520–31 77**Colo** 156, 234**P**1055.

520–35 **Mo** 281**SW**686; 36 **OklACR**645, 646 [quotCJ]. [a] **Evidence held admissible.**–37**F(2d)**711; 181**Ark**192, 25**SW (2d)**28.

520–36 177**Ark**1141, 9**SW(2d)**553.

520–38 **TexCommnA** 296**SW**487.

520–44½–New. Evidence to show a general custom among sheep men throughout eastern Oregon to put sheep contracted to be delivered at a future date in corrals for inspection has been held admissible. 123 **Or**243, 261**P**701.

521–45 167**Ga**555, 146**SE**173.

521–47 But see 97**CalA**112, 274**P**1009.

521–50 222**AppDiv**233, 225**NYS**764.

521–51 314**Mo** 515, 284**SW**439; 196**NC** 208, 145**SE**5.

521–52 215**Ala**177, 110**S**376, 377 [cit CJ].

521–53½–New. Opinion is not admissible to prove that custom ought to exist. 314**Mo** 515, 284**SW**439.

521–54 201 **Iowa**621, 207**NW**767 (custom of commission houses, or factors in handling class of goods in his possession).

522–57 151**Md**392, 135**A**166.

522–62 7**F(2d)**893; 74**CalA**734, 241**P** 945; 89**Fla**224, 104**S**593; 178**Minn**526, 227**NW**850 (specific instances must be numerous enough to base inference of systematic conduct); 221**MoA**1056, 296 **SW**263, 268 [citCJ]; 77**Mont**406, 251**P** 157; 103**NJL**83, 134**A**771; 242**NY**38, 150**NE**594; 220**AppDiv**293, 222**NYS**11; 115 **Okl** 176, 241**P**781 (evidence sufficient); **TexCommnA** 278**SW**188 (clear and satisfactory evidence necessary); **Sask** [1927] 3**DomLR**812. [a] But see **MoA** 4**SW(2d)**486. [f] **Evidence held sufficient.**–196**NC**208, 145**SE**5. [g] **Evidence held too vague and general** to make error binding against custom. 242 **NY**38, 150**NE**594. [h] **Evidence held sufficient to establish custom.**–36**GaA**105, 135**SE**767.

523–63 89**Fla**224, 104**S**593; **MoA** 22**SW (2d)**201; 242**NY**38, 150**NE**594; 220**App Div**491, 222**NYS**38, 41 [quotCJ]; **Can** [1929] 4**DomLR**161. [a] (19) Custom to regard bills of lading without notation as receipts for merchandise in apparently good condition. 267**US**260, 45 **SCt**269, 69**L ed**603. (20) That local banks give credit on certain drafts to certain holders. **TexCommnA** 278**SW** 188. (21) That language used had by custom meaning of option rather than lease contract. 33**NM**11, 261**P**813. (22) Other instances. 39**F(2d)**348; 39**F(2d)** 578; **TexCivA** 27**SW(2d)**851. [b] **Refusal to find custom held not erroneous** in view of vague and general evidence. 242**NY**38, 150**NE**594.

523–64 **MoA** 24**SW(2d)**660 (negative testimony). [a] (36) Custom enlarging meaning of word "royalty." 123**Kan** 310, 255**P**52. [c] (12) Custom that creditor's pro rata share of assets was satisfaction and creditor's knowledge thereof. 172**Ark**156, 292**SW**117.

524–66½–New. Proof that there is a standard form of contract used in a trade must be accepted as governing the contract, unless contradicted. 215**App Div**617, 213**NYS**468.

524–68½–New. Evidence has been held insufficient to charge a buyer of grain with knowledge of a custom possessed by one who acted in his behalf in receiving the grain. 120**Kan**373, 243**P** 1041.

524–71 [c] **More than one witness essential.**–232 **IllA**450.

525–75 12**PaDist&Co** 335.

525–77 177**Ark**1138, 9**SW(2d)**1064.

525–79 **MoA** 300**SW**559. [a] 233**Ky**142, 25**SW(2d)**51.

525–86 149**Wash**685, 271**P**878.

525–86½–New. or should not submit issue to jury. **TexCommnA** 278**SW**188.

525–87 30**F(2d)**776; 33**Ariz**474, 266**P**3; 195**Cal** 655, 235**P**438; 36**GaA**105, 135**SE** 767; 319 **Ill** 326, 150**NE**242; **MoA** 4 **SW(2d)**486; 115 **Okl** 176, 241**P**781; 49 **RI** 18, 139**A**466 (probative value of evidence for jury); **TexCommnA** 3**SW(2d)** 72; 146**Va**641, 132**SE**840; 142**Wash**101, 252**P**540. [b] 146**Va**641, 132**SE**840. [c] **Whether custom is definite, uniform, and universal** is jury question. 36**GaA**105, 135**SE**767.

526–88 178**Ark**753, 13**SW(2d)**298.

526–90½–New. Intention of the parties to contract with reference to making custom a part thereof has been held a question of fact. **TexCivA** 283**SW**634.

526–91 36**GaA**105, 135**SE**767.

526–95 But see 36**GaA**105, 135**SE**767.

527–98 41**GaA**794, 154**SE**809; 143**Va** 656, 129**SE**687 (instruction to consider general custom of wading at port in absence of agreement, justified under evidence).

527–99 21 **OhA**444, 153**NE**313.

CUSTOMS DUTIES

535–4 [h] (7) Provision of Philippine Tariff Act for levy of duty as charge for wharfage is valid though goods exported were loaded from private wharf. 51 **Philippine**131. [i] (6) Legislature of Porto Rico cannot now impose tax which may in fact operate as import duty on articles introduced into Porto Rico from United States. 35**PortoRico** 869, [j] (1) 16**CustA**442.

537–14 19**F(2d)**484.

537–16 12**CustA**266; 13**CustA**105; 14 **CustA**273; 14**CustA**406.

537–19 [b] **Porto Rico.**–34**PortoRico** 33.

538–24½–New. The theory of the customs laws is to impose duties on dutiable articles which enter into the commerce of the country. 16**CustA**214.

538–25 13**F(2d)**83; 12**CustA**299. [b] **Congress may impose duty** on forbidden imports. 16**F(2d)**682.

539–45 [a] **Foraker Act** § 3 prohibiting imposition of duties on imports into Porto Rico was not repealed by Jones Act. 34**PortoRico** 33.

541–75½–New. Statute authorizing president to regulate customs duties for purpose of equalizing differences in cost of production in United States and competing foreign countries is not invalid if done to secure revenue although other motions exist. 276**US**394, 48**SCt**348, 72 **L ed**624.

541–75⅛–New. Countervailing duty provisions are not applicable to a reappraisement case in which the court is required to find whether imported merchandise had both foreign and export values and if so which was higher, or, if but one, the kind and amount thereof. 16**CustA**56.

541–76 See also 11**CustA**266.

542–99 [f] **Treaty with Great Britain** authorizing seizure of vessels importing liquor construed. 40**F(2d)**74.

543–2 [b] **Statute held not repealed by treaty.**–20**F(2d)**164.

543–6½–New. Search and seizure of a vessel for failure to produce manifest is not unlawful, under treaty. 30**F(2d)** 534.

543–18 13**F(2d)**548. See also 13**CustA** 72.

544–23 16**F(2d)**937; 13**CustA**489.

544–24 17**F(2d)**879; 23**F(2d)**336; 12 **CustA**481; 12**CustA**483; 12**CustA**541. a] (4) 16**CustA**82. (7) 14**CustA**209. [b] **Particular statutes construed.**–11 **CustA**435; 12**CustA**88; 12**CustA**318; 12 **CustA**327; 12**CustA**341. (5) 13**CustA** 22; 13**CustA**105; 13**CustA**101; 13**CustA** 140; 14**CustA**57; 14**CustA**255; 14**CustA** 419; 15**CustA**122; 15**CustA**316; 15**CustA** 343; 16**CustA**61; 16**CustA**112 (hydraulic processes and special tools and dies to be used in connection therewith held each required to be marked); 16**CustA** 478 (Hecolith-Base-Plates held capable of being marked).

544–25 10**CustA**31; 10**CustA**57; 10 **CustA**183; 12**CustA**407; 12**CustA**415; 12**CustA**451. [b] **Construction of war revenue acts.**–11**CustA**15; 11**CustA**226; 11**CustA**252.

544–28 14**CustA**194; 15**CustA**161. See also 14**CustA**222.

545–29½–New. The heading or title of a tariff paragraph is given weight in determining the character of the article claimed to be dutiable under it. 16 **CustA**176.

545–30 14**F(2d)**874; 13**CustA**42.

545–34 12**CustA**486.

545–37 11**CustA**181; 16**CustA**461.

545–40 16**CustA**461.

546–43 11**CustA**157. See also 12**CustA** 359.

547–49 16**CustA**556.

547–49½–New. A designation by use is more specific than a designation of composition in whole or in part. 16**CustA** 467.

547–50 274**US**225, 47**SCt**616, 71**L ed** 1013; 10**CustA**44; 12**CustA**365; 12 **CustA**557; 14**CustA**128; 14**CustA**289; 16**CustA**378.

547–51 16**CustA**82; 16**CustA**180; 16 **CustA**418. [c] **Surrounding circumstances** may be considered where it is uncertain whether congress intended that other than ordinary meaning should be attached to language used. 16**CustA** 82.

547–53 But see 274**US**225, 47**SCt**616, 71 **L ed**1013.

547–54 11**CustA**157; 12**CustA**365; 13 **CustA**224; 14**CustA**1; 15**CustA**16; 15 **CustA**202; 15**CustA**440; 16**CustA**366.

548–55 13**CustA**69; 13**CustA**93.

548–60 10**CustA**183; 11**CustA**261.

548–60½–New. A commercial meaning once established is not presumed to continue. 13**CustA**419.

548–61 10**CustA**275 (descriptive term); 12**CustA**563.

548–62 [b] (10) Evidence is insufficient to prove a commercial designation in absence of proof that descriptive term has meaning in trade and commerce of United States which differs from common meaning. 16**CustA**126. (11) Evidence held insufficient to show that term "shoebuckles" included enameled shoe ornaments. 16**CustA**374. (12) Witness who has dealt extensively in "stearic acid" and is familiar with its trade requirements is competent to testify as to products designated in trade as stearic acid though they never bought nor sold product like one involved. 16 **CustA**488. (13) Evidence held insufficient to show that product involved was bought and sold in principal markets of United States as stearic acid. 16 **CustA**488.

548–64 16**CustA**353.

548–66 16**CustA**50; 16**CustA**353.

548–67½–New. Expert testimony as to chemical or scientific meaning of a tariff term is of no probative value. 16 **CustA**378.

549–69 10**CustA**107; 10**CustA**124.

549–73 13**CustA**315; 14**CustA**108; 16 **CustA**144.

549–75 16**CustA**548; 16**CustA**552.

550–81 10**CustA**228; 11**CustA**453; 12 **CustA**48; 12**CustA**209; 13**CustA**367; 14 **CustA**328.

550–86½–New. Every article, finished or partly finished, made in chief value of cellulose is subject to the operation of the provision for duty on compounds of cellulose although more specifically provided for elsewhere. 16**CustA**229 (sporting powder).

550–86⅛–New. In the case of an article obtained by reduction of substances by heat, the question to be determined is the component material of chief value of the article which came out of the furnace. 16**CustA**358.

550–87 13**CustA**428. But see 12**CustA** 502.

550-91½-New. Doctrine of classification by use has no application where manifest intention of congress is otherwise shown. 16**CustA**358.
551-94 11**CustA**314.
551-95 11**CustA**131; 11**CustA**139; 11 **CustA**144; 11**CustA**453; 11**CustA**479; 11**CustA**525; 12**CustA**490; 13**CustA**98; 13**CustA**252; 13**CustA**444; 14**CustA**411; 15**CustA**97; 15**CustA**369.
551-97 11**CustA**217; 11**CustA**495; 13 **CustA**167; 14**CustA**247; 16**CustA**15.
552-9 12**CustA**497.
552-10 13**CustA**105; 51**Philippine**305.
552-12 See also 13**CustA**105.
552-16 16**F(2d)**937.
553-22 12**CustA**134; 12**CustA**137; 12 **CustA**138(1stcase); 12**CustA**138(2d case); 12**CustA**139; 12**CustA**207; 12 **CustA**218; 12**CustA**250; 12**CustA**253; 12**CustA**255; 12**CustA**290; 12**CustA**306; 13**CustA**176; 13**CustA**237; 13**CustA**569. But see 12**CustA**266. [a] (3) Merchandise imported and entered and for which duties were paid and permit for withdrawal was entered prior to Sept. 21, 1922 is dutiable under Tariff Act of 1913 and not under Tariff Act of 1922. 16**CustA**97. [d] **Reliquidation under act of 1922** as to goods in warehouse at time act became effective could not affect portion of entry withdrawn and duty paid before act became effective. 13 **CustA**96. [e] **Reliquidation under act of 1922** as to goods dutiable under act of 1913 and on which duties were paid and for which withdrawal permit was issued before act of 1922 took effect is unauthorized and invalid. 16**CustA** 97.
554-32 [a] (5) But see 10**CustA**207.
554-33 13**CustA**310.
554-35 12**CustA**296.
554-38 10**CustA**112; 11**CustA**246; 11 **CustA**388; 12**CustA**215; 14**CustA**345; 15**CustA**298.
554-38½-New. cresylic acid; 12**CustA** 359.
555-39 12**CustA**447; 13**CustA**24; 13 **CustA**203; 13**CustA**210; 13**CustA**607; 15**CustA**348. [f] **Mixtures** including solutions consisting in whole or in part of coal tar products include mixture of coal tar pitch and cresylic acid. 16 **CustA**378. [g] **Standards of strength.**–16**CustA**392.
555-40½-New. compounds containing cyanide; 16**CustA**50.
555-40⅓-New. cyanide salts; 16**CustA** 50.
555-42 12**CustA**32; 13**CustA**30. [a] (1) 11**CustA**144. (15) Soapbark siftings are within provision. 16**CustA**103.
556-45 13**CustA**3; 15**CustA**403.
556-46 11**CustA**487; 11**CustA**488; 14 **CustA**301.
556-50 11**CustA**329; 11**CustA**331; 14 **CustA**216; 15**CustA**277.
556-51 10**CustA**112; 15**CustA**295.
556-53 [a] (19) Wood stain, though containing large percentage of alcohol, is dutiable as such only. 41**F(2d)**788.
556-53½-New. perfume materials; 13 **CustA**346; 13**CustA**534; 15**CustA**279.
556-53⅓-New. pyroxylin, compounds of, made into partly finished articles; 16 **CustA**478.
556-53¼-New. pickling salt; 15**CustA** 460.
556-53⅙-New. pigments not specially provided for; 12**CustA**502.
557-54½-New. soap; 13**CustA**87; 16 **CustA**499.
557-54⅓-New. soap powder; 16**CustA** 499.
557-55½-New. tuscan red; 10**CustA** 177.
557-55⅓-New. synthetic phenolic resin and all resinlike products prepared from phenol; 16**CustA**461.
557-57 15**CustA**401.
557-62 12**CustA**11.
557-64½-New. common earthenware; 11**CustA**249.
557-64⅓-New. incandescent electric light bulbs and lamps; 16**CustA**144 (aviation field flood lights not included).
558-65 11**CustA**525; 12**CustA**37; 14 **CustA**7; 14**CustA**321. [a] (16) Marble mosaic inlaid floor designed for use in church as flooring under altar and shrines held dutiable as manufacture of marble and not free as part of altar or shrine or as work of art. 16**CustA** 233.
558-67½-New. ornamented or decorated; 11**CustA**50.
558-67⅓-New. mountings; 12**CustA** 425.
558-70 16**CustA**144 (aviation field flood lights not included).
558-70½-New. vials; 14**CustA**332.
558-70⅓-New. scientific articles composed wholly or in chief value of glass or paste or a combination of glass and paste; 16**CustA**427. [a] **That article is commonly used in trades** does not render it any less scientific article. 16 **CustA**427. [b] **Question of fact.**–16 **CustA**427.
558-71 11**CustA**13.
558-72 13**CustA**319.
558-73 15**CustA**352.
558-74½-New. illuminating articles; 13**CustA**5; 13**CustA**353; 13**CustA**362; 14**CustA**297.
558-74⅓-New. glass partly blown; 12 **CustA**105.
558-74¼-New. glass not specially provided for; 16**CustA**410.
558-74⅙-New. incandescent electric light bulbs and lamps; 16**CustA**472.
558-75½-New. surveying instruments; 11**CustA**426.
558-75⅓-New. plain green or colored, molded or pressed, glass jars; 15**CustA** 463.
558-76 11**CustA**314; 13**CustA**350; 13 **CustA**362; 13**CustA**407; 15**CustA**175. [a] (15) Glass insulators used for insulation of outside radio antenna. 16 **CustA**315. [b] **Glass candlesticks are not classifiable under heading of illuminating articles.**–13**CustA**5.
559-77 [a] (15) Millinery ornaments of metal and paste. 13**CustA**407.
559-79½-New. alloys in which aluminum is component material of chief value, in crude form; 16**CustA**358.
559-79⅓-New. alloys of steel, not specifically provided for; 16**CustA**358.
559-80 13**CustA**525.
559-80½-New. automobiles; 11**CustA** 345.
559-80⅓-New. automobile and parts; 13**CustA**569.
559-82½-New. blades for safety razors; 14**CustA**432.
559-83½-New. bronze powder; 13 **CustA**636.
559-87½-New. castings advanced in condition; 16**CustA**255.
559-88 13**CustA**519; 14**CustA**443.
559-89 [a] (6) Copper matte. 10**CustA** 228.
559-89½-New. cream separators; 15 **CustA**32.
560-91 15**CustA**110.
560-92 15**CustA**271.
560-92½-New. embroidering machines; 11**CustA**446; 13**CustA**256.
560-93 [a] (3) Ferromanganese containing more than one per cent of carbon under Tariff Act (1922) par 302. 16**CustA**180.
560-93½-New. ferrosilicon; 10**CustA** 155.
560-96 [a] (4) Term does not include all articles having hollow interiors. 16**CustA**570. (5) That hollow ware is silver plated does not exclude it from provision. 16**CustA**570.
560-1 10**CustA**228; 13**CustA**507; 13 **CustA**660.
560-1½-New. machines or parts thereof; 15**CustA**308; 15**CustA**322; 16**CustA** 315; 16**CustA**420.
560-1⅓-New. lead bearing ores; 16 **CustA**46 (flue dust not included).
560-1¼-New. parts of machines not specially provided for; 16**CustA**285.
560-3 [a] (6) Nor is flue dust. 16 **CustA**46.
560-7 10**CustA**57.
561-12½-New. pistols; 15**CustA**291.
561-13 [a] (1) 10**CustA**201.
561-14½-New. scissors; 11**CustA**396.
561-15 14**CustA**449.
561-15½-New. snap fastners and clasps; 13**CustA**456; 13**CustA**462; 13 **CustA**522.
561-15⅓-New. sewing machines, and parts thereof, not specifically provided for, valued at not more than seventy-five dollars each, or at more than seventy-five dollars each; 16**CustA**539.
561-16 11**CustA**281.
561-17 [c] (8) Steel plates known as universal mill plates held dutiable as steel plates not specially provided for rather than as parts or sections of columns or posts, or building forms, or structural shapes. 16**CustA**524. [g] (1) 16**CustA**524. (4) Corrugated steel bars held dutiable as structural shapes of steel rather than as steel bars. 16 **CustA**372. (5) Steel bars held structural shapes of steel. 16**CustA**328. (6) Deformed steel bars held structural shapes of steel. 16**CustA**345. (7) That steel bars require certain manipulations by bending of ends so that they may be anchored by means of stirrups, or otherwise, to wall columns or laterals of building does not remove them from classification of structural shapes into that of material. 16**CustA**328. (8) Steel product used as structural shape of steel is not removed from classification because it requires fitting and fabricating before use. 16**CustA**328. (9) Whether steel that goes into structure is to be classed as structural shapes or material depends on character, designation, and use. 16**CustA**328. [j] **Provision for additional rate of duty on steel containing molybdenum and tungsten** is inapplicable to materials not containing both of such ingredients. 16 **CustA**26.
561-17½-New. surgical instruments; 14**CustA**446.
561-17⅓-New. structural shapes of iron or steel; 15**CustA**97.
561-18½-New. table and household utensils; 16**CustA**570 (not excluded from provision because silver plated).
562-22 10**CustA**191. [a] (5) Flue dust is not unwrought metal. 16**CustA**46.
562-24 11**CustA**363; 13**CustA**647; 15 **CustA**390.
562-28 See also 12**CustA**350; 13**CustA** 53; 13**CustA**262.
563-31 16**CustA**144 (aviation field flood lights); 16**CustA**482 (dental copper amalgam held dutiable as partially manufactured nonenumerated article composed in chief value of copper). See also 15**CustA**424.
563-31½-New. It does not necessarily follow from the fact that a provision appears in the schedule for metals and manufactures thereof that only such articles are covered thereby as are made wholly or in chief value of metals. 16 **CustA**285.
563-33½-New. bamboo, articles partly manufactured of; 16**CustA**518.
564-35 11**CustA**110.
564-37 13**CustA**90.
564-38 [a] (14) Timber unmanufactured. 10**CustA**104.
564-38½-New. raffia; 11**CustA**81.
564-38⅓-New. mahogany; 16**CustA** 502.
564-38¼-New. manufactures of bamboo; 14**CustA**60.
564-39 10**CustA**220.
564-39½-New. staves; 11**CustA**107.
564-43 12**CustA**13. [a] (17) Wallboard consisting of thin layer of wood with layer of cement on each side and layer of paper or pulp superimposed is dutiable as manufacture of which wood is component material of chief value rather than as wallboard under eo nomine provision. 16**CustA**257.
564-44 13**CustA**404.
564-45½-New. sugar cane; 15**CustA** 337.
565-52 See also 15**CustA**105.
565-67½-New. chicle; 10**CustA**98.
565-67⅓-New. caviar, fresh; 14**CustA** 304.
565-67¼-New. cherries; 12**CustA**337.
565-67⅙-New. cherries sulphured or in brine; 14**CustA**330.
565-69 13**CustA**404.
565-71 12**CustA**90.
566-72½-New. dried egg yolk; 16**CustA** 126.
566-73½-New. fish roe; 13**CustA**155.
566-73⅓-New. fish, dried; 15**CustA**386.
566-74 12**CustA**4; 12**CustA**124.
566-74½-New. fish, other than specially provided for; 14**CustA**251.

566–75 15CustA288.
566–75½–New. grapes in barrels. 14 CustA150.
566–75⅓–New. fresh lamb; 16CustA120 (frozen lamb included).
566–76 12CustA552.
566–76½–New. meats not specially provided for; 13CustA542.
567–78 14CustA228; 14CustA234(1st case); 15CustA406.
567–79 10CustA259(2dcase).
567–80 13CustA633; 15CustA55.
567–80½–New. onions; 14CustA123; 14CustA131; 16CustA174 (onions packed in brine not included).
567–84½–New. potato flour; 15CustA 231.
567–88 12CustA7; 12CustA22; 12 CustA47; 15CustA355.
567–88½–New. smoked herring; 12 CustA421; 14CustA206.
567–88⅓–New. screenings of grains or seeds; 16CustA176. [a] **Proviso** was intended to prevent admixture of wheat and other grains or seeds with foreign matter dutiable at higher rate and importing mixture at grain or seed rate. 16CustA176.
567–88¼–New. sauces of all kinds, not specially provided for; 11CustA127.
567–90½–New. tomatoes; 14CustA267.
567–91 11CustA46; 12CustA407; 12 CustA463. [b] **Pastes composed of vegetables.**–13CustA280.
567–92 12CustA548.
567–93 11CustA186; 11CustA514; 14 CustA96. [a] (11) Onions packed in brine are included in provision for vegetables packed in brine. 16CustA 174.
568–95½–New. "Beans, green or unripe" includes green lima beans dried. 16CustA562.
568–98 11CustA288.
568–99 [a] (6) Caviar consisting of sturgeon roe is dutiable under act of 1922 as caviar, prepared or preserved. 16CustA531.
568–1 See also 13CustA538.
568–2 See also 12CustA415.
568–3½–New. The act of 1922 provides for smoked fish in containers of state size. 16CustA167 (codfish included).
569–5 16F(2d)937.
569–5½–New. cider; 11CustA157.
569–6 13CustA101 (grape juice capable of producing more than one per centum of alcohol is subject to additional duty of five dollars per proof gallon).
569–6½–New. alcoholic medicinal compounds; 11CustA402.
569–8 13CustA63.
569–10 11CustA60 (War Revenue Act); 13CustA63.
569–10½–New. The government may tax liquor unlawfully imported. 13F (2d)548.
569–12½–New. cotton having a staple of one and three-eighths inches or more in length; 13CustA553.
569–13 10CustA79; 11CustA197. [a] (5) Act of 1913. 11CustA90 ("colored"); 11CustA124.
570–15½–New. cotton or other vegetable fiber; 11CustA163.
570–19 11CustA102; 11CustA174; 15 CustA228; 15CustA323.
570–21 11CustA174.
571–25½–New. rugs; 13CustA222.
571–27 11CustA519.
571–30 11CustA181.
571–30½–New. woven figured; 14CustA 32; 14CustA234(2dcase); 14CustA197.
571–32 [a] (24) Cotton canvas stamped with designs in various colors intended to be embroidered. 16CustA548; 16 CustA552.
571–32½–New. Under the provision of Tariff Act of 1922 imposing additional duty on cotton cloth when not less than forty percent of cloth is printed, dyed, or colored with vat dyes, both sides of cloth should be counted if printed on both sides and only one side should be considered if printed on only one side. 16CustA437.
571–35 10CustA183.
572–36½–New. bags made of jute; 16 CustA225.
572–38½–New. cordage; 11CustA134; 14CustA185.
572–39½–New. floor coverings not specially provided for; 14CustA315.
572–39⅓–New. vegetable fiber; 11 CustA536.
572–39¼–New. colored fabrics; 11 CustA368; 11CustA373.
572–42½–New. napkins; 13CustA291; 15CustA341.
572–42⅓–New. rugs, made wholly of cotton; 13CustA299.
572–46 13CustA359.
573–48 274US225, 47SCt616, 71L ed 1013.
573–51 15CustA198; 16CustA424.
573–51½–New. camel's hair; 13CustA 149.
573–52 10CustA254; 11CustA333; 11 CustA406; 11CustA548.
573–53½–New. clothing wool; 12CustA 62; 12CustA78; 12CustA557.
573–54½–New. craped wool; 11CustA 471.
573–55½–New. floor coverings; 14 CustA240.
573–55⅓–New. flocks; 14CustA280.
573–56 11CustA475; 11CustA492.
574–59½–New. manufactures of wool not specially provided for; 14CustA51; 16CustA424.
574–61½–New. outerwear and other articles wholly or in chief value of wool; 13CustA57.
574–61⅓–New. scoured wool; 13CustA 641.
574–62 12CustA391.
574–64 11CustA540.
574–66½–New. wool not improved by the admixture of merino or English blood; 15CustA74.
574–67 11CustA392; 13CustA1.
574–68½–New. woven fabrics; 14CustA 65; 14CustA166; 16CustA424.
574–68⅓–New. wool thread waste; 16 CustA475.
574–69 12CustA293.
574–69½–New. wool in the fleece, 274 US225, 47SCt616, 71L ed1013.
574–69⅓–New. and wool in the yarn. 274US225, 47SCt616, 71L ed1013.
574–69¼–New. Wool yarn is provided for in Tariff Act of 1922. 16CustA548.
575–70½–New. new artificial silk; 11 CustA321.
575–71 10CustA49. [a] (6) 10CustA 52.
576–81 16CustA548.
576–82 11CustA199; 12CustA34.
577–83 12CustA5.
577–84 12CustA167; 14CustA376; 14 CustA404.
577–84½–New. bibulous paper; 11 CustA464.
577–89 15CustA244.
577–90½–New. fashion magazines or periodicals; 16CustA566.
577–92½–New. hanging paper; 12 CustA451.
577–94 14CustA116.
577–96 11CustA493.
577–98½–New. paper otherwise coated for photographic purposes; 13CustA59.
577–2 [a] (18) Telephone note books held not included. 16CustA323.
577–2½–New. printing paper not otherwise provided for; 16CustA431.
578–3½–New. pulp manufactures; 15 CustA19.
578–6 10CustA22.
578–7 11CustA291; 11CustA523. [a] (14) Paper trays. 11CustA105. (15) Telephone note books. 16CustA323.
578–8 10CustA54; 10CustA62; 10 CustA74; 11CustA81; 11CustA391; 11 CustA412; 12CustA34; 13CustA87; 15 CustA274; 15CustA318. [a] (23) Carvings from solid pieces of ivory made to resemble on their face various flowers are not "artificial and ornamental flowers." 10CustA57. (24) Electric perfume burners in shape of rose held dutiable as articles in chief value of flowers and parts thereof rather than as artificial flowers or manufactures of shell. 16CustA512.
578–8½–New. articles designed to be worn on apparel or carried on or about or attached to the person; 11CustA502; 12CustA181; 13CustA66; 14CustA71; 15CustA94; 15CustA116; 15CustA118; 15CustA365; 16CustA374; 16CustA409.
578–8⅓–New. articles of religious devotion; 12CustA347; 12CustA470.
578–8¼–New. all fabrics and articles embroidered in any manner by hand or machinery; 13CustA474; 13CustA479; 13CustA530; 13CustA533.
578–8⅙–New. annatto; 12CustA189.
578–8⅛–New. athletic sporting articles; 15CustA180.
579–9 [a] (17) Graduated bead necklaces in imitation of emeralds held dutiable as jewelry rather than as articles in chief value as beads. 16CustA 353.
579–10 12CustA332.
579–10½–New. athletic sporting goods; 12CustA204; 12CustA516; 12CustA533; 12CustA543; 12CustA546; 13CustA287; 13CustA616; 14CustA27; 14CustA43.
579–10⅓–New. balls designed for use in physical exercise; 16CustA421.
579–10¼–New. basket of bamboo; 11 CustA69.
579–10⅙–New. automobile chassis, and finished parts of automobiles; 11CustA 1.
579–11 12CustA368; 12CustA530; 13 CustA199; 15CustA165. [a] (8) Beads as used in Tariff Act (1922) par. 1403, refers to such beads as are ornamental in character or suitable for decorative purposes. 16CustA418.
579–11½–New. billiard balls; 12CustA 539.
579–12 14CustA414.
579–13 10CustA107; 11CustA340.
579–17½–New. leaves, plants, shrubs, etc., chemically treated; 12CustA377; 14CustA323.
580–19½–New. colored or crayon leads, not otherwise provided for; 16CustA 467.
580–21½–New. crayon leads; 16CustA 467.
580–22½–New. embroideries; 12CustA 384; 16CustA340.
580–22⅓–New. embroidered netting; 16 CustA340.
580–23 14CustA175.
580–23½–New. footwear; 13CustA57; 13CustA552; 14CustA392.
580–23⅓–New. feathers; 12CustA413; 14CustA191.
580–23¼–New. flouncings; 12CustA 384.
580–24 15CustA89; 15CustA190; 15 CustA454.
580–24½–New. gloves; 13CustA33; 13 CustA290.
580–24⅓–New. game; 11CustA78.
580–24¼–New. goat skins; 15CustA 190.
580–25 10CustA74; 11CustA536; 15 CustA214.
580–27 12CustA514.
580–27½–New. imitation of precious or semiprecious stones; 13CustA164; 13 CustA353.
580–28½–New. imitation jet buttons; 13CustA172.
580–30 12CustA524.
580–31 10CustA194; 10CustA201; 11 CustA363; 12CustA225; 12CustA524; 12CustA530; 13CustA181; 13CustA182; 13CustA190; 13CustA199; 15CustA46; 15CustA266; 15CustA315; 15CustA334; 15CustA394; 15CustA412. [a] (52) Jet is not precious or semiprecious stone. 16CustA15. (53) Graduated bead necklaces in imitation of emeralds held dutiable as jewelry. 16CustA353. (54) Ivory carved in form of roses, pansies, daisies, etc., made into brooches, is not jewelry. 10CustA57. (55) Articles of bone are not commonly considered as jewelry. 10CustA44. (56) Jet earrings, brooches, and pins. 13CustA181.
580–31½–New. laces; 14CustA17; 15 CustA252; 15CustA254.
581–32 11CustA177; 12CustA481; 12 CustA571; 13CustA224; 14CustA36; 14CustA264; 14CustA285; 15CustA 210; 15CustA307. [a] (45) Sheepskin leather cut into forms and advanced in condition by embossing and coloring processes held dutiable as manufactures of leather when forms themselves constitute manufactures of leather. 16 CustA132. (46) Such leather is dutiable as sheep leather dressed and finished where forms in themselves do not constitute manufactures of leather. 16 CustA132. [b] **Football leather.**–13 CustA69.
581–32½–New. manufactured articles not specifically provided for; 16CustA 46 (flue dust).

582-33½-New. military ornaments; 12 CustA550.
582-33⅓-New. minerals; 11CustA8.
582-33¼-New. mechanical pencils, not specially provided for; 13CustA265.
582-33⅓-New. matte; 11CustA3.
582-33⅙-New. moss; 16CustA43.
582-35 13CustA306; 13CustA620.
582-35½-New. nets; 12CustA108; 15 CustA420.
582-37 10CustA37.
583-39 16CustA518.
583-40½-New. plaster of Paris manufactures; 13CustA252.
583-43½-New. saddlery; 13CustA241.
583-43⅓-New. seaweeds; 12CustA463.
583-43¼-New. rosaries, chaplets, etc; 14CustA270.
583-43⅓-New. photographic cameras and parts, not specially provided for; 14CustA139.
583-44½-New. spades; 16CustA91.
583-44⅓-New. shoe buckles; 16CustA 374; 16CustA409.
583-45 10CustA161; 12CustA186.
583-45½-New. spangles; 13CustA227.
583-46½-New. stibnite containing antimony; 11CustA3.
583-47 11CustA105; 11CustA217; 11 CustA219; 11CustA220(1stcase); 12 CustA258; 12CustA533; 13CustA10; 13CustA167; 13CustA230; 13CustA252; 13CustA278; 13CustA287; 13CustA306; 13CustA310; 14CustA260; 15CustA310.
584-48½-New. tuckings; 15CustA60.
584-49½-New. wafers; 11CustA88.
584-50 10CustA31; 11CustA155; 11 CustA255; 11CustA499; 12CustA418; 15CustA12; 15CustA78; 16CustA406. [a] (21) Nigari. 12CustA477. (22) Flue dust is not included. 16CustA46. (23) Cod liver oil pressings held included. 16 CustA404. (24) Rags fit only for remanufacture. 16CustA93. (25) Broken sheet glass used only in manufacture of window glass is not included. 16CustA 410.
584-50½-New. wearing apparel; 13 CustA93.
584-52 11CustA211.
584-53 [c] (1) See also 13CustA386.
585-56 12CustA15.
585-57 10CustA70; 10CustA89.
586-77 13CustA126. See also 11CustA 321.
587-81 11CustA443; 13CustA126.
587-83 13CustA633.
588-87 11CustA418.
588-90 12CustA552.
588-91½-New. The similitude provisions take precedence over the nonenumerated provisions. 11CustA340.
588-95 [a] (9) Christmas trees. 13 CustA214. (10) Saint John's bread or bean. 12CustA474. (11) Christmas trees described as small table trees. 16 CustA171.
589-99 16CustA132.
589-7 [a] (59) Combination of essential oils of pine and eucalyptus known as "pinelyptus" is unenumerated article of manufacture. 13CustA346. (60) Samples and booklets of samples of wool cloth. 16CustA398. (61) Dyed vegetable fiber. 16CustA117. (62) Cod liver oil cake meal used for purposes other than human consumption held dutiable as nonenumerated manufactured article not specially provided for rather than free of duty as fish for purposes other than human consumption, or oil cake meal, or cod. 16CustA366. (63) Dog fish oil cake meal. 16CustA406.
590-18½-New. Under Tariff Act of 1922, providing that, whenever dutiable merchandise and merchandise which is free of duty or merchandise subject to different rates is so mingled that quantity or value of each class cannot be readily ascertained, the merchandise shall be subject to highest rate applicable to any part unless importer or consignee shall segregate such merchandise at his own risk and expense. 16CustA475.
590-19 12CustA200.
590-22½-New. The provision is applied only where each of the enumerations is equally specific. 13CustA172.
591-25 12CustA483. [a] (8) Garden sets, excepting spades, are agricultural implements free of duty. 16CustA91. (9) That implements are suitable for use both in kitchen garden and in cultivation of flowers does not remove them from category of garden implements. 16CustA91.
591-27½-New. animals owned by persons emigrating from foreign countries; 15CustA40.
591-27⅓-New. altars, statuary, etc., for religious uses; 13CustA587.
591-31½-New. arsenic or arsenious; 12CustA212.
592-39½-New. boots and shoes; 14 CustA172(2dcase).
592-42½-New. chestnuts; 16CustA141.
592-43 13CustA607.
592-49 13CustA30; 14CustA408; 15 CustA153. [a] (14) Word "crude" is limited by use of additional words "shredding, grinding, chipping, crushing." 16CustA103.
592-51½-New. fertilizer, substances used chiefly for; 13CustA37; 15CustA 218.
592-51⅓-New. fish to be used for purposes other than human consumption; 16CustA404; 16CustA406.
592-51¼-New. ferromanganese; 12 CustA365.
592-52 15CustA34.
592-54 12CustA117.
593-60½-New. harness; 15CustA16.
593-65 11CustA270.
593-65½-New. iridium; 10CustA275.
593-67½-New. junk, old; 14CustA112; 16CustA93; 16CustA410.
594-68½-New. lac; 14CustA85.
594-70½-New. leather cut into forms suitable for conversion into manufactured articles; 16CustA132.
594-71 11CustA177; 12CustA334; 13 CustA224; 14CustA153; 14CustA188.
594-71½-New. limestone, unmanufactured; 10CustA93.
594-72 [b] **Lumber unmanufactured** does not include Christmas trees described as small table trees. 16CustA171.
594-73 11CustA35.
594-73½-New. lumber, not further manufactured than sawed; 15CustA111. See also 16CustA502.
594-73⅓-New. other lumber; 12CustA 472.
594-74 12CustA86; 12CustA275; 12 CustA278; 12CustA468.
594-77 12CustA477.
594-81½-New. oil cake; 16CustA404; 16CustA406.
594-81⅓-New. newsprint paper, standard; 16CustA431.
594-81¼-New. oil cake meal; 16CustA 366; 16CustA406.
595-85½-New. platinum; 10CustA275.
595-88½-New. publications of individuals for gratuitous private circulation, not advertising matter; 16CustA 566.
595-90 11CustA64; 15CustA383; 15 CustA433.
595-90½-New. rough hewn; 11CustA 457.
595-95½-New. secondhand; 11CustA 261.
595-98½-New. shellac; 12CustA81.
595-99½-New. shoe leather; 16CustA 556.
595-5 11CustA409; 13CustA1.
595-5½-New. sticks; 13CustA214.
595-5⅓-New. skin undressed; 12CustA 178.
596-9 11CustA529.
596-13½-New. textile grasses, not dressed or manufactured; 14CustA133 (2dcase).
596-13⅓-New. typewriters and parts thereof; 12CustA140.
596-14½-New. waste bagging; 16 CustA225.
596-15½-New. wheat; 11CustA489.
596-17½-New. wool on the skin; 12 CustA178.
596-22 16CustA306. [a] (5) Certificate of foreign seller must give name of person from whom goods were purchased or show good reason for failure to do so. 16CustA306.
596-22½-New. Importer obtaining free entry without compliance with treasury regulations cannot make oral proof thereafter. 16CustA306.
597-24 12CustA541.
597-28 11CustA449; 11CustA505.
597-32 11CustA240; 15CustA268; 15 CustA329; 15CustA331.
598-40 10CustA198; 11CustA240. [a] **Held not to be textbooks.**-10CustA24.
598-41 11CustA233. [a] (8) Marble mosaic inlaid floor held not included. 16CustA233.
598-42 11CustA275; 15CustA132.
598-44½-New. fish sounds; 10CustA 47.
598-44⅓-New. charts; 15CustA1.
598-45½-New. original sculptures or statuary; 12CustA128.
598-47½-New. original drawings and sketches in pen and ink or pencil and water colors; 12CustA195.
599-48 [a] **"Models of women's wearing apparel".**-10CustA39.
599-49 17F(2d)879; 13CustA28.
599-60 [d] **Ruins of vessel suitable for use only as scrap or junk** is not vessel, but merchandise. 13CustA216.
600-62 10CustA54; 10CustA124; 10 CustA273; 11CustA401. [b] **"Outfit and equipment."**-13CustA74.
600-65 10CustA83; 10CustA85; 10 CustA124.
600-68½-New. Models of women's wearing apparel may be admitted without duty under bond for their exportation within a given period. 11CustA41.
600-71 [a] (8) As to coverings and holdings. 46Philippine961.
601-83½-New. Determination whether imported drugs have been adulterated or misbranded requires finding of facts and exercise of judgment. DC 41F(2d) 430.
602-6½-New. Treasury decisions have been held to constitute sufficient compliance with the law providing that the secretary of the treasury should fix compensation of customs officials. 13 F(2d)489.
602-7 11CustA336.
602-9 26F(2d)606; 13CustA424.
602-10 15CustA26.
603-14 21F(2d)484; 12CustA432; 13 CustA612; 14CustA38; 14CustA400.
603-15 10CustA172; 14CustA159.
603-17½-New. Treasury department regulations do not alter or amend the customs law but only regulate the mode of carrying out its provisions. 21F(2d) 484.
603-22 13F(2d)489. [a] **Treasury decisions, though signed by assistant secretary,** have been held compliance with law. 13F(2d)489.
603-22⅓-New. [§ 68a] B½. **Tariff Commission.** Commission cannot pass on validity of patents. 39F(2d)247.
603-22⅓-New. Commission's findings will not be disturbed and appeal to Court of Customs and Patent Appeals is one of law only. 39F(2d)247 (methods and presumption of findings).
603-22¼-New. Questions as to patent's validity became moot on investigation of importer's practices where patent had expired and president released embargo on patented products. 39F(2d) 247.
603-22½-New. Evidence has been held sufficient to sustain findings of Commission. 39F(2d)247.
603-22⅙-New. (5) Commission's refusal to permit examination by respondents of complainant's book has been held no error where books were always open for inspection. 39F(2d)247. (6) Member of commission concurring in findings as to unfair practices of importers should be held to have concurred in findings of unfair competition. 39F(2d)247.
603-22⅐-New. What constitutes unfair competition is matter of law for courts not for Commission. 39F(2d)247.
603-26 10CustA62; 11CustA38; 16 CustA392; 16CustA418 (presumption held not overcome by record); 16CustA 472. [b] **Presumption that goods could not be marked so as to indicate country of origin** does not arise from mere delivery of merchandise to importer without being marked. 16CustA282.
604-28½-New. Articles allowed to go into the commerce of the country without marking as to the country of origin are presumed to have been found by the collector to have been incapable of marking without injury. 16CustA61.
604-28⅓-New. Such presumption is not overcome by fact that additional duty is afterwards assessed because the goods were not marked. 16CustA61.
604-30 46Philippine467.
604-38½-New. Where a collector takes

possession of merchandise because an imperfect entry has been made, he becomes the bailee, under ordinary obligations as such. 34F(2d)612 (liable for conversion when goods delivered to wrong persons).

604–40 34F(2d)612.

605–62 21F(2d)484.

605–73 [a] **Under statute** collector of customs is personally liable for wrongful delivery of merchandise without production of bill of lading. 35F(2d) 541.

606–81½–New. In Philippines the collector of custom is personally liable for wrongful delivery of merchandise although he took a bond to protect himself from liability. 46Philippine207.

606–81⅓–New. Collector of customs, permitting party not the owner to enter goods, pay duty, and receive goods, is liable for conversion. 21F(2d)484.

606–81¼–New. Collector of customs, delivering goods to wrong party, cannot defeat action for conversion on the ground that his control over the goods was merely for customs purposes. 21 F(2d)484.

606–81⅕–New. Consignor of goods, holding bill of lading to his own order indorsed per pro consignor by his attorney, is proper party to sue for conversion of goods. 21F(2d)484.

606–81⅙–New. Customs collector, refusing to permit consignor of goods consigned to his order to make entry and pay duty, is liable for conversion. 21 F(2d)484.

606–81⅐–New. Pro forma invoice not shown to have come to notice of collector of customs does not relieve him from liability for delivery to wrong party. 21F(2d)484.

607–19½–New. Ferry boats have been held subject to the requirement for extra compensation for overtime service performed by customs officials. 13F(2d) 489.

607–19⅓–New. Overtime pay allowed customs officials is payable for work after hours, whether or not the officer worked regular hours on such day. 13 F(2d)489.

607–19¼–New. Overtime pay for customs officials for services between 5 P. M. and 8 A. M. has been held to apply to services between 12:01 A. M. and 8 A. M. and between 5 P. M. and midnight, on Sundays and holidays, although the statute provides additional overtime pay for Sundays and holidays. 13F(2d) 489.

607–22 [a] **De facto appraiser.**–15CustA 83.

608–27 13CustA130.

609–57 13CustA112.

609–58 13CustA245.

609–60 13CustA61.

609–61½–New. The rules must be reasonable. 13CustA273.

610–75 13CustA245.

610–85 [a] **Evidence held sufficient to** warrant action of secretary of treasury in revoking license. 20F(2d)249.

610–88½–New. In an action by a broker and freight forwarder, questions of agency and the reasonableness and necessity of the services are for the jury. Mass 166NE768 (testimony on irrelevant issue is inadmissible but not prejudicial).

610–88⅓–New. [§ 94a] G. **Other Officers.** In Canada, a customs officer who seizes a ship outside of the territorial limits of Canada while not in hot pursuit and without other justifying circumstances is not entitled to protection under the Customs Act, and is liable to the master as bailee for the value of the cargo. NS [1928] 2DomLR263.

610–88¼–New. In such case an action by the master as bailee of the cargo is not barred by an action by the owner of the vessel for wrongful detention of the ship. NS [1928] 2DomLR263.

610–90 [a] (7) Vessel does not make "entry" under customs laws by arriving at port, but "entry," in technical sense of navigation laws, means compliance with regulations of port for purpose of taking on or discharging passengers or cargo, not merely putting in for orders or supplies or repairs. 26F(2d)606.

612–17½–New. Statute relating to ownership of imported goods for customs purposes does not conflict with treasury regulation permitting entry of goods, without bill of lading, on giving bond. 21F(2d)484.

612–18 See also 11CustA357. [a] (3) Purpose of manifest under Tariff Act of 1922. 28F(2d)215.

612–21 See also 11CustA508.

613–39 10CustA262(2dcase) (estoppel to deny authority). See also 11CustA466.

614–53½–New. Any doubt in construction of provisions of a tariff act relating to filing of duress entries should be resolved in favor of the government and against the importer. 16CustA268.

614–53⅓–New. Provisions of Tariff Act of 1922 § 489 relative to duress entries cover only such merchandise as is comparable in value to that involved in cases pending on appeal. 16CustA268.

614–53¼–New. Merchandise of higher value due to ascending market cannot be brought within such provisions. 16 CustA268.

614–53⅕–New. Under such provisions merchandise entered in duress entries must be at appraised value in pending case. 16CustA268.

615–80 [d] **Certificate as to depreciated currency** is not conclusive as to whether goods were purchased with it. 10CustA 247.

616–97 See also 12CustA198.

616–5½–New. An appraisement not made as prescribed by law is void. 11 CustA351.

616–6 See also 13CustA161; 15CustA 143. [b] **Evidence of market value.**–12 CustA520. [c] **Cost and not value of containers and coverings** is to be taken into consideration. 14CustA120. [d] **Free open market** exists where watch crystals are sold to wholesale dealers and trade discount is allowed on identically same conditions to every wholesale dealer, local or foreign. 16CustA37. [e] **Allowance of special rebates** at end of year on purchases of stated quantities during such period in addition to regular discounts cannot be considered in ascertaining foreign value. 16CustA185.

617–7 See also 11CustA94. [d] **"Such or similar merchandise."**–16CustA19.

617–8½–New. Dutiable value cannot be fixed by comparison by taking proportionate part of value of other kinds of goods. 16CustA19.

617–8⅓–New. An appraisement based upon rather than at the value of similar merchandise is contrary to the provisions of the Revenue Act of 1922. 16 CustA122.

617–8¼–New. No export value is shown where the importer is the sole purchaser in the foreign country for export to United States and it does not appear that similar merchandise was sold for such export. 16CustA185.

617–8⅕–New. Evidence has been held to sustain finding that foreign value of goods was dutiable value and exceeded export value. 16CustA293.

617–8⅙–New. A thing may be similar chemically without being similar within provision for taking the price or value of a similar article for the value of an imported article. 16CustA347.

617–8⅐–New. The phrase "usual wholesale quantities" as used in the Tariff Act of 1922 refers to a major portion of the sales or offers for sale of the merchandise in question and not to sporadic sales or sales in minor quantities. 16 CustA507.

617–8⅛–New. Finding that dutiable value of imported Japanese silk piece goods was its export value held supported by substantial evidence. 16CustA 542.

617–8⅑–New. Goods cannot be taken from foreign value provision by a few changes in structure, or a new name, or restriction to American purchasers. 16 CustA19.

617–8 1/10–New. An article is not to be regarded as similar or not similar within such provision solely because of whims, petty prejudices, or like considerations of trade in reference to commercial interchangeability of merchandise. 16CustA347.

617–8 1/11–New. Sale for home consumption in foreign country of rejects and goods for which orders had been canceled does not establish foreign value where it appears that there was no wholesale market for such merchandise. 16CustA542.

617–8 1/12–New. Evidence held to support finding that imported rock candy was similar to that freely offered to home consumption in Holland. 16CustA347.

617–9 See also 15CustA262.

617–15 But see 11CustA115.

618–25 12CustA42.

618–25½–New. Invoice value alone is not sufficient basis upon which to fix cost of production. 16CustA398.

618–25⅓–New. Samples and booklets of samples of wool cloth universally given away to domestic and foreign customers of exporters have no foreign or export value and, in absence of showing of value in United States, are dutiable at cost of production. 16CustA398.

622–18½–New. The appraisement of a local appraiser is not vacated by an appeal to reappraisement. 16CustA382.

622–18⅓–New. Upon dismissal of an appeal to reappraisement the appraisement of the local appraiser becomes effective. 16CustA398.

618–26 11CustA351. See also 13CustA 7; 13CustA644; 15CustA140 (under act of 1922).

618–29 13CustA122. See also 15CustA 443.

619–37 See also 13CustA593; 13CustA 639; 14CustA293.

619–38½–New. In order to include the foreign export tax as part of the export value it must be part of the market value. 12CustA172.

619–38⅓–New. If a foreign internal tax is part of the market value, it is proper to consider it in determining the actual market value. 12CustA506.

619–39 15CustA360.

619–40 10CustA65; 10CustA120. See also 13CustA137.

619–43 15CustA114.

621–98 11CustA438.

622–15 See also 272US640, 47SCt229, 71 L ed454.

622–17 11CustA224.

622–19 16CustA382.

622–20 16CustA382.

623–23 11CustA477; 12CustA40.

623–25 16CustA382; 16CustA392.

623–26 272US640, 47SCt229, 71L ed 454; 11CustA473.

623–27 272US640, 47SCt229, 71L ed454.

623–28½–New. An appraisement is not rendered invalid by failure to retain samples. 16CustA382.

624–41 See also 10CustA101.

624–42 See also 12CustA126; 12CustA 376; 14CustA381.

624–47½–New. The statute requiring the payment of a fee as a condition precedent is mandatory. 10CustA179.

624–47⅓–New. The payment of the fee required by statute is jurisdictional. 12 CustA145.

624–47¼–New. The trial in reappraisement is de novo. 14CustA10.

624–47⅕–New. On appeal to reappraisement the hearing before the single general appraiser is a trial de novo. 16 CustA161.

624–47⅙–New. Trial before single justice of United States customs court on reappraisement is de novo. 16CustA 293.

624–47⅐–New. On such hearing appraised value is to be determined from weight of evidence with no presumption of the correctness of the appraiser's action. 16CustA161.

624–47⅛–New. On such trial there is no presumption of the correctness of the appraiser's return. 16CustA293.

624–50½–New. The proceedings in reappraisement are de novo. 15CustA235.

624–50⅓–New. Findings of United States customs court affirming decision on reappraisement have been held sustained by evidence. 16CustA37.

624–50¼–New. Where no two justices of the customs court concur in findings of fact there is nothing on which a judgment can be entered. 16CustA56.

624–50⅕–New. On appeal in reappraisement to United States Customs Court question is whether decision of single appraising justice is supported by

weight of evidence. 16CustA161.
624-50⅙-New. On reappraisement the United States customs court is required by statute to find essential facts. 16 CustA293.
624-50⅐-New. A special concurrence in the result by one of the justices of the United States customs court is a concurrence in the findings of fact stated in the majority opinion. 16CustA293.
624-56½-New. Record in one reappraisement proceeding is not admissible in another involving similar merchandise unless witnesses are produced for cross examination as required by rule. 16CustA263.
624-58½-New. The review extends to the law and facts. 13CustA373.
625-62 13CustA259. But see 11CustA 459.
625-71 11CustA430.
626-82½-New. A re-reappraisement is a proceeding de novo. 15CustA4.
626-82⅓-New. The custom court, in reviewing the reappraisement, is required to make written findings. 15 CustA422.
626-82¼-New. The appellate division of the customs court is required to make findings of fact and state them in a written decision and failure to do so is reversible error. 16CustA56.
626-82⅕-New. The jurisdiction of United States Court of Customs Appeals in reappraisement cases is limited to questions of law. 16CustA185.
626-82⅙-New. Findings of the lower court on questions of fact are conclusive on the court of customs appeals where they are supported by substantial evidence. 16CustA220.
626-82⅐-New. Although mandate of court of customs appeals requiring the United States customs court to find certain facts has not been complied with the state of the record may justify the court of customs appeals in making decision on the merits. 16CustA293.
626-82⅛-New. A finding that merchandise had no export value will be held to be without evidence to sustain it where the record fails to show that merchandise similar to that imported was not freely offered for sale in the principal markets of the foreign country for exportation to the United States. 16 CustA122.
626-82⅑-New. On appeal in reappraisement to United States Court of Customs Appeals the decision of the court below will be affirmed if there is any substantial evidence supporting the special finding of facts. 16CustA161.
626-82 1/10-New. Judgment will be affirmed if supported by any substantial evidence. 16CustA448.
626-82 1/11-New. Where United States Customs Court makes no finding as to value except a finding of export value which is not supported by evidence the judgment must be reversed. 16CustA 185.
626-82 1/12-New. On such appeal the decision will be reversed if any material fact is found to be without substantial evidence to support it. 16CustA161.
626-82 1/13-New. The court has no authority to review the evidence for purpose of determining its weight. 16 CustA448.
626-82 1/14-New. [§ 141a] C½. **Bond to Secure Estimated Duties.** Construction and enforcement. 41F(2d)917.
626-89 24F(2d)351.
626-95 12CustA499.
626-95½-New. The invoice weights, appearing to be substantially correct, may be accepted as the basis upon which the duties are ascertained. 12CustA430.
627-6 14CustA78.
627-21 15CustA107; 16CustA392.
628-29 See also 12CustA115.
628-30 But see 13CustA80.
628-32 11CustA29; 11CustA310; 11 CustA336; 11CustA481; 14CustA21; 15 CustA408.
628-33 12CustA499.
629-42 [c] **Evidence held sufficient.**-12 CustA396.
629-48 See also 13CustA627.
631-76 13CustA72 (government not insurer); 13CustA124.
631-78 12CustA250 (application to secretary of treasury); 12CustA373; 13 CustA324; 13CustA597 (evidence of loss); 14CustA283. But see 13CustA 485; 14CustA147; 16CustA139.
631-79 11CustA484.
631-80½-New. Under Tariff Act of 1922 notice for refund must be given within reasonable time under all the facts in the case. 16CustA156.
631-80⅓-New. An order for refund will not be reversed on ground of laches where question was not raised in court below. 16CustA156.
631-82 See also 13CustA626.
631-84½-New. The foreign internal revenue tax is properly added to the invoice price to make the dutiable value. 12CustA201.
631-85 11CustA203; 12CustA230; 15 CustA378; 16CustA461.
632-97 11CustA284; 11CustA310; 11 CustA477; 13CustA130.
634-37 [a] **Time of application for remission.**-16CustA109.
632-6 15CustA44.
633-14 13CustA133.
633-15 See also 11CustA304.
633-23 11CustA192 (appraised value finally ascertained); 12CustA245 (entry on pro forma invoice); 12CustA535; 13 CustA269; 13CustA271. [b] But see 10 CustA120.
633-24½-New. The two values, in order to be comparable, must be of the same unit. 12CustA1.
633-25 12CustA237.
633-26 12CustA440.
634-37 [a] **Time of application for remission.**-12CustA354.
634-38½-New. Application for remission has been held timely. 14CustA90.
634-38⅓ Application for remission before liquidation is premature. 14CustA 81; 14CustA133(1stcase); 14CustA171; 14CustA172(1stcase); 15CustA62.
634-38¼-New. By force of statute there may be remission when the importer has acted in good faith. 13CustA409; 13 CustA562; 14CustA76; 14CustA105.
634-38⅕-New. The statutory right to remission may be lost by failure to make due inquiry when put on notice. 14 CustA13; 14CustA44.
634-38⅙-New. Express statutory provision has been made for remission of additional duties under given circumstances. 13CustA295.
634-38⅐-New. Where the statute allows remission a consignee who acts as the importer's agent may file petition therefor. 13CustA498.
634-38⅛-New. Statutes providing for remission of additional duties are liberally construed. 13CustA273.
634-38⅑-New. The requirement that the petition for remission be verified may be waived. 13CustA432.
634-38 1/10-New. The failure of the importer to inquire as to the value of goods, when he has no knowledge, precludes remission. 15CustA418.
634-38 1/11-New. The importer is bound to exercise the utmost good faith in order to warrant remission. 15CustA57 (burden of proof).
634-38 1/12-New. Under Tariff Act (1922) § 489, providing for remission of additional duties for undervaluation where there was no intention to defraud the government or conceal or misrepresent facts, it has been held that the importer was not entitled to remission. 13CustA 498; 13CustA589.
635-59 24F(2d)351.
635-60 24F(2d)351.
635-61 10CustA133.
635-62 24F(2d)351.
635-63½-New. A liquidation based upon an erroneous classification is illegal and void. 16CustA461.
635-64 12CustA370; 12CustA410. [a] (2) Collector's demand for payment of duty on lost merchandise is not reliquidation. 16CustA156. [b] **Proceedings as civil.**-10CustA133.
635-71 11CustA529.
635-71½-New. Reliquidation is an abandonment of all prior liquidations. 12CustA19.
635-71⅓-New. Reliquidation extends to the rate of exchange. 14CustA16.
635-73 [a] (3) In case of whisky withdrawn from warehouse attempted reliquidation more than one year from date of withdrawal held nullity. 16CustA 334.
636-83 10CustA133.
636-96½-New. Reliquidation by order of the secretary is the act of the collector. 14CustA24.
636-99 12CustA410.
637-13 10CustA109; 11CustA84; 11 CustA220(2dcase); 13CustA527. [b] **Not "manifest clerical error."**-10CustA 247.
637-15 10CustA262.
638-17 [a] (5) Where it can be proved only by evidence outside the record. 10 CustA262.
638-27 See also 13CustA603 (construction of statute).
634-38½-New. A petition for remission is not supported by testimony of the importer that he made no effort to ascertain the foreign value of merchandise and that he failed to reveal the declared value of which he had knowledge. 16CustA88.
634-38⅓-New. Judgment denying petition for remission held sustained by evidence. 16CustA100.
634-38¼-New. Judgment denying petition for remission held not against weight of evidence. 16CustA90.
634-38⅕-New. Denial of petition for remission is res adjudicata on subsequent application. 16CustA150.
634-38⅙-New. Evidence held insufficient to support petition for remission. 16CustA152.
634-38⅐-New. Evidence held insufficient to justify remission of additional duties. 16CustA169.
634-38⅛-New. Evidence held not to show that importer performed duty of making due inquiry as to dutiable value of goods. 16CustA188.
634-38⅑-New. Evidence held sufficient to sustain finding of good faith of importer and to sustain petition for remission. 16CustA304.
634-38 1/10-New. Evidence held to sustain denial of petition for remission. 16CustA320.
634-38 1/11-New. Evidence held sufficient to sustain petition for remission. 16 CustA325.
634-38 1/12-New. Evidence held insufficient to show good faith required to authorize remission. 16CustA457.
634-38 1/13-New. Denial of petition for reargument of petition for remission for purpose of introducing additional evidence is not abuse of discretion where it does not appear that proposed new evidence was newly discovered or could not be produced at the trial. 16CustA 152.
634-38 1/14-New. Proof of negligence is not sufficient to establish good faith. 16 CustA457.
641-80 269US492, 46SCt180, 70Led373.
644-53 24F(2d)351.
645-59 10CustA112.
646-84½-New. Where setting aside of attempted reliquidation is only relief asked for in protest the importer is entitled to no further relief except to rely on the status quo after setting aside of attempted reliquidation. 16CustA334.
646-86 See also 11CustA382. [a] **Name of owner** need not appear in papers connected with entry. 10CustA124.
647-2 11CustA137.
647-3 13CustA424; 14CustA29.
647-4 14CustA62. [b] **Protest held timely.**-13CustA398; 16CustA97.
647-11 12CustA370.
648-25 10CustA165. [b] **Strict rules of construction** are not applicable to protests. 16CustA301.
648-27 10CustA191.
648-34 11CustA297.
649-61 16CustA301.
650-68 16CustA566.
651-87 [a] (1) 16CustA301.
653-37½-New. The statutory requirement that the board should make a written decision setting forth the facts and reasons for findings is mandatory. 12 CustA261; 12CustA316; 12CustA324; 12CustA512.
653-43 10CustA211; 10CustA216 (presumption overcome); 11CustA186; 12 CustA56; 12CustA133; 12CustA170; 12 CustA421; 12CustA567; 13CustA230; 13CustA233; 13CustA428; 15CustA22; 15CustA172. But see 49Philippine324.

[c] **Presumption held rebutted.**–12CustA 455. [d] **Presumption held not rebutted.**–16CustA117.

653–50 10CustA211; 11CustA229; 11 CustA388; 11CustA406; 11CustA421; 11CustA497; 11CustA512; 11CustA515; 11CustA536; 11CustA551; 12CustA78; 12CustA84; 12CustA222; 12CustA284; 12CustA299; 12CustA390; 12CustA396; 13CustA14; 13CustA589; 13CustA601; 13CustA649; 14CustA262; 14CustA318; 15CustA21.

654–55 But see 12CustA402.

654–57½–New. Under some statutes, samples must be accessible for inspection in order to warrant a reappraisement. 13CustA259.

654–69 12CustA26.

654–71½–New. The evidence is in the form of a bill of exceptions. 13CustA 273.

655–79 11CustA385; 11CustA415.

655–88 12CustA490.

655–98½–New. Judicial notice is not taken of records in former proceedings which may be, but are not, pleaded as res judicata. 12CustA494.

655–98½–New. Where facts upon which proper classification depends are patent to the eye of an expert only and the board has no record evidence before it as to the nature, kind, and character of the goods, it cannot classify them solely on its own expert knowledge and experience. 16CustA117.

656–1 See also 12CustA26.

656–3½–New. Affidavits duly filed but not considered by the collector are proper evidence before the board. 11CustA 129.

656–5 13CustA373.

656–6 11CustA278; 11CustA438; 13 CustA330; 13CustA540. But see 13Cust A332.

656–9 See also 11CustA167. [a] **Construction of particular stipulations.**–12 CustA193.

657–24 See also 12CustA93; 12CustA 103; 12CustA104.

657–30½–New. The court is authorized to review only final decisions. 11CustA 216.

657–30½–New. The right to appeal is limited to review of final decisions. 12 CustA40.

657–30¼–New. The review is confined to final decisions. 15CustA260.

657–34 12CustA462.

658–42 16CustA214.

658–44 13CustA167; 14CustA161; 15 CustA448.

658–55 13CustA82. See also 11CustA 147.

658–56½–New. The return of the board, made in conformity with statute, imports verity. 13CustA118.

658–59 13CustA82.

659–67½–New. The review is limited to the evidence introduced before the board. 11CustA121.

659–71 12CustA280.

659–72 11CustA73; 11CustA99; 11 CustA440; 12CustA440; 13CustA144; 13CustA337; 13CustA341; 13CustA412; 13CustA466; 13CustA472; 13CustA547; 13CustA574; 13CustA579; 14CustA53; 14CustA68; 14CustA161; 14CustA289; 14CustA416; 14CustA428; 15CustA428; 15CustA451. See also 15CustA285. See also 16CustA427.

659–75 13CustA545.

659–76 14CustA242; 15CustA130.

659–76½–New. Finding of United States customs court on issue of commercial designation will be sustained unless there is no evidence to support it or unless it is contrary to weight of evidence. 16CustA488.

659–77 13CustA343; 14CustA47; 14 CustA143; 14CustA176; 15CustA126. See also 15CustA372.

659–78 12CustA307; 13CustA282; 13 CustA295.

660–88 [b] **Modification.**–13CustA203; 13CustA438. [c] **Reversal for exclusion of evidence.**–16CustA243. [d] **Harmless error** in exclusion of evidence is not ground for reversal. 16CustA437.

660–91 13CustA17. But see 12CustA 570.

660–95 12CustA281; 14CustA256.

660–4 [a] **Rehearing denied.**–12CustA 582.

661–14 [a] **Repacking for exportation.**–Rule applies whether goods are exported in original packages or are repacked for export. 16CustA214. [b] **Shipment to Guam from San Francisco warehouse** is not exportation of warehoused merchandise. 16CustA442.

661–18 13CustA627.

661–22½–New. A statute requiring a warehouseman, except for lawful excuse specified therein, to deliver goods on demand made by the holder of the receipt or by a depositor, has no application to a warehouseman operating a bonded warehouse who is not obligated to deliver goods except on a production of a valid customs permit. 225AppDiv822, 232NYS515.

661–22½–New. The purpose of a withdrawal must be determined by the importer at the time of withdrawal. 16 CustA334.

662–26½–New. A warehouse bond does not relieve the importer of payment of duties if he reëxports the goods with the intention of returning them. 34F (2d)133.

663–40½–New. Abandonment cannot be effected unless the merchandise be deliverable at the time of abandonment. 11CustA19.

663–50 [b] **Time for export.**–16CustA 248.

663–52 See also 10CustA172; 14CustA 277.

664–67½–New. Phrase "coastwise trade" in Philippine Tariff Act applies to vessels in bay and river business entitling them to drawback of duty paid on coal consumed. 51Philippine348.

664–70 [d] **Statute is inapplicable to** vessels not required to make entry. 26 F(2d)606. [e] **Regulation** under Tariff Act (1922) § 442 is unreasonable which requires penal bond conditioned that cargo be actually delivered at foreign port of destination; condition being enforceable, if at all, as one of indemnity. 26F(2d)606.

664–74½–New. In Canada surety on bond respecting liquor entered for export is liable where bond is canceled on false certificate of delivery to place named in entry. **Can** [1930] 3DomLR 321.

665–30 [a] **Evidence.**–16CustA236.

665–32 16CustA236. [a] **Secretary of Treasury has power to make regulations** to ascertain amount of imported merchandise used to determine whether articles to be exported were produced or manufactured in United States, and whether articles were actually exported. 16CustA451 (regulations held reasonable). [b] **Compliance with regulations of secretary of treasury** is condition precedent. 16CustA451 (failure to give notice of diversion of shipment).

665–93 23F(2d)336 (strictly construed).

665–95 14F(2d)109; 20F(2d)164; 13 CustA328 (Tariff Act of 1922 requiring merchandise to be legibly marked); 4 HawaiiFed113; NS [1930] 3DomLR70 (holding statutes for seizures of Canadian craft hovering within 12 mile limit to be within power of Dominion parliament). [a] **Liberal construction.**–24F (2d)239. [b] **Smuggling** constitutes clandestine introduction of goods without payment of duty. 42F(2d)203. [c] **Word "importation"** used in customs law must be taken in ordinary sense and means bringing article into country from outside. 42F(2d)203.

666–99½–New. Where the acts constitute violations of the revenue laws, the government may proceed thereunder, although such acts constitute violations of the National Prohibition Act. 27F (2d)296.

666–99½–New. Tariff Act fixing special penalty for importations of intoxicating liquors supersedes as to such offense, omnibus clause of National Prohibition Act. 36F(2d)425.

666–2 [a] **In Canada.**–61 OntL583, [1928] 2DomLR767.

666–4 14F(2d)109.

666–5½–New. **In Canada** the Internal Revenue Act does not confer summary jurisdiction in cases where the offense charged is necessarily punishable by both fine and imprisonment. **NS** [1928] 2DomLR755.

666–7 13F(2d)736; 20F(2d)901 (intoxicating liquor held merchandise); 42F (2d)354. [c] (3) Merchandise held to include foreign coin. 17F(2d)7. [g] (2) Other instances. 41F(2d)166. [q] **National Prohibition Act is not bar to prosecution** for unlawful importation or concealment of intoxicating liquors for beverage purposes. 4F(2d)833. [r] **Tariff Act of 1922** as to entry of vessel and unloading cargo held not attempt to extend jurisdiction beyond boundaries of United States. 5F(2d) 838; 16F(2d)363. [s] **Evidence held sufficient.**–4F(2d)833. [t] **Decisions construing statutes.**–273US261, 47SCt 371, 71Led636; 13F(2d)736; 14F(2d) 109; 16F(2d)682. [u] **Under Canadian Customs Act.**–**Can** [1929] 1DomLR661 (summary jurisdiction of magistrate of offense of harboring goods); **NS** [1929] 1DomLR808. [v] **Unlawful importation** must be proven by government, though charge not essential to indictment, 41F (2d)166. [w] Labels on bottles are not evidence to prove kind of liquor or place of manufacture absent evidence proving label genuine. 44F(2d)131. [x] **Aider and abettor as principal.**–42F(2d) 354. [y] **Guilt of possessing and transporting** is not prima facie evidence of importation. 44F(2d)131. [z] **Government has burden** of proving importation on indictment for receiving and concealing smuggled goods. 44F(2d)131. [aa] **Evidence held insufficient.**–44F(2d)131.

666–8 13F(2d)736. [e] (2) 12F(2d) 849. (5) Disclosure while entry is being made but before it is completed is sufficient to avoid guilt. 12F(2d)849. (6) Goods must have passed customs barrier. 14F(2d)426. [f] (1) 12F(2d) 849. [l] **National Prohibition Act** does not bar prosecution under Tariff Act of 1922 which is not repealed thereby. 15F(2d)916. [m] **Selling and delivering liquor** to government agent by vessel nineteen miles from shore is not violation of Tariff Act of 1924. 5F(2d) 838. [n] **Smuggling intoxicating liquors** is criminal offense. 5F(2d)437. [o] **Evidence held sufficient.**–28F(2d)704.

668–16 [d] **National Prohibition Act** has not repealed statute making it crime to defraud government of customs duties by fraudulently withdrawing liquor from warehouse, as regards transportations occurring before enactment of the act. 5F(2d)45. [e] **Evidence insufficient to sustain conviction** of fraudulently removing liquor from warehouse to defraud government of customs duties. 5F(2d)45.

668–23 [a] **Indictment held insufficient** in alleging importation of liquor without permit from Commissioner of Internal Revenue where Commissioner of Prohibition had power to issue permits. 36F(2d)425.

668–25 14F(2d)561. [d] 13F(2d)736; 15F(2d)190; 20F(2d)901; 20F(2d)903; 42F(2d)205. [e] **Indictments held sufficient.**–4F(2d)833. [f] **Indictment for facilitating transportation and concealment of smuggled whisky** has been held to charge offense under Comp. St. Suppl. Annot. (1923) § 5841h13 (formerly Rev. St. § 3082) and not offense of smuggling under § 58114b12. 13F(2d)736.

668–26 [a] **Indictment held insufficient** to charge failure to pay customs duties. 36F(2d)425.

669–31 [a] **Indictment held sufficient.**–42F(2d)812.

669–35½–New. An indictment charging that defendants threw overboard cases of alcohol to prevent seizure by customs officers is demurrable in the absence of an allegation that the boat was engaged in smuggling or that those thereon were committing, or attempting to commit, an offense. 6F(2d)579.

669–35½–New. Possession of goods on which customs duties were not paid is sufficient to authorize conviction unless explained away. 42F(2d)203.

669–35¼–New. Evidence. Statutory presumption does not relieve government of burden of showing merchandise was really brought into United States. 42 F(2d)205.

669–35½–New. Evidence held sufficient to show liquor prima facie came from

without country. 42F(2d)203.

669-35⅙-New. Evidence held insufficient to support conviction for unlawful importation of liquor. 4F(2d)205.

669-35⅐-New. Evidence held sufficient to show unlawful importation. 42F(2d) 203.

669-37 39F(2d)86 (truck subject to forfeiture). [e] **Tariff Act of 1922** held to supersede prior prohibition laws inconsistent therewith. 16F(2d)604. [f] **Effect of National Prohibition Act.**-39 F(2d)120.

669-41 [a] **Acquittal not bar.**-8F(2d) 763.

669-41½-New. Seizure over twelve miles from shore of a liquor vessel, which was first challenged seven and one-half miles from shore, has been held not unlawful. 20F(2d)164.

669-41⅓-New. The government may elect which remedy to pursue where forfeiture was based on violation of Prohibition Act or violation of customs laws. 14F(2d)874.

669-41¼-New. A beer smuggling automobile is liable to forfeiture. 16F(2d) 604.

669-41½-New. Government, having charged defendant with transporting liquor is precluded from seeking forfeiture of automobile for violation of customs law. 43F(2d)212.

669-42½-New. A cargo of liquor seized beyond territorial jurisdiction is not subject to forfeiture because of false statements of the master. 20F(2d)164.

670-46 39F(2d)120 (state officers turning seized automobile over to federal officers would make it continuous seizure).

670-46½-New. Transfer of cargo on the high seas to small boats, knowing that it would be smuggled ashore, has been held not to render the schooner subject to forfeiture. 19F(2d)397.

670-46⅓-New. Facts held to establish reasonable cause for filing information for forfeiture of smuggled goods. 21 F(2d)989.

670-46¼-New. "Vessels bound to United States" does not include vessels whose cargo is destined thereto by transshipment on the high seas but which did not intend to discharge the cargo within the twelve-mile limit. 28 F(2d)215.

670-46⅕-New. That defendant charged with transportation of intoxicating liquor is fugitive from justice does not authorize proceedings to forfeit automobile. 43F(2d)212.

670-48 See also 27F(2d)296; 36F(2d) 688. [d] **Clearance papers held not manifest** required by statute. 20F(2d) 164. [e] **Liquor laden vessel seized fourteen miles from coast** held not subject to forfeiture. 20F(2d)353. [f] **Liquor cargo is regarded as consigned to master** where manifest describes cargo generally without showing ownership, and is forfeitable. 41F(2d)285.

670-49 30F(2d)534; 36F(2d)688; 36 F(2d)729. [b] **Master must take manifest** and carefully preserve it. 36F(2d) 729. [c] **Fact that cargo cannot lawfully be imported** does not dispense with necessity of manifest. 36F(2d) 729.

670-50 41F(2d)288.

670-51 [f] **Where cargo is surrendered before reaching port of entry** cargo cannot be forfeited under statute. 23 F(2d)336. [g] **Cargo of liquor brought in by Coast Guard** is not subject to forfeiture. 40F(2d)74.

671-54 [e] (1) 17F(2d)7.

671-58 35F(2d)872 (for not producing cargo manifest).

671-59½-New. That a liquor laden vessel produced no manifest, rather than a false one, has been held not to preclude forfeiture. 20F(2d)164.

672-61 4HawaiiFed113. [a] (5) Mere bringing of intoxicating liquor within three-mile limit did not constitute offense of "smuggling" or "clandestinely introducing" such liquor into United States with intent to defraud the revenue, denounced by Tariff Act (1922) § 593 (USCA tit 10 §§ 496, 497). 28F(2d) 572.

672-63 8F(2d)764.

673-67 [j] **Dismissal of indictment for fraudulently importing merchandise,** under Act (1922) § 593(b), does not estop government from asserting forfeiture for failure to declare goods, under Act (1922) § 497. 34F(2d)142(1st case).

674-72½-New. Merchandise must be imported before it is the subject of a fraudulent entry, and where merchandise was seized at sea several miles from port, the offense was not committed. 19F(2d)484.

674-73 13F(2d)548.

674-73 36F(2d)729. [e] **Automobile not used for smuggling liquor at time of seizure** is not subject to forfeiture. 39F(2d)120. [f] **Vehicle is guilty of contraband** and can be forfeited when contraband article is contained in pocket of person driving vehicle. 35F(2d)777.

674-83½-New. A ship carrying a cargo of liquor does not become bound to the United States, as required to authorize forfeiture of the ship and cargo, by reason of the fact that she was towed there by a Coast Guard boat, without right to board and seize her for not producing manifest. 30F(2d) 441.

674-83⅓-New. Seizure and forfeiture of a cargo of liquor is proper as having been brought within the collection district without a permit. 30F(2d)534.

674-83¼-New. A liquor-laden British vessel, arrested within territorial waters of the United States, and not satisfactorily proving its claim of distress, is liable to penalties for unlawful importation. 18F(2d)754.

674-85 23F(2d)336.

675-86 23F(2d)336.

675-87 16F(2d)604; 43F(2d)491; DC 40F(2d)808 (good faith is no defense). [l] **Good faith of mortgagee of auto** used for "beer running" held not to preclude forfeiture. 16F(2d)604. [m] **Fact that vessel did not produce any manifest, rather than false one,** did not prevent forfeiture of cargo. 27F(2d) 296.

676-95 274US501, 47SCt735, 71L ed 1171; 274US559, 47SCt746, 71L ed1202; 12F(2d)970; 23F(2d)882. [a] **Domestic vessel suspected of smuggling** may be seized and searched inside or outside of United States waters. 4F(2d)815.

676-96 274US559, 47SCt746, 71L ed 1202; 30F(2d)444; 35F(2d)872. [a] **What constitutes contraband article** "on," "in," or "about" beast or vehicle. 35F(2d)777.

676-97 17F(2d)988.

676-98 274US501, 47SCt735, 71L ed 1171; 274US559, 47SCt746, 71L ed1202. [b] **Seizure of ship** in open sea is not invalid where there is no allegation that she was foreign vessel. 7F(2d)413.

676-99 [a] See also 14F(2d)400.

676-1 [b] 30F(2d)534. [c] **Continuous pursuit.**-Right to seize ship because of absence of manifest is not lost because ship succeeded in getting further than twelve miles from shore, in continuous attempt to escape before she was overtaken. 30F(2d)444.

676-2½-New. No warrant is necessary where, on boarding vessel, no manifest of freight is found. 13F(2d)382.

676-2⅓-New. Visitation, search and seizure of vessels on the high seas beyond the twelve mile limit has been held not authorized. 14F(2d)400.

676-2¼-New. Seizure of a liquor laden foreign vessel thirty-five miles from the American coast is unlawful. 19F(2d) 417.

676-2⅕-New. After lawful seizure, search is proper. 274US559, 47SCt746, 71L ed1202.

676-2⅙-New. Statute authorizing search and seizure within twelve-mile limit is valid. 27F(2d)296.

676-2⅐-New. The right to seize a liquor-laden vessel without manifest was not lost because of success in getting further than twelve miles from shore in an attempt to run away. 27F(2d) 296.

676-2⅛-New. The right within the twelve-mile limit to seize vessels bound for the United States has not been limited in any way by the treaty with Great Britain of 1924. 27F(2d)296.

676-2⅑-New. Although a liquor-laden vessel, bound for the United States with an unmanifested cargo, coming within twelve miles of the coast, never came within the three-mile limit before being seized, the seizure was justified. 27 F(2d)296.

676-7 22F(2d)388; 35F(2d)931 (airplane libeled for smuggling liquor). [g] **Condition of bond** furnished by master of boat entering in distress held one of forfeiture. 22F(2d)388. [h] **Violation of agreement** in bond executed by master of foreign vessel completed forfeiture. 22F(2d)388. [i] **Government** may recover full penalty of bond furnished by master of foreign vessel entering port in distress on proving failure to furnish required certificate. 22 F(2d)388.

677-20 [d] **Search held to be without probable cause.**-43F(2d)1005.

677-23 8F(2d)788; 23F(2d)882.

677-23½-New. A liquor-laden vessel, seized by a coast guard vessel thirty miles off shore in the Gulf of Mexico and brought into the port of New Orleans and there taken into possession by the collector of customs, is lawfully seized and subject to libel in the eastern district of Louisiana although first brought into the southern district of Mississippi. 18F(2d)673.

677-23⅓-New. Jurisdiction acquired by seizure is not lost by failure to allege seizure in libel itself. 23F(2d) 103.

678-31 28F(2d)50.

678-35½-New. Owner and charterer of vessel and owner of cargo may appear and defend proceedings. 23F(2d)336.

678-37 38F(2d)106 (under National Prohibition Act thing may be convicted only on conviction of offending person).

678-42 [c] **Cause of forfeiture** under Tariff Act held properly pleaded. 7 F(2d)413. [d] **Libel to forfeit automobile** used in transporting foreign liquor unlawfully imported should allege facts made, by statute, condition to forfeiture. 33F(2d)217.

678-43 [a] (2) While pleadings in admiralty need not have formal precision of those in law, libels of information are in nature of indictments and admiralty jurisdiction is only incidental. 14F(2d)426. [c] **Libel has been held not insufficient.**-38F(2d)106. [d] **Libel held insufficient.**-40F(2d)74.

678-45 32F(2d)849. [c] **Libel for forfeiture** for violation of National Prohibition Act and Tariff Act of 1922 must show cause of action and jurisdiction to seize. 4F(2d)928.

679-48 4F(2d)928. [c] **Cause of forfeiture** for violating Tariff Act must be averred. 7F(2d)413.

679-51 [b] **Libel for forfeiture of vessel** for violation of Tariff Act held defective in not alleging that vessel arrived from foreign port or place within limits of collection district. 4F(2d) 928.

679-57½-New. Allegations of libel must be taken as true on exceptions. 40 F(2d)74.

679-58 14F(2d)426; 19F(2d)397; 23 F(2d)126; 35F(2d)777; 36F(2d)688. [b] **Burden of proving claim of distress** rests on libeled vessel where evidence is introduced showing that vessel was brought within territorial waters of United States, carrying forbidden cargo without proper permits. 18F(2d) 754. [c] **Though onus of proving lawful importation** is on claimant, it does not relieve crown of proving importation. NS [1928] 1DomLR657.

679-59 23F(2d)882.

679-59½-New. The burden of proving that a ship flying a foreign flag was an American vessel is on the government. 19F(2d)417.

679-59⅓-New. The alleged owner of a vessel and cargo, seized for the master's failure to produce manifest, has the burden of proving ownership thereof. 27F(2d)296.

680-62 [a] **Liquor will not be presumed** to have been smuggled merely because it is foreign liquor. 5F(2d)273.

680-63½-New. Where it is shown that

a vessel had no manifest, and claimant failed to furnish an explanation, the fair inference is that the cargo was under control of the master of the schooner, and that he could do with it as he pleased. 30F(2d)441.

680–63⅓–New. Prima facie case, in proceeding to forfeit ship and cargo of liquor, requires proof by facts, or fair inference therefrom, that the ship was bound to the United States. 30F(2d) 441.

680–70½–New. Evidence obtained beyond the three-mile limit on a foreign ship, where no manifest of freight is found, has been held admissible. 13F(2d)382.

680–71 13F(2d)548; 30F(2d)444. [a] **Evidence held sufficient.**–30F(2d)534. [b] **Evidence held insufficient.**–30F(2d) 441.

680–72 4HawaiiFed113. [a] **Violation of Tariff Act of 1922.**–Evidence held sufficient to sustain charge and subject vessel and cargo of liquors to forfeiture. 8F(2d)764. [b] **Evidence held sufficient.**–16F(2d)604. [c] **Evidence held sufficient.**–36F(2d)729. [d] **Government must be held to clear and satisfactory proof** in proceeding against automobile used to transport narcotics. 40F(2d)557. [e] 41F(2d)288. [f] **Foreign character of goods.**–42F(2d)458.

680–72½–New. A ship may not be declared forfeited on mere suspicion. 19 F(2d)417.

680–73 30F(2d)441. [b] 15F(2d)363; 19 F(2d)344; 20F(2d)164; 22F(2d)109; 24F(2d)27; 27F(2d)296; 28F(2d)215; 39F(2d)86. (2) Vessel held subject to forfeiture under evidence where carrying liquors without manifest. 36F (2d)729.

681–78½–New. In a libel against a vessel seized off the coast with a cargo of liquor, evidence has been held insufficient to sustain claimant's burden to prove that the vessel was not bound for the United States. 30F(2d)534.

681–78⅓–New. Statute relating to possession of narcotic drugs as prima facie evidence of transportation does not apply in proceeding in rem against automobile. 40F(2d)557.

681–82½–New. Failure to allege formal seizure in libel is not fatal where proper seizure is shown by evidence. 23F(2d) 103.

681–88 17F(2d)7.

682–13½–New. , regardless of whether criminal charges are instituted. 28 F(2d)50.

682–13⅓–New. or the party is acquitted. 28F(2d)50.

682–13¼–New. Summary forfeiture may proceed without libel action being brought. 28F(2d)50.

682–13⅙–New. Procedure for summary forfeiture of property seized cannot be assumed to be intended to be abandoned by congress. 28F(2d)50.

683–26 13F(2d)149.

683–26½–New. where a foreign vessel unloads at any time after its arrival within four leagues of the coast of the United States without coming to the proper place for the discharge of merchandise and without receiving a permit to unlade; 13F(2d)992.

683–27 See also 7Alaska500.

683–29 7Alaska605. [d] 23F(2d)126 (chauffeur having knowledge). But see 25F(2d)917. [e] **Provisions for forfeiture of vehicles** do not apply to importation of intoxicating liquors in violation of National Prohibition Act. 4 F(2d)923. [f] **Truck used to transport** smuggled liquor without owner's privity or consent is not liable to forfeiture. 5 F(2d)372. [g] **National Prohibition Act does not impliedly repeal** statute providing for forfeiture of conveyance engaged in smuggling. 23F(2d)126.

683–30 3F(2d)1 (tugboat towing a barge not forfeitable on theory that tug and barge were one vessel or that tug was part of tackle, apparel, and furniture of barge).

683–31 13F(2d)992.

683–32½–New. A vehicle on which smuggled goods are found is subject to forfeiture although not moving at the time of seizure. 13F(2d)83.

683–32⅓–New. A vessel seized under customs laws held releasable on bond. 14F(2d)697.

683–32¼–New. A liquor laden American vessel, seized thirty-four miles off the coast, has been held not subject to forfeiture under the act relating to smuggling of goods with intent to defraud the United States of a tax. 13F(2d)433.

683–32⅕–New. nor under the act relating to merchandise unlawfully unloaded within four leagues of the coast. 13 F(2d)433.

683–32⅙–New. Where no penalties have been imposed for violation of customs revenue laws by person in charge of schooner, there is no basis for forfeiture under Tariff Act (1922) § 594. 20 F(2d)904.

683–32⅛–New. Where a vessel attempting to land intoxicating liquors in violation of Tariff Act, 1922, was seized by a coast guard and turned over to the collector of customs, who proceeded to sell same, purchaser at such sale acquired title 21F(2d)594.

683–32⅛–New. as against the original owner who purchased at a sale by the district court, sitting in admiralty, which did not have jurisdiction to adjudicate a claim for repairs to the vessel which was appraised at five hundred dollars. 21F(2d)594.

683–32⅒–New. Where the collector of customs proceeded with such sale diligently under the requirements of statute he cannot be said to have abandoned seizure of vessel so as to give district court jurisdiction sitting in admiralty to adjudicate a claim for repairs to the vessel. 21F(2d)594.

683–32⅒–New. An automobile is not liable to forfeiture because used in unlawful transportation of foreign liquor by reason of merely piloting other cars smuggling liquor. 33F(2d)217.

683–35 5F(2d)372 (courts are reluctant to enforce forfeiture of vehicle taken from innocent owner without his privity or consent). [a] **Constitutional right of innocent assignee of conditional sales contract** is not violated by forfeiture of car. 40F(2d)808.

683–36½–New. The owner of property seized, failing to take advantage of the protection offered by statute cannot restrain forfeiture, 28F(2d)50.

683–36⅓–New. although due to lack of knowledge of the seizure. 28F(2d)50.

683–36¼–New. If cargo is properly forfeited, its owner cannot object to an order directing its destruction. 27F(2d) 296.

684–37 [a] **Assessment of penalty.**–41 F(2d)288 (priced liquors when sold as basis).

684–38 13F(2d)548; 20F(2d)164; 27 F(2d)296; 30F(2d)534. [d] **That sale of intoxicating liquor for beverage purposes is prohibited** does not establish that liquor has no value, on basis of which penalty for importation without manifest can be assessed. 27F(2d)296. [e] **Goods delivered to master without bill of lading** held consigned to master, within statute, imposing penalty in absence of manifest. 27F(2d)738. [f] **Vessel carrying liquor, destined for United States by discharge into contact boats,** held bound for United States, within statute imposing penalty for failure to exhibit manifest. 27F(2d)741. [g] **Amount of penalty.**–Master of liquor-laden vessel, failing to produce manifest, is liable, in addition to penalty for five hundred dollars, for penalty equal to value of cargo. 27F(2d)738. [h] **Vessel within four leagues of coast** bound to United States is subject to penalty. 27F(2d)738. [i] **Fact that vessel did not produce manifest, rather than false one,** does not limit liability to five hundred dollars. 27F(2d)296. [j] **Vessel seized within forty-eight hours after entering limits of customs district** held not subject to penalty for not making entry or mailing manifest. 19F(2d)397. [k] **Vessel within four leagues of coast** and bound for United States held subject to penalty. 14F(2d)753.

684–41 13F(2d)548.

684–47 30F(2d)534 (where it was intended to transfer cargo of liquor to smaller boats near shore of United States, vessel was bound for port in United States). [a] **Where vessel did not intend to discharge cargo** within twelve-mile limit, and had never been within territorial waters, master of it was not subject to penalty. 28F(2d)215.

684–55 [c] **Burden of proof.**–13F(2d) 548.

685–59 41F(2d)288.

685–60 27F(2d)296; 27F(2d)738.

685–70½–New. **Agency.** One who undertook the duties of importer and made false entries cannot waive the penalty by denying ownership and pleading agency. Sask [1927] 3DomLR591.

685–72 See also 4HawaiiFed137.

685–74⅙–New. **Use instead of sale.** Government may use forfeited vessel instead of selling same under statutes. 24 F(2d)239.

CYCLE

691–49½–New. In electrical nomenclature, is two successive reversals of directions of electromotive force or current or full period of alternative current. 39 F(2d)684.

CYCLONE

692–52 [a] (3) 156Minn65, 194NW99.

692–54 [a] **Popularly,** a cyclone is any violent and destructive windstorm. 156 Minn65, 194NW99.

CYCLONE AND TORNADO INSURANCE

693–4 38F(2d)197; 181Ark637, 27 SW(2d)786; 289Pa13, 136A856.

693–4½–New. "Direct," in a windstorm policy referring to the cause of the loss, means "immediate" or "proximate." 289 Pa13, 136A856.

693–4⅓–New. Clause requiring notice of change in ownership refers to change increasing hazard. 181Ark637, 27SW(2d) 786.

693–5 38F(2d)197; Nebr 231NW148 (holding "husk elevator" within policy covering "husking sheds"); TexCivA 18SW(2d)348 (sprinkler system covered).

693–7½–New. Vendee, by purchasing property, has been held not to acquire rights in insurance contract. 181Ark 637, 27SW(2d)786.

693–8 See also 181Ark637, 27SW(2d) 786.

694–10 But see SD 226NW552.

694–11½ Sale of real property has been held not to avoid policy as to personal property. 181Ark637, 27SW(2d)786.

694–11⅓–New. Where a policy is claimed to be void ab initio, tender back of the premium paid is necessary within a reasonable time after notice in order to work forfeiture. MoA 19SW(2d) 297.

694–11¼–New. A provision voiding a policy for misrepresentation as to insured's title is waived where insurer did not return or offer to return the premium paid. MoA 19SW(2d)297.

694–12 122Kan620, 253P245.

694–13 198NC572, 152SE684; 289Pa13, 136A856. [a] (1) 289Pa13, 136A856. [b] **Damage caused by rain or hail** entering building because of injury done to it by windstorm is recoverable. 170 Ark694, 280SW656.

694–21½–New. Recovery for damaged floors is not limited to the cost of repairs, but patched condition of the floors may be considered. 170Ark694, 280SW656.

695–23½–New. Valued policy statutes do not apply to tornado insurance. MoA 19SW(2d)297.

695–23⅓–New. By denial of liability insurer precluded itself from claiming right to exercise option to repair building after institution of suit. TexCivA 23SW(2d)853.

695–23¼–New. A provision of a policy for prorating is put in operation by an existing valid policy where it had lapsed for nonpayment of premiums and would have become enforceable at any time on payment of installments. MoA 19 SW(2d)297.

695–24 24F(2d)216.

695–25 24F(2d)216; Nebr 231NW148; SD 226NW552. [a] **Denial of liability** waives right to proof of loss. 244Mich,

668, 222NW116. [b] **Failure to make objection at time of receipt of notice of loss** waives delay where insurer was not prejudiced thereby. 53SD305, 220NW525.

695-27 [b] (3) Other instances. **MoA** 28SW(2d)411.

695-28 [b] **Plaintiff is not required** to show that materials in building damaged or destroyed could not be advantageously used. 58ND387, 206NW230.

695-31¼-New. [a] (8) To show damage was caused by windstorm. 289Pa13, 136A856. (4) To support verdict. 289Pa13, 136A856.

695-31½-New. XII. TRIAL [§ 11a]. Cases in which instructions have been held sufficient will be found in the notes. 172Ark169, 287SW1000.

695-31¾-New. Whether damage to insured's building was caused by a windstorm has been held for the jury. 289Pa13, 136A856.

695-31¼-New. In suit on tornado policy, excepting loss by hail, plaintiff need not prove that damages were not from hail. **TexCivA** 5SW(2d)162.

695-31½-New. Evidence held not to show that tornado policies were merely renewals of policies issued by another company. 172Minn398, 215NW783.

695-31¾-New. Testimony of the value of property destroyed is sufficient to uphold judgment for the amount of loss. **MoA** 19SW(2d)297.

695-31⅞-New. Testimony of defendant's local agent as to statements of defendant's attorney that he did not think defendant was liable and that policy had been cancelled has been held admissible on question whether defendant waived option to repair building. **TexCivA** 23SW(2d)853.

DACTYLOGRAPHY

696-25½-New. Scientific study of finger prints as means of identification. **Iowa** 230NW536.

DAILY

696-40 161La915, 109S675.

DAMAGE

697-72 222MoA201, 297SW151; 25OhNPN572. [a] **"Loss" distinguished** in that damage means partial, rather than total, loss. 222AppDiv302, 226NYS243.

698-84½-New. "Damage" implies that property still exists, although in damaged form. 222AppDiv302, 226NYS243.

DAMAGES

710-1 36GaA723, 137SE901; **Mass** 166NE707; 230Mich117, 202NW938; 195NC233, 141SE594; 33OhA539, 169NE709; 25OhNPN572; **TexCommnA** 280SW762. [a] (2) 202Iowa1251, 211NW898. (5) 202Iowa1251, 211NW898. (13) "Estimated reparation in money for detriment or injury sustained." 312Mo173, 279SW89. [f] **As including exemplary damages.**–TexCommnA 283SW141.

710-6 234Ky202, 27SW(2d)955.

710-7 195NC233, 141SE594.

710-12 [a] 178Ark147, 10SW(2d)22.

711-27 312Mo173, 279SW89; 194NC188, 138SE608.

711-30 120Or600, 253P542, 544 [quot CJ]. [a] (4) 13PaDist&Co109.

711-31 320Mo120, 6SW(2d)935.

711-35 13F(2d)71. [a] 37GaA418, 140SE763.

712-43 **TexCivA** 300SW253.

712-48 125Or587, 267P812, 58ALR1556.

712-49 30Ariz569, 249P751.

712-56 **Ariz** 288P1029; 104Conn508, 133A686; 37GaA439, 140SE386.

713-57 21F(2d)836, 837 [citCJ]; 104Conn508, 133A686; 42Ida688, 247P791; 39OklACR90; **TexCivA** 10SW(2d)391.

713-59 [a] **Other definitions.**–"General damages are such as naturally and ordinarily follow the breach." 27F(2d)234, 235.

713-60 104Conn508, 133A686.

713-61 104Conn508, 133A686. See also 333Ill90, 164NE224.

714-74 [a] (1) 47RI180, 131A647. [b] **Distinguished from unliquidated damages.**–Mass 166NE752.

714-74½-New. Where a cause of action arises from debt or money demand or it sounds in damages, if damages are capable of being ascertained with certainty by arithmetical computation, they are liquidated. 105NJL542, 147A337.

714-86 126Kan181, 183, 268P103 [quot CJ].

714-87 6LaA420, 423 [quotCJ].

714-88 127Misc671, 217NYS354, 355 [quotCJ]; 194NC188, 138SE608.

715-92 126Kan181, 183, 268P103 [quot CJ]; 6LaA420, 423 [quotCJ]; **TexCivA** 286SW578, 579 [quotCJ].

715-93 **Ariz** 288P1029; **CalA** 292P132; 104Conn508, 133A686; 106Conn475, 138A483, 54ALR361; 42Ida688, 247P791; 39OklACR90; **Tex** 10SW(2d)391.

715-94 21F(2d)836; 104Conn508, 133A686; 106Conn475, 138A483, 54ALR361; 102NJL222, 130A610 [citCyc]; **Sask** [1929] 2DomLR321, 333 [quotCJ].

715-95 104Conn508, 133A686.

715-96 **TexCivA** 278SW334 (dictum). [a] (2) Distinction is not that one is, and other is not, direct and proximate consequence of breach complained of. 27F(2d)234. [b] **Other definitions.**–"Special damages are those that ensue, not necessarily or ordinarily, but because of special circumstances." 27F(2d)234, 235.

716-97 [a] **Determination depends largely on circumstances of particular case.**–40Wyo378, 278P71.

716-10 47RI180, 131A647. See also 248IllA396 [citCJ]. [a] (2) Those which cannot be made certain by one party alone. **Mass** 166NE752.

716-12 281US57, 50SCt180, 74Led699, 67ALR1423; 22F(2d)59; 84CalA174, 257P873; 103Conn759, 131A404; 118Nebr792, 226NW444; 124Okl106, 254P34; 29PortoRico977; **TexCivA** 18SW(2d)237.

717-13 **NJ** 151A477.

718-24 135Misc764, 239NYS585.

718-25 104Conn318, 132A910; 46Ida62, 266P413 (breach of contract); 333Ill90, 164NE224; 228Ky635, 15SW(2d)497; 7LaA281; **MoA** 285SW1028, 1033 [citCJ]; 27OhNPN8116; 300Pa78, 150A155; 156SC397, 153SE473; **TexCivA** 278SW334.

719-26 **TexCivA** 278SW334.

719-27 But see 85PaSuper483. [a] **Difficulty in proving amount of damages** does not allow defendant's escape therefrom. 248Mich128, 226NW824.

719-33 [a] (5) Where punitive damages may be allowed under law of state where cause of action arose, they may be recovered in state of forum where recovery thereof would be authorized if cause of action arose in state of forum. 120Kan575, 244P1063.

719-35 31F(2d)757(2dcase).

720-38½-New. 210Ky108, 275SW363.

720-41 **TexCivA** 15SW(2d)144(1st case).

720-44 120Kan105, 242P117.

720-45 236Mich90, 210NW222; **NJSup** 135A795.

720-46 33OhA539, 169NE709.

720-48 **Conn** 152A64.

720-51½-New. The rule permitting nominal damages for breach of contract does not apply where only special damages are sued for and are not recoverable. 36GaA796, 138SE254.

720-52 48Philippine523.

720-55 **TexCivA** 278SW334, 336 [cit Cyc].

721-56 30F(2d)481; 83CalA18, 256P298; 104Conn318, 132A910; 43Ida320, 251P617; 43Ida265, 251P621, 623 [cit CJ]; 1LaA461; Me 150A538(1stcase); 236Mich90, 210NW222; 217MoA76, 273SW204; 222MoA370, 38W(2d)256; **MoA** 38W(2d)399; **NJSup** 135A795; **NJSup** 137A559; **NJ** 150A321; 133Misc260, 231NYS342; 196NC95, 144SE697; 93PaSuper540; **TexCivA** 271SW106; **TexCivA** 274SW172; **TexCivA** 278SW334, 336 [citCyc]. See also **TexCivA** 278SW950.

722-57 108Conn186, 142A683; 224Ky460, 6SW(2d)454; 128Me481, 148A682; 217MoA76, 273SW204; 76Mont105, 245P523; **TexCivA** 272SW616 (conclusively presumed); **TexCivA** 23SW(2d)527; **NB** [1925] 3DomLR1036.

722-58 108Conn605, 142A853; 217MoA592, 274SW941; **TexCivA** 278SW334; 34Wyo299, 242P1111. [a] (2) Nominal damages only are recoverable for breach of contract terminable by either party on five days' notice. 6F(2d)212.

723-60 236Mich90, 210NW222 (fraud).

723-61 96Fla375, 118S211; 222MoA370, 38W(2d)256; 144Va473, 132SE179.

723-62 124Okl106, 254P34; **NB** [1925] 3DomLR1036.

723-64 228Ky156, 14SW(2d)418.

724-69½-New. Where the contract is concededly breached, judgment for nominal damages, at least, to plaintiff was required, even in the absence of proof that breach was cause of the damages suffered. 126Misc613, 214NYS492.

724-70 96Fla375, 118S211; 260Mass45, 157NE82, 52ALR1125; **NJSup** 135A795; 130Or282, 279P279; **TexCivA** 278SW334 (contract); **TexCivA** 30SW(2d)665; **Sask** [1928] 3DomLR555.

725-74 26OhA546, 160NE97. See also 81Colo181, 254P440.

725-77 **NB** [1925] 3DomLR1036.

725-81 237IllA230; 255Mass599, 152NE87.

726-82 237IllA230.

726-88 164La1003, 115S62 (violation of letter, not spirit of contract).

727-91 2LaA396, 397 [quotCJ].

727-95 **NJSup** 135A795. [a] (4) Twenty-five dollars. **Utah** 265P745, 747 [cit CJ]; 110Conn184, 147A762, 66ALR1121.

727-2 26SUS146, 45SCt465, 69Led890; **Cal** 293P30 (limited to injury); 103Conn759, 131A404; 36GaA698, 137SE850; 36GaA723, 137SE901; 192NC287, 134SE855; 194NC188, 138SE608; 153Tenn59, 281SW778, 48ALR301.

728-3 126Me597, 138A311; 85PaSuper483; **TexCivA** 272SW582.

728-6 145Wash4, 258P845.

728-7 103Conn759, 131A404; **LaA** 130S60.

728-9 91Fla109, 107S336; **NJSup** 135A71; 254NY41, 171NE899; 215AppDiv240, 213NYS553; 129Misc765, 222NYS724; 192NC287, 134SE855, 857 [citCJ]; 118Okl82, 246P839; **TexCivA** 286SW578; **TexCommnA** 292SW200. [c] **Damages must be directly traceable to wrongful act.**–215AppDiv240, 213NYS553 (not consequence of some intervening cause). [d] **Damages must be natural result of wrongful act.**–215AppDiv240, 213NYS553.

729-11 23AlaA566, 129S320(2dcase); 30Ariz569, 249P751; 219Ky579, 293SW1064; 11LaA150, 119S757(2dcase); **MoA** 12SW(2d)767; 114Nebr353, 207NW669; 192NC287, 134SE855, 857 [cit CJ]; 123Okl149, 256P32; 289Pa51, 137A104; **TexCivA** 286SW578, 579 [cit CJ]; **TexCivA** 30SW(2d)665.

733-12 **CalA** 291P445; 91Fla109, 107S336; 128Kan120, 276P289; 114Nebr353, 207NW669; 192NC287, 134SE855, 857 [citCJ]; 116Okl63, 243P216.

733-13 12LaA15, 123S430; **TexCivA** 286SW578, 579 [citCJ].

734-27 26F(2d)218, 224 [citCJ]; 32OhA1, 167NE406.

735-38 26F(2d)218, 224 [citCJ]; 192NC287, 134SE855; 289Pa51, 137A104.

736-39 216AppDiv558, 215NYS502; 289Pa51, 137A104.

736-43 216AppDiv558, 215NYS502; 192NC287, 134SE855.

738-50½-New. Failure of a property owner to obtain a building permit is not a defense to an action by him against an engineer for failure to furnish proper grades. 91PaSuper589.

738-53 192NC287, 134SE855.

738-56 49GaA587, 151SE114(2dcase); 129Kan563, 283P511; 128Me464, 148A684; 262Mass383, 160NE269; 130Misc301, 223NYS415; 192NC287, 134SE855, 857 [citCJ]. See also 130Misc301, 223NYS415. But see 221AppDiv371, 223NYS418. [a] (1) But see 128Me464, 148A684.

739-57 221AppDiv371, 223NYS418. Contra 130Misc301, 223NYS415.

739-65 216AppDiv558, 215NYS502; 289Pa51, 137A104.

740-71 219Ky579, 293SW1064.

740-73½-New. Where aggravation of injury is due to an independent cause not attributable to the original cause, plaintiff's recoverable damages are accordingly reduced. 289Pa51, 137A104.

740-74 216AppDiv558, 215NYS502 (diabetes); 289Pa51, 137A104; 100WVa49, 129SE760; 197Wis349, 222NW249.

741-75 **Iowa** 219NW398; 213Ky432,

281SW519; 5LaA94; 9LaA36, 119S91; 90PaSuper280, 284 [quotCJ]. See also 221MoA1231, 300SW531.

741-76 225Ky542, 98W(2d)517.

742-77 126Kan181, 26SP103; 192NC287, 134SE855; TexCommnA 292SW200.

742-78 192NC287, 134SE855.

742-79 9LaA36, 119S91; TexCommnA 292SW525.

742-84 8F(2d)930; 13F(2d)459; 24F(2d)329; 26F(2d)218; 22AlaA207, 114S179; Ala 130S772; 94CalA557, 271P540; 36GaA796, 138SE254; IndA 154NE780; 202Iowa1251, 211NW898; 103NJL566, 137A406; 192NC287, 134SE855; 56ND201, 216NW567; 118Okl82, 246P839; 41OklACR59, 61 [quotCJ]; 119Or55, 248P158, 162 [citCJ]; TexCivA 290SW802; TexCommnA 292SW200; TexCivA 19SW(2d)134; 151Va706, 144SE635; 134Wash647, 236P290.

743-85 13F(2d)71; 21F(2d)836, 837 [citCJ]; 30F(2d)481; 30F(2d)571; 212Ala679, 103S848, 849 [citCJ]; 22AlaA207, 114S179; CalA 277P525. See 96Fla151, 117S853; 36GaA796, 138SE254; IndA 154NE780; 202Iowa1251, 211NW898; 1LaA19; 263Mass228, 161NE240; Mass 173NE411; MoA 29SW(2d)170; 103NJL566, 137A406; 254NY41, 171NE899; 132Misc489, 229NYS471; 41OklACR59, 61 [quotCJ]; 130Or282, 279P279; 295Pa486, 145A595; 153Tenn59, 281SW778, 48ALR801; TexCivA 290SW802; TexCommnA 292SW200; TexCommnA 292SW863; TexCivA 16SW(2d)969; TexCivA 19SW(2d)134; 134Wash647, 236P290; Wash 290P847. See also 213Ala681, 105S831.

744-86 20AlaA574, 104S143; 84Colo93, 267P1068; 265Mass223, 163NE905; MoA 294SW755; NJ 145A637; 56ND201, 216NW567; 41OklACR59, 61 [quotCJ]; TexCivA 272SW616.

746-87 41OklACR59, 61 [quotCJ].

746-88 41OklACR59, 61 [quotCJ].

746-89 CalA 285P1048(2dcase).

746-98 26F(2d)218; 213Ala660, 106S142; 168Ark1167, 273SW381; 195NC274, 142SE12; 41OklACR59, 61 [quotCJ]; 119Or55, 248P158. [c] **Evidence of express notice of peculiar use and function of machinery** to be repaired and of special purpose for which it was intended warrants special damage upon breach of contract. 192NC442, 135SW343.

747-99 21F(2d)836, 837 [citCJ]; 41OklACR59, 61 [quotCJ]; TexCivA 4SW(2d)193; TexCivA 10SW(2d)391; TexCivA 22SW(2d)975.

747-1 181Ark209, 25SW(2d)448; 192NC442, 135SW343.

748-3 45Ida217, 261P679, 683 [citCJ].

748-9½-New. Special damages for increased costs of operation because of the manufacturer's negligence are properly allowable where the court instructs that the injured party was required to minimize damages. 192NC442, 135SE343.

748-10 13F(2d)3.

748-11 221Ky131, 297SW1114; 224Ky649, 6SW(2d)1089, 1091 [citCJ].

749-18 But see TexCivA 292SW602.

750-23 30Ariz569, 249P751; 102Conn759, 131A404; 110Conn184, 147A762, 66ALR1121; Mass 166NE713; 170Minn250, 212NW413; NJSup 135A71; 105NJL602, 147A402; 129Misc765, 222NYS724; 225AppDiv454, 233NYS461; 137Misc888, 244NYS82; 192NC287, 134SE855, 857 [citCJ]; 118Okl82, 246P839; TexCivA 27SSW950; TexCivA 28SSW578; TexCivA 28SSW661; 105WVa153, 143SE98. [b] 151Va278, 144SE436. [d] **In Porto Rico.**—33PortoRico102, 104.

750-24 192NC287, 134SE855, 857 [citCJ]; 44Philippine165.

750-25 170Minn250, 212NW413; 192NC287, 134SE855, 857 [citCJ]; 44Philippine165; TexCivA 27SSW950. [a] (2) Plaintiff could recover for losses due to lost bookings where moving picture reels were destroyed by defendant's negligence. TexCivA 27SSW950.

750-26 34GaA355, 129SE557; LaA 130S861; 126Me597, 138A311; 105NJL602, 147A402.

751-29½-New. All damages foreseeable as result of negligent act and connected therewith as unbroken sequence are recoverable. 23AlaA490, 127S679.

751-30 120Kan380, 244P236; 6LaA743, 744 [citCJ]; 154Miss680, 123S859; 114Nebr358, 207NW669. [a] 81NH451, 130A145 (dictum).

751-31 NJSup 135A71.

751-32 35GaA59, 132SE399; 126Kan181, 26SP103; 118Okl82, 246P839; TexCommnA 292SW200, 201 [citCJ]; Can [1925] 3DomLR1075 (though existence of damage became apparent after injury); Sask [1930] 4DomLR722.

752-33 153Tenn59, 281SW778, 48ALR301.

752-34 See also 11LaA462, 123S439.

752-36 TexCivA 286SW578, 579 [quot CJ].

752-37 TexCivA 286SW578, 579 [quot CJ].

752-39 275US303, 48SCt134, 72Led290; 37GaA516, 140SE794; Alta [1928] 3DomLR610.

753-46 8F(2d)357; 22F(2d)360; 25F(2d)216; 215Ala398, 110S822; CalA 285P1077; 81Colo125, 254P156; 232 IllA27; 120Kan380, 244P236; 6LaA736; 238Mich164, 213NW93; 174Minn107, 218NW461; 194NC401, 139SE841; 123Okl149, 256P832; 289Pa51, 137A104; TexCivA 48W(2d)574. See also 17F(2d)896. But see 38GaA570, 144SE358.

754-47 84Colo93, 267P1068; 128Kan120, 276P284; 238Mich164, 213NW93; NC 155SE167(1stcase); 27OhNPN873; 123Okl149, 256P832; 134Wash647, 236P290; 151Va706, 144SE635.

754-48 177Ark177, 6SW(2d)10 (loss of contract held too remote); 85PaSuper483 (injury to property); 289Pa51, 137A104.

754-50 136Misc490, 240NYS145. See also 147Va758, 133SE788.

754-53 204Cal4, 266P273.

754-59 27F(2d)314; 123Okl149, 256P832.

754-60 27F(2d)314; 92CalA575, 268P939 (under statute); 6LaA72; 7LaA4; 123Okl149, 256P832; 85PaSuper483; TexCivA 300SW159, 170 [quotCJ].

755-63 27F(2d)314; 35GaA59, 132SE399; 219Ky579, 293SW1064; 156Miss693, 126S650; 123Okl149, 256P832.

756-64 156Miss693, 126S650.

756-66 199Ind1, 154NE801, 802 [citCJ]; NJSup 142A821.

756-69 273US359, 47SCt400, 71Led684; 35GaA511, 133SE878 [citCJ]; 232IllA27, 36 [quotCJ]; 124Kan579, 261P561, 562 [quotCJ]; 124Okl196, 255P710, 714 [citCJ]; TexCivA 271SW145; TexCivA 300SW159.

756-70 273US359, 47SCt400, 71Led684; 35GaA511, 133SE878 [citCJ]; 232IllA27, 36 [quotCJ]; 124Kan579, 261P561, 562 [quotCJ]; 130Or282, 279P279; TexCivA 25SW(2d)671.

756-71 273US359, 47SCt400, 71Led684; 27F(2d)314; Ala 128S139; 203Cal1, 262P1087; 92CalA230, 268P385, 387 [citCJ]; 108Conn549, 143A855, 63ALR139; 232IllA27, 36 [quotCJ]; 167La578, 120S13(3dcase); 259Mass528, 156NE859; 240Mich306, 215NW422; 241Mich279, 217NW26; MoA 299SW74, 78 [citCJ]; MoA 299SW74, 78 [citCJ]; 284Pa397, 131A250; 189Wis60, 205NW826; Can [1930] 4DomLR977.

757-72 13F(2d)71; 27F(2d)314; 34F(2d)589; 167La578, 120S13(3dcase).

757-73 259Mass528, 156NE859; 284Pa397, 131A250; 189Wis60, 205NW826. But see NB [1925] 3DomLR1036.

757-74 240Mich306, 215NW422; MoA 299SW74.

757-75 13F(2d)71; 27F(2d)314; 34F(2d)589; 232IllA27; 241Mich279, 217NW26. [a] (4) Where amount was ascertainable by computation. 232IllA27. [b] **Where it is impracticable** to estimate damages, contracting parties are relegated to equity, statute precluding recovery at law. CalA 285P1077. [c] **Person breaching contract cannot complain** that damages cannot be accurately fixed. 39F(2d)399.

757-76 142Va639, 128SE156 (persons found at distillery where ardent spirits were being made deemed prima facie guilty of manufacturing same).

758-77 MoA 299SW74, 78 [citCJ].

758-78 213Ala630, 105S896, 897 [quotCJ]; 238Mich164, 213NW93; 241Mich279, 217NW26; 123Okl149, 256P832; 284Pa397, 131A250; 85PaSuper483.

758-79 Ala 128S145; 241Mich279, 217NW26; MoA 188SW(2d)102; 116Oh554, 157NE367; 284Pa397, 131A250; 85PaSuper483. See also Mass 166NE713. [a] **Inconvenience to public held not measurable.**—238Mich164, 213NW93.

758-80 20F(2d)14; 213Ala630, 105S896, 897 [quotCJ]; 241Mich279, 217NW26; 174Minn339, 219NW185; 116Oh554, 157NE367; 284Pa397, 131A250; 289Pa51, 137A104; 12PaDist&Co722; 85PaSuper483; 153Wash591, 281P8; NB [1925] 3DomLR1036.

758-81 241Mich279, 217NW26; 85PaSuper483.

759-82 213Ala630, 105S896, 897 [quotCJ]; 289Pa51, 137A104; TexCivA 289SW736. See also 47Ida794, 279P302 (recovery on counterclaim properly denied).

759-83 MoA 299SW74, 78 [citCJ].

759-84 284Pa397, 131A250.

759-84½-New. Where defendant's conduct causes uncertainty, he cannot complain thereof. 273US359, 47SCt400, 71Led684.

759-86 273US359, 47SCt400, 71Led684; 200Iowa458, 204NW413; 238Mich164, 213NW93; 144Miss804, 110S510; 225AppDiv23, 232NYS63; 116Oh554, 157NE367; 284Pa397, 131A250; 85PaSuper483.

760-87 273US359, 47SCt400, 71Led684; 284Pa397, 131A250; TexCivA 276SW448. [b] (5) **To purchase automobile motors.**—232IllA27. [d] **If proof shows reasonable basis for computation,** damages are sufficiently proved. 39F(2d)399.

760-88 250Mich298, 230NW154; 284Pa397, 131A250.

761-90 24F(2d)329; 156Tenn571, 3SW(2d)1057.

761-91 39F(2d)399; 92CalA230, 268P385, 387 [citCJ].

761-92 124Kan579, 261P561, 562 [quotCJ].

761-92½-New. . or that there is an element of uncertainty in assessing damages. Mass 166NE713.

761-93 124Kan579, 261P561, 562 [quotCJ].

762-99 130Or282, 279P279.

762-1 35GaA804, 134SE824; 149Md152, 131A151; 170Minn250, 212NW413; 120Or181, 250P628; 44Philippine165; 135Wash588, 238P631. [c] **Fact that opportunity for marriage was affected** by disfigurement was taken into consideration in determining amount of injuries. 11LaA164, 121S777.

763-3 200Cal628, 254P256; 149Md152, 131A151; 44Philippine165. [a] (2) TexCivA 299SW507.

763-4 200Cal628, 254P256; 35GaA804, 131SE824; 235Ky640, 32SW(2d)18; 170Minn250, 212NW413; 222AppDiv835, 226NYS390; TexCivA 280SW864.

764-5 200Cal628, 254P256; 35GaA804, 134SE824; TexCivA 280SW864.

764-8 200Cal628, 254P256; 205Iowa365, 218NW31; 219Ky293, 293SW151; 170Minn250, 212NW413; 117Nebr60, 219NW805; 120Or181, 250P628.

765-9 227Ky690, 13SW(2d)1022.

765-10 Mo 23SW(2d)174.

765-12 Mo 23SW(2d)174. [b] 101CalA218, 281P681; MoA 23SW(2d)193. [c] 205Iowa365, 218NW31; 9LaA507, 120S109; 131Or631, 284P183.

766-13 TexCivA 3SW(2d)535.

766-18 245IllA264; 230Mich117, 202NW938, 940 [quotCJ]. [b] **Where action is for damages to land by excavation,** plaintiff may recover prospective damages due to loss sustained on contract. 230Mich117, 202NW938.

767-19 245IllA264.

767-24 213Ala242, 104S418; 197Cal694, 242P709; 99CalA417, 278P874; 161LaS06, 109S498; La 129S725; 7LaA738; 153Md264, 138A1; MoA 300SW301; 125Misc186, 211NYS149; 195NC274, 142SE12; 196NC516, 146SE209; 130Or590, 280P511; 98PaSuper510; 49Philippine998; 133SC55, 130SE119, 42ALR286; TexCivA 28SSW572; TexCivA 296SW653; TexCivA 300SW159; Utah 262P274; Utah 287P931; 144Wash543, 258P469; 99WVa657, 129SE718, 47ALR189.

769-25 209Ky442, 449, 272SW912 [citCJ]; 233Ky187, 25SW(2d)55; 13LaA642, 128S863 [quotCJ]; 153Md264, 138A1; TexCivA 296SW653; Vt 151A642.

769-26 32F(2d)800; TexCivA 296SW 653. [b] Injured persons actions held sufficient attempt to minimize loss. LaA 126S593(2dcase).
770-32 171Ark86, 284SW529, 46ALR 1186.
770-34 221MoA478, 282SW97; 221MoA 478, 282SW97; MoA 285SW1028, 1033 [quotCJ]; 131 Okl 134, 268P224, 227 [quotCJ]; 135 Okl 216, 275P329; Tex CivA 8SW(2d)957.
770-34½-New. Where one, by his negligence, has created a situation which will probably result in loss to another, he cannot complain if that other, in good faith, does what seems reasonable in an effort to minimize the loss. 11 LaA348, 123S355.
770-35 MoA 285SW1028, 1033 [quot CJ]; MoA 300SW301; TexCivA 8SW (2d)957.
770-36 218Ala582, 119S606; MoA 300 SW301; 213Ala242, 104S418; 171Ark 86, 284SW529, 46ALR1186.
771-39 37F(2d)593; 214Ala565, 108S 456, 459, 47ALR270 [citCJ]; 217Ala 180, 115S230 (cannot increase damages); 175Ark539, 299SW994; CalA 284 P1028; 230Ky151, 18SW(2d)1000; 161 LaS06, 109S498; 167LaS05, 119S530; 10LaA119, 119S551; 10LaA635, 120S 539 (especially where goods are perishable); 10LaA571, 121S616; MoA 285 SW1028, 1033 [quotCJ]; NH 146A525; 254NY41, 171NE899; 50 Philippine69; TexCivA 283SW568; TexCivA 208SW (2d)108; 144Wash543, 258P469; Wash 292P412; 40Wyo 226, 276P452; Sask [1927] 3DomLR115. [g] Rule held not applicable to contract to pay absolutely certain sum of money. 219Ky539, 293 SW1078.
773-40 161Ga503, 131SE904, 44ALR 599 (purchaser of part of tract of land not required to pay off encumbrance on entire tract assumed by purchaser of other portion and thus lessen damages from foreclosure sale); NJSup 135A 501; 294Pa518, 144A529, 63ALR297; 151Wash382, 275P737; 199Wis30, 225 NW185.
774-42 99WVa657, 129SE718, 47ALR 189.
774-43 224AppDiv29, 229NYS545; 155 Wash564, 285P433; Ont [1929] 4DomLR514. See also 263Mass228, 161NE 240.
774-44 171Ark86, 284SW529, 46ALR 1186.
774-45 110Conn234, 147A709; 236Mich 698, 211NW22.
774-46 TexCivA 291SW938, 939 [cit CJ].
774-47½-New. It is not in every case of breach of contract that the injured party is under the duty to mitigate damages. TexCommnA 285SW1047.
775-48 211Ky232, 277SW453; 145Miss 372, 110S774. See also 235Ky425, 31SW (2d)701.
775-50 145Miss372, 110S774.
775-51 211Ky232, 277SW453, 455 [quot CJ].
775-52 211Ky232, 277SW453, 455 [quot CJ].
775-53 211Ky232, 277SW453, 455 [quot CJ]; 232Ky630, 24SW(2d)263. [a] (3) Carpenter, contractor, or architect who is to do definite work. 211Ky232, 277 SW453. [c] Architect not required to minimize damages by doing other work. 211Ky232, 277SW453.
776-56 218Ala582, 119S606; 2LaA365; 221MoA478, 282SW97; Utah 262P274. [a] (10) Where going business illegally seized, owner must minimize damages. 154Wash163, 281P327.
777-58 12LaA661, 126S90.
777-59 218Ala582, 119S606.
777-60 207Cal 8, 276P1017(2dcase).
777-61 126 Or621, 270P781.
777-63 146Wash190, 262P228, 231 [quotCJ].
778-70 CalA 287P526; 35GaA59, 132 SE399; 233Ky38, 24SW(2d)915; 153 Md264, 138A1; MoA 23SW(2d)1087; 73Mont407, 236P1069; 192NC287, 134 SE855.
778-71 208 Iowa873, 224NW36.
778-72 TexCivA 1SW(2d)743.
779-74 73Mont407, 236P1069 (breach of contract by employer to furnish medical attendance to employee); 192NC 287, 134SE855; 48RI 316, 138A45. [c] Failure to secure immediate medical assistance has been held not to preclude recovery of damages. CalA 287P526. [d] Duty discharged by consulting doctor and following prescribed treatment. 48RI 316, 138A45.
779-75 [a] 221MoA1231, 300SW531.
779-76 206Cal 494, 274P955; TexCivA 299SW933, 934 [citCJ].
779-77 213Ala346, 104S653, 39ALR 1263; 109Conn87, 145A659; 242 IllA 93; 221AppDiv551, 224NYS559.
779-77½-New. If treatment of the injury procured by the injured party in exercise of due care is beneficial, and reduces damages, such reduction relieves the wrongdoer pro tanto. 192NC 287, 134SE855.
779-77½-New. If the result of treatment is not beneficial, damages otherwise recoverable are not affected. 192 NC287, 134SE855.
779-78 233Ky38, 24SW(2d)915; MoA 23SW(2d)1087; 48RI 316, 138A45.
779-79 NJSup 132A221.
780-80 48RI 316, 138A45.
780-81 Md 13A1; 48RI 416, 138A45, 46 [citCJ].
780-84 220Ala245, 124S907; Ala 130S 199; 105Conn88, 134A154; 3Del 564, 140A659; 13LaA27, 127S57; 216App Div512, 215NYS574; 29PortoRico 977; 69Utah323, 255P172. But see 144 Okl 123, 289P281.
781-86 Sask [1929] 2DomLR321.
781-87 Sask [1929] 2DomLR321.
781-93 105WVa579, 144SE292.
782-96 292Pa191, 140A897.
782-97 220Ala220, 124S516; 30Ariz 347, 247P122 (action against employer).
782-98 193Wis370, 214NW374, 53ALR 771.
782-11 230AppDiv389, 244NYS663. [b] At common law action would lie to recover loss sustained for injury to servant, wife, or child from time of act resulting in death to time of death. Wis 231NW597.
782-13 181Ark299, 25SW(2d)760; 106Conn302, 138A147; 87 IndA27, 154 NE41; 203 Iowa721, 211NW430; 207 Iowa895, 223NW745 (right not affected by plaintiff removing to another city); 211Ky774, 278SW116; 231Ky713, 22 SW(2d)108; 149Md152, 131A151; 261 Mass183, 158NE656; 261Mass188, 158 NE658; NJSup 132A201; NJSup 135A 82; 5PaDist&Co 531; 44Philippine165; 29PortoRico 977; 128 Or582, 275P600; TexCivA 284SW683.
783-14 233Ky129, 25SW(2d)38.
783-17 203 Iowa721, 211NW430. Contra 219Ky510, 293SW1079.
783-18 218Ala260, 118S276; 203 Iowa 721, 211NW430; 321Mo 887, 13SW(2d) 648.
784-23 218Ala260, 118S276.
784-26 97CalA377, 275P840.
784-28 89CalA477, 265P268 (impairment of woman's power to work).
784-31 See also 44Philippine165.
784-34 38GaA337, 144SE11.
784-35 [a] (2) Instruction upheld. 38 GaA337, 144SE11.
784-37½-New. Allowance of damages for permanent impairment of power to earn money begins when any allowance the jury may make for loss of time ends. 230Ky157, 18SW(2d)983.
785-39 TexCivA 290SW892. [a] Loss of rent while house is being rebuilt is not proper element of damages in some jurisdictions. TexCivA 290SW892.
785-44 176Ark864, 48W(2d)901; MoA 27SW(2d)497. But see 219Ky290, 292 SW829.
786-57 151SC484, 149SE246; 143Wash 397, 255P146.
786-58 32Ariz552, 261P33; 160La778, 107S571, 574 [citCJ]; 5LaA69; 36 Okl ACR410; 143Va802, 129SE491. See also 91Fla230, 107S528, 529 [citCJ].
786-59 231Ky558, 21SW(2d)976; 113 Okl 271, 242P260.
787-62 35F(2d)333; 160La778, 107S 571, 574 [citCJ]; 44Philippine165; 143 Va802, 129SE491; Ont [1930] 4DomLR 731. [a] In Philippines.-44Philippine 165.
787-63 Wash 290P813. [a] (2) Where gasoline tank cap was patented and without competition on the market. Wash 290P813.
788-65 113 Okl 271, 242P260.
788-67 151Wash382, 275P737.
788-68 81Colo 125, 254P156; 83Colo 136, 263P23.
788-69 231Ky558, 21SW(2d)976; 36 OklACR410; 143Wash397, 255P146.
788-69½-New. To recover future profits as damages for loss or injury to business, it must be shown that the business was established and going, not a mere experiment or new adventure. 151Wash382, 275P737.
788-70 8F(2d)357; 32F(2d)261 [aff 32 F(2d)264(1stcase)]; 213Ala681, 105S 891; 203Cal 1, 262P1087; 81Colo 125, 254P156; 43 Ida111, 249P773; 2LaA 181; 128Me75, 145A741(1stcase); 260 Mass265, 157NE532; 175Minn236, 220 NW946; MoA 294SW755, 756 [citCJ]; 225AppDiv467, 233NYS348; 21 OhA 482, 153NE272; 117 Or637, 244P531; 125 Or343, 267P523; 126 Or345, 269P 342; 291Pa387, 140A148; 295Pa374, 145A425; TexCivA 300SW159; Tex CivA 19SW(2d)134. [c] Evidence held sufficient to warrant allowance of substantial damages. 39F(2d)521.
789-71 213Ala681, 105S891; 81Colo 125, 254P156; 43 Ida111, 249P773; 260 Mass265, 157NE532; 175Minn236, 220 NW946; TexCivA 297SW882; Va 153 SE676.
790-72 213Ala681, 105S891 (profits held estimable with reasonable certainty); 81Colo 125, 254P156; DelCh 140A 803; 260Mass265, 157NE532; 175Minn 236, 220NW946; 114 Okl 156, 245P63; 117 Or637, 244P531; 126 Or345, 269P 342; TexCivA 297SW676; TexCivA 297 SW882; Va 153SE676; 134Wash647, 236P290; Wash 290P813.
791-73 8F(2d)357; 40F(2d)873; 213 Ala681, 105S891; 10LaA268, 120S686; 260Mass265, 157NE532; 227AppDiv375, 237NYS429; 44Philippine98; 33Porto Rico 276; 134Wash647, 236P290; Can [1926] 4DomLR1, [1926] 3WestWkly26.
792-74 260Mass265, 157NE532.
792-76 81Colo 125, 254P156; 117 Or 637, 244P531.
793-80 44Philippine98; TexCivA 293 SW217.
793-81 39F(2d)521; 81Colo 125, 254P 156; 231Ky558, 21SW(2d)976; MoA 294SW755, 756 [citCJ]; 117 Or637, 244 P531; 125 Or343, 267P523.
794-84 224Ky649, 6SW(2d)1089, 1091 [citCJ]; 126 Or345, 269P342.
795-87 177Minn390, 225NW395; 117 Or306, 244P75, 78 [citCJ]; TexCivA 30 SW(2d)809; 105WVa453, 143SE98.
795-88 143Wash398, 255P146.
795-93 108Conn549, 143A855, 63ALR 139.
795-94 36 OklACR410.
795-95 22AlaA336, 115S689, 690 [cit CJ]; 317Mo 125, 295SW109, 113 [cit CJ]; TexCivA 293SW217, 219 [citCJ].
796-96 18F(2d)858; 22AlaA336, 115S 689, 690 [citCJ]; 80CalA689, 252P780; 4LaA248; 317Mo 125, 295SW109, 113 [citCJ]; 220MoA773, 277SW64; 135 Okl 249, 274P1082; 36 OklACR410; 117 Or306, 244P75, 78 [citCJ]; 47RI 29, 129 A594, 595 [citCJ]; TexCivA 16SW(2d) 151; 143Wash397, 255P146.
797-97 317Mo 125, 295SW109; 36 OklACR410.
797-98 See also SD 227NW438.
797-99 80CalA689, 252P780, 784 [quot CJ]; 317Mo 125, 295SW109, 114 [cit CJ]; 220MoA773, 277SW64. [a] Losses are possible as well as profits and in either case they are nothing more than contingent probabilities. 80CalA689, 252P780. [b] Loss of profits growing out of breach of contract and resulting to established business is too uncertain to form basis for computation of damages for breach. 80CalA689, 252P780.
797-9 [b] 262Mass348, 159NE922. [c] Before damages can be awarded for injuries to established business, there must be satisfactory evidence of amount of business transacted before and after injury complained of. 48Philippine523.
798-11 Ont [1930] 4DomLR731.
798-14½-New. Money expended to rent a dwelling may be recovered where defendant contracted to build the dwelling but failed to do so. 10LaA219, 120S672.
798-16 230AppDiv389, 244NYS663 (actual expenses); TexCivA 289SW736, 741 [citCJ].
798-18 MoA 29SW(2d)170.

799-19 69CalA384, 231P567; 263Mass 228, 161NE240; MoA 298W(2d)170; TexCivA 289SW736.

800-20 163La198, 111S675, 677 [quot CJ].

800-22 40F(2d)873.

800-24 40F(2d)873 (good faith requisite); 216Ala97, 112S454; 291Pa387, 140A148.

801-25 13LaA253, 126S534(2dcase). But see 40F(2d)873. [a] **Actual payment is not necessary.**–156Miss597, 126 S388.

801-27 216Ala318, 112S633, 53ALR840.

801-28 246 IllA69; 89PaSuper461. [b] **Too remote.**–38GaA249, 143SE922.

801-32 216Ala495, 113S531; 105Conn 88, 134A154; 35GaA92, 132SE259 (under statute); 207 Iowa720, 223NW405 (nurses, members of plaintiff's family); 9LaA507, 120S109; Me 151A 197; 261Mass183, 158NE656; 237Mich 264, 211NW661; 216AppDiv512, 215 NYS574; ND 233NW264(3dcase) (aggravation due to malpractice); 29Porto Rico 977; TexCivA 278SW871.

802-33 NJ 130A448. [a] **Medical expenses for wife's injuries** are not "damages for injuries to property" within statute. Mass 173NE524.

802-35 LaA 129S226(2dcase).

802-36 TexCivA 298SW631, 637 [cit CJ]; 104WVa445, 140SE141, 142 [quot CJ].

803-37 216Ala495, 113S531; 235Ky 492, 31SW(2d)725; NJ 151A624; Tex CivA 298SW631; TexCivA 18SW(2d)743; 104WVa445, 140SE141, 142 [quot CJ].

803-38½-New. The right to recover for medical and nursing expenses is personal and exclusive and cannot be asserted by the husband of the injured wife. 105Conn88, 134A154.

803-42 TexCivA 278SW871.

803-43 219Ala162, 121S543; 96CalA 169, 273P866 (recovery by minor); 7 LaA18. [d] **Limitation to actual payment or liability; special contract with physician.**–Alta [1925] 3DomLR574.

804-44 319 Ill 344, 150NE276; 12LaA 562, 126S274; NJ 151A629; 144 Okl 123, 289P981.

804-45 319 Ill 344, 150NE276; 200Wis 261, 227NW857.

804-48 105Conn88, 134A154; TexCivA 278SW871.

804-49 TexCivA 278SW871.

804-50 72CalA57, 236P319 (paid by parent of infant plaintiff); 105Conn88, 134A154.

804-51 219Ala101, 120S914.

805-57 96PaSuper221 (recovery allowed where no family relationship).

805-57½-New. Where defendant, the husband of plaintiff, paid for medical and nursing bills, plaintiff may not recover therefor. 103Conn533, 131A432, 44ALR785.

805-58 Mass 168NE169; Me 151A197; MoA 274SW507.

805-59 172Ark219, 288SW717.

805-60 [b] **Evidence held insufficient.**–TexCivA 278SW(2d)357.

805-61 13F(2d)772; 213Ala232, 104S 406 (repairs of automobile injured in collision); 87CalA758, 262P764 (cost of repair); 222Ky531, 18SW(2d)972; MoA 282SW150 (repairing and repainting automobile); 31NM457, 247P270; 137 Misc43, 243NYS54; TexCivA 295SW633. [b] (2) Chauffeur's salary while car was being repaired held recoverable. 70 CalA300, 233P345. [d] **Expenses not recoverable.**–TexCivA 290SW892.

805-62 11LaA150, 119S757(2dcase); MoA 293SW483 (cost of harvesting and marketing but not cost of planting and cultivating).

805-63 13F(2d)772; 213Ala232, 104S 406; 216Ala495, 113S531; 70CalA300, 233P345.

806-64 78CalA785, 248P1031; 13LaA 219, 127S5(1stcase); LaA 130S60; 137 Misc43, 243NYS54; 36 OklACR515.

806-67 217Ala180, 115S230 (action for breach of sublease in failing to put sublessee in full possession); 217AppDiv 498, 217NYS123; TexCivA 293SW593, 597 [quotCJ]. [a] **Expenditures held not recoverable.**–217Ala180, 115S230 (sublease).

806-69 Ida 288P421; TexCivA 300SW 641.

806-72 218Ala582, 119S606, 609 [cit CJ].

807-73 217AppDiv498, 217NYS123.

807-76 118 Okl 82, 246P839, 840 [quot CJ].

807-77 165Ga135, 139SE873; 120Kan 380, 244P236; 86Mont545, 284P542; Nebr 229NW330; 118 Okl 82, 246P839, 840 [quotCJ]; 38Wyo 469, 269P40, 43 [citCJ].

807-78 40F(2d)606; 35GaA133, 132SE 461; 120Kan380, 244P236; 164La301, 113S855; 21 OhA454, 153NE248; 118 Okl 82, 246P839, 840 [quotCJ]; Tex CivA 296SW663; 38Wyo 469, 269P40, 43 [citCJ]. But see 30F(2d)402. [b] (2) Attorney's fees paid in defending suit in federal court, brought and maintained in violation of injunction of state court, are not recoverable as such in suit for damages for violation of injunction. 118 Okl 82, 246P839.

808-79 42F(2d)901; 256Mass404, 152 NE715.

808-80 165Ga135, 139SE873. See also 203 Iowa190, 210NW749. [a] (1) 165Ga 135, 139SE873.

808-81 See also 46Philippine881.

808-83 21 OhA454, 153NE248.

809-98 217AppDiv43, 215NYS702, 708 [citCJ]; 225AppDiv454, 233NYS461 (erroneous decision of lower court was not intervening wrong preventing such recovery); 118 Okl 82, 246P839, 841 [quotCJ].

810-99 217AppDiv43, 215NYS702, 708 [citCJ].

810-2 217AppDiv43, 215NYS702, 708 [citCJ].

810-3 217AppDiv43, 215NYS702, 708 [citCJ].

811-5 217AppDiv43, 215NYS702, 708 [citCJ].

811-6 118 Okl 82, 246P839.

811-9 14F(2d)587; 22F(2d)599; 215 Ala398, 110S822; 100CalA531, 280P543; 129Kan418, 283P493(2dcase); 30NM566, 240P469; 44Philippine98; TexCivA 283 SW298; TexCivA 288SW855; TexCivA 118SW(2d)338. [d] **Bank deposit.**–191NC 500, 132SE468.

812-10 Mass 166NE752; TexCivA 283 SW298; TexCivA 6SW(2d)830 (provision for liquidated damages).

812-14 219AppDiv107, 219NYS97.

812-15 20F(2d)746; 243 IllA497; 156 Miss775, 125S826.

813-18 28F(2d)793 [certiorari den 279 US836, 49SCt251, 73Led984(3dcase)].

813-21 [a] **Delayed payments to contractor** do not entitle contractor to interest thereon where delays were caused by contractor's failure to complete in time and owners do not profit by withholding money. 104Conn430, 133A677.

813-22 123 Or469, 259P1064, 260P1099.

813-23 MoA 11SW(2d)1088; 123 Or 469, 259P1064, 260P1099.

813-23½-New. Consular court regulations of 1864, allowing twelve per cent interest on judgments, do not apply to interest allowable as damages. 14F(2d) 586.

814-27 127Misc21, 215NYS181.

814-28 34F(2d)157; 37GaA788, 142SE 170; 127Misc21, 215NYS181, 182 [quot CJ]. [b] **Partial payment of principal.**–127Misc21, 215NYS181.

814-31 TexCivA 283SW298.

815-36 39F(2d)521; 170Ark506, 280 SW977; 84CalA174, 257P873; CalA 273 P1070; 127Kan83, 272P151; 142 Okl 246, 286P797.

816-37 24F(2d)329; 39F(2d)521 (fair compensation); 170Ark506, 280SW977; 35GaA8, 131SE543. But see TexCivA 6 SW(2d)425.

816-38 221MoA448, 282SW459 (breach of carrier's common-law duty).

816-40 35GaA8, 131SE543; 219AppDiv 107, 219NYS97.

817-42½-New. The fact that a demand is unliquidated is not conclusive against the allowance of interest as damages from date of default. 30NM566, 240P 469.

817-42¼-New. Where damages are allowed on a theory requiring taking of expert testimony, interest is not allowed. 217AppDiv300, 216NYS240.

817-43 219Ala238, 121S722; 232 IllA 523; 30NM566, 240P469; 217AppDiv 300, 216NYS240.

817-44 216Ala9, 112S151; 232 IllA523; 30NM566, 240P469.

817-47 41F(2d)960.

818-48 213AppDiv607, 211NYS53.

818-55 199Wis99, 225NW700; Wis 232 NW547.

818-57 Mass 166NE752.

820-68 203Cal 219, 263P1007.

820-71 105Conn482, 136A95.

821-72 219Ala238, 121S722; 41GaA746, 154SE706.

821-73 105Conn482, 136A95.

821-74 41GaA746, 154SE706. [a] **Nature of "discretionary" damages.**–41GaA 746, 154SE706.

821-75 170Ark506, 280SW977.

822-78 170Ark506, 280SW977; 41GaA 746, 154SE706; TexCivA 292SW631.

823-84 84Mont397, 276P437; 127 Okl 106, 260P26.

823-86 85Colo 530, 277P306. See also 248 IllA287.

823-88 219Ala238, 121S722.

824-91 TexCivA 18SW(2d)740. But see 13LaA424, 127S81(2dcase).

824-98 [a] (3) TexCivA 11SW(2d)368. (4) In action for damages to shipment of cattle submitted on special issues, it is error to render judgment including interest on damages found to date of judgment. TexCivA 274SW305. [b] **In Louisiana.**–158La43, 103S436.

824-99 198NC518, 152SE503.

825-1 219Ala238, 121S722; Ala 128S 132; 36 OklACR515; TexCivA 299SW 668.

825-5 But see TexCivA 32SW(2d)255 (1stcase).

825-6 TexCivA 272SW340.

825-6½-New. Interest on items of expense necessarily paid because of injury to a ship is recoverable. 13F(2d)772.

825-7 127 Okl 106, 260P26.

826-12 127 Okl 128, 260P16.

826-22 14F(2d)587.

826-24½-New. In equity interest is seldom allowed as a penalty. 131 Or350, 283P17.

826-25 39F(2d)869; 30Ariz491, 249P 66; 181Ark299, 25SW(2d)760 (present and probable future pain and suffering); CalA 288P805; 3Del 564, 140A 659; 87 IndA27, 154NE41; 199 Ind660, 161NE251; 204 Iowa1162, 216NW627; 211Ky774, 278SW116; 235Ky640, 32 SW(2d)18; 149Md152, 131A151; Md 149A4; 232Mich316, 205NW93; 230App Div389, 244NYS663; TexCivA 280SW 864; TexCivA 286SW661; 144Va358, 132SE316; 147Va217, 136SE668; 104 WVa417, 140SE340. See also 192NC287, 134SE855. [a] (2) Plaintiff whose nervous system was injured and who was made sick as result of wrong information given her by station agent. SC 155SE145. [d] **Bodily injury** as regards recovery of damages need not necessitate loss of limb or wound inflicted. SC 155SE145.

828-29½-New. Where the terms of a contract relate to matters which directly concern the comfort, happiness, or physical welfare of one of the parties, or the subject matter is such as to move the affection, self-esteem, or tender feelings of such party, he may recover damages for physical suffering proximately caused by its breach. 68CalA198, 228 P734.

828-31 [b] **Receiving by administration** of deceased child's estate for negligence resulting in injuries is limited to pain and suffering where injuries did not cause death. 234Mich112, 207NW 892.

828-34 217Ala120, 115S16, 19 [quot CJ].

828-35 39F(2d)869; 81Colo 498, 256P 8, 9, 56ALR655 [quotCJ]; 199 Ind660, 161NE251; 211Ky774, 278SW116; 221 Ky765, 299SW967, 55ALR964; 235Ky 640, 32SW(2d)18; 149Md152, 131A151; 261Mass183, 158NE656; 261Mass188, 158NE658; 225AppDiv454, 233NYS461; 29PortoRico 977; 144Va358, 132SE316; 147Va217, 136SE668; 104WVa417, 140 SE340.

829-36 81Colo 498, 256P8, 9, 56ALR 655 [quotCJ]; 253Mass433, 149NE142.

829-37 181Ark299, 25SW(2d)760 (humiliation is an element).

830-43 150Md511, 133A322, 327 [cit CJ]; TexCivA 26SW(2d)340.

830-45½-New. Plaintiff was held entitled to recover for mental pain, humiliation and mortification for defendant's invasion of his right of privacy by post-

ing notice respecting plaintiff's indebtedness in front window of garage. 221 Ky765, 299SW967, 55ALR964.

830–48 [a] See also 144Miss804, 110S 510.

831–54 18F(2d)650; 181Ark137, 25SW (2d)428; 35GaA59, 132SE399; 40GaA 822, 151SE668; 126Kan181, 268P103; 141Miss7, 105S749; 146Miss394, 111S 588; 311Mo 66, 277SW913; 317Mo 782, 297SW20; MoA 293SW89; 194NC188, 138SE608; TexCivA 30SW(2d)497; 152 Wash626, 279P112; [1930] 4DomLR 901.

831–56 181Ark137, 25SW(2d)428; 3Del 323, 138A273; 36GaA817, 138SE267; 125Misc835, 211NYS582. See also 35 GaA59, 132SE399.

831–56½–New. or gross carelessness or recklessness showing utter indifference to consequences, 3Del 323, 138A273.

832–57 36GaA817, 138SE267.

832–61 38GaA581, 144SE680; NJSup 139A904.

832–64 MoA 21SW(2d)491.

832–67 215Ala600, 111S753; 100CalA 503, 280P394(2dcase); 103Conn583, 131 A432, 44ALR785; 35GaA59, 132SE399; Md 149A4; MoA 7SW(2d)749; 34Porto Rico 324; TexCivA 30SW(2d)1108; Sask [1930] 4DomLR722. [a] 104WVa 417, 140SE340.

833–68 103Conn583, 131A432, 44ALR 785; 38GaA581, 144SE680; 126Kan181, 268P103; 150Md511, 133A322, 327 [cit CJ]; 129 Or224, 277P101; TexCivA 280 SW864; 152Va484, 147SE461; 104WVa 417, 140SE340.

834–69 103Conn583, 131A432, 44ALR 785; DC 32F(2d)938; 317Mo 782, 297 SW20; 317Mo 782, 297SW20; MoA 7 SW(2d)1028. [a] (2) 104WVa417, 140 SE340. [c] (1) 104WVa417, 140SE340. (2) Evidence of pain and suffering following miscarriage is inadmissible where not direct result of collision. 233 Ky464, 26SW(2d)20.

835–72 [c] **That disfigurement of legs will be concealed** goes to amount of damage rather than right of recovery. Minn 232NW3.

835–73 237 IllA488; 208Ky612, 271SW 680.

835–74 237 IllA488.

836–77 37GaA516, 140SE794.

836–79 10LaA280, 120S107; 155Tenn 611, 299SW775. [a] (2) 104WVa417, 140SE340.

836–81½–New. A tenant wrongfully evicted cannot recover damages for humiliation or mental suffering endured by his minor children. TexCivA 280 SW1076.

836–82 136Misc826, 242NYS277; 36 Wyo 166, 255P3, 4, 52ALR91 [citCJ]. But see Ala 130S805; 23AlaA346, 125 S795(2dcase).

838–91 36F(2d)841; 103Conn583, 131 A432, 44ALR785; 111Conn58, 149A 210; 35GaA59, 132SE399 (married woman in state of pregnancy); 126Kan 181, 268P103; 125Misc835, 211NYS582.

838–92 125Misc835, 211NYS582. [a] (3) Defendant is liable if, through his negligence, fright causes one to lose balance and become physically injured. 125Misc835, 211NYS582.

838–93 35GaA59, 132SE399; 232Ky 285, 23SW(2d)272; MoA 7SW(2d)749; 220AppDiv464, 221NYS621; 286Pa536; 134A446.

839–94 220AppDiv464, 221NYS621; 220AppDiv547, 221NYS737; 23 OhA493, 155NE243. But see 125Misc835, 211NYS 582. [c] 220AppDiv464, 221NYS621. [d] **Wanton and reckless act.**–220AppDiv 547, 221NYS737.

839–95 10LaA191, 120S692; NH 150 A540; 39 OklACR257; 197Wis83, 221 NW392. See also 32 OhA207, 167NE 701. But see 220AppDiv464, 221NYS 621.

840–98 NJSup 135A71. [b] **There is no necessity that shock result exclusively from physical injury** where both are caused by same act. 36F(2d)841.

840–1 [d] **Physical injuries may be slight.**–111Conn58, 149A210.

841–4 176Ark728, 3SW(2d)982; 38 GaA581, 144SE680.

841–5 265Mass223, 163NE905.

842–11 27 OhA475, 161NE557; TexCivA 298SW654; 149Wash631, 272P32.

842–12 94CalA703, 271P789.

842–14 10LaA604, 120S696.

842–15 232Mich316, 205NW93.

843–18 See also 141 Miss7, 105S749.

843–19 237 IllA488; 87IndA27, 154 NE41; 154Md195, 140A70; MoA 31 SW(2d)260; NJ 132A201; 144Va358, 132SE316. [a] 34Wyo 415, 244P637, 653 [citCJ]. [b] **Permanent disfigurement.**–MoA 31SW(2d)260.

843–21 NJ 149A757 (embarrassment of scar on calf of woman's leg). But see 157Miss822, 126S480.

843–24 339 Ill 94, 170NE845 (paralytic stroke); MoA 30SW(2d)641 (neurotic condition); TexCivA 284SW683; 100 Vt414, 139A440, 56ALR1011; 144Va 358, 132SE316; 147Va217, 136SE668; 135Wash588, 238P631 (susceptibility of injured member to similar injury in future); 104WVa417, 140SE340. [a] **Nervous troubles** are included in physical impairment. 100Vt414, 139A440, 56 ALR1011.

843–28 144Va358, 132SE316.

843–31½–New. Acceleration of the progress of an existing disease by reason of physical injury or shock is an element to be considered in assessing damages. Alta [1929] 2DomLR604.

843–31¼–New. Damages for impairment of health resulting from a breach of contract may be recovered where they were within the contemplation of the parties. 68CalA198, 228P734.

843–31¼–New. Where the terms of a contract relate to matters which directly concern the comfort, happiness, or physical welfare of one of the parties, or the subject matter is such as to move the affection, self-esteem, or tender feelings of such party, he may recover damages for illness proximately caused by its breach. 68CalA198, 228P734.

843–32 240Mich306, 215NW422.

844–37 11LaA124, 119S446 (must be some uniformity); Mo 28SW(2d)1035; 115Nebr650, 214NW297, 300 [quotCJ].

844–38 217Ala180, 115S230; 339 Ill 426, 171NE514; 115Nebr650, 214NW 297, 300 [quotCJ]; TexCivA 293SW 593; 144Va358, 132SE316.

844–40 120Kan105, 242P117. [a] (2) In awarding damages for loss of future earnings they cannot be computed on basis of present purchasing value of dollar as compared with such value in former years without applying same rule to dollars plaintiff earned at time of injury. 242Mich163, 218NW677. (3) In determining compensation for pain and suffering scant consideration can be given to depreciated purchasing value of dollar. 242Mich163, 218NW 677.

844–42 89CalA721, 265P541; 79Mont 226, 255P730; 230AppDiv389, 244NYS 663; 21SaskL19, [1926] 4DomLR527, [1926] 3WestWkly11. See also 111Conn 666, 151A189. [b] **Rule not applicable in actions ex contractu.**–84CalA161, 258 P114.

844–43 NJSup 142A647.

845–51 29PortoRico 977, 980 (where court, after stating general rule, said: "We do not doubt that, whether consciously or not, the wealth of a community does play a part in determining the size of a verdict both by the jury in the first place and by the reviewing courts").

846–52 225Ky635, 9SW(2d)998.

846–55 TexCivA 281SW600. [a] **For failure to remove railroad tracks** gold mining claim owner may recover net value of recoverable gold content of lost yardage where less than cost of removal. Ida 288P641.

847–57 TexCivA 7SW(2d)878.

847–60 22AlaA207, 114S179; 93CalA 775, 270P382; 77CalA219, 246P143; 103Conn390, 130A794; 232 IllA493; 216Ky504, 287SW977; 228Ky395, 15 SW(2d)242(1stcase); 165LaI, 115S347; 10LaA219, 120S672; 147Miss335, 112S 469, 53ALR88; MoA 281SW128; 73 Mont407, 236P1069 (for failure of master to furnish medical attendance as agreed to employee, measure is reasonable amount spent by him to secure such attendance elsewhere); 220AppDiv 265, 221NYS512; 223AppDiv533, 229 NYS390; 225AppDiv407, 233NYS279; 195NC274, 142SE12; 196NC597, 146SE 579; 132 Okl 283, 270P39; RI 129A 734; TexCivA 286SW552; TexCivA 300 SW159, 165 [quotCJ]; TexCivA 16SW (2d)969; 38BC348, [1927] 2DomLR1128, 3WestWkly27; Can [1926] 4DomLR 1, [1926] 3WestWkly26. [a] (30) To purchase school bonds. 117 Okl 1, 245 P60. (31) To sue on policy for benefit of both parties to agreement. 287Pa 505, 135A223. (32) To have insurance policy changed to vendee's name. 144 Okl 24, 289P294. (33) Other instances. CalA 266P312. [b] (3) Owner, on unauthorized abandonment of contract to quarry asphalt, may recover reasonable cost of restoring quarry to original condition. 221Ky131, 297SW1114.

848–61 77CalA219, 246P143; 110Conn 234, 147A709; 202 Iowa1251, 211NW 898; Mass 168NE781; Mass 170NE403; Mass 172NE101; 147Miss335, 112S469, 53ALR88; MoA 7SW(2d)288; 130 Or 282, 279P279.

849–62 TexCivA 286SW552, 557 [cit CJ]; TexCivA 7SW(2d)878; 108WVa 354, 151SE1.

850–68 IndA 154NE780; 246NY158, 158NE58; 127Misc461, 216NYS473; 196Wis25, 219NW373. See also 256 Mass404, 152NE715. But see IndA 163 NE517.

851–75 21F(2d)683. [a] (3) Other instances. 107WVa658, 150SE9.

852–80 232 IllA493; TexCivA 18SW (2d)256. [a] (2) 232 IllA493. (4) Prima facie amount agreed on is measure of damages for breach of contract to pay for callophone equipment at specified monthly charges. 132Misc693, 230 NYS155.

852–91 Cal 246P207; 234Ky794, 29 SW(2d)545; 219AppDiv107, 219NYS97; 24 OhA73, 156NE227.

853–92 Cal 246P207; 232Ky519, 23 SW(2d)917; MoA 296SW243; 219 AppDiv107, 219NYS97; 223AppDiv612, 229NYS190. See also 114 Okl 293, 245 P653.

853–92½–New. or, in the case of a contract for the rental of personal property, the rental to date plaintiff was ready, willing, and able to furnish it. 224App Div516, 231NYS51.

853–98 178Ark1085, 13SW(2d)301; 88 IndA685, 148NE430; 217Ky329, 287SW 292; 229Ky662, 17SW(2d)739; 160La 443, 107S299, 300 [quotCJ]; Mass 172 NE855; 294Pa518, 44A529, 63ALR297. But see TexCivA 286SW599. [a] (4) In action on contract for construction of buildings, measure of damages for defective work is difference in value of buildings as constructed and as contracted for. 217Ky329, 289SW292.

853–99 170La733, 129S202; TexCivA 10SW(2d)597; TexCivA 10SW(2d)786. [a] (2) Where concrete sidewalk was worthless, because of defects, return of price received by contractor was proper. 11LaA310, 123S517.

854–3 228Ky395, 15SW(2d)242(1st case); TexCivA 286SW599.

854–8 20F(2d)14; 104Conn430, 133A 677; 157Md652, 147A790, 65ALR1285; MoA 20SW(2d)968; TexCivA 281SW 1110; TexCivA 25SW(2d)176. [b] **Rental value of building as adapted to particular use** may be recovered for delay in completion of building erected for particular use known to contractor. MoA 20SW(2d)968. [c] **For delay in filling in property,** landowner could recover damages reasonably resulting. 254NY41, 171NE899.

854–14½–New. , or where it is not shown that difference could have been saved had there been no delay or that compensation for difference was within contemplation of parties. 104Conn 430, 133A677.

855–18 But see 114 Okl 156, 245P63.

855–20 53ND42, 204NW849, 854 [quot CJ].

855–21 14F(2d)38; 40F(2d)873; 167 La689, 120S52; MoA 281SW128; 53ND 42, 204NW849, 854 [quotCJ]; RI 129 A734; TexCivA 278SW939.

855–22 53ND42, 204NW849, 854 [quot CJ].

855–23 53ND42, 204NW849, 854 [quot CJ].

855–24 213Ala681, 105S891; 235Ky425, 31SW(2d)701; 53ND42, 204NW849, 854 [quotCJ]. See also MoA 281SW128.

856–25 213Ala681, 105S891; 93CalA 390, 269P735; 35GaA8, 131SE543; 156 Md558, 144A705; 157Md652, 147A790, 65ALR1285; 236Mich698, 211NW22; MoA 281SW128; 220AppDiv178, 220 NYS623; 53ND42, 204NW849, 854 [quot CJ]; 93PaSuper101; TexCivA 278SW 939; TexCivA 20SW(2d)797. [a] **Recovery, where no work is done, cannot be on contract.**–TexCivA 278SW939.

856–26 88 IndA685, 148NE430; 53ND 42, 204NW849, 854 [quotCJ]. [a] **Outlay and expenses less value of materials on hand** is measure of damage. 35F(2d) 233.

856–27 53ND42, 204NW849, 854 [quot CJ].

856–28 53ND42, 204NW849, 854 [quot CJ].

856–29 53ND42, 204NW849, 854 [quot CJ].

856–30 213Ala681, 105S891 (where proof fails to show profit would have been realized, damages are confined to expenditures and loss of time less value of material on hand); 53ND42, 204 NW849, 854 [quotCJ].

856–31 53ND42, 204NW849, 854 [quot CJ].

857–39 7PaDist&Co 517.

857–43 213Ala681, 105S891.

857–44 88 IndA685, 148NE430.

857–47 69CalA225, 230P978; 103NJL 683, 137A591.

858–49 197Cal 694, 242P709; 103NJL 683, 137A591; 298Pa568, 148A849.

858–51 157Md652, 147A790, 65ALR 1285; 243Mich85, 226NW883; 103NJL 683, 137A591; TexCivA 238W(2d)829. But see 157Md652, 147A790, 65ALR1285.

858–53 156Md558, 144A705.

858–58 69CalA225, 230P978.

859–64 69CalA384, 231P567 (measure of damages for breach of implied warranty is not applicable, if contract is not one of sale but one for work and labor); 88 IndA685, 148NE430.

859–65 36GaA723, 137SE901; 36GaA 726, 137SE902; 111 Okl 269, 239P640 (contract to drill oil well); 137 Okl 90, 278P281; Wash 290P813. [b] **Damages for breach of contract** to quarry asphalt is difference between price to be paid and reasonable cost of doing work after abandonment. 221Ky131, 297SW1114.

859–66 171Ark604, 285SW32; 36GaA 723, 137SE901; 36GaA726, 137SE902; 209Ky112, 272SW411 (contract to cut timber).

859–67 TexCivA 26SW(2d)319.

859–68½–New. The measure of damages for failure to furnish the lumber for and construct scaffolds, and remove them, is the reasonable value of the use of the necessary lumber taking into consideration the necessary breakage and deterioration and the reasonable cost or value of the labor necessary to place and remove the scaffolds. 176Minn402, 223NW456(2dcase).

859–68⅓–New. On breach of service contract, an employee is entitled to the agreed compensation as liquidated damages. 226AppDiv532, 235NYS8.

859–69 TexCommnA 285SW1047.

860–70 TexCommnA 285SW1047.

860–71 Ark 29SW(2d)1088. [d] (1) 218Ky98, 290SW1052, 50ALR1394. (2) Value of plaintiff's personal services in carrying out contract should be deducted from contract price. 218Ky98, 290 SW1052, 50ALR1394.

861–73 211Ky232, 277SW453; 157Miss 256, 126S35.

861–76 163La880, 113S133.

862–89½–New. The measure of damages for failure to pay a share of a crop sold for labor in growing and gathering it is the reasonable value of the crop sold less indebtedness to the owner. MoA 15SW(2d)943.

862–90 DelCh 140A803 (not profits of seller).

863–92 225AppDiv23, 232NYS63. See also Iowa 231NW383. [a] (3) **Difference between value of business immediately prior to breach and value thereafter.** Iowa 231NW383.

863–93½–New. Damages for tort in wrongfully divulging trade secrets and appropriating customers of plaintiff are not recoverable in an action at law for breach of contract for commissions. 92 CalA575, 268P939.

863–95 215Ala398, 110S822. [c] 134 Okl 111, 272P443.

863–96 Cal 291P184.

864–98 29F(2d)78; 113Nebr821, 205 NW250; 44Philippine98 (interest at twelve per cent denied).

864–5 127Misc461, 216NYS473.

865–9 174Minn350, 219NW287.

865–11 228AppDiv350, 239NYS473; TexCivA 23SW(2d)890. [a] **Though present value of contingent obligation is indeterminable** it should not be disregarded. TexCivA 23SW(2d)890.

865–18 114 Ind37, 15NE834; 123 Okl 89, 252P15.

865–19 225Ky440, 9SW(2d)110.

865–21 83CalA187, 256P825 [quotCyc] (where obligation payable in alternative); 86PaSuper396, 400 [quotCJ]; 13 PaDist&Co 6; 34Wyo 299, 242P1111, 1112 [citCJ].

866–22 86PaSuper396, 400 [quotCJ]; 34Wyo 299, 242P1111, 1112 [citCJ].

866–23 173Ark1128, 293SW1041.

867–31½–New. **Under contract for transmission of funds to foreign country,** liability of transfer agent is limited to value of foreign currency at time refund should have taken place. 6PaDist &Co 567.

868–46 254NY41, 171NE899 (partial performance).

868–47 [b] **In purchaser's action for vendor's breach of contract,** depreciation in land value as enhanced by erection of building by purchaser is not too remote to be allowed in arriving at damages sustained. MoA 7SW(2d)288.

868–51 103Conn759, 131A404; 79Mont 226, 255P730; 114Nebr353, 207NW669; 229AppDiv581, 243NYS179 (damages from erroneous statement of accountants); 142SC125, 140SE443; TexCivA 2SW(2d)362. [b] (4) Measure of damages for tortiously procuring breach of contract is damage suffered by breach. 35GaA122, 132SE393. (5) Damages recoverable by broker against person tortiously procuring to make sale independently of broker thereby defeating collection of commissions under exclusive listing contract is amount broker would have collected under contract. 35 GaA122, 132SE393. (6) Such is measure of damages where contract provided for stated percentage of price obtained over stipulated sum and included compensation for prior sale and broker's damage is not agreed commission on prior sale nor commission at customary rate on transaction involved in suit. 35GaA122, 132SE393. [c] (2) Measure of damages for torts is ordinarily same as for breach of contracts under California statute. 97CalA692, 276P156(1stcase).

869–53½–New. **In an action for fraudulent representations in sale of business,** measure of damages is difference between actual value of business at time of sale and what it would have been worth had it been as represented. 103 Conn759, 131A404.

869–55 [a] **Measure of damages for permanent injury** is permanent impairment of earning capacity. 233Ky198, 25SW(2d)373.

869–57 211Ky774, 278SW116; 228Ky 635, 15SW(2d)497; 315Mo987, 288SW 777; MoA 31SW(2d)117; NJSup 136 A415; 196NC359, 145SE684; 300Pa457, 150A622; RI 150A498; TexCivA 296 SW647; TexCivA 26SW(2d)435; 193 Wis370, 214NW374, 53ALR771. [c] **Damages should not be** for both permanent injuries and loss of earning power. 211Ky774, 278SW116. [d] **Where injuries are not permanent,** damages are limited to pain and suffering, past and future. 231Ky713, 22SW(2d) 108. [e] **Permanent impairment of earning power** is measure of damages for permanent injury. 231Ky713, 22 SW(2d)108.

870–59 204 Iowa44, 214NW564; 219 MoA81, 268SW645.

870–60 23F(2d)794; 21AlaA545, 109S 895; 203Cal 604, 265P238, 59ALR480; 81 CalA690, 254P671; 84CalA743, 258P 1000; 85CalA332, 259P470; 88CalA1, 262 P1100; CalA 283P886; 35GaA804, 134SE 824; 40GaA814, 151SE541; 41GaA72, 151SE686; 204 Iowa44, 214NW564; 207 Iowa895, 223NW745; 232Ky702, 23SW (2d)564; 235Ky640, 32SW(2d)18; 126 Me99, 136A354; MoA 30SW(2d)196; Mont 285P184; Mo 28SW(2d)1035; 104 NJL405, 140A277; 137 Okl 180, 278P 645(2dcase); 157Tenn173, 7SW(2d)38; 105WVa309, 143SE86; 105WVa555, 144 SE100; 107WVa181, 147SE759; 193Wis 187, 212NW648; 197Wis28, 221NW388.

871–61 204 Iowa44, 214NW564; 219 MoA81, 268SW645; 85PaSuper436 (one thousand dollars not excessive where plaintiff confined in house for several weeks with pain and suffering); Tex CivA 2SW(2d)362.

871–62 204 Iowa44, 214NW564; 128 Me77, 145A740; 107WVa181, 147SE759.

872–68 32Ariz479, 260P191, 193 [cit CJ], 57ALR55; CalA 293P80; 225Ky 635, 9SW(2d)998; 233Ky321, 25SW (2d)722; Nebr 228NW528.

873–76 126Me583, 140A374. [b] (2) Disfigurement of face is permanent injury justifying admission of proof of life expectancy. 126Me583, 140A374.

874–77 8F(2d)16; 3Del 206, 134A56. But see 231Ky772, 22SW(2d)300.

874–78 8F(2d)16; 89CalA477, 265P 268, 271 [citCJ]; 126Me583, 140A374 [citCJ].

875–81 248Mich399, 227NW694.

875–87 248Mich399, 227NW694.

876–97 35GaA804, 134SE824; 285Pa 561, 132A810; 194Wis501, 217NW297 (not determined by plaintiff's wages).

876–1 85PaSuper97; 99Vt219, 131A 21, 49ALR1382.

876–5 181Ark1147, 29SW(2d)674; 201 Iowa897, 208NW356; 203 Iowa467, 212 NW886; 206 Iowa166, 220NW123; 9 LaA441, 121S345; 169La797, 126S64; 151Md664, 135A835; MoA 6SW(2d) 676; TexCivA 278SW950; Can [1925] 3DomLR1075. [a] (3) Automobile. 151 Md664, 135A835. [c] **City purchasing new fire truck of same value as truck wrecked** in avoiding collision with train because repairs could be made only at factory, which would have taken some months, has been held entitled to recover from railroad companies amount paid for new truck, less three per cent per annum for depreciation of, and credit obtained for, old truck. 167La157, 118S872. [d] **Neither cost of reproduction** or that less depreciation is the sole guide of market value of thing destroyed. 268US146, 45SCt465, 69Led 890. [e] **Money spent in unsuccessful repair** may not be recovered where plaintiff recovers for total loss. Can [1925] 3DomLR1075. [f] **Cannot recover for loss of use** on recovering for total destruction. 35 OhA91, 172NE 298. [g] **Destruction or injury by fire set by railroad.**–97 IllA337; 95 IllA1; 2KanA154, 43P289; 44MoA396; 17MoA 356; 7HeiskTenn451, 19AmR618.

877–7½–New. **In California** the code limiting liability of a depositary to the value of the property disclosed is a limitation of the rule of damages for lost property. 99CalA436, 278P891 (depositary of film not knowing its special value is liable only for cost of film lost, not expense of taking pictures).

877–8 219Ala291, 122S173; Ala 130S 192; 181Ark715, 27SW(2d)524; 181 Ark818, 28SW(2d)68; 78CalA785, 248P 1031 (automobile); 106Conn254, 138A 136; 3Del 450, 139A66; 33GaA778, 127 SE821; 35GaA606, 134SE336, 338 [cit CJ]; 201 Iowa897, 208NW356 (partially repairable injury); 222Ky286, 300 SW890; 224Ky367, 6SW(2d)453; 224 Ky460, 6SW(2d)454; MoA 275SW572; 220AppDiv170, 221NYS516; 131Misc 891, 228NYS503; 137Misc43, 243NYS 54; 192NC647, 135SE791; 21 OhA6, 152NE780; 36 OklACR515, 516 [quotCJ] (rule applied where salvage value is greater than cost of removing and saving property incapable of repair); 115 Or608, 239P105, 107, 43ALR1285 [citCJ]; 117 Or319, 244P79 (automobile). 44ALR 1397; Or 288P212; 85PaSuper483; TexCivA 283SW877; TexCivA 284SW 261; TexCivA 293SW593; TexCivA 12 SW(2d)829(2dcase); TexCivA 18SW (2d)237; TexCivA 21SW(2d)559(2d case); TexCivA 28SW(2d)899 (measure

of damages for permitting automobile to be stolen); TexCivA 31SW(2d)850; Utah 290P169; 21SaskL452 [1927] 2 DomLR1005, [1927] 1WestWkly967; Sask [1928] 3DomLR671. But see MoA 282SW150. [a] (6) Damages for destruction of automobile three weeks old is value of new car less value of wreckage 170La483, 128S284. [b] **Evidence of value of necessary repairs** is held admissible under this view as bearing on question of depreciation. TexCivA 284SW261. [c] **Destruction or injury by fire set out by railroad.**–70Conn563, 40A533; 44MoA396; MoA 24SW(2d)243; 59Tex674.

877–9 [b] **Damages for injuries to stolen property.**–132 Okl 29, 269P299.

877–10 173Ark25, 291SW813; 224Ky 460, 6SW(2d)454; 158La43, 103S436; LaA 130S60; 117 Or319, 244P79, 44 ALR1397; TexCivA 10SW(2d)397; 147 Wash570, 266P726. [a] (3) Damage of general deterioration and loss of value resulting from automobile collision are not allowable. 158La43, 103S436. [b] CalA 284P974. [c] **Reason for rule.**–114 Nebr689, 209NW238, 47ALR585.

877–11 215Ala8, 108S857; 70CalA300, 233P345; 201 Iowa897, 208NW356 (for fully repairable injury); 158La43, 103 S436; 220AppDiv170, 221NYS516; 36 OklACR514; TexCivA 276SW746; Tex CivA 17SW(2d)1095; 21SaskL452, [1927] 2DomLR1005, [1927] 1West Wkly967. See also MoA 275SW572. [a] (3) Defendant in automobile collision is not responsible for delay of plaintiff in making repairs. 158La43, 103S436. [c] **Period of delay in arrival of parts necessarily ordered from distant city** is properly included in time for which value of use is allowed. 70CalA300, 233 P345.

878–12 78CalA785, 248P1031; 106 Conn254, 138A136; 9LaA344, 119S294; TexCivA 276SW746; 21SaskL452, [1927] 2DomLR1005, [1927] 1West Wkly967.

878–15 27 OhA279, 161NE230.

878–16 36 OklACR515; 94PaSuper553 (measure is difference in market value before injury and after repair, in addition to reasonable cost of repair).

878–16½–New. In an action for damages caused by collision of automobiles, plaintiff is entitled to recover the amount which he was compelled to pay to his chauffeur during the time his automobile was unfit for use where he had no use for the chauffeur during such time. 70CalA300, 233P345.

878–16⅓–New. In a suit for destruction of a telephone line plaintiff cannot recover expense of rebuilding line where old line was in bad condition and new line possibly more valuable than old line when destroyed. 217Ky762, 290 SW684.

878–17 220AppDiv170, 221NYS516.

878–19 132 Or689, 288P212. [a] **Recovery of full value** of chattel destroyed prevents additional recovery of value of use thereof. 9LaA441, 121S345.

878–20 96CalA396, 274P390 (amount equal to interest on value of property); 137 Okl 35, 277P643. [a] **Where usable value exceeds lawful rate of interest,** reasonable value of use may be recovered. CalA 288P111.

878–21 TexCivA 3SW(2d)534, 535 [cit CJ]. [a] TexCivA 16SW(2d)908.

878–22 19 OhA421. [a] **Owner's books showing earnings of automobile at time of injury** are admissible to show probable earnings during time required for repairs. 19 OhA421.

878–23 158La43, 103S436; 9LaA441, 121S345; 138Misc183, 244NYS409; 19 OhA421. See also 131Misc891, 228NYS 508.

878–27 19 OhA421.

879–29 207 Iowa495, 223NW178; MoA 24SW(2d)243.

879–31 219MoA62, 265SW851, 854 [cit CJ].

879–32 [a] **Where immediate death occurred,** there could be no recovery for loss of use. 166La718, 117S805.

880–43 TexCivA 21SW(2d)754(2dcase) (that purchaser could reject at $42.50 did not change market value of $45).

880–46½–New. One selling and appropriating proceeds of sale of animals injured by him cannot claim that owner has not suffered complete loss. MoA 24SW(2d)243.

880–50 Utah 282P1026. [b] **In cases of private ownership of property, property owner's recovery for temporary damage** for continuing or recurring wrong continues till time of trial. 196 NC383, 145SE774.

881–51 245 IllA264, 267 [citCJ]; 206 Iowa166, 220NW123; 220Ky646, 295SW 995, 54ALR1275; 51ND828, 200NW 1009; 115Tex263, 280SW532; TexCivA 281SW577; TexCivA 300SW641; Tex CivA 12SW(2d)1082. [b] **Destruction or injury by fire set by railroad.**–67Ark 371, 55SW159; 90Ga83, 158SE645; 95 IllA199; 97 IllA337; 100 IllA530; 155 IllA55; 6 IndA262, 33NE241; 16 IndA 139, 44NE265; 23IndA37, 64NE1071; 54 IndA335, 101NE748; 117 Iowa344, 90 NW708; 47Kan630, 28P612; 8KanA 545, 54P322; 2KanA154, 43P289; 3 KanA577, 43P854; 133Md276, 105A159; 61Minn449, 63NW1104; 54MoA223; 39 NJL299, 23AmR219; 132NY119, 30NE 298, 28AmSR563, 15LRA612; 158NC 215, 73SE1013; 61SC329, 39SE527; 111 Tex15, 224SW471; 74Tex581, 12SW227; 69Tex643, 9SW440; 67Tex685, 4SW 365; TexCivA 25SW433; TexCivA 78 SW724; 54TexCivA460, 118SW166; 85 Vt60, 81A236; 93Wis373, 67NW721. [c] **For leaves and trash** which the fire consumed, there can be a recovery to the extent that the owner could have used or disposed of the same in supplying any demand then existing or near at hand, the measure being the value of the raw material as it lay on the ground, not including in the quantity to be paid for any of the material which could not have been used or sold to supply the demand then existing or which arose soon thereafter. For material which, had it not been destroyed, would have been mere waste in the woods, there can be no recovery. 93Ga256, 20SE129.

881–52 174Ark603, 299SW2; TexCivA 281SW577; TexCivA 284SW691; Tex CivA 292SW264; 37Wyo 419, 263P703. [a] (3) Cave-in of land owner's irrigation ditch because of town changing channel of river. 37Wyo 419, 263P703.

882–54 218Ala582, 119S606; 220Ky646, 295SW995, 54ALR1275; Utah 282P1026. See also 41Wyo 402, 286P372. [c] **Wrongful removal of fixtures.**–41Wyo 402, 286P372.

882–55 245 IllA264; 206 Iowa166, 220 NW123; 214Ky361, 283SW113; 220Ky 646, 295SW995, 54ALR1275 [quotCJ]; 12PaDist&Co 722. [c] **Award for cost of restoration of trees** precludes award for impairment of value of property. 169La797, 126S64.

882–59 12PaDist&Co 722.

883–62 [a] **Determination of value of stone fence.**–220Ky646, 295SW995, 54 ALR1275.

883–64 174Ark603, 299SW2; 106WVa 518, 146SE57.

883–66 214Ky361, 283SW113. [a] **Measure of damage for injury to rental value** occasioned by deposit of débris following washout is cost of replacement and repairs and not difference in value of property itself before and after damage. 214Ky361, 283SW113.

883–70 [b] 131 Okl 98, 267P629.

883–71 28Ariz531, 238P336 (wrongful act preventing planting and cultivation of crop after land has been prepared for planting); Utah 265P745.

884–72 TexCivA 11SW(2d)631.

884–75½–New. Proper measure of damages for loss of use of property by reason of its destruction by fire has been held to be six per cent of total value of property at time of its destruction. TexCommnA 23SW(2d)304.

884–80 31NM457, 247P270.

885–90 [a] **Cost of erection of better building** cannot be recovered. Utah 267 P1011.

885–92 233Ky230, 25SW(2d)370; MoA 5SW(2d)649, 652 [citCJ]; TexCivA 290 SW892.

885–95 203 Iowa471, 212NW884; 219 Ky290, 292SW829. [e] **Reasonable value of house at time of loss held proper measure.** TexCivA 11SW(2d)631. [f] **Destruction or injury by fire set by railroad.**–128Ala283, 29S781; 192Ala 568, 68S867; 47Conn575; 1KanA788, 41 P1051; 169Mass398, 48NE270; 211Mass 549, 98NE582; 190Mich11, 155NW696; 142Mo 645, 44SW802; 12 OhCirCt426, 5 OhCirDec561; TexCivA 65SW649; 110 Va622, 66SE817 [quotCyc]; 120Va790, 92SE801 [quotCyc]. Compare 97SW727, 30KyL152.

885–96 240Mich300, 215NW375. See also IndA 170NE336(2dcase).

885–98 243 IllA562; 228Ky214, 14 SW(2d)749; 233Ky230, 25SW(2d)370; 235Ky41, 29SW(2d)592; Utah 267P 1011. See also 229Ky222, 16SW(2d) 1022; TexCivA 11SW(2d)631.

886–99 216Ky57, 287SW210.

886–1 Utah 267P1011.

886–2½–New. The measure of damages for the destruction of a building by fire is not the market value of the building apart from the land but its fair and reasonable value when and where it was destroyed. 215Ky77, 284SW405, 47ALR 483.

886–3 215Ky77, 284SW405, 47ALR483; 127 Or276, 263P907.

886–5 127 Or276, 263P907.

886–6 127 Or276, 263P907.

886–7 215Ky77, 284SW405, 47ALR483.

886–8 215Ky77, 284SW405, 47ALR483; 127 Or276, 263P907.

886–11½–New. Only the actual damage caused by fire may be recovered where before the fire the owners had been notified by the city authorities that they could not repair the damages from the former fire. 162La885, 111S269.

886–14½–New. Where defendant wrecks the building about to be moved by plaintiff, measure of damages is value of the building when moved less cost of moving. TexCivA 292SW909.

886–14⅓–New. The measure of damages for having been deprived of the use and occupancy of a house which was burned should be measured by the value of the use of the property destroyed during the time that the occupant was deprived thereof. TexCivA 11SW(2d) 631.

886–15 [b] **Destruction or injury by fire set by railroad.**–(1) 119Ark143; 93 Ga256, 20SE129; 124Ga250, 52SE166; 119MoA492, 95SW311; 178MoA274, 165 SW1112; 64Tex92; TexCivA 25SW792; 7TexCivA245, 26SW441; 14TexCivA386, 37SW382; TexCivA 71SW294. See Tex CivA 40SW438. Compare 4 IndA69, 30 NES12.

886–16 TexCivA 294SW665.

887–21 37F(2d)180; Ark 31SW(2d) 530; 197Cal 321, 240P765, 777 [quot CJ]; 84CalA42, 257P573; 199 Iowa974, 203NW287; MoA 293SW483; MoA 294 SW132; 12PaDist&Co 722; TexCivA 288SW554; 145Va94, 133SE781, 787 [citCJ].

887–22 197Cal 321, 240P765, 777 [quot CJ]; 199 Iowa974, 203NW287.

888–23 43 Ida320, 251P617; 130 Okl 272, 267P274.

888–26 130 Okl 272, 267P274. [b] **Evidence as to condition at time of trial** may be admissible in rebuttal in certain cases. 130 Okl 272, 267P274.

888–28 See also 145Va94, 133SE781.

889–35 199 Iowa974, 203NW287; 219 MoA657, 284SW510.

890–36 199 Iowa974, 203NW287; 219 MoA657, 284SW510.

890–37 199 Iowa974, 203NW287; 219 MoA657, 284SW510.

890–40 178Ark898, 12SW(2d)899; 222 Ky531, 1SW(2d)972.

891–45½–New. Damages cannot be recovered for loss of use of lots and loss of garden truck produced thereon. 199 Iowa974, 203NW287.

891–47 [b] **Damages not limited to value of one crop.**–30Ariz569, 249P751 (alfalfa).

891–48 39GaA612, 147SE916; 128Me 409, 148A146. [c] **Trees in national forest.**–23F(2d)936. [d] **Destruction or injury by fire set by railroad.**–67Ark373, 65SW159; 28Del 428, 94A514; 93Ga256, 20SE129; 128Ga438, 57SE694; 129Ga 526, 59SE266; 163 Ind534, 72NE561; 83 Iowa270, 49NW95; 102 Iowa286, 71 NW409; 43Minn375, 45NW713; 45Minn 17, 47NW260; 119Minn251, 138NW30,

52LRAN871; 132NY199, 30NE398, 28 AmSR563, 15LRA612; 229Pa285, 78A 143; 235Pa417, 84A421; 45PaSuper468; 61SC329, 39SE527; 85Vt60, 81A236. Apparently contra 28Del 339, 93A559. [c] **Trees whether fully matured or not** have been included within the rule. 132 NY199, 30NE298, 28AmSR563, 15LRA 612; 213NY136, 101NE55; 13HunNY 254.

891-49 [a] **Destruction or injury by fire set out by railroad.**–67Ark371, 55SW 159; 119Minn251, 138NW30, 52LRANS 91; 61SC329, 39SE527.

891-49½-New. Where damaged timber is fit for posts, ties, and similar use, measure of damages is difference between reasonable value before and after damage. 219MoA657, 284SW510.

891-50 220MoA141, 281SW93. [b] **Measure of damages for cutting trees not valuable is injury caused to land.**–220MoA141, 281SW93. [c] **Destruction or injury by fire set by railroad.**–124Ga 250, 52SE166; 73 Iowa179, 34NW865; 84 Iowa97, 50NW547; 111 Iowa562, 82 NW996; 116 Iowa304, 89NW1088; 54 MoA223; 62MoA431; 131MoA457, 110 SW9; 178MoA375, 165SW1122; 132NY 199, 30NE398, 28AmSR563, 15LRA612 (dictum); 49PaSuper641; 7TennCivA212. See also 20ND124, 126NW995, 28LRANS 757. [d] **Evidence admissible on measure of damages.**–149Del 97, 36NE91; 54 MoA223; 62MoA431; 178MoA274, 165 SW1112; 49PaSuper641.

891-50½-New. to grove of trees which was ordinarily a windbreak as protection to stock and buildings, 203 Iowa471, 212NW884.

892-51 MoA 274SW837. [b] **Destruction or injury by fire set out by railroad.**–97Ark64, 133SW191; 149 Ill 97, 36NE91; 100 IllA530; 74 IllA595; 158 IllA473; 163 Ind534, 72NE561; 9 IndA 505, 36NE381; 102 Iowa286, 71NW409; 117 Iowa394, 90NW708; 57Kan526; 75Kan691, 90P273; 1KanA586, 42P259; 3KanA577, 43P854; 8KanA545, 54P322; 54MoA223; 136MoA254, 116SW1126; 178MoA274, 165SW1112; 189MoA6, 176 SW465; 132NY199, 30NE398, 28AmSR 563, 15LRA612 [overr 36BarbNY644]. See also 94Ark61. But see 24Del 324, 77A766.

892-51½-New. Where woodland acquired for forestry school was destroyed by fires, measure of damages is held not market value but actual loss. 106Conn 423, 138A444.

892-52 135Misc589, 239NYS20. But see 30F(2d)642.

892-53 30F(2d)642.

892-54 [c] **Destruction or injury by fire set out by railroad.**–63Mo 367; 76 Nebr545, 107NW757; 30Nebr70; 48 Nebr653, 67NW602; 83Nebr652; 118 Va43, 86SE847. See also Damages § 191.

892-56 [a] **Destruction or injury by fire set by railroad.**–126Ky328; 61Nebr 49, 84NW416; 85Va293, 78E236.

892-59 88CalA405, 263P573.

893-65½-New. Replacement value cannot be accepted as measure of damage for cutting tree, where replacement is impossible. 170La432, 128S35(4thcase).

893-69 174Minn443, 219NW459, 460 [citCJ]. [b] **Permitting recovery for loss of grass by fire as** "loss of plant food" has been held error where actual loss or diminution of value of land not shown. **TexCivA** 288SW476. [c] **Destruction or injury by fire set out by railroad.**–102 Iowa632, 71NW536; 117 Iowa344, 90NW708; 137Ky659, 126SW 349; 180MoA501; 56 Okl 727, 156P672; 64Tex92; 69Tex643, 9SW440; 74Tex 581; 3TexCivA493, 23SW90; TexCivA 25SW792; TexCivA 25SW971; TexCivA 26SW338; 8TexCivA593, 28SW39; TexCivA 32SW846; TexCivA 35SW970; TexCivA 40SW438; 24TexCivA374, 59 SW833; TexCivA 60SW451; TexCivA 71SW294; 39TexCivA144, 86SW1046; TexCivA 122SW67; TexCivA 158SW561 (such an expenditure is required to prevent a greater damage by reason of depreciation in the value of the cattle); 49WVa296, 36SE489.

893-70 174Minn443, 219NW459, 460 [citCJ]. [d] **Destruction or injury by fire set by railroad.**–74 IllA595; 100 IllA 530; 158 IllA473; 11 IndA13, 38NE534; 61Minn449, 63NW104; Mo 8SW538; 56 Okl 727, 156P672; 69Tex643, 9SW440; 67Tex685, 48SW365; 74Tex581; 3Tex CivA493, 23SW90; TexCivA 25SW433; TexCivA 25SW792; 7TexCivA245, 26 SW441; TexCivA 29SW638; TexCivA 32SW717; TexCivA 32SW846; Tex CivA 40SW438; 24TexCivA374, 59SW 833; TexCivA 74SW942; 39TexCivA 144, 86SW1046.

894-72 84CalA42, 257P573. [d] (4) Measure of damages for burning meadows is expense of reseeding meadow and rental value. MoA 284SW863. [e] **Destruction or injury by fire set by railroad.**–59Ark105, 26SW595; 110 Ind225, 11NE285; 66 Iowa606, 24NW234, 55 AmR279; 84 Iowa131, 50NW567; 111 Iowa562, 82NW996; 117 Iowa344, 90 NW708; 122 Iowa32, 96NW984. See 23SFed14. See also Damages § 187.

894-74 [b] **Destruction or injury by fire set out by railroad.**–49 IllA43; 56 IllA145; 11 IndA13, 38NE534 (in order to arrive at the proximate amount of the injury, the jury is entitled to know the probable quantity and quality of hay that could have been made from the meadow but for the fire); 111 Iowa562, 82NW996; 126 Iowa581, 102NW499; Tex 8SW538; TexCivA 59SW833.

894-77 TexCommnA .23SW(2d)304 (homestead right).

894-78 315Mo 987, 288SW777; 21 OhA 12, 153NE103; 85PaSuper275. [b] **Work depending on weather conditions.**–85PaSuper275.

894-80 220Ala245, 124S907.

896-85 95Fla997, 117S381; Mich 233 NW378 (market value).

896-95 TexCivA 273SW611, 612 [quot CJ].

896-96 TexCivA 273SW611, 612 [quot CJ].

896-97 TexCivA 273SW611, 612 [quot CJ].

896-98½-New. In the absence of evidence as to the value of time lost there can be no recovery therefor. 203 Iowa 1194, 212NW354.

897-4 See also CalA 288P805.

897-11 181Ark790, 27SW(2d)985; 69 CalA779, 232P178; 232Mich300, 205NW 199; 285Pa561, 132A810. [b] **Allowance for temporary impairment** of earning power begins at expiration of time for which damages have been allowed for lost time. 233Ky129, 25SW(2d)38.

898-12 RI 148A595; TexCivA 284SW 683.

898-13 69CalA779, 232P178; MoA 296 SW212; 89PaSuper334.

898-16 292Pa191, 140A897.

899-19 298Pa560, 148A851.

900-28 222AppDiv330, 225NYS673.

900-31 89PaSuper461; TexCivA 284 SW683.

901-32 [a] **Where exactness of amount is attainable,** indefinite testimony thereon is inadmissible. 298Pa423, 148A520.

901-33 TexCivA 6SW(2d)202.

901-34 220Ala220, 124S516; 101CalA 218, 281P681; 222AppDiv330, 225NYS 673.

901-36 TexCivA 6SW(2d)202 (diminished capacity to labor alone insufficient).

902-39 CalA 285P751; RI 148A595.

902-42 TexCivA 23SW(2d)739.

902-44 298Pa560, 148A851; 86PaSuper 475; TexCivA 6SW(2d)202.

902-45 181Ark790, 27SW(2d)985.

903-51 TexCivA 6SW(2d)439.

904-57 181Ark790, 27SW(2d)985; Tex CivA 6SW(2d)439.

904-59 43F(2d)832.

905-65 208 Iowa275, 225NW406.

905-68 105NJL602, 147A402 (evidence held not erroneous because limited to one year).

906-79 212Ky738, 280SW93; 318Mo 453, 300SW758; TexCivA 286SW483.

906-81 285Pa561, 132A810.

906-82 285Pa561, 132A810.

907-89 285Pa561, 132A810.

907-89½-New. It is not permissible to calculate the damages so that the income at six per cent would probably equal earnings through the years of expectancy and at death leave the principal sum intact. 235Mich687, 209NW 813.

907-89¾-New. In an action for loss of services of a child, the amount of recovery should be governed by impaired earning power during the remainder of the child's infancy only, reduced to present worth. 285Pa116, 131A665.

907-89¾-New. The present worth tables should not be admitted at jury trials for the purpose of determining compensation for impairment of earning power. 285Pa561, 132A810.

907-90 209Ky730, 273SW555; 213Ky 432, 281SW519.

907-90½-New. Where an action is to recover for loss of time and wages, recovery should be limited to time of trial. TexCivA 288SW251.

907-92 219Ky652, 294SW188; MoA 297SW175; 12PaDist&Co 722; 29Porto Rico 996; TexCivA 278SW950. [i] **Value is measured at market at place and time of injury.**–TexCivA 278SW950. [j] **Shares in corporation.**–236 IllA187.

908-97 138Misc183, 244NYS409.

908-98 33NM440, 270P794, 63ALR237. [a] **Where used goods injured have market value,** that, and not actual value, is correct measure of damages. TexCivA 283SW877.

908-99 33NM440, 270P794, 63ALR237; TexCivA 285SW920.

908-1 33NM440, 270P794, 63ALR237.

909-4 TexCivA 278SW950; TexCivA 12 SW(2d)829(2dcase). [c] **Intrinsic and actual value is measure without market.**–TexCivA 278SW950. [d] **To warrant proof of actual value,** facts of no market must be shown. TexCivA 278SW950.

909-6 See also 138 Okl 190, 280P305, 66 ALR894.

909-18 138Misc183, 244NYS409.

910-19½-New. In an action for damages to an old and almost worn out vehicle, plaintiff cannot recover the cost of a practically new one. 85PaSuper 483.

910-26 [b] **Deduction for light, power, and janitor services** must be made from rental value of factory for period of delay. 104Conn430, 133A677.

910-30 See also 199Wis188, 225NW727.

912-36 213Ala681, 105S891; 285Pa299, 132A350.

913-37 213Ala681, 105S891.

913-39 213Ala681, 105S891. See also TexCivA 4SW(2d)336.

913-42½-New. Where severable contract provided for payment of certain amount per car of gravel removed by lessee, and during period of contract lessee failed to remove gravel in accordance with contract, lessor was entitled to stated amount for each car load which should have been removed with interest thereon, but lessee is entitled to take amount of gravel for which he has compensated lessor, although not removed until expiration of contract. 167Minn 399, 209NW259.

914-44 117 Or306, 244P75, 78 [citCJ].

914-48 TexCivA 300SW159.

914-52 285Pa116, 131A665; TexCivA 300SW159.

914-56 95PaSuper520.

915-57 216Ala495, 113S531; 95PaSuper520.

915-58 Wis 229NW860.

915-65 85CalA332, 259P470; 10LaA57, 120S791; 104WVa445, 140SE141.

915-66 103Conn583, 131A432, 44ALR 785.

915-66 224Ky460, 6SW(2d)454; 237 Mich264, 211NW661, 662 [citCJ].

915-67 216Ala495, 113S531; 115 Or 656, 239P825, 828 [citCJ]; 104WVa445, 140SE141, 142 [citCJ]. [c] 216Ala495, 113S531.

916-68 115 Or656, 239P825.

916-69 237Mich264, 211NW661. [b] 237Mich264, 211NW661.

917-74 85CalA332, 259P470.

917-81 285Pa116, 131A665.

917-82 TexCivA 288SW852.

918-83 39GaA467, 147SE430 (jury may fix any rate of interest that they may think reasonable and just under all circumstances).

919-1 268US98, 45SCt420, 69LEd869; 316Mo 1050, 294SW1012.

919-4 39F(2d)521; 35GaA8, 131SE543; 245NY156, 156NE649; 132Misc704, 230 NYS482; TexCommnA 292SW203; Tex CivA 28W(2d)505; TexCivA 6SW(2d) 380.

919-5 30Ariz245, 246P543. See also 123 Or469, 259P1064, 260P1099.

919-6 152Miss32, 118S370; TexCivA 2 SW(2d)505; TexCivA 4SW(2d)597 (items not open account).

920-8 221MoA160, 290SW78; 221MoA 67, 294SW123.

920-13 196Wis64, 219NW352.

922-40 34Ariz95, 268P181.

923-47 11LaA224, 123S483(2dcase); 115 Oh584, 155NE133; TexCivA 280SW 235; TexCivA 5SW(2d)567.

924-54 218Ala416, 118S662; 293Pa577, 143A202; TexCivA 2SW(2d)505.

924-56 158La874, 104S747.

924-57 115 Oh584, 155NE133. [b] (3) This rule in Louisiana has been changed by statute to allow interest from date of judicial demand. 158La874, 104S747. (4) Such statute is not retroactive. 158 La874, 104S747. [c] **Interest not specifically allowed** runs from date of judgment. 198NC518, 152SE503.

924-57½-New. Where expenses are incurred by reason of injury to personal property, interest is recoverable on items of expense from time items were paid. 13F(2d)772.

924-57⅓-New. Where the statute does not provide for interest in matters of tort, it may be allowed not "to nomine" but merely as damage. TexCivA 296 SW967.

924-60 36GaA513, 137SE404; 36GaA 516, 137SE407; Me 151A197; TexCivA 286SW526.

925-61 36GaA513, 137SE404; 36GaA 516, 137SE407.

925-62 MoA 12SW(2d)938; TexCivA 286SW526.

925-71 35GaA804, 134SE824; 36GaA 513, 137SE404; 36GaA516, 137SE407.

925-71½-New. , but it is proper to instruct jury that in awarding damages for future pain and suffering they should consider fact that plaintiff is receiving present cash consideration for damages not yet sustained. 35GaA804, 134 SE824.

925-73 213Ala522, 105S874; 22AlaA 199, 114S15.

925-73½-New. There is no standard or legal rule by which damages for mental suffering may be measured. TexCivA 286SW526.

926-81 136Wash628, 241P2. [b] **Except in cases where injuries complained of are increased** by wealth and standing of defendant, as in cases of injury to character, or in actions for breach of promise or malicious or wanton torts, compensatory damages are same whether caused by prince or pauper. 125Me 44, 130A737.

926-84½-New. , nor by financial condition of defendant. 216Ala479, 113S507.

926-85 118Nebr792, 226NW444. See also 244NY105, 155NE65.

927-93½-New. Obligation to minimize damages is measured by reasonable conduct. 104Conn430, 133A677.

927-95 161La806, 109S498; 154Wash 163, 281P327.

927-98 175Ark539, 299SW994; 161La 806, 109S498; Mass 166NE867; Mass 172NE855.

927-99 [a] (4) Lessees are held not required to alter form of proposed building to decrease damages caused by breach of covenant of quiet enjoyment. TexCivA 297SW676.

927-3 136Misc483, 241NYS403. [a] **Rule that one mitigate damages** applies only while damages are accruing, not to election of remedies after they have accrued. 41 Ida54, 238P298.

928-4 28 OhA38, 162NE616; 85PaSuper108.

928-5½-New. nor is defendant's motive material, 220AppDiv584, 222NYS66.

928-7½-New. Publisher notified by advertiser to cancel valid contract is not required to minimize advertisers loss by discontinuing advertisement. 13LaA 285, 127S749.

928-7⅓-New. Owners of building need not attempt to profit from their possession of sum due contractor to minimize their damages. 104Conn430, 133 A677.

928-7¼-New. In an action for breach of covenant against encumbrances it is not a defense that plaintiff was insured where insurer would be subrogated to plaintiff's rights against defendant if plaintiff recovered on policy. 223App Div244, 228NYS308.

928-9 But see 28 OhA427, 162NE753.

928-16½-New. The rule is applicable to negligence cases. 230Mich414, 203NW 126.

929-20½-New. Where plaintiff asked damages for medical bills, the court properly refused to credit the amount paid plaintiff for the same on damages found by the jury for personal injuries. TexCivA 4SW(2d)1003.

929-21 221AppDiv371, 223NYS418; TexCivA 6SW(2d)202; TexCivA 13SW (2d)918; BC [1929] 4DomLR280.

929-22 246 IllA69; 100Vt246, 136A697; Ont [1929] 2DomLR561.

929-23 71CalA571, 236P152; CalA 291 P618; 229Ky37, 16SW(2d)489; 177Minn 10, 224NW271; 100Vt246, 136A697; 141 Wash534, 252P98; 193Wis370, 214NW 374, 53ALR771. See also 243 IllA60.

929-24 243 IllA562; 127 Or276, 263P 907; 141Wash534, 252P98. Contra 165 La222, 115S466. [b] **Subrogation of insurer** by agreement is held not to lessen damages recoverable from wrongdoers. 141Wash534, 252P98.

930-27 239Mich485, 214NW402; 193 Wis370, 214NW374, 53ALR771.

930-27½-New. In determining the amount to be awarded as damages in a personal injury action, the fact that plaintiff may be entitled to a pension is not an element to be considered. 176 Minn377, 223NW619.

930-27⅓-New. Compensation received by an injured employee under Federal Compensation Act may not be set up by wrongdoer in mitigation of damages. 217AppDiv323, 217NYS128.

930-30 9LaA189, 119S453.

931-36 [b] **Apportionment of damages.** -BC [1930] 4DomLR30.

931-37 But see 96Fla15, 117S703.

931-38 174Ark639, 297SW1027, 59ALR 1128; 198Cal137, 243P866; 90Fla621, 106S424; 98Fla118, 123S519(2dcase); 124Kan449, 260P651; 216Ky470, 287 SW962; 238Mich164, 213NW93; 98 NJEq589, 131A223; 192NC330, 135SE 141; 122 Or230, 257P801; TexCivA 295 SW641.

931-39 25F(2d)4; 43F(2d)832; 97Fla 1, 119S513(2dcase); 118Kan247, 234P 963; 124Kan449, 260P651; 130Kan838, 288P579; 217Ky343, 289SW316; 264 Mass560, 163NE167; 238Mich164, 213 NW93; Nebr 229NW22; 98NJEq589, 131A223; 135Misc361, 238NYS181; Tex CivA 296SW641; Utah 264P975; 153 Wash198, 279P395; 104WVa44, 138SE 737.

932-40½-New. , but the contract may so provide. 98NJEq589, 131A223.

932-41½-New. A contract in connection with the giving of notes and pledging of stock as security, providing for the return of "additional shares" before the due date of the original notes, has been held not to constitute an agreement by defendant to purchase those shares which were not returned at the time and in the manner provided, and to pay a stipulated sum per share as the purchase price, but such clause was a provision for liquidated damages. 205Cal 541, 271P1091(2dcase).

932-42 197Cal321, 240P765; 198Cal 137, 243P866; 205Cal541, 271P1091(2d case); 208Cal606, 283P936; 70CalA204, 232P1002; 97CalA650, 275P1001; 98 CalA121, 276P404; 117 Okl1, 245P60; 131 Okl22, 267P464. [a] (1) Cal 292P 950; 70CalA204, 232P1002. (14) Uncertainty which authorizes stipulation for liquidated damages is uncertainty as to extent and amount and not uncertainty as to measure. 70CalA204, 232P1002. (15) Other instances of construction 102 CalA691, 283P372(2dcase). [b] (5) Provision in agricultural lease limiting lessee's recovery to certain amount per acre upon total destruction of crops on leased premises by lessor's failure to protect land from overflow is invalid and not within exception in statute. 197Cal 321, 240P765. (6) Such provision is valid as furnishing agreed amount of damages for loss of prospective crops. 197Cal 321, 240P765. [d] 70CalA204, 232P 1002. [e] **Stipulations for liquidated damages held valid.**-86CalA689, 261P 717. [f] **Provision held valid.**-42F(2d) 496.

932-42½-New. Other statutes provide that certain kinds of contract may contain provision agreeing upon a sum to be paid as liquidated damages for breach, which amount shall be stated in the contract. 200 Iowa1293, 206NW297 (contracts between coöperative associations and members).

932-42⅓-New. The contract is sufficient under such statute if it provides for such damages and the by-laws of the association provide the schedule therefor. 200 Iowa1293, 206NW297.

933-45 162La139, 110S178; 126 Or 218, 269P228, 229 [citCJ]; 44Philippine 105; SD 225NW218.

934-52 315Mo 927, 288SW20; TexCivA 296SW641. See also 117 Okl1, 245P60, 62 [citCJ].

934-53 247Mich315, 225NW485(1st case); 315Mo 927, 288SW20, 33 [quot CJ]; 117 Okl1, 245P60; TexCivA 283 SW303.

934-54 315Mo 927, 288SW20.

934-55 315Mo 927, 288SW20, 33 [quot CJ]; TexCivA 283SW303; TexCivA 296 SW641

934-56 207 Iowa826, 221NW843; 220 AppDiv649, 222NY8442. [b] (3) Provisions in a coöperative marketing contract for liquidated damages for breach is held not a penalty. 84 IndA51, 150 NE106. [c] **Obligee under drilling bond,** sustaining no injury by default, can recover no damage in absence of agreement that sum fixed was to be paid regardless of injury. TexCivA 283SW887.

934-56½-New. Provision in contract of insurance of mutual fire insurance company for payment of ten per cent damages in case of default was a provision for liquidated damages. 232Mich210, 205NW165.

934-57 98Fla118, 123S519(2dcase); 157 Md652, 147A790, 65ALR1285; 117 Okl 1, 245P60; 138 Okl8, 280P286; Tex CivA 299SW304.

935-58 198Cal137, 243P866. See also TexCivA 282SW940.

935-59 TexCivA 293SW199.

935-60 88CalA344, 263P376; 88CalA 481, 263P826; MoA 308SW(2d)1049; 126 Or218, 269P228.

935-61 280US224, 50SCt142, 74Led382; 30F(2d)77 [certiorari granted 279US 830, 49SCt348, 73Led980(10thcase)]; 31 Ariz187, 251P453; 177Ark997, 88SW(2d) 502; 198Cal137, 243P866; 70CalA204, 232P1002; 105Conn11, 134A252; 200 Iowa1094, 205NW966; 315Mo 927, 288 SW20; MoA 308SW(2d)1049; 134Misc 866, 236NYS486; 117 Okl1, 245P60; 290Pa561, 139A315; 114Tex528, 272SW 772; TexCommnA 278SW178; TexCivA 283SW303; TexCivA 283SW887; Tex CivA 293SW199; TexCivA 296SW641.

936-66 70CalA204, 232P1002; 255 IllA 345; 200 Iowa1094, 205NW966; 315Mo 927, 288SW20, 33 [quotCJ]; MoA 275 SW48, 50 [citCyc]; 117 Okl1, 245P60; 126 Or218, 269P228, 229 [citCJ]; TexCivA 283SW303; TexCivA 283SW887; TexCivA 293SW199; TexCivA 296SW 641. See also MoA 308SW(2d)1049.

937-67 315Mo 927, 288SW20, 33 [quot CJ]; TexCommnA 278SW178.

937-68 315Mo 927, 288SW20, 33 [quot CJ].

937-69 43F(2d)832; 248IllA313, 319 [citCJ]; 114Tex528, 272SW772; TexCivA 283SW303; TexCivA 283SW887. [b] **Equitable principle of granting relief from penalties and forfeitures,** as applied to agreement in lease for specified sum as liquidated damages, does not raise presumption that such sum is penalty. 225AppDiv65, 232NYS242.

938-70 290Pa561, 139A315.

938-71 126 Or218, 269P228.

938-72 31Ariz187, 251P453; 198Cal 137, 243P866; 70CalA204, 232P1002; 115 Or396, 237P982; 290Pa561, 139A 315; TexCivA 290SW1045.

939-74 200 Iowa1094, 205NW966.

939-75 198Cal137, 243P866; Minn 231 NW613; 136Misc11, 240NYS78 (though characterized as liquidated damages, it was not).

939-76 70CalA204, 232P1002.
940-78 TexCivA 292SW618. But see 136Misc11, 240NYS78.
940-79½-New. A recital in a contract for the purchase of a stock of goods that a note for a stated sum was part of the purchase price does not render it ambiguous as to whether such sum was for liquidated damages or for part payment. 149Miss47, 115S106.
940-80 31Ariz187, 251P453; MoA 30 SW(2d)1049.
941-81 31Ariz187, 251P453.
941-85 234 IllA267; TexCommnA 278 SW178; TexCivA 283SW303. [a] Surrounding circumstances at time contract was made may be considered to ascertain whether any satisfactory rule of damages was known to parties at time they stipulated for damages. TexCivA 283SW303.
941-86 219Ala595, 122S837 (provision held not void as penalty); 31Ariz 187, 251P453; 199Cal 168, 248P658, 47 ALR904; 70CalA204, 232P1002; 86CalA 659, 261P717; 88CalA344, 263P376; 91 CalA103, 267P172; 105Conn11, 134A 252; Ill 234 IllA267; 255 IllA345; 216 Ky470, 287SW962; MoA 284SW191; 115 Nebr177, 212NW839; 127 Okl 124, 260P 10; 285Pa212, 131A733; 13PaDist&Co 321; TexCommnA 278SW178; TexCivA 283SW940; TexCivA 283SW303; Tex CivA 283SW887. [a] (8) Plaintiffs held entitled to rely on provision as to liquidated damages where parties to contract were, till breach by defendants, on an even basis in being precluded by labor organization from getting any business, and after breach plaintiffs could not compete with defendant on even footing. 72CalA202, 237P386. [a] (9) Billboard advertising contract. TexCommnA 278 SW178.
943-87 Cal 292P950; 19 OhA210; Tex CommnA 278SW178; TexCivA 283SW 303; TexCivA 6SW(2d)390. [b] 198Cal 137, 243P866.
943-89 [a] Uncertainties in results from drilling for oil are to be considered in determining whether amount fixed is to be regarded as liquidated damages or penalty. TexCivA 283SW887.
943-91½-New. Although the parties to a contract agree by written stipulation that it would be impracticable or extremely difficult to fix the actual damages, a stipulation for liquidated damages will not be enforced unless the facts support it. 90CalA1, 265P828.
943-93 70CalA204, 232P1002; 88CalA 344, 263P376.
943-94 126 Or218, 269P228; TexCivA 293SW199; TexCivA 6SW(2d)390, 392 [citCJ].
944-95 43F(2d)832; 105Conn11, 134A 252; 115 Or396, 237P982, 983 [citCJ]; 98PaSuper49; SD 225NW218.
945-96 [a] (3) Twenty-five hundred dollars to architect on abandonment of project under contract whereby he would have received twelve thousand five hundred dollars on basis of five per cent of total cost. 200 Iowa1094, 205NW966. [b] Obligee suffering no damage by obligor's default cannot recover, though bond is for stipulated damages. Tex CivA 283SW887.
945-97 280US224, 50SCt142, 74Lod382; 43F(2d)832. [a] Though code recognizes penal clause as secondary obligation, nature of penalty is by way of compensation for damages and not as punishment. 162La139, 110S178.
945-97½-New. But if sum is not unconscionable or unreasonable, it will be considered as liquidated damages. 98 NJEq589, 131A223.
945-98 88CalA481, 263P826; 196Wis 56, 219NW370.
945-99 MoA 256SW103.
945-2 114Tex528, 272SW772 (contract for liquidated damages in excess of actual damages is lawful).
945-3 [d] 115Nebr177, 212NW39; 135 Misc361, 238NYS181. [e] (2) Other instances. MoA 30SW(2d)1049. [f] (3) Contract between marketing association and member. 27 OhA426, 162NE453.
945-3½-New. One cannot by agreement subject himself to a penalty for something he may thereafter do. 15F (2d)823.
946-4 31Ariz187, 251P453; Ariz 291P 997; 115 Or396, 237P982, 983 [quotCJ]; TexCivA 6SW(2d)390, 392 [citCJ].
946-6 70CalA204, 232P1002; 247 IllA1 (provision considered reasonable).
946-8 [a] (3) $2,000 liquidated damages for breach of $14,000 land contract held not penalty on its face. 134Misc 866, 236NYS486.
946-12½-New. Where the sum specified as stipulated damages for delay in making repairs to a vessel was inserted in the contract by the owner and was allowed to remain unchanged, it will be assumed as against the owner that the amount represented the reasonable amount of damages. 70CalA204, 232P 1002.
947-18 13PaDist&Co 321.
947-20 98NJEq589, 131A223; 157SC 221, 154SE167. But see 177Ark997, 8 SW(2d)502.
948-24 255Mass536, 152NE33; 240Mich 222, 215NW356, 357 [quotCJ]; 136Misc 11, 240NYS78; 136Misc710, 243NYS401; 114Tex528, 272SW772 (check deposited in escrow); TexCivA 272SW216. Tex CommnA 280SW561. [a] (8) Retention of twenty per cent by vendors on land contract defaulted by purchaser. 31Ariz 187, 251P453.
949-25 31Ariz187, 251P453; 114Nebr 496, 208NW615 (agreement held valid); 98PaSuper49; 196Wis56, 219NW370. [d] Defaulting buyer cannot recover on theory of implied contract.-196Wis56, 219NW370. [e] Proceedings to enforce provision.-196Wis56, 219NW370.
949-26 31Ariz187, 251P453; 162La139, 110S178; 176Minn601, 224NW157; MoA 275SW48.
949-26½-New. A cash payment on ordering locks has been held not to constitute liquidated damages so as to limit the maximum amount recoverable by the seller where a written guaranty of payment was required of the buyer. 199Wis30, 225NW185.
950-27½-New. When the amount retained on forfeiture is grossly disproportionate to the actual damage whether excessive or inadequate, it will be deemed penalty. 31Ariz187, 251P453.
951-38 216Ky470, 287SW962.
951-39 MoA 30SW(2d)1049; 130Misc 725, 225NYS135; 127 Okl 124, 260P10; 290Pa561, 139A315; 154Wash282, 282P 65.
952-44 235Mich333, 209NW70.
952-46 235Mich333, 209NW70; MoA 256SW103; 222MoA476, 280SW713; 229 AppDiv236, 241NYS556.
953-50 290Pa561, 139A315; Tex CommnA 278SW178.
953-52 235Mich333, 209NW70.
953-53 41 Ida783, 242P793.
954-60 187Wis1, 203NW923 (contract in alternative cannot be used as cover for enforcement of penalty).
954-64 TexCommnA 278SW178.
954-65 TexCommnA 278SW178.
955-67 TexCommnA 278SW178.
956-79 154Wash282, 282P65. [b] Provision attempting to fix penalty as liquidated damages is void if actual damages are susceptible of proof. 39 OklACR35.
956-80 25F(2d)397; 127Kan762, 275P 166(2dcase); 264Mass560, 163NE167; 240Mich79, 214NW973; 117 Okl 1, 245 P60 (sale of school bonds); SD 225NW 218; TexCivA 300SW193. See also Ind A 155NE214.
956-81 240Mich79, 214NW973.
956-82 23F(2d)593.
956-84 TexCivA 293SW199.
957-85 234 IllA267; 159La981, 106S 536; 177Minn208, 225NW19 (retention of initial payment); 285Pa212, 131A 733; 98PaSuper49; TexCivA 283SW 303; TexCivA 292SW618; TexCivA 299 SW304; TexCivA 28W(2d)929; Tex CivA 11SW(2d)551. See also 198Cal 137, 243P866.
957-86 204Ky711, 265SW282; 222MoA 476, 280SW713; 189NC434, 127SE521.
957-87 Utah 286P633 (vendor cannot recover for rental value); 187Wis1, 203 NW923.
957-89 [a] (4) Provision allowing vendor to forfeit deposit and enforce specific performance is one for penalty. 18F(2d)1013. [b] Provision not unreasonable.-TexCivA 20SW(2d)843.
957-90 30F(2d)77; 10LaA709, 120S 898; 219AppDiv275, 219NYS715; 225 AppDiv65, 232NYS242; TexCivA 12SW (2d)620; NS [1930] 3DomLR664. [d] Billboard advertising.-TexCommnA 278 SW178.
958-91 MoA 30SW(2d)1049; TexCivA 6SW(2d)390. [d] Landlord's option to declare forfeiture held penalty.-MoA 30 SW(2d)1049.
958-92 235Mich333, 209NW70. See also MoA 30SW(2d)1049.
958-93 235Mich333, 209NW70.
958-94 235Mich333, 209NW70; 219App Div275, 219NYS715.
958-95 240Mich222, 215NW356.
958-96 240Mich222, 215NW356.
958-97 But see 135Misc142, 237NYS 279. [a] Provision permitting tenant, constructively evicted, to remain rent free, held in nature of penalty. 136Misc 844, 242NYS407.
958-97½-New. Where lessee retains premises for practically a full new term after giving notice of termination of the lease, a stipulation for liquidated damages for each day the premises are so occupied has been held inapplicable. 10LaA633, 120S535.
958-97½-New. Where lessee does not provide that tenant shall remain liable for deficiency after eviction, whether deposit constitutes liquidated damages or penalty depends upon expressed intention of parties. 219AppDiv275, 219 NYS715.
958-98 126 Or218, 269P228, 229 [cit CJ].
959-5 174Ark639, 297SW1027, 59ALR 1128. [a] (5) Ten thousand dollars for breach of contract not to enter into competitive business purchased for ten thousand dollars, half of which was good will, is held not to show sum intended as penalty. 174Ark639, 297SW1027, 59 ALR1128.
959-6 93Fla214, 111S722.
960-7 93Fla214, 111S722.
960-8 Sask [1926] 3DomLR810, [1926] 2WestWkly604. [a] Reasonableness of damages must be determined by facts at time contract was made. 174Ark639, 297SW1027, 59ALR1128.
960-14 88CalA344, 263P376; 98NJEq 589, 131A223; TexCommnA 1SW(2d) 265.
961-16 180Ark643, 22SW(2d)381; 217 Ky343, 289SW316; 238Mich164, 213NW 93; 98NJEq589, 131A223. [d] Unless amount was reasonable compensation at time contract was made, provision for payment for delay cannot be interpreted as liquidated damages. 157Md652, 147 A790, 65ALR1285.
962-17 238Mich164, 213NW93.
962-18 157Md652, 147A790, 65ALR 1285.
962-19 But see 98NJEq589, 131A223.
962-19½-New. The rule of liquidated damages for delay should be applied until the day of completion of the building although a tenant paid rent prior thereto. 88CalA481, 263P826.
962-19½-New. In the absence of a stipulation for damages for delay, none may be recovered where no actual damages are shown. 238Mich164, 213NW93.
962-20 105Conn11, 134A252; 134Misc 456, 234NYS665.
963-22 70CalA204, 232P1002 (supplementary contract held to incorporate provision of original contract for liquidated damages for delay); 240Mich222, 215NW356. [a] (4) Provision for liquidated damages in contract for execution of lease and purchase of furnishings relates to lease as well as sale of furnishings. 240Mich222, 215NW356. [b] Interpretation of particular provisions.-97CalA650, 275P1001. [c] Where amount is left blank, provision is nugatory. 104NJL248, 139A900.
963-23 187Wis1, 203NW923.
963-24 [a] That provision is long, hard to understand, and printed in type hard to read does not invalidate it where contents were known and understood. SD 225NW218.
964-28½-New. Assignee of one giving an option is not in a position to urge the unreasonableness of a provision for liquidated damages on the buyer's de-

fault. **MoA** 284SW191.

964-28½-New. Where no liquidated damages are stipulated, none may be recovered in the absence of proof of actual damages. 238Mich164, 213NW93.

964-31 131Misc407, 226NYS752.

964-33 See also 21F(2d)288; 98Fla118, 123S519(2dcase); 19 OhA210.

964-34 117 Okl 204, 245P994.

964-35 See also 21F(2d)288.

964-36 117 Okl 204, 245P994.

965-37 117 Okl 204, 245P994.

965-39½-New. Where the parties are mutually responsible for delays by reason of which the date fixed for completion of the contract is passed, a provision for liquidated damages is annulled and cannot be revived without express agreement. 117 Okl 204, 245P994.

965-40 117 Okl 204, 245P994.

965-42 174Ark639, 297SW1027, 59ALR 1128; 88CalA344, 263P376; 98CalA121, 276P404; 165La200, 115S458; 9LaA 616, 118S387; TexCivA 299SW304 (resale at profit held not to defeat recovery). [a] **Liquidated damages** may be recovered on proof of breach of contract. 174Ark639, 297SW1027, 59ALR 1128.

965-44 74CalA333, 240P39; 135Misc 361, 238NYS181. [a] (1) 135Misc361, 238NYS181.

966-52 [c] **Subsequent agreement to complete work** after failure to perform does not abrogate stipulation as damages. 137Misc888, 244NYS82.

966-55½-New. A clause in a realty sale contract, authorizing the vendor, on the purchaser's default, to make payment, immediately to cancel the contract, and retain payments as liquidated damages, is a penalty or forfeiture intended for the vendor's benefit, which he may enforce or waive at his pleasure. 98Fla 118, 123S519(2dcase).

966-56 198Cal 137, 243P866, 867 [cit CJ]; 72CalA202, 237P386 (evidence held to show that plaintiffs were seeking liquidated damages); 91CalA103, 267P172; 234 IllA267; 255 IllA345; 256 IllA540 (precluding injunction); 135Misc361, 238NYS181; 45Philippine242 (damages under building contract held compensated by retention of unpaid balance in hands of owner); TexCivA 300SW193. [e] **Recovery of stipulated damages** requires deduction of payments made on contract before breach. 132Misc885, 230 NYS753.

967-57 198Cal 137, 243P866, 867 [cit CJ]; 234 IllA267. [e] **Where parties contract with damages shall not exceed certain amount,** particular measure of damages which will give practical effect to agreement will be approved. 201 Iowa148, 205NW833.

967-58 211Ky254, 277SW282 (additional damages denied on unambiguous contract); 119 Oh588, 165NE296; 45 Philippine242. But see 208 Iowa311, 223NW247(2dcase); TexCivA 6SW(2d) 390.

967-59¼-New. Liquidated damages are not allowable in addition to actual damages. TexCivA 6SW(2d)390.

967-60 199Cal 168, 248P658, 47ALR 904; 135Misc361, 238NYS181.

968-63 43F(2d)832; MoA 256SW103; 6PaDist&Co 731; SD 225NW218.

968-64 See also 23F(2d)593.

968-69 154Miss691, 123S861 (reward for public service in bringing wrongdoer to account).

968-70 30Ariz569, 249P751; 165Minn 233, 206NW171; 127Misc671, 217NYS 354, 355 [quotCJ]; 194NC188, 138SE 608; 115 Oh298, 152NE641; 125 Or587, 267P812, 58ALR1556; 128 Or121, 270 P772; TexCivA 5SW(2d)1025, 1026 [citCJ]; Utah 269P1008.

969-71 165Minn233, 206NW171; 115 Oh298, 152NE641; 128 Or121, 270P772.

969-73 114Nebr353, 207NW669. [a] (1) 165La169, 115S447; 168La527, 122 S716; 1LaA606; 4LaA223; 4LaA605; 6LaA666. [d] (1) 147Wash251, 265 P727; Wash 291P323.

970-79 35Ariz60, 274P639; 128Me201, 146A692 (distinguished from fine imposed for violation of law).

971-85 253 IllA589 (injuries inflicted in another state).

971-87 TexCivA 300SW253, 256 [cit CJ].

971-88 TexCivA 300SW253, 256 [cit CJ].

971-92 21AlaA545, 109S895; 206 Iowa 70, 220NW17; 206 Iowa1134, 221NW 802; 165Minn233, 206NW171; 47RI 186, 131A643.

971-94 21AlaA545, 109S895; 206 Iowa 70, 220NW17; 206 Iowa1134, 221NW 802; 165Minn233, 206NW171; 47RI 144, 131A385; 47RI186, 131A643; Tex 300SW253, 256 [citCJ].

973-11 Del 146A737, 739 [citCJ&Cyc]; 193NC614, 137SE871; 194NC40, 138SE 340, 52ALR1330; Utah 282P1026.

973-13 MoA 208SW(2d)918; 193NC614, 137SE871; 194NC40, 138SE340, 52ALR 1330; Utah 282P1026.

973-15 47RI186, 131A643.

973-16 215Ala363, 110S801.

973-19 Wash 292P106.

974-20 5F(2d)957; 20F(2d)763, 771 [citCJ]; 31F(2d)65; 96CalA671, 274P 764; 206 Iowa1134, 221NW802; 153 Miss237, 120S823; 35 OhA405, 172NE 420; Tex 300SW253, 256 [citCJ]; Tex CivA 297SW596; TexCivA 12SW(2d) 271; TexCivA 27SW(2d)331; 36Wyo 166, 253P862, 867 [citCJ]. See also DC 39F(2d)512. [a] **In Georgia.**–36GaA817, 138SE267.

974-21 125 Or316, 266P252 [citCJ].

974-26 Nev 284P310.

974-27 194NC40, 138SE340, 52ALR 1330; 156SC397, 153SE473; TexCivA 5 SW(2d)1025, 1026 [citCJ].

976-29 142Miss622, 107S761; 194NC 40, 138SE340, 52ALR1330.

976-30½-New. In some jurisdictions a citizen of another state cannot recover punitive damages for a willful and wanton injury committed there. 253 IllA589.

977-34 142Miss622, 107S761, 763 [cit CJ]; 194NC40, 138SE340, 52ALR1330; 125 Okl 202, 257P298; Can [1926] 4Dom LR1, [1926] 3WestWkly26. [b] (2) By another provision "smart money" may be recovered in action on official bond where officer did not act in good faith. 36GaA817, 138SE267. (3) Any arbitrary omission of officer to do that which is required of him by law, or any conscious disregard of limitations upon his authority amounts to bad faith. 36GaA817, 138SE267.

977-35 CalA 274P368.

977-37 142Miss622, 107S761; TexCivA 16SW(2d)969; TexCivA 26SW(2d)718.

977-41 120Kan575, 244P1063; 129 Okl 75, 263P105; 47RI 186, 131A643.

979-42 [g] **Oppression, fraud, or malice, actual or presumptive.**–37 OklACR 543.

980-45 Ind 269P412, 415 [citCJ]; Miss 114S746; TexCivA 282SW651, 657 [quot CJ]; TexCivA 300SW253.

980-46 Ala 127S907; BC [1930] 4Dom LR451.

980-47 TexCivA 300SW253, 256 [cit CJ].

981-54 See also 220MoA141, 281SW93.

982-63 85 IndA426, 154NE289; IndA 150NE393.

983-71 120Kan575, 244P1063; MoA 20 SW(2d)918; 225AppDiv454, 233NYS 461; 113 Okl 280, 241P752; 118 Okl 82, 246P839; 129 Okl 118, 263P645; 143 Okl 196, 288P309; 47RI 186, 131A643.

983-72 118 Okl 82, 246P839.

983-73 30F(2d)391.

983-76 MoA 28SW(2d)687.

983-77 217Ala120, 115S16; 208Cal 315, 281P70; 233 IllA421; 128Me201, 146A 692; MoA 275SW572; 79Mont91, 254P 1070; 225AppDiv454, 233NYS461; 47RI 186, 131A643.

983-78 215Ala363, 110S801; 21AlaA 369, 108S632; 175Ark101, 298SW1023; 81Colo 498, 256P8, 56ALR655; Del 146 A737; 41 Ida703, 243P649; 234 IllA234; 193NC614, 137SE871; 129 Okl 75, 263P 105; 39 OklACR29; 142SC125, 140SE 443; 156SC158, 153SE119; 101WVa268, 132SE739; 34Wyo 465, 244P1002.

984-84 80Mont480, 261P273; 101WVa 268, 132SE739.

984-86 [b] **Wrongful act must be intentional or result from gross disregard of person's rights amounting to wilfulness** to authorize punitive damages. 157 Miss83, 127S725.

984-87 Del 146A737. See also 47RI 186, 131A643.

984-88 95CalA228, 272P810.

984-89 80Mont480, 261P273.

984-92 80Mont480, 261P273; 101WVa 268, 132SE739 (must be clearly shown); 197Wis382, 222NW320.

984-93 80Mont480, 261P273.

984-94 SD 227NW438.

985-98 5F(2d)957; 220MoA141, 281SW 93; 101WVa268, 132SE739; Sask [1927] 3DomLR232.

985-2 MoA 284SW815, 820 [quotCJ].

986-7 21AlaA369, 108S632; 30Ariz569, 249P751; 253 IllA589; 143 Okl 196, 288 P309. [a] **Telephone company's double listing** of patron's name in directory after change of address and number is not malicious so as to authorize exemplary damages. Del 146A737, 739 [quot CJ].

986-8 113 Okl 280, 241P752; 129 Okl 118, 263P645; 125 Or587, 267P812, 58 ALR1556; 127 Or256, 270P784; Tex CivA 27SW(2d)331.

987-11 71CalA671, 236P200; 154Miss 691, 123S861; 143 Okl 196, 288P309; 132SC212, 128SE423.

987-12 180Ark41, 20SW(2d)310; 143 Okl 196, 288P309.

988-19 23AlaA132, 122S184.

988-23 120Kan575, 244P1063; 113 Okl 280, 241P752; 118 Okl 82, 246P839.

988-28½-New. Where the result of a wrong is injury directly and primarily to an infant, parent cannot recover punitive damages in his action. 225AppDiv 454, 233NYS461.

988-32 115 Oh298, 152NE641; 27 OhA 179, 161NE35.

983-32½-New. Exemplary damages may be allowed against an individual in a proper case. MoA 298SW254.

988-33 25 OhNPNS101, 105 [citCJ].

988-34 25 OhNPNS101, 105 [citCJ].

989-37 "Damages of this nature, etc." 128 Or121, 270P772; RI 133A439.

989-38 99Vt91, 130A758.

989-39 142SC125, 140SE443.

989-42 RI 133A439; 99Vt219, 131A21, 49ALR1382.

989-45 RI 133A439.

989-47 6F(2d)1000, 42ALR503.

989-48 29Hawaii524; 141Miss7, 105S 749; 115 Oh298, 152NE641; 31 OhA340, 167NE469; 125 Or587, 267P812, 814 [citCJ], 58ALR1556; TexCivA 291SW 254; TexCivA 8SW(2d)288; 145Va175, 133SE759, 47ALR308; 148Va879, 139SE 480.

990-49 193NC614, 137SE871.

992-61 115 Oh298, 152NE641.

992-63½-New. In absence of knowledge of principal, he is not liable for damages for agent's acts which are tantamount to punitive or exemplary damages, 115 Oh298, 152NE641.

992-63¾-New. as, for example, the enhancement in value of coal by severance of agent or servant, made willfully. 115 Oh298, 152NE641.

993-89 [a] **Cannot exceed** amount of plaintiff's expenses of litigation less taxable costs. 111Conn575, 150A692.

994-90 21AlaA545, 109S895; 80Mont 480, 261P273; 86Mont314, 283P427; 193NC614, 137SE871; 47RI 144, 131A 385; 47RI 186, 131A643; 142SC125, 140 SE443; 99Vt91, 130A758. See also 34 Wyo 465, 244P1002.

994-91 193NC614, 137SE871.

994-92 80Mont480, 261P273.

994-93 35Ariz60, 274P639 ($3,000 held not excessive in personal injury action); 80Mont480, 261P273, 277 [quotCJ]; 47 RI 144, 131A385.

995-96 80Mont480, 261P273, 277 [quot CJ]; 193NC614, 137SE871.

995-97 80Mont480, 261P273, 277 [quot CJ]; 47RI 186, 131A643.

995-98 80Mont480, 261P273, 277 [quot CJ].

995-99 80Mont480, 261P273, 277 [quot CJ].

995-1 80Mont480, 261P273, 277 [quot CJ].

995-2 80Mont480, 261P273, 277 [quot CJ].

995-3 93CalA337, 269P705; 288Pa518, 137A171; Nev 269P1008, 1013 [citCJ].

995-4 80Mont480, 261P273 (award must be reasonable).

995-4½-New. Some of the same elements that have already been considered in fixing actual damages may be considered. 243Mich350, 220NW762.

995-7 7LaA582; 125Me44, 130A737; 80 Mont480, 261P273, 272 [quotCJ]; 86

Mont314, 283P427; 47RI186, 131A643; 99Vt91, 130A758.

996-8 216Ala479, 113S507.

996-10 47RI186, 131A643.

996-15 154Miss325, 122S756, 63ALR1402.

996-20 See also 128Me201, 146A692.

997-34 90CalA563, 266P353; SD 227NW438 (held no forcible ejectment to justify triple damages). [b] Under California Forestry Act, allowing double damages for destruction of timber by fire in certain cases, double damages are not allowed where fire was started by oil burning engine. 23F(2d)936.

998-35½-New. In general the law does not permit the awarding of double damages. 199Iowa974, 203NW287.

998-37 [b] 99CalA303, 278P448; Tex CivA 23SW(2d)527.

998-38 31F(2d)38; 333Ill90, 164NE224; Mo 24SW(2d)1017.

998-39 TexCivA 13SW(2d)997; Tex CivA 24SW(2d)1108. [a] (4) TexCivA 26SW(2d)451. (5) Action to recover damages based on nullity of foreclosure proceedings. 33PortoRico959. [b] (1) 133Misc494, 232NYS554; 39OklACR70; Tex CivA 293SW224; TexCivA 295SW305; TexCivA 4SW(2d)1003; TexCivA 19SW(2d)151. (3) Specific rules for measurement of damages need not be pleaded. TexCivA 21SW(2d)547.

999-41 83CalA566, 257P199.

999-44 118Or127, 246P211 (amount required by statute to be stated); Or291P380.

999-46 TexCivA 297SW676.

999-47½-New. Mitigation need not be pleaded as it is matter of defense. Tex CivA 278SW939.

999-47½-New. Where payment of a certain sum of money is alleged to have been wrongfully made, the amount of damages necessarily appears from a statement of the facts thus set forth. 78CalA362, 248P947.

999-48 TexCivA 4SW(2d)165.

999-52 29OhA399, 163NE310; 128Or582, 275P600; TexCivA 284SW261. See also TexCivA 4SW(2d)165. But see 13PaDist&Co476. [a] (2) In action for damages to property caused by negligence value of each item destroyed need not be alleged if injuries and damages are substantially shown. 13PaDist&Co329. [b] Complaint must allege damages in definite amount.-74CalA254, 240P298. [c] Where statement alleges number of plants of each of several varieties destroyed value of each variety should be given. 13PaDist&Co329.

1000-58 11LaA314, 123S433.

1000-59 37GaA418, 140SE763; 38GaA583, 144SE324; 41GaA794, 154SE809; 21SAppDiv653, 219NYS112; 220AppDiv178, 220NYS623; TexCivA 281SW1087.

1000-59½-New. Pleading need not plead rule for measure of damages. Tex CivA 293SW593.

1000-62 193Wis164, 213NW464, 467 [citCJ].

1000-63 25OhA197, 158NE282.

1001-71 177Ark907, 9SW(2d)318; 81CalA423, 254P289; 104Conn508, 133A686; 42Ida688, 247P791; 232IllA493; 39OklACR90; 128Or582, 275P600; TexCivA 21SW(2d)547; TexCivA 30SW(2d)110S; Utah 265P745.

1002-72 102CalA677, 283P871; 104Conn508, 133A686; 91Fla109, 107S336; 96Fla151, 117S853; 128Me393, 148A147, 68ALR481; 49Nev80, 237P377; 125Okl144, 256P903; 128Or582, 275P600. [b] Utah 265P745 (proof of enhanced value of land because adaptable for sheep raising).

1002-73 125Okl144, 256P903.

1002-78 21F(2d)836; Ariz 288P1029; 202Cal359, 260P869; 81CalA624, 254P615; CalA 292P132; 104Conn508, 133A686; 109Conn693, 145A573; 3Del206, 134A56; 91Fla109, 107S336; 42Ida408, 245P933; 214Ky189, 282SW1087; 128Me393, 148A147, 68ALR481; 76Mont254, 246P168; 49Nev80, 237P377; 225AppDiv407, 233NYS279; 26OhA420, 160NE520, 522 [citCJ]; 39OklACR90; 130Or282, 279P279; 134SC510, 133SE444; TexCivA 4SW(2d)1003; TexCivA 10SW(2d)391; Utah 265P745; 59OntL520, [1926] 4DomLR1138.

1004-79 104Conn508, 133A686; 91Fla109, 107S336; 232Mich300, 205NW199; 106WVa224, 145SE277.

1004-82 232Mich300, 205NW199; Tex CivA 4SW(2d)1003.

1004-84 102NJL222, 130A610 [citCyc].

1004-86 214Ala597, 108S509; TexCivA 4SW(2d)1003. See also 4HawaiiFed43, 49 [citCyc]. [b] (3) Pleading special damages in blank is insufficient, and evidence thereof is inadmissible. 214Ky189, 282SW1087.

1005-91 136Misc447, 241NYS349 (loss of use of automobile).

1005-92 [c] Demand for payment need not be alleged or proved. TexCivA 6SW(2d)390.

1005-94 98CalA121, 276P404. [a] Complaint did not raise issue of liquidated damages because of failure to allege that it was difficult to fix damages or that any damages resulted. 98CalA121, 276P404.

1005-95 Contra TexCivA 6SW(2d)390.

1005-98 70CalA204, 232P1002; 98CalA53, 276P607. [a] 70CalA204, 232P1002. [b] Complaint held insufficient.-Cal 292P950.

1005-1 39GaA761, 148SE414; 206Iowa1134, 221NW802; Utah 273P298.

1006-2 95CalA228, 272P810; 29Hawaii524; 34Wyo465, 244P1002, 1004 [citCJ].

1006-3 29Hawaii524; 34Wyo465, 244P1002, 1004 [citCJ]. [b] 81Colo498, 256P8, 56ALR655; TexCivA 23SW(2d)527.

1006-6½-New. Under the Georgia statute in an action on an official bond, where the facts narrated in the petition are sufficient to authorize the inference that the wrongful acts complained of were in bad faith, it is unnecessary so to characterize them by express allegations. 36GaA817, 138SE267.

1006-8 36GaA817, 138SE267.

1007-12½-New. Under the Georgia statute no allegation of actual official bond where the petition shows that the officer acted in bad faith. 36GaA817, 138SE267.

1007-14 23F(2d)936.

1007-20 22F(2d)603; 214Ala597, 108S509; Ala 130S199; 202Cal474, 261P465; 101CalA426, 281P723; 104Conn508, 133A686; 219Ky510, 293SW1079; 149Miss692, 115S774; 120Or181, 250P628. [b] (33) Other injuries held provable. 203Cal621, 265P814. [d] (26) Symptoms of miscarriage. 214Ala597, 108S509.

1009-21 104Conn508, 133A686; 219Ky510, 293SW1079; 226AppDiv94, 234NYS377. [a] (3) 104Conn508, 133A686.

1010-22 229Ky716, 17SW(2d)1008.

1011-23 See also 150Miss697, 116S814.

1011-25 214Ala597, 108S509; 215Ala254, 110S316. [a] (2) Allegation sufficient to admit evidence of concussion of brain. TexCivA 290SW1108.

1011-28½-New. Although not specially pleaded evidence of special injuries is proper to characterize and indicate extent of injuries where no claim for special damage is based thereon. 104Conn508, 133A686.

1011-29 22F(2d)603; TexCivA 299SW301. [b] TexCivA 9SW(2d)449.

1012-30 219Ky510, 293SW1079; 149Wash631, 272P32.

1012-35 [b] (1) 124Or1, 263P886.

1012-37 107Conn23, 139A272; 128Me393, 148A147, 68ALR481. See also 86IndA324, 157NE444. [a] (2) Allegation that injuries "are of such serious and permanent nature" that plaintiff "suffered great pain and agony, and is still suffering great pain and agony" is insufficient. 135Wash689, 238P633.

1013-38 NJSup137A890. See also TexCivA 14SW(2d)307. [a] 205Iowa666, 216NW733 (allegation that injuries are permanent).

1013-45½-New. An allegation that plaintiff suffered a fracture of the skull causing insomnia and headaches and nervous shock, and that plaintiff sustained concussion of the brain, is sufficient to authorize admission of testimony of a physician that plaintiff's mental condition was not what it was before the injury. 322Mo386, 15SW(2d)335.

1014-58½-New. , and also excuses for failure to reduce damages. 73Mont407, 236P1069.

1014-60 219Ky510, 293SW1079. [b] Ala 130S199; 123Or647, 263P881; TexCivA 30SW(2d)809. [c] (1) TexCivA 4SW(2d)1003. (2) Petition, claiming damages for time lost while finding shelter from falling stone caused by blasting in excavation of highway, which failed to specify amount of time so lost or value thereof, was inadequate as basis for allowance of such special damages. 228Ky214, 14SW(2d)749.

1015-61 69Utah323, 255P172. [b] Allegations of injury and confinement are held necessarily to infer loss of time so as to admit proof. 69Utah323, 255P172.

1015-63 Okl292P335(2dcase); Sask [1929] 2DomLR321, 336 [quotCJ].

1015-69 22F(2d)603; 218Ala55, 117S634; 69Utah323, 255P172. See also 86IndA324, 157NE444. [c] 128Or582, 275P600.

1016-70 216Ala455, 113S403, 405 [quotCJ]; 168Ga259, 147SE513(2dcase); 128Or582, 275P600.

1016-71 128Or582, 275P600.

1017-78 CalA 285P905.

1017-79 [c] 80CalA689, 252P780. [d] Allegations held sufficient.-TexCivA 23SW(2d)527.

1017-80 143Ida111, 249P773.

1017-86 3Del206, 134A56; 150Miss687, 116S609, 611 [citCJ]; TexCivA 19SW(2d)144. [b] Allegations held sufficient.-TexCivA 9SW(2d)449.

1018-88 232Mich300, 205NW199.

1018-95 215Ala254, 110S136; 150Miss687, 116S609, 611 [quotCJ].

1018-97 220MoA273, 286SW153.

1019-3 TexCommnA 18SW(2d)577. But see TexCivA 293SW688.

1019-8 But see 155Miss765, 125S349.

1019-11 31F(2d)38.

1019-12½-New. A claim for loss of rents as damages caused by delay in performance of a contract for the exchange of land should be specially pleaded. 198Cal16, 243P21.

1019-13 24F(2d)206; 232Mich446, 205NW169 [citCJ]; 241Mich675, 217NW908; 5PaDist&Co639. But see TexCivA 299SW687; TexCivA 6SW(2d)425; TexCivA 7SW(2d)665.

1020-14 123Or469, 259P1064, 260P1099.

1020-25½-New. Invalidity of provision for liquidated damages must be pleaded when not apparent on the face of the complaint. 134Misc866, 236NYS486.

1020-26 But see TexCivA 28SW(2d)622. [c] In action for breach of contract to furnish employee with medical attendance, plaintiff may set forth reason why he failed to minimize damages. 73Mont407, 236P1069.

1021-27 33NM11, 261P813; 34NM509, 285P494; TexCommnA 285SW1047; TexCivA 271SW145.

1021-29 31F(2d)38; CalA 293P112 (evidence admissible). [a] (9) Allegation as to reduction of rent, certain amount less than reasonable market value of rent is not at variance with proof of inability to raise such amount as he did for other houses. TexCivA 290SW892. (10) Evidence of previous condition of knee admissible under allegation of injury due to accident. MoA 293SW1051. (11) Evidence of loss of weight held authorized. TexCivA 299SW325. (12) Allegation of various ills of heart caused by injury and medical testimony as to human heart. Mo 293SW386. (13) Proof that left knee was smaller than right and pleading that left knee had been rendered permanently crippled and deformed. MoA 293SW1051. (14) Other instances. 101CalA218, 281P681; 101CalA426, 281P723; MoA 20SW(2d)580. [f] (7) Pleadings have been held sufficient to authorize admission of evidence as to rental value of personal property. TexCivA 294SW641 (tools).

1021-30 22AlaA598, 118S230; CalA 292P950; 289Pa51, 137A104; TexCivA 282SW940; TexCivA 284SW691; TexCivA 293SW593; TexCivA 6SW(2d)202 (loss of future earnings admissible); TexCivA 18SW(2d)189; TexCivA 31SW(2d)839; Wash 290P847. [a] (4) Under general averment of loss from work, plaintiff can show time lost from classes of law school where he was student. 216Ala495, 113S531. [b] Under general

allegation of personal injuries, plaintiff may prove any specific physical injury or mental impairment which he sustained. 85CalA332, 259P470. [c] **Allegations sufficient.**–MoA 31SW(2d)260 (disfigurement). [d] **Pleadings sufficient to admit evidence.**–Mo 31SW(2d)792.

1022–31 Ala 130S557; CalA 260P337; 92Fla903, 110S536; 229Ky716, 17SW(2d)1008; 317Mo782, 297SW20; MoA 271SW851; 226AppDiv94, 234NYS377; 39OklACR90; 289P51, 137A104; TexCivA 282SW850; TexCivA 284SW691. [a] (4) Other instances. 181Ark790, 27SW(2d)985. [c] **No variance.**–Allegation that plaintiff received fractures and concussion of brain and injuries to nerves and nervous system gave notice of mental condition shown by evidence at trial. 293Pa441, 143A131. [d] **Under plea of general damages,** evidence of prior earning capacity is admissible. CalA 287P354.

1022–33 215Ala254, 110S316; 181Ark790, 27SW(2d)985; TexCivA 18SW(2d)501. [b] (1) See also 87PaSuper403. (11) Under allegation of injuries to spine evidence of sprain of sacro-iliac joint is admissible since such joint is part of spine. 35GaA804, 134SE824. (12) Under allegation of injuries to leg evidence of tenderness extending down the sciatic nerve is admissible since such nerve extends into leg. 35GaA804, 134SE824. (13) Evidence of injury to spinal processes is held admissible. 172Minn284, 214NW890. (14) Where fractured heel resulted from defendant's negligence, plaintiff may recover damages therefor, though ulcerated condition subsequently developing was due to independent cause. 289Pa51, 137A104. (15) Allegation of permanent impairment in strength, health, and earning capacity and proof of permanent impairment of vision or other injury to eye. 149Miss692, 115S774. (16) Other instances. 181Ark1145, 28SW(2d)1077; 89PaSuper160. [g] **General allegations of aches and pains all over body,** in absence of bill of exception, are sufficient to render admissible testimony of pains in any part of body from any injury. TexCivA 286SW661. [h] **Real test of admissibility** depends on construction of pleader's language rather than on rule that inclusion of certain injuries excludes all others. TexCivA 286SW661. [i] **Under allegation of shock to nervous system** evidence of injuries not specifically alleged has been held admissible even in absence of expert testimony that injuries would tend to produce such nervous condition. TexCivA 286SW661. [j] **Evidence held admissible.**–Mo 31SW(2d)50.

1022–35½–New. Under general allegation of damages from personal injury, plaintiff may prove such damages as necessarily and directly result therefrom as general damages. 104Conn508, 133A686.

1022–36 TexCivA 281SW1087.

1022–37 13LaA518, 128S666; 103WVa97, 136SE691. [a] (2) Impairment of earning capacity is recoverable as general damages when shown to result as natural and necessary consequence of injury complained of. 128Or582, 275P600. (3) Where plaintiff, suing for personal injuries, alleges that earning capacity has been impaired as result of accident, evidence of such impairment, and extent and amount of loss sustained, is admissible, without allegation as to nature of employment and amount received therein. 128Or582, 275P600.

1022–38 103WVa97, 136SE691.

1023–39½–New. Under statutes in some jurisdictions in certain classes of actions damages alleged must be proved, although not traversed. 217Ky762, 290SW684 (injuries to property).

1023–41½–New. An averment describing damages to an automobile does not require proof of damage to each specific part thereof. 21OhA6, 152NE780.

1023–41¼–New. It is not error to exclude evidence offered by defendant that he paid plaintiff's medical bills prior to the suit where plaintiff's claim for damages did not specifically declare therefor. 155Miss104, 124S866.

1023–43 21OhA6, 152NE780. [a] (4) Erroneously alleging market value as measure of damages will not prevent court from applying proper measure of damages. TexCivA 297SW690.

1023–46 40GaA799, 151SE526 (action dismissed).

1023–47 130Or282, 279P279 (general damages provable under general allegation).

1023–48 228Ky184, 14SW(2d)768.

1023–50 [a] **Damages allowed held:** (1) Not variance between pleading and evidence. TexCivA 277SW172. (2) Not recovery of damages not pleaded. TexCivA 277SW172. (3) No recovery on cause of action not pleaded. TexCivA 277SW172.

1023–50½–New. If plaintiff suffers injury from which some pecuniary damage must result, although the extent is not provable, the court may presume the loss and award damages accordingly. Alta [1929] 1DomLR114.

1023–53 [a] **Plaintiff must show injury.**–CalA 291P659.

1023–54 7LaA424; 238Mich164, 213NW93; 289Pa51, 137A104; 85PaSuper483; 89PaSuper263; 92PaSuper129; TexCommnA 280SW762; TexCivA 6SW(2d)202. [a] **Value of domestic services** as bearing on amount of damages recoverable for personal injuries need not be proved. MoA 24SW(2d)203.

1024–55 216Ala138, 112S633, 53ALR840; 218Ala260, 118S276; 171Ark86, 284SW529, 46ALR1186; 108Conn549, 63ALR139, 143A855; 44Ida620, 258P555; Me 151A197; 263Mass228, 161NE240; 237Mich76, 211NW75; MoA 296SW243 (by substantial evidence); 229AppDiv679, 243NYS173; 117Okl224, 246P230; 285Pa299, 132A350; 289Pa51, 137A104; 85PaSuper483; TexCommnA 280SW762; TexCivA 291SW270; TexCivA 48W(2d)336; TexCivA 21SW(2d)559(2dcase) (reasonableness of amount); TexCivA 24SW(2d)1108; Va 154SE558; 144Wash543, 258P469; 148Wash583, 269P838. [a] (5) To sustain substantial verdict for nonpermanent injury, plaintiff is required to establish by satisfactory evidence permanent impairment of earning capacity. 230Ky478, 19SW(2d)1076. [b] (6) Facts which must be proved where defendant prevents performance by plaintiff of contract to install sprinkler system stated. 35GaA8, 131SE543. (7) In action to recover for refusal to permit plaintiff to perform contract, plaintiff must prove both contract price and what it would have cost him to perform. 285Pa299, 132A350. [d] **Expenses.**–263Mass228, 161NE240.

1024–56 91Fla109, 107S336; 289Pa51, 137A104.

1024–56½–New. In an action for injuries, the duty of showing affirmatively that serious injuries resulted from defendants' negligence rested on plaintiff. 10LaA50, 120S886.

1024–56¼–New. In an action for personal injuries, the burden of proof was on plaintiff to show that a later accident was the natural consequence of the earlier one. 128Me92, 145A748.

1025–57 238Mich164, 213NW93; TexCivA 292SW602.

1025–60½–New. The value of performance to plaintiff is presumed to be at least equal to the cost of defendants' performance where it would give plaintiff a chance to make profit. TexCivA 18SW(2d)256.

1025–60¼–New. It is presumed that each party to the contract seeks to give value. TexCivA 18SW(2d)256.

1025–60¼–New. Jurors may be presumed to be familiar with the value of a housewife's services. 89CalA477, 265P268.

1025–61 22F(2d)599; 219Ala324, 122S316; 206Cal445, 274P750; 39GaA490, 147SE420; 13LaA285, 127S749; 2LaA64, 71 [citCyc]; 141Miss199, 106S525; 103NJL683, 137A591; 33NM11, 261P813; 34NM509, 285P494; 254NY41, 171NE899; 196NC516, 146SE209.

1025–62 171Ark86, 284SW529, 46ALR1186; 197Cal694, 242P709; 109Conn87, 145A659; 221MoA478, 282SW97.

1026–65 134Misc866, 236NYS486.

1026–66 See TexCivA 296SW641.

1026–67½–New. The party seeking to recover liquidated damages must prove that it would be impracticable to fix the actual damages. 90CalA1, 265P828.

1026–69½–New. Where a statute declares contractual provisions for liquidated damages void except in cases where it would be impracticable or very difficult to fix the actual damages, party seeking to enforce a provision for liquidated damages must prove facts bringing the case within the exception of the statute. 70CalA204, 232P1002.

1026–69½–New. The presumption under code that the amount of liquidated damages agreed on is the figure which will adequately compensate for breach of contract may be rebutted. 98CalA121, 276P404.

1026–69¼–New. By statute, in some jurisdictions, it is presumed that a breach of an agreement to exchange real property cannot be adequately relieved by pecuniary compensation. 198Cal137, 243P866 (presumption rebuttable).

1026–69½–New. Person relying on statutory exception allowing liquidated damages only in specified cases has burden of proof. Cal 292P950.

1026–70 99Vt91, 130A758.

1026–71 213Ala346, 104S653, 39ALR1263; 228Ky635, 15SW(2d)497; 295Pa168, 145A81; 49RI498, 144A443; TexCommnA 13SW(2d)334; TexCivA 11SW(2d)358; Wash 289P44.

1026–75 33OhA488, 169NE716. [a] (3) Evidence of facts transpiring after filing suit, but before verdict, and legitimately bearing on recoverable damages, is admissible. 98Fla304, 123S785. [b] 232Ky639, 24SW(2d)295; 191NC257, 131SE653.

1027–82½–New. Evidence is admissible to show aggravation of injury. MoA 14SW(2d)506.

1027–87 [c] **Evidence of discharge of motorman causing injury** is held irrelevant on issue of damages. 214Ala15, 106S239.

1027–90 213Ala681, 105S891; 220Ala210, 124S420; 250Mich172, 229NW463; 293Pa97, 141A638; TexCivA 22SW(2d)954; 155Wash564, 285P433. [a] (16) In action for price of plastering work letter from architect referring to plaintiffs' contention as to cause of defects is admissible. TexCivA 286SW599. (17) Evidence of market value of land at date of contract and at time of breach held competent in architect's action for services. 193NC94, 136SE294. (18) In action for damages because of subcontractor's delay in furnishing material, estimates of period of delay and expenses of help needed and retained during such period are competent. 124Kan579, 261P561. (19) Evidence of rental value of bowling alleys in building is admissible in action for damages for failure to install plumbing in building within reasonable time. 263Mass220, 160NE888. [c] (8) Where defects in plastering work could be remedied without impairing building as whole, exclusion of testimony as to decreased value of building is proper. TexCivA 286SW599. [d] **Evidence in mitigation of damages.**–43F(2d)625.

1028–93 MoA 20SW(2d)968. [a] **Cost of moving rock crusher** to place where it had never been shipped has been held erroneously admitted. Utah 290P367.

1028–94 238Mich164, 213NW93.

1028–97½–New. Defendant should be permitted to prove that damages are less than the reasonable cost of defendant's performance. TexCivA 18SW(2d)256.

1028–99 Ark 31SW(2d)756; IndA 168NE701; 222Ky150, 300SW359, 58ALR1423; Me 151A199; 322Mo514, 17SW(2d)960; 189NC837, 127SE516; 288Pa377, 135A722; 100Vt414, 139A440, 56ALR1011. [d] (1) 216Ala495, 113S531; 152Md536, 137A299; Mass 168NE918. (17) Suffering and discomfort occasioned to uninjured parts by essential medical treatment. 242Mich651, 219NW632. (18) Loss of time from work. 150Wash278, 272P736. (19) Physicians' testimony that injuries could have resulted from accident, all other causes having been eliminated. MoA 298SW1037. (20) Other instances. 101CalA218, 281P681. (21) Suffering. Ala 130

8557. [e] **TexCivA** 284SW664. [f] **Doctor and hospital bills are inadmissible** to show character or nature of injuries suffered. 103Conn583, 131A432, 44ALR 785. [g] **Plaintiff's testimony as to dizziness following accident** is competent notwithstanding absence of expert testimony that dizziness might have resulted from personal injuries, where dizziness occurred at time of and immediately following accident. **Utah** 266P504.

1029-1 **Mo** 274SW726; 295Pa168, 145A 81. [e] (3) Plaintiff's testimony that her injury was such as to necessitate operation is improper. **TexCivA** 282SW 850.

1030-4 213Ala346, 104S653, 39ALR 1263.

1031-6½-New. Plaintiff may show by medical testimony that diseased condition resulted from injury. 152Md536, 137A299.

1031-7½-New. Evidence admissible to show injury to nervous system. 100Vt 414, 139A440, 56ALR1011.

1031-7½-New. Evidence of settlement by plaintiff against party jointly liable with defendant held competent in mitigation. 222AppDiv481, 226NYS673.

1031-9 216Ala495, 113S531; 97CalA311, 275P526; **TexCivA** 285SW925; **TexCivA** 298SW654; 149Wash631, 272P32. [a] (5) Proper to allow plaintiff to state age as ninety-seven. 213Ala637, 105S899 (age and condition being material). [b] (3) Other evidence held inadmissible. 317Mo 782, 297SW20.

1032-10 219Ala162, 121S543; 178Ark 199, 10SW(2d)5; 339 Ill 94, 170NE845; 253 IllA498; **MoA** 296SW1036; 288Pa 203, 135A612; **TexCivA** 290SW292; 143 Wash444, 255P666. But see 171Ark 1074, 287SW583.

1032-11 34F(2d)927; 220Ala198, 124 S739; 181Ark145, 28SW(2d)1077; 107 Conn23, 139A272; 339 Ill 94, 170NE845; 253 IllA498; 207 Iowa113, 222NW416, 62ALR1174; 214Ky310, 283SW86; 128 Me92, 145A748; **Mo** 274SW377; **MoA** 296SW1036; **MoA** 9SW(2d)644; **NJSup** 149A126; 29 OhA241, 163NE568; 288Pa 203, 135A612; 143Wash444, 255P666. [b] (3) It is not error to allow plaintiff, injured when train struck his automobile at crossing, to show nature of soil there, since gravel and dirt found in his wounds tended to show nature of injuries. **CalA** 279P474. [d] (2) Evidence of return to hospital several months after accident and treatment for diseased condition held inadmissible. 196Wis334, 220NW375. (3) Other instances. 256 IllA425.

1032-12 253 IllA498; 214Ky310, 283 SW86. [c] 51SD240, 213NW1. [e] **Evidence concerning second injury** not proximately resulting from defect in bridge is admissible to show extent of disability arising from first injury. **MoA** 18SW(2d)545.

1033-18 **NJ** 130A732.

1034-22 254 IllA362 (condition several months after accident); **MoA** 271SW851.

1034-26 178Ark199, 10SW(2d)5; 127 Or256, 270P784.

1034-27 215Ala436, 111S17.

1034-30½-New. The jury, in estimating the loss sustained by plaintiff from an injury, should be advised as to the character or standing of plaintiff in the community. 29F(2d)551.

1035-40 150Md525, 133A593.

1035-41 See also 293Pa524, 143A231.

1035-43 131 Or27, 279P635, 67ALR1.

1035-46½-New. Testimony of a physician who examined plaintiff at the time of the injury as to an examination made at a later date is admissible. **TexCivA** 281SW234.

1036-49½-New. Evidence as to present value of future damages is admissible. 8F(2d)16.

1036-51 214Ala15, 106S239; 216Ala 495, 113S531. [c] **Where evidence as to hospital care was admitted,** evidence of details thereof is held properly excluded. 214Ala15, 106S239. [d] **Plaintiff's refusal to submit to physical examination** before trial in personal injury suit is admissible in evidence. **TexCommnA** 292SW536. [e] **Evidence of refusal of plaintiff's attorney** that she submit to physical examination before trial is held properly excluded. **TexCommnA** 292SW536.

1036-54 213Ala346, 104S653, 39ALR 1263 (not admissible in mitigation or defense).

1036-58½-New. Testimony for the purpose of showing that the method of treatment of the injured person was improper has been held inadmissible. 242 IllA93.

1036-63 237Mich612, 213NW128; **Tex CivA** 278SW881. [a] (6) That plaintiff was married is inadmissible. **TexCivA** 278SW881.

1037-65 30Ariz491, 249P66.

1037-67 237Mich612, 213NW128.

1037-73 **Admissibility of evidence to show financial circumstances of defendant** see supra § 166.

1037-74 148SC161, 145SE790. But see 6LaA137.

1037-76½-New. In an action for damages for personal injuries against the administrator of the estate of a deceased person whose negligence caused the injury testimony as to the amount of the estate is inadmissible. 119Kan 404, 239P750.

1037-79 **Ala** 128S233; 87**Colo** 369, 287 P866; 35GaA292, 133SE63 (plaintiff's lack of education or profession); 40 GaA188, 149SE85 (evidence of wife's injury admissible to show diminution of her earning capacity); **Mass** 167NE 661; 239Mich485, 214NW402; **Mich** 233NW365; **NJSup** 149A526 (holding evidence of loss of profits admissible); 293Pa45, 141A631; 92PaSuper105; **Tex CivA** 298SW654 (education of person injured); **TexCivA** 6SW(2d)432; 38 Wyo 151, 265P446. [b] (1) **CalA** 279P 474. (4) Other evidence held admissible. 207 Iowa895, 223NW745; **Mo** 17SW(2d)337; 105NJL218, 143A380. [c] (4) Other evidence held inadmissible. 29 OhA241, 163NE568; 127 Or406, 271P733, 62ALR574. (5) Evidence of employer's policy in hiring injured employees. 16F(2d)240.

1038-80 108Conn549, 143A855, 63ALR 139.

1038-82 216Ala495, 113S531; 219Ala 101, 120S914; 189NC602, 127SE677; **TexCivA** 293SW584. [a] (2) **Expenses** incurred by married woman suing for injuries, for services contracted in her own right. **CalA** 291P269. [b] (2) In personal injury suit, court erred in admitting bills handed plaintiff by bookkeeper of surgeon who attended him, without evidence of reasonable value of service rendered. 245Mich425, 222NW 774. [c] **Though no testimony is contemporaneously offered to show that charges were reasonable,** plaintiff is held properly allowed to testify to amount of medical charges. 216Ala138, 112S633, 53ALR840.

1038-83 **CalA** 290P597 (competent to show seriousness of injuries).

1038-84 [a] **To whom bill rendered.**-103Conn583, 131A432, 44ALR785.

1038-85 216Ala495, 113S531; 103Conn 583, 131A432, 44ALR785; 224Ky460, 6SW(2d)454.

1038-85½-New. Evidence that plaintiff's wife was compelled to go to work to pay bills contracted because of injury is held improperly admitted. 105 Conn625, 136A687.

1038-86½-New. **Loss of wife's services.** In a suit to recover for personal injuries and for loss of wife's services, testimony of both plaintiff and his wife as to the wife's injuries is admissible on the question of such loss of services. 40GaA188, 149SE85 (evidence of expenses incurred for labor to take wife's place admissible to show value of wife's services but not as additional element of damage).

1038-87 **Ala** 112S443; 223Ky321, 25 SW(2d)722 (showing damage to automobile in suit for loss of wife's services); 244Mich208, 221NW314; **Tex CivA** 276SW746. [c] (1) **NJ** 138A519. [d] (1) 106Conn254, 138A136.

1039-93 **Tex** 297SW524, 529, 530 [quot Cyc&CJ].

1039-95½-New. Evidence of reasonable value of repairs after injury is admissible. 117 Or319, 244P79, 44ALR 1397 (automobile).

1039-95¼-New. Although the difference in value before and after the injury is the proper measure of damages to an automobile, cost of repairs is evidential and properly admitted. **NJSup** 133A79.

1039-95¼-New. It is not necessary for the owner of a damaged car to give evidence of payment of repair bills before recovery can be had. **NJSup** 133A79.

1039-97 37F(2d)180; 213Ala15, 104S 222; 213Ala78, 104S250; 33GaA778, 127SE821; 215Ky77, 284SW405, 47 ALR483; 151Md664, 135A835; 47RI 44, 129A605; **TexCivA** 278SW950. But see 136Misc447, 241NYS349. [d] (1) **MoA** 32SW(2d)296. (11) Testimony of salesman who appraised car before accident and his offer for car after accident held admissible to show value of car. **NJSup** 130A205. (12) Expert testimony as to possibility of restoring car to formerly good condition. 213Ala 232, 104S406. (13) To show value of building. **TexCivA** 286SW919. (14) To show value of house destroyed by fire. 215Ky77, 284SW405, 47ALR483. [e] (10) Testimony as to what house would cost when burned held inadmissible on question of fair and reasonable value of house. 215Ky77, 284SW405, 47ALR483. [g] **Wide latitude allowed to prove actual value in absence of market value.**-**TexCivA** 278SW950. [h] **To permit evidence of actual value, lack of market value must be shown.**-**TexCivA** 278SW950. [i] **Evidence of cost inadmissible** in absence of proof of no market value. **TexCivA** 278SW950.

1040-98 213Ala214, 104S505 (difference in value before and after may be shown by reasonable cost of restoring automobile); **MoA** 293SW483; 192NC 647, 135SE791; **TexCivA** 275SW218 (damage from spread of grass seed); **TexCivA** 25SW(2d)907(2dcase).

1040-98½-New. Charge that depreciation in market value, and not worth to plaintiff, is test properly states rule. 192NC647, 135SE791.

1040-3½-New. But evidence what plaintiff paid for land on which injured trees and crops were growing is inadmissible where damages not assessed on injury to land. 219MoA657, 284SW510.

1040-3½-New. In an action for an injury merely to rental value of property, and not the property itself, occasioned by deposit of débris following washout, evidence of the value of the property before and after the damage is incompetent since the evidence should be confined to the cost of replacement and repairs. 214Ky361, 283SW113.

1040-4 213Ala15, 104S222; 178Ark732, 14SW(2d)230. [a] (5) Evidence as to effect on market value of fox hounds of rabbit hunting in daytime held properly admitted. 213Ala15, 104S222.

1041-14 213Ala232, 104S406; **MoA** 293 SW432.

1042-28 27F(2d)32; 30F(2d)580 [certiorari den 279US860, 49SCt418, 73L ed 1000(5thcase)]; 178Ark732, 14SW(2d) 230; 179Ark812, 18SW(2d)340; 181 Ark1147, 29SW(2d)674; 203Cal 724, 265P933; 204Cal 2, 266P290; 204Cal 415, 268P644; 93CalA775, 270P382; 87 CalA758, 262P764; 88CalA405, 263P 573; 88CalA481, 263P826; **CalA** 266P 312; 95CalA566, 272P1092; **CalA** 275P 951; 108Conn738, 143A845; 38GaA637, 144SES10; 39GaA282, 146SE770; **Iowa** 231NW383; 227Ky676, 138SW(2d)1021; 228Ky184, 14SW(2d)768; 10LaA50, 120 S886; 7LaA608; **LaA** 130S843 (reconventional demand); **Me** 151A197; 175 Minn236, 220NW946; 176Minn402, 223 NW456(2dcase); 152Miss897, 120S198; 221MoA448, 282SW459; **MoA** 296SW 243; **NJSup** 145A319; **NJ** 143A817; **NJ** 143A818; 225AppDiv23, 232NYS63; 92PaSuper458; **TexCivA** 8SW(2d)957; **TexCivA** 18SW(2d)189; **Utah** 290P169; **Vt** 151A568; 151Va706, 144SE635; 155 Wash564, 285P433. [a] (1) 89PaSuper 334; **TexCivA** 23SW(2d)739. (4) **NJ Sup** 147A579. (7) 242Mich9, 217NW 792. (28) 172Minn377, 215NW865; 141 Wash190, 251P123. (35) 71CalA671, 236P200. (40) To justify finding for damages for loss of time from being struck by automobile. 69CalA779, 232 P178. (41) To justify finding as to damages caused in plaintiff's destruction of defendant's building. 119Kan 534, 240P960. (42) Time consumed in

making repairs to automobile. 70CalA 300, 233P345. (43) To sustain finding as to reasonable time for repairing automobile. 70CalA300, 233P345. (44) To show damages to principal in broker's action for compensation. 70CalA 415, 233P366. (45) To sustain finding as to value of paper stock wrongfully taken. 136Wash628, 241P2. (46) To show that buyer of defendant's bakery was damaged one hundred and fifty dollars by defendant's engaging in bakery business in violation of agreement. 174Ark1179, 298SW882. (47) To sustain finding that deformity and humiliation resulted from loss of eye. 242 Mich217, 218NW803. (48) To show no damage to plaintiff. 102CalA345, 283P 115. (49) That organic impairment of previously healthy man was caused by injury. 230Ky108, 18SW(2d)958. (50) To justify amount of damages awarded for breach of contract for hauling road-building materials. 179Ark963, 19SW (2d)1107. (51) To support judgment as to permanent injuries and amount of future necessary expense for operation. CalA 279P474. (52) To show plaintiff's permanent partial disability and impairment. TexCivA 19SW(2d)77. (53) To sustain finding that there was no willfulness or malice of theater manager in excluding plaintiff from participating in moving picture contest, from which mental suffering was claimed to have resulted. 152Wash626, 279P112. (54) To warrant recovery of some damages for breach of contract not to engage in designated business. 180Minn 95, 230NW268. (55) To show nervousness of child was caused by failure of defendant to have fire escapes whereby child inhaled smoke during fire. Oh 170NE869. (56) To sustain finding that disability was caused by injury. Minn 231NW710. (57) To warrant recovery of profits. Va 153SE676. (58) Other evidence held sufficient. 170Ark 931, 282SW14; 171Ark750, 285SW379; 84 IndA243, 149NE454; 216Ky407, 287 SW926; 219Ky290, 292SW829; 162La 885, 111S269; LaA 129S565; Me 150A 538(1stcase); MoA 277SW581; NJSup 136A413; 192NC287, 134SE855; 284Pa 397, 131A250; 293Pa45, 141A631; RI 137A467; 136SC506, 134SE503; Tex CivA 281SW1087; TexCivA 290SW292; 136Wash628, 241P2; 141Wash534, 252 P98. (59) To support conclusion that injuries were permanent. NM 290P 793. (60) As basis for estimating damages for future pain and suffering. Tex CivA 30SW(2d)1108. (61) To warrant dumages for faulty construction by contractor. CalA 290P633. (62) To show expenses incurred on seller's breach. 137Misc888, 244NYS82. (63) To show future damages. Mich 233NW373 (mortality tables unnecessary). [b] (1) 214 Ala104, 106S593, 46ALR1459. (14) 85 PaSuper483. (40) To show value and cost of materials and labor necessary to performance of contract to install sprinkler system where performance prevented by defendant. 35Ga8, 131SE 543. (41) To show amount of damages from breach. 209Ky112, 272SW411. (42) To sustain judgment for injury to automobile. 36 OklACR515. (43) To show liability for charges of physician. NJSup 139A238. (44) To show damages to extent of $15,000 for flat feet. 173Minn239, 217NW128. (45) To sustain finding that shock of accident caused tubercular condition. 11LaA 678, 123S841. (46) To show expenses incurred. 179Ark963, 19SW(2d)1107. (47) To sustain amount allowed for doctors' bills and medicines. 130Kan 336, 286P236. (48) To show injury was direct cause of suffering following miscarriage. 233Ky464, 26SW(2d)20. (49) To support finding that plaintiff was not entitled to damages for falling over lumber in defendant's place of business. TexCivA 26SW(2d)298. (50) To show damages. 248Mich85, 226NW 883; TexCivA 28SW(2d)899. (51) To warrant recovery of profits. 40F(2d) 873. (52) To show market value of hogs. 208 Iowa382, 226NW178. (53) Other evidence held insufficient. 20 F(2d)14; 214Ala314, 107S858; 198Cal 71, 243P420; 103Conn583, 131A432, 44 ALR785; 217Ky329, 289SW292; 164 La1003, 115S62; NJSup 137A559; Tex CivA 291SW270. (54) Other instances. LaA 130S137. (55) To warrant damages for contractor's failure to properly locate building. CalA 290P633. (56) To show probability of future injuries. Mass 173NE436. [d] 205 Iowa666, 216 NW733 (in order to authorize recovery for future pain and suffering). [f] **Damages held within evidence.**–211Ky 158, 277SW313. [m] **Failure of defendant to prove** that plaintiff could have lessened damages justifies finding that damages could not by reasonable care have been lessened. 197Cal694, 242P 709. [n] **Verdict for permanent injuries** must be based upon positive and satisfactory evidence. 211Ky830, 278SW 143. [o] **Defendant's testimony as to securing cheapest possible attendant for** injuries is held proof of reasonableness of charges of doctor. 216Ala495, 113S 531. [p] **Evidence as to reasonable cost of repairs to damaged automobile** makes prima facie case. 90CalA384, 265P955. [q] **Evidence held not too speculative** to warrant finding as to what legless cripple's average weekly earnings amounted to, so as to fix his loss. Mass 167NE661.

1042-29 170La783, 129S202 (owner not entitled to cost which is not disclosed in separate items of bill); LaA 130S843.

1042-30½-New. Mental suffering may be inferred from wrongful acts having such natural or reasonable effect within relation of parties. 213Ala522, 105S 874.

1042-31 85PaSuper483; TexCivA 273 SW611.

1042-31½-New. Plaintiff's testimony as to injuries which are occult and latent and not visible to the professional eye must be accepted with caution. 6 LaA30.

1042-31⅓-New. Where injuries are of such character as to require skilled and professional men to determine the cause and extent thereof, testimony of such persons is necessary. 137 Okl133, 278P 334.

1042-31½-New. The payment of a charge for medical services is prima facie proof of the reasonableness of the charge. 85CalA332, 259P470.

1042-31⅚-New. The payment of charge for medical services is prima facie proof of reasonableness of charge. 319 Ill 344, 150NE276.

1042-31⅙-New. In assessing damages the jury is not limited to some specific amount named by the witnesses, when there are other facts and circumstances bearing on the issue. TexCivA 285SW 338.

1042-31⅞-New. Speculative value of rights of plaintiff furnishes no basis for damages. 36Wyo 166, 253P862.

1042-31⅛-New. Where plaintiff's evidence is such as to warrant adoption of inconsistent inferences, as to defendant's liability, he fails to sustain burden of proof. 289Pa51, 137A104.

1042-32 [a] 129 Okl75, 263P105; Or 291P1009; BC [1920] 4DomLR151. [b] 71CalA671, 236P200; 142Miss622, 107 S761; 154Miss691, 123S861; 125 Okl 202, 257P298. [c] **Evidence held sufficient to go to jury.**–156SC158, 153SE 119.

1042-33 [b] **Evidence insufficient** to warrant punitive damages. 101WVa 268, 132SE739.

1042-43 216Ala393, 113S397; 142Miss 825, 108S142; 103WVa561, 138SE313. [a] **Assessment cannot be ordered except under a judgment** given either prior or contemporaneously with assessment. Alta [1930] 3DomLR210.

1043-56 [a] **General rules of procedure govern** in absence of statute. 252NY 347, 169NE605. [b] **Where amount fixed by court** assessment by court does not involve discretion. 252NY347, 169 NE605.

1043-58 216Ala393, 113S397.

1043-67 180Ark154, 20SW(2d)610.

1043-68½-New. Damages allowed under Federal Employers' Liability Act cannot be fixed arbitrarily by court. 125Me347, 133A911.

1044-79 156SC203, 152SE878.

1044-84 98Fla497, 124S19; 156SC203, 152SE878. [b] **In Alberta.**–[1930] 3 DomLR210.

1044-85 93Fla1128, 1148425.

1045-88 But see 213Ala223, 104S402.

1046-16 But see 98Fla970, 124S729.

1047-19 98Fla970, 124S729; 248 IlA 396.

1047-20 252NY347, 169NE605. [e] **In Rhode Island.**–47RI 85, 129A813.

1047-27 [a] **Postponement of assessment** may not be had by defendant on ground of absence of codefendants who left jurisdiction after judgment was signed. 62 OntL370, [1928] 3DomLR 481.

1048-45 142Miss825, 108S142.

1048-54½-New. Assessment of damage by court instead of under writ of inquiry cannot be complained of on appeal by defendant in error against whom a judgment by nil dicit has been taken. TexCommnA 284SW210.

1048-54⅔-New. Under statutes in some jurisdictions in action of assumpsit on open account, filing of an affidavit with the declaration does not dispense with the necessity of an order for inquiry. WVa 130SE143.

1048-56 98Fla970, 124S729.

1048-57 191NC224, 131SE584.

1049-59 252NY347, 169NE605; Alta [1930] 3DomLR210.

1049-62 Alta [1930] 3DomLR210.

1049-75 252NY347, 169NE605.

1050-84 OklCr 292P379.

1051-97 NJ 132A513.

1052-6½-New. Where defendant before execution of writ of inquiry files an affidavit denying that he owes any part of the debt sued on, he is entitled to have a default judgment as to him set aside. 103WVa561, 138SE313.

1052-7 103Conn267, 130A571; 152Md 39, 136A30, 51ALR177; 129Misc415, 220NYS632; 195NC777, 143SE865.

1053-8 28F(2d)788.

1053-12 103Conn267, 130A571; Nebr 231NW809 (on application during trial). [d] 168Ark330, 270SW956; 129 Or210, 277P99.

1054-14 34F(2d)829; 129Misc415, 220 NYS632; 227AppDiv794, 237NYS197.

1055-23½-New. Where plaintiff was examined by defendant's doctor prior to the beginning of the action, no examination was had "in the action," as provided by statute, and hence defendant did not waive the statutory remedy. 226AppDiv691, 233NYS476.

1055-24 223AppDiv200, 228NYS183.

1055-27 68CalA494, 229P885 (where defendant refused to give bond to indemnify plaintiff against injuries from such examination).

1055-27½-New. Whether plaintiff may be required to submit to an X-ray examination is for the court to determine. 195NC777, 143SE865.

1055-28 [e] **Refusal to permit second examination** held justified. 155Wash60, 283P444(1stcase).

1056-32 190NC449, 130SE171 (ill-feeling between physicians selected, not sufficient ground to deny plaintiff's right to examination); TexCivA 118SW (2d)556. [a] (4) Court has discretion to allow examination of injured member under reasonable restrictions in presence of jury. 190NC449, 130SE171.

1056-37 152Md39, 136A30, 51ALR177.

1056-41½-New. Refusal to submit to examination by defendants' physician warrants the exclusion of testimony by plaintiff's physician. 11LaA187, 123S 166(2dcase).

1056-42 [b] (2) Other instances. Mass 169NE797. [d] **X-ray examination.**–195NC777, 143SE865.

1057-44 145Wash390, 260P255.

1057-47 154Wash330, 282P213 (permitting plaintiff to appoint one physician of three held not error).

1057-51½-New. Permitting physical examination by doctor in presence of jury held error. MoA 30SW(2d)641.

1057-55 125 Or587, 267P812, 58ALR 1556; TexCivA 295SW305; 197Wis382, 222NW320.

1057-56 17F(2d)628; 216Ala160, 112S 763; 216Ala455, 113S403; 216Ala479, 113S507; 216Ala684, 114S139; Ala 128 S145; 21AlaA545, 109S895; 169Ark825, 277SW337 (award for pain and suffering); 172Ark262, 287SW766; Ark 298

SW2; 175Ark274, 299SW11; 95CalA 566, 272P1092; 100CalA503, 280P394 (2dcase); 100CalA545, 280P557; 35GaA 511, 133SE878 (nonsuit on theory damages sought to be proved were speculative held error); 37GaA329, 140SE430; GaA 155SE500; 234 IllA234; 207 Iowa 495, 223NW178; 208 Iowa275, 225NW 406; Iowa 232NW421; 218Ky32, 290 SW1070; 235Ky60, 29SW(2d)632(2d case); 222Ky531, 1SW(2d)972, 170La 432, 128S35(4thcase); 153Md680, 139A 557; 239Mich485, 214NW402; Mich 233 NW354; 171Minn321, 214NW52; Mo 271SW500; 317Mo1255, 298SW69; Mo 2SW(2d)785, 790 [citCJ]; 220MoA720, 293SW468; MoA 16SW(2d)649; MoA 22SW(2d)884; MoA 22SW(2d)887; 104 NJL357, 140A427; NJSup 146A683(1st case) (evidence held sufficient to preclude nonsuit); NJSup 147A387; 20 OhA486, 152NE197; 22 OhA520, 155NE 151; 116 Okl 126, 242P151 (question of future pain and suffering); 124 Okl 196, 255P710; 129 Okl 70, 263P1091; 36 OklACR515; 125 Or587, 267P812, 58 ALR1556; 130 Or282, 279P279; 299Pa 79, 149A104; 89PaSuper461; RI 150A 259; TexCivA 19SW(2d)77; TexCivA 25SW(2d)276; TexCivA 25SW(2d)678; TexCivA 27SW(2d)357; TexCivA 295 SW633; TexCivA 18W(2d)353; Tex CivA 38W(2d)535 (future physical and mental suffering); 135Wash99, 237P14; 105WVa309, 143SE86; 186Wis574, 203 NW362 (in action for personal injuries); Can [1927]AC167, [1926] 4 DomLR110, [1926] 3WestWkly81. [a] (3) Question of value of plaintiff's automobile immediately before collision with defendant's automobile held for jury. 97CalA377, 275P840. (4) Evidence held to justify submission to jury of question as to her earning capacity and degree to which it might be lessened by injuries, such matters being presumably within jury's knowledge or observation as persons of ordinary intelligence and experience. 97CalA377, 275P840. [c] (1) See also 221MoA1231, 300SW531. (2) On question of plaintiff's longevity. 242Mich217, 218NW 803. [f] **Question is for jury in first instance**, and for court in second instance, on motion for new trial. **Tex CivA** 13SW(2d)481. [g] **Damages are largely within court's discretion** in action tried to court. 111Conn722, 150A 64.

1058–57 216Ala684, 114S139; 219Ala 291, 122S173; 218Ky32, 290SW1070; 227Ky423, 13SW(2d)254; 126Me261, 137A773. [a] 219AppDiv261, 219NYS 709.

1058–58 145Wash691, 261P642.

1058–60 30F(2d)296 (wide latitude must be allowed jury); 216Ala684, 114S 139; Ala 129S6 (punitive damages); 16SArk1167, 273SW381; 37GaA329, 140 SE430; 242Mich163, 218NW677 (pain and suffering); 251Mich628, 232NW 194; 221AppDiv164, 223NYS1; 55ND 353, 213NW841; 142SC125, 140SE443 (punitive damages); 196Wis25, 219NW 373; BC [1930] 4DomLR73.

1058–60½–New. Where the amount of property destroyed or the extent of the injury is shown, the case is made for the jury, although damage is not shown in dollars and cents. 145Miss399, 110S 782.

1059–61 216Ala684, 114S139; 215Ky 283, 284SW1068; Mich 233NW378; 127 Okl 106, 260P260; 115 Or536, 239P825; 134Wash647, 236P290; 36Wyo166, 253 P862. [c] **Evidence held sufficient to go to jury.**–230Mich462, 202NW945.

1059–61½–New. Where evidence warrants, issue of permanent injury should go to jury. 211Ky774, 278SW116.

1059–62 39F(2d)869; 174Ark1180, 297 SW1020; 208 Iowa1157, 225NW346; Mass 165NE122; Mass 166NE713; 320 Mo 371, 8SW(2d)11 (evidence held sufficient to go to jury); NJSup 144A318; SD 22SNW409; TexCivA 275SW505 (which of two causes); TexCivA 299SW 301 (mental suffering); TexCivA 31SW (2d)839; 144Wash291, 257P840. See also 134SC462, 133SE99, 45ALR1112. [a] (3) Whether tenant was damaged by landlord's breach of covenant. 48Kl 448, 38A177.

1059–63 216Ala684, 114S139; 170Ark 815, 281SW374; Ark 30SW(2d)840(2d case); 207 Iowa574, 223NW365(2dcase) (serious injury); 208 Iowa1157, 225NW 346; 208 Iowa275, 225NW406; 228Ky 134, 14SW(2d)379; 157Md528, 146A 851; Md 148A453; 234Mich307, 207NW 822; 242Mich217, 218NW803; 155Miss 765, 125S340; Mo 271SW500; Mo 287 SW434; MoA 15SW(2d)917; MoA 6SW (2d)993; MoA 6SW(2d)1017; MoA 273 SW128; MoA 277SW578; 58ND263, 225 NW459; 22 OhA475, 154NE61; 28 OhA 183, 162NE614; 120 Or181, 250P628; 127 Or246, 271P730. [a] (5) Whether plaintiff would ever recover from injuries received in railroad collision. 284 Pa59, 130A398. [c] **In action by property owner for another property owner's unlawful interference** with his use of his land, issue of permanent damages may be submitted only by plaintiff's consent, though different rule prevails as to right to take private property for public purposes. 196NC383, 145SE774. [d] **Evidence held insufficient to take case to jury.**–205 Iowa365, 218NW31.

1059–63½–New. In a personal injury case whether there was necessity for an operation on plaintiff is for the jury. TexCivA 282SW850.

1059–63¼–New. In the absence of evidence showing expense of cultivation issue of value of crop destroyed is held erroneously submitted. TexCivA 288 SW554.

1059–63¼–New. In an action for injuries sustained in a collision of automobiles at a street intersection evidence that defendant was driving at a speed of forty miles per hour warrants the submission of the question of punitive damages to the jury. 149Miss56, 115S117.

1059–64 41F(2d)542; 173Ark729, 293 SW9; 107Conn201, 139A782; 45 Ida 175, 260P1092; 215Ky283, 284SW1068; Mo 151A197; Mo 280SW412; Mo 282 SW38; MoA 279SW212; 219MoA590, 282SW141; 220MoA720, 293SW468; 115 Nebr506, 213NW826; 105NJL602, 147A 402; 225AppDiv454, 233NYS461; 55ND 353, 213NW841; 295Pa342, 145A293; RI 148A901; TexCivA 284SW683; Tex CivA 290SW892; Wash 291P344; 195 Wis341, 218NW188; 197Wis83, 221NW 392. [a] (1) Mo 31SW(2d)21. [b] (6) Whether internal injuries resulted from fall into post hole. MoA 298SW134. (7) Conflicting evidence as to whether injury was caused by being caught and rolled between car top and lumber. MoA 293 SW84. [c] **In determining proximate cause** speculation cannot be indulged in. 233Ky325, 28SW(2d)736.

1060–65 MoA 22SW(2d)876; TexCivA 284SW664.

1060–67 339 Ill 94, 170NE845; 253 IllA498; 265Mass423, 164NE487; 109 Okl 141, 144, 234P607 [citCyc]; 288Pa 377, 135A722.

1060–68 172Ark262, 287SW766; 224 Ky192, 5SW(2d)1058; 224Ky385, 28SW (2d)465; NJSup 144A318; RI 150A 259; TexCivA 288SW72. [a] (2) See also 208 Iowa873, 224NW36. (4) Whether plaintiff buying material for replacement knew or by reasonable diligence should have known of certain firm's selling such material at less price than paid by plaintiff is question of fact for jury. 233Mich298, 206NW331.

1060–70 35GaA8, 131SE543. [a] **Issue involving amount** of interest as matter of law need not go to jury. TexCivA 32 SW(2d)255(1stcase).

1060–72 [a] **In unliquidated damages** it is in jury's discretion to allow interest. 41GaA189, 152SE141.

1061–74 225AppDiv454, 233NYS461.

1061–77½–New. Whether the fixing of actual damages would be impracticable or extremely difficult is a question of fact to be determined in each particular case. 90CalA1, 265P828.

1061–77¼–New. Whether a stipulation is for liquidated damages or penalty is question of law for the court, where the contract is unambiguous. TexCommnA 278SW178.

1061–79 39F(2d)521 (interest); 218 Ala354, 118S644; Ark 32SW(2d)633; 103Conn390, 130A794; 109Conn730, 144 A894(1stcase); 35GaA122, 132SE393; 35GaA668, 134SE350; 206 Iowa1134, 221NW802; 220Ky454, 295SW455; 226 Ky580, 11SW(2d)409; 228Ky635, 15SW (2d)497; MoA 275SW572; NJ 144A166; 300Pa457, 150A622; 85PaSuper97; Tex CivA 292SW588; 103WVa97, 136SE691. [a] (1) 172Ark151, 287SW738; 157Miss 439, 128S327; MoA 299SW74. [b] **Instruction erroneous** in not fixing standard for determination of compensation. 208Ky488, 271SW583; 215Ky85, 284SW 409.

1061–80 82Colo 51, 256P1088; Okl 293 P250; 85PaSuper97; TexCivA 298SW 631. [a] 16F(2d)246; CalA 286P456; 82Colo 51, 256P1088; 315Mo 318, 286 SW106; Mo 26SW(2d)957; 192NC522, 135SE522 (damages for loss of leg); 155 SC356, 152SE646; TexCivA 4SW(2d) 165; WVa 154SE769. [b] 40F(2d) 488; 181Ark818, 28SW(2d)68; NJSup 146A671; 85PaSuper97; TexCivA 293 SW901. [h] **Possible issue, not actually in case.**–135Wash689, 238P633. [i] **Present worth of future earnings.**–85 PaSuper97. [j] **Elements of damage should be submitted to jury upon separate issues** where pleadings and evidence warrant submission. TexCivA 16 SW(2d)855.

1062–81 228Ky296, 14SW(2d)1059; 128 Me409, 148A146; 294Pa518, 144A529, 63ALR297; 103WVa97, 136SE691. [a] 36GaA149, 136SE319; 121Kan18, 245P 1041; Utah 282P1026. [c] (1) 224Ky 367, 6SW(2d)453. (5) As to measure of damages. 88 IndA685, 148NE430. (6) Damages to property from fire of locomotive. 103WVa97, 136SE691. (7) Breach of rental contract. 132 Okl 283, 270P39. [d] **Charge defining measure of damages** unnecessary and inapplicable in case submitted on special issues. TexCivA 275SW430. [e] **In action for destruction of house by fire** jury should be instructed to find from evidence "fair and reasonable value" of house at time and place of destruction and not merely its "reasonable value" at such time. 215 Ky77, 284SW405, 47ALR483. [f] **Instructions properly refused.**–MoA 24SW (2d)243.

1062–82 77CalA481, 246P1086.

1062–84 35GaA668, 134SE350; 203 Iowa430, 212NW751; 315Mo 1136, 287 SW1031; 85PaSuper97. [a] 135Wash 689, 238P633 (where there is no evidence to support specific item going to make up demand of plaintiff). [b] 35GaA376, 133SE288; 203 Iowa430, 212NW751; 141 Miss655, 107S195; 315Mo 1136, 287SW 1031; TexCivA 5SW(2d)1010. [e] **In Pennsylvania.**–284Pa59, 130A898.

1063–85 78CalA37, 247P601; 202 Iowa 643, 210NW761; 203 Iowa430, 212NW 751; 252Mass465, 148NE123.

1063–88 CalA 290P57. [b] (1) 229Ky 284, 17SW(2d)233.

1063–89 80Mont431, 261P253. [b] (1) 214Ala314, 107S858; 80Mont431, 261P 253. (3) "Problematical" or speculative elements are held erroneously submitted. 218AppDiv222, 218NYS146.

1063–93 See also 90PaSuper300.

1064–94 Mo 18SW(2d)401(2dcase); TexCivA 29SW631.

1064–97 8F(2d)930.

1064–1 220MoA766, 276SW1038; 221 MoA558, 287SW842; 90PaSuper300; TexCivA 293SW233. [a] 36GaA513, 137 SE404; 233Ky198, 28SW(2d)373; Mo 287SW628; 141 Okl 133, 281P21 (recovery not exceeding amount demanded); TexCivA 25SW(2d)935; TexCivA 26SW (2d)340.

1064–2 82Colo 51, 256P1088; 220MoA 766, 276SW1038; MoA 17SW(2d)376. But see 21AlaA24, 104S868. [a] 204Cal 415, 268P644; 35GaA622, 134SE198; Mo 30SW(2d)1018; 220MoA273, 286SW 153; MoA 299SW74; TexCivA 293SW 835.

1064–3 142Wash240, 252P915.

1065–7 82Colo 51, 256P1088; 216Ky 374, 287SW948; 217MoA528, 269SW404 (criticizing instruction using words "in all not to exceed $5,000"); 220MoA766, 276SW1038; 221MoA881, 288SW109; 79 Mont91, 254P1070; 20 OhA12, 151NE 805 (loss of minor's earning capacity where no plea of special damage). Contra MoA 19SW(2d)522. [b] 102CalA 396, 283P336; CalA 291P611; 36GaA 605, 137SE636; Mo 19SW(2d)679.

1065–8 216Ky374, 287SW948; MoA 288 SW113.

1065–10 218Ky197, 291SW401.

1065-15 Ala 128S145; 82Colo 51, 256P 1088; Ind 166NE297; 201 Iowa897, 208 NW356; Iowa 230NW570 (where evidence showed cost of repair of personalty); 227Ky587, 13SW(2d)753; MoA 5SW(2d)649; 196NC359, 145SE684; 29 OhA241, 163NE568; TexCivA 293SW 233; TexCivA 293SW835; TexCivA 299 SW301; TexCivA 218SW(2d)559(2dcase); TexCivA 22SW(2d)492 (special issue). [a] CalA 286P1097; 82Colo 51, 256P 1088; 36GaA513, 137SE404; 210Ky92, 275SW16; MoA 273SW754; MoA 48W (2d)831; 74Mont176, 240P829; 142 Okl 89, 285P27; TexCivA 5SW(2d)839; 141 Wash504, 252P526; 145Wash597, 261 P405; 105WVa156, 141SE622.

1066-16 216Ala684, 114S139; Mo 30 SW(2d)56; MoA 27SW(2d)497; 134 Wash636, 236P276; 151Wash137, 275P 78. [a] (1) 173Ark1104, 295SW16. (4) Instruction as to effect of injury on minor's earning capacity is erroneous in absence of evidence of emancipation of minor suing by next friend. 20 OhA 12, 151NE805. [c] (1) 41GaA746, 154 SE706. (2) Evidence held to support instruction respecting injuries to health and earning capacity. Ark 32SW(2d) 422. (3) Other instances. 100CalA775, 281P95. [d] **Evidence held to require instruction** as to measure of damages by removal of pipe line. TexCivA 8SW (2d)957. [e] **Instruction authorizing recovery for loss of earnings** held proper under evidence. 321Mo 887, 13SW(2d) 648. [f] **Instructions held properly refused.**–Ala 128S139.

1066-17 35GaA59, 132SE399; 35GaA 292, 133SE63; 37GaA733, 141SE818; 203 Iowa476, 212NW682; 205 Iowa365, 218 NW31; 210Ky407, 276SW117; 213Ky 432, 281SW519; 214Ky189, 282SW1087; 221MoA858, 287SW842; 80Mont431, 261P253; NJSup 137A528; 218AppDiv 222, 218NYS146; 19 OhA421; TexCivA 273SW611. But see TexCivA 1SW(2d) 760. [b] (1) TexCivA 298SW631.

1066-18½-New. Instruction to consider all facts proved by evidence in determining amount of damages held erroneous, especially since there were two defendants. 339 Ill 276, 171NE271.

1066-19 38GaA426, 144SE213; 339 Ill 276, 171NE271 (evidence as to damages for which law allows recovery); 201 Iowa897, 208NW356; 217Ky781, 290 SW662; 233Ky309, 25SW(2d)733; 24 OhA539, 157NE765. [b] (1) 199Cal 545, 250P565; 36GaA516, 137SE407; 40GaA 383, 149SE806; 217Ky781, 290SW662; Mo 26SW(2d)957; 105WVa118, 141SE 631.

1067-20 175Minn96, 220NW429.

1067-21 201 Iowa897, 208NW356.

1067-22 170Ark576, 280SW363; 36GaA 516, 137SE407; 217Ky781, 290SW662.

1067-28 TexCivA 294SW873.

1067-29½-New. An instruction as to the rule for computing damages is not erroneous because not prefaced with the words "if you find for the plaintiff." Nebr 223NW21(2dcase).

1067-29½-New. A charge limiting recovery to injuries caused by defendant's negligence is held not erroneous. TexCivA 294SW873.

1067-30 [b] **Instruction held erroneous** as on weight of evidence. TexCivA 27SW(2d)917.

1067-31 [a] Mo 32SW(2d)602.

1067-32 Mo 280SW412; MoA 7SW(2d) 412.

1068-46 315Mo 987, 288SW777.

1069-51 MoA 23SW(2d)225; 32 OhA 451, 168NE230; RI 147A751.

1069-56 218Ala55, 117S634; NJSup 137A890; 142Va197, 128SE644.

1069-57 NJSup 137A890.

1069-59 22AlaA226, 114S285; MoA 20 SW(2d)592; NJ 147A445; 129 Or224, 277P101.

1070-64 87Colo 369, 287P866; 211Ky 774, 278SW116; 180Minn310, 230NW 826. [a] (10) Loss of earning power and physical and mental suffering, and for personal injuries. 211Ky774, 278 SW116. [c] (1) 211Ky774, 278SW116; 213Ky432, 281SW519; 231Ky713, 22 SW(2d)108; 175Minn236, 220NW946; MoA 279SW230; TexCivA 289SW413; TexCivA 26SW(2d)435. [d] (1) 15F (2d)790; Minn 232NW3; 222MoA808, 10SW(2d)338; 292Pa191, 140A897; TexCivA 9SW(2d)449.

1071-65 Mo 285SW403(2dcase). [b] (1) TexCivA 293SW584.

1071-66 TexCivA 293SW901; TexCivA 5SW(2d)1010.

1071-68 TexCivA 284SW268.

1071-70 320Mo 371, 8SW(2d)11. [b] (1) Iowa 230NW570; 157Md652, 147A 790, 65ALR1285; TexCivA 298SW631. (4) 181Ark715, 27SW(2d)524 (value before and after damage); 149Miss692, 115S774. [c] (1) 35GaA376, 133SE288; Mo 280SW412.

1072-71 [a] 96Fla186, 117S840; 219 Ky652, 294SW188.

1072-79 16F(2d)240; 202 Iowa643, 210NW761.

1073-80 TexCivA 298SW631; 135 Wash588, 238P631 (citedcase).

1073-83 97CalA720, 276P357; 84Colo 511, 272P6; 226Ky813, 11SW(2d)953; 220MoA1229, 298SW1069; MoA 24SW (2d)243; 151Wash86, 274P1050.

1073-84 [a] 30Ariz491, 249P66.

1074-86 TexCivA 1SW(2d)471, 474 [citCJ]. [a] CalA 287P354; 209Ky13, 273SW526; TexCivA 286SW536; 100 WVa49, 129SE760.

1074-89 [a] 94CalA703, 271P789.

1074-89½-New. [§ 378½] A½. **Comparative Health and Condition.** An instruction, which requests the jury in estimating plaintiff's damage to consider his health and condition before injury as compared with present condition in consequence of injury, is unobjectionable. 149Md152, 131A151.

1074-89½-New. Instruction that railroad is liable for failure properly to care for injured person thereby increasing damages sustained is not error. 86 IndA434, 157NE61.

1074-91 205 Iowa291, 217NW880; 220 Ky682, 295SW981; MoA 287SW871, 873 [citCJ]; 21 OhA444, 153NE313. [b] (1) Iowa 226NW928; NJSup 130A 225. (2) 138GaA556, 144SE506. [g] **Evidence held to require instruction** as to obligation of plaintiff to submit to operation. 285Pa561, 132A810. [h] **Failure to limit landowner's recovery** for washing of burned-over land to damages incurred before plowing is held not error where recovery was limited to direct and proximate results of fire. 222Ky531, 1SW(2d)972. [i] **Instruction held improperly refused.**–CalA 288P 805.

1074-92 Mich 233NW321 (duty to mitigate future damage). [a] **Instruction held properly refused.**–Ala 128S139.

1074-97 Md 148A453.

1075-99 22AlaA180, 114S288; 179Ark 225, 15SW(2d)391; 36GaA698, 137SE 850; MoA 31SW(2d)575; TexCivA 286 SW526; Sask [1930] 3DomLR860. But see 245Mich425, 222NW774. [a] (1) 22 AlaA180, 114S288; 30Ariz491, 249P66; 103Conn583, 131A432, 44ALR785; 36 GaA516, 137SE407; 202 Iowa643, 210 NW761; 122Kan361, 252P218; 149Md 152, 131A151; 150Md511, 133A322; Mo 280SW412; MoA 298SW134. (5) Instruction that jury may give damages for pain and suffering, if any, need not state any measure of damages or legal rule by which they may be assessed since there is no such measure or legal rule. TexCivA 286SW526. [c] **Request improperly refused.**–TexCivA 3SW(2d) 545 (physical injury necessary for recovery for mental suffering).

1075-3 [a] **Instructions held improper.**–35GaA59, 132SE399.

1075-5 180Ark366, 21SW(2d)861; 36 GaA516, 137SE407.

1075-6 40GaA814, 151SE541.

1075-8 107Conn27, 139A274. See also 150Md511, 133A322. [c] **Mental suffering from physical deformity.**–37GaA 780, 141SE922.

1075-10 214Ala597, 108S509; 118Kan 302, 235P123; 170Minn250, 212NW 413; MoA 273SW754; 221MoA1231, 300SW531; 142Wash65, 252P155; 38 Wyo 151, 265P446. [a] MoA 6SW(2d) 983. [e] **Method of computing present worth** should be explained to jury. 242 Mich217, 218NW803. [f] **Requested instruction not to consider nervous condition** resulting from accident held properly refused. Ala 128S139.

1076-11 214Ala597; 108S509; 228Ky 184, 14SW(2d)768; 219MoA590, 282 SW141; MoA 7SW(2d)417; MoA 7SW (2d)719; 142Wash65, 252P155. [b] 178Ark199, 10SW(2d)5; 36GaA513, 137 SE404. [d] (1) 214Ala597, 108S509; 179Ark631, 17SW(2d)889. (3) 218Ala 260, 118S276.

1076-12 233 IllA526. [c] **Instruction not warranted.**–Vt 146A812.

1076-13 219Ky293, 293SW151. [a] (1) 36GaA513, 137SE404; 36GaA516, 137 SE407. (5) Charge as to future injuries using words "will reasonably be expected to suffer in the future." 21 OhA322, 153NE302. [b] 151SC415, 149 SE124(1stcase).

1077-16 199Cal 545, 250P565.

1077-17 21 OhA282, 152NE757.

1077-24 NJSup 137A890; 289Pa560, 137A731.

1077-24½-New. Where there is no claim of damages for future pain and suffering, the court need not restrict the jury to compensation "if paid presently." TexCivA 286SW526.

1077-26 218Ala260, 118S276; 228Ky 214, 14SW(2d)749. [a] 35GaA622, 134 SE198. [c] 261Mass188, 158NE658; Mo 256SW1031. [e] **Refusal to charge not to consider lost earnings** in absence of evidence thereof is held error. 80 Mont431, 261P253.

1077-27 69Utah323, 255P172. [b] 20 OhA12, 151NE805 (alleged loss of weekly salary or compensation in definite amount).

1078-29 Mo 274SW778.

1078-30 321Mo 887, 13SW(2d)648.

1078-30½-New. An instruction authorizing the jury to compensate an injured railroad employee for destruction of his power to earn money has been erroneous as being the form of instruction given in death cases and not limiting recovery to permanent impairment of such power. 226Ky472, 11SW(2d)131.

1078-30½-New. An instruction allowing recovery for diminution of earning capacity of a minor is not misleading, even in the absence of proof of emancipation. MoA 294SW762.

1078-31½-New. Excluding consideration of bad reputation in determining extent of future earnings is not error. 169Ark698, 277SW7.

1078-31½-New. Instruction permitting recovery for loss of earnings in excess of amount shown by evidence is erroneous. Iowa 230NW570.

1078-33 MoA 278SW84; MoA 297SW 193. But see MoA 23SW(2d)193. [a] 210Ky92, 275SW16. [c] 242Mich9, 217 NW792; 221MoA1231, 300SW531; 40 Wyo 324, 277P703.

1078-34 210Ky129, 275SW380; 20 OhA 12, 151NE805. [b] (1) 210Ky92, 275 SW16. [c] 41GaA72, 151SE686; 149 Md152, 131A151; MoA 298SW1037; 124 Or534, 264P863; TexCivA 5SW(2d) 1010. [d] **Instruction held erroneous.**–233Ky198, 25SW(2d)373.

1078-35 [c] 152Md536, 137A299.

1078-36 Mo 31SW(2d)792. [a] 179 Ark631, 17SW(2d)889; 235Ky640, 32 SW(2d)18; TexCivA 23SW(2d)512. [b] 231Ky772, 22SW(2d)300; MoA 274SW 493. [d] **Reasonable probability of future ill effects** is sufficient to warrant submission of issue of permanent injuries. TexCivA 5SW(2d)1010.

1079-38 211Ky774, 278SW116. [a] (5) Instruction should confine recovery to loss of earning power. 211Ky 774, 278SW116. [b] TexCivA 274SW 263. See also 38GaA337, 144SE11. [c] 80CalA56, 251P235; 211Ky774, 278SW 116; MoA 283SW455; 285Pa561, 132A 810.

1079-41½-New. Attention of jury should be called to the decrease of earning power with age. 285Pa561, 132A 810.

1079-42 94Fla571, 113S716; 247Mich 291, 225NW569. [b] (1) NJSup 139A 898 ("compensate" held sufficient). (2) Instructions covering rule in general way. 284Pa59, 130A398. [d] **Instructions held erroneous.**–193NC775, 138SE 129.

1079-42½-New. And an instruction permitting assessment of prospective damages not reduced by computation of

present worth is error. 231Mich452, 204 NW126.

1079-42½-New. An instruction as to the duty of the jury to reduce its award of future payments to their present worth is always appropriate where such payments are to be anticipated in the verdict. 285Pa561, 132A810.

1079-42¼-New. The absence of such instruction does not necessarily constitute reversible error, particularly where the attention of the trial judge is not called to the omission. 285Pa561, 132 A810.

1079-43 178Ark199, 108SW(2d)5.

1079-44½-New. Instruction erroneous for failure to incorporate principle of present value of such future earnings. 210Ky108, 275SW262.

1079-44¾-New. Failure to give requested instruction as to present value of future losses, is held error. 102NJL 23, 125A270.

1079-44¼-New. Charge as to present value should refer to usual rate of discount if warranted by evidence. Tex CivA 298SW(2d)825.

1079-46 30Ariz491, 249P66; 223MoA 227, 258SW12; 104Ind112, 135A-2; TexCommnA 18SW(2d)602. [b] 124 Or 534, 264P263; TexCivA 18SW(2d)766.

1080-47 [a] 218Ala260, 118S276; 319 Ill 344, 150NE276; 38Wyo 151, 265P446.

1080-47½-New. An instruction authorizing recovery on basis of gratuitous service to effect cure of injuries is erroneous. 198 Ind79, 151NE385.

1080-48 216Ala128, 112S633, 52ALR 840. See also 396GaA689, 148SE291(1st case). [a] 35GaA92, 132SE259 (under Infnte).

1080-50 TexCommnA 18SW(2d)577; TexCommnA 18SW(2d)602.

1080-50½-New. An instruction that the jury may consider nursing and care on account of injuries is not erroneous because the petition prays for recovery only for nursing. 322Mo514, 17SW(2d) 966.

1080-52 209Ky112, 272SW411 (instruction held erroneous); 222Ky531, 18W (2d)972. [c] **Instructions held proper.**—114 Okl 156, 245P63. [d] **Petition to oust incumbent from office on theory that he was appointed to "office under this state"** involves title to "office under this state" so as to give supreme court jurisdiction. 316Mo 754, 291SW454. [e] **Jurisdiction determined by pleadings.**—316Mo 754, 291SW454. [f] **Instructions held correct.**—39F(2d)521.

1080-53 316Mo 674, 291SW109; 285Pa 561, 132A810. [a] (3) Instruction that mortality table, in evidence, could be used held not objectionable where court instructed that recovery must be governed by rules it had previously given. 40GaA332, 149SE582. [b] 207 Iowa295, 223NW746. [d] **Instruction held erroneous.**—124Kan492, 260P643.

1080-54 [a] 8F(2d)16; 36GaA513, 137 SE404.

1081-59 [b] **Directed judgment for treble damages on basis of jury finding of actual damage** should be given in action covered by statute permitting such damage. 215AppDiv86, 213NYS 192.

1081-59½-New. An instruction on punitive damages is erroneous where the pleadings do not warrant it. 29Hawaii 524.

1081-60 102WVa11, 135SE395.

1081-62 Mo 318SW(2d)14.

1081-66 [a] Mo 287SW634; 121 Okl 288, 249P906; 129 Okl 75, 263P105. [b] (1) 85 IndA426, 154NE329, 161WVa 263, 132SE719; 102WVa415, 135SE395.

1082-70 95CalA228, 272P810.

1082-71 [b] TexCivA 288SW(2d)844.

1082-78½-New. Jury should be admonished that defendant shall not be punished twice for same wrong. 102WVa 415, 135SE395.

1082-79½-New. and that if they consider the compensatory damages sufficiently punitive no other amount should be added thereto. 102WVa415, 135SE 395.

1082-80 204Cal 9, 266P276, 33GaA773, 127SE821; MoA 148SW(2d)529; Tex CivA 292SW284. [a] **Particular findings construed.**—TexCivA 168SW(2d)441.

1083-90½-New. It has been held that, where complaint and evidence warrant it, the jury may allow interest although it was not mentioned in instructions. 37 F(2d)455.

1083-91½-New. A verdict of no damage cannot be considered as the equivalent of a verdict for nominal damage. 207 Iowa1094, 224NW955(2case).

1083-91½-New. Plaintiff recovering for bodily inconvenience under one item could not recover for same item in another clause of special issue. TexCivA 278SW(2d)357.

1083-92 2[illegible]Pa512, 137A171.

1083-93 CalA 283P822. [a] **Where both general and special damages are alleged and items of each are specified,** special findings should be made on issues presented. 193Cal 71, 243P420.

1083-96 204Cal 9, 266P276.

1083-3 SD 227NW438 (better practice).

1083-4 121 Okl 288, 249P905, 907 [cit CJ].

1083-6 121 Okl 288, 249P905, 907 [cit CJ]. 282Pa312, 137A171.

1084-8½-New. In the absence of instructions requiring the jury to set out separately the amount of actual and exemplary damages, a verdict for a lump sum will not be reversed on appeal. 121 Okl 288, 249P905.

1084-9 72CalA232, 236P937.

1084-11 [b] **Findings should be construed in connection with pleadings and evidence.**—TexCivA 228SW(2d)753.

1084-13 TexCivA 291SW573. [a] 127 Kan34, 272P155.

1084-14 TexCivA 284SW261.

1084-18 25 OhA197, 158NE282 (court held authorized to treat apportionment as surplusage); RI 133A439.

1084-19 95PaSuper338.

1085-26½-New. The trial court has no power to consent to substitutes of lump sum for illegal award of annuities. Can [1927] AC167. [1926] 4DomLR110, [1926] 3WestWkly81.

1085-28 [b] **Remittitur held without authority of law** where it was impossible to determine how it was arrived at. 83 IndA325, 142NE486.

1085-31 43F(2d)625. But see 30F(2d) 222.

1085-32 227AppDiv597, 238NYS508; 193Wis164, 213NW464, 467 [cit CJ].

1085-34 79CalA75, 264P341; 35CalA 107, 264P776; 25 OhA197, 158NE282.

1086-36 234NY41, 171NE299.

1086-41½-New. Where time of performance of contract is regarded by parties as continuing and still existing after date of performance, damages may be recovered as of such later date, and are not confined as of original date set. 6F(2d)531.

1086-41¼-New. Where recovery is primarily a sum expressed in foreign currency in determining the amount of the judgment, rate of exchange at the time of the breach of the contract is applied. 214AppDiv279, 212NYS141.

1087-47 90CalA63, 266P353.

1087-53 CalA 235P379.

1087-56 151 (2d)240; 16F(2d)734; 75 CalA516, 243P43; 77CalA328, 246P559; 97CalA311, 275P526; 85 IndA435, 150 NE239; 85 IndA227, 150NE374; IndA 151NE22; 126Mo99, 136A254; 172Minn 362, 215NW812; 142Miss60, 114S259; MoA 148SW(2d)46; MoA 278SW(2d)52; 130 Okl 122, 265P768; 47RI 186, 131A 643; 104WVa445, 140SE141, 142 [cit CJ]. See also 316Mo1303, 295SW102. [b] **Verdict of three thousand two hundred and four dollars held under evidence not to indicate passion, prejudice, etc., and not excessive.** 215AppDiv1, 212NYS749. [c] **Verdict not indicative of bias and prejudice.**—38GaA280, 143SE905. [d] **When personal injury verdict is attributable to passion or prejudice.**—43F(2d)397.

1088-58 92Kan292, 1098597, 598 [cit CJ]. 119Kan464, 239P750 [quotCJ]; 210Ky129, 275SW330; 148Miss60, 114 S259; Mo 38SW(2d)244, 250 [quotCJ]; NJ 130A448; NJSup 130A439; 289Pa 246, 137A228; TexCivA 297SW244. See also 96Pa15, 117S703.

1088-60 121IaA191, 125S185; 127Mo 278, 143A63; Mont 285P184; 37 OklACR 409. [a] **Awards for personal injuries and injuries to property held not excessive.**—95CalA428, 273P76; NJSup 145 A472(2case); NJSup 145A276(2dcase); 151Wash154, 275P632(2dcase). [b] **Awards for personal injuries and injuries to property held proper.**—10IaA 210, 120S65. [c] **Awards for personal injuries and injuries to property held inadequate.**—10IaA486, 120S689.

1089-61 16F(2d)724; 148Miss60, 1148 259; 289Pa246, 137A228.

1089-61½-New. Reduction of the amount of the verdict, by agreement of the parties, with the approval of the court, to prevent bankruptcy of defendant, is not recognition by the court of the excessiveness of the verdict. 293 Pa441, 143A131.

1089-64 NJSup 130A537.

1090-65 [b] **Particular awards held not excessive.**—328 Ill 641, 160NE180.

1090-71 26Mont420, 261P273; 47RI 144, 131A385; 47RI 186, 131A643; 152 SC178, 149SE753.

1090-72 47RI 144, 131A385.

1090-75 235 IllA198; 126Me597, 138A 311.

1090-78 RI 133A345.

1090-81 181Ark299, 258W(2d)769.

1090-83 MoA 298SW134. [a] **Awards for medical expenses held excessive.**—10 IaA57, 120S791. [b] **Awards to husband for injuries to wife and injuries to property held not excessive.**—NJSup 145A226. [c] **Awards to husband for injuries to wife held not excessive.**—NJSup 143A271.

1091-84 85 IndA629, 155NE265.

1091-85 319Mo948, 68W(2d)587; 141 Wash293, 251P558; 142Wash474, 253P 646 (injuries keeping man out of business for three weeks). [a] (2) 16F(2d) 240. (4) Mo 8SW(2d)922. (6) 85CalA 332, 259P470; 253 IllA498; Mo 21SW (2d)873. (9) 205Cal 519, 271P1055; 77 CalA181, 246P1086; 218Ky84, 290SW 1064; Mo 271SW952; 312Mo581, 280 SW37; Mo 328W(2d)576 (36 year old boiler maker's helper earning $37.40 weekly); 31 OhA379, 166NE645; TexCivA 68W(2d)432 ($14,700 for injuries, $5 300 for loss of time and expenses to one having 34 year life expectancy). (10) $35,000. 252 IllA238; Mo 288SW 777. (11) $31,000. 242 IllA205. (12) $28,541 30F(2d)493 (able seaman). (13) $21,000. 231Mich452, 204NW126. (14) $31,168. 309Mo560, 274SW703 (earning $960 year with life expectancy of thirty-two and one-half years complete and permanent physical wreck). (15) $22,500. 245 IllA463; Mo 328W(2)288. (16) $12,500. GaA 155 SE500. [b] (3) 320Mo1011, 8SW(2d) 982. (4) Mo 281SW951; Mo 292SW732 (fracture of skull and loss of leg below knee). (6) 35GaA376, 133SE283; 213Ky197, 281SW401; 317Mo181, 296 SW155. (11) 80CalA109, 250P692; 80 CalA208, 250P1062 (direct laborer); 250 IllA222; 315Mo713, 290SW135; Mo 298SW951 (permanent injuries, loss of $4,000 in wages before trial, and mental and physical ailments); 318 Mo453, 300SW753; 321Mo378, 11 SW(2d)268; 322Mo737, 158W(2d) 775; 128 Or582, 275P600; 291Pa211, 139A878; 10PaDist&Co 799. (15) Mo 280SW45 (young man, 21). (16) $15,-254.32. 239Mich656, 215NW19. (17) $1,550. 10LaA723, 122S912. (18) $18,-750. 208Cal652, 284P443. [c] (3) 214 Ala15, 106S239; TexCivA 294SW978. (4) Mo 278SW361 (man, 33, incapacitated for work). (6) 172Minn284, 214NW 890; NJ 151A91(2dcase); 140 Okl 160, 282P322 (puncture of urethra); TexCivA 198W(2d)77 (for permanent partial disability and diminished earning capacity of lawyer, twenty-eight years old, with additional allowance, making total of $13,918). (7) 302Mo77, 271SW806 308Mo673, 274SW356; 317Mo86, 296 SW764; 193Wis137, 212NW648. (8) Mo 308SW(2d)1018. (11) 143Wash245, 255P138. (12) 9CalA428, 273P76 (injuries to plaintiff and his daughter). (15) 181Ark1145, 288SW(2d)1077; CalA 287P526 (permanent incapacity for active work); 234 IllA382; 233Mich11, 207NW856; 172Minn134, 215NW198; 149Miss56, 115S117; Mo 256SW1031; Mo 280SW42 (young man, 22); 317Mo 1255, 298SW69; 322Mo514, 17SW(2d)

960; NJ 141A167; NJSup 130A639; NM 290P793 (earning capacity reduced from $150 to $20 per month); 26 OhA 367, 159NE846; 299Pa91, 149A110 (loss of speech); Wis 229NW541. (24) $12,-230. 49ND433, 191NW477. (25) $10,-000 for permanent disability of expressman earning $2,500 per year. NJ 130A 370. (26) $12,325. TexCivA 284SW983. (27) Other instances. ND 231NW283. [d] (4) 166Minn131, 207NW188; 168 Minn287, 210NW32; 310Mo 184, 274SW 827 (concussion of brain and injuries to back, spine, neck, hips, chest, abdomen and pelvis resulting in permanent incapacity to engage in previous work requiring activity and strength). (5) 102CalA656, 283P823; 153Wash14, 279 P94 (man, earning $4.28 per day, totally lost earning capacity regardless of whether he was fifty-six or sixty-six years old). (7) 204Cal4, 266P273 (brain, rib, knee, and lung); 102CalA 477, 283P132; 38GaA280, 143SE905; 248 IllA609; 218MoA698, 268SW102; MoA 273SW221; MoA 282SW109; MoA 13SW(2d)567 (40-year-old woman); MoA 20SW(2d)556; NJ 151A77. See also MoA 282SW525. (12) MoA 22SW (2d)887; TexCivA 30SW(2d)652; 100 WVa733, 132SE746. (16) Iowa 230NW 336. (20) CalA 291P641; 247 IllA395; 171Minn47, 213NW372; 177Minn222, 225NW85; 297Pa41, 146A134 (47-year-old carpenter; award based on testimony as to progressive character of injuries). (21) 240Mich306, 215NW 422. (23) 172Ark729, 290SW942. (28) 170Ark815, 281SW374; 179Ark812, 18 SW(2d)340; 102CalA464, 283P88; CalA 284P681; 38GaA280, 143SE905; 202 Iowa285, 208NW856; 210Ky508, 276SW 133; 232Mich300, 205NW199; 235Mich 344, 209NW177; MoA 295SW818; 221 MoA181, 299SW150; MoA 18SW(2d)252; MoA 20SW(2d)584; MoA 22SW(2d)881; MoA 31SW(2d)267; NJ 143A546 (girl of 6 years); NJSup 147A400; NJSup 149A67; 134Wash231, 235P1; 141Wash 190, 251P123. (29) $4,081. 5PaDist &Co 149 (head and knee). (30) $6,225. NJSup 132A245 (for serious injuries to skull, ribs, and head). (31) $8,895. 104 Conn508, 133A686 (very serious and painful injuries to woman). (32) $9,-800. 171Minn321, 214NW52 (twenty-four bone fractures). (33) $5,675.83. MoA 273SW777. (34) $8,000, common laborer permanently disabled. 320Mo 95, 6SW(2d)617. (35) $7,915.66 held reasonable. 320Mo 672, 8SW(2d)599. (36) $5,231. 13LaA546, 128S530. (37) $7,689.32. Wis 228NW741. (38) $9,-000. CalA 291P269. [e] (5) 222MoA 1036, 7SW(2d)398; 195Wis341, 218NW 188. (6) MoA 6SW(2d)983 (boy 5½ years old). (12) Ark 31SW(2d)962; 37 GaA54, 138SE800; MoA 3SW(2d)740; MoA 31SW(2d)262; NJSup 135A76 (12-year-old boy suffering injuries to head, face, hip, and side); NJSup 137A792 (saleswoman incapacitated for two years); 228AppDiv42, 238NYS407. (14) 49Nev261, 244P897. (15) CalA 291P 597; 221MoA585, 283SW464; MoA 288 SW992; MoA 297SW180; MoA 299SW 85 (child); TexCivA 284SW617; 154 Wash261, 282P52 (personal injuries and property damage). (17) 244 IllA441. (18) 167Minn437, 209NW317. (19) 29 Ariz300, 241P35; 201Cal 560, 258P73; 69CalA779, 232P178; 77CalA328, 246P 559; 41 Ida703, 243P649; 246 IllA69; 211Ky669, 278SW100 (stone mason); 231Ky211, 21SW(2d)272; 170Minn250, 212NW413 (man earning $1,500 yearly, and who could not work 11 months due to injury); MoA 273SW128; MoA 274 SW933 (seamstress, 55, earning $3 daily); MoA 280SW79; MoA 298SW1037; MoA 7SW(2d)417 (woman); MoA 23 SW(2d)193; 80Mont492, 261P261 (woman, 76 years old, seriously injured about head and in nervous system); NJ 143A871 (woman); 135Wash99, 237P 14. (21) RI 149A584 (beaten, ear bitten half off). (23) NJ 130A468. (24) 212Ky824, 280SW146; 7LaA629; 240 Mich671, 216NW413; 221MoA537, 232 SW1037; MoA 31SW(2d)265. (25) $3,-353.33. 235Mich521, 209NW667. (26) $3,750. 97CalA311, 275P526. (27) $4,-049. 127Me316, 143A178 (woman, physician's bill of $600). (28) $2,739. 10 LaA313, 120S420(2dcase). (29) $2,760. 32 OhA451, 168NE230. [f] (6) CalA 293P112; 39GaA187, 146SE783 (tenant); 233Ky211, 25SW(2d)363 (old woman); MoA 22SW(2d)1058; 29 OhA 220, 163NE210 (broken glass in cutting mouth and lodging in stomach); 92Pa Super68. (7) 188Wis1, 205NW549; Wis 229NW541. (11) 237 IllA488; 90 PaSuper176. (16) 118Kan302, 235P 123; 218Ky59, 290SW1044; MoA 288 SW974; 222MoA138, 1SW(2d)1030; MoA 10SW(2d)348(2dcase) (woman 28 years old); MoA 20SW(2d)918; 138 Okl 53, 280P464; 92PaSuper105. (18) 170 Minn49, 212NW180. (23) 208Ky112, 270SW998. (27) 69CalA184, 230P677; 200 Iowa922, 205NW779; 12LaA598, 126S241; 7LaA559; Me 151A199; 222 MoA346, 300SW845 (possibly permanent injuries to woman); 222MoA845, 6SW(2d)63; NJSup 130A634; NJSup 132A231; 85PaSuper436; TexCivA 10 SW(2d)426 (woman); 135Wash99, 237 P14. (33) 140Miss397, 105S854; 92Pa Super586. (36) $175. 214Ala279, 107S 751. (37) $422. RI 137A780. (38) $1,-267.93. 144Wash155, 257P236. (39) $1,794. 213Ky122, 280SW494. (40) $1,425. 211Ky669, 278SW100 (stone mason, for loss of time). (41) $1,200. RI 139A301 (woman not recovered three years later). (42) $1,083. 129 Okl 118, 263P645. (43) $2,300. 151Wash245, 275P559 (injuries to husband and wife). (44) $1,950. 244 IllA414. (45) $1,270. 227Ky690, 13SW(2d)1022 (woman). (46) $1,212. 226Ky415, 11SW (2d)105 (woman). (47) $500. 9LaA44, 118S787; 6LaA30 (for pain and suffering in addition to $1,000 for loss of earnings); LaA 127S756 (young woman losing 8 weeks $17 weekly wages and $50 medical bill); (48) $150. 12LaA 209, 125S754. (49) $1,208. 13LaA660, 127S647(2dcase). (50) $250. 13LaA 581, 127S648. (51) $300. 13LaA159, 127S661 (adequate). (52) $140. LaA 130S367. (53) $1,800. Minn 232NW 344.

1095-86 NJSup 144A182(1stcase) (foreman cabinetmaker earning $214 a month). [a] (1) 319Mo 139, 3SW(2d) 374 (reduced to $30,000); 322Mo 980, 18 SW(2d)62 (fractured skull and loss of right arm, excessive by $25,000). (2) 316Mo 1246, 295SW89 (reduced to $25,-000). (4) 231Mich452, 204NW126; Mo 6SW(2d)843 ($30,000, reduced to $22,-500); 321Mo 798, 12SW(2d)476 (reduced to $17,500). (6) 233Mich150, 206NW494 (married woman, reduced to $15,000); NJSup 144A178(2dcase) (34-year-old housemaid; reduced to $20,-000). (7) 214Ala15, 106S239; 119Kan 738, 241P246; Mo 20SW(2d)888 (reduced to $12,500); NJSup 132A243 (reduced to $15,000); 55ND353, 213NW 841 (reduced to $12,000). (8) Only $15,000 held proper for injuries suffered by electric-lineman. 311Mo 369, 279SW43. (9) $85,000. 315Mo 987, 288 SW777 (reduced to $35,000). (10) $75,-000. 129 Or435, 277P291 (reduced to $30,000). (11) $74,000. 242Mich163, 218 NW677. (12) $36,000. 219Ala101, 120S 914 (young woman; reduced to $20,000, in view of additional award of $14,000 against other joint tort-feasor); 322 Mo 469, 17SW(2d)337 (excessive by $11,000). (13) $24,000. Mo 18SW(2d) 401(2dcase) (excessive by $6,000). (14) $4,470. 198Wis82, 223NW414 [mandate amend 224NW488(3dcase)]. [b] (1) 37 OklACR409 (reduced to $5,000). (3) 177Ark757, 9SW(2d)8 (reduced to $10,000). (5) 143Wash245, 255P138 (injuries to woman's neck). (6) Mo 273SW110 (reduced to $9,000). (7) $11,400. NJ 135A86 (24 year old clerk and baseball pitcher, reduced to $7,000). (8) $19,500. NJSup 144A316(2dcase) (motor cycle policeman disabled from such work; excessive by $4,500 where he did other work at same salary). [c] (4) Kan 292P937 (reduced to $5,000). (6) 247 IllA336; 221MoA505, 282SW 128. (11) 111Conn102, 149A213(1st case) (excessive by $2,500); Mo 23SW (2d)174. (12) MoA 17SW(2d)994 (by $1,000); MoA 21SW(2d)195 (excessive by $1,500). (18) 237 IllA488; 12LaA 562, 126S274 (excessive by $1,000). (26) $5,675.83 declared excessive by $2,000. MoA 273SW777. (27) $3,583. 195Wis114, 217NW694. (28) $2,000. 28 OhA42, 162NE456 (injuries to woman thrown forward in automobile seat; reduced to $1,200). [d] $5,000 for loss of infant child's services held excessive and reduced to $1,500. 215 AppDiv549, 214NYS268 (in action by father for injury caused by street car).

1095-87 [a] (1) 5LaA513. (3) $5,000. 11LaA124, 119S446. (4) $3,000. 10LaA 50, 120S886; 3LaA305; 7LaA138. (5) $2,250. 30F(2d)402. (6) $300. 7LaA 439. (7) $1,500. 6LaA165. (8) $750. LaA 129S390. [b] (2) LaA 129S459. (21) $1,812. 166Minn425, 208NW182 (of which $1,671.44 was for hospital attention, physician's services and lost time). (22) $400. 132SC212, 128SE 423. (23) One cent, where there was evidence of serious injury. 237 IllA230. (24) $500. 150Miss458, 117S117. (25) $300. NJSup 149A69. (26) $5,000. LaA 125S748 (increased to $7,500). [c] Held not excessive.–209Ky730, 273 SW515 ($1,032.64 for injuries to kidney, eye, hand, and knee).

1095-88 [a] (3) LaA 130S567(2dcase); 195Wis5, 216NW491. (4) $35,000. 292 Pa213, 140A867 (no permanent injuries and interest on verdict double previous earnings). (5) $7,500. 150Va467, 143 SE709 (16-year-old girl; cuts on face). (6) $2,000. NJSup 143A763 (woman; broken teeth, partial deafness, and nervous trouble). (7) $750. 9LaA352, 120S396 (cut on lip of young woman; reduced to $400). (8) Other instances. Me 151A197.

1095-89 [a] (2) 179Ark631, 17SW(2d) 889; 220MoA876, 295SW492. (3) NJSup 135A76. (4) MoA 299SW85. (6) 180Minn185, 230NW473; NJSup 135A81 (laceration of ear, and other injuries and shock). (7) NJSup 136A300 (reduced to $10,000). (8) Nebr 231NW 809. (10) 210Ky129, 275SW380. (12) 173 Minn622, 217NW485; (12) MoA 78W (2d)749 (plaintiff rendered unconscious by blow on head; shoulders and hips bruised). (13) 112 Okl 86, 240P110. (25) $3,000. 174Ark258, 295SW27; LaA 130S229. (26) $17,000. NJSup 132A485. (27) $35,000. 295Pa168, 145 A81 (34-year-old woman). (28) $21,-000. NJSup 145A321(2dcase) (laceration of scalp, fractures of vertebræ, and piece of bone chipped off skull). (29) $15,000. Mo 28W(2d)787. (30) $10,000. Mo 26SW(2d)766 (contusion on forehead resulting in sinus trouble); 105WVa555, 144SE100. (31) $4,127.50. NJSup 143A153. (32) $506. 13LaA27, 127S57. (33) $2,323.40. MoA 31SW (2d)260 (scar and other injuries).

1096-90 [a] (3) $375. 11LaA162, 123 S184 (increased to $600).

1096-91 [a] (6) $20,000. 144Miss804, 110S510.

1096-92 [a] (3) 204Cal 415, 268P644 (fractured skull and permanent injury to mentality); 251 IllA342 (fracture). (8) 10LaA278, 119S720 (fireman, earning $1,500 annually; fractured skull which disabled him permanently); Mo 31SW(2d)50; NJSup 146A676 (fracture probably interfering with life work of injured person and possibly resulting in epilepsy). (13) 202Cal 474, 261 P465 (cranial fracture and concussion of brain); TexCivA 7SW(2d)934 (6-year-old boy; fracture). (14) $15,300. 308Mo 142, 271SW773. (15) $8,000. 202 Iowa1180, 211NW696. (16) $20,-000. 172Ark671, 290SW953. (17) $4,500. 173Minn365, 217NW369 (fractured skull and probably permanent injuries). (18) $35,000. 151Va740, 145 SE342 (acetylene worker rendered incapable of caring for himself). (19) $16,150. 197Wis349, 222NW249 (workman; fractured skull, foot, and pelvis, rendering him unable to do his work). (20) $30,000. 140 Okl 185, 282P345 (minor circus laborer).

1096-93 [a] (4) $400. 151Miss436, 118S298 (fractured skull and hip, under comparative negligence rule). (5) $6,000. 131 Or631, 284P183.

1096-94 [a] (9) $7,500. 126Me583. 140A374 (reduced to $3,500). (10) Other instances. MoA 28SW(2d)113.

1096–95 [a] (1) 197Cal598, 242P76. (3) **NJSup** 135A76. (4) **NJ** 151A90; **NJ Sup** 151A469. (10) **MoA** 294SW758. (11) $9,500. 173Minn186, 217NW99 (woman, 31 also suffering injury to eye). (12) $10,000. 28 **OhA**152, 162NE633 (mouth of 1-year-old girl badly burned). (13) $5,000. **LaA** 130S669; **NJSup** 145A228 (wounds on face, with injuries to shoulder, arm, and side). [b] **Held not inadequate.–TexCivA** 300SW201 ($62.50 for injury to lip).

1096–95½–New. , or adequate. 105 **NJL**305, 144A323.

1097–96 [a] (2) $1,800. 150Wash278, 272P736 (logger; incapacitated for four months; excessive by $800). (3) $35,000. **NJSup** 147A463 (injuries to nose and scars on face; reduced to $15,000). (4) Other instances. **Ala** 128 S433; **NJSup** 150A564(1stcase).

1097–97 [a] (10) $1,500. **NJSup** 143A 818 (minor boy; broken nose and broken eardrum). (11) $25,000. **NJSup** 135A81. (12) $1,000. **Miss** 129S597.

1097–97½–New. , or inadequate. **NJ Sup** 135A71. [a] **Held inadequate.–NJSup** 135A71 ($200).

1097–98 [a] (2) 222**MoA**238, 296SW 860; **NJSup** 151A211(1stcase). (9) $12,325. **TexCivA** 284SW983 (broken jawbone, loss of upper teeth and injury to upper jaw). (10) $1,000. 227**Ky** 587, 13SW(2d)753 (broken jawbone, four teeth knocked out, and cut on shoulder).

1097–99 [a] (2) $1,000. 10**LaA**132, 120S426 (breaking of enamel on one tooth, loosening of several others, and bruises and sprains; reduced to $500). (3) $10,000. **NJSup** 152A182(2dcase).

1097–1 [a] (7) $1,200. 9**LaA**394, 120 S494 (loss of two teeth and cracking of another, with number of stitches inside mouth and around lips).

1097–2 [a] (4) $6,750. **NJ** 130A732 (reduced to $5,000). (5) $4,000. **RI** 135A401 (reduced to $2,000). (6) $77,-000. 15**F(2d)**66 (reduced to $47,000). (7) $12,500. 216**Ala**138, 112S633, 53**ALR** 840 (reduced to $7,500). (8) $2,500. **MoA** 288SW948 (reduced to $1,500 for temporary contusions of chest and shoulder). (9) $300. 11**LaA** 612, 124S595(2dcase) (reduced to $194). (10) All of verdict above $3,500. **NJ** 149A759(1stcase).

1097–3 [a] (7) **Me** 149A385 (sacroiliac strain and multiple injuries). (8) **Tex CivA** 26SW(2d)340. (9) 115**Nebr**579, 213 NW966, 52**ALR**1393. (15) 9**LaA**417, 121 S250(1stcase); 9**LaA**57, 118S781; **Wash** 287P656. (18) 11**LaA**129, 119S748 (woman; contusions of knee and side with cuts back of ear). (19) 9**LaA**441, 121S 345 (cuts and bruises; able to return to work without medical expense). (32) **NJSup** 135A81. (33) $839. 167Minn502, 210NW62. (34) $500. **RI** 137A698. (35) $18,000. **TexCivA** . 285SW925. (36) $8,500. **Mo** 28SW(2d)760 (injury to groin). (37) $8,000. 10**LaA**604, 120S696 (7-year-old boy; burns from chest to knees, resulting in disfigurement and impediment in gait). (38) $5,250. **MoA** 15SW(2d)876 (hip, lung, heart, and ribs permanently injured). (39) $7,500. **MoA** 27SW(2d)733. (40) $19,500. **NJ Sup** 139A238 (permanent injuries to truck driver). (41) $47,500. **CalA** 290 P1062. (42) $14,700. **ND** 231NW283. (43) Other instances. **Ala** 128S139.

1097–4 [a] (4) $1,500. 7**F(2d)**922. (5) $500. 11**LaA**164, 121S777 (slight lacerations of scalp, bruises on body, and nervous shock). [b] **Held inadequate.–**13**LaA**439, 127S5(2dcase) ($500); 13**LaA** 443, 127S8(1stcase) ($350); 13**LaA**432, 127S8(2dcase) ($500).

1097–4½–New. , or inadequate. **NJSup** 135A71. [a] **Held inadequate.–NJSup** 135A71 ($400); 49**RI** 12, 139A473 ($500).

1097–5 [a] (1) **Mo** 20SW(2d)906. (2) $25,000. 211**Ky**830, 278SW143; 156 **Miss**693, 126S650 (fall on stairs, striking hip and back, in bed six weeks). (3) $250. 11**LaA**150, 119S757(2dcase) (reduced to $150).

1097–6 [a] (4) 100**CalA**545, 280P557 (thirty-nine-year-old man compelled to wear brace and prevented from hard labor because of weakened back and leg); **Mo** 31SW(2d)792. (9) 130**Kan** 163, 285P557; **NJSup** 137A646; 28 **OhA** 183, 162NE614. (12) 253 **IllA**450; 219 **MoA**471, 275SW775. (14) **MoA** 274SW 493. (18) 176**Ark**1205, 2SW(2d)1112 (laborer confined for six weeks). (20) 10**LaA**295, 120S400 (broken ribs and injuries to back); **MoA** 22SW(2d)884; **NJ** 135A93. (21) **Ark** 31SW(2d)756. (22) 170**Ark**346, 280SW354; 140**Wash** 693, 250P351. (25) 204**Cal** 14, 266P275 (back and shoulders). (27) **TexCivA** 9 SW(2d)182 (43-year-old brakeman earning $2,300 yearly). (28) $1,289.93. 142 **Wash**474, 253P646 (injured back and shoulder). (29) $17,000. 126**Me**261, 137 A773. (30) $35,000. 130**Misc**559, 224 **NYS**354 (other injuries, and complete loss of earning power). (31) $12,500. **TexCivA** 4SW(2d)320. (32) $23,500. 175**Minn**150, 220NW412 (fracture of lumbar vertebræ). (33) $6,622.35. 88 **CalA**678, 263P1025. (34) $4,500. **MoA** 16SW(2d)1012 (truck driver; partially incapacitated for life). (35) $1,150. **RI** 148A901 (carbuncles on back). (36) $1,750. **MoA** 22SW(2d)215.

1097–6½–New. , or inadequate. **NJSup** 135A71. [a] **Held inadequate.–NJSup** 135A71 ($5,000 for broken back).

1097–6¼–New. , or inadequate. 153 **Miss**437, 121S118. [a] **$1.00.–**153**Miss** 437, 121S118.

1098–7 [a] (5) **Kan** 292P939 (excessive by $2,500). (42) $6,106. **RI** 137A1. (43) $15,000. 216**Ala**455, 113S403.

1098–8 [a] (1) 130**Misc**559, 224**NYS**354 (other injuries, and complete loss of earning power). (3) 16**F(2d)**309; 225 **Ky**117, 7SW(2d)823 (complete paralysis below waist; earning $5,000 a year); **TexCivA** 275SW463; **TexCivA** 28SW (2d)853. (4) 149**Wash**368, 271P65 (man of 26 years earning $6.00 a day). (5) 322**Mo** 901, 18SW(2d)408. (6) **Mo** 26SW(2d)969. (9) **NJSup** 144A318 ($2,-500 medical expenses, $1,600 lost earnings, and possible future suffering). (11) **TexCivA** 276SW460 (injury to woman thirty-two years of age). (13) **Mo** 28SW(2d)1035; 49**ND**370, 191NW776. (19) **MoA** 9SW(2d)644 (32-year-old employee earning $6.60 per day); **TexCivA** 28SW(2d)622. (20) 98**CalA**268, 276P 1055 (dislocated vertebræ causing permanent partial disability and other bruises). (23) **MoA** 18SW(2d)528; 153 **Wash**549, 280P50 (conductor earning $200 to $300 monthly unable to perform duties). (25) **TexCivA** 17SW(2d)858. (29) 134 **Okl** 145, 272P475. (31) 29 **OhA** 101, 163NE206 (ten weeks confinement in bed). (32) **Minn** 232NW715; **MoA** 29 SW(2d)207 (woman of 38). (34) **MoA** 277SW578. (41) $50,000. 322**Mo** 158, 16SW(2d)190. (42) $12,500. 220**Ky**30, 294SW777. (43) $7,000. **MoA** 19SW (2d)902 (curvature and other permanent physical impairments). (44) $1,200. 12 **LaA**13, 124S846. (45) $12,750.31. **CalA** 292P132. (46) $13,500. **Mo** 30SW(2d) 984. (47) Other instances. **CalA** 287 P354; **CalA** 288P834.

1099–9 [a] (1) **NJSup** 152A172(1st case). (2) $200. **NJCh** 135A71. [b] **Held adequate.–**11**LaA**368, 123S338 ($3,-000 for injuries to coccyx and sacrum).

1099–10 [a] (5) 196**Wis**334, 220NW375 (dislocation of rib, rigidity of shoulder, and bruises). (11) $6,106. **RI** 137A1. (12) $2,800 for two broken ribs and injuries to nervous system. **NJ** 138A694.

1099–11 [a] (4) 102**CalA**464, 283P88 (broken ribs and shoulder). (9) 84**CalA** 743, 258P1000 (fracture of one rib, cut over eye, and six weeks in hospital); **NJSup** 145A226 (woman; fractured rib and other injuries). (13) 148**Wash**429, 269P813 (woman; broken rib and bruises). (28) $6,000. 77**Colo** 463, 238P 22. 42**ALR**964; 200**Wis**504, 228NW126. (29) $18,000. **NJSup** 136A337. (30) $9,-883.33. 126**Me**597, 138A311. (31) $10,-000. 177**Ark**359, 6SW(2d)296 (broken ribs and injury to kidney). (32) Other instances. 137**Misc**530, 242**NYS**608; 35 **OhA**204, 172NE409; **Wash** 290P215.

1099–12 [a] (3) $1,000. 1**LaA**300.

1099–13 [b] $100. **NJSup** 135A71 (fractured rib and other injuries).

1099–15 [a] (2) **NJSup** 145A471(1st case) (58- or 60-year-old woman; fractured pelvic bones). (7) 216**Ky**712, 288 SW665. (13) $1,000. 172**Minn**377, 215 NW865 (woman). (14) $14,000. 322 **Mo** 718, 17SW(2d)511. (15) $10,000. 137 **Okl** 180, 278P645(2dcase). (16) $5,-800. 179**Minn**123, 228NW752.

1099–15½–New. $500 held inadequate. **NJSup** 152A76.

1099–17 [a] (13) 12**LaA**586, 122S903; **MoA** 295SW826. (19) 233**Ky**38, 24SW (2d)915.

1100–19 [a] (6) $10,000. 9**LaA**36, 119 S91 (injury to two girls by reason of eating unwholesome food, superinducing chronic appendicitis and heart trouble, held excessive, and reduced to $4,000). (7) $4,000. 10**LaA**57, 120S791 (woman; abdominal operation and use of crutches necessary; reduced to $3,000).

1100–20 [a] (6) **TexCivA** 284SW683; 148**Wash**93, 268P145 (farm laborer of 23 gored by bull). (13) 13**LaA**298, 127S 22; 219**MoA**590, 282SW141 (injury to heart and lungs from inhaling gas); **MoA** 28SW(2d)440. (18) 145**Miss**876, 111S305. [a] (21) 89**PaSuper**257. (27) $41,000. **NJSup** 135A81. (28) $11,102.-80. 82**CalA**215, 255P755. (29) $2,200. 228**Ky**184, 14SW(2d)768. (30) $1,260. 157**Miss**746, 128S563.

1100–22 [a] (4) $35,000. 135**Wash**260, 237P711, 241P969 (heart block). (5) $20,000. 169**Ark**235, 275SW329 (neurocirculatory asthenia). (6) $8,000. **Tex CivA** 286SW536. (7) $8,750. 107**Conn** 201, 139A782 (injury to heart incapacitating plaintiff from performing physical labor).

1100–25 [a] (8) $15,250. 43 **Ida**661, 254P528 (for negligence of nurse causing pneumonia and tuberculosis). (9) $35,000. 130**Misc**559, 224**NYS**354 (fluid in pleural cavity, other injuries, and complete loss of earning power).

1100–27 [a] (4) 219**MoA**405, 271SW 880. (10) $2,400. 96**PaSuper**221 (loose kidney and permanent injury).

1100–27½–New. , or inadequate. 10 **LaA**280, 120S107.

1101–28. [a] (1) **NJSup** 144A179(1st case) (50 to 75 per cent of normal use of arm left). (12) 315**Mo** 1136. 287SW 1031 (thirteen-year-old boy). (16) $12,-000. 315**Mo** 1181, 289SW913 (excessive by $2,000). (17) $17,000. **NJSup** 135A 690 (foreman, earning $42 per week; reduced to $12,000). (18) $10,000. 245 **Mich**425, 222NW774 (58-year-old man; salary reduced $10 a week). (19) $2,-000. 254 **IllA**261 (reduced to $1,000).

1101–29 320**Mo** 791, 9SW(2d)972. [a] (1) 152**Va**484, 147SE461 (40-year-old man earning $82.50 a month; right arm permanently useless). (14) 219**MoA**663, 272SW90; 26 **OhA**261, 160NE99. (24) 289**Pa**246, 137A228 (to parents of boy eleven, arm permanently disabled). (25) **NJSup** 135A81 (bruising of arm, other injuries, and shock). (28) **MoA** 19SW (2d)534 (seventy-eight-year-old woman also suffering from shock). (32) 41 **Ida** 697, 243P647. (33) 203 **Iowa**721, 211 NW430. (36) 214**Ky**308, 283SW92 (permanent scar and severe shock from collision to eighteen-year-old girl). (48) $8,431. 286**Pa**281, 133A507 (hod carrier fifty-seven years old earning $44 a week, permanent injury shortening of right arm). (49) $13,000. 142**Wash** 240, 252P915. (50) $14,000. 172**Ark** 219, 288SW717 (permanent impairment of left arm). (51) $20,000. 289**Pa**246, 137A228 (boy eleven, right arm permanently impaired for use). (52) Arm necessary for business. **NJ** 138A694. (53) $1,624.88. 222**MoA**578, 292SW1075 (arm of spike driver earning $2.80 per day). (54) Other instances. **NJSup** 151 A211(1stcase).

1101–31 [a] (5) $8,000. **Mo** 300SW465 (reduced to $6,000).

1101–32 [a] (5) $4,000. **NJSup** 145A7 (fracture of collar bone and other injuries).

1101–33 [a] (3) 208**Ky**692, 271SW1036 (excessive above $5,000). (11) $2,500 **NJSup** 140A304 (restricted use of right shoulder). (12) $2,000 13**LaA**625, 127 S655 (contusions of shoulder blade, knees and dislocation of kneecap of colored woman reduced to $1,250). (13) Other instances. **NJSup** 150A557.

1101–34 [a] (7) **MoA** 248SW(2d)660. (9) 103**WVa**194, 136SE855 (man of fifty-five, where there was injury to

knee in addition). (12) 82Colo 51, 256 P1088 (injury to back and shoulders and lower part of spine); NJ 149A756; 92PaSuper68. (16) NJSup 132A231 (shoulder and ankles of woman forty-five conducting business). (18) TexCivA 25SW(2d)907(2dcase). (28) $700. 142 Wash65. 252P155 (with hip injuries). (29) $9,883.33. 126Me597, 138A311. (30) $1,250. MoA 279SW160 (injuries to shoulder and arm). (31) $19,000. NJ Sup 145A472(1stcase) (injuries to shoulders and legs; $2,000 expenses and decreasing plaintiff's earnings $50 a week). (32) $100. NJ 146A48 (woman; where injury lasted two weeks). (33) $4,415. RI 148A595.

1102–36 [a] (7) $5,414. 218Ky319, 291 SW372. (8) $8,675. 9LaA76, 118S791 (reduced to $1,250).

1102–37 241 IllA477. [a] (5) 207 Iowa 574. 223NW365(2dcase). (8) MoA 19 SW(2d)522. (9) 12LaA567, 125S142 (fracture above elbow and injuries to sacroiliac region). (13) 174Ark1030, 298SW337. (14) 230Ky53, 188SW(2d) 864. (15) 104Conn300, 132A455 (fracture of collar bone and other injuries to woman); 138 Okl 55, 280P466(1stcase). (18) 85 IndA476, 152NE183, 154NE390; LaA 130S648. (21) $10,000. Mo 285SW 403(2dcase).

1102–38 [a] (4) 237 IllA145. (9) $22,-500. Mo 282SW423. (10) $35,000. NJ Sup 149A122 (reduced to $25,000, loss of arm of infant child).

1102–39 [a] (3) 189NC783, 128SE158 (boy over fourteen earning eight to twelve dollars a week outside of school hours). (6) 116 Okl 142, 243P959. (7) 237 IllA145 (man earning $100 month). (11) TexCivA 6SW(2d)439 (boy required to give up plan to study medicine). (27) TexCivA 275SW415. (30) $25,000. 234 IllA234 (loss of right arm by youth of fifteen, which still caused pain and trouble for six years after accident); TexCivA 25SW(2d)717 (loss of arm and sight of eye). (31) $65,000. 219Ky307, 292SW791. (32) $20,000. TexCivA 25SW(2d)969 (loss of arm and other injuries). (33) $35,000. 252 IllA 428.

1102–40 [a] (4) 32Ariz154, 256P503. (7) 10LaA335, 120S528 (laborer earning $4.50 per day; confined in hospital considerable time). (13) 219MoA81, 268SW645 (man of 78 able to do a man's work). (15) $8,250. 287Pa588, 136A 294 (to widow, thirty-five, for loss of eighty-five per cent of motion of arm). (16) $3,000. 242Mich9, 217NW792.

1103–43 [a] (2) 145Wash597, 261P405. (11) Other instances. 13LaA604, 128S 54.

1103–44 [a] (2) $750. 13LaA83, 126S 739.

1103–44½–New. , or inadequate. 31 F(2d)941.

1103–46 [a] (7) 75CalA516, 243P43. (14) $1117.31. 44 Ida658, 259P1. (15) $5,000. MoA 273SW137 (wrist and hand).

1103–48 [a] (5) Mo 294SW1014 (held excessive by $2,500). (12) $25,000 reduced to $18,000. NJSup 140A889. (13) $8,350. 93Fla1128, 114S425 (loss of hand by middle-aged gang saw operator). (14) $20,000. Mo 298SW306 (loss of fingers and use of hand; reduced to $17,000). (15) $5,500. Ala 127 S534 (held excessive by $2,500). (16) $1,250. 138 Okl 56, 280P466(2dcase) (reduced to $750).

1103–49 [a] (8) 94CalA703, 271P789 (carpenter 32 years old earning $9 a day disabled from trade). (13) 169Ark825, 277SW337 (incapacitating from work for two years up to time of trial, considering loss of earning power and pain suffered); 174Ark463, 295SW727; MoA 28SW(2d)391. (17) 120Kan141, 242P 464, 466 [citCJ]. (19) MoA 256SW1076. (20) 93Fla1128, 114S425; MoA 273SW 137 (hand and wrist); MoA 273SW165; 220MoA452, 276SW105. (23) Nebr 230 NW769 (hand, wrist and other injuries to boy of 19). (32) NJSup 135A81 (bruising of hand, other injuries, and shock). (35) 218AppDiv202, 218NYS 153 (permanent impairment of gripping power of hand of mechanic). (36) MoA 296SW212; 144Wash291, 257P840. (43) 176Ark1204, 3SW(2d)41; 133 Okl 260, 272P363. (46) 51ND158, 199NW 480. (48) NJSup 143A694 (to one earning $35 a week, and losing 15 weeks' time). (56) $1,189. TexCivA 271SW 424 (fracture of bones in the hand and injuries to arm). (57) $2,045. 170Minn 332, 212NW533 (locomotive engineer, forty-two years old, who lost nine days' pay and sustained other damage). (58) $10,390. 171Minn472, 214NW287 (permanently impairing right hand). (59) $15,000. 192NC287, 134SE855 (for injuries resulting in amputation of part of hand of nineteen-year-old soldier formerly engaged in farming). (60) $17,-500. 87 IndA27, 154NE41 (injuries making hands useless and disfiguring body).

1104–50 [a] (4) $7,500. 12LaA91, 124 S538.

1104–52 [a] (2) 320Mo 1005, 8SW(2d) 964; 322Mo 765, 18SW(2d)42 (by $5,-000). (6) MoA 7SW(2d)438 (loss of index finger at first joint and middle finger behind first joint; reduced to $6,-500). (23) $30,000. 315Mo 1136, 287 SW1031 (two fingers and toes). (24) $8,500. 148Miss60, 114S259 (loss of fifth finger and partial impairment of fourth). (25) $3,000. 219Ala136, 121S 399 (loss of child's little finger and partial loss of use of another; excessive by $1,800).

1104–53 [a] (5) 219MoA234, 271SW 1023; MoA 2SW(2d)199. (7) 148Miss 60, 114S259; 222AppDiv330, 225NYS 673. (8) 156SC158, 153SE119; TexCivA 289SW1027 (including medical expense). (9) MoA 12SW(2d)938. (16) 234 IllA 502; 218MoA253, 267SW431 (loss of thumb from infection); MoA 287SW810 (loss of ring finger, fracture of little finger and forearm). (29) 169Minn136, 210NW866 (cut by scythe causing stiffening of thumb of farmer); MoA 19 SW(2d)510. (38) $200. 168Ark879, 271 SW979. (39) $2,250. 218AppDiv202, 218 NYS153 (two-thirds loss of power of fingers of mechanic's right hand). (40) $2,610. 124Kan115, 257P939 (for loss of part of finger and permanent impairment of use of hand). (41) $5,270.75. 292Pa537, 141A496. (42) $7,000. MoA 6SW(2d)1015 (disabling hand). (43) $13,000. Mo 26SW(2d)942 (loss of three fingers and use of right hand by seamstress). (44) $4,000. 100CalA775, 281P 95 (severance of thumb's extensor muscle and of radial muscle at wrist preventing color photography work). (45) $4,750. 180Ark253, 21SW(2d)411 (boy ten years old, amputated forefinger and half of bone to wrist).

1105–56 [a] (3) NJCh 135A71 (broken finger and other injuries). (4) 105WVa 335, 142SE434 (brakeman). 251 IllA 299. (10) 80CalA109, 250P693. (26) MoA 25SW(2d)491 (also nervous shock and confinement to bed). (35) $12,000. 215Ala600, 111S753 (permanent impairment of arm and knee of railroad foreman).

1105–57 [a] (3) NJSup 132A204 (reduced to $9,000). (5) 248 IllA26. (9) LaA 130S247. (13) 230Ky478, 19SW (2d)1076 (permanent impairment not shown); NJ 149A758(1stcase). (14) 217Ala144, 115S31 (slight bow in child's leg, reduced to $3,000). (20) $30,000. NJSup 144A307 (45-year-old man; 35 per cent leg injury; reduced to $20,-000). (21) $8,931.30. 10LaA422, 121S 360 (permanent injury; reduced to $7,-500). (22) $2,500. LaA 129S258 (remitted to $750 plus $100 medical bill). (23) $10,000. NJ 151A79. (24) $1,677. LaA 130S229 (reduced to $1,200).

1106–58 [a] (1) 225Ky542, 9SW(2d) 517 (11-year-old boy for scraping of shin resulting in blood poisoning rendering him helpless cripple). (3) 250 IllA 450. (15) 217Ky11, 288SW1022 (vigorous man, forty-three years old, earning $6.40 a day, unable to work because of permanent injuries to leg); NJSup 132 A221 (serious permanent injury to leg of boy fourteen). (19) 320Mo 839, 8SW (2d)873. (21) 92Fla339, 110S529 (widow having life expectancy of between twenty-nine and thirty years). (23) MoA 18SW(2d)564; Alta [1929] 4Dom LR561. (24) MoA 272SW987. (27) 220 MoA876, 295SW492; MoA 30SW(2d) 196. (32–33) MoA 280SW444. (34) 119 Kan404, 239P750; Minn 232NW3. (36) MoA 291SW145; 48SD400, 204NW899 (severance of muscles of leg). (39) 97 CalA877, 275P840 (injuries to leg bone of minor girl); NJSup 134A908; 129 Okl 263, 264P621. (41) MoA 6SW(2d) 1017 (permanent numbness); NJ 135A 93 (weakness and other injuries hindering treatment of prior ailment); NJ 149A757. (51) RI 150A498. (65) $1,000. 5PaDist&Co 531 (where bone broken and did not knit properly). (66) $4,500. NJSup 139A893 (47-year-old carpenter). (67) $11,800. 84Colo 511, 272P6 (withered leg and unable to walk without crutches; woman). (68) $6,-880. 221MoA1158, 298SW125 (permanent injury to leg affecting employment). (69) $4,500. 222MoA740, 9SW (2d)824. (70) $17,300. Minn 231NW 710. (71) $6,000. CalA 286P1097. (72) $4,500. MoA 20SW(2d)580 (arthritis resulting in lameness). (73) $2,708. 13 LaA424, 127S81(2dcase). (74) $650. 13 LaA212. 127S119. (75) $1,477.50. Me 151A443.

1107–59 [a] (3) $2,300. NJSup 135A 271. (4) $1,000. NJ 151A99(1stcase). (5) $300. 34PortoRico 109 (increased to $1,000). (6) Other instances. LaA 128S721(2dcase).

1107–59½–New. or which have been held not inadequate. 24F(2d)159.

1107–61 [a] (6) CalA 292P186. (7) NJ Sup 133A523. (10) 6LaA137. (16) 105 Conn88, 134A154 (fractured hip). (27) $700. 142Wash65, 252P155 (with injuries to shoulder). (28) $4,000. NJSup 135A76 (and other injuries to twelve-year-old boy). (29) $9,883.33. 126Me 597, 138A311. (30) $17,500. 320Mo 34, 8SW(2d)7. (31) $6,500. MoA 285SW 542 (in connection with permanent injury to back). (32) $12,000. NJSup 147A653(2dcase). (33) $4,591.40. Tex CivA 27SW(2d)584 (woman). (34) $4,-000. 251Mich628, 232NW194. (35) $19,500. Mo 30SW(2d)468.

1107–61½–New. or adequate. 6LaA137. [a] $5,000.–6LaA137.

1107–62 [a] (2) $6,500. NJSup 135A 663 (fractured hip, resulting in shortening of leg and paralysis of foot, heavy expense and loss of earnings). (3) $500. 10LaA85, 122S90 (woman, 27 years old; thigh bone driven into acetabulum; increased to $1,000). [b] Held adequate.–10LaA739, 123S344(1stcase).

1107–62½–New. , or sufficient. 1LaA 260 ($150).

1107–63 [a] (3) NJSup 132A205 (reduced to $8,000). (8) Mo 9SW(2d)918; 321Mo 697, 12SW(2d)735 (three fractures; reduced to $7,500). (11) 178 Minn353, 227NW203 (reduced to $5,000). (25) $19,000. 145Miss702, 110S586 (reduced to $12,600; switchman). [a] (26) $41,375. 317Mo 492, 297SW353 (reduced to $10,000). (27) $20,000. 9LaA213, 120S133; 297Pa390, 147A82 (twenty-one-year-old truck driver not permanently disabled by fracture of both legs). (28) $9,375. 321Mo 887, 13SW (2d)648 (reduced to $7,000). (29) $3,-850. 197Wis538, 222NW821 (woman; compound fracture of leg and wounds on head; excessive by $850). (30) $13,-500. Mo 19SW(2d)865(2dcase) (fracture of right fibula, reduced to $8,000). (31) Other instances. CalA 290P57. (32) $27,500. Minn 231NW829.

1107–64 [a] (1) 176Minn377, 223NW 619. (6) 239 IllA403 (nine-year-old boy); 192Wis249, 212NW796. (8) Tex CivA 297SW896; 105WVa416, 143SE95, 64ALR839 (nurse). (10) 105WVa309, 143SE86 (16-year-old boy). (11) 117 Nebr786, 222NW633. (13) 252 IllA550; 234Ky181, 27SW(2d)973; MoA 18SW (2d)545. (14) 75CalA96, 241P902; MoA 5SW(2d)709. (17) NJ 138A517; 129 Okl 70, 263P1091. (18) 317Mo 64, 296 SW1008; MoA 282SW131 (right hip and leg). (22) 15F(2d)166, 48ALR1420 (old woman; thigh and wrist); 234 Mich551, 208NW695; 320hA445, 168 NE225. (23) 199Wis549, 227NW38. (24) 29Ariz554, 243P405; Iowa 207NW 342; 11LaA503, 123S346 (fracture of both left leg bones of man of eighteen, developing infection and injury to nerves and causing ulcers). (27) 173 Ark27, 291SW816 (boy eleven years old); 207 Iowa585, 223NW397 ($2,989

to 70-year-old man for broken femur); 214Ky630, 283SW963. (30) MoA 300 SW1048; MoA 23SW(2d)1073. (33) TexCivA 14SW(2d)307 (young woman). (35) 204 Iowa1162, 216NW627. (42) 210Ky792, 276SW800. (48) 179Ark225, 15SW(2d)391 (10-year-old child). (51) Mo 256SW222. (60) 165Minn67, 205NW 628. (61) $1,325. 141Wash504, 252P 526. (62) $2,040.60. IndA 168NE701. (63) $2,250. 13LaA208, 127S2. (64) $2,393. 241 IllA502. (65) $2,400. 175 Ark618, 299SW1016 (both bones of leg). (66) $6,644. 224Ky274, 6SW(2d)264 (and numerous minor injuries). (67) $11,405. NJ 143A220 (fracture of legs necessitating 13 weeks in bed); 296Pa 561, 146A141 (24-year-old man earning $45 a week; fracture of both legs causing permanent injuries). (68) $18,000. 88CalA1, 262P1100 (together with $2,-719 medical expenses for boy of 17). (69) $18,500. 176Ark737, 4SW(2d)528 (44-year-old fruit packer; fractured bones failing to unite). (70) $27,500. Mo 23SW(2d)1049. (71) Other instances. Me 151A197.

1108–65 [a] (6) $2,500. NJSup 135A 872. (7) $7,500. 11LaA380, 122S293 (carpenter; impaired his earning capacity 20 per cent). (8) $1,700. 6LaA468.

1108–66 [a] (5) $1,000 for transverse fracture of tibia. 101NJEq644, 139A 408. (6) $1,000 for fractured leg not straightening. 101NJEq449, 139A428. (7) $750. NJSup 152A76.

1109–67 [a] (4) Mo 284SW794, 46ALR 1220 (reduced to $15,000). (6) Mo 287 SW628 (reduced to $15,000). (16) $54,-000. 15F(2d)388 (reduced to $45,000). (17) $40,000. TexCivA 291SW590 (reduced to $30,000). (18) $45,000. 26 F(2d)905 (brakeman 59 years old, earning $2,000 a year; $30,000 more appropriate). (19) $25,000. 157Miss3, 127S 575 (farmer 59 years old losing one leg and one toe held excessive by $10,000). (20) $42,500. 43F(2d)397.

1109–68 [a] (1) NJSup 139A898 (other leg broken). (3) 235 IllA198; 322Mo 299, 15SW(2d)825, 65ALR599. (9) Mo 26SW(2d)764. (11) 226Ky561, 10SW (2d)1064 (brakeman earning $125 to $150 a month); 167Minn211, 208NW 657. (24) 35GaA622, 134SE198; 239 Mich390, 214NW172 (twenty-two years of age, earning about $50 a week). (32) NJSup 135A679 (infant deficient mentally). (35) 159La36, 105S91 (foot and part of leg). (56) $22,541. 171Ark647, 286SW815 (other permanent injuries). (57) $16,000. 246Mich36, 224NW434 (42-year-old man earning $135 a month). (58) $7,491.66. 127Me482, 144A395 (30-year-old carpenter). (59) $1,000. 206 Iowa771, 221NW489. (60) $8,603.66. Sask [1930] 2DomLR142. (61) $24,375. Nebr 233NW450.

1110–69 [a] (4) $5,500. 20F(2d)337.

1110–73 [a] (2) CalA 284P1086. (19) $24,486.20. 125Me96, 131A5 (so far as in excess of $15,000). (20) $17,000. 29 PortoRico 977 (boy eleven years, amputation of foot above ankle; reduced to $12,000). (21) $13,500. 10LaA641, 120 S801.

1110–74 [a] (4) CalA 284P499. (8) Mo 292SW67; NJSup 130A441; TexCivA 278SW881 (man, twenty-seven, earning $180 a month). (11) 37F(2d)67; 42 F(2d)556. (13) NJ 144A327 (11-year-old boy; loss of three-fourths inch off one foot). (36) $25,000. 136Miss701, 101S548. (37) $17,000 318 Ill 570, 149 NE469 (loss of leg below knee).

1111–75 [a] (11) $14,250. RI 133A 345 (reduced to $10,000). (12) $28,000. 176Minn331, 223NW605 (reduced conditionally to $23,000).

1111–76 [a] (6) 215Ala166, 110S13. (11) MoA 285SW114 (man); NJSup 138 A509. (18) 30 OhA143, 164NE429(2d case) (woman). (37) $20,000. Mo 271 SW992 (nervous system shocked and deranged). (38) $18,000. 236 IllA520. (39) $14,980. 141Wash689, 252P131 (with injuries to arm and other injuries). (40) $7,000. 292Pa293, 141A41. (41) $31,230.48. NJSup 145A223 (50-year-old woman). (42) $12,000. 322Mo 271, 18SW(2d)494 (21-year-old negro laborer).

1112–77 [a] (4) $8,000. 24F(2d)412 (and injury to ankle, raised to $12,000).

1112–78 [a] (2) NJSup 135A82 (woman, thirty-eight years old, earning $25 a week; reduced to $10,000). (17) $16,-850. 101NJEq369, 139A241 (teacher, reduced to $13,000). (18) $67,700. 207 Cal 154, 277P481 (43-year-old man earning $2,500 a year). (19) $3,500. 200 Wis353, 228NW745 (excessive by $2,-850). (20) $750. 12LaA128, 124S598 (reduced to $500).

1112–79 [a] (1) CalA 291P903. (2) 145Miss793, 110S833. (6) NJSup 139A 430. (8) 221MoA1231, 300SW531; TexCivA 13SW(2d)481 (48-year-old housewife; permanently dislocated knee). (10) 312Mo 173, 279SW89 (permanent injuries to knee and knee cap and loss of earnings and medical expense); MoA 7SW(2d)304. (12) 103WVa194, 136SE 855 (man of fifty-five, who sustained injuries to shoulder in addition). (15) MoA 7SW(2d)417 (woman). (17) MoA 273SW1078. (22) NJ 130A448. (23) Me 150A487. (28) 11LaA555, 123S407 (coupled with injuries to eye and neck). (31) 77CalA164, 247P212. (39) $22,000. 239Mich485, 214NW402. (40) $12,500. 145Wash460, 261P115. (41) $12,000. Mo 287SW434 (injury which would probably cause amputation of leg). (42) $4,300. 177Minn42, 224NW255; NJ 143 A694 (broken kneecap disabling plaintiff from engaging in particular occupation). (43) $840. 12LaA642, 125S773. (44) $9,690. Minn 232NW710 (one earning $145 a month).

1112–79½–New. or inadequate. LaA 128S551 ($2,500); NJSup 140A24 ($75).

1112–79½–New. or not inadequate. NJ Sup 140A24 ($175).

1112–80 [a] (17) NJ 145A620(2dcase) (stevedore). (19) $950 for cut above right ankle. TexCivA 300SW183.

1112–81 [a] (2) 165Minn58, 205NW 689. (9) 215Ala678, 112S230. (12) 220 MoA1, 285SW112; 220MoA337, 286SW 434. (16) Ariz 286P371; 12LaA442, 124 S780. (21) 173Minn439, 217NW493. (23) 204 Iowa922, 216NW262. (26) 9 LaA467, 119S736 (permanent limp). (42) $3,000. NJSup 136A193. (43) $9,-883.33. 126Me597, 138A311. (44) $18,-000. 102WVa673, 135SE478 (young woman requiring treatment for indefinite period); 102WVa215, 136SE30 (woman of twenty-three, possibly permanently deformed). (45) $7,000. IndA 165NE 764 (mail carrier) (46) $350. 154Miss 475, 122S735.

1113–82 [a] (2) $300. 2LaA745.

1113–84 [a] (3) 30Ariz204, 245P673 (amount reduced to $7,500); Mo 8 SW(2d) 624 (by $5,000). (12) $16,250. 95Fla960, 117S383 (held excessive by $4,000). (13) $20,000. 132 Okl 107, 269 P368 (reduced to $8,000). (14) $16,000. 176Minn437, 223NW675 (held excessive by $4,000). (15) $500. 10LaA20, 120 S797 (no broken bones; reduced to $350).

1113–85 [a] (1) Cal 290P571; 316Mo 1266, 296SW105; TexCivA 1SW(2d) 760. (2) 318Mo421, 1SW(2d)791. (6) 308Mo 31, 271SW997(switchman). (10) TexCivA 24SW(2d)491. (20) MoA 274 SW911; TexCivA 25SW(2d)188. (31) $12,500. TexCivA 8SW(2d)527 (deliveryman 55 years old earning $110; disabled from performing manual labor). (32) $9,000. 322Mo 147, 14SW(2d)603.

1113–86 [a] (4) $563.79. MoA 26 SW(2d)838 (injury to foot, instep and knee). (5) $1,250 in addition to doctor and hospital bills. 13LaA101, 126S573.

1113–87 [a] (3) $2,300. NJSup 135A 271. (4) $250. 9LaA312, 120S486(1st case) (increased to $350).

1113–88 [a] (6) $30,000. 315Mo 1136, 287SW1031 (two fingers and toes).

1113–89 [a] (12) $12,000. 168Ark330, 270SW956 (brakeman). (13) $1,800. 132SC321, 128SE504 (broken toe resulting in infection).

1114–90 [a] (4) 219Ala324, 122S316. (11) $35,000. 130Misc559, 224NYS354 (other injuries, and complete loss of earning power). (12) $3,500. NJ 145A 644(1stcase) (practical nurse). (13) $2,-500. NJSup 149A343 (to mother of boy sustaining brain injury). (14) $8,500. NJSup 149A343 (exemplary damages to boy sustaining brain injuries when assaulted by theater attendant). (15) $25,000. NJSup 149A342 (injury to head, side, back and permanent injury of brain). (16) $16,800. Minn 232NW712 (severe and permanent brain injury). [b] Held inadequate.–$250. NJSup 137 A545.

1114–90½–New. as are awards held excessive. 99CalA264, 278P442 ($5,000 for fracture of thumb and concussion).

1114–90½–New. $50,000 award for serious brain injury held excessive and reduced to $30,000. NJSup 149A343.

1114–92 [a] (5) Mo 29SW(2d)76. (6) 248 IllA545. (21) $25,100. 48 Ida310, 282P72.

1114–93 [a] (2) $5,000. 5LaA6.

1114–95 [a] (10) $35,000. 130Misc559, 224NYS354 (other injuries, and complete loss of earning power).

1114–97 [a] (4) Mo 293SW386 (reduced to $15,000). (8) 221MoA505, 282SW128 (woman; reduced to $5,000). (16) $2,800 for injuries to nervous system and ribs. NJ 138A694. (17) $12,-000. 247 IllA378. (18) $3,500. MoA 19 SW(2d) 306 (reduced to $2,500). (19) $2,000. 12LaA520, 124S778.

1114–98 [a] (1) 34 OhA499, 171NE357 (permanent injury to woman's nervous system, eyesight, facial distortion, continual flow of tears). (3) 171Minn399, 214NW761; 105WVa555, 144SE100 (railroad section hand; permanent disability). (7) NJSup 134A908 (permanent injury to spine and nervous system). (8) 81CalA40, 252P1078 (woman; traumatic neurosis). (9) Mo 23 SW(2d)1045; (9) 140Wash693, 250P351. (11) 100CalA503, 280A394(2dcase) (accompanied by injuries to face, shoulder, knee, and spine). (13) Mont 285P184. (16) 170Minn250, 212NW413; MoA 285 SW151 (woman). (17) TexCivA 18 SW(2d)189 (severe physical pain). (25) 220Ky30, 294SW777 (pain and suffering). (39) $8,293. 126Me99, 136A354 (severe bruises and mental shock tending to aggravate arteriosclerosis). (40) $11,500. 286Pa536, 134A446 (psychoneurosis, recovery from which is uncertain). (41) $8,000. 42 Ida789, 248P 438; Mo 271SW500 (woman; shock and bruises resulting in other serious conditions). (42) $17,000. Mo 3SW(2d)244 (crippled woman in constant pain; hospital bill). (43) $50. 10LaA191, 120S 692 (12-year-old boy). (44) $25,000. 180Ark366, 21SW(2d)861 (permanent injury to nervous system). (45) $628. Ark 32SW(2d)316.

1114–98½–New. $500 is not grossly inadequate for damages to seven-year-old girl where she suffered shock, bruises, and inguinal hernia. 186Wis574, 203 NW362.

1115–99 [a] (1) 311Mo 604, 279SW115. (11) $13,615.50. 243Mich454, 220NW 722 (permanent partial paralysis of arm and leg; reduced $3,615.50).

1115–1 [a] (2) 311Mo 604, 279SW115. (9) 104NJL405, 140A277 (tongue and larynx). (12) 220Ky30, 294SW777. (21) MoA 14SW(2d)529 (39-year-old married woman; recurrence of facial paralysis and nervous prostration). (36) $28,000. Mo 274SW377. (37) $7,-875. NJSup 142A435 (woman; paralysis of legs).

1116–4 [a] (12) $7,500. 222MoA370, 3 SW(2d)256 (glaucoma). (13) $10,000. NJSup 148A154.

1116–5 [a] (8) $5,000. 234Mich112, 207NW892 (reduced to $3,000). (9) $25,000. 235Mich687, 209NW813 (reduced to $15,000). (10) $30,000. Mo 26SW(2d)957 (excessive by $10,000).

1116–6 [a] (1) 316Mo 1303, 295SW102 (car carpenter). (8) 242Mich217, 218 NW803. (29) 315Mo 331, 289SW908 (loss of one eye and progressive decline of other eye). (30) 84CalA259, 257P871. (31) $10,305.04. 287Pa365, 135A100 (minor, loss of eye affecting use of other eye and necessitating use of artificial eye). (32) $25,000. 107WVa 181, 147SE759. (33) $20,000. 150Wash 578, 274P188 (loss of one eye, impairment of other, and mutilation of hand; 7-year-old boy). (34) $12,500. 153 Miss362, 121S111. (35) $12,000. 11LaA 164, 121S777 (9-year-old girl; other injuries). (36) $35,000. CalA 291P874.

1116-9 [a] (8) $17,500. 128Kan32, 276 P63.
1116-10 [a] (3) Mo 282SW38 (blindness); 320Mo 819, 8SW(2d)884. (5) 315Mo 331, 289SW908. (7) 181Ark1145, 27SW(2d)520 (loss of nine-tenths of vision); NJ 151A89(2dcase); 28 OhA453, 162NE791. (9) 222MoA370, 3SW(2d) 256. (12) 88 IndA36, 159NE156. (13) MoA 282SW125. (18) 146Wash43, 261 P782 (both eyes affected). (19) MoA 279SW212. (21) MoA 273SW754; MoA 274SW849; MoA 284SW813; 48RI 316, 138A45 (loss of sight of one eye). (24) 217MoA55, 273SW186. (26) 30Ariz491, 249P66 (laborer's right eye and general health affected so as to make him unfit to work around machinery). (37) $1,700 MoA 281SW71 (permanent scar on cornea). (38) $9,500, 173Minn186, 217NW 99 (woman, 31, also suffering disfigurement).
1117-11 [a] (2) $3,000 raised to $6,000 for loss of sight of one eye. 10LaA 772, 123S187. (3) $3,500. NJ 151A89 (1stcase).
1117-12 [a] (3) $25,000. 36F(2d)254 (excessive by $7,500).
1117-13 [a] (3) 220MoA876, 295SW 492. (5) MoA 19SW(2d)559 (accompanied by pain in head, hips, legs, and back, and loss of sleep). (13) $10,700. 102CalA405, 283P148 (other injuries).
1117-15 [b] **Held excessive.**—NJSup 136 A715 (where no evidence of permanency; reduced to $5,000).
1117-16 [a] (1) 35Ariz60, 274P639 (traumatic neurosis; reduced by $5,000).
1117-17 [a] (4) 228AppDiv37, 238NYS 401 (injury to brain). (5) Mo 30SW(2d) 56 (traumatic neurosis). (31) $5,500. 235Mich616, 209NW850 (traumatic neurosis). (32) $7,000. 220MoA1229, 298 SW1069 (sciatic rheumatism). (33) $2,902.10. Mich 233NW354 (paralysis of face of 79 year old man). (34) $1,800 CalA 291P269.
1118-18 [a] (13) NJ 130A732. (14) $12,000. 219Ky824, 294SW460. (15) $20,000. 320Mo 371, 8SW(2d)11 (by $5,000).
1118-21 [a] (10) 156Miss77, 125S539 (excessive by $1,500). (33) $2,000 to wife and $500 to husband. 126Me244, 137A689 (reduced to $1,500 and $300).
1118-22 [a] (3) 313Mo 492, 285SW965. (6) 172Minn134, 215NW198; 318Mo 502, 300SW479. (11) See also MoA 285SW 183 ($7,500). (15) MoA 24SW(2d)682; MoA 31SW(2d)279. (18) 210Ky92, 275 SW16 ($3,850). (19) 210Ky92, 275SW 16; MoA 9SW(2d)650. (26) CalA 288P 151. (32) $35,000. 89CalA721, 265P541. (33) $7,500. MoA 293SW455. (34) $6,000. MoA 298SW134. (35) $4,500. MoA 296SW1036; MoA 287SW803.
1119-25 [a] (3) 207Iowa862, 224NW 28 (broken coccyx and miscarriage). (4) 174Minn294, 219NW179. (5) MoA 295SW517 (other injuries). (17) $41,000. NJSup 135A81 (also internal injuries and augmenting previous nervous condition).
1119-26 [a] (2) $250. 202 Iowa643, 210NW761.
1119-27 [a] (9) $22,500. Ark 294SW 1002 (for burns on legs and head of boy six reduced to $12,500). (10) $34,963. 180Minn298, 230NW823.
1119-28 [a] (2) 207 Iowa720, 223NW 405 (X-ray burn). (5) 195Wis572, 217 NW723 (third degree X-ray burn). (24) 8LaA30; 13LaA581, 127S648 (acid burns, contusions and loss of $1250 automobile $1500 inadequate raised to $2100). (33) $25,000. 168Minn248, 210 NW55; TexCivA 297SW244. (34) $35,000. 288Pa443, 136A223. (35) $200. 207 Iowa895, 223NW745. (36) $3,556. 298Pa560, 148A851. (37) $7,039.20. Kan 289P962. (38) $15,700. Mont 291 P1042.
1119-30 [a] (8) $6,000. MoA 11SW (2d)1060 (by $2,000).
1119-31 [a] (8) 232Ky285, 23SW(2d) 272. (29) $4,500 TexCivA 270SW1101.
1120-32 [a] (3) $40,000. Nebr 223NW 21(2dcase) (reduced to $28,000). (4) $318. 13LaA343, 127S413 (reduced to $218).
1120-35 [a] (2) $500. 12LaA191, 125S 185 (increased to $1,000).
1120-36 [a] (13) 10LaA790, 123S341 (reduced to $1,000, for bruises to woman's chest and legs). (20) NJSup 150A558. (29) LaA 130S567(1stcase). (34) 191Wis618, 211NW762. (40) $3,600. 204 Iowa44, 214NW564 (reduced to $2,500). (41) $8,500. NJSup 146A 684 (personal injuries and damage to automobile where injuries neither serious nor permanent, earnings doubtful, and value of car small).
1120-37 [a] (5) 136Wash4, 238P982 (permanent scars). (12) NJSup 137A 403. (13) 236Mich1, 209NW918. (18) Mich 233NW365; 131 Okl 13, 267P480; (23) 135Wash455, 237P1018. (44) 38 GaA581, 144SE680 (woman; humiliation and embarrassment); NJSup 137A403. (48) 8LaA437. (51) 11LaA306, 123S399 (2dcase). (58) $5,000. TexCivA 293 SW584 (for injuries causing woman to lose hair). (59) $4,000. 229Ky444, 17 SW(2d)231. (60) Other instances. 40 F(2d)280.
1121-38 [a] (2) LaA 129S226(2dcase). (3) 5LaA344(2dcase). (5) 8LaA278. (8) $600. 2LaA458. (9) $250. 12LaA 121, 125S152(2dcase) (causing loss of income). (10) $100. 10LaA733, 122S 879; 12LaA475, 125S304 (bruises). (11) $250. LaA 130S565.
1121-39 [a] (3) 13LaA518, 128S666.
1121-40 93CalA609, 269P975; 93Fla 387, 112S264. 232IllA169; 232 IllA 440; 88 IndA339, 156NE571; 200 Iowa 204, 202NW515 (excessive); 204 Iowa 983, 216NW112; 219Ky768, 294SW481; 222Ky723, 28W(2d)382; 223Ky315, 8 SW(2d)654 (wrongful entry and construction of pipe line); 223Ky611, 4SW (2d)375; 229Ky662, 17SW(2d)739; MoA 17SW(2d)656; TexCivA 18W(2d)350; 146Va10, 135SE685 (damage from use of lead truck in connection with chute); 145Wash420, 260P666.
1122-41 216Ala160, 112S763; 166Minn 193, 207NW305; 177Minn390, 225NW 395; 53ND291, 205NW722 ($6,500 for conversion of property excessive by $2,500 under evidence).
1122-42 35GaA704, 134SE623 ($17,500 not excessive for destruction by fire of lumber yards, planing mill, and machinery valued in market at $30,000); 234 Ky243, 27SW(2d)952; 156SC397, 153 SE473; TexCivA 286SW335.
1122-49 82Colo 146, 257P364; 232 IllA 440; 130Kan314, 286P240; 208Ky820, 271SW1097; 222Ky286, 300SW890 (damages held excessive); 9LaA431, 121S250 (2dcase); 11LaA306, 123S399(2dcase) ($220 for injuries to ditched automobile held not excessive); 12LaA228, 125S 140(2dcase); 13LaA120, 125S296; 12 LaA209, 125S754; 12LaA661, 126S90; 13LaA219, 127S5(1stcase); 13LaA74, 127S27; 249Mich586, 229NW499; 179 Minn123, 228NW752; 154Miss475, 122S 735; NJSup 134A894; NJSup 143A817; NJSup 146A684 ($8,500 for personal injuries and damages to automobile held grossly excessive where value of car was small and injuries not permanent or severe); 137 Okl 35, 277P643; 36 Okl ACR515; 47RI 44, 129A605; 151Wash 510, 276P554; Wis 229NW541.
1122-51 11LaA150, 119SW757(2dcase).
1122-53 213Ky235, 280SW966 (bull); 226Ky30, 10SW(2d)482; TexCivA 13 SW(2d)996.
1122-55 174Ark191, 294SW407; 180 Ark857, 23SW(2d)256.
1122-56 232 IllA169; 246 IllA334; 242 Mich14, 217NW775; 177Minn261, 225 NW111(2dcase); MoA 299SW74; NJ Sup 142A642; Okl 286P769.
1122-61 216Ala160, 112S763; 181Ark 144, 25SW(2d)13; 222Ky531, 1SW(2d) 972; 229Ky572, 17SW(2d)756 ($400 held not inadequate); 160La998, 107S 779 (trees, hay, and fence posts); 170 La432, 128S35(4thcase).
1122-62 172Ark273, 288SW901 (strawberries); MoA 293SW483.
1122-63 90CalA563, 266P353.
1122-64 93Fla387, 112S264; 214Ky361, 283SW113 ($1,000 held excessive); 219 Ky768, 294SW481; 227Ky423, 13SW (2d)254.
1123-66 16F(2d)734; 169La701, 125S 860; RI 135A158.
1123-67 124 Or332, 263P391; 134SC 510, 133SE444.
1123-68 210Ky38, 275SW7; 250Mich 172, 229NW463; 170Minn451, 212NW 815; MoA 295SW477; NJ 130A732 ($1,000 not excessive); 47RI 29, 129A 594; 142Wash571, 253P797.
1123-69 MoA 7SW(2d)288.
1123-73 232Mich112, 205NW142.
1123-74 Iowa 231NW383.

DAMN

1123-7½—New. To invoke condemnation; to curse; to swear; invoke condemnation upon; to condemn to eternal punishment in a future world; to consign to perdition. Webster D. [quot 147 Miss160, 113S202].

DANCE HOUSE

1125-46 75Mont88, 242P344.
1125-46½—New. , the rules for admission to which are not based upon personal selection or invitation. 75Mont88, 242P344.

DANGER

1126-48 MoA 275SW586.
1126-49 MoA 275SW586.

DANGEROUS

1127-63½—New. That degree of peril which, when known and disregarded, marks such want of care as constitutes negligence. 215Ala53, 108S851.
1128-74 [a] (5) Automobile with defective brakes and steering gear is an inherently dangerous instrumentality when driven on highway. 117 Or286, 243P778.
1128-78 164Minn21, 204NW634, 635 [citCJ].

DATE

1130-25 100NJEq150, 135A264.
1130-33 100NJEq150, 135A264.
1130-34 100NJEq150, 135A264.
1130-35 202 Iowa1123, 211NW583, 585 [citCJ]; 100NJEq150, 135A264; 192Wis 367, 212NW792, 793 [citCJ].
1130-37 100NJEq150, 135A264; 192 Wis367, 212NW792, 793 [citCJ].
1130-39 100NJEq150, 135A264.
1130-43 87CalA301, 262P452, 454 [cit CJ].

DAY

1131-85 146Miss565, 111S571.
1132-88 146Miss565, 111S571.
1132-96 146Miss565, 111S571.

DAYTIME

1135-83½—New. Daytime is not only from sunrise to sunset, but includes dawn and twilight. 22F(2d)834.

DEAD BODIES

1137-3 21AlaA5, 105S161; 100CalA201, 280P163; 219Ky528, 293SW1091; 127 Misc558, 217NYS413; 142Wash469, 253 P654. [a] **Burial society has been held not entitled** to retain dead body as security for charges for services rendered. 218Ala354, 118S644.
1137-7 21AlaA5, 105S161 (legal right complied with duties); 218Ala354, 118S 644; 219Ky528, 293SW1091; 142Wash 469, 253P654.
1138-8 127Misc558, 563, 217NYS413 [citCJ]; 142Wash469, 253P654.
1138-9 See also 21AlaA5, 105S161.
1138-11 242NY395, 152NE126.
1138-12 242NY395, 152NE126.
1138-13 242NY395, 152NE126; 142 Wash469, 253P654. [d] **Conflict between daughter and son.**—Where daughter had maintained filial relations with deceased father for seventeen years and son had entertained no affection for him, custody of body should be awarded to daughter. 6PaDist&Co 275.
1138-18 242NY395, 152NE126; 6Pa Dist&Co 720.
1139-20 21AlaA5, 105S161; 101NJEq 399, 138A654; 22 OhA437, 155NE153. But see 242NY395, 152NE126. [b] **Where surviving spouse waives right,** expressly or impliedly, right to possession is in next of kin. 21AlaA5, 105 S161. [c] **Right of surviving spouse must be promptly asserted** in case body needs burial. 21AlaA5, 105S161.
1139-20½—New. **Surviving spouse's right** to possession is waived unless asserted. 21AlaA5, 105S161 (holding that

wife's right impliedly waived where not living with husband at time of death and was not present to claim his body).

1139-21 142Wash469, 253P654. But see 242NY395, 152NE126.

1139-22 [c] **Burial of son.**-21AlaA5, 105S161 (where wife was not present if living).

1140-28 242NY395, 152NE126. [d] **Transformation of church vestry room into a lobby** held to be improvement within statute authorizing disinterment. 191NC427, 132SE1.

1140-30½-New. A temporary injunction should not be granted in advance of judgment to restrain interference with removal of bodies from a cemetery. 242NY395, 152NE126.

1140-30⅓-New. A certificate of purchase of a burial lot in a church cemetery was held not to import a contract that there be no disinterment where forbidden by tenets of church. 242NY395, 152NE126.

1140-30¼-New. A wife's statement that her husband would prefer to be buried beside her was held not controlling on the court in an attempt to prevent interference with disinterment. 242NY395, 152NE126.

1140-30½-New. A preliminary injunction was denied to a wife against interference with the removal of her husband's body from a catholic cemetery to a noncatholic cemetery. 242NY395, 152NE126.

1140-31 142Wash469, 253P654. [a] **Immediate relatives held entitled to have body disinterred** for reburial despite rules of church against disinterment. 142Wash469, 253P654.

1140-35 127Me197, 142A728 (evidential purposes held sufficient).

1140-36 204Iowa1074, 216NW630.

1141-46 22OhA437, 155NE153. See also 142Wash469, 253P654. But see 242NY395, 152NE126.

1141-47 12LaA675, 127S70; 213App Div329, 210NYS372 (holding that widow has the right to remove the bodies of her husband, children, mother, and brother from ground consecrated under rites of church of which deceased were nominal members, to unconsecrated ground, it not appearing that any of deceased had ever expressed any desire to be buried in any particular cemetery. Ecclesiastical law of church as distinguished from contract enforceable in equity cannot avail cemetery authorities opposing such removal; English rule recognizing ecclesiastical rights superior to those of next of kin never has been adopted in this country). But see 242NY395, 152NE126. [b] **In Ohio.**-22OhA437, 155NE153. [c] **Widow too poor to rent vault did not lose right to remove husband's remains** from his family's tomb by failing to reserve right. 12LaA675, 127S70.

1141-48 242NY395, 152NE126.

1141-49½-New. As respecting the rights of relatives to remove an interred body, the will of deceased, although not legally compelling, may have large significance. 242NY395, 152NE126.

1141-49⅓-New. Only a rare emergency should permit removal of a body from a grave in consecrated ground to unhallowed ground contrary to the wishes of decedent. 242NY395, 152NE126.

1141-53 12LaA675, 127S70 (no right in spouse unless made necessary by unusual circumstances).

1142-56 [a] **Petition of widow alleging that she consented to interment in defendant's tomb temporarily** does not show intent interment be permanent. 12LaA675, 127S70 (surrounding circumstances should be considered to determine freedom of consent).

1142-66½-New. Other consideration. In determining the right to remove an interred body, due regard must be given to the interests of the public and the rights and feelings of those entitled to be heard by reason of relationship and association. 242NY395, 152NE126.

1142-68 21AlaA5, 105S161 (duty of father who had lawful custody in absence of wife); 169Ark173, 273SW705 (duty rests upon some of living).

1143-83 14PaDist&Co 237.

1144-94 21AlaA5, 105S161; 14PaDist&Co 237.

1144-98 21AlaA5, 105S161 (any interference with actionable custody is legal wrong). [b] **Nearest relation of dead person present** may maintain action for interference with burial. 21AlaA5, 105S161. [c] **Intentional withholding of death certificate by insurance company** held to give father cause of action for resulting damage or injury from interference with burial. 21AlaA5, 105S161. [d] **Notice.**-21AlaA5, 105S161.

1144-5½-New. A widow's suit for mutilation of her daughter's corpse held not barred because she was not told before interment that the casket was dropped by the railroad. 219Ky528, 293SW1091.

1145-13½-New. A widow has the right to refuse to permit an autopsy of her husband's body. 154Tenn295, 294SW1097, 52ALR1442.

1145-13⅓-New. She may also limit her consent to an autopsy in any way she chooses. 154Tenn295, 294SW1097, 52ALR1442.

1145-19½-New. Under South Dakota statute consent of the father of a child is not sufficient to authorize an autopsy on the child where the father and mother are living together within the state, and does not constitute a defense to an action by the mother for unauthorized autopsy. 50SD372, 210NW348, 48ALR1205.

1146-22 See also 21AlaA5, 105S161 [cit CJ].

1146-30½-New. Removal of body by cemetery company, without necessary religious rites and without notice to plaintiff states sufficient cause of action. 14PaDist&Co 237.

1146-33 8PaDist&Co 612; 142Wash469, 253P654.

1146-34½-New. The nearest relation may maintain an action for unwarranted interference with the burial of the body of a relative or for unwarranted withholding of the body from burial. 218Ala354, 118S644.

1147-36 See also 21AlaA5, 105S161 [cit CJ] (in absence of wife father had lawful custody of body of son).

1147-37½-New. Father as nearest relative present is a proper party plaintiff in a tort action for interference with burial of son's body. 21AlaA5, 105S161.

1147-37⅓-New. Surviving husband and children of deceased may be joined in an action for improper and indecent burial. 3Del323, 138A273.

1147-37¼-New. Where an ancient burial ground in which historic and prominent personages are buried is being desecrated, any church, patriotic organization, or person of the community may appear as joint parties plaintiff in equity to restrain such desecration. 8PaDist&Co 612.

1147-41½-New. Complaint alleging that plaintiff had been delayed in burying his son by act of defendant's insurance company's employee in refusing to surrender death certificate held to state a cause of action. 21AlaA5, 105S161.

1147-41⅓-New. A declaration alleging that defendants performed an autopsy on the body of plaintiff's husband in an open space in a cemetery and removed and kept the heart contrary to stipulation that an autopsy be made in a decent way, not in open or public place and without mutilation of body, states a cause of action. 154Tenn295, 294SW1097, 52ALR1442.

1147-42½-New. In an action based upon invasion of parent's right to sepulture, allegations of negligence resulting in death, breach of contract for maintenance and care of child, and of signs of mutilation and suspicious death, are irrelevant. 217AppDiv510, 217NYS401.

1147-42⅓-New. A complaint has been held sufficient for refusal to surrender a body. 218Ala354, 118S644.

1147-42¼-New. Petition held sufficient to state cause of action for removal of husband's body. 12LaA675, 127S70 (exception should be overruled).

1147-47½-New. Evidence of place where blank death certificates were kept by board of health is relevant on issue of diligence in securing second death certificate in action for wrongful interference with burial by retention of death certificate. 21AlaA5, 105S161.

1147-47⅓-New. That body was not embalmed is relevant to show urgent necessity of avoiding delay in carrying out funeral arrangements, in action for interference with burial. 21AlaA5, 105S161.

1147-47¼-New. Length of time body remained in undertaker's shop before it could be legally buried is relevant in action for wrongful interference with burial by retention of death certificate. 21AlaA5, 105S161.

1147-47⅙-New. All facts and circumstances tending to show delay in burial, caused by refusal of defendants to return certificate of death are relevant and admissible in action for interference with burial. 21AlaA5, 105S161.

1147-47⅙-New. In an action for wrongful interference with burial of body of plaintiff's son, it is immaterial as to who were members of plaintiff's family. 21AlaA5, 105S161.

1147-47⅐-New. In an action against an insurance company for interference with burial of body of plaintiff's son by wrongful retention of death certificate, it is not relevant as to when plaintiff obtained an insurance policy on the son from defendants nor that suit on that policy was defeated on ground of fraud. 21AlaA5, 105S161.

1147-47⅛-New. Question for jury. Diligence in procuring second death certificate so as to minimize damage held for jury in action for interference with burial by retention of first certificate. 21AlaA5, 105S161.

1147-47⅛-New. Certificate of death is prima facie evidence of the facts therein stated. 21AlaA5, 105S161.

1147-47 1/10-New. In actions against coroners for unauthorized autopsies, evidence has been examined and held insufficient to show any ground for supposition that death was caused by unlawful means so as to authorize an autopsy. 50SD372, 210NW348, 48ALR1205.

1147-47 1/11-New. Defendant held not entitled to peremptory instruction. 219Ky528, 293SW1091.

1147-47 1/12-New. In a mother's action against a burial society for wrongful detention of her daughter's remains after demand, plaintiff's conversation with defendant's manager, relating to the disposition of the body and its condition and evidence of the time when it was buried, has been held admissible. 218Ala354, 118S644.

1147-47 1/13-New. In an action by the nearest relative for defendant's refusal to surrender the dead body for burial, it is not necessary to specify wherein the refusal was wrongful nor to show the time, place, or manner of demand. 218Ala354, 118S644.

1147-51½-New. In father's suit for interference with burial of son's body plaintiff is entitled to compensatory damages for resulting trouble and delay as well as loss of consolation of wife and relatives at time of burial. 21AlaA5, 105S161.

1147-51⅓-New. Vexation, wrong, or distress of mind as natural proximate and reasonably to be expected result of withholding death certificate by insurance company may constitute support for award of additional compensation damages in father's action for interference with burial of son's body. 21AlaA5, 105S161.

1147-52½-New. $500 damages for mutilation of corpse held not excessive. 219Ky528, 293SW1091.

1147-52⅓-New. A mother's recovery for wrongful refusal of a burial society to deliver up the remains of her daughter on demand, and for the burial society's improper detention of the body for another day, has been held not limited to nominal damages. 218Ala354, 118S644.

1147-52¼-New. Inability to be at the burial is not an element of damage. 218Ala354, 118S644.

1147-52⅛-New. A mother, suing a burial society for damages for wrongful

refused to surrender her daughter's dead body to her on demand, has been held not entitled to exemplary damages, where no want of respect for the body or other aggravating circumstances or willful misconduct was alleged. 218Ala 354, 118S644.

1147–53 3Del 323, 138A273; 50SD372, 210NW348, 48ALR1205. But see 21 AlaA5, 105S161.

1148–55 50SD372, 210NW348, 48ALR 1205 (unauthorized autopsy).

1148–55½–New. or other wanton, fraudulent, and malicious or grossly negligent acts. 3Del 323, 138A273.

1148–56 3Del 323, 138A273.

1148–59½–New. In an action for improper and indecent burial, no recovery for mental suffering may be had for mere negligence of an undertaker when there was no evidence of mental suffering. 3Del 323, 138A273.

DEAL

1153–54 168Ark504, 270SW946, 1119.

1154–59 313Mo 114, 280SW697, 700 [citCJ].

1154–60 333Mo 114, 280SW697, 700 [citCJ].

1154–61 313Mo 114, 280SW697, 700 [citCJ].

1154–62 142Va342, 128SE604.

1154–63 142Va342, 128SE604.

1154–65 142Va342, 128SE604.

DEALER

1155–80 289Pa22, 136A862; 289Pa27, 136A863.

1155–83 Sask [1927] 3DomLR626, 638 [citCJ].

DEALING

1157–18 But see 168Ark504, 270SW946, 1119.

DEATH

1165–4 248 IllA176; 229Ky771, 17SW (2d)1029; 162La690, 111S62; 135Misc 861, 239NYS722.

1166–5 119 Oh367, 164NE358.

1166–9 30Hawaii116.

1166–16 128Misc118, 217NYS666. [c] **Evidence held not to overcome presumption** of absentee being alive. 211NYS624.

1166–18 101NJEq664, 139A33.

1166–20 8PaDist&Co 369.

1166–24 216AppDiv255, 214NYS595 (death may be established by presumption as well as evidence); TexCivA 283 SW330.

1166–25 248 IllA176; 203 Iowa555, 213 NW247; 207 Iowa1145, 222NW390; MoA 243SW250; NC 154SE674(2dcase); 141 Okl 212, 285P120; TexCivA 283SW 330 (ten years). [c] (2) In Missouri. MoA 27SW(2d)31. [e] **Common law and statutory presumptions.**–MoA 27SW (2d)31.

1167–26 Mass 166NE874; MoA 22SW (2d)178(2dcase); 228AppDiv703, 239 NYS223; TexCivA 16SW(2d)154.

1167–27 135Misc861, 239NYS722; Tex CivA 273SW666, 670 [quotCJ].

1167–28 97PaSuper34 (presumption not same as actual death).

1167–29 19 OhA187; TexCivA 273SW 666, 670 [quotCJ]. Contra 99NJEq19, 132A237.

1167–30 128Misc118, 217NYS666.

1167–31 25F(2d)335; 203 Iowa596, 213 NW236; Man [1927] 2DomLR864, [1927] 1WestWkly429.

1168–32 218Ala16, 117S472; 203 Iowa 555, 213NW247; 142Miss517, 107S198, 44ALR1487; MoA 3SW(2d)269; 130 Misc501, 224NYS442; 131Misc842, 228 NYS330; 124 Or225, 264P373 (statute); 97PaSuper34; 8PaDist&Co369; Tex CivA 289SW87; TexCivA 290SW237; Alta [1926] 3DomLR140, [1926] 2 WestWkly148; Man [1927] 2DomLR 864, [1927] 1WestWkly429. [a] (2) In suit to administer children's estates, evidence that mother, after divorcing father, took them to distant state, and that they were not heard from for many years and that they were not shown to have known of father's estate, held insufficient to establish death of children. 134Misc715, 236NYS370.

1169–34 204Cal 180, 267P538; 126Kan 120, 266P935; 9PaDist&Co 328, 332 [cit Cyc].

1169–35 135Misc861, 239NYS722.

1170–40 41GaA627, 154SE213.

1170–42 99NJEq19, 132A237, 238 [quot CJ]; 135Misc861, 239NYS722.

1170–43 TexCivA 273SW666.

1170–45 99NJEq19, 132A237.

1170–46 [a] (1) See also TexCivA 290 SW237; 117Tex1, 295SW913.

1170–48 MoA 27SW(2d)31.

1171–49 203 Iowa555, 213NW247; 175 Minn51, 220NW401; 125Misc360, 211 NYS624 (inquiries at place last seen); 135Misc861, 239NYS722; Man [1927] 2DomLR864, [1927] 1WestWkly429.

1171–52 MoA 27SW(2d)31.

1171–54 MoA 27SW(2d)31; TexCivA 273SW666 (hearsay evidence admissible to show where this was).

1171–57 135Misc861, 239NYS722.

1171–58 99NJEq19, 132A237.

1171–59½–New. An inquiry of a minister at the place the person was last heard from and word of death justifies the presumption of death. TexCivA 16 SW(2d)136.

1171–61½–New. Law only requires that proof should remove reasonable probability of person's being alive. 130Misc 501, 224NYS442.

1172–66 203 Iowa555, 213NW247; 134 Misc715, 236NYS370 (uncles and aunts, not necessarily "near and dear" collaterals).

1172–69½–New. Failure of absentee to communicate with relatives where no such custom existed does not raise presumption. 125Misc360, 211NYS624.

1172–70 245 IllA432; 203 Iowa555, 213 NW247; 124 Or225, 264P373; TexCivA 273SW666; Wash 290P694; Man [1927] 2DomLR864, [1927] 1WestWkly429.

1172–71 TexCivA 289SW87; 153Va468, 143SE625. But see TexCivA 273SW666 [disting 108Ky11, 55SW694, 21KyL 1465].

1172–73 [a] (2) Fact of death must be established by preponderance of probabilities, under seven-year statute. 134 Misc715, 236NYS370.

1172–74 130Misc501, 224NYS442 (evidence sufficient to justify presumption of death). **Erratum.**–Strike out Wilcox v. Trenton Potteries Co., 64 N. J. Eq. 173, 53 A 474.

1173–75 117Tex1, 295SW913; TexCivA 273SW666, 670 [quotCJ]; TexCivA 290 SW237, 238 [citCJ].

1173–76 142Miss517, 107S198, 44ALR 1487 (insufficient alone to rebut presumption); TexCivA 273SW666, 670 [quotCJ]; TexCivA 290SW237, 238 [cit CJ]. [a] **Indictment and proceedings thereunder** are admissible for this purpose. TexCivA 273SW666.

1173–77 TexCivA 273SW666, 670 [quot CJ].

1173–80 TexCivA 290SW237, 238 [cit CJ]; Wash 290P694.

1173–81 TexCivA 273SW666 (doubt of witness as to identity goes to weight not to admissibility).

1173–83 But see TexCivA 273SW666.

1173–86 142Miss517, 107S198, 44ALR 1487 (only sufficient method of rebuttal); MoA 27SW(2d)31.

1173–92½–New. **Evidence held insufficient to overcome presumption.**–153Va 468, 143SE625.

1173–93 203 Iowa555, 213NW247; 124 Or225, 264P373; TexCivA 273SW666; Wash 290P694. [d] **Whether death of absentee may be presumed** to have occurred within life of policy and within seven years' period is for jury on conflicting evidence. 84Colo 71, 268P529, 61ALR1321.

1173–94 108Conn271, 142A891.

1173–99½–New. Presumption of death is applicable to all persons. TexCivA 289SW87.

1173–99¼–New. In Kentucky, the statute relating to presumption of death does not apply to a nonresident. 214Ky 267, 283SW111.

1173–99¾–New. The presumption of death, after seven years' absence, of one who has disappeared and has not been heard from after diligent search and inquiry, applies to those who are insured. 196NC408, 145SE787, 61ALR821.

1174–1 108Conn271, 142A891; 250Mich 185, 229NW509 (fix time of death within life of policy); 135Misc861, 239NYS722; 153Va468, 143SE625 (evidence held sufficient). But see TexCivA 273SW666.

1174–2 250Mich185, 229NW509; 135 Misc861, 239NYS722 (place of death).

1174–3 84Colo 71, 268P529, 532, 61ALR 1321 [quotCJ]; 37GaA206, 139SE363; 41GaA627, 154SE213; 203 Iowa596, 213 NW236; TexCivA 273SW666; TexCivA 286SW330; TexCivA 16SW(2d)136.

1174–5 25F(2d)335; 37GaA206, 139SE 363 (no presumption that death occurred at any particular time during period); 144Md623, 125A441; 245Mich548, 222 NW744, 65ALR1033; 134Misc715, 236 NYS370 (time of presumptive death is fixed as of date of decree unless contrary is justified by facts); 8PaDist&Co 369; 9PaDist&Co 328.

1175–7 29F(2d)71.

1175–10 135Misc861, 239NYS722.

1175–12 203 Iowa596, 213NW236. [a] (2) Other instances. 203 Iowa596, 213 NW236.

1175–13 84Colo 71, 268P529, 61ALR 1321; 124 Or225, 264P373 (question for jury); TexCivA 286SW330.

1175–13½–New. Usually the actual time of death is a question of fact for the jury. 117Tex229, 18W(2d)256, 61ALR 682.

1175–13¾–New. When rights have accrued after expiration of absence for seven years' period additional proof of exact time will not be required. 135 Misc861, 239NYS722.

1175–16 [a] (2) Where circumstances lead to inference that absentee was placed with family of different name at very early age. 211NYS624.

1175–18 19 OhA187; 198Wis140, 223 NW571, 64ALR1284(2dcase); Ont [1927] 3DomLR412.

1176–20 203 Iowa555, 213NW247.

1176–22½–New. Testimony that the missing person left his residence before the witness who has also been absent several years does not create a presumption of death. TexCivA 15SW(2d)108.

1176–23 245 IllA432.

1176–24 117Tex1, 295SW913.

1176–27½–New. Records of United States war department properly authenticated are plenary proof of soldier's death in action. NJ 134A88.

1176–28 248 IllA176; 165La777, 116S 182; 117Tex1, 295SW913; Can [1930] 4DomLR1011(2dcase).

1176–29 84Colo 71, 268P529, 61ALR 1321; 203 Iowa596, 213NW236; 135 Misc861, 239NYS722. [b] **Death may be proved** by facts invoking statutory presumption. 117Tex1, 295SW913.

1176–34 TexCivA 273SW666; TexCivA 4SW(2d)666.

1177–36 102NJEq230, 140A458, 459 [citCJ]; TexCommnA 25SW(2d)606. See also TexCivA 16SW(2d)136.

1177–39 125 Or522, 267P519.

1177–43 See also 217Ala212, 115S223.

1177–52 135Misc861, 239NYS722.

1178–73 84Colo 71, 268P529, 61ALR 1321; 108Conn271, 142A891; 126Kan 120, 266P935; 214Ky267, 283SW111; MoA 27SW(2d)31; 102NJEq230, 140A 458 (insufficient as basis of title in suit for specific performance); 222AppDiv 700, 225NYS217; 135Misc861, 239NYS 722; TexCivA 290SW237; Can [1930] 4DomLR1011(2dcase). [a] **Evidence to rebut presumption from absence** held sufficient. TexCivA 273SW666. [b] **Evidence held to establish death of absentee** (1) unheard of for fifty-five years. 216AppDiv255, 214NYS595. (2) After twenty years' absence. 166La122, 116S722. [c] **Evidence held to sustain finding** that insured absentee was alive. 117Tex1, 295SW913.

1179–76 203 Iowa596, 213NW236; 135 Misc861, 239NYS722.

1179–78 124 Or225, 264P373.

1179–80½–New. **Sufficiency of evidence** is determined by general rules. 25 F(2d)335 (insufficient to show death at beginning of period of absence).

1179–81 150Md60, 132A376.

1179–82 335 Ill 239, 167NE52 (at common law); 201 Iowa969, 204NW448, 43 ALR1340; 125Kan537, 265P73; 142 Miss522, 107S420, 45ALR618; 317Mo 216, 295SW83, 85 [citCJ]; 296Pa313, 145A820.

1179–83 201 Iowa969, 204NW448, 43

ALR1340; 317Mo 216, 295SW83; 220 MoA1245, 290SW655; 296Pa313, 145A 820. See also BC [1930] 1DomLR649.

1179-85 201 Iowa969, 204NW448, 43 ALR1340; 220MoA1245, 290SW655.

1179-86 201 Iowa969, 204NW448, 43 ALR1340; 220MoA1245, 290SW655.

1179-87 See also 220MoA1245, 290SW 655.

1180-88 201 Iowa969, 204NW448, 43 ALR1340.

1180-95 296Pa313, 145A820 (evidence must be such as to satisfy reasonably well balanced minds of fact).

1181-98 150Md60, 132A376; 31 OhA 175, 165NE869. [a] (7) Evidence held sufficient to show simultaneous death. 220MoA1245, 290SW655. (8) Evidence held sufficient to sustain finding that husband and wife died simultaneously in gas filled room. 317Mo 216, 295SW 83.

1181-98½-New. Evidence held sufficient to show survivorship. 171Minn 475, 214NW469.

1181-3 13F(2d)865; 16F(2d)948; 91 Fla1064, 109S225; 165Ga131, 139SE 868; 198 Ind675, 154NE484, 485 [cit CJ]; 202 Iowa517, 210NW573, 574 [cit CJ]; 158La853, 104S740; 126Me409, 139A227; 144Miss350, 109S857; 319Mo 1061, 5SW(2d)367, 368 [citCJ]; 221 MoA609, 283SW723; 82NH268, 133A4, 46ALR380; 190NC573, 130SE313; 190 NC806, 131SE274 (did not exist at common law); 113 OhSt546, 149NE876; TexCivA 274SW1014; TexCivA 286SW 291; TexCivA 286SW568 (stating rule); 195Wis108, 217NW687; Wis 231NW 597.

1184-21 Contra 27Hawaii626.

1184-23 [a] **Federal Employees' Liability Act** gives personal representation of deceased an independent right of action for the benefit of certain beneficiaries. 121Kan392, 247P446.

1184-25½-New. In Hawaii. Since May 1923 action by statute exists. 27Hawaii 626.

1184-29 13F(2d)865; 175Ark626, 1SW (2d)48; 82CalA610, 256P447; 7LaA 356; Mass 171NE658; 314Mo 390, 284 SW455; 221MoA609, 283SW723; 117 Nebr85, 219NW802; 130Misc755, 225 NYS211; TexCivA 27SW(2d)641. [a] **Right of action is completely within jurisdiction of legislature.**–82CalA610, 256P447.

1185-34 120Kan659, 245P162; 217 AppDiv775, 217NYS194; 190NC573, 130 SE313; 190NC806, 131SE274.

1185-35 48RI 437, 138A210.

1185-38 274US112, 47SCt509, 71L ed 952; 13F(2d)865; CalA 285P879; DelSuper 143A250; 165Ga131, 139SE 868; 128Me174, 146A257; 314Me13, 283 SW51, 45ALR1466; MoA 28SW(2d)107; 221AppDiv214, 223NYS5; 229AppDiv 590, 243NYS545; 191NC396, 131SE721; 31 OhA237, 166NE237; TexCivA 286SW 568. [c] **Act is enabling act** and its requirements are exclusive and permissive. 190NC806, 131SE274.

1186-46 108Conn645, 144A665.

1186-47 19F(2d)522; 31F(2d)767; 41 F(2d)578; 82NH268, 133A4, 46ALR 380; 142SC202, 140SE468; 153Tenn250, 283SW71.

1187-50 41F(2d)578; 330 Ill 571, 162 NE170; Ont [1930] 1DomLR683.

1187-52 12PaDist&Co 343 (where plaintiff dies pending suit).

1187-54 103Conn520, 131A501.

1188-60 But see Ala 127S553.

1188-62 See also 50RI 217, 146A488.

1188-63 Ont [1930] 1DomLR683.

1189-66 [b] (2) Action for death of invitee cannot rest on statute protecting employees. 171Minn440, 214NW659.

1189-69 19F(2d)522; 26F(2d)290 (Jones Act, as to seamen); 284Pa577, 131A484.

1190-72 284Pa577, 131A484. [b] **Double recovery.**–284Pa577, 131A484.

1192-84 274US112, 47SCt509, 71L ed 952; 307Mo 307, 270SW318 (statute giving right of action for death from negligent operation of automobiles). [d] **Provision authorizing personal representative to bring action for benefit of estate of deceased employee** is not violative of equal protection clause of federal constitution. 28Ariz527, 238P335.

1192-85 [a] (2) Under its police power, legislature, in providing remedy for wrongful death, may place operators of automobiles engaged as common carriers for hire in same category as other common carriers, and may place other drivers of automobiles in a separate class. 307Mo 307, 270SW318.

1192-91 [a] (3) Action under death act against county for negligently causing death by defective highway and bridge may be maintained notwithstanding provisions of General Highway Damage Act limiting recovery of damages for personal injuries to action under such act and abrogating common-law liability therefor. 231Mich681, 204NW756. [g] **Right of action may be abrogated in whole or in part.**–82CalA610, 256P 447. [h] **Sections of special act will repeal** those of prior general act in so far as they are inconsistent. CalA 285 P879. [i] **Statute limiting liability for death of guest in automobile** does not destroy right under death statute. Cal 287P343.

1193-97 [a] **Particular statutes construed.**–CalA 285P879.

1193-98 158La853, 104S740 (holding rule to apply to persons entitled to sue, right of action deceased had, and right of action of survivors).

1193-2 202 Iowa517, 210NW573; 314 Mo 390, 284SW455; 148SC1, 145SE539, 61ALR826. [a] **Statute held merely to change proof** required to permit recovery. Cal 293P62.

1193-3 274US112, 47SCt509, 71L ed 952; 108Conn436, 143A568; 125Kan 537, 265P73; 253Mass499, 149NE208; NH 146A395(2dcase).

1194-5 165Ga131, 139SE868; 48RI 357, 138A212 (Massachusetts statute).

1194-9 274US112, 47SCt509, 71L ed 952.

1194-10 48RI 357, 138A212.

1194-11 165Ga131, 139SE868; 48RI 357, 138A212.

1194-16 [a] **Statute held merely to change degree of negligence** required to permit recovery. Cal 293P62.

1195-24½-New. Delivery truck held "other vehicle" within statute rendering owner liable for negligent death. 115 Tex455, 283SW475.

1195-25 Cal 293P62; CalA 287P360; 290Pa167, 138A751, 54ALR1073.

1195-27 CalA 285P879.

1195-34 115Tex551, 285SW1084, 1087 [citCJ].

1197-65 152Va736, 148SE803 (in action against municipality).

1197-76 202 Iowa517, 210NW573; NJ Sup 150A226(1stcase) (where suit as general administrator plaintiff properly nonsuited as to count as administratrix ad prosequendum).

1198-90 125Kan537, 541, 265P73 [cit CJ]; 81Mont79, 261P613.

1199-98 256Mass337, 152NE373.

1199-5½-New. Under such statute the fact that the jury assesses the damages for conscious suffering by deceased at nothing does not affect the right of the beneficiaries to recover for pecuniary loss caused by his death. TexCivA 291 SW281.

1199-7 216Ala241, 113S235; Ill 233A 373; 253 IllA190; 217AppDiv775, 217 NYS194. [a] **Cause of action is ex delicto.**–319Mo 1061, 5SW(2d)367.

1199-8 217AppDiv775, 217NYS194; 191 NC396, 131SE721.

1199-13 Mo 26SW(2d)980.

1200-17 215Ky525, 286SW784; 263 Mass73, 160NE301, 56ALR1123.

1200-20½-New. A right of action under the Federal Employers' Liability Act for the death of an employee is dependent on the existence of a duty to deceased immediately before his death, breach thereof and death as a proximate result. TexCivA 291SW281.

1200-21 277US335, 48SCt541, 72L ed 906; 38F(2d)808; 111Conn196, 149A 682; 46 Ida622, 269P993; 191NC396, 131SE721; 153Tenn250, 283SW71; Tex CivA 286SW568.

1201-22 153Tenn250, 283SW71.

1201-24 145Wash548, 260P1075.

1201-27 111Conn196, 149A682; 244 IllA427, 431 [citCJ]; 251 IllA382.

1201-31 214Ala611, 108S566.

1201-33 22F(2d)960 (Texas statute); 221MoA609, 283SW723.

1202-34 TexCivA 286SW568.

1204-54 Mo 26SW(2d)980.

1204-55 39GaA689, 148SE308.

1204-56 [a] **Effect of decedent's participation in criminal act.**–257Mass518, 154 NE251, 49ALR958.

1204-59 218Ala609, 119S647; 319Mo 1061, 5SW(2d)367, 368 [citCJ].

1204-64 262Mass387, 160NE326. [b] (1) 104WVa134, 139SE642.

1205-70 Iowa 218NW492; TexCivA 274 SW1014.

1206-71 Wash 291P344. See also Tex CivA 291SW667.

1206-73 82NH268, 133A4, 46ALR380.

1207-77 [a] (2) 101NJL496, 130A9.

1207-79 See also 87CalA626, 262P423.

1207-80 194Cal 159, 228P428; 198Cal 290, 244P1077; CalA 287P570; Fla 129 S915; NJSup 135A664; 130 Okl 171, 265P1045; TexCivA 274SW1014; Tex CivA 286SW291; TexCivA 288SW588; 195Wis108, 217NW687 (son suing for mother's death).

1208-81 172Ark353, 289SW6; 111Conn 196, 149A682; 166Minn79, 207NW186; 144Miss350, 109S857.

1208-82 130 Okl 171, 265P1045. [a] (2) Adult children must prove their pecuniary loss. 130 Okl 171, 265P1045.

1209-86 166Minn79, 207NW186.

1209-87 166Minn79, 207NW186.

1210-89 NJSup 147A464.

1210-95 48RI 437, 138A210.

1210-96 191NC396, 131SE721.

1210-98 213Ala490, 105S651 (estate of deceased has no claim on amount recovered for sole benefit of minor daughter); 170Ark842, 281SW910; 173Ark 135, 292SW386; 168Minn152, 210NW70 (under Federal Employers Liability Act); 48Nev72, 227P1008; NH 146A395 (2dcase); 226AppDiv153, 234NYS541; 191NC396, 131SE721; TexCivA 29SW (2d)524; Wyo 288P524. [d] **In Oklahoma.**–117 Okl 190, 245P891.

1211-2 167La249, 119S37; 169La450, 125S445; TexCivA 286SW291.

1211-4 281US38, 50SCt207, 74L ed686; 8F(2d)835 (under Tennessee statute); Mass 172NE590; 314Mo 390, 284SW455; 117 Okl 190, 245P891; 21SaskL345, [1927] 1DomLR951, [1927] 1WestWkly 193.

1212-11 71CalA442, 235P652; Wash 291P714.

1212-14 166Minn79, 207NW186; 130 Okl 171, 265P1045; TexCivA 278SW 272; 145Wash31, 258P842. [a] (6) In order for mother to recover it must appear not only that child contributed materially but also that mother was dependent upon it to material degree, although dependency and contribution are mentioned alternatively in code. 34GaA 315, 129SE301. (7) Insane mother committed to state sanitarium not "dependent" upon child for support within meaning of code. 34GaA315, 129SE301. [a] (8) Under recent statutes dependency of widow or child, minor or sui juris, is no longer necessary to right to maintain action. 163Ga784, 137SE24.

1213-15 145Wash31, 258P842; 146 Wash688, 264P990 (sixty-two year old sister of deceased held dependent). [a] (7) Adult child can recover if parent contributed to support. TexCivA 278SW 272. [b] **Dependency is based on condition,** not on promise. 145Wash31, 258P 842.

1213-16 145Wash31, 258P842.

1213-17 145Wash31, 258P842.

1213-18 [a] (2) Minor son, proceeds of whose labor come into common fund for support of family, is contributing substantially to mother's support as regards recovery for his death. 40GaA4, 148SE757.

1213-20 [a] 166Minn79, 207NW186.

1214-22 166Minn79, 207NW186; 170 Minn317, 213NW32, 51ALR1408.

1214-23 234Ky504, 28SW(2d)733; 166 Minn79, 207NW186.

1214-25 166Minn79, 207NW186; 170 Minn317, 213NW32, 51ALR1408. [a] **Act does not define "next of kin"** and meaning of term is left to state law. 170 Minn317, 213NW32, 51ALR1408.

1214-26 166Minn79, 207NW186; Tex CivA 28SW(2d)312.

1214-27 166Minn79, 207NW186. [a] (6) Dependency is to be determined from facts and circumstances of each particu-

lar case. 166Minn79, 207NW186. (7) Dependency may exist, though there was no actual necessitous want on part of alleged dependent where he or she received support from one who furnished it voluntarily and who might reasonably be expected to continue to do so. 166 Minn79, 207NW186. (8) Finding that sister of employee was dependent upon him, though she was of age, free from mental or physical disability and capable of earning livelihood where, at brother's request, she gave up independent occupation to manage his household and care for their mother and she received money from him for her support and maintenance of family. 166Minn79, 207NW186.

1215–28 Cal 287P343; 120 Oh110, 165 NE576, 64ALR441.

1215–31 213Ky846, 281SW996.

1215–33 158La853, 104S740 (holding that, where there was member of prior class who began suit and died pending suit, action did not survive to members of deferred class).

1215–34 170Minn317, 213NW32, 51ALR 1408; 152SC161, 149SE692 (action maintainable for mother's benefit where there was no father or children and decedent's wife had eloped with adulterer).

1215–36 170Minn317, 213NW32, 51ALR 1408.

1215–38 169La450, 125S445.

1215–40 210Ky163, 275SW379 (under statute administrator of wife entitled to recover from administrator of husband amount received for husband's death in railroad accident).

1215–41 7LaA51. But see 7LaA543.

1216–42 4LaA723; MoA 12SW(2d)933.

1216–44 See also 1LaA332.

1216–46 1LaA100.

1216–47 169Ga158, 149SE898 (whether minors or adults).

1216–50 163Ga598, 136SE895. [a] **In Georgia** minor married child who lived with widowed mother cannot recover for her homicide occurring prior to act of Aug. 18, 1924 where it does not appear whether he was in fact dependent upon her for support. 163Ga598, 136SE895.

1216–52 170Ark842, 281SW910 (under Federal Employers' Liability Act); 314 Mo123, 282SW416 (Federal Employers' Liability Act).

1217–57 TexCivA 27SW(2d)641.

1217–59 202 Iowa517, 210NW573.

1217–63 Mo 23SW(2d)102 (right of action joint and indivisible till merged in judgment).

1217–64 130 Or452, 280P505 (right of action given by statute only for negligence of employer causing death, and not for negligence of others).

1217–68½–New. That deceased minor son had not been living with mother does not preclude recovery by her where she had provided a home for him. MoA 27 SW(2d)31.

1218–69 59 OntL641, [1927] 1DomLR 477.

1218–70 6LaA103.

1218–71 235 IllA126. [a] **In Illinois.–** 235 IllA126.

1218–76 130 Okl 171, 265P1045.

1219–89 Cal 290P22; 32PortoRico 208 (natural mother of illegitimate adult child). [a] (2) Adult sister of decedent who left surviving him two minor children is not heir. 194Cal 159, 228P428. (3) Right of heirs to sue is statutory right. Cal 293P62.

1219–95 35F(2d)736.

1219–98 See also 1LaA147.

1220–6 32PortoRico 208.

1220–7 32PortoRico 208 (even though adult). [a] **Natural mother** entitled to recover as heir for death of adult illegitimate child under Civ. Code § 1913. 32 PortoRico 208.

1220–14½–New. Where status of child of void marriage is that of a legitimate, he is a child within the meaning of the Federal Employers' Liability Act. 170 Minn317, 213NW32, 51ALR1408.

1222–30 [e] **Under Workmen's Compensation Acts,** widow receiving compensation for herself and minor son and who supports son is under no obligation to account to him for his proportionate share of such compensation. 239Mich 373, 214NW62.

1222–32 232Ky702, 23SW(2d)564.

1222–34 72CalA45, 236P568 (according to pecuniary loss).

1223–50 191NC396, 131SE721. [e] 191 NC396, 131SE721.

1224–51 43F(2d)36 (construction of Oklahoma statute).

1225–65 228Ky56, 14SW(2d)185.

1225–66 320Mo 916, 9SW(2d)912.

1225–68 Ala 129S60 (may be apportioned).

1225–70 149Va318, 141SE228.

1226–73 Cal 290P22.

1227–92 175Ark626, 1SW(2d)48.

1228–93 160Tenn134, 22SW(2d)221.

1228–94 160Tenn134, 22SW(2d)221 (where lex loci delictus designates beneficiaries).

1228–95 160Tenn134, 22SW(2d)221.

1228–7 But see 41GaA98, 152SE485(2d case).

1229–12 [d] (2) Administrator's claim under sheriff's bond is based on rights of intestate which survived and passed to representative for benefit of estate. Wyo 288P524.

1229–14½–New. A wife who sat on a rock with the purpose of preventing the removal of a culvert, of which it was a part, by a grading crew, is not liable for the death of a member of the crew killed by her husband in a controversy over the removal of the stones. 123Kan290, 255P32.

1229–14½–New. The crown is liable for death due to the negligence of its servants. 41CanSC71, 6EastLR119.

1229–18 116Tex207, 288SW402.

1229–18½–New. Receiver of railroad is liable under statute. TexCivA 278SW 272.

1230–29 [b] **In Texas.–**22F(2d)960.

1232–36½–New. Under some statutes a joint recovery against master and servant is authorized. 310Mo 72, 274SW 1031.

1232–39 111Conn196, 149A682.

1232–40 235 IllA126; 158La853, 104S 740 (holding right of action not transmissible from one survivor to another either by general laws of inheritance or statute). [d] **In Louisiana.–**158La 853, 104S740.

1232–42 158La853, 104S740 (where court said that where right survives widow or minor child or either right was not transmitted to child from widow upon her death, but was acquired concurrently with widow and was not affected by her death); 317Mo 782, 297 SW20.

1232–43 275US161, 48SCt73, 72Led 216, 59ALR758; 235 IllA126; 158La 853, 104S740 (holding that, where mother who was only beneficiary entitled to sue dies pending suit, action does not inure to benefit of brothers and sisters, since right of action is not transmissible by force of inheritance or statute).

1233–44 156SC390, 153SE337(2dcase).

1233–46 152Tenn239, 276SW866.

1233–47 125Kan537, 541, 265P73.

1233–48 253Mass499, 149NE208; 300 Pa457, 150A622; Wis 231NW597.

1233–54 46RI 475, 129A267; 155Wash 585, 285P425, 67ALR1152; 197Wis535, 222NW811(1stcase); Wyo 288P524. [b] **Action for wrongful death cannot be maintained against sheriff's surety** after sheriff's death. Wyo 288P524.

1233–54½–New. Judgment may be entered on verdict rendered before defendant's death where law questions are reserved for decision. 253Mass499, 149NE208.

1234–58 155Wash585, 285P425, 67 ALR1152.

1234–59½–New. In Canada cause of action for death against crown which arises during lifetime of sovereign does not abate on death of such sovereign. 6 ELR119.

1234–62 320Mo 916, 9SW(2d)912.

1234–64 35F(2d)736; 191NC396, 131 SE721; 141 Okl 1, 283P571, 67ALR 1059. [c] (2) Husband or wife, in absence of children, have one year to commence action. 317Mo 204, 295SW95. (3) Minor children, in absence of husband or wife, have one year to sue. 317Mo 204, 295SW95. [d] **Under Federal Employers' Liability Act** action for death is barred in two years from death. 271US58, 46SCt405, 70Led835. [e] **In Arkansas.–**175Ark626, 1SW(2d)48. [f] **In New York.–**229AppDiv590, 243NYS 545.

1234–65 165La132, 115S412 (quasi offense or tort); 141 Okl 1, 283P571, 67 ALR1059. [d] **In Massachusetts.–**170 NE796.

1234–68 [a] **Statutes, expressly applicable to municipal corporations.–**178 Minn489, 227NW653.

1235–77 30Hawaii132; 254 IllA323; 10La382, 120S907; 148Md477, 129A793, 794 [citCJ]; 319Mo 1061, 5SW(2d)367; 190NC806, 131SE274 (limitation not required to be pleaded by defendant); 193NC800, 138SE165; 198NC397, 151 SE857, 68ALR210; 28 OhA70, 162NE 455. See also MoA 275SW599. [a] (4) 317Mo 204, 295SW95. (6) Time of bringing suit is not reduced, so far as tort-feasor is concerned, by fact that both spouse and minor children survive. 317Mo 204, 295SW95.

1236–78 36F(2d)591.

1236–83 CalA 285P321.

1236–91 111Conn196, 149A682; Mass 170NE796.

1237–94 MoA 291SW174.

1237–97 But see NJCir 149A814.

1238–7 8F(2d)843; 12PortoRicoFed 460.

1238–8 26F(2d)290; Mo 23SW(2d) 100.

1239–13½–New. Issuance of new summons after discontinuance for failure of service and expiration of the period of limitation prescribed does not comply with death statute. 190NC806, 131 SE274.

1239–17 111Conn196, 149A682; 131 Misc395, 226NYS617. [a] **Where deceased commenced action within period of limitation after accident,** death action by administrator is not barred because death occurred five years after accident. 131Misc395, 226NYS617.

1240–25 198NC397, 151SE857, 68ALR 210.

1240–27 175Ark626, 1SW(2d)48.

1240–34 216Ala241, 113S235. [b] (2) Consent of woman to abortion does not bar representative from suing. IndA 163NE610. [d] **Member's contractual assumption of risk in using pool** cannot defeat mother's action for death based on negligence. CalA 291P848.

1241–37 249Mich147, 228NW723 (contributory negligence).

1241–46 TexCommnA 298SW267.

1242–51½–New. Imputed negligence. Great weight of authority is that under death statute negligence of an infant's parents is not to be imputed to infant or his personal representative. 120 Or 19, 251P252.

1242–54 38F(2d)808; 92Fla310, 109S 427, 430 [citCJperWhitfield, J]; 211Ky 750, 278SW111; 10LaA342, 120S405; 239Mich699, 214NW939; Mich 232NW 700; 244NY111, 155NE67; 198NC795, 153SE413; TexCivA 19SW(2d)211 (unless question of discovered peril is presented); TexCivA 30SW(2d)586; Va 154SE575; Man [1930] 3DomLR215.

1243–55 TexCommnA 298SW267; Tex CivA 28SW(2d)320. [b] (1) 262Mass 56, 159NE507 (under statute); Mass 168NE171.

1243–56 92Fla310, 109S427, 430 [cit CJperWhitfield,J].

1244–59 218Ala350, 118S656; 124Me 407, 130A212.

1244–62 97CalA654, 275P980; Mass 173NE545 (negligence not imputable to parents of deceased children).

1244–63 102CalA600, 283P295 (parent held not negligent per se); 232 IllA115; 250 IllA53; 211Ky750, 278SW111; 317 Mo 782, 297SW20; 317Mo 782, 297SW 20; 141SC333, 139SE788; TexCivA 22 SW(2d)695. [b] **Contributory negligence of parents** bars action for death of child. 211Ky750, 278SW111. [c] **Parents held not negligent.–**12LaA97, 124S572.

1245–64 38F(2d)958; CalA 287P570; 108Conn645, 144A665.

1245–66 But see CalA 287P570.

1245–67 Mo 23SW(2d)102; 221AppDiv 402, 222NYS740.

1245–68 108Conn645, 144A665.

1245–68½–New. Contributory negligence of parents is no bar where de-

cedent was child illegally employed. 232 IllA430.

1245–68½–New. Passive negligence of a parent will not prevent the operation of the doctrine of last clear chance. 9 LaA688, 121S775.

1245–68½–New. A husband, as administrator, cannot maintain an action in behalf of himself and the next of kin against his son for negligently causing his wife's death. 252 IllA333.

1245–69 OhA 173NE245.

1245–70 233 IllA373.

1246–73 173Ark135, 292SW386; 232 IllA115. Contra 232 IllA430.

1246–73½–New. The consent and acquiescence of a father, sole beneficiary, in the unlawful employment of his infant son in a gainful occupation, dangerous to life and health, in violation of a statute, will bar a recovery by him for death of his son resulting from such employment. 104WVa344, 140SE1.

1246–73½–New. Where an infant was unlawfully employed, with his father's consent, as a common laborer in a dangerous occupation, his employment in unloading gravel cars does not constitute a shifting to a more dangerous kind of work so as to justify a recovery by the father for his death resulting from such employment. 104WVa344, 140SE1.

1246–79 277US335, 48SCt541, 72Led906; 111Conn196, 149A682; 124Kan66, 257P971.

1247–96 40 OklACR117.

1247–98 215Ala328, 110S566.

1248–99 125Kan252, 264P59. [a] **Widow can compromise claim after judgment** without consent of children and settle judgment. 43F(2d)36.

1249–7 125Kan252, 264P59.

1249–12 320Mo 46, 6SW(2d)929.

1250–28½–New. Where, pending an action by administrator under the Lord Campbell Act, decedent's mother before judgment (herein elected to bring suit under the Employers' Liability Law her right was superior and not barred by first action. 31Ariz27, 250P255.

1250–33 244 IllA427, 431 [citCJ]; 251 IllA382.

1250–35 111Conn196, 149A682.

1250–38 But see 46 Ida622, 269P993.

1251–46 139 Okl 142, 281P565 (child not named in action by widow in representative capacity must look to recovery had by her in appropriate proceeding).

1251–62½–New. The widow of one killed by gross negligence may recover exemplary damages although workmen's compensation was paid, where actual damages had not then been recovered. TexCivA 16SW(2d)976.

1252–65 9LaA147, 119S489; 8LaA395.

1252–68 74CalA726, 241P938.

1252–73 237Mich583, 213NW188; 156Miss567, 126S395; 130Misc755, 225NYS211; 135Misc36, 237NYS655; 160Tenn134, 22SW(2d)221.

1253–75 156Miss567, 126S395; Mo 30SW(2d)37; NH 146A395(2dcase) (nature of action); 217AppDiv775, 217NYS194. [b] (2) 237Mich583, 213NW188. [c] **Injury occurring in one state and death in another.**–237Mich583, 213NW188. [f] **Recovery in Connecticut will be permitted under New York statute,** though such statute allows greater recovery than Connecticut statute. 108Conn436, 143A568.

1253–76 156Miss567, 126S395 (right of action); 217AppDiv775, 217NYS194; 130Misc755, 225NYS211; 30 OhA528, 165NE865.

1254–79 [b] **Federal Employers' Liability Act** has no extraterritorial force. 268US29, 45SCt402, 69Led828, 38ALR1048. [c] **Mere fact that boat is owned and registered in this country** does not make act applicable to foreign employer. 21F(2d)814.

1254–91½–New. In jurisdictions where, under statutes, the damages are for loss to the estate of deceased, the action is in trespass and not in case. 48RI 437, 138A210.

1255–99 193Wis515, 213NW658.

1255–2 193Wis515, 213NW658.

1257–16 130Misc755, 225NYS211.

1258–19½–New. An action for death occurring in a foreign country is presumed to be based on a foreign statute, the state statute having no force outside the state. 126Me409, 139A227.

1260–36 48RI 357, 138A212 (Massachusetts statute).

1261–45 24F(2d)299.

1261–46 128Misc138, 217NYS856.

1262–51 30F(2d)466.

1262–55 170Ark842, 281SW910; 198NC397, 151SE857, 68ALR210.

1262–57 [a] **Where action is in federal court,** provision must be observed, but if in state court (under Jones Act by incorporation of Employers' Act), there being no "district," question is not jurisdictional, and action brought in wrong county need not be dismissed, but place of trial may be changed. 128Misc138, 217NYS856.

1262–59 314Mo 123, 282SW416.

1262–1 72CalA45, 236P568; 36 OklACR129; 118 Or436, 246P733; TexCivA 286SW291.

1263–3 [a] (2) Where only person authorized to sue under Employers' Liability Act is appointed administratrix of decedent's estate, she may waive right to sue under Employers' Liability Act and sue in representative capacity under General Death Act. 118 Or436, 246P733.

1263–5 178Ark103, 10SW(2d)894.

1263–6 235Ky252, 30SW(2d)952; 165Minn390, 206NW714 (is real party in interest); 117Nebr85, 219NW802; 50Nev392, 263P768; NH 146A395(2dcase); 217AppDiv510, 217NYS401; 130Misc755, 225NYS211; 191NC396, 131SE721; 283Pa573, 129A574; Wis 231NW597; Wyo 288P524. [e] **Only administrator or executor duly appointed** may sue. 215AppDiv678, 213NYS576. [f] **Onondago Indian** may be appointed administrator with limited letters to sue for wrongful death. 215AppDiv678, 213NYS576. [g] **Indian appointed administratrix of deceased Indian's estate at death feast under tribal custom** is not "administratrix" within law entitling her to sue for wrongful death. 215AppDiv678, 213NYS576.

1265–9 108TexCr444, 18SW(2d)617 (consent to search waives warrant).

1265–11½–New. or by failure to exercise it generally, 213Ky846, 281SW996.

1266–17 215Ky774, 286SW1071.

1266–22 [b] **Administratrix, as such, has no title or interest** in subject matter but is mere nominal party. 318Mo 28, 298SW817.

1266–26 20F(2d)220.

1266–28 170Ark842, 281SW910. [b] **Action under Federal Employers' Liability Act** may be maintained by administrator appointed in state where decedent resided at time of death and where he was killed while he was engaged in interstate commerce. 303Mo388, 261SW58.

1267–33 See also NH 146A395(2dcase).

1267–34 NH 146A395(2dcase). [a] (1) See also SC 155SE740. (2) Under act, appointment of foreign administratrix does not prevent suit by resident administratrix, especially where former has been discharged. 318Mo 28, 298SW817.

1268–43 130Misc755, 225NYS211 (Canadian rule).

1269–54 43F(2d)36; 120Kan659, 245P162 (widow may sue for husband's death where no personal representative appointed); 154Tenn602, 290SW402. [c] **In Oklahoma.**–36 OklACR129; 139 Okl142, 281P565. [d] **Plaintiff was not surviving husband** where deceased had obtained interlocutory decree of divorce against another but no final judgment had been entered. TexCivA 8SW(2d)295.

1270–56 34NM660, 287P694. [b] **Widow's suit within six months irrevocably establishes cause of action in her to exclusion of children** regardless of subsequent disposition of suit. 317Mo 204, 295SW95.

1270–58 13F(2d)865 (Nevada statute); 317Mo 782, 297SW20 ("survivor"). [b] **In Porto Rico.**–13PortoRicoFed405.

1270–60 263Mass73, 160NE301, 56ALR1123.

1270–62 13F(2d)865.

1270–64 174Ark966, 298SW207.

1271–73 CalA 287P570; 139 Okl 142, 281P565.

1271–75 198Cal 290, 244P1077; 72CalA45, 236P568; 169Ga158, 149SE898. [b] (2) The children alone cannot maintain action instituted by children after death of husband. 169Ga158, 149SE898.

1272–80 [a] (2) Where suit is brought for benefit of decedent's mother, there being no children or father and decedent's widow having previously eloped with adulterer, defendant is entitled to have deceased's widow joined as party to preclude possible double recovery. 152SC161, 149SE692.

1273–85 See also 178Ark103, 10SW(2d)894.

1273–89 [b] **Where both father and mother are killed** action is instituted in name of children jointly. Pa 151A680.

1274–94 12PortoRicoFed460.

1274–96 MoA 27SW(2d)31.

1275–8 72CalA45, 236P568.

1277–29½–New. Neither the employer nor his insurer under Workmen's Compensation Act is a necessary party to an action against third person whose negligence caused death of employee. 165Minn390, 206NW714.

1278–52 1LaA197.

1278–54 39GaA724, 148SE413. [f] **Complaint held sufficient.**–SD 229NW383 (action by administrator against hospital for death of child). [g] **Complaints held sufficient.**–TexCivA 28SW(2d)844.

1278–55 9LaA147, 119S489.

1279–60 [c] **Every ground of negligence** relied on for recovery must be set forth. 38F(2d)304.

1279–63 253 IllA190.

1283–16 8F(2d)223.

1283–21 113 OhSt546, 149NE876.

1284–23 [a] (4) Where complaint in action for death resulting from injuries sustained in another state does not set forth statute of such state, omission may be cured by amendment. 113 OhSt546, 149NE876. (5) Such amendment does not set up independent or substituted cause of action or constitute departure. 113 OhSt546, 149NE876.

1284–29½–New. Allegations that decedent was engaged in interstate commerce and of damages in excess of amount allowed by state statute do not bar recovery thereunder. 253 IllA190.

1285–33 255 IllA239; 220MoA1245, 290SW655; 117 Okl 190, 245P891.

1286–38 41GaA484, 153SE442 (necessity of alleging son left no wife or child).

1287–48 139 Okl 142, 281P565. But see 72CalA45, 236P568.

1287–49½–New. A petition by a parent to recover for the homicide of his child, not negativing the existence of a wife or child of deceased, is insufficient. 39GaA685, 148SE278.

1287–57½–New. A petition showing no right of action in plaintiff public administrator, by reason of a child living, is jurisdictionally defective. MoA 291SW174.

1287–62 320Mo 1130, 9SW(2d)596.

1288–87 194Cal 159, 228P428 (complaint in action by adult sister of deceased insufficient where not alleging plaintiff heir of decedent).

1288–87 Mo 21SW(2d)762; TexCivA 286SW291. [b] **In Porto Rico.**–32PortoRico 208.

1288–89 Mo 21SW(2d)762.

1289–92 [a] **Father suing for death of son** must allege death of mother before time of homicide. 37GaA631, 141SE322.

1289–98 130A221.

1290–7 248 IllA584; 193NC800, 138SE165. [i] **"Twenty four calendar months"** synonymous with "two years" and sufficient compliance with statute. 101NJL419, 129A191. [j] **Amendment of complaint by insertion of words "two years"** in place of "within 24 months" declared properly allowed, if necessary. 101NJL419, 129A191.

1290–8 131Misc395, 226NYS617.

1290–9 148Md477, 129A793.

1290–12 230Ky333, 19SW(2d)980 (allegation that deceased left surviving him widow or kin who sustained pecuniary

loss is necessary where death occurred in Illinois).

1291–14 TexCivA 28SW(2d)312.

1292–19 [a] 283Pa378, 129A323.

1292–25½–New. Action on foreign statute for death is not objectionable because the statute allows greater damages than alleged in the writ. 126Me409, 139A227.

1292–29 BC [1929] 1DomLR903.

1294–53 117 Okl 190, 245P891.

1294–57 198 Ind675, 154NE484. [b] **Allegation that husband killed wife** held properly stricken out in action by administrator against children of his decedent's deceased husband. 198 Ind675, 154NE484.

1295–69 [b] **Plea of self-defense,** interposed in civil action for homicide, has been held sufficient. 220Ala120, 124S 296.

1296–79 [b] (2) Where answer contained plea of contributory negligence, to that extent answer is sufficient. 231 Ky160, 21SW(2d)250.

1296–83 190NC806, 131SE274.

1297–93 36GaA70, 135SE439 (as to damages); NJ 130A221 (amending complaint to show capacity to sue); 102NJL 288, 132A253; 113 OhSt546, 149NE876. [a] (6) Setting forth statute of sister state where injury occurred where original complaint failed to do so. 113 OhSt546, 149NE876. [d] (6) Claim for damages in excess of amount allowed under Illinois statute may be amended after verdict. 253 IllA190.

1297–94 113 OhSt546, 149NE876.

1297–95 253 IllA190; NJ 130A221; 113 OhSt546, 149NE876.

1299–14 198Cal 290, 244P1077.

1299–16 [a] **Time for amendment.**–25 OhNPNS236.

1299–19 198Cal 290, 244P1077; MoA 279SW217.

1300–22 MoA 279SW217.

1301–36 [b] **Proof that plaintiff was deceased's widow** is not necessary where answer is general denial and suit is founded on right of deceased transmitted to his representative. MoA 14SW (2d)701.

1301–38 Mo 21SW(2d)762. [a] (5) Pecuniary damages must be shown where answer denies allegations of dependency which were merely to effect that deceased was sole support of adult sister and that she was dependent on him for support. 194Cal 159, 228P428.

1301–42½–New. Limitation on action for wrongful death is a condition which must be proved by plaintiff to make out a cause of action, and applies whether defendant is a resident or nonresident. 196NC345, 145SE771.

1301–43 220MoA760, 277SW67 (evidence admissible).

1301–44 126Me409, 139A227 (foreign statute not alleged cannot be proved); 24 OhA391, 156NE619; TexCivA 28SW (2d)865.

1302–47 134SC17, 131SE619.

1302–48 134SC17, 131SE619.

1302–51 91CalA715, 267P741 (earnings of wife). MoA 27SW(2d)31. [a] (3) Mother may show that deceased was healthy, obedient, and affectionate child without specially pleading fact. MoA 27SW(2d)31.

1302–52 320Mo 1130, 9SW(2d)596. See also 220MoA760, 277SW67.

1303–57 21AlaA163, 106S69; Iowa 218 NW492; 258Mass232, 154NE762; 259 Mass272, 156NE254; 262Mass437, 160 NE249; 32PortoRico 208; Wis 233NW 91. [a] (2) Other instances. Mass 171 NE658. [b] **Where no evidence of intestate's care,** no presumption exists of due care on his part. 259Mass401, 156NE 538.

1303–58 39F(2d)869; 21AlaA163, 106 S69; IndA 172NE783; Iowa 218NW 492; 32PortoRico 208; 146Wash66, 262 P133. [a] **Lack of driver's license** at time of killing a pedestrian with car will not make driver liable, unless that circumstance had some connection with the cause of death. 32PortoRico 208.

1303–60 35F(2d)736; 5LaA417; 259 Mass272, 156NE254; 190NC806, 131SE 274 (plaintiff required to prove action instituted within time prescribed by law). See also 228Ky56, 14SW(2d)185. [a] **Failure of one heir to prove loss** will not prevent recovery by another whose loss has been proved. CalA 287 P570.

1303–63 152Va264, 146SE277.

1303–64½–New. Mere happening of accident causing death is insufficient to charge defendant with negligence. 284 Pa521, 131A363.

1303–64¼–New. Proof of the fact that the next of kin living in a foreign country were dependent at the last date it was reasonably possible to prove such fact without making them witnesses, together with proof of their physical infirmities and financial inability to attend the trial, might afford a reasonably rebuttable inference of present dependency. 119 Oh367, 164NE358.

1303–64¼–New. Plaintiff has burden of establishing relationship existing between deceased and defendant. TexCivA 32SW(2d)220.

1303–67 [a] 32PortoRico 208.

1304–72 101NJL496, 130A9; 292Pa200, 140A877, 879 [citCJ].

1304–77 23F(2d)395; 207Cal 753, 279 P788 (only in absence of direct proof); 70CalA303, 233P357; 74CalA10, 239P 429; 102CalA744, 283P850; 202 Iowa 1038, 208NW334; 119Kan751, 241P437; 236Mich590, 211NW86; 240Mich352, 215 NW337; 240Mich273, 215NW346; 247 Mich157, 225NW609; 164Minn512, 205 NW440; 165Minn223, 206NW436; 167 Minn290, 208NW995; 171Minn440, 214 NW659; Mo 20SW(2d)509; MoA 271 SW862; MoA 279SW217; 220MoA869, 295SW129; MoA 15SW(2d)952; MoA 17SW(2d)621; 283Pa538, 129A575; 289 Pa320, 137A451; 296Pa249, 145A822; 297Pa233, 146A598; TexCivA 281SW295; Utah 289P146; 148Va148, 138SE658. See also 296Pa319, 145A840. But see 135Misc467, 238NYS719. [a] **Only in absence of direct and credible evidence** is presumption of decedent's due care applicable. 249Mich350, 228NW766.

1304–78 33F(2d)866. See also Mo 28 SW(2d)97.

1304–78½–New. The presumption that decedent exercised due care is not conclusive, but may be rebutted by direct or circumstantial evidence. 243Mich634, 220NW770.

1304–79 248 IllA128; 243Mich634, 220 NW770; 249Mich350, 228NW766; 220 MoA869, 295SW129; 283Pa538, 129A 575; 144Wash188, 257P393. But see 236Mich590, 211NW86.

1304–80 5F(2d)912; 204 Iowa1169, 216 NW613 (physical facts); 262Mass485, 160NE265; 164Minn512, 205NW440 (presumption of due care refuted by undisputed evidence showing that deceased must have seen approaching cars, if he looked); 283Pa538, 129A575; 289Pa320, 137A451; 289Pa313, 137A453; 292Pa 458, 141A263.

1304–81½–New. Where evidence is adduced, the question of care or want of it exercised by decedent can be determined only on evidence and not on the presumption that every man exercises due care for his own safety when in a place of danger. Utah 275P582.

1305–82 84CalA721, 258P686; 102CalA 744, 283P850; 125Me160, 132A209; 259 Mass272, 156NE254; 254NY148, 172NE 272; 288Pa134, 135A736; 32PortoRico 208; 194Wis480, 215NW908. [a] (1) 262Mass437, 160NE249. [b] (3) 230App Div330, 243NYS597.

1306–83 208 Iowa369, 226NW151 (though there is no eyewitness).

1306–86 277US19, 48SCt417, 72L ed761 (evidence of threats of violence to prevent arrest improperly excluded on issue of unlawful killing during arrest); 220Ala120, 124S296; 125Kan252, 264P 59; 215Ky663, 286SW929; 218Ky488, 291SW723; NJ 147A535; 245NY551, 157 NE853 (photograph of deceased admitted); 24 OhA391, 156NE619. [c] **Evidence that tenants rented houses** destroyed by slide of defendant's waste pile from defendant upon their own request has been held properly excluded. 30F(2d)349. [d] **Admission of proof of membership** held improper. 215Ky682, 286SW1078. [e] **Evidence held inadmissible.**–253Mass499, 149NE208. [f] **Contributory negligence.**–Vt 146A5. [g] **Evidence held immaterial.**–220Ala120, 124S296.

1306–87½–New. In action by heirs plaintiffs may prove their character as heirs without resorting to special statutory proceedings. 35PortoRico 224.

1306–88 Mass 168NE918.

1306–89 79Mont358, 257P270. [c] (3) Inquiries as to what provoked difficulty causing deceased's death have been held immaterial. 220Ala120, 124S296.

1306–90 106Conn99, 136A869; 125 Or 280, 266P627.

1307–1 251 IllA127 (where there were no eye-witnesses).

1307–4 218Ala607, 119S638; 215Ky663, 286SW929; 235Ky429, 31SW(2d)709; Wis 229NW549. But see 132 Or290, 285 P825.

1307–5 215Ky663, 286SW929; 235Ky 429, 31SW(2d)709.

1307–10½–New. In North Carolina, dying declarations of deceased as to cause of death are admissible. 191NC396, 131 SE721.

1307–10¼–New. Uncommunicated threats by deceased are admissible in a suit for damages for unlawful killing where the evidence as to who was the aggressor is in doubt. 156Miss182, 125 S529(4these).

1308–15½–New. A statement by deceased to a police officer that he did not wish to prosecute as the accident was unavoidable is without force as a declaration against interest where deceased was on an operating table and was in great pain. 89CalA511, 265P318.

1308–19 92CalA656, 268P1083; 323 Ill 200, 153NE623; 251 IllA127 (where there were no eye-witnesses). [a] **Inadmissible to show due care** by plaintiff's intestate where there were no eyewitnesses to accident. 251 IllA127.

1308–20 But see 118 Oh307, 160NE898, 58ALR1476.

1308–26 202 Iowa517, 210NW573 (evidence held to show abandonment of child by father precluding recovery by latter); 125Kan252, 264P59; MoA 20SW (2d)561(2dcase); 117Nebr85, 219NW 802. [a] (1) TexCommnA 296SW498. (14) To sustain finding decedent, aged seventeen, was unmarried. 113 Or570, 232P637, 233P561, 234P261. (15) To sustain recovery under survival act. 240 Mich536, 215NW317. (16) To show want of beneficiary's contributory negligence. 244 IllA47. (17) To show swimming pool was jointly conducted by association leasing and corporation owning hall. CalA 291P848. (18) To show contributory negligence of decedent. NC 154SE630. [b] (2) Minn 219NW 161. [e] **Evidence insufficient** to sustain recovery, it showing that if deceased had exercised ordinary care he could have avoided accident. 32Porto Rico 208. [f] **Evidence held insufficient to sustain verdict for plaintiff.**–117Nebr 418, 220NW685. [g] **Evidence sufficient to show gross negligence.**–TexCivA 28 SW(2d)844.

1309–29 92CalA656, 268P1083. [a] **Presumption arising from absence of eyewitnesses** may be considered by jury only in connection with all facts and circumstances shown in determining whether deceased was free from contributory negligence. 208 Iowa369, 226NW151.

1309–31 33PortoRico 915. [a] **Evidence held sufficient** to show that police officer had reasonable or probable cause to believe that deceased had in fact committed felony and that he acted in good faith, shooting only to intimidate deceased. 74CalA726, 241P938.

1309–31½–New. Circumstances themselves may be sufficient to raise an issue of fact for the jury as to exercise of due care by decedent, 243Mich634, 220 NW770.

1309–31¼–New. or to show contributory negligence as a matter of law. 243 Mich634, 220NW770.

1309–32 36GaA70, 135SE439; 55ND 606, 215NW83, 53ALR1096 (evidence held sufficient); TexCivA 278SW258. [a] (1) 87CalA626, 262P423; 162La690, 111S62; 125 Or280, 266P627. (14) To sustain verdict that drowning was cause of death. 81Colo 246, 254P1000. (15) To warrant conclusion that death was due to infection of wound. 297Pa79, 146 A443. (5) In general. Wash 291P344. [b] (7) To exclude idea that tuberculosis subsequently contracted was not due to intervening cause. 101NJL496,

130A9. (8) To show causal connection between death of night watchman and negligence of railroad. **TexCivA** 278SW 258. (9) To show that death was caused by carbon monoxide gas. 195Wis253, 218NW186 (new trial granted defendant because of unsatisfactory evidence). (10) other instances. **Wash** 292P436. [c] **Evidence held to show** death caused by flu epidemic. 21AlaA163, 106S69.

1310-33 **TexCivA** 278SW258; **NS** [1927] 3**DomLR**30. [b] **Evidence must authorize reasonable conclusion or inference** that death was proximately caused by defendant's negligence. **Tex CivA** 278SW258.

1310-34 146Wash66, 262P133.

1310-35 **NJSup** 149A48 (satisfactory proof).

1310-36 70CalA77, 232P505 (evidence held to warrant inference deceased met his death while coupling cars); 92CalA 656, 268P1083; 82NH513, 135A147; 146 Wash66, 262P133.

1310-42 172Minn76, 214NW774; **Mo** 9 SW(2d)159. [c] **Evidence held insufficient.**–**TexCivA** 30SW(2d)673.

1310-43 92CalA656, 268P1083; 84 IndA707, 150NE926; 125Kan252, 264P 59; 253Mass499, 149NE208; 263Mass 129, 160NE410; **MoA** 279SW438 (intentional injury); 117Nebr85, 219NW802; 102NJL422, 131A900; 49SD113, 206NW 466.

1310-44 248Mich523, 227NW725 (damages).

1311-48 34GaA225, 128SE923; 213Ky 96, 280SW479.

1311-48½-New. In an action under the Federal Employers' Liability Act, nonsuit is properly granted where evidence fails as a matter of law to establish the relationship of master and servant. 35GaA672, 134SE793.

1311-48½-New. Submitting death action under res ipsa loquitur rule is not erroneous where defendant moved for withdrawal of all but general ground of negligence. 208 Iowa369, 226NW151.

1311-49 11F(2d)913; **CalA** 291P848; 253Mass499, 149NE208; 240Mich352, 215NW337; 153Miss72, 1178881; **MoA** 275SW575; **MoA** 14SW(2d)475; 82 NH268, 133A4, 46ALR380; **NJSup** 135 A52; 125 Or280, 266P627; 292Pa106, 140A622; 141SC333, 139SE788; 146 Wash66, 262P133; Wash 291P344.

1311-51 70CalA303, 233P357; 153Md 119, 137A484; 239Mich682, 214NW969; 240Mich352, 215NW337; 240Mich273, 215NW346; 171Minn440, 214NW659; 172Minn76, 214NW774; **MoA** 271SW 862; **NJSup** 135A664; 219AppDiv843, 220NYS453; 130Misc755, 225NYS211; 289Pa320, 137A451; 297Pa233, 146A 598; 49SD113, 206NW466.

1312-52 34GaA225, 128SE923; 198NC 795, 153SE413 (where plaintiff's evidence shows contributory negligence).

1312-54 229Ky129, 168W(2d)785.

1312-55 87CalA563, 262P481; 97CalA 654, 275P980; 102CalA600, 283P295; 335 Ill 164, 166NE530; 153Md119, 137 A484; 260Mass28, 156NE557; 180Minn 125, 230NW469; 113 Okl 188, 240P702; 141SC333, 139SE788; 104WVa12, 138 SE749. See also 98CalA598, 277P365.

1312-56 92CalA656, 268P1083; 90Fla 168, 1058315; 146Miss696, 1118828; 219 AppDiv518, 220NY8217; 225AppDiv 761, 232NYS387. Or 291P494. [a] **Evidence held insufficient to take case to jury.**–248Mich523, 227NW725.

1312-60 **CalA** 291P896; 100Vt135, 135 A598.

1312-61 146Miss696, 1118828; 49SD 113, 206NW466; **TexCivA** 272SW394 (counsel, moral training, advice, and education).

1312-61½-New. Loss of companionship should not be submitted to jury as element of damages in absence of evidence that it has monetary value. **Nebr** 231NW747.

1312-62 173Ark135, 292SW386; 235 Mich53, 209NW118.

1313-64½-New. Where evidence of the widow's damage from her husband's death in an automobile accident is uncontradicted, it becomes a matter of law for the court. 85Colo 87, 273P1030.

1313-65 84CalA721, 258P686 (as to presumption that deceased acted with due care). [b] 123Kan88, 254P348. [d] 123 Kan88, 254P348. [e] **Instruction referring to plaintiff as widow of deceased** is not improper where evidence shows that she is sole next of kin. 253 IlA 190.

1313-66 30F(2d)349; 37GaA244, 139 SE579; 41 Ida106, 238P517 (restriction as to finding excessive damages for death of child); 236Mich590, 211NW86; 240 Mich350, 228NW766; 172Minn76, 214 NW774; 156Miss182, 125SE529(4theses); **Mo** 282SW441 (proper instruction); **Mo** 9SW(2d)159 (instruction on self-defense held not erroneous); **NJSup** 150A226 (1st case) (holding instruction permitting consideration of aggravation of cancer not erroneous); 225AppDiv188, 232 NYS379; 21 OhA374, 157NE708. [c] **Instructions held proper or not erroneous.**–318Mo28, 298SW817. [d] **Refusal of instruction that contributory negligence of father would not defeat recovery by administrator of deceased child** was held error. 142Va425, 128SE 732. [e] **Instruction held properly refused** denying recovery for conscious mental pain and physical suffering, where complaint did not allege consciousness. 215Ala285, 110S312. [f] **Instruction limiting damages for death** and for conscious suffering to amount sued for is not reversible error. 102 WVa40, 135SE262, 48ALR806.

1313-67 **Fla** 129S915; 323 IlA115; 281 Mich404, 204NW84; 169Minn342, 211 NW580; 26 OhA447, 160NE493. But see **Mo** 9SW(2d)159.

1313-68 219Ala546, 122S677; 121Kan 392, 247P446 (instruction proper); **MoA** 27SW(2d)31; 215NY552, 157NE 854; 24 OhA374, 157NE708; **TexCivA** 16SW(2d)399.

1314-70 92CalA656, 268P1083 (instruction held not to invade province of jury); 121Kan392, 247P446 (instruction upheld).

1314-71 41GaA196, 152SE583; 122Kan 438, 252P223.

1314-73 See also 37GaA771, 142SE185.

1314-73½-New. Instruction held not erroneous for stating liability to plaintiff's wife dying from automobile collision injuries. **CalA** 286P1097.

1314-74 275US133, 48SCt49, 72LEd200; 105NJL264, 144A182(2dense). [c] **Instructions held erroneous.**–194Cal159, 228P428 (based on right of recovery on inapplicable statute). 37GaA389, 140SE 632.

1314-75 214Ala23, 106S242; 215Ala 285, 110S312; 180Ark19, 208SW(2d)614; 35GaA528, 134SE126; 36GaA70, 135SE 439; 37GaA244, 139SE579; 207 Iowa 367, 223NW100 (jury should be told that life tables are not conclusive); 217 Ky21, 288SW761; Miss 168NE918; 312 Mo342, 278SW1000; 21 OhA12, 152NE 102; 136Wash312, 239P1011. [a] (19) Instruction, allowing deduction of expenditures, which could only be understood as embracing personal expenses of deceased and not for family or dependents, is proper. 190NC573, 130SE 313. (20) Instructions held not subject to interpretation that net income was to be deducted from something not defined but that expenditures were to be deducted from gross income. 190NC 573, 130SE313. (21) Instruction that damages should be assessed without regard to Compensation Act held correct. **NJSup** 140A578. (22) Instruction that jury should not consider "sorrow and grief" instead of "mental distress." **Tex CivA** 291SW681. (23) Instruction authorizing recovery of reasonable expense for medical treatment. **Mo** 26SW (2d)988. (24) Other instructions held proper. 214Ala23, 106S242; 218Ala 481, 119S242. 172Ark353, 288SW6; 83 CalA508, 257P114; 87CalA563, 262P 481, 170Ga208, 152SE471; 36GaA70, 135SE439; 39GaA216, 146SE776; 153 Miss711, 121SE82; 312Mo342, 278SW 1000, 317Mo1096, 298SW795; 320Mo 916, 9SW(2d)912, 321Mo1190, 18SW (2d)133; **Mo** 31SW(2d)1; **MoA** 31SW (2d)250; 217AppDiv537, 216NYS658; **TexCivA** 291SW343; 136Wash312, 239P 1011. [b] (1) 235 IlA122. (10) Where no evidence was shown as to reasonable expenses of caring for and rearing child. 27Hawaii671. (11) Instruction ignoring fact that some probable earnings might cover period beyond time of trial. 24 OhA374, 157NE708. (12) That jury may consider injuries as such where death was instantaneous. 148Miss809, 114S866. (13) Charge on damages for minor son's death, authorizing estimate of earnings and contributions without relation to present value. **TexCivA** 300SW949. (14) Permitting jury to consider need of assistance on part of beneficiaries. 117Nebr418, 220NW685. (15) Instruction excluding loss of society and companionship of decedent as element of damage. 153Miss741, 121S482. (16) In action under Federal Employers' Liability Act, instruction allowing interest from date suit was filed. 219Ala 238, 121S722. (17) Instruction that in determining present cash value of contributions plaintiff would probably have received, jury should calculate on basis of amount of award, bearing interest at highest net rate of interest money could safely be invested. 219Ala238, 121S722. (18) In action under Federal Employers' Liability Act for death of foreman, instruction that element of damage was such accumulations, derived from earnings, as dependents might inherit at his death, had he not been killed, plus additional benefits during his lifetime. 219Ala238, 121S722. (19) In action for death, instruction on measure of damages, which expressly called for assessment of damages rather than penalty and made necessary pecuniary loss sustained by plaintiff sole measure of recovery, without leaving any discretion whatsoever to jury to arrive at any other amount within limits fixed by statute, has been held prejudicial error. **Mo** 148W(2d)475. (20) Instruction in mother's action for minor son's death is erroneous where it does not submit mother's life expectancy. **MoA** 27SW (2d)31. (21) Other instances. 153Miss 72, 1178881; **Okl** 293P250; **TexCivA** 28SW(2d)866. [e] **Instructions improperly refused.**–Instruction in action for death of automobile driver resulting from hemorrhage claimed to have been caused by collision, that, on question of pecuniary loss of decedent's father and mother, jury had right to consider the number, ages, and conditions of their other children. 225AppDiv188, 232NYS 379. [f] **Instructions held properly refused.**–40F(2d)586.

1314-75½-New. An instruction, stating the rule prescribed for measuring damages, should not use a definite figure based on a mortality table as indicating the life expectancy of deceased. 219Ala 238, 121S722.

1315-76 **Nebr** 229NW901 (including mortality tables). [c] **MoA** 27SW438.

1316-80 **MoA** 14SW(2d)701. But see **Fla** 151A680.

1316-81 **Fla** 129S915; 253 IlA107. [a] (2) Instruction in action under penalty statute held not misleading as authorizing jury to give compensation for damages sustained. 311Mo 92, 277SW 908. [b] (3) Instruction authorizing damages in amount reasonably compensating deceased's wife and children for necessary pecuniary loss. **Mo** 30 SW(2d)37.

1316-82 231Mich404, 204NW84 (possibility of young widow remarrying should be submitted); 220MoA1175, 299 SW110.

1316-84 150Miss508, 117S345; **Mo** 282SW441 (instruction supported by evidence); **OhA** 157NE708. [b] (2) Evidence in action under Federal Employers' Liability Act held to warrant instruction submitting question of conscious suffering. 170Ark842, 281SW910. (3) As to consideration of life expectancy and earning capacity. 144Wash 440, 258P321.

1316-86 213Ky236, 281SW170.

1317-88 [a] **Instructions held proper.**–**Mo** 208W(2d)31.

1317-88½-New. An instruction to fix damages at fair pecuniary compensation not exceeding a maximum sum has been held erroneous as directing assessment of damages and not the penalty, and as not leaving the sum to the discretion of the jury. 220MoA1175, 299SW110.

1317-89½-New. An instruction men

tioning the maximum amount recoverable for death is not erroneous as permitting recovery against one defendant of the statutory maximum, notwithstanding settlement in part with the others. **MoA** 178W(2d)621.

1317-90 310Mo72, 274SW1031 (verdict held not erroneous in form because assessing "plaintiff's damages" at stated sum). [a] **General verdict should be returned** where father and mother are killed and suit is brought in name of children jointly. **Pa** 151A680.

1317-91 **TexCivA** 11SW(2d)583. [b] **Verdict must be sustained** by pleadings and evidence. **TexCivA** 28SW(2d)865.

1317-94 [a] **Defendant cannot object** to jury awarding damages to widow "for all relief, general and special, legal and equitable" by which minor children were denied relief. **TexCivA** 291SW946.

1317-95½-New. Finding that defendants' intestate's negligence was the proximate cause of the death of plaintiffs' intestate's death is not erroneous. 109Conn144, 145A662.

1317-96 [c] **To sustain verdict for nominal damages,** finding of pecuniary loss to relatives is unnecessary. **MoA** 28W(2d)107.

1317-1 123Kan290, 255P32.

1317-2 85 **IndA**611, 155NE218.

1317-8½-New. In an action for the death of a husband and father it is not error for the court to require the jury to state separately the amounts which the wife and the minor children are entitled to recover. **TexCivA** 274SW200.

1317-9 220Ala120, 124S296 (prejudicial error).

1318-11 255 **IllA**494; **TexCivA** 274SW 200. [b] **Erroneous instruction as to damages** is ground for reversal where it cannot be said that jury would have awarded amount named in verdict if proper instruction had been given. 37 GaA737, 141SE917.

1318-30 214Ala23, 106S242; **Ala** 129 S60 (earning value of money, at date of trial, in hands of reasonable man controls); 88CalA67, 262P1106 (measure properly based on pecuniary loss); 36 GaA70, 135SE439; 165Ga131, 139SE 868; 39GaA513, 147SE795; 235 **IllA** 122; 253 **IllA**107; 120Kan659, 245P 162; **Kan** 245P1053; 228Ky56, 14 SW(2d)185; 12LaA236, 125S168(2d case) (amount held proper); 22 **OhA**440, 153NE860; 24 **OhA**374, 157NE708; 115 **Okl** 166, 242P164; 290Pa167, 138A751, 54ALR1073; 300Pa457, 150A622; 195 **Wis**108, 217NW687. [b] **In West Virginia.**–107WVa97, 147SE547.

1320-31 103Conn520, 131A501; 165Ga 131, 139SE868; 46 **Ida**622, 269P993; 235 **IllA**122. [a] **Depreciation in value of dollar** may be considered when verdict is rendered long after death. 321 **Mo** 1080, 158SW(2d)762.

1320-33 36F(2d)591; 214Ala23, 106S 242; **Ala** 129S60; 234Ky427, 28 SW(2d)479; 49SD113, 206NW466. [b] **Tax rate on money allowed for future benefits** has been held immaterial in determining damages. **Ala** 129S60. [c] **Damages recoverable** do not depend solely on decedent's earnings. 234Ky 427, 28SW(2d)479.

1321-41 165Ga131, 139SE868.

1321-42 165Ga131, 139SE868.

1322-52 213Ala222, 104S526; **TexCivA** 28SW(2d)844. [a] (1) 213Ala222, 104 S526. (4) Must be founded upon an actionable wrong. 213Ala222, 104S526. (5) Within state police power to fix punitive damages for actionable wrong contemplated by such statute. 213Ala 202, 104S526. [e] (1) 116Tex207, 288 SW402. (2) Parent cannot recover exemplary damages for death of child. **TexCivA** 8SW(2d)317. (3) Compensation award has been held not to preclude action for exemplary damages. **TexCivA** 28SW(2d)844.

1323-65 **Or** 291P494.

1324-72 108Conn436, 143A568; **MoA** 31SW(2d)250; 26 **OhA**392, 160NE495.

1324-74½-New. or by decedent's estate, 106Conn329, 138A220.

1324-76 253 **IllA**107. [b] **Expenses incurred in recovering damages** is not an element of damages. 234Ky427, 28 SW(2d)479.

1324-77½-New. In determining whether damages for death are excessive, reasons for allowance of damages and rules for measurement thereof make no distinctions because of sex. 227Ky841, 14 SW(2d)174.

1324-77¼-New. Commission of deceased as captain of national guard may be omitted as element of measure of damages. 35PortoRico 224.

1324-78 92Fla310, 109S427; 213Ky336, 281SW170.

1324-79 90Fla558, 106S416.

1325-83 213Ky336, 281SW170.

1325-87 103Conn520, 131A501; 148Md 669, 130A41 (under statute authorizing personal representative to prosecute personal actions); 117 **Okl** 190, 245P891.

1325-90 103Conn520, 131A501.

1325-92 117 **Okl** 190, 245P891.

1325-93 103Conn520, 131A501; 81NH 522, 129A768, 42ALR176 (adverse rule examined and criticized).

1325-95 106Conn329, 138A220; 153 **Miss**72, 117S881; 120 **Or**286, 249P627.

1325-96 207 **Iowa**367, 223NW100; 26 **OhA**392, 160NE495 (stating rule in Kentucky). [e] **In North Carolina.**–191NC 130, 131SE400.

1326-98 35F(2d)736; 3Del450, 139A 66; **NH** 147A413.

1326-3 15F(2d)573; **Cal** 290P22; 103 **Conn**520, 131A501; 90Fla558, 106S416; 170Ga208, 152SE474; 36GaA70, 135SE 439; 235 **IllA** 122; 232Ky702, 23SW(2d) 564; 5LaA649; 150Miss621, 116S287; 150Miss68, 116S295 (cannot be based on value of life expectancy); **NJSup** 132 A310; 117 **Okl** 190, 245P891; **Pa** 151A 680; 100Vt135, 135A598. [d] (2) value of child's services from time of death until its majority. **IndA** 172NE783. [f] (7) Beneficiary is entitled to recover only such damages as would represent pecuniary value, capable of monetary measurement, of contributions which decedent would probably have made for benefit of beneficiary had he not been killed. 37GaA737, 141SE917. (8) Other instances. **LaA** 128S724. [g] **Apportionment of damages.**–134Misc833, 237NYS292 (not governed by state statute).

1327-4 218Ala481, 119S212 [certiorari granted **US** 49SCt349(4th case)]; 219 Ala238, 121S722; **Ala** 129S60 (contribution made during lifetime is only a guide); 35Ariz285, 276PS46; 103Conn 520, 131A501; 90Fla558, 106S416; 39 GaA246, 146SE776; 235 **IllA**122; 232 Ky702, 23SW(2d)564; 231Mich494, 204 NW84 (amount based on known earnings and contributions of father in absence of evidence of reasonable prospect of larger earnings); **TexCivA** 19 SW(2d)166.

1328-5 215Ala285, 110S312; 209Ky 348, 272SW880 (under Federal Employers' Liability Act present cash value of pecuniary loss); 231Mich404, 204NW84 (sum which if placed at five per cent interest would yield income equal to deceased's earnings and leave principal intact at end of widow's life expectancy is excessive); **Nebr** 232NW767. [a] **Present cash value of total pecuniary loss depends upon rate of interest** (1) upon which it is figured. 209Ky348, 272 SW880. (2) Such rate is controlled by results which reasonably prudent and careful person under circumstances and at time and place may be expected to obtain in making safe investment. 209Ky 348, 272SW880.

1328-9 214Ala23, 106S242; **Cal** 290P 22; 90Fla558, 106S416; 92Fla310, 109 S427; 36GaA70, 135SE439; 37GaA771, 142SE185; **NJSup** 132A310; **TexCivA** 283SW273; **TexCivA** 19SW(2d)166. See also 228Ky500, 15SW(2d)300. [a] (2) Son against whom judgments had been rendered requiring payments at his mother's death cannot recover such amounts as damages. 195Wis108, 217 NW687. (3) That mother's death hastened time for such payments does not authorize such recovery. 195Wis108; 217NW687. [g] **Special services of deceased in domestic life** may be computed as element of damage to surviving widow and child. 36GaA70, 135SE439.

1328-9½-New. Measure of damages in suit under Federal Employers' Liability Act is amount deceased would have contributed to wife during their joint lives. **Mo** 26SW(2d)988.

1326-10 92Fla310, 109S427.

1328-11 213Ky336, 281SW170; 218Ky 337, 291SW395.

1329-17 Contra 90Fla558, 106S416.

1329-21½-New. Measure of damages for death of adult son. 215Ky401, 285 SW24.

1329-21¼-New. Damages recoverable by a parent for a son's death are limited under some statutes to those accruing during the life expectancy of the parent. 35Ariz285, 276PS46.

1329-21¼-New. The value of a son to his mother is not determined by a hard and fast rule based on the amount he has previously contributed to her support. 321Mo1080, 158SW(2d)762.

1329-21½-New. As regards recovery by a parent of damages for a son's death, the son has the legal duty to support indigent aged parents. **SD** 226NW644.

1329-26½-New. Father cannot recover for loss of child's services between time of death and time child would have reached majority. 235Ky252, 30SW(2d) 952.

1329-27 283Pa378, 129A323.

1329-31 237Mich612, 213NW128; **MoA** 291SW525.

1330-32 87CalA563, 262P481; 81Colo 246, 254P1000; 41 **Ida**106, 238P[illegible]; **Miss** 130S499; 84Mont397, 276P[illegible]; **TexCivA** 30SW(2d)399. But see **NJSup** 134A895.

1331-39½-New. In some jurisdictions mother can recover for loss of services of minor son while he would have remained with family where she provided him a home. **MoA** 27SW(2d)31.

1331-40 283Pa378, 129A323.

1331-43 237Mich612, 213NW128; **Sask** [1926] 4DomLR1072.

1331-44 237Mich612, 213NW128.

1331-50 See also 55ND606, 215NW83, 53ALR1096. [e] **Parent's reasonable expectancy of support in old age** is sufficient to sustain right to damages for death of son, though son had not contributed to parent's support prior to death. 49SD113, 206NW466.

1332-55 34PortoRico 661.

1332-65½-New. In action by personal representative for benefit of parents life expectancy of parents and not that of child is used as time element in determining amount of damages. **Nebr** 229 NW901 (where life expectancy of child exceeds that of parents).

1332-65½-New. Measure of damages in action by personal representative of child for benefit of parents is present worth in money of contributions of monetary value of which they have been deprived. **Nebr** 229NW901.

1332-68 See also 221AppDivS08, 223 NYS444.

1332-69½-New. Where question is submitted to jury with no request to limit award, any reasonable award cannot be questioned. 90Fla558, 106S416; 223 NYS444.

1333-71 135Misc467, 238NYS719 (sisters of deceased brother).

1333-75 See also 55ND606, 215NW83, 53ALR1096.

1333-76 153Miss741, 121S482; **Miss** 130S499.

1333-81 90Fla558, 106S416; 221MoA 550, 288SW69.

1333-82 36GaA70, 135SE439. [d] **Under Federal Employers' Liability Act.**–**LaA** 128S724.

1334-86 88CalA67, 262P1106.

1334-89 36GaA70, 135SE439.

1334-90 92Fla310, 109S427. See also 232Ky702, 23SW(2d)564.

1334-92½-New. A like rule prevails in Mississippi. 153Miss741, 121S482.

1334-95 214Ala23, 106S242; 180Ark 567, 22SW(2d)373; 92Fla310, 109S427; 36GaA70, 135SE439; 231Mich404, 204 NW84; 300Pa457, 150A622 (limited to present worth of likely amount that would have been contributed).

1335-98 Contra 214Ala23, 106S242.

1335-2 90Fla558, 106S416; 207 **Iowa** 367, 223NW100.

1336-6 215Ala285, 110S312; 170Ark 842, 281SW910; 232Ky764, 238SW(2d) 564; 253Mass499, 149NE208; 139NC 813, 128SE345.

1336-9½-New. Pains of deceased who remained unconscious between time of injury and death held proper item of damages. 13**LaA**272, 127**S**764.

1336-10 33**Ariz**460, 265**P**757.

1336-11 103**Conn**520, 131**A**501; 103 **NJL**145, 134**A**650. [a] (3) 215**Ky**663, 286**SW**929. [b] **Under statute authorizing personal representative to prosecute personal actions** which deceased might have prosecuted, declaration for damages for physical and mental suffering of deceased caused by improper care during last illness, limits recovery to compensation for such suffering. 148 **Md**669, 130**A**41. [c] **Jury have right, in determining damages, to infer that deceased's mental processes** are such as reasonable men would have under similar circumstances. **Mass** 168**NE**918.

1337-15 But see **Can** [1930] 2**DomLR** 868.

1337-18 148**Miss**827, 114**S**734; 148**Miss** 809, 114**S**866. [c] 168**Ark**479, 271**SW** 321. [d] 168**Ark**479, 271**SW**321.

1337-20 90**Fla**188, 105**S**818; 90**Fla**558, 106**S**416.

1338-21 [a] (2) Father cannot recover for mental anguish of mother. **Fla** 129**S** 915.

1339-24 290**Pa**167, 138**A**751, 54**ALR** 1073; **Sask** [1926] 4**DomLR**1072. [a] **Under Federal Employers' Liability Act.**-**LaA** 128**S**724.

1339-26 8**F(2d)**608, 609 [quotCJ]; 103 **Conn**520, 131**A**501; 48 **Ida**789, 285**P**676; **Mo** 26**SW(2d)**988.

1339-27 8**F(2d)**608, 609 [quotCJ]; 70 **CalA**303, 233**P**357; 103**Conn**520, 131**A** 501; 48 **Ida**789, 285**P**676; **MoA** 291**SW** 525; 55**ND**606, 215**NW**83, 86, 53**ALR** 1096 [citCJ]; 38 **OklACR**260, 264 [cit CJ]; **TexCivA** 30**SW(2d)**399. [a] (5) In action by husband individually and as executor, for death of wife, verdict for doctors and hospital bill should have at least included funeral expenses. 221**AppDiv**808, 223**NYS**444. [b] **Amount must be reasonable.**-**TexCivA** 28**SW(2d)**865. [c] **In Kentucky.**-235**Ky** 252, 30**SW(2d)**952.

1340-28 8**F(2d)**608, 609 [quotCJ]; 70 **CalA**303, 233**P**357; 38 **OklACR**260, 264 [citCJ].

1340-29 8**F(2d)**608, 609 [quotCJ].

1340-30 8**F(2d)**608, 609 [quotCJ].

1340-31 8**F(2d)**608, 609 [quotCJ]; 38 **OklACR**260, 264 [citCJ].

1340-34 83**NH**29, 137**A**445; 197**Wis** 513, 222**NW**792.

1340-36 290**Pa**167, 138**A**751, 54**ALR** 1073.

1340-39 **TexCivA** 28**SW(2d)**865.

1340-41 84**Mont**397, 276**P**437.

1340-47½-New. A wife is entitled to compensation for the loss of whatever she might reasonably expect to receive in way of dower or legacies from her husband's estate, in case her life expectancy is greater than his. 90**Fla**558, 106 **S**416.

1341-50 103**Conn**520, 131**A**501. [b] (7) Recovery is not limited to two thousand dollars where deceased was widower with two married daughters and resided with one of them and aided her financially. 310**Mo** 72, 274**SW**1031.

1342-57½-New. Jury are to consider circumstances in mitigation or aggravation of penalty under death statute. 311 **Mo** 92, 277**SW**908.

1342-57½-New. Provision for support of deceased's dependents gratuitously made by father of defendant held not to be considered in mitigation. 59**OntL** 364, [1926] 4**DomLR**635.

1342-60½-New. Payment made by third person not a joint tort feasor in consideration of covenant not to sue cannot be considered in reduction of damages. 253 **IllA**190.

1342-64 **NJSup** 132**A**310; 245**NY**552, 157**NE**854; 219**AppDiv**163, 218**NYS**517.

1342-65 [d] **Amount employer contributed towards procurement of insurance** may be deducted. 36**F(2d)**886.

1342-66 See also **TexCivA** 22**SW(2d)** 971.

1343-70 23**F(2d)**282; **MoA** 12**SW(2d)** 933; **MoA** 14**SW(2d)**701.

1343-71 36**F(2d)**886.

1344-82 [c] (2) Recovery for wrongful death of minor should be diminished in proportion to extent of contributory negligence according to statutory rule. **Nebr** 232**NW**767.

1344-84 214**Ala**23, 106**S**242; 231**Mich** 404, 204**NW**84; 190**NC**231, 129**SE**580.

1344-87 283**Pa**378, 129**A**323.

1344-94 106**Conn**329, 138**A**220; 92**Fla** 310, 109**S**427; 234**Ky**427, 28**SW(2d)** 479; **MoA** 256**SW**139; **MoA** 2**SW(2d)** 107; 84**Mont**397, 276**P**437 (death of minor child); 219**AppDiv**518, 220**NYS**217; 120 **Or**286, 249**P**627; **Or** 293**P**412; 146 **Wash**688, 264**P**990. [c] **Findings not set aside as excessive unless** (1) it is result of passion or prejudice. 90**Fla**168, 105**S**315. (2) Court can clearly see jury made some palpable error. 90**Fla**168, 105**S**315. (3) Jury has totally mistaken rules of law by which damages in particular case were to be measured. 90 **Fla**168, 105**S**315. [d] **Jury's division of damages** for death among decedent's heirs not permitted. **CalA** 291**P**215.

1348-98 **Iowa** 232**NW**421; 165**La**341, 115**S**613.

1348-99 **Iowa** 232**NW**421. [a] (2) Verdict for more than financial loss of services of minor child held excessive. **NJ Sup** 134**A**895. [b] **As regards excessiveness** statute limiting damage is mere limitation, not a criterion. **Iowa** 232**NW** 421.

1348-1 **Iowa** 232**NW**421; 124**Me**407, 130**A**212.

1348-2 [a] **To determine excess,** award is viewed as though each of several plaintiffs had sued alone. **TexCivA** 278 **SW**272.

1349-4 219**AppDiv**518, 220**NYS**217.

1350-6 [a] **Ky** 28**SW(2d)**479; 310**Mo** 1, 274**SW**1079 (reduced to $25,000). [b] **NJ** 146**A**37(1stcase). [c] 237**Mich** 612, 213**NW**128; 315**Mo** 409, 286**SW**45; 318**Mo** 28, 298**SW**817 (reduced to $13,000); **NJSup** 147**A**382; 19 **OhA**94; **Tex CivA** 294**SW**978. [e] 90**Fla**188, 105**S**818 (judgment affirmed for $10,000 if plaintiff remits $5,000, otherwise new trial, where there was no ground for charges as to punitive or exemplary damages); 231**Mich**404, 204**NW**84 (to child and widow 21-years old); **NJSup** 135**A**664; 300**Pa**457, 150**A**622. [g] 13 **LaA**194, 127**S**133(2dcase); 148**Miss**871, 114**S**807 (woman eighty-five with no income and no estate); 308**Mo** 513, 273 **SW**401 (for death of son 6 years 7 mo. reduced to $5,000); 308**Mo** 513, 273**SW** 401 (death by drowning of child six years and seven months, reduced to $5,000); 158**Tenn**407, 15**SW(2d)**1 (reduced to $2,000). [g] 193**Wis**496, 211**NW**782 (reduced to $8,000). [h] **NJSup** 146**A** 359; **TexCivA** 272**SW**543 (boy of 16 in school, excessive by $3,500). [i] 10**LaA** 678, 121**S**382; 116**Nebr**740, 219**NW**1 (excessive to extent of $1,000); 148**Miss**890, 115**S**394 (railroad brakeman forty-one years old leaving widow and nineteen-year-old son; reduced to $27,500); **NJ Sup** 152**A**82. [k] **NJSup** 135**A**692 (for death of boy ten years old); **TexCivA** 18**SW(2d)**757. [m] **TexCivA** 282**SW**257. [ii] 230**Mich**472, 202**NW**1004 (for pain and suffering for four hours after receiving gasoline burns held excessive by $4,000); **NJSup** 138**A**114 (reduced to $6,000 for death of sixteen-year-old boy). [ddd] **NJSup** 134**A**895 (for death of twelve-year-old boy, earning $25 a week). [ttt] **$2,000.**-193**Wis**496, 211**NW** 782 (suffering of deceased reduced to $500). [uuu] **$3,000.**-**TexCivA** 19**SW (2d)**166 (to widow of sixty-five-year-old man with expectancy of eleven years, who for some time contributed only $15 per month and whose salary had been reduced from $100 to $30 a month, excessive by $1,500). [vvv] **$3,500.**-13**LaA** 115, 126**S**724. [www] **$5,500.**-**NJSup** 134**A**184 (for minor's death). [xxx] **$6,125.**-235**Mich**53, 209**NW**118 (reduced to $5,000 in case of death of child). [yyy] **$7,000.**-13**LaA**194, 127**S**133(2dcase). [zzz] **$7,200.**-11**LaA**237, 122**S**873. [aaaa] **$7,250.**-**Nebr** 229**NW**901 (death of minor). [bbbb] **$8,000.**-**IndA** 172**NE**783. [eeee] **$8,500.**-**Iowa** 232**NW**421 (for death of 26 year old woman running boarding house; reduced to $6,000). [dddd] **$9,000.**-298**Pa**528, 148**A**845. [eeee] **$10,200.**-**NJSup** 133**A**74 (for death of boy nine years old, reduced to $3,500). [ffff] **$13,150.**-118**Nebr**449, 225**NW**738 (held excessive after remittitur of $4,400). [gggg] **$14,000.**-90**Fla**168, 105**S** 315 (excessive by $4,000). [hhhh] **$20,030.**-**Pa** 151**A**680 (death of parents). [iiii] **$26,500.**-213**Ky**336, 281**SW**170. [jjjj] **$46,800.**-**NJSup** 144**A**187(2dcase) (to widow for death of man 40 years old, earning $57.50 per week; reduced to $25,000). [kkkk] **$47,500.**-**TexCivA** 15 **SW(2d)**200 (for death of switchman 31 years old receiving $6.16 a day having life expectancy of 34 years and leaving 29-year-old widow and two children, younger of which had physical affliction; reduced to $37,500). [llll] **$50,000.**-13**F(2d)**246 (reduced to $30,000).

1350-7 [a] 39**GaA**246, 146**SE**776; 153 **Miss**327, 121**S**144; **NJSup** 145**A**751. [b] (1) 6**F(2d)**982. (2) Of which $8,500 was in favor of mother, $3,400 in favor of son and $5,100 in favor of daughter of a middle-aged man, healthy, steady, and of settled habits. **TexCivA** 273**SW**684. [c] 82**CalA**226, 255**P**279; 89**CalA**511, 265 **P**318; 36**GaA**679, 137**SE**855 (for death of husband, thirty-eight, earning $130 per month); 209**Ky**348, 272**SW**880 (brakeman 35 years old good health expectancy of twenty-eight years, four children who lived with deceased without their mother); 312**Mo** 342, 278**SW** 1000; 143 **Okl** 249, 289**P**343; **TexCivA** 283**SW**359 (to minor female child for loss of parents); **TexCivA** 294**SW**978 (for death of wife). [e] 76**CalA**569, 245 **P**468; 227**Ky**841, 14**SW(2d)**174; 102 **NJL**288, 132**A**253 (for death of skilled workman, thirty-five, earning $2,500 a year); **NJSup** 140**A**578. [g] **TexCivA** 272**SW**291 (man 26 years having no money and out of employment; earned five dollars per day when employed). [h] (1) 10**LaA**215, 120**S**391(2dcase); 11**LaA**586, 123**S**626 (to adult children for loss of mother's companionship, though they were not dependent on her, in view of her intense pain and suffering); 180**Minn**391, 231**NW**10; **NJSup** 139 **A**904 (thirteen-year-old boy); **TexCivA** 28**SW(2d)**844. (2) Other instances. **NJ Sup** 150**A**226(1stcase). [i] 8**F(2d)**223; 70**CalA**303, 233**P**357; 80**Colo** 375, 251**P** 224 (for death of son, eighteen years old); 85**Colo** 87, 273**P**1030; 102**Conn**567, 129**A**523 (child 2½ years); **MoA** 256**SW** 139; **MoA** 279**SW**438; 22 **OhA**413, 153 **NE**274; **TexCivA** 272**SW**497; **TexCivA** 26**SW(2d)**305; 136**Wash**312, 239**P**1011 (death of mother of family). [k] 174 **Ark**1148, 298**SW**485; 70**CalA**303, 233**P** 357 (death of child 21-years old); 87 **CalA**626, 262**P**423 (man 63 years old); 2**LaA**177; **MoA** 2**SW(2d)**107; **NJSup** 135**A**504 (for death of girl eight years and eleven months old, of splendid physical appearance). [l] 235 **IllA**431 (man, fifty-eight, earning $80 per month). [m] 180**Minn**496, 231**NW**210; **Mo** 9**SW (2d)**159; 220**MoA**38, 285**SW**757; **MoA** 297**SW**171 (mother dependent); 141**SC** 238, 139**SE**459. [n] 173**Minn**7, 216**NW** 245 (child nine years old); 55**ND**606, 215**NW**83, 53**ALR**1096 (for loss of services of adult daughter). [q] 219**AppDiv** 518, 220**NYS**217. [r] 8**F(2d)**608. [w] 148**Miss**827, 114**S**734. [x] 25 **OhA**393, 158**NE**238 (for death of married woman accustomed to doing own housework); **TexCivA** 3**SW(2d)**921. [z] 162**La**690, 111**S**62 (for death of husband and father thirty-nine years old and addicted to drink). [aa] 217**Ky**738, 290**SW**677 (man nineteen years old, earning $4 a day); 240**Mich**352, 215**NW**337; 302**Mo** 538, 259**SW**83; 118 **Okl** 124, 247**P**92. [bb] 125 **Okl** 260, 257**P**797. [gg] 170 **Ark**842, 281**SW**910; **NJSup** 140**A**882. [jj] 16**F(2d)**930; **IndA** 154**NE**885 (action under federal act for death of fireman, thirty years old); 314**Mo** 123, 282 **SW**416; **TexCivA** 272**SW**594. [rr] 168 **Minn**259, 209**NW**905. [xx] 38 **OklACR** 260. [ddd] **TexCivA** 281**SW**652. [eee] $35,000. **Cal** 293**P**62 (death of man 42 years old earning $4,000 to $5,000 yearly); **CalA** 283**P**886 (for death of father and husband 42 years old with annual income of over $4,000 and contributing over $250 per month to wife and minor children); **CalA** 285**P**879; 172**Minn**447, 216**NW**234 (to widow thirty years old for death of switchman thirty-two years

old, leaving two infants); **TexCivA** 274 **SW**200 (death of locomotive fireman). [fff] **$17,500.**–84 **IndA**354, 148**NE**489 (for death of locomotive fireman 36 years old and earning $250 a month). [ggg] **$13,666.68.**–208**Ky**507, 271**SW**570, 39**ALR**919 (man earning $130 per month, life expectancy of 25 years). [hhh] **$10,000.**–204**Cal** 354, 268**P**334, 60 **ALR**1381 (7-year-old son of plaintiff); 41 **Ida**106, 238**P**517 (death of 9 year old girl); 232 **IllA**193 (for death of skilled workman, fifty, earning $35 to $70 per week); 254 **IllA**526; 12**LaA**405, 123**S** 384 (to thirteen-year-old minor for loss of father, forty-one years old, earning $10,500 a year with expectancy of twenty-seven years); **Miss** 130**S**499; **Mo** 282 **SW**441; 319**Mo** 8, 4**SW(2d)**762 (man 31 years old with wife and child); 321**Mo** 1080, 15**SW(2d)**762 (for conscious suffering before death); 322**Mo** 778, 16**SW (2d)**59; **Mo** 30**SW(2d)**37; **NJSup** 147**A** 469(2dcase). [iii] **$3,400.**–283**Pa**378, 129**A**323 (boy 13 years attending school). [jjj] **$2,450.**–124**Me**407, 130**A** 212 (for death of boy 17 years of age). [kkk] **$2,250.**–189**NC**813, 128**SE**345 (not excessive for pain and suffering of deceased). [lll] **$1,320.**–118 **Okl** 42, 246**P** 615 (for pain and suffering for thirty-four hours before death). [mmm] **$10,-748.**–20**F(2d)**17 (for death of forty-seven-year-old fisherman earning $2,132 annually). [nnn] **$1,500.**–173**Ark**322, 292**SW**359 (pain and suffering before death). [ooo] **$3,200.**–172**Minn**76, 214 **NW**774. [ppp] **$3,500.**–85 **IndA**227, 150 **NE**374 (to parents for death of minor daughter). [qqq] **$4,595.21.**–239**Mich** 682, 214**NW**969. [rrr] **$5,150.**–239**Mich** 37, 214**NW**170 (death of six-year-old boy). [sss] **$6,305.**–122**Kan**438, 252**P** 223. [ttt] **$7,000.**–242 **IllA**166; **Tex CivA** 282**SW**257 (to mother for death of twenty-seven-year-old son). [uuu] **$8,-560.**–236**Mich**173, 210**NW**309. [vvv] **$3,-645.35.**–22 **OhA**440, 153**NE**860. [www] **$10,500.**–**NJSup** 132**A**310 (death of druggist fifty-four, earning $25 a day). [xxx] **$14,500.**–203 **Iowa**430, 212**NW**751 (reduced from $22,500); **NJSup** 136**A** 195 (man earning between $3,000 and $3,500 expectancy, between eighteen and nineteen years); **TexCivA** 293**SW**650. [yyy] **$16,000.**–**NJSup** 134**A**882 (death of thirty-seven-year-old husband who was earning $2,000 per year, and was survived by three children). [zzz] **$22,-000.**–129**Misc**145, 221**NYS**93 (for death of twenty-seven-year-old workman earning $45 weekly). [aaaa] **$27,000.**–**TexCivA** 291**SW**343. [bbbb] **$27,500.**–**TexCivA** 278**SW**270 (to two minor children, aged six and four, for death of father, thirty-three, earning $150 month). [cccc] **$30,-000.**–180**Ark**567, 22**SW(2d)**373 (for death of 23 year old lineman contributing $115 per month to wife and one small child); **CalA** 286**P**1097 (forty-year-old wife with four children under twelve years old); **TexCivA** 292**SW**935 (death of electrical engineer, thirty-two years old, earning $260 per month); **TexCivA** 15**SW(2d)** 46(2dcase). [dddd] **$50.000.**–140**SC**123, 138**SE**675. [eeee] **$53,750.**–102**WVa**40, 135**SE**262, 48**ALR**806 (death and suffering of locomotive engineer). [ffff] **$3,-433.**–146**Wash**688, 264**P**990 (dependent sixty-two years old, sister of decedent). [gggg] **$8,000.**–246**Mich**620, 225**NW**601; **NJSup** 139**A**245 (damages to father, fifteen and one-half year-old-son earning $20 per week); **Va** 143**SE**887 (comparative negligence involved). [hhhh] **$10,-550.**–175**Minn**22, 220**NW**162 (fireman). [iiii] **$13,200 to next of kin** held not excessive. **NJSup** 139**A**387. [jjjj] **$20,-500.**–25**F(2d)**516 [aff 25**F(2d)**518] (ferryboat engineer, fifty-one years old, earning $180 per month). [kkkk] **$25,-000 for death of husband** earning $7,000 a year held not excessive. 101**NJEq**347, 139**A**406. [llll] **$35,000** to widow and children. **TexCivA** 300**SW**93. [mmmm] **$40,000.**–26 **OhA**392, 160**NE**495. [nnnn] **$42,500.**–**TexCivA** 4**SW(2d)**1019. [oooo] **$45,000.**–116**Nebr**615, 218**NW**424 (reduced to $25,000). [pppp] **$28,000.**–321 **Mo** 1190, 18**SW(2d)**433 (switchman of 27 receiving $180 a month leaving wife and two children). [qqqq] **$26,000.**–**225AppDiv**184, 232**NYS**330. [rrrr] **$22,-750.**–319**Mo** 619, 5**SW(2d)**447. [ssss] **$18,750.**–35**Ariz**285, 276**P**846. [tttt] **$11,000.**–153**Miss**741, 121**S**482. [uuuu] **$7,500.**–92**CalA**656, 268**P**1083 (boy of 10 years 7 months); 12**LaA**97, 124**S**572; **Mo** 26**SW(2d)**988. [vvvv] **$7,166.67.**–221**MoA**1110, 298**SW**121 (for death of 6-year-old boy). [wwww] **$4,096.80.**–321**Mo** 1080, 15**SW(2d)**762 (to mother). [xxxx] **$2,600.**–89 **Ind**358, 164**NE**708 (death of 5-year-old child in previous good health). [yyyy] **$2,500.**–318**Mo** 79, 1 **SW(2d)**172; 84**Mont**397, 276**P**437. [zzzz] **$1,200.**–**NJSup** 145**A**225(1stcase) (for death of plaintiff's father 70 years old, earning $30 a week with possibility of having it increased, who gave $12 to $15 a week to plaintiff, who boarded him and did his washing and ironing). [aaaaa] **$2,000.**–180**Ark**1043, 23**SW(2d)**965. [bbbbb] **$2,564.**–179**Minn**528, 229**NW**784 (child of eight years). [ccccc] **$3,900.**–**TexCivA** 27**SW(2d)**621 (to widow for death of husband). [ddddd] **$4,182.**–298 **Pa**528, 148**A**845. [eeeee] **$4,596.35.**–13 **LaA**272, 127**S**764 (to sisters for death of brother 63 years old and contributing $50 monthly to their support). [fffff] **$5,000.**–**NJSup** 149**A**827 (boy nine years old). [ggggg] **$9,000.**–11**LaA**11, 123**S**822 (on award, by appellate court, reversing judgment for defendant, to widow and minor son, for death of thirty-year-old man earning $60 per week with expectancy of thirty-five years, and for destruction of his automobile). [hhhhh] **$19,500.**–**Mo** 26**SW (2d)**929 ($17,500 to wife and $2,000 to sixteen year old daughter). [iiiii] **$33,-000.**–232**Ky**702, 23**SW(2d)**564. [jjjjj] **$48,000.**–180**Ark**19, 20**SW(2d)**614. [kkkkk] **$25,000.**–**Mo** 30**SW(2d)**1069 (switchman 42 years old earning $200 monthly and leaving wife and two children). [lllll] **$20,000.**–170**Ga**208, 152**SE** 474. [mmmmm] **$15,000.**–**NJSup** 147**A** 381. [nnnnn] **$14,000.**–**OhA** 173**NE**33. [ooooo] **$9,000.**–**NJSup** 152**A**187. [ppppp] **$7,500.**–**Cal** 290**P**22; **TexCivA** 30**SW(2d)**423.

1351–10 [b] 141**Miss**55, 105**S**858; **NJ Sup** 142**A**647 (death of wife). [i] **NJ Sup** 130**A**537. [j] 141**Miss**573, 106**S**826. [p] **$13,500.**–5**F(2d)**58 (damages fixed by court). [q] **$729.**–221**AppDiv**808, 223 **NYS**444 (including doctor and hospital bill but no funeral expenses). [r] **$3,-000.**–**NJSup** 140**A**18. [s] **$7,000.**–12**LaA** 350, 125**S**469 (to widow for death of husband 52 years old earning nearly $200 per month survived accident nearly two weeks, increased to $10,000).

1351–11 [c] 106**Conn**329, 138**A**220. [k] **$1,250.**–7**F(2d)**953. [l] **$2,000.**–12 **LaA**477, 126**S**86. [m] **$2,500.**–13**LaA** 70, 126**S**262. [n]**$4,000.**–**LaA** 129**S**247 (55 year old man earning $14 per week and suffering considerable pain before death). [o] **$4,596.35.**–13**LaA**272, 127**S** 764 (to sisters for death of 63 year old brother). [p] **$1,500.**–**NH** 147**A**413. [q] **Other amounts.**–**LaA** 128**S**186.

1352–16 **MoA** 27**SW(2d)**31. But see 248**Mich**523, 227**NW**725. [d] **Burden is on children suing for parent's death to show sufficient facts from which extent of damages can be determined.**–**Pa** 151 **A**680.

1352–19 **Fla** 130**S**601.

1352–22½–New. but capacity of parent to bestow benefits on child must be shown. 231**Mich**404, 204**NW**84.

1352–22⅓–New. And evidence of nature bestowed by parent on child, and revealing intellectual powers and moral character of parent must be introduced where available. 231**Mich**404, 204**NW** 84.

1352–25½–New. Plaintiff must show the amount of contributions which decedent would probably have made. 37 **GaA**737, 141**SE**917.

1352–27 39**GaA**513, 147**SE**795.

1353–37 231**Mich**404, 204**NW**84 (purchase of house on contract and payment made thereon admissible only to show devotion of so much of earnings to joint advantage of himself and wife); 168 **Minn**347, 210**NW**78; **NJSup** 145**A**225 (1stcase).

1353–38½–New. But circumstances mitigating or aggravating penalty under death statute are admissible in fixing amount of verdict. 311**Mo** 92, 277 **SW**908.

1353–39 **Ala** 129**S**60; 237**Mich**612, 213 **NW**128; 225**AppDiv**19, 232**NYS**66; 118 **Okl** 124, 247**P**92.

1354–42 118 **Okl** 124, 247**P**92, 96 [quot CJ].

1354–44 118 **Okl** 124, 247**P**92, 96 [quot CJ].

1354–46 But see **MoA** 27**SW(2d)**31.

1354–47 74**CalA**10, 239**P**429; **NJSup** 146**A**359; 225**AppDiv**19, 232**NYS**66; 33 **OhA**539, 169**NE**709; 118 **Okl** 124, 247**P** 92.

1356–57 5**PaDist&Co** 783.

1356–70 **NJSup** 146**A**359; 33 **OhA**539, 169**NE**709; 118 **Okl** 124, 247**P**92.

1357–71 33 **OhA**539, 169**NE**709.

1357–75 96**CalA**161, 273**P**875; **225App Div**19, 232**NYS**66.

1357–76 See also **225AppDiv**19, 232 **NYS**66.

1357–78 **TexCivA** 291**SW**681. [a] **Evidence that shortly before accident** deceased was convicted of driving automobile while intoxicated, sentenced, and put on probation which was set aside, held erroneously excluded. 167**Minn** 232, 208**NW**808. [b] **Evidence of conviction of deceased** for driving automobile while intoxicated admissible on question of pecuniary loss to wife and next of kin. 167**Minn**232, 208**NW**808.

1358–82 2**Del** 540, 127**A**49; 36**GaA**70, 135**SE**439; 241 **IllA**58; **NH** 147**A**413; 21 **OhA**57, 152**NE**773; 21 **OhA**57, 152 **NE**773; 118 **Okl** 124, 247**P**92; **TexCivA** 283**SW**273; **TexCivA** 291**SW**681. [c] (2) 130 **Or**440, 279**P**631.

1358–83½–New. Evidence as to unaccepted offer for services as singer is not admissible on issue of probable net income of deceased. 191**NC**130, 131**SE** 400.

1359–84 See also **TexCivA** 11**SW(2d)** 247.

1359–95 320**Mo** 916, 9**SW(2d)**912.

1359–96 37**GaA**771, 142**SE**185; 237 **Mich**612, 213**NW**128; **TexCivA** 283**SW** 273.

1360–14 225**AppDiv**19, 232**NYS**66.

1361–16 237**Mich**612, 213**NW**128; **NJ Sup** 135**A**504.

1361–21 74**CalA**10, 239**P**429.

1362–37 **Cal** 290**P**22; 199**Cal** 562, 250 **P**572. [b] (1) 241 **IllA**58.

1363–39 33 **OhA**539, 169**NE**709; 118 **Okl** 124, 247**P**92; **SD** 226**NW**644; **Tex CivA** 283**SW**689.

1363–40 118 **Okl** 124, 247**P**92; **Tex CivA** 283**SW**689. [a] (1) 179**Minn**528, 229**NW**784.

1363–41 225**AppDiv**184, 232**NYS**330.

1364–45 22 **OhA**440, 153**NE**860.

1364–46 85 **IndA**227, 150**NE**374. [a] (4) In action for death of plaintiff's daughter, evidence of physical condition of plaintiff's wife is admissible. 85 **IndA**227, 150**NE**374. [b] (1) 199**Cal** 562, 250**P**572; 95**CalA**447, 273**P**84.

1364–47 **Utah** 275**P**582.

1365–50 231**Mich**404, 204**NW**84; 33 **OhA**539, 169**NE**709.

1365–60 144**Wash**440, 258**P**321.

1365–61 235 **IllA**122; 231**Mich**404, 204 **NW**84 (mere parentage does not show child's loss from death of father).

1366–64 168**Ark**479, 271**SW**321; 144 **Wash**440, 258**P**321.

1366–65 [a] (1) 168**Ark**479, 271**SW** 321. (2) 144**Wash**440, 258**P**321; 147 **Wash**672, 267**P**433. (5) 207**Cal** 379, 278 **P**858. (7) 157**SC**174, 154**SE**118. (14) To sustain finding as to reasonableness of funeral expenses. **TexCivA** 289**SW** 746. (15) To show owner of boat liable for death of seaman. 7**F(2d)**953. (16) To show decedent's pecuniary worth justifying verdict for $10,000. 82**CalA** 141, 255**P**215. (17) To show that father sustained damages from death of child. 81**Mont**79, 261**P**613. (18) To justify finding for some amount in favor of decedent's parents. **TexCommnA** 22**SW(2d)**1061(2dcase). (19) Other evidence held sufficient. 278**US**496, 49**SCt** 231, 73**Led**473; 173**Ark**103, 10**SW(2d)** 894; 228**Ky**56, 14**SW(2d)**185; 232**NYS** 387; 130 **Or**392, 280**P**496; 295**Pa**168, 145**A**81; **TexCivA** 18**SW(2d)**757; 197 **Wis**601, 222**NW**826.

1366–66 [a] (1) 35**F(2d)**736; 235 **IllA** 122; 231**Mich**404, 204**NW**84. (9) To

show dependency of adult child on deceased. TexCivA 278SW272.

1366-68 87CalA563, 262P481, 488 [cit CJ].

1367-69 207 Iowa367, 223NW100.

DEBENTURE

1369-68 242 IllA296, 299 [citCJ].

1369-78 242 IllA296, 299 [quotCJ]. [a] 28Hawaii 232.

DEBT

1371-26 137SC288, 135SE153, 158 [cit CJ]. See also 12PaDist&Co 106.

1371-29 [a] **Three necessary elements** are debtor, creditor, and promise to pay. 124 Or112, 264P441, 60ALR528.

1372-32 137SC288, 135SE153, 158 [cit CJ]; TexCivA 78W(2d)152, 153 [cit CJ]. [1] (1) 154Md273, 141A125, 128 [citCJ]. [t] (4) Annual rent reserved in lease to be paid out of current revenues of school district is not "debt" within meaning of constitution. 9Pa Dist&Co 113. [v] **"Debt" arises out of some obligation of decedent, himself, as term is used in statutes as to settling** estates. 217AppDiv210, 216NYS699.

1372-33 TexCivA 287SW673. [a] See also Iowa 227NW587.

1372-34 116 Or195, 237P974, 976 [quot CJ].

1373-36 20F(2d)935; 289Pa542, 137A 802, 52ALR1251; TexCivA 290SW777.

1373-37 TexCivA 290SW777.

1373-38 TexCivA 290SW777.

1373-39 TexCivA 290SW777.

1373-40 TexCivA 290SW777.

1373-41 TexCivA 290SW777.

1373-42 8F(2d)91, 94 [quotCJ]; 289 Pa542, 137A802, 52ALR1251; TexCivA 290SW777.

1373-43 8F(2d)91, 94 [quotCJ]; 116 Or195, 237P974, 976 [quotCJ]; 289Pa 542, 137A802, 52ALR1251; TexCivA 290SW777.

1373-44 8F(2d)91, 94 [quotCJ].

1374-45 8F(2d)91, 94 [quotCJ]; 94Fla 614, 114S254; 116 Or195, 237P974, 976 [quotCJ]; TexCivA 290SW777.

1374-46 8F(2d)91, 94 [quotCJ]; 94Fla 614, 114S254; TexCivA 290SW777. [a] 8F(2d)91, 94 [quotCJ].

1374-47 8F(2d)91, 94 [quotCJ].

1374-48 8F(2d)91, 94 [quotCJ]; 20F (2d)935, 937 [quotCJ].

1374-49 116 Or195, 237P974, 976 [quot CJ].

1374-50 94Fla614, 114S254; 81Mont 560, 264P679.

1374-52 5F(2d)682; 92Fla848, 110S 522; 116 Or195, 237P974, 976 [quotCJ].

1374-53 116 Or195, 237P974, 976 [quot CJ].

1375-59 116 Or195, 237P974, 976 [quot CJ].

1375-66 8F(2d)91, 94 [quotCJ].

1375-68 [a] **Accrued taxes not debt.**–129Misc222, 220NYS334. [b] **General taxes not debt.**–219AppDiv576, 220NYS 337.

1376-82½-New. A debt as to the creditor is an asset, chose in action, or personal right to be paid, which belongs and adheres to him wherever he may be, while as to the debtor it is a liability, obligation to pay, or indebtedness against, upon, or following, him wherever he may go. 239Mich295, 214NW 110, 55ALR1157.

1377-90 221MoA495, 281SW968.

1377-91 221MoA495, 281SW968.

1377-91½-New. Warrants of a county, not to be paid out of current funds of year of issuance, are a debt within prohibition against incurring debt without provision for its payment. TexCivA 291 SW628.

1377-92 81Mont560, 264P679.

1378-5 TexCivA 290SW777.

1379-28½-New. **Evidence of debt.** Option of insured to take the surrender value of a policy is not evidence of debt, at least until exercised. 222MoA 1228, 3SW(2d)1046.

DEBT, ACTION OF

18 C. J.—16-66 See also 235 IllA308.

16-73 235 IllA308; 240 IllA281; 153 Md235, 138A261, 53ALR1165.

17-93 153Md235, 138A261, 53ALR1165.

20-74½-New. Evidence constituting failure of proof and not variance. 34 PortoRico 397.

21-18½-New. Judgment for payment based on fact not alleged nor proved is erroneous. 34PortoRico 560.

DECAY

25-39½-New. a result of bacterial action. 13F(2d)871. [a] **"Inherent decay."**–13F(2d)871.

DECISION

27-96 [d] **"Decree" distinguished.**–30 Hawaii620.

28-4 See also 13CustA579, 583 [citCJ]. [a] (1) TexCivA 286SW548, 549 [cit Cyc].

28-6 [f] **Appointment of secretary by board** is not "decision." 221AppDiv 646, 224NYS544.

29-16 See also 13CustA451, 455 [cit CJ]; 13CustA579, 583 [citCJ].

DECOCTION

30-65 See also 12CustA189.

DECORATE

31-75 [c] **As meaning "ornament."**–13 CustA474.

DECREE

32-1 217AppDiv55, 216NYS466. [a] (2) In New York term "decree" is officially limited to surrogate's court. 217 AppDiv55, 216NYS466.

DEDICATION

38-1 262Mass514, 160NE260; 142Va 255, 128SE606, 43ALR752. [a] (1) 103 WVa91, 137SE353; 107WVa263, 148SE 135; 107WVa342, 148SE198. (8) 218 Ala403, 118S572. (10) 169Ga166, 150SE 905; 101Vt325, 143A384. [e] **Motive** for dedication is immaterial. NC 155 SE856.

38-2 203 Iowa1114, 211NW986.

38-4 80Colo 390, 252P808; 203 Iowa 1114, 211NW986.

39-6 101Vt325, 143A384.

39-13 80Colo 390, 252P808.

39-14 203 Iowa1114, 211NW986.

41-32 203 Iowa1114, 211NW986; 125 Or150, 266P891.

41-33 203 Iowa1114, 211NW986.

41-34 203 Iowa1114, 211NW986.

41-36 203 Iowa1114, 211NW986.

41-37 203 Iowa1114, 211NW986.

41-50½-New. Repeal of all general laws as to the organization and government of incorporated cities and towns includes statutes relating to dedication. 85Colo 388, 276P671.

43-68 101WVa662, 133SE373.

43-69 101WVa662, 133SE373.

43-69½-New. **A municipal corporation** may dedicate for public use any property not needed for corporate purposes or held in trust for special uses. 166 La512, 117S573.

43-75 TexCivA 272SW299 (joint trustees acted within scope of duty in dedicating a public street).

43-84 213Ala466, 105S562, 579 [cit CJ]; 131SC540, 128SE724; TexCivA 296SW665. See also 8LaA628. But see 32PortoRico 570.

44-85 131SC540, 128SE724 (or at least with his consent).

44-86 213Ala198, 104S253.

44-93 106Conn665, 138A790; 157Md 213, 145A554.

44-95½-New. While title is in the government, there can be no dedication. 213Ala466, 105S562. [a] **Estoppel from asserting title in government.**–213Ala 466, 105S562.

44-95½-New. An executory, forfeitable contract with the state for the purchase of shore lands vests no element of title, either legal or equitable, in the purchaser, as regards power to dedicate. 151Wash179, 275P547, 62ALR 476.

44-98 96Fla818, 119S330; 332 Ill 561, 164NE23, 63ALR658; 9LaA618, 121S 661; 9LaA603, 121S768; 103NJEq552, 144A14; TexCivA 13SW(2d)933.

44-2 See also 32PortoRico 570.

44-2½-New. A third party, not claiming a strip under an owner filing a map, cannot question it. 219Ala219, 121S 514.

44-2½-New. A deed providing that a strip of land is understood not to be a public street but private property of the grantor, but conveying to the grantee a perpetual easement over the strip of land, conveys a private easement, to the grantee with reservation of fee in the grantor, and does not prevent a subsequent dedication of the strip to public use as a street by the grantor. Tex CivA 13SW(2d)933.

45-3 151Wash179, 275P547, 62ALR 476.

45-5 151Wash179, 275P547, 62ALR 476.

45-11 151Wash179, 275P547, 62ALR 476.

45-15 [b] **Right of lot owner to dedicate lot under restrictive covenant** for street may be determined whether other lot owners would be necessary parties in condemnation proceedings. CalA 281 P93.

46-20 96Fla818, 119S330.

46-25½-New. Under a deed of trust requiring a trustee to hold lands and on written request of any of the beneficiaries or survivors to convey the land as directed and distribute the proceeds of sale as therein directed, the trustee is without any authority, express or implied, to dedicate any portion of the land for city streets or to dispose of the land in any way except in accordance with the provisions of the deed. 103NJEq552, 144A14.

46-30 131SC540, 128SE724 (essence of dedication is for use of public at large). [b] **Dedication must be to use of public exclusively** and not merely in connection with user of owners as they may desire. 131SC540, 128SE724.

47-60 MoA 296SW442, 445 [citCJ]; 127Misc558, 563, 217NYS413 [quotCJ]; 218AppDiv682, 219NYS413.

47-64 [a] **For pious or charitable use.**–127Misc558, 217NYS413.

47-67 85 IndA227, 150NE374; Iowa 230NW432; Mass 167NE417; 32NM 342, 257P998; 127Misc558, 217NYS 413; 128Misc525, 219NYS545; 136 Misc808, 241NYS156; TexCommnA 296 SW877. See also 29Hawaii820.

48-68 93Fla342, 112S75; 334 Ill 67, 165NE343; 216Ky314, 287SW894.

48-70 13PaDist&Co 409.

48-87 221Ky566, 299SW197; 101Vt 325, 143A384.

50-12 127Misc558, 217NYS413; 6Pa Dist&Co 395, 401 [quotCJ]; 131SC540, 128SE724.

50-13 6PaDist&Co 395, 401 [quotCJ].

51-22½-New. Dedication may not be for a purpose bearing on interest or profit in land, as distinguished from general public uses. 131SC540, 128SE 724.

51-27 190NC568, 130SE161 (under statutes providing for dedication of lands used or occupied by public, city did not acquire sidewalk used with permission of owner).

51-28 218Ala19, 117S481.

51-28½-New. The act of dedication is in nature of conveyance of title and interest in land. 213Ala466, 105S562.

52-41 216Ala679, 114S63; CalA 289P 877; 96Fla818, 119S330; 319 Ill 351, 150NE250; 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 203 Iowa1114, 211 NW986; 222Ky569, 1SW(2d)979; 162 La342, 110S497; 235Mich606, 209NW 825; MoA 282SW473; MoA 9SW(2d) 835; 105NJL317, 144A720; 64ALR304; 135Misc710, 238NYS212; 91PaSuper 290; TexCommnA 288SW313; Tex CivA 276SW959; TexCivA 296SW665; TexCivA 48W(2d)1032. See also CalA 272P1095. [b] (1) 203 Iowa1114, 211 NW986.

53-42 213Ala198, 200, 104S253 [cit CJ]; 219Ala219, 121S514; 96Fla818, 119S330; 319 Ill 351, 150NE250; 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 203 Iowa1114, 211NW986; 207 Iowa 1173, 224NW834; 221Ky712, 299SW 579, 581 [citCJ]; 222Ky103, 300SW 362; 142Miss65, 107S196; 217AppDiv 164, 216NYS351; 154Tenn334, 285SW 567; TexCivA 276SW719; TexCivA 276 SW959; 101Vt325, 143A384. But see

190NC568, 130SE161. [a] 10LaA283, 119S738. [c] TexCivA 22SW(2d)479.
53-43 203 Iowa1114, 211NW986.
53-45 213Ala198, 104S253; 218Ala403, 118S572; 203 Iowa1114, 211NW986; 221Ky712, 299SW579, 581 [citCJ]; MoA 277SW56; 228AppDiv596, 240NYS766; 190NC568, 130SE161; TexCivA 296SW 665. [a] (3) Acknowledgment by dedicator of plat that he caused plat to be laid out in streets as shown by plat and certified to by county surveyor expresses intention to dedicate streets as public streets. 321 Ill 346, 151NE896.
54-47 213Ala198, 104S253.
54-48 213Ala198, 200, 104S253 [citCJ].
54-50½-New. No particular way or manner is necessary to manifest the intention to dedicate. 319 Ill 351, 150NE 250.
54-51 80Colo 390, 252P808, 810 [cit CJ]; 288Pa434, 136A669; 12PaDist&Co 652; TexCommnA 288SW813; 101 Vt325, 143A384.
54-52 12PaDist&Co 652.
55-56 216Ky314, 287SW894; 169La 1035, 126S545; 4LaA300; Mo 272SW 933; 111 Okl 220, 239P236; 12PaDist&Co 652.
55-58 Cal 290P587; 332 Ill 561, 164NE 23, 63ALR658; 203 Iowa1114, 211NW 986; 225Ky692, 9SW(2d)1015; MoA 282SW473; 12PaDist&Co 652. [c] **Dedication of public graveyard** may be established without deed. 127Misc558, 217NYS413.
55-59 203 Iowa1114, 211NW986.
55-60 111 Okl 220, 239P236.
55-62 332 Ill 561, 164NE23, 63ALR658; 166La512, 117S573; 169La1035, 126S 545.
56-63 203 Iowa1114, 211NW986.
56-64 288Pa434, 136A669 (term defined).
56-66 [a] **Act of congress granting highway right of way over public lands** constitutes dedication. 33Wyo 271, 238 P284.
56-68 332 Ill 561, 164NE23, 63ALR658.
56-72 TexCivA 13SW(2d)933.
56-73 213Ala198, 104S253.
56-76 166La512, 117S573.
57-80 85 IndA227, 150NE374; MoA 6 SW(2d)1009.
57-83 89PaSuper1.
57-85 [a] (2) Deed reciting that grantors were desirous that property be laid out as public street, covenanting to waive damages and providing grantee city should assume assessments for improvement, did not create trust. Mass 167NE417.
57-88½-New. Absence of record of deed in town clerk's office does not prove that highway described in deed was not dedicated to town. 228AppDiv596, 240NYS 766.
57-95 [a] **Filing map** showing lots and streets, and containing dedication clause accepted by board of supervisors, has been held common-law dedication. CalA 289P877.
57-95½-New. , or by a certificate attached to a map stating reservation of streets to public purposes. 78CalA74, 248P256.
57-1 44 Ida143, 255P408, 409 [citCJ]; Iowa 227NW421 (description of land dedicated insufficient, and therefore void).
58-3 TexCivA 296SW665. [a] **Twenty years' adverse use** is necessary. 245NYS 534.
58-4 196Cal 62, 235P647; 80Colo 390, 252P808, 810 [citCJ]; 319 Ill 351, 150 NE250; 221Ky712, 299SW579, 581 [cit CJ]; 229Ky538, 17SW(2d)422; 228App Div596, 240NYS766; 102WVa574, 136 SE42. See also 218Ala19, 117S481. [e] **Interpretation of plats.**–319 Ill 351, 150 NE250. [f] **Map hung in public place** showing tract as park is not dedication where there is no intent to dedicate. 222Ky569, 1SW(2d)979.
58-5 162La342, 110S497. [a] **Acts held not to constitute dedication.**–CalA 292P981.
58-10 233Mich342, 206NW312.
58-11½-New. Dedication of property to public use may result from substitution of a new way for an old. MoA 9 SW(2d)835.
58-12 206Cal 753, 276P336; 82CalA 382, 256P255; 83CalA555, 256P1114; 170Ga324, 152SE831; 203 Iowa1114, 211 NW986; 216Ky314, 287SW894; 245 NYS534; 111 Okl 220, 239P236; 91 PaSuper290; TexCivA 291SW262; Tex CivA 295SW212. See also IndA 169 NE873. But see 190NC568, 130SE 161; TexCivA 275SW173. [f] Tex CommnA 288SW813. [g] **Where railroad company acquiesced in and recognized statutory dedication to public by those executing plat of streets,** there is as against it implied or common-law dedication. 206 Iowa533, 220 NW315. [h] **In Louisiana.**–160La957, 107S709. [i] **Actual use to which roadway or waterway is put** may be of assistance in determining whether it is public or private. 319 Ill 351, 150NE 250. [j] **Users of strip of land along water front** denying dedication to public and claiming under decree purporting to pass title to all territory involved are not estopped to assert that title to part of land was in United States and not subject to dedication. 213Ala466, 105S562.
58-12½-New. Implied dedication requires exclusive control by public long enough to raise presumption of grant. 169Ga166, 150SE905.
58-14 41F(2d)823; 213Ala466, 105S 562 (where court said owner, party to such conveyance, is estopped to deny dedication in absence of express qualification); 215Ala670, 112S136; 218Ala 270, 118S658; 219Ala56, 121S62; 219 Ala219, 121S514; 207Cal 1, 276P570; 70CalA635, 233P991; 94CalA480, 271P 507; 320 Ill 467, 151NE253; 222Ky103, 300SW362; 225Ky692, 9SW(2d)1015; 228Ky156, 14SW(2d)418; 230Ky304, 19 SW(2d)963; 231Ky356, 21SW(2d)436 (plat need not be signed and acknowledged by owner); 231Ky666, 22SW(2d) 102; 160La109, 106S711; 168La588, 122 S859; 169La1035, 126S545; 157Md213, 145A554; 148Miss306, 114S625; MoA 27SW(2d)456; 104NJL335, 140A415; NJ 148A783; NJSup 129A406; NJSup 140A668; 103NJEq552, 144A14; 58ND 536, 226NW635 (as between owner of lots and purchasers dedication is complete on delivery of conveyance); 19 OhA225; 125 Or150, 262P853, 57ALR 311; 12PaDist&Co 652; TexCivA 272 SW299, 306 [quotCJ]; TexCivA 282SW 296; TexCivA 295SW212; 147Va1019, 133SE481; 107WVa263, 148SE135; WVa 155SE538. But see 246Mich579, 225NW3. [g] **Estoppel to claim land between lot and way.**–70CalA635, 233P 991.
60-15 TexCivA 272SW299, 306 [quot CJ].
60-16 85Colo 388, 276P671.
60-16½-New. Intention of the owner to dedicate streets and alleys on a plat must be deduced largely by what appears on the face of the recorded plat. 38Wyo 13, 264P87.
60-19 213Ala466, 105S562; NJSup 140 A668.
60-24 TexCivA 272SW299, 306 [quot CJ].
60-25 83CalA415, 256P1103, 1105 [quot CJ]; TexCivA 272SW299, 306 [quot CJ]; 38Wyo 13, 264P87.
61-26 Ala 121S514; 130Kan731, 288P 572; 231Ky356, 21SW(2d)436 (recorded); 125 Or150, 262P853, 57ALR311.
61-30 213Ala466, 105S562, 579 [quot CJ].
61-32 213Ala466, 105S562, 579 [quot CJ]; 217AppDiv164, 216NYS351.
61-33½-New. **Remote designation; clearness and distinctness.** Where reference is made to a map reduced from a larger map and it appears that the land claimed to have been dedicated is located only on the larger map, the designation is too remote and not sufficiently clear or distinct to effectuate a dedication. 213Ala466, 105S562.
61-33⅓-New. **Reference to map reduced from other map.** Where reference is made to a map reduced from larger map, the reference does not effectuate dedication of land included in the larger tract but not in the smaller. 213Ala 466, 105S562.
61-34 213Ala466, 105S562, 580 [quot CJ].
61-35 213Ala466, 105S562, 580 [quot CJ]; 166La1059, 118S134. [d] **Where plat indicates only prospective intention to dedicate** it does not import dedication for street purposes. TexCivA 282 SW319.
61-36 213Ala198, 200, 104S253 [citCJ]; 213Ala466, 105S562, 580 [quotCJ]; 171 Ark878, 286SW1025.
61-37 213Ala466, 105S562.
62-38 213Ala466, 105S562, 580 [citCJ]; 166Ga506, 143SE894.
62-39 68CalA153, 228P726.
62-41 OhA 173NE260.
62-42 12PaDist&Co 652. See also 231 Ky356, 21SW(2d)436.
63-44½-New. Recital in a deed excepting a road has been held not a dedication of the road to the public nor recognition of such dedication. 162La342, 110 S497.
63-46 213Ala466, 105S562 (judicial sale of lots by reference to map held not to show dedication of strip along water front as shown in earlier map).
63-46½-New. Where plan of lots included in prior sales to which reference in chancery decree is made covers much smaller tract than that covered by decree, and does not show clearly the plat according to which such sales had been made, there is no dedication. 213Ala 466, 105S562. [a] **Reference to plan in prior sales held not dedication.**–213Ala 466, 105S562.
63-46½-New. Sales of different lots pursuant to single decree, and approved by one decree, although extended through four days, constitute a single proceeding and are to be construed together. 213Ala466, 105S562.
63-47 213Ala466, 105S562 (sale of land with reference to a map which is a reproduction of a portion of an earlier map is not a dedication of streets and water front shown in earlier map and located some distance from lots sold).
63-52 157Md213, 145A554.
63-55 125 Or150, 262P853, 57ALR311; 101Vt325, 143A384.
63-56 125 Or150, 262P853, 57ALR311; 101WVa662, 133SE373. [g] **Where plat shows circular driveway which was never graded** and which was eliminated by subsequent plats, and property was taxed by a town thereafter incorporated, there was no dedication. 131SC540, 128 SE724.
63-56½-New. or "vacant," 101WVa662, 133SE373.
64-65 [a] **Labelling plat "reserve"** held not dedication for park purpose. 218 Ky356, 291SW752.
65-70 213Ala198, 200, 104S253 [citCJ].
65-71 213Ala198, 104S253.
65-76 213Ala466, 105S562, 580 [citCJ]. [a] 213Ala466, 105S562, 580 [citCJ].
65-77 213Ala466, 105S562.
66-81½-New. The fact that the first lot, remote from water edge, was sold by reference to a map showing an open strip along the water is not evidence of dedication thereof where other lots fronting on the water were sold pursuant to some decree without such reference. 213 Ala466, 105S562. [a] **Easement in land alleged dedicated.**–213Ala466, 105S562.
66-83 319 Ill 351, 150NE250.
66-84½-New. A ship extending into land from a navigable river, when designated on the plat, will be presumed to be intended for its ordinary use. 319 Ill 351, 150NE250.
66-84½-New. **Although plat used neither word "public" nor "private,"** it was held that the plat sufficiently dedicated to public use. 319 Ill 351, 150NE250.
66-86 105WVa395, 142SE841, 842 [cit CJ], 58ALR231.
66-89 331 Ill 523, 163NE468. [d] **Map or plat with streets, alleys, and square shown thereon filed and recorded in conformity to statute** constitutes complete statutory dedication of land in proposed town site. 146Miss570, 111S565.
67-90 331 Ill 523, 163NE468; 334 Ill 46, 165NE143. [a] (2) The approval of plat by village is evidence that plat complies with statute. 331 Ill 523, 163NE468. [c] **Compliance held sufficient.**–319 Ill 351, 150NE250.
67-93½-New. A statute requiring that a map or plat and abstract be filed with

the board of mayor and aldermen does not apply to a proposed town site where there is no corporate existence at the time the plat is made and map is filed. 146Miss570, 111S565.

67-95½-New. A plat is not defective although the figures on it are not designated as feet, where the plat shows on its face that it was made to a certain scale and that the lines correspond to numbers as indicating feet according to the scale. 319 Ill 351, 150NE250.

67-95¾-New. An owner is not forbidden to subdivide land in such a way as to establish over it only private ways for the sole benefit of subsequent owners of lots therein. 319 Ill 351, 150NE250.

67-96 219Ala682, 123S208; 331 Ill 523, 163NE468. [a] (3) Map or plat filed and recorded in substantial conformity to statute is sufficient statutory dedication of lot marked "City Square" as well as streets mentioned and alleys shown. 146 Miss570, 111S565. (4) "Alley" means public way unless term "private" is prefixed. 147Va1019, 133SE481. (5) To show relation of platted lands to government survey. 219Ala682, 123S208 [citCJ]. [c] (2) Placing of word "Fifth" as being south of boundary of village and word "Street" as north of boundary sufficiently names streets as extended beyond boundary. 321 Ill 346, 151NE896. [e] **Monuments.**–321 Ill 346, 151NE896; [f] **Where plat and surveyor's certificate** enable surveyor to locate and determine dimensions of lots, blocks, streets, and alleys, they sufficiently comply with statute. 321 Ill 346, 151NE896.

67-98 321 Ill 346, 151NE896.

68-7 321 Ill 346, 151NE896.

68-17 168La588, 122S859. But see 130 Kan731, 288P572. [b] **In Kentucky.**–219 Ky418, 293SW956.

69-30 319 Ill 43, 149NE577; 150Miss 656, 115S890, 892 [quotCJ], 58ALR849; 142Va255, 128SE606, 43ALR752.

69-33 CalA 272P1095; 332 Ill 400, 163 NE816; 142Va255, 128SE606, 43ALR 752.

70-39½-New. A condition subsequent bars forfeiture for noncompliance without reëntry or equivalent act. 332 Ill 561, 164NE23, 63ALR658.

70-41 319 Ill 43, 149NE577.

70-45 142Va255, 128SE606, 43ALR752.

71-53 [a] **Usual effect of inclosing area on map** which would otherwise appear as street is to indicate intent to reserve inclosed area from dedication. 151Wash 179, 275P547, 62ALR476.

71-55 CalA 272P1095.

71-63 142Va255, 128SE606, 43ALR752.

71-70 207Cal 465, 279P148.

72-74 93Fla342, 112S75.

72-77 78CalA74, 248P256; 203 Iowa 1114, 211NW986; 221Ky712, 299SW 579; 101Vt325, 143A334.

72-79 213Ala466, 105S562; 216Ala679, 114S63; 68CalA153, 228P726; CalA 289 P877; 85Colo 388, 276P671; 106Conn 34, 137A13; Conn 152A136; 96Fla818, 119S330; 320 Ill 467, 151NE253; 85 IndA227, 150NE374; 203 Iowa1114, 211 NW986; 216Ky314, 287SW894; 233Ky 299, 25SW(2d)730; 160La109, 106S711; 157Md213, 145A554; MoA 9SW(2d)835; 135Misc710, 238NYS212; 123 Or563, 263 P75; 127 Orl, 270P924, 927 [citCJ]; 288Pa434, 136A669; TexCivA 276SW 959; TexCivA 48W(2d)1032; TexCivA 28SW(2d)603; 147Va1019, 133SE481; Va 154SE489; 103WVa91, 137SE353, 355 [quotCJ]. See also TexCivA 286SW 763.

73-80 106Conn34, 137A13; 92Fla770, 110S341; 320 Ill 467, 151NE253. But see TexCivA 286SW763.

73-81½-New. In order to constitute a public street or highway at common law, there must be both a dedication and acceptance. 85Colo 388, 276P671.

73-82 85Colo 388, 276P671.

73-82½-New. and the offer may be withdrawn or revoked by the owner or his grantee. 320 Ill 467, 151NE253.

73-83 106Conn34, 137A13; 334 Ill 46, 165NE143; 217AppDiv164, 216NYS351. [a] 58ND536, 226NW635.

73-84 106Conn34, 137A13; 334 Ill 46, 165NE143.

73-86 MoA 27SW(2d)456.

74-94 85Colo 388, 276P671; 334 Ill 46, 165NE143.

74-94½-New. Failure of authorities to accept will not defeat an assessment for a village street improvement. 25 OhA 301, 157NE817.

74-2 320 Ill 467, 151NE253; 225Ky692, 9SW(2d)1015.

74-4 85Colo 388, 276P671; 320 Ill 467, 151NE253; 240Mich398, 215NW293; TexCivA 296SW665; TexCivA 48W(2d) 1032. But see NJSup 129A406.

75-6 94CalA450, 271P342; 240Mich398, 215NW293.

75-7 68CalA153, 233P991; NJ 148A 783.

75-9 320 Ill 467, 151NE253; 240Mich 398, 215NW293; 288Pa434, 136A669.

76-10 320 Ill 467, 151NE253.

76-17 288Pa434, 136A669.

76-18 [a] **Prior to statute** acceptance did not have to be immediate, but could be made when public necessity arose. 87 PaSuper588.

76-20 [a] **Acceptance by city completes contract,** after which act does not apply. 288Pa434, 136A669.

77-23 87PaSuper588.

77-24 87PaSuper588.

77-28 78CalA74, 248P256; 136Misc808, 241NYS156. [a] **Actual acceptance** is formal acceptance by proper authorities. 94CalA480, 271P507.

77-29 78CalA74, 248P256; 321 Ill 346, 151NE896; 160La109, 106S711; Tex CivA 276SW959. [a] **Acceptance** is implied by use by public for such length of time as will evidence intention to accept dedication. 94CalA480, 271P507.

77-30 127 Orl, 270P924, 926 [citCJ].

77-31 94CalA480, 271P507; 85 IndA 227, 150NE374; 216Ky314, 287SW894; NJCh 150A202; 127 Orl, 270P924, 926 [citCJ]. [a] **Condemnation proceedings may constitute acceptance.**–136Misc808, 241NYS156.

77-32½-New. To constitute acceptance it must be made by the proper authorities. 85Colo 388, 276P671.

77-33 216Ala679, 114S63; 78CalA74, 248P256; 94CalA480, 271P507; 320 Ill 467, 151NE253; 321 Ill 346, 151NE896; 203 Iowa1114, 211NW986; 221Ky712, 299SW579; 226Ky132, 10SW(2d)623; NJSup 129A406; 123 Or563, 263P75; 288Pa434, 136A669. "The general rule," etc. 127 Orl, 270P924, 926 [citCJ]. [c] **Use must be by public at large.**–203 Iowa 1114, 211NW986.

78-35 216Ala679, 114S63; 78CalA74, 248P256; 83CalA415, 256P1103; 320 Ill 467, 151NE253; 85 IndA227, 150NE374; 160La109, 106S711; 218AppDiv682, 219 NYS413; 19 OhA225; 123 Or563, 263 P75; 288Pa434, 136A669. [c] **Character of use held sufficient.**–321 Ill 346, 151 NE896.

78-37 221Ky712, 299SW579.

78-42 78CalA74, 248P256; 111 Okl 220, 239P236. [b] (3) 317 Ill 264, 148 NE7. (8) Other instances. IndA 169 NE873; 27 OhNPNS418.

78-43 94CalA480, 271P507.

79-52½-New. To create public rights to streets or alleys under a common-law plat, such plat must be accepted and acted upon by the public. 320 Ill 467, 151NE253.

79-52⅓-New. To establish dedication by public use, evidence need not necessarily show repairs by public authority. 85 IndA227, 150NE374.

79-52¼-New. Acceptance must be shown by open and notorious acts of the user, based on a claim of right in those using the way. 288Pa434, 136A 669.

79-52½-New. Immediate use of all streets of the plat is not required to indicate acceptance. 321 Ill 346, 151NE 896.

79-52⅗-New. A sale of a lot bounded on a street in a proposed subdivision does not show acceptance by the public. 240Mich398, 215NW293.

79-52½-New. Where dedication is very beneficial, greatly convenient, or necessary to the public, acceptance may be implied from slight circumstances. 321 Ill 346, 151NE896.

79-57 106Conn34, 137A13.

79-58½-New. or where formal action of a board of selectmen, duly recorded, is required. 106Conn34, 137A13.

80-62 [e] 91PaSuper290. [h] 27 Oh NPNS418.

80-65 [b] **Federal grant of highway right of way over public lands** constitutes dedication which may be accepted by public user. 33Wyo 271, 238P284.

80-68 147Va1019, 133SE481.

80-70 78CalA74, 248P256; 286Pa561, 134A481; 288Pa434, 136A669; 146Va 340, 131SE790, 791, 44ALR810 [quot CJ].

80-71 146Va340, 131SE790, 791, 44 ALR810 [quotCJ].

80-72 233Ky299, 25SW(2d)730; 239 Mich551, 214NW957; 146Va340, 131SE 790, 791, 44ALR810 [quotCJ].

81-73 239Mich551, 214NW957; 146Va 340, 131SE790, 791, 44ALR810 [quot CJ].

81-74 239Mich551, 214NW957; 146Va 340, 131SE790, 791, 44ALR810 [quot CJ].

81-75 146Va340, 131SE790, 791, 44 ALR810 [quotCJ].

81-76 146Va340, 131SE790, 791, 44 ALR810 [quotCJ].

81-77 146Va340, 131SE790, 791, 44 ALR810 [quotCJ].

81-78 146Va340, 131SE790, 791, 44 ALR810 [quotCJ].

81-79 146Va340, 131SE790, 791, 44 ALR810 [quotCJ].

81-80 146Va340, 131SE790, 791, 44 ALR810 [quotCJ].

81-81 216Ky314, 287SW894.

81-81½-New. A town incorporated two years after an alleged dedication cannot be said to have accepted it. 131SC 540, 128SE724.

81-81⅓-New. The court cannot compel the municipality to accept a street. 147Va1019, 133SE481.

81-83 320 Ill 467, 151NE253.

82-84 242Mich340, 218NW805.

82-85 320 Ill 467, 151NE253; 332 Ill 561, 164NE23, 63ALR658; 239Mich551, 214NW957; 242Mich340, 218NW805; MoA 9SW(2d)835; 127 Orl, 270P924, 926 [citCJ]; 91PaSuper290; 156Tenn 7, 299SW789; TexCivA 296SW665.

82-86 127 Orl, 270P924, 926 [citCJ].

82-87 240Mich398, 215NW293 (sale of lot, by resident, bounded on street).

82-87½-New. It has been held that formal action of a board of selectmen, duly recorded, is necessary for acceptance. 106Conn34, 137A13.

82-89 233Ky734, 26SW(2d)1039.

82-91 207Cal 1, 276P570; 83CalA415, 256P1103; 85 IndA196, 150NE67; 242 Mich340, 218NW805. [a] (5) Federal grant of highway right of way over public lands constitutes dedication which may be accepted by constructing highway. 33Wyo 271, 238P284.

83-92 320 Ill 467, 151NE253; 222Ky 103, 300SW362; 228AppDiv596, 240 NYS766 (repeated acts of maintenance and repair). [e] **Repairs by persons under general contract** to repair streets, but without specific instructions as to street in question, held not acceptance as public highway, though some village officers knew of such repairs. 217 AppDiv164, 216NYS351.

84-2 WVa 155SE538 (resolution of city council to pave).

84-11 207Cal 465, 279P148; 106Conn 34, 137A13; 334 Ill 46, 165NE143; 240 Mich398, 215NW293.

84-11½-New. even though the statute requires municipal authorities to approve streets laid out by private owners, 106Conn34, 137A13.

84-15 240Mich398, 215NW293.

84-20½-New. An order of a county court, which does not in terms accept an offer of dedication of streets and alleys in an incorporated town but is ambiguous and uncertain, should be construed as to its true intent and purpose by the acts of the parties giving it a practical construction and the facts and circumstances under which it was made. 103WVa91, 137SE353.

84-20⅓-New. The owner's agreement to put streets into a condition satisfactory to selectmen, secured by bond executed as a condition for the town's permitting the sale of lots, and the filing of an agreement and map, does

not constitute acceptance. 106Conn34, 137A13.

85-24 41F(2d)823; 321 Ill 346, 151NE 896; 127 Ori, 270P924, 927 [citCJ]; 156Tenn7, 299SW789; 107WVa263, 148 SE135. [a] (3) City light and fire plug along with public sewer and water main are important factors but not conclusive. 13PaDist&Co 409.

85-25 321 Ill 346, 151NE896.

85-33½-New. It has been held that an acceptance may be shown by lighting the lands dedicated. 320 Ill 467, 151 NE253.

86-46 See also 41F(2d)823.

86-52 217AppDiv164, 216NYS351.

86-57 222Ky103, 300SW362. But see 131SC540, 128SE724.

86-58 [a] **Payment of taxes by owner** on property dedicated to public purpose does not work estoppel against public or vest owner with title. 218Ky 356, 291SW752.

86-60 24 OhA73, 156NE227.

87-62 24 OhA73, 156NE227.

87-68½-New. Under Kentucky statute, vested powers in the board of public works to approve plans have been held not divested by repeal of the act, where the commission authorized was never created. 219Ky418, 293SW986.

88-73 136Misc808, 241NYS156. [a] **Use of land dedicated for street** does not amount to acceptance of rest of tract dedicated but not so used. 288 Pa434, 136A669.

88-74 96Fla128, 117S799.

88-76 [a] **Constructive acceptance of part** of highway may exist by use and acceptance of another part. Conn 152 A136.

88-77½-New. Mere dedication or its acceptance by the municipality does not make it a public highway. 288Pa434, 136A669.

88-78 240Mich398, 215NW293.

88-79 87PaSuper588.

88-80 19 OhA225, 230 [quotCJ]; 156 Tenn7, 299SW789.

88-84 288Pa434, 136A669.

89-87 19 OhA225; 288Pa434, 136A669.

89-89 320 Ill 467, 151NE253.

89-90 320 Ill 467, 151NE253; 240Mich 398, 215NW293.

90-2½-New. [§ 92½] E½. **Estoppel To Assert Dedication.** Where a railroad company constructed a depot on premises without complaint and with the knowledge of all persons interested, the public and claimants under the original owner can no longer claim dedication for street purposes. TexCivA 282 SW319.

90-2⅓-New. Whether a depot was built before or after conveyance to the railroad of land claimed to have been dedicated, it was held immaterial where done with the consent of the owner and public. TexCivA 282SW319.

90-3 169La352, 125S269.

91-29 320 Ill 467, 151NE253.

91-30 320 Ill 467, 151NE253.

91-32 320 Ill 467, 151NE253.

91-34 218Ky356, 291SW752.

92-38 320 Ill 467, 151NE253.

92-38½-New. "Revocation" of an offer to dedicate streets may be shown by acts inconsistent with such public use, as by conveyance of the property inclosing the land or erecting buildings thereon. 334 Ill 46, 165NE143.

92-40 80Colo 390, 252P808; 317 Ill 179, 147NE804; 203 Iowa134, 209NW 731.

92-41 203 Iowa134, 209NW731, 735 [citCJ].

92-44½-New. Other circumstances. Neglect of strip along water front by municipal authorities for sixty or seventy years and their acquiescence in private use thereof may be considered in determining original intent to dedicate. 213Ala466, 105S562.

92-46 218Ky356, 291SW752.

92-48 96Fla128, 117S799; NS [1930] 4DomLR43.

92-50½-New. Neglect of strip along water front by municipal authorities for sixty or seventy years and their acquiescence in private use thereof may be considered in determining acceptance by public. 213Ala466, 105S562.

92-50⅓-New. Whether or not a dedication has been accepted by the city, it is proper to consider the intent, purpose, and importance of the dedication to the public. MoA 9SW(2d)835.

93-59 TexCivA 272SW299.

93-68 213Ala198, 104S253; 213Ala466, 105S562; 218Ala403, 118S572; 73CalA 193, 238P732; 4LaA232; 105WVa395, 142SE841, 842 [citCJ] 58ALR231; 33 Wyo 271, 238P284.

93-69½-New. Party asserting dedication has burden of proving ownership of dedication. 213Ala466, 105S562.

93-70 225Ky692, 9SW(2d)1015. [a] NJSup 129A406; TexCivA 28SW(2d) 603; 107WVa342, 148SE198.

93-72 [a] (3) Where part of alley was accepted by city by user and improvements, property owner claiming title to part of alley adjoining his property has burden of proving that there was no intention on part of city to accept whole alley. 242Mich340, 218NW805.

94-82½-New. Recordation of deed raises presumption that it was recorded by grantee and proof thereof is presumptive evidence of delivery. 228 AppDiv596, 240NYS766.

94-85 213Ala466, 105S562; 203 Iowa 1114, 211NW986. [b] **Equivocal acts and declarations** of owner are insufficient to establish dedication. 213Ala 466, 105S562.

94-86 213Ala466, 105S562; 203 Iowa 1114, 211NW986; 157Md213, 145A554.

94-90 218Ala19, 117S481; 203 Iowa 1114, 211NW986; 235Ky222, 30SW(2d) 207. [a] (4) Twenty years' user by public raises presumption of dedication. 218Ala19, 117S481.

94-91 319 Ill 351, 150NE250; 203 Iowa1114, 211NW986.

94-94 203 Iowa1114, 211NW986; 10 LaA283, 119S738.

95-9 Conn 152A136; TexCivA 27 SW(2d)343.

95-10 331 Ill 523, 163NE468.

95-11 [a] (2) Intention of village authorities to accept strip of land in public highway held not presumed in absence of formal action. 217AppDiv164, 216NYS351.

95-12 157Md213, 145A554.

95-13 [a] **Long continued acquiescence** by municipality of private use of water front strip may be considered in determining acceptance by public and intention to dedicate. 213Ala466, 105S 562.

96-15 203 Iowa1114, 211NW986.

96-19 203 Iowa1114, 211NW986; 207 Iowa1173, 224NW834; 221Ky712, 299 SW579; 228AppDiv596, 240NYS766; 13 PaDist&Co 409 (proof must be strong); 154Tenn334; 285SW567; TexCivA 275 SW173 (must be unequivocal setting apart of property to some form of public use); TexCivA 22SW(2d)479 (must show unequivocal setting apart to public use). But see 288Pa434, 136A669.

96-21 323 Ill 486, 154NE207.

96-22 96Fla818, 119S330; 169Ga166, 150SE905; 320 Ill 467, 151NE253; 142 Miss65, 107S196; 154Tenn334, 285SW 567; 103WVa91, 137SE353; 107WVa 342, 148SE198.

96-23 TexCivA 278SW341.

96-26½-New. Evidence that the owner considered dedicating his property and had it surveyed has been held insufficient to establish dedication. 323 Ill 486, 154 NE207.

96-27 203 Iowa1114, 211NW986.

96-29 Contra 91PaSuper290.

96-35 80Colo 390, 252P808; 82Colo 359, 260P99; 331 Ill 523, 163NE468; 85 IndA227, 150NE374; 130Kan731, 288P 572; 221Ky712, 299SW579; 222Ky103, 300SW362; 225Ky692, 9SW(2d)1015; 233Ky734, 26SW(2d)1039; 233Mich342, 206NW312; 321Mo 766, 12SW(2d)491, 62ALR1056; MoA 9SW(2d)835; 111 Okl 220, 239P236; 91PaSuper290; RI 151A4; TexCivA 278SW341; TexCivA 286SW763; TexCivA 9SW(2d)143; Tex CivA 12SW(2d)1074; TexCivA 20SW(2d) 356; 101WVa662, 133SE373; NS [1930] 4DomLR43.

97-36 317 Ill 179, 147NE804; 142Miss 65, 107S196; 26 OhA590, 160NE101. [a] TexCivA 278SW341.

97-37 224AppDiv63, 229NYS201.

97-38 142Miss65, 107S196. [a] Tex CivA 296SW665. [d] **Evidence held sufficient to show that offer was not revoked** before city's implied acceptance. 207Cal 587, 279P427, 66ALR318.

97-39 82Colo 359, 260P99; 207 Iowa 351, 222NW881; 231Ky700, 22SW(2d) 98; Mo 272SW933; 91PaSuper290.

97-40 142Miss65, 107S196.

97-42 217AppDiv164, 216NYS351.

97-42½-New. to show knowledge by the purchasers. TexCivA 286SW763.

97-43 276US182, 48SCt276, 72L ed523; 213Ala198, 104S253; 68CalA153, 228P 726; CalA 289P877; 106Conn665, 138A 790; 96Fla818, 119S330; 99Fla1287, 128S809; 170Ga324, 152SE831 (express written dedication); 320 Ill 467, 151NE 253; 203 Iowa1114, 211NW986; 10LaA 283, 119S738; 239Mich551, 214NW957; TexCivA 276SW959.

97-44 216Ala679, 114S63; 317 Ill 179, 147NE804; 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 162La342, 110S497; 239Mich551, 214NW957; 32PortoRico 570; 154Tenn334, 285SW567; TexCivA 276SW719.

97-45 216Ala679, 114S63; 68CalA153, 228P726; 106Conn34, 137A13; 320 Ill 467, 151NE253; 154Tenn334, 285SW 567; 103WVa91, 137SE353; 107WVa 342, 148SE198.

98-52½-New. That owners of land forming part of a tract including a strip claimed to have been dedicated as a street conveyed by deeds mentioning the center line of the street as a boundary is not sufficient to prove dedication of anything to the public. 68CalA153, 228 P726.

98-52⅓-New. or acceptance of an offer of dedication. 68CalA153, 228P726.

99-81½-New. The fact that some lots along the water front would be without access from neighboring streets without dedication is not conclusive of dedication where conveyances described them as extending to channel and each had access to tidewater highway. 213Ala466, 105S562.

99-90 TexCivA 272SW299.

99-91 TexCivA 272SW299, 306 [quot CJ].

100-99 218Ala403, 118S572; 83CalA 415, 256P1103; TexCivA 272SW299 (finding that railroad caused mapping showing street, sustained). [b] (6) Nonaccess to water front lots from neighboring streets is not conclusive of dedication of street along water front where there was access to tidewater highway. 213Ala466, 105S562. (7) Evidence held insufficient to show dedication by recorded plat of strip of land to public use as street. 213Ala198, 104S253.

100-1 26 OhA306, 159NE490.

100-1½-New. That a public map shows land laid out as a street is not in itself evidence of dedication. 68CalA153, 228 P726.

100-2 203 Iowa134, 209NW731. [b] (6) Insertion of word "vacated" on alley and part of street shown on recorded plat and subsequent conveyance thereof indicates intention to annul alley and put end to existence of part of street so marked. 38Wyo 13, 264P87.

100-4 162La342, 110S497.

100-5 MoA 256SW549 (evidence held insufficient); MoA 282SW473; TexCivA 275SW173.

101-7 207 Iowa1173, 224NW834.

101-12 MoA 6SW(2d)1009; MoA 9 SW(2d)835; TexCivA 286SW763.

101-15 219Ala634, 122S881(2d case); MoA 9SW(2d)835.

101-17 219Ala634, 122S881(2dcase).

102-23 190NC568, 130SE161 (evidence insufficient to show city acquired easement by prescription).

104-50 See also Utah 285P646.

104-53 103WVa386, 137SE754 [cit CJ].

105-59 TexCommnA 288SW813; 105 WVa395, 142SE841, 842 [citCJ] 58ALR 231. [c] **Leaving alley open** does not constitute dedication, unless left open for public and its use inconsistent with private ownership. TexCivA 275SW173.

106-69 TexCivA 275SW173 (alley).

106-72 MoA 6SW(2d)1009.

107-79 TexCivA 275SW173 (alley); Tex CivA 276SW959.

107-80 221MoA435, 282SW71.

107-81 221MoA435, 282SW71.

107–86 94**CalA**450, 271**P**342; **TexCivA** 278**SW**341 (dedication by circumstances held shown as matter of law); **TexCivA** 22**SW(2d)**479 (directed verdict held proper).

108–89½–New. Evidence insufficient to authorize instructed verdict. **TexCivA** 275**SW**173.

108–89½–New. Taking case from jury is justified when all the evidence shows an irrevocable dedication. **TexCivA** 286 **SW**763.

108–91 **TexCivA** 275**SW**173 (where evidence conflicting).

108–93 166**La**1059, 118**S**134.

108–94 207**Cal** 587, 279**P**427, 66**ALR** 318; 94**CalA**480, 271**P**507; 218**AppDiv** 682, 219**NYS**413; 136**Misc**808, 241**NYS** 156.

108–95 106**Conn**34, 137**A**13; 85 **IndA** 227, 150**NE**374; 218**AppDiv**682, 219**NYS** 413.

108–96 5**F(2d)**572.

108–98½–New. Certiorari. Stipulated facts did not show that street was not dedicated. **NJSup** 129**A**406.

108–98½–New. What constitutes a revocation of an offer to dedicate is a question of fact. 320 **Ill** 467, 151**NE**253.

108–99 207**Cal** 314, 278**P**236. [c] **Provision referring to "alleys and streets"** includes designated avenue. **CalA** 289**P** 877.

109–1 201**Cal** 299, 257**P**60.

109–2 213**Ala**466, 105**S**562, 581 [cit CJ].

109–3 218**Ala**403, 118**S**572.

109–4 213**Ala**466, 105**S**562; 223**Ky**698, 4**SW(2d)**726.

109–5½–New. A dedication of land by an individual for park purposes will be construed more strictly than a dedication by the public for such purpose. 201 **Cal** 299, 257**P**60 (deed construed as dedicating land for park purposes only).

109–6 213**Ala**466, 105**S**562, 581 [cit CJ].

109–7 213**Ala**466, 105**S**562, 581 [citCJ]; 151**Wash**179, 275**P**547, 62**ALR**476.

109–8 213**Ala**466, 105**S**562, 581 [citCJ]; 125 **Or**150, 266**P**891, 894 [quotCJ].

110–9 213**Ala**466, 105**S**562, 581 [citCJ]; 38**Wyo** 13, 264**P**87.

110–10 70**CalA**635, 233**P**991, 994 [cit CJ]; 125 **Or**150, 266**P**891, 894 [quot CJ]; 101**WVa**662, 133**SE**373.

110–22 216**Ala**679, 114**S**63; 166**Ga**93, 142**SE**554; 321 **Ill** 466, 152**NE**141; 217 **Ky**524, 290**SW**342; 168**La**949, 123**S**636 (2dcase) (title to triangular plat, left over between old and new roads, part of strip originally dedicated, was in dower of strip); 167**Minn**190, 208**NW** 821 (deed giving city right to permit "one or more railroads to be laid, built and operated upon or across" certain premises held to grant city easement for public benefit); 148**Miss**306, 114**S** 625, 626 [citCJ]; 317**Mo** 1235, 298**SW** 363; 127**Misc**558, 217**NYS**413; 218**App Div**682, 219**NYS**413; 136**Wash**589, 241**P** 16, 42**ALR**886. [a] (2) 142**Va**255, 128 **SE**606, 43**ALR**752. [b] **Title in town.–** 127**Misc**558, 217**NYS**413.

111–23 216**Ala**679, 114**S**63. [a] **Grantee has same rights as though land acquired by eminent domain.–Cal** 288**P** 1080.

111–24 231**Ky**666, 22**SW(2d)**102; 167 **Minn**190, 208**NW**821 (decision affirming public easement of land and order in conformity therewith affirmed without prejudice to claims of ownership in fee).

111–26 136**Wash**589, 241**P**16, 42**ALR** 886.

111–27 231**Ky**356, 21**SW(2d)**436 (hold as trustee for public).

111–27½–New. Under the common-law dedication of a lot for a street, the village is vested with the right to exclusive possession and control of the property in trust for the use of the public as a street. 332 **Ill** 561, 164**NE**23, 63 **ALR**658.

111–28 78**CalA**74, 248**P**256. See also 317**Mo** 1235, 298**SW**363.

111–29 206 **Iowa**533, 220**NW**315; 317 **Mo** 1235, 298**SW**363 (valid exercise of legislative power); 82**Mont**250, 266**P** 646; **TexCivA** 30**SW(2d)**348.

112–31 225**Ky**692, 9**SW(2d)**1015; **Tex CivA** 4**SW(2d)**1032.

112–35 317**Mo** 1235, 298**SW**363.

112–43 See also 151**Wash**179, 275**P**547, 62**ALR**476.

112–46 125**Kan**630, 266**P**58; **Utah** 285 **P**1033 (no presumption that land south of center line was dedicated because land north of such line owned by same party was dedicated).

112–47 88**CalA**94, 263**P**313; 150**Miss** 656, 115**S**890, 58**ALR**849; 151**Miss**302, 117**S**836. But see **Conn** 152**A**136. [e] **Extent of dedication in recorded plat** could not be diminished. **TexCivA** 296 **SW**665.

113–53½–New. A highway established by public user under a grant of an indefined easement over public lands made by act of congress must be only of reasonable width, necessary for the use of the public generally by way of well-defined line of travel. 33**Wyo** 271, 238**P** 284. [a] **Width necessary for most convenient and advantageous trailing of sheep across unfenced lands** is not conclusive on question of width, unless such use was reasonable and necessary. 33**Wyo** 271, 238**P**284.

113–53½–New. The dedication is presumed to have been of a right of way of statutory width. 103**WVa**386, 137**SE** 754.

115–83 [a] **In Texas.–38F(2d)**466.

115–87½–New. An instrument reserving sewers has been held to reserve no title but merely a right to make connections. **TexCivA** 300**SW**177.

115–87½–New. An owner, who subdivided a tract into lots with reservation of streets for public use, is not entitled to object to laying of water pipes in the street, where ownership of the soil passed to the purchaser of the lots. 78 **CalA**74, 248**P**256.

115–92½–New. A corporation dedicating a street, reserving a sewer system, cannot maintain a suit for the value of use after parting with title to the lots served by the system. **TexCivA** 300**SW**177.

115–96 80**Colo** 390, 252**P**808; **NJ** 148**A** 783; 286**Pa**561, 134**A**481; 12**PaDist&Co** 652. [a] (4) Right to have scheme of public places maintained or shown on lot. **Ala** 128**S**166. [d] **Grantee of lot obtains by subsequent recordation of map** only rights of general public to streets. **Va** 154**SE**439.

116–97 **CalA** 289**P**877 (representations to purchaser).

116–1½–New. The purchaser of lots from dedicators, relying upon maps showing the location of alleys and streets, has been held not entitled to claim any advantage based on different dimensions, in a recorded map not relied on by such purchaser. **TexCivA** 282**SW**296.

116–5 80**Colo** 390, 252**P**808.

117–6 [b] **Map not showing boundaries of street.–68CalA**153, 228**P**726.

117–13 **NJCh** 150**A**202 (superior to private rights): 197**NC**671, 150**SE**200; **TexCivA** 296**SW**665. See also 207**Cal** 314, 278**P**236. [a] (3) Easement created by building line shown on plat inures to public as well as to adjoining property owner. 125 **Or**150, 266**P**891 (light, air, vision, and similar conveniences).

117–19½–New. Reservation held void in so far as it interferes with police power. **TexCivA** 300**SW**177.

117–21 196**Cal** 248, 237**P**48 (deed construed to give municipal authorities discretion to change use to accord with changed conditions); 197 **Ind**28, 149**NE** 639; **NJCh** 150**A**202. [c] **Property dedicated to specific** or defined purpose may not be used for any other purpose. 138**SC**343, 136**SE**484. [d] **City cannot use property** dedicated for park purposes for stadium. 138**SC**343, 136**SE**484.

118–23 98**NJEq**129, 129**A**756 (injunction against erection of obstruction to view by municipality at suit of assignee of dedicator).

118–25 **NJCh** 150**A**202.

118–26 196**Cal** 248, 237**P**48 (deed construed as giving future authorities of city power to determine use). [a] **Use of land for municipal auditorium** is authorized though not contemplated by grantor at time of dedication. 196**Cal** 248, 237**P**48. [b] **Change of use.–**196 **Cal** 248, 237**P**48 (municipal auditorium). [c] **Where deed conveys land to lot owners in newly founded city for such public uses as** municipal authorities may determine, lot owners have no rights in property other than those which general public may exercise and have no rights which would preclude municipality from devoting land to such public uses as it may determine. 196 **Cal** 248, 237**P**48.

118–26½–New. Devotion of land to one proper purpose does not prevent the latter devotion to another proper purpose. 196**Cal** 248, 237**P**48.

118–28 **NJCh** 150**A**202.

118–31½–New. City has management and control of property dedicated to it for a landing. 319 **Ill** 43, 149**NE**577, 41 **ALR**1405.

118–44 123 **Or**563, 263**P**75; **TexCivA** 4**SW(2d)**1032; 103**WVa**91, 137**SE**353; 107**WVa**342, 148**SE**198.

119–45 216**Ala**679, 114**S**63; 207**Cal** 587, 279**P**427, 66**ALR**318 (prescription not involved); 88**CalA**94, 263**P**313; 94**CalA** 480, 271**P**507; **CalA** 272**P**1095; 221**Ky** 712, 299**SW**579; **NJ** 148**A**783; 154**SC** 415, 151**SE**741.

119–46 **NJCh** 150**A**202.

119–52 70**CalA**635, 233**P**991; 151**Miss** 302, 117**S**836; **MoA** 27**SW(2d)**456; 104 **NJL**335, 140**A**415; **NJSup** 140**A**668; 125 **Or**150, 262**P**853, 57**ALR**311; 296**Pa** 281, 145**A**815; **TexCivA** 4**SW(2d)**1032; 147**Va**1019, 133**SE**481.

119–52½–New. One who claims title under muniment in chain of title which describes his lots according to map is estopped to deny dedication of streets shown thereon. 215**Ala**670, 112**S**136.

120–53 217**Ky**524, 290**SW**342; 125 **Or** 150, 262**P**853, 57**ALR**311.

120–55 70**CalA**635, 233**P**991; 217**Ky** 524, 290**SW**342.

120–59 125 **Or**150, 262**P**853, 57**ALR**311.

121–69½–New. Dedicator may revoke or abandon the dedication with consent of the municipality before acceptance of use by the public. 147**Va**1019, 133**SE** 481.

121–72 **TexCivA** 4**SW(2d)**1032.

121–74 70**CalA**635, 233**P**991.

122–82 177**Ark**1097, 9**SW(2d)**323.

122–87 334 **Ill** 46, 165**NE**143 (question of fact).

122–90 **TexCivA** 28**SW(2d)**603.

122–95 68**CalA**153, 228**P**726.

123–96 68**CalA**153, 228**P**726.

123–1 But see 146**Miss**570, 111**S**565.

123–10 147**Va**1019, 133**SE**481. [a] **Whether dedication shall be set aside when street is abandoned** is within discretion of municipal authorities. 13**LaA** 173, 127**S**659.

123–12 **Conn** 152**A**136.

123–16½–New. A commissioner's court is authorized to abandon the municipality's claim to streets under a dedicated deed and plat. **TexCivA** 4**SW(2d)**1032.

124–18½–New. A municipal corporation, by paving only part of a street, does not abandon the part unimproved. 85 **IndA**196, 150**NE**67.

124–30 213**Ala**466, 105**S**562 (dicta).

124–31 213**Ala**466, 105**S**562 (dicta).

125–34 293**Pa**326, 142**A**867; **TexCivA** 4 **SW(2d)**1032.

125–35 **TexCivA** 286**SW**763. [a] **Statute of limitation requiring highways to be "opened and worked"** does not run till dedication has been accepted. 136 **Misc**808, 241**NYS**156.

125–38 146**Va**804, 132**SE**863, 866 [quot CJ].

125–39 104**NJL**335, 140**A**415 (permitting streets to fall into disuse); 125 **Or** 150, 262**P**853, 57**ALR**311; **TexCivA** 12 **SW(2d)**1074; 146**Va**804, 132**SE**863, 866 [quotCJ]; 154**Wash**682, 283**P**198. See also 213**Ala**466, 105**S**562.

125–40 146**Va**804, 132**SE**863, 866 [quot CJ].

126–44 [a] **Abutting owner wrongfully obstructing part of alley by building thereon** cannot claim that public rights have been lost by nonuser. 242**Mich** 340, 218**NW**805.

126–50 224**AppDiv**63, 229**NYS**201.

126–54 6**LaA**360.

127–68 201**Cal** 299, 257**P**60; 207**Cal** 314, 278**P**236; 70**CalA**635, 233**P**991; 319 **Ill** 43, 149**NE**577, 41**ALR**1405; 221**Ky** 566, 299**SW**197; **Mass** 167**NE**417; **Pa** 151**A**883.

128–75 201**Cal** 299, 257**P**60.

128–77½–New. Consent to erection of a "boardwalk" which partially obstructs the view does not waive objections to further obstructions where the rights

of view were expressly reserved. 98 NJEq129, 129A756.

128-93 319 Ill 43, 149NE577, 41ALR 1405.

129-19 [c] **Occasional use for private purposes.**–196Cal 248, 237P48.

130-30½-New. A municipality is authorized to improve canal areas as surface streets where the canals were intended primarily as highways. 207Cal 314, 278P236.

130-46½-New. Where land has been dedicated for park purposes, the leasing of a portion thereof to the county for a veterans' memorial building is consistent with the purpose of the dedication. 201Cal 299, 257P60.

130-48 196Cal 248, 237P48 (fact that private persons are allowed to use municipal auditorium and charge fees for entertainment does not constitute improper use of property dedicated for "public purposes").

130-50 217Ky524, 290SW342, 344 [cit CJ].

131-58 101WVa662, 133SE373.

131-59 TexCivA 295SW212.

132-60 101WVa662, 133SE373.

132-71 104NJL335, 140A415.

133-83 24 OhA73, 156NE227. [b] (2) With respect to bill, brought by state's attorney on relation of electors and taxpayers, to enjoin unauthorized use of dedicated property, objection is not valid that special injury to complainants is not shown. 319 Ill 43, 149NE577, 41 ALR1405. [d] **Injunction** is proper remedy to prevent misuse of dedicated property by city. 319 Ill 43, 149NE577, 41ALR1405.

133-88½-New. Where there is a conflict between the width of an alley as shown on a recorded map and that indicated by the lots designated as bordering on the alley, evidence as to the acts of adjoining owners in improving their property is material on the question of intention. 70CalA635, 233P991.

DEEDS

146-1 31Ariz456, 254P223.

147-10 [a] (5) 114Nebr226, 206NW754.

147-16 [b] (9) Mortgage in which wife joins. 215Ky292, 284SW1084.

147-17 201Cal 225, 256P419, 55ALR 157; 159La981, 106S536.

147-18 201Cal 225, 256P419, 55ALR 157.

147-19 201Cal 225, 256P419, 55ALR 157; TexCivA 286SW315, 320 [citCJ].

147-24 31Ariz456, 254P223.

148-39 [d] **Power of attorney,** under which right to acquire title to land on performance of certain services was given, held not to pass title. TexCivA 298 SW477.

149-42 58ND881, 228NW217.

149-45 TexCommnA 13SW(2d)342.

149-45½-New. A writing purporting to be a deed executed by D, attorney in fact for R, has been held unenforceable as a contract to convey where no equitable grounds were alleged. 193NC395, 137SE322.

149-46 164Ga661, 139SE519; 336 Ill 366, 168NE349; 232Ky127, 22SW(2d) 568; 116 Okl 180, 244P813.

149-47 164Ga661, 139SE519.

152-80 [a] **In Porto Rico.**–32PortoRico 836.

154-19 93Fla849, 112S846, 859 [citCJ].

154-24 103WVa341, 137SE744.

154-31 103WVa341, 137SE744.

155-33 212Ala557, 103S578 (deed construed to convey estate in fee on condition subsequent). [a] 103WVa341, 137 SE744.

155-35½-New. Deed of bargain and sale containing no warranties is mere conveyance and not basis for recovery of purchase money. Or 289P1044.

156-42 See also 103WVa341, 137SE744.

156-42½ 219MoA271, 275SW965; NJ 144A588, 589(2dcase) [citCJ]; 117 Okl 195, 246P472; 128 Okl 36, 261P165.

156-43 [b] (11) Instrument whose language fairly implies purpose to convey. TexCommnA 300SW28.

156-44 [a] (2) 71CalA272, 235P455. (5) Other instruments held quitclaim deeds. 12PaDist&Co 230. [b] (2) TexCommnA 280SW163.

157-61 213Ala27, 104S234; 216AppDiv 72, 215NYS50.

158-66 318 Ill 425, 149NE427; 192NC 398, 135SE121; 121 Or76, 252P708, 709 [citCJ]; SD 216NW880.

158-67 170Ga771, 154SE355(2dcase); 200 Iowa329, 204NW408; 157Miss295, 127S665; 121 Or76, 252P708.

158-70 35GaA631, 134SE349; 200 Iowa329, 204NW408; 157Miss295, 127S 565.

158-71 318 Ill 425, 149NE427.

158-72 318 Ill 425, 149NE427.

159-78½-New. Where children entitled to the remainder join with their mother, holding the life estate, in conveying land, the children cannot avoid a deed on the ground that their mother was married at the time the deed was executed and that her second husband did not join in the deed. 226Ky806, 11 SW(2d)949.

159-79 192NC398, 135SE121; 116 Or 661, 242P626.

159-80 [a] **Conveyance by one to himself and wife,** while sufficient as to her, operates only as reservation of interest as to himself. 116 Or661, 242P626.

159-85½-New. A deed to heirs and devisees of a deceased person is invalid. Cal 264P750.

159-86 318 Ill 425, 149NE427; 100 WVa413, 130SE660.

159-88½-New. A trust deed, using the words "heirs of the grantor" to designate the parties as grantees of the remainder, is ineffectual. 32 OhA164, 166 NE247.

159-93 240Mich558, 215NW702.

160-95 25F(2d)570; 156Miss790, 126S 821(2dcase); 133Misc382, 232NYS248.

160-97 76CalA530, 245P451; 258Mass 226, 154NE579; 116 Or661, 242P626.

160-99 76CalA530, 245P451; Tex CommnA 300SW33.

161-17 192NC398, 135SE121.

161-22 163Ga776, 137SE22.

161-33 Va 155SE802. [d] **Statute prohibiting sale of contingency unless present right exists in seller** held inapplicable where contingency is as to interest, not person. 169Ga543, 150SE912.

161-34 243Mich279, 220NW801; 79 Mont432, 257P278; 129Misc506, 221NYS 692. [b] **Under statutes** in some jurisdictions right of reëntry upon breach of condition subsequent in deed may be transferred. 79Mont432, 257P278. [c] **Conveyance by one life tenant** at time when he had no contingent interest in remainder held conveyance only of his life interest. 221Ky123, 297SW1104.

162-38 215Ky88, 284SW419.

162-39 [a] **Interest of either life tenant** may be alienated, though ceasing to exist, if remainderman did not survive first taker. 221Ky123, 297SW1104.

162-44 164Ga880, 139SE658.

162-45 Cal 287P459; 97CalA628, 276P 122; CalA 290P86; 323 Ill 380, 154NE 149; 234Mich322, 208NW41; 250Mich 637, 231NW89(2dcase); 50ND857, 198 NW472; 116 Or467, 241P996; Tex CommnA 15SW(2d)1037.

162-46 171Ark626, 286SW822, 827 [cit CJ].

162-48 207 Iowa776, 223NW686.

162-53 [d] **Conveyance reciting consideration** to be one dollar and other good and valuable consideration is valid. 241 NY193, 149NE829.

162-53½-New. No implied promise to pay value of land will be read into deed reciting consideration to be one dollar, and other good and valuable consideration. 241NY193, 149NE829.

163-61 153SC100, 150SE610.

163-64 84CalA90, 257P581.

163-66 [b] **Services rendered and to be rendered** to grantor are sufficient consideration for deed. 55AppDC262, 4F (2d)874.

163-67 206 Iowa732, 221NW474.

163-71 174Ark26, 295SW392; Wis 230 NW610.

164-78 TexCivA 275SW468.

164-83 TexCivA 26SW(2d)671.

164-89½-New. extinguishment of third person's claim against grantor; 75Mont 99, 242P425.

164-89½-New. The mutual understanding and agreement between parties executing the deed; TexCivA 293SW327.

164-95½-New. Consideration paid to third party at request or consent of grantor is sufficient. 211Ky196, 277SW 248.

164-95⅓-New. Forbearance to sue amounting to a good consideration must be upon a right asserted in good faith. TexCivA 275SW468; TexCivA 286SW 241, 246 [citCJ].

164-95¼-New. Title of the purchaser cannot be questioned merely because a remainderman who joined in the conveyance did not secure part of the consideration. 150Md333, 134A124.

164-95½-New. The return of husband to wife after a short separation and resumption of marital relations under mutual promises is not a valuable consideration for her deed to him. 217Ala235, 115S258.

164-97 87Colo 345, 287P641; 103NJL 166, 134A687, 48ALR234; 98NJEq404, 129A620; TexCivA 23SW(2d)808.

164-99 [c] **Reconciliation and resumption of marital relations** is sufficient consideration for deed from husband to wife. 87CalA359, 262P339. [d] **No obligation to continue marital relation** is implied. TexCivA 26SW(2d)694.

165-1 234Mich322, 208NW41.

165-6 But see 190NC378, 130SE13.

165-18 333 Ill 478, 165NE231.

166-20 225AppDiv137, 232NYS94 (unless never fulfilled).

166-21 173Ark1182, 292SW128; 80 CalA538, 252P638; 204 Iowa1331, 217 NW245; 237Mich108, 211NW82; Mo 26 SW(2d)598 (conveys fee); Mo 308W (2d)980; NJCh 141A620; 50ND857, 198NW472, 474 [citCJ] (deed given in consideration of support held an absolute conveyance); 142 Okl 152, 286P322. [e] **In Alabama.**–213Ala685, 105S889. [f] **Grantees of deed** in consideration of support are held to strict performance, but not to unreasonable requirement. 220Ky723, 295SW1070.

166-25 168Ga359, 147SE882; 232 IllA 583.

166-26 144SC252, 142SE498. See also 232 IllA583. [c] (4) Mo 26SW(2d)611. (5) Son's agreement to support father for life and make certain payments held sufficient consideration for conveyance. 143 Okl 152, 286P322.

167-30 Ala 129S43; 213Ky580, 281SW 525; 39 OklACR298.

167-31 214Ala313, 107S864; Ala 129S 43; 97CalA628, 276P122; 98CalA112, 276P391; 321 Ill 336, 151NE865; 321 Ill 354, 151NE871; 206 Iowa732, 221 NW474; 118 Okl 85, 246P593; 123 Okl 33, 251P729; 138 Okl 212, 281P265; Okl 291P800; Okl 293P206; 144Va727, 130SE794; Va 153SE807 (holding consideration not so grossly inadequate not to warrant inference of undue influence). [e] (1) Mo 26SW(2d)611.

167-32 321 Ill 354, 151NE871.

167-33½-New. , or some unfair advantage taken over him. 321 Ill 336, 151NE 865.

167-34 213Ky580, 281SW525. [a] **Profiteering.**–214Ala313, 107S864.

167-35 321 Ill 354, 151NE871.

168-39 217Ala134, 115S19 (recognizing rule); 94Fla717, 115S828; Okl 291P800.

168-42 [b] 214Ala313, 107S864; 39 OklACR298. See also 80CalA538, 252P 638.

168-42½-New. The fact that a deed was made at the time when grantor might possibly have lived for years, although he in fact died within a few months thereafter, would not necessarily vitiate the deed for inadequacy of consideration. 80CalA538, 252P638.

168-43 80CalA185, 251P666; 87CalA 359, 262P339; 98Fla166, 123S569; 205 Iowa1285, 217NW852; 300Pa513, 150A 882; 153SC100, 150SE610; TexCivA 24 SW(2d)786. [c] Ill 173NE376.

168-46 139SC475, 138SE198.

168-47 98Fla166, 123S569; 333 Ill 478, 165NE231; Ill 173NE376 (death of grantee); 139SC475, 138SE198, 199 [cit CJ].

168-49 80CalA185, 251P666; Ill 173NE 376.

169-51 See also Mo 285SW409. [a] (9) For failure of consideration consisting of assignment of land contract, which was in default at time of assignment. 230Mich381, 203NW65.

169-52 Mo 29SW(2d)103; 81Mont382, 263P967, 969 [quotCJ].

169-53 81Mont382, 263P967, 969 [quot CJ].

169-54 213Ala685, 105S889; 337 Ill 498, 169NE328; Mo 29SW(2d)103; 81 Mont382, 263P967, 969 [quotCJ]; 32 OhA164, 166NE247; 136Wash378, 240 P9. [a] 81Mont382, 263P967; 247NY 145, 159NE891. [c] **Contribution by one child to support of father** against interest of other children. Ark 31SW (2d)738.

169-55 173Ark1182, 292SW128; 81 Mont382, 263P967, 969 [quotCJ]; 136 Wash378, 240P9. [a] (2) Conveyances of this kind are contracts for personal services peculiar in their character and incidents in that respect. 213Ala 319, 104S751.

170-58 148SC147, 145SE705; TexCivA 297SW664.

170-61 220Ky723, 295SW1070.

170-62 Ga 155SE513; 337 Ill 498, 169 NE328.

170-63 337 Ill 498, 169NE328; TexCivA 297SW664. See also 211Ky398, 277SW 462.

170-68 Ark 31SW(2d)738.

170-71 164Ga880, 139SE658; 229Ky 767, 17SW(2d)1014. See also 159La981, 106S536.

171-72 164Ga880, 139SE658; 203 Iowa 1352, 214NW513; 226Ky806, 11SW(2d) 949; TexCivA 4SW(2d)985.

171-73 203 Iowa1352, 214NW513.

171-77 153Va98, 149SE509.

171-87 164Ga880, 139SE658. But see 13F(2d)76.

172-94 [c] **Estate granted may be limited in premises** and habendum clause may be omitted. 329 Ill 235, 160NE605.

172-96 215Ala12, 108S858.

173-98 226Ky806, 11SW(2d)949.

173-2 209Ky651, 273SW545, 547 [quot CJ]. [a] 209Ky651, 273SW545, 547 [quotCJ].

173-7 121 Or76, 252P708. [c] **Man receiving title under assumed name** could not assume additional feminine name in conveying title. 84CalA142, 257 P606.

173-9 MoA 293SW441, 444 [citCJ]. But see 100NJEq193, 135A351.

173-10 See also 100NJEq193, 135A351.

174-20 200 Iowa329, 204NW408; 100 WVa413, 130SE660.

174-21 196Cal 248, 237P48; 170Ga37, 151SE923.

175-22 200 Iowa329, 204NW408.

175-23 CalA 289P922 (need not be named in granting clause); 229Ky767, 17SW(2d)1014. See also CalA 291P688.

175-30 205Cal 658, 272P567.

176-47½-New. A clause in a deed purporting to be a conveyance from the grantor to himself does not invalidate the conveyance where it is apparently a clerical error. 192NC398, 135SE121.

176-49 84CalA142, 257P606; 99CalA 293, 278P454(2dcase).

176-50 172Ark129, 287SW745; 75CalA 540, 243P487; 85CalA714, 259P1017; 329 Ill 482, 160NE759; 233Ky142, 25 SW(2d)51; 166Minn464, 208NW193; 167Minn486, 209NW307; 34NM144, 279 P563 (so long as blank remains unfilled); SD 217NW390; SD 228NW811.

176-52 164Minn154, 204NW642; 166 Minn190, 207NW498; 167Minn486, 209 NW307; 177Minn127, 224NW843 (authority implied by delivery to agent to sell); 180Minn552, 231NW234; 34NM 194, 279P563; 128Misc118, 217NYS666; 140 Okl26, 282P145.

176-53 167Minn486, 209NW307; SD 217NW390.

177-55 329 Ill 482, 160NE759; 140 Okl 26, 282P145.

177-56 315Mo 1046, 287SW1042.

177-57 Contra 85CalA714, 259P1017; 164Minn154, 204NW642; 128Misc118, 217NYS666.

178-69 165La57, 115S366.

178-72 181Ark654, 27SW(2d)90; 318 Ill 425, 149NE427; 82Mont222, 266P406, 408 [citCJ]; 141NC265, 139SE625, 54 ALR964.

178-75 103WVa341, 137SE744.

178-76 318 Ill 425, 149NE427; 260 Mass407, 157NE362; 197NC508, 149SE 687. [a] (33) "Give, grant, bargain, and sell" are sufficient. 318 Ill 425, 149 NE427. [d] **Insufficient words.**-318 Ill 425, 149NE427.

179-77 318 Ill 425, 149NE427.

179-83 123Kan16, 254P694, 696 [quot CJ]; TexCivA 1SW(2d)950. [a] (2) Statute providing that vagueness of description shall not invalidate conveyance held inapplicable when there is none. 191NC260, 131SE655.

179-84 169Ga184, 150SE91; 123Kan16, 254P694, 696 [quotCJ].

179-85 170Ga37, 151SE923; 153Miss 869, 121S845; 191NC220, 131SE627; 198NC393, 151SE879.

180-86 198NC393, 151SE879.

180-88½-New. Words of limitation have no appropriate place in descriptive part of a deed. 260Mass407, 157NE362.

180-90 213Ala494, 106S150, 158 [cit Cyc]; Conn 152A152 (description sufficient to convey disputed strip); 169Ga 395, 150SE584; 122 Okl 277, 254P748; TexCivA 275SW494; TexCivA 283SW 1073. But see 191NC260, 131SE655. [c] 163Ga776, 137SE22.

180-91 201Cal 225, 256P419, 55ALR 157; 161Ga468, 131SE510; 170Ga530, 153SE415; 170Ga764, 154SE353; 323 Ill 303, 154NE135; 223Ky713, 4SW(2d) 721; 119 Or297, 247P761; TexCivA 283 SW1073; TexCivA 4SW(2d)102. See also 130 Or24, 278P989. [c] 220Ala 511, 125S655(2dcase); 166Ga226, 142SE 861; 149Miss354, 115S40.

180-92 181Ark739, 28SW(2d)70; 201 Cal 225, 256P419, 55ALR157; 170Ga600, 153SE516; 34NM246, 280P253; 103W Va12, 136SE509. [a] **Voluntary conveyance is void if description leaves quantity and location in doubt by failure to furnish key** with which with aid of aliunde testimony may definitely establish agreed boundaries. 160Ga793, 129SE662.

180-93 162La319, 110S489; 84Mont 304, 275P281; 122 Okl 277, 254P748; 119 Or297, 247P761; TexCivA 281SW 277; TexCr 26SW(2d)251(2dcase). [b] **Description in preamble.**-335 Ill 101, 166 NE495.

180-94 220Ala511, 125S655(2dcase); 228Ky206, 14SW(2d)753; 119 Or297, 247P761; 123 Or370, 261P69 (dictum); TexCivA 281SW277; TexCivA 12SW (2d)260.

181-95 89Fla296, 103S827.

181-95½-New. , or if anyone familiar with the locality could identify the premises with reasonable certainty. TexCivA 293SW690.

181-96 181Ark739, 28SW(2d)70; IndA 165NE252; 121 Or332, 254P355; Tex CivA 283SW1073. [b] **Failure to name county and state held not fatal** under circumstances. TexCivA 293SW690.

181-97 201Cal 225, 256P419, 55ALR 157; 9LaA434, 121S224; 122 Okl 277, 254P748; TexCivA 293SW690; Tex CivA 29SW(2d)414; 152Wash562, 278P 686. See also TexCommnA 13SW(2d) 683. [a] 323 Ill 303, 154NE135. [c] **Statute which deals with indefinite descriptions** applies only to descriptions which can be aided by parol. 198NC 393, 151SE879.

181-98 173Ark414, 292SW668; 170Ga 408, 153SE53.

181-2 TexCommnA 1SW(2d)592.

181-2½-New. A court will declare a deed void for uncertainty only when, after resort to oral proof, it still remains mere matter of conjecture what the instrument intended. 84Mont304, 275P281.

181-3 119 Or297, 247P761, 763 [citCJ].

181-4 119 Or297, 247P761, 763 [citCJ].

181-7 220Ala511, 125S655(2dcase); 119 Or297, 247P761, 763 [citCJ].

181-9 220Ala511, 125S655(2dcase) (aided by proof that grantor only owned land so designated).

181-12 [c] (3) Deed describing land as one hundred and three acres, more or less, of lot of land No. 286 in eighth district and third section of named county, Georgia, cannot operate as conveyance. 169Ga395, 150SE584.

182-13 Can [1926] 3DomLR642.

182-15 201Cal 225, 256P419, 55ALR 157; 159Tenn612, 21SW(2d)626 (or as all of his property in certain locality).

182-16 159Tenn612, 21SW(2d)626.

183-20 [a] (2) Where possession by several parties is shown, a deed, although uncertain and ambiguous, is not void, if land intended to be conveyed can be identified by aid of intrinsic testimony. TexCivA 283SW1073. (3) Deed to acre of designated lot on which public schoolhouse stands is sufficiently described. 168Ga359, 147SE882.

183-21 82Colo 288, 259P1025, 1026 [cit CJ]; TexCommnA 13SW(2d)683; Tex CivA 31SW(2d)168.

183-22 162La319, 110S489.

183-25 82Colo 288, 259P1025. [a] **Improvements not described** are not included in such deed. 82Colo 288, 259P1025.

183-30 160Ga822, 129SE98.

184-38 219Ala219, 121S514; 119 Or297, 247P761; 123 Or370, 261P69 (dictum); TexCivA 4SW(2d)102; Vt 150A70.

184-39 223Ky574, 4SW(2d)385; 230 AppDiv307, 243NYS741; 130 Or24, 278 P989; 100WVa508, 130SE666 (reference must be definite and certain).

184-43 100WVa508, 130SE666.

184-47 123 Or370, 261P69 [dictum] (court records).

184-49 213Ala466, 105S562 (plan must be distinctly and certainly designated by deed in order to be made part thereof); 119 Or297, 247P761 (recorded plot); 130 Or24, 278P989. [b] 213Ala 466, 105S562, 578 [citCyc]; 130 Or24, 278P989.

184-52 219Ala219, 121S514.

184-54 121 Or332, 254P355.

185-61 TexCivA 293SW690.

185-62 TexCivA 293SW690.

185-68 121 Or332, 254P355.

185-71½-New. The omission of the block number may render the description of a lot by reference to a map void. 149Miss296, 115S339.

185-72 169Ark1177, 278SW12; 110 Conn374, 148A133; 220MoA1290, 290 SW80; TexCommnA 276SW211; Tex CivA 283SW1073; TexCivA 293SW690. [b] 169Ark1177, 278SW12.

186-73 84Mont304, 275P281; TexCivA 293SW690.

186-74 [b] 191NC220, 131SE627.

186-75 121 Or332, 254P355.

186-78 169Ga801, 151SE496; Tex CommnA 1SW(2d)592; TexCivA 297SW 557. [a] (5) See also 149Miss671, 115S 780. [b] **In Louisiana.**-(1) 6LaA187.

187-79 TexCivA 293SW690.

187-81 75CalA540, 243P487. [a] (2) Deed describing property as acre of land upon point of land extending into lake in designated lot, section, township, and range may be completed by insertion of description by metes and bounds if parties so contemplated. 164 Minn154, 204NW642.

187-83 93Fla849, 112S846; 329 Ill 235, 160NE605; 260Mass407, 157NE362; 238Mich33, 213NW59. [c] 260Mass407, 157NE362.

187-86 260Mass407, 157NE362.

187-87½-New. Where the character of the estate conveyed is shown by the granting clause, its omission from the habendum is immaterial. 93Fla849, 112 S846.

188-1 [b] **Deed forged by grantee** should be set aside as void. 137Misc 700, 244NYS290.

188-5 59 OntL245, [1926] 3DomLR806, 59 OntL546, [1926] 4DomLR1120.

188-6 24 OhNPNS101 (defective deed not contract to convey where it lacks all elements of contract except name).

188-8 Cal 273P567; 164Minn154, 204 NW642 [citCJ]; 192NC552, 135SE452.

189-20½-New. A forged deed, being void ab initio, affords no ground for implications or supplementary consent. TexCommnA 280SW748.

189-21 30F(2d)885.

189-23 109Conn307, 147A4, 66ALR 1036.

189-23½-New. The subsequent repeal of a statute which cured defects in deeds will not invalidate them. 172Ark454, 289SW485.

190-28 164Ga880, 139SE658; 215Ky57, 284SW410, 412 [citCJ]. [a] **Failure of party mentioned as grantor in deed to sign it** held to preclude transfer of title. 164Ga880, 139SE658.

190-30 187Wis399, 204NW484 (when signed by scrivener preparing deed).

190-34 219Ky569, 293SW1094. [b] **Signature in acknowledgment certificate** held sufficient signature at end of instrument. 219Ky569, 293SW1094.

190–37 187Wis399, 204NW484. [a] (3) 209Ky651, 273SW545 (deed is not void, though grantor signed by mark and signature is not witnessed).
190–38 29PortoRico 841 (discrepancy between name in body of deed and signature).
190–39½–New. or wrong name is signed by scrivener where pen is touched by grantor and the latter's name appears in acknowledgment. 187 Wis399, 204NW484.
190–40 178Ark1150, 13SW(2d)624; 84 CalA142, 257P606; Ga 155SE185; Tex CivA 277SW225 (quitclaim deed signed by brother in presence and with permission of grantor after being read to him); 187Wis399, 204NW484. [a] 27Hawaii 544; 187Wis399, 204NW484.
191–41 130 Okl 71, 265P117 (acknowledgment as adoption of signature). [b] 178Ark1150, 13SW(2d)624.
191–43 TexCivA 280SW247.
191–43½–New. An unwitnessed deed required by statute to be witnessed is valid as between the parties and others, except creditors and good-faith purchasers or mortgagees. 117Nebr765, 223 NW8.
191–51 164Ga880, 139SE658; 165Ga 359, 140SE869.
192–56½–New. 192NC191, 134SE451.
193–74 244Mich403, 221NW322.
193–76 164Ga880, 139SE658.
193–78 213Ala66, 104S5.
194–91 163Ga718, 137SE53.
194–95 30F(2d)885; 109Conn307, 147A 4, 66ALR1036; 164Ga880, 139SE658.
195–6 242Mich269, 218NW788.
196–17 25F(2d)404; 208Cal 172, 280P 947; 71CalA251, 235P62; 79CalA762, 251P227; 82CalA786, 256P290; 92CalA 526, 268P682; 95CalA117, 272P614; CalA 274P552; 83Colo 430, 266P217; 103Conn88, 130A75; 164Ga279, 138SE 218 (dictum); 164Ga682, 139SE421; 164Ga880, 139SE658; 42 Ida660, 249P 93; 316 Ill 221, 147NE40; 330 Ill 48, 161NE68; 338 Ill 313, 170NE195; 339 Ill 530, 171NE621; Ill 172NE173; 201 Iowa107, 204NW294, 48ALR394; 203 Iowa767, 210NW609; 205 Iowa1285, 217 NW852; 215Ky57, 284SW410, 412 [cit CJ]; 216Ky682, 288SW676; 221Ky7, 297SW702; 234Mich322, 208NW41; 320 Mo474, 7SW(2d)691; 75Mont294, 243P 803 (actual or constructive delivery necessary divesting grantor of title and control of property); 83Mont214, 271 P433; 99NJEq254, 132A224; NJCh 144 A183; 125Misc546, 211NYS557; 127 Misc662, 217NYS274; 130Misc12, 223 NYS626; 128Misc118, 217NYS666; 55 ND546, 214NW857; 58ND501, 226NW 485, 65ALR852; 114 Okl 153, 244P744; 126 Okl246, 259P219, 54ALR1237; 138 Okl 201, 280P570; 47RI 348, 133A239, 240 [citCJ]; SD 206NW475; SD 222 NW297; TexCommnA 294SW519; Tex CommnA 13SW(2d)69; TexCivA 297SW 509; TexCivA 3SW(2d)932; TexCivA 4 SW(2d)157; TexCivA 6SW(2d)136; 101WVa514, 133SE123; Wis 231NW276.
197–20 173Ark387, 292SW377; 175Ark 30, 298SW481; 71CalA251, 235P62; 82 CalA786, 256P290; CalA 283P970; 164 Ga265, 138SE231; 339 Ill 530, 171NE 621; 201 Iowa107, 204NW294, 48ALR 394; 205 Iowa1379, 219NW492; 120 Kan283, 243P323; 307Mo 682, 271SW 489; NJCh 144A183; 125Misc546, 211 NYS557; 130Misc12, 223NYS626; Tex CivA 293SW888; 104WVa582, 140SE 346.
197–21 25F(2d)404; 174Ark1180, 298 SW219; 175Ark30, 298SW481; 199Cal 344, 249P180; 71CalA251, 235P62; 79 CalA252, 249P219; 82CalA786, 256P 290; 85CalA87, 258P969; CalA 290P 898; 83Colo 430, 266P217; 91Fla995, 108S891; 164Ga682, 139SE421; 27 Hawaii544; 329 Ill 323, 160NE548; Ill 172NE173; 221Ky7, 297SW702, 704 [quotCJ]; 81Mont393, 264P115; 83 Mont214, 271P433; 127Misc662, 217 NYS274; 116 Okl 180, 244P813; Tex CivA 291SW650; TexCivA 293SW888; TexCivA 7SW(2d)1096; 104WVa382, 140SE346.
198–22 199Cal 344, 249P180; 79CalA 252, 249P219; 79CalA762, 251P227; 116 Okl 180, 244P813; 104WVa382, 140 SE346; 195Wis589, 219NW426. [a] 71 CalA251, 235P62.
198–23 175Ark30, 298SW481; 71CalA 251, 235P62; 79CalA252, 249P219; 79 CalA762, 251P227 (intent is question of fact); 82CalA786, 256P290; 42 Ida660, 249P93; 328 Ill 338, 159NE775; 315Mo 917, 287SW1038; Mo 289SW579; 118 Nebr364, 224NW857.
198–24 315Mo 917, 287SW1038.
198–25 71CalA251, 235P62; 82CalA 786, 256P290, 293 [citCJ]; 81Mont393, 264P115; 141SC1, 139SE209, 56ALR 729; 135Wash146, 237P297. [b] 215 Ky57, 284SW410.
198–27 82CalA786, 256P290, 293 [cit CJ]; 91Fla995, 108S891; 329 Ill 323, 160NE548; 144Miss841, 110S793.
199–28 82CalA786, 256P290, 293 [cit CJ]; 91Fla995, 108S891.
199–29 175Ark30, 298SW481; 82CalA 786, 256P290, 293 [citCJ]; 164Ga682, 139SE421; 144Miss841, 110S793; 307 Mo 682, 271SW489; 75Mont294, 243P 803; TexCivA 293SW888; TexCivA 7 SW(2d)1096; 101WVa514, 133SE123; 104WVa382, 140SE346.
199–30 82CalA786, 256P290, 293 [cit CJ]; 164Ga265, 138SE231; 338 Ill 313, 170NE195; Ill 172NE173 (voluntary settlement deed); 203 Iowa979, 213NW 605; 120Kan283, 243P323; 307Mo 682, 271SW489; 75Mont294, 243P803; 116 Okl 180, 244P813; 104WVa382, 140SE 346 (constructive delivery). [b] 101 WVa514, 133SE123. [c] See also 101 WVa514, 133SE123. [d] **True test** is whether or not grantor, by acts or words, or both, intended to divest himself of title. 138 Okl 212, 281P265.
200–31 135Wash146, 237P297.
200–34½–New. , nor is the motion of the grantor material. 217Ala287, 116S 139.
200–35 116 Okl 180, 244P813.
200–40 175Ark30, 298SW481; 79CalA 762, 251P227; 42 Ida660, 249P93; 338 Ill 313, 170NE195; 339 Ill 530, 171NE 621; Ind 168NE879; 150Md659, 133A 306; 83Mont214, 271P433; 125Misc546, 211NYS557 (dominion); 198NC229, 151 SE270; 47RI 348, 133A239. [b] **Reservation of right of revocation or recall.**–Delivery must not be hampered by reservation of right of revocation or recall. 71CalA251, 235P62.
201–41 47RI 348, 133A239.
201–42 164Ga265, 138SE231; 329 Ill 323, 160NE548 (deed of voluntary settlement).
201–43 83Colo 335, 264P1087; 91Fla 995, 108S891, 893 [citCJ]; 164Ga265, 138SE231.
201–43½–New. But there must be an intention to deliver. TexCivA 7SW(2d) 1096.
201–43½–New. The intention of the grantor subsequent to execution may be considered. TexCivA 7SW(2d)1096.
201–44 83Colo 335, 264P1087; 125Kan 286, 289, 264P75 [citCyc].
201–45 Ill 172NE173.
201–48 Ill 172NE173. [a] **Such reservation raises presumption** that title should vest in remainderman. 27Hawaii 544. [a] 329 Ill 323, 160NE548.
202–49 236Mich317, 210NW318; 240 Mich151, 215NW400, 401 [citCyc]; 146 Wash638, 264P1003, 1005 [quotCJ]. But see 95CalA117, 272P614.
202–53 [a] (1) 195Wis589, 219NW426.
202–55 81Mont393, 264P115.
203–59 83Mont214, 271P433.
203–61 317 Ill 356, 148NE64.
203–67 91Fla995, 108S891; 164Ga880, 139SE658; 322 Ill 492, 153NE740; 332 Ill 551, 164NE1; 232Ky532, 23SW(2d) 959; 233Ky181, 25SW(2d)75; 234Mich 322, 208NW41; 251Mich132, 231NW96; 307Mo 682, 271SW489; 226AppDiv142, 234NYS635.
204–68 214Ala10, 106S188; 42 Ida660, 249P93; 332 Ill 551, 164NE1; 123Kan 487, 255P1112; 51Nev437, 279P32.
205–70 203 Iowa979, 213NW605; 123 Kan487, 255P1112; 130Kan595, 287P 596; 130Kan524, 287P614; Minn 225 NW903; 76Mont403, 247P554; Okl 285 P314; 194Wis628, 217NW311.
205–73 232Ky532, 23SW(2d)959.
205–74 123Kan487, 255P1112.
205–75 [b] **Delivery by depositary or** agent in violation of instructions from principal passes no title. SD 226NW 267.
205–81 246Mich324, 224NW611.
205–85½–New. Where a grantor executes and delivers to the father of an infant of tender years, in consideration of love and affection, a deed conveying to the infant son of the father title to a described tract of land, delivery to the father and his possession of the deed is evidence of delivery to the infant. 167Ga623, 146SE311.
205–87 [b] **Grantee ignorant** of existence of deed cannot assent thereto. 234 Mich322, 208NW41.
206–91 239Mich237, 214NW189.
206–92 247Mich29, 225NW487.
206–97 89CalA535, 265P292; SD 231 NW900.
206–99 232Ky525, 23SW(2d)956; 234 Mich322, 208NW41.
206–1 146Wash638, 264P1003.
207–4 123Kan487, 255P1112; 250Mich 117, 229NW414 (notwithstanding it may subsequently come back into hands of grantor).
207–5 217Ala287, 116S139; 95CalA117, 272P614. [a] **Illustrations.**–125Misc 546, 211NYS557.
207–7 91Fla995, 108S891, 894 [citCJ]; 125Kan485, 264P1047. See also Tex CivA 23SW(2d)808.
207–8 70CalA607, 233P988; 167Ga491, 145SE877; Mo 30SW(2d)980.
207–12 [a] **Recording by grantee,** after obtaining without grantor's knowledge possession of deed, intended to take effect on grantor's death is ineffective. 83Mont214, 271P433.
207–14 265Mass265, 163NE851; Tex CommnA 294SW519. See also 83Colo 430, 266P217, 222 [citCJ].
207–15 204Cal 141, 267P102; 234Mich 322, 208NW41.
208–21 234Mich322, 208NW41.
208–22 164Ga265, 138SE231, 234 [cit CJ]; 125Kan485, 264P1047.
208–24 144Miss841, 110S793.
208–24½–New. A deed executed by grantor and retained by him during life, not made known to grantee and never delivered to anyone for him, cannot be sanctioned as a valid transfer. 130Misc12; 223NYS626.
208–25 42 Ida660, 249P93; 202 Iowa 621, 210NW764; 51Nev437, 279P32; Wash 288P919.
208–26 213Ala544, 105S813; 27Hawaii 544; 320 Ill 371, 151NE244.
208–27 85CalA87, 258P969; 332 Ill 551, 164NE1; 247 IllA265; 203 Iowa 979, 213NW605; 206 Iowa6, 218NW37; 208 Iowa480, 222NW858; Iowa 228NW 311 (delivery of key of safe deposit box in which deed was deposited); 232 Ky525, 23SW(2d)956; 236Mich317, 210 NW318; 315Mo 917, 287SW1038; 250 Mich117, 229NW414; Mo 20SW(2d) 670; 76Mont403, 247P554; 118Nebr 364, 224NW857; 127Misc662, 217NYS 274; 116 Okl 180, 244P813; SD 217NW 386, 389 [citCJ]; SD 220NW500, 501 [quotCJ]; 155Tenn44, 290SW985, 987 [quotCJ]. But see 98NJEq728, 130A 628. [a] (2) Deed gives grantee present fixed right of future enjoyment, though use of premises are retained by grantor, during his life. Mo 20SW(2d) 670. [f] 116 Okl 180, 244P813. [g] **Grantors' estate is reduced to life estate** by valid delivery of deed to third person with directions to deliver it to grantee upon grantor's death. Cal 285 P314.
209–28 85CalA720, 260P342; 315Mo 917, 287SW1038; 127Misc662, 217NYS 274; 116 Okl 180, 244P813; 155Tenn 44, 290SW985, 987 [quotCJ]. But see 226AppDiv596, 236NYS205.
210–29 Cal 285P314; 236Mich345, 210 NW348; 127Misc662, 217NYS274; SD 217NW386; 155Tenn44, 290SW985, 987 [quotCJ]; Wash 288P919. [a] (2) See also 42 Ida660, 249P93. [b] **Recording deed after revocation.**–Where grantor reserved right to revoke and reclaim deed delivered to third person to take effect on grantor's death, recording of deed after grantor demanded return thereof is insufficient as delivery to grantees. 127Misc662, 217NYS274.
210–30 208 Iowa480, 222NW858; 155

Tenn44, 290SW985, 987 [quotCJ]. See also 76Mont403, 247P554.

210-32 236Mich345, 210NW248; Mo 20SW(2d)670; 76Mont403, 247P554; 127Misc662, 217NYS274; 116 Okl 130, 244P813; 155Tenn44, 290SW985, 987 [quotCJ].

210-33 155Tenn44, 290SW985, 987 [quotCJ].

210-33½-New. Where the grantor delivered the deed to the grantee, requesting her to deliver it to a notary to be delivered on the grantor's death, which was done, and the deed recorded, delivery was sufficient. 236Mich317, 210 NW318.

210-34 155Tenn44, 290SW985, 987 [quotCJ]. But see 234Mich322, 208NW 41.

210-35 164Ga682, 139SE421; 316Mo 891, 292SW702; 83Mont214, 271P433.

211-37 147Miss758, 113S341, 345 [quot CJ]; 315Mo 917, 287SW1038.

211-37½-New. But where the grantor intended that the deed should not be operative until her death, delivery by a third person to the grantee after the death of the grantor is not effective. 315Mo 917, 287SW1038.

211-40½-New. The date of delivery of a husband's deed to his wife, not delivered personally to the wife, was the date when filed for record. 26 OhA508, 160 NE526.

211-41 76Mont403, 247P554 (deposit in escrow for delivery on condition of payment of grantor's funeral expenses by grantee after grantor's death effective where condition performed).

211-42 236Mich317, 210NW318.

211-43 297Pa179, 146A534.

211-46½-New. It is the intention of the grantor that determines whether the delivery is absolute or conditional even though the delivery has been made to the grantee of a deed. 155Tenn44, 290 SW985.

211-46¼-New. Whether a delivery to the grantee is conditional or absolute is determined by the intention of the grantor. 155Tenn44, 290SW985.

211-46¼-New. Mailing executed and recorded deed with request that reconveyance deed be executed is at most a conditional delivery. 125Misc546, 211 NYS557.

211-46½-New. Where an owner delivers his deed on the oral promise of the guarantee to reconvey on demand on the happening of a given contingency and the delivery is otherwise regular, he parts with title subject only to the contingent right to a reconveyance on the happening of such contingency. 71CalA 251, 235P62. [a] **Illustrations.**-71CalA 251, 235P62.

211-46¾-New. Where a deed is delivered during the grantor's life with the intent to vest title, breach of a promise not to record the deed does not divest the grantee's title and revest title in the grantor. 155Tenn44, 290SW985.

211-47 76CalA530, 245P451; 79CalA 762, 251P227; 80CalA185, 251P666; 85 CalA475, 259P770; 55ND546, 214NW 857. [a] **Oral agreement** that deed shall not be recorded during grantor's life or that grantee shall only have rents and profits while single is immaterial as to effect upon delivery of deed. 85 CalA475, 259P770.

212-49 201Cal518, 258P55; 249Mich 640, 229NW459.

212-51 TexCivA 28SW(2d)481, 484 [cit CJ].

212-54 25F(2d)404, 407 [quotCJ].

212-57 164Ga265, 138SE231, 234 [cit CJ].

212-63 95CalA117, 272P614; 103Conn 88, 130A75; 338 Ill 313, 170NE195; 215 Ky57, 284SW410; 216Ky682, 288SW 676; 221Ky7, 297SW702; 234Mich322, 208NW41; 164Minn384, 205NW434; 174Minn434, 219NW552, 553 [citCJ]; MoA 272SW85; 125Misc546, 211NYS 557; SD 206NW475; 135Wash146, 237 P297.

213-65 215Ky57, 284SW410.

213-66½-New. but not where person receiving deed acts solely under discretion of grantor and is stranger to grantee. 234Mich322, 208NW41.

213-68 203 Iowa979, 213NW605.

213-69 125Misc546, 211NYS557.

213-71 [b] **In California.**-195CalA377, 234P318.

214-78 173Ark387, 292SW377; 70CalA 607, 233P988; 94Fla899, 114S441; 203 Iowa480, 212NW933; 221Ky7, 297SW 702; 158La557, 104S367. [a] **Placing of record deed** from father-in-law to grantee and wife evidences acceptance of terms of deed. TexCivA 15SW(2d)159.

214-79 94Fla899, 114S441.

214-81 158La557, 104S367 (payment of purchase price and subsequent sale); 307Mo 682, 271SW489.

214-83 164Ga265, 138SE231, 234 [cit CJ]; LaA 122S81.

214-85 164Ga265, 138SE231, 234 [cit CJ].

214-86 203 Iowa480, 212NW933; SD 206NW475.

214-87 [a] **Failure to return** deed is not an acceptance. Conn 152A145.

214-88½-New. One cannot impose a grant of land on another by simply executing. 125Misc546, 211NYS557.

214-88½-New. recording, 125Misc546, 211NYS557.

214-88¼-New. and mailing a deed. 125Misc546, 211NYS557.

214-88½-New. Acceptance must be found as a fact. 125Misc546, 211NYS 557.

214-89 203 Iowa480, 212NW933.

214-90½-New. A communication to the grantor of an intention to share property with others did not prevent effective acceptance by the grantee under a rule that the deed must be accepted as his own. Mass 168NE96.

214-92 See also 158La557, 104S367.

214-93 70CalA607, 233P988.

215-97 76CalA530, 245P451; 79CalA 252, 249P219; 99CalA106, 277P1060 (1stcase); 91Fla995, 108S891; 168Ga 561, 148SE336; 170Ga398, 153SE44; 130Kan243, 285P574(2dcase); 221Ky7, 297SW702; 83Mont214, 271P433; 47RI 348, 133A239, 240 [citCJ]; TexCivA 289SW119; TexCivA 28W(2d)481. [a] **Where deed remained in possession of grantor,** questions as to delivery and intention to deliver should have been submitted to jury. TexCivA 7SW(2d) 1096.

215-98 79CalA252, 249P219; Okl 291 P569; 47RI 348, 133A239, 240 [citCJ].

215-99 76CalA530, 245P451; 47RI 348, 133A239, 240 [citCJ].

215-1 174Minn434, 219NW552.

215-4 TexCivA 291SW650.

215-5 82CalA786, 256P290; CalA 285 P325; TexCivA 291SW650. See also 71 CalA251, 235P62.

215-6 125Kan466, 265P42.

216-8 Mo 20SW(2d)670.

216-9½-New. The question of existence of grantor's intent to divest himself of title and control of the instrument, when he delivered it, is one of fact for the trial court or jury. 79CalA 762, 251P227.

216-10 130Kan524, 287P614; ND 231 NW888; SD 217NW386.

216-12 DelCh 141A271; Iowa 231NW 436 (holding grantee's approval and acceptance of terms subsequent to delivery relate back to date of instrument); 150Md659, 133A306; 26 OhA48, 159NE 840.

216-13 76CalA530, 245P451; DelCh 141A271; 325 Ill 146, 156NE313; 215 Ky373, 285SW198 [citCJ].

216-14 TexCr 26SW(2d)251(2dcase). See also 99WVa335, 128SE735, 736 [cit CJ].

216-15 215Ala297, 110S391.

216-16 76CalA530, 245P451; CalA 286 P510; 215Ky373, 285SW198 [citCJ].

217-27 240Mich151, 215NW400; Nebr 230NW254.

217-29 Cal 285P314.

217-34 201Cal225, 256P419, 55ALR 157; 240Mich151, 215NW400.

217-35 165Ga334, 140SE879; 243 IllA 170, 175 [citCJ]; TexCivA 285SW897.

217-36 TexCommnA 15SW(2d)1037.

217-37 214Ala150, 107S94; 80CalA459, 251P87 (supplying conditions omitted); 230Ky835, 20SW(2d)1015; 149Miss354, 115S40 (corrected deed held inoperative as to subsequent grantees). [c] **In PortoRico.**-29PortoRico 852.

218-38 214Ala150, 107S94; 165Ga808, 143SE149.

218-44 230Ky835, 20SW(2d)1015.

218-45 [a] **In Porto Rico.**-29PortoRico 852.

218-46 6LaA187.

218-47 230Ky835, 20SW(2d)1015; 128 Or483, 275P45.

218-48 230Ky835, 20SW(2d)1015.

218-58 169Ark1181, 278SW48; 171Ark 1189, 283SW368; 203 Iowa979, 213NW 605 (question of fact); 29 OhA109, 162 NE780.

218-59 169Ark1181, 278SW48; 209Ky 243, 272SW732; 233Ky452, 26SW(2d) 5; 114Nebr704, 209NW492; 111 Okl 16, 237P445, 447 [citCyc] (not sufficient to show he did not understand transaction); 124 Okl 260, 256P727; 130 Okl 71, 265P117; 131 Okl 144, 268P245; 39 OklACR304; 116 Or467, 241P996; TexCivA 281SW331, 334 [citCJ].

219-60 216Ala265, 113S238, 239 [quot CJ]; 169Ark1181, 278SW48; 172Ark 176, 287SW1001; 173Ark1180, 292SW 673; 178Ark983, 13SW(2d)15; 80CalA 538, 252P638; 164Ga682, 139SE421; 322 Ill 406, 153NE662; 324 Ill 457, 155 NE349; 334 Ill 168, 165NE605; 334 Ill 233, 165NE624; 206 Iowa732, 221NW 474; 209Ky243, 272SW732; 219Ky612, 294SW191; 249Mich1, 227NW729; 319 Mo 65, 3SW(2d)712; 114Nebr704, 209 NW492; 116Nebr339, 217NW583; 124 Okl 260, 256P727; 116 Or467, 241P996; TexCivA 271SW311; TexCivA 281SW 331, 334 [citCJ]. [a] (2) 201 Iowa1268, 203NW812. (10) Sufficient intellect to understand in general way nature, effect, and immediate consequences of transaction. 29 OhA109, 162NE780. (11) Test of capacity to convey homestead is whether grantor could understand consequences of transaction and exercise reasonable judgment. 219Ky 612, 294SW191. (12) Ability to transact ordinary business. 129 Or674, 278 P946 (meaning of phrase). [b] **Want of mental capacity to transact business** is not in itself conclusive of want of capacity to execute deed. 123Kan207, 252 P256. [c] **Less mental capacity is required to sustain father's conveyance to son** for maintenance and care than other transactions. 219Ky612, 294SW191.

220-61 172Ark176, 287SW1001; 178 Ark983, 13SW(2d)15; 164Ga682, 139 SE421; 324 Ill 457, 155NE349; 55ND 546, 214NW857; 144SC252, 142SE498. [a] (3) Belief in spiritualism is not sufficient to establish incapacity. 149Md 593, 132A645.

220-71 207Cal582, 279P653.

220-71½-New. The fact that the deed was suggested by another person does not affect its validity, where the grantor was able to comprehend the nature and effect of his act in making the deed. Utah 271P797.

220-72 85Colo154, 274P816; 163Ga 553, 136SE526; 220Ky98, 294SW785; Mo 26SW(2d)611. [b] **Deeds to relatives** when grantor is ill calls for only testamentary capacity as distinguished from capacity to contract. 314Mo 95, 282SW1014.

221-73 197NC8, 147SE433; 29 OhA 109, 162NE780.

221-74 322Mo484, 15SW(2d)801.

221-75 169Ark1181, 278SW48; 164Ga 682, 139SE421; 165Ga335, 141SE667; 249Mich1, 227NW729; TexCivA 294SW 328, 331 [citCJ]; TexCivA 25SW(2d) 881.

221-77 175Ark1170, 1SW(2d)56; 179 Ark556, 17SW(2d)282.

221-78 Okl 293P206.

222-82 311Mo551, 279SW122.

222-83 311Mo551, 279SW122.

222-84 83CalA1, 256P294; 55AppDC 262, 4F(2d)874; 230Ky575, 20SW(2d) 444; 311Mo551, 279SW122; 29 OhA109, 162NE780; 131 Okl 144, 268P245, 247 [citCJ]; 39 OklACR298.

222-85 55AppDC262, 4F(2d)874; 173 Ark1182, 291SW415; 322 Ill 406, 153NE 662; 230Ky575, 20SW(2d)444; 29 OhA 109, 162NE780.

222-86 55AppDC262, 4F(2d)874; 230 Ky575, 20SW(2d)444; 29 OhA109, 162 NE780.

222-87 29 OhA109, 162NE780; 131 Okl 144, 268P245, 247 [citCJ].

222-88 55AppDC262, 4F(2d)874.
222-89 173Ark1182, 291SW415; 322 Ill 406, 153NE662; 330 Ill 106, 161NE 99; 29 OhA109, 162NE780; 131 Okl 144, 268P245, 247 [citCJ].
222-90 233Ky452, 26SW(2d)5.
222-90½-New. Deed by aged grantor cannot be treated as confirmation of prior agreement to sell where consideration different. 233Ky452, 26SW(2d)5.
222-92 83CalA1, 256P294; 131 Okl 144, 268P245.
224-5 41 OklACR118; 49Philippine19; 106WVa307, 146SE59. [c] **Mere recording of forged deed** gives it no added authority. 336 Ill 490, 168NE340.
224-6 238Mich354, 213NW202, 56ALR 578; 41 OklACR118.
224-8½-New. A forged deed is void ab initio. TexCommnA 280SW748.
224-12 87CalA359, 262P339; TexCivA 294SW894.
224-16 TexCivA 294SW894.
225-23 [b] NS [1925] 2DomLR659.
225-23½-New. A deed of a tract of land on which there is a cemetery and a schoolhouse occupied and used as such for many years to the knowledge of the parties to the deed conveys no title to the part so occupied evidently included inadvertently and by mutual mistake and without intention of either party. 116 Okl 293, 244P762.
225-25 337 Ill 41, 168NE625.
225-30 204 Iowa732, 216NW39.
226-42 87CalA359, 262P339; Iowa 229 NW753; 154Miss441, 122S488; 253NY 159, 170NE530.
226-43 246Mich255, 224NW359.
226-45 TexCivA 294SW894.
226-48 [b] **Illiterate foreigners** may be allowed reformation of deed. 99NJEq 202, 132A497.
227-50 204 Iowa732, 216NW39; 143SC 325, 141SE564.
227-51 124 Okl 260, 256P727.
228-57 219Ala645, 123S38; 204 Iowa 732, 216NW39; 151Md140, 134A130, 132 [citCJ]; 322Mo 842, 16SW(2d)72; Mo 30SW(2d)146 (grantees not intended to take beneficially); NJCh 131A620.
228-58 204 Iowa732, 216NW39.
228-60 227AppDiv516, 238NYS222 (deed represented as mortgage extension).
228-61 215Ala205, 110S384, 386 [cit CJ].
228-61½-New. A contract never agreed upon has been held incomplete precluding a claim that the deed called for by the contract was valid although fraudulently obtained. 87 IndA309, 159NE 691.
228-63 204 Iowa732, 216NW39. See also TexCivA 286SW241. [d] **Complainant held entitled to cancellation of deed for fraud** of grantee in misrepresenting consideration. 215Ala205, 110 S384.
228-64 TexCivA 15SW(2d)702.
228-64½-New. A false suggestion or suppression of truth, more especially both together, constitutes sufficient ground to set aside any conveyance. 97Fla392, 121S475.
229-67 TexCivA 280SW859.
229-68 Nebr 231NW517.
229-75 255Mass607, 152NE363.
230-79 149Va113, 140SE264, 56ALR 421 (purchaser is not obligated to disclose knowledge of possible events that may enhance value).
230-82½-New. Purchasers of cestui's interest, who procured trustee's signature as an individual have been held to have no duty to advise the trustee of her interest in property as a remainderman. 150Md333, 134A124.
230-82½-New. In an action at law, a deed under seal cannot be impeached for fraud which goes only to the consideration, and does not inhere in the execution of the instrument itself. 335 Ill 101, 166NE495.
230-86 175Ark1170, 1SW(2d)56; 204 Iowa732, 216NW39; 152Md464, 136A 831; NJCh 140A309; 220AppDiv282, 221NYS850; 24 OhNPNS235. [b] **Fact that lawyer hired by grantee had explained to grantors nature of papers** held not such independent advice as to preclude cancellation for fraud. NJCh 140A309.
231-91 173Minn51, 216NW311; 146 Miss161, 110S583; 128 Okl 91, 261P224. [b] 146Miss161, 110S583.
231-91½-New. Where a fiduciary relationship exists between the grantor and grantee, equity will regard the dealings between the parties according to the rules which apply to such relation. 334 Ill 233, 165NE624.
231-97 173Minn51, 216NW311; 229 AppDiv555, 242NYS383 (wife held not estopped).
232-1 216Ky777, 288SW746; 145Miss 845, 111S376; 136Wash378, 240P9.
232-2 146Miss161, 110S583.
232-3 256Mass528, 152NE749.
232-5½-New. the stepchildren, 128 Okl 91, 261P224.
232-8 207 Iowa776, 223NW686.
232-9½-New. It is not always necessary that the confiding party must indispensably have had independent advice to constitute a valid transfer. 100 CalA177, 280P187.
232-13 173Minn51, 216NW311.
232-16 87CalA359, 262P339; 98Fla166, 123S569; 169Ga184, 150SE91.
232-17 169Ga184, 150SE91.
233-26 213Ala131, 104S393; 173Ark1, 291SW802; 136Wash378, 240P9, 12 [quotCJ].
233-27 136Wash378, 240P9, 12 [quot CJ].
233-32½-New. Grantors are not entitled to set aside, on the ground of fraud, a deed given under an oral stipulation that the grantees would remain on the property and care for the grantors, where it is not shown that the grantees had no intention of complying with the obligation at the time they assumed it. 158Tenn394, 13SW(2d)49.
233-32½-New. An agreement by an aged testatrix with her executrix for her support in consideration of a conveyance of four thousand dollars interest in realty has been held invalid where the testatrix died four months after the agreement. 227AppDiv638, 236NYS113.
234-35 176Ark565, 3SW(2d)322.
234-37 255Mass607, 152NE363.
234-39 175Ark1170, 1SW(2d)56 (mental weakness coupled with duress); 70 CalA607, 233P988 (request to execute deed not menace or duress); 215Ky119, 284SE431; 142Miss641, 107S885; NJCh 131A620.
234-40 95Fla889, 116S863, 864 [citCJ]; 323 Ill 380, 154NE149; 324 Ill 457, 155 NE349. [b] **Compulsion must operate and be effectual** at time of execution. 324 Ill 457, 155NE349.
234-41 [b] **Effect of prosecution.**-70 CalA607, 233P988.
234-41½-New. Duress to avoid a deed must have been the sole and efficient cause for execution. 318 Ill 218, 149NE 306.
234-41½-New. Mere annoyance and vexation do not constitute duress. 318 Ill 218, 149NE306.
234-42 [a] **Mere vexation and annoyance not sufficient to set aside deed** where it is knowingly executed and acknowledged in due form. 323 Ill 380, 154NE149.
234-46 215Ky119, 284SW431.
234-47 85CalA46, 258P705 (acts insufficient).
235-63 [a] **Exceptions to rule.**-TexCivA 288SW1092.
235-65 TexCivA 278SW286. [c] **Waiver.**-TexCivA 278SW286.
236-70 80CalA230, 251P692; 152Md 464, 136A831; NJCh 131A620; Or 286P593; 144SC252, 142SE498, 503 [cit Cyc]; TexCivA 271SW311.
236-71 [a] **Means of control** may consist of force or coercion, violence or threatened violence, or moral coercion. 27 OhA499, 161NE293.
236-73 322 Ill 406, 153NE662; Ill 173 NE376; 114Nebr704, 209NW492; 115 Nebr761, 215NW99.
236-75 90Fla162, 105S321; 163Ga899, 137SE561; 201 Iowa1268, 203NW812; 202 Iowa129, 209NW303; 208 Iowa300, 225NW419; 155Md230, 141A531; 311 Mo 551, 279SW122; 319Mo 769, 5 SW(2d)420; 114Nebr522, 208NW630; 114Nebr704, 209NW492; 114Nebr752, 209NW737; 115Nebr761, 215NW99; Nebr 231NW517 (deed voluntarily executed cannot be annulled); 198NC594, 152SE681(1stcase); 27 OhA499, 161NE 293; 129 Or674, 278P946; TexCivA 271SW311; TexCivA 281SW331, 334 [citCJ]. [a] **Extent of undue influence is immaterial** where it is sufficient to make act of grantor act of another. 27 OhA499, 161NE293.
236-76 Ala 127S815; 80CalA230, 251 P692; 163Ga899, 137SE561; 322 Ill 406, 153NE662; 155Md230, 141A531; 144SC252, 142SE498, 503 [citCyc]; Tex CivA 271SW311.
237-77 90Fla162, 105S321; TexCivA 271SW311.
237-78 322 Ill 406, 153NE662; 323 Ill 380, 154NE149; 201 Iowa1268, 203NW 812.
237-79 201 Iowa1268, 203NW812.
237-81 80CalA230, 251P692.
237-83 Ill 173NE376; 115Nebr761, 215NW99.
237-84 323 Ill 380, 154NE149; Ill 173 NE376; 202 Iowa129, 209NW303.
237-85 119 Or277, 241P46; 153SC100, 150SE610.
237-87 Mo 274SW460 (kindly attentions).
237-88 119 Or277, 241P46.
237-89 322 Ill 406, 153NE662; 115 Nebr761, 215NW99; 119 Or277, 241P46; 153SC100, 150SE610.
237-94 220Ky205, 294SW1032; 247 Mich372, 225NW573; 119 Or277, 241P 46; SD 231NW912; TexCivA 281SW 331.
237-95 155Md230, 141A531.
237-96½-New. Doctrine of independent advice does not apply to granddaughter who signed deed for consideration to cure defect in conveyance. 100NJEq 117, 135A547.
237-96½-New. Court must take care not to interfere with right of free disposal of property in determining existence of undue influence. Ala 127S815.
237-97 Mo 4SW(2d)459, 463 [quotCJ].
237-98 173Ark856, 293SW728, 730 [cit Cyc]; 175Ark1170, 1SW(2d)56; 80CalA 230, 251P692; Mo 4SW(2d)459, 463 [quotCJ].
238-99 173Ark856, 293SW728, 730 [cit Cyc].
238-1 Mo 4SW(2d)459, 463 [quotCJ].
238-4 Va 153SE807 (promise to support and kindness of care is not undue influence).
238-5 216Ky792, 288SW747.
238-6 126Mel30, 136A667.
239-10 220Ky557, 295SW859. But see 55App(DC)262, 4F(2d)874.
239-14 Ala 127S527; 256Mass528, 152 NE749; 153SC100, 150SE610.
239-16 325 Ill 47, 155NE763.
239-22 [b] **Doctrine of independent advice** applies only to gifts. 98NJL404, 129A620.
239-23 39 OklACR298.
240-26 119 Or277, 241P46.
240-27½-New. In case of a conveyance to a person of whom the grantor was fond, and to whom she alluded as her son, although she had no natural children, the deed is not void because the grantor did not have the benefit of independent advice. 119 Or277, 241P46.
240-27½-New. A voluntary deed executed to a grantee in a confidential relation with the grantor is not invalid if executed with full knowledge of its nature and through the deliberate desire of the grantor. 335 Ill 52, 166NE477.
240-30 323 Ill 380, 154NE149; 326 Ill 398, 158NE138.
240-32 311Mo 551, 279SW122.
240-33 311Mo 551, 279SW122; 142 Okl 152, 286P322; TexCivA 281SW331.
240-36 323 Ill 380, 154NE149.
240-38 155Md230, 141A531.
240-43 11F(2d)841.
241-44 11F(2d)841; 325 Ill 47, 155NE 763. [a] 97NJEq25, 129A128.
241-45 129 Or674, 278P946.
241-46 208Ky803, 272SW52.
241-49½-New. That a corporation was not a party to the wrong was not a defense, where a son had improperly induced his mother to deed the property. 97NJL25, 129A128.
241-50 326 Ill 398, 158NE138.
242-72 TexCivA 278SW(2d)857. [a] 87

IndA309, 159NE691.

242-73 205 Iowa1285, 217NW852; **Tex CivA** 27SW(2d)857 (grantor must sue for cancellation in order to recover land).

242-74 Ala 127S527 (interest of persons participating).

242-78½-New. Where a deed is void, the covenant of warranty annexed thereto fails with it. **TexCivA** 272SW809.

242-78½-New. Deeds may be void or voidable, depending on the opposite party's status. 164Ga138, 137SE825.

242-78¼-New. Grantee obtains no rights by recording photostatic copy of undelivered deed obtained by fraud. 99 **NJEq**788, 134A363.

242-78½-New. An estate cannot be divested by a forgery. 175**Ark**641, 1 **SW(2d)**59.

242-78½-New. A forged deed is a nullity, and neither the grantee nor those claiming under him can acquire any title under such deed. 106**WVa**507, 146SE59.

242-79 TexCivA 28SW(2d)837.

243-80 238Mich354, 213NW202, 56ALR 578.

243-81 TexCommnA 12SW(2d)955.

243-82 238Mich354, 213NW202, 56ALR 578; **TexCivA** 5SW(2d)547, 548 [quot CJ]. [a] **There is no constructive forgery invalidating deed as to innocent purchaser** where vendor in land contract, willingly and with full knowledge that he was passing his interest, executed deed conveying property and accepted seven-day note in payment, which was never paid. 242Mich296, 218NW 657.

243-84 Okl 39OklACR317.

243-85½-New. Where there is more than one grantor, a delivery may be good as to one grantor if not as to all. 20 **OhA**419, 152NE200.

243-96 [a] (6) Discontinuance of suit by grantor to cancel for undue influence is held not a satisfaction. 314**Mo** 95, 282 SW1014.

244-97 215**Ky**492, 284SW1110.

244-3 168**Ark**682, 272SW367. [a] **Retention of consideration money** without being apprised of real situation constituting fraud does not constitute ratification. 168**Ark**682, 272SW367. [b] **Mortgaging of property without knowledge that it was fraudulently obtained.**—Where son induced father to give deeds to children, mortgage by another son of share given him without knowing of deed is held not ratification. 197 **Ind** 236, 150NE361.

244-13½-New. Defrauded vendor may recover property not in the hands of an innocent purchaser for a new and valuable consideration. 126Me443, 139A461.

244-13½-New. One having election to ratify or disaffirm cannot do both. 99 **Fla**277, 126S293.

244-16 218Ala637, 119S844(2dcase).

244-17 CalA 290P86.

245-18 337 **Ill** 617, 169NE743 (one who has parted with value); 338 **Ill** 23, 169 NE817. (deed cannot be assailed by strangers).

245-23½-New. A deed will not be set aside on the ground that it was obtained by fraud, at the suit of one who assisted in the perpetration of such fraud on the grantor. **TexCivA** 13SW(2d)388.

245-23½-New. A deed which is void because made by an officer with no authority to do so may be attacked collaterally. 152Miss17, 118S357.

245-25 See also 220**AppDiv**282, 221 **NYS**50.

245-36 171**Ark**1189, 283SW368.

246-42 85**CalA**475, 259P770; 97**CalA** 628, 276P122; **CalA** 286P510; 87**Colo** 345, 287P641; **DC** 42**F(2d)**604; 230**Ky** 61, 18SW(2d)884; 127Me328, 143A169; 117 **Okl** 195, 246P472; **TexCivA** 286SW 519; **TexCommnA** 291SW537.

247-43 117 **Okl** 195, 246P472; **TexCivA** 286SW519.

247-44 Cal 238P81; 198NC190, 151SE 255; 55**ND**475, 214NW461; **TexCivA** 286SW519.

247-48 159**Tenn**254, 17SW(2d)917, 65 **ALR**357.

247-50 244**Mich**403, 221NW322.

247-54½-New. The record of a derivative conveyance is not notice of transfer of the original grantor's title. 164**Ga** 880, 139SE658.

248-64 169**Ga**705, 151SE652 (effect of illegible signature).

248-65 244**Mich**403, 221NW322; 119 **Or**573, 250P218. [a] (5) Where deed presented to auditor for certification contains such description as might be claimed to include lands which have been sold to state for delinquent drainage assessments, he may not be compelled to certify thereon that taxes have been paid. 170**Minn**141, 212NW170.

248-66½-New. Under some statutes, a borough which has established a system for the registration of titles has no authority to collect a fee on each title registered. 92**PaSuper**558.

249-80½-New. Under some statutes, deed conveying land situated partly in two counties, but recorded in one county only, is imperative as to the land in the other county as against bona fide mortgagee without notice. 214**Ala**390, 107S863.

250-93½-New. As a general rule the deed speaks from the date of record. 98**NJEq**104, 130A470.

250-94 167**Ga**883, 146SE901.

251-15 216**AppDiv**72, 215NYS50.

251-17 128**Misc**603, 220NYS50, 54 [cit CJ].

252-21 192**NC**398, 135SE121.

252-22 163**Ga**468, 136SE434; 129**Misc** 201, 221NYS656.

252-25½-New. Court cannot add words modifying clear meaning of deed. **MoA** 26SW(2d)796.

252-27 192**NC**505, 135SE332.

252-28 126Me45, 136A119.

252-29 NC 155SE856; 122 **Or**285, 258P 205, 58ALR339. [a] **Where deeds are for valuable consideration,** all covenants are construed as for valuable consideration. **TexCivA** 295SW653.

252-30 5**F(2d)**160; 216**Ala**81, 112S444; 52**ALR**536; 216**Ala**288, 112S815; 179 **Ark**376, 16SW(2d)15; 102**CalA**42, 282P 438; 99**Fla**152, 126S135; 162**Ga**529, 134 **SE**161, 47**ALR**865; 163**Ga**236, 135SE 719; 163**Ga**468, 136SE434; 163**Ga**645, 136SE907; 84 **IndA**500, 151NE627; 206 **Iowa**1121, 221NW851; 211**Ky**842, 278 **SW**137; 226**Ky**806, 11SW(2d)949; 229 **Ky**767, 17SW(2d)1014; 126Me521, 140A 189; **Md** 152A107(2dcase); 256**Mass**343, 152NE617; 224**Mich**330, 221NW293; 311**Mo** 262, 278SW398; 115**Nebr**781, 215 NW117; 129**Misc**201, 221NYS656; 192 **NC**398, 135SE121; 196**NC**107, 144SE 547; 19 **OhA**319; 122 **Okl** 73, 250P890; **TexCivA** 286SW624; **TexCommnA** 11 SW(2d)778; 153**Va**730, 151SE130; 100 **WVa**413, 130SE660; 108**WVa**463, 151 **SE**435; 196**Wis**36, 219NW420; 200**Wis** 405, 228NW499.

252-31 163**Ga**468, 136SE434; 167**Ga**66, 144SE903; 336 **Ill** 366, 168NE349; 129 **Misc**201, 221NYS656; 194**NC**269, 139SE 438; **NC** 154SE825; 132**SC**306, 128SE 31. [a] **In case of deed poll,** intention is primarily that of grantor. 216**Ala**81, 112S444, 52**ALR**536.

253-32 213**Ala**66, 104S5; 171**Ark**117, 283SW379; 200**Cal** 425, 253P733; 88 **CalA**762, 264P332; 210**Ky**612, 276SW 540; 215**Ky**14, 284SW109; 194**NC**269, 139SE438; 19 **OhA**319; **Or** 293P425; 290**Pa**448, 139A154; 132**SC**306, 128SE 31 (intention signifies meaning of writing); **TexCivA** 2SW(2d)895; 118**Tex** 196, 13SW(2d)340.

253-33 122 **Or**285, 258P205, 58ALR 339.

253-34 161**Tenn**187, 30SW(2d)227.

253-35 93**Fla**849, 112S846, 852 [citCJ]; 163**Ga**236, 135SE719; 264**Mass**436, 163 NE70; **Mass** 167NE417; 116 **Or**661, 242 P626; 122 **Or**285, 258P205, 58ALR339; 299**Pa**484, 149A725; 50**RI** 475, 149A 374; 155**Tenn**25, 290SW8; **TexCivA** 13 SW(2d)152; **TexCivA** 26SW(2d)457; 153**Va**20, 149SE497; 100**WVa**413, 130SE 660.

254-36 194**NC**269, 139SE438.

254-37 210**Ky**612, 276SW540; 219**Ky** 496, 293SW964; 264**Mass**436, 163NE70; **Mass** 166NE922; 86**Mont**463, 284P553; 195**NC**542, 142SE765; **TexCivA** 2SW (2d)481, 483 [citCJ]; **TexCivA** 13SW (2d)152; 100**WVa**413, 130SE660.

254-38 216**Ala**81, 112S444, 446 [citCJ], 52**ALR**536; 331 **Ill** 437, 163NE327, 62 **ALR**511; 265**Mass**428, 164NE616; 115 **Nebr**781, 215NW117; 192**NC**398, 135SE 121.

254-39 171**Ark**117, 283SW379.

254-40 132**SC**306, 128SE31; 153**Va**636, 151SE157.

254-41 194**NC**269, 139SE438.

254-42 265**Mass**428, 164NE616; 192**NC** 398, 135SE121.

254-43 264**Mass**436, 163NE70.

254-44 163**Ga**468, 136SE434; 210**Ky** 612, 276SW540; 101**Vt**367, 143A639.

254-44½-New. Rule that intention of parties governs is applicable to construction of deeds. 299**Pa**484, 149A725.

254-45 216**Ala**81, 112S444, 446 [citCJ], 52**ALR**536.

254-46 122 **Or**285, 258P205, 58ALR339.

254-47 NC 154SE825; 132**SC**306, 128 SE31 (does not mean purpose of grantor apart from writing); 153**Tenn**418, 284 SW68.

256-60 254**NY**152, 172NE452.

256-61 243 **IllA**170; **TexCivA** 2SW(2d) 481, 483 [citCJ].

256-63 116 **Or**661, 242P626; 121 **Or**179, 254P359; 103**WVa**341, 137SE744.

256-64 219**Ala**265, 122S29; 176**Ark**418, 3SW(2d)62; 93**Fla**849, 112S846.

256-65 103**WVa**341, 137SE744.

256-66 28**Hawaii**385; 153**Va**591, 151SE 146 (deed signed by part of heirs held to bind signers as executory contract to convey).

256-71 229**Ky**767, 17SW(2d)1014.

256-73 40**F(2d)**333; **Ala** 130S780; 179 **Ark**376, 16SW(2d)15; 200**Cal** 425, 253P 733; 90**CalA**96, 265P548; 109**Conn**529, 147A181; 90**Fla**452, 108S189; 93**Fla** 849, 112S846, 852 [citCJ]; 162**Ga**529, 134SE161; 47**ALR**865; 163**Ga**468, 136 SE434; 163**Ga**645, 136SE907; 329 **Ill**30, 160NE179; 85 **IndA**428, 151NE700; 204 **Iowa**995, 216NW116; 211**Ky**842, 278 SW137; 219**Ky**496, 293SW964; 219**Ky** 671, 294SW168; 227**Ky**773, 14SW(2d) 183; 229**Ky**767, 17SW(2d)1014; 168**La** 394, 122S122; 126Me521, 140A189; **Mass** 171NE229; 310**Mo** 684, 276SW39; 311**Mo** 208, 278SW686; **Mo** 23SW(2d) 20; 82**Mont**222, 266P406; 86**Mont**276, 283P213; 86**Mont**463, 284P553; 117 **Nebr**472, 221NW97; 115**Nebr**781, 215 NW117; 129**Misc**201, 221NYS656; 133 **Misc**69, 231NYS165; 195**NC**363, 142SE 229; 195**NC**542, 142SE765; 19 **OhA**319; 122 **Okl** 73, 250P890; 121 **Or**179, 254P 359; 122 **Or**285, 258P205, 58ALR339; 131 **Or**19, 281P832; 32**PortoRico** 12; 132**SC**306, 128SE31; **TexCivA** 286SW 624; **TexCivA** 15SW(2d)1102; **Tex CommnA** 11SW(2d)778; 153**Va**730, 151 SE130; 100**WVa**413, 130SE660; 103 **WVa**272, 137SE5. [a] (3) 116**Nebr**428, 218NW86. [a] (4) Under Comp. St. (1922) § 5594, it is provided in substance that in construing conveyances of real estate it shall be duty of court to carry into effect intent of parties. 114**Nebr** 226, 206NW754.

257-75 TexCivA 15SW(2d)1102.

257-76 Ala 130S780; 121**Kan**678, 680, 249P671 [quotCJ]; **NC** 155SE726; 128 **Okl** 36, 261P165; 29**PortoRico** 984; **Tex CivA** 15SW(2d)1102; 118**Tex**196, 13SW (2d)340; 153**Va**730, 151SE130; **Va** 154 SE538. [a] (2) Provisions in deed which were to be effective "until and in default of exercise of appointment" therein held to become of no effect on grantee's exercising such appointment. 136SC1, 134SE230.

257-77 121**Kan**678, 680, 249P671 [quot CJ].

257-79 5**F(2d)**160; 176**Ark**418, 3SW (2d)62; 97**CalA**296, 275P817; 162**Ga** 529, 134SE161, 47**ALR**865; 163**Ga**468, 136SE434; 163**Ga**645, 136SE907; 335 **Ill** 156, 166NE498; 204 **Iowa**995, 216 NW116; 211**Ky**842, 278SW137; 168**La** 394, 122S122; 310**Mo** 684, 276SW39; 82 **Mont**222, 266P406; 192**NC**595, 135SE 533; 195**NC**363, 142SE229; **TexCivA** 15 SW(2d)1102; **TexCommnA** 273SW815; 102**WVa**290, 135SE282; 103**WVa**341, 137 SE744.

258-80 201**Cal** 299, 257P60; 163**Ga**468, 136SE434.

258-81 162**Ga**529, 134SE161, 47**ALR** 865; 310**Mo** 684, 276SW39; **Mo** 23SW (2d)20; 100**NJEq**290, 134A673; 29**PortoRico** 984.

258-82 TexCivA 2SW(2d)481, 483 [cit CJ].

258-83 162**Ga**529, 134SE161, 47**ALR**

865; 122 Or285, 258P205, 58ALR339.
258-93 162Ga529, 134SE161, 47ALR 865.
258-94 162Ga529, 134SE161, 47ALR 865; 82NH342, 134A520; 132SC306, 128 SE31; 153Va20, 149SE497. [a] **Every word is presumed** to have been used for some purpose and to have some effect. 219Ala314, 122S330.
258-95 82NH342, 134A520.
258-96 90Fla452, 108S189.
258-99 [a] 254NY152, 172NE452.
258-6 153Md443, 138A225, 227 [citCJ]; TexCivA 15SW(2d)1102; TexCivA 31 SW(2d)828.
259-10 132SC306, 128SE31.
259-11 329 Ill 604, 161NE141; 335 Ill 533, 167NE802.
259-16 153Md248, 138A5; 100WVa 413, 130SE660.
259-17 153Va20, 149SE497.
259-18 100WVa413, 130SE660.
260-25 221Ky123, 297SW1104 (word "heirs" inserted after word "natural"); 319Mo 1246, 6SW(2d)594.
260-32 196NC107, 144SE547.
260-33½-New. "or" construed "and" wherever necessary to carry out intention, but such change is not required where the result is contrary to rule favoring early vesting. 190NC558, 130 SE166.
260-34 192NC595, 135SE533.
260-38 36GaA470, 137SE642, 645 [cit CJ]; 311Mo 262, 278SW398 (rule applied only to ascertain intent of parties).
260-40 28F(2d)168; 172Ark667, 291 SW68; 201Cal 225, 256P419, 55ALR157; CalA 258P91; 93Fla849, 112S846; 204 Iowa995, 216NW116; 210Ky612, 276 SW540; 224Mich330, 221NW293; 82 NH342, 134A520; 224AppDiv63, 229 NYS201; 19 OhA319; 122 Or285, 258P 205, 58ALR339; 290Pa448, 139A154; 153Tenn418, 284SW68; TexCivA 286 SW624; TexCivA 2SW(2d)481; Tex CivA 25SW(2d)881; TexCivA 30SW(2d) 348; 153Va730, 151SE130.
261-41 172Ark667, 291SW68; 122 Or 285, 258P205, 58ALR339; Or 293P425; TexCivA 282SW935; TexCivA 292SW 633.
261-42 202Cal 23, 259P38; 93Fla849, 112S846, 855 [citCJ].
261-43 93Fla849, 112S846, 855 [citCJ]; 310Mo 684, 276SW39.
261-46 93Fla849, 112S846, 855 [citCJ]; 256Mass379, 152NE625; 122 Or285, 258 P205, 58ALR339; 153Va636, 151SE157 (situation of parties).
261-47 93Fla849, 112S846, 855 [citCJ].
261-48 264Mass436, 163NE70.
262-57 176Ark418, 3SW(2d)62; 201Cal 299, 257P60; Mo 29SW(2d)1100; 82 NH139, 130A846. See also 254NY152, 172NE452. [d] **Construction of deed by parties is evidence of their intent.**-153 Va636, 151SE157.
262-59 82NH139, 130A846; 195NC 708, 143SE644; 122Okl 73, 250P890.
263-60 196Wis36, 219NW420.
263-64 40F(2d)333; 213Ala466, 105S 562; 220Ala598, 127S176; CalA 258P 96; 97CalA296, 275P817; Conn 151A 309; 93Fla849, 112S846; 99Fla152, 126 S135; 163Ga645, 136SE907; 338 Ill 391, 170NE243; Mass 173NE502; Mass 173 NE508; 246Mich318, 224NW366, 68ALR 1; 82NH342, 134A520; 101NJEq55, 136 A713; 126Misc349, 214NYS123; 218 AppDiv502, 219NYS14; 195NC363, 142 SE229; 29 OhA296, 163NE573; 120 Oh 19, 165NE350; 121 Or179, 254P359; 50 RI 475, 149A374; SD 216NW592; 114 Tex452, 270SW1014; TexCommnA 10 SW(2d)973; 151Va28, 144SE629; 101 WVa211, 133SE330; 105WVa69, 141SE 521, 523 [citCyc]; 196Wis36, 219NW 420. See also 152Va254, 146SE284.
264-72 218AppDiv502, 219NYS14.
265-30 32NM124, 252P478, 485 [quot CJ&citCyc]; 189NC790, 128SE404, 407 [citCJ].
265-92 32NM124, 252P478, 485 [quot CJ&citCyc].
265-94 32NM124, 252P478, 485 [quot CJ&citCyc].
265-4½-New. Where a deed reciting a money consideration to be paid is silent as to the time of payment, the consideration is to be paid on demand. 195Wis 47, 217NW719.
265-4¾-New. A recital in a deed to the effect that the purchase price was ten dollars and other considerations deemed valuable in law has been held to constitute reference to the covenants in a previous agreement for the exchange of properties. 151Va655, 144SE645.
265-6 128Misc603, 220NYS50; TexCivA 276SW947.
266-9 141Miss370, 106S528.
266-12 TexCivA 276SW947.
267-22 163Ga468, 136SE434.
267-23 201Cal 225, 256P419, 55ALR 157; 163Ga468, 136SE434; 163Ga645, 136SE907; 121 Or179, 254P359, 361 [cit CJ].
267-24 204 Iowa995, 216NW116.
267-25 162Ga529, 134SE161, 47ALR 865; 163Ga468, 136SE434; 84 IndA500, 151NE627.
267-26 86Mont276, 283P213; 121 Or 179, 254P359, 361 [citCJ].
267-27 99Fla152, 126S135; 163Ga468, 136SE434; 84 IndA500, 151NE627; 221 Ky644, 299SW543; 310Mo 684, 276SW 39.
267-28 179Ark376, 16SW(2d)15; 221 Ky644, 299SW543.
267-30 163Ga645, 136SE907.
268-36 162Ga529, 134SE161, 47ALR 865.
268-37 216Ala494, 113S620; 163Ga645, 136SE907; 329 Ill 235, 160NE605; 211 Ky842, 278SW137; 102NJEq193, 140A 226; 192NC398, 135SE121; 195NC363, 142SE229; 288Pa428, 135A862; 153Va 20, 149SE497.
268-38 211KySA2, 278SW137.
268-42 90Fla452, 108S189; 153Va20, 149SE497.
268-42½-New. Where the intention is clearly expressed in explanatory clauses in the habendum, habendum may control over granting clause. 86Mont463, 284P553.
268-43 215Ala12, 108S858; 216Ala494, 113S620.
268-48½-New. Explanatory clauses between premises or granting clause should be considered as part of granting clause. 86Mont463, 284P553.
268-49 325 Ill 296, 156NE294; 124 Kan 637, 261P587; 168Minn206, 209NW752 (two deeds essential at same time held to give life estate to grantee in one and remainder to grantees in other); Mo 281 SW715; Or 293P425. [a] (11) TexCivA 284SW339. [a] (13) Deed and contract subjecting title to forfeiture for breach of condition for maintenance. 213Ala 319, 104S751.
269-50 124Kan637, 261P587.
269-55 90CalA96, 265P548; 164Ga856, 139SE547.
269-58 [a] **In absence of facts disclosing intention** of grantor in executing second deed, first of two independent deeds on record and equally effective will be given precedence. TexCivA 287 SW77.
269-59 129Misc201, 221NYS656.
269-60 12LaA293, 123S486; 251Mich 67, 231NW70.
269-65 124Kan637, 261P587.
270-67 But see 260Mass407, 157NE362.
270-71½-New. Whether parties to conveyance, which is not full performance of prior contract, intended to surrender stipulations is to be determined from evidence in or out of deed. Or 289P 1044.
270-75½-New. An unsigned memorandum, attached to a deed complete on its face and duly signed, providing for conveyance of land to a third party on the happening of certain events, has been held to convey no estate, whatsoever. Va 149SE615.
270-76 172Ark230, 288SW8; 101CalA 712, 282P420; 82Colo 359, 260P99; 164 Ga845, 139SE668; 46 Ida394, 267P1074, [citCJ]; 86 IndA621, 158NE916; 199 Iowa1176, 201NW102; 206 Iowa39, 218 NW56; 205 Iowa563, 218NW251; 226 Ky97, 10SW(2d)608; 226Ky106, 10SW (2d)620; 230Ky290, 19SW(2d)970; 230 Ky769, 20SW(2d)1002; 155Md410, 142 A598; Md 150A852; 239Mich139, 214 NW81; 243Mich447, 220NW750; 248 Mich606, 227NW784; 155Miss185, 124S 270(2dcase); MoA 256SW116; MoA 299 SW105; 72Mont519, 234P475; 99NJEq 806, 134A299; NJ 148A650; 23 OhA 352, 155NE403; Or 289P1044; Or 289 P1048; 294Pa360, 144A271; 150SC493, 148SE554; TexCivA 2SW(2d)895, 897 [citCJ]; Alta [1928] 1DomLR24. But see 102NJEq492, 141A581. [d] **Purchaser's agreement to assume payment of mortgage** not incorporated in deed raises presumption that contract assumption had been abrogated or in some manner canceled. 201 Iowa765, 208NW 518. [e] **Merger not effected** where deed varies in description from agreement for sale. 78Mont122, 252P796.
271-78 131 Or19, 281P832; TexCivA 15SW(2d)159.
271-79½-New. Printed advertisements distributed prior to conveyance by the grantor will not expand or limit the interest conveyed. 249NY52, 162NE581.
271-80 239Mich139, 214NW81.
271-81 46 Ida394, 267P1074, 1075 [cit CJ]; 155Md410, 142A598; Md 150A852 (holding where purported deed was only assignment of lease rule does not apply); MoA 299SW105; 99NJEq806, 134A299; 101NJEq536, 138A371; 130 Misc64, 223NYS634; 117 Or438, 243P 773. But see Or 289P1044. [a] (12) Agreement in contract of sale to furnish abstract showing title to be clear of any and all liens is not merged in deed. 46 Ida394, 267P1074.
271-82 MoA 299SW105.
271-83 Fla 129S777; 46 Ida394, 267P 1074, 1075 [citCJ]; 155Md410, 142A 598; 100NJEq166, 134A835; 101NJEq 388, 139A524; 96PaSuper574.
271-87 155Md410, 142A598.
271-89 201NJEq388, 139A524.
272-90 Or 289P1044. See also 235Ky 1, 29SW(2d)571.
272-93 Fla 129S777. See also NJCh 145A330.
272-94 164Ga201, 138SE78; 167Ga66, 144SE903; NJ 134A520; 101WVa217, 132SE501.
272-95 NJ 150A399.
272-97 168Minn206, 209NW752.
273-6½-New. The legal effect of a deed depends on its terms, not on the order in which the grantors' names are written. 226Ky82, 9SW(2d)1095.
273-6¾-New. In a deed from a widow and "her heirs," showing who the heirs were, and signed and acknowledged by the heirs, the word "heirs" should be held to mean children of the widow, where the parties designated as heirs were not heirs of the widow but heirs of the widow's husband under whom they held the land. 226Ky806, 11SW (2d)949.
273-9 151Va472, 145SE300. [c] **Grant to certain persons** is not affected by habendum clause, unless such intention may be gathered from instrument. 219 MoA365, 271SW1008. [d] **Habendum clause cannot change grantees,** unless such intention is gathered from instrument as whole. 219MoA365, 271SW 1008.
273-10 216Ala494, 113S620. But see 43F(2d)467.
274-22 311Mo 208, 278SW686.
274-23 195NC542, 142SE765.
274-27 Me 150A375.
274-31½-New. A deed to husband and wife with remainder to "their children" has been held to include only children of the husband and his then present wife. 195NC371, 142SE224.
274-39 153Md248, 138A5.
275-48 129Misc201, 221NYS656.
275-50½-New. "Legal heirs" and "nearest kin" in deed are interchangeable. Ala 130S890.
275-51 153Md248, 138A5.
275-53½-New. "Heirs of body" in deed furnishing no means of interpretation other than legal meaning of terms cannot be construed to mean child living at time of grant. 216Ala346, 113S270.
275-66 335 Ill 156, 166NE498.
276-71 93Fla849, 112S846, 859 [citCJ]. [a] (2) TexCommnA 12SW(2d)175.
276-72 93Fla849, 112S846, 859 [cit CJ].
276-73 93Fla849, 112S846, 859 [cit CJ].
277-85 TexCivA 14SW(2d)316.
277-88 13F(2d)712; 207Cal 8, 276P 1017(2dcase); 110Conn267, 147A820; 163Ga645, 136SE907; 150Miss446, 116S

736; 194NC269, 139SE438; Or 293P 425; BC [1928] 4DomLR421; NS [1928] 1DomLR459. [c] (5) Other instances. 170Ga408, 153SE53. [d] **Superior certainty controls.**–Where there is conflict in description, elements thereof of less certainty must give way to those of superior certainty. 13F(2d)712.

277–89 168Ark555, 270SW965 (generally parties intend location and quantity be determined from government surveys); 246Mich318, 224NW366, 68 ALR1; 84Mont304, 275P281.

277–90 168Ark555, 270SW965 (given effect if consistent with rules of law); 194NC269, 139SE438; 94PaSuper62; TexCivA 294SW938. [d] **Speculation** may not be indulged in where interpreting deeds of realty. 9LaA434, 121S224.

278–93 299Pa484, 149A725.

278–96½–New. Intention to convey tract other than that described in deed must be gathered from deed itself. Tex CommnA 289SW993.

278–99½–New. A deed conveying certain land "held" under patent within the described boundary includes only land owned by the grantor. 223Ky 574, 4SW(2d)385.

278–1 170Ga408, 153SE53; TexCivA 283SW1073; Can [1925] 3DomLR595.

279–3 94PaSuper62.

279–4 213Ala494, 106S150; 128Kan5, 275P1093; 82NH342, 134A520.

279–5 82NH342, 134A520.

279–9 204 Iowa995, 216NW116; 98Pa Super456.

280–15 101WVa711, 133SE695; 38Wyo 414, 267P691, 692 [citCJ]. [b] Three deeds made on same day to three grandchildren held to convey equally sized tracts. Mich 233SW179.

280–17 29PortoRico 984.

281–30 Iowa 230NW656; 236Ky11, 32 SW(2d)546.

281–31 213Ala466, 105S562.

281–36 223Ky574, 4SW(2d)385, 387 [citCJ]; 144Wash224, 257P627, 628 [quotCJ]; 100WVa508, 130SE666 (but deed referred to must describe land intended to be conveyed).

281–38 13LaA671, 128S696.

281–43½–New. to an engineer's report; TexCivA 4SW(2d)597 (held restricted thereto).

281–46 102WVa290, 135SE282.

282–50 13F(2d)878; 213Ala466, 105S 562; 215Ala297, 110S391; 99CalA482, 278P894; 89Fla296, 103S827; 90Fla 452, 108S189; 163Ga645, 136SE907; 164Ga856, 139SE547; 339 Ill 22, 170NE 709; 160La72, 106S698; 13LaA332, 126 S529; 124Mc347, 129A4; 254Mass350, 150NE203; 261Mass447, 158NE321 (easements); 125 Or150, 266P891, 898 [quot CJ]; Utah 263P485; Wash 289P520. [b] **Attached plat** is held to show that only half of lot was conveyed. 163La 945, 113S156. [c] **Purpose and effect of plan** referred to in deed is question of intention of parties. 254Mass350, 150 NE203.

282–51 213Ala466, 105S562; Ill 172NE 805; 226Ky32, 9SW(2d)1095.

283–54 163La945, 113S156; 124Mc347, 129A4.

283–56 Va 153SE667.

283–59 213Ala466, 105S562, 578 [quot Cyc]. [a] (2) Where lots are conveyed by giving number of lot and block as shown on plat, extent and location of lots must be determined from plat. Utah 263P485.

283–60½–New. but in such case another plan cannot be referred to and parol evidence cannot be received to show that another map or plat not referred to was the one intended. 213Ala466, 105S562.

283–62 [a] **That recording of plat was subsequent to date of deed** but prior to its acknowledgment is held immaterial. 215Ala297, 110S391.

283–68½–New. Where reference is made to map which represents no actual survey, and is shown to be inaccurate, it will not prevail over more particular description. 90Fla452, 108S189.

283–70½–New. Where parties know that plat referred to has been made without survey, rule does not apply and subsequent survey governs. 13F(2d) 878.

283–70¾–New. Where there is a discrepancy between a deed and a recorded map referred to therein, the map controls the description. 168La997, 123S 653.

283–73½–New. Description by sections and quarter sections considered with reference to public surveys of United States. 168Ark555, 270SW965.

284–77 168Ark555, 270SW965 (not inconsistent); 163Ga645, 136SE907; 214 Ky193, 282SW1102; 229Ky134, 16SW (2d)776; 191NC575, 132SE576. [a] **Rule held inapplicable.**–170Ga408, 153 SE53.

284–78 163Ga645, 136SE907; 317Mo 505, 297SW362; TexCivA 278SW(2d)591.

284–84 214Ky193, 282SW1102; 8LaA 680; TexCivA 300SW171, 176 [citCJ].

284–86 149Miss105, 115S196, 197 [quot Cyc].

284–87 TexCivA 300SW171, 176 [cit CJ].

285–91 170Ark758, 281SW17, 20 [cit CJ].

285–92 178Ark300, 10SW(2d)885.

285–99 100WVa508, 130SE666, 668 [cit CJ].

285–2 170La680, 129S128. [a] **When deed refers to another sale for more perfect description,** purchaser must look to reference deed to determine extent of acquisition. 170La680, 129S128.

286–7 102CalA42, 282P438; 90Fla452, 108S189, 205 [citCJ]; Mo 298SW(2d)133; 195NC363, 142SE229; 121 Or332, 254 P355.

286–8 121 Or332, 254P355.

287–12 169Ga395, 150SE584.

287–14 175Ark1118, 18SW(2d)823; 102 CalA42, 282P438; 164Ga257, 138SE333. [c] **Quitclaim deed of half of quarter-section** containing recital of acreage and parenthetical recital of previous conveyance of part thereof conveys grantor's interest in whole tract. Mo 298SW(2d) 1100.

287–17 308Mo 9, 271SW743.

287–18 163Ga645, 136SE907.

287–19 163Ga645, 136SE907.

287–20 216Ala202, 112S914, 916 [cit CJ]; Mo 298SW(2d)133 (intelligible portions should be given effect); 194NC 269, 139SE438.

288–22 191NC220, 131SE627.

288–23 See also 90Fla452, 108S189.

288–24 90Fla452, 108S189.

288–27 219MoA365, 271SW1008. [a] 216Ky355, 287SW936, 937 [quotCJ]; 219MoA365, 271SW1008.

288–28 219MoA365, 271SW1008. [b] **Qualifying words in habendum** may lessen, enlarge, explain, or qualify estate granted, unless there is necessary repugnance between grant and habendum. 219MoA365, 271SW1008.

288–31 204 Iowa995, 216NW116. But see 219MoA365, 271SW1008.

288–38 Can [1925] 3DomLR595 (natural meaning). [c] (3) Adjoining certain tracts means same as to go and run with lines of such tracts. 101WVa711, 133SE695.

289–40 101WVa711, 133SE695.

289–42 102Conn663, 129A849.

289–44 164Ga257, 138SE333.

289–48 164Ga257, 138SE333.

289–49 164Ga257, 138SE333; 82NH 342, 134A520.

289–52 233Ky403, 25SW(2d)1028; 152 Md13, 136A48; 82NH342, 134A520. [b] **Words of caution** denoting uncertainty in mind of one using them, and desire not to misrepresent. 102Conn663, 129 A849. [c] **Words do not weaken or destroy statement of distance and quantity** when no other guides are furnished. 102Conn663, 129A849.

290–53 152Md13, 136A48.

290–58 122 Okl 73, 250P890. [c] **Deed absolute on face** may be construed to convey one-half interest. 39 OklACR 295.

290–59 TexCivA 300SW171. [a] (5) Where husband joined in deed, releasing "all right of and to curtesy, and all other rights in the above-mentioned premises," it was held only his right as tenant by curtesy initiate was conveyed. 258Mass226, 154NE579(1stcase).

290–60 Iowa 227NW529; 122 Okl 73, 250P890; 156SC248, 153SE168(2dcase); TexCivA 299SW718.

291–66½–New. Where conveyance is definitely described by metes and bounds, statement of number of acres is merely cumulative. 214Ala187, 106 S815.

291–67 179Ark376, 16SW(2d)15; 26 OlaA171, 151NE790.

291–68 162La319, 110S489.

291–69 217AppDiv555, 217NYS106; 296Pa126, 145A706.

292–73 TexCivA 48SW(2d)985.

292–77 122 Or285, 258P205, 58ALR339; 29PortoRico 984 (rule applied to release of certain claims on property). But see 151Va322, 144SE497(2dcase).

292–78 TexCivA 48SW(2d)635.

292–79 194NC269, 139SE438; TexCivA 297SW888 (warranty deeds of undivided one hundred acres by grantors, who had already conveyed one hundred and fifty acres out of original three hundred and sixty-eight acres, held to convey one hundred acres from remaining tract). [a] **Warranty deed, conveying specified number of undivided acres** in land from which part had already been conveyed, conveys good title to amount specified. TexCivA 297SW888.

292–79½–New. A conveyance of fifty acres undivided in a large tract is a conveyance of a definite quantity of undivided land of larger tract. 160Ga822, 129SE98.

293–86 Mo 298SW(2d)1100.

293–89 TexCivA 28SW(2d)895, 896 [cit CJ].

294–91 103WVa341, 137SE744, 745 [cit CJ].

294–1 Ariz 243P922, 924 [quotCJ]; 208 Iowa759, 225NW939; Mont 290P255. [b] (3) Utah 263P485 (alley shown on plat with reference to which lots were sold). (18) Water rights pass under deed as appurtenant to land. 72 Mont318, 233P607. (19) Power line consisting of poles set in ground and wires strung thereon will pass with conveyance of soil in which poles are imbedded. 79CalA770, 251P331.

295–4 229Mich366, 201NW499, 502 [quotCJ].

295–7 84Mont571, 276P944; 136Misc 720, 241NYS632.

295–8 [a] **Personalty need not be attached or annexed to land in order to become appurtenance.** Mont 290P255.

295–10½–New. **Express grant of "appurtenances and all estate and rights of grantor in and to premises" construed.** 217AppDiv555, 217NYS106.

295–12 230AppDiv52, 243NYS57.

296–14 262Mass159, 159NE513; 195NC 473, 142SE713.

296–15 256Mass379, 152NE625.

296–17 85PaSuper555.

296–18½–New. Encroachment below surface of building not seen or contemplated by parties does not pass. 85Pa Super555.

296–24½–New. , growing crops. 315Mo 811, 288SW774.

296–21 Iowa 231NW358.

296–25 But see 194NC269, 139SE438 (conveyance of undivided interest, not including timber).

296–28½–New. A quitclaim deed conveys no title to a crop which has been harvested. 176Minn37, 222NW292.

297–30 31NM331, 245P249[citCJ].

297–37 NJ 150A399.

297–38 TexCommnA 292SW518; TexCivA 292SW633.

297–42 214Ky514, 283SW1059; TexCivA 318SW(2d)168.

297–45 93Fla849, 112S846, 851 [citCJ &Cyc].

298–47 43F(2d)873; 81Colo 168, 254P 768; 93Fla849, 112S846, 851 [citCJ& Cyc].

298–54½–New. Words "and at her death to be equally divided between lawful begotten heirs of her body" bars application of rule in Shelley's case. 191 NC453, 132SE278.

298–54¾–New. Deed to grantee and his legal heirs or next of kin created fee simple. Ala 130S890.

298–55 164Ga371, 138SE892 (dictum); 150SC351, 148SE190.

298–56 93Fla849, 112S846.

299–57 93Fla849, 112S846, 852 [citCJ].

299–58 164Ga371, 138SE892. Contra 81Colo 168, 254P768.

299–59 81Colo 168, 254P768; 164Ga 371, 138SE892.
299–60 93Fla849, 112S846.
299–61 93Fla849, 112S846.
299–65 81Colo 168, 254P768; Del 147 A165; 93Fla849, 112S846; 163Ga468, 136SE434; 207 Iowa696, 223NW497; 219Ky143, 292SW743; 114Nebr226, 206 NW754; 121 Or179, 254P359; 151Va 213, 144SE434; 153Va20, 149SE497.
299–66 93Fla849, 112S846, 852 [citCJ]; 163Ga468, 136SE434; 164Ga371, 138SE 892; 828 Ill 76, 159NE229; 207 Iowa 696, 223NW497 (deed construed to vest fee subject to life estates); 121 Or179, 254P359. See also 114Nebr226, 206NW 754. [b] **In Oklahoma.**–140 Okl 227, 282P617. [c] **Presumption is rebuttable.**–81Mont330, 263P421.
299–67 163Ga468, 136SE434. [a] (3) Deed conveying land in trust for married woman and her named children and their heirs and assigns only conveys fee simple title to married woman and named children where repugnant habendum may not be considered. 329 Ill 235, 160NE605.
300–69 163Ga468, 136SE434.
300–71 85CalA475, 259P770; 97CalA 296, 275P817; 328 Ill 76, 159NE229; 121 Or179, 254P359. [b] **"Ambiguity"** does not appear until application of pertinent rules of interpretation to face of instrument leaves it genuinely uncertain which one of two or more meanings is proper meaning. 127Kan365, 273P661 (2dcase).
300–75 93Fla849, 112S846, 851 [citCJ].
301–83 166Ga898, 144SE736; 89 IndA 119, 165NE768.
301–88 91PaSuper343.
301–92 121 Or373, 254P1012, 51ALR 1466.
301–93 121 Or373, 254P1012, 51ALR 1466; 156Tenn137, 299SW776.
301–94 190NC378, 130SE13; 121 Or373, 254P1012, 51ALR1466.
301–95 328 Ill 76, 159NE229.
301–97 NJCir 146A881(2dcase).
301–98 121 Or373, 254P1012, 51ALR 1466.
302–99 236Mich565, 211NW99; 121 Or 373, 254P1012, 51ALR1466.
302–3 162Ga428, 134SE49.
302–4 218Ky442, 291SW739.
302–5 [a] **Heirs of body in grant of fee conditional are named to qualify estate of their ancestor** and fix course of descent if he makes no disposition. 154SC 140, 151SE276.
302–11 218Ky442, 291SW739; 103WVa 272, 137SE5.
302–13½–New. Phrase "and then to his grandchildren forever" in deed to grantee and children, made when grantee was unmarried and had no children, is held not to affect fee simple taken by grantee, not depending on any contingency so as to constitute conditional limitation.
302–13⅓–New. A deed with a general grant and habendum reverting to the grantor at the death of the grantee creates a base fee determinable upon the death of the grantee before the grantor, 84 IndA500, 151NE627.
302–13¼–New. and, on prior death of the grantor, the grantee becomes the owner of the fee without limitation. 84 IndA500, 151NE627.
302–13⅓–New. Under statute, the possibility of reverter under conveyance of a base, determinable, or qualified fee may be alienated. 110Conn267, 147A 820.
302–13⅙–New. Deed to wife and daughter in fee survivor to take all held qualified or base fee. 169Ga543, 150SE912.
303–18 [d] **Deed to daughter and "heirs of her body"** creates contingent remainder of conveyance by daughter to one of her children who died leaving her surviving does not convey contingent remainder of other surviving children. 314Mo 206, 282SW696.
303–19 [a] **Omission in operating clauses** of deed of words "of her body" is held not to convert instrument from one creating contingent remainder to one creating vested estate in daughter or her children. 314Mo 206, 282SW696.
304–23 169Ga282, 150SE148.
304–24 169Ga282, 150SE148.
304–26 216Ala346, 113S270; 225Ky 355, 9SW(2d)49; 192NC398, 1s5SE121.
304–27 170Ga805, 154SE257.
304–27½–New. Form of the acknowledgment is not material in construing deed. 216Ala346, 113S270.
305–35 231Ky831, 22SW(2d)268; 100 WVa413, 130SE660. [a] (17) Deed conditioned that land should not be subject to grantee's debts, though deed was to grantee and heirs. 163Ga468, 136SE 434. (18) Devise or conveyance by man to his wife and children ordinarily vests life estate in wife with remainder to children. 231Ky731, 22SW(2d)133. (19) **Other instances.** 108WVa463, 151 SE435.
305–36 162Ga529, 134SE161, 47ALR 865; 162Ga731, 135SE76; 163Ga468, 136SE434; 222Ky584, 1SW(2d)1079; 191NC453, 132SE278; 8D 227NW479; 100WVa413, 130SE660. [c] **Grantee of one who took under deed to sons for** life and then to their children took only life estate where his grantor died without issue. 162Ga731, 135SE76.
305–38 Ala 130S780; 162Ga529, 134SE 161, 47ALR865; 163Ga468, 136SE434; 220Ky701, 295SW1034; 116Nebr428, 218 NW86; 196NC107, 144SE547; 100WVa 413, 130SE660. [a] **In Georgia.**–162Ga 731, 135SE76.
305–41 202Cal 23, 259P38 (construed as exception).
306–47 166Ga898, 144SE736; 215Ky 14, 284SW109.
306–47½–New. Conveyance of grantor's undivided half interest to wife and infant children created life estate in wife. 211Ky361, 277SW323 (remainder to children).
306–47⅓–New. Deed of premises to the wife for life with provision that the children have a home thereon conveys the life estate subject to the equitable rights of the children. 126Me45, 136A 119.
306–47¼–New. Under such a deed interest of the children is personal and did not extend to their heirs and assigns. 126Me45, 136A119.
306–48 124Kan818, 262P539, 591 [cit CJ].
306–51 [a] **Under statute permitting person not party to grant to take present interest deed** from husband to wife forever, providing that on her death title shall go to heirs of both parties, does not pass remainder to children of parties not named in deed. 8D 216NW 592.
306–52¼–New. Deed to son and heirs prohibiting sale of land during life of son and minority of youngest child held not to give remainder interests to children. 160Ga807, 128SE90.
306–52⅓–New. No remainder can be limited after grant of estate in fee. 192 NC398, 135SE121.
306–53 191NC453, 132SE278; TexCivA 296SW929.
306–57 212Ala512, 103S591; 120Kan 545, 246P992; 191NC453, 132SE278. [c] **Under conveyance to two life tenants** with remainder to their heirs, remainder to moiety of life estate vested on death of either life tenant. 221Ky123, 297SW1104.
307–58 162Ga731, 135SE76; IndA 158 NE299; 222Ky584, 1SW(2d)1079.
307–59 162Ga731, 135SE76. [a] **On death of grantee without issue** estate is left in grantor and passes to his heirs. 162Ga731, 135SE76.
307–63 [c] **Appointment of trustee for infant grantee** is one of main facts favoring vesting of grant, notwithstanding possession or enjoyment is postponed. 168Ga790, 149SE221. [d] **Gift vests immediately on delivery of instrument,** where income is given to grantee during period for which possession or enjoyment by grantee is postponed. 168 Ga790, 149SE221. [e] **Grant vests instanter** if futurity annexed to substance of gift appears to relate not to substance of gift, but merely to intent to delay vesting in possession. 168Ga790, 149SE221.
307–64 32 OhA423, 168NE220.
307–64½–New. Vested remainder may be subject to condition subsequent. Tex CivA 26SW(2d)694.
307–65 223AppDiv98, 227NYS486.
307–68 TexCivA 296SW929.
307–69 42F(2d)596; 329 Ill 604, 161NE 141 (estate held contingent); 219Ky116, 292SW748; 99NJEq585, 134A546. [a] (2) Where grant is conditioned on event which may never occur at all. 168Ga790, 149SE221.
308–70 37F(2d)304; 166Ga898, 144SE 736; 311Mo 208, 278SW686.
308–71 168Ga790, 149SE221.
308–75 330 Ill 48, 161NE68.
308–77 37F(2d)304; 171Ark117, 283SW 379; 327 Ill 28, 158NE366; 214Ky536, 283SW1019.
308–78 327 Ill 28, 158NE366.
309–79 171Ark117, 283SW379; 190NC 558, 130SE166. [c] **Contingent remainder of heir of life tenant** at latter's death becomes estate in fee. 221Ky123, 297 SW1104.
309–81 190NC558, 130SE166.
309–89 169Ga543, 150SE912.
309–90 335 Ill 156, 166NE498 (provided both are determined by same contingency); 224Ky97, 5SW(2d)906.
310–93 But see 154Miss828, 123S881(2d case).
310–94 [a] **Under deed to grantor's son and his heirs, issue of his body, reserving life estate to grantor, and with gift over to grantor's children in default of issue to grantee,** grantee cannot take under gift over. 335 Ill 156, 166NE498.
310–96 321 Ill 368, 151NE905.
310–99 127Misc498, 216NYS616; 156 Tenn137, 299SW776; 147Va1030, 133SE 581.
310–2 TexCivA 296SW929. See also 223 AppDiv693, 229NYS440.
311–3 127Misc498, 216NYS616; Va 155 SE802. See also RI 132A2. [a] **Grant to sons for life and then to their children** vests remainder of son who dies without issue in estate of grantor and his heirs. 162Ga731, 135SE76.
311–5½–New. Where a grantor includes a defeasance clause providing that, if the grantee should die without leaving children, land conveyed for consideration of parental love and affection should revert to his "estate," his estate in the sense of the sum total of possessions is meant, and not his heirs, and the deed provides for returning the interest conveyed, whether it was a possibility of reverter or contingent reversion, subject to a conveyance of the fee thereof by subsequent absolute deed by the grantor and his wife. 227Ky705, 13SW(2d)1043.
311–5⅓–New. A conveyance to a trust company "in fee simple" in trust to pay income to a life tenant, and after his death to his son during his minority, after which the property was to be conveyed to him, was held to create a vested remainder in the son and not reversion in the grantor. 168Ga790, 149SE221.
311–6 299Pa484, 149A725. [a] **Deed construed to be warranty in fee,** though described as estate "by entirety." 201 Iowa1290, 207NW369.
311–7 207Cal 542, 279P443.
311–11 247Mich563, 226NW242.
311–15 227Ky773, 14SW(2d)183; 121 Or179, 254P359; TexCivA 298SW645.
311–17½–New. In construction of deeds, equitable estates are governed by the same rules as legal estates. 329 Ill 235, 160NE605.
312–20 223Ky321, 2SW(2d)405.
312–21 121Kan678, 249P671.
312–23 318 Ill 425, 149NE427; 120Kan 545, 246P992 (deed creating present interest).
313–30 35 OhA1, 171NE367 (rights of grantees can rise no higher than those of their predecessors in title). [d] **Warranty deed, executed after action on mortgage** covering land was barred by limitation, held to convey both legal and equitable estate. TexCivA 297SW281.
313–31 121Kan291, 246P1017.
313–36 149Miss205, 115S336; 102NJEq 193, 140A226. [b] (2) 130 Or148, 279P 546 (undivided half interest). (3) 161 Ga711, 132SE547; 130 Or148, 279P546. (5) Contingent executory devise may be conveyed by quitclaim deed. 121Kan 291, 246P1017.
314–37 40F(2d)882; Fla 129S767; 161 Ga711, 132SE547; 163Ga917, 137SE396; 121Kan291, 246P1017; 128 Okl 96, 261 P165; TexCivA 4SW(2d)985. [b] 26 OhA306, 159NE490.

314-40 202 **Iowa**1251, **211NW**898; 26 **OhA**306, 159**NE**490; 117 **Okl** 195, 246**P** 472. [f] **Excludes any implication** that grantor has good title or any title. 202 **Iowa**1251, 211**NW**898.

315-43 [c] **Quitclaim deed may operate as contract** to convey interest subsequently acquired. **Mont** 267**P**691.

316-55 47**RI** 366, 133**A**437.

316-57 **Ont** [1927] 3**DomLR**199. See also 29 **OhA**296, 163**NE**573.

316-60 But see 100**NJEq**254, 135**A**509.

316-62 145**Va**669, 134**SE**707.

317-64 145**Va**669, 134**SE**707.

318-82 150**Md**125, 132**A**587; 232**Mich** 175, 205**NW**169, 170 [citCJ]; 20 **OhA** 171, 151**NE**790.

318-83 214**Ky**536, 283**SW**1019.

318-89 100**NJEq**254, 135**A**509.

319-92½-New. **Conveyance by owner of fee** could not affect or lessen the estate of the life tenant. 256**Mass**76, 152**NE** 341.

319-94 [a] (1) 151**Md**477, 135**A**245; 192 **NC**630, 134**SE**629. [f] **"Purchase"** as used in rule is held to include every mode of acquisition of property save substitution of heir for ancestor on latter's death. 151**Md**477, 135**A**245.

319-95 **TexCivA** 8**SW(2d)**776.

320-96 See also **NJPrerog** 145**A**867.

320-97 208 **Iowa**586, 226**NW**8 (abolished); 215**Ky**14, 284**SW**109; 151**Md** 477, 135**A**245; **SD** 227**NW**479. [a] **Rule held applicable** in apt cases, despite statutory repeal of rule. 151**Md**477, 135**A** 245.

320-99 151**Md**477, 135**A**245; 192**NC**630, 134**SE**629.

320-1 329 **Ill** 235, 160**NE**605; 151**Md** 477, 135**A**245; **NJPrerog** 145**A**867.

320-2 143**SC**277, 141**SE**448.

320-4 336 **Ill** 137, 168**NE**116(2dcase).

320-5 But see 171**Ark**117, 283**SW**379. [d] **Rule held not applicable.**–171**Ark**117, 283**SW**379.

321-6 156**Md**428, 144**A**367; 192**NC**630, 134**SE**629.

321-8 See also 151**Md**477, 135**A**245.

321-16 93**Fla**849, 112**SE**846, 851 [citCJ]. See also **Mo** 23**SW(2d)**20.

322-17 151**Md**477, 135**A**245; 132**SC**306, 128**SE**31; **TexCivA** 13**SW(2d)**176.

322-18 196**NC**668, 146**SE**710.

322-19 121 **Or**179, 254**P**359; 100**WVa** 413, 130**SE**660.

322-20 See also 129**Misc**201, 222**NYS** 656.

322-21 100**WVa**413, 130**SE**660.

323-27½-New. Presumption that the word "heirs" is used in a technical sense is more difficult to overcome in the case of wills than in deeds. 128 **Or**483, 275**P** 45.

323-27½-New. In absence of proof to contrary, use of word "heirs" implies that heirs or assigns of grantees named were intended. **TexCivA** 25**SW(2d)**881.

323-28 151**Md**477, 135**A**245; 195**NC**427, 142**SE**313. [e] **Word "then" in deed** conveying land to daughter and then to heirs, when used as adverb of time means immediately afterward. 170**Ga** 805, 154**SE**257.

323-29 129**Misc**201, 221**NYS**656. [a] **In New York.**–129**Misc**201, 221**NYS**656.

324-35½-New. Reconveyance by the grantee to the grantor does not enlarge the grantor's interest where the estate granted was limited. 286**Pa**237, 133**A** 252.

324-36 [a] **In Georgia.**–166**Ga**898, 144**SE** 736.

324-37 193**NC**453, 137**SE**418.

324-38 193**NC**453, 137**SE**418.

324-39 170**Ga**805, 154**SE**257.

324-42 128 **Or**483, 275**P**45; 132**SC**306 128**SE**31.

324-43 See also 132**SC**306, 128**SE**31.

324-44 329 **Ill** 235, 160**NE**605.

324-45 **NC** 154**SE**825.

325-46 329 **Ill** 235, 160**NE**605; 335 **Ill** 156, 166**NE**498; **Mo** 23**SW(2d)**20; **Mo** 29**SW(2d)**1100. [a] (2) Deed granting fee tail to grantee with reversion to grantor's heirs on default of grantee's issue, and reserving life estate to grantor vests in grantee estate for life, subject to previous life estate reserved. 335 **Ill** 156, 166**NE**498. [c] **That grantee executed mortgage for consideration named in deed** held not to show understanding that deed conveyed fee. **Mo** 29**SW(2d)** 1100.

325-48 But see 132**SC**306, 128**SE**31.

325-50 [a] **In Oregon.**–128 **Or**483, 275**P** 45.

326-57 129**Kan**786, 284**P**436; 132**SC** 306, 128**SE**31 (dictum). [b] But see 132 **SC**306, 128**SE**31 ("bodily issue" not equivalent to "children").

326-58 162**Ga**731, 135**SE**76.

326-62 168**Ga**752, 149**SE**44(1stcase); 162**Ga**731, 135**SE**76; 164**Ga**279, 138**SE** 218.

326-63 162**Ga**731, 135**SE**76; 164**Ga**279, 138**SE**218; 168**Ga**752, 149**SE**44(1stcase).

327-65 192**NC**398, 135**SE**121.

327-70 162**Ga**731, 135**SE**76; 164**Ga**279, 138**SE**218; 129**Kan**786, 284**P**436 (deed to grantee for life without power of alienation, and at death to surviving children, creates life estate and remainder and not estate tail); 147**Va**1030, 133 **SE**581. [a] (5) Grant to sons for life refers to grantor's sons individually. 162**Ga**731, 135**SE**76.

327-71 162**Ga**731, 135**SE**76; 164**Ga**279, 138**SE**218. [b] **Grant to sons for life and then "to their children"** leaves remainder to children of each son as class. 162**Ga**731, 135**SE**76 (construction of grant). [c] **Grant to children equally for life** with remainder to their children is held to give remainder to latter only in shares of parents. 164**Ga**279, 138**SE** 218.

328-75 196**NC**778, 147**SE**294.

328-76½-New. , and even where there is no statute in other jurisdictions. 163 **Ga**520, 136**SE**551, 50**ALR**615.

328-77 **IndA** 158**NE**299; 197**NC**508, 149**SE**687.

328-81 Contra 132**SC**306, 128**SE**31.

328-82 [a] See also 132**SC**306, 128**SE**31.

329-87 336 **Ill** 594, 168**NE**666; **Tex CivA** 21**SW(2d)**532; 108**WVa**285, 150**SE** 744.

329-88 192**NC**398, 135**SE**121; 198**NC** 802, 153**SE**458; **TexCivA** 13**SW(2d)**743. [a] (3) If grantee has children at time estate is conveyed to himself and children, he and children take as tenants in common. 192**NC**398, 135**SE**121.

329-91 **NJCh** 145**A**329.

330-96 198**Wis**547, 224**NW**717.

330-2 219**Ky**671, 294**SW**168.

330-4 192**NC**505, 135**SE**332.

330-4½-New. **Under deed giving land to daughters for life** remainder to their children, children being designated as a class take per capita. 192**NC**505, 135**SE** 332.

331-18½-New. **Description and habendum.** Habendum controls over description in determining extent of estate granted. 260**Mass**407, 157**NE**362.

331-19 216**Ala**81, 112**SE**444, 52**ALR**536.

331-20 329 **Ill** 235, 160**NE**605; 84 **IndA** 500, 151**NE**627; 260**Mass**407, 157**NE**362. [a] (10) 116**Nebr**428, 218**NW**86 (may determine character and extent of estate).

331-21 213**Ala**66, 104**S**5; 204 **Iowa**443, 215**NW**599. See also 97**CalA**296, 275**P** 817. [a] 204 **Iowa**443, 215**NW**599. [d] **Reference may be had to habendum** only where granting clause does not definitely describe estate granted. 329 **Ill** 235, 160 **NE**605 (use of word "only" in connection with word "heirs" in granting clause held not to give rise to indefinite description).

332-22 5**F(2d)**160; 212**Ala**512, 103**S** 591; 216**Ala**494, 113**S**620; 179**Ark**376, 16**SW(2d)**15; 93**Fla**849, 112**SE**846; 204 **Iowa**443, 215**NW**599; **Md** 152**A**107(2d case) (when rule applicable).

332-23 310**Mo** 684, 276**SW**39; 129**Misc** 201, 221**NYS**656; 121 **Or**179, 254**P**359.

333-25 213**Ala**66, 104**S**5; 329 **Ill** 235, 160**NE**605; 84 **IndA**500, 151**NE**627.

333-27 202**Cal** 23, 259**P**38; 93**Fla**849, 112**SE**846; **Md** 152**A**107(2dcase); 310**Mo** 684, 276**SW**39.

333-28 204 **Iowa**443, 215**NW**599; 121 **Or**179, 254**P**359.

333-29 329 **Ill** 235, 160**NE**605; 192**NC** 398, 135**SE**121. [a] (2) Deed to grantee and his children with habendum to them, "their lives, heirs and assigns being repugnant," heirs and assigns will control because consistent with fee conveyed in previous clause. 192**NC**398, 135 **SE**121.

333-30 213**Ala**66, 104**S**5 (habendum cannot enlarge estate granted in premises of deed); 329 **Ill** 235, 160**NE**605.

333-32 216**Ala**288, 112**S**815. [a] (2) 260**Mass**407, 157**NE**362. [b] **Granting clause failing to define estate created is** not inconsistent with habendum limiting life estate. 160**Tenn**645, 28**SW(2d)**349.

333-34 212**Ala**512, 103**S**591; 327 **Ill** 28, 158**NE**366; 216**Ky**355, 287**SW**936; 198 **Wis**547, 224**NW**717.

334-37 93**Fla**849, 112**S**846; 162**Ga**529, 134**SE**161, 164 [citCJ], 47**ALR**865; 207 **Iowa**696, 223**NW**497. [d] **Covenant of warranty** cannot change estate granted in premises and habendum. 162**Ga**529, 134**SE**161, 47**ALR**865.

334-38 162**Ga**529, 134**SE**161, 47**ALR** 865.

334-40 204 **Iowa**443, 215**NW**599; 116 **Nebr**785, 219**NW**138; 50**RI** 475, 149**A** 374; **SD** 216**NW**592; **TexCivA** 15**SW (2d)**72; 153**Va**20, 149**SE**497. [c] (2) 204 **Iowa**443, 215**NW**599. [d] **Rule applies to grant of fee conditional** with superadded words of limitation repugnant thereto. 132**SC**306, 128**SE**31.

335-41 227**Ky**705, 13**SW(2d)**1043. [a] 207**Cal** 542, 279**P**443. [c] (2) Word "heirs," used in granting clause and in warranty, may be qualified by use of words denoting procreation in clause describing party of second part and in habendum. 310**Mo** 684, 276**SW**39.

335-42 129**Misc**201, 221**NYS**656.

335-44 207**Cal** 542, 279**P**443.

336-54 190**NC**378, 130**SE**13.

336-55 190**NC**378, 130**SE**13; **NC** 154**SE** 825.

336-57 190**NC**378, 130**SE**13.

336-59½-New. A conveyance by deed to a school board with provision "to hold same for uses aforesaid mentioned forever" does not create an estate with a condition subsequent. 168**Ga**359, 147**SE** 882.

336-62 121 **Or**373, 254**P**1012, 51**ALR** 1466.

336-64 **NJCir** 146**A**881(2d case).

337-67 116**Nebr**785, 219**NW**138, 139 [quotCJ]; 108**WVa**128, 150**SE**531, 66 **ALR**518 (restriction against conveying, demising, or leasing property to any person of Ethiopian race or descent for fifty years).

337-69 116**Nebr**428, 218**NW**86.

337-69½-New. Power of alienation inheres in every grant in absence of clause in restraint of alienation. 130**Kan**165, 285**P**563.

337-72 **Mass** 171**NE**229.

338-79 152 **Tenn**664, 280**SW**689.

338-85½-New. Property excepted or estate reserved in a deed is never included in the grant. **TexCommnA** 11**SW(2d)** 778.

338-86 120**Kan**545, 246**P**992.

338-87 329 **Ill** 323, 160**NE**548.

340-95 **CalA** 258**P**91, 95 [quotCJ]; 81 **Colo** 168, 254**P**768, 770 [quotCJ]; 164 **Ga**371, 138**SE**892, 895 [citCJ]; 126**Me** 427, 139**A**230; 283**Pa**250, 129**A**83; 87**Pa Super**369; 13**PaDist&Co** 616; **Tex CommnA** 11**SW(2d)**778; 187**Wis**232, 202 **NW**34. [a] (14) "The creation in behalf of a grantor of some new right in the thing granted." 210**Ky**612, 615, 276 **SW**540.

340-96 81**Colo** 168, 254**P**768, 770 [quot CJ]; 164**Ga**371, 138**SE**892, 895 [citCJ]; 126**Me**427, 139**A**230; 81**Mont**430, 263**P** 692; 283**Pa**250, 129**A**83; 87**PaSuper** 369; 13**PaDist&Co** 616; 187**Wis**232, 202 **NW**34. [a] (4) 86**CalA**736, 261**P**1092. [b] (20) Reserving and retaining from sale caves and right of way for caves that may be upon or under land. 210 **Ky**612, 276**SW**540. (21) "Reserving unto the grantor the right to the fixtures and improvements to and upon said premises, together with the right to enter thereon and to remove the same." 122 **Or**531, 259**P**911.

340-96½-New. A reservation is an incorporeal hereditament; an exception is a part of the realty itself. 210**Ky**612, 276**SW**540.

341-97 81**Colo** 168, 254**P**768, 770 [quot CJ]; 164**Ga**371, 138**SE**892; 210**Ky**612, 276**SW**540; 81**Mont**430, 263**P**692; **Tex CommnA** 11**SW(2d)**778; 187**Wis**232, 202 **NW**34. See also **TexCommnA** 299**SW** 225.

341-98 81**Colo** 168, 254**P**768, 770 [quot CJ]; 164**Ga**371, 138**SE**892; 214**AppDiv** 8, 210**NYS**623; 131 **Or**19, 281**P**832.

341-99 202**Cal**23, 259**P**38, 41 [quotCJ]; **Cal** 271**P**471; 81**Colo** 168, 254**P**768, 770

[quotCJ]; 164Ga371, 138SE892; 126Me 427, 139A230; Mass 171NE229; 214App Div8, 210NYS623, 627 [citCJ]; 13PaDist &Co 616; 187Wis232, 202NW34. [c] (2) Reservation of use of property not inconsistent with use by grantee is held exception rather than reservation. 81 Colo 168, 254P768. (3) Under deed reserving strips of land and declaring that they are not included in conveyance, grantee takes no title thereto. 230Ky 769, 20SW(2d)1002.

342-1 164Ga371, 138SE892.

342-1½-New. The nature of a provision as a reservation or exception is not determined by the technical language used. 122 Or531, 259P911.

342-1⅓-New. but by the context. 122 Or531, 259P911.

342-5½-New. Whether a particular provision of a deed constitutes an exception or a reservation depends on the nature and effect of the provision itself. 247Mich369, 225NW514(2dcase).

342-6 202Cal 23, 259P38, 41 [citCJ]; CalA 258P91, 95 [citCJ].

342-7 But see 202Cal23, 259P38.

342-9 Cal 271P471; 164Ga371, 138SE 892, 895 [citCJ]; 122 Or531, 259P911.

343-10 210Ky761, 286SW826. [a] 283 Pa250, 129A83.

343-11 210Ky761, 286SW826. [c] (7) Other instances. Cal 271P471.

343-13 CalA 258P91, 95 [quotCJ].

343-14 202Cal23, 259P38, 42 [quotCJ]; CalA 258P91, 95 [quotCJ]. [a] 202Cal 23, 259P38.

343-15½-New. Where parties contract for the purchase and sale of a tract of land with the understanding that the vendor shall have a certain portion and, at the same time execute deeds the vendor's deed conveying the whole tract and the vendee's deed conveying the portion intended for the vendor, the transaction amounts to a conveyance with reservation. TexCivA 18SW(2d)773.

343-16 164Ga371, 138SE892, 895 [cit CJ] (dictum); 145Wash295, 259P1079, 1081 [quotCJ]. [a] (3) However, under statutory modification of common-law rule, words of inheritance are held not essential to create reservation in fee. 164Ga371, 138SE892.

344-17 164Ga371, 138SE892, 895 [cit CJ].

344-18 66Utah509, 243P922, 924 [cit CJ].

344-19½-New. By an exception a severance of caves and surface of the land may be made. 210Ky612, 276SW540.

344-19⅓-New. In case of exception of cave, grantor retains something more than mere cavity; he owns so much of the material above, about, and below the cavity as is necessary to preserve and maintain the cave. 210Ky612, 276SW 540.

344-20½-New. Generally the benefit of a defect of description in an exception or reservation accrues to the grantee. 30Ariz82, 244P1022.

344-20⅓-New. The granting part of a deed is not invalidated by a defect in the exception, but the exception itself becomes ineffectual. 86CalA736, 261P 1092.

344-21 CalA 286P510; TexCommnA 299SW225. [a] Rents and profits through stated period may be reserved. Mont 288P616.

344-23 157Md144, 145A369.

344-34 81Mont430, 263P692.

344-35½-New. Deed is held operative which excepted certain lands and identified exceptions through map referred to in deed. 192NC40, 133SE173.

344-36 Wash 287P46.

344-37 119Kan83, 240P576 (reservation in deed held not to cut down grant). [b] Particular reservations or exceptions construed.–200Cal425, 253P733.

344-38 [a] City's deed conveying property subject to "permanent and perpetual easement" to portion used for subway station, held to withhold fee to portion retained. 214AppDiv8, 210NYS623.

345-40 Mass 171NE229.

345-40½-New. Part of an estate excepted and not granted necessarily remains in the grantor. TexCommnA 11 SW(2d)778.

345-40⅓-New. A reservation in a deed to desert land of the right to well sites has been construed as being an absolute equitable interest upon the selection of a site and construction of a well, independent of any right to rescind the contract or recover damages for breach. 30Ariz82, 244P1022.

345-40¼-New. Language speaking in futuro will be given effect if not contrary to law. 213Ala494, 106S150.

345-40⅕-New. A recital in habendum clause to effect that grantor did not warrant property, "except coal, mineral and timber," has been held exception to warranty and not to grant. 145Va731, 134SE696.

345-42 102CalA42, 282P438; TexCommnA 292SW518, 520 [citCyc]; TexCivA 293SW628; 152Va889, 148SE779.

345-43 23AlaA416, 125S398 (excepted land must be sufficiently identified).

345-44 102Conn663, 129A849 (final rule of interpretation is determination of what he meant by what he said); 13Pa Dist&Co 616.

345-46 200Cal 425, 253P733. [a] 187 Wis232, 202NW34.

345-47 318 Ill 425, 149NE427; RI 150 A462.

345-48 153Tenn418, 284SW68.

346-55 114Tex452, 270SW1014.

346-57½-New. of caves; 210Ky612, 276SW540.

346-59 152Tenn664, 280SW689.

346-60½-New. of ways; 152Tenn664, 280SW689.

347-63 CalA 258P91 (life estate in grantor's surviving husband).

347-72 TexCommnA 299SW225.

347-73 TexCommnA 299SW225.

347-81½-New. Where a valid reservation is made, the entire grant, including the reservation, passes, subject to the reservation. 39GaA295, 147SE189.

347-82 329 Ill 334, 160NE597.

348-84 30Ariz82, 244P1022, 1026 [quot Cyc].

348-85 30Ariz82, 244P1022, 1026 [quot Cyc].

348-94 Ala 127S155 [quotCJ].

349-6½-New. A deed granting described property, except a right of way previously granted, together with reversions, conveys the reversionary interest in the strip granted for the right of way. 90CalA96, 265P548.

349-7 5PaDist&Co 691.

349-11 126Me427, 139A230.

350-21½-New. A deed to certain land reserving a private way does not grant the right to open an unobstructed passage of light and air through the length of the passageway. 265Mass203, 163NE 856.

350-25½-New. Exception of caves, and rights therein, included rights of ingress, egress, search for openings, exploration, and exhibition. 210Ky612, 276SW540.

351-36½-New. An exception of caves retains to grantor and his successors in interest the right of exclusive possession. 210Ky612, 276SW540.

351-36⅓-New. even as against the grantee; 210Ky612, 276SW540.

351-36¼-New. and the grantor, or his successor in interest, may remove boulders or other obstructions in route of travel. 210Ky612, 276SW540.

351-36½-New. preserve natural formations of stalactite and stalagmite. 210 Ky612, 276SW540.

351-36⅙-New. or remove and sell them, if support of land above is not destroyed. 210Ky612, 276SW540.

351-37 145Wash295, 259P1079.

351-39 145Wash295, 259P1079, 1081 [quotCJ].

351-40 145Wash295, 259P1079, 1081 [quotCJ].

351-41 145Wash295, 259P1079, 1081 [quotCJ].

351-42 217Ala510, 116S693 (interest vests in præsenti); 221Ky644, 299SW 543 (widow is not estopped to exercise possessory rights where grantee knew of rights); 127Me328, 143A169; TexCommnA 299SW225. [c] Reservation of possession, rents, and profits until demand shall be made for them requires making of demand regardless of whether it would have been complied with if made. 199Cal 203, 248P672.

351-43 221Ky644, 299SW543; 190NC 378, 130SE13; 146Wash638, 264P1003. [d] Quitclaim deed by life tenant "subject to support" of grantor (1) till death or property sold is not reservation of possession, rents, and profits. 311Mo 208, 278SW686. (2) Such deed is not void but conveys to grantee right of possession apart from right to support, though grantee can take all rents and profits and out of them comply with obligation to support without yielding possession. 311Mo 208, 278SW686. [e] Reservation for support is not necessarily interest in land or lien thereon, but agreement or obligation for support and at most ground for setting aside deed for failure to support. 311Mo 208, 278 SW686.

352-50⅓-New. Under a provision in a deed requiring the delivery of premises not later than a given number of days, grantor is entitled to retain possession for the full period. TexCommnA 299SW 225.

352-61 164Ga371, 138SE892. [a] Reasonable time under terms of reservation held jury question.–164Ga371, 138SE 892.

352-65½-New. A limitation of time within which to enter and remove a building and fixtures excepted in a deed does not operate to convey them to the grantee or his successors in interest. 122 Or531, 259P911.

352-66 83CalA391, 257P124; 190NC 326, 130SE18.

352-69 121 Or373, 254P1012, 51ALR 1466.

353-70 215Ala412, 111S427. [a] Recitals held not to constitute conditions.–15DelCh286, 136A833.

353-71 286Pa364, 133A565, 47ALR 1172. [d] Conditions are created only expressly, or by necessary implication. 220Ky703, 295SW1063.

353-73 215Ala412, 111S427, 430 [cit CJ]; 286Pa364, 133A565, 47ALR1172.

353-76 327 Ill 28, 158NE366.

354-79 247Mich29, 225NW487; 136 Misc406, 241NYS5.

354-80 167Ga491, 145SE877.

354-82 327 Ill 28, 158NE366.

354-83 332 Ill 561, 164NE23, 63ALR 658; 127Misc498, 216NYS616; 190NC 326, 130SE18.

354-84 213Ala66, 104S5.

354-85 327 Ill 28, 158NE366.

354-88 327 Ill 28, 158NE366; TexCivA 21SW(2d)1102 (intention of grantor controls as to whether provision amounts to condition precedent).

355-91 327 Ill 28, 158NE366; 222Ky 569, 1SW(2d)979; 219AppDiv220, 220 NYS58. [a] (22) Deed conveying land to city for park for exclusive use of white citizens, containing agreement by city to accept land for such purpose and providing that land shall revert to grantor or his estate when park is neglected for longer period than twelve months or ceases to be used as park. 161Ga588, 131SE487, 43ALR1045. (23) Deeds requiring grantee to maintain church, raise fund for appeal, and maintain connection with presbyterian church organization, with right of grantor or heirs to reënter in case of breach, conveys fee, with possibility of reverter. 129Misc506, 221NYS692. (24) Use of land conveyed restricted to residence purposes with penalty of reverter. 80 CalA459, 251P87. (25) Deed recites that it is given in gift, but that, if grantee fails to make payments, title should revert to grantor. 335 Ill 533, 167NE802. [b] 321 Ill 450, 152NE133. [c] Deed held not to create estate on condition subsequent, in absence of clause of forfeiture, reverter, or reëntry and other controlling indicia. 191NC769, 133SE 93; SD 220NW500. [d] Condition may be subsequent though designated as precedent. 222Ky569, 1SW(2d)979.

355-92 Del 147A165; 219AppDiv220, 220NYS58, 62 [quotCJ]; 128Misc603, 220NYS50, 56 [citCJ]; 190NC326, 130 SE18; 32PortoRico 12.

355-93 213Ala66, 104S5; 128Me320, 147A343; 155Md221, 141A525; 219App Div220, 220NYS58, 62 [quotCJ]; 128 Misc603, 220NYS50, 56 [citCJ]; 190NC 326, 130SE18; 32PortoRico 12.

355-94 155Md221, 141A525; 229App Div428, 243NYS483.
355-95 128Misc603, 220NYS50, 56 [cit CJ].
355-96 190NC520, 130SE189 (no particular language necessary).
355-97 213Ala66, 104S; 155Md221, 141A525; 190NC326, 130SE18; 106WVa 339, 146SE385. [a] **Particular words are unnecessary.**–Del 147A165.
356-99 128Misc603, 220NYS50, 54 [cit CJ].
356-1 327 Ill 28, 158NE366.
356-3 327 Ill 28, 158NE366; 129Misc 609, 222NYS83.
356-7 80CalA459, 251P87.
356-9 Del 147A165; 155Md221, 141A 525; 32PortoRico 12. [b] 32PortoRico 12. [h] 190NC326, 130SE18.
357-12 190NC326, 130SE18.
357-13 215Ala412, 111S427; 80Cal 459, 251P87; TexCivA 278SW316.
357-15 213Ala66, 104S; 215Ala412, 111S427; Del 147A165; 243 IllA170; 82NH186, 131A836; 128Misc603, 220 NYS50; 245NYS510; 126 Okl 3, 258P 906; TexCivA 278SW316; TexCivA 14 SW(2d)369. [c] (18) Agreement to construct and maintain flume is covenant and not condition. TexCivA 278SW316. (19) Provision in deed that grantee shall live on property and take care of grantors, as consideration thereof, should be treated as covenant, for which remedy would be suit for breach of covenant, unless deed was taken with no intention of complying with obligation assumed. 158Tenn394, 138SW(2d)49.
358-16 155Md221, 141A525; 128Misc 603, 220NYS50.
359-19 80CalA459, 251P87.
359-20 80CalA459, 251P87.
359-30 80CalA459, 251P87, 88 [citCJ]; 338 Ill 412, 170NE425.
359-30½-New. But the law is opposed to conditional or limited ownership and favors absolute enforcement. 221App Div502, 224NYS651.
359-31 80CalA459, 251P87.
360-44 [a] (4) Other conditions held not repugnant. 161Ga588, 131SE487, 43ALR1045.
360-51 206 Iowa1242, 219NW490. [a] (2) Restriction of occupancy and ownership to white persons is not repugnant to fee simple. Colo 291P822.
360-58 316Mo 891, 292SW702.
360-66 Mo 28SW(2d)999.
361-68 205Cal 46, 269P660; 80CalA 459, 251P87; 128Misc408, 219NYS59; 121 Or373, 254P1012, 51ALR1466. [a] (7) Restriction of occupancy and ownership to white persons is valid. Colo 291P822.
361-69 96CalA418, 274P380.
361-70 Cal 287P962; 128Misc408, 219 NYS59.
361-77 Colo 291P822; 327 Ill 28, 158 NE366; 206 Iowa1242, 219NW490; 124 Kan604, 261P840; 156Md229, 144A245; 129Misc506, 221NYS692; 191NC789, 133 SE93; 7PaDist&Co 738; SD 227NW479 (condition that life tenant shall not mortgage or encumber property).
361-79 124Kan604, 261P840, 842 [cit CJ]; 124Kan792, 797, 262P601 [citCJ]. [b] (3) Restriction against conveying, demising, or leasing property to any person of Ethiopian race or descent for fifty years. 108WVa128, 150SE531, 66 ALR518. [c] **To be effective** some enforceable result of consequence for breach of such restrictions must be prescribed in instrument. 129Kan24, 281 P888.
362-80 203 Iowa979, 213NW605. But see 327 Ill 28, 158NE366.
362-84½-New. All provisions of a deed must be considered in determining whether a covenant is invalid as undue restraint on alienation. 153Md699, 142 A380.
362-84¼-New. A stipulation by the husband in a divorce action that he will not convey or encumber land made for the benefit of the children is not a conveyance to them. 206 Iowa1242, 219NW 490.
362-85 154Miss441, 122S488.
362-88 252Mass513, 147NE837 (provision for period during which restrictions were to remain in force held to apply to restriction as to frontage of lots on redivision, though this restriction was in separate paragraph); 286Pa364, 133A565, 47ALR1172; 155Tenn25, 290 SW8.
362-89 220Ky703, 295SW1063; 286Pa 364, 133A565, 47ALR1172.
363-91 295Pa40, 144A740.
363-1½-New. A deed delivered on condition that reconveyance deed be executed gives grantor a right to have implied promise to recovery specifically performed. 125Misc546, 211NYS557.
363-1¾-New. Courts prefer construing stipulation in deed to be covenant, trust, or equitable charge rather than condition. 15DelCh286, 136A833.
363-1¼-New. A covenant by the general owner of land that no lot or plot of land shown on the map shall be conveyed excepting subject to restrictions is not an actual restriction. 103NJEq 478, 143A627.
363-2 76CalA629, 245P464; 85CalA717, 259P1013; 94CalA323, 271P118; 220Ky 703, 295SW1063; 128Mc320, 147A343; 221AppDiv502, 224NYS651; 249NY111, 162NE601; 190NC520, 130SE189. See also 168Ga359, 147SE882.
363-3 15DelCh286, 136A833; 128Mc320, 147A343; 155Md221, 141A525; 243Mich 279, 220NW801; 249NY111, 162NE601; 221AppDiv502, 224NYS651; 129Misc506, 221NYS692.
363-4 76CalA629, 245P464; 161Ga588, 131SE487, 43ALR1045; 155Md221, 141 A525; 129Misc506, 221NYS692; 106 WVa339, 146SE385.
364-5 161Ga588, 131SE487, 43ALR 1045; 50ND857, 198NW472 (grantee held bound to perform contract of support for which deed, accepted by her, was given).
364-7½-New. A mere provision in a deed that property is conveyed for a particular purpose does not create a condition subsequent. 76CalA629, 245P 464.
364-7⅓-New. Deeds construed together are held to show the grantor's intent that so long as a church used any portion of lot for church building it was to have title to the entire lot. 170Ark996, 282SW364.
364-7¼-New. Where an unambiguous deed reserves a life estate, a following provision "and upon condition" that the grantee pay certain amounts will not be construed to read "or upon condition" 316Mo 891, 292SW702.
364-7½-New. A deed containing words of condition, but without provision for forfeiture or reversion, operates to pass all of the grantor's interest, so that a building thereon does not pass to the grantor's heirs when no longer used as specified in the deed. 120 Oh309, 166 NE218.
364-7⅙-New. The term "Ethiopian," used in a deed prohibiting conveyance, demise, or lease to persons of Ethiopian race or descent, will be deemed to include negroes. 108WVa128, 150SE531, 66ALR518.
364-9 TexCommnA 273SW815.
364-10 [f] **Payment of amount named as consideration is not condition precedent** to vesting of title where deed providing for payment of consideration after death of grantor and wife recited that obligations for payment were received before execution of instrument. 139SC475, 138SE198.
364-12 76CalA530, 245P451; 245Mich 213, 222NW198; 249NY111, 162NE601; 121 Or373, 254P1012, 51ALR1466.
364-13 221AppDiv502, 224NYS651; 127 Misc498, 216NYS616; 129Misc506, 221 NYS692; 229AppDiv428, 243NYS483; 121 Or373, 254P1012, 51ALR1466.
364-14 221AppDiv502, 224NYS651.
364-15 249NY111, 162NE601; 221App Div502, 224NYS651; 129Misc506, 221 NYS692; 190NC520, 130SE189; 121 Or 373, 254P1012, 51ALR1466; 286Pa364, 133A565, 47ALR1172. [a] (7) Where grantor waived forfeiture, his heirs cannot revive right and declare forfeiture on ground waived. 321 Ill 450, 152NE 133. (8) And where grantor died without giving notice of forfeiture, right of heirs to declare forfeiture can be revived only by notice. 321 Ill 450, 152 NE133. (9) Entry by heirs without notice of intention to declare forfeiture is unauthorized. 321 Ill 450, 152NE133. [c] **Heirs take by force of representation** and not by descent. 221AppDiv 502, 224NYS651. [d] **Nature of right or interest in heirs of grantor.**–229App Div428, 243NYS483.
365-19 190NC520, 130SE189.
365-28 125Kan303, 263P1048 (grantee in deed excepting land conveyed for railroad right of way).
366-31½-New. Fact that restriction as to frontage of lots on redivision was in terms of personal agreement, and that it was not in group of restrictions to be included in other deeds, tends to show that it was not intended for benefit of other lot owners. 252Mass513, 147NE 837.
366-33 221AppDiv502, 224NYS651; 129Misc506, 221NYS692.
366-35 [b] **In Michigan.**–248Mich112, 226NW867.
366-37 See also 83CalA391, 257P124.
366-38 80CalA459, 251P87.
366-39 128Misc408, 219NYS59.
366-46 80CalA459, 251P87. [b] **Effect of failure to refer to dominant tenement.**–Though deed restricting use of land to certain type of dwelling houses under penalty of reversion contains no reference to dominant tenement, grantor reserves interest against purchaser from original grantee with notice. 80CalA 459, 251P87.
367-47 80CalA459, 251P87.
368-69½-New. Whether there was breach of condition subsequent has been held for jury. 170Ga550, 153SE424.
368-70 [a] **Relief will not be given** to one breaking condition precedent, where grantor has by reason thereof regained possession. 101WVa41, 131SE874.
370-88 [c] (2) Where grantor continued to live with grantees after alleged assault on him. 216Ala493, 113S 313. (3) Where it appeared that grantee had made regular payments for board of grantor up to date grantor's action to recover property was brought, it was held that grantee had not abandoned undertaking to support grantor. 83NH374, 142A702.
370-89½-New. Where condition has been substantially breached, equity will declare and enforce the forfeiture in absence of laches or waiver. 219Ala319, 104S751.
370-90 213Ala131, 104S393; 213Ala 319, 104S751. [a] **Death of grantee.**–213Ala319, 104S751.
370-91 213Ala319, 104S751.
370-99 [a] Contra. 167Minn384, 209 NW22.
370-5 81Mont382, 263P967. [a] **In New Hampshire.**–83NH374, 142A702. (2) 83NH374, 142A702.
371-10 76CalA629, 245P464.
371-11 79Mont432, 257P273; 121 Or 373, 254P1012, 51ALR1466. [b] **Condition that property shall be used to maintain school** (1) does not necessarily mean that school must be kept up perpetually. 76CalA629, 245P464. (2) Under such condition property does not revert in twenty-nine years. 76CalA 629, 245P464.
371-12 121 Or373, 254P1012, 51ALR 1466. [a] (8) Conveyance to canning factory on condition of continued operation reverts to grantor on cessation of work. 121 Or373, 254P1012, 51ALR 1466.
372-21 129Misc506, 221NYS692.
373-26 But see 121 Or373, 254P1012, 51ALR1466.
375-59 [a] 316 Ill 196, 147NE53.
375-60 316 Ill 196, 147NE53. But see 213Ala319, 104S751.
375-62 But see 129Misc609, 222NYS83. [b] **Reëntry and forfeiture allowed under special terms of deed.** 129Misc609, 222NYS883.
375-63 316 Ill 196, 147NE53.
375-65 129Misc506, 221NYS692.
375-67 161Ga588, 131SE487, 43ALR 1045. [b] **On breach land reverts to grantors** free of lien of mortgage by grantees. 169Minn519, 211NW675.
375-68 128Mc320, 147A343. See also 83CalA391, 257P124.
375-69 161Ga588, 131SE487, 43ALR 1045; 335 Ill 533, 167NE802; 121 Or 373, 254P1012, 51ALR1466.

375-70 121 Or373, 254P1012, 51ALR 1466.

376-75 335 Ill 533, 167NE802; 79Mont 432, 257P278; 129Misc506, 221NYS692; 121 Or373, 254P1012, 51ALR1466; 156 Tenn137, 299SW776; TexCivA 299SW 705. See also 286Pa364, 133A565, 47 ALR1172.

376-78 79Mont432, 257P278. [a] **Rule inapplicable** where grantee was school district whose electors voluntarily elected to discontinue use of grant for school purposes and by merger with another district made performance of condition impossible. 79Mont432, 257P278.

376-79 173Ark1182, 292SW128.

376-81 129Misc609, 222NYS83.

376-83 161Ga588, 131SE487, 43ALR 1045; 249NY111, 162NE601; 221 AppDiv502, 224NYS651; 129Misc506, 221NYS692. [a] **Heirs of grantor** (1) may waive right of reëntry after breach of condition subsequent. 249NY111, 162NE601. (2) They have power to waive right of reverter and reëntry before breach of condition subsequent. 249NY111, 162NE601.

376-84 But see 129Misc506, 221NYS 692.

376-84½-New. Such release passes no estate but operates as an extinguishment of all possible right of reverter. 129Misc506, 221NYS692.

377-87½-New. Condition subsequent requiring perpetual use of property for church purposes and all possibility of reverter are released where grantor's heirs at law give a quitclaim deed to grantees. 221AppDiv502, 224NYS651.

377-89 161Ga588, 131SE487, 43ALR 1045; Ga 155SE513. [e] **Agreement has been held not absolute waiver of original restrictions.**–250Mich167, 229 NW600.

377-90 93CalA437, 269P722; 161Ga 588, 131SE487, 43ALR1045.

377-91 221AppDiv502, 224NYS651 (release or deed to grantee). [a] **Release to owner of fee** is valid provided it is release of something in ease. 221 AppDiv502, 224NYS651.

377-91½-New. before condition is broken, 221AppDiv502, 224NYS651.

377-92 Ga 155SE513.

377-93 89CalA462, 265P287, 289 [cit CJ]; 161Ga588, 131SE487, 43ALR1045. But see 96CalA418, 274P380.

377-94 213Ala319, 104S751, 752 [quot CJ].

378-97¼-New. A waiver or estoppel to assert a forfeiture for breach of condition subsequent arises only where the grantor does some act inconsistent with his right of forfeiture and where it would be unjust for him thereafter to insist upon a forfeiture. 161Ga588, 131 SE487, 43ALR1045.

378-99 221AppDiv502, 224NYS651. See also 243Mich279, 220NW801.

378-2 213Ala319, 104S751, 752 [quot CJ] (where grantee had died and his successors were really benefited and not injured by grantor's indulgence and delay); 161Ga588, 131SE487, 43ALR1045; 128Me320, 147A343; 167Minn275, 208 NW1003, 1004 [citCJ].

378-3 213Ala319, 104S751, 753 [quot CJ].

378-7 321 Ill 450, 152NE133.

378-8 222Ky569, 1SW(2d)979; 83NH 374, 142A702. But see 161Ga588, 131SE 487, 43ALR1045 (mere inaction does not amount to waiver).

378-10 245Mich213, 222NW198. See also 89CalA462, 265P287, 289 [citCJ]. [a] **Delay not amounting to estoppel,** for less than period of limitation, does not bar right of entry. 213Ala319, 104 S751.

379-11 213Ala319, 104S751, 753 [quot CJ] (dictum). But see 161Ga588, 131 SE487, 43ALR1045.

379-15 Compare 213Ala319, 104S751.

379-16 Ga 155SE513.

379-20 128Me320, 147A343.

379-28 335 Ill 533, 167NE802.

380-35 206Cal 392, 274P527 (where title to particular property involved was never divested by sale or otherwise); 15 DelCh286, 136A833; 161Ga588, 131SE 487, 489 [citCJ], 43ALR1045; 335 Ill 533, 167NE802.

380-39 116Tex356, 291SW860.

380-42 213Ala319, 104S751 (where delay was not accompanied by elements of estoppel and action was commenced within statutory period of limitation by analogy). [a] 213Ala319, 104S751.

381-49 83NH374, 142A702.

381-52 TexCivA 27SW(2d)260. [b] **Right to reëntre is available only** to grantor or his heirs at law. 129Misc 609, 222NYS83.

381-54 161Ga588, 131SE487, 43ALR 1045; 222Ky569, 1SW(2d)979. [c] (2) Base, determinable, or qualified fee reverts at once on occurrence of event by which it is limited without entry by person having possibility of reverter. 110Conn267, 147A820.

382-55 161Ga588, 131SE487, 43ALR 1045.

382-58 But see 245Mich213, 222NW 198.

383-72 [c] But see 128Me320, 147A343.

384-73 [a] **After reëntry has been made,** equity cannot give relief. 101 WVa41, 131SE874. [b] **Any loss sustained** by lawful reëntry is damnum absque injuria. 101WVa41, 131SE874.

384-75 321 Ill 450, 152NE133.

384-78 245Mich213, 222NW198.

384-86 6F(2d)702; CalA 281P93; 164 Ga856, 139SE547; 165Ga159, 140SE360; 125 Or150, 262P853, 57ALR311; Tex CivA 278SW513 (covenant against apartment houses). [a] **Restriction** arising from restrictive covenant is not estate in land, but purely creature of equity arising out of contract. NJ 147 A390.

384-87 See also 244Mich473, 221NW 632.

384-89 189NC589, 127SE697 (intention of both parties to original purchase and of mesne grantees to insert restrictions must be shown to establish that omission was through inadvertence). [b] **Grantee is chargeable with notice** of restrictions mentioned in deed but not of restrictions not referred to therein. 131Misc30, 226NYS258. [c] Conveyance for particular purpose necessarily carries implication of such limitation. TexCivA 26SW(2d)457. [d] **Intention clearly expressed.**–TexCivA 26 SW(2d)457.

384-90 189NC589, 127SE697 (that unrestricted lots were scattered through tract held to negative contention that restrictions were omitted by mutual mistake).

385-91 256Mass101, 152NE225.

385-91½-New. , or that a general plan was not filed. 256Mass101, 152NE225.

385-92½-New. Restrictions are, in nature, reciprocal negative easements. 232Mich682, 206NW527.

385-92⅓-New. Owner of each lot in plat has property right in every other lot under restrictive covenants. 193 Wis549, 214NW324.

385-95 90Fla879, 106S901, 43ALR1127 [citCJ]; 95Fla135, 116S447; 241 IllA 28; 252 IllA222; 232Mich682, 206NW 527; 311Mo 262, 278SW398; 322Mo 621, 15SW(2d)770; 101NJEq532, 138A197; 189NC589, 127SE697; 122 Okl 179, 252 P1088. But see 42 OklACR26 [reh pending]. [a] **Whether condition in deed created monopoly** was question of fact for trial court. 96CalA418, 274P 380.

385-96 234Mich246, 207NW799; 121 Or643, 256P1043, 54ALR837.

385-98 90Fla879, 106S901, 43ALR1127 [citCJ]; 149Md271, 131A446, 449 [cit CJ]; 261Mass314, 158NE761; 311Mo 262, 278SW398; 128Misc408, 219NYS 59; 122 Okl 179, 252P1088. [b] **Covenants not indefinite, uncertain, or conflicting.**–311Mo 262, 278SW398 (restricting section to residences and excluding enumerated industries).

385-99 30F(2d)983; 90Fla879, 106S 901, 43ALR1127; 95Fla135, 116S447; 252 IllA222; 149Md182, 131A148; 149 Md271, 131A446, 449 [citCJ]; 261Mass. 314, 158NE761; 311Mo 262, 278SW398; MoA 27SW(2d)462; 128Misc408, 219 NYS59; 121 Oh58, 166NE887; 122 Okl 179, 252P1088; 42 OklACR26 [reh pending]. [a] 6F(2d)702.

385-1 100NJEq290, 134A673.

385-2 197Cal 733, 242P718; 261Mass 314, 158NE761; 234Mich246, 207NW 799; 311Mo 262, 278SW398; 100NJEq 290, 134A673. [a] See also 311Mo 262, 278SW398.

385-3 90Fla879, 106S901, 43ALR1127; 338 Ill 412, 170NE425; 285 IllA170; 149Md182, 131A148; 311Mo 262, 278SW 398; 25 OhSt580. [b] (2) Restriction to residence purposes, with permission to use grounds for riding academy, is not unreasonable, in conveyance of lot by person who retains lots across street from one conveyed. 235Mich355, 209 NW107. [c] (1) 261Mass314, 158NE 761. (2) Restriction requiring approval of grantors held sufficiently broad to include grading and construction of driveway. 261Mass314, 158NE761. (3) And where construction of such driveway would be detrimental to character and development of vicinity, grantors may disapprove plans therefor. 261 Mass314, 158NE761. [d] **Approval by grantor of plans for erection of houses** required by restriction in deed is not unreasonable. 149Md271, 131A446.

386-5 Colo 291P822; 235Mich355, 209 NW107.

386-7 155Md19, 141A710 (covenant held not invalid as against public policy); 128Misc408, 219NYS59. [a] **Where contrary to public policy.**–In order for restrictions to be void as against public policy they must violate some statute, or be contrary to judicial decision or be against public health, morals, safety, or welfare, or be injurious to public good. 121 Oh58, 166NE887.

386-11½-New. Partial invalidity. Valid restrictive provisions in a deed are sustainable, even though a portion thereof may be invalid. 149Md271, 131 A446.

386-12½-New. Where, by deeds executed at the same time, one party conveys a tract to the other, who conveys a portion thereof to his grantor, the grantee of the tract did not have title to the part conveyed to his grantor which he could impress with a building restriction. TexCivA 18SW(2d)773.

386-16 82CalA180, 255P269; 90Fla879, 106S901, 43ALR1127; 250 IllA214; 238 Mich337, 213NW125; 99NJEq288, 133 A184; 215AppDiv291, 213NYS446. [d] **Courts recognized creation of restricted residential districts** with favor. Tex CivA 278SW513.

386-17 197Cal 733, 242P718; 90Fla 879, 106S901, 43ALR1127; 126Kan613, 270P584; 219Ky418, 293SW986; 231 Mich581, 204NW698; 234Mich246, 207 NW799; 237Mich10, 211NW90; 241 Mich604, 217NW764 (subdivider's intention should be considered); 311Mo 262, 278SW398; 215AppDiv291, 213 NYS446; 218AppDiv646, 219NYS222; 87PaSuper251; 8PaDist&Co 691; 156 Tenn474, 2SW(2d)414. [h] **Grammatical construction.**–231Mich581, 204NW 698. [i] **General plan considered.**–241 Mich604, 217NW764.

387-18 82CalA180, 255P269; 14DelCh 449, 129A259; 95Fla135, 116S447; 90 Fla879, 106S901, 43ALR1127; 126Kan 613, 270P584; 234Mich246, 207NW799; 244Mich473, 221NW632; 246Mich284, 224NW396; 311Mo 262, 278SW398; 322 Mo 621, 15SW(2d)770; 98NJEq256, 130 A618; 245NY77, 156NE621; 215 AppDiv291, 213NYS446; 218AppDiv 646, 219NYS222; 132Misc903, 230NYS 738; 122 Okl 179, 252P1088; 156Tenn 474, 2S(2d)414; TexCivA 272SW231; TexCivA 283SW615.

387-19 Cal 288P1080; 90Fla879, 106 S901, 43ALR1127; 210Ky737, 276SW 823; 226Ky465, 11SW(2d)154; 240 Mich56, 214NW943; 101NJEq532, 138 A197; NJCh 147A195; 213AppDiv595, 211NYS382; 214AppDiv628, 212NYS 430 (between original parties); 116 Or 336, 241P66, 68 [quotCJ]; 288Pa428, 135A862; 295Pa530, 145A593; 114Tex 452, 270SW1014; 99WVa388, 129SE 314. [a] (2) In restriction of "building line of porch" word "porch" does not mean isolated, independent structure but a part of the dwelling house forming its exterior projecting way or entrance. 149Md434, 131A785. [b] **Where municipality acquires land for street purposes,** the rule of strict construction of deed is especially applicable. Cal 288P1080.

387-20 90Fla879, 106S901, 43ALR 1127; 252 IllA222; 210Ky737, 276SW 823; 240Mich56, 214NW943; 224Mich 330, 221NW293; 245Mich406, 222NW 714; 247Mich98, 225NW611; 213 AppDiv595, 211NYS382; 215AppDiv 243, 218NYS446; 134Misc733, 236NYS 194; 116 Or336, 241P66, 68 [quotCJ]; 128 Or229, 274P306; 288Pa428, 135A 862; 7PaDist&Co 640; 8PaDist&Co 487; 35PortoRico 445; 114Tex452, 270 SW1014; 99WVa388, 129SE314; 102 WVa374, 135SE399 [citCJ]. See also 156Tenn474, 2SW(2d)414. [a] **Intention to adopt restrictions in deed of another landowner** and make them part of deed as limitation in favor of such owner must be made plain. 322Mo 621, 15 SW(2d)770.

388-21 107Conn400, 140A763; 240 Mich56, 214NW943; 322Mo 621, 15SW (2d)770; MoA 27SW(2d)462 (and against grantor); 134Misc733, 236NYS 194 (against grantor); 30 OhA430, 165 NE51.

388-22 14DelCh449, 129A259. See also NJCh 147A195. [a] **Building restrictions should be construed as whole.**-241 Mich604, 217NW764.

388-23 250 IllA214; 233Mich682, 206 NW527; 240Mich56, 214NW943; 242 Mich381, 218NW662 (restriction held not to prohibit erection of Jewish synagogue); 322Mo 621, 15SW(2d)770; 126 Misc465, 214NYS488 (being in derogation of common law); 135Misc845, 240 NYS38; 30 OhA430, 165NE51; 128 Or 229, 274P306; 288Pa428, 135A862; 294 Pa360, 144A271. See also TexCommnA 108W(2d)973. [a] (9) Covenant against leasing or renting land to any persons other than white or Caucasian race is not violated by sale to negroes. 99CalA8, 277P893. (10) Restriction against erection of more than one residence on lot is not violated by occupation of building by two families, when building was two-family building and so occupied when purchased and plaintiff purchased adjoining lot with knowledge of facts. 168Ga670, 148SE593 (1stcase).

388-25 288Pa428, 135A862. [a] **Limitation as to material to be used** in construction of building. 239Mich377, 214 NW108.

388-27 210Ky737, 276SW823; 233 Mich682, 206NW527; 311Mo 262, 278 SW398; 99NJEq288, 133A184; NJCh 150A202 (meaning of "structure"); 288 Pa428, 135A862. [a] **Use of word "only" in limitation,** restricted use to purposes enumerated. TexCivA 26SW (2d)457.

388-27½-New. Building restrictions should receive construction which their plain and obvious language implies. 286Pa33, 132A809.

389-29 14DelCh449, 129A259; 90Fla 879, 106S901, 43ALR1127 [citCJ]; 245 Mich252, 222NW180; TexCivA 283SW 615; TexCivA 290SW256. [a] **Object held not "building" within restriction of deed.**-258Mass30, 154NE521, 49ALR 1361. [b] **Meaning of building.**-258 Mass30, 154NE521, 49ALR1361.

389-30 288Pa428, 135A862; 99WVa 388, 129SE314, 317 [quotCJ]. But see NJCh 152A164.

389-32 238Mich337, 213NW125; 311 Mo 262, 278SW398 (practical construction of great aid).

389-32½-New. After deeds have been given, containing restrictive covenants, but reserving right to grant permission to use property for specified purposes, it is immaterial that permission is given in separate instrument from deed conveying property. 116 Or336, 241P 66.

389-32⅓-New. Practical construction by grantor. A restriction against the erection of a building beyond a certain line will be held not to have been violated where there was practical interpretation of the restriction by the grantor's erecting the building over the line himself. 99NJEq425, 131A579.

389-33 107Conn400, 140A763; Ga 155 SE755 (restrictions inapplicable); 226 Ky465, 11SW(2d)154; 245Mich406, 222 NW714; NJCh 129A256 ("and" construed as "or"); 295Pa530, 145A593. See also 87PaSuper251. [a] (10) Terms in deed held not vague. 164Ga 856, 139SE547. [b] **Restriction inapplicable** to avenue subsequently extended diagonally across lots. 250Mich427, 230NW176.

389-34 210Ky737, 276SW823; 245 Mich406, 222NW714; 101Vt384, 143A 700. [a] (8) Construction of building covering part of two lots is violative of restriction prohibiting building within stated distance from side lines. 233Mich146, 206NW505.

389-35 [a] But see 247Mich481, 226 NW262.

389-37 [a](3) Building projections, chiefly consisting of wall space rather than window space, and chief purpose of which is to enlarge building rather than to furnish light and air, are not bay windows within exceptions of restrictive covenants against projection over building line. 332 Ill 136, 163NE 440.

390-39 But see NJCh 129A256.

390-40 235 IllA170; 261Mass72, 158 NE339, 55ALR330 (sun porches).

390-42 128Misc408, 219NYS59. [b] **Sun porch extending beyond building line held to violate restriction** and not to come under exception of "steps, windows, porch or other usual projection." 128Misc408, 219NYS59.

390-42½-New. , and walls. 286Pa33, 132A809.

390-44 TexCivA 14SW(2d)369.

390-44½-New. A building line restriction not specifically referring to erection of churches but clearly referring to dwelling houses does not apply to erection of church building. 149Md434, 131A785.

390-44⅓-New. Erection of multiple apartment house on two lots which make site not less than prescribed width does not violate restriction prohibiting erection of apartment houses on sites less than such width. 238Mich162, 212 NW969.

390-44¼-New. A filling station is a "building" constituting a breach of covenant against the erection of a building within a certain distance of a courthouse on land conveyed to the county. 101Vt384, 143A700.

390-47½-New. Where a building restriction prohibits any building being placed nearer than twenty-five feet to a residential street and prohibits any alley or entrance from such street to business buildings fronting on an intersecting street, the fact that the residential street is widened by taking a twenty-five-foot strip therefrom does not affect the restriction or give owners of lots fronting thereon the right to erect a garage in violation thereof. 237 Mich10, 211NW90.

390-47⅓-New. Side line of lot may not be treated as front line. 239Mich242, 214NW123.

390-47¼-New. Store buildings may not front on restricted street. 239Mich 242, 214NW123.

390-48½-New. Where a covenant is against the erection of any building which would obstruct the view and light of a church building proposed to be erected on the land conveyed or be a nuisance to such church, 8PaDist&Co 691.

390-48⅓-New. such covenant is violated by erecting a building which would, even to a small extent, obscure light and view although church windows are composed of stained glass. 8PaDist&Co 691.

391-49 235 IllA170; 98NJEq289, 130 A824 (use of large house by families of owners held not nuisance nor use depreciating value of property for residential purposes); 288Pa428, 135A862. [a] (2) Restriction to dwelling for residential purpose excludes apartment house. 234Mich246, 207NW799. [b] **Term "first class dwelling house,"** when not otherwise qualified, conveys idea or notion of home. 311Mo 262, 278SW 398. [c] **College fraternity or chapter house prohibited.**-245Mich252, 222NW 180 (single private dwelling). [d] **"Private dwelling house"** means building designed and used by one family. 245Mich252, 222NW180. [e] **"Duplex house"** must be construed under common-sense construction of words when at the time it had no definite settled meaning. 246Mich284, 224NW396 (means house having accommodation for two families). [f] **"Double house"** means two-family house divided vertically. 246Mich284, 224NW396. [g] **Restriction for residential purposes only** is in nature of negative easement or equitable servitude. Cal 288P1080.

391-49½-New. and excludes garage. 219Ky418, 293SW986.

391-49⅓-New. Where several buildings were consolidated by removal of exterior walls at sides of contact, the building has been held but one house within provision that but one dwelling house shall occupy property. NJCh 132A748.

391-50 235 IllA170; 241Mich604, 217 NW764; 248Mich625, 227NW772; 219 AppDiv552, 219NYS404; 288Pa428, 135 A862.

391-52 311Mo 301, 278SW410 (covenant limiting use of each lot in restricted district to single family dwelling house); 101NJEq823, 139A16; 98NJEq289, 130A 824 (use by number of families is not violation of restriction of use for dwelling); TexCivA 278SW513.

391-53½-New. ; or by use of portion of residence as dental office 14PaDist&Co 256.

391-54 NJ 137A317 [citCJ].

391-59½-New. , or the use of the premises for any other purpose than that of a residence, Ont [1925] 3DomLR560.

391-59⅓-New. such as the use of the lot when still vacant for garage, storage, or unloading purposes, Ont [1925] 3DomLR560.

391-59¼-New. or for the burning of rubbish thereon. Ont [1925] 3DomLR 560.

391-59⅕-New. , or construction of church building. 164Ga77, 137SE831.

391-59⅙-New. Church is not residence within express terms of covenant. 164 Ga77, 137SE831.

391-60½-New. Stipulations in deed against erection or use on premises of any building other than for residence purposes are not violated by construction thereon of spur track of railroad. 99WVa388, 129SE314.

391-60⅓-New. Plaintiffs are not estopped by slight encroachment of their own houses upon the building line from protesting against erection of apartment house with stores on ground floor in district restricted to single dwellings. 234Mich246, 207NW799.

391-60¼-New. Use of dwelling house as hospital or institution for incurables is violation of covenant. 311Mo 262, 278SW398.

391-60⅕-New. Covenant restricting use to that for dwellings is violated by the use of rear room of store as a storage room and of the stairway in connection therewith. 149Md182, 131A148.

391-60⅙-New. Taking in guests, who paid proportionate cost of their living expenses is held violation of restriction requiring use of premises for single dwelling house exclusively. 99NJEq673, 134A355.

391-60½-New. In a covenant restricting the use of land to residence purposes, the word "residence" means dwelling house where person lives in settled abode. 90Fla879, 106S901, 43 ALR1127.

391-60⅓-New. As used in a covenant restricting the use of land to residence purposes "only," "only" is synonymous with word "solely" or equivalent of phrase "and nothing else." 90Fla879, 106S901, 43ALR1127.

391-60⅕-New. Erection of a private sanitarium is breach of a covenant forbidding use for any purposes inconsistent with the nature of a strictly residential section. 95Fla135, 116S447.

391-60$\frac{1}{10}$-New. A provision that any residence shall cost not less than a stated sum is not violated by construction of an apartment house costing a greater sum although individual apartments cost a less sum. 195NC759, 143SE521.

391-60$\frac{1}{11}$-New. The covenant is not

broken by a sign to rent a garage. 25 OhA344, 158NE203.

391–60½–New. Keeping two automobiles and a truck is no violation of a residence covenant. 25 OhA344, 158NE 203.

391–60¼–New. Attorney and plumbing signs do not violate a residence covenant. 25 OhA344, 158NE203.

391–60¼–New. The maintenance of a dining room, news stand, and cigar counter incidental to the operation of an apartment building, reservation of parking space and advertisement of accommodations, and occasional service to transient visitors, is not in violation of a covenant restricting the use of the premises to residential purposes. 332 Ill 136, 163NE440.

391–60½–New. Restriction to dwelling houses is not limited to the first building erected on the premises. Mass 165 NE419.

391–60½–New. That a business was conducted in a house originally designed solely for residence purposes has been held not to constitute any the less a violation of restrictions in the deed, prohibiting the erection of any structures other than residences on the premises. 96CalA597, 274P614.

391–60½–New. A building in which the rooms were rented to members as offices is not a clubhouse authorized by the restrictions. 265Mass256, 163NE 859.

391–60½–New. A restriction to two single family residences excludes an apartment house. 226Ky465, 11SW(2d) 154.

391–60½–New. Restrictions that the lot conveyed "shall be used for private residence purposes only" do not prevent the erection of more than one residence. 33 OhA432, 170NE23.

391–61 169Ga570, 151SE11; 332 Ill 136, 163NE440; 235Mich527, 209NW 568; 237Mich236, 211NW666; 238Mich 162, 212NW969; 250Mich427, 230NW 176; 195NC690, 143SE522; 195NC759, 143SE521; 288Pa428, 135A862. [a] **Apartment house is held not "hotel"** under restriction. 288Pa428, 135A862.

391–64 256Mass101, 152NE225; 239 Mich234, 214NW239.

391–65 238Mich337, 213NW125; 239 Mich234, 214NW239. But see NJCh 132 A748. [b] **"Income bungalow"** is story and a half two-family dwelling and therefore prohibited by restriction limiting use of lots to one-family buildings two stories in height or "an approved type of bungalow." 238Mich337, 213NW 125.

391–66 99NJEq673, 134A355; 7PaDist &Co 88; TexCivA 283SW615.

391–66½–New. apartment hotel. 235 IllA170.

392–67 Ont [1928] 4DomLR609.

392–68½–New. , or one single private dwelling house, 20 OhA362, 152NE203. [a] **Remodeling** of single private dwelling house into double or duplex building adapted for use as two buildings is forbidden by restriction that such building shall not be erected or maintained on premises. 20 OhA362, 152NE203.

392–68¼–New. or a single private dwelling house and a private garage or private stables connected therewith, 256 Mass101, 152NE225.

392–69 Contra 195NC690, 143SE522. But see 169Ga570, 151SE11. [b] **Restriction not violated** by building dwelling house on each lot, both being joined by brick party wall on line between lots. 169Ga570, 151SE11. [c] **Deeds restricting use of lot to one residence** limits use to buildings designed for home for one family. 33 OhA174, 168 NE755.

392–70½–New. Erection of an income bungalow on lot restricted to duplex or double houses cannot be enjoined as not duplex, 246Mich284, 224NW396.

392–70¼–New. a covenant restricting a lot to single dwelling, duplex or double houses restricts houses to two families. 246Mich284, 224NW396.

392–70¼–New. A restriction prohibiting the erection of any building "other than a single private residence, a double house, or a two family flat, apartment house or terrace" restricts the use to two family buildings (twenty-five family apartment house excluded). 231Mich 581, 204NW698.

392–70½–New. Restriction to one-family residences forbids erection of four-family apartment building. 236Mich 116, 210NW323.

392–70½–New. That two families occupy a one-family house does not change its character. NJCh 132A748.

392–72 But see TexCivA 21SW(2d)1091.

392–76 240Mich425, 215NW241, 54ALR 657. Contra NJCh 146A533.

392–77 99NJEq636, 134A359. See also NJCh152A164. But see 7PaDist&Co 70.

392–77½–New. Erection of garage not in violation of covenant nor a nuisance. 98NJEq289, 130A824.

392–77½–New. A restriction against erecting other than private or community garages is violated by a garage erected to sell oil, tires, and other automobile accessories and repair tires. 263Mass 585, 161NE596.

392–77¼–New. Whether a building is an "outbuilding" depends upon its location and use. 88CalA762, 264P332.

392–77½–New. Chicken houses and barns used in conducting a chicken ranch are not "outbuildings" within limitations restricting buildings to dwelling houses and garages or other outbuildings. CalA 261P1026.

392–77¼–New. Unusually large chicken coops are prohibited as not being within the exception of "necessary outbuildings." 227Ky826, 14SW(2d)143.

392–77½–New. A private garage erected upon a city lot is not an "outbuilding" similar to a "barn" within a restriction against any barn or similar outbuilding. 30 OhA404, 165NE366.

392–77½–New. Use of part of garage as dwelling house is violation of some restrictions. 94PaSuper35.

392–80 TexCivA 278SW513 (apartment).

392–80½–New. An apartment house of the same height, depth, width, character, style and color of brick as the adjoining building is a "twin building" as defined in the covenant. NJ 144A877.

393–82 218AppDiv646, 219NYS222.

393–84½–New. 187Wis282, 202NW701.

393–84½–New. or an apartment house; TexCivA 278SW513.

393–84¼–New. the sale of automobile accessories; 263Mass585, 161NE596.

393–85 209Ky332, 272SW890.

393–86 98NJEq256, 130A618.

393–86½–New. a tea room; 263Mass 282, 160NE831, 57ALR409.

393–87 See also 283Pa517, 129A558.

393–87½–New. or as a parking place for automobiles; 226Ky747, 11SW(2d) 910, 61ALR453.

393–90 288Pa48, 135A719. But see 228 AppDiv721, 239NYS147.

393–93 311Mo 262, 278SW398 (for incurables).

393–94 TexCommnA 288SW180.

393–96½–New. , an apartment house. 288Pa428, 135A862.

393–5½–New. Location of business in one section of large tract will not affect binding force of restrictions for residents in another section. NJCh 130A 615.

393–5½–New. A covenant to use store as fruit and grocery store only does not exclude use thereof for sale of vegetables. 214AppDiv628, 212NYS430.

393–5¼–New. Sale of gasoline, oil, and grease comes within restriction prohibiting use of building on lot for purposes other than sale of ordinary merchandise. 103Conn177, 129A228 (such sale not conflicting with any ordinance).

393–5½–New. The business of conducting a public restaurant and roadhouse is prohibited by a covenant forbidding the use of the premises for "trade." 98 NJEq256, 130A618.

393–5½–New. Evidence sufficient to show grantees operated a roadhouse and public restaurant ostensibly as a club on restricted lots. 98NJEq256, 130A 618.

393–5½–New. and no distinction can be drawn between portions of premises where customers are dealt with and other portions where goods are stored or carried to and fro; both uses are prohibited. 149Md182, 131A148.

393–5½–New. A covenant against business uses in area restricted to dwellings is violated by use of rear room of store and stairway in connection therewith as a storage room. 149Md182, 131A148.

393–5½–New. Under a restriction against the erection of a slaughterhouse or bone boiling establishment, or any other nuisance, an icehouse is not per se a nuisance. 99NJEq425, 131A579.

393–5½–New. A provision that any residence built on certain lots should face a certain street does not prevent indefinitely the erection of a gasoline filling station on such lots. 156Tenn474, 2SW (2d)414.

393–5½–New. The maintenance of a cafeteria, barber shop, tailor shop, and smoke shop, incidental to the use of premises as a club house, is not a use within restrictions in the deed. 264Mass 516, 163NE174. [a] **Matters not constituting violation.**–Vt 146A417.

393–5½–New. Restriction of the use of land for railroad purposes precludes use for an oil and gas plant. TexCivA 13 SW(2d)230.

393–5½–New. To constitute a violation of a covenant against operation of a restaurant the business of operating a restaurant must be carried on. Vt 146 A417.

393–5½–New. Under a deed to lake shore property conveying the privileges of bathing, boating, and fishing in the waters of a lake owned by the grantors, and the covenant of the grantors to do nothing which would render the shore or property less desirable for residence purposes, the grantors were precluded from denying privileges so granted by filling in part of the lake. 333 Ill 535, 165NE 181.

393–5½–New. Sales of ice cream only, when frequency of sales does not appear, does not constitute violation of a covenant against maintenance of a restaurant, confectioner's stand, soda fountain, sale of bottled soda, or anything conflicting with such business. Vt 146A 417.

393–5½–New. Restrictions are not violated by carrying on the prohibited business on property opposite to that conveyed but not on it. Vt 146A417.

393–6 99NJEq288, 133A184; NJCh 152 A164. See also 14DelCh449, 129A259.

393–6½–New. , but restriction to a single private dwelling and private garage is violated by a garage as the middle portion of a structure containing a building at each end for living quarters of a chauffeur and coachmen and their families. 256Mass101, 152NE225.

393–8 35F(2d)823; 93Fla664, 112S 551; 164Ga77, 137SE831; 164Ga856, 139SE547; 165Ga159, 140SE360 (grantee accepting deed and property is bound by restrictive covenant without signing deed); 337 Ill 589, 169NE760; 261Mass 314, 158NE761; 241Mich591, 217NW 794; 180Minn382, 231NW7(2dcase); NJ 147A390; 128Misc408, 219NYS59; 189 NC589, 127SE697; TexCivA 272SW231; Ont [1925] 3DomLR560 (where grantee had both actual and constructive notice). See 103Conn477, 129A228. [a] **Enforcement.**–166La581, 117S725. [b] **Effect of sale of part of land by defendant.**–166 La581, 117S725. [c] **Subsequent grantee can enforce oral agreement imposing building restriction on land retained** against subsequent grantee of land retained, where restriction was contained in common owner's deed thereto. 180 Minn382, 231NW7(2dcase).

394–9 8PaDist&Co 487. See also 103 Conn177, 129A228.

394–10 See also 98NJEq163, 129A822. But see 29 OhA290, 163NE571.

394–11 164Ga739, 139SE530.

394–13–15 But see Cal 288P1080.

394–13–15½–New. A reciprocal negative easement runs with the land sold and is operative upon the use of the land by any owner having actual or constructive notice thereof, passing its benefits and carrying its obligations to all purchasers of land subject to its affirmative or negative mandates. 233 Mich227, 206NW496.

394–13–15⅓–New. Reciprocal negative easements arise only out of a benefit accorded land retained by restrictions on land sold by a common owner. 233 Mich227, 206NW496.

394–13–15¼–New. Such easements may not arise and fasten upon one lot by reason of other lot owners conforming to a general plan. 233Mich227, 206NW 496.

394–13–15½–New. Person who has parted with his interest in premises cannot question validity of restrictive covenant. 116 Or336, 241P66.

394–13–15⅙–New. Where restriction is inserted in deed of land for school purposes solely for the benefit of the school property, it will not inure to the future owners of part of the property in question. 210Ky737, 276SW823.

394–13–15⅐–New. Where a church society has acquired land with the right to use it for church and school purposes, such right cannot be taken from it by restriction imposed on land in the same block in subsequent contracts. 239Mich 216, 214NW245.

394–13–15⅛–New. One who has an interest as vendor in a contract for the sale of lots in a subdivision on which the purchase price has not been fully paid and owns properties in an adjoining subdivision incident to which identical restrictions are being enforced has such interest as entitled him to maintain suit to restrain violation of a restriction on a lot sold by him. 241 Mich591, 217NW794.

394–13–15⅑–New. A deed conveying shore land to the city for a park, containing a proviso as to obstruction of view, does not affect the right of an owner of a pre-existing pier to repair it. 101NJEq785, 139A6.

394–13–15 1/10–New. That an owner of property opposite to restricted property would incidentally benefit from the enforcement of the restrictions does not entitle him to such enforcement. 102 NJEq467, 141A564.

394–13–15 1/11–New. A village, passing a zoning ordinance having no retroactive effect, cannot claim the benefit of a restriction in a deed to an owner restricting the use of premises. 199Wis 214, 225NW838.

394–16 218Ala270, 1188658; 197Cal 733, 242P718; 90CalA606, 266P570; 103Conn177, 129A228; 105Conn464, 136 A71; 108Conn359, 143A245; 94Fla313, 1148455; 164Ga868, 139SE546; 164Ga 856, 139SE547; 337 Ill 589, 169NE760; 209Ky332, 272SW890; 266Ky465, 11 SW(2d)154; 149Md434, 131A785; 256 Mass101, 152NE225; 262Mass585, 161 NE596; 233Mich227, 206NW496; 234 Mich246, 207NW799; 98NJEq163, 129 A822; 99NJEq425, 131A579; 222 AppDiv570, 226NYS544; 218AppDiv 646, 219NYS222; 190NC835, 130SE835; 191NC61, 131SE567, 571 [quotCJ]; 122 Okl 179, 252P1088; 116 Or336, 241 P66, 68; 121 Or643, 256P1043, 54ALR 837; 125 Or150, 262P853; 57ALR311; 283Pa517, 129A558; 297Pa247, 146A 889; 35PortoRico445 (no owner of adjoining lot); 106WVa201, 145SE267; 188 Wis17, 205NW548; 59 OntL379, [1926] 4DomLR582. See also NJCh 129A256. [a] 59 OntL223, [1926] 4DomLR392. [b] **That lot is sold in accordance with blue print showing size of lots** does not imply covenant that size of remaining lots shall not be changed. 242Mich331, 218 NW692. [c] **Though there be no plot,** it may be shown that limitations were applicable to all land included in general scheme. 294Pa360, 144A271. [d] **In absence of proof that lots sold to school were included in general development scheme,** school takes free of any restrictive covenant. 198NC520, 152SE 496. [e] **Covenants. must apply substantially to entire tract.–Wash** 289P 530.

394–17 164Ga856, 139SE547; 191NC61, 131SE567, 571 [quotCJ]; TexCivA 290 SW256, 259 [citCJ].

394–18 197Cal733, 242P718; 201Cal 530, 258P60; 82CalA180, 255P269; 83 CalA391, 257P124; 233Mich227, 206NW 496; 244Mich473, 221NW632; 191NC 61, 131SE567, 571 [quotCJ]; 116 Or 336, 241P66, 68; 121 Or643, 256P1043, 54ALR837; 35PortoRico 445; TexCivA 290SW256, 259 [citCJ]; 196Wis70, 219 NW354. See also 103Conn177, 129A228.

394–18½–New. So, also, such restriction may be enforced by the grantors owning some of the tracts, acting in good faith. 261Mass314, 158NE761.

394–19 163Ga580, 136SE785; 164Ga 868, 139SE546; 98NJEq163, 129A822; 191NC61, 131SE567, 571 [quotCJ]; Tex CivA 272SW237.

395–20 98NJEq163, 129A822; 191NC 61, 131SE567, 571 [quotCJ].

395–21 82CalA180, 255P269; 333 Ill 535, 165NE181; 203 Iowa134, 209NW 731; 222AppDiv570, 226NYS544 (modification of restriction held unavailing); 218AppDiv646, 219NYS222; 225App Div685, 231NYS314 (recorded restrictions constituting uniform plan); 134 Misc733, 236NYS194; 191NC61, 131SE 567, 571 [quotCJ]; 125 Or150, 266P 891. Contra 101NJEq532, 138A197.

395–22 191NC61, 131SE567, 571 [quot CJ]. Contra 101NJEq532, 138A197.

395–25 NJCh 130A615; 133Misc790, 233NYS473; TexCivA 88SW(2d)352. [a] **Vendor's successor cannot modify restrictions.–133Misc790,** 233NYS473.

395–27 256Mass101, 152NE225.

395–27½–New. A purchaser under deed restricting all lots to residential purposes purchasing after plan has been changed to except certain lots from the restriction is chargeable with notice of the change in plan where he previously purchased one of unrestricted lots. 126 Misc309, 212NYS572.

395–27⅓–New. In such case the owner cannot enforce the restriction against owner of one of the unrestricted lots. 126Misc309, 212NYS572.

395–27¼–New. But he may enforce it against the original covenantor notwithstanding his knowledge of the change in plan at time of his purchase. 126 Misc309, 212NYS572.

395–27⅙–New. Where the owner of two or more lots so situated as to bear the relation sells one with restrictions for the benefit of the land retained, the servitude becomes mutual and the owner of the lot or lots retained may do nothing forbidden to the owner of the lot sold. 233Mich227, 206NW496.

395–27⅛–New. In such case subsequent purchasers of the lot or lots retained with notice of the reciprocal negative easements have the right to enforce observance of them. 233Mich227, 206NW496.

395–27 1/7–New. Where deeds contain provision that grantor reserves right to grant permission to use lots for specified purposes, one cannot grant such permission after parting with all interest in the property. 116 Or336, 241P66.

395–27⅛–New. That property owners in a subdivision restricted to residence purposes only have adopted a general plan of erection of single residences only with certain spaces between buildings does not deprive the owner of lots of his right to build an apartment building thereon where his deed contains no such restriction. 235Mich527, 209NW 568.

395–27⅓–New. A purchaser with notice of restrictions and their general observance is bound, although the use of the premises was therein "limited by the restrictions of record only if any" and some lots in subdivision had been sold without restriction. 236Mich490, 211 NW107.

395–27 1/10–New. The owner of a subdivision, platted, and sold as a high grade residential district, cannot lift the reciprocal easement impressed on the lots, either as to himself or any one else with notice, by buying back some of the lots and reselling them without the restriction. 238Mich274, 213NW973.

395–27 1/11–New. The omission of restrictive covenant in a deed to one lot is held not to defeat general scheme of development. 191NC61, 131SE567.

395–27 1/12–New. Purchasers of lots so repurchased by the original owner of the subdivision and resold without including the restriction in the contract do not obtain vested rights to use the lots in violation of the restrictions where it has been observed in the meantime, and the subdivision has developed into a high grade residential district. 238Mich274, 213NW973.

395–27 1/13–New. Acceptance of a deed binds the covenant on the grantee, even if he did not sign the deed. 164Ga856, 139SE547.

395–27 1/14–New. That the beneficiary of a common grantor gave a lease of certain lots free from restrictions does not affect a right of enforcement against the other lots. 90CalA606, 266P570.

395–27 1/15–New. A restriction in the use of land to railroad purposes in a town platted jointly by the railroad and owners is for the benefit of all adjoining property covered by plat. TexCivA 13 SW(2d)230.

395–27 1/16–New. Where a restriction is only for the benefit of the grantor and adjoining owners on either side of described premises, the owner of a lot separated therefrom by an intervening lot cannot enforce the restriction. 30 OhA 430, 165NE651.

395–27 1/17–New. A subdivider cannot sell with strict restrictions all lots in a subdivision except the corner ones, retain them until after a fine residential district is built up, and then dispose of them free from any reciprocal easements, so as to permit a place of business on every corner. 245Mich188, 222 NW171.

395–27⅛–New. A deed authorizing amendment of restrictive covenant will permit the change from an exclusive residential district to a mixed resident and business district. TexCommnA 10 SW(2d)973.

395–27 1/19–New. If a uniform scheme is to lay the basis for implication of reciprocal restrictions on the part of a grantor, it must have been clearly made known to the grantee. 251NY275, 167 NE441.

395–27 1/20–New. The fact that deeds do not refer to a plan on which lots were plotted and that no such plan was recorded will not prevent enforcement of restriction. 297Pa247, 146A889.

395–28 197Cal733, 242P718; 101NJEq 761, 139A174; 198NC96, 150SE702; 294 Pa360, 144A271; TexCivA 272SW231. See also TexCommnA 286SW182. [c] **To constitute neighborhood scheme,** restrictions must apply to all lots of like character brought within the scheme. NJCh 130A615.

395–29 TexCivA 278W(2d)828 (holding sale of all lots unnecessary).

395–29½–New. A lot conveyed by deed not imposing building restrictions is not sold pursuant to a general plan or scheme where other deeds limited restrictions to parties purchasing lots by similar conveyances. 316Mo 805, 291 SW104.

395–29⅙–New. The mere fact that lot purchasers in improving their respective properties have conformed to the terms of an old restrictive covenant in the title, not a part of a neighborhood scheme, and which they have not in any other way acquired the right to enforce, will not in itself raise a neighborhood scheme restriction among them, so that they can enjoin one of their number who attempts to build upon his own lot a house or structure not in conformity with the terms of such old restriction. NJ 144A717, 60ALR1219.

395–30 252 IllA222; 232Mich682, 206 NW527.

395–31 252 IllA222; TexCivA 278W (2d)828 (holding failure to apply same restrictions to lots did not raise fact issue of failure to carry out general plan). But see 101NJEq761, 139A174. [b] **Different periods of duration.–201** Cal 530, 258P60. [c] **Permission in deeds to part of tract for operation of electric railway** does not abrogate restrictions as to other lots in tract restricted for residential purposes where it does not appear that railway would render such lots less desirable for residential purposes. 201Cal530, 258P60. [d] **General plan held shown.–TexCivA** 278W(2d)828.

395–33 92CalA446, 268P436; 252 IllA

222; 240Mich501, 215NW526; 101NJ Eq761, 139A174; 189NC589, 127SE697, 701 [quotCJ]; 194NC823, 140SE737.

396-37½-New. Where each deed contained the same restrictions and were declared to run with the land and to be enforceable by grantor, successors, assigns, or grantees, there is a clear case of a general development scheme. 99 NJEq425, 131A579.

396-37⅛-New. Where a grantor purchased several tracts covering city blocks and deeds to the grantees of lots on several blocks contained restrictions but not in the deeds to the lots on another block, the restrictions are not carried by implication to other blocks, although all property purchased was ultimately intended for residential purposes. 294Pa360, 144A271.

396-38 315Mo 1239, 288SW38, 44 [quot CJ]; 316Mo 805, 291SW104; 316Mo 805, 291SW104; 218AppDiv646, 219NYS222. [d] **Reservation by grantor of right to cancel covenants** (1) operates as covenant solely for his benefit. 218AppDiv 646, 219NYS222. (2) Right to cancel includes power to modify. 218AppDiv 646, 219NYS222.

396-39 164Ga856, 139SE547; 315Mo 1239, 288SW38, 44 [quotCJ]; 101NJEq 761, 139A174. See also 256Mass101, 152 NE225.

396-40 164Ga856, 139SE547; 235Mich 355, 209NW107; 218AppDiv646, 219 NYS222; 26 OhAl, 159NE482 (without proof of damages). See also NJ 144A 717, 60ALR1219.

396-41 214Ky123, 282SW763; 218App Div646, 219NYS222; Alta [1928] 2Dom LR793. [a] (2) Assignees of grantee are bound, although not named in deed, where they take with notice. Ont [1925] 3DomLR560. [b] In Alberta.–[1928] 2DomLR793.

396-42 83CalA566, 257P199; 157Md 674, 145A483; NJ 144A717, 60ALR1219. But see 256Mass101, 152NE225.

396-43 108Conn359, 143A245; 165Ga 159, 140SE360; 226Ky465, 11SW(2d) 154; 180Minn382, 231NW7(2dcase); 247 NY131, 159NE886; 286Pa33, 132A809.

396-44 155Md19, 141A710; 247NY131, 159NE886. See also 108Conn359, 143A 245. [a] **Covenant for benefit of land retained by covenantee** will be enforced regardless of whether covenant runs with land or of existence of general scheme. 155Md19, 141A710.

396-45 101NJEq761, 139A174.

396-45½-New. Restrictive covenant reserving to grantor authority to change or annul same was a special covenant primarily for benefit of grantor's retained lands which grantees of adjacent lands could enjoy so long as restrictions remained in force. NJCh 130 A615.

396-46 294Pa360, 144A271. See also 98NJEq256, 130A618. [a] **In determining whether restriction is inserted for benefit of common grantees,** intention of parties is ascertained from instrument in light of surrounding circumstances. 226Ky465, 11SW(2d)154.

397-48 251NY275, 167NE441.

397-50½-New. Where grantor did not exercise reserved right to modify or annul restrictions, adjoining lot owners entitled to benefit thereof for residential purposes. NJCh 130A615.

397-50⅓-New. Unless it appears that restrictions are for benefit of remaining lots of grantor in deed itself, or from a plan, or from situation of property with reference to other land of grantor, grantees of other lots cannot enforce them. 252Mass513, 147NE837.

397-50¼-New. In determining whether a restrictive covenant contained in a deed was imposed for the benefit of the land owned by the party seeking to enforce it, the intention of the parties to the original deed by which the covenant was created is to be considered. 315Mo 1239, 288SW38.

397-50⅕-New. Such intention is to be determined from the language of the covenant read in the light of the context and of the surrounding circumstances when the covenant was made. 315Mo 1239, 288SW38.

397-50⅙-New. The mere sale of part of land owned does not necessarily carry to that retained the restriction found in the deed given. 294Pa360, 144A271.

397-50½-New. Where apparent that the purpose of limitation was to be inserted for several properties, of which one only is at the time conveyed, all the property of the grantor in contemplation will be bound. 294Pa360, 144A271.

397-51 30F(2d)981; 108Conn359, 143A 245; 241 IllA28; 98NJEq289, 130A824. [a] **Persons having sufficient title or authority to execute agreement.**–30F(2d) 981.

397-52 30F(2d)981 (facts considered in determining reasonable time).

397-53 163Ga471, 136SE440 (bond for title); 163Ga580, 136SE785; 164Ga856, 139SE547; 203 Iowa134, 209NW731; NJCh 130A615; 35PortoRico 445; 102 WVa374, 135SE399 [citCJ]; Ont [1925] 3DomLR560. [a] NJSup 132A481.

397-53½-New. , or in any previously recorded deed affecting their title. NJ 144A877.

397-54 163Ga580, 136SE785. But see 101NJEq532, 138A197.

397-55 166Ga149, 142SE690; 233Mich 227, 206NW496; 191NC61, 131SE567, 571 [citCJ]. But see 316Mo 805, 291 SW104; 316Mo 805, 291SW104 (lot conveyed subject to "restrictions of record" held not subject to restrictions not in chain of title). Contra 9PaDist&Co 149.

397-59½-New. Where the purchaser of a lot in a residential neighborhood could not avoid noticing the strictly uniform residence character given the lots by expensive dwellings thereon, clearly indicating a general plan, he is put on inquiry beyond merely asking his grantor whether there are restrictions where record reason for such general conformation can be found. 233Mich227, 206NW496.

397-59⅓-New. Actual notice binds lot buyer, although restriction was omitted from deed. 97NJEq425, 129A442.

397-59¼-New. A bond for title merged in a later deed made to purchaser by obligor, but such deed does not abrogate a general building scheme under which the land was sold. 136Ga471, 136SE 440.

397-59⅕-New. Representations by platter to purchasers of two lots that the restrictions imposed on their lots applied to the whole subdivision are insufficient to establish a general plan of restriction so notorious as to put all purchasers of property therein on inquiry. 237Mich333, 211NW746.

397-59⅙-New. A purchaser of land for church and school purposes is not chargeable with constructive notice of the adoption and execution of a uniform plan limiting the use of land to residential purposes where there were churches, schools, and business places in the subdivision at the time of the purchase. 239Mich216, 214NW245.

397-59⅐-New. That a typewritten portion of a contract for the sale of land is pasted over printed portions of the contract containing building restrictions does not charge the purchaser with constructive notice of the portions thus obliterated. 239Mich216, 214NW245.

397-59⅛-New. Building restrictions are not imposed on a lot conveyed subject to restrictions of record where such restrictions do not appear in the chain of title although other lots in the neighborhood are subject to restrictions. 316Mo 805, 291SW104.

397-59⅑-New. The filing of an application for a permit to build an apartment house, with plans showing spaces on the ground floor for "lounge," "coffee shoppe," and dining rooms, has been held not constructive notice to inhabitants of the restricted subdivision that such spaces were to be used for grocery store, butcher shop, drug store, and public restaurant. 245Mich188; 222NW 171.

397-59 1/10-New. In Porto Rico restriction to be effective against third person must be recorded in the registry. 35 PortoRico 445.

397-61 31F(2d)205; 164Ga77, 137SE 831, 833 [citCJ]; 164Ga868, 139SE546; 164Ga856, 139SE547; 256Mass101, 152 NE225; 261Mass314, 158NE761; 234 Mich246, 207NW799; 233Mich627, 207 NW913; NJCh 130A615; 121 Or643, 256P1043, 54ALR837; 125 Or150, 262P 853, 57ALR311; 294Pa360, 144A271; 102WVa374, 135SE399. [a] **Facts held insufficient** to show that equitable easement was created appurtenant to remaining lots of grantor. 252Mass513, 147NE837.

397-62 CalA 281P93; 164Ga868, 139SE 546; 164Ga856, 139SE547; 261Mass 314, 158NE761; 233Mich146, 206NW 505; 98NJEq256, 130A618 (grantee may rely upon restrictions); NJCh 150A 202 (holding not a violation of covenant); 191NC736, 133SE18; 121 Or643, 256P1043; 54ALR837; TexCivA 272 SW237.

398-63 Ont [1925] 3DomLR560 (though no privity of contract exists). [a] **Covenant binding "grantee, his heirs, executors, administrators, and assigns"** runs with land. 252 IllA222.

398-64 164Ga77, 137SE831, 833 [cit CJ].

398-65 214Ala230, 107S67, 69 [citCJ]; 164Ga868, 139SE546; 164Ga856, 139SE 547; 234Mich246, 207NW799; Ont [1925] 3DomLR560. [d] 238Mich274, 213NW973. [e] **Analogy to equitable enforcement of legal right.**–Ont [1925] 3DomLR560. [f] **Grantee with notice** who erects building in violation of restrictions acts at his peril. NJCh 130A615.

398-66 214Ala230, 107S67, 69 [citCJ].

399-67 237Mich333, 211NW746; 251 NY275, 167NE441 (evidence held insufficient to disclose purpose to make covenants contained in deed reciprocal).

399-69 116 Or336, 241P66, 68 [quot CJ]; 121 Or643, 256P1043, 54ALR837.

399-70 116 Or336, 241P66, 68 [quot CJ].

399-71 6PaDist&Co 796.

399-72 9PaDist&Co 149.

399-73 252 IllA222. [a] **Equity will not impress restriction as to size of lots** in absence of general plan restricting lots in subdivision to certain size. 242 Mich331, 218NW692.

399-78 157Md674, 145A483.

399-80 121 Or643, 256P1043, 54ALR 837.

399-80½-New. Equity will not enjoin a restriction amounting to a condition subsequent because on breach of condition title reverts to grantor. TexCivA 272SW231.

399-80⅓-New. Grantees of lot outside restricted tract, knowing hostelry existed in violation of restrictions not in position to object to its continuance. 98 NJEq256, 130A618.

399-81 83CalA391, 257P124; 35Porto Rico 445. [a] **In action at law for damages** for violation of uniform building restriction, substantial injury must be shown to justify award of damages. 83 CalA391, 257P124.

399-82 TexCivA 272SW231. [c] **Equity takes jurisdiction in such cases to** prevent irreparable injury to comfort and enjoyment, although without damage, but not to protect a mere preference. 244NY22, 154NE652. [d] **Extension of garage from adjoining lots** upon lot which was conveyed with restriction to residence purposes is substantial violation of rights of grantor who retains property across street from lot conveyed. 235Mich355, 209NW107.

400-84 200Cal 743, 254P1101; NJCh 130A615 (changes are not material if they do not interfere with enjoyment by the lot owners as place of residence or show general intention to abandon plan); 194NC74, 138SE408, 54ALR806. [a] **Widening of street and creation of business section.**–246Mich14, 224NW339.

400-85 200Cal 743, 254P1101; 105 Conn464, 136A71, 75 [citCJ]; Ill 241 IllA28; 232Mich682, 206NW527, 528 [citCJ] (change held not so material as to render injunction inequitable); 237 Mich642, 212NW959; 99NJEq61, 131A 633; 244NY22, 154NE652; 194NC74,

138SE408, 54ALR806. See also Ont [1928] 1DomLR354. [c] **Each case is to be determined on its own facts.**–232 Mich682, 206NW527. [d] **Increased vehicular traffic over boulevards passing through restricted residential property** does not abrogate restrictions. 201Cal 530, 258P60.

400–86 200Cal 743, 254P1101.

400–87 248Mich625, 227NW772. [a] **Single block restricted to single family dwellings** may not be changed by reason of altered character of neighborhood. 216AppDiv135, 215NYS65.

400–88 121 Or643, 256P1043, 54ALR 837. [a] 233Mich6, 206NW362.

401–89 235Mich355, 209NW107. [a] **Covenant limiting buildings to dwelling houses continues binding** where, though nearby buildings have been adapted to commercial purposes, neighborhood remains essentially residential. Mass 165 NE419.

401–89½–New. Where the only substantial changes in the character of a neighborhood are outside of a restricted subdivision which is still a high class residential district, there is no such change in the neighborhood as would render it inequitable to enforce the restriction as to such subdivision. 201Cal 530, 258P60; 231Mich592, 204 NW767.

401–90 232Mich682, 206NW527 (change held not so material as to render injunction inequitable). [b] **Owner of property, subject to building restrictions under covenant in prior deed,** is not entitled to have restrictions removed on ground of change in residential character of neighborhood, unless change rendering covenant ineffective is shown by present conditions. Mass 165 NE419.

401–91 [a] **Residential section is not changed to business section** by maintenance of small mercantile businesses in dwellings primarily used for residential purposes within restricted section. 106 WVa201, 145SE267.

401–93 235Mich355, 209NW107 (evidence held sufficient to show that character of neighborhood had not materially changed and that restriction was still of substantial value to grantor).

401–93½–New. The presence of certain structures has been held not so to change the neighborhood as to prevent the enforcement of a covenant against noxious businesses. 232Mich682, 206 NW527.

401–93⅓–New. That covenant had only few years to run and property was included by board of estimate in business district does not destroy covenantee's rights. 216AppDiv135, 215NYS65 (purchaser with notice can't complain of its enforcement).

401–93¼–New. However, injunctive relief should not preclude privilege of bringing before court subsequent change in conditions. 235 IllA170.

401–93⅓–New. Unless the change in character of the neighborhood clearly neutralizes benefits of restriction to a point of defeating its object and purpose, equity will not refuse to enforce it. 99NJEq61, 131A633.

401–93⅙–New. Minor departures by property owners from restrictions imposed on a subdivision different from the infraction charged in the suit and not sufficient to change its general conditions, appearance, and character are not of such moment as to warrant denial of relief from a violation of the restriction. 236Mich116, 210NW323.

401–93½–New. Property owners are entitled to enjoin violation of restrictions on the street on which they live although there have been violations elsewhere which did not infringe on their welfare or peaceable enjoyment of their homes. 238Mich274, 213NW973.

401–93⅛–New. A zoning ordinance purporting to permit business in certain zones does not supersede or nullify restrictions in a deed. 121 Or643, 256P 1043, 54ALR837(2dcase).

401–94 NJ 144A877; 14PaDist&Co 256. [a] 209Ky332, 272SW890. [c] 209Ky332, 272SW890; 256Mass101, 152 NE225 (notifying defendant within five days after work began); 231Mich592, 204NW767; 234Mich246, 207NW799; 233Mich627, 207NW913; 238Mich337, 213NW125; 98NJEq256, 130A618; 128 Misc408, 219NYS59; 125 Or150, 262P 853, 57ALR311; 106WVa201, 145SE 267.

401–95 233Mich627, 207NW913.

401–96 191NC61, 131SE567, 571 [cit CJ]; 194NC74, 138SE408, 410, 54ALR 806 [citCJ].

401–97 252Mass513, 147NE837.

402–98 191NC61, 131SE567, 571 [cit CJ].

402–4 98NJEq256, 130A618. [b] (2) 105Conn464, 136A71.

402–6½–New. A restrictive covenant for the personal benefit of the grantor will be terminated by his death. NJ 144A717.

402–6⅓–New. Building restrictions are not terminated by zoning ordinances of the city. 128 Or229, 274P306.

402–6¼–New. Erection of three dwellings with closed porches, violating restrictions, which are from three hundred to seven hundred feet from defendant's home and not interfering with enjoyment of premises, does not constitute such change in conditions as to render inequitable further enforcement of a decree restraining violation of such restriction next door to defendant's home. 236Mich251, 210NW226.

402–6⅛–New. Valid restriction upon use of real property is not nullified or superseded by a zoning ordinance. 338 Ill 412, 170NE425.

402–7 96CalA597, 274P614; 94Fla313, 114S455; 218AppDiv646, 219NYS222. But see 98NJEq256, 130A618. [b] **To constitute release of restrictions** as against other purchasers because of breach by one purchaser, such breach must substantially defeat object of general scheme. 166La581, 117S725. [c] **Question of fact.**–166La581, 117S725. [d] **Grantees declared not to have waived violations** of which they had no knowledge. 98NJEq256, 130A618.

403–10 83CalA391, 257P124; 98NJEq 140, 130A1 (dictum).

403–12 235 IllA170.

403–12½–New. But where grantee's violation of restricted covenant is remedied before trial, he is not precluded from injunctive relief against others' violations. 216AppDiv135, 215NYS65.

403–13 235Mich527, 209NW568; 98NJ Eq140, 130A1 (especially where not peculiarly affected by structure complained of).

403–14 105Conn464, 136A71; 337 Ill 589, 169NE760 (abandonment of one restriction held not abandonment of another); 227Ky826, 14SW(2d)143; 232 Mich682, 206NW527, 528 [citCJ]; 239 Mich377, 214NW108; 98NJEq256, 130 A618 (not evidence of acquiescence); 194NC74, 138SE408, 54ALR806; 6Pa Dist&Co 261; 14PaDist&Co 256; Tex CivA 283SW615, 618 [quotCJ]. [a] **Acquiescence in breach** in respect of only a few of lots involved in general scheme was not such general abandonment of scheme as to release restriction in future cases. 166La581, 117S725.

403–15 236Mich251, 210NW226; 6Pa Dist&Co 261; 6PaDist&Co 796; Tex CivA 283SW615, 618 [quotCJ].

403–16 194NC74, 138SE408, 54ALR 806; 122 Okl 179, 252P1088; TexCivA 283SW615, 618 [quotCJ]; 106WVa201, 145SE267.

403–17 235 IllA170; 236Mich116, 210 NW323; 248Mich625, 227NW772; 311 Mo 262, 278SW398; 26 OhA1, 159NE 482 (acquiescence by original grantor not defeating his right to enforce). [a] (6) Building by plaintiffs and others of open porches extending into restricted space is not waiver of right to prevent building of inclosed porches. 233Mich 627, 207NW913. (7) That third floor of dwelling house was used as offices for three physicians, only one of whom resided on premises, is not change in residential character of building, so as to preclude injunctive relief to owner against violation of restrictive covenant. 216AppDiv135, 215NYS65.

404–18 128Me339, 147A419. [a] **Restrictions applicable to limited areas in general plan.**–Under covenant limiting right to enforce restriction to owners in same block, nonobservance in other blocks does not affect lot owner's right to enforce restrictions in his block. 83 CalA391, 257P124.

404–19 [a] **Corner lots.**–232Mich682, 206NW527.

404–21 241Mich591, 217NW794.

404–23½–New. Waiver need not partake of technical estoppel. 89CalA462, 265P287.

404–23⅓–New. An owner of premises by conveying to himself as executor by full covenant warranty deed, free from covenant imposed in the deed from the original grantor, abandons any right to enforce the covenant. 226AppDiv745, 233NYS596.

404–23¼–New. Where it appears that a subdivision is not entirely restricted to a residential section but provisions are made in certain sections for business or apartment houses, 20 OhA362, 152NE203.

404–23⅕–New. the fact alone that such apartment houses are upon the same street and within two squares of a restricted lot would be no defense to violation of restriction on such lot, 20 OhA362, 152NE203.

404–23⅙–New. but it would have to be shown that the house was erected in a restricted section and that one seeking to enforce the restriction was in some degree responsible therefor or consented to, or acquiesced in, the construction or maintenance thereof. 20 OhA362, 152NE203.

404–23⅐–New. That promoters of a subdivision accepted brick veneer as compliance with restrictions requiring brick or stone construction and permitted shingles on a dormer window of one such house will not justify the use of stucco on the second story of a brick veneer building. 239Mich377, 214NW 108.

404–23⅛–New. Every lot owner in a subdivision who has not become estopped by his acts must be dealt with before it can be said that a negative easement restricting lots to private residences has been abandoned in the subdivision. 196Wis70, 219NW354.

404–24 188Wis17, 205NW548, 549 [cit Cyc]. [c] **Modification of plan as to use of property** cannot be made by grantor or by his heirs or their corporate successor without consent or acquiescence of owners of lots previously sold. 125 Or150, 262P853, 57ALR311 (burden of proof is on defendants in suit to enforce restrictions). [c] **Amendment of restrictive covenants** authorized in deeds to lots. TexCivA 30SW(2d)590.

404–26 NJ 144A717, 60ALR1219; Tex CivA 1SW(2d)699. See also 61 OntL 545, [1928] 1DomLR1034.

404–27½–New. Where a grantor has reserved the right to consent to the erection of a church on a part of a tract of land restricted for use for residential purposes, he may grant such consent after he has conveyed all of his interest in the property. 116 Or336, 241P66, 68.

404–27⅓–New. In such case consent may be given in an instrument separate from the deed conveying the land as to which consent is given for the erection of a church. 116 Or336, 241P66.

404–27¼–New. In such case grantees of other lots cannot complain that the consent was executed by the original grantor instead of by his successor in interest in the lands upon which the erection of a church was consented to. 116 Or336, 241P66, 68.

404–28 [a] 324 Ill 457, 155NE349.

404–32 164Ga96, 137SE833; Ill 172NE 173; 251NY177, 167NE213.

405–34 230Ky835, 20SW(2d)1015 (subsequent inconsistent deed).

405–51 209Ky109, 272SW396; 146 Wash638, 264P1003.

406–58 150Md659, 133A306.

406–59 150Md659, 133A306.

406–60 317 Ill 325, 148NE37; Minn 232 NW511(2dcase).

406–66 [a] **Alteration.**–317 Ill 325, 148 NE37.

406–68 But see Iowa 228NW574.

406-68½-New. Where a vendor executed and delivered a deed to the purchaser's wife at his request, a subsequent deed to the purchaser after his destruction of the original will, without the consent of the grantee, is of no effect. **Mo** 289**SW**579.

406-69½-New. Court of equity will hold deed void where, after execution, name of grantee was changed without consent of either grantor or original grantee. **Iowa** 229**NW**844.

407-80 But see 229**Ky**369, 17**SW(2d)** 207. [a] (2) Deed of land held annulled by subsequent writing conveying only tributes, and payment back of purchase money. 219**Ky**615, 294**SW** 183, 184 [quotCJ].

407-83 173**Ark**429, 292**SW**405; 177**Ark** 1194, 9**SW(2d)**14; 85**CalA**475, 259**P**770; 163**Ga**87, 135**SE**433; 165**Minn**198, 206 **NW**170, 171[citCJ], 43**ALR**41; 84**Mont** 424, 276**P**16, 63**ALR**528; 146**Wash**638, 264**P**1003.

408-86½-New. In Minnesota it is held that the return and acceptance of an unrecorded deed in connection with other circumstances may have the effect of an estoppel. 165**Minn**198, 206**NW**170, 43**ALR**41 (return of deed to vendor for cancellation satisfaction of mortgage and mortgage debt by vendor and conveyance of part of property to vendee's wife).

408-86⅓-New. In Iowa the same rule applies. 205 **Iowa**639, 216**NW**99.

408-90 322 **Ill** 492, 153**NE**740.

409-4 169**Ga**187, 149**SE**910; 221**Ky**7, 297**SW**702 (petition and amended petition held to show prima facie delivery and acceptance).

409-5 73**CalA**312, 238**P**798.

409-6 5**F(2d)**873 (bill seeking cancellation for fraud must allege facts constituting fraud); 331 **Ill** 11, 162**NE**144; **Ga** 155**SE**8; 255**Mass**607, 152**NE**363 (no fraud alleged to invalidate deed); **Mo** 282**SW**25 (undue influence); **Tex CommnA** 18**SW(2d)**595, 63**ALR**1009; **TexCivA** 9**SW(2d)**494; 152**Wash**543, 278 **P**673(1stcase); 153**Wash**102, 279**P**402. [a] **Denial of title with admission of execution of deed,** in answer, constituted mere denial of effect of deed, rather than of execution and delivery. 226**Ky**456, 11**SW(2d)**140. [b] **Fraud.**–197**NC**329, 148**SE**425 (complaint held insufficient).

409-7 213**Ala**131, 104**S**393; 219**Ala**77, 121**S**86; 331 **Ill** 11, 162**NE**144.

409-9 169**Ga**187, 149**SE**910; 167**La**705, 120**S**58; 255**Mass**607, 152**NE**363; **Mo** 282**SW**25; **TexCivA** 296**SW**902; **Tex CivA** 21**SW(2d)**305. [b] **Issues on** the issue of undue influence, sufficient capacity is presumed. **TexCivA** 271**SW**311. [c] **Plaintiff alleging invalidity by fraud,** must prove not only fraud but very fraud alleged. **TexCivA** 28**SW(2d)** 837.

409-12 128**Me**382, 147**A**816; 101**NJEq** 388, 139**A**524 (absence of covenant); 295**Pa**241, 145**A**75. But see **TexCivA** 289 **SW**119.

410-5½-New. Separate demands for money due could be treated as continuous transaction constituting one offense. **Wyo** 293**P**365.

410-18 **TexCivA** 6**SW(2d)**136.

410-19-20 **TexCivA** 29**SW(2d)**872.

410-21 **Iowa** 228**NW**313; 37 **OklACR** 551.

411-46 168**Ark**1033, 275**SW**653 (recorded deed); 168**Ark**1057, 272**SW**668; 169**Ark**210, 275**SW**524; 336 **Ill** 490, 168 **NE**340. [b] **Deed authentic in form is presumed genuine** in absence of proof of forgery. 167**La**137, 118**S**865. [c] **Where certified copy is introduced,** plaintiff must show forgery. **TexCivA** 288**SW**615. [d] **All presumptions are in favor of genuineness of deed** duly attested and recorded. **Ga** 155**SE**185.

411-47 167**Ga**883, 146**SE**901. [d] **Affidavit of forgery held insufficient.**–170 **Ga**398, 153**SE**44.

411-49 See also 135 **Okl** 123, 276**P**200.

411-52 [a] **Presumption in favor of genuineness of deed** is not destroyed by proof grantor could not write where deed attacked 86 years after record. **Ga** 155**SE**185.

412-55 79**CalA**560, 250**P**411.

412-64 15**DelCh**302, 137**A**74.

412-65½-New. Ordinarily the grantor has no intention of reserving a fee in the boundary street or way, when its use has ceased to be of benefit to him. 152**Tenn**664, 280**SW**689.

412-65⅓-New. There is no presumption as to disposition of property other than that expressed in the deed proved to have been made and delivered. 330 **Ill** 48, 161**NE**68.

413-82½-New. It is not presumed that the grantor placed the grantee in possession, thus rendering an uncertain description certain. 130 **Or**24, 278**P**989.

413-83 83**Colo** 430, 266**P**217, 222 [cit CJ]; 130**Kan**524, 287**P**614; 58**ND**501, 226**NW**485, 65**ALR**852 (burden is on grantee to prove delivery); **TexCivA** 6**SW(2d)**136. See also **Ind** 168**NE**879; 203 **Iowa**767, 210**NW**609.

413-84 164**Ga**265, 138**SE**231, 234 [cit CJ].

413-86 125**Kan**485, 264**P**1047; 84**Mont** 424, 276**P**16, 63**ALR**528. [e] **Acknowledgment on date deed bears is prima facie evidence** of its delivery where signature on deed was that of grantor in his own handwriting. **SD** 226**NW**557.

413-87 **Wis** 231**NW**276 (holding there is no conclusive presumption that deed naming grantee was delivered to him).

413-88 329 **Ill** 323, 160**NE**548; **Ill** 172 **NE**173. [b] **Rule held inapplicable.**–339 **Ill** 530, 171**NE**621.

414-93 338 **Ill** 313, 170**NE**195; **Ind** 168 **NE**879; 201 **Iowa**107, 204**NW**294, 48 **ALR**394.

414-96 201 **Iowa**107, 204**NW**294, 48 **ALR**394; **Iowa** 228**NW**313.

414-96½-New. The delivery of a deed and its acceptance by the grantees may be presumed after many years, especially where the parties are all dead and the grantees' possession has been undisputed for many years. 228**Ky**209, 14**SW (2d)**750.

414-1 See also 201**Cal** 518, 258**P**55 (assent of wife to delivery of deed to attorney is presumed).

414-2 80**CalA**185, 251**P**666; **DelCh** 141 **A**271; 316 **Ill** 221, 147**NE**40; 215**Ky**373, 285**SW**198; 55**ND**546, 214**NW**857; 294 **Pa**282, 144**A**75; 39**Wyo** 266, 270**P**1072, 1075 [citCJ].

415-11 75**Mont**294, 243**P**803.

415-12 75**Mont**294, 243**P**803 (by proof of grantor's possession long after execution and before recordation).

416-18 332 **Ill** 551, 164**NE**1; 338 **Ill** 313, 170**NE**195; 205 **Iowa**1285, 217**NW** 852; 234**Mich**322, 208**NW**41; 307**Mo** 682, 271**SW**489.

416-19 215**Ky**57, 284**SW**410; 232**Ky** 532, 23**SW(2d)**959.

416-20 322 **Ill** 492, 153**NE**740.

417-21 234**Mich**322, 208**NW**41.

417-24 221**Ky**7, 297**SW**702. See also **Mo** 30**SW(2d)**980.

417-27 [c] **Retention of deed containing reservation** in grantors held to establish rebuttable presumption of acceptance. 126**Me**299, 138**A**170.

417-28 **CalA** 285**P**328; **CalA** 288**P**117; 75**Mont**294, 243**P**803 (before recordation); 130**Misc**12, 223**NYS**626.

417-29 **CalA** 285**P**328; 75**Mont**294, 243 **P**803; 130**Misc**12, 223**NYS**626.

417-30 But see 101**WVa**514, 133**SE**123.

418-38 79**CalA**762, 251**P**227; 97**CalA** 628, 276**P**122; 338 **Ill** 23, 169**NE**817; 202 **Iowa**340, 209**NW**291; 203 **Iowa**767, 210**NW**609; 120**Kan**283, 243**P**323; 244 **Mich**504, 221**NW**635; **Mo** 28**SW(2d)**665; 33**NM**193, 263**P**29, 30 [quotCJ]; 297**Pa** 179, 146**A**534.

418-38½-New. and accepted, 79**CalA** 762, 251**P**227.

418-39 79**CalA**762, 251**P**227; 316 **Ill** 221, 147**NE**40 (presumption overcome only by clear and convincing evidence); 203 **Iowa**767, 210**NW**609; **Iowa** 228**NW** 313; **Mo** 28**SW(2d)**665; **SD** 231**NW**912. But see 244**Mich**504, 221**NW**635.

418-40 92**CalA**526, 268**P**682; **Mo** 28 **SW(2d)**665.

418-41 79**CalA**762, 251**P**227.

419-43½-New. that it is overcome only by evidence that no delivery was in fact made and none intended, 297**Pa**179, 146 **A**534.

419-53 98**CalA**408, 277**P**146; 101**CalA** 497, 281**P**1089; **CalA** 285**P**715; 91**Fla** 995, 108**S**891; 167**Ga**883, 146**SE**901; 169**Ga**801, 151**SE**496; 328 **Ill** 338, 159 **NE**775; 201 **Iowa**107, 204**NW**294, 48 **ALR**394; 203 **Iowa**767, 210**NW**609; 205 **Iowa**1285, 217**NW**852; 125**Kan**485, 264 **P**1047; 211**Ky**196, 277**SW**248, 249 [cit Cyc]; 215**Ky**57, 284**SW**410; 221**Ky**7, 297**SW**702; 239**Mich**551, 214**NW**957; 244**Mich**504, 221**NW**635; 164**Minn**366, 205**NW**262 (filing for record raises same presumption); 219**AppDiv**624, 220**NYS** 763; 130**Misc**12, 223**NYS**626; 226**App Div**142, 234**NYS**635; 297**Pa**10, 146**A**135 (1stcase); **TexCivA** 283**SW**310; 39**Wyo** 266, 270**P**1072, 1075 [citCJ]. See also 125**Misc**546, 211**NYS**557. [e] **Deed delivered to father of grantee and grantor** then delivered to grantee is presumed to be with consent of grantor. 211**Ky** 196, 277**SW**248 (in absence of evidence to contra).

420-54 211**Ky**196, 277**SW**248, 249 [cit Cyc]; 125**Misc**546, 211**NYS**557 (on basis of assumed benefits to grantee).

420-55 167**Ga**491, 145**SE**877; 203 **Iowa** 767, 210**NW**609. See also **Wash** 289**P** 1015.

420-58 205 **Iowa**1285, 217**NW**852, 855 [quotCJ].

420-60 83**Colo** 430, 266**P**217, 222 [cit CJ]; **TexCivA** 289**SW**119. [a] (2) Where deed was recorded forty-eight years after its execution. **TexCivA** 289 **SW**119.

420-62 217**Ala**287, 116**S**139 (by proof that no delivery was intended); 92**CalA** 526, 268**P**682; 91**Fla**995, 108**S**891; 96 **Fla**358, 118**S**215; 328 **Ill** 338, 159**NE** 775; 201 **Iowa**107, 204**NW**294, 48**ALR** 394 (only by clear and satisfactory evidence); 215**Ky**57, 284**SW**410; 239**Mich** 551, 214**NW**957; 244**Mich**504, 221**NW** 635; 125**Misc**546, 211**NYS**557; 141**SC** 1, 139**SE**209, 56**ALR**729. [d] **Presumption held rebutted.**–239**Mich**551, 214**NW** 957.

420-62½-New. Burden is on grantor to show recordation. 201 **Iowa**107, 204**NW** 294, 48**ALR**394.

420-63½-New. The presumption of delivery and acceptance may be rebutted by evidence competent to rebut any presumption of fact. 125**Misc**546, 211**NYS** 557.

421-71 73**CalA**312, 238**P**798; 75**Mont** 99, 242**P**425.

421-72 202 **Iowa**129, 209**NW**303; 206 **Iowa**732, 221**NW**474; 211**Ky**196, 277 **SW**248 (recital prima facie correct); 141**Miss**370, 106**S**528; 134**Misc**334, 235 **NYS**477.

421-74 73**CalA**312, 238**P**798; 211**Ky** 196, 277**SW**248; 141**Miss**370, 106**S**528; 75**Mont**99, 242**P**425; **TexCivA** 11**SW (2d)**350; **TexCivA** 22**SW(2d)**1096. [a] 172**Ark**198, 288**SW**4.

421-80½-New. Where a fee-simple deed recited a consideration of five dollars and other good and valuable considerations, it will be assumed that the purchaser paid the full value. 150**Md**333, 134**A**124.

421-80⅓-New. In absence of direct evidence respecting consideration it will be presumed that the grantor received approximately the consideration indicated by a United States internal revenue stamp on the deed. 134**Misc**334, 235**NYS** 477.

421-80¼-New. No presumption of absence of consideration arises from fact that conveyance is from father to son. 142 **Okl** 152, 286**P**322.

422-86 43 **Ida**675, 256**P**529; 204 **Iowa** 1367, 217**NW**456; 224**Ky**75, 5**SW(2d)** 280; 225**Ky**25, 7**SW(2d)**496; 42 **OklA CR**100; **TexCivA** 283**SW**288.

422-87 320**Mo** 474, 7**SW(2d)**691; 24 **OhA**57, 155**NE**815.

422-91 43 **Ida**675, 256**P**529.

422-94½-New. The vendor of an interest in real estate derived under a will, devising to the vendor and other grandchildren of the testator the remainder after termination of an intermediate life estate, is presumed to know the interest that she might have at the time of conveyance in determining the validity of a deed of such interest. 29 **OhA**296, 163**NE**573.

422-94⅓-New. The presumption of validity cannot be overcome by uncorroborated testimony of the grantors alone where the surrounding facts are as consistent with the validity as with the denials by the grantors. 138 **Okl** 177, 280P808.

422-95 11F(2d)841; 69CalA399, 231P 375; 43 Ida675, 256P529; 320 Ill 371, 151NE244; 325 Ill 47, 155NE763; 331 Ill 420, 163NE393; 197 Ind236, 150NE 361; 202 Iowa129, 209NW303; 205 Iowa196, 217NW825; 209Ky677, 273 SW522; 221Ky737, 299SW727; 222Ky 411, 300SW859; 225Ky25, 7SW(2d)496; 225Ky804, 10SW(2d)294; 157Md287, 145A773; 146Miss161, 110S583; Mo 281 SW431; 322Mo 484, 15SW(2d)801; 52 ND380, 202NW860; 128 Okl 91, 261P 224; 128 Okl 125, 261P371; 299Pa568, 150A169; TexCivA 283SW288. [b] **Where one exercises dominion, superiority and influence,** confidential relationship exists. 208Ky803, 272SW52.

423-96 11F(2d)841. [a] (2) Mutual friendship or reliance on another based on previous business relations not sufficient to show confidential relation. 299Pa568, 150A169.

423-97 335 Ill 52, 166NE477; 157Md 287, 145A773; 146Miss161, 110S583; 128 Okl 91, 261P224.

423-1 216Ky577, 288SW305; 122 Okl 301, 254P979; 38 OklACR253.

423-2 314Mo 95 282SW1014.

423-4 217Ala134, 115S19; 89CalA594, 265P580. [a] **Grantee has burden to explain purpose of deed** only if mental disability or fiduciary relation has been shown. 207 Iowa776, 223NW686.

423-5 See also 157Md287, 145A773.

424-7 202 Iowa129, 209NW303; 205 Iowa196, 217NW825; TexCivA 283SW 288.

424-10 204 Iowa1367, 217NW456.

424-13 202 Iowa129, 209NW303.

424-18 207Cal 582, 279P653; 80CalA 230, 251P692; 101CalA497, 281P1089; 322 Ill 406, 153NE662; Ill 173NE376; 222Ky411, 300SW859; 316Mo 1213, 293 SW405; 114Nebr752, 209NW737; 115 Nebr761, 215NW99; 142 Okl 152, 286P 322; TexCivA 283SW288. See also 220 Ky98, 294SW785.

424-19 Mo 282SW25 (one raised as son). See also 119 Or277, 241P46.

424-20 220Ky98, 294SW785; 230Ky 125, 18SW(2d)945.

425-21 101CalA497, 281P1089.

425-22 151Md140, 134A130.

425-23 80CalA230, 251P692; 209Ky 677, 273SW522; 136Wash378, 240P9.

425-24 212Ala676, 103S877; 80CalA 230, 251P692; 197 Ind236, 150NE361.

425-25 83CalA1, 256P294; 52ND380, 202NW860.

425-29 But see 326 Ill 398, 158NE138.

425-33 Okl 261P224.

425-34 100CalA177, 280P187; 78Colo 36, 238P59.

426-35 87CalA320, 262P461 (deed without consideration); 128 Okl 172, 261P 944. [a] **Evidence held sufficient to rebut presumption.**–203Cal 61, 263P200.

426-38 241Mich308, 217NW23.

426-40 136Wash378, 240P9.

426-46 But see 217Ala134, 115S19.

427-51 218Ala515, 119S224; 69CalA 399, 231P375; 125Kan560, 264P1055; 146Miss161, 110S583; 122 Okl 301, 254 P979; 128 Okl 125, 261P371; 128 Okl 172, 261P944; Wash 136Wash378, 240P 9. See also 334 Ill 233, 165NE624.

427-52 320 Ill 371, 151NE244; 122 Okl 301, 254P979.

427-54 197Cal 396, 240P1010; 71CalA 251, 235P62; 146Miss161, 110S583. But see 101CalA497, 281P1089.

427-55 38 OklACR253. But see 218Ala 515, 119S224. [a] 38 OklACR253.

427-57 215Ala205, 110S384; Ill 173NE 376; 204 Iowa1367, 217NW456; 232Ky 781, 24SW(2d)603; 151Md140, 134A 130; 241Mich416, 217NW42; NY 124 Misc906, 210NYS320; 285Pa533, 132A 709.

428-65½-New. That the grantee holds a mortgage executed by the grantor on other property does not raise a presumption of fraud in securing the deed. 197 NC329, 148SE425.

428-65½-New. Where grantee complies with deed of support until he dies there can be no presumption of fraud. Ill 173 NE376.

428-66 43 Ida675, 256P529.

428-67 178Ark983, 13SW(2d)15; 92 Fla937, 111S240; 204 Iowa1367, 217NW 456; 214Ky179, 282SW1106; 232Ky 127, 22SW(2d)568; Mo 274SW460; Mo 282SW25; 316Mo 1213, 293SW405 (in suit to set aside deed from father to son); Mo 26SW(2d)611; 114Nebr522, 208NW630; 114Nebr704, 209NW492; 115Nebr761, 215NW99; 130 Or417, 279 P865; SD 205NW47. [a] **Real mental weakness creates presumption of invalidity,** imposing burden on party charged to show fairness and capacity. 129 Or674, 278P946.

428-68 217Ala235, 115S258; 90Fla162, 105S321; 338 Ill 23, 169NE817; 205 Iowa196, 217NW825 (evidence insufficient to overthrow presumption of undue influence from fiduciary relation); 208 Ky803, 272SW52; 220Ky98, 294SW785; 227Ky268, 12SW(2d)854; 99NJEq443, 129A124; NJCh 129A705; Or 286P593. But see Kan 289P406.

428-69½-New. Presumption is against validity of deed to child by parent who is old and weak or dependent or under control of grantee. Or 286P593.

428-70 318 Ill 218, 149NE306; 241Mich 416, 217NW42; 116 Or626, 239P108, 241 P56.

428-71 172Ark176, 287SW1001; 330 Ill 48, 161NE68; 331 Ill 11, 162NE144; 317Mo 228, 295SW794; TexCivA 271SW 311.

428-72 216Ala265, 113S238; 218Ala 102, 117S679; 169Ark1181, 278SW48; 172Ark176, 287SW1001; 178Ark983, 13 SW(2d)15; 330 Ill 48, 161NE68; 330 Ill 106, 161NE99; 206 Iowa732, 221NW 474 (insanity); 317Mo 228, 295SW794; Mo 26SW(2d)611; 114Nebr522, 208NW 630; 114Nebr704, 209NW492; 114Nebr 752, 209NW737; 115Nebr761, 215NW 99; SD 205NW47; TexCivA 281SW331; TexCivA 294SW328; Va 153SE807.

428-78 216Ala265, 113S238. [b] **That grantor was adjudged incompetent** and committee appointed raises no presumption of law that he was incompetent executing deed 5 months later. Va 153 SE807.

429-85 209Ky677, 273SW522; 227Ky 268, 12SW(2d)854.

430-3 [b] **Proof is not confined to subscribing witnesses.**–161Ga517, 131SE 483.

430-6 161Ga517, 131SE483; 167Ga883, 146SE901.

430-19 135 Okl 123, 276P200.

430-25 NJ 142A907.

431-28 165Ga685, 142SE142; 170Ga 530, 153SE415; 102WVa1, 135SE254; 103WVa12, 136SE509.

431-30 100Vt26, 134A608.

431-37 218Ala102, 117S679; CalA 285 P325; CalA 290P898; 161Ga517, 131 SE483; 83 IndA515, 149NE88; 127Misc 662, 217NYS274; 47RI 348, 133A239. [c] **Mere manual delivery to third person of itself** is not such unequivocal and absolute transaction as to determine whether intention was to deliver to grantees through him, and other evidence of owner's intention is admissible. 127 Misc662, 217NYS274.

432-38 161Ga517, 131SE483 (proof is not confined to subscribing witnesses).

432-39 219Ala296, 118S513; 79CalA 252, 249P219; 79CalA762, 251P227; 161Ga517, 131SE483; Ind 168NE879; 125Misc546, 211NYS557.

432-40 47RI 348, 133A239.

432-41 70CalA67, 232P723; 92CalA161, 267P928.

432-42 Cal 285P314; 85CalA720, 260P 342; 92CalA161, 267P928; CalA 285P 325; 47RI 348, 133A239.

432-43 47RI 348, 133A239.

432-46 But see 85CalA475, 259P770.

432-51 CalA 285P325.

432-53 But see 161Ga517, 131SE483.

432-54 214Ala10, 106S188. [c] **Letter accompanying deed** seen by attorney of grantor for first time after his death held to have no bearing on question of delivery. 214Ala10, 106S188.

432-56 76Mont403, 247P554; SD 217 NW386.

432-60½-New. Oral evidence is not admissible to show delivery of a deed was made conditionally. 125Misc546, 211 NYS557.

432-60½-New. Acceptance may be shown by oral evidence. 125Misc546, 211NYS557.

432-60¼-New. In suit for cancellation of deed of deceased for want of delivery in which evidence was conflicting, reasonable freedom must be accorded in judging relevancy of evidence. CalA 285P325.

432-67 CalA 283P970 (evidence of no consideration despite recital thereof); 83 IndA515, 149NE88; 204 Iowa732, 216NW39; 222Ky361, 300SW913.

433-69½-New. Evidence tending to show vendor's lien note valueless. Tex CivA 31SW(2d)350.

433-70 TexCivA 12SW(2d)686.

433-71 TexCivA 25SW(2d)881.

433-72 TexCivA 290SW270.

433-74 TexCivA 271SW311 (physical condition).

433-79 330 Ill 106, 161NE99 (as to purpose in making deed).

434-84 165Ga228, 140SE497; TexCivA 295SW347.

434-85 165Ga407, 141SE67; TexCivA 295SW347.

434-86 70CalA98, 232P763; 165Ga228, 140SE497; TexCommnA 10SW(2d)977; TexCivA 296SW902. [a] (2) No general time limit can be fixed in determining whether evidence of grantor's prior insanity is inadmissible for remoteness. TexCivA 296SW902.

434-92 169Ark210, 275SW524; 80CalA 230, 251P692.

434-93 80CalA230, 251P692; 314Mo 95, 283SW1014; 129 Or674, 278P946.

434-95 [a] See also 80CalA230, 251P 692.

434-96 80CalA230, 251P692 (secrecy).

434-98 314Mo 95, 282SW1014; 129 Or 674, 278P946 (age, feebleness and mental condition).

434-3 TexCivA 25SW(2d)881.

434-5 123Kan207, 252P256.

435-9 128 Okl 125, 261P371.

435-10 169Ark210, 275SW524.

435-16 89CalA594, 265P580.

435-32½-New. Evidence that a corporation to which plaintiff conveyed land without restrictions was plaintiff's alter ego is properly excluded in an action to enforce forfeiture for breach of restriction where similar conveyances were made to others. 89CalA462, 265P 287.

436-34 [a] Ky 23SW(2d)959; 98NJEq 404, 129A620.

436-36 TexCivA 6SW(2d)396 (conclusive evidence not required). See also 178Ark1150, 13SW(2d)624. [a] (2) Other instances. TexCivA 29SW(2d) 872. [b] 330 Ill 48, 161NE68; 120Kan 283, 243P323; 126Kan435, 268P821; 223Ky217, 3SW(2d)627; 232Ky532, 23 SW(2d)959; 167La137, 118S865; 307 Mo 682, 271SW489; 146Wash638, 264P 1003 (date). [d] 167Minn486, 209NW 307 (authority to fill in name of grantee). [f] **Filling in blanks.**–164Minn154, 204NW642. [g] **Clear and satisfactory proof** required to impeach deed regular on its face and properly acknowledged. 307Mo 682, 271SW489. [h] **Evidence held to show no execution.**–220Ala397, 125S665.

436-38 178Ark1150, 13SW(2d)624 (evidence sufficient). [a] **Evidence held sufficient** to show that deed was not forged. 168Ark1057, 272SW668.

436-42½-New. Where plaintiff denied signing the deed and later amended the complaint to allege fraud and that she did not remember signing, and produced no testimony as to execution, defendant's version as to circumstances of signing will be accepted in the absence of fraud or undue influence. 149Md412, 131A 780.

436-42½-New. Evidence that grantee had had reputation as a forger is of no probative value in proving that the deed was a forgery. TexCivA 288SW615.

436-42¼-New. Small consideration is no evidence of forgery. TexCivA 288 SW615.

436-42⅛-New. Execution of a deed is not shown as matter of law when a contrary inference may reasonably be drawn from the evidence. TexCivA 291 SW597.

436-43 84CalA142, 257P606 (deed designating grantee under assumed name).

437-46 [a] (1) Ala 127S671. (15) To

show intention to convey to grantee only tract of land owned by grantor, though deed described other land conveyed by grantor and her husband to other persons. 119 Or277, 241P46. (16) To warrant finding that grantees consented or acquiesced in filing amended plat changing numbers of lots. 130 Or24, 278P989. [b] (6) To establish by elimination true description of land described in deed as one hundred and twenty-three acres in specified section. 162La319, 110S489.

437-55 TexCivA 6SW(2d)396 (conclusive evidence not required). [a] Tex CivA 6SW(2d)396.

438-62 95CalA136, 272P319; 97CalA 628, 276P122. [a] 218Ala102, 117S679; 71CalA251, 235P62; 82CalA786, 256P 290; 85CalA475, 259P770; CalA 286P 510; 87Colo 345, 287P641; 164Ga265, 138SE231, 234 [citCJ]; 203 Iowa767, 210NW609; 204 Iowa896, 216NW20; Iowa 228NW311; 129Kan283, 243P323; 125Kan485, 264P1047; 125Kan466, 265 P42; 234Ky104, 27SW(2d)679; 239 Mich237, 214NW189; 247Mich29, 225 NW487; 247Mich5, 225NW490; 249 Mich640, 229NW459; 168Minn206, 209 NW752; 151Miss497, 118S543; 84Mont 424, 276P16, 63ALR528; 219AppDiv 624, 220NYS763; 55ND546, 214NW857 (good, valid, and unconditional delivery); SD 231NW912; TexCivA 288SW 528; Utah 288P903; 195Wis258, 218 NW593. [b] 173Ark387, 292SW377; 174Ark1180, 298SW219; 175Ark30, 298 SW481; 199Cal 344, 249P180; 200Cal 644, 254P269; CalA 285P325; CalA 288 P117; 339 Ill 530, 171NE621; 125Kan 560, 264P1055; 219Ky78, 292SW465; 164Minn384, 205NW434; 83Mont214, 271P433; 58ND501, 226NW485, 65ALR 852; ND 231NW888; 20 OhA293, 152 NE201; SD 226NW267; TexCivA 26 SW(2d)281; 67Utah45, 245P695; 135 Wash146, 237P297. [g] 329 Ill 323, 160 NE548. [h] **Evidence sufficient to sustain finding of no delivery.**–CalA 283P 970. [i] **Evidence held insufficient to show ratification of delivery.**–130Kan 243, 285P574(2dcase). [j] **Evidence held to sustain finding that deed was not delivered.**–Minn 225NW903.

438-62½-New. But requiring the fact of nondelivery or delivery with intention to vest title in the grantee as trustee to be established with clearness and certainty places an excessive burden upon the party alleging such fact. Tex CivA 7SW(2d)1096.

439-63 164Ga265, 138SE231, 234 [cit CJ]; 229Ky369, 17SW(2d)207.

439-64 316 Ill 221, 147NE40 (finding of nondelivery not sustained by evidence); 130Kan243, 285P574(2dcase). [a] **Finding of no delivery has been held fair inference from facts.** 92CalA161, 267P 928.

439-68 164Ga265, 138SE231, 234 [cit CJ]; Iowa 228NW313.

439-70½-New. Mere proof of manual tradition is insufficient. 71CalA251, 235 P62.

439-70¾-New. Evidence of intention to deliver is corroborative of direct evidence of facts sufficient to constitute symbolical delivery. Iowa 228NW311.

439-74 97CalA628, 276P122. [b] 216 Ky682, 288SW676; 234Ky104, 27SW (2d)679; Mo 30SW(2d)980; 125Misc 546, 211NYS557 (shows refusal to accept); TexCivA 288SW528. [c] 173 Ark387, 292SW377; 338 Ill 313, 170NE 195; 126Me299, 138A170; SD 206NW 475.

439-75 204 Iowa896, 216NW20.

439-78 85CalA87, 258P969; 91Fla995, 108S891; 123Kan487, 255P1112; 125 Kan286, 289, 264P75 [citCJ]; 76Mont 403, 247P554; 118Nebr364, 224NW857 (sufficient); 116 Okl 180, 244P813. [a] Cal 285P314; 338 Ill 313, 170NE195; 123Kan116, 254P322; 130Kan524, 287P 614; 127Misc662, 217NYS274; ND 231 NW888; 194Wis628, 217NW311. [b] **Evidence held sufficient to support finding that deed was intended to be effective from its date.** TexCivA 293SW888.

440-80 76Mont403, 247P554.

440-82 81Colo 195, 254P779; 169Ga 801, 151SE496 (sufficient if unrebutted to prove delivery); 43 Ida142, 249P890; 130Misc12, 223NYS626; 297Pa10, 146A 135(1stcase); 141SC1, 139SE209, 56 ALR729 (delivery held not established by record); TexCivA 291SW650; SD 231NW900.

440-82½-New. Evidence held not to support conclusion grantee was estopped to assert title, deed not being recorded. CalA 286P510.

440-83 [b] Cal 285P314; 85 IndA366, 154NE291; 123Kan116, 254P322.

440-84 [a] 175Ark1169, 300SW424; 70 CalA67, 232P723; 92CalA722, 268P696; CalA 285P328; 51Nev437, 279P32 (deed found in grantor's safe deposit box at bank).

441-85 Ill 172NE173; 125Kan286, 289, 264P75 [citCJ]; 101WVa514, 133SE 123. [a] 101WVa514, 133SE123. [b] **Mere retention of deed by grantor held insufficient** to overcome circumstance creating inference of delivery. 169Ga 801, 151SE496.

441-86 [d] **Possession by grantee is prima facie evidence of absolute delivery.** CalA 286P510.

441-87 79CalA762, 251P227; Mo 28 SW(2d)665; 33NM193, 263P29.

441-88 [d] 85CalA720, 260P342 (deed delivered to third person taking effect at once); 331 Ill 420, 163NE393.

441-89 81Mont393, 264P115.

441-92 307Mo 682, 271SW489 (assessment of taxes in name of husband and his payment of the taxes insufficient as against wife to overcome presumption arising from acknowledged and recorded deed).

441-93 [a] **Evidence insufficient to overcome presumption.**–205 Iowa1285, 217NW852.

441-94 [a] 329 Ill 323, 160NE548; 101 WVa514, 133SE123. [b] **Presumption of constructive delivery of deed to grantee is not overcome** by grantor's remaining in possession of property, paying taxes and making leases, and doing other acts of ownership not inconsistent with grantee's power of attorney to grantor and agency in his possession. 101WVa514, 133SE123.

442-96 203 Iowa767, 210NW609; Mo 28SW(2d)665; 155Tenn44, 290SW985. [b] **Evidence held insufficient** to show conditional delivery to grantee. 155 Tenn44, 290SW985.

442-97 201 Iowa107, 204NW294, 48 ALR394 (fraudulent possession by grantee of deed deposited in escrow); 203 Iowa767, 210NW609; 205 Iowa1285, 217NW852.

442-5 172Ark198, 288SW4; 211Ky196, 277SW248; 320Mo 474, 7SW(2d)691.

442-7 [b] 178Ark983, 13SW(2d)15; 335 Ill 52, 166NE477; 129Kan72, 281P 927; 211Ky196, 277SW248; 230Ky 575, 20SW(2d)444; Mo 26SW(2d)611; 142 Okl 152, 286P322; 127 Or211, 271P 594; 153SC100, 150SE610; TexCivA 23SW(2d)808; 151Wash424, 276P294 (1stcase). [c] (1) 217Ala230, 115S256; 200Cal 644, 254P269; 163Ga32, 135SE 314; 125Kan727, 265P1113; 149Md 593, 132A645; 114Nebr563, 208NW669; 33PortoRico 931. (2) 215Ala315, 110S 465; 199 Iowa1176, 201NW102; 247 Mich372, 225NW573; SD 221NW676. [d] 85CalA46, 258P705; 233Ky313, 25 SW(2d)725; TexCivA 21SW(2d)705. [e] (1) 180Ark750, 22SW(2d)386 (to warrant cancellation of deed); 208Ky 803, 272SW52. (2) 138 Okl 212, 281P 265. [f] (1) 247Mich137, 225NW510. [g] (1) 80CalA538, 252P638; 337 Ill 498, 169NE328; 99NJEq443, 129A124. (7) Refraining from contesting probate of will. TexCivA 275SW468. (8) Compounding of felony. TexCivA 283SW 607. (9) Engagement to marry grantor. 14F(2d)933. [h] **Failure of consideration shown.**–Mo 285SW409.

443-10½-New. Evidence held to show conveyance to trustee for nominal sum with understanding to convey absolute title when trustee cleared title. 171Ark 912, 287SW373.

443-11 124Kan604, 261P840; 221Ky 775, 299SW960; 232Ky816, 24SW(2d) 601; 99NJEq26, 131A620; 297Pa179, 146A534. See also 307Mo682, 271SW 489. [a] 97NJEq95, 129A128. [b] 68 CalA448, 229P993; 205 Iowa639, 216 NW99; 124Kan604, 261P840; Kan 289 682, 271SW489; 142 Okl 152, 286P322.

443-14½-New. The acceptance of a deed sufficiently indicates an assent to its terms, whatever they may be. Tex CivA 15SW(2d)159.

443-15 180Ark1141, 24SW(2d)338; 156 Md221, 144A257; 299Pa568, 150A169.

443-17 [a] **Evidence held to show** that deed of deceased man, seventy-five years old, was not invalid for incapacity. 220Ky205, 294SW1032.

443-19 206 Iowa732, 221NW474 (clear, satisfactory and convincing evidence required); Mo 26SW(2d)611. [a] 171 Ark1189, 283SW368; 179Ark556, 17SW (2d)282; 180Ark1141, 24SW(2d)338; 163Ga32, 135SE314; 316 Ill 158, 147NE 44; 324 Ill 457, 155NE349; 122Kan294, 252P256; 208Ky803, 272SW52; 209Ky 677, 273SW522; 218Ky321, 291SW379; 220Ky557, 295SW859; 227Ky268, 12 SW(2d)854; 237Mich108, 211NW82; 241Mich308, 217NW23; 244Mich129, 221NW127; 244Mich536, 222NW131; 245Mich391, 222NW710; 175Minn428, 221NW644; 175Minn522, 221NW907; Mo 272SW944; 319Mo 65, 3SW(2d)712; 114Nebr563, 208NW669; 98NJEq133, 129A713; 20 OhA293, 152NE201; 129 Or674, 278P946; 156SC381, 153SE346; TexCommnA 10SW(2d)977; TexCivA 270SW1043; 136Wash659, 241P296. [b] 17F(2d)221; 35F(2d)578; 218Ala 102, 117S679; 169Ark1181, 278SW48; 172Ark176, 287SW1001; 173Ark1182, 291SW415; 178Ark983, 13SW(2d)15; 70CalA98, 232P763; 74CalA576, 241P 579; 80CalA538, 252P638 (grantor afflicted with serious physical malady); 91CalA621, 267P565; 55AppDC262, 4F (2d)874; 163Ga87, 135SE433; 164Ga 201, 138SE78; 320 Ill 371, 151NE244; 322 Ill 406, 153NE662; 323 Ill 380, 154 NE149; 329 Ill 410, 160NE765; 330 Ill 48, 161NE68; 330 Ill 106, 161NE99; 335 Ill 52, 166NE477; 201 Iowa1268, 203 NW812; 202 Iowa129, 209NW303; 202 Iowa246, 210NW91; 203 Iowa979, 213 NW605; 206 Iowa732, 221NW474; 207 Iowa776, 223NW686; 208 Iowa300, 225 NW419; 124Kan401, 260P526; 129Kan 55, 281P897; 208Ky825, 271SW1093; 208Ky845, 272SW36; 213Ky580, 281 SW525; 218Ky830, 292SW508; 219Ky 612, 294SW191; 221Ky737, 299SW727; 222Ky411, 300SW859; 225Ky150, 7SW (2d)1069; 225Ky821, 10SW(2d)276(2d case); 225Ky804, 10SW(2d)294; 230 Ky575, 20SW(2d)444; 231Ky377, 21SW (2d)484; 233Ky42, 24SW(2d)931; 165 La57, 115S366; 236Mich317, 210NW 318; 240Mich342, 215NW291; 247Mich 5, 225NW490; 247Mich372, 225NW 573; 251Mich492, 232NW199; 174Minn 131, 218NW455; Mo 281SW431; 316 Mo 1213, 293SW405; 317Mo 228, 295SW 794; 319Mo 769, 5SW(2d)420; 114Nebr 522, 208NW630; 114Nebr704, 209NW 492; 114Nebr752, 209NW737; 115Nebr 761, 215NW99; 99NJEq26, 131A620; 55ND546, 214NW857; Okl 291P524; 116 Or467, 241P996; 144SC252, 142SE 498; TexCivA 290SW270; TexCivA 294 SW328; Va 153SE807. [f] **Evidence held sufficient** to support dismissal of suit to set aside deed for mental incapacity. 211Ky398, 277SW462. [g] **Evidence held to show capacity.**–144Wash657, 258P465.

444-20 See also TexCommnA 10SW (2d)977.

445-23 209Ky677, 273SW522.

445-25 319Mo 65, 3SW(2d)712; 114 Nebr752, 209NW737 (evidence of attorney drafting deed).

445-26 114Nebr752, 209NW737.

445-27 114Nebr752, 209NW737.

445-33½-New. That grantors had independent advice may be shown. 98 CalA112, 276P391.

445-34 But see 204 Iowa1367, 217NW 456. [a] (1) 204 Iowa732, 216NW39; 156Md221, 144A257; 175Minn522, 221 NW907; Mo 272SW944. [b] (1) 212 Ala676, 103S877; 217Ala235, 115S258; 180Ark1141, 24SW(2d)338; Ark 29SW (2d)1082; 200Cal 644, 254P269; 80CalA 230, 251P692; 316 Ill 158, 147NE44; 122Kan294, 252P256; 122Kan755, 253P 556; 125Kan560, 264P1055; 221Ky33, 297SW942; 149Md593, 132A645; 152 Md464, 136A831; 237Mich108, 211NW

P406; 233Ky42, 24SW(2d)931; 307Mo 82; Mich 232NW704; Mo 281SW431; 314Mo 95, 282SW1014; Mo 4SW(2d) 459; 114Nebr563, 208NW669; 129 Or 674, 278P946; 104WVa600, 140SE689. (2) 213AppDiv756, 210NYS119. (3) 217 Ala230, 115S256; 245Mich391, 222NW 710. (4) 175Ark1170, 1SW(2d)56; 124 Kan323, 259P684. (5) 124Kan323, 259 P684; 227Ky268, 12SW(2d)854. (6) 179Ark556, 17SW(2d)282; 325 Ill 47, 155NE763; 230Ky125, 18SW(2d)945; 230Mich204, 203NW79; Or 286P593. (7) 322Mo 484, 15SW(2d)801. (14) 241 Mich308, 217NW23 (confidential business adviser). (19) Widow to father-in-law. 101NJEq99, 136A730. [c] (1) 214Ala10, 106S188; 217Ala134, 115S19; 219Ala414, 122S414; Ala 127S815; 173 Ark1182, 291SW415; 178Ark983, 13SW (2d)15; 67CalA448, 229P993; 74CalA 576, 241P579; 98CalA112, 276P391; 55 AppDC262, 4F(2d)874; 92Fla937, 111 S240; 320 Ill 371, 151NE244; 323 Ill 380, 154NE149; 338 Ill 23, 169NE817; Ill 173NE376; 201 Iowa1268, 203NW 812; 202 Iowa129, 209NW303; 206 Iowa732, 221NW474; 207 Iowa776, 223 NW686; 208 Iowa300, 225NW419; 124 Kan401, 260P526; Kan 289P406; 208 Ky825, 271SW1093; 208Ky845, 272SW 36; 220Ky205, 294SW1032; 221Ky737, 299SW727; 221Ky775, 299SW960; 222 Ky411, 300SW859; 225Ky25, 7SW(2d) 496; 233Ky42, 24SW(2d)931; 236Mich 23, 209NW914; 240Mich342, 215NW 291; 247Mich5, 225NW490; 247Mich 372, 225NW573; 249Mich1, 227NW729; 174Minn131, 218NW455; 316Mo 1213, 293SW405; Mo 19SW(2d)487; 114Nebr 522, 208NW630; 114Nebr704, 209NW 492; Nebr 231NW517; 98NJEq404, 129 A620; 99NJEq26, 131A620; NJCh 129 A705; 52ND380, 202NW860; Okl 291P 524; 119 Or277, 241P46; 116 Or467, 241P996; 127 Or211, 271P594; 130 Or 417, 279P865; 299Pa568, 150A169; 131 SC414, 127SE719; 144SC252, 142SE498; TexCivA 271SW311. (2) 100CalA177, 280P187 (conveyance to wife and children); Mo 274SW460. (4) 322 Ill 406, 153NE662; 330 Ill 48, 161NE68; 202 Iowa246, 210NW91; 220AppDiv282, 221 NYS50; 142 Okl 152, 286P322. (6) 319 Mo 769, 5SW(2d)420. (8) 81CalA479, 253P1110; 230Ky125, 18SW(2d)945; Mo 282SW25 (one raised as son); 115 Nebr761, 215NW99; 52ND380, 202NW 860. (9) 205 Iowa196, 217NW825. (15) 232Ky127, 22SW(2d)568. (16) 167Ga790, 146SE635(2dcase). (17) SD 231NW912. (20) To wife and daughter. 214Ky179, 282SW1106. (21) Aunt to niece. 236Mich317, 210NW 318. (22) Sister to brother. 155Md230, 141A531. (23) Parents to sons. 335 Ill 52, 166NE477. [e] **Essentials of undue influence.–TexCivA** 271SW311. [f] **Evidence sufficient** to support dismissal of suit to set aside deed for undue influence. 211Ky398, 277SW462. [g] **Absence of fraud established.–144Wash** 657, 258P465.

446–35 80CalA230, 251P692, 695 [cit CJ].

446–36 [b] **Evidence insufficient to overcome presumption arising from confidential relation.–122 Okl** 301, 254P979.

446–37 220Ky205, 294SW1032; 240 Mich342, 215NW291; 119 Or277, 241P 46.

446–39 152Md464, 136A831; 314Mo 95, 282SW1014; TexCivA 271SW311 (reasonable satisfaction).

446–40 124Kan401, 260P526.

447–44½–New. Grantor's failure to express regret at conveyance, after executing deed, is held circumstance favoring its validity. 220Ky205, 294SW 1032.

447–45 156Md221, 144A257. [a] (1) TexCivA 11SW(2d)341. (2) 215Ky119, 284SW431; 213AppDiv756, 210NYS119. (7) Influence over widow by relatives of deceased husband. 101NJEq99, 136A 730. [b] (1) 14F(2d)933; 319 Ill 392, 150NE272; 323 Ill 380, 154NE149; 324 Ill 457, 155NE349; 206 Iowa732, 221NW 474; 233Ky42, 24SW(2d)931; 236Mich 23, 209NW914; 99NJEq26, 131A620; 138 Okl 293, 281P135; 116 Or626, 239P 108, 241P56; TexCivA 283SW607; Tex CivA 283SW903. (6) 336 Ill 80, 168 NE6.

447–46 170Ark877, 281SW660; 178Ark 1199, 13SW(2d)289; 318 Ill 218, 149NE 306; 204 Iowa1367, 217NW456; 208 Iowa156, 225NW353; 151Md140, 134A 130; 156Md221, 144A257; 150SC45, 147 SE661. [a] (1) 285Pa533, 132A709. [c] (1) 168Ark682, 272SW367; Ark 30 SW(2d)823; 200Cal 644, 254P269; 100 CalA482, 280P383; CalA 288P448; 167 Ga790, 146SE635(2dcase); 329 Ill 482, 160NE759; 119Kan568, 240P570; 149 Md593, 132A645; 152Md464, 136A831; 156Md610, 145A204; 173Minn51, 216 NW311; Mo 285SW409; 101NJEq99, 136A730; NJCh 147A43 [aff NJ 147A 44]; 229AppDiv555, 242NYS383; 33 OhA37, 168NE477; 123 Okl 181, 252P 437; 128 Okl 188, 261P941; 143SC325, 141SE564; 39Wyo 141, 270P537. (3) 197 Ind236, 150NE361; 124Kan323, 259 P684; 256Mass169, 152NE367; Mo 30 SW(2d)146. (5) 146Miss161, 110S583; 145Miss845, 111S376; 136Wash378, 240 P9. [d] (1) 37F(2d)633; 215Ala315, 110S465; 217Ala134, 115S19; 98CalA 112, 276P391; 101CalA497, 281P1089 (presumption against fraud); 318 Ill 218, 149NE306; 319 Ill 392, 150NE272; 323 Ill 380, 154NE149; 329 Ill 410, 160 NE765; IndA 171NE310(2dcase); 206 Iowa732, 221NW474; 208 Iowa156, 225 NW353; 121Kan490, 247P449; 129Kan 72, 281P927; 233Ky42, 24SW(2d)931; 233Ky313, 25SW(2d)725; 165La57, 115 S366; 234Mich322, 208NW41; 236Mich 23, 209NW914; 240Mich408, 215NW 305; 246Mich255, 224NW359; Mo 274SW 460 (by conspiracy); Nebr 231NW517; 99NJEq26, 131A620; 247Ny145, 159NE 891 (conveyance by brother to sister); 124Misc906, 210NYS320; 52ND380, 202 NW860; Okl 291P524; Okl 293P179; 33PortoRico 931; 131SC414, 127SE719; 144SC252, 142SE498; 150SC45, 147SE 661; 158Tenn394, 13SW(2d)49; Tex CivA 275SW468; TexCivA 283SW903; TexCivA 290SW884; 149Va113, 140SE 264, 56ALR421. (3) 334 Ill 19, 165NE 147; 319Mo 769, 5SW(2d)420; 220App Div282, 221NYS50; 138 Okl 293, 281P 135; 142 Okl 152, 286P322. (4) 170Ark 877, 281SW660; 100CalA177, 280P187 (conveyance to wife and children). (5) 208 Iowa300, 225NW419; Mo 282SW25. (7) Conveyances by children to parent. 245Mich640, 223NW227. [e] **Absence of fraud established.–144Wash**657, 258P 465.

448–47 142 Okl 168, 285P968. But see 101CalA497, 281P1089. [a] **Where evidence vague and ambiguous,** preponderance insufficient. 115 Okl 277, 242P 1047. [b] **Fraud held not established.–** 169Ark210, 275SW524.

448–47½–New. In some jurisdictions it is held that fraud must be established by a preponderance of evidence so great as to overcome all opposing evidence and repel all opposing presumptions. 120 Okl 282, 251P43.

448–48 200 Iowa121, 204NW260 (fraud not shown by evidence of inadequacy of price paid). [b] 168Ark682, 272SW 367; 321 Ill 423, 152NE137; 156Md 610, 145A204; 173Minn51, 216NW311; TexCivA 22SW(2d)467. [c] 100CalA 177, 280P187; 98Fla166, 123S569; 124 Misc906, 210NYS320 (as to value of property deeded in exchange); 150SC45, 147SE661; 149Va113, 140SE264, 56 ALR421 (concealment).

448–50 152Md464, 136A831; 128 Okl 125, 261P371. [a] Lack of consideration may be considered, with other circumstances in determining whether fraud was practiced. 300Pa513, 150A 882.

449–51½–New. Fiduciary relationship between the parties must be shown by the evidence. 334 Ill 233, 165NE624. [a] **Evidence held insufficient** to show transaction was fair. 334 Ill 233, 165 NE624.

449–52 170Ark877, 281SW660; 178Ark 1199, 13SW(2d)289; 160Ga865, 129SE 528; 204 Iowa1367, 217NW456. [a] Mo 25SW(2d)479. [b] 170Ark877, 281SW 660; 170Ark1194, 281SW657; 142 Okl 152, 286P322; TexCommnA 15SW(2d) 1037.

449–53 See also 160Ga865, 129SE528.

449–54 224Ky75, 5SW(2d)280; 307Mo 682, 271SW489. [a] 169Ark210, 275SW 524 (not established by preponderance of evidence). [c] 171Ark912, 287SW373; 171Ark1189, 288SW720; 202Cal 681, 262P719; 220Ky673, 295SW986; 234 Ky296, 28SW(2d)22; 41 OklACR118. [d] 28F(2d)118; 168Ark1033, 275SW 653; Ga 155SE185; 224Ky1, 5SW(2d) 278; 224Ky75, 5SW(2d)280; 232Ky 781, 24SW(2d)603; 122 Okl 210, 253P 487; 138 Okl 177, 280P808; 108WVa 154, 150SE524. [e] 216Ky599, 288SW 326. [f] **Proof that signature of clerk of court as subscribing witness to deed was not genuine** is conclusive evidence. of forgery of paper. Ga 155SE185. [g] **That deed is ancient deed** is not sufficient to overcome proof that signature of official is forgery. Ga 155SE185.

449–56 [b] **Grantor's inability to write** does not necessarily show grantor's signature was forgery. Ga 155SE185.

449–57½–New. Sufficiency of evidence to go to jury. Only evidence of incapacity should be considered in arriving at determination. TexCivA 271SW 311.

449–58 172Ark176, 287SW1001; 197 NC8, 147SE433; TexCivA 13SW(2d)78; TexCivA 271SW311; Va 153SE807.

449–59 178Ark1150, 13SW(2d)624.

449–59½–New. acceptance of deed, 126 Me299, 138A170.

449–60 TexCivA 13SW(2d)78; 39Wyo 141, 270P537.

449–61 Ala 130S226; NC 153SE844; TexCivA 18SW(2d)829.

449–62½–New. The existence of a confidential relationship between brother and sister is a question of fact. 155 Md230, 141A531.

450–66½–New. Evidence held insufficient for jury on question of grantor's knowledge of signing of deed. Iowa 229NW753.

450–67 [a] (1) 216Ala493, 113S313; 220Ky723, 295SW1070. (2) 172Minn145, 214NW769. [b] (6) Existence of condition to recovery. 81CalA479, 253P 1110.

450–68 263Mass282, 160NE831, 57ALR 409.

450–70½–New. Single instance of unbecoming conduct by grantee does not authorize inference that he substantially failed to perform consideration requiring care and support of grantor. 222Ky411, 300SW859.

DEEM

450–9 134Wash525, 236P274.

450–10 134Wash525, 236P274.

450–16 134Wash525, 236P274.

451–18 12CustA145.

451–22 134Wash525, 236P274.

451–25 134Wash525, 236P274.

451–33 134Wash525, 236P274; 195Wis 1, 216NW498, 499 [quotCJ].

451–34 134Wash525, 236P274; 195Wis 1, 216NW498, 499 [quotCJ].

451–35 134Wash525, 236P274; 195Wis 1, 216NW498, 499 [quotCJ].

451–37 195Wis1, 216NW498, 499 [quot CJ].

451–38 195Wis1, 216NW498, 499 [quot CJ].

451–40 195Wis1, 216NW498, 499 [quot CJ].

451–41 159Tenn245, 17SW(2d)919.

DEFEASANCE

457–94 21F(2d)984.

DEFECT

458–9½–New. deficiency; 81Mont68, 261P609.

458–12 [a] **As used in Highway Law.–** 219AppDiv124, 219NYS530.

DEFENSE or DEFENCE

463–95 51ND246, 199NW930.

464–4 51ND246, 199NW930.

DEFINITION

467–79 204 Iowa857, 216NW33.

467–83 204 Iowa857, 216NW33.

DEFLECT

468–92½–New. To turn aside; to deviate from a straight or horizontal line or from a proper position; to swerve; to deviate. 34F(2d)41.

DEFORMABLE BAR

468-4½-New. Bar which can be bent without breaking and which after bending will stay bent. 37F(2d)562.

DEL CREDERE

471-88 127Mich855, 217NYS595.

DELECTUS PERSONÆ

471-91 21F(2d)602.

DELEGATA POTESTAS NON POTEST DELEGARI

471-92 [a] 14CustA421.

DELFOS

473-8½-New. A long staple cotton. 4 LaA388.

DELIBERATELY

473-29 309Mo 397, 274SW423.
473-33 309Mo 397, 274SW423.

DELINQUENT

475-82 Or 289P1048, 1050 [citCJ].
475-84 121Kan886, 250P316.

DELIVER

476-14 108TexCr77, 299SW259.

DELIVERY

478-36 85CalA419, 259P496, 500 [cit CJ].
478-40 205 Iowa1379, 219NW492, 495 [citCJ].
479-37 253NY359, 171NE569.

DEMAND

479-62 168Ark251, 270SW537.
479-65½-New. Notice requiring surrender of possession. 199Cal 203, 248P 672.
479-70 [b] **Claims against estate.**-168 Ark251, 270SW537.

DE MINIMIS NON CURAT LEX

481-14 [a] 15F(2d)1003; 77Colo 347, 236P993; 82Colo 258, 259P1042; 103 Conn553, 131A426; 206 Iowa90, 219NW 44; 190NC644, 130SE635; TexCivA 275 SW290.
483-15 148Wash328, 268P889, 891 [cit CJ].

DEMONSTRATE

484-40½-New. To derive from admitted premises by steps of reasoning which admit of no doubt, prove indubitably. Standard D. [quot 121 Or621, 256P766].
484-40¼-New. To teach by exhibition of examples. Standard D. [quot 121 Or 621, 256P766].

DENTIFRICE

487-94½-New. Any preparation used for cleansing the teeth. 39F(2d)723.

DEPARTMENT

490-38 124Misc766, 210NYS68 (subdivision of city government superior to bureau).

DEPENDENCIES, COLONIES, AND BRITISH POSSESSIONS

494-17 Imp [1930] 1DomLR98 (women are eligible to be summoned to senate in Canada).
505-40 NS [1926] 4DomLR653.
511-38½-New. The Canadian parliament, for the purpose of protecting revenue, may prohibit the harboring of goods within the territorial waters of Canada. NS [1929] 2DomLR849.
511-52 [a] **Dominion revenue legislation construed as authorizing taxation** of liquor illegally sold under provincial temperance act. Can [1930] 2DomLR 725.
513-89 Can [1925] 3DomLR114 (civil rights and regulation of hours of labor in territories and generally where affecting Dominion employees). Alta [1926] 4DomLR796, [1926] 3West Wkly 447; NS [1929] 1DomLR528 (fraudulent transfer by bankrupt to wife); Can [1930] 1DomLR141; Can [1930] 1 DomLR290; 59OntL453, [1926] 4 DomLR548; Ont [1929] 1DomLR300; Ont [1929] 1DomLR303. See also Alta [1928] 4DomLR161. [a] **Criminal law.**-Can [1929] 2DomLR802. [b] **Trade and commerce.**-Can [1929] 2DomLR802. [c] **Bankruptcy and insolvency.**-Que [1928] 1DomLR945. [d] **Provisions of Customs Act for seizure of vessel hovering within twelve miles of coast** are intra vires dominion parliament. NS [1930] 4DomLR159.
513-90 Imp [1930] 1DomLR409 (power commission created by legislature with limited powers not government department); Man [1926] 4DomLR318, [1926] 2WestWkly868; Man [1930] 1 DomLR152; Ont [1930] 4DomLR553 (punishment by fine). [a] **Power to regulate marketing.**-BC [1928] 4DomLR659. [b] **Trade Unions Act** Rev. St. [1927] c 202 is ultra vires parliament of Canada being statute dealing with property and civil rights. Ont [1930] 2DomLR513.
514-91½-New. A statute authorizing a married woman to sue her husband in tort is intra vires a province as legislation in relation to a civil right. Alta [1929] 2DomLR735.
514-98 Can [1925] 3DomLR1114; BC [1929] 2DomLR73; Ont [1930] 2DomLR 669.
514-1 Imp [1930] 1DomLR409 (repealed act as standard for determining rights created while in force).
514-3 Imp [1930] 1DomLR194 (licensing of fish canneries ultra vires).
515-23 Sask [1930] 2DomLR596. [a] **Permissive or prohibitive legislation.**-Sask [1930] 2DomLR596.
515-25½-New. Dominion statute giving certain fines to certain municipalities is not ultra vires as taking away from province royalty belonging to it at confederation. Ont [1929] 4DomLR 832.
515-26½-New. The Dominion parliament has power to authorize the construction and operation by the Dominion government of works wholly for power purposes, and the purchase of lands required for such purposes, including lands of the crown in the right of a province, in provincial or interprovincial rivers, provided such works fall within the ambit of British North America Act [1867] 592, No 10(c). Can [1929] 2 DomLR481.
515-26½-New. A statute purporting to prohibit civil proceedings for assault after discharge of the penalty under a criminal prosecution is ultra vires of the Dominion parliament. NS [1929] 2 DomLR669.
515-31 But see Can [1930] 2DomLR 721.
515-33 Can [1925] 3DomLR1.
516-40½-New. Provinces have no legislative power over subjects comprehended under the phrase "water power" in the first item of the third schedule of the British North America Act of 1867. Can [1929] 2DomLR481.
516-40½-New. Statute imposing tax on timber cut in province with rebate when used in province is ultra vires provincial legislature as imposition of interest tax. BC [1929] 4DomLR954.
516-40¼-New. Seizure and forfeiture of vessel carrying dutiable goods is intra vires of Canadian parliament. NS [1930] 1DomLR674.
517-61 Can [1925] 3DomLR1089 (jurisdiction of exchequer court); Can [1930] 4DomLR537 (act conferring jurisdiction on exchequer court not construed retroactively so as to oust vested jurisdiction of provincial court); Can [1930] 3DomLR704. [a] **Jurisdiction of exchequer court to entertain jurisdiction of claim concerning several departments.**-Can [1928] 1DomLR512. [b] **Exchequer court.**-Can [1929] 4Dom LR818.
530-38 [c] (5) Man [1930] 3DomLR 413 (appeal on question of enforcibility of wage agreement between labor union and employer).

DEPENDENT

555-5 [a] **"Dependent child."**-Tex CommnA 285SW285.
555-6 86 IndA175, 156NE518. [c] **Married daughter** receiving gifts not necessary for support not dependent. OhA 155NE415.
555-7 166Minn79, 207NW186; TexCivA 283SW633. [a] **"Dependent children"** is term applied to normal children who must be supported by others than their natural guardian. 135Misc521, 238NYS 738.

DEPOSIT

559-80 [a] **As used in contract** may mean "cash deposit." 181Ark923, 28SW (2d)700.
559-82 41 Ida432, 242P297.
559-83 [b] 41 Ida432, 242P297.
559-87½-New. Expression "deposits and credit balance of the plaintiff" in bank means deposits and credit balance belonging to plaintiff. 73Mont385, 236P545.

DEPOSITARIES

565-74 5PaDist&Co 649.
565-75½-New. Contract for rental of safe deposit box is a bailment for hire and for mutual benefit of both parties. 287Pa398, 135A114.
565-84 207 Iowa910, 223NW865.
565-86½-New. Bond or undertaking to secure repayment of deposit. Duress cannot be predicated on demand that the bank give security for a deposit. 176Minn541, 224NW152.
565-86½-New. Continuance of deposit and making of a further deposit is sufficient consideration for a bond or undertaking by bank officers to secure repayment of deposits. 176Minn541, 224 NW152.
565-86¼-New. The evidence here shows that the bond was voluntarily given by defendants, and given for a lawful purpose. Delivery of the bond to the judge of probate was a sufficient delivery. 176Minn541, 224NW152.
565-86½-New. Authority and intention of signers of a bond that the probate judge may fill a blank in the bond with a certain condition may be implied. 176 Minn541, 224NW152.
565-86½-New. Reformation of the bond so as to make plaintiff's guardian the obligee therein was not necessary. 176 Minn541, 224NW152.
566-92 [a] **Stakeholder to hold earnest money payment** for mutual benefit of parties concerned holds money for mutual benefit of both parties. 337 Ill 584, 169NE765.
566-5 See also SD 216NW366.
568-45 5PaDist&Co 649.
568-51 287Pa398, 135A114.
569-64 133Wash622, 234P456 (contract construed not to relieve lessor from liability as bailee for hire).
570-85 337 Ill 584, 169NE765.
571-18 SD 216NW366.
573-70 See also 337 Ill 584, 169NE765.
573-72 287Pa398, 135A114.
573-72½-New. Fact that depositor knew condition of safe-keeping and did not protest is no defense to recovery for securities stolen from bank's safe deposit box. 287Pa398, 135A114.
574-98 73Mont385, 236P545 (insolvency).
575-17½-New. Defense of limitation in original contract not available to defeat action for loss where the relation had been continued under a contract containing no limitation. 133Wash622, 234P456.
576-33 SD 216NW366.
576-44 [a] (3) Generally. SD 216NW 366.
577-66 133Wash622, 234P456 (defendant has burden of explaining disappearance of valuables from box under its absolute control, by showing that loss did not result from its negligence or fault).
577-67 133Wash622, 234P456.
577-68 5PaDist&Co 649.
578-90½-New. An instruction as to the ordinary care of a depositary is held warranted by evidence. 287Pa398, 135 A114.
579-16 75Mont369, 243P1093, 1097 [cit CJ].
579-17 162Ga488, 134SE310. [a] **In Alabama.**-219Ala554, 123S31.
579-19 166Minn109, 207NW138; 141 Wash440, 252P147.
580-21 119 Oh124, 162NE420; 141 Wash440, 252P147.

580-22 5F(2d)34.

580-24½-New. A deposit of state funds is not an exercise of sovereignty, but in such a transaction the government is acting in its proprietary capacity. 119 Oh124, 162NE420.

580-26 See also TexCivA 288SW870.

580-31½-New. Liability of bank receiving county bank without being designated as legal depositary. 44F(2d) 19.

580-33 32Ariz444, 259P886; Iowa 220 NW63; 51ND646, 200NW888; SD 208 NW576. But see 39F(2d)387. [b] Deposits affected by statute.-30Ariz36, 243 P919. [c] Deposit of public moneys construed.-74Mont152, 240P812. [d] The legislature alone has authority to empower public official to make deposit and to provide terms and conditions of such deposit. 119 Oh124, 162NE420.

580-35 [b] Effect of irregularities.-30 Ariz383, 247P135.

581-37 41 Ida432, 242P297. [b] In Nebraska.-118Nebr817, 226NW460, 65 ALR804.

581-43½-New. Legislative authority to make deposits without limitation as to kind is authority to make a time deposit. '41 Ida432, 242P297.

581-43½-New. Where the legislature has designated the depositary, county officers cannot designate another, nor can a county board ratify any scheme in effect designating another depositary. 51ND646, 200NW888.

581-45 30Ariz383, 247P135; 115Nebr 273, 212NW617; 35ND45, 212NW236, 51ALR296; 34Wyo134, 241P1063, 42 ALR1290.

581-47 SD 208NW576.

581-51 SD 208NW576.

582-58½-New. Ordinances providing for the selection and designation of depositary banks and the giving of bonds by such banks have been held to be within the legislative power of a municipality under a state depositary law. 41 Ida432, 242P297.

582-60 206 Iowa464, 221NW342. [b] Statute requiring deposits to be made in banks in state is positive command and does not permit deposits in banks outside of state. SD 208NW576. [c] Place of deposit.-SD 208NW576. [d] What law governs.-208 Iowa133, 217NW 472.

582-61 SD 208NW576.

582-62 SD 208NW576.

582-63 TexCivA 11SW(2d)553.

582-67½-New. Repeal of Preferential Claim Law has been held to apply to a county as a subdivision of the state. 205 Iowa987, 213NW528.

582-71 TexCivA 17SW(2d)478 (provisions of special charter of city of Galveston held not repealed by general statute relating to depositaries).

582-73 7PaDist&Co 93. [a] Though statute requiring county funds to be deposited in Bank of North Dakota was repealed, that bank could be designated by proper authorities. 52ND420, 203 NW317.

582-74 219Ala554, 123S31.

582-76 Mo 30SW(2d)32; 58ND867, 228 NW226(2dcase).

582-83 34Wyo 134, 241P1063, 42ALR 1290. [a] (2) 128Kan516, 279P1. (6) Board of county commissioners of each county is authorized in some jurisdictions to select and designate one or more banks located in county as county depositaries. 125 Okl 243, 257P318.

583-94½-New. A city may acquiesce in the act of its treasurer in continuing deposit of its funds in the state bank as unsecured deposit. TexCivA 283SW 213.

583-94½-New. Under the Alabama statute providing for appointment of an emergency treasurer or custodian on failure to select a depositary, the minutes of the commissioners' court declaring inability to secure from any bank terms for handling county funds shows authority of such court to select an emergency treasurer. 219Ala554, 123S 31.

583-3½-New. Where a city advertised for bids, and received none, it may continue unsecured deposit of its funds by its treasurer by acquiescence. Tex CivA 283SW213.

584-9 164La932, 114S841 (where rejected bid not in compliance with statute).

584-10 TexCivA 18SW(2d)936.

584-16½-New. Treasurer authorized by law to select depositary is not chargeable with negligence in making selection where he acts in good faith and with reasonable prudence in accordance with statute. SD 208NW576.

584-22 TexCivA 289SW451.

584-24 178Minn317, 227NW50(2dcase). Contra 51ND272, 199NW873. [a] (2) Designation must specify amount to be deposited. 204 Iowa1083, 216NW748, 65ALR679. (3) Resolution of county board extending time of insolvent bank for payment of deposit and assuming mortgage due bank held not to constitute designation as depositary. 180 Minn423, 230NW891. [b] (2) Entry in minutes is not essential to validity of order of county board designating depositary made at regular session of board. 77Mont498, 251P548.

584-25 39F(2d)387 (oral designation).

585-26½-New. Where the mode of exercising the power to designate a depositary of county funds is not prescribed by statute, the board of county commissioners may use its own discretion in selecting the mode. 77Mont498, 251P 548.

585-26½-New. In such case the board may choose any method of making known to the county treasurer the bank authorized to receive county deposits. 77Mont498, 251P548.

585-26¼-New. Under some statutes the approval of a county judge of a depositary for funds of a water district is required only where the highest bidder for the depositary is a bank in which the directors of the water district board are also directors. TexCivA 280SW845.

585-33 148Miss109, 114S26; 321Mo749, 12SW(2d)751. [b] (2) Statutes authorizing county to receive certain enumerated assets of state bank as pledge to secure deposits of county impliedly grants authority to bank to make pledge in place of giving surety bond. 40 Okl ACR690 [reh pending]. (3) Such statute does not authorize bank to pledge assets collateral to and for performance of condition of surety bond executed and delivered to county to secure its deposits. 40 OklACR690 [reh pending]. [c] Giving of security is condition precedent to right to receive deposit. 30NM537, 239P740. [d] Purpose of enactment is to provide for safety of public funds. SD 210NW723.

585-34 32Ariz444, 259P886; 203 Iowa 1335, 214NW559; 55ND45, 212NW236, 51ALR296. See also 175Minn363, 221 NW242.

585-35 203 Iowa1335, 214NW559; 128 Kan516, 279P1 (county treasurer responsible for securities). See also 38 Wyo 88, 264P1030.

585-36 32Ariz444, 259P886; 203 Iowa 1335, 214NW559. [a] The taking of bills receivable as security, being merely ultra vires and not unlawful, will support a lien against them. TexCivA 11SW(2d)553.

585-37 203 Iowa1335, 214NW559.

585-38 See also 321Mo 749, 12SW(2d) 751. But see TexCivA 11SW(2d)217; TexCivA 11SW(2d)553.

585-39 55ND45, 212NW236, 51ALR296.

585-39½-New. Where a bank pledged and delivered collateral to the state treasurer to secure the deposit of public money, return of the securities to the bank under agreement that the bank acknowledged itself to be the bailee holding such security for the benefit of the treasurer does not void the original pledge. 34Ariz565, 273P728.

585-39½-New. Amount of security. Not subject to interference by court, although result unjust and erroneous where there is no fraud, bad faith, or flagrant abuse of discretion. 76Mont 502, 248P193.

585-39¼-New. Where the statute requires the furnishing of bonds or other securities, it creates no exception to statute forbidding banks to pledge assets to secure deposits. SD 210NW723 (such provision construed).

585-39½-New. As applicable to deposits of public moneys the statute forbidding banks to pledge its assets to secure deposits is proper legislative enactment to provide against contingency of bank's insolvency for protection of private depositors. SD 210NW723.

585-39½-New. Where a sinking fund protects public deposits, library funds are so protected. 203 Iowa349, 212NW 742.

585-39½-New. Where the county commissioners have fixed the nature and amount of the security to be given by a depositary of county funds, the county treasurer is justified in accepting such security until notified to the contrary so long as the bonds are approved by the board and delivered to him. 77 Mont498, 251P548.

585-41 32Ariz444, 259P886; 204 Iowa 1083, 216NW748, 65ALR679; 166Minn 109, 207NW138 (deposit in excess of half amount of bond held illegal); MoA 21SW(2d)781; 52ND420, 203NW317 (provisions of L. [1921] c 56, relating to bonds given by depositaries of county funds, not repealed by L. [1923] c 199); 55ND45, 212NW236, 51ALR296; TexCommnA 26SW(2d)1062 (pledge of vendor's lien notes has been held illegal); 34Wyo 134, 241P1063, 42ALR 1290; 34Wyo 189, 242P319 (purpose of statute stated). [a] Indemnity bonds or undertakings are the kind of bonds required within meaning of statutes requiring "bonds or other security," and not negotiable bonds. SD 210NW723. [b] Failure by designated bank to furnish bond is held to prevent such bank from being classed as depositary. 193 Wis274, 213NW676. [c] Bond given creates liability, though treasurer not required by law to take security. SD 223NW204. [d] Owners of bonds pledged with bank for safe keeping are entitled thereto though bank unlawfully pledged bonds to secure city deposits. TexCommnA 26SW(2d)1059. [e] City is not legally injured by bank's fraudulently representing itself owner of bonds illegally pledged to city. Tex CommnA 26SW(2d)1059. [f] City acquires no lien on illegally pledged assets of bank. TexCommnA 26SW(2d) 1059. [g] Bank's pledging certain assets without statutory authority to secure city deposits is illegal, being contrary to public policy. TexCommnA 26 SW(2d)1059. [h] City lacking notice of bank's unauthorized pledge of bonds could hold bank as owner of bonds. Tex CommnA 26SW(2d)1059. [i] Bank cannot pledge assets to secure sureties.-Ind 173NE181.

585-42 32Ariz444, 259P886.

585-43 32Ariz444, 259P886; GaA 155 SE64; 53ND789, 208NW380. [a] Acquisition and improvement district bond has been held good as security, as provided by statute, for deposit by county treasurer of county's funds, though another statute designates another class of bonds as security for such deposits, the two statutes not being inconsistent. 96CalA107, 273P1085.

585-44 53ND789, 208NW380; TexCivA 280SW845; TexCivA 17SW(2d)478. See also TexCivA 23SW(2d)411. [b] Bonds held invalid and unenforceable.-208 Iowa 588, 226NW66, 68 [citCJ] (amount of penalty left blank). [c] Defects held not fatal.-208 Iowa588, 226NW66.

585-45 51ND272, 199NW873 (name of obligee sufficiently identified by bond).

585-47 174Minn56, 218NW444; Mo 30 SW(2d)32.

585-49 75Mont369, 243P1093.

585-50 30Ariz383, 247P135; 41 Ida432, 242P297; 170Minn115, 212NW183.

586-54½-New. , nor is a statute applicable which provides that if there are any defects in the approval or filing of the bond it shall not be void so as to discharge the officer or his sureties. 75 Mont369, 243P1093.

586-54½-New. A resolution of county commissioners requiring that a depositary of county funds shall furnish "an approved surety bond" does not require a bond executed by a surety bonding company authorized to do business in the state so as to relieve sureties on a personal bond. SD 225NW216.

586-54¼-New. The act of a bank in

giving a deed of trust to a school district to secure a deposit is not ultra vires. **MoA** 21**SW(2d)**781.

586–54½–New. Statutes do not require any particular number of sureties on the bond. 51**ND**272, 199**NW**873.

586–54⅙–New. The bond of a foreign surety company is not invalid because a member of the firm countersigning it was also a member of the city commission. 13**F(2d)**401.

586–58½–New. A bond is not void as without consideration because the statute exempts a bank complying with the depositors' guaranty law from giving a further bond as public depositary. **SD** 225**NW**298.

586–58⅓–New. Bond executed after completion of transaction as requirement of contract held supported by sufficient consideration. **Mo** 26**SW(2d)**785 (mutual obligations furnishing consideration).

586–62 41 **Ida**54, 238**P**298 (deposit of bonds with county auditor is not condition precedent to their becoming effective).

586–65 207 **Iowa**478, 223**NW**171 (evidence showing no approval deposit held illegal); **Iowa** 230**NW**404 (acceptance and approval cannot be waived by bond); 75**Mont**369, 243**P**1093 [citCJ]; **Tex** 12**SW(2d)**662. [c] **In Montana.–** 75**Mont**369, 243**P**1093. [d] **Comptroller of public accounts** must approve original bond of county depositary. **Tex** 12 **SW(2d)**662. [e] **Form.–Mo** 30**SW(2d)** 83.

586–66½–New. Formal action is not necessary, application for bond and payment of premium being sufficient acceptance. 228**Ky**426, 15**SW(2d)**255.

586–68⅓–New. Acceptance by a city of United States bonds, pledged by a bank as security for city deposits, although different security from that specified in the statute, not being prohibited by law or contrary to any rule of public policy, was not an illegal contract for a city depositary and the city may assert the rights of an innocent purchaser for value. **TexCivA** 11**SW(2d)**217.

586–68⅓–New. Formal approval of a bond by the obligee will not validate an invalid bond. 208 **Iowa**588, 226**NW**66.

586–68¼–New. Where not approved return of bond constitutes a rejection, 75 **Mont**369, 243**P**1093.

586–68½–New. and after sureties have been informed thereof board of county commissioners have no power to approve the bond at a subsequent date so as to bind the sureties. 75**Mont**369, 243 **P**1093.

586–68⅙–New. The action of the county and its officials may be such as to show an implied approval of the bond, 51**ND** 272, 199**NW**873.

586–68⅐–New. which the obligors may be estopped to deny. 51**ND**272, 199**NW** 873.

586–70 55**ND**245, 212**NW**928.

586–72 41 **Ida**432, 242**P**297; 55**ND**245, 212**NW**928. See also 141**Wash**440, 252**P** 147.

586–73 41 **Ida**432, 242**P**297; 46 **Ida**224, 267**P**225.

586–74 41 **Ida**432, 242**P**297.

586–75 41 **Ida**432, 242**P**297.

586–76 41 **Ida**432, 242**P**297.

586–79 41 **Ida**432, 242**P**297; 205 **Iowa** 975, 213**NW**612; **Minn** 232**NW**320; 84 **Mont**207, 274**P**850; 51**ND**646, 200**NW** 888, 891 [citCJ]; 38**Wyo** 1, 264**P**93. [b] **Sureties on de facto bond** are chargeable with notice of statutory provisions relating to obligation. **Mo** 30 **SW(2d)**32.

586–80 51**ND**646, 200**NW**888, 891 [cit CJ].

587–81 205 **Iowa**1154, 213**NW**517; 205 **Iowa**975, 213**NW**612.

587–81½–New. That a bond contains obligations other than those required by statute does not invalidate it, since the additional obligations can be read out of the bond. **TexCivA** 17**SW(2d)** 478.

587–82 121**Kan**223, 246**P**524. See also 38**Wyo** 1, 264**P**93.

587–83 41 **Ida**432, 242**P**297; 55**ND**245, 212**NW**928. See also 46 **Ida**224, 267**P** 225.

587–86 45 **Ida**554, 263**P**997 (time deposits of school district); 157**Tenn**87, 6 **SW(2d)**328; **TexCivA** 280**SW**845. See also 151**Wash**55, 275**P**62, 65**ALR**794. [d] **Particular contracts construed.–**41 **Ida**432, 242**P**297 (contract consisting of ordinance and bond construed as intended to cover general deposits with interest on daily balances and not time deposits). [e] **School district funds deposited by county treasurer,** who is custodian thereof, are secured by bond of depositary of county funds. 125 **Okl** 243, 257**P**318. [f] **School funds.–Tex CivA** 17**SW(2d)**478. [g] **Taxes restricted to sinking funds.–TexCivA** 17 **SW(2d)**478. [h] **Bond given to secure school district** depositing money which is later withdrawn cannot be enforced as obligation to it by new school district formed from such old district and others. **MoA** 21**SW(2d)**781. [i] **Bond of de facto county depositary** held to cover township funds in absence of selection of township depositary. **Mo** 30 **SW(2d)**32.

587–90 286**Pa**405, 133**A**551.

587–93½–New. An ordinance providing that city moneys may be deposited on time deposit to bear interest at four per cent per annum is a material amendment of an ordinance providing for general deposits with interest on daily balances and effects a material change in the contract of sureties on an existing bond, 41 **Ida**432, 242**P**297.

587–93⅓–New. and a time deposit made under the authority of the later ordinance is not within the undertaking of sureties on such bond and they are not liable therefor. 41 **Ida**432, 242**P**297.

587–93¼–New. That certificates of deposit are not subject to check and are payable at a future date does not change their nature as deposits so as to exempt the surety on the depositary's bond from liability. **SD** 208**NW**982.

587–93⅙–New. Bond is held to secure all funds lawfully coming into treasurer's hands except funds collected as public administrator. 43 **Ida**600, 255**P**310.

587–94 170**Minn**115, 212**NW**183; 84 **Mont**297, 275**P**265; **SD** 208**NW**982; 193**Wis**403, 214**NW**342.

588–1 276**US**238, 48**SCt**239, 72**L ed**547. But see 126**Kan**122, 267**P**35. [a] 51**ND** 646, 200**NW**888. [b] **Funds transferred from another depositary.–TexCivA** 17 **SW(2d)**478. [c] **Deposits held authorized.–TexCivA** 17**SW(2d)**478.

588–2 [c] **Taking of time certificate for money already on general deposit** and protected by depositary's bond does not change nature of deposit or relieve sureties on bond from liability therefor when taking of time certificate was unauthorized. 41 **Ida**432, 242**P**297.

588–4½–New. It is unlawful for the county treasurer to deposit county moneys in a bank in excess of the amount of a surety bond, 32**Ariz**444, 259**P**886.

588–4⅓–New. either by giving the bank money to transmit, 32**Ariz**444, 259**P**886.

588–4¼–New. or by purchasing an exchange. 32**Ariz**444, 259**P**886.

588–4⅕–New. Liability of sureties on depositary's bond is not affected by the liability of the sureties on the county treasurer's official bond for the treasurer's violation of a statute limiting deposits. 38**Wyo** 1, 264**P**93.

588–4⅙–New. Measure of sureties' liability is penalty of bond and not the amount authorized to be deposited with the bank regardless of the official's violation of duty in making an excessive deposit. 38**Wyo** 1, 264**P**93.

588–6 55**ND**245, 212**NW**928, 929 [cit CJ]. [a] **Bond conditioned to pay promptly** held breached on failure to make prompt payment and not upon loss. 205 **Iowa**987, 213**NW**528.

588–7 55**ND**245, 212**NW**928. [a] **Demand held timely** and in compliance with bond requiring notice of default within ninety days after knowledge thereof. 55**ND**245, 212**NW**928.

588–8 55**ND**245, 212**NW**928.

588–9 [a] **When depositary closes its doors,** liability of surety becomes absolute and enforcible under some statutes. **Minn** 232**NW**320.

588–9½–New. Statutes providing that property of a county depositary bank shall be bound for the payment of all liability arising from a breach of the bond declares a lien. 31**F(2d)**612.

588–9⅙–New. Default of bank may arise whether it was depository de facto or de jure. **Mo** 26**SW(2d)**785.

588–11 170**Minn**115, 212**NW**183; 77 **Mont**1, 248**P**207, 208 [citCJ].

588–12 77**Mont**1, 248**P**207, 208 [citCJ].

588–12½–New. Where a county has two bonds covering the same deposit, it may maintain an action on each. 170**Minn** 115, 212**NW**183.

588–12⅓–New. In such a case the county can collect only once. 170**Minn**115, 212**NW**183.

588–15½–New. Extent of liability of sureties. 13**F(2d)**401; 16**F(2d)**688; 16 **F(2d)**873; 171**Minn**8, 212**NW**948; 147 **Miss**183, 113**S**335; 115**Nebr**754, 214**NW** 626; 288**Pa**300, 135**A**748.

588–15⅓–New. Sureties on the bond of a bank to secure county deposits to a certain amount are held without the right to require an adjustment of matters outside of such deposit, on failure of the bank. 22**F(2d)**356.

588–15¼–New. Sureties on a bond guaranteeing a bank deposit are not liable to the greater extent because directors of the bank. 195**NC**357, 142 **SE**231.

588–15⅕–New. Liability of sureties on a bond guaranteeing deposits of county funds being fixed by the bond itself was not affected by the fact that the applicant in one application offered to pay interest on deposits and in a subsequent application offered no interest at all. **SD** 223**NW**204.

588–15⅙–New. Sureties are liable for the full amount of a deposit when the bond was approved less withdrawals, although no deposits thereafter were made. **SD** 225**NW**298.

588–15⅐–New. After demand upon surety of insolvent depositary, the rates of interest provided for active and inactive accounts are not applicable, and recovery will be allowed of interest at rate which liquidated claims as damages ordinarily bear. 30**Ariz**383, 247 **P**135.

588–15⅛–New. A municipal ordinance providing for the designation of depositaries and giving of bonds and the bond given by a depositary constitute the contract by which the sureties are bound. 41 **Ida**432, 242**P**297.

588–15⅑–New. Fact that bond in addition to statutory bond was demanded and received from bank was not illegal so far as sureties' liability was concerned. **Iowa** 230**NW**404.

588–15 1/10–New. The surety on the bond of a school treasurer is not liable as surety for a depositary bond and is not made liable by its letter explaining the effect of such bond which was accepted. 178**Minn**317, 227**NW**50(2dcase).

588–15 1/11–New. Under statutes it is held that a surety cannot require the state to apply securities assigned as security for deposits in reduction of liability. 179**Minn**143, 228**NW**613.

588–15 1/12–New. A statute authorizing the surety's action to compel satisfaction of a debt is not applicable to a surety on a depositary bond covering state funds. 179**Minn**143, 228**NW**613.

588–15 1/13–New. Sureties on bond securing county deposit held charged with knowledge that bank intended to become county depositary and to receive county and township money. **Mo** 30**SW (2d)**32.

588–15 1/14–New. Sureties' liability is limited to penalty of bond. **Minn** 232 **NW**320.

589–17 [a] **Bond given as security for additional money to be deposited** held to cover not only funds subsequently deposited, but those already deposited as well. **TexCivA** 23**SW(2d)**411.

589–18 170**Minn**115, 212**NW**183.

589–18½–New. That county officers knew that a depositary was in default or insolvent and accepted its bond without communicating such fact to the

sureties does not absolve the sureties from liability. 170Minn115, 212NW183.

589-23½-New. In some jurisdictions the payments will be applied on the unsecured deposits first and then on the secured deposits. 121Kan223, 246P524.

589-25½-New. or their authority to sign bond. 140Miss585, 105S484.

589-26 41 Ida432, 242P297; 228Ky426, 15SW(2d)255 [d] **Validity of ordinance making designation.**-41 Ida432, 242P297.

589-26½-New. Sureties are estopped to assert that the depositary had no authority to furnish the bond because it was operating under the Guaranty Law. SD 208NW982.

589-28 176Ark1166, 5SW(2d)735; 103 WVa561, 138SE313.

589-28½-New. , or that bond had not been approved by board of supervisors. Iowa 230NW404.

589-30 176Ark1166, 5SW(2d)735.

589-31½-New. Failure to comply with the requirements of statute relative to the selection of a depositary of water district funds does not prevent the making of a valid bond between a bank, its sureties, and the water district. TexCivA 280SW845.

589-31⅛-New. A deposit bond executed by a bank not selected by bid and accepted and approved by a water district is not invalidated by the absence of approval of the depositary by a county judge. TexCivA 280SW845.

589-31¼-New. The surety cannot question the validity of the bond or its statutory character. 205 Iowa987, 213 NW528.

589-31⅓-New. Where sureties on the bond of a bank acting as depositary for county funds were stockholders and directors of the bank, and on expiration of the bond executed a new bond in order to enable the bank to continue as depositary, and the bond was filed and accepted by the county treasurer, the sureties are estopped, on the bank's failure, to deny their liability on the ground that the bond was not approved by the county commissioners. 84Mont297, 275P285.

589-31⅓-New. Sureties cannot question the validity of the principal's designation where deposits have been made on the faith of the bond. TexCivA 178SW(2d)478.

589-31⅙-New. The sureties on a new bond incur no liability if it is not approved, so as to be sufficient as a substitute bond, and so release the original bond. Tex 128SW(2d)662.

589-31⅚-New. Sureties cannot question the validity of a bond on the faith of which deposits have been made on the ground that it was exacted under city charter provisions instead of under general statutes. TexCivA 178SW(2d)478.

589-31⅙-New. Although the original bond of a county depositary is not approved as required by statute, yet, it having been delivered and deposits made on the faith of it, the sureties are liable. Tex 128SW(2d)662.

589-31 1/10-New. Representations made by a commissioner of revenue in behalf of a relative who conducted a bank in order to secure the signature of a surety to a depositary bond do not bind the city. TexCivA 178SW(2d)478.

589-31 1/11-New. Sureties may be estopped to contend that deposits were not legally made. Iowa 227NW622.

589-31 1/12-New. Sureties cannot dispute liability on ground that principal was not duly selected nor bond executed and delivered within statutory time. Mo 268SW(2d)785.

589-31 1/13-New. Bond is to be liberally construed in favor of public as written and parties' intention gathered from whole instrument. TexCivA 238SW(2d)411.

589-31¼-New. The surety on an invalid bond is not estopped to deny liability by reason of statements which did not prejudice the obligee. 208 Iowa588, 226NW66.

589-33 41 Ida432, 242P297; 205 Iowa878, 219NW34; SD 225NW216. [a] (1) 41 Ida432, 242P297. (2) 41 Ida432, 242P297. [d] **Statute requiring all public funds to be deposited in particular bank** terminates liability of sureties on previously executed bonds as to deposits subsequently made contrary to its provisions. 52ND204, 202NW279. [e] **Use of pronoun "her" in ordinance and bond in referring to incumbent in treasurer's office** does not limit obligations of bond to term of particular treasurer who was then a woman. 41 Ida432, 242P297. [f] 52ND420, 203NW317.

589-35 [a] **Effect of notice of withdrawal by one surety.**-Such notice, under terms of bond, releases any surety who complies with terms of bond. 43 Ida600, 255P310.

589-36 121Kan223, 246P524; 175Minn482, 221NW865; 195NC357, 142SE231. [a] **Bond given to secure deposits by county treasurer** expires, under some statutes, with term of county treasurer, and does not apply to funds deposited by successor, though bond, by its terms, runs for period beyond such term. Nebr 228NW868.

589-37 See also Tex 128SW(2d)662.

589-38 13F(2d)401; 205 Iowa672, 216 NW119, 121 [cit CJ]. See also Tex 12 SW(2d)662.

590-42 30 OhA549, 165NE857.

590-44 See also Tex 128SW(2d)663.

590-47½-New. Sureties are not discharged because of breach of contract by a county to deposit all funds in a secured account. Tex 128SW(2d)662.

590-47⅓-New. A contract of a county with its depositary bank, to release it from its obligation to pay interest after a certain date, is void under the constitution, and does not work a material change of contract between the bank and county, effecting a discharge of the depositary's sureties. Tex 128SW(2d)662.

590-51½-New. Where bond requires obligee to give surety notice of obligor's default, surety is released on failure to give such notice. 53ND789, 208NW380.

590-51⅓-New. Where there are several sureties, released one under term of bond leaves others liable. 43 Ida600, 255P310.

590-51 1/6-New. Sureties on the bond of a depositary of city funds are not released from liability by reason of the transition of the city from one class to another shortly before the depositary became insolvent and was closed, and the fact that no new bond was taken by reason of such transition where no new deposits were made after the organization of the city as one of its new class. 41 Ida432, 242P297.

590-51⅙-New. Sureties on such bond are not released by reason of a reasonable delay of the city in procuring a new bond in accordance with a statute which took effect shortly before the depositary became insolvent, where no deposits were made thereafter. 41 Ida432, 242P297 (nine days held not unreasonable delay).

590-51⅙-New. Sureties on such bond are estopped from questioning their liability where they were stockholders of the depositary and knew that no new bond had been given and large amounts of city funds were deposited with the depositary on the faith of the bond. 41 Ida432, 242P297.

590-51⅞-New. Repeal of Preferential Deposit Law is held no release of security of surety on bond. 205 Iowa1154, 213 NW517.

590-51⅞-New. Release of illegally accepted collateral security is held no discharge of sureties on bond. 205 Iowa 975, 213NW612.

590-51 1/10-New. It cannot be said that a county treasurer who succeeds himself in office is not harmed by the nonpayment of deposits made during his first term of office, although he has requalified and given a new bond to cover the second term. 205 Iowa672, 216NW119.

590-51 1/10-New. Redeposit releases sureties. 124Kan372, 260P630.

590-51 1/11-New. Statutory consolidation of state banks is held not to release sureties on bonds. 173Minn406, 217NW 360.

590-51 1/11-New. A resolution of city commissioners that the pay roll account shall be free of interest does not invalidate an existing bond of a depositary whereby the depositary agreed to pay four per cent interest on daily deposits. TexCivA 178SW(2d)478.

590-51 1/13-New. Although new bond had not been approved, old bond still in existence covers deposits. Iowa 230NW 404.

590-54 124Kan372, 260P630.

590-55 Iowa 230NW404 (approval by board of supervisors is required to release by county treasurer).

590-58½-New. Right of subrogation in bond and application therefor is held to refer only to principal's rights and remedies against wrongdoers causing loss. 288Pa300, 135A748.

590-58½-New. A surety for school district's depositary, who was a stockholder and director thereof, is held not entitled to the protection afforded to gratuitous private sureties. 193Wis403, 214NW342.

590-58¼-New. In a controversy between surety of depositary of county funds and surety on bond for the treasurer, the former cannot charge negligence of the treasurer in taking collateral security on the ground that the deposit was greater than the treasurer's books showed, which circumstances were due to misrepresentations of the depositary, its principal. 5F(2d)34.

590-58⅛-New. A surety, accepting the benefits of a reduction of liability by the sale of the assets of an insolvent bank, cannot attack the sale without a tender of the reduced amount. 177Ark 181, 5SW(2d)929.

590-58⅛-New. Sureties who pay a claim are held not subrogated to the rights of the state as to preference where the preference statute was repealed before payment. 205 Iowa1154, 213NW 517.

591-61½-New. The fact that the county treasurer upon succeeding himself gives a new bond for his second term of office creates no conclusive presumption that the liability which attached during his first term has been carried over to his new bond. 205 Iowa672, 216 NW119.

591-61½-New. Separate instruments held to constitute one bond. Mo 26SW (2d)785.

591-62 41 Ida432, 242P297; 173Minn 428, 217NW496; 321Mo 815, 12SW(2d) 755; Mo 30SW(2d)32.

591-63 41 Ida432, 242P297.

591-66 [a] **Form of deposit.**-147Wash 482, 266P707.

591-68 47 Ida346, 275P780 (moneys of the state); 148Miss109, 114S26. [a] (3) Funds of school districts in custody of county treasurer must be deposited. 125 Okl 243, 257P318. [c] **Street improvement funds** are city funds, required to be deposited in banks designated as public depositaries. IndA 165 NE332.

591-69 49ND27, 186NW381; 49ND 1026, 194NW385; 125 Okl 243, 257P318; SD 208NW576. [a] **Full amount of bid of bank offering highest rate of interest** must be deposited before depositing elsewhere. 34 OhA279, 170NE882.

591-75 [a] **Resolution designating bank** as depositary of not more than stated amount of county funds applies to any deposits then existing or thereafter made. 203 Iowa1089, 213NW232. [b] **Rescission of resolution limiting amount of deposit and fixing of limitation in smaller amount** renders existing deposits in excess of latter limitation, after reasonable time, unlawful and unauthorized. Iowa 214NW232.

591-77 34 OhA279, 170NE882 (statutory limitation).

591-78½-New. Deposit properly made by treasurer of school district creates relation of debtor and creditor between depositary and district, but not between depositary and treasurer. SD 208NW 576.

591-78½-New. Under some statutes deposit of township funds in de facto county depositary is authorized in absence of selection of township depositary. Mo 30SW(2d)32.

592-81½-New. On adoption by board

of supervisors of resolution reducing maximum authorized deposit in bank, it is duty of county treasurer, if possible, to withdraw excess. **Iowa** 230NW308.

592-81¼-New. In such case it is duty of treasurer to use reasonable diligence to comply with resolution. **Iowa** 230 NW308.

592-81¼-New. Such resolution, if requiring performance of impossibility, does not render excess deposit illegal. **Iowa** 230NW308.

592-81½-New. That checks were not drawn for excess deposit after such resolution is immaterial where they would not have been paid. **Iowa** 230NW308.

592-83 13F(2d)401; 41 **Ida**432, 242P 297, 302 [quotCJ].

592-84 41 **Ida**432, 242P297, 302 [quot CJ].

592-85 41 **Ida**432, 242P297, 302 [quot CJ].

592-86 41 **Ida**432, 242P297, 302 [quot CJ].

592-87 41 **Ida**432, 242P297, 302 [quot CJ].

592-90 41 **Ida**432, 242P297.

592-95½-New. Under some statutes, in counties governed by the statute providing for an emergency treasurer or custodian on failure to select a depositary, the term of such emergency custodian cannot extend beyond one year or until a successor is selected. 219**Ala**554, 123S31.

592-95⅓-New. Where the board of county commissioners has made a designation in accordance with statute, and the statute does not require periodical designation, the county treasurer is justified in continuing to make deposits with the depositary so designated until notified to the contrary. 77**Mont**498, 251P548.

592-1½-New. On deposit by county treasurer under Montana statutes, title to money passes to depositary. 74**Mont** 152, 240P812.

592-1½-New. An agreement to use public funds to purchase and pledge securities to secure county is void as permitting speculation in such funds. **Tex CivA** 288SW870.

592-1¾-New. Bank designated as depositary, having been advised by clerk of terms of deposit, cannot subsequently contend that board's instructions were unauthorized. 39F(2d)387.

593-7½-New. Where a county treasurer deposits with a depositary bank of his county a check or warrant drawn on another county treasurer for the purpose of transferring to his custody money belonging to a school district in his county and the depositary gives him credit for the amount, there is an implied agreement that the depositary may charge the amount to his account if the item is not paid. 125 **Okl** 243, 257P318.

593-7½-New. Liability for aiding county treasurer in embezzlement of funds. 13F(2d)213.

593-7¼-New. And a deposit, whether legal or illegal, creates a trust in favor of a public depositor 25 **OhA**165, 157 **NE**903.

593-7½-New. entitled to preference in the hands of the receiver of depositary. 25 **OhA**165, 157**NE**903.

593-7¼-New. Liability of public depositary is not conditional on the fidelity of other public agents or officers. 38 **Wyo** 1, 264P93.

593-7½-New. A city treasurer's deposit of the city's moneys in depositaries duly selected by the city commissioners, establishes the ordinary relation of debtor and creditor between the depositary and the city, and the depositary is liable on its contract and any statutory bond given by it for any neglect of duty occasioning loss to the city, 29F(2d) 417.

593-7⅛-New. or when the deposits are paid by proper applications of withdrawals from the second bank. **Tex** 12 SW(2d)662.

593-7½-New. The continued existence of a special county depositary bank in the name of the bank which took over the depositary account, on which theory liability of the bond of the first bank for the default of the second bank is claimed, is negatived by the fact of the first bank's being still in existence at the time of the trial. **Tex** 12SW(2d)662.

593-7¼-New. The nonsurrender of forged checks to depositary has been held no defense where request for returns was not accompanied by offer of receipt. 300**Pa**39, 150A96.

593-7¼-New. Liability for wrongful withdrawal of funds by county treasurer. 44F(2d)19.

593-9 39F(2d)387; 162**Ga**488, 134**SE** 310; 40**GaA**242, 149**SE**297 (no other person liable "when depository has funds to pay same"); 203 **Iowa**1089, 213**NW**232. [b] **Bank which paid out of special public deposit** sums not lawfully authorized was liable to account for funds in its possession and funds thus illegally paid out. 162**Ga**488, 134**SE** 310. [c] **Warrants, to absolve special depositary,** must be proper, approved by proper officers, and must be for purposes only for which such money could be used. 162**Ga**488, 134**SE**310. [d] **City's dereliction in duty to others by wrongfully commingling special funds with funds collected for payment of current expense fund warrants** is not available to depositary as excuse for failure to repay funds to city or such persons as it directs. 147**Wash**482, 266P707. [e] **Liability for negligence in payment.**–300**Pa**39, 150A96.

593-10½-New. And relation of debtor and creditor between depositor and its depositary does not cease because depositors accept illegal surety. 25 **OhA** 165, 157**NE**903.

593-12 See also 46 **Ida**224, 267P225.

593-14½-New. Private funds inadvertently mingled with public funds may be returned by depositary to owner. **TexCivA** 277SW411.

593-14⅓-New. Depositor of public funds has lien on bank assets therefor, 164**Ga**790, 139**SE**566.

593-14¼-New. A city depositary, paying out in an unauthorized manner city money employed to discharge valid and due debts of the city, would be protected. 29F(2d)417.

593-14½-New. Where a tax collector deposits in depositary bank drafts as "gold and silver," and an amount thereof is credited to the tax collector's account as such, the depositary cannot withdraw funds to pay the collector's dishonored drafts, notwithstanding a specific agreement to the contrary between the bank and collector to which the state and county were not parties. **TexCivA** 15 **SW(2d)**82.

593-19 164**La**932, 114S841; 147**Miss** 695, 112S877; **TexCivA** 288SW870. [a] **Commingling of tax money** has been held not to obviate bank from liability for interest. 147**Miss**695, 112S877. [b] **Statute requiring interest on deposits held valid.**–147**Miss**695, 112S877. [c] **Law requiring payment of interest on deposits** has been held not impliedly repealed. 147**Miss**695, 112S877.

593-20 See also **Tex** 12SW(2d)662.

594-29½-New. Under statute in some jurisdictions depository bank is liable for interest to the county at two per cent per annum on daily balances or amount deposited therein as collections of the tax collector of the county. 142**Miss**799, 107S548.

594-29½-New. Where the interest is not paid as required by the statute, a penalty of five per cent a month or fraction thereof is imposed in addition to the interest. 142**Miss**799, 107S548.

594-29¼-New. Where the officers of the bank know that a deposit made by a county officer is a public fund, it is the duty of the bank to keep the funds covered by the statute in a separate account. 142**Miss**799, 107S548.

594-29½-New. It is a bank's duty to ascertain what part of such funds were tax collections and keep them separate from other funds of the officer's account. 142**Miss**799, 107S548.

594-29⅓-New. A bank account cannot escape liability by commingling funds in such way, or keep such account, as will not disclose tax collections fund to the proper state officer. 142**Miss**799, 107S548.

594-29⅐-New. It is duty of a bank when called to account to show the amount of money received and the true daily balances of such account required by the statute. 142**Miss**799, 107S548.

594-29⅛-New. If the bank commingles the funds in such manner that the daily balances cannot be ascertained from its books, it must be able to point out and make a correct accounting. 142 **Miss**799, 107S548.

594-29⅛-New. in default of which it will be held liable for interest on the entire account. 142**Miss**799, 107S548.

594-29⅒-New. Ignorance by the bank of the existence of the statute is no defense to its liability for interest and the penalty imposed for failure to pay interest. 142**Miss**799, 107S548.

594-29⅒-New. Under some depositary laws it is not unlawful for a municipality to require a depositary to pay interest. 41 **Ida**432, 242P297.

594-42½-New. When funds of irrigation district are deposited by county treasurer, the county becomes debtor to the district, and, therefore, loss of funds due to insolvency of depository bank is a loss by the county of county funds. 74**Mont**152, 240P817.

594-42⅓-New. After a deposit is made by the county treasurer of funds of the school district, the relationship of debtor and creditor exists between the county and the school district. 74**Mont**152, 240P812.

594-42¼-New. In case of loss, due to insolvency of depositary following deposit of school funds by county treasurer, the loss is that of the county, not that of the school district. 74**Mont**152, 240P812.

594-47½-New. A county treasurer cannot recover from the bank the amount of a check placed to his account where the state's attorney by virtue of a resolution of the county board had filed a claim for the amount against the guaranty fund and received payment. **SD** 221**NW**267.

594-51 58**ND**673, 227**NW**190 (action for recovery of money evidenced by certificates of deposit held premature).

595-53½-New. A county cannot predicate liability against sureties on the bond of a bank, which was the depositary of special county funds, on the theory that the turning over of such account by such bank to another bank was a default, the county having acquiesced in such transfer and received interest from the second bank, based on its having received the county's money from the first bank, and having thereafter dealt with the second bank as such depositary. **Tex** 12SW(2d)662.

595-59 **GaA** 155SE64.

595-64 170**Minn**164, 212**NW**185. [a] **Joinder of sureties on successive bonds in different amounts.**–170**Minn**164, 212 **NW**185.

595-69½-New. Notice of default need not be given to all sureties of depositary of school district to enforce several liability of one surety. 193**Wis**403, 214 **NW**342.

595-71 73**Mont**385, 236P545, 547 [cit CJ&Cyc].

596-87 [b] **In Iowa.**–207 **Iowa**208, 222 **NW**529.

596-88 73**Mont**110, 236P1085 (where bond securing county funds runs to county treasurer or successor, county treasurer may sue in official capacity as successor to named obligee). But see **SD** 208**NW**982. [a] **Assignee of depositor.**–25 **OhA**165, 157**NE**903.

596-95½-New. Under statutory provision a county depositary having given two bonds, the sureties on both may be joined in the same action. **Tex** 12SW (2d)662.

596-95⅓-New. Where a bond recites that a named person is principal, refusal to allow sureties to make another person a party on the ground that he was a partner of such principal is proper in the absence of allegation that the bond was a partnership obligation. **Tex CivA** 17SW(2d)478.

596-95¼-New. In an action by a school district against sureties on a bank's depository bond, the receiver of the

insolvent bank is not a necessary party. 58ND673, 227NW190.

596-95⅓-New. County may sue sureties on bank's bond without joining bank or its liquidating agent. **Mo** 29SW(2d) 1096.

596-98 [c] **Complaint held demurrable.**-52ND204, 202NW279.

596-4½-New. That a county's petition on two bonds of its depositary alleges that it was duly approved as required by law, but not alleging the date thereof, does not entitled the sureties on the first bond to judgment, on the theory that they were thereby discharged. **Tex** 12SW(2d)662.

596-4¼-New. A cross bill by sureties on a depositary's bond seeking to recover from the city treasurer on the ground that he so commingled funds of the city that it was impossible to determine what portion were city revenues is properly dismissed. **TexCivA** 17SW (2d)478.

596-4¼-New. Declaration or motion for judgment on depositary bond is not demurrable for failure to allege that county court entered order directing suit. **WVa** 153SE312.

597-8 [a] (4) That bond of depositary of school district was delivered, accepted, and approved. 193Wis403, 214NW 342. (5) That county depositary located in same city with only other county depositary was most convenient depositary for township funds. **Mo** 30SW (2d)32.

597-8½-New. Burden of proof is on plaintiff. 29F(2d)417; **Iowa** 227NW 622 (burden on sureties alleging penalty of bond fraudulently altered); **Tex** 12 SW(2d)662.

597-8⅓-New. The burden of showing lack of notice of conditional delivery by the surety is not placed upon the county. 51ND272, 199NW873.

597-9 Mo 26SW(2d)785 (separate bonds are admissible); **TexCivA** 17SW (2d)478. [d] (2) Inadmissible to show bond delivered subject to conditions. 46 Ida224, 267P225.

597-10 56ND707, 219NW110 (judgment for plaintiff supported by evidence). [a] (8) To justify court in concluding that bond had not been approved by board of county commissioners on certain day. 75Mont369, 243P 1093. (9) To show that bank was legally designated as depositary of county funds. 170Minn115, 212NW183. (10) To show that withdrawals were applied on account existing before bank became regular county depositary. **Tex** 12SW (2d)662. (11) To show delivery of bond. **TexCivA** 17SW(2d)478. (12) To show negligence of one surety in signing bond estopping his executor to deny execution. **Mo** 30SW(2d)83. (13) To present jury question as to whether bond in altered form was accepted by county court. **Mo** 30SW(2d)83. [b] (7) To show that original depositary was discharged and new depositary substituted by agreement of parties. 166 Minn109, 207NW138. (8) To support allegations that directors of depository bank who were sureties on its bond were estopped by knowledge that county funds were deposited in bank in reliance on bond and made no objection or effort to terminate their obligation. 75 Mont369, 243P1093. (9) That county had notice of conditional agreement or delivery by sureties that bond should not operate unless signed by another surety. 51ND272, 199NW873. (10) That certain sums of money were not on hand at time of execution of bond. **TexCivA** 17SW(2d)478. (11) To show that penalty of bond was fraudulently altered. **Iowa** 227NW622.

597-13 [a] **Right to have claim against bank preferred** is not adjudicated by judgment against sureties on bond. **Mo** 29SW(2d)1096.

597-16½-New. In an action to recover of several individual sureties on two depositaries' bonds, given by a state bank to secure deposits of county funds, the amount on deposit when the bank became insolvent, it is error to direct judgment against sureties on either bond for less than the amount of the deposit, interest, and costs, where such sum is less than the amount of either bond. 171Minn8, 212NW948.

597-16⅓-New. Judgment adjudging bonds to a county has been held proper, where depositary claimed no interest in the deposit and the bonds were the property of the county. **TexCivA** 288 SW870.

597-16¼-New. Decree limiting recovery against sureties to deficit after exhausting complainant's priority is not erroneous. 157Tenn87, 6SW(2d)328.

597-17 41Ida432, 242P297.

597-21 276US238, 48SCt239, 72Led547 (matters considered in fixing attorney's fees).

DEPOSITIONS

605-3 [a] (10) 8PaDist&Co 420.

606-17 34Ariz153, 268P1027; 115 OhSt 25, 153NE264.

607-18 115 OhSt25, 153NE264.

607-30 CalA 290P906; Kan 290P3.

607-34 115 OhSt25, 153NE264.

607-36 14F(2d)495; CalA 290P545; 245 IllA524; 115 OhSt25, 153NE264. But see 197Cal 389, 240P1006. [c] **In Pennsylvania.**-6PaDist&Co410.

607-39 [c] **In Philippines.**-44Philippine 30.

607-39½-New. Statutes for depositions are remedial and should be liberally construed. 128Misc714, 220NYS141.

607-39⅓-New. Depositions may be taken only when intended for use on trial. 15F(2d)869.

608-46 [b] **In California.**-A 286P1053.

609-66 223AppDiv70, 227NYS580. [b] **As respects possession required to maintain proceedings to perpetuate testimony,** constructive possession of wild lands follows legal title and cannot arise on void conveyance. 223AppDiv 70, 227NYS580. [c] **Bar of limitations** against action to establish title held sufficient to authorize proceedings to perpetuate testimony. 223AppDiv70, 227NYS580.

609-78 79CalA361, 249P236.

610-88 100CalA652, 280P992.

611-16½-New. Female witness is not obliged, as general rule, to attend court in order to testify. 169Ga770, 151SE 381(2dcase).

611-19 CalA 293P106; 36GaA363, 136 SE808.

611-20 112 Okl 240, 240P739.

611-22 36GaA363, 136SE808.

612-30 125 Or34, 265P445.

612-38 CalA 292P145; 10PaDist&Co 540.

612-39 [a] **Taking of deposition covered by testimony of other witnesses,** already given, will not be ordered where not of great importance. 172Minn250, 215NW181.

612-45 22F(2d)412; 157Miss890, 128S 83.

613-58½-New. law providing for taking of depositions within state for use without state is based on county, 214AppDiv 271, 212NYS183.

613-58⅓-New. and it is the policy of the law to give complete assistance to the courts to which such comity is extended. 214AppDiv271, 212NYS183.

615-87½-New. Under Rev. St. § 863 the distance at which a witness lives from the place of trial is to be measured over the shortest, ordinary, and usual route of travel. 15F(2d)869.

615-89 14F(2d)495.

616-14 30F(2d)234 [certiorari den 279 US858, 49 SCt353, 73Led999(1stcase)].

617-33 Sask [1930] 2DomLR986 (order for commission granted).

617-36½-New. Taking of the deposition of an absent witness by defendant is not objectionable as depriving plaintiff of opportunity to rebut, where his counsel was present and cross-examined the witness but failed to ask to present rebuttal testimony. **SD** 221NW601.

618-62 148Wash376, 268P1038.

618-64 200 Ind623, 162NE441.

618-81½-New. Depositions of official stenographers on hearing on merits of charges against petitioner have been held unnecessary for order of prohibition against justice as disqualified. 222App Div827, 226NYS389.

618-82 156Md390, 144A501.

619-95 Fla 112S83 (Rev. Gen. St. [1920] § 6085); **OklCr** 269P377. [b] **In Oklahoma.**-Cr 273P372(2dcase).

619-3 220MoA702, 293SW488.

619-6 112 Okl 240, 240P739, 740 [quot CJ].

620-26 [a] **Special commissioner acts in judicial capacity,** and as substitute for court in conduct of proceedings. **MoA** 29SW(2d)199.

621-35 MoA 29SW(2d)236.

622-65 327 Ill 538, 158NE694 (recognizing rule). See also **TexCivA** 289SW 159.

622-75½-New. Refusal to suppress defendant's depositions on the ground that the notary had been securing testimony for plaintiff in a similar case against defendant has been held not error. **Tex CivA** 289SW159.

623-76 See also **MoA** 273SW133.

623-92 32F(2d)734.

623-98½-New. A statute against an attorney's taking a deposition has been held not to extend to a stenographer of the attorney. 327 Ill 538, 158NE694.

624-11 112 Okl 240, 240P739 (person in Canada certifying deposition as notary public is presumed to be such and authorized to administer oaths).

627-75 24F(2d)858 (claim against contractor engaged to repair vessel).

630-48 36GaA363, 136SE808.

630-49 36GaA363, 136SE808.

632-89½-New. It is not error for the federal court to refuse to grant a commission to take a deposition in a foreign country in support of allegations in a bill on motion made two years after commencement of the suit. 8F(2d)460.

632-94 NH 150A485. [d] **Motion to set aside verdict** is pending cause authorizing depositions. **NH** 150A485.

633-4½-New. In some jurisdictions, as regards the time for taking depositions, a suit is begun when the complaint is filed and the summons issued, 177Ark 374, 6SW(2d)290.

633-4½-New. and depositions taken after the filing the original complaint but before filing the amended complaint not stating a new cause of action are admissible. 177Ark374, 6SW(2d)290.

633-6 OklCr 269P377 (in criminal prosecutions).

633-7½-New. If an answer is filed, the fact that it is called by another name is immaterial. 221Ky808, 299SW979.

633-15 229Ky195, 16SW(2d)1018.

634-39 NH 150A485; 49ND729, 193NW 477. [a] **On petition for new trial,** depositions may be taken, but not between time of judgment and petition. **NH** 150A485.

635-43 NH 150A485 (holding depositions cannot be taken during transfer of cause to supreme court).

636-82 223AppDiv70, 227NYS580 (petition held sufficient); 128Misc714, 220 NYS141. [b] (2) 79CalA361, 249P236.

636-83 See also 101WVa492, 133SE106.

637-6 CalA 290P906; **OklCr** 270P339.

638-25 CalA 290P906.

639-32 79CalA361, 249P236; 100CalA 433, 280P136(2dcase); **CalA** 290P906.

639-33 68CalA621, 230P221 (in criminal prosecution); 79CalA361, 249P 236; 93Fla504, 112S83. [c] **Nature of controversy,** interest of applicant, and claims of adverse parties should be stated with sufficient certainty to enable court to settle proposed interrogatories or to compel witnesses to answer questions propounded. 79CalA361, 249P236.

639-34 OklCr 279P923(2dcase).

640-50 100CalA652, 280P992 (compliance with statute held sufficient); **CalA** 290P906; **CalA** 292P145. [a] **Particularity of bill in equity is not required.**-79CalA361, 249P236. [b] **Application has been held insufficient.**-**CalA** 292P145.

640-54 32F(2d)734; 38F(2d)581. [b] **Equity** does not authorize ex parte proceeding to take testimony where relief sought purports to be binding upon defendant. 32F(2d)734.

640-56 [c] **In Georgia.**-162Ga664, 135 SE195.

640-66½-New. , or by not appearing at the hearing of the application or at the taking of depositions. **MoA** 287SW 657.

641-71 [d] **In Missouri.**-A 287SW657.

641-73 [a] **Order shortening notice.**–91CalA242, 266P990.
641-84½-New. Unless right to take deposition is challenged, it need not be shown that the examination comes within statutory provisions. 215AppDiv89, 212NYS628.
642-1 25F(2d)574; 11PaDist&Co 519; 12PaDist&Co 665.
643-8 OklCr 279P923(2dcase); 134 Wash152, 235P21.
643-18 170La744, 129S150.
645-54 TexCivA 272SW291.
645-55 33F(2d)236 (refusal to grant application held erroneous).
645-57 93Fla504, 112S83.
645-58 36GaA363, 136SE808; 128Misc 714, 220NYS141.
645-64 31F(2d)777.
646-84 [a] **Failure to state residence of commissioner** is not ground of objection where disinterested attorney of court is named as commissioner. 162Ga664, 135SE195.
646-85 [b] **But in Alberta** there is no rigid rule that names of witnesses must be stated in order. [1925] 3DomLR805.
647-12 93Fla504, 112S83.
648-37 5PaDist&Co 429. [b] **Naming of place** held insufficient. 5PaDist&Co 429.
649-56½-New. That a deposition is taken before a notary other than the one named in the notice does not render it inadmissible. 22F(2d)73.
650-63 [d] **But in Alberta** there is no rigid rule that names of witnesses must be stated in commission. [1925] 3 DomLR805.
650-67 Alta [1925] 3DomLR805.
652-20½-New. Where notice of motion for a deposition on written interrogatories is made the opposite party need not elect to have depositions taken on oral interrogatories before the date specified in the notice to have the deposition taken on written interrogatories. 91CalA242, 266P990.
653-27 [a] **Illustration.**–125Misc494, 211NYS435.
653-29 But see 125Misc494, 211NYS 435; 8PaDist&Co 420.
653-30½-New. Although the statute permits oral depositions within the state, there is no absolute right to have depositions taken orally without the state. 125Misc494, 211NYS435.
653-30⅓-New. The matter of allowances for oral examination outside the state is in discretion of the court, 125 Misc494, 211NYS435.
653-30¼-New. as is the question whether written interrogatories should be required. 125Misc494, 211NYS435.
653-31 [a] (1) 223Ky713, 48W(2d)721. (3) Interrogatories are not necessary, though widow is sole, adult, defendant and files answer. 223Ky719, 48W(2d) 723.
653-34 129Misc794, 222NYS621.
653-38½-New. It is within the discretion of the court to impose terms where testimony is to be taken orally outside the state. 125Misc494, 211NYS435.
653-38⅓-New. And such power exists where the order to take testimony is pursuant to notice. 125Misc494, 211 NYS435.
653-38¼-New. But pecuniary terms ought not to be imposed except in meritorious case in interest of justice. 125Misc494, 211NYS435.
653-42½-New. Where plaintiff procures an order for a deposition on written interrogatories, defendant's request to cross-examine orally will be granted on condition that plaintiff be permitted to take redirect examination orally also, 129Misc794, 222NYS621.
653-42⅓-New. and that defendant be required to pay for oral cross and redirect examinations. 129Misc794, 222 NYS621.
653-43 239Misc508, 215NW21, 22 [quot CJ].
654-44 239Mich508, 215NW21.
654-45 239Mich508, 215NW21.
654-50 CalA 287P560.
654-53 CalA 287P560.
654-60 100CalA433, 280P136(2dcase) (affidavit of materiality necessary).
655-87 See also NJCh 147A637.
656-90 98CalA714, 277P759.
658-35½-New. That interrogatories were first delivered to witness to be forwarded to notary taking depositions did not render depositions inadmissible. TexCivA 28SW(2d)259.
660-66½-New. Although a clerk failed to attach cross-interrogatories which the commission originally issued, deposition will not be quashed where they were finally attached and deposition was taken on both direct and cross-interrogatories, no inquiry being claimed. TexCivA 282SW819.
660-69 162Ga664, 135SE195; 225App Div873, 232NYS658; 115 Oh25, 153NE 264; 115 Okl 95, 241P1102; 48KI 99, 135A606; 103WVa590, 138SE201.
661-75 221Ky808, 299SW979.
661-82 237Mich361, 211NW634. [b] **Ignorance of defect in service before trial** established by interveners will permit objection for want of notice. 167 Ga821, 146SE851.
662-94½-New. **Waiver by attorney of client's right to notice** is not permissible. 5PaDist&Co 429.
662-2 22F(2d)73.
663-23½-New. A notice sufficiently designates the court in which the application to perpetuate testimony was filed where it is signed by the deputy clerk of the court and the signature is followed by a description of his office. 162Ga664, 135SE195.
664-32½-New. Failure of notice to state that residence of witness was outside of state is defect of form only and curable by statute. 162Minn57, 202NW54.
664-35 150Wash242, 272P980.
664-38 125Me260, 132A892.
665-61 237Mich361, 211NW634.
665-82½-New. A party taking a deposition must serve notice. 115 OhSt25, 153NE264.
666-85 TexCivA 78W(2d)922.
666-86 5PaDist&Co 429.
666-87½-New. A party actually adverse must be given notice although not nominally adverse. 115 OhSt25, 153NE 264.
666-97 5PaDist&Co 429.
667-9 NC 154SE311(2dcase).
668-22 [a] (11) Notice to take depositions on May 31, in Missouri, served on counsel on May 26. 35Wyo 300, 249 P81. [b] 143Va656, 129SE687.
668-23 143Va656, 129SE687.
668-24 143Va656, 129SE687.
668-25 143Va656, 129SE687.
668-26 143Va656, 129SE687.
668-27 39 OklACR368.
669-38 4HawaiiFed92.
670-51 [a] **Where party does not reside in city where deposition is taken,** personal service may be made where he is found. 317Mo 392, 295SW532.
670-57 RI 150A78(1stcase).
671-79 215Ky226, 284SW1052.
672-82 [a] **Showing as to payment of fees.**–317Mo 392, 295SW532.
672-94 33Ariz354, 264P1083; 95Fla 851, 116S865; 132 Okl 244, 270P85. See also 13PaDist&Co 236.
672-97 220MoA702, 293SW488. [a] (2) 114 Oh194, 150NE735.
673-11 95Fla851, 116S865.
674-21 221Ky808, 299SW979.
674-22 TexCivA 272SW291 (not abuse of discretion for court to permit commission to correct deposition by changing address from one county to another after deposition had been taken in latter county).
674-27½-New. In furtherance of justice a deposition may be taken outside of jurisdiction. Man [1927] 2DomLR847 [1927] 1WestWkly435.
675-44½-New. In certiorari proceedings to review attachment proceedings before the sheriff, on which return of the sheriff was inadequate, it was immaterial whether depositions to ascertain what facts were established at the inquest held by the sheriff were taken before or after allowance of writ of certiorari. NJSup 142A421.
675-48 [b] **Proceedings must be begun** on day set. MoA 29SW(2d)199.
675-61 3LaA410.
676-77 But see Mo 12SW(2d)508(1st case).
677-92 See also 220MoA702, 293SW 488. [b] **In California.**–197Cal 389, 240 P1006.
677-96 65Utah619, 238P1114, 41ALR 433.
678-20½-New. **Vacating subpœna.** On motion to vacate subpœna, court is not required to pass on question of strict legality and competency of evidence sought to be elicited. 214AppDiv271, 212NYS183 (in examination for use without state).
678-29 MoA 29SW(2d)236.
679-48 220Ky539, 295SW856.
680-61 [c] **Continuance** for good cause shown is within incidental powers of special commissioner to grant. MoA 29 SW(2d)199.
680-76 [c] **Counsel** in proceedings are entitled to reasonable opportunity, in exercise of diligence to prepare themselves. MoA 29SW(2d)199.
681-77 MoA 29SW(2d)199 (holding question of counsels' diligence in preparation of case is within discretion of commissioner).
681-92 [a] **Party refusing to answer any proper questions** on sole ground that he does not come within classes of witnesses specified in statute is guilty of contempt. 36GaA363, 136SE808.
682-2½-New. Failure to obey subpœna is contempt although no statutory grounds for taking deposition existed. 215AppDiv89, 212NYS628 (where no motion to vacate was made).
682-7 36GaA363, 136SE808.
682-27 317Mo 392, 295SW532 (notary taking deposition).
683-29 317Mo 392, 295SW532 (notary).
683-32½-New. The legislature may empower a notary to punish for contempt. 220MoA702, 293SW488.
684-49 [b] **Master taking depositions** for use in Wisconsin cannot determine whether action was properly instituted in Wisconsin. 193Wis145, 211NW916.
684-55½-New. It is the duty of the commissioner to see that questions are answered and documents produced. 169 La229, 124S837.
694-56 NH 150A485.
684-59½-New. Permitting leading questions to plaintiff as a witness is not an abuse of discretion where he is suffering from a serious malady shortly resulting in his death. Iowa 228NW 886.
685-68 3Del 541, 140A648.
685-74½-New. **Termination of examination.** Witnesses desiring termination of their examination should first apply to the commissioner for such relief. 214AppDiv271, 212NYS183.
685-74⅓-New. On motion to terminate examination, court is not required to pass on strict legality and competency of evidence sought to be elicited. 214 AppDiv271, 212NYS183 (in examination for use without the state).
686-82½-New. The courts will not prejudge the competency or materiality of the evidence in a cause pending in another state, in an examination for use without the state, 214AppDiv271, 212 NYS183.
686-82⅓-New. and will afford the widest possible latitude in the conduct of the examination. 214AppDiv271, 212 NYS183.
687-92 193NC814, 138SE169; 149Wash 409, 271P85.
687-93 NJSup 134A288, 289 [citCJ]; 193NC814, 138SE169. [f] **Where only irregularity** of depositions consists of taking answers to interrogatories which had been disallowed, court will permit reading proper answers. 137Misc274, 242NYS161.
688-97 NJSup 134A288.
688-4 13Del 541, 140A648. [a] Ill 172 NE40.
688-6 170Ark745, 281SW354.
690-44 85CalA454, 259P488.
690-47 But see 85CalA454, 259P488.
691-51½-New. In a suit for infringement of a patent defendant is not excused from answering interrogatories as to process alleged to infringe on the ground that it is a trade secret. 22F (2d)180.
692-57 193NC814, 138SE169.
694-97½-New. An objection that de-

ponent refused and commissioner declined to require him to answer questions propounded on cross-examination may be first presented at the trial where notice thereof was given during the taking of the deposition as appears from its face. 193NC814, 138SE169.

694-99 [a] **Cross-interrogatories held proper** and within scope of direct examination. 252Mass552, 148NE105.

695-29 123Kan603, 256P986.

695-38½-New. Requirement that stenographer be sworn is inapplicable where notary taking deposition takes down testimony himself. **Ark** 31SW(2d) 963.

696-41 123Kan603, 256P986.

697-67 But see **TexCivA** 29SW(2d)891.

698-91 132 **Okl** 11, 268P1111.

699-6 3Del 541, 140A648, 651 [citCJ]; 4HawaiiFed92; 5PaDist&Co 429; 8QuePr 154. But see 220Ala115, 124S285 (written interrogatories). But see 125Me260, 132A892.

699-8 189NC585, 127SE588.

699-22 See also 42F(2d)623.

700-30½-New. Depositions taken on two successive days are not inadmissible, although not subscribed and sworn to until the third day. 22F(2d)73.

700-53 34Ariz153, 268P1027. But see 42F(2d)814.

701-67 **TexCivA** 7SW(2d)1112.

701-80 100Vt328, 137A324.

701-83 5PaDist&Co 429.

702-5 125Me260, 132A892.

706-74 125Me260, 132A892.

706-77 95Fla851, 116S865, 867 [citCJ].

708-20 192NC199, 134SE488. [a] (3) Certificate of officer that deposition was written by disinterested person is not required where deposition was written by officer himself. **IndA** 168NE46.

709-33 2 **OntWR**345, 3 **OntWR**160.

709-34 89 **IndA**1, 164NE322; 125Me 260, 132A892.

710-35 192NC199, 134SE488.

710-38 192NC199, 134SE488.

711-46 95Fla851, 116S865, 866 [citCJ]; **TexCommnA** 273SW834.

711-51 [a] **Recital omitting "whole truth"** is not material, evasions of truth not being assumed. **Ala** 129S12.

711-57 192NC199, 134SE488.

712-75 13**PaDist&Co** 236.

712-76 3**Del** 541, 140A648.

713-87 133Misc183, 231NYS374.

714-9 43 **Ida**703, 255P638.

714-14 [b] 50ND804, 197NW868.

716-76½-New. Notary taking deposition has no right, except for nonpayment of fees, to refuse to transmit it to the clerk of court. 114 **Oh**194, 150NE 735.

716-76¼-New. Dismissal of action does not relieve notary from compliance with order of court to transmit it to clerk of court. 114 **Oh**194, 150NE735.

716-76¼-New. Failure of notary to observe strictly and literally the requirements of the statute in transmitting depositions to the court is held an irregularity which should be disregarded under Judicial Code § 269. 22F(2d)73.

717-80 170Ark498, 280SW12.

718-95 114 **Oh**194, 150NE735, 738 [cit CJ]. See also **IndA** 154NE300. [c] **Order of court** is not necessary for filing of deposition. 226Ky776, 11SW(2d)956.

718-96 114 **Oh**194, 150NE735 (within power of court to order filing of deposition in case, whether pending or dismissed). [c] **After dismissal of action** motion lies to compel filing as of proper date of deposition withheld from files. 25 **OhNPNS**543.

722-97 10QuePR174.

722-7 [b] **Return to officer who took deposition** for correction of certificate, without notice to adverse party, is not prejudicial. **TexCivA** 28SW(2d)282.

724-39 233 **IllA**262.

724-48½-New. But after withdrawal the other party may move to refile the deposition he wants to use. 233 **IllA** 262.

724-50 [b] **Power to bring suit at time of application to perpetuate testimony.**-162Ga664, 135SE195. [c] **Failure to enter order to perpetuate testimony in minutes** is not ground for suppression of interrogatories. 162Ga664, 135SE195. [d] **Failure to sue some of persons named in application to perpetuate testimony** as persons against whom suit would be brought is not ground for suppression of interrogatories. 162Ga664, 135SE195.

726-84 **IndA** 168NE46.

726-85 **IndA** 168NE46.

726-99½-New. Depositions or matters contained in amended pleadings filed too late are properly stricken. 215Ky199, 284SW997.

726-99¼-New. By statute depositions in certiorari proceedings to review the public utility board's order will be stricken. **NJSup** 140A254.

726-99¼-New. Incompetency of testimony is no ground for suppression. 218 Ala173, 118S327.

726-1 [a] **Test of propriety of proceedings** before special commissioner is one of error on motion to suppress. **MoA** 29SW(2d)199.

727-17 See also 174Ark1025, 298SW 198.

727-21½-New. On exception to deposition, it will not be presumed that the stenographer was sworn or that the witnesses signed the stenographer's notes. 3Del 541, 140A648.

727-21¼-New. Under statute, motions to suppress deposition of physicians taken by notaries public, pursuant to an agreement in writing waiving commissions, is properly overruled. 218Ala541, 119S672.

723-28 215Ala282, 110S399.

728-35 [a] **Exclusion of note as part of commission,** previously set aside, is error where execution of note is admitted. 137Misc274, 242NYS161.

731-87 128Kan127, 276P74.

732-90 78CalA293, 248P555; 233 **IllA** 262; 157Md596, 146A750; 234Mich528, 208NW691, 695 [citCJ]; **Mo** 32SW(2d) 288; **NH** 149A70; **Alta** [1925] 3**DomLR** 369; 2 **OntWR**345, 3 **OntWR**160. See also 7 **OntL**737, 3 **OntWR**724.

732-91 78CalA293, 248P555; 44 **Ida** 560, 260P150 [citCJ]; 233 **IllA**262; 234 **Mich**528, 208NW691, 695 [citCJ]; **Mo** 38SW(2d)244. [a] **Despite personal appearance of party,** adversary can read his deposition, providing it contains anything material, not covered by examination. **CalA** 288P93.

733-95 172Ark927, 291SW58.

733-96 172Ark927, 291SW58.

733-4 233 **IllA**262; 234Mich528, 208NW 691.

733-5 233 **IllA**262.

733-6 **NH** 149A70. [a] (3) Other instances. **TexCivA** 29SW(2d)891.

733-12½-New. Where a party who has taken a deposition introduces it in evidence and the witness is afterward called by the adverse party, the party taking the deposition may not cross-examine the witness in reference to matters in the deposition. 234Mich528, 208NW691.

733-12¼-New. In such case the party taking the deposition is entitled to cross-examine the witness as to all matters testified to in court although they are contained in the deposition. 234 Mich528, 208NW691.

733-12¼-New. In such case the party taking the deposition may offer proof to show that statements made by the witness, although contained in the deposition, are not true. 234Mich528, 208NW 691.

734-16 115 **Oh**25, 153NE264.

734-18 [a] **Deposition is inadmissible** against codefendant where such defendant did not have notice. **TexCivA** 7 SW(2d)922.

734-19 115 **Oh**25, 153NE264.

734-24 See also **Can** 5TerrL30.

734-25 **MoA** 276SW93; **SD** 222NW297.

735-29½-New. The work of notary of another state, if fair and reasonably regular on its face, and giving evidence of having been taken after actual and sufficient notice, with substantial compliance with statutes, may be received. 125Me260, 132A892.

735-29¼-New. At common law, depositions were not admissible in law courts except by consent. 3Del 541, 140A648.

735-29¼-New. Falsity of deposition for court or submission to jury under proper instructions. 83NH190, 139A753.

735-31 3Del 541, 140A648.

735-32 143Va656, 129SE687.

735-35 [c] **Permission to read deposition** when all material evidence therein contained has been fully covered is discretionary with court. **CalA** 288P93.

735-36½-New. New depositions taken by a notary outside the state may be admitted or rejected in the discretion of the court. 125Me260, 132A892.

735-39 **DC** 37F(2d)801.

736-41 **CalA** 260P337; 86CalA125, 260 P586 (cross-examination not excluded); 3Del 450, 139A66. [c] **Where without fault of defendant in criminal case whole deposition** cannot be submitted, it is error to permit incomplete deposition of state's witness on direct examination to go to jury. 248NY255, 162NE24.

736-43 308Mo 673, 274SW366.

736-51 223AppDiv127, 227NYS522.

737-55 44 **Ida**560, 260P150 [citCJ].

737-64 208Cal 578, 283P67 (striking mere conclusions of law not error).

738-76½-New. A deposition taken in another state is not presumed to have been taken in accordance with the law of such state. 100Vt328, 137A324.

738-78 33Ariz354, 264P1033, 1086 [cit CJ].

738-79 108Conn173, 143A51; **MoA** 23 SW(2d)1104; **MoA** 308SW(2d)203; 131 **Okl** 190, 268P266. [b] **TexCivA** 271SW 143.

739-80 **MoA** 23SW(2d)1104 (declaration against interest).

739-82 120Kan545, 246P992 (deposition admitted where absent witness could not be served with subpœna and deposition had been taken on due notice and full opportunity to cross-examine).

739-85 See also **MoA** 30SW(2d)203.

739-91 35GaA777, 134SE813.

740-98 120Kan545, 246P992.

740-5 5 **OntWR**589, 805.

741-9 [a] (6) If deposition was taken in foreign country, and parties agree that witness resides outside United States, deposition may be used without further showing. 112 **Okl** 240, 240P739.

743-32 16F(2d)805.

743-40 191NC529, 132SE572. But see 12**PaDist&Co** 792.

743-41 12**PaDist&Co** 792.

744-45 [a] **Deposition of widow was incompetent** in action to set antenuptial agreement aside. **Ky** 298SW(2d)15. [b] **That witness was paid compensation as expert** does not render deposition inadmissible. **TexCivA** 288SW(2d)259.

744-46½-New. Even though plaintiffs took a deposition before the trial, they may object to its admission on the ground of deponent's incompetency as to the matter involved in the questions. 226AppDiv142, 234NYS635.

744-47½-New. Witness' failure to remember conversation one year afterward when deposition was taken made it inadmissible as evidence. 250Mich398, 230NW181.

745-60 33Ariz354, 264P1083; **CalA** 284 P1077; 132 **Okl** 244, 270P85; 35**Porto Rico** 603 (delivery by notary to attorney for one of parties is error).

745-63 49**Kl** 358, 142A375 (objection to deposition at trial on account of omission of testimony).

746-65½-New. Irregularities in taking a deposition are immaterial where the deposition was never completed and was admitted only as a statement of defendant and not as a deposition. 80 CalA470, 251P237.

746-69½-New. An answer is not objectionable because beginning with the words "I think." 98CalA714, 277P759.

749-11 234Mich170, 207NW924 (same weight as other testimony).

750-18 166Ga794, 144SE271.

750-19 See also 95Fla392, 118S52.

750-24 187Wis282, 202NW701.

751-25 82Mont239, 266P410. [a] (3) Deposition in former divorce suit by husband admissible in suit by wife. 82 Mont239, 266P410. [f] **Opportunity of direct examination** is substantial equivalent of cross-examination, and, when present, renders deposition admissible. 187Wis282, 202NW701.

751-26 201 **Iowa**878, 208NW310; 213 Ky805, 281SW1024; **NJ** 146A332.

752-27 221MoA1129, 298SW117; 187 Wis282, 202NW701 (substantially the same).

753-50 220Ala125, 124S286 (refusal to exclude part of deposition on interrogatories held not error where timely objection not filed); MoA 274SW105.
754-55 42F(2d)623; 215Ky226, 284SW 1052. [a] 131 Okl 190, 268P266. [e] In Kentucky.–215Ky226, 284SW1052.
754-56 218Ala173, 118S327; 220Ala 115, 124S285 (motion to suppress); DC 25F(2d)542; 137Misc274, 242NYS161.
755-59 95Fla851, 116S865.
755-60 17F(2d)480; 216Ala69, 112S 426; Ala 129S12; 3Del 541, 140A648; 237Mich631, 211NW634; MoA 274SW 105; 137Misc274, 242NYS161; 192NC 199, 134SE488; RI 129A734. [e] (3) Effect of making rule absolute is to preclude all objections founded on irregularity in execution of commission. 169 La229, 124S837. (4) Objection for failure to attach exhibits is unavailable after rule to show cause is made absolute. 169La229, 124S837.
756-62 119 Or682, 250P1098; 49RI 358, 142A375.
757-70½-New. , or if not made until the day of trial. 17F(2d)480.
758-83 167Ga821, 146SE851; MoA 29 SW(2d)199; 119 Or682, 250P1098. [b] **Objection that deposition was taken at time when there was no authority for taking it** may be raised by objection to evidence when offered, where there was no opportunity for making objection before trial. 119 Or682, 250P1098.
758-84 17F(2d)480; CalA 260P337; 232Ky469, 23SW(2d)922; 131 Okl 190, 268P266. [g] **Objection to witness' answer** as not responsive can be raised only by motion to quash made in due time. TexCivA 28SW(2d)611.
759-89½-New. The foundation of an objection to the introduction of interrogatories because the envelope in which they were transmitted was opened in violation of agreement is not shown where the contents of the agreement does not appear. 35GaA126, 132SE414.
759-92 233Mich234, 206NW356 (objection to part of answer of witness); NH 150A485.
759-99 Ill 172NE40; 235Ky208, 30SW (2d)892.
760-4 17F(2d)480.
761-8 Ark 31SW(2d)963; 226AppDiv 142, 234NYS635.
761-10 Ill 172NE40.
761-12 181Ark649, 26SW(2d)1108; 219 MoA519, 282SW535; 137Misc274, 242 NYS161; 124 Or179, 264P351.
761-14 [c] **Each question as read should be objected to** where counsel desires to object to particular series of questions and answers. 83CalA578, 257 P103.
762-18 235Ky741, 32SW(2d)327; 192 NC199, 134SE488. But see CalA 290P 545.
762-19 9LaA664, 120S79.
762-23 [a] **Waiver held not shown.**–3Del 541, 140A648.
762-24 See also 232Ky739, 24SW(2d) 554.
762-26 31F(2d)777.
762-27 But see CalA 290P545.
763-30½-New. Announcing ready for trial and proceeding without asking the court to pass on a motion to suppress, filed at a prior term, waives the right to have it suppressed. 220MoA355, 286 SW718.
763-34½-New. Consent that a deposition be taken without notice has been held not to waive the right to object to incompetent testimony thereon. 192NC 287, 134SE855.

DEPOSITS IN COURT

766-8 230AppDiv213, 243NYS411; 11 PaDist&Co 523. [b] **Consignations in Porto Rico** under Civ. Code § 1144 see 32PortoRico 629.
766-9 [a] **In Porto Rico.**–32PortoRico 629.
766-11 [b] **Mercantile deposits in Porto Rico.**–32PortoRico 629.
766-12 100NJEq572, 136A181. See also 141Wash672, 252P105.
766-12½-New. Trust funds. Where a party put proceeds of insurance in the hands of its attorney for the benefit of successful claimants, it was proper to direct trustee to deposit in court. 170 Ark1039, 282SW975.
769-55 [b] **In Porto Rico.**–32Porto Rico 629.
770-62 73CalA455, 238P1110, 1111 [quotCJ]; 318Mo 151, 1SW(2d)193, 202, 58ALR1518; TexCivA 284SW315, 317 [citCJ]. See also 39 Ill 87.
770-63½-New. Order made after money embezzled by clerk confers no jurisdiction on the court. TexCivA 284SW 315.
772-94½-New. Where, pending an appeal and supersedeas, it appears that several months will elapse before decree of distribution of fund can be had, the court on application should invest or loan out of funds in hands of its special officer to protect parties from loss of interest and consequential damages. 100WVa612, 131SE455.
773-7½-New. An owner depositing a sum with the clerk of court for the benefit of the adverse party, must stand the loss of the clerk's embezzlement, where there was no court order authorizing the deposit. 118Tex180, 12 SW(2d)973.
773-10 76Mont320, 246P953, 48ALR 1425 (judgment against clerk individually held erroneous).
774-38½-New. Where two actions in the same court relate to the rights of the parties in certain real estate, and one of them is dismissed after a receiver appointed therein has paid rentals collected into court, the court in the other action, having all of the parties before it, may properly dispose of the fund so brought into its custody. 119Kan407, 239P765.
774-38½-New. In such case it is immaterial that some steps in the litigation were in one division of the court and some in another and that the judge making the order was not the one who tried the merits of the action. 119Kan 407, 239P765.
775-39½-New. One tendering money into court as prerequisite to enforcement of equitable rights retains title subject to outcome of suit. 144 Okl 110, 289P 756.
775-42 [b] **Where by decree in accounting commissioner was directed to pay interest** on funds in his hands to party, action of court relieved commissioner of all responsibility on account of interest. 150Va534, 143SE716.
776-45 167La712, 120S61.
776-46½-New. Clerk of court, to whom money had been paid under statute, may ask the court to determine ownership of fund as between conflicting claimants. 308Mo 123, 272SW66.
777-61 [g] **Conditional return.**–170Ark 1039, 282SW975.
777-65½-New. A lodge paying money, belonging to a deceased member's estate, into the registry of the district court, in obedience to a void order thereof, is entitled to hold the money as stakeholder until a court of competent jurisdiction decides who is entitled to it. 118Tex386, 15SW(2d)602.
777-68 See also 4HawaiiFed355.
778-70 TexCivA 18SW(2d)1091.
778-73½-New. Where clerk of court and his surety denied liability, interest was properly allowed from institution of suit. TexCivA 18SW(2d)1091.
778-74 But see SD 207NW97.
778-82 [a] 178Minn161, 226NW410.
779-94 [c] **Claimants may be cited or summoned to answer by court** having jurisdiction over fund to be distributed. 170La218, 127S606.
780-97 170Ga731, 154SE231; 243Mich 508, 220NW706 (evidence held sufficient).
780-98½-New. In Saskatchewan, where issues of fact which cannot be determined in affidavits arise on an interlocutory application to determine conflicting claims as to money in court, an issue may be directed. Sask [1929] 2DomLR 454.
780-3 Alta [1929] 2DomLR911.
781-16½-New. Vacation of order of distribution at instance of person failing to file claim because of court's promise to defer distribution. 40GaA756, 151SE 557.

DEPOT

781-17 [a] (2) 146Va10, 135SE685.
782-20 146Va10, 135SE685.

DEPRECIATION

784-47 256Mass600, 153NE19.

DEPRESS

784-47½-New. To press down. 34F (2d)41.

DEPUTY

784-61 318 Ill 600, 149NE526.
785-69 145Miss867, 111S372.
785-69½-New. A special deputy is one appointed to exercise some special function or power of the official or person for whom he is appointed. 318 Ill 600, 149NE526.

DERIVE

788-69½-New. to separate or take from the stream. 25F(2d)997.

DESCENDANT

792-96 49RI 319, 142A330, 331 [citCJ].
792-99 237 IllA410.
793-4 237 IllA410. [a] **Adopted children** are not descendants. 237 IllA410.
793-10 [a] 223AppDiv98, 227NYS486.

DESCENT AND DISTRIBUTION

802-11 [a] (7) 114 Okl 66, 243P522.
803-18 333 Ill 643, 165NE208.
803-19 200Cal 335, 253P706.
803-24 44Philippine186.
803-27 51ND140, 199NW183.
804-49½-New. General rule is that the heir shall not take by purchase when he may take the same estate in land by descent. 20 OhA171, 151NE790.
804-53 70CalA680, 234P412; 165Ga 384, 141SE42; Iowa 231NW661; 235Ky 658, 32SW(2d)8; 75Mont186, 243P589, 44ALR1470; 217AppDiv342, 217NYS 176; 295Pa571, 145A797, 63ALR1086; 143SC402, 141SE726; 68Utah344, 250P 469, 48ALR1322; 100Vt217, 136A389.
804-56 70CalA680, 234P412; 89Fla457, 105S106; 320 Ill 382, 151NE250; 116 Nebr450, 218NW89; 117Nebr332, 220 NW583; 217AppDiv342, 217NYS176; 117 Or399, 244P526; 120 Or80, 250P 735; 143SC402, 141SE726; 100Vt217, 136A389.
805-59 251Mich420, 232NW239.
805-60 89Fla457, 105S106 (statutes grounded on principles of justice and equity with object of making will for party as he would probably make).
805-64 31Ariz272, 252P521; 323 Ill 519, 154NE337; 232Ky365, 23SW(2d) 601; 127Misc662, 217NYS274.
805-67 31Ariz272, 252P521; 144Va727, 130SE794.
805-69 209Ky651, 273SW545.
805-70½-New. Under the law, heirs must take, unless they are disinherited by express words or necessary implication. 179Ark30, 13SW(2d)810.
806-76 200Cal 335, 253P706.
806-78 [b] **Inheritance under statute.**–44Philippine186.
806-83 70CalA680, 234P412; 320 Ill 382, 151NE250; 327 Ill 214, 158NE475; 152Va353, 147SE468.
806-86 115 Oh639, 155NE227.
807-89 120Kan341, 243P1021.
807-93 337 Ill 232, 168NE900, 66ALR 1062.
807-97 200Cal 335, 253P706.
807-2½-New. Some statutes of descent and distribution apply to distribution of estates of intestates who were never competent to make a will. 297Pa22, 146 A531.
807-3 115 Oh639, 155NE227.
808-15 14DelCh465, 130A746.
808-16 96Fla131, 117S691; 331 Ill 203, 162NE848, 60ALR305; 124Kan539, 262 P16; 50Nev371, 261P654 (holding right of inheritance exists by virtue of law); 116 Oh435, 156NE905; Va 155SE802. [a] **Law of descent and distribution and not corporation law or law of administration** governs passing of resident decedent's stock in foreign corporation. 317Mo 986, 296SW778.
808-20 See also 29PortoRico 836.

809-22 Cal 263P1013; 203Cal 106, 263 P1017; 204Cal 557, 269P519; 201 Iowa 247, 207NW241; 204 Iowa648, 215NW 710; 207 Iowa127, 222NW431; 98NJEq 569, 131A210; 245NYS298; 23 OhA506, 155NE813; 90PaSuper533, 537 [citCJ]. [b] **Rule not applicable** where provision was changed by amendment before funds were received. 26 OhA122, 158NE 588.

809-24 34F(2d)690; 213Ala27, 104S 234; CalA 289P889; 105Conn192, 134 A778; 328 Ill 431, 159NE780; 124Kan 539, 262P16, 17, [citCJ]; 216AppDiv 72, 215NYS850; 142 Okl 163, 286P327; 47RI 64, 129A832; 48RI 187, 136A842.

809-25 [a] **Law will be respected by other courts in respect to such property.**-126Misc54, 213NYS286. [b] **Property vesting by reason of foreign law** cannot be impeached directly or indirectly. 126Misc54, 213NYS286.

809-26 124Kan539, 262P16; 47RI 64, 129A832.

809-27 124Kan539, 262P16.

809-27½-New. The state of Alberta cannot enact a law vesting escheated lands in the province where such land escheats to the Dominion. Can [1927] 2DomLR194.

810-29 34F(2d)690; 216Ala686, 114S 301; 196Cal 508, 238P681; 105Conn192, 134A778; 124Kan539, 262P16, 17 [citCJ]; NJ 134A684; NJ 148A882; 103 NJEq487, 143A771; 133Misc457, 233 NYS145; 135Misc733, 240NYS691; 26 OhA122, 158NE588; 300Pa217, 150A 606; 12PaDist&Co 16; 29PortoRico 836 (principle applied); TexCivA 158SW(2d) 86; 98Vt424, 129A166. [b] **Foreign law,** if relied on, must be alleged and proved. 29PortoRico 836. [c] **Statutory provision** is not applicable where foreign court from which fund came had declared it personalty. 26 OhA122, 158 NE588. [d] **Where beneficiary's next of kin are brothers and sisters,** fund under foreign will passes to beneficiary's relict. 26 OhA122, 158NE588. [e] **Rule may be changed by statute.**-160 Tenn134, 22SW(2d)221.

811-35 196Cal 508, 238P681.

811-36 144Miss233, 109S601. [a] **In Mississippi.**-144Miss233, 109S601.

811-40½-New. Interest in decedent's estate is determinable by law of state in which estate is settled. 111Conn452, 150A526.

811-41 44Philippine186.

811-43 124Kan539, 262P16.

811-44 124Kan539, 262P16.

811-50 93Fla849, 112S846; 28Hawaii 590; 215Ky492, 284SW1110; 125Me 305, 113A689; 129Misc506, 221NYS 692; 115Texas469, 283SW754; Va 155SE 802.

812-57 Iowa 216NW753; 119Kan568, 240P570.

812-58½-New. An accommodation note, held by a privately owned bank, does not devolve upon the heirs of the owner of such bank. 119 Oh66, 162NE277.

813-64 280US306, 50SCt103, 74Led445.

813-71 [c] **In Alberta.**-[1927] 1DomLR 76, [1926] 3WestWkly436.

814-73 BC [1930] 3DomLR1004(1st case).

814-74 161Ga403, 131SE75; 37GaA8, 133SE863; 131Misc912, 229NYS301; TexCivA 10SW(2d)584 (equitable interest). [a] 161Ga403, 131SE75.

815-96 But see 128Me546, 149A297.

815-4 131Misc912, 229NYS301.

815-4½-New. Deferred payments on lease of mineral lands and sale of minerals for lump sum are personalty. 223 Ky589, 4SW(2d)392 (widow of seller entitled to one half).

815-4½-New. Royalty accruing under a mineral lease after lessor's death is realty. 223Ky589, 4SW(2d)392.

815-4¼-New. Sums, received by the estate of a deceased remainderman under the residuary clause of the will of a grantee of a life tenant's interest in realty, and of any future interest he might acquire, are personalty. 134Misc 334, 235NYS477.

816-9 129Misc201, 221NYS656. [a] **Ancestral estate** is one acquired either by descent or by operation of law. 114 Okl 66, 243P522. [b] **Nonancestral estate** is one acquired by purchase or by act or agreement of parties. 114 Okl 66, 243P522. [c] **To determine nature or character of estate,** its source or origin must first be ascertained. 114 Okl 66, 243P522. [d] **In Oklahoma.**-114 Okl 66, 243P522.

816-15 22F(2d)588; Ark 32SW(2d) 155; 34 OhA150, 170NE176; 114 Okl 66, 243P522; 137 Okl 265, 278P648. [b] **In Michigan.**-242Mich156, 218NW798.

816-17 137 Okl 265, 278P648.

816-17½-New. Share of granddaughter, under will, held to have come to her under power of appointment in her mother's will, and to descend to the next of kin. 257Mass72, 153NE337.

817-19 287Pa274, 135A232.

817-20 114 Okl 66, 243P522; 134 Okl 127, 272P471; 139 Okl 171, 281P787; 141 Okl 212, 285P120.

817-23 313Mo 514, 285SW433, 436 [cit CJ].

817-23½-New. Whatever heir takes from estate of intestate, who died spouseless, childless, and parentless, he takes direct from intestate. Iowa 231 NW661.

817-29 121 Oh535, 170NE170, 67ALR 1160.

818-33 [a] **Share of pretermitted child in parent's real estate** is ancestral estate taken by inheritance rather than by will and passes as ancestral estate. 242Mich156, 218NW798.

818-34 181Ark933, 28SW(2d)1048; 127 Misc579, 217NYS323; 121 Oh535, 170NE 170, 67ALR1160; 26 OhA48, 159NE840; 115 OhSt575, 155NE134.

818-36 127Misc579, 217NYS323.

818-38 39F(2d)188 (acquisition of land under partition decree is by purchase and not by inheritance).

819-44 But see 116 Oh327, 156NE450.

819-46 127Misc579, 217NYS323.

819-50 [a] (3) 21 OhA214, 152NE687.

819-55½-New. A deed by purchase is not converted into a gift by contemporaneous instruments distributing real estate to children. 115 OhSt575, 155 NE134.

819-55¼-New. A deed from father to son reciting a consideration is presumed to convey title by purchase although contemporaneous instruments indicated an intention to distribute the property. 115 OhSt575, 155NE134.

819-57 133Misc470, 233NYS76. See also 115 OhSt639, 155NE227. [c] **In California.**-202Cal 130, 259P440. [d] **Property inherited from deceased spouse descends from, and not through,** such surviving spouse, under statute, upon his or her death intestate. 29 OhA22, 162NE788. [e] **Only identical property** received is subject to such statute. 119 Oh184, 162NE797. [f] **Purpose of statute** is to prevent escheat. 226App Div621, 236NYS593. [g] **Estate held to come from wife,** though deed was from her parents, where wife paid entire valuable consideration for conveyance. 226AppDiv621, 236NYS593.

819-57½-New. It is not necessary that the entire property shall have come from the deceased spouse, 133Misc470, 233 NYS76.

819-57¼-New. or that the intestate inherits property from such deceased spouse. 133Misc470, 233NYS76.

819-61 242Mich156, 218NW798, 800 [citCJ]. [c] **In Ohio.**-119 Oh1, 162NE 46.

820-62 See also 24 OhNPNS277.

820-67 232Ky37, 22SW(2d)432; 137 Okl 265, 278P648 (parent or grandparent as source of title); 139 Okl 171, 281 P787 (interest in mother's estate inherited from father goes equally to surviving children by deceased father's first and second marriages). [b] **Maternal grandfather will inherit** interest of unmarried minor in mother's estate to exclusion of half brother. 139 Okl 171, 281P787. [c] **Sole surviving half brother** of unmarried minor will take interest of such minor in his mother's estate inherited through father. 139 Okl 171, 281P787.

820-75 139 Okl 171, 281P787 (children of second marriage of father excluded from share in interest inherited by unmarried minor son from his mother).

820-76 133 Okl 217, 271P1023.

821-81 233Ky46, 24SW(2d)927.

821-88 160Ga449, 128SE393, 397 [cit CJ]; 166Ga898, 144SE736; 170Ga94, 152SE448; 330 Ill 624, 162NE164; 125 Me305, 133A689; 98NJEq538, 131A 208; 99NJEq131, 132A671; 127Misc332, 215NYS374; 134Misc99, 234NYS329(2d case); 194NC448, 139SE840; RI 132 A2; 193Wis10, 212NW634. [c] **Deceased having parted with reversionary right to timber,** her heirs had no claim thereto. 169La759, 126S52.

822-89 Ala 128S149; 170Ga94, 152SE 448; 192NC285, 134SE849; 103WVa 272, 137SE5.

822-91 249NY111, 162SE601; 129Misc 506, 221NYS692.

822-98 317 Ill 241, 148NE17.

823-5 136Misc118, 238NYS749. [a] **To ascertain heirs at law and next of kin,** it is necessary to resort to statute of distribution. 148SC30, 145SE549.

823-6 87 IndA149, 165NE435. See also 200Cal 335, 253P706.

823-6½-New. The term "next of kin" within the statute means persons who were decedent's next of kin at his death. 220AppDiv472, 221NYS771.

823-6¼-New. Where a deed to a husband and wife creates a tenancy in common, the wife's undivided half interest goes to her heirs subject to the husband's curtesy. 226AppDiv621, 236NYS 593.

823-6¼-New. Heirs by designation under statute take directly from declarant and not through declarant or his ancestors. 27 OhNPNS193 (statute held constitutional).

823-10 330 Ill 571, 162NE170; 116 Oh 435, 156NE905.

823-11 Wash 292P743. [a] (5) Widower of deceased daughter of testator is not heir of testator's deceased wife. 125Me22, 130A433.

823-11½-New. Where a husband died simultaneously with his wife, his heirs and administrator are not entitled to an interest in the real estate of his deceased wife under a statute, providing that when a wife dies without descendants capable of inheriting, the widower shall be entitled to one half of her estate. 317 Mo 216, 295SW83.

823-11¼-New. **A statute** providing that in the absence of own kindred an intestate's property goes to the kindred of his or her deceased husband or wife cannot be construed to read husbands or wives. 317Mo 148, 295SW118.

823-17 29PortoRico 836. [a] **In Porto Rico.**-29PortoRico 836.

823-18 See also 49Philippine698.

823-21 160Ga449, 128SE393, 397 [cit CJ]; 44Philippine186. [a] (5) Under statute next of kin of decedent who left no husband, descendants, father, mother, brother, or sister or the issue of such, mother and father are counted as relatives in first degree, grandparents in second degree, uncles and aunts in third degree, and first cousins in fourth degree. 14DelCh465, 130A746. [b] **Propositus** is person from whom degrees are to be reckoned. 44Philippine186.

823-24 14DelCh465, 130A746; 154Md 107, 140A91; 116 Oh435, 156NE905; Alta [1928] 1DomLR643.

823-24½-New. **Propositus** in calculating the degrees of kinship within which the reservable right can be claimed, the person upon whom the property last devolved by descent in the line from which the property is derived, must be taken as the propositus or person from whom the degrees are to be reckoned. 44Philippine186.

824-37 96Fla131, 117S691; 263Mass1, 160NE441. [a] BC [1930] 1DomLR365. Contra 99NJEq835, 133A481; 99NJEq 837, 133A482.

824-38 96Fla131, 117S691; 263Mass1, 160NE441; NJPrerog 151A67. [a] (7) Nieces and nephews of intestate, whose parents are dead, take per capita, and grandnieces and grandnephews take shares of their deceased parents. 96Fla 131, 117S691.

825-54½-New. **In Saskatchewan** brothers and sister of the half blood share equally with those of the full blood in estate of deceased brother or sister. Alta [1927] 1DomLR76, [1926] 3WestWkly 737.

825-56 11PaDist&Co 499.
826-58 219Ky84, 292SW752.
826-60 196NC79, 144SE559.
826-61 202Cal 130, 259P440. [a] **Statute is inapplicable** where widow who inherited property from her predeceased husband dies intestate leaving no heirs of his blood. 202Cal 130, 259P 440.
826-66 160La555, 107S425.
826-67 160La555, 107S425. [b] (3) On death of reservista or person bound to reserve, his executor or administrator does not succeed to property, and reservee may revindicate it without intervening in administration proceedings. 44Philippine186.
826-68 [b] **In Porto Rico.**-29Porto Rico 836.
826-70 But see 158La1000, 105S42.
826-74½-New. In Louisiana, a husband's gift of immovables joined in by the wife is not a nullity as to the wife. 162La22, 110S75.
826-74⅓-New. But forced heirs of a parent leaving three or more children have a cause of action for reduction of the parent donation to one of the children exceeding one third of the property. 162La22, 110S75.
827-87 Ark 30SW(2d)823; TexCivA 298SW154; TexCivA 118SW(2d)567.
827-88 Ark 32SW(2d)155. See also 79 Mont256, 255P1058. [a] **In New Jersey.**-102NJEq393, 141A16.
827-92 129Misc447, 221NYS714.
828-97 Conn 151A345.
828-98 [a] **Child is considered born** when inheritance of property is involved, if such holding is for its advantage. 130Misc110, 222NYS532.
828-2 156Tenn222, 300SW572.
828-6 204 Iowa610, 215NW726.
828-8 213Ala599, 105S686.
828-13 330 Ill 571, 162NE170; 166La 102, 116S714; 193Wis10, 212NW634.
829-15 74Mont558, 241P636; 191NC 396, 131SE721. [b] (3) When mother has had exclusive custody and care of deceased minor, she takes entire estate to exclusion of father. 112 Okl 116, 240P87.
829-18 NC 154SE7. [a] (2) In New Jersey, surviving mother who is only next of kin of unmarried intestate takes personal estate. 99NJEq837, 133A482. [b] (2) In North Dakota father is not heir within meaning of statute where intestate left surviving widow but no lineal descendants and gross value of estate did not exceed four thousand five hundred dollars. 51ND140, 199NW183 (as to proceeds of two thousand dollar life insurance policy).
829-21 Or 252P964.
829-23 See also 235 IllA126.
829-23½-New. The father gets life estate in one half thereof, on son's death, he being the only surviving parent. 173 Ark828, 293SW735.
829-25 39 OklACR253.
830-30½-New. Where an infant son of deceased father dies pending administration, the mother succeeds to his interest in the father's estate. 79Mont 256, 255P1058.
830-36½-New. Under New York statute children of wife's predeceased husband by former marriage take surplus of wife's estate. 245NYS298 (statute construed).
830-37 Cal 292P469; 197NC334, 148SE 456, 64ALR1121 (where decedent left no widow). See also 24 OhA331, 157 NE423. [b] **In Kentucky.**-229Ky771, 17 SW(2d)1029.
831-50 39 OklACR253; Sask [1928] 1 DomLR230.
831-61 99NJEq835, 133A481; 99NJEq 837, 133A482; 192NC614, 135SE632; 197NC334, 148SE456, 64ALR1121.
831-62 98NJEq569, 131A210; 130Misc 188, 223NYS776; 38 OklACR503. Contra 99NJEq835, 133A481; 99NJEq837, 133A482.
831-65½-New. Where an intestate leaves a legitimate child, surviving nephews and nieces have no interest in his real property. 161Ga319, 130SE 559.
831-65⅓-New. Under some statutes, children of deceased brothers and sisters have no rights as heirs where deceased left a wife surviving. 141Wash 526, 252P534.
831-66 98NJEq569, 131A210; 146 Wash154, 262P235.
832-67 130Misc188, 233NYS776. Contra 98NJEq569, 131A210.
832-76 8PaDist&Co 319.
832-78 TexCivA 297SW286.
833-85 [b] **In Texas.**-CivA 297SW286.
833-88 297Pa22, 146A531.
833-90 135Misc247, 238NYS765. But see 297Pa22, 146A531.
834-96 TexCivA 297SW286.
835-15 [a] **Descendant of wife of intestate's father,** other than his mother, is not "heir." Iowa 231NW661.
835-16 127Misc579, 217NYS323.
835-18 127Misc579, 217NYS323.
835-19 127Misc579, 217NYS323.
835-21 98NJEq569, 131A210.
836-24 [a] (1) 103NJEq86, 141A676. (3) Surviving niece takes to exclusion of grandnieces and grandnephews. 98NJEq569, 131A210. (4) Under amendment of 1918 children of deceased brothers and sisters take as representatives, even if all brothers and sisters are dead. 99NJEq835, 133A481.
836-26 135Misc247, 238NYS765 (takes to exclusion of relatives more remote).
836-29 135Misc247, 238NYS765; BC [1930] 3DomLR438.
837-38 103NJEq86, 141A676.
837-39 134Misc464, 234NYS713.
837-44 14DelCh465, 130A746 (first cousins living take per capita); 116 Oh 435, 156NE905.
837-48 14DelCh465, 130A746.
837-49 116 Oh435, 156NE905.
837-51 101NJEq713, 139A167.
838-62 124Kan425, 260P658; 233Ky 554, 26SW(2d)497; 127Misc579, 217 NYS323; 230AppDiv290, 243NYS606; 51Philippine267. See also OhA 161NE 548; 292Pa336, 141A253. [a] **Rule applied** where devise was void because devisee was witness necessary to prove devise. 212Ky209, 278SW555.
838-62½-New. Where husband and wife who have made reciprocal wills die in common disaster, and there is no evidence of survivorship, respective heirs of each are entitled under descent statute. 201 Iowa969, 204NW448, 43 ALR1340.
838-62⅓-New. Devisee takes worthier title by descent only where the will passes identical share with distributive share. 204 Iowa1231, 213NW395.
838-64 131Misc534, 227NYS384.
838-68 201Cal 357, 256P1101; Mo 280 SW707; 190NC122, 129SE148; 196NC 398, 145SE776; 47RI 64, 129A832 (in Florida child not provided for in will does not share); 47RI 150, 131A556; 48RI 1, 135A35.
838-70 47RI 64, 129A832.
838-71 179Ark543, 16SW(2d)996, 65 ALR466.
838-72 212Ala526, 103S465 (will construed to apply only to child of which testator's wife was pregnant at its date, and not to prevent application of statute to subsequent posthumous child); 242Mich156, 218NW798; 134 Okl 219, 273P246.
839-81 137Misc518, 244NYS130; 49RI 339, 142A531. 59ALR1501.
839-88 175Minn193, 220NW601.
839-89 244Mich197, 221NW116; 49RI 339, 142A531, 59ALR1501; RI 150A 750; 117Tex302, 38SW(2d)408.
839-90 33F(2d)856; 47RI 64, 129A 832.
840-96 34PortoRico 120 (acknowledged natural child adjudged such by courts). [a] **In Missouri.**-308Mo 314, 274SW77.
840-99½-New. Under Missouri statutes grandchildren not named or provided for are not pretermitted heirs where testator made nominal bequest to their mother who predeceased him. Mo 28SW(2d)658.
840-2 201Cal 357, 256P1101.
840-3 179Ark543, 16SW(2d)996, 65 ALR466.
840-4 See also Mo 282SW37 [citCJ].
840-7 134Misc26, 234NYS316.
840-11 167La1095, 120S869.
840-12 179Ark543, 16SW(2d)996, 65 ALR466; Mo 28SW(2d)803; 133Misc 457, 233NYS145.
841-17½-New. "Omission to provide" for heirs means omission to make provision in a will and not to failure of heirs to receive anything thereunder. 47 RI 150, 131A556.
841-17⅓-New. A will stating an obligation of testator to some of his children, and bequeathing property to a designated child after bequeathing one dollar to each of the other contestants shown to be children, entitles a child not mentioned to share as in case of intestacy, it not appearing that all children were included in the word "contestants." 179Ark543, 16SW(2d)996, 65 ALR466.
841-20 Mo 28SW(2d)658; 46RI 492, 129A499 (where there is no evidence of intention to omit, statute operates); 47RI 150, 131A556. [a] **Whether child was intentionally omitted** depends on testator's intention at time will was made. RI 150A750. [b] **Intention to disinherit heir,** when clearly expressed, must be carried out. 128Misc769, 220 NYS151. [c] **Such intention** will not be implied. 128Misc769, 220NYS815. [d] **In Missouri.**-28SW(2d)658.
841-21 [a] **Whole will construed.**-213 AppDiv637, 211NYS228.
841-23 Mass 166NE874.
841-23½-New. Sale by testator of property devised, during his lifetime, manifests his intention that devisees should take nothing under the will, and the statute does not apply. 47RI 150, 131 A556.
841-24 197Cal 20, 239P406; 175Minn 193, 220NW601; 47RI 64, 129A832; 48 RI 1, 135A35; SD 230NW884.
841-25 254Mass63, 149NE608; 48RI 1, 135A35; 48RI 304, 137A878.
841-27 Mass 166NE874; RI 150A750; SD 230NW884.
841-30½-New. Existence of will disposing of heir's share in father's estate is not presumed but must affirmatively appear. SD 230NW884.
841-31 46RI 492, 129A499; 47RI 64, 129A832; 48RI 1, 135A35; RI 150A750; SD 230NW884. But see 36 OklACR 401.
841-32 197Cal 20, 239P406; 321 Ill 198, 151NE577; Mo 28SW(2d)658. [a] **In Oklahoma.**-37 OklACR551.
841-32½-New. Evidence will, however, be received of circumstances surrounding the testator, although only for the purpose of showing his intention, where the will is ambiguous. 321 Ill 198, 151 NE577.
842-35 197Cal 20, 239P406; 36 OklACR 401; 48RI 1, 135A35; RI 146A409; RI 148A322. [a] (5) Will providing for heirs in any amount, substantial or not, shows that they were not forgotten or unintentionally omitted. Mo 28SW(2d) 658.
842-36 321 Ill 198, 151NE577; 164La 630, 114S493; 175Minn193, 220NW601; 193NC439, 137SE306; RI 150A750. [b] **Held child not provided for in will.**-213 AppDiv637, 211NYS228.
842-36½-New. Prima facie case is shown by proof of heirship, death of father, and that he left estate. SD 230 NW884.
842-44 308Mo 314, 274SW77; 130Misc 175, 223NYS699; 47RI 64, 129A832; 117Tex302, 38SW(2d)408 (as long as child lives).
842-46 47RI 64, 129A832.
842-48 47RI 64, 129A832 (amount of residuary personal estate determined by deduction of federal and state inheritance taxes).
842-49 92CalA185, 267P897 (cutting share of daughter one half to provide for grandchildren not mentioned in will proper).
843-53½-New. Under statute, where child was omitted from will, trustee is required to hold during the life of the widow one third of the personalty which stands in place of real estate, and on her death to deliver the principal to such child or legal representatives. 47 RI 64, 129A832.
843-55 85CalA500, 259P992; 99NJEq 538, 134A84. [a] **Definition of term.**-CalA 290P302.
843-56½-New. A child cannot be deprived by will of all part in the testa-

tor's succession, either by declaring in words that the child shall take no part in the succession or by leaving the whole of the succession to others, at least to the extent of legitime reserved by law to forced heirs. 167**La**1095, 120**S**869.

843-63 50**Nev**371, 261**P**654; 50**Nev**440, 264**P**697. But see 251**Mich**420, 232**NW** 239.

843-65 **Iowa** 229**NW**850; 140**Wash**679, 250**P**456.

844-75½-New. A statute authorizing property to be set over to surviving spouse in lieu of a homestead, which property would pass to heirs under the common law, should be strictly construed. 149**Wash**679, 250**P**456.

844-75⅓-New. Interests of relatives of one spouse may vest under statute regardless of whether other spouse left any relatives to claim share. **Cal** 292 **P**469.

844-79 337 **Ill** 232, 168**NE**900, 66**ALR** 1062. [a] **In Maine.**-125**Me**22, 130**A**433.

844-80 6**PaDist&Co** 211.

844-83 172**Ark**549, 289**SW**780; 205 **Iowa**1311, 217**NW**441; 12**LaA**326, 125**S** 154(2dcase) (aged widow held entitled to marital one fourth of succession where her circumstances are precarious); 127**Me**328, 143**A**169 (seisin of realty necessary); **Mass** 166**NE**703; 79 **Mont**256, 255**P**1058; 102**NJEq**393, 141 **A**16; 25 **OhA**242, 158**NE**12; 98**PaSuper** 279; 49**Philippine**452. [b] **In Porto Rico.**-33**PortoRico** 296.

845-84 81**Colo** 73, 253**P**1059; **Mass** 167 **NE**648; 79**Mont**256, 255**P**1058. [a] **In Kentucky.**-210**Ky**343, 275**SW**804. [b] **In Iowa.**-231**NW**661.

845-85 210**Ky**343, 275**SW**804.

845-89 137**Misc**910, 244**NYS**632.

845-91 13**PaDist&Co** 42.

845-93 117 **Okl** 209, 245**P**622.

845-98 142**SC**395, 140**SE**801.

845-2½-New. **Right to inherit may exist although right to widow's exemption** based on family relation may be destroyed. 5**PaDist&Co** 42.

846-7 171**Ark**912, 287**SW**373; 175**Ark** 1169, 1**SW(2d)**34.

846-8 [a] **Wife not joining in husband's conveyance** becomes owner of one-third interest in property conveyed on husband's death. **IndA** 157**NE**7.

846-11½-New. In some jurisdictions a widow takes one third where there is more than one surviving child. 41 **Okl ACR**63.

846-11⅓-New. In Pennsylvania, a wife is not entitled to a statutory share in lands sold by decedent without joinder of his wife. 285**Pa**368, 132**A**181.

846-11¼-New. Widow was not husband's heir at common law. **IndA** 158 **NE**643.

846-12 97**Fla**916, 123**S**668(2dcase).

846-13 But see 127**Me**423, 144**A**218.

847-37 **Ala** 130**S**67 (statute held applicable where bill to cancel conveyances to widow showed that husband left lands and personalty). [c] **Statute is limitation on widow's distributive share.**-**Ala** 130**S**67.

847-47 218**Ala**203, 118**S**391.

847-50 97**Fla**916, 123**S**668(2dcase).

848-60 252 **IllA**575; 88**PaSuper**109. [b] **Where personalty is less than personalty allowed widow,** she is entitled to entire amount. **Mo** 30**SW(2d)**1073.

848-61 [a] **Provision made for wife.**-**Del** 142**A**825.

848-64½-New. In Illinois renunciation by the widow does not convert the husband's estate into an intestate estate or entitle the widow to one third of the husband's lands in fee under the Descent Act but only entitles her to dower in the husband's lands under the Dower Act. 320 **Ill** 270, 150**NE**630.

848-67 25**F(2d)**673.

848-69 See also 48**Philippine**601. [a] **Surviving husband is not "heir"** of his wife. **Iowa** 231**NW**661.

848-70 [a] **Mo** 23**SW(2d)**91.

848-73 200**Cal** 335, 253**P**706; 20 **OhA** 171, 151**NE**790 (life estate). [a] **In Missouri.**-322**Mo** 654, 15**SW(2d)**842.

849-74 245**NYS**186; 15 **OhA**297. See also 248 **IllA**453.

849-75 122**Kan**647, 253**P**549; 242**Mich** 608, 219**NW**675. [b] **In Kansas.**-122 **Kan**647, 253**P**549.

849-87½-New. **In New York,** where the wife dies wholly or partially intestate, leaving no descendant, parent, brother or sister, nephew or niece, the surplus of personalty undisposed of goes to the husband. 127**Misc**579, 217**NYS**323.

849-90 149**Md**109, 131**A**40, 42 [citCJ]; 156**Tenn**222, 300**SW**572.

850-91 [b] **Life estate of deceased wife in property** passes no interest to surviving husband. 232**Ky**741, 24**SW(2d)** 560.

851-7 21 **OhA**236, 152**NE**768 (quitclaim deed by remainderman to wife, holding as life tenant under will, gives her estate by purchase authorizing husband at her death to bring suit to quiet title).

851-8 22**F(2d)**588.

851-9 20 **OhA**171, 151**NE**790 (wife held not to have held by purchase her undivided one-fifth interest in realty where other cotenants conveyed their shares to her by deed purporting to convey whole tract instead of their undivided shares).

851-10 197**NC**334, 148**SE**456, 64**ALR** 1121.

851-11 205 **Iowa**331, 217**NW**876.

851-25 87**IndA**149, 165**NE**435.

852-27 139 **Okl** 171, 281**P**787 (second wife taking child's part, and surviving children by both wives taking in equal parts).

852-27½-New. Surviving spouse remarrying ceases to be widow so that sister of first husband is not entitled to half of estate on her death. **CalA** 284 **P**718.

852-28 [b] **In Ohio.**-27 **OhNPNS**478.

853-33½-New. Children of a widow who receives the balance of her statutory allowance on their father's death and no realty in addition to one third of his realty are entitled to all such realty on her death as against her children by a subsequent marriage. **IndA** 149**NE**99.

853-43½-New. Under the Oregon statute, where a deceased wife who had been twice married never had any children by either husband, her second husband is her heir although her first husband had children by a former wife. 116 **Or**184, 240**P**223.

856-82 [a] (2) Husband abandoning wife and marrying another is estopped, on ground of public policy, to deny his marriage relation with second wife, and from claiming to be the surviving husband of first wife. 135 **Okl** 263, 275 **P**309.

856-83 149**Md**109, 131**A**40 (conveyance to wife of husband's interest as tenant by entireties is not release of marital rights). [a] (8) Statements of husband at time of conveyance to wife. 149**Md** 109, 131**A**40.

856-83½-New. Some affirmative act of the husband is necessary to release his statutory interest in his deceased wife's estate. 149**Md**109, 131**A**40.

856-91½-New. **Divorce** obtained by wife estops her to claim any share in the husband's estate. 132**SC**288, 128**SE** 705.

856-91⅓-New. Requirement of recording a mutual agreement for the abandonment of property rights is mandatory, 108**Conn**722, 145**A**165.

856-91¼-New. and an agreement, not recorded in their lifetime, cannot be made effective by recordation after their death. 108**Conn**722, 145**A**165.

856-93 113 **OhSt**228, 148**NE**585.

856-93½-New. In mutual agreement between husband and wife for the release of dower and distributive share in each other's estate, they may contract for the future support of either of them or of their children. 113 **OhSt**228, 148 **NE**585.

857-98 90**PaSuper**448; 9**PaDist&Co** 544.

857-99 242**Mich**608, 219**NW**675, 677 [quotCJ].

857-1 See also 242**Mich**608, 219**NW**675, 677 [quotCJ].

857-4½-New. Mutual agreement, in contemplation of separation by which husband and wife release his and her right to distributive share in the other's property, is valid. 113 **OhSt**228, 148**NE**585.

857-4⅓-New. The principle announced in 7 **OhSt**433, 70**AmD**85 that "mere expectancy or chance of succession of an heir apparent to his ancestor's estate" is not subject to release at common law, does not apply to husband or wife's release of their respective claims of dower and distributive share in the property of each other. 109 **OhSt**375, 142**NE**676 overruled. 113 **OhSt**228, 148**NE**585.

857-19 [a] (2) Though married to another man while first marriage was still in existence, wife may assert rights to property of deceased husband. 169 **Ga**712, 151**SE**340.

857-21 **Pa** 152**A**38.

858-22 287**Pa**184, 134**A**472; 5**PaDist&Co** 42.

858-23 86**PaSuper**238; 86**PaSuper**494.

858-24 [a] (18) 287**Pa**184, 134**A**472. (19) Separation by consent is not desertion within Pennsylvania statute. 88 **PaSuper**109. (20) The desertion must be of such character as would be ground for divorce. 10**PaDist&Co** 449. (21) Wife may be entitled to take under Pennsylvania Intestate Act, though she has forfeited her right to exemption under Fiduciaries Act of 1917. 88**PaSuper** 109.

858-25½-New. **Separation by mutual consent** does not bar a right to inherit, but does bar exemption. 5**PaDist&Co** 42.

858-25⅓-New. **Where husband has not made effort to induce wife to resume marital relations after separation by mutual consent, wife has been held not to have deserted husband.** 300**Pa**217, 150**A**606.

858-27 125**Misc**668, 212**NYS**116; 140 **Wash**679, 250**P**456. [a] (2) Contrary to justice, good conscience, morals, and maxims of common law adopted by statute. 140**Wash**679, 250**P**456. [b] **That husband killed wife held not pertinent** where wife died before husband, since wife acquired no life estate in his property. 198 **Ind**675, 154**NE**484. [c] **Coroner's verdict that husband unlawfully killed wife is not "conviction"** within statute precluding husband from inheriting. 155**SC**323, 152**SE**506.

859-29 [a] (2) Under similar statute it has been held that there is no disqualification on account of homicide, unless the homicide is established in the manner provided by statute. 120 **Kan**341, 243**P**1021. (3) "Conviction," as used in such statutes, does not include finding of coroner's jury. 120**Kan**341, 243**P**1021.

859-29½-New. **Evidence held insufficient to show that widow wrongfully procured husband's death.** **Miss** 130**S** 91.

859-31 136**Misc**863, 242**NYS**464.

859-32 132**SC**288, 128**SE**705.

859-34 136**Misc**236, 242**NYS**232.

859-38 201**Cal** 36, 255**P**800.

859-39½-New. Possession by wife of property decreed her in prior divorce proceeding at time of death of husband whom she remarried does not affect her right to share in husband's estate. 300**Pa**217, 150**A**606.

859-42 327 **Ill** 214, 158**NE**475 (widow waiving dower held not entitled to share in property conveyed during marriage).

860-44 327 **Ill** 214, 158**NE**475.

860-47 See also 166**Ga**857, 144**SE**728.

860-49 97**Fla**813, 122**S**219; 98**Fla**276, 123**S**768; 330 **Ill** 155, 161**NE**477; 337 **Ill** 232, 168**NE**900, 66**ALR**1062 (dower is waived by timely recording such intention or by failure within time to file election to take dower); **Okl** 268**P** 727 (under Mansfield's Digest of Statutes of Arkansas).

860-50 166**Ga**857, 144**SE**728.

860-51 **MoA** 274**SW**486.

860-52 319**Mo** 930, 5**SW(2d)**636, 641 [citCJ]; **MoA** 274**SW**486. See also **Mo** 273**SW**725. [a] **Widower failing to elect** takes only life estate. **Mo** 26**SW** (2d)601.

860-54½-New. In Illinois, the waiver of a right of dower is a condition precedent to the right of a widow to claim

one third of real estate. 320 Ill 382, 151 NE250.

860-54½-New. The rule also applies to surviving husband. 327 Ill 500, 159NE 38.

860-54¼-New. Where the surviving husband died without waiving dower, the right to election terminated so that his heir inherited no interest in the real estate of his predeceased wife. 327 Ill 500, 159NE38.

860-54⅓-New. A statute giving a widow the right to one year's support will not compel an election upon its acceptance. 166Ga857, 144SE728.

860-56 Mo 26SW(2d)601.

860-58 337 Ill 232, 168NE900, 66ALR 1062; Mo 26SW(2d)601; 131 Okl 277, 268P727 (under Mansfield's Digest of Statutes of Arkansas).

861-60 333 Ill 112, 164NE154.

861-61 169Ga288, 150SE149.

861-62 166Ga857, 144SE728; 169Ga 288, 150SE149 (burden is on those seeking to show that she made no election).

861-65 169Ga288, 150SE149 (presumption held not rebutted).

862-94 219Ala58, 121S52(2dcase); Cal 263P1013 (right to inherit is mere expectancy); 204Cal 557, 269P519; 339 Ill 11, 170NE767; 121Kan291, 246P 1017; 317Mo 207, 294SW723; 217App Div342, 217NYS176; 225AppDiv562, 234 NYS2; 137Misc627, 244NYS255; 34 PortoRico 58; 142SC395, 140SE801; SD 207NW654; TexCivA 280SW901. [a] (5) Heir of contingent remainderman cannot recover for anything affecting land during ownership in fee, done with owner's consent. 221Ky123, 297SW 1104. [b] **Mortgage of expectant interest** passes nothing unless grantor survives parent. 219Ala58, 121S52(2d case).

862-95 TexCivA 278SW243 (dictum). [b] **Heir cannot endow ancestor** with title latter already owns. TexCivA 278 SW243.

863-96 TexCivA 278SW243; TexCivA 9SW(2d)758.

864-2 But see TexCommnA 24SW(2d) 1 (children of daughter who predeceased father are not prevented from inheriting by daughter's release of expectancy).

864-9 168Ark981, 272SW869; 316 Ill 221, 147NE40; 216Ky557, 299SW312; 317Mo 207, 294SW723; TexCivA 287SW 666. But see 157Md147, 145A370.

864-12 168Ark981, 272SW869; 77Colo 427, 236P1004 (rule applied to trust fund created by husband to pay expenses of his last sickness); 26 OhNPNS 387.

865-16 [b] (3) Gift in trust of bank deposit for both husband and beneficiary held valid as against surviving wife. 152Md654, 137A378.

866-21 254Mass584, 150NE866.

866-23½-New. It is held that right of husband to receive share of wife's property at her death will be protected against fraudulent alienation, where substantial ownership is reserved to her. 149Md109, 131A40. [a] **Evidence** held to show attempt to convey and reserve control by reassignment in fraud of rights of husband. 149Md109, 131A40.

866-26 164La888, 114S723.

867-45½-New. that forced heir may not disprove sale by parol; 160La175, 106S735.

867-47½-New. Forced heirs cannot contest ancestor's renunciation of succession on the ground of mental incompetency where the petition merely alleged unsoundness of mind at the time due to intemperance. 164La1071, 115 S273.

867-47⅓-New. Donation set aside after death of testatrix does not return to her possession but goes to heirs by virtue of judgment. 165La769, 116S 180.

867-53 Iowa 227NW905 (evidence held insufficient to show that relinquishment was induced by fraud); TexCommnA 24 SW(2d)1; TexCivA 12SW(2d)1091.

867-55 313Mo 514, 285SW433.

867-58 13LaA309, 127S139.

868-61 32PortoRico 540.

868-64 [a] **In Porto Rico** Civ. Code § 966 defines cases in which inheritance considered accepted. 32PortoRico 540.

868-67 170La1019, 129S622.

868-68 32PortoRico 540. [a] (8) Tacit acceptance not shown by proof that creditors had collected debt of ancestor from heirs in previous suit through execution levied on latter's property, defendant heirs not having answered complaint or entered appearance in action, nor shown to have taken possession of estate. 32PortoRico 540. (9) Act of heirs in continuing to reside on property after father's death raises no inference of unconditional acceptance. 13 LaA309, 127S139. [c] **Law relative to coöwner binding other coöwners is inapplicable to coheirs.**–13LaA309, 127S 139. [d] **Silence raises no presumption of acceptance** by heirs of age. 13LaA 309, 127S139.

868-71 32PortoRico 540 (acceptance of inheritance must be understood to be with benefit of inventory). [c] **Law accepts succession with benefit of inventory for minor heirs** who cannot accept without benefit of inventory. 13 LaA309, 127S139.

868-72 [a] **Acceptance by mother for minors** must be understood to be with benefit of inventory.. 32PortoRico 540.

869-81 [a] **In Porto Rico.**–32PortoRico 540.

869-84 164La1071, 115S273 (renunciation terminates heirship).

869-85½-New. In Porto Rico, under Civ. Code § 948, in legitimate successions the portion of person repudiating inheritance accrues to coheirs. 32Porto Rico 540.

869-87½-New. Where an act of renunciation is valid the children acquire no interest in the property as against one holding under beneficiary of act of renunciation. 164La1071, 115S273 (cannot assume status of creditors).

869-87⅓-New. Creditors of an heir renouncing succession in order to accept succession in debtor's name under statute must provoke administration and have administrator bring suit to annul the renunciation. 164La1071, 115S273.

869-88 Nebr, 228NW852 (purpose of statute stated); 123 Okl 38, 251P1028; 11PaDist&Co 693; 196Wis125, 218NW 193. [a] (3) 83Mont400, 272P525. (7) Heirship is ordinarily question to be determined in court of law. WVa 153 SE581.

869-89 Cal 289P841. [c] **In Nebraska.**–228NW852. [d] **In Oklahoma.**–142 Okl 163, 286P327.

869-90 [a] (2) It is not necessary that succession should be opened and legal heirs recognized by judgment of court, but their heirship may be proved in any other method. 6LaA33.

870-1 29PortoRico 847; 34PortoRico 120; 35PortoRico 491 (heirship held only incidental issue and action held not proceeding to determine so as to restrict court's jurisdiction).

870-2½-New. A proceeding for the determination of heirship is not necessary where a person seeks specifically to enforce against an administrator a contract of adoption entered into by his intestate. 77Mont260, 250P823.

870-2⅓-New. National bank transferring decedent's deposit to purported sole heir upon faith of judgment sending her into possession is not liable to legal heirs. 13LaA204, 127S428.

871-5 See also 32PortoRico 392.

871-13 235Ky115, 29SW(2d)616. [a] **State may intervene** to assert right of escheat. 114Nebr266, 207NW31. [b] **Unborn heirs** cannot be made parties to such proceeding nor can their rights be adversely affected thereby. 317 Ill 535, 148NE317.

871-14 78Mont370, 254P179.

871-17 215Ky526, 286SW780; 165La 710, 115S911 (allegations held proper); 123 Okl 193, 250P847. [a] (4) Other instances. 165La710, 115S911. [b] (5) Other averments held insufficient. 215 Ky526, 286SW780. (6) Other instances. WVa 153SE581.

872-20½-New. A pleading charging that instruments acknowledging paternity of an illegitimate child were procured by fraud and duress is defensive and the acts constituting the fraud or duress should be set out specifically. 125 Okl 208, 257P303.

872-21 [a] **Contract pleaded** as made by child relinquishing interest in father's estate must be contract proved. 313Mo 514, 285SW433.

872-24 178Ark1141, 13SW(2d)605; 12 LaA224, 125S761; NJCh 144A615; 136 Misc636, 243NYS759; 147Wash378, 266 P165.

872-26 215Ky526, 286SW780; 141 Wash74, 250P463.

872-27 215Ky526, 286SW780; 229Ky 771, 17SW(2d)1029; 117Nebr636, 222 NW57.

873-31 150Md235, 133A723; 117Nebr 636, 222NW57.

873-32 117Nebr636, 222NW57.

873-37 135Misc861, 239NYS722.

873-44 Ala 130S67.

873-53 Pa 152A38. See also 6LaA33. [a] **In absence of showing of ownership or possession by decedent,** contents of packages, consisting of family Bibles, articles of jewelry, with inscriptions thereon, photographs, and letters have been held inadmissible. 132Misc205, 229 NYS814.

873-54 32PortoRico 392 (marriage certificate issued by competent official is sufficient to prove marriage, parole evidence also admissible, especially where records have to be reconstructed and validity of certificate thereof questioned by adverse party); TexCivA 282SW 819. Contra 35PortoRico 485. [a] **Evidence held admissible.**–117Nebr636, 222 NW57. [b] **Evidence held inadmissible.**–117Nebr636, 222NW57. [c] **Evidence held inadmissible.**–13LaA600, 128S44.

873-55 330 Ill 172, 161NE493; Tex CivA 282SW819. [a] (4) Photostatic copies of letter of intestate to insurance company held inadmissible. 254 IllA 334.

874-58 See also 32PortoRico 392.

874-64½-New. Proceedings in the probate court on the estates of persons claimed to have been the parents of an alleged heir are admissible for the purpose of showing that such alleged heir was not mentioned in the wills of the alleged parents and was not a party to the proceedings. 198Cal 32, 243P423.

874-67 [b] **Documentary evidence is more reliable than oral testimony** on question of paternity of claimant. 330 Ill 172, 161NE493.

874-68 174Ark669, 297SW1008.

874-69 Pa 152A38. [a] (2) Evidence to sustain oral contract of child to relinquish interest in father's estate must be cogent and convincing. 313Mo 514, 285SW433.

874-72 313Mo 514, 285SW433.

874-76 178Ark1141, 13SW(2d)605; 330 Ill 172, 161NE493; 254 IllA461; 215 Ky526, 286SW780; 165La710, 115S911; 313Mo 514, 285SW433; 114Nebr266, 207 NW31; NJCh 144A615; 132Misc205, 229NYS814; Pa 152A38; 141Wash74, 250P463.

874-77 254 IllA334; 118Kan598, 236P 649; 132Misc259, 230NYS161; 35Porto Rico 459. See also 117Nebr636, 222NW 57 (evidence sufficient to support verdict).

875-78 119Kan603, 240P586; 147Wash 378, 266P165. [a] (1) 161Ga319, 130 SE559; 207 Iowa1229, 224NW597 (son); 209Ky598, 273SW438; TexCivA 16SW(2d)874. (4) 196NC206, 145SE25. (6) Cousin. 93CalA36, 268P1090.

875-79 141Wash74, 250P463.

875-98 283Pa520, 129A577 (facts did not require determination by jury); TexCivA 281SW335; TexCivA 29SW (2d)911.

875-99 117Nebr636, 222NW57 (parties are entitled to jury trial).

876-6½-New. Instructions. In actions to determine rights between nephews and nieces and an alleged son of an intestate, instructions have been held not erroneous. 161Ga319, 130SE559.

876-6¼-New. In a proceeding under the Nebraska statute, the title to real estate is not drawn in question and the court merely determines who are the

heirs. Nebr 228NW852.

876-8 126 Okl 133, 258P891. [b] **Proceedings to determine descent** are not maintainable where estate has been completely administered. 169Minn420, 211 NW578.

876-13½-New. In Nebraska the proviso in the statute that the term within which liens against real estate of deceased may be enforced shall not be affected or limited does not relate to liens created by the death of decedent in favor of all creditors. Nebr 228NW852.

876-15 82Colo 503, 261P874.

876-16 See also 245 IllA423.

876-17 94CalA453, 271P542; 101CalA 20, 281P518(2dcase); 104Conn97, 132A 411; 319Mo 241, 3SW(2d)722; 29 PortoRico 847; TexCivA 12SW(2d)811; 192Wis524, 213NW479. [d] **In Porto Rico.**–29PortoRico 847, 848 [citCiv.Code § 669).

876-18 230Ky835, 20SW(2d)1015; LaA 129S218. [b] **Rights of deceased wife's heirs in her predeceased husband's property** can rise no higher than wife's own rights therein. 207 Iowa994, 222NW3. [c] **Presumptive title.**–214 Ala329, 107S830.

876-19 202 Iowa855, 211NW246; 153 Va567. 149SE515.

876-19½-New. Where the entire estate is sold to pay debts, legal heirs inherit no interest in decedent's property. 160 La771, 107S569.

877-20 212Ala635, 103S692; 219Ala 157, 121S538; 220Ala654, 127S221; 33 Ariz288, 264P103; 207Cal 556, 279P 655; 77Colo 574, 238P58, 59 [citCJ]; 109Conn529, 147A181; 90Fla441, 106S 470; 37GaA8, 138SE863; 37GaA279, 139SE922; 201 Iowa389, 207NW389; 204 Iowa610, 215NW726; 156Miss736, 126S656; 76Mont143, 245P529; 191NC 529, 132SE572; 19 OhA499; TexCivA 274SW292; TexCivA 291SW340; Tex CivA 32SW(2d)666; 70Utah564, 262P 105; 100Vt217, 136A389; 144Va727, 130 SE794; 146Wash421, 263P741; 193Wis 196, 214NW497, 53ALR359. [b] **In Louisiana.**–6LaA33. [c] **In Oklahoma.**–142 Okl 163, 286P327.

877-24 193Wis196, 214NW497, 53ALR 359.

877-25 37GaA279, 139SE922; 201 Iowa 389, 207NW389; 76Mont143, 245P529; 19 OhA499; 142 Okl 163, 286P327. [a] **Where other property is sufficient to pay debts,** executor may not sue to oust tenants of heirs. 223Ky35, 2SW(2d)1053.

877-25½-New. The heirs of a grantee in a deed delivered in escrow have as much right to perform the conditions of the escrow as the grantees to secure their deed and perfect their title to the land. 332 Ill 551, 164NE1.

877-26 207Cal 556, 279P655; 133Misc 647, 233NYS667.

878-34½-New. In Oklahoma actual interest of heir prior to distribution is undetermined and subject to determination by county court. 143 Okl 57, 287P 414.

878-34⅓-New. In Oklahoma heir is dependent for his title not only upon statutes of succession, but upon probate procedure for determination and distribution thereof. 143 Okl 57, 287P414.

878-34¼-New. In Oklahoma rights of heir are determined by decree of county court in administration proceedings. 143 Okl 57, 287P414.

878-41 104Conn97, 132A411.

879-44 280US327, 50SCt115, 74L ed457.

880-54 33Ariz288, 264P103 (contract of fire insurance does not pass as incident to realty).

881-77 69CalA598, 232P157 (administrator claiming to be only heir, whose claim is challenged by surviving husband of deceased, can, pending determination of dispute, deal with property other than as administrator and under directions of probate court).

881-78 [a] **Succession is terminated** by judgment putting heirs in possession and they hold as coöwners. 166La730, 117S810.

881-78½-New. Persons holding property of estate, or owing money to it, have no authority to deal with heirs except through orders of probate court. 113 OhSt543, 149NE868.

881-79 37GaA8, 138SE863; 25 OhA7, 158NE207; TexCivA 274SW292; Tex CivA 32SW(2d)666 (constructive possession). [a] (3) In Alabama. 212Ala635, 103S692.

882-94 321 Ill 442, 151NE877; 227Ky 607, 13SW(2d)772, 64ALR630; 102 NJEq393, 141A16; 144Va727, 130SE794 (rents accruing after death are payable to heirs at law). [c] **Usufruct from royalties** held income. 102NJEq393, 141 A16.

882-97 See also 22AlaA1, 113S651.

882-97½-New. Where, in an instrument, no real estate is involved, the word "heirs" means "next of kin" in reference to the personalty mentioned. 103NJEq 487, 143A771.

882-5½-New. The usufruct arising from a continuing contract for payment of royalties is income and not principal. 103NJEq487, 143A771.

882-5⅓-New. Chancery may establish and enforce a trust for distribution of income to the next of kin, 103NJEq487, 143A771.

882-5¼-New. or it may be distributed directly. 103NJEq487, 143A771.

883-18½-New. Where there is distribution of a fund to all heirs except one whose residence was unknown, his administrator subsequently suing for his share with interest is entitled to recover interest from the date of death of the widow for whose benefit the principal sum was charged by a deed on real estate in lieu of dower. 8PaDist&Co 41.

883-22 178Ark851, 12SW(2d)785.

883-23 204 Iowa1127, 216NW617 (debt against insolvent devisee's share in realty); MoA 31SW(2d)585; 87PaSuper 177; TexCivA 16SW(2d)844. [c] **Debts of son to deceased mother's estate** are not charge on real estate which, under Kirby's Dig. § 2636, descended free from charge or lien and could properly be included by son in deed of trust. 177Ark 703, 7SW(2d)780. [d] **Priority of rights.**–204 Iowa1127, 216NW617.

884-26 See also 207 Iowa1287, 224NW 554 (debt charged against his interest).

885-54 205 Iowa1194, 219NW311.

885-58½-New. A surviving husband converting a deposit of deceased wife must deal fairly and openly with the wife's sister entitled to a share. 215 Ala550, 112S115.

886-64 87PaSuper177.

887-83 [a] (25) Ex parte judgment sending heir into possession is prima facie evidence of ownership entitling him to exclusive possession until others prove ownership. 13LaA204, 127S428.

887-83½-New. Where a widow elects to renounce a life estate under the will and take her statutory interest, it is not required to include any particular tract in the portion set aside to her, but her entire half may be set off as a body. 320 Ill 31, 150NE333.

887-84 173Ark828, 293SW735; 176Ark 1170, 5SW(2d)927 (notwithstanding irregularities); 206 Iowa606, 219NW512; 239Mich348, 214NW146; 253NY260, 170 NE912 (contingent remainders may be subjected to compromises); TexCivA 283SW1085. [a] (6) Agreement between heirs and widow that she should have possession of all of intestate's land during her life held valid. 212Ala635, 103S692, 694 [quotCJ]. (7) Contract between husband and heirs of deceased wife childless and intestate. Mo 27SW (2d)6.

888-85 173Ark828, 293SW735; 44 Ida 211, 256P369; 96CalA767, 274P991; 142Miss676, 107S865; 191NC609, 132SE 560; TexCivA 283SW1085; Tex CommnA 29SW(2d)949. [a] (9) Debt of one of heirs to deceased barred by statute of limitations cannot be deducted by widow against amount due heir under compromise agreement. 153Va738, 151SE171. (10) Compromise between sister and decedents respecting disposition of proceeds is not invalid on ground others entitled to receive portion by descent were not parties. 233Ky396, 25SW(2d)1043. [b] **Parol evidence** may be considered in construing instrument. 318 Ill 297, 149NE228.

888-86 231Ky386, 21SW(2d)474 (right to cancellation of deeds for false representation of widow grantee held established by evidence).

888-87 318 Ill 297, 149NE228.

888-89½-New. Duress has been held shown where conveyance of granddaughter's share was procured by threat to imprison her for theft of money from widow and children of decedent. Tex CivA 288SW1092.

888-89¼-New. Construction of statutes authorizing approval of agreements affecting future contingent interests of persons not in being see 227AppDiv160, 237NYS162.

888-92 79CalA203, 249P42; GaA 155 SE51; 207 Iowa647, 223NW369; 239 Mich348, 214NW146; 174Minn173, 218 NW551, 553 [citCJ]; 153Va540, 150SE 238. See also 146Va504, 131SE692. But see 207 Iowa183, 222NW365; 227App Div160, 237NYS162. [a] (16) Agreement between widow and heirs that widow take stipulated portion of estate in lieu of her rights including year's support. 35GaA645, 134SE194. (17) Where land of intestate is divided between heirs by agreement, such beneficiary cannot thereafter claim value of personalty received by other from estate. 38GaA503, 144SE383. (18) Party's casual remarks, just before contract dividing decedent's estate was signed, to effect that she intended to give others part of securities decedent had transferred to her during his lifetime, held not to impress trust on securities. 218 Ala359, 118S649. [e] **Mere inequality in intelligence, experience, and business judgment** of heirs does not justify annulment of agreement. 146Va504, 131 SE692. [f] **Consideration.**–Agreement to pay funeral expenses of deceased is sufficient consideration for assignment of interest in estate. 318 Ill 297, 149NE 228. [g] **Where confidential relations exist between relatives,** equity will relieve party yielding to coercive influence of another. 175Ark502, 1SW(2d)38. [h] **Agreement held without fraud or undue influence.**–79CalA203, 249P42.

889-93 239Mich348, 214NW146; 174 Minn173, 218NW551, 553 [citCJ]; 307 Mo 674, 271SW755; 191NC609, 132SE 560.

889-94 191NC609, 132SE560; 146Va 504, 131SE692, 699 [quotCyc].

889-95 318 Ill 297, 149NE228; 166La 479, 117S562 (agreement must be in writing). [a] (12) Authority to one heir by another to sell property has been held not to carry with it authority to give away property. 222Ky569, 1SW (2d)979. (13) An agreement dividing decedent's estate has been held intended to conclude complainant's claim that respondent held securities, which decedent had transferred to respondent during his lifetime, in trust. 218Ala 359, 118S649.

890-98½-New. Facts have been held to show sufficient performance of particular contracts. MoA 256SW1088.

890-2 [a] **Whole scheme falls through** where necessary party thereto refused or failed to participate. 221AppDiv 369, 223NYS150.

890-4 175Ark502, 1SW(2d)38. [a] **Conveyance by heir to coheir of valuable lime land,** actual value of which was known only to grantee, set aside for fraud on ground that latter was under duty to disclose its true worth. 125Me 183, 132A214. [b] **Fiduciary relationship** exists between executor who is testator's son and stepmother, widow of testator. 327 Ill 448, 158NE706.

890-8 35GaA645, 134SE194.

890-9 207 Iowa647, 223NW369.

890-9½-New. An agreement between a widow and heirs whereby the widow is to take a stipulated portion of the estate in lieu of her rights including the provision for a year's support will not be set aside, unless it appears that it was induced by ignorance amounting to accident or mistake or was procured by fraud or duress. 35GaA645, 134SE194.

890-9⅓-New. That a contract between a widow and her heirs, operated to satisfy the widow's statutory claims, has been held to be warranted by the construction of the parties. 221Ky732, 299SW 729.

890-9¼-New. Agreements covering family settlements between heirs have been held supported by consideration. 130Kan826, 288P593.

891-20 204 **Iowa**927, 216**NW**55; **Iowa** 231**NW**661; 191**NC**609, 132**SE**560; 154 **Wash**130, 281**P**337 (despite statute).
891-29 122**Kan**563, 253**P**426.
892-44½-New. Plaintiff's brothers and sisters who received none of her share held not liable to her for her share in her father's estate. 217**Ky**357, 289**SW** 252.
892-44½-New. Where only a part of land sold by plaintiff's mother belonged to the estate of her father, plaintiff was held not entitled to a share in the proceeds of sale to the same extent that she shared in the estate. 217**Ky**357, 289**SW**252.
892-50 122**Kan**563, 253**P**426.
892-52½-New. In Louisiana an action to reduce an excessive donation brought within five years from the donor's death is timely. 162**La**22, 110**S**75.
892-56½-New. In sister's suit against brother to set aside mother's deed for undue influence he is not relieved from answering for his wrong by fact that he was mother's executor. **Or** 286**P**593.
893-70 [b] (3) In heirs' action involving right to decedent's property, allegation that plaintiffs were entitled to named property has been held insufficient allegation that there was no administration of decedent's estate nor any necessity therefor. 117**Tex**467, 7**SW(2d)** 524.
893-74½-New. A complaint in an action by the mother of a decedent against his widow for specific performance of a contract stipulating that certain real estate was deceased's separate property and for its equal distribution has been held insufficient to state a cause of action. 44 **Ida**211, 256**P**369.
893-75½-New. The burden of proving transfer by decedent prior to death is on the children asserting it, where evidence showed that the property came into their possession at death. **TexCivA** 288**SW**1092.
894-79 **GaA** 155**SE**51.
894-80 181**Ark**597; 27**SW(2d)**88; 169 **La**35, 124**S**137 (evidence insufficient to sustain judgment).
894-81½-New. Evidence held inadmissible. **TexCivA** 286**SW**616.
894-81½-New. Evidence held sufficient. **TexCivA** 288**SW**1092.
894-81¼-New. Evidence held insufficient. 146**Va**504, 131**SE**692.
894-81½-New. A finding that a contract between a widow and her sons for the division of decedent's property was not procured by fraud was held sustained by evidence. 221**Ky**732, 299**SW** 729.
894-81½-New. In an action by an heir for a joint interest in property that belonged to heirs of his predecessor on the ground that the property was allotted to an heir for payment of debts without previous authorization of court, the burden rests on plaintiff to show such facts. 33**PortoRico**131.
894-81¼-New. Charge that heir claiming personalty as heir of mother could not recover if personalty belonged to father has been held proper. **GaA** 155 **SE**51.
894-81½-New. Charge denying recovery if it was agreed property should belong to defendants has been held not erroneous. **GaA** 155**SE**51.
894-81½-New. Charge that heirs sued for personalty claimed they were given personalty in division of property and if there was such division plaintiff could not recover has been held proper. **GaA** 155**SE**51.
894-82 **TexCommnA** 293**SW**563.
894-93 **Cal** 273**P**822.
894-94 19 **OhA**499.
894-95 [b] **Surviving wife** cannot sell property of intestate decedent, where rights of minor are involved, till statutory requirements of administration appointment of guardian and approval by county court have been complied with. 39 **OklACR**314.
894-96 **Cal** 273**P**822; 109**Conn**452, 146 **A**831; 19 **OhA**499; 34**PortoRico**170; 144**Va**727, 130**SE**794 (facts not authorizing cancellation of deed from legatees and heirs to executrix). See also 46 **Philippine**664. [c] **Quitclaim deed held** to pass father's vested life estate in son's land. 173**Ark**828, 293**SW**735. [d] **In Rhode Island.**–48**RI** 348, 138**A**182.
894-97 **Md** 148**A**228.
894-98 **Cal** 273**P**822.
895-15 317**Mo** 505, 297**SW**362; 134**Misc** 334, 235**NYS**477.
895-19½-New. Husband's mortgage must be treated as equitable assignment of leasehold interest if legal title was in administrator. **Md** 148**A**228.
895-20 **TexCivA** 18**SW(2d)**784.
896-21 207**Cal** 556, 279**P**655; 94**CalA** 453, 271**P**542; 234**Ky**613, 28**SW(2d)** 959; 31 **OhA**199, 165**NE**542 (evidence sufficient to show assignment). [b] **Construction of assignment.**–**MoA** 31 **SW(2d)**585.
896-22 207 **Iowa**882, 223**NW**888.
896-25 [d] **Assignment of "all interest of every kind and nature"** held to transfer interest in real estate. 203 **Iowa**1352, 214**NW**513.
896-31 33**Ariz**288, 264**P**103.
896-32½-New. Assignment of equity in estate as collateral security for a note was a mortgage. 67**Utah**54, 245**P** 698.
896-32½-New. Notice to an administrator of an assignment by an heir of funds in the administrator's hands is not necessary in order to vest title to the funds in the assignee. **TexCivA** 18**SW(2d)** 784.
896-33 34**PortoRico**170.
896-34 [a] **Husband's direction to pay over his interest to children** held assignment of net interest. 215**Ala**674, 112**S**251.
896-35 134**Misc**334, 235**NYS**477.
897-57 217**Ala**188, 115**S**182; 178**Ark** 140, 9**SW(2d)**1058; **MoA** 31**SW(2d)** 585; 119 **Oh**66, 162**NE**277 (accommodation note); **TexCommnA** 5**SW(2d)**744; 196**Wis**125, 218**NW**193.
897-57½-New. Purchaser from a widow, under a will before the birth of children, is chargeable with notice of the rights of after-born children, under statute. 321 **Ill** 198, 151**NE**577.
897-57½-New. Use of proceeds of sale by the widow to pay debts of the testator would not render her deeds valid as to such after-born children. 321 **Ill** 198, 151**NE**577.
898-60½-New. Under an agreement to pay devisee, when properties were sold, the excess over the estimated value of property advanced to him in consideration of conveyance thereof, no recovery can be had in the absence of proof of sale of some part of the property. 325 **Ill** 296, 156**NE**294.
898-60½-New. An assignment to an administrator gives him a right subject to claims against the estate then existing and administration expenses, not to his debt accruing after the assignment. 96**CalA**460, 274**P**769.
898-61 160**La**790, 107**S**576.
899-82 216**Ala**623, 114**S**223; **Tex CommnA** 26**SW(2d)**191.
899-83 216**Ala**623, 114**S**223. [a] (4) Heirs held proper parties to suit to subject land to payment of probate judgment obtained by decedent against estate of another. 173**Ark**38, 291**SW**14.
899-88 **TexCommnA** 26**SW(2d)**191.
899-90 [a] **In Georgia,** under statute heir may sue to recover land before close of administration without showing that there are no debts, where one administrator consents and coadministrator claims land in individual capacity. 168**Ga**240, 146**SE**905.
900-94 161**Ga**403, 131**SE**75; 37**GaA**8, 138**SE**863. [a] (2) So also in the Philippines. 44**Philippine**186.
900-95 44**Philippine**186 (action by reservee against executor); 193**Wis**196, 214**NW**497, 53**ALR**359.
900-5 37**GaA**8, 138**SE**863 (rescission and suit for purchase money paid).
901-26½-New. Where the widow of a vendee in possession of land under a bond for title agreed with his administrator and the holders of the purchase-money notes to pay off the balance of the purchase price and take title in her name, and, after she had received from rents enough to reimburse her, to convey the lands to the heirs at law of decedent, consisting of his children and herself, if there were no other debts of decedent unpaid, a cause of action to enforce the implied trust and to recover for its breach arising from her wrongful sale and encumbrance of parts of the land is not one in favor of the administrator but one in favor of the children which they could enforce in their own names. 161**Ga**403, 131**SE**75.
901-26¼-New. Son claiming right of recovery through mother must base his title on right of inheritance from her, and her deeds may be avoided by him only if she could have avoided them. 311**Mo** 551, 279**SW**122.
901-26¼-New. In absence of fraud and mental incapacity, mother is bound by deeds to daughter, 311**Mo** 551, 279 **SW**122.
901-26½-New. and a son claiming through her is equally bound. 311**Mo** 551, 279**SW**122.
901-26¼-New. In Louisiana an heir put into possession under judgment of a competent court is entitled to recover the estate from defendants claiming under null judgment. 162**La**92, 110**S**100.
901-26½-New. The right to cancel a deed obtained from a grantor through mistake, fraud, duress, or undue influence, descends to the grantor's heirs if it exists in the grantor unimpaired at the time of his death. 178**Ark**983, 13 **SW(2d)**15.
901-30 [c] **In Porto Rico.**–32**PortoRico** 849.
902-31 **TexCommnA** 298**SW**412.
902-38 166**La**730, 117**S**810.
902-41 37**GaA**73, 138**SE**915.
903-42 37**GaA**73, 138**SE**915. [a] **Action to recover money deposited with veterans' home by deceased inmate** may be maintained by heir without administration, especially where statute provides that such money may be paid over without probate. 88**CalA**16, 263**P**253.
903-45 37**GaA**73, 138**SE**915 (suit to revive judgment).
903-47 See 166**La**730, 117**S**810 (right to one recognized where plaintiff claimed both as heir and legatee).
904-66 216**Ky**557, 288**SW**312.
904-67 216**Ky**557, 288**SW**312; 221**Ky** 33, 297**SW**942; 136**Wash**378, 240**P**9.
905-78 316**Mo** 968, 293**SW**116.
905-81 171**Ark**791, 286**SW**1022.
905-82 68**CalA**235, 228**P**714. [b] **Right of heir to recover property devised by ancestor while she was married woman incapable of devising it** accrues at least upon death of ancestor's husband. 229 **Ky**109, 16**SW(2d)**771.
905-83 174**Ark**669, 297**SW**1008; 135 **Wash**449, 237**P**1006.
906-89½-New. Where a will naming a universal legatee has been duly probated and the legatee has been recognized and sent into possession by a court of competent jurisdiction, prescription acquirendi liberandi begins to run against an action of forced heirs for reduction. 160**La**790, 107**S**576.
906-95 178**Ark**183, 10**SW(2d)**14.
906-97 177**Ark**1060, 9**SW(2d)**1062.
906-98 167**La**21, 118**S**488. But see 33 **PortoRico** 172.
906-99 [a] **In Porto Rico.**–32**PortoRico** 793.
906-2 216**Ala**570, 114**S**192. See also 22 **AlaA**1, 113**S**651.
907-20 [a] **Person who assisted in recovering property** for heirs, and who claimed privilege in funds for services rendered by him, was not necessary party. 167**La**21, 118**S**488.
907-28 216**Ala**570, 114**S**192; 216**Ala** 623, 114**S**223; 169**Ga**150, 150**SE**86; 167 **La**21, 118**S**488. See 166**La**730, 117**S**810. [a] (9) Complaint by heirs in action of revendication of undivided hereditary joint interests in land allotted to their mother for payment of debts without authorization of court has been held sufficient. 33**PortoRico** 172.
908-33 216**Ala**623, 114**S**223.
908-34 216**Ala**623, 114**S**223; 163**Ga**899, 137**SE**561; **TexCivA** 16**SW(2d)**426. [b] (3) Petition failing to allege that there was no administration on estate of deceased or that there was no necessity for one is demurrable. **TexCivA** 8**SW (2d)**310. (4) In general. **TexCommnA** 26**SW(2d)**191.

909-36½-New. Answer denying plaintiff's interest and pleading estoppel held sufficient. 235Ky741, 32SW(2d)327.

909-38 [a] **In suit to construe will and settle estate,** defendants not intimating, in exception to commissioner's report, defense of advancement chargeable against certain distributees, held not entitled to file amended pleadings setting up such defense, after judgment. 220Ky613, 295SW893.

909-38½-New. An amendment germane to the original petition may be allowed. 161Ga403, 131SE75.

909-43 81Mont68, 261P609.

909-44 [a] 318 Ill 297, 149NE228; 130 Misc41, 224NYS95; 189NC790, 128SE 404 (in action to recover dower lands, to show that defendant's predecessor held land under deed conveying widow's dower or life interest); TexCivA 28SW (2d)584. [b] (2) To show that conveyances to decedent's concubines and natural children were simulated. 33Porto Rico 3. [c] **Evidence of pauperism of decedent's grantee at time prior to conveyance** is insufficient to refute presumption that contents of deed are true. 33PortoRico 3. [d] **Domestic difficulties and separation cannot be substituted for proof** that husband assigned mortgage to sister to defraud wife of rights by descent. 128Me546, 149A297.

909-56½-New. Mother, remaining in possession and exercising acts of ownership after an alleged conveyance, creates presumption of simulation. 164La 888, 114S723.

909-56⅓-New. Evidence that a check was returned by mother after giving a deed is admissible on the question of simulation. 164La888, 114S723.

909-56¼-New. In the absence of evidence that the grantor remained in possession delivery held presumed to have accompanied transfer. 164La888, 114S 723.

909-56½-New. Evidence was held to show that deed by mother to a forced heir was a simulated transaction. 164 La888, 114S723.

910-64½-New. Where a deed to a forced heir is set aside as a simulated decree, annulling the mortgage given by the heir is proper. 164La888, 114S723.

910-69½-New. Conveyance to a forced heir, set aside as simulated, is properly ordered returned to successor. 164La 888, 114S723.

910-73½-New. Statutory provisions requiring lapse of six months after presentation of demands before bringing suit have been declared not applicable in actions against heirs or devisees. 208 Ky594, 271SW666.

910-72⅓-New. Petition defective for failure to aver value of services. 208Ky 594, 271SW666.

910-73¼-New. A life insurance company cannot bring suit against heirs at law of insured to cancel a policy payable to the administrator, to restrain assignment on prosecution of action thereon and to prevent beneficiary's delay until expiration of the period prescribed by incontestable clause. 18F(2d)599.

910-73⅓-New. Recourse against decedent's estate need not be waived in a suit after full administration. 45 Ida 200, 261P671.

910-73⅓-New. Single creditor may sue heirs entitled to distribution where no administrator is appointed. TexCivA 32SW(2d)666.

910-73½-New. Husband's conveyance to wife to protect against what he believed were unjust claims has been held not to preclude his recovery of title after wife's death, as against her heirs. 138Misc117, 244NYS713.

910-75 TexCivA 16SW(2d)433.

911-83½-New. [§ 198a] d½. **Pleading.** A petition to recover shares of certain distributees in the proceeds from a sale of redeemed land, under contract with the distributees whereby the petitioner was to furnish money to redeem the land and employ an attorney to prosecute the action, must state a cause of action. 167 Ga470, 146SE22.

911-84½-New. [§ 199a] e½. **Evidence.** Evidence of redemption and sale of land by the administrator of an estate has been held sufficient to show equitable assignment for value of the shares of distributees in the proceeds of land recovered or a claim in the nature of a lien on funds necessary for payment of their indebtedness to petitioner, for money advanced for redemption of the land from tax sale and for expenses in conducting the litigation. 167Ga470, 146SE22.

911-84⅓-New. Evidence has been held insufficient to sustain a claim in redemption litigation. 167Ga470, 146SE22.

911-90 175Ark763, 300SW437; 205 Iowa100, 215NW595; 215Ky92, 284SW 413, 415 [citCJ], 46ALR1424; 229Ky 162, 16SW(2d)756; Miss 130S145; 197 NC40, 147SE680; 298Pa514, 148A704. [a] (4) 81Colo 73, 253P1059. (5) 136 Misc615, 241NYS648. (13) 125 Or333, 267P534 (similar deposition). (21) Other definitions. 235Ky741, 32SW(2d) 327.

912-96 81Colo 73, 253P1059.

912-97 81Colo 73, 253P1059; 168La 534, 122S718.

912-98 81Colo 73, 253P1059; 215Ky 92, 284SW413, 415 [citCJ], 46ALR1424.

913-9 92Fla327, 109S435; 205 Iowa 100, 215NW595.

913-10 235Ky658, 32SW(2d)8.

916-65 211Ky16, 276SW989 (land).

917-71 166La829, 118S35; 12LaA608, 125S776.

917-72 81Colo 73, 253P1059; 204 Iowa 1331, 217NW245; 213Ky457, 281SW 466; 148Va860, 139SE490. [c] **Where, in deed to son, rental was required and** sale forbidden on death of decedent, it was held an advancement. 215Ky496, 284SW1101.

917-75 81Colo 73, 253P1059; 145Miss 87, 110S218, 49ALR565.

918-78 229Ky476, 17SW(2d)407.

918-82 215Ky92, 284SW413, 415 [cit CJ], 46ALR1424; 217Ky716, 290SW718.

918-85 217Ky716, 290SW718.

918-85½-New. Advancements operate only on undevised property. 215Ky92, 284SW413, 46ALR1424.

918-86 81Colo 73, 253P1059; 136Misc 615, 241NYS648.

919-91 Miss 130S145.

919-99 168La534, 122S718.

919-1 235 IllA568; 235 IllA568.

919-3 235 IllA568.

920-14½-New. In some jurisdictions no written charge is necessary. 81Colo 73, 253P1059.

920-17 235Ky741, 32SW(2d)327.

920-18 235Ky741, 32SW(2d)327.

921-20 235Ky741, 32SW(2d)327.

921-24½-New. The market value of a parent's lands when the expectancy was conveyed does not determine the adequacy of the consideration for such conveyance. TexCivA 12SW(2d)1091.

921-25 [b] **Evidence held to show no sufficient acknowledgment,** under statute. 235 IllA568.

921-26 [a] **Receipt for advancements to testator's grandchildren signed by their mother** held sufficient under will. 323 Ill 269, 154NE101.

922-41 214Ala10, 106S188; 81Colo 73, 253P1059, 1062 [quotCJ].

922-42 145Miss87, 110S218, 49ALR565.

922-43 81Colo 73, 253P1059.

922-44 214Ala10, 106S188; 81Colo 73, 253P1059; 13PaDist&Co 380.

923-51 81Colo 73, 253P1059. [a] (1) 81Colo 73, 253P1059.

923-64½-New. or from tiling used by the donee to drain a farm belonging to her mother, although used by the donee; 211Ky16, 276SW989.

924-71½-New. Where a child of the intestate breached a condition subsequent in a deed from the intestate, his interest in the land, if retained, should be treated as an advancement. 316Mo 891, 292 SW702.

924-71⅓-New. Where an insurance policy on defendant's life is payable to his mother in case she survived him, and otherwise to insured's estate, and some of the premiums were paid by the mother and some by insured, payments by the mother do not constitute advancements to insured for which insured could be required to account to his mother's estate. 197NC40, 147SE680.

924-71¼-New. Conveyance by father to daughter by deed reciting that land was to be grantee's entire share in owner's estate constitutes advancement. 233Ky 372, 25SW(2d)1030.

925-87 235Ky741, 32SW(2d)327.

925-90 229Ky476, 17SW(2d)407. See also 168Ga317, 147SE711.

925-91 220Ky638, 295SW976.

933-92 235Ky741, 32SW(2d)327.

925-94 215Ky92, 284SW413, 46ALR 1424.

925-95½-New. In making distribution of an estate, children who have received advancements receive nothing further until other heirs are made equal with them. 215Ky492, 284SW1110.

925-95⅓-New. Where a contract to give land to a son as an advancement in full of a prospective share in his father's estate is fully performed, a creditor obtaining judgment against the son after performance of such contract can not subject any property left by the intestate father on the ground that the son is entitled to it as a share in his father's estate, which passes to other heirs to the exclusion of the son. 168 Ga317, 147SE711.

925-95¼-New. The doctrine is part of the law of descent and distribution and requires a child to bring into hotchpot all received before decedent's death in order to share in the distribution. 229 Ky162, 16SW(2d)756.

925-97 215Ky92; 284SW413, 46ALR 1424; 217Ky361, 289SW228.

926-98 TexCivA 12SW(2d)1091.

926-3 [a] **Where son predeceased mother from whom he received advancement,** neither his succession nor his widow as universal legatee can be compelled to collate advances. 168La534, 122S718.

926-8 [b] **Upon sale of property,** son is entitled to what land brought. 215 Ky496, 284SW1101.

927-16 215Ky92, 284SW413, 46ALR 1424.

927-21½-New. Where the court cancels deeds to children and declares advancement, the children should be credited with improvements. 215Ky492, 284SW 1110.

927-27 81Colo 73, 253P1059, 1062 [quotCJ].

927-29 [a] **Collation held not before court** where condition on which it was required was not claimed by defendant. 161La313, 108S549.

928-32 [b] **In Colorado.**-81Colo 73, 253 P1059.

928-40 [a] **Where all personalty is set aside to widow as exempt,** advancements in land or money should be deducted from shares in proceeds of sale of land. 220Ala654, 127S221.

929-47 217Ky835, 290SW683. [a] **Charge held unreasonable** where greatly exceeding amount paid for lot just before advancement made. 211Ky16, 276 SW989. [b] **Advancement for lumber** held excessive. 211Ky16, 276SW989.

929-49 212Ala554, 103S574; 211Ky16, 276SW989; 215Ky492, 284SW1110; 145Miss87, 110S218, 49ALR565.

929-50 145Miss87, 110S218, 222 [cit CJ], 49ALR565. See also 169La35, 124 S137.

930-53½-New. Grantee cannot be compelled to refund excess in value of advancement where worth more than land owned by grantor at time of death. 233 Ky372, 25SW(2d)1030.

930-55 211Ky16, 276SW989.

931-66 215Ky492, 284SW1110.

931-70½-New. Where the court cancels a deed and declares advancements, interest may be charged from the date of the deed. 215Ky492, 284SW1110.

931-70⅓-New. Intent may be computed for the purpose of equalizing distribution. 215Ky492, 284SW1110.

932-72 [a] (5) Taxes paid by donee on own farm and personal property is not deductible. 211Ky16, 276SW989.

932-88 [a] **Defense in action to determine title** that conveyance of land by father to son upon express contract that it was in lieu of any further share in father's estate is inconsistent with defense that land was advancement to son. 313Mo 514, 285SW433.

932-88½-New. In the absence of coun-

terclaim in a suit to have a conveyance declared an advancement, defendant's claim for rent and services rendered to the grantor after the conveyance cannot be considered. 229**Ky**476, 17**SW(2d)** 407.

932–88½–New. Defendant, in an action to have a conveyance adjudged an advancement, need not plead that the consideration was wrongly expressed as love and affection instead of services rendered, because of oversight, fraud or mutual mistake. 229**Ky**476, 17**SW(2d)** 407.

933–96 81**Colo** 73, 253**P**1059; 204 **Iowa** 1237, 212**NW**306; 205 **Iowa**100, 215**NW** 595; 204 **Iowa**1331, 217**NW**245; 217**Ky** 716, 290**SW**718; 168**La**534, 122**S**718; 313**Mo** 514, 285**SW**433; 217**MoA**354, 266 **SW**992; 144**Va**816, 130**SE**771; 148**Va** 860, 139**SE**490. [a] (1) 148**Va**860, 139 **SE**490. (2) 81**Colo** 73, 253**P**1059. (3) Presumption is one of law and based on supposed intention or desire of ancestor that any inequalities in division of whole estate shall be corrected as far as practicable. 144**Va**816, 130**SE** 771. [b] **In Illinois.**–254 **IllA**484.

933–98 204 **Iowa**1331, 217**NW**245.

934–99 175**Ark**763, 300**SW**437; 145 **Miss**87, 110**S**218, 49**ALR**565.

934–1 157**Tenn**183, 15**SW(2d)**746.

934–12 81**Colo** 73, 253**P**1059.

935–14 204 **Iowa**1331, 217**NW**245.

935–18 172**Ark**932, 290**SW**966; 81**Colo** 73, 253**P**1059; 313**Mo** 514, 285**SW**433; 148**Va**860, 139**SE**490. [a] 81**Colo** 73, 253**P**1059.

935–18½–New. The burden of proving that an ancestor has not made an equal division of property between the children prior to his death is upon the heirs asserting it. **TexCivA** 283**SW**288.

935–18⅓–New. Presumption is rebuttable. 205 **Iowa**100, 215**NW**595.

935–19 211**Ky**16, 276**SW**989; 235**Ky** 741, 32**SW(2d)**327.

935–20 212**Ala**554, 103**S**574 (party denying heir's right to share must prove that advancement equals or exceeds his distributive share).

935–22 204 **Iowa**1237, 212**NW**306; 205 **Iowa**100, 215**NW**595; 229**Ky**476, 17**SW (2d)**407; 217**MoA**354, 266**SW**992.

935–23 204 **Iowa**1237, 212**NW**306.

935–25 **TexCivA** 12**SW(2d)**1091.

935–25½–New. Children rendering services to their father, who thereafter agreed to compensate them therefor and executed a deed to them in consideration thereof, are not required to show particular facts clearly raising a presumption of an implied contract therefor. 229**Ky**476, 17**SW(2d)**407.

935–27 81**Colo** 73, 253**P**1059; 148**Va** 860, 139**SE**490.

936–31 37 **OklACR**551.

936–32 323 **Ill** 269, 154**NE**101.

936–33 148**Va**860, 139**SE**490.

937–40 217**MoA**354, 266**SW**992.

937–44 211**Ky**16, 276**SW**989 (where donee is not present at time of declaration).

937–44½–New. Declaration of donor as to value of advancement is not admissible in absence of evidence that donee was present at the time. 211**Ky**16, 276 **SW**989.

939–66 81**Colo** 73, 253**P**1059; 162**La** 512, 10**S**738.

939–72 323 **Ill** 269, 154**NE**101; 217**MoA** 354, 266**SW**992; **SD** 226**NW**740; **Tex CivA** 297**SW**888; 144**Va**816, 130**SE**771 (declarations of donor).

939–73 214**Ala**10, 106**S**188; 81**Colo** 73, 253**P**1059; 211**Ky**16, 276**SW**989; 235 **Ky**741, 32**SW(2d)**327.

939–73½–New. or was insufficient to show want of consideration for conveyance of expectancy, **TexCivA** 12**SW(2d)** 1091.

939–74 172**Ark**932, 290**SW**966; 205 **Iowa**100, 215**NW**595; 204 **Iowa**1331, 217 **NW**245; 207 **Iowa**183, 222**NW**365; 148 **Va**860, 139**SE**490.

939–75 81**Colo** 73, 253**P**1059; 204 **Iowa** 1237, 212**NW**306; 229**Ky**476, 17**SW(2d)** 407. [a] **Statement of husband that second wife would get her part of estate,** which would be more than he had given other children, and at her death would go to her son, does not rebut presumption that gifts to other children were advancements. 144**Va**816, 130**SE**771. [b] **That children worked with father and aided in building up his fortune** has no bearing to rebut presumption that gifts to them were advancements. 144 **Va**816, 130**SE**771. [c] **Age and dependence of infant son** coupled with fact that children who received gifts had worked with father in accumulating estate held not to rebut presumption that gifts were advancements. 144**Va**816, 130**SE**771.

939–75½–New. or was insufficient to establish that advances to a child were loans to be repaid, 217**Ky**716, 290**SW** 718.

939–77½–New. Defendant, in an action to have a conveyance declared an advancement, must establish beyond doubt his claim that the consideration was wrongly expressed in the deed as love and affection, instead of services rendered, because of oversight, fraud or mutual mistake. 229**Ky**476, 17**SW(2d)**407.

939–77⅓–New. It is not sufficient for such purpose to show that services which might have answered as consideration were rendered but it must be shown that the parties intended when the conveyance was executed that the services should be thus satisfied. 229 **Ky**476, 17**SW(2d)**407.

940–85½–New. In Pennsylvania an appeal from a decree of distribution sustaining exceptions to a previous decree must be taken within three months. 290 **Pa**537, 139**A**198.

940–92 213**Ala**586, 106**S**140; 33**Ariz** 288, 264**P**103; 179**Ark**543, 16**SW(2d)** 996, 65**ALR**466; 207**Cal** 556, 279**P**655; 77**Colo** 574, 238**P**58, 59 [citCJ]; 247 **IllA** 393; 204 **Iowa**927, 216**NW**55; 207 **Iowa** 1074, 224**NW**82; 123**Kan**329, 254**P**1040; 168**La**608, 122**S**866; 131 **Okl** 1, 267**P**650; 298**Pa**235, 148**A**83 (heirs cannot repudiate decedent's note). See also **Cal** 273 **P**822. But see 226**AppDiv**153, 234**NYS** 541.

940–93 **CalA** 291**P**871; 329 **Ill** 93, 160 **NE**172.

942–19 247 **IllA**393; **TexCivA** 274**SW** 292; 151**Va**156, 144**SE**447. [a] **Decedent's debt as consideration** is insufficient to support heir's liability. 198**NC**14, 150**SE**668.

942–20 36**F(2d)**183. But see **TexCivA** 274**SW**292 (heirs do not become liable for value of property received unless they have converted it).

943–28⅓–New. Where an agreement of intestate to pay for one half interest in real estate was never carried out, the owner, not suing for specific performance, is not entitled to recover such sum against the heirs. **TexCivA** 283 **SW**206.

944–38 32**PortoRico** 540. [b] (2) Renunciation can be impugned only when tainted by any of defects which annul consent, or when unknown will appears. 32**PortoRico** 540. (3) Failure to renounce succession does not make children of deceased mortgagor liable on mortgage. 169**La**421, 125**S**435(3dcase). [f] (5) Acceptance not presumed from previous successful suit by creditor against heirs to collect debt of ancestor, heirs not having answered complaint or appeared in action and there being no showing that they were in possession of estate. 32**PortoRico** 540. [g] **In absence of acceptance,** recourse lies only against ancestor's estate. 32**Porto Rico** 540.

944–39 158**La**822, 104**S**728. [d] **Liability for obligations of ancestor.**–158**La** 822, 104**S**728.

944–42 [a] **Acceptance or renunciation cannot be impugned** or revoked except for defects which annul consent, or when unknown will appears. 32**PortoRico** 540 (Civ. Code § 963).

944–43 169**La**421, 125**S**435(3dcase) (failure to claim benefit of inventory imposes no liability on children).

944–47 [a] 32**PortoRico** 540.

944–50 109**Conn**529, 147**A**181. [a] **Realty not devised to be sold for payment of debts and charges** can only be subjected in invitum in equity, after personalty is exhausted, at suit of creditors or legatees, executrix having no power over it. 144**Va**727, 130**SE** 794. [b] **Right to have personal estate charged** with amount of mortgages on property where widow is surviving tenant by entireties. **Md** 148**A**444.

945–52 See also 167**La**293, 119**S**54 (property uncovered from simulated sale at suit of forced heirs, after its return to succession is subject to payment of debts of succession).

945–59 214**Ky**267, 283**SW**111.

945–60 204 **Iowa**610, 215**NW**726.

946–79½–New. Where deceased contracts to make a will in favor of plaintiffs, heirs hold land in trust for plaintiffs. 216**Ala**232, 113**S**40.

947–90 81**CalA**786, 254**P**684; 123**Kan** 329, 254**P**1040; **TexCivA** 24**SW(2d)**440.

947–97½–New. Borough taxes have no preference in the distribution of a personal estate, 8**PaDist&Co** 70.

947–97⅓–New. and the mortgagor creditor who has paid taxes cannot claim preference. 8**PaDist&Co** 70.

947–99 123**Kan**329, 254**P**1040.

947–2 **NJ** 144**A**619.

947–2½–New. The rule that an heir or devisee may have exoneration of a mortgage debt from, and out of, the estate of the deceased mortgagor does not apply where the widow of the deceased mortgagor and such mortgagor held the lands as husband and wife by an estate in entirety. **NJ** 144**A**619.

948–8 100**NJEq**196, 134**A**822.

948–13 **TexCivA** 280**SW**315.

949–19 But see **CalA** 291**P**871.

949–22½–New. Although the lien of a judgment did not attach during the debtor's life because it was not properly abstracted, recorded, or indexed, property in the hands of heirs is chargeable with its payment. **TexCivA** 274 **SW**292.

949–30 See also 94**PaSuper**216.

950–41 32**F(2d)**257 [aff 32**F(2d)**260].

950–44 329 **Ill** 30, 160**NE**179.

950–47½–New. A covenant of warranty in a deed executed by an ancestor creates no personal liability against his heir. 131 **Okl** 1, 267**P**650.

951–62½–New. A reputed widow in possession is bound to redeem from tax sale, and her attempt thereafter to convey the property to the tax purchaser is in fraud of the heirs. 156**La**932, 101 **S**270.

952–75 See also 178**Ark**851, 12**SW(2d)** 785.

953–86 217**Ala**188, 115**S**182.

953–95½–New. Under the Ontario statute a conveyance by an heir at law or his assigns after the expiration of three years from the death of the intestate vests title free from liability for debts in a bona fide purchaser for value without notice. **Ont** [1929] 3**DomLR** 70.

953–7 [a] **Allotment to widow** for payment of debts without authorization of court, has been held void. 33**PortoRico** 172.

954–11 23**F(2d)**835, 837 [citCJ].

954–12 **MoA** 4**SW(2d)**856.

955–15½–New. Mortgagee may sue sole heir to foreclose mortgage after distribution of estate and discharge of administrators without presenting claim to latter or waiver of recourse against all other property of decedent, 76**Mont** 143, 245**P**529.

955–15⅓–New. but in such case he cannot recover any deficiency, 76**Mont**143, 245**P**529.

955–15¼–New. and any overplus of sum realized from sale over debt must be paid to heir entitled to residue of estate. 76**Mont**143, 245**P**529.

955–17 **TexCivA** 22**SW(2d)**1100.

955–18 13**LaA**309, 127**S**139.

955–18½–New. or creditor alleges that there is no administration or necessity therefor, **TexCivA** 275**SW**156.

955–22½–New. Claimant, appearing and asserting claims against an estate, is precluded from suing distributees on claims not then presented. 223**Ky**561, 4**SW(2d)**380.

955–30 23**F(2d)**835, 837 [citCJ].

956–39½–New. A creditor of a decedent has no such lien on the decedent's property as can be foreclosed in court in the usual way. **TexCivA** 274**SW**292.

956–39⅓–New. A notice to defend served on an heir of a deceased warrantor

pursuant to a statute providing a special procedure for recovery on warranties against persons bound does not authorize entry of judgment against the heir for damages without pleading and service of summons. 131 **Okl** 1, 267 P650.

957-44 [b] **Period for bringing suit for separation of patrimony** under statute commences from date of acceptance by heirs of succession. 13**LaA**309, 127S139.

957-45 [b] (2) Statute limiting time for presentation of claims against estate has been held not to limit right to enforce claim against heirs and devisees in event of insufficiency of personalty to pay debts. 241 **IllA**216.

958-79½-New. The district court has jurisdiction where there was no administration or need thereof to adjudicate the validity of a judgment which was not a lien during the debtor's lifetime because not properly abstracted, recorded, or indexed, and to order a sale of property to satisfy it. **TexCivA** 274**SW** 292.

959-89 105**WVa**29, 141**SE**444.

959-99 **TexCivA** 274**SW**292 (action to foreclose judgment lien).

960-14 [a] **Complaint held sufficient.**–135**Misc**626, 238**NYS**147.

960-16 **TexCivA** 275**SW**156 (allegation that there was no administration nor necessity therefor).

960-17 **TexCivA** 21**SW(2d)**1094 (that there was no administration or necessity therefor).

962-54 321 **Ill** 612, 152**NE**539, 47**ALR** 891.

962-57 158**La**1078, 105S70 (claim against heirs of father for services in managing store for father).

962-57½-New. In an action by one joint owner of land against the widow and heirs of the other joint owner to recover one half of the proceeds of sale of the land made by the deceased joint owner, evidence has been held insufficient to sustain a plea of payment. 168 **La**608, 122S866.

963-81 See also 228**Ky**390, 15**SW(2d)** 251.

964-87½-New. Where an heir of a deceased debtor expended money for improvements, enhancing the value of the property, and the property, on sale to satisfy a judgment against decedent, fails to bring enough to satisfy the judgment and to reimburse the heir, it is the duty of the court to prorate the proceeds between the claims. **TexCivA** 274**SW** 292.

964-94 214**Ky**267, 283**SW**111; **RI** 136 **A**248. [b] **Liability of descendants of deceased cohelr.**–214**Ky**267, 283**SW**111,

965-5 **SD** 221**NW**257.

965-14½-New. Restrictions upon the seizure of an unascertained interest of an heir or legatee are not for the benefit of the debtor heir, but to guard the rights of others having a superior right to the estate of the deceased. **SD** 221 **NW**257.

965-14⅓-New. A creditor of an heir cannot reach the latter's apparent interest in his ancestor's land as against a grantee under the ancestor's prior unrecorded deed. 159**Tenn**254, 17**SW(2d)** 917, 65**ALR**357.

966-27 **SD** 226**NW**740.

967-34½-New. In Kansas an heir's debt to estate unpaid at final settlement is equitable lien on his share of real property superior to lien of judgment of heir's creditors, and after settlement interests of other heirs in real property are paramount to such judgment lien. 120**Kan**650, 244**P**1061.

967-34⅓-New. Where heir receives personal property from estate, agreeing to relinquish his interest in real property of estate in consideration thereof, he becomes indebted to estate, and judgment lien of his creditor is inferior to interest of other heirs in such real property. 120**Kan**650, 244**P**1061.

DESCRIBE

968-2 99**NJEq**619, 100**NJEq**569, 133**A** 516, 517 [quotCJ].

963-3 99**NJEq**619, 100**NJEq**569, 133**A** 516, 517 [quotCJ].

968-4 99**NJEq**619, 100**NJEq**569, 133**A** 516, 517 [quotCJ].

968-5 99**NJEq**619, 100**NJEq**569, 133**A** 516, 517 [quotCJ].

968-6 99**NJEq**619, 100**NJEq**569, 133**A** 516, 517 [quotCJ].

968-7 99**NJEq**619, 100**NJEq**569, 133**A** 516, 517 [quotCJ].

DESCRIPTION

968-10 **Utah** 280**P**722.

DESERTION

969-43 103**TexCr**428, 280**SW**1069, 1070 [citCJ]; 103**TexCr**428, 280**SW**1069.

DESIGNATE

971-90 Webster Int. D. [quot 77**Mont** 498, 251**P**548].

971-94 Webster Int. D. [quot 77**Mont** 498, 251**P**548].

971-97 Webster Int. D. [quot 77**Mont** 498, 251**P**548].

971-98 Webster Int. D. [quot 77**Mont** 498, 251**P**548].

971-5 315**Mo**405, 285**SW**1007.

DESIRE

973-36 101**NJEq**252, 137**A**582, 52**ALR** 965.

973-42½-New. ; to empower or authorize. 218**Ky**267, 291**SW**399.

DESLINDE

973-52 44**Philippine**221. [a] **In Philippines.**–44**Philippine**221.

DESTIERRO

974-71 45**Philippine**84.

974-74 [a] **Inflicted in cases of homicide of adulterous wife, under Pen. Code** art. 423. 45**Philippine**84.

DESTINATION

974-82 88**PaSuper**546, 549 [citCJ].

DESTROY

975-4 10**PaDist&Co** 339.

DETECTIVES

980-20 196**Wis**622, 220**NW**214.

980-27 9**PaDist&Co** 74. See also 10**Pa Dist&Co** 654.

980-29 7**PaDist&Co** 707.

980-29½-New. The business of private detectives should be restricted to persons whose characters are clean and above suspicion. 8**PaDist&Co** 795.

980-29⅓-New. One who has been indicted for operating an automobile while intoxicated, and arrested on other charges, will be refused a license, although acquitted and discharged. 8**PaDist&Co** 795.

980-30 6**PaDist&Co** 603; 9**PaDist&Co** 74.

980-30½-New. **Court has discretion in** granting license and may reject application when no necessity for granting it. 6**PaDist&Co** 603.

981-40 7**PaDist&Co** 707.

982-53 [b] **Unlicensed detective cannot** recover for services performed. 196**Wis** 622, 220**NW**214.

982-55 238**Mich**242, 213**NW**158.

DETERMINATION

984-24 [f] **Review not synonymous.** 154**Tenn**432, 289**SW**497.

DETINUE

990-1 99**WVa**539, 130**SE**137, 138, 48 **ALR**967 [citCJ].

990-6 Contra **TexCommnA** 272**SW**1105.

993-59 215**Ala**460, 110S904; 220**Ala**86, 124S234(2dcase); 220**Ala**2, 127S241.

995-90 220**Ala**2, 127S241.

997-25 215**Ala**460, 110S904.

997-32 220**Ala**86, 124S234(2dcase).

998-41 76**Mont**38, 245**P**257.

998-43 76**Mont**38, 245**P**257, 259 [quot CJ].

999-53 219**Ala**372, 122S320.

1001-72 [b] **Such person must defend** suit himself. 21**AlaA**91, 105S725.

1001-73½-New. **Such transfer is protected by such right as person through whom transferor obtained possession** had. 21**AlaA**91, 105S725.

1001-77 195**Cal**27, 231**P**340.

1004-4 93**Fla**342, 112S75.

1004-7 [d] **Lienor in possession may defeat recovery** by one who does not show superior claim and right to immediate possession. 220**Ala**2, 127S241.

1005-11 145**Va**199, 133**SE**881, 882 [quotCJ].

1005-12 145**Va**199, 133**SE**881, 882 [quotCJ].

1005-17 21**AlaA**91, 105S725.

1005-20 213**Ala**156, 104S277.

1005-23 But see 148**Va**601, 139**SE**288.

1006-37½-New. The affidavit, required as a prerequisite to the indorsement on a summons by a clerk of a writ of seizure, need not within itself disclose that it is made by plaintiff, his agent, or attorney. 23**AlaA**118, 121S690(2dcase).

1006-46 [a] (2) Statutory affidavit unnecessary where defendant's possession is not disturbed. 23**AlaA**285, 124S397.

1008-66 23**AlaA**505, 127S912(2dcase).

1009-86 [d] **Plaintiff need not plead** source of his ownership. 195**Cal** 27, 231 P340.

1009-98 216**Ala**321, 113S495. [c] (7) Household furniture, tools, and chickens. 20**AlaA**609, 104S445. (8) Motor car by motor number and names of maker and steering wheel. 216**Ala**321, 113S495.

1010-9 148**Va**601, 139**SE**288, 290. [cit Cyc].

1011-17 99**WVa**539, 130**SE**137, 48**ALR** 967 (retention of goods by buyer on seller's complete breach of warranty of fitness).

1012-36½-New. The plea conclusively admits possession at the time of suit, 219**Ala**372, 122S320.

1012-36⅓-New. and failure of plaintiff to object to testimony showing defendant's lack of possession does not change the rule. 219**Ala**372, 122S320.

1012-46 23**AlaA**286, 124S394(2dcase) (replication alleging settlement).

1012-48½-New. Where the replication presents a bar to defendant's plea of non detinet and a suggestion that the mortgage debt be ascertained, although it is imperfectly pleaded, a general demurrer thereto cannot be sustained. 23 **AlaA**286, 124S394(2dcase).

1012-49 99**WVa**539, 130**SE**137, 48**ALR** 967.

1013-54½-New. Title of intervener is immaterial issue where plaintiff fails to show title in himself. **TexCivA** 4 **SW(2d)**595.

1013-55 21**AlaA**91, 105S725. [b] **Title in third person** may be proved by defendant to defeat claim, under general issue. 21**AlaA**91, 105S725. [c] **Superior title of sheriff or purchaser from sheriff** may be proved to defeat claim. 21**AlaA**91, 105S725.

1013-56 [a] (1) 215**Ala**473, 110S907; 220**Ala**155, 124S208 (where replevin bond given).

1013-63 [b] (2) Manner in which plaintiff lost possession of property held immaterial under pleading. 191**NC**297, 131**SE**735.

1015-80 21**AlaA**276, 107S327; **TexCivA** 48**W(2d)**595. [b] **Plaintiff does not have burden of overcoming effect of illegal evidence.**–**Ala** 130S202(2d case).

1015-88 21**AlaA**276, 107S327.

1015-96 216**Ala**321, 113S495.

1015-97 [a] (5) That plaintiff knew person claimed by defendant to have been owner and possessor of horse taken from defendant's possession is admissible though not that such person was known as horse swapper. 213**Ala** 695, 106S37.

1015-98 214**Ala**4, 106S239; 21**AlaA**412, 109S168. [a] (5) Evidence of judgment for plaintiff and execution sale at which defendant was purchaser is admissible on issue. 214**Ala**4, 106S239.

1016-1 [a] (2) Evidence of lien is relevant on issue whether purchaser under landlord's attachment suit for rent had superior title to plaintiff claiming under tenant. 21**AlaA**91, 105S725.

1016-2½-New. , or identity of property. 216**Ala**321, 113S495.

1016-3 [a] (4) Other evidence held sufficient. 214**Ala**425, 108S239; 215**Ala** 225, 109S873; 191**NC**297, 131**SE**735. [b] (2) **To establish that defendants**

were wrongdoers, authorizing recovery on prior possession only. 220Ala86, 124 S234(2dcase).

1016-3½-New. Plaintiff's failure to produce a ring band from which he claimed a diamond was lost has been held immaterial except as affecting credibility. 191NC297, 131SE735.

1016-5 216Ala321, 113S495. [c] 216 Ala321, 113S495. [f] **Possession and title.**-(1) 220Ala155, 124S208. [g] **Title is question for jury.**-21AlaA412, 109S 168.

1017-6 21AlaA276, 107S327.

1017-11 214Ala433, 108S248.

1017-17 20AlaA609, 104S445 (sufficient).

1017-20½-New. A verdict for plaintiff, in an action by several plaintiffs, has been held too uncertain to warrant judgment for one plaintiff. 148Va601, 139SE288.

1017-21 216Ala321, 113S495. [a] (3) Finding held sufficient to fix alternative value. 20AlaA609, 104S445.

1018-22 214Ala433, 108S248.

1018-28 148Va601, 139SE288, 290 [cit Cyc].

1018-29 148Va601, 139SE288, 290 [cit Cyc].

1021-66 212Ala655, 103S839; 215Ala 225, 109S873; 215Ala590, 112S194; 21 AlaA80, 105S430; 195Cal 27, 231P340. But see 216Ala74, 112S342. [a] 215 Ala225, 109S873. [f] **Provision for issuance of execution** directed to clerk against obligors in replevy bond if property involved in judgment is not delivered in thirty days is proper. 20AlaA 614, 104S446.

1021-69 20AlaA609, 104S445 (description held sufficient).

1021-72 20AlaA609, 104S445 (sufficient); 20AlaA614, 104S446.

1021-74 21AlaA412, 109S168.

1021-76 214Ala370, 108S13; 21AlaA 80, 105S430. [b] **Where neither pleading nor verdict fixes value separately** entry of judgment for gross valuation is erroneous. 148Va601, 139SE288.

1021-77 21AlaA80, 105S430 (judgment reversed). Contra 214Ala370, 108S13.

1023-11 [a] 216Ala74, 112S342. [f] **In Virginia.**-148Va601, 139SE288.

1023-19 215Ala590, 112S194.

1024-25 215Ala225, 109S873.

1025-40½-New. nor for expenses of plaintiff in storing property pending trial, where at institution of action he gives bond and takes possession of the property, 99WVa665, 129SE703, 43 ALR89.

1025-42½-New. Damages for detention of property under replevin bond covers loss by deterioration in value, up to time of trial and period between date of bond and date of trial. 220Ala413, 125S649.

DETRIMENT

1030-7 117 Okl 131, 245P852; 124 Okl 106, 254P34; 129 Okl 28, 263P448; 37 OklACR543. [a] 129 Okl 28, 263P448.

DEVASTAVIT

1031-20½-New. A gift to an executor of part of testator's estate which should have gone to the payment of creditors of the estate. [1927] CanSC 389, [1927] 2DomLR1049.

DEVIATION

1032-40 272US718, 47SCt261, 71L ed 491.

DEVICE

1033-50 [b] **"Device for taking game."** -131Misc553, 228NYS231.

DÉVOLVE

1034-84 121 Okl 83, 248P569, 573 [cit CJ&Cyc].

DIKE

1038-10 317 Ill 92, 147NE479.

1038-10½-New. A mound thrown up to prevent low lands from being inundated by the sea or a river; a ditch; channel for water made by digging; a bank, as of earth, thrown up to form a barrier line of demarkation or the like especially an embankment to prevent inundation; a levee. 317 Ill 92, 147NE 479.

1038-10¼-New. "An embankment thrown up usually to retain the waters of a stream or to protect low lands from inundation; a dam; a bank; levee." Standard D. [quot 317 Ill 92, 147NE479, 481].

DILIGENCE

1039-28 NJ 129A422 (ordinary care).

1040-58 47Fed614, 620; 134Fed546, 549, 67CCA470; 140Fed801, 802, 72CCA 213; 193Fed867, 872, 113CCA653; 1F (2d)233; 1F(2d)964; 22Conn213, 220, 221, 56AmD397; 77Conn688, 60A640, 641, 69LRA561, 2AnnCas343; 12Del 3, 6, 30A639; 2GaA470; 6 IndT534, 93SW341, 344; 125 Iowa729, 733, 101NW649; 90 Me46, 48, 37A328; 129Mich475, 89NW 349, 350; 46Minn183, 184, 48NW780, 24AmSR218; 120MoA24, 29, 96SW310; NJ 130A435; 25 OhA197, 158NE282; 103 Okl 5, 229P165; 59Pa167, 171, 172; 51Philippine287; TexCivA 662, 663, 73 SW857; 49TexCivA409, 108SW732, 734; TexCivA 219SW291; TexCivA 254 SW1117; TexCivA 269SW163; 118Va 89, 86SE852; 32Wash513, 517, 73P495; 48WVa453, 455, 37SE617; 125Wis102, 103NW464, 467. [a] **"Ordinary care" synonymous.**-119Ky862, 84SW1154, 1156, 27KyL316, 7AnnCas1126.

1041-61 25 OhA197, 158NE282 (similar definition).

DIP

1042-3 90Fla582, 107S354.

DIPLOMA

1042-7 [b] See also 32PortoRico 159.

DIRECT

1043-14 289Pa13, 136A856.

1043-14½-New. approximate, 289Pa13, 136A856.

1043-15 289Pa13, 136A856. [a] 289Pa 13, 136A856.

1043-20 [a], **Crooked or zigzag route** is not "direct" line. TexCivA 32SW (2d)271.

1043-38 112 Okl 180, 240P321.

DIRECTLY

1045-15 142 Okl 208, 286P7.

DIRECTLY CAUSED

1045-26½-New. Directly caused means "thereby caused," "proximate cause." 208Ky721, 271SW1074.

DISABILITY

1047-58 [a] **"Total disability."**-136SC 90, 134SE224.

DISCOUNT

1051-62 44Philippine126.

1051-64½-New. In a discount, interest is deducted in advance, while in a loan, interest is taken at the expiration of a credit. 44Philippine126.

1051-64¼-New. A discount is always on double-name paper, while a loan is generally on single-name paper. 44 Philippine126.

DISCOVERY

1057-1 92Fla246, 109S577; 292Pa244, 141A47.

1057-3 92Fla246, 109S577.

1057-5 157Md378, 146A271.

1057-6 92Fla246, 109S577.

1057-9 156Miss795, 126S838.

1057-10 156Miss795, 126S838. See 26 F(2d)985.

1058-12 TexCivA 25SW(2d)923.

1058-13 297Pa462, 147A93; 11PaDist &Co 117.

1058-15 36F(2d)431. [b] 283Pa488, 129A563. [c] **Examination for discovery of defendant** may be ordered though plaintiff has been asked for particulars which he has not given. Alta [1930] 2 DomLR759.

1058-17 12F(2d)682.

1058-18 152Miss512, 120S193(1stcase) (does not lie to ascertain value).

1059-31 297Pa462, 147A93.

1059-32 297Pa462, 147A93 (requiring corporation to disclose names of its agents).

1059-36 12F(2d)682; 155Tenn605, 296 SW1, 53ALR812. [d] (2) Bill to enjoin action at law to recover damages and to require accounting in equity will not be entertained as bill of discovery. 155Tenn605, 296SW1, 53ALR812.

1059-43½-New. The bill will not lie where plaintiff is guilty of inexcusable laches prejudicial to defendant. 99 NJEq369, 131A897.

1059-44 47 Idaho195, 273P952.

1060-56 [a] (5) NJCh 150A328; TexCivA 25SW(2d)923. (31) As a means of disclosing fraud. 12PortoRicoFed5. (32) In infringement suit, even where prayer for treble damages. 17F(2d) 934.

1060-57 [a] (12) In New York discovery in aid of another action no longer survives under Pract. Act § 345. 245 NY215, 156NE670. (13) In aid of action to recover profits from sale of goods converted by defendant. 245NY215, 156NE670.

1061-58 30F(2d)137; 9PaDist&Co 568.

1062-69 43F(2d)1000; Ala 128S443; 150Md397, 133A134; 100NJEq234, 134 A867; 297Pa462, 147A93; TexCivA 25 SW(2d)923.

1062-71 153SC56, 150SE347, 66ALR 1264.

1062-76 150Md397, 133A134; 155Tenn 605, 296SW1, 53ALR812.

1063-78 12F(2d)682.

1063-79 12F(2d)682.

1063-80 12F(2d)682; 36F(2d)431.

1063-87 12F(2d)682.

1063-93 NJCh 147A785(2dcase).

1063-94 38F(2d)68.

1064-6 212Ala528, 103S470.

1064-7 297Pa462, 147A93. See also 11 PaDist&Co 442, 443 [citCJ].

1065-24½-New. [§ 14a] C½. **Verified Motion.** A verified motion for substituted service of a bill for discovery is a sufficient affidavit. 32F(2d)391.

1065-24¼-New. Service of subpœna of a bill for discovery on plaintiff's attorney without a court order, although bad, is not ground for dismissing the bill. 32F(2d)391.

1065-26½-New. Sufficiency of a bill depends on uniformity to general rules of equity pleading. 150Md397, 133A 134.

1065-26¼-New. Proceeding for discovery may be in court or at chambers. 249Mich246, 228NW689.

1066-38 150Md397, 133A134.

1066-39 36F(2d)431.

1067-50 29Hawaii702.

1067-52 156Miss795, 126S838.

1067-54 36F(2d)89.

1068-62 But see 107WVa205, 148SE7.

1069-66 49Philippine512.

1069-68 148Miss278, 114S482, 484 [cit CJ].

1069-71½-New. The court is not bound in passing on objections to assume that a perjured case will be brought in when the opportunity is open. 14F(2d)143.

1069-72 141Miss681, 105S482; 148Miss 640, 114S736.

1069-73 141Miss681, 105S482. [a] **Where bill embodies two equities,** as discovery and cancellation, but latter equity depends upon former, bill must also fail as bill for cancellation. 148 Miss640, 114S736.

1069-75 148Miss278, 114S482, 484 [cit CJ].

1070-85 But see 157Md378, 146A271.

1070-88 157Md378, 146A271 (complaint held sufficient for discovery and relief).

1070-92 213Ala556, 105S590; 150Md 397, 133A134.

1070-93 92Fla246, 109S577.

1070-94 213Ala556, 105S590; 92Fla 246, 109S577.

1071-98½-New. A bill for discovery is not fatally defective because waiving answer under oath, where the waiver does not relate to interrogatories seeking discovery propounded by complainant. 92Fla246, 109S577.

1072-28½-New. Difficulty in securing the relief prayed for is no ground for dismissal of the bill of complaint. NJ 146A211.

1073-44½-New. A bill for discovery and relief is not demurrable as praying for relief obtainable in a suit at law.

150Md397, 133A134.

1074–68 297Pa462, 147A93.

1075–85½–New. Failure of defendant stockholders' main action for discovery against a corporation and its stockholders to allege the amount of property which each stockholder received from the corporation does not render the answer demurrable where the answer alleges that defendants received no property from the corporation. 218Ky93, 290SW1061.

1075–85¾–New. An answer by reason of inherent unreliability and absence of verification may not constitute an adequate defense. 150Md397, 133A134.

1075–85¼–New. Answers evasive, equivocal, and unverified are insufficient. 150Md397, 133A134.

1075–87½–New. Plaintiff cannot compel defendant to supply the names of persons having knowledge of matters pleaded in defense. 34F(2d)79(2dcase).

1076–6 But see 141Miss681, 105S482.

1076–18 203 Iowa1277, 212NW391, 394 [citCJperMorling,J].

1077–46 238Mich39, 213NW448.

1077–47 [a] **Liability for increased damages** is not penalty. 17F(2d)934.

1078–57 150Md397, 133A134.

1078–59 203 Iowa1277, 212NW391, 394 [citCJperMorling,J].

1078–59½–New. A bill solely for discovery will be dismissed where facts upon which discovery is sought would tend to incriminate defendant. 238Mich 39, 213NW448.

1078–59¾–New. After filing an insufficient answer, defendant is not prejudiced by taking of his oral testimony. 150Md397, 133A134.

1078–59¼–New. Equity will not grant two orders for discovery of the same facts in answer to the same interrogatories. TexCivA 25SW(2d)923.

1078–62 17F(2d)490. [a] **Defendant may file interrogatories at any time** with leave of court. 36F(2d)89.

1078–63 17F(2d)490.

1078–64 17F(2d)490.

1079–91 150Md397, 133A134.

1079–95 17F(2d)490.

1079–96 17F(2d)490.

1079–97 17F(2d)490.

1079–1½–New. , or where the document is purely hearsay, and not the only or best evidence. 17F(2d)490.

1080–2 17F(2d)490.

1080–12½–New. Proceedings of this nature are separate from the examination of parties and witnesses, under statute. 221AppDiv420, 223NYS184.

1080–13 5PaDist&Co 665.

1081–24 42F(2d)814.

1081–26 17F(2d)490.

1081–27 17F(2d)490.

1081–33 See also 21SaskL291, [1926] 4 DomLR885, [1926] 3WestWkly494.

1081–34 127Misc165, 215NYS307; 128 Misc219, 219NYS124; 128Misc454, 219 NYS137; 130Misc566, 224NYS331. See also 134Misc71, 234NYS552. [f] **Nature of proceeding.**–51ND742, 200NW908. [g] **Statutes should be liberally construed.**–220AppDiv12, 221NYS63.

1081–35 203 Iowa1277, 212NW391.

1082–39 222AppDiv767, 225NYS481; 130Misc767, 225NYS779 (including surrogate's court); 229AppDiv16, 240NYS 623.

1082–39½–New. Under Practice Act, right to examine is greatly liberalized. 214AppDiv306, 212NYS167.

1082–39⅓–New. Where testimony of plaintiff cannot be material or necessary to establishment of defendant's affirmative defense, he should not be examined. 214AppDiv846, 211NYS769.

1082–39¼–New. A defendant is not entitled to examine in regard to immaterial 214AppDiv846, 211NYS769.

1082–39⅕–New. and unnecessary matters specified in order to show cause. 214AppDiv846, 211NYS769.

1082–39⅙–New. Court in its sound discretion, under Rules of Civ. Prac. § 124, may permit examination of adversary as to concealed facts material and necessary to prosecution, 214AppDiv306, 212 NYS167.

1082–39⅐–New. or defense of an action, 214AppDiv306, 212NYS167.

1082–39⅛–New. but not simply as to adversary's version of facts known to both. 214AppDiv306, 212NYS167.

1082–39⅑–New. Unlimited freedom in examination of adversary before trial was not intended by liberal interpretation of Civ. Prac. Act § 288 et seq. 214 AppDiv306, 212NYS167.

1082–39 1/10–New. A general examination before trial will not be granted in a libel action. 128Misc859, 220NYS306.

1082–39 1/11–New. An insurance company, setting up the defense of breach of warranty, may examine insured before trial. 220AppDiv21, 220NYS356.

1082–39 1/12–New. Examination of defendant respecting a matter of affirmative defense not covered by the complaint or admitted by the answer will be denied. 128Misc859, 220NYS306.

1082–39 1/13–New. A foreign corporation, by permitting the manager of a local office to testify on examination before trial, has been held not to have waived the right to object to a change in the nature of the examination. 128Misc859, 220NYS306.

1082–39¼–New. Power to allow examination before trial is plenary but will be exercised generally where examining party has affirmative of issue. 245NYS 427.

1082–40 127Misc455, 215NYS773. [b] **In Saskatchewan.**–[1928] 2DomLR150.

1082–40½–New. Party not having affirmative of issue held entitled to examination. 245NYS427.

1082–40⅓–New. Only party having affirmative of issue is entitled to examination generally. 245NYS427.

1082–41 [c] **In New York.**–214AppDiv 522, 212NYS386. (2) All parties are subject to examination before trial. 128 Misc861, 220NYS430. [d] **To justify taking deposition of persons not party to action,** under Civil Practice Act, where he is not without the state and does not reside more than one hundred miles from place of trial or is not so sick as to afford reasonable ground for belief he will not be able to attend trial, it must appear that other special circumstances render it proper that his deposition should be taken. 216AppDiv510, 215 NYS532.

1082–45 NJ 140A439 (administrator); 133Misc599, 233NYS412. [c] **Administrator cannot be compelled to testify** at examination before trial as to transactions with, or statements of, decedent, opening door to prove such transactions or statements. NJ 140A439.

1082–48 196NC9, 144SE297. [a] (2) Foreign corporation plaintiff must submit to examination in state at instance of defendant on penalty of suit being stayed unless it does. 127Misc598, 217 NYS154. (3) And it is only where serious hardship would result to corporation by examination in state will defendant be relegated to applying for commission instead. 127Misc598, 217NYS 154. [e] (2) Order for examination of nonresident defendant within jurisdiction should not be granted except under special circumstances. Alta [1929] 4 DomLR1086(2dcase).

1083–50½–New. Statute permitting examination of adverse party or his assignor should be liberally construed. 214AppDiv846, 211NYS769; 220AppDiv 12, 221NYS63.

1083–50⅓–New. In an action brought by a minister in the name of the king, such minister cannot be examined for discovery. Alta [1927] 2DomLR69.

1083–50¼–New. Legatees and devisees served with notice of probate and nonresidents may be examined before trial of contested probate proceeding. 130 Misc767, 225NYS779.

1083–50⅕–New. Physician may be examined before trial in a malpractice case. 131Misc9, 225NYS667.

1083–50⅙–New. A proponent of a will is always a party to the probate proceeding, and becomes an adverse party on filing of objections so as to be subject to examination. 232NYS430; 33Misc256, 232NYS431; 133Misc598, 233NYS660.

1083–50⅐–New. Where witnesses sought to be examined by the contestant of a will are not shown to be subscribing witnesses to the will, nor produced by proponent for examination, such witnesses, including the executor, executor's wife, and residuary legatee, cannot be examined before trial as material and necessary witnesses. 133Misc599, 233 NYS412.

1083–50⅛–New. Defendant cannot complain of competent testimony taken by plaintiff on examination of codefendant who had defaulted, although he had interests claimed to be identical with plaintiff's. SD 225NW301.

1083–50⅑–New. In Alberta party asking examination of employee of adverse party has burden of showing employment. Alta [1930] 2DomLR696.

1083–51 129Misc571, 221NYS289. But see 153SC56, 150SE347, 66ALR1264.

1083–52 216AppDiv730, 214NYS450 (examination allowed where their testimony is material); 127Misc175, 215NYS 311; 221AppDiv420, 223NYS184; 138 Misc320, 244NYS661; 196NC93, 144SE 534(1stcase); 8BC368. [e] (2) 220App Div587, 222NYS43. (15) Civ. Prac. Act § 289 places claim agent in "managing employer" class of railroad company and may be examined before trial as party. 125Misc140, 210NYS241. (16) Motorman may be examined, as agent most familiar with conditions of brakes and appliances, to prove defective condition. 126Misc674, 214NYS475. (17) Street car motorman and conductor are "managing agent or employees" who may be examined. 216AppDiv730, 214 NYS450. (18) Claim agent of railroad is not person subject to examination as to operation, management, maintenance, and equipment of railroad. 216AppDiv 115, 214NYS579. (19) Railroad vice president and general manager is person subject to examination as to operation, maintenance, equipment, and management of railroad. 216AppDiv115, 214NYS579. (20) Applicant may examine officers as to matters on which he has burden of proof, but not as to other matters. 127Misc175, 215NYS311. (21) Civil Practice Act extends to one examining witness or party, corporate or otherwise, the right enjoyed on examination of corporation under Code of Civil Procedure. 220AppDiv21, 220NYS356. (22) Elevator operator held "agent" or employee of corporate employer. 135 Misc87, 236NYS409. [f] (2) Examination of officers and agents must be limited to affairs of corporation involved in litigation. 153SC56, 150SE347, 66ALR 1264.

1084–53 See also 214AppDiv846, 211 NYS769. [a] (4) Architect. [1930] 4 DomLR1030 (2dcase).

1084–56 Man [1928] 3DomLR709. [a] **Where president had no information regarding matters** general sales agent was conversant of, general sales agent and not president is proper person to be examined. 228AppDiv668, 238NYS305.

1084–59 127Misc175, 215NYS311.

1084–60 Sask [1928] 1DomLR696.

1084–69¼–New. By statute in New York the superintendent in charge is an employee who may be examined before trial. 217AppDiv202, 216NYS563.

1084–70 134Misc305, 235NYS121.

1084–71 See also 215AppDiv842, 213 NYS681.

1085–75–76½–New. [§ 54a] d½. **Municipal Corporation.** 129Misc177, 221 NYS40.

1085–77 196NC9, 144SE297.

1085–78 [a] (2) Time for appointment. Man [1928] 4DomLR568.

1085–81 140SC107, 138SE622, 623 [quotCJ].

1085–83 129Misc417, 220NYS768. [d] **Where court has power to require discovery in adoption proceeding,** it should only be exercised in proper case, appealing to discretion of court. 215App Div652, 211NYS875.

1085–91½–New. In New Brunswick, amendments made to rules in revision of 1927 restrict oral examination, but do not abolish it. [1929] 1DomLR106.

1085–92 196NC9, 144SE297. [b] **In negligence action an examination of**

railroad company may be had as to operating rules, its knowledge of character and condition of crossing, and speed of car involved, its running schedule, etc., under Civ. Pract. Act §§ 288, 289, 290, 125**Misc**140, 210**NYS**241.

1085-92½ 36**F(2d)**89.

1085-92½-New. In Saskatchewan it is error for trial judge to use as evidence portions of examination not put in at trial. [1930] 4**DomLR**54.

1085-93 73**Mont**297, 236**P**553.

1085-94 **Sask** [1928] 1**DomLR**696.

1086-97 **LaA** 128**S**546; 219**AppDiv**835, 220**NYS**650; 131**Misc**91, 225**NYS**634; 135**Misc**87, 236**NYS**409; 245**NYS**253; 140**SC**107, 138**SE**622.

1086-98 127**Misc**165, 215**NYS**307; 127 **Misc**175, 215**NYS**311; 215**NYS**857; 128 **Misc**454, 219**NYS**137; 219**AppDiv**835, 220**NYS**650; 221**AppDiv**420, 223**NYS** 184; 130**Misc**566, 224**NYS**331; 225**App Div**898, 233**NYS**391; 227**AppDiv**837, 237 **NYS**301. [a] (2) Indorser may examine payee on issue of usury where defense is that payee was usurer. 126**Misc** 34, 212**NYS**392 (in action on note against indorser). [b] **Where party has burden of establishing defense,** he may examine adverse party before trial as to issues raised. 127**Misc**165, 215**NYS**307. [c] **Knowledge of some matters by applicants** held not bar to examination order. 127**Misc**165, 215**NYS**307. [d] **Though action is one for libel,** defendant may examine plaintiff as to defenses. 130**Misc**566, 224**NYS**331.

1086-2 226**AppDiv**757, 234**NYS**1. But see 226**AppDiv**38, 234**NYS**154.

1086-3 130**Misc**566, 224**NYS**331 (public record); 229**AppDiv**16, 240**NYS**623. [a] **Reason for rule.**–Party may examine adverse party as matter contained in public record if only for purpose of eliciting admissions as to contents thereof, thereby simplifying trial. 130**Misc** 566, 224**NYS**331. [b] **That defendant offers to give plaintiff information required** without examination does not deprive plaintiff of right to examination. 224**AppDiv**651, 229**NYS**22.

1086-8 73**Mont**297, 236**P**553; 216 **AppDiv**19, 214**NYS**547 (as to matters of defense or counterclaim, notice of examination before trial is properly vacated); 219**AppDiv**835, 220**NYS**650.

1087-9 20**F(2d)**226; 61 **OntL**495, [1928] 1**DomLR**634.

1087-12 15**F(2d)**358; 221**AppDiv**870, 224**NYS**337.

1087-16 129**Misc**130, 220**NYS**522.

1087-18 215**AppDiv**724, 212**NYS**404 (plaintiff is not entitled to examination on issues as to which defendant has affirmative); 127**Misc**452, 217**NYS**233; 218**AppDiv**842, 219**NYS**27; 128**Misc**219, 219**NYS**124; 129**AppDiv**571, 221**NYS** 289; 221**AppDiv**870, 224**NYS**337; 130 **Misc**767, 225**NYS**779; 133**Misc**255, 232 **NYS**327; 225**AppDiv**823, 232**NYS**469; 133**Misc**666, 232**NYS**638; 225**AppDiv** 899, 233**NYS**180; 227**AppDiv**751, 237 **NYS**57; 137**Misc**163, 241**NYS**549. See also 216**AppDiv**113, 214**NYS**776. [e] **Denial of examination of plaintiff before trial held proper** as to issue of which he has affirmative. 216**AppDiv**113, 214 **NYS**776. [f] **In action for annulment of marriage** on ground of fraud, defendant having affirmative of defense of voluntary cohabitation with full knowledge of facts is entitled to examine plaintiff to establish defense. 224**AppDiv** 668, 230**NYS**147.

1087-19 226**AppDiv**767, 234**NYS**259; 134**Misc**71, 234**NYS**552.

1088-20 131**Misc**91, 225**NYS**634; 136 **Misc**146, 239**NYS**333. [a] **That plaintiff has personal knowledge** as to matters on which examination of defendant before trial is sought does not deprive her of right to examination. 131**Misc**91, 225 **NYS**634.

1088-23 133**Misc**253, 232**NYS**325 (2dcase); 133**Misc**255, 232**NYS**327; 226 **AppDiv**715, 233**NYS**400; 140**SC**107, 138 **SE**622.

1088-24 129**Misc**417, 220**NYS**768. [a] (2) Caused by defendant's dog, plaintiff is entitled to examine defendant before trial on issue of scienter. 129**Misc**417, 220**NYS**768.

1088-25 But see 228**AppDiv**819, 240 **NYS**444.

1088-27 See also 198**NC**699, 153**SE**260.

1088-27½-New. nor for the purpose of getting information to locate witnesses, 129**AppDiv**571, 221**NYS**289.

1088-30½-New. Discovery cannot be had as to immaterial matters. 134**Misc** 71, 234**NYS**552.

1088-30⅓-New. Examination before trial of the proponent of a will as an adverse party, under Civ. Pract. Act § 288, should be limited to the questions of fraud and undue influence which were raised by objections to probate. 133 **Misc**560, 232**NYS**430; 133**Misc**256, 232 **NYS**431; 133**Misc**598, 233**NYS**660.

1088-30¼-New. Examination before trial is not allowable in summary proceedings. 125**Misc**921, 212**NYS**284.

1088-30⅕-New. An examination is limited to issues on which applicant has the burden of proof, and is denied as to issues on which other party has affirmative burden. 127**Misc**165, 215**NYS** 307.

1088-30⅙-New. An examination on items of damage in an equitable action involving an accounting will be permitted after the merits of the application have been passed on. 128**Misc**147, 218**NYS**296.

1088-30⅐-New. Discovery must be in aid of general relief. 20**F(2d)**226.

1088-30⅛-New. Only facts pertinent to the issue may be obtained through discovery. 21**F(2d)**159.

1088-30⅑-New. No examination of plaintiff before trial in respect to a release executed by him is necessary or proper where the release is acknowledged and may be introduced in evidence without further proof. 223**AppDiv** 850, 228**NYS**379.

1088-30⅒-New. That money judgment in contract action is incidental to desire for personal vindication does not deprive plaintiff of right to examine before trial. 131**Misc**91, 225**NYS**634.

1088-30 1/11-New. The mere fact that plaintiff gave publicity to an action in a contract has been held not to defeat her right to examine defendant before trial. 131**Misc**91, 225**NYS**634.

1088-30 1/12-New. Where examination would involve accounting, examination before trial will not be allowed. 228 **AppDiv**837, 240**NYS**480.

1088-31 198**NC**699, 153**SE**260.

1088-42 216**NYS**912; 221**AppDiv**158, 222**NYS**3.

1090-47 223**AppDiv**337, 227**NYS**737; 136**Misc**761, 240**NYS**801 (right to accounting need not be first established). [c] **Surrogate's Court Act § 141,** referring to examination before objections have been filed, has no application to examination of proponent of will in probate proceedings before trial, which is governed by Civ. Pract. Act § 288. 133 **Misc**255, 232**NYS**327. [d] **Not violative of constitutional rights.**–Attorney-general is empowered to subpœna and examine party to civil proceeding after commencement thereof, and this is not violation of constitutional rights. 227 **AppDiv**734, 236**NYS**579.

1090-50 220**AppDiv**587, 222**NYS**43.

1091-59 But see 129**Misc**445, 222**NYS** 367.

1091-60 217**AppDiv**753, 216**NYS**418.

1091-62½-New. That contestant has filed objections to probate does not deprive him of right to examination of witnesses before trial. 130**Misc**767, 225 **NYS**779.

1091-69 [a] **After interlocutory judgment by default is signed,** defendant cannot examine plaintiff with view to subsequent assessment of damages. 62 **OntL**370, [1928] 3**DomLR**481.

1091-71½-New. Motion to vacate notice for examination before trial, made on notice and pleadings, goes to the merits of right to examination, where there was no affidavit or specification of irregularities. 126**Misc**316, 212**NYS**705.

1091-71⅓-New. Court being granted a motion to vacate notice for examination before trial cannot thereafter decide a similar motion, against a notice substantially similar, the other way. 126 **Misc**316, 212**NYS**705.

1091-71¼-New. The remedy of a party whose notice for examination has been unconditionally vacated for formal defects in papers is to move to resettle the order so that it reads without prejudice to serve another notice, 126**Misc**316, 212 **NYS**705.

1091-71⅕-New. or to apply for an order under Civ. Pract. Act § 292. 126 **Misc**316, 212**NYS**705.

1091-71⅙-New. [§ 59a] C½. **Actions and Proceedings in Which Authorized.** In New York oral examination of a party before trial cannot be had in arbitration proceedings. 127**Misc**452, 217**NYS** 233.

1091-72 218**AppDiv**732, 217**NYS**819. But see 226**AppDiv**717, 233**NYS**481. [a] **Rule and burden of proof are same where notice of examination** is challenged by motion to vacate as on application for order. 228**AppDiv**668, 238 **NYS**305.

1091-73 218**AppDiv**732, 217**NYS**819; 128**Misc**861, 220**NYS**430; **SD** 225**NW** 301; **TexCivA** 25**SW(2d)**923. See also 218**AppDiv**842, 219**NYS**27; 134**SC**183, 132**SE**171. [a] **Notice in compliance with statute** is sufficient. 128**Misc**861, 220**NYS**430. [b] **Officers of corporation not named in notice for order** need not appear for examination. 153**SC**56, 150**SE**347, 66**ALR**1264.

1091-74½-New. A notice of examination of defendants before trial and before joinder of issue, will be vacated as premature where the record fails to show issues. 129**Misc**445, 222**NYS**367.

1091-74⅓-New. The mere lapse of time between commencement of an action and notice of examination of a party before trial, in the absence of any other showing, is not sufficient reason for vacating notice on the ground of laches, 225**App Div**899, 233**NYS**180.

1091-74¼-New. but notice must be vacated when given before joinder of issue, and the record fails to show issues. 225**AppDiv**776, 232**NYS**126.

1091-75 [a] **In South Carolina.**–153**SC** 56, 150**SE**347, 66**ALR**1264.

1092-82 130**Misc**767, 225**NYS**779.

1092-83 190**NC**187, 129**SE**403.

1092-88 216**AppDiv**765, 214**NYS**674 (no cause stated).

1093-94 186**Wis**530, 203**NW**399.

1093-94½-New. The affidavit need not state facts sufficient to constitute a cause of action or show plaintiff's knowledge thereof. 186**Wis**530, 203**NW**399.

1093-94⅓-New. If affidavit does not negative existence of cause of action and complies with statute, discovery cannot be denied or suppressed. 186**Wis**530, 203**NW**399.

1093-94¼-New. On motion to examine defendant before trial the court does not pass on the merits. 131**Misc**91, 225 **NYS**634.

1093-95 216**AppDiv**19, 214**NYS**547 (as to matters not material, notice for examination before trial is properly vacated).

1093-97 216**AppDiv**19, 214**NYS**547 (as to matters not necessary, notice for examination before trial is properly vacated); 132**Misc**292, 229**NYS**488.

1094-1 196**NC**233, 145**SE**241.

1094-2 153**SC**56, 150**SE**347, 66**ALR**1264 (prima facie proof of material allegations is necessary). [b] (4) Reference, in notice for examination of witnesses before trial of contested probate, to attached exhibit stating facts is sufficient statement of matters on which examination is sought. 130**Misc**767, 225 **NYS**779. [c] **Where party's testimony** is not material or necessary, he should not be examined. 214**AppDiv**846, 211 **NYS**769.

1094-5 229**AppDiv**16. 240**NYS**623.

1094-8 130**Misc**588, 224**NYS**340. [a] **"Matters" to be examined.**–Under statute requiring "matters" upon which examination is sought to be stated, "matters" means "facts." 130**Misc**588. 224 **NYS**340. [b] **Rule applied more strictly where adverse party is to be examined** than where more witnesses are to be examined. 130**Misc**588, 224**NYS**340.

1095-12 132**Misc**531, 229**NYS**563.

1095-13 128**Misc**861, 220**NYS**430. But see 220**AppDiv**781, 222**NYS**140. But see

226AppDiv717, 233NYS481; 134Misc 800, 236NYS291. Contra 132Misc531, 229NYS563; 223AppDiv772, 227NYS 467; 224AppDiv759, 230NYS39. [b] **Fact that plaintiff was present at transactions on which he sought examination before trial** is held not conclusive that he is fully acquainted therewith. 128 Misc861, 220NYS430.

1095–15 But see 230AppDiv713, 243 NYS247.

1096–30 217AppDiv202, 216NYS568; 216NYS852. [b] **Plaintiff must establish right to accounting** by interlocutory judgment, before he may examine party before trial. 221AppDiv158, 222NYS3.

1096–31 217AppDiv202, 216NYS568.

1096–34 196NC233, 145SE241.

1096–40 216NYS852; 153SC56, 150SE 347, 66ALR1264.

1097–56 See also 128Misc861, 220NYS 430.

1097–61½–New. [§ 71a] 3½. **Hearing and Determination.** Party seeking examination before trial has burden of proof where the right to examine is challenged. 128Misc861, 220NYS430.

1097–61½–New. A motion to vacate notice of examination before the trial must be determined on notice, pleadings, and supporting affidavit, in the absence of answering affidavit. 128Misc861, 220 NYS430.

1097–61¼–New. An affidavit supporting a motion to vacate notice of examination is held sufficient to require plaintiff to show necessity of examination. 128Misc861, 220NYS430.

1098–79 [a] **Time of objection to examination.**–Objection should be timely made to order permitting examination, and not postponed until proof is offered at trial. SD 225NW301.

1098–80½–New. Where affidavit is regular, it is proper to grant an order adjudging defendant in contempt when he refuses to answer interrogatories. 100NJEq234, 134A867; 186Wis530, 203 NW399.

1098–80½–New. So much of an order as stays action until former officers of a corporation are produced for examination has been held not justified. 223App Div680, 229NYS323.

1098–80¼–New. Order for examination of parties before trial and order for discovery and inspection may be combined in one order. 228AppDiv795, 239 NYS668.

1098–90½–New. On motion to vacate, sufficiency of defense will ordinarily not be inquired into. 126Misc328, 213NYS 248.

1098–90½–New. But the notice of examination will be vacated if defense on face is palpably so insufficient that no evidence in support thereof could be adduced. 126Misc328, 213NYS248.

1098–90¼–New. Notice of motion to vacate served three days after service of notice of examination is timely served even though return day is two days after date set for examination. 214App Div522, 212NYS387.

1098–90½–New. Failure of witness to object to an examination before trial does not waive objections, 214AppDiv 522, 212NYS387.

1098–90¼–New. nor deprive the party of the right to have the notice of examination vacated. 214AppDiv522, 212 NYS387.

1098–90½–New. Validity of order may not be questioned by party not appealing and submitting to examination. 126 Misc855, 214NYS414 (on motion to compel defendant to answer certain questions).

1098–90¼–New. On a motion to vacate notice of examination of plaintiff, the court need not pass on the merits of defendant's defense. 220AppDiv12, 221 NYS63.

1099–1½–New. In Alberta, service of a copy of the appointment on the examinee's solicitor is sufficient. [1929] 1 DomLR605.

1099–1½–New. Conduct money need not be tendered until the examinee presents himself for examination. Alta [1929] 1DomLR605.

1099–3½–New. In some jurisdictions notice of examination is sufficient to procure the attendance of a party for examination, and service of a subpœna is merely cumulative. 65Utah619, 238 P1114, 41ALR433.

1099–8 130Misc767, 225NYS779.

1099–10½–New. An order appointing a referee to examine the adverse party before trial may be obtained ex parte. SD 225NW301.

1099–11 [b] **In South Carolina.**–153SC 56, 150SE347, 66ALR1264.

1099–13 216AppDiv115, 214NYS579; 220AppDiv21, 220NYS356. [c] **In negligence cases** inquiry should be limited to matters clearly material and necessary. 216AppDiv115, 214NYS579 (no fishing excursions permitted).

1099–14 Alta [1930] 2DomLR999(2d case) (court refusing to interfere as to order in which witnesses examined). See also 135Misc87, 236NYS409.

1099–15 73Mont297, 236P553 (questions "pertinent to matter in issue," as specified in statute, means subject matter of litigation as disclosed by complaint and any evidence tending to prove material allegations therein); Alta [1930] 2DomLR1003(2dcase) (practice on refusal to answer); Man [1927] 1 DomLR148, [1926] 3WestWkly436; Man [1928] 3DomLR709. [d] (2) But see Alta [1925] 3DomLR395. (3) Provisions of Evidence Act providing that witness shall not be excused from answering incriminating questions does not apply to examination for discovery at which common-law right to refuse to testify is applicable. Alta [1925] 3Dom LR395.

1099–15½–New. **On examination before referee** who overrules attorney's objection to questions asked of defendant, questions should be answered. 126Misc 855, 214NYS414 (if improper trial court will exclude them).

1099–15½–New. Questions relative to issue are proper, although examinee can only give his belief or information. Sask [1926] 3DomLR542, [1926] 2West Wkly861.

1099–15¼–New. , and awards which have been held inadequate. Mo 26SW (2d)618. [a] $1,000.–Mo 26SW(2d)618.

1100–16½–New. **Discovery may be reserved until after determination of defenses** of acquiescence and accounts stated, and may be limited to matters in which plaintiff has not acquiesced and is not excluded by settlements made. 31F(2d)1.

1100–16½–New. **In New York** Civ. Pract. Rules, rule 129 requiring that testimony be subscribed to, does not authorize order that deposition be subscribed to as taken and transcribed. 215 AppDiv530, 214NYS272.

1100–16¼–New. A motion for continuation of examination of defendant will be denied for unexcused laches in waiting more than one and one-half years before making motion. 128Misc859, 220 NYS306.

1100–17 221AppDiv420, 223NYS184. See also 128Misc147, 218NYS296. But see 224AppDiv745, 229NYS776 (notice to produce so as to permit secondary evidence on such examination if not produced held proper).

1100–18 220AppDiv21, 220NYS356; 226AppDiv715, 233NYS472; 227AppDiv 837, 237NYS301. [a] **Discretionary power of court.**–220AppDiv21, 220NYS 356.

1100–23 224AppDiv651, 229NYS22; 132Misc531, 229NYS563 (scope of examination in discretion of court).

1100–25 220AppDiv21, 220NYS356.

1100–26½–New. Where a will in a discovery proceeding was inadvertently not offered in evidence, but only marked for identification, the instrument will be deemed to have been received and marked in evidence, on application by petitioner in his brief. 132Misc209, 229 NYS799.

1100–27 127Misc455, 215NYS773.

1100–28 But see 214AppDiv46, 211NYS 900; 219AppDiv261, 219NYS709.

1100–31½–New. The court in proper case might stay defendant's proceedings. 214AppDiv146, 211NYS900 (dictum).

1101–33 [a] **Ontario Judicature Act Rule 331** contemplates motion for attachment or dismissal of action to be heard before trial and contempt is not added ground for defense. Ont [1930] 2DomLR199.

1101–34 [b] **Dismissal of action is only method** of compelling plaintiff to answer questions. NJ 140A439.

1101–35 [b] **Voluntary appearance** for examination before trial subjects witness to same liability as if served as provided by civil practice act. 129Misc 908, 223NYS395.

1101–45½–New. Where a party fails to attend for examination as a witness on notice, the court should require him to testify or show cause why he should not do so. 65Utah619, 238P1114, 41 ALR433.

1101–45½–New. Some statutes providing that a party's pleading may be rejected or his pending motion overruled where he fails to appear for examination upon being duly summoned do not apply unless suit is actually pending. 218McA578, 266SW130.

1101–45¼–New. A motion to strike out party's pleading or to commit cannot be made before the validity of the questions which he refused to answer is passed upon by the court or judge. NB [1925] 3DomLR189.

1101–45½–New. Defendant served only with notice, and without subpœna, is not subject to penalty for failure to appear. 127Misc455, 215NYS773.

1101–45¼–New. Plaintiff who fails to appear will have proceedings stayed, although served only with notice. 127 Misc455, 215NYS773.

1101–45¼–New. Where plaintiff fails to submit to an examination after service of notice of examination, the proper practice is to apply for stay of proceedings until he does submit. 127Misc 598, 217NYS154.

1101–45½–New. Plaintiff, not appearing at examination pursuant to his notice, could not, without leave, abandon proceedings and serve another notice. 223AppDiv786, 227NYS613.

1102–56 [c] **In Louisiana.**–13LaA646, 127S445.

1102–58 NJ 149A761.

1102–60½–New. Procedure must follow statute. 203 Iowa1277, 212NW391.

1102–60½–New. Statute on subject merely creates rule of evidence. 203 Iowa1277, 212NW391.

1102–60¼–New. Statutory procedure is substitute for equitable bill. 203 Iowa 1277, 212NW391.

1102–60½–New. **Purpose of interrogatories** is to eliminate undisputed facts, lay ground for summary disposition, or enable the party to prepare for trial. 26F(2d)120.

1102–65½–New. Order in discovery proceeding made in open court is court order which could be changed by presiding judge. 249Mich246, 228NW689.

1102–65½–New. Subsequent order obtained by creditors fixing new date for hearing is not void because not made by judge making original order where return would be before such judge. 249 Mich246, 228NW689.

1102–66 Mass 169NE505; 283Pa488, 129A563.

1103–71 203 Iowa1277, 212NW391; La A 128S546; NJ 149A761 (extent of damage); 131Misc672, 227NYS629. See also Mass 165NE513(2dcase).

1103–72 [d] **Scope of subject about which interrogatories may be asked** is as broad as field of inquiry, when person interrogated is called as witness to testify orally in actual trial. Mass 165 NE513(2dcase). [e] **Interrogatory inquiring whether plaintiff was married,** date and place of marriage, and number and dates of birth of children, if any, was not improper where fact that plaintiff was unmarried did not appear in writ or declaration and apparently was unknown to defendant. Mass 165NE513.

1103–73 Mass 169NE505.

1103–78 36F(2d)431; 13PortoRicoFed 398.

1103–93½–New. Until pleadings create an issue interrogatories are improper. NJ 149A761.

1104–11 264Mass364, 162NE735; Mass 169NE505.

1104-15 [a] **Interrogations held not objectionable.**–195 Ind265, 145NE2, 150 NE407.
1104-16 38F(2d)691.
1104-17 218Ala440, 118S638; Mass 169NE505.
1104-18 Mass 169NE505.
1104-19 Mass 169NE505 (contents of public record). [a] **Interrogatories held not objectionable.**–195 Ind265, 145NE2, 150NE407.
1104-24 38F(2d)691; NJ 141A162.
1104-27½-New. Interrogatories cannot be made to perform office of bill of particulars. NJ 149A761.
1104-28 Mass 169NE505 (disclosure of names of witnesses); NJ 141A162. But see 13PortoRicoFed398. [b] (1) 13 PortoRicoFed398.
1105-29 Mass 165NE513(2dcase).
1105-29½-New. Where interrogatories submitted are not as a whole or in any great part irrelevant or improper, the action of the trial court in striking them from the files is error. Mass 165NE513 (2dcase).
1105-29¼-New. That some of the interrogatories propounded are objectionable as being too vague and indefinite does not justify the court in refusing to require answers to proper questions. 217Ala143, 115S155.
1105-29¼-New. Fundamental rules of admission and exclusion of evidence define and limit interrogatories. Mass 169NE505.
1105-29⅓-New. That interrogatory otherwise permissible may incidentally accomplish unauthorized purpose does not render it objectionable. 13PortoRicoFed398.
1105-30 216Ala321, 113S495.
1105-38½-New. The trial court is not bound to sustain interrogatories on grounds not stated by objector. 195 Ind265, 145NE2, 150NE407.
1105-38½-New. an objection to an interrogatory is held not waived by answering before the court ruled. 216 Ala303, 113S74.
1105-42 [c] **Time held not to have elapsed.**–218Ala67, 117S622.
1105-45 148Wash72, 268P132.
1106-57 [b] **Answer held sufficient.**–264Mass364, 162NE735.
1107-93 IndA 171NE878.
1107-96 213Ala627, 105S869 (if examining party elects to offer interrogatories in evidence, he must offer them as whole and cannot select answers, or accomplish same purpose by filing additional interrogatories); 253Mass37, 148 NE101.
1108-5 213Ala627, 105S869 (examining party only has option to offer interrogatories in evidence).
1108-8 [a] **As against parties not notified.**–SD 224NW951.
1108-12 MoA 18SW(2d)575.
1108-14½-New. Admission of an entire transcript of defendant's testimony on examination as an adverse party, without an offer by plaintiff's counsel to read it by question and answer, is irregular. SD 224NW951.
1108-14⅓-New. An adverse party examined before trial, and those similarly situated may first interpose objections at the trial for incompetency and irrelevancy, as when an ordinary deposition is read. SD 224NW951.
1108-14¼-New. Where defendant states without objection, on cross-examination, that he testified as shown by a transcript of his testimony on examination before the trial, such transcript becomes part of his oral examination at the trial. SD 224NW951.
1108-14⅕-New. Although a transcript of defendant school treasurer's testimony on examination as adverse witness was inadmissible against codefendant sureties on his bond not notified on examination, evidence of his admissions against interest as to facts materially bearing on his liability under the bond is admissible against the sureties as part of his oral cross-examination at the trial. SD 224NW951.
1108-14⅙-New. Whether an adverse party may be called for oral cross-examination after or before the proper introduction in evidence of a record of a similar examination of the same party before trial, under statute, is a matter of trial procedure within the trial court's discretion. SD 224NW951.
1108-17 Mass 169NE505.
1109-26 Ont [1929] 4DomLR734.
1109-27 TexCivA 297SW869. [d] (2) Refusal to answer interrogatory whether sale was in good faith has been held to prevent claimant from testifying on that issue. TexCivA 297SW869. (3) Refusal to answer interrogatory whether sale was in good faith does not prevent party refusing from offering evidence on that issue. TexCivA 297SW 869.
1109-31 219Ala181, 121S548.
1110-33 213Ala414, 104S817.
1110-35 218Ala440, 118S638; 22AlaA 573, 117S912.
1110-42½-New. A party who fails to move under statute for the infliction of penalties for failure of the other party to answer loses his right to complain. 22AlaA573, 117S912.
1110-42⅓-New. Interrogatories which are competent and designed to elicit facts admissible of the evidence at the trial of the case must be answered, although causing annoyance to the party or objected to as an unnecessary burden on the court. Mass 165NE513(2dcase).
1110-42¼-New. A party refusing to answer an improper interrogatory is not precluded from presenting evidence upon the subject matter at trial. NJSup 136A334.
1110-42½-New. Party refusing to answer interrogatory is not in contempt unless court directs answer. 104NJL 243, 140A285.
1110-42⅙-New. In Saskatchewan, a party on examination for discovery is not bound to obtain information from persons in no way under his control. Sask [1928] 2DomLR93.
1110-42½-New. Test as to necessity of answering interrogatories is whether they are directed to disclosure of facts admissible in evidence. Mass 169NE 505.
1110-46 Iowa 232NW492.
1111-62 218AppDiv753, 218NYS102.
1111-67½-New. Objections must be claimed before trial. 216Ala321, 113S 495.
1113-90 3LaA109 (after three months).
1116-76 12F(2d)682.
1116-79 [e] **Laboratory analysis of organ of human body reduced to writing** is paper within meaning of statute. 201 Iowa43, 206NW98. [f] **In Oklahoma.**–39 OklACR378.
1116-80 [a] **Purpose of provision of federal statute** is to provide substitute for discovery in aid of legal action. 12 F(2d)682.
1116-81 316Mo 1032, 292SW1033.
1116-82 196NC9, 144SE297.
1116-83 84Colo 456, 271P191.
1116-84 214Ala239, 107S98.
1117-91 Alta [1929] 2DomLR953.
1117-91½-New. Only such writings as are admissible in evidence are subject to inspection. 70CalA191, 232P985.
1117-96 213AppDiv286, 210NYS338. [b] **Discharged employee whose compensation is not percentage of profits** but percentage of invoice value of goods purchased is not entitled to order of inspection. 213AppDiv286, 210NYS338.
1119-15 Can [1930] 4DomLR1013 (servant of one not a party).
1118-9 [d] **On inspection of mine** to enable plaintiff to elect his remedy plaintiff may be required to do work himself at defendant's expense. 81NH 535, 129A374.
1118-11 [h] (3) Extent to which plaintiff may inspect and experiment with street car causing injury. 61 OntL550, [1928] 1DomLR101. (4) Court will not order experiments to be made by way of discovery where it is apparent that such experiments are not necessary for proper determination of issues and would only complicate issues. 62 OntL124, [1928] 2DomLR364.
1119-15 But see 224AppDiv745, 229 NYS776; 137Misc28, 244NYS377. [b] **Federal officer cannot be compelled to produce affidavits** which he is forbidden to exhibit. 255 IllA503. [c] **Federal equity receiver** may be compelled to produce books and papers. 229AppDiv 657, 243NYS200. [d] **Books of third party ordered produced** where order for taking evidence made. 137Misc28, 244 NYS377.
1119-18½-New. A foreign corporation must submit to reasonable orders to produce documentary evidence. 151 Miss516, 118S606(1stcase).
1119-20 329 Ill 612, 161NE137; 191 Wis586, 211NW923. But see 316Mo 1032, 292SW1033.
1119-21 40 Ida712, 237P284; 201 Iowa 43, 206NW98; 207 Iowa453, 223NW 271; 229AppDiv16, 240NYS623 (one alleging fraud of fiduciaries may inspect records); 24 OhNPNS557. But see 316 Mo 1032, 292SW1033. [a] (8) Court will not require production of private correspondence and memorandum relative to laboratory analysis of organ of human body in possession of insurance company where it would not be admissible in evidence. 201 Iowa43, 206NW 98. (9) Order requiring production of letters which are inadmissible in evidence is too broad. 316Mo 1032, 292SW 1033. (10) Other instances. 207 Iowa 453, 223NW271; Mo 27SW(2d)1027. [b] **Laboratory analysis of organ of human body** which is material to issue in action on accident insurance policy is proper subject of inspection and its production may be ordered. 201 Iowa 43, 206NW98.
1120-28 218AppDiv632, 219NYS181.
1120-32 316Mo 1032, 292SW1033.
1120-33 129Misc130, 220NYS522.
1121-46 251Mich701, 232NW373; 222 AppDiv512, 226NYS524; 229AppDiv16, 240NYS623.
1122-62 3Del 252, 138A277 [citCJ].
1122-65 See also 137Misc28, 244NYS 377.
1123-72½-New. Actions and proceedings in which authorized. In New York inspection of books and papers may not be had in arbitration proceedings. 127 Misc452, 217NYS233.
1123-80 5PaDist&Co 665.
1124-92 CalA 292P531.
1124-96 Mo 27SW(2d)1027; CalA 292 P531. [b] **In California.**–79CalA361, 249P236.
1124-97 329 Ill 612, 161NE137.
1124-99 329 Ill 612, 161NE137; 163La 824, 112S799, 801 [quotCJ], 53ALR82.
1125-1 163La824, 112S799, 801 [quot CJ], 53ALR82.
1125-2 163La824, 112S799, 801 [quot CJ], 53ALR82.
1125-3 163La824, 112S799, 801 [quot CJ], 53ALR82; 153SC56, 150SE347, 66 ALR1264.
1125-4 329 Ill 612, 161NE137 (affidavits on information and belief insufficient); 163La824, 112S799, 801 [quot CJ], 53ALR82.
1125-5 159La169, 105S278, 282 [cit CJ]; 163La824, 112S799, 801 [quot CJ], 53ALR82.
1125-11 [a] **Under Federal Equity Rules, rule 58,** to authorize summary order to produce documents there must be admission of possession of documents by answers to interrogatories or otherwise. 5F(2d)322.
1126-13 CalA 292P531.
1126-24 But see 316Mo 1032, 292SW 1033 (application under Rev. St. [1919] § 1378).
1127-34 137Misc28, 244NYS377.
1127-35 [a] See also 137Misc28, 244 NYS377.
1127-39 81CalA471, 254P287 (court not bound to accept averments in support of motion as final); CalA 292P 531; 207 Iowa453, 223NW271 (order properly granted); Mo 27SW(2d)1027; 122 Or498, 259P891.
1127-43 207 Iowa453, 223NW271 (order held not improper).
1127-48 207 Iowa453, 223NW271. [b] (3) Other instances. 207 Iowa453, 223 NW271.
1128-55½-New. Order for discovery and inspection and order for examination of parties before trial may be combined in one order. 228AppDiv795, 239 NYS668.
1128-55⅓-New. Remedies of inspection to refresh memory of witnesses

and to collect data in preparation for trial may be granted by single order. 229AppDiv16, 240NYS623 (order held not to limit former order).

1128-76 [a] 329 Ill 612, 161NE137.

1129-88 197NC787, 149SE382.

1129-89 329 Ill 612, 161NE137; 153 Wash35, 279P91; 191Wis586, 211NW 923, 925 [quotCJ].

1129-91½-New. Orders permitting inspection of ship's engines must contain such limitations as will prevent detention of vessel. 37F(2d)168.

1130-8 [b] 316Mo 1032, 292SW1033. [e] **In British Columbia.**-[1928] 2DomLR244(1stcase).

1130-10 [a] 316Mo 1032, 292SW1033, 1036 [citCJ].

1130-16 [a] (2) Where attorney acts as agent in reference to drawing up a document. BC [1930] 3DomLR989.

1131-17½-New. In British Columbia communications between patent agents and their client in reference to pending application for patent are privileged. BC [1929] 4DomLR231.

1132-48 224AppDiv660, 228NYS701.

DISCRETION

1134-37 317Mo 41, 295SW78; 285Pa 337, 132A189.

1135-39 285Pa337, 132A189.

1135-44 56ND772, 219NW228; TexCivA 282SW940, 942 [quotCJ].

1135-45 RI 131A553, 554 [quotCJ]; TexCivA 282SW940, 942 [quotCJ].

1135-46 TexCivA 282SW940, 942 [quot CJ].

1135-49 112 Oh667, 148NE362, 364 [quotCJ].

1135-50 112 Oh667, 148NE362, 364 [quotCJ].

1135-51 112 Oh667, 148NE362, 364 [quotCJ].

1135-52 112 Oh667, 148NE362, 364 [quotCJ].

1135-53 112 Oh667, 148NE362, 364 [quotCJ].

1135-54 205 Iowa141, 217NW809, 811 [quotCJ]; 112 Oh667, 148NE362, 364 [quotCJ].

1136-58 112 Oh667, 148NE362, 364 [quotCJ; SD 204NW999 (judicial discretion governed by known and established rules).

1136-59 112 Oh667, 148NE362, 364 [quotCJ].

1136-60 112 Oh667, 148NE362, 364 [quotCJ]; SD 204NW999.

1136-61 112 Oh667, 148NE362, 364 [quotCJ].

1136-64 78CalA497, 248P683; 191NC 378, 131SE743. [a] (1) 191NC378, 131 SE743.

1136-65 78CalA497, 248P683. [a] 78 CalA497, 248P683.

1136-67 SD 204NW999 (discretion to do in particular case what ends of justice demand).

1137-70 123Kan396, 256P152.

1137-76 78CalA497, 248P683.

1137-80 [a] **Sound judicial discretion is not unlimited power.**-128Me191, 146 A439.

1138-83½-New. **"In its discretion"** is held to mean an advised, just, judicial, and revisable discretion in the light of the whole record. 214Ala243, 107S210.

DISEASE

1139-4 [b] (2) Ailments, injuries, indispositions, and sicknesses do not necessarily constitute disease. 246NY63, 158NE21. [e] **As used in application for insurance.**-15F(2d)646.

DISFIGUREMENT

1139-16 See also 3LaA83.

DISHONESTY

1140-42 TexCivA 270SW1062.

DISINTERESTED

1140-56 204 Iowa15, 214NW562, 563 [quotCJ]; 101NJEq692, 139A399; 126 Misc75, 213NYS407, 411 [citCJ].

1140-57 204 Iowa15, 214NW562, 563 [quotCJ]; 126Misc75, 213NYS407, 411 [citCJ].

1140-58 204 Iowa15, 214NW562, 563 [quotCJ]; 126Misc75, 213NYS407, 411 [citCJ].

1140-59 126Misc75, 213NYS407, 411 [citCJ].

1140-60 204 Iowa15, 214NW562, 563 [quotCJ]; 126Misc75, 213NYS407, 411 [citCJ].

1140-61 126Misc75, 213NYS407, 411 [citCJ].

1140-62 126Misc75, 213NYS407, 411 [citCJ].

1140-63 204 Iowa15, 214NW562, 563 [quotCJ]; 126Misc75, 213NYS407, 411 [citCJ].

1140-64 126Misc75, 213NYS407, 411 [citCJ].

1140-65 126Misc75, 213NYS407, 411 [citCJ].

1140-65½-New. free from all interest; 126Misc75, 213NYS407.

1140-65¾-New. not in employ of either party to controversy. 126Misc75, 213NYS407.

DISMISS

1141-75 [a] **As meaning temporary or permanent removal.**-77CalA627, 247P 614.

DISMISSAL AND NONSUIT

1145-6 15F(2d)364, 365 [citCJ]; Mo 31SW(2d)50; 220MoA32, 285SW775.

1146-11 222MoA408, 7SW(2d)279; 25 OhNPNS161. [a] (2) 322Mo 892, 17SW (2d)524. [b] 222MoA408, 7SW (2d)279. [f] **In law "discontinuance" means** to abandon or terminate action. 168Ark645, 271SW21.

1146-13 25 OhNPNS151.

1146-14 [a] **In Missouri.**-20SW(2d) 896.

1146-15 222MoA408, 7SW(2d)279. [a] **Definition.**-322Mo 892, 17SW(2d)524; 222MoA408, 7SW(2d)279.

1146-13 25 OhNPNS161.

1146-20 [a] **The difference is that a** discontinuance is not of right, as is voluntary nonsuit, but is discretionary with court. 97PaSuper556.

1147-24 [a] **Whether nonsuit is voluntary or involuntary depends on** manner invoked as ascertained by attendant circumstances, and not its designation by court or plaintiff. 320Mo 185, 7 SW(2d)255.

1147-26 97PaSuper275; 29PortoRico 61 (error to sustain motion for nonsuit where plaintiff made out prima facie case).

1147-27 313Mo 406, 281SW693.

1147-28 104Conn693, 133A669; 169La 312, 125S134(2dcase).

1147-29½-New. Recital in record that nonsuit was involuntary does not make it such. 313Mo 406, 281SW693.

1148-34 [a] 119 Or636, 250P840.

1148-36 119 Or636, 250P840.

1148-38 CalA 287P149 (joint tort feasors); 119 Or636, 250P840. [a] **Dismissal as to two defendants though operating as retraxit of cause of action for damages against all,** remaining defendant's right to vacate judgment is unaffected. CalA 287P149.

1148-40 119 Or636, 250P840. [a] **Presumptions.**-119 Or636, 250P840.

1148-41 119 Or636, 250P840.

1148-49 123Kan739, 742, 256P979 [quotCJ]; 309Mo 341, 348, 274SW380 [citCJ]; 243NY397, 153NE848; 127 Misc505, 217NYS280; 6PaDist&Co 633.

1148-50 123Kan739, 742, 256P979 [quotCJ].

1148-51 123Kan739, 742, 256P979 [quotCJ].

1148-52 123Kan739, 742, 256P979 [quotCJ].

1148-53 216Ala581, 113S447, 59ALR 348; 123Kan739, 742, 256P979 [quot CJ].

1148-54 25F(2d)78; 133Wash568, 234 P446. [a] **Right confined by statute** liberally construed. TexCivA 295SW 318.

1148-55 21F(2d)893; 25F(2d)758; 123 Kan739, 742, 256P979 [quotCJ]; 235 Ky506, 31SW(2d)897; 4LaA322; 221 MoA308, 273SW169; 129Misc163, 221 NYS110; 131Misc315, 226NYS553; 44 Philippine168; 144Wash505, 258P482.

1149-56 123Kan739, 742, 256P979 [quotCJ]; 213AppDiv347, 210NYS484.

1149-57 123Kan739, 742, 256P979 [quotCJ].

1149-58 165La437, 115S648.

1149-58½-New. In matrimonial case right to discontinue may be denied in its entirety unconditionally. 127Misc 505, 217NYS280.

1149-58¾-New. Action will be discontinued where attorneys for both parties ask discontinuance. 129Misc183, 221 NYS52.

1149-58¼-New. **Proceedings under a writ ad quod damnum** are likened to "actions" and included in that term as used in a statute providing for dismissal of actions. 116Nebr405, 217NW604 (may be dismissed on same terms as other actions).

1149-62 313Mo 406, 281SW693.

1149-63 But see 31F(2d)717.

1149-67 313Mo 406, 281SW693.

1149-70 28Hawaii487; 115Nebr260, 212NW431, 51ALR237; 93PaSuper591; 6PaDist&Co 633. Contra 221MoA308, 273SW169.

1149-71 38F(2d)123; 309Mo 341, 348, 274SW380 [citCJ]; 115Nebr260, 212 NW431, 51ALR237; 93PaSuper591; TexCivA 24SW(2d)757. [d] **Order is necessary** so that persons affected may have opportunity to object. 309Mo 341, 274SW380.

1150-72 309Mo 341, 348, 274SW380 [citCJ].

1150-74 28Hawaii487; 168Minn84, 209 NW907; 309Mo 341, 348, 274SW380 [citCJ]; 129Misc163, 221NYS110; 93 PaSuper591. [a] 309Mo 341, 274SW357 (prosecution of public nuisance by state seeking dismissal on grounds that only private persons are interested); 38Wyo 28, 264P699, 702 [citCJ]. [b] **Where one requests leave to take off nonsuit** the motion involves judicial discretion and is not a matter of right. 97Pa Super556.

1150-75 123Kan739, 256P979; 168 Minn84, 209NW907; 309Mo 341, 274SW 357 (discretion not abused).

1150-76 28Hawaii487; 116Nebr405, 217NW604 (court's discretion not called into action unless it appears that defendant will be prejudiced).

1150-79 [a] **In Missouri.**-309Mo 341, 274SW380.

1150-86 21AlaA326, 108S81.

1150-88 21AlaA326, 108S81.

1151-96 [b] **Petitioner for intervention** may dismiss unless plaintiff's rights are prejudiced. Mich 233NW347.

1152-12 203 Iowa667, 213NW207; 169 La268, 125S73. [c] **Motive inducing withdrawal** is immaterial if right exists. 169La268, 125S73.

1152-14 213AppDiv347, 210NYS484.

1152-17 203 Iowa667, 213NW207.

1153-23 [c] (2) Cannot discontinue. Mass 171NE645.

1153-27 See also 44Philippine62.

1153-28 TexCivA 278SW884.

1153-34 36GaA459, 137SE106; 83NH 397, 142A695. [b] **In Louisiana.**-12LaA 371, 125S140(1stcase).

1154-44½-New. Oral or written publication by court of its conclusion on issue tried is "announcement of decision" preventing subsequent nonsuit. 216Ala272, 113S240.

1154-44¾-New. Court's statement after trial that in his opinion plaintiff was entitled to relief sought as announcement of decision. 216Ala272, 113S240.

1154-44¼-New. Under statutes defendant who has filed a counterclaim against plaintiff in a cause tried to the court may dismiss without prejudice before judgment is rendered. 34NM298, 280P 254.

1154-45 324 Ill 89, 154NE412.

1154-49 97PaSuper556; 148SC386, 146 SE249.

1154-51 31F(2d)112(1stcase).

1155-60 174Ark932, 298SW215; 179 Ark367, 15SW(2d)997; Ark 32SW(2d) 447; CalA 266P843; 204 Iowa278, 213 NW804; 101WVa31, 131SE638; 103 WVa597, 138SE745.

1155-61 98Fla382, 123S758; 248 IllA 624; 116Nebr405, 217NW604 (matter of right); TexCivA 286SW584; Tex CivA 22SW(2d)753. See also TexCivA 278SW884.

1155-62 204 Iowa655, 215NW749; 205 Iowa225, 217NW820; TexCivA 286SW

584; **TexCivA** 32SW(2d)669 (after close of testimony nonsuit improperly denied).

1155-64 94Fla272, 114S240; 126Kan 429, 268P828; **MoA** 276SW880 (nonsuit without instruction directing verdict is not voluntary); **MoA** 19SW(2d)553; 129Misc183, 221NYS52; 57ND482, 222 NW618; 103WVa597, 138SE745; 104 WVa67, 138SE748. See also 143Wash 20, 254P452.

1155-65 40 OklACR128; 155Wash147, 283P691.

1155-68 204 Iowa1037, 216NW622.

1155-69 119 Okl 297, 249P393; **Tex CivA** 22SW(2d)753.

1156-70 179Ark367, 15SW(2d)997.

1156-72½-New. Under some statutes the court has no authority to permit plaintiff to take a nonsuit after the case has been submitted to the jury. 220MoA32, 285SW775.

1156-72½-New. Before decision of court, under statute permitting nonsuit any time before decision of court trying case is announced, nonsuit must be awarded when requested before the actual decision is rendered, although the court has indicated its opinion after argument. **TexCivA** 286SW548.

1156-73 205 Iowa1300, 217NW803.

1156-73½-New. What is a final submission as meant by the statute giving plaintiff the right to dismiss before final submission to the jury is a question of state practice. 31F(2d)717.

1156-76 174Ark932, 298SW215.

1156-77½-New. after permission to file briefs but before briefs are filed, 204 Iowa1037, 216NW622.

1156-86 318Mo 10, 298SW766.

1156-86½-New. after the court has ruled on challenge of defendant to the sufficiency of evidence; 145Wash258, 259P718.

1156-90½-New. A suit in equity cannot be submitted until the evidence is taken, although defendants defaulted and defaults are taken and entered. CalA 266P843.

1156-91 143Miss447, 109S18; 118 OhSt 106, 160NE629; **TexCivA** 289SW1017. [b] **Where court orally and by appropriate entry on docket** sustains motion for directed verdict, plaintiff cannot voluntarily dismiss without prejudice. 205 Iowa1300, 217NW803.

1157-95 205 Iowa1300, 217NW803.

1157-7 25F(2d)78; 204 Iowa278, 213 NW804; **Mass** 172NE221; 83NH397, 142A695.

1157-9 15F(2d)364, 365 [citCJ]. See also **TexCivA** 278SW884.

1157-10 51Nev275, 274P192(2dcase); 50RI 95, 145A305; **Wyo** 292P897.

1158-20 87Colo 126, 285P775 (after withdrawal of juror and declaration of mistrial); 168Minn84, 209NW907; 83 NH397, 142A695. [d] **Exercise of discretion.**-83NH397, 142A695.

1158-22½-New. In some jurisdictions plaintiff may dismiss his petition after the introduction of all evidence by both parties and at any time before judgment has been put in writing and entered as such. 165Ga243, 140SE364.

1158-22½-New. Before entry of final judgment. Under some statute absolute dismissal without prejudice may be had at any time before entry of final judgment. 223Ky258, 3SW(2d)602.

1158-29 126 Or466, 260P998, 999 [cit CJ]; 126 Or466, 270P492, 495 [citCJ]. See also 44Philippine168.

1158-33½-New. It is not prejudicial error for the trial court to permit an action to be dismissed without prejudice after remand for a new trial where the only judgment possible to be entered is dismissal either with or without prejudice. 123Kan739, 256P979.

1158-33½-New. [§ 30a] 15. **After Plea of Privilege Has Been Sustained.** Plaintiff is entitled to dismiss the cause after plea of privilege has been sustained and before actual transfer. **Tex CivA** 298SW612.

1158-34 17F(2d)482; 21F(2d)893; 123 Kan739, 742, 256P979 [quotCJ]; 243NY 397, 153NE848; **SD** 208NW773; **Tex CivA** 278SW884; **TexCivA** 283SW351; **TexCivA** 286SW584; **TexCivA** 293SW 301; 133Wash568, 234P446, 447 [quot CJ]. [a] **Where defendant's right to hearing on affirmative plea** is not prejudiced, plaintiff may have nonsuit. **Tex CivA** 278SW884.

1159-35 21F(2d)893; 25F(2d)78; 33 F(2d)760; 38F(2d)123; 309Mo 341, 274 SW380; 129Misc163, 221NYS110; **Tex CivA** 286SW584; **TexCivA** 290SW842; 133Wash568, 234P446, 447 [quotCJ]. See also 17F(2d)482.

1159-36 4LaA322, 325 [quotCJ]; 133 Wash568, 234P446, 447 [quotCJ].

1159-36½-New. Dismissal was denied where the rights of one of several defendants were prejudiced thereby. 25 F(2d)78.

1159-37 116Nebr405, 217NW604, 607 [citCyc]; 133Wash568, 234P446, 447 [quotCJ].

1159-38 38F(2d)123; 123Kan739, 742, 256P979 [quotCJ]; 116Nebr405, 217NW 604. See also 17F(2d)482.

1159-39 15F(2d)745; 157Md175, 145A 497; **TexCivA** 286SW584; **TexCivA** 24 SW(2d)757; 142Wash363, 253P460. But see **TexCivA** 4SW(2d)304. [a] (2) Where defendant corporation showed certificate of payment of license at time of motion. 142Wash363, 253P460. [c] **Relief barred** even where one of several defendants seeking affirmative relief was corporation where license had not been paid. 142Wash363, 253P460. [d] **Extent of denial of nonsuit.**-**TexCivA** 286 SW584. [e] **Time when motion to dismiss was made** determines whether affirmative relief prayed by defendant prevents dismissal. **Wyo** 292P897 (answer filed same day but subsequent to motion).

1159-41 204 Iowa278, 213NW804; **Tex CivA** 278SW884; 144Wash505, 258P482.

1159-42 15F(2d)364, 365 [citCJ].

1159-43½-New. Where, at time plaintiff moves to dismiss, no answer seeking affirmative relief has been filed, he is entitled to dismissal as matter of right. **TexCivA** 283SW351.

1159-43½-New. and subsequent filing of answer seeking affirmative relief cannot deprive plaintiff of such right to dismissal. **TexCivA** 283SW351.

1159-43¼-New. Filing plea of privilege is held not to ask for affirmative relief. **TexCivA** 293SW301.

1159-44 21F(2d)893; 84Colo 534, 271P 622; 97Fla240, 121S883(2dcase); 37 GaA621, 141SE218; **NJ** 144A110; 189 NC460, 127SE519; 189NC805, 128SE 329; 126 Or466, 260P998 (dictum); **SD** 208NW773; 144Wash505, 258P482. [e] **Plea of limitations** does not preclude dismissal. **Iowa** 213NW804; 133Wash 568, 234P446.

1160-45 129Misc183, 221NYS52. [b] **Nonsuit denied as matter of discretion.**-129Misc183, 221NYS52.

1160-48 33GaA674, 128SE76; **TexCivA** 286SW584; **TexCivA** 294SW618. [a] **Matters not constituting set-off within rule.**-Plea that plaintiff in action on notes was entitled to recover only amount obtained by defendant because part of loan for which notes were given was retained as usury does not set up counterdemand within rule. 35GaA 284, 134SE174.

1160-50 98Fla382, 123S758; **Fla** 129 S840; **TexCivA** 286SW584.

1160-52 **NJ** 144A110; 140 Okl 292, 283 P563(2dcase); **TexCivA** 286SW584; **TexCivA** 294SW618. See also **MoA** 13 SW(2d)659. [b] **Answer in action of ejectment asking adjudication of title** is not dismissed by dismissal of count in ejectment. **MoA** 18W(2d)203.

1161-53 [a] **Process need not be served on plaintiff** to authorize trial of counterclaim since plaintiff's original invocation of court's jurisdiction is an appearance. **TexCivA** 286SW584.

1161-56½-New. Where defendant himself invokes the ruling that makes dismissal necessary, the claim and counterclaim go out together. 33GaA674, 128 SE76.

1161-56½-New. Use of dismissed petition in trial of counterclaim.-**TexCivA** 286SW584.

1161-56¼-New. but pleading need not be labeled counterclaim. 204 Iowa278, 213NW804.

1161-56½-New. Whether defendant has pleaded counterclaim must be determined from answer. 204 Iowa278, 213 NW804.

1161-57 8F(2d)121; 38F(2d)123; 216 Ala581, 113S447, 59ALR348; 173Ark 250, 292SW150; 160La400, 107S239; 12LaA371, 125S140(1stcase); **Mo** 31SW (2d)1002; **TexCivA** 286SW584; **Tex CivA** 287SW141; **TexCivA** 288SW573.

1161-58 179Ark367, 15SW(2d)997; **TexCivA** 287SW141; **TexCivA** 297SW 692.

1161-69 169Ga300, 150SE156(2dcase) (one seeking to intervene, but seeking neither counterclaim nor affirmative relief); 158La274, 103S766; 129Misc163, 221NYS110.

1162-70 235Ky506, 31SW(2d)897.

1162-71 But see **TexCivA** 28SW(2d) 191.

1162-73½-New. Suit by county treasurer against former officer to recover sums allegedly misappropriated is subject to voluntary dismissal notwithstanding objections of taxpayers where no fraud or collusion shown. 235Ky506, 31SW(2d)897.

1162-74 107Conn380, 140A724. [d] **Cause of action on contract** may be dismissed and recovery allowed on quantum meruit where plaintiff sued in alternative. **TexCivA** 19SW(2d)451.

1162-78 16F(2d)334; 216Ala275, 113S 300; 73CalA236, 238P763; **CalA** 291P 611; **Mo** 31SW(2d)50; 50ND813, 197 NW854; **TexCivA** 298SW612. [c] **Acts constituting voluntary dismissal.**-317Mo 707, 296SW386. [d] **Agreement** between defendant and one plaintiff held not dismissal of suit. **TexCivA** 300SW118.

1163-80 But see 252 IllA567.

1163-81½-New. Dismissal refused against defendants seeking venue charge. **TexCivA** 295SW210.

1163-82 253 IllA328; **TexCommnA** 285 SW307.

1168-83 **Fla** 129S840.

1164-98 259Mass232, 156NE26.

1164-2 7F(2d)548.

1164-4 **TexCommnA** 285SW307.

1164-5½-New. Dismissal may be allowed, although court had no jurisdiction of party. **TexCivA** 295SW216.

1165-11 **NJSup** 146A872 (defendants not real parties in interest).

1166-31 [b] **Presence of attorney.**-195 NC268, 142SE10.

1166-34 [c] **In Nebraska.**-115Nebr260, 212NW431, 51ALR237. [d] **Mere placing of discontinuance on court's files** does not end action not ripe for judgment. **Mass** 172NE221.

1166-39½-New. Amendment of complaint by adding individuals composing firm sued is held voluntary dismissal. 21AlaA572, 110S156.

1166-41 69CalA207, 230P974; 101CalA 659, 282P23.

1166-43½-New. Hearing and determination. When a motion to dismiss is called to the attention of the court and defendant's attorney, plaintiff is entitled to dismissal whenever the motion is taken up for disposition; **Tex CivA** 283SW351.

1166-43½-New. and no further pleadings on defendant's part can deprive plaintiff of such right to dismissal. **TexCivA** 283SW351.

1166-48 See also **TexCivA** 283SW351.

1167-54 131Misc315, 226NYS553. [b] **Dismissal upheld.**-128Misc439, 218NYS 291.

1167-55 146Wash684, 264P991 (notice waived by moving to set order aside and arguing merits). See also **TexCivA** 283SW351.

1167-63½-New. Notice to defendant in open court is sufficient. **TexCivA** 283SW351.

1167-64 205 Iowa225, 217NW820 (notice to court sufficient).

1167-64½-New. Notice to judge before court is convened is sufficient. **Tex CivA** 283SW351.

1167-68 **TexCivA** 19SW(2d)394. [a] (4) Announcement in open court that cause has been settled. 169Ga300, 150 SE156(2dcase).

1167-71½-New. In Michigan motions to dismiss take the place of demurrers, plus in abatement and pleas to the jurisdiction. 230Mich354, 203NW108.

1167-71½-New. Voidable order. Dismissal of case in vacation, ordered by plaintiff acting under duress, is voidable, not void. **TexCivA** 283SW203.

1167-71¼-New. An order allowing plaintiff to nonsuit the cause at his request will not affect the right of defendant to affirmative relief on his cross action. **TexCommnA** 287SW1090.

1167-73 115Nebr260, 212NW431, 51 **ALR**237. [c] **Time of entry.-Mass** 172 NE221.

1167-74 189NC805, 128SE329 (may be entered at any time that judge could have rendered such judgment).

1168-81 157Md175, 145A497; 214 **AppDiv**255, 212NYS101.

1168-83 93PaSuper591.

1168-87 127Misc505, 217NYS280.

1169-90½-New. But where the vested rights would be lost by an adverse party, or have been surrendered in reliance on an action, further terms may be imposed. 127Misc505, 217NYS280.

1169-92 21F(2d)893; **Fla** 129S840; 243NY397, 153NE848; 127Misc505, 217 NYS280; 126Misc23, 211NYS858. [b] Contra 51Nev275, 274P192(2dcase).

1169-94 23F(2d)128 (difficult and extraordinary action). [a] (1) 116Nebr 405, 217NW604 (where no substantial right of defendant is affected).

1170-15 204 **Iowa**655, 215NW749; **NC** 154SE406; **6PaDist&Co** 633, 635 [quot CJ]. [b] **Court should order discharge of bond** filed by defendant to secure judgment on discontinuance. 245NYS 398.

1170-18 **6PaDist&Co** 633, 635 [quot CJ].

1170-19 **6PaDist&Co** 633, 635 [quot CJ].

1170-20 288Pa314, 136A221; **6PaDist &Co** 633, 635 [quotCJ].

1170-21 **6PaDist&Co** 633, 635 [quot CJ].

1170-22½-New. Venue dismissed did not destroy judgment on plea of privilege. **TexCivA** 271SW183; **TexCivA** 294SW698.

1170-23½-New. As to prior proceedings. Plaintiff must take notice of all proceedings had in case prior to taking nonsuit. **TexCivA** 286SW584.

1170-22¼-New. When a judgment of nonsuit or dismissal originates out of and is based on agreement of parties, it must be considered and construed in connection with such agreement. **Tex CivA** 291SW602.

1170-22½-New. Order, signed by judge, is immediately effective. 25 F(2d)758.

1170-23 See also 220**MoA**1331, 296SW 836. [a] **Dismissal by real plaintiff in interest** ends case as to nominal plaintiff. 232**Mich**476, 205NW600.

1170-26 194NC671, 140SE435.

1171-31 180**Minn**467, 231NW194.

1171-32 252 **IllA**567. [c] **Judgment may be properly rendered** against remaining defendant. 71**CalA**752, 236P 365.

1171-34½-New. Dismissal of complaint as to surety discharges principal debtor where he can be held only on theory of joint liability with surety. 168**Ark**185, 269SW369.

1171-34½-New. Where an action is dismissed as to a defendant named in the original complaint but not served with summons by filing an amended complaint omitting him as defendant, and such defendant fails to appeal from an order denying his request for leave to intervene, an answer and cross complaint to the original complaint can have no effect as a complaint in intervention, and should be stricken out. 69**CalA**207, 230P974.

1171-34¼-New. In such case plaintiff is not required to answer such cross complaint, and an entry of his default for failure to do so should be set aside. 69**CalA**207, 230P974.

1171-34½-New. In a suit against a bank and individual defendants where plaintiff was denied voluntary dismissal without prejudice and introduced no evidence, judgment on cross bill of bank determining issues between plaintiff and individual defendant is erroneous where plaintiff was entitled to dismissal of such individual defendant. 8 F(2d)121.

1171-35 41F(2d)312; **CalA** 265P327; **6PaDist&Co** 633; **13PaDist&Co** 400; **TexCivA** 286SW584. [b] **Rights of legal and equitable plaintiffs** are not prejudiced by legal plaintiff's nonsuit. 35F(2d)273.

1171-37 34F(2d)158.

1171-38 [a] **Abandonment of appeal** from order granting motion to change venue held not to terminate principal action. 32**PortoRico** 167.

1171-43 **CalA** 266P843; 204 **Iowa**655, 215NW749.

1171-46 **CalA** 266P843; 220**MoA**32, 285SW775.

1172-48 24F(2d)592.

1172-58 See also 204 **Iowa**655, 215NW 749.

1172-61 [a] 5**LaA**269.

1172-66½-New. Voluntary dismissal may not be set aside and action reinstated when dismissal was brought about by negligence of dismissing party. 204 **Iowa**655, 215NW749.

1172-66½-New. where such negligence is wholly unexplained or excused. 204 **Iowa**655, 215NW749.

1173-72 119 **Or**636, 250P840; 293**Pa** 454, 143A115.

1173-76 293Pa454, 143A115. [a] **Grounds held sufficient.**-155SC187, 152 SE189.

1173-85½-New. or duress, **TexCivA** 283SW203.

1173-88 119 **Or**636, 250P840. [b] **Proof to establish lack of authority must be clear.**-119 **Or**636, 250P840.

1174-92½-New. Plaintiff corporation, whose president ordered attorney to have case dismissed under duress of threatened death, should not be denied relief because attorney complied instead of attempting to rescue president. **Tex CivA** 283SW203.

1174-93 160**Ga**303, 127SE752; 293**Pa** 454, 143A115.

1174-97½-New. or for nonpayment of costs. 25F(2d)758.

1174-97½-New. Unsuccessful negotiations with defendant's insurance carrier looking to adjustment were not a reasonable excuse for plaintiff's default, justifying granting of relief from judgment of non pros. 293Pa454, 143 A115.

1174-98 94**CalA**449, 271P346 (newspaper accounts were mere hearsay and did not support motion); **TexCivA** 283 SW203.

1174-5 **TexCivA** 283SW203.

1174-8½-New. Evidence has been held sufficient to show that president of plaintiff corporation acted under duress in ordering attorney to have case dismissed. **TexCivA** 283SW203.

1174-8½-New. The court's expression of willingness to hear evidence on a count withdrawn by plaintiff, acquiesced in by plaintiff, is equivalent to an order restoring the count. 107**Conn** 380, 140A724.

1174-8¼-New. Vacation of order and reinstatement of case should not be made where negligence of plaintiff's attorney in requesting dismissal is not excused, 204 **Iowa**655, 215NW749.

1174-8½-New. and where there is no satisfactory showing of diligence or of unavoidable casualty, accident, or mistake. 204 **Iowa**655, 215NW749.

1174-9 308**Mo** 322, 272SW692.

1175-13 **Ariz** 283P924; 99**Fla**690, 127 S306.

1175-15 [c] **In Iowa.**-201 **Iowa**912, 208 NW505.

1175-16½-New. In New York, under Conservation L., § 9, as amended by L. [1918] c 68, relating to actions involving forest lands, courts may, and in some cases should, refuse discontinuance even though application therefor is unopposed. 215**AppDiv**47, 214 NYS79.

1175-20 222**AppDiv**765, 226NYS180.

1175-23½-New. In New York, in actions relating to title to forest lands under the application for discontinuance, the motion will be denied. 215 **AppDiv**47, 214NYS79 (where important questions were involved).

1175-23½-New. Upon trial of right of property between execution creditor and claimant, each asking affirmative relief, the latter may have judgment in his favor in absence of execution creditor and his attorney, and is not limited to dismissal for want of prosecution. **TexCivA** 275SW168.

1176-25 [a] **Filing of motion to strike out petition** and to quash garnishment affidavits and bonds is held not waiver of rights under motion to dismiss. **Tex CivA** 296SW703.

1176-29 [c] **Right to dismissal of counterclaim** improperly interposed, waived by noncompliance with rules as to time for objection. 217**AppDiv**550, 217NYS373.

1176-34 322**Mo** 329, 188SW(2d)892.

1176-37 37**GaA**130, 138SE633.

1176-42½-New. Where failure to serve summons and make return within three years deprives the court of jurisdiction, a stipulation of the parties against dismissal cannot resume jurisdiction. 74**CalA**580, 241P570.

1176-44 **Oh** 171NE89.

1177-60 179**Minn**553, 230NW89.

1177-62½-New. An order, dismissing selected issues of a complaint and directing trial of the remaining issues where all of the issues set forth but one cause of action and are essential thereto, is not authorized under New York Civ. Prac. Act § 476. 216**AppDiv**548, 215NYS338.

1177-64 **CalA** 290P86; 285**Pa**241, 132 A185 (under act of June 29, 1923); 10 **PaDist&Co** 219.

1178-73 165**Minn**482, 205NW888.

1178-87 36**GaA**447, 136SE803.

1178-89 See also 247 **IllA**141.

1179-95 332 **Ill** 177, 163NE343.

1179-97½-New. Where defendant, after securing from plaintiff an instrument purporting to dismiss the action after judgment, appealed from the judgment and plaintiff contested the appeal, defendant is estopped to set up the instrument against plaintiff. 126 **Okl** 232, 259P224.

1179-4 **Ala** 130S536.

1179-10 91**CalA**356, 267P169.

1179-11 **TexCivA** 271SW293 (extinguishment of cause by payment).

1179-11½-New. In some jurisdictions the grounds for which the court may dismiss an action are defined by statute. 126 **Okl** 144, 259P128.

1179-11½-New. Where statutory grounds do not exist and statute provides that in all other cases decisions must be on the merits, motion is properly overruled. 36**Wyo** 448, 256P1035.

1180-14 207**Cal** 414, 278P1038; 117 **Or** 83, 243P78; 119 **Or**237, 243P548. But see 137**Misc**579, 243NYS92.

1180-17 50ND511, 197NW129; 115 **Or** 456, 239P98; 119 **Or**237, 243P548; 126 **Or**1, 267P1035; 148**Va**610, 139SE273.

1180-20 213**AppDiv**336, 210NYS261.

1180-21 135**Misc**103, 236NYS673; 135 **Misc**553, 238NYS239.

1180-24 234**Mich**296, 207NW883, 44 **ALR**804; 144**Wash**505, 258P482.

1180-28 244**Mich**480, 221NW622.

1180-31 6**LaA**132; 232**Mich**546, 205 NW600.

1181-35 [a] **Propriety of filing of bill** for injunction and issuance of temporary injunction thereunder will not be decided where matter is academic. **NJCh** 145A732.

1181-35½-New. A motion to dismiss an action, brought in a county other than defendant's residence, where the action was alleged to have accrued, for noncompliance with a statute, requiring plaintiff to file with his præcipe an affidavit that the action was brought in good faith, and with no intention to annoy defendant, is a correct proceeding, if the record shows on its face the jurisdictional defect. 97**Fla**310, 120 S852.

1181-37 6F(2d)102.

1181-42 164**Ga**803, 139SE552; 232**Ky** 173, 22SW(2d)593; 127 **Okl** 35, 259P 575. Contra **CalA** 265P327.

1181-43½-New. or refuses to comply with an order to make his petition more definite and certain, 127 **Okl** 35, 259P 575.

1181-51 101**NJEq**732, 138A882.

1182-61 **MoA** 18SW(2d)569.

1182-61½-New. A delay in amending a complaint after demurrer was sustained can only be predicated on some

positive act of the actor in the proceeding, or in consequence of the actor's failure or omission to perform some precedent duty enjoined upon him by law. 219Ala60, 121S849.

1182-86 [b] **Dismissal of intervener's petition for same cause** is not justified because of dismissal of original petition for want of authority of attorneys to prosecute it. **TexCivA** 5SW(2d)849. [c] **Instrument authorizing transferee of insured's interest against insurer as security to sue in insured's name** precluded dismissal of suit so brought for want of authority. **TexCivA** 58W(2d) 849.

1182-68 **TexCivA** 5SW(2d)849.

1182-72 37GaA222, 139SE682.

1183-79 43 **Ida**589, 254P515; **NJ** 148 A761.

1183-80½-New. Suit by a resident and citizen of another state against a corporation organized and existing under and by virtue of laws of another state must be dismissed for want of jurisdiction in the federal court, where neither party is a resident of the district wherein the suit is instituted, where defendant by its demurrer seasonably asserts its privilege. 31F(2d)383.

1183-81 44F(2d)234; 178Ark194, 10 SW(2d)12; 91Fla36, 107S249; 154 **Tenn**134, 289SW533; **TexCommnA** 299 SW213; **TexCivA** 14SW(2d)342; **Tex CivA** 28SW(2d)887.

1183-82 81CalA704, 254P599; 230Ky 744, 20SW(2d)735; **TexCivA** 9SW(2d) 292 (trial court having sustained plea of res judicata against seller's claim for damages, and remaining claim asserted by buyer being for amount below jurisdiction of court, court should have rendered judgment of dismissal for want of jurisdiction).

1183-86 213Ky23, 280SW469.

1184-88½-New. On plaintiff's motion to dismiss defendant's counterclaim, the court may dismiss petition if it is convinced that it is without jurisdiction thereof. 213Ky23, 280SW469.

1184-88¾-New. In such case it is proper to dismiss defendant's counterclaim also. 213Ky23, 280SW469.

1184-88¼-New. Motion to dismiss not proper remedy where action erroneously brought in equity instead of at law. **Iowa** 232NW477.

1184-91 204 **Iowa**958, 216NW10; 83NH 465, 144A70; 161Tenn155, 25SW(2d) 580.

1184-94 86 **IndA**653, 159NE469. [b] **Dismissal as against nonresident defendant** held error where application for appointment of curators was timely filed. 165La1005, 116S488.

1184-96 74CalA580, 241P570; 197NC 79, 147SE729(2dcase).

1184-98 74CalA580, 241P570.

1184-3½-New. Failure to perfect service upon defendant in first instance is not necessarily ground for dismissal, 163Ga525, 136SE545.

1184-3¼-New. , and in such case the court may grant orders extending the time to perfect service either personally or by publication. 163Ga525, 136SE545.

1184-3¼-New. Failure to have alias issued at return term and succeeding pluries writs at every succeeding term until service does not work discontinuance. **MoA** 24SW(2d)703.

1184-8 [b] **Where service of process on nonresident defendant is quashed after verdict** against him and in favor of resident defendants, court should not dismiss action since nonresident may be served with alias summons if found in county. 252 **IllA**203.

1185-11 But see 258**Mass**531, 155**NE** 445.

1185-17 118**Nebr**718, 226NW329 (case dismissed as to defendant, improperly summoned outside county of forum, where plaintiff not entitled to judgment against only defendant served therein).

1185-19½-New. A motion to dismiss should be granted where the court is without jurisdiction because the statute relating to substitute service has not been sufficiently complied with. 192**Wis** 601, 213NW475.

1185-21 20**AlaA**643, 104S774 (suit in partnership name, not naming individual partners); 91**CalA**356, 267P169, 170 [sit CJ]; **TexCommnA** 14SW(2d)1020(2d case).

1185-22 163Ga857, 137SE382; 213**Ky** 818, 281SW1002; 238**Mich**198, 213NW 112; 130**Misc**755, 225NYS211 (nonsuit allowed).

1185-27½-New. Defendant is not entitled to nonsuit, on the ground that plaintiff brought action as administratrix ad prosequendum, when the action should have been brought as executrix under statute, where the trial judge properly permitted the amendment changing the form of action. **NJSup** 145A225(1stcase).

1186-31 131**Misc**506, 227NYS185.

1186-33 18F(2d)599.

1186-34 See also 5**LaA**605.

1186-36 219**AppDiv**486, 220NYS340.

1186-37 31**Ariz**137, 250P995.

1186-38 98**Fla**792, 124S275; 144**Wash** 494, 258P335.

1186-45 137SC11, 134SE859.

1186-47 226**Ky**326, 10SW(2d)1071; 167 **La**137, 118S865.

1187-50 8F(2d)428; 161Ga838, 131SE 891 (dismissed on special demurrer); 209Ky723, 273SW552 (under Declaratory Judgment Act); **TexCivA** 24SW (2d)796.

1187-52 81**Colo** 195, 254P779.

1187-59 **CalA** 265P327; 98**CalA**198, 276P1064; **CalA** 285P1062(2dcase) (by statute); **SD** 230NW805(3dcase) (where motion treated as demurrer stated no reason for insufficiency). [d] **Motion to dismiss** does not admit conclusions of pleader. 5F(2d)873.

1187-60 37GaA208, 139SE367; 37GaA 211, 139SE585; 37GaA222, 139SE682; 37GaA447, 140SE432; 1LaA217; 118 **Misc**503, 194NYS874; 122**Misc**170, 202 NYS401; 224**AppDiv**603, 231NYS461; 224**AppDiv**576, 231NYS529; 134**Misc** 309, 235NYS237; 198NC688, 153SE264 (where demurrer had been erroneously overruled); 34 **OhA**464, 171NE346. But see 48**Fed**241. [a] (3) Objection to complaint as not alleging jurisdictional fact may be taken advantage of by motion to dismiss as not stating cause of action by defendant appearing specially. 125**Misc** 681, 212NYS263. [b] 213**AppDiv**313, 210NYS527.

1188-63 131**Misc**712, 227NYS717 (allegations deemed true).

1188-64 **LaA** 124S685; 214**AppDiv**589, 212NYS304 (complaint held sufficient to withstand motion); 193NC274, 136SE 869.

1188-66 31**Ariz**137, 250P995; 161**Ga** 403, 131SE75; 163Ga31, 135SE409; 241 **Mich**63, 216NW382; 218**AppDiv**172, 218 NYS68; 219**AppDiv**486, 220NYS340; 131**Misc**506, 227NYS185; 136**Misc**287, 240NYS627; 55ND104, 212NW776. [e] 55ND104, 212NW776.

1188-68 218**Ky**805, 292SW508.

1188-69 37GaA208, 139SE367; 37GaA 211, 139SE585; 128 **Okl** 162, 261P545.

1188-69½-New. or where amendment fails to comply with order; 37GaA801, 142SE303.

1189-75 **SD** 230NW805(3dcase).

1189-77½-New. Where the objection is lack of jurisdiction of the person of defendant, motion must point it out specifically, 214**AppDiv**671, 212NYS707.

1189-77¼-New. and an objection that the complaint does not state facts sufficient to constitute a cause of action does not raise such question. 214**AppDiv**671, 212NYS707.

1189-77¼-New. It is reversible error to dismiss on the merits for omission of necessary allegations. 133**Misc**32, 231 NYS79.

1189-77½-New. Nonsuit without prejudice to bringing of new action is the proper remedy. 133**Misc**32, 231NYS79.

1189-77½-New. Misjoinder of causes of action is not ground for motion to dismiss case. **Iowa** 228NW293.

1189-86 246 **IllA**279; 247 **IllA**388; 189 **NC**460, 127SE519; 293**Pa**454, 143A115.

1190-87 [c] 195**NC**376, 142SE319 (extension of time for filing pleadings).

1190-89 122 **Okl** 62, 250P1027.

1190-1 78**CalA**90, 248P546; 38**GaA**343, 143SE909; 97**PaSuper**236.

1190-1½-New. or a nonsuit, 34**GaA**162, 128SE816.

1190-2 78**CalA**90, 248P546.

1190-6 25F(2d)275.

1190-7 218**AppDiv**172, 218NYS68.

1191-10 236 **IllA**104.

1191-11 236 **IllA**104.

1191-13 125**Misc**172, 210NYS423. See also 227**Ky**61, 11SW(2d)994. [b] **Refusal to dismiss held not error,** for failure to file within time specified, plaintiff not being prejudiced. 198NC432, 152SE38 (2dcase).

1191-14 28**Ariz**598, 238P399; 178**Ark** 635, 12SW(2d)18; 173Ark210, 293SW 25; 205Cal 42, 269P640; 100**CalA**24, 279 P677; 83**Colo** 235, 263P717; 164**Ga**803, 139SE552; 166**Ga**278, 142SE855; 45 **Ida** 211, 261P242; 328 **Ill** 582, 160NE113; 237 **IllA**530; 179**Minn**225, 229NW86; **NJ** 129A422; **NJ** 140A453 (one year); 216 **AppDiv**244, 215NYS87 (action pending six years, though triable any time within six months after plaintiff chose to move should be dismissed); 222**AppDiv** 765, 226NYS180; 222**AppDiv**840, 226 NYS749; 226**AppDiv**371, 235NYS521; 298**Pa**137, 148A50 (laches does not depend on statute of limitations, but on due diligence); 10**PaDist&Co** 47; **Tex CivA** 8SW(2d)711. [d] **Clerk of supreme court is not authorized** to dismiss case, noted and calendared for trial within a week after issue was reached, in absence of rule that notice should be given each term or every year. 30F(2d) 869. [e] **Where state is interested party.**—"Interested party," as used in Oklahoma statute prohibiting dismissal of action for want of prosecution where state is interested party and attorney general appears as attorney of record for state, means party to action. 137 **Okl** 67, 277P 1029.

1192-16 328 **Ill** 582, 160NE113; 222 **AppDiv**679, 225NYS813; **TexCivA** 280SW 855.

1192-18 28**Ariz**598, 238P399; 200**Cal** 661, 254P564; 89**CalA**94, 264P307; 45 **Ida**211, 261P242; 328 **Ill** 582, 160NE 113; 179**Minn**225, 229NW86; 113**TexCr** 495, 23SW(2d)365. [a] **Court will not read provisions as to retrial into statute.**—200**Cal** 661, 254P564.

1192-20 200**Cal** 661, 254P564.

1192-22 41**GaA**448, 153SE369(2dcase); 208 **Iowa**1199, 227NW108 (where issues fully joined and case legally assigned for trial on certain date); **LaA** 129S398; 32 **PortoRico** 621; **TexCivA** 294SW1115; **TexCivA** 297SW592. But see **TexCivA** 275SW168 (where both parties claim affirmative relief, court not limited to judgments of dismissal). [b] **Law presumes** that parties are always advised of course of pending cases. 32**PortoRico** 621. [c] **In Porto Rico.**—32**PortoRico** 621.

1193-23 [b] **Court is not deprived of jurisdiction** by mere lapse of five years between filing of answer and date of trial. 207**Cal** 617, 279P650.

1193-24 89**CalA**94, 264P307; 83**Colo** 235, 263P717; 179**Minn**225, 229NW86; 82**Mont**15, 264P683; 298**Pa**137, 148A50 (nine years' delay in action already old); 157SC297, 154SE415. [b] **Delays held not unreasonable.**—32F(2d)689 (eight years). [c] **Dismissal of intervention** for failure to prosecute for over two years after numerous extensions to procure evidence held not abuse of discretion. 42F(2d)991.

1193-25 22F(2d)431. [a] (1) 102**CalA** 290, 283P73. (10) Where supplemental answer five years begins to run from date of filing thereof. 69**CalA**106, 230P 952. (11) Where supplemental answer and plea in abatement setting up defense that plaintiff was alien enemy, which did not exist at time of answer, is filed, five-year period runs from entry of order granting leave to file such pleading and not from date of filing of notice of motion for leave to file same, 69**CalA**106, 230P952. (12) More than five years having elapsed since filing of original answer, suit is properly dismissed. 100 **CalA**24, 279P677. [f] **In British Columbia.**—[1925] 3**DomLR**541. [g] **In Massachusetts.**—168NE724.

1193-29½-New. Where action is pending more than three terms, it is proper to grant dismissal. 186**Wis**523, 203NW 332.

1193-29¼-New. Rule does not apply to retrial after new trial has been granted. 200**Cal** 661, 254P564.

1193-31 TexCivA 2SW(2d)936, 938 [quotCJ].
1193-32 70CalA452, 233P402; CalA 265 P973; 14PaDist&Co 270; 33PortoRico 932.
1194-35 151Wash392, 275P729.
1194-40 70CalA452, 233P402; 84CalA 750, 258P673; 328 Ill 582, 160NE113; TexCommnA 1SW(2d)268; TexCivA 2 SW(2d)936, 938 [quotCJ]; TexCivA 21 SW(2d)540 (where case continued from term to term, though plaintiff's attorney answered docket every term).
1194-41 But see CalA 267P537.
1194-42 [a] (4) Estoppel by action cannot take place of written stipulation for extension of time of trial so as to prevent dismissal. 87CalA108, 261P1100. (5) Letters between counsel not definitely extending time for trial do not prevent dismissal. 87CalA108, 261P1100.
1194-44½-New. or failed to answer after filing of demurrer. 70CalA452, 233 P402.
1195-45½-New. Steps taken by a defendant to bring cause to issue or trial will constitute a waiver of plaintiff's prior laches. 298Pa137, 148A50.
1195-47 But see TexCivA 273SW924.
1195-55½-New. or before the court, after leave to do so is granted by the referee. 222AppDiv765, 226NYS180.
1195-61½-New. Death of attorney is no excuse for failure to bring action to trial for six years. 216AppDiv244, 215NYS 87.
1195-63 70CalA452, 233P402.
1195-72 [b] **That attorneys were busy practitioners** does not excuse delay of six years in bringing action to trial. 216AppDiv244, 215NYS87.
1196-77½-New. or that plaintiff had the right to enter default; 89CalA94, 264P307.
1196-81½-New. That there was other litigation between some parties not involving same issues, is no excuse for six-year delay. 216AppDiv244, 215NYS87.
1196-88 298Pa137, 148A50 (defendants in assumpsit not bound to force action).
1196-93 32PortoRico 621. [c] **Setting in open court of day for trial** of case, sufficient notice to parties, and thereafter defendant may move to dismiss upon failure of plaintiff to appear. 32Porto Rico 621.
1197-97 Wash 286P664.
1197-99½-New. An order providing that judgment will be rendered in favor of plaintiff on presentation of a written judgment is not a final judgment precluding the court from dismissing the action for want of prosecution on plaintiff's failure to present a written judgment is required. 28Ariz598, 238P399.
1197-99⅓-New. The lapse of sixteen months after an order for judgment without presentation of a final judgment for approval and signing is sufficient to warrant dismissal. 28Ariz598, 238P399.
1197-6½-New. or was brought on the wrong side of the court, 148Va610, 139 SE273.
1197-11½-New. or improper argument by counsel; 119 Or598, 243P787.
1197-11⅓-New. or because of fraud practiced by plaintiff in obtaining order for new trial; 129Kan19, 281P925, 68 ALR415.
1197-12 See also 32PortoRico 167.
1197-14 [a] 219Ala492, 122S641; Mo 2SW(2d)743; 107WVa365, 148SE322 (1stcase).
1197-15½-New. A dismissal will be granted where plaintiff fails to discharge his burden of proof in a case tried without a jury. PrEdwIsl [1926] 2DomLR 883.
1197-19½-New. Where defendant, on motion to have the action discontinued, is not before the court, the court has no authority to make an order for discontinuance. 225AppDiv812, 232NYS 337.
1198-21 121Kan6, 245P742.
1198-32 315Mo 437, 285SW992.
1199-48 161Tenn155, 25SW(2d)580.
1199-49 45 Ida211, 261P242.
1199-53½-New. A case may be dismissed for want of prosecution on the call of the case for trial without notice to plaintiff or his attorney. 252 IllA 560.
1199-55 [a] **Where notice of motion was entitled only against defendants individually,** supporting affidavit, stating that complaint has not been served meant complaint thus entitled and not complaint against defendant as executor. 225AppDiv594, 234NYS15.
1200-58½-New. A notice of motion on basis of insufficiency of the complaint is insufficient where it refers to complaint as a whole not specifying parts alleged to be sham, frivolous, redundant, etc. 214AppDiv530, 212NYS464.
1200-67 14F(2d)1; 22F(2d)409; 200 Cal 661, 254P564; 204Cal 595, 269P446; CalA 265P973; 45 Ida211, 261P242 (defendant's presence on date of trial immaterial); 259Mass21, 155NE658; 298 Pa137, 148A50 (non prosequitur on account of plaintiff's laches); TexCivA 296 SW703.
1200-68 14F(2d)1; 70CalA452, 233P 402; 52ND28, 202NW852; TexCivA 296 SW703. [b] **In absence of showing excusing delay** order denying defendant's motion to dismiss for failure to prosecute is erroneous and therefore should be reversed and motion granted. 214 AppDiv145, 212NYS12.
1200-69½-New. Generally there must be a hearing on the motion. 161Tenn 155, 25SW(2d)580.
1200-70 Mass 167NE749. [b] **Quo warranto.**-32PortoRico 126.
1200-71 125Misc417, 211NYS270.
1200-72 8F(2d)161; 231Mich604, 204 NW704; 252NY430, 169NE635; 217App Div685, 217NYS226.
1200-74 27F(2d)618; 37F(2d)41; CalA 265P327, 334 [citCJ]. [d] **Changes in foreign law.**-125Misc417, 211NYS270.
1201-76 Utah 268P1029.
1201-77 5F(2d)1005; 213AppDiv760, 210NYS406 (where so used, allegations of complaint are taken as admittedly true); 131Misc514, 227NYS209. [b] **Allegations of complaint will be deemed true.**-142 Okl 187, 286P294.
1201-77½-New. A motion to dismiss on the ground that the complaint does not state facts sufficient to constitute a cause of action is in effect one for judgment on the pleadings. 165Minn482, 205NW 888.
1201-78 [a] **Declaration cannot be modified or extended** by statements on motion to dismiss. 40F(2d)544.
1201-78½-New. That plaintiff moved for trial before defendant's motion to dismiss may be considered with the pertinent circumstances, although not alone precluding dismissal. 32F(2d)689.
1201-78⅓-New. Questions relating to matters appearing on the face of the record may properly be raised by motion to dismiss. Mass 167NE254.
1201-78¼-New. Motion to dismiss on ground that complaint does not state cause of action must be decided on its allegations, and statements in brief cannot be considered. 131Misc712, 227NYS 717.
1201-82 23F(2d)885; 34F(2d)312; 36 F(2d)108; 43F(2d)225; DC 40F(2d) 800; 244Mich480, 221NW622; 249Mich 276, 228NW677; 222AppDiv627, 227 NYS331. [b] **Facts and inferences therefrom, but not conclusions or inferences of pleader,** are admitted. 131Misc514, 227NYS209.
1201-86 CalA 268P481; MoA 288SW 979.
1201-88 213Ala119, 104S412 (affidavit stating "belief" of affidavit that recovery should have been for greater amount is insufficient in motion to set aside judgment and dismiss suit on ground that recovery was less than jurisdictional amount).
1201-90 89CalA94, 264P307.
1201-91 83Colo 235, 263P717.
1201-95½-New. A presumption of injury arises from unreasonable delay in prosecuting an action, and defendant seeking dismissal need not show damage. 204Cal 595, 269P446.
1201-95⅓-New. On motion to dismiss, an allegation in the affidavit of plaintiff's counsel on information and belief that release set up by defendant was procured without adequate consideration and by collusion and was therefore void, without stating the source of affiant's information or grounds of his belief, is ineffectual to create an issue. 133Misc843, 233NYS632.
1201-95¼-New. On motion to dismiss for lack of jurisdiction of the person, jurisdictional facts may be controverted, although alleged in the complaint. 15 F(2d)256.
1201-95⅙-New. Injury from delay in prosecution of suit may be shown or inferred. 22F(2d)431.
1201-95⅙-New. An action should not be dismissed on the ground of abandonment unless abandonment clearly appears. TexCommnA 1SW(2d)268.
1201-1 100CalA64, 279P669; 104Conn 693, 133A669; 6LaA132 (premature action); Mass 168NE725; 143Miss597, 109S8; 50ND287, 195NW511; TexCivA 286SW584. [a] (3) Where action for libel in judicial proceedings was prematurely brought, suit was dismissed without prejudice. 160La652, 107S478. [e] **Judgment dismissing action for abandonment,** by permitting it to lie dormant for unreasonable time, should not have included words "with prejudice." 151 Wash392, 275P729. [f] **Premature action** should be dismissed without prejudice. 33F(2d)289.
1202-2 [b] **Dismissal by clerk** of inactive case under court rule is equivalent to nonsuit. Mass 168NE724.
1202-3 11F(2d)854; 213Ky567, 281SW 487; 162La83, 110S97.
1202-7 13PortoRicoFed113 (on confession of demurrer). See also 45 Ida595, 264P233.
1202-10 TexCivA 29SW(2d)966.
1202-10½-New. where plaintiff fails to appear when the case is called for trial; 206 Iowa507, 220NW74.
1202-11½-New. where plaintiff asks for leave to take voluntary nonsuit which is refused and declines to participate in trial of defendant's counterclaim; Tex CivA 286SW584.
1202-14½-New. Fact that action was premature does not require dismissal without prejudice, where the cause of action accrued before filing of the second amended complaint and trial. 150 Wash554, 274P176.
1202-14⅓-New. Order or judgment by court is ordinarily required to make dismissal effective. 161Tenn155, 25SW(2d) 580 (case not out of court until proper action taken by defendant).
1202-14¼-New. Under a statute providing for dismissal for want of prosecution, the only relief granted is to require on a proper showing that an order of dismissal be entered. 207Cal 617, 279P650.
1202-16 271US228, 46SCt496, 70Led 920 (plaintiff's want of standing to maintain suit requires dismissal on merits).
1202-17 [b] **Record held to show that court passed** on merits of plaintiff's evidence, notwithstanding use of words "judgment of nonsuit will be granted." 145Wash258, 259P718.
1202-18 11F(2d)854.
1202-19 [a] **Notice of change before entry of judgment.**-After granting plaintiff's motion to dismiss without prejudice, court cannot enter judgment dismissing action on merits without notice to plaintiff. SD 213NW2.
1203-36 [b] **Where case is dismissed without evidence having been taken,** it is error to render judgment on merits. CalA 265P327.
1203-37½-New. Decision of the court in dismissing an action for want of jurisdiction is a judicial act and must be in the form of a judgment. 225AppDiv 484, 233NYS530.
1204-45½-New. Court having subsequently ratified order of dismissal made without application therefor, the legal effect is the same as if application had been made to and granted by the court on the principle that a court will ratify that which has been done, which it would have ordered to be done had application therefor been made. 157Md 175, 145A497.
1204-45⅓-New. An oral order is sufficient. 186Wis523, 203NW332.
1204-45¼-New. When an inactive suit is dismissed by the clerk pursuant to a court rule, the judge need not be pres-

ent. **Mass** 168**NE**724.

1204–54½–New. Unauthorized words in the docket entry of dismissal are properly stricken. **Mass** 168**NE**724.

1204–68½–New. Waiver of cross action as discontinuance. TexCivA 283**SW**188.

1204–64 But see 322**Mo** 892, 17**SW(2d)** 524; 222**MoA**408, 7**SW(2d)**279.

1204–70½–New. Under some statutes, where the sheriff, to whom a writ of scire facias to revive a judgment is directed, makes return of "not found" and the court, after ordering issuance of alias summons to same sheriff returnable at second succeeding term, orders the case continued to such term, there is no discontinuance. 322**Mo** 892, 17**SW (2d)**524.

1204–72 322**Mo** 892, 17**SW(2d)**524; 222 **MoA**408, 7**SW(2d)**279, 282 [citCJ]; 222 **MoA**408, 7**SW(2d)**279.

1204–73 Mo 20**SW(2d)**896. [a] **In Missouri.**–20**SW(2d)**896.

1205–75 322**Mo** 892, 17**SW(2d)**524; 222 **MoA**408, 7**SW(2d)**279, 282 [citCJ]; 222 **MoA**408, 7**SW(2d)**279.

1205–78½–New. Elimination of dormant case from docket operated as dismissal. 207 **Iowa**581, 223**NW**383.

1206–5 45 **Ida**211, 261**P**242 (want of prosecution). [a] **On motion for nonsuit by certain defendants** court erred in entering judgment for others, absent motion. **Cal** 292**P**624.

1207–23½–New. In absence of motion for judgment on pleadings, or submission for trial to court, it is error to dismiss on court's own motion. 35 **OhA**76, 171**NE**870.

1207–24 Fla 129**S**889.

1207–25 Fla 129**S**889; 235**Mich**90, 209 **NW**76 (jurisdiction of subject matter is thereby lost); **TexCommnA** 288**SW**406. See also 236**Mich**480, 210**NW**332.

1207–26 89**CalA**94, 264**P**307; 102**CalA** 290, 283**P**73; 252 **IllA**560; 235**Mich**90, 209**NW**76 (judgment cannot be rendered); 298**Pa**137, 148**A**50 (right to amend pleadings is ended). [b] **Effect of dismissal as to one party.**–Such party has no standing to reply to any additional pleading or to file amended pleading. 58**ND**738, 227**NW**362.

1207–29 Fla 129**S**889; **TexCivA** 290**SW** 841.

1207–30 270**US**593, 46**SCt**367, 70**L ed** 750, 45**ALR**1370 (holding dismissal of suit to cancel contract as in violation of Anti-Trust Act was on merits and not for want of jurisdiction to grant relief on counterclaim). [b] **Judgment for dismissal is as final,** for purpose of appeal, as judgment on the merits. **Tex CommnA** 288**SW**406.

1207–31 117 **Or**598, 243**P**787 (bars further prosecution except as allowed by judgment of nonsuit). See also 91**Fla** 30, 107**S**249.

1208–34 222**Ky**361, 300**SW**913.

1208–34½–New. When order becomes final, it could be set aside only by direct proceedings. **TexCommnA** 288**SW**406.

1208–34⅓–New. Dismissal in equity case, without findings and conclusions of law, is regarded as nonsuit. 222 **AppDiv**754, 225**NYS**338.

1208–34¼–New. Judgment overruling a general demurrer to a petition is not pertinent on the question of plaintiff's right to sue, where, on trial, some of the allegations of the petition are not proved by plaintiff's evidence, and a nonsuit is awarded. 40**GaA**268, 149**SE** 296.

1208–35 160**La**400, 107**S**239; 161**La** 1002, 109**S**816; 162**La**83, 110**S**97. [b] **Demand in reconvention.**–160**La**400, 107 **S**239. [c] **Motion for nonsuit without motion for judgment** on counterclaim is waiver of judgment on counterclaim. **NC** 154**SE**318.

1208–36 [a] **Rights of parties held to be in same condition** as before inception of suit. 160**La**400, 107**S**239.

1208–39 TexCommnA 13**SW(2d)**688. [d] **Dismissal of petition on demurrer as without equity** will not effect dismissal of cross bill alleging additional matters germane to original petition and praying affirmative relief, although relief prayed for is not of equitable character and is cognizable in court of law. 35**GaA**178, 132**SE**410.

1208–43 TexCivA 299**SW**474.

1208–44 73**CalA**95, 238**P**133.

1209–49 207 **Iowa**581, 223**NW**383.

1209–51½–New. The court clerk's order, dismissing a case, noted and calendared for trial within the week after issue was reached, being void as not authorized, the order vacating dismissal and the order vacating such order are also void, as the cause is deemed to be still pending. 30**F(2d)**869.

1209–51⅓–New. An order of dismissal may be vacated on behalf of one in whose favor the order was made. 73 **CalA**95, 238**P**133.

1209–51¼–New. The trial court has jurisdiction and power to hear a motion to reinstate a case where defendant has prayed affirmative relief and the case has been dismissed on plaintiff's motion. **TexCivA** 282**SW**900.

1209–51½–New. Motion to reinstate cause after judgment of dismissal at prior term held not in nature of bill in equity to review judgment as affects authority of court. **TexCivA** 18**W(2d)** 681.

1209–53 200**Cal** 697, 254**P**573. 51**ALR** 930; **Fla** 129**S**889; 36**GaA**199, 136**SE** 112; 37**GaA**110, 139**SE**100 (during term); 208 **Iowa**199, 227**NW**108; **Tex CivA** 271**SW**199; **TexCivA** 294**SW**278.

1209–54 [a] (1) 297**Pa**47, 146**A**148. (2) Motion by plaintiff, under act of March 11, 1875, submits legal sufficiency of evidence to court in banc for decision. 288**Pa**164, 135**A**742.

1209–55 Fla 129**S**889; 36**GaA**199, 136 **SE**112; 37**GaA**110, 139**SE**100; **TexCivA** 271**SW**199. [a] (1) 29**F(2d)**246; 203 **Cal** 504, 265**P**180; 37**GaA**110, 139**SE**100; 208 **Iowa**199, 227**NW**108.

1209–57 37**GaA**110, 139**SE**100; **Mo** 19 **SW(2d)**668 (on court's own motion); **TexCivA** 23**SW(2d)**888; **TexCivA** 271 **SW**199; **TexCivA** 274**SW**655; **TexCivA** 297**SW**878.

1209–60 14**F(2d)**331; 245 **IllA**575; 103 **NJL**549, 137**A**533; **TexCommnA** 288**SW** 406; **TexCivA** 299**SW**474; **TexCivA** 1 **SW(2d)**681; **TexCivA** 22**SW(2d)**334. But see 83**Colo** 406, 266**P**211. [c] **Order dismissing cause is final judgment** within court rule extending term of court. 42**F(2d)**142.

1210–61 103**NJL**549, 137**A**533. See also 34**F(2d)**660(1stcase).

1210–64 29**F(2d)**246. But see **TexCivA** 271**SW**199.

1210–65 103**NJL**549, 137**A**533.

1210–66 73**CalA**95, 238**P**133.

1210–67 But see **TexCivA** 25**SW(2d)**622 (2dcase).

1210–68½–New. In Illinois a motion to reinstate a case at a subsequent term is not addressed to equitable powers of court. 252 **IllA**443.

1210–68⅓–New. Motion to reinstate cause after judgment of dismissal is not motion for new trial within statute making judgment final after 30 days from overruling such motion. **TexCivA** 23**SW(2d)**888.

1210–68¼–New. An application to vacate an order of dismissal made after the expiration of the time to appeal therefrom is too late under some statutes. 28**Ariz**598, 238**P**399.

1210–68⅛–New. Where reinstatement is in fact made at term of court at which dismissal of case occurred without entry of order on minutes, an order of reinstatement nunc pro tunc may be made at subsequent term. **TexCivA** 274**SW** 655.

1210–78 TexCivA 294**SW**278.

1210–80 235**Mich**90, 209**NW**76.

1211–81½–New. Where defendant was in default at the time of dismissal and had not appeared in the action, service of notice on defendant is not necessary to give the court jurisdiction to vacate the judgment of dismissal. 199**CalA** 523, 250**P**397.

1211–81⅓–New. Service of process is not necessary to give the court jurisdiction to vacate its judgment of dismissal for mistake. 199**CalA**523, 250**P**397.

1211–81¼–New. Service of notice of motion is sufficient for such purpose. 199**Cal** 523, 250**P**397.

1211–81⅛–New. Service of such notice may be made by mail where defendant is a resident. 199**Cal** 523, 250**P**397.

1211–82 See also 94**PaSuper**413.

1211–84 Mo 271**SW**52 (motion must specify reasons).

1211–85½–New. where order of dismissal was inadvertently or improvidently made, 73**CalA**95, 238**P**133.

1211–3 102**CalA**290, 283**P**73 (must be based on facts directly affecting grounds on which dismissal was granted); 41 **GaA**448, 153**SE**369(2dcase); 252 **IllA** 443; 230**AppDiv**392, 244**NYS**725. [e] **That plaintiff's attorney did not know that case had been reached for trial** because of many judges assigned to hear calendar is not ground for reinstating case. 252 **IllA**443.

1212–5 TexCivA 270**SW**1041. [c] **Mistake of clerk** in setting cause for trial on day earlier than that agreed upon with plaintiff's attorney is ground for vacating order of dismissal and reinstating action. 252 **IllA**476.

1212–6½–New. Defendant's ignorance of certain steps in the litigation is not a sufficient excuse for considering his motion to set aside a dismissal granted to him for lack of prosecution. 102 **CalA**290, 283**P**73.

1212–6⅓–New. Failure to enter order of dismissal though signed is ground for vacation. 42**F(2d)**142.

1212–7 [b] **Motion for reinstatement** is, in legal effect, motion for new trial. **TexCommnA** 288**SW**406. [c] **Application to strike off judgment of non prosequi** is appeal to equitable power of court. 293**Pa**454, 143**A**115.

1216–8 14**PaDist&Co** 4.

1212–9 [a] **Plaintiff is only party** entitled to move to take off nonsuit. 285 **Pa**241, 132**A**185.

1212–10 [b] **Statement of grounds in affidavit attached to notice of motion** is sufficient to apprise adverse party of grounds, and cures defect in notice. 203**Cal** 504, 265**P**180.

1212–11 246 **IllA**79.

1213–18½–New. Where a motion to set aside an order for nonsuit, not acted on during term, is continued until the following term, the cause is not kept in status as at the trial so as to obviate the necessity of further order of continuance, if not acted on at the time set. 219**Ala**352, 122**S**410.

1213–18⅓–New. In Texas a bill of review to set aside dismissal for want of prosecution, after the term at which judgment was rendered, must be docketed, numbered, and tried as a separate suit, wherein plaintiff must show a valid excuse for not appearing at the trial, or moving for a new trial, and show meritorious cause of action. **TexCivA** 9**SW(2d)**472.

1213–18¼–New. A proceeding to set aside a dismissal after term, wherein allegations set forth facts to excuse failure to appear at the trial, or to move for a new trial, and a meritorious cause of action, should be treated as an equitable proceeding in the nature of a bill of review. **TexCivA** 9**SW(2d)**472.

1213–18⅛–New. Judgment is not void because of previous reinstatement of case, after dismissal for want of prosecution, without compliance with the law as to hearing on motions. 32**F(2d)** 159.

1213–18¼–New. On motion to set aside nonsuit, plaintiff is entitled to every inference which might reasonably be drawn from all the evidence, 218**MoA** 590, 265**SW**856.

1213–18⅛–New. and the evidence must be taken as true. 218**MoA**590, 265**SW**856.

1213–18⅛–New. On such motion the court may consider the evidence given at the time of the nonsuit. 105**WVa**46, 141**SE**434.

1213–33½–New. Where order purporting to set aside order of dismissal was obtained ex parte without affidavits or notice, it is properly set aside as improvident. 183**Wis**523, 203**NW**332.

1213–33⅓–New. Motion to set aside such order held too late. 315**Mo** 437, 285**SW**992.

1213–36 246 **IllA**79.

1214–40½–New. Though an order rein-

stating the case does not recite that counsel were present and waived provisions of the statute, the order is not void so as to be subject to collateral attack in subsequent proceedings. 32 F(2d)159.

1214-41 [b] **Order is in effect granting of new trial.**–308Mo 322, 272SW692.

1214-44½-New. Judgment of restitution of dismissed case rendered without notice to parties may be collaterally attacked in any court. 235Mich90, 209 NW76.

1214-44¾-New. Reinstatement on consent of parties at subsequent term amounts to institution of new suit of which the court has jurisdiction. 322 Mo 1017, 18SW(2d)13.

DISORDERLY CONDUCT

1216-4 See also 214NYS778.

1216-12 [a] **Other statements of what constitutes disorderly conduct.**–179Minn 355, 229NW311. [b] For husband to be "disorderly person" for abandonment of wife or children they must be in danger of becoming a public burden. 245NYS559.

1217-13 [a] **Time of act.**–14PaDist &Co 4.

1217-14 9PaDist&Co 713.

1217-17½-New. In New York violation of Volstead Act when it is public, offensive, and annoying is punishable as disorderly conduct under Pen. L. § 722. 126Misc762, 214NYS781 (even in absence of state enforcement law).

1217-17¼-New. Statute making disorderly conduct crime must be strictly construed. 214NYS778.

1217-17½-New. Such statutes may be changed, amended, or repealed only by state legislature. 214NYS778.

1217-17⅝-New. They cannot be modified by congress. 214NYS778.

1218-31 135Misc214, 238NYS151 (discretion of magistrate). [b] **Violation of Volstead Act** may be punishable as disorderly conduct for disturbance of peace which it may occasion. 126Misc762, 214 NYS781 (for further reason of public nature of act and disrespect for law which it encourages).

1218-43 **NJSup** 139A423. [a] (3) Town hall held a public place within meaning of statute. 101NJL450, 130A 569. [b] (4) Home held not public place. **NJSup** 139A423.

1219-47 135Misc336, 239NYS356.

1219-53½-New. **In New York** neither violation of Volstead Act by restaurant proprietor, 214NYS778.

1219-53¾-New. nor drinking of intoxicating liquors by patrons is disorderly conduct within Pen. L. § 722. 214NYS 778.

1220-58 101NJL450, 130A569. [a] See also NJ 146A426. [b] **Held not disorderly conduct.**–**NJSup** 147A625(1stcase).

1220-59 101NJL450, 130A569.

1221-87 37GaA116, 139SE109.

1221-91 118 OhSt25, 160NE473. [a] **Religious healers.**–92PaSuper169. [b] **Fortune teller** is one pretending to knowledge of futurity and foretelling events of one's life. 118 OhSt25, 160NE 473.

1221-94 [a] (12) Strikers carrying banner in front of home of non-union coemployee with language directed against her as strikebreaker. 179Minn 355, 229NW311. (13) Street car passenger, refusing to pay fare or leave car when transfer tendered was properly refused, is guilty of disorderly conduct. 149Va882, 141SE829. (14) Husband's taking wife to her mother's home and telling her to stay there. 245NYS559. (15) Other instances. 39GaA814, 148SE 612. [b] (10) Other acts not constituting disorderly conduct. 23 OhA109, 155NE393. (11) Collection of voluntary contributions at Sunday amateur ball game is not disorderly conduct. 14 PaDist&Co 4. (12) Mere noise or assembly of persons does not constitute disorderly conduct. 14PaDist&Co 4. (13) Conduct of amateur ball game on Sunday in residential district held not to constitute disorderly conduct. 14 PaDist&Co 4. [c] (14) One marching up and down in front of business place, when no strike is on, and no crowd collected, is not guilty of disorderly conduct under Pen. L. § 722. 245NY401, 157NE508. (15) Five persons on Broadway at 12th Street, New York City, are not a crowd under Pen. L. § 722. 245NY401, 157NE508.

1223-17 118 OhSt25, 160NE473 (fortune telling).

1223-32 [c] **Identity.**–**NJSup** 135A789.

1224-45 20AlaA585, 104S345; **NJSup** 135A789.

1224-46 **NJSup** 135A789.

1225-64 [a] (5) Other instances. 35 **PortoRico** 585.

1226-85 21AlaA455, 109S288.

1226-87 21AlaA455, 109S288.

1227-95 [b] (2) Nor of her prior sexual relationship with defendant. 21AlaA 455, 109S288.

1227-97 97PaSuper459. [a] 21AlaA 422, 109S124; 39GaA814, 148SE612; 245NYS559. [b] 36GaA122, 135SE496; 39GaA634, 148SE169; 9PaDist&Co 713.

1227-3 [a] (1) 36GaA122, 135SE496.

1227-6 [a] 37GaA116, 139SE109.

1228-12 **SD** 221NW253, 254 [citCJ].

1228-28 23AlaA140, 122S301(1stcase).

1228-29 But see 151SC90, 148SE710.

1229-34 151SC90, 148SE710 (directed verdict for defendants held error under evidence).

1229-45 151SC90, 148SE710 (fine of one hundred dollars for disorderly conduct held not excessive).

DISORDERLY HOUSES

1233-11 32Ariz607, 261P337 (statutes regulating houses of ill fame held repealed by statute punishing owners and lessees).

1234-16 See also 125Misc658, 211NYS 705 [citCJ].

1236-50 See also 125Misc658, 211NYS 705 [citCJ].

1236-69 204Ky718, 265SW285.

1240-32 [b] **SD** 221NW253, 254 [citCJ].

1240-35 85PaSuper316.

1240-43 85PaSuper316.

1240-45½-New. Under some statutes the offense defined is not keeping a house which is reputed to be a disorderly house, but keeping one which is disorderly in fact. OklCr 277P676(2dcase).

1241-51 100TexCr358, 273SW584.

1241-54 85PaSuper316.

1242-61 85PaSuper316.

1242-63 85PaSuper316 (per se).

1244-88 127Misc244, 216NYS442.

1244-97 [a] **RI** 133A649.

1244-99 [a] **RI** 133A649.

1245-5 See also 125Misc658, 211NYS 705 [citCJ]. But see 127Misc244, 216 NYS442.

1246-28½-New. One may be guilty of keeping a bawdyhouse by furnishing the place and opportunity to practice fornication, although no actual act of fornication is committed. 90PaSuper 403.

1246-28½-New. Under some statutes owner of premises used as house of prostitution is "landlady" thereof. **Or** 290P1093.

1246-29 **NJSup** 138A310; 127Misc594, 217NYS488.

1246-30 **NJSup** 138A310.

1246-33 See also **SD** 221NW253.

1247-48 187Wis445, 204NW498 (offense of knowingly letting room for purpose of prostitution is completed by letting, though act not accomplished or intended to be).

1248-50 32Ariz607, 261P337.

1248-54 126Me136, 136AS08.

1251-9½-New. Proprietor's recent absence did not relieve her of liability for acts of employee in operating place resorted to for lewdness. **Wash** 286P42.

1251-15 **NJSup** 132A312.

1252-29 [a] **Provision for penalty in statute relating to suppression of nuisances held unconstitutional.** 245NYS95.

1253-47 34PortoRico 318; **SD** 221NW 253.

1254-52 [a] (1) 200 **Ind**43, 161NE265.

1255-70 32Ariz607, 261P337 (under statutes regulating location).

1256-85 [a] (3) 219Ky494, 293SW963.

1257-2 32Ariz607, 261P337.

1259-41 126Me136, 136AS08.

1262-91 126Me136, 136AS08.

1262-4 229AppDiv790, 242NYS178.

1263-5 [a] (3) Care and treatment of minor children immaterial. 199 **Iowa** 1209, 203NW20.

1264-25 226AppDiv104, 234NYS567.

1264-33 [c] **Reputation of defendant in** respect to bawdy house may be shown. 97PaSuper216.

1266-47 3Del 191, 133A788, 789 [citCJ].

1266-48 174Minn603, 218NW557; **Okl Cr** 277P676(2dcase); 97PaSuper216.

1267-49 **SD** 221NW253.

1267-51 3Del 191, 133A788, 789 [cit CJ].

1267-55 205 **Iowa**1052, 219NW23.

1268-63 250Mich679, 231NW63; 226 AppDiv104, 234NYS567 (bad character of frequenters).

1268-67 **NJSup** 138A310.

1268-68 **NJSup** 138A310.

1268-71 200 **Ind**1, 161NE5, 6 [citCJ].

1269-83 200 **Ind**1, 161NE5, 6 [citCJ].

1270-98 [a] (4) Statement of inmate of house that defendant advised prostitution has been held admissible to show knowledge. 126Me136, 136A808. (5) Acts prior or subsequent to act in indictment have been held admissible to show knowledge. 126Me136, 136A808.

1270-2½-New. Evidence of prior raid under another tenant is inadmissible. 245NYS120.

1270-3 110TexCr321, 5SW(2d)772.

1270-5 205 **Iowa**1052, 219NW23.

1270-6 193Wis652, 215NW455 (evidence sufficient).

1271-12 200 **Ind**43, 161NE265. [a] (1) 36GaA114, 135SE492; 200 **Ind**1, 161NE 5; 205 **Iowa**1052, 219NW23; 204Ky718, 265SW285; 240Mich489, 215NW345; 173Minn610, 216NW533; 174Minn603, 218NW557; **NJSup** 132A312; 226App Div104, 234NYS567; 90PaSuper403. [b] (1) 200 **Ind**43, 161NE265; 200 **Ind** 53, 161NE271; **OklCr** 277P676(2dcase); 110TexCr288, 8SW(2d)126.

1271-13 [a] (1) 240Mich489, **215NW** 345.

1272-20 [a] 173Minn610, 216NW533.

1272-31 **OklCr** 277P676(2dcase); 102 TexCr409, 278SW210.

1273-40 [a] 240Mich489, 215NW345; **Or** 290P1093. [c] **Evil disposition and tendency of frequenters** need not be shown where there is other proof sufficient to support conviction. 205 **Iowa** 1052, 219NW23.

1273-51 [a] (1) **NJSup** 133A412.

1274-57 187Wis445, 204NW498 (circumstantial evidence sufficient). [a] (5) Other evidence held sufficient. 110 TexCr321, 5SW(2d)772.

1274-58 [a] 187Wis445, 204NW498 (letting room for prostitution).

1275-72 **NJSup** 133A412; **Or** 290P 1093.

1275-81 **NJSup** 133A412.

1275-86 [a] **Instructions held erroneous.**–229AppDiv790, 242NYS178.

1275-90 [a] 126Me136, 136AS08.

1276-99 240Mich489, 215NW345.

1277-22 135Misc475, 239NYS122 (fine of one hundred dollars and year in penitentiary).

DISPENSE

1278-35½-New. Etymologically, dispense has meaning to weigh out; pay out; distribute; regulate; manage; control; but when used with "with," may mean do without; or do away with; and hence, when used in connection with a municipal office, may be synonymous with abolish. **TexCivA** 275SW 614.

DISPOSE

1280-71 289Pa101, 137A132.

1280-91 [b] (2) "The expression 'to dispose of' is very broad, and signifies more than to sell." 31NM120, 241P 1027, 1037.

1280-87 99Fla152, 126S135.

1280-93 161La771, 109S485.

DISPOSITION

1282-7½-New. alienation, 289Pa101, 137A132.

1282-7⅛-New. bestowal, 289Pa101, 137A132.

DISQUALIFY

1283-43 **Utah** 269P103, 128 [citCJ].

DISTILLATION

1287-21 [c] 51LaAnn562, 585, 25S447.

DISTILLERY

1288-31½-New. Fortifying room of a bonded warehouse is a distillery within the federal statute. 14F(2d)118.

DISTORT

1289-55½-New. To twist out of natural or regular shape; to twist aside physically; to force or put out of true posture; to twist, wrest, or deform. 34 F(2d)41.

DISTRESS

1290-71 131Misc373, 226NYS723.

DISTRIBUTEE

1291-92 108WVa480, 151SE709.

DISTRIBUTIVE

1292-6 92Fla327, 109S435, 437 [cit Cyc].

DISTRICT

1293-11 [g] **As meaning "territorial jurisdiction."**-14F(2d)312.

1293-19 [a] **As used in compensation statute,** it means place or locality, which has common characteristics of business or employment. 259Mass376, 156NE 533.

DISTRICT AND PROSECUTING ATTORNEYS

1296-5 41 Ida14, 236P862 (is officer of judicial department).

1296-6 94Fla318, 113S689; 120 Okl 105, 250P519; Pa 152A33.

1296-7½-New. He is not an executive officer. 41 Ida14, 236P862.

1296-9 89 IndA701, 168NE28.

1296-10 94Fla1128, 115S537, 538 [cit Cyc].

1296-15 157Miss576, 128S759 (powers cannot be changed by attorney-general).

1297-18 TexCivA 274SW1011 (power to regulate duties in certain circumstances delegated).

1297-20 See also 118Tex463, 16SW(2d) 1063.

1298-41½-New. Election. Where constitution provides for election where unexpired term exceeds one year, amending statute providing for appointment by county board in such case is unconstitutional. 327 Ill 433, 158NE743.

1299-63 See also Sask [1928] 4DomLR 581.

1299-67 319 Ill 596, 150NE280.

1299-69 Pa 152A33.

1300-70½-New. A state's attorney in presenting a case to the grand jury does not act as an attorney in fact. 319 Ill 596, 150NE280.

1301-3 TexCivA 274SW1011.

1302-26 Pa 152A33.

1302-36 120Kan733, 245P150.

1302-37 120Kan733, 245P150.

1303-39 120Kan733, 245P150.

1303-43 120Kan733, 245P150.

1303-43½-New. or sanctioning extortion by justices of peace, 120Kan733, 245P150.

1304-64½-New. Proceedings are civil and not criminal. 120Kan733, 245P150.

1304-67½-New. The governor is not prevented from taking jurisdiction by failure of electors to file a bond for costs at the time of filing charges. 57 ND511, 222NW652 (defect cured by subsequent filing).

1304-67¾-New. The governor is not deprived of power to determine the issues by his failure to set a time for hearing the charges within a stated time after the commissioner's report. 57ND 511, 222NW652.

1304-68 [a] **Amendments.**-57ND511, 222NW652 (properly allowed with reasonable time to prepare defense).

1304-68½-New. Statutes in some jurisdictions make no provision for removal of prosecuting attorney until he has been tried and found guilty. 309Mo 408, 274SW407.

1304-72 [b] **Evidence sufficient** to justify removal for official misconduct and neglect of duty. 120Kan733, 245P150. [c] **Admissibility.**-120Kan733, 245P150.

1304-75 57ND511, 222NW652.

1305-80 [a] **Resignations complete when filed in proper office** although intended to take effect later. 137Misc748, 244NYS445.

1305-92½-New. Upon transfer of county to new judicial district it may be provided that district attorney of old district shall continue to prosecute criminal actions to the end of his term. Tex CivA 274SW1011.

1306-2 [a] **Waiver of objections to citation or venue.**-18F(2d)357.

1306-36½-New. Order directing United States to show cause served on district attorney does not necessarily bring into court any representative of government in any of its branches. 40F(2d) 593.

1306-47 319 Ill 596, 150NE280; 33NM 664, 275P373; 38 OklACR88 (duty of county attorney). [b] 33NM664, 275P 373.

1306-48 323 Ill 261, 154NE97; 123Kan 495, 256P149; 56ND227, 216NW898, 56 ALR1217.

1307-49 323 Ill 261, 154NE97; 123Kan 495, 256P149; 157Miss576, 128S759 (statute held to confer no common law powers); 315Mo 549, 286SW355; 121 Okl 108, 247P996. [a] (13) 323 Ill 261, 154NE97.

1309-60½-New. The district court may determine which of two prosecuting attorneys is authorized by statute to prosecute criminal actions before it. Tex CivA 274SW1011.

1309-60⅓-New. District attorney has authority to investigate places amounting to public nuisances in violating liquor laws. 125Misc658, 211NYS705.

1309-60¼-New. to indict and bring to trial persons responsible therefor. 125 Misc658, 211NYS705.

1309-60⅕-New. He may employ detectives to investigate illegal sale of liquor. 125Misc658, 211NYS705.

1309-60¼-New. It is the duty of the county attorney to advise and assist the board of county commissioners where they act for, and on behalf of, a township within the county in the issuance of road improvement bonds. 38 OklACR 88.

1309-60⅐-New. It is the duty of the prosecuting attorney, under some statutes, to institute suit against one who usurps county office. 172Ark1009, 291 SW420, 51ALR559.

1309-60⅛-New. State's attorney is under no duty to refrain from challenging legislation which violates constitution. 329 Ill 65, 160NE175.

1310-68 [c] **Powers of district attorney are statutory** and cannot encroach on powers of Attorney General. 157 Miss576, 128S759.

1310-69 [a] (4) County attorney under direction of attorney general may institute mandamus suit for state to compel city officers to call election. 115Tex 205, 281SW837.

1310-71 23AlaA255, 123S275(1stcase).

1311-80 123Kan774, 256P804.

1311-84 See also 157Miss576, 128S759.

1311-88 But see TexCommnA 282SW 793.

1311-83½-New. Under constitutional provisions, in some jurisdictions, all district officers are required to reside in their districts. TexCommnA 282SW 793.

1312-6 MoA 7SW(2d)375.

1313-7 142 Okl 105, 288P463.

1313-19 13PaDist&Co 500 (applicable to violation of statute prohibiting driving under influence of liquor).

1314-28 204Cal 31, 266P522. [b] **Status of detectives.**-69CalA230, 230P987. [c] **Determination of necessity for employment.**-(1) 69CalA230, 230P987. [d] **Character of crimes to be detected.**-69 CalA230, 230P987 (detection of violations of motor vehicle laws and liquor laws held included). [e] **Continuing character of employment.**-69CalA230, 230P987.

1314-34½-New. Public authorities may employ detectives or other persons to secure evidence in furtive crimes and misdemeanors. 89PaSuper190.

1314-42 319 Ill 596, 150NE280.

1314-45 94Fla1128, 115S537, 539 [cit Cyc].

1314-46½-New. He has the duty to protect persons from unfounded accusations. 27F(2d)137.

1315-54½-New. , and in determining what cases shall be prosecuted, dismissal for want of evidence, or in payment of costs. 120Kan733, 245P150.

1315-57 99Fla1330, 128S807 (holding prosecuting attorney must retain control and remain present when privately retained assistants are employed).

1315-69 See also MoA 7SW(2d)375.

1315-77 77CalA29, 245P769.

1316-79½-New. It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon issue of guilt or innocence in relation to main issue. 235Mich475, 209NW584.

1316-79⅓-New. or to give some good excuse for not doing so. 235Mich475, 209NW584.

1316-79¼-New. The prosecuting attorney should not testify in a criminal prosecution except under the most extraordinary circumstances. 32F(2d)505.

1316-79⅕-New. A prosecutor, having evidence that a police official improperly collected money, should present the facts to the grand jury, not assert the right to examine the bank accounts of all members of the department. NJ 146A34(2dcase).

1316-92 MoA 277SW354.

1316-3 33 OhA501, 170NE33 (recovery of real estate belonging to county).

1317-7 [d] **Power to compromise.**-30 NM491, 239P741.

1317-13½-New. A county attorney is authorized to maintain, on relation of the state for, and on behalf of, the county, an action against county commissioners and their bondsmen for illegal expenditures. 127 Okl 113, 261P368.

1317-29 127 Okl 113, 261P368.

1318-35½-New. The consent of the board of county commissioners is not necessary to authorize the county attorney to prosecute an appeal from a judgment adverse to the county, in an action instituted against the commissioners and their bondsmen for illegal expenditures of public funds. 127 Okl 113, 261P368.

1318-40 15F(2d)314, 317 [citCJ]; 120 Okl 105, 250P519.

1318-40½-New. A county attorney is immune from civil liability in damages for the discharge of his official duties even where error of judgment is disclosed. 120 Okl 105, 250P519.

1319-43 TexCivA 288SW518.

1319-48½-New. In Kansas, a board of county commissioners has no authority to collect a forfeiture from the county attorney for failure to keep his office open during business hours. 128Kan 113, 276P55.

1319-61½-New. Statutes requiring a prosecuting attorney to turn over a list of fees collected by his office and fees due to his office create two offenses. 222 MoA597, 292SW1061.

1319-65 [b] (4) Right to salary is preserved by agreement of record for payment of old salary and provision that such allowance should not bar additional allowance after judicial construction of statute. Mo 282SW722. (5) Other statutes. Mo 282SW722; Mo 285SW 421; MoA 30SW(2d)1039. [g] **County prosecuting attorney performing duty of district attorney** not entitled to constitutional salary of five hundred dollars provided for latter. 115Tex74, 273SW 560.

1320-67 See also TexCivA 274SW1011.

1320-68 [b] **Order of fiscal court,** made in 1913, appropriating money out of levy for year of 1914 to pay salaries of county attorney, did not fix salaries for future terms. 227Ky591, 13SW(2d)761. [c] **Time.**-227Ky591, 13SW(2d)761.

1321-79½-New. The fact that the prosecuting attorney was paid by fees instead of salary does not disqualify him to conduct a criminal prosecution. 112 TexCr280, 16SW(2d)231.

1321-85 175Ark1110, 18W(2d)996.

1325-54 202 Iowa673, 210NW912.

1327-82 175Ark388, 299SW388.

1327-86 32NM178, 253P20; 36Wyo 460, 256P1039, 1040 [quotCJ]. [a] (3) Act providing that commissioners may furnish office for county attorney does not entitle county attorney to reimbursement for amounts paid for rent while in office. 36Wyo 460, 256P1039.

[d] **Clerk.**–**TexCivA** 289**SW**428.

1327–87 **CalA** 283**P**962 (employment of detectives to investigate qualifications and fitness of prospective jurors); 36 **Wyo** 460, 256**P**1039, 1040 [quotCJ]. [b] (3) Under statute allowing deduction of expenses, such as stationery, etc., excess fees cannot be applied toward payment of office assistant. **TexCivA** 289 **SW**428. [f] **Statute changing allowance for mileage and other expenses** is inapplicable in case of district attorneys who were in office at time of enactment. 65**Utah**406, 237**P**513.

1327–91 But see **CalA** 283**P**962.

1328–1 But see 39**Wyo** 314, 271**P**13.

1331–47½–New. Under constitutional provisions in some jurisdictions the legislature is authorized to classify counties by population making the law for payment of fees uniformly applicable to all counties in each class. 314**Mo** 55, 282 **SW**715.

1331–47¼–New. The legislature may use that method although it is not confined to it. 314**Mo** 55, 282**SW**715.

1331–47¼–New. The legislature may use census for ascertaining population or may use some other arbitrary method. 314**Mo** 55, 282**SW**715.

1331–53½–New. Nor to compel the allowance of a claim not warranted by law. 115**Tex**74, 273**SW**560.

1331–57 **Mo** 285**SW**421.

1331–60½–New. A contract of a county court for settlement of a prosecuting attorney's claim for unpaid salary including consideration must be in writing under statutes. 314**Mo** 55, 282**SW**715.

1331–62½–New. A prosecuting attorney who filed a claim for additional salary under statute for six months, but did not file claims pending determination of constitutionality of subsequent statute, is not estopped to claim additional pay for subsequent period. 314**Mo** 55, 282 **SW**715.

1332–68 [a] **In Georgia** solicitor general cannot compel payment out of general funds of county of judgment for insolvent costs accruing prior to passage of act abolishing fees. 162**Ga**216, 134 **SE**57.

1332–71 **TexCivA** 280**SW**851.

1332–73 162**Ga**221, 133**SE**468.

1335–21 237**Mich**481, 212**NW**105; 57 **ND**230, 221**NW**25 (not repealed).

1335–22 94**Fla**1128, 115**S**537, 540 [cit Cyc].

1335–23 122 **Or**644, 259**P**780.

1336–39 205**Cal** 441, 271**P**478 (special counsel for state).

1336–44 77**Colo** 546, 238**P**25, 28 [cit CJ]; 114**Nebr**853, 211**NW**188; 116**Nebr** 440, 218**NW**83; 122 **Or**644, 259**P**780; 44 **Philippine**267; 9**PaDist&Co** 161; **SD** 206**NW**925, 926 [citCyc]; 145**Wash**644, 261**P**385. [i] 44**Philippine**267. [j] **In Philippines.**–44**Philippine**267.

1337–45 77**Colo** 546, 238**P**25, 28 [citCJ].

1337–46 77**Colo** 546, 238**P**25, 28 [citCJ].

1338–59 125 **Or**644, 266**P**1069 (county court)

1338–66 125 **Or**644, 266**P**1069, 1073 [cit CJ].

1338–67 9**PaDist&Co** 161.

1339–74 [a] **Objection by defendant.**–(1) Defendant has burden of showing facts rendering participation improper. **SD** 221**NW**251. (2) Objection should be supported by affidavit. **SD** 221**NW** 251.

1339–77 **Mo** 270**SW**378 (power inherent in court); 142 **Okl** 105, 288**P**463; **OklCr** 273**P**369.

1339–79 **OklCr** 272**P**493; **OklCr** 273**P** 369; **OklCr** 274**P**11; **OklCr** 275**P**1071; 108**TexCr**177, 299**SW**420. [h] **Consistency with laws relative to county powers.**–81**CalA**590, 254**P**648. [i] **Special counsel as state officer.**–81**CalA**590, 254 **P**648. [j] **Bonds.**–81**CalA**590, 254**P**648. [k] **Length of absence warranting appointment.**–**OklCr** 275**P**1071.

1340–47½–New. The propriety of the amount of verdict must be measured by the standard approved in like cases. **NJ Sup** 152**A**82.

1340–80 81**CalA**590, 254**P**648; 335 **Ill** 123, 166**NE**526.

1340–83 **OklCr** 275**P**1071.

1340–84 142 **Okl** 105, 288**P**463.

1341–85½–New. nor to assist grand jury to investigate charges against regular prosecuting attorney, who is neither sick nor absent, 309**Mo** 408, 274**SW** 407.

1341–88 [a] **Disqualification may arise from physical causes.**–142 **Okl** 105, 288**P** 463.

1341–96 **Mo** 270**SW**378; 142 **Okl** 105, 288**P**463.

1341–99 But see 309**Mo** 408, 274**SW**407.

1342–6 335 **Ill** 123, 166**NE**526.

1342–7 [a] **Order making appointment on ground that official acts of regular prosecuting attorney are under investigation by grand jury** (1) is not within inherent power of judge of circuit court. 309**Mo** 408, 274**SW**407. (2) Nor is such appointment authorized by statute providing for appointment of substitute to prosecute or defend cause in which prosecuting attorney or his assistant may be interested. 309**Mo** 408, 274**SW**407.

1342–9½–New. Before courts have power to appoint substitute, hearing must be had and proof must be offered showing disqualification of prosecuting attorney. 142 **Okl** 105, 288**P**463.

1343–39½–New. Counsel who appeared for one of two defendants, jointly charged, is not ineligible to aid as special prosecutor in the prosecution of the other defendant after severance. 39 **OklCr**119, 263**P**473.

1343–40 77**Colo** 546, 238**P**25, 28 [cit CJ]; 99**Fla**1330, 128**S**807.

1344–41 77**Colo** 546, 238**P**25, 28 [citCJ].

1344–42 77**Colo** 546, 238**P**25, 28 [citCJ].

1345–49 See also 96**Fla**237, 118**S**18.

1345–52 57**ND**230, 221**NW**25.

1345–59 199 **Ind**489, 158**NE**480; 110 **TexCr**367, 8**SW(2d)**677.

1346–72½–New. **Removal of deputies.** Deputy after having been given required notice is removable without hearing. **CalA** 291**P**889.

1346–72¼–New. District attorney has authority with or without reason to discharge deputy. **CalA** 291**P**889.

1346–74 77**Colo** 546, 238**P**25.

1346–78 **OklCr** 272**P**493; 35**PortoRico** 670 (may draft sign and present information); 35**PortoRico** 672 (may draft sign and present information).

1347–81 225**Ky**655, 9**SW(2d)**990.

1348–84 **Mo** 29**SW(2d)**156.

1348–91 335 **Ill** 123, 166**NE**526.

1349–2 [b] **Order for payment of special state's attorney** from contingent fund is not invalid because not concurred in by four fifths of commissioners. 335 **Ill** 123, 166**NE**526.

1350–12 [h] **Statute applies to court of county of original venue.**–**Ind** 172**NE**194.

1351–26 [b] **Time of appropriation.**–**Ind** 172**NE**194.

1351–26½–New. A second assistant prosecuting attorney is not estopped from collecting back salary due him from the county under a statute because of acceptance of a lesser amount in full and understanding at time of employment, that such sum was all that county owed him. 217**MoA**480, 268**SW**665.

1351–26¼–New. The fact that the county could have reduced the salary of the second assistant prosecuting attorney by reducing the salary of the first assistant if the law had been known does not estop the second assistant prosecuting attorney from collecting the amount of compensation fixed by law. 217**MoA** 480, 268**SW**665.

1351–28 See also **Ind** 172**NE**194.

DISTRICT OF COLUMBIA

1358–81 91**Fla**522, 1078**S**689, 691 [citCJ].

1358–82 91**Fla**522, 1078**S**689, 691 [citCJ].

1360–39 91**Fla**522, 1078**S**689, 691 [citCJ].

1362–77½–New. The traffic Act of 1925 has been held to authorize regulation imposing reasonable penalty. 17**F(2d)** 210.

1362–77¼–New. An act granting authority to make regulations as to market has been held not repealed by statute, repeal of parts of charter, and lease to market company. 24**F(2d)**622.

1362–78 [i] **Motor vehicles.**–17**F(2d)** 210.

1363–89¼–New. Grounds necessary for instruction have been held included in educational institutions excepted from zoning ordinance. 17**F(2d)**219.

1365–43 [c] **Informations held insufficient.**–20**F(2d)**286.

1366–62½–New. Commissioners are not liable in damages for mistake in the exercise of discretionary statutory duties in instigating a lunacy proceeding. 25 **F(2d)**540.

1370–60 30**F(2d)**471 [aff 30**F(2d)**474 (1stcase)].

1370–61 [b] **Retired policemen and firemen** are entitled, under statute, to pensions based on pay of class at time of application for increase in pension. 30 **F(2d)**471 [aff 30**F(2d)**474(1stcase)].

1373–65 See also **DC** 40**F(2d)**797.

1375–4 17**F(2d)**953.

1375–14 17**F(2d)**953.

1375–15½–New. It is within the power of the commissioners of the District of Columbia to establish safety zones for the protection of the public in entering and alighting from street cars. 18**F(2d)**806.

1376–40 [a] **Zoning regulation** authorizing "the erection of additional buildings" for garage purposes permits erection of new buildings as well as additions to existing buildings. 55**AppDC** 318, 5**F(2d)**380.

1376–48½–New. Traffic regulation of the District of Columbia, prohibiting greater speed than fifteen miles per hour on certain bridges for passenger vehicles, is not unreasonable. 18**F(2d)**367.

1376–48¼–New. Such regulation is not in conflict with a provision prohibiting a greater speed than twenty-two miles per hour except in outlying districts or arterial highways or any speed greater than is reasonable and proper. 18**F(2d)**367.

1377–74 17**F(2d)**219; 24**F(2d)**1007 (act authorizing construction of highway construed).

1378–86½–New. Commissioners are unauthorized to widen a street by adding forty-five feet to the width on one side only. 26**F(2d)**538.

1379–21 16**F(2d)**525.

1379–22 43**F(2d)**271.

1379–23 **DC** 40**F(2d)**813.

1379–24 16**F(2d)**525.

1380–36½–New. Accord between assessment and benefit is open to inquiry. 16 **F(2d)**525.

1380–36¼–New. Where assessment based on frontage is discriminatory, it is invalid. 16**F(2d)**525.

1380–36¼–New. However, if frontage assessment shows relative equality in value of depth of abutting property, it may be sustained. 16**F(2d)**525.

1380–40½–New. **Restitution.** The District of Columbia is a municipal corporation, responsible as a private person for restitution of moneys paid under special assessments of benefits to accrue from the opening of a street, which is abandoned or not done within a reasonable time. 30**F(2d)**476 [certiorari granted 279**US**829, 49**SCt**265, 73**L ed**980 (8thcase)].

1380–40¼–New. Jurisdiction of action for restitution of an amount paid for an abandoned street opening is in the municipal court. 30**F(2d)**476 [certiorari granted 279**US**829, 49**SCt**265, 73**L ed**980 (8thcase)].

1381–74 [a] **Paving assessment properly cancelled as inequitable.**–43**F(2d)** 271.

1381–77½–New. Recovery of payment of assessment on abandonment of street extension project. 281**US**25, 50**SCt**172, 74**L ed**677.

1382–91½–New. The statute imposing a tax on a national bank's gross earnings does not apply to interest on tax-exempt government bonds. 30**F(2d)**873.

1382–1½–New. Statutes exempting bonds from taxation by the United States apply to the District of Columbia, as well as the states. 30**F(2d)**873. [a] **Whether congress may repudiate exemptions from taxation** need not be considered in national bank's suit against District to recover taxes paid on interest on such bonds, there being nothing indicating such intention in language of either taxing act or bonding acts. 30**F(2d)**873.

1383–30 20**F(2d)**442.

1383–40 6**F(2d)**710. [a] (3) Abrupt variation between surface of sidewalk

and cement platform erected thereon. 55AppDC280, 4F(2d)947. [i] **Failure to light streets properly** when required under existing conditions constitutes negligence rendering District liable for resulting injuries. 6F(2d)710.

1385–79 [a] (2) To warrant finding that District was negligent in failing properly to light column supporting viaduct over street. 6F(2d)710.

DISTURBANCE OF PUBLIC MEETINGS

1388–7. [b] **Meeting of prisoners in jail not within statute.**–35PortoRico 161.

1394–94 173Ark906, 293SW1010.

1394–2 21AlaA275, 107S321.

1394–4 173Ark906, 293SW1010.

1394–5 But see 21AlaA275, 107S321.

1396–24 MoA 297SW993.

1398–62 But see MoA 297SW993.

1401–13 [e] 21AlaA698, 109S926; 173 Ark906, 293SW1010; 37GaA324, 140 SE391; MoA 297SW993. [f] MoA 297 SW993.

1401–19 [a] **Evidence held insufficient to take case to jury.**–173Ark906, 293SW 1010.

1401–19½–New. Guilt vel non of disturbing public worship meeting held for jury. 21AlaA275, 107S321.

1401–21 [a] **Instructions held properly refused.**–21AlaA275, 107S321.

1401–22 22AlaA25, 111S756.

1402–31½–New. Punishment held not excessive. MoA 297SW993.

DIVIDEND

1406–61 [b] **Gain or profit.**–18F(2d) 239.

1407–65 287Pa190, 134A455.

DIVINE

1407–87 [a] **Divine healer** is one capable of healing sick and afflicted through divine interpretation induced or made active or efficacious by means of prayer or supplication. 69CalA475, 231P572.

DIVISION

1407–95 [a] **School district is "municipal division"** within meaning of statute requiring contracts with such bodies involving employment of labor to contain provision for workmen's compensation acts. 289Pa75, 137A140.

DIVORCE

19 C. J.—16–3 Miss 130S688.

17–16 243Mich406, 220NW812.

18–34 146Miss349, 112S161, 52ALR375; 130Misc900, 226NYS152.

18–35 130Misc900, 226NYS152 (is in affirmance of marriage).

19–7 NJSup 147A726.

19–45 200Cal 310, 253P145; 211Ky799, 278SW121.

19–47 24F(2d)605 (divorce granted by rabbi in New York held invalid there, though valid at foreign residence of wife); 243Mich406, 220NW812; 120 Or 244, 251P895, 896 [quotCJ].

19–48 203Cal 61, 263P200; 200 Ind56, 160NE345; 243Mich406, 220NW812; 127 Misc826, 217NYS528; 136Misc656, 241 NYS445; 195NC169, 141SE572; 120 Or 244, 251P895, 896 [quotCJ].

19–48½–New. "There can be no such thing as a 'legal right' to a divorce vested in any married person." 103Conn 189, 130A254.

19–48¾–New. The state may render divorce decrees and auxiliary relief enforceable within its jurisdiction. 213 Ala573, 105S647.

19–49 120 Or244, 251P895, 896 [quotCJ].

19–50 120 Or244, 251P895 [quotCJ].

19–51 247Mich52, 225NW542; 32 OhA 487, 168NE223; 120 Or244, 251P895, 896 [quotCJ].

19–52 35Ariz357, 278P375; 86Colo 1, 278P780; 94Fla516, 114S371; 319 Ill 426, 150NE270; 205 Iowa395, 217NW 883; 243Mich406, 220NW812; 247Mich 52, 225NW542; Mich 233NW170; 222 MoA941, 300SW540; 98NJEq444, 131A 576; 120 Or244, 251P895, 896 [quot CJ]. [a] (1) 247Mich52, 225NW542.

19–52½–New. because divorce is prima facie prejudicial to the public good, 120 Or244, 251P895.

19–53 98NJEq444, 131A576; Alta [1925] 3DomLR676. [a] RI 150A754. [f] **Court held to represent state** in divorce suit. 319 Ill 426, 150NE270.

20–57½–New. ; also the statute requiring payment of a fee in a stated amount to cover the appearance of the district attorney in the suit. 120 Or244, 251P895.

20–57¾–New. Such fee is in no sense a tax. 120 Or244, 251P895

20–57¼–New. nor is the validity of the statute affected by the provision that the fee paid shall be forwarded to the state treasurer and used to pay a portion of monthly salaries of various district attorneys. 120 Or244, 251P895.

20–58½–New. A statute purporting to confer jurisdiction to alter or amend a decree for alimony held unconstitutional. 49RI 45, 139A662.

20–64½–New. Statute authorizing limited divorce operates in favor of either spouse. 198NC669, 153SE163.

20–69 203Cal 61, 263P200; 103Conn 189, 130A254; 107Conn484, 140A820; 94 Fla516, 114S371; 93Fla261, 111S637; Md 150A717; 98NJEq444, 131A576 (sui juris); 189NC805, 128SE329; 32 OhA 16, 165NE746; 120 Or244, 251P895; TexCivA 290SW889; 197Wis159, 221 NW733. [c] **Courts favor reconciliation.**–37 OklACR438.

21–70 93Fla261, 111S637; 200 Ind56, 160NE345; 99NJEq473, 134A615; 98 NJEq444, 131A576.

21–71 TexCivA 290SW889.

21–78 Alta [1930] 3DomLR1002.

21–82 See also 127Misc826, 217NYS528.

22–84 240Mich209, 215NW306. [a] **Recovery from third person of wife's property, squandered by husband,** is not within jurisdiction of court in divorce suit. 240Mich209, 215NW306.

22–84½–New. Children cannot interfere in divorce suit between parents. 220Ala 420, 125S662.

22–85 116 Oh524, 156NE908, 909 [cit CJ]. But see 51Nev62, 268P771; 155 Tenn422, 295SW62, 64 [citCJ].

22–86 Ala 128S440; 240Mich209, 215 NW306; 242Mich555, 219NW593; MoA 282SW153; 48Nev205, 228P615, 239P 801; 116 Oh524, 156NE908, 909 [citCJ]; 47RI 122, 130A861; RI 152A256. [c] **Rabbinical divorce** is not recognized in Ohio. 26 OhNPNS81.

22–87 49Nev375, 247P545, 546 [quot CJ], 47ALR569; 116 Oh524, 156NE908, 909 [citCJ]; 116 Okl 188, 243P962; 119 Or292, 247P145; 47RI 122, 130A861.

22–88 135Misc486, 238NYS723.

22–94½–New. Under Louisiana statute, holding that separation suits may only be instituted directly, wife is not permitted to file reconvention for separation in husband's suit to annul marriage. 159La796, 106S308.

22–95 200Cal 310, 253P145; 203Cal 61, 263P200; 42 Ida357, 245P691 [citCJ]; 324 Ill 276, 155NE288; 200 Iowa1193, 206NW262; 211Ky799, 278SW121 (quasi in rem); 155Tenn530, 296SW356; 149 Va584, 140SE670. But see 251 IllA45 (suit by husband).

23–98 223AppDiv471, 228NYS618.

23–1 324 Ill 276, 155NE288; 200 Iowa 1193, 206NW262.

23–2 324 Ill 276, 155NE288; 136Misc 634, 244NYS123.

23–4 [a] **Necessity of judge's authorization.**–La 129S677.

23–6 155Tenn422, 295SW62.

23–8 334 Ill 370, 166NE85; 245Mich 306, 222NW722; Mich 233NW208; 127 Misc826, 217NYS528; 132Misc339, 229 NYS511; 50RI 105, 145A444; 144Va 692, 130SE902; 149Va584, 140SE670.

24–12 127Misc826, 217NYS528. [a] **Ecclesiastical law** has never been recognized as part of common law. 98Fla 1196, 125S694.

24–13 321 Ill 134, 151NE550; 242Mich 555, 219NW593; 116 Okl 188, 243P962; 149Va584, 140SE670.

24–14 [b] 123 Okl 295, 253P295.

25–18½–New. In divorce case equity court has inherent power to do equity. CalA 285P860.

25–19 200 Iowa1193, 206NW262.

25–23 217Ala142, 115S827; 321 Ill 134, 151NE550; 236 IllA339; 178Minn75, 226NW211 (district courts); 221MoA 135, 296SW460; MoA 68SW(2d)1025; NJCh 129A212; 142Va31, 128SE599 (circuit courts). [d] (1) 253Mass411, 149NE40. (2) Probate court has jurisdiction of divorce case transferred from superior court on withdrawal of libelee's appearance. 262Mass297, 159 NE750. [e] (2) Powers of court are broader than ecclesiastical courts of England. 243Mich406, 220NW812. [g] (2) Jurisdiction of court of common pleas in divorce cases is defined by statute and is limited to question at issue as between plaintiff and defendant. 21 OhA222, 153NE113. [h] 323 Ill 585, 154NE414. [i] **In Maryland.**–156Md10, 142A510. [j] **In Michigan.**–Jurisdiction of circuit courts in chancery in divorce proceedings is entirely statutory. 233Mich569, 207NW 818; 242Mich23, 217NW913. [k] **In Texas.**–CivA 10SW.(2d)420.

25–24 Mass 171NE815. But see 38 Okl ACR99.

25–27 217Ala142, 115S827; 220Ala237, 124S519; 236 IllA339; 247Mich52, 225 NW542; 118Nebr373, 224NW860; NJCh 152A246; 127Misc826, 217NYS528. [a] 98Fla1196, 125S694.

25–28½–New. That general jurisdiction of circuit and chancery courts of actions for divorce is statutory rather than inherent is not material on the question of jurisdiction of the subject matter of divorce between persons domiciled within the state. 155Tenn530, 296SW 356.

25–28¾–New. A divorce statute enacted pursuant to the constitution differentiates divorce cases from ordinary equity suits, and renders a divorce case a chancery case sui generis. 149Va584, 140SE670.

25–29 Mass 172NE914.

26–34½–New. Statute granting divorce for cruelty is silent on requirement of residence construed together with the Divorce Act of 1907 and is declared not to interfere with the residence requirement. 98NJEq107, 130A600.

26–34¾–New. The statute relating to jurisdiction in divorce suits should be liberally construed. 102NJEq50, 139A 721.

26–35 253Mass411, 149NE40.

26–40½–New. A statute requiring the court to enter a decree of divorce on application of the guilty party is an unconstitutional encroachment on the judiciary. 86Colo 1, 278P780.

26–42 200 Iowa1193, 206NW262; 203 Iowa619, 213NW420; 203 Iowa1355, 214NW536; 150Md592, 133A729, 46 ALR983; 256Mass97, 152NE91; 128 Misc778, 220NYS262; Man [1929] 4 DomLR649. [e] **In New York.**–223App Div471, 228NYS618.

26–44 105Conn502, 136A98; 92Fla818, 110S539; 98Fla1196, 125S694; 160La 91, 106S705. But see 144Wash421, 258 P37. [b] See also 205 Iowa108, 215NW 661. [d] **Where party "lives"** means where he has his domicile. 253Mass411, 149NE40. [e] **Residence** is where plaintiff or defendant lives. 228Ky577, 15 SW(2d)433. [f] **To be "inhabitant,"** there must be domicile acquired with stamp of permanency on it. TexCivA 15SW(2d)686.

27–45½–New. Divorce is the proper subject for legislation, if either of the parties at the time thereof is a resident or domiciled in the state. 92Fla818, 110S539.

27–45¾–New. In some jurisdictions, if either party is a resident of the state, the court has jurisdiction and the decree will be valid. 203 Iowa619, 213 NW420.

27–45¼–New. Distinction exists between residence for commercial purposes and one fixing court's jurisdiction. 93Fla1004, 113S374.

27–45½–New. Generally, divorce may be secured at the domicile of either the husband or wife separately domiciled. 203 Iowa1355, 214NW536.

27–46 206 Iowa1075, 221NW837; 160 La91, 106S705. [b] **Proper forum for divorce action** has been held to be parish where husband had maintained domicile with wife and where wife continued to reside. 160La91, 106S705.

[c] **In Massachusetts** libel must be filed in county where parties last lived together. 253Mass411, 149NE40. [d] **State where both parties are domiciled has jurisdiction.**–135Misc486, 238NYS723.

27-47 226AppDiv747, 233NYS585; **Wash** 290P861. [a] **Marriage status cannot exist separate and apart from both parties.**–135Misc486, 238NYS723.

27-48 131Misc13, 226NYS115.

27-49 131Misc13, 226NYS115.

27-50 150Md592, 133A729, 46ALR983.

27-52½-New. In New York a nonresident cannot sue for a separation from his wife living in New York. 240NY429, 148NE624, 40ALR937.

27-52¾-New. The residence of a child within the state which gives the court jurisdiction to determine its custody cannot be used as pretense for adjudicating the status of the parents whose domicile is elsewhere. 240NY429, 148NE624, 40ALR937.

27-54 120Kan90, 242P124, 126 [citCJ]; 128Misc309, 219NYS333; **Sask** [1925] 3DomLR1085 (resident temporarily absent).

27-55½-New. Where the court has jurisdiction of a cause and parties by general appearance in person and by counsel, nonresidence is immaterial. 120Kan90, 242P124.

27-56-57 155Tenn422, 295SW62, 64 [quotCJ]; 104WVa254, 139SE754, 755 [quotCJ].

27-58 120Kan90, 242P124; 234Ky314, 28SW(2d)1; 241Mich96, 216NW437; 104WVa254, 139SE754, 755 [quotCJ]. [a] **Judgment for resident plaintiff** in such case where judge was in doubt about conclusiveness of judgment if rendered for defendant has been held not prejudicially erroneous. 120Kan90, 242P124.

27-59 155Tenn422, 295SW62, 64 [quot CJ]; 104WVa254, 139SE754, 755 [quot CJ].

28-60 104WVa254, 139SE754, 755 [quotCJ].

28-60½-New. Under these rules the principle is held to be the same whether the nonresident is defendant to the original bill or to the cross bill of the resident party. 104WVa254, 139SE754.

28-62 105Conn502, 136A98; 205Iowa108, 215NW661; 102NJEq50, 139A721; 240NY429, 148NE624, 40ALR937; 25OhA432, 158NE493; 87PaSuper1; 106WVa569, 146SE376; **Sask** [1930] 3DomLR522. See also 256IllA436.

28-63 **Wash** 290P861. [a] **Where court has rendered valid judgment of separation from bed and board,** it may grant absolute divorce though when petition for absolute divorce was filed parties were residents of foreign state. 166La219, 116S890.

28-64½-New. Temporary visit to a friend in an adjoining county does not constitute a change of domicile. 91PaSuper354.

28-66 170La958, 129S543; **MoA** 291SW508; **NJCh** 129A212; 97NJEq451, 129A420; 12PaDist&Co 25.

28-68 [b] **In Missouri.**–**Mo** 24SW(2d)997.

29-72 90Fla368, 106S131; 93Fla1004, 113S374; 121Kan206, 246P980; 232Mich163, 205NW194; 242Mich555, 219NW593; 221MoA516, 282SW57 (burden of proof is on plaintiff); 102NJEq50, 139A721; 216AppDiv546, 215NYS405; 25OhA432, 158NE493; 87PaSuper1; 90PaSuper86; 5PaDist&Co 669; 6PaDist&Co 712; **TexCivA** 15SW(2d)684; **TexCivA** 21SW(2d)38; 106WVa569, 146SE376. [c] (3) Residence for six months next preceding filing of amended petition is sufficient. **TexCivA** 20SW(2d)813. [i] **In Florida.**–90Fla368, 106S131.

29-73 190NC418, 130SE7. [a] **TexCivA** 293SW899. [b] **Term "suit for divorce,"** relating to residence required, applies to causes arising after marriage. **TexCivA** 16SW(2d)304. [c] **Statute construed.**–51Nev285, 274P194.

30-82 103Conn189, 130A254; 205Iowa108, 215NW661; 256Mass97, 152NE91; 51Nev285, 274P194. [f] **Traveling salesman** (1) present in state three or four times year for two or three days does not satisfy actual residence requirement. 103Conn189, 130A254 (in construing "continuously reside"). (2) Engaging room in state where he occasionally spent few days, but who never registered or voted in state and still had cottage in another state, former domicile, has not established new domicile. 103Conn189, 130A254. [g] **Plaintiff claiming father's house in county of suit as his home** does not entitle him to maintain suit therein. **TexCivA** 24SW(2d)96. [h] **Absence from state for purpose of study** is not abandonment of domicile. **Miss** 130S52.

30-83 6PaDist&Co 765. But see 93Fla1004, 113S374; 98Fla1196, 125S694.

30-85 93Fla1004, 113S374; 205Iowa108, 215NW661; 5PaDist&Co 669; 12PaDist&Co 200; 144Wash275, 257P837.

30-86 95PaSuper267; 144Wash275, 257P837.

31-89 144Wash421, 258P37.

31-91 93Fla1004, 113S374; 204Iowa575, 215NW619; 205Iowa108, 215NW661; **MoA** 6SW(2d)1006; 144Wash421, 258P37.

31-92 **Sask** [1929] 2DomLR546.

31-93 See also 50Nev419, 264P981.

31-99 But see 15OhA335.

31-2 108Conn292, 142A843; 92Fla818, 110S539; 208Iowa534, 224NW586 (evidence of residence in another county is sufficient to support jurisdiction); **MoA** 6SW(2d)1025, 1027 [quotCJ]; 131Misc13, 226NYS115; 87PaSuper1; 10PaDist&Co 733. But see **Sask** [1928] 4DomLR910. Contra **Man** [1929] 4DomLR649.

32-3 131Misc13, 226NYS115.

32-4½-New. Law of foreign country, of which husband is subject, does not preclude wife from acquiring independent domicile within the state of the forum. 108Conn292, 142A843.

32-6 160Ga618, 128SE902 (where wife was without means to follow husband to new domicile); 12PaDist&Co 200.

33-10 15OhA335.

33-12 131Misc462, 227NYS194.

33-13½-New. After a husband abandons his wife in a foreign jurisdiction and obtains divorce by fraud in another jurisdiction, the wife in coming to New York may sue there for divorce. 241NY240, 149NE844, 42ALR1398.

33-13¾-New. Where a husband and wife have separate domiciles, a divorce action may be entered at the domicile of either. 205Iowa1081, 216NW619.

33-21 10PaDist&Co 733.

34-24 108Conn292, 142A843; **Mo** 24SW(2d)997; 10PaDist&Co 733.

34-25 108Conn292, 142A843; **Mo** 24SW(2d)997.

34-27 203Iowa1355, 214NW536; **Mass** 171NE815; 5PaDist&Co 669; 6PaDist&Co 389. Contra 173Ark496, 292SW686.

34-28 But see 90Fla368, 106S131.

34-28½-New. The court acquired jurisdiction of parties, where plaintiff had lived in the state two years before her bill of complaint, and an appearance by defendant was entered. 232Mich163, 205NW194.

34-28¾-New. A foreign state acquired no jurisdiction over a wife in New York by an unauthorized attorney handing a certified copy of a New York judgment of separation to the master. 126Misc443, 212NYS443.

34-30 170La958, 129S543.

34-32¾-New. Court is without jurisdiction of cause of parties where libel is filed in the wrong county. 253Mass411, 149NE40.

34-33 170La958, 129S543; 147Miss822, 112S785; **MoA** 6SW(2d)1025; 13PaDist&Co 11.

35-34 [a] 214Ala321, 107S827.

35-35 214Ala321, 107S827; 147Miss822, 112S785; 7Dist&Co 488.

35-36 147Miss822, 112S785; 155Tenn530, 296SW356. [a] **In Tennessee.**–155Tenn530, 296SW356.

35-38 13PaDist&Co 11.

35-41 153Wash1, 279P88.

35-45 **MoA** 6SW(2d)1025, 1027 [quot CJ]; 153Wash1, 279P88.

36-53 217Ala517, 116S685; **MoA** 6SW(2d)1025.

36-58 [c] (2) Where plaintiff is resident of state more than one year, defendant is not entitled as matter of right to change of venue to county of residence. 155Wash121, 283P689.

36-60 42Ida357, 245P691 (within power of legislature to authorize divorce for insanity); 153Wash610, 278P223.

36-62 190NC418, 130SE7.

36-63 217Ala142, 115S27; **Ark** 31SW(2d)134; 98Fla1196, 125S694; 161La121, 108S307; 127Me201, 142A751; 190NC418, 130SE7; 35OhA408, 172NE451; 124Or415, 263P397; 124Or219, 263P891; 89PaSuper319; 50Philippine42; 49RI84, 140A193; 66Utah580, 245P335. See also 148Wash622, 269P804. [a] 66Utah580, 245P335. [d] **Statutory grounds** for divorce should be strictly construed. **TexCivA** 27SW(2d)311.

37-67 161La121, 108S307; 32OhA487, 168NE223; 66Utah580, 245P335.

37-68 7Alaska609; **Iowa** 228NW30; **Iowa** 230NW512; 161La121, 108S307; **NJCh** 152A83; 85PaSuper323; 96PaSuper230.

37-68½-New. conflicting ideas of economy and frugality, **Iowa** 230NW512.

37-70 [a] **Breach of promise** on part of husband that he would go to church with wife after marriage, and differences on religious questions, are not grounds for divorce. **TexCivA** 10SW(2d)738.

37-70½-New. A divorce may not be granted on the ground of public policy. 237Mich326, 211NW740.

38-81½-New. The trial court is not authorized to deny a divorce where plaintiff's evidence establishes, beyond question, allegations of misconduct relied on. 87CalA17, 261P501(2dcase).

38-81¾-New. A decree for separation from bed and board may be rendered on the ground that would not justify an absolute divorce. 211Ky7, 276SW967.

38-97½-New. Under statutes in some jurisdictions a husband may obtain a divorce when the wife, at the time of marriage, was pregnant by one other than her husband without his knowledge, unless he has an illegitimate child then living unknown to the wife. 204Iowa553, 215NW705.

38-97¾-New. A wife is not entitled to divorce for breach of a prenuptial agreement to divide property where the property greatly depreciated in value. 151Wash380, 275P719.

38-98 110Conn443, 148A363 (matters considered).

39-3 110Conn443, 148A363.

39-7 [a] 10PaDist&Co 462.

39-11 **MoA** 299SW832.

39-14 **MoA** 299SW832.

40-20 [b] **That husband was taken with epileptic seizures after marriage,** he having assured wife of recovery, does not constitute deceit where his belief was on medical advice. 244Mich42, 221NW170.

40-29 **Alta** [1927] 2DomLR1137, [1927] 2WestWkly12.

40-30 **Alta** [1927] 2DomLR1137, [1927] 2WestWkly12.

41-34 **Alta** [1927] 3DomLR481.

41-37 [a] **Confirmation of marriage.**–6PaDist&Co 347.

41-38½-New. Under some statutes incapacity for procreation must be general. 88PaSuper98.

41-41 [a] 151Miss78, 117S352.

42-52 [c] **In Philippines.**–50Philippine42.

42-59½-New. **Husband guilty of desertion** is not entitled to divorce for wife's subsequent adultery. 101NJEq126, 138A116.

42-59¾-New. In Saskatchewan a divorce will not be granted upon evidence of a husband's adultery committed for the special purpose of bringing the parties within the statute. **Sask** [1929] 2DomLR121.

42-60 38OklACR99; **TexCivA** 15SW(2d)684.

42-66 164La199, 113S816. [f] **Conviction held not to constitute larceny** within statute. 10PaDist&Co 773.

42-67 114Oh568, 151NE750; 9PaDist&Co 437. [c] **In Ohio.**–114Oh568, 151NE750. [d] **Wife granted divorce** on ground of husband's imprisonment in penitentiary and remarrying him during term of sentence cannot obtain second

divorce on ground of imprisonment on same sentence. 19 OhA518.

43-69 114 Oh568, 151NE750.

43-70 14PaDist&Co 116. [b] **In Ohio.**–114 Oh568, 151NE750.

43-70½-New. Sentence to imprisonment in parish prison is held not infamous punishment entitling other spouse to divorce. 164La199, 113S816.

43-75 161La121, 108S307. [a] (2) Divorce from bed and board may be rendered "for such other cause as court in its discretion may deem sufficient." 214 Ky397, 283SW391. (3) Cruelty to husband is not ground for divorce. 222 Ky175, 300SW354. [b] (1) 89PaSuper 183. [c] 35PortoRico 790. [d] **In Louisiana.**–164La62, 113S764.

43-76 93Fla261, 111S637; NJCh 140A 233. [b] **Acts held not ground for divorce as extreme cruelty.**–99CalA163, 277 P1065.

43-76½-New. "intolerable cruelty." 107Conn484, 140A820.

43-77 324 Ill 207, 155NE28; 252Mass 133, 147NE578.

43-78 217Ky126, 288SW1050; 129Misc 137, 220NYS651; 129 Or402, 275P915. [a] **In Iowa.**–228NW30.

43-80 168La632, 122S888. [a] 129Misc 137, 220NYS651. [d] **In Louisiana.**–161 La955, 109S775.

43-81½-New. The statute forbidding more than one divorce to a party, unless for adultery, precludes divorce for cruelty, though divorce from first husband was for adultery. 230Ky617, 20 SW(2d)436.

43-83 324 Ill 207, 155NE28.

44-87 90Fla60, 105S123; 93Fla261, 111 S637; 98Fla1196, 125S694; 170Ga349, 153SE11; 324 Ill 207, 155NE28; Iowa 230NW512; 170La100, 127S378; 151 Md444, 135A176; 152Md515, 137A288; 154Md11, 139A573; 157Miss425, 128S 270; 98PaSuper369; TexCivA 278SW 288; Va153SE670. [a] (1) CalA 284P 950. (2) Other definitions. NJCh 151A 620. (3) Any willful misconduct of husband which exposes wife to bodily hazard and intolerable hardship and renders cohabitation unsafe. 327 Ill 39, 158NE 411. [g] **In Iowa.**–201 Iowa864, 208NW 377.

44-88 324 Ill 207, 155NE28; 201 Iowa 864, 208NW377; 128 Okl 147, 262P199; RI 132A4; TexCivA 278SW288; TexCiv A 283SW641; TexCivA 290SW889; 106 WVa680, 146SE720.

44-89 201 Iowa864, 208NW377; Tex CivA 278SW288; TexCivA 283SW641.

44-90 324 Ill 207, 155NE28.

45-92 201 Iowa864, 208NW377; NJ 151 A743; 85PaSuper323.

45-93 85PaSuper323; TexCivA 281SW 1096; TexCivA 289SW440. [a] 8PaDist &Co 348.

45-94 [b] **Bribing telephone girls to connect defendant** with complainant's telephones held not cruelty, but "undignified curiousity prompted by jealousy." 29PortoRico 723, 734.

45-95½-New. 151Md444, 135A176.

45-96 104Conn152, 132A406. [h] **Continuous nagging** may constitute cruelty under statute. 86Mont135, 282P855. [i] **Acts of cruelty and indignities to person compared.**–13PaDist&Co 411. [j] **Unusual conduct resulting from illness** producing irritability is not ground for divorce. 96PaSuper377.

45-97 107Conn484, 140A820 (acts, declarations, and conduct held to warrant divorce); 324 Ill 207, 155NE28; 159La 219, 105S296; 244Mich675, 222NW98; TexCivA 291SW964; TexCivA 292SW 963.

45-99 219Ala196, 121S710(1stcase) (preventing conception against wife's will); Fla 129S886; 324 Ill 207, 155NE 28; 205 Iowa684, 216NW636; 217Ky 126, 288SW1050; NJ 151A743; 128 Okl 147, 262P199; TexCivA 281SW1096; TexCivA 283SW641; TexCivA 291SW 964. [a] 102Conn755, 129A275. [b] **In Iowa.**–228NW290.

46-2½-New. Same principles of law and rules of evidence are applicable where the husband seeks a divorce for extreme and repeated cruelty as when the wife is complainant alleging cruelty. 324 Ill 207, 155NE28.

46-2½-New. Under the Kentucky statute requiring continuance of cruelty for six months in order to constitute ground for divorce, that the parties did not live together for six months is not ground for denial of divorce where cruelty continued after separation. 213 Ky100, 280SW477.

46-2¼-New. Wife's representation before marriage that she was a widow whereas she had a living husband from whom she had procured a divorce cannot constitute cruelty as a ground for divorce. TexCivA 281SW1096.

46-2½-New. A series of acts considered as a whole may constitute cruelty, although no one of them standing alone would be sufficient. SD 214NW846.

46-2¾-New. Men and women must be judged by same standard as to conduct rendering cohabitation unsafe. 245NYS 439.

46-3 27Hawaii 280; 324 Ill 207, 155NE 28; 239 IllA366; 202 Iowa668, 210NW 896; 163La597, 112S498; 168La847, 123S595; Md 150A717; 88PaSuper519. [b] **Intent to do serious bodily harm** may render single act of violence ground for divorce a mensa. Md 149A616.

46-4 MoA 6SW(2d)989; 88PaSuper519.

46-5 See also 29PortoRico 723.

46-7 68CalA218, 228P715.

46-8 But see 231Ky209, 21SW(2d)245.

46-10 239 IllA366. See also 324 Ill 207, 155NE28.

46-11½-New. Cruel acts, not individually intolerable, may become such in cumulative effect so as to warrant a divorce. 107Conn484, 140A820.

46-12 35 OhA408, 172NE451; RI 132 A4.

47-18 150Md608, 133A725, 727, 47ALR 681 [quotCJ].

47-20 See also 245NYS439.

47-22 121Kan716, 250P265; 161La 121, 108S307; 161La955, 109S775; 152 Md515, 137A288; 154Md585, 141A395; TexCivA 11SW(2d)397.

47-23 9PaDist&Co 109.

47-24 30Hawaii 354. Contra 324 Ill 207, 155NE28.

48-25 RI 140A1.

48-26 324 Ill 207, 155NE28; Sask [1928] 3DomLR549.

48-28 202 Iowa1311, 210NW431; 204 Iowa575, 215NW619; 217Ky126, 288 SW1050; 128 Okl 147, 262P199; 131 Okl 164, 268P282; TexCivA 283SW641; TexCivA 290SW889.

48-29 98Fla1196, 125S694; 103NJEq 367, 144A332.

48-30 NJCh 150A679; 37 OklACR438.

48-31½-New. Treatment must be of such character as to endanger life. 202 Iowa1311, 210NW431.

48-32 202 Iowa1311, 210NW431.

49-35 324 Ill 207, 155NE28; 13PaDist &Co 294.

49-39 29Ariz538, 243P402; 86CalA744, 261P503; 94Fla1001, 114S661; 223Ky 537, 4SW(2d)363; 230Ky545, 20SW (2d)170 (mental anguish and wounded feelings, constantly aggravated by repeated acts of neglect, constitute cruel treatment); 163La218, 111S683, 685 [quotCJ], 58ALR457; 48Nev153, 238P 402; 123 Okl 295, 253P295; 131 Okl 164, 268P282; 86PaSuper182; TexCivA 278SW288; TexCivA 290SW889; Tex CivA 290SW927; TexCivA 20SW(2d) 224; TexCivA 27SW(2d)311; 106WVa 634, 146SE614(2dcase). But see 98Fla 1196, 125S694.

50-44½-New. That a husband twitted his wife because of failure to come with a dowry, does not entitle her to a divorce. 244Mich42, 221NW170.

50-45 94Fla1001, 114S661.

50-45½-New. Extreme cruelty may be shown by continued abuse of other spouse's parent in others' presence. 90 Fla858, 107S188.

50-45⅓-New. Mere unhappiness of one spouse is not ground for divorce. 151 Md444, 135A176.

50-45¼-New. Where mental pain and suffering or physical violence is not of itself sufficient to show cause for divorce, either may supplement the other. 94Fla1001, 114S661.

50-45½-New. A husband's insistence, without valid reason, on his mother's living with him, may constitute cruelty. 243Mich385, 220NW786.

50-46 113 Okl 164, 240P62; 132 Okl 291, 270P833; TexCivA 27SW(2d)311. See also 125 Or127, 265P1089.

50-47 166La92, 116S711; 157Miss425, 128S270; 132 Okl 291, 270P833; 50RI 434, 148A318.

50-48 85Mont446, 278P1009; 113 Okl 164, 240P62; 123 Okl 295, 253P295; 128 Okl 147, 262P199; TexCivA 290SW 927; 106WVa680, 146SE720.

50-49 [a] **Mental suffering held not to constitute extreme cruelty** warranting divorce at instance of husband. 99 CalA163, 277P1065.

50-49½-New. In some jurisdictions treatment or abuse must be such as damages health or causes a constant apprehension of physical violence, renders cohabitation intolerable, or makes it impracticable to discharge marital duties. 94Fla1001, 114S661.

51-51 [e] **Maintaining illicit relationship with daughter** causing her to become mother is "habitual behavior in cruel and inhuman manner" entitling wife to divorce and alimony. 211Ky 207, 277SW243.

51-52 163La597, 112S498.

51-62 170Minn235, 212NW193.

51-67 68CalA218, 228P715; CalA 284P 950; 90Fla858, 107S188; 202 Iowa1311, 210NW431; 203 Iowa1218, 211NW705; 121Kan716, 250P265; 164La117, 113S 787; 237Mich631, 212NW964; 237Mich 631, 213NW66; 239Mich306, 214NW 133; 86Mont135, 282P855; 113 Okl 164, 240P62; 130 Okl 42, 265P121, 122 [quot CJ]; 121 Or402, 255P480; 29PortoRico 723, 734 [citCJ]; 158Tenn437, 14SW (2d)745; TexCivA 290SW927. [b] (2) **Husband's accusations against wife of improper relations between her and another man constitute "cruel and inhuman treatment,"** whether or not direct charge of unchastity is made. 207 Iowa271, 222NW862. [c] 107WVa299, 148SE118. [d] **Unfounded charge of lewdness** as cruel treatment. 233Ky 134, 25SW(2d)59.

52-68 NJCh 152A83; 130 Okl 42, 265P 121, 122 [quotCJ].

52-69 NJCh 147A193(1stcase); 36Wyo 310, 254P689.

52-74 68CalA218, 228P715.

52-75 231Ky420, 21SW(2d)653(1st case); 118 Or178, 245P1082, 1083 [cit CJ]. [c] **Mere filing petition, alleging improper conduct of wife,** but not alleging adultery, does not establish cruel and inhuman treatment. 202 Iowa668, 210NW896.

52-76 163La1022, 113S361.

52-77½-New. A husband's unfounded charge of lewdness or adultery in a counterclaim filed in his wife's action for divorce on the ground of cruelty is not alone sufficient ground for granting the wife a divorce on her original complaint. 222Ky203, 300SW598.

52-78 213Ky125, 280SW932; 222Ky 203, 300SW598; 237Mich639, 213NW 66; 130 Okl 42, 265P121, 122 [quotCJ]; 29PortoRico 723. [b] **Charges must be shown to be maliciously made.**–29Porto Rico 723.

52-79 79CalA626, 250P580; 213Ky125, 280SW932; 152Miss476, 119S581 (filing suit charging adultery).

53-83 164La117, 113S787. [d] But see 8PaDist&Co 348. [f] **Disloyalty.**–227 AppDiv1, 236NYS544.

53-89 But see 245NYS439.

53-92¼-New. A false charge in a prior divorce suit, that the husband communicated a venereal disease to his wife, is cruel and inhuman treatment. 200 Iowa 910, 205NW785.

53-92½-New. Circulation of false and slanderous statements tending to destroy reputation and harmful to peace of mind and health may constitute cruelty. Ariz 291P993.

53-96 118 Or178, 245P1082, 1083 [quot CJ].

53-96½-New. Whether a charge of impotency involves cruelty depends upon the circumstances surrounding a given case, 118 Or178, 245P1082.

53-96⅓-New. and generally must have been made maliciously. 118 Or178, 245P 1082.

53-97 201 Iowa864, 208NW377, 378 [cit CJ]. [a] **Divorce for use of offensive language** refused where plaintiff was guilty of similar conduct. 234Mich657, 209NW 147.

53-98 171Minn213, 213NW919; 121 Or 402, 255P480; TexCivA 290SW889.
53-99 124 Or480, 264P842.
53-1 47RI 114, 131A81.
54-2 35PortoRico 790.
54-3½-New. or where not affecting or tending to affect wife's health, 47RI 114, 131A81.
54-9 TexCivA 291SW964.
54-10 98Fla1196, 125S694 (threat to leave wife and go to another country); Md 134S176; 152Md515, 137A288; 151 Wash380, 275P719.
54-15 [a] **In Pennsylvania.**-12PaDist& Co 265.
55-17½-New. Failure of wife to attend to household duties is not extreme cruelty. 72CalA513, 237P814.
55-19 TexCivA 29SW(2d)868.
55-22 159La219, 105S296 (and not providing medical attention).
55-28 [a] **In connection with acts and threats of violence and other acts,** inducing conveyance and exclusion from property conveyed has been held sufficient. 84Colo 250, 269P22.
55-29 251Mich1, 230NW915; 120 Or 624, 253P1117; 5PaDist&Co 42. [d] **Attempt to force wife to have intercourse** while knowing he is suffering from syphilis constitutes extreme cruelty. 102NJEq132, 139A881.
55-32 161La121, 108S307; 154Md696, 140A590; 124 Or480, 264P842. **Erratum.**-Strike out "Ill.-Youngs v. Youngs, 33 Ill. A. 223 [aff 130 Ill. 230, 22 NE 806. 17 AmSR 313, 6 LRA 548]."
56-34½-New. Wife cannot justify failure to return to husband on ground that she will not resume marital connection. 151Md444, 135A176.
56-36 165La283, 115S489. [b] **Intemperance** must continue until time of filing libel. 126Me342, 138A477, 54ALR 327.
56-37 TexCivA 276SW795. But see Tex CivA 292SW963.
56-37½-New. Use of drugs. In Nevada, excessive and intemperate use of morphine, standing alone, does not constitute extreme cruelty. 48Nev153, 238P 402.
56-37⅓-New. When, however, a spouse using a drug is guilty of cruelties and indignities which render the situation of the injured spouse intolerable, destroying the legitimate objects of matrimony, such conduct constitutes extreme cruelty. 48Nev153, 238P402.
56-38 151Md444, 135A176; 13PaDist& Co 294.
56-39 CalA 284P950.
56-40 NJ 147A633 (two years).
56-41 106WVa691, 146SE880.
56-44 214Ala112, 106S602; 153Md213, 138A22; 115Nebr685, 214NW300; 129 Misc137, 220NYS651; 123 Okl 9, 252P 837. [b] 129Misc137, 220NYS651; 241 NY446, 150NE511 (to action for abandonment). [e] **Without intermediate reconciliation,** not more than one desertion can take place. 97NJEq451, 129A 420. [d] **Prosecution by wife** for separate maintenance on ground of cruelty does not militate against husband's action for divorce on ground of abandonment. 103NJEq214, 142A898.
56-44¼-New. A wife leaving her husband and without justification bringing suit for a separation reduces the husband's marital duties to a minimum. 241NY446, 150NE511.
57-45 214Ala112, 106S602; 215Ala545, 112S119; 150Md313, 133A56; 150Md608, 133A725, 47ALR621; 153Md213, 138A22; 154Md501, 140A717; 156Md656, 145A 180; Md 148A259; Md 150A717; 101 NJEq126, 138A116; 248NY175, 161NE 461 (all circumstances must be considered); 241NY446, 150NE511; 241NY 446, 150NE511; 213AppDiv103, 210NYS 1; 5PaDist&Co 18; 5PaDist&Co 309; 5 PaDist&Co 787; 6PaDist&Co 378; Tex CivA 278SW236; 145Va596, 134SE536; 106WVa634, 146SE614(2dcase). [d] **Presumption of intention to return** must be rebutted at least by failure of reconciliation because defendant refused to obey summons to return to matrimonial domicile. 159La717, 106S250. [e] **Where husband suing for divorce alleges and proves he abandoned her** for her failure to support herself, she is entitled to divorce on cross action. TexCivA 278SW 236. [f] **Wife's conduct making it necessary for husband to leave home** does not constitute desertion by wife where she remains in habitation theretofore occupied by them. 13PaDist&Co 193. [g] **Other definitions.**-300Pa217, 150A606.
57-45½-New. But mere departure of one spouse with present intention not to return is not of itself a finality entitling the other to a decree. 241NY446, 150NE511.
57-46 MoA 31SW(2d)211; 98NJEq476, 131A386.
57-47 98NJEq729, 130A603.
57-48 101NJEq682, 139A333.
58-50 69CalA742, 232P471; 85PaSuper 473; 5PaDist&Co 787; 5PaDist&Co 298; TexCivA 283SW328; 188Wis151, 205NW 829. [d] **In Kentucky.**-218Ky648, 291 SW1032.
58-51 151Md196, 134A136; 153Md213, 138A22.
58-52 150Md608, 133A725, 729, 47ALR 681 [quotCJ].
58-53 115Nebr685, 214NW300.. [a] 34 OhA483, 171NE350.
58-61½-New. Departure from home followed by commencement of an action on charges later withdrawn is not conclusive of parties' rights, although some evidence bearing on intent to abandon. 241NY446, 150NE511.
58-61⅓-New. A wife who leaves her husband and sues for divorce but fails to establish her cause of action has not abandoned her husband as a matter of law. 241NY446, 150NE511.
58-61¼-New. nor has the husband abandoned her when she herself disregards the marriage contract. 241NY 446, 150NE511 (Civ. Pract. Act § 1163).
58-61⅙-New. Departure of wife and commencing separation action subsequently withdrawn is not conclusive as to fact of desertion. 241NY446, 150NE 511.
58-61⅙-New. Where the wife leaves the husband and suing for divorce fails to establish a cause of action, it does not constitute an abandonment as a matter of law because case does not come to trial for a year. 241NY446, 150NE511.
58-62 153Md213, 138A22; 99NJEq399, 131A876; NJ 147A633; NJ 151A610; NJCh 147A330(1stcase); 242NY74, 150 NE605; Alta [1926] 4DomLR1117.
59-66 159La570, 105S624 ("living apart" must be in such manner that those in neighborhood can see they are not living together); 48Nev220, 228P 889, 891 [quotCJ]; 13PaDist&Co 195.
59-67 MoA 31SW(2d)211; 117 Or157, 242P852; 5PaDist&Co 547. But see 121 Okl 273, 249P732, 734 [citCJ].
59-69 MoA 31SW(2d)211; 117 Or157, 242P852.
59-70 Md 148A259; 117 Or157, 242P 852. [a] 104WVa254, 139SE754 (where facts show desertion by husband).
59-72 117 Or157, 242P852.
59-77 213AppDiv103, 210NYS1.
60-78 [a] 9PaDist&Co 86.
60-80 220Ala57, 124S107; 99CalA163, 277P1065; 218Ky700, 292SW332, 333 [citCJ]; 234Ky314, 28SW(2d)1; 82 Mont239, 266P410; 117 Or157, 242P 852; 5PaDist&Co 547; 148Wash537, 269P836; 188Wis151, 205NW829, 832 [citCJ]. [c] **Continued abandonment,** for over year by wife, first refusing in another state to live with husband in Kentucky, is held cause for divorce in Kentucky. 218Ky700, 292SW332. [d] **Refusal to reside with husband** held not without good cause. 234Ky314, 28SW (2d)1. [e] **Wife's refusal to follow husband** is not abandonment occurring in state. 170La958, 129S543.
60-81 [a] 188Wis151, 205NW829.
60-82 117 Or157, 242P852; 5PaDist& Co 303.
60-83 Md 148A259; 5PaDist&Co 303.
60-84 118 Or614, 247P808, 809 [citCJ]; 5PaDist&Co 303; 106WVa634, 146SE614 (2dcase). But see 154Md84, 140A37.
60-86 150Md608, 133A725, 727, 47ALR 681 [quotCJ].
60-86½-New. Peace of mind cannot be impaired. 5PaDist&Co 303.
60-88½-New. A husband is not entitled to a divorce on the ground of desertion because of his wife's refusal to follow him to a new residence where he had previously left her without reasonable cause and refused to discuss their difficulties with her and thereafter rejected all of her attempts at reconciliation. 85 PaSuper488.
61-90½-New. Husband who continues to stay at home of parents, where wife is not allowed to stay, and does not communicate with her, is guilty of desertion. NJCh 134A903.
61-91 106WVa634, 146SE614(2dcase).
61-92 215Ala545, 112S119; Ala 130S 677; 231Ky209, 21SW(2d)245; Md 132 A614; 154Md84, 140A37 (failure to provide home except with husband's relatives); 86Mont135, 282P855; 49Nev254, 243P817; 100NJEq91, 135A91; 101NJ Eq30, 137A839; 103NJEq567, 144A332; 129Misc137, 220NYS651; 191NC740, 133 SE9; 95PaSuper445; 98PaSuper230; 108WVa71, 150SE231. [b] **Husband forced to leave by cruelty of wife** held not entitled to divorce on ground of abandonment. But see 222Ky175, 300 SW354.
61-96 104Conn152, 132A406; 128 Or 622, 275P673.
61-97 108Conn292, 142A843; 106WVa 634, 146SE614(2dcase).
61-98 156Tenn655, 4SW(2d)358, 359 [citCJ]. See also 154Md84, 140A37.
61-99 49Nev254, 243P817; 100NJEq91, 135A91.
62-3½-New. A wife's adultery justified her husband's living apart from her, unless his subsequent conduct, with full knowledge of the facts, raises a presumption that he condoned her offense. 264Mass291, 162NE663.
62-5 Md 149A616.
62-10 215Ala545, 112S119; 172Ark918, 290SW951; 164La62, 113S764; 151Md 196, 134A136; 153Md213, 138A22; 117 Or157, 242P852; 124 Or611, 265P415 (institution of action breaks continuity of desertion); 5PaDist&Co 547; 88Pa Super296; 96PaSuper410; 5PaDist&Co 787; 13PaDist&Co 195; TexCivA 283 SW328; 188Wis151, 205NW829. [a] (2) 128 Or622, 275P673. (3) Other computations. NJCh 151A620.
63-11 151Md196, 134A136; 124 Or611, 265P415. [e] **Litigation between parties for which husband was not responsible** does not suspend running of statutory period. 156Tenn655, 4SW(2d)358.
63-12 30Hawaii595; 151Md196, 134A 136.
63-15 140Miss340, 105S753, 42ALR 1525.
63-18½-New. Desertion is not established where spouses agree, within statutory period, to live separate and do so thereafter. 151Md196, 134A136.
63-19 150Md313, 133A56.
63-20 287Pa184, 134A472, 473 [citCJ].
63-22 92CalA276, 268P401; 150Md313, 133A56.
63-23 150Md313, 133A56.
64-25 NJCh 140A454.
64-26 29Ariz549, 243P413; 247 IllA 463; 128Me148, 146A84; Md 132A614; 151Md196, 134A136; 34 OhA483, 171NE 350; 85PaSuper74; 5PaDist&Co 298; 47RI 81, 129A830; 50RI 129, 145A445; Sask [1925] 2DomLR794.
64-27 215Ala545, 112S119; Ala 130S 677; 33Ariz123, 262P614; 82CalA313, 255P767 (acts not amounting to consent); 107Conn406, 140A765; Ill 173NE 84; 151Md196, 134A136; 154Md501, 140A717; Md 140A834; 115Nebr685, 214NW300; 124 Or611, 265P415; 85Pa Super473 (wife held not guilty of desertion where son-in-law ordered her from his house where she and husband boarded and husband consented to her going and assisted her in doing so and took no steps to provide her with home); 85PaSuper74; 88PaSuper575; 91PaSuper147; 95PaSuper542; 95Pa Super584; 96PaSuper410; 5PaDist&Co 298; 8PaDist&Co 484; 12PaDist&Co 316; 50RI 129, 145A445; SD 216NW 857; 101WVa636, 133SE363; 188Wis 151, 205NW829; Sask [1925] 2DomLR 794. [b] 124 Or611, 265P415. [e] **Mere acceptance by one spouse of clearly expressed irrevocable determination of other to leave** does not constitute separation by agreement. 29Ariz549, 243P413. [f] **Essentials for consentable separation.**-To establish a consentable separation sufficient to constitute a defense there must be present intention of parties to live apart or at least no prea-

ent intention of resuming cohabitation. 85PaSuper74. [g] **Mere payments for wife's support** after separation to avoid nonsupport proceedings does not show consent to continued separation. 107 Conn406, 140A765. [h] **Mere silence of** injured party is insufficient to establish consent. 92PaSuper310. [i] **Filing by husband of cross petition** for divorce on ground of cruelty constituted consent to desertion. 50RI 129, 145A445.

64-29 236Mich397, 210NW294; 88Pa Super296.

65-33 124 Or611, 265P415; 96PaSuper 91; 5PaDist&Co 787.

65-34½-New. To sustain charge of abandonment, it must be shown deserting party had opportunity to return for full statutory period. 115Nebr685, 214NW300.

65-35 33Ariz123, 262P614, 615 [citCJ]; 159La717, 106S250; 164La62, 113S764; 151Md196, 134A136; 101NJEq284, 137A438; NJCh 145A733(2dcase); NJ 150A418; 88PaSuper575; 8PaDist&Co 484; 10PaDist&Co 434; 145Va596, 134SE536. [c] (1) 159La717, 106S250. (2) Interlocutory judgment for wife's return is no bar to her defense to divorce action. 159La717, 106S250. (3) There can be no divorce suit on ground of separation until preliminary judgment ordering errant spouse to return to matrimonial domicile is rendered. 159La717, 106S 250. [d] **Circumstances under which husband is under no duty to seek reconciliation.**-145Va526, 134SE555.

65-37 214Ala112, 106S602; 92CalA276, 268P401; 103NJEq214, 142A898; 5Pa Dist&Co 309.

65-40 100NJEq482, 135A792.

66-44 82CalA449, 255P892.

66-47 172Ark918, 290SW951; 30 Hawaii796; 88PaSuper35; 88PaSuper 296; 94PaSuper606; 95PaSuper542; 98 PaSuper194; 5PaDist&Co 38; 6Pa Dist&Co 765. See also 82Mont239, 266P 410. [a] 241NY446, 150NE511. [c] **On temporary absence of wife not yet abandonment,** husband is under duty to take back wife on her offer to return. 241NY446, 150NE511.

66-50 33Ariz123, 262P614; 85PaSuper 74; 94PaSuper257; 5PaDist&Co 298; 188Wis151, 205NW829.

66-51 215Ala545, 112S119; 107Conn 406, 140A765 (bona fide attempt held sufficient); 3Del 430, 138A640; 101 NJEq682, 139A333; 241NY446, 150NE 511; 89PaSuper15; 91PaSuper77 (representations of strangers held insufficient); 93PaSuper500; 145Va596, 134 SE536; 188Wis151, 205NW829. [b](2) Offer to return not shown to have been made in good faith but rather appearing to be mere attempt to defeat husband's suit is insufficient. 213AppDiv103, 210 NYS1. [c] 98NJEq350, 129A126.

67-52 3Del 430, 138A640. [a] **Offer under advice of counsel** made as part of strategy of action for separation is entitled to little weight. 241NY446, 150 NE511.

67-53 NJCh 129A190; 91PaSuper147.

67-54 3Del 430, 138A640; 98NJEq350, 129A126 (heartfelt contrition).

67-54¼-New. Formal offer of reconciliation in course of the action may be sufficient. 241NY446, 150NE511.

67-55 172Ark918, 290SW951; 82CalA 313, 255P767; 93CalA465, 269P561; 241 NY446, 150NE511 (after cause for abandonment has accrued). [c] **In New York.**-241NY446, 150NE511. [d] **Offer after decision against wife** by wife's father is held too late to prevent decree for husband. 145Va526, 134SE555.

67-55½-New. An offer to return thereafter is of no avail where the husband has in good faith indicated his willingness to have his wife live with him, which she unreasonably refused. 241 NY446, 150NE511.

67-55⅓-New. Wife's offers of return made under advice of counsel as part of strategy of separation action are entitled to but little weight. 241NY446, 150NE 511.

67-56 Md 152A230; 47RI 81, 129A830 (reasonable fear of wife); 188Wis151, 205NW829.

67-60 178Ark530, 118W(2d)454; 107 Conn406, 140A765; 159La717, 106S250; Md 132A614; Md 140A834; NJ 151A 855; 126Misc349, 241NYS123; 95Pa Super415; 188Wis151, 205NW829. See also 87PaSuper318.

67-61 Md 140A834.

68-64 215Ala545, 112S119.

68-66 213AppDiv103, 210NYS1 [aff 241 NY446, 150NE511, and expl and dist 218 NY525, 113NE495]. But see 248NY175, 161NE461.

68-67 241NY446, 150NE511. [b] **In Arizona.**-33Ariz367, 265P87, 61ALR 1264.

68-67½-New. A wife to whom her husband communicated a venereal disease is justified in refusing to resume marital relations. 231Mich614, 204NW758.

68-71 214Ala112, 106S602; 215Ala545, 112S119; 100CalA168, 279P1052; 151 Md196, 134A136; 156Md656, 145A180; 153Md213, 138A22; 213AppDiv103, 210 NYS1 [aff 241NY446, 150NE511] (filing action for divorce on grounds of cruelty afterward abandoned, as proof of intent); 35PortoRico799; TexCivA 283 SW328; 188Wis151, 205NW829.

68-72 110Conn277, 147A800; 91Fla 427, 107S630; 153Md213, 138A22; 177 Minn428, 225NW287(3dcase); TexCivA 283SW328; 152Wash429, 277P994; 188 Wis151, 205NW829.

68-75 91Fla427, 107S630; 101NJEq 236, 136A191; 100NJEq482, 135A792; 241NY446, 150NE511. [c] **Meaning of "obstinate."**-(1) Determined. 91Fla 427, 107S630. (2) Fixed. 91Fla427, 107 S630. (3) Persistent. 91Fla427, 107S 630.

68-75½-New. obstinate and hardened; 248NY175, 161NE461.

68-76 89PaSuper398; 90PaSuper312; 96PaSuper410; 7PaDist&Co 357. [a] **Willful and malicious desertion not shown** where respondent was mentally ill prior to expiration of two year period. 14PaDist&Co 303.

68-77 See also 85PaSuper473.

69-78 95PaSuper415.

69-81 [a] **Acts held not to constitute "excessively vicious conduct."**-152Md 515, 137A288.

69-88 [a] 132 Okl 291, 270P833; 37 OklACR438. [c] **Selection of improper domicile** and requiring wife to remain there for protracted period whereby her health was endangered constitutes gross neglect of duty. 121 Okl 273, 249P732.

69-88½-New. Willful neglect is not established where, while spouses live together, the wife earns sufficient to provide for herself and is permitted to use it. 92CalA212, 267P893.

69-91 34 OhA483, 171NE350.

69-92 129 Okl 244, 264P162.

70-96 47RI 114, 131A81.

70-98 159La193, 105S286.

70-99 159La193, 105S286; 47RI 114, 131A81.

70-2 237Mich639, 213NW66, 51ALR 1186; 47RI 114, 131A81.

71-14 148Wash622, 269P804.

71-16 171Minn258, 213NW906; 35 OhA 408, 172NE451; 25 OhNPNS123.

71-17 See also 50RI 179, 146A478. [a] (1) 213Ky606, 281SW801. (5) Separation without cohabitation for statutory period entitles husband to divorce regardless of question as to who was at fault. 213Ky606, 281SW801. [b] (2) 160La196, 106S781. (3) To justify divorce living apart must be such as is open and visible in neighborhood; living in same house, though relations between spouses have ceased, is insufficient. 159La570, 105S624. (4) Questions of cause of separation and of which party was at fault are not considered by statute. 164La293, 113S852. (5) Suit by plaintiff for separation on grounds of cruel treatment during statutory period held not inconsistent with demand for divorce. 164La293, 113S852. [c] (5) Under Consol. St. § 1659 sub 4, divorce may be had on application of party injured, if there has been separation for five successive years, and plaintiff has resided in state for that period prior to suit. 191NC319, 131SE641. (6) Involuntary separation is not such separation as law contemplates. 191NC 319, 131SE641.

71-21 98Fla1196, 125S694.

71-22 Nev 292P616; 129Misc207, 221 NYS594.

72-24 51Nev271, 274P9; 131Misc830, 229NYS67.

72-29 27Hawaii823.

72-29½-New. Where wife refused to live within husband's income he is not guilty of nonsupport because he does not furnish her with more. 237Mich459, 212NW80.

72-33 [c] **Husband's failure to support** where wife leaves without good cause has been held to justify divorce for nonsupport. 27Hawaii823.

72-36 Nev 292P616.

73-43 MoA 16SW646; MoA 16SW(2d) 621; 129 Or402, 275P915; 95PaSuper 474; 8PaDist&Co 684; 8PaDist&Co 734.

73-44 MoA 299SW61.

73-45 MoA 280SW430; 221MoA104, 289SW973; 318Mo 476, 300SW455; MoA 299SW61; MoA 300SW1046; MoA 28W(2d)180; MoA 21SW(2d)915; MoA 31SW(2d)213.

73-47 MoA 16SW(2d)621; MoA 28SW (2d)398.

73-48 179Ark171, 148SW(2d)551; MoA 28SW(2d)398; MoA 31SW(2d)213; 97 PaSuper70; 8PaDist&Co 350.

74-49 MoA 6SW(2d)989; 97PaSuper 405.

74-50 MoA 280SW430, 435 [quotCJ]. Contra 93PaSuper305.

74-51 163La218, 111S683, 58ALR457.

74-58 95PaSuper474. But see 168La 32, 121S182.

74-59 7PaDist&Co 747. But see 152Md 515, 137A288.

74-63 See also 10PaDist&Co 518.

74-64 MoA 17SW(2d)594.

75-72 [a] **In Pennsylvania.**-12PaDist &Co 265.

75-73 85PaSuper323; 13PaDist&Co 294.

75-81 8PaDist&Co 684.

75-83½-New. A wife marrying a husband for the third time with full knowledge of his disagreeable habits cannot assert such habits as ground for divorce. MoA 17SW(2d)381.

75-85 163La1022, 113S361.

75-88 164La1060, 115S269.

75-89 170La813, 129S212(2dcase).

75-89½-New. A true charge in court against the husband for failure to support his wife according to his agreement is not a public defamation. 164 La1060, 115S269 (where wife withdrew charge upon receiving agreed allowance).

75-89⅓-New. The filing of a suit for separation for illtreatment by the husband, afterward withdrawn upon reconciliation, is not a public defamation. 164La1060, 115S269.

75-91 251Mich1, 230NW915.

75-93½-New. Practice of religious belief may constitute cruelty warranting separation. 163La218, 111S683, 58ALR 457.

76-3 93Fla261, 111S637.

76-4 94Fla1001, 114S661; 93Fla261, 111S637.

76-5 93Fla261, 111S637; 94Fla1001, 114S661.

76-6 93Fla261, 111S637; 94Fla1001, 114S661.

76-7 93Fla261, 111S637; 94Fla1001, 114S661.

76-12 [b] **Fact that wife knew of husband's bad temper or temperamental defects** before marriage does not compel her to submit to his indignities. 224AppDiv46, 229NYS77.

76-12½-New. An antenuptial agreement of a wife that her husband need not support her, being invalid constitutes no defense to the wife's separation action. 133Misc109, 231NYS221.

76-12⅓-New. Pendency of suit based on extreme cruelty, such suit being false allegations of fact is no defense. NJCh 151A620.

76-15 98NJEq444, 131A576; 101NJEq 15, 137A787; 133Misc109, 231NYS221; 130Misc262, 223NYS705; Vt 147A700. [f] **Where parties are already validly divorced,** divorce cannot be granted. 98 NJEq444, 131A576.

76-16½-New. Annulment of marriage cannot be obtained under counterclaim in separation action but invalidity of marriage may be alleged as a defense. 130Misc262, 223NYS705.

76-16⅓-New. A decree on other grounds than that having another spouse living and not divorced is not void

although the subsequent marriage is void. 128Kan762, 280P751.

76-19 140Miss340, 105S753, 755 [quot CJ], 42ALR1525; 239Mich306, 214NW 133. [b] (1) 140Miss340, 105S753, 42 ALR1525. [c] Reason is that spouse is incapable of intentionally doing or committing an act that will constitute ground for divorce. 239Mich306, 214 NW133.

77-20 239Mich306, 214NW133; 171 Minn258, 213NW706; 140Miss340, 105 S753, 755 [quotCJ], 42ALR1525; 151 Miss78, 117S352; NJCh 152A246; 35 OhA408, 172NE451; 148Wash622, 269P 804.

77-21 Iowa 225NW948; 140Miss340, 105S753, 755 [quotCJ], 42ALR1525.

77-22 140Miss340, 105S753, 755 [quot CJ], 42ALR1525.

77-23 140Miss340, 105S753, 755 [quot CJ], 42ALR1525.

77-24 140Miss340, 105S753, 755 [quot CJ], 42ALR1525 (not deciding question). [a] 140Miss340, 105S753, 755 [quotCJ], 42ALR1525.

77-25 214Ky171, 283SW73; 239Mich 306, 214NW133; 140Miss340, 105S753, 755 [quotCJ], 42ALR1525; 35 OhA408, 172NE451; 13PaDist&Co 373.

77-27 140Miss340, 105S753, 755 [quot CJ], 42ALR1525 (not deciding question).

77-28 29PortoRico 723, 728 [citCJ]; 106WVa446, 145SE813.

77-31 100NJEq486, 136A421.

78-35 100NJEq486, 136A421.

78-41 100NJEq486, 136A421.

78-54 163La597, 112S498; 150Md648, 133A316; 235Mich389, 209NW115; 144 Miss314, 109S795; NJ 151A743; 29 PortoRico 723; TexCivA 293SW336.

79-58½-New. Where insults and outrages are mutual and brought about by mutual provocations, the court will not grant a separation to either; 159La489, 105S595.

79-58¾-New. but where the quarrels in which the abuse by defendant was resented, although in a degree reciprocated by plaintiff, were always provoked by defendant, a separation will be granted. 159La489, 105S595.

79-58¼-New. Where defendant is not insane generally, it is not a defense that, in the practice of cruelty, she was under a delusion. NJCh 129A122.

79-58½-New. Acts of plaintiff's mother do not constitute a defense or excuse for defendant's cruelty. 128 Okl 147, 262P199.

79-67 85PaSuper473; 85PaSuper488; 50RI 1, 144A437.

79-67½-New. Where defendant is not insane generally, it is not a defense that, in deserting her home, she was acting under a delusion. NJCh 129A 122.

80-69 85PaSuper473.

80-72½-New. In Kentucky a wife previously divorced from another on the ground of cruel treatment cannot obtain a second divorce on the ground of abandonment. 221Ky759, 299SW961.

80-76 30Hawaii595, 598 [quotCJ].

80-77 168Ark1167, 272SW643; 168Ark 1167, 272SW643; 150Md608, 133A725, 47ALR681; 85PaSuper473; 89PaSuper 319; 7PaDist&Co 416.

80-78 150Md608, 133A725, 729, 47ALR 681.

80-80 156Tenn655, 4SW(2d)358, 359 [quotCJ].

80-81 110Conn277, 147A800; Md 148A 259; 29PortoRico 723, 728 [citCJ].

80-82 89PaSuper398 (insufficient).

80-87 Md 148A259.

80-94½-New. A wife's refusal of marital privileges constitutes defense to her action for abandonment under Civ. Pract. Act § 1163. 242NY74, 150NE605.

81-95 89PaSuper15.

81-96 233Mich315, 206NW358; NJ 152 A181; 124 Or611, 265P415; 93PaSuper 603. See also 85PaSuper473. [a] Extreme cruelty which warrants separation is such conduct as endangers safety of person or health of aggrieved party, either actually inflicted or reasonably apprehended. 103NJEq214, 142A898.

81-97 See also 85PaSuper473.

81-10½-New. Failure of husband to provide home for wife after she had been expelled by son-in-law from latter's home where they lived precludes divorce on ground of desertion. 85Pa Super473.

82-14 5PaDist&Co 547.

82-15½-New. A wife may have a divorce on the ground of willful neglect, notwithstanding after the cause of action for nonsupport matured, she refused overtures of the husband requesting her return. 82CalA515, 255P880.

82-17 151Md196, 134A136; 131Misc 851, 228NYS313 (separation agreement not performed by husband).

82-18 81Mont587, 264P667, 671 [cit CJ].

82-19 Sask [1927] 3DomLR383.

82-21 151Md196, 134A136. But see BC [1925] 3DomLR872.

82-23 Cal 269P628(1stcase); 99NJEq 486, 133A529. But see 145Va85, 133SE 756. [a] Agreement revoked by resumption of marital relations is not bar to subsequent action for divorce for subsequent desertion. 81Mont587, 264P 667.

82-26 81Mont587, 264P667; 145Va85, 133SE756.

83-30 146Wash175, 262P118.

83-31 169Ark1001, 277SW41; 170Ga 349, 153SE11; 323 Ill 608, 154NE405; 324 Ill 207, 155NE28; 327 Ill 39, 158NE 411; 202 Iowa1311, 210NW431; 204 Iowa575, 215NW619; 221MoA944, 288 SW794; MoA 299SW832; 132Misc339, 229NYS511; TexCivA 283SW201; Sask [1930] 4DomLR36. [c] 158La933, 105S 18. [d] Condonation restores parties to original marital relationship. 49Nev 375, 247P545, 47ALR569. [e] Other definitions.-125Me397, 134A373.

83-32 30Hawaii796, 806 [citCJ]; 323 Ill 608, 154NE405; 226Ky278, 10SW (2d)844; 49Nev375, 247P545 [citCJ], 47ALR569 (written agreement between separated husband and wife to live together again construed to be condonation of prior grievances); 124 Or364, 264P447; TexCivA 283SW201.

83-33 172Ark918, 290SW951; 101WVa 636, 133SE363 (separation).

83-34 178Ark343, 10SW(2d)884; Tex CivA 283SW201.

83-35 TexCivA 283SW201.

84-42 TexCivA 4SW(2d)296.

84-43 107Conn89, 139A507; 202 Iowa 1311, 210NW431; 132Misc339, 229NYS 511; 197Wis159, 221NW733. [a] 132 Misc339, 229NYS511.

84-46 TexCivA 283SW201; TexCivA 285SW693, 694 [citCJ].

84-48½-New. That wife was seen with husband, talked with him and gave him money is not condonation. 13PaDist &Co 411.

84-48¾-New. Condonation implies agreement that offending spouse will not afford other cause to suspect that improper conduct has not ceased. 169 Ark1001, 277SW41.

84-48¼-New. Fact that abandoned wife is furnished adequate support during separation does not in itself bar her right to divorce. 214Ala321, 107S827.

84-48½-New. Mere endurance of husband's cruelty with patience and forbearance does not constitute condonation. 165La283, 115S489.

84-49 TexCivA 285SW693, 694 [citCJ]. [e] Law does not enforce condonation.-68CalA218, 228P715. [f] Right to refuse offer of reconciliation.-Where husband has completed cause of action for divorce on ground of extreme cruelty, he has right to refuse wife's offer of reconciliation. 68CalA218, 228P715.

84-52 Iowa 228NW290.

84-53 159La478, 105S559; 132Misc11, 228NYS611.

85-61 Ala 129S3 (where husband sued for seduction). [a] Belief imbued by spouse's deception.-Where husband is convinced of wife's innocence because he believes her false denials, there is no condonation. 159La478, 105S559.

85-63 219Ala104, 121S386; 201 Iowa 299, 207NW114; 202 Iowa1311, 210NW 431; 164La117, 113S787; 164La272, 113S845 (remaining in house pending arrangements for leaving held not condonation); 125Me397, 134A373.

85-64 201 Iowa299, 207NW114.

85-66½-New. Receiving offending spouse back into home does not alone condone so long as full marital rights are intentionally withheld. 125Me397, 134A373.

85-67 214Ky566, 283SW1031; Vt 148 A287. See also 99CalAl63, 277P1065.

85-68 Contra Alta [1925] 3DomLR676.

85-69 162La4, 110S68; 154Md585, 141 A395; 99NJEq373, 131A903; 38 OklA CR663; 121 Okl 259, 249P692; 120 Okl 281, 251P43; 5PaDist&Co 42; Alta [1925] 3DomLR676.

86-72 161La613, 109S140. Contra 226 Ky278, 10SW(2d)844. But see 99NJEq 373, 131A903.

86-74 5PaDist&Co 42.

86-76 86CalA744, 261P503; 223AppDiv 19, 227NYS345; TexCivA 283SW201. See also 327 Ill 39, 158NE411.

86-77½-New. Under a statute providing no petition for divorce shall be filed until after six months from the date of the last act of cruelty complained of, continuance to live under the same roof does not condone the offense, and separation is not necessary to start running of six-month period. 99NJEq373, 131A 903.

86-77¾-New. Plaintiff, a weak old man, did not condone cruel treatment by continuing to live separately in his home. 259Mass26, 155NE658.

86-77¼-New. Condonation of repeated acts of cruelty creates but a slight bar, removed by reasonable apprehension of further violence. TexCivA 283SW201.

86-77½-New. Cohabitation is not necessarily condonation of cruel treatment. 202 Iowa1311, 210NW431.

87-78 137Wash349, 242P1; Alta [1925] 3DomLR676 (visiting and having intercourse with wife after obtaining rule nisi).

87-79 TexCivA 272SW501 (dismissal of divorce suit and resumption of marital relations).

87-80 154Md501, 140A717.

87-81½-New. or to find out whether the husband would not relieve her of certain burdens, MoA 279SW755.

87-83 233Ky134, 25SW(2d)59. See also NJCh 151A620. [c] Effect of resuming marital relation pending suit.-233 Ky134, 25SW(2d)59.

87-86 120 Okl 281, 251P43.

87-87 CalA 286P747.

87-90 See also CalA 286P747.

87-90½-New. Where living in the same house is relied on as condonation, proof should show connubial cohabitation so as to operate more completely as forgiveness of cruel acts complained of. TexCivA 283SW201.

87-92 235Mich315, 209NW58.

88-97 169Ark1001, 277SW41; 170Ga 349, 153SE11; 47 Ida374, 276P34; 327 Ill 39, 158NE411; 126Kan760, 763, 271 P275 [citCJ]; 159La478, 105S559; Md 148A264; 265Mass317, 163NE852; 93 PaSuper398; TexCivA 278SW288; Tex CivA 283SW201; Sask [1930] 4DomLR 36. [e] Condonation not bar where clandestine telephone communications continued. 169Ark1001, 277SW41. [f] Condonation is absolute, if conditions are not breached, and is not revocable at will. 170Ga349, 153SE11.

88-98 TexCivA 283SW201.

88-99 [d] In Louisiana.-158La933, 105 S18.

88-1 204 Iowa575, 215NW619; 7PaDist &Co 423; TexCivA 278SW288; TexCivA 283SW201.

88-2 210Ky89, 275SW26 (subsequent act). But see 210Ky89, 275SW26.

88-5½-New. Rule as to cruelty is not as strict as that of statutory condonation of adultery, connivance, or collusion. TexCivA 283SW201.

89-7 169Ark1001, 277SW41; 323 Ill 608, 154NE405; 221MoA944, 288SW 794; Man [1930] 1DomLR72.

89-8 323 Ill 608, 154NE405; 221MoA 944, 288SW794.

89-11 323 Ill 608, 154NE405; 221MoA 944, 288SW794.

89-12 323 Ill 608, 154NE405.

89-15 [a] RI 129A805 (harsh words).

89-18 10PaDist&Co 257.

89-19 221MoA944, 288SW794.

90-22 158La48, 103S438; 288Pa1, 136 A228; Man [1926] 3DomLR430.

90-23 87PaSuper162; Sask [1929] 4 DomLR134.

90-33 Sask [1929] 2DomLR136; Sask

[1929] 4DomLR134.
91-34 221MoA944, 288SW794, 796 [quot CJ].
91-40 100NJEq486, 136A421.
91-41 100NJEq486, 136A421.
91-42 100NJEq486, 136A421.
91-44 [a] (5) "Collusion may consist in understanding, express or implied, that court shall be deceived by misrepresentation, exaggeration, or suppression of facts." 127Me201, 142A751.
92-45 93Fla709, 112S622; 244Mich290, 221NW153; 284Pa414, 131A236.
92-47 Sask [1928] 1DomLR881.
92-51 Sask [1929] 3DomLR1. [b] (1) Sask [1929] 3DomLR1. [d] Suggestion of divorce not collusion. 5PaDist&Co 547.
92-52 215Ala569, 112S147; 284Pa414, 131A236, 238 [citCJ].
92-53 130 Or619, 278P969. See also 127Me201, 142A751 (agreement as to property and custody of children subject to court approval held not collusive).
92-53½-New. 215Ala569, 112S147.
92-54 127Me201, 142A751.
92-56 130 Or619, 278P969.
93-63 97PaSuper405 (agreement not to defend); 99Vt452, 134A529.
93-66 9PaDist&Co 104. [a] Where record shows service was "at sheriffs office" without explanation why served there divorce will not be granted till court is satisfied there is no collusion. 13PaDist&Co 486.
93-68 5PaDist&Co 47.
93-77 158La767, 104S709.
93-78 214Ky566, 283SW1031; 218Ky636, 291SW1044; 158La767, 104S709 (mutual wrongs of same character and so proportional that it is difficult to ascertain which party is mainly at fault); 161La121, 108S307; 168La32, 121S182; 125Me506, 131A137; 152Md515, 137A288; 230Mich186, 203NW69; 230Mich534, 203NW70; 237Mich271, 211NW633; 245Mich339, 222NW738; 156Miss132, 125S562; MoA 16SW(2d)646; 221MoA1136, 298SW110; MoA 299SW61; MoA 14SW(2d)519; 51Nev356, 276P9; 115 Or655, 239P302; 123 Or203, 260P218; 124 Or415, 263P397.
94-80 123 Or203, 260P218.
94-81 218Ky636, 291SW1044; 230Mich186, 203NW69. But see 51Nev356, 276P9. [b] (2) Divorce not denied husband where wife's clandestine conduct continued after reconciliation and fault was greater than that of husband. 169Ark1001, 277SW41.
94-81½-New. Misconduct of defendant will not prevent him from being an innocent party entitling him to divorce on a cross bill, unless so great as to entitle the other party to a divorce. MoA 21SW(2d)915.
94-82 MoA 17SW(2d)381 (defendant filing cross bill); NJCh 146A469; 132Misc339, 229NYS511; 29PortoRico 723; 35PortoRico 343 (insufficient); TexCivA 11SW(2d)397. [a] Adultery committed by complainant after suit brought is as effectual a bar as would be adultery committed before suit brought. 121Mass232; 41NJEq198, 5A725; 4PaigeNY432, 27AmD75; 2EdwNY447; 2AddEccl249, 162Reprint 288. [b] Time of commission of offense.-Vt 151A504.
94-83 Vt 151A504.
95-88½-New. That a husband, after desertion by his wife, believed that he had a right to contract a second marriage is not available as justification of his matrimonial offense as respects recrimination. 156Miss132, 125S562.
95-90 95PaSuper429.
95-91 125Me506, 131A137; Md 148A264.
95-92 214Ky566, 283SW1031; 234Mich144, 207NW821; 51Nev356, 276P9; 115 Or655, 239P302; TexCivA 28SW(2d)468.
95-93 85PaSuper488.
95-94 161La121, 108S307.
96-99 128 Or622, 275P673.
96-3 MoA 14SW(2d)519.
96-11 Contra 125Me506, 131A137.
96-12½-New. Dismissal of suit would not prevent defendant in divorce proceedings from setting up defense of complainant's misconduct. 29PortoRico723.
96-14 [a] Suit on ground of desertion brought within two years of dismissal of suit on same ground is not premature where former suit was dismissed because statutory period had not run and such period had run when second suit was commenced. 156Tenn655, 4SW(2d)358.
97-24 85CalA372, 259P453. [a] 213Ky606, 281SW801, 803 [citCJ]. [h] In New Jersey.-Ch 140A233.
97-25 51Philippine736.
97-27 151Miss78, 117S352 (after discovery of insanity of spouse); 86Mont135, 282P855. [b] (2) Montana statutes states same definition. 81Mont587, 264P667.
97-28 81Mont587, 264P667. [a] Delay due to desire to support wife pending cure of disease with which she was afflicted is excusable though continued for two and a half years. 81Mont587, 264P667.
97-30 87CalA17, 261P501(2dcase).
98-32 87CalA17, 261P501(2dcase).
98-34½-New. Time elapsing during pendency of wife's suit for divorce and separate maintenance does not militate against husband's action for divorce on ground of abandonment. 103NJEq214, 142A898.
98-34½-New. There is no laches where an action for divorce on the ground of cruelty was brought during the year in which the last acts of cruelty occurred. 259Mass26, 155NE658.
98-35 21 OhA222, 153NE113; TexCivA 293SW325.
98-38 9PaDist&Co 80.
98-40 5PaDist&Co 336; 6PaDist&Co 794; 9PaDist&Co 80; 12PaDist&Co 574.
98-42 TexCivA 274SW217, 219 [quot CJ].
98-43 TexCivA 274SW217, 219 [quot CJ].
99-49 13PaDist&Co 8 (rule is not affected by statute permitting wife to sue husband without intervention of next friend in certain cases). [a] When fact of infancy appears, proceedings should abate till appointment of guardian ad litem. 5 PaDist&Co 336. [b] Decree refused till guardian appointed. 5PaDist&Co 336.
99-51 158La274, 103S766 (to compel specific performance of husband's agreement to sell community property).
99-57½-New. Children are not proper parties nor can they be made parties in the action. 22 OhA222, 153NE113.
99-57½-New. Child, whose legitimacy is in question, is not proper party defendant. 240NY268, 148NE518.
99-57¼-New. Children are not proper parties in divorce proceedings. 21 OhA222, 153NE113.
99-58 319 Ill426, 150NE270. [c] (2) Attorneys of wife are held not entitled to intervene after reconciliation of parties. TexCivA 293SW325. [e] Intervenor cannot have confirmation of preliminary default of parties to divorce suit since such judgment would be subject to dismissal at any time before rendition of judgment in main action. 158La274, 103S766. [f] Intervenor cannot control dismissal of divorce suit, unless he has proceeded by direct action and had same consolidated with divorce suit. 158La274, 103S766. [g] Dismissal of cross bill for enforcement of equitable claim to mortgage eliminated all controversies pertaining thereto, leaving only divorce case in which petitioner had no interest entitling him to intervene. 220Ala395, 125S640.
99-61 [a] (1) 319 Ill426, 150NE270 (dictum).
99-62 319 Ill426, 150NE270, 271 [quot CJ]; 152Miss476, 119S581; 7PaDist&Co 671, 680 [citCJ]. [b] Correspondent cannot intervene as representative of public. 319 Ill426, 150NE270.
99-63 319 Ill426, 150NE270 (dictum); 120 Or439, 251P303. [a] (1) 319 Ill426, 150NE270. [b] In Alberta.-[1925] 3DomLR676 (condonation).
99-63½-New. Defendant must be permanently absent from state to justify the appointment of curator ad hoc for her as "absentee." 158La961, 105S28.
99-63½-New. It is policy of law that all proper defenses shall be made or compelled. 98NJEq444, 131A576.
99-63¼-New. Referring case to county attorney was proper, where the chancellor received purported certified copy of foreign divorce. 220Ky251, 294SW1072.
100-64 RI 142A537 [certiorari den 278US642, 49SCt36, 73Led556].
100-67 [d] In Illinois.-337 Ill451, 169NE175.
100-72½-New. The appointment of a guardian ad litem and service on the prosecuting attorney and guardian ad litem, as provided for by statute in some jurisdictions in case of a nonresident insane defendant, are indispensable parts of procedure. 42 Ida357, 245P691.
100-72½-New. but do not render unnecessary service on the insane defendant. 42 Ida357, 245P691.
100-72¼-New. The appointment of a guardian ad litem and service on him and the prosecuting attorney would not of themselves constitute due process of law. 42 Ida357, 245P691.
100-72½-New. Where defendant appears and has a copy of the bill for divorce, he must be deemed to have notice of the prayer of the bill for custody of a child, although the underwriting does not so state as required by statute. 236Mich604, 211NW52.
100-72¼-New. The purpose of the underwriting stating whether alimony or custody of children is prayed for in the bill which some court rulers require to be attached to the summons is to notify defendant of the specific relief sought. 237Mich563, 213NW115.
100-72½-New. A statement in such underwriting that plaintiff seeks interests in the property and desires custody of minor children is sufficient compliance with such rule to justify the court in giving plaintiff custody of the children and in making an allowance for their support. 237Mich563, 213NW115.
100-72¼-New. An objection that the summons was not served on the prosecuting attorney is without merit where he takes the action required by statute as to minor children and the court follows his recommendations. 237Mich563, 213NW115.
100-72½-New. A summons requiring defendant "to answer the complaint" instead of "to serve his answer to the complaint on the subscriber, by copy" is sufficient to confer jurisdiction. 170Minn463, 212NW812.
101-97 142Va31, 128SE599. See also 11PaDist&Co 752. [a] Service and affidavit by sheriff not required. 5PaDist&Co 575.
102-2 [a] Provision that citation shall be served at least five days before return day held directory.-100NJEq24, 134A904. [b] Where defendant was served with citation and copy of petition, and had the full twenty days allowed by statute to answer, court acquired jurisdiction, regardless of failure to serve citation five days before return day. 100NJEq24, 134A904.
102-3 42 Ida357, 245P691 [quotCJ]; 128Misc778, 220NYS262. See also Sask [1925] 3DomLR1085.
102-4 42 Ida357, 245P691 [quotCJ]; 121 Oh188, 167NE684, 64ALR1384; Sask [1925] 3DomLR1085 (substitutional service). [a] But see 222MoA941, 300SW540. [f] In Alabama.-214Ala69, 106S507.
102-5 81CalA367, 253P954; 42 Ida357, 245P691; NJCh 133A38; 25 OhA432, 158NE493 (failure to mail summons and petition held not cured by leaving copies with counsel).
102-6 42 Ida357, 245P691 [quotCJ]; 247NY32, 159NE713; 67Utah371, 248P83.
102-6½-New. Judgment in an action begun by publication binds nonresident defendant only so far as he has property in the state of which the court may take possession. 247NY32, 159NE713.
102-6½-New. The right of the court in such case to dispose of such nonresident defendant's property depends on whether it was seized before judgment. 247NY32, 159NE713.
102-6¼-New. Want of jurisdiction in such case to dispose of the property cannot be cured subsequently. 247NY32, 159NE713.

102-6½-New. Order for substituted service on resident defendant cannot be had in matrimonial actions. 227AppDiv 757, 237NYS56.

102-8 [a] (1) But see **Sask** [1925] 3 **DomLR**1085.

102-11 190NC536, 130SE315. [d] **Filing.**-121Kan206, 246P980.

102-12 **Ala** 128S440; 190NC536, 130SE 315; 25 **OhA**432, 158NE493. [a] (12) Allegations substantially in language of statute held sufficient. 40 **Ida**751, 236 P863, 42ALR1363. (13) Failure to aver that post-office address of defendant is unknown does not render affidavit defective, wherein both it and the bill show residence is unknown. 214 **Ala**69, 106S507. (14) Other instances. 51Nev468, 279P758. [b] (5) For failure to state street address of nonresident defendant known to plaintiff. 165**Ga** 233, 140SE503.

103-19 205**Cal** 713, 272P747.

103-20 81CalA720, 254P944 (summons published without any order having been made). See also 5**PaDist&Co** 575.

103-20½-New. Order for service by publication on resident defendant cannot be had in matrimonial actions. 227 AppDiv757, 237NYS56.

103-24 **TexCivA** 281SW598. [b] (7) Under statute requiring publication once in each week for four consecutive weeks previous to return day, service is insufficient where less than twenty eight days intervene between first publication and return date. **TexCivA** 281SW598. [d] **Omission of name of plaintiff's attorney from copy of summons published** renders decree rendered against nonresident defendant on service by publication void. 81Mont442, 264P108. [e] **Publication of summons and supplemental complaint** complete in itself is sufficient without publication of original complaint. 203Cal 462, 264P751.

103-25 10**PaDist&Co** 124.

104-27 [b] **Mailing to attorneys for defendant** where exact residence unknown does not void service. 203**Cal** 462, 264P751.

104-30 [a] (2) Proof of service under Nevada statute held insufficient. **Nev** 280P651. [b] See also **Nev** 280P651. [e] **Evidence held insufficient** to show constructive service of summons or admission of service. **Nev** 280P651.

104-32½-New. In an order adjudging that service has been perfected on a nonresident defendant in a divorce case, and its entry on the petition, are not jurisdictional, and failure to enter such order on the petition does not invalidate the final decree. 165Ga233, 140SE503.

104-32½-New. Such order may be entered nunc pro tunc after final decree. 165Ga233, 140SE503.

104-34 203Cal 61, 263P200; 169La862, 126S218; **Mass** 171NE815; 99NJEq473, 134A615; 114 **Okl** 298, 247P106; 6**Pa Dist&Co** 122; 9**PaDist&Co** 104; 142**Va** 31, 128SE599. [c] **Participation in hearing on question of alimony pendente lite** by cross-examining plaintiff constitutes waiver of objection to jurisdiction over person. 221**MoA**516, 282 SW57. [d] **Respondent is entitled to** be heard before master on filing answer. 6**PaDist&Co** 422. [e] **Appearance to contest motion** to punish for contempt for nonpayment of alimony is not general appearance in action. 227**AppDiv** 757, 237NYS56.

104-36 99NJEq473, 134A615.

104-38 See also 221**MoA**516, 282SW57.

105-46 120 **Or**439, 251P303.

105-47 120 **Or**439, 251P303.

105-48 120 **Or**439, 251P303.

105-50½-New. Defendant appearing and answering is entitled to notice of all subsequent proceedings. 247**Mich** 52, 225NW542.

105-51 167Ga706, 146SE457. But see 142**Va**31, 128SE599.

105-58½-New. So, in a separation suit, defendant is not entitled to examine plaintiff before trial as to general issues. 126**Misc**640, 215NYS154.

105-60 163Ga361, 136SE141.

106-69 See also 80**CalA**126, 251P661.

106-70½-New. Where husband violates, at wife's request, an order restraining him from visiting his wife, he cannot be punished for contempt. 149**Wash** 352, 270P1028.

106-70½-New. After final determination of the suit by a decree denying divorce on the ground of reconciliation, the court is without jurisdiction to order an injunction pendente lite in the action. 80**CalA**126, 251P661.

106-71 169Ga832, 152SE103 (finding as to breach of ne exeat bond authorized); **NJCh** 147A543.

106-77½-New. The trial court's refusal to relieve defendant from the obligation to give a ne exeat bond notwithstanding his denial of an intention to leave the state is not an abuse of discretion where circumstances of prior desertion are shown. 160Ga685, 128SE905.

106-80½-New. Courts scrutinize pleading in divorce suits and apply rule different from that in other civil cases. **TexCivA** 290SW889.

106-80½-New. In Texas pleadings in divorce suits are construed more liberally than in other civil cases. **TexCivA** 6SW(2d)403.

106-80¼-New. In Saskatchewan petition need not deny collusion. **Sask** [1929] 4**DomLR**372.

106-80½-New. Pleadings in divorce suit should be so framed as to entitle pleader to the remedy he seeks. 232**Ky** 683, 24SW(2d)584.

106-83½-New. A husband suing for divorce for indignities and adultery has been held not required to elect as to cause. 177**Ark**374, 6SW(2d)290.

106-84 177**Ark**374, 6SW(2d)290.

107-93½-New. An action for accounting may not be joined with one for divorce. 205 **Iowa**684, 216NW636.

107-93½-New. In Saskatchewan claim for damages for criminal conversation may be joined in action for dissolution of marriage or separation. **Sask** [1929] 4**DomLR**372.

107-95 [b] **Allegations held not inconsistent.**-166Ga153, 142SE684.

107-97 But see 116 **Okl** 129, 243P730.

107-1½-New. **Foreign divorce.** Where defendant is prosecuting for, or has procured, foreign divorce, plaintiff must plead and allege validity of such proceedings and decree. 98NJEq444, 131 A576.

107-5 90**Fla**858, 107S188; **TexCivA** 286 SW257.

107-6 90**Fla**858, 107S188; 98**Fla**1196, 125S694; 200 **Ind**56, 160NE345; **MoA** 300SW1023; **TexCivA** 286SW257; **Tex CivA** 293SW899; **TexCivA** 21SW(2d) 559(1stcase); **WVa** 153SE242. [e] **Allegations insufficient.**-98NJEq107, 130 A600. [f] **Filing cross action** does not cure failure to allege residence as required. **TexCivA** 286SW257.

108-11 [b] (4) Allegation held insufficient. **TexCivA** 28SW(2d)211. [d] (8) Allegation of residence "continuously" before filing suit held not to show residence "next preceding" filing. **Tex CivA** 286SW257. (9) Other instances of sufficient allegations. 130 **Or**619, 278 P969.

108-17 [a] **Affidavit held insufficient.**-88 **IndA**623, 165NE263.

108-20 217**Ala**142, 115S27 (omission held jurisdictional defect); 93**Fla**261, 111S637; 153**Md**213, 138A22; 198**NC** 669, 153SE163; **TexCivA** 281SW1096; **TexCivA** 290SW889. [e] (2) Allegations held sufficient. **MoA** 28SW(2d) 398. [g] **Time and place.**-159**Tenn**551, 20SW(2d)1037 (mathematical certainty not required).

109-28 216**Ala**464, 113S513; 157**Md**97, 145A179; 54**ND**475, 209NW959. [e] **Allegations of defendant's gross immoral conduct are held insufficient.** 216**Ala** 464, 113S513.

109-30 160**La**809, 107S582.

109-31 160**La**809, 107S582.

109-32 234**Mich**657, 209NW147.

110-42 217**Ala**517, 116S685.

110-46 46 **Ida**418, 267P1076, 1077 [cit CJ].

110-47 217**Ala**142, 115S27 (held insufficient); 219**Ala**104, 121S386; 93**Fla**261, 111S637; 98**Fla**1196, 125S694; 166**La** 92, 116S711; 54**ND**475, 209NW959 (complaint sufficient); 121 **Or**402, 255P 480; **TexCivA** 281SW1096. [c] (4) Allegations that husband played part of detective subjecting wife to suspicion, and made remarks imputing unchastity, constituting brutal slander, held sufficient under statute to state cause of action for separation. 158**La**933, 105S18. (5) Allegations held sufficient. 86**Mont** 135, 282P855. [e] **Petition held sufficient.**-**TexCivA** 16SW(2d)303. [f] **Refusal of wife to live with or love husband** is insufficient to state cause of action for cruelty. **TexCivA** 22SW(2d)764 (2dcase). [g] **Petition detailing specific acts of cruelty held sufficient.**-**TexCivA** 22SW(2d)1080.

111-48 163Ga31, 135SE409; 167Ga98, 145SE63; 168Ga76, 147SE74(2dcase); 40 **Ida**751, 236P863, 42ALR1363 (complaint held sufficient under Washington statute); 48**Nev**220, 228P889; 30 **OhA** 198, 164NE648; 7**PaDist&Co** 528; 158 **Tenn**91, 11SW(2d)630; **TexCivA** 276 SW795; **TexCivA** 290SW889. [c] **Allegations sufficient.**-84**Colo** 250, 269P22.

111-50 159**Tenn**551, 20SW(2d)1037 (sufficient).

112-55 [a] **Allegations held sufficient.**-102**CalA**387, 282P1001; **TexCivA** 20SW (2d)224.

112-58 69**CalA**742, 232P471; 153**Md** 213, 138A22; 101**NJEq**30, 137A839; 11 **PaDist&Co** 76; **TexCivA** 281SW1096. [c] 142**Miss**832, 108S161 (based on acts subsequent to termination of prior unsuccessful action). [e] **Inconsistent allegations.**-**TexCivA** 281SW1096.

112-59 [b] **If simple desertion is charged,** defendant may remain away and rely upon plaintiff's being unable to prove it. 101**NJEq**30, 137A839. [c] **In divorce action for constructive desertion,** if simple desertion is charged, defendant may remain away and rely upon plaintiff's being unable to prove it. 101 **NJEq**30, 137A839.

112-62 224**Ky**218, 5SW(2d)1046.

113-72 [b] **Allegation held sufficient.**-219**Ala**104, 121S386.

113-75 93**Fla**261, 111S637.

114-85 219**Ala**104, 121S386;

114-86 217**Ala**621, 116S918; 49**Nev**375, 247P545, 47ALR569.

114-88½-New. [§ 286½] c½. **Invalidity of Foreign Divorce.** Where defendant is prosecuting for, or has procured, a foreign divorce, plaintiff must plead such foreign proceedings and decree, and allege their invalidity. 98**NJEq**444, 131A576.

114-94 [b] **Plea of prior suit pending** is limited to cases where relief sought in second action is obtainable in first. 74 **CalA**101, 239P383.

114-97½-New. Averment that defendant resided at one time with plaintiff at a certain domicile with mother is held admission notwithstanding denial of fact of domicile. 163**La**649, 112S517.

114-97½-New. Denial of matrimonial domicile held plea to jurisdiction. 170 **La**958, 129S543.

114-98 264**Mass**551, 163NE197.

114-99 14**PaDist&Co** 303.

115-19 327 **Ill** 39, 158NE411; 208 **Iowa** 713, 225NW843; 50**Nev**298, 258P232; 132**Misc**11, 228NYS611; **TexCivA** 283 SW201.

116-29 97**CalA**768, 276P351; 7**PaDist &Co** 747, 749 [quotCJ].

116-32 156**Miss**132, 125S562.

116-34 132**Misc**11, 228NYS611. [f] **In Tennessee.**-156**Tenn**655, 4SW(2d)358. [g] **Where answer to wife's cross action for alimony** alleged wife's insulting conduct to husband's women clients, omission of clients' names made reply demurrable. 167Ga98, 145SE63. [h] **Failure to reply to cross-bill charging adultery and cruelty** precludes relief to plaintiff. **WVa** 153SE493.

116-34½-New. Additional acts of cruelty may be set out in reply. 50**Nev**298, 258P232.

116-35 177**Ark**374, 6SW(2d)290 (pleading over allowed).

117-41½-New. Where want of jurisdiction does not appear on face of complaint, such question cannot be presented by demurrer. 86 **IndA**16, 154NE503.

117-41½-New. Sufficiency of petition on general demurrer must be determined by peculiar facts of each case. **Tex CivA** 290SW889.

117-43 190NC418, 130SE7.

117-45 241Mich96, 216NW437.
117-46 30Hawaii473.
117-49½-New. On proof of allegations of cross bill decree should be entered in conformity therewith. 90Fla41, 105S318 (allegations and proof of desertion for statutory period).
117-49⅓-New. Where, in a nonresident wife's suit for maintenance, the husband files a cross bill praying for divorce, the wife may file an amended pleading asking for similar relief. 104WVa254, 139SE754.
117-53 172Ark647, 291SW90; 167Ga98, 145SE63; 135Misc264, 238NYS36 (in separation action). But see 170La813, 129S212(2dcase).
118-54 172Ark647, 291SW90; 135Misc264, 238NYS36.
118-55 167Ga98, 145SE63; 51Nev62, 268P771.
118-62½-New. Facts constituting cause of action for annulment of marriage constitute no basis for counterclaim in a separation action. 133Misc109, 231NYS221.
118-63 MoA 24SW(2d)171; 102Okl114, 227P435; TexCivA 21SW(2d)38. [b] **Allegations held insufficient.**-170La813, 129S212(2dcase).
118-64½-New. In an action against a wife for divorce, her cross bill bringing in as cross defendant a woman to whom it is alleged that the husband gave money belonging jointly to husband and wife is properly dismissed, in the absence of allegations of conspiracy between the husband and cross defendant to defraud the wife of interest in property held by reason of marital rights. 240Mich209, 215NW306.
118-65 [a] (2) Wife's cross complaint for separate maintenance need not state that husband is resident. 89CalA86, 264P497. [b] **Where husband answers wife's complaint** for maintenance in which proper residence is alleged, he need not allege residence in his cross-complaint for divorce. 90Fla858, 107S188.
118-69½-New. Where specific prayer is for separate maintenance, prayer for general equitable relief cannot be construed as request for divorce. Iowa 229NW855.
118-72½-New. A petition of defendant, entitled "supplemental petition and cross bill," seeking relief from an alimony agreement recognized by the supplemental decree, is not an original bill giving the court of equity jurisdiction to hear it. 321 Ill 134, 151NE550.
119-75 220AppDiv130, 220NYS513.
119-77 51Nev363, 276P530.
119-77½-New. Divorce cannot be granted on subsequently occurring facts alleged in supplemental complaint after sustaining res judicata defense to original complaint. Nev 287P445.
119-88 177Ark374, 6SW(2d)290; 168Ga76, 147SE74(2dcase); 164La117, 113S787; 10PaDist&Co 124; 11PaDist&Co721; 14PaDist&Co 382; 153Wash1, 279P88; Sask [1929] 4DomLR372.
120-89 93Fla261, 111S637; 93PaSuper500; 12PaDist&Co 224 (allowed with great caution).
120-90½-New. , or to allow a plaintiff to set up the invalidity of a foreign divorce procured by defendant. 98NJEq444, 131A576.
120-92 221MoA944, 288SW794.
120-96 11PaDist&Co 76.
120-99½-New. Amended bill of complaint may be allowed to be filed, after default of defendant whose appearance was entered. 232Mich163, 205NW194.
120-5 167Ga98, 145SE63.
120-6 152Miss476, 119S581 (bill of particulars); 9PaDist&Co 80 (name of next friend). But see 12PaDist&Co 224. [c] **Where petition omitted invalidity of foreign divorce** procured by defendant, court will allow petitioner to amend same by pleading such foreign proceedings and alleging their invalidity. 98NJEq444, 131A576.
121-12 See also 317 Ill 247, 148NE40.
121-15 98Fla1196, 125S694 (substituting one ground for another).
121-18½-New. An amendment of a bill for absolute divorce and alimony, by striking out the prayer for divorce, ipso facto converts the bill into one for separate maintenance. 214Ala321, 107S827.
121-18⅓-New. Libel for desertion may be amended by adding averment that marriage was incestuous. 6PaDist&Co669.
121-18¼-New. Amendment will not be allowed so as to set up cause of action for desertion before statutory period has elapsed from date of desertion. 13PaDist&Co 195.
121-19 179Minn266, 229NW128 (cross bill amended to include prayer for divorce).
121-23½-New. Libel may be amended so as to substitute next friend or trustee as plaintiff in place of minor plaintiff. 12PaDist&Co 574.
121-24 235Mich315, 209NW58.
121-33 101NJEq15, 137A787.
122-35 But see 9PaDist&Co 104.
122-36 Contra 134 Okl 283, 273P267.
122-44 Ind 173NE232; 86IndA16, 154NE503. [a] 101NJEq15, 137A787. [c] **Affidavit must be taken in county** in which court is located. 9PaDist&Co 109. [d] **Knowledge and belief** insufficient in statutory affidavit. Del 130A677. [e] **Time of filing.**-86IndA16, 154NE503. [f] **Oath commits party to causes alleged.**-101NJEq15, 137A787.
122-45 Ind 173NE232; IndA 169NE475(1stcase); IndA 169NE478(1stcase); 89PaSuper182; 12PaDist&Co 224.
122-46 IndA 169NE475(1stcase).
122-47 Ind 173NE232. [b] **Affidavit held insufficient.**-Ind 173NE232.
122-48 But see IndA 169NE478(1st case).
123-53½-New. Affidavits are not insufficient because they do not deal with every act of adultery alleged in libel, or do not disclose names of witnesses other than affiant to acts referred to therein. 252Mass281, 147NE823.
123-56 5PaDist&Co 654, 655 [quotCJ]; 9PaDist&Co 547.
123-58 5PaDist&Co 654.
123-61½-New. In jurisdictions where the corespondent is a party, he is entitled to the best possible particulars that plaintiff can give as to the times and places of the various acts of adultery charged. Man [1925] 3DomLR436.
123-61⅓-New. In British Columbia application by intervener for bill of particulars has been granted although application of respondent had been previously denied. BC [1929] 4DomLR1069.
123-67 86CalA744, 261P503; 93Fla261, 111S637; 169Ga832, 152SE103; 249 IllA598; 143 Okl 91, 287P721 (condonation not pleaded). But see 156Tenn655, 4SW(2d)358. [a] (6) **Thus uncorroborated charges by wife** of personal violence, when not alleged in bill, form no sufficient ground for divorce. 234Mich657, 209NW147. [b] **Former adjudication.**-156Tenn655, 4SW(2d)358.
124-68 Mass 171NE476 (public policy).
124-68½-New. Statute requiring plaintiff to prove allegations before obtaining judgment for divorce is inapplicable where defendant did not default and put in issue an allegation of adultery. 130Misc854, 225NYS404.
124-68⅓-New. Statutory defenses to a divorce action for adultery must be pleaded and proved before required to be negatived by plaintiff. 130Misc854, 225NYS404.
124-69 264Mass551, 163NE197; 95PaSuper584 (date of desertion).
124-70 93Fla1004, 113S374; 98Fla1196, 125S694 (proof is necessary notwithstanding admission by parties in pleadings); 116 Okl 188, 243P962; TexCivA 293SW899; TexCivA 15SW(2d)684; TexCivA 21SW(2d)38.
124-74½-New. Plaintiff for whom the jury found on the issue of adultery is entitled to an interlocutory judgment for divorce without further proof. 130Misc854, 225NYS404.
124-74⅓-New. Where evidence is sufficient to support a decree for divorce on a count for cruelty, failure to sustain a count for willful neglect is immaterial. 86CalA744, 261P503.
124-75 101CalA354, 281P705; 85PaSuper473; 12PaDist&Co 468 (divorce held erroneously refused by master on ground of variance in date of marriage). [a] (4) Allegation of residence in state for statutory time held broad enough to permit proof of residence in county of suit. 153Wash1, 279P88.
124-78½-New. Evidence of condonation may be introduced without special pleas. 125Me397, 134A373.
124-79 215Ala684, 112S218. [b] (2) Such evidence is admissible in connection with evidence of adultery alleged. 215Ala684, 112S218.
124-82 228AppDiv185, 239NYS480.
125-87 [a] **Court will consider on appeal** testimony as to personal violence, though not alleged, when admitted without objection. 234Mich657, 209NW147.
125-90 [a] **Charge of extreme cruelty** founded on personal violence is appealing to court. 234Mich657, 209NW147.
125-91 168La32, 121S182 (where wife was in ill health, court may assume, in suit for separation, that husband owed her greatest possible consideration); Wash 290P861. [a] **Domicile once acquired is presumed to continue,** and burden of proving contrary is on party alleging it. Miss 130S52.
125-92 217Ala157, 115S229 (cruelty); 97Fla881, 122S272, 126Me342, 138A477, 54ALR327; 154Md11, 139A573; 254Mass506, 150NE296; MoA 299SW61; MoA 78SW(2d)420; NJCh 129A212 (jurisdictional facts); 131Misc830, 229NYS67 (action for separation); 5PaDist&Co463; TexCivA 283SW328; TexCivA 24SW(2d)96 (residence in county of suit). See also TexCivA 21SW(2d)38. [d] **Residence.**-221MoA516, 282SW57. [e] **Burden of proving both defendant's misconduct and plaintiff's innocence** is on plaintiff. 221MoA1136, 298SW110. [f] **Cruel treatment and indignities.**-94PaSuper364; 5PaDist&Co 669.
125-95 MoA 6SW(2d)1025 (plea in abatement); NJCh 151A474. [b] **Whether insanity caused by plaintiff.**-42 Ida357, 245P691.
125-96 227AppDiv756, 237NYS852.
125-96½-New. Wife seeking separation and provision for support has the burden of showing that she is willing to discharge her obligations under the marriage contract. 242NY74, 150NE605.
125-98½-New. The burden of showing good faith in offers requesting the wife to return rests on the husband justifying failure to support on the grounds of the wife's absence and refusal to return. 82CalA515, 255P880.
125-97 161La823, 109S504; 155Md464, 142A485; 156Md699, 144A361; 100NJEq71, 135A54; 38 OklACR99.
125-98 161La823, 109S504; 155Md464, 142A485.
126-4 Iowa 225NW948; 208Ky585, 271SW664; Md 152A230; 97PaSuper562. [d] **That wife was mentally capable of forming intent** to desert must be shown by husband where wife had been judicially declared insane. Iowa 225NW948 (evidence insufficient to overcome presumption of incapability). [e] **Evidence held sufficient to raise presumption** that husband intended to desert wife and to cast on him burden of showing no such intention. Md 148A259.
126-5 Iowa 225NW948.
126-6 NJCh 129A190; 85PaSuper488. But see 163La649, 112S517.
126-6½-New. , and in case separation was commenced by mutual consent, plaintiff must prove that request to return was made in good faith. 188Wis151, 205NW829.
126-8 14PaDist&Co 303.
126-9 101NJEq284, 137A438; 101NJEq682, 139A333; NJCh 145A733(2dcase); NJCh 151A620.
126-10 [a] **That husband and wife stayed under same roof overnight** creates rebuttable presumption of cohabitation. NJ 151A855.
126-11 [b] **Husband will be presumed to have intended to cause separation** if that is natural consequence of treatment of wife. 108WVa71, 150SE231.
126-11½-New. A husband will be presumed to have intended to cause a separation, if that is the natural consequence of his treatment of the wife. 106WVa634, 146SE614(2dcase).

126–11⅓–New. The burden is on the wife seeking separation to show that she is willing to discharge her obligations under the marriage contract. 242 NY74, 150NE605.

126–11¼–New. Commencement of suit for divorce is held consent to alleged desertion by spouse from date of suit. 100NJEq482, 135A792.

126–11⅓–New. Presumption held rebuttable. 100NJEq482, 135A792.

126–17½–New. A foreign divorce procured by defendant is presumed to be valid. 98NJEq444, 131A576 (unless procured by fraud).

127–20 324 Ill 207, 155NE28; 327 Ill 39, 158NE411; 202 Iowa1311, 210NW 431, 434 [citCJ]; 125Me397, 134A373; Md 148A264; 264Mass291, 162NE663; 132Misc11, 228NYS611; Va 148SE579; 153Wash1, 279P88.

127–21 [a] 264Mass291, 162NE663. [c] **Occupancy of room and bed** by husband and wife raises rebuttable presumption of condonation. MoA 289SW 16(2dcase). [d] **Condonation is presumed more readily against husband.** 170Ga349, 153SE11.

127–23 [a] **Burden is on aggrieved spouse** to show repetition of misconduct to avoid condonation. 49Nev375, 247P 545, 47ALR569.

127–26 But see 20SaskL474, [1926] 3 DomLR95, [1926] 2WestWkly185; Sask [1930] 4DomLR1025.

127–27 237Mich459, 212NW80 (adultery).

127–28 [a] 99NJEq896, 133A485; 8Pa Dist&Co 398.

127–30 101WVa636, 133SE363 (admission over telephone held inadmissible).

127–32½–New. [332a] 1½. **Evidence Contained in Depositions.** A statutory provision that all hearings and trials as to granting divorce decrees shall be held before the court does not prohibit the use of depositions. 197Wis140, 221NW 734.

127–32⅓–New. Action of trial court in refusing to permit defendant's witnesses to testify, after plaintiff and defendant had testified, has been held a prejudicial abuse of discretion. 32 OhA16, 165NE 746.

127–32¼–New. Failure of justice, in trial of divorce action, to require statement of facts related to counsel in establishing the good faith of the wife in the institution of a previous divorce action on advice of her counsel, has been held erroneous. 50RI 129, 145A445.

127–33 But see 229Ky21, 16SW(2d)485.

127–34 135Misc350, 238NYS193.

127–35 169Minn148, 210NW878.

128–42½–New. Evidence is admissible upon the question of plaintiff's good faith in remarrying defendant where the parties had been twice previously divorced. MoA 17SW(2d)381.

128–42⅓–New. It is error to permit plaintiff to show by the court record that the sister of defendant wife, who lived in the same house with her, was arrested, charged with disorderly conduct. 196NC472, 146SE138.

128–46 [d] **Testimony as to where parties lived** at time of marriage twenty years ago held properly excluded. 49 Nev375, 247P545, 47ALR569.

128–54½–New. Wife's adultery committed subsequent to the filing of her husband's bill for absolute divorce cannot be made the basis of a decree, but could only be considered as reflecting on the charge of misconduct occurring prior to the suit. 156Md10, 142A510.

128–54⅓–New. In Kentucky, witnesses' testimony to show adultery of the wife is improperly admitted in the absence of statutory proof of the credibility or character of the witnesses. 224Ky18, 4SW(2d)1106.

128–55 152Miss476, 119S581; 85Pa Super403; Alta [1927] 2DomLR1082, [1927] 1WestWkly993. [b] (2) Where evidence of nonaccess is tendered together with evidence of admission of pregnancy, both are admissible. Alta [1928] 1DomLR227. (3) Evidence that husband did not have sexual intercourse with wife during year child was born is admissible. Vt 148A287.

129–61 93PaSuper500 (letter is admissible).

129–64 152Miss476, 119S581. [a] 168 Ga725, 149SE39. [c] **Conversations.**– 152Miss476, 119S581.

129–65 152Miss476, 119S581.

130–73½–New. Evidence of prior acts condoned by husband may be considered as corroborative of specific act. 159La 478, 105S559.

130–76 169Ga832, 152SE103.

130–77 [a] (3) Where charge of cruelty is based on false charge of adultery source of information on which charge of adultery was based may be shown. 152Miss476, 119S581.

130–80½–New. In a suit for divorce for extreme and repeated cruelty, evidence of threats are admissible. 324 Ill 207, 155NE28.

130–80⅓–New. Evidence that complainant treated defendant roughly and was moving cause of insanity proceedings against her is admissible. 324 Ill 207, 155NE28.

130–80¼–New. Threats and abusive language are admissible in evidence to characterize the conduct of the person using them. 327 Ill 39, 158NE411.

130–80⅙–New. Evidence of condonation may be considered in connection with other evidence as tending to explain the seriousness of the wife's conduct as viewed by the husband. 208 Iowa713, 225NW843.

130–80⅛–New. Evidence of defendant's action in the conduct of a family corporation has been held immaterial, being a business, and not a marital, transaction. MoA 6SW(2d)989.

130–82 223AppDiv19, 227NYS345. [f] But see 196NC472, 146SE138. [g] (2) Prior acts of cruelty condoned by wife and alleged in case held admissible. 164La117, 113S787. [i] **Evidence as to conduct prior to former decree** denying divorce is admissible to throw light on subsequent conduct. 208 Iowa534, 224 NW586. [j] **Nagging** by wife of husband is admissible. 168Ga725, 149SE 39.

131–83 164La144, 113S796; 128 Okl 147, 262P199.

131–86½–New. Evidence of acts prior to marriage is inadmissible. 128 Okl 147, 262P199.

131–86⅓–New. Testimony that wife never entertained male callers may be admissible where defendant accused her of improper conduct. 169Ga832, 152SE 103.

131–87 81CalA406, 253P945; 241NY 446, 150NE511; 89PaSuper15 (evidence held admissible to show justification for separation). But see 50RI 1, 144A437. [a] (1) 110Conn277, 147A800.

131–91 8PaDist&Co484.

131–92½–New. Evidence of offers to return is admissible on question of abandonment or temporary absence, 241NY 446, 150NE511.

131–92⅓–New. and right to return after abandonment, in action for separation for abandonment. 241NY446, 150 NE511.

131–92¼–New. Evidence of mistreatment by plaintiff's parents introduced by wife to justify her desertion is not objectionable as being acts of third parties, where husband compelled her to live with his parents. TexCivA 283SW 328.

131–97 33Ariz123, 262P614 (desertion); 324 Ill207, 155NE28; 205 Iowa424, 216 NW22; 216Ky669, 288SW291; 254Mass 506, 150NE296; 232Mich163, 205NW194 (judge held justified by record in entering decree); 244Mich341, 221NW129; MoA 280SW430; MoA 11SW(2d)1078; 86Mont135, 282P855; 101NJEq284, 137 A438; NJCh 150A679; 32 OhA487, 168 NE223 (more than scintilla of evidence is required); 124 Or415, 263P397; 124 Or 219, 263P891; 85PaSuper473; 87Pa Super511; 95PaSuper429; 95PaSuper 584; 5PaDist&Co 481; 6PaDist&Co 712; RI 136A246; 50RI 129, 145A445; RI 146 A415(1stcase); TexCivA 283SW328; Tex CivA 283SW641; TexCivA 2SW(2d)468; TexCivA 5SW(2d)223; TexCivA 20SW (2d)1073 (evidence must be full and satisfactory); TexCivA 27SW(2d)311; 66 Utah580, 245P335; 148Wash537, 269P 836. [c] (1) 49RI 84, 140A193. (2) Evidence held sufficient to justify decree on ground that personal safety of plaintiff was threatened. 211Ky7, 276SW 967. (3) Evidence held sufficient to justify decree for "other causes" under statute. 211Ky7, 276SW967. [d] (1) See also 118 Or178, 245P1082. (2) Proof that wife bore child prior to marriage with defendant and that marriage relations sustained with him for eight years have not resulted in conception is insufficient to prove that defendant is naturally impotent or incapable of procreation. 88PaSuper98. [i] (8) To show due and regular confinement in hospital for insane. 42 Ida357, 245P 691. (9) To sustain cross bill on ground of nonsupport. 241Mich96, 216 NW437. [l] **Evidence held sufficient.**– 176Ark1204, 2SW(2d)1107; 181Ark 1145, 26SW(2d)576(2dcase); 92CalA 212, 267P893; 232Ky123, 22SW(2d) 424; Wash 290P327. [m] **Evidence held insufficient.**–110Conn443, 148A363; MoA 11SW(2d)1078. [n] **Evidence of fraud consisting of premarital pregnancy unknown to husband held insufficient.**–91PaSuper82. [o] **Conclusions of witnesses unsupported by facts** do not constitute sufficient evidence. 218Ky 212, 291SW42. [p] **Absence of testimony on part of answering defendant** does not entitle petitioner to decree. NJCh 150A679. [q] **Evidence must be clearly up to measure required by statute.** 97PaSuper405. [r] **Antenuptial ground.**–Evidence **insufficient.** 234Ky 207, 27SW(2d)950.

132–98½–New. Justice may insist on oral examination of witnesses when circumstances appear to him to warrant it. RI 136A246.

132–99 81Mont587, 264P667. [a] **Separation agreement.**–81Mont587, 264P 667. [b] **Evidence held insufficient.**– 233Ky423, 25SW(2d)1013.

132–99½–New. Proof that defendant did not receive copy of summons does not prove that it was not published or mailed, and lack of jurisdiction for want of legal service. 40 Ida751, 236 P863, 42ALR1363.

132–2 38 OklACR99.

132–3 100NJEq71, 135A54.

132–3½–New. The court, before decreeing a divorce, must be reasonably satisfied that libelant has been faithful to the marriage vows, that libelee has been guilty of offenses specified in the statute, and that there has been no condonation or collusion. 127Me201, 142A 751.

132–3⅓–New. Courts scrutinize the evidence in divorce suits and apply rule different from that in other civil cases. TexCivA 290SW889.

132–3¼–New. Evidence has been held sufficient to show renunciation of a separation agreement and resumption of marital relations. 240Mich323, 215NW 319.

132–3⅙–New. Evidence has been held sufficient to show that personal service on defendant was not procured by fraudulently inducing him to come within the jurisdiction. 221MoA516, 282SW 57.

132–3⅛–New. Evidence to support pleadings in divorce suit must be clear and explicit. 232Ky683, 24SW(2d)584.

132–5 227Ky468, 13SW(2d)486(1st case).

132–6 97NJ393, 129A178 (character of witness goes to weight of testimony).

132–14½–New. Unconvincing evidence of libelant and one interested witness which did not agree in material particulars is insufficient to prove adultery. 85 PaSuper167.

132–16 234Mich144, 207NW821. [a] **Complaint of refusal to permit children** to testify held not justified where court merely spoke forcibly of propriety of such procedure and counsel agreed that statement of what they would testify to should be admitted. 234Mich144, 207 NW821.

133–21 224Ky300, 6SW(2d)244 (self-serving declarations); 231Mich614, 204 NW758; 87PaSuper511. [b] **Where there are material conflicts in testimony of plaintiff** testifying in his own behalf, he is not entitled to divorce unless portion of his testimony least favorable is

of character to authorize divorce. 86 Mont135, 282P855.

133-23 179Ark171, 14SW(2d)551; 77 CalA556, 247P260; CalA 285P860; 98 Fla1196, 125S694; 200 Iowa1176, 206 NW115; MoA 274SW530; MoA 280SW 430; MoA 17SW(2d)381; 99NJEq896, 133A485; NJCh 148A8 (defendant pleading counter matrimonial offense); TexCivA 29SW(2d)868; 197Wis159, 221NW733. Contra TexCivA 20SW(2d) 224. [a] **Justice may insist on corroborating evidence** when it appears to exist. RI 136A246. [b] **Lack of corroboration of residence** of petitioner in divorce from time of commencement of action to hearing has been held immaterial. NJCh 144A791.

133-24 227Ky468, 13SW(2d)486(1st case); 154Md585, 141A395.

133-25 77CalA556, 247P260; 200 Iowa 1176, 206NW115; 205 Iowa395, 217NW 883; 224Ky218, 5SW(2d)1046; 229Ky 436, 17SW(2d)412; 87PaSuper312; TexCivA 293SW336.

133-26 NJCh 144A791; 156Tenn640, 4SW(2d)350 [citCJ].

133-27 [d] 221MoA104, 289SW973; MoA 31SW(2d)213.

133-29 TexCivA 278SW288. [a] (2) Even though there is evidence of admission by corespondent and corespondent takes stand and fails to deny it. 99 NJEq896, 133A485.

134-33 200 Iowa1176, 206NW115; 157 Md476, 146A266, 65ALR165; TexCivA 29SW(2d)868 (discretion of court). [a] **Corroboration held sufficient** to sustain divorce for cruel and inhuman treatment because of accusations by husband of improper relations of wife with another man. 207 Iowa271, 222NW862; MoA 279SW755.

134-34 77CalA556, 247P260; 85CalA 372, 259P453; 86CalA744, 261P503; 102CalA387, 282P1001; CalA 289P227; 155Md464, 142A485; 99NJEq373, 131A 903; 33 OhA309, 169NE39(1stcase); 106WVa680, 146SE720. [b] 47 Ida374, 276P34; 157Md476, 146A266, 65ALR 476.

134-38 82CalA313, 255P767 (corroboration held sufficient); 102CalA387, 282 P1001; 205 Iowa395, 217NW883; 99 NJEq399, 131A876; NJ 151A855; NJ Ch 147A330(1stcase); NJCh 148A618; TexCivA 29SW(2d)868. But see 233Ky 134, 25SW(2d)59. [a] 99NJEq399, 131 A876. [d] **Refusal to have intercourse** is sufficiently corroborated by testimony of witnesses to whom plaintiff had reluctantly confided his mental and physical condition and marital relation. 99 NJEq399, 131A876.

134-37 77CalA556, 247P260; 157Md 476, 146A266, 65ALR165, [b] **Corroboration held insufficient.**–181Ark367, 26 SW(2d)88.

134-38 [a] (2) In action by wife on ground of adultery two witnesses' testimony as to seeing husband and corespondent together on street is insufficient. 99NJEq896, 133A485.

134-41 CalA 289P227 (child and other witnesses); 99NJEq373, 131A903. But see CalA 284P950.

135-44 MoA 279SW755. But see CalA 284P950.

135-45½-New. Evidence of one witness not agreeing in material particulars with that of libelant and not convincing to court is insufficient. 85PaSuper167.

135-45½-New. Evidence inadmissible under settled rules of law is insufficient to satisfy the statute requiring corroboration of plaintiff's testimony. 157 Md476, 146A266, 65ALR165 (hearsay or irrelevant testimony).

135-46 93Fla709, 112S622, 625 [cit CJ]; 95Fla70, 115S838; 165Ga122, 139 SE821; 232Ky698, 24SW(2d)573 (collusion between husband and wife). [d] **Court is not bound** by admission of cause of action. 48Nev220, 228P889.

135-48 165Ga122, 139SE821.

135-49 93Fla1004, 113S374.

135-50 178Ark343, 10SW(2d)884; 93 Fla1004, 113S374; 95Fla70, 115S838; 165Ga122, 139SE821; 137Misc364, 242 NYS45; 229AppDiv631, 243NYS436; 34 OhA483, 171NE350.

135-51 [f] (1) 98NJEq528, 131A94. (2) But where defendant in such criminal prosecution pleaded non vult, there is no such evidence of the adultery. 98 NJEq528, 131A94.

135-52 Md 150A281. [g] (2) To warrant divorce for desertion. 32Ariz392, 259P401. [h] **Confessions to different witnesses** are not corroborating evidence of each other. 137Misc364, 242NYS45. [i] **Insufficient corroboration.**–229App Div631, 243NYS436.

136-56 [d] **Common-law marriage** is held established by evidence. 237Mich 417, 212NW95.

136-66 98Fla1186, 125S694; 234Ky 610, 28SW(2d)953(2dcase); 5PaDist& Co 669; RI 142A537; TexCivA 27SW (2d)635; 144Wash421, 258P37. [a] 91 Fla427, 107S630; 204 Iowa575, 215NW 619; Mo 24SW(2d)997; 221MoA516, 282SW57; 130Misc248, 223NYS789; 116 Okl 188, 243P962; 90PaSuper192; TexCivA 15SW(2d)686; Wash 290P 861. [b] (1) 213Ala578, 105S647; 103 Conn189, 130A254; 93Fla1004, 113S 374; 232 IllA447; 228Ky577, 15SW (2d)433; MoA 6SW(2d)1025; NJCh 129A212; 5PaDist&Co 669; TexCivA 15SW(2d)684; TexCivA 21SW(2d)559 (1stcase); TexCivA 23SW(2d)751; TexCivA 24SW(2d)96. (2) To prove residence of plaintiff in state at time of commission of adultery by defendant. 214AppDiv263, 212NYS155. (3) To prove husband had resided in parish where he had instituted divorce action. 160La91, 106S705.

136-67 [a] **But it cannot be proved by** admissions of parties. 93Fla1054, 113S 374.

136-69 90PaSuper86.

136-70 221MoA516, 282SW57 (plaintiff's testimony held insufficient).

136-74 Man [1930] 1DomLR1006 [1st case] (defendant's residence shown).

137-78½-New. Husband's testimony on residence is not to be discredited because the suit for divorce was brought the day after completing the statutory residence taken with the intention to secure a divorce. 32Ariz392, 259P401.

137-79 158La899, 105S6 (clear and convincing proof required to sustain charge of unchastity of wife); 153Md 170, 137A904; 155Md464, 142A485; 156 Md699, 144A361; 99NJEq190, 131A 673; 123 Okl 9, 252P837; 87PaSuper 545. [a] 166Ga850, 144SE665; 323 Ill 608, 154NE405; 241 IllA7; 120Kan 545, 246P992; 217Ky786, 290SW686; 159La478, 105S559; 168La195, 121S 741; 170La584, 128S523; Md 132A614; 156Md10, 142A510; 157Md18, 145A 190; Md 148A264; 235Mich299, 209 NW48; MoA 58SW(2d)697; MoA 13 SW(2d)664; 98NJEq719, 130A602; NJ 146A431; 98NJEq379, 129A131; 98 NJEq393, 129A178; 98NJEq97, 129A 478; 100NJEq59, 135A150; 100NJEq 378, 135A775; 103NJEq532, 143A824; NJCh 148A618; NJCh 151A474; 131 Misc66, 225NYS692; 5PaDist&Co 481; RI 149A382; Va 153SE670; 104WVa 209, 139SE710; Alta [1926] 4DomLR 1117; BC [1930] 2DomLR797. [b] 215 Ala684, 112S218; 217Ala517, 116S685; 165Ga122, 139SE821; 323 Ill 170, 153 NE658; 203 Iowa1218, 211NW705; 120 Kan545, 246P992; 218Ky370, 291SW 706; 229Ky125, 16SW(2d)781; 229Ky 436, 17SW(2d)412; 232Ky698, 24SW (2d)573; 158La48, 103S438; 161La 823, 109S504; 164La553, 114S155; 156 Md699, 144A361; 156Md607, 145A10; 235Mich315, 209NW58; 237Mich639, 213NW66; 165Minn291, 206NW450; MoA 274SW530; 98NJEq719, 130A602; 100NJEq546, 135A777; NJ 148A606; NJ 151A749; 98NJEq393, 129A178; 99 NJEq896, 133A485; 99NJEq190, 131 A673; NJCh 140A454; 123 Okl 9, 252 P837; Man [1929] 4DomLR801; Sask [1930] 4DomLR1025. [f] **Hitherto chaste woman** will not be assumed to turn adulteress suddenly, in absence of strong proof. 99NJEq190, 131A673.

137-80 155Md464, 142A485. [c] **Purpose of plaintiff's presence.**–159La478, 105S559.

137-82 153Md170, 137A904.

137-83 99NJEq190, 131A673.

138-86 217Ala517, 116S685; 233Ky 691, 26SW(2d)536; 153Md170, 137A 904; 154Md11, 139A573; 157Md18, 145 A190; 100NJEq378, 135A775; 85 PaSuper41; 85PaSuper403; 90PaSuper 25; 91PaSuper354; 5PaDist&Co 481; Vt 151A504; 204WVa209, 139SE710; Alta [1927] 2DomLR854, [1927] 2 WestWkly12. See also 177Ark613, 7 SW(2d)783. [a] **Evidence held insufficient.**–170La813, 129S212(2dcase). [b] **Evidence held sufficient.**–Md 150A873. [c] **Ordinary rules govern.**–Va 153SE 670.

138-87 [c] **Admission of other offenses; contradiction.**–Where defendant and paramour admit acts other than those charged, and are contradicted in another proceeding, their denial of specific acts alleged is insufficient to affect credibility of plaintiff as to such acts. 159La478, 105S559.

138-88 Sask [1926] 4DomLR470, [1926] 2WestWkly726. [b] 205 Iowa 1096, 216NW609.

138-89 217Ala517, 116S685; 157Md18, 145A190; 87PaSuper545.

138-90 154Md11, 139A573; NJCh 146 A57.

138-92 Md 150A873; 103NJEq281, 143 A377; 5PaDist&Co 481; 104WVa209, 139SE710.

138-93 177Ark613, 7SW(2d)783; 218 Ky636, 291SW1044; 229Ky21, 16SW (2d)485; 99NJEq190, 131A673; 129 Or402, 275P915; Alta [1928] 2DomLR 23.

139-95 Alta [1927] 2DomLR854, [1927] 1WestWkly821.

139-95½-New. Proof of illicit love or desire is a strong inference. 5PaDist &Co 481.

139-96 154Md11, 139A573.

139-97 153Md170, 137A904, 906 [cit CJ]; 154Md11, 139A573; 157Md18, 145 A190; 100NJEq378, 135A775; NJCh 148A618; 85PaSuper403; 5PaDist&Co 481. See also 103NJEq348, 143A338. [b] **Lewd letters together with other evidence** showing opportunities have been held sufficient to sustain decree. 85PaSuper403.

139-99 99NJEq190, 131A673; NJCh 146A57.

139-3 99NJEq896, 133A485.

140-5 But see 86PaSuper60.

140-10 217Ky786, 290SW686; Md 132 A614.

140-11 See also 87PaSuper545.

140-13 See also Alta [1928] 1DomLR 934.

140-20 [b] **Evidence held insufficient to show daughter born** during common-law marriage was not husband's child. 237Mich459, 212NW80.

141-24 [a] **Evidence held insufficient** to show contraction of disease. 227Ky 468, 13SW(2d)486(1stcase).

141-30 [a] (1) 231Ky477, 21SW(2d) 812. [b] **Evidence held sufficient.**–233 Ky752, 26SW(2d)511.

141-32 123 Okl 9, 252P837. [b] **Testimony as impeaching plaintiff.**–159La478, 105S559. [c] **Evidence held properly rejected.**–159La478, 105S559.

141-33 123 Okl 9, 252P837; Man [1929] 4DomLR801.

141-41 See also 131Misc115, 226NYS95.

142-45½-New. Persons openly, knowingly, and willingly associating and consorting with adulterers must be corroborated, 131Misc115, 226NYS95.

142-45¾-New. and where there is no corroboration, divorce should not be granted. 131Misc115, 226NYS95.

142-46 108Conn292, 142A843; 221App Div875, 224NYS620.

142-47 100NJEq378, 135A775; 87Pa Super545. [b] **Evidence of detectives held insufficient** to prove adultery where respondent produced many disinterested witnesses whose testimony met and completely answered evidence of libelant. 85PaSuper39.

142-48 221AppDiv875, 224NYS620 (corroboration held sufficient).

142-49 221AppDiv875, 224NYS620.

142-51 5PaDist&Co 463. [b] **Evidence showed extreme cruelty on part of both** and neither was entitled to recover. 230 Mich186, 203NW69; 230Mich534, 203 NW70.

142-52 29Ariz538, 243P402; 126Kan 760, 271P275; 150Md313, 133A56; 233 Mich584, 207NW806; 119 Or292, 247P

145; 124 Or415, 263P397; 87PaSuper 312; 87PaSuper543; 88PaSuper1; 88 PaSuper266; 8PaDist&Co 684; TexCivA 281SW1096; TexCivA 283SW641; Tex CivA 290SW927. [a] (1) 176Ark1204, 28W(2d)1107; 177Ark613, 7SW(2d)783; 172Ark647, 291SW90; 203Cal 441, 264P 761; 72CalA513, 237P814; 99CalA172, 277P1089; 102CalA387, 282P1001; CalA 289P227; 110Conn695, 147A907(2d case); 94Fla1001, 114S661; Fla 129S 886; 163Ga31, 135SE409; 169Ga524, 150SE822; 28Hawaii217 (on cross-libel); 29Hawaii689; 323 Ill 608, 154 NE405; 324 Ill 207, 155NE28; 327 Ill 39, 158NE411; 202 Iowa1311, 210NW 431; 200 Iowa162, 204NW239; 204 Iowa575, 215NW619; 205 Iowa1096, 216 NW609; 205 Iowa212, 217NW629; 205 Iowa192, 217NW821; 208 Iowa534, 224 NW586; Iowa 228NW290; 128Kan498, 278P717; 217Ky126, 288SW1050; 223 Ky537, 4SW(2d)363; 226Ky278, 10 SW(2d)844; 228Ky580, 15SW(2d)415; 160La708, 107S499; 158La933, 105S18 (unwarranted suspicions and remark reflecting on chastity as ground for separation); 159La489, 105S595; 168La632, 122S888; 164La272, 113S845; 164La 553, 114S155; 170La1033, 129S627; 154 Md696, 140A590; Md 149A616; Md 150A717; 235Mich299, 209NW48; 236 Mich397, 210NW294; 237Mich459, 212 NW80; 237Mich637, 212NW878; 237 Mich631, 212NW964; 239Mich306, 214 NW133 (suit of husband against wife); 240Mich323, 215NW319; 241Mich302, 217NW13; 243Mich436, 220NW655; 247 Mich327, 225NW483(1stcase); 247Mich 487, 226NW230; 249Mich132, 227NW 683; 251Mich115, 230NW935; 251Mich 508, 232NW190(1stcase); 165Minn291, 206NW450; 168Minn489, 210NW393; 171Minn213, 213NW919; 172Minn96, 214NW771; 172Minn250, 215NW181; 177Minn53, 224NW461; 179Minn266, 229NW128; 221MoA944, 288SW794; 221 MoA1136, 298SW110; MoA 298SW 1058; 114Nebr456, 207NW939; 115 Nebr685, 214NW300; 115Nebr708, 214 NW632; 117Nebr285, 220NW271 (on wife's cross petition); 48Nev220, 228P 889; NJCh 140A233; NJCh 143A336; 253NY498, 171NE756(2dcase); 224App Div46, 229NYS77; 137Misc364, 242NYS 46; 111 Okl 227, 239P134; 123 Okl 295, 253P295; 128 Okl 147, 262P199; 135 Okl 87, 274P19; 117 Or319, 243P565; Or 245P1116; 120 Or439, 251P303; 123 Or594, 262P1119; 123 Or639, 263P385; 124 Or364, 264P447; 124 Or480, 264P 842; 125 Or327, 266P907; 126 Or114, 268P986; 127 Or354, 272P288(1stcase); 127 Or514, 272P667; 132 Or228, 283P 1117; 86PaSuper182; 89PaSuper183; 90 PaSuper192; 95PaSuper66; 95PaSuper 474; 98PaSuper1; 9PaDist&Co 353; 13 PaDist&Co 373; 35PortoRico 343; RI 142A537; SD 214NW846; TexCivA 278SW288 (course of conduct involving utter disregard of wife's health); Tex CivA 283SW641; TexCivA 291SW964; TexCivA 20SW(2d)224; TexCivA 20 SW(2d)1073; TexCivA 22SW(2d)1080; 152Va896, 148SE579; 149Wash277, 270 P822. (2) To show wife's innocence of similar conduct. 159La489, 105S595. [b] 217Ala157, 115S229; 172Ark647, 291SW90; 179Ark763, 18SW(2d)341; 179Ark1199, 20SW(2d)194; 204Cal 193, 267P101; 75CalA614, 243P24; 79CalA 626; 250P580; 99CalA130, 277P1092; CalA 284P935(1stcase); 28Hawaii217; 199 Iowa953, 202NW883; 200 Iowa1176, 206NW115; 201 Iowa864, 208NW377; 205 Iowa684, 216NW636; 205 Iowa395, 217NW883; Iowa 218NW292; 208 Iowa713, 225NW843; 208 Iowa1329, 227 NW107; Iowa 228NW30; Iowa 230 NW512; 120Kan545, 246P992; 213Ky 125, 280SW932; 216Ky669, 288SW291; 219Ky47, 292SW516; 222Ky175, 300SW 354; 222Ky203, 300SW597; 231Ky57, 21SW(2d)134; 159La489, 105S595; 161 La121, 108S307; 161La613, 109S140; 163La597, 112S498; 168La847, 123S 595; 150Md648, 133A316; 150Md608, 133A725, 47ALR681 (cruelty of husband keeping insane brother in home); 151 Md444, 135A176; 156Md607, 145A10; Md 150A286; Md 150A717; 230Mich 468, 202NW994 (in action by husband); 231Mich614, 204NW758; 234Mich444, 208NW428; 244Mich42, 221NW170; 236 Mich397, 210NW294; 238Mich587, 214 NW203; 239Mich686, 214NW835; 241 Mich302, 217NW13; 251Mich412, 232 NW181(1stcase); Mich 233NW435; 166Minn137, 207NW200; 169Minn148, 210NW878; 177Minn428, 225NW287(3d case); 157Miss425, 128S270; MoA 6 SW(2d)989; MoA 24SW(2d)171; 100 NJEq546, 135A777; NJ 151A743; NJ 152A172(2dcase); 103NJEq304, 143A 324; NJCh 152A246; 129Misc137, 220 NYS651; 131Misc830, 229NYS67; 228 AppDiv334, 239NYS508; 50ND696, 197 NW773; 144 Okl 160, 290P179; 117 Or 556, 245P1117; 120 Or624, 253P1117; 123 Or203, 260P218; 123 Or639, 263P 385; 124 Or219, 263P891; 125 Or129, 265 P1089; 130 Or242, 279P641; 132 Or228, 283P1117; 132 Or581, 287P80; 85Pa Super323; 88PaSuper266; 88PaSuper 289; 88PaSuper417; 88PaSuper519; 90 PaSuper146; 90PaSuper438; 94PaSuper 364; 95PaSuper429; 96PaSuper230; 96 PaSuper377; 98PaSuper369; 5PaDist& Co 463; 8PaDist&Co 348; 8PaDist&Co 734; 9PaDist&Co 109; 9PaDist&Co 240; 29PortoRico 723; RI 132A4; RI 133 A241; RI 140A471; TexCivA 278SW 236 (husband's testimony that he left wife because she could not support herself as she had promised, and because of minor money dispute); TexCivA 289 SW440; TexCivA 299SW924; TexCivA 27SW(2d)311; 66Utah580, 245P335; 100Vt65, 135A5; Vt 151A504; Va 153 SE670; 107WVa36, 146SE881. [d] (3) 120 Or624, 253P1117. [e] **Evidence held to warrant decree for wife** in reconventional demand for separation from bed and board. 159La267, 105S313 (in action by husband for separation on ground of abandonment). [f] **Preponderance of evidence required.**—202 Iowa 1311, 210NW431. [g] **Failure to prove other cruelties alleged** is immaterial, if extreme cruelty is proved. CalA 286P 747. [h] **Undue familiarity with other men.**—132 Or228, 283P1117 (evidence held insufficient).

143-53 8PaDist&Co 684. [a] 175Ark 330, 299SW38; 176Ark12, 2SW(2d)41; 177Ark374, 6SW(2d)290; 179Ark171, 14SW(2d)551; 214Ky397, 283SW391; 218Ky613, 291SW1058; 170Minn235, 212NW193; 318Mo 476, 300SW455; 216 MoA699, 273SW241; MoA 279SW189; MoA 279SW755; MoA 282SW153; MoA 289SW16(2dcase); MoA 300SW1046; MoA 2SW(2d)180; MoA 7SW(2d)420; MoA 17SW(2d)381; MoA 21SW(2d) 915; MoA 24SW(2d)171; MoA 28SW (2d)398; 144 Okl 160, 290P179; 95 PaSuper474; 10PaDist&Co 385. [b] 170Ark1194, 281SW657; 179Ark1199, 20SW(2d)194; Mo 279SW705; MoA 280SW430; 221MoA104, 289SW973; MoA 299SW61; MoA 7SW(2d)420; MoA 16SW(2d)621; MoA 21SW(2d)915; MoA 31SW(2d)213; 121 Or127, 254P 813; 88PaSuper417; 88PaSuper554; 94 PaSuper364; 8PaDist&Co 348; 8PaDist &Co 350; 152Wash429, 277P994. [d] **Evidence showing indignities** held not to show that plaintiff was not innocent and injured party. MoA 14SW(2d)504. [e] **It is sufficient that condition of person of ordinary sensibility** is rendered intolerable. 13PaDist&Co 411.

144-55 13PaDist&Co 294.

144-57 See also 158La899, 105S6.

144-58 See also MoA 279SW755.

144-58½-New. Failure of wife to perform household duties is of weight in determining question of her cruelty. 72CalA513, 237P814.

144-59½-New. Evidence held insufficient to corroborate wife's testimony that her health was affected by husband's conduct. 152Md515, 137A288.

144-59¾-New. Proof of cohabitation is proof that treatment of wife by husband is not extreme cruelty. NJCh 151 A620.

144-60 170La813, 129S212(2dcase) (necessity of reiterated notices); 117 Or 556, 245P1117 (insufficient); 90PaSuper 312. [a] 117 Or157, 242P852. [b] 124 Or415, 263P397.

144-61 101NJEq682, 139A333. [a] 115Nebr685, 214NW300; 123 Okl 9, 252 P837. [b] 97Fla881, 122S272; 47 Ida 135, 273P1; 156Md656, 145A180; 48 Nev220, 228P889.

145-62 [a] 214Ala112, 106S602; 171 Ark1187, 284SW780; 172Ark918, 290 SW951; 179Ark1199, 20SW(2d)194; 180Ark235, 21SW(2d)157 (without just cause); 81CalA406, 253P945; 82CalA 313, 255P767; 82CalA449, 255P892; 87 CalA787, 262P813; 93CalA465, 269P 561; 100CalA312, 279P1013; 101CalA 106, 281P512; 91Fla427, 107S630; 160 Ga618, 128SE902; 165Ga837, 142SE278; 206 Iowa1203, 219NW416; 218Ky613, 291SW1058; 226Ky243, 108W(2d)828; 154Md84, 140A37; Md 150A286; 166 Minn137, 207NW200; 318Mo 476, 300 SW455; MoA 9SW(2d)855; MoA 31SW (2d)211; 83Mont37, 269P158; 98NJEq 719, 130A602; 98NJEq729, 130A603; NJ 151A610 (wife's refusal to have relations with husband); 97NJEq451, 129A 420; 103NJEq214, 142A898; 241NY 446, 150NE511; 117 Or157, 242P852; 128 Or622, 275P673; 91PaSuper607; 94 PaSuper257; 95PaSuper474; 96 PaSuper258; 98PaSuper450; 5PaDist &Co 309; 5PaDist&Co 547; RI 146A 409; TexCivA 28SW(2d)201; 70Utah 274, 259P925; Utah 270P149; 145Va 596, 134SE536. [b] (1) 215Ala545, 112 S119; 33Ariz123, 262P614; 168Ark1167, 271SW949; 69CalA742, 232P471; 99 CalA130, 277P1092; 98Fla205, 122S566 (2dcase); 232 IllA447; 233Ky134, 25 SW(2d)59; 150Md313, 133A56; 151Md 196, 134A136; Md 152A230; 231Mich 614, 204NW758; 233Mich315, 206NW 358; 236Mich397, 210NW294; 238Mich 491, 213NW691; 251Mich412, 232NW 181(1stcase); 179Minn266, 229NW128; MoA 2SW(2d)137; 86Mont135, 282P 855; 98NJEq350, 129A126; 101NJEq 236, 136A191; 101NJEq284, 137A438; NJ 146A431; NJ 150A418; NJ 152A 233; 100NJEq482, 135A792; 224 AppDiv46, 229NYS77; 131Misc830, 229 NYS67; 228AppDiv334, 239NYS508; 128 Okl 101, 261P548; 121 Or127, 254P 813; 124 Or364, 264P447; 85PaSuper 473; 85PaSuper488; 87PaSuper581; 88 PaSuper35; 88PaSuper296; 90PaSuper 312; 91PaSuper77; 91PaSuper147; 96 PaSuper285; 97PaSuper562; 98 PaSuper230; 98PaSuper507; 5PaDist &Co 303; 8PaDist&Co 484; 11PaDist &Co 300; 35PortoRico 799; 100Vt65, 135A5. (4) To sustain findings of desertion without connivance or procurement. SD 216NW857. (5) To show that husband, ever in good faith, requested wife to follow him to new domicile. Md 148A259. [d] (5) Intention to desert not shown. 5PaDist&Co 18. (6) Evidence sustained finding that wife left husband with deliberate intention of permanently separating and that such permanent separation was without husband's consent. 93CalA465, 269P561. (7) Evidence that wife, without cause, refused to live with husband against his will and without his consent, constitutes willful desertion. 100CalA168, 279P1052. [f] (1) 91PaSuper147; 8 PaDist&Co 484. (2) Evidence held insufficient to show separation by agreement. 29Ariz549, 243P413. [k] **Request to return** after separation by mutual consent held not shown by evidence to have been made in good faith. 188 Wis151, 205NW829. [l] **Refusal to return** after request held not shown to be unreasonable. 188Wis151, 205NW829. [m] **Finding of abandonment** held proper. 241NY446, 150NE511 (where no offer to return till eight months after departure and action for separation had been commenced, though husband had offered to receive wife back on her motion for alimony). [n] **In determining sincerity of petitioner's request for reconciliation,** court proceeds upon theory quo animo. NJCh 151A620.

145-63 214Ala112, 106S602.

145-67½-New. Offers of reconciliation, given under advice of attorney as part of strategy of separation action, are entitled to but little weight as evidence of honest desire to live with spouse. 241NY446, 150NE511.

146-69 [a] (2) To show "habitual intemperance" of husband. 159La193, 105S286 (entitling wife to separation a mensa et thoro). [b] (2) To show defendant guilty of continued drunken-

ness. 47RI 114, 131A81. [c] 325 Ill 553, 156NE828.

146-71 [b] **Evidence held insufficient.**–91Fla427, 107S630.

146-74 288Pa1, 136A228. [a] **Evidence held sufficient.**–87PaSuper162.

146-77 202 Iowa1311, 210NW431; 121 Kan716, 250P265; 132Misc11, 228NYS 611 (insufficient); TexCivA 283SW201; TexCivA 285SW693. [a] (2) 121 Okl 259, 249P692 [b] 204 Iowa575, 215NW 619 (evidence of visit in order that husband might visit children); 125Me397, 134A373; 235Mich315, 209NW58; 171 Minn85, 212NW738; MoA 289SW16(2d case); NJCh 140A233; 124 Or364, 264 P447; RI 148A413; 153Wash1, 279P 88. [e] **Condonation may be established** by conduct or express agreement. 49 Nev375, 247P545, 47ALR569. [f] **Evidence held not to show condonation of adultery.**–153Md170, 137A904. [g] **Cohabitation is evidence of condonation.**–324 Ill 207, 155NE28. [h] **Evidence held sufficient** to sustain finding of no condonation. 264Mass291, 162NE663. [i] **Less evidence is required to prove breach of condition** of condonation than condonation itself. 265Mass317, 163NE852.

146-78 154Md11, 139A573 (divorce denied husband because of his adultery). [b] 158La767, 104S709 (acts by both parties of same character and so proportional as to deny relief to either). [c] **Evidence in wife's suit for divorce relative to her inequitable and adulterous conduct** has been held sufficient to preclude her from relief, though insufficient to warrant granting of divorce to husband. 106WVa446, 145SE813.

146-78½-New. Evidence held insufficient to show reconciliation. 170La 473, 128S281.

146-78¾-New. Uncorroborated testimony of defendant wife justifying desertion by husband's cruelty held insufficient to establish defense. 96PaSuper 258.

146-80 32F(2d)421; 227AppDiv1, 236 NYS544 (conduct of trial); 29PortoRico 723. See also 197Wis140, 221NW734. [a] **Collusion and other questionable methods** should be guarded against by court. 232Ky683, 24SW(2d)584. [b] **Courts will generally scan whole proceedings** to verify if complainant is entitled to divorce. 29PortoRico 723.

146-81½-New. Defendant who has appeared is entitled to notice of proceedings in suit, but may waive them. 235 Mich223, 209NW79.

146-81⅓-New. Defendant waives notice of taking of testimony by stating to plaintiff's attorney that he does not desire to contest case. 235Mich223, 209 NW79.

146-81¼-New. Where neither party to separation action establishes right to decree, court leaves parties as they were. 241NY446, 150NE511.

146-81⅓-New. Petition to revoke order whereby it was agreed that rights of plaintiff for alimony should be considered and determined at trial of petition for divorce, and petition for alimony should abate, is properly denied in the absence of a showing that any rights of plaintiff had been lost by reason of order, which were not voluntarily waived. 162Ga240, 133SE242.

146-81⅙-New. Hearing of evidence orally, in divorce case as permitted by statute, without a previous order directing that it be so presented, has been held unauthorized. 227Ky96, 11SW(2d) 998.

146-81½-New. Under statutory provisions the court may exclude newsgatherers and minors from the court room to prevent the spread of salacious testimony. 197Wis140, 221NW734.

146-81⅚-New. Absence of plaintiff wife from trial is not ground for refusing decree nisi. Alta [1930] 1DomLR253.

146-82 [b] **Retirement that proof of facts be taken before court is not jurisdictional.** 195Cal 364, 233P337, 43ALR 1509.

147-83½-New. That testimony in wife's divorce action relating to alleged improper relations between the wife and other men, offered as a bar to her right to divorce, was taken in the chambers of the presiding judge to which the parties and their counsel retired on the request of defendant's counsel, did not violate the statute providing that all hearings to determine whether a divorce decree shall be granted shall be before the court and shall in all cases be public. 197Wis140, 221NW734.

147-84 233Ky134, 25SW(2d)59; 118 Nebr373, 224NW860. [c] In Kansas.–(1) 121Kan495, 247P650. [d] **Statutes constitutional.**–118Nebr373, 224NW860. [e] **In Texas,** statute requiring that suit shall not be heard or determined before expiration of thirty days after filing petition, renders void judgment rendered on date amended petition was filed. CivA 20SW(2d)813.

147-84½-New. Determination of statutory residence is not required to be had at preliminary hearing in advance of trial. Del 146A603.

147-84¾-New. A decree granted in an ex parte hearing pending the rule for a bill of particulars and jury trial is erroneous. 90PaSuper438.

147-85 [b] **Refusal to sustain defendant's motion** not to proceed until defendant's suit for alimony pending in supreme court was determined is held not error. 163Ga31, 135SE409.

147-99 189NC805, 128SE329, 333 [quot CJ]. [c] See 216Ala581, 113S447, 59 ALR348 (holding wife's right to discontinue is unqualified).

147-1 214Ala573, 108S375, 45ALR935; 92Fla1081, 111S382, 386 [citCJ]; 236 Mich15, 209NW925; 189NC805, 128SE 329, 333 [quotCJ]; RI 142A537; 118 Tex581, 17SW(2d)1041; 155Wash33, 283P457. [e] **In Georgia.**–165Ga243, 140 SE364(2dcase).

147-5 [a] **In Minnesota.**–164Minn102, 204NW915.

147-7 131Misc315, 226NYS553 (necessity and sufficiency of protecting co-respondent). But see TexCivA 293SW 325.

147-9 131Misc315, 226NYS553 (leave to withdraw counterclaim granted on terms). But see 165Ga243, 140SE364.

148-12 See also 98NJEq519, 131A219.

148-14 189NC805, 128SE329 (failure to require payment of arrears of alimony held presumptively proper). But see 12 PaDist&Co 101.

148-15½-New. Disposition of counterclaim after dismissal of petition. 98 NJEq519, 131A219.

148-15¾-New. Application for affirmative relief may be withdrawn at any time before judgment. 141Wash531, 252 P99.

148-15¼-New. It is error to enter judgment on cross complaint after withdrawal. 141Wash531, 252P99.

148-15½-New. As a matter of public policy one innocent of offense against the marital relation is not obliged to submit to its dissolution. 86Colo 1, 278 P780.

148-15⅚-New. A wife is not entitled to withdraw her suit upon condition that her solicitor's fees be paid. 253 IllA 351.

148-16 264Mass549, 163NE177; 137 Misc417, 242NYS281 (motion held improper in view of pleadings). But see 145Wash418, 260P531. [b] **Involuntary dismissal** prima facie means decision on merits. Mass 172NE335.

148-21 105Conn502, 136A98.

148-22 224Ky18, 4SW(2d)1106; 233 Mich584, 207NW806; MoA 6SW(2d) 968; 129Misc616, 221NYS493; 228App Div185, 239NYS480 (defendant entitled to dismissal without prejudice); 94Pa Super293. [d] **That parties may not live together** gives no right or reason based on public policy to find defendant guilty in absence of sufficient proof. 233Mich584, 207NW806.

148-27 99Vt452, 134A529. [a] **But if collusion is actually discovered,** before termination of court's jurisdiction, divorce should be denied. 93Fla709, 112 S622.

148-29½-New. Complaint charging adultery cannot be dismissed for failure to name co-respondents known to plaintiff. 215AppDiv553, 214NYS307.

148-29⅓-New. It is error to dismiss complaint where plaintiff made out prima facie case and case is not fully developed. TexCivA 278SW288.

148-29¼-New. Dismissal on strength of unverified certificate of divorce presented by defendant is held improper. 220Ky251, 294SW1072.

148-29⅙-New. Trial court has discretion to dismiss suit and appeal court will not review such discretion. BC [1927] 2DomLR604.

148-29⅙-New. Counterclaim will be dismissed if based on abandonment in another state if it is not shown that this is ground for divorce in such state. 234 Ky314, 28SW(2d)1.

148-30 48Nev153, 238P402, 404 [cit CJ] (ordinarily whole case, including interlocutory decree, goes out of court on dismissal or discontinuance); 50RI 1, 144A437.

148-31 200 Ind56, 160NE345.

149-35½-New. In a suit for divorce tried on the issue whether plaintiff's abandonment of the matrimonial domicile was justified by defendant's extreme cruelty, a judgment of dismissal with prejudice is a denial of such justification and necessarily implies that plaintiff had willfully and without cause deserted defendant. 29Ariz549, 243P413.

149-36½-New. Taking of testimony after default under provision requiring it to be "taken before the court" is mandatory, but, not jurisdictional, and failure to do so can be corrected only by direct attack by appeal or motion on the same case. 195CalA364, 233P337, 43 ALR1509.

149-37 161La718, 109S399.

149-37½-New. Divorce cannot be properly granted by mere consent of parties or by collusion. 204 Iowa82, 214 NW602.

149-37⅓-New. Mere fact that defendant during trial makes certain concessions of fact does not render decree one by consent. 204 Iowa82, 214NW602.

149-37¼-New. Plaintiff, after introducing rebuttal testimony and moving the court to submit the case, could not take depositions on matters admittedly in chief. 229Ky436, 17SW(2d)412.

149-41 93Fla1004, 113S374.

149-44 [a] 150Md119, 132A585. [b] **Incompetent evidence is not validated** because admitted without objection. 157 Md476, 146A266, 65ALR165.

149-45 Man [1929] 4DomLR1068(2d case). [e] **In Manitoba.**–[1929] 4Dom LR1068(2dcase).

150-54½-New. Allegation of adultery in complaint, shown by testimony to be mere conclusion, must be disregarded. 215Ala684, 112S218.

150-54⅓-New. Statement of witness amounting to conclusion is disregarded. 215Ala684, 112S218.

150-55 101CalA106, 281P512; 107Conn 484, 140A820; 223AppDiv124, 228NYS 347. [a] (1) Ariz 291P993. [b] (1) CalA 284P950. [h] (2) Where defendant neither appears nor answers, no findings of fact are necessary on granting interlocutory decree. 88CalA296, 263P 298. [j] **Time to file requests.**–129Misc 127, 220NYS526.

150-56 CalA 286P747; 47 Ida135, 273 P1.

150-58 But see 51Nev285, 274P194.

150-59 But see TexCivA 21SW(2d)38.

150-61 92CalA276, 268P401. [c] **Finding that wife refused to live with husband as wife, continually found fault, and created trouble** held to sustain divorce. 145Wash234, 259P385.

151-62½-New. A finding against a wife on a cause of action for failure to provide is not necessarily inconsistent with a finding for her on a cause of action for extreme cruelty, although failure to provide is admitted in the answer. 48 Nev220, 228P889.

150-61½-New. The fact that the court expressly found certain probative facts does not thereby exclude all other probative facts appearing in the record and tending to support the general findings. 92CalA276, 268P401.

151-62½-New. Finding by court that defendant resided in state is not a find-

ing that he was domiciled there where court also found that he had no intention of remaining permanently. 105 Conn502, 136A98.

151-64 [a] **Statement of court at close of evidence that divorce would not be granted** is not finding such as to preclude dismissal after hearing additional evidence. 86 IndA14, 155NE617.

151-68 119 Or292, 247P145; 7PaDist&Co 755; 9PaDist&Co 378 (discretion of trial court); 10PaDist&Co 372 (inadvisable); SD 214NW846; 136Wash129, 238P977.

151-69 [a] 255 IllA389. [c] (1) 136 Misc29, 239NYS98. (7) Motion to frame issue of adultery held properly granted in court's discretion even conceding that plaintiff is not entitled as matter of right. 224AppDiv13, 229NYS249. [h] (2) 7PaDist&Co 184. [k] **In Nevada.**–48Nev205, 228P615, 239P801. [l] **Error for court to refuse to hear all the evidence** for defendant. 161La718, 109S 399.

151-71 RI 142A537.

151-72 255 IllA389 (may be made when case called for trial).

151-73 See also 9PaDist&Co 652.

151-74 255 IllA389.

152-76 121Kan716, 250P265; 90PaSuper192.

152-77 190NC418, 130SE7 (issue submitted insufficient to support judgment).

152-77½-New. Material facts in complaint deemed denied and no judgment allowed until all material facts have been found by the jury. 190NC418, 130 SE7.

152-80 [c] **Failure to prove place of offense as designated in framed issue,** entitles plaintiff to frame new issue and trial thereof. 228AppDiv185, 239NYS 480.

152-84 166Ga38, 142SE158 (submission held not erroneous).

152-86½-New. Where husband suing withdrew issue as to wife's adultery on certain dates, it is error to refuse to strike out testimony on such issue without limiting it to show inclination, opportunity, or lascivious disposition to show probability of subsequent illicit intercourse on date set forth in remaining issue. 218AppDiv407, 218NYS454.

152-86⅓-New. Special findings should be filed with the clerk. 130Misc905, 225 NYS606.

152-86¼-New. Failure to file special findings may be waived. 130Misc905, 225NYS606.

152-87 85Mont446, 278P1009; 90Pa Super192. [a] (3) 248NY175, 161NE 461. (7) TexCivA 290SW889. (16) Residence of plaintiff. 67Utah371, 248P 83. (17) Other question for jury. 324 Ill 207, 155NE28; TexCivA 293SW336. (18) Whether further living together of parties would be insupportable to husband. TexCivA 22SW(2d)1080. [b] (6) Whether words and acts proved constitute personal indignities is for court. 8PaDist&Co 350. (7) What is sufficient grounds for divorce is matter of law. 98Fla1196, 125S694. (8) Condonation is question of law when evidence regarding it is undisputed and comes from lips of party seeking to avoid its effects. Vt 148A287. [d] **Evidence of adultery not inconclusive** as to warrant direction of verdict for defendant. 215AppDiv553, 214NYS307. [e] **In North Carolina.**–195NC169, 141SE 572.

152-87½-New. Dismissal by the probate court of libel for divorce without prejudice after a full hearing has been held not error as matter of law. 264Mass549, 163NE177.

153-88 TexCivA 272SW501. [b] (2) Instruction that impossibility of reconciliation by parties should not be considered by jury is properly refused. 168 Ga725, 149SE39. [c] (2) Instructions that two or more assaults by wife within five years intentionally injuring husband constituted cruelty. 324 Ill 207, 155NE28. (3) Instruction that jury should not be influenced against either party solely on account of difference in sex. 324 Ill 207, 155NE28. (4) Instruction on circumstantial evidence. 324 Ill 207, 155NE28. [d] **Instruction on grant of total or partial divorce** held required, if authorized. 170Ga349, 153SE11.

153-89 166Ga38, 142SE158 (held not erroneous). [a] (6) Instruction that physical violence, by forgiven spouse, without justification, after condonation, would revive former acts. 324 Ill 207, 155NE28.

153-91 [b] Instructions held correct. 170Ga349, 153SE11.

153-92½-New. An instruction as to admission of counsel as to the sufficiency of evidence is not at variance with a statute providing that material facts in a complaint shall be deemed denied by defendant. 197NC465, 149SE585(1st case).

153-92⅓-New. An instruction as to the necessity for two verdicts before a total divorce can be granted, and that the second verdict would determine the alimony, is not error. 168Ga725, 149SE 39.

153-92¼-New. An instruction as to whether a second jury would pass on the same evidence the then present jury were considering held not error. 168Ga 725, 149SE39.

153-95 [b] **Findings on special issues affording no basis for judgment** properly disregarded. TexCivA 31SW(2d) 828.

154-97 29Ariz538, 243P402; 101CalA 106, 281P512; 191NC319, 131SE641. But see 130Misc905, 225NYS606.

154-98 48Nev205, 228P615, 239P801, 804 [citCJ]. [c] **Court cannot disregard jury's findings and make its own.**–48Nev 205, 228P615, 239P801.

154-99 48Nev205, 228P615, 239P801, 804 [citCJ].

154-99½-New. Where findings are advisory only, the court may adopt them if satisfied with them and need not make its own findings. 48Nev205, 228P615, 239P801.

154-99⅓-New. Where verdict has established all essential requirements for absolute divorce and is allowed to stand, nothing else appearing, plaintiff is entitled to judgment in accordance therewith. 191NC319, 131SE641.

154-1 [c] **In Pennsylvania.**–13PaDist& Co 253.

154-7½-New. Rule need not issue for jury trial before appointment of master when facts are not disputed or respondent fails to appear. 13PaDist&Co 253.

155-28 See also 11PaDist&Co 665. [b] (3) It is master's duty to examine answer, though no proof is offered to support it, and he may examine record and testimony in prior suit. 7PaDist&Co 747. [d] **Time for taking testimony.**–6 PaDist&Co 698.

155-32½-New. Alimony demand is not an essential part of the divorce and is not among the issues referred to the referee. 130Misc243, 223NYS744.

155-32⅓-New. May be required to report facts as to informal amendment of libel made by drawing ink line through certain averment. 12PaDist&Co 373.

156-34 Contra 6PaDist&Co 437.

156-36½-New. Technical rules as to the order in which evidence is presented do not prevail. 86PaSuper537.

156-37 11PaDist&Co 234; 11PaDist& Co 451; 12PaDist&Co 373.

156-43 12PaDist&Co 373.

156-45 288Pa1, 136A228; 85PaSuper 473; 85PaSuper488; 87PaSuper162; 87 PaSuper511; 88PaSuper519; 98PaSuper 369; 12PaDist&Co 468; 13PaDist&Co 193. [a] **In Pennsylvania.**–88PaSuper1. [b] **Advisory capacity of master.**–85Pa Super488.

156-45½-New. Under some statutes the report of a master is advisory only, 85 PaSuper488.

156-45⅓-New. and it is the duty of the court to exercise its independent judgment as to the law and the facts. 85 PaSuper488.

156-45¼-New. Under some statutes it is the duty of the court to exercise its independent judgment as to the law and the facts notwithstanding the report of a master. 85PaSuper473.

156-45⅕-New. In Pennsylvania appointment of a master does not relieve a trial or appellate court from the duty of examining all testimony. 288Pa1, 136A228.

156-45⅙-New. A trial court may adopt advisory opinion of the master. 288Pa 1, 136A228.

156-45⅐-New. Weight to be given master's findings is not governed by the rule as to the weight of the master's findings in equity. 288Pa1, 136A228.

156-49 But see 85PaSuper473.

156-50 [b] (2) Whether or not exceptions are filed it is duty of court to examine and consider evidence. 13PaDist &Co 193.

156-53 12PaDist&Co 316.

157-54½-New. Where the age of respondent does not appear, the report may be recommitted to take further testimony. 6PaDist&Co 294.

157-57 But see NJCh 130A24.

157-59 131Misc115, 226NYS95. [a] (1) 131Misc115, 226NYS95 (new trial before different referee ordered).

157-59½-New. In some jurisdictions it is the duty of the court to state its reasons for overriding or sustaining exceptions to the report of a master and to review in writing the case on the merits. 85PaSuper488.

157-59⅓-New. Confirmation refused for error in the name of a party. 7PaDist &Co 650.

157-63 MoA 6SW(2d)968. [a] **Where both parties are at fault,** neither is entitled to divorce unless misdoings of one would not furnish provocation for one guilty of excess. 218Ky636, 291SW 1044. [b] **Divorce granted one party may be granted other party** on same ground where cross-action filed. 170Ga 349, 153SE11.

157-63½-New. Conscious deception of a court by a petitioner is unconscionable conduct, which will preclude relief, notwithstanding otherwise the suitor would have been entitled to a decree. NJCh 144A333.

157-63⅓-New. Where a divorce action is contested, the court has jurisdiction to grant any particular relief authorized by the facts. 101CalA736, 282P433.

157-66 214Ala219, 106S866; 180Ark 836, 22SW(2d)1003; 321 Ill 134, 151NE 550 (wife owes no duty to husband); 259Mass486, 156NE685, 52ALR886; 114 Okl 279, 246P599.

157-68 167La208, 118S890.

157-69 214Ala219, 106S866; 216Ala16, 112S318; NJCh 146A351(2dcase) (is simply judicial separation). [b] 159La 1091, 106S650. [c] **Decree denying libel for divorce, but continuing it on docket from time to time,** held not erroneous. 254Mass506, 150NE296.

157-71 175Ark330, 299SW38; 198Cal 695, 247P194; 69CalA66, 230P462; 29 Hawaii464; 211Ky7, 276SW967; 217Ky 337, 289SW259; 218Ky636, 291SW1044; 153Md213, 138A22. [a] **Judgment of absolute divorce on jury's findings authorizing divorce from bed and board only** is void. 195NC169, 141SE572.

158-72 211Ky7, 276SW967; Mich 233 NW170. [f] **Evidence of incompatibility** held to warrant divorce from bed and board where both parties sought absolute divorce. 218Ky636, 291SW 1044.

158-75 159La251, 105S307.

158-76 [b] **Thus,** where married person, in whose favor separation judgment was rendered, sues two years later, absolute divorce is properly granted. 159 La251, 105S307 (where no reconciliation has taken place).

158-77 159La251, 105S307; Mich 233 NW170.

158-79½-New. Where both parties are at fault, the court may grant a divorce to both. 149Wash464, 271P268.

158-79⅓-New. Divorce cannot be arbitrarily denied where the evidence establishes the truth of allegations in the complaint. 99CalA172, 277P1089.

158-79¼-New. In some jurisdictions the court retains jurisdiction to modify its judgment of divorce from bed and board by granting an absolute divorce. 213Ky100, 280SW477.

158-79⅕-New. In determining whether the divorce should be from bed and board or absolute, public policy should be considered. 237Mich326, 211NW740.

158-79⅙-New. Where a decision grants divorce from bed and board when the amended petition asked for absolute divorce, there is such an irregularity as to be a ground for reviewing the case. 47**RI** 139, 131**A**551.

158-80 76**CalA**481, 245**P**459; 99**NJEq** 376, 132**A**603; **Wash** 287**P**892. [b] **In Nevada.**-48**Nev**153, 238**P**402. [c] **Intervening amended judgment** will not render premature final judgment entered more than year after interlocutory judgment. 99**CalA**53, 277**P**872.

158-81 99**NJEq**376, 132**A**603, 604 [quot Cyc]; 128**Misc**1, 217**NYS**675; 196**Wis** 7, 219**NW**273 (marital status exists till husband's death if final decree is not entered).

159-82 Cal 290**P**18; **CalA** 285**P**860. [i] **Service of decree.-Sask** [1928] 4**Dom LR**566. [j] **Failure to file affidavit,** showing no reconciliation, does not affect jurisdiction to enter final decree. **Cal** 290**P**18. [k] **Trial judge should not dispense with entire affidavit** showing parties were not reconciled, on application for final decree. **Cal** 290**P**18.

159-85 224**AppDiv**355, 231**NYS**146.

159-86 133**Misc**373, 231**NYS**469.

159-88 86**Colo** 362, 281**P**737(1stcase).

159-90 196**Cal** 222, 237**P**42, 40**ALR** 1110; 69**CalA**660, 232**P**154; 101**CalA** 736, 282**P**433; 148**Wash**457, 269**P**821. [a] **When application for final decree denied.**-Where such application is made pending wife's suit in equity to set aside interlocutory decree for fraud, court has discretion to deny it till final determination of such suit. 76**CalA**481, 245**P**459.

160-95½-New. In some jurisdictions courts of equity have power to refuse to enter a final decree where, subsequent to entry of interlocutory decree, the offense has been condoned. 74**CalA**350, 240**P**294.

160-95⅓-New. Upon proof of adultery committed during the running of the decree nisi period, by the party applying for an absolute divorce and in whose favor such decree nisi has been issued, the decree will be vacated. 103**NJEq** 348, 143**A**338.

160-95¼-New. Resumption of marital relation before final decree will estop the parties to rely on such order for final decree, although an affidavit that the parties had not cohabited since the decree nisi can be considered as showing ground for a final decree. 148**Wash**457, 269**P**821.

160-95⅕-New. Interlocutory order may present allegation of cruel treatment, after such resumption of marital relation, in support of a final decree obtained without knowledge of the spouse. 148**Wash**457, 269**P**821.

160-95⅙-New. It is within trial court's discretion to refuse final decree where parties cohabit for considerable time after interlocutory decree. **CalA** 285**P**860.

160-97 335 **Ill** 260, 167**NE**68. [e] **Equitable considerations** govern in determining property rights and also question of alimony. 317 **Ill** 247, 148**NE**40. [f] **Provision in interlocutory decree** determining property rights does not render decree void. 85**CalA**372, 259**P** 453. [g] **Court not justified in allowing wife sums for investment** where husband has management and control of community property and of his separate property. 47 **Ida**135, 273**P**1.

160-10½-New. In Saskatchewan where husband secures a divorce for wife's adultery, damages may be awarded against the co-respondent. **Sask** [1925] 3**DomLR**370.

160-10⅓-New. In such case, the damages awarded should be measured by wife's usefulness to husband, having regard to his capabilities and moral character. **Sask** [1925] 3**DomLR**370.

160-10¼-New. Where plaintiff raises an issue as to the validity of a separation agreement, the court may properly pass thereon. 29**Ariz**398, 242**P**337.

160-10⅕-New. Interest of the state and parties requires that when the bond of marriage is dissolved, rights and duties incidental to marriage status be determined within a reasonable time thereafter. 48**RI** 420, 138**A**179.

160-10⅙-New. An injunction restraining the husband from molesting the wife and children cannot be added to a decree of divorce without notice. **TexCivA** 294 **SW**694.

160-10⅐-New. The court may adjudicate every right appertaining to either party. 98**Fla**205, 122**S**566(2dcase).

160-10⅛-New. In Manitoba, in action based on adultery committed outside of province, neither costs nor damages can be awarded against nonresident respondent who has not submitted to jurisdiction. [1929] 4**DomLR**1053(2d case).

160-14 87**CalA**787, 262**P**813.

160-18 Contra. 234**IllA**323.

160-24½-New. Recital in a judgment that certain allegations of the complaint were found is equivalent to finding that allegations not received were not found. 105**Conn**502, 136**A**98.

160-24⅓-New. A decree reciting that the cause was heard on the record and testimony for both parties and that the court found that complainant failed to provide for the cross complainant and that the latter was entitled to a divorce from bed and board sufficiently sets forth the issues and decision. 155**Tenn** 422, 295**SW**62.

160-24¼-New. Uncertainty, if any, in a divorce decree must be so resolved that the form shall be adapted and made subordinate to the purpose. 251**NY**366, 167**NE**501.

161-25 339 **Ill** 400, 171**NE**504; 234**Ky** 774, 29**SW(2d)**10; 230**AppDiv**79, 243 **NYS**344 (where jury failed to determine wife's innocence). [b] **Where defendant does not pray for divorce** it is error to grant her divorce. 35 **OhA**142, 171**NE** 864.

161-27 237**Mich**326, 211**NW**740; **Mich** 233**NW**170. Contra 235**Mich**427, 209 **NW**566.

161-29 [a] **If more relief awarded than demanded,** court is in error but not beyond jurisdiction. **CalA** 289**P**645.

161-30 327 **Ill** 39, 158**NE**411 (verdict of jury held sufficient compliance with requirement to show facts justifying decree). [b] **Judgment held proper under findings.**-223**AppDiv**19, 227**NYS**345. [c] **Judgment need not declare** that facts alleged in petition were proven. **Tex CommnA** 26**SW(2d)**1054. [d] **Construction of statute** making findings and conclusions in divorce suit operate as final decree. **Colo** 291**P**1035.

161-35 134 **Okl** 283, 273**P**267 (alimony).

161-35½-New. Verdict granting total divorce to defendant wife in proceeding brought by husband is not authorized by plea and answer alleging facts justifying separation and asking for alimony but containing no prayer for divorce. 160**Ga**896, 129**SE**287.

161-36 136**Misc**634, 244**NYS**123.

161-38 166**Minn**468, 208**NW**180 (after death of party); 170**Minn**470, 213**NW** 35; 98**NJEq**421, 131**A**125 (final decree only); 105**WVa**621, 143**SE**349. [a] **Even after death of defendant,** final decree may be entered in favor of successful petitioner where petitioner is still living and was entitled to decree in lifetime of defendant. 98**NJEq**426, 131**A** 127. [b] **Decree nunc pro tunc improperly entered** where no findings of fact and conclusions of law had been made by court and terms of decree had not been fixed. 170**Minn**470, 213**NW**35 (after death of defendant husband). [c] **Entry after death of husband** of nunc pro tunc order is void and ineffective to validate divorce proceeding abated by husband's death. 136**Misc**634, 244**NYS** 123.

161-41 189**NC**805, 128**SE**329 (judgment of voluntary nonsuit in absence of defendant's demand for affirmative relief).

161-41½-New. After expiration of statutory time for entry either party may compel court on motion ex parte to enter decree, on showing facts entitling him thereto. 196**Cal** 222, 237**P**42, 40**ALR** 1110.

161-43 See also 98**NJEq**421, 131**A**125.

161-43½-New. Entry of final decree amounts to entry of judgment. 48**RI** 60, 135**A**241.

161-43⅓-New. Where a statute requires a specified period to elapse after service of summons before entry of decree, it is not necessary that such period elapse after the filing of a cross petition. 32 **OhA**274, 167**NE**897.

161-44 220**Ala**237, 124**S**519(sufficient showing of publication); 337 **Ill** 451, 169**NE**175; **Nev** 280**P**651 (entry of judgment on defective proof of service, though erroneous, is not void unless there was no service). [a] (2) Decree rendered on constructive service authorized because of absence from state for over four months is erroneous and not void though such ground for constructive service was not relied on and evidence was not sufficient to justify divorce. 218**Ky**212, 291**SW**42. [c] **After withdrawal of answer,** wife is entitled to notice of subsequent proceedings. 129 **Misc**382, 221**NYS**241. [d] **Where proof of service of summons by publication was defective,** plaintiff may supply statutory proof after entry of default and judgment. **Nev** 280**P**651.

161-45 [c] **Where answer is filed and issues made up decree is not "default judgment"** though defendant does not appear. **MoA** 28**SW(2d)**418.

161-46 98**Fla**1196, 125**S**694.

161-46½-New. Default decree cannot be entered nunc pro tunc where defendant files motion for suit money in time to answer and decree is entered after ruling, as nothing can be entered nunc in such order that did not happen tunc. 116 **Or**108, 239**P**541.

161-46⅓-New. Defendant waives notice of settlement of decree where he informs plaintiff's attorney that he does not desire to contest case. 235**Mich**223, 209**NW**79.

161-46¼-New. Some statutes require, where service is by publication and defendant fails to appear or answer, that the trial court appoint an attorney for the nonappearing defendant, and that a statement of the evidence be filed as part of the record. **TexCivA** 281**SW**598.

162-47½-New. Under some statutes a copy of the proposed decree with notice of settlement should be served on defendant's attorney even after the bill is taken as confessed. 236**Mich**604, 211**NW** 52.

162-47⅓-New. Default decree is not in any legal sense a decree by consent or collusion. 204 **Iowa**82, 214**NW**602.

162-47¼-New. A divorce decree has been held not void as against the contention that it did not appear that default of defendant was duly entered by the clerk, where the interlocutory decree recited that defendant had not appeared either by counsel or in person, but made default. 205**Cal** 713, 272**P**747.

162-47⅕-New. A decree entered after defendant's appearance and answer without further notice to defendant or provision for care of minor child is void. 247**Mich**52, 225**NW**542.

162-48 203**Cal** 433, 264**P**754.

162-49 48**Nev**230, 229**P**386; 228**App Div**796, 240**NYS**29; 135**Wash**188, 237**P** 304. [b] 135**Wash**188, 237**P**304.

162-52 [b] **Motion to vacate divorce decree** held not writ of error coram nobis. **MoA** 26**SW(2d)**804. [c] **Motion to vacate order** setting aside divorce decree cannot be held petition for review, absent patent irregularity. **MoA** 26**SW (2d)**804. [d] **Order setting aside divorce decree** has been held not void, though after husband's death. **MoA** 26**SW(2d)** 804.

162-54 101**CalA**248, 281**P**707; 249 **IllA** 113; 232**Mich**163, 205**NW**194; 235**Mich** 223, 209**NW**79; 135**Wash**188, 237**P**304. [a] (2) Where both parties were in advance years at time of marriage and both prayed for divorce and little or no excuse was shown for defendant's failure to appear at trial, refusal to set aside default was not abuse of discretion. 135 **Wash**188, 237**P**304. (3) Refusal to vacate judgment is proper where answer was voluntarily withdrawn and defendant's showing on motion is simply attack on evidence. 175**Minn**71, 220**NW** 546.

162-55½-New. Under some statutes a divorce decree rendered against a nonresident defendant on service by publication does not shift the burden of proof

on the issue of desertion on defendant, whose petition denies the material allegations of plaintiff's bill. 104WVa114, 139SE470.

162-55¼-New. Where, after default is entered, the judge notices defendant in court, he is permitted to call him to the stand after plaintiff has put in her case. 92CalA212, 267P893.

162-55¼-New. And such testimony is sufficient to warrant opening default without an affidavit of merits. 92CalA 212, 267P893.

162-55½-New. Court's control over divorce decree ceases at close of term absent proper motion for new trial or patent irregularity. **MoA** 268SW(2d)804.

162-55¾-New. Decree may be opened after term if circumstances in regard to notice and conduct of hearing were irregular. 14PaDist&Co 16.

162-56 48Nev230, 229P386. [d] **Fraud.**–To justify setting aside to decree for fraud, party seeking must show defense. 114 Okl 298, 247P106.

163-58 5PaDist&Co 1.

163-62 Iowa 229NW694; 235Mich223, 209NW79; 14PaDist&Co 16. [b] (3) Six months' delay is not fatal where defendant's return was delayed by distance and lack of funds. 203Cal 433, 264 P754.

163-71 116 Or108, 239P541 (showing insufficient).

163-72 159La570, 105S624 (wife lulled into inactivity by deceptions of husband not precluded); 48Nev230, 229P386 (attorney's miscalculation of time to plead or appear held insufficient).

163-75 159La570, 105S624 (wife lulled into inactivity and failure to answer and defend, by husband's deceptions); Mont 292P730; 32NM445, 259P822. [a] (3) Intentional failure to disclose street address of nonresident defendant in affidavit for constructive service or to disclose it to court or clerk, resulting in failure of defendant to receive notice of suit, is fraud justifying relief. 165Ga 233, 140SE503. [b] **Existence of equitable remedy** does not affect right to set aside default on ground that fraud was by motion. 203Cal 433, 264P754. [c] **In Louisiana.**–159La155, 105S273. [d] **Fraud on court.**–159La570, 105S624.

164-76 159La570, 105S624; **TexCivA** 281SW1096.

164-78 116 Or108, 239P541 (excuse not shown on ground of surprise and neglect). But see 101CalA248, 281P707.

164-79 [b] **Amendment to complaint without notice to wife.**–Default judgment against wife, based on amendment of complaint without notice to wife, alleging her adultery after commencement of action, will be vacated. 129Misc382, 221 NYS241.

164-82 203Cal 433, 264P754.

164-82½-New. or jurisdiction based on a false affidavit as to plaintiff's residence, 218MoA301, 272SW1038.

164-87½-New. Where defendant was not served with process before term time but entered written appearance during term at which bill was filed decree entered by default and without notice during term should be vacated. 254 IllA 234.

164-87¾-New. Refusal to set aside default judgment against wife is not abuse of discretion when she was guilty of inexcusable neglect. Iowa 229NW833.

164-90 93Fla709, 112S622.

164-91 95Fla396, 116S501; 218MoA 301, 272SW1038. But see 200Cal 654, 254P567. [a] (1) 148Wash457, 269P 821. [b] (4) Court has no inherent authority to modify final decree, right being purely statutory. 127Misc826, 217 NYS528. [c] **Trial court has been held not to have abused discretion in entering order setting aside final decree of divorce,** where parties had sporadically cohabited after entry of interlocutory order. 151Wash480, 276P300. [d] **In Wisconsin.**–Wis 229NW636.

164-92 But see 215Ala569, 112S147. [a] **Court has inherent power** to set aside decree obtained by fraud committed upon it. 196Cal 222, 237P42, 40ALR1110.

164-93½-New. On motion of mother of respondent, divorce will be set aside. 6 PaDist&Co 81.

165-94 215Ala569, 112S147; 247 IllA 321; 120Kan90, 242P124; 227Ky96, 11 SW(2d)998; 221MoA300, 278SW90; 221 MoA300, 278SW90. [c] (2) Court cannot of its own motion vacate decree on ground that it was procured by collusion. 215Ala569, 112S147. [e] **In Alabama.**–215Ala569, 112S147.

165-95 93Fla709, 112S622; MoA 21SW (2d)2. [b] **In Wisconsin.**–229NW636.

165-95½-New. [a] **Order vacating judgment after expiration of statutory time** is nullity. 46 Ida418, 267P1076.

165-96 137Misc658, 244NYS34. See also 236 IllA339. [a] **Separation decree entered by stipulation of parties** is invalid and will be set aside. 215AppDiv 504, 213NYS643 (even after statutory period for bringing motions to vacate).

165-97 218MoA301, 272SW1038.

165-98 151Wash480, 276P300.

165-3½-New. In case of fraud, the defrauded party must act promptly. 107 WVa655, 150SE225.

165-3¾-New. Modification or vacation of divorce judgment without notice required by statute may be set aside on appeal. Wis 229NW636.

165-3¼-New. Where required notice as to vacation of divorce judgment parties may waive irregularity by acts. Wis 229NW636.

165-5 250Mich105, 229NW622; NJCh 144A333.

165-7 But see 98Fla1196, 125S694. [a] **Clerical defect in complaint in allegation of prior marriage** does not render complaint insufficient on motion to set aside judgment after expiration of statutory time. 46 Ida418, 267P1076.

165-9 [a] **Failure to appear and object to venue** is waiver of right to object after decree. 130 Or619, 278P969.

165-13 See also 190NC418, 130SE7. [a] **Failure to file affidavit** showing parties were not reconciled since interlocutory judgment is sufficient grounds for setting aside final decree. Cal 290P18.

166-17 173Ark496, 292SW686. But see 95Fla396, 116S501.

166-17½-New. or for errors committed by the court on trial where it had jurisdiction of the parties and subject matter, 204 Iowa82, 214NW602.

166-20½-New. , or because plaintiff returned to state of former residence after obtaining decree, 49Nev18, 236P1097.

166-20¾-New. or because plaintiff, who had established a required residence in the state granting the divorce, returned to the state of his former residence after obtaining a decree. 49Nev 18, 236P1097.

166-20¼-New. Failure to notify counsel for defendant of steps taken in open court held ground for vacating a decree granted without deciding motions to make the petition more definite and certain. 25 OhA432, 158NE493.

166-27½-New. A petition to set aside a divorce decree on the ground that it was prematurely rendered was held properly refused where the petitioner was in the court room when the case was called and made no defense. 171Ark717, 286SW 877.

166-27¾-New. A citation constituting notice that a case would be called any time after appearance day, defendant held not to have substantial excuse for failure to defend at the divorce trial. **TexCivA** 296SW643.

166-27¼-New. That the record was corrected ex parte to show the actual date of service of process on the district attorney does not invalidate the decree. 130 Or619, 278P969.

166-27½-New. Where divorce suit was prosecuted by husband's family to divest wife of rights in his estate court should vacate divorce judgment. 233Ky 134, 25SW(2d)59.

166-27¼-New. Decree will not be annulled for nonconformity with agreement which defendant repudiated. 169 La862, 126S218.

166-28 215Ala569, 112S147; 205Cal 186, 270P209; Cal 290P18; 85CalA381, 259P373; 311Mo 128, 277SW916; 221 MoA300, 278SW90; 222MoA941, 300SW 540; NJCh 144A333; 32NM445, 259P 822, 823 [citCJ]; 6PaDist&Co 81; 148 Wash610, 270P126. But see 49Nev18, 234P688. [c] (2) Concealment of defendant of resumption of marital relations after interlocutory decree is extrinsic fraud authorizing setting aside, even after his death, of final decree granted on his motion. 196Cal 222, 237 P42, 40ALR1110. (3) False statement by libelant as to residence. 6Pa Dist&Co 81. [d] (5) Obtaining decree after reconciliation and resumption of marital relations, without knowledge of wife or notice thereof, and without informing court of reconciliation, is extrinsic fraud justifying setting aside. 196Cal 222, 237P42, 40ALR1110. [e] **Fraud in regard to residence.**–Since residence is fact upon which right to divorce depends, fraudulent allegation as to residence is not ground for annulling decree. 49Nev18, 234P688. [f] **Concealment of resumption of marital relations** from court after issuance of interlocutory decree but before final judgment is ground for vacating final judgment for fraud. 126Misc44, 213NYS324. [g] **Fraud must be extrinsic or collateral** to authorize vacation of decree after expiration of term. 91PaSuper301. [h] **Extrinsic or collateral fraud** is some act or conduct by prevailing party which has prevented fair submission of controversy. 91PaSuper301.

167-29 162La4, 110S68.

167-31 171Ark173, 283SW979; 262 Mass297, 159NE750; 32NM445, 259P 822; 142Va31, 128SE599 (fraud not shown). [a] (2) Mistake of husband in stating wife's residence is not intentional fraud justifying vacation of default decree obtained on constructive service authorized on other grounds. 218Ky212, 291SW42.

167-31½-New. and is not ground where defendant appeared in action and had knowledge of facts before decree. 49Nev 18, 236P1097.

167-33 96PaSuper198.

167-34 158La961, 105S28 (plaintiff's willful perjury); 86PaSuper142; 5Pa Dist&Co 1. See also 148Wash457, 269P 821.

167-36 148Wash457, 269P821.

167-37 91PaSuper301. [c] **Fraud is intrinsic** where perjury relates to question raised in record upon which there is conflict to be determined by trial. 91 PaSuper301.

167-38 157Md429, 146A389; 49Nev18, 236P1097 (residence of plaintiff).

167-41 142Va31, 128SE599.

167-43 173Ark496, 292SW686 (fraud not established); 121Kan495, 247P650 (insufficient); 96PaSuper267 (evidence insufficient); 142Va31, 128SE599. [b] **Evidence held insufficient.**–142Va31, 128 SE599.

168-44 [a] **Evidence held insufficient.**–142Va31, 128SE599.

168-46 93Fla709, 112S622, 629 [citCJ]; 244Mich290, 221NW153.

168-48 157Md429, 146A389; 142Va31, 128SE599.

168-50 215Ala569, 112S147, 148 [cit CJ]; **TexCivA** 286SW749, 756 [quot Cyc].

168-56 217Ala142, 115S27 (divorce and incidental relief held void); 98Fla1196, 125S694; 190NC418, 130SE7.

168-57 See also 5PaDist&Co 503.

168-58½-New. A party misrepresenting the residence and securing a divorce in the state cannot afterward impeach the decree for lack of jurisdiction. 93Fla709, 112S622.

168-59 But see 220Ala237, 124S519.

168-60½-New. A decree is not void because no witness was sworn or testified in the cause and no corroborating testimony was offered. 204 Iowa82, 214 NW602.

168-63 [c] **Directed verdict held proper.**–170Ga486, 153SE25(2dcase).

169-66 225AppDiv757, 232NYS388.

169-70 222MoA941, 300SW540; 25 OhA432, 158NE493.

169-72 196Cal 222, 237P42, 40ALR 1110.

170-74 196Cal 222, 237P42, 40ALR1110 (rule applied, though property rights not involved or mentioned in decree); 190NC536, 130SE315, 319 [quotCJ]. [c] **Final decree granting divorce** may be set aside after death of husband on motion of wife for extrinsic fraud, where suit was brought solely to sever marital relations and involved no property rights. 196Cal 222, 237P42, 40ALR 1110.

170–75 190NC536, 130SE315, 319 [quot CJ].

170–76½–New. [§ 421a] b½. **Death of Party against Whom Divorce Was Granted.** After complainant's death proceeding to vacate decree granting divorce lacks the necessary parties, the death revoking the attorney's authority, 218Ala15, 117S462(3dcase).

170–76½–New. Death of spouse improperly granted divorce does not abate wife's right to maintenance. 233Ky134, 25SW(2d)59.

170–77 171Ark173, 283SW979; 205 Iowa339, 217NW864; 49Nev18, 236P 1097; 5PaDist&Co 503.

170–81½–New. Contempt of provisions of interlocutory decree is ground for denial of final decree. 72CalA531, 237P 782.

170–83 97CalA613, 275P1023.

170–83 MoA 299SW147; 114 Okl 298, 247P106; 5PaDist&Co 503; 6PaDist&Co 639; 147Va331, 137SE473.

171–84 217Ala19, 114S472; 147Va331, 137SE473.

171–88 42 Ida821, 248P468. [a] 101. CalA736, 282P433. But see 85CalA381, 259P373. [b] **When time begins to run.** –88CalA296, 263P298.

171–89 [b] **Effect of saving exceptions.** –47RI 122, 130A861.

171–89½–New. Where separation decree is entered by consent of parties, it will be set aside even if motion is made after statutory period. 215App Div504, 213NYS643 (where such decree is absolutely invalid).

171–89½–New. A motion to set aside a decree for fraud on defendant and on the court filed at the same term at which the decree was rendered gives the court jurisdiction to set aside the decree at a subsequent term, although the motion was not filed within four days after decree. 221MoA300, 278SW 90.

171–91 316Mo 1310, 293SW414; 219 AppDiv344, 220NYS242; 131 Okl 276, 268P726, 727 [quotCJ]. See also 121 Kan206, 246P980. [c] (1) 131 Okl 276, 268P726. [d] **Executor and legatees under will of libelee husband,** who died after entry of final decree granting divorce, may contest motion of widow to set aside decree for extrinsic fraud and appear in prohibition proceedings to restrain further procedure in divorce action. 196Cal 222, 237P42, 40ALR1110.

171–93½–New. One procuring divorce by fraud is estopped to question its validity, 217Ala19, 114S472.

171–93½–New. and also one in privity with such person is estopped. 217Ala 19, 114S472.

171–93¼–New. Fraud of the second husband in procuring a divorce for the wife from her first husband does not authorize setting aside the decree in the first husband's suit. 217Ala19, 114S 472.

172–1 But see 121Kan495, 247P650.

172–2 76CalA481, 245P459; 190NC536, 130SE315 (motion in cause proper procedure to set aside for void service by publication). But see 71CalA705, 236P 162. [a] **Leave of court** is essential before making application to modify final judgment in some jurisdictions. 228 AppDiv837, 239NYS12.

172–3 See also 221MoA300, 278SW90.

172–4 215Ala569, 112S147.

172–6 48RI 426, 138A188, 189 [citCJ].

172–6½–New. A decree will not be set aside on an unverified motion with no proof in support thereof. 215Ala434, 111S7.

172–7 221MoA300, 278SW90. [a] (2) But the rule is contra in Missouri. 311 Mo 128, 277SW916.

172–8 215Ala569, 112S147. See also 76CalA481, 245P459. [a] **Bill to review decree, not showing error on face of record,** is in essence bill to impeach decree for fraud. 93Fla709, 112S622.

172–8½–New. although a motion to set aside judgment has been held not sustainable as suit in equity, 311Mo 128, 277SW916.

172–9 203 Iowa619, 213NW420. But see 218Ala15, 117S462(3dcase).

172–9½–New. Suit held not to lie under statute to set aside decree which could not be said to be void. MoA 23 SW(2d)1089.

172–9½–New. Venue. Venue of suit to set aside judgment is properly laid in county wherein divorce suit was had. TexCivA 24SW(2d)1101(2dcase).

172–11 32NM445, 259P822, 823 [quot CJ].

172–12 See also 32NM445, 259P822, 823 [quotCJ].

172–13 See also 32NM445, 259P822, 823 [quotCJ].

172–14 196Cal 222, 237P42, 40ALR 1110 (legatees under deceased prevailing party's will may contest motion to vacate decree of divorce).

173–20 204 Iowa82, 214NW602.

173–22 204 Iowa82, 214NW602; 158La 961, 105S28 (averment that allegation in divorce petition was false to husband's knowledge held sufficient). [b] **Petition held insufficient.**–155Wash52, 283P704. [c] **Conclusion stating in effect that divorce was granted solely on husband's false testimony** held warranted by allegations of fact in wife's petition to annul divorce. 158La961, 105S 28. [d] **Allegation that plaintiff was not legally cited in divorce suit** presents question of jurisdictional fact though it involves question of law. 158La961, 105 S28. [e] **Petition held insufficient.**–Md 152A110.

173–23 See also 158La961, 105S28.

173–24 [a] **If bill of complaint does not wholly fail to state cause of action,** demurrer should be overruled. 90Fla553, 106S414.

173–25½–New. A motion to vacate a decree, which does not conform to statutory requirements as to procedure, is properly denied. 204 Iowa82, 214NW 602.

173–25½–New. A petition for alimony after final decree cannot be effective as a petition for review. 221MoA201, 299 SW840.

173–26 47RI 122, 130A861. [a] **Whether there was cohabitation between parties** after filing bill for divorce could not be decided on petition and answer to vacate decree. 250Mich105, 229NW 622.

173–34 97CalA613, 275P1023.

173–35 [a] (2) Burden of proof is on wife seeking to set aside decree for fraud, unavoidable casualty, or misfortune preventing defense. 205 Iowa339, 217NW864. (3) Wife moving to vacate decree awarded to her has burden of proving grounds relied on. 131 Or117, 282P111. [g] (2) To show that husband was resident of county in which divorce decree was granted where ground of suit to set aside such decree was brought on ground of nonresidence of both parties. 203 Iowa619, 213NW 420. (3) Other evidence insufficient. 120 Or484, 252P705. [h] **Presumption is that legal procedure was followed** in granting divorce based on publication. MoA 299SW147. [i] **Same degree of proof of adultery is required** on application to vacate decree nisi for that cause, as would be required in suit for divorce on same ground. NJCh 144A 333. [j] **Evidence held inadmissible.**–157Md429, 146A389 (on petition to annul for continuance and perjury). [k] **Findings held to support judgment.**–94 CalA657, 271P575. [l] **Evidence held insufficient** to show collusion. 244Mich 290, 221NW153; 131 Or117, 282P111 (to show that decree was premature and procured by fraud). [m] **Evidence held sufficient.**–108SWVa191, 150SE609.

173–35½–New. In Saskatchewan filing notice of motion in vacation to vacate divorce decree to be heard before expiration of legal duration of notice after vacation is unauthorized. [1929] 4 DomLR981.

173–39½–New. A decree in an action for divorce adjudging that plaintiff is entitled to relief and ordering reference on the question of alimony is an interlocutory decree. 214Ala321, 107S827.

173–40 [c] **Husband may be required to pay expenses of proceeding** on opening decree for any purpose. 34Ariz340, 271P717.

173–40½–New. Review. On appeal from judgment dismissing petition to annul divorce decree on exception of no cause or right of action, allegations of petition must be taken as true. 158 La961, 105S28.

173–41 See also 11PaDist&Co 377.

173–41½–New. The cause stands for further proceedings or trial as in other actions. 221MoA300, 278SW90.

174–42½–New. Decree opens cause anew for trial of all issues. 221MoA 300, 278SW90.

174–47½–New. In a suit for maintenance, the wife may not, by collateral attack, question the decree in a former suit. 103NJEq214, 142A898.

174–47½–New. A decree of divorce absolute in form can be successfully attacked only on grounds which will warrant an attack on judgments generally. 153Wash591, 280P8.

174–49 204 Iowa82, 214NW602; 284Pa 346, 131A244.

174–53 195Cal 364, 233P337, 43ALR 1509; 103WVa423, 137SE703.

174–54 30F(2d)211; 200Cal 310, 253P 145; 203Cal 61, 263P200; CalA 289P 647; 234 IllA53; 121Kan206, 246P980; 232Ky254, 22SW(2d)605; 284Pa346, 131A244, 245 [citCJ]; 155Tenn422, 295 SW62; 103WVa423, 137SE703.

175–63½–New. A default decree is not subject to collateral attack because evidence was taken at unauthorized place after default. 195Cal 364, 233P337, 43 ALR1509.

175–63½–New. , or because the full term had not expired between the date of desertion and the date of the final decree 284Pa346, 131A244.

175–63¼–New. or because the decree had been entered before costs were paid. 6PaDist&Co 92.

175–64 215Ala569, 112S147. See also 121Kan495, 247P650.

175–65 147Va331, 137SE473.

175–66 234 IllA53; 316Mo 1310, 293SW 414; 49Nev18, 236P1097 (findings as to jurisdiction are as conclusive as any other fact in issue); NJCh 129A212 (record of dismissal for failure of proof is not conclusive that parties were living separately by consent); 145Wash 61, 258P856. [a] (3) Finding as to defendant's residence cannot be overcome by averment as to different residence in another proceeding. 67Utah371, 248 P83. (4) Finding of court as to plaintiff's residence is conclusion in absence of fraud. 67Utah371, 248P83.

175–66½–New. Nonresidence at the time of adultery does not authorize collateral attack by way of counterclaim in a second action. 223AppDiv789, 229 NYS136.

176–68 195Cal 364, 233P337, 43ALR 1509; 204 Iowa82, 214NW602; 121Kan 206, 246P980; 228Ky42, 14SW(2d)152; 130 Or619, 278P969. [a] (2) Evidence held sufficient to show that plaintiff was resident of state and county for statutory period preceding filing of petition for divorce. 121Kan206, 246P980. [c] **Clear and affirmative proof of facts** showing lack of jurisdiction is required of one attacking jurisdiction of court because of nonresidence of plaintiff and failure to file affidavit of publication. 121Kan206, 246P980.

176–69½–New. The decree is presumptive evidence of facts essential to its jurisdiction. 204 Iowa82, 214NW602.

176–69¼–New. Presumption of court's jurisdiction may be overcome by showing that neither party to the action was a resident in the county of venue. 204 Iowa82, 214NW602.

176–72½–New. **"The courts will not look with favor** upon the application of parties who desire to avoid the binding force of a divorce decree for some personal benefit to themselves." TexCivA 286SW749, 756.

176–73 141 Okl 105, 283P1017. See also 90Fla197, 105S814; 284Pa346, 131A 244.

176–74 93Fla709, 112S622.

176–75 93Fla709, 112S622; 49Nev18, 234P688; TexCivA 286SW749.

176–79 33Ariz367, 265P87, 61ALR1264 (on statutory grounds); Ariz 291P993;

156Md10, 142A510. But see **Va** 153SE 879. [a] **Husband's suit after decree for wife.**–178Minn1, 226NW412.

176–80 218Ky370, 291SW706; 34 OhA 483, 171NE350; 188Wis151, 205NW829.

176–80½–New. Judgment denying divorce on the ground of extreme cruelty is no bar to an action for divorce on the ground of desertion. 70Utah274, 259P925.

177–87 142Miss832, 108S161; 5PaDist &Co 23. [b] (2) Complainant, seeking maintenance from husband, cannot nullify res judicata rule by changing character of relief sought from that of decree of divorce a mensa et thoro to decree for maintenance, nor be held to question decree in former suit for divorce by collateral attack in subsequent suit for maintenance. 103NJEq214, 142 A898. [c] **Denial of absolute divorce for cruelty** does not bar subsequent action by wife for separate maintenance where she has legal cause for living apart from husband. 174Minn159, 218 NW559.

177–88 174Minn159, 218NW559; 222 AppDiv239, 225NYS737. [a] **Suit dismissed for lack of proof** is assumed to be on merits and res judicata in subsequent action for maintenance. 103 NJEq214, 142A898.

177–89 35 OhA189, 172NE413.

177–91 158La933, 105S18 (dismissal of suit for separation on ground of abandonment not res judicata in suit based on excesses, outrages, and defamation); 5PaDist&Co 23. But see 32 OhA487, 168NE223.

177–94 [c] **Rule is not applicable** where first suit for separation is on ground of abandonment in which absent spouse is summoned to return which is inconsistent with subsequent suit on grounds of excesses, outrages, and defamation. 158La933, 105S18.

177–95 172Ark918, 290SW951; 163La 20, 111S481; 142Miss832, 108S161. [b] **Particular instance of cruelty,** included within continuous course, though ground for divorce in previous action in which divorce was denied, is available in subsequent action. 100CalA584, 280P693.

178–96½–New. Former judgment adverse to plaintiff in action on ground of cruelty is not a bar to action on ground of desertion. 172Ark918, 290 SW951; Nev 243P817.

178–96⅓–New. Where defendant, in a suit for alienation of affections, had intervened in a prior divorce suit and denied adultery with plaintiff's wife, a divorce decree is res judicata on the issue of adultery, NJSup 135A63.

178–96¼–New. but such decree is not a bar to maintenance of the suit on the ground that defendant instigated the wife's desertion although the wife was awarded a divorce on the ground of the husband's desertion. NJSup 135 A63.

178–96½–New. Claim for support. Court of appeal's adjudication that refusal of the husband to have a religious ceremony performed did not justify the wife's refusal to live with him is no bar to a claim for support following the refusal of an offer to do so after such judgment. 248NY175, 161NE461.

178–96⅙–New. Dismissal of suit in which alimony was sought, where no proof was taken, is not a bar to the wife's subsequent suit in so far as recovery of alimony is concerned. 229Ky 353, 17SW(2d)204.

178–96½–New. Final judgment against complainant does not affect her right to bring action for cruelty occurring after interlocutory decree. CalA 285P860.

178–96⅙–New. Decree of divorce granted wife on ground of cruelty does not estop husband from suing wife's relatives for alienation of affections. Nebr 230NW669.

178–97 See also 153Va342, 149SE493. [a] (1) 156Tenn655, 4SW(2d)358. [c] **Plaintiff losing suit for divorce on ground of seven years' separation** need not wait seven years longer before bringing another suit on same ground. 163La20, 111S481.

178–99 172Ark918, 290SW951; 200Cal 310, 253P145; 338 Ill 583, 170NE664; 201 Iowa516, 207NW778; 264Mass549, 163NE177; MoA 14SW(2d)458; MoA 9 SW(2d)823; 49Nev18, 236P1097 (residence of plaintiff); 130Misc262, 223NYS 705; 50RI 129, 145A445; 156Tenn655, 4SW(2d)358; Va 153SE879; 145Wash 61, 258P856; 188Wis151, 205NW829.

178–1 35 OhA189, 172NE413.

178–2 178Ark513, 11SW(2d)1; 97CalA 558, 275P987; 42 Ida158, 243P655 (right to property not adjudicated). [a] 47RI 81, 129A830. [h] **Grounds of divorce not litigated.**–178Minn1, 226NW 412.

179–7 Mass 172NE335.

179–14 203Cal 61, 263P200; TexCivA 286SW749, 755 [citCJ].

179–15 TexCivA 286SW749, 755 [cit CJ].

179–19½–New. Finding that there was no issue born of the marriage does not affect the status or rights of one not a party to the action, 21 OhA222, 153NE 113.

179–19½–New. and does not determine his right of succession to estate of party to action, as an alleged child of the parties. 21 OhA222, 153NE113.

179–19¼–New. Where the correspondent denies adultery in the husband's cross petition for divorce interposed in the wife's suit for divorce on the ground of desertion, the decree is binding on the correspondent as to the issue of adultery but not as to issue of desertion. NJSup 135A63.

179–19⅓–New. Children are not concluded. 21 OhA222, 153NE113.

180–26 177Ark613, 7SW(2d)783; 99 Fla862, 127S851 (after time for appeal has elapsed); 150Md322, 133A110, 47 ALR467; 259Mass486, 156NE685, 52 ALR886, 146Miss849, 112S161, 52ALR 375; 114 Okl 279, 246P599; 132 Okl 45, 269P257 (judgment held final though complete operation is postponed).

180–28½–New. The judgment is res judicata only as to parties and privies. 209Ky127, 272SW419; 102NJL551, 133 A752.

180–28⅓–New. The entry of a final decree of divorce a vinculo terminates the jurisdiction of the court over the subject matter and parties, in respect of matters involved, except for enforcement or correction of the decree. 122 Or620, 260P206, 59ALR707.

180–28¼–New. A divorced husband is liable for services rendered to his divorced wife at his request. 1LaA576.

180–28⅕–New. Judgment of divorce implies affirmance of facts alleged in complaint. TexCommnA 26SW(2d)1054.

180–28⅙–New. Divorce decree obtained by wife after entering illegal marriage is not binding on legal husband as regards parentage of child. Wash 291P 1089.

180–30 8F(2d)490.

180–42 284Pa414, 131A236; 97PaSuper 429; SD 226NW725(4thcase) (agreement made in contemplation of divorce).

181–44 149Va584, 140SE670.

181–45 218Ky370, 291SW706; 150Md 322, 133A110, 47ALR467.

181–46 150Md322, 133A110, 47ALR467.

181–47 48Philippine53.

181–51½–New. Where divorce is denied, property rights are not affected. 149Va584, 140SE670.

181–51⅓–New. Decreeing as to property is an incident of granting a divorce, although not asked for in the pleadings. 149Va584, 140SE670.

181–51¼–New. Under statutes divorce operates as a bar to a claim of either party to property of the other in the absence of fraud. 137 Okl 148, 278P388.

181–53 Ark 31SW(2d)136; 122 Or620, 260P206, 59ALR707.

181–54½–New. After absolute divorce the wife has no interest in the husband's after-acquired property. 114 Okl 279, 246P599.

181–56 122 Or620, 260P206, 59ALR707.

182–64 3Cal 312; 22Cal 633; 31Cal 29; 101CalA195, 281P533; TexCivA 290SW 812.

182–65 259Mass486, 156NE685, 52ALR 886; 259Mass486, 156NE685, 52ALR 886; Mo 30SW(2d)49; 102NJEq367, 140A681; 125Misc851, 213NYS4; 221 AppDiv679, 225NYS87; 119 Or573, 250 P218, 250P763; 122 Or620, 260P206, 208 [citCJ], 59ALR707; 48RI 106, 135 A850; 160Tenn685, 28SW(2d)350; Vt 147A692. [b] **Partition.**–Mo 30SW(2d) 49. [c] **Where wife makes loan to husband secured by mortgage** on land held as tenants by entirety, and parties are subsequently divorced, wife is entitled to payment from husband's half of foreclosure sale proceeds. 102NJEq367, 140 A681. [d] **In Tennessee.**–160Tenn685, 28SW(2d)350.

182–66 7PaDist&Co 605; 9PaDist&Co 436. See also 10PaDist&Co 278.

182–66½–New. On death of divorced husband, wife takes title to land deeded to both with right of survivorship. 188 Wis160, 205NW817.

182–68½–New. Where wife's title becomes vested even though husband paid all consideration, her adultery and later divorce will not deprive her of her vested right. 125Misc851, 213NYS4.

182–68⅓–New. Separation judgment for cruel and inhuman treatment justifies the assumption that the wife was ousted from the residence, as regards the right to recover for use and occupancy. 129 Misc10, 220NYS469.

182–72 177Ark613, 7SW(2d)783; Utah 270P1089.

182–75 47RI 337, 133A243.

183–76 [a] **Second petition for removal of disabilities identical with first** is properly dismissed under plea of res judicata. 166Ga225, 142SE889.

183–76½–New. But remarriage before expiration of statutory time is no ground for refusal to grant divorce from such marriage. 200 Iowa162, 204NW 239.

183–82½–New. Statute prohibiting remarrying of parties to a divorce within one year declared to render marriage voidable and not void. 115Tex77, 273 SW795.

183–82⅓–New. Statute did not authorize insertion of injunctive order in divorce decree. 115Tex77, 273SW795.

183–82¼–New. Penalty under statute is annulment of marriage in a proper case and not punishment for contempt. 115 Tex77, 273SW795.

183–82⅕–New. Violation of order prohibiting divorced parties from remarriage, inserted in divorce decree void. 115Tex77, 273SW795.

183–82⅙–New. There is no principal of equity jurisprudence which would authorize a court trying a divorce case to prohibit the parties from marrying again for any period of time. 115Tex 77, 273SW795.

183–82½–New. Where verdict and statute prohibit remarriage of plaintiff, no valid marriage can be contracted until the disability is removed. 168Ga478, 148SE151.

183–81 128Misc1, 217NYS675.

183–83 See also 214Ala529, 108S573; 329 Ill 497, 160NE835; 128Misc1, 217 NYS675; 47RI 337, 133A243; WVa 153 SE293.

183–84 [a] **In Michigan.**–237Mich417, 212NW95.

183–85 316Mo 1310, 293SW414; 250NY 320, 165NE460; 223AppDiv19, 227NYS 345.

183–88 265Mass242, 163NE879. [e] **Divorce as to second marriage** cannot be obtained in state prohibiting such marriage where cause for divorce accrued there partly during disability period, even though foreign second marriage must be there recognized. 265 Mass242, 163NE879.

184–92 [a] (4) Under Gen. L. c 207 § 10, remarriage prohibited under Gen. L. c 208 § 24 is absolutely void. 264Mass 453, 162NE894.

185–97 34F(2d)284(2dcase); 151Wash 424, 276P294. [a] **Subsequent annulment of marriage to first husband** does not validate void marriage contracted by wife in violation of statute. 34F(2d) 284(2dcase).

185–1 69CalA660, 232P154 (interlocutory decree is inoperative to fix status of parties); 201Cal 36, 255P800; 148 Wash457, 269P821. [a] **Interlocutory decree dealing only with status** of parties became functus officio on death of

one of parties before final decree. 69 CalA660, 232P154. [b] **Interlocutory decrees of divorce do not operate retrospectively** so as to remove legal barrier existing at time parties entered into marital state, before expiration of one year from entry of interlocutory decree. 97CalA558, 275P987.

185-4 72CalA531, 237P782; 128Miscl, 217NYS675. [a] (3) It is public policy of state to permit remarriage during time allowed for appeal from judgment of divorce and thereafter if appeal is taken till right to divorce is finally determined. 76CalA481, 245P459.

185-5 69CalA660, 232P154 (parties may have or omit adjudication partially or wholly of property rights in interlocutory decree); 72CalA531, 237P782; 148Wash113, 268P159. [a] **As to property rights** interlocutory rights become final at expiration of time for attack by motion or appeal. 69CalA660, 232P154. [b] **Interlocutory decree dealing with property rights, not** violated in mode presented by law, becomes final, though one of the parties dies before final decree. 69CalA660, 232P154. [c] **Failure of interlocutory decree,** dealing with property rights, to incorporate contract between parties, does not prevent it from being conclusive, if not vacated on mode prescribed by law. 69 CalA660, 232P154.

185-6 Utah 270P1089. See also 48Nev 153, 238P402.

185-7 148Wash113, 268P159.

185-9 [b] **Subsequent matrimonial cohabitation** after judgment of separation does not render judgment nullity. 137 Misc658, 244NYS34.

185-10 214Ala219, 106S866; 9PaDist& Co 544.

185-12½-New. The wife's decree from bed and board may be amended under proper circumstances so as to grant absolute divorce on the husband's petition where reconciliation is hopeless. 237 Mich326, 211NW740.

185-12½-New. Failure to serve the prosecuting attorney with notice of such petition is irregular but does not deprive the court of jurisdiction to amend the decree which had been entered but not enrolled and no change as to custody of children was sought. 237Mich326, 211 NW740.

185-12¼-New. Whether, under a bill for divorce from bed and board, a decree of absolute divorce may be entered in some jurisdictions depends upon the statute under which the bill was filed. 237Mich326, 211NW740.

185-12½-New. Where neither party to a separation action establishes a right to a decree for separation, they are left as they were. 241NY446, 150NE511.

186-21 [b] **Petition for alimony made after final decree** cannot be effective as motion for new trial. 221MoA201, 299 SW840. [c] **Rules of evidence are not effected** where petition under statute for new hearing of divorce libel was heard before same justice who heard original case. 128Me148, 146A84. [d] **Petition for new trial made within eight months of granting of divorce** held too late for consideration. RI 147A798.

186-22 [c] (2) Motion to set aside judgment for divorce is not effective as motion for new trial where not filed within time latter motion should be filed. 311Mo 128, 277SW916.

186-23 136Misc656, 241NYS445; 230 AppDiv79, 243NYS344 (discretion as to retrial of all issues). [d] **Abuse of discretion** not shown. 168Ga272, 147SE 389. [e] **New trial may be granted on question of alimony** without disturbing judgment for divorce. MoA 218W(2d)2.

186-25½-New. In a proceeding under statute for a new hearing of divorce libel after a decree granting the husband a divorce for desertion, evidence of separation by mutual agreement was entitled to great weight. 128Me148, 146A84.

186-25¼-New. Petition under statute for a new hearing of divorce libel, on the grounds of fraud, accident, mistake, or misfortune, is in the nature of a petition for review. 128Me148, 146A84.

186-25⅓-New. A physician's testimony as to a wife's insanity prior to a decree granting the husband a divorce has been held admissible in connection with their testimony as to her condition, in proceedings for a new hearing. 128Me 148, 146A84.

186-25⅙-New. An allegation of a petition under statute for a new hearing of divorce libel, that the wife was unable to instruct her counsel intelligently and take the necessary measures to protect her rights at the time of the final hearing, put in issue her sanity. 128Me148, 146A84.

186-25½-New. A wife's sanity, having been determined by a divorce decree, was not open on a petition under statute for a new hearing, the question being one to be raised by exceptions. 128Me 148, 146A84.

186-25⅛-New. In proceedings under statute for a new hearing of divorce, evidence of separation by mutual agreement was admissible on the question of fraud in procuring the divorce. 128Me 148, 146A84.

186-26 168Ga552, 148SE395(2dcase) (insufficient ground); TexCivA 28SW (2d)309. [f] 162Ga326, 133SE860; SD 214NW846. [g] **In proceedings under statute for new hearing of divorce libel,** petitioner must show that justice failed because of fraud, accident, mistake, or misfortune. 128Me148, 146A84. [h] **Perjury committed by plaintiff in another proceeding** in another state affecting marital relations between parties is no ground for new trial. 135Misc350, 238NYS193.

186-30 163Ga31, 135SE409; TexCivA 272SW501.

186-34 RI 147A425(1stcase). [a] **Evidence that wife was not resident of state** is merely cumulative not material. 126 Misc797, 214NYS364.

187-37 234Mich657, 209NW147.

187-38½-New. Failure of jury to answer all issues warrants new trial. 136 Misc29, 239NYS98.

187-39 [c] (1) 211Ky207, 277SW243. (2) 208Ky690, 271SW1037; 211Ky207, 277SW243; 213Ky125, 280SW932; 214 Ky171, 283SW73; 215Ky278, 284SW 1071; 218Ky621, 291SW1017; 218Ky 672, 291SW1015; 224Ky398, 6SW(2d) 470; 227Ky96, 11SW(2d)998; 228Ky 580, 15SW(2d)415; 232Ky123, 22SW (2d)424. But see 233Ky134, 25SW(2d) 59. (3) 211Ky207, 277SW243; 213Ky 125, 280SW932. [e] (4) Court of appeals has power to review, affirm, or reverse order of common pleas court denying motion to vacate decree. 25 OhA 432, 158NE493. [f] (1) 50RI 278, 146A 626 (reviewable only on exceptions to decision). (4) Appeal is proper remedy to review decision denying motion to modify final decree of divorce. 48RI 195, 136A443. (5) Exceptions is not proper remedy to review decision denying motion to modify final decree of divorce. 48RI 195, 136A443. [g] **In New York.**-213AppDiv183, 210NYS515.

187-40 3Del 593, 140A697 (writ of error). [b] **In Rhode Island.**-48RI 426, 138A188.

187-43½-New. A correspondent in a divorce suit is not entitled to sue out a writ of error. 319 Ill 426, 150NE270.

187-43⅓-New. Defendant's remedy for improper exclusion of evidence in an action for divorce is by appeal. 130Misc 854, 225NYS404.

188-47 121 Okl 4, 246P1099 [citCJ].

188-48 128 Okl 242, 262P679. But see 208Cal 518, 282P503.

188-51 128 Okl 242, 262P679.

188-54½-New. Relief for failure to file or prosecute bill of exceptions is by petition, under Rhode Island statute. 47 RI 122, 130A861.

188-54⅓-New. A wife does not waive her right to appeal from a decree against her by accepting a sum of money and releasing her claims against her husband's property where the decree did not attempt to dispose of property. TexCivA 281SW1096.

188-54¼-New. Compulsory compliance with the decree has been held no waiver of the right to appeal. 203 Iowa 495, 211NW249.

188-54⅕-New. A wife separated from her husband, suing for partition and declaring judgment of separation to be final, has been held to have no right of appeal from judgment. 160La813, 107 S584.

188-57 243Mich406, 220NW812. [a] (1) 51Nev145, 271P336 (where court refused to quash summons). (3) 48RI 420, 138A179. (9) Utah 270P1089. (12) 213Ky125, 280SW932. (13) Judgment denying divorce. 94CalA664, 271P783. (14) Ruling of common pleas refusing to vacate judgment, in divorce action, on ground of lack of service on guardian of insane wife is within jurisdiction of court of appeals. 29 OhA76, 163NE 36. (15) Order refusing to vacate judgment for alimony. 29 OhA76, 163NE 36. (16) On appeal from judgment of divorce on cross-complaint, denial of plaintiff's motions for alimony pendente lite and expenses of appeal, made after filing notice of appeal, may be reviewed as supplemental proceedings following final judgment. 103Conn265, 130A126. (17) Order denying motion to set aside final decree of divorce. 99CalA501, 278 P1062. [b] (8) 213Ky125, 280SW932; 224Ky18, 4SW(2d)1106. (9) Orders denying motion to set aside decree. 215Ala434, 111S7. (10) Order overruling objection to jurisdiction and setting aside special appearance. 54ND86, 208NW846. (11) In Kentucky court of appeals cannot review judgment denying divorce. 224Ky300, 6SW(2d)244. (12) Judgment of divorce cannot be disturbed on appeal whatever reasons are assigned therefor by lower court. 229 Ky125, 16SW(2d)781. (13) Grant of divorce not subject to review. 229Ky 436, 17SW(2d)412. (14) Decree staying execution against body for contempt for failure to pay alimony, pending appeal. 50RI 326, 147A621, 66ALR214. (15) Judgment dismissing complaint. 87 Colo 173, 286P114(1stcase). (16) Other instances. 233Ky423, 25SW(2d)1013; 233Ky752, 26SW(2d)511. [c] **In California.**-81CalA414, 253P969. [d] **Where judgment entered in favor of husband** did not conform with agreement between parties, and wife did not acquiesce in such judgment, wife is entitled to a devolutive appeal. 168La309, 121S 877.

189-64½-New. A decision granting a limited divorce, when amended petition is asked for, is such an irregularity as to be a ground for review. 47RI 139, 131A551.

189-64⅓-New. A proceeding to modify a previous void decree is itself void and does not support an appeal. 217Ala142, 115S827.

189-73½-New. Where an allowance to plaintiff's attorneys was made direct to them eo nomine and was taxed against defendant as costs, the question as to the excessiveness of the allowance cannot be considered on an appeal to which they were not made parties. 213 Ky125, 280SW932.

189-74 206Cal 769, 276P573; 85Colo 65, 273P878(2dcase). [g] (1) 316Mo 1310, 293SW414. [i] 124 Okl 245, 255P 580. [j] **In Utah.**-270P1089. [k] **In Kansas.**-121Kan495, 247P650; 124Kan 642, 261P838. [l] **Extension of time.**-47RI 139, 131A551.

189-75 144 Okl 234, 291P94.

189-75½-New. Perfecting appeal in general. Until decree settling all matters involved has been made, proceedings for appeal need not be taken. 243 Mich406, 220NW812.

189-78 131 Okl 55, 267P842 (notice of intention to appeal). [e] **Failure to give notice within required time** is not excused by failure to receive written notice of entry of judgment. 208Cal 501, 282P385. [f] **Notice of intention to appeal** is required to be filed with clerk within prescribed time after judgment rendered, when appeal is taken by casemade. 124 Okl 245, 255P530.

189-81½-New. Pendency of appeal on demurrer in divorce suit does not preclude reference to determine allowance to wife pending trial. Ala 130S206.

190-83 115Nebr217, 212NW429.

190-87 115Nebr217, 212NW429. [a] 204 Iowa1312, 216NW693. [b] **Particular proceedings stayed.**-Mandatory in-

junction in divorce suit excluding plaintiff from dwelling occupied by spouse. 75CalA292, 242P741. [c] **Marital relations continue** till final determination of appeal. 75CalA292, 242P741; Nebr 212 NW429. [d] **Particular proceedings not stayed.**–75CalA292, 242P741.

190–88 See also 208Cal 676, 284P442.

190–90½–New. Allowance of two hundred and fifty dollars attorney's fees and fifty dollars costs, incident to defense of first appeal in divorce action on application for supersedeas, has been held reasonable. 99CalA658, 279P208 (1stcase).

190–91 124 Okl 245, 255P580.

190–93½–New. Defendant not at hearing who asks for preservation of the record and its proper certification waives any question as to its sufficiency. 204 Iowa82, 214NW602.

190–93¼–New. Entry on "clerk's docket" is unavailing against an order book entry. IndA 165NE442(1stcase).

190–94 256Mass97, 152NE691; 259Mass 26, 155NE658; 264Mass551, 163NE197; 221MoA1033, 295SW515. [b] 318Mo 476, 300SW455 (abstract held sufficient).

190–94½–New. Nor can it decide whether the trial judge abused his discretion in refusing rehearing when some of the testimony heard by him is not before it. 229Mich199, 200NW991.

191–96½–New. Absence of record prevents consideration of appeal where papers in transcript are not authenticated. 203Cal 541, 264P1095.

191–96¼–New. An appeal, in libel for divorce, from final decree, where there was no report of the evidence and no finding of material facts, stands on the same footing as an appeal from final decree in equity, is subject to the same principles as to disposition, and may be dismissed without prejudice. 264Mass 549, 163NE177.

191–97 [c] **Failure of appellant wife without means to retain counsel to appear in appellate court and file assignments of error or brief** will not debar court from reviewing evidence in record. 158La899, 105S6.

191–98 93Fla261, 111S637; 98Fla1196, 125S694. [a] 253Mass411, 149NE40.

191–99 107Conn484, 140A820; 3Del 593, 140A697 (failure to except to admission of evidence); Iowa 229NW700; 223Ky539, 4SW(2d)375; 233Ky752, 26 SW(2d)511; Mass 168NE168; 51Nev 285, 274P194 (good faith as to residence); 227AppDiv1, 236NYS544; 47 RI 114, 131A81. But see 177Ark374, 6 SW(2d)290; 197Wis159, 221NW733. [a] (4) Objection to amendment of bill for separate maintenance by adding prayer for divorce. 247Mich475, 226NW 227.

191–3½–New. On review of a decree denying plaintiff a divorce on grounds of nonsupport and extreme cruelty, the supreme court will not discuss cruelty where plaintiff testified her only complaint was nonsupport. 237Mich459, 212NW80.

191–3½–New. A motion for a new trial as a basis for review in the appellate court is made unnecessary where the trial court made an order dispensing with the motion and disposing of the case on the following day. 82Colo 278, 260P104.

191–3¼–New. Assignment of error, not based on exceptions filed in the lower court, may be dismissed without consideration, although the commonwealth is an interested party. 93PaSuper398.

191–3⅛–New. Where both parties prayed for divorce, wife to whom divorce was granted cannot predicate error thereon where she did not move to vacate decree. 130Kan81, 285P520.

191–4 MoA 7SW(2d)420. See also 264 Mass551, 163NE197. [b] **On appeal from final decree,** scope of review will be confined to matters intervening since rendition of interlocutory decree. 81 CalA414, 253P969. [c] **In absence of evidence and contract made basis of counterclaim from record,** judgment thereon will not be reversed because of undenied allegation in reply as to forfeiture provision. 223Ky539, 4SW(2d) 375. [d] **Matters reviewable on appeal from interlocutory decree** are not reviewable upon appeal from final decree. 101CalA736, 282P433. [e] **Mere concession of parties** will not allow supreme court to let decree of divorce stand, under its power of review. 153Wash328, 279P740.

191–5 104Conn412, 133A249.

192–8½–New. On appeal from a judgment of divorce on cross complaint, denial of plaintiff's motion for alimony pendente lite and expenses of appeal, made after filing notice of appeal, may be reviewed as supplemental proceedings following final judgment. 103 Conn265, 130A126.

192–8¼–New. An appeal from the main judgment denying separation does not bring up an alimony order. 161La121, 108S307.

192–8¼–New. Appeal from decree settling all matters involved brings to the appellate court all previous partial decrees adjudicating parts of the controversy. 243Mich406, 220NW812.

192–9 177Ark374, 6SW(2d)290; Mich 208NW428; 202 Iowa1311, 210NW431; 221MoA104, 289SW973; MoA 21SW (2d)915; 115Nebr217, 212NW429; 153 Wash1, 279P88. [b] **In Oregon.**–117 Or 319, 243P565. [c] **In Washington.**–153 Wash1, 279P88. [d] **Law does not contemplate trial de novo** where there was jury trial. 94PaSuper257.

192–9½–New. Merits of appeal will not be considered where the probate court was without jurisdiction. 253Mass411, 149NE40.

192–9¼–New. The supreme court has no jurisdiction of a wife's motion for allowance for defense pending appeal. 104Conn412, 133A249.

192–9¼–New. On appeal by defendant from only a part of the judgment, no other part may be reviewed by the appellate court. 81CalA414, 253P969 (appeal from allowance to wife).

192–10 128 Or683, 275P692(1stcase). [a] (2) Where wife did not file a cross-appeal from a decree denying divorce to either party, appellate court was not called upon to decide whether evidence adduced by appellee was sufficient to warrant a decree in her favor. Ark 272 SW643. [b] **Joinder of child sought to be declared illegitimate** cannot be complained of by plaintiff. 240NY268, 148 NE518.

192–12½–New. Defendant could not assign as error that he had been excluded from the court room during the trial where that was done on his counsel's suggestion. 32F(2d)421.

192–13 29Ariz398, 242P337 (estoppel to question jurisdiction of court to adjudicate validity of separation agreement); 42 IdaS21, 248P468 (error invited by appellant); Mass 168NE168; 240NY268, 148NE518; 197Wis140, 221 NW734.

192–16 29Ariz398, 242P337; 171Ark 477, 284SW537; 100CalA584, 280P693 (where evidence in action is not before appellate court); 324 Ill 207, 155NE28; 223Ky539, 4SW(2d)375; 152Miss476, 119S581; 51Nev62, 268P771; 198NC 669, 153SE163; TexCivA 285SW693; TexCivA 290SW889; TexCivA 24SW (2d)76 (recital in judgment that attorney was appointed to represent absent defendant). But see 214Ala112, 106S 602.

192–16½–New. Where a decree does not mention the date of desertion, the date alleged in the bill will be regarded as the date of desertion. 101NJEq682, 139A333.

192–19 81CalA406, 253P945.

192–19½–New. Where the court granted a divorce on one of two grounds alleged, its action amounted to refusal of petition on the other ground. 47RI 114, 131A81.

192–21 50RI 179, 146A478.

192–22 219Ky296, 292SW798; 23 OhA 271, 155NE145; TexCivA 29SW(2d) 868. [a] (1) 145Va85, 133SE756.

192–23 215Ala434, 111S7. [a] **Abuse of discretion.**–203Cal 433, 264P754.

192–25 129 Okl 301, 264P898; 37 Okl ACR438 (refusal to settle property rights); 38 OklACR99; 66Utah612, 245 P329; 153Wash1, 279P88 (ruling on motion for change of venue).

192–25½–New. First grant of a new trial will not be disturbed by the supreme court in the absence of abuse of discretion. 169Ga7, 149SE564.

193–26 177Ark374, 6SW(2d)290 (as to evidence considered); 107Conn484, 140 A820; 3Del 593, 140A697 (whether any ground for conclusions); Me 150A496; Md 148A264; Mass 171NE815; 39 Okl ACR303. [a] **Questions held to be for determination of trial court.**–(1) Whether grievous bodily injury or mental suffering was inflicted. 86CalA744, 261P 503.

193–27 MoA 28SW(2d)180 (appellate court makes its own findings of fact). [a] **Appellate court is required to consider all the evidence** and express independent conclusions thereon in absence of jury trial. 97PaSuper70.

193–29 MoA 118SW(2d)1078.

193–30 28Hawaii217; Mass 171NE 815; 233Mich584, 207NW806; 219MoA 8, 267SW950; MoA 289SW16(2dcase); 221MoA104, 289SW973; MoA 299SW 61; MoA 300SW1046 (disregarding incompetent evidence); MoA 28SW(2d) 137; MoA 148SW(2d)519; MoA 28SW (2d)414; 23 OhA271, 155NE145; 116 Okl 188, 243P962; 128 Okl 101, 261P548; 128 Okl 147, 262P199; 137 Okl 12, 277P 943; 117 Or319, 243P565; 288Pa1, 136 A228; 88PaSuper1; 88PaSuper170; Tex CivA 292SW963. [a] (1) 28Hawaii217; MoA 256SW111; MoA 280SW430; MoA 299SW61; MoA 24SW(2d)171. (5) Findings supported by clear preponderance of evidence will not be disturbed. 66Utah366, 242P947. (6) When evidence is taken by special master, findings of chancellor on facts will not be disturbed unless clearly shown to be erroneous. 90Fla60, 105S123. (7) Findings supported by evidence will not be disturbed. 86CalA744, 261 P503. (8) Decision of trial court on question of cruel treatment is conclusive in absence of contrary evidence or findings. 264Mass551, 163NE197.

193–31½–New. The successful party in a divorce case is not required to support the decree by certificate of evidence or facts recited in the decree. 324 Ill 207, 155NE28.

193–31¼–New. Verdict cannot be set aside except in accordance with practice in common-law cases. 324 Ill 207, 155NE28.

193–32 55AppDC269, 4F(2d)936; 29 Ariz398, 242P337; 171Ark1187, 284SW 780; 177Ark374, 6SW(2d)290; 78CalA 282, 248P286; 78CalA326, 248P686; 81CalA406, 253P945; 82CalA313, 255P 767; 92CalA276, 268P401; 101CalA106, 281P512; 102CalA387, 282P1001; CalA 287P138; CalA 289P227; 86Colo 370, 282P250(1stcase); 102Conn755, 129A 275 (credibility of plaintiff for court); 107Conn484, 140A820; 91Fla706, 108S 671; 94Fla1001, 114S661; 30Hawaii 240; 45 Ida49, 260P693; 324 Ill 207, 155NE28; 208Ky585, 271SW664; 224 Ky398, 6SW(2d)470; 125Me397, 134A 373; 253Mass411, 149NE40; 254Mass 506, 150NE296; 171Minn85, 212NW 738; 219MoA8, 267SW950; MoA 28 SW(2d)414; 82Mont239, 266P410; 83 Mont37, 269P158; 48Nev220, 228P889; 50Nev234, 255P1014; 101NJEq318, 137 A892; 111 Okl 227, 239P134; 113 Okl 164, 240P62; 116 Okl 188, 243P962 (if judgment is not clearly against weight of evidence); 128 Okl 101, 261P548; 141 Okl 160, 285P30; 144 Okl 94, 290 P187; 37 OklACR438; 38 OklACR99; 115 Or520, 236P482, 238P1119; 123 Or 594, 262P1119; RI 132A4; RI 133A 241; SD 214NW846; SD 226NW755; TexCivA 272SW501; TexCivA 11SW (2d)533; TexCivA 20SW(2d)1073; Tex CivA 27SW(2d)268; 148Wash457, 269 P821; 148Wash692, 269P1037; 197 Wis140, 221NW734. See also MoA 2 SW(2d)180. [a] (1) 228Ky277, 14 SW(2d)1061; 219MoA8, 267SW950; 123 Or594, 262P1119; 35PortoRico 343. (2) 123 Or594, 262P1119; 150Wash685, 274P708. [b] 208Ky690, 271SW1037; 233Mich584, 207NW806; 219MoA8, 267 SW950; MoA 28SW(2d)398. [c] 202 Iowa1311, 210NW431. [g] (2) 123 Okl

295; 253P295. [h] **Under assignment of error** that evidence was insufficient to warrant divorce, only question is whether law was erroneously applied to facts. **TexCivA** 291SW964. [i] **When sustained by sufficient evidence,** judgment in action for divorce on ground of extreme cruelty will be sustained though evidence is conflicting. 123 **Okl** 295, 253P295. [j] **Findings conclusive,** unless they clearly fail to do justice between parties. **RI** 132A4. [k] **Findings against defendant on charges of cruelty** held conclusive. 78CalA326, 248P686.

194-33 8F(2d)909; 78CalA282, 248P286; 218Ky636, 291SW1044; 254Mass506, 150NE296; **TexCivA** 27SW(2d)311.

194-34 233Mich584, 207NW806; **MoA** 279SW189; **MoA** 7SW(2d)420; **MoA** 11SW(2d)1078; 128 **Okl** 101, 261P548.

194-36 120Kan545, 246P992; 229Ky21, 16SW(2d)485; 158La48, 103S438; **MoA** 14SW(2d)524; 85Mont446, 278P1009; 116 Oh524, 156NE908; 128 **Okl** 101, 261P548; 132 **Okl** 291, 270P833; 137 **Okl** 12, 277P943; 117 Or319, 243P565; 125 Or129, 265P1089; 90PaSuper146; **TexCivA** 2SW(2d)468; **TexCivA** 20SW(2d)1073 (decree not rendered upon full and satisfactory evidence); 101 WVa636, 133SE363 (finding held not against plain preponderance of evidence); 188Wis151, 205NW829 (where evidence consists largely of writings). [b] **Evidence must be full and satisfactory to appellate court.–TexCivA** 283SW641.

195-38½–New. Amount of damages awarded against correspondent, if based on evidence and not so excessive as to be shocking, will not be interfered with on appeal. **Sask** [1925] 3**DomLR** 370.

195-38⅓–New. But findings of fact on sharply conflicting evidence will not be disturbed. 172Ark647, 291SW90; 235Mich299, 209NW48.

195-38¼–New. Court of Appeals may weigh evidence in divorce suit. **Md** 148A264.

195-39 227Ky96, 11SW(2d)998; 49Nev375, 247P545, 47ALR569. See also **TexCivA** 27SW(2d)268. Contra 116 **Okl** 188, 243P962.

195-40 172Ark647, 291SW90; 177Ark374, 6SW(2d)290 (lack of proof of additional ground); 78CalA326, 248P686; 85CalA372, 259P453; **CalA** 286P747; 94Fla1001, 114S661; 166Ga38, 142SE158 (remarks of court); 169Ga832, 152SE103; 120Kan90, 242P124; 130Kan81, 285P520; 152Miss476, 119S581; **MoA** 6SW(2d)989; 49Nev375, 247P545, 47ALR569; 241NY446, 150NE511; 218AppDiv407, 218NYS454; 31 OhA59, 165NE585; 35 OhA142, 171NE864; 38 **Okl** ACR99; 93PaSuper398; 50RI 1, 144A437; **TexCivA** 276SW795; **TexCivA** 283SW328; **TexCivA** 299SW528; **TexCivA** 6SW(2d)403. [a] (1) 85CalA372, 259P453. (12) Failure to render judgment in regard to community property is not ground for reversal where statute provides that such property shall be held as tenants in common in absence of division. 29Ariz538, 243P402. (13) Where defendant alleged and showed readiness to return to husband and that she left him because of mistreatment, evidence to offer to live with husband after expiration of statutory desertion period is not reversible error. **Tex CivA** 283SW328. [g] (2) Decree of divorce in favor of wife should be reversed where sixteen-year old daughter was permitted to testify in her behalf and testimony of twelve and fifteen-year old sons in behalf of father was excluded. 231Mich347, 204NW117. (3) Refusal of court to permit wife to introduce any evidence to rebut evidence introduced in support of husband's cross action is ground for reversal of judgment for husband. 124 Or219, 263P891. [h] **Consideration of wife's letter to husband** on issue of prior abandonment held harmless error on contention that it was confidential communication. 241NY446, 150NE511.

195-42 88 **IndA**623, 165NE263; **Kan** 293P391; 232Mich677, 206NW523 (decree modified in respect to division of property); 235Mich315, 209NW58; 241 Mich80, 216NW386 (modification in respect of division of property); **MoA** 24SW(2d)171 (may make finding of fact de novo); 23 OhA271, 155NE145; 116 **Okl** 188, 243P962; 128 **Okl**101, 261P548; 118 Or396, 247P1118; 288Pa1, 136A228. See also 128 Or683, 275P692(1stcase). [a] (1) 117 **Okl** 63, 244P788. (3) Modification on agreement by appellee. **Tex CivA** 276SW795. [c] (1) 218Ky370, 291SW706; 231Ky477, 21SW(2d)812. (3) Court of appeals may revise circuit court's action on refusing alimony and awarding custody of child to husband. 218Ky370, 291SW706.

196-43 120Kan545, 246P992; **Vt** 151A504; 148Wash558, 269P835.

196-44 241 **IllA**7. [h] **Trial court may set aside interlocutory decree on proper motion,** correct clerical error in findings, and order judgment in accordance with corrected findings. 207Cal 60, 276P569. [i] **Proof of domicile.–Alta** [1930] 1**Dom LR**253.

196-45 128 **Okl** 147, 262P199.

196-46 130 **Okl** 42, 265P121.

196-48 99NJEq707, 134A189.

196-53 98Fla205, 122S566(2dcase); **MoA** 282SW153; **MoA** 17SW(2d)594; 128 **Okl**101, 261P548; 131 **Okl** 55, 267P842; 131 **Okl** 164, 268P282.

196-53½–New. Where the evidence is insufficient to justify a decree in favor of either the wife on her bill or the husband on his cross bill, a decree granting a divorce to the husband will be reversed and the bill and cross bill dismissed. 238Mich587, 214NW203.

196-53⅓–New. Where the complaint of a wife suing for divorce alleged that the parties had settled property rights and did not ask for alimony, and the decree granted none, the appellate court cannot adjust the property settlement. 131 Or117, 282P111.

197-60 Utah 292P214 (fee for filing brief in prosecuting appeal). [e] **Costs on appeal held not excessive.–CalA** 284P950.

197-61 154Md501, 140A717; 156Md607, 145A10; **Alta** [1928] 1**DomLR**227. See also 94CalA172, 270P995; 169Minn148, 210NW878. But see **Sask** [1929] 4**Dom LR**406.

197-66 **TexCivA** 299SW528; **TexCivA** 6SW(2d)403. [c] **Where court of errors and appeals did not decide question,** court of chancery could grant counsel fees for services rendered on appeal. 100NJEq532, 135A893.

197-69 123 Or203, 260P218; 124 Or415, 263P397.

197-71½–New. Court may refuse any allowance of costs and attorney's fees contracted in prior and voluntarily dismissed actions for divorce. 200 **Iowa** 1016, 205NW970.

197-71⅓–New. Successful party is entitled to an allowance for attorney's fees. 200 **Iowa**1016, 205NW970.

197-71¼–New. Where stipulations by parties as to alimony pendente lite and solicitor's fees were acted on in the trial, a final decree making an additional allowance of the fee to the wife's solicitor was held error. 90Fla824, 107S257.

197-71⅕–New. Public policy forbids reopening grounds of divorce after reconciliation to allow attorney's fees against the husband. 216AlaA581, 113S447, 59ALR348.

197-72 224Ky18, 4SW(2d)1106; 156 Md607, 145A10; **BC** [1930] 3**DomLR** 155; **Sask** [1929] 4**DomLR**406.

198-73 83Mont37, 269P158 (where plaintiff husband was awarded divorce).

198-74 [a] **TexCivA** 18SW(2d)399. [g] **Wife held not at fault to extent justifying denial of costs and attorney's fees.–214Ky397,** 283SW391. [h] **In Manitoba** in absence of exceptional circumstances wife's costs will not be taxed against husband after trial where she was unsuccessful. **Man** [1929] 4 **DomLR**700.

198-74½–New. Where a wife was awarded nearly half of her husband's property, including money sufficient to include costs and attorney's fees, and the husband was without substantial earning power, failure to award costs is not error. 70Utah274, 259P925.

198-76 But see **Iowa** 229NW761.

198-79 **BC** [1930] 3**DomLR**155. [b] (2) Entitled to taxable costs on granting of husband's motion to withdraw counterclaim charging adultery. 131 Misc315, 226NYS553.

198-81 **Mass** 172NE914. [f] **Fee paid to cover appearance of district attorney** is court cost to be taxed as disbursement in favor of successful divorce applicant. 120 Or244, 251P895.

198-82 47 **Ida**135, 273P1; 151Md152, 134A32; 154Md501, 140A717.

199-83 But see 124 Or415, 263P397.

199-87 10PaDist&Co 310.

199-89 [c] **Proceeding with divorce suit eleven days after order requiring payment of costs** in former annulment suit within ten days has been held not abuse of discretion. **Ala** 130S206.

200-97 **TexCivA** 299SW528.

200-99 But see 125Misc123, 210NYS257. [a] (3) Wife cannot recover attorney's fee where unsuccessful, but attorney may recover on quantum meruit. 170La813, 129S212(2dcase). (4) Fee of attorney for wife in divorce suit should be based on quantum meruit instead of percentage of value of community property. 169La591, 125S628. [d] (2) If wife can charge husband for attorney's fees in divorce proceedings against him, charge must create primary obligation for which independent action will lie against him. **SD** 228NW464. [g] **Attorney renders service to wife on faith of having husband pay for it, only on conditions authorizing allowance thereof,** among which is possibility of reconciliation. 214Ala573, 108S375, 45 **ALR**935. [h] **In Maryland.–154Md501,** 140A717.

200-2 163La660, 112S521.

200-3 214Ala573, 108S375, 45ALR935; **TexCivA** 5SW(2d)776. [b] **Evidence of probable cause and good faith.–TexCivA** 5SW(2d)776.

201-4 216Ala581, 113S447, 59ALR348; **IndA** 168NE492(2dcase). [d] **Wife entitled to reasonable attorney's fee** in defending action to modify decree as to custody of children. 233IllA488. [e] **Wife entitled to attorney's fees for services in appeal,** where husband appeals from modification decree. 233 IllA488. [f] **In Kentucky.–213Ky** 606, 281SW801.

201-4½–New. In some jurisdictions counsel fees cannot be taxed as costs. **TexCivA** 281SW598.

201-4⅓–New. An attorney cannot render services to the wife in a divorce suit on the faith of the husband's paying for it, except on conditions authorizing allowance thereof. 216Ala581, 113S447, 59ALR348.

201-4¼–New. Attorney's lien statute held inapplicable to a divorce suit when an allowance is made to the wife. 216 Ala581, 113S447, 59ALR348.

201-4⅕–New. The wife's attorney may not, in order to obtain a fee, continue the litigation and so obstruct reconciliation proceedings. 216Ala581, 113S447, 59ALR348.

201-4⅙–New. After the abandonment of a separation action by reconciliation of the parties, the wife's attorney was remitted to an action against her husband to recover the value of his services for the wife in litigation, notwithstanding an order directing the husband to pay counsel fees to the wife's attorney, made before reconciliation. 133Misc266, 231NYS329.

201-4⅐–New. A husband is not required to pay counsel fees upon his divorced wife's unsuccessful petition to have the decree annulled. 157Md429, 146A389.

201-7 216Ala581, 113S447, 59ALR348. See also **TexCivA** 4SW(2d)296.

201-8½–New. Ordering the wife, without independent means, to pay an additional fee to her solicitor has been held erroneous. 154Md501, 140A717.

201-9 [c] **In New Jersey.–99NJEq470,** 134A518. [d] **Grantng of counsel** by court is discretionary. 99NJEq470, 134A518. [e] **Privilege of counsel** once granted may be revoked. 99NJEq470, 134A518. [f] **Petition for counsel** should be referred to master in chan-

cery for proper investigation. 99NJEq 470, 134A518.

201-10 170Ga349, 153SE11; LaA 130 S634 (alimony is not debt); 151Md644, 135A841, 50ALR232; SD 228NW464. [a] 116 Or31, 236P751, 240P237. [g] **Statutory definition.**-160Ga200, 127SE 860. [h] **Alimony, in commonly accepted meaning,** is allowance to wife out of husband's earnings or income from his estate, and not estate itself. 144Va692, 130SE902. [i] **"Alimony" is continuing allotment of sums** payable at regular intervals for support of wife from year to year. 179Ark192, 14SW(2d)1100. [j] **"Alimony" is periodical allowance for wife's support** when she is separated or divorced from her husband and is in form of sum of money to be paid from time to time out of husband's property or wages, and continues during joint lives of husband and wife, or so long as they live separate and apart. 157Md166, 145A488. [k] **Other definitions.**-149Md590, 131A821; Md 149A 468; WVa 153SE150.

202-11 92Fla1081, 111S382.

202-13 SD 217NW192. [c] 92Fla1081, 111S382.

202-18 [a] 251NY366, 167NE501.

202-21 [g] (2) 243Mich406, 220NW812. (3) Alimony may be granted even though it may result in division of husband's estate. 243Mich406, 220NW812.

203-33 [a] **In so far as allowance of alimony after divorce under statute, is from existing estate** or charged on existing estate, including income from capital investment, it is more strictly in lieu of division of parties' estate, allowance passing in absolute right as permanent provision for wife's support. 218Ala667, 120S150.

203-34 Conn 152A302; 91Fla910, 108 S896; 92Fla1081, 111S382; 323 Ill 113, 153NE654; 254 IllA552; 124Kan455, 260P975; 241Mich679, 217NW924 (alimony is substitute for common-law right of marital support); RI 150A754; 65Utah605, 238P647, 648 [quotCJ]; 144 Va692, 130SE902. [a] See also 92Fla 1081, 111S382.

203-35 65Utah605, 238P647, 648 [quot CJ].

204-39 245Mich306, 222NW722; 81NH 509, 129A725; 24 OhNPNS241; 49RI 45, 139A662. See also 94Cal 35, 270P 463(2dcase).

204-42 But see 144Va692, 130SE902.

204-42½-New. Power to grant alimony is inherent in courts with jurisdiction in divorce proceedings. 178Minn75, 226 NW211.

204-44 MoA 218W(2d)2.

204-46 [b] (4) Should not be allowed defendant husband against whom decree is entered where he has never made contribution to plaintiff's property. 204 Iowa1122, 216NW629. [h] 55ND471, 214NW460.

205-50 215Ala280, 110S409; 214Ala 219, 106S866; 91Fla910, 108S896; 162 Ga358, 133SE875 (temporary alimony and counsel fees to afford wife means of contesting issues); 43 Ida395, 253P 622; 151Md644, 135A841, 50ALR232; 154Md501, 140A717; 153Md213, 138 A22; 191NC740, 133SE9; 55ND471, 214 NW460; 9PaDist&Co 406; WVa 153SE 493; Ont [1925] 2DomLR880. [j] **Jurisdiction of local master.**-Sask [1925] 3DomLR552. [k] **Statute is remedial in nature,** affirmative in its terms, cumulative in effect, and does not conflict or abrogate common law. 191NC740, 133SE9. [l] **Order may be made** in action brought by husband against wife notwithstanding statute provides only for case where wife applies for divorce. 191NC740, 133SE9. [m] **Purpose of allowance** is to insure support of wife in order that she may prosecute or defend suit. 74CalA431, 240P1023.

206-56½-New. An interlocutory order for temporary alimony, in a divorce action, requiring the husband to make all payments and properly finance all arrearages on premises occupied by plaintiff wife, has been held in excess of the power of the court and a nullity, there being no statute vesting power in the court to compel a husband by interlocutory order to pay out money to conserve property rights or those of his wife. 245Mich306, 222NW722.

206-56½-New. The trial court is not bound to grant temporary alimony ex mero motu. 215Ala684, 112S218.

206-68 [a] (1) 214Ala321, 107S827; 217Ala176, 115S226; 220Ala409, 125S 669. (4) This statute is not germane to provisions relating to limited divorce. 214Ala219, 106S866. (5) Amount to be allowed as temporary alimony rests in discretion of trial court. 220Ala409, 125 S669.

206-69 74CalA431, 240P1023; 91Fla 910, 108S896; 92Fla1081, 111S382; 164Ga592, 139SE76; 164Ga704, 139SE 427; 165Ga118, 139SE811; 318Mo 476, 300SW455; MoA 287SW834; 55ND471, 214NW460; 7PaDist&Co 755; 89Pa Super566; 138SC1, 136SE25; SD 228 NW464; 136Wash241, 239P551. [c] **Judge** must find facts. 191NC740, 133 SE9.

207-70 91Fla910, 108S896; 136Wash 241, 239P551.

207-71 74CalA431, 240P1023; 165Ga 118, 139SE811; 230AppDiv66, 243NYS 217; 136Wash241, 239P551.

207-72 74CalA431; 240P1023; 164Ga 592, 139SE76.

208-73 72CalA90, 236P927. [b] **After reconciliation and abandonment of wife's suit for divorce,** there can be no need for alimony, and none should be granted. SD 228NW464.

208-74 199 Ind737, 164NE493 (period of time intervening between commencement of action and rendition of final judgment by trial court). [a] **After default,** action is still pending for purposes of alimony. 72CalA90, 236P927.

208-74½-New. Under statutes in some jurisdictions orders for alimony may be made at any time from commencement of the action until its final determination and expiration of the time for appeal. 72CalA90, 236P927.

208-74½-New. A claim to alimony pendente lite terminates on the death of the wife even though a divorce decree has been entered. 103NJEq203, 142A817.

208-75 170Ga341, 153SE10.

208-76 104Conn412, 133A249; 153Md 213, 138A22.

209-85 81CalA367, 253P954 (orders for alimony and counsel fees void); 170Ga 340, 153SE9. [a] 152Tenn287, 277SW 894, 42ALR1379. [c] **Prayer for alimony** must be ignored where only constructive service was made and no property impounded. 152Tenn287, 277SW 894, 42ALR1379.

209-87 MoA 256SW546.

209-95 217Ala176, 115S226; 99CalA 658, 279P208(1stcase) (order for temporary alimony is not cumulative where previous allowance for support had been made); 104Conn412, 133A249; 92Fla 1081, 111S382; 121Kan363, 245P1022, 46ALR1200; 154Md501, 140A717; 157 Miss425, 128S270; 318Mo 476, 300SW 455. See also 126Kan310, 312, 267P977 [citCJ]. [c] **Purpose of allowance** of alimony pending writ of error to United States supreme court is to enable wife to have such court pass upon federal questions. 220MoA484, 276SW84. [d] **Before perfection of appeal.**-220MoA484, 276SW84. [e] **Granting of writ of error to United States supreme court** is sufficient ground for allowance of alimony, and objections going to merits of appeal will not be sustained. 220MoA 484, 276SW84.

209-96 MoA 14SW(2d)486. [b] 220 MoA484, 276SW84. [d] **Decree of divorce granted in another state which is before United States supreme court on writ of error** will not prevent granting of alimony pending determination of case pending in United States supreme court on writ of error to review dismissal. 220MoA484, 276SW84.

209-2 165La145, 115S439.

209-3 165La145, 115S439.

210-6½-New. , or where the wife appeals from a decree dismissing her bill. 154Md501, 140A717.

210-7 72CalA90, 236P927 (after default entered). See also 126Kan310, 312, 267 P977 [citCJ].

210-9 104Conn412, 133A249; MoA 32 SW(2d)125 (after foreign decree dissolving marriage).

210-11½-New. **Future provision for wife thereafter is for permanent alimony,** not temporary support. 48RI 420, 138A179.

210-15 91Fla910, 108S896, 898 [citCJ]; 121Kan363, 245P1022, 46ALR1200; 48 RI 420, 138A179.

210-16 91Fla910, 108S896, 898 [citCJ]; 153Md213, 138A22.

211-20 But see 218AppDiv848, 218NYS 643.

211-22 171Ark241, 283SW984.

211-23 90Fla824, 107S257.

211-27½-New. Refusal to hear evidence, in defense of wife's application for alimony based on bona fide separation, held error. 170Ga294, 152SE581 (1stcase).

212-38 164Ga839, 139SE663 (dictum). [h] **Refusal to award temporary alimony** to enable wife to contest issue of validity of marriage held error. 162 Ga358, 133SE875.

214-53 18F(2d)823.

214-56 130Misc248, 223NYS789.

214-60 7PaDist&Co 755.

214-61 99CalA198, 278P456; 91Fla910, 108S896; Md 150A873; 318Mo 476, 300 SW455; SD 228NW464.

215-63 74CalA431, 240P1023.

215-64 99CalA198, 278P456.

215-69 91Fla910, 108S896.

216-70 91Fla910, 108S896.

216-73 220MoA484, 276SW84; 7Pa Dist&Co 755.

216-74½-New. Under statute court may make allowance out of husband's property. 24 OhNPNS241.

217-85 217Ala176, 115S226.

217-86 217Ala176, 115S226.

218-92 91Fla910, 108S896. **Erratum.**-"Tex.-(Civ. A.) 123SW91" should be "125SW91."

218-5½-New. , or that he had no "estate" within statute out of which allowance could be made, where he received a weekly salary. 162Ga42, 132 SE389.

218-5½-New. A wife who refused to have marital relations with her husband without showing an adequate excuse for such refusal has been held not entitled to temporary alimony. 225AppDiv886, 233NYS39.

218-6 See also 218AppDiv848, 218NYS 643.

218-9 169Ga593, 150SE827; MoA 17 SW(2d)381; 127Misc157, 215NYS325. See also 214Ala112, 106S602.

219-10 203Cal 406, 264P490, 491 [cit CJ]; 127Misc764, 217NYS3.

219-11 But see 127Misc764, 217NYS3.

219-13 213AppDiv183, 210NYS515 (where plaintiff had sued for amount due upon breach, thereby electing to affirm agreement and not to rescind, order for alimony pendente lite could not be made unless applied for after new breach).

219-16½-New. Validity cannot be determined on affidavits but only on careful inquiry and competent proof. 127 Misc157, 215NYS325.

220-25½-New. A judgment in a prior action for separate maintenance which has been paid does not bar an allowance of temporary alimony in a subsequent action by the husband for divorce. 74 CalA431, 240P1023.

220-29½-New. Offer must be bona fide to be given effect. 59 OntL501, [1927] 1DomLR94.

220-30 133Misc681, 233NYS268.

220-31 216Ala197, 112S756. But see 89PaSuper566.

220-32 217Ala176, 115S226.

220-35 [a] **Husband's living at wife's home** without her consent is not condonation warranting annulment of temporary alimony. 173Ark1111, 296SW26.

221-38 121Kan363, 245P1022, 1023 [citCJ], 46ALR1200; 129Misc302, 221 NYS202.

221-38½-New. An oral decision granting a wife separation from bed and board, in which the court expressly reserves the question of permanent alimony, does not, as matter of law, terminate an order for temporary alimony. 30Hawaii80.

221-38½-New. In such case an order for temporary alimony may properly be continued in effect until entry of final decree fixing the amount of permanent alimony. 30Hawaii80.

221-44 11PaDist&Co 483.

221-45 92Fla1081, 111S382. Contra

129Misc302, 221NYS202.

221-48 Contra 129Misc302, 221NYS202.

221-50 121Kan363, 245P1022, 1023 [quotCJ], 46ALR1200.

221-51 121Kan363, 245P1022, 1023 [quotCJ], 46ALR1200; 129Misc302, 221NYS202; 189NC805, 128SE329 (alimony pendente lite).

221-52 92Fla1081, 111S382.

222-56 189NC625, 127SE682, 683 [cit CJ].

222-57 189NC625, 127SE682.

222-60 99CalA198, 278P456; Md 150A 873; 138SC1, 136SE25.

223-61 48Nev153, 228P305, 238P402, 240P1115.

223-76 [d] 95PaSuper387.

224-78 130Misc248, 223NYS789.

224-83 [i] 138SC1, 136SE25. [j] Ala 129S3. [k] 169Ga580, 151SE14. [l] 74 CalA431, 240P1023; 89PaSuper566. [m] 160Ga618, 128SE902; 160Ga685, 128SE905; 164Ga704, 139SE427. [n] 216Ala197, 112S756; 164Ga592, 139SE 76. [hh] 48Nev153, 228P305, 238P402, 240P1115. [mm] **$300 per month** with use of house. 162Ga349, 133SE842. [nn] **$85 per month.**–161La716, 109S 398. [oo] **$150 per month.**–165Ga486, 141SE299 (in addition to $1,100 back alimony). [pp] **$225 per month.**–154Md 501, 140A717 (husband's annual income at least $6,000). [qq] **$1,000 per month.**–99CalA198, 278P456. [rr] **Other instances.**–230AppDiv66, 243NYS217.

225-84 [gg] **$100 a month.**–MoA 256 SW111 (husband's income $100 per month); [i] 189NC625, 127SE682 (husband's income as physician $1,050 a year).

225-85 92Fla1081, 111S382, 384 [cit CJ]; Ga 155SE31; 121Kan363, 245P 1022, 46ALR1200; 151Md644, 135A 841, 50ALR232. [e] **Husband's injury subsequent to award,** and loss of earnings, held no factor in reduction. 216 Ala197, 112S756.

225-86 92Fla1081, 111S382, 384 [citCJ]; 48RI 420, 138A179.

225-90½-New. The fact of the husband's default in, or resistance to, payment of arrears of alimony does not affect the power of the court to modify its former order, 92Fla1081, 111S382.

225-90⅓-New. nor require the court to refuse reduction otherwise proper, 92Fla 1081, 111S382.

225-90¼-New. though such are circumstances which may justify refusal of the reduction. 92Fla1081, 111 S382.

225-90⅕-New. A modifying decree supersedes a former decree. 48RI 420, 138A179.

225-90⅙-New. Allowance when due is like judgment for debt and may not be vacated or altered. 49RI 64, 139A667.

225-90⅐-New. Modification, after the wife has abandoned her suit for divorce and is living with her husband, is erroneous. SD 228NW464 (where real object of modification was to compel husband to pay wife's attorney's fees).

225-90⅛-New. and without jurisdiction. SD 228NW464.

225-90⅑-New. An order modifying an order for temporary alimony is a new order, and does not relate back to the situation as it existed when the original order was made. SD 228NW464.

226-92 135Misc264, 238NYS36.

226-94 92Fla1081, 111S382; 160Ga369, 127SE772 (evidence held to show voluntary cohabitation after order granting temporary alimony); 83Mont511, 273P638 (plaintiff's existing marriage to another); 137Misc419, 242NYS279. [a] 12PaDist&Co 740. [b] **Voluntary subsequent cohabitation** justifies vacating of decree for temporary alimony. 160 Ga369, 127SE772. [c] **Vacation** without hearing held error. 49RI 64, 139A667.

226-94½-New. , even though the original order was made by consent of the parties and pursuant to an agreement between them. 92Fla1081, 111S382.

226-2 161La716, 109S398.

226-2½-New. Ignorance of the contents of the petition is no ground where the citation is read to respondent. 49 RI 64, 139A667.

226-3 SD 217NW192.

226-4 50Philippine22; SD 217NW192.

226-7 215Ala280, 110S409; Ala 130S 677; 164Ga704, 139SE427; 43Ida395, 253P622; 153Md213, 138A22; 9PaDist &Co 406; RI 142A537; WVa 153SE493. [c] **"Suit money"** has been held to cover solicitor's fees and cost of divorce proceedings. 90Fla824, 107S257.

226-9 [c] 245IllA1. [f] **In Hawaii.**–30Hawaii61. [g] **In Pennsylvania.**–13 PaDist&Co 349.

226-10 [a] 214Ala573, 108S375, 45ALR 935.

226-11 104Conn152, 132A406; 162Ga 358, 133SE875; 43Ida395, 253P622; 200Ind56, 160NE345; 154Md501, 140A 717; TexCivA 281SW598.

227-12 245Mich306, 222NW722; 122 Or68, 256P389. See also 129Or111, 276 P267.

227-15 [b] 214Ala573, 108S375, 45ALR 935. [c] **Advance or payment of funds or expenses by wife.**–75CalA705, 243P 451.

227-17 214Ala112, 106S602; 216Ky669, 288SW291; 233Ky134, 25SW(2d)59; 136Wash241, 239P551. Contra Alta [1928] 3DomLR195. [c] **Such fees are considered temporary alimony.**–214Ala 112, 106S602. [d] **Traveling expenses to and from residence** out of state are allowable. 136Wash241, 239P551. [e] **In Alberta.**–[1930] 3DomLR152.

227-22 164Ga704, 139SE427; 324Ill 276, 155NE288; 153Md213, 138A22. [c] **Failure of wife to apply** is not waiver of right. Common-law right of wife to bind her husband by contract for necessaries continues till final decree is entered and will support independent action by her counsel against husband after decree in wife's favor has become final. 125Misc123, 210NYS257.

228-23½-New. A wife seeking a divorce from the bonds of matrimony is entitled to reasonable allowance for suit money although no provision was made therefor in a decree of divorce from bed and board. 108WVa104, 150SE377.

228-28 Mass 172NE914.

228-29½-New. A party guilty of collusion is not entitled to an allowance of alimony and solicitor's fees pendente lite. 93Fla709, 112S622.

228-31 But see 144Okl 94, 290P187.

228-32 See also 99Fla862, 127S851.

228-32½-New. A divorced wife is not entitled to a counsel fee to defend an appeal from an order awarding to her temporary custody of her children primarily for her own pleasure rather than for their interest. 252IllA607.

228-34 229AppDiv744, 241NYS434. But see 128Kan406, 278P33.

228-37 133Misc26, 231NYS33.

228-37½-New. Where the husband in a divorce action made payments of weekly alimony only after several motions to punish him for contempt, he is punishable by payment of an additional sum fixed as reasonable counsel fees of a motion to punish for contempt. 133Misc 26, 231NYS33.

228-37⅓-New. Court can order husband to place sum at wife's disposal to defray expenses on appeal from judgment finding husband guilty of contempt for disobeying order for support. 132Or556, 287P82.

228-39 220Ala409, 125S669; 171Ark 241, 283SW984; 74CalA431, 240P1023; CalA 284P950; 164Ga592, 139SE76; 164Ga704, 139SE427; 169Ga366, 150SE 167; 200Ind56, 160NE345; MoA 287 SW834; MoA 299SW61; 189NC625, 127 SE682; 120Or439, 251P303; 122Or68, 256P389; 129Or402, 275P915; 13Pa Dist&Co 349; 138SC1, 136SE25; 136 Wash241, 239P551; 106WVa370, 145SE 643. [a] **Necessity for allowance shown.**–74CalA431, 240P1023.

229-40 98CalA203, 276P627; 229Ky 353, 17SW(2d)204.

229-41 74CalA431, 240P1023; CalA 284 P950; 189NC625, 127SE682; 120Or439, 251P303; 136Wash241, 239P551.

229-42 74CalA431, 240P1023; 104Conn 412, 133A249, 251 [citCJ].

229-43 89CalA177, 264P573; 90Fla824, 107S257, 259 [citCJ]; 223AppDiv19, 227NYS345.

229-49 Minn 232NW793; 83Mont37, 269P158.

229-53 171Ark241, 283SW984.

229-54 171Ark241, 283SW984.

230-55 171Ark241, 283SW984.

230-56 108WVa104, 150SE377.

230-56½-New. The matter of suit money need not be finally determined by a decree awarding a divorce from bed and board. 108WVa104, 150SE377.

230-57 [c] **Allowance where trial only five days off** is unwarranted where no showing of necessity is made. 99CalA 198, 278P456.

230-58½-New. A claim to counsel fees and costs terminates on the death of the wife even though a divorce decree has already been entered. 103NJEq203, 142 A817.

230-60 160La708, 107S499; 122Okl 266, 254P722.

231-73 47Ida135, 273P1.

231-79 214AppDiv785, 211NYS193; 138Misc298, 244NYS597; 132Okl 45, 269P257 (separate judgment for counsel fees at subsequent term held void); 129Or111, 276P267.

231-81½-New. Counsel fees may be awarded to a wife to resist a motion by the husband to modify a decree in relation to custody and support of children although the time to appeal from the decree has expired. 68CalA 725, 230P209.

231-82 But see 46Ida418, 267P1076 (void order setting aside judgment after expiration of time allowed therefor).

231-85 28Hawaii487.

231-87 214Ky566, 283SW1031. But see 200Ind56, 160NE345.

232-88 28Hawaii487. [a] **Right of attorney to compensation is limited** to services rendered before notice of reconciliation. 214Ala573, 108S375, 378, 45 ALR935 [citCJ]. [b] **Public policy forbids reopening of grounds of divorce after reconciliation** for purpose of allowing counsel fees. 214Ala573, 108S375, 45ALR935.

232-89½-New. Where a husband's suit is dismissed at the request of both parties and it appears that the wife is a bigamist and is living with her pretended second husband, the wife's attorneys will not be allowed counsel fees for past services. 153Miss889, 122S194.

232-92 104Conn412, 133A249; 92Fla 1081, 111S382; 233IllA488; 121Kan 363, 245P1022, 46ALR1200; 151Md152, 134A32; 156Md607, 145A10; 157Miss 425, 128S270; NJ 145A3(istcase). [a] (1) 233IllA488; 48Nev239, 229P1, 35 ALR1096 (appellate court cannot allow expenses of depositions in trial court). [b] 128Or622, 275P673 (allowance of $500 held proper). [f] **Wife's actual need** is basis of her right to counsel fees on appeal from decree of divorce against her. 48Nev205, 228P 615, 239P801 (affidavits held insufficient to justify allowance).

232-93 Contra 233IllA488.

232-95 104Conn152, 132A406.

233-96 177Ark790, 8SW(2d)437.

233-99 229Ky353, 17SW(2d)204 (appeal from insufficient allowance for alimony and counsel fees). But see 18 F(2d)805.

233-1 But see 18F(2d)805.

233-8 43Ida395, 253P622. [c] **Court will not hear husband's appeal** while he is in default of order of lower court to pay alimony. 43Ida395, 253P622. [d] **Appellate court may order payment only when necessary** to complete exercise of appellate jurisdiction. 43Ida 395, 253P622.

233-9 MoA 287SW829.

233-12 214Ala573, 108S375, 45ALR935; 90Fla824, 107S257, 259 [citCJ]; 324Ill 276, 155NE288; 217AppDiv473, 217NYS 221; 133Misc266, 231NYS329; Utah 271 P225.

233-14 217AppDiv473, 217NYS221.

233-21 95CalA304, 272P752; 96CalA 765, 274P990; 30Hawaii61.

233-23 223AppDiv19, 227NYS345.

234-24 83Mont37, 269P158 (necessity must be shown).

234-32 [d] **Evidence held sufficient** to entitle wife to attorney's fees. 169Ga 586, 151SE22.

235-42 [g] **Refusal of counsel fees** to enable wife to contest issue of validity of marriage held error. 162Ga358, 133SE875.

235-43 See also 16F(2d)509.

235-47 48Nev205, 228P615, 239P801.

235-49 13**PaDist&Co** 349. [c] 13**PaDist &Co** 349.
235-50 142 **Okl** 302. 286**P**900 (where divorce granted for fault of husband).
236-53 99**CalA**198, 278**P**456.
236-59 See also 92**CalA**365, 267**P**1090.
236-60 142 **Okl** 302. 286**P**900.
236-62 180**Ark**235, 21**SW (2d)**157.
236-63 48**Nev**239, 229**P**1, 35**ALR**1096.
236-65 48**Nev**239, 229**P**1, 35**ALR**1096.
237-74 But see 144 **Okl** 160, 290**P**179.
237-79½-New. Where a wife, suing for divorce, failed to move for alimony or counsel fees, or alleged that it was impossible to obtain personal service of process on defendant, so that defendant was given no opportunity to be heard, allowance in an interlocutory decree of a sum of money to the wife for attorney's fees was unauthorized. 95 **CalA**304, 272**P**752.
237-79½-New. A wife who refused to have marital relations with her husband without showing an adequate excuse for such refusal has been held not entitled to counsel fees. 225**AppDiv**886, 233**NYS** 39.
237-79¼-New. Where husband received weekly salary, award of attorney's fees payable in monthly installments is proper as against contention that husband had no estate within statute out of which allowance could be made. 162 **Ga**42, 132**SE**389.
231-81½-New. Counsel fees may be fore hearing on contempt order for failure to pay does not bar allowance of attorney's fees for appearance of plaintiff's counsel at hearing. **CalA** 284**P**950.
237-79¼-New. Where a husband has no property out of which an attorney's fee allowed the wife could be collected except future earnings, the attorney's fee is not allowed. 153**Wash**328, 279**P**740.
237-81 218**AppDiv**848, 218**NYS**643.
237-83 **MoA** 274**SW**530; 219**AppDiv** 740, 220**NYS**229; 127**Misc**157, 215**NYS** 325; 127**Misc**764, 217**NYS**3. See also 204 **Iowa**423, 214**NW**483. But see 214 **Ala**112, 106**S**602; 151**Md**196, 134**A**136.
237-83½-New. A judgment in a prior action for separate maintenance which has been paid does not bar an allowance of counsel fees in a subsequent action by the husband for divorce. 74**CalA**431, 240**P**1023.
238-90 **MoA** 16**SW**646.
238-92 99**Vt**356, 133**A**248.
238-93 38 **OklACR**678.
238-95 151**Md**152, 134**A**32; **TexCivA** 299**SW**528.
238-98 18**F(2d)**805.
238-1 136**Wash**241, 239**P**551. [a] 51 **Nev**339, 276**P**14; 136**Wash**241, 239**P**551.
238-8 200 **Iowa**1016, 205**NW**970.
239-15 46 **Ida**588, 269**P**589 (court is not bound by rules of evidence applicable to contesting litigants).
239-18 220**Ala**409, 125**S**669 (good faith of proceeding and probability of success is to be considered).
240-19 218**Ky**9, 290**SW**725.
240-22 [a] 218**Ky**9, 290**SW**725. [d] 122 **Or**68, 256**P**389. [l] **$1,420.–MoA** 256**SW** 111. [m] **$5,000.**–47 **Ida**135, 273**P**1 (reduced to $2,000). [n] **$1,500.–Ala** 129**S** 3 (reduced to $1,000); 102**NJEq**249, 140 **A**303 (reduced to $500).
240-23 98**CalA**203, 276**P**627 ($300). [b] 142 **Okl** 302, 286**P**900 (counsel fees and expenses). [d] 200 **Ind**56, 160**NE**345; 154**Md**501, 140**A**717 (counsel fees where husband's annual income is at least $6,000); 149**Wash**448, 271**P**72. [f] **CalA** 284**P**950; 229**Ky**436, 17**SW (2d)**412; 231**Ky**726, 22**SW (2d)**122 (1stcase). [i] 162**Ga**349, 133**SE**842 (husband's estimate annual earnings $10,000); 226**Ky** 264, 10**SW (2d)**821; **MoA** 28**SW (2d)**398. [k] 169**Ga**580, 151**SE**14; 89**PaSuper**566. [m] 211**Ky**7, 276**SW**967; 168**La**632, 122 **S**888; 138**SC**1, 136**SE**25. [n] 160**Ga**618, 128**SE**902; 165**Ga**486, 141**SE**299; 215 **Ky**598, 284**SW**1113; 217**Ky**337, 289**SW** 259; 124 **Or**480, 264**P**842 (counsel fee). [o] 164**Ga**592, 139**SE**76; 164**Ga**704, 139 **SE**427; 81**NH**509, 129**A**725. [q] 124 **Or** 480, 264**P**842 (suit money). [y] 165**La** 283, 115**S**489. [cc] **$75.**–160**Ga**685, 128 **SE**905; 219**Ky**787, 294**SW**493. [dd] **$1,500.**–18**F(2d)**805; 99**CalA**198, 278**P**456 (on appeal together with $200 costs); 218**Ky**621, 291**SW**1017. [ee] **$30.**–165 **Ga**208, 140**SE**382. [ff] **$10,000.**–223**App Div**19, 227**NYS**345. [gg] **$7,500.**–99**CalA** 198, 278**P**456. [hh] **$200.**–229**Ky**353, 17 **SW (2d)**204. [ii] **$400.–Iowa** 228**NW** 290. [jj] **$12,000.–Ind** 168**NE**881.
241-24 [d] 214**Ky**577, 283**SW**1061. [g] 229**Ky**353, 17**SW (2d)**204. [h] 229**Ky** 125, 16**SW (2d)**781. [j] 245**NYS**439. [k] 220**Ala**57, 124**S**107. [l] **$250.**–46 **Ida** 588, 269**P**589; 210**Ky**89, 275**SW**26 (in wife's suit where husband was granted divorce); 160**La**708, 107**S**499. [m] **$2,500.**–135 **Okl** 87, 274**P**19.
241-25 [e] 154**Md**501, 140**A**717. [g] **$250.–MoA** 298**SW**1058.
241-27 214**Ala**573, 108**S**375, 45**ALR**935.
241-27½-New. An order for reference to determine the propriety of granting an allowance for counsel fees has been held not an adjudication of a right thereto. 214**Ala**573, 108**S**375, 45**ALR** 935.
241-28 220**Ala**409, 125**S**669 (matters to be considered); 131**Misc**278, 227**NYS** 456.
241-29 213**Ala**114, 104**S**27 (allowance pendente lite reduced on proof of wife's misconduct); 171**Ark**241, 283**SW**984.
241-30 135**Misc**264, 238**NYS**36.
242-33 323 **Ill** 608, 154**NE**405. [a] **Wife held not entitled to additional solicitor's fees** where she was more able than her husband to pay them. 323 **Ill** 608, 154**NE**405.
242-36½-New. An order modifying an order for counsel fees is a new order, and does not relate back to the situation as it existed when the original order was made. **SD** 228**NW**464.
242-42½-New. Reconciliation of parties after interlocutory decree does not make void a note given in settlement of wife's attorney's fees. 135**Wash**17, 236 **P**562.
242-46 [a] **Alimony in addition to share of community property** may be allowed for wife's support during her life or for shorter period. 79**CalA**734, 251**P** 218.
242-48 151**Md**196, 134**A**136.
242-51 [a] **Marriage creates marital rights in wife,** basis of claim for maintenance, support, and alimony. 211**Ky**799, 278**SW**121.
242-55½-New. Procedure to obtain alimony is equitable in nature and ancillary to the original proceeding for divorce. 48**RI** 420, 138**A**179.
242-55½-New. Respondent who has secured an order for support cannot secure an order for alimony. 6**PaDist&Co** 120.
242-55¼-New. Alimony is an incident to the divorce and properly goes with the divorce decree. 229**Ky**353, 17**SW (2d)** 204.
242-55½-New. Proper provision in respect to alimony under statute depends upon facts and circumstances involved in each case. **Iowa** 229**NW**689.
242-56 241**Mich**679, 217**NW**924. [d] **In Alabama.**–214**Ala**321, 107**S**827.
242-57 331 **Ill** 413, 163**NE**323; 213**Ky** 100, 280**SW**477; 221**Ky**744, 299**SW**723; 224**Ky**234, 5**SW (2d)**1041; 149**Md**590, 131**A**821; 121 **Oh**188, 167**NE**684, 64**ALR** 1384; 123 **Okl** 9, 252**P**837. [b] **In Kentucky.**–209**Ky**585, 273**SW**438.
243-58 48**RI** 420, 138**A**179.
243-59 243**Mich**406, 220**NW**812; 98 **NJEq**454, 131**A**304. [d] **In Louisiana.**–158**La**57, 103**S**441. [e] **In Washington.**–153**Wash**610, 278**P**223.
243-60 224**Ky**398, 6**SW (2d)**470; 231**Ky** 829, 22**SW (2d)**251; 243**Mich**406, 220**NW** 812; 156**Tenn**619, 4**SW (2d)**345; 65**Utah** 605, 238**P**647. [e] **In Kentucky.**–209**Ky** 257, 272**SW**736.
243-62 218**Ky**777, 292**SW**343. But see 232**Ky**123, 22**SW (2d)**424; 124 **Or**609, 265**P**1116 (2dcase).
243-66½-New. Where, after a limited divorce is granted to the wife, the parties agree to a lump sum paid in satisfaction of future payments awarded in such action, such settlement does not withdraw statutory duty of the court to award alimony on a subsequent absolute divorce. 98**NJEq**454, 131**A**304.
243-66½-New. Such award to the husband is not authorized by the fact that an action to dissolve partnership between the parties was tried with the divorce action. 177**Minn**189, 224**NW**852.
243-66¼-New. Cause of action for alimony terminates at the death of the wife before completion of a final hearing on that cause, notwithstanding a decree for divorce has been entered. 103**NJEq**203, 142**A**817.
243-66½-New. Award of alimony to husband is not authorized upon the court's granting a divorce to the wife on the ground of cruel and inhuman treatment. 177**Minn**189, 224**NW**852.
243-66½-New. Judgment for alimony to a wife is connected with the decree for divorce only as such decree furnishes the basis for the jurisdiction of the court to allow it. **MoA** 21**SW (2d)**2.
243-69 153**Va**342, 149**SE**493 (error to grant alimony where bill and cross bill in wife's divorce suit are dismissed).
244-70 140**Miss**340, 105**S**753, 42**ALR** 1525.
244-71 68**CalA**725, 230**P**209; 74**CalA** 101, 239**P**383; 100**CalA**28, 279**P**458; 221**Ky**744, 299**SW**723; 229**Ky**436, 17**SW (2d)**412. [b] (2) Refusal of husband to provide reasonable and suitable home, and circumstances showing unpleasant and unhappy marital relation of parties. 100**CalA**28, 279**P**458.
244-73 214**Ky**566, 283**SW**1031; 129 **Misc**616, 221**NYS**493.
244-74 214**Ky**566, 283**SW**1031.
244-78 169**Minn**156, 210**NW**885.
244-79 200 **Iowa**910, 205**NW**785.
244-81 68**CalA**701, 230**P**214; 210**Ky**89, 275**SW**26; 213**Ky**606, 281**SW**801; **MoA** 21**SW (2d)**2; 82**Mont**239, 266**P**410; 144 **Okl** 160, 290**P**179; **RI** 150**A**754 (consent to entry of decree providing for payments held not to establish power to award alimony); **TexCivA** 283**SW**564.
245-82 218**Ky**672, 291**SW**1015; 224**Ky** 18, 4**SW (2d)**1106; 233**Ky**134, 25**SW (2d)** 59.
245-84 220**Ala**57, 124**S**107; 175**Ark**330, 299**SW**38; 179**Ark**738, 17**SW (2d)**897; 170**Ga**349, 153**SE**11; 169**Minn**156, 210 **NW**885; **Miss** 130**S**688. [d] 94**Fla**1001, 114**S**661.
245-85 170**La**473, 128**S**281.
245-90 83**Mont**37, 269**P**158.
246-94 152**Miss**476, 119**S**581.
246-96 94**Fla**1001, 114**S**661.
246-3 But see 164**La**293, 113**S**852 (alimony held not allowable under Louisiana seven-year statute).
246-7 **NJ** 151**A**749.
246-8½-New. In some jurisdictions alimony cannot be awarded where a divorce is denied. 140**Miss**340, 105**S**753, 42**ALR**1525.
246-10 But see 103**NJEq**203, 142**A**817.
246-11½-New. An independent action seeking to set aside a decree of divorce and asking judgment for alimony is equivalent to a motion in the original action and gives the court jurisdiction to grant alimony. 217**Ky**212, 291**SW**42.
246-11½-New. Where a wife's action for alimony fails on the ground that she never became defendant's wife, she cannot recover on quantum meruit for services rendered. **Alta** [1927] 2**DomLR**979, [1927] 2**WestWkly**253.
247-12 149**Md**590, 131**A**821.
247-13½-New. Separation. A judgment of separation in wife's favor does not relieve husband of legal duty to contribute to the support of his wife, notwithstanding she has property of her own. 125**Misc**451, 211**NYS**192.
247-19 99**Fla**862, 127**S**851; 168**Ga**573, 148**SE**386 (1stcase); 221**MoA**201, 299**SW** 840. But see 128**Misc**425, 219**NYS**341; 152**Tenn**287, 277**SW**894, 42**ALR**1379. [e] **Wife obtaining divorce** on constructive service only loses her right to alimony. 152**Tenn**287, 277**SW**894, 42**ALR** 1379. [f] **Decree based on service by publication** bars proceedings for alimony by independent action or modification of decree. 202 **Iowa**489, 210**NW**545.
247-20 152**Tenn**287, 277**SW**894, 42**ALR** 1379 (petition for alimony after unenforceable decree held not original bill). [a] (2) Wife sued for divorce under constructive service may proceed for first time to obtain alimony after final judgment granting divorce. 217**Ky**212, 291**SW**42.
247-22 201 **Iowa**516, 207**NW**778.

247-24 Ala 130S677; 128 Or305, 274P 507.

247-24½-New. An agreement for alimony inadvertently omitted from the decree may be subsequently entered on proper application. 200 Iowa415, 203 NW26.

248-26 211Ky799, 278SW121; 222MoA 825, 10SW(2d)344.

248-29 An action against a former husband for alimony and maintenance of minor children may be maintained by a former wife who has obtained a decree of divorce from him on constructive service in a court of another state having jurisdiction over neither his person nor property. 114 Okl 279, 246P 599.

248-36 202 Iowa489, 210NW545, 547 [citCJ]; 128Misc425, 219NYS341; 245 NYS237. [a] (2) Where decree of divorce is rendered on service by publication, plaintiff may not resurrect proceeding for purpose of allowance of alimony notwithstanding assumed reservation of question. 202 Iowa489, 210 NW545.

248-39 162La229, 110S332.

249-43 Ala 130S677; 79CalA734, 251P 218; Ind 168NE881; 200 Iowa910, 205 NW785 (award to guilty party); 200 Iowa1016, 205NW970 (not mandatory on court to grant alimony); 121Kan 495, 247P650; 124Kan461, 260P618; 126Kan760, 271P275; 127Kan624, 274P 247; 130Kan81, 285P520; 170La473, 128S281; 247Mich234, 225NW499; 221 MoA944, 288SW794; 81NH509, 129A725 [citCJ]; 24 OhA342, 156NE237; 128 Or 162, 273P715; 65Utah605, 238P647, 648 [citCJ].

249-44 81NH509, 129A725, 727 [cit CJ]; 65Utah605, 238P647, 648 [citCJ].

249-45 81NH509, 129A725, 727 [citCJ]; 65Utah605, 238P647, 648 [citCJ].

249-46 162Ga7, 132SE228 (discretion not abused in denying alimony to wife); 86 IndA593, 159NE33 (refusal held abuse of discretion); 124Kan461, 260P 618; 81NH509, 129A725, 727 [citCJ]; 65Utah605, 238P647, 648 [citCJ].

249-48 229Ky353, 17SW(2d)204.

249-51½ 99Vt356, 133A248.

249-51½-New. Court may wholly deny any alimony to successful party in view of amount allowed on former decree. 200 Iowa1016, 205NW970.

249-51¼-New. Where the parties are both young and there are no children, the court may take into consideration the possibility and desirability of allowing the respective parties to establish a new and more congenial home. 80 CalA494, 251P943.

249-51⅓-New. Judgment in separation suit is not bar to granting of alimony in divorce action. 228AppDiv788, 239NYS 381.

250-57 323 Ill 608, 154NE405; 224Ky 398, 6SW(2d)470.

250-59 CalA 287P138.

250-63 [d] **Husband's agreement** not to seek repayment of moneys paid wife under judgment, and to dismiss appeal from judgment in return for wife's release of claims for her support and for custody of children, showed want of consideration on its face. 94Cal 35, 270 P463(2dcase).

250-69 95CalA690, 273P86; 98NJEq 454, 131A304; 137Misc8, 244NYS265; 141Wash62, 250P641.

251-70 220MoA1266, 290SW85; 284Pa 414, 131A236.

251-71 94CalA97, 270P732; 151Md196, 134A136.

251-73 [a] (1) See also 141Wash62, 250P641.

251-74 See also 141Wash62, 250P641.

251-75 99NJEq376, 132A603; 137Misc 8, 244NYS265. See also 95CalA690, 273 P86. [a] **Such agreement is binding till set aside,** and divorce judgment cannot grant alimony till agreement is set aside. 129Misc263, 221NYS249.

251-77½-New. A separation agreement made after a wife has willfully and without cause deserted her husband, in so far as it releases the husband from liability for support in consideration of stipulated payments, is a mere waiver by the wife of a right which she had forfeited for a consideration which the husband was under no obligation to pay. 29Ariz398, 242P337.

251-77¼-New. Agreement fixing sum after limited divorce. Where, after limited divorce, the parties agree to a lump sum paid in satisfaction of future payments awarded by the court, such settlement does not bar the court from granting alimony on a subsequent absolute divorce. 98NJEq454, 131A304.

251-77¼-New. The wife's retention of property, kept under agreement for her to keep it safely, may charge her with its value so as to bar a decree for alimony. 204 Iowa423, 214NW483.

251-81 Mass 165NE17.

251-84 174Ark517, 295SW963; CalA 289P645; 94Fla516, 114S371; 334 Ill 370, 166NE85; 154Md675, 141A387, 58 ALR634 (provision in decree held not permanent alimony so as to be alterable); 98NJEq230, 130A463; 130Misc 698, 225NYS431 (such agreements are generally adopted); 224AppDiv168, 230 NYS51; 128 Or305, 274P507; Va 153 SE879. [a] 334 Ill 370, 166NE85. [f] (1) 229AppDiv446, 243NYS21. (2) Words in stipulation of parties relating to alimony and upon which court bases decree are to be given ordinary meaning. 116 Or31, 236P751, 240P237. [k] **Agreement of wife to accept** five hundred dollars in lieu of distributive share, if she survived husband, has been held not to entitle her to such sum on divorce. 218Ky648, 291SW1032. [l] **In determining effect of decree embodying agreement bill,** answer and all other proceedings, including agreement filed, should be considered. 154Md675, 141A 387, 58ALR634.

252-4 Conn 152A302.

252-4½-New. That a divorce was granted for the husband's cruelty does not justify a disregard of his means and circumstances in awarding alimony. 80 CalA494, 251P943.

252-85 99NJEq376, 132A603; 224App Div168, 230NYS51; 48RI 420, 138A179.

252-86 94CalA97, 270P732; Mich 233 NW170. [e] **Burden of proof** that agreement is unfair rests on defendant. 98NJEq230, 130A463.

252-87 99NJEq461, 133A768.

252-88 89CalA177, 264P573. [a] **Right to relief in general.**—Where contract adjusting alimony payments to wife was not presented to court for ratification with application for judgment, her inadvertent omission in this regard may be disregarded. 224AppDiv168, 230 NYS51.

252-89 203Cal 406, 264P490; CalA 289 P645; Va 153SE879.

252-90 99NJEq461, 133A768; 224App Div168, 230NYS51 (agreement may be set aside).

252-91 203Cal 406, 264P490; 89CalA 177, 264P573; 230NYS51.

252-91½-New. In Virginia the court has authority in a divorce suit to approve agreements settling alimony and property rights, but may not enforce them. 144Va692, 130SE902.

252-91¼-New. Decree approving agreement for settlement of alimony and property rights is not a decree for alimony. 144Va692, 130SE902.

252-91¼-New. Circumstances may be such as to justify an award of interest on an agreed settlement of alimony long delayed by the wrong of defendant. 203 Iowa1218, 211NW705.

252-91½-New. Where the contract has been procured by fraud or coercion, the court may disregard it. 224AppDiv168, 230NYS51.

252-92 251Mich115, 230NW935.

252-95 99NJEq376, 132A603.

253-6 323 Ill 608, 154NE405; 86 IndA 593, 159NE33; 200 Iowa1016, 205NW 970; 204 Iowa550, 212NW569; 213Ky 100, 280SW477; 214Ky577, 283SW1061; 224Ky398, 6SW(2d)470 (not only criterion); 76Mont160, 248P864; 114 Okl 279, 246P599; 123 Okl 9, 252P837; 122 Okl 266, 254P722; 38 OklACR678; 65 Utah605, 238P647. [d] **Except for cash surrender value** insurance policy cannot be counted. Ala 129S3. [e] **Instruction to consider source of property** and condition of husband held proper. 170Ga 349, 153SE11. [f] **Value of estate at death of husband, improperly granted divorce,** will be considered to determine alimony of wife deprived of dower rights. 233Ky134, 25SW(2d)59.

253-7 114 Okl 279, 246P599.

253-8 [c] **In Porto Rico.**—35PortoRico 636 (property held not to include earning capacity or income).

253-8½-New. The fact that the wife has an inchoate right of dower which is cut off by the decree should not be overlooked. 237Mich657, 211NW657.

254-14 Md 150A873; 114 Okl 279, 246 P599.

254-21 86 IndA593, 159NE33; 200 Iowa 1016, 205NW970; 204 Iowa550, 212NW 569; 207 Iowa1193, 224NW503; 124 Kan461, 260P618; 209Ky223, 272SW 757 (denying increase in monthly allowance); Minn 232NW793; 217AppDiv790, 217NYS224; 99Vt356, 133A248; 108 WVa337, 150SE748.

254-24 216Ala16, 112S318; Man [1927] 1DomLR756, [1927] 1WestWkly106.

255-29 108WVa337, 150SE748.

255-29½-New. A fee of defendant received prior to the period for determining income should be included only if other income of the same nature was included. 130Misc243, 223NYS744.

255-29¼-New. Income of defendant from speculation in stocks as a side line to a profession is not the basis for permanent alimony. 130Misc243, 223NYS 744.

255-29¼-New. Spendthrift trust is not basis for alimony. 5PaDist&Co 776.

255-33 124Kan461, 260P618; 209Ky 257, 272SW736 (husband of small earning capacity must contribute to wife in very moderate circumstances); 217App Div790, 217NYS224; 86PaSuper182.

255-34 Ala 130S677; 86 IndA593, 159 NE33; 200 Iowa1016, 205NW970; 124 Kan461, 260P618; 213Ky100, 280SW 477; 224Ky398, 6SW(2d)470; NJ 150A 340; 217AppDiv790, 217NYS224; 50RI 326, 147A621, 66ALR214; 65Utah605, 238P647.

256-39 323 Ill 608, 154NE405; 200 Iowa1016, 205NW970; 214Ky577, 283 SW1061.

256-42 200 Iowa1016, 205NW970; 124 Kan461, 260P618; 208Ky566, 271SW 660 (age seventy years earning $130 per month required to pay $30 per month); 208Ky605, 271SW659 (allowance not excessive despite impaired health); 224 Ky398, 6SW(2d)470; 114 Okl 279, 246P 599.

256-45 216Ala16, 112S318; 86 IndA 593, 159NE33; 231Ky829, 22SW(2d) 251; 115Nebr708, 214NW632.

256-46 115Nebr708, 214NW632.

256-47 215Ala581, 112S190.

257-50 Conn 152A302.

257-50½-New. The wife cannot complain in a divorce action because she failed to read the terms of the instrument purporting to be a property settlement within Civ. Code § 159, executed after she separated from her husband, where she was represented in the transaction by an attorney. 95CalA690, 273 P86.

257-53 Ala 130S677; 35Ariz69, 274P 638; 209Ky223, 272SW757 (denying increase in allowance where wife's condition had improved); 209Ky257, 272 SW736; 76Mont160, 248P864.

257-54 123 Okl 9, 252P837.

257-55 But see 200 Iowa1016, 205NW 970.

257-56 [a] 243Mich385, 220NW786.

257-58 [c] **It would be inequitable** where wife aided husband in business enterprises to relieve him of obligation to support her where she had insufficient income to support herself. 125Misc451, 211NYS192.

257-63 86 IndA593, 159NE33; 200 Iowa1016, 205NW970; 209Ky223, 272 SW757 (subsequent inheritance by wife considered in denying increase in allowance); 65Utah605, 238P647. See also Ala 129S3.

258-64 65Utah605, 238P647.

258-66 125Misc451, 211NYS192.

258-68 218Ky648, 291SW1032. [d] **In California.**—79CalA734, 251P218.

258-74½-New. Where a second divorce

after remarriage between the parties is granted, the court in fixing alimony may properly take into account the former division of the property and estate. 200 Iowa1016, 205NW970.

258-74½-New. The prior decree is no limitation on the power of court to award alimony in subsequent divorce proceeding, but may be taken into consideration in determining equities and fixing anew the property rights, even to the extent of denial of participation of each in the estate of the other. 200 Iowa1016, 205NW970.

259-75 99NJEq53, 132A113.

259-79½-New. The wife's children by a former marriage need not be considered. 46 Ida588, 269P589.

259-80 200 Iowa1016, 205NW970.

259-82 35Ariz69, 274P638; 99Vt356, 133A248.

259-85 213Ala114, 104S27; Ala 130S 677.

259-88½-New. The wife is not entitled to alimony when, without fault of the husband, she refuses to live with him. 145Miss872, 111S377.

259-86½-New. Wife's misconduct may bar her from alimony. 222Ky175, 300 SW354.

259-88 See also **Ont** [1928] 3DomLR 261.

260-1 But see 99NJEq461, 133A768.

260-2 99NJEq376, 132A603.

260-4 215Ala581, 112S190; 216Ala16, 112S318; 122 Okl 266, 254P722.

260-92 233Mich569, 207NW818, 820 [quotCJ].

260-93 233Mich569, 207NW818 [quot CJ].

260-95 27Hawaii230; 204 Iowa550, 212 NW569; 157Md166, 145A488; 98NJEq 454, 131A304.

260-96 98NJEq454, 131A304.

260-99 [a] **In Kansas.**-130Kan848, 288 P566.

261-5 27Hawaii230, 232 [quotCJ].

261-6 [d] **Periodical payments approved** where husband's estate is insufficient to pay reasonable lump sum. 209 Ky223, 272SW757.

261-8 99NJEq376, 132A603.

261-9 156Tenn619, 4SW(2d)345. [c] **In Tennessee.**-156Tenn619, 4SW(2d)345.

262-20 325 Ill 553, 156NE828; Wis 230 NW77. [a] **Lien held properly subjected** securing husband's share of property divided between parties. Wis 230NW 77.

262-23 325 Ill 553, 156NE828; 327 Ill 39, 158NE411; MoA 283SW59; 123 Or 667, 263P914; 144Va692, 130SE902 (without express statutory authority, court has no power to transfer specific portion of husband's real estate). But see 218Ky370, 291SW706. [e] **A demand clearly showing criminal charges** pending in demanding state is sufficient. Minn 232NW788(2dcase). [d] **Where income of property is allowed,** wife gets benefit of repairs charged to her. 99NJEq53, 132A113.

262-27 157Md166, 145A488; 123 Or 667, 263P914.

262-27½-New. Where husband was ordered to assign portion of interest in a trust fund, that the order was unjust is not ground for abrogation since court could modify or set it aside. 81NH509, 129A725.

262-29 236Mich20, 209NW836 (wife awarded entire interest in husband's land contract); 122 Okl 266, 254P722; 38 OklACR678. But see 216Ala259, 112 S836. [c] 327 Ill 39, 158NE411. But see 336 Ill 410, 168NE331. [d] (1) 237 Mich637, 212NW878. (2) 237Mich637, 212NW878. (4) Property or estate remaining in husband after decree is his absolutely subject only to any lien for alimony or allowance decreed thereon. 233Mich569, 207NW818.

263-34 But see 336 Ill 410, 168NE331.

264-49 171Minn213, 213NW919.

264-50 Ala 129S3; 79CalA734, 251P 218; 215Ky598, 284SW1113; 237Mich 323, 211NW657. See also 164Ga81, 137 SE821.

264-51 79CalA734, 251P218; Ind 168 NE881; 86 IndA593, 159NE33; IndA 168NE492(2dcase); Iowa 228NW290; 200 Iowa1016, 205NW970; 204 Iowa 550, 212NW569; 126Kan359, 267P981; 224Ky234, 5SW(2d)1041; 169La708, 107S499; 237Mich323, 211NW657; MoA 21SW(2d)2; 76Mont160, 248P864; 99 NJEq53, 132A113; 217AppDiv790, 217 NYS224; 114 Okl 279, 246P599; 122 Okl 266, 254P722; 50RI 326, 147A621, 66ALR214; RI 150A754; Utah 262P 292. [a] 81NH509, 129A725. [b] **Since alimony may be awarded by way of compensation to wife,** or given to her for support to which she was entitled by marriage and which she has been compelled to forego, conduct of husband is proper subject of inquiry in reaching determination as to amount to be allowed. 167Ga98, 145SE63. [c] **Husband owning property worth $500 to $1000** and able-bodied, court should have allowed $500 alimony. 211Ky207, 277SW243 (together with counsel fees and costs). [d] **Divorced wife held entitled to live as husband formerly was accustomed to sustain her,** unless his means have decreased. 99NJEq53, 132A 113. [e] **Amount inducing idleness on part of former wife** should not be awarded where husband is earning wages by daily labor. 80CalA494, 251P943. [f] **"Circumstances,"** as used in statute providing for consideration of circumstances of parties, includes practically everything which has legitimate bearing on present and prospective matters relating to lives of both parties. 80CalA 494, 251P943.

264-52 Iowa 228NW290.

264-57½-New. Payment. Where a divorced wife has concurrent remedies under a property settlement agreement and a divorce decree, payments made under one should be credited to the amount due under the other. 83CalA 345, 256P826.

264-53 79CalA734, 251P218; 46 Ida 588, 269P589, 590 [citCJ]; 86 IndA593, 159NE33; 200 Iowa1016, 205NW970; 121Kan495, 247P650; 126Kan21, 266P 746; 215Ky598, 284SW1113; Mass 165 NE17 (judge in divorce proceedings, in deciding amount of alimony, is to act on his own responsibility); 237Mich637, 212NW878; 221MoA944, 288SW794; 116 Okl 129, 243P730, 731 [citCyc]; 123 Okl 9, 252P837; 65Utah605, 238P647; 99Vt356, 133A248; 108WVa337, 150SE 748.

265-59 79CalA734, 251P218; 121Kan 495, 247P650; 126Kan21, 266P746; 237 Mich637, 212NW878; 65Utah605, 238P 647; 99Vt356, 133A248; 108WVa337, 150SE748; WVa 153SE150.

265-59½-New. No additional amount will be allowed for maintenance because **of an amount** due in another state on a judgment. 101NJEq523, 139A385.

265-61 [a] **Reasonable and equitable apportionment** should be made of husband's income and is not necessarily based on amount required to support wife and children. 206 Iowa334, 220NW 31.

265-62 323 Ill 608, 154NE405.

265-66 126Kan21, 24, 266P746 [citCJ]; Wash 287P892. [a] **Award held erroneous.**-Okl 292P824.

265-72 172Minn250, 215NW181; 99 NJEq53, 132A113; 5PaDist&Co 776. [b] (3) One third of husband's property has been held equitable allowance as alimony to wife awarded custody of two minor children. 122 Okl 266, 254P722.

266-73 177Ky790, 8SW(2d)437; 173 Minn464, 217NW488 (limitation held to refer to net income); 87PaSuper137.

266-75 215Ala581, 112S190, 192 [cit CJ]. See also 86 IndA593, 159NE33.

266-81 175Ark330, 299SW38; 214Ky 397, 283SW391; 229Ky125, 16SW(2d) 781; 173Minn165, 216NW940 (award held not founded upon sufficient evidence); 221MoA944, 288SW794, 797 [quotCJ]; 76Mont160, 248P864; 101 NJEq111, 137A648; 217AppDiv31, 216 NYS434.

267-82 Iowa 229NW689; 219Ky787, 294SW493; 171Minn213, 213NW919; NJ 150A340; 130Misc698, 225NYS431; Utah 270P149. [c] 204 Iowa550, 212 NW569 ($50 per month instead of $40). [f] **$50 per month.**-239Mich306, 214NW 133.

267-83 [e] 215Ky299, 284SW1073. [f] **$900.**-226Ky243, 10SW(2d)828 (to wife aged 65 by husband aged 73). [g] **$2,600 per annum.**-217AppDiv790, 217 NYS224.

267-84 327 Ill 39, 158NE411 (property allowance). [f] 170Ga291, 152SE574. [j] 211Ky7, 276SW967. [p] 18F(2d) 805; 121Kan495, 247P650. [q] 100 CalA28, 279P458 (husband's monthly income three hundred dollars). [s] 175 Ark330, 299SW38 (allowance to wife against whom divorce was granted); 218Ky636, 291SW1044; 161La955, 109 S775. [t] 108WVa157, 150SE523. [u] 214Ky171, 283SW73 (for twenty months); 218Ky212, 291SW42; 76Mont 160, 248P864. [w] 233Ky423, 25SW (2d)1013; Utah 292P214. [y] 170Ga 292, 152SE573. [nn] 172Minn89, 214 NW793. [pp] **$150,000.**-20 OhA518, 152 NE767 (husband worth $600,000). [qq] **$5,700 per annum.**-99NJEq53, 132A113. [rr] **$8,000 per annum.**-217AppDiv31, 216NYS434 (husband's income $12,000 on $380,000 estate). [ss] **$80 per month.**-160La708, 107S499 (where average income $232 monthly). [tt] **$100 per month.**-237Mich326, 211NW740 (alimony and support of children for twenty months). [uu] **$7,837.**-226Ky264, 10 SW(2d)821. [vv] **$50 per month.**-166 Ga850, 144SE665; 168La632, 122S888. [ww] **$45 per month.**-86PaSuper182. [xx] **$2,200 held not excessive** where husband was worth $6,000 and could obtain gross income of $7,000 a year. 243Mich385, 220NW786.

267-85 214Ky577, 283SW1061; 217 AppDiv31, 216NYS434. [a] **$5 per week.**-129Misc207, 221NYS594 (husband earning $30 per week, paying $10 to former divorced wife, second wife having income from real estate).

267-86 [e] 170La104, 127S379. [n] **$2,500 per year** reduced to $1,200. 209 Ky670, 273SW545. [o] **$2,000 per annum,** reduced to $1,200. 51ND897, 201 NW832. [p] **$5,000 per annum.**-217App Div790, 217NYS224. [q] **$11,000.**-214 Ky577, 283SW1061. [r] **$12,000 per annum.**-217AppDiv31, 216NYS434. [s] **$15,000** and half interest in certain property. 218Ky621, 291SW1017 (reduced to $10,000). [t] **$833.33 per month.**-216Ala16, 112S318. [u] **Allowance of $34,000 for back alimony held excessive.**-217AppDiv31, 216NYS434. [v] **$100 per month** reduced to $75 per month. 164La726, 114S632. [w] **$200 per month.**-206 Iowa334, 220NW31 (reduced to $175 a month). [x] **$50 per week.**-50RI 326, 147A621, 66ALR 214. [y] **$20 per month.**-220Ala57, 124 S107.

268-87 [d] **$720** where husband's income was $9,000 a year. 101NJEq111, 137A648. [e] **$25 per month.**-239Mich 306, 274NW133. [f] **$25 per month for one year and $15 per month for four years.**-141Wash226, 251P111. [g] **$7.00 per week.**-214Ky397, 283SW391. [h] **$40 per month.**-204 Iowa550, 212NW569 (increased to $50 per month). [i] **$1,000 in lump sum** or $40 per month, and $20 per month for child if plaintiff should marry before payments are completed. 223Ky531, 4SW(2d)366. [j] **$75 per month.**-Utah 262P292 (wife and three children).

268-88 229Ky436, 17SW(2d)412 ($5,000); 231Ky477, 21SW(2d)812; 251 Mich1, 230NW915; 251Mich253, 231NW 577(1stcase); MoA 298SW1058; SD 214NW846 ($9,000). [b] 229Ky353, 17 SW(2d)204. [e] **$15,000.**-127Kan624, 274P247. [f] **$6,200.**-148Wash417, 269 P341. [g] **$500.**-46 Ida588, 269P589. [h] **$12,500.**-241Mich191, 216NW433.

268-90 20 OhA518, 152NE767. [c] 215 Ky598, 284SW1113. [f] 250Mich295, 230NW143. [k] 168Minn489, 210NW 393; 171Minn85, 212NW738; MoA 28 SW(2d)398; 125 Or327, 266P907. [m] 221MoA944, 288SW794. [r] 116 Okl 129, 243P730. [v] 231Ky829, 22SW(2d) 251. [bb] 219Ky608, 294SW170; 229 Ky353, 17SW(2d)204. [dd] 35Ariz69, 274P638 (payable $100 a month). [ee] 224Ky398, 6SW(2d)470 (wife's health poor and husband able to earn money); MoA 21SW(2d)2. [mm] SD 214NW 846. [pp] **$15,000.**-208Ky690, 271SW 1037. [qq] **$22,000.**-205 Iowa1096, 216 NW609. [rr] **$170,000.**-Ind 168NE881. [ss] **$8,500.**-Iowa 228NW290. [tt] **$7,-**

500.–219Ala371, 122S618. [uu] $55,000.–TexCivA 29SW(2d)868. [vv] $12,500.–230Ky545, 20SW(2d)170 (where less than one third of husband's estate).

269–92 [i] 247Mich475, 226NW227 (reduced to three thousand dollars). [n] 237Mich323, 211NW657. [y] $5,000.–200 Iowa910, 205NW785. [z] $1,800.–117 Okl 63, 244P788 (to wife against whom divorce was granted). [aa] $48,000.–135 Okl 87, 274P19 (reduced to $20,000). [bb] $11,500.–Ala 129S3 (reduced to $7,500). [cc] $3,300.–200Wis 208, 227NW879.

269–93 [c] 118Nebr94, 223NW649(1st case) (increased to $3,000). [m] 241 Mich563, 217NW769 (increased to $1,000 where wife helped husband to accumulate $4,000, though divorce was granted for her misconduct). [n] $12,500 increased to $17,500. 237Mich371, 211NW738. [o] $500 increased to $1,250. 224Ky234, 5SW(2d)1041. [p] $5,000.–207 Iowa1193, 224NW503.

269–3½–New. In divorce cases where payment of alimony or custody of children is involved, calling possibly for modification of decree entered at the time of granting principal relief, the court should order that the cause be retained on the docket with leave for either party to apply for further relief. 157Tenn697, 11SW(2d)896.

269–3⅝–New. After vacating divorce judgment granted on wife's aggression, the court was held authorized to make division of property acquired under marriage, but not to make other allowances in nature of alimony. 23 OhA29, 154NE59.

269–3¼–New. Alimony paid by husband under decree cannot be recovered back by husband upon modification of decree. 219AppDiv370, 220NYS39.

269–3⅝–New. After death of parties, court cannot set aside or reduce decree as affects past-due alimony. 20F(2d) 267.

269–3⅛–New. Court properly refused to reopen divorce case to allow introduction of further evidence as to alimony. 99Vt356, 133A248.

269–3⅞–New. After vacation of judgment of divorce granted on wife's aggression, awarding alimony to her was held prejudicial to husband where the record did not show that an additional hearing was had. 23 OhA29, 154NE 59.

269–3⅛–New. A special term, on motion to punish the husband's default in paying temporary alimony, has no authority to modify an order awarding alimony. 221AppDiv710, 225NYS174.

269–4 233Mich569, 207NW818, 820 [quotCJ].

269–5 233Mich569, 207NW818, 820 [quotCJ].

269–6 233Mich569, 207NW818, 820 [quotCJ].

269–7 233Mich569, 207NW818, 820 [quotCJ].

269–8 233Mich569, 207NW818, 820 [quotCJ].

269–9 78CalA595, 248P715; 97CalA 144, 275P245; 99Fla859, 128S488 (correction held proper); 216Ky810, 288SW 737 [quotCJ]; 217Ky723, 290SW708, 709 [citCJ]; 233Mich569, 207NW818, 820 [quotCJ]; 129Misc683, 221NYS 551; 29 OhA62, 163NE43; 49RI 45, 139 A662; 147Va277, 137SE503; 137Wash 284, 242P388; 145Wash210, 259P385; 146Wash612, 264P1. [f] **Pending motion for new trial,** allowance may be modified. 126Kan310, 267P977.

270–10 124Kan455, 260P975; 149Md 590, 131A821 (dictum); 154Md675, 141 A387, 58ALR634; 144Va692, 130SE902 (dictum). See also 86Colo 1, 278P780.

270–11 217Ky723, 290SW708.

270–11½–New. Consent decree for alimony cannot be opened or modified except for fraud, mistake, or absence of real consent. 217Ky723, 290SW708.

270–11⅛–New. The party aggrieved by the amount of alimony should appeal to the appellate division of the supreme court, and, on failure to appeal, must bring the case on for trial. 222AppDiv 816, 226NYS280.

270–12 215Ala627, 111S911; 215Ala 581, 112S190, 191 [citCJ]; 241 IllA414; 204 Iowa550, 212NW569; 217Ky723, 290SW708; 157Tenn697, 11SW(2d)896 (retention of case for enforcement reserves power to modify at subsequent term); 147Va277, 137SE503; NS [1930] 3DomLR157. See also 127Kan 287, 273P409. [d] In Kansas.–130Kan 848, 288P566.

270–13½–New. Right to reopen must be reserved in decree. 147Va277, 137 SE503.

270–13⅛–New. The reservation of jurisdiction to modify has been disapproved in some cases. 148Wash417, 269 P341.

270–15 208Ky566, 271SW660; 213Ky 100, 280SW477; 149Md590, 131A821; 145Wash210, 259P385.

270–16 215Ala581, 112S190; 179Ark 738, 17SW(2d)897; 203Cal 173, 263P 234; 203Cal 787, 266P283; 69CalA66, 230P462 (provision for support of wife and children on denial of divorce); 74 CalA101, 239P383; 100CalA28, 279P 458; CalA 285P902; Conn 152A302; 42 Ida29, 243P827 (court empowered to modify order in case of divorce granted for offense of husband); 323 Ill 113, 153NE654; 236 IllA487; 201 Iowa516, 207NW778; Iowa 231NW389 (statute does not authorize new trial); 128Kan 406, 278P33; Mass 165NE17; 233Mich 67, 206NW353; 233Mich569, 207NW 818; 245Mich111, 222NW137; 250Mich 641, 231NW82; 251Mich53, 231NW140; MoA 21SW(2d)2; MoA 22SW(2d)853; 99NJEq461, 133A768; 144 Okl 97, 290 P185; 116 Or31, 236P751, 240P237; 48 RI 60, 135A241; RI 150A754; SD 215 NW931; Va 153SE879. [g] **Court retains jurisdiction of subject matter and parties.**–201 Iowa516, 207NW778. [h] **In Virginia.**–147Va277, 137SE503. [i] **Granting or refusing motion is in discretion** of trial court. 86CalA275, 260P 845. [j] **Where amount originally fixed by contract** between parties, court has considered statute in affirming judgment cancelling contract and modifying divorce decree by making more suitable provision for wife. 224AppDiv168, 230NYS51. [k] **Determination of time of filing petition.**–220Ala592, 126S862. [l] **Authority of court to modify allowance** does not include right to alter award on state of case existing when decision was entered. CalA 283P956. [m] **"New decree,"** within statute, means another and different decree on same subject matter as original decree. 155Miss 621, 125S91. [n] **"Change in decree,"** in statute, means modification of, or addition to, decree in respect of subject matter decided. 155Miss621, 125S91. [o] **Wife's agreement releasing husband** does not oust court's power. Minn 232 NW793.

271–19½–New. But decree containing no provision as to alimony cannot be modified in that respect. 29Ariz288, 240P 1033.

271–19⅛–New. The right is not affected by expiration of the time for appeal from interlocutory judgment. 94Cal 35, 270P463(2dcase).

271–20 220Ala592, 126S862.

271–21 80CalA494, 251P943.

271–23½–New. A continuing order for payment of alimony remains within the control of the court to be altered in accordance with changes in circumstances. 168Ark937, 272SW655.

271–23⅛–New. A decree for an accrued sum becomes final at the end of the term and cannot be set aside at a subsequent term, even though found to be erroneous. 168Ark937, 272SW655.

271–23¼–New. In Rhode Island court has no power under guise of modification to expunge amount of accrued alimony. 48RI 50, 135A322.

271–23⅛–New. Statutory right to modify decree need not be mentioned therein. 147Va277, 137SE503.

271–23⅛–New. Decree may not be altered or amended under some statutes. 241Mich122, 216NW400.

271–23⅞–New. Where a decree contains no provision for alimony, an appellate court cannot modify the decree by requiring the husband to pay alimony. 131 Or117, 282P111.

271–25 215Ala627, 111S911; 94Cal 35, 270P463(2dcase); 92Fla1081, 111S382; 323 Ill 113, 153NE654; 200 Iowa415, 203 NW26; Mass 165NE17; Mass 172NE 251; Mich 233NW170; Minn 231NW 413; MoA 22SW(2d)853 (as to past-due alimony); Va 153SE879. [a] **Where final decree of divorce was silent on subject of alimony,** order more than six months after entry of decree, purporting to modify it as to alimony, is void, notwithstanding stipulation of parties or statute. 78CalA595, 248P715.

271–26 144Va692, 130SE902.

271–28 144Va692, 130SE902.

271–28½–New. Designated property awarded to the wife under a stipulation for alimony is hers forever. 116 Or31, 236P751, 240P237.

272–29 129Misc683, 221NYS551.

272–29½–New. Where it does not appear that the court, in framing its decree for alimony, adopted, rejected, or ignored an agreement between the parties, it may modify its decree by reducing the allowance notwithstanding such agreement. 68CalA195, 228P675.

272–30 233Mich569, 207NW818, 820 [citCJ]; 116 Or31, 236P751, 240P237, 243 [quotCJperBean,J].

272–31 233Mich569, 207NW818; 116 Or31, 236P751, 240P237, 243 [quotCJper Bean,J].

272–32 223Mich569, 207NW818; 49ND 1144, 194NW817; 116 Or31, 236P751, 240P237, 243 [quotCJperBean,J].

272–33 116 Or31, 236P751, 240P237, 243 [quotCJperBean,J].

272–34 20 OhA224, 151NE786.

272–38 218Ala667, 120S150; Ala 127 S819; 69CalA66, 230P462; 323 Ill 113, 153NE654; 201 Iowa516, 207NW778.

272–39 48RI 60, 135A241; 48RI 50, 135A322.

273–43 218Ala667, 120S150; 203Cal 787, 266P283; 55AppDC285, 4F(2d)952; MoA 22SW(2d)853.

273–46 127Misc313, 215NYS259. See also 137Misc706, 244NYS238. Contra 129 Misc263, 221NYS249. [b] **Docket entry, "Agreement to revoke decree of alimony allowed,"** together with written agreement therefor is held to contain all matters of substance required for final decree. 255Mass238, 151NE80. [c] **Approval by court of consent agreement to revoke decree for alimony** is held to be revocation of earlier decree respecting payment of alimony. 255Mass238, 151 NE80. [d] **After separation allowance,** parties cannot contract to modify allowance. 127Misc313, 215NYS259. [e] **Agreement to support child in lieu of support of wife** is held not supported by consideration as to wife under divorce decree giving support for both. 127Misc313, 215NYS259. [f] **Agreement to pay delinquent installment on temporary alimony** in lump sum becomes a decree for permanent alimony rather than for temporary support, when embodied in final decree. 48RI 420, 138A 179.

273–47½–New. Provisions for the wife on settlement of alimony must be passed on by the court. 101NJEq342, 139A235.

273–47⅛–New. However, agreements seeking to waive modification are void as against public policy. 48RI 60, 135 A241.

273–47¼–New. An application to discharge a husband from payment of alimony, on representations that the parties have amicably settled the matters in difference, without the court's examination of the provisions for the wife, will be denied. 101NJEq342, 139A235.

273–47⅛–New. A prior property agreement, which the wife denied, is not a ground for modification of a decree where the divorce suit was not contested and part of the alimony was paid. 153Wash591, 280P8.

273–49 215Ala627, 111S911. See also 149Md590, 131A821.

273–50 [a] 149Md590, 131A821.

273–52 Ala 128S801(1stcase); 42 Ida 29, 243P827; Iowa 231NW389; 217 Ky723, 290SW708; 250Mich641, 231NW 82; Minn 232NW793; MoA 280SW 1059; 141Wash600, 251P851; 145Wash 210, 259P385.

274-56 334 **Ill** 370, 166**NE**85; 250 **IllA** 349; 201 **Iowa**516, 207**NW**778; 208 **Iowa** 1384, 227**NW**330 (that original allowance was too great is insufficient); 206 **Iowa**942, 221**NW**580; 233**Mich**67, 206 **NW**353; **MoA** 292**SW**1066(1stcase); **Nebr** 226**NW**798 (contract for property settlement and alimony approved by court). [c] **Modification of decree held erroneous in view of evidence.–CalA** 283 **P**956.

274-58 **Ala** 128**S**801(1stcase). See also 251**Mich**53, 231**NW**140.

274-59 80**CalA**494, 251**P**943; 323 **Ill** 113, 153**NE**654; **Iowa** 231**NW**389; 173 **Minn**464, 217**NW**488; 129**Misc**263, 221 **NYS**249; 141**Wash**600, 251**P**851.

274-61 69**CalA**66, 230**P**462; 80**CalA** 494, 251**P**943; **Iowa** 231**NW**389; 232 **Mich**695, 206**NW**482; 141**Wash**600, 251 **P**851.

274-62½-New. Court will not on mere suspicion determine that assignments of income to relatives by divorced husband were invalid. 101**NJEq**111, 137**A** 648.

274-62⅓-New. Comfortable maintenance of a divorced wife should be assured in determining the question of reduction of alimony. 130**Misc**698, 225**NYS**431.

274-62¼-New. Where, after entry of a divorce decree awarding the custody of minor children to the wife with specified monthly alimony and giving the right of visitation to the father, the wife took the children to another state it is not an abuse of discretion to refuse to relieve the husband of the obligation to pay alimony until the children are returned to the city of their former residence. 207 **Iowa**189, 222**NW**400.

274-62⅕-New. After remarriage of parties to each other, neither can maintain action to modify divorce decree while subsequent marriage exists. 143 **Okl** 274, 288**P**475.

274-63 42 **Ida**29, 243**P**827 (increase in husband's salary is ground for increasing allowance); **Minn** 232**NW**793 (that increased income is unattachable is immaterial). [a] **Wife's earnings to support herself** do not justify modification. **Iowa** 231**NW**389.

274-64 99**NJEq**461, 133**A**768.

274-65 218**Ala**80, 117**S**645.

275-72 179**Ark**738, 17**SW(2d)**897; 203 **Cal** 173, 263**P**234; 180**Minn**33, 230**NW** 117; 245**NYS**338; 50**RI** 278, 146**A**626; **RI** 148**A**900.

275-73 **MoA** 17**SW(2d)**584.

275-81 42 **Ida**29, 243**P**827 (higher cost of living).

275-82 [b] **Birth of child after decree** is not ground for increasing alimony when consideration was given to such possible birth in fixing original amount of alimony. 205 **Iowa**1200, 219**NW**314.

275-82½-New. **Where amount awarded is insufficient** to take care of respondent, it may be increased. 6**PaDist&Co** 120.

275-87 149**Miss**111, 115**S**197; 50**RI** 278, 146**A**626.

275-88 30**Hawaii**652; 231**Ky**477, 21 **SW(2d)**812; 131**Misc**388, 226**NYS**729.

275-89½-New. **Where amount awarded is insufficient** to take care of children, it may be increased. 6**PaDist&Co** 120.

276-92 215**Ala**627, 111**S**911; 236**Mich** 604, 211**NW**52; 99**NJEq**711, 134**A**338. But see 138**Misc**298, 244**NYS**597.

276-93 236**Mich**604, 211**NW**52. [c] **Remarriage of wife** raises a rebuttable presumption that necessity for alimony no longer exists. 99**NJEq**711, 134**A**338.

276-94 236**Mich**604, 211**NW**52; 99**NJEq** 711, 134**A**338; 116 **Or**31, 236**P**751, 240 **P**237.

276-96 203**Cal** 787, 266**P**283 (wife presumed supported by second husband); 323 **Ill** 113, 153**NE**654; 99**NJEq**711, 134 **A**338; 116 **Or**31, 236**P**751, 240**P**237.

276-97 323 **Ill** 113, 153**NE**654; 116 **Or** 31, 236**P**751, 240**P**237.

276-99 **Md** 149**A**468.

276-1 179**Ark**192, 14**SW(2d)**1100.

276-2 215**Ala**627, 111**S**911; 179**Ark**192, 14**SW(2d)**1100.

276-4 **Iowa** 231**NW**389.

276-5 **Ala** 127**S**819; 141**Wash**623, 251 **P**851. But see 208 **Iowa**1384, 227**NW** 330.

277-6½-New. **In a proceeding for increase of allowance for support of wife and child, defense is not available that husband has remarried and his earnings are community property.** 42 **Ida**29, 243 **P**827.

277-6⅓-New. Remarriage of husband taken into consideration. 99**NJEq**711, 134**A**338.

277-6¼-New. That a divorced husband desires to remarry may be taken into consideration. 80**CalA**494, 251**P**943.

277-7 244 **IllA**488.

277-9 321 **Ill** 134, 151**NE**550. But see 180**Minn**33, 230**NW**117.

277-17 But see 206 **Iowa**942, 221**NW** 580. [b] **Application denied** because of applicant's false testimony. **Colo** 291**P** 1031.

277-19½-New. A decree fixing the wife's allowance will not be opened for an alleged fraud which merely made it difficult for the wife to show her husband's real financial worth. 218**Ala**80, 117**S** 645.

277-22 **Va** 153**SE**879.

278-31⅓-New. Payment of alimony is not terminable at the option of the husband. 227**AppDiv**1, 236**NYS**544.

278-31¼-New. Trial court has power to vacate alimony judgment. **Conn** 152 **A**302.

278-32 127**Misc**826, 217**NYS**528.

278-33 151**Md**644, 135**A**841, 50**ALR** 232; 127**Misc**821, 216**NYS**593; 127**Misc** 826, 217**NYS**528; 128**Misc**362, 219**NYS** 485; 224**AppDiv**355, 231**NYS**146; 10**Pa Dist&Co** 639. See also 103**NJEq**203, 142 **A**817.

278-38½-New. Court's jurisdiction over divorce decree is not lost on plaintiff's death. 20**F(2d)**267.

278-39 20**F(2d)**267.

278-40 204 **Iowa**1312, 216**NW**693. But see 224**AppDiv**355, 231**NYS**146.

278-40½-New. Where a wife to whom a decree has been granted awarding alimony in gross dies after her husband has perfected an appeal without bond, the right to such alimony survives her death in favor of her administratrix. 216**MoA**699, 273**SW**241.

279-41 215**Ala**581, 112**S**190, 192 [cit CJ]; 94**CalA**97, 270**P**732; 108**WVa**337, 150**SE**748.

279-42 See also **Va** 153**SE**879.

279-43 95**PaSuper**11 (law of Nebraska). [a] (2) 127**Misc**826, 217**NYS**528.

279-46 215**Ala**581, 112**S**190; 262**Mass** 278, 159**NE**512 [citCJ] (court may direct husband to keep his life insured).

279-47 215**Ala**581, 112**S**190, 192 [cit CJ].

279-49½-New. Divorced wife's release of former husband for installments due before annulment of second marriage does not release subsequent installments. 136**Misc**604, 240**NYS**362.

279-50 94**CalA**97, 270**P**732; 127**Misc** 821, 216**NYS**593.

279-53 137**Misc**658, 244**NYS**34; 245 **NYS**383.

280-54 229**AppDiv**214, 241**NYS**684; 137 **Misc**658, 244**NYS**34. See also 245**NYS** 383.

280-54½-New. Wife must show husband's misconduct after reconciliation to vacate discontinuance of alimony. 220 **AppDiv**812, 222**NYS**412.

280-54⅓-New. Remarriage of parties to each other annuls alimony decree. 143 **Okl** 274, 288**P**475.

280-56 [c] **On annulment of divorced wife's remarriage,** first husband is liable for alimony under divorce decree only from time of annulment. 251**NY** 366, 167**NE**501. [d] **Presumption on remarriage of divorced wife** is that second husband's duty to provide suitable support was fulfilled. 251**NY**366, 167**NE** 501.

280-57 229**Ky**21, 16**SW(2d)**485; 236 **Mich**604, 211**NW**52; **NJ** 144**A**621. See also 206**Cal** 7, 272**P**1052. [b] **Under decree for payment of stated sum** for use of wife and minor child until latter becomes eighteen years of age, husband is not relieved from payment by remarriage of wife. 163**Ga**19, 135**SE**403. [c] **Liability for payments incorporated in decree** is not affected by remarriage of divorced wife though erroneously called alimony. **Md** 149**A**468.

280-58 216**Ky**810, 288**SW**737; 228**NYS** 711 (right to alimony restored on annulment of remarriage). [a] **Burden of removing case** from operation of rule is on wife. **Conn** 152**A**302.

280-65 **NJCh** 145**A**639; **RI** 150**A**754.

280-70 But see 103**Conn**189, 130**A**254. [j] **Personal jurisdiction essential,** order based on service by publication being void. 233 **IllA**203. [k] **Where court had no personal jurisdiction of defendant,** it could not reserve question of alimony. 233 **IllA**203.

281-76½-New. Alimony may not be awarded without personal service on defendant. 128**Misc**309, 219**NYS**335.

281-76⅓-New. Counsel fees may not be awarded without personal service on defendant. 128**Misc**309, 219**NYS**335.

282-84 121**Kan**363, 245**P**1022, 46**ALR** 1200.

282-87 128**Misc**362, 219**NYS**485.

282-87½-New. A claim for temporary alimony cannot be had in a separate action. 128**Misc**362, 219**NYS**485.

282-87⅓-New. A claim for alimony based on a temporary order cannot be subject of an award in a special proceeding before the surrogate. 128**Misc**362, 219**NYS**485.

282-89 [a] (2) Court of common pleas of another county had jurisdiction of action to recover accrued and unpaid amounts of judgment for alimony absolutely fixed. 29 **OhA**62, 163**NE**43. [b] **In New York.**–130**Misc**161, 223**NYS**616 (Civ. Proc. Act §§ 1171, 1172; Gen. Constr. L. § 47).

282-90 But see **CalA** 284**P**494.

282-92 241**Mich**679, 217**NW**924.

283-95 168**Ga**648, 148**SE**591 (allegations held sufficient); 48**RI** 420, 138**A** 179.

283-97 48**RI** 420, 138**A**179.

283-6 122 **Or**68, 256**P**389.

283-6½-New. after commencement of suit. 122 **Or**68, 256**P**389.

283-8 81**CalA**414, 253**P**969 (sufficient allegations); 99**NJEq**461, 133**A**768; 48 **RI** 420, 138**A**179.

283-10 99**NJEq**461, 133**A**768; 137**Misc** 8, 244**NYS**265; 121 **Okl** 273, 249**P**732, 734 [citCJ].

284-13 48**RI** 420, 138**A**179.

284-16 **Utah** 271**P**225.

285-39 [a] **In Alberta.**–[1928] **2DomLR** 188.

285-47½-New. An allowance of counsel fees must be based on proper allegations. **TexCivA** 281**SW**598.

285-50 [a] (1) 121 **Okl** 273, 249**P**732. (2) Under prayer for such other and further relief, court in its discretion may award alimony. 137**Misc**8, 244**NYS** 265.

285-61 164**Ga**839, 139**SE**663 (notice by publication held sufficient).

286-69 164**Ga**839, 139**SE**663 (notice held sufficient).

286-72 179**Minn**106, 228**NW**351 (order to show cause served with summons and complaint held to give court jurisdiction).

286-77 167**Ga**706, 146**SE**457.

286-77½-New. In the absence of jurisdiction of the person or property of defendant the court has no jurisdiction to award alimony. 202 **Iowa**489, 210 **NW**545.

286-81 164**Ga**839, 139**SE**663 (notice held sufficient). [c] (2) Alimony cannot be decreed unless prayed for and notice of prayer given in underwriting on summons. 241**Mich**679, 217**NW**924. [d] **Purpose of requiring notice** in summons is to save husband necessity of examining record. 233**Mich**624, 207**NW** 836. [e] **In Michigan.**–236**Mich**604, 211 **NW**52.

287-91 131**Misc**318, 227**NYS**13. **Erratum.**–"Mo.—Chapman v. Chapman, 269 Mo. 663, 192 SW 448" should be "269 Mo. 663, 192 SW 448 [rev 194 Mo. A. 483, 185 SW 221]."

287-92 148**Wash**113, 268**P**159 (motion for entry of final decree of divorce has been held appearance).

287-93 128**Mich**425, 219**NYS**341.

287-95 164**Ga**839, 139**SE**663.

288-1 121 **Oh**188, 167**NE**684, 64**ALR** 1384.

288-4 135**Misc**713, 238**NYS**207 (court

cannot dispose of nonresident defendant's property not in its possession). But see 269Mo 663, 192SW448.

288-5 121 Oh188, 167NE684, 64ALR 1384.

289-19½-New. Set-off. A husband may be allowed to set off property taken by his wife, in the absence of an objection by her. 204 Iowa423, 214NW483.

289-20 [a] 233Mich624, 207NW836.

289-21 [c] (1) 165Ga486, 141SE299 (discretion not abused).

289-21½-New. Correctness of court's decree for divorce and cancellation of alleged fraudulent conveyance cannot be determined until after final decree of trial court on those issues. 171Ark241, 283SW984.

289-21¾-New. The validity of a foreign divorce cannot be determined upon rule for alimony. 161La716, 109S 398.

289-23 But see 170Ga349, 153SE11; Ga 155SE31.

289-24 [b] Issues.-124Kan97, 258P295.

290-30 223AppDiv843, 228NYS172 (counsel fees and alimony are improperly granted where allegations of adultery in complaint were denied and unsupported by any proof); TexCivA 281SW 598. [a] 162La229, 110S332.

290-8 MoA 292SW1066(1stcase). [d] (2) To show income of husband with certainty. 162La229, 110S332. [e] Evidence held sufficient to entitle wife to temporary alimony. 169Ga586, 151SE 22.

290-11 217Ky786, 290SW686.

291-95½-New. Entire testimony of party need not be supported by corroborative evidence. 33 OhA309, 169NE39(1st case).

291-18 99CalA198, 278P456. [e] Evidence held sufficient to sustain finding as to value of husband's property. 168 Minn489, 210NW393.

291-20 See also 29 OhA275, 163NE308.

291-25½-New. Any evidence properly introduced in action for divorce may be considered upon incidental issues as to alimony. 211Ky271, 277SW287.

291-25¾-New. Evidence has been held sufficient to entitle the wife to reasonable alimony on granting a divorce to her husband on counterclaim. 229Ky 21, 16SW(2d)485.

291-27 99NJEq461, 133A768; 137Misc 356, 242NYS3.

292-32½-New. Referee's finding as to financial condition of defendant is merely advisory to court. 130Misc243, 223 NYS744.

292-34½-New. Judgment silent as to alimony and attorney's fees to the unsuccessful party is an adjudication that such party was not entitled thereto. 224 Ky18, 4SW(2d)1106.

292-37 164Ga81, 137SE821.

292-44 191NC740, 133SE9.

292-47 324 Ill 276, 155NE288.

292-53 325 Ill 553, 156NE828.

292-58 163Ga19, 135SE403.

292-59 224AppDiv355, 231NYS146; 48 RI 420, 138A179.

293-60 48RI 420, 138A179.

293-61 134 Okl 283, 273P267. [b] (1) 163Ga19, 135SE403; 127 Okl 103, 260P 49. (2) Allowance of stated sum monthly for support of wife and minor child is invalid as for alimony to wife. 127 Okl 103, 260P49. (3) Such allowance is valid as for support and maintenance of child. 127 Okl 103, 260P49. (4) Provision allowing stated sum per month for support of wife and minor child during minority of child is construed to be for support, maintenance, and education of child. 127 Okl 103, 260 P49.

293-64 204 Iowa550, 212NW569.

293-70 220Ala592, 126S862; 134 Okl 226, 273P209. [a] Decree providing that allowance shall terminate on remarriage of wife is void. Kan 293P391.

293-71 204 Iowa550, 212NW569. [b] In West Virginia.-153SE150 (proper case for reservation).

293-72½-New. Upon refusal of modification order decree should be entered. 48RI 60, 135A241.

293-72¾-New. Decree may require payment of amount directed to be paid during pendency of suit. 325 Ill 553, 156 NE828.

293-72¼-New. Decree may require payment to court officer in proper case. 250Mich641, 231NW82.

294-83 250Mich641, 231NW82.

294-88 132Misc785, 230NYS671.

294-91 216Ala16, 112S318; 119Kan704, 241P117 (final decree is final measure of liability for alimony); 222MoA516, 281 SW69. But see 92Fla1081, 111S382; 124 Kan455, 260P975.

294-92 124Kan455, 260P975.

294-94 LaA 130S634.

294-98 See also 205Cal 392, 270P930.

294-1½-New. Consent decree fixing alimony has as much force as if parties were adversaries. 217Ky723, 290SW708.

294-1¾-New. In decree awarding wife one-half interest in husband's property where husband has life estate, wife gets one half of life estate. 24 OhA543, 155 NE866.

294-1¼-New. Order for temporary alimony is interlocutory in character and remains within control of court at least until entry of final decree. 92Fla1081, 111S382.

294-1⅛-New. Alimony judgment must stand until judicially modified or vacated. Conn 152A302.

294-2 24 OhA543, 155NE866. [e] Consent decree for support of wife and children providing for deductions from amount payable to wife as each child reaches specified age, marries, or dies, is not to be construed to provide for termination of alimony when youngest child reaches specified age. 160Ga422, 128SE179. [f] Particular constructions.-250Mich641, 231NW82.

295-4½-New. Judgments involving a wife's right to permanent alimony do not preclude an action for maintenance and support of the children. 29 OhA373, 153NE590.

295-5 203Cal 787, 266P283; 129 Or612, 277P1012, 63ALR1216.

295-8½-New. Consent decree for support and maintenance may be regarded as a contract between the parties. 334 Ill 370, 166NE85.

295-9 222MoA516, 281SW69 (decree bars third person); Va 153SE879 (husband must comply with order). [b] Where court's exercise of jurisdiction in rendering divorce decree affecting title to property was induced by fraud, innocent purchaser was held to have right to rely on decree. 323 Ill 585, 154 NE414. [c] Does not affect children as they are not parties. 21 OhA222, 153 NE113.

295-11 181Ark367, 26SW(2d)88 (binding effect on grantee of husband).

295-13 [a] Subsequent action may be had on clauses of maintenance agreement excepted by court in decree holding agreement valid. 83CalA345, 256 P826.

296-8½-New. Error in making counsel fees payable to attorney is not subject to collateral attack. 324 Ill 276, 155 NE288.

296-9 323 Ill 585, 154NE414.

296-10 See also 124Kan97, 258P295. [b] When grantor bought and reconveyed land after wife had obtained divorce which was later set aside on ground of fraud, it was held purchaser was protected against wife's claim of dower. 323 Ill 585, 154NE414.

296-13 48RI420, 138A179.

296-15½-New. Claim for alimony is waiver and release of dower. 48RI 420, 138A179.

296-16 92Fla1081, 111S382; 116 Or31, 236P751, 240P237.

296-27 99NJEq461, 133A768.

297-34½-New. Even though alimony awarded for a wife and children could be applied to payment of a judgment for necessaries furnished the wife, failure to show what portion belonged to the wife would be a defense to an action by the wife's judgment creditor and sheriff for the husband's refusal to turn over sufficient alimony to pay the judgment, on the theory that alimony had been attached. 225AppDiv553, 233NYS 648.

297-34¼-New. If it is shown by the wife's judgment creditor that it is not required for the wife's support, a portion of alimony allotted to the wife and not so needed may be applied to payment of judgment for necessaries. 225 AppDiv553, 233NYS648.

297-5½-New. Nor on ground that wife has failed to permit husband to see children as directed. 127Misc761, 217 NYS379.

297-9-34½-New. Payment of alimony cannot be a discharge or satisfaction of any other demand. 157Md166, 145A 488.

297-35 151Wash568, 276P866. [a] (2) Demand for past-due alimony has no place in independent suit by husband for divorce on ground of separation for statutory period. 164La293, 113S852. [b] Application in original divorce action is proper action to collect arrears of alimony, rather than by independent proceeding. 65Utah597, 239P501. [c] In Kansas.-121Kan363, 245P1022, 46ALR1200. [d] On application for arrears in original divorce action court granting divorce may inquire into matters preceding entry of decree awarding alimony. 65Utah597, 239P501.

297-40 154Md675, 141A387, 58ALR634 (statutory remedies).

297-40½-New. A petition seeking aid of court to enforce a decree may properly ask to receive that which is equitable. 48RI 420, 138A179.

297-40¼-New. The court may refuse to compel plaintiff to proceed further until defendant obeyed the order. 154 Md267, 140A205, 56ALR697.

297-40¼-New. In some jurisdictions periodical allowances to a wife for both herself and child are treated as alimony under statutes providing for enforcement of payment. 242Mich23, 217NW 913.

297-40⅛-New. A decree against the garnishee held not erroneous as an award of alimony in a gross sum. 180Ark638, 22SW(2d)165.

297-40⅛-New. Where a decree fixing alimony and directing payment provided that on failure to pay execution shall issue, it does not have the effect of limiting enforcement to execution. 155 Miss316, 124S365.

297-40⅛-New. Enforcement against nonresident's property within state, see Minn 233NW312.

297-41 157Md166, 145A488.

297-45 20F(2d)267; 216Ala197, 112S 756, 757 [citCJ]. [b] Bill by wife's executor held not without equity.-20F (2d)267.

298-55 230AppDiv786, 244NYS653.

298-56 See also 164Ga81, 137SE821. But see 132Misc785, 230NYS671.

298-57½-New. Estoppel. Wife is estopped to recover alimony during period subsequent to judgment when parties lived together as husband and wife. 137 Misc658, 244NYS34.

298-59 83 IndA415, 148NE435; 245 Mich111, 222NW137; 20 OhA224, 151 NE786 (where alimony is payable in lump sum).

298-60 20 OhA224, 151NE786, 787 [cit CJ]. See also 127Misc313, 215NYS259.

298-61½-New. not for a fixed sum but payable in installments, 20 OhA224, 151 NE786.

298-62 20 OhA224, 151NE786, 787 [cit CJ].

298-63 20 OhA224, 151NE786, 787 [cit CJ].

298-64 20OhA224, 151NE786, 787 [cit CJ]. [b] Remedy is to obtain modification of order for alimony by reducing it to order for payment of lump sum. 20 OhA224, 151NE786.

299-65 128Misc362, 219NYS485.

299-69 130Misc769, 225NYS56.

299-73½-New. Payments ordered in a divorce decree in pursuance of property settlement cannot be enforced by contempt proceedings. 245Mich111, 222NW 137.

299-74 48RI 50, 135A322; 68Utah220, 249P806. [b] Duty of maintenance which may be enforced by contempt proceedings, though requiring payment of

stated sums at intervals, is a specific duty. 53ND480, 206NW793. [c] **Attachment is merely supplemental process for enforcement of judgment,** and not addition to, or modification of, judgment requiring order retaining case in court for future orders. 156Tenn619, 4SW(2d)345.

299-75 But see 170La671, 129S125.

299-75½-New. In some jurisdictions contempt proceedings for failure to comply with alimony decree is sui generis. 20AlaA514, 104S561.

299-75½-New. It is collateral to, but independent of, the cause in which the contempt arose. 20AlaA514, 104S561.

299-75¼-New. While technically classified as a civil contempt, it is quasi criminal in which the elements of both a civil and criminal proceeding appear. 20AlaA514, 104S561.

299-75½-New. Refusal to punish for contempt is not abuse of discretion where the husband had custody of and supported the child provided for by award. 221AppDiv710, 225NYS174.

299-75½-New. A contempt proceeding, for failure to obey an order of court requiring defendant in a divorce suit to pay the fee of the referee, is separate from the divorce suit. 128 Or46, 273 P395.

299-76 91Fla82, 107S251; 208Ky658, 271SW1100; 154Md675, 141A387, 58 ALR634; 138Misc5, 245NYS137; 224 AppDiv355, 231NYS146; 48RI 50, 135A 322; 156Tenn619, 4SW(2d)345 (alimony in gross). See also 98CalA337, 276P 1059(1stcase).

299-77 Iowa 229NW163; 78Mont92, 252P388; 221AppDiv710, 225NYS174; 128 Or305, 274P507.

299-85 124Kan455, 260P975; 78Mont 92, 252P388; Nebr 229NW770; 227App Div1, 236NYS544; 130 Or187, 279P560; RI 150A754; 101Vt381, 143A676. See also 46 Ida97, 266P677.

300-86 124Kan455, 260P975; 152Tenn 431, 278SW65 (court does not lose control of case after final decree where retained for future orders as to alimony).

300-87 53ND480, 206NW793.

300-89 30Hawaii80. [b] **Defendant, in contempt for not complying with order,** (1) held without right to demand further proceedings. 154Md267, 140A 205, 56ALR697. (2) He remains in contempt even after serving jail sentence. 154Md267, 140A205, 56ALR697. [d] **Committing** defendant to jail held not to operate as rescission of order. 154Md267, 140A205, 56ALR697.

300-93 CalA 293P96.

300-94 137Misc419, 242NYS279 (where husband has obtained interlocutory decree of annulment).

301-97 118Tex581, 17SW(2d)1041.

301-99½-New. Where a decree grants a stated sum for alimony and support of a minor child and the award for alimony should be annulled, the terms of the decree for the support of the child cannot be enforced by contempt proceedings since it is impossible to determine what part of the award should be paid for such purpose. 236Mich604, 211NW52.

301-99½-New. Proceedings are not barred by limitations when brought thirteen years after judgment. 164Ga 81, 137SE821.

301-99¼-New. Part of a decree void as awarding counsel fees for past services does not invalidate the entire decree as the basis for a contempt proceeding to punish for failure to pay alimony. 89 CalA177, 264P573.

301-99½-New. On a motion to punish a husband for contempt for failing to pay alimony awarded for support, education, and maintenance of the children, the court is without power to reduce the alimony for any period prior to the date of granting of the order. 225AppDiv 453, 233NYS366.

301-99¼-New. Contempt proceeding is predicated on award and judgment and refusal to comply therewith and not on evidence forming basis of judgment. Nebr 229NW770.

301-2 124Kan455, 260P975; 242Mich 23, 217NW913; Nebr 229NW770 (judgment for alimony and attorney's fees is not debt; 27 OhA290, 161NE346; 128 Or305, 274P507; 129 Or612, 277P1012, 63ALR1216; 152Tenn431, 278SW65; 156Tenn619, 4SW(2d)345. [b] 27OhA 290, 161NE346.

301-3 126 Or253, 269P878.

301-5 But see 178Minn75, 226NW701.

302-6 156Tenn619, 4SW(2d)345. But see 154Md675, 141A387, 58ALR634.

302-7 124Kan455, 260P975.

302-7½-New. Disobedience of a court order or decree to pay alimony must be willful to justify conviction for contempt. 208 Iowa1224, 226NW917.

302-10 178Minn75, 226NW701. See also 133Misc266, 231NYS329.

302-13 127Misc788, 217NYS498; 226 AppDiv327, 235NYS169.

302-15 [b] **In New York.**-127Misc788, 217NYS498.

302-18 157Md166, 145A488 (agreement to pay wife certain sum as alimony is not alimony); 227AppDiv757, 237NYS56 (void provision of alimony judgment). [b] **Certified copy of alimony decree** must be served on defendant in order to maintain contempt proceeding. 230AppDiv737, 243NYS473.

302-18½-New. It must be shown that the husband knew or should have known of the terms of the decree. 236Mich604, 211NW52.

302-22 164Ga81, 137SE821.

303-23 164Ga81, 137SE821; 170La 1011, 129S619. [b] **Conversely,** proceedings for contempt do not prevent or suspend execution. 170La1011, 129S 619.

303-31 129 Or612, 277P1012, 63ALR 1216.

303-35½-New. Demand is unnecessary when no immediate arrest is proposed and the filing of an affidavit is followed by notice of an intention to apply for the rule to show cause. 129 Or612, 277 P1012, 63ALR1216.

304-38½-New. A statute, dispensing with demand or notice of an order or decree for alimony where a party has appeared in person or by attorney or has been personally served with process within the jurisdiction of the court, implies that the statute and court rules relative to notice have been complied with. 236Mich604, 211NW52.

304-40 [b] **Alleged agreement whereby husband supported wife** is held not shown by evidence. 164Ga81, 137SE821.

304-45 124Kan455, 260P975; 27 OhA 290, 161NE346. [b] **Evidence held insufficient** to support finding of willful failure to pay alimony. Iowa 229NW 168.

304-46 See also 124Kan455, 260P975.

304-47 20AlaA514, 104S561; 81CalA 498, 253P953; 99CalA788, 279P466; 55 AppDC285, 4F(2d)952; 166Ga211, 142 SE743; 30Hawaii80; 202 Iowa134, 209 NW396; 208 Iowa1224, 226NW917 (nature of disability which may purge defendant from contempt); 165La145, 115 S439; 178Minn31, 225NW913(1stcase); 78Mont92, 252P388; 49ND1144, 194NW 817; 53ND591, 207NW486; 152Tenn 431, 278SW65; 68Utah220, 249P806; Utah 269P775. [d] 83Colo 277, 263P 716; 46 Ida97, 266P677. [h] 20AlaA 514, 104S561; 202 Iowa134, 209NW396. [j] **Alimony decree is prima facie evidence** of ability to pay. 27 OhA290, 161 NE346. [k] **Court should grant hearing as to husband's ability to pay** before finding him guilty of contempt in failing to pay alimony on fourteen-year-old order. 27 OhA290, 161NE346. [l] **Evidence held insufficient to show ability to pay.**-93CalA177, 269P547.

304-47½-New. even though, if he was able, he would not make payment, 202 Iowa134, 209NW396.

304-48 93CalA177, 269P547; 124Kan 455, 260P975. [a] 83Colo 277, 263P 716.

304-51 78Mont92, 252P388.

305-58 46 Ida97, 266P677; 129Kan 541, 283P918 (where fact of noncompliance with order is admitted in pleading); 168Minn196, 209NW901.

305-58½-New. In some jurisdictions the burden of proof is on complainant to show beyond reasonable doubt that the husband was financially able to comply with the decree. 20AlaA514, 104 S561.

305-58½-New. The husband must be given opportunity to give his own explanation of failure to pay before he can be convicted and punished. 20AlaA 514, 104S561.

305-58¼-New. In the case of a professional man, the court should consider fluctuations in income in enforcing payment. 173Minn464, 217NW488.

305-60 133Misc266, 231NYS329. See also 127Misc313, 215NYS259. [a] **In adverse decision against husband in proceedings to collect alimony,** held error to deny motion to commit for contempt where only defense was agreement alleged as bar to accrued alimony claim. 216AppDiv812, 214NYS262.

305-62 236Mich604, 211NW52.

305-65 130Misc696, 224NYS634.

305-66 124Kan455, 260P975, 976 [cit Cyc]. See also 27 OhA290, 161NE346. [c] **Court passing alimony order has jurisdiction to attach defendant for contempt,** though at time contempt proceeding was brought defendant may reside out of county where alimony suit was brought, if he can be found and served within jurisdiction of court. 167 Ga602, 146SE446.

305-66½-New. Court has no jurisdiction to punish for contempt for nonpayment of alimony where judgment for alimony is void. 167Ga706, 146SE457.

306-69½-New. Proceedings to enforce decree can have no extraterritorial effect. 216Ala16, 112S318.

306-74 20AlaA514, 104S561; 129 Or 612, 277P1012, 63ALR1216.

306-75 20AlaA514, 104S561; 27 OhA 290, 161NE346 (filing of affidavit setting forth facts constituting contempt necessary to render contempt statute applicable). [a] **Averment of familiarity with duty neglected.**-129 Or612, 277P1012, 63ALR1216.

306-76 20AlaA514, 104S561.

306-76½-New. The affidavit or petition must be verified. 20AlaA514, 104S561.

306-76½-New. It is insufficient for affiant to state that the facts are true according to best of his knowledge, information, and belief. 20AlaA514, 104 S561.

306-78 129 Okl 219, 280P1097 (need not allege willful disobedience); 128 Or 305, 274P507.

306-78½-New. Demand must be alleged unless necessity therefor is eliminated. 129 Or612, 277P1012, 63 ALR1216.

306-80 83Colo 368, 265P911.

306-86 72CalA90, 236P927 (cannot be punished where order was not served on him, nor made in his presence, and of which he had no knowledge).

306-87 133Misc266, 231NYS329.

307-98 But see 170La671, 129S125.

307-99 [b] **Defenses available for noncompliance with final judgment for alimony in gross** may be set up by husband in proceedings to enforce judgment by attachment for contempt. 156Tenn619, 4SW(2d)345.

307-8 [a] **Conclusiveness of admissions.**-170La1011, 129S619.

307-9½-New. That a husband asserts that he was not the father of a child born to the wife shortly after the decree affords no excuse for refusal to contribute to the support of an older child 202 Iowa134, 209NW396.

307-9½-New. whose custody was granted to the mother who is unable to support the child. 202 Iowa134, 209NW 396.

307-9¼-New. A husband's inability is a complete defense against enforcement of an alimony order by imprisonment in a civil contempt proceeding. 20AlaA 514, 104S561.

307-9½-New. Propriety of order cannot be questioned on motion to commit for contempt. 127Misc788, 217NYS498.

307-9½-New. Jurisdiction of the court to award alimony cannot be questioned for the first time in contempt proceedings. 167Ga602, 146SE446.

307-9½-New. In contempt proceedings to enforce payment required from a husband under a divorce decree, relief held properly denied owing to delay, where over twenty years elapsed between the

time payment was due and the date of filing the petition, and defendant had resided within the state for eight and one-half years during that time. 246 Mich80, 224NW337(1stcase).

307-11 83Colo368, 265P911 (court's remarks at time of entry of order held not findings); 170La671, 129S125. [d] (3) 46 Ida97, 266P677. [e] **Conviction without hearing or opportunity to be heard** held erroneous. 128 Or46, 273P395. [f] **Findings held insufficient to support judgment.**–Utah 269P775. [g] **Evidence held sufficient** to authorize finding that husband earned more than sufficient to make monthly payments. 169Ga97, 149SE870.

307-12½-New. Evidence in a divorce action on which alimony decree is based is properly admitted in hearing on the husband's motion to reduce alimony in contempt proceeding. 144Va244, 132SE303.

307-12½-New. Presumption in contempt proceeding to enforce alimony is that decree was right. 144Va244, 132SE303.

307-12¼-New. Evidence held to show husband failed to pay alimony not from inability but from unwillingness. 144Va244, 132SE303.

307-12⅓-New. Although a wife's amendment of her bill seeking divorce a mensa et thoro on the ground of cruelty so as to pray for absolute divorce in accordance with an agreement with her husband for alimony and division of property is a suspicious circumstance, the court cannot, in the absence of other testimony, after ten years, and after the parties had accepted the decree, find that the agreement was induced by collusion. 157Md166, 145A488.

307-12⅙-New. Refusal to make alimony payments until several motions are made constitutes willful contempt. 133Misc26, 231NYS33.

307-14 28Hawaii291.

307-15 28Hawaii291. [a] **Order held void** for uncertainty. 157Miss457, 128S342.

308-20½-New. An order preventing the wife from ever attempting to collect the balance of the alimony in arrears by contempt proceedings is erroneous although the sum which it directs the husband to pay is as much as he is able to pay at the time. 135Wash186, 237P304.

308-20⅓-New. An order directing confinement in jail until alimony is paid, unless sooner released, is proper. Iowa 229NW163.

308-22½-New. In the absence of a showing elsewhere the record order must show ability to comply with the order or that defendant intentionally deprived himself of ability to comply with it, 68Utah220, 249P806.

308-22⅓-New. and in the absence of such showing the order is in excess of the court's jurisdiction and subject to annulment on certiorari. 68Utah220, 249P806.

308-27 208Ky658, 271SW1100. [a] (1) 78Mont92, 252P388. [c] 48RI 50, 135A322.

308-28 208Ky658, 271SW1100.

308-32½-New. In some jurisdictions statutes entitling persons confined in jail under executions issued in civil actions to apply for a hearing for the purpose of obtaining a discharge apply to persons in jail for noncompliance with an order for the payment of alimony. 40 Ida432, 233P514.

308-36 175Minn57, 220NW414 (decision below held final on facts). [b] **In Montana.**–83Mont428, 272P543(1stcase) (order dismissing contempt proceeding).

308-36½-New. Appeal from order of commitment, after demurrer to answer in show cause order, brings up the question whether allegation of answer taken as true purges of contempt. 208Ky658, 271SW1100.

309-41 213Ky100, 280SW477.

309-41½-New. Property in the hands of the administrator of an estate of which nonresident defendant husband is an heir may be impounded at the commencement of the suit to secure the husband's alimony obligation. 177Ark790, 8SW(2d)437.

309-44 221MoA1043, 295SW824.

309-45 221MoA135, 296SW460; 127Misc313, 215NYS259; 224AppDiv355, 231NYS146. [a] 66Utah194, 240P458. [c] **Execution** not proper for alimony. 49RI 64, 139A667.

309-52 230Ky56, 18SW(2d)859(2d case); 133Misc681, 233NYS268.

309-57 MoA 256SW546. [b] **Attack on sheriff's deed** is collateral attack and not allowed in absence of showing lack of jurisdiction. 324 Ill 276, 155NE288.

309-59½-New. Erroneous order discharging respondent from custody held no bar to alias execution under statute. 49RI 64, 139A667.

309-59⅓-New. Where a direction for payment of temporary alimony is contained in an order directing payment of counsel fees, payment of counsel fees cannot be enforced by execution, apart from temporary alimony. 133Misc681, 233NYS268.

310-60 66Utah194, 240P458.

310-68 48RI 50, 135A322.

310-70½-New. Motion to vacate and recall execution. The remedy of defendant upon plaintiff's obtaining an ex parte order for the issuance of an execution is to move to vacate the order and recall the execution. 203Cal 787, 266P283.

310-70⅓-New. Under some circumstances an injunction is properly issued to restrain a sale to enforce an alimony allowance against property not subject to execution. 230Ky56, 18SW(2d)859(2dcase).

310-71½-New. Execution will not be quashed on ground of compromise and settlement of alimony claims in the absence of clear evidence showing such settlement. 176Ark1205, 28SW(2d)1084.

311-74½-New. Under statutes an execution may issue within ten years from the last payment in the absence of scire facias. MoA 18SW(2d)526.

311-77 203Cal 787, 266P283.

311-79 88CalA260, 263P347; 101CalA363, 281P710.

311-81 95CalA757, 273P609; Md 150A873 (injunction restraining disposition of farm does not apply to crops); Tex CivA 27SW(2d)268.

311-83 [a], (2) Solvency of defendant does not constitute defense to application for injunction. TexCivA 291SW648.

311-88 But see MoA 276SW881. [a] **Bond.**–MoA 276SW881.

313-16 66Utah194, 240P458, 459 [quot CJ].

313-17 66Utah194, 240P458, 459 [quot CJ]; WVa 153SE504. Contra 94Fla25, 113S638. [a] (1) 66Utah194, 240P458. (2) Such decree constitutes lien though gross sum is payable partly or wholly in future installments. 66Utah194, 240P458. **Erratum.**–N. J.—Strike out citation.

313-18 66Utah194, 240P458, 459 [quot CJ].

313-19 66Utah194, 240P458, 459 [quot CJ].

313-20 66Utah194, 240P458, 459 [quot CJ].

313-21 66Utah194, 240P458, 459 [quot CJ].

313-22 66Utah194, 240P458, 459 [quot CJ].

313-22½-New. No lien on husband's realty is created by installments of alimony not yet due. 66Utah194, 240P458.

313-22⅓-New. Where alimony is made payable in installments for an indefinite period, installments to become due in future do not constitute a lien. 66Utah194, 240P458.

313-23 66Utah194, 240P458, 459 [quot CJ].

313-24 66Utah194, 240P458, 459 [quot CJ].

313-25 94Fla25, 113S638, 639 [citCJ& Cyc]; 169Ga273, 149SE895, 66ALR1469; 249 IllA252; 130Kan26, 285P548 (decree construed as not imposing lien); 66Utah194, 240P458, 459 [quot CJ].

313-27 94Fla25, 113S638, 639 [citCJ].

313-28 215Ala581, 112S190; Ala 129S3; 94Fla25, 113S638, 639 [citCJ]; 324 Ill 276, 155NE288; 233Mich569, 207NW818 (to effectuate lien authorized by statute, decree must so provide); 66Utah194, 240P458. [e] **Statute held to show legislative construction** that decree for permanent alimony did not constitute lien on husband's property. 94Fla25, 113S638. [f] **Statute** does not apply to permanent alimony. 94Fla25, 113S638.

314-34 215Ala581, 112S190; 66Utah194, 240P458. [a] **Erratum.**–Strike out citation.

314-36 121 Oh188, 167NE684, 64ALR1384.

315-47 94Fla25, 113S638.

315-48½-New. Surety not liable after divorce decree, unless husband renders it impossible to execute warrant of commitment. 101NJEq122, 137A851.

315-58 [d] **Husband's ne exeat bond cannot be forfeited** for nonpayment of alimony or counsel fee, where he remains amenable to appropriate writ. 101NJEq122, 137A851.

316-62 216Ala259, 112S836; 88CalA292, 263P343; CalA 279P174; 229AppDiv446, 243NYS21; 155Tenn530, 296SW356. [a] **Order for payment to receiver** held to refer only to alimony and not additional trust income. 135Misc661, 240NYS703.

316-63 163Ga95, 135SE434. [g] (2) Statute does not authorize appointment of receiver for corporation to which husband had conveyed property. 101CalA541, 282P21.

316-64½-New. In New York, under Civil Practice Act, an order to appoint a receiver of husband's property and directing its application to payment of alimony and counsel fee, which had not been paid under previous order, could not be made without notice to defendant or his attorney. 125Misc292, 210NYS619.

316-68 172Ark1135, 291SW999; 213Ky100, 280SW477; 127Misc761, 217NYS379; 130Misc567, 224NYS328; 224AppDiv355, 231NYS146; 229AppDiv446, 243NYS21.

316-69 [b] **Motion granted.**–127Misc761, 217NYS379. [c] **Sequestration allowed notwithstanding payment pending motion** where husband has been delinquent at various times for two years. 219AppDiv451, 220NYS93. [d] **Jurisdiction over husband** obtained where after registered notice sent husband appears to oppose motion. 219AppDiv451, 220NYS93.

316-71 MoA 283SW59.

317-72½-New. Sequestration should be denied where financial ability of husband required to pay alimony is conceded. 222AppDiv838, 226NYS454.

317-74 247NY32, 159NE713.

317-75½-New. Sequestration is merely one step in separation action and separation judgment does not necessarily terminate the action. 128Misc309, 219NYS335.

317-75⅓-New. Where husband's property is sequestered after judgment in separation proceedings on constructive service, notice must be given husband before the property can be appropriated for alimony and counsel fees. 128Misc309, 219NYS333.

317-75¼-New. Future income of trust fund may be sequestered. 219AppDiv451, 220NYS93.

317-75⅕-New. Order of court in sequestration proceedings held conclusive on court in accounting proceeding by trustee as to amount of alimony. 135Misc661, 240NYS703.

317-77 219AppDiv451, 220NYS93.

317-81½-New. Receivership does not terminate with separation decree, but continues for protection of wife and child. 131Misc318, 227NYS13.

318-97 81NH275, 125A433, 35ALR1034.

318-99 172Ark1135, 291SW999; 34OhA89, 170NE181; 130 Or230, 279P870 (voluntary conveyance is binding on grantor and all parties in privity with him except wife, and neither grantor nor his heirs can question its validity).

318-99½-New. Where the fraudulent transferee of a contract for the sale of land has paid the balance due under the contract, the wife may be required as a condition of relief to repay the money paid thereon with interest within a definite time. 237Mich671, 213NW77.

318–99½–New. In a suit by a husband to set aside a conveyance of property transferred to defendant's son for the purpose of defeating his wife's recovery of alimony, neither party is entitled to any affirmative relief in equity, where the original transaction was consummated by both parties for the express purpose of defrauding the wife, 206**Cal** 424, 274**P**532.

318–99¼–New. but the wife's rights are not affected, notwithstanding her quitclaim deed, executed before the fraud was discovered. 206**Cal** 424, 274 **P**532.

318–99½–New. A deed by a husband to evade his wife's rights creates no trust relation in his favor permitting him to regain property after the fraudulent purpose has been accomplished. 130 **Or**230, 279**P**870.

318–99½–New. Order for payment of costs on decree for judicial separation makes wife creditor entitled to set aside husband's fraudulent conveyance made pending alimony action against him. **BC** [1930] 3**DomLR**497.

318–1–2 168**Ga**630, 148**SE**522 (title of grantee from transferee of husband without notice of husband's intent held superior to wife's claim); 131**Misc**318, 227**NYS**13. But see 169**Ga**595, 151**SE**5.

319–3 165**Ga**228, 140**SE**497; 237**Mich** 671, 213**NW**77.

319–4 172**Ark**1135, 291**SW**999. [a] 229**Ky**406, 17**SW(2d)**220 (rule applied whether transfer by husband was made before or after separation).

319–6½–New. A wife whose action for divorce is unsuccessful cannot set aside a fraudulent conveyance made by her husband pending the action. 160**Ga** 634, 128**SE**903.

319–7 But see 171**Ark**241, 283**SW**984.

320–12 165**Ga**228, 140**SE**497; 168**Ga** 646, 148**SE**530.

320–21 48 **Ida**722, 285**P**678. [b] **Default by such parties** authorizes annulment of deed conveying property. 181 **Ark**367, 26**SW(2d)**88.

320–22½–New. Jurisdiction in a divorce suit to determine title to property transferred by the husband to defeat alimony is not lost by the divorce decree. 168**Ga**630, 148**SE**522.

320–23 [a] (2) Equitable petition is not multifarious by reason of alternative prayer. 165**Ga**228, 140**SE**497. [c] (2) Other instances. 169**Ga**595, 151 **SE**5. [d] **Complaint alleging mental incapacity** of husband and intent to defraud of alimony is held sufficient. 162**Ga**502, 134**SE**302. [e] **Amendment.**–75**CalA**569, 243**P**445. [f] **Admissions in pleadings.**–75**CalA**569, 243**P**445. [g] **In passing on demurrer,** court errs in granting nonsuit as to grantee unless nonsuit should have been granted as to grantor, where court adjudged that grantee was proper party. 168**Ga** 630, 148**SE**522.

320–27 [a] 206**Cal** 424, 274**P**532; 75 **CalA**569, 243**P**445; 165**Ga**228, 140**SE** 497; 130**Kan**40, 285**P**633; 229**Ky**406, 17**SW(2d)**220; 164**La**553, 114**S**155; 237 **Mich**671, 213**NW**77; **MoA** 20**SW(2d)** 912; **MoA** 24**SW(2d)**704; 34 **OhA**89, 170**NE**181. [b] 41 **Ida**538, 240**P**600. [c] **Evidence held insufficient to show consideration.**–**MoA** 20**SW(2d)**912.

320–27½–New. Findings held not in irreconcilable conflict. **TexCivA** 25**SW (2d)**642.

320–28½–New. Under some circumstances the entire property may be awarded to the wife. 75**CalA**569, 243**P** 445.

320–28½–New. Where the wife obtained a foreign money judgment against the husband providing for satisfaction thereof by conveyance of real property and in an action on such judgment was awarded half of the real property, she is entitled to deficiency judgment for balance. 75**CalA**569, 243**P**445.

321–32 130**Misc**567, 224**NYS**328. [d] **Future alimony held secured by bond** reciting sureties will pay "all alimony ordered," and order required securing of future alimony. 221**AppDiv**348, 222 **NYS**662. [e] **Fact that requirement cannot be enforced by contempt** does not justify refusal to order furnishing of security. 130**Misc**567, 224**NYS**328.

321–33 But see 130**Misc**567, 224**NYS** 328.

321–41 See also 164**Ga**839, 139**SE**663.

321–41½–New. Complaint held sufficient to state cause of action against sureties on bond securing payment of future alimony. 221**AppDiv**348, 222 **NYS**662.

321–41½–New. Proceedings against surety on ne exeat bond held to be connected with original action so as to warrant enforcement order. 164**Ga** 839, 139**SE**663.

321–41¼–New. Surety may be liable for delinquent installments, although more than the amount of the bond has been paid by the husband. 180**Ark**190, 20**SW(2d)**859.

321–42 But see 164**Ga**839, 139**SE**663.

321–43 136**Wash**241, 239**P**551. [a] **Court may stay divorce trial** where husband fails to pay alimony and attorney's fees. 136**Wash**241, 239**P**551.

321–44 92**Fla**1081, 111**S**382; 51**Nev** 339, 276**P**14. [b] **Vacation of order staying cause** for nonpayment of temporary alimony is within discretion of court. 92**Fla**1081, 111**S**382.

322–51 173**Minn**165, 216**NW**940. [a] See also 173**Minn**165, 216**NW**940. [c] **Right to defend** and question sufficiency of plaintiff's proof cannot be denied. 215**AppDiv**316, 213**NYS**671.

322–51½–New. although it does stay any affirmative action by the husband. 215**AppDiv**316, 213**NYS**671.

322–53 216**AppDiv**348, 215**NYS**47 (affirmative action by husband may be denied).

322–54½–New. It is also within discretion of court to refuse to stay action by wife until husband, urging alimony decree unwarranted, purges himself of contempt by paying alimony and counsel fees. 216**AppDiv**348, 215**NYS** 47 (Judiciary L. § 775).

322–56 126 **Or**519, 270**P**484, 62**ALR** 660.

323–64 200**Cal** 652, 254**P**266; 99**CalA** 718, 279**P**227.

323–65½–New. Former husband's nonpayment of alimony does not bar husband's application for amendment of decree on ground of former wife's remarriage. 138**Misc**298, 244**NYS**597.

323–67 41 **OklACR**213.

323–67½–New. A like rule applies where the husband fails to make payments for the support of minor children as required by order of the appellate court. 41 **OklACR**213.

323–68½–New. Stay of appeal is not allowed on a motion for failure to pay counsel fees, without showing of ability. 200**Cal**652, 254**P**266.

323–68½–New. Husband in contempt for not obeying trial court's orders and concealing himself has been held not entitled to maintain error to review divorce decree. **Ill** 173**NE**107.

323–73 180**Minn**33, 230**NW**117; 48**RI** 60, 135**A**241. [a] (2) When not made until three years after final decree and year and a half after payment of alimony, there being no evidence of mistake. 48**RI** 420, 138**A**179. [b] **In Iowa.**–201 **Iowa**516, 207**NW**778. [c] **Husband's motion for modification of decree is not premature** when made thirty-three days after losing his position. **CalA** 285**P**902. [d] **In Kansas.**– 130**Kan**848, 288**P**566.

323–74 170**La**473, 128**S**281. [b] **Burden of proof is on husband as moving party.**–**CalA** 285**P**902. [c] **Motion for new trial on question of alimony, filed at same term divorce granted to wife,** may be regarded in same light as motion to review and change order on question of alimony filed after expiration of term, under statute. **MoA** 21 **SW(2d)**2.

323–74½–New. Decree of alimony cannot be informally modified at special term, so as to excuse payment or deprive defendant of the amount due. 222 **AppDiv**838, 226**NYS**454.

323–74½–New. Reduction of alimony in the absence of proper application to the court is error. 226**AppDiv**815, 234 **NYS**542.

323–75 99**NJEq**711, 134**A**338.

323–78 [a] **Order to show cause** is not "leave of court" required under statute. 227**AppDiv**670, 236**NYS**27.

323–79 222**AppDiv**838, 226**NYS**454; 69**Utah**293, 254**P**784. [b] (2) Alimony agreement, embodied in decree, if obtained by fraud, must be attacked by same method recognized by courts of equity, and not by petition. 334 **Ill** 370, 166**NE**835. [d] **In Iowa.**–201 **Iowa** 516, 207**NW**778.

323–79½–New. or by appeal, 69**Utah** 293, 254**P**784.

323–81 69**Utah**293, 254**P**784.

323–82 20 **OhA**224, 151**NE**786.

324–83 20 **OhA**224, 151**NE**786.

324–86 99**NJEq**461, 133**A**768; 20 **OhA** 224, 151**NE**786. [c] **Bill held not demurrable.**–**Va** 153**SE**879.

324–87½–New. Proposed order immature in so far as it prescribes method of applying for alimony and service of notice by publication. 128**Misc**425, 219**NYS**341.

324–87½–New. Rule against splitting cause of action applies to modification of divorce decree wherein single ground of complaint is relied on for modification in judgment. 69**Utah**293, 254**P**784.

324–88 Wash 292**P**1011 (properly made on wife's attorney).

324–88½–New. Under some statutes the retained jurisdiction of the court may be reasserted at any time on such notice as the court may order provided that it is reasonably calculated to give the interested party knowledge of the proceeding and an opportunity to be heard. 201 **Iowa**516, 207**NW**778 (five days' notice held sufficient).

324–88½–New. Legal and timely notice is requisite to give the court jurisdiction although the statute does not expressly provide for notice. 201 **Iowa** 516, 207**NW**778.

324–90 But see **NJ** 144**A**621.

324–90½–New. Remarriage by a divorced wife does not raise a presumption that the necessity of alimony no longer exists, and the burden of establishing that remarriage has placed the wife in a position so that she is in no further need of alimony rests on the divorced husband. **NJ** 144**A**621.

324–91 But see 173**Minn**464, 217**NW** 488.

324–92 206 **Iowa**942, 221**NW**580; 208 **Iowa**1384, 227**NW**330; 233**Mich**67, 206 **NW**353 (evidence of changed condition held insufficient); 251**Mich**53, 231**NW** 140; **MoA** 287**SW**829; **Nebr** 226**NW** 798 (evidence justifying refusal to modify decree); **SD** 215**NW**931. [b] **Burden is on wife seeking increased alimony,** to establish increased income of husband and necessity for increased allowance. **NJCh** 131**A**103. [c] **Evidence held insufficient.**–(1) 206 **Iowa** 942, 221**NW**580. (2) To establish necessity for increased allowance. **NJCh** 131**A**103. (3) To justify cancellation of accrued alimony. 178**Minn**31, 225 **NW**913(1stcase). (4) To justify modifying alimony decree. **Iowa** 231**NW** 389. (5) To warrant modification. **Ala** 127**S**819. [d] **Evidence held sufficient to justify modification.**–178**Minn** 31, 225**NW**913(1stcase). [e] **Denial of husband's motion to reduce alimony** and support of child from forty dollars to twenty dollars per month held not abuse of discretion. **SD** 215**NW**931. [f] **That former wife is afflicted with disease preventing her from following her profession as nurse** does not require conclusion that she is unable to earn money in other fields of labor. 80**CalA**494, 251**P**943. [g] **Evidence held to warrant reduction of alimony.**– **RI** 148**A**900. [h] **Evidence held to sustain judgment** to set aside release of alimony judgment and increase amount awarded. **MoA** 290**SW**624.

324–94½–New. A divorced husband, applying for modification of a decree awarding alimony, has the burden of establishing an allegation that he has no ability to pay any sum. 96**CalA** 267, 273**P**1079(1stcase).

324–96½–New. A contract between husband and wife whereby the husband agreed to pay a stipulated monthly

sum as an allowance is admissible on the hearing of his motion for modification of an interlocutory decree for alimony. 68CalA195, 228P675.

324-96⅓-New. A husband's motion for modification of a decree granting alimony to his unoffending wife although she was refused a divorce by striking out the provision for alimony may be denied by the court, in its discretion, where it believes that the husband's offer of reconciliation was not made in good faith. 68CalA725, 230 P209.

324-96¼-New. On such hearing the court has jurisdiction to determine whether the contract was invalid because tinctured with fraud or for other reason. 68CalA195, 228P675.

324-96½-New. Petition to modify decree will be stricken when hearing was had on matters complained of therein. 69Utah293, 254P784.

324-96⅓-New. On a husband's motion to reduce payments the court might find voluntary settlement embodied in the divorce decree binding, although the divorce had been granted to the husband for the wife's fault. SD 215 NW931.

324-96½-New. Household furniture, surrendered to wife, is to be taken into account in determining reduction of alimony. 130Misc698, 225NYS431.

324-96¾-New. On application to reduce alimony the court must treat conditions as it finds them. 130Misc698, 225NYS431.

324-96⅙-New. In determining reduction of alimony, stipulation between parties does not measure the amount of alimony, but the question is open for further inquiry. 130Misc698, 225 NYS431.

324-96 1/10-New. A wife resisting her husband's application for reduction of allowance has the burden of proving an agreement that the allowance should be permanent. 203Cal 173, 263P234.

324-96 1/11-New. Evidence has been held sufficient to sustain an order. 96CalA 267, 273P1079(1stcase).

324-96½-New. An order terminating alimony after a hearing has been held not reviewable in proceedings to punish the judge for contempt as for disobedience of a writ of prohibition. MoA 17 SW(2d)586.

324-99 321 Ill 134, 151NE550.

324-99½-New. Jurisdiction. In Saskatchewan an order for interim alimony improperly made by local master can be set aside only by a judge in chamber on appeal, not on a substantive motion to quash. Sask [1925] 3DomLR552.

324-1 103NJEq416, 143A559.

324-6½-New. Evidence held sufficient to justify court in vacating amended judgment and reinstating original judgment on ground of undue influence. 179 Minn488, 229NW791.

325-14 See also 82Colo 278, 260P104.

325-14½-New. Refusal to modify consent decree as to alimony held reviewable. 48RI 60, 135A241.

325-14¼-New. By statute, order overruling defendant's petition for further proceedings by plaintiff in divorce case held not appealable. 154Md267, 140A 205, 56ALR697.

325-14¼-New. Review does not lie in the supreme court by a bill of exceptions to proceedings for contempt for nonpayment of alimony brought before and heard by a single judge. 101Vt381, 143A676.

325-15 215Ala280, 110S409; 125 Or60, 253P12. [c] **But in suit for alimony without divorce,** decree on final submission, awarding temporary alimony and also future alimony until further orders of court, held final and appealable. 215 Ala259, 110S140.

325-16 215Ala259, 110S140; 125 Or60, 253P12.

325-16½ 77Colo 260, 236P777 (writ of error); 211Ky207, 277SW242; 224Ky 18, 48SW(2d)1106; 158La682, 104S616; 169La390, 125S282; MoA 256SW546; 82Mont463, 267P803; 230AppDiv66, 243 NYS217; 191NC740, 133SE9; 95PaSuper387. [c] 166Minn283, 207NW616. [g] **Appeal from order granting alimony pendente lite** does not give appellate court jurisdiction to enter on original trial of issues. DC 41F(2d)566.

326-17 50RI 278, 146A626.

326-17½-New. Denial of plaintiff's motion for alimony pendente lite made after filing notice of appeal from final judgment of divorce on cross complaint is not of itself an appealable final judgment. 103Conn265, 130A126.

326-24 215Ala259, 110S140; 215Ala 280, 110S409; Utah 271P225.

326-26 218Ky9, 290SW725.

326-27½-New. Denial of plaintiff's motion for an order awarding her expenses of appeal, made after filing notice of appeal from a final judgment of divorce on cross complaint, is not of itself an appealable final judgment. 103Conn265, 130A126.

326-27⅓-New. An order denying an allowance to the wife for attorney's fees is appealable. 166Minn283, 207NW616.

326-27¼-New. Appellate court will not consider interlocutory orders for attorney's fees in divorce action in appellate court where such orders had already been appealed to supreme court. 86 IndA16, 154NE503.

326-29 229Ky436, 17SW(2d)412; 233 Ky423, 25SW(2d)1013; 233Ky752, 26 SW(2d)511; 161La121, 108S307; 50RI 326, 147A621, 66ALR214. But see Ala 130S677. [c] (2) Procedure is not by bill of exceptions to review decree modifying final decree which has been fully performed. 48RI 420, 138A179. [e] (1) 224Ky398, 6SW(2d)470; 232Ky123, 22 SW(2d)424. [f] 48RI 420, 138A179.

327-31 218Ala701, 120S167; Ala 127S 819 (decree finally disposing of petition for modification is appealable). See also 173Minn464, 217NW488.

327-37 200 Ind56, 160NE345.

327-38 207 Iowa1193, 224NW503; 127 Kan624, 274P247; 81NH509, 129A725. But see Ga 155SE31.

328-50 See also 84Colo 429, 271P193.

328-51 83Colo 368, 265P911.

328-53 169Ga366, 150SE167 (bill of exceptions to review grant of temporary alimony held not premature).

328-54½-New. Where filing of written notice of application for writ of error is required by statute to review award of temporary alimony, filing of such notice is prerequisite to jurisdiction of reviewing court. 77Colo 260, 236P777.

328-57 94CalA593, 271P548; 50RI 326, 147A621, 66ALR214.

328-58 [c] **Effect of failure to file bond.** 216MoA699, 273SW241.

328-59 See also 91CalA606, 267P392.

329-65 Ala 130S677; Cal 290P25(1st case); MoA 279SW755. [b] **Contempt proceedings** are held not to be remanded for findings where memorandum in record of trial court contains findings. 137 Wash284, 242P388.

329-66 221MoA1033, 295SW515.

329-67 49RI 64, 139A667.

329-68½-New. On appeal from an order granting suit money pendente lite on abstract of the record taken from the bill of exceptions in the original trial on the merits is no part of the bill of exceptions and will not be considered. 220MoA484, 276SW84.

329-70 207 Iowa1193, 224NW503; 224 Ky300, 6SW(2d)244. [a] **Where attorneys and guardian ad litem are not made parties** to appeal, excessiveness of their fees cannot be considered. 214Ky171, 283SW73; 218Ky613, 291SW1058.

329-71 163Ga87, 135SE434; 168Ga648, 148SE591; Ga 150SE849(2dcase); 165 Ga208, 140SE382; 126 Or484, 270P1118.

329-72 35Ariz69, 274P638; 74CalA431, 240P1023; 82CalA313, 255P767; 86 CalA275, 260P845 (refusing modification); 86Colo 1, 278P780; 165Ga118, 139SE811; IndA 168NE492(2dcase); Iowa 231NW389; 124Kan461, 260P618; 130Kan81, 285P520; 224Ky398, 6SW (2d)470; 229Ky353, 17SW(2d)204; 154 Md267, 140A205, 56ALR697; MoA 274 SW530; MoA 287SW834; 99NJEq426, 131A887; 20 OhA518, 152NE767; 116 Okl 129, 243P730; 65Utah605, 238P647; Utah 262P292; 99Vt356, 133A248; 136 Wash241, 239P551; WVa 153SE150. [c] (1) 180Minn180, 230NW638 (decision as to property values based on competent evidence); 66Utah366, 242P947. (3) Husband cannot complain of division more favorable to him than to wife. TexCivA 208SW(2d)229. (4) Parties are entitled to judgment of supreme court as to whether division is equitable. Utah 292P214. [f] **Agreement between parties not made known to court** can have no weight in construing intention of court in making decree. 69CalA66, 230P462

330-73 74CalA431, 240P1023; 99CalA 198, 278P456; 163Ga87, 135SE434; 244 IllA488; 228Ky277, 14SW(2d)1061; MoA 287SW834; 99NJEq426, 131A887; 136Wash241, 239P551. [b] **Where attorneys of wife suing for divorce are not parties to husband's appeal from divorce,** court of appeals is without authority to consider objections to allowance to such attorneys. 230Ky545, 20 SW(2d)170.

330-74 Iowa 231NW389.

330-75 [a] **Where husband's cross complaint in wife's action for divorce sought annulment of deed** from husband to wife, wife cannot complain on appeal of decree for division of property requiring her to reconvey land, the subject matter of deed, in view of record requiring inference that issue of the cross complaint resolved in her favor. 84Colo 429, 271P193.

330-77 229Ky21, 16SW(2d)485. [c] **Failure of wife to appeal** from judgment dismissing her reconventional demand for divorce presents no question as to her paraphernal claim in reconventional demand on husband's appeal from alimony decree. 158La57, 103S441. [d] **Supreme court's decision** as to suit money and alimony pending appeal is determination as such point in subsequent appeal from trial court's order thereon. 42 Ida821, 248P468. [e] **Bank's claim to note** held as collateral for debt of husband cannot be determined on wife's appeal from order dismissing petition for division of community property. 42 Ida821, 248P468. [f] **Appellate court must presume that judgment was regular** and supported by evidence. CalA 285P902.

330-78 [a] (2) Where circuit court granted divorce, reviewing court was without power to modify judgment in so far as it granted divorce to parties but it could modify judgment in so far as it refused wife alimony. 229Ky 21, 16SW(2d)485.

330-79½-New. In determining the jurisdiction of the trial court to award alimony, the appellate court cannot consider an affidavit as to facts which arose subsequent to the entry of the decree. 68CalA725, 230P209.

330-79⅓-New. Where it does not appear from the face of a decree allowing alimony to an unoffending wife who was refused a divorce that circumstances existed depriving the court of jurisdiction to award alimony, the decree will not be disturbed on the ground of lack of jurisdiction to make the award. 68CalA 725, 230P209.

330-79¼-New. The judgment which recognized plaintiff as owner of undivided half of community property, but did not order partition thereof, may not be amended on request of respondent in absence of appeal by her from such judgment or filing answer to appeal praying amendment. 159La219, 105S 296.

330-79⅕-New. In Michigan, on wife's motion for alimony and expense money, supreme court will not consider affidavits as to alleged statements made by husband after decree was granted him since court passes on record made in circuit court. 235Mich299, 209NW48.

330-79⅙-New. Appellate court will not interfere with discretionary orders of lower court. 99NJEq426, 131A887.

330-79 1/7-New. Facts reported by register fixing alimony pendente lite will not be disturbed, unless clearly wrong. 215 Ala280, 110S409.

330-79⅛-New. On an appeal from a decree refusing to reduce alimony taken after the expiration of the time to appeal from the original decree, the question as to the amount of the allowance

as fixed by the original decree is not presented. 216Ala259, 112S836.

330-79⅕-New. Court of appeal may determine whether property rights were properly adjusted. 215Ky278, 284SW 1071.

330-79 1/10-New. On appeal from decree denying divorce and permanent alimony, questions of temporary alimony and counsel fees not finally disposed of below will not be considered on appeal. 217Ala157, 115S229 (rulings not invoked till after final decree).

330-79 1/11-New. Error in the judgment for separation from bed and board, cured by a final judgment for divorce, cannot be complained of. 226Ky264, 10 SW(2d)821.

330-79 1/12-New. Exclusion of evidence of adultery of the party to whom custody of the children was awarded is ground for reversal. 152Miss476, 119S 581.

330-79 1/13-New. Husband cannot complain of alimony granted to wife from property conveyed, grantee consenting. 181Ark367, 26SW(2d)88.

330-79 1/14-New. Objection that husband was in contempt of court cannot be urged first on appeal in absence of objection below. CalA 285P902.

330-79 1/15-New. Where controversy as to alimony is submitted on affidavits, it cannot be objected on appeal that hearing should have been on oral evidence. 179Minn488, 229NW791.

330-80 206Cal 7, 272P1052; Cal 290P 25(1stcase); 68CalA195, 228P675; 87 CalA359, 262P339; 99CalA172, 277P 1089; 99CalA130, 277P1092; 164Ga 839, 139SE663; 244 IllA497; 154Md 267, 140A205, 56ALR697; Miss 130S 688; MoA 21SW(2d)2. See also 226Ky 264, 10SW(2d)821. But see 65Utah605, 238P647. [c] **Decree confirming report of register fixing temporary alimony** strengthens presumption in its favor. 215Ala280, 110S409. [d] **Report of register fixing temporary alimony** and decree confirming it are presumed correct. 215Ala280, 110S409.

330-82 129Kan326, 282P590 (alimony decree not prejudicial); 230Ky545, 20 SW(2d)170 (allowance, pending appeal, set aside); 122 Okl 266, 254P722; 155 Tenn530, 296SW356. See also 251Mich 53, 231NW140. [g] **Modification** to reserve jurisdiction of defendant's reconventional demand. 158La682, 104S616. [h] **Finding that all arrears of alimony have been paid,** though not within issues on application for reduction of alimony, is not ground for reversal or modification of order reducing alimony. 128Kan406, 278P33. [i] **Invalid provision of decree awarding alimony may be annulled** though husband does not appeal. RI 150A754.

330-83 164La272, 113S845; 189NC625, 127SE682 (wife allowed to amend complaint on remand to lower court). See also 38 OklACR678.

330-84 200 Iowa910, 205NW785; 231 Ky477, 21SW(2d)812; 237Mich542, 212 NW963; 230AppDiv66, 243NYS217; Okl 292P824; 126 Or388, 270P516. See also 42 Ida29, 243P827. [a] (1) 237 Mich542, 212NW963.

331-87½-New. Decree may be regarded solely for entry of modified orders. 48 RI 60, 135A241.

331-89½-New. Because of modification of decree for alimony plaintiff may be required to pay defendant an attorney fee in stated amount. 239Mich306, 214 NW133.

331-91½-New. A mandate reversing a judgment modifying a decree because the decree was modified without hearing evidence, sets aside the judgment modifying the decree, leaving the motion to modify still pending and does not prevent quashal of execution on the original judgment. MoA 17SW(2d) 586.

331-93 106WVa105, 144SE875.

331-97 48Nev296, 229P764 (community property may be given to wife); 33NM 132, 262P1007; 53ND887, 207NW987; TexCivA 291SW648; Utah 291P298; 36Wyo 379, 256P76. See 243Mich406, 220NW812. [g] **Both real and personal property** are subject to distribution under some statutes. 53ND887, 207NW 987.

331-98 197Wis358, 222NW242.

331-98½-New. Property right in community. Property under conditional sales contract may be awarded to wife, although husband as buyer was in default, where no forfeiture had been declared. 43 Ida1, 249P89, 48ALR1225.

331-98⅓-New. Until entry of the final decree of divorce the property rights of the parties remain as they were before entry of the interlocutory decree in the absence of any property settlement between them. 201Cal 36, 255P800.

331-98¼-New. Estate by entirety cannot be divested out of one spouse and vested in other. 177Ark250, 6SW(2d) 21.

331-98⅕-New. A statute providing that a wife shall be entitled to immediate possession of all of her real estate when a divorce is granted for any cause except her adultery does not prevent the determination of the husband's rights in her real estate so far as such issues are tendered by pleadings or litigated by consent. 176Minn206, 222NW922.

332-99 [a] **On dismissal of petition and cross petition** for want of evidence, court can enter judgment only for costs, and has no jurisdiction to divide defendant's property. 114 Oh309, 151NE 186. [b] **Transfer** from wife to husband of property conveyed by him to her is permitted by such statute. 84 Colo 429, 271P193.

332-99½-New. Where divorce was denied, property rights will not be determined. 205 Iowa684, 216NW636; Tex CivA 18SW(2d)399.

332-1 119 Or292, 247P145; TexCivA 30 SW(2d)801. [e] **Supplemental judgment** reawarding occupancy of house to wife, where benefit was originally given to give her home for herself and child, but she had never occupied or used it for maintenance, held erroneous. 209Ky 571, 273SW26. [f] 199Wis197, 225 NW749. [g] **In Texas.**-30SW(2d)801.

332-3½-New. It has great latitude in determining whether part of the husband's separate estate should be awarded the wife. 148Wash537, 269P836.

332-8 Utah 292P214.

332-9½-New. Order subsequent to allowance of alimony allowing wife use of certain household goods held not abuse of discretion. 169Ga580, 151SE14.

332-9⅓-New. Doubt as to right to division resolved against guilty party. Utah 292P214.

332-10 TexCivA 293SW325.

332-14 325 Ill 553, 156NE828; Tex CivA 6SW(2d)403; 141Wash62, 250P 641; 149Wash464, 271P268; 199Wis 501, 227NW11; 200Wis208, 227NW879; 36Wyo 379, 256P76. See also 142Wash 359, 253P121. But see 131 Okl 33, 267P 620. [a] 106WVa105, 144SE875.

332-15 208Ky800, 272SW51 (husband supporting and paying burial expenses of wife's grantor is entitled on divorce to such interest as consideration furnished bore to whole); 141Wash62, 250 P641; 153Wash328, 279P740 (husband not entitled to interest in wife's property).

332-16 206Cal 657, 275P801.

333-17 237Mich200, 211NW738.

333-20 179Minn266, 229NW128.

333-28½-New. Under some statutes the court has authority to make an equitable division of property where a decree of divorce is denied to both parties. 120 Okl 128, 250P916.

333-28⅓-New. Property which may be divided under such statutes is that portion of the property of the parties acquired during coverture, whether title thereto is vested in husband and wife jointly or in one of them separately. 120 Okl 128, 250P916.

333-28¼-New. Such statutes do not authorize the court to decree to the husband an interest in the separate property of the wife owned by her before marriage nor in the income and profits of such property, the husband being able-bodied and suffering no infirmity. 120 Okl 128 250P916.

333-28⅕-New. Just and equitable division of property under one statute gives wife just and reasonable part of personal property that came to husband by marriage under another statute. 36Wyo 379, 256P76.

333-28⅙-New. Dower. The court has no power to compel relinquishment of dower. MoA 280SW76.

333-28⅐-New. Husband is entitled to one-half of joint bank account after divorce for wife's adultery. NJCh 148A 618.

333-29 See also 129 Or402, 275P915.

333-31 79CalA734, 251P218; 83CalA 345, 256P826; 325 Ill 553, 156NE828; 159La46, 105S95 (become coöwners and entitled to judicial partition); 131 Okl 33, 267P620; 140 Okl 60, 282P607; 141 Okl 160, 285P30; 143 Okl 91, 287P721; 29PortoRico909 (Civ. Code § 173); Tex CivA 6SW(2d)403; TexCivA 30SW(2d) 801; TexCivA 31SW(2d)828; 141Wash 62, 250P641; 150Wash685, 274P708; 151Wash468, 276P547. [f] **Court may award alimony** in lieu of division of community property regardless of question of existence of children of marriage of parties. 196Cal 761, 239P36. [g] **Presumption.**-29PortoRico 909. [h] **Community property does not come into custody** of court merely by institution of divorce suit. CalA 289P169.

333-37½-New. Temporary alimony paid during suit is chargeable in a settlement by the husband against the revenues from community property, but not against the wife's half of the corpus of the community estate. TexCivA 125SW937.

333-37⅓-New. Reimbursement. Community property must be reimbursed for community funds expended on improvement of separate property. Tex CivA 277SW210.

333-37¼-New. Wife in a separation suit is not entitled to have property in the third person adjudged community property, on claim of purchase for account of the husband. 169La153, 124S 676(2dcase).

333-40 176Ark1065, 5SW(2d)299; 247 Mich234, 225NW499; SD 226NW755 (mortgaged homestead decreed to children with consent of innocent husband); TexCivA 281SW598; TexCivA 15SW (2d)1083; TexCivA 20SW(2d)229; Utah 269P485. [a] (4) Court cannot assign undivided half interest in homestead to party at fault. 99CalA172, 277P1089. [b] 158Tenn437, 14SW(2d)745. [c] **In Oklahoma.**-137 Okl 12, 277P943.

334-42 229Ky125, 16SW(2d)781.

334-43½-New. Homestead held by entirety may be awarded to innocent party for limited time or for life, the court not being limited to division of rents. 177Ark250, 6SW(2d)21.

334-45 166Ga850, 144SE665; 232Mich 677, 206NW523; 237Mich371, 211NW 738; 120 Or439, 251P303; TexCivA 20SW(2d)229; 141Wash62, 250P641; 150Wash685, 274P708; Wis 230NW77. See also 142Wash359, 253P121. [d] (4) But see Cal 288P65. [h] **Statutory equitable division** would give each party approximately one-half. SD 228NW 804. [i] **Division of property depends on facts of particular case.**-Utah 292P 214. [j] **That wife already possesses husband's property** should be given proper weight in deciding whether she is entitled to further award or should return part. Utah 291P298.

334-47 [a] (1) 122 Or620, 260P206, 59 ALR707. [b] (1) Cal 288P65; 99CalA 172, 277P1089. (2) Where divorce is granted to husband on ground of wife's cruelty, decree awarding husband less than one half of community property is erroneous. 68CalA701, 230P214. (3) In such case, where custody of invalid daughter is awarded to wife and care of such daughter will prevent wife from accepting remunerative employment and share of community property awarded to her will be her sole means of sustenance, full one half of such property should be awarded to her. 68CalA701, 230P214. (4) Community property to be distributed is residue remaining after discharge of community obligations. 68CalA701, 230P214. (5) Before division of community property can be made nature of debts chargeable against husband must be determined. 68CalA

701, 230P214. [c] (1) 117 Or319, 243P 565; 119 Or679, 250P839; 124 Or364, 264P447. (2) 122 Or620, 260P206, 59 ALR707. (3) 122 Or620, 260P206, 59 ALR707. (6) Where property in which successful husband is awarded one third interest is encumbered by mortgage, unsuccessful wife should be required to pay only two thirds thereof. 123 Or 639, 263P385. (7) Under Oregon statute, court cannot award wife one-third interest in husband's half of property held by entireties. 122 Or620, 260P206, 59ALR707. (8) Such statute contemplates that, by virtue of a decree, title in fee to an undivided one-third of the property is to be conveyed. 122 Or620, 260P206, 59ALR707.

334-49 46 Ida588, 269P589; TexCivA 30SW(2d)801; 66Utah366, 242P947; 66Utah612, 245P329; 141Wash62, 250 P641; 36Wyo 379, 256P76. [b] 235 Mich115, 209NW49. [d] **Discretion held abused.**–66Utah366, 242P947; Utah 262 P292. [e] **Discretion is not arbitrary,** but is sound legal discretion. 66Utah 366, 242P947. [f] **Division held proper.**–145Wash234, 259P385. [g] **In Kansas.**–130Kan848, 288P566. [h] **Court has been held not to have exceeded its discretion.**–TexCivA 30SW(2d)801.

334-50 Cal 288P65; 207 Iowa271, 222 NW862; 128Kan498, 278P717; 130Kan 81, 285P520; SD 228NW804 (division held inequitable); 66Utah366, 242P947; 66Utah612, 245P329 (award held inequitable); Utah 262P292; 141Wash62, 250P641; 146Wash473, 263P600; 149 Wash277, 270P822. [a] **Discretion is subject to review.**–66Utah366, 242P947. [b] **Particular allotments to spouses held proper.**–36Wyo 379, 256P76.

334-50½-New. Questions relating to the disposition of property of parties in divorce suits are not determinable under statute by any rule of law less general than statutory rule, nor by the fact that all or most of the property is the separate property of the husband. 150 Wash685, 274P708.

335-52 164La1077, 115S275.

335-53 317 Ill 247, 148NE40; Iowa 229NW689; 249Mich132, 227NW683. But see 122 Or620, 260P206, 209 [cit CJ], 59ALR707. [a] **In Oregon.**–123 Or 667, 263P914.

335-53½-New. as has such division of community property; 149Wash448, 271P72.

335-54½-New. Accounting for rents and profits of land ordered to be divided may be ordered, and where such funds have been largely expended in maintenance, repairs, interest on mortgage, and support of wife and minor children, the order may properly be made effective as of the date of the decree rather than as of the date of the filing of the suit. 317 Ill 247, 148NE40.

335-54¼-New. Where the husband has collected all rent on a house awarded to the wife, he should be required to pay all taxes and assignments thereon up to and including the date of the decree. 236Mich397, 210NW294.

335-54¼-New. A substantially equal division of the accumulations of a joint farming enterprise has been held proper where a husband farmed his wife's lands without keeping accounts. SD 216NW587.

335-54½-New. A divorced wife must account for a joint bank deposit withdrawn by her after commencement of action. 130Misc701, 225NYS426.

335-54¾-New. and also for rents of property held by parties as tenants by the entirety, receiving credit for payments from her own funds for husband's benefit. 130Misc701, 225NYS 426.

335-54¾-New. Under Civ. Pract. Act § 1156, husband not claiming furniture before judgment in divorce forfeits claim to furniture in his wife's possession. 130Misc701, 225NYS426.

335-54⅞-New. Placing the parties in a financial condition similar to that before marriage has been sustained. 149 Wash464, 271P268.

335-54⅞-New. Allowance of one-sixth of the husband's property to a wife having a substantial separate estate has been held excessive. 197Wis358, 222 NW242.

335-57 [b] (5) Duty of court to make such provision. 237Mich371, 211NW 738. (6) Conveyance by husband without wife's signature does not prevent allowance in lieu of dower. 237Mich371, 211NW738.

335-58½-New. Divorce from bed and board neither takes away the right of a wife to dower nor entitles her to recover it during the life of her husband. 50RI 105, 145A444.

335-59 235Mich115, 209NW49. [a] **Where community acquired nothing during its existence** and there was no issue or material change in condition of either husband or wife, and wife signed property settlement whereby each kept their own separate property with full and complete understanding of all that it provided, court properly refused to award wife portion of husband's separate property in action for divorce. 148 Wash537, 269P836.

335-60 TexCivA 6SW(2d)403 (no consideration). [b] **Evidence held to entitle wife to judgment** for property converted by husband. 181Ark1145, 26SW (2d)576(2dcase).

335-65 141 Okl 160, 285P30 (where divorce was obtained by husband). [b] **In Kansas.**–125Kan807, 266P650.

335-67 [a] **In Kentucky.**–218Ky636, 291SW1044.

336-68 [c] (1) 210Ky89, 275SW26.

336-68½-New. Money spent by wife or given to husband need not be accounted for by him. 214Ky577, 283SW1061.

336-76½-New. Nor should the court restore to the wife money given the husband before marriage. 177Ark613, 7 SW(2d)783.

336-79½-New. Where husband in suit granting him divorce admits he owes wife sum of money secured by lien on real estate wife should have judgment for such sum with lien to secure it and order for sale of the property in satisfaction thereof. 210Ky89, 275SW26.

336-83½-New. or for money advanced to the wife over her living expenses, 235Mich115, 209NW49.

336-84½-New. Wife is entitled to return of amount of money acquired by husband, not merely a proportionate part of land in which it was invested. 214Ky171, 283SW73.

336-84½-New. Where the wife bought household goods with money which she earned, they should be awarded to her on granting her a divorce. 236Mich397, 210NW294.

336-85 TexCivA 272SW225.

336-87 137Wash349, 242P1.

336-88 87 IndA39, 158NE251. [b] **Award of half interest in property held authorized** as part of decree, where it had been conveyed to wife upon agreement for joint ownership. 87 IndA39, 158NE251.

336-89 See also 26 OhNPNS223.

336-90 [b] 208Ky566, 271SW660.

336-91 [b] (1) 226Ky243, 10SW(2d) 828 (one half). (21) Refusal to restore bonds to husband before either he or wife sought absolute divorce, where he abandoned her without cause, held not error. 214Ky633, 263SW952. [c] **In Minnesota.**–167Minn80, 208NW643, 644 [citCJ].

337-92 331 Ill 413, 163NE323; 226Ky 278, 10SW(2d)844.

337-93½-New. Where a decree for the husband gave him certain property and the wife a money award, and later she takes and misappropriates personalty of plaintiff, the court may order a return of the property or its value within a certain time in default of which the value of the property may be credited on alimony. 124Kan411, 260P622.

337-93⅓-New. Reformation of deed to both spouses so as to make husband sole grantee will be denied where the evidence does not entitle him to divorce. Md 140A834.

337-93¼-New. Under some statutes the husband may be awarded a lien on property purchased in part with money advanced by him, to the extent of such advances. 123 Or639, 263P385.

337-93⅙-New. Land purchased by a husband with his separate estate should be awarded to him. 92CalA365, 267P 1090.

337-93⅓-New. The court may order an insurance policy on the husband's life turned over to him, although the wife named as beneficiary had paid small portions of the premiums. 149Wash 464, 271P268.

337-97 122Kan515, 253P411.

337-98 131 Okl 55, 267P842. But see 243Mich406, 220NW812.

337-99½-New. Under Pleadings and Practice Act, plaintiff may by rule submit to court the question of the right to judgment upon petition and answer. 158La682, 104S616.

337-99⅓-New. Under some statutes, the court, after a decree of absolute divorce, must divide property held by the parties as tenants by the entirety, even in the absence of a prayer in the bill or answer or cross-bill. 245Mich366, 222 NW760.

337-99¼-New. An action between a divorced husband and wife relating to property, based on the existence of a trust, is an equitable action. 26 OhNP NS223.

337-5 [b] **In Georgia.**–162Ga349, 133 SE842.

337-6 166Ga153, 142SE684 (petition held demurrable). [a] **Facts relied on to avoid recital of deed** must be specifically alleged to show fraud, coercion, undue influence, or mistake. 88CalA 769, 264P294. [b] **Allegations held sufficient.**–84Colo 250, 269P22.

338-9 See also TexCivA 277SW210.

338-10 [a] (1) 172Ark647, 291SW90; TexCivA 6SW(2d)403; TexCivA 20SW (2d)229. (2) To warrant finding that all cash on hand was community property. TexCivA 277SW210. (3) To support finding as to husband's indebtedness to wife. 214Ky171, 283SW73. (4) To show validity of property settlement contract. 101CalA354, 281P705. [b] (3) To establish agreement that wife was to put money in farm against husband's time and for division of profits on sale. 202 Iowa1311, 210NW431. (4) To support findings on other issues. 87 CalA359, 262P339.

338-13½-New. and the question is one solely within the province of the court. TexCivA 299SW528.

338-17 [a] **Interest on amount of wife's loan to husband** is not deducted. 199Wis501, 227NW11.

338-20½-New. Although wife's evidence is incompetent, her testimony taken with that of husband's banker has been held sufficient to support finding as to husband's indebtedness to her. 214 Ky171, 283SW73.

338-20½-New. In determining the status of property of both or each of the parties to a divorce action recitals of whatever transfers there may have been between the spouses regarding the properties, or in transfers thereof to one or other of them, are merely prima facie evidence of ownership, raising only disputable presumptions as to whether the properties are separate or community property of the parties to the transfers. 206Cal 657, 275P801.

338-20¼-New. Evidence has been held to show that parties abrogated an agreement in which the wife released claims as to alimony, costs, and attorney's fees. 97CalA603, 275P996.

338-20⅛-New. The contention that the plaintiff was in no event entitled to an interest amounting to more than one thousand and thirty dollars in the realty and personalty purchased with the joint earnings of the parties is without merit for the reasons stated in the opinion. 166Ga850, 144SE665.

338-20¼-New. Testimony of a witness in rebuttal of the wife's testimony of an antenuptial agreement is admissible. TexCivA 10SW(2d)738.

338-20½-New. In an action between divorced parties, an award of property accumulated to the husband and a money judgment to the wife as for services has been sustained. 26 OhNPNS223.

338-20¾-New. Court cannot decide ownership of stock in name of husband's father, where he is not party to

suit. 250Mich295, 230NW143.

338-20½-New. Findings as to what constituted separate property and jointly acquired property held against weight of evidence. 141 Okl 160, 285P 30.

338-20 1/10-New. To enable court equitably to divide property, parties must disclose conditions as to property. Utah 291P298.

338-22 201Cal 36, 255P800; 69CalA 660, 232P154 (interlocutory decree becomes conclusive on expiration of time for attack); 80CalA126, 251P661 (becomes final and conclusive where not appealed from); 92CalA691, 268P928 (division of property becomes contract); TexCivA 299SW528. But see 84 Colo 429, 271P193; Mich 233NW208. [d] **Husband, pending settlement,** where on granting of divorce property was equally divided, is trustee of property in his possession and liable for master, but not chargeable with interest thereon. 78Colo 458, 242P56.

338-22½-New. Property rights have been held to have no place in interlocutory decree of divorce. 72CalA531, 237 P782.

338-22¼-New. In Wisconsin court cannot grant both alimony and final division of property. 188Wis160, 205NW 817.

338-22¼-New. The court's discretion in the division and distribution of a husband's property is subject to the control of the supreme court on appeal. 197Wis358, 222NW242.

338-22½-New. Until final decree the court has no authority to direct sale of property held by the parties. 243Mich 406, 220NW812.

338-22½-New. The court has no authority to direct a sale of property merely because its value is difficult to determine. 243Mich406, 220NW812.

338-25 208 Iowa534, 224NW586.

338-30½-New. Judgment against wife for money advanced to her by husband since separation, with interest, is proper under evidence. 202 Iowa1311, 210 NW431.

338-30½-New. Judgment or finding of court in action for divorce cannot direct the course of succession to title to property real or personal after the death of one of the parties. 21 OhA222, 153NE113.

338-30¼-New. Such judgment is ultra vires and void and may be attacked in collateral proceeding. 21 OhA222, 153 NE113.

338-30½-New. In the absence of a statute providing that decree may operate as a conveyance of an estate, decree that title of defendant shall vest in plaintiff is erroneous in form. 327 Ill 39, 158NE411.

338-31 [a] (3) Decree held not to divest parties of their interests in joint real estate. 188Wis160, 205NW817.

339-39½-New. A settlement agreement on file in a cause may be properly taken into consideration, where the decree is ambiguous or incomplete. 245 Mich111, 222NW137.

339-42 [a] **Community property.**-202 Cal 312, 260P545.

339-44 220Ala446, 125S611 (mortgagee); TexCivA 20SW(2d)229.

339-44½-New. Interlocutory decree affecting property rights becomes final on lapse of time without appeal. 72CalA 531,237P782.

339-44½-New. Where findings give a legal description of the residence of the parties, which is also the case in an interlocutory decree which awarded such property to the wife, and findings regarding other property do not specifically describe the property, but it is so described in a decree awarding it to the husband, the findings and decree are sufficient. 97CalA603, 275P996.

339-44¼-New. A judgment vesting absolute title to certain property in the husband is not open to collateral attack by the wife on the ground that she was a joint tenant with her husband in such real estate. 176Minn206, 222NW 922.

339-44½-New. A wife, while continuing to enjoy real estate awarded to her by the judgment, cannot attack the judgment in so far as it vests title to other property in the husband. 176Minn206, 222NW922.

339-44½-New. A grantee, who was a witness in her brother's divorce case, and whose attorney in an action for trespass to try title was her brother's attorney in the divorce case, cannot successfully assert title to land, where, in the divorce proceedings, she stood by with full knowledge, making no claim to ownership of the land which was awarded to the wife. TexCivA 15SW (2d)77.

339-44½-New. On remarriage with former husband property set aside as wife's separate property remains wife's separate estate. 300Pa217, 150A606.

339-3 See also 70Utah274, 259P925.

339-6 See also 92CalA691, 268P928.

339-9-44½-New. Decree awarding wife automobile includes as between the parties whatever interest the husband had under a conditional sales contract. 43 Ida1, 249P89, 48ALR1225.

339-9-44½-New. A decree for division of property and a lien created thereby are binding upon defendant and upon his estate. 53ND887, 207NW987.

339-9-44¼-New. Decree approving agreement transferring realty to wife and children vests in them equitable interest and leaves bare legal title as trustee in husband. 144Va692, 130SE902.

339-48½-New. Disobedience of part of decree which is valid is sufficient basis for punishment for contempt without inquiry as to validity of other provisions. 72CalA531, 237P782.

339-48½-New. Interlocutory decree ordering husband to build house for wife will be enforced where no motion to set aside is made nor appeal taken in time. 72CalA531, 237P782.

339-48¼-New. A decree ordering the transfer of property to the wife may be enforced by providing for the execution of a quitclaim deed by the husband rather than by amendment of the original decree. 241Mich122, 216NW400.

339-48½-New. A wife is entitled to determination of priority of lien of mortgage and judgment in favor of husband before paying latter on attachment by husband's creditor. 223Ky539, 4SW (2d)375.

339-50 42 Ida821, 248P468; 233Mich 569, 207NW818, 819 [quotCJ]; TexCivA 30SW(2d)663. See also OhA 173NE208.

339-51 233Mich569, 207NW818, 819 [quotCJ]; 245Mich111, 222NW137; Va 153SE879. [a] But see 69CalA66, 230P 462.

340-53 [b] **Fraud held not found** justifying setting aside portion of divorce decree approving settlement agreement containing clause that it was made on each party's own responsibility, not on other's representation. TexCivA 286SW 647.

340-56½-New. On appeal, error may not be predicated on part of verdict entered by consent of parties. TexCivA 277SW210.

340-56½-New. Wife cannot have judgment set aside for easily discoverable overvaluation of property awarded her and undervaluation of property awarded her husband. TexCivA 289SW110.

340-56¼-New. Trial court's division of property on divorce should not be disturbed except on clear grounds. 36Wyo 379, 256P76.

340-56½-New. A judgment awarding a house to the wife for the benefit of herself and child may be modified to the extent of providing that she shall have such right until further order of court. 213Ky621, 281SW800.

340-56½-New. Where a wife knew all facts of husband's property, judgment as to property is not set aside for fraudulent concealment. TexCivA 278SW520.

340-56 1/7-New. A husband may not have his wife deprived of the occupancy and benefit of a house awarded to her for the benefit of herself and a child because she did not maintain it as a home for herself and child where his interference with her custody of the child rendered it impossible for her to do so. 213Ky 621, 281SW800.

340-56½-New. Where a decree grants alimony, counsel fees, and costs on constructive notice, the court may modify the decree so as to eliminate these items. 128Misc309, 219NYS333.

340-56½-New. Where a statute permitting modification of a decree is not involved, the decree cannot be attached or amended. 241Mich122, 216NW400.

340-56 1/10-New. Alleged nonjoinder of parties will not be considered on appeal where objection was first raised on motion for new trial. TexCivA 6SW (2d)403.

340-56 1/11-New. Where defendant fails to appeal from part of judgment dealing with community property, he cannot complain of taxation against him of costs relating thereto. TexCivA 6SW (2d)403.

340-56 1/12-New. A defense to the cause of action for divorce need not be shown in order to confer jurisdiction upon the court to hear a petition filed after the term to modify a decree on the ground of fraud so far as it effects a division of property. 135 Okl 211, 275P 348.

340-58 201Cal36, 255P800; 94Fla516, 114S371; 241Mich416, 217NW42; 241 Mich679, 217NW924; 33NM132, 262P 1007; OhA 173NE208; 38 OklACR99.

340-59 241Mich416, 217NW42.

340-59½-New. The divorce court has jurisdiction to determine the validity of settlement agreements, 201Cal 36, 255P 800.

340-59½-New. upon the entry of the interlocutory decree of divorce. 201Cal 36, 255P800.

340-60 201Cal 36, 255P800 (interlocutory decree); 94CalA97, 270P732; Mich 233NW170; 230AppDiv786, 244NYS653; 130 Or619, 278P969 (approved by court); SC 155SE627; TexCivA 299SW 528. [b] **Court has jurisdiction** to include agreement of parties in findings of fact, conclusions of law, and decree. 53ND887, 207NW987. [c] **Judgment should conform to paper parties signed.**-235Ky387, 31SW(2d)614.

340-62 321 Ill 134, 151NE550 (not set aside for fraud where recognized by supplemental decree).

340-63 See also 226Ky750, 11SW(2d) 933; 148Wash537, 269P836.

340-65 38 OklACR99.

340-66 95CalA690, 273P86; 38 OklACR 99.

340-67 241Mich416, 217NW42; 33NM 132, 262P1007; SC 155SE627.

340-69 83CalA345, 256P826. [b] **Agreement contemplating divorce if free from illegal objects** and influences will be sustained. 83CalA345, 256P826.

340-71½-New. In Virginia court has jurisdiction and authority to approve agreements settling property rights, and transferring husband's real estate, but may not enforce them. 144Va692, 130 SE902.

340-71½-New. Decree approving agreement for settlement of property rights is not a decree for alimony. 144Va692, 130SE902.

340-71¼-New. The court having jurisdiction to determine whether agreement settling property rights is fair and equitable and to ratify it and set it forth in the decree, the decree is binding to that extent, if no other. 144Va 692, 130SE902.

340-71½-New. Agreements, findings of fact, conclusions of law, and decree are to be construed together so as to give effect to every part if reasonably practicable. 53ND887, 207NW987.

340-71½-New. An agreement is enforceable in equity only to the extent that it is just. 124 Or364, 264P447.

340-71½-New. A property settlement between husband and wife, fairly made in contemplation of separation, will be upheld, and is not affected by a statutory order in the divorce proceedings for restoration of property obtained by either spouse during the marriage. 228 Ky277, 14SW(2d)1061.

341-74 See also 144Va692, 130SE903.

341-75½-New. Judgments against the husband on obligations contracted since the acquisition of a homestead are not liens on the homestead when awarded to the wife as alimony. 200 Iowa1217, 206NW110, 42ALR1158.

341-75½-New. The rule applies although the judgment is for money borrowed to pay temporary alimony and at-

torney's fees for the wife in the divorce proceedings. 200 **Iowa**1217, 206**NW**110, 42**ALR**1158.

341-77 214**Ala**219, 106**S**866; **Cal** 292 **P**622; 21 **OhA**222, 153**NE**113; 19 **OhA** 309. [a] **Jurisdiction continues** only so long as child is, and continues to be, in contemplation of law, child of divorced parents, and ceases when by any legal proceeding that relationship is extinguished. 70**CalA**1, 232**P**738.

341-79 217**Ala**378, 115**S**866 (as between parents only); 165**Ga**243, 140**SE**364; **Mass** 171**NE**815; 236**Mich**604, 211**NW**52; 241**Mich**96, 216**NW**437; 243**Mich**406, 220 **NW**812; 240**NY**429, 148**NE**624, 40**ALR** 937 (as incident to separation suit); 22 **OhA**261, 154**NE**316; 120 **Or**557, 251**P** 263. [d] **In Louisiana.**–161**La**825, 109**S** 505. [e] **Where bill for divorce is dismissed,** decree awarding custody may be within court's jurisdiction under cross bill. 24**F(2d)**609.

341-80 236**Mich**604, 211**NW**52; 81**NH** 509, 129**A**725; 117 **Or**80, 242**P**832; 120 **Or**557, 251**P**263. But see **MoA** 294**SW** 736.

341-81 120 **Or**557, 251**P**263.

341-82 22 **OhA**261, 154**NE**316: [a] **In Porto Rico.**–33**PortoRico** 897.

341-82½-New. And such is the rule in some jurisdictions apart from statute. 29**Ariz**288, 240**P**1033.

341-82½-New. Thus the court has no jurisdiction to award custody of children in suit by divorced wife to annul contract for custody and support entered into prior to divorce. 29**Ariz**288, 240**P**1033.

341-84 19 **OhA**309; 22 **OhA**261, 154**NE** 316.

341-85 **MoA** 296**SW**196; 22 **OhA**261, 154**NE**316.

341-86½-New. The jurisdiction of the common pleas court in a divorce action is a continuing jurisdiction. 29 **OhA**114, 162**NE**750.

341-86½-New. A court without jurisdiction in a divorce action has no jurisdiction to make any order relative to custody of children. 103**Conn**189, 130**A** 254.

341-86¼-New. Where a divorce proceeding abates prior to the entry of judgment by the death of either party, statutes relative to provision for support of children in divorce proceedings are not available. 70**CalA**680, 234**P**412.

341-87 See also 130**Kan**205, 285**P**606 (court cannot adjudicate custody of minor child domiciled in another state).

341-88 200 **Ind**448, 163**NE**269.

341-89 **BC** [1930] 1**DomLR**288. See also 7**Alaska**414.

341-89½-New. In an action by publication the court may determine custody of children who are within the state. 247**NY**32, 159**NE**713.

342-91½-New. In some jurisdictions the prosecuting attorney is required to be served with notice or to appear. 238 **Mich**587, 214**NW**203.

342-93 99**NJEq**461, 133**A**768.

342-94 237**Mich**563, 213**NW**115, 116 [cit Cyc]. [c] **In Texas,** custody of children is an issue, in divorce case, only when such issue is raised by pleadings. **CivA** 8**SW(2d)**524.

342-94½-New. Petition for custody of children may be joined with original petition, or may be brought separately. 48**RI** 420, 138**A**179.

342-94⅓-New. In some jurisdictions, where a wife's bill for divorce prays for custody of a child, the court has a right to award custody and to decree that the husband contribute toward the child's support. 236**Mich**604, 211**NW**52.

342-94¼-New. Failure to state in the underwriting on the summons that custody of children is prayed as required by the court rule does not deprive the court of power to decree maintenance of minor children. 241**Mich**679, 217**NW** 924.

342-95 165**Ga**243, 140**SE**364. See also 226**Ky**207, 10**SW(2d)**815.

342-97 144 **Okl** 97, 290**P**185.

342-99½-New. In Porto Rico, the innocent spouse has the right of patria protestas over minor children, although not prayed for in the complaint or expressly adjudged by the judgment of divorce. 33**PortoRico** 903.

342-99⅓-New. In Porto Rico, the guilty spouse does not recover the right of patria protestas over minor children on death of the innocent spouse. 33**Porto Rico** 903.

342-99¼-New. In some jurisdictions the court has the same jurisdiction as to the parties and the subject matter to make orders concerning custody after entry of interlocutory or final decree of divorce as before. 203**Cal** 238, 263**P**1009.

342-99½-New. In proceeding after divorce for custody of children affidavits objected to were not proper proof. 232 **Ky**155, 22**SW(2d)**578.

342-3 214**Ky**566, 283**SW**1031.

343-5 165**Ga**243, 140**SE**364; 140**Miss** 340, 105**S**753, 42**ALR**1525; **MoA** 282**SW** 153, 157 [citCJ]; 240**NY**429, 148**NE**624, 40**ALR**937; 217**AppDiv**673, 217**NYS**168. [b] (1) 129**Misc**616, 221**NYS**493. (4) If separation is refused, jurisdiction is not retained to determine custody of child in same proceeding. 240**NY**429, 148**NE** 624, 40**ALR**937; 217**AppDiv**673, 217 **NYS**168. [d] **Upon dismissal of wife's suit,** temporary orders ceased to be of force, and husband may thereafter refuse permission to see the children. 170 **Ga**502, 153**SE**22.

343-8½-New. On voluntary dismissal of an action for divorce the court is without power to provide for the custody of the children. 165**Ga**243, 140**SE**364.

343-9 [a] **Part time or divided custody not desirable.**–176**Minn**490, 223**NW**789 (order held abuse of discretion).

343-10 214**Ala**1, 106**S**228; 214**Ala**642, 108**S**746; 216**Ala**169, 112**S**646; 219**Ala** 31, 121**S**92; 169**Ark**1001, 277**SW**41; 177 **Ark**613, 7**SW(2d)**783; 95**CalA**594, 272**P** 1113; 29**Hawaii**85; **Ill** 173**NE**172; 204 **Iowa**550, 212**NW**569; 125**Kan**594, 264 **P**1069; 213**Ky**397, 281**SW**180; 213**Ky** 562, 281**SW**493; 216**Ky**281, 287**SW**715; 218**Ky**370, 291**SW**706; 232**Ky**123, 22**SW** (2d)424; 232**Ky**155, 22**SW(2d)**578; 151 **Md**196, 134**A**136; 156**Md**500, 144**A**490; 241**Mich**96, 216**NW**437, 438 [citCJ]; 241 **Mich**302, 217**NW**13; 243**Mich**587, 220**NW** 659; 247**Mich**487, 226**NW**230; 249**Mich** 19, 227**NW**541 (2dcase); 180**Minn**182, 230 **NW**479; 152**Miss**365, 118**S**721; **MoA** 6 **SW(2d)**669; **MoA** 14**SW(2d)**458; **MoA** 277**SW**961; **MoA** 287**SW**786; **MoA** 2 **SW(2d)**180; **MoA** 28**SW(2d)**414; 82**Mont** 239, 266**P**410; 115**Nebr**615, 214**NW**254; 50**Nev**333, 259**P**288; 83**NH**413, 143**A** 471; 96**NJEq**398, 130**A**361; **NJCh** 129 **A**212; 224**AppDiv**28, 229**NYS**489; 51**ND** 897, 201**NW**832; 137 **Okl** 12, 277**P**943; 141 **Okl** 160, 285**P**30; 117 **Or**80, 242**P**832; **Or** 258**P**185; 131 **Or**440, 283**P**27; **Tex CivA** 299**SW**289; 145**Va**596, 134**SE**536; 144**Wash**116, 256**P**1032; 107**WVa**321, 148**SE**203; 35**Wyo** 206, 248**P**1. See also **RI** 152**A**256.

343-11 34**Ariz**340, 271**P**717; 29**Hawaii** 85; 47 **Ida**374, 276**P**34; 204 **Iowa**550, 212**NW**569; 213**Ky**562, 281**SW**493; 241 **Mich**96, 216**NW**437, 438 [citCJ]; 242 **Mich**178, 218**NW**654; 251**Mich**576, 232 **NW**184(1stcase); **MoA** 279**SW**189; **MoA** 296**SW**196; 50**Nev**333, 259**P**288; **Or** 258**P**185; **TexCivA** 1**SW(2d)**355.

343-12 241**Mich**96, 216**NW**437, 438 [cit CJ].

344-15 70**CalA**1, 232**P**738; 165**Ga**243, 140**SE**364; 83**NH**413, 143**A**471; **Tex CivA** 299**SW**289; **Wash** 290**P**327.

344-16 156**Md**500, 144**A**490; 115**Nebr** 615, 214**NW**254; 67**Utah**316, 247**P**301.

344-17 115**Nebr**615, 214**NW**254. See also 97**CalA**351, 275**P**470.

344-18 115**Nebr**615, 214**NW**254.

344-20 180**Minn**182, 230**NW**479 (award to maternal aunt held justified by evidence). [b] (1) 218**Ky**370, 291**SW**706. (3) Paternal grandfather entitled to custody of child where mother before divorce lived in adultery with present husband. 232**Ky**513, 23**SW(2d)**944.

344-21½-New. An award to a third person without the state is not an unreasonable infringement of the guilty party's right of access. 83**NH**413, 143 **A**471.

344-23 107**WVa**321, 148**SE**203.

344-24 241**Mich**302, 217**NW**13; **MoA** 279**SW**189; **MoA** 20**SW(2d)**545 (to either party); **MoA** 24**SW(2d)**1048; **Or** 258**P**185; 144**Wash**116, 256**P**1032.

344-25 156**Md**500, 144**A**490; **MoA** 296 **SW**196 (permission to take child out of state temporarily).

344-26 180**Ark**235, 21**SW(2d)**157; 141 **Okl** 160, 285**P**30.

344-27 204 **Iowa**550, 212**NW**569. [b] **Seven-year-old child.**–96**NJEq**398, 130**A** 361.

344-28 **MoA** 279**SW**153. But see 148**Va** 467, 139**SE**251; 144**Wash**116, 256**P**1032.

344-28½-New. Other considerations being equal, custody will be awarded to innocent spouse. 107**WVa**321, 148**SE** 203.

344-28⅓-New. Inaction of innocent spouse in failing to move for custody of child after decree of divorce will not prevent custody being awarded such party at any time on motion. 35**Porto Rico** 693.

344-29 67**Utah**371, 248**P**83.

344-30 156**Md**500, 144**A**490.

345-31 206 **Iowa**1191, 221**NW**819 (financial ability of mother not shown); 227 **Ky**561, 13**SW(2d)**751; 156**Md**500, 144**A** 490; 115**Nebr**615, 214**NW**254; 51**ND** 897, 201**NW**832 (ability to furnish home considered); 145**Va**596, 134**SE**536. [b] **Evidence sufficient** to justify award of child to father. 235**Mich**299, 209**NW**48.

345-32 204 **Iowa**550, 212**NW**569; 237 **Mich**105, 211**NW**80.

345-33 125**Kan**594, 264**P**1069; **MoA** 24 **SW(2d)**1048 (no presumption in favor of father); 131**Misc**66, 225**NYS**692. [a] **That father is in better financial condition** does not alone justify award to him. **Ill** 173**NE**172.

345-33½-New. Where mother from whom father was granted divorce for cruelty was at time of trial insane and confined in the state hospital, the court properly awarded custody of the minor son to the father, 239**Mich**306, 214**NW** 133.

345-33⅓-New. with provision that he be taken to see his mother at stated intervals until conditions change requiring modification of decree. 239**Mich** 306, 214**NW**133.

345-35 24**F(2d)**609; 219**Ala**31, 121**S**92; 177**Ark**613, 7**SW(2d)**783; **Cal** 290**P**36; 204 **Iowa**550, 212**NW**569; 213**Ky**397, 281**SW**180; 213**Ky**562, 281**SW**493; 216 **Ky**281, 287**SW**715; 218**Ky**777, 292**SW** 343; 219**Ky**296, 292**SW**798; 232**Ky**155, 22**SW(2d)**578; 233**Ky**423, 25**SW(2d)** 1013; 234**Mich**200, 207**NW**894 (under statute mother is entitled to custody of child under twelve years of age unless she is not of good moral character or conditions exist in her home that make it unfit place for child); 238**Mich** 587, 214**NW**203; 241**Mich**302, 217**NW** 13; 247**Mich**327, 225**NW**483(1stcase) (three-year-old adopted child); 249**Mich** 388, 228**NW**684; **MoA** 24**SW(2d)**1048; 48**Nev**220, 228**P**889; **NJ** 151**A**749 (where husband refused divorce); 134**Misc**696, 236**NYS**589 (child born after divorce of parents); 122 **Or**620, 260**P**206, 59 **ALR**707; **Or** 289**P**1062; **SD** 214**NW** 846; 135**Wash**567, 238**P**573; 106**WVa** 622, 146**SE**618. See also 227**Ky**561, 13 **SW(2d)**751. [a] (2) Evidence held to justify award of custody of girl fifteen and boy twelve years of age to mother. 172**Minn**89, 214**NW**793. [c] **Award to mother held not error,** where shown she could furnish adequate home. 233**Ky** 423, 25**SW(2d)**1013. [d] **Award of custody to mother** does not raise presumption father is not suitable person to have care of the child. 235**Ky**117, 29 **SW(2d)**590.

345-36 213**Ky**562, 281**SW**493.

345-37 218**Ky**613, 291**SW**1058; 235**Ky** 117, 29**SW(2d)**590; 151**Md**196, 134**A** 136; **MoA** 2**SW(2d)**180 (minor children); 98**NJEq**116, 130**A**637; 135**Wash** 567, 238**P**573; 137**Wash**349, 242**P**1.

345-38 32**PortoRico** 20; 67**Utah**371, 248**P**83. But see 47 **Ida**374, 276**P**34; 242**Mich**178, 218**NW**654.

345-38½-New. Custody must go to mother where actual custody would remain with grandparents if father were awarded legal custody. **MoA** 24**SW(2d)** 1048.

345-38⅓-New. Where a bill and cross bill in a wife's suit for divorce are dismissed, it is error to award custody of two children to the wife. 153**Va**342, 149 **SE**493.

345-40 165**Ga**243, 140**SE**364; 213**Ky** 397, 281**SW**180; 247**Mich**487, 226**NW**230 (husband granted divorce is entitled to custody of children); **MoA** 20**SW(2d)**

545 (wife obtaining decree is presumed innocent and injured party); 35**Porto Rico** 693. But see 232**Ky**123, 22**SW(2d)** 424. [a] (1) 159**La**251, 105S307; **La** 129S677. (3) Where it is not to minor's greater advantage to do otherwise, custody will be given to prevailing party. 159**La**251, 105S307. (4) Decree not providing for custody is not order to deliver children to parent obtaining decree. 170**La**418, 127S888.

346-41 **MoA** 5**SW(2d)**697; 131**Misc**66, 225**NYS**692.

346-42 219**Ala**31, 121S92; 220**Ala**400, 125S638.

346-43 **Utah** 270P149.

346-47 169**Ark**1001, 277**SW**41 (preference of sixteen-year old girl); 70**CalA**1, 232P738; 151**Md**196, 134A136; 157**Md** 18, 145A190; **MoA** 2**SW(2d)**180; 132 **Misc**11, 228**NYS**611; 141 **Okl** 160, 285 P30. [b] **Where father had no fixed home and small salary,** custody was given to mother who lived with parents, who were willing and able to rear child. 159**La**251, 105S307 (even though father obtained absolute divorce).

346-47½-New. Custody, if not determined is left open, parent prevailing, ordinarily being entitled to custody. 170**La**418, 127S888.

346-48 220**Ala**400, 125S638. [a] **Evidence held insufficient** to show mother's character was such as to render her unfit for custody of three and one-half-year-old daughter. 237**Mich**105, 211**NW** 80.

346-49 97**CalA**351, 275P470; **MoA** 287 **SW**786; 115**Nebr**708, 214**NW**632.

346-50 **Cal** 290P36; 216**Ky**281, 287**SW** 715; 216**Ky**731, 288**SW**676; 157**Md**18, 145A190 (divorce for wife's adultery and though father had no fixed place of abode); 241**Mich**302, 217**NW**13; 82 **Mont**239, 266P410 (mother shown unfit); 153**Wash**97, 279P87. [a] (6) That facts in deposition concerned time two years prior to trial of divorce suit affect weight rather than admissibility. 82**Mont**239, 266P410. (7) Evidence held to warrant finding that mother was not suitable person. 251**Mich**576, 232**NW** 184(1stcase). [e] **Divorce for wife's adultery is conclusive adjudication** of her relative unfitness for custody of children. 215**Ala**487, 111S207. [f] **Mother must be shown** to be clearly unfit for custody of young children before awarding them to others. 137**Wash**349, 242P1.

347-54 145**Va**596, 134**SE**536.

347-54½-New. In some jurisdictions a party guilty of adultery is not entitled to the custody of the children. 152**Miss** 476, 119S581.

347-54⅓-New. A mother obtaining a decree and remarrying should be allowed to retain custody of the child where the father remarried to a woman with children and failed to contribute substantially to the child's support. **MoA** 20**SW(2d)**545.

347-55 169**Ark**1001, 277**SW**41; 232**Ky** 513, 23**SW(2d)**944; 51**ND**897, 201**NW** 832.

347-56 131**Misc**66, 225**NYS**692; 135 **Wash**567, 238P573.

347-57 **Ill** 173**NE**172.

347-65 24**F(2d)**609; 81**CalA**793, 254P 683; **Cal** 292P622; 101**CalA**440, 281P 674; 164**Ga**704, 139**SE**427; 165**Ga**243, 140**SE**364; 214**Ky**566, 283**SW**1031; **Me** 143A471; **MoA** 6**SW(2d)**669; 82**Mont** 239, 266P410; 48**Nev**220, 228P889; 83 **NH**413, 143A471; **OhA** 173**NE**317.

347-67 **TexCivA** 15**SW(2d)**684. See also 166**Ga**38, 142**SE**158.

347-68 175**Ark**161, 298**SW**1012; 200 **Cal** 721, 254P945; 227**Ky**96, 11**SW(2d)** 998; 131**Misc**66, 225**NYS**692; 117 **Or**80, 242P832.

347-70 196**Cal** 534, 238P714 (evidence held to show failure to pay monthly allowances for support of daughter as stipulated); **SD** 222**NW**689. See also 235**Ky**117, 29**SW(2d)**590 (agreement made after decree awarding custody).

347-71 30**Hawaii**652; 117 **Or**80, 242P 832.

347-72 151**Md**196, 134A136.

348-76 124 **Or**480, 264P842. See also **Iowa** 228**NW**652. [e] **Wife removing children from jurisdiction in violation of order giving custody to husband is** in contempt and cannot be heard in merits of appeal from decree. 213**Ala** 328, 104S804. [f] **Child should not be removed** to another jurisdiction without court order by mother awarded custody. **MoA** 20**SW(2d)**545.

348-78 129 **Okl** 301, 264P898.

348-78½-New. Where a mother, after requesting a divorce decree awarding the custody of a minor child in conformity with an agreement with her husband, violates the decree embodying the agreement by refusing to return the child to its father at the close of the period which the child was to spend with her in another state, and in order to defeat the court's mandate secretly removed the child out of such state, and only desisted after the scheme failed and she was in danger of being punished for contempt and after her husband obtained possession of the child, because of the premeditated contempt of court, the court is not justified in putting it again into her power to nullify its decree by awarding custody of the child to her. 156**Md**500, 144A490.

348-79 **Me** 143A471; 241**Mich**96, 216 **NW**437. See also 83**NH**413, 143A471. But see **MoA** 14**SW(2d)**458.

348-80 **MoA** 14**SW(2d)**458. See also **MoA** 296**SW**196; 128 **Or**655, 275P661. [a] **Court may give permission** to divorced wife to take children in custody of husband out of state on visit. 35 **Wyo** 206, 248P1.

348-81½-New. Where custody of children after decree of divorce has been taken from father, he has no right to dictate as to their residence. 48**RI** 195, 136A443.

348-81⅓-New. Ordinarily custody should not be awarded to one outside jurisdiction or contemplating removal from state. **TexCivA** 299**SW**289, 291 [citCJ].

348-81¼-New. Custody should not be awarded to third person living in distant state unless for best interest of child. **TexCivA** 299**SW**289.

348-81⅕-New. Where decree is silent as to custody, husband cannot be held in contempt for removing child from jurisdiction. 170**La**418, 127S888.

348-82 See also **RI** 142A537.

348-83 29**Hawaii**85; 207 **Iowa**1193, 224 **NW**503; 216**Ky**281, 287**SW**715; 218**Ky** 370, 291**SW**706; 218**Ky**613, 291**SW**1058; 232**Ky**155, 22**SW(2d)**578; **MoA** 6**SW** **(2d)**669; 117**Nebr**285, 220**NW**271; 35 **Wyo** 206, 248P1. [a] 98**NJEq**116, 130A 637.

348-84 166**Ga**38, 142**SE**158; 34**Porto Rico** 199.

348-85 35**Wyo** 206, 248P1 (abuse of discretion not shown). [a] **Decree denying access** has been held erroneous. **TexCivA** 29**SW(2d)**868.

348-86 207 **Iowa**1193, 224**NW**503; 241 **Mich**96, 216**NW**437, 438 [citCJ]; 83**NH** 413, 143A471.

348-87 **TexCivA** 29**SW(2d)**868.

348-93½-New. Provision in decree enjoining husband from going about child held unwarranted by evidence. **Tex CivA** 285**SW**693.

348-93⅓-New. Failure of wife to permit husband to visit children as directed by decree is no excuse for his failure to pay alimony provided by that decree. 127**Misc**761, 217**NYS**379.

348-93¼-New. Provision may be made permitting one parent to communicate over the telephone with a child while in the custody of the other parent. **MoA** 279**SW**153.

348-94 214**Ala**642, 108S746; 214**Ky** 566, 283**SW**1031.

348-95 **MoA** 296**SW**196; 221**MoA**1199, 2**SW(2d)**821; 19 **OhA**309.

349-3 7**Alaska**411; 131 **Or**440, 283P27 (paramount right of father on death of mother).

349-6 70**CalA**1, 232P738 (on death of parent to whom custody was accorded, order of award becomes immediately of no force or effect); 19 **OhA**309.

349-9 19 **OhA**309.

349-11 177**Ark**613, 7**SW(2d)**783. [a] **Mother may be given custody** notwithstanding former decree giving custody to father, where there had been a remarriage. 177**Ark**613, 7**SW(2d)**783.

349-11½-New. Motion in respect to custody of children of divorced parents cannot be properly determined upon affidavits. 138**Misc**298, 244**NYS**597.

349-13 **CalA** 285P323 (unfitness of mother); **Ill** 233A488; **Iowa** 228**NW** 652; 164**La**458, 114S96; **Md** 148A226; 173**Minn**177, 216**NW**937; **MoA** 14**SW** **(2d)**458; 222**MoA**819, 10**SW(2d)**324; 73**Mont**591, 237P702; 19 **OhA**309; **Tex CommnA** 299**SW**875; **TexCivA** 2**SW(2d)** 331; 67**Utah**371, 248P83; **Sask** [1929] 2**DomLR**253, 260 [citCJ]. But see 240 **NY**444, 148**NE**630.

349-14 164**La**458, 114S96.

349-15 240**NY**444, 148**NE**630. But see 19 **OhA**309.

349-16 233 **IllA**488; 156**Md**607, 145A 10; 19 **OhA**309. [a] 202 **Iowa**1, 209**NW** 412.

349-17 See also **Okl** 292P1111.

349-18 [a] **Father not deprived of natural right to custody** and upon mother's death he has full right to custody against any one. **Nebr** 229**NW**885.

349-18½-New. The decree disposes of the question of custody of child merely as between husband and wife. 240**NY** 444, 148**NE**630.

349-18⅓-New. Thus a mother may apply for letters of guardianship after death of the husband where the decree of divorce had given custody of child to the father. 240**NY**444, 148**NE**630.

349-18¼-New. Such judgment is not conclusive that wife was unfit person to be appointed guardian of child after husband's death, 240**NY**444, 148**NE**630.

349-18⅕-New. although it might be evidence to justify such conclusion. 240 **NY**444, 148**NE**630.

349-18⅙-New, Suspending a judgment awarding the custody of children, then with the grandparents, to wife pending appeal, does not deprive the court of authority to inquire into the circumstances and make necessary orders. **Tex CivA** 8**SW(2d)**524.

349-18⅐-New. Provision in decree awarding custody of child in accordance with prior contract of parties held not contractual. **Md** 148A226.

349-18⅛-New. Father given custody of sons should determine place of living and conduct and is entitled to earnings during minority. 235**Ky**395, 31**SW(2d)** 615.

349-19 164**La**458, 114S96; 173**Minn** 623, 217**NW**494; 32**PortoRico** 20. [b] **Deliberate ignoring of order as to custody** renders defendant liable. 164**La** 458, 114S96. [c] **Where defendant deliberately ignores decree as to custody,** summary process to punish for contempt is proper and timely. 164**La**458, 114S 96. [d] **Imposition of jail sentence, unless custody decree is carried out** in future, is not abuse of discretion. 164 **La**458, 114S96.

349-19½-New. Injunction enjoining interference see **RI** 152A256.

349-20 216**Ala**169, 112S646; 218**Ky** 398, 291**SW**359; 161**La**721, 109S400; **NJCh** 129A212 (always subject to modification); 112 **Or**63, 228P687. See also 95**CalA**594, 272P1113. But see **Minn** 231**NW**795.

349-21 204 **Iowa**550, 212**NW**569; **MoA** 296**SW**196. But see **TexCivA** 286**SW** 534.

349-22 95**CalA**205, 272P761; 70**CalA**1, 232P738; 101**CalA**440, 281P674; 102 **CalA**503, 283P127; 201 **Iowa**516, 207 **NW**778; 206 **Iowa**1191, 221**NW**819; **Iowa** 228**NW**652; 119**Kan**803, 241P115; 209**Ky**127, 272**SW**419; 213**Ky**562, 281 **SW**493; 214**Ky**566, 283**SW**1031; 227 **Ky**96, 11**SW(2d)**998; 233**Ky**423, 25**SW** **(2d)**1013; 161**La**721, 109S400; 168**La** 874, 123S604; 151**Md**196, 134A136; **Mass** 171**NE**815; 233**Mich**569, 207**NW** 818; 173**Minn**177, 216**NW**937; 155**Miss** 621, 125S91 (statute construed); 221**MoA** 1199, 2**SW(2d)**821; 127**Misc**826, 217 **NYS**528; 121 **Okl** 283, 249P925; 141 **Okl** 160, 285P30; 143 **Okl** 183, 288P298; 124 **Or**497, 264P856; 126 **Or**114, 268P 986; **SD** 215**NW**931; 101**Vt**195, 142A 762; 35**Wyo** 206, 248P1; **Sask** [1929] 2**DomLR**253. See also 214**Ky**171, 283 **SW**73. [b] **Court retains jurisdiction**

of subject matter and parties.–201 **Iowa** 516, 207**NW**778. [c] **Statute permitting modification held to authorize application** only when both parents are alive. 127**Misc**826, 217**NYS**528. [d] **Changes not possible when judgment was first rendered cannot be ordered later.**–127 **Misc**826, 217**NYS**528. [e] **Where mother accepts custody** she cannot question jurisdiction. **Mass** 171**NE**815.

350–23 200**Cal** 721, 254**P**945; 165**Ga**208, 140**SE**382; **NJCh** 129**A**190; 129 **Okl** 301, 264**P**898; **SD** 215**NW**931.

350–24 34**Ariz**340, 271**P**717 (refusal of modification held not abuse of discretion); 200**Cal** 721, 254**P**945 (discretion not abused); 209**Ky**571, 273**SW**26 (reawarding custody to mother and provision as to education held not abuse of discretion); 135**Misc**264, 238**NYS**36.

350–25 200 **Iowa**415, 203**NW**26; **Iowa** 230**NW**339; 216**Ky**281, 287**SW**715; 112 **Or**63, 228**P**687.

350–26 204 **Iowa**550, 212**NW**569; 157 **Tenn**697, 11**SW(2d)**896; 67**Utah**316, 247**P**301; 148**Va**467, 139**SE**251.

350–26½–New. Where divorce decree contains no order concerning custody and maintenance of after-born child, court has jurisdiction to consider its custody and support and also question of its paternity. 308**Mo** 201, 271**SW**481.

350–27 [b] **Payment of mother's expenses.**–34**Ariz**340, 271**P**717.

350–28 213**Ala**328, 104**S**804 (it is proper to reserve in decree power of modification as to custody and control of children); 97**CalA**351, 275**P**470; 201 **Iowa** 516, 207**NW**778; **RI** 152**A**256. [a] **Statute is read into decree.**–203**Cal** 238, 263 **P**1009.

350–29½–New. Court may modify decree within six months of its rendition like any other judgment. 29**Ariz**288, 240**P**1033.

350–29⅓–New. But decree containing no provision as to custody of children cannot be modified in that respect. 29 **Ariz**288, 240**P**1033.

350–30 200**Cal** 721, 254**P**945; 120 **Or** 557, 251**P**263; **Va** 153**SE**879.

350–32½–New. Either party to a final divorce judgment may have the question of the custody of the children readjudicated by filing an independent suit. **TexCivA** 2**SW(2d)**331.

350–32½–New. In an action for divorce, in which the fitness of the mother to have the custody of a minor child is contested, testimony as to matters immaterial to the issues is properly excluded. 206**Cal** 513, 274**P**965.

350–32¼–New. That an order requires production of a child at the hearing does not divest the judge issuing the order of jurisdiction of the proceedings. 101**Vt** 195, 142**A**762.

350–32⅕–New. The court should order case retained on the docket with leave to the other party to apply for relief. 157**Tenn**697, 11**SW(2d)**896.

350–35 **Mass** 171**NE**815; **MoA** 296**SW** 196; 144 **Okl** 97, 290**P**185.

350–37 131 **Or**440, 283**P**27.

350–38 **Ill** 233**A**488; 201 **Iowa**516, 207 **NW**778; **Iowa** 228**NW**652; **Iowa** 230 **NW**339; 214**Ky**171, 283**SW**73; 169**La** 862, 126**S**218; 237**Mich**105, 211**NW**80; **MoA** 14**SW(2d)**458; **MoA** 280**SW**1059, 1061 [quotCJ]; **MoA** 20**SW(2d)**545; 73 **Mont**591, 237**P**702; 223**AppDiv**230, 227 **NYS**726; 228**AppDiv**837, 239**NYS**12; 120 **Or**557, 251**P**263; **Or** 258**P**185; 32 **PortoRico** 20; **TexCivA** 286**SW**534; **Tex CivA** 299**SW**289; **TexCivA** 9**SW(2d)**141; **WVa** 155**SE**652; **Sask** [1929] 2**DomLR** 253. But see 143 **Okl** 183, 288**P**298. [a] (1) 98**NJEq**116, 130**A**637. But see 243 **Mich**587, 220**NW**659. (5) Where custody of child under twelve years of age had been awarded to mother, her remarriage and removal from state may justify modification of decree so as to give custody to father during part of each vacation. 234**Mich**200, 207**NW**894. (6) Remarriage of mother and inability to take care of minor left with her sister justifies modification and award of custody to father. **Or** 289**P**1062. [g] **Burden is on applicant** to show cause for nullification of written agreement as to custody. 35**Wyo** 206, 248**P**1. [h] **Burden of proof** rests on parent seeking modification. **Iowa** 230**NW**339.

351–39 233 **IllA**488; **MoA** 280**SW**1059, 1061 [quotCJ]; **MoA** 6**SW(2d)**669 (insufficient).

351–40 95**CalA**594, 272**P**1113; **MoA** 280 **SW**1059, 1061 [quotCJ].

351–41 233 **IllA**488; 200 **Iowa**415, 203 **NW**26; **Iowa** 228**NW**652; **Iowa** 230**NW** 339; 214**Ky**171, 283**SW**73; **Mass** 171 **NE**815; **NJCh** 131**A**103; 120 **Or**557, 251 **P**263; **Or** 258**P**185; **TexCivA** 286**SW** 534; **TexCivA** 9**SW(2d)**141. [a] **Moral surroundings** into which wife placed child awarded to her custody, and character of persons that child was compelled or permitted to associate with should be inquired into. **Utah** 273**P**512. [b] **Allowing child to live part time in one household and part in another** is not to best interest and welfare of the child. 200 **Iowa**415, 203**NW**26.

351–42 214**Ky**171, 283**SW**73; 131**Misc** 66, 225**NYS**692; 137 **Okl** 12, 277**P**943; 43 **OklACR**261; **Or** 274**P**516; 131 **Or**440, 283**P**27. [b] **Custody properly awarded mother.**–**MoA** 14**SW(2d)**458.

351–43 **Mass** 171**NE**815; 229**Mich**181, 200**NW**968; **MoA** 24**SW(2d)**1048; **MoA** 28**SW(2d)**414; **NJCh** 131**A**103; **Or** 274 **P**516; 145**Wash**54, 258**P**1026. See also 131 **Or**440, 283**P**27.

351–45 73**Mont**591, 237**P**702 (loss of position by husband awarded custody and removal from state justified award to wife who had remained and could furnish comfortable home).

351–46 222**MoA**819, 10**SW(2d)**324.

351–47 200 **Iowa**415, 203**NW**26. See also 233 **IllA**488.

351–48 200 **Iowa**415, 203**NW**26; **MoA** 20**SW(2d)**545 (may involve forfeiture of right to custody). [a] (1) 81**CalA**793, 254**P**683.

351–50 81**CalA**793, 254**P**683; 242**Mich** 62, 217**NW**771; **NJCh** 131**A**103. [a] **Father's use of profanity in children's presence** does not prove him unfit in absence of proof of demoralizing influence. **Iowa** 230**NW**339.

351–51 135**Wash**567, 238**P**573 (custody of daughters, sixteen and eighteen years of age respectively, held properly transferred from father to mother, both parties having married again and daughters having strong dislike for stepmother).

351–52 213**Ky**397, 281**SW**180. [a] **NJCh** 131**A**103. [d] **That mother left child in care of maternal grandparents** does not deprive her of right to its custody where she paid for its keep, which was all that father would have done. **Ariz** 283**P**922.

351–52½–New. The fact that the mother who was given the right to visit her child at stated times has become better circumstanced to provide financially for the child is not such a change of condition as justifies a change of the order for custody. 200 **Iowa**415, 203**NW**26.

351–52⅓–New. It is not the court's province in proceeding to modify a divorce decree as to the custody of minor children, to punish or reward either parent. **MoA** 14**SW(2d)**458.

351–52¼–New. Modification of part of a divorce decree, which gave to the mother, the prevailing party, custody of the children, sought on the ground of interference with the permission decreed the father to visit them, is properly denied, the children having been placed in school, one out of the state, with the permission of the court and defendant. **MoA** 11**SW(2d)**757.

352–53 **TexCivA** 286**SW**534.

352–54 161**La**721, 109**S**400; **Or** 274**P** 516. [f] See also 99**NJEq**53, 132**A**113. [i] **Application held sufficient,** in case of award of custody subject to further orders of court. 67**Utah**316, 247**P**301. [g] **In North Dakota.**–**ND** 231**NW**846.

352–55 201 **Iowa**516, 207**NW**778; **MoA** 277**SW**961; 221**MoA**1199, 2**SW(2d)**821. [b] **Evidence insufficient** to warrant modification. **MoA** 277**SW**961.

352–56 201 **Iowa**516, 207**NW**778; **MoA** 13**SW(2d)**1082. [a] **Motions held sufficient.**–**MoA** 13**SW(2d)**1082.

352–57 201 **Iowa**516, 207**NW**778.

352–57½–New. In other jurisdictions the application is not regarded as a continuation of the original action, **TexCivA** 286**SW**534.

352–57⅓–New. but must be made by an independent suit therefor in the nature of a habeas corpus proceeding whether so designated or not. **TexCivA** 286**SW** 534.

352–57¼–New. Application must be brought in the county of respondent's residence. **TexCivA** 286**SW**534.

352–60 223**AppDiv**230, 227**NYS**726.

352–61½–New. Petition to modify judgment for care of children must state grounds for relief and answer should put them in issue. 219**Ky**284, 292**SW** 773.

352–61⅓–New. A motion may be treated as a petition for modification of judgment. 219**Ky**284, 292**SW**773.

352–61¼–New. Parties by proceeding to trial may waive insufficiency of petition as to statement of grounds. 219 **Ky**284, 292**SW**773.

352–61⅕–New. Pleading styled "Motion for Contempt and Custody of the Children" may be treated as original petition for readjudication of custody of children. **TexCivA** 2**SW(2d)**331.

352–63 202**Cal** 272, 260**P**294; 201 **Iowa** 516, 207**NW**778. [d] (3) Right of mother to custody may be lost by her failure to assert it in previous proceedings to determine right as between father and grandparent. **Utah** 269**P**487. [e] **Delivery of petition and order by disinterested** person is sufficient. 101**Vt** 195, 142**A**762. [f] **Discretion of court as to notice.**–201 **Iowa**516, 207**NW**778 (five days' notice held sufficient).

352–64 201 **Iowa**516, 207**NW**778; 101 **Vt**195, 142**A**762. [a] **In California.**–203 **Cal** 238, 263**P**1009.

352–65 [a] **Parent outside of state** is bound to take notice of process. **Mass** 171**NE**815.

352–70½–New. Petition to vacate or modify order granting wife custody of children held insufficient. 155**Wash**52, 283**P**704.

353–72 97**CalA**351, 275**P**470.

353–73 See also **MoA** 14**SW(2d)**458.

353–74 **TexCivA** 9**SW(2d)**141.

353–75 99**CalA**290, 278**P**242; 101**CalA** 440, 281**P**674 (modification of decree to award custody to father held not abuse of discretion); 102**CalA**503, 283**P**127 (modification of order relative to custody of minor child held not erroneous); 205 **Iowa**215, 217**NW**823 (insufficient); **Iowa** 228**NW**652 (insufficient); **Iowa** 230**NW** 339; 249**Mich**19, 227**NW**541(2dcase) (charge of unfitness to deprive wife of custody must be supported by persuasive evidence); 179**Minn**184, 228**NW**759 (insufficient to show mother unfit to have custody of child); 179**Minn**490, 229**NW** 869; **MoA** 14**SW(2d)**458 (sufficient new facts); **MoA** 277**SW**950 (burden of proof and sufficiency of evidence); **MoA** 280 **SW**1059; **MoA** 28**SW(2d)**414 (burden of proof); **Or** 274**P**516 (clear and convincing evidence required); 131 **Or**440, 283 **P**27 (sufficient as to father's right to custody of child on death of mother). [c] (2) 67**Utah**316, 247**P**301. (3) 67 **Utah**316, 247**P**301. [d] (2) 213**Ky**397, 281**SW**180; 213**Ky**738, 281**SW**979. [e] **Wife divorced for adultery** and having married paramour after divorce has burden of proving fitness. 215**Ala**487, 111 **S**207. [f] **Where evidence is equally balanced,** application for modification of decree awarding part time custody to mother on ground that father was best situated to care for child is properly denied. **Ariz** 283**P**922. [g] **Evidence held insufficient.**–**Iowa** 230**NW**339; 249 **Mich**19, 227**NW**541(2dcase).

353–76 See also **MoA** 14**SW(2d)**458. But see 95**CalA**205, 272**P**761. [b] **Refusal of court to change custody of child to father held error under evidence of** mother's misconduct in child's presence. 200**Wis**318, 228**NW**492. [c] **Evidence held insufficient to justify amended decree.**–249**Mich**388, 228**NW**684.

353–77 82**CalA**580, 256**P**226 (order not required to be filed and entered).

353–77½–New. Court cannot consider affidavits upon hearing, 219**Ky**284, 292 **SW**773.

353–77⅓–New. as parties have the right to cross-examine witnesses. 219**Ky**284, 292**SW**773.

353–78 **MoA** 14**SW(2d)**458.

353-78½-New. The trial court's judgment in the divorce action is res judicata as to all matters existing at that time concerning the welfare of the child, **TexCivA** 286**SW**534.

353-78¾-New. but not as to changed conditions and circumstances subsequently arising jeopardizing the child's welfare. **TexCivA** 286**SW**534.

353-78¼-New. Evidence held sufficient to warrant modification of decree. 224 **Ky**252, 5**SW(2d)**1075 (awarding custody to father).

353-78½-New. In an action to modify an unappealed divorce decree awarding the custody of a child, the presumption that the child's best interests require giving the custody to the parents ceases. 222**MoA**819, 10**SW(2d)**324.

353-78½-New. Refusal of referee at hearing for change of custody of child to receive evidence as to mental condition of mother held not error. **CalA** 285 **P**323.

353-78½-New. The court cannot consider the wisdom of a provision in a decree that custody should continue only so long as the mother resided in the state. **Iowa** 228**NW**652.

353-83 70**CalA**680, 234**P**412.

353-84 308**Mo** 201, 271**SW**481; 114 **Okl** 279, 246**P**599. [a] **Mother cannot in independent action recover of father for future support of child** in her custody but relief must be obtained in proceeding under statute as continuation of divorce action. 220**MoA**360, 285**SW**1035. [b] **Opposition to petition held not to require verification.**–35**PortoRico** 921 (raising jurisdictional and other questions of law).

353-84½-New. The court has no authority as to the support of adult children over whose custody it has no control. 130**Misc**243, 223**NYS**744.

353-84¾-New. A distinction is made between "alimony" strictly so-called, and "allowance for maintenance of minor children." 237**Mich**563, 213**NW**115.

353-84¼-New. In some jurisdictions a divorce does not affect the common-law liability of each parent to support minor children. 206 **Iowa**1334, 222**NW** 20.

353-84½-New. Under statutory provision, care and support include not only food, shelter and clothing but, if the parent is able, suitable training for a vocation in life. 127**Me**356, 143**A**263.

353-86 180**Ark**836, 22**SW(2d)**1003; 156 **Md**500, 144**A**490; 217**AppDiv**773, 216 **NYS**740; 29**PortoRico** 909, 916 (Civ. Code § 176 "The divorce of parents will not deprive the children born during the marriage of the rights and privileges which according to law, belong to them, by reason of the marriage of the parents").

353-87 254 **IllA**552; 236**Mich**604, 211 **NW**52; 308**Mo** 201, 271**SW**481; **MoA** 284**SW**811; 217**AppDiv**773, 216**NYS**740; 245**NYS**287; 141 **Okl** 160, 285**P**30 (where divorce granted husband for fault of wife); 131 **Or**440, 283**P**27; **TexCivA** 15 **SW(2d)**141; 103**TexCr**428, 280**SW**1069; But see 180**Ark**836, 22**SW(2d)**1003.

353-90 175**Ark**161, 298**SW**1012; 247 **IllA**554; 220**MoA**360, 285**SW**1035; 217 **AppDiv**773, 216**NYS**740 (medical expenses).

353-91 205 **Iowa**1081, 216**NW**619.

354-95 22**AlaA**160, 113**S**480, 481 [cit CJ]; 223**Ky**539, 4**SW(2d)**375; 258**Mass** 460, 155**NE**424, 52**ALR**285 (rule applied where father awarded custody).

354-97 115 **Or**595, 239**P**124. [a] **It is not policy of law** to deprive children of their rights on account of dissensions of their parents. 114 **Okl** 279, 246**P**599.

354-98 114 **Okl** 279, 246**P**599.

354-99 180**Ark**836, 22**SW(2d)**1003; 233 **IllA**488; 202 **Iowa**718, 210**NW**969; **Iowa** 230**NW**326; 209**Ky**127, 272**SW**419; 258 **Mass**460, 155**NE**424, 52**ALR**285; 168 **Minn**196, 209**NW**901; 135**Miss**865, 101 **S**345; 155**Miss**621, 125**S**91 (jurisdiction is in court of another county where wife resides of suit in equity to recover expenditures and future allowance); **MoA** 8**SW(2d)**1076; 29 **OhA**373, 163**NE**590; 114 **Okl** 224, 245**P**844; 114 **Okl** 279, 246 **P**599, 602 [citCJ]; 115 **Or**595, 239**P**124; 157**Tenn**352, 8**SW(2d)**484; 103**TexCr** 428, 280**SW**1069; **TexCivA** 32**SW(2d)** 233 (demand on father is unnecessary). [e] **Contract settling property rights between husband and wife approved by court in divorce decree** does not estop minor children nor their mother acting for them to make application for support of children for their benefit. 114 **Okl** 224, 245**P**844. [f] **In Oklahoma.**–(1) 114 **Okl** 224, 245**P**844; **Okl** 246**P**599. [g] **Validity and enforcement of contract for support.**–235**Ky**117, 29**SW(2d)**590.

354-1 157**Md**166, 145**A**488; 120 **Oh**151, 165**NE**717. [a] But see 168**Ga**573, 148 **SE**386 (1stcase).

355-2 209**Ky**127, 272**SW**419 (judgment awarding custody not res judicata in subsequent action for support); 135**Miss** 865, 101**S**345; **MoA** 8**SW(2d)**1076; 114 **Okl** 279, 246**P**599. See also **TexCivA** 15 **SW(2d)**141. But see 221**MoA**1199, 2 **SW(2d)**821. [b] **Suit as next friend** does not entitle wife to recover from father value of necessaries furnished children. **TexCivA** 15**SW(2d)**141.

355-2½-New. the recovery may include past expenditures by the wife for a period for which service could not be had on the husband; 209**Ky**127, 272**SW**419.

355-4 157**Tenn**352, 8**SW(2d)**484; **Tex CivA** 15**SW(2d)**141. [a] **Children to whom necessaries have been furnished** have no right of action against father for value thereof, sole recovery being on part of person furnishing necessaries. **Tex CivA** 15**SW(2d)**141.

355-7 155**Miss**621, 125**S**91 (sums expended by wife reasonably necessary for support and maintenance of child). [a] **Mother retaining child with knowledge that custody was awarded to father** cannot recover for support of child. 28 **OhA**51, 161**NE**291.

355-9 **MoA** 284**SW**811.

355-10 127**Misc**826, 217**NYS**528.

355-10½-New. Where a decree of divorce provides for a property settlement in accordance with a stipulation between the parties, neither the decree nor the stipulation affects the rights of a child for whom no provision was made nor the duties of the parents toward it. 115 **Or**595, 239**P**124.

355-11 19 **OhA**257. See also 29 **OhA** 114, 162**NE**750.

355-12 97**PaSuper**166.

355-12½-New. In some jurisdictions it is held that in such case it is the primary duty of the husband to support the children. 68**CalA**701, 230**P**214.

355-14 67**Utah**371, 248**P**83.

356-15 127**Me**356, 143**A**263; 130**Misc** 819, 225**NYS**236.

356-16 202 **Iowa**134, 209**NW**396. [a] **Father is not liable for nurse's services caring for child** after order allowing alimony for support of wife and child of which nurse had knowledge. 86**CalA** 676, 261**P**539. [b] **As between his mother and sister husband's primary obligation is support of his child** awarded to wife by divorce decree. 155**Wash**272, 283**P**1096.

356-18 176**Minn**393, 223**NW**609; 221 **MoA**1199, 2**SW(2d)**821; **TexCivA** 15 **SW(2d)**141. [b] **Though wife was in fault for separation and has as much property as husband,** he may be required to contribute to support of children. 213**Ky**606, 281**SW**801. [c] **That father is denied access to child** does not relieve him of obligation to support it. 241**Mich**96, 216**NW**437. [d] **Where custody of children is awarded to divorced wife,** she is entitled to reasonable allowance for their support, though divorce was granted against her. 94**Fla**1001, 114**S**661.

356-18½-New. The custody of a minor child may be awarded to the wife and the father may be required to support it, although both parties are denied a divorce. 68**CalA**725, 230**P**209.

356-20 **CalA** 289**P**240; 115 **Or**595, 239**P** 124. See also 124 **Or**673, 265**P**437.

356-20½-New. ; and the rule is the same where the property settlement was made after suit was filed. 217**Ky**38, 288 **SW**1029.

356-20½-New. An agreement between the parties that there should be no provision made by the court for the support of a child does not deprive the court of its authority and discretion under the statute to make such provision. 50 **Nev**333, 259**P**288.

356-20¼-New. The parents of a minor child may not, by agreement, take from the court the power, in case of divorce, to make a decree for the maintenance of the child. 241**Mich**679, 217**NW**924.

356-20½-New. The maintenance of a child is a common-law obligation resting on the father and enforced by a divorce decree. 241**Mich**679, 217**NW**924.

356-20¼-New. A provision in a decree for the care and maintenance of a minor child is not a substitute for such common-law obligation but an enforcement thereof. 241**Mich**679, 217**NW**924.

356-21½-New. A decree providing for maintenance of children is binding only on parties but not on children as to whom father's duties of support continue. 217**Ky**38, 288**SW**1029.

356-21¾-New. A wife can recover from husband money expended for medical service to child despite separation judgment allowing alimony for support of wife and child. 128**Misc**146, 218**NYS** 555.

356-21¼-New. Where a decree fixes the child's maintenance, an order directing the divorced husband to pay for the medical expenses of the child is unauthorized. 222**AppDiv**34, 225**NYS**336.

356-21½-New. Amount awarded for support of wife and children need not be expended solely for benefit of children. 234**Ky**332, 28**SW(2d)**17.

356-22 But see 177**Minn**144, 225**NW**11 (1stcase). [a] **Court has jurisdiction to determine paternity** of child born before marriage and make order for support upon finding party to action is father. 132 **Okl** 302, 270**P**557 (2dcase).

356-25 But see 244 **IllA**166.

356-26 132**Misc**11, 228**NYS**611. See also 95**CalA**205, 272**P**761.

356-26½-New. A decree for support for a legally adopted child is proper in a divorce suit. 247**Mich**327, 225**NW**483 (1stcase).

356-27 **CalA** 289**P**240 (discretion of court); 217**Ky**38, 288**SW**1029; 250**Mich** 670, 231**NW**68; 127**Misc**826, 217**NYS** 528.

356-28 215**Ky**299, 284**SW**1073; 127**Me** 356, 143**A**263.

356-28½-New. Award of $9,900 annual alimony to wife and three children, living in own home, against defendant earning $20,000 per year, is excessive by one third. 130**Misc**243, 223**NYS**744.

356-29 79**CalA**734, 251**P**218.

356-32 [e] 205 **Iowa**1096, 216**NW**609; 121**Kan**495, 247**P**650 (three children); 237**Mich**326, 211**NW**740; 50**Nev**333, 259 **P**288; 122 **Or**620, 260**P**206, 59**ALR**707. [f] 146**Wash**473, 263**P**600. [g] 82**Mont** 218, 266**P**398. [h] 175**Ark**161, 298**SW** 1012; 206 **Iowa**1191, 221**NW**819; 218 **Ky**636, 291**SW**1044; 221**MoA**135, 296 **SW**460; 112 **Or**63, 228**P**687. [n] 237 **Mich**323, 211**NW**657. [p] 213**Ky**606, 281**SW**801; 137**Wash**349, 242**P**1. [r] 217**Ky**38, 288**SW**1029. [s] 30**Hawaii** 964; 215**Ky**299, 284**SW**1073; 172**Minn** 89, 214**NW**793. [z] **$50,000.**–20 **OhA**518, 152**NE**767 (income for support of five-year-old daughter until she becomes twenty-five years old). [aa] **$75 per month** awarded mother for support of three children. 117 **Or**319, 243**P**565. [bb] **$30 per month.**–209**Ky**571, 273**SW** 26 (for boy 14 years old). [cc] **$25 per month.**–120**Kan**545, 246**P**992; 216**Ky** 281, 287**SW**715. [dd] **$20 per month.**–219**Ky**608, 294**SW**170. [ee] **$60 per month.**–230**Ky**545, 20**SW(2d)**170 (where husband owned property aggregating about fifty-eight thousand three hundred dollars in value); 161**La**825, 109 **S**505. [ff] **$6.00 per week.**–99**Vt**356, 133**A**248. [gg] **$15 per week.**–237**Mich** 326, 211**NW**740. [hh] **$8 per week.**–224 **Ky**234, 5**SW(2d)**1041 (for two children). [ii] **$35 per month.**–123 **Or**608, 262**P**943. [jj] **$25 per week.**–124 **Or**480, 264**P**842. [kk] **$10 per month.**–226**Ky**278, 10**SW (2d)**844 (infant). [ll] **$50 per month.**–177**Ark**613, 7**SW(2d)**783. [mm] **$200 per month.**–157**Md**264, 145**A**614 (minor son and daughter where father's income amounts to twelve thousand dollars annually). [nn] **Other instances.**–**CalA**

289P240. [oo] **$125 per month less** amount received by wife from rent. 235 Ky395, 31SW(2d)615.

356–32½–New. In this note illustrations are given of allowances held unreasonable. 241Mich679, 217NW924.

356–32½–New. An allowance of ten dollars per month for the support of a child has been held inadequate under the circumstances. 118Nebr94, 223NW 649(1stcase).

356–32¼–New. Father must support children during minority regardless of amount in decree. 151Md644, 135A841, 50ALR232.

356–32⅓–New. Where provision in separation agreement as to support of children is inadequate, the court should prescribe a reasonable amount. 151Md 196, 134A136.

357–34 22AlaA160, 113S480; **Kan** 289 P471; 151Md196, 134A136; 171Minn 213, 213NW919; 50Nev333, 259P288 (power and duty of court authorized and imposed by statute); **Nev** 280P95 (decree not requiring construction as ambiguous); 144 **Okl** 97, 290P185; 117 **Or** 319, 243P565; **SD** 222NW486; **Utah** 270P149; **Wis** 230NW77. [c] **Decree construed.**–129 **Okl** 219. [d] **Court cannot enter personal judgment** for future support of children. **TexCivA** 296SW 643. [e] **Provision that support of child at boarding school** be borne equally by parents is not void for uncertainty. **Cal** 290P8. [f] **Effect on common law obligation to support.**–**Md** 150 A720.

357–35 308Mo 201, 271SW481. [b] Judgment for maintenance and support of minor children is not contained in alimony award which, in its proper significance, is not maintenance to children but to wife. 29 **OhA**373, 163NE 590. [c] **Base of award** for support is on father's ability to work, though owning no property. 208Ky658, 271SW 1100. [d] **In proceeding brought after divorce** court cannot require former husband to pay former wife's attorney's fees. 99Fla1117, 128S490. [e] **Remedy of divorced wife for reimbursement for medical expenses incurred for benefit of child is by suit at law.**–**Md** 150A720.

357–36 175Ark161, 298SW1012.

357–36½–New. The court has discretion to award provision for the support of a child, although the complaint in the divorce suit did not ask for such relief. 50Nev333, 259P288.

357–36⅓–New. The best interest of the child is the paramount consideration. 50 Nev333, 259P288.

357–36¼–New. and not the rights of the parents. 50Nev333, 259P288.

357–38½–New. In some jurisdictions the jurisdiction of the court in making provision for the support of children is limited to making an allowance in money. 68CalA701, 230P214.

357–38⅓–New. , and it cannot award property of either spouse subject to trusts in favor of the children. 68CalA 701, 230P214.

357–38¼–New. The facts that the divorce was granted for the fault of the wife, and that custody of the children was awarded to her do not affect the power of the court to compel the husband to support the children. 68CalA 701, 230P214.

357–38⅕–New. A decree granting a divorce to the husband and awarding a monthly sum to the guilty wife for her support and for the support of children whose custody was awarded to her is illegal as to the entire award for support. 68CalA701, 230P214.

357–38⅙–New. Order failing to state amount for support of child held not void. 164Ga81, 137SE821.

357–38⅐–New. A judgment making an allowance a lien upon specified real estate, cannot be attacked collaterally by a third party who subsequently purchased the property at a foreclosure sale under a prior mortgage. 176Minn 393, 223NW609.

357–38⅛–New. Acts not compliance with decree. **Wash** 289P1000.

357–41 308Mo 201, 271SW481, 485 [quot CJ].

357–42 308Mo 201, 271SW481, 485 [quotCJ].

357–43 308Mo 201, 271SW481, 485 [quotCJ].

357–44 68CalA701, 230P214; 73CalA 128, 238P139; 241Mich679, 217NW924; 308Mo 201, 271SW481, 485 [quotCJ]; **OhA** 173NE317 (lump sum for arrears); 114 **Okl** 224, 245P844; 115 **Or**595, 239P 124. See also 221MoA135, 296SW460. [c] (1) 308Mo 201, 271SW481. (2) Court may determine legitimacy. 308 Mo 201, 271SW481. [f] **Medical expenses.**–73CalA128, 238P139. [g] **Power does not depend on change of circumstances.**–241Mich679, 217NW924. [h] **In California.**–203Cal 238, 263P1009.

358–47 163Ga19, 135SE403. See also 127Kan287, 273P409.

358–48 **OhA** 173NE317.

358–49 169Ark1001, 277SW41 (where divorced wife given custody of child).

358–50 But see 148Wash558, 269P835.

358–53 200Cal 654, 254P567; 68CalA 701, 230P214.

358–53½–New. A statute providing for the giving by the husband of a bond to the state conditioned on payment into court of a stipulated weekly sum for support of minor children as a condition of the entry of a decree of divorce is constitutional. 22 **OhA**507, 153NE 287.

358–53⅓–New. A bond given pursuant to such statute is valid. 22 **OhA**507, 153NE287.

358–53¼–New. The state may maintain an action on such bond without joining the beneficiary. 22 **OhA**507, 153NE 287.

358–54 68CalA701, 230P214 (in nature of lien). See also 151Wash468, 276P 547.

358–55 But see 121Kan495, 247P650.

358–56½–New. Allowance for support of nine children subject to modification is not final judgment constituting lien in real estate. 86 **IndA**552, 156NE411.

358–57 **TexCivA** 158W(2d)141. But see **TexCivA** 299SW482.

358–58 **TexCivA** 299SW528; **TexCivA** 158W(2d)141.

358–60½–New. Costs and attorney's fees. Before a father may be charged with payment of attorney's fees based on his primary obligation to furnish a minor child with necessaries, it must affirmatively appear that the proceeding begun or defense interposed, in which such services were rendered, was reasonable and necessary for temporal or personal welfare of the minor. 156Md 500, 144A490.

358–60⅓–New. An attorney's services may be included in "necessaries" for a child, if reasonable and necessary to protect the child's property rights, personal liberty, or relief. 156Md500, 144 A490.

358–61 214Ala465, 108S35; 218Ala80, 117S645; 176Ark1204, 6SW(2d)1; 203 **Cal** 173, 263P234; 203**Cal** 787, 266P283; **Cal** 290P8; 68CalA725, 230P209; 69 CalA66, 230P462 (provision for support of children on denial of divorce); **CalA** 289P240; 94Fla1001, 114S661; 42 **Ida** 29, 243P827; 244 **IllA**166; 248 **IllA**358; **Ind** 172NE192; 200 **Iowa**1016, 205NW 970; 201 **Iowa**516, 207NW778; **Iowa** 227NW341(1stcase) (language of decree held not to authorize change after child attained majority); 126Kan405, 267P 988; 209Ky127, 272SW419; 213Ky100, 280SW477; 213Ky738, 281SW979; 218 Ky398, 291SW359; 224Ky234, 5SW(2d) 1041; **Md** 148A226; **Md** 150A720; 234 Mich200, 207NW894; **Minn** 231NW413; 155Miss621, 125S91 (statute construed); **MoA** 279SW153; **MoA** 22SW(2d)886; 127Misc826, 217NYS528; 136Misc781, 243NYS754; 120 **Oh**151, 165NE717; **OhA** 173NE316; 121 **Okl** 283, 249P925; 127 **Okl** 103, 260P49; 144 **Okl** 94, 290P. 187; 117 **Or**319, 243P565 (appellate court will not modify decree on petition for rehearing because of change in conditions but its mandate may be modified by trial court); 120 **Or**557, 251 P263; 122 **Or**620, 260P206, 59**ALR**707; 124 **Or**480, 264P842; 124 **Or**497, 264P 856; 126 **Or**114, 268P986; **SD** 215NW 931; **Wash** 292P1011. See also 93CalA 481, 269P744. [a] (1) But see 248Mich 663, 227NW538. (3) Where no change of conditions rendering modification proper is shown, modification should be denied. 127 **Okl** 103, 260P49. (4) Court's power to be exercised only when changed conditions clearly indicated. **Md** 148A226. [f] 213Ky738, 281SW 979. [i] **By statute** in some jurisdictions, court retains jurisdictions of subject matter and parties. 201 **Iowa**516, 207NW778. [j] **Modification held allowed only when both parties are living.**–127Misc826, 217NYS528. [k] **Effect of agreement of parties.**–241Mich 565, 217NW767.

359–62 [a] **Application to set aside order** for maintenance or for reduction of award cannot be heard unless arrears are paid. 103NJEq416, 143A559.

359–62½–New. Conditions justifying modification must be shown in order to authorize court to act. 201 **Iowa**516, 207NW778.

359–63 69CalA66, 230P462; 201 **Iowa** 516, 207NW778; 308Mo 201, 271SW481. [a] **Statute authorizing modification is read into decree.**–203Cal 238, 263P1009.

359–63½–New. Both paternity and question of maintenance of child born after divorce may be decided by court on motion by wife for maintenance of such child. 308Mo 201, 271SW481.

359–64 214Ala465, 108S35; 68CalA725, 230P209; 94Fla1001, 114S661; 155 Wash272, 283P1096.

359–65 214Ala465, 108S35; 218Ky398, 291SW359; 234Ky332, 28SW(2d)17; 127Me356, 143A263; **MoA** 7SW(2d)427; 120 **Or**557, 251P263, 907. See also 123 **Or**608, 262P943. [a] (1) 214Ala465, 108S35. [f] **Evidence sufficient to justify modification.**–203Cal 73, 263P234.

359–66 215Ala447, 111S224; 208Ky 614, 271SW679.

359–66½–New. It must be shown that modification will enhance welfare of child. 120 **Or**557, 251P263, 907.

359–66⅓–New. or that change in circumstances since original decree have been such as injuriously affected the child. 120 **Or**557, 251P263, 907.

359–66¼–New. It is insufficient that the parent show that he is better able to care for child than when divorce was granted. 120 **Or**557, 251P263, 907.

359–67 215Ala447, 111S224; 218Ala 80, 117S645; 221MoA135, 296SW460; **Va** 153SE879 (contract between parents). See also **Md** 150A720. [a] **Husband held liable** for necessary operation on child. 215Ala447, 111S224.

359–70½–New. An order of modification should not provide for future changes in the event of future change of condition. 112 **Or**63, 228P687.

359–70⅓–New. That the mother to whom custody of children was awarded has taken up residence in another state is not ground for terminating an allowance for the support of the children. 213Ky738, 281SW979.

359–70¼–New. In order to authorize a modification of a final judgment affecting the support and maintenance of minor children there must be shown a change in the condition of the parties such as to render such modification proper. 121 **Okl** 283, 249P925.

359–70⅕–New. Short length of time from rendition of final decree of divorce to petition for increase in allowance for child is properly to be considered in determining whether chancellor abused discretion in denying petition without formal hearing. 214Ala465, 108S35.

359–70⅙–New. On the death of a child the wife could apply for a funeral expense allowance where all but two hundred and forty dollars of one thousand dollars amount fixed in divorce decree has been paid. 29 **OhA**114, 162NE750.

359–70⅐–New. Changes in a decree are unauthorized under rules of court where a motion for construction of the decree and an order reducing the amount for support of children were not made within six months after judgment was rendered. **Nev** 280P95.

359–70⅛–New. After remarriage of wife to third person amply able to support her, divorced husband whose financial condition had changed could have allowance for support of minor child set aside. **Iowa** 229NW700.

359–71 151Md644, 135A841, 846 [citCJ perUrner,J], 50**ALR**232.

359-74 But see 209Ky571, 273SW26.

359-75 203Cal 787, 266P283; 124 Or 497, 264P856. See also Ind 172NE192 (in suit for accrued payments).

359-76 [a] **Order striking from interlocutory and final decrees** provisions for payment of alimony by husband to wife for support of latter's minor children, who had been adopted by husband on ground of want of jurisdiction held erroneous. 196Cal 761, 239P36.

359-76½-New. Costs and attorney's fees. Plaintiff may properly be allowed attorney's fee to resist a motion for modification of the decree, as to custody of children, on the theory that the motion is a continuation of the original suit. MoA 11SW(2d)757. [a] **Basis.-** Power of chancery court to require husband to pay wife alimony and counsel fees rests fundamentally on existence of marital relation, and after absolute divorce is granted there is no implied obligation on husband to pay wife's counsel fees for services in opposing husband's request for modification of divorce decree with respect to custody of infant child. 156Md500, 144A490.

359-76⅓-New. Where a wife fails to show that she has paid anything out on account of counsel fees in her divorced husband's proceeding to modify the divorce decree with respect to custody of the minor child of the parties, any liability of the husband therefor would be to the wife's solicitor, and allowance to the wife for such fee is improper. 156 Md500, 144A490.

359-76¼-New. Where a divorced wife's resistance to her husband's petition for modification of a divorce decree respecting custody of a minor child is not in the best interest of the infant, but is in her own behalf, counsel fees for services of her solicitor are not recoverable from the husband as "necessaries" for the benefit of the infant. 156Md500, 144A 490.

359-77 202Cal 272, 260P294; 201 Iowa 516, 207NW778; 209Ky127, 272SW419 (proper to retain action on docket for making and enforcement of orders); 218 Ky398, 291SW359; 235Ky395, 31SW (2d)615 (necessity of application); 308 Mo 201, 271SW481, 485 [quotCJ]; 221 MoA135, 296SW460. [b] **Sufficiency of notice of motion** is determined in some jurisdictions by code provisions as to notice of motions in civil actions. 203 Cal 238, 263P1009. [c] **Time for modification.-**Under some statutes decree may be modified at any time. 201 Iowa516, 207NW778. [d] **Notice.-**201 Iowa516, 207NW778. [e] **Motion is continuation of original action.-**221MoA1199, 2SW (2d)821. [f] **By whom made.-**218Ala 80, 117S645.

359-78 308Mo 201, 271SW481, 485 [quotCJ].

359-78½-New. The burden is upon a divorced husband to move for modification of an award for support of his wife and children, in the event of the wife's remarriage. 148Wash558, 269P 835.

359-79 308Mo 201, 271SW481, 485 [quotCJ]. [a] **Cross petition** may be filed in proceeding to modify judgment in divorce action awarding support to minor child. 136Wash129, 238P977.

359-80 214Ala465, 466, 108S35 [cit CJ].

359-81 [a] **Finding of fact not required** in proceeding to modify decree awarding support to minor child. 136 Wash129, 238P977.

359-82 See also 218Ala268, 118S282; 112 Or63, 228P687. [a] **Court may order payment of reasonable fee** to wife's solicitor. 215Ala447, 111S224.

359-82½-New. Under statute jurisdiction to make orders affecting the custody or maintenance of children of a divorced pair remains in the divorce court and an action will not be in any other court. 308Mo 201, 271SW481.

359-82⅓-New. The court granting the divorce alone has jurisdiction to revise the judgment as to maintenance of children. 209Ky127, 272SW419; 221MoA 1199, 2SW(2d)821.

359-82¼-New. In Kentucky children may intervene in a wife's suit for additional allowance and claim the right thereto, although the wife's petition is dismissed. 217Ky38, 288SW1029.

359-82⅙-New. Probate court is without jurisdiction to modify order in divorce proceedings. 200Cal 654, 254P 567.

359-82⅙-New. Court is without jurisdiction to decide rights of intervening assignee of trust funds left defendant by his father. 221MoA135, 296SW460.

359-82⅐-New. A wife resisting her husband's application for reduction of allowance has the burden of proving an agreement that the allowance should be permanent. 203Cal 173, 263P234.

359-82⅛-New. Wife may be denied recovery of rent on property received for support of children unpaid to time of motion. 235Ky395, 31SW(2d)615.

359-83 242Mich23, 217NW913; 221 MoA135, 296SW460. See also MoA 297 SW718. [a] **Admissibility of evidence.-** Cal 290P8. [b] **Father cannot defeat obligation by letter to child** claiming inability. Cal 290P8. [c] **Father is entitled to show present financial ability** in proceedings to require him to make future payments for child's support. Cal 290P8. [d] **Mother's payment of expenses** does not relieve father of obligation to pay one half under decree. Cal 290P8. [e] **Proper method of enforcing father's obligation** of supporting child is by motion in divorce proceedings to show cause why decree should not be amended. Cal 290P8.

359-83½-New. It is within the court's discretion to grant or refuse the wife's request that the husband give a bond to pay a monthly allowance for the support of the children. 180Ark235, 21SW (2d)157.

359-84½ 208Ky658, 271SW1100; 166 Minn263, 207NW617; 78Mont92, 252 P388; 137Misc158, 241NYS623 (matters determinable); 129 Okl 219, 280P1097 (complaint held sufficient); 146Wash 473, 263P600. [a] **Failure of notary before whom petition for attachment was sworn to set forth notarial expiration date** is mere irregularity. 237Mich563, 213NW115. [b] **Evidence held sufficient** to support order committing accused to prison. 53ND480, 206NW793. [c] **Form of attachment.-**237Mich563, 213 NW115. [d] **Sufficiency of record to show default in payments.-**237Mich563, 213NW115. [e] **Effect of laches.-**137 Misc158, 241NYS623. [f] **Degree of proof.-**129 Okl 219, 280P1097.

359-85 93CalA177, 269P547; 78Mont 92, 252P388; 129 Okl 219. [a] 208Ky 658, 271SW1100. [c] **Evidence held not to show inability.-**166Minn263, 207NW 617.

360-86 157Md166, 145A488; 129 Okl 219, 280P1097.

360-89½-New. In a proceeding to punish for contempt in not returning a child to the mother, personal service is unnecessary, ex parte affidavits are competent, and the order should be modified to permit the husband to purge himself on returning the child. NJ 147A486.

360-91 221MoA135, 296SW460. [a] 53 ND480, 206NW793. [b] **In Oregon.-** 124 Or497, 264P856.

360-92 CalA 289P240 (authority to create lien).

360-94 Kan 289P471. But see WVa 153SE504.

360-97½-New. A lien takes priority over a later probate court order setting the same property aside for the widow of the deceased husband. 200Cal 661, 254P567.

360-97⅓-New. In some jurisdictions the court may impose a lien on specified real estate of the father for the payment of a monthly allowance for the support of children. 176Minn393, 223 NW609.

360-97¼-New. Under statute lien is superior to conveyance made subsequent to installments due at the time of the conveyance. 124 Or497, 264P856.

360-99 28Hawaii291; TexCivA 287SW 139.

360-99½-New. The court may in its discretion appoint either a receiver or trustee regardless of which appointment was asked for. TexCivA 287SW139.

360-3 40 Ida751, 236P863, 42ALR1363 [citCyc]; 228AppDiv298, 239NYS422.

360-4½-New. Where the purpose of an allowance has been completed the husband is entitled to be relieved from further payments. 127Kan287, 273P409.

360-4⅓-New. Where the money paid by a father pursuant to decree, to the mother, for the support of a child awarded to the mother, was apparently applied by the mother to her own uses, such fact alone would justify the father in suspending payments. 151Wash328, 275P710.

360-4¼-New. Order is binding on parties until modified or set aside, though child is removed from state. Ind 172 NE192.

360-4⅕-New. Payment of alimony for the support of a child is not terminable at the option of the husband. 227App Div1, 236NYS544.

360-4⅙-New. Husband is not liable during time he had custody of child. Wash 289P1000.

360-6 151Md644, 135A841, 50ALR232. [a] **Father's estate not liable** for payments accruing after father's death. 151Md644, 135A841, 50ALR232.

360-7 200Cal 661, 254P567; 151Md644, 135A841, 846 [citCJperUrner,J], 50 ALR232 (dictum).

360-8 200Cal 661, 254P567; 70CalA 680, 234P412. Contra 127Misc826, 217 NYS528. [a] **Maintenance of minor whose custody was awarded to father at divorce** held no charge on father's estate during minority, as obligation is personal. 127Misc826, 217NYS528.

360-9 70CalA680, 234P412 (estate liable, and proceedings did not abate after entry of judgment); 141 Okl 188, 284P 638 (rights under decree held continuing).

360-10 200Cal 661, 254P567.

360-17 129 Okl 219, 280P1097 (amount decreed for support of wife and child held deemed for support and education of child upon wife's remarriage); 136 Wash129, 238P977. But see 180Ark836, 22SW(2d)1003. [a] **Remarriage of wife** does not affect obligation of husband. 137Misc158, 241NYS623.

360-17½-New. Where separation agreement, providing that claim of wife for alimony should cease upon her remarriage, was incorporated in the judgment and the wife thereafter remarried, it has been held that she could not recover sums expended for support of child. 217Ky542, 290SW312.

360-19 220Ala400, 125S638; 233Ky423, 25SW(2d)1013; 141 Okl 160, 285P30; Or 258P185; Or 274P516; 35PortoRico 921; TexCivA 8SW(2d)524. [a] (1) 213Ky397, 281SW180; 232Ky123, 22SW (2d)424. (2) Where court reserves question of custody of children, question is not before appellate court, no final judgment being had. 229Ky21, 16SW (2d)485. [d] 166Minn283, 207NW616. [e] **In Missouri.-A** 13SW(2d)1082.

361-21 214Ala465, 466, 108S35 [citCJ]; 168La874, 123S604.

361-22 206Cal 513, 274P965.

361-22½-New. Defendant, on appeal from an interlocutory decree in a divorce suit, awarding custody of a minor child, is not entitled to produce additional evidence with reference to the character and fitness of plaintiff to have the child's custody, where no showing is made that justice requires supplementing of the record. 206Cal 513, 274P965.

361-27 MoA 14SW(2d)458; MoA 277 SW961; MoA 20SW(2d)545 (court will review entire record and decide case on merits with view to best interests of child, but deferring to lower court on doubtful questions of fact). [a] **Husband, instituting proceedings to modify decree** for support, cannot complain that court on its own motion increased allowance. 209Ky571, 273SW26.

361-31½-New. Allowance for support of children reviewed and increased one hundred per cent. 200 Iowa1016, 205 NW970.

361-31⅓-New. Appeal from order transferring custody of child after expiration of period for transfer held to present moot question and will be dismissed. 200Cal 381, 253P323.

361–31¼–New. An order, denying a motion to have reconsideration of a judgment denying a petition to modify a decree of divorce in so far as custody of children is concerned, is not appealable. 144**Wash**650, 258**P**465.

361–31½–New. Failure to require bond of trustee of property of husband is not ground for reversal. **TexCivA** 287 **SW**139.

361–31⅙–New. A determination that notice of a motion to modify a decree as to the support of minor children might be served on the attorney who represented a party in the action is reviewable by appeal and not by writ of review. 203**Cal** 238, 263**P**1009.

361–31½–New. A finding that the mother is an improper person to have the custody of a child is conclusive where supported by substantial evidence. 92 **CalA**276, 268**P**401.

361–31⅙–New. Error in excluding evidence of adultery is ground for reversal. 152**Miss**476, 119**S**581.

361–31⅙–New. Husband obtaining divorce cannot raise question as to alleged irregularity in hearing wherein custody of child was changed to wife, where counsel acquiesced therein. **CalA** 285**P** 323.

361–31 1/10–New. Appeal, and not bill of exceptions is correct procedure to review decree entered after final decree. **RI** 152**A**256.

361–33 168**Ga**87; 135**SE**434; 218**Ky** 613, 291**SW**1058; 179**Minn**520, 229**NW** 868; 82**Mont**218, 266**P**398; **TexCivA** 299**SW**289; 35**Wyo** 206, 248**P**1. See also **MoA** 28**SW(2d)**180; **MoA** 7**SW(2d)** 427. But see **MoA** 296**SW**196.

361–36 214**Ala**1, 106**S**228; 214**Ala**465, 108**S**35; 215**Ala**487, 111**S**207; 34**Ariz** 340, 271**P**717(2dcase); **Ariz** 283**P**922 (abuse of discretion in refusal of modification of decree not shown); **Cal** 290**P** 36; **Cal** 292**P**622; 68**CalA**725, 230**P**209 (refusing to modify decree awarding custody of children to unoffending wife who was denied divorce and requiring father to support child held not abuse of discretion); 69**CalA**66, 230**P**462; 81 **CalA**793, 254**P**683 (discretion not abused); 92**CalA**276, 268**P**401; 95**CalA**594, 272**P**1113; 101**CalA**440; 281**P**674; 102 **CalA**503, 283**P**127; **CalA** 285**P**323; 47 **Ida**374, 276**P**34; 241**Mich**302, 217**NW** 13; **Mich** 233**NW**409; **MoA** 296**SW**196; **MoA** 28**SW(2d)**414; 82**Mont**239, 266**P** 410; 48**Nev**220, 228**P**889; 81**NH**509, 129**A**725; **Or** 258**P**185; 34**PortoRico** 199; 35**Wyo** 206, 248**P**1. See also **RI** 142**A**537. [a] 214**Ala**465, 108**S**35. [b] (2) 214**Ala**465, 466, 108**S**35 [citCJ]. (4) On appeal from modified decree original decree is presumed correct. **Mass** 171 **NE**815. [f] **Abuse of discretion not shown.**–214**Ala**465, 108**S**35; 200**Cal**381, 253**P**323.

361–37 246**Mich**668, 225**NW**494 (trial court cannot change supreme court's decree); 151**Md**196, 134**A**136. [a] **Appellate court has no jurisdiction** to compel husband to pay attorney's fees to divorced wife suing for operation to child. 215**Ala**447, 111**S**224.

361–37½–New. In a proceeding for modification of allowance, reviewing court may decide that amount fixed by lower court should be further increased to a sum stated, and remand cause for proceedings in conformity with the opinion. 42 **Ida**29, 243**P**827.

361–37⅓–New. Where evidence is conflicting, the appellate court should remand case upon reversal. **TexCommnA** 295**SW**581.

361–37¼–New. The court may affirm judgment on issue of divorce and remand on issue of custody of child. **Tex CivA** 285**SW**693.

361–37⅕–New. It was the circuit court's duty to carry out the supreme court's decree, modifying a divorce decree as to custody of the children, until some material change in the situation of the parties. **Or** 274**P**516.

361–40 208**Cal** 518, 282**P**503. [b] 99 **CalA**121, 278**P**240(1stcase) (trial court cannot change custodian). [c] **Until appeal is perfected** wife's remedy is to ask that service of order be set aside and that all matters remain in statu quo until appeal is perfected. 82**CalA**580, 256**P** 226.

362–42 See also **CalA** 291**P**650.

362–43½–New. In absence of exceptions to refusal to modify decree in the record proper or bill of exceptions, judgment will be affirmed where no error appears in the record proper. **MoA** 256**SW**518.

362–45 211**Ky**799, 278**SW**121; **MoA** 32 **SW(2d)**125; 98**NJEq**444, 131**A**576; 121 **Or**44, 252**P**972. [a] **Refusal of foreign divorce** unavailable as plea of res judicata in subsequent divorce proceedings. 169**Ga**832, 152**SE**103.

362–47 254 **IllA**254; 200 **Iowa**1193, 206**NW**262; 205 **Iowa**1081, 216**NW**619; 130**Kan**205, 285**P**606; 211**Ky**799, 278**SW** 121; 98**NJEq**444, 131**A**576; 129**Misc** 159, 220**NYS**372; 132**SC**288, 128**SE**705. [b] (1) 211**Ky**799, 278**SW**121. [e] **Validity of foreign divorce** is governed by laws of country where obtained, unless such laws offend some positive law of state determining. 31 **OhA**482, 166**NE** 423.

362–49 215**Ky**598, 284**SW**1113.

362–50 **NJCh** 149**A**823.

362–54 254 **IllA**254.

362–55 **Nev** 283**P**593. [c] **Suits held not to involve different causes.**–**Nev** 283**P** 593.

363–58 114 **Okl** 279, 246**P**599. [a] (1) See also 206 **Iowa**1075, 221**NW**837. (3) Court will look alone to judgment roll, pleadings, and judgment as entered in wife's action for alimony in Canada to determine whether wife seeking custody of child was guilty of adultery. 67**Utah** 371, 248**P**83. (4) Divorce and alimony are separable causes of action so that divorce granted husband in foreign state is not bar to action for alimony by wife. 32 **ObA**202, 167**NE**690.

363–66½–New. Court must assume that foreign divorce decree is valid. 215**App Div**38, 213**NYS**70.

363–66¼–New. Validity of divorce decree in foreign state is for determination of such state. 213**Ala**573, 105**S**647.

363–66¼–New. Necessity of final decree. 74**CalA**494, 241**P**270.

363–66⅙–New. A statute authorizing the court to apply the same remedies for enforcement of a judgment for separation or divorce rendered in another state on the ground of adultery and requiring payment of alimony as are available for enforcement of a domestic judgment does not include divorce decrees granted in foreign countries. 224 **AppDiv**576, 231**NYS**529.

363–66⅙–New. Judgment in a foreign state, denying a husband divorce and the wife's prayer for alimony, but allowing the wife attorney's fees and suit money, has been held not sufficient to bar a subsequent suit in the state by the wife for divorce, temporary and permanent alimony, and attorney's fees. 166 **Ga**879, 144**SE**561(2dcase).

363–66⅐–New. Public policy will prevent recognition of decree of sister state tending to make adulteress and bigamist of complainant's deceased former wife. 38**F(2d)**775.

363–67 [b] **Presumption,** in absence of evidence is that a rabbinical divorce under Jewish law between parties in Russia did not violate Russian law. 31 **OhA**482, 166**NE**423. [c] **Evidence** held to establish that parties were divorced in Russia in accordance with Jewish law. 31 **OhA**482, 166**NE**423.

363–78 **Can** [1925] 3**DomLR**22. [a] **As matter of comity,** judgment of English court for separation bars husband's action for divorce. **Nev** 292**P**298.

363–80 324 **Ill** 276, 155**NE**288; 140 **Okl** 168, 282**P**335.

363–81 97**CalA**144, 275**P**245; 99**CalA** 45, 277**P**1096; 152**Md**49, 135**A**840; 155 **Miss**316, 124**S**365 (by contempt proceedings and other legal remedies); 219**App Div**61, 219**NYS**203. [b] **Decree for alimony in another state** is held evidence of right thereto. 101**NJEq**523, 139**A** 385. [c] **Judgment of another state showing on its face** that court had jurisdiction is sufficient to authorize recovery of accrued payments thereunder. 97**CalA**144, 275**P**245. [d] **Right to recover alimony** is usually vested one protected by full faith and credit clause. 136**Misc**598, 240**NYS**364.

364–87½–New. Allegations in pleadings in an action to recover unpaid alimony based on a foreign decree sufficiently put in issue a fact concerning the law of the foreign state. 100**CalA**195, 279 **P**1064.

364–87⅓–New. In British Columbia a final judgment for alimony rendered in a court of a foreign country in an action instituted by husband will be enforced although the divorce was granted on a ground which would not justify a decree of divorce in British Columbia. **BC** [1929] 3**DomLR**18.

364–88 30**Hawaii**637; 101**NJEq**523, 139**A**385.

364–90 101**NJEq**523, 139**A**385. [b] **Action might be maintained to establish foreign judgment for alimony,** where there was nothing on face of record to show that it had not become finality. 206**Cal** 8, 272**P**751. [c] **Decree of appellate court awarding temporary alimony in installments enforceable by execution** becomes final so as to sustain action in another state after affirmance of judgment appealed from without mention of alimony. 121**Kan**363, 245**P**1022, 46**ALR** 1200.

364–91 154**Miss**832, 123**S**883.

365–96 214**Ala**345, 107**S**843.

365–3 99**CalA**45, 277**P**1096.

365–4 214**Ala**345, 347, 107**S**843 [citCJ].

365–5½–New. Where foreign decree awarded alimony payable as long as necessary, a subsequent decree of the same court, decreeing that accrued alimony had been paid and revoking the decree in respect of alimony, has been held to effect satisfaction and revocation of the former decree. 214**Ala**345, 107**S**843.

365–6 219**AppDiv**61, 219**NYS**203. [b] **Foreign divorce decree held limited as to enforcement to money judgment** for alimony, enforceable by execution. 219 **AppDiv**61, 219**NYS**203.

365–7 Contra 148**Miss**723, 114**S**813, 814 [citCJ].

366–10 [b] (3) 224**AppDiv**576, 231**NYS** 529. (5) Remedies for enforcement of alimony under judgments obtained in other states do not authorize equitable relief, seeking enforcement of alimony provisions of foreign judgment procured in Holland. 252**NY**178, 169**NE**130.

366–10½–New. Jurisdiction of defendant held not obtained on failure to prove that warrant of attachment was levied on property within the state. 221**App Div**754, 222**NYS**556.

366–11 221**AppDiv**754, 222**NYS**556; 136**Misc**759, 240**NYS**826.

366–11½–New. Where judgment for accrued alimony under a foreign judgment was merely a money judgment, defendant cannot be punished for contempt thereunder. 219**AppDiv**241, 219**NYS**638.

366–15½–New. That court ordering payments had not acted on petition for enlargement of decree held immaterial. 152**Md**49, 135**A**840.

366–15⅓–New. Though divorce decree in another state ordered separation agreement to remain in force, defendant may assert invalidity of note and agreement in action on note. 228**AppDiv**341, 239**NYS**533.

366–17 67**Utah**371, 248**P**83.

366–18 **CalA** 292**P**285; 243 **IllA**367; 83 **NH**413, 143**A**471; 129**Misc**172, 220**NYS** 664; 144**Wash**565, 258**P**333. [a] **Finding of Canadian court** in wife's action for alimony that she was guilty of adultery held not to prevent her from retaining custody of child. 67**Utah**371, 248**P**83.

366–21 **Ill** 173**NE**172; 202 **Iowa**1, 209 **NW**412, 415 [citCJ]; 128 **Or**655, 275**P** 661.

366–21½–New. A valid foreign divorce is conclusive between parties as to custody of children on facts existing as of time of decree. 215**AppDiv**38, 213**NYS** 70.

366–21⅓–New. But not conclusive as to others not parties. 215**AppDiv**38, 213 **NYS**70.

367–22 217**Ala**378, 115**S**866; 160**Ga**480, 128**SE**765; 243 **IllA**367, 372 [citCJ]; 202 **Iowa**1, 209**NW**412 (award as between parties in divorce decree not res judicata as to persons not parties thereto); 240 **Mich**240, 215**NW**384; 83**NH**413, 143**A**

471; 101WVa235, 132SE507. But see 144Wash565, 258P333. [c] **Foreign decree denying divorce and dividing custody of child** between parties is not controlling. 217Ala378, 115S866.

367-23½-New. Judgment of court of sister state awarding custody will be upheld unless conditions affecting child have changed and child is lawfully domiciled in jurisdiction. 144 Okl 83, 289P740.

367-24 152Miss365, 118S721.

367-27 46 Ida512, 269P987. [a] **Actual situs and legal domicile of child** must be within jurisdiction of court before its decree will be accorded extraterritorial effect. 46 Ida512, 269P987.

367-30 130Kan205, 285P606.

367-32½-New. Child must have been brought into state by person having lawful custody before court will disregard judgment of court of sister state. 144 Okl 83, 289P740.

367-37 121 Or44, 252P972.

367-39 But see 83CalA356, 256P579. Contra 129Misc172, 220NYS664.

367-40½-New. Construction of decree. Wash 289P1000.

367-42 200 Iowa1193, 206NW262 (adjusting of property rights not precluded by foreign divorce decree).

368-52½-New. Denial of a motion by plaintiff to open the case for evidence on the law of Belgium where she obtained a divorce from defendant is improper, where it denies her a fair trial in an action to be declared tenant in common with defendant in real estate in the state of forum. 226AppDiv159, 235 NYS273.

368-52½-New. Decree canceling divorce does not affect absent infant defendant's personal and property rights in sister state. 38F(2d)775.

368-53 DC 40F(2d)159; Mass 165NE 29; 98NJEq444, 131A576; 213AppDiv 360, 210NYS695.

368-54 92Fla818, 110S539; 203 Iowa 1355, 214NW536; 98NJEq444, 131A576; 213AppDiv360, 210NYS695; 299Pa264, 149A317. See also 218AppDiv104, 218 NYS87.

368-55 [a] **Where foreign decree was procured by fraud,** it is no bar to subsequent suit in another state. 98NJEq 444, 131A576.

369-61 132Misc217, 228NYS539.

369-65 [a] **Status fixed prior to residence in state will be recognized,** if not fixed policy of state will control. 135 Misc486, 238NYS723.

369-66 98NJEq444, 131A576.

369-68 218AppDiv104, 218NYS87.

369-69 203 Iowa1355, 214NW536; 218 AppDiv104, 218NYS87; 154Wash499, 282P830.

369-70 203 Iowa1355, 214NW536; 98 NJEq444, 131A576; 218AppDiv104, 218 NYS87; 135Misc486, 238NYS723.

369-72 16F(2d)509; 200 Iowa1193, 206 NW262; 98NJEq444, 131A576; 226App Div454, 235NYS652. [a] **Evidence held to show bona fide residence.**–203Cal 61, 263P200.

369-74 16F(2d)509.

370-75½-New. Fraud. Where plaintiff procures foreign decree by use of fraud as to his residence, it is without extraterritorial effect. 98NJEq444, 131 A576.

370-76 16F(2d)509; 203Cal 61, 263P 200; 110Conn348, 148A385 (without fixed intention of remaining); DC 40 F(2d)159; 50Philippine22 (though marriage was not contracted at place of matrimonial domicile); BC [1930] 2 DomLR940; Man [1929] 4DomLR1051.

370-78 NJ 147A447 (intent must appear); Alta [1929] 3DomLR159.

370-80 110Conn348, 148A385.

370-82 See also 103NJEq149, 142A417.

370-83½-New. The period of residence required in a similar case by the state in which a foreign decree is questioned does not govern in determining sufficiency of residence. 103NJEq174, 142 A644.

371-84 128Misc778, 220NYS262. [a] **Only state having jurisdiction as of right is state of matrimonial domicile.** 135 Misc486, 238NYS723.

371-85 206 Iowa1075, 221NW837; 128 Misc778, 220NYS262; 132Misc551, 230 NYS579; 135Misc486, 238NYS723.

371-85½-New. Divorce granted to husband, wife living in Denmark, is valid and will be recognized by courts of New York. 219AppDiv344, 220NYS242.

371-86 131Misc867, 228NYS405; 132 Misc551, 230NYS579. [a] **That husband returned to state of matrimonial domicile without intent to give up foreign domicile** does not affect rule. 131Misc 867, 228NYS405.

371-90 131Misc13, 226NYS115.

371-91 130Kan205, 285P606.

371-92 205 Iowa1081, 216NW619; 241 NY240, 149NE844, 42ALR1398; 135Misc 486, 238NYS723.

371-92½-New. To invalidate a divorce granted by a court of the husband's original domicile, more must be shown than abandonment of such domicile, and it must be shown that he acquired a domicile of choice at the time of commencement of the proceedings. Alta [1928] 4DomLR371.

372-2½-New. Where a separation agreement permits the wife to reside wherever she chooses, it has been held that, although the wife may acquire a separate domicile in a state other than the matrimonial domicile to procure a divorce, a divorce there obtained will not be recognized in the state of the matrimonial domicile. 131Misc13, 226NYS 115.

372-3 288Fed262; 92Fla818, 110S539; 7PaDist&Co 643; 9PaDist&Co 613.

372-4 128Misc778, 220NYS262; 224 AppDiv576, 231NYS529; 230AppDiv99, 243NYS414.

372-6½-New. Where husband and wife are residents of one state and husband goes to another state and there obtains divorce through constructive service, abandonment will be implied on trial court's decision that wife was domiciled in original state at time of divorce. 241 NY240, 149NE844, 42ALR1398.

372-6½-New. Jurisdiction once acquired not exhausted until entry of decree. 128Misc778, 220NYS262.

372-7 128Misc778, 220NYS262.

372-9 200 Iowa1193, 206NW262; 131 Misc867, 228NYS405 (stating rule in California).

373-12 254NY238, 172NE483; 223App Div124, 228NYS347; 130Misc248, 223 NYS789; 136Misc236, 242NYS232; 12 PaDist&Co 757. But see 245NYS600. [b] **Public policy does not require courts to recognize foreign marriage of citizens.** 223AppDiv124, 228NYS347.

373-14 [a] **Validity is dependent on validity under laws of defendant's domicile** where wife abandoned husband without cause and was domiciled in another state when husband acquired foreign domicile and obtained foreign divorce on constructive service. 131Misc 867, 228NYS405.

373-15 131Misc13, 226NYS115; 132 Misc551, 230NYS579.

373-17 85Colo 364, 276P674; DC 40 F(2d)159; 254 IllA254; 200 Iowa1193, 206NW262; 241NY240, 149NE844, 42 ALR1398; 213AppDiv360, 210NYS695; 223AppDiv124, 228NYS347; 131Misc13, 226NYS115; 132Misc551, 230NYS579. [d] **Jurisdiction of marital status was not acquired** where, after separation decree in New York, parties lived together in state in which decree was rendered without complying with New York statute as to reconciliation. 132Misc576, 230 NYS278.

374-18 222MoA825, 10SW(2d)344; Tex CivA 294SW601.

374-19 200 Iowa1193, 206NW262; Tex CivA 294SW601. [b] **Exclusively for state court** to determine whether divorce decree contravenes public policy. 245 NYS600.

374-20 TexCivA 294SW601.

374-22 213AppDiv360, 210NYS695.

374-23 218AppDiv104, 218NYS87; 135 Misc486, 238NYS723.

375-24 135Misc486, 238NYS723.

375-26 213Ala573, 105S647, 648 [quot CJ]. [b] **Letter held not appearance.**–131Misc13, 226NYS115.

375-30 [a] **Contempt proceedings** for disobedience of separate maintenance decree is not collateral attack on divorce decree of another state subsequent to separate maintenance decree. 85Colo 364, 276P674. [b] **Procedural errors.**–199Cal 523, 250P397.

375-31 100CalA195, 279P1064 (that agreement forming basis of decree for divorce and alimony by foreign state is contra bonos mores cannot be raised in action on decree by wife for alimony); 211Ky799, 278SW121; 128Misc778, 220 NYS262.

375-32 [a] **Failure of complaint to allege residence of plaintiff within state for statutory time and defendant's absence or desertion** is not available on collateral attack. 203Cal 61, 263P200.

375-33 128Misc778, 220NYS262.

375-34½-New. Full faith and credit clause does not defeat right to state to regulate marriage and divorce therein. 92Fla818, 110S539.

375-34½-New. A Belgian divorce decree, not challenged at the trial of an action involving property rights thereunder, will be deemed binding. 226App Div159, 235NYS273.

375-35½-New. Burden of attack is on him who denies validity of decree. 200 Iowa1193, 206NW262.

375-36 98NJEq444, 131A576; 99NJEq 106, 132A674; 213AppDiv360, 210NYS 695 (wife entitled to sue for divorce, where husband's original decree procured in another state, is invalid); 132 Misc217, 228NYS539 (Mexican divorce by husband where parties were married and domiciled in New York); 50Philippine22 (collateral attack on judgment of state court in court of Philippine Islands). See also 214Ala345, 348, 107S 843. [a] **Denial on information and belief** as to jurisdiction of court is sufficient pleader. 100CalA195, 279P1064.

375-37 98NJEq444, 131A576; 103NJ Eq149, 142A417.

376-40 135Misc486, 238NYS723.

376-45½-New. After intervention of rights of other parties, clearest proof is necessary to overcome finding of domicile, in decree granting divorce. 92Fla 818, 110S539.

376-45½-New. On assumption that chancellor has passed on domicile, accrual of cause of action, residence, and service, foreign divorce will be upheld by comity. 92Fla818, 110S539.

377-49 147Va331, 137SE473.

377-56 214Ala345, 348, 107S843 [cit CJ]; 200 Iowa1193, 206NW262.

377-61 [a] **Evidence held sufficient** to establish jurisdiction. 147Va331, 137SE 473.

377-62 211Ky799, 278SW121.

377-63 254 IllA524; 98NJEq444, 131A 576; 99NJEq106, 132A674; NJCh 144A 18; 147Va331, 137SE473. See also 241 NY240, 149NE844, 42ALR1398. But see 135Misc717, 238NYS333. [b] **Evidence insufficient to show fraud or collusion.**–203Cal 61, 263P200.

378-66 147Va331, 137SE473.

378-67 211Ky799, 278SW121.

378-76 203Cal 61, 263P200.

378-81 48RI 426, 138A188, 189 [citCJ]. See also 90Fla197, 105S814, 815 [citCJ].

DOGMA

384-34½-New. An arbitrary dictum. Webster D. [quot 81Colo 276, 255P610].

DOING BUSINESS

384-38 254Mass569, 151NE63, 46ALR 563; 242NY224, 151NE214; 129Misc 173, 220NYS667. See also 30Hawaii51.

DOMESTIC

387-14 106Conn236, 137A764. [d] **Term may have broader meaning** under terms of will. 106Conn236, 137A764.

389-52 106Conn236, 137A764. [c] **Term includes gardener living outside of** house. 106Conn236, 137A764.

389-55 106Conn236, 137A764.

389-56 106Conn236, 137A764.

DOMICILE

392-1 19 OhA404. [c] **Technically,** domicile is preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by law may be determined. 131Misc13, 226NYS115.

392-2 19 OhA404.

392-4 43 Ida64, 249P254; 12PortoRico Fed73. [b] (1) 34GaA151, 128SE781

(statutory definition where family shall permanently reside). [c] **Domicile (verb transitive)** means "to establish in residence that constitutes habitancy," while domicile (verb intransitive) means "to dwell." 43 **Ida**64, 249**P**254.

393–5 199 **Ind**262, 157**NE**275, 53**ALR** 1386 [citCJ222]; 205 **Iowa**108, 215**NW** 661; **MoA** 29**SW**(2d)240; 135**Misc**486, 238**NYS**723; 116 **Okl** 188; 243**P**962; 90 **PaSuper**192; 144**Wash**421, 258**P**37. [a] (5) Place with which person has settled connection for legal purposes. **Iowa** 231 **NW**671. [b] 205 **Iowa**108, 215**NW**661.

394–9 104**Conn**169, 132**A**902; **NB** [1926] 4**DomLR**56.

394–11 43 **Ida**64, 249**P**254; 19 **OhA**404; 5**PaDist&Co** 503.

395–17 199 **Ind**262, 157**NE**275; 53**ALR** 1386; 160**La**91, 106**S**705; **MoA** 29**SW** (2d)240; 50**ND**662, 197**NW**862, 866 [cit CJ]; 116 **Okl** 188, 243**P**962; 124 **Or**592, 265**P**435, 436 [citCJ]; 115**Tex**417, 282 **SW**576.

395–18 13**F**(2d)541; 135**Misc**486, 238 **NYS**723; 50**ND**662, 197**NW**862, 866 [cit CJ]; 19 **OhA**404.

395–18½–New. In New Jersey husband's nonpayment of costs on application for alimony pendente lite is a breach of ne exeat bond, making surety liable. 101**NJEq**122, 137**A**851.

396–21 [c] "Residence" is where a man "sits down" with thought of remaining. 28**F**(2d)288.

396–23 199 **Ind**262, 157**NE**275, 53**ALR** 1386; 203 **Iowa**1355, 214**NW**536; **Tex CivA** 19**SW**(2d)136.

397–24 105**Conn**564, 136**A**102; 19 **OhA** 404; 124 **Or**592, 265**P**435, 436 [citCJ]; 86**PaSuper**38; 115**Tex**417, 282**SW**576; 143**Va**267, 129**SE**235; 197**Wis**163, 221 **NW**856; **NB** [1926] 4**DomLR**56.

397–25 20**F**(2d)978 (naturalization statute); 92**Fla**818, 110**S**539; 210**Ky** 575, 276**SW**500; 160**La**91, 106**S**705; 236 **Mich**677, 211**NW**60; **TexCivA** 25**SW**(2d) 638 (venue statute).

397–28 But see 236**Mich**677, 211**NW**60.

398–32 29**F**(2d)485; 104**Conn**169, 132**A** 902; 210**Ky**575, 276**SW**500; 265**Mass** 531, 164**NE**472; 135**Misc**736, 240**NYS** 398; 144 **Okl** 102, 290**P**190.

398–33 29**F**(2d)485; 81**Colo** 144, 254**P** 150; **Iowa** 231**NW**671, 265**Mass**531, 164 **NE**472; 144 **Okl** 102, 290**P**190; 94**Pa Super** 293; **Alta** [1925] 3**DomLR**22.

398–34 104**Conn**169, 132**A**902; 135**Misc** 736, 240**NYS**398.

399–37 199 **Ind**262, 157**NE**275, 53**ALR** 1386; **NB** [1926] 4**DomLR**56. [a] **Depends on intention.**–199 **Ind**262, 157**NE** 275, 53**ALR**1386.

399–42 166**Ga**670, 144**SE**206.

400–43 20**F**(2d)978.

400–48 **NB** [1926] 4**DomLR**56.

400–52 19 **OhA**404.

400–53 19 **OhA**404.

400–53½–New. Earlier home is domicile, unless later one is regarded as principal one. 26**F**(2d)106.

400–54 [a] **Legal residence or domicile** may be acquired. 28**F**(2d)288.

401–57 [a] **Residence of child temporarily delivered by probation officer to persons desiring to adopt it** is residence of officer. 172**Ark**541, 289**SW**466.

401–58 210**Ky**575, 276**SD**500.

401–60 15 **OhA**335, 338 [quotCyc].

401–61 15 **OhA**335, 338 [quotCyc].

401–62 3**F**(2d)21 (question of domicile must be tended on particular facts of each case); 81**Colo** 144, 254**P**150; 93 **Fla**1004, 113**S**374; 170**Ga**202, 152**SE** 239; 4**HawaiiFed**226; 163**La**537, 112**S** 408; 221**MoA**516, 282**SW**57; 133**Misc** 457, 233**NYS**145; 135**Misc**736, 240**NYS** 398; 50**ND**662, 197**NW**862; 15 **OhA** 335, 338 [quotCyc]; 19 **OhA**404; 117 **Or**157, 242**P**852, 853 [citCJ]; **NB** [1926] 4**DomLR**56. [a] **"Legal residence"** is constituted by actual residence coupled with intent to remain there. 233**Ky**441, 26**SW**(2d)8; 233**Ky** 663, 26**SW**(2d)526.

402–65 214**Ala**356, 108**S**18.

402–66 93**Fla**1004, 113**S**374.

403–69 168**La**326, 122**S**54.

403–78 226**AppDiv**454, 235**NYS**652; **Vt** 147**A**771.

404–79 105**Conn**502, 136**A**98; 168**La** 326, 122**S**54; **MoA** 6**SW**(2d)1006; **MoA** 6**SW**(2d)1025, 1027 [quotCJ].

404–80 226**AppDiv**454, 235**NYS**652.

404–82 19 **OhA**404.

404–84 214**Ala**356, 108**S**18; 81**Colo** 144, 254**P**150; 104**Conn**169, 132**A**902; 105 **Conn**502, 136**A**98; 93**Fla**1004, 113**S**374; 205 **Iowa**108, 215**NW**661; 210**Ky**575, 276**SW**500; 221**MoA**516, 282**SW**57. [b] (2) To effect change of domicile there must be intent to make new place of residence real, true, fixed home. 50**ND** 662, 197**NW**862.

405–85 **Vt** 147**A**771.

405–86 210**Ky**575, 276**SW**500.

405–89 20**F**(2d)978; 205 **Iowa**108, 215 **NW**661; **MoA** 6**SW**(2d)1006; **NJ** 149**A** 759(2dcase); 135**Misc**486, 238**NYS**723 (decisive factor); 229**AppDiv**654, 241 **NYS**601; 116 **Okl** 188, 243**P**962 (controlling fact to be considered); 287**Pa** 115, 134**A**463; 197**Wis**163, 221**NW**856.

405–90 12**PortoRicoFed**64.

406–91 168**La**326, 122**S**54; 104**WVa** 617, 141**SE**7.

406–92½–New. Intention as an element of domicile may be found or inferred from facts excluding an intention to make a domicile elsewhere. 105**Conn** 502, 136**A**98.

406–96 265**Mass**531, 164**NE**472; 223 **AppDiv**89, 227**NYS**421.

406–99 73**CalA**565, 239**P**60.

406–2 36**GaA**394, 136**SE**826.

407–4 199 **Ind**262, 157**NE**275, 53**ALR** 1386.

407–5 205 **Iowa**108, 215**NW**661 (military officer).

407–6 **Alta** [1925] 3**DomLR**22 (residence in foreign country).

408–8 214**Ala**356, 108**S**18; 199 **Ind**262, 157**NE**275, 278, 53**ALR**1386 [citCJ].

408–10 199 **Ind**262, 157**NE**275, 278, 53 **ALR**1386 [citCJ].

408–11 199 **Ind**262, 157**NE**275, 53**ALR** 1386.

408–17 205 **Iowa**108, 215**NW**661; 12 **PortoRicoFed**64.

409–18 199 **Ind**262, 157**NE**275, 53**ALR** 1386.

410–21 34**GaA**151, 128**SE**781.

410–25 36**GaA**394, 136**SE**826; 200 **Iowa**1193, 206**NW**262 (husband); 197 **Wis**163, 221**NW**856.

411–27 166**Ga**670, 144**SE**206; 44 **Ida** 244, 256**P**366; 240**NY**444, 148**NE**630 (residence); 217**AppDiv**233, 216**NYS** 646. [a] **Thus** it is said that infant has no legal residence of his own no matter where his place of abode may be. 240**NY**444, 148**NE**630.

411–28 217**AppDiv**233, 216**NYS**646.

411–30 98**Fla**1196, 125**S**694; 44 **Ida** 244, 256**P**366; 227**Ky**788, 14**SW**(2d) 181; 1**LaA**399; **Nebr** 229**NW**885; 47 **RI** 375, 133**A**651; **TexCivA** 285**SW**909; **DC** 37**F**(2d)818; **Sask** [1927] 3**DomLR** 349. But see 240**NY**444, 148**NE**630. [g] **Infant living apart from father.**–240**NY** 444, 148**NE**630.

411–30½–New. even though living apart from him, 240**NY**444, 148**NE**630 (under common law).

412–35½–New. The residence of an infant is no longer exclusively that of the father, but may be either that of the father or mother and if infant lives with his mother then her domicile is his. 240**NY**444, 148**NE**630.

412–36 35**GaA**40, 132**SE**108. But see 240**NY**444, 148**NE**630.

412–37 240**NY**444, 148**NE**630; 47**RI** 375, 133**A**651.

413–40½–New. When mother dies, domicile of child remains that of mother until changed by competent authority. 47**RI** 375, 133**A**651.

413–48½–New. Parents' residence at time of death does not fix perpetual residence for their minor children. **Tex CivA** 292**SW**947.

414–56 [c] (5) Order authorizing guardian to place ward in sanitorium does not authorize guardian to fix residence of ward in another state. 38 **Okl ACR**503. [f] **Presumption** is that domicile of guardian of person is that of minor ward hence second adoption proceedings begun at county in which guardian resides and not that in which adoptive father resides are in jurisdiction of court of former county. **IndA** 148**NE**163.

414–57 See also 155**Tenn**565, 4**SW**(2d) 955, 956 [citCJ].

414–58 But see **IndA** 148**NE**163.

414–61 176**Ark**442, 3**SW**(2d)6; 176**Ark** 714, 3**SW**(2d)993; 104**Conn**169, 132**A** 902; 105**Conn**502, 136**A**98; 160**Ga**618, 128**SE**902; 160**La**91, 106**S**705; 222**MoA** 941, 300**SW**540; **MoA** 6**SW**(2d)1025; **NJ** 129**A**410; **NJCh** 129**A**212; 116 **Okl** 188, 243**P**962 (whether under guardianship or not); 86**PaSuper**38; **Sask** [1930] 4**DomLR**736.

416–62 **NJCh** 129**A**212.

416–63 [a] **Wife may acquire domicile** separate and apart from husband. 219 **AppDiv**344, 220**NYS**242.

416–66 222**MoA**941, 300**SW**540.

416–68½–New. Deserted wife may maintain domicile of her own. 241**NY** 240, 149**NE**844, 42**ALR**1398.

416–69 Man [1929] 4**DomLR**649.

416–70 220**Ala**482, 125**S**612; 176**Ark** 442, 3**SW**(2d)6; 219**AppDiv**344, 220 **NYS**242.

416–71 [b] **Wife must establish a matrimonial offense to justify leaving husband** before she has legal right to separate and create her own domicile. **NJ** 148**A**615.

416–72 132**Misc**551, 230**NYS**579; **NJ** 148**A**615.

417–73 200 **Iowa**1193, 206**NW**262; **NJ Ch** 129**A**212; 131**Misc**13, 226**NYS**115, 121 [citCyc].

417–74 15 **OhA**335.

417–74½–New. In Pennsylvania, where wife leaves husband with his consent, she cannot acquire another domicile or residence until period of separation by his consent has ended. 6**PaDist&Co** 712.

417–75 **Vt** 147**A**700.

418–83 36**GaA**394, 136**SE**826.

418–93 [a] **Adjudication prima facie establishes incapacity.**–36**GaA**394, 136 **SE**826.

418–95 73**CalA**565, 239**P**60; 205 **Iowa** 108, 215**NW**661, 662 [citCJ].

419–96 73**CalA**565, 239**P**60; 205 **Iowa** 108, 215**NW**661, 662 (dictum). [d] **Membership in state National Guard** does not prevent member from establishing domicile in another state. 228 **Ky**790, 15**SW**(2d)1005.

420–8 217**AppDiv**233, 216**NYS**646.

421–23 46 **Ida**512, 269**P**987.

422–32 20**F**(2d)978; 28**F**(2d)288; 81 **Colo** 144, 254**P**150; 103**Conn**189, 130**A** 254; 104**Conn**169, 132**A**902; 105**Conn** 502, 136**A**98; 4**HawaiiFed**233; 205 **Iowa**108, 215**NW**661; 210**Ky**575, 276 **SW**500; **MoA** 29**SW**(2d)240; 241**NY** 180, 149**NE**415; 135**Misc**736, 240**NYS** 398; 42 **OklACR**293 [reh pending]; 6 **PaDist&Co** 793; 86**PaSuper**38; 91**Pa Super**354; 197**Wis**163, 221**NW**856; **NB** [1926] 4**DomLR**56. See also 241**NY**180, 149**NE**415.

423–36 83**Colo** 355, 265**P**92; 205 **Iowa** 108, 215**NW**661; 6**LaA**182.

423–37 28**F**(2d)288; 205 **Iowa**108, 215 **NW**661; 129**Misc**241, 221**NYS**726.

423–38 20**F**(2d)978; 205 **Iowa**108, 215 **NW**661; 33 **OklCr**250, 242**P**539. [a] But see 6**LaA**182.

423–39 7**F**(2d)19; 73**CalA**565, 239**P**60; 82**CalA**485, 256**P**846; 205 **Iowa**108, 215 **NW**661; 223**Ky**612, 4**SW**(2d)417; 160 **La**91, 106**S**705; 265**Mass**531, 164**NE** 472; **MoA** 29**SW**(2d)240; 42 **OklACR** 293 [reh pending]; 91**PaSuper**354; 94 **PaSuper**293; **Alta** [1925] 3**DomLR**22. See also 104**Conn**169, 132**A**902.

424–40 42 **OklACR**293 [reh pending].

424–42 **Alta** [1925] 3**DomLR**22.

424–42½–New. Declaration of intention to change domicile will not avail to evade law when contradicted by acts. 160**La**91, 106**S**705.

424–43 **Sask** [1929] 2**DomLR**546.

424–44 7**F**(2d)19; 105**Conn**502, 136**A** 98; 160**La**91, 106**S**705; 42 **OklACR**293 [reh pending].

426–54 20**F**(2d)978; 228**Ky**790, 15**SW** (2d)1005.

426–56 Man [1929] 4**DomLR**649. But see **Vt** 147**A**771.

426–57 See also Man [1930] 1**DomLR** 1006(1stcase). [a] (4) Domicile of choice is lost by abandonment. **Sask** [1930] 4**DomLR**736.

427–57½–New. Where there is a continued intention to return to country, al-

though not the particular state, where domicile of choice exists, residence in another country will not cause a reversion to domicile of origin. **Alta** [1925] 3**DomLR**22.

427-64 20F(2d)978.

427-65 20F(2d)978; **Vt** 147A771.

427-66 20F(2d)978; 73CalA565, 239 P60.

428-68 20F(2d)978.

428-70 3F(2d)21 (evidence of intent to return admissible); 73CalA565, 239P 60; 194NC293, 139SE604.

428-71 73CalA565, 239P60; 194NC293, 139SE604.

428-72 20F(2d)978.

428-76 **DC** 37F(2d)808; 194NC293, 139SE604. [g] **Declarations may become important** when supported by acts. 135Misc736, 240NYS398.

429-85½-**New.** Statements by attorney in fact have been held not proof of intent. 135Misc736, 240NYS398.

430-88 50ND662, 197NW862.

430-91 **DC** 37F(2d)808; 194NC293, 139SE604; 116 **Okl** 188, 243P962.

431-1 199 **Ind**262, 157NE275, 279 [cit CJ]; 53**ALR**1386.

431-2 199 **Ind**262, 157NE275, 279 [cit CJ]; 53**ALR**1386.

431-3 199 **Ind**262, 157NE275, 279 [cit CJ]; 53**ALR**1386.

431-8 85CalA323, 259P374; 117 **Or**157, 242P552, 853 [citCJ]; **TexCivA** 15 SW(2d)686.

431-11 218**Ala**424, 118S636; **DC** 37 F(2d)818; 210Ky575, 276SW500; 160 **La**91, 106S705; **NJSup** 150A238; 126 Misc826, 215NYS1; 129Misc241, 221 NYS726; 134Misc192, 235NYS741; 50 ND662, 197NW862, 865 [citCJ]; 33 **Okl** Cr250, 242P539; 144 **Okl** 102, 290P190; 38 **OklACR**503; 91**PaSuper**354; **Vt** 145 A410; **Wash** 290P861. [g] **Presumption applies** to widow and heirs of party. 126Misc826, 215NYS1.

431-11½-**New.** and so proof of the acquisition of a new domicile is not complete without evidence of an abandonment of the old. 103**Conn**189, 130A254.

433-17 20F(2d)978; **TexCivA** 15 SW(2d)686.

433-18 20F(2d)978. [e] **Members of the Cortez** are presumed to be Spaniards domiciled in Spain. 12**PortoRicoFed**64.

433-19 20F(2d)978; 25 **OhNPNS**231.

434-20 20F(2d)978; **NB** [1926] 4**DomLR**56.

434-24 20F(2d)978.

434-25 25 **OhNPNS**231.

435-28½-**New.** But there is no presumption that unmarried man whose occupation suggests no permanency of abode would continue to live for any length of time where he voted. 198**Cal** 329, 245P176.

435-33 **NB** [1926] 4**DomLR**56.

435-34 **NB** [1926] 4**DomLR**56.

435-35 210Ky575, 276SW500; **MoA** 29SW(2d)240; 194NC293, 139SE604; **BC** [1927] 2**DomLR**655; **NB** [1926] 4 **DomLR**56. [d] (2) **To support finding** that parent of school child had never acquired domicile in school district. 44 **Ida**244, 256P366. [e] **Evidence held sufficient.**–**MoA** 29SW(2d)240. [f] **Evidence held sufficient to establish change of domicile.**–135Misc736, 240NYS398.

436-36 210Ky575, 276SW500; **NB** [1926] 4**DomLR**56.

436-37 194NC293, 139SE604; 50ND 662, 197NW862; **NB** [1926] 4**Dom LR**56.

436-37½-**New. Evidence to overcome presumption** of continuance of domicile of origin must show unmistakable intention to change it. 6**PaDist&Co** 703.

436-41 253**Mass**55, 147NE899; 264 **Mass**112, 162NE225; **Sask** [1929] 2 **DomLR**546. See also 210Ky575, 276SW 500.

436-42 73CalA565, 239P60; 201**Cal** 36, 255P800; **NJSup** 150A238; 94**PaSuper** 293; 6**PaDist&Co** 703; 34**PortoRico** 50; **Vt** 145A410.

436-45½-**New.** Notarial acts declaring residence in certain parish held not conclusive on question of jurisdiction. 160 **La**91, 106S705.

436-46 **MoA** 29SW(2d)240; **NJCh** 129 A212.

437-48 [b] 198**Cal** 329, 245P176.

437-50 But see 73CalA565, 239P60.

437-53 See also 129Misc241, 221NYS 726.

438-54 286**Pa**113, 132A918.

439-71 42 **OklACR**293, 296 [reh pending, and citCJ].

439-72 42 **OklACR**293, 296 [reh pending, and citCJ].

439-73 253**Mass**55, 147NE899; 50ND 662, 197NW862 (probative value dependent upon circumstances of making will); 42 **OklACR**293, 296 [reh pending, and citCJ].

439-74 130Misc499, 223NYS777.

439-75 42 **OklACR**293, 296 [reh pending, and citCJ]. [e] (1) See also 129 Misc241, 221NYS726.

440-76 **NB** [1926] 4**DomLR**56.

440-77 42 **OklACR**293, 296 [reh pending, and citCJ].

440-80 44 **Ida**244, 256P366. [b] **Declarations made after controversy has arisen** are of little weight. 44 **Ida**244, 256P366.

440-81 **NB** [1926] 4**DomLR**56.

440-82 **NB** [1926] 4**DomLR**56.

440-83 **NB** [1926] 4**DomLR**56.

440-84 253**Mass**55, 147NE899; **NB** [1926] 4**DomLR**56.

440-85 **NB** [1926] 4**DomLR**56.

441-87 **NB** [1926] 4**DomLR**56.

441-89 **NB** [1926] 4**DomLR**56.

441-95 212**Ala**597, 103S884.

441-96 265**Mass**531, 164NE472; **MoA** 29SW(2d)240; 133Misc457, 233NYS145; 194NC293, 139SE604; 116 **Okl** 188, 243 P962. But see 12**PortoRicoFed**73.

442-97 **DC** 37F(2d)808; 39 **OklACR** 303; **Can** [1930]1**DomLR**75.

DONATION

444-55 76**Mont**429, 247P332, 47**ALR** 424.

DOUBLE

446-25 **SD** 210NW730.

447-35 215Ky394, 285SW188.

DOWER

457-1 124**Kan**97, 258P295. [a] (4) Since 1867 dower is legal right of widow whose husband dies intestate, or when she dissents from will to have allotment of one third in value of all lands, tenements and hereditaments including legal and equitable estates whereof he was beneficially seized during coverture. 190NC102, 129SE419. [d] **"Tenant in dower** is where the husband of a woman is seized of an estate of inheritance and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold to herself for the term of her natural life." 190 **NC**815, 130SE867 (quotBlackstone).

457-2 320 **Ill** 480, 151NE369; 191NC 227, 131SE585.

458-9 331 **Ill** 287, 162NE855.

458-13 [a] 191NC227, 131SE585. [d] **Dower is common-law estate.**–328 **Ill** 388, 159NE782.

458-15 98**Fla**1103, 125S521; **Del** 141 A315; 81**Mont**185, 262P887.

458-16 [b] **In Florida.**–98**Fla**1103, 125 S521.

459-17 123**Kan**131, 254P407.

459-18 204 **Iowa**473, 215NW761 (dower now primary right regardless of will); 123**Kan**131, 254P407.

459-22½-**New.** Statutory provisions for dower are not ordinarily repealed or superseded or modified by implication. 97**Fla**916, 123S668(2dcase).

459-25 13**PaDist&Co** 704.

459-32 189NC790, 128SE404.

459-33 [a] 189NC790, 128SE404.

460-35½-**New.** Determination of application of Dower Act see **Man** [1930] 3 **DomLR**875.

460-37 313**Mo** 476, 285SW92; 191NC 227, 131SE585.

460-39 81**Mont**185, 262P887; 133**Misc** 581, 232NYS680; 190NC180, 129SE450, 41**ALR**1111; 191NC227, 131SE585; 47 **RI** 150, 131A556. [a] 191NC227, 131SE 585.

460-40½-**New.** The statutes of dower are founded on principles of humanity, beneficent in their nature. 313**Mo** 476, 285SW92.

460-46 190NC102, 129SE419 (there is no contract between husband and wife for either dower or curtesy law giving this right in respect to property to encourage matrimony); 190NC180, 129SE 450, 41**ALR**1111. [b] **Statutory provisions governing contractual relations** between grantor and grantee pertaining to taxes do not apply to widow's dower right or assignment of dower. 117 **Or** 125, 242P616.

460-51 190NC180, 129SE450, 41**ALR** 1111 (dower only elongation of husband's estate).

461-57½-**New. In Florida,** where there is but one child surviving, widow's dower is one half entire estate. 89**Fla** 457, 105S106.

461-68 180**Ark**1023, 24SW(2d)314; 201 **Iowa**247, 207NW241.

462-74 239**Mich**178, 214NW199.

462-75 239**Mich**178, 214NW199.

462-81 239**Mich**178, 214NW199.

463-86 131Misc266, 227NYS543.

463-88 150SC411, 148SE228.

463-5 163**Ga**510, 136SE523; 98**Fla** 1103, 125S521; 127**Me**328, 143A169; 239**Mich**178, 214NW199.

464-15 [d] **In Kentucky.**–232Ky37, 22 SW(2d)432.

465-17 **Or** 283P747.

465-24 See also 215Ala572, 112S141. But see 190NC102, 129SE419.

465-25 215Ala572, 112S141.

465-29 215Ala572, 112S141.

465-30 13**PaDist&Co** 704. See also 215 Ala572, 112S141.

465-33 215Ala572, 112S141. But see 97Fla449, 121S472(2dcase).

466-35 215Ala572, 112S141. [e] **Reasons for rule.**–215Ala572, 112S131.

467-49 239**Mich**178, 214NW199; 190 NC180, 129SE450, 41**ALR**1111.

468-55 214Ky467, 283SW439; 190NC 102, 129SE419.

468-59½-**New.** , or dower in land for which widow paid part of purchase price. 235Ky301, 31SW(2d)367.

468-62 112 **Oh**306, 147NE513, 39**ALR** 334 (permanent leaseholds are corporeal hereditaments and therefore real property).

468-66 [a] **Real beneficial ownership of corporation's realty as sole stockholder** does not entitle widow to dower therein where statute does not provide for dower in equitable estates. **Or** 283 P747.

469-69½-**New.** A widow is entitled to a dower interest of one third the profits over and above expenses of a crop growing at the death of her husband. 178 **Ark**324, 11SW(2d)765.

469-71 [d] **Dower in mineral rights.**–235Ky301, 31SW(2d)367.

469-73 223Ky589, 4SW(2d)392, 394 [citCJ]; 235Ky301, 31SW(2d)367.

469-74 214Ky467, 283SW439; 116 **Okl** 281, 244P782 (annual rentals and delay money preceding development and production of oil and gas).

469-76 [c] **Oil and gas in place** is real estate to which dower attaches. 102**WVa** 308, 135SE1.

470-87½-**New.** The interest of a vendor in a land contract, upon his death, goes to his administrator as personalty, does not descend as real estate, and therefore is not subject to dower. 230 **Mich**551, 203NW154.

472-2 27 **OhA**430, 161NE235.

472-10 320 **Ill** 480, 151NE369.

472-11 [b] **In Illinois.**–320 **Ill** 480, 151 NE369.

472-13 [a] **Strictly speaking** dower does not include widow's claim to distributive share of husband's personal estate. 189NC558, 127SE684.

472-16 97Fla916, 123S668(2dcase). **Erratum.**–In 1926 Annotations, strike out citation "188**Cal** 199, 205P113."

472-16½-**New.** A widow is not entitled to dower interest both in the items of money received by the administrator from insurance on the intestate's life and in an item of money deposited by the administrator in bank, where the latter item is but part of the former. 178**Ark**324, 11SW(2d)765.

472-18 197NC644, 150SE178.

473-21 190NC815, 130SE867.

473-22½-**New. In Illinois** renunciation

by widow entitles her only to dower in her husband's lands as fixed by the Dower Act, and the Descent Act does not apply. 320 Ill 270, 150NE630.

473-27 12DelCh1, 114A207; 193NC578, 137SE668.

473-38 168Ark1066, 272SW363. [f] **Repayment of money advanced or belonging to widow or third part.**-168Ark 1066, 272SW363. [g] **Property held partnership property** as affecting question of dower where purchased with partnership funds, conveyed to decedent, but deed afterward amended by inserting name of other partner. 168Ark 1066, 272SW363. [h] **Improvements.**-168Ark1066, 272SW363.

475-52 163Ga510, 136SE523; 213Ky 547, 281SW522; 190NC102, 129SE419.

475-56 See also 125Misc653, 211NYS 621.

475-59 Contra 112 Oh306, 147NE513, 39ALR334.

475-59½-New. Supreme court will not attempt to explain or distinguish its expressions in former adjudications on the general subject. 112 Oh306, 147NE 513, 39ALR334.

475-61 Contra 112 Oh306, 147NE513, 39ALR334.

475-63 [a] (2) Assignee of interest in oil and gas lease had an "interest in land" as respects wife's dower. Ark 32SW(2d)630. [d] **In Ohio.**-112 Oh 306, 147NE513, 39ALR334.

475-65 190NC815, 130SE867; 192NC 121, 133SE407. **Erratum.**-See Myers v. Moore "12 OhDec(Reprint)812" should be "12 OhS&CP812." "Not" should be inserted after "is" in last line af parenthetical note. [a] **Dower is not defeated by widow's failure to dissent from will devising the estate to her,** as required by statute where husband dies intestate, as husband did not die intestate as to defeasible fee. 190NC815, 130 SE867.

476-68 29 OhA138, 162NE704. [b] **Forfeiture of lease,** held by husband, by his agreement terminates wife's inchoate right of dower. 29 OhA138, 162NE704.

476-71 Ont [1925] 3DomLR661.

476-72 Ont [1925] 3DomLR661 (inchoate dower attaches immediately at time of grant).

476-78 232Ky37, 22SW(2d)432. [a] (3) Dower of wife does not accrue where husband remainderman dies while life tenant is in possession. 126Misc366, 214 NYS243.

477-84½-New. Interest of heir who conveyed property to his mother for life held not remainder, and his widow's dower is not barred. 232Ky37, 22 SW(2d)432.

477-85 232Ky37, 22SW(2d)432.

478-99 190NC180, 129SE450, 41ALR 1111.

479-1 Or 283P747.

479-6 332 Ill 280, 163NE692.

479-7 204 Iowa727, 215NW963.

480-14 133Misc581, 232NYS680.

480-18 204 Iowa727, 215NW963.

481-23 Ill 172NE32 (recorded agreement as notice of equities); Mass 167 NE292.

481-29 99NJEq65, 132A485.

481-30 98Fla1103, 125S521.

482-38 [b] **Conveyance to children before death of first wife** is not fraudulent on marital rights of second wife. 232Ky532, 23SW(2d)959.

482-40 166Minn464, 208NW193; 213 AppDiv352, 210NYS510. But see Mo 23 SW(2d)149. [b] **Fraud not shown.**-166 Minn464, 208NW193.

482-41 98NJEq109, 130A717.

482-44 190NC102, 129SE419.

484-60 Ill 172NE32.

484-62½-New. Taxes and assessments on decedent's land, due at his death, are payable by the estate and the dowress is not chargeable with contribution. NJCh 144A27.

484-62¾-New. A dowress is not obliged to contribute to the cost of administration and of litigation involving dower. NJCh 144A27.

484-62¼-New. The appraised value of the dower interest of a widow in the purchase price resulting from the sale of real estate of deceased is not subject to administration expenses or fees, nor accounted for in the administrators' settlement. DelSuper 143A407.

485-78 203 Iowa23, 212NW324; Alta [1930] 4DomLR750.

485-82 32F(2d)322; NJCh 144A27. See also Utah 269P780.

486-88 99Fla1169, 128S420.

486-89 215Ala572, 112S141; 27 OhA 430, 161NE235.

486-90 [a] 153Tenn11, 282SW201.

486-91 328 Ill 161, 159NE213; NC 153 SE597.

486-93 215Ala572, 112S141.

487-94 78Va504; 87Va444, 12SE800; 39WVa638, 20SE663 (recognizing rule).

487-96 215Ala572, 112S141.

488-14 But see 215Ala572, 112S141.

489-28 153Va304, 149SE512.

490-29 NJ 144A619. [b] **In New Jersey.**-Ch 144A27.

491-49 27 OhA430, 161NE235. [a] **Where conditions of mortgage not broken until after marriage,** wife is entitled to dower calculated on entire proceeds of sale unless mortgage was for purchase money. 27 OhA430, 161NE 235.

491-50 178Ark558, 118W(2d)460; Del 141A315; 215Ky292, 284SW1084.

492-63 179Ark543, 16SW(2d)996, 65 ALR466; 144Va727, 130SE794.

493-66 124Kan97, 100, 258P295 [quot CJ].

493-67 318 Ill 193, 149NE292; 203 Iowa23, 212NW324; 124Kan97, 100, 258 P295 [quotCJ]; 191NC744, 133SE5; 197 NC152, 147SE829, 64ALR656; 48RI 213, 136A767.

493-68 124Kan97, 100, 258P295 [quot CJ].

493-70 RI 150A76.

493-71 124Kan97, 100, 258P295 [quot CJ].

493-72 124Kan97, 100, 258P295 [quot CJ]; 239Mich178, 214NW199.

493-72½-New. , or a mere intangible, contingent expectancy. 318 Ill 193, 149 NE292.

493-73 124Kan97, 100, 258P295 [quot CJ]. [a] **Distinguished from dower in equities of cestui que trust.**-98Fla1103, 125S521.

493-74 215Ala572, 112S141.

493-76 318 Ill 193, 149NE292; 23 OhA 484, 156NE146.

493-78 318 Ill 193, 149NE292; 239 Mich178, 214NW199; 191NC744, 133S E5.

493-79 181Ark1105, 29SW(2d)278; 197 NC152, 147SE829, 64ALR656.

493-81 28F(2d)417; 215Ala572, 112S 141; 197NC152, 147SE829, 64ALR656; 28 OhA361, 162NE722.

494-84 Del 141A315; 203 Iowa23, 212 NW324; Mo 23SW(2d)149; 48RI 213, 136A767.

494-87 43F(2d)703.

494-90 23F(2d)897, 900 [citCJ]; Del 141A695; Del 142A825; 203 Iowa23, 212 NW324; 239Mich178, 214NW199; 191 NC227, 131SE585; 23 OhA484, 156NE 146.

494-91 215Ala572, 112S141; 99NJEq 65, 132A485.

494-92 197NC152, 147SE829, 64ALR 656 (mode of computing present value stated). [b] **Date of widow's age in estimating value by mortality table.**-235 Ky301, 31SW(2d)367.

494-95 But see 197NC152, 147SE829, 64ALR1047.

494-97 174Ark110, 295SW720, 53ALR 306; 243NY211, 153NE51; 190NC180, 129SE450, 41ALR1111.

495-99 Mo 23SW(2d)149. [a] **Complaint to enforce oral promise respecting dower** held insufficient to state cause of action on theory of estoppel. 137 Misc177, 243NYS322.

495-3 98Fla549, 124S29. [b] **Where husband's grantee opened oil wells,** wife's unrelinquished inchoate dower rights constitute contingent interest which should be protected. 174Ark110, 295SW720, 53ALR306.

495-6 RI 150A76.

495-8 [b] **Evidence held not to show** that husband's bond and mortgage was fraudulent transaction. Pa 151A683.

495-11 215Ala572, 112S141.

495-11½-New. to require production and recording of unrecorded deed to husband; 215Ala572, 112S141.

495-13 215Ala572, 112S141.

495-14½-New. , and under prayer for general relief in a bill for redemption the court may define the wife's rights or fix the value of dower in property sold by the husband's quitclaim deed. 215 Ala572, 112S141.

496-16 Ark 32SW(2d)630.

496-22 Ark 32SW(2d)630 (extent of right).

497-28 84 IndA274, 151NE106.

497-44 84 IndA274, 151NE106.

498-58½-New. Judicial proceedings are necessary to reduce the wife's one-third interest in the property. 84 IndA 274, 151NE106.

498-60 84 IndA51, 151NE106.

498-62 [b] **In Ohio.**-27 OhA430, 161NE 235.

498-77 43F(2d)703; 190NC180, 129SE 450, 41ALR1111; 154SC64, 151SE110, 68ALR501. [b] **Death of wife.**-240NY 470, 148NE639.

498-79 DelSuper 143A407; 239Mich 178, 214NW199.

499-80 179Ark543, 16SW(2d)996, 65 ALR466; 252 IllA575.

499-93 124Kan97, 100, 258P295 [quot CJ entire section].

499-93½-New. In Ontario consent judgment in alimony action has been construed as barring dower in property then held by joint tenants, to which wife released claims. Ont [1930] 4DomLR 339.

500-5 239Mich178, 214NW199. 202 [quotCJ]; 190NC180, 129SE450, 452, 41ALR1111 [citCJ].

500-5½-New. though wife had no right to possession during husband's lifetime. 190NC180, 129SE450, 41ALR1111.

500-7 239Mich178, 214NW199.

500-8½-New. Widow's rights lost only by adverse possession for statutory period. 235Ky301, 31SW(2d)367.

501-25 27 OhA430, 161NE235.

502-36 [a] (6) Where husband and reputed spouse, with whom he had been openly living for seventeen years to knowledge but against will of wife, conveyed land to innocent purchaser for value, who believed reputed spouse to be wife, but wife had no notice of conveyance, widow is not estopped of her dower. NJCh 145A480.

503-50 139SC393, 137SE697; Ont [1927] 3DomLR237. [a] **"Leave"** implies willful departure with intent to remain away. Ill 173NE84 (intention is gathered from acts and expressions of parties).

503-53 Ill 173NE84.

504-60 139SC393, 137SE697.

504-67 [c] (3) Wife's leaving husband because of her frail physical condition to obtain necessary care and attention for herself and child which husband refuses to provide is not desertion barring dower. 101WVa335, 132SE656.

504-70½-New. In Ontario that wife lives apart from husband under separation agreement does not bar dower right or entitle husband to order dispensing with her signature to deed. Ont [1930] 2DomLR84.

504-71 Ark 31SW(2d)136; 122 Or620, 260P206, 59ALR707.

505-77 30F(2d)211; 50RI 105, 145A 444.

505-84 24 OhA342, 156NE237.

505-85 [a] **Divorce from bed and board** does not take away right of wife to dower nor entitle her to recover it during life of her husband. 50RI 105, 145 A444.

505-85½-New. Under statutes a decree of divorce from bed and board in so far as it attempted to deal with dower is a nullity. 50RI 105, 145A444.

505-86 338 Ill 307, 169NE478(1stcase).

507-10 100WVa585, 131SE449.

507-11 100WVa585, 131SE449.

507-15 100WVa585, 137SE449.

508-21 100WVa585, 131SE449.

509-36 100WVa585, 131SE449 (entitled to dower in land equal in value to that of which she has been deprived).

509-43 176Ark853, 48W(2d)534.

510-52 316Mo1310, 293SW414; 115 Nebr882, 215NW131, 134 [citCyc].

511-53 317 Ill 468, 148NE323.

511-57 115Nebr882, 215NW131, 134 [citCyc].

511-58 317 Ill 468, 148NE323.
511-61 But see WVa 154SE870.
512-73 223AppDiv244, 228NYS308.
512-74½-New. It has been held that the wife is a purchaser for value of her potential interest under a deed of trust in the nature of a postnuptial settlement, dower right being released. 150Md322, 133A110, 47ALR467.
512-74½-New. In Illinois wife by postnuptial contract, based on valuable consideration, may release her right of dower. 323 Ill 323, 154NE146.
512-76 231Ky740, 228SW(2d)124; 113 Oh228, 148NE585. [a] **Separation does** not render agreement inoperative. 231 Ky740, 228SW(2d)124.
512-78 231Ky740, 228SW(2d)124.
512-79 [b] (1) 202 Iowa465, 210NW 596; 203 Iowa23, 212NW324. (3) Husband may be estopped as to wife's creditors to assert invalidity of transaction under statute. 202 Iowa465, 210NW596.
513-82 113 OhSt228, 148NE585.
513-82½-New. Such agreement may include contract for each other's support and support of their children. 113 OhSt 228, 148NE585.
513-84 30F(2d)211.
513-85 30F(2d)211.
513-86 30F(2d)211.
513-90½-New. Mere expectancy or change of heirship which is not subject to release does not apply to husband and wife's release of dower and distributive share. 113 OhSt228, 148NE585.
513-91 88 IndA150, 163NE540; 244 Mich638, 222NW180.
514-1 24 OhNPNS459.
514-5 132Misc891, 230NYS723.
515-6 NJCh 146A470.
515-7½-New. In some jurisdictions a wife pleading that her deceased husband fraudulently disposed of his property before marriage must establish an existing contract of marriage at the time of the conveyance, and that she had no knowledge of the conveyance prior to her marriage. 201 Iowa878, 208NW310.
515-13 190NC102, 129SE419 (deed not contemplating present vesting insufficient to bar dower).
516-25 97Fla449, 121S472(2dcase); 333 Ill 461, 165NE172; 327 Ill 214, 158NE 475; IndA 160NE56; 224AppDiv525, 231NYS524 [mod on other grounds 166 NE344(6thcase)]; 197NC644, 150SE178. [c] (2) Husband executing contract of sale, holds title in trust for purchaser subject to wife's inchoate interest. IndA 163NE236. [i] **Quitclaim deed reconveying in payment of debt** by husband, vests in vendor's original owner, legal title with present right of entry and possession, encumbered by wife's inchoate dower. 215Ala572, 112S141. [j] **Written assignment of contract of sale** without wife joining is ineffectual as to inchoate right of dower. 208 Iowa 564, 226NW110, 66ALR59.
516-30 162Ga734, 134SE767; 197NC 644, 150SE178; 9PaDist&Co 5. [a] **Husband may alienate** and defeat dower as to any lands except those in which title came through wife. 162Ga734, 134 SE767.
517-34 321Mo 1244, 14SW(2d)583.
517-48 19 OhA278. [b] **In Ohio.**-19 OhA278.
518-54 145Va578, 134SE701.
518-66 179Ark605, 17SW(2d)298.
518-66½-New. Wife not entitled to sum of money for inchoate right of dower where her husband is living. NJ 130A 452.
518-66½-New. Mortgagee not entitled to foreclose where he was vendor of property and did not perform condition precedent to mortgage falling due, which provided for a release of his wife's right of dower. NJ 130A452.
519-69 [a] **In Kentucky.**-215Ky292, 284SW1084.
519-70 215Ky292, 284SW1084. See 218Ala109, 117S623. But see 243NY211, 153NE51.
519-80 243NY211, 153NE51. But see 213AppDiv352, 210NYS510.
520-83 90Fla42, 105S147 (sheriff's deed does not divest widow of inchoate right of dower); 84 IndA51, 151NE106.
521-1½-New. A sale of a lunatic's lands by his guardian does not bar the dower rights of the lunatic's wife. 97Fla48, 119S148.
521-2 IndA 160NE56.
521-4 233Mich210, 206NW351.
521-5 203 Iowa23, 212NW324; 102NJ Eq460, 141A265, 267 [citCJ].
522-8 126Misc250, 212NYS240.
522-13 129Misc506, 221NYS692.
522-13½-New. A widow, joining her husband in a deed relinquishing an inchoate interest in land acquired as against his creditors, has no rights in the land or proceeds thereon. IndA 158 NE581.
522-16 203 Iowa23, 212NW324; 191NC 227, 131SE585; 223AppDiv186, 228NYS 63; 6PaDist&Co 673.
523-20½-New. A prior mortgage executed by the husband alone instantly becomes a lien on the entire mortgaged premises upon the subsequent execution of conveyance of premises by both husband and wife. 203 Iowa23, 212NW 324.
524-39 20 OhA419, 152NE200.
524-41 209Ky806, 273SW476.
525-48 [a] 223AppDiv244, 228NYS308.
526-61½-New. Where the husband alone executed a contract of sale and he and his wife subsequently joined in executing a mortgage on the property, the wife released her inchoate interest. IndA 163NE236.
526-61½-New. Widow entitled to dower in half of property waives right by joining in conveyance by daughter. 235 Ky301, 31SW(2d)367.
526-62 209Ky806, 273SW476 (estoppel to assert incapacity).
526-66 243Mich553, 220NW788.
526-68 But see Mo 23SW(2d)149.
526-70 177Ark1073, 9SW(2d)317.
527-84 232Ky37, 22SW(2d)432. [a] (5) Other applications. 232Ky37, 22 SW(2d)432.
527-85½-New. When a wife unites with her husband in a mortgage on his land to secure his debt her dower, in case of foreclosure, attaches only to equity of redemption payable out of surplus. 153Va304, 149SE512.
528-93 216AppDiv72, 215NYS50 (dower interest ceases on death before admeasurement of dower in husband's property); [1930] 4DomLR1011(2d case). See also 203 Iowa23, 212NW324; 240NY470, 148NE639.
528-95½-New. Wife's dower right to fund placed in custody of chamberlain by order of court after sale of property for partition abates at her death where she took no proceedings to withdraw such fund. 214AppDiv497, 212NYS407.
528-95½-New. and husband is entitled to the fund as against the wife's personal representatives. 214AppDiv 497, 212NYS407.
528-96 26 OhNPNS573.
528-96½-New. Right to fund set aside as wife's contingent dower abates at her death where she has taken no proceedings to withdraw such fund during her life. 240NY470, 148NE639.
528-98 [f] **Wife held not entitled to rescind contract conveying her dower right.**-191NC227, 131SE585.
529-1½-New. Widow cannot attack deed in her action which is founded on deed. 235Ky301, 31SW(2d)367.
529-1½-New. Widow cannot claim dower where deed had long been of record and rights acquired in reliance on it. 235Ky301, 31SW(2d)367.
529-5 128 Or218, 270P762.
530-10 215Ala572, 112S141; 255Mass 206, 150NE902.
530-15 255Mass206, 150NE902.
530-16 327 Ill 214, 158NE475; 239 Mich178, 214NW199; 125Misc654, 211 NYS174; 126Misc479, 214NYS167 (dower right becomes absolute on death of husband); 191NC227, 131SE585. See also DelSuper 143A407. [b] **Dower consummate is vested right** to receive one third of all rents and profits for life. 116 Okl 281, 244P782.
530-18 215Ky292, 284SW1084.
530-19½-New. Widow claiming dower is neither a creditor nor purchaser for value. 190NC102, 129SE419.
530-19½-New. Dower becomes consummate by law and not by succession or descent. 239Mich178, 214NW199.
530-21 331 Ill 287, 162NE855.
531-23 See also Del 142A825. [a] (1) 172Ark549, 289SW780.
531-25 218Ala292, 118S342; 209Ky 24, 272SW38; 317Mo 544, 297SW54; 48 RI 213, 136A767; 50RI 105, 145A444.
531-27 208 Iowa1208, 227NW103.
531-29 117Or125, 242P616.
531-34 208 Iowa1208, 227NW103.
531-36½-New. Widow is chargeable with personal expenses prior to assignment. 99NJEq605, 133A522.
531-37 239Mich178, 214NW199.
532-44 [a] (1) 219Ala98, 121S89.
532-47 99NJEq605, 133A522; 117 Or 125, 242P616.
532-48 99NJEq605, 133A522.
533-59 But see 244Mich504, 221NW 635.
533-72½-New. Fact that widow appointed executrix accepted, qualified, and acted as such will not prevent her claiming dower right. 204 Iowa473, 215 NW761.
534-76½-New. Where a widow, as administratrix of her husband, sells under an order of court reciting her consent to a sale free from her dower right, she is estopped to question the authority of the court to make such order. 170Ark823, 281SW391.
534-85 97Fla813, 122S219; MoA 13 SW(2d)565.
534-86 315Mo 442, 286SW385. [b] **Where homestead exceeds statutory amount,** widow has no dower in remaining portion. 315Mo 442, 286SW385.
534-90 [b] (3) Where dower not assigned to widow. 220Ky471, 295SW 462. (4) Where value of land does not exceed one thousand dollars, it is presumed that widow elected to take homestead. 221Ky685, 299SW571.
534-91½-New. In some jurisdictions, in which homestead is the broader estate, it is not necessary that dower in lands comprising the husband's homestead be assigned or that the widow bring an action for the recovery and admeasurement of dower therein. 319Mo 930, 5SW(2d)636.
535-98 Ala 128S225; 209Ky24, 272 SW38.
535-6 173Ark828, 293SW735.
536-12 116 Okl 281, 244P782.
536-15 173Ark828, 293SW735.
536-16 NJCh 151A766; 191NC744, 133 SE5; 193Wis389, 214NW363. [citCJ].
536-18 193Wis389, 214NW363.
536-24 NJCh 151A766. See also 208 Iowa1208, 227NW103. [b] **On refusal of widow to have dower assigned,** mortgagee, after default on mortgage, may do so and dower will inure to benefit of mortgagee. NJCh 151A766.
536-25 [b] **Joinder with husband in deed of gift to son** delivered to him by widow after husband's death with complete understanding and intent, passes all her interest where deed so worded as to convey all her interest including vested or inchoate right of dower. 20 OhA419, 152NE200.
537-33 23 OhA484, 156NE146.
537-38 249 IllA576, 582 [quotCJ]; NJ Ch 151A766.
538-50 13PaDist&Co 704.
539-68 99NJEq605, 133A522.
539-77 99NJEq605, 133A522.
540-81 99NJEq605, 133A522.
541-97 99NJEq605, 133A522.
541-6½-New. Right is against the heir, not the personal representative. 215Ky 532, 284SW385.
542-15 99NJEq605, 133A522.
542-21½-New. Where widow joined in oil and gas lease, her rights to share in royalties vested on production of minerals. 232Ky188, 22SW(2d)567.
542-23 215Ky532, 284SW385. [c] **Widow is entitled to only life interest in one third of accruing royalties** on oil and gas lease. 232Ky188, 22SW(2d) 567.
543-25½-New. Widow and remaindermen may join in oil and gas lease and in absence of agreement royalties will be apportioned according to law. 232 Ky188, 22SW(2d)567.
543-25½-New. Where widow had joined in lease of mineral land court should determine and adjudge present cash value of royalties to her. 232Ky188, 22 SW(2d)567.
543-29 215Ky532, 284SW385.

544-44 215Ky532, 284SW385.
544-52½-New. The duty of heirs to have dower assigned to the widow is not avoided merely because the widow sets up an unfounded claim to the entire property. 98Fla344, 123S777.
544-61½-New. On death of father intestate, seizin of children is suspended during widow's life as to land assigned to widow for homestead and dower. 161Tenn172, 29SW(2d)254.
545-76 208 Iowa1208, 227NW103. [a] (3) Deed from daughter to mother of part of land left by deceased father in exchange for deed from mother to other land held to be assignment of widow's dower. 217Ky258, 289SW275.
545-77 99NJEq605, 133A522.
545-78 But see 99NJEq605, 133A522.
545-81 99NJEq605, 133A522.
545-83½-New. A widow's dower may be made a charge on land by a written agreement. 294Pa221, 144A91.
547-6 [a] (5) Statutory method of allotment is exclusive. 189NC790, 128SE404. (6) But where widow takes under will allotment need not be made upon petition filed in superior court in analogy to quasi dower under will. 189NC790, 128SE404. (7) No mode of ascertaining and setting apart substitute for dower as contemplated under § 4098 is provided by statute. 189NC790, 128SE404. (8) But though no mode is provided by statute or by will statutory provision for widow will not fail for want of remedy. 189NC790, 128SE404. (9) Hence statutory method for allotting dower or allotment or location of same by parties is sufficient. 189NC790, 128SE404.
547-7 220Ala149, 124S202.
547-9 [a] **Original jurisdiction of courts of chancery** to assign dower is not taken away by Code (1923) §§ 7433, 7438, 213Ala405, 104S803.
548-19 [c] (6) Proper remedy action for dower. 13PaDist&Co 704.
549-25½-New. Where widow has mortgaged her undivided one-third interest in realty, admeasurement and segregation may still be had, and the segregated part becomes subject to mortgage. 208 Iowa1208, 227NW103.
550-32 [b] See also 208 Iowa1208, 227NW103.
550-42½-New. Minor heirs of a deceased husband did not waive the right to assignment of the widow's dower by several years' delay in asserting their rights. 98Fla276, 123S768.
550-42½-New. A claim of a widow to the entire homestead of her deceased husband under his will will not bar proceedings in equity by the husband's heirs for assignment of dower and adjudication of the widow's claim. 98Fla344, 123S777.
550-43 218Ala436, 118S651. [a] **Widow is under no duty** to proceed for assignment of dower in homestead but may await action of husband's heirs or personal representatives. 98Fla276, 123S768.
550-46 [c] **Scope of prayer for relief.**-100WVa585, 131SE449.
552-78 [a] (2) Appeal within twenty days from decree affirming commissioner's report is timely. 103NJEq359, 143A445.
554-16½-New. Right to have dower assigned is a claim against the heir, not the personal representative. 215Ky532, 284SW385.
554-20 9PaDist&Co 5.
554-21 9PaDist&Co 5.
554-24 9PaDist&Co 5, 6 [citCJ].
554-25 9PaDist&Co 5.
554-26 236Mich628, 211NW25.
554-28 203 Iowa254, 212NW471; 208 Iowa1208, 227NW103.
554-29 [b] But see 320Mo617, 8SW(2d)900.
555-45 98Fla276, 123S768; 208 Iowa1208, 227NW103; 317Mo207, 294SW723, 726 [citCJ].
556-47 [a] **In Tennessee.**-153Tenn150, 281SW929.
556-49½-New. In some jurisdictions there is no substitute on the equity side of the court for the method employed in an action of ejectment for the recovery of a dower interest not previously admeasured. 236Mich628, 211NW25.
556-50 [a] **Property fraudulently conveyed.**-317Mo207, 294SW723.
556-51 218Ala109, 117S623; 317Mo207, 294SW723, 726 [citCJ].
558-94½-New. Breach of warranty of title in husband's deed is no defense or set-off. 13PaDist&Co 704.
558-96 190NC180, 129SE450, 41ALR1111.
558-97 190NC180, 129SE450, 41ALR1111.
559-2 [a] (4) Under Code (1923) §§ 7427-7429, etc., a dower right not asserted within ten years is barred. 218Ala436, 118S651. [b] (1) 315Mo442, 286SW385; Mo 26SW(2d)603. (2) Under statute as it existed prior to repeal by L. (1921) pp 119, 120, widow's consummate dower expired unless proceeding for recovery of dower was commenced within ten years from husband's death. 319Mo930, 5SW(2d)636.
559-5 18Fla368 (actions for recovery of real property leased on seizin or possession of plaintiff, ancestor, predecessor, or grantor).
559-8 239Mich178, 214NW199; 315Mo442, 286SW385; Mo 23SW(2d)149 (cause of action for recovery of dower in lands to which husband took title in names of children).
559-10 219Ala98, 121S889.
559-12 315Mo442, 286SW385. [a] **Quarantine does not toll statute.**-315Mo442, 286SW385.
560-23 90Fla42, 105S147, 148 [quotCJ &Cyc]. [b] **Claim made twenty four years after sheriff's sale and seventeen years after right accrued to widow** who has lived in foreign state and failed to protect rights while lands have passed through hands of various parties will be barred by laches. 90Fla42, 105S147. [c] **Doctrine of laches inapplicable** where dower right vested. 235Ky301, 31SW(2d)367.
561-45 [a] **Wife of purchaser at foreclosure sale who joined in conveyance to husband's sister** held proper party in action by mortgagor's wife to protect dower. 243NY211, 153NE51.
563-79 190NC102, 129SE419. See also Ill 233A310.
566-44 214Ky467, 283SW439.
568-90½-New. Fraud against a former wife immaterial, where her rights were determined by death before husband. 98NJEq109, 130A717.
568-96 98NJEq109, 130A717.
568-98 81Mont185, 262P887.
569-21 15 OhA283.
569-26 [a] **Where rights of widow and cestui que trust were determinable by methods prescribed by statute,** resort to life expectancy table was held unnecessary. 49RI87, 140A356.
570-53 [i] **Evidence held insufficient** to warrant finding that agreement assigning dower in gross sum was for best interests of infant. 49RI87, 140A356.
572-90 See also 13PaDist&Co 704.
573-10 See also 208 Iowa1208, 227NW103.
575-39 [c] **Where there was no proof as to value of rents,** allowance of maximum dower of one sixth of proceeds of sale held proper. 214Ala10, 106S188.
575-43½-New. Where lands have been sold by the husband's executor under a power in the will, the sale price of the land is the basis for calculating the value of dower. NJCh 144A27.
575-43½-New. Interest on advances by widow. Widow recovering money advanced by her to partnership, which invested it in homestead in which she lived during husband's lifetime, is entitled to interest thereon only from date she departed from such homestead. 168Ark1066, 272SW363.
575-50½-New. Although indebtedness against land of an intestate's estate is paid with money belonging to his estate derived from insurance on his life, his widow is entitled to dower interest of only one third of the difference between the value of the land and the indebtedness where all the insurance money is accounted for in the settlement, and she gets a third of it, so that the indebtedness is in effect paid from the portion of the insurance money that does not belong to her. 178Ark324, 11SW(2d)765.
576-64 13PaDist&Co 704.
577-78 13PaDist&Co 704.
578-86½-New. Partnership property. Where deceased partner purchased land in own name but thereafter other partner paid him half of purchase price and there was intention that it be treated as partnership property, it will be held to be such and not conveyance to partnership as third party, so that improvements made by the partnership will not be excluded from value is basis for dower. 168Ark1066, 272SW363.
578-92 WVa 153SE918.
578-93 WVa 153SE918.
578-97½-New. A widow's dower, under statute, should be allotted in specie whenever it is practically possible to do so. 98Fla276, 123S768.
579-1 145Va578, 134SE701.
579-6 145Va578, 134SE701 [citCJ].
579-8½-New. A widow has no right to dictate which particular tract or tracts shall be set off to her where none constituted a homestead. 208 Iowa1208, 227NW103.
580-11 218Ala109, 117S623; 98Fla344, 123S777 (dower should be assigned in specie by metes and bounds whenever it is practically possible).
581-34 WVa 153SE918.
582-38 [c] (1) 313Mo476, 285SW92; Mo 20SW(2d)26.
583-47 98Fla276, 123S768.
584-71 [c] **Rights of mortgagee or assignee** after mortgage or assignment of dower consummate. NJCh 151A766.
585-74 NJCh 144A27; 48RI213, 136A767.
585-81 216Ky557, 288SW312.
585-82½-New. Statement of guardian of infant and others that settlement was satisfactory is held not to enlarge court's jurisdiction to pay gross sum. 49RI87, 140A356.
586-92½-New. Where widow is awarded judgment against surviving partner of husband for rents collected, amount due him by widow is properly credited. 168Ark1066, 272SW363.
587-96 But see 168Ark1066, 272SW363.
587-97½-New. There is no difference between dower and proceeds thereof taken by election of widow in money. 27 OhNPNS49.
587-98 [a] (5) It is proper to decree sale if dower not paid within time specified rather than postpone assignment by providing for payment out of monthly rents. 168Ark1066, 272SW363. [d] (2) Proceeds of dower should be paid to widow without any deduction of federal estate tax. 27 OhNPNS49.
587-99 168Ark1066, 272SW363.
589-34 See also 234 IllA528.
589-47 84 IndA51, 151NE106.
590-87½-New. Determination that an assignment of dower in gross sum was for the best interests is held not to validate a decree assigning dower contrary to statute. 49RI87, 140A356.
593-33 98Fla276, 123S768 (after dower has been assigned and allotted, widow is entitled to immediate possession of portion allotted her with title and burdens incident to estate for life).
593-41 189NC790, 128SE404.
593-43 189NC790, 128SE404.
593-44 23F(2d)897, 900 [citCJ]; 13PaDist&Co 704.
594-46 Contra 13PaDist&Co 704.
594-51 [b] **Where dower is assigned in partition suit, widow cannot be required to pay proportionate interest** on total encumbrances on land including that subject to dower where commissioners in estimating value of land did not deduct amount of any encumbrances, all of which were paid on sale of land, except that on land assigned as dower. 313Mo476, 285SW92.
594-52 208 Iowa1208, 227NW103.
594-53½-New. Amount of encumbrances should be deducted by commissioners in estimating value of decedent's land in partition suit for purpose of assigning dower. 313Mo476, 285SW92.
596-86 214Ky467, 283SW439.
596-89 117 Or125, 242P616, 618 [citCJ].
596-90 Or 248P616, 618 [quotCJ].
596-99½-New. Indebtedness owing by the widow to partner of her deceased

husband is properly credited against liability of such partner for rents collected by him. 144Ark1246, 2728W344.

598-6 [a] **Evidence.**–132NC790, 1288E 474.

598-7 [illegible]

DRAFT

599-31 [illegible] 211NW796. [illegible]

DRAINS

604-1 [illegible]

605-2 [illegible]

605-3 [illegible]

605-13 [illegible]

[illegible] 148443; 224Ky737, 15 [illegible] **Legislature may authorize sewer or drain to be built anywhere, in any form.**–137Miss341, 242 NW4142.

607-14 [illegible]

607-17 [illegible] **Legislation may provide** [illegible] shall not be considered in [illegible]

607-18 [illegible]

607-19 [illegible]

607-24 [illegible]

607-26 [illegible] to promote public [illegible]

607-28 [illegible]

610-30 145Minn74, 205NW625.

610-30½-New. In some jurisdictions a project for a drain [illegible] deemed necessary for the [illegible] of the lands of owners [illegible] project. 193Wis230, 223NW[illegible] ALR 1445.

610-32½-New. Drains may not serve as sewer unless expressly so provided by statute authorizing drainage construction. 250Mich[illegible] 229NW609.

611-32 29 OhAl[illegible]. [d] **In** [illegible]

611-34 Mo 328W(2d)583; **SD** 213NW 352.

611-38 72CalA68, 237P59. [a] (2) Florida board of commissioners of Everglades drainage district is agency of state. 89Fla129, 103S[illegible]

611-40 SD [illegible] NW[illegible] 111, 150NE626.

612-41 [a] (9) Statute providing county judge and others selected by him shall constitute board of directors who shall receive certain compensation does not give additional compensation to county judge so as to violate constitutional provision prohibiting proceedings before interested judge. 153Tenn469, 284SW372. (10) Statute not unconstitutional as requiring landowner to file claim for damages before he can know extent of damage. 153Tenn469, 284SW 372. (11) Other statutes construed. 318 Ill 204, 149NE302; 320 Ill 136, 150NE 626; TexCivA 283SW267. (12) Michigan Pub. Acts (1925) No. 316, as amended, provides only for drains and not for city sewers. 250Mich135, 229 NW609. (13) Statute providing that not less than twenty thousand cubic feet of water per minute per one hundred thousand inhabitants shall be turned into channel fixes minimum, and not maximum, amount. 336 Ill 11, 167NE 807. (14) Statute empowered legislature to authorize construction of disposal works in village adjoining sewer [illegible] 137Miss341, 242NW142. [illegible] district to [illegible] continuous 264 does not require that amount of water turned into channel should be uniform. 336 Ill 11, 167NE 807. (16) Held to permit sewer construction. 250Mich[illegible] 229NW616. [c] **Statutes held valid.**–339 Ill 103, 170NE 721. [d] **Validity of particular statutes.** –Mass 166NE910. [e] **Statute providing only for drains** [illegible] not authorize construction of city sewer. 250Mich135, 229 NW609.

612-42 220Ala12, 123S573(4thcase); 200Cal277, 252P1043; 213Ky30, 280SW [illegible] Ky[illegible]7, 248SW764; 308Mo 123, [illegible]

612-42 [illegible] 149Miss7, 113S909. [a] (2) Organization held not invalid for failure to [illegible] order on records of county court. [illegible] w of correction. 172Ark297, 288 SW[illegible]

612-45 4F(2d)865.

612-51 Mo 32SW 2d)583; 197Wis261, [illegible]NW884. [b] 200Ind307, 163NE225; [illegible] Iowa237, 204NW452.

613-52 IndA 166NE252; 220MoA193, 282SW499; TexCivA 118SW(2d)833.

613-54 Ind 154NE12.

613-60½-New. A statute, providing a form of civil action by which joint and several liability of signers of a drainage ditch petition for expenses incurred in preliminary proceedings shall be enforced, creates no new liability but affects the remedy only and may be given retroactive effect. SD 220NW918.

613-60½-New. A statute providing for new procedure for enforcing such liability by requiring the county to pay the costs of the proceedings, and authorizing it to sue petitioners on its own behalf for moneys expended, cannot be given retroactive effect. SD 220NW918.

614-66½-New. Statute requiring service upon state commissioner of notice of proceedings for formation of drainage district repealed statute requiring notice upon county auditor. Wash 286P89.

614-68 278US421, 49SCt181, 73Led436; 26F(2d)218; Fla 129S870(2dcase).

614-72 12F(2d)909 (Missouri statute); 200Cal 277, 252P1043; 72CalA68, 237P 59; 73CalA261, 238P760; 95Fla530, 116 S449; 123Kan191, 254P372; 371Mo 175, 279SW50 (under public power); 143SC 178, 141SE274, 276 [citCJ]; 155Tenn 590, 296SW354. See also 332 Ill 192, 163NE546. [d] Ill 173NE90. [e] **Creation of drainage district from a levee district** is not authorized by statutes after improvement has been completed and paid for with money borrowed on bond issue. 170Ark1059, 282SW675. [f] **In Arkansas.**–181Ark974, 28SW(2d) 1060. [g] **Whether statute may be applied to particular locality** depends upon existence of facts within limitations of statute. Fla 129S870(2dcase).

615-73 200Cal 277, 252P1043; 127Kan 207, 272P177; 155Tenn590, 296SW354; 35Wyo 73, 246P918, 922 [citCJ].

615-74 41F(2d)433. [a] **Manner and plan by which reclamation shall be carried out** may be provided for in special act creating reclamation district. 200 Cal 277, 252P1043.

615-75 155Tenn571, 296SW17; 35Wyo 73, 246P918, 922 [citCJ]. [a] (4) Statute held not unconstitutional as delegating legislative powers to district court. 123Kan191, 254P372.

615-77 12F(2d)909; 73CalA261, 238P 760; 339 Ill 103, 170NE721; 123Kan 191, 254P372; 148Miss182, 114S264; 157Miss336, 128S91; TexCivA 291SW 322. But see 72CalA68, 237P59; 204 Iowa720, 216NW8. [e] **Everglades drainage district held statutory subdivision** for special governmental purposes. 95Fla530, 116S449.

616-78 72CalA68, 237P59 (where legislature has sole and exclusive right and power to administer affairs of district for reclamation of swamps, such district is public mandatory or governmental agency of state); 72CalA68, 237P 59; 234Ky263, 27SW(2d)968; 311Mo 175, 279SW50; Mo 328SW(2d)583; 143 SC178, 141SE274; 155Tenn571, 296SW 17. [a] 12F(2d)909 (political subdivision); 143Miss841, 107S559 [citCJ]; 309Mo 189, 274SW448 (political subdivisions of state). But see 83Colo 468, 266P501. [b] **Districts exercise governmental functions only.**–309Mo 189, 274SW448.

616-79 195NC439, 142SE477. See also 32F(2d)451.

617-85 175Ark712, 300SW386.

617-86 [d] **Legislative determination as to property to be included** is conclusive. 200Cal 277, 252P1043. [e] **Contiguous lands.**–41F(2d)433.

617-88 204Iowa1043, 217NW81. [a] **Lands cannot be excluded from district** after final establishment of district. 204 Iowa1043, 217NW81.

618-92½-New. It is no objection to the validity of the organization of a drainage district that lands within its boundaries are not included therein. MoA 16 SW(2d)691.

618-94 95Fla530, 116S449; La 122S 714; Miss 128S339. See also SD 212 NW489. [b] (8) Lands within district subject to overflow are benefited. 116 Nebr806, 219NW187. [c] (5) Equality of benefit of all lands in proposed district is not essential. 141Miss851, 106S 88.

618-95 32Ariz322, 257P990; 160La 1036, 107S897.

619-97 169Ark117, 273SW383. [b] **Statute providing for inclusion of benefited lands in established district held not unlawfully discriminatory.** 270US 45, 46SCt196, 70Led463.

619-98 32Ariz322, 257P990.

619-3 323 Ill 350, 154NE153; 332 Ill 192, 163NE546; 337 Ill 362, 169NE228. [c] **Persons organizing smaller drainage district under Drainage Act,** are not chargeable with fraud on account of preventing organization of district in larger territory, including property embraced within smaller district, where organization of smaller district was authorized. 332 Ill 192, 163NE546.

619-10 174Ark173, 294SW418. [b] **City's assuming jurisdiction of creek within corporate limits precludes inclusion in another drainage district.** 331 Ill 249, 162NE886.

620-12½-New. Jurisdiction of subdistrict created by general law over district created under special law is in county court, where lands of subdistrict are wholly in one county. 171Ark739, 285SW382.

620-14 169Ark117, 273SW383 (holding that it is no grounds for remonstrance against creation of subdistrict that it comprises nearly whole area of original district or that improvement of subdistrict is to cost more than the original improvement of the district).

620-16 319 Ill 379, 150NE259.

620-23½-New. Where drainage district is created by special act, a subdistrict may be made part of it under general law. 171Ark739, 285SW382.

621-30 195Cal 1, 231P34; 200 Iowa 441, 204NW242 (addition of land to district in which improvement had become obstructed and making of additional improvement held to amount to establishment of new district).

621-31 270US45, 46SCt196, 70Led463. [i] **In Iowa.**–207 Iowa970, 221NW589. [j] **Landowner not satisfied with decision of commissioner** annexing her land to drainage district can only appeal from order. 338 Ill 67, 170NE1.

621-32½-New. That all land within the district might be protected by levees from waters flowing from adjacent lands is not ground for denying a petition for annexation of such lands. MoA 16SW (2d)691.

621-34 327 Ill 236, 158NE383; 338 Ill 67, 170NE1.

622-35 [c] **Work necessary to give court or justice jurisdiction** to enter order annexing land to district refers to work of district as originally constituted. 331 Ill 68, 162NE184.

622-37½-New. That connection with district drains might be severed by highway authorities will not be presumed and is no defense. 327 Ill 236, 158NE383.

622-42½-New. A board of supervisors has no jurisdiction to annex to an intracounty drainage improvement lands situated in another county. 201 Iowa1003, 206NW802.

622-42½-New. Such annexation is not authorized by a statute providing for intercounty drainage districts. 201 Iowa1003, 206NW802.

622-42¼-New. A drainage district may annex adjacent lands partially reclaimed

by it in draining its own land. **MoA** 16SW(2d)691.

622-42½-New. Adjacent lands may be annexed without the consent of the owners where the character or situation of the lands or the nature of the improvement would enable them to share the benefit of the work without contributing to the cost or would otherwise make it inequitable for them to withhold assistance. **MoA** 16SW(2d)691.

622-42¼-New. Such extension is not unconstitutional. **MoA** 16SW(2d)691.

622-42½-New. All lands that are benefited at all should be included. **MoA** 16SW(2d)691.

622-42¾-New. Lands benefited by drainage of overflow reasonably necessary to protect lands already included in the district should be included, although overflowed by branches of a river not overflowing lands already within the district. **MoA** 16SW(2d)691.

623-52½-New. A property owner duly notified of hearing on report of commissioners for extension of boundaries cannot complain that others were not notified. 46 **Ida**248, 267**P**443.

623-52¾-New. Notice of such hearing directed to property owners within the proposed enlarged district has been held sufficient. 46 **Ida**248, 267**P**443.

623-52¼-New. Service of summons on proposed change of plans by publishing notice of the time and place of hearing together with the petition is sufficient under some statutes. 46 **Ida**248, 267**P** 443.

623-53 MoA 16SW(2d)691. See also **SD** 213NW952.

623-54 181**Ark**974, 28SW(2d)1060; 327 **Ill** 236, 158NE383. [a] **Stating names of landowners.-MoA** 16SW(2d)691.

623-57 331 **Ill** 68, 162NE184.

623-60 MoA 16SW(2d)691. [a] **Conflict between map and engineer's testimony.-MoA** 16SW(2d)691.

623-66 [a] **In Iowa.-**201 **Iowa**1099, 206 NW624.

623-66½-New. Bill attacking creation of district held insufficient. 93**Fla**1035, 113S383.

623-66¾-New. Where a drainage district was created by agreement of property owners under statute, a subsequent order of the county court striking part of the territory from the district was void and ineffective because not authorized by statute. 332 **Ill** 192, 163NE546.

624-73 [c] **In Illinois.-**323 **Ill** 120, 153 NE673.

624-75 245 **IllA**111; **La** 122S714.

624-76½-New. But as governmental agencies they cease when their purpose has been accomplished. 72**CalA**68, 237 **P**59.

624-77 330 **Ill** 599, 162NE131.

624-79 [c] **Extinguishment of district** by placing it within new district cannot extinguish rights of creditor of extinguished district. 195**Cal** 1, 231**P**34.

624-82½-New. Judgment extending life of drainage district is void when based on defective notice. 221**MoA**911, 289 SW19.

624-82¾-New. Appeal lies from judgment extending life of district after expiration of charter. 221**MoA**911, 289SW 19.

624-82¼-New. A statute which saves rights of action as against dissolved private corporations does not save rights as against drainage districts after dissolution. 33**F(2d)**451.

624-89 331 **Ill** 549, 163NE476. See also 245 **IllA**111.

625-90½-New. Where commissioners had determined amount due on dissolution, a dissatisfied landowner has burden of proving allowances inequitable. 172**Ark**144, 287SW752.

625-93 200**Cal** 550, 254**P**542. [a] **No appeal** lies from judgment of reorganization. 221**MoA**911, 289SW19.

625-95½-New. Landowners not within any district are not authorized, by going through the form of reorganizing the expired district, to organize the original district. 221**MoA**911, 289SW 19.

625-99 See also 4**LaA**119. [d] **In Louisiana.-**166**La**840, 118S39.

626-15½-New. Board of directors of a drainage district is, for the purposes of suit, deemed a quasi-public corporation, charged with execution of governmental purposes as a governmental agency. 155**Tenn**571, 296SW17.

627-30 233**Mich**32, 206NW539 (oath held properly filed).

627-35½-New. Under some statutes, where the bond of a commissioner has been approved by the board of supervisors instead of by the county clerk, county treasurer and probate judge, the defect may be corrected. 233**Mich**32, 206NW539.

627-36 But see 181**Ark**669, 27SW(2d) 100.

627-42½-New. Services of drainage commissioners as such are at an end upon the filing of their report. **IndA** 159NE2.

627-42¾-New. Compensation for services in preparing for trial of remonstrance in drainage proceeding is a matter of private arrangement. **IndA** 159 NE2.

627-42¼-New. As witnesses at such trial they are only entitled to ordinary witness fees and mileage. **IndA** 159 NE2.

627-50 12**F(2d)**909; 200**Cal** 550, 254**P** 542; 336 **Ill** 211, 168NE509; 148**Miss** 182, 114S264; 157**Miss**336, 128S91; **Tex CivA** 291SW322. [c] **District acquiring property without its powers** is held to have sufficient title to dispose thereof. 148**Miss**182, 114S264. [d] **District may purchase material accumulated** by another in attempted annexation. 148 **Miss**182, 114S264.

627-51 12**F(2d)**909; 16**F(2d)**227; 336 **Ill** 211, 168NE509; 245 **IllA**175. See also 245 **IllA**367. [a] **In Arkansas.-**181 **Ark**974, 28SW(2d)1060. [b] **Operating sand plant for profit** is not authorized by statute. 126**Kan**43, 267P31.

627-52 [a] **Every landowner within drainage district is entitled to notice and right to hearing** on question of power of court to authorize work therein by another district. 336 **Ill** 211, 168 NE509.

627-52½-New. Whatever may be done by an individual landowner in protection and improvement of his land may be done by a legally organized drainage district. **TexCivA** 291SW322.

627-52¾-New. The public service commission may fix sewer rates for county buildings, notwithstanding a franchise contract between the county commissioners and the sewer company providing for free service. 50**Nev**173, 254**P** 696.

627-52¼-New. Filing and granting of petition for rehearing as to sewer rates fixed by public service commission do not suspend operation of rates theretofore established by commission's order. 50**Nev**173, 254**P**696.

627-52⅝-New. Under some statutes the amount of benefits assessed limits the amount that may be expended for any purpose. 174**Ark**659, 298SW489.

627-56 214**Ky**263, 283SW95.

628-57 171**Ark**739, 285SW382; 336 **Ill** 211, 168NE509; 249 **IllA**133; **SD** 213 NW952. [a] **Liability of district for unauthorized acts.-**153**Miss**440, 121S117.

628-58 336 **Ill** 211, 168NE509.

628-65 200 **Iowa**1333, 206NW83 (implied authority to employ attorneys to collect from state assessments made against land owned by state).

628-66 200 **Iowa**1333, 206NW83 (to appear before legislature to secure from it such legislation as will fulfill state's moral obligation to district).

628-69 But see 216**Ky**827, 288SW764. [a] **Orders** of board of drainage commissioners reciting employment of attorney held insufficient as written contract. 216**Ky**827, 288SW764.

628-70½-New. Recovery on quantum meruit for legal services performed under oral contract cannot be had, where such contract is void because not in writing. 216**Ky**827, 288SW764.

628-70⅝-New. Drainage district has no power to employ lobbyist to procure levee board to perform functions of drainage district. 156**Miss**297, 126S9.

628-70¼-New. Statute validating acts of drainage districts cannot extend power of districts to do that which was clearly outside its authority. 156**Miss** 297, 126S9.

628-71 231**Ky**670, 22SW(2d)94. [b] (2) Kansas statute limiting power of board to borrow is not limitation on board's power to incur expenses in organization and preliminary work. 130 **Kan**290, 286P206. [c] **Bank, loaning money to drainage district, acquired rights of lender,** though transaction was represented by district's indorsement and transfer of certificate of deposit to bank, instead of by execution of notes. 30**F(2d)**892. [d] **Landowner has right to be heard** at every stage of proceedings that fix liability against land of each owner benefited by proposed work. 336 **Ill** 211, 168NE509. [e] **Power to incur additional indebtedness.-**169**La**719, 125S866. [f] **Ultra vires** is no defense to corporation with general powers to defeat liability for machinery purchased. 43**F(2d)**867.

629-76½-New. District retaining proceeds of draft signed by officer ratifies his conduct. 26**F(2d)**218.

629-79 [a] **Reclamation district constructing levees** under contract cannot recover interest on contract price from due date to date of warrants issued on payment. 197**Cal** 482, 241P552.

629-83 208**Cal** 661, 284P668.

629-87 203 **Iowa**263, 210NW929.

629-90½-New. That an order on the drain fund is signed by only two of the three commissioners does not invalidate it. 231**Mich**362, 204NW135.

629-90¾-New. The transfer by a contractor of an order on the drainage fund is tantamount to an assignment of his claim for labor. 231**Mich**362, 204NW 135.

629-90¼-New. Warrants are not entitled to payment on parity with bonds to which they were expressly subordinated. 21**F(2d)**928.

629-90⅝-New. Warrants not secured by first and paramount lien as bonds previously issued are not payable on parity therewith. 21**F(2d)**928.

629-90⅛-New. A contractor receiving warrants with the knowledge that bonds previously issued constituted a first lien was estopped as against a bondholder from destroying or impairing the lien. 21**F(2d)**928.

629-92 Fla 116S449; 143**SC**178, 141**SE** 274. [a] (2) Authorization of issuance of bonds superior in obligation and privilege to prior bonds issued is unconstitutional as impairing obligation of contract. 27**F(2d)**377. [f] **Single bond issue for double purpose of refunding** outstanding bonds and obtaining money to improve drainage system was authorized. 177**Ark**728, 7SW(2d)794. [g] **After sixty days,** inquiry cannot be made as to regularity of bond authorization for causes occurring before sale. **La** 129S668. [h] **Legality of bids on bonds.-La** 129S668. [i] **Right to premium received for deposit of proceeds of bonds.-La** 129S668.

630-4 La 129S668.

631-9½-New. Where bonds are unpaid, collected moneys cannot be used to pay contractor. 16**F(2d)**227.

631-9¾-New. Purchaser of bonds from unknown holder in market is "holder in due course." 26**F(2d)**218.

631-9¼-New. That bonds were originally sold at discount is immaterial. 26 **F(2d)**218.

631-9⅝-New. A bond reciting that statutory procedure for issue was followed estops the district from setting up irregularities. 26**F(2d)**218.

631-9⅛-New. Irregularities in preliminary proceedings for issue may be cured by statute. 26**F(2d)**218.

631-9⅞-New. Holders of bonds in due course hold valid bonds as against possible irregularities in assessments under statute. 26**F(2d)**218.

631-9⅛-New. Bonds are not invalidated by irregularities in amount assessed against realty. 26**F(2d)**218.

631-9⅛-New. Purchase on maturity day does not prevent purchaser from

unknown holder from being holder in due course. 26F(2d)218, 222.

631-9 1/10-New. A statute designating the county treasurer as the person to sell drainage bonds does not contemplate a substitute. 204 Iowa936, 216NW 257.

631-9 1/11-New. Bonds held by parties in exchange for certificates of indebtedness were held valid and duplicates thereof invalid. 164La808, 114S694.

631-9 1/12-New. The law authorizing issuance of bonds and their issuance thereunder become a part of the contract, just as if written on the face of the bonds. 27F(2d)377.

631-9 1/13-New. In some jurisdictions holder of drainage district bonds issued by county board of supervisors cannot recover judgment against district thereon. Iowa 229NW711.

631-9 1/14-New. Bonds of district are not generally obligations of county, but are payable only by assessments. 160Tenn 619, 28SW(2d)351.

631-9 1/15-New. Bonds payable out of drainage tax money are negotiable. 41 F(2d)433.

631-10 [a] (2) Failure of statutory majority to sign petition validated by curative statute. 142Miss756, 107S545.

631-17 [a] **Election held invalid** as not having majority of property voted. 159 La439, 105S441 (where drainage district embraced two parishes but voting was in one, making vote cast by other parish illegal).

631-23 [b] **In Louisiana.**-159La422, 105S418.

631-23 1/2-New. A judgment validating bonds in regular proceedings pursuant to statutory notice is conclusive upon all parties. 148Miss7, 113S908.

631-23 1/3-New. Such judgment cannot be attacked for defense which might have been interposed in the proceeding. 148Miss7, 113S908.

631-24 179Ark834, 18SW(2d)370.

632-26 1/2-New. Lien of first issue of bonds is prior to that of subsequent issues. 13F(2d)905.

632-26 1/3-New. Holders of first mortgage bonds of a drainage district are not entitled to priority in interest payments from the receiver in the absence of a statutory provision creating such right. 19F(2d)513.

632-26 1/4-New. A bondholder's security on assessment of benefits and lands cannot be altered by subsequent proceedings without consent. 193Wis118, 213 NW885.

632-26 1/5-New. Under some statutes a pledge of assessed benefits for the payment of bonds issued in several subdistricts is in effect a pledge, and the assignment of a mortgage as collateral security for the payment of the bonds and revenue of the district must be first applied to the payment of the bonds. 174Ark659, 298SW489.

632-26 1/6-New. Each tract of land within the district is subject to a lien of bonds only within the limits of benefits legally assessed against it. Utah 269P 1023. [a] **Utah statute declaring rule** merely clarified original statute and added nothing to it. 269P1023.

632-27 1/2-New. Failure of a purchaser to pay the engineer's first estimate is a breach of the purchaser's bond to pay the purchase money, left on deposit with it, as called for by the district to meet such estimates. 221MoA898, 295 SW1083.

632-27 1/3-New. On such breach the balance of the purchase price becomes due without demand by the district where the bond so provides, 221MoA898, 295 SW1083.

632-27 1/4-New. and the surety on the purchaser's bond becomes immediately liable therefor. 221MoA898, 295SW1083.

632-27 1/5-New. Such balance due is in the nature of liquidated damages, although it is the same in amount as the penalty of the purchaser's bond. 221 MoA898, 295SW1083.

632-27 1/6-New. Such breach is not waived by the district by accepting the amount of the estimate tendered conditionally by the purchaser's surety with reservation of the right to deny liability on the bond. 221MoA898, 295SW1083.

632-27 1/7-New. Evidence has been held not to show conclusively that payments made by a surety on a defaulting purchaser's bond were made on the bond rather than on an oral contract of the surety to carry out the purchaser's contract. 221MoA898, 295SW1083.

632-29 95Fla530, 116S449.

632-32 TexCivA 283SW267. [b] **Right of county to funds.**-TexCivA 283SW267.

632-40 1/2-New. **Drainage board** is not liable for negligent or malicious acts of its servants. 214Ky263, 283SW95.

632-40 1/3-New. Drainage commissioners are not liable for what they do in obedience to court orders with ordinary care in exercise of reasonable discretion. 234Ky263, 27SW(2d)968.

632-41 1/2-New. Attorney, appearing for a drainage district in an action against directors and district for trespass across the owner's land, and who continued so to act until the district ceased to be a party to the action, may recover of the district the full sum it agreed to pay him for services in action. 76CalA 492, 245P227.

632-41 1/3-New. Costs and expenses incurred prior to the time the district was dropped as a party to the action constitute a proper charge against the district and should be so adjudicated in the action, 76CalA492, 245P227.

632-41 1/4-New. and even though the directors, after the district ceased to be a party, agreed to pay him out of their own pockets a fee for his professional services to them. 76CalA492, 245P 227.

633-53 72CalA68, 237P59 (such statutes are remedial only and do not create liability); 76CalA492, 245P227; 81 CalA427, 254P606; 330 Ill 250, 161NE 519; TexCivA 283SE267. [c] **Such provisions in statute creating a governmental agency are construed as remedial only.**-72CalA68, 237P59. [d] **County, by appearing for drainage district** in suit to recover funds received by county treasurer in capacity of drainage district treasurer, does not destroy its separate existence as drainage district with authority to sue and be sued. TexCivA 283SW267.

633-54 72CalA68, 237P59; 89Fla128, 103S422 (board of commissioners of Everglades drainage district is not liable to be sued). Contra 83Colo 468, 266 P501.

633-57 1/2-New. A drainage district receiver, appointed by the state court in a suit to annul the district organization, is not entitled to intervene in, and become a party defendant to, a suit in the federal court against the district commissioners by the bank, not a party or privy to the former suit, for recovery of interest on district bonds. 27 F(2d)286.

633-61 1/2-New. **Attack on allowance of attorney fees in drainage proceeding.** In landowner's injunction suit to annul allowance by board of supervisors of claim for attorney's fees in drainage proceedings, court will not review either allowance or amount thereof in absence of fraud. 200 Iowa1333, 206NW 83.

633-61 1/3-New. Receivers may not be appointed for a drainage district designated as a political subdivision or public political corporation. 158La1099, 105S78.

633-61 1/4-New. Taxpayers' suit attacking bond issues held brought too late if begun over sixty days after promulgation of results of election. 161La309, 108S548.

633-61 1/5-New. Taxpayers' petition to attach bond issue must aver sale of bonds. 161La309, 108S548.

633-61 1/6-New. A statute designating the county court for creation of a drainage district does not confer on such court jurisdiction of suits for collection of debts owing to or by the district. 155Tenn571, 296SW17.

633-61 1/7-New. Taxpayer's application to intervene in action on bonds, made month after judgment, is too late. 26 F(2d)218.

633-61 1/8-New. Proposed defense of applicant for intervention as to defendant's counterclaim is fatally defective. 26F(2d)218.

633-61 1/9-New. Taxpayer seeking to intervene in action on bonds cannot counterclaim for district against holder nor question validity of issuance.. 26F(2d) 218.

633-61 1/10-New. Leave to taxpayer to intervene after judgment in an action on bonds has been denied where the effect would be to delay use of the judgment on mandamus for a higher levy. 26F(2d)218.

633-61 1/11-New. Refusing intervention by district receiver in action on bonds is proper. 27F(2d)286.

633-61 1/12-New. An amended answer in an action for interest on bonds at a variance with the original matter, and setting up collateral attack and frivolous matters, is properly stricken. 27F(2d) 286.

633-61 1/13-New. Suit to enjoin issuance of new bonds is not premature, because brought before the issuance thereof. 27 F(2d)377.

633-61 1/14-New. The court does not err in allowing plaintiff to show validity and ownership of bonds in a suit to recover interest. 27F(2d)286.

633-61 1/15-New. Testimony admitted has been held not to warrant setting aside rulings as to matters within the court's discretion. 27F(2d)286.

633-61 1/16-New. Evidence has been held sufficient to go to jury and sustain verdict. 27F(2d)286.

633-61 1/17-New. A taxpayer is entitled to maintain an action against directors of a drainage district for alleged misappropriation of funds, without demand on the directors to bring action, it being obvious that such demand would have been unavailing. 97CalA120, 275P 465.

633-61 1/18-New. Some statutes do not give the circuit court of the county in which a petition to incorporate a drainage district is filed jurisdiction of a suit to enjoin the district from overflowing lands in another district. 97 Fla890, 122S516.

633-61 1/19-New. In a taxpayer's action against directors of a drainage district for alleged misappropriation of funds, a director who did not participate in any way in such misappropriation is not a necessary party defendant. 97 CalA120, 275P465.

633-61 1/20-New. In an action against directors of a drainage district for alleged misappropriation of funds, interest is properly allowed on each item from the date it was drawn by the directors from funds of the district. 97 CalA120, 275P465.

633-61 1/21-New. Failure to give owner of bonds judgment for amount of certificate of indebtedness, exchanged for invalid bond, is error. 164La808, 114 S694.

633-61 1/22-New. In an action against directors of a drainage district for alleged misappropriation of funds paid to an owner of land over which a ditch had been constructed without condemnation proceedings and without the owner's consent, evidence has been held sufficient to support findings that such payment was not in satisfaction of all damage by reason of construction and maintenance of the ditch. 97CalA120, 275P465.

633-61 1/23-New. Appointment of receiver for drainage district is held not void for court's lack of power to make appointment. 195NC439, 142SE477.

633-61 1/24-New. Complaints as to violation of statute by reason of a lesser flow than required may only be entertained on behalf of the state, or some persons showing special injury. 336 Ill 11, 167NE807.

633-61 1/25-New. Parties to drainage district proceeding cannot complain of discretionary action of commissioners under court's direction until application to court in such proceeding is refused. 234Ky263, 27SW(2d)968.

633-61 1/26-New. Necessity for ditches to be dug would be accepted as proved where necessary to complete drainage

system. 169La719, 125S866.
633-63 95Fla530, 116S449; 332 Ill 192, 163NE546. See also 27F(2d)286.
635-70 36 OklACR510 (injunction against organization where commissioners proceeding without, or in excess of, statutory authority).
635-71 331 Ill 68, 162NE184.
635-71½-New. In Louisiana suit attacking legality of creation of district may not be maintained unless brought within sixty days of its creation. 159 La422, 105S418 (regularity presumed after such time).
635-74 [b] **Presumptions.**-46 Ida248, 267P443.
636-96 [c] **Contract construed as whole** held to be joint and several. MoA 297 SW730.
636-96½-New. Where plaintiff arranging for drainage system on his land agreed to allow use of his tile as outlet for draining land of adjoining owner who agreed plaintiff should receive compensation for necessary changes in size of tile increase in such size being left to engineer increased cost could not be determined by considering cost of laying each size at different depths. SD 208NW173.
636-96¾-New. Award to plaintiff in excess of actual additional cost of laying tile occasioned by change in size not allowed. SD 208NW173.
636-98 [a] **Publicity of proceedings.**-117Nebr453, 220NW695. [b] **Proceeding is purely statutory.**-179Minn566, 229 NW878.
636-99 [a] **Agreement for organization** of drainage district is not defective for failure to contain location and character of work, premises being described and location of work left to commissioner's discretion. 332 Ill 192, 163NE546.
637-2 148Miss7, 113S908. [a] **Proceeding in rem.**-148Miss7, 113S908.
637-6 160La1036, 107S897.
637-7 [a] **Petition filed under old statute held of no effect** after repeal and substitution of new statute. Alta [1930] 4DomLR843.
637-8 SD 213NW952.
637-8½-New. In some jurisdictions a project for a drainage ditch must originate with the owners of the land. 199 Wis230, 225NW331, 63ALR1165.
637-8¾-New. Under some statutes, articles of association of a proposed drainage district constitute the first pleading in a proceeding for organization of the district. 30F(2d)700.
637-8¼-New. Rule that only the state may challenge the existence of a governmental corporation applied to an individual's action for injunction. 118Kan 363, 235P95.
637-8½-New. Rule of police jury requiring ordinances pertaining to taxation and bond issues to be laid over thirty days does not apply to creation of drainage district. 160La1036, 107S 897.
637-8¼-New. Proceeding is in rem. 179Minn566, 229NW878.
637-14 [a] (4) Petition gives jurisdiction to make changes necessary to afford complete drainage for all lands likely to be assessed but not to construct ditches to drain territory not affected by ditches petitioned for. 167 Minn10, 208NW417. (5) Proceeding held to provide for construction of ditches in territory over which court had no jurisdiction. 167Minn10, 208 NW417. [c] (2) Court's jurisdiction to order second drain not affected by fact that flood waters would drain off in different directions. 196 Ind225, 147NE 810. [e] **County board of supervisors has no power** to establish drainage improvement of no substantial present value, admittedly incomplete, unduly burdening taxpayers, confiscatory, and furnishing no assurance that benefits will equal assessments. 203 Iowa1023, 213 NW623.
638-15 115 Or541, 237P684, 1117, 1118, 239P193 (county court). See also 331 Ill 68, 162NE184. [g] **In Arkansas.**-169Ark117, 273SW383. [h] **In Illinois.**-323 Ill 350, 154NE153.
638-17 323 Ill 350, 154NE153.
638-18 323 Ill 350, 154NE153; 337 Ill 362, 169NE228.
638-23 But see 251Mich495, 232NW213 (2dcase).
638-25½-New. Where county court has no jurisdiction of subject matter in drainage case, its attempted judgment or order is a nullity. 323 Ill 350, 154 NE153.
638-26 [b] **Owner of land within proposed district** is disqualified to act as member of board of supervisors in passing on petition for establishment of district. 200 Iowa1133, 206NW26. [c] **Nondeciding vote of supervisor financially interested in improvement** does not render proceeding illegal. 200 Iowa 1133, 206NW26.
639-30½-New. The state and not the county or township is the supervisor of the regularity of the proceeding for incorporation of a drainage district under a valid law. 123Kan204, 254P371.
639-33 178Ark346, 10SW(2d)854.
639-34 331 Ill 68, 162NE184.
639-35 [b] (4) Filing of petition and bond with county auditor of each county is mandatory in order to give jurisdiction to establish intercounty drainage improvement. 201 Iowa1003, 206 NW802.
640-55 But see Mo 31SW(2d)201. [e] **If county court did not acquire jurisdiction of person** of landowner organization of district would be void as to her, but valid as to others. 338 Ill 67, 170NE1.
641-59½-New. An executive officer of the department of conservation, having no power to sue or be sued, cannot intervene as such officer in drainage proceedings. 197 Ind556, 151NE418.
641-61 323 Ill 350, 154NE153; 115 Oh 81, 152NE18. [g] **Filing of petition and bond with county auditor** of each county is mandatory in order to give jurisdiction to establish intercounty drainage improvement. 201 Iowa1003, 206NW802.
641-62 323 Ill 350, 154NE153; 233Mich 32, 206NW539; 167Minn10, 208NW417; 134Wash208, 235P31 (petition insufficient).
641-68 323 Ill 350, 154NE153.
641-69½-New. A statute authorizing the transfer of a petition for the establishment of an intercounty drainage district to the district court for the failure of the boards of supervisors to act thereon has no application to an intracounty drain. 201 Iowa1003, 206NW 802.
641-69⅓-New. Petition need not expressly declare that proceedings are under alternate system where the fact conclusively appears therefrom. 174Ark 369, 295SW360.
641-69¼-New. Where a petition for organization was filed, hearing had, orders entered, and commissioners appointed thereon, and then withdrawn and dismissed, it was not functus officio when refiled later in the same court. 323 Ill 350, 154NE153.
641-69½-New. On application to drain commission for construction of sewer or drain over described route, commission cannot order construction of independent sewers affecting different districts. 250Mich135, 229NW609.
642-75 220MoA193, 282SW498. But see 15F(2d)145.
642-78 338 Ill 67, 170NE1. [a] (1) 318 Ill 204, 149NE302; 172Minn295, 215NW 204.
642-79 318 Ill 204, 149NE302.
642-82 174Ark369, 295SW360. [e] (2) Under petition praying for appointment of engineer to examine and make survey and for such other proceedings as are provided by law, duty and power of board of supervisors is as broad as statute, and it is not limited to particular improvement described in petition or by understanding of parties contrary to petition and statute. 200 Iowa 1133, 206NW26.
643-92 331 Ill 68, 162NE184; 134Wash 208, 235P31. But see 150Miss353, 116 S543. [a] (3) Mo 31SW(2d)201. (4) Petition setting forth names of owners of lands so far as known to petitioners is sufficient. 338 Ill 67, 170NE1. [e] **In Oklahoma.**-4F(2d)865.
643-93 165Minn74, 205NW625 (petition need not set forth that it was signed by required number of petitioners).
643-95 338 Ill 67, 170NE1; 165Minn74, 205NW625.
644-99 323 Ill 350, 154NE153; 338 Ill 67, 170NE1; 172Minn295, 215NW204; 172Minn295, 216NW229. [i] **Trustees of incorporated town** included in district may sign petition, and individuals need not sign individually. 136 Okl 47, 275P622. [j] **County court held without jurisdiction of petition** which did not contain signatures of owners representing majority of land in area as required by statute. 323 Ill 350, 154 NE153.
644-1 318 Ill 204, 149NE302. [a] (2) Petition alleging that twenty-one petitioners are freeholders of proposed district and that whole number affected by proceeding is thirty-four shows on its face that at least one half of petitioners will be assessed for proposed drain. 233 Mich32, 206NW539. [b] **Commissioners of highway** in corporate capacity and as representatives of public are regarded as owners of land, qualified as petitioners. 338 Ill 67, 170NE1.
645-4 169Ark117, 273SW383 (statute mandatory not permissive when petition signed by requisite majority).
645-4½-New. In determining whether majority of landowners signed, life tenant may be counted as owner. 316 Ill 345, 147NE248.
645-5 311Mo 309, 278SW388 (amended petition). [b] (2) Initial lack of authority in agent may be cured by subsequent ratification of his act even after proceedings reach appellate court. 169Ark117, 273SW383. [c] **Conditional signatures.**-169Ark117, 273SW383.
645-7 318 Ill 204, 149NE302.
645-13 172Minn295, 215NW204.
645-13½-New. But the petitioners may dismiss the proceeding in the manner provided by statute. 172Minn295, 215 NW204.
645-17 319 Ill 72, 149NE583 (petition held not functus officio after withdrawal for corrections and amendments); 323 Ill 350, 154NE153; 136 Okl 47, 275P622.
646-19 [a] **Where petitioners did not represent majority of land as required by statute,** petition could not be amended to produce necessary proportion of signers and acreage to give court jurisdiction. 323 Ill 350, 154NE 153.
646-24 338 Ill 67, 170NE1. [a] **Petition for organization of district in adjacent counties** need not be first filed with clerk of supreme court. 136 Okl 47, 275P622.
647-44½-New. The fact that some of the signers of the petition did not sign the bond as was agreed between the parties initiating the petition will not affect the enforcibility of the bond when the bond was received and acted upon by the county in good faith and without knowledge of such agreement and of the violation thereof. 200 Iowa 1133, 206NW26.
647-44⅓-New. Such knowledge on the part of a member of the board of supervisors will not be imputed to the county where such member was a landowner within the proposed district and therefore disqualified to act in the proceedings. 200 Iowa1133, 206NW26.
647-44¼-New. Sureties on a bond are estopped to plead nonliability because conditions on which they signed had been violated where they filed the bond or caused it to be filed with knowledge or with ready means of knowing that such conditions had been violated and stood in silence while the county, at large expense, acted thereon. 200 Iowa 1133, 206NW26.
647-44½-New. **Statutory bond given by engineer** covers negligence in survey, supervision of construction, and issuance of certificate for payments to the contractor in the progress of the work. 176Minn15, 222NW289 (added conditions are surplusage).
647-44¾-New. Surety on an engineer's bond is not released from liability for his negligence in issuing certificates by the fact of the auditor's negligence in

issuing warrants on certificates. 176 Minn15, 222NW289.

647–44½–New. In an action on an engineer's bond for negligence in issuing certificates, neither the subcontractor repaying excess money nor his surety is a necessary party. 176Minn15, 222 NW289.

647–48 But see Mo 31SW(2d)201.

647–49 311Mo 309, 278SW388 (applicable statute). See also Sask [1929] 2 DomLR919.

648–50 175Ark712, 300SW386; 337 Ill 362, 169NE228 (not cured by subsequent acts of parties); 203 Iowa726, 213NW 435.

648–57 203 Iowa726, 213NW435.

649–59 Mo 31SW(2d)201. But see 114 Nebr596, 209NW256.

649–63½–New. Benefit is presumed as to persons served with notice. 203 Iowa 726, 213NW435.

649–64 [a] **In Indiana.**–198 Ind557, 154 NE389.

650–74 148Miss7, 113S908.

650–75 172Ark611, 290SW63; 176Ark 474, 2SW(2d)1079; 318 Ill 204, 149NE 302; 148Miss7, 113S908; 136 Okl 47, 275P622. [a] 168Ark889, 271SW965. [b] **Publication in newspaper printed across state and county line** but circulating in county is sufficient compliance with statute. 176Ark474, 2SW(2d)1079.

650–76 318 Ill 204, 149NE302; 337 Ill 362, 169NE228 (ten notices posted within proposed district); 338 Ill 67, 170NE 1.

650–77 318 Ill 204, 149NE302; 179 Minn566, 229NW878.

650–77½–New. Recitation in judgment that all parties had been duly summoned and were properly before the court held sufficient to show notice. 215 Ky106, 284SW1009.

650–81 276US567, 48SCt396, 72L ed703. [c] **Notices held sufficient.**–171Ark1012, 287SW205; 220MoA193, 282SW498. [f] **Filing of copy of decree in eminent domain proceedings with land commissioner** is not notice of proceedings for formation of drainage districts. Wash 286P89.

650–82 158Tenn166, 11SW(2d)882. [f] (2) Time stated when petitioner will appear in court is "return day." 318 Ill 204, 149NE302. [h] (4) Failure to state day of term for hearing is fatal. 318 Ill 204, 149NE302. [i] 169Ark117, 273SW383.

651–83 169Ark117, 273SW383; 171Ark 1012, 287SW205. [a] **Presumed that no such variance exists** (3) and burden is on remonstrant to show it. 169Ark117, 273SW383. [b] **Notice** properly included land included in petition, though engineer recommended exclusion from district. 175Ark712, 300SW386. [c] **Order held valid** which excluded tract recommended by engineer, though tract was included in petition and notice. 175 Ark712, 300SW386.

651–84 See also 220MoA193, 282SW498.

651–90 203 Iowa726, 213NW435; 158 Tenn166, 11SW(2d)882. [a] 318 Ill 204, 149NE302.

651–90½–New. Sufficiency of service is waived in the absence of motion to quash return of process. 215Ky106, 284SW 1009.

651–91 203 Iowa726, 213NW435.

651–94 215Ky106, 284SW1009.

652–3 169Ark117, 273SW383.

652–13 [e] **Plea in abatement** on ground that another action was pending held insufficient to show identity of drain. 196 Ind225, 147NE810.

653–21½–New. Plea in abatement insufficient. 196 Ind225, 147NE810.

657–69 But see 150Miss353, 116S543.

658–84 [d] **Commissioners may ascertain and declare** probable requirements of drainage district to meet obligations. 172Ark1059, 291SW810.

658–93 [d] **Failure to file report within thirty days** after judgment establishing district does not invalidate subsequent proceedings, including assessment. 215Ky106, 284SW1009.

659–5 197 Ind350, 149NE178.

659–9 200Cal 550, 254P542.

659–10 200Cal 550, 254P542.

659–11 318 Ill 204, 149NE302.

660–27 [a] **Verification by one remonstrator for all** is sufficient. 197 Ind350, 149NE178.

660–35½–New. Remonstrances need not be filed until landowners are in court on statutory notice. 197 Ind350, 149NE 178.

661–39 [d] **Scope** of remonstrances must be confined to new matters in amended or new report. 197 Ind350, 149 NE178.

661–40½–New. Unless the party affected by the inclusion of his lands in the district takes some step to release them, it is not the duty of the court to do so. 215Ky106, 284SW1009.

661–46 [a] **In vacation.**–148Miss7, 113 S908.

661–47½–New. Under some statutes, hearings may be had at any place within the district. 148Miss7, 113S908.

661–48 197 Ind350, 149NE178.

662–51 Where petition appears to be duly signed, burden is on remonstrant to show that signatures have been affixed without authority to such extent that petitioners do not constitute majority. 169Ark117, 273SW383.

662–56 197 Ind350, 149NE178.

662–58 [b] **Evidence held inadmissible.**–228Ky737, 15SW(2d)531.

662–64 169Ark117, 273SW383 (evidence that petition signed by majority of landowners sufficient).

662–67 318 Ill 204, 149NE302.

662–68 318 Ill 204, 149NE302.

662–70 [a] (3) To show that proposed ditch will not damage lake. 164Minn 482, 205NW442.

662–71½–New. Mere fact, that two drains would be so located that after hard rain flood waters from creek might drain off through both ditches would not defeat jurisdiction of court to order second drain constructed. 196 Ind225, 147NE810.

662–72 [b] **Finding held sufficient** to show posting, publication and mailing. 338 Ill 67, 170NE1.

663–74 338 Ill 67, 170NE1; Iowa 230 NW800. [b] **Finding of necessity** is final unless appealed from. 136 Okl 47, 275P622. [c] **Finding not required** by finding made on formation of original drainage district having different boundaries. Iowa 230NW800.

663–75½–New. Finding that lake will not be damaged includes finding that it will not be drained in a way held not permissible in former decisions of reviewing court in respect of the same subject matter. 164Minn482, 205NW 442.

663–85½–New. Under a statute limiting the exceptions allowed to a petition to establish a drainage district to a denial of facts alleged in the petition or facts stated in the report of viewers, the failure of the petitioners to meet affirmative matter contained in the exceptions of landowners does not require dismissal. 228Ky737, 15SW (2d)531.

663–87 200 Iowa1162, 206NW245 (order establishing district properly reversed where project was impossible, where sum total of plan would be to redeem certain lands and submerge others).

663–88 [a] (3) Proceeding held to have terminated and requirement of statute as to setting aside former order and dismiss petition, merely directory. 35 OhA211, 172NE405.

664–91 But see 169Ark117, 273SW383.

664–91½–New. The court will not assume that plans and specifications will not be prepared or that commissioners will be unfaithful. 332 Ill 192, 163 NE546.

664–98 Mo 31SW(2d)201; 158Tenn166, 11SW(2d)882. See also 332 Ill 192, 163 NE546. [d] **Immaterial misnomer in name of district** does not render decree void. 136 Okl 47, 275P622. [e] **Entry of judgment establishing drainage district** need not be made at regular term of court under St. §§ 2380–4, 2380–6. 215Ky106, 284SW1009.

664–1 [a] **Where existing drain is to be used in construction of new drain,** commissioner's order of determination should provide for cleaning it out and thus recognize its identity. 233Mich32, 206NW539.

664–2½–New. Order organizing district may be made before filing of plat as required by statute. 318 Ill 204, 149NE 302.

664–3½–New. Where the court on final hearing reduced the area within the district, the form of the petition was required to be modified so as to show jurisdictional facts in conformity with the changed territorial limits. 331 Ill 249, 162NE886.

664–3⅓–New. An order is valid, although the minute book showed that the court was not in session where the statute provides that the court be deemed open for transaction of business at all times. 158Tenn166, 11SW(2d)882.

664–5 73CalA361, 238P760; 148Miss7, 113S908; 195NC264, 141SE885; ND 228NW839. See also 171Ark285, 284 SW770. [d] **Petition to construct county ditch** has performed its function when board of county commissioners has found for or against such improvement. 115 Oh81, 152NE18. [e] **Petitioners not made parties** are not bound by commissioners' judgment. 169Ga766, 151SE 369.

665–13 [a] **Order finding against improvement** cannot be vacated. 115 Oh 81, 152NE18.

665–14 [b] **New parties cannot be added** after judgment and confirmation of final report. 169Ga766, 151SE369.

665–16 203 Iowa726, 213NW435, 440 [citCJperMorling,J]; 115 Oh81, 152NE 18 (jurisdictional mistakes may be corrected when board has found in favor of improvement). [a] **Evidence insufficient to show fraud** warranting vacation of decree. 136 Okl 47, 275P622.

665–26 331 Ill 68, 162NE184.

667–39 153Tenn469, 284SW372.

667–41 31NM188, 242P683, 687 [quot CJ].

667–42 220Ala12, 123S573(4thcase) (judgment of probate court in petition under drainage act, holding such act unconstitutional and dismissing petition, held not reviewable on appeal by circuit court, under general laws for appeal, as not being final judgment); 325 Ill 400, 156NE274; Okl 292P42(2d case) (order of county commissioners establishing district held not appealable to district court); SD 214NW842.

668–53 See also 153Tenn469, 284SW 372.

668–55 [a] (2) Iowa 230NW800.

669–61 215Ky106, 284SW1009.

669–64 197 Ind556, 151NE418.

670–79 200 Ind605, 165NE433.

670–91 [d] **Appeal bond acts as stay of proceedings** to assess benefits or damages to land pending appeal from judgment extending boundaries of district. Mo 24SW(2d)629.

672–15 153Tenn469, 284SW372.

672–16 [a] **Admission of evidence** held not error in view of state of record. 197 Ind350, 149NE178.

672–17 [a] **Admission of incompetent evidence** not presumed harmless. 197 Ind350, 149NE178. [b] **Exclusion of evidence** held harmless. 197 Ind350, 149 NE178.

672–17½–New. Objection to disqualification of county judge not made by landowner at hearing or in limine cannot be made on appeal. 153Tenn469, 284SW372.

672–21 150Miss353, 116S543; 153Tenn 469, 284SW372.

672–22 153Tenn469, 284SW372.

673–42 But see 167Minn10, 208NW417.

673–43 [a] **Disqualification of county board of drainage commissioners** is not ground for reversal where case is tried de novo on appeal. 150Miss353, 116S 543.

674–50½–New. Under some statutes it is proper for the circuit court, on appeal from a county court order confirming a drainage board's assessment of benefits and damages, to modify the report to conform to the jury's verdict that damages and costs of construction exceeded the benefits. 199Wis257, 225 NW198.

674–62 171Ark285, 284SW770; 220 MoA193, 282SW498, 500 [citCJ]. [a] (1) 240Mich146, 215NW387 (in absence of fraud). [c] **Certiorari held proper remedy** to challenge establishment of

district by court. 220MoA193, 282SW498.

675-63 220MoA193, 282SW498, 500 [cit CJ].

675-65 180Minn132, 230NW481(1stcase). But see 204 Iowa1043, 217NW81.

676-98 175Minn8, 220NW157.

677-3½-New. Petitioner is not liable for engineer's services where proceeding is abandoned. 325 Ill 402, 156NE385.

677-14 [b] (2) Plea that survey departed from plan proposed in petition is unusually comprehensive and vested board of supervisors with full statutory jurisdiction over proposal and survey is not beyond call of statute. 200 Iowa1133, 206NW26. (3) That disqualified member took part in proceedings of board of supervisors does not constitute defense where his vote was not deciding vote and claims on which he did not vote exceeded amount of bond. 200 Iowa1133, 206NW26. (4) That new survey was made does not constitute defense where many bench marks of previous surveys were destroyed and cross sections of ditches would change and engineer could not safely accept previous surveys. 200 Iowa1133, 206NW26. (5) That by last reports of engineer all lateral ditches were eliminated from plans of improvement as proposed in petition does not constitute defense where such departure was merely change of plan by which purpose of proposed improvement was to be accomplished. 200 Iowa1133, 206NW26. [c] **Admissibility of evidence.**-200 Iowa 1133, 206NW26. [d] **Conclusiveness of audit of claims and expenses.**-200 Iowa 1133, 206NW26. [e] **Burden of proof.**-200 Iowa1133, 206NW26. [f] **Answer.**-200 Iowa1133, 206NW26. [g] **Both principals and sureties** are liable on bond though proceeding was dismissed. 233 NW294.

677-18½-New. Under some statutes liability of sureties on bond given in conformity therewith is not limited to the fair and reasonable cost of the preliminary survey. 200 Iowa1133, 206NW26.

678-25 [a] (2) Expense of employment by supervisors of counsel on appeal to resist establishment of new drainage not taxable. Iowa 230NW800.

678-33 [a] **Proceedings by county board.**-175Minn8, 220NW157 (notice to petitioners unnecessary and board's determination final).

678-38½-New. Under some statutes an order allowing costs and expenses incurred in proceedings for the establishment of a drain made before the expiration of the time prescribed by statute is voidable only and not subject to collateral attack. 89 IndA537, 166NE30.

679-40 46 Ida248, 267P443; 215Ky106, 284SW1009. See also 315Mo597, 286SW93.

679-41 203 Iowa726, 213NW435; 215Ky106, 284SW1009. See also 225Ky610, 9SW(2d)727.

679-46 315Mo597, 286SW93, 94 [quot CJ].

679-49 251Mich495, 232NW213(2dcase).

680-51 41F(2d)433; 175Ark712, 300SW386; 73CalA361, 238P760; 338 Ill 67, 170NE1; 311Mo309, 278SW388; 144Wash320, 257P851.

681-55 MoA 286SW832.

681-56 203 Iowa726, 213NW435.

681-57 203 Iowa726, 213NW435.

682-58 203 Iowa726, 213NW435.

682-59 117Nebr453, 220NW695; 36 OklACR510.

682-61 See also 244 IllA137.

683-62 [a] **Gross irregularities** constituting hardship to property owners and extravagant use of taxpayers' money constitute constructive fraud justifying equitable relief. 250Mich135, 229NW609.

683-68 [c] **Statutory remedy** by joining with others in taxpayers' action to restrain illegal appropriation. Mass 169NE498.

683-71 204 Iowa716, 215NW965; 162Minn296, 202NW496 (evidence held to show that drainage project would not substantially lower water level of meandered lake); TexCivA 291SW322.

683-75 95Fla530, 116S449.

684-78½-New. The work to be done by a drainage district can include only such drains, ditches, and other work as may be necessary to give complete drainage to the lands of the district as it exists, without regard to possible future annexation. 331 Ill 68, 162NE184.

684-78⅓-New. That the survey and plans for bridges in connection with a drain were not made by a registered surveyor but by a contractor who was a competent surveyor is an irregularity not available in a court of equity to persons who stood by and saw the work done without protest and without seeking to review the proceedings in the manner provided by statute. 231Mich362, 204NW135.

684-79 See also 251Mich608, 232NW346.

684-87 233Mich32, 206NW539.

684-92 317 Ill 292, 148NE44; 331 Ill 68, 162NE184.

685-93 317 Ill292, 148NE44.

685-94 39 OklACR346. [a] **Contractor for construction** of drainage ditch is liable for damage to lands of adjacent proprietor if he constructs it in manner other than as provided in approved plans. 39 OklACR346.

685-94½-New. Notice required of petition for change of plans is notice to all persons interested. 318 Ill 241, 149NE250.

685-96 83Colo510, 267P605, 607 [cit CJ].

685-97 [a] **Approval by state authorities is required** (1) under statutes in some jurisdictions, of drainage district's plans for construction of structures affecting natural flow of streams. 330 Ill 121, 161NE300 (statute applicable to Illinois River). (2) Such statutes have been held not invalid as delegation of legislative power, conferring judicial power, or as not providing notice to interested persons. 330 Ill 121, 161NE300.

686-10 141Miss851, 106S88.

686-11 [a] **Diverting natural flow into another district.**-123Kan393, 254P366.

686-15½-New. A drainage district, by the acquisition of a right of way for the outlet of the main ditch, became entitled to complete control of the channel for purposes of an outlet for all the district drains. 336 Ill 211, 168NE509.

687-29½-New. Money voted for construction of a drainage system within the boundaries of a drainage district cannot be used to build levees outside of the district to prevent future overflow and damage to land outside of the district. TexCivA 291SW322.

687-29⅓-New. Under some statutes notice is not required to be served on all landowners after they are made parties to the proceeding with respect to all acts involved in the construction of a ditch. 199Wis230, 225NW331, 63ALR1165.

687-29¼-New. Under some statutes the court is vested with the usual powers of a court of equity over drainage proceedings, including direction, supervision, and ratification. 199Wis230, 225NW331, 63ALR1165.

687-29⅕-New. The court, independent of statute, has broad discretionary power to prevent inequitable results in drainage proceedings. 199Wis230, 225NW331, 63ALR1165.

687-29⅙-New. The court is vested with supreme power of supervision and direction over all matters pertaining to the construction of a drainage ditch except as restricted by the legislature. 199Wis230, 225NW331, 63ALR1165.

687-40 See also 331 Ill 549, 163NE476.

688-43 [d] **Agreement between bidders** held not tending to suppress bidding. 235 IllA265.

688-46 202 Iowa212, 210NW122.

688-49 159La471, 105S556.

688-57 159La471, 105S556.

689-72 [a] **Buildings designed by contractor.**-159La471, 105S556.

689-77½-New. Specification may permit prospective bidder to design own buildings and are not, therefore, void for uncertainty or risk. 159La471, 105S556.

689-77½-New. Specifications permitting charges and prices to be agreed upon are not void for uncertainty or risk, since they cover only minor changes. 159La471, 105S556.

689-77¼-New. Specifications providing that contractor erect engines capable of operating satisfactorily on certain oil and meeting full guarantees is not indefinite because they did not provide that he furnish apparatus for preheating the oil. 159La471, 105S556.

689-77⅓-New. Provision requiring oil tanks to be erected on earth foundation is proper. 159La471, 105S556.

689-77⅙-New. Specification for Deisel engines need not specify fuel oil consumption since all such engines consume about same amount. 159La471, 105S556.

689-77⅐-New. The fact that the specifications exclude some engines of a certain type is unimportant. 159La471, 105S556.

689-77⅛-New. If the authority exists to do the work, a contract will be implied to pay for services rendered, in the absence of specific requirement of formal contract. 67CalA488, 227P787.

689-77⅑-New. Clause in contract, requiring payment to contractor on basis of cost plus percentage if rock or quicksand is encountered, is void where such provision is absent from specifications and advertisement for bids. 202 Iowa212, 210NW122.

689-79½-New. Records of proceedings have been held not to show that the contractor's bid was less than the amount fixed in the contract. 231Mich362, 204NW135.

689-80 330 Ill 250, 161NE519 (contract of treasurer void); 235 IllA265.

689-82½-New. A surveyor who made plans for bridge in constructing a drain, although not registered as a surveyor, is not precluded from bidding on the contract and the commissioners may let the contract to him where he is the lowest responsible bidder. 231Mich362, 204NW135.

690-84 TexCivA 31SW(2d)314 (statute read into bond).

690-85 155Tenn571, 296SW17. [a] **Board of directors of drainage district** is vested with power as quasi-public corporation to sue in name of county payee on contractor's bond to recover damages for breach of contract, though damages exceed amount of bond. 155Tenn571, 296SW17.

690-91½-New. A drainage contractor's bond, with paid surety, is regarded as in the nature of an insurance contract, and will be most strongly construed against the surety. 178Ark573, 11SW(2d)458.

690-91⅓-New. A bond of a contractor for the construction of drainage ditches is not invalid because made to the commissioners instead of the state, 174Ark1110, 298SW1032.

690-91¼-New. , or because not executed in the statutory amount. 174Ark1110, 298SW1032.

690-91⅕-New. A bond should be construed most strongly against the surety. 174Ark1110, 298SW1032.

690-91⅙-New. Where the contract of surety was certain and unambiguous, it had right to stand on terms thereof. IndA 159NE21.

690-91⅐-New. Where contractor defaulted under construction contract, surety was not bound by allowance of claims for construction without notice to it. IndA 159NE21.

690-91⅛-New. Officers in charge of the construction of a public drain could not by an unlawful allowance and payment of claims, or by other violations of law, prejudice the rights of surety on bond. IndA 159NE21.

690-91⅑-New. Surety could assume that the commissioner in charge and the court in allowing claims against construction funds would not violate the law. IndA 159NE21.

690-91⅒-New. and surety had the right when sued on bond to examine

into allowance of claims. **IndA** 159NE 21.

690-91 1/11-New. An allowance to a contractor of an amount exceeding the contract is held an unwarranted overpayment to the prejudice of the surety. **IndA** 159NE21.

690-91 1/12-New. A surety is not bound by payment of claims without a certification of the commissioner in violation of statute. **IndA** 159NE21.

690-91 1/13-New. Payment of estimates to a party advancing money to contractor, without knowledge of surety, is held trespass on its rights. **IndA** 159 NE21.

690-93 But see 99Fla928, 128S25. [a] (3) Oil and gasoline furnished contractor to operate machinery used by him in digging canals and ditches for district are "materials" within statute. 143Miss841, 107S559. [b] **Claim for labor supplies and freight charges for repair of dredge boat used to excavate canal** has been held not within provisions of contractor's bond. 169La163, 124S768.

690-94 143Miss841, 107S559 (complaint held not demurrable).

690-94 1/2-New. A drainage contractor's bond to "pay all persons, firms or corporations who perform labor or furnish equipment, supplies and material for use in the work," is executed for the benefit of all who perform labor or furnish equipment although not a statutory bond, because not filed in the circuit clerk's office, as provided by statute. 178Ark573, 118SW(2d)458.

690-94 1/4-New. Parties performing labor or furnishing equipment for use in work are entitled to sue on a drainage contractor's bond to pay therefor, on the principle that the beneficiary of a promise to another may sue for breach thereof, notwithstanding a provision in the bond that only the drainage district may sue thereon. 178Ark 573, 118SW(2d)458.

690-94 1/5-New. A drainage contractor's bond to pay all persons furnishing supplies and material "for use in the work" covers liability, not merely for material actually entering into work, such as might be the basis of mechanics' liens, but all material and supplies furnished to the contractor for use in, or reasonably necessary to, accomplish the purpose of the work. 178Ark573, 118SW(2d) 458.

690-96 1/2-New. A surety is not estopped from denying liability where a change in the specifications was made without its knowledge or consent. **IndA** 159NE 21.

690-96 1/3-New. Surety is not released from liability on contractor's bond because superintendent of construction collected extra assessment against landowners. **IndA** 171NE206.

690-2 1/2-New. Construction of bond guaranteeing title for period of years provided that county should notify the surety of the contractor's default within three days after discovery thereof. **SD** 210NW976.

690-4 178Minn183, 226NW473 (liability held properly determined). [a] **Parties to whom surety is liable.-IndA** 172NE 656.

691-7 [a] **Stipulation for liquidated damages binding on both contractor and surety.-171Minn**20, 213NW30.

691-8 1/2-New. The surety of a contractor is liable for principal's default in failing to pay subcontractor. 174Ark 1110, 298SW1032.

691-9 [b] **Amount of recovery** on bond guaranteeing title for five years is not limited to title actually examined and found defective. **SD** 210NW976.

691-10 [a] **Parties entitled to sue on bond.-IndA** 172NE656.

691-11 1/2-New. An action against a contractor and his sureties is local and is triable in the county in which the cause of action arose. **166Minn**499, 207NW 648.

691-11 1/3-New. Suit is properly brought in chancery court where statute fails to specify the court. 155**Tenn**571, 296 SW17.

691-11 1/4-New. Overruling of objections to testimony and refusal of instructions relating to change in specifications without knowledge of surety is held error. **IndA** 159NE21.

691-11 1/5-New. Evidence offered to prove illegality of collateral contract between plaintiff and district is properly rejected. 41F(2d)693.

691-11 1/6-New. Surety bound though bond not signed by contractor till after default. 41F(2d)693.

691-11 1/7-New. Defendant must show existence of prior default. 41F(2d)693.

691-11 1/8-New. Contract is not incompetent as evidence on ground of supposed invalidity. 41F(2d)693.

691-11 1/9-New. Amendment of answer to attack validity of contract between plaintiff and district is properly denied. 41F(2d)693.

691-14 235 **IlA**265.

691-15 **SD** 210NW976.

691-19 See also 21F(2d)257. [a] **Particular contracts construed.**-168Ark1157, 272SW840 (as to guaranty to contractor of excavation of certain per cent. of total yardage upon total mileage as estimated by engineer not applicable to each item of specification).

691-20 1/2-New. Failure of a drainage district to sell bonds is not such a legal difficulty as will authorize the suspension of work under a clause authorizing suspension because of legal difficulties. 15F(2d)41.

691-20 1/3-New. Where a contract to construct a drainage improvement was void, a subcontract was likewise void, notwithstanding the subcontractor expended money in getting ready to perform. 33F(2d)451.

691-25 But see 235Ky37, 29SW(2d) 635. [b] **Modification to meet exigency.**-235**Mich**117, 209NW127 (encountering solid rock under conditions rendering it too dangerous to blast).

691-26 [a] **Minor changes.**-159**La**471, 105S556.

691-29 175**Minn**60, 220NW432.

691-30 1/2-New. Substitution of new contract by oral agreement relieves parties from obligations of original contract. 176**Ark**31, 28W(2d)70.

692-39 [a] 168**Ark**1157, 272SW840. [b] **Remedy on contractor's failure to complete ditch,** where it can be completed within statutory limit, is for county to cause it to be completed and recover excess cost from contractor. 175**Minn** 60, 220NW432 (determination of cost).

692-40 164**Minn**390, 205NW277 (good faith no excuse for insufficient performance).

692-41 [a] **Damages for delay in completing work** and for extra engineering charges during alleged overtime cannot be recovered where delays unavoidable and acquiesced in by commissioners who did not indicate intention of charging for necessary delay in performance according to changed method. 168**Ark** 1157, 272SW840.

692-47 1/2-New. **Damages for defective work** cannot be recovered by district where it retained from amount due contractor sum to cover expenses of completing work. 168**Ark**1157, 272SW840.

692-54 6F(2d)825; 168**Ark**1157, 272 SW840; 235 **IlA**265; 203 **Iowa**1144, 212 NW691.

692-55 1/2-New. 164**Minn**390, 205NW277 (statutory power to alter plan of construction is not limited by contract provision).

692-57 203 **Iowa**1144, 212NW691. [c] **Additional expense in clearing right of** way by use of teams instead of by dredge boat that débris could be hauled outside limits of right of way was not item falling within clause providing payment for extra work. 168**Ark**1157, 272SW840.

692-58 [a] (2) Contractor is not entitled to compensation for extra work not included in original contract done under order of engineer in charge but not ordered or approved by board of supervisors. 203 **Iowa**1144, 212NW691.

692-59 1/2-New. Surety who undertakes work on contractor's failure to complete contract is not entitled to notice of application for change in plan of contractor. 164**Minn**390, 205NW277.

692-60 1/2-New. Where a contract for the construction of a public drain provides that the contractor shall be paid additional compensation for removal of solid rock which must be blasted to be removed, his right to extra compensation is not barred by the fact that he removed rock which ordinarily would be blasted in some way other than by blasting because it was too dangerous to blast. 235**Mich**117, 209NW127.

693-62 **MoA** 297SW730 (establishment by agreement of landowners).

693-67 310**Mo** 526, 275SW927.

693-74 21F(2d)267; 167**Minn**458, 209 NW638 (in absence of statute authorizing audit and allowance of claims for engineering services in judicial ditch proceedings claimant may sue county in action at law). [a] **In Mississippi.**-152 **Miss**872, 120S184. [b] **Petition held sufficient** on demurrer ore tenus. **MoA** 297 SW730. [c] **Defense.-MoA** 297SW730.

693-76 [b] **Provision for retained percentages.**-168**Ark**1157, 272SW840.

694-87 1/2-New. After board, with power to pass upon claims, has ordered warrants to be issued, liability of district is fixed and cannot be changed by subsequent action of the board. 310**Mo** 526, 275SW927.

694-87 1/3-New. Under statutes of some states interest must be paid on warrants at rate of six per cent from day they were protested. 310**Mo** 526, 275SW927.

694-87 1/4-New. Interest on long deferred payments may properly be ordered. 203 **Iowa**1144, 212NW691.

694-87 1/5-New. In an action on an admitted contract, legality of notice to bidders is held not in issue. 21F(2d)257.

694-87 1/6-New. In computing amount due contractor under contract for construction of canals district held not entitled to deduction for "slush," 235**Ky** 37, 29SW(2d)635.

694-87 1/7-New. , or old creek bed. 235 **Ky**37, 29SW(2d)635. [a] **District claiming old creek bed should be excluded in computing yardage** should file exceptions to estimate of cost. 235**Ky**37, 29 SW(2d)635.

694-90 21F(2d)267.

695-2 1/2-New. Statute, allowing holder of order against drain fund to be paid, at his option, out of general fund of county in case of insufficiency of drain fund, and providing for crediting general fund with delinquent drain taxes received thereafter, does not violate constitutional provisions against taking private property without due process of law. 235**Mich**364, 209NW142.

695-2 1/3-New. Even though reimbursement of county fund, contemplated by the act, becomes impossible because delinquent lands in assessment district are conveyed to the state and become state tax homestead lands. 235**Mich** 364, 209NW142.

695-2 1/4-New. nor does the statute violate a constitutional provision prohibiting legislature from auditing any private account and conferring on boards of supervisors authority to adjust all claims against their respective counties. 235**Mich**364, 209NW142.

695-13 176**Ark**31, 28W(2d)70. [b] **Measure of damages.**-15F(2d)41.

695-15 1/2-New. A contractor cannot recover for alleged delay, where the district used reasonable diligence to remove a bridge. 16F(2d)429.

695-15 1/3-New. Damages for breach of contract for the purchase of bonds should be estimated as of the time the breach occurred. 176**Ark**31, 28W(2d) 70.

695-19 1/2-New. A drainage district is liable for lumber furnished to a contractor and not paid for by him where it appears that the drainage commissioners, with knowledge of the facts, used the lumber after abandonment of the work by the contractor. 170**Ark**701, 280SW640.

695-19 1/3-New. A subcontractor of a contractor employed by a drainage district to construct an improvement was chargeable with notice that the district was first required by law to obtain federal and state permits for such work. 33F(2d)451.

695-19 1/4-New. Liability of the commis-

sioner of construction of a drain for material furnished the contractor see **IndA** 168**NE**608.

695-19½-New. Failure of assignee of claims for labor and material to file contract between district and construction firm does not prevent recovery against member of firm. **MoA** 23**SW(2d)** 639.

695-19⅙-New. In determining liability of member of such firm to assignee of labor claims court is confined to contract between firm and district. **MoA** 23 **SW(2d)**639.

695-19⅐-New. Contract between district and construction firm construed as rendering members of firm liable for labor and materials furnished at instance of assignee. **MoA** 23**SW(2d)**639.

695-19⅛-New. Such contract construed as making members of firm liable only for work and materials becoming part of improvement or employed in work contemplated by contract. **MoA** 23**SW(2d)** 639.

695-21 245 **IllA**48 (statute construed). [a] **Claims not lienable.**-206 **Iowa**577, 218**NW**920. [c] **Statute giving subcontractor lien** (1) on public funds or for labor performed or materials furnished for the construction does not give lien for groceries and provisions and money loaned to contractor to enable him to execute his contract. 202 **Iowa**747, 210 **NW**954. (2) Statute does not authorize allowance of attorney's fees to intervene in suit by contractor to recover balance due under construction contract. 202 **Iowa**747, 210**NW**954.

696-24 251 **IllA**405 (future upkeep devolves on public road authorities).

696-25 313**Mo** 302, 281**SW**410.

696-25½-New. Where the construction of a bridge over a drain is required by the state highway department and flooring constitutes a part of the construction, an order on the drain fund for payment for such flooring is not invalid because the contract therefor was not let separately. 231**Mich**362, 204**NW**135.

696-26 251 **IllA**405 (mandamus to repair bridge under statute exempting district properly denied).

696-29 209**Ky**193, 272**SW**387 (except where conditions specified in statutory exceptions exist). [c] (2) 311**Mo** 309, 278**SW**388. (3) District whose organization was begun before but completed and organized under act of 1913 is not immune from paying cost of bridges thereunder. 311**Mo** 309, 278**SW**388. [d] **Evidence held to show** that bridges were constructed under contract properly let, and were not larger or more costly than necessary to meet actual needs. 209**Ky** 193, 272**SW**387. [e] **Plans and specifications for bridge.**-233**Ky**650, 26**SW(2d)** 548.

696-31 128**Kan**442, 278**P**32.

697-40 [a] (4) In action by railroad for expenses of removal and replacement of bridge, it has been held that company is not entitled thereto in absence of contract. 86 **IndA**266, 155**NE**708. [d] **In Missouri.**-12**F(2d)**909.

697-41½-New. Under some statutes a drainage district is liable for the expenses of a railroad in opening its track and roadbed and all damage sustained as a result of construction, including the expense of replacing the roadway including a bridge. 149**Miss**31, 115**S**189 (statute held not to authorize arbitrary refusal to pay claim).

697-43½-New. A statute requiring railway companies to enlarge natural waterways obstructed by culverts built by them merely declares the common-law rule. 199**Wis**46, 225**NW**132.

697-43⅓-New. A proceeding by a drainage district to require a railway company to remove streets under a culvert is properly instituted under a statute requiring railway companies to enlarge natural waterways obstructed by culverts built by them. 199**Wis**46, 225**NW** 132.

697-45 174**Ark**160, 294**SW**711. [j] **Authority to extend** includes power to lengthen ditches to reach outlet. 174 **Ark**160, 294**SW**711.

698-47 172**Ark**373, 288**SW**895.

698-49½-New. A statute permitting an assessment of a stated per cent for maintenance does not limit the cost of improvement of an existing drain to make it adequate to serve the district. 213 **Ky**30, 280**SW**456.

698-49⅓-New. A proceeding for the improvement of an existing drain to make it adequate to serve the district is not invalid as one to create a second drainage district covering the same territory. 213**Ky**30, 280**SW**456.

698-49¼-New. It is not permissible to deepen and widen a drainage ditch where no assessment for benefits has been made to the owners of land affected, and the cost of the proposed work would exceed all benefits received before or after the improvement. 192**Wis**458, 212**NW** 288.

698-57 174**Ark**160, 294**SW**711.

699-58 **SD** 213**NW**952. [b] **Description of lands included.**-219**Ky**310, 294**SW** 474. [c] **Petition for reconstruction of drain and enlargement of district not signed** by owners of statutory proportion of lands is insufficient. 219**Ky**810, 294**SW**474. [d] **Petition need be signed** only by majority in number, acreage, or value of landowners of district. 177 **Ark**728, 7**SW(2d)**794.

699-61½-New. Action of commissioners on petition is quasi-judicial and, in absence of appeal, is final. **SD** 213**NW** 952.

700-64 [a] (9) Finding that ponds on land assessed as benefited had never been drained, in proceedings to remedy public drain, held to entitle petitioners to appointment of viewers notwithstanding contrary finding. **Ind** 154**NE**12.

700-67½-New. Burden of proving that a drain as constructed is insufficient for lands intended, and that the proposed repair will accomplish drainage and be of public utility, is on the petitioners for the improvement of the drain. 200 **Ind**307, 163**NE**225.

700-67⅓-New. Decision that cause should be dismissed, followed by entries relative to denial of new trial and appeal, constitutes a final judgment. 200 **Ind**307, 163**NE**225.

700-68 **SD** 213**NW**952.

700-72 324 **Ill** 93, 154**NE**437. [b] (2) Under some statutes trustee of particular township is not required to clean allotment ditch till trustee in adjoining township in another county has cleaned ditch from mouth to county line. **IndA** 166**NE**252. [g] **In Minnesota.**-171 **Minn**478, 214**NW**285. [h] **"Repair" held to include** authority to contract for placing pipes through waste banks to prevent erosion. 203 **Iowa**263, 210**NW** 929.

700-73 203 **Iowa**263, 210**NW**929.

701-77 203 **Iowa**263, 210**NW**929.

701-78 203 **Iowa**263, 210**NW**929.

701-79 233**Mich**32, 206**NW**539.

701-81½-New. or repair thereof, **SD** 213**NW**952.

701-87 200 **Iowa**143, 202**NW**379.

701-87½-New. Where a county board acquired jurisdiction by filing of a petition for repair, its jurisdiction was not taken away by a legislative enactment changing the requirements as to the number of landowners joining in the application. **SD** 212**NW**48.

701-87⅓-New. Where notice of appeal from a decision of the county board on petition for cleaning and repairing was not served within the required time, appeal was properly dismissed. **SD** 212 **NW**48.

701-87¼-New. Under some statutes no repairs can be made after installments have been so collected in an amount equal to the assessed benefits. 174**Ark** 659, 298**SW**489.

701-87⅕-New. Revenue raised in one subdistrict cannot be used to repair drains in other subdistricts in the same district. 174**Ark**659, 298**SW**489.

701-87⅙-New. Abutting owners have the duty to maintain a river in new course, where the diversion thereof was lawful and properly effected, unless the plans specifically provided for the maintenance of the district. 116**Nebr**300, 216**NW**817.

701-87⅐-New. Such rule obtains also where an abutting owner has estopped itself to complain of the negligent construction in the diversion of the river. 116**Nebr**300, 216**NW**817.

702-98½-New. Mutual drains. The distribution of the burden of maintaining a mutual drain is governed by the facts in each particular case. 335 **Ill** 192, 166**NE**449.

702-1 [b] **Implied terms.**-67**CalA**488, 227**P**787.

702-3 67**CalA**488, 227**P**787. [c] **Ratification.**-67**CalA**488, 227**P**787.

702-9 204 **Iowa**716, 215**NW**965.

702-14½-New. Private drainage rights of landowners in district become merged in, and are supplanted by, rights conferred on district by statute. 141**Miss** 851, 106**S**88.

702-14⅓-New. A corporation authorized to construct channels for drainage purposes may utilize water power to generate electrical power as a source of revenue for the purpose of paying its indebtedness incurred in the construction and maintenance of a channel. 336 **Ill** 11, 167**NE**807.

703-29 76**CalA**492, 245**P**227. But see 311**Mo** 175, 279**SW**50.

704-31½-New. Where the extension of a drainage ditch was unauthorized, the drainage district was under no liability to the owner of the land into which the ditch was extended, although the work incident thereto was done under the direction of its commissioners. 153**Miss** 440, 121**S**117.

704-31⅓-New. That, by reason of drainage, the volume of water flowing into a bayou is increased by reason of the hastening of the flow does not give a landowner whose land is overflowed a cause of action against the district. **TexCivA** 291**SW**322.

704-32 114**Nebr**134, 206**NW**741; 116 **Nebr**300, 216**NW**817.

704-34 137**Miss**393, 102**S**259 (damages from cleaning).

706-40½-New. Under a statute authorizing the owner of land affected by a drainage improvement, made without notice to him and opportunity to be heard, to bring action and recover any damages sustained, a landowner is entitled to recover the actual damages sustained where a change in route from that ordered is made without notice to him, regardless of what damages he would have suffered by the construction on the original location. 29 **OhA**505, 163**NE** 919.

706-50 [j] **In Missouri.**-308**Mo** 123, 272 **SW**66.

707-51 See also **TexCommnA** 4**SW(2d)** 33. But see 181**Ark**30, 24**SW(2d)**875.

708-57 [c] **Pleadings.**-256 **IllA**63. [d] **Maintenance of flow.**-256 **IllA**63. [e] **District permanent structure.**-256 **IllA** 63. [f] **Evidence.**-256 **IllA**63. [g] **When right of action accrues.**-256 **IllA** 63.

709-68 171**Ark**802, 286**SW**962.

709-70 72**CalA**68, 237**P**59; **Cal** 293**P** 53; 72**CalA**68, 237**P**59; 200 **Iowa**251, 202**NW**521; 234**Ky**263, 27**SW(2d)**968; 169**Minn**79, 210**NW**626; **Mo** 32**SW(2d)** 583; **Nebr** 231**NW**685(2dcase). [c] **Damages by reason of volume of water** passing on plaintiff's land extends liability. **Nebr** 231**NW**685(2dcase).

710-73 76**CalA**492, 245**P**227. [b] **In absence of showing that district actually took owner's property** or was using it for its purposes, it is not required to satisfy judgment against directors in action of trespass by owner for damages for digging ditch across his land without his consent and without first making just compensation. 76**CalA**492, 245**P**227.

710-73½-New. A drainage district is not liable to a citizen for the consequences of the construction of a drainage system in the absence of negligence. **TexCivA** 291**SW**322.

710-73⅓-New. Drainage district failing to maintain or erect dams in accordance with judgment is not liable for damages from overflow in absence of negligence. 198**NC**487, 152**SE**386.

710-79 [a] (2) Directors of drainage district are severally and jointly liable for trespass in digging ditch across owner's property without his consent

and without first making just compensation therefor, though acts were committed in official capacity. 76CalA492, 245P227. [d] (2) Instruction that person acting in official capacity is individually liable for negligent discharge of his duties is proper in action tried before modification of rule by Pol. Code § 3464. CalA 261P1021. (3) Instruction that negligence is not simply in originating that which may be cause of injury, but consists also in failing to control such cause, has been held proper in view of other instructions. CalA 261P1021. [e] **Questions for jury.**–CalA 261P1021. [f] **Pleading.**–234Ky263, 27SW(2d)968.

711-84½-New. Engineer making plans is not responsible to property owner. 234Ky263, 27SW(2d)968.

711-86 49ND636, 192NW969. [c] 49ND636, 192NW969. [d] 49ND636, 192NW969. [e] 49ND636, 192NW969.

711-88½-New. In some jurisdictions complaint in action against contractor must show contract and breach. 234Ky263, 27SW(2d)968.

712-91 177Minn287, 225NW152(1st case). See also 83Colo510, 267P605. [e] **Evidence held sufficient.**–174Minn317, 219NW158. [f] **Damage by town improving highway.**–174Minn317, 219NW158.

712-92½-New. A town having no jurisdiction over a drain is liable for injuries from flooding adjoining land by removing a fill between a branch and lateral which was installed by the county having jurisdiction. 164Minn452, 205NW372.

712-92½-New. An instruction that the words "continuous flow," in a statute for the construction of a canal, refer to the capacity of the channel and not the manner in which it shall be operated was applicable to the evidence and should have been given. 336Ill11, 167NE807.

712-92¼-New. An instruction that, in determining the quantity of water required to flow through defendant's canal, certain waters which did not turn into the channel should not be considered held erroneously refused. 336Ill11, 167NE807.

712-92½-New. An instruction that the burden of proving the population of defendant district in order to determine the flowage required was on plaintiff held erroneously refused. 336Ill11, 167NE807.

712-92⅛-New. In an action to recover for damage to real estate from overflow, introduction of the assessment roll held inadmissible for the purpose of showing that it was for a greater amount than the evidence showed to have been expended for repairs. 336Ill11, 167NE807.

712-92½-New. In an action to recover for damage to real estate from overflow, plaintiff must prove the population of defendant district, the amount of sewage, the amount of water required, and that excess was the proximate cause of the damage. 336Ill11, 167NE807.

712-92⅛-New. In an action to recover for damage to real estate from overflow, evidence held insufficient to take the case to the jury. 336Ill11, 167NE807.

712-92½-New. An act providing that there be sufficient water turned into a canal to prevent its being obnoxious is applicable to the district of Chicago as soon as sewage comes into the canal. 336Ill11, 167NE807.

712-92¼-New. An instruction that defendant could not flow water for the primary purpose of creating electrical energy, and that flowage exceeding twenty thousand cubic feet per minute per one hundred thousand inhabitants would be unlawful, held erroneous. 336Ill11, 167NE807.

712-93 213Ky630, 281SW494; 114Nebr161, 206NW965. [b] **Injunction lies to restrain supervisor from altering level of ditch.** 134Wash121, 234P1036. [c] **Allowance of time for removal.**–213Ky630, 281SW494. [d] **Pleadings held insufficient to justify issuance of injunction in suit by town to restrain obstruction of drain.** 170La297, 127S729(2dcase).

712-96 335Ill192, 166NE449.

712-3½-New. Under a statute relative to repair of drains the board of supervisors of a county has no power to abandon an established drain. 200Iowa143, 202NW379.

712-6 41F(2d)433; Ark 293SW1031; 95Fla530, 116S449; 43Ida703, 255P638; Mo 29SW(2d)716 (increase collector's fees); 143SC178, 141SE274; 153Tenn469, 284SW372; Wash 286P89. [a] (2) Legislature may require district benefited by improvements in adjoining district to contribute just proportion of cost and maintenance. Ill 173NE90 (statute construed). [g] **Origin of power.**–Utah 269P1023. [h] **Notice of limitation of taxing powers of district** is chargeable to all persons dealing with district. Utah 269P1023. [i] **That public benefit is practically limited to lands within district** does not render statute creating district unconstitutional. 200Cal277, 252P1043. [j] **Provision that drainage taxes shall have force of judgment and execution** is held inoperative to deprive person of property without due process of law. 95Fla530, 116S449.

714-8 157Miss336, 128S91; 199Wis85, 225NW873.

714-9 42Ida284, 244P1099.

714-10 42Ida284, 244P1099. [a] Ill 173NE90.

714-11 42Ida284, 244P1099.

714-11½-New. The legislature has power to make the owner of land, in possession at the time the assessment is certified by the board of drainage commissioners for collection, liable therefor. 213Ky352, 281SW169.

715-17 24OhNPNS281 (Ohio ditch laws declared unconstitutional); Wis 225NW873.

715-21 95Fla530, 116S449; Tex CommnA 4SW(2d)33. [e] **Drainage for artificial waters** may be proper purpose. 89CalA322, 264P572. [f] **Contra.**–313Mo302, 281SW410. [g] **Amount paid county agent to sell bonds.**–204Iowa936, 216NW257.

715-25 See also 127Kan283, 273P425.

716-28 See also Miss 128S339.

716-31½-New. Authority to raise money under a statute for construction to complete the project does not authorize assessment for the cost of maintenance or repair of a ditch previously constructed. SD 213NW952.

716-33½-New. The right to levy and collect assessments for the purpose of maintenance does not exist in the absence of statute conferring it. 174Ark659, 298SW489.

716-35 [f] **Pipe line and its right of way subject to assessment.** 173Ark372, 293SW1031. [g] **Easements.**–43Ida803, 255P411.

716-38 [a] **In Arkansas.**–173Ark372, 293SW1031.

716-38½-New. State selling land within drainage district free of assessments, cannot afterwards require purchaser to pay assessments. Wash 286P89.

716-41 SD 213NW952.

716-42 [a] **Special assessments may extend throughout special taxing district formed for local improvements.** 95Fla530, 116S449. [b] **Excluding lands from taxing district** held not to render tax illegal. 95Fla530, 116S449.

716-47 327Ill236, 158NE383.

717-48 155Miss160, 124S262(2dcase).

717-50 270US378, 46SCt236, 70Led641 (holding county commissioners cannot assess part of costs of repairing ditches and spillway and straightening river on lands outside original drainage district).

717-54½-New. Where there had been accretions to tracts of land included in the original drainage district bounded by a navigable river, the land that had been accreted since the district was originally created was not subject to assessment for subsequent work. 208Iowa987, 223NW904.

717-63 43Ida803, 255P411. [b] **Lands of Indians.**–140Okl204, 282P457.

717-64 [a] (2) Legislature has power to provide that public property is benefited by improvement and may be assessed or charged with its proportionate share of benefits accruing therefrom. 317Mo933, 297SW1.

717-65 93Fla672, 112S561.

718-69 21F(2d)267; Mo 278SW387.

718-71 But see 91CalA143, 266P969. [a] **Municipal corporations** are not bound by general words in statute to effect that all real property in district should be and remain liable for taxes. 207Cal697, 280P360. [b] **City is not liable for special assessments on property privately owned at time of creation of flood control, sanitation, and drainage district, but which city subsequently acquired and used for public purposes before assessments were made.** 207Cal697, 280P360.

718-73 317Mo933, 297SW1. See also 336Ill267, 168NE283. But see 127Kan833, 275P191. [a] (2) Under Circuit Court Drainage Law assessments against public roads and highways must, in counties under township organization, be paid by township in which they are located rather than by county. 317Mo933, 297SW1. [f] **In Arkansas.**–179Ark91, 14SW(2d)226.

718-75 179Ark567, 17SW(2d)299; 247Mich542, 226NW245 [quotCyc]; 118Nebr43, 223NW639. [b] **In Arizona.**–285P998.

719-80 But see Ill 172NE13. [a] (3) Reduction of levy of sanitary district of Chicago to fifteen cents on hundred dollars held not objectionable to taxpayer. Ill 172NE13. [e] **Limitation of amount to be paid in any one year** applies to assessments to pay maintenance costs as well as to assessments to pay construction costs. 174Ark659, 298SW489.

719-83 [a] **Anticipated surplus** of $3,115 held not excessive. 172Ark1059, 291SW810.

719-86½-New. Taxpayers cannot be required to pay more than the actual cost of the drain, including necessary bridge work and expenses incident to the proceedings. 232Mich380, 205NW127.

719-86½-New. Landowner suffers no injustice by being required to pay assessment of drainage calculated on reasonable basis. 201Cal451, 257P504.

719-89 See 225Ky86, 7SW(2d)827.

720-93 95Fla530, 116S449; 42Ida284, 244P1099; 43Ida803, 255P411; 43Ida703, 255P638; 336Ill267, 168NE283; Ill 173NE90. [d] 95Fla530, 116S449. [m] **Special assessment is to be spread** so that no land will be burdened with more than its proportionate cost of improvement. 319Ill379, 150NE259.

721-95½-New. Where landowners have prior to construction of drainage district works effectively drained their land and the drainage district has not improved the situation, they are not liable for cost. Alta [1927] 2DomLR591.

722-98 200Iowa557, 204NW311 (many factors enter into value of drainage to railroad right of way that do not obtain in consideration of benefits to farm land); 208Iowa748, 226NW1 (sufficient credit held not to have been allowed for condition of land by reason of improvement existing theretofore); SD 212NW489. [d] **Set-off of benefits from work done by landowner.**–118Nebr43, 223NW639.

722-1 28F(2d)56; 173Ark372, 293SW1031; 95Fla530, 116S449.

723-4½-New. In order that an assessment for benefits may be levied and collected, there must be a determination of benefits accruing. 43Ida703, 255P638.

723-4⅓-New. "Benefits," as used in the statute, means those calculated at the time of construction of the drain. ND 228NW839.

723-5 164La263, 113S842.

724-18 [a] **In Missouri.**–310Mo171, 275SW44.

724-24 [g] **Determination of assessment from calculations of engineer** held not delegation of authority by commissioners. 179Ark567, 17SW(2d)299.

725-26½-New. Much must be left to the discretion of the officers and the court reviewing the proceedings. 89CalA322, 264P572.

725-34 [c] (2) Certification of assessments without authority of law under statute. 83 **IndA**331, 147**NE**311. [d] **In Kansas.**–130**Kan**290, 286**P**206.

725-35 200 **Iowa**557, 204**NW**311 (engineer's recommendations should not be set aside for slight or transient reasons).

726-39 142**Miss**756, 107**S**545.

726-40 [a] **In Iowa.**–202 **Iowa**33, 209 **NW**456.

726-41 142**Miss**756, 107**S**545. See also 178**Ark**346, 10**SW(2d)**854. [a] (2) 319 **Ill** 379, 150**NE**259. [e] **Resolution stating amount of assessment** not required before entering order making assessment. 317 **Ill** 92, 147**NE**479.

726-41½-New. **In Arkansas** county court of one district has jurisdiction over matters of assessments, although lands affected are situated in the district where the court sits and another district. 171**Ark**802, 286**SW**962.

727-46 200**Cal** 550, 254**P**542; 203 **Iowa** 726, 213**NW**435; 223**Ky**346, 3**SW(2d)** 653 (further assessment). But see 144 **Wash**320, 257**P**851.

727-47 203 **Iowa**726, 213**NW**435. [h] See also 153**Tenn**469, 284**SW**372.

728-48 [b] (1) Contra 203 **Iowa**726, 213**NW**435.

728-52 170**Ark**1138, 282**SW**988; 158 **Tenn**166, 11**SW(2d)**882.

728-53 [b] (9) Publication in newspaper "issued" in county is sufficient, though newspaper is printed across state and county line. 176**Ark**474, 2**SW(2d)** 1079.

728-53½-New. Right to hearing in opposition to proposed apportionment of benefits does not extend to adjourned meeting where no protests were filed at date originally set. **SD** 229**NW**932.

728-53½-New. That property owner filed protest against prior tentative apportionment does not entitle him to hearing on subsequent tentative apportionment against which he filed no protest. **SD** 229**NW**932.

729-54 **Ariz** 285**P**998 (adoption of state tax commission's assessment and appraisement of railroad property partially within or in vicinity of district and appraisement of like property in district unauthorized); 200**Cal** 550, 254**P**542; 127**Kan**283, 273**P**425; 152**Miss**872, 120**S** 184; 157**Miss**336, 128**S**91; **Mo** 31**SW (2d)**201 (liability of townships); 119 **Or** 351, 248**P**157; 153**Tenn**469, 284**SW**372.

729-56 41**F(2d)**433; 172**Ark**1059, 291 **SW**810; 173**Ark**372, 293**SW**1031; 42 **Ida**284, 244**P**1099; **Ill** 173**NE**90; 225**Ky** 610, 9**SW(2d)**727; 157**Miss**336, 128**S**91. [j] **Subdistrict organized under general law to become part of drainage district** organized under special act becomes separate entity for assessment of benefits. 171**Ark**739, 285**SW**382. [k] **Assessments held arbitrary and fraudulent.**–249**Mich**138, 228**NW**525. [l] **Application of tentative apportionment.**–**SD** 231**NW**531. [m] **Assessments for benefits received from work by adjoining district** are levied in manner of original assessments. **Ill** 173**NE**90 (provisions regarding additional assessments are inapplicable).

730-57 12**F(2d)**909 (Missouri statute); 331 **Ill** 68, 162**NE**184; 208 **Iowa**1332, 225**NW**264. [a] (2) Under statute a meeting of commissioners to confirm classification of lands of drainage district is lawfully held at county clerk's office, though such office is not within limits of drainage district. 317 **Ill** 92, 147**NE**479. [c] (2) Classification of portion of land at zero or as not within benefits did not in effect detach land from district and render classification void. 317 **Ill** 92, 147**NE**479. [e] (3) Comparison of assessment of farm lands per acre with assessment of railroad right of way per acre furnishes no necessary basis for determining equitableness of assessment on railroad right of way. 199 **Iowa**857, 201**NW**115. [h] **Unanimous adoption of proposed classification,** not open to objection that such classification was not made by commissioners but by some one else. 317 **Ill** 92, 147**NE** 479.

731-58 208 **Iowa**987, 225**NW**953.

731-60 28**F(2d)**56; 171**Ark**1088, 287 **SW**380; 208 **Iowa**748, 226**NW**1 (amount of assessment against quarter section as general district benefits held not out of proportion with assessment against other lands); 143**SC**178, 141**SE**274.

731-61 179**Ark**567, 17**SW(2d)**299. [a] **Estimated requirement,** based on anticipated delinquencies, held not speculative or unreasonable. 172**Ark**1059, 291**SW** 810.

731-61½-New. Under a statute, providing that the county court shall be deemed always open for the transaction of business, orders establishing a drainage district and apportioning assessments made, as shown by the drainage record, required by statute, at session held pursuant to adjournment, were valid, although the regular minute book indicated that the county court was not in session on their date. 158**Tenn**166, 11**SW(2d)**822.

731-63 208 **Iowa**1332, 225**NW**264.

731-64½-New. Widening of a drainage ditch, in order properly to care for waters discharged into the ditch from another drainage district, did not, as respected apportioning of assessment constitute wholly "repair work," in view of the fact that the ditch as originally constructed was sufficient until water was brought therein more rapidly by reason of a subsequent improvement, thereby largely destroying the effectiveness of the ditch to accomplish the purpose intended. 208 **Iowa**987, 223**NW**904.

731-64½-New. Where, in order to rectify inadequacy of outlet of an existing district a new district is organized consisting of lands within the existing district and other lands but all the money is expended in the added lands, the assessment of lands within the limits of the original district must be computed on the basis of benefits acquired by the furnishing of such lands with an adequate outlet. 200 **Iowa**441, 204**NW**242.

731-68 28**F(2d)**56; 36**F(2d)**650 (assessment held unconstitutional); 95**Fla** 530, 116**S**449; 319 **Ill** 379, 150**NE**259; 331 **Ill** 68, 162**NE**184; 200 **Iowa**557, 204 **NW**311 (excessive); **Utah** 269**P**1023. [c] **Assessment held** to be in excess of benefit to be derived from improvement. 319 **Ill** 379, 150**NE**259. [d] **Constitutional guaranties** preclude assessment of one landowner beyond benefits to pay for default of another landowner. **Utah** 269**P**1023. [e] **Interest may, in proper case,** be added to benefit accruing to land. **Utah** 269**P**1023.

732-72 12**F(2d)**909.

732-74 173**Ark**372, 293**SW**1031; 31**NM** 7, 240**P**482, 488 [quotCJ]; 143**SC**178, 141**SE**274, 276 [citCJ].

732-75 31**NM**7, 240**P**482, 498 [quotCJ]; 143**SC**178, 141**SE**274, 276 [citCJ].

732-78 200 **Iowa**441, 204**NW**242.

732-79 172**Minn**295, 216**NW**229.

732-80 But see 208 **Iowa**987, 223**NW** 904.

733-84 **MoA** 274**SW**1108 (as to tax books).

733-88 160**Ga**793, 129**SE**62 (description making reference to plats affording information for accurate survey); 158 **Tenn**166, 11**SW(2d)**882.

734-92 158**Tenn**166, 11**SW(2d)**882.

734-99 [b] **Damages.**–170**Ark**1138, 282 **SW**988.

734-4 **Mo** 31**SW(2d)**201; 158**Tenn**166, 11**SW(2d)**882; 144**Wash**320, 257**P**851. [i] **That county commissioners sat with county judge on hearing** does not render void decree assessing benefits and damages. 115 **Or**541, 237**P**684, 1117, 1118, 239**P**193. [j] **Defective description of property** by other property owners is no defense where such misdescriptions are not definitely pointed out. 179**Ark** 567, 17**SW(2d)**299.

735-7 164**La**263, 113**S**842.

735-12½-New. That the final assessment roll of a drainage district was prepared by district directors instead of commissioners did not invalidate the assessment roll, where the county court adopted the assessment roll by a decree reciting that no parcel was assessed in excess of benefits or more or less than its proportionate share. 158**Tenn**166, 11 **SW(2d)**882.

735-12½-New. Where no notice or opportunity to be heard was given, assessments are invalid. **Wash** 286**P**89.

736-20 179**Ark**567, 17**SW(2d)**299.

736-27 32**Ariz**322, 257**P**990; 337 **Ill** 540, 169**NE**726 (estoppel to claim lands not benefited); **IndA** 170**NE**344. See also 315**Mo** 597, 286**SW**93, 94 [citCJ]. [a] (2) 118**Nebr**43, 223**NW**639. (6) Railroad company failing to contest inclusion of right of way within drainage district held estopped to question inclusion on ground that lands were not agricultural. 32**Ariz**322, 257**P**990. (7) Persons having homestead locations on land of United States, who sought benefit of annexation of lands to drainage district, acquired it, and are enjoying it, cannot be heard to question validity of assessments invited by them for very purpose of securing benefits conferred. 278**US**421, 49**SCt**181, 73**Led**436.

736-28 276**US**567, 48**SCt**396, 72**Led** 703; 173**Ark**372, 293**SW**1031.

736-30 4**F(2d)**865; 315**Mo** 597, 286**SW** 93, 94 [quotCJ]; **Wash** 286**P**89.

737-31 [a] **Conduct of landowner's outside district** before notice of assessments was published held not to estop them from attacking validity. 270**US** 378, 46**SCt**236, 70**Led**641.

737-39½-New. **Failure to object to original assessment** bars complaint that valuation was discriminatory. 173**Ark** 372, 293**SW**1031.

737-41 204 **Iowa**720, 216**NW**8; **SD** 213 **NW**952. [f] **Notice.**–204 **Iowa**720, 216 **NW**8. [g] **Evidence of owners objecting to assessment held insufficient** to overcome case made by commissioners. 337 **Ill** 540, 169**NE**726. [h] **Right of townships to hearing.**–**Mo** 31**SW(2d)**201.

738-42 [c] 200 **Iowa**557, 204**NW**311.

738-43 200**Cal** 550, 254**P**542; **SD** 213 **NW**952.

738-44 200**Cal** 550, 254**P**542 (grounds must be stated); 208 **Iowa**987, 223**NW** 904.

738-45 204 **Iowa**720, 216**NW**8.

738-46½-New. Objections filed by the owner of land are available to a subsequent grantee who became such after the objections were filed and before they were passed upon by the board of supervisors. 200 **Iowa**441, 204**NW**242.

738-46½-New. Extension of time within which protest may be filed and issues tendered is not authorized, and unless protestant files written objection at time and place indicated in notice, right to do so is waived. **SD** 213**NW**952.

738-46¼-New. Where board's duty is to make equalization of benefits, it may adjourn from time to time and continue hearings from day to day until final equalization is fixed. **SD** 213**NW**952.

738-47 153**Tenn**469, 284**SW**372 (provision denying landowner right to reopen question of benefits on objection to assessments not denial of due process where other statute permits him to contest inclusion of land in proposed district). [a] **Mandamus lies by one property owner in district** to compel proper description of property of another owner therein for sale under assessment. 203 **Iowa**643, 213**NW**257.

738-49½-New. In Louisiana validity of election of special tax is not maintainable unless brought within sixty days after election. 159**La**422, 105**S**418 (regularity of taxes necessary to pay bond issue is presumed after such time).

738-49½-New. That improvements were never completed held not ground for setting assessment aside. **Ark** 293 **SW**381.

738-49¼-New. In reviewing assessments of benefits, the supreme court must consider that assessors were more familiar with conditions than it can be. 174**Ark**381, 295**SW**381.

738-49½-New. Some drainage laws provide an exclusive method for a landowner to litigate the question whether his land is benefited and, if so, the amount of benefit. 177**Minn**598, 225**NW** 909.

739-51 172**Ark**297, 288**SW**705. [a] **Instructions.**–**Ill** 173**NE**115. [b] **Opinions whether district would be benefited** are incompetent. **Ill** 173**NE**115.

739-54 199 **Iowa**867, 201**NW**115; 172 **Minn**295, 215**NW**204.

739-56 **Ill** 173**NE**115 (presumption

then loses force).

739–58½–New. An order sustaining objections to an assessment is held conclusive on contractor and his assignees. 204 **Iowa**720, 216**NW**8.

739–64½–New. A confirmation of an assessment for the cost of construction and benefits cannot be held to have been induced by fraud on the court where the facts were known to the court, commissioners, landowners, and others interested. 199**Wis**230, 225**NW**331, 63 **ALR**1165.

739–66 336 **Ill** 267, 168**NE**283.

741–84 **Miss** 128**S**339.

741–85 12**F(2d)**909; 155**Miss**160, 124**S** 262(2dcase); 153**Tenn**469, 284**SW**372.

741–86½–New. That the supreme court may not review the judgment of the commissioner and board of review does not prevent it from doing equity. 249**Mich** 138, 228**NW**525.

741–92 **Ill** 173**NE**108.

742–93 [a] **Action for relief** must be taken within twenty days. 174**Ark**381, 295**SW**381.

742–93½–New. Purchaser of property after owner and vendor has filed objections to assessment may appeal from board's action in overruling objections without refiling objections in his own name, he being real party in interest. 200 **Iowa**441, 204**NW**242.

742–99 208 **Iowa**748, 226**NW**1; **Oh** 171 **NE**103.

742–2 **Oh** 171**NE**103.

742–3 335 **Ill** 147, 166**NE**497.

742–6 337 **Ill** 540, 169**NE**726; **MoA** 281 **SW**60.

743–10 26**F(2d)**218; 200 **Iowa**441, 204 **NW**242; **Oh** 171**NE**103.

743–12 See also 28**F(2d)**56; 89**CalA** 322, 264**P**572. [a] **Assessment honestly and fairly** made cannot be set aside because it lacks mathematical precision. 28**F(2d)**56.

743–13 118**Nebr**43, 223**NW**639.

744–19½–New. Harmless error. Where court admits evidence as to feasability of proposed drainage or reclamation project as to exceptor, refusal to declare law thereon, if error, is harmless. 12 **F(2d)**909.

744–19⅓–New. An assessment, invalid as to appellant, must be enjoined, although it disturbs the present distribution of the cost. 28**F(2d)**56.

744–19¼–New. Appellate court is bound to make proper apportionment and assessment, affecting substantial rights of parties. **SD** 231**NW**531.

744–23 171**Ark**1088, 287**SW**380; 201 **Cal** 451, 257**P**504.

745–38 95**Fla**530, 116**S**449; 148**Miss**7, 113**S**908; 158**Tenn**166, 11**SW(2d)**882.

745–39 **MoA** 274**SW**1108; 155**Tenn**590, 296**SW**354.

745–42 170**Ark**1138, 282**SW**988.

746–49 [a] **Purchaser pending action to set aside judgment assessing land for drainage taxes** stands in vendor's shoes. 229**Ky**189, 16**SW(2d)**1036.

746–50 73**CalA**361, 238**P**760; 208 **Iowa** 1332, 225**NW**264; **ND** 228**NW**839. But see 97**Fla**1007, 122**S**570. [c] **Cancellation of assessment.**–83 **IndA**331, 147**NE** 311.

746–51 229**Ky**189, 16**SW(2d)**1036; 235 **Ky**755, 32**SW(2d)**338.

746–53 **ND** 228**NW**839 (proof of fraud insufficient).

747–54 203 **Iowa**726, 213**NW**435; 235 **Ky**755, 32**SW(2d)**338; 250**Mich**135, 229 **NW**609. [a] (1) 270**US**378, 46**SCt**236, 70**L ed**641. [b] 203 **Iowa**726, 213**NW** 435. [i] (3) Allegation that complainant's property does not need drainage and will not receive benefit from drainage district is held insufficient on demurrer. 95**Fla**530, 116**S**449. (4) Legislative determination of benefits from drainage is held not subject to general allegations of no benefits, in absence of specific allegations that there could have been no conceivable basis for accrual of benefits. 95**Fla**530, 116**S**449. (5) Bill held not to show abuse of legislative power in including in drainage district lands alleged to need no drainage and subjecting them to tax. 95**Fla** 530, 116**S**449. (6) Petition by landowner against drainage commissioners to enjoin levying of drainage assessments, alleging that part of project was abandoned, has been held to state a cause of action. 228**Ky**633, 15**SW(2d)**451. [k] **Where same property has been assessed against different persons as owner and** sheriff has refused to allow person not owning such land to pay assessments on lands owned by him without paying such assessment on land not owned by him, court of equity has jurisdiction to cancel wrongful assessment against him, although time to object and appeal from assessment has passed. 141**Miss**542, 106**S**774. [l] **Levy may be void for uncertainty of description** and afford good grounds for enjoining sale of the property. 160**Ga**793, 129**SE**62.

747–56 [b] **Decree enjoining levy under excessive assessment** of benefits does not preclude lawful assessment. 36 **F(2d)**650.

747–58½–New. Where immediately upon presentation of petition against commissioners to enjoin sale by sheriff court signed restraining order against sale until further order, and appointed receiver for board of commissioners, such act of the court was erroneous as a grant of injunction and appointment of receiver without hearing. 161**Ga**634, 131**SE**495.

747–58⅓–New. Refusal to enjoin sale of land under assessment on ground of insufficiency of description not error where description made reference to plats affording information for accurate survey. 160**Ga**793, 129**SE**62.

748–59 30**F(2d)**700.

748–59½–New. Limitation against suit to set aside assessments, or to enjoin collection of assessments, does not apply to a special assessment which is entirely illegal. 34**F(2d)**357.

748–60 270**US**378, 46**SCt**236, 70**L ed**641 (proceeding to enjoin assessment on lands outside of district held not premature).

748–64 200 **Iowa**557, 204**NW**311.

748–65½–New. A corporation acquiring land at foreclosure sale under a deed of trust stands in the same position as that in which the mortgagor would have stood as respects the right to enjoin assessment or levy of drainage taxes thereon. 30**F(2d)**700.

748–65⅓–New. Holders of district's bonds have been held indispensable parties in a suit to restrain assessment and collection of taxes. **TexCivA** 17 **SW(2d)**109.

748–70½–New. Evidence held to authorize finding that description of land in levies was insufficient. 160**Ga**793, 129 **SE**62.

748–70⅓–New. In action to annul assessment, exclusion of evidence as to benefits from reclamation district held properly excluded. 73**CalA**361, 238**P**760.

748–74 324 **Ill** 81, 154**NE**403; 155**Miss** 160, 124**S**262(2dcase); **MoA** 281**SW**60; **Wis** 230**NW**57. [h] **Commissioners held to have power** to increase rate per centum of betterments to be collected in any one year. 172**Ark**1059, 291**SW**810.

749–75 324 **Ill** 93, 154**NE**437. [a] **Construction of tile drain along line of ditch** when latter filled with silt and vegetation so as to be inadequate outlet held "new construction." 324 **Ill** 93, 154 **NE**437.

749–76½–New. An additional assessment may be made where the actual cost of a drain exceeds the estimated cost. 232**Mich**380, 205**NW**127.

749–76⅓–New. An additional assessment may include a shortage caused by enjoining the collection of the tax levied on a part of the district. 232**Mich**380, 205**NW**127.

749–80 232**Mich**380, 205**NW**127.

749–83½–New. Drainage commissioners are under no obligation to make an additional assessment until the amount which may legally be reassessed has been determined. 232**Mich**380, 205**NW** 127.

749–83⅓–New. A statute providing for additional assessments, if the original assessment is inadequate, does not prohibit further construction before an additional assessment is levied nor prohibit further liability unless an additional assessment is made prior to continuation of construction. 199**Wis** 230, 225**NW**331, 63**ALR**1165.

749–83¼–New. Where additional expenditures over the original cost of construction were actually incurred, landowners and commissioners acquiescing therein and receiving the benefits without protest are estopped to prevent an additional assessment. 199**Wis**230, 225 **NW**331, 63**ALR**1165.

749–83½–New. Where an original assessment for cost of construction was well within the benefits and was confirmed, the court's jurisdiction is established and the project is one for further execution. 199**Wis**230, 225**NW** 331, 63**ALR**1165.

749–83⅙–New. Landowners agreeing that voluntary subscriptions should not be considered part of the assessment for the cost of construction, in order that the cost should not exceed the benefits, are estopped, after receiving benefits, to claim that the scheme was fraudulent and that additional assessment was void because such subscriptions became part of the cost. 199**Wis**230, 225**NW** 331, 63**ALR**1165.

749–83⅐–New. Under statutes a second assessment may be had to assess lands not included in the original district but benefited thereby. 155**Miss**160, 124**S**262 (2dcase).

749–88 324 **Ill** 81, 154**NE**403.

749–90½–New. In some jurisdictions circuit court may order commissioners of drainage district to apply to county court to increase levy on assessment of benefits pledged to secure bonded indebtedness for purpose of paying judgment against district, 169**Ark**592, 276 **SW**604.

749–90⅓–New. where surplus of assessed benefits is sufficient to meet all reasonable future expenses and pay judgment after providing for bonded indebtedness. 169**Ark**592, 276**SW**604.

749–91 200 **Iowa**441, 204**NW**242 (under statutory rule for equitable distribution of cost of new improvement, original district is chargeable for benefits received by it from new district furnishing adequate outlet where original outlet had become obstructed); 200 **Iowa** 557, 204**NW**311 (supervisors cannot act arbitrarily or in manner to create excessive assessment). [a] **Drainage district held not entitled to limit assessment** for drain to only such lands as were benefited. 324 **Ill** 81, 154**NE**403.

749–92 155**Miss**160, 124**S**262(2dcase).

750–94½–New. Interest on assessments for drainage construction is not part of cost of construction in determining benefit. **Wis** 230**NW**57.

750–98 [c] 324 **Ill** 93, 154**NE**437.

750–99 [a] **Petition held insufficient.**–**Ind** 170**NE**537.

750–99½–New. filing of bond with petition; **Ind** 170**NE**537.

750–2 335 **Ill** 147, 166**NE**497.

750–4 [a] **Where view is taken at request of party** at close of evidence, he waives objection that such view is premature. 335 **Ill** 147, 166**NE**497.

750–6½–New. An order denying an additional assessment on the ground that completion of the project is not feasible is not res judicata in an action involving additional assessments to meet expenditures already made. 199**Wis**230, 225**NW**331, 63**ALR**1165.

750–11 230**Mich**108, 202**NW**996.

751–17 235**Ky**689, 32**SW(2d)**22 (lien attaches to proceeds of timber on land); 190**NC**672, 130**SE**497 (assessment is in rem and not in personam); 159**Tenn**187, 17**SW(2d)**16. [b] **Destruction of drainage district** as a legal entity by decision of state court held not to nullify or affect lien. 15**F(2d)**145.

751–18 [a] **In North Carolina.**–195**NC** 176, 141**SE**533. [b] **Under Missouri statute** lien annually accrues and becomes fixed incumbrance at time board of supervisors determine and levy amount of annual installment of total taxes. **Mo** 28**SW(2d)**650.

751–20 173**Minn**186, 217**NW**101.

751–22½–New. Right to remove timber where installments become due subsequent to removal see **Miss** 130**S**910.

751–24 **IndA** 170**NE**344.

51-24½-New. Purchase of the assessed property does not affect the lien. 235**Ky** 689, 32**SW(2d)**22.

751-29½-New. Special assessments are subject to lien of prior mortgage of ecord, if mortgagee was not given notice f proceedings. 114**Nebr**596, 209**NW**256.

752-31 41**F(2d)**433.

752-31½-New. Statute giving district tax lien preference over other liens construed as referring to contract liens and not lien for taxes of state or other improvement districts. 181**Ark**898, 28 **SW(2d)**721.

752-33 But see 199**Wis**85, 225**NW**873.

752-36 41**F(2d)**433 (cost or equivalent). [b] (2) A statute permitting landowners within boundaries of drainage district to present district warrants in payment of assessments levied is valid, and makes county treasurer's receipt of warrant in payment of assessment mandatory. 206**Cal** 242, 273**P**1064. [d] **Statute permitting landowner to offer drainage district bond in payment** held invalid as impairing obligation of contract. **Wis** 231**NW**588.

752-38 155**Tenn**590, 296**SW**354. See also 225**Ky**610, 9**SW(2d)**727.

752-45 [b] **Interest not payable on** original assessment prior to date of delinquency. 193**NC**627, 137**SE**716.

753-48 193**NC**627, 137**SE**716.

753-49 **Mo** 31**SW(2d)**201.

753-50½-New. Waiver of penalty for failure to pay drainage tax within time may not be implied from failure to seasonably demand it. **Mo** 31**SW(2d)** 201.

753-52 172**Ark**414, 288**SW**910; **Wash** 286**P**89.

753-53 172**Ark**414, 288**SW**910.

753-55 251**Mich**495, 232**NW**213(2d case).

753-57⅓-New. Railway company, which on certiorari failed to review validity of drain tax assessment claimed to be exempt and which was denied relief in two equity suits because of failure to avail itself of such remedy, cannot revive its right of review by paying a tax under protest and recovering it in an action at law. 236**Mich**254, 210 **NW**331.

753-59½-New. Whether personal judgment could be rendered for nonpayment of taxes held not in issue. 32**Ariz**322, 257**P**990.

753-61 152**Miss**872, 120**S**184. [c] (2) Drainage commission may maintain suit to foreclose lien of assessment in analogy to foreclosure of tax lien, notwithstanding statutory provision for collection by sheriff or collector. 190 **NC**672, 130**SE**497. [d] **Assessments against public roads and highways** (1) cannot be enforced by foreclosure of lien and sale (317**Mo** 933, 297**SW**1), (2) but may be enforced by ordinary action against political subdivision of state charged with their upkeep (317**Mo** 933, 297**SW**1). (3) It must be assumed that legislature intended that such assessments should be enforceable by adequate remedy. 317**Mo** 933, 297**SW**1. [e] **In Georgia.**–166**Ga**809, 144**SE**242.

754-65½-New. Statutes providing for proceedings in rem upon notice by publication have been repealed in some jurisdictions. 170**Ark**837, 281**SW**378.

754-65½-New. Liability of the county to the drainage district for the proceeds of a drainage assessment certificate bid in by the county between 1919 and 1923 see 199**Wis**476, 227**NW**12.

754-69 67**Utah**507, 248**P**479 (drainage district held not liable to county for services of county assessor and treasurer in collecting drainage taxes levied by district).

754-70 [a] **Statute authorizing county courts** to increase township collector's fees applies to circuit court, drainage districts. **Mo** 29**SW(2d)**716. [b] **Percentage of tax retained by collectors.**–**Mo** 29**SW(2d)**716.

754-72½-New. Statute authorizing appointment of receiver to collect drainage taxes held not void. 41**F(2d)**433.

755-84 41**F(2d)**433; 175**Minn**206, 220 **NW**608.

755-88½-New. In a suit against a county upon a special assessment for a drain, a claim in favor of the county for the cost of bridges constituting part of the cost of the establishment of the drain may be set off. 209**Ky**193, 272 **SW**387.

755-88½-New. Matters not constituting defenses. 41**F(2d)**433.

755-90 176**Ark**545, 3**SW(2d)**306. [a] **Failure to publish notice to nonresident landowners is not shown** by order of county court that summons should be issued to certain persons whose lands were contained in proposed district. **MoA** 286**SW**832.

755-92 179**Ark**988, 18**SW(2d)**1035; **MoA** 274**SW**1108. [c] **Limitations must be pleaded.**–**MoA** 274**SW**1108. [d] **In North Carolina.**–193**NC**21, 136**SE**248. [e] **In Arkansas.**–179**Ark**988, 18**SW(2d)** 1035.

755-94 **Mo** 31**SW(2d)**201.

756-99 27**F(2d)**613.

756-4 170**Ark**837, 281**SW**378. [b] **Owner should be summoned** in manner provided by general law where statute does not provide for proceeding in rem. 170**Ark**837, 281**SW**378.

756-8 [a] **Failure to allege assessment against each forty-acre tract** does not render petition demurrable where it is not attacked by motion to make more definite and certain. **MoA** 286**SW**832.

757-28½-New. Answer held insufficient. 41**F(2d)**433.

757-38 **Mo** 31**SW(2d)**201.

757-40 200**Cal** 550, 254**P**542; 155**Tenn** 590, 296**SW**354.

758-41½-New. Under statute providing that general allegation of incorporation of district is sufficient, defendant has burden of sustaining attack on validity of district. 172**Ark**297, 288**SW**705.

758-42 **MoA** 286**SW**832 (drainage tax books).

758-46 144**Wash**320, 257**P**851 (evidence held inadmissible).

758-52 5**F(2d)**605 (evidence held to show that owing to elevation and location lands would receive no benefits); 155**Tenn**590, 296**SW**354. [b] **Evidence held sufficient.**–172**Ark**297, 288**SW**705; 319 **Ill** 379, 150**NE**259.

758-53 155**Tenn**590, 296**SW**354; 160 **Tenn**619, 28**SW(2d)**351. [a] **Testimony of taxpayer that he had never received service of summons** and knew nothing of order of publication is insufficient to overcome prima facie case. **MoA** 286 **SW**832.

758-64 **MoA** 286**SW**832.

759-72 174**Ark**698, 296**SW**363.

759-73 174**Ark**698, 296**SW**363.

759-82½-New. Statutes authorize collection of assessment out of any other property real or personal of owner of assessed land if sheriff is unable to collect assessment out of assessed land. 193**NC**627, 137**SE**716 (statute not retroactive).

759-84½-New. Sale on notice designating legal owner in possession as "supposed owner," not including first mortgage, held valid. 174**Ark**698, 296**SW** 363.

759-89 [a] **Title acquired.**–176**Ark**315, 3**SW(2d)**964. [b] **Authority to resell.**–176**Ark**315, 3**SW(2d)**964.

760-94 93**Fla**124, 111**S**504.

760-5½-New. A complaint alleging that plaintiff paid all of a drainage ditch assessment against realty owned by him, and that nothing further is due or owing him thereon, that the drainage commissioner has certified to the county auditor that there is still due a specified sum on the assessment, and that the county treasurer has advertised and is threatening to sell plaintiff's realty therefor, states a cause of action for injunction. **Ind** 146**NE**507.

760-8 [d] **In Georgia.**–163**Ga**136, 135**SE** 720.

761-23 310**Mo** 526, 275**SW**927 (warrants of drainage districts by statute made subject to law relating to county warrants).

761-33½-New. In North Carolina unexpended funds may be distributed by drainage commissioners after determination that it is unnecessary to hold such funds. 192**NC**652, 135**SE**781.

761-33⅓-New. Administrator whose intestate paid assessment is entitled to refund rather than heirs at law. 192**NC** 652, 135**SE**781.

DRAW

762-27 86 **IndA**372, 158**NE**243.

DRIVE

765-2⅓-New. ; to impel the motion and quicken. Century D. [quot 80**CalA** 109, 250**P**693].

DRIVER

765-5 [f] **Motor vehicles.**–78**Mont**97, 252**P**382.

DRUG

767-37 173**Ark**674, 293**SW**714.

DRUGGISTS

770-10 [a] **Registered pharmacist** is one who has qualified by training, education, and experience and is so certified. 206 **Iowa**314, 217**NW**545. [b] **Persons held not pharmacists.**–152**Miss**54, 118**S** 360. [c] **Practice of pharmacy** is preparation of medicine, filling of prescriptions of physicians, and compounding such drugs as are usually dangerous to life or health and are usually handled under prescriptions of physicians. 152 **Miss**54, 118**S**360.

771-15 206 **Iowa**314, 217**NW**545; 127 **Misc**538, 217**NYS**217; **SD** 215**NW**487; 155**Tenn**476, 295**SW**469, 54**ALR**725. But see 278**US**105, 49**SCt**57, 73**L ed**204.

771-16 155**Tenn**476, 295**SW**469, 54**ALR** 725.

771-17 155**Tenn**476, 295**SW**469, 54**ALR** 725.

772-28½-New. Statute requiring every owner of a pharmacy, except unlicensed owners when the act was passed, to be licensed is reasonable and constitutional. 22**F(2d)**993; 127**Misc**538, 217**NYS** 217.

772-29 172**Minn**132, 214**NW**766, 767 [cit CJ]; 155**Tenn**476, 295**SW**469, 54**ALR** 725. [a] **Act regulating sale of poisons** held not unconstitutional. 155**Tenn**476, 295**SW**469, 54**ALR**725.

772-31 **SD** 215**NW**487.

772-32 206**Cal** 497, 274**P**974. [b] **That medicines or remedies are usually put in sealed packages or containers, with directions as to their use,** is not alone sufficient to remove them from realm of regulation. 206**Cal** 497, 274**P**974.

772-35 32**Ariz**222, 257**P**366, 54**ALR**736; **SD** 215**NW**487.

772-35½-New. A statute requiring all sales of original package medicines, other than patent or proprietary medicines, to be made by, or in the presence and under the direct and immediate supervision of, registered pharmacists, is not unconstitutional as a grant of special privileges and a denial of equal protection of the law. 206**Cal** 497, 274**P**974.

772-35⅓-New. In so far as a statute limits to licensed pharmacists the sale of all articles in the United States Pharmacopœia or National Formulary, it transcends the police power and is invalid. 118**Nebr**562, 225**NW**709.

772-35¼-New. A law restricting to registered pharmacists the sale of such articles as salt, soda, soap, distilled water, cornstarch, and other useful and harmless articles is beyond the police power and is invalid. 118**Nebr**562, 225 **NW**709.

772-35½-New. A statute prohibiting any corporation from establishing, owning, or conducting any pharmacies other than those owned or conducted by it at the time of its passage, unless all members of such corporation are registered pharmacists, is violative of U. S. Const. Amendm. XIV § 1. 294**Pa**142, 144**A**97.

772-35⅙-New. A statute prohibiting any corporation from establishing, owning, or conducting any pharmacies other than those owned or conducted by it at the time of its passage, unless all members of such corporation are registered pharmacists is violative of the due process clause. 278**US**105, 49**SCt**57, 63**L ed** 204.

772-43 206**Cal** 497, 274**P**974; 172**Minn** 132, 214**NW**766, 767 [citCJ]. [b] **Camphorated oil** is not patent or proprietary medicine within exception of statute. **NJ** 141**A**587.

773-44 [h] **Continuance in business.**-127**Misc**538, 217**NYS**217.

773-45 127**Misc**538, 217**NYS**217.

773-46 [a] **Refusal to renew certificate because of commission of felony by applicant** is not abuse of discretion. **Oh** 173**NE**192.

773-48 172**Minn**132, 214**NW**766, 767 [citCJ]. [b] **Construction of statute.**-10**PaDist&Co** 147 (opinion of attorney-general).

774-49½-New. A statute requiring that a place of business be at all times in charge of a registered pharmacist is held not violated by leaving the store in charge of an assistant while the owner was within call, where the assistant was instructed not to sell and did not sell drugs. 173**Minn**322, 217**NW**342.

774-51 [b] **Single sale of camphorated oil by grocer or tradesman** is violation of New Jersey Pharmacy Act. **NJ** 141**A** 587.

774-52 [a] **Aspirin** is drug within statute. **Iowa** 228**NW**288; 172**Minn**132, 214**NW**766.

774-54½-New. A person is "engaged in business" of selling or offering for sale enumerated articles where he has them for sale, for profit, to any person who may apply, although it is not his exclusive occupation. **Iowa** 228**NW**288 (grocer keeping aspirin for sale).

774-56 But see **SD** 215**NW**487.

774-57 [a] **Aspirin** is not proprietary medicine within exception. **Iowa** 228 **NW**288.

775-82 But see **Wis** 231**NW**261.

776-90 [d] **In North Dakota.**-228**NW** 830.

776-92 See also 32**PortoRico** 159.

776-93 See also 32**PortoRico** 159.

776-2½-New. The secretary of the board of pharmacy, in receiving judgments of conviction of a pharmacist, ascertaining that each is a final judgment, adding them up, determining that there are three or more, and proceeding to cancel registration, does not exercise judicial functions. **CalA** 265**P**1022.

776-2½-New. Under some statutes the board of regents may find that specific acts of wrong on the part of one licensed to practice pharmacy, permit the revocation of a license on the ground of unfitness. 250**NY**173, 164**NE**895.

776-2¼-New. , and the board does not act without, or in excess of, its jurisdiction in requiring such pharmacist to appear and show cause why his registration should not be canceled. **CalA** 265**P**1022.

776-2½-New. Revocation of a pharmacist's license on the ground of unfitness is justified, where it appears that the licensee, in order to obtain a license to practice pharmacy, sought to manufacture evidence of qualifications. 250**NY** 173, 164**NE**895.

776-7 [a] **Nonsuit was properly not granted** where charge and proof was of violation of act which requires that one must be registered pharmacist or registered assistant to dispense drugs and medicines. **NJSup** 147**A**726.

778-36½-New. Evidence tending to show registered pharmacist was in charge of place of business at all times is held erroneously excluded. 173**Minn** 322, 217**NW**342.

778-36⅓-New. [§ 33a] 3. **Weight and Sufficiency.** Evidence in a prosecution for violation of an act regulating the practice of pharmacy has been held sufficient to identify defendant as the violator. **NJSup** 143**A**764.

778-36¼-New. In a prosecution for dispensing drugs and medicines without a license, evidence of the contents of bottles purchased from defendant has been held admissible where the witness said he could determine the contents. **NJSup** 147**A**726.

778-38½-New. Where there is no dispute on the facts in a penal action for violation of the Pharmacy Act by a grocer's sale of camphorated oil, the court may properly direct a verdict for plaintiff board of pharmacy. **NJ** 141 **A**587.

778-41 214**Ala**279, 280, 107**S**751 [cit CJ].

779-42 214**Ala**279, 280, 107**S**751 [cit CJ]; 144**Va**106, 131**SE**198, 44**ALR**1478.

779-43 21**AlaA**51, 105**S**716; **TexCivA** 288**SW**588; 155**Wash**317, 284**P**96.

779-44 202 **Iowa**822, 211**NW**419.

779-46 21**AlaA**51, 105**S**716.

779-49 [a] **Manufacture of serum for hog cholera, expressly providing "no guaranty"** except obedience to regulations of federal department of agriculture, held not to warrant use by manufacturer of additional research facilities as bacteriological laboratory. 202 **Iowa**822, 211**NW**419.

779-51 [b] **Druggist who buys in bulk and bottles drug with his own label** impliedly warrants it to be what he represents it to be. 144**Va**106, 131**SE**198, 44**ALR**1478.

779-54 [a] **Where druggist fills prescription,** he impliedly warrants it to be what he represents it to be. 144**Va** 106, 131**SE**198, 44**ALR**1478.

780-68 See also **MoA** 294**SW**740.

780-74 **TexCivA** 288**SW**236; 144**Va**106, 131**SE**198, 199 [quotCJ], 44**ALR**1478. [a] **Irresponsible person** drinking carbolic acid could not recover of drug company because it sold acid to his minor son. **IndA** 170**NE**862.

780-75 144**Va**106, 131**SE**198, 44**ALR** 1478 (liable for slightest negligence in filing prescription or bottling and labeling drug purchased in bulk). [b] **Failure to observe extraordinary precautions, as to establish bacteriological laboratory in serum plant,** held not predicate of liability. 202 **Iowa**822, 211**NW** 419.

780-76 21**AlaA**51, 105**S**716; 260**Mass** 105, 156**NE**731.

781-84 But see 153**Wash**615, 280**P**56.

781-87 10**PaDist&Co** 796; 144**Va**106, 131**SE**198, 44**ALR**1478 (is prima facie guilty of negligence). [a] **Negligence of druggist must be proximate cause** of injury. **TexCivA** 288**SW**588.

781-93 144**Va**106, 131**SE**198, 44**ALR** 1478.

781-95 144**Va**106, 131**SE**198, 44**ALR** 1478 (in absence of knowledge of its ingredients).

781-95 [a] **Rule inapplicable** where druggist furnishes article different from that requested. 155**Wash**317, 284**P**96.

782-2½-New. Druggist held bound by representations of employee in charge of pharmacy that substance compounded was the same as that prescribed. 260 **Mass**105, 156**NE**731.

782-2¼-New. A druggist is not liable for the death of an infant due to furnishing medicine called for by a prescription unless the medicine delivered proximately caused the child's death. 219**Ala**427, 122**S**416, 65**ALR**1097.

783-14½-New. A poultry raiser damaged by using linseed oil sold by a retailer by mistake for codliver oil can maintain an action against the wholesaler who sold the oil to the retailer by like mistake. 177**Minn**390, 225**NW**395.

783-21 21**AlaA**51, 105**S**716 [quotCJ].

783-24½-New. A poultry raiser to whom a druggist sold linseed oil by mistake on an order for codliver oil is not guilty of contributory negligence as matter of law, in continuing to feed the oil to his poultry after being assured by the druggist that it was codliver oil. 177**Minn**390, 225**NW**395.

783-30 [b] 21**AlaA**51, 105**S**716.

784-33 [a] 21**AlaA**51, 105**S**716.

784-44 205 **Iowa**946, 219**NW**40.

784-45 144**Va**106, 131**SE**198, 44**ALR** 1478.

784-48½-New. Direct proof of the cause of infection or injury is not required, the best evidence being admissible to go to the jury. 224**AppDiv**314, 230**NYS** 640.

784-49 But see 205 **Iowa**51, 217**NW**557.

784-49½-New. Admission of evidence as to druggist's negligence in selling plaintiff medicine, where action thereon is barred by statute of limitations, is error. 72**CalA**132, 236**P**966.

784-49⅓-New. Evidence of former sale of stale medicine more than year prior to bringing suit and for which medicine claimed harmful had been exchanged is inadmissible because barred by statute of limitations. 72**CalA**132, 236**P**966.

784-49¼-New. In an action for injury resulting from the use of an improper solution of arnica, evidence that arnica subsequently purchased from defendant produced no injury was held competent. 23 **OhA**160, 155**NE**248.

784-49½-New. In an action by a poultry raiser for damages resulting from a mistake in selling him linseed oil for codliver oil, testimony of others who used the oil from the same barrel and whose poultry was affected in same way as poultry of plaintiff is competent. 177 **Minn**390, 225**NW**395.

784-50 260**Mass**105, 156**NE**731; **MoA** 294**SW**740; 134**NYS**995 [aff 155**AppDiv** 879, 139**NYS**11341; 23 **OhA**160, 155**NE** 248; **TexCivA** 288**SW**236.

784-51 144**Va**106, 131**SE**198, 44**ALR** 1478.

784-52 177**Minn**390, 225**NW**395 (negligence of wholesaler and of retailer).

784-52½-New. that the negligence of a wholesaler and of a retailer concurred in, and contributed to, the damage done, 177**Minn**390, 225**NW**395.

785-57 202 **Iowa**822, 211**NW**419; 205 **Iowa**946, 219**NW**40; 260**Mass**105, 156 **NE**731.

785-58 [a] 49**ND**92, 189**NW**837.

785-59 109**Conn**350, 146**A**490; 205 **Iowa**51, 217**NW**557 (evidence sufficient to go to jury); 224**AppDiv**314, 230**NYS** 640.

785-59½-New. , to rebut presumption of negligence from sale of a harmful for a harmless drug. 144**Va**106, 131**SE**198, 44**ALR**1478.

785-60 But see 144**Va**106, 131**SE**198, 199 [quotCJ], 44**ALR**1478.

785-61 144**Va**106, 131**SE**198, 199 [quot CJ], 44**ALR**1478.

785-64 202 **Iowa**822, 211**NW**419; 208 **Ky**112, 270**SW**998.

785-64½ Mere fact that druggist gave other medicine than that called for does not establish negligence, as a matter of law. **TexCivA** 288**SW**588.

785-64⅓-New. [§ 68a] 4⅓. **Trial; Question of Law and Fact.** Contributory negligence of plaintiff in an action against a druggist is for the jury to determine if the issue is raised by sufficient evidence. **TexCivA** 288**SW**236.

785-64¼-New. Whether buyer of powder, alleged to have killed hogs, fed it to them according to directions, is for jury. **Iowa** 231**NW**323.

785-64½-New. Whether druggist was negligent is for jury, under conflicting evidence. 155**Wash**317, 284**P**96.

785-64⅓-New. Question of customer's contributory negligence is for jury. 155 **Wash**317, 284**P**96.

785-64½-New. Whether death of animals was due to pills furnished held for jury on conflicting evidence. 155**Wash** 317, 284**P**96.

785-65 [c] **Instructions held correct.**-205 **Iowa**51, 217**NW**557.

785-66½-New. In an action against a druggist for the death of a child resulting from the use of the wrong medicine, a requested instruction permitting a recovery if the medicine furnished contributed to the child's death is properly refused where the complaint used the words "poisonous" or "dangerous." 219**Ala**427, 122**S**416, 65**ALR**1097.

785-68 See also 224**AppDiv**314, 230 **NYS**640.

785-72 208**Ky**112, 270**SW**998.

786-89 [b] **Scienter is necessary element** of offense of purchasing narcotic drugs except from or in original stamped packages. 4**F(2d)**781.

786-91 [a] **Alcoholic content** of drugs should be shown on label. 5**F(2d)**971.

786-92½-New. Dismissal of informations for shipping drugs misbranded is not res adjudicata in subsequent civil proceedings to condemn other misbranded bottles. 37**F(2d)**137.

786-1 33**F(2d)**506.

787-7 [a] **Under Act June 30, 1906** seizure of misbranded drugs must precede filing of libel for forfeiture. 5**F (2d)**971.

787-7½-New. Under the Pure Food and

Drugs Act, conferring jurisdiction of the subject matter with power to issue judicial process, the court can entertain a condemnation case without the necessity of a previous seizure under a search warrant before filing of the libel. 30 F(2d)300.
787-14½-New. The United States, in a suit to condemn medicine for adulteration and misbranding should be required to pay for samples taken for the test and permit claimant to be present at the test. 36F(2d)53.
787-20 5F(2d)971 (libel held insufficient for failure to show drugs subject to act).
787-21 [b] **Libel for forfeiture of misbranded drugs** must be verified by one having knowledge of facts. 5F(2d)971.
790-65½-New. Government estopped where similar proceedings against different shipment ended in decree for owner of goods sought to be forfeited. 41 F(2d)460.

DRUNK

791-23 See also 5LaA49.
791-30 OklCr 274P687.
791-30½-New. "Drunk" does not mean intoxicated from the use of drugs. 166 Ga561, 144SE109.

DRUNKARDS

794-1 5LaA49.
795-13 5LaA49.
796-19 [a] (3) "Drunk" is relative term, and embraces various degrees of intoxication and mental obscuration. 213Ala620, 105S809.
796-21 [b] 47RI 114, 131A81.
797-25 229Ky522, 17SW(2d)453 (drunken person in care of discreet person is not within statute). [d] 225Ky 202, 7SW(2d)1039.
797-25½-New. **In Kentucky** peaceable drunkenness on hillside is no offense. 219Ky319, 292SW806.
797-27 126Kan569, 268P827.
797-31 37GaA382, 140SE524. [h] Store while open for business is public place within Manitoba statute. Man [1930] 3 DomLR630.
797-32 37GaA382, 140SE524. [d] 153 Miss593, 121S275.
798-33 37GaA382, 140SE524 (gasoline station and store).
798-40 [c] **In Kentucky.**-225Ky202, 7 SW(2d)1039.
798-47 36GaA121, 135SE494; 40GaA 658, 151SE55.
798-48 36GaA121, 135SE494.
798-49 36GaA121, 135SE494.
798-50 36GaA121, 135SE494.
800-75½-New. Whether grand jury will indict for one act of public drunkenness is discretionary. 160Tenn267, 23 SW(2d)665.
801-93 218Ky807, 292SW467.
802-9 234Ky544, 28SW(2d)732.
802-17 [a] (7) 200Ind48, 160NE294. (12) Other evidence held sufficient. 170 Ark709, 280SW982. (13) Generally. 37 GaA505, 140SE774. [b] (5) 36GaA121, 135SE494; 37GaA382, 140SE524. (7) 35GaA256, 132SE645. (9) Other instances. 40GaA658, 151SE55. (8) Defendant found drunk one hundred yards from place mentioned in statute has been held not to come within place. 229 Ky522, 17SW(2d)453.
803-23 218Ky807, 292SW467.
803-33½-New. Court determining punishment should consider whether it is accused's first offense and circumstances attending crime. 160Tenn267, 23SW (2d)665.
804-49 [a] (3) To support conviction of drunkenness on highway. 165Ga326, 140SE889. [b] (3) Failure of state's witnesses to testify whether defendant was drunk, notwithstanding testimony that defendant was intoxicated two hours before in another place in different county. TexCr 18SW(2d)1084(1st case).
804-52 [e] **At least substantial compliance with statutory requirements** is necessary. 95CalA219, 272P787.
804-58 95CalA219, 272P787.
813-66 116Nebr339, 217NW583; 51ND 848, 201NW159, 36ALR613.
816-88 116Nebr339, 217NW583; 51ND 848, 201NW159, 36ALR613.

DUE

818-33 [b] **According to ordinary usage and meaning, a debt or other obligation is "due"** at time when creditor has right to demand payment and to enforce collection, if not paid, and till that time it is not due. 103NJEq425, 143A548.
818-34 72CalA179, 236P972, 974 [quot CJ].
818-35 72CalA179, 236P972, 974 [quot CJ]. [b] **Past due obligation.**-67Utah 54, 245P698.
818-36 72CalA179, 236P972, 974 [quot CJ]; TexCommnA 24SW(2d)381.
819-37 72CalA179, 236P972, 974 [quot CJ].
819-38 72CalA179, 236P972, 974 [quot CJ].
820-71 20FCasNo 11,589, 2 Ben 53; 143 Cal 253, 76P1034; Eng LR7Eq532. [a] **"A debt is 'due and payable'** when the debtor has the right to pay it, regardless of whether the time has arrived when the creditor may have his action to enforce payment of same." TexCivA 258 SW211, 212.
820-77 79CalA234, 249P223.
822-24½-New. "due to date," 299Pa20, 148A906.

DUELING

825-1 77CalA483, 247P221.
825-2 77CalA483, 247P221; 100TexCr 641, 274SW611.
825-6 100TexCr641, 274SW611.
825-7 100TexCr641, 274SW611.
826-18½-New. Purpose of constitutional and statutory provisions against dueling is to discourage such method of settling grievances. 100TexCr641, 274SW611.
826-19 77CalA483, 247P221; 100TexCr 641, 274SW611.
826-22 77CalA483, 247P221.
827-33½-New. Use of deadly weapons need not be alleged. 77CalA483, 247P 221.

DUES

832-7 [a] 132Misc109, 228NYS248.

DULY

833-13 22F(2d)832 (by proper procedure).
833-33 85CalA607, 259P976, 979 [cit CJ].
833-34 85CalA607, 259P976, 979 [cit CJ].
833-35 85CalA607, 259P976, 979 [cit CJ].

DUMP

836-24 TexCivA 22SW(2d)320 (in re dumping garbage).

DUMPING

836-25½-New. Orderly marketing of cotton throughout the whole year, instead of forcing it on the market during the short gathering season thereby preventing what is termed "dumping." 168 Ark504, 270SW946, 1119.
836-25⅓-New. The forcing of cotton on the market during the short gathering season. 168Ark504, 270SW946, 1119.

DUORUM VEL PLURIUM IN IDEM PLACITUM CONSENSUS.

836-31½-New. A phrase applied to the essential requirement that a contract or agreement must have for its existence the assent of two or more minds. 4 FCasNo 2316. See also Contracts § 43.

DUPLICATE

836-49 196Cal 131, 236P307, 309 [cit CJ].

DURESS

838-80-82 [e] **Duress signifies** compulsion, constraint, imprisonment, or pressure. 107TexCr254, 296SW531.

DURING

838-88 222Ky95, 300SW353 (inclusive of whole time fixed).

DWELL

842-89 43 Ida64, 249P254.
843-91 43 Ida64, 249P254.
843-94 43 Ida64, 249P254.
843-98 43 Ida64, 249P254; NS [1925] 2DomLR663.

DWELLING or DWELLING HOUSE

843-5 [a] **"Dwelling" is not synonymous with "dwelling house" or "flat."**-333 Ill 355, 164NE699, 61ALR561(2d case).
843-7 [a] (51) Other terms included. 173Ark287, 292SW129 [quotCJ].
845-19 290Pa121, 138A90.
846-21 [a] NJ 137A317 [citCJ].

EACH

850-9 217Ky615, 290SW480.
850-22 [a] (1) 48Nev436, 233P531.
852-52½-New. "each way," 48Nev436, 233P531.

EARNINGS

853-91 169Minn106, 210NW846, 849 [quotCJ].
854-95 169Minn106, 210NW846, 849 [quotCJ].
854-97 TexCivA 283SW601.

EASEMENTS

862-1 68CalA554, 229P1002; 77CalA 328, 246P559; 92Fla375, 109S648; 206 Iowa1084, 221NW825; 213AppDiv476, 211NYS3, 4 [citCJ]; 128Misc299, 218 NYS401; 190NC244, 129SE623, 625 [quotCJ]; 290Pa210, 138A763; 114Tex 452, 270SW1014. [a] (1) 143SC223, 141SE375. (3) 168Ga359, 147SE882. (11) It is right which one person has to use land of another for specific purpose. TexCivA 273SW969. (12) Liberty, privilege, or advantage in land without profit existing distinct from ownership of soil. TexCivA 273SW 969. (13) It is privilege without profit which owner of one tenement has right to enjoy in respect to that tenement in and over tenement of another person, by reason whereof latter is obliged to suffer or refrain from doing something on his own tenement for advantage of former, charge or burden on one estate (the servient) for benefit of another (the dominant). TexCivA 273 SW969. (14) "A right, distinct from ownership, to use in some way the land of another, without compensation." 101NJEq649, 138A569, 573. (15) Other illustrations. NJCh 151A289.
862-2 77CalA328, 246P559; 92Fla375, 109S648. [a] (2) Servitude, which is civil law term for easement, is right of owner of one parcel of land to use another's land for special purpose of his own not inconsistent with general property in other owner. 33Ariz325, 264P 692, 58ALR145.
862-3 77CalA328, 246P559. [a] **Adjoining owners.**-213AppDiv476, 211NYS 3.
863-8 [a] **Fire exit reserved in deed** is property right. 215AppDiv301, 213NYS 637.
863-10 5F(2d)908; 137Misc122, 241 NYS386; 189NC589, 127SE697; 190NC 582, 130SE330; 114Tex452, 270SW 1014.
863-11 24F(2d)339 (held real property); 68CalA554, 229P1002; 219Ky757, 294SW483; 153Miss185, 120S814; 137 Okl 86, 278P292; 114Tex452, 270SW 1014.
863-12 130Misc676, 224NYS711.
863-14 17F(2d)357, 365 [quotCJ]; 68 CalA554, 229P1002. [b] 68CalA554, 229 P1002.
863-15 17F(2d)357, 365 [quotCJ]; 68 CalA554, 229P1002.
863-18 68CalA554, 229P1002.
863-20½-New. "Fee," in the sense of uses to which land or right may be denoted, signifies land itself and all of such uses, 126Misc349, 241NYS123.
863-20⅓-New. while "easement" is confined to a limited use. 126Misc349, 241NYS123.
863-21 Ida 288P427; 322 Ill 350, 153 NE684; 88PaSuper71, 80 [citCJ]; Tex CommnA 18W(2d)597, 600 [citCJ].
864-23 92Fla375, 109S648; 143SC223, 141SE375; TexCommnA 18W(2d)597.
864-24 92Fla375, 109S648; 143SC223, 141SE375; TexCommnA 18W(2d)597.
864-25 92Fla375, 109S648; 143SC223, 141SE375; TexCommnA 18W(2d)597.

864-26 92Fla375, 109S648; 143SC223, 141SE375.
864-27 5F(2d)908; 92Fla375, 109S648; 309Mo 142, 274SW679; MoA 282SW473; 143SC223, 141SE375; TexCommnA 1SW (2d)597; 187Wis232, 202NW34. [a] **Ordinarily there must be privity of estate** between dominant and servient estates. 5F(2d)908.
864-28 5F(2d)908.
865-33 189NC589, 127SE697; 154Tenn 545, 290SW409.
865-34 171Minn358, 214NW49; 283Pa 250, 129A83; 131SC540, 128SE724 (one terminus of way being on land and incident of estate of party claiming); 143 SC223, 141SE375; TexCivA 14SW(2d) 316.
865-35 [a] **Land cannot be appurtenant to land** as such, since corporeal thing cannot be appurtenant to another corporeal thing. 265Mass56, 163NE761.
865-36 234 IllA458, 466, 471 [citCyc]; 260Mass407, 157NE362; 261Mass47, 158 NE321; Mo 281SW715; 126 Or18, 268 P758; 283Pa250, 129A83; 154Tenn545, 290SW409; TexCivA 14SW(2d)316. [a] **Instrument held not to create easement passing with premises.**–CalA 291P615.
865-36½-New. Easement appurtenant is favored over easement in gross. 154 Tenn545, 290SW409.
865-36⅓-New. A right of way by prescription appurtenant to certain lots cannot be acquired, where there is no use of the strip in question in connection with such lots. 206Cal 753, 276P 336.
865-36¼-New. A way appurtenant to land cannot be extended to be appurtenant to other land except by grant or prescription. NH 146A169.
865-38 94CalA480, 271P507.
865-40 128Misc299, 218NYS401. [a] (10) 24F(2d)339; 126 Or18, 268P758; TexCivA 292SW288. (13) Use of word "temporary" in grant of privilege of roadway which is to terminate when street is extended past grantee's land does not require grant to be construed as one of license and not of easement, where grant is to grantee and his "heirs or assigns." 68CalA554, 229P1002. (14) Where land court's decree, and map and plan, showing restrictions and passageway, were duly recorded, held title certificate gave holder right of passage as appurtenant to his land. 261Mass47, 158NE321. [b] (8) Right of lot owners to use common alley. 187Wis232, 202NW34. (9) Reservation in deed of right to free and uninterrupted passage along road fifteen feet wide on east side of land conveyed, for benefit of purchasers of adjoining land from same vendor, constitutes easement appurtenant to adjoining land. TexCivA 14SW (2d)316. [c] **Created by prescription.**–171Minn358, 214NW49.
866-41 48RI 292, 137A687.
866-47 234 IllA458, 476 [citCJ].
866-51 Mo 281SW715; TexCivA 14SW (2d)316. See also 131SC540, 128SE724.
866-52 189NC589, 127SE697. [a] **In New York.**–126Misc349, 214NYS123. [b] **Public easements** require no document estate. 126Misc349, 214NYS123.
867-53 189NC589, 127SE697; 131SC 540, 128SE724.
867-54 68CalA554, 229P1002; 87CalA 188, 262P53(2dcase) (right of way).
867-57 68CalA554, 229P1002; 125 Or 150, 262P853, 57ALR311; 131SC540, 128SE724; 143SC223, 141SE375.
867-65 [a] **Easement or right in gross** may be perpetual and inheritable and transferable. 126Misc349, 214NYS123.
868-75½-New. The right to have an adjoining "circle" kept open, based on oral representations inducing purchase of lot, is an easement in gross. 131SC 540, 128SE724.
868-76 68CalA554, 229P1002; Mo 281 SW715; TexCivA 14SW(2d)316.
868-77 68CalA554, 229P1002; 152Md 604, 137A312; 126Misc349, 214NYS123 (reference may be made to situation of parties at time of grant); TexCivA 14 SW(2d)316. [b] **Use of words "heirs or assigns"** necessarily creates easement appurtenant, being inconsistent with personal character of easement in gross. 68CalA554, 229P1002.
868-80 [a] **While word "apparent" has been extended** to cover underground connections or the like, discoverable by expert, something like pipes or signs of outtake must exist. 33PortoRico 69.
869-89 150Md125, 132A587. But see 150Md125, 132A587.
869-94 189NC589, 127SE697.
870-98½-New. Private ways across location of railroads are not favored. 260 Mass407, 157NE362.
870-98⅓-New. Private easements are independent of public easements. 128 Misc525, 219NYS545.
870-99 224Ky732, 7SW(2d)216, 218 [citCJ&Cyc]; 235Ky301, 31SW(2d) 367.
870-1 170Ga279, 152SE575.
870-11 170Ga279, 152SE575.
870-12½-New. or take oil and gas; 120 Kan602, 245P107.
870-14 234Mich60, 207NW915.
870-25 170Ga279, 152SE575; 234Mich 60, 207NW915.
871-29 170Ga279, 152SE575.
871-30 234Mich60, 207NW915. [b] **Grant of hunting rights** may be by deed or lease. 234Mich60, 207NW915.
871-31 170Ga279, 152SE575.
871-39 213AppDiv476, 211NYS3, 4 [cit CJ].
871-41 219Ala616, 123S79, 64ALR 1550; 213AppDiv476, 211NYS3, 4 [cit CJ].
871-47 219Ky757, 294SW483.
872-50 [b] (3) Use of words "his heirs and assigns" after name of grantee in grant of privilege of roadway is express recognition that privilege is inheritable and assignable and constitutes easement rather than license. 68CalA 554, 229P1002. (4) Agreement giving right to connect sprinkler system with tank. 219Ky757, 294SW483. [i] **An easement implies interest in land** while license does not. 92Fla375, 109 S648.
872-51 Mo 281SW715, 718 [quotCJ].
873-62½-New. The servitudes of the civil law as to rights of light and air are not recognized in the doctrine of easements as expounded in United States. 147Va736, 133SE586.
873-63 67Utah278, 247P503. [b] **Easements may be created** by grant, estoppel, way of necessity, implication, dedication, prescription, ancient window doctrine, reservation, or condemnation. 189NC589, 127SE697.
873-64 16F(2d)395; 68CalA554, 229P 1002; 107Conn656, 142A301; 92Fla375, 109S648; 206 Iowa1084, 221NW825; 152Md126, 136A618, 56ALR1103; 75 Mont202, 243P568; 130Misc676, 224 NYS711; 137 Okl 86, 278P292; 143SC 223, 141SE375.
873-66 58ND536, 226NW635; 143SC 223, 141SE375; TexCivA 273SW969; Man [1930] 2DomLR947 (equitable easement acquired by oral consent and expenditure of money). [b] **Easement by estoppel can not be predicated** on oral promise where promisee has notice of promisor's conveyance before making expenditures. TexCivA 273SW969.
873-66½-New. or by operation of law, 75Mont202, 243P568.
873-68 See also 29PortoRico 864.
873-69 92Fla375, 109S648; 67Utah278, 247P503. See also 147Miss215, 113S332. [a] See also 34PortoRico 244.
873-70 But see Mass 169NE428.
874-79 TexCivA 291SW263, 264 [quot CJ].
874-80 123 Or549, 262P243.
874-81 70CalA283, 233P370; 107Conn 656, 142A301; 234 IllA458, 466, 471 [cit Cyc]; 240Mich327, 215NW331; 153Miss 185, 120S814; 189NC589, 127SE697; 123 Or549, 262P243; TexCivA 291SW 263, 264 [quotCJ]. But see Mass 169 NE428. [c] **Mere lapse of time** held not to raise presumption of grant of right to run electric wires across land. 235 IllA387.
875-82 TexCivA 291SW263, 264 [quot CJ].
875-85 205 Iowa994, 219NW135.
877-17 219MoA271, 275SW965, 969 [citCJ].
878-37 172Ark381, 288SW890.
878-38 16F(2d)395; 92CalA504, 268P 675; 235Mich24, 209NW133; 147Miss 215, 113S332; MoA 26SW(2d)796; 103 NJL140, 134A735; 120 Or202, 250P722; 154Tenn334, 285SW567, 568 [quotCJ]; 108WVa180, 150SE525.
879-39 154Tenn334, 285SW567, 568 [quotCJ].
879-40 154Tenn334, 285SW567, 568 [quotCJ].
879-45 154Tenn334, 285SW567, 568 [quotCJ].
879-49 154Tenn334, 285SW567, 568 [quotCJ].
879-49½-New. Mere use itself of premises is not sufficient to establish an easement. 203 Iowa992, 213NW759.
879-53-54 16F(2d)395; 93CalA658, 270 P243; 149Md484, 132A64; 147Miss215, 113S332; 79Mont485, 257P406; 218App Div240, 218NYS78; 120 Or202, 250P 722; 192Wis338, 212NW646.
879-58 16F(2d)395; 42F(2d)541; 70 CalA283, 233P370; 205 Iowa994, 219 NW135; 206 Iowa1084, 221NW825; 208 Iowa169, 225NW417; 149Md484, 132A 64; 237Mich689, 213NW72; 103NJL 140, 134A735; 127Misc316, 215NYS297; 190NC568, 130SE161, 163 [citCJ]; 154 Tenn334, 285SW567, 568 [quotCJ]; Tex CommnA 288SW813, 815 [citCyc]; 108 WVa180, 150SE525. [d] (2) 218App Div240, 218NYS78. [g] **Easement does not begin to run till owner or predecessor in title has knowledge.**–218App Div240, 218NYS78.
880-60 70CalA283, 233P370.
880-61 70CalA283, 233P370.
880-63 16F(2d)395; 235Mich24, 209 NW133.
880-69 70CalA283, 233P370.
881-75 93CalA658, 270P243.
881-76 16F(2d)395; 323 Ill 309, 154 NE120; 256Mass311, 152NE360; 237 Mich689, 213NW72; Miss 128S572; 79 Mont485, 257P406; 190NC568, 130SE 161, 163 [citCJ]; 191NC747, 133SE2; 120 Or202, 250P722.
882-88 79Mont485, 257P406.
882-6 Vt 150A70.
883-14 Miss 128S572.
885-56 16F(2d)395; 100CalA517, 280 P389; 105Conn722, 136A684; 323 Ill 309, 154NE120; 237Mich689, 213NW72; 240Mich327, 215NW331; 147Miss215, 113S332; 147Miss385, 113S336; MoA 282SW473; 79Mont485, 257P406; NJCh 137A96; 191NC747, 133SE2; 120 Or202, 250P722; 154Tenn334, 285SW567, 568 [quotCJ]; Vt 150A70.
886-57 Vt 150A70.
886-58 149Md484, 132A64.
886-61 240Mich327, 215NW331; 147 Miss215, 113S332; 147Miss385, 113S336. [c] **Inceptive entry must arise from invasion of rights** of another for which he might have maintained action. 178 Minn203, 226NW569(2dcase), 65ALR 124.
886-64 16F(2d)395; 172Ark390, 288 SW932; 70CalA283, 233P370; 105Conn 722, 136A684; 323 Ill 309, 154NE120; 205 Iowa994, 219NW135; 206 Iowa1084, 221NW825; 237Mich689, 213NW72; 240 Mich327, 215NW331; 127Misc813, 216 NYS695; 190NC568, 130SE161, 163 [cit CJ]; 120 Or202, 250P722; TexCivA 289SW697. [a] **Use of road by adjoining owners** as means of access and egress to lands held not inconsistent with existence of road as public highway. 149 Md484, 132A64.
887-65 154Tenn334, 285SW567, 568 [quotCJ].
887-66 172Ark390, 288SW932; 154 Tenn334, 285SW567, 568 [quotCJ].
887-68 172Ark390, 288SW932.
887-73½-New. Character of user may be determined as inference from circumstances. 105Conn722, 136A684.
887-74 149Md484, 132A64; 147Miss 215, 113S332; 152Va889, 148SE779. See also 127Misc813, 216NYS695.
887-75 147Miss215, 113S332.
887-78 15F(2d)37.
888-79 214Ala64, 106S400; 172Ark390, 288SW932; 100CalA517, 280P389; 92 Fla375, 109S648, 652 [citCJ]; 317 Ill 511, 148NE269; 327 Ill 423, 158NE745; 203 Iowa1133, 212NW417; 206 Iowa 1084, 221NW825; 209Ky284, 272SW 752; 221Ky190, 298SW710; 239Mich 491, 214NW406; 240Mich327, 215NW 331; 178Minn203, 226NW569(2dcase); 65ALR124; MoA 26SW(2d)796; 103

NJL140, 134A735; 127Misc316, 215NYS 297; 191NC747, 133SE2; NC 155SE856; 137 Okl 86, 278P292; 120 Or202, 250P 722; 286Pa413, 133A627; 5PaDist&Co 475, 477 [quotCyc]; 35PortoRico 100; TexCivA 289SW111; TexCivA 289SW 697; TexCivA 293SW259; 108WVa180, 150SE525. [a] (13) Permissive use of old roadway previously used by owner of subdivision gives no rights to lot owners who bought with reference to plot which established new street, and abandoned old. 209Ky284, 272SW752. [b] See also 143Va201, 129SE217.

889–81 297Pa583, 148A56.

889–84 178Minn203, 226NW569(2dcase) 65ALR124.

889–86½–New. Unsought consent of the owner, as distinguished from permission, is immaterial where claimant's entry is hostile and adverse. 178Minn203, 226NW569(2dcase), 65ALR124.

889–89 172Ark390, 288SW932; 240Mich 346, 215NW349.

889–90 172Ark390, 288SW932.

889–91 172Ark390, 288SW932. [b] (4) One whose right to use sewer arose from rental contract cannot, by discontinuing payments, acquire right by prescription. 13LaA181, 127S470.

890–92 172Ark390, 288SW932.

890–93½–New. Where permissive use of a stairway is revoked by conveyance of the property, continued use without action or objection on the part of the purchaser is adverse and may ripen into a prescriptive right. 239Mich491, 214 NW406.

890–93½–New. Permissive use is revoked by conveyance of the premises by will and continued use is adverse. 240 Mich346, 215NW349.

890–1 240Mich327, 215NW331; 83NH 573, 145A665.

891–9 120 Or202, 250P722.

891–15 12LaA635, 126S79.

891–21 323 Ill 309, 154NE120; 240Mich 327, 215NW331; 147Miss215, 113S332; 79Mont485, 257P406; 120 Or202, 250P 722; 154Tenn334, 285SW567, 568 [quot CJ]; 143Va201, 129SE217.

892–22 286Pa413, 133A627; 154Tenn 334, 285SW567, 568 [citCJ]. But see 214Ala64, 106S400; 153Miss185, 120S 814.

892–23 34F(2d)303.

892–24 Miss 128S572.

892–25 105Conn722, 136A684; 240Mich 327, 215NW331; 179Minn228, 228NW 755; 143Va201, 129SE217 (when proprietary and not use by public generally).

892–26 105Conn722, 136A684, 686 [cit CJ].

892–28 143Va201, 129SE217.

892–30 237Mich689, 213NW72; 190NC 568, 130SE161, 163 [citCJ] (identity of thing enjoyed).

893–46 147Miss385, 113S336; NH 146 A169; NJCh 137A96; 120 Or202, 250 P722. See also TexCivA 10SW(2d)132.

893–48 [b] Ark 31SW(2d)409. [c] 147 Miss385, 113S336; MoA 26SW(2d)796; 117Nebr245, 220NW278, 58ALR1033. [d] 219Ky450, 293SW958; Vt 150A70. [e] NJCh 137A96; 127Misc316, 215NYS 297; 130Misc599, 224NYS153; 127Misc 813, 215NYS695; 191NC747, 133SE2; 143Va201, 129SE217.

894–51 [a] **In absence of allegations and findings that defendant was possessed of sum of money,** it is not contempt to fail to pay sum into court on order. 170Ark41, 278SW654.

894–59 257Mass483, 154NE79. But see 247Mich563, 226NW242.

895–77 172Ark390, 288SW932; 317 Ill 511, 148NE269; 221Ky190, 298SW710; 128Misc299, 218NYS401; 196NC617, 146 SE531; 91PaSuper404; 154Tenn334, 285SW567. But see 169La352, 125S 269.

896–81 143Va201, 129SE217.

896–83 172Ark390, 288SW932; 175Ark 1170, 300SW418; 327 Ill 423, 158NE 745; 208 Iowa169, 225NW417; 235Mich 24, 209NW133; 248Mich95, 226NW849; 103NJEq552, 144A14; 127Misc813, 216 NYS695; 154Tenn334, 285SW567; Tex CommnA 288SW813; TexCivA 293SW 259; 143Va201, 129SE217 (and exclusive); 143Va29, 129SE272. [c] **Merely placing doors so as to open on land of another** cannot give title to land, **even** though so placed with consent of owner. 286Pa413, 133A627. [d] **Mere user** for statutory period is not sufficient to create easement of private way over lands of another. 196NC617, 146SE531, 197NC280, 148SE246.

897–95 [b] **Charge in motive power of vehicles** held immaterial. 105Conn722, 136A684.

897–99 92CalA504, 268P675, 678 [cit CJ]; 327 Ill 423, 158NE745; 208 Iowa 169, 225NW417; 235Mich24, 209NW 133; NC 154SE678; 120 Or202, 250P 722, 725 [citCJ]; 286Pa413, 133A627; 49RI 6, 139A499; 143Va201, 129SE217; 143Va29, 129SE272. [a] (2) 92CalA504, 268P675, 678 [citCJ].

898–2 235Mich24, 209NW133.

898–4 See also NJCh 137A96.

898–11 103NJL140, 134A735, 736 [cit CJ]; 286Pa413, 133A627; 154Tenn334, 285SW567.

899–14 See also 143Va29, 129SE272.

899–16 209Ky586, 273SW432.

899–18 92CalA504, 268P675, 678 [cit CJ]; 127Misc813, 216NYS695; 288Pa 494, 136A779; 297Pa317, 147A51; 143 Va29, 129SE272; Ont [1929] 1DomLR 493 (extent of way is limited by amount of ground actually and reasonably used). [a] **Fifty years' user gives prescriptive right to driveway despite absence of well-defined track.**–127Misc813, 216NYS695.

899–19 127Misc813, 216NYS695; 297 Pa317, 147A51.

899–20 92CalA504, 268P675, 678 [cit CJ].

900–30 104Conn389, 133A35, 36 [cit CJ]; 149Md484, 132A64.

900–31 104Conn389, 133A35 (dictum).

901–49 317 Ill 511, 148NE269; 235Mich 24, 209NW133.

902–53 172Ark390, 288SW932; Iowa 218NW955. [b] **Full prescriptive period, however,** must elapse before such use can ripen into prescriptive easement. NJ 137A96.

903–73 328 Ill436, 159NE793; 251Mich 684, 232NW223; 189NC589, 127SE697; Wis 232NW851. But see 135Misc514, 239NYS552.

904–80 47BarbNY314.

904–81 9PaDist&Co 23.

904–98 76Mont600, 248P196.

905–3 215AppDiv94, 213NYS589 (by reservation or covenant); 67Utah278, 247P503. See also 317 Ill 179, 147NE 804.

905–10½–New. Where portion of right of way released by a quitclaim deed was abandoned merely as part of a plan for relocation of a small portion of a road over lands owned by neither party, by mutual consent of the parties, the grantor's rights were not affected by the change. 94CalA323, 271P118.

905–11–12 258Mass226, 154NE579; 117 Okl 212, 245P888; 152Va226, 146SE 263.

906–20 150Md125, 132A587; 103NJEq 167, 142A645. [a] **In North Carolina.**–189NC589, 127SE697.

906–21 NJCir 143A79; 197NC280, 148 SE246.

906–22 Mass 165NE426; SD 212NW 497; Wis 232NW851.

906–25½–New. Where the dominant easement is described in the grant, it need not be described as such. 68CalA 554, 229P1002.

906–26 [a] (1) 173Ark414, 292SW668. (3) Way granted held capable of determinate location, 233Mich261, 206NW 334, 335.

906–30 But see 250Mich656, 231NW69.

906–31½–New. Where an instrument granting an easement appurtenant is executed voluntarily as a transfer in præsenti, the grant is an executed contract and no consideration is necessary to its validity. 68CalA554, 229P1002.

906–33 [c] 152Md604, 137A312.

907–41 104Conn596, 134A63.

907–44½–New. The acceptance of a grant, in a conveyance to a county of land on which the courthouse stood, of free passage around the courthouse, being beneficial to the county, will be presumed. 101Vt384, 143A700.

908–45 68CalA554, 229P1002; 256 IllA 357; 117 Okl 212, 245P888; 120 Or202, 250P722, 725 [citCJ]; 299Pa484, 149 A725 (duration of easement); TexCivA 299SW532, 533 [citCJ]. [a] (4) Deed conveying use of walls "adjacent to" boundary lines conveyed such located close, near to, or in immediate neighborhood thereof. TexCommnA 292SW 518, 520 [citCyc]. [f] **Instrument construed as grant of permanent easement in land,** where in addition to releasing past and future damages it granted right to maintain railway with right to overflow land. 204 Iowa368, 213NW 253. [g] **Water rights in utility dedicated to public.**–TexCommnA 6SW(2d) 96. [h] **Particular grants construed.**–MoA 26SW(2d)796.

908–47 120 Or202, 250P722, 725 [cit CJ].

908–48 68CalA554, 229P1002; 120 Or 202, 250P722, 725 [citCJ].

908–49 [a] 68CalA554, 229P1002; Tex CivA 17SW(2d)1092.

908–50 254Mass37, 149NE632; 48RI 292, 137A687; 48RI 312, 138A38, 53 ALR550.

908–51 68CalA554, 229P1002; 104Conn 139, 132A565; 254Mass37, 149NE632; 48RI 292, 137A687; 48RI 312, 138A38, 53ALR550. [a] 247Mich369, 225NW514 (2dcase). [b] (1) 12PaDist&Co 547 (blind alley).

909–52 254Mass37, 149NE632; 48RI 292, 137A687.

909–54 48RI 312, 138A38, 39 [citCJ], 53ALR550; 100WVa304, 130SE454.

909–59½–New. In case of doubt presumption favors easement being appurtenant. 48RI 292, 137A687.

909–59½–New. Grant of profit a prendre for indefinite period will be construed as grant for reasonable time only. 60 OntL102, [1927] 1DomLR 1116.

909–61 196Wis36, 219NW420.

909–65 190NC582, 130SE330; 91Pa Super343; 152Tenn664, 280SW689; Tex CommnA 288SW813, 815 [citCyc]; Tex CivA 26SW(2d)457; 195Wis139, 217NW 730.

909–67 Mass 173NE508.

910–70 TexCivA 20SW(2d)380.

910–71 261Mass47, 158NE321; 215App Div94, 213NYS589. [b] 261Mass47, 158 NE321 (title certificate). [d] (1) 217 Ala196, 115S237. (3) Matters not creating equitable easement as to buildings. 262Mass34, 159NE503. [e] (4) Mutual covenants in deeds of part of tract restricting use of lots to residential purposes, with provision that covenant should run with land, created easement running with land. 108Conn359, 143A 245. (5) Other instances of restrictive clauses construed as mutual covenants operating as easements. 217Ala196, 115 S237. [i] **Agreement releasing all past and future claims for damages to land by flood** creates easement with respect to that land. 36BC376, [1926] 2DomLR 157, [1926] 1WestWkly645.

910–76½–New. Grant of preferential right to electric energy of power plant does not create an easement in the lands or water rights of the power company. 6F(2d)633.

911–78 104Conn596, 134A63; 216Ky 657, 288SW293; Mass 168NE794; NJCir 143A79; 67Utah278, 247P503. See also 149Wash433, 271P93. [c] **Reservation of right personal to grantor** does not pass to grantees. 215Ky189, 284SW 1031. [d] **Stipulation in deed that vendee shall allow window to remain open** as long as vendor desires is personal obligation in favor of vendor and not servitude of light and vendor cannot transfer it to third person. 34Porto Rico 428.

911–84½–New. The description of the easement must not be too uncertain, vague, and indefinite. 197NC280, 148 SE246.

911–86 156Md284, 144A231; Mass 172 NE890; 128Misc299, 218NYS401.

911–92 121Kan264, 246P969; Mass 172 NE882; 247Mich369, 225NW514(2d case); 131 Or19, 281P832 (provision held reservation only); 187Wis232, 202 NW34 (holding conveyance, subject to reserved right to create reservation, not exception). [a] (2) Description of right of way reserved in deed held clear,

explicit and free from ambiguity. Mass 172NE890.

912-94 254NY186, 172NE464.

912-97 RI 150A462 (not effective unless existing at time of conveyance).

913-12 Wis 232NW851.

913-16 92Fla375, 109S648.

914-17 Pa 151A690.

914-18 134Misc34, 235NYS98; 20 OhA 442, 152NE734. [d] **Implied easement for light and air** held not to exist. 137 Misc462, 244NYS439.

914-19 338 Ill 420, 170NE252 (deed providing that no conveyance of lien on adjoining premises shall be read into it).

914-21 Wis 232NW851. [a] **Purchaser of land with reference to plot,** showing dedicated streets, acquired rights to use streets, precluding another grantee from closing street on its being vacated by city. TexCommnA 296SW503.

914-21½-New. Doctrine of implied grant of easement is based on the principle found in the maxims that one shall not derogate from his grant and that the purchaser takes with the land whatever right in the grantor is necessary to its enjoyment. 169Ark792, 276SW605.

914-21¾-New. Tenant on upper floors has "easement of necessity" for bringing gas through pipes from cellar of another tenant. 152Md398, 136A822, 51 ALR1291.

914-21¾-New. Easement by implication cannot exist if it is of such nature as to require act of man to perfect or indicate its use. TexCommnA 6SW(2d) 96.

914-21⅞-New. The doctrine of implied easement, in so far as applicable to city property, should be curtailed rather than extended. 149Wash494, 271P591.

914-22 198Cal 510, 246P58; Ida 288P 427; 338 Ill 420, 170NE252; 124Kan 757, 761, 262P592 [quotCJ]; 152Md 398, 136A822, 51ALR1291; 154Md102, 140A74, 56ALR1135; 157Md1, 145A215; 321Mo 186, 98SW(2d)978; 99NJEq879, 133A392; 98NJEq481, 131A96; 135Misc 598, 238NYS301; Oh 172NE276; 20 OhA442, 152NE734; 20 OhA442, 152NE 734; 297Pa317, 147A51; Pa 151A690; 29PortoRico 864; 33PortoRico 69; 151 Va1018, 145SE827. [a] (1) 124Kan757, 262P592. (4) 150Md125, 132A587, 590 [quotCyc]. [b] (3) Doctrine of implied easement applies. 321Mo 186, 9SW(2d) 978. [e] **Ability of plaintiff** to reach part of tract touched by private way through other land owned by him is immaterial in determining implied grant of private way. 20 OhA442, 152NE734. [f] **Law in regard to necessity of apparent signs** of servitude, where land formerly owned by same person is severed or divided, is the same in the United States as in Porto Rico. 33Porto Rico 69. [g] **Easement is limited to needs and purposes of dominant parcel.**-124Kan757, 262P592.

915-23 124Kan757, 761, 262P592 [quot CJ].

915-24 124Kan757, 761, 262P592 [quot CJ].

915-26 322 Ill 350, 153NE684; 260Mass 407, 157NE362; 262Mass159, 159NE 513; 98NJEq481, 131A96; 115 Oh11, 152NE14; Pa 151A690; 151Va1018, 145 SE827.

915-26½-New. Where a walk between properties conveyed is not an open, visible, and apparent servitude, it does not create an implied easement, the deed being silent. 149Wash494, 271P591.

916-30½-New. Whether an easement passes by implication with a grant of remaining tract of the grantor must be determined as of the time of severance of the tenement. 157Md1, 145A215.

916-33 29PortoRico 864 (Civ. Code § 548 applied to road). [a] **Sign is equivalent to title,** and "There could be no better apparent, visible and ostensible sign of the right of way than the existence of the road itself." 29PortoRico 864, 867. [b] **Changed road.**-29Porto Rico 864.

916-35 12LaA635, 126S79. [b] **Servitude of passage** can be acquired only by written title, and not by destination de père de famille. 7LaA375.

916-36 [a] 20 OhA442, 152NE734.

916-41 150Md125, 132A587.

916-42 149Wash494, 271P591. But see 299Pa484, 149A725.

916-43 297Pa317, 147A51.

917-44 297Pa317, 147A51; Pa 151A 690.

917-45 297Pa317, 147A51.

917-49 Ala 130S559; 150Md125, 132A 587; 33PortoRico 69.

917-50 150Md125, 132A587; Pa 151A 690. [c] **Leases of adjoining parcels.**-Lessor's use of lot previously leased held not sufficient to create easement of way in favor of lot subsequently leased. Pa 151A690.

918-56 108Conn19, 142A452.

918-58 206Cal 753, 276P336; 247Mich 563, 226NW242 [citCJ] (at common law mere right of way does not constitute such continuous easement as will pass by implication).

918-60 157Md1, 145A215; 115 Oh11, 152NE14.

919-64 203 Iowa1133, 212NW417; 154 Md102, 140A74, 56ALR1135; 235Mich24, 209NW133, 136 [quotCyc]; 309Mo 142, 274SW679; Pa 151A690; TexCommnA 6SW(2d)96.

919-65 235Mich24, 209NW133, 136 [quot Cyc].

919-67 152Md398, 136A822, 51ALR 1291; 309Mo 142, 274SW679; TexCivA 273SW697.

919-69 33PortoRico 69.

919-70 152Md398, 136A822, 51ALR 1291; 20 OhA442, 152NE734; 143SC 223, 141SE375; TexCivA 273SW697.

920-75 128Me252, 147A41 (openness of use and necessity); Me 151A558.

921-79 198Cal 510, 246P58; 94PaSuper 313. [b] **That roadway ends at highway separating lands conveyed from lands retained** does not militate against existence of easement over roadway when such highway existed and was used at time whole tract was under single ownership. 198Cal 510, 246P58. [c] **Reservations not implying grants of easements.**-193Wis212, 213NW472. [d] **Presumption** of reservation is raised where otherwise grantor's access would be cut off. 83 IndA569, 149NE375. [e] **Foreclosure decree** should set off easement where necessary to grantor. 83 IndA569. 149NE375.

921-81 190NC582, 130SE330 (arises by implication from necessity); TexCivA 273SW697.

921-86 107Conn32, 139A348; 143SC 223, 141SE375.

921-87 CalA 292P157; 206 Iowa1084, 221NW825; 143SC223, 141SE375; 143 Va159, 129SE274 (incumbent on owner of dominant estate to show previous unity of ownership).

922-90 107Conn32, 139A348; 203 Iowa 1133, 212NW417; 235Mich24, 209NW 133; 190NC582, 130SE330 (way of necessity not one of convenience); 286Pa 413, 133A627.

922-91 Ala 130S559; 143SC223, 141 SE375.

922-92 Ala 130S559; 217Ky317, 289 SW261; 254Mass37, 149NE632; 235 Mich24, 209NW133; 247Mich563, 226 NW242; MoA 26SW(2d)796; 286Pa413, 133A627; WVa 153SE146. [a] **Property abutting on highway.**-286Pa413, 133A627.

923-93 203 Iowa1133, 212NW417.

923-98½-New. An element of necessity need not be so strictly applied in determining whether an implied easement in riparian rights arises on severance of common ownership of property bordering on waters as in cases involving roads. 321Mo 186, 9SW(2d)978.

923-1 107Conn32, 139A348; 254Mass 350, 150NE203; 254Mass540, 151NE 291; 143Va159, 129SE274.

923-2 107Conn32, 139A348, 350 [citCJ]; 219Ky450, 293SW958; Md 148A441 (existence of other reasonable rights of way); 254Mass540, 151NE291; 20 OhA 442, 152NE734; 143SC223, 141SE375; TexCivA 273SW697; 143Va159, 129SE 274; 150Va231, 142SE361. See also 28 OhA392, 162NE706.

923-3 Ala 130S76; 169Ark792, 276SW 605; 104Conn36, 132A533; 206 Iowa 1084, 221NW825; 217Ky317; 289SW 261; Md 148A809; 232Mich283, 205NW 52; 221NYS190, 192 [citCJ]; 143SC 223, 141SE375; 143Va159, 129SE274. [a] (6) Where owner deeds island which can be reached only over his land or over lands of others, way of necessity over lands retained by him is granted by implication. 232Mich283, 205NW52.

924-5 143Va159, 129SE274 (as long as necessity continues to exist).

924-12 254Mass540, 151NE291.

925-13 217Ky317, 289SW261.

925-13½-New. Easement of way to the nearest public highway, given by implication to the grantee of a lot, can be invoked only for his benefit. 157Md213, 145A554.

925-26 321Mo 186, 9SW(2d)978. [a] 321Mo 186, 9SW(2d)978.

926-27 254Mass540, 151NE291.

926-29 93CalA658, 270P243.

926-30 20 OhA442, 152NE734.

926-33 254Mass540, 151NE291; 19 OhA489; TexCivA 273SW697.

927-42 254Mass540, 151NE291.

927-44 254Mass540, 151NE291.

927-48 TexCivA 273SW697.

927-53 TexCivA 14SW(2d)316; 143Va 159, 129SE274. [b] **Existence of way over lands of third person** does not affect grantee's right to way over grantor's lands where he is without access to highway. Ala 130S76.

927-55 But see 83Mont244, 271P455.

928-61 174Ark248, 294SW1006, 1009 [quotCJ]; 83CalA415, 256P1103; Conn 151A305; 165Ga83, 140SE67 (alley); 170Ga764, 154SE353; 317 Ill 179, 147 NE804; 321 Ill 346, 151NE896; 210Ky 654, 276SW563; 261Mass47, 158NE321 (passageways); 246Mich579, 225NW3; NJSup 129A406; 249NY52, 162NE581; 128Misc525, 219NYS545; 289Pa535, 137 A610; 87PaSuper265; RI 139A311; TexCivA 10SW(2d)1054; 103WVa81, 137SE349; 59 OntL318, [1926] 4DomLR 258. [d] **Easement attaches at time of actual sale.**-157Md213, 145A554.

929-62 174Ark248, 294SW1006, 1009 [quotCJ]; 169Ga678, 151SE349 [citCJ]; Ill 172NE829 (though plat is not executed according to statute); 157Md213, 145 A554; 283Pa381, 129A445.

929-63 283Pa381, 129A445.

929-64 261Mass47, 158NE321.

929-65 260Mass407, 157NE362; 261 Mass47, 158NE321; 289Pa535, 137A610.

929-69 210Ky654, 276SW563; 283Pa 381, 129A445; 103WVa81, 137SE349.

929-73 210Ky654, 276SW563.

929-81½-New. Purchasers of land abutting on a street dedicated by the original owner of a tract bear a contractual relation between themselves as to the street. 289Pa535, 137A610.

930-84 165Ga83, 140SE67 (alley).

931-5½-New. Rule applies to property adjacent to platted tract purchased from heirs of plattor, in reliance on streets as platted by him. 321 Ill 346, 151NE896.

931-7 Ill 172NE829; 210Ky654, 276 SW563.

931-9 [a] **Right of abutting owner to** keep abutting street open. Conn 151A 305.

931-10 58ND536, 226NW635; 151Va 108, 144SE483. See also 253Massl, 147 NE848.

931-12 254Mass350, 150NE203.

931-13 Conn 151A305.

931-14 But see 283Pa381, 129A445.

932-26½-New. [§ 133a] b½. **Ways Created by Will Incorporating Map.** Devise of land by will, incorporating a map showing a highway or road, creates a right of way therein, 210Ky654, 276 SW563.

932-26¾-New. which is a private right appurtenant to the land devised, and exists even though there is no acceptance of the way by public authorities, 210Ky 654, 276SW563.

932-26¼-New. and is not extinguished by abandonment of the public right. 210Ky654, 276SW563.

932-27 Ill 172NE829; 217Ky673, 290 SW474 [citCJ]; 130Misc599, 224NYS 153; 133Misc260, 231NYS342; 89 PaSuperl; 94PaSuper313.

933-36½-New. A deed conveying to a point near a road and along a line just below the road does not pass an easement in the road. 217Ky673, 290SW474.

933-43 TexCivA 10SW(2d)1054.

934-44 286Pa561, 134A481.

935-59 154Tenn545, 290SW409, 412 [quotCJ]; 103WVa81, 137SE349. [b] **Deed reserving right of access to park and spring** to individual and public held

not to indicate construction of prior deed to individual. 154Tenn545, 290SW409. [c] **Tract separated by street** and other property held covered by easement in "adjoining park." 154Tenn545, 290SW409.

935-61 154Tenn545, 290SW409, 412 [quotCJ].

935-63½-New. The establishment of a building line also creates an easement of unobstructed light, air, and vision for the benefit of the public and of owners whose property is included in the restricted area. 317 Ill 73, 147NE664.

935-64 107Conn32, 139A348; Ida 288P427; 322 Ill 350, 153NE684; 83 IndA737, 149NE647; 215Ky423, 285SW200; 223Ky315, 3SW(2d)654; 152Md604, 137A312; 260Mass407, 157NE362; 261Mass47, 158NE321; 233Mich261, 206NW334, 335 [quotCJ]; 171Minn358, 214NW49; 131Misc903, 228NYS473; 129Misc143, 221NYS190; 48RI292, 137A687; Tex CommnA 292SW518.

936-65 261Mass47, 158NE321; 233Mich261, 206NW334, 335 [quotCJ].

936-66 261Mass47, 158NE321; 233Mich261, 206NW334, 335 [quotCJ].

936-67 233Mich261, 206NW334, 335 [quotCJ]; TexCivA 10SW(2d)147; 143Va189, 138SE728.

936-71½-New. It has been said that an easement may be granted or transferred only by operation of law, or by instrument in writing, or by prescription. 75 Mont202, 243P568.

937-84 104Conn596, 134A63; 203 Iowa1133, 212NW417; 215Ky423, 285SW200; 128Me62, 145A405; Md 148A809; 253Mass422, 149NE116; Mass 168NE919; Mass 169NE664; 233Mich261, 206NW334; 235Mich245, 209NW73; 241Mich560, 217NW763; 244Mich571, 222NW96; 171Minn358, 214NW49; Miss 128S572; 131Misc903, 228NYS473, 474 [citCyc]; 128Misc299, 218NYS401; 129Misc143, 221NYS190; 28 OhA392, 162NE706; 126 Or18, 268P758; TexCivA 292SW288. See also 265Mass56, 163NE761. But see 137 Okl 86, 278P292. [a] 283Pa250, 129A83. [b] (1) 129Misc143, 221NYS190. [f] **Description of way held sufficient** though not exactly mentioned, where such way was only one touching premises. 214AppDiv147, 212NYS13. [g] **On division of tract right of way appurtenant will exist in owner of each division.**–Mass 169NE416. [h] **Right of way appurtenant to whole tract is appurtenant to any part** into which it is later subdivided. Mass 169NE664.

937-86½-New. Where a purchaser bought with knowledge that the vendor who had a right of passage over an adjoining lot had consented to reconstruction of a garage interfering with servitude of passage, he has no right to demand that the original extent of servitude be reëstablished. 160La459, 107S305.

937-86¾-New. A tenant having a mere right of way over a portion of premises, and not a right of possession thereof, may not grant actual possession thereof to sublessee. 128Misc24, 217NYS190.

937-86¼-New. A deed conveying property with certain easements, including rights in a right of way occupied by a spur track used in common with adjoining owners pursuant to an agreement therefor, conveys the easement of way created under the spur track agreement rather than the transient use and occupation thereof in accordance with the original agreement with the railroad company. 128Me62, 145A405.

937-87 [a] 95PaSuper358.

938-94 223Ky315, 3SW(2d)654; 187Wis232, 202NW34, 42 [quotCJ].

939-95 187Wis232, 202NW34, 42 [quotCJ].

939-97 232Mich283, 205NW52, 54 [quotCJ].

939-98 217Ala196, 115S237; 207Cal613, 279P657; CalA 271P1103(2dcase); 107Conn656, 142A301; 322 Ill 350, 153NE684; 205 Iowa678, 216NW637 (easement of drainage); 223Ky315, 3SW(2d)654; 233Ky299, 25SW(2d)730; 254NY186, 172NE464; 130Misc676, 224NYS711; 128Misc299, 218NYS401; 58ND536, 226NW635; TexCivA 8SW(2d)750. See also 154Tenn545, 290SW409. [a] (2) Where parties to deed conveying building, rights, and appurtenances understood rooms overhanging adjoining property to be part of building, easement of space thereunder passed so far as grantor had power. TexCommnA 292SW518.

939-99 256Mass311, 152NE360.

939-1 232Mich283, 205NW52, 54 [quot CJ].

939-3 233Mich261, 206NW334; 128Misc299, 218NYS401; TexCommnA 288SW813.

939-4 152Md604, 137A312.

939-5 95PaSuper358.

939-6 102CalA571, 283P314; 104Conn139, 132A565; 128Misc299, 218NYS401; 126 Or18, 268P758.

939-7 219Ky757, 294SW483; 130Misc676, 224NYS711; 224AppDiv435, 231NYS315; TexCommnA 292SW518; 149Wash433, 271P93. See also CalA 271P1103(2dcase). [a] (1) 233Mich261, 206NW334. (2) 232Mich283, 205NW52 (way to island). [f] **Facts not showing due diligence to ascertain extent of easement.**–219Ky757, 294SW483.

940-8½-New. But where a written contract under seal granting the use of a lot for display advertising is not acknowledged or attested as required by statute, it is void as to a subsequent purchaser or incumbrancer with actual notice. 130Misc676, 224NYS711.

940-9 TexCivA 273SW969.

940-10 TexCivA 273SW969.

940-11½-New. The dominant owner is not bound to exhibit the written grant on inquiry, but it is sufficient if he gives notice of his claim as a matter of right on the written grant. 219Ky757, 294SW483.

940-12 229Ky369, 17SW(2d)207; 149Md484, 132A64; 192NC280, 135SE26. See also CalA 271P1103(2dcase).

940-13 205 Iowa678, 216NW637 (easement of drainage); 101Vt64, 141A603. See also 224AppDiv435, 231NYS315. [a] **Prescriptive right cannot be lost** by adverse user for less than statutory period. 219Ky450, 293SW958. [b] **Happening of contingency.**–108WVa564, 152SE315.

940-14 NC 155SE856 (construction of deed as to termination).

940-14½-New. Courts are not inclined to favor forfeiture of easements. 218Ky239, 291SW38.

940-14¾-New. Upon loss or abandonment of an easement, right to possession reverts to owner of fee. 127Misc558, 217NYS413.

940-14¼-New. Grant of easement of way providing for reversion when roadway to which way leads shall be closed or otherwise restricted to use terminates on use of either party being effectively restricted. 251Mich474, 232NW189.

940-14⅛-New. Easement of roadway by written grant cannot be avoided by indefinite conversations or negotiations. 251Mich474, 232NW189.

940-15 104Conn139, 132A567; 107Conn656, 142A301; 111Conn90, 149A241; 149Md484, 132A64; 152Md126, 136A618, 56ALR1103; Mass 168NE919; RI 139A311. [a] (2) Where abandonment leaves servient estates abutting or convenient to other public ways. 149Md484, 132A64.

941-18 107Conn656, 142A301; 111Conn90, 149A241; NJ 147A437. [c] (8) Other cases. NJ 147A437.

941-19 104Conn139, 132A567; 218Ky239, 291SW38; Md 148A441; Mass 167NE298; NJ 147A437; Ont [1930] 1DomLR354. [c] (8) Servitude cannot be deemed to be abandoned because method of use has been changed. 90PaSuper412. (9) Other cases. Mass 168NE919. [i] **Construction of new roadway** by dominant owners claiming right to both old and new ways made them remain legal owners of old right of way. Mass 168NE919.

941-20 104Conn596, 134A63; 111Conn90, 149A241.

942-22½-New. A right of way by necessity is not lost by payment of crossing fee. 254Mass540, 151NE291.

942-25 101WVa19, 131SE859, 861 [cit CJ].

942-26 162La941, 111S336; Mass 173NE508 (mere nonuser not conclusive).

942-30 Mass 168NE919.

942-31 87CalA188, 262P53(2dcase); 104Conn139, 132A565; 104Conn596, 134A63; 111Conn90, 149A241; 339 Ill 22, 170NE709; 156Md284, 144A231; 260Mass407, 157NE362; 261Mass47, 158NE321; Mass 167NE298; Mass 168NE919; 231Mich277, 203NW990 (use of road branching off from road conveyed pursuant to agreement); 233Mich261, 206NW334; NJ 147A437; 254NY186, 172NE464; 226AppDiv490, 235NYS569; 299Pa284, 149A184; 101Vt384, 143A700; 142Wash204, 252P916; 59 OntL318, [1926] 4DomLR258; Ont [1930] 1DomLR354 (non-user of portion). [b] (1) 260Mass407, 157NE362. [c] (1) See also 89PaSuper1. (2) If capable of partial use, easement is not extinguished. 260Mass407, 157NE362.

943-33 104Conn139, 132A565; 111Conn90, 149A241; 339 Ill 22, 170NE709; 260Mass407, 157NE362; 261Mass47, 158NE321; 233Mich261, 206NW334; 62 OntL328, [1928] 3DomLR397.

943-36 231Ky508, 21SW(2d)805; 261Mass47, 158NE321.

943-37 **Erratum.**–See "supra § 157 note 37" should be See "infra § 153 note 47."

943-44 105Conn350, 135A289.

944-45 103WVa81, 137SE349, 352 [cit CJ].

944-46 169Ga678, 151SE349. [c] **Use by one or more persons,** to whom easement of right of way was granted by partition decree, of another way over abutting lands owned by stranger to partition suit, is not election to extinguish way decreed. 101WVa19, 131SE859.

944-51 [b] (1) 162La941, 111S336.

944-53 125Misc584, 211NYS217.

944-54 TexCivA 27SW(2d)260.

945-59 150Md125, 132A587, 589 [quot Cyc]; 152Tenn664, 280SW689, 692 [cit CJ]. See also 154Tenn545, 290SW409.

945-61 150Md125, 132A587; Mass 168NE919; 299Pa484, 149A725; 152Tenn664, 280SW689, 692 [quotCJ]; 152Va226, 146SE263. [a] **In Oklahoma.**–144Okl133, 289P763.

946-67½-New. On railroad company's taking by eminent domain half of width of street in which there is an easement appurtenant to its property, easement in the part of the street not taken remains. 253Mass1, 147NE848.

946-67¼-New. Where servient owner acquired only part of dominant tenement easement appurtenant is not merged. Mass 169NE664.

946-72 Mass 169NE664.

947-83 198Cal510, 246P58. [a] **Easements for benefit of parcels reserved.**–198Cal510, 246P58.

947-85 Mass 168NE919.

947-86 198Cal510, 246P58.

947-88 203 Iowa1133, 212NW417.

947-90 203 Iowa1133, 212NW417.

947-90½-New. Easements, granted by an agreement between a grantee and mortgagee that a certain "place" should forever remain open and unencumbered for common use of owners and occupants of abutting realty for the purpose of passing over and draining under it, are lost by merger when mortgages are discharged, where no lots were sold after the agreement while the mortgages were in force. 265Mass571, 164NE483.

948-3 152Md604, 137A312, 313 [cit CJ]; 257Mass32, 153NE325, 47ALR897.

949-9 107Conn656, 142A301; 111Conn90, 149A241; 295Pa108, 145A63(2dcase). [c] **Where lots were purchased by direct reference to plat showing dedicated streets,** city can, by deed to subsequent grantee of other lots, relinquish its public easement for street purposes in certain portion of street, even though it passes no ordinance or resolution closing street. TexCivA 10SW(2d)1054.

949-10 [g] **Easement held not released.**–187Wis232, 202NW34.

949-13½-New. Release by two of three

owners of an easement does not serve to release it as against the owner who did not release. 152Md604, 137A312.

949-14 102WVa230, 135SE2, 3, 50ALR 1293 [citCJ].

949-15½-New. An easement of way acquired by prescription is not lost by obtaining permission from the owner of the servient estate to widen the way and use it as a wagon road. 102WVa230, 135SE2, 50ALR1293.

949-18 107Conn656, 142A301. But see 249NY417, 164NE336.

950-21 160La459, 107S305.

950-28 Mass 165NE27.

951-33 [f] **Maintenance of gate** across alleyway does not constitute obstruction or result in ouster or adverse possession, if it permits of use of way. 233 Mich261, 206NW334.

951-35 Mass 173NE508.

951-36 104Conn139, 132A567.

951-40 See also 108WVa531, 151SE 842.

953-66 254Mass540, 151NE291.

953-71 See also 29PortoRico 864.

953-73½-New. Where an electric power company never renounced its existing right of way easement acquired under deed and did nothing indicating an intention to do so, its condemnation of a wider right of way does not automatically cause the old right to revert to the owner of the land. 226AppDiv490, 235 NYS569.

954-77 RI 150A462.

954-83 261Mass47, 158NE321.

954-84 221Ky190, 298SW710.

954-89 Iowa 227NW421; NH 146A169.

955-90 Iowa 227NW421; 167La199, 118SS87; 167La347, 119S73(2dcase).

955-94 Ala 129S26; 262Mass159, 159 NE513.

955-96 [a] (3) Where agreement gave easement for connection of sprinkler system with water tank, till servant owner should change location of or remove tank, deterioration of tank necessitating replacement does not terminate easement. 219Ky757, 294SW483.

955-99 38GaA494, 144SE330.

955-2 [a] (3) Replacing old windows which swing into rooms on hinges by modern windows moving up and down does not defeat easement of light and air where neither wider nor higher than old windows, though necessitating casing. 98NJEq481, 131A96.

956-9 231Ky508, 21SW(2d)805; 147 Miss215, 113S332; 147Miss385, 113S 336; 103WVa81, 137SE349; 108WVa 531, 151SE842. But see 101Vt384, 143 A700. [d] **Abandonment of cemetery.**–127Misc558, 217NYS413. [e] **Where assessment registered.**–261Mass47, 158NE 321.

956-10 147Miss215, 113S332.

956-12 198Cal 510, 246P58; 104Conn 139, 132A567; 104Conn596, 134A63; 147Miss385, 113S336; 103WVa81, 137 SE349.

956-13 103WVa81, 137SE349.

956-13½-New. An implied easement of a grantee of a lot in the use of a street is extinguished as to a portion of the street which had never been opened or used as a way, where the grantee and his successors in title permitted another to inclose, use, occupy, and claim that portion of the street under claim of right for the statutory period. 157Md 213, 145A554.

957-14 104Conn596, 134A63.

957-15 104Conn139, 132A565.

957-17 104Conn139, 132A565.

957-18 104Conn139, 132A565; 147 Miss385, 113S336.

957-19 147Miss215, 113S332.

957-28½-New. Condemnation by city of part of passageway does not affect right of holders of dominant estate to use remaining portion. 258Mass544, 155NE447.

958-37 16F(2d)395; Mass 167NE233; 137 Okl 86, 278P292; 297Pa317, 147A 51; 49RI 6, 139A499; Vt 150A70; 193 Wis361, 214NW441.

958-39 120 Or202, 250P722.

958-40 16F(2d)395; 70CalA283, 233P 370; 92CalA504, 268P675; 317 Ill 511, 148NE269; 258Mass494, 155NE459; 120 Or202, 250P722; 123 Or549, 262P 243; 154Tenn334, 285SW567; TexCivA 289SW111, 112 [citCJ]; TexCivA 289 SW697; 152Va889, 148SE779; 193Wis 212, 213NW472. [a] **Petitioner need not prove acquisition of right to pass in specified defined course.**–Mass 169NE 664.

959-41 70CalA283, 233P370; 297Pa 317, 147A51; TexCivA 289SW111, 112 [citCJ].

959-42 16F(2d)395; TexCivA 289SW 111, 112 [citCJ]. [a] **Evidence disproving actual knowledge of claim** of right compels claimant to rely on use of land so visible, open, and notorious that law will presume knowledge of claim to use it as matter of right. 70CalA283, 233P 370.

959-43 70CalA283, 233P370; 297Pa 317, 147A51.

959-44 Ala 130S559; 70CalA283, 233P 370; 235Mich24, 209NW133; 154Tenn 334, 285SW567; 193Wis212, 213NW 472. [a] 70CalA283, 233P370.

959-45 70CalA283, 233P370; TexCivA 289SW111, 112 [citCJ].

959-46 70CalA283, 233P370; 193Wis 212, 213NE472.

959-47 [a] (2) To support claim of easement by adverse possession, adverse claim must be proved to have been communicated by claimant to owner. 100CalA517, 280P389. [b] 38 GaA494, 144SE330; 38GaA684, 145SE 498.

959-49 143Va29, 129SE272.

959-51 16F(2d)395; 70CalA283, 233P 370; 216Ky729, 288SW679; Mass 169 NE428; 179Minn228, 228NW755; 76 Mont600, 248P196; 213AppDiv476, 211 NYS3; 127Misc813, 216NYS695; Vt 150A70; 143Va201, 129SE217 (presumption from long acquiescence of owner); 193Wis212, 213NW472; 193 Wis361, 214NW441. See also Mo 264 SW368. But see 154Tenn334, 285SW 567. [b] (1) But see 154Tenn334, 285 SW567. (4) Ordinarily driveway over land is in itself no indication of easement of way over it. 104NJL212, 141 A13. [d] **Adverse use, claim of right, and hostile intent** presumed where open and continuous use long enough to create presumption of adverse grant. 70 CalA283, 233P370.

960-52 226Ky225, 10SW(2d)840; 175 Minn592, 222NW272; 76Mont600, 248P 196; 127Misc813, 216NYS695; Vt 150 A70; 193Wis212, 213NW472.

960-54 70CalA283, 233P370.

960-57 70CalA283, 233P370; 92CalA 504, 268P675; 209Ky586, 273SW432; 127Misc813, 216NYS695; 143Va201, 129 SE217.

960-58½-New. As regards establishing private easement by prescription, presumption is that user is permissive rather than adverse. Ala 130S559.

960-61 Md 148A809; 66Utah509, 243P 922.

960-62½-New. It is incumbent on the owner of dominant estate to show previous unity of ownership. 143Va159, 129SE274.

961-66 62 OntL328, [1928] 3DomLR 397.

961-69 Contra 104Conn139, 132A565.

961-69½-New. Abandonment of easement will be presumed when owner does or permits act inconsistent with future enjoyment. 111Conn90, 149A241.

961-78 [a] (2) 120 Or202, 250P722.

961-81 [b] 169Ark792, 276SW605.

962-82 171Minn358, 214NW49.

962-93½-New. Adverse user may be inferred from situation of parties and nature and circumstances of use. 105Conn 350, 135A289.

962-4½-New. Plaintiff's deed conveying land and right of way, which was recorded when defendant acquired land subject to right of way, is admissible in action to quiet title, although reciting other deeds and wills in chain of title. 104Conn596, 134A63.

962-4½-New. Evidence of permissive use after prescription period held admissible. Mass 169NE428.

962-8½-New. In determining intent to grant easement the entire situation when the deeds were given must be considered. 254Mass350, 150NE203.

963-9½-New. Evidence of the plat has been held admissible. 170Ga764, 154SE 353.

963-10 Mass 169NE428.

963-20½-New. Evidence that plaintiff's wife purchased land over which he could pass is not evidence of his abandonment of right of way over another route. 104 Conn596, 134A63.

963-22 178Minn203, 226NW569(2dcase) 65ALR124 (strict proof required). [b] (1) 20 OhA41, 153NE142. (5) To sustain finding that right of way was not granted. 169Ark792, 276SW605. (6) To show easement for ditch. 76Mont 600, 248P196. (7) To raise presumption of designation of right of way by necessity. 254Mass540, 151NE291. (8) To show easement limited to particular use. 259Mass256, 156NE70. (9) To show creation of permanent drainage easement. 205 Iowa678, 216NW637. (10) Easement in portion of property used as driveway. 95CalA523, 272P1099. [c] **Evidence insufficient.**–135Misc710, 238NYS212.

963-23 [a] **Evidence held insufficient** to show easement of necessity for perpetual maintenance of water pipe. 309 Mo 142, 274SW679.

963-25½-New. Whether the use of a road was by prescription or merely permissive may be determined from the relationship of the parties in the light of surrounding circumstances. 92CalA504, 268P675.

964-28 [a] (1) 203 Iowa992, 213NW759; 247Mich44, 225NW492. (2) To support decree requiring defendant to deed land without reservation of right of way. 102WVa574, 136SE42. [b] (7) To show easement for perpetual maintenance of water pipe. 309Mo 142, 274SW679. (8) To show easements by implication over remaining land of grantor. 149Md484, 132A64. (9) To establish easement for flow of sewage by express agreement. 99NJEq864, 132A678.

964-29 [a] (1) 260Mass407, 157NE362. (5) To show acquiescence for ten or twelve years in use of road branching off from road conveyed, pursuant to agreement between grantee and record owner of servient tract. 231Mich277, 203NW990. (6) To show creation of easement of way. 121Kan264, 246P969; 67Utah278, 247P503. (7) To show easement capable of use in part and extent of such part. 260Mass407, 157NE362. (8) To show intention not to include land previously sold in vendor's deed conveying right of way. 78CalA334, 248 P526. (9) To show easement in passaging over lot as shown on registered plan. 261Mass47, 158NE321. (10) To establish boundary of way. 265Mass56, 163NE761. (11) Other instances. Mass 173NE508. [b] (3) To show existence of any apparent servitude permitting drawing water from cistern situated in adjoining lot. 33PortoRico 69. (4) To warrant cancellation on ground of fraud or mutual mistake. Mich 233NW424.

964-29½-New. , or by permission. 76 Mont600, 248P196.

964-32 [a] TexCivA 273SW697 (that substituted mode of egress involved one and one-half miles of further travel held to show that existing right of way under railroad track from one part of plaintiff's land to another was way of necessity); TexCivA 281SW226; 150Va231, 142SE361. [b] Ala 130S559; CalA 292 P157; Md 148A809; 254Mass350, 150 NE203.

964-32½-New. Easement by implication can be established only by clear proof. Pa 151A690.

964-33 92CalA504, 268P675; 317 Ill 511, 148NE269; 203 Iowa1114, 211NW 986; 123 Or549, 262P243. [b] 152Va 889, 148SE779. [e] (3) 297Pa317, 147 A51. [f] **Mere proof of use** is insufficient. 205 Iowa994, 219NW135.

964-34 203 Iowa992, 213NW759. [a] 214Ala64, 106S400; 80Colo 390, 252P 808; 257Mass483, 154NE79; 83NH219, 140A162; 103NJEq552, 144A14 (public way); TexCivA 281SW226; TexCivA 285SW689; TexCivA 289SW697; 193 Wis212, 213NW472; 193Wis361, 214 NW441. [b] 92CalA504, 268P675; 93 CalA658, 270P243; 170Ga53, 152SE44; 203 Iowa1114, 211NW986; 147Miss385, 113S336; 79Mont485, 257P406; 120 Or 202, 250P722; 146Va246, 135SE809; Va 154SE538. [c] (1) 196Cal 666, 239P314

(sufficient); 105Conn350, 135A289. [e] (1) 172Ark390, 288SW932; 208 Iowa169, 225NW417; 221Ky190, 298SW710; 221 Ky195, 298SW712; 240Mich327, 215NW 331; 171Minn358, 214NW49; 179Minn 228, 228NW755; 127Misc813, 216NYS 695; 91PaSuper368; 91PaSuper404; 152 Va226, 146SE263; Wis 232NW697 (right of ingress and egress). (2) Tex CivA 289SW111; Utah 287P622. (3) 206Cal 753, 276P336; 154Tenn334, 285 SW567. (4) 205 Iowa994, 219NW135. (5) To rebut presumption of easement by open user for more than twenty years. 127Misc813, 216NYS695. (6) To show that way extended to depth claimed. 91PaSuper368. [f] **Width of easement of way.**–70CalA283, 233P370. [g] **Notice.**–TexCivA 285SW689.

964–35 216Ky729, 288SW679.

964–36 [a] (1) 214Ala64, 106S400; 172 Ark390, 288SW932; 175Ark1170, 300 SW418; 70CalA283, 233P370; 105Conn 722, 136A684; 205 Iowa678, 216NW637 (easement of drainage). (3) To justify finding of absence of adverse possession or user relied on to establish easement for use of adjoining land for turn row, though defendant's predecessor gave plaintiff permission to use land. 100CalA517, 280P389. [b] Ala 130S 559; 317 Ill 511, 148NE269; 147Miss 385, 113S336; 103NJL140, 134A735; 191 NC747, 133SE2.

964–37 175Minn592, 222NW272.

964–38 [a] 214Ala64, 106S400; 196 Cal 666, 239P314 (to put defendant in inquiry of claim of easement in water ditch). [b] 147Miss385, 113S336.

964–39 [a] 70CalA283, 233P370; 203 Iowa1133, 212NW417; 226Ky225, 10SW (2d)840; 175Minn592, 222NW272; 191 NC747, 133SE2. [b] (1) 203 Iowa1133, 212NW417; 49RI6, 139A499. (2) 172 Ark390, 288SW932. [c] (2) To show use permissive in inception. Mo 264SW368.

964–40 [a] 70CalA283, 233P370; 105 Conn722, 136A684. [e] **Evidence held insufficient.**–175Minn592, 222NW272; 191NC747, 133SE2.

965–41 [a] 209Ky586, 273SW432.

965–42 105Conn350, 135A289; Tex CommnA 288SW813.

965–42½–New. An oral agreement for the use of a way made at the time of sale of land and use thereunder conclusively show use under a claim of right. 221Ky195, 298SW712.

965–42¾–New. That a way traversed uninclosed woodlands tends to show that the use thereof was permissive and requires a stronger proof of claim of right. 221Ky190, 298SW710.

965–43 [a] 196Cal 666, 239P314. [b] **Evidence insufficient.**–191NC747, 133 SE2.

965–44 221Ky190, 298SW710.

965–47 92CalA504, 268P675; 221Ky 190, 298SW710.

965–55 261Mass47, 158NE321; Mass 168NE919; NJ 147A437. [a] (3) To show loss by nonuser. NJCir 143A79. [b] (1) Conn 151A351; 169Ga678, 151 SE349; 260Mass407, 157NE362; 261 Mass47, 158NE321; Mass 168NE919; Mass 173NE508; 233Mich261, 206NW 334 (slight use of way); RI 139A311; Ont [1930] 1DomLR354.

966–56 NJ 147A437. [a] (2) Ark 31 SW(2d)409. (3) To show extinguishment of way by restriction of use of roadway to which way led. 251Mich 474, 232NW189. [b] (2) To sustain finding that street had not been extended past premises of dominant owner, thereby terminating easement. 68CalA 554, 229P1002. (3) To show extinguishment of easement under agreement of parties. 20 OhA41, 153NE142.

965–58 Ala 130S559; 254Mass350, 150 NE203; Vt 150A70; 193Wis361, 214 NW441.

966–60 70CalA283, 233P370; 100CalA 517, 280P389; NC 154SE678; TexCivA 289SW111; 193Wis361, 214NW441.

966–62 193Wis361, 214NW441.

966–63 Mass 169NE428; 193Wis361, 214NW441.

966–65 93CalA658, 270P243; 197NC 280, 148SE246; TexCommnA 288SW813.

966–70½–New. Question of right of way of necessity is for jury. 143SC223, 141SE375.

966–71 104Conn596, 134A63; Mass 167 NE298.

966–73 257Mass483, 154NE79.

966–75 NC 155SE856. [a] **Evidence held insufficient to go to jury** (1) on necessity for passageway. 217Ky317, 289 SW261. (2) On agreement for passageway. 217Ky317, 289SW261.

966–75½–New. Whether the alleged necessity on which an alleged right of way is predicated really exists is a question for the jury. TexCivA 273SW 697.

966–77 233Mich261, 206NW334, 335 [quotCJ]; 289Pa535, 137A610.

966–78 233Mich261, 206NW334, 335 [quotCJ]; 128Misc24, 217NYS190.

967–80 70CalA283, 233P370 (question resolves itself into what may be considered reasonable use of right as acquired); 77CalA328, 246P559; 120 Or 202, 250P722; 154Tenn545, 290SW409; 148Va431, 139SE247; 196Wis36, 219 NW420.

967–81 47 Ida619, 277P542. See also 77CalA328, 246P559.

967–81½–New. Harbor line has been held line beyond which easements appurtenant to lots across street do not extend. 339 Ill 463, 171NE550.

967–82 70CalA283, 233P370; 77CalA 328, 246P559; 248Mich95, 226NW349; 102WVa230, 135SE2, 3, 50ALR1293 [cit CJ]. [c] **Way by prescription, whether public or private, can never be wider** than used on ground. 298Pa77, 148A41.

967–85 248Mich95, 226NW849; 102 WVa230, 135SE2, 3, 50ALR1293 [citCJ].

967–83½–New. An easement of way acquired by prescription is not enlarged by permissive use of a wider way. 102 WVa230, 135SE2, 50ALR1293.

967–90 77CalA328, 246P559; Mass 167 NE233; 152Va889, 148SE779; 196Wis 36, 219NW420. [b] **Grant of right to build bridge without restriction as to size** invests officers of grantee with fair discretion as to size. 205 Iowa678, 216 NW637. [c] **Construction in connection with statute.**–Mass 165NE27.

968–92 265Mass571, 164NE483.

968–93 128Me62, 145A405.

968–94 47 Ida619, 277P542; 120 Or202, 250P722, 725 [citCJ]; 152Tenn664, 280 SW689 (carries no rental rights).

968–94½–New. Rights claimed under an implied covenant must not conflict with the express terms of the grant. 120 Or202, 250P722.

968–95 295Pa40, 144A740. [f] **Inside lot.**–233Mich261, 206NW334.

968–96 128Misc24, 217NYS190; 48RI 312, 138A38, 53ALR550.

968–97 Mass 167NE233; Mass 172NE 882; 224AppDiv762, 230NYS215. See also 2LaA126. [a] (4) Right to have way open full width from surface to sky in view of circumstances and long continued use. 187Wis232, 202NW34. [d] **Right to possession** of property is not granted by easement or right of way over it. 128Misc24, 217NYS190. [e] **Unopened streets.**–Implied covenant of right of way on part of grantor, selling property previously subdivided into lots shown as bordering streets and alleys, is limited to that portion of unopened street over which it is necessary for grantee to pass to public highway. 157Md213, 145A554.

968–98½–New. Reservation of fire exit requires reasonable, practical, and safe exit. 215AppDiv301, 213NYS637 (not "mole hole").

968–98¾–New. Where parties stipulate for way of necessity to highway, their rights are the same as when the way of necessity has been established in invitum. 190NC582, 130SE330.

968–98¼–New. Reservation of ten-foot strip for use as driveway held to reserve passage to garage, obstructing further passage only. 160La459, 107S 305.

968–99 254Mass37, 149NE632; 187Wis 232, 202NW34 (court so construing where language is ambiguous). [c] **Beginning and end fixed in first call of reservation paragraph,** being more material and important than second, are controlling. 102Conn663, 129A849.

963–1 [a] 187Wis232, 202NW34 (construction of easement under circumstances and long continued use).

968–2 104Conn596, 134A63.

968–4 128Me62, 145A405.

969–6 104Conn596, 134A63; 101Vt384, 143A700; 151Va229, 144SE460.

969–7 TexCivA 292SW288.

969–8 101Vt384, 143A700.

969–11 104Conn139, 132A565.

969–12½–New. Any implied easement of right of way arising on the sale of property prior to the date of a plat will not extend to increased width of a street first shown by the subsequent plat. 157Md213, 145A554.

969–13 92Fla375, 109S648, 654 [quot CJ].

969–15 [b] Mass 167NE233. [f] **Easement of right of way in alley construed,** in view of ambiguous language, circumstances and long continued use to grant right to have same open from surface to sky. 187Wis232, 202NW34.

970–17 290Pa448, 139A154.

970–26 70CalA283, 233P370.

971–32 101Vt64, 141A603; 142Wash 204, 252P916, 919 [citCJ].

971–33 101Vt64, 141A603.

971–40 TexCivA 17SW(2d)1092; 195 Wis139, 217NW730.

971–43 101Vt64, 141A603.

971–45 48RI 292, 137A687.

971–46 104Conn139, 132A565; 176Minn 264, 223NW151.

972–49½–New. Undefined way may be located by actual user, and can be protected in same way as defined way. 152 Md604, 137A312.

972–49¾–New. The practical adoption and use for a long time of a particular route under a right of way granted by deed, if acquiesced in by the grantor, operates to determine the location of the way as if it had been described in the deed. 254Mass540, 151NE291.

972–52 254Mass540, 151NE291; Tex CivA 292SW288, 289 [quotCJ].

972–56 254Mass540, 151NE291; 190NC 582, 130SE330; 192NC577, 135SE466.

972–57 254Mass540, 151NE291; 192NC 577, 135SE466.

972–58 190NC582, 130SE330.

972–60 143SC223, 141SE375.

972–61 TexCivA 273SW697.

972–61½–New. Acceptance. Plaintiff is entitled to select road over defendant's land if road built by defendant is in effect a location by plaintiff of road. 217Ky132, 289SW222.

972–63 126 Or18, 268P758, 759 [quot CJ].

972–64 Mass 164NE822. [b] **Effect of registration of part of servient land as free from easement.**–Registration of title to land, free of easement of right of way to river landing from lots conveyed with privilege of crossing land between adjacent highway and river, does not prevent location of way in strip adjoining it at demand of owners of such lots. Mass 164NE822.

972–65 158La682, 104S616 (minutes should show what rules were taken on cause); 232Mich283, 205NW52; 126 Or 18, 268P758, 759 [quotCJ].

973–67 Mass 172NE882; 101Vt64, 141 A603.

973–71 232Mich283, 205NW52.

973–72 70CalA283, 233P370 (easement must contain description of land subject to servitude with sufficient clearness to locate it); 232Mich283, 205NW52. [a] **Easement to which one is entitled is not lost because undefined before litigation.**–Mass 169NE664.

973–76 254Mass37, 149NE632.

973–78 Utah 276P912.

973–79 228Ky211, 14SW(2d)766(2d case); 254Mass540, 151NE291; 176 Minn264, 223NW151; Utah 276P912. [a] **Grantee held authorized** to make different location under circumstances of case. 176Minn264, 223NW151.

973–80 Utah 276P912.

973–82 232Mich283, 205NW52; 297Pa 317, 147A51 (there cannot be ambulatory location of private street); 101Vt 64, 141A603; 195Wis139, 217NW730. [b] TexCivA 273SW697.

974–85 254Mass540, 151NE291; Mass 164NE822. But see 101Vt64, 141A603.

974–97 77CalA328, 246P559; 88 PaSuper71, 80 [citCJ]; 101WVa15, 131 SE712, 713 [citCJ]; Can [1930] 4DomLR961. [g] **Privilege of watering cattle at pond** does not include right to main-

tain dock or bathe in pond. 88PaSuper 71. [h] **Care required.**–101WVa15, 131 SE712.

975–99 77CalA328, 246P559.

975–1 101WVa15, 131SE712.

975–2 244Mich571, 222NW96. [d] **Grant of bathing beach privileges and right of way** with hotel carried incidental right of way over grantor's intervening strip of land. Mass 169NE 664.

975–8 77CalA328, 246P559.

975–9 77CalA328, 246P559; 207 Iowa 1025, 221NW665; TexCivA 299SW532.

975–10 317 Ill 179, 147NE804.

975–13 Mass 172NE882.

976–14 254Mass540, 151NE291.

976–15 48RI 312, 138A38, 53ALR550.

976–17 104Conn139, 132A565.

976–21 TexCivA 299SW532, 533 [cit CJ].

976–23 152Md398, 136A822, 51ALR 1291; 254Mass540, 151NE291. [b] (2) Tenant on upper floors, having easement of necessity for bringing gas through premises of lower tenant may enlarge user with increasing needs. 152Md398, 136A822, 51ALR1291.

977–31 70CalA283, 233P370.

977–33 70CalA283, 233P370.

977–38½–New. Copossessor of right of way can only give consent to laying water mains to extent of his rights. 229 AppDiv392, 242NYS122.

977–41 241Mich560, 217NW763, 764 [citCJ].

977–48 196Wis50, 219NW425, 426 [cit CJ&Cyc].

977–49 223Ky315, 3SW(2d)654.

977–50½–New. Where right of way was granted without reservation of use thereof as appurtenance to adjacent lands of grantor, purchaser of such adjacent lands acquires no right to use the way. TexCommnA 288SW813.

978–51 77CalA328, 246P559; 265Mass 203, 163NE856; 233Mich261, 206NW 334; 48RI 312, 138A38, 53ALR550; TexCommnA 288SW813.

978–52 256Mass311, 152NE360. [a] **Owner of fee** may require owner of easement for pipe line to change construction of line as originally constructed so as to render possible full enjoyment of property rights of both parties. TexCivA 294SW284.

978–57 229AppDiv392, 242NYS122.

978–58 229AppDiv392, 242NYS122 (digging trench).

978–63 229AppDiv392, 242NYS122 (parking automobiles); 48RI 312, 138 A38, 53ALR550; 195Wis139, 217NW 730.

979–73 317Ill 179, 147NE804; 215Ky 189, 284SW1031, 1032 [citCJ]; 215Ky 423, 285SW200; TexCommnA 288SW 813.

979–74 215Ky189, 284SW1031, 1032 [citCJ].

979–75 215Ky189, 284SW1031, 1032 [citCJ].

979–76 317 Ill 179, 147NE804; 215Ky 189, 284SW1031, 1032 [citCJ]; WVa 153SE146.

980–78 215Ky189, 284SW1031, 1032 [citCJ].

980–80½–New. The owner of the dominant tenement may be enjoined, and is liable for damages, for improper use of a prescriptive right of way. 219Ky450, 293SW958.

980–81 221MoA389, 277SW944. [e] **Right to contribution for improvements.**–221MoA389, 277SW944.

980–82 221MoA389, 277SW944, 945 [quotCJ]. [c] (2) State, to whom bridge is conveyed by town which granted to railroad easement over bridge, is not required to make repairs when bridge is abandoned by it. 227AppDiv11, 236NYS 477.

981–83 221MoA389, 277SW944. See also 94CalA323, 271P118.

981–84 221MoA389, 277SW944.

981–99 70CalA283, 233P370; 152Md 398, 136A822, 51ALR1291; 133Misc260, 231NYS342; 229AppDiv392, 242NYS 122; 289Pa535, 137A610.

982–4 70CalA283, 233P370.

982–5 152Md398, 136A822, 51ALR1291.

982–12 289Pa535, 137A610; TexCivA 296SW954. [c] (2) Owner of lot abutting on street held entitled to injunction, where other lot owners raised surface of street eight feet above his land. 289Pa 535, 137A610.

983–13 289Pa535, 137A610.

983–15 29Hawaii43.

983–16 152Md398, 136A822, 51ALR 1291.

983–18½–New. So long as the use of an easement is confined to the purposes under which it was acquired and created without increasing the burden upon the servient estate, the owner of the easement may make improvements or changes not affecting its substance. 70 CalA283, 233P370, 374 [citCJ].

983–21 [g] **Change in grade and level of fire exit.**–Easement held substantial and adjoining new building to interfere with reasonable use of way, rendering it less convenient and accessible. 215AppDiv 301, 213NYS637.

984–27 130Misc599, 224NYS153.

984–27½–New. Injury to easement must be shown before erection of fire escape across alley. 289Pa164, 137A184, 55 ALR908.

984–28 207 Iowa1025, 221NW665; 253 Mass422, 149NE116; 265Mass571, 164 NE483; 229AppDiv392, 242NYS122; 34 PortoRico 244 (regulation not obstruction); 151Va229, 144SE460. See also 94 CalA480, 271P507. [b] **Increased price of site and cost of building hotel** because of easements interfered with give no greater rights than owners of similarly situated lots. 339 Ill 463, 171NE 550.

984–29½–New. Defendant has no right to obstruct highway unless he has some title to land though highway is not public highway. 233Ky299, 25SW(2d)730.

984–29¼–New. Passway established and acquired as open passway must be kept unobstructed. 235Ky226, 30SW (2d)963.

984–29¼–New. Parties adding strip to width of unobstructed passway held to have intended entire passway to be of same character. 235Ky226, 30SW(2d) 963.

984–30 [g] (2) Utilization of land after notice did not give defendant equity to set up against plaintiff's claim to have his property restored as before wrong. 252Mass165, 147NE556. [h] **In constructing driveway,** easement in walkway must not be interfered with. 28 OhA392, 162NE706.

984–33 199Wis71, 225NW193.

985–41 Mass 167NE233.

985–42 290Pa210, 138A763. [e] **Erection of fire escape across alley,** where easement not injured, not enjoined. 289 Pa164, 137A184, 55ALR908.

985–46 93PaSuper139.

986–50 224AppDiv762, 230NYS215; 195Wis139, 217NW730.

986–51 253Mass1, 147NE848; 154Tenn 381, 289SW493, 494 [quotCJ].

986–52 249NY52, 162NE581.

986–55 [l] 154Tenn381, 289SW493.

986–56 216Ky657, 288SW293; Mass 168NE919 (unlocked gates at either end); 154Tenn381, 289SW493, 494 [quot CJ]. But see 143Va98, 129SE354.

987–57 Mass 168NE919.

987–58 216Ky657, 288SW293; 224App Div762, 230NYS215; 229AppDiv392, 242 NYS122.

987–60 154Tenn381, 289SW493, 494 [quotCJ].

987–62 151Va229, 144SE460.

988–80½–New. Grantor's covenant against the erection of buildings does not prevent a successor from erecting structures equal in height to those already erected without objection. 290 Pa448, 139A154.

988–81 248Mich95, 226NW849; 157Md 229, 145A546; 229AppDiv392, 242NYS 122; TexCivA 14SW(2d)316.

989–87 157Md229, 145A546; TexCivA 14SW(2d)316.

989–89½–New. That the owner of an easement of way in an alley built a wall in the alley under the mistaken belief that he owned the fee does not entitle adjoining owners, who do not own the fee, to go upon the alley and remove any part of the wall. 199Wis71, 225NW 193.

989–91 172Ark390, 288SW932; 321Mo 186, 9SW(2d)978; 83NH91, 139A366; 215AppDiv301, 213NYS637 (no need to prove intent to erect new building or to change existing one, where "fire exit" was reserved in grantor's deed); Man [1930] 2DomLR947. See also 94CalA 667, 271P768; 38GaA494, 144SE330. [c] **Easement is property right which could be asserted whenever occasion arises.**–215AppDiv301, 213NYS637.

989–96½–New. Mere belief from neighborhood gossip that right of way was appurtenant to tract purchased does not entitle purchaser to equitable relief to enjoin obstruction thereof. NJCh 137 A96.

989–97 TexCivA 299SW532.

990–3 TexCivA 296SW954.

990–4 134SC106, 131SE678.

990–5 107WVa259, 148SE73.

990–21 TexCivA 296SW954.

991–34 [c] **Delimitation of right of way.**–Court in action to quiet title to right of way has jurisdiction to set aside definite right of way for poles of electric company where there is ample evidence to show establishment, character, and extent of right of way. 70CalA283, 233 P370.

991–37 94CalA480, 271P507; 339 Ill 463, 171NE550 (differences of location or use do not affect right to recover damages).

991–38 154Md393, 140A603, 605 [cit CJ].

991–40 187Wis232, 202NW34. But see 137Misc122, 241NYS386.

992–45 94CalA480, 271P507; 248 IllA 495; 237Mich689, 213NW72; 9PaDist &Co 23; TexCivA 28W(2d)956 (preliminary injunction); 187Wis232, 202 NW34.

992–49 187Wis232, 202NW34 (continuous trespass); 199Wis71, 225NW193.

993–62 Md 148A809; NJCh 133A172; NJCh 137A96; 225AppDiv608, 233NYS 541.

993–65 Md 148A809.

994–69 Ala 130S559; 172Ark390, 288 SW932; 165Ga83, 140SE67 (alley cul de sac); Iowa 218NW955; 124Kan757, 262 P592; 154Md393, 140A603; 265Mass 555, 164NE622; 94 PaSuper313; 101Vt 64, 141A603; 103WVa81, 137SE349. [e] **Acquiescence of adjoining lot owners in obstruction** does not affect right of owner of easement of way to enjoin obstruction. 101Vt64, 141A603.

994–72 172Ark390, 288SW932; 154Md 393, 140A603; 91PaSuper343; 103WVa 81, 137SE349.

995–76 NJCh 137A96; 35PortoRico 541 (unrecorded lease held insufficient to support mandatory injunction pending determination of lessee's claim of easement over leased premises).

995–78 TexCivA 299SW532.

995–82½–New. An injunction may be granted or refused in the discretion of the chancellor. 103WVa81, 137SE349.

995–82¼–New. Plaintiff's right to an injunction is not affected by additional right as member of public to cross locus. 83NH91, 139A366.

995–83 339 Ill 463, 171NE550 (cost of infringing building immaterial).

996–96½–New. Defendant in a suit to enjoin the use of a driveway on an adjoining lot may restrain plaintiff's interference with the use of a sewer in the driveway where defendant's claim thereto was conceded. 206 Iowa1084, 221NW 825.

996–97 102Conn663, 129A849 (hindrance and molestation of servient owners enjoined while dominant owners are removing obstruction to right of way); 339 Ill 463, 171NE550 (differences of location or use do not affect right to injunction); Oh 172NE276; 283Pa250, 129A83 (where conveyances show extent of privileges).

996–98 102Conn663, 129A849.

996–99 172Ark390, 288SW932.

996–1 41F(2d)823; 172Ark390, 288SW 932; 233Ky299, 25SW(2d)730; 83NH 91, 138A428.

997–2 Ill 172NE829.

997–6 83NH91, 138A428.

997–7 [a] **Plaintiff need prove only adverse user and obstruction by defendant.** 105Conn722, 136A684.

997–9 265Mass571, 164NE483.

997–17 NJCh 146A326(2dcase).

998-24 [d] **Delay held not to constitute laches.**–339 **Ill** 22, 170**NE**709.
998-25 But see **Ill** 172**NE**829.
998-27 [a] (5) Where suit filed before alley was obstructed, though wall across alley was constructed before interlocutory hearing. 165**Ga**83, 140**SE**67.
998-29 See also 165 **Ga**83, 140**SE**67.
998-29½-New. One who sold all his interest in lots is not necessary party to action to enjoin obstruction of common driveway. **MoA** 26**SW(2d)**796.
999-34 83**CalA**415, 256**P**1103.
1000-52 165**Ga**83, 140**SE**67.
1000-62½-New. Joinder of dominant tenant in suit by servient tenant to enjoin use by lessee of dominant tenants of express easement. **WVa** 155**SE**315.
1000-63 See also **Md** 148**A**809.
1000-72½-New. Plea of necessity for driveway easement is insufficient as strict necessity is required. **MoA** 26 **SW(2d)**796.
1000-73 [c] 98**Fla**544, 124**S**5(1stcase). [d] **Must specifically plead** prescriptive right to easement. **TexCivA** 271**SW** 190.
1001-75 143**SC**223, 141**SE**375.
1001-77 143**SC**223, 141**SE**375.
1001-81 94**CalA**667, 271**P**768; 38**GaA** 684, 145**SE**498.
1001-87 [a] (2) Bill held to make case for equitable relief for implied covenant or right of way of necessity. **Ala** 130 **S**76.
1001-88½-New. Plaintiff in possession need not set out quantum of interest which he has in land. 328 **Ill** 360, 159 **NE**805.
1001-88⅓-New. On general demurrer an easement will be presumed to be in writing, unless it affirmatively appears to be oral. **TexCivA** 8**SW(2d)**352.
1002-93 [a] 102**WVa**230, 135**SE**2, 3, 50 **ALR**1293 [citCJ]. [b] **TexCivA** 292 **SW**288.
1002-98½-New. Allegations declared to show license and not prescriptive right. **TexCivA** 271**SW**190.
1002-99 [i] **Pleading held insufficient.**–**TexCivA** 28**SW(2d)**861.
1002-14½-New. Answer setting up waiver of easement is sufficient. **Tex CivA** 296**SW**954.
1002-14⅓-New. General demurrer to answer, portion of which was good, held properly overruled. 169**Ga**678, 151**SE** 349.
1003-16 193**Wis**361, 214**NW**441.
1003-18 **Mass** 167**NE**233 (burden is on plaintiff to establish intention of parties).
1003-27 See also 232**Ky**659, 24**SW(2d)** 574.
1003-30 [a] **Evidence held not to justify disturbance of findings.**–149**Md**484, 132**A**64. [b] **Evidence held insufficient to warrant recovery by landowner.**–**Tex CivA** 28**SW(2d)**861.
1003-31 265**Mass**571, 164**NE**483.
1003-35 83**NH**91, 138**A**428; 91**PaSuper** 404; 105**WVa**81, 137**SE**349; 193**Wis**361, 214**NW**441.
1003-36 106**Conn**464, 138**A**364; 130 **Misc**599, 224**NYS**153; 193**Wis**361, 214 **NW**441.
1003-36½-New. to show that obstruction proximately caused injury; 106 **Conn**464, 138**A**364.
1003-37½-New. to show damages from obstruction of way; 130**Misc**599, 224 **NYS**153.
1003-40 **TexCivA** 271**SW**190.
1003-40½-New. to establish the width of a way; 178**Ark**1199, 13**SW(2d)**4.
1003-40⅓-New. to show that there was no intention that no part of a way should be built over; 265**Mass**203, 163 **NE**856.
1003-41 156**Md**284, 144**A**231; **TexCivA** 271**SW**190.
1003-41½-New. **Evidence held sufficient** to show that no oral agreement to close passway was made in suit to enjoin obstruction of passway. 232**Ky**659, 24 **SW(2d)**574.
1003-42 **Wis** 232**NW**697 (issue whether way was public or private not raised by pleading).
1003-43 38**GaA**494, 144**SE**330.
1004-46½-New. In a suit to restrain defendant from passing over plaintiff's land, when answer gave notice of a claim of justification for alleged trespass by reason of a right of way, the defense of right of way by necessity was thereby raised. 254**Mass**540, 151**NE**291.
1004-48 **TexCivA** 28**SW(2d)**861 (negligence of owners of right of way).
1004-51 244**Mich**571, 222**NW**96.
1004-54 169**Ga**678, 151**SE**349 (misleading). [a] **Instruction held proper.**–169 **Ga**678, 151**SE**349. [b] **Instructions erroneously refused.**–169**Ga**678, 151**SE**349.
1004-56 206**Cal** 753, 276**P**336; 92**CalA** 504, 268**P**675; **Mass** 172**NE**890.
1004-60 [a] **Where encroachment is neither slight nor unintentional,** injunction will require removal of bridges, notwithstanding expense. **Ill** 172**NE** 829.
1004-60½-New. In judgment in action to quiet title to easement of way and restrain interference with use, description of way held sufficient in regard to location. 70**CalA**283, 233**P**370.
1004-60⅓-New. The description of an easement for an electric transmission line is not indefinite for failure to designate the character of materials to be used. 70**CalA**283, 233**P**370.
1004-60¼-New. The territorial description of an easement for an electric transmission line is sufficient where it describes the right of way by courses and distances and as being a stated number of feet in width equally on each side of the line of poles. 70**CalA**283, 233**P**370.
1004-60⅕-New. It would be impossible in a judgment to describe and limit the exact kind and character of materials that might be used by owner of easement in matter of repairs or reconstruction. 70**CalA**283, 233**P**370.
1004-60⅙-New. The action of the court in determining the intent and purpose manifested in a deed in fixing and defining location of passageway was correct. 102**Conn**663, 129**A**849.
1005-61 [a] **Decree ordering removal of obstruction** of way "forthwith" is not objectionable as it means as soon as practicable. 253**Mass**378, 149**NE**155.
1005-61½-New. An injunction, permitting respondents to roof over a passageway at not less than stated heights, is not objectionable as giving them affirmative relief. **Mass** 167**NE**233.
1005-62½-New. Plaintiff is not limited to damages for trespass, but defendant could be compelled to remove obstruction to way. **RI** 139**A**311.
1005-74½-New. Decree requiring the removal of hatchway from passageway and filling in excavations so as to render the passageway as firm as on a fixed date has been construed to require the removal of the hatchway and did not permit it to remain, although covered. 252**Mass**78, 148**NE**567.
1005-74⅓-New. Decree requiring defendants to fill, cover, and strengthen a certain passageway to render it as safe as on a fixed date has been held not to permit maintenance of stairway and elevator well. 252**Mass**78, 148**NE**567.
1005-74¼-New. Where removal of encroachment underneath a way would entail great loss and projections above surface were not substantial, the court will not order removal, since to do so would be inequitable. 187**Wis**232, 202**NW**34.
1005-74⅕-New. Defendant by adopting construction of its predecessors in plaintiff's land has no ground for objecting to that part of the decree requiring it to fill the excavation to the level of a surrounding passageway and restore plaintiff's land to former condition. 252 **Mass**165, 147**NE**556.
1005-74⅙-New. Violation of injunction subjects servient owner to payment of damages. 106**Conn**464, 138**A**364.
1005-74⅐-New. Decree fixing bounds for area over which private way remains in force is proper. 260**Mass**407, 157**NE** 362.
1005-74⅛-New. A judgment denying relief by injunction may save to the landowner his right of action for damages. 103**WVa**81, 137**SE**349.
1005-74⅑-New. A judgment requiring the removal of obstructions from a private way includes any gates across the way. 165**Ga**765, 142**SE**139.
1005-75 See also 92**CalA**504, 268**P**675.
1005-75½-New. In a suit by an upper riparian owner to enjoin the lower owner from interfering with plaintiff's running a recreational resort, or his patrons in the free use of the lake, judgment, in so far as it restrained defendants' interference with the use of the lake by the general public, was incorrect. 321**Mo**186, 9**SW(2d)**978.
1005-77 See also **TexCivA** 8**SW**(2d) 957.
1005-80 128**Me**339, 147**A**419 (date of writ).
1007-12 See also 32**PortoRico** 586. [b] **Evidence sufficient to show ownership** in plaintiff enabling him to maintain action of denial of servitude. 32**PortoRico** 586.
1007-16½-New. In Porto Rico the usufructuary of a lot belonging to a municipality, who owns a house thereon, may bring an action for denial of servitude where the municipality is joined as plaintiff or defendant. 33**PortoRico** 523.
1007-16⅓-New. An action of denial of servitude does not lie where the parties have entered into a contract whereby the owner of the dominant tenement agreed to pay to the owner of the servient tenement a proportion of the cost of work necessary to prevent trespass. 33**Porto Rico** 616.

EBULLIOMETER

1008-29½-New. An instrument or apparatus used to test the alcoholic percentage of a liquid by boiling it and comparing its boiling temperature and specific gravity with those of water. 22 **F(2d)**549.

EDITOR

1013-58 114**Nebr**858, 211**NW**134.

EDUCATION

1014-71 **Mont** 28**SP**188.

EDUCATIONAL

1015-87 81**Colo** 276, 255**P**610.

EFFECTS

1017-25 211**Ky**638, 277**SW**500, 505 [quotCJ].
1017-26 211**Ky**638, 277**SW**500.
1017-27 211**Ky**638, 277**SW**500.
1017-28 211**Ky**638, 277**SW**500.
1017-29 211**Ky**638, 277**SW**500.
1017-30 211**Ky**638, 277**SW**500.
1017-31 211**Ky**638, 277**SW**500.
1017-32 37**GaA**279, 139**SE**922; 211**Ky** 638, 277**SW**500.
1018-33 **CalA** 290**P**906; 211**Ky**638, 277**SW**500.
1018-34 37**GaA**279, 139**SE**922; 211**Ky** 638, 277**SW**500; **TexCivA** 283**SW**576. [a] **TexCivA** 283**SW**576.
1018-35 211**Ky**638, 277**SW**500.
1018-36 211**Ky**638, 277**SW**500, 505 [quotCJ].
1018-36½-New. The word includes money, bonds, war savings stamps, rugs, and furniture. 211**Ky**638, 277**SW** 500.

EFFICIENT

1019-52 [a] (2) Is proximate cause, and terms may be, and often are, used interchangeably. **TexCivA** 271**SW**228. (3) In either case producing cause is held to reach to alleged result and to be proximate cause of it. **TexCivA** 271**SW** 228.

EITHER

1020-81 102**NJEq**50, 139**A**721.

EJECTMENT

1028-1 32**PortoRico** 254, 256 [quotCJ].
1028-2 32**PortoRico** 254, 256 [quotCJ].
1028-3 32**PortoRico** 254, 256 [quotCJ]. [b] **Similar definitions.**–**Ala** 130**S**226.
1028-4 32**PortoRico** 254, 256 [quotCJ].
1028-5 32**PortoRico** 254, 256 [quotCJ].
1029-10 297**Pa**33, 146**A**113.
1030-15 103**NJL**617, 137**A**543. [d] **In Georgia.**–164**Ga**805, 139**SE**678.
1030-17 See also 16**F(2d)**395.
1030-20 93**CalA**346, 269**P**760; 316**Mo** 953, 292**SW**419; 319**Mo** 149, 3**SW(2d)**

1008; **NJCh** 145A631; 34**Wyo** 324, 243 P392. See also 189**NC**790, 128**SE**404. [b] 34**Wyo** 324, 243P392. [c] (4) 165 La511, 115S733; [d] See also 29**Porto Rico** 813. [e] **In Porto Rico.**–12**Porto RicoFed**139; 29**PortoRico** 813.

1031–21 32**PortoRico** 254. [a] **"Revendication" and "unlawful detainer"** distinguished. 32**PortoRico** 254.

1031–22 221**Ky**529, 299**SW**173; **Utah** 286P625 (suit may elect between remedies). [a] **Bills, if regarded as ejectment bills,** are actions at law; if, as bills to remove cloud on title, they would be of equitable cognizance. 152 **Tenn**97, 275**SW**340.

1031–30 170**La**499, 128S290.

1031–32 44**F(2d)**125; 34**Wyo** 324, 243P 392.

1031–35 93**CalA**346, 269P760; 336 **Ill** 125, 168**NE**1. See also 189**NC**790, 128 **SE**404. But see 34**Wyo** 324, 243P392. [c] (2) Title will be considered where essential for determination of plaintiff's right to maintain possessory action. 165**La**511, 115S733.

1031–40 **Ala** 130S226; 336 **Ill** 125, 168 **NE**1.

1032–57½–New. The inquiry in an action of ejectment is limited to a comparison of titles held by plaintiff and defendant. 125**Kan**169, 263P1074.

1032–59 164**Ga**138, 137**SE**825.

1032–60 236**Mich**628, 211**NW**25; **Mont** 288P1016; 135**Misc**796, 238**NYS**463 (action in form of partition); 128 **Okl** 48, 262P682. [a] **Those claiming that deed to mortgagor was obtained from them by fraud** may sue in ejectment against mortgagor, making mortgagees parties. 227**AppDiv**516, 238**NYS**222.

1032–61 236**Mich**628, 211**NW**25.

1033–69 236**Mich**565, 211**NW**99.

1034–1 7**PaDist&Co** 389.

1035–16 243**NY**28, 152**NE**454; 93**Pa Super**547.

1035–32 4**F(2d)**838; 176**Ark**682, 4 **SW(2d)**533; 95**Fla**370, 116S1; 162**Ga** 731, 135**SE**76; 328 **Ill** 431, 159**NE**780; 243**NY**28, 152**NE**454; 191**NC**194, 132**SE** 12; 108 **Okl** 163, 235P619; 134 **Okl** 182, 273P222; 144**Va**523, 132**SE**307. See also 8**LaA**743. [a] (3) Conveyance in fraud of grantor's creditors. 331 **Ill** 240, 162**NE**869. [i] **Plaintiff in statutory ejectment** must show facts or muniments of title from which law attributes to him legal title with immediate right of possession. 220**Ala**35, 123S229. [m] **Grantee of original owner** must fail if grantor would fail as plaintiff. 180**Ark** 671, 22**SW(2d)**553.

1036–33 162**Ga**731, 135**SE**76; 191**NC** 194, 132**SE**12.

1036–34 26**F(2d)**841; 331 **Ill** 80, 162**NE** 119; **Mo** 292**SW**30; 50**RI** 183, 146A480. [e] 218**Ala**424, 118S636.

1036–38 [a] (8) 163**Ga**381, 136**SE**151. (11) 293**Pa**459, 143A113.

1037–39½–New. Plaintiff in a statutory action in the nature of ejectment can recover only by showing either a legal or equitable title in himself and right of possession. 133 **Okl** 34, 270P1098.

1038–64 192**NC**40, 133**SE**173.

1038–66 See also 29**PortoRico** 847.

1038–70 172**Ark**108, 287**SW**1019, 1021 [citCJ]; 223**Ky**321, 2**SW(2d)**405.

1039–72 192**NC**40, 133**SE**173.

1039–73 16**F(2d)**395, 397 [citCJ]; **Ala** 127S671; **Ala** 128S239; 178**Ark**1141, 13 **SW(2d)**605; 81**CalA**643, 254P668; 91 **Fla**89, 107S350; 94**Fla**457, 113S722; 97 **Fla**591, 121S793(2dcase); 160**Ga**799, 129 **SE**99; 167**Ga**94, 144**SE**759; 169**Ga**830, 152**SE**73; 160**Ga**865, 129**SE**528; 162**Ga** 731, 135**SE**76; 163**Ga**439, 136**SE**409; 163**Ga**778, 137**SE**237; 331 **Ill** 132, 162 **NE**202; 331 **Ill** 240, 162**NE**869; 336 **Ill** 125, 168**NE**1; 213**Ky**746, 281**SW**1033; 210**Ky**417, 276**SW**116; 221**Ky**529, 299 **SW**173; 221**Ky**726, 299**SW**566; 221**Ky** 789, 299**SW**955; 223**Ky**363, 3**SW(2d)** 760; 231**Ky**36, 20**SW(2d)**1013; 231**Ky** 675, 22**SW(2d)**93; 105**NJL**580, 147A 537; 243**NY**28, 152**NE**454; 126**Misc**642, 214**NYS**418; 132**Misc**639, 230**NYS**585; 192**NC**40, 133**SE**173; 193**NC**541, 137**SE** 658; 194**NC**231, 139**SE**381; 113 **Okl** 278, 241P768; 125 **Okl** 147, 256P908; 128 **Okl** 48, 262P682; 42 **OklACR**100; 289**Pa** 184, 137A254; 86**PaSuper**508; 144**SC** 137, 142**SE**247; **TexCivA** 281**SW**642; 146**Va**695, 132**SE**853; 151**Va**773, 145**SE** 317; 197**Wis**461, 219**NW**100.

1040–74 225**Ky**36, 7**SW(2d)**517.

1040–75 221**Ky**726, 299**SW**566.

1041–84 221**Ky**726, 299**SW**566.

1041–85 243**NY**28, 152**NE**454.

1041–91 94**Fla**457, 113S722. Contra 128 **Okl** 48, 262P682.

1041–92 94**Fla**457, 113S722.

1042–4 But see 158**La**1024, 105S51.

1042–10 243**NY**28, 152**NE**454.

1043–23 29**Hawaii**43.

1044–35 But see 156**Md**469, 144A489.

1046–63 99**Vt**304, 131A610. [b] **Right based on prior possession.**–94**Fla**457, 113 S722.

1046–65 99**Vt**304, 131A610.

1046–67 15**F(2d)**774; 144**Va**523, 132 **SE**307.

1047–81 213**Ky**746, 281**SW**1033; **NC** 154**SE**35; 7**PaDist&Co** 181.

1047–83 210**Ky**417, 276**SW**116.

1047–85 91**Fla**89, 107S350; 94**Fla**457, 113S722; 164**Ga**231, 138**SE**76; 168**La** 934, 123S625 (defendants purchasing land succeeded to same constructive possession which their authors had); 146 **Va**804, 132**SE**853.

1048–87 94**Fla**457, 113S722.

1048–88 165**La**511, 115S733.

1048–89 [a] But see 165**La**511, 115S 733.

1048–90 94**Fla**457, 113S722.

1048–91 94**Fla**457, 113S722.

1048–92 49**Nev**101, 238P344, 346 [cit Cyc].

1049–94 94**Fla**457, 113S722; 146**Va**695, 132**SE**853. See also 214**Ala**329, 107S830.

1050–15 See also 94**Fla**457, 113S722.

1050–19 94**Fla**457, 113S722; **Mo** 300 **SW**469 (held sufficient as against defendant having no title).

1050–20 94**Fla**457, 113S722; 2**LaA**528; 245**NYS**478. [e] (2) Prior possession must have been for more than one year. 165**La**332, 115S581.

1050–21 [f] **Plaintiff having valid title** is, in law, in constructive possession. 135**Misc**796, 238**NYS**463.

1051–22 See also 11**PaDist&Co** 630.

1052–48 170**La**949, 129S540 (continuous physical and actual possession).

1052–51 218**Ala**348, 118S585.

1053–52 [d] **Abandonment of fence around part of tract covered by title deed** does not operate as forfeiture of possession. **LaA** 130S244.

1054–79 **LaA** 130S244.

1055–1 26**F(2d)**841; 210**Ky**417, 276**SW** 116; **NJCh** 151A212; 245**NYS**478; 146 **Va**695, 132**SE**853; 107**WVa**85, 147**SE** 472. [k] **Rule dispensed with** when plaintiff shows such a state of facts as will warrant jury in presuming a grant. 146**Va**695, 132**SE**853.

1056–3 213**Ky**746, 281**SW**1033.

1056–4 49**Nev**101, 238P344, 346 [citCJ].

1057–23½–New. Actual entry on the ground is not necessary to support the right of a holder of a paper title. 89**Pa Super**69.

1057–29 12**PortoRicoFed**139.

1058–40 26**F(2d)**841.

1058–42 [a] **Decree not conforming to** pleadings in respect of lands involved is not sufficient. 26**F(2d)**841.

1058–53 214**Ala**467, 108S327.

1059–54 214**Ala**467, 108S327.

1059–57 164**Ga**96, 137**SE**833; 144 **Okl** 74, 289P742 (action in nature of ejectment).

1059–59 164**Ga**96, 137**SE**833.

1059–60 164**Ga**96, 137**SE**833; 125**Kan** 169, 263P1074.

1059–62 164**Ga**231, 138**SE**76.

1059–65 165**Ga**125, 139**SE**864.

1059–66 164**Ga**231, 138**SE**76.

1060–70½–New. That plaintiff knew that the deed by which he held title might be in effect only a mortgage will not defeat his right to recover possession against one holding under a void tax deed. 125**Kan**169, 263P1074.

1060–77 163**Ga**778, 137**SE**237.

1061–4 196**NC**55, 144**SE**523.

1061–5 44**F(2d)**119; 172**Ark**108, 287 **SW**1019, 1021 [citCJ]; 95**Fla**370, 116S 1; 164**Ga**231, 138**SE**76; 231**Ky**675, 22 **SW(2d)**93; 102**NJL**176, 130A598; **NJ Ch** 151A212; 285**Pa**212, 131A733.

1063–10 285**Pa**212, 131A733.

1063–25½–New. Where defendant admits in answer that he claims right of possession through plaintiff, no further proof of title in plaintiff is required. 285**Pa**212, 131A733.

1064–51 165**Ga**200, 140**SE**507.

1064–55 134 **Okl** 182, 273P222; 99**Vt** 304, 131A610.

1065–56 316**Mo** 953, 292**SW**419; 134 **Okl** 182, 273P222.

1065–57 12**PortoRicoFed**148; 12**Porto RicoFed**152.

1065–58 91**Fla**89, 107S350; 292**Pa**327, 141A152.

1065–63 29**PortoRico** 813 (applying Civ. Code § 354; action held not one under § 448 by possessor to be protected or reinstated in his possession).

1065–64 196**NC**55, 144**SE**523.

1066–85 165**La**511, 115S733.

1067–93½–New. Ejectment may be maintained where plaintiff was forced to move from his house by misconduct of defendants residing there under agreement to support plaintiff therein until his death when it was to become defendant's property. 12**PaDist&Co** 732.

1067–1 **Ala** 129S55; 315**Mo** 568, 287 **SW**445; 221**MoA**1178, 299**SW**629; 146 **Va**695, 132**SE**853. [a] 315**Mo** 568, 287 **SW**445.

1067–2 134 **Okl** 182, 273P222.

1067–10 285**Pa**212, 131A733; 10**PaDist &Co** 766.

1069–35 102**NJL**443, 131A870.

1069–54½–New. A stranger cannot acquire title to unoccupied land by payment of taxes thereon. 89**PaSuper**69.

1070–61 [h] **Explained delay in bringing suit** does not render demand for possession of no force and effect. **Utah** 293P7.

1071–87 217**Ala**287, 116S139.

1072–22½–New. Prayer for equitable relief may be joined with demand for damages. 104**Conn**318, 132A910.

1073–27½–New. Heirs who are heirs of unliquidated or undivided portions of real estate may bring action of revendication to extent of their portions. 35 **PortoRico** 273.

1073–31 32**PortoRico** 254, 256 [quot CJ]; 12**PortoRicoFed**371.

1073–32 32**PortoRico** 254, 256 [quot CJ].

1073–35 8**PaDist&Co** 434.

1073–41 117 **Okl** 27, 245P630.

1074–51 [a] (3) Defendant may establish prescriptive title. 167**Ga**94, 144**SE** 759. (4) Where record title is clear, only defense is adverse possession. **Mo** 30**SW(2d)**126.

1075–57 35**PortoRico** 273 (title by prescription). [d] (15) Title by adverse and exclusive possession for forty-seven years. 289**Pa**184, 137A254.

1076–73 322 **Ill** 350, 153**NE**684; 236 **Mich**565, 211**NW**99.

1077–76 **Ga** 155**SE**185.

1077–77 125**Kan**169, 263P1074.

1078–93 167**Ga**883, 146**SE**901.

1078–94 34**Wyo** 324, 243P392.

1079–10 146**Va**695, 132**SE**853.

1081–43 But see 99**Fla**833, 127S855.

1082–46 93**Fla**743, 112S887; **Mo** 293 **SW**133; 117 **Okl** 27, 245P630; 199**Wis** 514, 226**NW**955.

1083–50 See also 96**Fla**219, 118S10.

1083–51 202**Cal** 557, 261P1017.

1084–76 99**Fla**833, 127S855.

1084–78 120**Kan**510, 243P1045.

1085–83 202**Cal** 557, 261P1017.

1085–85 But see 99**Fla**833, 127S855.

1085–86 89**CalA**494, 265P344.

1085–88 89**CalA**494, 265P344.

1085–93 [a] (6) 331 **Ill** 240, 162**NE**869.

1086–99 **Ala** 130S226.

1086–2 215**Ala**205, 110S384.

1086–10½–New. Defendant in possession under a tax deed void on its face may not show that the deed under which plaintiff relies is in effect a mortgage. 125**Kan**169, 263P1074.

1087–22 98**Fla**1258, 116S642; 245**Mich** 213, 222**NW**198.

1088–34 12**PortoRicoFed**165.

1088–42 10**LaA**608, 120S235 [reh den 10**LaA**608, 121S357(3dcase)] (action timely brought); 129 **Okl** 281, 285, 264 P623, 627; 35**PortoRico** 949. [j] **In Porto Rico.**–29**PortoRico** 813. [k] **Limitation statute as to one out of possession five years** held not to apply where plaintiff asserts title. 181**Ark**914, 28**SW** (2d)697.

1090–62 46**Philippine**184.

1090–63 [a] **Jurisdictional amount**

sufficient.–34PortoRico 321.
1090–66 58Vt727, 6A648.
1090–80 108Conn173, 143A51.
1091–85 101WVa205, 133SE323, 325 [quotCJ].
1091–87 93PaSuper519.
1091–95 101WVa205, 133SE323, 325 [quotCJ].
1092–22½–New. In absence of objection that all tenants in common were not parties, single tenant in common may maintain action against stranger. 223 Ky321, 28W(2d)405.
1093–48 32PortoRico 254, 256 [quot CJ].
1093–49 32PortoRico 254, 256 [quot CJ].
1094–50 32PortoRico 254, 256 [quot CJ].
1094–51 32PortoRico 254 256 [quot CJ].
1094–52 Mo 31SW(2d)1002.
1094–60 Mo 9SW(2d)947.
1094–61 223Ky321, 28W(2d)405.
1099–27 213Ala279, 104S523.
1100–45 177Ark19, 6SW(2d)315; 33 PortoRico 172. [c] **In revendication by particular heirs** to recover their undivided interest in land, other heirs not joining are not necessary parties. 33Porto Rico 172.
1101–60 [e] **Intervention by children,** in ejectment against their widowed mother, is demurrable for failure to allege that mother refused or failed to set up same defense they offered. 169 Ga781, 151SE490.
1102–71 103NJL617, 137A543. [g] **Notice of intention to file declaration in ejectment is not official writ,** issued out of clerk's office in name of commonwealth, being directed to defendant and not to officer. 144Va752, 130SE802. [h] **Attestation of copy of notice and declaration by clerk of court, before return of service,** is mere surplusage and not official act. 144Va752, 130SE802.
1102–73 10PaDist&Co 766.
1103–97 Contra 34PortoRico 222.
1103–99 [b] **Case is not pending till return of service is filed in clerk's office,** with notice and declaration. 144Va752, 130SE802.
1104–10½–New. In an action on a bond given on issuance of a writ of estrepement, plaintiff, showing that he was deprived of the privilege of removing timber until after the expiration of his right to do so, is entitled to recover the value of the timber in place. 88PaSuper47.
1104–16½–New. Appointment of receiver to prevent waste may be necessary. 46Philippine407.
1105–32 [a] **In Porto Rico.**–33Porto Rico 105.
1105–34 [a] 29PortoRico 813.
1105–48 165Ga422, 141SE188 (complaint held sufficient); 165Ga685, 142SE 142; 168Ga240, 146SE905; 43 OklACR 221; Utah 278P811. [d] **Complaint held sufficient.**–170Ga760, 154SE226.
1105–49 43 OklACR221. [e] **Prayer of judgment for half of any rents and profits** held equivalent to prayer for accounting. 173Ark788, 294SW21.
1106–50 29PortoRico 813 (complaint held sufficient); 33PortoRico 300; 34 PortoRico 321. [e] See also 33Porto Rico 172. [e] 33PortoRico 172.
1106–62½–New. Action for land may be joined with equitable petition. 164 Ga805, 139SE678.
1106–63 164Ga774, 139SE543; 167Ga 633, 146SE444; 103NJL617, 137A543; 123 Or370, 261P69.
1106–65 123 Or370, 261P69, 70 [citCJ].
1107–66 214Ala591, 108S534; 164Ga 200, 137SE924.
1107–70 171Ark1000, 287SW183; 127 Kan601, 274P240; Mo 298SW47; 103 NJL617, 137A543.
1107–74 164Ga774, 139SE543; 167Ga 633, 146SE444; 103NJL617, 137A543; 123 Or370, 261P69, 70 [citCJ]. [a] (6) Generally. 164Ga774, 139SE543. [d] **Sufficiency of description is tested from** petition as whole. 164Ga774, 139SE543. [e] **No greater certainty required than in conveyance.** 123 Or370, 261P69. [f] **Description held sufficient.**–123 Or370, 261P69.
1107–75 103NJL617, 137A543.
1108–80 219Ala68, 121S55; 123 Or370, 261P69.
1108–84 164Ga774, 139SE543. [a] **Several parcels and defendants.**–35Porto Rico 485.
1108–87½–New. Description by inference and deductions from facts alleged is improper. 216AppDiv237, 214NYS 774.
1108–89 164Ga200, 137SE924.
1108–93 171Ark1000, 287SW183.
1109–3½–New. Failure to include state and county in description locating land in city held not defective. 214Ala591, 108S534.
1109–5 216AppDiv237, 214NYS774. [a] (1) 33PortoRico 172; 35PortoRico 712. [b] (3) Where plaintiff claimed title to land under agreement of testatrix to will her house, and alleged undue influence and want of consideration in deeding of home to defendant by testatrix. 161Ga838, 131SE891.
1109–6 170La499, 128S290.
1109–7 170Ga760, 154SE226.
1109–8 [b] **Ownership in fee simple** need not be alleged 34Wyo 324, 243P 392. [c] **Undivided interest** of coheirs held sufficiently shown. 33PortoRico 172.
1110–10 216AppDiv237, 214NYS774 (neither permissible nor necessary).
1111–22 139 Okl 110, 281P243.
1112–30 147Wash354, 266P148.
1112–36 76CalA541, 245P476; 12Porto RicoFed148.
1112–37 76CalA541, 245P476.
1112–43 216AppDiv237, 214NYS774.
1113–72½–New. In an action of ejectment in the common-law form, a recovery cannot be had on a demise laid in one who is dead at the time suit is brought. 161Ga401, 131SE176.
1113–72¾–New. In such action, if plaintiff desires to take advantage of the title which a deceased person had at the time of his death, he must lay the demise in the name of the heirs at law, devisee, or personal representative, as the case may be. 161Ga401, 131SE176.
1113–72¼–New. In such case it is safer to lay the demise in the names of all of them. 161Ga401, 131SE176.
1114–74 214Ala591, 108S534.
1114–75 [a] (4) 214Ala591, 108S534; Utah 278P81L1.
1114–79 214Ala591, 108S534; 33Porto Rico 172.
1115–93 76CalA541, 245P476.
1115–95 214Ala591, 108S534.
1116–16 214Ala591, 108S534.
1116–17 214Ala591, 108S534.
1116–20 214Ala591, 108S534. [a] (2) Plea of general issue admits entry by defendant and ouster of plaintiff, but denies plaintiff's title. 23F(2d)266.
1116–27 220Ala75, 124S110; 103NJL 617, 137A543.
1118–56 52Miss487; 131NC499, 42SE 937.
1118–68 95Fla90, 116S23.
1118–76 38Fed165; 27Colo 218, 60P 637; 3Tex273; TexCivA 42SW326. [e] 38Fed165.
1119–80 98PaSuper237.
1119–85 71Cal 470, 12P480; 73Cal 193, 14P831.
1119–89 80Colo 223, 249P1095. But see 96Fla219, 118S10.
1121–24 216Ala113, 112S640.
1121–25 216Ala113, 112S640; 102WVa 240, 135SE230.
1122–42 216Ala113, 112S640. But see 97Fla591, 121S793(2dcase).
1122–49 23F(2d)266.
1123–63 216Ala113, 112S640.
1123–66½–New. Defendant filing disclaimer cannot be called by plaintiff as for cross-examination. 12PaDist&Co 792.
1124–89 [c] **Cross bill seeking reformation** of description in partition deeds for mutual mistake is permissible as affording partial defense. Mo 293SW 133.
1126–23 [b] (2) Other cross complaints held sufficient. 127Kan627, 274P261.
1127–33 102Conn640, 129A786.
1128–52 29PortoRico 813.
1128–54 164Ga774, 139SE543; 10Pa Dist&Co 676, 678 [quotCJ&citCyc].
1128–61 12PortoRicoFed371.
1129–78 [a] **Amendment in nature of petition in equity** to declare absolute deed to be security for debt only and for accounting cannot be ingrafted on original petition under code provisions without alleging that defendant is resident of county where suit is pending or a nonresident. 165Ga650, 141SE652.
1131–31½–New. Defendant's claim of title set up in amended answer held not inconsistent with claim to original title. 177Ark19, 6SW(2d)315.
1131–32 207 Iowa155, 222NW530.
1132–48 132 Okl 80, 251P59. [a] **Adding prayer for rents and profits.**–122 Okl 80, 251P59.
1134–91 But see 286Pa331, 133A563.
1134–99 237Mich361, 211NW634.
1134–2 237Mich361, 211NW634.
1134–6½–New. Failure to attach statement of title to declaration may be cured by later filing. 237Mich361, 211NW634.
1136–36 13PaDist&Co 592.
1136–37 289Pa184, 137A254.
1136–43½–New. Defendant's motion to dismiss complaint because plaintiff showed no title is sufficient to raise question of propriety of remedy in ejectment. 243NY28, 152NE454.
1136–43¾–New. Where plaintiff failed to make necessary averments, he is not entitled to summary judgment. 289Pa 184, 137A254.
1137–71½–New. Only issues are possession as owners for more than year prior to disturbance thereof, fact of disturbance, and timely filing of suit. 169La 1041, 126S547.
1137–74 214Ala591, 108S534.
1139–95 214Ala591, 108S534; 91Fla89, 107S350.
1139–97 See also Ala 128S239.
1141–35 102NJL443, 131A870.
1141–40 Ala 128S239; 91Fla89, 107S 350; 95Fla90, 116S23.
1142–47 89Fla312, 103S828 (plea denying possession puts plaintiff to proof of defendant's possession).
1143–79 170Ga398, 153SE44.
1143–82 214Ala591, 108S534; Ala 128S 239; Ala 130S226; 96Fla219, 118S10. [d] (4) Defendant's good faith. 219Ala 191, 121S706.
1144–86 133 Okl 40, 270P1096.
1144–90 212Ky81, 278SW139.
1144–91 34Wyo 324, 243P392.
1144–94½–New. Plan made by surveyor without summoning adjoining owners and based on statements of witnesses whose source of knowledge is not shown is insufficient to prove title in plaintiff. 34PortoRico 65.
1144–96 214Ala591, 108S534; 331 Ill 240, 162NE869.
1144–97 [a] (11) Defendant entitled to reconveyance from plaintiff. 144SC137, 142SE247.
1145–16 214Ala591, 108S534.
1146–21 207 Iowa155, 222NW530.
1146–21½–New. Where plaintiff in his petition alleges title and ownership in plaintiff and seeks to recover on the strength of plaintiff's title, and defendant sets up title through a deed from plaintiff and plaintiff's reply denies generally the execution of such deed, the pleadings raise an issue as to whether such deed was obtained under circumstances amounting to forgery in the second degree. 115 Okl 56, 241P750.
1146–29 94CalA755, 271P912.
1146–40 91Fla439, 109S440; Mo 30SW (2d)126; 131NC499, 42SE937.
1147–41 23Ala377; 31Ala136; 72Ark 539, 81SW1057; 3JJMarshKy363; 85 Ky503, 3SW911, 9KyL83.
1147–46 214Ala591, 108S534; 91Fla 439, 109S440.
1147–50 See also 94Fla457, 113S722.
1147–57½–New. Adverse possession of part of land included in deed may be shown under general issue. 99Fla833, 127S855.
1148–69 RI 151A893.
1148–70 117 Okl 27, 245P630. [b] 93 Fla743, 112S887.
1148–79 98Fla1258, 116S642.
1149–88 98PaSuper72.
1151–3 169Ga378, 150SE552(2dcase) (right to recovery); 193NC541, 137SE 658; 111 Okl 220, 239P236; 33PortoRico 13; 144Va523, 132SE307. [i] **Plaintiff must make out more** than prima facie case. 144Va523, 132SE307.
1151–4 164Ga665, 139SE335.
1151–7½–New. As to matter of proving estoppel and counter estoppel, each

party carries an equal responsibility. 98Fla1258, 116S642.

1151–11 44F(2d)119; 216Ala113, 112S 640; 328 Ill 431, 159NE780; 215Ky316, 285SW199; 223Ky321, 2SW(2d)405; 231 Ky36, 20SW(2d)1013; Mont 288P1016; 192NC40, 133SE173; 193NC541, 137SE 658; 194NC231, 139SE381; 113 Okl 278, 241P768. [i] **Plaintiff claiming under common grantor** is not relieved in first instance from burden of establishing connection with grantor and that defendant claims under same grantor, by rule that relative strength of title derived from common grantor should determine result. 160Ga799, 129SE99. [m] **Where both parties assert title from common source** plaintiff need not make proof of ownership beyond such point. 292Pa378, 141A250.

1152–15 328 Ill 431, 159NE780; 245 Mich135, 222NW89.

1153–16 76CalA541, 245P476; Mont 288 P1016. [a] (1) 76CalA541, 245P476.

1153–21 Conn 152A152; 221Ky529, 299 SW173; 32PortoRico 290; 101WVa711, 133SE695 (true boundary line between plaintiff's and defendant's property). [f] **In Porto Rico.**–32PortoRico 290.

1154–23½ 12PortoRicoFed139.

1154–24 216Ala113, 112S640.

1154–26 Mont 288P1016.

1154–28½–New. On a suit by a remainderman against the life tenant's assignee, plaintiffs have the burden of showing that the property passed by will. 225 Ky36, 7SW(2d)517.

1154–35½–New. Plaintiff has not burden of anticipating defenses. 287Pa304, 135A260.

1154–35¼–New. Plaintiff claiming under deed from executors under will probated in another state could show no title without proof of will. 328 Ill 431, 159NE780.

1154–35¼–New. Where both parties admit claim of title from common source, it is unnecessary to deraign title. 99 Fla833, 127S855.

1154–36 164Ga665, 139SE335. [c] **Defendant not required to develop relative connection with common grantor** till plaintiff has established prima facie right to recover. 160Ga799, 129SE99.

1155–37 164Ga665, 139SE335. [b] 168 Ga607, 148SE515. [c] **Plaintiff must show better title, prior actual possession, or good conveyance** in order to compel defendant to prove his superior title. 99Fla833, 127S855.

1155–53 196NC55, 144SE523.

1156–59 143Va124, 129SE260.

1156–65½–New. Onus of affecting plaintiff with notice is on defendant. 144Va523, 132SE307.

1156–76½–New. A presumptive title once established is as effective for every purpose as title resting on perfect chain of titles. 214Ala329, 107S830.

1156–76¼–New. It is presumed that records referred to in abstract of title were in same county as that in which land was described. 289Pa65, 137A127.

1157–82 [a] (2) Where state is not party title is conclusively presumed to be out of state. 195NC189, 141SE570.

1158–7 214Ala329, 107S830. [d] **Presumption of title arising from possession** is conclusive against a bare trespasser, or one who, not having any title of his own, cannot show antecedent actual possession, or an outstanding title in a third person. 214Ala329, 107S830.

1158–11 Mont 288P1016.

1159–18 220Ala35, 123S229; 168Ga 607, 148SE515.

1159–24½–New. Where entry of a railroad company is by consent of the life tenant, it will not be presumed that the company intends to despoil the estate of the remainderman. 203Cal 578, 265P220.

1159–30 But see 135Misc796, 238NYS 463.

1160–37½–New. Evidence of sale or gift by plaintiff's intestate to defendant would not show abandonment of claim so as to rebut presumption of title from possession. 214Ala329, 107S830.

1160–37¼–New. Presumption of possession arising from title under some statutes is rebutted where plaintiff has not been in possession for over ten years before suit. Mont 288P1016.

1160–40 163Ga381, 136SE151; Ga 155 SE185.

1160–48½–New. Evidence of want of notice of defendant's title is admissible, although not required until defendant produces evidence of notice. 215 Ala9, 109S101.

1161–55 193NC541, 137SE658 (homestead appraiser's return).

1161–57 165Ga685, 142SE142; 167Ga 448, 145SE875(2dcase).

1162–74 See also 32PortoRico 290.

1162–82 319Mo 787, 5SW(2d)70.

1162–90 216Ky648, 288SW289; 87Pa Super426.

1163–18 26F(2d)841; Ala 128S239.

1163–22 218Ala328, 118S552.

1164–28 162Ga743, 135SE95. [i] **Proceedings of court setting land aside as year's support** admissible in aid of description. 162Ga743, 135SE95. [j] **Order of court giving leave to sell land** is admissible in aid of identity. 162 Ga743, 135SE95.

1165–56½–New. Certificate of survey signed by public surveyor and plan accompanying it are admissible to establish possession although not signed by adjoining owners. 34PortoRico 65.

1165–59 336 Ill 125, 168NE1 (proof that deed absolute in form was in fact made to secure debt is incompetent in ejectment).

1166–63 [a] **In Louisiana.**–165La511, 115S733.

1166–68 218Ala328, 118S552.

1166–77½–New. Evidence that plaintiff acquired title and right of possession after commencement of action is not competent. 328 Ill 431, 159NE780.

1166–79 Mo 282SW53.

1166–80 [b] But see 48Philippine412.

1166–85 162Ga743, 135SE95; 165Ga 698, 141SE898; 167Ga94, 144SE759; LaA 130S244; 86PaSuper157. [a] (2) Administrator's deed. 162Ga743, 135 SE95. [o] **Description in deed held sufficient to warrant admissibility.**–162Ga 743, 135SE95.

1167–87 218Ala348, 118S585. [d] **Recitals in ancient deed,** relating to person or persons from whom title was derived, are admissible in evidence only in connection with other proof of long-continued and undisputed possession, in accordance with right or title claimed. 107WVa85, 147SE472.

1167–89½–New. Where answer admits common source of title, deeds antedating such source are immaterial. 288 Pa320, 137A127.

1168–4½–New. or to show character of claim and possession. 214Ala329, 107 S830.

1168–6 197NC412, 149SE374(1stcase).

1168–10 165Ga685, 142SE142.

1168–13½–New. Deed not sufficiently describing property is inadmissible in ejectment. 175Ark475, 299SW745.

1168–14 167Ga94, 144SE759.

1172–1 163Ga381, 136SE151.

1172–9 163Ga381, 136SE151.

1172–10 163Ga381, 136SE151.

1174–48 See also 219Ala21, 121S76.

1174–61 163Ga381, 136SE151.

1174–62 220Ala35, 123S229.

1175–75 26F(2d)841; 214Ala285, 107 S812.

1175–77 89PaSuper69.

1176–86 36GaA816, 138SE263.

1176–92 26F(2d)841.

1176–95 123 Or370, 261P69. [f] **Payment of taxes** is insufficient by itself to prove ownership. 32PortoRico 235.

1178–29 167Ga94, 144SE759.

1178–30 [a] (1) 160Ga865, 129SE528; 163Ga169, 135SE731; 163Ga295, 136SE 58; 164Ga550, 139SE2; 164Ga665, 139 SE335; 122Kan94, 251P397; 232Mich 175, 205NW169; 83Mont100, 269P408; 49Nev101, 238P344; 135Misc796, 238 NYS463; 133 Okl 34, 270P1098. (2) To show substantial loss to plaintiff justifying decree requiring defendant to remove encroachment. CalA 286P700. [b] 30Ariz270, 246P551; 163Ga439, 136 SE409; 165Ga407, 141SE76; 36GaA816, 138SE263; 193NC541, 137SE658; 134 Okl 182, 273P222. [c] **Evidence held to show no abandonment of demand for** possession by plaintiff. Utah 293P7.

1178–31 [d] 144Va523, 132SE307.

1178–33 See also 144Va752, 130SE802. [a] Ala 127S671. [h] **Proof of prior possession** makes prima facie showing of right to possession entitling plaintiff to recover unless defendant shows better right. 34Wyo 324, 243P392. [i] **Evidence held insufficient** to show prima facie possession by defendant. 89Fla312, 103S828.

1178–34 [d] **Evidence held not to show** joint possession of defendant and another of part of land so as to defeat recovery by plaintiff who was purchaser at partition sale. Mo 19SW(2d)284.

1179–35 127 Okl 163, 260P58.

1179–38½–New. Evidence has been held sufficient as proving timely suit. 9LaA286, 119S896.

1179–40 167Ga633, 146SE444; 33Porto Rico 503. [e] (2) 92PaSuper547. (8) To establish accuracy of surveys. CalA 286P700. [f] (5) 221Ky529, 299SW 173; 101WVa711, 133SE695.

1179–45 See also 143Va124, 129SE260.

1180–50 [a] (2) To show that state was owner and plaintiff entitled to possession. Utah 286P625.

1180–54 193NC541, 137SE658. [a] 172 Ark108, 287SW1019; 160Ga865, 129SE 528; 165Ga422, 141SE188; 319Mo 149, 3SW(2d)1008; 287Pa304, 135A260; 33 PortoRico 920. [b] (1) 167Ga94, 144SE 759; 83 IndA515, 149NE88; 121Kan 606, 249P668; 49Philippine965; 32 PortoRico 235. (2) To establish parol surrender of property to defendant. 49 Nev101, 238P344. (3) To establish abandonment of property. 49Nev101, 238P344. [c] **Failure to pay taxes** for six years on property claimed is incompatible with ownership. 30Ariz270, 246P551.

1180–54½–New. Conflicting evidence of transfer and payment of consideration is sufficient to authorize plaintiff's recovery of land. 168Ga240, 146SE905.

1180–56 102NJL443, 131A870.

1180–58 215Ky316, 285SW199; 245 NYS478.

1180–59 189NC790, 128SE404.

1181–60 [b] (2) Unless plaintiff and defendant claim title from common source, plaintiff, in order to make prima facie case, must show unbroken chain of title from government or commonwealth. 107WVa85, 147SE472.

1181–64½–New. Evidence held sufficient to show title of plaintiff derived by deed in fee from state good as against title of defendant claiming through deed granting only such title as his grantor had. 102NJL443, 131A 870.

1181–69 [b] 176Ark303, 3SW(2d)342 (mere unexecuted promise to convey).

1183–9 Mo 282SW53; 29PortoRico 847.

1183–17 220Ky471, 295SW462.

1184–26 [a] **Evidence held insufficient.**–225Ky36, 7SW(2d)517 (possession of life tenant).

1184–28 87PaSuper426 (verdict for plaintiff sustained as against fraudulent conveyance to defendant's grantee).

1185–36 336 Ill 125, 168NE1.

1185–53 93PaSuper519 (held insufficient).

1186–67 [b] **In PortoRico.**–32Porto Rico 235.

1186–70½–New. Evidence held insufficient to establish title by adverse possession. 123 Or370, 261P69.

1186–72 [c] **Evidence held to warrant finding of equitable title.**–144 Okl 74, 289P742.

1186–73 98Fla1258, 116S642.

1187–85 165Ga698, 141SE898.

1187–90 [a] **Evidence held sufficient.**–34Wyo 324, 243P392.

1187–98 [b] **Evidence held sufficient.**–9LaA286, 119S896.

1188–1 [a] **Evidence held sufficient.**–170La949, 129S540.

1188–3 89Fla312, 103S828 (facts must be shown which in law constitute possession); 196NC55, 144SE523 (held insufficient).

1190–67½–New. On defendant's refusal to plead, in accordance with statute, after overruling motion to quash and refusal of continuance, the court may, in its discretion, execute a writ of inquiry. 144Va752, 130SE802.

1190-67½-New. The court has the right in its discretion to refuse to execute a writ of inquiry and grant continuance to give defendant time to plead after overruling his motion to quash. 144Va752, 130SE802.

1190-67½-New. Under some statutes plaintiff must establish allegations of his petition by competent evidence, whether the answer be filed or not. 139 Okl 110, 281P243.

1193-16½-New. Court is without jurisdiction to determine whether land used for many years as way of access to wharf was subject to public easement. 102NJL443, 131A870.

1193-16⅓-New. In injunction to recover possession, determination of boundary lines as the only real question cannot be determined. 35PortoRico 949.

1193-28 Ga 155SE7. [a] (6) Inconsistent positions of defendant in regard to property involved. 287Pa304, 135A260. (7) Whether leases to defendant's predecessor in title were genuine and latter was tenant. 191NC329, 131SE646. (8) Whether defendant owned land. 176 Ark1204, 3SW(2d)979. (9) Question of estoppel or counter estoppel. 98Fla 1258, 116S642.

1194-31 26F(2d)841; 218Ala348, 118S 585; 68CalA83, 228P717 (whether location of mining claim was sufficiently marked on ground); Ga 155SE7; Mo 298SW717; 89PaSuper69; 96PaSuper 133.

1194-33 26F(2d)841; 86PaSuper49; 101WVa711, 133SE695.

1194-34 217Ala 411, 116S113; 196NC 803, 144SE525; 89PaSuper116 (whether boundary had been moved certain distance); 101WVa711, 133SE695.

1194-38 218Ala348, 118S585.

1195-45 196NC55, 144SE523.

1196-58 161Ga311, 130SE914.

1196-61 Ga 154SE909; 318 Ill 490, 149 NE465. [a] (1) 318 Ill 490, 149NE465. (3) Where evidence was conflicting as to amount of encroachment by defendant. 103NJL340, 135A890. [b] (1) 26F(2d) 841. [c] Mo 9SW(2d)947.

1196-63 155Miss185, 124S270(2dcase).

1196-66 318 Ill 490, 149NE465; 210Ky 417, 276SW116.

1197-86 [b] **Dismissal held error.**-220 Ky471, 295SW462.

1197-87 161Ga838, 131SE891.

1198-1 26F(2d)841; NC 154SE829.

1198-11 161Ga401, 131SE176; 94Pa Super62.

1199-22 [a] (3) In directing verdict for plaintiff it is proper to explain elements of recovery, form of verdict, and to say that plaintiff is entitled to recover rent at value of land if jury believes evidence. 215Ala9, 109S101.

1199-33 [a] (1) Ala 121S75; 160Ga799, 129SE99; 163Ga439, 136SE409; 165Ga 698, 141SE898; 164Ga665, 139SE335; 165Ga349, 141SE74; 168Ga650, 148SE 585; 170Ga1, 152SE65; Ga 155SE185; Mo 9SW(2d)947; 316Mo 1058, 293SW 770; 196NC55, 144SE523; 285Pa212, 131A733; 146Va804, 132SE863. [b] (1) Ga 155SE185; 195NC189, 141SE570.

1200-35 214Ala329, 107S830.

1200-42 217Ala411, 116S113. [a] (6) Where evidence of certain witness is corroborated and there was no conflict or doubt as to its sufficiency or credibility, court may charge jury to find for plaintiff if it believes such evidence. 285Pa 212, 131A733. (7) In ejectment action, instruction that record title to certain part of land in controversy was in plaintiff's grantor held proper under evidence. Mo 9SW(2d)947.

1201-45 [b] (3) Other instructions held erroneous. Mo 298SW717.

1201-50 26F(2d)841.

1202-57 164Ga665, 139SE335.

1202-57½-New. or is misleading. 217 Ala287, 116S139.

1202-62 [a] See also 144Va523, 132SE 307.

1202-63 [b] (4) Other findings held responsive. Mo 30SW(2d)77.

1203-73 101WVa711, 133SE695 (location of boundary lines must be found).

1203-78 167Ga20, 144SE780. [b] 27 OhA21, 160NE641.

1203-79 146Va695, 132SE853. [a] (1) 146Va695, 132SE853.

1204-93 144Va523, 132SE307; 101WVa 711, 133SE695. [c] (8) To satisfy statutory requirement where referee's finding was for plaintiff and his judgment stated quantity of estate to which plaintiff was entitled. 96Fla219, 118S10.

1204-94 165Ga698, 141SE898 (sufficient); 144Va523, 132SE307.

1205-1 [a] (3) Finding that plaintiff obtained possession of deed forcibly justifies conclusion that there was no delivery and plaintiff is not entitled to possession. 83 IndA515, 149NE88.

1205-15 [a] (4) Failure of verdict to state estate of plaintiff cannot be cured by amendment. 101WVa711, 133SE695.

1205-17 92PaSuper547.

1205-21 219Ala68, 121S55.

1207-50 165Ga698, 141SE898.

1207-53½-New. Under a verdict for plaintiff for the recovery of lands, part of which were dedicated as a highway, recovery may be had upon plaintiff's title, but the recovery is subject to the easement of way. 105NJL317, 144A720, 64ALR304.

1208-69½-New. Where a judgment recites a confession of plaintiff's allegations by default and that evidence was heard to support the petition, a recital of the confession will be treated as surplusage. 139 Okl 110, 281P243.

1208-85 219Ala68, 121S55; 307Mo 172, 270SW105. [a] (2) 171Ark1000, 287SW 183.

1208-86 307Mo 172, 270SW105. See also 219Ala68, 121S55.

1208-87 27 OhA21, 160NE641.

1208-93 27 OhA21, 160NE641.

1209-96½-New. Evidence may be given as to removal or change of fence on road. 171Ark1000, 287SW183.

1209-20 80Colo 223, 249P1095; 91Fla 1053, 109S311, 312 [citCJ]; 34PortoRico 509.

1210-21 319Mo 149, 3SW(2d)1008; Mo 30SW(2d)77 (judgment held responsive).

1210-26 91Fla1053, 109S311; 23F(2d) 266 (vacated where less than that in verdict).

1213-90 See also 319Mo 149, 3SW(2d) 1008.

1213-91 32PortoRico 264.

1214-96 34PortoRico 509.

1214-10 But see 165La511, 115S733. [b] **There is no reason for destroying defendant's title** except in so far as it conflicts with title of complainant. 32Porto Rico 264.

1214-18½-New. A judgment declaring that plaintiff is entitled to possession and quieting title in lien can have no effect on so far as it quiets title except as to matters that were, or should have been, litigated by parties to the record. 34Wyo 324, 243P392.

1214-18⅓-New. Plaintiff may be awarded less quantity of land than he claims. 96PaSuper133.

1215-20 CalA 290P1077. But see 221 MoA1178, 299SW629.

1215-30 101WVa205, 133SE323.

1215-31 292Pa327, 141A152.

1215-35 101WVa205, 133SE323.

1218-69 214Ala443, 108S47.

1218-77½-New. Judgment that insured owned land but that others were entitled to recover for improvement does not show that insured was not unconditional owner. 192NC148, 134SE427.

1218-81 [b] **Court will not exercise discretion to grant new trial** to party who has disclaimed under oath, where stated ground for new trial is that he was actually in possession of property as his own. 12PortoRicoFed161.

1219-84 75CalA437, 243P30.

1219-5 102WVa240, 135SE230.

1220-17 230Ky97, 18SW(2d)965 (writ of possession cannot properly be awarded till survey is confirmed and land located).

1221-33 [a] 43 OklACR119. [c] **Nature of writ.**-43 OklACR119.

1221-52 43 OklACR119.

1221-53 43OklACR119.

1221-57½-New. Where default judgment by default was entered against tenant in suit against him and his landlord, no writ of possession can be issued on such interlocutory judgment while suit is still pending against the landlord. 213Ala279, 104S523.

1222-69 [c] **Marshal's reading description in execution in presence of parties** to ejectment suit has been held delivery of possession. 41F(2d)32.

1222-85 218Ala564, 119S651.

1224-24 131 Or554, 284P172.

1224-29 41F(2d)32 (conclusive evidence of facts recited).

1226-95 125NY678mem, 25NE1064mem [aff 5NYS550]; 131NY422, 30NE243 [aff 15NYS533]; 141NY88, 35NE1089 [aff 73 Hun607, 26NYS806].

1228-57½-New. A stranger to an ejectment proceeding who enters after suit is begun without collusion and not under defendant cannot be removed by writ of restitution. 204Cal 370, 268P341.

1233-63 89PaSuper120; 11PaDist&Co 120.

1237-28½-New. Nor does the fact that a third party, from whom defendant claimed purchase of land, agreed to allow defendant to occupy premises free of charge prevent award of damages for value of use thereof. 198Cal 177, 244P 330.

1237-29 [b] **In PortoRico.**-32Porto Rico 740.

1237-32 217MoA578, 272SW978 (defendant in possession under contract of sale not consummated may counterclaim for difference between value of rents while in possession and amount originally paid on purchase price).

1238-58 29PortoRico 897. [b] **In Porto Rico.**-13PortoRicoFed148 (allegations held sufficient equivalent of bad faith).

1238-59 [g] **In Philippines.**-44Philippine186.

1238-60 See also 29PortoRico 897.

1238-62 [b] **Allegations held sufficient.**-11PaDist&Co 120.

1238-69 [c] **In PortoRico.**-29PortoRico 897.

1239-76 [f] **Damages for torment and invasion of property rights** are recoverable under evidence. LaA 130S244.

1239-77 See also 46Philippine757.

1239-78 83Mont100, 269P408 (evidence held sufficient); 29PortoRico 996.

1239-79½-New. Where defendant in an action to recover possession of real property and for mesne profits acquired possession by inheritance, the burden of showing that he had knowledge of defects that made his title void rests on plaintiff. 33PortoRico 920.

1239-84 214Ala329, 107S830.

1239-90½-New. Evidence of good faith in entering into possession is not admissible on the issue of amount of rents and profits. 308Mo 406, 275SW32.

1240-98½-New. In case similar lands are not rented for cash rent, evidence of the character of the land, its fertility, the kind of crops that best grow thereon, the amount of such crops actually grown each year during defendant's possession, and the reasonable market value thereof is admissible to show reasonable value of use and occupation. 308Mo 406, 275 SW32.

1240-98⅓-New. Evidence of gross receipts of a business is not admissible to show mesne profits, no showing being made as to losses. 99Vt244, 131A10 (deposit slips).

1240-2 33Gratt(74Va)278.

1240-2½-New. Instructions held erroneous. 308Mo 406, 275SW32.

1240-16 See also 319Mo 149, 3SW(2d) 1008.

1240-19 44Philippine186 (reservation of future right to demand damages or rents and profits held erroneous where complaint contains no prayer for either).

1241-29 [b] **Forcibly driving plaintiff off property** under pretense of uncertainty regarding boundary line renders defendant liable for damages. LaA 130 S244.

1241-30 215Ala9, 109S101.

1242-41 See also 3LaA261.

1242-47 220Ky471, 295SW462.

1242-51½-New. In case similar land is not rented for cash rent, landowner may recover reasonable market value of crop raised, as determined by price which it is reasonably worth on the farm, not by the price for which it is sold. 308Mo 406, 275SW32.

1242-53 But see 316Mo 1058, 293SW 770, 772, [citCJ].

1243-59 247NY457, 160NE913.

1243-62 [a] **Attorney's fees recoverable.**-LaA 130S244.

1244-73 83Mont100, 269P408.

1244-76 [b] (1) See also 29**PortoRico** 813. (4) Five hundred dollars allowed for four years of defendant's possession. 12**PortoRicoFed** 139.
1244-84 104**Conn**318, 132A910 (award of twenty-five dollars sustained).
1244-94 [1] **In Montana.**–83**Mont**100, 269P408.
1245-96 31**F(2d)**624.
1245-10 See also 147**Wash**354, 266**P**148.
1246-16 See also 29**PortoRico** 897.
1246-22 12**PortoRicoFed**165.
1246-27 See also 29**PortoRico** 897. [c] **In PortoRico.**–29**PortoRico** 897, 900.
1247-41 [a] **In Arkansas.**–173**Ark**788, 294SW21.
1247-45½–New. Some decisions hold that the amount due to plaintiff arising out of profits of the land should be offset against the amount due defendant for taxes paid. 119 **Or**573, 250**P**218, 250 **P**763.
1247-50 Mo 31SW**(2d)**1026. [a] **In Missouri.**–217**MoA**578, 272SW978. [b] **Evidence held erroneously excluded.–Ga** 155SE183.
1248-55 Mo 7SW**(2d)**1010. [e] **In Missouri.**–308**Mo** 406, 275SW32. [f] **Instructions properly refused.–Mo** 31SW **(2d)**1026. [g] **Instructions held proper.–Mo** 31SW**(2d)**1026. [h] **Instruction as to measure of damages held proper.–Mo** 31SW**(2d)**1026.
1248-56½–New. The value of improvements are to be assessed at the reasonable worth to the land at the time the landowner takes them. 308**Mo** 406, 275 SW32.
1248-56½–New. Surrender of possession in response to suit for possession does not affect pending suit to recover value of improvements. 316**Mo** 1058, 293SW770.

EJUSDEM GENERIS

1255-13 91**Fla**60, 107S345, 347, 44**ALR** 698 [citCJ].
1255-14 213**Ala**102, 104S21, 24, 40**ALR** 1171 [quotCJ].
1255-15 203**Ala**102, 104S21, 24, 40**ALR** 1171 [quotCJ].
1255-16 213**Ala**102, 104S21, 24, 40**ALR** 1171 [quotCJ]; 76**CalA**114, 243**P**898; 93**Fla**5, 112S289, 293 [citCJ]; 212**Ky** 185, 278SW597, 601 [quotCJ]; **Can** [1925] 3**DomLR**810. [b] 16**F(2d)**59; 74 **CalA**551, 241**P**429; 76**CalA**114, 243**P** 898; 93**Fla**415, 111S801, 814, 52**ALR** 51 [citCJ]; 93**Fla**5, 112S289; 201 **Iowa** 931, 208NW503; 212**Ky**185, 278SW597, 601 [quotCJ]; 311**Mo** 262, 278SW398; 114**Nebr**584, 208NW742; 49**Nev**5, 234 **P**520; 219**AppDiv**422, 219**NYS**390; 130 **Misc**320, 224**NYS**316; 133**Misc**542, 232 **NYS**647; 8**PaDist&Co** 681; **TexCivA** 289SW428, 430 [citCJ]; **Can** [1925] 3 **DomLR**810; **Ont** [1927] 3**DomLR**764. [c] 93**Fla**5, 112S289. [d] 114**Nebr**584, 208NW742. [e] **Only where same subject matter is involved** is rule applicable. 246NY270, 158NE618.
1255-16½–New. It is not a rule of interpretation, 214**AppDiv**506, 212**NYS**343.
1255-16½–New. being merely an aid to interpretation, when interpretation is not otherwise apparent, 214**AppDiv**506, 212**NYS**343.
1255-16¼–New. and is never controlling where it clearly appears from the instrument that no such limitation was intended. 214**AppDiv**506, 212**NYS**343.

ELASTIC

1256-23 37**F(2d)**562.

ELECT

1257-46 102**WVa**162, 134**SE**749.
1257-49 102**WVa**162, 134**SE**749.
1257-51 102**WVa**162, 134**SE**749.
1257-54 102**WVa**162, 134**SE**749.
1257-57 102**WVa**162, 134**SE**749.
1257-58 102**WVa**162, 134**SE**749.

ELECTION

1258-63 219**MoA**490, 282SW542.
1258-87 235**Ky**692, 32SW**(2d)**26.

ELECTION OF REMEDIES

20 C. J.—2-1 290**Pa**107, 138A81, 84 [citCJ]; **TexCivA** 290SW849, 851 [cit CJ]. [a] (7) Election is choice of optional remedies or debtors and consequent waiver of cause against others. **CalA** 290**P127**. (8) Other instances **Fla** 130S596.
2-2 16**F(2d)**589; 41 **Ida**767, 244**P**404, 405 [citCJ]; 124**Kan**810, 262**P**567; 234 **Ky**707, 29SW**(2d)**3; 81**Mont**509, 264**P** 396; 128**Misc**152, 218**NYS**408, 410 [quot CJ]; 290**Pa**107, 138A81, 84 [citCJ]; 69**Utah**161, 253**P**196.
3-3 16**F(2d)**589; 17**F(2d)**228; 41 **Ida** 767, 244**P**404, 405 [citCJ]; 128**Misc** 152, 218**NYS**408, 410 [quotCJ]; 191 **NC**392, 131**SE**760; 120 **Or**381, 250**P**717, 719 [citCJ]; 138**SC**74, 136**SE**19; 194 **Wis**298, 216NW502.
3-4 41 **Ida**767, 244**P**404, 405 [citCJ]; 128**Misc**152, 218**NYS**408, 410 [quotCJ] (without giving credit); 194**Wis**298, 216NW502.
3-6 128**Misc**152, 218**NYS**408; 69**Utah** 161, 253**P**196. [b] 16**F(2d)**589. [d] **Election of remedies is rule of policy** to prevent vexatious litigation and is somewhat arbitrary. 243**NY**295, 153**NE** 79.
4-8½–New. The doctrine of election of remedies, although not a favorite of equity, is a long-observed and deeply intrenched rule of procedure. 29**F(2d)** 712.
4-10 68**CalA**785, 230**P**212; 76**CalA**278, 244**P**916; 81**Colo** 214, 254**P**771, 58**ALR** 250; 162**Ga**664, 135**SE**195; 69**Utah**161, 253**P**196, 200 [citCJ].
4-11 162**Ga**664, 135**SE**195; 69**Utah**161, 253**P**196, 200 [citCJ]. But see **CalA** 265**P**327.
4-12 162**Ga**664, 135**SE**195. But see 204 **Cal** 515, 269**P**433; 115 **Okl** 152, 243**P** 732.
4-22 See also 37**F(2d)**117.
4-26 30**F(2d)**500; 39**F(2d)**242; **Fla** 130S596; 33**GaA**795, 127**SE**797; 203 **Iowa**1270, 212NW134. [a] **Right may be waived.–CalA** 290**P**127.
5-30 219**MoA**490, 282SW542, 545 [cit CJ].
5-30½–New. Whether an administrator had authority from the court of his appointment is immaterial in regard to the application of the doctrine of election of remedies. **Iowa** 228NW51.
5-32 203 **Iowa**1270, 212NW134; 158 **Tenn**554, 14SW**(2d)**961; 136**Wash**410, 240**P**355, 359 [quotCJ]; 136**Wash**410, 240**P**355, 359 [quotCJ]. [a] (1) **TexCivA** 20SW**(2d)**843.
5-34 16**F(2d)**589; 17**F(2d)**228; 36**F (2d)**203; 76**CalA**541, 245**P**476; 161**Ga** 629, 131**SE**505; 162**Ga**664, 135**SE**195; 42 **Ida**479, 246**P**1, 5 [citCJ]; 236 **IllA** 84, 87 [citCJ]; 154**Md**125, 140A87; 81 **Mont**509, 264**P**396; 217**AppDiv**7, 216 **NYS**61; 191**NC**392, 131**SE**760; 123 **Okl** 64, 251**P**1040; 137 **Okl** 248, 278**P**1115; 120 **Or**381, 250**P**717; 127 **Or**427, 272 **P**556; 136**SC**231, 134**SE**222, 223 [cit CJ]; **TexCommnA** 288SW127; 141 **Wash**560, 252**P**133.
5-35 236 **IllA**84, 87 [citCJ]; 115**Nebr** 547, 213NW829; 123 **Okl** 64, 251**P**1040. [a] **Party cannot sue on contract and for rescission for fraud.**–236 **IllA**84.
6-37 [a] **Where election is required between set-off in suit of seller for purchase price of goods and independent counter action** for damages caused by breach of warranty of goods sold, election at conclusion of testimony in suits tried together is proper. **RI** 129A801.
6-39 206 **Iowa**1319, 221NW944.
6-40 115**Nebr**547, 213NW829.
6-45½–New. Doctrine of election is a severe rule and will not be lightly enforced. 128**Misc**152, 218**NYS**408.
6-47 136**SC**231, 134**SE**222, 223 [citCJ].
6-50 76**CalA**541, 245**P**476; 217**AppDiv** 7, 216**NYS**61; 141**Wash**560, 252**P**133.
6-51 76**CalA**541, 245**P**476; 128**Misc**152, 218**NYS**408.
6-54 13**F(2d)**887; 161**Ga**629, 131**SE** 505; 37**GaA**462, 140**SE**785; 41 **Ida**767, 244**P**404; 234 **IllA**387; 253 **IllA**229; 203 **Iowa**418, 212NW711, 56**ALR**233; **Iowa** 227NW526(3dcase); **Iowa** 228NW51; 130**Kan**149, 285**P**624; 120 **Or**381, 250**P** 717; **TexCivA** 283SW213 (city's suit against treasurer and surety on official bond and against guaranty fund of insolvent bank); 34**Wyo** 332, 243**P**394.
7-55 13**F(2d)**887; 37**GaA**462, 140**SE** 785; 234 **IllA**387; **Mo** 271SW992; 141 **Okl** 181, 284**P**290; 152**Tenn**162, 274SW 544; **TexCivA** 283SW213.
7-56 13**F(2d)**887; 95**CalA**307, 272**P** 1068; 37**GaA**462, 140**SE**785; **Ill** 172**NE** 161; 234 **IllA**387; 117 **Okl** 58, 245**P**48.
7-57 13**F(2d)**887; 152**Tenn**162, 274SW 544.
8-62 13**F(2d)**887.
8-64 171**Minn**65, 212NW738; 154**Tenn** 253, 290SW5, 50**ALR**1052.
8-65 13**F(2d)**887, 890 [citCJ]; 14**F(2d)** 978; 234 **IllA**387; 168**Minn**298, 210NW 105; 220**MoA**1034, 278SW1081; **MoA** 18W**(2d)**855; 117**Nebr**407, 220NW588, 589 [citCJ]; 117 **Okl** 58, 245**P**48; 154 **Tenn**253, 290SW5, 50**ALR**1052; **TexCivA** 283SW213. [a] (7) Action against carrier for wrongful delivery held not barred by prior unsuccessful action against drawee on unaccepted sight draft with order bill of lading attached. 14**F(2d)** 978. (8) Action on note of third person, given on account of goods previously sold to another on buyer's credit, though pursuant to judgment, does not constitute election precluding suit against buyer. 220**MoA**1034, 278SW 1081. (9) Action by mortgagee of chattels against mortgagors does not preclude suit against purchaser of mortgaged chattels on his agreement to pay purchase money to mortgagee. 47 **Ida** 794, 279**P**302.
9-66 13**F(2d)**887; 234 **IllA**387; 194**NC** 775, 140SE709; 117 **Okl** 58, 245**P**48.
9-67 13**F(2d)**887; 40**GaA**83, 149SE58; 234 **IllA**387; 168**Minn**298, 210NW105; 154**Tenn**253, 290SW5, 50**ALR**1052.
9-68 13**F(2d)**887; 40**GaA**83, 149SE58; 234 **IllA**387; 168**Minn**298, 210NW105.
9-70 Ariz 286**P**930. [a] (17) Rights under New York Personal Property Law of buyer either to accept goods and plead breach of warranty by way of defense, or rescind contract, return, or offer to return, goods and pray for return of anything paid on account, are so inconsistent as to demand election on part of defendant sued for price of goods sold and claimed to be of no value. 125**Misc**78, 210**NYS**129. (18) Party maintaining that mortgage was lien has been held not entitled to have it paid out of another mortgage which would require recognition that mortgage lien was divested. 115**Nebr**547, 213NW829. (19) Rescission of purchase for fraud and recovering money, and keeping purchase and recovering damages for fraud. 243**NY**295, 153**NE** 79. (20) Action to recover for damages to property and action to recover full value for conversion. 147**Wash**104, 265 **P**159. (21) Purchasers could not, in same complaint, claim right to rescind land contract and damages for vendor's misrepresentations. 132**Misc**480, 230 **NYS**116. [e] 46 **Ida**701, 270**P**1059.
10-72 [a] (38) Appeal from award in condemnation proceedings on street widening and injunction to restrain are unreasonable proceedings to create benefit district to pay cost thereof. 121**Kan** 122, 245**P**1033. (39) Commission merchant's action for stipulated commissions for selling grapes to be delivered by defendant, where latter failed to make delivery, is not precluded by plaintiff's former action on note given by defendant for advances made to him by plaintiff. 68**CalA**785, 230**P**212. (40) Action on implied contract to make home for testator while he lived is not inconsistent with action on express contract to devise land to pay for such services. 119**Kan**633, 240**P**582. (41) Suit for specific performance of alleged contract for conveyance of land by deceased in consideration of care for himself and parents not inconsistent with action on claim against his estate for services. 324 **Ill** 562, 155**NE**475. (42) Employer's negligence causing injury and physician's malpractice in treating same are unrelated wrongs. 221**App Div**371, 223**NYS**418. (43) Other remedies held consistent. 126**Kan**554, 268**P** 810. (44) Suit to establish trust ex maleficio for fraudulent deed on trustee's sale held not to preclude claim that deed was voidable for want of proper advertisement. 147**Va**166, 136 **SE**655. (45) Other remedies held inconsistent. 26**F(2d)**601; 218**Ala**207, 118S389; 203**Cal** 246, 263**P**534; 204**Cal**

515, 269P433; 127Kan673, 275P181; MoA 7SW(2d)726; 198Wis43, 223NW579. (46) Other instances. 36F(2d)203; Ill 172NE161; Iowa 227NW526 (3dcase); 132Or338, 285P813(2dcase); 152SC386, 150SE128, 66ALR416.

11-73 205Iowa633, 216NW719.

11-78 312Mo581, 280SW37, 41 [quot CJ].

11-79 Mo 271SW992, 996 [quotCJ]; 312Mo581, 280SW37, 41 [quotCJ]; MoA 17SW(2d)986.

11-80 Mo 271SW992, 996 [quotCJ]; 312Mo581, 280SW37, 41 [quotCJ]; NJ 139A703; 223AppDiv654, 229NYS414.

11-81 Mo 271SW992, 996 [quotCJ]; 312Mo581, 280SW37, 41 [quotCJ]. [b] **Where alternative remedies** depend on identical facts, they are not inconsistent, as applied to doctrine of election of remedies. 138SC74, 136SE19.

12-86 TexCivA 283SW213.

12-87 247Mich279, 225NW556.

12-87½-New. Remedies are inconsistent when the right to any of them necessarily yields or concedes the right to another. 40GaA83, 149SE58.

12-89 319Mo787, 5SW(2d)70, 73 [cit CJ]; 115Tex93, 276SW424. [b] (5) Seller under conditional sale contract reserving title until full payment and giving seller right of repossession and sale at any time and of holding buyer for deficiency, does not, as to purchaser with notice, waive right to retake property and hold it as security by taking judgment on purchase-money note. 203Iowa418, 212NW711, 56ALR233.

13-94 41Ida767, 244P404.

13-96½-New. A judgment in conversion for the wrongful taking of property which has been removed from the state by the trespasser does not prevent the owner from maintaining an action in claim and delivery for its recovery if the property is returned to the state. 41Ida767, 244P404.

14-98 68CalA785, 230P212; 77Colo533, 238P69; 46Ida701, 270P1059; 217AppDiv7, 216NYS61; 222AppDiv115, 225NYS696; 128Misc152, 218NYS408; 136Misc507, 240NYS11; 136SC231, 134SE222, 223 [citCJ]; TexCivA 289SW461; TexCivA 290SW849, 851 [citCJ]; TexCivA 12SW(2d)1059; 141Wash560, 252P133. [a] (2) 141Wash560, 252P133. [b] (3) Filing of libel in United States court was not inconsistent with, or bar to, subsequent action in state court. 224AppDiv442, 231NYS362. (4) Other instances. 135Misc851, 241NYS579. [c] (1) 245Mich348, 222NW743. (10) Action for deceit and fraud in inducing plaintiff to enter contract of partnership is inconsistent with action for accounting of partnership affairs. 136SC231, 134SE222. (11) Buyer suing for damages for false representations in sale of stock cannot defend cross bill on note for price on ground of fraud (MoA 25SW(2d)566), (12) or on ground that note was without consideration (MoA 25SW(2d)566). [h] **Judgment that seller abrogated contract** by suing for balance due and causing attachment after buyer's default held erroneous. 221Ky44, 297SW936.

15-99 68CalA785, 230P212; 200Iowa572, 203NW935, 205NW205; 119Kan719, 241P690; 100NJEq315, 135A69.

15-2 [b] (2) Action by purchaser of land, including animals to be cared for by vendor, for failure to render accounts was held not to preclude subsequent action to rescind for continuing failure to account and for refusing to pay purchaser his share from sale of hogs. 69CalA621, 232P162.

16-3 243NY295, 153NE79.

16-4 69CalA621, 232P162 (refusal to accept attempted rescission by vendor of land for nonpayment of installments of purchase price, which nonpayment was due to vendor's refusal to render accounts and recovery of nominal damages from vendor, held not to prevent rescission by vendee for subsequent breaches).

16-6½-New. That the original complaint alleged a cause of action for conversion is not a bar to recovery under an amended complaint for rescission or fraud. 221AppDiv779, 223NYS642.

16-9 16F(2d)589.

17-15 16F(2d)589; 36GaA275, 136SE465; 40GaA83, 149SE58; 42Ida479, 246P1; 234IllA387, 389 [quotCJ]; 203Iowa1073, 211NW894, 898 [citCJ]; Iowa 228NW51; 167LaA474, 119S432; 150Miss841, 117S262; 81Mont509, 264P396, 401 [citCJ]; 133SC326, 131SE265 (joinder of tort-feasors implies election to recover on theory of joint liability and involves relinquishment of right to raise separable controversy); Sask [1929] 4DomLR1062. See also 39GaA264, 146SE794. [a] (11) Where judgment was recovered against wife for work done, with knowledge of available facts, this barred action against husband on theory that wife acted as his agent. 125Misc114, 210NYS153. [d] **Action for damages for fraud and defense of fraud.**-Buyer's commencement of action for damages for fraud against seller does not preclude his setting up fraud as defense in action by seller's transferee to foreclose mortgage securing notes for price. 149Wash561, 271P823(2dcase).

18-16 197NC100, 147SE686, 64ALR656.

18-17 27F(2d)212; 234IllA387; 206Iowa297, 218NW71; 9LaA302, 119S473; Mass 165NE889; 168Minn298, 210NW105; Mo 20SW(2d)502; 223AppDiv543, 228NYS718; TexCivA 283SW213; 149Wash561, 271P823. [d] **City bringing action** against city treasurer was not election of remedies barring suing county treasurer for wrongful payment to him. Iowa 231NW428.

18-18 81Mont509, 264P396; 194NC775, 140SE709; 146Wash257, 262P639.

18-19½-New. That remedies are pursued against different persons is not conclusive on the question whether they are inconsistent. MoA 18SW(2d)955.

18-20 81Mont509, 264P396, 402 [quot CJ]; SD 226NW734; TexCivA 25SW(2d)176 [quotCJ]; 146Wash257, 262P639.

18-21½-New. Plaintiff, suing the owner, is not precluded because of filing a counterclaim for the same cause in a third person's suit against defendant. MoA 11SW(2d)1072.

18-21½-New. If defendant, sued for the price of materials and work in repairing a truck of which he was not the owner, was not the agent of the owner when he ordered materials and repairs, then defendant, and not the owner, became liable therefor, and plaintiff has no choice between inconsistent remedies against different persons. MoA 11SW(2d)1072.

18-22 42Ida479, 246P1.

19-24 [a] (2) Foreclosure suit against principal debtor does not estop suit for deficiency against purchaser of land assuming mortgage debt. 201Iowa765, 208NW518.

19-25 53ND551, 207NW37. But see 116Or433, 240P549. [a] (2) Foreclosure proceedings may not bar subsequent action on note. 102Conn644, 129A854. [b] **Bringing action to foreclose lien** is not an election to waive any tort that may have been omitted. 53ND564, 207NW438.

19-27 290Pa107, 138A81, 84 [citCJ].

19-34 7F(2d)231; 28F(2d)933; 42F(2d)515; 161Ga629, 131SE505; 41Ida767, 244P404; 203Iowa418, 212NW711, 56ALR233; 119Kan719, 241P690 (objection to admission of evidence under amended inconsistent petition held sufficient to raise question of estoppel by election); 124Kan810, 262P567; 243Mich673, 220NW773; 170Minn278, 212NW461; 243NY295, 153NE79; 132Misc494, 230NYS179; 131Okl34, 267P659, 660 [quotCJ&citCyc]; TexCivA 272SW550 (permitting submission of issue as of damages for fraud, ignoring issue as to rescission); TexCivA 294SW917, 920 [quotCJ]; 69Utah161, 253P196 [cit CJ]; 141Wash560, 252P133. [a] (8) Action to rescind purchase for fraud brought prior to action for other relief constitutes an election of remedies. 243NY295, 153NE79.

20-37 16F(2d)589; 41Ida767, 244P404; 126Kan554, 558, 268P810 [quot CJ]; Mich 233NW200; 298Pa182, 148A94; TexCivA 294SW917, 920 [quot CJ]; 69Utah161, 253P196, 199 [citCJ]. [b] (1) 83IndA85, 147NE728. (2) Offer of judgment. 136Misc507, 240NYS11. [c] **If any element is absent,** preclusion does not follow. 16F(2d)589.

20-39 69Utah161, 253P196, 199 [cit CJ]; 146Wash594, 264P410. [a] (4) Reply in action for negligence seeking to reform absolute release set up by defendant, by limiting and restricting it to definite time in future and stipulating as to rights and obligations of parties in future, necessarily makes action so far one upon contract as to be considered such in election of remedies where plaintiff seeks to attack release for fraud. 127Kan843, 275P163.

20-39½-New. A purchaser suing to rescind purchaser for fraud may waive or abandon action of rescission, 243NY295, 153NE79.

20-39¼-New. and waiver or abandonment by purchaser of right to rescind for fraud is question of intent unless merged into estoppel. 243NY295, 153NE79.

20-39¼-New. Where answer in a vendor's action for specific performance and complaint in vendee's subsequent action for vendor's fraud inducing contract were served simultaneously, there could be no election of remedies. 128Misc152, 218NYS408.

21-42½-New. **That exempt property of bankrupt was set apart** in bankruptcy court without objection by chattel mortgagee and allowed to pass out of jurisdiction of bankruptcy court with chattel mortgagee's consent does not constitute election as alleged in plaintiff's reply to mortgagee's claim in replevin action. 200Iowa1308, 206NW291.

21-43 14F(2d)284, 295 [citCJ]; 16F(2d)589; 38F(2d)795; 41Ida767, 244P404; 234IllA387; 84IndA313, 151NE227, 229 [citCJ]; 203Iowa418, 212NW711, 712 [citCJ], 56ALR233; 207Iowa430, 223NW154; 126Kan554, 268P810; 171Minn65, 212NW738, 742 [cit CJ]; 81Mont509, 264P396, 401 [citCJ]; 113Nebr721, 204NW786; 83NH221, 140A704; ND 224NW668; 112Okl35, 239P660; 140Okl271, 282P1104; 155SC370, 152SE512; SD 207NW460; TexCivA 281SW264, 267 [citCJ]; TexCivA 290SW849 [quotCJ]; TexCivA 294SW917, 920 [quotCJ]; TexCivA 17SW(2d)68; 69Utah161, 253P196, 199 [citCJ]; 194Wis298, 216NW502.

22-44 234IllA387, 389 [citCJ]; 170Minn278, 212NW461; 136Misc507, 240NYS11; TexCivA 281SW264, 267 [cit CJ]; TexCivA 284SW315, 317 [citCJ]; TexCivA 290SW849, 851 [quotCJ]; TexCivA 294SW917; 150Wash559, 274P102; 194Wis298, 216NW502.

22-45 16F(2d)589; 106Conn41, 137A159; 336Ill522, 168NE640; 234IllA387, 389 [citCJ]; 126Kan554, 558, 268P810 [quotCJ]; 150Md397, 133A134; 233Mich633, 208NW28; 249Mich685, 229NW479; 170Minn278, 212NW461; 171Minn65, 212NW738, 742 [citCJ]; MoA 11SW(2d)1072; 112Okl35, 239P660, 662 [quotCyc]; 138SC74, 136SE19, 21 [quotCJ]; TexCivA 281SW264, 267 [cit CJ]; TexCivA 290SW849, 851 [quot CJ]; TexCivA 294SW917; 69Utah161, 253P196 (dictum); 146Wash257, 262P639; 194Wis298, 216NW502. [a] (11) One suing for rescission of contract induced by fraud may, on failure to prove rescission, amend and pay for damages caused by fraud. 201Iowa1186, 207NW247.

23-46 16F(2d)589; 80CalA377, 252P647; CalA 265P327; 234IllA387, 389 [citCJ]; 84IndA313, 151NE227; Iowa 228NW51; Iowa 230NW415; 236Mich197, 210NW260; 170Minn278, 212NW461; 221MoA329, 273SW772; 79Mont198, 255P737; 81Mont509, 264P396; 126Misc820, 215NYS607; 112Okl35, 239P660, 662 [quotCyc]; 155SC370, 152SE512; SD 222NW941; Tex 12SW(2d)

662; **TexCivA** 281**SW**264, 267 [citCJ]; **TexCivA** 290**SW**849, 851 [quotCJ]; 146 **Wash**257, 262**P**639; 146**Wash**597, 264**P** 406; 194**Wis**298, 216**NW**502. [a] (12) Habeas corpus proceeding held no bar to action for discharge of guardian or modification of order of appointment. 79**Mont**198, 255**P**737.

25-47 170**Minn**278, 212**NW**461; **Tex CivA** 299**SW**659, 660 [citCJ].

25-52½-New. An unsuccessful effort to obtain marshalling of securities is not an election precluding the subsequent right of subrogation. 152**Wash**47, 277 **P**79.

26-58 **TexCivA** 294**SW**917, 920 [citCJ].

26-59 **TexCivA** 294**SW**917, 920 [citCJ].

27-61 16**F(2d)**589; 41 **Ida**767, 244**P**404, 405 [citCJ]; 44 **Ida**554, 258**P**528, 531 [citCJ]; 46 **Ida**313, 268**P**31; 46 **Ida**701, 270**P**1059, 1062 [citCJ]; 203 **Iowa**418, 212**NW**711, 712 [citCJ]. 56**ALR**233; 126 **Kan**554, 268**P**810; 236**Mich**197, 210**NW** 260; **MoA** 1**SW(2d)**855; 81**Mont**509, 264 **P**396, 401 [citCJ]; 221**AppDiv**371, 223 **NYS**418; 115 **Okl** 152, 243**P**732; **Or** 286 **P**588; 290**Pa**107, 138**A**81, 84 [citCJ]; **TexCivA** 294**SW**917, 920 [quotCJ]; 69 **Utah**161, 253**P**196, 199 [citCJ].

27-62 16**F(2d)**589; 290**Pa**107, 138**A**81, 84 [citCJ].

27-63 16**F(2d)**589; 44 **Ida**554, 258**P** 528, 531 [citCJ]; 203 **Iowa**418, 212**NW** 711, 56**ALR**233; 290**Pa**107, 138**A**81, 84 [citCJ]; **TexCivA** 294**SW**917; 150**Wash** 559, 274**P**102.

28-67 83 **IndA**85, 147**NE**728; 134**Misc** 291, 235**NYS**299.

29-68 69**Utah**161, 253**P**196.

29-70½-New. **On reversal and granting of new trial** against plaintiff, he may waive tort which was basis of first action and bring new action on theory of implied contract. 215**AppDiv**491, 214 **NYS**25.

29-73 16**F(2d)**589; 162**Ga**664, 135**SE** 195; 46 **Ida**701, 270**P**1059, 1062 [cit CJ]; 335 **Ill** 202, 167**NE**90; 234**Mich** 385, 208**NW**609, 611 [citCJ]; 170**Minn** 273, 212**NW**461; **MoA** 1**SW(2d)**855; 132 **Or**338, 285**P**813(2dcase); **SD** 226 **NW**734 (deliberate commencement of inconsistent action with full knowledge); 69**Utah**161, 253**P**196, 200 [cit CJ]; 136**Wash**538, 241**P**5; 141**Wash** 560, 252**P**133, 136 [quotCJ]. But see 198**Wis**114, 223**NW**568. [b] (7) Suing in contract for loan, with knowledge of all facts, prevents later suit in tort for conversion. 125**Misc**457, 211 **NYS**342. **Erratum.**–State catchline "Miss." should be "Mass."

30-74 236**Mich**197, 210**NW**260; 178 **Minn**93, 226**NW**417.

30-75 16**F(2d)**589; 83 **IndA**85, 147**NE** 728.

31-76 100**NJEq**137, 134**A**865.

31-80 **MoA** 17**SW(2d)**563; **TexCivA** 297**SW**1070; 68**Utah**530, 251**P**354. See also 131 **Okl** 34, 267**P**659.

32-85 178**Ark**695, 10**SW(2d)**897.

32-86 83 **IndA**85, 147**NE**728.

32-88 6**F(2d)**582; 17**F(2d)**228; 42**F (2d)**515; **Iowa** 231**NW**416. [b] **Mere filing of claim** without asking specific relief has been held not an election. **Mich** 233**NW**200. [c] **Allowance of claim and acceptance of dividends** constitutes an election. **Mich** 233**NW**200.

33-89 168**Minn**298, 210**NW**105. [a] (3) Presentation by administrator of deceased creditor of claim against estate of deceased distributee does not prevent him from deducting indebtedness from share of distributee. 253 **Ill**A229.

33-90 17**F(2d)**228. [a] (3) Filing of claim against estate of defendant's deceased ward is not election preventing claim against defendant personally. 192**Wis**571, 213**NW**300.

33-93½-New. If conditional seller's claim was inadvertently allowed as unsecured and unpreferred, remedy was by petition in receivership proceedings. **Mich** 233**NW**200.

33-94 153**Tenn1**, 282**SW**199.

33-95 153**Tenn1**, 282**SW**199, 201 [quot CJ].

34-98 243**NY**482, 154**NE**531; 153**Tenn 1**, 282**SW**199, 201 [quotCJ]. [a] **Filing notice of lien** is held not election by contractor to abandon title to materials furnished, or to regard them as annexed to realty. 243**NY**482, 154**NE**531.

34-99 153**Tenn1**, 282**SW**199.

34-1 153**Tenn1**, 282**SW**199.

34-1½-New. In case one has choice of bringing suit to recover damages or maintaining bill for injunction, a notice of intention to obtain an injunction which results in other party's dissolving a partnership and abandoning his business constitutes an election. 153**Tenn1**, 282**SW**199.

34-2 153**Tenn1**, 282**SW**199, 201 [quot CJ].

34-3 Contra 21**F(2d)**515.

34-9 286**Pa**449. 133**A**642: 141**Wash** 560, 252**P**133, 136 [quotCJ].

34-10 141**Wash**560, 252**P**133, 136 [quot CJ].

34-11 141**Wash**560, 252**P**133, 136 [quot CJ]. [a] (3) Election by purchaser to rescind for fraud or to recover for damages is effected by action first brought and bringing of later action for damages for fraud is not an election of remedies. 243**NY**295, 153**NE**79.

34-12 243**NY**295, 153**NE**79; 141**Wash** 560, 252**P**133, 136 [quotCJ]. But see 226**Ky**290, 10**SW(2d)**1101. [a] **Subsequent foreign action** held not to be waiver or abandonment of plaintiff's action to rescind. 243**NY**295, 153**NE**79.

35-13 141**Wash**560, 252**P**133, 136 [quot CJ].

35-14 141**Wash**560, 252**P**133, 136 [quot CJ].

35-15 141**Wash**560, 252**P**133, 136 [quot CJ].

35-16 141**Wash**560, 252**P**133, 136 [quot CJ].

35-20 177**Ark**342, 6**SW(2d)**302, 304 [cit CJ]; 101**NJEq**373, 139**A**486; **TexCivA** 299**SW**659; 141**Wash**560, 252**P**133. [a] **Plea of rescission** in suit for specific performance of contract to purchase land will not preclude an amendment asking damages for fraud. 119**Kan**719, 241**P** 690.

35-22½-New. Change from the law to the equity side of the court by amendment of prayer for relief does not bring about election of remedies, if the change involves no prejudice to the opposing party. 207**Cal** 414, 278**P**1038.

35-24 [a] 221**MoA**329, 273**SW**772.

35-26 167**La**474, 119**S**432.

35-30 19**F(2d)**656; 77**Colo** 533, 238**P** 69; **Ill** 172**NE**161; 84 **IndA**313, 151**NE** 227; **Iowa** 228**NW**51; 234**Ky**504, 28**SW** (2d)733; 233**Mich**552, 207**NW**850; 171 **Minn**65, 212**NW**738; 221**MoA**329, 273**SW** 772, 776 [citCyc]; 221**MoA**960, 289**SW** 352; **MoA** 11**SW(2d)**1072; 81**Mont**509, 264**P**396, 402 [citCJ]; 82**NH**372, 134**A** 524; 83**NH**221, 140**A**704, 707 [citCJ]; 100**NJEq**104, 134**A**846; 242**NY**346, 152 **NE**110, 45**ALR**1041; 243**NY**295, 153**NE** 79; 226**AppDiv**32, 234**NYS**171; 22 **OhA** 220, 153**NE**924; 115 **Okl** 152, 243**P**732; 101**Vt**147, 141**A**682. See also 76**CalA** 278, 244**P**916. [c] **Question for jury** whether party had sufficient knowledge of facts under rule. **Iowa** 228**NW**51.

36-32 221**MoA**329, 273**SW**772.

36-36 167**La**474, 119**S**432.

36-37 131 **Okl** 34, 267**P**659, 660 [cit CJ]. [a] 131 **Okl** 34, 267**P**659, 660 [cit CJ].

37-38 See also 101**Vt**147, 141**A**682.

37-39 233**Mich**552, 207**NW**850; 221 **MoA**329, 273**SW**772, 777 [citCJ]; 136 **Misc**507, 240**NYS**11.

37-42 170**Minn**278, 212**NW**461, 464 [citCJ].

37-44 83**CalA**87, 256**P**479; 170**Minn** 278, 212**NW**461, 464 [citCJ].

37-45 101**Vt**233, 143**A**391.

37-46 170**Minn**278, 212**NW**461, 464 [cit CJ].

37-47 102**Conn**644, 129**A**854; 244**NY** 132, 155**NE**74; **TexCivA** 300**SW**148.

37-49½-New. **Ineffectiveness of remedy.** Election to pursue one remedy, if found inadequate, does not bar resort to other relief. 243**NY**295, 153**NE**79.

37-53 29**Ariz**156, 240**P**275, 277 [citCJ]; 236**Mich**197, 210**NW**260; **Mich** 233**NW** 200; 316**Mo** 129, 289**SW**814, 820 [quot CJ].

37-54 16**F(2d)**589, 592 [citCJ]; 29**Ariz** 156, 240**P**275, 277 [citCJ]; 247**Mich**329, 225**NW**504; **Mich** 233**NW**200; 316**Mo** 129, 289**SW**814, 820 [quotCJ]; 321**Mo** 639, 12**SW(2d)**453; **TexCivA** 292**SW** 271; 101**Vt**147, 141**A**682.

37-55 29**Ariz**156, 240**P**275, 277 [citCJ].

37-56 [a] **Burden of proof** is on party asserting defense of election. 234 **Ill**A 387.

37-56½-New. Where plea in abatement is unavailing, defendant is not precluded from setting up as a defense in bar an election of remedies. 125**Misc**457, 211 **NYS**342.

37-56¼-New. In a suit in detinue, a plea that plaintiff was barred by a suit against defendant for money had and received must allege that plaintiff received benefit under such suit or that rights were adjudicated therein which are asserted in the instant suit. 22**AlaA**303, 115**S**145.

38-58 6**F(2d)**322; 21**F(2d)**515; 46 **Ida** 701, 270**P**1059, 1062 [citCJ]; 167**La**474, 119**S**432; **MoA** 11**SW(2d)**1072; 99**NJEq** 563, 134**A**176; 216**AppDiv**395, 215**NYS** 288; 112 **Okl** 35, 239**P**660, 662 [quot Cyc]; 39 **OklACR**284; 218**Ala**296, 118**S** 513.

38-61 81**Colo** 214, 254**P**771, 58**ALR** 250; 42 **Ida**479, 246**P**1; 335 **Ill** 202, 167 **NE**90; 336 **Ill** 522, 168**NE**640; **Ill** 172 **NE**161; 84 **IndA**313, 151**NE**227; 127 **Kan**145, 272**P**165; 127**Kan**509, 274**P** 255; 234**Ky**707, 29**SW(2d)**3; 171**Minn** 65, 212**NW**738; 177**Minn**79, 224**NW**464; 221**MoA**1178, 299**SW**629; 99**NJEq**563, 134**A**176; 242**NY**346, 152**NE**110, 45**ALR** 1041; 243**NY**295, 153**NE**79; 216**AppDiv** 395, 215**NYS**288; 221**AppDiv**371, 223 **NYS**418; 229**AppDiv**162, 241**NYS**282; 191**NC**392, 131**SE**760; 112 **Okl** 35, 239**P** 660, 662 [quotCyc]; 133 **Okl** 41, 270**P** 1095; 140 **Okl** 184, 282**P**342; 39 **OklACR** 284; 286**Pa**449, 133**A**642; **TexCommnA** 288**SW**127; **TexCivA** 290**SW**849, 851 [citCJ]; 145**Wash**180, 259**P**30. [a] (3) Materialman who asserted mechanic's lien is concluded thereby, materials furnished becoming part of premises. 216 **AppDiv**395, 215**NYS**288.

40-62 203 **Iowa**1073, 211**NW**894; 99 **NJEq**563, 134**A**176; 216**AppDiv**395, 215 **NYS**288; 112 **Okl** 35, 239**P**660, 662 [quotCyc]; 34**PortoRico** 820 (may be pleaded as bar though it has not been executed); 115**Tex**93, 276**SW**424. See also 103**NJEq**121, 142**A**441.

40-63 21**F(2d)**515; **Kan** 289**P**439; **Mich** 233**NW**200; 286**Pa**449, 133**A**642; **TexCommnA** 12**SW(2d)**184; **TexCivA** 25 **SW(2d)**255. [a] **If on motion party elects between two inconsistent remedies,** moving party waives right to rely as conclusive upon an opposite election at previous trial. 53**ND**340, 205**NW**875.

40-64 **Mich** 233**NW**200; 242**NY**346, 152**NE**110, 45**ALR**1041.

40-65 **Mass** 170**NE**44. [b] **Party who seeks to recover damages cannot rescind contract as to any part.**–229**AppDiv**162, 241**NYS**282.

40-65½-New. Equity may relieve one, suing for rescission, from mistakes in bringing subsequent foreign action for damages for fraud which was abandoned. 243**NY**295, 153**NE**79.

40-65½-New. Plaintiff electing one of several remedies is confined to damages appropriate to remedy which he selects. 228**AppDiv**402, 240**NYS**139.

41-75 219**AppDiv**219, 220**NYS**308.

41-77 40**F(2d)**626; 101**NJEq**373, 139**A** 486. [a] (2) See also 101**NJEq**373, 139 **A**486.

41-78 101**NJEq**373, 139**A**486.

42-87 289**Pa**65, 137**A**127.

42-88 **NJ** 151**A**784.

43-91 286**Pa**449, 133**A**642.

43-93 7**F(2d)**494, 497 [citCJ]. [a] **Doctrine of election** is usually exercised after party has gained some advantage by first suit. 7**F(2d)**494.

43-99 286**Pa**449, 133**A**642.

ELECTIONS

55-12 143 **Okl** 281, 289**P**254.

56-32 326 **Ill** 310, 157**NE**177.

57-34 121 **Or**4, 252**P**552, 555 [citCJ].

57-35 121 **Or**4, 252**P**552, 555 [citCJ].

57-38 121 **Or**4, 252**P**552, 555 [citCJ].

57-39½-New. In determining whether an election is special regard must be had for the subject matter as well as the time of election. 121 **Or**4, 252**P**552.

57-44 34**F(2d)**464.

58-64 332 Ill 230, 163NE657.
58-81 314Mo 55, 282SW715.
58-82 314Mo 55, 282SW715.
58-83 332 Ill 230, 163NE657; 314Mo 55, 282SW715.
58-84 314Mo 55, 282SW715.
59-95 172Ark1009, 291SW420, 51ALR 559.
59-97 [b] **Female citizen held not elector** within meaning of statute so as to entitle her to have her name put on jury list. 319 Ill 403, 150NE290.
59-4 [a] (1) 141SC347, 139SE775. [b] **"Qualified voter" distinguished.**–One who is not only qualified elector but has met additional requirement of payment of taxes. 141SC347, 139SE775.
59-22 141SC347, 139SE775.
59-23½-New. "People," as used in city charter with regard to referendum, means "qualified electors." 31NM576, 249P242.
59-24 81Colo 144, 254P150. [a] **Beet workers, leaving district temporarily when working in beet fields,** are legal voters of district. 81Colo 144, 254P150.
59-24½-New. A registered voter is one who has been lawfully registered and has present right to vote, 35GaA107, 132 SE411.
59-24⅓-New. although one is not a registered voter if he has become disqualified since such registration. 35 GaA107, 132SE411.
60-26 220Ala309, 125S51; 10LaA563, 121S632.
60-28 196 Ind542, 148NE149; 200 Ind 515, 165NE241; 33PortoRico 76.
60-29 326 Ill 310, 157NE177; 131Misc 728, 228NYS82, 83 [citCJ].
60-32 199Cal 147, 248P521; 210Ky649, 276SW554; 155Miss858, 124S643.
60-38 See also 128Misc163, 218NYS3.
61-39 114 Okl 144, 244P798 (right is inherent in right of self-government though not in mere right to live).
61-39½-New. That electors shall have equal weight in exercising the right of suffrage is the cardinal principle of representative government. 195Cal 676, 235P445.
61-41 5PaDist&Co 515.
61-42 220Ala309, 125S51. [e] **Statute providing that every political party may prescribe qualifications of its own members,** and shall, in its own way, determine who shall be qualified to vote or otherwise participate in such political party, is not unconstitutional. 34F(2d) 464. [f] **Statute authorizing disqualification of persons at primary** because of color held unconstitutional. 33F(2d) 177.
61-43 199Cal 147, 248P521; 200 Ind 515, 165NE241; NJ 143A536; 194NC 293, 139SE604.
61-44 NJ 143A536; 116 Or543, 241P 386; Or 289P494; 150Va174, 142SE 415; 150Va54, 142SE423. [a] **In Oregon.**–132 Or572, 287P74.
62-46 155Miss858, 124S643; 115Nebr 315, 212NW760; 119 Or101, 248P146; 5PaDist&Co 139; RI 135A360. [b] **Courts must consider** that object of elections is to ascertain popular will. 191 Wis538, 211NW938. [c] **Object of election laws** is to secure rights of duly qualified electors. 191Wis538, 211NW 938.
62-46½-New. Statutory enactments will be strictly enforced to prevent fraud but liberally construed in order to ascertain and effectuate the will of the voters. TexCivA 275SW115.
62-47½-New. Policy of Election Law is to afford electors reasonable opportunity to vote at election. 131Misc820, 227 NYS430.
62-47⅓-New. A state democratic committee, passing a resolution that only a white person could participate in primary elections, was not acting as a state governmental agency to which the legislature could delegate authority to legislate. 34F(2d)464.
62-47¼-New. Unless restrained by state or federal constitution power of state legislature to enact laws respecting elections is unlimited. 132 Or572, 287P74.
62-51 96CalA58, 273P863; 114 Okl 144, 244P798; 132 Or572, 287P74; 295Pa 478, 145A597. [b] **In Oklahoma.**–114 Okl 144, 244P798. [c] 31NM188, 242P 683. [d] **In Porto Rico.**–33PortoRico 687.
62-51½-New. Only limitations on right of legislature to enact laws governing elections are those stated in constitution. 323 Ill 561, 154NE474.
62-54 101CalA754, 282P394 (adoption of state laws governing election by city); 97Fla127, 120S361(2dcase).
62-55 33PortoRico 687. See also 295 Pa478, 145A597.
62-56 326 Ill 240, 157NE235; 252NY14, 168NE447.
62-57 199 Ind89, 155NE257; 126Kan 811, 816, 271P400 [quotCJ]; 132 Or572, 287P74.
63-60 117Tex159, 299SW221.
63-63½-New. Ballot law should be liberally construed and voter's intention given effect where possible. RI 135A 360.
63-63⅓-New. Corporations not permitted to vote are not discriminated against. 168La111, 121S592.
63-63¼-New. Right of suffrage was not conferred on women by nineteenth amendment. Ill 173NE145(2dcase).
64-78 210Ky649, 276SW554; 149Md 286, 131A459.
64-79 See also 321Mo 275, 10SW(2d) 524.
64-81½-New. ,or the consent of the state. 313Mo 283, 281SW709.
65-86 [a] **Period for which registration certificate runs** does not begin till twenty days after date of certificate. 152Tenn213, 275SW28.
65-87 210Ky649, 276SW554; 321Mo 275, 10SW(2d)524.
65-88 321Mo 275, 10SW(2d)524. [a] **Statutes held valid.**–152Tenn213, 275SW 28.
65-94 149Md286, 131A459.
66-95½-New. A statute providing for investigation and purging of registry lists is not unconstitutional. NJ 143A 536.
67-17 322 Ill 265, 153NE351; 210Ky 642, 276SW152; 215Ky199, 284SW997; 217Ky653, 290SW471; 195NC697, 143 SE513 (married woman); 141SC347, 139 SE775. [b] **Persons becoming twenty one** since last assessing time are held disqualified as electors. 173Ark970, 294 SW74.
67-21 322 Ill 265, 153NE351; 199 Ind 89, 155NE257; 195NC697, 143SE513; 141SC347, 139SE775; Tex 275SW117.
68-30½-New. Alien son of alien parents whose father had not been naturalized is not qualified to vote. TexCivA 275SW117.
68-34 322 Ill 265, 153NE351; 332 Ill 230, 163NE657; 199 Ind89, 155NE257; 215Ky199, 284SW997; 217Ky653, 290 SW471; 6LaA182; NJ 129A410; 157SC 290, 154SE164.
68-37 92Fla818, 110S539; 170Ga202, 152SE239; Iowa 231NW422; 9PaDist& Co 9. [b] **County superintendent of schools residing in independent school district** is not necessarily voter therein so as to be disqualified from voting for county superintendent. 170Ga202, 152 SE239.
69-39 133Misc38, 231NYS396; 9PaDist &Co 9; Iowa 231NW422; TexCivA 278 SW919.
69-43 245NYS475; 9PaDist&Co 9; Tex CivA 278SW919.
69-49 Ind 168NE454.
69-52 See also 133Misc38, 231NYS396. [c] **Married woman** who has not heard from her husband for twenty-five years may be elector of district where she resides. 71CalA361, 235P79.
69-56 136 Okl 10, 275P1056; TexCivA 278SW919.
70-60 TexCivA 278SW919, 921 [quot CJ].
70-61 See also TexCivA 278SW919.
70-63 210Ky642, 276SW152; 106 Okl 78, 233P211. [a] **Period of residence.**–195NC697, 143SE513. [b] **Under City Election Law,** providing for establishment of precincts in which resident qualified electors, shall be entitled to vote, such precincts are within meaning of constitutional requirement of thirty days residence prior to election, and same is true where City Election Law has not been adopted. 332 Ill 230, 163 NE657.
70-63½-New. But one moving from precinct about a month before election may vote therein. 215Ky199, 284SW 997.
70-63⅓-New. One who, upon election day, has only begun to move from precinct may vote therein. 215Ky199, 284 SW997.
70-63¼-New. Persons who have been temporarily absent from precinct, having part of their household goods therein, always intending to return, and who have returned by election time, are entitled to vote. 215Ky199, 284SW997.
70-63⅕-New. A voter must vote in the precinct in which the house in which he lives is located. 210Ky642, 276SW152.
70-63⅙-New. The rule applies although the larger part of the farm on which the house is located is situated in another precinct. 210Ky642, 276SW152.
70-65½-New. In Kentucky, persons not residing in the state one year and in the precinct for sixty days are not entitled to vote. 215Ky199, 284SW997.
70-66½-New. In some jurisdictions, however, if the precinct line runs through a voter's house, he may elect to vote in either precinct. 210Ky642, 276SW152.
70-66⅓-New. In such case the option once exercised is final. 210Ky642, 276 SW152.
70-69½-New. Where there is doubt as to the precinct in which a person is entitled to vote because the boundary line is not definitely known, the voter's election of precinct may not be challenged. 217Ky653, 290SW471 (such election must be adhered to).
70-69⅓-New. In case of doubt as to voter's residence it is resolved in favor of permanency of residence in precinct where he cast his ballot. 81Colo 144, 254P150.
70-70 Where precinct lines have never been run out or have been lost, weight will be given to the fact that a person has voted in a precinct without objection, has paid taxes, and has used schools of the precinct. 210Ky642, 276 NW152.
70-73 [b] **School teachers** under annual contracts are "residents," making them qualified voters. Iowa 231NW422.
71-75 TexCivA 275SW117.
71-78 81Colo 144, 254P150, 152 [cit CJ]; 196 Ind460, 148NE477; Iowa 231 NW422 (holding teacher's reference "a sort of a home" to parental home does not change legal status of school teacher as voter); 215Ky199, 284SW997; 241 NY180, 149NE415; 9PaDist&Co 666; TexCivA 275SW117. [a] TexCivA 275 SW117. [h] **Notification to commissioners** in domicile of origin of abandonment thereof is insufficient. 241NY180, 149NE415. [i] **Renunciation of one home** without acquisition of new one is insufficient. 241NY180, 149NE415. [j] **Abandonment not shown** by wife expecting to give birth to child visiting mother in adjoining county and husband remaining though losing job before election. TexCivA 275SW117. [k] **Removal to another county without knowing whether they intended to return to former residence** has been held surrender of right to vote in former residence. Ind 168NE454.
71-79 77Colo 478, 238P53; 81Colo 144, 254P150, 152 [citCJ]; 215Ky199, 284 SW997. [b] (2) 6LaA182. [c] **Persons residing but not voting in another state,** who have, for thirty years, voted in certain precinct, in which they always intended to make their home, and to which they did return within year before election, may vote in such precinct. 215 Ky199, 284SW997.
71-81 TexCivA 275SW117.
71-82 Ind 168NE454; 215Ky199, 284 SW997; TexCivA 275SW117.
71-82½-New. Renunciation of one domicile without acquisition of another is not sufficient to bring about a change. 241NY180, 149NE415.
71-83 222Ky201, 300SW597, 598 [quot CJ]; TexCivA 275SW117. [a] **Husband and wife returning, less than sixty days before election,** to precinct where they had formerly lived, after absence of eight months elsewhere,

where husband had voted, cannot vote. 215Ky199, 284SW997.

71–85 But see **TexCivA** 275SW117.

71–85½–New. A voter does not lose his residence in a precinct by temporary absence for business purposes. 210Ky 642, 276SW152.

71–85⅓–New. A voter loses his residence in a precinct by moving out of it without intention of returning. 210Ky 642. 276SW152.

71–86 **TexCivA** 275SW117.

72–88 196 **Ind**460, 148NE477.

72–92 241NY180, 149NE415.

72–95 241NY180, 149NE415; 126**Misc** 174, 212NYS202.

72–95½–New. In such case the question is one of domicile to be determined on circumstances of the case, 126**Misc**174, 212NYS202.

72–95⅓–New. and intent to change legal residence must be manifested by acts independent of voter's presence as a student. 126**Misc**174, 212NYS202.

72–97 [a] **Thus** renouncing of former residence and all family connections does not entitle seminary student right to vote in election district where seminary is located. 126**Misc**174, 212NYS 202.

72–98 77**Colo** 478, 238P53, 54 [quotCJ]; 241NY180, 149NE415. [e] **Affidavits of students.**–241NY180, 149NE415. [f] **Registration by students in local election district** and notification of commissioner of elections of former residence of change of residence to election district where seminary was located entitled students to vote in latter district. 126**Misc**174, 212NYS202 (even though registration of students in local district was annulled on ground of incomplete intention).

73–1 224**AppDiv**411, 231NYS230; 245 NYS475.

73–3 224**AppDiv**411, 231NYS230.

73–5 See also 133**Misc**38, 231NYS396.

73–6 133**Misc**38, 231NYS396.

73–7½–New. Rules governing the right to register in an election district by patients of a federal hospital, apply equally to employees of a hospital and to wives of patients and employees. 133**Misc**38, 231NYS396.

73–7⅓–New. In proceeding under the Election Law to strike the names of patients at a federal hospital from the registration lists of the town in which the hospital was situated, no consideration can be given the fact that patients are veterans of the World War in determining a right to registration. 133 **Misc**38, 231NYS396.

73–8 [e] **Civilian employees of hospital** maintained by United States government are not entitled to vote. 77**Colo** 177, 234P1068.

74–9 [a] **School teachers** voting for office of mayor must have established legal residence in town. 195NC697, 143 SE513.

75–27½–New. Statute discriminating as to color is invalid. 42**F(2d)**101.

75–28 **Mont** 286P125(2dcase).

76–42 169**Ga**622, 151SE28; 170**La**556, 128S514; 8**LaA**451; 141SC347, 139SE 775; 157SC290, 154SE164. [a] (1) **TexCivA** 275SW117. (10) In Georgia. 162**Ga**462, 134SE103. (11) Voters are required to pay poll tax for any particular year to county where they resided on first day of such year. **Tex CivA** 275SW117. (12) Hence for such year they are not liable for tax to county to which they removed after first day of such year. **TexCivA** 275SW117. (13) Their voluntary payment to such latter county does not satisfy provision of statute requiring payment of poll tax to county in which they resided on first day of January of year of levy. **Tex CivA** 275SW117. (14) Where statute fixes no time for levy of poll tax, fact that it was not levied till October 8 does not invalidate levy so as to entitle voters, who later removed to another county and there paid poll tax, to vote in such county. **TexCivA** 275SW117. (15) Voters residing in one county on first of January who later in year removed to another county cannot vote in latter county at election in ensuing year where they failed to pay poll taxes in first county. **TexCivA** 275SW117. (16) In absence of affirmative showing that county where voter resided on January 1 had levied poll tax, voter who later removed to another county may vote therein on timely payment of poll tax in latter county. **TexCivA** 275SW117. (17) Obligation to pay poll tax is not obligation that may be enforced, but is to be performed voluntarily as test of good citizenship. 220**Ala**309, 125S51. [b] **As distinguishing feature** between "qualified voter" and "qualified elector." 141SC347, 139SE775. [c] **Legatees and distributees** are not legally required to pay taxes on land of estate being administered in order to qualify as electors. 153**Miss**722, 121S156.

76–46 170**Ga**687, 153SE773. [b] **Failure of taxpayer to make return of taxes** is not alone disqualification preventing one from voting in city bond election under statutes. 35**GaA**107, 132SE411. [c] **If election is held within six months** from time fixed for payment of taxes, nonpayment is not, under statutes in some jurisdictions, disqualification of voter. 35**GaA**107, 132SE411.

76–52 [a] **Married women** improperly assessed for poll tax by adding words "and Mrs" after husbands' names held not qualified voters. 173**Ark**970, 294 SW74.

76–53 See also **Or** 289P494.

76–53½–New. Voluntary payment of poll tax in county where not subject thereto did not satisfy the statute. **Tex CivA** 275SW117.

76–53⅓–New. Where persons did not pay their poll tax in the county of their residence, they were not entitled to vote in the county to which they removed. **TexCivA** 275SW117.

76–53¼–New. Where there was no showing that county of voter's residence levied tax on January 1, timely payment of tax in county to which voters removed entitled them to vote. **Tex CivA** 275SW117.

76–53⅕–New. Where voter had no residence in any county, his timely payment of tax in county where he settled entitled him to vote. **TexCivA** 275SW 117.

77–60 171**Ark**334, 284SW40.

77–60½–New. Where statute fixes no period for making levy, persons coming into the county after January 1 were not entitled to vote although the poll tax was not levied until October and they had paid it. **TexCivA** 275SW117.

77–66 173**Ark**970, 294SW74. [b] **Payment by check** on February 1 constituted sufficient payment as of date it is accepted though check is not cashed till later. 153**Miss**722, 121S156.

77–69 See also 5**PaDist&Co** 139.

77–71 173**Ark**970, 294SW74.

77–72 **TexCivA** 21SW**(2d)**580.

77–77 [d] **In Rhode Island.**–49**RI** 296, 142A372.

78–87½–New. Registration certificate may be accepted as proof of payment if elector has just registered for election. 157SC290, 154SE164.

78–88 [a] **In Porto Rico.**–33**PortoRico** 76. [c] **Nineteenth Amendment** affects state constitution only so far as necessary to give effect to supreme law. 83 **NH**589, 139A180.

78–89 [a] **In Missouri.–Mo** 30SW**(2d)** 149.

78–93 But see 5**PaDist&Co** 139.

78–93½–New. The Nineteenth Amendment to the federal constitution automatically removed all disqualifications of women to vote in the states theretofore existing on account of sex. 162**Ga** 462, 134SE103.

78–97 **Mo** 30SW**(2d)**149. But see 5**Pa Dist&Co** 139.

79–15 97**NJEq**555, 129A624.

80–33 215**Ky**199, 284SW997, 1004 [quotCJ].

81–42 [a] **"Persons under guardianship"** are those who are deemed incapable of managing their own affairs and are placed by law under control of another with respect to their relations with third persons. 34**Ariz**308, 271P 411.

81–60½–New. Absentee vote statute being in derogation of General Election Law, it should be strictly construed. 126**Misc**49, 213NYS524.

81–60⅓–New. There are no presumptions or inferences in its favor. 126 **Misc**49, 213NYS524.

81–60¼–New. Absent voter statute is construed as mandatory and as an exception to the rule of liberal construction. 155**Miss**858, 124S643.

81–62 199 **Ind**89, 155NE257. But see 141SC347, 139SE775.

81–63 131**Misc**728, 228NYS82.

82–67 141SC347, 139SE775.

82–81½–New. Registration is now a qualification of voters. 168**Ga**67, 146 SE908; 168**Ga**444, 148SE102.

83–82 173**Ark**970, 294SW74; 169**Ga** 622, 151SE28; 135 **Okl** 33, 273P238; 50 **RI** 318, 147A665. [d] **Person obtaining complete exemption from personal property tax** is not qualified to vote for general officers without registration. 49**RI** 296, 142A372.

83–92 135 **Okl** 33, 273P238.

84–94 106 **Okl** 78, 233P211 (vote in precinct other than that of registration is void).

84–94½–New. Some statutes require each qualified voter to register in the election precinct of which he is a resident. 125 **Okl** 248, 257P328.

84–95 **La** 114S167. [a] **Computation of time.**–135 **Okl** 33, 273P238.

84–96 135 **Okl** 33, 273P238.

84–1 210**Ky**649, 276SW554. See also 224**AppDiv**411, 231NYS230.

84–2 [a] **Registration by non-taxpaying voter,** where tax paying is qualification, is void and cannot be validated by subsequent tax payment. 169**Ga** 622, 151SE28.

84–3½–New. Illness during part of registration hours does not bring one within class permitting one to register "specially." 222**Ky**95, 300SW353.

84–4 11**LaA**529, 121S621. [a] **In Louisiana.**–169**La**394, 125S283.

85–13 See also 86**PaSuper**600.

85–13½–New. That the town registrar had others assisting him in the clerical work of issuing registration certificates to voters does not affect the validity of the certificates issued. 147SC498, 145 SE412.

85–26 321**Mo** 275, 10SW**(2d)**524.

86–33½–New. Right of voters to vote for want of required residence cannot be attacked, such being collateral attack on their registration. 170**La**556, 128S514.

86–35 See also 133**Misc**38, 231NYS396.

86–37 **NJ** 143A536. [a] **Notice.**–Personal service is not indispensable in all cases. 210**Ky**649, 276SW554.

86–38 220**Ky**510, 295SW873. See also 219**Ala**236, 122S26.

86–39 210**Ky**649, 276SW554; 321**Mo** 275, 10SW**(2d)**524. [b] **Provisions construed.**–310**Mo** 542, 276SW389. [c] **Constitutionality of statutes.**–33NM533, 271 P469.

86–40 210**Ky**649, 276SW554 (names of persons who have become ineligible, as well as of those who were never eligible, properly stricken from registration books). [a] **Voters whose names were added to clerk's poll tax** list, after payment of delinquent taxes, by sheriffs and deputies, have been held not properly accused. 173**Ark**970, 294SW74.

86–43 294**Pa**139, 143A776.

86–44 But see 118**Kan**184, 235P132.

86–48 294**Pa**139, 143A776. See also 9 **LaA**171, 119S264; 227**AppDiv**673, 236 NYS421.

86–49 210**Ky**649, 276SW554.

86–50 [a] **Demurrer to petition** does not lie. 33NM533, 271P469.

86–51½–New. Registration commissioners in proceedings to strike names from a list of registered voters have authority to expedite the proceedings before them so as to enable their final decision to be heard on appeal. 294**Pa** 139, 143A776.

87–55 220**Ala**309, 125S51; 210**Ky**649, 276SW554; 136**Wash**610, 241P12. But see 36**GaA**92, 136SE107.

87–58 149**Md**286, 131A459. See also 36 **GaA**92, 136SE107.

87–59 149**Md**286, 131A459 (statute construed); 50**RI** 318, 147A665; 147 SC498, 145SE412.

87-61 152Va209, 146SE196.
87-63 But see 219Ala349, 122S457.
87-65 [b] **Where county registration certificate was not required** by municipal registrar, voters were not thereby disqualified. 146SC338, 144SE62. [c] **Municipal registration certificate** is not invalid because it was issued by registrar not qualified voter. 146SC338, 144SE62.
87-69 197NC675, 150SE332.
88-77 197NC675, 150SE332.
88-77½-New. Failure of a town registrar to take an oath did not vitiate the election, where he is at least a de facto officer. 147SC498, 145SE412.
88-79 146SC338, 144SE62.
88-79½-New. The right of challenging every person voting in the city primary by any resident of the city has been held to give adequate legal remedy to correct irregularities in registration. 197NC675, 150SE332.
88-81 But see 332 Ill 230, 163NE657.
88-83 225Ky534, 9SW(2d)298. [f] **In Oklahoma.**-125 Okl 248, 257P328.
88-87½-New. A county committee meeting called to do a certain act only is without power to elect an officer and declare the offices vacant. 221AppDiv 365, 222NYS747.
88-88 [a] **Court cannot upon division of district into additional districts** make appointments which would result in depriving an inspector from serving during term for which he was elected. 12PaDist&Co 444.
88-89 225Ky534, 9SW(2d)298.
89-99½-New. Resolution establishing three village election districts could not be modified to provide for single district unless votes decreased to eight hundred. 131Misc820, 227NYS430.
89-6½-New. Election officers are not clothed with judicial power. 115Nebr 315, 212NW760.
89-13½-New. Persons serving as election officials become officers de facto so that their eligibility to appointment and the validity of their acts cannot be collaterally attacked. IndA 165NE788.
90-16 [a] **"Qualified electors"** under Ohio Code relating to appointment of deputy state supervisors of elections means persons qualified to exercise rights of electors and in other respects qualified to discharge duties imposed by law on such officers. 113 OhSt386, 149 NE192.
90-18 5PaDist&Co 7.
90-20 11PaDist&Co 397.
90-22 [a] **Truth of statement as to qualifications** in recommendation by political committee may be judicially determined. 113 OhSt386, 149NE192.
90-24 TexCivA 280SW351, 352 [cit Cyc].
90-25 TexCivA 280SW351; 352 [cit Cyc].
90-26½-New. Burden of establishing disqualification of a deputy state supervisor of elections is on the state supervisor. 113 OhSt386, 149NE192.
90-27 [b] **State supervisor of elections** is not bound to accept recommendation of political committee in appointing deputy state supervisor where evidence of disqualification is clear and convincing. 113 OhSt386, 149NE192.
90-28 [d] **Appointment by city council.**-(1) Under Dunbar city charter it is duty of municipal council to appoint commissioners of election and challengers upon recommendation of chairmen of two leading political parties. 107 WVa414, 148SE487.
90-29 174Ark98, 294SW411, 413 [quot CJ]; TexCivA 294SW863, 864 [citCJ]. [c] **Payment in compromise of will contest** held justified. 128Misc553, 220 NYS188.
91-30 TexCivA 291SW957, 959 [citCJ].
91-31½-New. Where court by mistake appoints as minority inspector person other than one elected it may amend decree by proper appointment. 12Pa Dist&Co 444.
91-36 [a] **Removal** gives right of appointment. 5PaDist&Co 7.
91-37 334 Ill 465, 166NE100, 64ALR 1006.
91-48 [a] **Written request** at least one week before election is necessary. 245 NYS539.
91-49½-New. A decree dividing two existing election districts into five as specified does not abolish the old districts so as to terminate the office of an inspector of one district, but he continues as to the new district formed of his residence. 296Pa326, 146A28.
92-54 SD 213NW730.
92-55 46Philippine595; 101WVa425, 133SE109 (poll clerks).
92-56 113 OhSt386, 149NE192 (state supervisor need not comply with recommendation of committee for appointment of deputy supervisor unless he is certified to be a qualified elector of the county and qualified in all other respects to fill the office). [b] **Unless state supervisor establishes in court** that person recommended for deputy supervisor is disqualified, it is his duty to appoint him. 113 OhSt386, 149NE192. [c] **Recognition of regularity of party faction.**-254NY341, 173NE6 (certificate of chairman of state committee not conclusive).
92-60½-New. That an officer affiliates with another party does not terminate his position. 296Pa326, 146A28.
92-60½-New. Under constitutional provision that election board shall consist of judge and two inspectors and electors may vote for judge and one inspector, both inspectors elected may be of same political party. 12PaDist&Co 444.
92-63 NJSup 147A785(1stcase) (compensation for recounting ballots); 2LaA 187.
92-64 88 IndA349, 164NE27(2dcase).
93-71 273US536, 47SCt446, 71L ed759.
93-73 273US536, 47SCt446, 71L ed759. [b] **Rule applied to primary election.**-273US536, 47SCt446, 71L ed759.
93-75 273US536, 47SCt446, 71L ed759.
93-81 See also 34F(2d)464.
94-86½-New. De facto officers are punishable for contempt of court for misbehavior in office during election. IndA 165NE788.
94-98 See also 225AppDiv149, 231NYS 477.
95-4 176Ark1093, 5SW(2d)350; 3Del 344, 138A354, 355 [citCJ]; 48Nev64, 227 P588; 136Wash467, 241P21. [a] **Particular elections held invalid.**-3Del 344, 138A354. [b] **Construction of statutes.**-159Tenn693, 21SW(2d)623.
95-7 136Wash467, 241P21.
95-9 116 Or264, 240P418, 429 [quot CJ].
96-20 114 Okl 246, 246P376, 379 [quot CJ].
96-21 114 Okl 246, 246P376, 379 [quot CJ].
96-22 114 Okl 246, 246P376, 379 [quot CJ] (not deciding question).
96-23 114 Okl 246, 246P376, 379 [quot CJ] (not deciding question).
96-24 114 Okl 246, 246P376, 379 [quot CJ].
96-25 114 Okl 246, 246P376, 379 [quot CJ].
96-26 114 Okl 246, 246P376, 379 [quot CJ].
96-27 114 Okl 246, 246P376, 379 [quot CJ].
96-28 114 Okl 246, 246P376, 379 [quot CJ]. [a] (3) Where petition is presented requesting call of election for purpose of submitting to voters bond issue in stated amount, and board finds that smaller amount is adequate and issues call for election to determine whether board shall be authorized to issue bonds in smaller amount, such reduction does not invalidate proceedings. 114 Okl 246, 246P376.
96-29 114 Okl 246, 246P376, 379 [quot CJ].
96-34 80Mont1, 257P1029.
96-35 121 Or4, 252P552.
96-36 121 Or4, 252P552.
97-37 116 Or264, 240P418, 431 [citCJ perBelt,JJ]; 121Or4, 252P552.
97-38 121 Or4, 252P552.
97-41 Contra 121 Or4, 252P552.
97-44 140Wash636, 250P66. [a] **Such election required to be held at next general election** is special election in sense that notice is necessary to validity. 140 Wash636, 250P66.
100-73 Sask [1928] 3DomLR747 (election void).
101-85 TexCivA 274SW196, 198 [cit CJ].
101-86 TexCivA 274SW196, 198 [cit CJ]. [a] 196 Ind542, 148NE149.
101-93 116 Or264, 240P418, 429 [quot CJ].
102-5½-New. Under statutes in some jurisdictions, proclamation for election on creation of a new county and officers thereof is required to be made some time more than five days subsequent to final determination on a petition for the creation of the new county. 80Mont1, 257 P1029.
102-6½-New. Repeal of statutes. 140 Wash636, 250P66.
102-16 125 Okl 248, 257P328.
103-22 151Wash19, 274P793.
104-32 164La981, 115S54; Tex 28SW (2d)515.
104-33 33PortoRico 687.
104-36 TexCivA 9SW(2d)747. [a] **County executive committee** may require pledge from members to vote for and support party's presidential nominee, and has inherent right to oust member announcing his support of other party's candidate. TexCivA 9SW(2d)747. [b] Members of county executive committee of political party are not "officers" within meaning of constitution, relating to continuance in office of state, county, and municipal officers until their successors are fully qualified. 96Fla519, 118S476(2dcase).
104-38 [a] **In Montana.**-83Mont162, 271 P446.
104-39½-New. In Texas regulations of party nominations are entirely statutory. CivA 287SW304.
104-39⅓-New. When a statute provides for two methods for nominating candidates, a party seeking nomination may resort to either method, but can not resort to both. 146Miss870, 112S386.
104-39¼-New. A statute requiring all nominating petitions to be filed prior to the sixtieth day preceding election has been held not in conflict with the Ohio state constitution. 115 Oh337, 154NE 160.
104-39½-New. Declaration of intention to become a candidate must be made by candidate himself and cannot be deputed to an agent or proxy. 126Kan576, 269 P500.
104-39⅙-New. Although one not receiving the majority of votes cast at an election may not, under the constitution, be declared elected to office, the legislature may so provide as to nomination. 230Ky689, 20SW(2d)727.
104-39⅐-New. Statute requiring filing of nomination papers will not be held repealed by implication where result would be to leave city without adequate method for holding elections of officers. Nev 286P119.
105-45 101CalA754, 282P394.
105-45½-New. A statute relating to candidates by nomination has been held not applicable so as to bar a right to have the name written on the ballot because of solicitation. 215Ky573, 286SW 793.
105-50 [b] **Statute relating to nominating circuit judges** held inapplicable to party nomination of circuit or superior judges of Cook County, Illinois. 323 Ill 561, 154NE474. [c] **Inalienable right.**-People have an inalienable right to organize and operate political parties. Ind 166NE270. [d] **In Nebraska.**-117 Nebr579, 221NW708(2dcase).
105-52½-New. State convention is the supreme judiciary within party of its own affairs so long as it represents the electors of the state comprising the party organization. 102WVa192, 135 SE11.
105-52½-New. Where a party convention has declared another nominated, 102WVa192, 135SE11.
105-52¼-New. A statute authorizing nomination by a county convention is applicable where the candidate at a previous primary failed to receive a certain percentage of the party's voting strength. 206 Iowa725, 221NW220.
105-52½-New. The purpose of a primary is not alone to choose party candidates, but to make a choice binding on party membership, particularly those

participating in the primary, whereby the party's strength will be combined for success of its nominees at the general election. **TexCivA** 98**SW(2d)**747.

105-53 127 **Or**91, 271**P**46.

106-56 127 **Or**91, 271**P**46.

106-60 [b] **New party formed on bolt from regular organization.**–102**Conn**600, 129**A**547.

106-62 [a] **Statutory provision** prescribes reëlection by state committee. 5**PaDist&Co** 356.

106-68½-New. Statute prevails over party rule. 5**PaDist&Co** 356.

106-69½-New. Political parties have power, beyond statutory control, to prescribe qualifications of members of conventions. **TexCivA** 30**SW(2d)**722.

106-72 [d] **Sufficiency of call.**–83**Mont** 162, 271**P**446.

107-82½-New. Where the amended rules of the county committee are not adopted by a majority of that committee, as required by statute, such rules are invalid, and their enforcement may be enjoined. 226**AppDiv**696, 233**NYS**482.

108-9 [d] **In South Dakota.**–207**NW**79.

108-18½-New. Under some statutes a voter must be a bona fide member of the party for whose nominees he intends to vote. 210**Ky**642, 276**SW**152.

109-19 But see 210**Ky**642, 276**SW**152 (voter is not qualified to vote if he voted against part of nominees of his party at last election).

109-28 96**Fla**495, 118**S**313.

109-29 333 **Ill** 606, 165**NE**217, 62**ALR** 912.

109-32½-New. Board of elections may determine validity of petition designating candidate for member of state committee though no objections have been filed. 131**Misc**744, 229**NYS**53.

109-32⅓-New. Where a central committee fails to act on the nomination of an unopposed candidate, such candidate may obtain proper relief in court. 132 **Okl** 84, 270**P**311(2dcase).

109-32¼-New. The chairman of the county committee of a political party may not capriciously or unreasonably refuse to convene the committee, but in the absence of such a situation, no one else is authorized to do so. 134 **Misc**259, 236**NYS**81.

109-32½-New. The rules of the county committee of a political party authorizing the chairman to appoint additional members to the executive committee, who need not be members of the county committee, have been held invalid, since standing committees are always composed of members of that body. 134 **Misc**259, 236**NYS**81.

109-32¾-New. Ward committees of city continue in office until successors are elected and qualify. **RI** 151**A**894 (executive committee of state committee cannot remove members of ward committee).

109-32½-New. Ward committees must file list of names of committees or nominees to be voted upon at any caucus. **RI** 151**A**894 (city committee cannot file list of nominees to be voted upon at ward caucus).

109-34 146**Miss**870, 112**S**386; 10**PaDist&Co** 507.

109-39½-New. Nomination papers cannot be completed after the hour at which nominations close, even though received by the returning officer in an incomplete form. **Alta** [1928] 3**DomLR** 61.

109-42½-New. Withdrawal and substitution of nomination papers. If the last day for filing has not gone by, an improper or deficient paper may be withdrawn and a valid one substituted therefor. 8**PaDist&Co** 125.

110-49 Oh 171**NE**315; 10**PaDist&Co** 509. See also 226**Ky**201, 108**W(2d)**814. [g] **Use of word "request"** instead of "petition" does not render petition insufficient. 216**Ky**500, 287**SW**965. [h] **Qualification of candidate** need not be shown in detail. 216**Ky**500, 287**SW**965. [i] **Form of nomination paper** under statute is that furnished by secretary of state which cannot be varied or modified by any other person. 8**PaDist&Co** 125. [j] **Showing that signers are voters of party.**–56**ND**539, 219**NW**115.

110-50 SD 219**NW**247 (signer can sign only one petition for same office in one year). [a] (1) 219**Ky**9, 292**SW**345. (2) 219**Ky**9, 292**SW**345; 7**PaDist&Co** 405. (9) Other decisions as to sufficiency of signature. 215**Ky**30, 284**SW**111; 219**Ky** 9, 292**SW**345. [b] (8) Names signed without authority are void. 215**Ky**566, 286**SW**797. (9) Nomination papers evidently not signed by persons whose signatures they purport to bear, and showing fraud and corruption, cannot be amended after filing. 8**PaDist&Co** 125. [h] **SD** 219**NW**247. [k] **Duplicate or fictitious signature** will be stricken from nominating petition. 219**Ky**9, 292 **SW**345.

110-51 [e] (3) Affidavit on back of list of large number of nomination papers fastened together will not be held to apply to all other preceding papers. 8 **PaDist&Co** 125. [f] **Affidavit of candidate.**–12**PaDist&Co** 366.

110-52 [a] (2) **SD** 219**NW**247 (voting precinct, post-office address and county). (3) Requirement held mandatory and distinguished. **Ky** 127**SW**991; 215 **Ky**566, 286**SW**797. [g] **Statement that subscribers are legal voters** is not sufficient. 215**Ky**566, 286**SW**797. [h] **Nonresident signature** will be stricken from nominating petition. 219**Ky**9, 292**SW** 345. [i] **Specification of post office address** by placing word "same" opposite name of place of residence is sufficient. 216**Ky**500, 287**SW**965.

111-54 SD 219**NW**247.

111-54½-New. the designation of the office, 156**La**930, 101**S**269 (candidate for judge of criminal district court of Orleans must designate section).

111-56 215**Ky**30, 284**SW**111; 215**Ky** 566, 286**SW**797; 219**Ky**9, 292**SW**345; 56**ND**541, 219**NW**116.

111-58 [b] 5**PaDist&Co** 515.

111-61 56**ND**541, 219**NW**116.

111-62 5**PaDist&Co** 436. But see 14**PaDist&Co** 182.

111-63 10**PaDist&Co** 636.

111-64 [a] (2) Residence in district is necessary. 5**PaDist&Co**436. [b] **Thus,** signature by young man who does not know how old he is but thinks he is twenty, there being no other evidence, is invalid. 215**Ky**30, 284**SW**111.

111-68 5**PaDist&Co** 436.

111-68½-New. Signer must possess all necessary qualifications at time of signing. 5**PaDist&Co** 436.

111-70 99**Fla**1081, 128**S**482(1stcase); **Fla** 130**S**721 (statute mandatory on all political parties); 167**Ga**294, 145**SE**841; 30**Hawaii**623; 121**Kan**897, 250**P**268; **Ky** 283**SW**1059; 146**Miss**870, 112**S**386; 50 **ND**708, 197**NW**770 (electors given opportunity to vote preference among those aspiring to be candidates for president of United States); 114 **Okl** 144, 244 **P**798; **Okl** 291**P**554; **TexCivA** 24**SW(2d)** 764 (statute held directory). [a] **Statutes applicable.**–144 **Okl** 206, 291**P**804.

111-70½-New. Primary laws do not confer power on "political parties," which are voluntary organizations with inherent powers of self-government, to make nominations, but are a regulation of exercise of power to nominate. 333 **Ill** 606, 165**NE**217, 62**ALR**912.

112-72 Fla 130**S**721; 197 **Ind**522, 151 **NE**401; 132 **Okl** 84, 270**P**311(2dcase). See also 197 **Ind**522, 151**NE**401.

112-78 197 **Ind**522, 151**NE**401; 25 **OhA**278, 158**NE**94; 106**WVa**21, 144**SW** 562. [a] (5) In Ohio party committee is not public office. 25 **OhA**278, 158**NE** 94.

112-83 96**Fla**512, 118**S**306.

113-90 [a] **In South Dakota.**–207**NW** 79.

113-93 132 **Okl** 84, 270**P**311(2dcase). But see **TexCivA** 8**SW(2d)**795.

113-94½-New. A person who participates in the primary must abide by its result and support the nominee. 146 **Miss**870, 112**S**386.

113-94⅓-New. A rule of a party state committee that at least one of two committeemen from each assembly district shall be a woman is invalid under election laws and Fed. Const. Amendm. XIX as restricting free choice of voters at primary election. 128**Misc**270, 218**NYS** 416.

113-94¼-New. Under some constitutions primary elections are made a component element of the right of suffrage. 114 **Okl** 144, 244**P**798.

113-94½-New. Political party committeemen are not public officers required to give bond or take oath. 328 **Ill** 512, 160**NE**60.

113-94⅗-New. Primary Act held not intended to take over entire control of political party activities. 328 **Ill** 512, 160**NE**60.

113-94⅞-New. Reholding of primary election can only be granted when discrepancies are such that result is likely to be changed. 245**NYS**105.

113-94⅛-New. Election at primary election is rendered abortive by death before general election. **Cal** 292**P**265.

113-1 328 **Ill** 512, 160**NE**60; 230**Ky** 638, 20**SW(2d)**475; 132 **Okl** 84, 270**P** 311(2dcase); 143 **Okl** 275, 288**P**938. See also 333 **Ill** 606, 165**NE**217, 62**ALR** 912. [a] (7) Law relating to selection of nominee in primary election held not to deprive elector of constitutional right of suffrage. 143 **Okl** 275, 288**P** 938. [b] **Method of choosing candidates** must conform to constitutional requirements. 326 **Ill** 240, 157**NE**235. [c] **Statutes held not unconstitutional.**–328 **Ill** 512, 160**NE**60. [d] **Primary is "election" only in qualified sense** that it is moulded, in general, on plan of election, and is conducted as election is conducted, but for purpose only of selecting candidates of political party, with right in no one else to participate therein. 333 **Ill** 606, 165**NE**217, 62**ALR** 912.

114-2 143 **Okl** 275, 288**P**938 (statute held valid).

114-3 325 **Ill** 357, 156**NE**474; 326 **Ill** 240, 157**NE**235; 328 **Ill** 512, 160**NE**60; 114 **Okl** 144, 244**P**798 (provision of preferential primary law requiring voter to designate more than one choice). [a] **Statute providing for primary nomination** held void for uncertainty and repugnancy. 325 **Ill** 357, 156**NE**474. [b] **Exceptions** from primary law of candidate to be elected at special sessions held unconstitutional. 326 **Ill** 240, 157**NE**235. [c] **Primary law, giving employees right to absent themselves** from employment on election day, held unconstitutional. 326 **Ill** 240, 157**NE** 235. [d] **Unconstitutional sections of primary law** not interfering with operation of rest of law held not to affect constitutionality of entire act. 326 **Ill** 240, 157**NE**235.

114-4 8**F(2d)**279; 333 **Ill** 606, 165**NE** 217, 62**ALR**912. [b] **Guaranty of free exercise of right of suffrage** applies to primary elections. 114 **Okl** 144, 244**P** 798.

114-5 8**F(2d)**279.

114-7 CalA 292**P**662.

114-7½-New. In Texas it is held that "state offices" as used in the primary election law means offices filled by electorate of entire state, "district offices" those filled by electorate of respective districts, and "county offices" those filled by electorate only of entire county. **TexCivA** 287**SW**304.

114-9 [d] (3) Petition held to be filed in time. 9**PaDist&Co** 435. (4) In Pennsylvania. 13**PaDist&Co** 82.

115-10 335 **Ill** 283, 167**NE**64(1stcase).

115-11 333 **Ill** 606, 165**NE**217, 62**ALR** 912. [c] **Protesting proposalman** entitled to sign minority proposal under South Dakota statutes must have opposed at proposal meetings principles promulgated by majority, or, at least, not voted for them, and it is not sufficient that he voted against majority nominee. **SD** 207**NW**79.

115-14 [a] **Charter disqualifying candidate** who pays, gives or offers to pay or give directly or indirectly money or anything of value, or knowingly allows any one to do so, to obtain votes or influence an elector does not include promise of future indefinite benefits to result from official conduct. 167**Ga**294, 145**SE**841.

115-15 [a] (2) That statement is sworn to before defacto notary public, both notary and candidate acting in good faith and believing him to be de

jure officer, does not invalidate statement. 167Ga294, 145SE841. [c] (1) 164La954, 115S45; 82Mont594, 268P558 (computation of time). (4) Time cannot be extended by custom or practice followed by officer with whom applications are filed. **Nebr** 232NW99; **Nebr** 232NW103. [d] (4) Delivery by mail or express to authorized agent of designated officer is sufficient. 54ND 274, 209NW345. (5) State senator is not "state officer" within statute specifying places for filing declarations of candidacy. **Mo** 30SW(2d)609. [e] **Statutes applicable to nonpartisan primary election.**–57ND152, 220NW834. [f] **Requirement is mandatory.**–106WVa18, 144SE578. [g] **Requirement applies to candidate for member of county executive committee.**–106WVa18, 144SE578.

115–17 [d] **In South Dakota.**–207NW79. [e] **Candidate's right to have primary conducted lawfully** is not dependent on personal party loyalty regardless of pledge required. **TexCivA** 30SW(2d)569.

115–20 167Ga294, 145SE841; 164La954, 115S45; **Nebr** 232NW99; **Nebr** 232NW103; 57ND152, 220NW834.

115–22 SD 210NW157. But see 178Ark51, 9SW(2d)769. [a] **Unauthorized certification of candidate's name by secretary of state** does not empower election board to place name on ballot. **Mo** 30SW(2d)609.

115–26 TexCivA 30SW(2d)569.

116–33½–New. Under some statutes the county committee is authorized to apportion the cost of a primary among certain candidates. **TexCivA** 286SW289 (such authority will not be extended by inference).

116–34 122Okl95, 251P497. [g] **Where name is placed on ballot before conviction of violation of statute** and candidate who violated statute is elected, he must be denied right to hold office. 122Okl95, 251P497. [h] **"Refusal or willful failure" to file statement** usually implies previous demand or request or existence of circumstances equivalent thereto. 96Fla484, 118S201. [i] **With what officer filed.**–29Hawaii185 (secretary of territory and not county clerk).

116–37 See also 27F(2d)942.

116–38 [b] **Names added to tax books by improper officer.**–Where persons paid poll tax but their names were added to tax books by collector rather than by county clerk as required, they were ineligible to vote. 168Ark64, 269SW57. [c] **Failure to apply to county clerk** to have name included in list of voters has been held not to render the votes illegal. **Ark** 32SW(2d)631. [d] **Failure of tax collector to file list or print name** has been held not to exclude elector otherwise qualified from voting. **Ark** 32SW(2d)625. [e] **Compliance with statutory requirements** is prima facie evidence of right to vote. **Ark** 32SW(2d)625.

116–39 [a] **In Texas.**–**CivA** 286SW275. [b] **Rules of Democratic Party providing that only white people may vote in party primaries** does not violate Constitution. 181Ark428, 26SW(2d)66.

116–40 See also 333Ill606, 165NE217, 62ALR912.

116–42 [c] (4) Change refused on failure to comply with law. 13PaDist&Co678. [d] **Effect of invalidity of list of poll tax payers.**–**Ark** 32SW(2d)625.

117–43 [a] (2) Voter's right to have primary conducted lawfully is not dependent on personal party loyalty regardless of pledge required. **TexCivA** 30SW(2d)569.

117–43½–New. A statute requiring a voter to exhibit a poll tax receipt or other evidence of payment of a poll tax or evidence of the voter's attainment of the age of twenty one, since the time of assessing taxes next preceding the election, is mandatory, and qualification of voters not on the list must be proved in accordance with statute. 179Ark178, 15SW(2d)314.

117–43⅓–New. A printed list of poll tax payers is void for want of substantial compliance with statute, where the collector does not make a list of poll tax payers or verify it in person or otherwise, and no certified copy of the list is delivered to the board of election commissioners. 179Ark178, 15SW(2d)314.

117–45½–New. Members of a political organization possess inherent power to prescribe qualifications regulating the membership of such political party. 34F(2d)464.

117–45⅓–New. No other test, declaration, or pledge may be exacted of prospective voters than that prescribed by statute restricting ballots for primary election. **TexCivA** 286SW275.

117–45¼–New. Statutes in some jurisdictions require collector to furnish properly authenticated lists of poll tax payers. **Ark** 32SW(2d)319.

117–50 221AppDiv365, 222NYS747.

117–52½–New. The time of holding primary elections is fixed by statutes in some jurisdictions. 28Hawaii744.

117–53 TexCivA 30SW(2d)569.

117–55 210Ky273, 275SW818.

117–56 See also **Ind** 166NE270.

117–57 TexCivA 30SW(2d)569. [f] **Name of unopposed candidate** need not be submitted to primary. 132Okl84, 270P311(2dcase). [g] **Alternation of names.**–251Mich286, 232NW387. [h] **County commissioners alone** have power to determine wording or marks on election ballots. **Pa** 151A897. [i] **Removal of name from ballot** of one declining after nomination at primary. 245NYS20.

118–58 See also 251Mich286, 232NW387. [e] **Identity of voter; difference in name.**–Difference in voter's name on ballot from that on printed list does not invalidate ballot where his identity can be proved by parol evidence. 168Ark64. 269SW57.

118–62½–New. Name on ballot. Election commissioner is bound to take notice of the act abolishing a city court in cities of the first class and may not be compelled by mandamus to place relator's name on ballot, although the act would not be effective until January, 1926. 196Ind157, 147NE622.

118–65 251Mich286, 232NW387 (marks held not distinguishing marks); 35OhA271, 172NE391. [a] **In municipal primary** inaccurately marked ballot may be counted since general primary law was inapplicable. 154SC116, 151SE214(2dcase).

118–67 [a] (6) Vote will not be thrown out if voters stamped ballots in secrecy even though no booths were provided. 210Ky277, 275SW879. (7) Leaving ballot box in custody of responsible person pending counting of ballots does not invalidate election. 90Fla430, 106S351.

118–69½–New. Under some constitutions and statutes the election must be by secret official ballot, 210Ky273, 275SW818.

118–69⅓–New. and the only exception made is in case of persons who are illiterate, blind, or otherwise disabled. 210Ky273, 275SW818.

118–69¼–New. A statute requiring a voter, in order that he may have his vote counted, to designate his first and second choice where there are three or four candidates for the same office and to designate his first, second, and third choice where there are more than four candidates, is violation of the constitutional guaranty of free exercise of the right of suffrage. 114Okl144, 244P798.

118–69⅕–New. Under North Dakota Presidential Primary Law, upon request of person to withhold his name from ballot and in absence of showing that he is aspirant for nomination, his name need not be included, notwithstanding petition filed in his behalf. 50ND708, 197NW770.

118–69⅙–New. Political parties have inherent powers to conduct general elections. 328Ill512, 160NE60.

118–69⅐–New. A party seeking to compel the placing of his name on the ballot must do equity, and comply with the maxim of clean hands. **TexCivA** 8SW(2d)795.

118–69⅛–New. Requirement as to identity of absent voter in community. 35OhA271, 172NE391.

118–69⅛–New. Court's right to guard against anticipated fraud in election is limited to appointment of overseers to conduct elections. **Pa** 151A897.

118–69 1/10–New. Right to challenge absent voter's ballot. 35OhA271, 172NE391.

118–69 1/11–New. Secretary of state may exclude from ballot name so changed as to make it deceptively similar to bona fide candidate for same office. **Nebr** 232NW104.

118–84 230Ky643, 20SW(2d)477; 230Ky689, 20SW(2d)727 (by statute). But see 29OhA117, 162NE687. [a] **Where another candidate, who is not party to contest, receives plurality of votes,** neither contestant nor contestee could be adjudged to be nominated in primary election. 230Ky633, 20SW(2d)479.

118–84½–New. A county court sitting as a canvassing board has no authority to pass on the eligibility of candidates. 102WVa325, 135SE179 (duties of board are ministerial).

118–84⅓–New. In some jurisdictions statutes provide that nomination tainted with a violation of the Corrupt Practice Act shall be declared void. 210Ky711, 276SW830.

118–84¼–New. Under some statutes, where there was no candidate of a political party for member of congress at the preceding election, a candidate for nomination for that office at a primary election must receive at least three hundred votes in order to be nominated, 54ND759, 210NW640.

118–84⅕–New. but where there was a candidate of the party at the preceding general election, the number of votes required for nomination must be at least three per cent of the total votes cast for the candidate of the party for the same office at the last general election. 54ND759, 210NW640.

118–84⅙–New. Under some statutes the candidate receiving a plurality of votes cast for state auditor is duly nominated where the candidate who ran second in the contest for governor withdrew and the candidate having the plurality of votes for gubernatorial nomination was declared nominated. 165La531, 115S740.

118–84 1/7–New. Votes cast for an ineligible candidate at a primary to make nominations for general elections are to be counted relative to the right of another to have his name go on the official ballot for the general election, under some statutes. 118Tex38, 9SW(2d)731.

118–84⅛–New. The result of an election is ascertained when the board of election commissioners officially signs something indicating that it has completed its work. 231Ky244, 21SW(2d)291.

118–84⅙–New. Poll list determination of number of votes cast. 251Mich286, 232NW387.

118–84 1/10–New. Absent voters' ballots cannot be counted as disputed ballots where they were not cast. 35OhA271, 172NE391.

118–84 1/11–New. To be counted ballots must bear evidence of initialing by inspectors. 251Mich286, 232NW387.

118–84 1/12–New. Uncounted or disputed ballots which may be counted are votes actually placed in box. 35OhA271, 172NE391.

118–84 1/13–New. Power to count particular ballots must be derived from statute. 35OhA271, 172NE391.

118–84 1/14–New. Use of voting machines not illegal so as to require rejection of votes because names of candidates not alternated. 251Mich286, 232NW387.

118–84 1/15–New. That only three counters were appointed and signed returns from certain precinct held not to defeat election in such precinct. 144Okl206, 291P804.

118–84 1/16–New. Failure of precinct officials to make timely return to county board will not defeat election in precinct. Okl291P554.

118–84 1/17–New. Precinct election officials' failure to make returns to county

election board within statutory time does not defeat election in precinct. 144 Okl 206, 291P804.

119-85 [a] **In Indiana.**-84IndA86, 150 NE60.

119-90 210Ky260, 275SW825; 210Ky 843, 276SW984; 121 Okl 193, 249P381.

119-92 210Ky260, 275SW825; 210Ky 843, 276SW984; 121 Okl 193, 249P381. [a] **Office of county commissioner.**-Some statutes do not furnish authority for contest of nomination of county commissioner in primary election. Fla 130S463.

119-93 121 Okl 193, 249P381.

119-95 173Ark120, 292SW382; 210Ky 843, 276SW984. [a] **Where Primary Law is inconsistent with Municipal Act** pertaining to contests of elections, then Primary Law holds. 27Hawaii596. [b] **In Kentucky.**-210Ky843, 276SW984.

119-97 210Ky260, 275SW825; TexCivA 288SW514.

119-98 [d] **Statutes declared invalid as** allowing recount contrary to constitutional provisions restricting method of relaxing secrecy of ballot. 315Mo 731, 286SW951. [e] **Statutes construed.**-Okl 291P554; Okl 291P565.

119-99 Ark 32SW(2d)319; 96Fla512, 118S306; 210Ky260, 275SW825; 146 Miss870, 112S386.

119-3½-New. Defendant in a contest is not estopped to set up that certain persons voted illegally for his opponent although others in the same precinct voted for him in the same way. 210Ky273, 275SW818.

119-3½-New. A contestant not asserting the right in accordance with statute to prevent the placing of his opponent's name on the primary election ballot cannot rely on error in doing so as ground of contesting his nomination. 221Ky272, 298SW691.

119-3¼-New. Where an election was such that persons might either be elected or nominated for office, depending upon the number of votes received, and contestant claims that it should have been declared that he received a majority of the legal votes cast and was elected to office instead of that he and another were nominated, the contest is not a primary election contest. 34Ariz528, 273P10.

119-3½-New. The right of voters and taxpayers to maintain such actions is enlarged in Kentucky under the Declaratory Judgment Act. 230Ky1, 18SW(2d) 316.

119-4 230Ky823, 20SW(2d)984.

119-5 [a] **Proceeding to cancel certificate of nomination** and order new election is not election contest requiring contest procedure. 165La685, 115S901.

119-6 173Ark120, 292SW382.

119-7 But see 96Fla512, 118S306; 245 NYS105.

119-8½-New. Primary election contest is purely statutory and is not to be dealt with in technical way. 149Va618, 140 SE664.

119-8¼-New. Particular remedy conferred by statute can be invoked only to extent and in manner prescribed. Fla 130S463.

119-10 [d] (2) Only person who claims to have been nominated can contest nomination. 165La531, 115S740.

119-12½-New. Where both parties have violated Corrupt Practice Act, neither can be declared nominated. 210Ky299, 276SW974.

120-16 165La685, 115S901.

120-17½-New. In proceeding to obtain new primary election court may bring in further parties after proceeding is instituted. 245NYS105.

120-18 200 Ind328, 163NE260(2dcase).

120-19 [a] **Powers.**-144 Okl 206, 291P 804. [b] **Authority of county election board limited by statute.**-Okl 291P554. [c] **Board acts judicially.**-Okl 291P554.

120-20 165La685, 115S901.

120-23 [d] **Statutes declared invalid as permitting contest** not prosecuted in court of law. 315Mo 731, 286SW951.

120-25 TexCivA 9SW(2d)747; 149 Wash473, 271P333.

120-26 [a] **In controversies arising within party convention,** where there is no controlling statute or clear legal right involved, supreme court will not assume jurisdiction but will leave matter to proper tribunals of party or to electors at polls. 102WVa192, 135SE11.

120-31 Complaint and answer held filed in time.-Ark 32SW(2d)319.

120-34 [d] (1) 230Ky599, 20SW(2d) 464; 230Ky753, 20SW(2d)719. (3) Tabulation was filed within meaning of statute requiring filing in county clerk's office immediately after canvass of returns and tabulation of votes as regards question of time for contest. 230 Ky753, 20SW(2d)719. [e] **"Instituted" in statute means "originate."**-245NYS 105.

121-35 173Ark120, 292SW382; Ark 32 SW(2d)319; CalA 292P662; 149Wash 473, 271P333.

121-41 210Ky260, 275SW825; 210Ky 299, 275SW866; 230Ky716, 20SW(2d) 723. [a] (2) Notice calling contestee to answer "not later than" named date is defective. 210Ky281, 275SW886. (3) "Third day after service of this notice" sufficiently fixes time. 210Ky299, 275 SW866. (4) Date not required to be stated where it is sufficiently indicated in notice. 210Ky299, 275SW866. [b] **Demand to answer at time specified** is not necessary where notice sufficiently sets forth time that contestant would move for judgment. 210Ky299, 275SW 866.

121-42 230Ky716, 20SW(2d)723.

121-43 230Ky716, 20SW(2d)723; 165 La685, 115S901.

121-44½-New. The notice of contest must state the grounds of contest. 210 Ky260, 275SW825. [a] **Notice not aided by petition in absence of reference.**-Notice not stating grounds of contest is not rendered sufficient by petition stating grounds where neither notice nor petition refers to other. 210Ky260, 275 SW825.

121-46 210Ky260, 275SW825; 230Ky 599, 20SW(2d)464; 230Ky689, 20 SW(2d)727 (service held sufficient). [b] (2) And is valid regardless of whether his absence was with or without good reason. 210Ky299, 275SW866. (3) If sheriff has made diligent effort to locate contestee, he need not wait till last moment allowed within which to make service, but may leave notice at contestee's abode. 210Ky299, 275SW866. [c] **Sheriff's return** stating manner of service of notice in absence of fraud or mistake is conclusive thereon. 210Ky 299, 275SW866. [d] **Service held sufficient.**-210Ky299, 275SW866. [e] **Evidence held insufficient** to overcome presumption of regularity of officer's return of service of notice of election contest delivered to contestee's wife. 230 Ky823, 20SW(2d)984.

121-49 170La556, 128S514.

121-55 [b] **Petition not conforming to statutory requirements.**-Okl 291P565. [c] **Allegations held to constitute cause of action.**-TexCivA 30SW(2d)569. [d] **Complaint held insufficient.**-Colo 292P 228(2dcase).

122-61 173Ark120, 292SW382; 230Ky 648, 20SW(2d)472.

122-62 Colo 292P228(2dcase); 7LaA 719.

122-63 [c] **Allegations as to majority vote.**-Okl 291P565.

122-67½-New. , also that if votes objected to were disregarded it would leave contestant a majority of remaining legal votes cast. 210Ky277, 275SW879.

122-67¼-New. An express allegation that contestant was eligible to hold the office is unnecessary where the facts alleged show that he was eligible. 210 Ky256, 275SW811.

122-67¼-New. It is sufficient for contestant to allege that he was a candidate for the office in question and that his name regularly appeared on the official ballot. 210Ky256, 275SW811.

122-67⅓-New. An allegation that contestant's opponent used bribery need not aver that the bribery affected the result. 210Ky256, 275SW811.

122-68 173Ark120, 292SW382; 167Ga 252, 145SE76.

122-69 170La556, 128S514.

122-74½-New. Contestant cannot set up in reply grounds of contest not set up in his original notice. 210Ky273, 275SW818.

122-77 [a] **Charge of circulating "of false reports** setting out only usual electioneering statements giving reasons why candidate should be preferred held properly stricken. 210Ky277, 275SW 879.

122-78 210Ky256, 275SW811.

122-78½-New. Indefiniteness of allegations is not ground for demurrer, 210 Ky256, 275SW811.

122-78⅓-New. but the proper remedy therefor is by motion or rule to make more specific. 210Ky256, 275SW811.

122-82 [a] **Blank notes** do not raise inference of fraud or discrepancy. 245 NYS105.

122-83 Ark 32SW(2d)631.

122-85 [a] **Verity of ballots cast is not impeached** by showing contestant received majority of votes cast by persons who became of age after last assessing time. Ark 32SW(2d)631.

122-85½-New. To successfully impeach the truth of the statement of campaign workers required by statute, the burden is upon complainant to establish the falsity thereof by clear and unequivocal allegation and proof including the candidate's knowledge of the falsity. 96 Fla484, 118S201.

123-86 230Ky633, 20SW(2d)479.

123-87 210Ky265, 275SW814; 216Ky 382, 287SW952; 230Ky633, 20SW(2d) 479; Okl 291P554. [a] (1) 210Ky265, 275SW814. [b] **Proof of identity; mistaken name.**-Where name of voter as signed on ballot differs from that on printed list, parol testimony is admissible to prove his identity. 168Ark64, 269SW57. [c] **Evidence held insufficient** to show ballots had been so preserved as to be best evidence. 216Ky382, 287 SW952.

123-89 [a] (2) Evidence held insufficient to show that nominating petition was written in presence and at request of voter in view of his denial. 219Ky9, 292SW345.

123-94½-New. If ground of contest is that contestee was guilty of corrupt practices, acts complained of must constitute corruption. 210Ky277, 275SW 879.

123-94½-New. In a jurisdiction providing that, where nomination is declared void, the party receiving the next highest vote not violating the Corrupt Practices Act shall be declared the nominee, the burden of proof is on contestant standing eleventh in voting not only to show that defendants who were two highest candidates were not entitled to nomination by reason of fraud, but also that all candidates who received more votes than himself violated the Corrupt Practices Act and that he was free from such violation. 210Ky711, 276SW 830.

123-94¼-New. The proof in support of allegations attacking the veracity of a statement of campaign workers, filed pursuant to statute has been held insufficient. 96Fla484, 118S201.

123-94½-New. Evidence has been held sufficient to show that the contestant knew of the conduct of one of his workers in bribing voters, constituting violation of the Corrupt Practices Act. 231 Ky278, 21SW(2d)455.

123-94⅙-New. It is always incumbent on the contestant to prove that he is nominated or elected before he is entitled to election. 230Ky633, 20SW(2d) 479.

123-94½-New. A finding, based on evidence showing that the contestant has violated the Corrupt Practices Act, cannot be disturbed. 230Ky689, 20SW(2d) 727.

123-94⅛-New. Guilty knowledge on the part of a candidate may be shown by circumstances which must be such as to connect the candidate with the unlawful act. 231Ky191, 21SW(2d)240.

123-94½-New. A finding, based on evidence that the contestant has not violated the Corrupt Practices Act, cannot be disturbed. 230Ky689, 20SW(2d) 727.

123-94 1/10-New. Evidence has been held to establish that the contestee violated the Corrupt Practices Act personally,

and by his agent with his knowledge. 230Ky823, 20SW(2d)984.

123-94½11-New. A finding that the candidate was not disqualified, under the Corrupt Practices Act, by evidence as to a request of the candidate's business associate to carry money to another candidate has been held justified. 231Ky 191, 21SW(2d)240.

123-94½12-New. Contest of an election, not being a "criminal proceeding," it is not required that charges of violating the Corrupt Practices Act should be proved beyond a reasonable doubt. 230 Ky823, 20SW(2d)984.

123-94½13-New. Evidence that a jackpot be raised for candidates, and payment of voters by persons interested in other candidates, did not require a finding of violation of the Corrupt Practices Act. 231Ky191, 21SW(2d)240.

123-94½14-New. Proof of violation of laws against corruption in elections must be substantial, something of consequence, substance, and weight showing such violation. 231Ky165, 21SW(2d) 260.

123-94½15-New. Evidence has been held insufficient to show that a candidate for sheriff expended more than one thousand five hundred dollars during the compaign. 231Ky165, 21SW(2d)260.

123-94½16-New. Evidence has been held insufficient to show that the contestee, if precinct workers violated the law, knew of such violation or directed it. 231Ky165, 21SW(2d)260.

123-94½17-New. Where there is substantial evidence that a candidate knew what precinct workers were doing, or if circumstances are such that it may be inferred that he had knowledge of their acts, the candidate is responsible. 231 Ky165, 21SW(2d)260.

123-94½18-New. To establish violation of laws against corruption of elections, direct evidence is not necessary. 231 Ky165, 21SW(2d)260.

123-94½19-New. Where the contestee produced all checks relating to expenditures that he could find, the rule that failure to produce evidence within one's knowledge gives rise to an inference of unfavorable evidence, if produced, is inapplicable. 231Ky165, 21SW(2d)260.

123-94½20-New. Evidence has been held to establish that plaintiff violated the Corrupt Practices Act and was not entitled to a certificate of nomination for county clerk. 231Ky129, 21SW(2d)152.

123-94½21-New. Evidence held to show that the prevailing candidate was connected with illegal expenditure of money sufficient to avoid the election and declare the contestant the nominee. 230 Ky638, 20SW(2d)475.

123-94½22-New. Evidence in a primary election contest held to show illegal use of money in behalf of the contestee and knowledge of such use by the contestee. 230Ky643, 20SW(2d)477.

123-94½23-New. Evidence held to sustain a finding of the circuit court in an election contest that there was no violation of the Corrupt Practices Act. 231Ky51, 21SW(2d)138.

123-94½24-New. Knowledge on the part of a candidate of corruption and bribery by friends during the election may be shown by direct evidence or deduced from facts and circumstances. 231Ky 278, 21SW(2d)455.

123-94½25-New. Evidence held to fall short of proof that the contestant had knowledge of violation of the act by others on his behalf, necessary to deprive him of a certificate of nomination. 231Ky44, 20SW(2d)1026.

123-94½26-New. Evidence held to show that the contestee had knowledge of such conduct constituting violation of the Corrupt Practices Act. 231Ky278, 21 SW(2d)455.

123-94½27-New. Although the knowledge of violation of the Corrupt Practices Act on behalf of the candidate, required to deprive him of the right to nomination, may be established by circumstantial evidence, the evidence should do more than merely raise a suspicion. 231Ky44, 20SW(2d)1026.

123-94½28-New. A finding of the trial court in the contestee's favor in an election contest, based on a claim that the contestee bought votes, has been held sustained. 230Ky648, 20SW(2d)472.

123-94½29-New. Official returns may be impeached by any competent evidence. Ark 32SW(2d)631.

123-94½30-New. Evidence held insufficient to show fraud. 245NYS105.

123-11 CalA 292P662 (mandatory).

123-11½-New. A candidate not shown to have known of, or participated in, violations of the Corrupt Practice Act by his friends and workers is entitled to nomination as against a candidate who received more votes but knew of, and participated in, such violations, and also as against a candidate who received a few votes. 210Ky771, 276SW 838.

123-11½-New. Where both parties contesting the nomination were guilty of violating the Corrupt Practice Act, neither is entitled to nomination under the statute. 210Ky711, 276SW830.

123-11¼-New. Where precinct returns have been stolen after canvass, and evidence does not authorize recount of ballots, voters will not be disenfranchised. 216Ky382, 287SW952.

123-11⅓-New. A candidate, not a party to contest proceedings, who received a plurality of votes, could not be declared by the court to be the nominee. 230Ky633, 20SW(2d)479.

123-11⅓-New. The court has no power to declare a primary election void for violation of the Corrupt Practices Act, save where all the candidates have violated the act, but the court is limited to deciding whether the contestant or the contestee is the party nominee. 231Ky 44, 20SW(2d)1026.

123-11⅓7-New. Under some statutes county election board has no authority to determine qualifications of voters or how any voter voted. 144 **Okl** 206, 291 P804.

123-11⅓8-New. Grounds for dismissal of contest. **Ark** 32SW(2d)319.

123-12 210Ky273, 275SW818; 230Ky 648, 20SW(2d)472.

123-17½-New. Errors in placing a candidate's name on primary ballots are not available as grounds of contest after election. 210Ky256, 275SW811.

124-21 210Ky265, 275SW814.

124-22 [c] (2) 251Mich286, 232NW387. See also 251Mich286, 232NW387. (5) Power to determine distinguishing marks. 251Mich286, 232NW387. (6) County election board has only such authority as is authorized by statute. 144 **Okl** 206, 291P804. (7) Withdrawal from original returns of excess number over poll lists. 251Mich286, 232NW387. (8) County election board has no authority to determine qualifications of voters or how any voter voted. 144 **Okl** 206, 291 P804. (9) Recount board may do what election inspectors should have done in count. 251Mich286, 232NW387. (10) Authority of deputies and direction of assistants. 251Mich286, 232NW387. (11) Other decisions as to scope of power. **Okl** 291P554. [d] **Petition for recount held sufficiently definite.**–144 **Okl** 206, 291P804. [e] **Grounds of refusal of recount.**–251Mich286, 232NW387. [f] **Appeal to state board from recount.**–251Mich286, 232NW387. [g] **Public recount.**–251Mich286, 232NW387.

124-23 [a] **Court's duties held to be ministerial** and not judicial. 84 **IndA**86, 150NE60.

124-24 [c] **In motion for recount,** contestant need not incorporate motion for authority to introduce evidence on preservation of ballots. 216Ky382, 287SW 952.

124-31 Okl 291P554. [c] (12) When entire vote must be rejected. **Pa** 151A 897. (13) Proceeding is confined to recounting and correction of errors in calculation apparent on face of returns; other matters must be determined in contest proceeding. **Pa** 151A897. (14) Petition need not set forth specific acts of fraud alleged. **Pa** 151A897. [d] **Proceeding to have recount** held to be not independent judicial proceeding, but special one for discovery of evidence. 84 **IndA**86, 150NE60. [e] **Petition sufficient.**–**Okl** 291P554. [f] **In Oklahoma.**–292P326. [g] **In Maryland.**–151A660.

124-32 [a] **"Ballots questioned"** within statute relating to recount by county election board are ballots from each election board questioned in verified petition. 144 **Okl** 206, 291P804.

124-33 144 **Okl** 206, 291P804. [a] **Proof of integrity and identity of ballots.**–210Ky265, 275SW814 (evidence held insufficient). [b] **Burden of proof.**–144 **Okl** 206, 291P804. [c] **Necessity for hearing.**–144 **Okl** 206, 291P804. [d] **Decision as to preservation reviewable.**–144 **Okl** 206, 291P804.

125-35½-New. In Indiana the result of the recount must be filed with the clerk of the court and by him recorded in the court order book. 84 **IndA**86, 150NE 60.

125-35⅓-New. County board's certificate of results after recount conclusive. **Okl** 291P554.

125-35¼-New. In some jurisdictions county election board's certificate of results after hearing of recount petition and recount is conclusive. 144 **Okl** 206, 291P804.

125-35⅕-New. County election board's action in recounting ballots after proper showing is ministerial and will not be controlled by court. 144 **Okl** 206, 291 P804.

125-37 TexCivA 32SW(2d)276.

125-43 Pa 151A897 (facts set forth in opinion of court below may be considered in reviewing proceedings for recount).

125-45 210Ky277, 275SW879 (court's finding entitled to considerable weight); 210Ky818, 276SW979 (special judge's findings of facts are given same weight as findings of ordinary trial judge); 230Ky689, 20SW(2d)727; 231Ky51, 21 SW(2d)138; 231Ky191, 21SW(2d)240.

125-49½-New. Error in sustaining a demurrer to the complaint in a contest is harmless where the contestee would have a majority of the votes if the votes claimed to be illegal were so declared. See also 216Ky382, 287SW952.

125-49⅓-New. In Kentucky statement required to be filed on appeal need not be signed by contestant. 210Ky299, 275 SW866.

125-49¼-New. Failure to state record page number on which judgment is entered is not ground of dismissal where statute requires original record, pages of which are not numbered to be sent up. 210Ky299, 275SW866.

125-49⅕-New. Purpose of statute in requiring page number is to aid court to identify and locate judgment entry, and provision is satisfied where under the circumstances there is substantial compliance. 210Ky299, 275SW866.

125-49⅙-New. Error of board of state canvassers in hearing appeal has been held harmless in view of correct decision. 154SC116, 151SE214(2dcase).

125-49⅐-New. Error in admitting evidence by board of state canvassers held harmless where decision was not affected. 154SC116, 151SE214(2dcase).

125-51 [a] **Electors cannot nominate one disqualified** to accept nomination. **SD** 232NW20.

125-53 TexCivA 30SW(2d)569. [a] (2) Detroit justice of the peace is not within meaning of charter so as to necessitate his resignation before being candidate for circuit judge. 243 Mich246, 220NW756. [b] **Ont** [1930] 3 **DomLR**714. [c] 95**Fla**438, 116S41 (time when qualification must exist). [e] **Conviction of violation of Corrupt Practice Act** is ground of disqualification under some statutes. 122 **Okl** 95, 251P497.

125-54½-New. Candidate for nomination for sheriff may be actual bona fide resident without occupying place of abode in parish every moment during required time. 164**La**855, 114S711.

125-54⅓-New. Evidence was held sufficient to show candidate for sheriff was "actual bona fide resident." 164**La**855, 114S711.

125-54¼-New. Candidate, otherwise qualified, having paid poll tax for two years preceding primary is eligible to file notice of intention to become candidate for constable. 164**La**869, 114S 716.

125-54⅕-New. Candidate to be qualified at primary election must be qualified to vote at election at which he

seeks nomination. 164La869, 114S716.

125-56 [c] **Party organization may require** that candidate must state under oath how he voted at last election. Ala 129S33. [d] **Propriety and reasonableness of tests required by party organization.**–Tex 28SW(2d)515.

125-57½-New. Registration and affiliation with party after expiration of time allowed by statute is insufficient. 164 La981, 115S54.

125-57¼-New. Under statute relating to class entitled to have names on ballots of independent candidates, something more than registering as qualified elector of party is necessary to disqualify. Fla 130S428.

126-59 126 Or630, 270P768.

126-65 233Ky51, 24SW(2d)921 (candidate held not defeated candidate); SD 232NW20. [a] **Purpose of such law** is to prevent party candidate from running against nominees of primary election. 96Fla495, 118S313.

126-73 121Kan897, 250P268; 233Ky 51, 24SW(2d)921; 48Nev419, 233P527; 126 Or630, 270P768. [b] **Statute construed to authorize filling vacancy** caused by failure to nominate at primary election. 196 Ind472, 149NE69. [c] **In Pennsylvania.**–13PaDist&Co 223. [d] **Construction of statutory provision.**–Fla 130S721. [e] **County central committee is without power to nominate candidate** for unexpired term of office of commissioner dying after primary election. Kan 292P396. [f] **Right of party executive committee to make nomination is contingent** on prior primary nomination followed by vacancy therein. Fla 130S721.

127-74 121Kan897, 250P268; 233Ky51, 24SW(2d)921. [c] (2) There can be no vacancy in nomination until there has first been nomination. Fla 130S721. [d] (3) Failure of candidate to file certificate creates vacancy. 215Ky573, 286 SW793. (4) On failure to file certificate in time county chairman of party may nominate. 219Ky9, 292SW345. [f] **Death of incumbent of office.**–48Nev419, 233P527. [g] **"Vacancy" means** existing office without incumbent. 196 Ind472, 149NE69. [h] **Failure of nominees to file certificates** of nomination within forty-five days of election creates vacancy in nomination under statute. Ky 283 SW1059.

127-76 126 Or630, 270P768.

127-77 233Ky51, 24SW(2d)921. [a] (2) Nomination is invalid when nominating power was in chairman and he failed to act. 215Ky573, 286SW793. [d] **City central committee** selected by those originally elected to take their places, whether or not latter had right to make such selection, are de facto officers whose acts are valid as to third persons. 196 Ind472, 149NE69. [e] **Nomination by de facto committee** cannot be collaterally attacked in suit in which it is not party. 196 Ind472, 149 NE69. [f] **Nomination by chairman is** not invalidated by concurrence of unnecessary members of committee. 215 Ky573, 286SW793.

127-82½-New. Candidate who failed to file certificate of nomination in time may be nominated. 215Ky573, 286SW 793.

127-82¼-New. Statutory prohibition of a defeated primary candidate, being a candidate at the next general election, does not prevent his selection to fill a vacancy in nomination caused by death. 84Colo 472, 271P627.

127-88 [a] **In Ontario.**–61OntL392, [1928] 1DomLR104.

127-89 SD 210NW187. See also 11Pa Dist&Co 626.

127-90½-New. Where a contestee is found guilty of violating Corrupt Practice Act, he may be deprived of his nomination. 210Ky277, 275SW879.

127-90¼-New. Failure to file certificate of nomination in time is tantamount to resignation. 215Ky573, 286SW793.

128-91 212Ky73, 278SW139.

128-92 [b] **Status as nominee** does not depend on issuance of nomination. 37 OklACR413 (declaration of election board fixes status). [c] **Provisions for issuance are directory depending on filing of expense report by nominee.** 37 OklACR413.

128-2½-New. Where a successful candidate files with the secretary of state a statement of his accounts and expenses incurred in a primary election, as required by statute, the secretary of state must issue a certificate of nomination to the county clerk without investigating the correctness of the statement. Wis 226NW470(1stcase).

129-8½-New. Certificate naming the wrong date for election is nullity. 48RI 281, 137A466.

129-15 37 OklACR413.

129-19½-New. Statute construed to apply only to party candidates. NJ 138A 706.

129-20 Ind 171NE381(2dcase). [a] **Statute is mandatory.**–213Ky116, 280SW 488. [b] **Petition or agreement for formation of new party** must accompany certificate of nomination by such party in order to entitle certificate to be filed. 117Nebr579, 221NW708(2dcase).

130-24 213Ky116, 280SW488.

130-24½-New. The statute relative to filing of certificate of nomination should be liberally construed in respect of the manner of filing. 213Ky116, 280SW 488.

130-24¼-New. A nominee at a primary who failed to file a certificate of nomination has been held validly nominated by a certificate of a county chairman where no action was taken by the party committee. 216Ky210, 287SW696.

130-24¼-New. Filing of tabulation of votes by the board is not tantamount to filing of a certificate. 215Ky573, 286 SW793.

130-25 [a] **Nominating petition.**–144 Okl 85, 289P759.

130-26 213Ky116, 280SW488. [b] **Record of filing.**–213Ky116, 280SW488.

130-29 68Utah388, 250P979. [a] (2) Under provision that day of filing shall be excluded and day of election included in computation, certificate filed October 14 for election held November 3 held filed twenty days before election. 286Pa257, 133A379. [b] **Substantial compliance** with statute is sufficient. 234Ky462, 28SW(2d)501.

130-30 212Ky73, 278SW139; 213Ky 116, 280SW488; Ky 283SW1059; 215Ky 30, 284SW111; 215Ky566, 286SW797; 215Ky573, 286SW793; 68Utah388, 250P 979. See also SD 210NW187, 188 [cit CJ]. [b] **Failure to file certificate** precludes any authority in county clerk to place name on ballot. 212Ky73, 278SW 139.

130-40 117 Oh317, 158NE546.

131-47 117 Oh317, 158NE546. [a] **Nominating petition** cannot be amended unless amendment is filed within statutory time limit. 117 Oh317, 158NE 546.

131-57½-New. A contestant in an election contest cannot be deprived of right of action by a voluntary act of adversary. 171Ark155, 283SW365.

131-57¼-New. A statute authorizing a candidate at a party primary to file objections with the committee to the application of any other candidate for want of prescribed qualifications, applies only to qualifications which the committee may prescribe, and not to property qualifications required of a member of a school board. 9LaA171, 119S264.

131-59 230Ky823, 20SW(2d)984 (contestee who has been eliminated by violation of Corrupt Practices Act).

132-64 124Kan285, 259P785; 233Ky51, 24SW(2d)921 (contest proceedings). [c] **Irregularities in filing of declarations of candidacy.**–Where several persons filed declarations of candidacy for office of judge before office was vacant, candidate not making objection on such ground at primary election is estopped to complain of irregularity thereafter. 140Wash518, 249P974.

132-66 124Kan285, 259P785; 48RI 281, 137A466. But see 9LaA171, 119S264.

132-71 48RI 281, 137A466, 467 [citCJ]. [a] **Choice of great majority of electors should not be nullified** for irregularity in filing candidate's certificate of nomination. 48RI 281, 137A466.

132-71½-New. After an election has been held, title to office cannot be affected by a decision holding invalid the law under which the nominations were made. 333 Ill 606, 165NE217, 62ALR 912.

132-76 [c] **Petition held not to state a cause of action.**–Tex 28SW(2d)512.

133-80½-New. Motion to make notice of nomination contest more specific must be made before filing of answer. 210Ky 771, 276SW838.

133-81 TexCivA 24SW(2d)764. [a] 124Kan285, 259P785.

133-84 Ky 283SW1059; 164La954, 115 S45.

133-91 165La685, 115S901; 117Nebr579, 221NW708(2dcase). [f] **Nomination by petition.**–146Miss870, 112S386.

134-93 286Pa257, 133A379.

134-97 [a] (2) Has power to determine ineligibility of one to hold public office. Cal 290P884.

134-99 164La954, 115S45; 146Miss870, 112S386.

135-1 130Misc520, 224NYS450.

135-6 9LaA171, 119S264.

136-20 230Ky633, 20SW(2d)479 (introduction of additional proof relative to integrity of ballots).

136-25 13PaDist&Co 560. [d] **Injunction against secretary of state.**–SD 219 NW247.

137-27 175Ark409, 299SW613, 615 [cit CJ].

137-28 175Ark409, 299SW613.

137-28½-New. Party jurisdiction of contests for committeemen and delegates is not abrogated by primary election law. 175Ark409, 299SW613.

137-30 175Ark409, 299SW613; 196 Ind 614, 149NE174.

139-45 196 Ind614, 149NE174; 151Miss 284, 117S839.

139-50 TexCivA 288SW514.

139-51 [b] **In Louisiana.**–164La855, 114S711.

139-52 [b] **In Kentucky.**–231Ky185, 21 SW(2d)266.

139-53½-New. Decision of parish executive committee is reviewable. 164La 855, 114S711.

140-57½-New. An appeal from an election contest involving matters of practical importance to the public may be considered, although the subject matter of the suit has become moot. 171 Ark155, 283SW365.

140-57¼-New. Defendant cannot abate an election contest by resigning from the contested office during appeal from judgment imposing costs on contestant. 171Ark155, 283SW365.

140-57¼-New. Resignation by a county judge during appeal from judgment which, if affirmed, would require payment of considerable costs by appellant has been held not to make the case moot. 171Ark155, 283SW365.

140-57⅓-New. Prospective candidate appealing from parish executive committee's decision sustaining objection to candidacy need not allege facts showing his qualifications for office. 164La 855, 114S711.

140-61 121 Oh301, 168NE131(2dcase), 66ALR849.

140-61½-New. Under constitutional provisions in some jurisdictions it is declared that the voter shall be left free to vote by either open, sealed, or secret ballot, as he may elect. 101WVa425, 133SE109.

140-61⅓-New. and a rule that causes voters to vote open ballots is opposed to such constitutional provision. 101 WVa425, 133SE109.

140-62 328 Ill 101, 159NE211 (purpose of official ballots).

147-66½-New. Only the name of the candidate for municipal office as council member who received the largest number of votes at the primary should be placed on the ballot to be used at the general municipal election when the general state law is applicable. 101CalA 754, 282P394.

141-67 [a] **Amendment permitting voter** to write or insert name of candidate must be construed so as to give it force or effect. 191Wis538, 211NW938.

147-69 8LaA435.

141-77 253Mass400, 149NE317; 221 MoA85, 290SW96.

141-79½-New. Where certain ballot is prescribed, but not what result will follow if not used, the statute is directory. 221MoA85, 290SW96.

141-80 See also 245 IllA513.

141-81 328 **Ill** 626, 160**NE**158. [a] (2) Officers in charge of election of judges are required to have ballots printed, regardless of whether nominations were valid. 328 **Ill** 626, 160**NE**158. [c] **Printer** does not determine whether ballots are in legal form. 328 **Ill** 626, 160 **NE**158.

142-87 But see 29**Hawaii**317.

142-92 [c] **Where statute prescribed no form** any form may be used that will not mislead voters. 181**Ark**859, 28**SW(2d)** 55.

142-99 [b] **In Missouri.**-30**SW(2d)**149.

143-4½-New. Statutory requirement that women given limited right to vote for president and vice president have separate ballots became inoperative when federal constitution granted full suffrage. **Mo** 30**SW(2d)**149.

143-5 [a] **Ballot listing held sufficient.**-181**Ark**859, 28**SW(2d)**55.

143-11½-New. A statute requiring the device of each party to be placed at the head of the list of candidates of the party and that the names of the candidates shall be printed in parallel columns is complied with by printing the names of candidates for each party in two columns under the party device, where to have printed the names in a single column would have rendered it cumbersome and unwieldy. 210**Ky**453, 276**SW**137.

143-19 83**Mont**162, 271**P**446.

144-31 [c] **In Oregon.**-119 **Or**324, 249**P** 631.

146-46 214**Ala**356, 358, 108**S**18 [citCJ].

146-62 **Ky** 283**SW**1059; 37 **OklACR** 413; **TexCivA** 10**SW(2d)**170.

146-63 **Cal** 292**P**265.

147-65 [f] **Statute declaring that candidate** for nonpartisan office receiving majority of votes in primary election shall be only candidate on ballot for general election has been held to apply where only two candidates appear for nomination. 48**Nev**261, 229**P**384. [g] **Independent party candidate,** being single candidate of such party and also nominated by major party, is not prejudicially discriminated against by placing name only in major party column where independent emblem also appears thereon. 246**NY**258, 158**NE**613.

147-66½-New. In some jurisdictions statutes require an official certificate of qualification for the office before the name will be placed on regular election ballots. 209**Ky**379, 272**SW**907.

147-66¼-New. The certificate when issued will be good at any election in subsequent years and need not have been issued during the year in which the holder desires to become a candidate. 209**Ky**379, 272**SW**907.

147-66¼-New. A nominee who was one of two nominees of the same political party is entitled to have his name placed on the ballot where no other party participated in the nomination of candidates. 51**Nev**192, 272**P**656.

147-69 [a] **Voting machines.**-212**App Div**848, 211**NYS**147.

148-91 252**NY**14, 168**NE**447.

148-94 252**NY**14, 168**NE**447.

149-9 **Mont** 286**P**125(2dcase).

149-10 **ND** 228**NW**819.

150-13 319**Mo** 497, 5**SW(2d)**1080, 1085 [quotCJ].

150-17½-New. Legislature may provide for trial of questions of fact without a jury, where citizens' constitutional rights are preserved. 102**Conn**579, 129**A** 551.

151-24 216**Ala**251, 113**S**230.

151-31 197 **Ind**561, 151**NE**424. [e] 196 **Ind**542, 148**NE**149.

151-32 332 **Ill** 304, 163**NE**675; 55**ND** 867, 215**NW**539 (holding unindorsed absent voter's ballots cannot be counted); **TexCivA** 275**SW**115; **Sask** [1928] 3**Dom LR**702 (initialing ballots). [a] **Statutes strictly enforced to prevent fraud though liberally construed to effectuate will of voters.**-**TexCivA** 275**SW**115; **Tex CivA** 275**SW**117.

151-33 **TexCivA** 275**SW**115 (substantial compliance is all that is required); **TexCivA** 275**SW**117 (initials substantial compliance with requirement of signature).

151-34 196 **Ind**542, 148**NE**149 (absent voters' ballots as distinguished from ballots voted in usual way); 197 **Ind**561, 151**NE**424.

151-35 [b] **Ballots not invalidated** where judge failed to sign before delivery to voters but did sign them before depositing in box. **TexCivA** 300**SW**207.

151-36 **TexCivA** 275**SW**115 (initials substantial compliance with requirement of signature).

151-36½-New. or the full initials, **Tex CivA** 275**SW**115.

151-37 332 **Ill** 304, 163**NE**675.

152-39 216**Ky**500, 287**SW**965.

152-40 102**WVa**689, 136**SE**263.

152-50 **Mass** 167**NE**329; 122 **Okl** 234, 254**P**47.

152-51 332 **Ill** 304, 163**NE**675.

153-53 97**Fla**159, 120**S**310. But see **NM** 292**P**611.

153-53½-New. A voter and the election officials are charged with notice of the election laws. 332 **Ill** 304, 163**NE**675.

153-56 328 **Ill** 101, 159**NE**211.

153-56½-New. Test of legality of ballot not conforming to directory statute is whether voters were afforded opportunity to express and did fairly express their will. 221**MoA**85, 290**SW**96.

153-61 127 **Or**91, 271**P**46.

154-62 See also **Cal** 290**P**884.

154-66 [a] **Effect.**-10**LaA**563, 121**S**632.

154-67 199**Cal** 147, 248**P**521; 67**CalA** 640, 228**P**409; **Alta** [1926] 4**DomLR**117, [1926] 3**WestWkly**1.

154-68 **Nebr** 227**NW**457 [disappr 46 **Nebr**772, 65**NW**889 and 59**Nebr**382, 81 **NW**313].

154-69 216**Ala**251, 113**S**230 [citCJ]; 196 **Ind**542, 148**NE**149; 231**Ky**244, 21 **SW(2d)**291; 115**Nebr**315, 212**NW**760; 102**WVa**703, 136**SE**772. [c] **Technical rules of construction** will not be permitted to disfranchise voter. 115**Nebr**315, 212**NW**760.

155-70 328 **Ill** 101, 159**NE**211; 332 **Ill** 304, 163**NE**675; 8**LaA**194; 8**LaA**202; 8**LaA**250; 115**Nebr**315, 212**NW**760; 25 **OhA**278, 158**NE**94; **RI** 135**A**360; 154 **SC**116, 151**SE**214(2dcase); 102**WVa**703, 136**SE**772. [b] (1) 25 **OhA**278, 158**NE** 94.

155-70½-New. Doubts resolved in favor of ballot where intent is clear and mark is fairly within statute. **RI** 135**A** 360.

155-70⅓-New. Even if ballot is improperly marked for any one candidate, it is not invalid as a whole and must be counted for all candidates for whom it is properly marked. 8**PaDist&Co** 749.

155-71 105**Conn**256, 135**A**40; 97**Fla** 159, 120**S**310; 115**Nebr**315, 212**NW**760; 154**SC**116, 151**SE**214(2dcase).

155-72 35**Ariz**265, 276**P**843; 199**Cal** 147, 248**P**521; **Mass** 167**NE**329; 221 **MoA**85, 290**SW**96; **RI** 135**A**360; **Tex CivA** 19**SW(2d)**911; 191**Wis**538, 211**NW** 938.

155-73 35**Ariz**265, 276**P**843; 8**PaDist& Co** 749 (evidence dehors ballot not controlling). [b] **Ballots indicating elector's real intention** must be counted as cast. 191**Wis**538, 211**NW**938.

155-74 199**Cal** 147, 248**P**521; 115**Nebr** 315, 212**NW**760; 102**WVa**703, 136**SE**772. [c] But see 155**Miss**858, 124**S**643.

156-77½-New. Under Connecticut statute "ballot cast" and "ticket" include only the names for which the elector voted. 104**Conn**396, 133**A**107.

156-78 106**WVa**544, 146**SE**378.

156-82 197 **Ind**561, 151**NE**424; 119**Kan** 420, 240**P**251.

156-83 221**Ky**546, 299**SW**170 (ballot impressed with corner of stencil).

156-84 102**Conn**579, 129**A**551.

156-85 197 **Ind**561, 151**NE**424.

156-87 But see 119**Kan**420, 240**P**251.

156-88 119**Kan**420, 240**P**251.

156-90 119**Kan**420, 240**P**251.

156-93 332 **Ill** 304, 163**NE**675; 106 **WVa**544, 146**SE**378. [a] 332 **Ill** 304, 163 **NE**675.

156-94 See also 55**ND**867, 215**NW**539.

156-95 332 **Ill** 304, 163**NE**675.

157-97 But see 332 **Ill** 304, 163**NE**675.

157-1 221**Ky**546, 299**SW**170; 8**PaDist &Co** 158.

157-3 8**PaDist&Co** 158.

157-6 106**WVa**544, 146**SE**378.

158-10 197 **Ind**561, 151**NE**424.

158-12 332 **Ill** 304, 163**NE**675.

159-24½-New. Ballot, marked in party square and also in small square opposite candidate's name and outside of square opposite same candidate's name, will be counted. 8**PaDist&Co** 749.

159-25 119**Kan**420, 240**P**251. [a] **SD** 223**NW**711 (statute held applicable to municipal elections).

159-31 199**Cal** 147, 248**P**521.

159-32 199**Cal** 147, 248**P**521, 522 [quot Cyc]; 191**Wis**538, 211**NW**938.

160-40½-New. Use of posters is unnecessary where the name of the candidate was already on the ballot, although improperly placed there. 216**Ky**210, 287 **SW**696.

160-40⅓-New. Stickers not pasted on space provided will not be counted. 13 **PaDist&Co** 518.

160-41 See also **MoA** 12**SW(2d)**102. [a] **Name of nominee omitted from ballot** may be written in space provided therefor. 37 **OklACR**413.

160-43 199**Cal** 147, 248**P**521; 106**Conn** 102, 137**A**11; 333 **Ill** 375, 164**NE**825; 25 **OhA**278, 158**NE**94; 191**Wis**538, 211**NW** 938. [d] **Such statutes are exclusive of** any other method and specifically authorized. 199**Cal** 147, 248**P**521.

160-44 97**Fla**159, 120**S**310; 328 **Ill** 101, 159**NE**211 (cross at head of column held sufficient); 119**Kan**420, 240**P**251; 25 **OhA**278, 158**NE**94 (law mentions cross but court held this not absolutely essential). [a] **Provision of Nebraska statute is directory only.**-**Nebr** 227**NW** 457.

160-45 35**Ariz**265, 276**P**843; 106**Conn** 102, 137**A**11; **Nebr** 227**NW**457.

160-50 106**Conn**102, 137**A**11.

160-51 49**Philippine**284. But see 7**Pa Dist&Co** 733.

160-52 106**Conn**102, 137**A**11. But see 13**PaDist&Co** 518.

160-53½-New. The attempted erasure of a cancellation of a candidate's name made by drawing a line through it restores the name so canceled. 115**Nebr** 315, 212**NW**760.

160-53⅓-New. Where voters placing a cross before the names of several candidates on Democratic and Republican tickets mark out the name of the Democratic candidate for an office, and over that name write the name of the Republican candidate, the ballots should be counted for the Republican candidate. 106**WVa**544, 146**SE**378.

160-53¼-New. In Philippines ballot is not rendered invalid by writing, instead of full christian name of candidate, a diminutive or argumentative, or a contraction or abbreviation of such name in Spanish or any local dialect. 50 **Philippine**629.

160-53½-New. In Philippines a ballot in which a candidate is voted for two or more different offices is invalid as voting a person for an office for which he is not a candidate. 50**Philippine**629.

160-56 106**WVa**544, 146**SE**378.

160-56½-New. That a cross in front of a candidate's name is blurred does not constitute an erasure. 106**WVa**544, 146 **SE**378.

160-56⅓-New. A ballot marked at the head of a party ticket with a vertical line drawn through certain names should not be counted for candidates through whose names a vertical line is drawn. 106**WVa** 544, 146**SE**378.

160-56¼-New. A line through the name of a candidate destroys the effect as to such candidate of a cross at the head of his party ticket. 106**WVa**544, 146**SE** 378.

160-57 35**PortoRico** 92. But see 106 **WVa**544, 146**SE**378.

161-62 332 **Ill** 304, 163**NE**675; 8**PaDist &Co** 749; 35**PortoRico** 92; 106**WVa**544, 146**SE**378.

161-72 8**PaDist&Co** 43.

161-73½-New. or by writing in the space provided the name of a candidate not appearing on the ballot; 106**Conn** 102, 137**A**11.

161-74 105**Copn**256, 135**A**40; 106**WVa** 544, 146**SE**378.

161-74½-New. or by writing in names not on the ballot; 106**Conn**102, 137**A**11.

162-77 8**PaDist&Co** 43.

162-84½-New. A ballot with a cross in the circle at the head of a party ticket

and to the right of the name of a candidate of such party for a particular office, and also a cross on another party ticket before the name of the candidate for such office, should not be counted for the candidate of the latter party. 106WVa544, 146SE378.

162-84½-New. Where a ballot containing a cross in the circle at the head of the Republican ticket has horizontal lines drawn through the name of the Republican candidate for an office for which the only other candidate is on the Democratic ticket, with a cross in the squares to the left of blank for such office in the Workers' ticket, it is properly counted for the Democratic candidate for such office. 106WVa544, 146SE378.

162-84¼-New. Where there are only two candidates for a particular office, a ballot having a cross in the circle at the head of one of such tickets constitutes a vote for the candidate on such ticket, although there is a cross placed in the square to the left of blank space for such office on a ticket having no candidate for such office. 106WVa544, 146SE378.

162-85 199Cal 147, 248P521; 251Mich 286, 232NW387.

162-85½-New. A ballot containing no marks that could possibly distinguish it from any other ballot, unless it be well-formed crosses in squares, is not objectionable. 332 Ill 304, 163NE675.

163-90 199Cal 147, 248P521; 332 Ill 304, 163NE675; 197 Ind561, 151NE424; 153Miss722, 121S156; RI 135A360; TexCivA 280SW351, 352 [citCyc].

163-91 153Miss722, 121S156.

163-92 But see RI 135A360.

163-94 119Kan420, 240P251.

164-1 [a] **In Kansas.**-119Kan420, 240P 251 (one line crossing two others at angle).

164-7 See also 119Kan420, 240P251.

164-7½-New. Marks on a ballot of such character that they may not be used for purposes of identification will not invalidate the ballot. 153Miss722, 121S 156.

164-8 [b] **Marking with pen and ink contrary to statute** renders ballot invalid as containing distinguishing mark. SD 223NW711.

164-10½-New. Using ink or pencils other than those furnished by the election board is not a fatal defect. 6Pa Dist&Co 388.

164-12 332 Ill 304, 163NE675; 119Kan 420, 240P251.

164-15 332 Ill 304, 163NE675.

164-17½-New. Failure of an election official to clip a ballot does not invalidate the ballot. 119Kan420, 240P251.

164-17⅓-New. Ballots containing writings or marks by person other than voter should be rejected. 215AppDiv791, 213NYS228 (as containing marks or writings other than those authorized by statute).

165-19 119Kan420, 240P251; RI 135 A360.

165-22 119Kan420, 240P251.

165-24 197 Ind561, 151NE424.

165-25 332 Ill 304, 163NE675; 196 Ind 460, 148NE477; 215AppDiv791, 213NYS 228 (ballots showing erasures should be rejected); 126Misc286, 213NYS656. [a] (6) Ballot, where candidate's name was written in two places, one of which was erased, must be rejected. 216Misc286, 213NYS656.

166-26 But see 119Kan420, 240P251.

166-29 197 Ind561, 151NE424; 119Kan 420, 240P251; 155Miss858, 124S643; 49Philippine284.

166-29½-New. The defacing of any square with a pencil for the purpose of obliterating marks already made or for any other purpose invalidates the ballot. 119Kan420, 240P251.

166-30 [a] **Identification mark of notarial seal** on ballot of absent voter is not illegal where ballot was placed in envelope before notary affixed seal to affidavit printed on envelope. Iowa 227 NW532.

166-32 [a] (5) Cross with straight line through middle. 196 Ind460, 148NE477. (6) Single line in square opposite blank space invalidates whole ballot. 119Kan 420, 240P251. (7) Single line in square opposite printed or written name invalidates whole ballot. 119Kan420, 240 P251. (8) Intentional making of check mark invalidates whole ballot. 119Kan 420, 240P251. [b] (17) Imperfect cross, whether it consists of too many lines in whole or in part or in lines zigzagging or extending beyond voting square or otherwise, does not invalidate ballot if it was made with intent to make cross mark in voting square and is not identifying mark. 119Kan420, 240P251. (18) Inaccurate retracing of lines of cross or marking cross through names. RI 135A360. (19) Cross, one intersecting line coming to end of cross line. 332 Ill 304, 163NE675.

166-33 [a] (2) 196 Ind542, 148NE149. [b] (3) 153Miss722, 121S156. (14) Cross in blank voting space in front of name written in. 225AppDiv212, 232 NYS399 [aff 250NY594, 166NE337(1st case)]. (15) Cross in square opposite individual name and also in party circle under Gen. L. (1923) c 11. RI 135A360.

167-34 [a] (6) 6LaA182. (10) Vote otherwise than by cross mark in square to left of candidate's name. 126Misc 286, 231NYS656. (11) Marks not in voting square but to right and after candidate's name. 126Misc286, 213NYS 656. (12) Mark to right and well near center of ballot is not vote for anyone. 126Misc286, 213NYS656.

167-37 [b] (2) 119Kan420, 240P251.

167-38 [a] (4) Writing in of name in proper blank space and voting same where same name is printed on ballot for same office invalidates whole ballot. 119Kan420, 240P251. [b] (4) Writing in of name in proper blank space and voting same where name is printed on ballot for another office. 119Kan420, 240P251. (5) Writing candidate's name as well as placing cross in square next to such candidate's name does not invalidate ballot, which should be counted. 126Misc286, 213NYS656.

168-41 [d] **Name written in wrong place** for short term but in correct place for long term is good vote for long term. 216Misc286, 213NYS656.

168-43 [a] (33) Any unauthorized mark outside of squares used for voting invalidates whole ballot if intentionally made. 119Kan420, / 240P251. (34) Any mark in voting square intentionally made for purpose other than making cross. 119Kan420, 240P251. (35) One line without any attempt to complete cross. 197 Ind561, 151NE424. (36) Deliberately and intentionally drawing two parallel lines in making cross. 197 Ind561, 151NE424. (37) Perpendicular line opposite name of candidate. 155Miss858, 124S643. (38) Check mark. 155Miss858, 124S643. [b] (8) Ballots marked with crosses resembling letters T and V more than X properly pointed. 197 Ind561, 151NE 424. (9) Blot from failure to use blotter. 155Miss858, 124S643.

169-44 [a] (2) Ballot containing cross in circle in Republican party column, together with pencil mark extending over first square in that column, and containing cross in square opposite Republican candidate's name, should have been rejected as containing distinguishing mark. 332 Ill 304, 163NE675.

169-46 119Kan420, 240P251.

169-46½-New. The writing of a name in a proper blank space therefor without making a cross in the square opposite invalidates the whole ballot. 119 Kan420, 240P251.

169-46⅓-New. A cross mark in a square opposite a blank space without writing any name in such space invalidates the whole ballot. 119Kan420, 240P251.

169-46¼-New. The writing of the name of the office after properly writing a name in a blank space provided therefor does not invalidate the ballot. 119 Kan420, 240P251.

169-46⅙-New. In jurisdictions where stickers are not permitted, it will be assumed that stickers on the ballot were not placed there by voters for the purpose of identifying their ballots. 199Cal 147, 248P521.

169-46⅛-New. Writing on a ballot only the christian name or only the surname of a registered candidate does not invalidate the ballot as to other candidates voted for in the absence of indications of intentional marking. 50 Philippine221.

169-51 139 Okl 82, 281P147 (mutilation by elector on erroneous advice of election official). [a] (3) An erasure that rubbed out party designation constitutes mutilation of ballot. 196 Ind460, 148 NE477.

169-54 210Ky205, 275SW790; 115 Nebr315, 212NW760; 119 Or101, 248P 146; TexCivA 275SW115. [a] **Strictly enforced to prevent fraud.**-TexCivA 275 SW115.

169-55 102Conn579, 129A551 (general assembly has power to regulate elections); 210Ky205, 275SW790; 115Nebr 315, 212NW760. [a] **A constitutional provision, requiring that all elections shall be free and equal,** means that every qualified voter may freely exercise right to cast his vote without restraint or coercion of any kind, and that his vote, when cast, shall have same influence as that of any other voter. 333 Ill 606, 165NE217, 62ALR912.

170-58 295Pa478, 145A597. [a] **Statute held not unconstitutional.**-150Va 174, 142SE415; 150Va54, 142SE423.

170-59 [a] **Statute providing for primary nomination of judges** held not in conflict with constitutional requirements of free and equal elections. 323 Ill 561, 154NE474.

170-60 [b] **Elections wherein legal voters** are deprived of vote because impostors have already voted for them are not "free and equal." 220Ky510, 295 SW873. [c] **Elections wherein challengers are not heard,** impostors are allowed to vote, violence is practiced, and threats made are not "free and equal." 220Ky510, 295SW873.

170-63½-New. If the election statute merely provides that certain acts shall be done within a particular time and in a particular manner, and does not declare their performance essential to the validity of the election, the statute will be regarded as directory only, if acts do not affect the actual merits of the election. 151Wash19, 274P793.

170-63⅓-New. A charter city is not authorized to prescribe a method of conducting state and county elections. 121 Oh301, 168NE131(2dcase), 66ALR849.

171-75½-New. Power of states to regulate. The power to prescribe the manner of conducting elections is clearly within the legislature's province. 200 Wis518, 228NW895, 69ALR348(2dcase).

171-87½-New. Duties imposed on officers by mandatory statutes are personal and cannot be delegated. 102WVa689, 136SE263.

172-91½-New. Election commissioner ordering goods in his official capacity is not personally bound to pay for them. 152Tenn476, 279SW793.

172-3 216Ky500, 287SW965.

172-4 328 Ill 576, 160NE215.

172-6½-New. Village trustees' resolution providing for single polling place held ineffective to repeal prior resolution establishing three election districts. 131Misc820, 227NYS430.

172-8 [a] **Validity and construction** of statute providing for distribution, location, and locking of ballot boxes. 235 Ky24, 29SW(2d)619.

173-19 [b] **Only number of voters** for which there are booths should be allowed in polls. 220Ky510, 295SW873.

173-22 210Ky205, 275SW790, 793 [cit Cyc]; 50Philippine45; 159Tenn226, 17 SW(2d)692.

173-23 210Ky205, 275SW790, 793 [cit Cyc].

173-26 210Ky205, 275SW790; 159 Tenn226, 17SW(2d)692.

173-29 115Tex205, 281SW837.

173-32½-New. In Alberta neglect to comply with provisions as to time for preparing list and certification and posting of list does not invalidate municipal election in absence of prejudice. [1930] 4DomLR154.

173-34 126Kan661, 270P609; 31NM7, 240P482, 491 [quotCJ]; 51ND520, 200 NW782.

174-35 31NM7, 240P482, 491 [quotCJ].

174-36 126Kan661, 270P609; 31NM7,

240P482, 491 [quotCJ].
174-37 31NM7, 240P482, 491 [quotCJ]; 41Wyo 157, 282P1058.
174-38 163La266, 111S700; 31NM7, 240P482, 491 [quotCJ].
174-39 31NM7, 240P482, 491 [quotCJ].
174-40 31NM7, 240P482, 491 [quotCJ].
175-59 220Ky510, 295SW873. But see SD 213NW730.
175-63½-New. Presence of candidate does not invalidate election. 322 Ill 265, 153NE351.
175-63¾-New. Exercise of franchise should be free from every extraneous influence, and impelled only by the best judgment of the individual voter. 196 NC535, 146SE225.
175-65 [a] **No voting should be allowed** pending disposition of challenge. 220Ky510, 295SW873.
175-68½-New. Requirement that a voter shall declare his party affiliation before being given a ballot is unconstitutional. 126Kan811, 271P400.
175-69 196NC535, 146SE225.
175-70 But see 196NC535, 146SE225.
175-75½-New. Construction of statute authorizing voting machines. Failure of board of elections to adopt voting machine on a certain date deprives them of that right thereafter, and such right becomes vested in the secretary of state. 213AppDiv561, 210NYS193 (Election L. §§ 243, 246).
176-77 121 Oh301, 168NE131(2dcase), 66ALR849.
176-81½-New. Where statute provides for installation of voting machines in certain proportion over period of years, on failure to install requisite number in some of the years, installation of all at one time thereafter should not be required. 211NYS861.
176-81¾-New. Thus, on failure to provide machines as required by statute, court cannot require those which were to have been supplied in one year to be supplied in subsequent year. 211NYS861.
176-85 14PaDist&Co 207. [a] **Voting machine** is not in proper condition if anything impedes honest, intelligent, and competent wish of voter. 128Misc 163, 218NYS3.
176-89 12PaDist&Co 207 (submission of adoption must be at general, and not at primary, election).
176-93 See also 128Misc163, 218NYS3.
176-93½-New. Reëxamination of machine may be initiated upon complaint of an elector under oath alleging change accompanied by statutory fee or bond. 14PaDist&Co 207.
176-93¾-New. Where voting machine has been approved by secretary of commonwealth and no change made in machine, the approval once given cannot be revoked. 14PaDist&Co 207.
176-96½-New. Absentee voters. Board of elections has no jurisdiction to deliver ballots to absentee voters whose affidavits did not comply with statute, 126 Misc49, 213NYS524.
176-96¾-New. and no list of applicants was given to county committees. 126 Misc49, 213NYS524.
176-96¼-New. Absentee voter may not vote ballot where board of elections had no jurisdiction to deliver ballot to him. 126Misc49, 213NYS524.
176-96½-New. Challenge to absentee ballot, illegally issued and voted, is not necessary. 126Misc49, 213NYS524.
176-96¾-New. Absentee voters. A voter wishing to cast absentee vote must comply with all statutory requirements. 126Misc49, 213NYS524.
176-96⅞-New. Votes cast by absentee voters on ballots illegally issued are illegal and void. 126Misc49, 213NYS524.
176-1 215Ky199, 284SW997.
176-1½-New. A voter does not vote a secret ballot where another person is present with him in the booth and such ballot may not be counted. 210Ky642, 276SW152.
176-3 221Ky546, 299SW170.
177-9 [a] **Constitutionality of statute requiring voter to detach secondary stub and deposit ballot.**–235Ky24, 29SW (2d)619.
177-14½-New. Maintenance of a ballot box containing separate slots for and against the question voted on, renders an election void as denial of the secrecy guaranteed by constitutional provision for election by ballot, although the votes cast all went into the box indiscriminately and were counted together, 196 NC535, 146SE225.
177-14¾-New. and the voters, not informed that they could place their votes in either slot, did not waive secrecy. 196NC535, 146SE225.
177-23 210Ky273, 275SW818; 159 Tenn226, 17SW(2d)692. [a] **Blind persons.**–221Ky546, 299SW170.
177-24 [a] **Where voter is illiterate** clerk should mark ballot and deliver it to voter who must retire and mark own ballot. 221Ky546, 299SW170.
178-30 210Ky273, 275SW818; 217Ky 653, 290SW471; 178Minn578, 228NW 155.
178-34 [a] **In Texas.**–CivA 300SW207.
178-38 TexCivA 300SW207.
178-44 [a] **Statute construed.**–248Mich 134, 226NW895.
179-69 [a] (2) Absent voters' ballots cast by electors without having made previous application therefor are illegal. 155Miss858, 124S643.
179-70½-New. [§ 221a] 8½. **Absent Voters.** Where a voter, absent from the place of election complies with the statute relating to absentee voters and delivers his ballot to the proper official, then such ballot is legal and valid. 196 Ind460, 148NE477.
179-70¾-New. Substantial compliance is necessary with the law respecting voting by absentee voters to authorize the counting of such votes. 196 Ind460, 148NE477.
180-72 [a] **Liberal construction of election law in interest of pure ballot** is required where irregularities are alleged in election district. 8PaDist&Co 110. [b] **Power of legislature.**–206 Iowa 845, 220NW30.
180-73 35Ariz265, 276P843; 328 Ill 576, 160NE215; 249 IllA217; 210Ky 205, 275SW790; 213Ky756, 281SW1031; 216Ky500, 287SW965; 246Mich115, 215 NW33; 71Mont165, 227P811; 130Misc 520, 224NYS450, 452 [quotCJ]; 126 Okl 130, 258P755; 9PaDist&Co 272; 48 Philippine211; 49Philippine906; 50 Philippine45; SD 213NW730; TexCivA 283SW307; TexCivA 5SW(2d)247; TexCivA 19SW(2d)911; TexCivA 23SW (2d)535; Alta [1930] 4DomLR154. [b] **Establishment of polling place at premises of Indian agency or trading post** does not invalidate vote of precinct, no one being deprived of vote. 71Mont165, 227P811. [c] **Visibility of inside of booths** to persons outside is no ground to invalidate election. SD 213NW730.
180-75 210Ky205, 275SW790; 216Ky 382, 287SW952; 286Pa257, 133A379; 50Philippine45. [a] **Solicitation of votes for particular candidate.**–206 Iowa845, 220NW30. [b] **Writing in names.**–35 Ariz265, 276P843.
181-76 196 Ind542, 148NE149; 196 Ind 460, 148NE477; 210Ky205, 275SW790; 213Ky756, 281SW1031; 251Mich286, 232NW387; NC 154SE88; 126 Okl 130, 258P755; 6PaDist&Co 388; 46Philippine595; TexCivA 5SW(2d)247.
181-77 121 Or4, 252P552; TexCivA 5 SW(2d)247.
181-78 Miss 130S482; 130Misc520, 224 NYS450; 126 Okl 130, 258P755; 50 Philippine45.
181-79 50Philippine45.
181-81 80Colo 465, 253P465.
181-82 50Philippine45.
181-82½-New. It is the policy of the law to uphold elections. 213Ky756, 281 SW1031.
181-82¾-New. Legislative acts held to have caused defects. 5PaDist&Co 54.
181-84 328 Ill 576, 160NE215; 196 Ind 542, 148NE149; 115Nebr315, 212NW 760; 116 Or264, 240P418, 429 [quotCJ]; SD 213NW730, 731 [quotCJ]. [b] **Election laws must be interpreted along sound and reasonable lines** and not so ultra-technical as to defeat will of public or place unnecessary burden on electors. 216Ky210, 287SW696.
181-85 328 Ill 576, 160NE215; 216Ky 382, 287SW952; 192NC590, 135SE467; 116 Or264, 240P418, 429 [quotCJ].
182-86 210Ky205, 275SW790; 216Ky 382, 287SW952; 115Nebr315, 212NW 760; 116 Or264, 240P418, 429 [quotCJ]. [a] **Statutes affecting manner of conducting mere details of election** are directory. 115Nebr230, 212NW437.
182-87 115Nebr315, 212NW760; 116 Or264, 240P418, 429 [quotCJ].
182-88 116 Or264, 240P418, 429 [quot CJ]; 102WVa689, 136SE263, 264 [cit CJ].
182-89 116 Or264, 240P418, 429 [quot Cyc]; 46Philippine595.
182-89½-New. Election statutes are usually held to be directory unless otherwise declared by statute. 101WVa 425, 133SE109.
182-89¾-New. Statute providing summary proceedings for appeals from decision of election board require electors to be summoned by delivering to them copies of notice of appeal. 35PortoRico 276.
182-90 251Mich286, 232NW387.
182-92 71Mont165, 227P811; 286Pa 257, 133A379; 101Vt441, 144A200.
182-93 328 Ill 576, 160NE215.
183-95 215Ky199, 284SW997.
183-95½-New. Votes cast by others in names of resident voters are illegal. 215 Ky199, 284SW997.
183-1 215Ky199, 284SW997, 1002 [quotCJ]; 41Wyo 157, 282P1058 (where fault of candidate not shown).
183-2 But see 41GaA515, 153SE437(2d case).
183-14 320Mo 877, 8SW(2d)881.
183-15 231Ky165, 21SW(2d)260; TexCivA 287SW670. [a] **Expenditure of one hundred and forty thousand dollars** for election of party candidates in Louisville, Ky. was held excessive. 220 Ky510, 295SW873. [b] **Expenditures for registration** and permanent headquarters are not properly chargeable against candidates. 220Ky510, 295SW 873.
183-16 231Ky165, 21SW(2d)260; TexCivA 287SW670. [a] **Laws regulating election expenditures** should be strictly enforced. 220Ky510, 295SW873.
184-17 122 Or311, 258P822.
184-17½-New. Promises by candidates for office, if falling within the inhibition of the Corrupt Practice Act, preclude candidates from holding office, regardless of whether promises can or cannot be kept. 30 OhA218, 164NE765.
184-18 [a] **Proof of charge beyond reasonable doubt.**–61OntL392, [1928] 1DomLR104.
184-23 [a] **Validity of statute upheld** as within power of legislature. 200Wis 518, 228NW895, 69ALR348(2dcase).
184-25 [a] 122 Or311, 258P822.
184-25½-New. Declaring a general election void for a candidate's misconduct in the primary is within the legislature's power. 200Wis518, 228NW895, 69ALR348(2dcase).
184-26 200Wis518, 228NW895, 69ALR 348(2dcase).
184-32 200Wis518, 228NW895, 69ALR 348(2dcase) (as applied to governor).
184-32½-New. Language of N. D. St. §§ 923-944 indicates that certain provisions are applicable to elections of public officers only, and that other provisions are applicable alike to elections of officers and elections involving some measure, proposition, or question submitted. 49ND1165, 194NW892.
184-32¾-New. Laws against corruption in an election should be strictly enforced, and the court should seek no excuse for not sternly condemning infractions of such laws. 231Ky165, 21 SW(2d)260.
184-40 [b] (3) Failure to date expense account. 220Ky546, 295SW871.
185-41 231Ky191, 21SW(2d)240; 231 Ky165, 21SW(2d)260 (giving boy one dollar with request to be remembered on election day). [a] **Knowledge of bribery by candidate** on part of precinct workers employed by him depends on facts and circumstances of the particular case. 231Ky165, 21SW(2d)260.
185-43 174Minn333, 219NW284.
185-44 See also 71Mont165, 227P811.
185-46 197 Ind161, 150NE53.
185-51 173Minn512, 217NW935.
185-52½-New. It is not unlawful electioneering under the Corrupt Practice Act for a candidate to declare his prin-

ciples. 122 Or311, 258P822 (statements held not in violation of statute).

185-56 231Ky165, 21SW(2d)260. [a] **Polling of precincts** by paid party workers before and after registration held proper. 220Ky510, 295SW873.

185-57½-New. Promises by candidates which are mere expressions of policy to be pursued as public officers, made in the interest of the public and which do not involve personal pecuniary consideration offered to accomplish election, do not fall within the Corrupt Practices Act. 30 OhA218, 164NE765; 119 Oh558, 165NE44. [a] **Prevention of definition of principles** by candidates is not purpose of a corrupt practice act. 119 Oh 558, 165NE44.

185-61 231Ky191, 21SW(2d)240; 231 Ky278, 21SW(2d)455.

185-62 231Ky165, 21SW(2d)260.

186-66½-New. N. D. St. §§ 923-944 applies to all primary and general elections held in the state. 49ND1165, 194 NW892.

186-68 80Colo 465, 253P465; 49Philippine284. [b] **Where fraud and gross negligence combine in conduct of election in district,** recount is precluded. 80Colo 465, 253P465.

186-69 80Colo 465, 253P465 (dictum).

186-74½-New. Sporadic instances of misconduct are not alone sufficient to support a general charge of fraud. 101 WVa425, 133SE109.

186-74½-New. Fraud to vitiate vote of district need not be actual or intentional. 80Colo 465, 253P465.

186-77 [a] **Acquiescence of candidates** in action of campaign committee in leaving management of campaign to persons guilty of fraudulent conspiracy is not ratification thereof. 220Ky510, 295SW873.

187-87 231Ky278, 21SW(2d)455.

187-88½-New. Votes induced by purchase of poll tax receipts and gratuitous distribution of them to voters are illegal. 159Tenn226, 17SW(2d)692.

188-3 But see 231Ky191, 21SW(2d)240.

188-6 231Ky165, 21SW(2d)260.

188-7 231Ky165, 21SW(2d)260.

188-10 197 Ind161, 150NE53.

189-19 101WVa425, 133SE109, 113 [quotCJ].

189-19½-New. An election is free and equal, where all qualified electors in the precinct are carefully distinguished from unqualified, and are protected in their right to deposit their ballots in safety and unprejudiced by fraud. 331 Ill 296, 162NE835.

189-20 220Ky510, 295SW873; 101WVa 425, 133SE109 (entire poll of precinct will be discarded).

190-23 101WVa425, 133SE109, 113 [quotCJ].

190-24 101WVa425, 133SE109, 113 [quotCJ].

190-25 101WVa425, 133SE109, 113 [quotCJ].

190-26 101WVa425, 133SE109, 113 [quotCJ].

191-45 See also Mo 278SW708. [a] **Votes specified by law** must be obtained to render valid results of election. 136 Wash610, 241P12.

191-46 143 Okl 281, 289P254.

191-61 97Fla159, 120S310. See also 5 PaDist&Co 54.

191-63 SD 213NW730.

192-71 286Pa257, 133A379.

192-74½-New. The duties of election officers in the matter of counting ballots are purely ministerial. 115Nebr 315, 212NW760.

192-74½-New. A town council, merely adding figures appearing on certificates forwarded by voting district wardens and clerks, does not "count the ballots" within the meaning of the statute. 49 RI 458, 144A54.

192-74½-New. Election officers may in proper cases determine whether the mark properly placed by the voter was intended by the voter to be a cross (X) mark. 97Fla159, 120S310.

192-81 67CalA640, 228P409 (school district bond election); 217Ky653, 290 SW471; TexCivA 275SW117; 101Vt441, 144A200. [a] **Votes of persons whose names were written in without authority** after certification and filing of list of voters can not be considered, though such voters may in fact have been entitled to appear on original list. 101Vt 441, 144A200.

192-83 97Fla159, 120S310. See also 97 Fla159, 120S310. [c] **Inspectors may determine** for whom vote is intended from face of ballot in cases of ambiguity or apparent uncertainty. 97Fla159, 120 S310.

193-91½-New. Where person to whom ballot was issued did not vote it, it is properly excluded although appearing among returns fully marked. TexCivA 275SW117.

193-91½-New. Election judges cannot count the ballots of absent voters without determining that the voters had the right to cast them. 152Va139, 146SE 287.

193-91¼-New. Absent voter ballots, not accompanied by the affidavit required by statute relative to votes of persons necessarily absent, can not be counted in a city election. 101Vt441, 144A200.

193-91½-New. Disputed ballots are ballots that have been considered, but have either been rejected or not counted according to law. 30 OhA37, 163NE246 (1stcase).

193-99 But see 29Hawaii112. [a] **Particular statutes construed.**-35PortoRico 587 (as to meaning of "recount"). [b] **In Porto Rico.**-35PortoRico 587.

193-1½-New. Where there is fraud or mistake such as to render it impossible to compute the vote without opening the ballot box, precinct election officers may be called in and, under supervision of the board, the box may be opened to make such investigation as will enable the judges to proceed with the computation, 295Pal, 144A735.

193-1½-New. but in the absence of palpable fraud or mistake, to authorize correction of the count by the computation court, the only relief in connection with a computation of the vote by recount must be had under additional remedy provided by statute, by recount by other judges than those engaged in computing returns in case of showing of fraud though not manifest. 295Pa 1, 144A735.

193-5 136Misc641, 241NYS405; Alta [1929] 1DomLR555.

193-10 [a] **An alternative writ of mandamus** for omission from recount of names of candidates on ballots not properly marked does not relieve officials of duty to make due return of all ballots. 97Fla159, 120S310.

194-15 229Ky320, 17SW(2d)198.

194-17½-New. Irregular votes should be separately counted, tabulated, and returned, and ballots preserved. 97Fla 159, 120S310.

194-20 36GaA286, 136SE334.

194-21 36GaA286, 136SE334.

194-23 10PaDist&Co 532.

194-26 TexCivA 23SW(2d)535 (affidavits of tax payment in lieu of receipts held no part of election returns).

195-27 136Misc641, 241NYS405; TexCivA 19SW(2d)911; TexCivA 23SW(2d) 535.

195-29½-New. Specific return of votes and ballots containing markings not in compliance with statute must be made, being then subject to appropriate judicial review. 97Fla159, 120S310.

195-29½-New. Election officers need not make special return that the ballot contained no mark expressing the voter's intention, where such was the case. 97Fla159, 120S310.

196-55 299Pa517, 149A733.

196-59 TexCivA 23SW(2d)535.

197-60 TexCivA 23SW(2d)535.

197-70 160Ga217, 127SE862 [quotCJ].

197-71 160Ga217, 127SE862 [quotCJ].

197-72 160Ga217, 127SE862 [quotCJ].

197-73 160Ga217, 127SE862 [quotCJ].

198-86 102WVa703, 136SE772.

198-90 328 Ill 576, 160NE215.

198-91 302Mo564, 258SW1020 (election commissioners of St. Louis County are legal custodians of ballots, with duties to open boxes and recount).

198-94 [a] **Jurisdiction of court to order removal.**-9PaDist&Co 698.

199-2 199 Iowa788, 202NW581.

199-3 7LaA422.

199-4½-New. Opening of ballot box. On petition of three qualified electors a ballot box may be opened, 8PaDist& Co 110.

199-4½-New. but where only one signs, the petition is fatally defective. 8PaDist&Co 110.

199-4¼-New. Where discrepancies and fraud in general terms are alleged, without specifying the fraud or mistake, the appeal from decision of the election board will be quashed. 8PaDist& Co 110.

199-4½-New. The fact that ballots in a precinct were destroyed before their production was ordered in an election contest does not warrant throwing out the vote of the entire precinct, where it appears that there was no attempt at concealment or fraud on the part of election officers. 35Ariz265, 276P843.

199-8 5PaDist&Co 54. [a] **Deputy state supervisors of elections.**-25 OhA 278, 158NE94 (board of elections [Gen. Code 5090]).

199-12½-New. A village board, through its inherent powers, is the judge of the election and qualifications of its own members, 52ND32, 201NW837.

199-12½-New. and, suo jure in the absence of statutory restraint, it may with propriety act as a canvassing board concerning its own members. 52ND32, 201 NW837.

199-17½-New. Where a village board acts as a canvassing board concerning its own members, the village clerk is the proper recording and certifying officer of the acts of the board. 52ND 32, 201NW837.

199-21 115Nebr230, 212NW437.

200-23½-New. After canvass and abstract of votes cast and before issuance of a certificate of election to the successful candidate the board may reconvene to canvass votes received by mail from absent voters although the board previously adjourned without canvassing such votes. 77Colo 478, 238P53.

200-33 115Nebr230, 212NW437; 225 AppDiv149, 231NYS477; 49ND11, 186 NW284.

200-34 102WVa116, 134SE594.

200-34½-New. Refusal of a majority of a canvassing board to perform a duty imposed by law will not be permitted to disfranchise citizens whose votes are thereby rejected. 115Nebr230, 212NW 437.

201-39 190NC441, 130SE35 (canvassers do not determine result in sense of depriving court of its jurisdiction); 49 ND11, 186NW284; 102WVa116, 134SE 594, 595 [citCJ].

201-41 TexCivA 23SW(2d)535.

201-48 102WVa116, 134SE594. [a] **Canvassers have no right to make inquiry** as to eligibility on own motion or on motion of present incumbent of office. 102WVa116, 134SE594.

201-49 102WVa116, 134SE594.

202-69 TexCivA 23SW(2d)535.

203-82 220Ky510, 295SW873; 25 OhA 278, 158NE94.

203-83 25 OhA278, 158NE94.

204-86½-New. Under some statutes the canvassing board is required to reject and not count ballots not indorsed by both poll clerks appointed to act as clerks of the receiving board. 102WVa 703, 136SE772.

204-86½-New. Where, upon the canvass of the returns of an election the ballots are appealed to by a candidate to overcome the prima facie case presented by the returns, he will be bound by the result of the recount unless the ballots, when opened and considered, disclose on their face some infirmity rendering them invalid. 102WVa703, 136 SE772.

204-90 178Minn578, 228NW155 (report of number of votes received by each candidate held in legal effect declaration of result). [a] **"Tabulate,"** as used in statute requiring election returns to be tabulated, means to arrange in table or list, or tally returns, and to add them. 230Ky566, 20SW(2d) 458.

204-4 162Ga222, 133SE251.

204-9½-New. Supreme court in New York has jurisdiction to determine whether absentee votes fully identified, challenged, and returned are legal. 126 Misc49, 213NYS524 (Election L. § 330

amended L. [1924] c 405).

204-9⅓-New. That no void or challenged votes were shown on statement of canvass does not deprive court of jurisdiction to determine legality of absentee votes. 136**Misc**49, 213**NYS**524 (where voting was by machine and blank statement provided no space therefor).

204-9¼-New. Court in proceeding to direct recanvass of ballots is without power to order new election. 136**Misc** 641, 241**NYS**405.

204-9½-New. Courts are without jurisdiction to direct recanvass of some of ballots, as protested, blank or void ballots tabulated by election inspectors as they were voted. 136**Misc**641, 241 **NYS**405.

204-9⅙-New. Courts will not correct mistake of electors in proceeding for recanvass of ballots. 136**Misc**641, 241 **NYS**405 (limited to review errors made by election inspectors).

204-9⅐-New. Proceeding for recanvass of ballots can be entertained only under express authority by statute. 136**Misc** 641, 241**NYS**405.

204-9⅛-New. That petition for recanvass of void ballots was upon information and belief without showing information has been held not jurisdictional defect. 136**Misc**641, 241**NYS**405.

204-9⅑-New. "Election," in statute requiring recanvass, has been held to include primary, special, and general elections. 245**NYS**105.

205-11 162**Ga**222. 133**SE**251; 234**Ky** 127, 27**SW(2d)**672(1stcase) (not issued to candidates in sixth class towns); 25 **OhA**278, 158**NE**94; 102**WVa**116, 134**SE** 594, 595 [citCJ]. [a] **Delegation of duty.**-227**Ky**334, 12**SW(2d)**1110.

205-13 52**ND**32, 201**NW**837. [b] **Certificate in substantial compliance with statute.**-52**ND**32, 201**NW**837 (filing made by village clerk instead of by inspectors of election).

205-15½-New. Certificate is not required to give notice of time within which person elected must qualify. 78 **Mont**308, 254**P**187.

205-16 See also 227**Ky**334, 12**SW(2d)** 1110.

205-18 102**WVa**116, 134**SE**594, 595 [cit CJ].

205-20 152**Va**139, 146**SE**287.

205-26 227**Ky**611, 13**SW(2d)**758; 230 **Ky**633, 20**SW(2d)**479 (primary election); 8**LaA**717, 718 [quotCJ]; 8**LaA** 717, 718 [quotCJ].

206-30 136**Wash**610, 241**P**12, 13 [cit CJ].

207-41½-New. Votes specified by law must be obtained to render valid the results upon election. 136**Wash**610, 241 **P**12.

207-41⅓-New. In some jurisdictions majority of votes cast for any measure must prevail except where the constitution otherwise provides. 142 **Okl** 38, 285 **P**92.

207-42 197**Ind**161, 150**NE**53, 56 [cit CJ]; 219**AppDiv**1, 219**NYS**52.

207-43 177**Ark**44, 5**SW(2d)**734; 197 **Ind**161, 150**NE**53, 56 [citCJ]; 245**NY** 534, 157**NE**847; 219**AppDiv**1, 219**NYS** 52; 128**Misc**36, 217**NYS**729. [b] **In New York.**-128**Misc**36, 217**NYS**729.

208-44 177**Ark**44, 5**SW(2d)**734; 197 **Ind** 161, 150**NE**53, 56 [citCJ]; 219**AppDiv** 1, 219**NYS**52.

208-45 197 **Ind**161, 150**NE**53, 56 [cit CJ].

208-49½-New. New York Village Law states that person who receives highest number of votes and is eligible is elected to office. 128**Misc**36, 217**NYS** 729.

209-55 219**AppDiv**1, 219**NYS**52; 55**ND** 867, 215**NW**539. [a] (4) 128**Misc**36, 217 **NYS**729.

209-62 322 **Ill** 575, 153**NE**613.

209-63 322 **Ill** 575, 153**NE**613; 209**Ky** 588, 273**SW**441, 442 [citCJ&Cyc]; 210 **Ky**843, 276**SW**984; 217**Ky**436, 289**SW** 677; 220**Ky**480, 295**SW**438. But see 154**Tenn**679, 290**SW**399.

210-64 220**Ky**480, 295**SW**438.

210-65 See also 167**Ga**833, 146**SE**734; 11**PaDist&Co** 350.

210-81 102**Conn**579, 129**A**551; 29 **Hawaii**112; 316 **Ill** 534, 147**NE**388; **Ill** 173**NE**94; 210**Ky**843, 276**SW**984; 214 **Ky**333, 283**SW**124; 313**Mo** 1, 281**SW** 768; **Mo** 278**SW**708; 321**Mo** 1042, 15 **SW(2d)**342. [d] (2) Sess. L. (1927) c 63 of Oklahoma repeals all former statutes on same subject. 139 **Okl** 271, 270 **P**63. [m] **Statutes applicable.**-77**Colo** 478, 238**P**53 (contest of election to county office other than office of county judge); 77**Colo** 475, 238**P**57 (contest of election to office of county judge). [n] **Offices which may be contested** under statutes in some jurisdictions include "county offices." 213**Ala**201, 104 **S**432. [o] **Election contest is a special proceeding** and must be confined to the provisions of the statute. **TexCivA** 28**S** **W**514.

211-82 **Ill** 172**NE**809; 190**NC**441, 130 **SE**35; 197**NC**731, 150**SE**507; **TexCivA** 17**SW(2d)**1100. [b] (2) See also **Ill** 172 **NE**809. (8) Rev. St. (1911) art. 3049 and Const. art. 5, § 24 do not affect district court's jurisdiction of election contests. **TexCivA** 275**SW**253. (9) Election contests are special proceedings and are governed strictly by Rev. St. (1911) arts 3046-3078. **TexCivA** 275 **SW**253. (10) District court has jurisdiction to try election contest for trustees of independent school district. **Tex CivA** 291**SW**957. [j] **In Alabama.**-213 **Ala**201, 104**S**432.

211-83 31**Ariz**421, 254**P**230; **Ill** 172**NE** 809; 217**Ky**436, 289**SW**677; 25**OhA**278, 158**NE**94 (where court's action in counting undisputed ballots in election of party committee was held surplusage). See also **MoA** 12**SW(2d)**102. [a] (1) **TexCivA** 275**SW**253. [b] (5) Trustees of independent or common school district are "county officers" both under statutes relating to election contests and under constitutional provisions. **TexCiv A** 275**SW**253. (6) Union high school district held political subdivision of county within election contest statute. 31**Ariz**421, 254**P**230.

212-86 138 **Okl** 4, 280**P**263; 288**Pa**585, 137**A**109. [a] **Purpose of court,** in election contest is to determine which candidate received highest number of legal votes. 173**Ark**970, 294**SW**74.

212-87 335 **Ill** 346, 167**NE**76. [a] **Remedy may not be extended** to include cases not within language or intent of statute. 34**Ariz**528, 273**P**10.

212-87½-New. Contestant must comply with the terms of the statute to avail himself of the remedy provided. 217 **Ky**436, 289**SW**677.

212-89½-New. ., nor by resigning from office subsequent to service of notice and statement of contest upon him. **TexCivA** 275**SW**253.

212-93½-New. Under some statutes election contests are special and summary in nature, 302**Mo** 564, 258**SW**1020.

212-93⅓-New. and the courts in which they are cognizable have only a limited and special jurisdiction, and can exercise only powers expressly conferred or incidentally necessary to those given. 302**Mo** 564, 258**SW**1020.

212-93¼-New. Jurisdiction over a contest is conferred on the court under some statutes by the act of the contestant in filing his statement of contest and bond. 199 **Iowa**788, 202**NW**581.

212-93⅕-New. Objection to counting ballots is not a condition precedent to action to test legality of election. 190 **NC**441, 130**SE**35.

213-96 333 **Ill** 58, 164**NE**208; 210**Ky** 843, 276**SW**984; 214**Ky**333, 283**SW**124; 25 **OhA**278, 158**NE**94; 139 **Okl** 271, 270 **P**63; 59 **OntL**570, [1927] 1**DomLR**188; **Sask** [1928] 3**DomLR**702.

213-99 [b] (2) **TexCivA** 28**SW(2d)** 276.

213-1 98**Fla**785, 124**S**273; 45 **Ida**653, 264**P**871; 34**PortoRico** 435 [citCJ] (certiorari).

214-5 See also 214**Ky**333, 283**SW**124.

214-12½-New. Remedy of certiorari provided by statute is not exclusive. 34 **PortoRico** 612.

215-18½-New. In Virginia, general assembly has power to determine results of contested election of municipal officers. 144**Va**320, 131**SE**784.

215-22 [c] **Ill** 173**NE**94. [h] **Other municipal officers.**-209**Ky**588, 273**SW** 441.

215-25 Contra 209**Ky**588, 273**SW**441.

216-32 [a] 209**Ky**588, 273**SW**441.

216-35 210**Ky**843, 276**SW**984; 213**Ky** 756, 281**SW**1031; 68**Utah**452, 250**P**1049. [b] **Court of equity does not have jurisdiction** of proceeding instituted because of alleged illegal participation by church organization. 68**Utah**452, 250 **P**1049.

216-37 68**Utah**452, 250**P**1049. [a] **In Tennessee.**-159**Tenn**226, 17**SW(2d)**692.

216-37½-New. and then only to the extent and in the manner provided by the statute; 68**Utah**452, 250**P**1049.

216-45 155**Miss**858, 125**S**433.

217-47½-New. Action to annul the election will not lie in equity, if contest is maintainable under statute. 49**ND**1165, 194**NW**892.

217-47⅓-New. A petition which was in substance a case of contest of an election of municipal officers cannot be determined on its merits in a court of equity, because of lack of jurisdiction, and the fact that there was a vacancy in the office of ordinary of the county, because of death of the former ordinary, does not give the court jurisdiction. 167**Ga**833, 146**SE**734.

217-52 35**Ariz**265, 276**P**843. [c] **Efforts of contestant's party workers** to get imposters to vote, as charged against contestee's supporters, constitute no defense. 220**Ky**510, 295**SW**873.

217-53 35**Ariz**265, 276**P**843; 77**CalA** 605, 247**P**252; 132 **Okl** 200, 270**P**75 (failure to take statutory oath); 41**Wyo** 157, 282**P**1058; **BC** [1925] 3**DomLR**770 (where there was compliance with general spirit of state and violation of secrecy not involved). [b] **In Saskatchewan.**-[1928] 2**DomLR**913.

217-53½-New. Corrupt practice is ground for contest. 49**ND**1165, 194**NW** 892.

217-55 50**Philippine**703.

217-56 197 **Ind**161, 150**NE**53; 154**Tenn** 679, 290**SW**399. [a] **Disqualification because of conduct in and about election** is not within statute permitting contest on ground of ineligibility of candidate. 217**Ala**239, 115**S**164.

217-61 [c] (2) Other cases of fraud. 34**PortoRico** 435.

218-67 **TexCivA** 273**SW**1006 (statute construed).

218-70½-New. Number of illegal votes in election is immaterial except where they form essential part of majority certified. 154**Tenn**679, 290**SW**399.

218-70⅓-New. Defeated candidate who admits validity of election cannot contest for invalidity of ballots. 154**Tenn** 679, 290**SW**399.

218-70¼-New. Whether there was a vacancy in office cannot be tested in an action in which the contestant claims that he received a majority of the legal votes cast and was entitled to a certificate of election. 34**Ariz**528, 273**P**10.

218-70⅕-New. Under some statutes, no contest can be instituted where the officers whose duty it is to declare the result of an election refuse or neglect to do so. 34**Ariz**334, 271**P**715.

218-70⅙-New. The fact that only a small percentage of qualified voters voted cannot affect the election. **TexCivA** 18**SW(2d)**212.

218-71 **TexCivA** 275**SW**253. [a] **Proceeding is instituted, commenced, or set in motion** by service of contestant's notice and statement. **TexCivA** 275**SW** 253. [b] **Where contest instituted in time** no notice is necessary. 222**Ky**162, 300**SW**349.

218-73 313**Mo** 1, 281**SW**768, 770 [cit CJ].

218-77 **TexCivA** 28**SW(2d)**276 (necessity of showing intention to contest election).

218-79½-New. and must state facts which constitute a cause of action; 313 **Mo** 1, 281**SW**768.

218-80½-New. Under some statutes notice must require contestee to appear on a certain day. 210**Ky**513, 276**SW**535.

218-87 230**Ky**581, 20**SW(2d)**437; 230 **Ky**566, 20**SW(2d)**458 (both holding that service was sufficient). [f] (1) 313**Mo** 1, 281**SW**768. (2) Where sheriff failed to use due diligence to get personal service prematurely posted, notice is

not made valid by attempted service of different copy on last two days of life of notice. 313Mo 1, 281SW768.

219-83 221Ky509, 299SW177; 313Mo 1, 281SW768; **TexCivA** 28SW(2d)276.

219-90 [a] (6) Motion to dismiss on ground notice insufficient in failing to state case for election contest not waiver of want of jurisdiction. 313Mo 1, 281 SW768. [c] **General appearance.**–199 Iowa788, 202NW581.

220-96½-New. A contest court, having acquired jurisdiction of the subject matter of the contest, may continue the case beyond the statutory period for service of process in order to effect such service. 199 Iowa788, 202NW581.

220-99 171Ark805, 286SW976; Ark 32 SW(2d)157.

220-1 222Ky162, 300SW349.

220-2 44Philippine581. But see Ark 32SW(2d)157.

220-3 214Ky812, 284SW115; 44Philippine581.

221-6½-New. If the contest is prematurely brought, objection thereto is waived when not timely interposed and an answer on the merits filed by the contestee. 128Kan632, 279P25.

221-7 See also 155Tenn1, 290SW396.

221-12 128Kan632, 279P25 (contest held not premature).

222-13 333 Ill 58, 164NE208.

222-14 210Ky215, 275SW794. But see 227Ky334, 12SW(2d)1110.

222-15 But see 230Ky566, 20SW(2d) 458.

222-21½-New. Under a statute requiring notice of contest to be served within a stated number of days from the "time" when the result of the election is ascertained, the day on which the result is ascertained is included. 210Ky 215, 275SW794.

222-21½-New. In Kentucky, the first day is included. 214Ky812, 284SW115.

222-29½-New. The secretary of state and the county canvassing board are not necessary parties in quo warranto. Tex CivA 23SW(2d)535.

222-30 214Ky812, 284SW115.

222-32 197 Ind161, 150NE53. [e] In Kentucky.–214Ky333, 283SW124.

223-33 235Ky816, 32SW(2d)419; 49 ND1165, 194NW892; TexCivA 17SW (2d)1100. [a] (2) Or on the ground that successful candidate did not file certificate of nomination in time. 215 Ky30, 284SW111. (3) Or on the ground that contestee failed to file certificate of nomination in time. 215Ky 566, 286SW797.

223-34 197 Ind161, 150NE53.

223-36 30Ariz397, 248P25 (only elector of political subdivision from which officer whose election is contested is chosen can contest election).

223-38 But see 332 Ill 230, 163NE657.

223-42 46Philippine595.

223-43 TexCivA 273SW1006. [b] In Texas.–117Tex237, 18W(2d)276.

223-44 235Ky816, 32SW(2d)419;

223-47½-New. An independent candidate is not estopped from contesting the election of a Democratic nominee, having voted at the primary, because of a ballot pledging voters to support the primary nominees. 10LaA563, 121S632.

223-47½-New. Members of a canvassing board and county clerk of the county have been held not indispensable parties or even proper parties defendant in a suit by resident electors against park commissioners, to contest the result of an election submitted on the question of bond issuance. 333 Ill 58, 164NE208.

223-47¼-New. The secretary of state and the county canvassing board are not necessary parties to election contest. TexCivA 23SW(2d)535.

224-61 [c] **Only municipal corporation or subdivision of state** in which election is held is proper defendant to proceedings under some statutes. 335 Ill 346, 167NE76.

224-65½-New. Mayor is held proper contestee under statute relating to elections other than election of officers. Tex CivA 293SW331.

224-69 But see Ind 169NE332.

225-74½-New. Where the certificate issued to next highest candidate was contested by the minority candidate, both the highest candidate and a third candidate were entitled to be heard on appeal. 102Conn600, 129A547.

225-77 287Pa135, 134A477; TexCivA 273SW1006 (and trial judge has wide discretion in conducting proceedings).

225-79 [d] (2) Period allowed for completing contestee's proof runs from last day on which contestant could take proof. 215Ky199, 284SW997. [m] **In Pennsylvania.**–288Pa585, 137A109 (evidence need not be pleaded). [n] **In Arkansas.**–171Ark805, 286SW976.

225-80 34Ariz334, 271P715.

226-84 165Minn116, 205NW702 (notice held to show by implication that contestant was voter). [a] **Allegation that contestant is elector.**–30Ariz397, 248 P25.

226-86 [f] **Allegation that contestant** is resident and citizen. 30Ariz397, 248 P25.

226-88 220Ala309, 125S51.

226-89½-New. A petition, not alleging that the petitioner had resided for thirty days in the election district, is fatally defective. 332 Ill 230, 163NE657.

226-93 167Ga333, 146SE734.

226-94 178Ark829, 12SW(2d)418.

227-8 216Ala251, 113S230; 77Colo 475, 238P57; 210Ky285, 275SW797; SD 213 NW730, 731 [citCJ]; 155Tenn1, 290SW 396; TexCivA 280SW873. But see 159 Tenn226, 17SW(2d)692. [b] **Specification that contestee was ineligible to office** is insufficient in absence of statement of grounds or facts showing that he was ineligible. 217Ala239, 115S164.

227-10 215Ky199, 284SW997; 119 Oh 558, 165NE44.

227-12 215Ky199, 284SW997.

227-13 215Ky199, 284SW997.

228-14 215Ky199, 284SW997.

228-15 77CalA605, 247P252; 10LaA 563, 121S632; SD 213NW730; 159Tenn 226, 17SW(2d)692. [d] 333 Ill 58, 164 NE208. [f] (4) For failure to allege details as to illegal votes cast. 155Tenn 1, 290SW396.

228-16 77CalA605, 247P252; 333 Ill58, 164NE208; SD 213NW730. [e] (2) Statement on information that judges of election were guilty of malconduct in counting ballots for contestee cast for other candidates and threw out ballots of other candidates is insufficient. 77 CalA605, 247P252.

229-19 169Ark132, 273SW364.

229-22 TexCivA 280SW873.

229-26 226Ky89, 10SW(2d)615.

230-55 178Ark829, 12SW(2d)418.

231-61 178Ark829, 12SW(2d)418; 154 Tenn679, 290SW399.

231-65 34Ariz528, 273P10. [a] **Where contestant was declared nominated.**–34 Ariz528, 273P10.

231-66 34Ariz334, 271P715, 716 [cit CJ]; 154Tenn679, 290SW399.

231-67 34Ariz334, 271P715.

231-70 288Pa585, 137A109; 41Wyo 157, 282P1058. [f] **Errors in one district as affecting township election.**–288 Pa585, 137A109. [g] **Allegation that illegal votes cast after polls should have been closed were sufficient to change result** is insufficient. 41Wyo 157, 282P 1058 (allegation that votes were cast after closing hour without showing for whom votes were cast).

231-72 29Hawaii 112; 41Wyo 157, 282 P1058.

231-73 332 Ill 500, 163NE792.

231-75½-New. A ground in an election contest charging the formation of a pool with others to corrupt voters is indefinite and uncertain where it does not allege that any voter was bribed or where the money was used or who used it and does not mention any candidate or friend of a candidate who contributed to the fund. 210Ky285, 275SW797.

232-88 288Pa585, 137A109.

232-91 29Hawaii 112; 332 Ill 500, 163 NE792; 332 Ill 339, 163NE801; 288Pa 585, 137A109.

233-9½-New. Plea in abatement held sufficient. Ark 32SW(2d)157.

233-9¼-New. Allowance of plea in abatement held no abuse of discretion. Ark 32SW(2d)157.

234-31 335 Ill 346, 167NE76; 288Pa 585, 137A109; 48Philippine362.

234-32 287Pa135, 134A477.

234-39 See also 287Pa135, 134A477.

234-41 215Ky199, 284SW997.

234-46 171Ark805, 286SW976; Tex CivA 4SW(2d)249.

235-48 215Ky199, 284SW997; 220Ky 510, 295SW873.

235-49 [b] **Matters not constituting excuse.**–77Colo 478, 238P53.

235-53 171Ark805, 286SW976; 220Ky 510, 295SW873; 68Utah452, 250P1049.

235-54 171Ark805, 286SW976.

235-54½-New. An amendment to statement of contest adding allegations as to alleged illegal absentee votes is properly disallowed where there is no allegation for whom such illegal votes were cast or counted. 77Colo 478, 238 P53.

235-54¼-New. Contestant's admission that another candidate who was not a party received more votes according to the returns than the contestant, warrants dismissal of the complaint, as amendment. 178Ark829, 12SW(2d)418.

235-63 332 Ill 500, 163NE792; 335 Ill 346, 167NE76.

235-64 288Pa585, 137A109.

236-66 30Ariz397, 248P25.

236-68 [a] **Contestant may amend** by asserting new ground disclosed by candidate's past election expense account. 220Ky510, 295SW873.

236-72 5PaDist&Co 12.

236-76 48Philippine362. [a] **Contestant's right to be on ballot** is not raised by demurrer. 235Ky816, 32SW(2d)419.

236-81 335 Ill 346, 167NE76.

236-82 169Ark132, 273SW364. But see 77Colo 475, 238P57.

236-83 169Ark132, 273SW364.

236-83½-New. A complaint or statement of contest not vulnerable to general demurrer may be assailable by special demurrer on other grounds. 77Colo 475, 238P57.

236-84 See also Ark 32SW(2d)319.

236-86 But see 328 Ill 27, 159NE237.

236-89½-New. On a motion to dismiss a petition in an election contest for want of jurisdiction, defendant may show facts not appearing on the face of the petition as ground for dismissal, as in other cases. 333 Ill 58, 164NE208.

236-89¼-New. The same practice as to motions to dismiss a bill in equity for want of jurisdiction prevails in election contest cases. 332 Ill 500, 163NE 792.

236-90 [d] **Parties may try case under petition charging grounds of contest indefinitely,** in absence of motion to require contestant to make it more specific. 215Ky199, 284SW997.

237-12½-New. Other matters that must be proved. 155Tenn1, 290SW396.

237-14 NM 292P611; 101WVa425, 133 SE109, 110 [citCJ].

237-15 101WVa425, 133SE109, 110 [cit CJ].

237-17 234Ky574, 28SW(2d)735.

237-24 101WVa425, 133SE109.

238-34½-New. Failure of contestees to move to quash or to demur to the notice of contest is not a waiver of evidence which fails to tally with the allegations. 101WVa425, 133SE109.

238-34¼-New. Vote of person whose name was not contained in statement of contest may not be declared illegal. 81Colo 144, 254P150.

238-34¼-New. Although fraud is not expressly charged in such words, testimony of voters that their votes had been fraudulently changed from one candidate to another may be competent under facts stated in petition. 148Miss 783, 114S820.

238-46 171Ark334, 284SW40; TexCivA 275SW253.

238-48 216Ala251, 113S230; Ark 32 SW(2d)319; 234Ky574, 28SW(2d)735; 147SC498, 145SE112.

238-50 226Ky89, 10SW(2d)615; 226 Ky103, 10SW(2d)619; 50Philippine45. [b] **Allegation that officials in certain precincts were guilty of fraud** does not permit presumption that remaining precincts were guilty. 333 Ill 58, 164 NE208.

239-51 390 OklACR186; 154Tenn679, 290SW399; 159Tenn226, 17SW(2d)692. See also 48Philippine199.

239-57½-New. Burden is on contestees

in contest of election of school trustees to show affirmatively that court is without jurisdiction, **TexCivA** 275**SW**253.

239-57½-New. mere allegation that contestee had resigned prior to filing papers in court not being sufficient. **TexCivA** 275**SW**253.

239-57¼-New. In the contest of an election, passing on the question of demurrer to a petition because of an insufficient allegation as to the method of the contestant getting his name on the election ballot, defendant had the burden of showing that the contestant's name was not legally thereon. 226**Ky** 103, 10**SW(2d)**619.

239-57⅓-New. Where absent voters' ballots do not bear the signature of the poll clerks, but are properly authenticated and identified by the seal and signature of the clerk of the circuit court, the party seeking to attack their validity in respect of the filing of the affidavits required by statute, bears the burden of showing that the statute was not complied with. 106**WVa**544, 146**SE** 378.

239-57⅙-New. A contestant assumes the burden of showing that his case falls within the statute. 34**Ariz**528, 273 **P**10.

239-59 214**Ala**114, 106**S**604; 139 **Okl** 271, 270**P**63; 154**Tenn**679, 290**SW**399; **TexCivA** 275**SW**253; **TexCivA** 280**SW** 873. [b] **Burden of showing that misconduct of election judges in soliciting votes was sufficient to change result** rests on contestant. 206 **Iowa**845, 220 **NW**30.

239-64½-New. Where matter pleaded as a defense by contestee is denied by contestant, burden of proving defense is on contestee. 215**Ky**573, 286**SW**793.

239-64⅓-New. Counting of ballot in favor of candidate other than one for whom it was cast is presumed to be result of innocent mistake. 77**CalA**605, 247**P**252.

239-64¼-New. Where name appearing on nominating petition is that of two persons and it is only shown that one had not signed, it cannot be said that other had not signed. 215**Ky**566, 286 **SW**797.

239-64⅕-New. Throwing out ballots is presumed to be result of honest judgment. 77**CalA**605, 247**P**252.

239-65 322 **Ill** 265, 153**NE**351. See also 178**Ark**829, 12**SW(2d)**418. [b] **Votes of unregistered but unchallenged persons** will not be rejected in absence of showing that they were illegal. 322 **Ill** 265, 153**NE**351. [c] **That voters are qualified** is presumed. **Iowa** 231**NW** 422.

240-66 85**Colo** 440, 276**P**333(1stcase); 159**Tenn**226, 17**SW(2d)**692.

240-69 234**Ky**574, 28**SW(2d)**735; 131 **Okl** 186, 268**P**254; 132 **Okl** 200, 270**P** 75; 138 **Okl** 4, 280**P**263; 41**Wyo** 157, 282**P**1058.

240-70 234**Ky**574, 28**SW(2d)**735; 132 **Okl** 200, 270**P**75; 159**Tenn**226, 17**SW** **(2d)**692.

240-72 But see **Ill** 172**NE**19.

240-76 215**Ky**199, 284**SW**997.

240-76½-New. A contestant has the burden of showing the illegality of votes cast, irrespective of whether the illegality was produced by bribery or otherwise. 159**Tenn**226, 17**SW(2d)**692.

240-76⅓-New. When illegal acts render the result of an election doubtful, approximate justice may be reached only by requiring the party to whose benefit such acts inure to purge the poll of their effect or to suffer the penalty of having the majority excluded from his count of votes. 331 **Ill** 296, 162**NE** 835.

240-76¼-New. The taking of an oath by a voter that he is physically incapacitated to prepare his own ballot raises a presumption that the incapacity is real. 50**Philippine**45.

240-80 214**Ala**114, 106**S**604.

241-84½-New. Certificate of election not showing to which office contestant was elected is held not to impose on contestee any burden of proof as to invalidity of contestant's alleged election. 214**Ala**356, 108**S**18.

241-87 220**Ala**309, 125**S**51 (parol evidence to identify contestant); **Ind** 168 **NE**454.

241-88 220**Ala**309, 125**S**51. [a] (2) In contest of election for office of county commissioner, evidence that there were errors in count of votes for other offices at same election is immaterial. 77**Colo** 478, 238**P**53.

241-89 [a] 102**Conn**600, 129**A**547.

241-2½-New. The report of a county clerk on a recount may not be read in evidence since secrecy of ballot would be thereby violated. 304**Mo** 583, 264**SW** 402.

241-2⅓-New. In the Philippines the court may receive evidence necessary for proper determination of questions raised. 51**Philippine**540.

241-3 220**Ala**309, 125**S**51.

242-18 328 **Ill** 101, 159**NE**211; **Ill** 172 **NE**19; 39 **OklACR**97.

243-23½-New. It need not be shown that the ballots could not by any possibility have been tampered with. 199 **Iowa**788, 202**NW**581.

243-26 See also 155**Tenn**1, 290**SW**396.

244-59 35**Ariz**265, 276**P**843.

245-60 35**Ariz**265, 276**P**843.

245-75 See also 215**Ky**199, 284**SW**997.

246-85 196 **Ind**460, 148**NE**477.

246-97 248**Mich**134, 226**NW**895.

247-8 41**Wyo** 157, 282**P**1058.

247-9 196 **Ind**460, 148**NE**477.

247-10 155**Tenn**1, 290**SW**396.

247-17 **Ind** 168**NE**454; 155**Tenn**1, 290 **SW**396.

248-21 104**Conn**396, 133**A**107; 322 **Ill** 265, 153**NE**351; 234**Ky**574, 28**SW(2d)** 735; 1**LaA**323; 139 **Okl** 271, 270**P**63. [c] (1) **Ill** 172**NE**19. (6) **NJ** 129**A**410. (16) 166**Minn**63, 206**NW**947. (19) That contestant was elected receiving majority of legal votes. 166**Minn**63, 206 **NW**947. (20) To show officers wrote contestee's name on ballots voted by illiterate persons in violation of statute. 216**Ky**842, 288**SW**755. (21) That ballots were intentionally marked for identification. 178**Minn**578, 228**NW**155. [d] (1) 235**Ky**816, 32**SW(2d)**419. (4) 220 **Ky**539, 295**SW**856. (13) That contestant received majority of votes. 197 **Ind**561, 151**NE**424. (14) To show voting of imposters by political club. 220 **Ky**510, 295**SW**873. (15) That persons whose names appeared on nominating petition had not signed same. 215**Ky** 566, 286**SW**797. (16) To warrant setting election aside and ordering new election. 233**Ky**579, 26**SW(2d)**532. [e] **Proof by preponderance of evidence** is sufficient. 220**Ky**546, 295**SW**871. [f] **Doubtful evidence** insufficient. 236**Ky** 5, 32**SW(2d)**565.

248-22 220**Ky**510, 295**SW**873. [c] **Person should not be deprived** of office unless facts fairly establish violation of Corrupt Practice Act. 220**Ky**539, 295 **SW**856.

248-24 [a] (4) Failure of witnesses to appear is insufficient to show how they voted. 236**Ky**5, 32**SW(2d)**565.

248-25½-New. Duplicate numbered ballots. Circumstances explanatory of the duplication in the numbering of two ballots have been held sufficient to entitle both ballots to be counted. **Tex CivA** 275**SW**117.

248-26 [a] **NJ** 129**A**410.

248-33½-New. Evidence held to show that voter who testified he was twenty-four and lived in village was qualified to vote. 322 **Ill** 265, 153**NE**351.

248-33⅓-New. Evidence held to show that voter was not qualified to vote. 322 **Ill** 265, 153**NE**351.

248-33¼-New. In an election contest, evidence has been held sufficient to support a finding that the electors actually moved into the town with the intention of establishing permanent residence. 85 **Colo** 440, 276**P**333(1st case).

248-34 [a] 80**Colo** 465, 253**P**465; 331 **Ill** 296, 162**NE**835; 216**Ky**563, 288**SW** 309; 8**PaDist&Co** 43; [b] 218**Ky**354, 291**SW**751; 46**Philippine**595; 159**Tenn** 226, 17**SW(2d)**692. [d] **Inferences from circumstantial evidence** must satisfy ordinary judgment. 220**Ky**546, 295**SW** 871. [e] **Evidence held to show conspiracy** to leave on registration books names which should have been stricken for purpose of having illegal votes cast. 220**Ky**510, 295**SW**873. [f] **Evidence held to show** consummated conspiracy to vote imposters under names wrongfully registered. 220**Ky**510, 295**SW**873.

249-35 220**Ky**546, 295**SW**871.

249-37 234**Ky**574, 28**SW(2d)**735; 159 **Tenn**226, 17**SW(2d)**692. But see 159 **Tenn**226, 17**SW(2d)**692.

249-52 139 **Okl** 271, 270**P**63; 39 **Okl ACR**101.

249-56 [a] **In Arizona.**–35**Ariz**265, 276 **P**843.

250-68 **Ind** 169**NE**521; 113 **Okl** 236, 241**P**197; 50**Philippine**629; 98**WVa**326, 128**SE**821; 102**WVa**267, 134**SE**597.

250-72 **TexCivA** 23**SW(2d)**535.

250-73 214**Ala**114, 106**S**604. [c] **Conspiracy to procure certificates** of elections for persons not entitled thereto, so consummated that it is impossible to determine whether they were fairly elected, requires election to be set aside. 220**Ky**510, 295**SW**873.

251-82 214**Ala**114, 106**S**604; 214**Ala** 353, 107**S**854; 214**Ala**356, 358, 108**S**18 [quotCJ].

251-83 214**Ala**114, 106**S**604; 214**Ala** 356, 358, 108**S**18 [quotCJ].

251-91 102**WVa**267, 134**SE**597.

252-92 98**WVa**326, 128**SE**821; 102**WVa** 267, 134**SE**597.

252-95½-New. Condition of ballots when box is opened is important in determining weight to be given thereto. 233**Ky** 579, 26**SW(2d)**532.

252-97 98**WVa**326, 128**SE**821. [c] **Ballots are best evidence,** if identified. 102 **WVa**267, 134**SE**597.

252-98 328 **Ill** 101, 159**NE**211 (evidence sufficient); **Ill** 172**NE**19 (keeping under lock and key); 98**WVa**326, 128**SE** 821.

252-99 233**Ky**579, 26**SW(2d)**532; 98 **WVa**326, 128**SE**821, 823 [citCJ]; 102 **WVa**267, 134**SE**597.

253-4 102**WVa**267, 134**SE**597.

253-5 102**WVa**267, 134**SE**597.

254-16 178**Minn**578, 228**NW**155.

254-23 But see 321**Mo** 863, 12**SW(2d)** 462.

254-25 231**NYS**618. [a] (2) Statute confers additional and independent remedy. **Pa** 151**A**897. [d] **In Missouri.**–321**Mo** 1042, 15**SW(2d)**342. [e] **In New York.**–131**Misc**2, 225**NYS**622. [f] **In Pennsylvania.**–299**Pa**517, 149**A**733.

254-27½-New. Where a new statute has been passed but has not gone into effect, the court properly disregards it in designating the officer to conduct a recount. 302**Mo** 564, 228**SW**1020.

254-29½-New. Under some constitutions it is within the discretion of the trial judge in an election contest to refuse to order the ballot boxes to be opened. 77**Colo** 478, 238**P**53.

254-29⅓-New. Application for recount should not be denied on ground of adequate remedy afforded by section relating to discrepancy in returns. 131**Misc** 2, 225**NYS**622.

254-29¼-New. Law providing for reexamination of voting machines and absentee ballots applies to cases of irregularities as well as discrepancies. 131 **Misc**2, 225**NYS**622.

255-36 77**Colo** 478, 238**P**53.

255-37 77**Colo** 478, 238**P**53; 77**Colo** 475, 238**P**57; 222**AppDiv**849, 226**NYS** 651; 139 **Okl** 271, 270**P**63; 39 **OklACR** 101; 286**Pa**257, 133**A**379; 7**PaDist&Co** 637. [a] 77**Colo** 478, 238**P**53; 77**Colo** 475, 238**P**57.

255-38½-New. It is not an abuse of discretion for the court in an election contest to refuse to direct that the ballot boxes be opened where the only proof of errors in the court is the statement of a witness for the contestor, who is unacquainted with the contents of the boxes, that mistakes would be disclosed which would change the entire election. 77 **Colo** 478, 238**P**53.

255-40 48**Philippine**243.

255-40½-New. Claim that some levers in voting machines stuck resulting in delay and disfranchising some voters held not basis for application to exam-

ine. .131Misc2, 225NYS622.

255-40½-New. Failure to recheck number on return slips ground for allowance of examination of voting machines. 131Misc2, 225NYS622.

255-40¼-New. Where closeness of vote is coupled with proof of discrepancies, discretion vested in the court should be exercised, so that doubt and lack of confidence in the result may be removed. 231NYS618.

255-41 216Ala251, 113S230; 155Tenn1, 290SW396.

255-42-231NYS618.

255-43 226Ky89, 10SW(2d)615; 222 AppDiv849, 226NYS651. [b] **In Pennsylvania.**-293Pa1, 141A633.

255-46 50Philippine221.

256-52 See also 10PaDist&Co 726; 10 PaDist&Co 759. [b] **Proof.-Colo** 292P 1061(2dcase).

256-53 34PortoRico 612.

256-61 [b] (1) Petition is required to be sustained by three separate and distinct affidavits of three separate electors. 6PaDist&Co 501.

256-62 See also 10PaDist&Co 537.

256-70 6PaDist&Co 501.

257-77½-New. After demurrer to petition is sustained, the court has no authority to order a recount. 215Ky199, 284SW997.

257-77¼-New. Sufficiency of petition for recount of election on bond issuance. 333 Ill 58, 164NE208.

257-80½-New. A demand for a recount of ballots is not timely, when made after the board of canvassers has ascertained and recorded the result of the election, and issued separate certificates thereof. 106WVa611, 146SE719.

257-81 [f] **In Pennsylvania.**-292Pa140, 140A854. [g] **Extent of court's authority.-Pa** 151A586.

257-83 [a] **Tampering with ballot boxes not shown.**-299Pa517, 149A733.

257-84 292Pa140, 140A854.

257-85½-New. Where the identification and explanation of duplicate numbered ballots was satisfactory but should be counted. **TexCivA** 275SW117.

257-85¼-New. After a recount and sealing, indorsing, and delivery of ballots to clerk it is duty of board to certify result. 102WVa696, 136SE266.

257-85¼-New. Review on certiorari is restricted to regularity of record of computation board's recount, although findings of fact concerning fundamental question may be considered. 292Pa140, 140A854.

257-85⅓-New. On such review regularity of first count is moot question where alleged additional votes on recount would not affect result. 292Pa140, 140 A854.

257-85⅓-New. Judges of election on recount may consult in private as to doubtful ballots and other questions. **Pa** 151A586.

257-85½-New. Court may correct erroneous though honest acts of election officials. **Pa** 151A586.

257-85½-New. Time for decision in recount proceeding. **Pa** 151A586.

257-87 [a] **Court's count of ballots prevails** where it appears that ballots were same as when counted by judges of election. **Ill** 172NE19.

257-93½-New. Second recount cannot be made after delivery of ballots and statement of result to clerk on motion of member of board because another member has succeeded in having ballots in one precinct recounted on some unsubstantial pretext or reason. 102WVa 696, 136SE266.

257-94 39 OklACR186 (plaintiff praying for recount cannot object to introduction of ballots by defendant). [a] (4) Rule in Connecticut see 102Conn579, 129A551.

258-96½-New. Mere request of defeated candidate that all ballots should be examined is not sufficient to invoke action of board. 35PortoRico 92.

259-18½-New. Refusal of contestants to proceed after denial of continuance justifies trial court in ordering dismissal. **TexCivA** 25SW(2d)153.

259-21 328 Ill 27, 159NE237. [a] (3) Failure of court to pass on contestant's demurrer to counter contest and motion to strike certain matters from answer and counter contest does not excuse contestant's failure to take proof within thirty days after reply was filed. 217 Ky436, 289SW677.

259-22 173Ark970, 294SW74. See also 332 Ill 500, 163NE792.

259-24½-New. In the Philippines the court may, for reasonable grounds, permit documentary evidence to be introduced after probatory period has closed. 51Philippine540 (certificate of candidacy).

259-28 124 Okl 251, 255P685; 39 OklA CR97.

259-29½-New. In the Philippine Islands, where the court's ruling on the protestee's motion to dismiss or demurrer to the evidence made after the protestant has rested is adverse to the protestee, the court must finally decide the contest without hearing the protestee's evidence. 50Philippine45.

259-30 [b] **Finding of contestant's capacity to vote is unnecessary** where not put in issue by sworn denial. 197 Ind 561, 151NE424.

260-38 102Conn579, 129A551.

260-49½-New. In Connecticut judgment must be rendered, judgment file drawn and filed in court and certificate of election under seal of court issued. 104Conn396, 133A107.

260-51½-New. Necessity for judgment file on petition for certificate of election. 111Conn338, 149A890.

261-60 159Tenn226, 17SW(2d)692.

261-64 215Ky573, 286SW793.

261-65 [c] 147Wash405, 266P166.

261-70½-New. Where contestant alleges and proves that he received a majority of the legal votes cast and that on account of illegal votes cast for the opposing party, the announced result was erroneous, the court may deduct the illegal votes and award the election to contestant. **TexCivA** 280SW873.

261-70¼-New. Where direct evidence is available to show how all alleged illegal votes were cast, the doctrine of apportionment cannot be applied. 159Tenn 226, 17SW(2d)692.

261-70¼-New. Where it is merely shown that the names of certain voters were on the tax books and subject to a poll tax and it appears that most of those who voted paid the tax, and it does not appear how they voted or that all voted, the doctrine of apportionment cannot be applied. 159Tenn226, 17 SW(2d)692.

261-71 215Ky30, 284SW111; 215Ky 566, 286SW797. [a] **New election** must be held. 60 OntL264 [1927] 2DomLR 977.

261-73 220Ky510, 295SW873; 235Ky 816, 32SW(2d)419; 292Pa389, 141A254 (facts held to warrant throwing out vote of entire ward).

261-74 234Ky574, 28SW(2d)735. See also 154Tenn679, 290SW399.

261-75 215Ky199, 284SW997; 287Pa 135, 134A477; 159Tenn226, 17SW(2d) 692.

262-82 48Philippine387.

262-89 316 Ill 534, 147NE388 (where rights of candidates not joined were affected, judgment held erroneous for want of necessary parties); 201 Iowa 1159, 208NW725.

263-10 [a] **In Texas.-CivA** 287SW304.

263-15½-New. Court has been held not to have abused discretion in denying motion to reopen suit. 322 Ill 265, 153 NE351.

263-16 116Tex662, 287SW45. See also 196Wis562, 221NW382.

264-17 But see 77Colo 272, 236P994.

264-18 [a] **In Oklahoma.**-139 Okl 85, 281P257.

264-19 [c] (4) Memorandum decision filed with clerk in statutory proceedings for certificate of election is final decision and appealable. 104Conn396, 133A107.

265-22 32NM231, 255P636.

265-26½-New. In the Philippines a candidate who has been declared ineligible by proclamation of the governor-general has no right to prosecute an appeal in an election contest. 50Philippine703.

265-28 173Ark970, 294SW74; 197 Ind 561, 151NE424.

265-29 [a] **Matters not changed in contestee's answer** cannot be considered on appeal. 215Ky199, 284SW997.

265-32 229Ky320, 17SW(2d)198.

265-34 235Ky758, 32SW(2d)324(1st case).

265-35 338 Ill 195, 170NE285(1stcase).

266-37 210Ky213, 275SW783; 225Ky 682, 9SW(2d)995. [a] (3) Also where no bond is executed on day judgment is rendered as required by statute and no casualty or misfortune or circumstances beyond control of contestant preventing him from executing bond on such day is shown. 210Ky213, 275SW783.

266-47 [b] **Service on respondent's wife is sufficient.-Wis** 232NW546.

267-72 155Miss858, 125S433 (statement as to absence of absentee applications properly considered). [d] **Matters waived.**-215Ky199, 284SW997.

268-78½-New. Where statute prescribes informal procedure, and judgment refers to written opinion, and it is duty of clerk to transmit original papers to the reviewing court, parts of the papers which he has failed to transmit but which are otherwise transmitted and sufficiently identified will be considered. 210Ky513, 276SW535.

268-78½-New. In Connecticut record on appeal not including the judgment file is defective. 104Conn396, 133A107.

268-83 155Miss858, 124S643 (appeal not dismissed on ex parte affidavit of appellee).

268-85 210Ky513, 276SW535. [a] **Rehearing denied by statute.**-8LaA8.

268-88 51Philippine540.

268-90½-New. Decision of lower court on sufficiency of notice of contest may be reviewed, although it appears in opinion only and opinion is brought before the court informally. 210Ky513, 276SW535.

268-91 210Ky513, 276SW535; 215Ky 566, 286SW797.

268-95 77Colo 475, 238P57; 299Pa517, 149A733.

268-95½-New. But where lower court recounts votes in certain precincts often sustaining demurrer to paragraph of petition asking recount in those and other precincts, court of appeals cannot presume lower court reconsidered ruling on demurrer. 215Ky199, 284SW 997.

268-98 77Colo 478, 238P53.

268-99 286Pa257, 133A379. [a] (2) Findings that certain ballots were legal and others illegal are conclusions of law and will be disregarded where not based on special findings. 197 Ind 561, 151NE424.

268-2 216Ala251, 113S230; 220Ky546, 295SW871; 286Pa257, 133A379; 292Pa 389, 141A254. [d] **So far as fundamental questions are concerned,** findings of fact of lower court may be considered. 299Pa517, 149A733.

269-3 222Ky201, 300SW597.

269-4 Colo 292P1061(2dcase) (election judges' finding as to voter's intention is not binding on appellate court).

269-8 197 Ind561, 151NE424.

269-9½-New. Trial court is held justified in holding women legal voters, where the contestants did not ask time to secure their attendance after learning they were not available. 81Colo 144, 254P150.

269-9½-New. Supreme court need not review all defective ballots where both sides agree that it need not do so. 328 Ill 576, 160NE215.

269-11 [d] (2) In contested election cases involving officers referred to in Shannon Code §§ 1308, 1309, cause is tried de novo on appeal. 159Tenn226, 17SW(2d)692.

269-17 102Conn579, 129A551 (sufficiency of petition not considered on appeal after ballot box has been opened); 331 Ill 296, 162NE835; Ind 168NE454; 215Ky199, 284SW997; 153 Miss722, 121S156; 287Pa135, 134A477; 51Philippine540. [g] **Failure to require witnesses** to answer questions as to bribery is held harmless where money did not come from successful candidate. 220Ky546, 295SW871. [h] **Defect in caption of notice and bond on appeal.**-128Kan632, 279P25.

270–25 [a] **Contest will not be remanded** to require all judges to sit in banc where one judge no longer holds judicial office. 292Pa389, 141A254.
270–36 But see 293Pa1, 141A633.
271–38 But see 35PortoRico 92.
271–43½–New. Certiorari does not lie to review discretion of board of elections in refusing to open ballots in absence of some irregularity on part of board. 35PortoRico 92.
271–45 [g] (4) Where contest is of election of borough tax collector and is sustained, court will direct borough to pay costs. 8PaDist&Co 158.
272–65½–New. The matter of taxing costs is for the trial judge to adjudicate. TexCivA 21SW(2d)582.
273–71 48Philippine223.
273–73 10PaDist&Co 810.
274–81 11PaDist&Co 381, 382 [citCJ].
274–3 7Alaska177.
274–5 [b] **Statute prohibiting conveyance of voters to voting place** does not contemplate that one may not permit friends and neighbors to ride with him to polls. TexCivA 4SW(2d)249. [c] **Altering or forging election return certificate by candidate.**–Offense complete without reference to fraudulent intent. 229Ky776, 18SW(2d)290.
274–7 [a] **Printing or causing to be printed ballot with illegal change of names**, so as to procure advantage at polls constitutes felony. Wis 232NW 564.
275–12 280US396, 50SCt167, 74Led508 (2dcase).
277–39 33 OhA1, 168NE550 (applicable to primary elections).
278–57 36GaA286, 136SE334.
279–60 36GaA286, 136SE334.
281–84 122 Okl 95, 251P497. [f] Construction of statute. 213Ky810, 281SW 999; 213Ky817, 281SW1002. [g] **With secretary of territory.**–29Hawaii169.
281–85 122 Okl 95, 251P497. [b] **In Oklahoma.**–37 OklACR413.
281–85½–New. Failure of the prevailing candidate to file a statement as required by the statute renders the election void. 213Ky810, 281SW999.
281–85⅓–New. A candidate contesting an election for failure to comply with such statute cannot be declared elected as having received a majority of the legal ballots where he also failed to comply substantially with the statute. 213 Ky817, 281SW1002.
281–90 230Ky689, 20SW(2d)727 (promise to pay taxes of widows and orphans).
281–95½–New. Representative in congress receiving money from officers and employees of United States for promoting his nomination at primaries is guilty of violation of Federal Corrupt Practice Act of 1925. 280US396, 50SCt 167, 74Led508(2dcase).
281–1½–New. It is a misdemeanor in some jurisdictions for a candidate to circulate and distribute, while polls are open, campaign cards in furtherance of his candidacy. 170Minn465, 213NW 48.
281–1⅓–New. Publication in a newspaper by a candidate for sheriff that he would not claim for himself delinquent tax penalties collected on delinquent property taxes is not a violation of the statute prohibiting promises of anything of value by candidates. SD 213NW362.
284–48½–New. Offense of attempting to influence vote of employees by threatening discharge is against employees and not elections. 194Wis636, 217NW412.
284–48⅓–New. Referendum is "election" within statute prohibiting attempt to influence votes of employees by threatening discharge. 194Wis636, 217 NW412.
284–48¼–New. To constitute offense under such statute attempt must be to influence votes for particular man or measure. 194Wis636, 217NW412.
284–53½–New. [§ 415b] q. **Contracting to Support Measure in Consideration of Support at Polls.** Statute prohibiting candidate from entering into contract to vote for or support a particular thing or measure in consideration of support at the polls does not refer to promises made by a candidate to the entire people. 210Ky285, 275SW797.
284–53⅓–New. Such statute is not violated by proposal of candidate for office of county attorney that the fiscal court take a sum from the salary of the office and turn it over to the road fund. 210Ky285, 275SW797.
284–64½–New. In prosecution for attempt to influence votes of employees failure to strictly comply with statute in calling election is no defense. 194 Wis636, 217NW412.
284–64⅓–New. Nor is defendant relieved from liability because election had not been formally called and notice posted at time of offense. 194Wis636, 217NW412.
289–41 See also 315Mo 156, 285SW718.
289–47 See also 315Mo 156, 285SW718.
290–63 See also 251 IllA314.
290–65 See also 108TexCr344, 1SW(2d) 291.
291–74 33 OhA1, 168NE550.
293–11 [a] (2) Affidavit, charging that defendant accepted sum of money for his promise to permit named individual to name appointees to certain city offices if defendant was elected mayor, sufficiently alleged violation of statute. IndA 166NE603.
293–15½–New. Indictment charging that defendant became agent of another to obtain poll tax receipt is insufficient where it does not definitely set out the offense. TexCivA 299SW899.
295–54½–New. **For altering or forging returns by candidate.** An indictment need not allege facts constituting common-law forgery. 229Ky776, 18SW(2d) 290.
295–54⅓–New. Such indictment need not allege the name of the party intended to be defrauded, nor need it set forth the instrument according to its tenor. 229Ky776, 18SW(2d)290.
295–54¼–New. Nor is it necessary that such indictment allege that the alterations were made without authority. 229Ky776, 18SW(2d)290.
295–54⅕–New. Validity of the returns need not be alleged. 229Ky776, 18SW (2d)290.
296–75½–New. Defendant is required to explain why the names appearing in his handwriting are those of nonvoters. 33 OhA1, 168NE550.
298–14 33 OhA1, 168NE550 (evidence held sufficient). [b] (2) Evidence that defendant promised that, if elected mayor, he would permit A to name majority of board of public works and city civil engineer, and that A paid defendant ten thousand dollars, has been held to warrant conviction. IndA 166NE603. [i] (1) See also 315Mo 156, 285SW718. (2) Evidence held not to sustain conviction of illegal voting. 108TexCr344, 1SW(2d)291. [q] **Attempt to influence votes of employees.**–194Wis636, 217NW 412. [r] **Conducting fraudulent election.**–92PaSuper175.
299–15 112TexCr329, 16SW(2d)818(1st case) (corroborating evidence held insufficient to sustain conviction).
299–26 229Ky776, 18SW(2d)290; 33 OhA1, 168NE550. [b] **Evidence held sufficient for jury** in prosecution for fraudulent voting at primary. 315Mo 156, 285SW718.
299–28 229Ky776, 18SW(2d)290; 315 Mo 156, 285SW718.
300–30½–New. Under a statute providing for fine, imprisonment, and ineligibility to public office for four years, a verdict and judgment of fine and imprisonment is not contrary to law because of the further provision that defendant be ineligible for office for a designated period. IndA 166NE603.
300–31 [a] (3) Verdict assessing punishment for fraudulent voting at primary election held within law. 315Mo 156, 285SW718 (year's imprisonment in penitentiary and one thousand dollars fine). [c] (2) Rule is otherwise in some jurisdictions. 122 Okl 95, 251P497. (3) Statute providing for cumulative punishment of fine, imprisonment, and disfranchisement from office violates constitutional provision relative to disqualification of voters and office holders. 168La648, 123S111.
300–34 36GaA286, 136SE334.
301–62 255 IllA288 (not governed by common-law rules).
301–63 [b] **Evidence admissible.**–255 IllA288.
301–63½–New. A court of equity has no power to pass on questions involving violation of the Corrupt Practice Act where the relief sought by the bill follows as an incident to a conviction under the statute. 122 Okl 95, 251P497.
301–63⅓–New. Special proceedings under Corrupt Practices Act. Wis 231NW 590.

ELECTRICITY

305–3 196NC359, 145SE684.
305–10 [c] **Conditional seller of generating unit to city is not public utility,** subject to control of public utilities commission so as to require permit or certificate of necessity. Utah 279P878.
305–11 Utah 279P878 (city not required to procure certificate of convenience and necessity from public utilities commission).
305–12 [b] **Capacity of plant.**–248Mich 34, 226NW680 (constitution construed as not limiting capacity plant). [c] **Where plant is not owned,** but city gets current by contract, it may nevertheless sell its excess current outside city limits. 197NC740, 150SE624. [d] **Disposal of excess current** to outsiders is proper exercise of municipality's powers. 197NC740, 150SE624.
306–15 197NC740, 150SE624.
306–15½–New. A city furnishing the public with electricity becomes a public service business. 142Miss885, 108S141.
306–15⅓–New. Unless forbidden by statute, authorized acquisition and operation by municipality of a public utility such as an electric light plant may be accompanied by purpose to prevent competition by another owner operating similar utility. 38F(2d)466.
306–17½–New. The railroad commission cannot disregard the rights of an existing company. 198Wis13, 222NW 783.
306–22 84Colo 494, 271P629.
307–24 Iowa 227NW514.
307–26 [a] (2) To take to jury question whether meters included in contract. 222MoA184, 296SW1047.
307–28 [a] 163Ga829, 137SE257. [b] **Meters.**–163Ga829, 137SE257. [c] **Deposits.**–163Ga829, 137SE257 (ordinance held reasonable).
307–33 [a] **Charge for service has been held illegal** where not fixed by ordinance, resolution, order, or any other official action. LaA 129S433.
307–34 [a] **Street railways and electric light plants** are within statutory definition of "electric company." 150 Wash690, 274P791.
307–41 319 Ill 66, 149NE580.
307–43 320Mo 1146, 9SW(2d)589.
307–44 [c] **Illegality in transfer of stock to foreign holding corporation** does not warrant denial of leave to issue new stock to same corporation. 227 AppDiv18, 236NYS411.
308–45½–New. A newly organized foreign corporation which is inactive although possessing practically unlimited powers is not an "electrical corporation" within the statute which may be authorized to acquire stock of a similar corporation. 215AppDiv578, 214NYS294.
308–45⅓–New. Public service commission may, in its discretion, refuse permission to electrical corporation to purchase stock of another where detrimental to the public, 154Md445, 140A840.
308–45¼–New. but if it gives reason for refusing permission, and such reason does not warrant refusal, action of commission will be set aside. 154Md 445, 140A840.
308–50 206 Iowa9, 216NW683.
308–57½–New. The contract is binding on city and company. 176Ark774, 4SW (2d)15, 58ALR534.
308–59½–New. A municipal ordinance granting the right to construct an electric light plant for the distribution and sale of current to the inhabitants and to maintain it for a period of years and

requiring the holder of the franchise to pay to the municipality a stated per cent of the gross receipts when they exceed a stated amount per year is not an attempt to enact revenue legislation within the meaning of a state constitution. 115 **Okl** 73, 242**P**254.

308–59¼–New. It has been held improper to grant a certificate of convenience and necessity where another company was adequately serving consumers. 320 **Ill** 427, 151**NE**236.

308–59¼–New. Approval of public service commission required for extension of electrical company claiming state-wide charter. 153**Md**523, 138**A** 487.

308–59½–New. In exercising state-wide franchise each town is regarded as separate unit. 153**Md**523, 138**A**487.

308–59½–New. A petition for initiation of proceedings for an electric franchise is not illegal because it contains the proposed franchise ordinance. 208 **Iowa** 36, 222**NW**882.

308–59½–New. Fraud or collusion in procuring franchise not shown. 169**Ga** 649, 151**SE**513.

308–59¾–New. Statutes granting privileges in streets contemplate only incorporated companies. 35 **OhA**481, 172**NE** 615.

308–59½–New. Formal acceptance of ordinance granting franchise is unnecessary. 35 **OhA**481, 172**NE**615.

308–62 [a] **Operation under county franchise not authorized** without authority from public service commission. **Mo** 31**SW(2d)**67.

309–72½–New. Resolution of village council drawn by electric company must be construed against company in matters of reasonable doubt. 219**AppDiv** 531, 219**NYS**537.

309–72½–New. Public service corporation accepting conditions imposed by municipality in consideration of right given to construct works must perform conditions or suffer penalty. **Pa** 152**A** 23.

309–77 153**Md**229, 137**A**899. [a] (7) Poles may not be placed beyond road. 153**Md**229, 137**A**899. [b] **Landowner's submission to erection of poles** is held not equivalent to license. 153**Md**229, 137**A**899.

309–77½–New. Right to erect poles within limits of highway may be acquired by contract or condemnation. 153**Md**229, 137**A**899.

309–77½–New. The consideration named in a grant of a right of way for power transmission lines and the right to construct, maintain, and remove the same includes payment for depreciation of land value notwithstanding provision in contract that consideration does not include damages from construction. 148**Va**431, 139**SE**247.

309–77¼–New. Such provision does not entitle the landowner to recover such damages as would be recoverable in condemnation proceedings. 148**Va**431, 139 **SE**247.

309–78 224**Ky**33, 5**SW(2d)**283.

309–80 [a] **Right to install electrical conduits under streets** is subject to police power of municipality. **Pa** 152**A** 23. [b] **Corporation owning electrical conduits under street must move conduits at own expense,** necessitated by construction of municipal subway. **Pa** 152**A**23.

310–86 [b] **Company may lease poles** on streets to other corporation, though latter has not municipal consent. 300 **Pa**134, 150**A**300.

310–88½–New. Where the grant was of right of way with power to prevent "obstructions," dwelling house is considered "obstruction." 214**Ala**643, 108**SS**868, 46 **ALR**1459.

310–88½–New. Power company assumes burden of correctly ascertaining and cutting only "danger tree" adjacent to its right of way. 214**Ala**643, 108**SS** 868, 46**ALR**1459.

310–88¼–New. Owner of fee granting right of way can use strip for any purpose not conflicting with right of company. 214**Ala**643, 108**SS**868, 46**ALR**1459.

310–88½–New. Sufficiency of notice given by selectmen to abutting owners of a grant to an electric company to construct electric lines within location of the railroad right of way is not open to collateral attack. **Mass** 166**NE**739.

310–88½–New. Sufficiency of notice by selectmen to abutting owners has been held properly raised by a petition for writ of certiorari seeking to quash the selectmen's order purporting to grant an electric company permission to construct transmission lines. **Mass** 166**NE** 739.

310–88½–New. Where there was no tax assessment to any owners of land abutting on way, selectmen have been held not required by statute to give notice to abutting owners before hearings on the petition of the company for location. **Mass** 166**NE**739.

310–88¼–New. The rule of mutual accommodation and forbearance prevails as between a lessee and an electric company having a license or easement from the owner to cross property with its high-tension wires, and such license or easement does not give the company exclusive use of the property crossed by its line; but the lessee, as holder of a dominant tenement, has a right to use the premises. 225**AppDiv**444, 233**NYS** 545.

310–88½–New. An electric company, under provisions of the franchise ordinance, may have authority to maintain a transmission line of high voltage on streets of a town. **Iowa** 227**NW**173.

310–91 224**Ky**33, 5**SW(2d)**283. [b] **Grant and agreement may give continuing right** to maintain power line. 230 **AppDiv**328, 243**NYS**599. [c] **Tenant takes land subject to company's rights** under prior written easement. 230**App Div**328, 243**NYS**599.

310–94 [a] **Landowner is not justified in interfering with work** where valuable trees are destroyed in resetting line of poles. **IndA** 169**NE**880.

310–1 [a] **Erection for private use.**–101 **WVa**15, 131**SE**712.

311–4½–New. Use of right of way for power lines must not interfere with use of land by servient owner. 77**CalA**328, 246**P**559.

311–4½–New. Power company transgressing extent of user of way for wires becomes trespasser. 77**CalA**328, 246**P** 559.

311–4¼–New. Company must pay owners of timber lease for trees cut down in right of way. 169**Ky**1065, 278**SW**571.

311–6 [a] (4) Corporation chartered for purpose of supplying heat, light, and power by electricity may, as incident to business, sell electrical appliances. 300 **Pa**577, 151**A**344.

311–12 [b] **Where petition is filed by electric company with state department of public utilities under statute,** requiring location through town, department had jurisdiction to determine whether company had location for its lines in other towns. **Mass** 166**NE**739.

312–22 [a] (11) Promissory notes held not "bonds." 36**F(2d)**603.

312–22½–New. An encumbrance on the property of an electric company, not made in accordance with statute, is void and cannot be validated by the commission. 221**MoA**814, 288**SW**95.

312–23½–New. Merger of electric light, heat, and power company with hydroelectric or water power company should be accelerated by liberal construction of acts empowering merger or purchase. 287**Pa**241, 134**A**419.

312–23½–New. Merger of company furnishing electricity with hydroelectric or water power cannot take place until power to furnish water is discarded. 287**Pa**241, 134**A**419.

312–23¼–New. Hydroelectric company cannot, under guise of acquiring water power, extend, through excessive steam construction, electric current in districts not covered by own charter. 287**Pa**241, 134**A**419.

313–35 [m] **Waiver of provisions.**–206 **Iowa**9, 216**NW**683.

315–47 NB [1925] 3**DomLR**387 (where court warned defendant, it proceeded at own risk and there was serious interference with plaintiff's vested rights).

315–47 [b] **Statute removing right; discretion as to retroaction.–NB** [1925] 3**DomLR**387.

315–52 87**Colo** 556, 289**P**1090 (territory outside municipal boundaries); **NB** [1925] 3**DomLR**387.

315–53 [a] **Defendant held entitled to enter into contract with city for erection of electric power plant** and distribution system notwithstanding existing contract whereby plaintiff was to furnish city with electric current. 32**F(2d)**693; 32**F(2d)**696.

315–54 202**Cal** 382, 260**P**1101, 1103 [quotCJ], 56**ALR**414; **TexCommA** 29 **SW(2d)**329 (priority in time creates no liability).

315–56 202**Cal** 382, 260**P**1101, 1103, 56 **ALR**414.

316–64 [a] **Railroad commission has no power** to adjudicate amount of damage to telegraph company from negligent construction or maintenance of parallel circuit system by power company. 197 **Cal** 426, 241**P**81, 86 [citCJ].

316–73½–New. Right to challenge exclusive character of franchise is in city and not in competitor. 153**Md**523, 138**A** 487.

316–73½–New. Electrical company claiming state-wide franchise can not extend lines without consent of city and public service commission. 153**Md**523, 138**A**487.

317–80 313**Mo** 283, 281**SW**709.

317–81 274**US**12, 47**SCt**480, 71**L ed**898.

317–86 [a] **In Missouri.**–7**F(2d)**806.

317–86½–New. Purchase by municipality. In some jurisdictions statutes provide a method for acquisition of the electric lighting property of corporations where the municipality has expressed a willingness to buy and the corporation has agreed to sell. 8**Pa Dist&Co** 200.

317–86½–New. Where the company built its plant under an agreement giving the borough the right to buy it at the end of a certain period, and the borough exercises the option to buy but the price cannot be agreed upon, the court may appoint viewers at the instance of the borough. 8**PaDist&Co** 200.

317–86¼–New. Showing that company is giving poor service is not necessary to authorize sale of its property. 130 **Kan**867, 288**P**556.

317–86½–New. A company acquiring property and rights of the grantee of a franchise for electric lighting necessarily accepts the burdens as well as the benefits of the franchise. 121 **Oh**235, 167**NE**877.

317–86¼–New. Purchaser of electric energy whose contract is not interfered with cannot complain of sale of electric transmission property. 130**Kan**867, 288 **P**556.

317–86½–New. Order of public service commission permitting transmission company to sell its property held not rendered void by vote on application for rehearing. 130**Kan**867, 288**P**556.

317–92 113 **OhSt**325, 149**NE**129 (indeterminate franchise); 35 **OhA**481, 172 **NE**615.

317–93 274**US**12, 47**SCt**480, 71**L ed**898; 313**Mo** 283, 281**SW**709.

317–94 121 **Oh**235, 167**NE**877.

318–5 274**US**12, 47**SCt**480, 71**L ed**898; **Mass** 166**NE**739; 313**Mo** 283, 281**SW**709.

318–6 203 **Iowa**1364, 214**NW**571.

318–10 313**Mo** 283, 281**SW**709.

319–11 313**Mo** 283, 281**SW**709; 229**App Div**526, 242**NYS**398. [d] (3) There is no abandonment by nonuser where franchise is exercised by distribution over transmission lines of another company under contract. 224**AppDiv**687, 229**NYS** 138.

319–13 226**AppDiv**825, 235**NYS**27.

320–19 203 **Iowa**1364, 214**NW**571.

320–19½–New. Ouster after termination of franchise should be postponed until determination of amount due for improvements city agreed to purchase. 203 **Iowa**1364, 214**NW**571.

320–19½–New. Purchase of improvements is held not condition precedent to right to terminate franchise under ordinance. 203 **Iowa**1364, 214**NW**571.

320–19¼–New. Where a corporation, applying for permission to surrender certain of its powers as conferred by charter, unless allowed to surrender such powers, would result in having its assets exhausted, a decree allowing sur-

render of such powers as petitioned for was held proper. 295Pa228, 145A128.
320-19½-New. No estoppel against city is created by continued use of streets by company after expiration of franchise. 35 OhA481, 172NE615.
320-21 125Kan70, 262P536.
320-26 [a] **Board of aldermen** acts as independent board in behalf of commonwealth. 263Mass81, 160NE413.
320-30 6F(2d)633; 102NJEq213, 140A261.
321-32 [e] 226AppDiv702, 234NYS174 (sale of electricity by electric railroad).
321-34 319 Ill 66, 149NE580; 124Kan 690, 261P592; 153Md464, 138A404; 154 Md445, 140A840; 102NJEq213, 140A 261. [a] (4) Statute providing that no stock corporation other than gas, electric, or street railroad corporation shall require more than ten per cent of total stock of such corporation without consent of public service commission held not violated by transfer of all of electric and gas company's common stock without consent where such transfer was less than ten per cent of entire stock. 227AppDiv18, 236NYS411. (5) Ownership by gas and electric corporation of all stock of subsidiary electric company does not give it interest in specific assets of subsidiary, but such assets belong to subsidiary which operates property and is responsible to public service commission. 227AppDiv18, 236NYS411. (6) Question of public policy is not involved in granting or refusing domestic electric corporation's application to sell its capital stock to foreign corporation, if there has been compliance with statute. 227AppDiv18, 236NYS411. (7) Though statute requires consent of public service commission for sale by domestic electric company of its stock to another corporation, such commission may not refuse consent arbitrarily or unreasonably. 227AppDiv18, 236NYS411. (8) Public service commission's refusal of electric corporation's application for leave to sell specified amount of common stock to foreign holding corporation held unreasonable, since operating company is subject to commission's regulatory powers. 227AppDiv18, 236NYS 411. (9) Contract to supply electricity by corporation not subject to provisions of public service commission has been held void. 137Misc197, 242NYS413. [c] **Regulation of rules of company.**-310 Mo 313, 275SW940. [d] **In Alabama.**-216Ala558, 114S46 (Code § 9741). [e] **Municipally owned and operated plants** are not subject to regulation or control of public utilities commission. Utah 279 P878. [f] **Review of orders** of public utilities commission. 87Colo 556, 289P 1090. [g] **Authority to determine public necessity** of furnishing electricity to community. Mo 31SW(2d)67. [h] **Extension of lines to new territory.**-Mo 31 SW(2d)67.
321-36 124Kan690, 261P592; 102NJEq 213, 140A261.
321-37 NJSup 147A735 (board has general supervision of, and jurisdiction over, electricity while in the ownership of public utility).
321-39 124Kan690, 261P592 (permit). [g] **Order denying company** right to supply electricity outside limits of municipality is held void. 78Colo 361, 242P72. [h] 56ND468, 217NW841. [i] **Requiring construction of line to prevent interference with telephone line.**-Mo 31SW(2d)67. [j] **Valid local consent is necessary** before public service commission can issue certificate of convenience or necessity. 229AppDiv526, 242NYS398.
322-40 [d] **In Kansas.**-124Kan690, 261 P592.
322-40½-New. Municipal plant is not unwarranted as duplication of existing facilities where city had been furnishing service in past. 153Md464, 138A404.
322-44 310Mo 313, 275SW940. [a] **Policy for regulation of public utilities** is to provide public with efficient service at a reasonable rate and to protect established public utilities from a ruinous competition. 320 Ill 427, 151NE236.
322-45 310Mo 313, 275SW940. [c] **Order of commission as to elevation of heavy voltage power lines** includes all subsisting lines. 87CalA44. 261P1107.
323-56½-New. Statute held to authorize order to take depositions on certiorari to review order of commissions. 102NJEq186, 140A261.
323-56¾-New. The granting of a certificate of public convenience approving acquisition by a municipality of an electric light plant is required by some statutes before any action can be effectively taken leading to such acquisition. 88 PaSuper495.
323-56¼-New. The granting of such certificate does not determine the validity or scope of subsequent proceedings. 88 PaSuper495.
324-63½-New. Franchise tax is measured by length of wires and not pole line. 103NJL281, 135A677.
324-63¾-New. Division between a county and a city of the tax paid by the holder of an electric light and power franchise has been held proper. 87CalA 744, 263P249.
324-67 Ala 128S454.
325-78 Iowa 231NW461.
325-80 204 Iowa1246, 214NW879, 54 ALR474.
325-82 204 Iowa1246, 214NW879, 54 ALR474.
325-86 Iowa 231NW461 (conflicting statutes construed). [c] **State highway commission** has no power to grant electric power transmission line over or upon any state highway under its control or supervision. 53ND742, 208NW 108. [d] **Power to impose conditions.**-58ND33, 224NW871, 63ALR1337. [e] **Decision of commissioners is controlling** on question of interference of transmission line with public use of highways. Iowa 231NW461.
326-87 197Cal 426, 241P81 (commission may require telegraph company to relocate its line at such distance from line of power transmission company as to prevent induction interference).
326-93 83NH551, 145A786.
326-94 [e] 58ND33, 224NW871, 63 ALR1337.
327-96 See also Iowa 223NW236(4th case). [d] **Restriction** as to location of poles may be waived by city. GaA 155 SE80 (acquiescence).
327-99 [b] (3) Maintenance of pole in public highway without permit created nuisance requiring city to remove it. 263Mass81, 160NE413.
328-4 104NJL480, 141A673.
328-12 [b] **Court on certiorari to review order** as to cost of relocation need not consider constitutional objections not set forth in application for rehearing. 197Cal 426, 241P81. [c] **Jurisdiction of commission** to make order dividing expense of relocation between telegraph and power companies does not rest on wisdom or unwisdom of decision. 197Cal 426, 241P81. [d] **Departure of commission** from its own precedent as to cost of relocation is not subject to control of court. 197Cal 426, 241P81. [e] **In determining whether telegraph company's line** or line of power company should be relocated to prevent interferences by induction, comparatively small cost of relocating telegraph line is proper for consideration. 197Cal 426, 241P81. [f] **Order of railroad commission** dividing costs of relocating telegraph line between telegraph and power transmission companies not disturbed on appeal. 197Cal 426, 241P81.
329-15½-New. Entry upon streets without franchise may be enjoined by city regardless of damages. 204 Iowa 1246, 214NW879, 54ALR474.
329-17 6F(2d)633. [d] **State has power to increase or lower rate** despite preexisting contract by company with consumer. 128Misc335, 219NYS418.
329-18 6F(2d)633; 308Mo 328, 275SW 940; 229AppDiv295, 241NYS162.
329-19 Iowa 223NW476.
329-20 [c] (3) Act making decisions of commission conclusive is not invalid as denying due process by way of judicial review, since finality of its conclusion on facts does not extend to jurisdictional facts. 6F(2d)633.
329-22 LaA 129S433 (necessity of ordinance, resolution, or formal orders); 229AppDiv295, 241NYS162. [a] **City charter giving power to fix rates held not in conflict** with statute giving public commission power to regulate rates. 229 AppDiv295. 241NYS162.
329-23 6F(2d)633; 157Tenn582, 12SW (2d)372 (extent of power). [f] **Public service commission is not court.**-308Mo 328, 275SW940. [g] **Public service commission cannot construe or enforce contracts.**-308Mo 328, 275SW940. [h] **Extent of powers.**-58ND33, 224NW871, 63 ALR1337.
329-25 229AppDiv295, 241NYS162.
329-26 7Alaska341; Ida 289P81 (court cannot fix rate for electricity); 229App Div295, 241NYS162. [b] **Determination of legislative intent** is judicial function, consideration being given to objects sought by legislature. 229AppDiv295, 241NYS162.
329-29 308Mo 328, 275SW940; Utah 279P878 (conditional sales contract for purchase of generating unit by city held not delegation to seller of rate fixing and charges).
330-30 6F(2d)633.
330-31 [a] **Where city fixes maximum rate,** it owes duty to franchise holder to enforce rate as both minimum and maximum rate. Iowa 223NW476.
330-32 229AppDiv295, 241NYS162.
330-33 19F(2d)547. [c] **Schedule of rates** prescribing discount of one third to charitable and other nonprofit institutions is unauthorized. 19F(2d)547. [d] **Schedule of rates** providing that users of power for irrigation should continue to receive service at same rates is unauthorized. 19F(2d)547.
330-34 [f] **Special contract** to furnish electrical energy to another utility corporation must be filed. 197Cal 376, 241 P76. [g] **Failure of plaintiff to file with railroad commission** letters modifying original contract does not enable defendant to avoid payment of legal charge. 197Cal 376, 241P76.
330-35 229AppDiv295, 241NYS162; 119 Oh282, 163NE914. [c] **Company charging less than established rates** for period of time may revert to legal rate without sanction of commission. 197 Cal 376, 241P76. [d] **Letters modifying original contract** to supply energy so as to render energy charge less held "device" for remitting portion of charge in violation of Public Utilities Act. 197 Cal 376, 241P76.
330-39 Iowa 223NW476 (in competition with utility operated by city).
331-46 6F(2d)633; 19F(2d)547; Utah 271P961; 151Va52, 144SE439 (reasonableness determined as of time of inquiry). [a] (4) Rates must be fair both to public and to investors. 308Mo 328, 275SW940.
331-47 23F(2d)891; 7Alaska341; 308 Mo 328, 275SW940; 229AppDiv295, 241 NYS162. [d] **Purpose of Public Service Act** is to require general public to pay such rates as will keep public utility plants in repair for effective public service and insure investors reasonable return upon funds invested. 308Mo 328, 275SW940. [e] **It is to public interest** that rate fixed by commission should afford an adequate return to company on value of property. 6F(2d)633. [f] **Electric rates need not be uniform** but each should be above cost of the particular service. 19F(2d)547. [g] **Public utilities commission, in determining whether electric rates are reasonable,** must act on facts and be governed by considerations intrinsic to service. 19 F(2d)547. [h] **Electric rates of sixtenths of a cent** and of one cent per kw. h. for water heating held unwarranted as not being substantially compensatory. 19F(2d)547. [i] **Electric rates for air heating** fixing amounts ranging from $24.05 to $217.10 for six months' service held invalid as not sufficient to cover bare operating costs. 19F(2d)547.
331-48 118 Oh592, 162NE262. [b] **City should receive return** on general city funds used in construction of electric plant. 229AppDiv295, 241NYS162. [c] **Rules regarding return on capital invested** do not apply in determining rates for electricity furnished by municipality. 229AppDiv295, 241NYS162.
331-48½-New. Fair return depends on circumstances and location, including rate of interest. 25F(2d)485.
331-49 19F(2d)547; Oh 162NE262. [a]

(15) Reproduction value for rate fixing purposes should include reasonable allowance for organization or other overhead charges. 267US359, 45SCt259, 69 L ed656. (16) Other decisions as to computation of value. 19F(2d)547.

331-50 Ida 289P81.

331-53 19F(2d)547; CalA 275P835.

331-53½-New. Depreciation depends on whether property has same value it would have if new. 19F(2d)547.

331-53¾-New. Factor's material in negotiating sale will be considered in determining depreciation such as near decay, deterioration, obsolescence, inadequacy, and redundancy. 19F(2d)547.

331-53¼-New. In determining depreciation information from actual inspection is preferred to percentage method. 19F(2d)547.

331-55½-New. The public service commission cannot be influenced or controlled by contracts between utility and consumers. 308Mo 328, 275SW940.

331-55¾-New. The rule applies although a public utility has a central electrical plant and smaller plants from some of which certain consumers are supplied with electricity and steam heat or with one or the other and that some of the local plants are not used for supply of electricity in summer. 308Mo 328, 275SW940.

331-55¼-New. No contract as to rates is of any force in determining the reasonableness of rates fixed by the public service commission. 308Mo 328, 275SW 940.

331-57 [b] Iowa 223NW476.

332-60½-New. Where a corporation, empowered to manufacture and furnish heat by electricity, heat by steam, electric light, and electric power, applies for increase of rates separately or generally, instrumentalities used in producing steam and electricity must be allocated and rate for each commodity must be apportioned so that there may be reasonable return on the whole investment and users of one commodity may not be subjected to burden of supporting the other. 308Mo 328, 275SW940.

332-60¾-New. Where public service commission established experimental rate, court will be slow to interfere therewith and will not vacate order without showing that it is unreasonable. 308Mo 328, 275SW940.

332-60¼-New. Value of unreasonable excess of equipment will be excluded in determining base for rates. 153Md464, 138A404.

332-60⅛-New. An unexpired contract does not authorize the public service company to charge less rate for services rendered than that provided by effective schedules. 128Misc335, 219NYS418.

332-60⅛-New. When proportionate part of electricity is generated in plant without state, proportion of plant's value must be included in rate base. 143 Wash67, 254P839.

332-60⅞-New. Filing of list of wholesale customers with contract rates paid by each is not filing of schedule of rates under statutes. 17F(2d)46.

332-60⅛-New. Consumer's contract rights may be enforced regardless of schedule of electric rate adopted after contract made. 19F(2d)547.

332-60⅛-New. Valuation set by public utilities department is not to be disturbed except for fundamental error of fact or law. 25F(2d)485.

332-60 1/10-New. Rates fixed by public utilities department are presumed reasonable. 25F(2d)485.

332-60 1/11-New. Court cannot fix rate at which electricity is to be furnished by company not constituting a public utility. 119 Oh12, 162NE45 (company held not public utility).

332-61 19F(2d)547. [d] **Statute regarding public utilities** is held to contemplate but one valuation proceeding, except revaluation, subsequent proceedings being rate-making proceedings. 143Wash67, 254P839. [e] **Who is "aggrieved party"** entitled to resort to public service for relief. 229AppDiv295, 241NYS162.

332-63½-New. Order authorizing erection of electric plant is not unlawful for failure to make a finding of necessity or convenience. 153Md464, 138A404.

332-65 307Mo 536, 271SW43 (notice to customer of increase in charge is unnecessary where company exercised option already possessed under schedule of rates and charges previously filed with public service commission).

332-67 153Md464, 138A404. [c] (1) 143Wash67, 254P839. (2) Writ must be sued out where hearing is held or commenced, but, in case of other orders when proceedings are instituted. 143 Wash67, 254P839. [f] (2) On appeal burden of proof is on appellant to prove order is incorrect. 214Ala164, 107S71. [h] 214Ala164, 107S71. [i] **On appeal from order of public service commission** trial is de novo. 214Ala164, 107S71. [j] **Act making decision of commission conclusive** is not invalid as denying due process by way of judicial review, since its determination of jurisdictional facts is subject to review. 6F(2d)633. [k] **Power to vacate or set aside order** is confined to grounds that rate is unlawful or regulation unreasonable. 153Md 464, 138A404. [l] **In Alabama.**-214Ala 164, 107S71. [m] **On appeal court cannot make classification of rates,** it can pass judgment only upon the legality or reasonableness of the action and nullify or sustain classification. 214Ala164, 107 S71. [n] **Order denying application for rehearing** is final order from which appeal lies as from original order reducing sales. 213Ala374, 204S814. [o] **Security for costs on appeal** may show appeal was from order denying application for rehearing and hence in time. 213Ala374, 104S814. [p] **On review of decision of intermediate courts.**-310Mo 313, 275SW940. [q] **Where evidence is conflicting,** court must determine value of services, and quantity consumed; if rate is unreasonable, court should fix reasonable rate and allow recovery. Miss 128S71. [r] **Where electric rates are involved** and complicated accounts are to be unraveled, public service commission is necessary party. 229AppDiv 295, 241NYS162.

332-67½-New. Municipality interested in a proceeding attacking an order of the commission authorizing it to erect plant is proper party. 153Md464, 138A 404.

332-68 Miss 128S71. [a] (4) 20F(2d) 816.

332-69 19F(2d)547; 151Va52, 144SE439.

332-70 151Va52, 144SE439.

332-70½-New. Statute making commission's findings prima facie lawful is not applicable to findings affected by error. 83NH551, 145A786.

332-71 19F(2d)547.

332-72 19F(2d)547. [a] (2) 20F(2d) 816. [b] (1) 25F(2d)485. [c] **Rejecting and reducing items** without justifying evidence held arbitrary. 267US359, 45SCt259, 69L ed656.

332-73½-New. Courts are powerless to set aside order of commission except on clear and satisfactory evidence. 153Md 464, 138A404.

332-73¼-New. Evidence held insufficient to show order authorizing municipal electric plant unlawful or unreasonable. 153Md464, 138A404.

332-74½-New. Appeal. Party appearing and taking part in proceedings has been declared a complainant and entitled to appeal. 46RI 496, 129A495.

332-74⅛-New. Error in rate valuation proceedings in not excluding property no longer used may be corrected as palpable error at subsequent hearing. 143 Wash67, 254P839.

332-74¼-New. A municipality has no standing to appeal from an order refusing to approve a contract where the municipality made a new contract which is actually in effect. 88PaSuper314.

332-74⅛-New. All presumptions are in favor of the action of the public service commission in approving or disapproving the acquisition of one electric light company by another or by a municipality. 88PaSuper369.

332-74¼-New. An action by a duly constituted quorum of the public utilities commission is valid. 88PaSuper495.

332-74½-New. An order of the public service commission, approving or disapproving the acquisition of one electric light company by another or by a municipality, will be sustained when there is ample evidence to support the conclusions of the commission. 88Pa Super369 (order approving acquisition by borough sustained).

332-74¼-New. Under some statutes the commissioner who heard the testimony need not be present when the testimony is reviewed and the case is decided. 88 PaSuper495.

332-74½-New. It will be presumed that testimony taken by a commissioner was examined and that all controverted points were considered when the commission sat to hear arguments on the law and the evidence, and a report was filed by a lawfully constituted quorum. 88PaSuper495.

332-74 1/10-New. Difference in rates between two competing companies to acquire utility is a material fact bearing on the question of the public good. 83 NH551, 145A786.

333-77 142Miss885, 108S141. [a] **Company is not insurer** of continuous service. 198Wis595, 225NW200.

333-82 176Ark774, 4SW(2d)15, 58ALR 534.

333-83 Iowa 228NW644; 240Mich667, 216NW385, 55ALR768; 142Miss885, 108 S141; 197Wis1, 220NW173. But see 197 NC766, 150SE621. [d] **Semipublic utility corporation** is within rule. 240Mich 667, 216NW385, 55ALR768.

333-86 220Ala620, 127S206.

333-87 220Ala620, 127S206.

333-88 220Ala620, 127S206; Iowa 228 NW644; 240Mich667, 216NW385, 55 ALR768; NJSup 147A735. [d] (5) Company may be entitled to require patron to pay construction cost of line. 243Mich444, 220NW768.

333-89½-New. And a rule to be binding on consumer must be of such character as to put a person of ordinary knowledge on his guard. 125Misc279, 211NYS441.

333-89⅛-New. A consumer is not bound by a rule stating that the company does not guarantee continuous service, where the rule is not part of his contract, 125Misc279, 211NYS441.

333-89¼-New. and the consumer has no knowledge of such rule. 125Misc279, 211NYS441.

333-89⅛-New. Posting and publishing such rule does not relieve the company from furnishing electric power. 125 Misc279, 211NYS441.

333-89⅛-New. It is not optional with the company to decide whether service is continuous, 125Misc279, 211NYS441.

333-89½-New. or at what time, 125Misc 279, 211NYS441.

333-89⅛-New. or in what manner it shall serve the public. 125Misc279, 211 NYS441.

333-90 Iowa 228NW644; 240Mich667, 216NW385, 386 [quotCJ], 55ALR768; 145Miss352, 110S673; 224AppDiv448, 231NYS308; 146SC85, 143SE650. [b] **Separate contracts.**-146SC85, 143SE650. [c] **Tender of amount for future service** does not bind company to furnish power to subscriber in arrears for past service. Iowa 228NW644. [d] **Consumer's belief as to erroneous bill** is not sufficient to create liability for refusing service for refusal to pay it. 231Ky558, 21SW (2d)976. [e] **Applying cut-off rule** requires that company know that its rules have been violated after presentation of correct bill. 231Ky558, 21SW(2d)976.

333-90½-New. regardless of the fact that the patron claims company is indebted to him for an unliquidated demand. 145Miss352, 110S673.

333-91 240Mich667, 216NW385, 386 [quotCJ], 55ALR768. But see Iowa 225 NW861. [b] **Dispute as to refund due customer under construction contract** does not authorize customer to refuse payment for electricity furnished or prevent company from cutting off supply for such refusal. 146SC85, 143SE 650.

334-92 240Mich667, 216NW385, 386 [quotCJ], 55ALR768; TexCivA 291SW 622.

334-92½-New. or a claim for service to another person at the same place, 142 Miss885, 108S141.

334-93 240Mich667, 216NW385, 386 [quotCJ], 55ALR768. [a] (2) Refusal of company, furnishing water and light, because applicant would not fulfill conditions applying to furnishing of water, was unjustified. 243Mich444, 220 NW768.

334-94 See also 243Mich444, 220NW 768.

334-97½-New. Light company is not insurer against interruption of current by uncontrollable causes. 216Ala290, 113S18, 52ALR1075.

334-97½-New. A provision of a contract for supplying electricity to a consumer, authorizing an electric company to remove a meter from the consumer's premises in order to protect itself from fraud and abuse, must be reasonably applied, and it is only fraud or abuse of the consumer, or at most that of those for whom he is responsible, and not that of third persons having no connection or relation with him, that is within the provision. 167La122, 118S860.

334-97¼-New. An electric company removing a meter from a consumer's residence either because it was a fire hazard or because it had been tampered with, without a charge that the consumer was guilty of the tampering, was under duty immediately to replace it with another. 167La122, 118S860.

334-97½-New. Right of defendant to solicit customers of other companies. 32F(2d)693; 32F(2d)696.

334-99 29 Oh4, 162NE755; 151Va52, 144SE439. [a] (10) Contract between city and public utilities company is not invalid for want of mutuality because of power of legislature to regulate rates. 268US232, 45SCt488, 69Led930. [b] (16) One contracting for entire output of plant of stated capacity held not harmed by use of larger plant where current furnished was under maximum capacity agreed on. 101CalA153, 281P 415. (17) Other instances. 101CalA 153, 281P415. [n] **Public interest in contract.**-218AppDiv377, 218NYS339. [o] **Contract held to impose no duty on company** to notify customer of suspension during repairs. 216Ala290, 113S18, 52ALR1075. [p] **Syndicate succeeding to power company's business** is not liable on on predecessor's contract where there was no merger or consolidation or ratification. 207Iowa820, 221NW194 (furnishing free light and heat to director). [q] **Franchise contracts.**-58ND 33, 224NW871, 63ALR1337. [r] **Effect of destruction of premises.**-96CalA322, 274P84.

335-1 94CalA343, 271P377.

335-2 151Va52, 144SE439.

335-3 6F(2d)633; 308Mo328, 275SW 940; 128Misc335, 219NYS418; 88PaSuper314; 151Va52, 144SE439. [d] **Contract rates are not private contract rights.**-308Mo 328, 275SW940.

335-4 [c] **Franchise contract.**-58ND33, 224NW871, 63ALR1337.

336-5 6F(2d)633; 131Okl205, 268P 248. [c] **Company may exercise option** under filed schedule without giving notice to consumer or commission. 307Mo 536, 271SW43. [d] **Contemplation of dedication to public use.**-6F(2d)633.

336-6 [a] **Right of consumer to contend** that rates are excessive. LaA 129S433.

336-9 19F(2d)547; Ida 289P81; 151 Va52, 144SE439. [a] **City's contract to pay for plant equipment out of net earnings** does not violate its duty to fix reasonable rates where contracting parties agreed that earnings should be based on reasonable charges. Nebr 228NW114. [b] **Only one affected can complain of rate.** Ida 289P81.

336-10 Ida 289P81. [d] **In Arkansas.**-169Ark1065, 278SW353. [e] **Court cannot substitute its judgment** for city council's as to what rates are reasonable, unless substantial right is adversely affected. Ida 289P81.

336-11 110Conn417, 148A337, 67ALR 814. Ida 289P81; 55ND805, 215NW287, 288 [citCJ] (location of transformers).

336-12 Ida 289P81.

336-15 131Okl205, 268P248.

336-18 [a]. (4) Acceptance by consumers of rules and regulations promulgated by a municipality operating electric plant does not constitute contract binding on city. 163Ga829, 137SE257.

336-20½-New. Where electricity used for lights is merely incidental to electricity used as power, a consumer is not required to pay a greater rate for electricity used for light than for the other electricity. 216MoA590, 262SW59.

336-20½-New. The fact that an electric light plant is a public utility under supervision of the corporation commission will not render a contract with a municipality granting the right to install a plant and sell electricity invalid where the corporation commission has not exercised its paramount power to fix rates to be charged by such utility. 115Okl 73, 242P254.

336-20¼-New. Particular contracts construed. 6F(2d)633.

336-20½-New. Accord and satisfaction operate to prevent recovery for balance due on current furnished where company accepts checks for monthly bills, claim being in dispute. 122Kan19, 251P431.

336-20¾-New. Estoppel does not lie against a public utility electric company in an action by it to collect the balance of the full legal rate for service which it had performed for a customer who had paid bills erroneously rendered for less than the legal rate. 123Kan321, 255P33.

336-20½-New. Termination of consumer's service as director of power company released it from liability under contract to continue to furnish free electricity in consideration of such services as director. 207Iowa820, 221NW194.

336-20¾-New. Property of school district held liable for cost of furnishing electric energy by city to district. Mont 287P164.

336-22 CalA 275P835; 110Conn417, 148A337, 67ALR814; 99Fla954, 128S 402; 206Iowa261, 218NW563, 565 [citCJ]; 233Ky68, 24SW(2d)928; 240Mich 667, 216NW385, 55ALR768 (semipublic utility company held within rule).

337-25 Ida 289P81; LaA 129S433.

337-30 [b] **Acts held not discriminatory.**-NJSup 147A735. [c] **Facts not constituting discrimination.**-Ida 289P81.

337-31 Ida 289P81.

337-32 11PaDist&Co 4. [b] **Furnishing free light to municipality,** by purchaser of municipal light plant, is not discriminatory against private consumers. 24 OhA251, 157NE410.

338-33 214Ala164, 107S71; 110Conn 417, 148A337, 67ALR814.

338-35 145Miss352, 111S142. [c] (2) Consumer cannot complain of cut off supply where he had reasonable opportunity to adjust differences arising out of excessive bills and failed to do so. 213Ala166, 104S407. (3) Company is liable for failure to supply power caused by something which could have been foreseen. 125Misc279, 211NYS441. [e] **Application.**-125Misc279, 211NYS441.

338-36 NB [1929] 1DomLR34.

338-38 [a] **Complaint alleging tender and refusal** of electric power under contract held not to state cause of action. 38F(2d)948.

338-39 28OhA351, 162NE725.

338-46½-New. An assignee of a contract whereby a city agreed to take and pay for electricity to be supplied by another city which assigned the contract is entitled to specific performance of the contract where the city which agreed to accept and pay for the electricity repudiated the contract after it had been performed on both sides for several years. 127Kan59, 272P158.

339-52 [a] (15) Counts held defective for failure to allege that consumer ascertained correct amount due and paid or tendered such amount to company before it cut off current. 213Ala166, 104S 407. (16) Counts not demurrable as showing reasonable opportunity for plaintiff to adjust differences after notified of excessive amount and before supply cut off. 213Ala166, 104S407. (17) Bill stated equitable cause. 220Ala620, 127S206. (18) Demurrers to counts charging company wantonly disconnected electric current properly overruled. Ala 130S224. [b] (4) 224AppDiv448, 231NYS308. [c] (2) To sustain finding that company's rule requiring use of certain switch was reasonable and would not damage contractor's business. 220 Ala620, 127S206. (3) To establish loss of profits, as damages, with reasonable certainty. 231Ky558, 21SW(2d)976. [d] (2) Whether company wantonly disconnected electric current to customer's residence. Ala 130S224. [e] (2) That consumer published newspaper articles displeasing to power company does not necessarily show that company acted thereon in cutting off power. Iowa 228 NW644. [f] **Parties.**-136Wash116, 238P 641. [g] **Instructions properly refused.**-Ala 130S224.

339-53 [d] **Evidence held insufficient** to establish that rate of municipally owned utility was discriminatory. Ida 289P81. [e] **Burden of proof.**-Ida 289P 81.

339-54 [d] (5) Other instances. 110 Conn417, 148A337, 67ALR814. [f] (2) Whether term "capacity" was used in ordinary or technical trade sense is for jury. 101CalA153, 281P415. (3) Other instances. 231Ky558, 21SW(2d)976. [g] (2) Instruction that jury in contract action must determine if plant was of agreed capacity and, if so, that defendant was bound to accept entire output is proper. 101CalA153, 281P415. (3) Instruction that word "about" allowed only slight variation from stated capacity was properly refused. 101CalA 153, 281P415. [h] **Instruction properly refused.**-148Va879, 139SE480.

339-55 [b] 151Va52, 144SE439.

340-59 167La122, 118S860; 240Mich 667, 216NW385, 55ALR768 (amount of award held justified by proofs); 148Va 879, 139SE480 (compensatory damages only). [g] **Verdict of twenty dollars** held proper for failure of company to furnish power to run motion picture show, though plaintiff returned forty-nine dollars to patrons, as he did not have to pay for heat and janitor service. 125Misc279, 211NYS441. [h] **Minimizing damages.**-171Ark86, 284SW529, 46 ALR1186. [i] **Where improvement district takes over waterworks** after electric company's breach of contract to furnish city electric power therefor, running of damages in favor of city stops on formation of improvement district. 171 Ark86, 284SW529, 46ALR1186. [j] **Award for interruption of service** held not supported by evidence. 198Wis595, 225NW200. [k] **Award for interruption of service** held sufficient, and not affected by evidence. 198Wis595, 225NW200. [l] **Nominal damages** for disconnecting lights. 13LaA515, 128S538 (under evidence). [m] **Punitive damages.**-Ala 130 S224. [n] **Damages held excessive.**-Ala 130S224.

340-62 [a] **Measure of damages is not determined** by difference between contract price and proceeds of resale of electrical energy, under statute, applicable to damages for breach of contract for sale of personal property. 96CalA 322, 274P84.

340-67 128Me207, 146A700; MoA 238SW (2d)225; 143Wash319, 255P380. [b] **Statute applicable to power companies.**-187Wis161, 204NW773.

341-68 31F(2d)717; 173Ark910, 294 SW44; 90Fla207, 105S330, 41ALR1323; 37GaA244, 139SE579; 223Ky33, 5SW (2d)283; 7LaA401; 128Me207, 146A 700; 262Mass81, 159NE447; 315Mo 1136, 287SW1031; 316Mo317, 289SW 597, 49ALR1034 (as to children); 242 NY436, 152NE253.

341-69 38OklACR260. See also 187 Wis161, 204NW773.

341-70½-New. The neglect of a third person to take precautions to protect an injured employee does not excuse defendant whose negligence, combined with that of the third person, caused the injury. 81NH451, 130A145.

341-71 35GaA777, 134SE813.

341-72 219Ala546, 122S677; 101CalA 318, 281P677; 217AppDiv206, 216NYS 516; 219AppDiv620, 221NYS66; 224 AppDiv182, 230NYS860.

341-73 35GaA777, 134SE813; 167Minn 48, 208NW524. [a] **Care is more exacting** in case of children. 167Minn48, 208 NW524.

342-74 19F(2d)732; 216Ala388, 113S 250, 251 [citCJ]; Ala 128S211; 90Fla

207, 105S330, 41ALR1323; 41 Ida106, 238P517; 321 Ill 341, 151NE886; 205 Iowa730, 218NW343; Iowa 232NW421; Me 146A800 (vendor of electricity is bound to exercise due care and diligence in construction, maintenance, inspection, and operation of its lines and in selection, installation, and inspection of its appliances); 167Minn48, 208NW524; 178Minn604, 228NW332; 252NY454, 169 NE644; 187Wis161, 204NW773 (dictum).

342-75 21F(2d)958; 203Cal 634, 265P 487, 489 [citCJ]; 203 Iowa471, 212NW 884.

342-79 80Colo 375, 251P224; 228Ky44, 14SW(2d)208; 315Mo 1136, 287SW1031; 192NC784, 136SE9; Or 291P365.

343-80 77CalA328, 246P559; 199Wis4, 225NW179; Wis 233NW91.

343-81 106Conn302, 138A147.

343-82 224Ky33, 5SW(2d)283; 233Ky 224, 25SW(2d)366; 233Ky230, 25SW (2d)370; 167Minn48, 208NW524; 315 Mo 1136, 287SW1031; Mo 26SW(2d) 770; 218MoA138, 262SW403; 221MoA 644, 283SW705; MoA 9SW(2d)813; MoA 23SW(2d)225; 287Pa280, 135A 253; 6PaDist&Co 315.

343-84 292Pa537, 141A496.

344-87 217AppDiv206, 216NYS516. [a] **Electric company is liable for injuries** which person of ordinary prudence, in light of surrounding circumstances, would reasonably and naturally have anticipated. 218MoA138, 262SW403.

344-89½-New. That person would use electrical appliance in improper manner is not to be reasonably anticipated. 216Ala388, 113S250.

344-89½-New. Extraordinary care and diligence are not required. 35GaA777, 134SE813.

344-89¼-New. Storekeeper is not liable to customer for injuries received in turning on electric light in improper manner. 216Ala388, 113S250.

344-89½-New. Compliance with conditions under which public service corporations are permitted to maintain wires along streets and highways does not, as matter of law, absolve them from negligence in respect of persons injured on their own premises. 179Minn46, 228 NW342.

344-91 214Ala530, 108S373, 374 [cit CJ]; 80Colo 375, 251P224; 39GaA379, 147SE396; Iowa 232NW421; 2LaA405; 2LaA517; 156SC158, 153SE119; 143 Wash319, 255P380.

344-92 101CalA174, 281P634 (rule does not relieve company from exercise of ordinary care); 224Ky33, 5SW(2d)283. [c] **Necessity that custom be consistent with due care.**–203Cal 634, 265P487.

344-96 142Va761, 128SE362.

345-2 19F(2d)732; 217AppDiv206, 216 NYS516; 287Pa280, 135A253; 157Tenn 391, 8SW(2d)495, 62ALR495. [a] (12) Liable for injuries resulting from lack of due care in performance, where voluntarily undertaking to make repairs on premises of customer. 307Mo 607, 271 SW788. (13) Company need not anticipate crossing of wires by radio wires. 221MoA644, 283SW705. [b] **All possible consequences from high voltage wires** need not be foreseen to render company liable. 217AppDiv206, 216 NYS516. [c] **Power company charged with notice** of defective construction of transmission line. 145Va409, 134SE558.

345-3 35F(2d)616 [citCJ] (duty to provide means for cutting off dangerous current in case of fire); 76CalA569, 245P468; 224AppDiv223, 229NYS766; 225AppDiv444, 233NYS545; 117 Or652, 244P665; 157Tenn391, 8SW(2d)495, 62 ALR495.

345-5½-New. Mere leaving of telephone wires on house from which telephone has been removed before death by lightning is not negligence as matter of law. 286Pa427, 133A629.

345-7 168Ark914, 272SW59 [quotCJ]; 77CalA328, 246P559; 37GaA244, 139SE 579; 39GaA379, 147SE396 (persons on adjoining premises); 315Mo 1136, 287 SW1031; 219AppDiv620, 221NYS66; 55ND805, 215NW287, 288 [citCJ].

345-8 168Ark914, 272SW59 [quotCJ]; 77CalA328, 246P559; 228Ky44, 14SW (2d)208.

346-9 168Ark914, 272SW59 [quotCJ]; 77CalA328, 246P559; 315Mo 1136, 287 SW1031.

346-10 39GaA379, 147SE396.

346-11 77CalA328, 246P559; 37GaA 244, 139SE579; 315Mo 1136, 287SW 1031; 142Va761, 128SE362 [quotCJ]. [c] (1) 315Mo 1136, 287SW1031. (2) 315Mo 1136, 287SW1031. (3) Negligence in maintaining power line through tree is measured by use which company might reasonably anticipate would be made of tree. 203Cal 634, 265P487. (4) Power company can be charged with negligence in maintaining wire through tree, though wire was insulated. 203Cal 634, 265P487.

346-12 55ND805, 215NW287, 288 [cit CJ]; 142Va761, 128SE362 [quotCJ].

347-15 55ND805, 215NW287; 38 Okl ACR260.

347-16 GaA 155SE80; 263Mass81, 160 NE413; 38 OklACR260.

347-17 102CalA422, 283P353; MoA 282 SW490; 103NJL639, 137A426; 38 Okl ACR260.

347-18 38 OklACR260.

348-20 173Ark910, 294SW44; 316Mo 317, 289SW597, 49ALR1034.

348-21 97Fla314, 120S842; 178Minn 604, 228NW332 (wires sufficiently high).

348-25 41 Ida106, 238P517 (sagging wire within reach of child).

348-32½-New. A company maintaining high tension wires alongside of a highway is not relieved from liability for failure to protect wires from the falling limb of a tree causing it to sag because the tree is on private property. 76CalA569, 245P468.

348-32¼-New. A statute regulating the height of wires at a "road crossing" does not apply to an injury one hundred and fifty feet from a crossing. 152Va 903, 147SE249.

349-43 102CalA422, 283P353; 82NH 440, 136A259; 192Wis231, 212NW273.

349-44 142Va761, 128SE362.

349-45 84CalA465, 258P394.

349-46 143Wash319, 255P380.

349-48 41 Ida106, 238P517, 520 [cit CJ].

350-54 102CalA422, 283P353; 117 Or 652, 245P317; Or 291P365; Vt 139A 441.

351-55 203Cal 634, 265P487.

351-56 315Mo 1136, 287SW1031.

351-57 321 Ill 341, 151NE886 (climbing tree in grass plot on public street); 315 Mo 1136, 287SW1031; 82NH440, 136A 259; 224AppDiv182, 230NYS60; 117 Or 652, 245P317.

352-61 [b] (19) Other instances. 102 CalA422, 283P353. [c] (15) Where owner of alley had permitted children to use it for twenty years. 82NH440, 136 A259. (16) Tenants who cut down tree which in falling broke electric wire running along highway. 224Ky33, 5 SW(2d)283. (17) Member of consumer's family electrocuted on taking hold of electric light cord while cleaning stove is not trespasser. 11LaA557, 123S396 (2dcase).

353-62 315Mo 1136, 287SW1031. [a] (4) Other instances. MoA 31SW(2d)123.

353-63 IndA 168NE465 (fourteen-year-old boy climbing bridge girder was trespasser); 316Mo 317, 289SW597, 49 ALR1034.

353-64 [a] (17) Electric light and power wire twenty-two feet from ground on pole set in parking in street equipped with cleats and steps is not attractive nuisance as to boy fourteen years of age who climbed it in spite of warning. 315Mo 32, 285SW455, 49ALR1047. (18) Pole without appliance to facilitate ascent within eight and a half feet from ground, carrying uninsulated transmission wire thirteen feet from ground, is not attractive nuisance though situated near creek and trees resorted to by children. 316Mo 317, 289SW597, 49ALR 1034. (19) Other cases not within exception. Kan 273P397; 58ND347, 220 NW851.

353-65 248 IllA204; 315Mo 1136, 287 SW1031; 117 Or652, 244P665, 669 [cit CJ]. [b] 315Mo 1136, 287SW1031; 117 Or652, 244P665 [citCJ]. [c] **Children held not trespassers.**–197NC433, 149SE 549.

353-68½-New. Child in public street has right to ascend as well as to travel horizontally. 315Mo 1136, 287SW1031.

353-69 168Ark914, 272SW59 [quotCJ].

353-70 168Ark914, 272SW59 [quotCJ]; TexCivA 18SW(2d)688. [g] **Custom of** linesman to take hold of anything available as handhold overcomes objection of defendant that invitation to joint use of pole did not warrant taking hold of cable. 81NH451, 130A145.

354-71 168Ark914, 272SW59 [quotCJ].

354-71½-New. Person electrocuted while in mine preparatory to entering employment is invitee. 143Va168, 130 SE403.

354-73 73CalA712, 239P344; 217AppDiv206, 216NYS516.

354-74 [a] (5) City employee's use of electric light pole, maintained without permit, was trespass or license imposing no duty on light company to maintain pole. 263Mass81, 160NE413.

354-79 28 OhA434, 162NE765.

355-85½-New. Owner of building has no duty to warn employee of independent contractor of danger from contact with electric wires. 257Mass507, 154 NE174.

355-87 180Ark1003, 24SW(2d)846; 37 GaA244, 139SE579; IndA 168NE465; 178Minn604, 228NW332; 315Mo 1136, 287SW1031; 322Mo 514, 17SW(2d)960; MoA 9SW(2d)813; 219AppDiv620, 221 NYS66; TexCivA 19SW(2d)816; 142Va 761, 128SE362. [a] (2) 315Mo 1136, 287 SW1031. [c] (3) Power company, maintaining uninsulated high-voltage wire, so exposed that worker in removing chimney might, and did, come in contact therewith, held liable for worker's injury, though it had warned employer contractor. NJSup 147A654. [d] **Instruction that company owed high degree** of care to keep high voltage wires properly insulated held error. 173Ark 910, 294SW44.

355-88 37GaA244, 139SE579; 315Mo 1136, 287SW1031; 225AppDiv184, 232 NYS330; TexCivA 300SW975.

356-90 30 OhA232, 164NE769.

356-91 180Ark1003, 24SW(2d)846.

356-95 168Ark1074, 272SW688; 180 Ark1003, 24SW(2d)846; 149SC375, 147 SE321.

356-96 13F(2d)846; 168Ark1074, 272 SW688; 173Ark910, 294SW44, 48 [quot CJ]; Iowa 227NW173 (insulation for height of forty feet held proper construction); 228Ky329, 14SW(2d)1087; 178Minn604, 228NW332 (twenty-five and one-half feet above spur track).

356-98 99Fla1086, 128S430 (company must exercise extraordinary activity to detect and remedy dangerous condition); 233Ky224, 25SW(2d)366; 218 MoA138, 262SW403; 158Tenn278, 12 SW(2d)947.

357-99 35GaA777, 134SE813; 233Ky 224, 25SW(2d)366.

357-5 19F(2d)732.

357-7 19F(2d)732.

357-9 See also 158Tenn278, 12SW(2d) 947.

357-11½-New. An electric power company maintaining high tension wires along a public highway is not relieved from liability for injuries to a person coming in contact with wires caused to sag during a storm unless the storm is one which could not reasonably have been anticipated. 76CalA569, 245P468.

357-11½-New. The franchise ordinance of the city prescribing the duties of the electric light company is not conclusive upon a pedestrian in an action brought by the latter against the light company for damages. 31 OhA118, 166NE588.

357-13 11LaA557, 123S396(2dcase) (electric company held negligent in running high voltage wire so close to secondary wire and so near limb of tree, that both wires touched same limb).

357-14 168Ark1019, 273SW1; GaA 155 SE83; 315Mo 1136, 287SW1031; 219 AppDiv620, 221NYS66.

358-15 219AppDiv620, 221NYS66.

359-19 [c] **Electric company is not liable for failure to raise wires** after knowledge that boom of crane was dangerously close to wires. 230AppDiv328, 243NYS599.

359-26 292Pa537, 141A496.

359-27 19**F(2d)**732; 180**Ark**1003, 24 **SW(2d)**846; 87**CalA**44, 261**P**1107; 102 **CalA**422, 283**P**353; 128**Me**207, 146**A**700; 307**Mo** 607, 271**SW**788; **MoA** 9**SW(2d)** 813; 219**AppDiv**620, 221**NYS**66; 195**NC** 788, 143**SE**861; 6**PaDist&Co** 315. [b] (1) 219**AppDiv**620, 221**NYS**66.

359-29 [a] (2) There is no duty imposed on defendant utility to inspect wires to enable it to be fully aware at all times of condition of wires. 106**Conn** 302, 138**A**147.

359-30 199**Wis**4, 225**NW**179.

360-34 **CalA** 259**P**973; 40**GaA**830, 151 **SE**696; 242**NY**436, 152**NE**253. [a] (5) It is not duty of electric company, after furnishing meter box to keep watch to prevent its being placed in dangerous position. 242**NY**436, 152**NE**253. [b] (5) Power company knowing of electrocution of third party by contact with sagging wires near highway and turning on current without examining line is negligent. **OhA** 173**NE**33. [c] (8) Where company permitted movable meter box to remain on premises for some weeks before it fell on workman, it was held not liable where it did not know of dangerous position of box. 242**NY** 436, 152**NE**253. (9) Electric light company is charged with knowledge of age, condition, weight, and location of wires and strength of their supports. **Tex CivA** 1**SW(2d)**513.

360-35 199**Wis**4, 225**NW**179.

360-36 315**Mo** 1136, 287**SW**1031.

361-39 158**Tenn**278, 12**SW(2d)**947.

361-40 232**Ky**262, 22**SW(2d)**620.

361-44 180**Ark**705, 22**SW(2d)**380.

361-44½-New. An electric light and power company must know the condition of its property and keep it safe, so that it may not do damage to others. 11**LaA**557, 123**S**396(2dcase).

362-47 [a] (3) 28 **OhA**434, 162**NE**765. [c] (3) Statute requiring full insulation at points where public may come in contact with wires is not limited to situations where possible or practicable. 86 **IndA**170, 154**NE**877.

362-55 232**Ky**262, 22**SW(2d)**620; 31 **OhA**118, 166**NE**588. [d] **Construction of transmission line so near building** as to make it dangerous to throw water on building through fire hose is not interference with property. 35**F(2d)**616.

363-69½-New. Excessive current on wire causing injury is actionable. 315 **Mo** 367, 286**SW**106.

363-69½-New. An electrician in all internal wiring is charged with the duty to look out for prevention of fires communicable by an electric spark. 219**Ala** 546, 122**S**677.

363-75 **TexCivA** 24**SW(2d)**762.

364-79 202**Cal** 638, 262**P**327.

364-81 [b] **"Premises"** has been held to mean station itself not grounds over which line was built. 145**Va**409, 134**SE** 558.

364-82 287**Pa**280, 135**A**253; 142**Va**761, 128**SE**362.

364-84 142**Va**761, 128**SE**362. See also **Wis** 233**NW**91.

364-86 **WVa** 153**SE**245.

365-87 **NJ** 149**A**767.

365-88 84**CalA**465, 258**P**394; 221**Ky** 517, 299**SW**166 (principle affirmed).

366-93 102**CalA**422, 283**P**353.

366-96 214**Ala**530, 108**S**373; 145**Va**409, 134**SE**558.

366-98½-New. A contractor, agreeing simply to repair electric company's high tension wires, is not liable for injuries to company's employee coming in contact with them on theory that contractor was under duty to change location of wires and to box and cover them with insulation. 101**WVa**79, 131**SE**717.

366-1 219**Ala**546, 122**S**677; 168**Ark**914, 272**SW**59 [quotCJ]; 218**MoA**138, 262**SW** 403; 145**Va**409, 134**SE**558.

367-2 168**Ark**914, 272**SW**59 [quotCJ]; 81**NH**451, 130**A**145; 21 **OhA**154, 153**NE** 88. [b] (4) Telephone company furnishing pole to traction company for joint occupation and undertaking its maintenance assumed duty to employees of traction company to keep pole safe for climbing. 81**NH**451, 130**A**145.

367-5 See also **TexCommnA** 6**SW(2d)** 344.

367-9 219**Ala**546, 122**S**677; 37**GaA**244, 139**SE**579; 233**Ky**224, 25**SW(2d)**366; 128**Me**207, 146**A**700; 218**MoA**138, 262 **SW**403; 286**Pa**427, 133**A**629.

367-10 157**Tenn**391, 8**SW(2d)**495, 62 **ALR**495. [a] (30) Uninsulated wire passing through tree which child climbed, came into contact with wire and was injured. 315**Mo** 1136, 287**SW** 1031. (31) Transmission of electricity over defective lines on consumer's grounds. 145**Va**409, 134**SE**558. (32) Permitting escape of current held proximate cause of injury to boy from contact with guy wire. 315**Mo** 1136, 287**SW** 1031. (33) Negligence of electrician doing internal wiring in failing to prevent fires communicable by electric spark may be regarded as endangering persons rightfully employed in building as well as building itself. 219**Ala**546, 122**S**677. (34) Proximate cause of death by electrocution held not taking hold by decedent of electric light cord, but negligence of defendant in maintaining high and low voltage wires close together. 11**LaA**557, 123**S**396(2dcase). (35) Other instances. 293**Pa**131, 141**A** 734. (36) Other instances. **GaA** 155**SE** 83. [b] (12) Other instances. 208 **Iowa** 369, 226**NW**151; 293**Pa**131, 141**A**734.

368-12 **TexCivA** 300**SW**975.

370-16 219**AppDiv**620, 221**NYS**66; 38 **OklACR**260. [a] (3) Telephone company's negligence in erecting pole near railway's high power wire held not to relieve railway from liability. 219**App Div**620, 221**NYS**66.

370-17 126**Kan**521, 268**P**847; 233**Ky** 224, 25**SW(2d)**366; [a] (1) 190**NC**664, 130**SE**735 (where lightning caused molten mass to drop from transmission lines and ignite inflammable material negligently on right of way).

370-18 37**GaA**244, 139**SE**579; 38 **OklA CR**260. [a] (3) Where injury caused by escape of electricity through leaning pole and swinging mast arm and third person failed to take measures to protect injured person, as he agreed to do. 81**NH**451, 130**A**145.

370-19 **GaA** 155**SE**83.

370-22 37**GaA**244, 139**SE**579.

370-22½-New. The rule is applicable in determining whether or not defendant has been negligent. 81**NH**451, 130**A**145 (dictum).

370-22½-New. But where negligence of defendant is the proximate cause of the injury, it is liable, even though it could not have foreseen the concurring of a third person. 81**NH**451, 130**A**145.

371-23 221**MoA**644, 283**SW**705; 81**NH** 451, 130**A**145.

371-24 37**GaA**244, 139**SE**579.

371-25 37**GaA**244, 139**SE**579. [a] **Held not natural consequence.**–Death of workman held not natural consequence of location of uninsulated wire. 101**CalA** 318, 281**P**677.

372-27½-New. That a person fell against uninsulated wires when he became dizzy or faint does not make such fall the proximate cause of his injuries. 322**Mo** 514, 17**SW(2d)**960.

372-30 35**GaA**482, 133**SE**643; **Wis** 233 **NW**91.

372-32 **TexCivA** 292**SW**935.

372-34 219**Ala**546, 122**S**677; **Md** 150**A** 452 (negligence not measurable by degree of voltage in wires); **TexCivA** 300 **SW**975 (plaintiff not guilty of contributory negligence as matter of law); **Wis** 233**NW**91. See also 80**Colo** 375, 251**P** 224. [a] (6) Negligence of telephone lineman in jerking coil of wire so that it recoiled and came in contact with live wire of electric light company on whose poles he was stringing wires constitutes contributory negligence. 173**Ark**1100, 294**SW**409.

372-36 **IndA** 168**NE**465 (fourteen-year-old boy climbing bridge girder and contacting with electric wire thereon held contributorily negligent as matter of law); 117 **Or**652, 244**P**665; **Or** 291**P**365. [a] (9) Boy climbing tree, not knowing of guy wire and not seeing it, is not guilty of contributory negligence. 315 **Mo** 1136, 287**SW**1031. (10) Boy flying kite with copper wire for string held guilty of contributory negligence, proximate cause of injury. **Iowa** 227**NW**173.

373-37 13**F(2d)**846; 214**Ala**678, 108**S** 610; 173**Ark**1100, 294**SW**409; 35**GaA** 482, 133**SE**643; 315**Mo** 32, 285**SW**455, 49**ALR**1047; **MoA** 282**SW**490; 230**App Div**328, 243**NYS**599; 284**Pa**112, 130**A** 309; 199**Wis**4, 225**NW**179. [a] (17) Workman repairing building of electric company is guilty of contributory negligence in swinging wire used in fastening pulley within few inches of high tension wires, after warning of danger. 13**F(2d)** 846.

374-39 See also 80**Colo** 375, 251**P**224.

375-42 [a] (4) Telephone lineman stringing wires on pole of electric light company is required to use ordinary care for his own safety. 173**Ark**1100, 294**SW**409.

375-42½-New. But a lineman is not required, as a matter of law, to inspect situation to learn whether or not defendant was keeping its pole in a safe condition. 81**NH**451, 130**A**145.

375-43 102**NJL**288, 132**A**253.

375-53 214**Ala**678, 108**S**610; 181**Ark** 886, 28**SW(2d)**710 (party held chargeable with knowledge); 315**Mo** 353, 287 **SW**341.

375-54 219**Ala**546, 122**S**677.

376-55 181**Ark**886, 28**SW(2d)**710 (test of contributory negligence); **Md** 150**A** 452 (failure to observe known peril as preventing application of implied negligence doctrine); 221**MoA**644, 283**SW** 705, 711 [citCJ].

376-57 173**Ark**1100, 294**SW**409.

376-59 [b] **Owner of lot may rely on company's seasonable compliance with his request** for removal of wire before it becomes menace to his building. 202**Cal** 638, 262**P**327.

376-60 81**NH**451, 130**A**145.

377-63 322**Mo** 514, 17**SW(2d)**960. But see 252**NY**483, 169**NE**654.

377-71 But see **TexCivA** 32**SW(2d)**264.

377-72 21 **OhA**154, 153**NE**88.

377-73 21 **OhA**154, 153**NE**88.

377-75 See also 143**Va**168, 130**SE**403. [a] **Absence of guard arm** was not sufficient notice of danger of escaping electricity to hold lineman assumed risk of grasping cable in climbing pole. 81 **NH**451, 130**A**145. [b] **Notice.**–81**NH**451, 130**A**145.

377-77 315**Mo** 367, 286**SW**106.

378-88 [a] (1) 37**F(2d)**296; 219**Ala** 136, 121**S**399; **Ala** 130**S**788; 220**MoA** 452, 276**SW**105; 315**Mo** 367, 286**SW**106; 315**Mo** 1136, 287**SW**1031; 222**MoA**845, 6 **SW(2d)**63 (under res ipsa loquitur doctrine); **TexCivA** 19**SW(2d)**816. (13) Injury to child from contact with electric wire. 90**Fla**207, 105**S**330, 41**ALR** 1323. (14) Fire caused by defective transformer. **TexCivA** 275**SW**430. (15) Burning house from defective wiring. 216**Ala**558, 114**S**46. (16) For delay in turning off current from wires so near plaintiff's burning building that firemen were prevented from throwing water thereon. 35**F(2d)**616. (17) Other instances. **Ala** 128**S**211. [b] (1) 97**Fla** 314, 120**S**842; 37**GaA**364, 140**SE**516; **GaA** 155**SE**80; 316**Mo** 317, 289**SW**597, 49**ALR**1034. [c] (4) 86 **IndA**170, 154 **NE**877. (6) 33**GaA**617, 127**SE**786. (15) Negligence, held alleged so as to create separate liability for manager and company. 156**SC**158, 153**SE**119. [d] (2) 35**F(2d)**616. (5) Negligent absence of defendant's agent from scene of injury. 213**Ala**228, 104**S**535. (6) Negligence of defendant as proximate cause of death. 35**GaA**521, 134**SE**132. (7) Other allegations. 40**GaA**830, 151**SE**696.

378-89 216**Ala**558, 114**S**46; 39**GaA**400, 147**SE**589; **TexCivA** 11**SW(2d)**583.

379-91 214**Ala**530, 108**S**373.

379-92 35**F(2d)**616 (complaint demurrable as not showing legal duty owing to plaintiff); 9**PaDist&Co** 21.

379-93 228**Ky**44, 14**SW(2d)**208; 315**Mo** 1136, 287**SW**1031; **TexCommnA** 12 **SW(2d)**1011.

379-95 203 **Iowa**471, 212**NW**884.

379-96 37**F(2d)**296.

379-97 247 **IllA**395; 203 **Iowa**471, 212 **NW**884.

379-97½-New. Complaint held not to permit inference that wires that caused injury were under the control of plaintiff only. 214**Ala**530, 108**S**373.

379-97½-New. In an action for injuries caused by coming in contact with unin-

sulated electric wires, an allegation that the wind whipped the wires against plaintiff is one of a subsidiary or evidential fact not limiting allegations of substantive or ultimate negligence relied on. 322**Mo** 514, 17**SW(2d)**960.

379–99 [c] **Plea alleging that decedent knew tools were "liable" to be charged** with electricity held demurrable. 215 **Ala**53, 108**S**851. [d] **Plea not demurrable as imputing knowledge** of danger to another workman. 215**Ala**53, 108**S**851.

379–2½–New. Replication alleging plaintiff's intestate seized wire to rescue another is demurrable when it fails to allege defendant's negligence. 213**Ala** 228, 104**S**535.

379–4 [a] (4) Evidence held not proof of nonfeasance under allegation of misfeasance. 315**Mo** 367, 286**SW**106. [c] **Variance not shown.**–294**Pa**265, 144**A**131.

379–5 221**Ky**517, 299**SW**166; 225**App Div**444, 233**NYS**545. [c] **Violation of rule** designed to guard against one danger is not proof of negligence in case of injury caused by another danger against which rule was not designed to guard. 81**NH**451, 130**A**145.

380–7 294**Pa**265, 144**A**131.

380–12 [a] (4) No presumption that electric company had authority to string its wires on sidewalk itself, or so near to its surface, as to endanger users of latter. **TexCommnA** 12**SW(2d)**1011. (5) Statute raising presumption of negligence held applicable only to injury by lines outside of cities and towns. 208 **Iowa**369, 226**NW**151. [b] **Defendant has burden of proving affirmative defense.**–**Ark** 294**SW**1002. [c] **Right to maintain wire over lot to exclusion of building erected thereon by owner** will not be presumed. **CalA** 259**P**973.

380–13 224 **IllA**589 (as to ownership of wire); 231**Ky**599, 21**SW(2d)**1028 (plaintiff telephone company had burden of proving that defendant caused passage of its current through former's equipment, damage therefrom, and its own right to maintain line).

380–14 206 **Iowa**567, 220**NW**360; 207 **Iowa**1149, 222**NW**560; 307**Mo** 607, 271 **SW**788; **MoA** 23**SW(2d)**225.

380–15 30**F(2d)**905; 203 **Iowa**471, 212 **NW**884; 208 **Iowa**369, 226**NW**151 (that alleged negligence of defendant was proximate cause); 307**Mo** 607, 271**SW** 788; 224**AppDiv**775, 230**NYS**143.

380–18½–New. It has been presumed where power company allowed telephone company to use its poles that the telephone company was allowed to place its wires near the pole. 205 **Iowa**730, 218 **NW**343.

380–18¼–New. In some jurisdictions statutes raise rebuttable presumption of negligence in the case of injury to person or property by transmission wire. 203 **Iowa**471, 212**NW**884.

380–18¼–New. Where plaintiff proves that the cause of injury from a fire was defendant's transmission line, the burden is on defendant to show nonviolation of duty on its part. 203 **Iowa**471, 212 **NW**884.

380–18½–New. In action against distributor for death caused by coming in contact with fallen wire burden rests on defendant to show condition of wire and proper insulation. **WVa** 153**SE**245.

381–20 19**F(2d)**732; 35**GaA**777, 134**SE** 813; 36**GaA**578, 137**SE**639; 224**AppDiv** 775, 230**NYS**143; **Vt** 139**A**441. [a] (14) 205 **Iowa**730, 218**NW**343. (17) Fact that live wire had loose end lying in public street makes prima facie case of negligence of light company. 142**Wash** 520, 253**P**819.

381–21 128**Me**207, 146**A**700; 294**Pa**265, 144**A**131; **Vt** 139**A**441; 142**Wash**520, 253**P**819.

381–22 19**F(2d)**732.

381–23 19**F(2d)**732, 735 [quotCJ]; 168 **Ark**1014, 273**SW**1; 97**Fla**314, 120**S**842; 36**GaA**578, 137**SE**639; **NJSup** 138**A**114; 196**NC**484, 146**SE**204; **Vt** 139**A**441. [b] (1) **TexCivA** 270**SW**1101, 1108 [citCJ]. (3) 19**F(2d)**732. (21) Death from coming in contact with fallen wire. **WVa** 153**SE**245.

382–24 31**F(2d)**671; 214**Ala**672, 108**S** 610 [citCJ]; 76**CalA**569, 245**P**468; 152 **Md**241, 136**A**615; 253**Mass**443, 149**NE** 127; 31 **OhA**118, 166**NE**588; **Vt** 139**A** 441.

383–29 30**F(2d)**905; 262**Mass**81, 159**NE** 447. [b] **When electric company shows that its appliances were of standard pattern,** inference of negligence is not available. 128**Me**207, 146**A**700.

383–30 Or 291**P**365.

383–32 135**Misc**835, 239**NYS**709.

383–33½–New. Inference as matter of law. The inference of negligence arising from happening of accidents is not such, as a matter of law, which the jury is obligated to draw, but is merely an inference of fact which the jury is authorized to draw. 35**GaA**777, 134**SE**813.

383–35 CalA 259**P**973.

384–39 196**NC**484, 146**SE**204. [a] (1) 33**F(2d)**876. (8) 214**Ala**530, 108**S**373. (19) 292**Pa**537, 141**A**496. (49) Custom of travel near dangerous agency. 41 **Ida** 106, 238**P**517. (50) Testimony as to similarity of weather conditions at witness' house and place of injury. 106 **Conn**302, 138**A**147. (51) Steps on telephone pole to show situation of place where injuries were received. 315**Mo** 1136, 287**SW**1031. (52) National electrical code. 219**Ala**546, 122**S**677. (53) To show knowledge of dangerous condition by manager. **Ala** 128**S**211. (54) Other phenomena showing excessive current on wires. 315**Mo** 367, 286**SW**106. (55) Other illustrations. 203**Cal** 291, 264**P**246; 233**Ky**224, 25**SW(2d)**366; **MoA** 31**SW(2d)**123. (56) **Res** gestæ. **Mo** 31**SW(2d)**21.

384–41 Iowa 232**NW**421.

385–43 [a] (7) Evidence that plaintiff on regaining consciousness saw companion dead admissible to show intensity of electric shock. 100**Vt**414, 139**A**440, 56**ALR**1011.

385–44 197**Wis**601, 222**NW**826. [a] (31) Evidence as to how foreign wire attached to guy wire and high tension wire came to be there motive in placing it there held properly excluded. 168**Ark** 1014, 273**SW**1. (32) Evidence as to instructions given to other employees of plaintiff's employer. 73**CalA**712, 239**P** 344. (33) Rules of public service commission inadmissible on question of negligence in installing electric service wires which caused fire. 216**Ala**558, 114**S**46. (34) Whether expert witness had even heard of transformer falling from pole struck by automobile where driver's death was actually so caused. 101**CalA** 174, 281**P**634. (35) Other instances. **Mo** 31**SW(2d)**21. (36) Amount of electricity necessary to electrocute a person. **TexCivA** 32**SW(2d)**220. [b] **Admissions.**–81**NH**451, 130**A**145.

385–45 [a] (4) 233**Ky**224, 25**SW(2d)** 366. [b] (1) 203**Cal** 634, 265**P**487; **Md** 150**A**452. (4) Sleet storms arising several hours after injury. 31 **OhA**118, 166 **NE**588.

386–49 228**Ky**329, 14**SW(2d)**1087. [a] (1) 73**CalA**712, 239**P**344; 77**CalA**328, 246**P**559; 36**GaA**578, 137**SE**639; 37**GaA** 244, 139**SE**579; **MoA** 282**SW**490; **MoA** 17**SW(2d)**621; 55**ND**805, 215**NW**287; 142**Va**761, 128**SE**362. (2) 203**Cal** 634, 265**P**487; 205 **Iowa**730, 218**NW**343; **Tex CivA** 19**SW(2d)**816. (4) 202 **Iowa**517, 210**NW**573. (10) 180**Ark**1003, 24**SW** **(2d)**846; **Mo** 24**SW(2d)**625. (31) Proper way to place voltage wire in mine. 143**Va**168, 130**SE**403. (32) Fire caused by excessive current. 34**PortoRico** 500. [b] (10) **MoA** 9**SW(2d)**813. (14) That wire was not insulated. 315**Mo** 1136, 287 **SW**1031. (15) That storekeeper was not negligent in not discovering that light was not burning in toilet. 216**Ala** 388, 113**S**250. (16) Defendant's knowledge of position of wires. **CalA** 259**P** 973. (17) Miscellaneous facts. **Iowa** 232 **NW**421. [d] (13) **Or** 291**P**365. (18) To rebut presumption of negligence. 19**F** **(2d)**732. (19) To show negligence in placing meter box on premises. 242**NY** 436, 152**NE**253. (20) Other instances. 208 **Iowa**369, 226**NW**151; 128**Me**207, 146 **A**700. (21) To show negligence in construction and maintenance of substation. **Pa** 151**A**699.

387–52 [a] (3) To show defendant's ownership of transmission system. 307 **Mo** 607, 271**SW**788. [b] (1) 224 **IllA**589.

387–53 [a] (1) 181**Ark**866, 28**SW(2d)** 710. (5) That driver of automobile was under influence of intoxicating liquor. **CalA** 285**P**709. [b] (1) 11**LaA**557, 123 **S**396(2dcase); 143**Va**168, 130**SE**403. (5) Conclusively to show negligence of lineman in grasping cable to aid his climbing of pole. 81**NH**451, 130**A**145. [c] **Lacking eyewitnesses** inferences are to be drawn from conditions existing when accident occurred. **Md** 150**A**452.

387–54 [a] (1) 95**CalA**545, 272**P**1100; 37**GaA**244, 139**SE**579. (5) 315**Mo** 353, 287**SW**341. [b] (8) To support verdict on question of contributory negligence where experienced lineman proceeded to repair wire in vicinity of high voltage wire with bare hand. 102**NJL**288, 132 **A**253.

388–56 [a] (1) **CalA** 259**P**973; 37**GaA** 244, 139**SE**579; **MoA** 23**SW(2d)**225; **Tex CivA** 19**SW(2d)**816. (5) 315**Mo** 353, 287 **SW**341. (22) That fire was caused by contact of defendant's wire with decayed limb of tree. 203 **Iowa**471, 212**NW**884. [b] (1) 208 **Iowa**369, 226**NW**151; **Iowa** 232**NW**421 (generating and transmitting company). (5) But see 30**F(2d)**905. (6) Death from lightning hitting tile phone pole though wire led from pole to house. 286**Pa**427, 133**A**629. (7) Death and acts of decedent not amounting to contributory negligence. 180**Minn**125, 230**NW** 469.

388–57 CalA 285**P**709. [a] (4) Evidence held insufficient to show that erection of telephone line constituted nuisance because of long span or proximity to highly charged electric wire. 243**NY** 351, 153**NE**444. (5) Knowledge of danger. 180**Ark**705, 22**SW(2d)**380. (6) Knowledge of defective wiring. 232**Ky** 262, 22**SW(2d)**620. (7) Other instances. 37**F(2d)**708. [b] (2) To show that children had been in habit of climbing into tree in which plaintiff was injured. 315 **Mo** 1136, 287**SW**1031.

388–58 [a] (1) 145**Va**409, 134**SE**558. (6) 205 **Iowa**730, 218**NW**343; 315**Mo** 367, 286**SW**106. (13) Action for damages caused by fire. 142 **Okl** 283, 286**P** 769. (14) Other actions. 180**Ark**1003, 24**SW(2d)**846. [b] (1) 91**CalA**375, 267 **P**178; 91**CalA**382, 267**P**181.

389–63 MoA 23**SW(2d)**225.

389–66 TexCivA 270**SW**1101; **TexCivA** 300**SW**975.

389–67 315**Mo** 367, 286**SW**106.

389–67½–New. Origin of fire alleged to have originated from electric transmission lines may be established by circumstantial evidence. 190**NC**664, 130 **SE**735.

389–68 TexCommnA 12**SW(2d)**1011.

389–69½–New. That fire originated from contact with wires may be shown by circumstantial evidence. 142 **Okl** 283, 286**P**769.

389–72 [a] (14) Evidence held sufficient to go to jury on question whether decedent was in contact with uninsulated wire at time of accident. 310**Mo** 469, 276 **SW**607. (15) Whether placing poorly insulated wire near roof was negligence. 80**Colo** 375, 251**P**224. (16) Whether engineer of corporation owes duty in exercise of ordinary care to take precautions against dangers incident to floor cleaning by usual methods. 219**Ala**546, 122**S** 677. (17) Existence of excessive current. 208 **Iowa**369, 226**NW**151. (18) It was question for jury whether town, in exercise of due care, should have discovered condition of wire and have made necessary repairs. 197**NC**433, 149**SE**549. (19) Where pleadings and evidence warrant finding against only one, whether company or manager is liable is for jury. 156**SC**158, 153**SE**119. (20) Other instances. **GaA** 155**SE**83; **MoA** 283**SW** 705; 222**MoA**1146, 15**SW(2d)**970; **NJ** 150**A**412; 158**Tenn**278, 12**SW(2d)**947.

390–75 37**F(2d)**296; 180**Ark**1003, 24 **SW(2d)**846; **GaA** 155**SE**80; 321 **Ill** 341, 151**NE**86; 307**Mo** 607, 271**SW**788; 315 **Mo** 367, 286**SW**106; 294**Pa**265, 144**A**131; **TexCivA** 32**SW(2d)**264; 142**Va**761, 128 **SE**362; 197**Wis**601, 222**NW**826; 199**Wis** 4, 225**NW**179. [a] (1) 19**F(2d)**732; 21 **F(2d)**958; 213**Ala**228, 104**S**535; 168**Ark** 1014, 273**SW**1; 173**Ark**910, 294**SW**44; 77**CalA**328, 246**P**559; 83**CalA**204, 256**P** 848; 84**CalA**465, 258**P**394; **CalA** 259**P** 973; 87**CalA**44, 261**P**1107; 102**CalA**422, 283**P**353; 80**Colo** 375, 251**P**224; 35**GaA** 777, 134**SE**813; 247 **IllA**395; 251 **IllA**

294; 202 Iowa225, 206NW815; 202 Iowa 517, 210NW573; Iowa 232NW421; 127 Kan109, 272P101; 130Kan719, 288P584; 253Mass443, 149NE127; 167Minn48, 208 NW524; 315Mo 353, 287SW341; 315Mo 1136, 287SW1031; 221MoA644, 283SW 705; MoA 9SW(2d)813; MoA 17SW(2d) 621; MoA 31SW(2d)123; 114Nebr305, 207NW518; 82NH405, 134A719; 103 NJL639, 137A426; 217AppDiv206, 216 NYS516; 224AppDiv775, 230NYS143; 192NC784, 136SE9; 197NC433, 149SE 549; 20 OhA449, 152NE677; 21 OhA154, 153NE88; 287Pa280, 135A253; 292Pa 537, 141A496; TexCivA 270SW1101; TexCivA 300SW975; TexCivA 3SW(2d) 882; Vt 139A441; 143Wash319, 255P 380; 144Wash399, 258P317. (2) 205 Iowa730, 218NW343; 179Minn46, 228NW 342; NJ 147A452; 117 Or652, 244P665. (4) 221MoA644, 283SW705; 144Wash 399, 258P317. (6) 233Ky224, 25SW(2d) 366; 152Md241, 136A615; 142Wash520, 253P819. (7) 321 Ill 341, 151NE886. (14) 20 OhA449, 152NE677 (proximity to trees causing them to burn down). (19) 221MoA644, 283SW705; 81NH451, 130A145. (21) 173Ark1100, 294SW409; 321 Ill 341, 151NE886; 205 Iowa730, 218 NW343; 322Mo514, 17SW(2d)960; Mo 31SW(2d)21; 221MoA644, 283SW705; MoA 9SW(2d)813; TexCivA 19SW(2d) 816. (22) 221MoA644, 283SW705. (25) 221MoA644, 283SW705. (29) 180Minn 125, 230NW469. (33) 218MoA138, 262 SW403. (37) 76CalA569, 245P468. (38) 233Ky230, 25SW(2d)370. (49) 180Minn 125, 230NW469 (failing to ground wires); Mo 31SW(2d)21. (51) 76CalA 569, 245P468. (58) Condition of walkway and stringing electric wire in mine. 143Va168, 130SE403. (59) Failure to guard cable properly. 81NH451, 130A 145; 82NH405, 134A719. (60) Failure to use due care in repairs on plaintiff's premises. 307Mo 607, 271SW788. (61) Failure to have transformer grounded resulting in excessive current on secondary wires in customer's house causing death. 191NC130, 131SE400. (62) Other instances. Ala 128S211. [b] (1) 292Pa537, 141A496; TexCivA 300SW 975. (8) 73CalA712, 239P344. (14) Whether escape of electricity through leaving of pole and swinging mast arm should have been foreseen and guarded against by defendant telephone company where traction company, joint user of the pole, had agreed to take other precautions. 81NH451, 130A145. (15) Want of care in use of uninsulated high power wire. 217AppDiv206, 216NYS516. (16) Permitting high power feed wire of railway near electric company's pole. 219AppDiv620, 221NYS66. (17) Hanging heavy transformer from cross arm of pole, by comparatively light hangers. 101CalA174, 281P634. (18) Sufficiency of warning of deadly character of current transmitted. 179Minn46, 228NW 342. (19) Other instances. Mo 287SW 341; 158Tenn278, 12SW(2d)947. [c] (12) Injury from electric current while operating electric sewing machine. 19 F(2d)732. (13) Wire broken by falling tree. 223Ky33, 5SW(2d)283. (14) Notice or knowledge of condition of hanging wire. TexCivA 18SW(2d)512. (15) Evidence as to injury to boy's eye from hanging wire held so improbable as to require direction of verdict for defendant. TexCivA 18SW(2d)512. (16) Notice or knowledge of condition of hanging wire. TexCivA 18SW(2d)513. (17) Other instances. 208 Iowa369, 226NW 151; 252NY454, 169NE644; 252NY483, 169NE654; Wis 233NW91. [d] **Place attractive to children.**–321 Ill 341, 151 NE886. [e] **Cause of injury.**–228Ky799, 16SW(2d)168.

391–77 219Ala136, 121S399; 82NH440, 136A259.

391–78 31F(2d)717; 37F(2d)296; MoA 23SW(2d)225; 81NH451, 130A145. [a] (1) 21F(2d)958; 213Ala228, 104S535; 244 IllA7; 307Mo 607, 271SW788; 310 Mo 469, 276SW607; 315Mo 353, 287SW 341; MoA 17SW(2d)621; 103NJL639, 137A426; 39 OklACR114. (2) 322Mo 514, 17SW(2d)960. (7) 233Ky230, 25 SW(2d)370. (9) 222MoA1146, 15SW (2d)970 (death). (10) 214Ala678, 108 S610. (23) Whether injury would not have occurred regardless of whether high voltage wire was insulated. 173Ark910, 294SW44. (24) As affecting right of service company to recover over against telephone company. TexCommnA 6SW (2d)344. (25) Other instances. MoA 23SW(2d)225. [b] **Evidence held insufficient to present question for jury** whether death of occupant of house was caused by lightning hitting pole from which telephone wire led to house. 286 Pa427, 133A629.

392–79 TexCommnA 12SW(2d)1014. [a] (1) NJSup 138A114. [b] **Evidence held insufficient to present question for jury.**–As to ownership of hanging wire. TexCivA 18SW(2d)512.

392–79½–New. But whether there is any evidence upon which a conclusion one way or another could be based is a matter of law. 81NH451, 130A145.

392–80 219Ala546, 122S677; 286Pa 427, 133A629.

392–81 19F(2d)732; Iowa 229NW244; 228Ky329, 14SW(2d)1087.

392–82 73CalA712, 239P344; 80Colo 375, 251P224; 221MoA644, 283SW705. [a] **Directed verdict held proper.**–Md 150A452.

392–84 19F(2d)732.

392–88 31F(2d)671.

392–89 19F(2d)732; 205 Iowa730, 218 NW343.

392–92 31F(2d)85; 31F(2d)717; 180 Ark1003, 24SW(2d)846; 81NH451, 130 A145; 225AppDiv444, 233NYS545. [a] (1) 21F(2d)958; 180Ark705, 22SW(2d) 380; 77CalA328, 246P559; CalA 259P 973; 102CalA422, 283P353; 244 IllA7; 202 Iowa225, 206NW815; 130Kan719, 288P584; 253Mass443, 149NE127; 167 Minn48, 208NW524; 179Minn46, 228NW 342; 180Minn125, 230NW469; 310Mo 469, 276SW607; 221MoA644, 283SW705; 222MoA845, 6SW(2d)63; 222MoA1146, 15SW(2d)970; 103NJL639, 137A426; NJSup 138A114; 224AppDiv775, 230 NYS143; 21 OhA154, 153NE88; 287 Pa280, 135A253; Or 291P365; 158 Tenn278, 12SW(2d)947; 143Wash319, 255P380. (2) 213Ala228, 104S535 (taking hold of wire); 87CalA44, 261 P1107; 322Mo 514, 17SW(2d)960; 221 MoA644, 283SW705; 117 Or652, 244P 665. (3) 221MoA644, 283SW705. (47) MoA 9SW(2d)813. (56) 292Pa537, 141 A496. (86) Boy nine years and seven months old coming in contact with wires while climbing tree. 321 Ill 341, 151 NE886. (87) Automobile driver killed by transformer falling from pole struck by driver's automobile. 101CalA174, 281P634. [b] (3) TexCivA 292SW935. (9) Whether plaintiff's intestate seized wire before or at same time as superintendent or afterward for purpose of rescuing him. 213Ala228, 104S535. (10) Whether plaintiff's intestate was conscious of danger when he took hold of wire, 213Ala228, 104S535. (11) Whether youthful floor cleaner was contributorily negligent in using open vessels and excess of gasoline-saturated material ignited by electric floor fixture sparks. 219Ala546, 122S677. (12) Whether plaintiff negligently grasped electric wire. 156SC158, 153SE119. [c] **In action for death of plaintiff's son** thirteen years of age, electrocuted while crawling through wire fence with which power line came in contact, contributory negligence of decedent has been held insufficient for jury. 196NC484, 146SE 204.

394–93 [a] (1) 321 Ill 341, 151NE886.

394–94 204Cal 15, 266P281 (nonsuit proper); 205 Iowa730, 218NW343; 152 Md241, 136A615; 315Mo 32, 285SW455, 49ALR1047; 315Mo 353, 287SW341; NJSup 139A885; OhA 173NE33; 145 Va409, 134SE558. [a] (1) 214Ala678, 108S610. [b] (1) 197Wis601, 222NW 826.

395–95 219Ala546, 122S677; 206 Iowa 567, 220NW360; MoA 282SW490.

395–97½–New. Assumption of risk of coming in contact with uninsulated wires while working on a roof may be a question of fact for the jury. 322Mo 514, 17 SW(2d)960.

395–99 [a] (1) 262Mass81, 159NE447; 315Mo 567, 286SW106. (24) As not embracing evidence of negligence not pleaded or proved. 41 Ida106, 238 P517. [d] (19) If defect resulted from plaintiff's negligent use thereof, jury could not find for plaintiff. 219 Ala546, 122S677.

395–1 [a] (1) 35GaA777, 134SE813; 37GaA244, 139SE579; 41GaA62, 151SE 672; 208 Iowa369, 226NW151; 127Kan 109, 272P101; 253Mass443, 149NE127; 179Minn46, 228NW342; 322Mo 514, 17 SW(2d)960; 220MoA452, 276SW105; NJSup 138A114; 142Wash520, 253P 819; 144Wash399, 258P317. (4) 253 Mass443, 149NE127; 322Mo 514, 17SW (2d)960. (21) 41GaA62, 151SE672. (24) 287Pa280, 135A253. (28) Instructions as to presumption and burden of proof. 217Ala119, 115S99. (29) Requiring exercise of ordinary care to prevent transformer's becoming detached from pole. 101CalA174, 281P634. (30) Other instances. Ala 128S211; 177Ark 359, 6SW(2d)297; MoA 23SW(2d)225. [b] (1) 37GaA244, 139SE579. [c] (1) 168Ark1014, 273SW1. (3) Instruction denying recovery if death could not have been anticipated as result of erection of wires. 173Ark910, 294SW44. [d] (19) Other instructions properly refused. Ala 128S211; Ark 6SW(2d) 296; 220MoA452, 276SW105; 292Pa 537, 141A496; Wash 255P380. [e] (1) 23F(2d)395; MoA 27SW(2d)31. (20) Instruction that employees of electric light service company must possess high degree of skill held erroneous. 307Mo 607, 271SW788. (21) Instruction that plaintiff could recover if repair workmen assured her that appliances were safe for use where they knew or should have known they were not safe for use held erroneous. 307Mo 607, 271SW788. (22) That electric company must inspect wires as often as required to enable it to be fully aware of their condition at all times. 106Conn 302, 138A147. [l] **Instructions held conflicting and confusing.**–307Mo 607, 271SW788. [m] **Instructions held not broader than petition.**–322Mo 514, 17SW (2d)960.

396–2 219Ala136, 121S399.

396–3 31F(2d)51. [a] (3) Other instances. 102CalA422, 283P353. [b] Ark 294SW1002.

396–4 315Mo 367, 286SW106; MoA 23 SW(2d)225; 225AppDiv444, 233NYS 545; TexCivA 19SW(2d)816 (construing term "natural and probable result" as used in instruction). [a] (1) 177Ark 359, 6SW(2d)296 (defendants' negligence as "sole" cause); 310Mo 469, 276SW607. [c] **Refusal of instruction** denying recovery of injury by electric wire was due solely to accident held error. 173 Ark910, 294SW44. [d] **Instruction held proper.**–That negligence must have been efficient moving cause without which death would not have occurred. TexCivA 19SW(2d)816.

396–5 253Mass443, 149NE127. [d] (4) Other instances. 233Ky230, 25SW (2d)370.

396–5½–New. Inference of defendant's negligence from happening of the accident. 35GaA777, 134SE813.

397–6 [a] (1) 177Ark359, 6SW(2d) 297; 37GaA244, 139SE579; 315Mo 353, 287SW341. (2) 315Mo 353, 287SW341. (11) 214Ala678, 108S610. [b] (1) 315 Mo 353, 287SW341. [e] **Defense of assumption of risk** withdrawn from jury. 31F(2d)85.

397–7 TexCivA 19SW(2d)816.

397–8½–New. Judge's comment on question of death may not be error in view of other testimony. NJSup 138 A114.

397–11 [a] (2) Verdict based on breach of duty in maintaining pole, where breach of duty claimed at trial was failure to maintain guard arm thereon, and abnormal condition of pole was not submitted to jury as negligence relied on, cannot stand. 81NH451, 130A 145. [b] **Finding held warranted.**–82 NH405, 134A719.

397–12 95CalA545, 272P1100. [d] **Findings held not inconsistent with each other.**–127Kan109, 272P101.

398–25½–New. To warrant a conviction of preventing a meter from registering the quantity of electricity supplied, it is not necessary that the electricity

diverted from the meter should be supplied to the person committing the offense. **NH** 146A870.

ELEEMOSYNARY

399-18 [a] 203**Cal** 641, 266**P**526.

ELIGIBLE

401-55 197**Cal** 524, 241**P**884.

ELISOR

402-75 81**CalA**590, 254**P**648, 655 [cit CJ].

EMBANKMENT

404-18 317 **Ill** 92, 147**NE**479.
404-19½-New. "A bank or dike cast up as to resist the encroachment of a river or the ocean or to preserve the level of a railroad or railway bed across a valley; loosely, any artificial bank or structure serving that purpose." Standard D. [quot 317 **Ill** 92, 147**NE** 479, 481].
404-19⅓-New. "A structure of earth, gravel, etc., raised to prevent water from overflowing a level tract of country, to retain water in a reservoir, or to carry a roadway, etc." Webster D. [quot 317 **Ill** 92, 147**NE**479, 481].

EMBARGO

404-25 217**AppDiv**282, 216**NYS**225.
404-26 [b] **Government control of exports during strike,** though not strictly embargo, is such within meaning of terms of letter of credit. 217**AppDiv** 282, 216**NYS**225.

EMBARQUE

404-27½-New. Putting goods on shipboard. 12**PortoRicoFed**210.

EMBELLISH

404-32½-New. To make beautiful or elegant. 13**CustA**390.

EMBELLISHMENT

404-32⅓-New. A beautifying or adorning. 13**CustA**33.

EMBEZZLEMENT

407-1 **CalA** 291**P**698; 85**Colo** 442, 276 **P**983; 118**Kan**620, 236**P**849; 246**Mich** 68, 224**NW**375; 315**Mo** 1285, 292**SW** 430; 21 **OhA**33, 153**NE**109. [a] (6) Possession with consent of owner and its fraudulent conversion. 100**TexCr** 380, 272**SW**197. (7) Embezzlement is breach of duty. 21 **OhA**33, 153**NE**109. [c] (8) 195**NC**537, 143**SE**3. [m] **"Misappropriation" synonymous with "embezzlement."**–203**Cal** 270, 263**P**812. [n] **Statutory definition.**–79**CalA**328, 249**P** 231.
409-2 **Conn** 151**A**325; 27**Hawaii** 253, 255 [citCJ]; 126**Me**230, 137**A**396; 246 **Mich**68, 224**NW**375; 312**Mo** 510, 279**SW** 411; 195**NC**537, 143**SE**3; 119 **Or**430, 249**P**1049, 1050 [citCJ]; 123 **Or**165, 261 **P**426, 427 [citCJ]; 52**SD**209, 217**NW** 213, 216 [citCJ]; 154**Tenn**77, 289**SW** 492; 158**Tenn**63, 12**SW(2d)**361, 61**ALR** 1148; **TexCivA** 294**SW**647. [d] **Previous statute making it unlawful fraudulently to dispose of property of another has been held not repealed by later statute** which is applicable only to cases not coming within earlier. 229**Ky**459, 17**SW(2d)**443.
409-3 165**La**497, 115**S**728; 123 **Or**165, 261**P**426, 427 [citCJ]; 110**TexCr**560, 9 **SW(2d)**360. [d] **In California.**–**CalA** 289**P**890.
410-4 But see 249**Mich**616, 229**NW**401.
410-5 But see 96**CalA**358, 274**P**592(2d case).
410-5½-New. Statute relating to collection of money for sale of realty and making collector trustee does not define crime but merely creates legal rights and presumption. 221**AppDiv** 602, 224**NYS**526.
410-6 199**Cal** 52, 247**P**1084, 1085 [cit CJ]; 79**CalA**328, 249**P**231; **CalA** 291**P** 698; 102**Conn**658, 129**A**724; 93**Fla**706, 112**S**575, 576 [citCJ]; 43 **Ida**580, 253**P** 618 [citCJ] (dictum); 243 **IllA**378; 196 **Ind**213, 147**NE**766; 126**Me**230, 137**A** 396; **OklCr** 275**P**359; 119 **Or**430, 249**P** 1049; 107**TexCr**514, 298**SW**296. [b] (5) Attorney's fraudulent appropriation to his own use of moneys received in behalf of client constituted embezzlement, under Pen. Code § 503, and not larceny, even if defendant had been discharged as attorney, since he acted as constructive agent in handling another's property. 206**Cal** 29, 273**P**568.
411-9 43 **Ida**580, 253**P**618 [citCJ] (dictum).
412-10½-New. Acquiring possession of money by subterfuge as a loan with intent to appropriate it is larceny and not embezzlement. 169**Ark**579, 275**SW**918.
413-17 119 **Or**430, 249**P**1049.
413-18 327 **Ill** 305, 158**NE**729. [a] Statutes in some jurisdictions merge embezzlement, larceny and obtaining money under false pretenses into one crime of theft. **CalA** 284**P**487.
413-19 169**Ark**579, 275**SW**918; 167**La** 550, 119**S**870; 119 **Or**430, 249**P**1049; 98**Fla**985, 124**S**725.
414-29½-New. Under some statutes "larceny by embezzlement" embraces all elements of larceny except actual taking. **Iowa** 228**NW**283.
414-32 79**CalA**713, 250**P**873 (note). [b] See also 79**CalA**697, 250**P**869 (trust deed).
414-33 15**F(2d)**734; 321 **Ill** 128, 151 **NE**505 (check with restrictive indorsement).
414-37 130 **Or**552, 278**P**936.
415-39 71**CalA**367, 235**P**658 (express checks).
415-49-50 199**Cal** 52, 247**P**1084, 1085 [citCJ]; **TexCivA** 294**SW**647; 100**Tex Cr**380, 272**SW**197 (principal is owner within meaning of statute); 144**Wash** 212, 257**P**387. [a] (6) Money received by president of bank as proceeds of sale of stock of bank and appropriated by him is property of bank. 30**Ariz**466, 248**P**39.
415-51 196 **Ind**213, 147**NE**766; 222**Ky** 310, 300**SW**866; 234**Mich**574, 208**NW** 682; 100**TexCr**380, 272**SW**197. [a] (1) 222**Ky**310, 300**SW**866. [b] 234**Mich**574, 208**NW**682.
415-51½-New. Ownership may be laid in one who had absolute qualified special or constructive ownership. 196 **Ind**213, 147**NE**766.
415-51⅓-New. Although complaining witness may be estopped to claim that title to securities did not pass to innocent purchasers under power of attorney to accused, state is not estopped to inquire into circumstances of transaction prior or subsequent to execution of power of attorney. 81**CalA**159, 253**P** 183.
416-52 **OklCr** 276**P**509.
416-56 40**GaA**535, 150**SE**450(2dcase) (tenant, charged by landlord for value of fertilizer, was not guilty of embezzlement by sale thereof); 124**Kan**216, 217, 257**P**944 [citCJ]; 170**La**638, 128**S** 661; 245**NY**234, 157**NE**121; 34**Wyo** 218, 242**P**802 (shipment of goods in name of shipper and his selling agent does not show transfer of goods to preclude embezzlement).
417-60 77**CalA**104, 246**P**84.
417-60½-New. An agent or officer is not guilty of embezzlement in retaining a commission or fee to which he is entitled. 148**Va**733, 138**SE**510.
417-60⅓-New. An agent, appropriating the entire fund, may be convicted of embezzlement, although entitled to deduct a commission or fee. 148**Va**733, 138**SE**510.
417-61 [b] (2) Shipment of goods under agreement that defendant should sell and divide profits does not show partnership. 34**Wyo** 218, 242**P**802.
417-62½-New. In some jurisdictions it is provided by statute that when money or property embezzled belonged in part to the agent or clerk he should not have a right to retain it, 234**Mich**574, 208 **NW**682.
417-62⅓-New. and that it should not be a defense that he was entitled to a portion of it as his compensation. 234 **Mich**574, 208**NW**682.
418-68 80**CalA**275, 251**P**826.
418-73 246**Mich**68, 224**NW**375.
418-75 [a] **Officer's misappropriation of funds placed by corporation in bank to its credit,** by drawing check on corporate account in payment of personal obligation, does not constitute embezzlement but fraudulent breach of trust. 159**Tenn**297, 17**SW(2d)**913.
418-76 243 **IllA**378, 381 [quotCJ]; 234 **Mich**574, 208**NW**682. [f] (4) Immaterial that no certificates of stock ever came into hands of broker who bought on margin for customer and sold stock and used money. 94**PaSuper**333.
419-78 20**F(2d)**359. [b] **Property in possession of board of supervisors** of county may be embezzled by one member of board. 140**Miss**224, 105**S**498. [c] **Property bought for road purposes** is in possession of board of supervisors so that embezzlement thereof by member of board may be committed. 140**Miss** 224, 105**S**498.
420-80 159**Tenn**297, 17**SW(2d)**913.
420-81½ 96**Fla**766, 119**S**330; 43 **Ida** 580, 253**P**618.
420-85 199**Cal** 52, 247**P**1084, 1085 [cit CJ]; 234**Ky**724, 29**SW(2d)**24 (transaction held a sale). [e] **Cotton grown by share cropper.**–170**Ark**495, 280**SW**6.
421-89 20**F(2d)**359; 30**Ariz**466, 248**P** 39 (bank president as to proceeds of stock of bank sold by him); 46 **Ida**124, 266**P**415; 243 **IllA**378; 196 **Ind**213, 147 **NE**766; 153**Tenn**441, 284**SW**361; 144 **Wash**629, 258**P**501. [f] 32**F(2d)**402.
422-91 169**Ark**579, 275**SW**918; 46 **Ida** 124, 266**P**415, 417 [citCJ]; 50**Nev**27, 249**P**566. [e] 34**Wyo** 218, 242**P**802. See also 54**SD**267, 223**NW**55.
422-93 But see 50**Nev**27, 249**P**566.
423-97½-New. Where defendant handled another's funds as if intrusted to him personally, the fact that they were intrusted to him by third person to be deposited for credit of certain corporation does not render him innocent of charge of embezzlement. 80**CalA**275, 251**P**826.
423-98 232**Ky**445, 23**SW(2d)**926; 159 **Tenn**297, 17**SW(2d)**913.
423-2 94**CalA**397, 271**P**361; 46 **Ida**124, 266**P**415; 159**Tenn**297, 17**SW(2d)**913; 144**Wash**212, 257**P**387. [f] (2) School and road funds coming to township treasurer are public money coming to him by virtue of office. **Mo** 30**SW(2d)** 59.
424-4 79**CalA**713, 250**P**873.
424-5 81**CalA**159, 253**P**183; 43 **Ida**580, 253**P**618 [citCJ]. [a] (5) Employer's bank account, subject to defendant's check, has been held subject of embezzlement. 43 **Ida**580, 253**P**618.
424-6 43 **Ida**580, 253**P**618 [citCJ].
425-14 20**F(2d)**359; 199**Cal** 52, 247**P** 1084, 1085 [citCJ]; 94**CalA**378, 271**P** 347; 327 **Ill** 305, 158**NE**729; 220**Ky**771, 295**SW**1047; 58**ND**554, 226**NW**601.
426-15 74**CalA**164, 240**P**36.
426-17 84**CalA**107, 257**P**463; 92**CalA** 376, 268**P**419.
426-19 [b] **Failure of private agent to account at time when his duty requires him to do so** is evidence of embezzlement. 21 **OhA**33, 153**NE**109. [c] **In Mississippi.**–150**Miss**780, 116**S**878.
426-20 21 **OhA**33, 153**NE**109.
427-21 100**TexCr**380, 272**SW**197.
427-22½-New. Where the embezzlement is complete, a subsequent demand does not change the date of the embezzlement. 75**CalA**115, 242**P**87.
427-23 [a] **Treasurer of company who gives company debit slip to bank cashier** in return for cashier's checks used to pay treasurer's personal debt held embezzlement under statute. 167**Minn** 216, 208**NW**761.
427-24 15**F(2d)**734; 43 **Ida**580, 253**P** 618; 122**Kan**235, 252**P**201; 221**AppDiv** 315, 222**NYS**744; **OklCr** 275**P**359; 144 **Wash**629, 258**P**501. [f] (1) 313**Mo** 98, 281**SW**720. [o] (7) Where officer of corporation, having placed money of corporation in bank on general deposit subject to check signed by himself as officer, draws check and delivers it to payee in payment of his personal debt and check is paid, he is properly charged with embezzlement of money and not with embezzlement of check. 79**CalA**612, 250**P**585. (8) **Agent depositing check and using proceeds embezzles both.** 54**SD**267, 223**NW**55. [r] **Embezzlement is committed by agent escrow depositary,** who having deposited escrow money in own name with

permission of owner, fails to keep balance sufficient to pay money back. 196 Cal 141, 236P301, 39ALR1076.

429-26 77CalA29, 245P769; 222Ky 310, 300SW866; 150Miss386, 116S605, 609 [quotCJ].

429-31 77CalA29, 245P769; 79CalA 488, 250P190; 79CalA612, 250P585; 94 CalA378, 271P347; 43 Ida564, 253P842, 845 [citCJ]; 220Ky771, 295SW1047.

430-32 77CalA29, 245P769.

430-37½-New. or where demand is necessary to establish essential element of the crime, 77CalA29, 245P769.

430-38 254 IllA96; 162La925, 111S 330; Wyo 293P365.

430-39 [c] **County commissioners or county treasurer,** may make demand of district court clerk's receipts. Wyo 293 P365.

431-40 [a] (2) Demand on district court clerk pursuant to county commissioners' request. Wyo 293P365. [c] **The demand need not be strictly formal.-Wyo** 293P365.

431-41 205 Iowa601, 218NW249.

431-42 199Cal 52, 247P1084; 77CalA 29, 245P769; 29Hawaii685; 312Mo 510, 279SW411. [a] (3) 199Cal 52, 247 P1084. [b] (2) Authority to use money in trading in stocks does not authorize wager on result of golf tournament. 89CalA451, 265P276.

431-43 30Ariz466, 248P39; 79CalA 697, 250P869, 871 [quotCJ]; 81CalA 671, 254P597, 598 [quotCJ].

431-44 30Ariz466, 248P39.

431-45 199Cal 52, 247P1084; 81CalA 159, 253P183.

431-46½-New. Where property intrusted to a person with authority to transmute it into property of another kind to the use of the depositor, only the property resulting from the transmutation is subject to embezzlement. 199Cal 52, 247P1084.

431-46¾-New. A public officer collecting a check payable to him in his official capacity and appropriating the proceeds is guilty of embezzlement of the money and not of the check. 312 Mo 510, 279SW411.

432-49 78CalA11, 247P917; 200 Iowa 627, 204NW441; 214AppDiv21, 210NYS 768. [k] **Officer entitled to retain larger sum out of fees** than he is charged with embezzling cannot be convicted of crime in absence of proof that such right accrued after conversion or city suffered loss. 200 Iowa627, 204NW441.

432-51 200 Iowa627, 204NW441 (as where bona fide offer to pay over money was refused).

432-52 21 OhA33, 153NE109.

432-54 200 Iowa627, 204NW441.

432-54½-New. A statute providing that, if money is embezzled by a series of sets during the same employment, the total amount shall be considered, as embezzled in one act has no application to embezzlement by a public officer. 200 Iowa627, 204NW441.

432-54¾-New. A public officer is not guilty of a "failure to account" where, before institution of prosecution, he makes an offer, in good faith to pay over any funds that may be shown to be due by him. 200 Iowa627, 204NW 441.

433-60 200 Iowa627, 204NW441; 96 PaSuper63.

433-60½-New. Conviction of converting to defendant's own use may be had without proof of demand. 96PaSuper 63.

433-63 20F(2d)359; 21AlaA361, 108 S398; 168Ark1128, 272SW858 (by statute); 176Ark1041, 5SW(2d)306; 199Cal 52, 247P1084, 1085 [citCJ]; 69 CalA558, 231P767; 79CalA697, 250P 869; Conn 151A325; 93Fla777, 112S62; 28Hawaii546; 48 Ida558, 283P529; 321 Ill 572, 152NE523; 272Ky445, 23SW (2d)926; 118Nebr828, 226NW449; 243 NY381, 153NE843; 214AppDiv21, 210 NYS768; 118 Or5, 244P512. [k] **So far as aider and abetter is concerned,** intent is essence of crime. 119 Or15, 244P516. [l] **In Florida.-90Fla381, 106** S741.

435-64 334 Ill 635, 166NE535; 52SD 209, 217NW213. [l] **Legislature may make embezzlement** of public moneys an offense without proof of fraudulent intent. 199Cal 1, 248P230.

436-65 109TexCr62, 2SW(2d)849.

436-66 79CalA697, 250P869. See also 92CalA376, 268P419.

436-67 90Fla381, 106S741.

436-68 75CalA1, 241P928; 77CalA29, 245P769; 82Colo 233, 259P1038, 1040 [citCJ]; 92Fla538, 109S438; 97Fla488, 121S793(1stcase); 232Ky686, 24SW (2d)568; Wash 293P280. But see 89 CalA451, 265P276. [e] **Right to deduct sum from amount of check** does not authorize agent to deposit check and appropriate entire proceeds. 54SD267, 223NW55.

437-71 196Cal 141, 236P301, 39ALR 1076; 48 Ida558, 283P529; 220Ky771, 295SW1047; 312Mo 490, 279SW405; 318Mo 1222, 2SW(2d)780; 130 Or552, 278P936.

437-73 19F(2d)627.

438-80 43 Ida580, 253P618.

441-11 123 Or165, 261P426.

441-12 Iowa 228NW283; Iowa 228NW 285; 50Nev27, 249P566; 130 Or552, 278P936; SD 227NW571 (agent to receive amount of loan for applicant); 100TexCr380, 272SW197 (principal is "owner" within statute); Ont 13UCIB 194. [j] 50Nev27, 249P566; 130 Or 552, 278P936. [m] **Agent of private person.-Nebr** 232NW781.

442-13 208 Iowa1046, 226NW717.

443-22 204 Iowa1296, 210NW580, 58 ALR646.

444-30 77CalA29, 245P769.

444-37 234Mich574, 208NW682.

445-42 85CalA450, 259P506; 210Ky 465, 276SW135; TexCivA 294SW647, 652 [citCJ]. Contra 92PaSuper162.

445-43 92PaSuper162. [e] (3) Agreement to share profits from sale of new automobiles and to share profits and losses from sales of used cars taken in exchange has been held not to constitute partnership. 85CalA450, 259P 506.

445-48 79CalA697, 250P869; 87CalA 482, 262P361; 83Colo 154, 262P1015; 93Fla706, 112S575; 327 Ill 305, 158NE 729; 50Nev27, 249P566; 107TexCr 514, 298SW296; 109TexCr62, 2SW(2d) 849.

446-49 [a] (2) Bailment within statute is bottomed on contract, express or implied, between bailor and bailee. TexCivA 3SW(2d)849. (3) Essential element of bailment within statute is delivery of property to bailee for particular purpose. TexCivA 3SW(2d)849. [d] (2) Ejusdem generis or noscitur a sociis doctrine is applicable to embezzlement statute, and statute refers to bailees for hire not enumerated. 98 Fla985, 124S725. [n] (3) Buyer attempting to dispose of property by bill of sale is guilty of embezzlement under Penal Code. 75CalA629, 243P468. [x] **Failure to pay over tax** on admission fees for boxing matches as required by United States statutes is not embezzlement. 268US220, 45SCt496, 69 L ed925. [y] **Delivery for purchase at price to be agreed on** with agreement to return property if price not agreed on, and subsequent conversion without agreeing on price, constitutes larceny as bailee. 327 Ill 305, 158NE729. [z] **Pledgor repledging property returned to him after pledgee had lost it** is not guilty of embezzlement as pledgee. TexCivA 3SW(2d)849. [aa] **Delivery of money to fix case.**-Prosecuting witness' delivery of money to defendant, in consideration of which defendant agreed to fix case in nature of prosecution pending or about to be instituted against him, did not constitute bailment, within embezzlement statute. MoA 15SW(2d)349.

446-49½-New. "Trustee," within a larceny statute, means one who voluntarily accepts a trust voluntarily imposed. 245NY234, 157NE121.

447-52 50Nev27, 249P566; 107TexCr 514, 298SW296.

447-56 204 Iowa1296, 210NW580, 58 ALR646.

448-65 127Kan481, 274P223; 114 Nebr393, 207NW668.

449-74 38GaA276, 143SE795(3dcase) (neither depositary nor its agents).

449-76 Conn 151A325.

449-77 Conn 151A325; 167Minn216, 208NW761. [f] **Statute construed.-Conn** 151A325. [g] **Statute as to embezzlement of funds of individuals** has been held to embrace conversion by agents, employees, and fiduciaries. 215 Ky689, 286SW1076.

449-78 196 Ind213, 147NE766.

450-81 154Tenn77, 289SW492, 493 [quotCJ].

450-83 154Tenn77, 289SW492, 493 [quotCJ].

450-94 69CalA558, 231P767 (misappropriation of funds of bank by its teller, a codefendant assisted by defendant, was held embezzlement and not larceny); 120Kan387, 243P1026 (embezzlement of funds of bank held committed by its president in his official capacity); 58ND601, 226NW601. [e] **Unincorporated and incorporated bodies** are covered by term "bank." 5PaDist &Co 339.

451-97 28Hawaii546.

451-98 242Mich345, 218NW704.

452-4½-New. A municipal court bailiff is not guilty of conversion of fees collected where, at the time of the embezzlement charged, the mileage taxed in his favor on the court docket exceeded the amount of the alleged embezzlement and he had a statutory right to retain such mileage. 200 Iowa627, 204NW441.

452-7 228Ky477, 15SW(2d)261.

453-21 51ND778, 201NW167. [a] (14) County engineer. 237Mich156, 211 NW346. [c] But see OklCr 288P385.

454-22 [a] (13) Recorder. 78CalA11, 247P917. [c] **In prosecution of tax collector** for embezzlement, invalidity of assessments and levies under statute has been held no defense. 228Ky 477, 15SW(2d)261. [d] **Treasurer of school district** who was also president of bank where school funds were deposited and who misappropriated such funds is guilty of embezzlement as such treasurer. 322Mo 86, 14SW(2d)436.

454-23½-New. The statute, relating to embezzlement by a county officer of public funds, is not repealed, in so far as it affects money received for hunting licenses, by the Game and Fish Act, imposing a fine for failure or neglect to turn over, as provided in the act, money collected or authorized to be collected thereunder. 51ND778, 201 NW167.

455-27 20 OhA284, 152NE194.

455-33 [b] **That president of bank** perpetrated fraud in sale of stock to company controlled by him is no defense to charge of misappropriating proceeds of sale. 30Ariz466, 248P39.

455-37½-New. Under statutes in some jurisdictions it is no defense that agent or clerk was entitled to a portion of the embezzled money or property as his compensation. 234Mich574, 208NW 682.

455-37¾-New. Defendant cannot question the prosecuting witness' ownership of property delivered to him to be dealt with as attorney and agent for the prosecuting witness. 79CalA488, 250P 190.

455-37¼-New. Fact that bailor is indebted to bailee on other transactions is no defense of charge of embezzlement of proceeds of sale of trust deed. 79CalA697, 250P869.

455-37⅛-New. That funds alleged to have been embezzled were by defendant mingled with funds belonging to other persons is no defense. 130 Or552, 278P936.

455-37⅙-New. Defendant charged with embezzlement of an automobile which he had sold, taking a conditional contract of sale from the purchaser, is estopped to deny the purchaser's title. 87CalA222, 261P1053.

455-37⅐-New. Claim of interest in checks embezzled no defense. Ill 172 NE812.

455-37⅛-New. That corporation exceeded corporate powers in collecting checks embezzled is no defense. Ill 172 NE812.

455-40 20F(2d)359; CalA 267P387; 100CalA78, 280P178; 82Colo 233, 259

P1038; 321 Ill 128, 151NE505; 120 Kan387, 243P1026, 1029 [citCJ]; 127 Kan481, 274P223; 161La686, 109S388; 174Minn323, 219NW176; Mo 285SW 1000; 158Tenn212, 12SW(2d)375; 188 Wis268, 205NW820. But see 205 Iowa 30, 215NW758.

456–44 87CalA783, 262P803. [b] **Evidence of settlement of civil action growing out of embezzlement** is not admissible under statute. 174Minn323, 219 NW176. [c] **Accused cannot plead restoration as defense** where restoration was not made before prosecution was laid before magistrate though made before district attorney filed information. 87CalA783, 262P803.

457–56 23AlaA361, 125S687; 82CalA 465, 255P777; 221AppDiv315, 222NYS 744; 44Philippine544. [d] **Knowledge of criminal enterprise of principal offender** is essential to constitute person aider and abetter. 118 Or5, 244P512. [e] **In Oregon.**–118 Or5, 244P512. [f] **Facts not showing criminal intent.**–33 F(2d)820.

457–58 158Tenn212, 12SW(2d)375.

458–62 141Miss289, 105S523; 312Mo 510, 279SW411; 123 Or165, 261P426. [c] (2) Charging officer with unlawfully, fraudulently, and feloniously converting to his own use public funds coming into his hands by virtue of his office is not required to charge that such conversion was made with intent to cheat and defraud. 141Miss289, 105S 523.

458–63 229Ky452, 17SW(2d)440. [d] (2) Indictment charging embezzlement of funds belonging to parish school board, and also alleging funds belonged to parish held valid, latter allegation being superfluous. 161La686, 109S388. [e] 6F(2d)727; 21AlaA361, 108S398; 102Conn658, 129A724; 35GaA399, 133 SE287; 28Hawaii546; 127Kan481, 274 P223; 161La686, 109S388; 312Mo 490, 279SW405; 312Mo 510, 279SW411; Mo 285SW416; OklCr 276P509; 123 Or 165, 261P426; 7PaDist&Co 126; 52SD 209, 217NW213 (bank officer); 105 TexCr220, 288SW221. [f] 85CalA697, 259P1009.

459–65 81CalA668, 254P640 (sufficient).

459–67 318Mo 1222, 2SW(2d)780. [a] (2) Indictment held sufficient and not vitiated when stripped of surplusage. 123 Or165, 261P426.

459–68 318Mo 712, 300SW738; OklCr 288P385; OklCr 288P993(2dcase); 118 Or5, 244P512; 119 Or15, 244P516; 123 Or165, 261P426. [c] **Indictment of adviser, aider, or participator in public officer's embezzlement** in language of statute is sufficient in some jurisdictions. OklCr 288P385.

460–79½–New. An indictment for grand larceny is sustained by retention by the attorney of a proportion of the recovery fixed in retainer with the guardian of infant plaintiff after the court fixed the fee at a lesser amount. 132Misc560, 230 NYS564.

461–81 196 Ind213, 147NE766.

461–82 196 Ind213, 147NE766; 229Ky 459, 17SW(2d)443. [b] (15) Information charging embezzlement of "shares" of stock instead of "certificates" referred to in statute. 87CalA783, 262P 803. (16) Other instances. 54SD267, 223NW55. [c] (7) "Certain check in the sum of five hundred dollars of value of five hundred dollars" belonging to certain person. 112TexCr328, 16SW(2d) 538.

462–84 126Me230, 137A396.

462–85 [b] (8) "United States liberty bonds to amount of $2,000, property of H. A." 222Ky310, 300SW866.

462–85½–New. **In Kentucky** code regulating description of money, currency or banknotes, is not applicable to liberty bonds. 222Ky310, 300SW866.

462–86 126Me230, 137A396 (under Rev St c 122 § 8); 58ND601, 226NW601. [b] (8) Checks. 196 Ind213, 147NE766. [d] 196 Ind213, 147NE766. [f] 126Me230, 137A396. [g] (2) Indictment referring to "money and property" held not bad, as words are synonymous and in view of content. 126Me230, 137A396. [i] **Information construed to charge embezzlement of draft** rather than that of money by use of draft. Mo 289SW553.

463–88 126Me230, 137A396.

463–89 141Miss289, 105S523; 33Porto Rico 217, 220 [quotCJ]. [a] (3) Indictment charging embezzlement by municipal officer of funds "received and had in his official possession" held sufficient. 33PortoRico 217.

464–90 33PortoRico 217, 220 [quotCJ]; 33PortoRico 217, 220 [quotCJ]. [b] **Money "received and had in (defendant's) official possession"** held sufficient allegation. 33PortoRico 217.

464–95 [a] **Insufficient as felony indictment,** but good as indictment for misdemeanor where amount is not stated. 231Ky505, 21SW(2d)828.

465–99 104TexCr148, 282SW810. [a] (5) Allegations charging that money belonged to parish school board and also to parish. 161La686, 109S388. [l] (2) In prosecution for embezzlement of money in bank, ownership of money need not be alleged. 165La497, 115S 728.

466–4 130 Or552, 278P936 (source of money embezzled is not required to be alleged).

466–7 196 Ind213, 147NE766. [a] (2) **Erratum.**–Strike out note in 1926 Permanent Annotations.

466–8½–New. Ownership of funds of an insolvent bank in the charge of the commissioner of finance is properly charged to be in the bank. 312Mo 510, 279SW411.

466–9 22AlaA90, 112S759; 196 Ind213, 147NE766.

466–10 100TexCr380, 272SW197.

467–13 [a] (4) Other instances. NJ Sup 149A339.

467–14 120Kan387, 243P1026 (allegations sufficient).

467–21½–New. An indictment of a public officer for embezzlement of funds of a bank in his charge need not allege the incorporation of the bank. 312Mo 510, 279SW405.

467–22 [c] **Averment that injured party was firm, corporation, or association** is not necessary under § 2061 and statement in indictment importing a corporation or association is sufficient. 196 Ind213, 147NE766.

467–27 71CalA367, 235P658.

467–29 227Ky39, 11SW(2d)981. [f] **Description of school board.**–Indictment stating owner was "board of school directors of parish of St. Helena" instead of "St. Helena parish school board" held not invalid. 161La686, 109S388.

468–31 158Tenn212, 12SW(2d)375.

468–33 196 Ind213, 147NE766; 100Tex Cr380, 272SW197.

469–37 34Ariz372, 271P872; 174Ark 584, 295SW965; 161La686, 109S388; 126Me230, 137A396; 167Minn216, 208 NW761 (allegation sufficient); MoA 15 SW(2d)349. [c] 22AlaA514, 117S489. [f] **Allegations held sufficient.**–161La686, 109S388; 169La377, 125S277.

469–38 43 Ida580, 253P618; 109TexCr 323, 4SW(2d)564. [c] 196 Ind213, 147 NE766 (treasurer).

469–39 98Fla985, 124S725; 215Ky689, 286SW1076; 167Minn216, 208NW761 (allegation sufficient); 115 OhSt350, 154 NE728. [c] **Agent of private person.**–Nebr 232NW781.

470–40 MoA 15SW(2d)349.

470–41 22AlaA90, 112S759. [c] **Indictment of public officer** under statute need not allege that money was received "by virtue of the trust reposed in him." 312 Mo 510, 279SW411.

470–43 87CalA783, 262P803.

470–44 [a] (7) Other instances. 52SD 619, 219NW817.

472–49 But see 120Kan387, 243P1026, 1028 [citCJ].

472–51 126Me230, 137A396. [o] **Allegation that amount demanded was due after deducting fees, charges, and commissions** is unnecessary in information in prosecution of agent for failure to deliver on demand money received by virtue of his employment. 121Kan339, 246P989. [p] **Indictment, in prosecution for embezzlement, charging misappropriation** of funds of city, held sufficient to allege embezzlement of city's funds by tax collector. 227Ky39, 11SW(2d) 981.

473–52 43 Ida564, 253P842; 162La925, 111S330; 94PaSuper452.

473–54 179Ark1149, 20SW(2d)886.

474–55 126Me230, 137A396; 109TexCr 323, 4SW(2d)564 (rules of ordinary theft apply). But see 121Kan339, 246P 989. [a] **Where ownership and possession are alleged in different persons,** state must prove want of consent of both. 109TexCr323, 4SW(2d)564.

474–56 46 Ida124, 266P415, 417 [cit CJ].

474–57 200 Iowa627, 204NW441 (necessary in case of public officer).

474–60½–New. Under some statutes loss to public must be alleged. 200 Iowa627, 204NW441.

474–61 200 Iowa627, 204NW441.

475–68 9PaDist&Co 817. [c] (1) 141 Miss289, 105S523 (same effect).

475–69 141Miss289, 105S523; 318Mo 1222, 2SW(2d)780 (specific intent); Okl Cr 288P385. See also 168Ark1128, 272 SW858.

476–72 126Me230, 137A396.

476–76 28Hawaii546.

476–78 105TexCr220, 288SW221. [d] 205 Iowa30, 215NW758 (township clerk); 28Hawaii546; 140Miss224, 105 S498 (indictment sufficient); 312Mo 490, 279SW405; 312Mo 510, 279SW411. [e] **In indictment against township clerk** allegation that a demand for the funds was made by succeeding clerk, naming him, is sufficient. 215 Iowa30, 215NW 758.

476–79 [a] (4) Description sufficient. 140Miss224, 105S498. (5) Allegation that accused was special deputy commissioner of finance and setting forth his duties is sufficient. 312Mo 490, 279 SW405. [e] **Information held sufficient.**–237Mich156, 211NW346. [f] **Appointment by virtue of constitution or statute** need not be alleged. 312Mo 490, 279SW405.

477–81 228Ky477, 15SW(2d)261.

477–81½–New. nor need it specify particular fund embezzled. 141Miss289, 105S523.

477–82 227Ky39, 11SW(2d)981.

477–85 34PortoRico 606 (sufficient).

477–88 22AlaA278, 114S788; 22AlaA 390, 115S858; 21AlaA595, 110S320; 200 Iowa627, 204NW441; 215Ky689, 286SW 1076; 229Ky452, 17SW(2d)440; 141 Miss289, 105S523; 72Mont270, 233P615; 196NC280, 145SE399; 109TexCr323, 4 SW(2d)564 (want of owner's consent). [c] (3) Indictment charging that accused was intrusted by bank with money, and evidence showing that bank's agent so intrusted him. 40GaA553, 150 SE449(1stcase).

478–89 177Ark448, 9SW(2d)30.

478–91 312Mo 510, 279SW411.

478–94 23AlaA194, 122S601; 91CalA 781, 267P593, 595 [citCJ]; 93Fla1082, 113S90; 336 Ill 313, 168NE320; Iowa 228NW285. [a] (4) Charge of embezzlement of check and proof of embezzlement of money. 110TexCr212, 8SW(2d) 125. [b] (3) Under information for embezzlement describing property as "the sum of $5,000 lawful currency of the United States," proof of check for five thousand dollars held not variance. 92Fla538, 109S438. [h] **Words "lawful money of United States"** do not necessarily qualify preceding allegation of coins and currency so as to confine meaning to legal tender. 130 Or552, 278P936.

478–95 70CalA476, 233P406; 72Mont 270, 233P615.

478–96 21Ala113, 105S429; 312Mo 510, 279SW411.

478–97 30F(2d)567; 79CalA612, 250P 585; 85CalA697, 259P1009; 94CalA397, 271P361; 83Colo 154, 262P1015; 167 Minn216, 208NW761; 193NC246, 136SE 715.

479–98½–New. Proof of embezzlement of money will sustain a conviction under a charge of embezzlement of a draft, and vice versa. Mo 289SW553.

479–99 222Ky310, 300SW866; 318Mo 712, 300SW738.

479–6 79CalA488, 250P190; 85CalA514, 259P982; 88CalA302, 263P345; 330 Ill 565, 162NE148; 200 Iowa627, 204NW 441; 52SD619, 219NW817.

479–7 322Mo 86, 14SW(2d)436; 46 Philippine625.

479–8 52SD619, 219NW817.

480-13 22AlaA278, 114S788; 115 Oh 279, 152NE670; 8PaDist&Co797. [b] (4) Other instances. 158Tenn212, 12SW (2d)375.
480-15 71CalA367, 235P658 (general ownership need not be proved where special ownership was alleged); Mo 285 SW416; Mo 30SW(2d)59; 100TexCr380, 272SW197.
480-17 But see 312Mo 510, 279SW411; 107TexCr514, 298SW296.
481-21 22AlaA390, 115S858; 115 OhSt 350, 154NE728. [b] (3) Indictment under statute punishing embezzlement by agent is not supported by facts showing relation of bailee. 115 OhSt350, 154NE 728.
481-22 See also 93Fla777, 112S62, 63 [citCJ].
481-24 But see 93Fla238, 112S70.
481-25 Mo 30SW(2d)59; 117Nebr556, 221NW689; 104TexCr315, 283SW798.
482-31½-New. Proof that defendant, on the date alleged in the indictment, procured receipts from his principal upon a purported settlement in full while concealing and misrepresenting facts with relation to his collections and disbursements conforms to the allegation as to time although a subsequent demand for the money is also shown. 75CalA115, 242P87.
482-33 [e] **Appropriation by agent.**—In embezzlement by agent, appropriation during agency and to agent's own use must be shown. 77CalA29, 245P769. [f] **Possession by public officer.**—110Tex Cr350, 7SW(2d)956.
482-34 148Miss410, 114S754; 50Nev27, 249P566; 104TexCr315, 283SW798; TexCivA 6SW(2d)393, 395 [citCJ]. [c] (4) Failure of public officer, receiving and failing to report and turn in same, makes case of embezzlement for state. 104TexCr315, 283SW798. [d] **Defendant interposing claim of right to retain money for indebtedness** (1) must show open and avowed appropriation under claim made in good faith. 77CalA29, 245P769. (2) But he need not prove that claim was valid one on which he might recover at law. 77CalA29, 245P769.
482-35 21 OhA33, 153NE109.
482-35½-New. In absence of contradictory evidence it will be presumed that every loan of a bank would be represented by corresponding asset. Utah 287P181.
482-36 158Tenn63, 12SW(2d)361, 61 ALR1148 (proof is dispensed with by defendant's admission). But see 318Mo 1222, 2SW(2d)780.
482-37½-New. Statutory presumption of fraudulent intent from failure of public officer to pay over public money on demand may be rebutted. 188Wis268, 205NW820.
482-39 22AlaA34, 111S765; 23AlaA361, 125S687; 75CalA1, 241P928; 77CalA44, 246P97; 80CalA275, 251P826; 82CalA 465, 255P777; 83Colo 154, 262P1015; Conn 151A325; 124Kan55, 257P 735; 229Ky459, 17SW(2d)443; 160 La525, 107S393; 161La686, 109S 388; 151Md118, 134A166; 312Mo 655, 280SW1040; Utah 287P181 (general shortage of bank's funds); Utah 279 P953 (keeping certain moneys in envelopes separate from general funds). [b] (2) Failure of public officer to enter on official books of his office fees collected by him is admissible on issue of conversion. 200 Iowa627, 204NW441.
483-40 20F(2d)359; 77CalA29, 245P 769; 79CalA328, 249P231; 37GaA195, 139SE103; 46 Ida561, 270P417; 151Md 118, 134A166; 234Mich574, 208NW682; Mo 285SW1000; 174Minn323, 219NW 176; 52SD619, 219NW817 (amount received by successor of defendant as public official); 105TexCr212, 287SW250. But see Conn 151A325.
483-43 15F(2d)734.
484-44 [a] **In prosecution for embezzlement** of express company checks, evidence that company conducted its business in state as unincorporated association is admissible to show company was de facto corporation organized as nonstock company or name under which certain persons transacted business. 71 CalA367, 235P658.
484-46 Wyo 293P365.
484-47 200 Iowa627, 204NW441; 313 Mo 98, 281SW720; 117Nebr556, 221NW 689; 107TexCr514, 298SW296. [a] (1) 52SD619, 219NW817.
484-49 21AlaA595, 110S320.
484-51 75CalA1, 241P928; 46 Ida124, 266P415; 245NY234, 157NE121; 130 Or552, 278P936; 105TexCr212, 287SW 250. [b] (1) Utah 279P953.
484-53 75CalA1, 241P928; 87CalA482, 262P361; 174Minn323, 219NW176; 180 Minn435, 231NW12; 312Mo 490, 279SW 405.
484-53½-New. That a broker repaid money to a customer is not admissible as evidence of a crime or misappropriation. 243NY381, 153NE843.
485-54 13F(2d)591; 23AlaA361, 125S 687; Conn 151A325; 254Mass320, 150 NE7; 86PaSuper351.
485-58 74CalA164, 240P36 (receipts by defendant and disposition and use thereof); Conn 151A325; 48 Ida558, 283P529; 232Ky445, 23SW(2d)926; 161La686, 109 S388; 118 Or5, 244P512 (financial condition). 94PaSuper333; TexCr 28SW(2d) 541; 148Va733, 138SE510, 512 [quot Cyc]. [a] (3) In prosecution of cashier, who was principal stockholder of bank, for embezzlement of bonds, evidence of one hundred per cent dividend by bank is competent to throw light on cashier's purpose. 222Ky310, 300SW866. (4) Evidence of increase in book value of bank building is inadmissible as unrelated to bond transaction. 222Ky310, 300SW866. [c] 161La686, 109S388. [d] (1) 118Nebr828, 226NW449. (6) Evidence of subsequent attempts of bank officer to secure bank against loss held inadmissible. 52SD209, 217NW213. (7) Evidence that bank officer had deposited securities with bank to insure payment of paper held inadmissible. 52SD209, 217NW213.
486-60 115 OhSt350, 154NE728 (agency); 44Philippine471; 110TexCr 350, 7SW(2d)956; 110TexCr212, 8SW (2d)125; Wis 231NW168. [c] (1) 221 AppDiv602, 224NYS526. [d] (1) 20F (2d)359; 199Cal52, 247P1084; 70CalA 476, 233P406; 71CalA550, 236P158; 74 CalA135, 239P412; 75CalA1, 241P928; 75CalA115, 242P87; 75CalA672, 243P 476; 77CalA29, 245P769; 77CalA 104, 246P84; 77CalA285, 246P342; 79CalA328, 249P231; 79CalA488, 250 P190; 80CalA275, 251P826; 81CalA 668, 254P640; 82CalA465, 255P777; 87CalA482, 262P361; 92CalA376, 268 P419; 94CalA378, 271P347; 95CalA 202, 272P754; 100CalA78, 280P178; 35 GaA399, 133SE287; 36GaA743, 138SE 253; 28Hawaii546; 29Hawaii150; 43 Ida564, 253P842 (on theory of continuing offense); 46 Ida561, 270P417; 47 Ida750, 278P776; 334 Ill 635, 166NE 535; 204 Iowa1296, 210NW580, 58ALR 646; 208 Iowa143, 226NW16; 118Kan 620, 236P849 (bank clerk); 121Kan339, 246P989; 125Kan365, 263P1081; 127 Kan481, 274P223; 124Kan55, 257P735; 229Ky459, 17SW(2d)443; 312Mo 490, 279SW405 (by public officer); Mo 285 SW1000; 318Mo712, 300SW738; 320 Mo 260, 7SW(2d)250; 194NC319, 139 SE451; 32NM17, 250P634; 54ND395, 209NW961; 21 OhA33, 153NE109; Okl Cr 275P359; OklCr 290P418; OklCr 290 P1113; 130 Or552, 278P936; 92PaSuper 162; 46Philippine651; 33PortoRico 859; 52SD619, 219NW817; 157Tenn 105, 6SW(2d)556; 159Tenn388, 19SW (2d)313; 105TexCr87, 287SW56 (on plea of guilty); 105TexCr89, 287SW55 (on plea of guilty); TexCivA 298SW434; 108TexCr48, 299SW254; 113TexCr462, 22SW(2d)922; TexCr 28SW(2d)541; Wis 231NW168; 34Wyo 218, 242P802; Wyo 293P365 (prima facie case). (4) 75CalA115, 242P87; 79CalA713, 250P 873; 87CalA783, 262P803. (6) 79CalA 713, 250P873; 174Minn323, 219NW176; 157Tenn105, 6SW(2d)556; 107TexCr 514, 298SW296. (7) 74CalA135, 239P 412; 75CalA672, 243P476; 54SD267, 223NW55; 107TexCr514, 298SW296; 109TexCr62, 2SW(2d)849; Wis 231NW 168. (9) 75CalA672, 243P476; 105NJL 270, 144A872. (10) 31F(2d)385; 82 CalA465, 255P777; 158Tenn212, 12SW (2d)375. (11) To sustain conviction for felonious conversion of property as bailee. 204 Iowa1296, 210NW580, 58 ALR646; Nebr 208NW126. (12) To show that stock, part of proceeds of sale of which by bank president were appropriated by him, belonged to bank. 30Ariz466, 248P39. (13) To sustain conviction of aiding and abetting bank officer in misapplication of funds. 118 Or 5, 244P512; 119 Or244, 244P516. (14) To sustain conviction of fraudulent breach of trust. 159Tenn297, 17SW(2d) 913. (15) To warrant finding that bank was member of federal reserve. 31F(2d) 385. (16) To show receipt of check. 100 CalA78, 280P178. (17) To show that shortage of bank's funds was not due to bad loans. Utah 287P181. (18) To show corpus delicti. Ill 172NE812. [e] (1) 21AlaA113, 105S429; 23AlaA194, 122 S601; 199Cal52, 247P1084; 74CalA164, 240P36; 77CalA29, 245P769; 77CalA 104, 246P84; 86CalA53, 260P301; 91 CalA781, 267P593; 92CalA785, 268P 1059; 98Fla985, 124S725; 34GaA236, 129 SE115 (larceny after trust); 204 Iowa 1296, 210NW580, 58ALR646; 218Ky483, 291SW742; 222Ky310, 300SW866; 232 Ky445, 23SW(2d)926; 315Mo 1285, 292 SW430; MoA 15SW(2d)349; 56ND741, 219NW334; 115 Oh350, 154NE728; Okl Cr 276P509; OklCr 289P780; 35PortoRico 48; BC [1926] 4DomLR955. (3) 169Ark579, 275SW918; 144Wash212, 257P387. (5) 74CalA164, 240P36. (7) Ownership of property as alleged. 115 Oh279, 152NE670. (8) To show that defendant invested proceeds of certificates of deposit for owner's benefit. 174Minn 323, 219NW176. (9) To show want of owner's consent. 109TexCr323, 4SW (2d)564. (10) To show that money in question was in defendant's custody and possession by virtue of his office. 110 TexCr350, 7SW(2d)956. (11) **Evidence that bank cashier embezzled part of money received for bank** is sufficient to support conviction. Utah 287P181. (12) To show embezzlement of bonds. Iowa 228NW285. [f] **Proof of ownership** as against embezzler sufficiently shown. 318Mo 1222, 2SW(2d)780.
487-61 27Hawaii109; 113TexCr462, 22 SW(2d)922. But see 109TexCr323, 4SW (2d)564.
487-62 77CalA44, 246P97; 313Mo 98, 281SW720; 21 OhA33, 153NE109. [a] **Proof of misappropriation of money intrusted to agent** held to establish charge of embezzlement. 254Mass320, 150NE7.
487-63 77CalA44, 246P97.
487-65 13F(2d)591; 118Nebr828, 226 NW449. [a] 206Cal29, 273P568; 79 CalA697, 250P869; 79CalA713, 250P 873; 81CalA671, 254P597; 96CalA664, 274P621; 48 Ida558, 283P529; 118 Or 5, 244P512; 157Tenn105, 6SW(2d)556; 100TexCr380, 272SW197; 109TexCr74, 3SW(2d)443 (procuring delivery to embezzler with knowledge of embezzler's intent); 108WVa639, 152SE326. [d] 21 AlaA361, 108S398; 115 Oh279, 152NE 670; 109TexCr384, 4SW(2d)977. [g] (3) Formation of intent to convert while employee need not be shown if property came into defendant's control by virtue of his employment. 72CalA582, 237P1087. [i] **Proof of intention to restore** public funds converted by public officer does not rebut statutory presumption of fraudulent intent to convert arising on failure to pay over money on demand. 188Wis268, 205NW 820. [j] **Where prosecution arises from contractual relations,** state will be held to strict rules of proof. 21AlaA361, 108S 398. [k] **Evidence held sufficient** to show lack of good faith on open and avowed appropriation. 75CalA1, 241P 928.
488-66 27Hawaii109; 46 Ida561, 270P 417; 48 Ida558, 283P529; Ind 168NE 579; 150Miss386, 116S605, 607 [citCJ]; 50Nev27, 249P566. [c] **Intent to embezzle may be inferred** from receipt of money and failure to account. 220Ky 771, 295SW1047.
488-67½-New. A check accepted and paid by the bank at its face value is prima facie of that value. 321 Ill 128, 151NE505.
488-70 205 Iowa601, 218NW249.
488-71 22AlaA90, 112S759; 79CalA328, 249P231; 85CalA514, 259P982; 87CalA 482, 262P361; Conn 151A325; 43 Ida

580, 253P618; 204 Iowa1296, 210NW580, 58ALR646; 141Miss289, 105S523 (guilt of defendant); Mo 285SW416; 318Mo712, 300SW738; 318Mo1222, 2 SW(2d)780 (evidence held sufficient to go to jury); 245NY234, 157NE121; 193NC246, 136SE715; 194NC319, 139 SE451; 21 OhA33, 153NE109; 21 OhA 33, 153NE109; 54SD267, 223NW55; 157Tenn105, 6SW(2d)556. But see 234Ky724, 29SW(2d)24. [b] (2) Whether embezzler was tenant or employee on farm from which cotton was taken held for jury. 169Ark567, 275 SW909. [c] 93Fla777, 112S62, 64 [cit CJ]. [f] (1) 13F(2d)591; 71CalA550, 236P158; 75CalA1, 241P928; 79CalA 697, 250P869; 92CalA376, 268P419; 94 CalA378, 271P347. (2) Intention with which bank account was overdrawn is question for jury. 118 Or5, 244P512; 119 Or244, 244P516. [g] 93Fla706, 112S 575. [i] 13F(2d)591; 312Mo655, 280 SW1040; 118 Or5, 244P512. [k] 15 F(2d)734. [l] **Whether overdrawing bank account is crime** is question for jury. 119 Or244, 244P516. [m] **Whether transaction constituted larceny** is question of fact for jury. 214AppDiv21, 210NYS768. [n] **Whether conversion by public officer of public funds** received from different sources is a single embezzlement or more is question of fact dependent on time intention to embezzle was formed. 104TexCr315, 283SW798. [o] **Evidence held insufficient** for submission of case to jury. 315Mo1285, 292SW430. [p] **Whether defendant used for his own living expenses** money received from women for speculative investment purposes has been held a question for jury. 224AppDiv546, 231 NYS557. [q] **Whether defendant was agent or debtor** of prosecuting witness held properly submitted to jury. 179 Ark1149, 20SW(2d)886. [r] **Evidence held sufficient** to go to jury. Wash 293 P280.

489–74 80CalA275, 251P826; 115 OhSt 350, 154NE728; 119 Or244, 244P516.

489–76 80CalA275, 251P826.

489–77 161La686, 109S388; 119 Or244, 244P516.

489–78 80CalA275, 251P826 (properly refused); 81CalA159, 253P183; 228Ky 477, 15SW(2d)261; 232Ky445, 23SW (2d)926; 161La686, 109S388; 249Mich 616, 229NW401. [c] **Instructions held applicable.**–21 OhA33, 153NE109.

489–79 232Ky445, 23SW(2d)926. [c] **Failure to instruct** on intent is prejudicial error. 227Ky39, 11SW(2d)981.

489–81 115 OhSt350, 154NE728.

489–83 105TexCr212, 287SW250.

489–83½–New. Verdict may be directed for defendant where proof shows no fraudulent appropriation. 21AlaA361, 108S398.

490–84 204 Iowa1296, 210NW580, 58 ALR646; 124Kan55, 257P735; 312Mo 490, 279SW405; 21 OhA33, 153NE109; 119 Or244, 244P516.

490–84½–New. It is error to refuse proper requests for instructions. 162 La925, 111S330.

490–84⅓–New. An instruction that restitution may be considered as bearing on defendant's intent is properly refused. 47 Ida750, 278P776.

490–85 82CalA465, 255P777 (sufficient).

490–87 30Ariz466, 249P39; 321 Ill 128, 151NE505; 215Ky689, 286SW1076; 148 Miss410, 114S754 (instruction held sufficient).

490–88 [a] (1) 196 Ind213, 147NE766. (3) Instruction held erroneous. 58ND 601, 226NW601 (that defendant was guilty, though he did not appropriate any property of bank). [b] (2) Modification of instruction as to money of county and state embezzled by defendant held proper. Mo 285SW416.

490–89 80CalA275, 251P826. [a] (5) Other illustrations of correct instructions. Iowa 210NW280; 121Kan339, 246P989. (6) In prosecution of deputy commissioner of finance for embezzlement of funds of private bank in his charge, instruction requiring jury to find that he took possession of funds as trustee for bank is not erroneous though such finding is not necessary. 312Mo 490, 279SW405. [c] **True purpose of deposit** by which accused obtained possession of money properly submitted when evidence tended to show transaction was subterfuge. 169 Ark579, 275SW918.

490–90 77CalA44, 246P97; Mo 285SW 1000. [a] (3) Other illustrations of correct instructions. 121Kan339, 246P 989.

491–92 168Ark1128, 272SW858 (instruction sufficient); 74CalA164, 240P 36; Conn 151A325; 93Fla777, 112S62; Mo 285SW1000; Wash 293P280. [a] (4) Instruction not erroneous as authorizing inference of criminal intent from mere acts of appropriation. 43 Ida 564, 253P842. (5) Instruction that law presumes man to intend reasonable and natural consequences of his act deliberately and intentionally done is not necessarily erroneous. 204 Iowa 1296, 210NW580, 58ALR646. (6) Omission of word "fraudulently," in charging in reference to secretion of embezzled property, has been held not error. OklCr 273P1014(2dcase). (7) Omission of word "knowingly" before word "permitted" not erroneous. 130 Or552, 278P936.

491–92½–New. But where intent to cheat or defraud is not element of offense, it need not be charged. 141Miss 289, 105S523; 90Fla381, 106S741.

491–93 Mo 285SW416.

491–97 46 Ida124, 266P415; 204 Iowa 1296, 210NW580, 58ALR646; 117 Or 153, 241P977 (instruction as to coercion held proper).

492–2 46 Ida124, 266P415.

492–3 See also 75CalA1, 241P928.

492–5 72CalA582, 237P1087 (verdict of guilty of petit embezzlement held direct and certain). [a] (5) Verdict of guilty of "petit" embezzlement under information charging felony embezzlement held sufficient. 72CalA582, 237P 1087. [d] **Agency.**–102Conn658, 129A 724.

492–6 [a] (4) Under information charging felony embezzlement finding by jury of guilty of petit embezzlement should indicate beyond any doubt that accused has been found guilty of lesser offense, but no particular form of language is necessary. 72CalA582, 237P 1087.

493–12 34Ariz372, 271P872; 72CalA 582, 237P1087 (verdict fixing value as "under $200" sufficient to sustain conviction for petit embezzlement). [a] 324 Ill 187, 154NE906; 20 OhA284, 152NE 194 (without stating amount embezzled). [b] **Jury should give defendant** benefit of reasonable doubt as to value. 72 CalA582, 237P1087.

493–14 43 Ida564, 253P842.

493–15 215Ky689, 286SW1076.

493–19½–New. A statute providing for imprisonment in the penitentiary for not less than one year and not more than twenty years in the discretion of the court is not affected, so far as the penalty is concerned, by a subsequent statute abolishing the minimum period and requiring the court to fix a maximum period of imprisonment not to exceed the maximum period prescribed by the existing statute and a minimum not to exceed one half of the maximum. 119 Or244, 244P516.

493–19⅓–New. , nor by a statute abolishing the minimum sentence and requiring the court to sentence without limitation stating only the maximum term not to exceed the maximum provided by law. 119 Or244, 244P516.

EMBRACERY

495–1 235Ky588, 31SW(2d)940; 160 Tenn594, 28SW(2d)47.

496–15 NJSup 132A336.

496–17 [a] **Generally,** juror is one who has already been selected and sworn as member of jury. 235Ky588, 31SW(2d) 940.

496–23 NJSup 132A336.

496–4½–New. It is not necessary to constitute crime that defendant should know of existence of member of jury panel, or that he had been drawn or summoned as juror where he caused letters to be sent to residents of county where case was to be tried. 70CalA315, 233P362.

496–30 70CalA315, 233P362.

496–31½–New. A general intent to corrupt all jurors in a panel includes a particular intent to corrupt each individual juror receiving a letter mailed to numerous persons. 70CalA315, 233P362.

497–36 70CalA315, 233P362 (causing letter to be mailed to residents of county, one of which was directed to, and received by, member of jury panel drawn for service in particular case about to be tried constitutes crime not less than if defendant had mailed it himself). [a] **Causing letter to be mailed to juror.**–That accused did not personally mail letter to juror does not constitute defense where he caused it to be mailed. 70CalA315, 233P362.

497–38 NJSup 132A336.

497–39 15F(2d)958.

497–43 70CalA315, 233P362.

497–53 [b] **Indictment charging attempt to corruptly influence one eligible for jury service** is insufficient. 235Ky588, 31SW(2d)940.

498–71 70CalA315, 233P362 (evidence of purpose and intent with which letters were sent out by defendant is admissible). [e] **Matters tending to show defendant's political views,** as corroborative of his sending radical literature to jury, held admissible. 77CalA438, 246P 1072.

498–72 [b] **Evidence held sufficient** to sustain finding that letter was sent with intent corruptly to influence juror. 70 CalA315, 233P362.

498–74 70CalA315, 233P362.

498–74½–New. Instruction held not erroneous. 70CalA315, 233P362.

498–74⅓–New. Whether a juror received the identical letter pleaded is a question for the jury. 77CalA438, 246P 1072.

EMBROIDER

498–2 See also 13CustAUS290.

EMBROIDERY

498–3 13CustAUS479. See also 13Cust AUS33; 13CustAUS656.

EMERGENCY

499–5 145Wash551, 261P90, 93 [quot Cyc].

499–6 33Ariz197, 263P589; Webster D. [quot120Kan196, 243P294]. [c] **Ordinary condition of streets following winter** held not to constitute "special emergency" within statute. 255Mass220, 151 NE111.

499–8 76CalA267, 244P919, 922 [cit Cyc]; 145Wash551, 261P90, 93 [quot Cyc]. [a] (2) 145Wash551, 261P90, 93 [quotCyc].

499–10 145Wash551, 261P90, 93 [quot Cyc]; Webster D. [quot120Kan196, 243 P294].

499–11 145Wash551, 261P90, 93 [quot Cyc]; Webster D. [quot 120Kan196, 243 P294].

EMIGRANT

500–24 36GaA87, 135SE514.

EMINENT DOMAIN

513–1 See also 126 Or417, 270P502. [a] (9) 191NC84, 131SE413. (14) Power to take private property without consent of owner upon making just compensation therefor. 321 Ill 101, 151NE 567.

514–2 217Ala268, 115S422; 220Ala433, 126S133; 169Ark399, 275SW890; 180 Ark1075, 24SW(2d)856; 92Fla617, 110 S451; 99Fla954, 128S402; 48 Ida1, 279 P298, 67ALR580; 237Mich338, 211NW 905; 237Mich446, 212NW207; 243Mich 649, 220NW881; 172Minn255, 214NW 930; 102NJEq221, 140A335; 220App Div351, 222NYS29; 249NY445, 164NE 541 [motion to amend remittitur granted 250NY559, 166NE324(1st case)]; 191 NC84, 131SE413 (one of highest attributes of sovereignty); 25 OhNPNS89; 123 Okl 255, 253P279; 122 Okl 241, 254 P61; 150Wash221, 272P983; 196Wis 76, 219NW428.

515–3 126Me537, 140A382; 220AppDiv 351, 222NYS29.

515–5 169Ark399, 275SW890; 199 Ind 95, 155NE465, 50ALR1518; 237Mich 338, 211NW905; 125Misc269, 210NYS 748; 25 OhNPNS89; 123 Okl 255, 253P 279.

515-8 48 **Ida**1, 279**P**298, 67**ALR**580.
515-10 56**ND**431, 218**NW**18; 122 **Okl** 241, 254**P**61, 62 [quotCyc].
515-11 154**Wash**529, 282**P**922.
515-12 122 **Okl** 241, 254**P**61, 62 [quot Cyc]; 131 **Okl** 29, 267**P**636 (function of court is merely ministerial).
516-13 243**Mich**517, 220**NW**808; 220 **AppDiv**351, 222**NYS**29, 36 [citCJ]; 155 **Wash**370, 284**P**788.
516-13½-New. That a school district makes a loan for school purposes and an irrepealable tax is assessed on the entire district does not prevent the taking of lands within the district for public purposes. 31**F(2d)**617.
516-17 169**Ark**399, 275**SW**890; 92**Fla** 617, 110**S**451; **Mass** 169**NE**910; 237 **Mich**338, 211**NW**905; 243**Mich**649, 220 **NW**881; 105**NJL**40, 143**A**759; 220**App Div**351, 222**NYS**29; 196**NC**284, 145**SE** 563; 22 **OhA**457, 153**NE**918; 123 **Okl** 255, 253**P**279; 150**Wash**221, 272**P**983. [c] **Act authorizing exercise** of right of eminent domain held not to grant special privilege or immunity. **Ind** 168**NE** 529.
516-18 122 **Okl** 241, 254**P**61.
516-20 30**F(2d)**121; 43**F(2d)**145; 319 **Ill** 66, 149**NE**580; 224**Ky**604, 6**SW(2d)** 1074; 169**La**111, 126**S**675; **Mass** 169 **NE**910; 241**Mich**161, 216**NW**426; 170 **Minn**124, 212**NW**202; 220**AppDiv**351, 222**NYS**29, 36 [citCJ]; 196**NC**284, 145 **SE**563; 147**Va**355, 137**SE**458; 142**Wash** 270, 253**P**115, 58**ALR**779; 143**Wash**687, 255**P**1025; 155**Wash**651, 286**P**33; 39 **Wyo** 355, 271**P**212. [b] **Statute granting right of eminent domain to owner of major part of head and volume of usable flow** held not to violate constitutional guaranties of due process and equal protection of laws. 220**AppDiv**351, 222**NYS** 29. [c] **Refusal to separately assess damages for leasehold interest** does not constitute denial of due process. **Mo** 28 **SW(2d)**80.
516-20½-New. Taking of private property for a private way of necessity does not violate due process under federal Const. Amendm. XIV. 145**Wash**307, 260 **P**527.
516-21 317**Mo** 1225, 298**SW**237, 239 [citCJ]; 196**Wis**76, 219**NW**428.
516-21½-New. A municipal arm of the government to which the power is delegated may not deprive itself by contract, even on a valid consideration, of the right to exercise it. 200 **Iowa**1116, 206**NW**35.
516-21¾-New. Restrictive covenants in a dedication of an addition to a city and in deeds thereto cannot limit or affect the police power of the state acting through the city to condemn land for fire protective purposes. 115**Tex**255, 281**SW**544.
517-25 But see 5**F(2d)**99.
517-27 [a] **IndA** 166**NE**779.
518-31 29**F(2d)**900; **CalA** 272**P**1076; 97**Fla**710, 122**S**225 (regulation of real estate brokers); **Fla** 129**S**861; 157**Md** 521, 146**A**758; 262**Mass**137, 159**NE**743, 56**ALR**784; 83**NH**253, 141**A**142; **Oh** 165**NE**499; 294**Pa**246, 144**A**81; 295**Pa** 538, 145**A**600; 118**Tex**491, 18**SW(2d)** 585; **TexCivA** 13**SW(2d)**933. But see 97**Fla**69, 120**S**335. [k] **Flooding land** by water improvement district held not taking property, but damaging or destroying it. **TexCivA** 297**SW**865.
518-42½-New. Suspending the operation of an injunction pending appeal from a decree granting the same does not constitute a taking of property without adequate compensation. 197**Cal** 649, 242**P**725.
518-42¼-New. Taking tobacco products for use of the army and navy has been held taking under power of eminent domain. 274**US**215, 47**SCt**581, 71**L ed**1006.
518-42¼-New. An action of a railroad in causing fire on adjoining land has been held not taking of property for public use without compensation. 106 **Conn**423, 138**A**444.
518-42½-New. Voluntary sale by one citizen to another at war prices fixed by the president under authority of an act of congress is not a taking of property for public purposes. 288**Pa**230, 135**A** 759.
518-43 See also 50**RI** 288, 146**A**777, 782, 66**ALR**1553 [citCJ].
519-48 14**F(2d)**257; **Cal** 287**P**455; 91 **Fla**241, 107**S**364; 93**Fla**415, 111**S**801, 52 **ALR**51; **Iowa** 228**NW**874; 262**Mass** 404, 160**NE**285; 171**Minn**231, 213**NW** 907; 309**Mo** 189, 274**SW**448; **Mo** 32 **SW(2d)**583; 230**AppDiv**338, 245**NYS**44; 112 **OhSt**628, 149**NE**30; 287**Pa**259, 134 **A**409; **Pa** 152**A**23; 99**Vt**360, 133**A**352; 136**Wash**437, 240**P**557; 104**WVa**660, 140 **SE**839. [a] (1) 110**Conn**92. 147**A**294. [f] 47**RI** 431, 133**A**812. [h] **Regulation of state waters subject of police power** is not eminent domain. 47**RI** 431, 133**A** 812. [i] **Levee improvement district,** having powers of eminent domain, may exercise police power in connection therewith. 117**Tex**34, 297**SW**206. [j] **Ordinance prohibiting sale of milk except in original containers** is not taking of property without compensation. 195 **Wis**148, 217**NW**703. [k] **Destruction of property under police power** is not taking for public use. 27**F(2d)**478. [l] **Zoning ordinance,** passed in legitimate exercise of police power as taking or damaging property without just compensation, cannot be complained of by owner. 168**La**752, 123**S**314.
520-49 14**F(2d)**257; **Utah** 292**P**194; 136**Wash**437, 240**P**557; 40**Wyo** 462, 278 **P**542. [d] **Æsthetic taste** will not be permitted to control private property under guise of police power. 198**NC**51, 150**SE**810.
520-50 **Oh** 165**NE**499; 119 **Oh**624, 165 **NE**502. [h] **TexCivA** 28**W(2d)**1001.
521-51 **Conn** 152**A**210; 137**Misc**341, 242 **NYS**142. [h] **Summary destruction of diseased animals** is not taking of private property for public use. **Oh** 165**NE** 499.
521-52 137**Misc**341, 242**NYS**142. [a] (29) Imposing liability on bank officers who knowingly permit deposits when bank is insolvent. 319**Mo** 474, 5**SW(2d)** 50, 57**ALR**881. [b] 90**CalA**634, 266**P** 552.
523-56 21**F(2d)**440; 111**Conn**27, 149**A** 205 (building lines); 162**La**202, 110**S** 201; 166**La**776, 117**S**827; 171**Minn**231, 213**NW**907; 23 **OhA**33, 155**NE**166; 50 **RI** 26, 144**A**674.
523-57 **NJSup** 130**A**534; **NJSup** 132**A** 337; 112 **OhSt**654, 148**NE**842, 43**ALR**662. [b] (8) Restricting erection of combined apartment house and stores under terms of zoning ordinance, without compensation, held unauthorized. **NJ** 130**A**362.
523-58 142 **Okl** 146, 285**P**1040.
523-61 155**Md**252, 141**A**714.
524-70 [a] **Radio broadcasting license.**-36**F(2d)**111.
524-70½-New. A statute providing that a license of persons buying oysters and preparing them for market shall require the licensee to turn over to the state ten per cent of the shells or their money equivalent is not void as taking property for public use without just compensation. 279**US**392, 49**SCt**372, 73 **L ed**754.
524-74 14**F(2d)**257; 24**F(2d)**226; 170 **Ga**873, 154**SE**439; 323 **Ill** 246, 154**NE** 112; 324 **Ill** 618, 155**NE**781; 155**Md**104, 141**A**509; **Pa** 152**A**23. [a] (3) **Cal** 288 **P**775 (union depot). (18) To restore tracks removed by city. 323 **Ill** 246, 154 **NE**112. (19) To construct underground cattle pass in place of one at grade. 115 **Nebr**727, 214**NW**746. (20) To remove piers of railroad bridge from street. 167**La**771, 120**S**290, 62**ALR**1512. [f] (2) 87 **IndA**59, 160**NE**48. (3) Other instances. **Me** 151**A**440. (4) Unauthorized exercise of power. **Me** 151**A**440. [h] **State, in acquiring new right of way for railroad** in exchange for railroad's right of way taken for highway purposes, destroys easements of landowners under power of eminent domain and not by virtue of police power. 245**Mich** 65, 222**NW**325, 67**ALR**373. [i] **Commission cannot take utility's property under guise of regulation.**-**Me** 151**A**440.
525-76 280**US**234, 50**SCt**123, 74**L ed**390.
526-79 But see 205**Cal** 231, 270**P**444. [c] **Undervaluation of, or failure to value, water right owned by public utility in fixing rate** amounts to taking of property without compensation. 44 **Ida**1, 262**P**863. [d] **Prohibiting municipality from charging for water furnished to schools or other public buildings** constitutes taking of property without compensation. 118 **Oh**295, 160**NE**902.
526-81 164**La**1020, 115**S**131; 309**Mo** 189, 274**SW**448.
526-86 24**F(2d)**226; 216**Ala**178, 112**S** 742; 197 **Ind**28, 149**NE**639; 87 **IndA**74, 160**NE**50; 223**Ky**427, 3**SW(2d)**1077; 152 **Md**367, 136**A**829; 317**Mo** 1179, 298**SW**720 (zoning); 142 **Okl** 146, 285**P**1040; 50**RI** 53, 144**A**888; 155**Tenn**364, 293**SW**757; **TexCivA** 24**SW(2d)**61; 104**WVa**660, 140 **SE**839; 40**Wyo** 462, 278**P**542. See also 243**Mich**679, 220**NW**672. [a] (3) Requirement that, as condition of acceptance of plat, streets be of width to conform to general plan does not infringe constitutional rights of dedicator. 241 **Mich**468, 217**NW**58. [b] **Ala** 127**S**832. [d] **Statute making cost of removing trees blown across highway charge** on them would be unconstitutional. 83**NH** 176, 139**A**747. [e] **Use may be prohibited.**-40**Wyo** 462, 278**P**542. [f] **Removal of electrical conduits under street** to make way for subway. **Pa** 152**A**23.
527-87 See also **TexCivA** 23**SW(2d)** 840.
527-89 147**Miss**244, 111**S**818, 56**ALR** 926.
527-90 **Wis** 231**NW**865.
527-93 127**Misc**211, 216**NYS**321 (tax on transfer of contingent estate without deduction for intervening estate or interest, but providing for return on account thereof on happening of contingency, is not taking property without just compensation); **TexCivA** 3**SW(2d)** 947. See also 198**Wis**326, 223**NW**852.
528-94 See also 109**Conn**388, 147**A**9.
528-96 201 **Iowa**947, 208**NW**511.
528-97½-New. The enlargement of the boundaries of a municipality does not constitute a taking of private property for public use in a constitutional sense. 201 **Iowa**947, 208**NW**511.
529-99 **CalA** 275**P**835; 170**Ga**699, 154 **SE**268; 147**Miss**244, 111**S**818, 56**ALR** 926; 321**Mo** 830, 13**SW(2d)**36; **Mo** 19 **SW(2d)**891; 35**Wyo** 73, 246**P**918. [e] **Statute releasing land of drainage district when sold from all liens of assessments** levied prior to sale held not to take property without just compensation. 199**Wis**85, 225**NW**873.
529-1 228**Ky**737, 15**SW(2d)**531; 117 **Nebr**251, 220**NW**289. [e] **Collection of cost of public improvement** constitutes exercise of taxing power. 177**Minn**598, 225**NW**909.
530-4 269**US**55, 46**SCt**39, 70**L ed**162.
531-5 29**F(2d)**932; 31**F(2d)**617.
531-5½-New. Consent of individuals is unnecessary. 31**F(2d)**617.
531-6 [a] **Condemnation for federal game refuge** (1) is not affected by school district loan and levy of irrepealable tax. 31**F(2d)**617. (2) Nor is it invasion of state's sovereignty or violation of state constitution. 31**F(2d)**617.
531-7 35**F(2d)**235.
531-13½-New. In the absence of an act of congress, the District of Columbia has no power to acquire land by eminent domain. 26**F(2d)**538.
531-15 200 **Iowa**1116, 206**NW**35; 122 **Okl** 241, 254**P**61; 123 **Or**501, 262**P**946. [c] **Exercise of power of eminent domain** is lodged in legislature and is political and legislative, rather than a judicial, function. 169**Ark**399, 275**SW**890. [d] **Interstate commerce** does not restrict state's right of eminent domain. 127**Misc**866, 217**NYS**781.
532-32 99**Fla**954, 128**S**402; 237**Mich** 338, 211**NW**905, 912 [citCJperSnow,J dis op].
533-34 220**AppDiv**351, 222**NYS**29, 36 [citCJ].
533-35 102**NJEq**221, 140**A**335; 220**App Div**351, 222**NYS**29, 36 [citCJ]; 125**Misc** 269, 210**NYS**748; 123 **Or**501, 262**P**946.
533-37 **Ida** 290**P**717(4thcase); 125**Misc** 269, 210**NYS**748.
533-39 220**Ala**433, 126**S**133 (power of eminent domain does not pass by implication); 331 **Ill** 132, 162**NE**202; 248

Mich28, 226NW663 (grant of power of eminent domain will never pass by implication); 102NJEq221, 140A335; 191 NC84, 131SE413; 283Pa588, 129A845 (statute authorizing exercise of power need not specify procedure); 290Pa156, 138A845; TexCommnA 280SW759; Tex CivA 32SW(2d)271 [citCJ]. [d] General terms are important in determining effect of particular provision. Mich 233 NW172.

534-40 149Miss623, 115S779; 123 Or 501, 262P946.

534-41 20F(2d)5, 8 [citCJ]; 214Ala 199, 107S80; 220Ala433, 126S133; 13 LaA459, 128S56; 243Mich517, 220NW 808; Mich 233NW172; 149Miss623, 115 S779; 218AppDiv356, 218NYS173; 191 NC84, 131SE413 (rule is expressly applicable to delegations to private corporations); 26 OhNPNS525; 283Pa588, 129A845; TexCivA 32SW(2d)271 [cit CJ]; 141Wash71, 250P466; 193Wis108, 213NW657 [c] Strict construction forbids extension of quantum of title to be taken. 218AppDiv356, 218NYS173. [d] Act providing that institute shall have all rights, privileges and franchises necessary to promote its creation has been held too broad to grant power of eminent domain. 220Ala433, 126S133. [e] Act held not to grant power of eminent domain but relates to mode of procedure. 220Ala433, 126S133.

535-42 Mich 233NW172.

535-43½-New. A statute which falls under inhibition of state constitution as to special laws is void. 199 Ind95, 155NE465, 50ALR1518.

536-48 13LaA459, 128S56; 249Mich 289, 228NW791.

536-50 32F(2d)27; 197Cal 467, 241P 549; 163Ga591, 136SE789; 166Ga111, 142SE535 (for school purposes); 83 IndA53, 147NE629 (cities of fifth class); 200 Iowa1116, 206NW35; 237Mich446, 212NW207, 209 [citCJ]; 246Mich501, 224NW622; 320Mo 120, 6SW(2d)935; 105NJL40, 143A759; 219AppDiv478, 220NYS298; 297Pa140, 146A557; Tex CivA 285SW944; Va 152SE537; 104 WVa660, 140SE839. See also 196NC756, 147SE301(2dcase). [c] (2) Statutes held not repealed. 95CalA602, 273P131; 167Ga865, 147SE63. [g] Extent of power.-200 Iowa1116, 306NW35.

536-51 95CalA602, 273P131; 158La 573, 104S372; 319Mo 697, 4SW(2d)810; 194Wis397, 216NW509 (county is not municipal corporation under constitution). [b] Extent of power.-Tex CommnA 280SW759.

536-51½-New. to cities, 217AppDiv 587, 217NYS359.

536-52 76CalA492, 245P227; 317 Ill 292, 148NE44; MoA 7SW(2d)285.

537-53½-New. to school districts, 170 Minn49, 212NW8.

537-54 173Ark645, 293SW2; 131 Okl 29, 267P636 (state highway commission). But see Cal 292P124. [a] 22 OhA457, 153NE918. [b] 150Miss416, 116S602. [e] 98Fla26, 123S527 (for establishment of public drainage system); 127Kan754, 275P379. [p] Board of park commissioners.-200 Iowa1116, 206 NW35. [q] Department of public works.-320 Ill 491, 151NE372. [r] County court.-123 Or103, 261P76. [s] Park commission.-30F(2d)121; 196NC 284, 145SE563. [t] Educational institution belonging to state.-Purdue University is such institution authorized to exercise right of eminent domain. Ind 168NE529. [u] Highway districts.-Ida 290P717(4thcase).

537-55 163Ga513, 136SE415; 200 Iowa 1116, 206NW35; 237Mich446, 212NW 207, 209 [quotCJ]. [b] (6) State fish commission has no power to appropriate private property for public use. 129 Or 302, 276P691. [d] 290Pa156, 138A845. [e] Where statute provides that on failure to agree as to purchase price of electric light works borough may appoint viewers to assess value of works so taken, words "so taken" do not import existence of power of eminent domain. 290Pa156, 138A845.

537-57½-New. A statute authorizing a borough specifically to exercise power for particular purposes shows that power was not conferred as to objects not mentioned. 290Pa156, 138A845.

538-62 237Mich446, 212NW207, 209 [quotCJ]; 172Minn255, 214NW930; Wash 288P258 (airport). [b] (2) or for diversion channels 317 Ill 292, 148 NE44.

538-63 237Mich446, 212NW207, 209 [quotCJ]. But see 73CalA90, 238P117. [a] Home Rule Act of Michigan, Comp. L. (1915) § 3307, as amended by Pub. Acts (1921) No. 353, does not confer on cities authority to provide in charters for right to secure land outside of corporate limits for park purposes by condemnation. 237Mich446, 212NW207.

538-64 [a] 220AppDiv351, 222NYS29. [d] (1) 42F(2d)692; 319 Ill 66, 149NE 580; 125Misc269, 210NYS748; 8PaDist &Co 281; 50RI 288, 146A777, 66ALR 1553. [e] 325 Ill 387, 156NE298. [l] (1) 11LaA69, 123S369 (extent of power). (3) Special provisions as to expropriation in statute chartering railroad company are not repealed by implication by general expropriation law. 11LaA69, 123S369; 261Mass523, 159 NE55; 141Wash71, 250P466; 155Wash 651, 286P33 (toll logging railroad). [w] Right of membership corporation to condemn land is unaffected by issuance of capital stock. 229 AppDiv30, 241NYS44.

540-65 23F(2d)349; 43F(2d)145; 107 Conn587, 141A654; 125Misc269, 210 NYS748. [d] (7) Statutes construed with respect to construction of subway at crossing. [1927] AC198, 59 OntL 486, [1926] 4DomLR193, [1926] 3 WestWkly100. (8) Other instances. 157Miss700, 128S738.

541-66 See also 296Pa65, 145A684.

542-78 219Ky739, 294SW494. [d] Foreign telephone and telegraph company which has qualified itself to do business within state need not domesticate itself in order to exercise power of eminent domain under Kentucky statute. 222Ky487, 1SW(2d)537.

543-87 180Ark148, 20SW(2d)636.

543-89 179Ark1029, 18SW(2d)1028, 65 ALR1446 (act of domestic corporation in securing right of way for electric line by exercise of power of eminent domain cannot be questioned except for fraud, though principal motive for its incorporation was to secure right of way for foreign corporation); 107WVa498, 148 SE847.

543-97 But see 287Pa376, 135A362.

543-99 107Conn587, 141A654; 287Pa 376, 135A362; 50RI 288, 146A777, 66 ALR1553. [a] Condemnation of all assets of old corporation and entire corporate stock thereof may be authorized by legislature. RI 147A668.

544-1 107Conn587, 141A654.

544-3½-New. A company with right of eminent domain leasing from a company without that right may serve the district involved although such service requires exercise of such right. 287Pa 376, 135A362.

544-5 Fla 129S582.

544-7 179Ark1029, 18SW(2d)1028, 65 ALR1446 (domestic corporation could condemn right of way for electric line and lease its rights to foreign corporation even though domestic corporation was created for such purpose by foreign corporation).

544-9½-New. [§ 30a] (b½). Lease of Water Company. A water company with power of eminent domain may, as lessee, operate the company without such power as part of the general system and exercise such right, although the lessor company formed after passage of the act providing that companies thereafter formed should not have such power. 287Pa376, 135A362.

544-10 328 Ill 610, 160NE226.

544-15 123 Or501, 262P946.

545-18 123 Or501, 262P946.

545-22 200 Iowa1116, 306NW35; 229 AppDiv381, 243NYS30. [e] (1) 317Mo 1225, 298SW237. (3) Where owner conveys strip of land in consideration of city's agreeing not to condemn other land, he cannot have damages for such strip in subsequent proceedings by city to condemn other land, constituting breach of such void agreement. 317Mo 1225, 298SW237. [f] After report of committee of inability to purchase necessary land board of supervisors itself should authorize condemnation of specific parcels. 229AppDiv381, 243NYS30.

546-26 269US55, 46SCt39, 70Led162 (statute construed to be implied declaration of public purpose); 21F(2d)72; 23F(2d)349; 33F(2d)242; 87CalA617, 262P425; 97Fla69, 120S335; 99Fla954, 128S402; 98Fla26, 123S527, 533 [cit CJ]; 161Ga524, 131SE517, 44ALR534; 321 Ill 101, 151NE567; Ill 172NE829; 219Ky739, 294SW494; NJSup 152A79; 223AppDiv654, 229NYS414; 132Misc 848, 230NYS691; 196NC383, 145SE774; 198NC51, 150SE810; 25 OhNPNS889; 285Pa102, 131A728; 289Pa535, 137A 610; 293Pa551, 143A208; 7PaDist&Co 385; 50RI 288, 146A777, 66ALR1553 (statute purporting to authorize taking of property for private use is held invalid); TexCivA 14SW(2d)357; Tex CivA 30SW(2d)532; 151Va108, 144SE 483; 155Wash651, 286P33. [d] (3) Easement. Ill 172NE829. [p] Statute providing for payment of attorney's license fees into state treasury and disbursement thereof under control of certain officers is not void as appropriation of private funds for private use. 45 Ida676, 266P665.

548-27 137Misc618, 244NYS224; 285 Pa102, 131A728.

548-34 [a] Fundamental principles of republican form of government would be violated by taking or damaging property for private purposes. 151Va1, 144 SE492.

548-35 [a] Statute impliedly authorizing private taking of land held unconstitutional where intent of legislature was unmistakable. 126Me121, 136A664, 51ALR1194.

548-36 202 Iowa508, 210NW604; 126 Me121, 136A664, 51ALR1194; 285Pa 102, 131A728.

549-38 [c] Construction of provisions.-48 Ida1, 279P298, 67ALR580.

549-43 33F(2d)242 (whether use for which property is sought to be condemned is public or private is judicial question); 169Ark399, 275SW890; 92 Fla617, 110S451, 455 [citCJ]; 98Fla26, 123S527, 533 [citCJ]; 161Ga432, 131SE 46, 50 [citCJ]; 325 Ill 387, 156NE298; 321 Ill 101, 151NE567; 327 Ill 356, 158 NE685; 199 Ind95, 155NE465, 50ALR 1518; 202 Iowa508, 210NW604; 124 Kan716, 261P556; 166La663, 117S765; La 130S337; 126Me121, 136A664, 51 ALR1194; 75Mont493, 244P298; 223 AppDiv654, 229NYS414; 125Misc269, 210NYS748; 220AppDiv351, 222NYS29; 127Misc866, 217NYS781.

550-44 202 Iowa508, 210NW604; 75 Mont493, 244P298; 248NY15, 162NE 10. But see 325 Ill 387, 156NE298.

551-47 169Ark399, 275SW890; 92Fla 617, 110S451, 458 [citCJ]; 224Ky604, 6SW(2d)1074. [c] 50RI 288, 146A777, 782, 66ALR1553 [citCJ]. [f] Mere flat pronounced by legislature does not make use public when in fact it is not. TexCommnA 296SW503.

552-53½-New. In determining whether use is public, the extent of the right by the public to use, and not the extent to which that right is or may be exercised, must be considered. 127Misc 866, 217NYS781.

552-53¼-New. In determining whether use is public, the court must accept a declared purpose as the real one, and not inquire into the motives. 127Misc 866, 217NYS781.

552-53¼-New. In jurisdictions where, under constitution, necessity for taking must be determined by jury, and it so finds, then the acquisition of the property is taking for public use. 237Mich 90, 211NW96.

552-55 25 OhNPNS397; 142Wash270, 253P115, 58ALR779. [b] 101Vt325, 143 A384. [d] Use must be public use in fact. TexCommnA 296SW503.

552-56 25 OhNPNS397; 142Wash270, 253P115, 58ALR779.

553-57 319 Ill 66, 149NE580; 202 Iowa 508, 210NW604; 149Va658, 140SE816; 142Wash270, 253P115, 58ALR779. [g] That private parties or interests may benefit is not fatal so long as use is open to public as a whole. 127Misc866, 217NYS781. [h] Destruction of buildings by city in order to prevent spread of fire from garbage deposited by city

outside of city was not taking of private property for public use. 208Cal 74, 280 P108.

553–59 37F(2d)602; 142Wash270, 253 P115, 58ALR779. [c] 142Wash270, 253 P115, 58ALR779.

554–60 34F(2d)287.

554–62 202 Iowa508, 210NW604; 136 Wash589, 241P16. [c] 143Va405, 130 SE764, 44ALR727 (if property is to be used as private property uncontrolled by law as to its use).

555–64 99Fla954, 128S402; 202 Iowa 508, 210NW604; La 130S337; 25 OhN PNS397; 143Va405, 130SE764, 44ALR 727. [h] 99Fla954, 128S402; 143Va 405, 130SE764, 44ALR727. [j] 50RI 288, 146A777, 66ALR1553. [m] See also 143Va405, 130SE764, 44ALR727.

556–65 25 OhNPNS397.

556–66 126Me121, 136A664, 51ALR 1194. [a] (3) Interest of public in purchase of commodities does not entitle dealer selling for private gain to take private property for his place of business on theory of necessity for public use. 202 Iowa508, 210NW604. (4) Excess condemnation of land for purpose of selling excess at profit to pay for improvement held not for "public use." 33 F(2d)242. [e] **Railroad company cannot be required to furnish private party with site on its right of way** for fixed rental in order to enable such party to erect and maintain coal shed for storage and sale of coal for private gain. 202 Iowa508, 210NW604.

556–67 223AppDiv358, 228NYS686; 101Vt325, 143A384. See also 99Fla954, 128S402. [h] **Where public benefit and private use are so blended that line of demarcation is difficult to observe,** judicial practice is to approve undertaking and disregard private benefit as mere incident. 143Va405, 130SE764, 44 ALR727.

558–70½–New. Whether purpose is public or private does not depend on use by public or amount of use, but upon right of the public to such use. 163 Ga919, 137SE272.

558–70½–New. Reservoir to regulate flow of a stream is a public use. 127 Misc866, 217NYS781.

558–70¼–New. The operation of ships is a public purpose, as distinguished from a "private purpose," in the sense in which such term is used in the laws of eminent domain. 29F(2d)932.

558–70⅓–New. Federal government has authority to establish game refuge, with the consent of the state. 31F(2d)617.

558–71 101Vt325, 143A384.

558–72 98Fla26, 123S527, 534 [citCJ]; 99Fla954, 128S402; 175Minn395, 221 NW527. See also 101Vt325, 143A384.

559–75 125Me238, 132A740.

559–76 237Mich90, 211NW96.

559–78½–New. Where a municipality already holds a perpetual lease of property, an appropriation of the fee merely to amortize the ground rent is not for public use. 25 OhNPNS889.

559–80 92Fla617, 110S451, 458 [citCJ]; 93Fla342, 112S75; 163Ga591, 136SE 789; 13LaA459, 128S56 (highway accessible to city, though not passing through it); Mass 172NE248; 177Minn 146, 225NW86; 122 Okl 241, 254P61; 297Pa140, 146A557; TexCivA 294SW 868; 144Wash124, 257P231; 148Wash 680, 270P104; 104WVa129, 139SE644; 104WVa660, 140SE839; 196Wis76, 219 NW428. See also 191NC147, 131SE277. [d] **Municipal projects as regards question of appropriation of land by eminent domain** may include useful, ornamental, and artistic designs, provided plans for future are reasonable. 297 Pa140, 146A557.

560–81 281US362, 50SCt299, 74Led 904; 163Ga591, 136SE789; 167Ga149, 144SE785; 261Mass99, 158NE329; 248 Mich13, 226NW690; NJSup 152A79 (to remove obstacles). See also 246Mich 501, 224NW632. [d] **In Illinois,**–317 Ill 203, 148NE69. [e] **Excess condemnation of land by city in widening of street** for purpose of selling such excess at profit, and using proceeds to pay for improvement, held not condemnation for "public use." 33F(2d) 242.

560–90½–New. Land for which patent has been given under federal statute stipulating reservation of public highways of certain width around every section of land allotted or opened to settlement falls within general rule requiring compensation notwithstanding such stipulation. 114Nebr204, 206NW 740.

560–90⅓–New. A state road commission may condemn rock adjacent to, and necessary to the construction of, a road, a contract for which a contractor cannot otherwise obtain at a reasonable price. 108WVa431, 151SE436.

560–91 See also 151Md154, 134A201.

560–91½–New. Persons who buy property in a city take it subject to the city's right to make necessary grade changes. 220Ky132, 294SW1076.

561–93½–New. But where an owner has an uncondemned easement in a public street, his right therein may not be impaired by temporary closing of the street which he may enjoin. 285Pa102, 131A728.

561–96 28F(2d)684(2dcase); 173Minn 448, 217NW499; 75Mont493, 244P298; 153Tenn220, 280SW1014; 143Wash687, 255P1025. [b] 75Mont493, 244P298. [d] (3) Establishment of building line under statute authorizing selectmen of town to acquire land for purposes of town way was held to constitute encumbrance on land, it being in nature of easement for public's benefit. 255 Mass67, 150NE860, 44ALR1374. [g] (4) Private right of way for logging railroad. 143Wash687, 255P1025. [h] **Extent of right of use and not extent of exercise of right** determines whether way is public or private. 75Mont493, 244P298. [i] **Private roads leading from highways to farms** are in fact not private roads but public roads and statutes authorizing taking of land for such use are not in violation of Fourteenth Amendment of federal constitution. 75 Mont493, 244P298.

562–98 126Me121, 136A664, 667 [cit CJ], 51ALR1194; 75Mont493, 244P298; TexCivA 30SW(2d)532.

563–6 145Wash307, 260P527; 139Wyo 355, 271P212. [a] (10) Taking authorized by constitutional provision prohibiting taking of private property for private use except for private ways of necessity. 145Wash307, 260P527.

563–7 See also 145Wash307, 260P527.

563–9 249Mich289, 228NW791.

563–11 16F(2d)395; 43F(2d)145; 142 Va512, 129SE384 (under general law conferring such right on internal improvement companies). [g] **Taking land to obtain better rapid transit facilities** for public is for "public use." Mass 172NE356.

564–15 321 Ill 101, 151NE567; 104NJL 283, 140A673.

565–17 155Wash651, 286P33.

565–20½–New. or that a private use may be made of the land as a mere incident to the public use, 129Kan176, 282 P183.

565–23 Fla 129S582 [quotCJ]; 248 Mich28, 226NW663; 155Wash651, 286 P33.

565–24 161Ga432, 131SE46; 248Mich 28, 226NW663 (yard tracks).

565–25 129Kan176, 282P183.

566–28 161Ga432, 131SE46; 131Misc 907, 228NYS736.

566–34 Fla 129S582; 129Kan176, 282 P183 ("aqueduct" in statute held to include conduits).

566–34½–New. drains, 129Kan176, 282 P183 ("proper drains" in statute held to include underground pipes).

567–44 129Kan176, 282P183.

567–52 [a] **For hotel purposes** under Canadian law. Sask [1930] 4DomLR 1004.

567–52½–New. An act permitting a railroad to straighten a portion of the lines has been held to authorize deviation from the old line by departure from the original roadbed. 289Pa6, 136A851.

567–52⅓–New. The manufacture of snowplows for railroads during the war was a "public use," for which coal and other private property might have been taken under power of eminent domain. 279US253, 49SCt314, 73Led688.

567–55 321 Ill 101, 151NE567.

567–56 LaA 12S498.

568–69 16F(2d)395; 153Tenn283, 282 SW382, 385 [quotCJ].

569–70 16F(2d)395; 219Ky739, 294 SW494; 153Tenn283, 282SW382, 385 [quotCJ]. [e] (2) Statute restricting mines and quarries to distance of three miles in condemnation of lands for railroads is not applicable to tramways for transportation of lumber to railroad switch. 219Ky739, 294SW494. [g] (2) "Branch road" and "lateral road" are used interchangeably in Tennessee statute. 153Tenn283, 282SW382. (3) Whether particular road is lateral or branch road does not depend on its length or direction. 153Tenn283, 282 SW382. [q] **Number of persons accommodated** is not test of public use. 161 Ga432, 131SE46. [r] **Lateral road** is merely an offshoot from main line. 153 Tenn283, 282SW382. [s] **Use of spur track** need not be opened to all public: but facility or instrumentality of transportation may be limited in its use. 161Ga432, 131SE46. [t] **Foreign and domestic railroad** may acquire land for construction of branch line notwithstanding branch road would not connect with main line of domestic road. 153 Tenn283, 282SW382.

571–71 198 Ind645, 154NE659; 13Pa Dist&Co 353; 153Tenn283, 282SW382, 385 [quotCJ]. [b] **Public character** of proposed lateral road is established by pledge that it will connect with existing main line, for public use. 198 Ind645, 154NE659.

571–72 153Tenn283, 282SW382, 385 [quotCJ].

571–73 153Tenn283, 282SW382, 385 [quotCJ].

571–74 321 Ill 101, 151NE567. [c] **Ordinance permitting railroad to lay industrial track** for use of public in alley, but not to be used generally as a dray track, does not make track private one for private use. 161Ga432, 131SE 46.

571–75 321 Ill 101, 151NE567.

573–92 187Wis552, 203NW912.

573–98 264Mass460, 163NE82; Mass 168NE78; 159Tenn600, 21SW(2d)385. [c] (4) Town may take land necessary for location of standpipe in connection with its waterworks system. 157Tenn 249, 7SW(2d)992. [d] (1) 287Pa376, 135A362. (2) 143 Okl 203, 288P344.

574–99 Cal 287P496.

575–7 287Pa376, 135A362.

575–9 287Pa376, 135A362.

575–13 248NY15, 162NE10.

575–14 See also 249NY445, 164NE541 [motion to amend remittitur granted 250NY559, 166NE324(1stcase)].

575–15 66Utah509, 243P922; 155Wash 370, 284P788 (necessity of forcing water uphill). [a] (2) Under some statutes right of condemnation is allowed whether sought by public or private individual. 66Utah509, 243P922.

576–18 147Wash520, 266P198.

576–19 147Wash520, 266P198.

578–34 335 Ill 299, 167NE106.

579–35 117Kan622, 233P508; 127Misc 834, 217NYS534.

580–53 31NM188, 242P683. [a] **Enlarging ditch.**–171Ark1079, 287SW581.

581–57 98Fla26, 123S527.

581–61 169Ark399, 275SW890; 172 Minn255, 214NW930, 931 [citCJ]; 191 NC1, 131SE407 (under statute in absence of charter power).

582–62 172Minn255, 214NW930, 931 [citCJ].

582–65 Miss 130S55.

582–68 7Alaska386; 7Alaska455; 7 Alaska655.

583–76½–New. Alaska eminent domain statutes do not authorize the taking of private property to obtain a site for a plant to operate a placer mine. 20F (2d)5.

583–78 119Kan374, 239P766.

584–83 99Fla954, 128S402 (corporation may acquire right of way for power line); 319 Ill 66, 149NE580; 197 Ind 430, 151NE220; 125Me238, 132A740; 220AppDiv351, 222NYS29; 125Misc269, 210NYS748; 8PaDist&Co 281; 142Wash 270, 253P115, 58ALR779; 145Wash351,

259P1089. [a] 187Wis552, 203NW912. [e] **Lands flooded by reservoir are appurtenances of single power site.**–220 AppDiv351, 222NYS29. [f] **Development of water power by several dams under single plan** is governed by statute relating to development of several sites under single plan. 220AppDiv351, 222NYS29. [g] **Power company condemning property for right of way** obligates itself to perform all duties to public incident to its business. 99Fla 954, 128S402. [h] **Power company may condemn land for transmission line** intended only to convey steam-generated electricity notwithstanding possible use of line for transmission of hydroelectricity. 107WVa498, 148SE847. [i] **Use of public highway for distribution.**–Ala 128S454.

584–83½–New. Purpose of Conservation Law was to preserve and develop water powers under state control. 220 AppDiv351, 222NYS29.

584–84 20F(2d)263; 163Ga919, 137SE 272; 197 Ind430, 151NE220. [c] **Operation of mill by water power to manufacture electricity** has been held to constitute public use for which lands may be appropriated. 197 Ind430, 151NE 220.

585–87 TexCivA 298SW627.

585–88 163Ga919, 137SE272; 197 Ind 430, 151NE220; 143Va405, 130SE764, 44ALR727 (company furnishing electric power to public service corporation); 142Wash270, 253P115, 58ALR779; 145 Wash129, 259P379; 107WVa498, 148SE 847.

585–89 163Ga919, 137SE272; 125Misc 269, 210NYS748.

585–90½–New. A lease by an electric power company to other public utilities of electricity to be manufactured by its plant does not affect its right to exercise the power of eminent domain for erection of a dam to produce electricity. 197 Ind430, 151NE220.

585–90½–New. Acceptance by petitioners of a license granted by the federal power commission, providing that licensee may reconstruct any dock damaged by raising the water level, unless otherwise compensated, does not prevent condemnation of a private commercial dock. 145Wash178, 259P382.

585–1 153Tenn393, 284SW370.

586–6 124Kan716, 261P556.

586–10 Md 148A209.

586–13 278US191, 49SCt160, 73Led 259.

586–22 161Ga907, 132SE218; 190NC 753, 130SE621. [a] 239Mich46, 214NW 239.

586–23 17F(2d)219; 239Mich46, 214 NW239. [a] **Condemnation for play ground at later date,** of lot which could not be purchased at time others were acquired by purchase, has been authorized. 190NC753, 130SE621. [b] **Meaning of word "site"** for school buildings as used in statute broad enough to include land within statutory limit reasonably required for use of building. 190NC753, 130SE621. [c] **Land taken for play ground may be as essential** as land taken for schoolhouse itself. 190 NC753, 130SE621.

586–25 220Ala433, 126S133; 250Mich 391, 230NW194 (golf course for incorporated athletic board). [a] **University dormitory.**–Ind 168NE529.

586–28½–New. Land having historic interest, as based upon the history of the state, may be taken for preservation under a public use doctrine. 124Kan 716, 261P556.

587–30 31F(2d)853; 177Minn146, 225 NW86; 196NC284, 145SE563; 101Vt 325, 143A384. [c] (3) Under statutes cities of certain population may condemn land for park purposes outside city limits. 139 Okl 76, 281P280. [f] **Limitation of authority.**–336 Ill 624, 168 NE690.

587–37 329 Ill 288, 160NE559; 83 IndA 53, 147NE629 (cities of fifth class may condemn land within or without city limits); Iowa 230NW561; 261Mass523, 159NE55; TexCivA 294SW868; Tex CivA 9SW(2d)435. See also 167Ga865, 147SE63.

588–38 [c] **"Enter upon or take"** construed to authorize condemnation of either easement or fee for drainage purposes. 169Ark399, 275SW890.

588–43 50RI 288, 146A777, 66ALR1553.

588–49 261Mass523, 159NE55; 261 Mass556, 159NE70.

588–51 89CalA462, 265P287, 289 [cit CJ].

588–52½–New. Under a statutory provision a judgment creditor's lien of judgment on which no execution has issued does not entitle him to a sheriff's sale and deed after commencement of condemnation proceedings. 331 Ill 132, 162NE202.

589–78½–New. The taking for public use of sand, which had not been dug nor placed on the surface of the soil, is an appropriation of real estate. 133 Misc388, 232NYS235.

589–79 322Mo 293, 15SW(2d)785.

590–85 187Wis552, 203NW912.

590–88 287Pa376, 135A362.

590–90 But see 287Pa376, 135A362.

591–95½–New. Statute prohibiting taking ground for rounding of highway corner applies where purpose is to round corner by leaving dwelling house segregated at corner. Iowa 232NW760 ("round" construed).

593–35 248Mich450, 227NW811; 26 OhA590, 160NE101; 283Pa381, 129A 445; 11PaDist&Co 30. [h] **Right of electric company to remove trees** from adjoining land is servitude. 214Ala160, 107S85.

593–37 265Mass70, 163NE745; 150 Miss656, 115S890, 58ALR849.

594–39 See also 177Minn343, 225NW 164.

594–41 128Misc863, 220NYS349.

595–44 173Ark645, 293SW2; 225Ky 324, 8SW(2d)392; 196Wis76, 219NW 428.

595–46 128Me108, 146A10.

596–52 132Misc848, 230NYS691.

596–54 127Misc834, 217NYS534.

597–55 See also 159La1079, 106S571.

597–60½–New. A statute against taking private springs and private water supplies does not prevent such taking when incidental to the construction of a reservoir. 287Pa376, 135A362.

598–71 274US215, 47SCt581, 71Led 1006; 335 Ill 101, 166NE495.

598–72 101NJL518, 129A138 (operation of grist mill not such public use as exempts from condemnation).

598–76 See also 31F(2d)853.

599–77 39F(2d)800 (taking land devoted to power dam for railroad right of way); 217Ala268, 115S422; 172 Minn255, 214NW930, 931 [citCJ]; 153 Miss517, 121S160; 102NJEq221, 140A 335; 219AppDiv478, 220NYS298; 127 Misc866, 217NYS781; 26 OhA590, 160 NE101; 8PaDist&Co 281; 117Tex34, 297SW206; TexCivA 285SW944. See also 101Vt325, 143A384. [c] **General delegation of power of eminent domain** does not authorize taking of property already devoted to public use unless intent is clearly inferred from nature of improvements authorized. 42F(2d)692. [d] **Statutes construed as conferring power.**–42F(2d)692.

600–85½–New. Under statute protecting one public utility from condemnation for use of another, canal company was held protected. 188Wis54, 205NW 551.

601–88½–New. Where no map showed that future streets were to be laid out, a railroad took the right of way free from such streets. 215Ky353, 284SW 1091.

601–88½–New. By statute in New York a river regulating a district is authorized to condemn railroad property for storage reservoir. 127Misc866, 217NYS 781.

602–93 31F(2d)853; 39F(2d)800; CalA 277P339; 163Ga513, 136SE415; 12Pa Dist&Co 652; TexCivA 14SW(2d)102; 200Wis170, 227NW859.

604–3 See also TexCivA 14SW(2d)102.

605–14 39F(2d)800; Cal 287P496; TexCivA 285SW944; 155Wash661, 286 P37.

611–54 213AppDiv343, 210NYS488.

611–57 104WVa660, 140SE839. See also 169La1085, 126S667.

612–58 200Wis170, 227NW859 [citCJ] (uses not inconsistent or mutually exclusive).

612–62 104WVa660, 140SE839.

612–63 169La1085, 126S667; 104WVa 660, 140SE839.

613–67½–New. A statute relating to condemning of public utility properties does not change a city's power to acquire property for street purposes. 200 Wis170, 227NW859.

613–68 104WVa660, 140SE839.

613–70 104WVa660, 140SE839.

615–99½–New. Statutes vesting in railroad commissioners authority to determine the rental value of a site on a railroad right of way used by the municipality for a public warehouse or by a private party for a wholly public purpose is valid, and an action of the board would not invade constitutional rights of the railroad company. 202 Iowa508, 210NW604.

615–3 283Pa381, 129A445. See also TexCivA 4SW(2d)136.

615–7 141Wash71, 250P466. See also 243Mich649, 220NW881.

616–16 283Pa588, 129A845. [c] **Relocation of highway.**–283Pa588, 129A 845.

617–22 198 Ind645, 154NE659.

617–25 101Vt325, 143A384; 136Wash 87, 238P985. [d] **Building railroad** held inconsistent with use for public park. 136Wash87, 238P985. [e] **Quarter of acre of park property** held not so inconsiderable as to be beyond notice of law. 136Wash87, 238P985.

618–37½–New. A municipality owning land under high-water line on a navigable stream, and vested with power to acquire title to the land for park purposes has an absolute right to condemn such land for use as a park. 217App Div587, 217NYS359.

618–40 289Pa16, 136A851.

618–45 [f] **Legislative consent required by Cemetery Act** is given by highway statute providing for system of state highways. NJSup 142A349.

620–57 Md 137A359.

620–59 200Wis43, 227NW298.

620–61 102NJEq221, 140A335.

620–63½–New. , or for a park. 217App Div587, 217NYS359.

621–72 [b] **Rule that town has no right to compensation** where commonwealth takes for one public use property devoted to another is not applicable where United States condemns under its own authority. 23F(2d)453.

622–73 237Mich446, 212NW207; 132 Misc848, 230NYS691. See also 152Va 559, 147SE239.

622–75 148Md493, 129A682; 249Mich 289, 228NW791. [d] (2) What is property is question for court. 152Md 367, 136A829. (3) What constitutes taking is question for court. 152Md367, 136A829.

622–76 191NC147, 131SE277 (courts should not go beyond language of statute granting power to township road board); 297Pa140, 146A557; Va 152 SE537.

623–78 [b] **Condemnation by state highway commissioner and exchange of land condemned** with railroad for other land necessary for highway purposes does not deny equal protection of laws. 33F(2d)918.

623–80½–New. The state's plan for improvement of a navigable stream has been held not subject to review in the courts. 219AppDiv114, 219NYS497.

623–80½–New. A statute making an appropriation for the purpose of acquiring by condemnation or otherwise, a fully described and specified tract of land for the site of an already established tuberculosis sanatorium, has been held not a mere appropriation act. 109Conn621, 147A126, 64ALR1453.

624–81 317 Ill 292, 148NE44.

624–82 109Conn621, 147A126, 64ALR 1453 (determination of necessity for exercise of power of eminent domain must be made by legislature); 98Fla 26, 123S527, 535 [citCJ]; Md 149A566; 237Mich338, 211NW905, 907 [quotCJ]; 196NC284, 145SE563; 122 Okl 241, 254 P61; 50RI 288, 146A777, 66ALR1553. [c] **Condemnation proceeding for con-**

struction of bridge requires adjudication of public necessity and determination of amount of compensation. 142 **Wash**284, 252**P**906. [d] **In Michigan.**–242**Mich**690, 219**NW**726.

624–83 42**F(2d)**692; 169**Ark**399, 275 **SW**890; 109**Conn**621, 147**A**126, 64**ALR** 1453; 317 **Ill** 147, 147**NE**796; 321 **Ill** 101, 151**NE**567; 332 **Ill** 416, 163**NE**795; 199 **Ind**95, 155**NE**465, 50**ALR**1518; 153 **Miss**517, 121**S**160; 220**AppDiv**351, 222 **NYS**29; 122 **Okl** 241, 254**P**61. [b] **Court cannot question purpose** for which property is to be taken. 42**F(2d)**692.

625–85 317 **Ill** 147, 147**NE**796; 237**Mich** 338, 211**NW**905, 912 [quotCJperSnow,J dis op].

625–86 321 **Ill** 101, 151**NE**567; 237 **Mich**338, 211**NW**905; 243**NY**15, 152**NE** 451; 196**NC**284, 145**SE**563. [a] **Constitutionality of levee improvement district.**–117**Tex**34, 297**SW**206.

625–87 [b] **Statutory presumption.**–191**NC**84, 131**SE**413.

626–89 109**Conn**621, 147**A**126, 64**ALR** 1453; **TexCivA** 298**SW**627, 629 [citCJ].

626–90 169**La**1085, 126**S**667; 237**Mich** 338, 211**NW**905, 907 [quotCJ]. [d] **Due process of law.**–237**Mich**338, 211**NW**905.

626–90½–New. Only where the constitution or statute limits taking to cases of necessity is the question of necessity a judicial one. **TexCivA** 298**SW** 627.

626–91 237**Mich**338, 211**NW**905.

626–92 98**Fla**26, 123**S**527, 535 [citCJ]; 237**Mich**338, 211**NW**905.

626–93 [b] 317 **Ill** 292, 148**NE**44.

627–95 43**F(2d)**145; 98**Fla**26, 123**S**527, 535 [citCJ]; 198 **Ind**645, 154**NE**659; 237**Mich**338, 211**NW**905. [a] (1) 308 **Mo** 359, 275**SW**940; 217**AppDiv**587, 217 **NYS**359; 141**Wash**465, 252**P**111, 49**ALR** 1249. (2) 149**Miss**623, 115**S**779. (6) 248**NY**215, 162**NE**10. (15) Village trustees. 55**ND**331, 213**NW**492. [b] 125**Misc**269, 210**NYS**748. [c] (3) Statute providing for taking of bridge is not defective in failing to provide for condemnation of franchises. 225**Ky**324, 8 **SW(2d)**392. [e] (5) Authority to determine route contemplates corporate action. 283**Pa**588, 129**A**845. (6) Corporate resolution operated as an appropriation of the land permitted by the act. 283**Pa**588, 129**A**845. (7) Adjudication of public interest or convenience on minutes of board is necessary. 149**Miss**623, 115**S**779.

627–96 85**Colo** 498, 277**P**467; 321 **Ill** 101, 151**NE**567; 327 **Ill** 356, 158**NE**685; 335 **Ill** 299, 167**NE**106; 224**Ky**604, 6**SW (2d)**1074; 153**Miss**517, 121**S**160; 125 **Misc**269, 210**NYS**748; 229**AppDiv**381, 243**NYS**30; 55**ND**331, 213**NW**492; 121 **Oh**257, 167**NE**889; 20 **OhA**455, 152**NE** 765; 152**Va**559, 147**SE**239; 144**Wash** 124, 257**P**231. See also 141**Wash**465, 252**P**111, 49**ALR**1249.

628–97 85**Colo** 498, 277**P**467; 98**Fla**26, 123**S**527, 535 [citCJ]; 327 **Ill** 356, 158 **NE**685; 332 **Ill** 416, 163**NE**795; 125**Me** 238, 132**A**740; 153**Miss**517, 121**S**160; 20 **OhA**455, 152**NE**765, 766 [quotCJ]; 28 **OhA**198, 162**NE**457; 148**SC**488, 146**SE** 411; 144**Wash**124, 257**P**231.

628–98 **Ida** 290**P**717(4thcase); 327 **Ill** 356, 158**NE**685; 83 **IndA**53, 147**NE**629 (whether land within or without city limits); **NJSup** 133**A**419.

629–99 327 **Ill** 356, 158**NE**685. [a] (2) Act giving city council power to condemn for school purposes "when in their judgment it may be necessary" does not render determination of fact of actual necessity unnecessary. 161**Ga**907, 132**SE** 218. [b] **In Wisconsin.**–187**Wis**384, 204**NW**589.

629–1 327 **Ill** 356, 158**NE**685; 83 **IndA** 53, 147**NE**629 (disposal of sewerage); 10**LaA**521, 120**S**700; 11**LaA**578, 123**S**498 (railroad company must show special circumstances necessitating exercise of expropriation rights); 248**NY**215, 162 **NE**10; 218**AppDiv**356, 218**NYS**173; 148 **SC**488, 146**SE**411; 155**Wash**651, 286**P** 33. [h] **Power cannot be used to perpetrate legal wrong** or accomplish purpose which equity could rightfully enjoin. **Fla** 129**S**582.

630–2 179**Ark**1029, 18**SW(2d)**1028, 65 **ALR**1446.

630–3 92**Fla**617, 110**S**451, 458 [citCJ]; 327 **Ill** 356, 158**NE**685; 166**La**663, 117 **S**765; 238**Mich**29, 212**NW**975; 55**ND** 331, 213**NW**492; 197**Wis**503, 222**NW** 776. [f] **Findings of commission** as to necessity of taking are not conclusive on court. 327 **Ill** 356, 158**NE**685.

630–3½–New. In some jurisdictions the determination of necessity is a condition precedent to the taking of property for the purpose of widening a street. 240**Mich**429, 215**NW**417.

630–4 238**Mich**29, 212**NW**975; 125**Misc** 269, 210**NYS**748; 104**WVa**660, 140**SE** 839.

630–4½–New. A statute declaring the conclusiveness of a determination of necessity by the legislative body of a county, city, or incorporated town does not apply to irrigation districts. 69 **CalA**150, 230**P**671.

631–5 98**Fla**26, 123**S**527, 535 [citCJ]; **Ida** 290**P**717; 219**Ky**739, 294**SW**494; 75**Mont**493, 244**P**298; 217**AppDiv**587, 217 **NYS**359; 218**AppDiv**356, 218**NYS**173; 130 **Okl** 156, 265**P**1059; 50**Philippine** 832; 200**Wis**170, 227**NW**859. [a] (9) Condemnation of portion of land at junction of proposed highway and old road, for purpose of constructing curve, rather than have approach at right angles, cannot be said to be unnecessary. 332 **Ill** 416, 163**NE**795. [e] **Reasonable necessity is limited** to carrying out of purposes for which power was given. 218**AppDiv**356, 218**NYS**173.

632–9 12**F(2d)**679; 283**Pa**588, 129**A** 845 (determination operates as appropriation); 289**Pa**200, 137**A**237. [c] **Flood Control Bill** leaves selection of locations and properties to discretion of secretary of war and chief of engineers. 35**F(2d)**357. [d] **Legislature may delegate power to board, commission, or other agency.**–**Md** 149**A**566.

632–10 12**F(2d)**679; 92**Fla**617, 110**S**451, 458 [citCJ]; 98**Fla**26, 123**S**527, 535 [citCJ] (to warrant denial of application for condemnation of property, it should appear that what is sought is clearly abuse of power by petitioner); **Fla** 129**S**784; **Ida** 290**P**717(4thcase); 317 **Ill** 292, 148 **NE**44; 127**Kan**754, 275**P**379; **Md** 149**A** 566; **NJSup** 136**A**183; 20 **OhA**455, 152 **NE**765; 289**Pa**200, 137**A**237, 240 [citCJ]; 154**Wash**117, 281**P**7(2dcase).

633–11 98**Fla**26, 123**S**527, 535 [citCJ]; **Ida** 290**P**717(4thcase); 289**Pa**200, 137**A** 237, 240 [citCJ].

633–11½–New. , nor an objection that all other intervening property needed had not yet been acquired. 198 **Ind**645, 154**NE**659.

633–12 198 **Ind**645, 154**NE**659; 283**Pa** 588, 129**A**845. See also 129**Kan**176, 282 **P**183. But see 10**LaA**521, 120**S**700. [f] (2) Power "to survey, mark and lay out" route for proposed railroad, under Burns St. Annot. (1914) § 5398 is not subject to review. 198 **Ind**645, 154**NE**659.

634–13 283**Pa**588, 129**A**845.

634–17 308**Mo** 359, 275**SW**940.

634–19 [a] **Difficulties, obstructions, and convenience** may be considered in addition to value of land under contemplation for appropriation. 28 **OhA**198, 162**NE**457.

634–23 289**Pa**200, 137**A**237.

634–24½–New. The order of succession in acquiring different panels of land needed is discretionary. 198 **Ind**645, 154**NE**659.

634–24¾–New. Legislature may designate agent to select necessary lands for highway and provide that selection shall be prima facie evidence of necessity. **Ida** 290**P**717(4thcase).

634–25 327 **Ill** 356, 158**NE**685; 332 **Ill** 416, 163**NE**795; 328 **Ill** 610, 160**NE**226; 339 **Ill** 610, 171**NE**737; 129**Kan**176, 282 **P**183; 224**Ky**604, 6**SW(2d)**1074, 1077 [quotCJ]; 248**Mich**13, 226**NW**690; 20 **OhA**455, 152**NE**765; 148**SC**488, 146**SE** 411. [e] **Control of highway** must extend to right of way sufficient to enable authorities to prevent accidents. 148**SC** 488, 146**SE**411.

635–26 327 **Ill** 356, 158**NE**685.

635–27 224**Ky**604, 6**SW(2d)**1074, 1077 [quotCJ]. [a] (5) Statute limiting width of right of way of street electric railway to two rods for transmission of power to system not applicable to electric light, heat, and power company supplying general public. 187**Wis**552, 203 **NW**912. (6) Under statute, railroad company has right to condemn more than one hundred feet of land for side tracks, storage tracks, switch yard, and car storage yards. 197**Wis**503, 222**NW** 776.

635–28 284**Pa**225, 130**A**491. See also 159**La**1079, 106**S**571.

636–29 224**Ky**604, 6**SW(2d)**1074, 1077 [quotCJ].

636–30 169**Ark**399, 275**SW**890; 98**Fla** 26, 123**S**527; 169**La**1111, 126**S**675; 227 **AppDiv**151, 237**NYS**147 (city cannot condemn land unrelated to street improvement, merely for speculative purposes); 230**AppDiv**522, 245**NYS**25; 50 **Philippine**832.

636–31 224**Ky**604, 6**SW(2d)**1074, 1077 [quotCJ].

636–32 328 **Ill** 610, 160**NE**226; 143 **Okl** 203, 288**P**344. See also 332 **Ill** 416, 163 **NE**795.

637–35 13**PaDist&Co** 576.

637–40½–New. Widening of so small a portion of an avenue as would create congestion and destroy its symmetry is against public welfare. 25 **OhA**53, 155 **NE**233.

637–40¼–New. Where a water system is so interlocked with that of another municipality that it would be very difficult to condemn a portion only, under statute, such part of the system of the other municipality may be condemned. 105**NJL**40, 143**A**759.

637–40¾–New. A city cannot be compelled to condemn a whole right to construct and maintain a waterworks and sewerage system under streets, alleys, and avenues of an addition to the city where public necessity requires only the condemnation of an equal easement with that of the owner. 153**Miss**517, 121**S**160.

637–43 224**Ky**604, 6**SW(2d)**1074, 1077 [quotCJ]; 227**Ky**376, 13**SW(2d)**283; **Mass** 172**NE**356; 289**Pa**200, 137**A**237.

638–44 289**Pa**131, 137**A**173.

638–46 333 **Ill** 143, 164**NE**129; 224**Ky** 604, 6**SW(2d)**1074, 1077 [quotCJ].

638–48½–New. A city may lease such property temporarily until it can be used for the purpose it was acquired. 227**Ky**376, 13**SW(2d)**283.

638–50 263**Mass**124, 160**NE**404.

639–51 95**CalA**602, 273**P**131; 148**Md** 493, 129**A**682; 197**NC**4, 147**SE**622. [f] **During pendency of proceedings,** condemnor has power to contract to pay actual cost of property contributed in addition to award for property covered by petition or to condemn such additional property, though statute requires value be ascertained as of filing petition and order. **NJSup** 142**A**905.

639–52 328 **Ill** 610, 160**NE**226.

640–53 328 **Ill** 610, 160**NE**226.

640–56½–New. In condemnation proceedings for flowage rights, the fact that a power company had maintained a dam at a certain height has been held not conclusive against the right to maintain a higher dam. 193**Wis**395, 214**NW** 388.

640–57 259**Mass**478, 156**NE**727; **Tex CivA** 30**SW(2d)**438.

640–58 328 **Ill** 610, 160**NE**226.

640–59 128**Kan**637, 279**P**15.

641–66 187**Wis**552, 203**NW**912 (relocation after survey held allowable under statute).

641–66½–New. **Necessity** of a new power transmission line is a legislative, and not judicial, question. **Del** 132**A**740.

641–69 249**NY**495, 164**NE**558 [certiorari granted 279**US**829, 49**SCt**348(2dcase), 73 **L ed**980]; 187**Wis**552, 203**NW**912 (property owner cannot object to agreement of petitioner and owner of adjoining land that electric line will not be run on location originally surveyed on such adjoining land). [a] (3) Ferry company not interfered with by construction of bridge cannot defeat condemnation proceedings for approaches on ground that construction was not commenced within time allowed by statute. 147**Wash**454, 266**P**724.

641–73½–New. One who dedicates property to a municipality may resist the action of a railroad company to take such property under eminent domain. 136**Wash**87, 238**P**985.

641–78 274**US**341, 47**SCt**611, 71**L ed** 1083; 4**HawaiiFed**16. [a] (1) 243**Mich** 649, 220**NW**881; 133**Misc**177, 231**NYS**

72. (12) Just compensation in eminent domain proceeding is payment of amount for which property would sell for cash under ordinary circumstances, assuming that owner is willing to purchase and purchaser willing to buy. 329 Ill 288, 160NE559. (13) Value of land taken and damage to land not taken. 102CalA299, 283P298. (14) Other instances. NC 154SE672. [h] **Destruction of property is "appropriation"** which requires compensation. 127Misc834, 217NYS534.

642-80 240NY533, 148NE668, 48ALR 1119 (synonymous in particular statute).

642-82½-New. There is no taking without compensation by uncompensated obedience to a regulation under the police power. 224 IllA380.

643-84 274US341, 47SCt611, 71Led 1033, 14F(2d)257; 13F(2d)784; 23F (2d)453; 29F(2d)140; 37F(2d)602; 216Ala160, 112S763; 217Ala524, 116S689; 169Ark399, 275SW890; 172Ark 94, 287SW761; 204Cal 125, 266P944, 58 ALR674 (corporation); 97CalA120, 275 P465; 95Fla984, 117S507(2dcase); 161 Ga524, 131SE517, 44ALR534; 37GaA 418, 140SE763; 30Hawaii912; 261Mass 191, 158NE561; 237Mich338, 211NW 905, 912 [quotCJperSnow,Jdis op]; 242 Mich239, 219NW74; Mich 233NW159; 309Mo 189, 274SW448; 117Nebr511, 221 NW438; 102NJL265, 131A637; 190NC 568, 130SE161; 198NC51, 150SE810; 219AppDiv27, 219NYS353; 22OhA457, 153NE918; 33OhA269, 169NE307; 25 OhNPNS89; 129Okl 28, 263P448; 117 Or220, 243P93, 45ALR521; 123Or571, 263P901; 115Tex449, 283SW139; Tex CivA 18SW(2d)928; TexCivA 58SW(2d) 532; TexCivA 29SW(2d)154, 146Va10, 135SE685; 149Va658, 140SE816; 136 Wash589, 241P16, 42ALR886. See also 97Fla69, 120S335; 243Mich517, 220NW 808. [n] **In Florida.**-89Fla128, 103S422.

644-85 85Colo 202, 274P827; 261Mass 191, 158NE561; 102NJL265, 131A637. [a] **Provision is limited to taking for public or quasi-public purpose under power of eminent domain.**-201Iowa947, 209NW911.

644-86 274US341, 47SCt611, 71Led 1083; 173Ark414, 292SW668. [d] **Right may be based upon implied contract.**-274US341, 47SCt611, 71Led1083.

644-88 274US341, 47SCt611, 71Led 1033; 14F(2d)257; 27F(2d)262; 181 Ark564, 26SW(2d)887; 92Fla617, 110S 461; 317Ill 334, 148NE632; 237Mich338, 211NW905, 912 [quotCJperSnow,Jdis op]. [e] **Refusal separately to assess damages for leasehold interest does not violate constitutional guaranty.** Mo 28 SW(2d)80.

644-88½-New. Right to compensation is not suspended by war. 15F(2d)823.

645-90 173Ark796, 293SW743.

645-91 321Mo 969, 13SW(2d)628 (ordinance as to garages held not void as taking property without compensation); 118Nebr522, 225NW679; 105NJL563, 148A616; 127Misc852, 217NYS609; 136 Misc148, 239NYS578; 22OhA457, 153 NE918; 50Okl108, 145A451; 136Wash 589, 241P16. [c] 127Kan547, 274P249 (taking of gravel by county). [i] **Ability to pay.**-160La727, 107S506. [m] **Federal government not exempted** from obligation to compensate for land taken under Flood Control Act, because state of Louisiana formerly was not required to pay for property taken for levee purposes. 35F(2d)235.

646-92 See also 50Ri108, 145A451.

646-94 173Ark796, 293SW743; 215Ky 295, 284SW1074; 164Minn226, 204NW 934; 297Pa140, 146A557; 115Tex449, 283SW139; TexCivA 300SW220. [j] **Railroad's right of way** cannot be taken for street purposes without compensation. 197Cal456, 241P545. [k] **City cannot compel property owners to sue** for damages due to vacation of street without first ascertaining and paying damages. 141Wash465, 252P111, 49 ALR1249.

647-95 287Pa120, 134A415. [b] (1) 286Pa351, 133A495. (2) Constitutional provision requiring compensation for injuring or destroying property has no application to occupation of land for public highways, or consequential injuries therefrom. 287Pa120, 134A415. (3) Legislature may by special enactment award damages. 5PaDist&Co 36.

647-96½-New. A court order changing a road does not permit taking private property for public use without compensation because it permits taking before payment. 175Ark1051, 18SW(2d)561.

647-97 19F(2d)695; 97Fla69, 120S335; 161Ga907, 132SE218 (Act [1923] p 640 as to condemnation of land for school purposes not violative of constitutional provisions forbidding taking of private property without first paying compensation); Ind 172NE309; 243NY15, 152 NE451; 31OhA142, 166NE597. [k] (7) 281US362, 50SCt299, 74Led904; 225Ky 324, 8SW(2d)392; Mass 172NE356; 34 NM346, 282P1; RI 152A225; TexCivA 278SW928. [m] **There is no presumption of legislative intent to provide inadequate compensation.**-TexCivA 278 SW928. [n] **Statute must itself provide means of securing just compensation** where it authorizes taking of property for public use, or compensation must be provided in some other statute forming part of it. 109Conn621, 147A126, 64 ALR1453. [o] **Statute insufficiently providing for compensation.**-Where statute provides sum of thirty-five thousand dollars for purpose of acquiring, by condemnation, tract of land for site of already established tuberculosis sanatorium, it does not provide just compensation. 109Conn621, 147A126, 64ALR 1453.

649-99 117Or566, 245P308, 45ALR527; RI 152A225.

649-1 159Tenn600, 21SW(2d)385.

649-3 225Ky324, 8SW(2d)392; 158 Tenn350, 13SW(2d)321.

649-7 31F(2d)617.

649-7½-New. The fact that the amount of money appropriated is insufficient does not necessarily make the taking of property void. 243NY15, 152NE451.

649-7¼-New. Money need not be specifically appropriated before the property is taken. 243NY15, 152NE451.

649-7¼-New. When a police jury undertakes to lay out a road or widen an established road without pursuing the forms provided for by statute, whether with or without obtaining the consent of the owner, it renders the parish liable to any other person whose property might be damaged as a result of the public improvement. 167La83, 118S700.

650-8 237Mich338, 211NW905, 912 [quotCJperSnow,Jdis op]; 105NJL437, 144A571. [g] (6) Right to have jury assess damages is held full protection to owner. 259Mass354, 156NE676. [o] 198Cal753, 247P897. [p] NJSup 142A 905.

651-9 220Ala668, 126S132 (statute held not unconstitutional as conferring discretion on commissioners).

651-10 237Mich338, 211NW905, 912 [quotCJperSnow,J].

651-14 159Tenn600, 21SW(2d)385.

651-14½-New. In condemnation by state road department, constitutional mode of determining compensation must be followed. 92Fla617, 110S451.

651-14¼-New. Statute authorizing mode of determining compensation otherwise than that provided by constitution is invalid. 92Fla617, 110S451.

651-15 [c] **Provision for payment for land taken for bridge from bonds payable from revenue of bridge** is valid where there is no taking unless bonds are sold. WVa 153SE305.

653-26 [c] **Nursery stock.**-202Cal 731, 262P737.

653-27 14F(2d)257; 163La117, 111S 619; 133Misc594, 232NYS666; 293Pa 483, 143A134. See also 108Conn359, 143 A245. [f] **Right to damages** as compensation for injury to property is dependent upon invasion of claimant's legal right. 117Tex34, 297SW206. [g] **Options** to purchase give no interest in real estate entitling holder of option to share of condemnation award. 246NY 1, 157NE911. [h] **Good will** is not property subject to compensation. 25 OhNPNS303.

654-33 324Ill 411, 155NE272.

654-43½ 89CalA462, 265P287, 289 [citCJ].

655-44 Cal 288P1080; 119Oh110, 162 NE385.

655-46 108Conn359, 143A245; 37GaA 290, 140SE45; 219AppDiv382, 220NYS 18; 283Pa381, 129A445.

656-47 Cal 273P833; 208Cal 29, 280P 109; 100CalA692, 280P1021; 151Va801, 145SE257. See also 96CalA708, 275P 228. But see 22AlaA50, 112S98.

657-51 [b] **When person having easement to travel over strip of ground improves it as road,** he is not necessarily entitled to damages when strip is included in public road. 175Minn168, 220 NW419.

657-54 234Ky661, 28SW(2d)982. See also 233Ky628, 26SW(2d)535.

657-55 But see Mass 172NE356.

657-57 126Misc879, 216NYS2; 33OhA 414, 169NE719; 141Wash465, 252P111, 49ALR1249.

658-59 88CalA545, 263P825; 167Ga 124, 144SE796; Ida 286P353; 84IndA 144, 149NE647; 126Misc879, 216NYS2; 33OhA414, 169NE719; 134Okl142, 272 P457(2dcase), 66ALR1047; 117Or220, 243P93, 45ALR521; 143Va213, 129SE 504; 141Wash465, 252P111, 49ALR 1249. [d] But see 123Kan897, 255P 1118.

659-60 145Val, 133SE674.

660-65 338Ill 499, 170NE717.

660-68 126Misc879, 216NYS2. [a] (1) 128Me108, 146A10.

660-72 152Wash53, 277P382.

660-73 86Colo178, 279P447; Mich 233 NW159; 118Nebr522, 225NW679; 219 AppDiv114, 219NYS497; 127Misc834, 217NYS534; 284Pa225, 130A491. [j] (1) 83NH181, 141A65.

662-75 127Misc834, 217NYS534. See also 249NY495, 164NE558 [certiorari granted 279US829, 49SCt348(2dcase), 73 Led980].

662-76 219AppDiv382, 220NYS18.

663-80 219AppDiv114, 219NYS497; 222 AppDiv690, 225NYS181.

664-83 [a] (4) Tenure by which city holds pier does not affect right to compensation by exercise of eminent domain. 284Pa225, 130A491.

665-88 125Misc47, 210NYS563; Can [1926]AC299, [1926] 1DomLR840, [1926] 1WestWkly398. See also 233Ky 628, 26SW(2d)535.

665-90 274US215, 47SCt581, 71Led 1006. But see 219AppDiv285, 219NYS 741.

666-97 170Ark1116, 282SW970; Tex CivA 278SW928.

666-2 216Ala160, 112S763; 179Ark695, 17SW(2d)886; 37GaA418, 140SE763; 209 Ky182, 272SW423 (washing away of land and destruction of warehouse caused by allowing drift to accumulate against railroad trestle); 126Misc879, 216NYS2; 33OhA269, 169NE307; 285 Pa102, 131A728; 159Tenn491, 19 SW(2d)236; 196Wis76, 219NW428. [f] (5) But see TexCivA 26SW(2d)338. [h] (3) Other statements. 234Ky618, 28 SW(2d)966.

668-3 285Pa102, 131A728.

668-4 285Pa102, 131A728.

668-5 [a] 285Pa102, 131A728.

668-9 285Pa102, 131A728.

669-17 324Ill 411, 155NE272; 229Ky 222, 16SW(2d)1022; 152Md367, 136A 829; Mass 168NE78; 320Mo 120, 6 SW(2d)935; 125Misc186, 211NYS149; 117Or220, 243P93, 45ALR521.

671-18 117Or220, 243P93, 45ALR521; 132Or509, 285P1030.

671-19 324Ill 411, 155NE272; 219App Div27, 219NYS353; TexCivA 278SW 928; Man [1927] 2DomLR606. See also 4HawaiiFed748, 761 [citCyc]. [i] **Taking of materials for road construction.**-County must pay all damages for removal, on failure to agree on compensation. TexCivA 278SW928.

671-19½-New. It is the duty of every one to mitigate as much as possible the damages which might result from the state's improvement of a canal, and riparian owner is not entitled to any damages he might have suffered had he done nothing to prevent the possible injury. 125Misc186, 211NYS149.

672-20 Ala 127S832; 208Cal 19, 280P 130; 37GaA418, 140SE763; 153Miss

683, 121S295; 320Mo 120, 6SW(2d)935; 219MoA271, 275SW965; 129 Okl 28, 263 P448; TexCommnA 11SW(2d)506; Tex CivA 299SW277.

673-21 115Tex449, 283SW139; Tex CivA 299SW277.

673-23 129 Okl 28, 263P448; 117Tex 34, 297SW206.

673-25 TexCommnA 29SW(2d)329.

673-26 [b] **Words "or damaged" include all damages causing diminution** of value. Nebr 230NW842. [c] **"Taking" restricted to actual physical appropriation.**–TexCivA 27SW(2d)1105.

674-29 181Ark626, 26SW(2d)1107 (right of way dividing farm into two parts); 131 Okl 63, 267P852, 853 [quot CJ]. [c] TexCivA 287SW137.

675-30 322 Ill 503, 153NE737, 48ALR 1027; 339 Ill 212, 171NE189 (depreciation in market value as sustaining claim for damages).

676-34 [a] (3) Other instances. Tex CommnA 29SW(2d)329.

677-36 230AppDiv407, 245NYS121.

677-38½-New. There must be an invasion of a lawful property right before an owner is entitled to damages. Nebr 229NW273.

677-39 324 Ill 411, 155NE272; 322 Ill 503, 153NE737, 48ALR1027; 339 Ill 212, 171NE189; 127Me522, 145A137; Nebr 230NW842; 161Tenn546, 30SW(2d)278; TexCivA 287SW137. See also 333 Ill 218, 164NE182. [c] (6) Depression of value of other land flooded or near it, neighbors' abandonment of farms, decrease in population, and discontinuance of schools are only indirect damages, suffered in common with people whose lands were not flooded. 127Me522, 145 A137. [f] **Landowner entitled to both special and general damages.**–300Pa78, 150A155.

678-41 225Ky131, 7SW(2d)821; 285Pa 102, 131A728.

679-42 126Me121, 136A664, 665, 51 ALR1194 [quotCJ].

681-59 37F(2d)602; 80Colo 365, 250P 527; 127Misc834, 217NYS534. [d] **Grantees of land under water from city** entitled to compensation for bulkhead or pier rights taken by city. 219AppDiv 27, 219NYS353.

681-68 216AppDiv603, 215NYS685; 133 Misc6, 231NYS36. [j] **Diversion of river into barge canal** is held no improvement of navigation. 216AppDiv603, 215NYS 685.

683-76 127Misc834, 217NYS534.

683-76½-New. After granting title state may not injure right of riparian owner by declaring river navigable. 244 NY596, 155NE911.

683-78 127Misc834, 217NYS534.

684-82 37F(2d)602; 181Ark564, 26SW (2d)887; 327 Ill 356, 158NE685; 127Me 332, 143A176; 115Tex449, 283SW139; TexCivA 16SW(2d)338. [a] 125Misc 186, 211NYS149. [n] **In Florida.**–89Fla 128, 103S422.

685-83 125Misc186, 211NYS149.

685-84 125Misc186, 211NYS149. See also 331 Ill 277, 162NE865. [a] (5) State's raising water level of its dam, does not damage millowner whose mill is situated above such dam. 125Misc 186, 211NYS149.

686-85½-New. Millowner is not entitled to compensation for changing old machinery for new to make use of additional water power made available by improvement to canal. 125Misc186, 211 NYS149.

686-88 50SD199, 208NW980.

686-89 256 IllA452; 50SD559, 210NW 978.

687-93½-New. No lawful claim for damages or compensation may be had by riparian owners from city which does not cause pollution of creek beyond natural drainage coming from city and upper proprietors prior to opening of sewer system. 314Mo 438, 284SW471, 47 ALR25.

687-93½-New. or where it does not render such waters more unfit for use than they were prior to the construction of the sewer. 314Mo 438, 284SW 471, 47ALR25.

687-96 MoA 16SW(2d)691; 115Tex 449, 283SW139.

688-6½-New. No permanent damages, founded on nuisance or negligence, in maintaining sewer near plaintiff's land prior to condemnation of right of way can be recovered where the conditions complained of have ceased to exist. 191 NC48, 131SE270.

688-6½-New. A county is liable for the appropriation of a private water main incident to carrying out a contract authorized by statute. 37GaA290, 140SE 45.

688-8 163La117, 111S619. [a] **Damage caused by negligent explosion** is proper subject of compensation. 163La117, 111 S619.

688-9 74CalA528, 241P418; 309Mo 189, 274SW448. [b] 309Mo 189, 274SW448. See also MoA 7SW(2d)285.

688-12 [a] **Expense of railroad** in accommodating roadbed to levee plan held not recoverable in proceedings by levee improvement district to condemn part of right of way. 117Tex34, 297SW206.

688-12½-New. An improvement district is not liable for damages that would have been occasioned by floods independent of the levee constructed by it. TexCivA 281SW577.

688-13 [a] **Qualification to state time necessary effectively to apply air brakes not shown.**–Mo 308SW(2d)56.

688-18 [a] 158La737, 104S636. [i] **No recovery** for destruction of growing crops. 158La737, 104S636. [j] **To recover compensation for land taken,** there must be allegation that land was taxed in preceding year. 158La737, 104S636.

689-21½-New. Land left between a levee and river is actually destroyed within the meaning of the constitution of Louisiana. 160La727, 107S506.

689-22 228Ky608, 15SW(2d)521; 153 Va43, 149SE456 (element of damages).

689-28 218Ala489, 119S13; Cal 273P 833; 208Cal 29, 280P109; Cal 292P124; 126Misc879, 216NYS2; Oh 153NE651 (railroad track so near property that cars will strike passing or standing vehicles).

691-43 152Md367, 136A829; Utah 280 P736.

691-44 152Md367, 136A829.

691-48 208Cal 29, 280P109.

692-51½-New. The construction of a bridge approach in a highway does not constitute a taking of property for which an abutting owner is entitled to compensation where there is no physical invasion of his property. 117 Or220, 243P93, 45ALR521.

692-55 172Ark1031, 291SW793; 151 Md154, 134A201; 237Mich202, 211NW 626; 130Misc136, 223NYS529; 228App Div300, 239NYS443; 229AppDiv423, 243 NYS212; 117 Or220, 243P93, 45ALR 521; 132 Or509, 285P1030; 287Pa120, 134A415; 103WVa186, 136SE840; 104 WVa129, 139SE644 (dictum). See NJ Sup 143A3. See also NJSup 148A171. [c] 132 Or509, 285P1030. [k] 287Pa120, 134A415. [l] **Mere change in grade** raises no inference of damage to abutting property. 103WVa186, 136SE840. [o] **Change of state highway grade.**–13PaDist&Co 484.

694-59 178Ark1130, 13SW(2d)598.

694-61 38F(2d)74; 220Ky132, 294SW 1076; 222Ky658, 1SW(2d)1043; 153 Miss683, 121S295; 128 Okl 169, 261P 910, 55ALR891; 143Va213, 129SE504; TexCivA 26SW(2d)706 (raising level); 143Wash479, 255P645, 52ALR625; 103 WVa186, 136SE840; 104WVa129, 139 SE644; 105WVa201, 141SE779. See also 113 Okl 106, 239P463; 86PaSuper 423; SD 232NW289. [c] (4) Where owner of land opened street on natural surface as grade line, and street was traveled and recognized by municipality, and abutting owners built with reference to natural grade, such grade is established grade. 105WVa201, 141SE 779. [f] (6) City liable for obstructing natural drainage of surface water from lots. 50SD42, 208NW174. [j] **City changing grade** is liable only where grade was previously established. 175 Ark697, 300SW397.

696-64 104WVa129, 139SE644 (dictum).

696-65 33 OhA414, 169NE719.

696-66 [a] **No property rights** exist in sidewalks. 117 Oh382, 159NE365.

696-67 113 Okl 106, 239P463 (by statute, owner entitled to recover consequential damages where property has been improved with reference to previous grade and damage results from change, but not where no grade had been established prior to erection of improvements and grade established is such as might ordinarily have been expected); 103W Va186, 136SE840.

697-71 224Ky326, 6SW(2d)277; 142SC 284, 140SE560, 564, 57ALR634 [citCJ]. [a] **Improvement district excavating** from bluff to widen street on same grade is liable only for injury to abutting owner by loosening soil through blasting. 172Ark1031, 291SW793.

697-72 250Mich587, 231NW125; 143Va 213, 129SE504.

697-74 224Ky326, 6SW(2d)277.

697-75 132 Or509, 285P1030.

697-78 Ala 129S50; 143Va213, 129SE 504; 103WVa186, 136SE840.

697-79 172Ark1031, 291SW793.

698-80½-New. Where the owner of land abutting beach is awarded damages for condemnation of a strip for an elevated boardwalk, such award includes damages for change of grade, and he is not entitled to additional damages therefor. 217AppDiv76, 216NYS121.

698-84 142SC284, 140SE560, 57ALR 634.

699-85 [a] **Street railroad company raising portion of street occupied by it to conform to established grade** under direction of municipality is not liable for injury to property owner in absence of negligence. 105WVa209, 141SE782.

699-86 142SC284, 140SE560, 57ALR 634.

699-89 But see TexCivA 286SW590.

701-93 286Pa561, 134A481.

701-94 286Pa561, 134A481; 152Wash 306, 278P159.

701-95 122Kan272, 252P229; 213Ky 407, 281SW158; 286Pa561, 134A481; 156SC147, 152SE809(2dcase); 141Wash 465, 252P111, 49ALR1249. [f] Nebr 230 NW842. [g] **Rule applied to vacation of part of street** for public use. 141Wash 465, 252P111, 49ALR1249. [h] **Constitutional provision relative to taking or damaging private property for public use** applies to special damages to land by vacating public highway. Nebr 230 NW842.

701-96 103WVa698, 138SE757. See also 11PaDist&Co 475.

702-97 109Conn151, 145A756.

702-98 103WVa698, 138SE757.

702-2 34F(2d)303.

702-3 Mont 288P181.

702-4 Ala 128S166 (statute requiring convenient means of access held effective unless just compensation due); 213Ky 407, 281SW158; 144Miss867, 110S669; NJSup 150A768; 229AppDiv423, 243 NYS212. But see 151Miss829, 119S315.

702-5 [b] **Landowner left with only one outlet** may suffer special damages not common to community at large. Nebr 230NW842.

703-9 286Pa561, 134A481; TexCivA 286SW590.

703-11½-New. Discontinuance of a public street or its appropriation to other purposes than that of a highway does not constitute a taking of the property of the users. 34F(2d)303.

703-11½-New. Under some constitutions and statutes compensation is allowed for any loss or injury reducing value of land because of vacation of highway. Nebr 230NW842.

703-11¼-New. Where lines of highway are changed or new location substituted, damages may be recovered for injury to land through which it passes. 13PaDist &Co 484.

703-17 See also 293Pa483, 143A134 (city street).

703-17½-New. Where a city widens or opens a street for automobile and motor traffic to its entire width, consuming all space theretofore set apart for sidewalks or foot roads, it is liable to abutting owners for consequential damages. 128 Okl 169, 261P910, 55ALR891.

703-20 147Wash454, 266P724. [a] **Franchise being merely injured,** legislature may provide payment for indirect and consequential damages resulting from injury. 128Me108, 146A10.

704-21 162Ga84, 132SE902; 126Misc 879, 216NYS2. [c] **Where construction of free bridge next to ferry afforded pub-**

lic means of evading ferry toll, ferry franchise is not only injuriously affected, but practically destroyed. 128Me 108, 146A10.

704–23 142Wash284, 252P906, 908 [quotCJ]. [b] (1) See also 168Ga883, 149SE182. (2) State may build public bridge over stream on which ferry is operated under franchise, and may condemn land of owners of ferry for such purpose, and need not compensate owners of ferry for loss of ferry profits. 40 GaA241, 149SE432.

704–28 164La1020, 115S131.

705–29 217Ala268, 115S422.

705–34½–New. Where a municipality has a right to condemn land owned by it, situated in the bed of a navigable stream, it is entitled to compensation therefor. 217AppDiv587, 217NYS359.

705–37 14F(2d)257; 126Misc879, 216 NYS2.

706–39½–New. Removal of spur of elevated road.–On condemnation and removal of spur of elevated railroad, the railroad is entitled to compensation therefor if it has any value as feeder to main system, present or potential, even if, when considered by itself, it was operated without profit. 126Misc879, 216 NYS2.

706–39⅓–New. A city, in constructing an elevated railroad, acts in proprietary capacity, and is bound to compensate an electric company for the expense of removing and relocating poles and lines, 221AppDiv544, 224NYS564.

706–39¼–New. but the electric company must bear the expense incurred in relocating its poles and lines because of the change in the use of the street for a public purpose. 221AppDiv544, 224NYS 564.

706–40 215Ky353, 284SW1091. [c] **City seeking right to open street** across railroad right of way is not bound to take fee. 197Cal 456, 241P545.

706–41 See also 127Misc316, 215NYS 297.

706–42 197Cal 456, 241P545 (compensation allowed railroad for street crossing is different from that allowed to individual). [a] **Only nominal damages awarded** where street crossing does not unduly interfere with use of right of way by railroad. 197Cal 456, 241P545. [b] **Diminution of value** of railroad's right of way by street crossing is question of fact. 197Cal 456, 241P545. [c] **Railroad is entitled to compensation** for buildings on its right of way taken by street crossing. 197Cal 456, 241P545.

706–44 [a] **Construction of highway where none existed.**–127Kan855, 275P 171.

707–56 30F(2d)749; 218AppDiv356, 218 NYS173. See also 141Wash465, 252P 111, 49ALR1249.

708–58 254NY366, 173NE224; TexCivA 48SW(2d)1032.

709–63 216Ala160, 112S763; 152Va1, 145SE425. [b] (7) Distribution of electricity to private consumers is public and municipal use, but not "street use." 254NY366, 173NE224. [d] (8) In providing drains and ditches streets may be devoted to any proper use incident to construction and maintenance of public thoroughfare. 143Miss201, 108S491. (9) Bridge approach, though access of abutting owner to street is destroyed. TexCivA 292SW606. (10) Other uses. 152 Va1, 145SE425.

712–84 TexCivA 26SW(2d)366.

714–5 241Mich139, 216NW461.

717–20 152Va1, 145SE425. [a] **Operation of freight cars on street railroad** with consent of adjacent owners is not additional servitude. 198 Ind9, 152NE 167, 46ALR1465.

717–20½–New. So long as track still remains within street limits, the owner is not entitled to damages for the removal of tracks to location nearer his land. 126Me205, 137A67.

718–27 198 Ind9, 152NE167, 46ALR 1465.

718–32 126Misc879, 216NYS2.

720–49 216Ala160, 112S763.

721–57 153Md229, 137A899; 254NY 366, 173NE224; 300Pa78, 150A155 (need not show material and visible destruction of premises); TexCivA 293SW 885. But see 229Ky254, 16SW(2d)1041. Contra 216Ala160, 112S763.

721–58 [a] **Where fee transferred on condemnation of land for highway,** landowner is not entitled to additional compensation for erection of electric poles. 254NY366, 173NE224.

721–59 Ala 128S454 (rule applicable to either urban or rural highway).

722–70 [a] **Compensation required** of electric company constructing vault under sidewalk for transformers and conduits. NJSup 150A344 (1stcase).

725–20 4HawaiiFed16; 229Ky627, 17 SW(2d)748; 226AppDiv490, 235NYS569 (award held not inadequate in view of uses to which land might be put); 131 Misc768, 228NYS159 (compensation is measured by what owner lost and not by what taker gained); 198NC404, 151SE 871. See also 128Me108, 146A10; TexCivA 14SW(2d)102. [e] **$22,550 held sufficient compensation** for condemnation of strip one hundred and fifty feet wide and mile long. 320 Ill 56, 150NE 403.

725–22 [b] **Denial of damages for grading and roadbed constructed** by railroad, error where defendant owned land and lease had expired. 142Va512, 129SE384.

725–23 Mass 171NE462.

726–24 216Ky64, 287SW232; 128 Okl 303, 262P1070. [a] **Awards held not inadequate.**–217Ky301, 289SW238.

726–25½–New. Fair value is measure of compensation for tobacco taken by federal government. 274US215, 47SCt581, 71L ed1006.

726–25⅓–New. The same rules apply in a suit to determine the rights of parties as to property taken, damages, and benefits, as would apply in an action in condemnation. 85Colo 202, 274P827.

726–25¼–New. A landowner is entitled to compensation for land in the condition when taken. 226Ky75, 10SW(2d)451.

726–25½–New. In a petition by a husband and wife to recover damages for the taking of land and water by a city, the damage of neither petitioner could be enhanced by proof of an oral understanding that the husband was the real owner of all the land. Mass 168NE78.

726–25¼–New. In a proceeding to condemn a right of way for an electric transmission line, a landowner could not recover damages on the ground that such line was erected at the time without sufficient authority. 179Ark1029, 18SW (2d)1028, 65ALR1446.

726–26 See also 179Ark154, 15SW(2d) 399.

727–28 Mont 288P181; 127Misc710, 217 NYS545; 47RI 378, 133A618; 159Tenn 147, 17SW(2d)22, 65ALR440. [a] 179 Ark154, 15SW(2d)399; 327 Ill 294, 158 NE687; 214Ky736, 284SW391; 214Ky 845, 284SW98; 220Ky778, 295SW1000; 232Ky282, 22SW(2d)1033; TexCivA 291 SW317. [b] (3) TexCivA 13SW(2d)416.

728–32½–New. Where evidence of value is conflicting, a sale of undivided half interest in the land, not attendant by any special circumstances, is a good criterion of value. [1925] 3DomLR355.

728–34 See also 133Misc177, 231NYS 72.

728–36½–New. To estimate fair market value there should be considered the cost of production, 240NY533, 148NE668, 48 ALR1119.

728–36⅓–New. and the cost reasonably expended in bringing structure into working condition. 240NY533, 148NE 668, 48ALR1119.

728–36¼–New. The sum allowed for the property appropriated need not equal the sum of these items, 240NY533, 148 NE668, 48ALR1119.

728–36½–New. but should merely be considered along with other evidence of value. 240NY533, 148NE668, 48ALR 1119.

728–36¼–New. Thus it was held in fixing market value of mill site, not permitting allowance for cost of preliminary construction, did not invalidate award. 240NY533, 148NE668, 48ALR 1119.

728–37 174Ark59, 294SW410; 179Ark 695, 17SW(2d)886; 76CalA369, 244P 609; 82CalA289, 255P553; 96CalA708, 275P228; 338 Ill 347, 170NE295; 220Ky 778, 295SW1000; Mass 168NE78; 170 Minn49, 212NW8; 105NJL165, 143A 369; NJSup 147A487; 127Misc710, 217 NYS545; 229AppDiv617, 243NYS665; 129 Okl 27, 263P152; 134 Okl 206, 273P 346; 47RI 378, 133A618. [i] (2) 243 Mich517, 220NW808; Mo 30SW(2d)729; 229AppDiv30, 241NYS44. [j] **Cost of construction or reproduction** is not controlling factor in determining compensation to be awarded for condemnation of turnpike property of company whose franchise has less than ten years to run. 159Tenn147, 17SW(2d)22, 65ALR 440. [k] **Price property will bring** when offered for sale by one who desires but is not obliged to sell is the measure of damages. Mo 30SW(2d)729.

729–38 See also 96CalA708, 275P228.

729–41 38GaA373, 144SE214; 127Me 522, 145A137; 136Misc148, 239NYS578; Sask [1930] 1DomLR900. See also 96 CalA708, 275P228. But see 105NJL165, 143A369.

730–45 NC 154SE72.

730–46 105NJL165, 143A369.

730–49½–New. The rule limits the proof to the present condition of the land and uses to which it is naturally adapted, but excludes speculative and possible uses if improvements and changes were made. Matters that are collateral involving calculation of costs and profits are too remote. 105NJL 165, 143A369.

730–49⅓–New. Commissioners, in ascertaining the damages where property has been taken, should assess the damages based on the difference between the market value of the property immediately before and immediately after the improvement. 153Va43, 149SE456.

730–51 179Ark1029, 18SW(2d)1028, 65 ALR1446; 82CalA289, 255P553; 86Colo 372, 282P191; 34GaA252, 129SE117 (market value of property taken and consequential damage to remaining property); 214Ky736, 284SW391; 216 Ky618, 287SW985; 163La117, 111S619; 245Mich65, 222NW325, 67ALR373; 250 Mich690, 230NW904(2dcase); 248Mich 1, 226NW688; 319Mo 697, 4SW(2d)810; 217AppDiv76, 216NYS121; 125Misc133, 210NYS184; 126Misc879, 216NYS2; 133 Misc388, 232NYS235; 136Misc148, 239 NYS578; 229AppDiv617, 243NYS665; 195NC92, 141SE484; 197NC556, 150SE 40; 198NC404, 151SE871; 34 OhA532, 172NE448; 118 Or412, 247P138; 50RI 489, 149A596; TexCivA 281SW318; Tex CivA 291SW317; TexCivA 8SW(2d) 705; 106WVa581, 146SE530; Wis 230 NW44. See also 329 Ill 478, 160NE750; 153Va43, 149SE456. [c] (2) Measure of damages for land not taken is difference between value of property unaffected by improvement and its value as affected by it. 338 Ill 347, 170NE295. (3) In determining damage to land not taken, effect of change of road upon buildings, their accessibility and items of like character may be considered. 338 Ill 347, 170NE295. [e] (4) Reasonable value is recoverable. 233Ky378, 25SW(2d)1036. [h] 338 Ill 499, 170NE 717. [m] **Boardwalk.**–217AppDiv76, 216 NYS121.

732–52 82CalA289, 255P553; 205 Iowa 283, 218NW66; Iowa 233NW36; 230 Ky806, 20SW(2d)991(2dcase); 177Minn 159, 225NW92(2dcase); 126Misc879, 216 NYS2; 221AppDiv458, 223NYS525. [b] Kan 291P768.

732–53 Ala 130S541; 181Ark626, 26 SW(2d)1107 (railroad right of way); 109Conn212, 146A20; 111Conn27, 149A 205; 321 Ill 538, 152NE486; 205 Iowa 283, 218NW66; Iowa 230NW302; 216 Ky303, 287SW357; 218Ky819, 292SW 501; 219Ky279, 292SW790; 224Ky383, 6SW(2d)480; 227Ky159, 12SW(2d)292; 233Ky378, 25SW(2d)1036 (separate items must be considered); 127Me522, 145A137; 156Md581, 144A710; 248Mich 13, 226NW690; 249Mich530, 229NW500; 319Mo 1240, 6SW(2d)565; 83NH181, 141 A65; 217AppDiv76, 216NYS121; 125 Misc133, 210NYS184; 226AppDiv490, 235NYS569; 197NC556, 150SE40; 50RI 489, 149A596; TexCivA 13SW(2d)929; TexCivA 26SW(2d)1103 (taking land for pipe line); Wis 230NW44. [b] (2) Damages for portions of land taken for levee purposes. 170La1057, 129S635. [c] 337 Ill 537, 169NE322. [d] (2) If remaining portion of building, part of which is taken, can advantageously be

reconstructed, alteration costs and consequential damages, plus value of portion taken, constitute measure of compensation. 248Mich1, 226NW688. [h] (3) 181Ark626, 26SW(2d)1107; 216Ky303, 287SW357; 169La1111, 126S675. (4) 205Iowa283, 218NW66; 231Ky788, 22SW(2d)281. [j] **Boardwalk.**–217App Div76, 216NYS121. [k] **Cost restoring usefulness of residue** has been held to be measure of damages. 33 OhA142, 168 NE566. [l] **Measure of damages to residue** is difference in value before and after taking less special benefits. WVa 155SE174.

734–54 109Conn212, 146A20; 248Mich 1, 226NW688.

734–56 214Ky736, 284SW391; 118 Or 166, 246P707, 709 [quotCJ].

734–57 214Ky736, 284SW391; 118Tex 469, 14SW(2d)266.

735–59 161Tenn546, 30SW(2d)278.

735–60 Mont 288P181.

736–61 96CalA708, 275P228; Mo 23 SW(2d)130 (occupancy of parts of farm by different tenants held not to destroy entirety); 127Misc710, 217NYS544. See also NJSup 142A905.

736–63 221AppDiv458, 223NYS525.

737–66 127Misc710, 217NYS545. [b] (3) Damage for severance of land taken is limited to contiguous land. 99CalA 240, 279P178. [f] (4) Where proceedings for condemnation were tried within year of commencement court properly ruled that defendant's tracts separated by land which he held under option at commencement of proceedings were separate tracts, not constituting single parcel. 99CalA240, 278P476.

738–78 [f] **Compensation allowed** where owner's waterfront property is condemned and his other parcel located across street is also damaged thereby. 219AppDiv27, 219NYS353.

738–80 Mont 288P181.

739–82 101WVa165, 132SE380.

739–83½–New. , and if a tract has been laid out in lots and lost its continuity as a tract then the lot becomes the basis of valuation. 101WVa165, 132SE 380.

739–85½–New. Claimant's riparian rights are of value, even though such value might be destroyed by improvement of navigation without compensation to upland owners; the city in taking title to claimant's lands for municipal purposes; not destroying their value incidentally and consequentially by exercising its dominant right to improve adjacent waters for purposes of navigation. 240NY68, 147NE361.

739–87 215Ala533, 112S131; 172Ark 1031, 291SW793; 179Ark154, 15SW(2d) 399; 321 Ill 538, 152NE486; 322 Ill 11, 152NE491; 200 Iowa1063, 205NW979; 96PaSuper358; TexCivA 13SW(2d)929; 147Va25, 136SE496.

739–88½–New. In proceedings to condemn land for a power line, land not occupied by towers is land not taken. 321 Ill 538, 152NE486.

739–88⅓–New. To support a claim for damages where land was not taken, there must be some direct physical disturbance of plaintiff's rights in connection with his property. 321 Ill 538, 152 NE486; 322 Ill 11, 152NE491.

739–88¼–New. and the owner must prove depreciation in market value of land. 321 Ill 538, 152NE486.

739–88⅜–New. Interference in the use for farming of land not taken may be considered in fixing damages to the owner. 322 Ill 11, 152NE491.

739–88¾–New. An award of damages to a part of land not taken, based on the difference in value of use, is improper. 322 Ill 11, 152NE491.

739–88½–New. Uncertain and conjectural matters should not be considered in determining damage to land not taken. 322 Ill 11, 152NE491.

740–89 314Mo 438, 284SW471, 480, 47 ALR25 [quotCJ].

740–90 314Mo 438, 284SW471, 480, 47 ALR25 [quotCJ].

740–91 314Mo 438, 284SW471, 480, 47 ALR25 [quotCJ].

740–95 [d] (3) Acquisition of electric light and power company by consent decree of permanent easement over strip of land makes company liable as though fee had been taken. 152Tenn348, 277 SW889. (4) Compensation to which property owner is entitled when his land is taken is ordinarily measured by market value of land taken, and, when easement appurtenant to land is taken, measure of damages is depreciation in market value of dominant tenement. 108Conn359, 143A245. (5) Measure of damages. TexCivA 8SW(2d)705.

741–97½–New. In laying out highway under statutes, adjoining lot owners in same plot are not entitled to damages because of restrictive covenants. 193 Wis549, 214NW324.

741–99 4HawaiiFed16; 243 IllA263; 133Misc594, 232NYS666; 155Tenn256, 291SW1074; TexCivA 271SW408; Tex CivA 4SW(2d)1032. See also 8LaA181. [a] (1) 99NJEq527, 133A875; 100NJ Eq101, 135A86. (2) 100NJEq101, 135 A86. (5) Value of leasehold over rents payable measures compensation. 155 Tenn256, 291SW1074.

741–3 247Mich1, 225NW498.

742–4 100NJEq101, 135A86.

742–5 99NJEq525, 133A872.

742–6 See also Ont [1930] 4DomLR 626 (mere possibility).

742–10 126Misc879, 216NYS2. [h] (2) On condemnation of spur of elevated railroad, value of franchise must be determined on basis of present and prospective earning power of spur, considered as part of entire elevated system. 126Misc879, 216NYS2.

743–15½–New. In a proceeding by a city to condemn in part a right to construct and maintain a waterworks and sewerage system under streets, alleys, and avenues of an addition to the city the owner is entitled to compensation, not only for the part of his easement actually taken, but in addition to damages resulting to him as a consequence of the taking. 153Miss517, 121S160.

743–17 178Ark1130, 13SW(2d)598.

744–21½–New. Where a city widens or opens a street for motor vehicles traffic to its full width, thereby consuming the space set apart for sidewalks or footpaths, the abutting owner's damage is the depreciation in the market value of the property. 128 Okl 169, 261P910, 55ALR891.

744–22 248Mich621, 227NW705(2d case); 104WVa660, 140SE839. See also 127Misc316, 215NYS297. [d] **Burden of proof** to show diminution in value is on railroad. 197Cal 456, 241P545.

744–23 197Cal 456, 241P545; 197Cal 467, 241P549.

745–25 104WVa660, 140SE839.

745–27 104WVa660, 140SE839.

745–28½–New. Condemnation of elevated railroad value of right to impair light, air, and access. 229AppDiv617, 243NYS665.

745–28⅓–New. Condemnation of elevated railroad. Determination of damages. 229AppDiv617, 243NYS665.

745–29 104WVa660, 140SE839.

745–31 104WVa660, 140SE839.

746–35 104WVa660, 140SE839.

746–39 172Ark317, 288SW715.

746–45 172Ark317, 288SW715.

746–46 172Ark317, 288SW715.

746–47 172Ark317, 288SW715.

749–65½–New. Erection and maintenance of telephone poles and wires within limits of country highway is additional burden upon the easement, for which owner is entitled to compensation. 112 Oh385, 147NE907.

750–71 128 Okl 169, 261P910, 55ALR 891.

751–76 128 Okl 303, 262P1070.

751–77 128 Okl 303, 262P1070.

751–78 Ala 129S50; 172Ark1031, 291 SW793; 36GaA492, 137SE107; 36GaA 554, 137SE646; 103WVa186, 136SE840; 104WVa129, 139SE644. [e] **Removal of lateral support.**–143Wash479, 255P645, 52ALR625. [f] **Lowering of grade and construction of improved street on new grade** constitute one improvement. 220 Ky132, 294SW1076.

752–79 [a] **When grade is changed** after land is once taken for street, abutting owner can only ask that he be made whole. 220Ky132, 294SW1076.

752–80 Contra 172Ark1031, 291SW793.

752–81 36GaA492, 137SE107. Contra 172Ark1031, 291SW793.

752–82 Contra 172Ark1031, 291SW793. [b] **Property owner held entitled** to substantial damages for excavating high bank in front of property in extending grade on account of gradual sliding away of embankment. 172Ark 1031, 291SW793.

752–85 [a] 151Miss829, 119S315; Nebr 230NW842. [f] **Diversion of travel** may be considered. Nebr 230NW842. [g] **Relocation of highway.**–Ark 31SW(2d) 300.

753–88 245Mich65, 222NW325, 67ALR 373.

753–90 [b] **Destruction of building restrictions** following construction of railroad through subdivision may be considered in determining value of lands not taken. 245Mich65, 222NW 325, 67ALR373.

753–91 218AppDiv356, 218NYS173. [a] 126Misc879, 216NYS2.

753–92 214Ky736, 284SW391; 161 Tenn546, 30SW(2d)278.

754–96 217AppDiv587, 217NYS359; 219AppDiv478, 220NYS298. [e] **Assessed value.**–160La727, 107S506.

755–97 213AppDiv187, 210NYS387 (residue separated from part taken by street).

755–98 217AppDiv587, 217NYS359. See also 293Pa551, 143A208. [j] (4) In appraising wharfage and cranage rights, depreciating tendency in value of upland, by reason of intervening, is taken into consideration. 132Misc774, 230NYS411. [m] **Determination of value.**–230AppDiv407, 245NYS121.

756–99 [a] **Riparian rights.**–284Pa225, 130A491.

756–1½–New. An award for enhanced value is held proper despite the fact that the land was owned in common. 219AppDiv382, 220NYS18.

756–1⅓–New. Land under water, taken by the city, should be valued on assumption that the piers could be shedded, although the owners not entitled to shed because not engaged in steam transportation. 219AppDiv382, 220 NYS18.

756–1¼–New. Where a grant of lands under water to a purchaser from the city extended to, but did not include, a potential street, and required the grantee to maintain at his own expense such street fronting on the property, when called to do so, on the city's condemnation of such lands, the owner was not entitled to allowance for loss of use of land in the bed of the street. 132Misc774, 230NYS411.

756–2 See also 80Colo 365, 250P527. [g] **Damages for diversion of natural channel** in constructing bridge is cost of flood control gate and expense in unsuccessful attempt to provide water. 118Nebr522, 225NW679. [h] **Rights included in determining compensation.**–Statute construed to require water company to extinguish not defendants' entire riparian rights, but only their rights in water diverted. 132Misc848, 230NYS691.

757–5½–New. but not the value of land taken. 331 Ill 277, 162NE865.

757–6 Ida 290P393, 394 [quotCJ]; 81 Mont26, 263P418; 136Misc148, 239NYS 578; 131 Okl 63, 267P852, 853 [quot CJ]. [e] **Construction of elevated boardwalk on beach is not laying out of street** entitling abutting owners to damages on such ground. 217AppDiv76, 216 NYS121. [f] **Sole consideration** is how taking of right of way affects premises in market. 81Mont261, 263P418. [g] **Cost of adapting property to improvement** is not separate element of damages. 298Pa77, 148A41.

757–7 111Conn27, 149A205 (cost of construction of sidewalk curb and sewer held not proper element of damages); 81Mont261, 263P418.

758–15½–New. Damage from discontinuance of old road cannot be considered in determining damages on condemnation for new highway. Mont 288P181.

759–25 136Misc890, 241NYS288. See also 127Misc316, 215NYS297.

759–25½–New. Only nominal award made for land under water required by covenant in deed to be kept open as waterway. 219AppDiv382, 220NYS19.

760-37 See also 127Misc316, 215NYS 297.

761-49 126Misc879, 216NYS2.

761-50 126Misc879, 216NYS2.

763-53 220Ky778, 295SW1000.

763-54 **Ont** [1930] 2DomLR650.

763-55 214Ala160, 107S85; 5PaDist&Co 741. [a] (7) Compensation for right of way is presumed to cover damages from prudent operation on additional track. 218Ky811, 292SW494. (8) Probable or contemplated increase in operation. TexCivA 13SW(2d)929.

764-59 215Ala239, 110S5; 86Colo 372, 282P191; Ida 290P393; 321 Ill 187, 151 NE553 (must be direct and proximate); 321 Ill 538, 152NE486; 322 Ill 11, 152 NE491; 324 Ill 411, 155NE272; 333 Ill 218, 164NE182; 338 Ill 347, 170NE295; 338 Ill 499, 170NE717 (to land not taken); 339 Ill 212, 171NE189; 214Ky736, 284SW391; 214Ky748, 284SW397; 216 Ky618, 287SW985; 81Mont261, 263P 418; 126Misc879, 216NYS2; 142SC284, 140SE560, 57ALR634; 147Va355, 137SE 458. See also TexCivA 8SW(2d)705. [n] **Possibility that railroad might not provide switching connections as valuable** as before is too remote as damage to owner. Mass 172NE356.

765-60 147Va25, 136SE496; 147Va355, 137SE458. [a] (6) Loss of profits charged to public for passing over defendant's land to railroad held not proper element of damage. 147Va25, 136SE 496.

766-62 314Mo 438, 284SW471, 478 [quotCJ], 47ALR25; 228AppDiv173, 239 NYS477; 299Pa503, 149A702; 146Wash 607, 264P411. [b] (2) 230Ky806, 20 SW(2d)991,(2dcase) (that culvert would have to be constructed).

767-63 314Mo 438, 284SW471, 478 [quotCJ], 47ALR25. See also 21AlaA 27, 104S873.

769-70 242Mich290, 219NW726.

769-71 See also 132Misc199, 228NYS 730.

769-72½-New. Where an improvement on land was separately sold by the owner and removed, subsequent to taking of land under exercise of eminent domain, and the purchase price was in excess of the proper award, it has been held that such vendor could not recover therefor. 160La727, 107S506.

769-72½-New. That a railroad station encroached on an abandoned street held not to warrant reducing the award on the taking of a building. 222AppDiv 644, 227NYS309.

769-75 174Ark59, 294SW410; 126Kan 648 (commercial sand and gravel); 126 Misc879, 216NYS2; 134 Okl 206, 273P 346; Ont [1930] 2DomLR650. But see 227Ky159, 12SW(2d)292.

769-76 176Ark253, 3SW(2d)969; 96 CalA708, 275P228; 327 Ill 294, 158NE 687; 333 Ill 218, 164NE182; 333 Ill 345, 164NE659; 205 Iowa283, 218NW66; 225Ky324, 8SW(2d)392; 232Ky282, 22 SW(2d)1033; 127Me522, 145A137; 151 Miss829, 119S315; 83NH181, 141A65; 240NY533, 148NE668, 48ALR1119 (all uses that could be made of property); 217AppDiv587, 217NYS359; 219App Div478, 220NYS298; 126Misc879, 216NYS2; 131Misc768, 228NYS159; 226AppDiv490, 235NYS569; 128 Okl 303, 262P1070; 129 Okl 27, 263P152; 296Pa423, 146A104; TexCivA 13SW (2d)929; TexCivA 27SW(2d)842; 148 Wash353, 268P1040; Can [1928] 4DomLR82. See also 132Misc774, 230 NYS411. But see 27 OhNPNS548. [q] **Use requiring joinder of land with other tracts.**–76CalA369, 244P609. [r] **Land used as picnic grove and amusement park** (1) is not property of unusual character having no market value, and rule as to adaptability to best use is applicable. 327 Ill 294, 158 NE687. [r] (2) And where it appears that highest and best use to which such land is adaptable is for industrial and manufacturing purposes, condemnation should be fixed on market value for such purposes. 327 Ill 294, 158NE687. [s] **Probability or possibility of rescission of municipal by-law restricting user of property** should be considered. Ont [1930] 2DomLR650.

772-77 174Ark59, 294SW410; 179Ark 695, 17SW(2d)886; 327 Ill 294, 158NE 687; 329 Ill 478, 160NE750; 331 Ill 322, 163NE17; Mont 288P181; 240NY533, 148NE668, 48ALR1119; 100WVa29, 129 SE747. See also 76CalA369, 244P609. [b] **Most profitable use cannot be cut down** by condemnor's refusal of consent necessary for such use. 230AppDiv41, 243NYS63.

772-79 TexCivA 13SW(2d)929.

772-80 TexCivA 7SW(2d)895.

772-81 126Misc879, 216NYS2; Ont [1930] 2DomLR650.

773-82 129 Okl 27, 263P152.

773-83 76CalA369, 244P609; Mont 288 P181; 126Misc879, 216NYS2; TexCivA 13SW(2d)929; 200Wis185, 227NW863.

773-84 Ala 130S541.

773-85 133Misc177, 231NYS72. [a] **"Market value" does not mean special value to owner.** Mass 172NE356.

774-86 Mass 168NE78; 133Misc177, 231NYS72; 226AppDiv490, 235NYS569.

774-87 133Misc177, 231NYS72.

774-88 327 Ill 294, 158NE687.

774-89½-New. If land is valuable for two purposes and use for one purpose excludes use for the other purpose only the value for one use may be recovered. 101WVa165, 132SE380.

774-90 202Cal 731, 262P737; 129 Okl 27, 28, 263P152 [quotCJ]; 101WVa165, 132SE380. But see Mont 288P181.

774-91 129 Okl 27, 28, 263P152 [quot CJ]. Contra 79CalA270, 249P221.

774-92 129 Okl 27, 28, 263P152 [quot CJ].

774-94 129 Okl 27, 28, 263P152 [quot CJ].

774-95 129 Okl 27, 28, 263P152 [quot CJ].

774-97 202Cal 731, 262P737; 101WVa 165, 132SE380.

775-99 Ida 290P393; 130Kan397, 286 P266; 225Ky324, 8SW(2d)392; 126 Misc879, 216NYS2; TexCivA 15SW(2d) 180. But see 159Tenn147, 17SW(2d)22, 65ALR440. [g] **Land held to be not of unusual character having no market** value so as to permit fixing compensation on basis of value to owner for purposes to which it was devoted. 327 Ill 294, 158NE687 (picnic grove and amusement park).

775-1½-New. Value of plant as live growing concern is properly considered as element of damages. 240NY533, 148 NE668, 48ALR1119.

775-2 227Ky159, 12SW(2d)292. [b] **Refusal by city to approve plans for apartment house sites** could not deprive owner of land taken of right to receive true market value. 230AppDiv41, 243 NYS63.

776-4 76CalA369, 244P609; 82CalA289, 255P553; 169La1111, 126S675; Mass 172NE356. [d] **Necessities of owner** cannot be considered in estimating damages. 148Wash353, 268P1040.

776-7 217Ala524, 116S689, 692 [citCJ]; 96CalA708, 275P228; 127Me522, 145A 137; 126Misc879, 216NYS2; 133Misc 177, 231NYS72; 5PaDist&Co 741; 148 Wash353, 268P1040. [d] **Value of right of elevated railroad to impair abutting owners' easements of light, air, and access** is entitled to be compensated for, on condemnation of its spur, to extent of its railroad purposes only, and without regard to future speculative use to which city may put property. 126Misc 879, 216NYS2. [e] **"Compensation"** does not include value or benefit to party taking, as distinguished from injury to owner. 133Misc177, 231NYS72.

777-10 83NH181, 141A65; 226AppDiv 490, 235NYS569; 142Va512, 129SE384; Ont [1930] 4DomLR626.

777-10½-New. The need of property taken to give value to the property as a whole by its use therewith may be considered in a condemnation proceeding. 227Ky159, 12SW(2d)292.

778-13 179Ark695, 17SW(2d)886.

778-15½-New. In estimating value of land it may be considered that defendant leased land for railroad in expectation of using roadbed to his own property at expiration of lease. 142Va512, 129SE384.

778-16 195NC92, 141SE484; 118 Or 166, 246P707 (where action to condemn is tried before actual appropriation); 155Tenn448, 295SW60.

778-17 TexCivA 28SW(2d)951. [c] (2) Where injury to dwelling house from blasting in construction of highway is necessary incident to necessary blasting, damages are chargeable to condemnor (157Tenn491, 9SW(2d)700); (3) but not if injury results from negligence (157 Tenn491, 9SW(2d)700).

779-20 118 Or166, 246P707, 709 [quot CJ] (where action to condemn is tried before actual appropriation).

779-21 192NC431, 135SE341; 2 Or933, 937 (where action to condemn is tried before actual appropriation); 155Tenn 448, 295SW60.

779-22 155Tenn448, 295SW60.

779-25 See also 118 Or166, 246P707 [quotCJ].

779-26 NJ 146A51; 25 OhNPNS303. [a] **Good will** is not item for which owner of land taken by eminent domain should be paid. 240NY533, 148NE668, 48ALR1119; 219AppDiv285, 219NYS 741.

779-28 [b] (1) 240NY533, 148NE668, 48ALR1119. [c] **In Ontario.**–[1925] 2 DomLR796.

780-29 86Colo 372, 282P191; 100NJEq 101, 135A86; 240NY533, 148NE668, 48 ALR1119; NC 154SE72; RI 152A225; 38Wyo 190, 266P117; Ont [1925] 2Dom LR796.

781-35 215AppDiv147, 213NYS337, 338 [quotCJ].

781-36 215AppDiv147, 213NYS337, 338 [quotCJ]. [a] **Damage to land resulting from diversion of travel** from ferry landing thereon is not element. 215App Div147, 213NYS337.

782-38 176Minn389, 223NW458; 100 NJEq101, 135A86; 240NY533, 148NE 668, 48ALR1119.

782-40 147Va355, 137SE458.

782-42 327 Ill 294, 158NE687. [b] **In New York.**–240NY533, 148NE668, 48 ALR1119.

782-45 [a] (2) Refusal of commissioners to make award for good will held proper in land taken for ceding to United States for Harlem Ship Canal under L. (1913) c 414. 245NY627, 157NE885 mem(2dcase). [b] **In New York.**–240NY 533, 148NE668, 48ALR1119.

783-49½-New. The legislature may authorize recovery for loss of profits in a business. 240NY533, 148NE668, 48ALR 1119.

783-49½-New. or damage done to good will of going concern caused by state's appropriation of land. 240NY533, 148 NE668, 48ALR1119 (L. [1905] c 724, as amended L. [1906] c 314).

783-49¼-New. A statute, extending time for filing claims for compensation or damages because of appropriation of lands or other property for Barge Canal, did not authorize payment for interruption to good will. 240NY533, 148NE 668, 48ALR1119.

783-49½-New. "Compensation" and "damages" in such statute are synonymous. 240NY533, 148NE668, 48ALR 1119.

783-49½-New. meaning compensation allowed by law for taking of property. 240NY533, 148NE668, 48ALR1119.

783-49½-New. "Other property" in this statute does not extend recovery beyond compensation for property seized under previous law. 240NY533, 148NE 668, 48ALR1119.

783-52 338 Ill 499, 170NE717.

783-53 171Minn369, 214NW653.

783-54 171Minn369, 214NW653.

784-55 Mont 288P181.

786-60 [a] (6) Unsightliness of poles carrying electricity not proper element of damage. 324 Ill 411, 155NE272.

786-62 111Conn237, 149A783. [a] (5) In estimating fair market value of mill site, court should consider not only cost of various items of property but also cost expended to bring mill into efficient working conditions by including fees paid to architects and engineers. 240 NY533, 148NE668, 48ALR1119.

787-63 118 Or166, 246P707 (cost of draining land overflowed by drainage of highway); 100WVa29, 129SE747 (expense of fitting residue of property for use and enjoyment).

787-64 214Ky736, 284SW391; Mont 288P181.

788-66 81Mont261, 263P418. [a] **Cost of maintenance of fence after erection** is too speculative to be considered in fixing compensation. 81Mont261, 263P418.

789-71½-New. Expenses incurred during preliminary construction of mill site held not proper element of damages. 240NY533, 148NE668, 48ALR1119.

789-73 [p] **In Texas.**-TexCivA 271SW408. [q] **In New Jersey.**-Tenant's loss of business profits, good will, fixtures and cost of removal not subjects of compensation. 99NJEq527, 133A875; 100NJEq101, 135A86.

790-82 126Misc879, 216NYS82; 141Wash465, 252P111, 49ALR1249.

790-82½-New. In assessing damages for impairment of abutting owners' casements of light, air, and access on construction of elevated railroad, damages are awarded on basis of permanent operation of railroad, 126Misc879, 216NYS2.

790-82⅓-New. and possibility of reverter of such easements to owners thereof upon removal of structure is not considered. 126Misc879, 216NYS2.

791-85 338Ill499, 170NE717; 216Ky618, 287SW985. See also 21AlaA27, 104S873.

792-87 195NC107, 141SE358; 34OhA532, 172NE448; TexCommnA 23SW(2d)320; Ont [1930] 2DomLR650.

792-88 216Ky618, 287SW985; 217Ky424, 289SW675; TexCivA 78W(2d)895.

792-90 7PaDist&Co432.

794-98 See also 127Me522, 145A137.

797-15 Wash 287P670. [c] **Duty of city to determine amount.**-Wash 287P670.

798-19 226Ky75, 108SW(2d)451; 128Okl303, 262P1070; 129Okl27, 263P152.

798-20 214Ky845, 284SW98; 129Okl27, 263P152.

799-29½-New. Increased value of land due to presence of structure thereon is element to be considered in assessing compensation. 240NY533, 148NE668, 48ALR1119.

799-30 338Ill347, 170NE295; 125Kan1, 3, 262P550 [citCJ]; 319Mo697, 4SW(2d)810; 240NY533, 148NE668, 48ALR1119 (appurtenances); 219AppDiv478, 220NYS298. [j] (5) Owner should be compensated for enhancement of value due to fixtures in factory or warehouse. 219AppDiv285, 219NYS741. (6) Nothing can be allowed for portable things which may be taken away by condemnation claimant, but equipment must be compensated for if peculiarly adapted to building in which located. 132Misc774, 230NYS411.

800-31 [a] (3) Owner may prove separately value of land and value of buildings, 219AppDiv27, 219NYS353.

800-32 125Kan1, 262P550; 233Ky378, 25SW(2d)1036 (cost of restoration of fence).

801-33 [c] **Where buildings do not enhance value of property,** compensation for buildings as such should not be allowed. 327Ill294, 158NE687.

801-37½-New. In appraising old tenement buildings, the rental value, and not reconstruction cost, less depreciation, is the proper criterion. 132Misc774, 230NYS411.

802-54 [b] (5) Right to compensation is not affected, though building was erected after change of grade was adopted where immediate change of grade was not in prospect, and change did not in fact take place until year or more after it was finally ordered. 293Pa326, 142A867. (6) If no definite time is fixed by ordinance for street change, owner is not prohibited from building because change is contemplated. 293Pa326, 142A867. (7) Owner with knowledge that borough was about to open highway through his land cannot recover for cost of removing structure erected thereafter, irrespective of validity of ordinance. 298Pa77, 148A41.

803-62 TexCivA 48W(2d)1032.

804-69 4HawaiiFed10; 4HawaiiFed12.

804-74½-New. Tenant has been held entitled to value of interest on sum spent for improvements for unexpired term. 100NJEq101, 135A86.

804-75 But see 327Ill356, 158NE685 (enhanced value because of improvement before filing of petition is recoverable).

805-79 142Va512, 129SE384.

805-84 142Va512, 129SE384 (as assignee of lease).

806-85½-New. In Nova Scotia, where land has a generating power value and it has increased by work of the expropriator, the expropriatee is not entitled to the benefit in ascertaining the value of land. NS [1928] 1DomLR930.

806-85⅓-New. Damages to contingent remainderman for interest in land with terminal constructed by railway company claiming fee under deed from life tenant should be assessed on basis of value of land without improvements as of date of death of life tenant. 160Tenn477, 26SW(2d)141.

806-87 217AppDiv381, 216NYS730. [c] **Interest mandatory.**-Allowance of interest, under New York Conservation Law, is not discretionary, but mandatory. 134Misc775, 236NYS245.

806-89 274US215, 47SCt581, 71Led1006; 108Conn359, 143A245; 4HawaiiFed33; 30HawaiiI; 11PaDist&Co532. [c] **Where taking is by state,** it is not liable for interest without its consent. 115Or562, 237P690, 239P193.

806-90 242Mich690, 219NW726 [citCJ]; 251Mich63, 230NW928.

807-93 7F(2d)624; 217Ala524, 116S689; 220Ala555, 126S855; 107Conn459, 140A814; 119Kan598, 240P591; 130Misc136, 223NYS529; TexCivA 288SW852, 853 [citCJ]; Can [1928] 4DomLR82.

808-94 119Kan598, 240P591, 593 [citCJ]; 299Pa503, 149A702; 14PaDist&Co62.

808-95 See also 217AppDiv417, 216NYS730.

808-97 108Conn359, 143A245.

808-3 Iowa 230NW302.

808-5 TexCivA 288SW852; 155Wash678, 286P286. See also 105NJL583, 146A182.

809-6 299Pa503, 149A702 (award including damages for delay in payment).

809-7 TexCivA 288SW852.

809-9 217AppDiv381, 216NYS730.

809-11 251Mich63, 230NW928; 249NY445, 164NE541 [motion to amend remittitur granted 250NY559, 166NE324 (1stcase)] (until thirty days after entry of final order).

809-12 [c] (1) 248NY64, 161NE420 (service of demand for interest held in time). (2) It has been held that interest runs from vesting of title till six months after final decree, and recommences thereafter upon second demand, in condemnation for ferry purposes. 245NY545, 157NE851.

810-14 107Conn439, 140A814.

810-14½-New. In case of change in grade interest in award rises from when actual physical changes resulting in damage are made; 130Misc136, 223NYS529.

811-16 [a] (2) Owner retaining possession after filing of petition for assessment of damages for land taken for railroad right of way is not entitled to interest on award from such date. 118Nebr477, 225NW468. (3) In such case delay of railroad company in procuring assessment of damages may not entitle land owner to interest. 118Nebr477, 225NW468.

811-22 14PaDist&Co62.

811-25 Mass 168NE78.

811-32½-New. Notice by the condemnor to the county judge to retain the deposit until the expiration of the time to appeal does not entitle the landowner to interest where he challenged the right of the condemnor to exercise the right of eminent domain and failed to waive the right to appeal. 118Nebr477, 225NW468.

811-32⅓-New. A statute, providing that the actual value of land at the date of summons shall be the measure of valuation of the land to be condemned, does not deny the right of owners to claim an interest by way of damages for the period between the date of summons and entry of judgment in a condemnation action. 30HawaiiI.

812-47½-New. Where the right of a city to take property is suspended and the owner has the right of possession during the city's appeal, the owner is not entitled to interest during the interim. 107Conn439, 140A814.

812-47⅓-New. notwithstanding the city's right to take the property by giving security, where security is not given. 107Conn439, 140A814.

812-47¼-New. and notwithstanding depreciation of value of use of the property because of condemnation proceedings, where such depreciation is considered on reassessment hearing. 107Conn439, 140A814.

813-50 217AppDiv381, 216NYS730.

813-52 217AppDiv381, 216NYS730.

813-58 269US411, 46SCt144, 70Led339; 220Ala485, 125S670, 68ALR776; 176Ark873, 4SW(2d)516; 230Ky806, 20SW(2d)991(2dcase); 170Minn124, 212NW202; 319Mo697, 4SW(2d)810; 81Mont261, 263P418; 197NC556, 150SE40. But see 172Ark340, 288SW711. [f] (2) 243Mich517, 220NW808. (3) Statute providing for deduction of benefits where land is taken for highway purposes is applicable and constitutional only where there is no special assessment for benefits, prior or subsequent. 242Mich239, 219NW74. (4) Where there is assessment for benefits to land, part of which is taken for highway purposes, statute allowing deduction of benefits from damages but requiring commissioners to state amount deducted and providing that such amount be deducted from assessment applies. 242Mich239, 219NW74. (5) Where special assessment for benefits is imposed which property owner must pay in full, just compensation for land taken is not awarded if benefits are deducted from damages. 242Mich239, 219NW74. (6) Where there has been special assessment for benefits, award of compensation deducting benefits without stating amount deducted will be set aside as not awarding just compensation. 242Mich239, 219NW74. (7) Benefits to residue from establishing public highway in order to be deducted from compensation awarded, must be capable of financial realization within reasonable period and not based on speculative forecasts uncertain to happen. 243Mich517, 220NW808.

814-59 172Ark942, 290SW948; 327Ill356, 158NE685; 214Ky748, 284SW397; 216Ky303, 287SW357; 167La368, 119S259; 226AppDiv490, 235NYS569. [b] (3) 125Misc186, 211NYS149.

815-61 198Ind645, 154NE659; Ind 170NE81 (unless taken by municipal corporation); Can [1930] 4DomLR955.

816-63 [d] Iowa 230NW302.

817-70 36GaA492, 137SE107; 330Ill39, 161NE55; 338Ill347, 170NE295; 127Me332, 143A176; 164Minn226, 204NW934, 205NW640; 170Minn124, 212NW202; 103WVa186, 136SE840. [f] (3) 220Ky132, 294SW1076. [g] (1) 248Mich1, 226NW688.

819-74 [b] (1) CalA 287P121.

819-75 125Misc186, 211NYS149. [c] **Damages due to readjustment of machinery** may be offset by benefits due to increase of water head of dam. 125Misc186, 211NYS149.

819-76 220Ala668, 126S132; 36GaA492, 137SE107; Ind 170NE81. [c] (1) 36GaA492, 127SE107; 143Va213, 129SE504. (3) 143Va213, 129SE504.

820-78 214Ky748, 284SW397.

821-80 [a] (5) Widening and grading of street are essentially different improvements, though included in same proceeding. 164Minn226, 204NW934, 205NW640. (6) Damages for taking of land to widen street cannot be offset by benefits arising from grading it. 164Minn226, 204NW934, 205NW640. (b) **Statute excluding from amounts paid owners for condemned lands improvements made by government** held not unconstitutional. 269US55, 46SCt39, 70Led162.

821-82 [a] (2) Where canal improvement increased value of land due to added water power, such benefits could be offset against consequential damages. 125Misc186, 211NYS149.

821-84 152Tenn348, 277SW889 (merely permissive uses which owner might make of land taken cannot reduce compensation).

822-86 85**Colo** 202, 274**P**827; 319**Mo** 697, 4**SW(2d)**810.

832-87 85**Colo** 202, 274**P**827; 319**Mo** 697, 4**SW(2d)**810; 321**Mo** 1154, 15**SW (2d)**338; **Mo** 18**SW(2d)**438; **TexCivA** 291**SW**317; 143**Va**213, 129**SE**504; 103 **WVa**186, 136**SE**840; **Alta** [1929] 4**Dom LR**333.

823-88 85**Colo** 202, 274**P**827. [b] (7) Enhancement of valuation of land in neighborhood of hard surface road. 149 **Va**658, 140**SE**816. (8) Farm previously abutting on dirt road did not derive special benefit from hard surface road dividing it into separate tracts. 149**Va** 658, 140**SE**816. (9) Other instances. 176**Minn**525, 223**NW**923. [d] 176**Ark** 873, 4**SW(2d)**516; 319**Mo** 697, 4**SW(2d)** 810. [f] 321**Mo** 1154, 15**SW(2d)**338. [g] 95**CalA**602, 273**P**131; **Mo** 18**SW(2d)** 438. [h] **That benefits are greater in degree than those accruing to other land** does not render them special. **Mo** 23**SW (2d)**130.

825-89 321**Mo** 1154, 15**SW(2d)**338; **Mo** 19**SW(2d)**465 (superior means of ingress and egress); 157**Tenn**491, 9**SW (2d)**700; 143**Va**213, 129**SE**504 (change of grade causing enhancement).

825-91 176**Minn**525, 223**NW**923. [a] 197**NC**556, 150**SE**40.

825-91½-New. A city cannot set off special benefits from an improvement against damages resulting because of an embankment constructed in front of a lot. 175**Ark**697, 300**SW**397.

825-93 105**NJL**583, 146**A**182.

826-99 **CalA** 283**P**381; **CalA** 287**P**121. [b] (5) Evidence showing location of country road before construction of highway is admissible. 321**Mo** 840, 12 **SW(2d)**747. [d] (5) Other evidence held inadmissible. 39**GaA**238, 146**SE** 651. [f] (3) Plaintiff is properly limited to the land described in his petition. 321**Mo** 840, 12**SW(2d)**747.

826-99½-New. A state highway presumptively confers upon adjoining land, on account of its physical relation to it, a special benefit. 321**Mo** 1154, 15**SW (2d)**338.

827-1 215**Ala**533, 112**S**131; 174**Ark**59, 294**SW**410; 82**CalA**289, 255**P**553; 333 **Ill** 218, 164**NE**182; 333 **Ill** 345, 164**NE** 659; 226**Ky**75, 10**SW(2d)**451; 229**Ky** 222, 16**SW(2d)**1022; **Mass** 172**NE**356; 197**NC**556, 150**SE**40; 299**Pa**503, 149**A** 702; 88**PaSuper**439; **TexCivA** 281**SW** 318; **TexCivA** 13**SW(2d)**416; **Ont** [1930] 2**DomLR**650. [j] **Compensation for taking of logging railroad reverting to landowners on expiration of timber contract,** is to be ascertained from date of expiration of contract. 217**Ala**524, 116**S**689.

828-2 **Ont** [1930] 2**DomLR**650.

828-4 [g] **Mere laying out of street and establishment of grade** (1) does not constitute taking. 88**PaSuper**439. (2) Effect of ordinance laying out street and fixing grade is to deny damages for any structure placed thereafter within lines of located street. 88**PaSuper**439.

828-5 127**Misc**710, 217**NYS**544. [c] **In Pennsylvania.**-88**PaSuper**439. [d] **Under provisions of Greater New York Charter (L [1901] c 466, as amended),** comptroller may deduct from amount of condemnation award value of use and occupation of premises from time of appropriation, when title vested in city, to date property was actually taken. 132**Misc**199, 299**NYS**752.

829-7 105**NJL**583, 146**A**182.

829-11½-New. Time of taking when owner rebuilds. 5**PaDist&Co** 641.

829-16 **TexCivA** 22**SW(2d)**537.

829-17 93**Fla**601, 112**S**60.

830-19 37**F(2d)**602.

830-21 102**CalA**299, 283**P**298 (statute held retroactive); 327 **Ill** 356, 158**NE** 685; 338 **Ill** 347, 170**NE**295; 169**La**1111, 126**S**675; 81**Mont**261, 263**P**418; 197**NC** 556, 150**SE**40. [c] (1) 201**Cal** 381, 257 **P**526, 53**ALR**679. (2) 201**Cal** 381, 257**P** 526, 53**ALR**679.

831-23 **CalA** 283**P**381; 56**ND**431, 218 **NW**18 (after judgment on verdict and court's order). [b] **Date of order setting case for trial.**-74**CalA**473, 241**P**409.

831-24 [d] 131 **Okl** 63, 267**P**852.

831-25 155**Wash**678, 286**P**286.

831-27½-New. Time of appointment of referee. Statutes provide that, in cases in which referees have been appointed to assess compensation and damages under street opening proceedings, the right to damages shall be deemed to have accrued at the date of the order appointing the referee. 201**Cal** 381, 257**P**526, 53**ALR**679 (statute held not unconstitutional).

831-30 **TexCivA** 281**SW**318.

832-31 [b] (2) Where original entry was by permission of landowner under species of leasing agreement under which industrial spur track was built and cost divided, and railroad subsequently wrongfully claimed perpetual easement and denied right of landowner and landowner after suit brought filed his election to consider original agreement at end and to treat acts of railroad as taking, compensation should be determined as of date of such election. 317 **Ill** 334, 148**NE**32.

832-32 93**Fla**601, 112**S**60, 61 [cit**CJ**].

833-48 281**US**362, 50**SCt**299, 74**L ed**904; 217**Ala**268, 115**S**422; 34**Ariz**38, 267**P** 420; 180**Ark**1075, 24**SW(2d)**856; 69 **CalA**72, 230**P**468; **Mo** 32**SW(2d)**63; 124 **Or**112, 258**P**193, 201, 60**ALR**528 [cit CJperCoshow,J]. [a] (1) 35**F(2d)**357. (2) Government's power to take is subject to constitutional limitation that owner shall be promptly paid. 35**F(2d)** 357. [h] **Delay in paying costs** has been held not to invalidate proceedings. **Tex CivA** 22**SW(2d)**537.

834-51 180**Ark**1075, 24**SW(2d)**856; 117 **Nebr**511, 221**NW**438. [a] **In Pennsylvania.**-91**PaSuper**85.

834-54 [b] (2) Postponement of payment by drainage district for three years on account of time required to assess and collect necessary special taxes held not unreasonable. 317 **Ill** 292, 148 **NE**44.

834-55 225**Ky**249, 8**SW(2d)**431; 177 **Minn**146, 225**NW**86; **TexCivA** 297**SW** 865; 150**Wash**221, 272**P**983. [i] **In Michigan.**-240**Mich**429, 215**NW**417.

835-56 72**CalA**331, 237**P**554; 51**SD**336, 213**NW**952.

835-57 92**Fla**611, 110**S**451, 458 [quot CJ].

835-57½-New. Legislature cannot indefinitely postpone payment since to do so would be violative of constitutional provision. 102**NJL**265, 131**A**637.

835-58 333 **Ill** 135, 164**NE**171; 207 **Iowa**191, 217**NW**75; 117 **Or**220, 243**P** 93, 45**ALR**521; 150**SC**418, 148**SE**366; 155**Wash**665, 286**P**39.

837-69 50**RI** 288, 146**A**777, 66**ALR**1553.

838-77 [c] **Landowner's refusal to accept** awarded damages obviates necessity of payment into court or tender in person. **TexCivA** 291**SW**968.

839-83½-New. Power of court to grant or refuse application to occupy premises pending the action to condemn is largely discretionary. 69**Utah**423, 255 **P**672.

839-91 **TexCivA** 30**SW(2d)**438.

839-95 See also 326 **Ill** 372, 158**NE**118, 55**ALR**196.

840-98 310**Mo** 171, 275**SW**44; **TexCivA** 297**SW**865; **TexCivA** 27**SW(2d)**1105. But see 333 **Ill** 135, 164**NE**171. [g] 122 **Kan**272, 252**P**229. [h] 310**Mo** 171, 275 **SW**44.

840-2 117**Nebr**511, 221**NW**438.

841-4 84 **IndA**305, 151**NE**355; **TexCivA** 10**SW(2d)**194.

841-7 155**Wash**678, 286**P**286.

842-8 [a] **Payment to clerk of court** who pays it to claimants other than mortgagee is not payment into court for mortgagee. 318**Mo** 151, 1**SW(2d)**193, 58 **ALR**1518.

842-10 See also **TexCivA** 288**SW**852.

842-11½-New. Upon completion of award of damages, board making same must issue proper certificates for proper amounts to proper persons. 199 **Ind**95, 156**NE**465, 50**ALR**1518.

842-11¾-New. Where taxes are due to city condemning property, it should deduct from award only such proportion of taxes as is due it pursuant to statute requiring apportionment of taxes as between vendor and vendee. 102**NJL**265, 131**A**637.

842-13 [c] **Issuance of check** by county treasurer for sum awarded for land taken for road is prima facie evidence that money was on deposit for landowner. **TexCivA** 291**SW**968.

842-24 [b] (2) **Tender of check rejected** because of absence of interest and presence of improper notation is not payment. **NJSup** 135**A**696.

843-33½-New. An owner accepting the amount of damages awarded by the county court is estopped from questioning plaintiff's right to maintain proceedings. 216**Ky**64, 287**SW**232.

843-39½-New. After payment and possession condemnor is estopped from declining to take land. 216**Ky**326, 287**SW** 889.

843-39¼-New. Where construction of railroad siding was use for which land has been condemned, any damage to residue of tract could not be claimed. 146**Va**10, 135**SE**685.

843-39¾-New. Ordinarily acceptance of amount awarded constitutes waiver of objections to its taking. 15**F(2d)**474.

843-40 35**F(2d)**357; 308**Mo** 123, 272**SW** 66; 49**Philippine**853; 154**Wash**529, 282 **P**922. See also 49**Philippine**605.

844-42 317 **Ill** 123, 147**NE**803.

844-47 [a] **In Ontario.-Ont** [1929] 3 **DomLR**890.

845-59 216**Ala**160, 112**S**763.

845-61 **TexCivA** 275**SW**845; 103**WVa** 37, 136**SE**507. [c] (3) Liability of county for changing grade of borough's street. 293**Pa**173, 142**A**319. [c] (4) County, in absence of agreement to contrary, is liable for damages occasioned to abutting property by construction of approaches to county bridge. 91**Pa Super**100. [d] (3) Where land is condemned for street widening or relocating by Illinois state department of public works, it must be paid for by state, whereas if land is taken for such purposes by city or village it must be paid for by means of a special assessment on the adjacent lands benefited thereby. 317 **Ill** 203, 148**NE**69. (4) Under statute, state highway commission, building bridge on main traveled thoroughfare on petition of town, is not liable for damages caused thereby. 126**Me**205, 137 **A**67. (5) But town making petition and paying share of costs is liable therefor, though commission supervised work. 126**Me**205, 137**A**67.

846-63 **TexCivA** 286**SW**590.

846-64½-New. Where damage results from negligence of those acting for public compensation can be had only against wrongdoer. 172**Ark**94, 287**SW**761.

846-64¾-New. An order directing payment of condemnation award is held to have improperly required incompetent owner's committee to give bond. 219 **AppDiv**721, 219**NYS**611.

846-64¼-New. Failure to pay an award for over a year after entry of judgment condemning rights of way for dikes is held not to invalidate it. 143**Wash**525, 255**P**955.

846-64½-New. The sovereign power of the state with its eminent domain cannot take from the humblest citizen a particle of his property for public use without allowing him just compensation. 227 **Ky**159, 12**SW(2d)**292.

847-73 [a] (2) Municipal corporation and railroad company which jointly undertake to lower grade of street to abolish grade crossing are both liable to abutting owners. 102**WVa**138, 134**SE** 745.

847-77 37**F(2d)**602; **Mass** 168**NE**78 (husband could recover only on strength of his own title and not on undivided half interest in adjoining land recorded in wife's name alone); 252**NY**320, 169 **NE**399; 230**AppDiv**407, 245**NYS**121. [h] (6) Right to petition for damages for taking of water and land is fixed as of date when votes authorizing taking were recorded, and not when plan and description were filed. **Mass** 168**NE**78. [j] **Damage to one defendant does not depend upon damage to others.**-102**CalA** 299, 283**P**298.

848-79 118**Nebr**477, 225**NW**468; 292 **Pa**262, 141**A**44. [k] **Holder of tax sale certificate** (1) is owner entitled to compensation. 118**Nebr**477, 225**NW**468. (2) Holder of tax sale certificate cannot be deprived of right under revenue laws to amount of taxes paid with interest at stated rate where award of appraiser ex-

ceeds in amount all liens. 118Nebr477, 225NW468. [i] **Interest in restrictions.**–CalA 281P93. [m] **Husband claiming control of wife's tract.**–Mass 168NE78

848–80 [a] (2) Requiring jury to assess damages as though tenant in common was sole owner of entire tract was proper, but permitting jury to award him entire damages with requirement that he account for half thereof to cotenant was error. Mass 168NE78.

849–82 But see Mass 168NE78.

849–83 11F(2d)971; 214Ky845, 284SW 98.

849–83½–New. But adverse title cannot be gained as against the state. 11F(2d) 971.

849–88 99CalA240, 278P476. But see Oh 170NE633.

850–93 Mo 28SW(2d)80; 219AppDiv 387, 220NYS23 (value of lessee's option); TexCivA 8SW(2d)298; TexCivA 10SW(2d)194. See also 133Misc382, 232 NYS248.

850–93½–New. Claimant will not be awarded damages until at least prima facie right is shown. 11F(2d)971.

850–94 Mass 168NE78; 175Minn300, 221NW14; 176Minn525, 223NW923; 123 Or579, 263P896.

850–96 123 Or579, 263P896.

851–97 100NJEq101, 135A86; 242NY 366, 152NE117; TexCivA 271SW408; TexCivA 4SW(2d)1032. [c] (2) Amount apportioned to tenant is properly computed as amount of rent he was compelled to pay under terms of lease. 201 Cal 381, 257P526, 53ALR679. (3) Argument that if tenant be allowed to recover full value of leasehold interest he will get portion of damages which is equivalent of rent to be paid and owner may lose his rent by insolvency of tenant cannot be considered. 201Cal 381, 257P526, 53ALR679. [d] 86CalA193, 260P605. [e] 123 Or579, 263P896.

851–98 242NY366, 152NE117. [e] **Landlord, part of whose land is taken, is entitled to compensation** for land taken and damages accruing to remainder by reason of taking. 310Mo 171, 275SW 44.

852–99 41F(2d)972; 243 IllA263; 82 NH153, 130A741; 99NJEq527, 133A875; 100NJEq101, 135A86; NJSup 148A 568; 242NY366, 152NE117; 219AppDiv 27, 219NYS353; 155Tenn256, 291SW 1074; TexCivA 271SW408. See also 9 PaDist&Co 225. [a] See also 201Cal 381, 257P526, 53ALR679. [f] (2) Other instances. 246NYI, 157NE911. (2) 178 Minn552, 228NW162(2dcase). [j] **Where lessee has knowledge of prospective improvement,** he cannot recover. 325 Ill 88, 155NE857. [k] **Award for nursery plants and trees goes to lessee** where lease provided that nursery stock might be planted and grown for resale by lessee. 202Cal 731, 262P737.

853–9 But see 8PaDist&Co 739. [a] **Right of subtenant as affected by sublease.**–(1) 292Pa262, 141A44.

853–17 [b] **Tenant** waiving claim for damages of unexpired term on condemnation of property having option to purchase is entitled to award for value of option. 219AppDiv387, 220NYS23 (notice or tender of payment not necessary).

853–24 See also 243 IllA263.

853–26½–New. A tenant occupying a building or part of a building is a "lessee" of property so as to be entitled to compensation under eminent domain. 242NY366, 152NE117.

853–26⅓–New. A statute giving lessee of part of building damages for change in grade is not unconstitutional as involving denial of due process to owner. 242NY366, 152NE117.

854–30 104Conn452, 133A570.

854–32 [b] But see 219MoA271, 275 SW965.

855–34 308Mo 123, 271SW374 (life tenant to show damages have been awarded as owner takes fund in trust as to principal for remaindermen).

855–34½–New. Railroad company has notice of title of life tenant and remaindermen, where they are in possession of land and deed to them is recorded. 219MoA271, 275SW965.

856–55 318Mo 151, 18SW(2d)193, 198 [citCJ], 58ALR1518; MoA 286SW729. [e] (2) Where property is subject to mortgage more than amount of award, final order should contain provision for paying mortgagee in case of release from owner. 133Misc177, 231NYS72. (3) In default of release, award is payable into court for further order. 133Misc 177, 231NYS72. [j] **Where portion of mortgaged property is taken** mortgagees need not first proceed against land not taken. 240NYS718.

857–60 MoA 286SW729.

858–67 206Cal 682, 275P808; Mass 168 NE78; 219MoA271, 275SW965; 127Misc 316, 215NYS297; 295Pa112, 144A901; 12PaDist&Co 610. [j] **Payment into court** in condemnation proceedings by government does not make purchaser from record owner, who has not completed his purchase, a purchaser for value. 6F(2)862.

858–67½–New. nor to one holding an option to purchase. 246NY1, 157NE911.

860–68 179Ark1116, 20SW(2d)179; 206 Cal 682, 275P808; 93PaSuper555.

860–69 12PaDist&Co 610.

860–73 225Ky131, 7SW(2d)821.

861–74 99NJEq669, 134A120; 252NY 320, 169NE399. See also 200 Iowa1063, 205NW979.

861–75 206Cal 682, 275P808.

861–78 220Ky778, 295SW1000; 240 Mich429, 215NW417, 418 [citCJ].

862–80 308Mo 123, 272SW66.

865–97 TexCivA 24SW(2d)483.

865–99 [d] **Status of corporation officer as one to whom condemnation award should be made** cannot be determined in proceeding under city charter relating to conflicting claims. 219AppDiv459, 220 NYS74. [e] **Money erroneously paid into court.**–Award paid into court under New York City charter should be paid out to rightful owner, though his right is so clear that money should never have been paid into court. 245NY 497, 157NE833.

865–2 92CalA501, 268P487. [a] **Controversy as to right of person to be treasurer of corporation** cannot be determined upon affidavits. 219AppDiv459, 220NYS74. [b] **Failure of defendant to except to award of commissioners within statutory time** does not deprive court of jurisdiction to determine his interplea claiming sum awarded to another. MoA 286SW729.

866–6 327 Ill 28, 158NE366.

866–12½–New. Determination of adverse claims. Evidence held inadmissible. 206Cal 682, 275P808.

866–13 [d] **Mortgagee** is not bound to follow award and collect his share from those who have received it. 318Mo 151, 18SW(2d)193, 58ALR1518.

869–49½–New. Release by county commissioners may bind a landowner. 157 Md521, 146A758.

869–51 204Cal 125, 266P944, 58ALR 674; 84 IndA305, 151NE355.

870–52 [a] **Grant of land on which water has been impounded for public use** for purpose of having land used for such purpose precludes recovery of any damages which landowner would be entitled to recover in condemnation proceedings. 132 Okl 4, 268P1110.

870–54 [a] (3) Where landowner did not enforce judgment for compensation, but merely accepted part payment and filed claim for balance with receiver of railroad and receiver's sale failed to bring enough for payment, it was held that owner waived his constitutional right to waive just compensation. 84 IndA305, 151NE355. [b] (5) 160La727, 107S506.

871–59 85Colo 202, 274P827. But see 204Cal 125, 266P944, 58ALR674.

871–62 202 Iowa557, 210NW535. [d] **Landowner appearing in response to fatally defective notice** is entitled under some statutes to statutory time after he so appears in which to file claim for damages. 202 Iowa557, 210NW535.

872–65 202 Iowa557, 210NW535.

872–71½–New. Sale by owner of remaining parcel is not abandonment of his claim for damages to whole tract by condemnation. 127Misc316, 215NYS 297.

872–71⅓–New. Failure of a mortgagee to appear in condemnation proceedings does not affect his right to compensation. 318Mo 151, 18SW(2d)193, 58ALR 1518.

872–74 102NJL523, 133A720; 187Wis 552, 203NW912.

872–75 26 OhNPNS161; 123 Or579, 263 P896; TexCivA 30SW(2d)532.

872–76 103WVa210, 136SE848.

873–79 145Wash576, 261P110.

873–80 145Wash576, 261P110.

873–83 201Cal 381, 257P526, 53ALR 679; 82CalA382, 256P255; 236Mich187, 210NW480; 236Mich282, 210NW297; 123 Or571, 263P901; 145Wash576, 261 P110 (proceeding sui generis).

873–86 180Ark1075, 24SW(2d)856; 236Mich187, 210NW480.

873–89 TexCivA 14SW(2d)357.

874–90 TexCivA 14SW(2d)357.

874–92 109Conn621, 147A126, 64ALR 1453.

874–94 162Ga84, 132SE902; 170Minn 49, 212NW8; 177Minn146, 225NW86; 308Mo 123, 272SW66; 317Mo 1225, 298 SW237.

874–94½–New. and not in personam, 170Minn49, 212NW8.

874–97 MoA 27SW(2d)711; 56ND431, 218NW18. [a] **Public use and necessity proceeding** is not to determine rights of property owners involved, but to establish whether taking is for public use under necessity. 148Wash353, 268P1040.

874–4½–New. City of New York cannot take abutting owner's easement in street in proceeding to acquire land for school purposes, but may in proceeding for street purposes. 128Misc525, 219 NYS545.

874–4⅓–New. Second proceeding to condemn additional land has been held independent proceeding. 227AppDiv 151, 237NYS147.

874–5 180Ark1075, 24SW(2d)856; 207 Cal 430, 278P1028. [c] **General condemnation statutes** may form basis of procedure for establishing drainage system where county's petition contains sufficient necessary allegations as to public use and purposes and description of property and ownership. 98Fla 26, 123S527.

874–7 237Mich338, 211NW905, 912 [quotCJperSnow,J dis op].

875–10 237Mich338, 211NW905, 912 [quotCJperSnow,J dis op].

875–12 167Ga149, 144SE785.

875–14 123 Or579, 263P896.

875–19 Cal 292P124.

875–20 237Mich338, 211NW905, 912 [quotCJperSnow,J dis op]. [a] (1) 92 Fla617, 110S451. (3) 178Ark372, 10 SW(2d)856; 198 Ind645, 154NE659 (Burns' St. Annot. [1914] §§ 929–936); 108WVa431, 151SE436.

876–30 [a] (2) Pub. L. (1927) c. 1012, providing for erection of bridge and imposing obligation to pay for damages and land acquired, has been held not violative of Const. art 1 § 2, or art 4 § 15. 49RI 324, 142A660.

876–37½–New. A statute providing for appeal from the probate court of a party interested in an appropriation proceeding by a municipality is not invalid. 119 Oh606, 165NE505.

877–46 109Conn621, 147A126, 64ALR 1453; 98Fla26, 123S527; 193NC519, 137 SE431; 194NC388, 139SE764; 25 OhA 53, 155NE233; 132 Or317, 285P236; 283 Pa588, 129A845; 193Wis108, 213NW 657. [a] (4) County held not "municipal corporation" within constitutional denial of certain procedure to such bodies. 194Wis397, 216NW509.

877–48 145Wash576, 261P110.

877–49 269US55, 46SCt39, 70Led162 (act construed as not requiring secretary of war's request for institution of proceedings to show condemnation was in his opinion necessary); 74CalA487, 241P415.

877–51½–New. A statute authorizing the state highway commission to improve roads and acquire lands should be liberally construed. NJSup 136A183.

877–51⅓–New. Proceedings for condemnation of land by a county to improve an existing road, is not rendered inapplicable on account of a section of the statute relating to procedure by the county for establishing a new road or al-

tering an old road, or by a section authorizing the county authorities to decline to accept after final judgment land sought to be condemned. 167Ga149, 144 SE785.

878-53 [a] **Statutes held to relate to pending proceedings.**–102NJL294, 132A 503.

878-54 148Md493, 129A682 (Act [1904] c 262 incorporated road directors of Allegany County, and they were authorized to condemn a bridge approach under Bagby Code [1924] §§ 331-337; such sections not repealed by Code Pub. Gen. L. art 33).

878-60 116Nebr862, 219NW394 (city council may complete proceedings under new law).

878-64½-New. Legislature has right to amend method of condemnation under express reservation of statute. 153Md 367, 138A334.

878-67 SC 155SE833.

879-72 317Mo 255, 296SW781. [a] **Provision of Kansas City charter for publication of orders in condemnation proceedings in city newspaper** (1) is not invalid as inconsistent with general scope and policy of constitution. 317 Mo 255, 296SW781. (2) Such provision is not inconsistent with policy of general statute relative to public notices and advertisements in cities. 317 Mo 255, 296SW781.

879-77 117 Or566, 245P308, 45ALR527; TexCivA 25SW(2d)625. [e] (2) Proceedings by state highway board to condemn lands from paying out of state aid road and for securing approaches for erection of free public bridge over navigable river, may not be brought under code provisions for condemning rights of way for county roads. 162Ga84, 132SE 902. (3) Such proceedings are properly instituted under act of August 14, 1914 providing for the condemnation of private property by the state or federal government for public purposes. 162Ga84, 132SE902. [i] (4) Act of 1921 authorizing parishes to expropriate land for state highways is not applicable to roads not part of state system as defined by statute and does not authorize expropriation through court proceedings rather than by jury of freeholders. 158La573, 104S372. (5) Court proceedings instead of laying out by jury of freeholders is not authorized by fact that parish voted bonds to construct public road under constitutional provision which did not necessitate acquisition of fee instead of mere servitude over land taken. 158La573, 104S372. [q] (2) County desiring to establish county road and condemn land therefor in its own right must proceed under Rev. St. (1925) art 6702 et seq. Tex CivA 25SW(2d)625. (3) Acts 41st Leg. 3d Called Sess. (1929) c 10 governs condemnation in behalf of highway commission of land in Hudspeth county. TexCivA 25SW(2d)625. (4) Under such statute commissioners' court acts on behalf of state highway commission. TexCivA 25SW(2d)625. [s] (2) City is authorized to proceed under Home Rule Act to pass ordinance to acquire land to lay out street or boardwalk and is not bound by general statute. NJ 140A447.

880-80 147Va355. 137SE458. But see 222Ky487, 18SW(2d)537.

880-81 147Va355, 137SE458.

881-82 177Ark157, 6SW(2d)23 (as to jurisdiction of county court); 158La 573, 104S372; 177Minn146, 225NW86; 194NC388, 139SE764 (as to preliminary attempt to purchase); 116 Oh441, 156 NE906; 31 OhA495, 167NE488 (right of appeal from insolvency court to common pleas in condemnation cases is not taken away by statute authorizing appeals to common pleas from probate court in such cases).

881-84 [a] **In Michigan.**–236Mich187, 210NW480.

881-86 194Wis376, 216NW837, 839 [cit CJ].

881-89 281US439, 50SCt360, 74L ed 950; 215Ala533, 112S131; 76CalA492, 245P227; 161Ga524, 131SE517, 44ALR 534; 255Mass67, 150NE860, 44ALR 1374; 243Mich517, 220NW808; 314Mo 242, 284SW490; 80Mont228, 260P134; 102NJL523, 133A720; 125Misc269, 210 NYS748; OhA 172NE841; 121 Or323, 255P330, 333 [citCJ]; 132 Or317, 285 P236; 289Pa200, 137A237; TexCivA 274 SW1006; TexCivA 294SW868; TexCivA 16SW(2d)642; 145Wash576, 261P110; 103WVa210, 136SE848. But see Mo 32 SW(2d)63. [c] 258Mass111, 154NE552. [e] **Petition, complying with statutory amendments,** to widen street and make assessments, must be signed by requisite number of property owners. 192NC776, 136SE123.

882-90 98Fla26, 123S527; Mass 172NE 593; 289Pa200, 137A237; 103WVa210, 136SE848.

882-95 198NC404, 151SE871.

882-96 CalA 284P707; 325 Ill 387, 156 NE298; Md 148A209; 258Mass111, 154 NE552; Mass 172NE248; 237Mich90, 211NW96; 80Mont228, 260P134; Mo 30 SW(2d)729; 102NJL523, 133A720; 229 AppDiv381, 243NYS30; 194NC388, 139 SE764; 25 OhA53, 155NE233; 121 Or 323, 255P330, 333 [citCJ]; 11PaDist& Co 30; TexCivA 294SW868. [j] **Reason for rule.**–102NJL523, 133A720.

883-97 203Cal 44, 262P1084.

884-2½-New. Liberal consideration should be given municipality in various steps essential to exercise of right of eminent domain. 137Misc632, 243NYS 160.

884-3 TexCivA 274SW1006.

884-6 But see TexCivA 274SW1006.

884-9 93PaSuper555.

885-16½-New. But it has been held that jurisdiction may not rest on technical waiver or estoppel. 243Mich517, 220NW808.

885-20½-New. Where a village failed to raise an objection in the answer as to an omission to procure previous findings and judgment that there was a change of grade, it waived the objection. 217AppDiv347, 217NYS50.

885-21 35F(2d)235; Cal 292P124; 98 Fla26, 123S527, 535 [citCJ]; 255Mass 67, 150NE860, 44ALR1374; TexCivA 21SW(2d)597; 187Wis552, 203NW912. But see 153Tenn220, 280SW1014; 148 Va554, 139SE303.

885-22 134Misc60, 234NYS668.

886-29 92Fla617, 110S451; 237Mich90, 211NW905, 909 [citCJ]. [e] **Requirement of right of judicial review** is satisfied where review by certiorari is provided for. 241Mich161, 216NW426. [f] **Review in court may be limited** to examination of regularity of proceedings and to exercise of statutory powers. 241Mich161, 216NW426. [g] **"Judicial determination"** provided for where proceedings are subject to review by certiorari. 243Mich649, 220NW881.

886-32 226AppDiv480, 236NYS89.

886-33 [a] 241Mich161, 216NW426; 177Minn146, 225NW86; 81Mont261, 263 P418; 116Nebr862, 219NW394. [b] **Provision for appeal to court.**–177Minn 146, 225NW86.

887-38½-New. Where the constitution makes the question of necessity a judicial one, a statute providing for the condemnation of private property for highway purposes is unconstitutional in so far as it denies a property owner due process of law as regards the question of the necessity of the taking. 237 Mich90, 211NW905.

887-42 [i] **Franchise to construct bridge** need not be obtained before instituting condemnation proceedings if obtained before trial. 142Wash284, 252 P906. [j] **Village board.**–55ND331, 213 NW492. [k] **Acquisition of land for highway purposes.**–80Mont228, 260P134. [l] **State park commission.**–197NC4, 147 SE682. [m] **State highway cannot be condemned** by commissioners' court. TexCivA 22SW(2d)709(2dcase).

887-43 149Miss623, 115S779; 123 Or 571, 263P901.

888-46 198 Ind645, 154NE659.

888-56½-New. A hydroelectric power company assuming to act under a charter which is void because granted without judisdiction by a judge of the superior court in vacation outside of the county where the application was pending is not such a corporation as may exercise the right of eminent domain. 161 Ga524, 131SE517, 44ALR534.

888-56½-New. In Wisconsin, under statute, an owner has exclusive remedy for loss of crops and use of land from flooding from dam. 198Wis472, 224NW 718.

888-58 109Conn621, 147A126, 64ALR 1453; 317 Ill 147, 147NE796; 255Mass 67, 150NE860, 44ALR1374; NJ 152A11; 132Misc848, 230NYS691. [a] (5) Right of county commissioners to institute proceedings under Rev. Codes (1921) § 1641 for condemnation of private property for highway rights of way depends on filing of petition of freeholders therefor as prescribed in § 1635. 80Mont228, 260P134. [d] NJ 140A447; 289Pa200, 137A237. [e] **Certificate of convenience.**–(1) 91PaSuper162. [f] **Taking is not void** under law of 1924, including provision that park commission must first seek to agree with owner at time it has at its disposal funds reasonably adequate to pay for property, because amount available is less than value assessed finally, provided commissioners acted in good faith. 132Misc494, 230 NYS179.

889-59 217Ala268, 115S422; 317 Ill 147, 147NE796.

889-71 Md 148A209. [a] (8) Public service commission's determination that company owns major part of head and volume of usable flow is condition precedent to instituting condemnation proceedings. 125Misc269, 210NYS748. [a] (9) Under Burns St. Annot. (1914) § 5398, certificate of ownership of coal mine and intent to build lateral connecting railroad need not be filed before action is commenced. 198 Ind645, 154 NE659.

890-72 289Pa200, 137A237.

890-72½-New. In the absence of statutory requirement, provision for payment or for completion of improvement is not a condition precedent to condemnation by the city. 26 OhNPNS161.

890-73 224Ky604, 6SW(2d)1074 (order held sufficient); 255Mass67, 150NE860, 44ALR1374; 258Mass111, 154NE552; 258Mass115, 154NE554; 297Pa140, 146 A557. [a] (5) Where order passed by city council for appropriating money for "acquiring land for any purpose" authorized did not describe specific land, it was insufficient. 258Mass111, 154NE 552; 258Mass115, 154NE554. (6) And consequently order subsequently passed by same council that part of money so appropriated be applied to specific improvement was also invalid. 258Mass 111, 154NE552; 258Mass115, 154NE554. (7) Order need not state whether trees are included in taking of land. 263 Mass124, 160NE404. (8) Order held not invalid because damages were not awarded. 263Mass124, 160NE404. (9) Order must state interest taken. Mass 172NE248. [c] **Failure to record order** within time specified voids proceeding and record of recorder is conclusive as to date of filing. Mass 165NE410. [k] **Order not making award of damages** is equivalent to adjudication that no damages were sustained. Mass 172NE593.

890-74 237Mich90, 211NW96; 290Pa 156, 138A845. But see 83 IndA53, 147 NE629. [f] (5) 155Wash678, 286P 286 (under later statute). (8) Borough cannot condemn electric plant, under ordinance authorizing its acquisition, if consent of majority stockholders could be obtained otherwise to construct its own system. 290Pa156, 138A845. [i] But see 227AppDiv151, 237NYS147. [j] (2) Ordinance is not necessary to maintain condemnation proceedings for construction of airport, being only necessary when city takes land for street improvements. 134Misc 60, 234NYS668. [l] **In Michigan.**–237 Mich90, 211NW96. [m] **Plat describing property is insufficient** where statute requires ordinance and resolution of local board. 337 Ill 391, 169NE251. [n] **Conclusiveness of ordinance** as to classification of property. 155Wash678, 286P286. [o] **Defect in ordinance** not describing property to be condemned is not cured by resolution of city council. 337 Ill 391, 169NE251.

891-75 NJSup 136A183; 25 OhA53, 155NE233; 123 Or103, 261P76 (resolution to locate highway); 297Pa140,

146A557. But see 244Mich559, 222NW 113. [e] (3) Statutory language need not be precisely followed in grand jury's resolution to condemn land for court house. 289Pa200, 137A237. (4) Requirement as to specifying purpose of appropriation of property applies to every appropriation including excess. 281US439, 50SCt360, 74Led950. (5) Necessity and sufficiency of definition of use in case of excess condemnation. 281US439, 50SCt360, 74Led950. [f] (2) Resolution held sufficient to show necessity and further proceedings. 289 Pa200, 137A237.

891-77 55ND331, 213NW492.

891-78 [a] **Petition as prerequisite** to widening street and making assessment therefor and requiring signature of majority of property owners must be signed by each divisee of undivided interests in lot. 192NC776, 136SE123.

892-84 [a] (4) Resolution by electric company held sufficient. 86PaSuper 522.

892-87½-New. Under a statute in Illinois, a petition for condemnation of property for school purposes in a city of over one hundred thousand population may be properly filed by the board of education in the name of the city without consent of city council. 323 Ill 389, 154NE117.

892-87¾-New. An electric power company may appropriate lands under power of eminent domain for erection of a dam without first securing a declaration of public convenience, economy, or necessity for such appropriation. 197 Ind430, 151NE220.

892-87¼-New. Some statutes do not require a village board of trustees to announce their determination of the necessity for opening a street in any particular form. 55ND331, 213NW492.

892-87½-New. Publication of a resolution declaring such necessity is unnecessary in the absence of statute requiring it. 55ND331, 213NW492.

892-87⅙-New. Where resolution of necessity is adopted before amended complaint is filed, and issue is joined thereon, it is immaterial that no resolution was adopted at the institution of the action. 55ND331, 213NW492.

892-87⅓-New. Although the statute requires that a certificate of convenience and necessity be obtained from the railroad commission in order to condemn for such purpose, the statute does not include condemnation for a spur track. 197Wis503, 222NW776.

893-91 248Mich473, 227NW718 (under statute eliminating former statutory requirement); 250Mich391, 230 NW194; 132 Or317, 285P236 (not necessary where proceedings instituted by city in manner provided by charter); 50Philippine832. [b] (1) 132 Or317, 285P236.

893-92 328 Ill 610, 160NE226; 197 Ind 430, 151NE220; 243Mich517, 220NW 808; Mich 233NW172; 249NY445, 164 NE541 [motion to amend remittitur granted 250NY559, 166NE324(1st case)]; 190NC577, 130SE203; 194NC 388, 139SE764, 766 [quotCJ]; 132 Or 317, 285P236; 297Pa140, 146A557; TexCivA 218SW(2d)597; TexCivA 22 SW(2d)709(2dcase); TexCivA 308W (2d)438; 142Va512, 129SE384. [a] 243Mich517, 220NW808. [g] **Evidence showing sufficient effort to acquire land** by agreement with railroad or its mortgagee. 127Misc866, 217NYS781. [h] **Failure to make formal offer** to railroad's mortgagee for purchase of land and serve formal notice of appropriation on it is not fatal. 127Misc866, 217NYS781.

893-93 243Mich517, 220NW808; 246 Mich501, 224NW632; 194NC388, 139 SE764, 766 [quotCJ]; 132 Or317, 285 P236; 142Va512, 129SE384.

893-94 117Nebr846, 223NW284; 194 NC388, 139SE764, 766 [quotCJ]; Tex CivA 78SW(2d)895; 194Wis376, 216NW 837, 840 [citCJ]. [b] **Preliminary jurisdictional fact.**-194NC388, 139SE764.

894-96 TexCivA 24SW(2d)483.

894-97 TexCivA 24SW(2d)483.

894-98 194Wis376, 216NW837, 840 [citCJ]. [a] **Declaration of highway commissioner in order** of necessity for condemnation proceedings that he had been unable to agree with owners on purchase is conclusive. 246Mich501, 224NW632.

894-2 [a] 191NC744, 133SE5; 194NC 388, 139SE764.

894-11 191NC744, 133SE5.

895-16 142Va512, 129SE384.

895-18 [a] (8) Offer of amount which was much less than actual value was held insufficient. 243Mich517, 220NW 808. [c] **Bona fide effort to purchase land** involves willingness to pay market value of land, which is selling price of property at that time. 243 Mich517, 220NW808.

895-22 249Mich289, 228NW791.

896-24 See also 105NJL40, 143A759.

896-26 [a] **Execution of option to another purchaser** will render negotiations continued to that time sufficient compliance with laws of 1924. 132Misc494, 230NYS179.

896-27 104NJL283, 140A673; Tex CivA 285SW944.

897-54½-New. An endeavor to negotiate with an attorney having no authority is not sufficient. 323 Ill 389, 154 NE117.

897-54¼-New. An owner's wife or a tenant is not an "owner" with whom an electrical company must negotiate before condemning lands for flowage from the construction of a dam. 197 Ind430, 151NE220.

898-61 328 Ill 610, 160NE226.

898-63 But see 246Mich501, 224NW 632.

898-65 220AppDiv351, 222NYS29; 90 PaSuper570; Va 152SE537. See also 156Md581, 144A710. [g] (4) Other instances. 89PaSuper126. [n] (2) Certificate of commission does not determine validity nor scope of subsequent proceedings. 86PaSuper522. (3) Certificate of commission is evidence only of preliminary approval. 86PaSuper 558. [q] **In Georgia.**-161Ga432, 131SE 46. [r] **Proceedings to obtan consent to condemn land** for additional water supply. NJ 152A11.

899-67 104NJL283, 140A673; 50 Philippine832.

899-68 [a] **Ordinance prohibiting laying of railroad tracks in street** does not forbid taking of alley by eminent domain. 161Ga432, 131SE46.

899-69 161Ga432, 131SE46; NJ 152A 11 (consent of water supply commission is unnecessary in proceeding to obtain conservation board's consent).

901-74½-New. Neither the validity nor scope of subsequent proceedings is determined by the public service commission's granting a certificate of public convenience authorizing the exercise of the right of eminent domain. 89 PaSuper352 (commission without jurisdiction over question of damages).

901-74¼-New. Judgment of minority of conservation board granting consent to acquisition of additional water supply cannot be ratified after expiration of statutory limitation. NJ 152A11.

901-75 125Misc269, 210NYS748; 297 Pa140, 146A557 (bridge).

901-76 25 OhA53, 155NE233.

903-88 125Misc269, 210NYS748.

903-92 See also 216AppDiv603, 215 NYS685.

903-92½-New. The filing of a map is waived where the owners accept an award. 216Ky64, 287SW232.

903-94 259Mass354, 156NE676. [a] (4) Reference in declaratory resolution to widening of street is not in nature of submission of plan. 25 OhA53, 155 NE233. (5) Plat merely indicating location of sewer, without showing amount of land to be taken. 337 Ill 391, 169NE251. [b] (11) Plan for street widening involving every principle applicable to plan for erection of structure held contemplated by municipal code. 25 OhA53, 155NE233. (12) Other illustrations. Mo 28SW(2d) 1008.

904-99 283Pa588, 129A845 (defect must be remedied by amendment).

905-13½-New. In widening an important thoroughfare, a general engineering plan is required, with an estimate of the cost and a showing of the effect on property owners and taxpayers. 25 OhA53, 155NE233.

907-47 35F(2d)357 (under Flood Control Act); 89PaSuper352. [a] **On application for approval** of bond condemning land company's charter cannot be attached, nor illegal intended use of land be asserted. 14PaDist&Co 341.

908-62½-New. The filing of a bond may be waived by acceptance of an award. 216Ky64, 287SW232.

908-62⅓-New. A bond conditioned for reimbursement of the county for any claim for land taken is not necessary in Arkansas, where the petition is filed by the state highway commission under statute. 179Ark733, 17SW(2d)872.

908-64 [c] **In Delaware.**-3Del 396, 138 A629.

909-77 283Pa588, 129A845.

909-85 98Fla26, 123S527; Fla 129S 582.

909-85½-New. Defendant may raise any issue challenging the legality of the proposed taking. TexCivA 14SW (2d)357.

909-86 [a] 198 Ind645, 154NE659; 132 Or317, 285P236 (error curable on appeal); 155Wash661, 286P37.

910-87 [b] **That joint construction of highway by highway district, state, and United States before acquisition of entire right of way** does not invalidate condemnation proceedings. Ida 290P717(4thcase).

910-89½-New. It is no defense that petitioner has a secret intention to violate a criminal statute not connected with the subject of appropriation. 198 Ind645, 154NE659.

910-92 198 Ind645, 154NE659.

911-4½-New. Specifications as to defects or errors of procedure may raise questions relating to sufficiency of the complaint. 73CalA90, 238P117.

911-4⅓-New. but they do not affect the jurisdiction of the court to determine the questions thus presented. 73 CalA90, 238P117.

912-23 [b] **Condemnation for toll bridge** is not objectionable as performing same service as existing ferry. 142 Wash284, 252P906.

912-24 Fla 129S582.

912-25 162Ga84, 132SE902.

912-26 [b] **In Texas** defendant in trespass to try title is not required to file admission of plaintiff's title in that proceeding in order to pursue its right to condemnation. CivA 20SW(2d)222.

913-33 See also 161Ga524, 131SE517, 520 [quotCJ], 44ALR534.

913-34 See also 161Ga524, 131SE517, 520, 521 [quot&citCJ], 44ALR534.

913-35 172Ark317, 288SW715; 161Ga 524, 131SE517, 520, 521 [quot&citCJ], 44ALR534 (landowner cannot question legality of charter).

913-36 See also 161Ga524, 131SE517, 520 [quotCJ], 44ALR534.

913-37 See also 161Ga524, 131SE517, 520 [quotCJ], 44ALR534.

914-49½-New. Under constitutional and statutory provisions in some jurisdictions a trial in court is not necessarily, or at least in the first instance, a prerequisite to appropriation of property in condemnation proceedings. 123 Or571, 263P901.

914-49⅓-New. If an impartial tribunal is provided fairly to consider and award a claim for damages, whether by viewers, commissioners, or arbiters, the condemning party need not resort to the courts. 123 Or571, 263P901.

915-51 82CalA382, 256P255. [a] **In Florida.**-96Fla110, 117S795.

915-55 82CalA382, 256P255.

915-55½-New. So a court obtaining jurisdiction of defendant retains it until final judgment, even though the statute does not provide for notice of subsequent proceedings. 198 Ind645, 154NE659.

915-55⅓-New. Jurisdiction is not lost by delay during which no objection is made or action taken by either party. 79CalA669, 251P247.

915-57 73CalA90, 238P117.

915-58 73CalA90, 238P117; 82CalA382, 256P255 (preventing possession prior to entry of judgment).

915-59 239Mich46, 214NW239.

915-60 239Mich46, 214NW239.

915-62 220Ky151, 294SW1066.
915-62½-New. Nor has the court sitting in a condemnation proceeding power to reform a lease on property affected or to determine to what extent covenant to pay rent is affected. 201Cal 381, 257P526, 53ALR679.
916-69½-New. It has been held that the intervention of a court is not necessary to the exercise of right to condemn land for either a public or private use. 145Wash576, 261P110.
916-69¼-New. A court of law has exclusive jurisdiction in condemnation proceedings. 159Tenn308, 17SW(2d) 921.
916-71 [b] (2) Circuit court. 175Ark 570, 299SW1014. (3) Though county court need not accede to highway commission's request to provide suitable rights of way (177Ark157, 6SW(2d)23), (4) it may accede to such request where proposed changes are practicable and in public's interest (177Ark157, 6SW(2d) 23). (5) Where county court refuses such request, commission may condemn necessary way. 177Ark157, 6SW(2d) 23. [c] (1) 82CalA382, 256P255; Cal 292 P124. [h] (1) 198 Ind645, 154NE659. [k] (2) Mass 168NE78. [s] (4) Court of insolvency. 118 Oh121, 160NE626. [t] (1) 283Pa422, 129A637. [u] (1) 118Tex 469, 14SW(2d)266; 118Tex469, 17SW (2d)774(1stcase); TexCommnA 24SW (2d)366; TexCivA 14SW(2d)357; Tex CivA 24SW(2d)483. (4) County court, by statute, has jurisdiction of proceeding to condemn property and to determine in first instance timely objections raised by defendant in connection with proceedings. TexCivA 285SW944.
917-72 But see 11F(2d)971.
917-77 162Ga84, 132SE902.
917-81 162Ga84, 132SE902.
918-83½-New. A general statute, providing that when an action or proceeding is brought by a county, city and county, or city, against a resident of another county or city, it must, on motion of either party, be transferred to a neutral county or city and county, applies to eminent domain proceedings. 79CalA422, 249P835.
918-83¼-New. Where the proceeding is already pending in a neutral county, the statute does not require transfer to another neutral county. 79CalA422, 249 P835.
918-90 322 Ill 503, 153NE737, 48ALR 1027.
918-93 159Tenn699, 22SW(2d)236 (road commissioners on whom power of eminent domain is conferred by statute are agents of county in whose name land may be condemned by commissioners without consent of quarterly county court).
919-7 [d] (2) Holder of valid mineral lease and assignment in actual physical possession is "owner" within statute. TexCivA 30SW(2d)438.
920-13 [p] **In proceeding by municipality to close street,** owners of nonabutting property are not necessary parties, not being entitled to damages. 213Ky 407, 281SW158.
920-13½-New. Only those unable to reach agreement with plaintiff as to price to be paid for their interest are necessary parties. 27 OhNPNS548.
921-15 162Ga84, 132SE902; 148Va554, 139SE303, 306 [quotCJ].
921-16 148Va554, 139SE303, 306 [quot CJ].
922-25 331 Ill 132, 162NE202.
922-30½-New. It is not error to make a county having a tax lien a codefendant with a nonresident landowner as depriving the county of the right to removal of the case to the federal court. 145Wash129, 259P379.
922-30¼-New. Holder of lien under condemnation judgment is proper party to second proceeding. MoA 27SW(2d) 711.
923-45 TexCivA 4SW(2d)1032.
923-53 308Mo 123, 272SW66 (represent remainderman).
923-55 220Ala433, 126S133 (contingent remaindermen not yet in being may be represented by one of their immediate class). But see 308Mo 123, 272SW66.
923-64 328 Ill 610, 160NE226.
924-76 [k] **Adverse claimants are not estopped** to intervene after judgment of condemnation but before payment of award. 154Wash154, 281P484. [l] **Interveners after judgment** should not be allowed to question damages where they could have intervened before trial. 154 Wash154, 281P484.
925-78 154Wash154, 281P484.
925-81½-New. Where the trial court goes back of the judgment to make an award to interveners, coming in after the judgment, it should vacate as much of the original findings and judgment as are contrary to exact justice. 154Wash 154, 281P484.
925-87½-New. The state highway commission may in a proper case be substituted for the county. 319Mo 697, 4 SW(2d)810.
927-12 TexCivA 20SW(2d)222.
927-19 174Ark618, 297SW861; 92Fla 617, 110S451; 4LaA296; 237Mich338, 211NW905, 912 [quotCJperSnow,Jdisop]; Mich 233NW172; 114Nebr813, 210NW273; 192NC776, 136SE123; 25 OhA53, 155NE233; SC 155SE833. But see 179Ark733, 17SW(2d)872; Mass 172 NE593. [a] (1) TexCivA 274SW1006. [j] **Service of notice of declaratory resolution** showing intention to appropriate held not dispensed with by notice of resolution providing for such appropriation, under correlated sections of charter. 25 OhA53, 155NE233.
928-20 175Ark1067, 1SW(2d)803; 92 Fla617, 110S451; 102NJL523, 133A720.
928-21 92Fla617, 110S451; 237Mich 338, 211NW905, 912 [quotCJperSnow,J disop].
928-22 203Cal 44, 262P1084; 92Fla617, 110S451; 167Ga149, 144SE785; Tex CivA 272SW575; 142Wash270, 253P 115, 58ALR779.
929-23 92Fla617, 110S451, 458 [citCJ]; 213Ky276, 280SW1101. See also 155 Wash678, 286P286. [c] **Notice of judgment and award of damages** not required by Washington statute. 155 Wash678, 286P286.
929-24 237Mich338, 211NW905, 912 [quotCJperSnow,Jdisop].
929-25 [c] (5) Notice of resolution to locate highway is necessary to bring property owners into court and give court jurisdiction. 123 Or103, 261P76.
930-26 114Nebr813, 210NW273.
932-44 169Ark415, 275SW745.
932-45 147Va355, 137SE458.
932-46 147Va355, 137SE458.
932-53 147Va355, 137SE458.
932-54 176Ark558, 3SW(2d)967.
933-58 169Ark415, 275SW745.
933-72 259Mass354, 156NE676; 142 Wash270, 253P115, 58ALR779.
933-73 [f] **In Ohio.**-26 OhNPNS161 ("city manager" and "mayor").
934-75 169Ark415, 275SW745.
934-76 [d] **Notice in form of summons,** requiring defendant to appear on date fixed and show cause, etc., is sufficient, under Burns St. Annot. (1914) § 931. 198 Ind645, 154NE659.
935-89 167Ga149, 144SE785.
935-90 See also 216AppDiv603, 215 NYS685.
935-91 See also 142Wash270, 253P115, 58ALR779.
936-92 [b] **Sufficient reference to complaint** as to several parcels as required by statute. Cal 288P68.
936-5 TexCivA 274SW1006 (notice of time and place of meeting of commissioners).
937-7 169Ark415, 275SW745.
937-13 127Misc866, 217NYS781.
937-15 [c] (1) 141 Okl 199, 284P631 (duly designated service agent of foreign corporation).
938-24 169Ark415, 275SW745; Tex CivA 274SW1006 (notice of time and place of meeting of commissioners); 145 Wash129, 259P379.
939-31 317Mo 255, 296SW781.
941-50 TexCivA 274SW1006 (notice of time and place of meeting of commissioners).
941-51 TexCivA 274SW1006 (notice of time and place of meeting of commissioners).
941-54 [a] (4) Notice cannot be presumed from declarations contained in report of commissioners, nor from recitals in decree of condemnation. Tex CivA 274SW1006. (5) Proof of notice independent of recitals in commissioners' report is necessary to confer jurisdiction on county court to enter decree in condemnation. TexCivA 274SW1006.
942-66 TexCivA 24SW(2d)83.
943-78½-New. Failure to serve notice of filing of petition and appointment of commissioners is not waived by a motion to quash the report based mainly on failure to give notice. 213Ky276, 280 SW1101.
943-80 259Mass354, 156NE676.
943-83 See also 208 Iowa314, 223NW 111.
944-88½-New. Presentation of a claim before commissioners' court, which under one law, acts in supervisory capacity, but is not the body which makes award, does not waive notice. TexCivA 272SW575.
944-92 [g] **Rules of pleading at law** may be applied in condemnation proceedings. Fla 129S582.
944-92½-New. Where statute silent as to how questions relating to pleadings shall be raised, courts may adopt usual modes of determining such questions. 99Fla954, 128S402.
944-94 TexCivA 16SW(2d)642.
944-99 TexCivA 14SW(2d)357.
945-25½-New. Some statutes requiring notice of filing of the petition are mandatory, 213Ky276, 280SW1101.
945-25¼-New. and the court is without jurisdiction where notice is not given. 213Ky276, 280SW1101.
945-25¼-New. Whether the petition of a foreign corporation was properly filed is material only in determining whether the court had jurisdiction. 180Ark 148, 20SW(2d)636.
945-27 [b] (1) NJSup 136A183; 217 AppDiv347, 217NYS850.
946-29 [b] NC 154SE74.
946-34 NJSup 132A83. [c] 43F(2d) 145.
947-37 134Misc60, 234NYS668.
948-47½-New. **Allegations** as to other intervening lands on right of way are not required. 198 Ind645, 154NE 659.
948-49 198 Ind645, 154NE659; NJSup 132A83; 123 Or501, 262P946. But see 50Philippine832. [g] **Power to condemn must affirmatively appear** and cannot be left to inference. NJSup 132A83.
949-57 156Md581, 144A710; TexCivA 14SW(2d)357. [a] (7) Other instances. 134Misc60, 234NYS668; 152Va559, 147 SE239.
949-58 But see TexCivA 298SW627.
950-60 327 Ill 356, 158NE685. But see TexCivA 298SW627. [e] (6) Against objection that petition failed to state that proposed right of way was located in manner most compatible with greatest public good and least private injury. 82CalA289, 255P553.
951-61 Contra 156Md581, 144A710.
951-67 243Mich517, 220NW808; 137 Misc632, 243NYS160 (sufficient); 191 NC744, 133SE5. [j] **Being a jurisdictional fact,** it presents question to be decided in first instance by clerk. 191NC 744, 133SE5.
952-70 194Wis376, 216NW837, 840 [cit CJ].
952-71 137Misc632, 243NYS160.
952-74 [a] (5) Allegation that parties have failed to agree is sufficient, read in connection with resolution passed by city commission reciting refusal to agree upon damages. TexCivA 285SW944.
953-76 26 OhNPNS161.
953-79 Ill 172NE718; 314Mo 242, 284 SW490; 34NM583, 286P422 (must conform to statutory requirement); 132 Misc848, 230NYS691; 156Tenn91, 299 SW809; TexCommnA 23SW(2d)320; TexCivA 290SW900. [w] (7) Allegations held sufficient as "specific description." 132Misc848, 230NYS691. [ee] **When description is definite enough to identify the land sought to be taken,** it meets requirements of statutes in some jurisdictions. 75Mont493, 244P 298. [ff] **Timber along right of way** need not be identified individually. 214 Ala160, 107S85. [gg] **Failure to mention or describe county road** is not erroneous where county is party to suit and proceedings are pending against county to condemn road. 145Wash129, 259P379. [hh] **Right to construct and**

maintain waterworks and sewerage system.–Application to condemn right to construct and maintain waterworks and sewerage system under streets, alleys, and avenues of addition to city sufficiently described right sought to be condemned, where it was described as right and easement under all streets, boulevards, alleys, and avenues, not to exceed ten feet in diameter by their length, space to be filled by one or more pipes or sewers to be laid in one or more places, and to be done in such manner as not to interfere with carrying and conveying of water and sewage in pipes, mains, and laterals laid or to be laid by owner. 153**Miss**517, 121 S160. [ii] **Blueprints or exhibits attached to petition** are to be considered as part of land described. **Ill** 172**NE** 718.

955-69 **Utah** 293**P**7.

955-80 **TexCivA** 11**SW(2d)**543.

956-84 322**Mo** 329. 18**SW(2d)**892 (description held sufficient).

956-87 [a] **Descriptions held sufficient.** –319 **Ill** 66, 149**NE**580.

956-89 [d] **Under charter requiring petition** to set forth "a description of the property and the estate or interest therein in each instance which the city seeks to appropriate or damage," the petition need not contain description of property of each owner and his estate or interest therein, but only property, estate, or interest sought to be appropriated. 314**Mo** 242, 284**SW**490.

956-91 155**Wash**370, 284**P**788.

957-1 319**Mo** 697, 4**SW(2d)**810. [e] **Widening road.**–**Mo** 30**SW(2d)**15.

958-8 **Mo** 30**SW(2d)**15 (although not actually incorporated); 314**Mo** 242, 284 **SW**490; 152**Va**559, 147**SE**239; 197**Wis** 503, 222**NW**776.

959-26 243**Mich**517, 220**NW**808.

959-27 [a] **Expense of draining land directly resulting from construction of highway** need not be pleaded. 118 **Or** 166, 246**P**707.

960-30 229**AppDiv**381, 243**NYS**30 (in proceedings under Highway Law).

960-34 [d] (2) In suit to condemn land for right of way for lateral road connecting mine with main line, collateral issue of secret future intention cannot be raised by alleging mere conclusion as to intention. 198 **Ind**645, 154**NE**659. [g] (7) Unsworn allegation that certificate of ownership and intention had not been filed before commencement of suit is insufficient. 198 **Ind**645, 154**NE** 659. (8) Answer denying essential allegations required to be made in petition, or otherwise setting out defense, is such sufficient answer as is authorized. 98**Fla**26, 123**S**527.

961-44½-New. Admissions by failure to deny. Where a village appears but no answer or counter affidavit denying allegations of the petition is filed, the facts alleged in the petition stand admitted. 217**AppDiv**347, 217**NYS**50.

962-47 159**Tenn**308, 17**SW(2d)**921.

962-48 **Fla** 129**S**582; 197**NC**4, 147**SE** 682. See also 243**Mich**517, 220**NW**808.

962-52½-New. or, where jurisdictional facts are not averred, by motion to dismiss, 243**Mich**517, 220**NW**808.

962-54 3**Del** 396, 138**A**629.

963-55 [c] (4) 283**Pa**588, 129**A**845. (13) Not necessary to specify number of tracks proposed. 283**Pa**588, 129**A** 845. (14) Attaching map, to show location of property, and resolution of approval. 134**Misc**60, 234**NYS**668.

964-57 176**Ark**253, 3**SW(2d)**969.

964-59 33 **OhA**475, 170**NE**27 (discretion of court in refusing amendment held not abused).

964-62 5**LaA**628.

964-68½-New. Amendments to answer. **NC** 154**SE**72.

965-72 319**Mo** 697, 4**SW(2d)**810; 55**ND** 331, 213**NW**492. [a] (3) Failure to object to insufficiency of petition till before selection of jury. 331 **Ill** 322, 163 **NE**17.

965-73 55**ND**331, 213**NW**492.

965-74 217**AppDiv**347, 217**NYS**50.

965-79 216**Ky**64, 287**SW**232.

965-81½-New. A petitioner does not waive admissions created by failure of the village to deny allegations in the petition, by unnecessarily going into proofs of facts admitted. 217**AppDiv** 347, 217**NYS**50.

965-84 **TexCivA** 7**SW(2d)**937.

965-85 197 **Ind**430, 151**NE**220; 283**Pa** 588, 129**A**845 (whether dedicated roads constituted established roads could not be raised in proceeding to condemn right of way). See also **TexCivA** 15**SW(2d)** 180. [a] (11) Whether electric corporation owns major part of head and volume of usable flow held not issuable fact under Conservation L. § 624 (L. [1922] c 242). 125**Misc**269, 210**NYS** 748. [g] **Denial in answer** of plaintiff's failure to attempt agreement with owner does not waive question of fact for jury. 191**NC**744, 133**SE**5.

966-86½-New. In proceedings to take land for construction of branch lines, under some statutes it is unnecessary to allege or prove that a point of connection has been agreed on or determined by prior proceedings. 198 **Ind**645, 154**NE**659.

966-88 See also **NC** 154**SE**72.

966-89 [b] **Averment of endeavor to purchase** must be proved, not proving any alleged fact, requiring no traverse, nor dispensing with evidence, and not bringing waiver where no motion to dismiss. 243**Mich**517, 220**NW**808.

967-92 98**Fla**26, 123**S**527.

967-95½-New. An issue joined as to the authority of an electric company to take fee simple title to land sought to be condemned was held to be within the trial court's jurisdiction. 197 **Ind**426, 151**NE**226.

967-95¾-New. In a county's action to condemn a right of way for a state highway, it is not necessary for plaintiff to allege or prove that other methods of acquisition have been attempted and failed. 95**CalA**602, 273**P**131.

967-97 193**Wis**395, 214**NW**388.

967-98 193**Wis**395, 214**NW**388.

967-1 [a] **Exclusion of evidence showing portion of land taken had been dedicated to public use** as portion of street, was error. 108**Conn**205, 143**A**96.

968-6 75**Mont**493, 244**P**298 (evidence of location of private road conforming to description in complaint).

969-24½-New. After dismissal on preliminary jurisdictional questions, a railroad seeking to appropriate property would not be barred from thereafter furnishing requisite proof. **Oh** 157**NE** 426.

969-26 30**F(2d)**121; 7**Alaska**655; 82 **CalA**382, 256**P**255. [n] **State highway commission** may take property for public use without first instituting condemnation proceedings. 102**NJEq**221, 140**A**335.

970-27½-New. But there is no such right in absence of such statute. 153 **Tenn**283, 282**SW**382.

970-34 See also 103**WVa**210, 136**SE** 848.

970-35 See also 30**F(2d)**121.

970-37 **TexCivA** 28**SW(2d)**826 (construction of statute). [i] **When right of eminent domain is delegated with conditions,** performance of such conditions is subject to judicial cognizance on notice and hearing. 92**Fla**617, 110**S**451. [m] **In Ohio.**–157**NE**426. [n] **Disqualification of officer.**–243**Mich**649, 220**NW** 881. [o] **Location.**–42**F(2d)**692.

971-42 317 **Ill** 147, 147**NE**796; 323 **Ill** 389, 154**NE**117; **Mich** 233**NW**172.

971-43 121 **Oh**257, 167**NE**889 (in appropriation proceedings by municipality, only issue is as to value of property).

972-44 **Ida** 290**P**717 (4th case); 69 **Utah**423, 255**P**672.

972-47 42**F(2d)**692; 161**Ga**432, 131**SE** 46. See also 134**Misc**60, 234**NYS**668. See also 238**Mich**29, 212**NW**975. [a] **In Michigan.**–237**Mich**338, 211**NW**905.

973-50 7**F(2d)**624.

973-51 338 **Ill** 347, 170**NE**295 (right to condemn). [a] (1) 85**Colo** 498, 277**P**467.

973-55 98**Fla**26, 123**S**527 (where statute is silent but application is to court); 155**Wash**651, 286**P**33. See also 108**Conn** 205, 143**A**96. [e] **Conclusiveness of preliminary adjudications.**–98**Fla**26, 123**S** 527.

973-56 317 **Ill** 147, 147**NE**796.

974-58 [b] **In Louisiana.**–166**La**663, 117**S**765.

974-60½-New. That a petition came on to be heard before a jury impaneled before a certain judge and was assigned for hearing to another judge, and a charge to the jury was read by a third judge, is not objectionable where all judges were of the same circuit. 239 **Mich**46, 214**NW**239.

974-60¾-New. A landowner has the right to be heard on description of land used in instituting proceedings, and departure in this respect is fundamental. 102**NJL**523, 133**A**720.

974-60¼-New. Consolidation of cases to condemn land for one hearing, on the question of public use and necessity, is within the discretion of the court. 145 **Wash**129, 259**P**379.

974-64 **TexCivA** 24**SW(2d)**483. [g] (5) Determination by court without presence of jury whether defendant's several tracts of land constituted single parcel held not erroneous, where there was no conflicting evidence. 99**CalA**240, 278**P** 476. [h] **In Michigan.**–239**Mich**46, 214 **NW**239. [i] **Fixtures.**–219**AppDiv**285, 219**NYS**741.

974-65 217**Ala**268, 115**S**422; 99**Fla**954, 128**S**402. [g] **In Kentucky.**–224**Ky**604, 6**SW(2d)**1074. [h] **Whether cost is arbitrary** is for court. 333 **Ill** 143, 164**NE** 129.

975-66 333 **Ill** 143, 164**NE**129.

975-67 39**F(2d)**34; 333 **Ill** 143, 164**NE** 129; 186**La**663, 117**S**765.

975-73 236**Mich**187, 210**NW**480; 237 **Mich**90, 211**NW**96; 249**Mich**550, 229**NW** 470; 200**Wis**170, 227**NW**859 (jury's finding is conclusive). [h] **Circuit court on certiorari to review finding of commissioners against necessity** is without power to find such necessity from proofs. 236**Mich**187, 210**NW**480.

975-74 [a] (4) Whether opening street over railroad track would seriously impair use of railroad. **TexCivA** 285**SW** 944.

975-76 75**Mont**493, 244**P**298 (instruction as to necessity of establishment of private way). [a] **Instructions held not erroneous.**–**Mich** 233**NW**325.

976-83 98**Fla**26, 123**S**527; 323 **Ill** 389, 154**NE**117.

976-86 98**Fla**26, 123**SE**527; **Ida** 290**P** 717(4thcase); 75**Mont**493, 244**P**298. [e] **Statute making commission's resolution conclusive of location of road** most compatible with greatest public good and least private injury applies, though complaint was filed before its enactment. 82**CalA**289, 255**P**553. [f] **Immediate necessity** need not be shown. 169**La** 1111, 126**S**675.

977-95½-New. The presumption is that the town board was duly organized and empowered to institute condemnation proceedings. 127**Misc**852, 217**NYS**609.

977-95¾-New. Courts cannot presume that land taken by a city for street purposes will not be used for that purpose. 333 **Ill** 143, 164**NE**129.

977-97 [a] 328 **Ill** 610, 160**NE**226; **Md** 148**A**209; **Wash** 288**P**258. [d] 28**F(2d)** 684(2dcase).

978-2 [a] (6) In proceedings to secure railroad right of way, evidence that railroad planned to use certain land for erecting overhead bridges at public crossings is admissible. 215**Ala**239, 110 **S**5.

979-19 [b] (5) To establish that land was natural forest. 336 **Ill** 624, 168**NE** 690.

980-21 [b] **Evidence held sufficient** to support inference that electric company was duly incorporated. 197 **Ind**430, 151 **NE**220.

980-22 327 **Ill** 356, 158**NE**685; 198 **Ind** 645, 154**NE**659. [a] (1) 39**F(2d)**34; 215 **Ala**239, 110**S**5; 78**CalA**115, 248**P**274; 161**Ga**907, 132**SE**218; **Ida** 290**P**717(4th case); 219**Ky**739, 294**SW**494; 169**La** 1111, 126**S**675; 239**Mich**46, 214**NW**239; 75**Mont**493, 244**P**298; 144**Wash**124, 257 **P**231; 145**Wash**307, 260**P**527 (private way); 197**Wis**503, 222**NW**776. (4) To require construction of toll bridge. 142 **Wash**284, 252**P**906. [c] **Ida** 290**P**717 (4thcase). [d] **Fraud and bad faith**

held not shown. 144Wash124, 257P 231.

980–23 321 Ill 101, 151NE567. [a] (1) 197 Ind430, 151NE220; 155Wash651, 286P33.

981–24 [a] (1) 332 Ill 416, 163NE795; 249NY445, 164NE541 [motion to amend remittitur granted 166NE324(1stcase)]; 197Wis503, 222NW776. [c] (1) Tex CivA 24SW(2d)83; 147Va355, 137SE 458.

981–25 [c] **Evidence held sufficient** to support inference that electric company was owner of site on which it proposed to construct dam. 197 Ind430, 151NE 220.

981–28 26 OhNPNS525. [e] (2) Finding that railroad company has legal right to make appropriation is not sufficient. 26 OhNPNS525. [g] **Record of proceedings and evidence** is contemplated by some statutes. Mich 233NW 172.

981–31 [c] (5) Finding that it is necessary to take private property described in petition for use and benefit of public for proposed public improvement is sufficient. 237Mich684, 213NW74.

982–39½–New. An order granting immediate possession pending an action to condemn the premises is merely interlocutory and not res judicata so as to prevent further hearing on the question. 69Utah423, 255P672.

982–39¾–New. Findings of the commission as to the necessity of taking are not conclusive on the court. 327 Ill 356, 158NE685.

982–39¼–New. Statement in language of statute as to inability to agree on purchase of property has been held sufficient. Mich 233NW172.

982–42 321 Ill 538, 152NE486.

982–43 205Cal 651, 272P585; 78CalA 353, 248P737 (valuation); 83CalA645, 257P123; CalA 267P326; 333 Ill 218, 164NE182; 337 Ill 555, 169NE753; 338 Ill 499, 170NE717; 200 Iowa1063, 205 NW979; 229Ky222, 16SW(2d)1022; 100 NJEq101, 135A86 (lessee); 157Tenn491, 9SW(2d)700; 159Tenn147, 17SW(2d)22, 65ALR440; TexCivA 281SW318; Tex CivA 293SW885.

982–44 TexCivA 281SW318.

983–47 Mass 168NE78.

983–50 321 Ill 538, 152NE486.

983–57 217Ky424, 289SW675; 190NC 577, 130SE203 (exclusion of testimony substantially same as previously admitted); 197NC556, 150SE40 (engineer's testimony as to manner in which subdivision could have been made); 98Pa Super131; 13PaDist&Co 576. [a] (4) Potential water supply. 13F(2d)361. (5) Zoning ordinance whose constitutionality had not been determined. 104 NJL402, 140A300. (6) Unregistered deed. Mass 172NE356. (7) Fact that owner made no application for temporary facilities, on question whether they should have been furnished. Mass 172 NE356. (8) Other instances, 321Mo 840, 12SW(2d)747; 148Wash353, 268P1040. [b] (3) Other instances. NJ 150A354.

983–58 37GaA45, 138SE588; 126Kan 1, 266P107; 233Ky628, 26SW(2d)535; 319Mo 697, 4SW(2d)810; NJ 150A387; 96PaSuper358; TexCivA 281 SW318. [a] (13) In proceedings to condemn land for electric transmission line, evidence that owner may be able to obtain light and power is inadmissible. 216Ky303, 287SW357. (14) Plan of dock department on which condemnation of lands under water was based is not admissible. 219AppDiv382, 220NYS18. (15) Evidence as to comparative costs between different sources of water supply, cost of maintaining and developing since taking, and income received by city, held properly excluded in determining damages. Mass 168NE78. (16) Fact that witness assessed damages is inadmissible. Mo 30SW(2d)729. (17) Commissioner, as witness, may not refer to his report or award. Mo 30SW(2d)733. [e] (2) Other instances. NJ 150A387. [f] **Plats and surveys.–296Pa423, 146A104.**

984–63 216Ky303, 287SW357.

984–65 Mass 172NE356; 159Tenn147, 17SW(2d)22, 65ALR440.

985–70 176Ark253, 3SW(2d)969; 179 Ark695, 17SW(2d)886; 82CalA289, 255P553; 213Ky164, 280SW949; 214Ky 748, 284SW397; 226Ky75, 10SW(2d) 451; 230Ky806, 20SW(2d)991(2dcase) (cost of removing timber from land after railroad was constructed held admissible on value); 153Md102, 137A506; 223AppDiv63, 227NYS239; 197NC556, 150SE40 (evidence of value at time reasonably close to taking); 131 Okl 63, 267P852, 853 [quotCJ]; TexCivA 278 SW255; TexCivA 15SW(2d)180. [a] (9) Evidence of price realized from voluntary sale of similar land in vicinity within reasonable time is admissible to prove market value. 153Md102, 137A 506. [c] (10) In proceeding to condemn for flood control purposes, fact that highest use adaptable for such purpose is dam of certain size is admissible in evidence. 76CalA369, 244P609. (11) Testimony of persons qualified to speak on such subjects is proper for jury. 76CalA369, 244P609. (12) Adaptability as power site properly considered. 216Ala671, 114S49. (13) After admitting evidence of adaptability as power site, it was error to refuse evidence that owner had no flooding rights on property above site. 216 Ala671, 114S49. (14)But fact that petitioner desires to condemn land is not to be considered in determining value. 216Ala671, 114S49. (15) Evidence respecting adaptability of riparian property for use with other properties is admissible. 83NH181, 141A65. (16) Other instances. 96CalA708, 275P228; Mass 165NE1; 105NJL165, 143A369; 50RI 489, 149A596. [i] **Sentimental value** may be considered. TexCivA 278 SW255. [j] **Replacement value of improvements less deterioration** may be considered. TexCivA 278SW255. [k] **In proceedings to condemn property of turnpike company,** evidence of existence of competing road is admissible. 159 Tenn147, 17SW(2d)22, 65ALR440. [l] **Evidence of use of sidewalk** for transacting business is irrelevant. Mo 30SW (2d)729. [m] **Use of adjacent sidewalk** is not material factor in determining property value. Mo 30SW(2d)733.

986–72 76CalA369, 244P609. See also 79CalA270, 249P221.

986–73 179Ark695, 17SW(2d)886; 179 Ark561, 18SW(2d)337; 76CalA369, 244 P609; 83CalA645, 257P123; 44 Ida272, 257P35; Ind 170NE81; 229Ky345, 17 SW(2d)203; 229Ky627, 17SW(2d)748; 153Md102, 137A506; Mass 168NE78; 24 OhA183, 156NE614; 47RI 378, 133A 618; 159Tenn147, 17SW(2d)22, 65ALR 440; TexCivA 300SW250; 38Wyo 190, 266P117. [c] (9) In proceeding to condemn flowage easement over defendant's land, though availability may be shown, value of purposes and uses to plaintiff are irrelevant. 76CalA369, 244P609. (10) Questions as to value of five acres of unimproved property as subdivision proposition properly excluded. 79CalA 270, 249P221. (11) Value of lands in terms of money for particular purposes, such as subdivision, is inadmissible. 82CalA289, 255P553. (12) Where market value for best use for which property adaptable is basis for compensation, evidence of net profits from use to which actually devoted is inadmissible. 327 Ill 294, 158NE687. (13) Exclusion of evidence as to property's value as source of water supply held not error, though other witness had testified thereon and property was taken by city for water supply. Mass 168NE78. (14) Other instances. 99CalA240, 278P476; 105NJL165, 143A369; 132Misc177, 231 NYS72; 230AppDiv41, 243NYS63. [d] (1) 214Ala107, 106S599; Wash 288P 258. (4) Evidence of difficulty of improving property for building uses held inadmissible where its greater value was for recreation uses desired by condemnor. NJ 132A244. [e] (2) Value cannot be determined by fact that party seeking to condemn has already determined to build reservoir thereon. 76 CalA369, 244P609. (3) Evidence of oral promise by taker to owner to build sidetrack is properly excluded. Mass 172NE356. [m] **Necessities of public are never taken into consideration in fixing value of land to be condemned** for purposes of flood control. 76CalA 369, 244P609. [n] **Evidence of cost** of new dock is not erroneously rejected in condemnation proceedings where no evidence tending to show fair market value of dock is rejected. 148Wash353, 268P 1040. [o] **Cost of clearing off growing timber from adjacent land.–Kan 291P** 768.

987–74 131 Okl 63, 267P852; 47RI 378, 133A618.

987–75 176Ark253, 3SW(2d)969; 195 NCl, 141SE338.

987–77 216Ala671, 114S49; 159Tenn 147, 17SW(2d)22, 65ALR440.

987–79 176Ark253, 3SW(2d)969. But see 205Cal 651, 272P585.

987–80 164La77, 113S772; 153Md102, 137A506; Wash 288P258; Can [1925] 3DomLR355 (sale of undivided half interest). [b] **Portion of property.–153** Md102, 137A506.

988–83 130Misc516, 223NYS833.

988–85 214Ky736, 284SW391; 229Ky 627, 17SW(2d)748; 105WVa321, 142SE 430 (under statute).

988–86 [a] **Returns held admissible.–** TexCivA 278SW255.

988–90½–New. Evidence of the character of structures to be placed on land taken by plaintiff is admissible to show effect on the owner's use. 216Ky64, 287SW232.

988–90¾–New. Opinion witness may not be questioned as to other sales, prices of which are stated in the questions. 27 OhNPNS548.

988–94 Ala 130S541; 205 Iowa283, 218 NW66; Iowa 233NW36; 214Ky736, 284 SW391; 214Ky748, 284SW397; 230Ky 806, 20SW(2d)991(2dcase); 197NC556, 150SE40; TexCivA 15SW(2d)180; Tex CivA 26SW(2d)1103; 69Utah423, 255P 672; 155Wash678, 286P286 (methods of determining depreciation held matters of evidence). See also MoA 11SW(2d)66; 127Misc316, 215NYS297. [g] **Evidence of objections of prospective purchasers to presence of public utility** involved may be shown. TexCivA 7SW(2d)937.

989–95 338 Ill 347, 170NE295; 338 Ill 499, 170NE717; 214Ky736, 284SW391; 214Ky748, 284SW397; 217Ky301, 289 SW238; 200Wis185, 227NW863; 38 Wyo 190, 266P117.

990–96 214Ky736, 284SW391; 245Mich 319, 222NW740. [b] (2) Other instances. Iowa 233NW36; 155Wash678, 286P286.

990–97 245Mich319, 222NW740; 130 Misc516, 223NYS833.

990–98 338 Ill 347, 170NE295; 205 Iowa283, 218NW66; 214Ky736, 284SW 391.

991–7 153Md102, 137A506; 103NJL 419, 136A176

991–10 [a] (3) Effect of high-power line on telephone line is not admissible in absence of showing relative distance of telephone lines from high-power line. TexCivA 7SW(2d)937.

991–12½–New. It is error to permit the commissioner viewing the premises to state the amount of damages awarded or to explain the basis of the award. 216Ky64, 287SW232.

991–12¾–New. Whether an electric power line will expose persons to danger must be determined from testimony of witnesses having knowledge. 322 Ill 11, 152NE491.

991–12¼–New. A landowner may prove separate damages to a particular parcel where there is substantial evidence that it is not usable as part of the whole tract. Mo 23SW(2d)130.

991–12⅛–New. Damages to a particular parcel may be shown as affecting the value of the entire tract. Mo 23SW (2d)130.

991–15 74CalA473, 241P409; 324 Ill 411, 155NE272; 329 Ill 478, 160NE750; 219Ky802, 294SW461; 232Ky282, 22 SW(2d)1033; 233Ky378, 25SW(2d) 1036; 247Mich325, 225NW508(1stcase); 176Minn389, 223NW458; 135Misc878, 238NYS583.

991–16 78CalA115, 248P274; 79CalA 270, 249P221; 95CalA602, 273P131; 321 Ill 187, 151NE553; 327 Ill 294, 158 NE687; 333 Ill 218, 164NE182; 333 Ill 345, 164NE659; 216Ky618, 287SW985;

219Ky802, 294SW461; 226Ky75, 10SW (2d)451; 164La77, 113S772; 167La891, 120S587; 170Minn49, 212NW8; 155 Wash678, 286P286; Wis 230NW44; 38 Wyo190, 266P117. [d] **Evidence held to sustain award.**–324 Ill 164, 155NE 37; 142Va135, 128SE546. [e] **Evidence held insufficient:** (1) To show that spur, when considered by itself, was profitably operated. 126Misc879, 216NYS2. (2) To show that excessive value of property was result of collusion against remaindermen. 220Ala433, 126S133. [f] **Evidence of present net income** is not conclusive. 159Tenn147, 17SW(2d) 22, 65ALR440. [g] **Evidence held sufficient to sustain award for taking toll turnpike property for highway purposes.**–159Tenn147, 17SW(2d)22, 65 ALR440. [h] **Court commissioners cannot follow their judgment as to value** in opposition to the testimony in determining award for land taken for public highway. 247Mich325, 225NW 508(1stcase). [i] **Proof necessary is** fair market value. Mo 30SW(2d)729.

992–17 321 Ill 187, 151NE553. [a] (1) 100NJEq552, 135A797. [b] (1) 78CalA 115, 248P274; 95CalA602, 273P131; 168Ga883, 149SE182, 432; 333 Ill 218, 164NE182; 337 Ill 555, 169NE753; 219 Ky802, 294SW461; 177Minn25, 224NW 257; 147Va355, 137SE458. (2) To sustain finding that no damages accrued. 101CalA104, 281P75. [c] 324 Ill 411, 155NE272; 248Mich621, 227NW705(2d case) (to sustain award for more than nominal damages for diminution of value of railroad's exclusive right of way); Mich 233NW172. [d] **Contract for development of property** held not conclusive as to value. Mich 233NW172.

992–19 74CalA473, 241P409; 324 Ill 164, 155NE37; 214Ky736, 284SW391. [d] **Testimony as to business damage.**–237Mich684, 213NW74.

992–20 146Wash6, 262P138.

993–26 92Fla617, 110S451.

994–33 123 Okl 255, 253P279. [a] **Matters constituting waiver.**–123 Okl 255, 253P279.

994–35 But see 123 Okl 255, 253P279.

994–42 161Ga524, 131SE517, 44ALR 534; 131Misc768, 228NYS159.

995–43 161Ga524, 131SE517, 44ALR 534.

995–44 [d] **To determine difference in market value,** any element which business men of ordinary prudence would weigh before purchasing should be considered. 172Ark1031, 291SW793.

996–46 161Ga524, 131SE517, 44ALR 534.

996–47 161Ga524, 131SE517, 44ALR 534.

996–49 Mich 233NW172.

996–55 [d] **In Tennessee.**–159Tenn308, 17SW(2d)921.

997–68 See TexCivA 7SW(2d)937.

997–69½–New. Where part of quarter section condemned for school purposes, value of land exclusive of highway should be found. 50SD274, 209NW543.

997–69⅓–New. Damages to property not actually taken may properly be ascertained in a proceeding by a city under the general condemnation statute. 148Va554, 139SE303.

997–72 331 Ill 322, 163NE17. [c] **After impaneling of jury,** notwithstanding denial of defendants' motion for separate trial before selection of jury, granting motion is not error. 331 Ill 322, 163 NE17.

998–73 148Va554, 139SE303, 306 [quot CJ].

998–74 148Va554, 139SE303.

998–79 Mo 28SW(2d)80.

999–82 [a] (2) Holder of leasehold interest is not entitled to separate assessment of damages under St. Louis charter. Mo 28SW(2d)80.

999–97 Mo 30SW(2d)729.

1000–99 Cal 292P124; 230Ky806, 20 SW(2d)991(2dcase); 259Mass354, 156 NE676; Mo 28SW(2d)1008; Mo 30SW (2d)729; 85PaSuper422; 150SC418, 148SE366; 141Wash465, 252P111, 49 ALR1249; 146Wash6, 262P138. [d] (5) Property owners in St. Louis condemnation proceedings are not entitled to jury trial under statute applicable to smaller cities. Mo 30SW(2d)729; Mo 30SW(2d)733. (6) Municipality is not "incorporated company" within statute. Mo 30SW(2d)729. [e] (2) This constitutional provision does not require common-law jury trial but merely verdict of jury. 187Wis384, 204 NW589. (3) Statute providing for inquisitorial body instead of jury charged with duty of finding facts under direction of court is unconstitutional. 187 Wis384, 204NW589. [i] (5) Under Montana statutes appointment of commissioners is not necessary in case of establishment of private road as matters ordinarily determined by them are determinable by jury in such case. 75 Mont493, 244P298. [j] (6) Women may serve on jury since statute makes women eligible. 33 OhA475, 170NE27. [l] (3) Unanimous verdict of jury of twelve is required under Kentucky constitution. 213Ky750, 281SW993. [o] **In Tennessee.**–158Tenn350, 13SW(2d)321. [p] **Separate jury trial** for each defendant, as provided by statute, does not require separate jury for each. 33 OhA242, 168NE859.

1001–1 [e] (3) 218Ky819, 292SW501.

1001–2 92Fla617, 110S451.

1002–7 259Mass354, 156NE676; 315Mo 775, 287SW621; 197NC748, 150SE495 (necessity of allegations of bad faith and misconduct); 11PaDist&Co 269.

1002–9 259Mass354, 156NE676.

1004–17 [a] (1) 315Mo 775, 287SW621.

1004–21 315Mo 775, 287SW621.

1004–22 [a] **Exceptions to report are of necessity sustained** by order sustaining demand for jury. 315Mo 775, 287 SW621.

1007–58 [b] **Challenge to array has been held insufficient** to raise question as to whether women were properly permitted to serve on jury. 33 OhA475, 170NE27.

1008–67 250Mich391, 230NW194 (juror not disqualified). [b] **Women eligible,** under constitutional provision requiring jury of "twelve men," term being used generically. 33 OhA242, 168NE 859.

1009–88½–New. A juror who had assisted in obtaining a right of way for the same road in his county near his town, but not engaged in any litigation of a similar kind, is not disqualified. Mo 19SW(2d)465.

1009–88⅓–New. The word "men," in a constitutional provision that a jury of twelve men shall ascertain the amount of damages, means persons rather than males. 121 Oh205, 167NE682 (constitutional provision held to relate to mode of trial and not qualifications of jurors).

1009–88¼–New. In condemnation proceedings the trial court has a large measure of discretion in determining whether a juror is prejudiced. Mo 19 SW(2d)465.

1010–96½–New. or the same oath given the commissioners; 103WVa346, 137 SE530.

1010–97 [a] (5) Jurors in condemnation suit need not take oath to support constitution of United States or oath referred to in Sixth Amendment to Massachusetts constitution. Mass 168 NE78.

1011–17 [c] **Jury of freeholders could properly use different methods** in assessing benefits. Mo 28SW(2d)1008.

1011–19 319Mo 1240, 6SW(2d)565. See also 29 OhA177, 163NE216. [f] **Discretion of court.**–153Md102, 137A506.

1011–20 [a] (3) Court should interpose where improper questions are asked on cross-examination even if no objection is made. 329 Ill 288, 160NE 559. (4) It is improper for counsel for owner to ask witness for petitioner what would be done with owners when they received sum which witness testified was fair value of property. 329 Ill 288, 160NE559.

1011–22 324 Ill 164, 155NE37; 337 Ill 555, 169NE753. See also TexCivA 8 SW(2d)705. [a] **Refusing mistrial for improper argument** has been held not abuse of discretion. Ala 130S541.

1011–23 337 Ill 555, 169NE753.

1011–25½–New. Where a condemnor joins in a supplemental agreement of facts proved on the trial which presents evidence raising the issue whether the court should have apportioned an award among respective landowners according to their interests, the landowners are not precluded by their previous waiver of right to raise an issue based upon their agreement that the only issue to be determined was the amount of the award. TexCivA 10SW(2d)194.

1011–27 226Ky75, 10SW(2d)451 (landowner); TexCivA 291SW317; TexCivA 293SW885; TexCivA 15SW(2d)180.

1011–28 105NJL165, 143A369.

1012–31 233Ky48, 24SW(2d)933. [a] (1) TexCivA 7SW(2d)937.

1012–32 99CalA240, 278P476.

1012–36 231Ky788, 22SW(2d)281; 234 Ky661, 28SW(2d)982 (properly denied). [a] (3) Practice statute held inapplicable to condemnation proceedings which are governed, as to court's discretion to order view, by specific provision. 231Ky 788, 22SW(2d)281. (4) Statute requiring view by commissioners held not to deprive court of discretion in determining whether or not to order view by jury. 231Ky788, 22SW(2d)281.

1013–37 228Ky512, 15SW(2d)303; 231 Ky788, 22SW(2d)281 (discretion held not abused).

1013–45 [a] **View unauthorized of other nearby property not to be appropriated.**–27 OhNPNS548.

1013–49 [d] **That jury was sent to view premises without sheriff,** as required under statute is not erroneous, where trial judge went along. 228Ky 90, 14SW(2d)392.

1013–57 123 Or579, 263P896.

1014–58 327 Ill 294, 158NE687; 123 Or 579, 263P896. [a] 327 Ill 294, 158NE 687. [c] (4) Instruction to disallow compensation for buildings on premises as such, if, from evidence including view, jury found they did not enhance value of premises, is proper. 327 Ill 294, 158NE687. (5) Such instruction is not erroneous as taking from jury consideration of improvements on property. 327 Ill 294, 158NE687.

1015–60 220Ky778, 295SW1000.

1015–64 76CalA369, 244P609; 321 Ill 538, 152NE486; 322 Ill 11, 152NE491; Iowa 231NW296; 233Ky628, 26SW(2d) 535; 153Md102, 137A506; Mo 28SW (2d)1008; 229AppDiv617, 243NYS665; TexCivA 288SW852. [a] (2) See 331 Ill 277, 162NE865. [b] (11) Effect of proposed use of property on remaining lots. 153Md102, 137A506. (12) Whether best use of land condemned is for industrial and manufacturing purposes or for amusement park and picnic purposes. 327 Ill 294, 158NE687. (13) Whether sale of low, vacant property for large consideration was bona fide. 104NJL402, 140A300. (14) Weight to be accorded element of annual income in determining value of property taken is for jury. 159Tenn147, 17SW(2d)22, 65ALR440. (15) Sole question for jury was difference in value of entire tract before and after taking. 298Pa77, 148 A41. (16) Other instances. Mo 19SW (2d)465. [c] See also 76CalA369, 244 P609. [e] (1) 237Mich684, 213NW74; 248Mich1, 226NW688 (jury uncontrolled by judge who acts only in advisory capacity). (2) Such is rule under Detroit City charter. 237Mich684, 213NW74. [f] **In Florida.**–99Fla954, 128S402.

1016–65 200 Iowa684, 205NW459 (depreciation in value of farm by construction of highway); 171Minn369, 214NW 653; 33 OhA475, 170NE27. See also 29 OhA177, 163NE216. [a] (1) 174Ark 59, 294SW410; 171Minn369, 214NW 653; 197NC556, 150SE40. (2) Jury determine value as matter of judgment and discretion after considering relevant facts. 248Mich1, 226NW688. [b] 245Mich319, 222NW740.

1016–66 148Wash353, 268P1040.

1016–66½–New. Under some statutes the question of the right to condemn for public use cannot be submitted to the jury where defendant's pleadings do not raise the issue that plaintiff acted arbitrarily, fraudulently, or unjustly in determining the necessity of taking. TexCivA 298SW627.

1016–70 236Mich282, 210NW297.
1016–71 237Mich684, 213NW74; 244 Mich377, 221NW279, 61ALR190.
1016–73 212Ala687, 103S859; 174Ark 59, 294SW410; Ark 31SW(2d)951; 37 GaA45, 138SE588; 214Ky736, 284SW 391; 219Ky802, 294SW461; 226Ky75, 10SW(2d)451; Wash 288P258 (not erroneous); 103WVa186, 136SE840. [c] 37GaA45, 138SE588. [e] (2) Instruction that jury, in assessing damages to land not taken, should not consider damages which were remote, imaginary, or speculative, has been held proper. 333 Ill 218, 164NE182. (3) Instructions properly refused. Kan 291P768. [j] **Instruction that jury is to be guided by rule provided for assessors in condemnation proceedings** which provides for assessment by majority was not objectionable as instructing that majority of jury could make verdict. 34GaA252, 129SE 117. [k] **Instruction held improperly refused.**–331 Ill 277, 162NE865. [l] **Instructions held insufficient.**–96PaSuper 358. [m] **Instructions held erroneous.**–Ark 31SW(2d)300 (relocation of highway).
1017–74 13F(2d)361; 179Ark154, 15 SW(2d)399; 78CalA353, 248P737 (instructions held not erroneous); 34GaA 252, 129SE117; 37GaA45, 138SE588; 327 Ill 294, 158NE687 (instruction held not erroneous as confusing rule); 337 Ill 537, 169NE322; 216Ky618, 287SW 985; 231Ky788, 22SW(2d)281 (value of easement); 156Md581, 144A710; Miss 130S55; Mo 30SW(2d)729; 296Pa423, 146A104; TexCivA 278SW255; 200Wis 185, 227NW863 (definition of "fair market value"); 38Wyo 190, 266P117; NS [1929] 1DomLR674. See also 21 AlaA27, 104S873. [a] (4) Instruction should define market value and state right to recover market value. TexCivA 278SW255. (5) Court should instruct on replacement value of improvement. TexCivA 278SW255. (6) Instruction held misleading which defines "market value" and also instructs not to consider speculative values. TexCivA 300SW 250. [b] 216Ala671, 114S49; 76CalA 369, 244P609; 327 Ill 294, 158NE687; 33 OhA142, 168NE566 (charge held misleading and properly refused). [c] **Court should define market value** rather than instruct jury on elements not to be considered. TexCivA 278SW255. [d] **Instruction held not erroneous as submitting question of law** regarding what constitutes proper elements of value. 327 Ill 294, 158NE687. [e] **Instructions held proper.**–159Tenn147, 17SW(2d)22, 65ALR440.
1017–75 322 Ill 11, 152NE491; 200 Iowa1063, 205NW979. [d] **Instructions held proper.**–NC 154SE322.
1018–76 196 Ind635, 149NE345; 156 Md581, 144A710; 321Mo 1154, 15SW (2d)338; Mo 19SW(2d)465 (declaring that special benefits must be peculiar to tract itself); Mo 23SW(2d)130 (instruction defining "special benefits" held erroneous); 118 Or166, 246P707 (instruction held proper); 153SC457, 150SE894. But see 103WVa186, 136SE840.
1018–77 34GaA252, 129SE117 (instruction restricting inquiry to only issue involved held proper); 230Ky806, 20SW (2d)991(2dcase); 104NJL385, 140A450 (properly refused); 200Wis185, 227NW 863 (failure to exclude improper element).
1018–78 179Ark154, 15SW(2d)399; 320 Ill 56, 150NE403; 200 Iowa1063, 205NW979; 214Ky748, 284SW397; Mass 168NE78; 321Mo 840, 12SW(2d) 747; TexCivA 297SW301; TexCivA 21 SW(2d)597 (refusal to submit question as to condemnor's attempt to agree with owner held error); 101WVa165, 132SE 380. [a] (2) Instruction that husband and wife could recover damages as joint owners held properly refused where evidence showed ownership in severalty. Mass 168NE78.
1018–79 21AlaA27, 104S873 (refusal of instruction that landowner had right to cultivate and cross right of way taken by power company prejudicial error); 34GaA252, 129SE117 (charge not objectionable); 217Ky424, 289SW675; 225 Ky131, 7SW(2d)821; 230Ky806, 20SW (2d)991(2dcase) (instructions held not erroneous); Mass 171NE462 (sufficient); Mo 18SW(2d)438; 300Pa78, 150A155 (instruction held not erroneous); Tex CivA 297SW301; TexCivA 27SW(2d) 842 (instruction held proper). [e] **Court must determine nature and extent of property condemned** and instruct jury thereon in connection with rule of damages applicable. TexCivA 297SW 301. [f] **Instructions properly refused.**–Mass 168NE78. [g] **Instructions held proper.**–Kan 291P768.
1018–80 212Ala687, 103S859; 330 Ill 39, 161NE55 (instruction properly refused); 217Ky424, 289SW675; Mass 168NE78 (instruction that owner of undivided half interest in land taken was limited to damages caused by taking one undivided half held erroneously refused); 131 Okl 63, 267P852.
1018–81 CalA 283P381; 200Wis185, 227NW863 (instruction, limiting consideration to use to which land was put at time of taking, properly refused). [b] **Instructions held not violative of rule.**–99CalA240, 278P476.
1018–82 214Ala107, 106S599.
1019–83 214Ala107, 106S599; 200 Iowa 1063, 205NW979.
1019–85 216Ky618, 287SW985; 33 OhA475, 170NE27. [c] 99CalA240, 278P 476; 324 Ill 164, 155NE37; 327 Ill 294, 158NE687; 118 Or166, 246P707; Tex CivA 291SW317; 148Wash353, 268P 1040.
1019–87 TexCivA 297SW301 (failure to define "value of land actually taken").
1019–88 [b] 147Va355, 137SE458.
1019–90 320 Ill 56, 150NE403.
1019–91 99CalA240, 278P476; TexCivA 298SW627.
1019–93 Mont 288P181; 38Wyo 190, 266P117.
1020–94 327 Ill 294, 158NE687; 118 Or 166, 246P707.
1020–99 TexCivA 26SW(2d)1103 ("reasonable fair cash market value"). [a] **Instructions held not erroneous.**–147Va 355, 137SE458.
1020–2½–New. Instructions need not be in the exact words of the statute. 80 Colo 365, 250P527.
1020–2¼–New. Requested instructions which are statements as to mere commonplace facts are properly refused. 99 CalA240, 278P476.
1020–8 200 Iowa1063, 205NW979 (one form of verdict submitted held proper under pleadings and evidence). [a] **Verdict responsive.**–TexCivA 7SW(2d) 937.
1020–11 103WVa346, 137SE530.
1020–20 213Ky750, 281SW993; 219Ky 279, 292SW790.
1021–22 33 OhA475, 170NE27.
1021–28½–New. Verdict of jury cannot be impeached by statements of other jurors indicating opinions formed prior to introduction of evidence. CalA 284 P707.
1021–28¼–New. The trial court has power to set aside a verdict of the jury as inadequate or excessive. Mo 19SW (2d)1066 (grant of new trial held not abuse of discretion).
1021–29 [a] (2) Discretion not abused in refusing to submit two questions and submitting another on amount of compensation. 200Wis185, 227NW863. [c] **Refusal to submit special issue** has been held not error. TexCivA 24SW(2d)483.
1021–31½–New. A verdict containing an accurate description of the property, finding as to value, damages, and amount, and value of benefit is sufficient. 80Colo 365, 250P527.
1021–33 103WVa346, 137SE530. [a] **Verdict condemning certain lots abutting on vacated alley** has been held sufficient to include alley. Mo 28SW(2d) 1008.
1021–46 [a] (2) Verdict which finds that value of land was sixty dollars per acre and that damage on entire land was three dollars per acre is sufficiently certain. TexCivA 7SW(2d)937. (3) Other instances. Wash 288P258.
1022–47 214Ky736, 284SW391.
1022–48 TexCivA 26SW(2d)1103 (award based on finding land was worth more after construction of pipe line than alleged previous value held fundamentally erroneous); TexCivA 27SW(2d)842 (findings as to value per acre held to sustain award); Wis 230NW44.
1022–54 320 Ill 56, 150NE403. But see 339 Ill 212, 171NE189.
1022–56 TexCivA 281SW641.
1022–57 214Ky736, 284SW391; 146 Wash6, 262P138.
1022–61 CalA 283P381.
1022–62½–New. A general verdict of six cents for plaintiff for appropriation of land imports inadequacy of appropriation. 222AppDiv762, 225NYS508.
1023–69 153Md102, 137A506.
1023–71 Md 148A128; 123 Or571, 263P 901; TexCommnA 23SW(2d)320; 147 Va355, 137SE458. [e] **Time for appointment.**–10PaDist&Co 247.
1023–72 Cal 292P124. [a] (7) 123 Or 571, 263P901.
1024–73 123 Or571, 263P901; Alta [1925] 3DomLR459.
1024–79½–New. Failure of the commissioners to assess damages has been held not to affect the validity of taking, in view of the right of the owner to have damages assessed by a jury. 259Mass 354, 156NE676.
1024–81 [d] **Order under unconstitutional statute** is illegal. 105NJL437, 144A571.
1025–82 122 Okl 241, 254P61; Alta [1925] 3DomLR459.
1025–86 [b] (6) Provisions of Arbitration Act, Rev. St. (1922) c 98 apply to expropriation proceedings, so that on default of one party to select arbitrator, arbitration may proceed before sole arbitrator appointed by court. Alta [1925] 3DomLR459. [c] In Georgia.–161Ga907, 132SE218.
1026–87 213Ky276, 280SW1101. [b] In Iowa.–200 Iowa723, 205NW343.
1026–88 TexCivA 7SW(2d)895.
1026–89 [b] 213Ky276, 280SW1101.
1026–99 217AppDiv347, 217NYS50.
1026–2 122 Okl 241, 254P61.
1027–17½–New. A municipality may have one set of commissioners appointed to ascertain the damages to property of different owners against whom a single proceeding is instituted. 148Va554, 139SE303.
1028–21 [a] **Findings and judgment authorizing assessment.**–217AppDiv347, 217NYS50.
1028–26 339 Ill 240, 171NE161.
1028–31 229AppDiv30, 241NYS44.
1029–39 134Misc60, 234NYS668.
1029–42 242Mich239, 219NW74.
1031–70 [b] **Adjudication of rights, title, and interests of persons claiming interest in land** is not within duties of commissioners. 318Mo 151, 18SW(2d) 193, 58ALR1518.
1032–75 See also 167Ga149, 144SE785.
1032–77 249Mich530, 229NW500.
1032–80 [b] **Petition held to:** (1) Imply legal taking by commission. 103 WVa346, 137SE530. (2) Allege sufficiently public nature of use and necessity. 103WVa346, 137SE530.
1032–80½–New. Proceedings to determine the extent of damage and benefit from taking land and making public improvements are separate and distinct and, in a sense, independent. 109Conn 212, 146A20.
1032–82 [f] **Receiving evidence in absence of complaining party** is generally improper. 148Va554, 139SE303.
1032–86 249Mich530, 229NW500.
1032–98½–New. Where an owner of land evinces the intention to resist, notice of going on the land to assess damages should be given. 103WVa346, 137SE530.
1032–98¼–New. An attempt to assess damages to owners of other lands in a plot for taking land subject to a restrictive covenant has been held not to vitiate the proceedings. 193Wis549, 214 NW324.
1033–5 117Tex34, 297SW206.
1034–15 226AppDiv490, 235NYS569.
1034–16 DC 41F(2d)972; 131Misc768, 228NYS159 (expert witnesses).
1034–21½–New. Permitting commissioner to ride free on railroad over land to be condemned not improper. 142Va 512, 129SW384.
1034–23 [b] **Report held sufficient.**–292 Pa262, 141A44.
1035–33 130Misc516, 223NYS833; 226 AppDiv490, 235NYS569. [b] **Report making alternative award.**–226AppDiv 490, 235NYS569.

1035–37½–New. , nor as to the separate interests or estates in the land, as that of a tenancy. 98NJEq469, 131A584.

1035–44½–New. Partial report of commissioners does not deprive them of jurisdiction to determine remaining claims. 126Kan643 (effect of failure of landowner to take appeal).

1035–44½–New. A journal entry by commissioners relating to an award in which the landowner had no part and which was made without his knowledge is not conclusive on him. 126Kan643.

1036–51 [l] **Right of way for pipe line.**–119Kan374, 239P766. [m] **"Land and appurtenances"** held to include spring. 147Va355, 137SE458.

1037–60½–New. The taking of property is not invalid for failure to assess damages in view of the owner's right to apply for a jury trial. 259Mass354, 156NE676.

1037–61 170Minn49, 212NW8.

1037–63 But see 175Minn300, 221NW14.

1038–70 MoA 18SW(2d)203.

1038–71 [c] **Separate award for value of tenancy** in land condemned need not be made. 98NJEq469, 131A584.

1038–77 Contra 164Minn226, 204NW934, 205NW640; 170Minn124, 212NW202. [a] **Failure separately to state amount of damages and benefits** is irregularity which does not render award nullity. 170Minn124, 212NW202.

1038–81 [b] (4) Commissioners not authorized to state conclusions as to sufficiency of notice given landowner by statutory requirement that they return all other papers with their report, but this should be shown by original notice and return thereon showing service or waiver duly signed. TexCivA 274SW1006.

1039–82 130Misc516, 223NYS833.

1039–90½–New. That appointment, qualification, and report of commissioners were on the same day does not show noncompliance with requirement of investigation and report. 335 Ill 299, 167NE106.

1040–98 130Misc516, 223NYS833.

1041–27 [c] **Court's statement that plaintiff's experts alone testified to familiarity with sales in vicinity** does not show acceptance of other sales as measure of damages. 83CalA645, 257P123. [d] **Dual capacity of court.**–134Misc120, 234NYS694.

1042–33 But see Mo 30SW(2d)733. [c] **Report containing value of land taken,** of remainder, and increase in value of part not taken, is sufficient to allow determination of value of remainder after taking. 109Conn212, 146A20.

1042–34 [b] **Same principles apply** in hearings before committee, appointed to report findings of damages and benefits, as in hearing before court. 109Conn212, 146A20. [c] **Burden of proving entire assessment erroneous,** on landowner, is met by evidence of benefits and damages, committee finding that net damage found by commissioners was erroneous. 109Conn212, 146A20.

1042–44 244Mich377, 221NW279, 61ALR190.

1043–45 249Mich530, 229NW500; 148Va554, 139SE303 (taking of evidence in absence of party).

1043–46 299Pa503, 149A702. [a] (5) Conversations between commissioner and real estate men in reference to value of lots involved. 148Va554, 139SE303.

1043–49 214Ky736, 284SW391.

1043–50 149Va658, 140SE816; 103WVa346, 137SE530.

1044–51 130Misc136, 223NYS529.

1044–52 133Misc177, 231NYS72.

1045–66½–New. The effect of an order on motion to reopen a case has been held to grant a new trial, making refusal to call a new jury error. 146Wash6, 262P138.

1045–69½–New. Under some statutes a refusal to confirm a commissioners' report is not justified unless it appears that the commission adopted an erroneous principle in estimating damages or that error so affected the result as to cause injustice. 226AppDiv490, 235NYS569.

1045–70 249Mich530, 229NW500; 103WVa346, 137SE530 (dictum).

1045–71 226AppDiv490, 235NYS569.

1045–73 249Mich530, 229NW500.

1046–77 Ala 130S541; 219AppDiv27, 219NYS353; 131Misc768, 228NYS159; 226AppDiv490, 235NYS569; TexCivA 293SW885; 148Va554, 139SE303.

1047–78 131Misc768, 228NYS159.

1047–80 214Ky736, 284SW391; 219Ky279, 292SW790; 249Mich530, 229NW500; 177Minn159, 225NW92(2dcase); 149Va658, 140SE816.

1048–88 337 Ill 555, 169NE753; 148Va554, 139SE303; 148Va569, 139SE307.

1048–89 208 Iowa620, 224NW66; 214Ky736, 284SW391; 225Ky131, 7SW(2d)821; 232Ky248, 22SW(2d)611; 233Ky48, 24SW(2d)933; 233Ky246, 25SW(2d)395; 233Ky254, 25SW(2d)397; 233Ky323, 25SW(2d)724; 195Wis198, 217NW324.

1048–90 Iowa 230NW335; 213Ky750, 281SW993; 228Ky90, 14SW(2d)392; 162La553, 110S753; 171Minn369, 214NW653.

1049–92 249Mich530, 229NW500.

1049–94 179Minn557, 230NW91.

1052–8 164Minn226, 204NW934, 205NW640 (award should be recommitted to commission, if it fails to state amount allowed for land taken to widen street and amount of benefits to remainder of tract from this improvement).

1052–15 198NC404, 151SE871.

1053–31 199 Ind210, 156NE465; 244Mich377, 221NW279, 61ALR190.

1055–59 149Va658, 140SE816.

1056–79 226Ky75, 10SW(2d)451. [f] **In West Virginia.**–105WVa460, 143SE154.

1056–85½–New. Numerous statements by counsel of dissatisfaction with the court's decision and attempt to emphasize to the jury that defendants were unwilling that the land be taken justify an order granting a new trial to plaintiff. CalA 277P339.

1056–85½–New. In Texas owner need not present claim audited by county auditor to commissioners' court before appealing from assessment by commissioners' court. TexCivA 25SW(2d)197.

1056–85¼–New. On such appeal failure to file proper transcript can only be taken advantage of by motion to dismiss. TexCivA 25SW(2d)197.

1056–85½–New. Petition to set aside assessment for land taken for road by jury of view may, in separate paragraph, allege cost of rearranging farm and fencing. TexCivA 25SW(2d)197.

1056–87 203Cal 44, 262P1084; 193NC519, 137SE431. [b] **Waiver.**–193NC519, 137SE431. [c] **Personal notice to parties, their appearance to contest** report of referees, and their introduction of evidence do not constitute waiver of notice required by Park and Playground Act. 203Cal 44, 262P1084.

1057–92 [a] **Commissioners are presumed to have been properly sworn.**–103WVa346, 137SE530.

1057–93 See also 226Ky75, 10SW(2d)451.

1057–98½–New. A commissioner who examined the property under court's order is not incompetent to testify to what damage will be at a trial of exceptions to the report. 314Mo 438, 284SW471.

1057–7 See also 233Ky378, 25SW(2d)1036.

1057–10½–New. A motion to set aside an award of arbitrators as a statutory award does not empower the court to decree the legal effect and conclusiveness of the award as a common-law award. 200 Iowa1176, 207NW115.

1057–10½–New. An instruction that exceptors could not recover damages unless waters of a stream acquired for use as a sewer outlet were rendered more unfit for use than before the operation of the sewer system sufficiently comprehends elements of damages. 314Mo 438, 284SW471.

1057–10¼–New. Damages awarded may not be disturbed except on a clear showing of good cause. 103WVa346, 137SE530.

1057–10½–New. In a proceeding to establish a road, where there was no evidence to show the cost, above the amount of tender of damages, of establishment and maintenance of the road, rejection of tender is not error. 146Va210, 135SE702.

1057–10¾–New. On property owner's objections to city's opening of street in condemnation proceedings and confirmation of assessment roll, only the issues to be determined by the jury are those arising out of compensation for land taken or damaged and the amount of benefits. 333 Ill 143, 164NE129.

1057–10½–New. Where exceptions to report are filed by both parties, condemnor is entitled to close argument. 233Ky246, 25SW(2d)395; 233Ky254, 25SW(2d)397.

1057–10⅛–New. Issue of fair market value of land taken for road has been held properly submitted to jury. Tex CivA 25SW(2d)197.

1057–10½–New. Issue of benefits from establishment of road has been held properly submitted to jury. TexCivA 25SW(2d)197.

1057–14 330 Ill 643, 162NE205.

1058–22 [a] **As regards limitation,** order confirming report is "final judgment." MoA 27SW(2d)711.

1058–24½–New. Where the parties have entered into a written agreement for submission to arbitration, the court's rejection of the arbitrators' award as a statutory award because not filed within the stipulated time leaves the award open for action thereon as a common-law award. 200 Iowa1176, 207NW115.

1058–26 139 Okl 76, 281P280 (evidence insufficient to set aside).

1058–35 134Misc775, 236NYS245 (defect in order, whereby insufficient interest was allowed on award, is correctable).

1058–37 125Misc133, 210NYS184 (in rendering award court is not bound to follow any rules used by real estate appraisers).

1059–43 But see TexCivA 288SW852.

1059–53½–New. As soon as matters to be tried by the court without a jury are settled by the filing of findings of fact and the court's order thereon, it is proper to enter judgment in accordance with the verdict as supplemented by the court's findings of fact and conclusions of law. 80CalA599, 251P341.

1059–54 [b] **Manner of construction of highway** is not required to be definitely described in judgment condemning land for highway. 69CalA72, 230P468.

1059–55 134Misc775, 236NYS245 (provision in order confirming commissioners' report, requiring payment of interest for thirty days from entry of order, held unauthorized since not in conformity with statute requiring payment of interest from date of judgment till thirty days after entry of final order).

1059–57 259Mass478, 156NE727; 197NC556, 150SE40.

1059–58 See also 94CalA318, 271P121.

1059–59 145Wash307, 260P527.

1060–60 197Cal 456, 241P545 (failure to incorporate in judgment for taking strip of railroad land for street purposes stipulation that strip taken was to be used in common for street and railroad purposes held not prejudicial); 145Wash307, 260P527.

1060–66 But see 174Ark618, 297SW861.

1061–78 See 331 Ill 322, 163NE17.

1061–79½–New. In a proceeding by the state fish commission to appropriate land for fish culture the judgment need not specify the time within which payment of the amount awarded must be made. 115 Or562, 237P690, 239P193.

1061–79½–New. Where certain defendants waived a jury trial and consented to a reference, and others demanded a jury trial, it is not error for the court to enter a separate interlocutory judgment as to the latter defendants. 74CalA473, 241P409.

1061–79¼–New. A county court's order condemning land for highway purposes need not state that changes are practicable and for the best interests of the county and are of sufficient importance to warrant payment for the land taken.

179Ark733, 17SW(2d)872.

1062-93 TexCivA 274SW1006 (judgment void where not described in report of commissioners or in judgment).

1062-94 259Mass354, 156NE676; 259 Mass478, 156NE727.

1062-5½-New. Where the respective interests of individual owners are not determined, a judgment providing for compensation for the entire tract to the county treasurer for the benefit of the owners is proper. 320 Ill 56, 150NE403.

1062-6 255Mass67, 150NE860, 44ALR 1374.

1062-12 320 Ill 305, 150NE636.

1063-14½-New. Judgment is erroneous if not void where the record does not show that the court appointed appraisers as required by statute. **TexCivA** 274SW1006.

1063-20 [b] **Judicial errors** in interlocutory and final judgments may not be corrected after affirmance of judgments on appeal where no attempt was made to correction by appeal motion for new trial or order under Code Civ. Proc. § 473. 69CalA72, 230P468.

1063-26½-New. Judgment confirming assessments and fixing awards for street widening will not be set aside after ninety days because city lacks funds to pay awards. Ill 171NE737.

1063-32 330 Ill 643, 162NE205; 244 Mich660, 222NW177; 246Mich149, 224 NW616; 170Minn124, 212NW202; 320 Mo 120, 6SW(2d)935; 78Mont170, 253P 313; **TexCivA** 10SW(2d)266.

1064-35 322Mo 329, 18SW(2d)892.

1064-36½-New. Where proceedings are fatally defective, they are subject to collateral attack. **TexCivA** 272SW575.

1064-37 78Mont170, 253P313. [a] (18) That court granted fee instead of mere easement. 78Mont170, 253P313.

1065-42½-New. An injunction suit to prevent taking has been held not a collateral attack. **TexCivA** 294SW868.

1065-42½-New. In an ejectment suit involving the validity of a condemnation proceeding, evidence to show that a deed concerned was in fact a mortgage is not admissible. 331 Ill 132, 162NE202.

1065-47 330 Ill 643, 162NE205; 118 Or 412, 247P138; 152Wash58, 277P380. [a] **Award of damages by county commissioners not appealable** by state's attorney for taxpayers under statute. SD 230NW224. [b] **Statute authorizing appeal from decisions of board of county commissioners** does not authorize appeal under statute relating to award of damages by appraisers. SD 230NW224. [c] **Right to appeal from award of damages by appraisers** for land taken for highway purposes is limited to person suffering personal grievance. SD 230 NW224.

1065-48 37GaA604, 141SE85; 118Nebr 477, 225NW468; 57ND338, 221NW879. [e] **Condemnation proceedings of a century past** will not be disturbed. 143Va 697, 129SE731. [f] **Adjoining property owners,** once compensated for damages for building railroad track in street, cannot claim damages for putting track in condition for use after many years of disuse. 237Mich117, 211NW68.

1066-52 208 Iowa314, 223NW111.

1067-69 See also 163Ga919, 137SE272.

1067-75½-New. Judgment for government in condemnation proceedings for forestry purposes, not being authorized as to land previously dedicated to public use, will not divest power company of its right of way. 31F(2d)853.

1067-77 323 Ill 389, 154NE117; 243 IllA263; **TexCivA** 14SW(2d)357. [c] **Failure to challenge allegation of endeavor and inability to agree on compensation** will preclude such question from being raised after verdict. 323 Ill 389, 154NE117.

1068-80 117Kan622, 233P508; 263Mass 124, 160NE404.

1068-83 320Mo 120, 6SW(2d)935.

1068-84 172Ark611, 290SW63; **NJSup** 148A568; 118 Or412, 247P138.

1068-85 37GaA604, 141SE85; 191NC 48, 131SE270 (plaintiff who did not appeal from award estopped from claiming additional damages); 118 Or412, 247P 138. [i] **Plaintiff who acquiesced in condemnation award for right of way for sewer** cannot recover any other or further sum for permanent damages by reason of taking of the land and construction of sewer line across it. 191NC 48, 131SE270.

1069-86 191NC48, 131SE270.

1070-89 Mo 28SW(2d)1008.

1070-91 TexCivA 272SW575 (negligence in construction of improvements).

1070-95 TexCivA 272SW575.

1071-99 See also 216AppDiv603, 215 NYS684.

1071-8 206Cal 682, 275P808; 308Mo 123, 272SW66 (payment of award does not operate to divest title as of date of decree). [c] **Owner is entitled to income of property** until award is paid. 155 Wash678, 286P286.

1072-14½-New. Recital in a confirmation order that compensation was for fee has been held not a judicial determination and not conclusive. 218App Div356, 218NYS173.

1074-35 165Minn303, 206NW447; 102 NJL265, 131A637 [citCJ]. **Erratum.**–In 1926 Annotations, "239NY303" should be "239NY220."

1074-37½-New. The award becomes a fund standing in place of the land. 170 Minn49, 212NW8.

1074-40 308Mo 123, 272SW66 (where there were no pleadings between claimants, judgment of damages in condemnation proceedings did not determine rights inter se).

1075-51 115 Or562, 237P690, 239P193.

1075-57½-New. Statute did not contemplate that condemnation proceeding should determine various interests in land taken, in view of provision that award could be paid in period not exceeding five years for use of owners, who may or may not have been owners at date of decree. 308Mo 123, 272SW66.

1075-65½-New. Appeal does not suspend interest on judgment. Mo 281SW 395.

1075-66 102NJL265, 131A637 [citCJ].

1076-71 102NJL265, 131A637 [citCJ].

1076-78 165Minn303, 206NW447.

1076-82 169Ga269, 149SE884; 11Pa Dist&Co 532.

1077-91½-New. Where exceptions to a report and demand for a jury trial are timely filed, an award of damages is in abeyance and the entire matter is under protection of the court until exceptions and demand are disposed of. 315Mo 775, 287SW621.

1077-95 206 Iowa1217, 220NW333; 315 Mo 712, 287SW623. [i] **City could dismiss proceeding before judgment** and before right to condemn had vested and property taken. **TexCivA** 28SW(2d) 826.

1078-97 85PaSuper202. [a] **Own volition of condemnor.**–Condemnor may not abandon proceeding of own volition; he must secure assent of court. 85PaSuper 202.

1078-3 242Mich658, 219NW614.

1078-4 [a] (2) Plaintiff cannot, in effect, grant himself new trial by abandoning proceeding after final judgment and then institute new proceeding to condemn same property. 99CalA240, 279P178.

1079-10½-New. Where appropriation had ceased to exist because of exception to award and demand for jury, prayer for leave to abandon appropriation may be rejected as surplusage. 315Mo 775, 287SW621.

1079-10½-New. Where the city had at all times since appropriation of a sewer easement right of way asserted a right thereto, it is not prejudiced by the trial court's allowing an action for compensation to go to trial instead of staying the proceedings to allow the city to elect to abandon appropriation or commence formal condemnation proceedings. 142 Wash533, 253P787.

1079-11 153Va461, 150SE401.

1079-12 330 Ill 643, 162NE205; Mich 233NW172; 165Minn303, 206NW447; 284Pa225, 130A491; 153Va461, 150SE 401. [c] **Where several condemnation proceedings for adjoining tracts were consolidated,** plaintiff, after final judgment, is powerless to abandon one without abandoning all. 99CalA240, 279P 178.

1079-13 165Minn303, 206NW447.

1079-14 315Mo 775, 287SW621. [a] (11) Detroit City board of education may discontinue condemnation proceedings as to part of land at any time before confirmation of verdict of jury. 242Mich658, 214NW614.

1080-15 331 Ill 144, 162NE128.

1080-21 196Wis76, 219NW428. [b] (2) Other statutes construed. 330 Ill 643, 162NE205. [d] (1) 56ND431, 218 NW18, 20 [citCJ].

1081-26 165Minn303, 206NW447.

1082-30 11PaDist&Co 449 (damages).

1082-34 284Pa225, 130A491.

1083-43 85PaSuper202.

1083-44 85PaSuper202.

1083-45 85PaSuper202.

1083-46 85PaSuper202.

1084-49 See also Mich 233NW172. [d] **Delay held not abandonment.**–79CalA 669, 251P247.

1084-53 79CalA669, 251P247; CalA 284P707.

1085-67 See also 243 IllA263 (transaction not considered as sale but as payment of award).

1085-69½-New. In Kansas proceedings for condemnation of real property under Rev. St. (1923) § 26-201 et seq. must be by resolution of the public body. 126 Kan1, 266P107.

1085-69¼-New. Election by a city to reject findings as to the amount of assessments and awards and to abandon proceedings to collect assessments or pay awards has been held not abandonment of improvement or dismissal of proceeding. 330 Ill 643, 162NE205.

1085-69¼-New. Failure of a city to elect within six months after a decree awarding the city the right to property constitutes election by the city to pay award. 154Wash529, 282P922.

1085-71 289Pa200, 137A237.

1085-74 169Ga269, 149SE884.

1085-80½-New. A city is not liable for damages caused by abandoning condemnation proceedings. 24 OhA268, 157 NE309.

1087-93 331 Ill 144, 162NE128.

1088-13 But see 4HawaiiFed748.

1088-20 167Ga110, 144SE739.

1089-29½-New. Trial court has no authority to set aside an order of dismissal and reinstate a condemnation proceeding at a subsequent term of the county court. **TexCivA** 274SW1006.

1089-32 171Minn297, 214NW30; 171 Minn300, 214NW32; 22 OhA457, 153NE 918; 123 Or579, 263P896; 132 Or311, 285P240 (statutes liberally construed); 193Wis395, 214NW388. [b] (10) Statute held not to make appeal from award of damages exclusive remedy, nor compel election between appeal and exceptions to viewer's report. 292Pa262, 141 A44. (11) In Nebraska. 230NW842.

1090-36 32F(2d)748.

1091-42 [a] **In Ohio.**–22 OhA457, 153 NE918.

1091-50 290Pa156, 138A845.

1091-51 20F(2d)5.

1091-53 TexCivA 10SW(2d)266.

1092-63 119 Oh606, 165NE505; 132SC 264, 128SE360 (city may appeal); 147 Va402, 137SE463.

1092-66 193NC519, 137SE431. See also 290Pa156, 138A845.

1092-70 Mo 28SW(2d)1008 (defendants not appearing as taxpayers in district).

1092-72 292Pa262, 141A44.

1093-91 194NC46, 138SE350.

1093-93 216Ky618, 287SW985.

1093-2½-New. Where no appeal is taken from order partly allowing claim for damages appeal from order disallowing balance is barred. 181Ark593, 27SW(2d)87.

1093-3 216Ky618, 287SW985.

1094-10½-New. A property owner has no right of appeal from a determination of the city council to the district court unless he files his objections to the proceeding or award as required by statute. 171Minn300, 214NW32.

1094-20½-New. A landowner who never remonstrated against an assessment roll in improvement proceedings cannot appeal from the assessment roll filed with the department of finance. 199 Ind210, 156NE465.

1094-23 171Minn300, 214NW32.

1095-24 102NJL294, 132A503. [s] (4) Appeal to quarter sessions is not exclusive remedy in all cases. 290Pa156, 138 A845. [v] (1) TexCommnA 23SW(2d) 320. [aa] NewJersey.-103NJL405, 135 A873.

1096-26 11PaDist&Co 57. [f] In Iowa.-200 Iowa723, 205NW343.

1096-27 [b] (15) Judgment affirming right to condemn and determining amount of compensation to be paid. 80 CalA599, 251P341.

1097-28 243NY522, 154NE589.

1098-33 See also 105NJL165, 143A369. [a] **Final order of condemnation** is in nature of special order made after final judgment. 80CalA599, 251P341.

1098-40½-New. An order granting a new trial does not absolutely vacate a judgment in condemnation proceedings so as to affect the right to appeal therefrom. 80CalA599, 251P341.

1098-40⅓-New. A landowner, appealing from a judgment of confirmation, has no right to take a separate appeal from an order for possession, but such order may be reviewed on appeal from the judgment of confirmation. 335 Ill 299, 167NE106.

1098-40¼-New. Such separate appeal will not be dismissed where bonds on both appeals are filed on the same day, but they will be treated as one appeal. 335 Ill 299, 167NE106.

1098-41 144Wash124, 257P231; 101 WVa531, 133SE315.

1099-42 84Colo 397, 270P866; 101WVa 531, 133SE315.

1099-43 101WVa531, 133SE315. [a] 101WVa531, 133SE315.

1099-44 Oh 157NE426. [a] Oh 157NE 426.

1100-60 233Ky48, 24SW(2d)933; Mo 28SW(2d)1008; TexCivA 20SW(2d)222; TexCivA 24SW(2d)483.

1101-61 74CalA473, 241P409; 102CalA 299, 283P298; CalA 287P121; 338 Ill 499, 170NE717; 216Ky303, 287SW357; 226Ky75, 10SW(2d)451; 249Mich289, 228NW791; 217AppDiv347, 217NYS50; 154Wash154, 281P484. [e] (1) 308Mo 123, 272SW66. [j] **Question of sufficiency of award of compensation** is not reviewable in some jurisdictions where landowner did not object to report of appraisers and apply for jury trial. 39 Wyo 355, 271P212.

1101-63 [a] **Where question of jurisdictional amount was not raised in circuit court.**-236Mich282, 210NW297.

1102-65 233Ky246, 25SW(2d)395; 233 Ky254, 25SW(2d)397.

1102-74 217AppDiv347, 217NYS50.

1102-76 79CalA270, 249P221; Mass 165NE1.

1103-82 TexCivA 7SW(2d)937.

1103-90 210Ala489, 98S466. [k] In Alabama.-210Ala489, 98S466; 216Ala 671, 114S849.

1104-4 12PaDist&Co 60; 105WVa355, 142SE520 (statute held inapplicable).

1105-15 See also 194NC46, 138SE350.

1105-16½-New. Under some statutes a judgment is duly rendered from which an appeal will lie, although no formal entry is made, where the trial court, after filing of the jury's verdict, as to issues of compensation and damages, signed findings of fact as to issues involved and conclusions of law that plaintiff was entitled to judgment of condemnation and directed entry of judgment. 80CalA599, 251P341.

1105-16⅓-New. Under some statutes an appeal before formal entry of judgment is not premature where final judgment has been rendered. 80CalA599, 251P341.

1105-21 See also TexCivA 288SW852.

1106-50 [d] **Joint or separate bonds.**-335 Ill 299, 167NE106.

1108-85½-New. Adjoining county which contracted to pay damages in excess of a certain sum cannot be made a party without voluntary submission to judgment. 147Va402, 137SE463.

1108-86½-New. An appeal taken by a person not a party to a proceeding does not confer jurisdiction on the court appealed to. 208 Iowa314, 223NW111.

1108-94 74CalA487, 241P415; 116 Oh 441, 156NE906.

1108-95 48 Ida592, 285P481 (on filing bond); 116 Oh441, 156NE906. [e] **Court's power extends** to order confirming assessment of compensation for property appropriated beyond six months' limitation. 116 Oh441, 156NE 906.

1109-96 116 Oh441, 156NE906.

1109-98½-New. Under some statutes assessment proceedings may be begun immediately after entry of interlocutory judgment in a condemnation action, although an appeal therefrom is pending. 74CalA487, 241P415.

1109-98⅓-New. An order authorizing the taking of property pending review of judgment involving validity of the ordinance is unauthorized. 326 Ill 55, 156NE774.

1109-98¼-New. An order for possession entered on the day of entry of final judgment is stayed with the judgment. 335 Ill 299, 167NE106.

1109-98⅕-New. Under some statutes a water company, on depositing with the clerk the amount of the verdict, may enter into possession and proceed with construction pending appeal as against objections of landowners. 150SC418, 148 SE366.

1109-10 101CalA104, 281P75 (appellate court is bound by record which sustains action of lower court); 217Ky301, 289 SW238; 220Ky151, 294SW1066; 126Me 205, 137A67; 236Mich282, 210NW297; Mo 28SW(2d)1008; Oh 157NE426. [a] (6) CalA 290P1073. [i] 202Cal 731, 262 P737, [l] **Maps and resolution** not shown to have been admitted for limited purpose in condemnation proceeding are entitled to full effect on review. 215 AppDiv438, 214NYS234. [m] **Court speaks only from its record and judgment,** not from expressions from bench or elsewhere in review condemnation proceedings. Oh 157NE426.

1110-13 TexCivA 168W(2d)297(1st case).

1110-15 214Ky748, 284SW397; 236 Mich282, 210NW297; 155Wash678, 286 P286.

1110-16 86PaSuper20.

1110-19 214Ky748, 284SW397.

1111-27 225Ky4, 7SW(2d)498.

1111-27½-New. Where presence of statements, pleadings, and all other papers issued and returned in condemnation proceedings in files of court, is called to the attention of the trial court in such a manner as to amount to their introduction in evidence, it is not necessary for them to be manually delivered and tendered to the judge. Tex CivA 10SW(2d)194.

1111-31½-New. , or for want of jurisdiction on other grounds; 208 Iowa 314, 223NW111.

1111-34 72CalA136, 236P925 (not dismissed for failure to serve notice of intention to move for new trial on other defendants).

1111-35½-New. Appeal from order denying motion for new trial will not be dismissed for failure of appellants to serve notice on codefendants of intention to apply for new trial under some statutes. 72CalA136, 236P925.

1112-51 179Ark1029, 18SW(2d)1028, 65ALR1446 (rights of corporation no longer party to condemnation suit are not properly presented on appeal); Vt 148A411. [a] (8) Landowner having appealed from assessment for land taken for street cannot contend that whole proceedings are void. 111Conn27, 149A 205. (9) Court will deny request to make additional finding where landowner did not adapt his pleadings to present such finding. 111Conn27, 149A 205. (10) In determining damages for land taken for street court is not bound to find front-foot value of lots. 111 Conn27, 149A205.

1112-52 [b] (2) On appeal there is trial de novo in circuit court. 210Ala 489, 98S466.

1112-56 216Ky326, 287SW889; 170 Minn49, 212NW8; 148Wash479, 269P 827. [b] (2) Ultimate issue is amount of damages though nature of claimant's interest is involved. 204 Iowa1104, 216 NW633. [c] (2) But under Condem. L. § 19, if notice of appeal from final order states that proceedings antecedent to judgment are brought up, court may review order appointing commissioners. 217AppDiv347, 217NYS50.

1113-58 216Ky326, 287SW889.

1113-58½ [a] (2) Not reviewed unless jury proceeded on wrong theory or were otherwise influenced to wrong conclusion. 236Mich187, 210NW480.

1113-60½-New. the regularity or sufficiency of the proceedings; 170Minn 49, 212NW8.

1113-61 [d] Oh 157NE426.

1113-64 CalA 290P1073.

1114-67 TexCivA 291SW317.

1114-69 328 Ill 610, 160NE226; 176 Minn525, 223NW923.

1114-69½-New. or waived, 331 Ill 322, 163NE17.

1114-70 159Tenn147, 17SW(2d)22, 65 ALR440.

1114-71 TexCivA 7SW(2d)895.

1114-71½-New. In New York on unanimous affirmance by appellate division of judgment of court of claims, review by court of appeals is confined to findings of fact made by court of claims. 240NY533, 148NE668, 48ALR1119.

1114-71⅓-New. and it cannot go behind such findings to determine what such court considered. 240NY533, 148 NE668, 48ALR1119.

1114-71¼-New. and did not consider in making up to its judgment. 240NY 533, 148NE668, 48ALR1119.

1114-71⅕-New. Rejection of evidence of the price received for other property, not clearly located, has been held not reviewable. 153Md102, 137A506.

1114-71⅙-New. A clerk's ruling on an allegation that an attempt was made to agree with the owner is subject to review. 191NC744, 133SE5.

1114-71⅐-New. An action of an intermediate appellate court in reversing a trial court and retaining a case de novo, being in the nature of granting a new trial, is not reviewable. Oh 157NE 426.

1114-71⅛-New. An owner appealing from an award cannot complain of an order transferring to the equity side of the calendar part of the appeal involving the issue whether condemnor or appellant owns the part of land sought to be condemned. 204 Iowa1104, 216NW633.

1114-71⅑-New. In some jurisdictions compensation to which claimant is entitled for vacation of public highway must be determined on appeal from award as in actions by ordinary proceedings. Nebr 230NW842.

1114-73 CalA 290P1073; 170La351, 127S865 (that verdict of jury was based in part on inspection made by them); 142Wash270, 253P115, 58ALR779.

1114-74 147Va355, 137SE458. [e] **It is assumed that damages, if found were awarded.**-Mass 172NE356.

1114-76 Vt 148A411; 142Wash270, 253 P115, 58ALR779.

1115-77 142Wash270, 253P115, 58ALR 779.

1115-78 See also 107Conn587, 141A 654 (it is presumed that land was outside city, village, public grounds, or highway).

1115-81½-New. In a second action against the same landowner for condemnation of land not included in the first proceeding, it will be presumed in the absence of evidence from the record that there was no necessity for including such other land. 145Wash 576, 261P110.

1115-84 Mass 172NE356.

1115-85 202Cal 731, 262P737 (correct theory in valuing land); 240NY533, 148 NE668, 48ALR1119.

1115-86 Mo 19SW(2d)1066; 240NY 533, 148NE668, 48ALR1119 (on unanimous affirmance of award by appellate division).

1115-92 233Ky378, 25SW(2d)1036; 314Mo 438, 284SW471, 47ALR25; 103 NJL419, 136A176; 33 OhA102, 168NE 752; 118 Or166, 246P707.

1115-97 118 Or166, 246P707; 159Tenn 147, 17SW(2d)22, 65ALR440.

1116-2 Mo 19SW(2d)1066; Mo 26SW (2d)954 (grant of new trial for inadequacy of award not disturbed unless discretion abused).

1116-3 Mo 288SW(2d)1008.

1116-4 148Md493, 129A682; Mo 288SW(2d)1008 (arbitrary or violates constitutional rights); 229AppDiv617, 243NYS665; 289Pa200, 137A237.

1116-5 174Ark59, 294SW410; 32 Ill 164, 155NE637; 200 Iowa684, 205NW459; 169La1111, 126S675; 102NJL294, 132A503. [a] **Jury's knowledge of** property values in their immediate neighborhood will be accorded considerable weight by appellate court. 161La444, 108S877.

1116-6 172Ark1031, 291SW793; 324 Ill 164, 155NE637; 214Ky736, 284SW391, 397 [cl(CJ)]; 232Ky248, 22SW(2d)611; 102NJL294, 132A503.

1116-6½-New. 289Pa200, 137A237.

1116-7 Mo 288SW(2d)1008; 103WVa 346, 137SE530; 38Wyo 190, 266P117.

1116-8 174Ark59, 294SW410; 109Conn 212, 146A20; 200 Iowa1063, 205NW979; 213Ky1, 280SW452; 230AppDiv338, 245NYS44. [d] 82CalA289, 255P553. [e] **Court's findings have same force as verdict.**–132 Or317, 285P236 (that property consisted of single tract)

1116-10 172Ark1031, 288SW925, 291SW793; 82CalA289, 255P553; 109Conn 212, 146A20; 324 Ill 164, 155NE637; 337 Ill 555, 169NE753; 336 Ill 390, 168NE370; 200 Iowa684, 205NW459; 205 Iowa283, 218NW66; 248Mich13, 226NW690; 177Minn146, 225NW86; 219App Div382, 220NYS18; 33 OhA142, 168NE566; 128 Okl 303, 262P1070; 147Va355, 137SE458.

1116-11 109Conn212, 146A20; 324 Ill 164, 155NE637; 331 Ill 322, 163NE17; 213Ky1, 280SW452; 219Ky802, 294SW461; 228Ky90, 14SW(2d)392; 228Ky 512, 15SW(2d)303; 167La891, 120S587; 237Mich684, 213NW74; 239Mich46, 214NW339; 243Mich517, 220NW808; 248 Mich473, 227NW718; 250Mich391, 230 NW194; 321Mo840, 12SW(2d)747; 128 Okl 303, 262P1070; Mo 308SW(2d)729; Mo 308SW(2d)733. [c] **Findings and judgments of court must be based on admissible testimony** of sufficient probative force to sustain judgment. Mo 308SW(2d)733.

1117-12 169Ark399, 275SW590; 96 CalA708, 275P228; 200 Iowa723, 205NW 343; 234Ky661, 28SW(2d)987; 162La 861, 111S260; 167La891, 120S587; 222 AppDiv554, 226NYS536; TexCivA 291 SW317; 153Va13, 149SE456 (strong evidence is required to warrant appellate court's setting aside commissioners' award); Wash 292P113; 103WVa 346, 137SE530.

1117-13 329 Ill 288, 160NE559; 216Ky 618, 287SW985; 243Mich517, 220NW 808; Mo 288SW(2d)1008; 219AppDiv27, 219NYS353; 222AppDiv554, 226NYS 536; 147Va355, 137SE458.

1118-14 329 Ill 288, 160NE559; 228Ky 90, 14SW(2d)392, 265Mass194, 163NE 265; 219AppDiv27, 219NYS353; 147Va 355, 137SE458. [b] **Where jury composed of property owners of vicinage,** appellate court will correct manifest inflation of value. 161La444, 108S877.

1118-15 219Ky802, 294SW461; 162La 553, 110S753; 123 Or579, 263P896; 108 WVa267, 150SE722.

1118-16 Wash 292P113. [a] **In New York.**–240NY533, 148NE668, 48ALR 1119.

1119-18 214Ky736, 284SW391; 216Ky 618, 287SW985; 221Ky723, 299SW462 (award held excessive); 233Ky323, 25 SW(2d)724; 234Ky661, 28SW(2d)982; 243Mich517, 220NW808; Mo 308SW(2d) 729; 230AppDiv142, 244NYS105; 137 Okl 229, 279P327.

1119-21 69CalA150, 230P671 (failure of plaintiff to amend complaint); 74 CalA473, 241P409; 95CalA602, 273P 131; CalA 284P707; 102CalA299, 283 P298; 111Conn27, 149A205; 320 Ill 56, 150NE403; 327 Ill 294, 158NE687; Ind 170NE81; 200 Iowa723, 205NW343 (assessing two separate tracts in lump sum, where jury, by court's direction found damages to each separately); 216Ky64, 287SW232; 216Ky303, 287SW357; 228 Ky90, 14SW(2d)392; 251Mich63, 230 NW928; 321Mo840, 12SW(2d)747; NJ Sup 136A183; NC 154SE322; 159Tenn 147, 17SW(2d)22, 65ALR440; 155Wash 678, 286P286; WVa 155SE174. See also TexCivA 8SW(2d)705. [a] (3) 146Wash 607, 264P411. (7) Permitting condemnation commissioners to state amount of award to jury, where they stated amount was reasonable. 216Ky326, 287SW889. (8) Inadvertent use of word "northwesterly" instead of "northeasterly" in description of property in resolution of intention is harmless where point of beginning is accurately established and controls word of course or direction. 201Cal316, 256P1097. (9) Denial of motion to make description of land more certain is not error where motions for bills of particulars were granted for same purpose. 145Wash129, 259P379. (10) Splitting of cause of action by including in second application land which might have been included in first. 145Wash576, 261P110. (11) Failure of verdict and evidence to show quantity of land taken is harmless. TexCivA 7 SW(2d)937. [d] (4) 329 Ill 288, 160NE559. (5) Improper question to witness. 329 Ill 288, 160NE559. (6) Denial of continuance where landowner was member of jury panel. 179Minn557, 230NW 91. [e] **Error cured.**–TexCivA 27SW (2d)842 (defective pleading).

1119-22 [b] **Error held prejudicial.**–230 Ky806, 20SW(2d)991(2dcase).

1120-23 76CalA369, 244P609; 202Cal 731, 262P737; 96CalA708, 275P228; 99 CalA240, 278P476; CalA 290P1073; 80 Colo 365, 250P527; 327 Ill 294, 158NE 687; 328 Ill 610, 160NE226; 331 Ill 322, 163NE17; 335 Ill 299, 167NE106; 336 Ill 390, 168NE370; 337 Ill 537, 169NE 322; 216Ky64, 287SW232; 314Mo 438, 284SW471; Mo 288SW(2d)1008; 103 NJL419, 136A176; NJ 150A354; 222 AppDiv554, 226NYS536; 226AppDiv 490, 235NYS569; 197NC748, 150SE495; 118 Or166, 246P707; 159Tenn147, 17SW (2d)22, 65ALR440; TexCivA 293SW 885; TexCivA 15SW(2d)180; 69Utah 423, 255P672. But see 40F(2d)745(2d case). [d] 248Mich13, 226NW690; 250 Mich391, 230NW194; Mo 238W(2d)130. [f] (3) 76CalA369, 244P609; Iowa 233 NW36; 217Ky424, 289SW675; 233Ky 628, 26SW(2d)535; 230AppDiv41, 243 NYS63; TexCivA 281SW318. (4) 329 Ill 288, 160NE559. [j] **Error held not prejudicial.**–216Ky64, 287SW232. [jj] **Admitting evidence favorable to appellant is harmless.** 327 Ill 294, 158NE 687. [k] **Where jury viewed property,** verdict will not be set aside for error in admission or exclusion of evidence unless evidence was of unquestioned materiality. 159Tenn147, 17SW(2d)22, 65ALR440. [l] **Error held not cured by delay in objecting.**–Mo 238W(2d)130.

1120-23½-New. In making improper remarks; 99CalA240, 278P476.

1120-24 99CalA240, 278P476; 320 Ill 56, 150NE403; 327 Ill 294, 158NE687; 213Ky750, 281SW993; 231Ky788, 22 SW(2d)281; 236Mich282, 210NW297; Mont 288P181; 104NJL402, 140A300; 118 Or166, 246P707; TexCivA 281SW 318; TexCivA 291SW317; TexCivA 4 SW(2d)1032; 38Wyo 190, 266P117.

1120-24½-New. or giving instructions generally; TexCivA 293SW885.

1120-24¾-New. in argument of counsel; 228Ky90, 14SW(2d)392.

1121-25 69CalA150, 230P671; 82CalA 289, 255P553 (immaterial findings treated as surplusage); 85Colo 57, 273 P646; 228Ky90, 14SW(2d)392; 231Ky 788, 22SW(2d)281; 169La1111, 126S 675; 249Mich289, 228NW791; 299Pa 503, 149A702.

1121-26 69CalA150, 230P671; 74CalA 473, 241P409; 92CalA501, 268P487; 231 Ky788, 22SW(2d)281; TexCivA 7SW (2d)937. [b] **Voluntary dismissal in intermediate appellate court** which retained case de novo after reversing trial court's dismissal on preliminary question is immaterial to owners whether such voluntary dismissal was with or without prejudice. Oh 157NE426. [c] **Failure to pass on all preliminary questions.**–Where court dismisses case on one preliminary jurisdictional question, prejudicial error in failing to pass on remaining questions cannot be based on owners' anticipation of favorable judgment thereon. Oh 157NE426.

1121-28 72CalA136, 236P925 (order denying motion for new trial may be affirmed on ground that notice of motion for new trial was not served by appellant on codefendants on considering appeal on merits). [e] **In Virginia.**–142 Va135, 128SE546.

1121-29 79CalA669, 251P247; Fla 129S 582; 146Wash607, 264P411.

1121-33½-New. Failure to give statutory notice to other defendants of intention to move for new trial constitutes sufficient reason for affirming order denying motion for new trial, though not ground for dismissing appeal. 72 CalA136, 236P925.

1121-33¼-New. Where point was fully developed at hearing, and although judge reserved decision, question will be disposed of on writ of error. 142 Va512, 129SE384.

1121-33¼-New. Where the judgment appealed from merely quashed the report of commissioners for plaintiff's failure to give notice of filing of the petition and of the appointment of commissioners, and plaintiff did not move for the reappointment of commissioners, the appellate court may properly dismiss the petition. 213Ky276, 280SW 1101.

1121-35 217AppDiv587, 217NYS359.

1122-37 [d] **Interest.**–(1) 220Ky151, 294SW1066.

1122-46 323 Ill 625, 154NE421; TexCivA 26SW(2d)338. [d] 108Conn205, 143A96; 323 Ill 625, 154NE421; Mo 30SW(2d)733. [h] **Special benefits exceeding damages.**–143Va213, 129SE504.

1123-62 [d] **Where remand as to part of recovery of damages is necessary,** remand should reopen case in trial court as to entire claim and all items thereof. 157Tenn491, 9SW(2d)700.

1124-79 226Ky75, 10SW(2d)451; 195 NC297, 142SE18 (on question of damages); Oh 157NE426; 22 OhA457, 153 NE918; 123 Or571, 263P901; 193Wis 395, 214NW388. [b] **Retention de novo after reversal.**–Oh 157NE426 (plaintiff may dismiss case). [c] **Lessor and lessee.**–TexCivA 4SW(2d)1032.

1125-82 251Mich63, 230NW928 (case not reviewed de novo).

1125-83 TexCivA 22SW(2d)537.

1125-87 TexCommnA 23SW(2d)320.

1126-99 [d] **View of jury.**–148Miss357, 114S611.

1127-1 195NC297, 142SE18; 198NC 404, 151SE871 (jury may be demanded); 123 Or571, 263P901. [c] **Submission of issues to jury held not error.**–TexCivA 4SW(2d)1032. [d] **Form and substance of issues** submitted held sufficient. 197NC556, 150SE40. [e] **Refusal of court on appeal to order new appraisal** does not deny property owners right to have matter determined by jury. 198NC404, 151SE871.

1127-5 123 Or571, 263P901.

1127-7 123 Or571, 263P901.

1128-17 193Wis395, 214NW388. [a] (2) Where landowner initiated proceedings, he must prove his title. 193Wis 395, 214NW388.

1128-24½-New. Refusal to allow defendant to explain the phrase "four run of stones" in a deed through which plaintiff asserted title has been held error. 193Wis395, 214NW388.

1129-34 205 Iowa523, 218NW258; 236 Mich187, 210NW480; 250Mich391, 230 NW194; Mich 233NW172; 146Miss613, 111S596; 127Miss866, 217NYS781. [b] **Improvement not suspended by allowance of writ.**–NJ 140A447.

1129-38½-New. Order quashing writ of review is proper where writ was obtained to determine same questions court on appeal was called upon to pass on. 132 Or311, 285P240.

1130-40 NJ 140A447.

1130-45 94Fla814, 114S526.

1130-52 [d] (3) In proceeding to condemn land for public purpose, final decree of appropriation cannot be questioned by appeal, but must be raised by certiorari. 148Wash353, 268P1040.

1131-59 142Wash284, 252P906.

1131-61 92Fla617, 110S451; 153Tenn 349, 284SW359.

1131-67 Mich 233NW172.

1131-68 Mich 233NW172.

1132-78½-New. A water company seeking to review by certiorari an order appointing condemnation commis-

sioners to condemn part of its franchises and property is not entitled to present and represent the legal status of other municipalities concerned in the condemnation, which have not appeared or objected to the proceedings. 105**NJL** 40, 143**A**759.

1132–80 249**Mich**530, 229**NW**500.

1132–86 242**Mich**239, 219**NW**74; 102 **NJL**523, 133**A**720.

1133–96½–New. In setting aside a finding of the commissioners as to necessity for taking land for railroad uses, the court should refer both necessity and damages to a new inquest instead of determining necessity itself. 236**Mich** 187, 210**NW**480.

1133–1 338 **Ill** 347, 170**NE**295.

1135–27½–New. Where a city dismissed condemnation proceedings, judgment for the landowner for attorney's fees has been held erroneous. **TexCivA** 296 **SW**663.

1136–29 See also 133**Misc**177, 231**NYS** 72.

1137–55 76**CalA**369, 244**P**609.

1138–66 133**Misc**177, 231**NYS**72.

1138–71 179**Ark**1029, 18**SW(2d)**1028, 65 **ALR**1446 (chancellor held not to have abused discretion in adjudging costs against landowner).

1138–72½–New. Taxing of costs after filing of commissioners' report rests in the discretion of the trial court. 314 **Mo** 438, 284**SW**471.

1139–84 130**Misc**136, 223**NYS**529.

1139–86 76**CalA**369, 244**P**609. [a] (3) 76**CalA**369, 244**P**609.

1139–90 330 **Ill** 39, 161**NE**55.

1141–1 [a] **In Minnesota.**–167**Minn**505, 209**NW**326.

1141–7 148**Miss**153, 114**S**34.

1142–8 But see 148**Miss**153, 114**S**34.

1143–28½–New. Some statutes do not allow costs and disbursements on appeal from the common council to the district court in a condemnation proceeding. 179**Minn**258, 228**NW**925(2d case).

1143–31 56**ND**431, 218**NW**18.

1143–44½–New. Costs and expenses incurred by a landowner incidental to discontinuance of the proceeding are matters to be determined in a separate action. 315**Mo** 775, 287**SW**621.

1144–48 [a] (5) Where property was taken by deed before assessment. 219 **AppDiv**285, 219**NYS**741.

1144–52½–New. Expenditures for maps and surveys are not allowable. 130**Misc** 136, 223**NYS**529.

1145–59 [a] (1) 11**F(2d)**971.

1145–70 81**CalA**737, 254**P**687.

1145–75 281**US**362, 50**SCt**299, 74**L ed** 904; 206 **Iowa**1217, 220**NW**333.

1145–76 202 **Iowa**406, 210**NW**281.

1146–79 281**US**362, 50**SCt**299, 74**L ed** 904 (allowance confined to railway condemnation proceedings). [c] **Attorney being one of defendants,** city not liable for attorney's fees. **CalA** 290**P**1073.

1146–80 206 **Iowa**1217, 220**NW**333.

1147–87 [e] **CalA** 290**P**1073.

1147–89½–New. Where one of the coowners and defendants in a condemnation proceeding is an attorney, and as such defends for both, he as defendant is entitled to an allowance of a reasonable attorney's fee independent of that allowed his codefendant, under statute, providing for awarding defendant reasonable attorney's fees on dismissal of the proceeding. **CalA** 272**P** 1088.

1147–99 206**Cal** 473, 274**P**968. [b] **Where attorney is on contingent retainer,** landowner is not entitled to attorney's fees. 91**CalA**760, 267**P**585.

1148–3 206 **Iowa**1217, 220**NW**333 (limited to services rendered on appeal).

1149–18 [b] **Provisions of Condem. L. § 16 authorizing extra allowance** of five per cent apply to proceeding under special statute to fix damages for change in grade in view of Highway L. § 59–a. 130**Misc**136, 223**NYS**529.

1149–28 247**NY**398, 160**NE**654; 222**App Div**691, 225**NYS**162. [a] 247**NY**398, 160 **NE**654.

1149–29 222**AppDiv**691, 225**NYS**162.

1149–30 247**NY**398, 160**NE**654.

1150–41 [a] (1) 206 **Iowa**1217, 220**NW** 333. (3) Where proceeding was abandoned pending appeal, testimony as to work done in resisting application for permit by condemnor, work done before sheriff's jury and before supreme court, and in proving title of landowners, is incompetent. 206 **Iowa**1217, 220 **NW**333.

1150–42 206 **Iowa**1217, 220**NW**333.

1150–49 222**AppDiv**686, 224**NYS**740.

1151–84 156**Miss**629, 126**S**405.

1151–84½–New. A proprietor of land cannot, in his private capacity and without any kind of judicial proceeding, physically disconnect and remove sewerage pipes from his lands merely because of wrongful entry. 167**Ga**865, 147 **SE**563.

1152–8 180**Ark**1075, 24**SW(2d)**856.

1152–9 180**Ark**1075, 24**SW(2d)**856.

1152–12 [a] **Statutory remedy for damage for erection of mill does not apply** where dam is built on land without owner's permission, damages for trespass being recoverable as at common law. 191**NC**117, 131**SE**369. [b] **Where mill dam is entirely built on defendant's land** but floods water on plaintiff's land, statutory remedy must be pursued if damages are sought. 191**NC**117, 131**SE**369.

1152–13 37**GaA**418, 140**SE**763; 208 **Iowa**314, 223**NW**111; **NC** 154**SE**317; 160**Tenn**477, 26**SW(2d)**141; **TexCivA** 26**SW(2d)**659 (special procedure to obtain redress); **Ont** [1929] 1**DomLR**585 (arbitration). See also 191**NC**147, 131 **SE**277; 153**Tenn**283, 282**SW**382. [c] **In absence of statute** recovery for taking cannot be had on contract implied in fact ordinarily arising under constitutional obligation to compensate for property taken. 270**US**280, 46**SCt**253, 70**L ed**585.

1153–14 310**Mo** 171, 275**SW**44 (party to drainage proceedings awarded compensation must act in such proceedings for claim for consequential damages); 197**Wis**25, 221**NW**381.

1154–22 240**Mich**12, 215**NW**8.

1154–24½–New. A statute relative to recovery of damages for property taken for municipal improvements provides an exclusive remedy only where the right of recovery for damages is for the taking of property necessary to the construction of the improvement. 155**Tenn** 448, 295**SW**60.

1155–25 [b] **Statutory remedy does not apply** to taking not authorized by condemnation statute. 191**NC**147, 131**SE** 277. [c] **Owner may sue for wrongful appropriation,** where railroad appropriated condemned land before payment of damages in compliance with statute. 220**Ky**778, 295**SW**1000.

1155–29 [b] **Slight deviation between road traveled by public and that laid out by jury of view** is not sufficient to entitle owner to recover therefor as if no proceedings had been had. **TexCivA** 290 **SW**573.

1155–29½–New. A municipality, having the right of appropriation, in exercising it, is neither a tort-feasor nor a trespasser, unless guilty of negligence in carrying out public works. 207**Cal** 430, 278**P**1028.

1155–30 103**WVa**210, 136**SE**848.

1156–35 121 **Oh**257, 167**NE**889 (before value of property taken has been determined, owner may have equity court decide whether use is public one and whether city has complied with statute and acted in good faith).

1156–44½–New. A court of equity is the proper tribunal in which to proceed to protect the rights of beneficiaries of a devise in trust for park purposes, as well as the legal rights of the trustees, from threatened continuing trespass by condemnation of part of the land by an electric power company. 101**Vt**325, 143**A**384.

1156–49½–New. Where property condemned has been dedicated to a public use, the operation thereof should not be interrupted by an action to recover possession. 69**CalA**72, 230**P**468.

1156–51 16**F(2d)**395; 97**CalA**120, 275**P** 465; 84 **IndA**305, 151**NE**355. See also 215**Ala**533, 112**S**131. [a] **Burden is on defendant** to establish public user. 16 **F(2d)**395.

1157–54 **Mo** 28**SW(2d)**656.

1157–55 84 **IndA**305, 151**NE**355.

1158–61 20**F(2d)**263.

1158–66 See also 16**F(2d)**395.

1158–69½–New. Ejectment will not lie if the owner acquiesces in a wrongful seizure of land by a railroad for a long time after the railroad has entered on its duties as common carriers. 84 **IndA**305, 151**NE**355.

1158–75 133**Misc**388, 232**NYS**235; 191 **NC**147, 131**SE**277 (may file claim for damages to be assessed by arbitration); 192**NC**670, 135**SE**772.

1159–76 198**Wis**112, 223**NW**571(1st case).

1159–77½–New. A railroad, obtaining a county commissioner's permission to lay tracks in a village street, could not thereafter claim as by condemnation. 20**F(2d)**250.

1159–77½–New. The county commissioner's consent to a railroad's laying a track in a village street has been held not a waiver of a right to require condemnation. 20**F(2d)**250.

1160–91 82**CalA**382, 256**P**255; **GaA** 155 **SE**384; 218**Ky**819, 292**SW**501; 219**Ky** 488, 293**SW**979; 9**LaA**603, 121**S**768; 233**Ky**741, 26**SW(2d)**1049; **NC** 153**SE** 632; 153**Tenn**283, 282**SW**382 (rule applies, though defendant set up adverse claim to land). But see 334 **Ill** 132, 165 **NE**627. [b] **Land requisitioned for war purposes** under Lever Act § 10 entitles owner to its value at time of seizure plus legal interest, as compensation. 5 **F(2d)**99. [c] **Owner of land** cannot recover against county for trespass in appropriating his property for road purposes. 218**Ky**819, 292**SW**501.

1160–92 219**Ala**172, 121**S**703.

1160–94½–New. Where a municipality clothed with the power of eminent domain takes possession of and uses property for a public purpose and then abandons it, the property owner is entitled to recover compensation for such use. 154**Wash**1, 280**P**65 (right is based on constitution and not on relation of landlord and tenant).

1160–94½–New. County liable for cost of any right of way although acquired at the instance of the state highway commission. 215**Ky**295, 284**SW**1074.

1160–96 102**NJL**265, 131**A**637.

1161–1 [a] **Acceptance by owner** of less than amount assessed while amount was in controversy and execution of deed for property taken precludes action for difference between amount accepted and awarded. 200 **Iowa**787, 205 **NW**460.

1162–22 38**F(2d)**74; 181**Ark**564, 26**SW (2d)**887 (where damages not conceded); 72**CalA**68, 237**P**59; 104**Conn**452, 133**A** 570; 40**GaA**319, 149**SE**326 (for destruction of sidewalk easement by removing sidewalk); **GaA** 155**SE**214; 321 **Ill** 538, 152**NE**486; 122**Kan**272, 252**P**229; 126**Kan**6, 266**P**655; 219**Ky**488, 293**SW** 979; 234**Ky**618, 28**SW(2d)**966; 160**La** 105, 106**S**710; 9**LaA**603, 121**S**768; **MoA** 282**SW**448; **MoA** 293**SW**503; 243**NY**15, 152**NE**451; 129 **Okl** 28, 263**P**448; 284**Pa** 248, 131**A**283; 48**Philippine**611; **Tex CivA** 286**SW**590; 143**Wash**506, 255**P** 654; 145**Wash**138, 259**P**26; 154**Wash**1, 280**P**65 (owner whose land is taken by city without condemnation is not limited to injunctive relief, but may recover for loss suffered, though city has depreciated property's value before date of trial); **Wash** 287**P**29; 102**WVa**138, 134**SE**745. But see 37**GaA**418, 140**SE** 763. [g] **Additional compensation.**–5**F (2d)**99. [h] **Recovery of damages not barred** for failure to institute injunction proceedings. 215**Ky**295, 284**SW** 1074. [i] **Damages resulting from failure to remove trees** in highway are not recoverable under Eminent Domain Act in Massachusetts. **Mass** 168**NE**779.

1162–22½–New. And damages may be recovered where land is not condemned under proper statute. 50**SD**240, 209**NW** 360.

1164–23 217**AppDiv**347, 217**NYS**50.

1164–28 118**Nebr**522, 225**NW**679.

1164–29 134**SC**271, 132**SE**590.

1164–31 2**LaA**37.

1164–32 But see 197**NC**195, 148**SE**29 (1stcase).

1164–32½–New. removal of lateral sup-

port of premises bordering on highway; 228Ky608, 158W(2d)521.

1164-33 234Ky645, 298SW(2d)650.

1164-34 104Conn452, 133A570; 320Mo 120, 68W(2d)935; 143Wash479, 255P 645; 52ALR625; 143Wash506, 255P 654; 102WVa138, 134SE745. But see 97 CalA22, 274P993. [a] **Reassessment statutes** do not preclude action for damages by unauthorized grading. 200Wis 230, 228NW117.

1164-34½-New. Before jury of view. in an ordinary action for injury to property, proceedings must be before a jury of view, followed by appeal from its award; 284Pa248, 131A283.

1164-34⅓-New. but any negligence appearing in such an action may not be considered, since injury due to negligence must be redressed in an action of trespass. 284Pa248, 131A283.

1164-34¼-New. Where an extension of a drainage ditch was unauthorized, the drainage district is under no liability to the owner of the land into which the ditch was extended, although the work incident thereto was done under the direction of its commissioners. 153 Miss440, 121S117.

1164-34⅓-New. Landowner has no cause of action for damages for highway changes where only damage suffered was to render access to land less convenient. 110Conn664, 149A408.

1164-34⅙-New. Removal of a sidewalk is a deprivation of a property owner's property right in his easement in the street for purposes of egress and ingress for which he may recover. 40GaA 319, 149SE326.

1164-34½-New. Planting of posts within a railroad right of way across the street does not constitute closing of the street crossing, rendering the railroad company liable to property owners where the crossing had been previously vacated by city ordinance. 129 Kan302, 282P751.

1164-35 320Mo 120, 68W(2d)935; 155 Tenn448, 295SW60. [a] 138Misc1, 244 NYS553. (3) State's exercise of right of eminent domain does not cut off owner's claim for damages already accrued. 138Misc1, 244NYS553. [b] **Damages recoverable in condemnation proceedings.**-NJSup 149A534.

1165-37 119Kan374, 239P766.

1165-38 155Tenn448, 295SW60; 134 Wash1, 235P4. [b] (2) Sounds of commercial and industrial activities must be material, substantial, and unreasonable to give rise to action for damages to adjoining property. 145Wash351, 259P1089. [c] **Fear of injury or death from falling transmission wires** entering and leaving electric sub-station does not warrant recovery of damages by owners of residences across street. 145 Wash351, 259P1089. [f] **Electric substation occupying entire block,** formerly used in part for woodyard operating power saw, is not improperly located, authorizing damages to residential property across street because of humming noise. 145Wash351, 259P1089.

1166-43 97CalA120, 275P465.

1166-46 76CalA492, 245P227; 103WVa 210, 136SE848; [1926] CanSC603, [1926] 4DomLR690. See also 181Ark 564, 26SW(2d)887. [a] (1) 225Ky249, 8SW(2d)431.

1167-56 235 IllA499.

1167-57 97CalA120, 275P465; 207 Iowa191, 217NW75; 153Md229, 137A 899.

1167-59 235 IllA499. [a] **Want of legal remedy** is not condition to relief. 235 Ill A499. [b] **Solvency of corporation taking or injuring property** does not preclude granting of injunction restraining taking of possession till compensation is paid, where corporation is attempting to evade condemnation statutes. 207 Iowa191, 217NW75.

1167-60 235 IllA499; Iowa 232NW760; 125Me238, 132A740; 243NY15, 152NE 451; 143Va405, 130SE764, 44ALR727 (under statute only awarded when transcending authority); 196Wis76, 219 NW428. [a] (2) **Injunction** is appropriate remedy to prevent state highway commission from establishing primary road through orchard and ornamental grounds, in violation of statute whether or not certiorari might lie. 207 Iowa56, 222NW438.

1168-61 129Kan176, 282P183.

1168-63 283Pa588, 129A845.

1168-64 283Pa588, 129A845.

1168-65½-New. Injunction is the proper remedy where a landowner desires to question the legality of the charter of the condemning corporation. 161Ga 524, 131SE517, 44ALR534.

1168-65⅓-New. An injunction should be granted where charter of purported corporation which is seeking to condemn land is void because granted without authority by a judge of a superior court in vacation outside of the county in which the application was pending. 161Ga524, 131SE517, 44ALR534.

1169-68½-New. Where appraisers fail to perform service enjoined by statute according to the provisions thereof and county clerk fails to give notice to claimants whose claims are disallowed in whole or in part as required by statute whereby claimants are deprived of opportunity to appeal from action of county board, suitable relief will be granted by way of injunction. 114Nebr 210, 206NW733.

1169-68⅓-New. A court of equity cannot enjoin proceedings by a municipality and impose a condition precedent that something by way of restoration or otherwise, not contemplated by statute, shall first be done. 200 Iowa1116, 306 NW35.

1169-68¼-New. Injunction will lie where it appears that a continuing trespass is contemplated. 123 Or103, 261 P76.

1169-70 20F(2d)263; 30F(2d)121; 178 Ark482, 10SW(2d)908 (matters to be shown); 235 IllA499; 172Minn604, 216 NW228; 153Tenn283, 282SW382; Tex CivA 286SW590; TexCivA 158W(2d)178 (2dcase); 196Wis76, 219NW428.

1169-71 235 IllA499; TexCivA 286SW 590; TexCivA 278W(2d)1105.

1169-73 161Ga907, 132SE218; 26 OhA 590, 160NE101; 159Tenn308, 178W(2d) 921.

1170-74 [a] **Landowner to whom warrant** for sum awarded was issued and who has not appealed from warrant cannot enjoin opening of road. TexCivA 291SW968.

1170-75 235 IllA499; 127Kan754, 275P 379 (unless discretion abused); 117 Or 220, 243P93, 45ALR521.

1170-78 CalA 291P227.

1171-84 TexCivA 88W(2d)187.

1171-84½-New. But an injunction will not be denied because of a previous attempt to oust another railroad. 289Pa 131, 137A173.

1171-97 283Pa588, 129A845.

1171-99½-New. Injunctive relief will be denied where there is no "taking" within a constitutional inhibition. TexCivA 286SW590.

1171-99⅓-New. Mandatory injunction pendente lite, requiring a telegraph company to remove poles and wires, should be denied pending condemnation proceedings. 219AppDiv729, 219NYS559.

1171-2 TexCivA 286SW590.

1171-5½-New. or where proceedings are instituted under inapplicable statute; TexCivA 258W(2d)625.

1171-6½-New. or where individuals composing a commission, board, or other arm of the state violate the clear provisions of the state constitution or statute, and attempt to appropriate private property for public use without authority; 207 Iowa56, 222NW438.

1171-7½-New. Injunction will lie to restrain appropriation proceedings where there is raised the issue of abusive power or bad faith, 25 OhA53, 155 NE233.

1171-7⅓-New. or where there is a question whether the use is a public one. 25 OhA53, 155NE233.

1171-7¼-New. Governmental agency may not be restrained from making such use of property as public purpose may require, but must give compensation if private property is taken. 108Conn359, 143A246.

1171-7⅙-New. Ordinarily it is no concern of an owner of land sought to be condemned how much the condemnor pays another owner for the property taken from him or how such payment is made. 129Kan176, 282P183.

1171-10 333 Ill 422, 164NE673; 178 Kan363, 235P95; 153Md229, 137A899; 196Wis76, 219NW428.

1172-12 82CalA382, 256P255; 207 Iowa 191, 217NW75; 245Mich65, 222NW325, 67ALR373; TexCivA 268W(2d)457; Tex CivA 278W(2d)1105; Wash 289P1018. But see Md 149A566.

1173-19 35F(2d)235; 248Mich450, 227 NW811; 285Pa102, 131A728; 50SD199, 208NW980 (discharge of sewage on land); TexCivA 294SW868; 103WVa 210, 136SE848; 105WVa395, 142SE841, 58ALR231. See also TexCivA 294SW 913. [a] **Proceedings to condemn land for public road** under statute relating to eminent domain is void and may be enjoined by district court. TexCivA 308W(2d)532.

1174-21 26 OhNPNS525.

1174-22 TexCivA 168W(2d)642.

1174-26 30F(2d)749; 150Wash221, 272 P983.

1174-27 128Misc216, 219NYS11.

1175-28½-New. Where one had conveyed all his interest in land at the time of judgment of condemnation thereof, he could not enjoin construction of a highway thereon. TexCivA 290SW900.

1175-29 37F(2d)602; Oh 153NE651.

1175-30 33 OhA414, 169NE719.

1175-31 153Md229, 137A899.

1175-32 153Md229, 137A899. See also MoA 282SW448.

1176-35 235Ky509, 318W(2d)906.

1176-35½-New. Where final order of condemnation has been made and recorded and the property described has vested in the county for highway purposes, and the road, as constructed, has passed into public use, an injunction will not be granted interfering with such use on the ground that the manner of construction was different from that proposed. 69CalA72, 230P468.

1176-35¼-New. Where property condemned has been dedicated to a public use, the operation thereof should not be interrupted by an action to enjoin continuance of the use. 69CalA72, 230P 468.

1176-35⅓-New. An owner whose land was condemned by a utility company for a transmission line cannot enjoin a subsidiary's use thereof for the generation of power, where a statute gives him adequate remedy. 34F(2d)287.

1176-35⅙-New. An owner whose land was condemned for a public utility's transmission line, cannot enjoin the use of part thereof by a subsidiary for generating electricity, although a part of the current is to be sold to companies in another state. 34F(2d)287.

1176-56 [a] (4) TexCivA 20SW(2d) 154.

1177-65 217AppDiv347, 217NYS50. [b] **Presentation to jury of view of written statement of damages.**-TexCivA 28SW(2d)230.

1177-66 144Wash315, 257P842; 145 Wash138, 259P26.

1177-68½-New. Failure of the city commissioner of public works to remove a decayed shade tree from the street will not give the owner of the house, on which it fell, a right to recover damages from the city under eminent domain statute, in the absence of public hearing. 265Mass65, 164NE83 (2dcase).

1177-69 [c] **In California.**-207Cal 430, 278P1028.

1178-81½-New. The owner of land condemned is not entitled to an injunction pending appeal from judgment in a condemnation proceeding, in view of the remedy at law for recovery of damages. TexCivA 10SW(2d)266.

1178-88 258Mass111, 154NE552; 258 Mass115, 154NE554.

1179-22½-New. It is no defense to an action against a contractor for trespass, based on entry before compensation paid, that condemnation proceedings are pending. 225Ky249, 8SW(2d)431.

1179-23½-New. The mere fact that a complaint has been filed for the condemnation of land for a highway is not a defense to an action to enjoin a county court from laying out and opening a

county road across plaintiff's property. 123 Or103, 261P76.

1179-23½-New. When the land was condemned and an award of damages made to the landowner, he may, if dissatisfied with the award, take an appeal within the prescribed time, and, where he fails to avail himself of this remedy, he is not entitled to a remedy by injunction. 127Kan754, 275P379.

1179-26 [a] (7) Owner's payment of improvement and pavement assessments will not defeat his action for damages suffered from change of street grade. TexCivA 20SW(2d)154.

1179-29 97CalA22, 274P993. [a] **Acts not constituting consent.**-TexCivA 26 SW(2d)706.

1180-30 215Ala533, 112S131.

1180-35 215Ala533, 112S131; Ala 130 S87.

1180-35½-New. A property owner is not prevented from seeking equitable relief on the ground that the condemnation proceedings are void, by having filed a petition for assessment of damages upon the theory that her land had been taken, since the validity of the taking is not thereby admitted. Mass 165NE410.

1180-35¼-New. Owner inviting improvement cannot claim damages as compensation. Ala 130S87.

1180-35¼-New. Consent withdrawn before outlays have been made does not deprive property owner of right to compensation for consequential damage. Ala 130S87.

1180-35½-New. , but it is otherwise as to consent withdrawn after outlays have been made. Ala 130S87. [a] **Owner's demand for making of improvement need not be leading or controlling inducement** in order to deprive him of right to compensation. Ala 130S87.

1180-36 297Pa140, 146A557.

1180-38½-New. A city, damaging property in construction of an improvement and failing to have damages ascertained, cannot assert that a property owner is estopped to claim damages by failure to present the question in special assessment proceedings. 335 Ill 368, 167NE 40, 64ALR760.

1180-38¼-New. Waiver or estoppel to claim compensation for consequential damage resulting from improvement inures to benefit of city's agents constructing it. Ala 130S87.

1180-39 160La105, 106S710.

1182-50½-New. Acceptance of payment for appropriation does not release landowner's claim for damages incurred prior to appropriation. 138Misc1, 244NYS 553.

1182-63 176Ark558, 3SW(2d)967; Mass 168NE78; 196NC711, 146SE808 (1stcase); 88PaSuper439. See also 181 Ark564, 26SW(2d)887. But see Cal 292 P124. [a] (3) Statute requiring owner of property assessed for street improvement to sue to correct assessment within twenty days is not bar to cross petition for damages for change of grade. TexCivA 290SW872. [b] (2) Filing of claim within statutory time. Ark 31 SW(2d)297. [d] **New petition after failure of former proceeding.**-Mass 167 NE652.

1183-64 68Utah309, 249P1036; 143 Wash506, 255P654.

1183-65 LaA 124S535 (inapplicable to action by heirs regarding ownership of property in possession of railway).

1183-66 But see 160Tenn477, 26SW(2d) 141. [b] **In Pennsylvania.**-88PaSuper 439.

1184-67 256Mass41, 152NE313; 219 MoA271, 275SW965 (as against contingent remainderman statute held not to begin running until vesting of estate on death of life tenant); 68Utah309, 249 P1036. [a] **Change of grade.**-287Pa370, 135A127.

1184-68 166La1059, 118S134. But see 248Mich437, 227NW739.

1185-73 104Conn452, 133A570; 159 Tenn491, 19SW(2d)236. [d] **Life tenant** may sue as owner. 104Conn452, 133A 570 (may not be compensated as owner in fee).

1185-79 215Ala533, 112S131; 159Tenn 491, 19SW(2d)236 (unless right specially assigned).

1186-94 [a] **Contingent remainderman,** prior to vesting of estate, cannot maintain action for taking of land. 219MoA 271, 275SW965.

1186-95 8PaDist&Co 739.

1187-3½-New. A devise to the president and fellows of a college in trust for a public park, being a gift in trust for a public use, the state, through its attorney-general, is the proper party to maintain and defend the public's rights therein, in a suit to enjoin condemnation of part thereof by an electric power company. 101Vt325, 143A384.

1187-9½-New. In a suit by a property owner for injunction preventing a county from constructing a bridge and approaches, a borough within whose limits part of the bridge is being constructed should be permitted to intervene to protect its highways from unlawful encroachment. 297Pa140, 146A557.

1187-11 104Conn452, 133A570.

1187-16 104Conn452, 133A570, 572 [citCJ]. [a] (2) 104Conn452, 133A570.

1188-17 104Conn452, 133A570.

1188-28 38F(2d)74 (railroad company and municipal corporation joining in construction of viaduct to eliminate grade crossing); 142Wash533, 253P 787. [a] **In suit against county** not party to contract between plaintiff and highway department, plaintiff may not recover. 38GaA419, 144SE55. [b] **Successors of fish commission** which wrongfully retained possession after expiration of lease till commencement of condemnation proceeding, after reversal of prior proceeding because of withdrawal of property from appropriation by statute, are not liable for rental value during such period. 129 Or302, 276P691. [c] **Where county court and county officers acted as agents of state in proceedings for establishment of road** action for damages will not lie against county. Mo 28SW(2d)656. [d] **Municipality grading street as independent contractor** is liable for damage to abutting property notwithstanding street became state-aid road. GaA 155SE214.

1188-29 GaA 155SE384.

1188-30 225Ky249, 8SW(2d)431; 118 Nebr522, 225NW679. See also 178Minn 144, 226NW398. [b] **Municipality which approves and consents to plans** of state highway commissioner changing grade renders itself liable, to abutting owner for damages. 178Minn430, 227NW357 (2dcase).

1188-31 But see 228Ky608, 15SW(2d) 521.

1189-32½-New. **Members of fiscal court not liable** for land taken without their consent. 219Ky488, 293SW979.

1189-32¼-New. A county, unless statute otherwise provides, is not liable for consequential damages for change of grade of a highway, and the commonwealth is not liable for damages occasioned by appropriation of private property, in the absence of legislation. 294 Pa451, 144A407(2dcase).

1189-35 149Miss383, 115S334.

1189-36 233Ky215, 25SW(2d)377.

1189-37½-New. **Interpleader.** A county can interplead in an action against a contractor for taking and injuring property before the termination of condemnation proceedings. 229Ky229, 16 SW(2d)1060.

1189-37¼-New. [§ 546a] M½. **Jurisdiction.** In a proceeding to recover damages for a leasehold taken by a state bridge and tunnel commission, the court of claims has no jurisdiction to determine any rights or liabilities existing between the lessor and the lessee, but only the value of a leasehold interest above the amount of rent reserved therein. 133Misc594, 232NYS666.

1189-37¼-New. Where one court acquires jurisdiction of condemnation proceedings, another court cannot take jurisdiction. 118Tex469, 14SW(2d)266.

1189-39 [a] **Matters constituting laches.**-160La105, 106S710.

1189-46 [b] (3) Where pleading and evidence show condemnation of land and award to owner. 168Ga569, 148SE337.

1190-57½-New. Railroad is not entitled to damages for wrongful suing out of injunction where it was illegally in possession of complainant's land. 153Tenn 283, 282SW382.

1190-65 [a] 37GaA418, 140SE763.

1191-70 [c] **Landowner is not entitled to damages** or compensation for land not described in his claim. 119Kan598, 240P591.

1191-73 36GaA554, 137SE646.

1191-79½-New. To state a cause of action for laying out and opening a road through plaintiff's land, where defendants were acting as road commissioners, the complaint should allege they acted maliciously or corruptly. 196NC711, 146SE808(1stcase).

1191-82 [a] **Complaint held sufficient** to state cause of action against individual defendants. 243NY15, 152NE451. [b] **Complaint held insufficient** to state cause of action against state park commission. 243NY15, 152NE451.

1191-85 [a] Ala 129S50; 181Ark564. 26SW(2d)887; 169Ga216, 150SE85(1st case); 36GaA554, 137SE646; 37GaA290, 140SE45; 37GaA418, 140SE763; 38GaA 419, 144SE55; 234Ky618, 28SW(2d) 966; 234Ky618, 28SW(2d)966; MoA 293SW503; 217AppDiv347, 217NYS50; 191NC147, 131SE277 (to state cause of action for trespass in taking top soil by road board); NC 153SE632; 129 Okl 28, 263P448; 155Tenn448, 295SW 60; TexCivA 286SW590; TexCivA 299 SW277; TexCivA 28SW(2d)230. [b] Ala 127S832; 72CalA68, 237P59; 72 CalA68, 237P59; 191NC147, 131SE277 (to hold members of road board individually liable for trespass in taking top soil). [c] **Complaint held insufficient.**-267US423, 45SCt240, 69L ed694 (action under Tucker Act to recover value of improvements on leased premises). [d] **Negligence** need not be alleged in suit to recover damages by reason of lowering grade of street where suit is for taking of property. 223Ky 377, 3SW(2d)768.

1191-86 133Misc388, 232NYS235.

1192-89 36GaA554, 137SE646 (allegation of damage held sufficient); 37GaA 418, 140SE763; TexCivA 286SW590. [b] **Allegations held sufficient.**-41GaA 212, 152SE303.

1192-89½-New. for a public use or to promote the ends of a public use, 72 CalA68, 237P59.

1192-93½-New. An allegation that plaintiff paid the assessments for benefits to his property on account of the street improvement does not show his consent to a lowering of the grade, where plaintiff further alleges that he was unaware that such change was contemplated. TexCivA 20SW(2d)154.

1192-94 [a] **Particulars as to cause of damage** need not be alleged. 181Ark 564, 26SW(2d)887.

1192-1 38GaA419, 144SE55. See also 36GaA554, 137SE646.

1192-2½-New. Pleading which alleges failure to notify owner of condemnation proceeding does not show regular condemnation barring recovery for taking of land. TexCivA 272SW575.

1193-14 [a] **Petitions held sufficient.**-168Ga569, 148SE337.

1193-17 [a] **Allegation that county court had made order** for condemnation of land for public highway, but had not paid or offered to pay for land condemned, has been held insufficient to give court equity jurisdiction to prevent the taking, on ground that owner had no adequate remedy at law. 178 Ark482, 10SW(2d)908.

1193-18 See also 132SC380, 129SE207; 128Kan637, 279P15 (petition insufficient to state cause of action for enjoining entry on land condemned for relocation of railroad).

1193-19 . [b] **Facts alleged** held to entitle plaintiffs to temporary possession. TexCivA 300SW220.

1193-22½-New. Landowners, to maintain suit to enjoin construction of highway across lands, must allege and prove that there was no certain way for them to be paid. 175Ark1051, 1SW(2d)561.

1193-28½-New. **In action to establish title** to lands appropriated, alleging that no effort to agree with plaintiff for acquisition thereof was made by commission, states good cause of action. 215

AppDiv816, 213NYS501 (L. [1924] c 112 §§ 16, 18).

1194-35 [a] 220Ky132, 294SW1076.

1195-69½-New. In an action to enjoin a county court from laying out a highway over plaintiff's property, where the complaint states facts indicating that defendants contemplate a continuing trespass, defendant's answer must show a right to enter and use the property for a highway. 123 Or103, 261P76.

1195-69⅓-New. In such case defendants must plead the adoption of a resolution and notice thereof. 123 Or103, 261P76.

1195-69¼-New. In such case, an allegation that a complaint in an action to condemn which states that certain facts exist is insufficient without allegation of the actual existence of such facts. 123 Or103, 261P76.

1196-83 129 Okl 28, 263P448; 197Wis 25, 221NW381.

1196-89½-New. An amendment of the date of taking has been held proper. 5 PaDist&Co 641.

1196-91 [c] **Evidence admissible under pleadings.**-TexCivA 28SW(2d)230.

1196-92 TexCivA 13SW(2d)929.

1197-96 123 Or103, 261P76.

1197-9½-New. Proof of lawful entry does not constitute a variance with a declaration of unlawful trespass against a city where there is a further showing consistent with the declaration that after entry defendant proceeded negligently and destroyed plaintiff's property. 155Tenn448, 295SW60.

1197-9⅓-New. Evidence as to defendants' destruction of trees and fences and other trespasses upon plaintiff's land is admissible, where the bill alleges that the order for taking was invalid because not recorded as required by law, entry of defendants upon plaintiff's land, and destruction of trees and other injury thereto, and where there is a prayer for damages, defendants went to trial without seeking continuance for surprise. Mass 165NE410.

1197-11 228Ky608, 15SW(2d)521.

1198-20 Del 132A740.

1198-24⅓-New. Damages awarded against a railroad company in proceedings to condemn a right of way will be presumed to cover all consequential damages in the absence of pleading and proof to the contrary. 104WVa335, 140SE51 (damages from flooding lands).

1198-28 175Ark1051, 1SW(2d)581. [a] **Lack of good faith of condemnor.**-Property owner seeking to enjoin taking has burden of showing that condemnor does not, in good faith, deem it necessary to take his land. 129Kan176, 282P183.

1198-30 Iowa 232NW150. [a] (5) 215Ky295, 284SW1074. [c] **Landowner must show title in himself** and cannot rely on invalidity of title claimed by condemnor. Iowa 232NW150.

1198-33 224Ky326, 6SW(2d)277; 198 Wis112, 223NW571(1stcase).

1199-35 37GaA418, 140SE763.

1199-39 Ala 127S832.

1200-46 142SC284, 140SE560, 57ALR 634.

1200-49 85Colo 202, 274P827; 25 OhA 53, 155NE233.

1201-59 179Ark733, 17SW(2d)872.

1202-68 [a] **Admission within discretion** of trial court. 293Pa326, 142A 867.

1202-72 Ala 129S850; 36GaA492, 137SE 107 (depreciation); Ida 290P393; 220 Ky778, 295SW1000; 265Mass270, 163 NE888; TexCivA 26SW(2d)366. [b] (3) Evidence of value of land in owner's business. 220Ky132, 294SW1076. [c] **Plaintiff as owner competent witness as to value.**-93PaSuper555. [d] **Evidence held inadmissible.**-265Mass270, 163NE888.

1203-73 214Ky845, 284SW98.

1203-78 218Ala489, 119S13; 265Mass 270, 163NE888; 104WVa129, 139SE 644. [a] (13) Other instances. 93Pa Super555. [b] (7) Evidence of retail store conditions for twenty-five years over city. 218Ala489, 119S13. (8) Failure of lessee to pay rent after partial taking. Mass 169NE74.

1204-79 178Ark417, 10SW(2d)867.

1205-90½-New. Evidence that boring of holes caused the removal of substrata beneath plaintiff's property held probative of extent of taking and of damages inflicted on residue of property. 33 OhA 269, 169NE307.

1205-8 172Ark942, 290SW948; Iowa 230NW561 (evidence sufficient to show condemnor was not "rounding corner" contrary to statute). [a] TexCivA 299 SW277. [b] 129Kan176, 282P183; 133 Misc594, 232NYS666; 118 Or412, 247 P138; 153Tenn283, 282SW382 (evidence held not to show land taken by injunction defendant was public street). [d] **Evidence held sufficient to show private purpose.**-La 130S337. [e] **Evidence independent of view by jury** must be sufficient to support verdict. Ida 290 P393. [f] **Lot subdivided from tract is prima facie separate tract** for purpose of assessing damages from public work without reference to remaining lots. GaA 155SE214.

1205-9 179Ark733, 17SW(2d)872; Ark 31SW(2d)297 (acquisition of land before condemnation); 215Ky295, 284SW 1074. [d] (1) 162Ga394, 133SE865. (4) To support charges of abuse of discretion and bad faith in issuing temporary restraining order against condemning land. 143SC36, 141SE108.

1206-12 [a] 129 Okl 28, 263P448.

1206-14 [a] **Evidence insufficient** to show that railroad acquired possession of plaintiff's land by fraud so as to be precluded from denying plaintiff's right to injunctive relief and remanding him to action for compensation under code. 153Tenn283, 282SW382.

1206-15 [b] (2) To show prior grant. 219MoA271, 275SW965.

1206-21 See also 167La83, 118S700, 68 ALR336.

1207-22 215Ky295, 284SW1074. See also 215Ala533, 112S121; 178Ark417, 10 SW(2d)867.

1207-23 215Ky295, 284SW1074; 104 WVa129, 139SE644.

1207-24 [b] **Value of use.**-129 Or302, 276P691.

1207-29 167La368, 119S259.

1207-30 229Ky229, 16SW(2d)1060. [a] **Damages for construction of open storm sewer,** especially one of great size, are recoverable on basis of permanent condition not abatable. Ala 130S83. [b] **Changes in grade of street** damaging property are compensable under some statutes as for permanent injury. Ala 130S83.

1207-31 167La368, 119S259.

1207-31½-New. Allowance to petitioner for assessment of damages for land taken, of damages for property taken, and damages for land not taken because of impaired value, does not permit recovery of double damages. 265 Mass270, 163NE888.

1207-37 190NC235, 129SE626.

1208-38 129 Okl 28, 263P448.

1209-45 37GaA418, 140SE763. [a] **Property owner must minimize damages,** if he can do so reasonably. 220 Ky132, 294SW1076.

1209-47½-New. An award for cost of two fences and also for depreciation from cutting tract in two was not double. TexCivA 272SW575.

1209-47⅓-New. Where the evidence failed to show that part of the damage was due to taking, the code provides for assessment of damages "as in cases of offenses, quasi-offenses, and quasi-contracts." 160La281, 107S110.

1209-47¼-New. Assessed value of land is conclusive on the owners as to the actual value. 163La117, 111S619.

1209-47⅕-New. Evidence held to show that owners had been compensated for right of way. 176Ark99, 2SW(2d)1102.

1209-47⅙-New. Where a city prescribed a tapping fee to be paid to an owner of a private water main as compensation for connection, but rescinded such action before the county proceeded to make the connection, the original estimate does not determine the compensation to which the owner is entitled. 37GaA290, 140SE45.

1209-47⅐-New. Nominal damages are not recoverable. 37GaA418, 140SE763.

1209-47⅛-New. In estimating damages to realty by construction of railroad near it, benefits inuring to community in general cannot be considered. Tex CivA 13SW(2d)929.

1209-47⅑-New. The owner is not required to mitigate damages. TexCivA 13SW(2d)929.

1209-47 1/10-New. If, at the time of the destruction of crops, tenants have made no division as croppers, the crop belongs to the original tenant so far as to the right to recover for the damage. 9LaA215, 120S137.

1209-47 1/11-New. A state agency is not liable for damage caused to crops from a contractor's removal of fences in widening a road. 9LaA215, 120S137.

1209-50 180Ark148, 20SW(2d)636 (void order).

1210-59 234Ky645, 29SW(2d)650; 160 La281, 107S110; 146Wash607, 264P 411; 105WVa321, 142SE430 (damages held not inadequate). [a] (3) $54 compensation for fifty-four hundredths of an acre and $800 damages for remaining thirty-four acres of farm land where land in vicinity was selling for only $50 an acre. 321 Ill 187, 151NE553. (4) Award of $2,300 for land taxed at $200. 232Ky24, 22SW(2d)278. (5) Other instances. 34 OhA532, 172NE448. [b] (1) 202Cal 731, 262P737; 223Ky377, 3 SW(2d)768; 170La351, 127S865; 319 Mo 1240, 6SW(2d)565; 217AppDiv347, 217NYS50; TexCivA 1SW(2d)349; 142 Wash533, 253P787; 105WVa201, 141SE 779. (7) Four thousand eight hundred and fifty dollars for establishment of highway across plaintiff's farm. 200 Iowa684, 205NW459. (8) Other instances. 167La368, 119S259. [c] **Awards held not inadequate.**-229Ky229, 16SW(2d)1060.

1210-61 [a] **Election between recovery for permanent injury or for temporary injury** will not be required where petition is one for permanent taking. 223 Ky377, 3SW(2d)768.

1210-67 [b] **View cannot be considered as evidence.**-Ida 290P393.

1210-68½-New. Where the action is for damages to property not involving negligence, the proceedings must be before a jury of view; 284Pa248, 131A 283.

1210-68⅓-New. but not where the action is based on negligence, in which case trespass is the proper action. 284 Pa248, 131A283.

1210-70 224Ky326, 6SW(2d)277. [a] **Questions properly withheld from jury.**-233Ky741, 26SW(2d)1049 (whether city converted bridge of turnpike company).

1210-74 142SC284, 140SE560, 57ALR 634.

1210-76 179Ark1116, 20SW(2d)179.

1211-79½-New. whether notice of opening a road was given, TexCivA 290SW 573.

1211-80 143Miss201, 108S491 (in action for injuries because of ditch in front of plaintiff's property, absence of evidence showing drain was not necessary or of negligence in maintenance authorizes peremptory instructions for defendant).

1211-84½-New. Whether the value of plaintiff's property was enhanced or diminished by the construction of a viaduct, 210Ky437, 276SW111.

1211-86 224Ky326, 6SW(2d)277 (taken); 287Pa370, 135A127.

1211-87 178Ark417, 10SW(2d)867.

1211-87½-New. whether the grade of a street conformed to the city records, 287Pa370, 135A127.

1211-87⅓-New. what constitutes entire tract for purpose of assessing damages caused from acts affecting part of land, GaA 155SE214.

1211-88 223Ky377, 38W(2d)768; 133 Misc388, 232NYS235; 287Pa370, 135A 127.

1211-94 269US411, 46SCt144, 70L ed 339. [a] (7) Instructions on theory that proceeding was one instituted for condemnation of land held proper. 233Ky 215, 25SW(2d)377.

1212-95 223Ky377, 3SW(2d)768.

1212-96 335 Ill 299, 167NE106. [b] **Instructions held proper.**-Ala 130S87.

1212-98 335 Ill 299, 167NE106.

1212-2 220Ky132, 294SW1076.

1213-7 269US411, 46SCt144, 70L ed

339; 214Ky845, 284SW98. [a] (1) 145 Wash138, 259P26. [b] (1) 41GaA212. 152SE303. (9) In absence of demand for permanent damages, error to instruct measure of damage was value of farm with sewer as it is, and value with sewer extended. 190NC235, 129 SE626.

1214-8 36GaA492, 137SE107. See also 85Colo 202, 274P827.

1219-9 210Ky437, 276SW111.

1219-9½-New. It is province of appellate court in particular case to determine whether use for which land is sought to be taken is public or private, regardless of charter of corporation. 143Va405. 130SE704, 44ALR727.

1214-9⅓-New. In an action for damages to plaintiff's property, caused by relocation of railroad tracks, a refusal to instruct that, unless plaintiff suffered some peculiar or special damage by reason of smoke, noise, or cinders than that suffered by other property owners in like circumstances, he could not recover, did not make the instruction stating the issues erroneous. 178Ark 417, 10SW(2d)867.

1214-10 233Ky741, 26SW(2d)1049.

1214-12 See also 234Ky645, 29SW(2d) 650.

1214-22 145Wash351, 259P1089 (finding as to noise held too broad).

1220-32 118Kan363, 235P95.

1215-40 [a] **When warranted by prayer** decree should provide for execution or injunction. 217Ala524, 116S689.

1215-42 207 Iowa191, 217NW75.

1217-65½-New. Where land is wrongfully taken for public use, the owner resorting to common-law action of trespass ratifies the wrongful taking by suing for and recovering judgment for the value of the land taken. 97CalA120, 275P465.

1217-65⅓-New. In action against railway to be recognized as owner of property, judgment relegating plaintiffs to action for value of property held proper. LaA 124S535.

1218-99 217AppDiv347, 217NYS50.

1218-3 126Me205, 137A67.

1218-5 See also 167La368, 119S259.

1219-9 319Mo 1240, 6SW(2d)565.

1219-10 204 Iowa1046, 216NW952; LaA 128S694.

1220-20½-New. Judgment awarding execution to life tenant for himself and as trustee for remainderman, proper and erroneously reversed by court of appeals. 308Mo 123, 272SW66.

1221-37 218AppDiv356, 218NYS173. [a] See also 218AppDiv356, 218NYS173.

1221-41 See NJSup 142A905.

1221-43 332 Ill 571, 164NE10.

1221-46 [a] **Commissioner in condemnation proceedings has no power to limit fee** where fee has been condemned. 224Ky143, 5SW(2d)903.

1221-47 214Ala199, 107S80; 143Va697, 129SE731. [c] **Statute for condemnation of easement** cannot be construed as excluding statute providing for condemnation of fee. 214Ala199, 107S80.

1221-49 NJSup 152A79; 218AppDiv 356, 218NYS173; 39Wyo 355, 271P212, 214[quotCJ].

1222-58 Ala 130S541.

1222-60 218AppDiv356, 218NYS173.

1222-60½-New. "Title," without qualifying terms, means the whole title. 214 Ala199, 107S80.

1222-62 265Mass70, 163NE745; 218 AppDiv356, 218NYS173; 254NY366, 173NE224; 159Tenn600, 21SW(2d)385.

1223-68½-New. In determining the extent of the title taken the record of the probate court in the original proceedings must be consulted. 214Ala199, 107 S80.

1223-68⅓-New. Where the width was not specified, it was held limited to land occupied by a railroad right of way. IndA 157NE287.

1223-68¼-New. In condemnation proceedings initiated by an alleged landowner, his title is an issue to be proved. 193Wis395, 214NW388.

1223-68½-New. Where right of way easement is obtained, owner retains title in fee with right to make uses which do not interfere with easement. Ala 130S 541.

1223-69 214Ala199, 107S80; Ala 130S 541; 179Ark1029, 18SW(2d)1028, 65 ALR1446 (right of way for electric power transmission line); 218AppDiv356, 218NYS173; 126Misc879, 216NYS2; 190 NC244, 129SE623 (right of eminent domain strictly limited to accomplishment of purpose of grant); 141 Okl 172, 284 P3.

1223-71 214Ala199, 107S80; 179Ark 316, 15SW(2d)985; 308Mo 123, 272SW 66.

1224-73 Mass 172NE593; 254NY366, 173NE224; 39Wyo 355, 271P212. [a] **In Wyoming.**-39Wyo 355, 271P212.

1224-74 214Ala199, 107S80. [a] (1) 214Ala199, 107S80. (2) 214Ala199, 107 S80. [b] **Where statute gives company unrestricted power to purchase** land by condemnation, it takes absolute title, as if from voluntary vendor. 143Va 697, 129SE731.

1224-75 214Ala199, 107S80.

1224-77 38F(2d)109; 126Misc879, 216 NYS2.

1225-78 38F(2d)109. [a] **Where federal government condemning lands in Pennsylvania takes conveyance in usual form,** conveyance passes fee title. 38 F(2d)109.

1225-81½-New. Easement to pond water for operation of mill did not carry right to fish or bathe. 190NC244, 129 SE623.

1225-85 TexCivA 30SW(2d)407.

1225-86 118Tex469, 14SW(2d)266.

1225-91 265Mass70, 163NE745; 218 AppDiv356, 218NYS173; 191NC84, 131 SE413.

1226-8 150Va166, 142SE383.

1226-16 126Misc879, 216NYS2.

1226-17 TexCivA 300SW250. Contra 224Ky143, 5SW(2d)903.

1227-34½-New. By statute land can be condemned only for the use stated in the application. 214Ala199, 107S80.

1227-34⅓-New. The right of an elevated railroad to impair or destroy easements of light, air, and access as incident to its franchise is acquired for railroad purposes only. 126Misc879, 216NYS2.

1227-36 283Pa422, 129A637.

1227-37 41F(2d)505.

1227-38 Nebr 225NW679; Pa 151A883.

1228-39 283Pa422, 129A637 (taken nominally as street, did not preclude city from using land for park purposes).

1228-42 [a] (2) State can lease rights acquired by condemnation and not needed for main purpose. 284Pa225, 130A 491.

1228-45 [a] **Generating company's easement** includes, without mention by court, use for carrying current for use of other public utility. 41F(2d)505.

1228-47 [a] **Servient owner** cannot enjoin leasing to country club of land condemned by railroad for reservoir where club agrees to police reservoir and landowner is not damaged. 130Kan685, 288 P560.

1228-52½-New. Adjoining land owners to condemned land to have preference to the use of surplus water have no right to the land itself. 143Va697, 129SE731.

1228-54 179Ark1029, 18SW(2d)1028, 65ALR1446; 126Kan106, 107, 266P932 [quotCJ] (right to rental value).

1229-57 283Pa422, 129A637. [a] **Condemnor has right to lease** part of condemned property. 284Pa225, 130A491.

1229-59 TexCommnA 238W(2d)320 (right of power company paying permanent damages).

1229-81 [a] **Not confined to service for** which railroad primarily constructed. 224Ky383, 6SW(2d)480.

1230-82 117Nebr619, 222NW40; 117 Nebr619, 225NW49, 61ALR724(2dcase). See also 265Mass70, 163NE745.

1230-83 CalA 284P1051.

1230-86 194NC488, 140SE213.

1230-87 187Wis567, 204NW499, 41ALR 1192 (railroad acquires right to lateral support).

1230-97½-New. A railroad acquires by condemnation an easement over that portion of its right of way not actually occupied by its roadbed, tracks, drains, and side ditches. 191NC84, 131SE413.

1230-98 [a] **Right to fence.**-130Kan685, 288P560.

1231-12½-New. Where lot condemned for railroad purposes and city abandons adjoining street, lot owner's right in such street is subject to railroad's easement. CalA 284P1051.

1231-24 254NY366, 173NE224.

1231-26 254NY366, 173NE224.

1232-36½-New. Use of part of land taken for highway for an embankment to support the traveled way is a use for a highway purpose. Mass 165NE34.

1233-70 246NY1, 157NE911 (resolution of sinking fund commissioners).

1233-74½-New. Under some statutes a district condemning railroad property does not obtain possession until the railroad has an opportunity to relocate and construct a new line. 249NY445, 164NE54 [motion to amend remittitur granted 166NE324(1stcase)].

1233-74⅓-New. Title finally acquired by plaintiff in a condemnation suit as against intervening rights of persons having actual or constructive notice of the suit relates back to the commencement of the suit. 99CalA240, 278P476.

1233-82½-New. A dock commission has been held to condemn land for term coextensive with existence of state. 214 Ala199, 107S80.

1233-85 [a] **Statute** permitting sale of land no longer required for highways does not apply to rights of way acquired by condemnation. NJSup 152A79.

1234-86 224Ky143, 5SW(2d)903.

1234-90 265Mass70, 163NE745.

1234-93½-New. Under the doctrine of eminent domain, title to land held by private owners may be acquired on behalf of the state and then transferred by legislative and congressional assent to the United States for inclusion in a national park, as provided by Pub. L. (1927) c. 48. 196NC284, 145SE563.

1234-1½-New. Estate or right remaining in owner. Where the state builds a canal, which requires the construction of a dam, the rights of upland owners in the absence of a written agreement is measured by the amount of water passing through the bulkhead openings of such dam. 125Misc186, 211NYS149.

1234-2 But see Mass 172NE593.

1234-4½-New. to pay compensation, 198 Ind645, 154NE659.

1234-9 20F(2d)263.

1234-12 320 Ill 432, 151NE284.

1234-16 TexCivA 283SW571.

1234-17 TexCivA 283SW571.

1235-19 32F(2d)27; TexCivA 283SW 571. [b] **Testimony of railroad officials held not conclusive** of question whether railway intended to abandon land, condemned for right of way purpose. Tex CivA 283SW571. [c] **Platting portion of land condemned** does not constitute evidence of intention of abandonment. 32 F(2d)27.

1235-21 CalA 284P1051. [a] CalA 284 P1051.

1235-23 CalA 284P1051; TexCivA 283 SW571. [a] TexCivA 283SW571.

1235-23½-New. Where the evidence and all inferences is insufficient to show abandonment, a directed verdict is proper. 32F(2d)27.

1235-26 TexCivA 283SW571, 572 [cit CJ].

1235-29 TexCivA 283SW571.

1236-41½-New. A railroad company does not abandon part of its right of way by leasing it for the erection of a store building where the right to cancel the lease on thirty days' notice is reserved. 217Ky698, 290SW507.

1236-41⅓-New. In such case, where the land was condemned for railroad purposes only, the former owner is entitled to the reasonable rental value of the part so leased. 217Ky698, 290SW507.

1236-42 143Va697, 129SE731, 736 [quotCJ]. [b] **Where full consideration was paid for land** condemned for school purposes, right of reverter does not arise except from clearest and most explicit language. 224Ky143, 5SW(2d) 903 (clause in deed of commissioner "for school purposes" held insufficient).

1236-44 38F(2d)109; 218AppDiv356, 218NYS173; 141 Okl 172, 284P3; 143 Va697, 129SE731, 736 [quotCJ]. [a] **Change of location.**-150Va166, 142SE 383 (change not shown). [b] **Remedies of owner.**-38F(2d)109.

1236-46 320 Ill 432, 151NE284; 87

IndA74, 160NE50; 218AppDiv356, 218NYS173; 143Va697, 129SE731, 736 [quotCJ].

EMPLOY

1240–52 200Cal579, 253P926.
1240–53 TexCommnA 271SW890.
1240–64 216Ala303, 113S74, 75 [citCJ]; 200Cal579, 253P926.
1240–65 TexCommnA 271SW890.

EMPLOYEE

1241–72 188Wis218, 205NW806, 807 [citCJ], 44ALR1213.
1241–74 [a] (1) CalA 287P368.
1241–75 200Cal579, 253P926; 69CalA310, 231P748; 9PaDist&Co 57, 58 [citCJ].
1241–77 69CalA310, 231P748; 174Minn594, 219NW924. [c] (1) 69CalA310, 231P748.
1241–78 254Mass280, 150NE157.
1242–84 155Tenn519, 296SW12, 13 [quotCJ], 54ALR564; 98Vt449, 129A311 (under Child Labor Law, illegal employment did not make child employee).
1242–91 [a] 188Wis218, 205NW806, 44ALR1213.
1242–92 [a] 188Wis218, 205NW806, 44ALR1213.
1243–26 [a] (1) 155Md51, 141A434, 438[citCJ], 58ALR767.
1244–30 188Wis218, 205NW806, 44ALR1213. [a] 155Tenn519, 296SW12, 13 [quotCJ], 54ALR564.
1244–31 [b] (3) Clerk of municipal court is "public officer" and not "employee" within retirement statute. 254Mass404, 150NE2.

EMPLOYMENT

1245–60 [b] **Employment of minors.**–220AppDiv743, 221NYS637.
1245–64 117Nebr148, 219NW899.
1246–78 276US154, 48SCt221, 72L ed507, 66ALR1402.
1246–78½–New. Term includes reasonable margin of space and time necessary to pass to and from place where work is to be done. 276US154, 48SCt221, 72L ed507, 66ALR1402.

ENCROACH

1248–22 82NH278, 132A685.

ENCROACHMENT

1249–26½–New. an invasion; 102NJL368, 131A888.
1249–27 102NJL368, 131A888. [a] (10) Something that illegally narrows street which municipal authorities may remove. 102NJL368, 131A888.

ENCUMBRANCE or INCUMBRANCE

1250–61 102NJL368, 131A888.
1250–62 100NJEq147, 135A88 [quotCJ].
1251–63 21AlaA222, 107S909; 100NJEq147, 135A88 [quotCJ].
1251–64 31Ariz8, 250P248.
1251–66 214Ala84, 107S914; 100NJEq147, 135A88 [quotCJ]; 128Misc596, 220NYS221; 33OhA452, 169NE836; 299Pa325, 149A479.
1251–67 [d] 213Ala80, 104S415. [b] **Assessment for betterment of lands** is not tax, but it is encumbrance. 316Ill345, 147NE248.
1251–69 31Ariz8, 250P248; 100NJEq470, 135A550.
1251–70 31Ariz8, 250P248; 84Mont276, 275P278; 100NJEq470, 135A550. "An encumbrance," etc. 169Ark201, 275SW709.
1252–74 102NJL368, 131A888. [a] (3) 169Ark201, 275SW709.
1252–78 102NJL368, 131A888.
1252–80½–New. , a paramount claim or interest resting as a charge upon land. 102NJL368, 131A888.
1252–81 102NJL368, 131A888.

ENDOWMENT

1254–31 275US129, 48SCt94, 72L ed196.

ENGAGE

1257–63 42Ida169, 244P149.
1257–64 42Ida169, 244P149.
1257–65 42Ida169, 244P149.
1257–68 42Ida169, 244P149.

ENGINEER

1261–47½–New. An officer not within the class of persons whose duty is ordinarily that of amanuensis, bookkeeper, scrivener, secretary, or accountant. 283Pa345, 129A92.

ENGINEERING WORK

1261–48 See also 4LaA498, 500 [citCJ].

ENJOY

1263–95 104WVa507, 140SE487.
1263–96 104WVa507, 140SE487.

ENJOYMENT

1264–99 MoA 284SW197, 198 [quotCJ].
1264–1 MoA 284SW197, 198 [quotCJ].

ENROLL

1265–16 154Tenn613, 290SW14 [quotCJ].

ENTER

1266–38 [a] (1) See also 115Nebr385, 213NW342. (3) The word is not synonymous with record in all cases, and may mean to file or to make a notation. 52ND53, 203NW679.

ENTERPRISE

1267–63 120Kan77, 242P131.
1267–69½–New. Joint enterprise is one participated in by associates acting together. 120Kan77, 242P131.

ENTICE

1269–12 CalA 285P412.

ENTITLE

1272–86 223AppDiv319, 228NYS680, 682 [citCJ].
1272–78 Mo 30SW(2d)149.

ENTRY

1275–51 22F(2d)760 (entry of minutes of meeting).
1275–52 16F(2d)206.
1275–53 16F(2d)206.

ENTRY, WRIT OF

1278–4 Mass 166NE703.
1278–18 82NH289, 133A22.
1279–33 NH 151A81(2dcase).
1280–37 128Me335, 147A417 (statute enables one to accomplish in one action what had previously required two).
1280–44 [a] **Writ of entry deals only with state of title to property as of date of writ.**–Mass 171NE281.
1285–33 82NH289, 133A22.
1285–34 128Me96, 145A896, 64ALR790; 82NH289, 133A22.
1285–37 82NH289, 133A22.
1286–43½–New. [§ 30a] E. **Breach of Contract To Support.** Where a father entered into a contract by which he conveyed a tenement house to his son and the son's wife in consideration of their caring for him during the remainder of his life, and the son mortgaged the premises to a loan association, and the father asserted breach of the agreement, it has been held that an action was properly brought at law by writ of entry. 83NH374, 142A702.
1286–47 See also Me 151A559.
1286–47½–New. That mortgagee entered to foreclose mortgage after date of writ is no defense. Mass 171NE281 (statute allowing equitable defenses at law held applicable to writ of entry).
1287–65½–New. Where a writ of entry was brought by a father, who had conveyed premises to his son in consideration of the latter's promise to support the father for life, and the premises had been mortgaged to a loan association, which invoked the aid of equity to protect against forfeiture, it has been held that, since it was clearly entitled to have its rights determined by application of equitable principles, equitable defense could be set up under general issue in answer to the writ of entry. 83NH374, 142A702.
1294–9 Me 152A56.
1294–13½–New. Claimant, under an earlier deed, held not to have sustained the burden of proving that deed included premises in dispute. 128Me382, 147A816.
1294–13½–New. Paper title, which does not reach back to state, shows prima facie title by deed from some one who had possession. 128Me382, 147A816.
1295–42 82NH289, 133A22.
1296–54½–New. Demandant cannot have judgment for more than two thirds of the land where the widow of defendant judgment debtor has an interest in the estate. 128Me96, 145A896, 64ALR790.

EQUIP

1301–42 29PortoRico 718.
1301–43 29PortoRico 718.

EQUIPMENT

1301–50 29PortoRico 718.
1301–51 29PortoRico 718. See also 12CustA516.
1301–52 29PortoRico 718.
1301–53 29PortoRico 718.
1301–54 29PortoRico 718. [b] 29PortoRico 718. [c] **Held to include physician's automobile** under exemption statute. 29PortoRico 718.

EQUITY

21 C. J.—22–1 98NJEq432, 131A117. [b] **As a noun,** "equity" means equitable claim or right, one which party possessing same has right to enforce, and adversary party no right to thwart by anything less than countervailing right. 98NJEq432, 131A117.
22–3 [a] (5) 77Mont361, 251P137, 49ALR627.
22–4 98NJEq432, 131A117.
22–5 [c] **Chancellor taking his idea of equity from Roman law** as declared by Roman jurists interpreted equity as being synonymous with the divine law of morality and as being therefore compulsory upon human tribunals in the work of adjudicating upon the civil rights of individuals with reference to personal conduct. IndA 147NE635.
22–6 81Mont560, 264P679, 683 [citCJ]; 98NJEq432, 131A117. See also 20F(2d)837.
23–9½–New. Courts of equity are to do equity and to compel a fair dealing, 243NY445, 154NE305.
23–9½–New. and not to aid clever attempts to escape just obligations. 243NY445, 154NE305.
24–39 [i] (6) Practice of state strictly observes demarcation between courts of equity and of law. 99Fla309, 126S151. [l] (2) Practice governed by Chancery Act except in cases referred to in Practice Act. 323Ill594, 154NE701. [x] (3) Constitution establishes well-defined line of demarkation between courts of equity and courts of law. 141Miss474, 106S766.
27–44 272US525, 47SCt189, 71L ed387; 274US208, 47SCt578, 71L ed1002; 17F(2d)710; 37F(2d)513 (suit to enjoin city from taxing liberty bonds); 42F(2d)65.
27–46 US 50SCt270 (unless objection is waived).
27–48 27F(2d)304.
28–50 [b] **Legal counterclaim in suit in equity** cannot be interposed. 36F(2d)485.
28–54 28F(2d)233.
29–58 7F(2d)917; 27F(2d)773; 29F(2d)932 [b] See also 42F(2d)490. [g] **State enactments which relate only to judicial remedies** cannot enlarge or restrict jurisdiction of federal court in equity. 32F(2d)570.
30–60 281US479, 50SCt378, 74L ed980.
31–61 39F(2d)5; 39F(2d)25.
31–62½–New. The federal court has jurisdiction to enjoin a collector of internal revenue from refusing to honor an application for the withdrawal of denatured alcohol. 14F(2d)976.
31–62½–New. As affecting jurisdiction of the federal court, there is a distinction between an application for mandamus requiring an officer to take a certain action and an injunction restraining his refusal on some particular ground. 14F(2d)976.
31–63 [b] **Legal counterclaim cannot be interposed in suit at equity.** 36F(2d)483.

31–64 28F(2d)233.

32–72 [a] **In Mississippi.**–152Miss201, 119S299.

32–73½–New. A court of equity has inherent power over property in custodia legis. 203 Iowa76, 212NW374.

32–76 [c] (2) Statute providing that chancery courts shall continue to have jurisdiction incident to court of equity by existing laws means by statutory and common law of state. 153Tenn451, 284 SW365.

32–77 204 Iowa1254, 215NW261. See also 82NH193, 132A12. [b] **Court does not act, unless complainant has right** cognizable in equity. 98NJEq48, 129A 711.

33–82 92Fla784, 110S350.

33–88 [c] **In Mississippi.**–152Miss201, 119S299.

33–89 [b] (5) Determination of conflicting claims to property in hands of third person is distinct head of equitable jurisdiction under statute, and common law courts have inherent power and duty, where matter is not controlled by statute, to make necessary orders in adjudicating such conflicting claims. 298 Pa463, 148A513.

34–1 91Fla709, 109S677.

34–2 91Fla709, 109S677.

34–3 91Fla709, 109S677 [quotCJ entire section].

34–3½–New. The existence of equitable jurisdiction does not of itself prove the propriety of granting equitable relief. 16F(2d)18.

34–5 [a] But see 102NJEq189, 140A 251.

34–6 337 Ill 122, 168NE886; 240Mich 595, 216NW406.

35–7 90CalA535, 266P329.

35–10½–New. A court of equity, in the exercise of a broad discretion, will see that wrong and oppression are not inflicted under the guise of legal procedure. 155Miss242, 124S344.

35–11 91Fla709, 109S677, 682 [quot CJ]; 132Misc82, 229NYS32; TexCivA 283SW560, 561 [quotCJ].

35–13 TexCivA 283SW560, 561 [quot CJ].

35–15 278US24, 49SCt69, 73L ed161, 62 ALR805; 19F(2d)68; 24F(2d)541; 37 F(2d)545; 69CalA416, 231P355; 164Ga 642, 139SE212, 214; 164Ga878, 139SE 799; 9LaA257, 119S462; 125Me183, 132 A214; 149Md629, 132A158; 154Md660, 141A405; Mass 171NE281; 317Mo1, 293 SW780, 52ALR879; MoA 17SW(2d) 591; 82Mont434, 268P512; 102NJEq 189, 140A251; 82NH193, 132A12; 100 NJEq78, 135A83; 32NM419, 258P817; 243NY28, 152NE454; 6PaDist&Co 53; 8PaDist&Co 314; 44Philippine249; 47 RI 240, 132A610; Va 154SE579; 34Wyo 378, 244P216 [citCJ], 44ALR1255. [a] (2) Application of rule depends on facts and circumstances peculiarly appealing to chancellor. 36F(2d)499. [c] **Equity supplements,** but does not supplant, legal remedies. 99Vt415, 133A245.

36–16 6F(2d)646; 6F(2d)660; 12F(2d) 963; 34F(2d)287; 214Ala400, 108S20; 214Ala449, 108S32; 178Ark906, 12SW (2d)893; 91CalA37, 266P1002; 85Colo 519, 277P773; 87Colo 316, 287P849; Fla 129S334; 160Ga675, 128SE908; 163 Ga70, 135SE406; 164Ga642, 139SE212; 36GaA611, 137SE918; 318 Ill 463, 149 NE521; 329 Ill 189, 160NE351; 339 Ill 184, 171NE169; 245 IllA579; Ind 169 NE332; 204 Iowa1195, 213NW264; 205 Iowa542, 218NW255, 58ALR153; 259 Mass295, 156NE443; Mass 164NE817; 143Miss643, 109S721; 152Miss694, 120S 830; Mo 19SW(2d)746 (rule rigorously applied in attacks on assessment judgments); 220MoA607, 289SW26; 86Mont 83, 282P268; 103NJEq273, 143A329; 100NJEq78, 135A83; 102NJEq115, 139 A887; 102NJEq497, 141A582; 32NM 311, 255P633; 32NM419, 258P817; 191 NC305, 131SE724; OhA 173NE449; 25 OhNPNS118; 125 Okl 174, 256P902; 113 Okl 109, 239P454; 127 Okl 260, 260 P758; Okl 292P54; 37 OklACR281; 39 OklACR267; 85PaSuper99; 157Tenn 343, 8SW(2d)498; TexCommnA 298SW 540; 103WVa110, 136SE783; 103WVa 490, 138SE116; 199Wis466, 226NW303. See also 330 Ill 589, 162NE209. [b] **Burden is on plaintiff** to show he has no plain, speedy, and adequate remedy at law. 5F(2d)793.

39–17 Fla 129S334; 248 IllA99.

39–18 32NM311, 255P633.

40–30 Wash 286P95.

40–31½–New. 11F(2d)984.

40–31⅓–New. Plaintiff is not compelled to establish a right at law where he is equitably entitled to relief. 297Pa33, 146A113.

40–33 149Md148, 131A147; NJCh 152 A184; 5PaDist&Co478.

40–34 149Md148, 131A147; 49RI 240, 132A610. [e] **Creditors' suits against heirs, executors, or administrators of deceased debtor** are within concurrent jurisdiction. 89 IndA689, 167NE617 (2dcase).

40–37 14F(2d)877.

40–38 252Mass111, 147NE562 (where amount due from guardian was determined in probate court, on ward's becoming of age he may be required in action at law to pay over such amount).

40–39 156Miss872, 127S558.

41–41 177Ark1194, 10SW(2d)500; NJCh 151A394; TexCivA 20SW(2d) 843. See also 243 IllA505.

41–44½–New. Jurisdiction of equity, in an action between tenants by entirety for proportion of rents, is concurrent with law. 129Misc155, 220NYS161.

41–44⅓–New. Where courts administer both law and equity, plaintiff alleging usury is not required to elect to sue for penalty and pay balance of note or waive penalty and have payments credited on principal, but may have penalty applied on principal. TexCivA 48SW(2d)293.

41–45 6F(2d)660; 13F(2d)384; 16 F(2d)545; 17F(2d)207; 21F(2d)333; 24F(2d)416; 37F(2d)482.

41–46 6F(2d)660; 13F(2d)384; 13 F(2d)633.

41–47 13F(2d)633.

41–48 13F(2d)384; 16F(2d)545; 44 F(2d)125.

41–49 13F(2d)384.

42–52 6F(2d)660; 13F(2d)510; 21 F(2d)172 (suit to cancel insurance); 23 F(2d)208; 23F(2d)374; 32F(2d)570.

42–53 [a] **Though suit is cognizable at** law and remedy is by mandamus, federal court will take jurisdiction of case properly before it. 41F(2d)823.

42–58 US 50SCt270; 13F(2d)633; 24 F(2d)66 (remedy in state courts immaterial); 32F(2d)819.

42–58½–New. The Judiciary Act, prohibiting suits in equity in United States courts, where a plain, adequate, and complete remedy may be had at law, does not permit such courts to base their actions on apparent superiority of one remedy over the other. 29F(2d)932.

42–58⅓–New. Statute, allowing action at law, erroneously begun as suit in equity to be transferred to law side, refers to cases where court would have jurisdiction if brought on law side. 280 US500, 50SCt186, 74L ed578.

43–59 274US208, 47SCt578, 71L ed1002; 21F(2d)333; 21F(2d)355; 23F(2d)109; 23F(2d)208; 35F(2d)331. [b] **Legal remedy of appeal** in state courts does not prevent injunctive relief in federal court against unauthorized drainage assessments. 270US378, 46SCt236, 70L ed 641. [c] **Legal remedy of appeal** in state courts does not prevent injunctive relief in federal court against unauthorized drainage assessments. 270US378, 46SCt 236, 70L ed641.

43–60 14F(2d)871; 22F(2d)574; 23 F(2d)225; 32F(2d)570. But see 18 F(2d)269.

43–65 21F(2d)333.

44–66 US 50SCt270; 7F(2d)917; 13 F(2d)384; 14F(2d)871; 32F(2d)570.

44–69 13F(2d)384.

45–76 82NH193, 132A12. But see 98 NJEq48, 129A711.

46–93 22F(2d)518.

47–4 47RI 240, 132A610, 612 [quotCJ].

47–6 47RI 240, 132A610, 612 [quotCJ].

47–7 115Nebr309, 212NW622; 125 Okl 174, 256P902; 37 OklACR281; 47RI 240, 132A610, 612 [citCJ].

48–10 99NJEq527, 133A875.

48–15 164Ga642, 139SE212, 214 [citCJ]; TexCivA 283SW560, 561 [citCJ].

49–16 164Ga642, 139SE212, 214 [cit CJ].

49–18 10PaDist&Co139.

50–31 21F(2d)333; 168Ark504, 270SW 946, 1119; 167Ga144, 145SE87; 241 Mich312, 216NW914; MoA 148W(2d) 12; NJ 146A34(2dcase); 100NJEq78, 135A83; NJCh 146A667(2dcase); 98 NJEq471, 131A386; NC 155SE452; 292 Pa244, 141A47; 147Va937, 133SE576. [b] **Where statute expressly gives remedy in equity,** adequacy of remedy at law is no objection. Mass 167NE314.

50–32 5F(2d)610; 5F(2d)793; 13F(2d) 633; 23F(2d)968; 27F(2d)304; 33 F(2d)248; 34F(2d)396; 38F(2d)212; 38F(2d)444; 204Cal 646, 269P533; 232 IllA419; 204 Iowa1195, 213NW264; 241 Mich312, 216NW914; 152Miss694, 120 S830; 311Mo 116, 274SW1058, 1060 [quotCyc]; 100NJEq78, 135A83; 135 Misc504, 240NYS113; 224AppDiv483, 231NYS368; 116 Or253, 240P886; 297 Pa33, 146A113; 11PaDist&Co117; 13 PaDist&Co267; TexCivA 18SW(2d)515. [a] (8) 219MoA609, 282SW494. (14) Other statements. 41F(2d)12. [b] **Where equitable remedy is more nearly complete and perfect** than remedy at law, equity will assume jurisdiction. 98NJEq471, 131A386.

51–33 16F(2d)1010; 37F(2d)545; Mo 292SW34, 51ALR863; 82Mont434, 268 P512, 518 [quotCJ]; 132Misc82, 229 NYS32.

51–35 20F(2d)837.

51–36½–New. Plaintiff must have the right to sue in his own name, with counsel of his own selection, and to direct litigation as in ordinary actions. 13 F(2d)633.

52–39 But see 21F(2d)333.

52–44 267US479, 45SCt431, 69L ed745; 32F(2d)639; 82Mont434, 268P512, 518 [quotCJ].

52–47 219Ala437, 122S656; 153Tenn97, 282SW379.

52–47½–New. However, it is assumed that law courts will afford complete relief if capable to act at all. 16F(2d) 473.

52–49 232 IllA419.

52–51 85PaSuper99.

53–53 6PaDist&Co353.

53–55 20F(2d)837; 177Ark1091, 9SW (2d)578; 82Mont434, 268P512.

53–59 16F(2d)545; 21F(2d)333; 21 F(2d)355.

53–60 16F(2d)545; 21F(2d)333; 21 F(2d)355; 82Mont434, 268P512, 518 [quotCJ].

53–61 267US479, 45SCt431, 69L ed745.

54–66 181Ark216, 26SW(2d)57; 126Me 167, 136A814, 815 [quotCJ]; 241Mich 312, 216NW914; 100NJEq78, 135A83; 116 Or253, 240P886; 147Va937, 133SE 576.

54–67 116 Or253, 240P886.

55–78 16F(2d)328.

55–79 [b] **Equity will not revive cause of action which has been satisfied at law.**–Wash286P95.

55–82 11PaDist&Co117, 119 [quotCJ].

55–85 234 IllA614.

55–86 91CalA37, 266P1002.

55–88½–New. Generally, one who complains that another has failed to fulfill his engagements is supposed to have sufficient remedy at law in recovery of damages. 83Mont317, 272P522.

55–89 13F(2d)321; 172Ark517, 289SW 482; 157Md322, 146A284; 241Mich266, 217NW43; 242Mich308, 218NW770; 167Minn489, 209NW636. [b] **Action on bond** is function of court of law. 98 Fla242, 123S759.

56–90 [d] **Recovery of profits from sale of stolen goods.**–219AppDiv398, 219NYS 625.

56–93 247Mich104, 225NW528; 6 PaDist&Co 133.

57–94 138Misc29, 244NYS209.

57–3 82Colo 1, 256P639, 52ALR1172.

59–18 33F(2d)667 (slander, libel, and assault).

59–21 156SC203, 152SE878.

60–39 47RI 240, 132A610.

61–45 [c] **Partition of personalty.**–IndA 169NE349.

61–47 101NJEq615, 138A876.

61–48 101NJEq615, 138A876.

61–48½–New. The jurisdiction is not confined to specific performance of contracts, but is freely exercised to enforce surrender of chattels in specie which have been tortiously obtained or are

wrongfully detained. 101NJEq615, 138 A876.

61-48½-New. Where plaintiff has, by his own acts, put a certain value upon the property, the remedy is at law, as damages would be sufficient compensation. 101NJEq615, 138A876.

61-48¼-New. Evidence held not to show placing of value on property by plaintiff seeking recovery thereof. 101 NJEq615, 138A876.

62-49 220Ala426, 125S684 (instruments, sole property of complainant's intestate, payable jointly to him and defendant).

62-54 154Md660, 141A405, 409 [quot CJ].

62-57 137 Okl 116, 278P294; 13Porto RicoFed323 (though there are many adverse claimants).

63-58 17F(2d)725; 29Hawaii1, 25 [quotCJ]; 44 Ida353, 256P953; 98 NJEq367, 129A144 (primary jurisdiction over controverted legal title is at law, and whether doubt as to title arises on face of bill or at final hearing, equity does not adjudicate it); 85 PaSuper99; 47RI 240, 132A610; 103 WVa12, 136SE509.

63-59 27Hawaii609; 85PaSuper99; 103WVa12, 136SE509. [d] **Interest of execution debtor in land; validity of sale.**–85PaSuper99.

64-60½-New. , or upon the construction of a deed, 103WVa12, 136SE509.

65-76 NJCh 137A96.

65-77 217Ala14, 114S360, 361 [citCJ]; 103WVa12, 136SE509.

67-89 100NJEq534, 135A874.

67-92 28Hawaii476.

67-93 234 IllA614.

67-94 28Hawaii476.

67-98 Ill 234 IllA614.

68-3 113 Okl 109, 239P454; TexCivA 286SW264.

68-9 232 IllA419.

68-11½-New. A suit will not lie to correct the filing date of a petition for appeal to show that it was filed too late and to enjoin prosecution of the appeal, since the fact that the appeal is barred may be shown on appeal in the case. 143Miss643, 109S721.

68-11½-New. Where an action at law is summary and there is no right to appeal on the merits, remedy is inadequate. 100NJEq78, 135A83.

68-11¼-New. If an equity proceeding is more adequate and complete, jurisdiction in equity will attach although certiorari exists to bring up papers. 12 PortoRicoFed99.

68-12 23F(2d)225; 88 IndA426, 164NE 318; 204 Iowa1195, 213NW264, 267 [quotCJ]; Mass 171NE281; 98NJEq 471, 131A386; 100NJEq78, 135A83. [a] (5) Action to cancel and enjoin enforcement of agreement with union providing for check off will not be entertained where company has adequate legal remedy by interpleader. 204 Iowa 1195, 213NW264. [e] **Right to compel action at law by another** in which complainant's rights may be fully determined is sufficient to exclude jurisdiction in equity. 22F(2d)518.

69-14 82Mont434, 268P512, 517 [cit CJ]; 100NJEq78, 135A83. [c] **Erroneous failure of law court to uphold defense.**–98NJEq471, 131A386.

69-16½-New. or where plaintiff would not be a party to an action at law or be heard to assert the defense. 100NJ Eq78, 135A83.

69-18 Mass 171NE281; 100NJEq78, 135A83.

69-24 [c] **Payments and set-off for services rendered** is not subject of equity jurisdiction. 21AlaA65, 106S54 (defense to action on note).

70-25½-New. Defense of payment and set-off for services rendered is easily ascertained and not of itself subject of equity jurisdiction. 21AlaA65, 106S54.

70-28 259Mass295, 156NE443. But see 14F(2d)587.

70-36 245NY17, 156NE81.

70-39 21F(2d)333; 232 IllA419; 232 IllA596; 234 IllA430.

71-47 [a] **Burden of proof.**–13F(2d) 633.

71-57 [b] **Where shipper by statute was required to demand that commissioners bring suit against carrier to recover excess charges, it was held that remedy at law was not as adequate as in equity.** 13F(2d)633.

72-66 6F(2d)646; 37F(2d)243; 38F (2d)212; 43F(2d)582; 31Ariz378, 253P 897; 171Ark576, 286SW873; 160Ga705, 129SE31; 160Ga720, 129SE36; 245 IllA 48; 204 Iowa1254, 215NW261; 233Ky 115, 25SW(2d)62; Md 148A809; 117 Nebr569, 221NW702; NJCh 150A844; 131Misc678, 227NYS199; 190NC512, 130 SE323; 95PaSuper406; 148SC403, 146 SE243; 158Tenn1, 11SW(2d)865; Tex CivA 282SW608; 103WVa394, 137SE 543; 103WVa432, 137SE878.

72-67 241Mich312, 216NW914.

72-69 TexCivA 283SW213.

73-71 23F(2d)835.

73-73 23F(2d)835; 27Hawaii308; 204 Iowa1254, 215NW261; WVa 155SE662.

73-75 214Ala449, 108S32.

73-78 214Ala449, 108S32; 28Hawaii1, 19 [quotCJ]; 115Nebr690, 214NW637.

73-79 28Hawaii1, 19 [quotCJ].

73-80 13F(2d)633; 28Hawaii1, 19 [quotCJ].

73-81 28Hawaii1, 19 [quotCJ].

73-82 28Hawaii1, 19 [quotCJ].

74-83 28Hawaii1, 19 [quotCJ].

74-84 28Hawaii1, 19 [quotCJ].

74-85 28Hawaii1, 19 [quotCJ].

75-90 117Nebr569, 221NW702.

75-3 38F(2d)153.

75-4 13F(2d)633.

75-6 27Hawaii308.

77-35 214Ala449, 108S36. [a] **Litigious or vindictive spirit or purpose needlessly to vex and harass citizen with lawsuits** will not be imputed to public officials. 214Ala449, 108S32.

77-37 23F(2d)225 (in at least one law action).

78-51 18F(2d)839.

78-54 164Ga888, 139SE802.

78-55 18F(2d)839; 164Ga888, 139SE 802.

79-59 39F(2d)21 (fire insurance policies with similar provisions).

79-61 18F(2d)839; 43F(2d)582.

79-62 148Miss278, 114S482.

80-64 334 Ill 539, 166NE118, 65ALR 887.

81-65 334 Ill 539, 166NE118, 65ALR 887; 265Mass329, 163NE880; 148Miss 278, 114S482. [a] (3) Where numerous plaintiffs had purely legal rights against one defendant as lessees of parts or subdivisions of whole market. 27 Hawaii308. (4) Where each of unrelated parties seeks separate actions, based on reparation award of interstate commerce commission, actions do not constitute multiplicity of suits justifying interposition of equity. 6F(2d)646.

82-72 31Ariz378, 253P897.

82-73 165Ga826, 142SE164.

82-78 Nebr 232NW762.

85-7 214Ala675, 108S594, 595 [citCJ]; 237Mich243, 211NW638, 639 [citCJ]. [a] (2) 214Ala675, 108S594, 595 [citCJ].

86-27 237 IllA50, 55 [citCJ]; 88 IndA 189, 163NE602; 233Ky403, 25SW(2d) 1028, 70ALR365; 98NJEq41, 129A699; 118 Okl 106, 246P468; 48RI 33, 134A 849; TexCivA 281SW616; TexCivA 285 SW641; TexCivA 12SW(2d)257; 194 Wis51, 215NW576. [c] **Mistake as to survey resulting in encroachment of building.**–Where building encroaches slightly on adjoining land, due to mutual mistake as to true survey, equity may require conveyance of strip upon payment of value and restrain execution of judgment in ejectment. 102 NJEq492, 141A581.

87-32 40F(2d)232; 194Wis51, 215NW 576.

87-34 40F(2d)232; TexCommnA 1SW (2d)857.

87-35 160Ga865, 129SE528; Tex CommnA 1SW(2d)857.

87-37 193Wis647, 215NW451.

87-38 225AppDiv152, 232NYS470.

87-39 237 IllA50, 55 [citCJ].

87-44½-New. Intrinsic mistake is not ground for equitable relief. 91CalA37, 266P1002.

87-45 124 Or276, 261P432, 441 [citCJ].

87-48 171Ark675, 286SW865; 5PaDist &Co 634; TexCivA 285SW641; TexCivA 294SW610.

88-49 96Fla148, 117S792, 59ALR807; 237 IllA50, 55 [citCJ]; 118 Okl 106, 246 P468. [a] **Stringency of covenants** cannot defeat rescission. 118 Okl 106, 246 P468.

88-51 79CalA45, 248P1035.

88-52 237 IllA50, 55 [citCJ]; 118 Okl 106, 246P468.

88-53 237 IllA50, 55 [citCJ]; 118 Okl 106, 246P468; NJCh 145A721(2dcase).

88-57 TexCivA 294SW610.

89-58 73CalA262, 238P752; Fla 129S 759; 244Mich112, 221NW136; 98NJEq 548, 131A122; 115 Okl 298, 243P137; 50RI 347, 147A872; 154Tenn389, 285 SW558, 562 [quotCJ]; Tex 285SW641; TexCivA 299SW671.

89-59 154Tenn389, 285SW558, 562 [quotCJ].

89-60 73CalA262, 238P752; 154Tenn 389, 285SW558, 562 [quotCJ].

89-61 73CalA262, 238P752; 154Tenn 389, 285SW558, 562 [quotCJ].

89-62 98NJEq548, 131A122; 154Tenn 389, 285SW558, 562 [quotCJ].

89-63 107Conn387, 140A749, 750 [quot CJ]; 154Tenn389, 285SW558, 562 [quot CJ].

89-64 106Conn436, 138A433, 437 [quot CJ]; 107Conn387, 140A749, 750 [quot CJ]; 154Tenn389, 285SW558, 562 [quot CJ]; 106WVa312, 145SE575, 61ALR 584.

90-68 154Tenn389, 285SW558, 562 [quotCJ].

90-71 154Tenn389, 285SW558, 562 [quotCJ].

90-77 160Ga865, 129SE528 ("clear, unequivocal and decisive").

93-13 40F(2d)626; 171Ark427, 285SW 20; 80CalA20, 251P232; 98CalA469, 277 P177; 320 Ill 23, 150NE344; 164La 443, 114S90 (where rights of other party would be prejudiced); 84Mont98, 274 P288; TexCivA 281SW626; 199Wis466, 226NW303. [c] (1) 13PortoRicoFed415 (except in extraordinary cases).

94-14 CalA 290P892; TexCivA 278SW 503.

95-23 TexCivA 281SW616.

96-24 79CalA45, 248P1035; 221MoA 814, 288SW95.

96-28 320 Ill 23, 150NE344; 150Md333, 134A124, 127 [citCJ]; 161Tenn79, 26 SW(2d)126; TexCivA 278SW503.

97-29 320 Ill 23, 150NE344.

97-30 34Ariz245, 270P1044; 252 IllA 575; 161Tenn79, 26SW(2d)126.

97-31 320 Ill 23, 150NE344.

97-37 164La443, 114S90. See also 40 F(2d)626.

98-39 164La443, 114S90.

98-48 102NJEq287, 140A568; 147SC 333, 145SE196.

99-59 102NJEq1, 139A514.

99-60 TexCivA 13SW(2d)174.

100-71½-New. However, where fines imposed would be vastly accumulated and business interrupted, equity may give relief. 16F(2d)401.

100-74 19F(2d)406; 214Ala674, 108S 562; 326 Ill 556, 158NE216; 328 Ill 487, 159NE819; 237 IllA1; 89 IndA431, 155 NE539; 255Mass76, 151NE81, 45ALR 1; 239Mich88, 214NW102; 151Miss387, 118S195; 152Miss825, 119S308; MoA 32SW(2d)103; NJ 149A811; 100NJEq 78, 135A83; Oh 154NE173; 128 Or347, 274P314(2dcase); 131 Or509, 283P2; 7 PaDist&Co 294; 156Tenn216, 300SW12; Wash 287P872. [a] **Equity abhors forfeitures.**–237 IllA1.

100-76 214Ala143, 107S92; 98Fla124, 123S561(2dcase); Fla 130S15; 249 IllA 222; Mass 170NE44; 83NH374, 142A 702; 103NJEq176, 142A648; 98NJEq 471, 131A386; 100NJEq78, 135A83; 102NJEq287, 140A568; NJCh 146A667 (2dcase); Oh 154NE173; OhA 172NE 698; 8PaDist&Co 627; 147SC333, 145SE 196. But see NJCh 145A631.

100-77 89 IndA431, 155NE539.

101-80 100NJEq78, 135A83.

101-83 335 Ill 284, 167NE69; 83NH 374, 142A702.

101-85½-New. Equity will not relieve against forfeiture in the absence of equitable grounds. 43 Ida796, 255P316.

101-85¼-New. To invoke the protection of a statute providing for relief from forfeiture or loss in the nature of forfeiture, a party must set forth facts that will appeal to the conscience

of a court of equity. 84Mont238, 275P 267.

101-92 250Mich509, 231NW74.

102-3 8PaDist&Co 662.

102-8 Fla 130S15; 335 Ill 284, 167NE 69; 13 OhA382. [a] Fla 130S15. [b] In Saskatchewan.-[1930] 4DomLR494. [c] Relief will be granted, even though action to dispossess tenant has proceeded to judgment. Fla 130S15.

102-13½-New. Equity will enjoin dispossession of assignee of lease without landlord's consent, where the landlord waived breach, although waiver is pleadable in dispossess proceedings, since such proceedings are summary and not appealable on merits. 100NJEq78, 135 A83.

102-13½-New. Under the California statute providing for relief against forfeiture of a lease, the court may impose such conditions, in addition to those enumerated in the statute, as it may see fit. 81CalA283, 253P944.

102-13¼-New. but may not grant relief without requiring performance of the conditions so enumerated. 81CalA 283, 253P944.

103-20 47RI 327, 133A85.

103-26 16F(2d)374.

103-27 335 Ill 284, 167NE69.

103-28 16F(2d)374.

103-30 47RI 327, 133A85.

103-31 Fla 130S15. See also 83NH374, 142A702.

103-33 240Mich366, 215NW528.

103-34 89CalA202, 264P493.

104-40½-New. The granting of relief under the California statute providing for relief against forfeiture of a lease is discretionary with the court. 81CalA 283, 253P944.

104-40½-New. Under such statute reasons may exist for denying relief, although the court finds that a case of hardship is presented. 81CalA283, 253 P944.

104-41 214Ala674, 108S562; 173Ark 210, 293SW25; 100NJEq78, 135A83. [a] Where relief from forfeiture would in itself be inequitable, it will not be awarded in suit for specific performance. 214Ala674, 108S562.

104-43 214Ala674, 108S562. [a] (1) 100NJEq78, 135A83. (3) But where it appears that lessor had no knowledge of facts constituting forfeiture, receipt of rent does not constitute waiver. 100 NJEq78, 135A83.

104-44 82Colo 264, 259P1033; 43 Ida 796, 255P316; 324 Ill 367, 155NE296; 332 Ill 561, 164NE23, 63ALR658; 256 IllA540; NJCh 145A631; 120 Or254, 251P701, 50ALR81; 8PaDist&Co 627; 147SC333, 145SE196; 151Va715, 145SE 260; 154Wash625, 282P928; 192Wis93, 212NW402. [e] (3) Equity will not grant discovery where penal statute is involved unless penalty is waived. 33 F(2d)358. [f] Accounting.-33F(2d) 356(2dcase).

105-45 43 Ida796, 255P316.

105-46 120 Or254, 251P701, 50ALR81. [a] (8) Equity will not decree a forfeiture unless a strict letter of the contract requires it. 85Colo 519, 277P773.

105-47 42 Ida436, 246P23 (equity leans against forfeiture in absence of public interest which would be favored); OhA 154NE173. [b] Forfeiture will not be enforced if party insisting thereon may be made whole. 86Colo 77, 278P800.

106-52 324 Ill 367, 155NE296.

106-58 256 IllA540.

106-63 59OntL164, [1926] 3DomLR 971, 7CanBankr180.

107-71 214Ala391, 108S11; 218Ala296, 118S513; 176Ark1206, 3SW(2d)696; Ill 172NE772; 153Md1, 137A518; 249 Mich400, 228NW765; Mo 276SW374; 100NJEq92, 135A511; 86PaSuper437; 10PaDist&Co 403; TexCivA 278SW503; TexCivA 283SW560.

107-75 82Mont434, 268P512.

107-76½-New. The means by which the fraud was perpetrated is of no particular moment. 51ND20, 198NW679.

107-78 38 OklACR461; WVa 153SE 905.

107-79 Ala 127S543 (fraud alone is not distinctive ground of equitable jurisdiction).

107-80 219Ala437, 122S656.

107-82 159Tenn520, 19SW(2d)251.

107-83 263Mass248, 160NE799; 47RI 215, 132A439.

107-83½-New. To entitle a party to interposition of equity for fraud, there must be a suppression of facts which the other party is bound in conscience and duty to disclose and in respect of which he cannot innocently be silent. 99NJEq115, 131A916.

107-83⅓-New. Where false representations create no legal liability against defendant, equity will not assume jurisdiction. 13F(2d)932.

107-84 176Ark1206, 3SW(2d)696; 125 Me402, 134A539.

108-85 5F(2d)793; 100NJEq92, 135A 511.

108-89 5F(2d)793.

109-96 125Me402, 134A539.

110-4 5F(2d)873.

110-5 5F(2d)793.

110-8 82Mont434, 268P512.

110-10 Mo 292SW34, 51ALR863.

111-18 176Ark1206, 3SW(2d)696.

111-27 [a] Equity will not remain inactive if fraud is not recognized or remedied at law. 100NJEq92, 135A511.

111-30 217AppDiv701, 216NYS154 (contract to compensate attorney).

112-36 73CalA268, 238P787.

112-37 125Kan223, 264P50, 54 [quot CJ].

112-38 125Kan223, 264P50, 54 [quot CJ]; 125Me183, 132A214.

113-39 90Fla787, 108S211.

113-42½-New. Equity protects old and enfeebled persons against imposition although there is no fraud. 133Misc772, 234NYS234.

113-43 18F(2d)483; Utah 271P797.

113-52 121 Or64, 253P373, 375 [quot CJ].

113-54 125Kan223, 264P50, 54 [quot CJ].

114-60 66Utah128, 240P175.

114-61 300Pa513, 150A882.

115-75 101NJEq388, 139A524 (transaction held not fraudulent).

115-81 178Ark183, 10SW(2d)14; 208 Iowa625, 226NW144; SD 225NW661; 34Wyo 378, 244P216, 44ALR1255.

115-87 [b] Insurer requiring receipts of holders of flooded cotton in view of extraordinary conditions. 23F(2d)526.

116-5 42F(2d)1; 217Ala112, 114S913; 208 Iowa625, 226NW144; 149Md608, 131A829; MoA 22SW(2d)836; 135Misc 833, 238NYS398 (supreme court as successor of chancery court); 121 Oh401, 169NE450; 50RI 427, 148A317; 136SC 312, 134SE395.

116-6 [a] Jurisdiction of equity over constructive trusts is not affected by statutes giving probate courts jurisdiction of testamentary trusts. 249Mich 558, 229NW481.

116-7 168Ga876, 149SE213 (determination of rights of litigants to special deposit account for payment of checks for cotton purchased); 242 IllA495; 149Md 608, 131A829; 101NJEq466, 138A385.

116-7½-New. Rights arising out of trust and quasi-trust relations from loan of securities are properly determined in equity proceeding. 150Md557, 133A472.

116-8 102NJEq307, 140A426.

117-9 28Hawaii 581; 249Mich400, 228 NW765; 283Pa168, 129A53.

117-10 37F(2d)907; 247 IllA265.

117-22½-New. Controversy as to basis on which receiver's dividend should be declared, which involves enforcement of administration of the trust, is within equity jurisdiction. 136SC312, 134SE 395.

118-31 232Mich345, 205NW140.

118-35 91Fla709, 109S677; 32NM537, 260P673; 34Wyo 378, 244P216, 44ALR 1255.

119-46 But see 36F(2d)89.

119-47 168Ga327, 147SE581; 32NM 537, 260P673, 674 [citCJ]; 33Wyo 326, 239P531.

119-50 MoA 22SW(2d)836.

119-51 32NM537, 260P673, 674 [cit CJ].

119-52½-New. Equity has jurisdiction to apportion between the owners of property the burden of a common lien or charge to which it is subject. 141 Miss515, 106S775.

119-52½-New. It is not a proper exercise of equitable jurisdiction for the trial court to attempt to fasten a lien upon real property as security for the payment of a judgment for damages. 68CalA198, 228P734.

119-54 Ala 129S23; 167Ga637, 146SE 319.

119-55 217Ala112, 114S913.

119-56 153Md1, 137A518.

120-57 153Md1, 137A518.

120-70 See also NJCh 151A546.

121-78 [b] (7) To assist probate court. 22F(2d)380.

121-87 Ga 154SE889. [a] (3) Ala 130S 209. (5) 215Ala51, 108S850 [citCJ]. (39) Equity jurisdiction in administering estates is unhampered by probate court rules of practice. 217Ala85, 115S 4. (40) Removal of administration to equity divests probate court of all jurisdiction in connection with such administration. Ala 128S440. (41) In suit to remove administration to equity court it will be assumed that complainants' claims as legatees were satisfied in absence of averments to contrary. Ala 130S209. [l] (7) 153Tenn451, 284SW 365. (8) Chancery court has inherent jurisdiction independent of statute to determine complicated disputes. 153 Tenn451, 284SW365. (9) Statute giving concurrent jurisdiction authorizing distributee to apply to court to compel payment of his share of estate does not deprive chancery court of jurisdiction to hear and determine complicated disputed question as to who is entitled to money in administrator's hands. 153 Tenn451, 284SW365.

126-94 180Ark552, 22SW(2d)370.

126-98 [a] (1) 175Ark902, 1SW(2d)40. [b] (4) Suit in equity has been held not exclusive remedy for recovery of portion of estate by reason of alleged agreement of adoption by deceased. 102CalA178, 283P331. [d] (4) See also 170Ga691, 153SE767. (5) 170Ga156, 152SE462. (6) Where equitable remedy is more speedy and with less circuity. 170Ga472, 153SE188. (7) Equity cannot appoint administrator. 170Ga691, 153SE767. [e] (1) 246 IllA229. (2) 246 IllA229. (9) Court of equity has no original jurisdiction to establish lost or destroyed will. 332 Ill 27, 163NE384. [g] (8) Suit by executrix held for equitable relief. MoA 27SW(2d)481.

126-98½-New. Equity has power to decree that widow had title to her dower estate and that she had conveyed it. 171Ark912, 287SW373.

130-21 82NH260, 132A525.

130-25 332 Ill 551, 164NE1; 234 IllA 430; 241Mich312, 216NW914; 82Mont 434, 268P512.

130-33½-New. Equity will enjoin the denial to a member of the privileges of membership in an unincorporated association, where the denial, if continued, will work irreparable injury, especially where the expulsion was not according to by-laws of the association and where the expelled member has no remedy by appeal to any organ within association. 240NY463, 148NE636.

130-33⅓-New. Systematic, repeated, and continuing violations of constitution or law, to complainant's injury, present ample ground for equitable relief. 13F(2d)442.

130-33¼-New. Equity held without jurisdiction of a suit by a surety on a bond given to release a mechanic's lien against a landowner where the lien was released by execution of the bond and no question of subrogation or accounting was presented. 98Fla242, 123S759.

131-36 280US541, 50SCt270, 74Led 602.

131-38 14F(2d)877.

131-39 20F(2d)837. [b] Jurisdiction to remove cloud on title is exclusive. 310Mo 116, 274SW1058.

132-56 230AppDiv571, 245NYS432.

132-56½-New. Where action at law will furnish relief, equity will not take jurisdiction merely because accounting

is demanded or needed. **MoA** 24SW(2d) 229.

133-82 29Hawaii 702.

134-98 [a] **Statute giving right to apply for attachment** in court of equity for legal or equitable claim gives equity jurisdiction to entertain suits in actions ex contractu. 100WVa93, 130SE96.

134-5 277US488, 48SCt580, 72L ed961; 13F(2d)510; 14F(2d)871; 20F(2d)267, 268 [citCJ]; 27F(2d)354; 30F(2d)178; 33F(2d)552; 34F(2d)163; 35F(2d)675; 39F(2d)5; 216Ala58, 112S338; 216Ala 60, 112S347; 218Ala235, 118S271; 218 Ala221, 118S404; 220Ala422, 125S661; 168Ark88, 269SW367 (accounting incidental to conversion of car acquired as result of joint venture); 170Ark258, 280SW357; 170Ark931, 282SW14; 171 Ark61, 283SW4; 171Ark96, 283SW47; 173Ark788, 294SW21; 75CalA569, 243 P445; 89CalA29, 264P328; 90CalA276, 265P1010; 81Colo 92, 253P830; 90Fla 595, 106S473, 476 [citCJ]; 92Fla87, 109S320; 92Fla718, 111S278; 98Fla 276, 123S768; 164Ga421, 138SE902; 45 Ida571, 264P229; 48 Ida329, 282P91; 317 Ill 247, 148NE40; 331 Ill 523, 163 NE468; 339 Ill 595, 171NE742; 235 IllA35; 244 IllA89; 245 IllA48; 246 IllA229; 203 Iowa1385, 214NW576; 204 Iowa1254, 215NW261; 125Kan457, 264P738; 233Ky403, 25SW(2d)1028, 70 ALR365; 153Md1, 137A518; Md 148A 228; 260Mass198, 157NE337; 232Mich 415, 205NW149; 235Mich174, 209NW 152; 251Mich533, 232NW378; 180Minn 134, 230NW575; 141Miss407, 106S518; 143Miss558, 108S802; 319Mo 787, 5SW (2d)70; Mo 30SW(2d)71; MoA 9SW (2d)839; 79Mont184, 255P744; 82Mont 73, 265P15; 85Mont352, 278P998; Mont 290P238(2dcase); 82NH193, 132A 12; 102NJEq307, 140A426; 101NJEq 192, 137A650; NJCh 140A247; 218App Div519, 218NYS644; 136Misc406, 241 NYS5; 137Misc420, 242NYS308; 50ND 857, 198NW472; 55ND505, 214NW805; 124 Okl 193, 255P577; 126 Okl 108, 258 P866; 126 Okl 93, 258P892; 130 Okl 62, 264P814; 115 Or591, 239P195; 117 Or83, 243P78, 85 [citCJ]; 117 Or350, 243P91; 119 Or573, 250P218; 120 Or 96, 251P715; 121 Or159, 254P353; 122 Or230, 257P801; 123 Or280, 261P55; 286Pa413, 133A627; 291Pa371, 140A 133; 85PaSuper406; 156SC203, 152SE 878; 116Tex1, 285SW1063, 1070 [cit CJ]; TexCivA 294SW894; 70Utah19, 257P1046; 143Va79, 129SE269; 149Va 584, 140SE670; 147Wash451, 266P191; 102WVa339, 135SE179. [d] **In suit to foreclose land contract.**-251Mich533, 232 NW378.

136-6 20F(2d)267, 268 [citCJ].

136-8 85PaSuper406.

136-9 90Fla595, 106S473.

137-12 90Fla595, 106S473; 286Pa413, 133A627; 85PaSuper406.

137-12½-New. Equity will adopt its relief to the exigencies of the case. 129 Misc612, 222NYS315.

137-13 150Miss559, 115S323.

137-14 101NJEq350, 139A812.

137-16 MoA 21SW(2d)214.

137-18 158Tenn554, 14SW(2d)961.

137-23 35F(2d)14; 129Misc612, 222 NYS315; 128Misc364, 218NYS669; 120 Or96, 251P715.

137-24 30F(2d)597 [certiorari den 279 US856, 49SCt351, 73L ed998(7thcase)]; 35F(2d)403; 43F(2d)163; 43F(2d)280; 218Ala109, 117S623; 170Ark258, 280SW 357; 171Ark61, 283SW4; 171Ark96, 283SW47; 178Ark807, 13SW(2d)1; 195 Cal 132, 231P987; 79CalA685, 250P705; 92CalA715, 268P948; 98CalA306, 277P 123; CalA 286P165(4thcase); CalA 291 P266; 93Fla301, 112S569; 99Fla309, 126S151; 164Ga421, 138SE902; 242 IllA495; 204 Iowa1254, 215NW261; 233 Ky115, 25SW(2d)62; 249Mich558, 229 NW481; MoA 14SW(2d)537; 116Nebr 466, 217NW956; 82NH193, 132A12; NH 146A90; 222AppDiv526, 226NYS 468; 129Misc521, 222NYS203; 225 AppDiv152, 232NYS470; 137Misc888, 244NYS82; 117 Or83, 243P78; 283Pa 168, 129A53, 55 [quotCJ]; 286Pa413, 133A627; 287Pa505, 135A223; 297Pa 140, 146A557; 85PaSuper406; 116Tex 1, 285SW1063, 1070 [citCJ]; TexCivA 23SW(2d)747; 155Wash493, 284P782. [c] (3) **To order partition.** 170Ark258, 280SW357.

138-27 89CalA29, 264P328.

138-28 15F(2d)774; 34F(2d)163; 35 F(2d)14; 37F(2d)527; 40F(2d)796; 214Ala230, 107S67; 218Ala141, 117S 648, 58ALR1495; 220Ala422, 125S661 (where cause was removed by defendant's bill in equity); 33Ariz272, 264P 98; 170Ark931, 282SW14; 171Ark61, 283SW4; 178Ark361, 12SW(2d)1; 181 Ark876, 28SW(2d)704; 166Ga757, 144 SE241(1stcase); 319 Ill 437, 150NE435; 235 IllA35; 203 Iowa257, 212NW555; 203 Iowa1385, 214NW576; 206 Iowa794, 221NW455; 153Md1, 137A518; 318Mo 192, 300SW1088; 318Mo 1089, 2SW(2d) 593; 136Misc386, 240NYS47; 228 AppDiv510, 240NYS232; 126 Okl 108, 258P866; 126 Okl 93, 258P892; 116 Or 562, 241P1011; 117 Or83, 243P78; 121 Or159, 254P353; 286Pa413, 133A627; 50RI 283, 146A634, 68ALR303; Tex CivA 294SW894; TexCivA 23SW(2d) 535.

140-29 99Fla535, 126S791.

140-36 14F(2d)234.

140-37 90Fla595, 106S473.

140-40 171Ark96, 283SW47.

140-48 153Md501, 138A665; 218 AppDiv519, 218NYS644; 115 Or591, 239 P195; 121 Or159, 254P353; 286Pa413, 133A627; SD 232NW910; TexCivA 294 SW894.

141-49 51Nev437, 279P32 (rents).

141-56½-New. Where the owner sues in equity for the restoration of shares of stock and an accounting for dividends and is entitled to such relief, he is not entitled to a decree for the value of stock as in an action at law for conversion. 237Mich133, 211NW83, 54ALR 351.

141-57 14F(2d)871; 246 IllA416; 264 Mass355, 162NE773; Mass 171NE482; 232Mich251, 205NW155; NJ 150A415; 131Misc678, 227NYS199; 116 Or562, 241 P1011; 122 Or331, 258P183; 153Tenn 283, 282SW382; TexCivA 294SW894; TexCivA 3SW(2d)835.

141-58 214Ala230, 107S67; 90Fla595, 106S473; 265Mass559, 164NE470, 62 ALR780; 122 Or331, 258P183; Tex CivA 294SW894.

142-59 157Tenn60, 6SW(2d)319.

142-60 23F(2d)426.

142-67 267US203, 45SCt307, 69L ed 574; 218Ala235, 118S271; 171Ark96, 283 SW47; 97Fla375, 121S102; 241Mich91, 216NW393.

143-68 4F(2d)932; 41F(2d)484; 219 Ala370, 122S336; 327 Ill 406, 158NE 692; 236 IllA187; 154Md426, 141A353; 156Md552, 144A703; Mass 164NE618; Mo 20SW(2d)650; MoA 21SW(2d)214; MoA 24SW(2d)229; 88PaSuper196; 105WVa610, 144SE410, 414 [citCJ], 62 ALR740. [a] 327 Ill 406, 158NE692 (advantages of action at law). [h] **Rule that equity will not retain bill if equity of bill fails** does not apply to bill for reformation of deed where at law evidence varying deed would not be admissible. 214Ala187, 106S815.

143-69 322Mo 419, 17SW(2d)535; 213 AppDiv355, 210NYS621; 116 Or562, 241 P1011; 105WVa610, 144SE410, 62ALR 740.

143-73 Mass 167NE635 (refusal to pass on question of damages where specific performance was denied for fraud held discretionary with judge).

143-74 35F(2d)675; 215Ala584, 112S 229; 171Ark61, 283SW4; 236 IllA187; 116 Or562, 241P1011, 1014 [citCJ]; 147 Va921, 133SE614.

144-76 171Ark61, 283SW4; Mass 170 NE42.

144-82 219Ala370, 122S336; Mass 164 NE618; 152Miss517, 120S456. See also 265Mass578, 164NE650. [a] **Court of equity denying specific performance cannot decree damages,** but may decree compensation. 144Va848, 130SE784.

144-83½-New. , although in some jurisdictions good faith is held not to change the rule. 327 Ill 406, 158NE692.

144-84½-New. It is a settled equity practice that, where peculiar equitable relief is denied, it is discretionary with the court either to retain the case for assessment of damages, or to dismiss the bill with reservation to plaintiff of his right to recover damages in an action at law. Mass 164NE921.

144-85 [d] (1) 138Misc29, 244NYS 209. (3) 246NY203, 158NE74. (5) Where equitable jurisdiction has been properly invoked, court will retain jurisdiction, even though only judgment which it can grant is one for damages. 133Misc359, 231NYS585.

145-86 203 Iowa1385, 214NW576; 116 Or562, 241P1011, 1014 [quotCJ].

145-87 41F(2d)12; 203 Iowa1385, 214 NW576; 55ND505, 214NW805; 116 Or 562, 241P1011, 1014 [quotCJ]. But see 246NY203, 158NE74.

146-88 55ND505, 214NW805; 116 Or 562, 241P1011, 1014 [quotCJ].

146-89 116 Or562, 241P1011, 1014 [quot CJ].

146-96 278US509, 49SCt220, 73L ed 480; 218Ala235, 118S271; 131Misc678, 227NYS199.

146-97 99NJEq356, 131A889.

146-1 See also 103NJEq428, 143A620.

147-4 90Fla595, 106S473.

147-13 90Fla595, 106S473, 476 [citCJ]; 286Pa413, 133A627.

148-18 90Fla595, 106S473.

148-19 128 Or70, 264P453.

148-20 35F(2d)763.

148-21 [a] **Plaintiff invoking equity** against defendants in possession of land under mistaken claim of ownership opens way for them to be compensated for improvements made in good faith. 236Mich374, 210NW212.

148-26 37F(2d)527; 204 Iowa1254, 215 NW261.

148-27 204 Iowa1254, 215NW261.

148-28 30Hawaii226, 229 [quotCJ]; 204 Iowa1254, 215NW261; 101NJEq 350, 139A812, 814 [citCJ]; NJCh 151A 282.

149-33 See DC 26F(2d)985.

149-34 92Fla246, 109S577.

150-48 7PaDist&Co 684.

150-49 223AppDiv28, 227NYS85, 87 [citCJ] (dictum); 155Tenn530, 296SW 356.

150-51 124Kan97, 258P295.

150-59½-New. Under statutes, where creditor and debtor are residents of another state, courts of equity are given jurisdiction independently of attachment laws to subject local property to payment of debt. 160Tenn453, 26SW (2d)131.

150-61 25F(2d)655; 42F(2d)65; 208 Cal 420, 281P613; 124Kan97, 258P295; 233Ky115, 25SW(2d)62; MoA 296SW 191.

151-65 MoA 296SW191.

151-67½-New. Allegations of malice in draining pond have no bearing on question of jurisdiction to compel defendant to perform positive acts in another state. Mass 171NE486.

151-67½-New. Court will not take jurisdiction where relief asked requires positive acts by defendant in another state. Mass 171NE486.

151-69 133 Okl 239, 271P660, 661 [quot CJ]; 154Tenn375, 289SW511; 154Tenn 513, 290SW31. [a] **Statute forbidding actions outside of county** where land or material part of it is situated is mandatory and must be observed when parties to suit assert right to locality of action given by statute. 154Tenn375, 289SW511.

151-71 133 Okl 239, 271P660, 661 [quot CJ].

151-72 124Kan97, 258P295; 154Tenn 375, 289SW511.

151-72½-New. jurisdiction being excluded only when successfully challenged through methods prescribed by statute. 154Tenn375, 289SW511.

151-73 124Kan97, 258P295; 154Tenn 513, 290SW31; 140Wash586, 250P346.

152-77 216Ala344, 113S389.

152-87 154Tenn375, 289SW511.

152-90 124Kan97, 258P295; 154Tenn 513, 290SW31.

153-94 133 Okl 239, 271P660, 661 [quot CJ].

153-95 133 Okl 239, 271P660, 661 [quot CJ].

153-8 TexCommnA 286SW185.

153-9 206 Iowa533, 220NW315; 164La 926, 114S839.

153-10 102NJEq112, 139A798; 198NC 705, 153SE327. [a] (5) **Where contract is fair on its face, neither oppres-**

sive nor unconscionable, contention that enforcement is ungenerous is unavailable in equity. 245NY1, 171NE884.

154-11 Wash 288P925.

154-11½-New. As a general rule courts of equity will not interpose in controversies growing out of personal or domestic relations, 163Ga361, 136SE141.

154-11½-New. and will leave the parties to pursue the remedies open to them in the courts of common law. 163Ga 361, 136SE141.

154-11¼-New. Equity will not lend its aid to compel an accounting for money received in violation of law. 254Mass 366, 150NE225.

154-11⅓-New. No one is entitled to the aid of a court of equity when such aid becomes necessary through his fault. 222MoA510, 281SW75.

154-12 13F(2d)510; 43F(2d)521; 194 Cal 49, 227P908; 163Ga361, 136SE141; 318 Ill 307, 149NE262; Mass 171NE430; TexCivA 281SW217.

154-13 194Cal 49, 227P908; 318 Ill 307, 149NE262; 116 Or310, 241P50; Tex CivA 281SW217.

155-27½-New. Where property rights or questions concerning property arise between husband and wife, jurisdiction will be assumed in a proper case to grant full relief to the injured party. 163Ga361, 136SE141.

155-27⅓-New. Principles of morality will not be enforced. 318 Ill 307, 149 NE262.

155-28 16F(2d)981; 194Cal 49, 227P 908; 163Ga725, 137SE60; 77Mont361, 251P137, 139, 49ALR627 [quotCJ]; 100 Vt37, 134A638, 50ALR983.

155-29 318 Ill 307, 149NE262; 77Mont 361, 251P137, 139, 49ALR627 [quotCJ].

155-31 77Mont361, 251P137, 139, 49 ALR627 [quotCJ]; 85Mont439, 279P 234.

155-32 194Cal 49, 227P908; 163Ga725, 137SE60; 100Vt37, 134A638, 50ALR983.

156-36 77Mont361, 251P137, 139, 49 ALR627 [quotCJ]. [a] See also 77 Mont361, 251P137, 149ALR627.

156-38 196 Ind614, 619, 149NE174 [cit CJ].

156-40 167Ga252, 145SE76.

157-47 39 OklACR267.

157-48 196Wis635, 220NW209.

157-52½-New. That plaintiff suing his attorney to compel a transfer of stock or for damages if the stock cannot be transferred does not establish damages does not preclude the court from compelling a transfer if the facts warrant it. 49Nev161, 241P213.

157-54 224AppDiv527, 231NYS526.

158-62 157Miss737, 128S98(1stcase).

159-87 Iowa 228NW295; 220AppDiv 404, 221NYS739; TexCommnA 298SW 540.

159-88 Iowa 228NW295; 83Mont317, 272P522.

160-89 Iowa 228NW295; 83Mont317, 272P522.

160-98 91CalA37, 266P1002.

160-6 99NJEq356, 131A889; NJCh 137 A98; TexCivA 9SW(2d)1055(2dcase).

161-12½-New. Where defendant fails to make motion to dismiss for lack of equity, the proper course is for the court to retain jurisdiction until complainant has a reasonable opportunity to establish title at law. 99NJEq356, 131A889.

162-30 91Fla709, 109S677, 683 [quot CJ].

162-34 91Fla709, 109S677, 683 [quot CJ].

162-37 274US195, 47SCt566, 71L ed996; 91Fla709, 109S677. [a] **Statement during trial that plaintiff had adequate remedy at law,** without making request for ruling thereon, presented no question of law as to that defense. Mass 167NE 272.

162-38 274US195, 47SCt566, 71L ed996; 274US684, 47SCt755, 71L ed1297; 29F (2d)932; 34F(2d)730; 27Hawaii609.

163-39 100NJEq417, 136A327.

163-46 283Pa250, 129A83.

164-47 42F(2d)886.

165-59 [d] **After hearing and grant of relief** on both bill and cross bill. 251 Mich478, 232NW355(2dcase).

166-64 91Fla709, 109S677; 248 IllA99.

167-65 96Fla691, 118S728(2dcase).

167-69 91Fla50, 107S443, 444 [citCJ].

167-71 283Pa250, 129A83.

168-81 274US195, 47SCt566, 71L ed 996; 122 Or337, 255P603; 123 Or339, 262P223; 33Wyo 457, 240P449, 454 [cit CJ].

168-82 274US195, 47SCt566, 71L ed 996; 27Hawaii835. [d] **Lack of jurisdiction over subject matter** cannot be waived or supplied by consent. Ala 128 S362(2dcase).

169-83 27Hawaii835.

169-85 330 Ill 589, 162NE209.

169-87 37F(2d)635; 91Fla709, 109S 677; 101NJEq350, 139A812; 122 Or 337, 255P603.

169-90 274US195, 47SCt566, 71L ed 996; 19F(2d)300; 19F(2d)496; 25F (2d)404; 41F(2d)305; 91Fla709, 109S 677; 255Mass270, 151NE70; 265Mass 578, 164NE650; 102NJEq436, 141A175; 122 Or337, 255P603; 123 Or339, 262P 223; 293Pa577, 143A202; 299Pa257, 148A25; 33Wyo 457, 240P449, 454 [cit CJ].

170-91 122 Or337, 255P603; 33Wyo 457, 240P449, 454 [citCJ].

171-94½-New. Where constitution confers jurisdiction of a case on law court, counsel cannot, by mere silence or by express consent, confer jurisdiction on, or transfer jurisdiction to, equity court. 99NJEq356, 131A889.

171-94¼-New. The court of chancery cannot acquire jurisdiction by consent of counsel or acquiescence of a vice chancellor. 103NJEq273, 143A329.

171-95 122 Or337, 255P603; 50RI 144, 146A87.

171-96 19F(2d)496; 171Ark607, 286 SW811 (when both parties appeared and submitted to equity jurisdiction); 208 Iowa412, 226NW10; 255Mass270, 151 NE70; 265Mass578, 164NE650; Mass 166NE758; Mass 170NE42; 102NJEq 436, 141A175; 122 Or337, 255P603; 123 Or339, 262P223; 286Pa114, 133A31. But see 127 Or204, 270P499(1stcase).

171-98 171Ark607, 286SW811; 204 Iowa1321, 217NW231; 102NJEq436, 141A175.

171-99 25F(2d)565; 43F(2d)521; 265 Mass578, 164NE650; NH 146A172; 123 Or339, 262P223; 130 Or255, 279P542.

172-5 41F(2d)929. [a] **Equity will not issue writs to oppress** or to hinder and delay justice. 196Wis76, 219NW428.

172-7 [b] See also 91CalA37, 266P1002.

172-8 94CalA175, 270P745.

172-12 187Wis232, 202NW34 (holding that equity, in doing substantial justice, will not endeavor to commit wrong, even to wrongdoer). See also 94CalA175, 270 P745.

172-12½-New. First principle of equity is justice. 217AppDiv691, 217NYS67.

172-12⅓-New. Abstract precepts of moral code, disconnected from property and rights of persons, are neither enforced nor noticed by courts of equity. 98NJEq432, 131A117.

172-12¼-New. One seeking aid of equity subjects himself to imposition of such terms as well-established principles would require. 286Pa457, 133A638.

172-12⅕-New. Equity abhors technical rules and restrictions that tend to prohibit free transfer of property. Tex CivA 296SW929.

172-12⅙-New. One who seeks aid of equity has no standing to question the application of its fundamental rules. 158Tenn289, 13SW(2d)51.

172-12½-New. In suits in a chancery court, although they are suits cognizable in law courts, and brought in the chancery court under statute, maxims and principles of equity apply. 158 Tenn289, 13SW(2d)51.

172-12⅛-New. Equity will not lend its aid to accomplish by indirection what the law forbids to be done directly. 94 CalA175, 270P745.

172-12⅙-New. Equitable principles cannot be permitted to prevail when contrary to provisions of a positive statute. 94CalA168, 270P749.

172-12 1/10-New. Equity will not compel the doing of a useless thing. 199Wis71, 225NW193.

172-12 1/11-New. Conscience, good faith, and reasonable diligence can call a court of equity into activity. 298Pa27, 147A 838.

172-13 273US18, 47SCt277, 71L ed515, 50ALR1181; 273US456, 47SCt416, 71 L ed734; 21F(2d)936; 25F(2d)608; 216 Ala632, 114S211; 216Ala623, 114S223; 29Ariz325, 241P515; 31Ariz378, 253P 897; 32Ariz580, 261P42; 176Ark31, 2 SW(2d)70; 197Cal577, 241P861; CalA 281P1043; 102CalA71, 282P801; CalA 286P165(4thcase); CalA 290P478; 81 Colo 230, 254P777; DC 41F(2d)115; 90 Fla621, 106S424; 160Ga424, 128SE194 (citing code); 162Ga534, 134SE152, 47 ALR283; 163Ga444, 136SE410; 170Ga 419, 153SE29(2dcase); 320 Ill 586, 151 NE491; 321 Ill 354, 151NE871; 323 Ill 227, 154NE111; Ill 158NE723; 339 Ill 628, 171NE629; 199 Ind687, 156NE552. 554 [citCJ]; 201 Iowa20, 206NW680; 201 Iowa984, 206NW827; 206 Iowa680, 218NW575; 120Kan749, 244P1054; 236 Ky42, 32SW(2d)536; 258Mass383, 155 NE193; 265Mass563, 164NE475; Mass 169NE897(2dcase); Mass 173NE495; 232 Mich548, 205NW592; 165Minn396, 206 NW728; 152Miss421, 120S168; 154Miss 765, 122S776; Mo 276SW12; 315Mo 276, 286SW3, 12 [citCJ]; Mo 295SW558; Mo 318SW(2d)1002; 222MoA510, 281SW75; MoA 21SW(2d)214; 80Mont468, 260P 1055; 114Nebr839, 211NW173; NJCh 145A234; 55ND227, 212NW841; 33 OhA 232, 168NE857; 27 OhA417, 161NE217; 118 Okl 66, 246P619; 118 Okl 45, 246P 638; 125 Okl 88, 256P743; 126 Okl 93, 258P892; 128 Okl 288, 262P1059; 129 Okl 222, 264P164; 120 Or613, 253P536; 286Pa413, 133A627; 288Pa85, 135A858; 141SC265, 139SE625, 54ALR964; 146 SC385, 144SE82; TexCivA 275SW70; TexCivA 291SW631; TexCivA 299SW 440; TexCivA 2SW(2d)352; TexCivA 9SW(2d)180; TexCivA 30SW(2d)596; 192Wis218, 212NW275; 196Wis76, 219 NW428; Wis 228NW478. See also 51 SD124, 212NW498.

173-14 163Ga444, 136SE410.

174-17 193Wis503, 215NW571, 55ALR 525.

174-19 273US18, 47SCt277, 71L ed515, 50ALR1181; 34F(2d)50; 216Ala519, 113S535; 197Cal 577, 241P861; 102CalA 71, 282P801; 163Ga444, 136SE410 (plaintiff seeking to enjoin execution on lands allegedly transferred for security must show payment or tender of judgment amount); 167Ga368, 145SE661; 199 Ind687, 156NE552; 129 Or109, 276 P686; 286Pa457, 133A638; 288Pa85, 135A858; 51SD124, 212NW498; Tex CommnA 13SW(2d)667(2dcase), 70ALR 684. [b] **Though defendant's claim against plaintiff is barred by lapse of time,** it is still available in application of maxim that "he who seeks equity must do equity." 207Cal 347, 278P233.

174-20 219Ala216, 121S517; 253 IllA1. See also 121 Or591, 256P186 (where court balanced "equities" of case); 51 SD124, 212NW498.

175-21 31F(2d)27; 197Cal 577, 241P 861; 207Cal 347, 278P233.

175-22 167Ga144, 145SE87; 286Pa 457, 133A638, 640 [citCJ].

175-23 218Ala557, 119S670; Minn 231 NW395; 55ND227, 212NW841, 842, 843 [quotCJ]. [b] (1) 197Cal 765, 242P 918; 82Mont349, 267P305; TexCivA 3 SW(2d)937.

175-24 55ND227, 212NW841, 842, 843 [quotCJ]; TexCivA 3SW(2d)592, 595 [citCJ].

175-26 55ND227, 212NW841, 842, 843 [quotCJ].

175-27 55ND227, 212NW841, 842, 843 [quotCJ].

176-33 273US18, 47SCt277, 71L ed515, 50ALR1181.

176-39 273US18, 47SCt277, 71L ed515, 50ALR1181; 118Nebr129, 223NW670.

177-41 TexCivA 3SW(2d)937, 941 [cit CJ].

177-43 216Ala519, 113S535; 320 Ill 586, 151NE491; 331 Ill 80, 162NE119; 206 Iowa680, 218NW575, 580 [citCJ]; 315Mo 276, 286SW3, 12 [citCJ]; Tex CivA 3SW(2d)592, 595 [citCJ].

177-44 22 OhA228, 153NE523.

178-48 172Ark611, 290SW63.

178-49½-New. Maxim is inequitable where there had been a failure to comply with the Torrens Law. 317 Ill 11, 147NE412.

178-50 86 IndA368, 158NE231; 172

Minn110, 215**NW**192; 55**ND**227, 212**NW** 841, 842, 843 [quotCJ].
178-52 55**ND**227, 212**NW**841, 842, 843 [quotCJ].
178-55 256**Mass**299, 152**NE**90.
178-56 [f] **State and its instrumentalities.–TexCivA** 25**SW(2d)**936.
179-60 39**F(2d)**859 (stockholders establishing rights of corporation).
179-66 97**CalA**609, 275**P**960.
179-70 See also 163**Ga**444, 136**SE**410. But see 170**Ga**419, 153**SE**29(2dcase). Contra 286**Pa**457, 133**A**638.
179-72 273**US**456, 47**SCt**416, 71**L ed**734; 32**F(2d)**658; 169**Ga**264, 149**SE**879; 321 **Ill** 354, 151**NE**871; 199 **Ind**687, 156**NE** 552; **NJCh** 150**A**209; 131**Misc**563, 227 **NYS**435; 58**ND**134, 226**NW**476; 121 **Oh** 321, 168**NE**473 (judgment); 125 **Okl** 88, 256**P**743.
180-76 29**Ariz**325, 241**P**515; **TexCivA** 17**SW(2d)**1109.
180-86 129 **Okl** 222, 264**P**164.
180-87 [a] (1) 34**F(2d)**50 (patent infringement suit); 81**Colo** 230, 254**P**777; 246 **IllA**457; 252 **IllA**620; 203 **Iowa**1139, 212**NW**709, 710 [citCJ] (suit to reform deed); 165**Minn**396, 206**NW**728; 27 **OhA**417, 161**NE**217; 118 **Okl** 66, 246**P** 619; 126 **Okl** 93, 258**P**892; **RI** 140**A**777 (attorney's statutory lien); 151**SC**152, 148**SE**722 (relief from judgment giving purchaser at foreclosure sale, title free from timber deed); 147**Wash**29, 264**P** 983. [b] (3) Surety sued for return of collateral securing bond may offset accrued premiums. 131**Misc**679, 227**NYS** 189. [d] (2) Maxim applies where purchaser seeks relief from forfeiture after foreclosure of land contract. 84**Mont** 238, 275**P**267. (3) Relief against forfeiture resulting from failure to pay interest is conditioned upon payment of such interest. 199**Wis**514, 226**NW**955. [n] **In suit to recover interest in land as cotenant** and for accounting, plaintiff must make good misappropriations of sums in which defendant had interest. 286**Pa**457, 133**A**638. [o] **Invalidating and setting aside corporation mortgages.–39F(2d)**859.
180-89 14**F(2d)**933; 15**F(2d)**153; 28 **F(2d)**515; 34**F(2d)**964; 31**Ariz**378, 253 **P**897; 32**Ariz**423, 259**P**676; 78**CalA**536, 248**P**779; 102**CalA**71, 282**P**801; 81**Colo** 230, 254**P**777; **Colo** 291**P**1024; **DelCh** 151**A**261; 90**Fla**621, 106**S**424; 93**Fla**709, 112**S**622; 165**Ga**135, 139**SE**873; 320 **Ill** 586, 151**NE**491; 338 **Ill** 46, 169**NE**809; 245 **IllA**552; 201 **Iowa**984, 206**NW**827; 205 **Iowa**92, 217**NW**436; 205 **Iowa**542, 218**NW**255, 58**ALR**153; 209**Ky**109, 272 **SW**396; 178**Minn**594, 228**NW**159; 154 **Miss**765, 122**S**776; **Miss** 130**S**145; 307 **Mo** 682, 271**SW**489; 315**Mo** 276, 286**SW** 3, 12 [citCJ]; **Mo** 23**SW(2d)**155; 99 **NJEq**414, 131**A**918; 98**NJEq**218, 130**A** 222; 99**NJEq**788, 134**A**363; 215**AppDiv** 454, 214**NYS**322; 126**Misc**777, 215**NYS** 549; 128**Misc**1, 217**NYS**675; 224**AppDiv** 768, 230**NYS**463; 55**ND**227, 212**NW**841; 57**ND**655, 223**NW**707; 129 **Okl** 222, 264 **P**164; 38 **OklACR**465; 118 **Or**359, 244**P** 308; 120 **Or**613, 253**P**536; 286**Pa**457, 133**A**638; 5**PaDist&Co** 129; 5**PaDist& Co** 447; 32**PortoRico** 833; 141**SC**265, 139**SE**625, 54**ALR**964; 143**SC**127, 141 **SE**278; 152**Tenn**339, 279**SW**257; 116 **Tex**603, 297**SW**225, 53**ALR**1147; **Tex CommnA** 291**SW**876; **TexCivA** 286**SW** 647; **TexCivA** 299**SW**440; **TexCivA** 8 **SW(2d)**795; **TexCivA** 15**SW(2d)**722; **TexCivA** 30**SW(2d)**596; 152**Va**760, 148 **SE**818; **Va** 152**SE**343; 104**WVa**76, 138 **SE**579; 193**Wis**503, 215**NW**571, 55**ALR** 525; 196**Wis**76, 219**NW**428; 200**Wis**153, 228**NW**123, 66**ALR**1085. See also 329 **Ill** 382, 160**NE**745. [a] (3) 99**NJEq**788, 134**A**363. (12) "He who asks relief must have acted in good faith." 14 **F(2d)**957. (13) To entitle one to relief in court of equity he must present such a case as appeals to the conscience of court. 239**Mich**357, 214**NW**163. (14) He who comes into equity must not only enter with clean hands, but must keep them clean after his entry till final decree. **NJCh** 144**A**333. [b] **Doctrine of clean hands is stranger to common law.–** 252 **IllA**358. [c] **Maxim is limited to equitable actions.–Wis** 229**NW**544.
181-90 14**F(2d)**933; 171**Ark**626, 286 **SW**822.
182-91 38 **OklACR**465.
182-93 99**NJEq**788, 134**A**363.
182-94 99**NJEq**788, 134**A**363, 367 [cit CJ]; 108**WVa**615, 152**SE**200.
182-98 14**F(2d)**957; 33**F(2d)**287 (failure to observe moral obligations); 110 **Conn**507, 148**A**347; 318 **Ill** 500, 149**NE** 495; 100**NJEq**486, 136**A**421; 120 **Or**626, 253**P**522; 120 **Or**613, 253**P**536; 293**Pa** 529, 143**A**197; 5**PaDist&Co** 431; 51**SD** 447, 214**NW**844; 200**Wis**153, 228**NW** 123, 66**ALR**1085. [b] **Maxim need not be pleaded.–DelCh** 151**A**261.
182-98½-New. Equity is not astute to find grounds for granting relief to a party previously in default. 127**Misc** 884, 217**NYS**297.
182-98⅓-New. Maxim requires one coming into equity to keep his hands clean until the final determination of the issue. 99**NJEq**788, 134**A**363.
182-98¼-New. Defense of unclean hands must usually be based on conditions existing when party applies for relief. 40**F(2d)**736.
182-99 164**Ga**721, 139**SE**521; 337 **Ill** 122, 168**NE**886; 52**ND**146, 202**NW**645.
183-4 224**Ky**56, 5**SW(2d)**271; 307**Mo** 682, 271**SW**489.
183-5 **MoA** 27**SW(2d)**757; 127**Misc**801, 217**NYS**467; 118 **Okl** 167, 247**P**692; 192 **Wis**111, 211**NW**652, 51**ALR**1156. See also 191**NC**500, 132**SE**468.
183-6 [a] **Other statements of rule.–**220 **Ala**605, 127**S**178.
183-6½-New. and equity will relieve neither party; **TexCivA** 286**SW**647.
183-12 102**CalA**71, 282**P**801; 93**Fla**709, 112**S**622; **Fla** 129**S**773; 249**Mich**269, 228**NW**698; 99**NJEq**414, 131**A**918; 102 **NJEq**259, 140**A**398; **NJ** 151**A**848; 99 **NJEq**788, 134**A**363; **NJCh** 149**A**636(1st case); **NJCh** 150**A**835; 55**ND**227, 212 **NW**841, 842, 843 [quotCJ]; 113 **Or**398, 233**P**547; 32**PortoRico** 833; **Utah** 290**P** 161; 200**Wis**153, 228**NW**123, 66**ALR** 1085. [b] **Illustrations.–**99**NJEq**788, 134**A**363.
183-13 99**NJEq**788, 134**A**363; 55**ND** 227, 212**NW**841, 842, 843 [quotCJ].
183-14 281**US**331, 50**SCt**288, 74**L ed**881; 198**Cal** 91, 243**P**431; 102**CalA**71, 282**P** 801; 81**Colo** 230, 254**P**777; **DelCh** 151**A** 261; 90**Fla**234, 107**S**175; 46 **Ida**313, 268**P**31; 234**Ky**817, 29**SW(2d)**573; 128 **Me**62, 145**A**405; 99**NJEq**788, 134**A**363; 102**NJEq**362, 140**A**684; 224**AppDiv**768, 230**NYS**463; 137**Misc**838, 243**NYS**736; 55**ND**227, 212**NW**841, 842, 843 [quot CJ]. [a] (4) Partners secretly attempting to purchase minority stock in corporation controlled by partnership before its termination may not have trust impressed on such stock in hands of other partner who purchased it. 215 **AppDiv**454, 214**NYS**322. (5) Adverse claimant of land, who purchases lease or procures tenant to attorn to him, gains no rights in equity by possession so obtained. 99**NJEq**788, 134**A**363. (6) Plaintiff held not entitled to relief against cloud on title because standing by and not informing defendant of wife's interest. 81**Colo** 230, 254**P**777. [g] **Conduct held not unconscionable.–** 35**F(2d)**14; 99**NJEq**230, 133**A**202. [h] **Contract** must be free from mistake or illegality, and perfectly fair, equal, and just. 28**F(2d)**373.
184-16 90**Fla**234, 107**S**175; 101**NJEq** 664, 139**A**33.
184-17 90**Fla**234, 107**S**175.
184-18 90**Fla**234, 107**S**175; 209**Ky**109, 272**SW**396 (destruction of former deed barring right to cancellation of substitute deed for duress); 21 **OhA**244, 153 **NE**172; **TexCivA** 299**SW**440; 200**Wis** 153, 228**NW**123, 66**ALR**1085. [b] **Plaintiff hiring members of union who voluntarily sought employment,** after termination of its agreement with union, was not precluded from obtaining injunction against union to restrain it from interfering with plaintiff's business on ground that it had unclean hands by maliciously inducing members to break contracts with union. **Mass** 167**NE**323.
184-18½-New. One who, by artful silence, gains unfair advantage will not be aided by equity. 101**NJEq**664, 139**A** 33.
184-19 **Iowa** 219**NW**583. See also 156 **Md**478, 144**A**521.
184-20 See also 337 **Ill** 122, 168**NE**886.
184-21 **CalA** 277**P**909; 318 **Ill** 500, 149 **NE**495. [c] **False testimony of administrator** held not to justify finding of unclean hands, barring such relief to prejudice of rights of heirs and creditors of estate. **CalA** 277**P**909.
184-23 205**Cal** 751, 272**P**745; **Minn** 231 **NW**397; **Miss** 130**S**145; **NJ** 152**A**14; 286**Pa**457, 133**A**638. [a] **Independent contract obligation** may be enforced by tort-feasor against party wronged, where latter was rendered solvent by recovery of damages. 127**Misc**801, 217 **NYS**467 (dictum). [b] **Wrongful act committed under honest belief of validity** does not preclude wrongdoer from seeking relief in equity. 286**Pa**457, 133 **A**638.
184-24 [b] **That corporation favored passage by legislature of statute upon which it relies** does not constitute unconscionable conduct justifying denial of relief. 121**Kan**348, 246**P**511, 1120, 54 **ALR**295.
184-26½-New. Where variance between pleading and proof, claimed to be the result of false swearing, was shown to be unintentional, equitable relief will not be denied because of alleged false swearing. 199**Cal** 366, 249**P**196.
184-27 118 **Or**359, 244**P**308.
184-28 32**PortoRico** 833.
184-29 98**NJEq**218, 130**A**222; **NB** [1925] 3**DomLR**866 (purchase by husband in wife's name in fraud of creditor's, court denying relief in suit by husband to impress trust in his favor). [c] **Partition.–307Mo** 682, 271**SW**489. [d] **Equity will not declare resulting trust** in favor of wife with whose knowledge property paid for by husband was conveyed in fraud of his creditors. 99 **NJEq**414, 131**A**918.
184-30 99**NJEq**414, 131**A**918; **NB** [1925] 3**DomLR**866 (purchase by husband in wife's name).
185-32 219**AppDiv**832, 222**NYS**220.
185-34 46**Philippine**930.
185-34½-New. Other circumstances have been held insufficient to defeat equitable relief on the ground of fraud against third persons. 199**Cal** 366, 249 **P**196.
186-35 200**Wis**153, 228**NW**123, 66**ALR** 1085. [d] (2) Druggist violating law as to possession and sale of intoxicating liquor cannot enjoin police officers from picketing his place of business, interfering with his business, or searching his customers without search warrant. 201 **Iowa**989, 208**NW**354. [g] **Breach of covenant.–255Mass**186, 150**NE** 885. [h] **Breach of contract.–RI** 150**A** 23.
186-37 93**Fla**709, 112**S**622. [d] **Conduct held not to cause unclean hands.–** 157**Miss**890, 128**S**83. [e] **Delay in asserting right to forfeit lease** does not constitute unclean hands. 36**F(2d)**769.
186-40 46 **Ida**313, 268**P**31; 234**Ky**817, 29**SW(2d)**573 (defendant seeking affirmative relief); 33 **OhA**501, 170**NE**33. But see 245**Mich**599, 223**NW**218; 99 **NJEq**198, 132**A**305.
186-41 46 **Ida**313, 268**P**31.
186-43½-New. The maxim does not apply to a defendant who has not been served with process nor made appearance in a divorce action. 81**CalA**367, 253**P**954.
186-44 152**Tenn**500, 279**SW**801, 803 [quotCJ].
186-45 82**Colo** 75, 256**P**1092; 99**NJEq** 788, 134**A**363, 368 [citCJ]. [a] (1) 82 **Colo** 75, 256**P**1092 [citCJ]. [b] **Maxim cannot be waived.–82Colo** 75, 256**P**1092.
186-46 99**NJEq**788, 134**A**363, 368 [cit CJ].
187-48 97**CalA**398, 275**P**861; 240**Mich** 167, 215**NW**401.
187-49 30**Hawaii**565, 571 [quotCJ]; **Mo** 30**SW(2d)**146; 286**Pa**457, 133**A**638; 51**SD**447, 214**NW**844; **TexCivA** 299**SW** 440.
187-51 286**Pa**457, 133**A**638.
187-52 286**Pa**457, 133**A**638, 640 [quot CJ].
187-53 152**Tenn**500, 279**SW**801, 803 [quotCJ].
187-54 14**F(2d)**907; 14**F(2d)**957; 24

F(2d)897, 898 [citCJ]; 34**F(2d)**432; 215**Ala**465, 111**S**22; 178**Ark**432, 10**SW (2d)**878; **CalA** 290**P**534; 90**Fla**234, 107 **S**175; 48 **Ida**711, 284**P**1034; 315**Mo** 276, 286**SW**3, 12 [citCJ]; 316**Mo** 891, 292 **SW**702; 117**Nebr**121, 219**NW**848; 99 **NJEq**788, 134**A**363; **NJCh** 148**A**8; 125 **Misc**546, 211**NYS**557; 219**AppDiv**682, 221**NYS**73; 137**Misc**838, 243**NYS**736; 21 **OhA**244, 153**NE**172; 131 **Okl** 159, 268**P** 205; 136 **Okl** 129, 276**P**753, 66**ALR**143; 286**Pa**457, 133**A**638; 300**Pa**542, 151**A** 15; 152**Tenn**500, 279**SW**801; 199**Wis** 379, 225**NW**209.

187–55 **Mass** 164**NE**393; 236**Mich**447, 210**NW**483; 219**AppDiv**682, 221**NYS**73; 152**Tenn**500, 279**SW**801.

187–56 14**F(2d)**907; 21**F(2d)**419; 167 **Ga**648, 146**SE**482; 320 **Ill** 586, 151**NE** 491; 126**Kan**705, 271**P**395; 216**Ky**69, 287**SW**225; 220**Ky**728, 295**SW**1055; 229 **Ky**436, 17**SW(2d)**412; **Mass** 164**NE** 393; **Mass** 173**NE**504; 251**Mich**195, 231 **NW**560; **Miss** 130**S**145; 99**NJEq**456, 132**A**496; 219**AppDiv**682, 221**NYS**73; 21 **OhA**244, 153**NE**172; 129 **Or**138, 276**P** 1086; 286**Pa**457, 133**A**638; 300**Pa**542, 151**A**15. [1] **Interest in partnership land.**–286**Pa**457, 133**A**638.

188–57 **NJCh** 133**A**41; 21 **OhA**244, 153 **NE**172.

188–61 30**Hawaii**565, 571 [quotCJ].

188–62 286**Pa**457, 133**A**638; 300**Pa**542, 151**A**15.

188–63 14**F(2d)**907; 32**F(2d)**559; **CalA** 290**P**534; **DelCh** 151**A**261; 90**Fla**234, 107**S**175; 286**Pa**457, 133**A**638. [b] (2) Owner of soap, by changing formula, is not deprived of equitable relief against unfair competition, under principle of clean hands. 21**F(2d)**419.

189–64 [a] **Court in applying maxim must also consider doctrine** that fraud without injury is not usually available as defense. **MoA** 27**SW(2d)**481.

189–67 318 **Ill** 500, 149**NE**495.

189–68 116**Nebr**466, 217**NW**956, 959 [citCJ].

189–69 85**Colo** 247, 274**P**931; 325 **Ill** 114, 156**NE**258; 178**Minn**594, 228**NW** 159. [a] **Improper conduct of both parties** did not require dismissal of bills. 38**F(2d)**448.

189–71 [c] **Where purchaser elects to retain property and recoup damages for constructive fraud** doctrine of unclean hands cannot deprive vendor of equitable remedy of foreclosure of mortgage securing part of consideration. 30**NM**566, 240**P**469.

189–72 18**F(2d)**839; 242 **IllA**302.

189–73 5**F(2d)**1005; 242**Mich**130, 218 **NW**671.

190–75 197**Cal** 765, 242**P**918. [a] 14 **F(2d)**957; 201**Cal** 754, 258**P**1099; 202 **Cal** 345, 260**P**881; 256**Mass**367, 152**NE** 635; **Mass** 168**NE**106; **Mass** 171**NE**281; 251**Mich**195, 231**NW**560; 149**Miss**111, 115**S**197; 138**Misc**322, 245**NYS**341; 126 **Okl** 108, 258**P**866; 195**Wis**304, 218**NW** 590.

190–76 28**F(2d)**472; 82**Colo** 75, 256**P** 1092; 90**Fla**234, 107**S**175; 99**NJEq**414, 131**A**918; 51**SD**447, 214**NW**844; 161 **Tenn**191, 29**SW(2d)**664; **TexCivA** 9**SW (2d)**747. [a] (3) To restrain enforcement of judgment based on fraudulent acts of plaintiff in equity. 224**AppDiv** 768, 230**NYS**463. [b] **Foreclosure of mortgage without reference to timber deed** bars relief as to judgment giving purchaser title free from timber lands. 151**SC**152, 148**SE**722.

190–77 100**NJEq**486, 136**A**421; **Tex CivA** 286**SW**647. [c] **Where husband assigned judgment for alienation of affections of wife,** he then being insolvent except for judgment, wife was not permitted to have assignment set aside to enable her to get payment of her judgment for disbursements for support of children. 127**Misc**801, 217**NYS** 467.

191–79 154**Miss**765, 122**S**776; 317**Mo** 207, 294**SW**723.

191–80 90**Fla**234, 107**S**175.

191–81½–New. In suit to enjoin insurance commissioner's enforcement of order, complainant's alleged violation of state trust laws held not to preclude relief on the ground that he did not come with clean hands. 14**F(2d)**907.

191–82 41**F(2d)**169 (bankruptcy proceedings); **Ala** 130**S**64; 251**Mich**434, 232**NW**208; **NJCh** 144**A**12; 129 **Okl** 222, 264**P**164; 32**PortoRico** 833. But see **Miss** 130**S**145. [c] **Occupant charging conspiracy between owner and purchaser of building to dispossess him by demolishing building** must come into court with clean hands. 168**La**714, 123**S**301.

191–85 **NJCh** 147**A**581.

191–88 85**Colo** 364, 276**P**674; 100**NJEq** 486, 136**A**421; 101**NJEq**664, 139**A**33; 135**Misc**350, 238**NYS**193.

191–88½–New. fraudulent summary foreclosure proceedings under mortgage law in Porto Rico; 32**PortoRico** 833.

191–92 102**CalA**71, 282**P**801; 322 **Ill** 489, 153**NE**677; 244 **IllA**540; 204 **Iowa** 1195, 213**NW**264; 98**NJEq**7, 129**A**704; 100**NJEq**486, 136**A**421; 116**Tex**603, 297 **SW**225, 53**ALR**1147; 150**Va**515, 143**SE** 741 (usury); **WVa** 153**SE**905. [d] 50 **RI** 194, 146**A**814 (mortgages given in consideration for intoxicating liquors). [j] **Unlawful sexual intercourse.–Tex CivA** 286**SW**647.

192–93 104**WVa**76, 138**SE**579. [g] **Illegal gaming device.**–104**WVa**76, 138**SE** 579. [h] **Ku Klux Klan.**–34**F(2d)**432.

193–96 5**F(2d)**873; 31**Ariz**324, 253**P** 435, 59**ALR**625; 198**Cal** 91, 243**P**431; 338 **Ill** 46, 169**NE**809; 120**Kan**749, 244**P** 1054; 243**Mich**668, 220**NW**730; 315**Mo** 276, 286**SW**3, 12 [citCJ]; **MoA** 23**SW (2d)**205; 80**Mont**266, 260**P**124; 99**NJEq** 369, 131**A**897, 898 [citCJ]; 195**NC**498, 142**SE**776; **TexCivA** 276**SW**308; **Tex CommnA** 288**SW**156; **TexCivA** 274**SW** 161; **TexCivA** 285**SW**700. [a] (14) Equity will not care for and protect slothful or those merely of dull apprehension. **TexCivA** 21**SW(2d)**309.

193–2 334 **Ill** 168, 165**NE**605; 198**Wis** 416, 224**NW**720.

193–5 [a] **Maxim held inapplicable** where doctrine of laches was not involved. 315**Mo** 276, 286**SW**3.

193–6 21**F(2d)**433; 32**F(2d)**215; 205 **Cal** 276, 270**P**939, 60**ALR**730; 321 **Ill** 480, 152**NE**587; 226**Ky**82, 9**SW(2d)** 1095; 99**NJEq**369, 131**A**897, 898 [citCJ]; 122 **Or**74, 257**P**690; 47**RI** 366, 133 **A**437.

194–8 87**Colo** 316, 287**P**849; 312**Mo** 563, 279**SW**714.

194–10 321 **Ill** 480, 152**NE**587.

194–11 231**Ky**421, 21**SW(2d)**653(2d case); 80**Mont**266, 260**P**124; 86**Mont** 193, 282**P**1042.

194–13 99**NJEq**369, 131**A**897.

194–14 133 **Okl** 264, 271**P**1042; 298**Pa** 27, 147**A**838.

194–17 270**US**438, 46**SCt**326, 70**L ed** 669; **NJCh** 149**A**636(1stcase). [a] **Promptness of action** required in disaffirming act depends on what effect delay will have. 270**US**438, 46**SCt**326, 70 **L ed**669.

194–18½–New. Maxim has also been applied to quitclaim form of mortgages. 31**Ariz**324, 253**P**435, 59**ALR**625.

194–29 13**F(2d)**249.

195–34 42**F(2d)**65; 233**Ky**115; 25**SW (2d)**62; 158**La**889, 105**S**2. [a] (3) Court of chancery acts only against person. 248**NY**261, 162**NE**73.

195–40 32**F(2d)**517.

195–43 1**F(2d)**871.

195–47 164**Ga**177, 137**SE**919; 164**Ga** 735, 139**SE**525; 164**Ga**861, 139**SE**674; **NJ** 149**A**44; 143 **Okl** 220, 289**P**315; 44 **Philippine**343; **Va** 154**SE**587; 199**Wis** 466, 226**NW**303. [a] (1) 35 **OhA**101, 172**NE**290.

195–52 164**Ga**735, 139**SE**525.

195–55 130**Misc**676, 224**NYS**711, 714 [quotCJ].

196–56 130**Misc**676, 224**NYS**711, 714 [quotCJ].

196–57 130**Misc**676, 224**NYS**711, 714 [quotCJ].

196–59 161**Ga**588, 131**SE**487, 43**ALR** 1045; 164**Ga**177, 137**SE**919; 164**Ga**861, 139**SE**674; 81**Mont**560, 264**P**679; 57**ND** 708, 223**NW**931; 121 **Or**373, 254**P**1012, 51**ALR**1466; **TexCivA** 276**SW**308, 315 [citCJ].

196–62 **Iowa** 231**NW**705.

196–64 13**F(2d)**249; 166**Ga**800, 144**SE** 261. [f] 172**Ark**1165, 291**SW**832.

197–65 54**SD**296, 223**NW**195; **TexCivA** 276**SW**308, 315 [citCJ]; 146**Va**197, 135 **SE**832 (court of equity must enforce all proper and legal contracts).

197–69 **TexCivA** 276**SW**308.

197–72 [a] **Parol evidence rule is in** equity no bar to justice. 100**NJEq**448, 136**A**320.

197–75 164**Ga**177, 137**SE**919.

198–85 8**F(2d)**632. [b] (1) 55**ND**505, 214**NW**805.

198–86 55**AppDC**309, 5**F(2d)**270; 164 **Ga**421, 138**SE**902; 320**Mo** 1077, 9**SW (2d)**907; 51**SD**447, 214**NW**844.

198–88 13**F(2d)**645; 126**Me**49, 136**A** 121; 147**SC**333, 145**SE**196. [a] (1) 152 **Tenn**664, 280**SW**689. (5) "Where there is a wrong, there is a remedy." 81**Colo** 379, 256**P**4, 8.

199–95 294**Pa**108, 143**A**574.

199–96½–New. Aside from legislative direction equity will right a wrong regardless of good or bad faith of wrongdoer. 216**AppDiv**250, 214**NYS**670.

200–3½–New. Equity does not aid doubtful rights. 244**NY**22, 154**NE**652.

200–5½–New. , nor does it apply where no right, legal or equitable exists. 152 **Tenn**664, 280**SW**689.

200–5½–New. It applies only to those who have not had their day in court. 229**Ky**189, 16**SW(2d)**1036.

200–6 13**F(2d)**645; 15**F(2d)**993; 23 **F(2d)**317; 34**F(2d)**53; 36**F(2d)**732; 214**Ala**150, 107**S**94; 214**Ala**516, 108**S** 257; 200**Cal** 482, 253**P**921; 83**Colo** 193, 265**P**682; 15**DelCh**248, 135**A**846; 235 **IllA**75, 85 [quotCJ]; 121**Kan**3, 245**P** 1017; 126**Me**167, 136**A**814; 237**Mich**303, 211**NW**648; 163**Minn**35, 203**NW**439, 205 **NW**65; **Mo** 281**SW**833; 319**Mo** 930, 5**SW (2d)**636, 643 [citCJ]; 77**Mont**260, 250**P** 823; 99**NJEq**339, 131**A**515; 137**Misc**407, 244**NYS**473; 193**NC**395, 137**SE**322; 52 **ND**146, 202**NW**645; 123 **Or**280, 261**P**55; **Or** 291**P**371; 285**Pa**186, 131**A**714; 93**Pa Super**591; 143**SC**325, 141**SE**564, 568 [cit CJ]. [a] (5) Equity considers as then done what was at time agreed to be later done. 31**F(2d)**948(2dcase). (6) Equity will consider as done whatever law required to be done under circumstances. 118**Tex**91, 11**SW(2d)**496. (7) In Louisiana the maxim has been expressed: "Law considers that as done which ought to be done." 169**La**394, 125**S**283.

200–7 235 **IllA**75, 85 [quotCJ]; **Mo** 295 **SW**558.

200–9 235 **IllA**75, 83 [quotCJ].

200–10 126**Me**7, 135**A**357.

200–11 197**Cal** 245, 239**P**1086; 76**CalA** 29, 243**P**877; 77**Mont**260, 250**P**823; 130 **Misc**110, 222**NYS**532; 50**ND**616, 197**NW** 595; **TexCivA** 299**SW**943; **TexCivA** 9 **SW(2d)**180. [b] **Plaintiff who as guardian** of his mother was bound to see that her agreement with defendant to discharge mortgage on land conveyed by her to defendant was performed, and who permitted land to be sold on foreclosure of mortgage for his benefit, held to have acquired title in trust for defendant. 163**Ga**326, 136**SE**403, 406 [cit CJ].

201–12 See also 222**MoA**474, 280**SW**711.

201–16 126**Me**7, 135**A**357.

201–17½–New. Maxim is applied to prevent wrong but never to perpetrate it. **TexCommnA** 276**SW**654.

201–20 153**Tenn**362, 284**SW**72.

201–25 80**Mont**593, 261**P**278.

201–26 26**F(2d)**696; **TexCommnA** 276 **SW**654.

201–30 80**Mont**593, 261**P**278.

201–32½–New. The maxim will not be applied to nullify the nonclaim statute affecting the time of filing a claim against a decedent's estate. 222**MoA** 474, 280**SW**711.

201–34 200**Cal** 482, 253**P**921.

202–36 78**CalA**334, 248**P**526, 530 [cit CJ].

202–41½–New. Equity will give effect to intention of parties in deed of conveyance by fixing status of parties as of date deed should have been executed. 214**Ala**150, 107**S**94.

202–42 86**Mont**463, 284**P**553; 193**NC** 395, 137**SE**322. [a] See also 131 **Okl** 119, 268**P**250.

202–46 **MoA** 275**SW**579; 285**Pa**186, 131 **A**714.

202–47 285**Pa**186, 131**A**714.

202–50 13**F(2d)**645.

203–54 95**CalA**490, 273**P**103. [a] (11) Where clerk of court failed to execute deed of lots sold under order of court in partition suit and purchaser failed to execute mortgage. 151**SC**114, 148**SE**704, 63**ALR**965. (12) Other applications of

maxim. 256 IIIA386. (13) Execution of trust to reconvey to husband and wife as joint tenants after death of one. 255 IIIA428. [b] (3) Where lessor refused to renew lease, lessee stood as if renewal had been actually made. 214Ala516, 108 S257.

203-55 15F(2d)743.

203-56½-New. to impress trust on proceeds of collected draft for bank becoming insolvent; 313Mo 412, 281SW733, 47 ALR754.

203-58 98PaSuper340.

203-59½-New. to carry out a contract for reorganization of a bank; 52ND364, 217NW637.

204-62½-New. Maxim bars recovery on note by partner who received consideration for release but failed to surrender note. 76CalA29, 243P877.

204-62¼-New. This maxim will be invoked to give effect to instrument granting one half of decedent's property to widow so as to include property discovered after distribution. 99NJEq339, 131A515.

204-62¼-New. A seller retaining title under an executed contract is entitled to foreclosure on the buyer's failure to perform, under this maxim. 22F(2d)38.

204-62½-New. A written executory contract to convey property as security creates an equitable lien, under this maxim. 22F(2d)38.

204-62½-New. Equity regards a purchaser of realty or chattels as the real owner, subject to liability for the unpaid price, and the seller as holding legal title as security, under this maxim. 22F(2d)38.

204-63 13F(2d)478; 18F(2d)360; 21 F(2d)993; 36F(2d)646; 218Ala433, 118 S633; Ill 158NE723; 85 IndA418, 154 NE692; 217Ky320, 289SW253; 252 Mass37, 147NE272; Mass 169NE897(2d case); 52ND16, 202NW645; 124 Okl 193, 255P577; 129 Or66, 275P39; Tex CommnA 282SW211, 45ALR1483; Tex CivA 88W(2d)745; Va 153SE659.

204-64 32F(2d)412.

204-65 180Ark355, 22SW(2d)12; 95 CalA490, 273P103; 82Colo 343, 259P 512; 206 Iowa1242, 219NW490; NJCh 151A121; 38 OklACR2; 287Pa205, 134 A422; TexCivA 218SW(2d)17; 104WVa 254, 139SE754. [a] (1) 77CalA681, 247 P516; 205 Iowa1185, 219NW315. (2) 253 IIIA288. (11) 99NJEq770, 134A309. (12) "Equity looks to spirit and not form of transaction." 193NC745, 138 SE124. (13) Equity seeks real and substantial rights. Nebr 231NW519.

204-67 22 OhA482, 154NE345.

204-68 218Ala433, 118S633; 77CalA 681, 247P516; 52ND16, 202NW645; 112 Okl 35, 239P660; 124 Okl 193, 255P 577.

204-70 TexCommnA 282SW211, 45 ALR1483.

204-71 Ill 172NE67; 153Va540, 150SE 238.

205-80 206 Iowa1025, 219NW411.

205-81 117Nebr121, 219NW848.

205-84 [a] (1) 18F(2d)360; 52ND16, 202NW645. [b] (1) 13F(2d)510; 32 Ariz560, 261P35; 22 OhA482, 154NE 345; 287Pa205, 134A422; TexCommnA 282SW211, 45ALR1483. (2) Legal fiction cannot be allowed to work injustice. 82Colo 343, 259P512. (3) Equity looks through form of corporation to see real partnership. 91CalA554, 267P375. [k] To grant appropriate relief in suit for infringement of patent without regard to whether parties come as plaintiff or defendant. 13F(2d)478. [l] Pleadings.-104WVa254, 139SE754 (divorce suit). [m] Applying statutory law.-195 Wis219, 217NW568 (income tax laws). [n] To determine water rights.-Or 286P 563. [o] To determine whether executors were trustees for widow.-136Misc 615, 241NY648.

206-90 26F(2d)227; DelCh 151A228; 90Fla407, 106S127, 43ALR1409; 206 Iowa75, 218NW622; 85Mont532, 281P 341; 52ND31, 202NW653; 34 OhA442, 171NE251; 118 Okl 45, 246P638; 192 Wis642, 212NW292.

207-93 206 Iowa75, 218NW622; Mont 279P253.

207-98 102NJEq20, 139A817.

207-99½-New. Maxim applies to equitable liens. 90Fla407, 106S127, 43ALR 1409.

207-1 222MoA510, 281SW75; 222MoA 510, 281SW75.

208-5 318Mo 1, 298SW762.

208-10½-New. Parties will be left where they are found in case equities are equal. 22F(2d)126.

209-16 56AppDC353, 13F(2d)959; 231 Ky40, 208W(2d)1009; 231Ky298, 218W (2d)457; 232Ky662, 248W(2d)576; 195 NC545, 142SE786; Or 289P500; 151Va 446, 145SE432.

209-22 96Fla704, 119S123.

210-24 MoA 23SW(2d)205.

210-25 96Fla704, 119S123; 86 IndA 368, 158NE231.

210-33 216Ala686, 114S301; 88 IndA 549, 165NE260; 126Mel95, 137A63; 120 Or658, 252P89, 91 [citCJ]; 96PaSuper 146; 6PaDist&Co 170, 174 [quotCJ]; 138SC86, 135SE643, 645 [citCJ]; 157SC 297, 154SE415. [a] 126Mel95, 137A63.

210-34 120 Or658, 252P89, 91 [citCJ]. [a] (3) TexCivA 218W(2d)309. (6) Negligence or omission seasonably to assert right. 126Mel95, 137A63.

211-35 216Ala686, 114S301.

211-36 216Ala686, 114S301; 325 Ill 596, 156NE769; 325 Ill 612, 156NE785; 333 Ill 183, 164NE179; 126Mel95, 137A 63; 155Md30, 141A440; 9PaDist&Co 170; 157SC297, 154SE415; Tex CommnA 291SW529, 531 [citCJ]. [b] (3) Negligence on one side and injury on other constitutes laches. 126Mel95, 137A63.

211-37 24F(2d)505; 170Ark272, 280 SW374; 68CalA270, 228P1057; 126Me 195, 137A63; Mass 165NE889; 96Pa Super146 (doctrine of laches not applicable); 47RI 47, 129A805; TexCivA 287SW693; 104WVa317, 140SE10. [a] Other definitions.-39F(2d)800.

211-38 But see 156Tenn459, 28W(2d) 413. [a] (1) 126Mel95, 137A63; (4) 198Cal 91, 243P431.

211-39 293Pa577, 143A202. [a] (2) 38 F(2d)946. (11) Not time but lack of diligence determinative. 5PaDist&Co 232.

211-39½-New. Laches is based in part on injustice resulting from the enforcement of long neglected rights and the difficulty of ascertaining the truth and doing justice. 32F(2d)215.

211-39⅓-New. Laches is peculiar to equity. 98CalA523, 277P354.

211-41 126Mel95, 137A63; 122 Or74, 257P690; 138SC86, 135SE643, 645 [cit CJ].

212-45 138SC86, 135SE643, 645 [cit CJ].

212-46 138SC86, 135SE643, 645 [cit CJ].

212-47½-New. Laches is to assist, not to defeat, justice. 29F(2d)383.

212-47⅓-New. Laches is peculiar to courts of equity. 32F(2d)215.

212-47¼-New. Doctrine of laches is not designed to punish plaintiff. Cal 291P414.

212-48 35F(2d)571; 35F(2d)462; 214 Ala684, 108S864; 216Ala686, 114S301; 168Ark718, 271SW970; 169Ark463, 275 SW905; 170Ark272, 280SW374; 174 Ark26, 295SW392; 180Ark303, 218W (2d)847; 198Cal 91, 243P131; 84CalA 577, 258P991; 94Fla11, 113S565, 55 ALR662; 48 IdaI8, 279P293; 321 Ill 480, 152NE587; 226Ky261, 108W(2d) 824; 236Ky54, 32SW(2d)558; 126Me 195, 137A63; MoA 299SW147; MoA 188W(2d)142; Nebr 231NW783; 99 NJEq369, 131A897; 130Misc204, 223 NY8740, 743 [citCJ]; 195NC498, 142 SE776, 778 [citCJ]; 115 Okl 207, 242P 264; 120 Or658, 252P89; 122 Or74, 257 P690; TexCivA 287SW693; 102WVa 652, 136SE184; 104WVa317, 140SE10; 107WVa1, 148SE566.

214-49 115 Okl 207, 242P264.

214-53 126Mel95, 137A63; 159Tenn 175, 17SW(2d)17.

214-54 215Ala550, 112S115; 101CalA 20, 281P518(2dcase); 86Mont10, 281P 548.

214-55 215Ala550, 112S115; 115 Okl 207, 242P264.

214-56 215Ala550, 112S115.

214-57 215Ala550, 112S115.

214-58 14F(2d)284; 238Mich236, 213 NW133; 240Mich295, 215NW311.

214-59 14F(2d)284; 330 Ill 250, 161 NE519; Ill 173NE477; Cal 291P414.

214-60 40F(2d)269; 196Cal 534, 238 P714; 161Ga588, 131SE487, 43ALR 1045; 117Nebr723, 223NW797(2dcase); 115 Okl 207, 242P264; Utah 291P493.

215-70 210Ky612, 276SW540.

215-70½-New. No laches can be imputed to one who has no remedy or right of action. 327 Ill 538, 158NE694.

215-70¼-New. An equitable defense of laches is available as against a bill to reach and apply, and, although an action at law is not barred by the statute of limitations, circumstances may be such that courts of equity will decline to give relief. Mass 165NE7.

215-70¼-New. The defense of laches did not lie to a suit to recover a common-law debt when statutes of limitations did not bar the action. Mass 165 NE7.

216-71 32F(2d)215; 126Mel95, 137A 63; 82Mont15, 264P683 (mandamus for reinstatement of policeman); 47RI 366, 133A437.

217-93 TexCivA 285SW340, 344 [quot CJ].

217-94 93Fla672, 112S561, 568 [cit Cyc]; 123 Or383, 261P415; TexCivA 285SW340, 344 [quotCJ].

217-2 14F(2d)284; 16F(2d)424; 22 F(2d)126; 24F(2d)981; 29F(2d)383; 216Ala686, 114S301; 172Ark851, 291 SW77; 181Ark216, 26SW(2d)57; Cal 291P414; 68CalA276, 228P1057; 89 IndA692, 168NE30(2dcase); 327 Ill 538, 158NE694; 125Kan44, 262P583, 587 [quotCJ]; 259Mass490, 156NE687; 264 Mass538, 163NE246(2dcase); 246Mich 82, 224NW404; Nebr 231NW783; 83 NH474, 144A261; 115 Okl 207, 242P 264, 267 [quotCyc]; 128 Okl 87, 261P 228; 135 Okl 142, 276P193; 138SC86, 135SE643; TexCivA 287SW693; 67 Utah90, 245P977, 46ALR466; 153Va 484, 150SE403. [a] Facts assumed and not in record are not sufficient basis for dismissal on ground of laches. 44 F(2d)11.

218-3 32F(2d)215; 79CalA69, 248P 1039; 91CalA631, 267P352; 125Kan 44, 262P583, 587 [quotCJ]; 220MoA 1004, 274SW894, 898 [quotCJ]; 77 Mont30, 248P219, 224 [citCJ]; 195NC 498, 142SE776; 138SC86, 135SE643.

219-4 91CalA631, 267P352; 125Kan 44, 262P583, 587 [quotCJ]; 220MoA 1004, 274SW894, 898 [quotCJ]; 77 Mont30, 248P219, 224 [citCJ].

219-17 BC [1930] 2DomLR117.

219-17½-New. Charging one with laches implies that he is in error. 327 Ill 538, 158NE694.

219-18 48 IdaI8, 279P293; 238Mich 236, 213NW133; 99NJEq369, 131A897.

219-20 96Fla435, 118S161; 327 Ill 538, 158NE694; 126Mel95, 137A63; 221 MoA987, 295SW821; 195NC498, 142 SE776, 778 [citCJ]; 7PaDist&Co 765; TexCommnA 299SW231, 233 [citCJ]; 104WVa317, 140SE10. [a] Period required for laches is little less than that of prescription. 213Ala408, 104S707.

220-21 14F(2d)696; 16F(2d)424; 21 F(2d)818; 25F(2d)614; 198Cal 91, 243 P431; 56AppDC330, 13F(2d)302; 327 Ill 538, 158NE694; 126Mel95, 137A63; 238Mich236, 213NW133; 101NJEq287, 137A440; 299Pa333, 149A473; 107 WVa418, 148SE131.

221-22 MoA 27SW(2d)462; TexCivA 287SW693.

221-23 33F(2d)594.

221-24 20F(2d)647, 654 [quotCJ]; 32 F(2d)215; 214Ala684, 108S864; 338 Ill 46, 169NE809; 238Mich236, 213NW 133; 168Minn227, 209NW507; NJCh 148A196 (as justification for striking pleading); 285Pa67, 131A663; 299 Pa333, 149A473.

221-24½-New. The doctrine that the period of prescription or presumption of payment after twenty years bars the action is broader than the mere statute of limitations. 216Ala686, 114S301.

221-26 14F(2d)284; 16F(2d)424; 27 F(2d)254; 29F(2d)383; 44F(2d)11; 219Ala638, 123S871; 198Cal 91, 243P 431; 68CalA270, 228P1057; 69CalA 447, 231P604; 90CalA291, 265P873; 94Fla11, 113S565, 55ALR662; 161Ga 588, 131SE487, 43ALR1045; 318 Ill 500,

149NE495; 321 Ill 423, 152NE137; 339 Ill 22, 170NE709; 336 Ill 80, 168NE6; 203 Iowa880, 210NW566; 208 Iowa 1379, 227NW414; 213Ky305, 280SW 1106; 126Me195, 137A63; 155Md30, 141A440; Mass 165NE7; 240Mich295, 215NW311; 242Mich631, 219NW740; 244Mich577, 222NW207; 249Mich306, 228NW711; 247Mich217, 225NW578; 172Minn52, 214NW767; Mo 282SW392, 409 [citCJ]; 220MoA1004, 274SW894; 221MoA987, 295SW821; Nebr 230NW 658; 101NJEq287, 137A440; 134Misc 417, 236NYS37 (delay without injury); Or 286P546 (suit within period of statute of limitations not laches); 285Pa 67, 131A663; 7PaDist&Co 289; 138SC 86, 135SE643; TexCivA 29SW(2d)438; 67Utah90, 245P977, 46ALR466; Utah 291P493; 147Va331, 137SE473; 153Va 484, 150SE403; 105WVa191, 141SE784, 786 [citCJ]; 106WVa312, 145SE575, 61ALR584; 108WVa194, 151SE700; BC [1929] 4DomLR178; Sask [1927] 3DomLR530.

223-28 220MoA1004, 274SW894, 898 [quotCJ].

223-29 126Me195, 137A63.

223-30 16F(2d)424; 18F(2d)987; 31 F(2d)535; 32F(2d)215; 174Ark669, 297 SW1008; 180Ark303, 21SW(2d)847; 198 Cal 91, 243P431; 196Cal 534, 238P714 (delay of twenty years in asserting daughter's claim for support under father's contract held not to show hardship or injustice to father's representatives or heirs at law); 204Cal 381, 268P 624; 68CalA270, 228P1057; 69CalA447, 231P604; 92CalA368, 268P488; 98CalA 6, 276P377; 94Fla11, 113S565, 55ALR 662; 29Hawaii142; 327 Ill 538, 158NE 694; 333 Ill 183, 164NE179; 203 Iowa 880, 210NW566; 206 Iowa556, 221NW 351; 208 Iowa1379, 227NW414; 233Ky 540, 26SW(2d)32; 235Ky301, 31SW(2d) 367; 126Me195, 137A63; 255Mass92, 151NE77; Mass 165NE7; 237Mich133, 211NW83, 54ALR351; 172Minn52, 214 NW767; Mo 58SW(2d)405; 322Mo435, 16SW(2d)46, 69ALR1; Mo 25SW(2d) 84; 220MoA1004, 274SW894, 898 [quot CJ]; Nebr 230NW658; 222AppDiv634, 227NYS338; 285Pa67, 131A663; 47RI 366, 133A437; 156Tenn459, 28SW(2d) 413; 158Tenn546, 14SW(2d)963; Tex CivA 292SW273; 67Utah90, 245P977, 46ALR466; 145Va184, 133SE672; 153 Va484, 150SE403; 107WVa394, 148SE 378.

224-31 285Pa67, 131A663.

224-32 264Mass538, 163NE246(2d case); NJ 130A454.

224-33 180Ark303, 21SW(2d)847; 126 Me195, 137A63.

225-35 285Pa67, 131A663.

225-37 100CalA49, 279P679; 327 Ill 538, 158NE694; 126Me195, 137A63; 220 MoA1004, 274SW894, 898 [quotCJ]; 285 Pa67, 131A663.

225-41 168Ark1098, 272SW836.

225-42 168Ark1098, 272SW836.

225-43 202Cal 345, 260P881, 885 [quot CJ].

226-44 168Ark1098, 272SW836; 170 Ark272, 280SW374; 220Ky271, 295SW 172; TexCivA 286SW307, 313 [quotCJ].

226-48 107WVa418, 148SE131.

227-49 See also 146Wash1, 261P647.

227-53 138SC86, 135SE643.

227-55 285Pa67, 131A663; 106WVa 642, 147SE22.

227-56 122 Or74, 257P690; 138SC86, 135SE643.

228-57 195Cal 132, 231P987; 138SC 86, 135SE643.

228-61 NJEq 130A454; 195NC498, 142 SE776; 46Philippine179.

230-71 NJSup 151A215 (protests and threats ineffective).

230-76 323 Ill 215, 153NE652; 208 Iowa1379, 227NW414; 292Pa532, 141A 446.

231-84 16F(2d)424; 33F(2d)594; 34 F(2d)135; 35F(2d)6; 216Ala686, 114S 301; 220Ala300, 124S874; 168Ark718, 271SW970; 198Cal 91, 243P431; 202Cal 345, 260P881, 885 [quotCJ]; 68CalA270, 228P1057; 325 Ill 596, 156NE769; 325 Ill 612, 156NE785; Ill 173NE168; 89 Ind A692, 168NE30(2dcase); 120Kan749, 244 P1054, 1055 [citCJ]; 126Me195, 137A 63; MoA 23SW(2d)205; 99NJEq369, 131A897; 122 Or74, 257P690; 285Pa67, 131A663; 291Pa574, 140A552; 295Pa 241, 145A75; 47RI 47, 129A805; 47RI 366, 133A437; TexCivA 287SW693; 147 Va331, 137SE473. [a] **Negligence on one side and injury on other** is ground for denial of relief for laches. 126Me195, 137A63.

231-85 195Cal 132, 231P987; 84CalA 577, 258P991; 285Pa67, 131A663.

232-87 56AppDC330, 13F(2d)302.

232-88 168Ark718, 271SW970; 169Ark 463, 275SW905; 68CalA270, 228P1057; 321 Ill 480, 152NE587; 120Kan749, 244 P1054; 240Mich595, 216NW406; 115 Okl 207, 242P264, 267 [quotCyc]; 283Pa 381, 129A445; 104WVa317, 140SE10, 12 [citCJ]. [a] 168Ark1098, 272SW836. [c] **Rule inapplicable** where adverse party was not justified in relying upon inactivity. 127Misc766, 217NYS452.

233-93 168Ark1098, 272SW836 (mineral property); 202Cal 345, 260P881, 885 [quotCJ]; 68CalA270, 228P1057; 48 Ida18, 279P293; 220Ky271, 295SW172, 174 [quotCJ]; 99NJEq369, 131A897; TexCivA 286SW307.

233-95 25F(2d)450, 453 [citCJ]; 147 Va331, 137SE473; 104WVa317, 140SE 10, 12 [citCJ]; 107WVa1, 148SE566.

234-96 99NJEq369, 131A897; 115 Okl 207, 242P264, 267 [quotCyc].

234-97 33F(2d)379; 214Ala684, 108S 864; 216Ala686, 114S301; 220Ala300, 124S874; 204Cal 454, 268P622; 89 IndA 692, 168NE30(2dcase); 213Ky73, 280 SW473; 163La191, 111S673, 675 [quot Cyc]; 126Me195, 137A63; 242Mich603, 219NW606; 243Mich668, 220NW730; 168Minn242, 209NW875; 86Mont10, 281P548; 299Pa333, 149A473; 158Tenn 289, 13SW(2d)51; 159Tenn175, 17SW (2d)17; 147Va331, 137SE473; 104WVa 317, 140SE10.

236-99 126Me195, 137A63.

236-1 220Ala300, 124S874; 104WVa 317, 140SE10.

237-10 33F(2d)594; 331 Ill 11, 162NE 144; 339 Ill 491, 171NE526; 338 Ill 46, 169NE809. [a] **Death of party** who could have explained transaction is material circumstance in determining laches. 49Nev55, 235P637.

237-11 19F(2d)683; 79CalA69, 248P 1039.

237-13 33F(2d)594. See also CalA 292 P699. [a] **Laches does not begin to run until fraud was or should have been discovered.**–TexCivA 26SW(2d)732.

237-14 [a] **Greater latitude** is accorded to municipal corporations in suits involving public rights. 127Misc766, 217 NYS452.

237-16 214Ala293, 107S908; 104WVa 317, 140SE10. [c] **On motion to strike bill for laches,** opportunity should be given complainant to prove facts excusing delay. NJCh 148A196.

238-17 36F(2d)747; 77Mont30, 248P 219, 224 [citCJ].

238-20 77Mont30, 248P219, 224 [citCJ].

240-51 104WVa317, 140SE10, 11 [cit CJ].

240-54 125Me183, 132A214.

240-56 TexCivA 285SW340.

241-61 93Fla143, 112S378.

241-65 168Ark718, 271SW970; 93Fla 143, 112S378; 29Hawaii297; 218Ky321, 291SW379; 49Philippine244; TexCivA 285SW340. [a] **Inexcusable delay** has bearing on judicial discretion. 250Mich 105, 229NW622.

241-67 92Fla360, 109S458.

241-70 218Ky321, 291SW379; TexCivA 285SW340; Tex 28SW(2d)907.

241-75 18F(2d)483.

242-78 14F(2d)284.

243-96½–New. Notice of claims against railroad is insufficient to destroy any estoppel established by laches of shipper. 14F(2d)284.

243-96⅓–New. but may be considered as an element bearing on the question of laches. 14F(2d)284.

243-96¼–New. Pendency of a prior suit not diligently prosecuted does not excuse laches. 21F(2d)4.

243-1 14F(2d)284; 20F(2d)647, 654 [quotCJ]; 33F(2d)594; 149Md593, 132 A645; 156Tenn131, 299SW805.

243-3 Mo 31SW(2d)28.

244-8 14F(2d)284; 23F(2d)605; 29 F(2d)383; 216Ala602, 114S220; 181Ark 216, 26SW(2d)57; 48 Ida18, 279P293; 334 Ill 193, 165NE616; 149Md593, 132 A645; 155Md146, 142A297, 301 [citCJ]; 238Mich679, 214NW320; 168Minn227, 209NW507; 101NJEq287, 137A440; 293 Pa577, 143A202; TexCivA 285SW340; 67Utah90, 245P977, 46ALR466; 153Va 484, 150SE403.

245-9 33F(2d)594; 214Ala684, 108S 864; 318 Ill 500, 149NE495; 325 Ill 47, 155NE763; 168Minn227, 209NW507. [a] **There must be not only knowledge of commission of act** but also of the extent of its consequences. 181Ark216, 26 SW(2d)57.

246-22 168Ark1098, 272SW836.

246-23 214Ala684, 108S864; 318 Ill 500, 149NE495.

247-25 125Me183, 132A214 (contra where fraud is charged).

247-27 But see 151Va28, 144SE629.

247-34 180Ark303, 21SW(2d)847; Ida 297P293; 334 Ill 168, 165NE605; 102 NJEq276, 140A781 (actual notice); Tex CivA 292SW273.

248-35 22F(2d)126.

249-46 33F(2d)594; TexCivA 285SW 340.

250-67 25F(2d)141.

250-68 TexCivA 285SW340.

251-77 195Cal 132, 231P987; Ida 287P 949; 216AppDiv554, 215NYS442.

251-78 DelCh 152A216; 318 Ill 500, 149 NE495; 291Pa574, 140A552.

252-79 NJPrerog 151A67; 151SC114, 148SE704, 63ALR965.

252-80 14F(2d)284; 15F(2d)794; 19 F(2d)683; 22F(2d)192; 27F(2d)397; 34F(2d)660(2dcase); 37F(2d)482; 213 Ala319, 104S751; 180Ark470, 21SW(2d) 853; 202 Iowa866, 211NW410; DelCh 152A216; DC 32F(2d)954; 216AppDiv 554, 215NYS442; 195NC498, 142SE 776; TexCivA 3SW(2d)937; BC [1929] 4DomLR508.

253-81 27F(2d)397; 48RI 113, 136A3; 153Va484, 150SE403.

253-83 197 Ind527, 151NE420.

254-84 331 Ill 11, 162NE144.

254-84½–New. Where plaintiff had been asserting rights in court with utmost diligence since cause of action accrued, statute of limitations is not a bar. 15F(2d)794.

254-85 216AppDiv554, 215NYS442; TexCivA 3SW(2d)937.

255-86 318Mo1214, 3SW(2d)381.

256-87 33F(2d)589; 216AppDiv554, 215NYS442.

256-99 213Ala319, 104S751 (there being no element of estoppel).

256-1 170Ark272, 280SW374; 202Cal 345, 260P881; 325 Ill 612, 156NE785; 195NC498; 142SE776; 115 Okl 207, 242 P264; 158Tenn289, 13SW(2d)51; Utah 291P298.

257-2 TexCivA 26SW(2d)732 (party relying on laches must prove extraordinary circumstances).

257-6 7F(2d)676; 34F(2d)66; 202Cal 345, 260P881, 885 [citCJ]; 92CalA368, 268P488; CalA 285P1096; 319Mo 149, 3SW(2d)1008; Mo 31SW(2d)28; Or 286P588; 49Philippine944; TexCivA 267 SW1047, 1051 [citCJ].

258-8 25F(2d)404; 47RI 366, 133A437.

258-9 47RI 366, 133A437.

258-13½–New. A stipulation by defendant's counsel admitting that plaintiff's suspicions were first aroused shortly before the action, was held not a waiver of the defense of limitations and laches. 101CalA20, 281P518(2dcase).

258-15 14F(2d)181; 22F(2d)147; 31 F(2d)553; 91Fla345, 108S173, 176 [cit CJ]; 165Ga479, 141SE291; 167Ga389, 145SE460; 170Ga472, 153SE188; 29 Hawaii804; 154Md599, 141A334; 259 Mass295, 156NE443; 256Mass568, 153 NE13; 265Mass329, 163NE880; 241Mich 101, 216NW458, 459 [citCJ]; 102NJEq 354, 140A573; 116Tex1, 285SW1063, 1069 [citCJ]; TexCivA 4SW(2d)153, 154 [citCJ]; 107WVa205, 148SE7; 196 Wis125, 218NW193.

260-16 [a] (8) All persons whose rights may be injuriously affected by decree should be made parties. 172 Minn110, 215NW192.

260-17½–New. There can be no suit without parties, 91Fla345, 108S173.

260-17⅓–New. and where it is uncertain who are persons called to answer, suit is fundamentally defective. 91Fla 345, 108S173.

260-18 195Cal 132, 231P987; 241Mich 101, 216NW458, 459 [citCJ].

262-24 259Mass295, 156NE443.
262-25 256Mass568, 153NE13.
262-26 NJCh 147A785(2dcase).
263-36 29Hawaii804, 807 [quotCJ]; 259Mass295, 156NE443; 318Mo 292, 300 SW1108, 1117 [quotCJ]; 116Tex1, 285 SW1063, 1069 [citCJ].
263-38 259Mass295, 156NE443; 116 Tex1, 285SW1063, 1069 [citCJ].
264-44 Md 149A689; 259Mass295, 156 NE443.
264-45 213Ky464, 281SW471, 472 [cit CJ].
267-30 39F(2d)834 (attorney's lien).
273-48 41F(2d)329; 99Fla193, 126S 282; 330 Ill 511, 162NE137; 98NJEq 512, 131A95; 215AppDiv454, 485, 214 NYS322 [quotCJ].
273-49 4F(2d)867; 8F(2d)576; 24 F(2d)169; 33F(2d)481; 330 Ill 511, 162 NE137; 98NJEq512, 131A95; 215App Div454, 485, 214NYS322 [quotCJ]. [c] **"Indispensable party"** is one bearing such relation to suit that no decree can be entered in case which will do justice to parties before court without injuriously affecting his rights. 28F(2d)257.
274-50 219Ala526, 122S841; 220Ala 529, 126S102; 330 Ill 511, 162NE137; 259Mass295, 156NE443; 98NJEq512, 131A95; 116Tex1, 285SW1063, 1069 [cit CJ].
275-51 123 Or406, 262P833. [d] **Persons who would be incidentally aided by favorable decree** are not indispensable parties. 24F(2d)169. [e] **Proposed purchasers of drainage district bonds** are not necessary parties to suit to enjoin issue of bonds. 27F(2d)377.
276-57 215AppDiv454, 485, 214NYS322 [quotCJ].
276-58½-New. No person need be made a party against whom complainant can have no decree. 123 Or406, 262P833.
277-68 98NJEq512, 131A95; 116Tex1, 285SW1063.
278-69 24F(2d)169; 219Ala645, 123S 38; 259Mass295, 156NE443.
281-79 98NJEq512, 131A95.
281-80 [a] **That surety's liability on contractor's bond is limited** does not require class suit by all claimants where it does not appear that demands exceed liability. NJSup 151A470.
284-16 218AppDiv367, 218NYS483, 487 [quotCJ].
284-17 218AppDiv367, 218NYS483, 487 [quotCJ].
284-18 218AppDiv367, 218NYS483, 487 [quotCJ].
285-19 218AppDiv367, 218NYS483, 487 [quotCJ].
285-20 But see 43F(2d)214.
292-93 218AppDiv367, 218NYS483.
292-94 218AppDiv367, 218NYS483.
294-3 319Mo 633, 5SW(2d)1100.
295-8 325 Ill 165, 156NE334.
297-33 132 Okl 5, 269P269; 49 Philippine34.
299-41 156Md565, 144A836(2dcase).
302-58 318Mo 292, 300SW1108.
305-86 106WVa559, 146SE619. [d] 150Va515, 143SE741.
306-89½-New. The court will look behind nominal complainant in determining who the real parties are as affecting and enforcing estoppel against either party. 217Ala19, 114S472.
306-96 235 IllA89, 95 [citCJ]; 235 IllA132, 143 [quotCJ]; 242Mich481, 219 NW705.
307-97 219Ala405, 122S623; 235 IllA 132, 143 [quotCJ].
307-98 235 IllA132, 143 [quotCJ].
307-99 235 IllA89, 95 [quotCJ]; 235 IllA132, 143 [quotCJ]. [a] 235 IllA89, 95 [quotCJ].
307-1 [b] **Bill held not multifarious.**-9PaDist&Co 167.
307-3 214Ala680, 108S742, 745, 46ALR 1084 [citCJ]. But see Ala 128S137.
308-7 165Ga652, 141SE651; 143Va460, 130SE408.
309-9 9PaDist&Co 167; 101WVa19, 131SE859 (ownership by two or more of common right of way).
309-12 82Colo 534, 261P859, 57ALR 203.
309-14 9PaDist&Co 167.
309-15 254 IllA86.
310-25 82Colo 534, 261P859, 57ALR 203.
311-31 [m] **Legal and equitable owners of chose in action may join.**-146Miss 837, 112S465.
312-38 5F(2d)708.
313-44 NJCh 151A48.
314-60½-New. A party plaintiff withdrawing from a suit must be made a defendant before a final decree can be entered where his presence is essential before the court can proceed. 154Miss 713, 123S865.
314-63 214Ala684, 108S864; 28Hawaii 1; 101NJEq185, 137A572.
315-64 219Ala405, 122S623.
315-65 163Ga222, 136SE52; 154Md353, 140A494.
315-67 163Ga222, 136SE52; 151Md140, 134A130.
315-68 212Ala557, 103S578; 213Ala66, 104S5; 163Ga222, 136SE52; 151Md140, 134A130.
315-69 261Mass209, 158NE836; 142 Miss123, 105S502.
316-71 163Ga222, 136SE52.
316-74 165Ga652, 141SE651; 149Md 629, 132A158; 173Minn538, 217NW930; 9PaDist&Co 167.
318-76 141Miss279, 106S514; 100WVa 639, 131SE550.
318-84 9PaDist&Co 167.
318-85 Va 152SE376.
320-99 [a] **When refusal of something which ought to be done is result of unlawful conspiracy,** all parties to conspiracy are properly joined in bill praying for decree to have it done, and when officials who act for corporation are in conspiracy and corporation is otherwise properly party, rule applies. 26F(2d) 821.
321-16 219Ala533, 122S625; 91Fla345, 108S173.
323-43 157Md565, 146A742; 157Miss 576, 128S759.
324-64 Ala 128S149; 154Md599, 141A 334; Mass 170NE49; 5PaDist&Co 134; 107WVa205, 148SE7.
325-68 219Ala328, 122S343.
325-73 215Ala566, 112S139.
326-92 Mass 170NE49; 5PaDist&Co 134. But see 10PaDist&Co 165.
328-10 218Ala109, 117S623; 107WVa 205, 148SE7.
328-11 218Ala109, 117S623.
329-16 316 Ill 534, 147NE388.
329-18 316 Ill 534, 147NE388.
330-24 26F(2d)227. See also TexCivA 48W(2d)153, 154 [citCJ].
331-32 But see 300Pa134, 150A300.
331-35 26F(2d)227.
334-69 297Pa406, 147A86.
334-77 214Ala680, 108S742, 745, 46 ALR1084 [citCJ]; RI 131A554.
335-81 RI 131A554. [f] **Misjoinder of parties** will not support demurrer to evidence. 122Kan533, 253P578.
337-15 235 IllA89, 108 [citCJ].
337-18 218Ala332, 118S587; 246 IllA 590.
338-30 180Ark63, 20SW(2d)307 (where, in suit to foreclose vendor's lien, it is discovered after submission that defendant had executed trust deeds on property); 148Miss97, 114S145 (under statute). [a] 165Ga724, 142SE96. [f] **Amendment not demurrable.**-Ala 128S 137.
339-34 148SC133, 145SE692.
339-35 [a] **Statute held inapplicable** to directors' suit against purchaser of insolvent trust company's assets, who improperly attempted to join trust company having no interest in controversy. 259Mass295, 156NE443.
339-47½-New. or counterclaim, 100 NJEq295, 134A770.
340-54 MoA 294SW742.
340-58 323 Ill 269, 154NE101.
340-59 [a] **Successor in interest of one defendant** held properly substituted as party plaintiff without dismissal of suit. 323 Ill 269, 154NE101.
341-78½-New. The right to question the right of substituted plaintiff to proceed in the case is waived by defendant's filing a cross bill seeking affirmative relief. 323 Ill 269, 154NE101.
341-80 16F(2d)744. [a] **Court may not make independent suit an intervention** when such relief not sought by complaint. Ala 129S69.
341-82½-New. Neither interveners nor original complainant need amend bill to include intervener as party. 300Pa479, 150A902.
341-86 91Fla345, 108S173; 165Ga168, 140SE373.
342-89 [a] **To avoid multiplicity of suits.**-13PaDist&Co 496 (rule of court).
342-95 165Ga168, 140SE373. [1] **Officers.**-160La631, 107S471.
343-1 93Fla101, 111S531 [citCJ].
343-7 256Mass568, 153NE13.
343-8 43F(2d)777; 316 Ill 336, 147NE 243, 39ALR1; 256Mass568, 153NE13; 13PaDist&Co 496.
343-9 43F(2d)485; 256Mass568, 153 NE13.
343-15 256Mass568, 153NE13.
343-16 6F(2d)666, 667 [citCJ]; 6Pa Dist&Co 350, 352 [quotCJ].
343-17 6PaDist&Co 350, 352 [quotCJ].
343-18 27F(2d)286; 6PaDist&Co 350, 352 [quotCJ].
343-19 6PaDist&Co 350, 352 [quotCJ].
343-21½-New. Intervention must be in subordination to, and in recognition of, the main proceeding. 241Mich146, 216 NW472.
343-22 6F(2d)666, 667 [citCJ].
343-24 6F(2d)666, 667 [citCJ]; 92Fla 458, 109S641 [citCJ].
344-34½-New. A third person will not be allowed to intervene in a suit for injunction where he has an adequate remedy at law. 13PortoRicoFed74.
345-59 26F(2d)218, 222 [citCJ]; 94 Fla474, 113S680, 682 [citCJ].
345-66 122Kan134, 251P192.
346-72½-New. Allegation in so far as not responsive to bill could not be considered on hearing of preliminary objections to bill. 300Pa134, 150A300.
347-84 300Pa479, 150A902 (unless specifically dissenting).
347-85 But see 300Pa479, 150A902.
347-87½-New. Order sustaining demurrer to intervention is interlocutory. 172Ark295, 288SW381.
347-87½-New. The court may dismiss intervention to which demurrer had been previously sustained. 172Ark295, 288 SW381.
347-2 42F(2d)904. [f] **Effect as statute.**-6F(2d)666. [g] **Limitation on pleading of intervener.**-6F(2d)666. [h] **Where matter of right.**-43F(2d)485.
347-3 43F(2d)485; 43F(2d)777.
348-10½-New. An equity rule authorizing the bringing in of new parties to complete the determination of a counterclaim presupposes the existence of the counterclaim and proper pleading thereof. 25F(2d)271.
349-23 24F(2d)169.
351-53½-New. The court of chancery may always issue fieri facias to master as well as to sheriff. 100NJEq370, 136 A408. [a] **Illustrations.**-Where land in two counties is to be sold or intricate distribution of proceeds of land lying in one county is to be made, practice is to issue fieri facias to master. 100NJ Eq370, 136A408.
351-57 93Fla337, 112S45; 98NJEq512, 131A95; 100NJEq181, 135A74.
352-75 219Ala601, 122S808.
352-84 214Ala35, 106S168.
353-1 93Fla611, 112S768, 777 [citCJ]. [c] **Leave of court to serve cross bill** is not necessary. SD 226NW270.
353-2 93Fla611, 112S768.
353-3 93Fla611, 112S768.
354-13 100NJEq181, 135A74.
354-15 100NJEq181, 135A74.
355-35 98NJEq512, 131A95.
355-37 Fla 129S848.
356-47 100NJEq24, 134A904, 905 [cit CJ].
356-59½-New. A subpœna defective in form may be amended. 20F(2d)46.
356-59½-New. Objection to a subpœna is waived by general appearance and prayer for affirmative relief. 20F(2d) 46.
351-60 100NJEq181, 135A74.
357-64 NJCh 147A109(1stcase).
357-73 [b] (2) Subpœna in chancery must be directed to defendant or defendants named in suit and served upon each of them in manner required by law before defendant is in court's jurisdiction. 93Fla337, 112S45. (3) Service on resident agent, in charge of property of individual nonresident, is not sufficient. 96Fla6, 118S57. [c] **Substantial compliance** with statutory directions has been held sufficient. NJCh 148A161(2d case).
357-74 89Fla240, 104S601 (where copy is given to person, original need not be

shown or read). [e] (4) **Original need** not be exhibited but leaving copy is sufficient. **NJCh** 148A161(2dcase).

358-78 **NJCh** 148A161(2dcase) (held directory and not mandatory).

358-83 178**Minn**379, 227**NW**429; 283**Pa** 339, 129A97; 6**PaDist&Co** 133.

358-86 **DelCh** 129A857; 98**NJEq**512, 131A95.

358-87 [b] (1) 93**Fla**366, 112S64. [b] (2) Constructive service is allowed upon nonresidents whether such persons are sui juris, or infants, or persons non compos mentis. 96**Fla**327, 118S60. [e] (7) 6**PaDist&Co** 133. (12) 10**PaDist&Co** 626. (13) 13**PaDist&Co** 187. (14) Where bill by wife against husband prays for order for support account of personal property and reconveyance of lands, service by publication is unauthorized. 13**PaDist&Co** 187.

359-92 93**Fla**366, 112S64; 157**Miss**518, 128S574; 98**NJEq**512, 131A95. See also 11**PaDist&Co** 209 (rule of court).

359-93 **DelCh** 129A857.

359-95 **DelCh** 129A857; 91**Fla**50, 107S 443; 94**Fla**1046, 115S496. [a] 94**Fla** 1046, 115S496; **NJCh** 148A161(2dcase) (sufficient compliance with requirements).

360-1½-New. If party to be served by publication is living, notice should be given to him and his heirs, but if he is known to be dead, notice to heirs is sufficient. 100**NJEq**141, 134A660.

361-15 [b] **In Florida.**-91**Fla**50, 107S 443.

362-29 [a] (5) Return that subpœna was served as to certain defendants by delivering copies to them and as to others by delivery to member of their household over age of fourteen held sufficient. **NJCh** 148A161(2dcase). [d] **NJCh** 148 A161(2dcase) ("served" or "duly served"). [e] 93**Fla**337, 112S45.

363-43½-New. The return date marks the beginning of the time for answering. **NJCh** 148A161(2dcase).

363-34 93**Fla**337, 112S45.

364-56 93**Fla**337, 112S45.

364-57 91**Fla**50, 107S443.

364-62½-New. When defendant has been served, he is within the court's jurisdiction, and must move to quash irregularities, if any, in return, or he waives them. 93**Fla**337, 112S45.

365-67 20**F(2d)**46; 91**Fla**50, 107S443. See also 179**Ark**235, 15**SW(2d)**318. [f] (4) Complainant's motion for additional time to answer cross bill dispensed with necessity of showing service of process on it. 98**Fla**146, 123S525.

365-68 91**Fla**50, 107S443.

365-69 219**Ala**293, 122S36.

365-70 91**Fla**50, 107S443.

365-73½-New. A motion to extend time to answer, made after appeal from an order overruling objection to jurisdiction by special appearance, does not constitute a waiver of jurisdictional defects or a general appearance, especially where rights are expressly reserved; 91**Fla** 50, 107S443.

365-73¼-New. but where defendant moves for and obtains extension of time to answer without taking steps to question the court's jurisdiction, he waives defects and causes general appearance. 91**Fla**50, 107S443.

365-74 **NJCh** 148A161(2dcase). [b] **"Amendment in practice"** is correction by allowance of court of error committed in progress of cause and amendments in equity, not being regulated by statute, are liberally allowed. **NJCh** 148A 161(2dcase). [c] **Order of publication** has been held amendable after execution sale, where sufficient publications were made and purchaser was not prejudiced. **NJCh** 148A161(2dcase).

366-79 [c] **Prosecution of appeal** (1) from final decree on merits operates as general appearance when cause is remanded. 91**Fla**50, 107S443. (2) But appeal from interlocutory order overruling objection to jurisdiction of person interposed on special appearance does not constitute general appearance. 91**Fla**50, 107S443. [d] **Special appearance for purpose of moving to dismiss** suit on ground of lack of jurisdiction is permissible. 26**F(2d)**860. [e] **Party must appear and plead at succeeding rule day** where served with process five days prior to rule day. 151**Miss**840, 119 S324.

366-81½-New. Order permitting appearance of nonresident alleging no notice of foreclosure suit held proper. 339 **Ill** 304, 171**NE**267.

366-86 But see 91**Fla**709, 109S677.

366-89 See also 126**Misc**17, 211**NYS**864.

366-95 [b] **In Massachusetts.**-254**Mass** 317, 150**NE**155. [c] **In Pennsylvania.**-6**PaDist&Co** 323.

366-97 79**CalA**662, 251P814; **NC** 133 **SE**472.

366-97½-New. Filing. All papers touching the case, not immediately connected with the proceedings before a court sitting elsewhere, must be filed in the clerk's office of the county where the case is pending. 264**Mass**475, 163 **NE**162.

366-98 [a] **Plea of general denial abolished.**-17**F(2d)**894.

367-7 [a] 93**Fla**342, 112S75.

367-23 93**Fla**342, 112S75.

368-38 90**Fla**192, 105S404 (certificate and affidavit to plea).

368-42 220**Ala**399, 125S644 (bill not demurrable for failure to verify); 91**Fla** 824, 108S679; 148**Miss**97, 114S145; 101 **NJEq**15, 137A787.

369-50 217**Ala**57, 114S909. [b] **Affidavit in support of bill to set aside conveyance by one laboring under mental disability** (1) as executed without independent advice, should state facts. 102 **NJEq**382, 140A889. (2) Physician's affidavit that grantor's memory was almost destroyed by stroke before conveyance is not materially weakened by fact that he was not in constant attendance. 102**NJEq**382, 140A889. [c] **Verification held insufficient.**-**Ala** 129S 465

369-53 216**Ala**167, 112S818. [a] **Sources of information should be stated.**-102**NJEq**467, 141A564.

369-55½-New. The language of a verification must be given a construction against the pleader. 216**Ala**167, 112S 818.

369-56 91**Fla**824, 108S679.

369-57 91**Fla**824, 108S679.

369-58 91**Fla**824, 108S679. [b] **Bill must state reason** why not verified by complainant. **Ala** 129S465.

370-63 **Ala** 129S465.

370-75 90**Fla**192, 105S404; 90**Fla**16, 104S860.

370-76½-New. It is sufficiently verified by oath of one defendant. 90**Fla**192, 105S404 (at least where demurrer is duly presented for and on behalf of all defendants who joined in demurrer.

370-76¼-New. In Pennsylvania an equity rule expressly abolishes demurrers. 7**PaDist&Co** 356.

370-77 99**Fla**259, 129S105.

370-78 99**Fla**259, 129S105; 96**Fla**699, 119S108.

371-92 96**Fla**699, 119S108.

371-92½-New. In the absence of affidavit, the alleged maker may show that the writing referred to in the complaint was procured by fraud. 180**Ark**620, 22 **SW(2d)**167.

371-95 [d] **In Illinois.**-323 **Ill** 594, 154 **NE**701. [e] **In Mississippi.**-145**Miss**87, 110S218, 49**ALR**565. [f] **Answer is not to be considered as evidence**, where bill is verified and answer is unverified. **Tex CivA** 25**SW(2d)**923.

373-27 5**F(2d)**1005; 149**Md**15, 130A62 (stating test of impertinence).

374-32 26**F(2d)**284.

374-33 5**F(2d)**1005.

375-42 5**F(2d)**1005.

375-47 99**Fla**887, 128S622.

377-73 149**Md**15, 130A62 (impertinence in trustee's report and in reply thereto held subject to be stricken under strict rules of equity pleading).

377-74 149**Md**15, 130A62 (where exceptions to trustee's report were stricken by court of own motion as "scurrilous and irrelevant."

378-79 [a] **Other definitions.**-153**Va**614, 151**SE**300.

378-87 149**Md**15, 130A62 (failure to specify will render exceptions defective if whole paper objected to contains irrelevant matter).

378-87½-New. , and it would appear that an order sustaining specific exceptions limits exclusion to the matter specified. 149**Md**15, 130A62.

379-94 [a] (3) Exceptions to bill for impertinence are taken in same manner as exceptions to answer for insufficiency and must be made before putting in answer. 98**Fla**171, 123S697.

380-4½-New. Where the court of its own motion orders a paper stricken as a whole for scandalous or impertinent matter, good practice requires that the objectionable matter to be omitted in preparing new paper be specified. 149 **Md**15, 130A62.

380-10 99**Fla**887, 128S622.

381-13 212**Ala**667, 103S874; **NJCh** 148 A196. [a] (2) Averments of facts in answer, which, if true, affect the equities of the case, should not be stricken on motion. 94**Fla**198, 113S714. (3) In action to foreclose mortgage, answer alleging fraud is good against motion to strike. 94**Fla**198, 113S714.

381-15 89**Fla**347, 104S585 (under statute motion to strike answer or designated portions not granted, unless matter wholly irrelevant and insufficient as defense); 99**Fla**259, 129S105; 205 **Iowa** 382, 218**NW**62; **Mass** 171**NE**830 (irrelevant and immaterial matter).

381-17 See also 94**Fla**198, 113S714.

381-19½-New. A bill of complaint, which on its face does not show a cause of action, should be stricken out. 99 **NJEq**381, 131A909.

381-19¼-New. On motion to strike out bill for lack of equity all its material allegations are admitted for purpose of motion. 99**NJEq**819, 134A619.

381-19¼-New. On motion to strike a bill, the averments must be taken as verity and in entirety. **NJ** 144A588(2d case).

381-19⅛-New. Procedure on motion is inquiry whether there is an issue of fact to be tried. **NJCh** 147A778.

381-19⅛-New. On motion, defendant must confine himself to the matter contained in the bill itself. **NJCh** 147A 583.

381-20 102**NJEq**1, 139A514. [a] **Only defensive pleadings** may be stricken out as sham. 101**NJEq**41, 137A91.

381-20½-New. A motion is entertained only against defensive pleadings. **NJCh** 147A778.

381-22 [a] (1) 108**WVa**346, 151**SE**180.

381-23 98**NJEq**512, 131A95.

383-64 157**Md**378, 146A271.

383-65½-New. The original bill must be a pleading recognized by the court whose cognizance is sought. 321 **Ill** 134, 151**NE**550.

386-26 28**F(2d)**115.

387-27 See also 28**F(2d)**115. [a] **Matters formerly made subject of replication** are not prohibited in charging part of bill by statute. 219**Ala**571, 123S61.

387-40 80**Mont**374, 260P734; 286**Pa** 114, 133A31.

388-44 96**Fla**408, 118S167.

388-51 [a] **Answer to interrogatories is admissible when offered by proposing party.** **NJ** 151A624. [b] **Purpose of interrogatories and extent of disclosure.** **NJCh** 150A328 (rule liberally construed). [c] **Part of answer** is inadmissible except by consent. **NJ** 151A624. [d] **Written interrogatories may be propounded only to party to suit.** **NJCh** 151A611.

388-55 But see 129**Misc**612, 222**NYS**315.

388-59 116 **Or**440, 241P388; 144**Va**848, 130**SE**784 (should contain prayer for both specific and general relief).

388-61 218**AppDiv**632, 219**NYS**181.

388-64 **Mich** 233**NW**223.

389-65½-New. Bill not demurrable for asking for much relief. 216**Ala**231, 113 S34.

389-65⅛-New. That a complaint prays for some specific relief to which plaintiff may not be entitled does not affect the sufficiency thereof if it states a case for equitable relief and contains a prayer for general relief. 130 **Or**148, 279P546.

389-71 40**F(2d)**963.

389-75½-New. A defect in a bill for specific performance of a contract for purchase and sale of land, in that it failed to pray for process against respondent, is not available, where re-

spondent demurred to the bill and answered the averment of facts before offering to take advantage of the point. 218Ala656, 119S861(1stcase).

389–77 Mo 28SW(2d)1017.

389–78 Mo 28SW(2d)1017.

389–79 42F(2d)541; 92Fla360, 109S 458; 330 Ill 589, 162NE209; Ind 166 NE281; 157SC85, 153SE640. [e] 170 Ark1039, 282SW975; 165Ga479, 141SE 291. [f] 13F(2d)932; 85Colo 585, 277P 781; 256Mass85, 152NE88. [h] **Bill which states any ground for equitable relief** is not entirely wanting in equity. 99Fla496, 126S117.

390–80 13F(2d)932.

390–83½–New. Where allegations could have been made with comparative brevity bill covering twenty-four pages of printed record violates statute. Mass 171NE451(1stcase).

390–84 214Ala234, 107S77; 36GaA611, 137SE918; 154Md660, 141A405 (sufficient); 193Wis382, 214NW366. [a] (1) 193Wis382, 214NW366.

390–85 Ala 130S795.

390–85½–New. Case which plaintiff's bill makes out depends on the facts pleaded, the way they are stated, and the relief sought. 28F(2d)115.

390–86 170Ark1039, 282SW975; 156 Md65, 143A644.

390–89 156Md65, 143A644.

390–91 5F(2d)873; 219Ala3, 121S415; 92Fla360, 109S458 (held sufficient); Fla 129S912(2dcase); 323 Ill 380, 154NE 149; TexCivA 10SW(2d)736. [a] (9) Bill to recover definite sum is insufficient where necessity for discovery or accounting was not alleged. 214Ala234, 107S77. [j], **Motion cannot be considered** as supplying deficiency in bill's averments. 219Ala437, 122S656.

392–99¼–New. Omission of bill to allege that grantors were mentally incompetent or that deed was obtained by duress or undue influence cannot be supplied by allegations of answer. 323 Ill 380, 154NE149.

392–99¼–New. Informality in pleading is aided if adverse party answers defective pleading in such manner that informality therein is expressly or impliedly supplied or rendered formal or intelligible. 323 Ill 380, 154NE149.

392–5 18F(2d)614; 331 Ill 11, 162NE 144; Mass 172NE510.

393–15 216Ala367, 113S592; 101NJEq 15, 137A787.

393–16 101NJEq15, 137A787.

393–19 26F(2d)821.

393–21 216Ala367, 113S592; 154Md 660, 141A405.

394–22 238Mich151, 213NW110, 51ALR 1303.

394–27 322 Ill 562, 153NE669. [a] **If upon facts alleged bill has equity,** conclusion of pleader and special prayer will not destroy that equity. 213Ala159, 104S395.

395–47 180Ark550, 21SW(2d)961(2d case); 88PaSuper482. See also 254 IllA 74. [b] **Averment of petitioner's expectation of ability to prove allegations made in information and belief** is sufficient without setting forth sources of information. 88PaSuper482.

395–48 101NJEq15, 137A787.

395–50 155Md66, 141A425; 101NJEq 15, 137A787.

395–52 101NJEq15, 137A787.

396–60 34NM209, 279P944.

396–62 219Ky349, 293SW543; 150Md 271, 132A627; 154Md660, 141A405; 155 Md66, 141A425.

397–82½–New. It is not necessary to allege that plaintiff comes to court with clean hands. 90Fla234, 107S175.

397–82½–New. Where contract attempted to be enforced rests on no good consideration, bill states no cause of action. 13F(2d)932.

397–83 [a] (3) In a suit to have debt established and collateral applied in payment, exception that bill describes collateral as five thousand shares of stock of par value of five dollars a share and that shares number only one thousand of total par value of five thousand dollars is immaterial, if identity of collateral is not controverted. 252Mass 574, 147NE847.

397–85 218Ala2, 117S688.

398–86 218Ala2, 117S688.

398–88 218Ala2, 117S688.

399–6 216Ala530, 113S589.

400–9 163Ga725, 137SE60.

400–14 31Ariz378, 253P897, 898 [cit CJ]; 84CalA1, 257P545; 128 Okl 288, 262P1059, 1060 [citCJ]. [d] **Bill to enforce lien is not demurrable** because of omission of offer to do equity in absence of showing such offer necessary. Ala 128S220.

401–29 14F(2d)587, 589 [quotCJ].

401–32 34F(2d)660(2dcase).

402–41 104WVa317, 140SE10.

402–42 104WVa317, 140SE10.

402–45 104WVa317, 140SE10.

403–63 29F(2d)162; Fla 129S698; 153 Miss314, 120S732. [c] **In Mississippi.**–153Miss314, 120S732.

403–64 215Ala566, 112S139.

403–66 98Fla475, 124S38; 148Miss97, 114S145 (filing of substantial copy held sufficient under statute). [e] **Allegation that testator's deed was executed to defendant as trustee** must be treated as allegation of parol trust, where not supported by terms of deed set out as exhibit to bill. 219Ala419, 122S645.

404–68 Fla 129S698.

404–72 214Ala37, 106S336; 219Ala131, 121S420; 172Ark889, 290SW961; 178 Ark309, 10SW(2d)493; 92Fla1110, 111S 386; 153Md598, 139A280.

404–73 216Ala367, 113S592; 170Ark 908, 281SW671; 172Ark889, 290SW961; 176Ark834, 4SW(2d)520. [a] (4) Bill to redeem homestead rights from foreclosure will be aided by exhibits of mortgage, foreclosure deed, and answer to notice of foreclosure. 219Ala601, 122S 808.

404–75 170Ark908, 281SW671.

404–76 214Ala37, 106S336, 337 [cit CJ]; 170Ark908, 281SW671.

405–78 Ala 128S137.

405–78½–New. The filing of exhibits with an amended bill referring to no written instrument and calling for no exhibits was unnecessary, where the amendment was made after testimony had been taken on issues raised by the original bill and answers thereto, since requisite proof of all written instruments referred to in the original bill was, or could have been, supplied before the amendment. 157Md239, 145A 550.

405–78½–New. Exhibits supported by proof may be sufficient. 157Miss518, 128 S574.

405–80 312Mo 300, 279SW65. But see 38F(2d)457 (one count in bill may not be aided by another count).

405–82 216Ala167, 112S818; 218Ala 555, 119S665 (on demurrer); 164Ga 861, 139SE674; 44 Ida110, 255P309; 255 IllA518; 157Miss737, 128S98(1st case). [b] Contra 159Tenn175, 17SW (2d)17. [d] **On demurrer,** averments of bill must be taken most strongly against pleader. 219Ala405, 122S623.

405–83 215Ala566, 112S139; 93Fla849, 112S846; 44 Ida110, 255P309; 164Ga 861, 139SE674; 324 Ill 113, 154NE707. [b] (2) Disjunctive averment will be construed against pleader. 150Md677, 133A843.

405–84 214Ala295, 107S815; 214Ala651, 108S763; Ala 128S362(2dcase). See also 164Ga861, 139SE674.

405–88½–New. The question to be determined on preliminary objections to bill is whether under facts averred it shows as question of law that plaintiff cannot recover. 13PaDist&Co 267.

405–83¾–New. To determine whether equity has jurisdiction bill must be viewed in light of circumstances existing when brought. 41F(2d)12.

406–89 35F(2d)462 (where party elects to stand on bill); 239Mich216, 214NW 245. But see 101NJEq15, 137A787. [d] **Signed pleading is prima facie indication of truth of averments.**–101NJEq15, 137A787.

407–6 215Ala411, 110S903; 215Ala455, 111S223.

408–17½–New. A bill by an insurance company to cancel a policy of life insurance on the ground of misrepresentations, and in the alternative to enjoin suit thereon in any other forum and secure limitation of its liability on the ground of suicide of insured within one year, is maintainable to the extent cancellation is sought, although alternative relief cannot be granted because merely involving a defensive issue. 158Tenn 554, 13SW(2d)795.

408–18 7F(2d)325; 20F(2d)1017, 1018 [citCJ]; 28Hawaii1, 13 [quotCJ]; 256 Mass568, 153NE13; 9PaDist&Co 167; 102WVa151, 135SE16. [g] (4) 34F(2d) 642 (injunction suit against prohibition officers, one of whose acts will give plaintiffs common cause). (7) Bill for specific performance of contract to execute will when defective is statutory bill to quiet title. 216Ala232, 113S40. (8) Bill for partition necessitating disposal of conflicting claims before partition sale could be had is not multifarious. 147 Va1030, 133SE581. (9) Bill is multifarious where rights of all parties spring from common source or are founded on common transaction. Miss 130S475.

409–19 28Hawaii113 [quotCJ]; 256 Mass568, 153NE13; 173Minn538, 217 NW930; 9PaDist&Co 167, 175 [cit CJ]; 147Va166, 136SE655.

410–23 7F(2d)325; 154Md150, 140A 42; 147Va1030, 133SE581.

410–24 99Fla887, 128S622; 160Tenn 374, 24SW(2d)894; 147Va1030, 133SE 581; 147Va166, 136SE655.

410–25 147Va166, 136SE655.

410–26 214Ala37, 106S336; 156Md65, 143A644; 255Mass607, 152NE363; 147 Va1030, 133SE581.

411–27 255Mass607, 152NE363.

411–29 165Ga228, 140SE497.

412–31½–New. If grounds for joinder of causes and parties justify inference that it will promote administration of justice, bill is not multifarious. 151 Md140, 134A130.

412–41 261Mass209, 158NE836.

413–55 239 IllA104.

413–56 42F(2d)1; 93Fla124, 111S504; Fla 129S698; 334 Ill 539, 166NE118, 65 ALR887; 158Tenn554, 14SW(2d)961. [a] (7) To appoint receiver and restrain suit on note. Md 150A806. [c] 11F(2d) 984.

414–58 11F(2d)841; 24F(2d)415. But see 24F(2d)703.

414–59 7F(2d)325; 28Hawaii581; 142 Miss123, 105S502. [a] **Where matters joined are not absolutely independent** and it will be more convenient to dispose of them in one suit, bill will not be regarded as multifarious. 106WVa 304, 145SE586.

414–60 93Fla124, 111S504; 97Fla198, 120S319.

414–63 Md 148A531.

415–65 214Ala446, 108S345.

415–71 216Ala383, 113S246; 219Ala 77, 121S86; 245Mich493, 222NW754; 103WVa432, 137SE878.

415–72 218Ala462,–119S2; 157Md239, 145A550; Mass 172NE510; 103WVa 432, 137SE878.

415–73 214Ala680, 108S742, 46ALR 1084; 219Ala181, 121S548; 162Ga403, 134SE98; 165Ga228, 140SE497; 156Md 229, 144A245; 255Mass607, 152NE363; 103WVa432, 137SE878. [a] (1) 214Ala 226, 107S57.

416–76 214Ala65, 106S397. [b] **Bill for support and maintenance if joined with bill to enforce resulting trust** held multifarious. 214Ala65, 106S397. [c] **Bill not seeking inconsistent relief.**–218Ala 143, 117S665.

416–78 Fla 130S713(2dcase); 254 IllA 86.

416–81 163Ga222, 136SE52; 259Mass 86, 156NE4; 160Tenn374, 24SW(2d) 894; 106WVa304, 145SE586. [a] (11) To annul unlawful issue of stock to defendant, whereby sale of all assets of one corporation to another was accomplished. 173Minn538, 217NW930 (suit by stockholder). (12) To cancel deed, annul divorce decree and order probating will by widow. Ala 129S23. [d] **Bill to quiet title against tax deeds** for state and county taxes and separate deed for drainage taxes held by same person is not multifarious. 93Fla124, 111S504.

418–83 [a] (9) Fla 130S713(2d case). (11) To settle priority of mortgage over mechanic's lien and to foreclose mortgage. 212Ala594, 103S882.

419–94 See also 156Md65, 143A644.

419–95 Ala 128S149; 93Fla124, 111S 504; 165Ga479, 141SE291. [a] (9) Assignment of dower to widow and parti-

tion of remainder of property may be had in single suit. 98Fla276, 123S768; 98Fla344, 123S777.

419–98 218Ala433, 118S633. See also 166Ga635, 144SE103.

420–99 213Ala95, 104S237.

420–5½–New. Misjoinder of causes of action may exist, although a single thing or object is involved, or causes grow out of a single transaction. 158 Tenn554, 14SW(2d)961.

421–13 Fla 129S698; 237Mich252, 211 NW623. [b] 149Md39, 129A887.

421–14 154Md150, 140A42; 153Tenn 97, 282SW379.

421–16 153Tenn97, 282SW379.

421–21½–New. Equity rule that causes of action on behalf of more than one plaintiff must be joint or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice applies to uniting of causes of action of several plaintiffs. 18F(2d)839.

421–23 153Tenn97, 282SW379.

422–31 28Hawaii1; 237Mich252, 211 NW623; 101NJEq185, 137A572. [a] (12) Bill under Declaratory Judgments Act of Tennessee joining two defendants whose claims are separate is multifarious. 152Tenn302, 278SW56. (13) Bill for construction of will and to have money in bank decreed to belong to estate and to enjoin disposition thereof in which bank is joined as defendant and fraud is charged is multifarious. 237Mich252, 211NW623. [d] Bill held not multifarious.–Ala 129S571.

423–32 28Hawaii1, 13 [quotCJ].

423–33 28Hawaii1, 13 [quotCJ].

423–34 [a] Bill held not multifarious because of joinder of two classes of stockholders where all were under similar liability to plaintiff. 215Ala261, 110S147.

423–34½–New. By statute, in some jurisdictions, where there is more than one defendant, the liability must be one asserted against all material defendants. 237Mich252, 211NW623.

423–38 147Miss296, 111S874.

423–40 219Ala609, 123S202; Ala 128S 132; 165Ga479, 141SE291; 149Md629, 132A158; 154Md150, 140A42; 153Tenn 97, 282SW379.

429–47 98NJEq617, 130A829 (allegation of fraud insufficient).

429–49 90Fla192, 105S404.

424–51 163Ga222, 136SE52; RI 131A 554. See also 93Fla283, 112S50. [a] (4) But in Illinois it is said that "the only question . . . is whether or not complainants are entitled to the relief prayed for." 317 Ill 356, 148NE64.

425–53 220Ala371, 125S215.

425–58 20F(2d)1017, 1018 [citCyc]; 215Ala205, 110S384; RI 131A554.

425–59 RI 131A554.

425–62 [a] (3) It cannot be raised in demurrer to evidence. 122Kan533, 253 P578.

425–64 RI 131A554.

425–65 RI 131A554.

425–66 147Va166, 136SE655.

426–70 20F(2d)1017, 1018 [citCyc].

427–88 258Mass196, 155NE7.

427–89 258Mass196, 155NE7.

427–90 258Mass196, 155NE7.

427–95 [c] In Maryland, same paper may contain both demurrer and answer, under code. 152Md190, 136A631, 60 ALR207.

428–4 155Md189, 141A528.

428–5 328 Ill 564, 160NE140.

429–47 Va 152SE376.

429–51 95Fla530, 116S449.

430–52 155Md86, 141A518.

430–55½–New. It is a pleading, not evidence. 90Fla192, 105S404.

430–55½–New. Demurrer to a bill of complaint on the ground of no equity does not raise the question of jurisdiction of the court over the person of defendant. 213Ala614, 105S689.

430–59 161Tenn121, 29SW(2d)664.

430–61 29SW(2d)664.

430–70 165Ga582, 141SE647; 27Hawaii835, 840 [citCJ].

430–72 41F(2d)305; 27Hawaii835, 840 [citCJ]; 33Wyo 457, 240P449, 454 [cit CJ].

431–85½–New. Where a bill to obtain equitable relief was not demurrable on its face, defendants should not be held to have lost any rights because of their failure to demur. 265Mass578, 164NE 650.

431–91 99Fla887, 128S622.

432–6 But see 15DelCh293, 136A889.

432–7 [a] Waiver.–233 IllA30; 233 IllA 123.

433–20 37F(2d)332; 212Ala667, 103S 874; 125Me38, 130A513; 155Md66, 141 A425; Mass 169NE891; 83NH91, 138A 428; 101NJEq536, 138A371.

433–23 212Ala519, 103S541; 212Ala 667, 103S874.

433–26½–New. 215Ala632, 112S209.

433–28 219Ala638, 123S71.

434–43½–New. Demurring defendant may not object to a defect in the bill which cannot affect his liability. DelCh 139A766.

434–45 Ala 128S158; 258Mass196, 155 NE7; Mass 171NE486.

434–53 Ala 129S465; 98CalA390, 277P 197; 99Fla496, 126S117; 99Fla726, 127 S329 (laches apparent on bill); 328 Ill 148, 159NE222. See also 99NJEq381, 131A909.

435–54 220Ala371, 125S215 (demurrer overruled in absence of objection for multifariousness); 90Fla334, 106S126; 99WVa489, 129SE393 (general allegations treated as surplusage, if specific allegations state cause of action).

435–55 92Fla458, 109S641. See also 163Ga557, 136SE550.

435–58 169Ga712, 151SE340.

435–67 34F(2d)660(2dcase); 213Ala95, 104S237; 213Ala265, 104S515; 214Ala 684, 108S864; 219Ala343, 122S413; Ala 128S604; Ala 130S178; 202Cal 345, 260 P881, 885 [citCJ]; 121Kan202, 246P 510; 204Cal 454, 268P622; 249 IllA39; 339 Ill 491, 171NE526.

436–69 DelCh 141A276.

436–70 101Vt276, 143A382. See also 151Va322, 144SE497(2dcase).

437–71 172Ark454, 289SW485; 249 IllA 39; 125Kan44, 262P583; Vt 145A258 (2dcase).

437–79½–New. Defense of laches cannot be raised by demurrer for failure of bill to show want of laches. 213Ala 265, 104S515.

437–80 34F(2d)135.

437–81 27Hawaii835, 840 [citCJ].

437–94 241Mich101, 216NW458, 459 [cit CJ].

437–94½–New. In order that a demurrer may lie on the ground that the bill was prematurely filed, it must appear on the face of the bill that it was filed before plaintiff became entitled to enforce his right. 241Mich101, 216NW458.

433–4 218Ala235, 118S271.

438–10 6F(2d)235 (motion to make more specific not passed upon as motion for bill of particulars).

438–22 213Ala95, 104S237; 213Ala131, 104S393; 213Ala159, 104S395; 216Ala 344, 113S389; 219Ala370, 122S336; Ala 130S67.

438–27½–New. or because allegations of bill are abstract and in the nature of asserted conclusions, if under allegations, the case entitling plaintiff to relief may be made by appropriate evidence. 91Fla305, 107S633.

439–37 [a] 90Fla201, 106S430.

439–48 93Fla124, 111S504.

439–49 90Fla375, 105S842; Fla 129S 779. [c] (1) 212Ala512, 103S591; 216 Ala225, 113S47. (3) All amendments of form that may be added are considered as made. 219Ala286, 122S169.

439–51 96Fla52, 117S850. [a] (3) Where demurrer was in five parts, one part addressed to entire bill will be treated as general demurrer. 93Fla124, 111S504.

440–52 216Ala504, 113S609, 54ALR 1413; 98Fla513, 123S919 (must be overruled as special demurrer).

440–53½–New. When bill contains several aspects, proper method of testing it as a whole and such several aspects is by demurrer to bill as whole or to aspects of bill as the demurrer is appropriate. 216Ala504, 113S609, 54ALR 1413.

440–55 216Ala58, 112S338; 216Ala504, 113S609, 54ALR1413; 216Ala597, 114 S1; 94Fla209, 113S712; 96Fla52, 117 S850; 98Fla1230, 125S369(1stcase) (general demurrer erroneously sustained); 98Fla1103, 125S521. [c] 214Ala675, 108 S594.

440–56 Fla 111S112; 98Fla513, 123S 919; 99Fla795, 128S408; 330 Ill 97, 161 NE133; 339 Ill 491, 171NE526.

440–57 96Fla52, 117S850.

441–71 218Ala420, 118S912.

441–77 2NBEq136, 21CanLTOccNotes 94.

442–85 325 Ill 296, 156NE294.

442–89 [b] (9) Where demurrer was in five parts demurrers to separate parts of the bill will be treated as separate demurrers to paragraphs or allegations to which they are addressed. 93Fla124, 111S504.

442–98 93Fla283, 112S50.

443–7 165Ga109, 139SE818; 159Tenn 76, 16SW(2d)186. See also 97Fla526, 121S564.

443–13 DelCh 151A218; 339 Ill 540, 171 NE632.

443–18 Vt 145A258(2dcase).

443–18½–New. Law, attacked as unconstitutional, is tested as to its validity in the light of such matters as are the subject of judicial notice. 97Fla750, 122 S239.

443–18½–New. Although demurrer and answer may be filed at the same time, or even in the same pleading nevertheless it yet remains true that, when a case is heard on bill and demurrer, no part of the answer can be looked to as regards any fact or facts alleged therein. 152 Miss578, 120S572.

443–18½–New. Claim by makers of note that names of two makers were purposely left off renewal notes increasing liability may not be determined on demurrer. Md 150A723.

443–18½–New. Statement in demurrer not justified by any allegation of bill is disregarded. DelCh 151A218.

443–19 214Ala295, 107S815; 215Ala433, 111S5; 217Ala201, 115S239; 215Ala566, 112S139; 220Ala605, 127S178; Ala 129 S23; 220Ala367, 125S212(2dcase) (cross bill); Ala 128S158; 170Ark908, 281SW 671; 15DelCh409, 138A347; 93Fla849, 112S846; 97Fla1085, 119S326; 98Fla 1103, 125S521; 98Fla422, 123S833; 98 Fla508, 124S2(2dcase); 98Fla513, 123S 919; 333 Ill 422, 164NE673; 339 Ill 540, 171NE632; Ill 172NE772; 237 IllA129; 254 IllA86; 255 IllA518; 151Md536, 135 A376; 155Md30, 141A440; 155Md86, 141A518; 157Md378, 146A271; Md 148 A531; Md 150A723; 254Mass434, 150 NE196; 261Mass103, 158NE504; 261 Mass209, 158NE836; 265Mass23, 163 NE648; Mass 165NE673; Mass 172NE 338; 151Miss111, 117S514; 81NH535, 129A374; 290Pa404, 138A909; 101Vt 325, 143A384; 160Tenn381, 25SW(2d) 583; 161Tenn46, 29SW(2d)253; 161 Tenn222, 30SW(2d)234; 152Va173, 146 SE254; Va 152SE376. [a] (7) On demurrer to bill to enjoin merger of banks, it will not be assumed proceedings were pursuant to code or under supervision of superintendent of banks. 215Ala566, 112S139. [m] On demurrer bill admits transfer of mortgage note to respondent but not that respondent was holder in due course. 214Ala146, 107S88.

445–25 81NH535, 129A374.

446–32 DelCh 141A697; 328 Ill 76, 159 NE229; 338 Ill 575, 170NE695.

446–33 328 Ill 76, 159NE229.

446–34 93Fla849, 112S846; 290Pa404, 138A909.

447–41 164Ga837, 139SE676.

447–42 218Ala559, 119S676; 220Ala82, 123S899; 93Fla124, 111S504; 164Ga 837, 139SE676; 164Ga805, 139SE678.

447–43 164Ga837, 139SE676; 164Ga 805, 139SE678; 241 IllA289; 333 Ill 422, 164NE673.

448–44 93Fla124, 111S504; 98Fla1103, 125S521; 164Ga805, 139SE678; Md 148 A228.

449–52 215Ala566, 112S139.

449–60½–New. Specific grounds of demurrer taken to bill as whole are insufficient. 219Ala286, 122S169.

449–67 147Miss335, 112S469, 53ALR88.

449–72 Fla 129S779. But see Mass 169 NE891.

450–85 218Ala102, 117S679; 241 IllA 109.

451–4 216Ala302, 113S20; 339 Ill 540,

171NE632 (dismissal proper). [a] **Demurrers challenging certain phases of bill only** held erroneously sustained in regard to bill as whole. 219Ala571, 123 S61.

452-7 216Ala302, 113S20.

452-10½-New. It is error on sustaining demurrer to a bill to direct dismissal, without prejudice to right at law, as the bill should have been dismissed without prejudice, without any limitations whatever upon complainant's remedies. 149Md39, 129A887, 894 [citCJ].

452-10½-New. Sustaining demurrer to original bill has been held not to strike from amended bills matters covered by original bill. 218Ala379, 118S549.

452-10¼-New. Ordinarily it is premature wholly to dismiss a bill on general demurrer unless complainant's case is, from his own showing, radically such that no discovery or proof properly called for or founded upon the allegations of the bill can possibly make it a subject of equitable jurisdiction. 107WVa 455, 148SE490.

452-11 156Miss597, 126S388.

452-13 216Ala503, 113S522; 93Fla124, 111S504.

452-19 218Ala462, 119S2.

453-30 See also 96Fla691, 118S728(2d case).

453-33 See also 96Fla691, 118S728(2d case).

453-38 214Ala400, 108S20; 216Ala464, 113S513; 163Ga725, 137SE60; 328 Ill 148, 159NE222.

453-38½-New. A decree, dismissing a bill on demurrer, granting leave to amend within a stated time and declaring that, if the amendment is not made within a time limited, the bill stands dismissed with prejudice, becomes final when no amendment is made within the time limited. 152Miss260, 119S180.

454-42 164Ga837, 139SE676.

454-43 164Ga837, 139SE676.

454-45 164Ga837, 139SE676.

454-46 154Md353, 140A494; Va 152SE 376.

455-71 90Fla16, 104S860.

455-72½-New. Demurrer filed after time allowed to answer may be properly stricken. 338 Ill552, 170NE756.

455-74 [b] 98NJEq617, 130A829. [c] 33F(2d)88.

456-75 Va 152SE376.

456-76 Mass 165NE660.

457-6 5PaDist&Co 169.

457-8½-New. Formal plea setting up fraud is not necessary, although it must appear from pleadings when relied on to defeat recovery. 143Va291, 130SE411.

457-8¾-New. Defense that plaintiff comes with unclean hands, and hence is not entitled to equitable relief, need not be pleaded. 14F(2d)957.

457-9 [a] **Defense in bar must be made by plea or answer,** unless facts which constitute bar appear on face of bill. 219Ala638, 123S71.

457-13 5PaDist&Co 169.

458-30 151Miss840, 119S324.

458-43 [b] 219Ala645, 123S38.

459-48 94Fla899, 114S441.

459-49 94Fla899, 114S441; 95Fla498, 116S498; NJCh 145A721(2dcase). [c] **Pleas held sufficient.**-265Mass108, 163 NE883.

459-51 94Fla899, 114S441.

459-54 99Fla678, 126S909.

459-55 94Fla899, 114S441.

460-64½-New. 94Fla11, 113S565, 55 ALR662.

460-64½-New. Verification. A statute, providing that no person may deny the execution or assignment of a written instrument unless he verify the plea by affidavit, is held to have no application to chancery cases. 323 Ill 468, 154NE 209.

460-69 TexCivA 108W(2d)151.

460-74 99Fla678, 126S909.

460-77 [b] **Nature and sufficiency** of plea of another suit pending. 99Fla678, 126S909.

460-78 [a] **Plea insufficient.**-99Fla678, 126S909.

461-82 95Fla498, 116S498; Fla 129S 698.

461-88 262Mass247, 159NE909.

466-66½-New. It is not abuse of discretion to refuse to permit withdrawal of pleas and filing of answer after hearing and report by master. 253 IllA274.

466-67½-New. Where a plea is overruled on demurrer and the owner did answer, or an amended answer is filed covering the defense raised by plea, the plea is waived. 145Va42, 134SE472.

467-72 98NJEq184, 130A830; 101NJ Eq730, 139A412. [a] **Plea held not filed in bad faith.**-Va 152SE376.

467-75 93Fla253, 111S631. [c] **Under statute,** complainant is saved from waiver of question of sufficiency of special plea by taking issue thereon without first having sufficiency of plea tested. 219Ala645, 123S38.

467-89 Mass 165NE660.

468-96 99Fla678, 126S909.

468-4½-New. Where defendant relies on special affirmative defenses pleaded in his confession and avoidance going to the bill as a whole, the confession, if the plea fails, becomes conclusive as proof of the averments of the bill. 219 Ala645, 123S38.

469-21 100NJEq174, 134A744.

471-43 [b] **That answer is also cross-bill** does not deprive it of its nature as answer. 220Ala422, 125S661.

471-46½-New. Maryland Code, art 16, §§ 173, 179, permit answer to ask same benefit as if pleading had demurred but in this case benefit denied is postponed to hearing of cause. 150Md397, 133A 134.

471-56½-New. When fraud is charged in the bill, it need not be answered if the bill, admitting the fraud, presents no ground for relief. 142Miss409, 107 S556.

471-56¾-New. Answer is unnecessary to averments showing no ground for equitable relief. 238Mich151, 213NW 110, 51ALR1303.

471-56¼-New. If prompt objection is made, no answer to bill is necessary. 334 Ill 539, 166NE118, 65ALR887.

471-57 216Ala679, 114S63; 318 Ill 259, 149NE239. [c] **Fraud relied on to defeat recovery** must appear from pleadings, although formal plea is not necessary. 143Va291, 130SE411.

471-59 215Ala205, 110S384; 318 Ill 436, 149NE492.

471-60 216Ala679, 114S63; 318 Ill 259, 149NE239. Contra 209Ky719, 273SW 483 (defense of laches in action of specific performance).

472-62 216Ala679, 114S63; 318 Ill 259, 149NE239.

472-76 Contra 93Fla611, 112S768.

472-79 93Fla611, 112S768.

472-81½-New. Preliminary objections to bill cannot be based on matters extraneous to matters contained in bill. 13PaDist&Co 267.

473-18½-New. On compliance with statute unserved defendant who has not received notice by mail is entitled to answer as of right. 339 Ill 304, 171NE 267.

473-19 261Mass417, 158NE785. [a] (1) 101WVa742, 133SE618.

474-20 338 Ill 21, 169NE821.

474-21 261Mass417, 158NE785; 152Va 27, 146SE193.

474-22 NJCh 148A203 (equitable defenses only may be set up).

474-26½-New. The time for answering to an intervention is within the discretion of the court in the absence of statute. 170Ark771, 281SW379.

475-40 254Mass317, 150NE155; 11PaDist&Co 442. [h] **Answer neither admitting nor denying any allegations of** bill amounted to denial of all allegations. 339 Ill 540, 171NE632.

476-43½-New. Answer should be considered in its entirety. Fla 129S759.

476-45 254Mass317, 150NE155.

477-76 238Mich39, 213NW448, 52ALR 136.

477-77 238Mich39, 213NW448, 52ALR 136.

478-88 98Fla565, 124S14 (either admit allegations or disclaim knowledge of facts).

478-91 Fla 130S274; 254Mass317, 150 NE155.

478-95 Fla 130S274.

478-97 Fla 130S274.

480-15 Fla 130S274.

480-21 13PaDist&Co 293.

480-24 [a] (9) **Allegation of ignorance** in regard to state of plaintiff's title is sufficient denial that plaintiff is ready, able, and willing to perform. Mass 168 NE157.

481-33 318 Ill 259, 149NE239; 254 Mass317, 150NE155.

481-35 30F(2d)178.

481-41 Or 290P233.

482-51 29F(2d)712.

482-65 [a] **Admissions in answer insufficient** to support plaintiff's allegations. Mass 170NE804.

482-67 98Fla565, 124S14 (defendant, having knowledge of truth of allegations, must admit them); 327 Ill 254, 158NE442.

483-68 327 Ill 254, 158NE442.

483-69 327 Ill 254, 158NE442.

483-70 327 Ill 254, 158NE442.

483-72 323 Ill 380, 154NE149; 327 Ill 254, 158NE442.

483-73 327 Ill 254, 158NE442.

483-74½-New. But if the answer admits material averments of the bill, and these make a case for equitable relief, complainant is entitled to relief. 216 Ala551, 114S37.

483-74¾-New. Answer which "neither admits nor denies allegations" of bill and calls for proof is considered as admission. Mass 171NE830.

483-76 327 Ill 254, 158NE442.

483-77 327 Ill 254, 158NE442.

484-86 264Mass253, 162NE319. But see Mass 171NE830.

484-91½-New. Every material allegation in a bill as to which defendant has knowledge or belief, not explicitly denied in his answer, is taken as admitted. 234Mich482, 208NW440.

485-99 Tenn 296SW3. [a] **Failure to deny allegation of readiness, willingness, and ability to perform** does not satisfy plaintiff's burden of proving, in action for specific performance, that he can give defendant good title. Mass 168NE157.

485-1 98Fla565, 124S14; 152Miss825, 119S308; 103WVa704, 138SE399.

486-8 [e] **In federal courts** defense pleaded in answer which was formerly pleadable by plea in bar admits allegations of bill not put in issue. 24F(2d) 602.

486-13 [a] **Methods of compelling discovery.**-96Fla408, 118S167. [b] **Equity rules go no farther than to require** better statement of nature of defense and greater definiteness of particulars. 34 F(2d)79(2dcase) (party not required to disclose names of witnesses).

486-16 But see 153Tenn40, 281SW932.

486-21 96Fla32, 117S704.

486-24 256Mass211, 152NE310 (by objections at trial on merits); 161Tenn 121, 29SW(2d)664. [b] 32F(2d)608.

486-25½-New. On a motion for a decree notwithstanding answer, all the facts set forth in the answer are taken as true. 15DelCh166, 132A892.

487-29 100NJEq325, 134A733; 102NJ Eq1, 139A514; NJCh 149A543(1st case).

487-31 208 Iowa698, 223NW756(2d case).

487-40 98Fla565, 124S14 (defect as defense). [b] **Portion of answer** should not be stricken out when not wholly irrelevant. 89Fla116, 103S417.

487-44½-New. Motion admits material averments. 97Fla788, 122S264.

487-44¾-New. Legal sufficiency is properly tested by a motion which should be denied if the material averments affect the equities of the case. 97 Fla788, 122S264.

487-45 156Miss795, 126S838. [a] (1) 96Fla32, 117S704; 99Fla277, 126S293. (4) Amended answer failing to deny material allegations of bill or to set up substantial defense may be stricken out. 99Fla253, 126S356. (5) Plea not verified by oath and not certified by counsel as well founded in law may be stricken from answer. 99Fla253, 126S 356. [b] (3) Motion to strike will not lie for failure to give details or particulars. 102NJEq1, 138A514.

487-47 5PaDist&Co 567. [a] **Under equity practice,** there cannot be exception to answer. Mass 166NE848. [b] **Exceptions must be good in entirety.**-Fla 129S769.

487-47½-New. In Massachusetts exception to answer in equity will not lie under equity pleading and practice. 258 Mass319, 154NE863.
487-51 256Mass211, 152NE310.
488-59 6PaDist&Co 237.
488-64 96Fla32, 117S704.
488-65 6PaDist&Co 237.
488-66 6PaDist&Co 237.
488-68 256Mass211, 152NE310; 161 Tenn121, 29SW(2d)664.
489-74 6PaDist&Co 237.
489-81 96Fla40, 117S846.
489-83 96Fla40, 117S846; 156Md270, 144A221; 161Tenn121, 29SW(2d)664.
491-27 Fla 129S769.
492-68 [a] 102NJEq1, 139A514.
493-73 161Tenn121, 29SW(2d)664.
493-1 93Fla611, 112S768. [b] (2) No reply to replication is necessary. 14 F(2d)956. [c] **In Florida** if answer merely sets up new affirmative matter defensive in character, without asserting any set-off or counterclaim, no reply thereto is required without special order from court, and cause will be deemed at issue upon filing of answer. 96Fla40, 117S846.
494-2 101NJEq757, 139A223.
495-23 37F(2d)572.
496-49 262Mass247, 159NE909.
496-53 93Fla253, 111S631.
496-63 240 IllA411.
497-73½-New. Motion to strike replication held properly denied. 98Fla565, 124S814.
497-74 39F(2d)455; 216Ala478, 113S538; 93Fla611, 112S768; 321 Ill 134, 151NE550; 5PaDist&Co 567.
497-75 39F(2d)455; 93Fla611, 112S768.
498-76 321 Ill 134, 151NE550.
498-77 216Ala364, 113S237.
498-78 335 Ill 406, 167NE59.
498-79½-New. Plaintiff cannot entirely ignore a counterclaim setting up the legal cause of the action in an equity suit but must raise objection in the trial court. 21F(2d)893.
498-80 TexCivA 17SW(2d)474. But see 93Fla611, 112S768.
498-81 216Ala478, 113S538.
499-83 39F(2d)455 [citCJ]; 93Fla611, 112S768.
499-84 93Fla611, 112S768; 254Mass 589, 150NE862; 12PortoRicoFed13.
499-85 5PaDist&Co 9.
499-87 252Mass244, 147NE676; NJCh 151A551; 87PaSuper265 (prior to Equity Rules, rule 52); 5PaDist&Co 9. See also 93Fla611, 112S768.
500-88 259Mass295, 156NE443.
501-90 292Fa184, 140A860, 862 [cit Cyc].
501-91 [b] **In Florida.**-99Fla277, 126S 293.
502-10 93Fla611, 112S768.
502-13 259Mass295, 156NE443. See also 155Miss91, 124S69.
502-14 259Mass295, 156NE443.
503-29 [a] **Cannot be filed after hearing** on original bill as matter of right. 321 Ill 134, 151NE550.
504-50 260Mass198, 157NE337. [a] **Denial of leave to file** is held not abuse of discretion. 260Mass198, 157NE337.
505-59 Ala 129S15; 233 IllA559.
505-64½-New. That certain respondents filed cross bills has been held not to preclude the filing of a cross bill by another respondent. 218Ala379, 118S 549.
505-65 233 IllA559.
505-68 93Fla611, 112S768.
505-74 7F(2d)143; 91Fla275, 107S 342; 33PortoRico 567.
505-76 213Ala66, 104S5; 100NJEq295, 134A770; 11Utah88, 39P488.
506-79½-New. A cross bill by parties having no controversy with plaintiff will be dismissed for want of equity. 23 F(2d)605.
506-83½-New. Where legal demand is interposed in an equity suit, defendant waives a jury trial, but plaintiff is not deprived of a jury trial. 21F(2d)893.
506-83 218Ala557, 119S670; 157Md 160, 145A375.
506-84 220Ala422, 125S661.
506-86 114 Oh312, 151NE189.
507-87 170Ark637, 280SW674; 114 Oh 312, 151NE189.
507-90 321 Ill 450, 152NE133; 5PaDist &Co 567. [a] (7) Counterclaim pleaded in answer must be equitable cognizance. 93Fla910, 112S837. [c] (2) Counterclaim pleaded in answer must claim relief against original plaintiff or matter alleged must affect his rights. 93Fla 910, 112S837.
507-91 But see **TexCivA** 6SW(2d)414. [a] Right to relief asserted in cross bill if sustained by proof, is sufficient to uphold it though complainant in original bill fails. **Ala** 129S23.
508-3 5PaDist&Co 567.
508-7½-New. A cross bill has been held properly presented in answer to the original bill rather than in answer to a cross bill of corespondent. 218Ala379, 118S549.
508-7½-New. A cross bill is not without equity because it is presented by way of further answer denying facts on which the cross bill must rest. 218Ala 379, 118S549.
508-8 235Mich126, 209NW125.
508-9 216Ala478, 113S538, 539 [citCJ]; 93Fla611, 112S768, 777 [citCJ]; 335 Ill 406, 167NE59; 245 IllA20; 235Mich 126, 209NW125; 5PaDist&Co 387.
508-10 213Ala66, 104S5; 216Ala478, 113S538, 539 [citCJ]; 93Fla611, 112S 768, 777 [citCJ].
508-11 213Ala66, 104S5; 216Ala364, 113S237; 216Ala478, 113S538, 539 [cit CJ]; 321 Ill 134, 151NE550; 235Mich 126, 209NW125. [a] (29) 241Mich209, 217NW36, 60ALR276. (30) On bill for partition of specific lands, cross bill for partition of personalty and partnership accounting is germane. 156Miss424, 125 S554. [b] (16) In suit to set aside proceedings vacating part of alley, cross bills bringing in new parties and praying that other proceedings vacating other parts of same alley be set aside. 218 Ala623, 119S844(1stcase); 235Mich126, 209NW125. (17) In suit to foreclose assessment liens claimant of record title cannot, by counterclaim, compel adjudication of paramount title as between himself and tax title claimant, no affirmative relief being sought against complainant. 93Fla910, 112S837. [c] **Counterclaim pleaded in answer** must set up matters arising out of, or connected with, subject matter of original bill and germane thereto, or matter arising out of transaction which is subject of suit. 93Fla910, 112S837.
510-13 216Ala478, 113S538, 539 [cit CJ].
510-14 216Ala478, 113S538, 539 [cit CJ]; 93Fla611, 112S768.
511-28 213Ala66, 104S5; 218Ala296, 118S513. [b] **Cross bill seeking relief** inconsistent with answer to original bill is demurrable. 213Ala66, 104S5.
511-30 93Fla611, 112S768.
511-32 241Mich209, 217NW36, 60ALR 276.
512-34 101WVa728, 133SE628.
512-39 213Ala66, 104S5; 96Fla662, 119 S113.
513-60½-New. Proceeding to hearing on merits waives demurrer to cross bill. 253Mass185, 148NE450.
513-60¼-New. Contention arising on answer and not on cross bill is not for consideration on demurrer to cross bill. 145Miss566, 110S591.
513-60¼-New. Where a cross bill is sufficient as to alternative relief prayed, a demurrer addressed to the entire cross bill is properly overruled. 218Ala557, 119S670.
513-66 [c] **On motion to vacate decree on cross bill,** cross defendant may be granted enlargement of time for filing answer, which need not be filed with motion. 335 Ill 406, 167NE59. [d] **Party filing answer to cross bill is defendant thereto** and may invoke statute to vacate decree on cross bill. 335 Ill 406, 167NE 59. [e] **Failure to file answer** within several months after counterclaim is waiver thereof. 97Fla240, 121S883(2d case). [f] **In absence of proper counterclaim,** answer is not necessary. 96Fla 807, 119S134(1stcase). [g] **Failure of defendant to insist on answer to cross bill** must be treated as abandonment of cross bill. 220Ala140, 124S388.
513-77 101NJEq41, 137A91.
514-83½-New. Motion to strike out counterclaim as sham will not be entertained when averments of counterclaim, if true, support affirmative equitable relief. **NJCh** 147A778.
514-85 207 Iowa505, 223NW182.
514-89 214Ala674, 108S562.
514-89½-New. , unless there is want of an adequate remedy at law. 214Ala 674, 108S562.
514-90 100NJEq319, 134A665. [a] **Defendant has right to have counterclaim not replied to taken pro confesso,** and court erred in granting plaintiff's motion to dismiss bill and counterclaim without prejudice. 21F(2d)893.
514-92 245 IllA20, 47 [citCJ].
515-7½-New. Where no objection is made to the master's finding that a cross bill was filed to the original suit, defendants could not claim that the cross bill should be treated as though not filed, on the ground that the cross bill recited that it was made to an amended bill and the amended bill was stricken from the record. 265Mass578, 164NE 650.
515-9 [c] **In Alabama.**-218Ala128, 117 S643.
516-13 [a] (4) 32F(2d)920.
516-16 [a] (1) 214Ala321, 107S827; 216Ala445, 113S411. (9) This statute does not change general principles requesting character of permissible amendments. 214Ala321, 107S827.
516-17 19F(2d)311; 26F(2d)98 (amendment setting up counterclaim); 93Fla253, 111S631; 248 IllA99; 30Hawaii148; 152Md289, 136A269; 157Md 239, 145A550; 257Mass509, 154NE175; 260Mass265, 157NE532; 142Miss768, 107S561; 50RI 375, 147A891. [c] (1) 252Mass258, 147NE878.
517-18 176Ark126, 28SW(2d)63.
517-22 [a] **On objection that bill is indefinite** it is trial court's duty to allow amendment. 40F(2d)796.
517-24 142Miss768, 107S561 (amendment refused).
517-28 NJCh 145A621.
518-32 252Mass258, 147NE878; 260 Mass265, 157NE532. [a] (5) Amendment discretionary and subject to review for abuse of discretion. 40F(2d) 604.
518-34 [b] **Default judgment on amended bill** is held proper without notice to defendant to plead. 237 IllA122.
519-49½-New. Denial of right to amend a bill had the effect of dismissing it. 98 Fla508, 124S2(2dcase).
519-55 252Mass258, 147NE878.
520-64½-New. Massachusetts equity practice does not permit allowance of substantial counsel fees as condition of leave to amend. 252Mass258, 147NE878.
520-70 219Ala601, 122S808.
520-77½-New. In case of a proposed amendment to a bill, so as to eliminate objections leading to dismissal of the prior bill, the proper practice is to grant motion to amend, and then consider on motion to dismiss all questions not previously decided, which go to the sufficiency of the bill as amended. 31F(2d) 311.
521-87 [a] **Amendment held permissible,** though presenting nothing requiring intervention of court of equity. 145 Miss482, 111S141.
521-95 See also 244Mich480, 221NW 622.
521-96½-New. Leave to amend should be granted where bill discloses equity and appropriate amendment would make out case of equitable cognizance. 28 Hawaii476.
521-96½-New. Absence of footnotes on amendments to bill requiring answer may be waived. 219Ala645, 123S38.
521-96¼-New. Proper filing of an amended bill may be waived by defendant, proceeding without raising a point. Mass 166NE563.
521-5 NJCh 151A48. [c] **Though amendments to pleadings are allowed with great latitude,** plaintiff is not entitled as of right to amend regardless of what amendment is to be. 335 Ill 106, 166NE488.
522-6 332 Ill 253, 163NE702.
522-7 NJCh 145A641.
522-8 338 Ill 552, 170NE756 (discretion not abused).
522-10 214Ala321, 107S827.
522-16½-New. Where an indispensable party is beyond reach of the court, it is

useless to grant leave to amend. 34F(2d)66.

522-18 157Md239, 145A550.

523-26 234 IllA458.

523-27 214Ala321, 107S827; 15DelCh 144, 132A687; Mass 166NE563. [a] (16) Bill to enforce payment of dividends which have been declared may not be amended by bill asking accounting to ascertain what dividends should have been declared. 15DelCh144, 132A687.

524-28 [c] 38F(2d)820; 213Ala173, 104S530; 219Ala461, 122S432; 168Ga 105, 147SE110; 338 Ill 552, 170NE756; 234 IllA458; 107WVa624, 150SE223.

524-33 32F(2d)711; 213Ala173, 104S 530.

525-34 145Miss494, 111S135.

525-39 213Ala173, 104S530.

525-43 312Mo 300, 279SW65.

525-48 [a] (5) Bill cannot be amended so as to deprive court of jurisdiction. 215Ala550, 112S115.

526-53 32F(2d)711; 156Tenn306, 300 SW567.

526-63 214Ala680, 108S742, 46ALR 1084; 166Ga186, 142SE680; 255Mass 52, 151NE167; 103WVa394, 137SE543, 546 [citCJ].

527-80 NJCh 152A245. [e] In Massachusetts.-265Mass396, 164NE453.

528-83 41F(2d)484.

528-89 260Mass265, 157NE532; 265 Mass396, 164NE453 (by statute).

528-92 37F(2d)637.

528-93 5PaDist&Co 119.

529-2 205 Iowa382, 218NW62 (motion to dismiss treated as demurrer).

529-13 98Fla1196, 125S694; Mass 166NE563.

530-35½-New. An amendment to a bill in equity may be made, even after a hearing on the merits. 50RI 332, 147A 666.

530-36 265Mass396, 164NE453.

530-41 [a] **Where situation developed by defendant's testimony,** refusal to allow amendment to include essential allegations is abuse of discretion. 251 IllA 262.

531-47 317 Ill 247, 148NE40.

531-49 291Pa171, 139A732.

531-57 But see 41F(2d)484. [a] (2) Nor is it error to refuse amendment changing form of action from divorce to separate maintenance. 317 Ill 247, 148NE40.

531-58½-New. Claims, based on a change in circumstances on appeal from denial of motion to reopen and review the final decree, should be presented by amendment to the pleadings, which may be done up to the time of final decree. Mass 165NE884.

531-61 31F(2d)742. But see 205 Iowa 382, 218NW62.

532-88 246 IllA590.

532-90 218Ala436, 118S651.

532-91 154Md510, 142A625. [b] **Where successive amendments** to original bill were made part of final amended bill, several amendments constituted bill as last amended. 219Ala571, 123S 61.

532-95 26F(2d)821.

533-9 [a] **When amendment is not prejudicial to parties,** motion to strike it should be overruled. 219Ala601, 122 S808.

533-24 Ala 129S571 (estoppel by previous demurrer).

533-25 97Fla340, 121S477.

534-31 213Ala173, 104S530 (special demurrer rather than general demurrer must be taken to amendment wholly shifting ground of relief).

534-43½-New. An amendment merely alleging manifest wrong and oppression and absence of remedy at law has been held not demurrable. 97Fla340, 121S 477.

534-43½-New. The fact that demurrer to an amended bill was sustained by adding words to the effect that plaintiffs were given twenty days in which to amend the bill has been held not an allowance of the amendment. Mass 166 NE563.

534-48 [a] (3) Plea to original bill is rendered insufficient after amendment. 219Ala645, 123S38.

535-54 338 Ill 552, 170NE756.

535-68 98Fla1196, 125S694.

535-69 264Mass511, 163NE193.

536-80½-New. An answer filed prior to the effective date of the equity rule permitting averment of additional facts entitling defendant to affirmative relief cannot be amended so as to conform thereto. 87PaSuper265.

536-86 235Mich500, 209NW563.

537-96 26F(2d)98 (setting up counterclaim not connected with transaction forming subject matter of suit).

537-2 NJCh 145A641.

538-13 12PortoRicoFed276.

539-41 But see 159Tenn281, 17SW(2d) 910.

540-60 Del 149A303 (amendment not allowed).

540-64 321 Ill 450, 152NE133.

540-68 321 Ill 450, 152NE133.

540-72½-New. Even if as matter of technical pleading a counterclaim must be equivalent of a cross bill amendment may be allowed. 19F(2d)496.

541-75 212Ala667, 103S874.

541-80½-New. Under Equity Rules, rule 34 superseding rule 57 in federal court the right to file a supplemental bill is extended to the facts of which plaintiff was ignorant at the time of suit. 8F(2d)781.

541-80½-New. A supplemental complaint is not required in equity. 89 CalA107, 264P776.

541-80¼-New. New justiciable controversy involving issues wholly distinct from original bill is not subject of supplemental proceeding. 99Fla1340, 128S 849.

542-84 26F(2d)821; 29F(2d)296; 34 F(2d)585 (matters occurring after decree); 212Ala667, 103S874 (supplemental bill averring facts occurring since final decree and material to controversy should not be stricken on ground that no occasion existed for further invocation of powers of court); 255Mass64, 150NE908. [b] **Motion to modify decree** in original suit cannot properly perform function of supplemental bill. 34F(2d)585.

543-95 32F(2d)711.

543-2 99Fla1110, 128S493.

543-3 99Fla1110, 128S493.

543-10 212Ala667, 103S874.

544-21 212Ala667, 103S874.

544-22 212Ala667, 103S874.

545-33 [a] **Where established rules of procedure under local laws of state are violated** supplemental bill should not be permitted by courts. 99Fla1110, 128S 493.

545-35 93Fla253, 111S631. [a] (2) Court can consider fact that plaintiff instituted action in state court on substantially same grounds. 33F(2d)478.

545-36 93Fla253, 111S631. [a] **Discretion not abused.**-Refusal of permission is not abuse of discretion where rights which plaintiff seeks to enforce are not ancillary to original decree. 33 F(2d)478.

545-45½-New. On a motion to file a supplemental bill, issues as to whether asserted new matter was of doubtful substantiation, as well as the right to relief asked, have been held not determinable. 29F(2d)296.

546-61 212Ala667, 103S874.

546-69 [b] **Filing of supplemental bill** is not waiver of error in previous ruling dismissing bill. 5F(2d)393.

547-87½-New. Supplemental bill is applicable only to cases where the same parties in interest remain before the court. 321 Ill 134, 151NE550.

547-87½-New. Where trust property is being administered by a circuit court through a trustee appointed by it, one questioning the validity of the trust may file an ancillary bill in the court having custody of the property. 241 Mich146, 216NW472.

548-30½-New. Allegations in a bill on which chancery jurisdiction might be maintained, but which are not proved at the trial, and on which no relief is decreed, will not authorize a decree on parts of the bill which would not give the court jurisdiction. 330 Ill 589, 162NE209.

548-30½-New. Actual fraud being the only issue before the court, complainant stands or falls on that charge alone, regardless of other allegations in the bill. RI 147A669.

548-33 295Pa241, 145A75; 101Vt147, 141A682, 684 [citCJ]. [c] **Prejudice from delays** must be shown by him who invokes it, when not shown on face of bill. 219Ala638, 123S71.

549-34 218Ala2, 117S688; 219Ala571, 123S61; 98Fla783, 124S374(3dcase); 330 Ill 589, 162NE209; 226Ky403, 11 SW(2d)103.

549-35 336 Ill 275, 168NE326 (material allegations neither admitted nor denied must be proved). [a] **Where cause is set down on bill and answer,** and answer is directly responsive to allegations of bill, and in denial thereof, allegations of bill must fall unless sustained by proof. 96Fla40, 117S846.

549-36 [a] **Averments of bill must be denied by defendant** to put complainant to proof of them. 219Ala645, 123S38.

550-43½-New. Where suit is brought after statutory period of limitations has run, complainant has burden of proving inequity of applying it to his case. 16 F(2d)45.

550-43¼-New. Where suit is brought after expiration of statutory period, complainant must plead and prove laches do not exist. Ala 130S178.

550-46 15F(2d)451; 327 Ill 21, 158NE 353.

551-51 219Ala571, 123S61; Mass 165 NE660.

552-63 215Ala546, 112S114; 93Fla261, 111S637; 232 IllA596; 233 IllA572.

552-64 85Colo 419, 276P972; Fla 130S 603 (facts developed by answer or proofs); 323 Ill 380, 154NE149; 330 Ill 589, 162NE209; 232 IllA596; 233 IllA 572; 235 IllA89. [e] **Averments are as essential** in equity as proof. Ala 128S 593.

552-65 337 Ill 111, 168NE908.

553-71½-New. On submission of a bill asserting affirmative defenses, the bill, to the extent it is covered by a plea, is thereby confessed, so that the only matter at issue is the truth of the plea. 219Ala645, 123S38.

553-84 [b] (1) Ala 130S80.

554-95 Ala 129S465 (notation by register of evidence).

555-11 213Ala512, 105S641. [f] **In Alabama.**-213Ala512, 105S641 (not restricted to special witnesses or matters; hence order directing oral examination before judge held proper).

556-16 95Fla396, 116S501. See 96 Fla40, 117S846.

556-27 11PaDist&Co 3.

556-29½-New. In Saskatchewan a trial judge cannot direct that parts of an examination for discovery be put in evidence except at the trial in the presence of counsel. Sask [1929] 2DomLR 443.

556-31 97Fla240, 121S883(2dcase); 99 Fla302, 126S305; 232 IllA596. [d] **After decree** but before entry is not too late. 232 IllA596.

557-32 240Mich419, 215NW362; 293Pa 529, 143A197. [d] **Where proof available at trial.**-In suit to cancel note and mortgage on ground of fraud, where proof had been held insufficient to show bona fide purchase by defendant, it is not abuse of discretion to deny motion to reopen case to introduce evidence available at trial. 240Mich419, 215NW 362.

557-33 [d] **For good cause** case may be opened to allow further time for testimony. Fla 130S274 (on hearing after time has expired answer is deemed true).

557-41 But see 293Pa529, 143A197.

557-46½-New. Error to exclude surrebuttal. 232 IllA596.

558-66 98NJEq274, 130A816 (though objected to testimony is in case where no motion is made to strike).

559-75 [a] 214Ala642, 108S739.

559-82 25F(2d)108 (in federal courts); 215Ala278, 110S465.

559-83 215Ala278, 110S465.

559-84½-New. A statement of account is not evidence under federal equity rules, but merely performs the function of pleadinig. 25F(2d)108.

559-88 15DelCh302, 137A74.

560-92 152Miss792, 119S194; 74Mont 468, 241P655. See also TexCivA 283SW 212.

560-93½-New. Pa 151A883.

560–95½–New. Allegations of amended petition not sworn to and expressly denied have been held to constitute no proof whatever of title attempted to be shown thereby. **TexCivA** 283SW212.
560–98 Del 149A303.
560–2 34F(2d)566; 216Ala551, 114S 37; DelCh 147A312; 90Fla542, 106S 402, 404 [citCJ]; 94Fla899, 114S441; 149Md569, 131A749; 156Md270, 144A 221; 157Md378, 146A271; 152Va1, 145 SE425. [b] (i) 32F(2d)693; 32F(2d) 696. [j] **Where plaintiff did not set case down for hearing on bill and answer,** facts set up were not admitted. Mass 166NE848.
560–2½–New. But averments of new affirmative matter, not responsive to the bill, cannot avail defendants. 96Fla32, 117S704.
561–5½–New. Cross-complainant could not set cause down for hearing on bill and answer where answer contained several valid defenses. 161Tenn121, 29SW (2d)664.
561–9 90Fla542, 106S402, 404 [citCJ].
561–14 [d] 15DelCh183, 133A698.
562–21 13F(2d)740.
562–23 13F(2d)740; Fla 130S764.
563–24½–New. On a hearing on bill, answer, and proofs the court may dismiss the bill where the bill or proofs show ground disentitling complainant to relief, although such ground is not set up in the answer. 15DelCh302, 137 A74.
565–53 152Miss792, 119S194; 154Miss 713, 123S865; RI 151A4 (answer has only force of plea in law action).
565–56 [a] (3) Defendant who answers under oath is entitled to benefits of his answer as evidence, notwithstanding waiver of answer under oath in bill of complaint. 96Fla40, 117S846.
566–63 15F(2d)451, 454 [citCJ].
572–10½–New. Complainant's evidence must be sufficient in volume not only to overcome the answer and supporting testimony, but to move the conscience of the chancellor. 13F(2d)740.
575–65 29Hawaii142, 147 [citCJ].
577–4 [a] **In vendee's suit for specific performance,** finding that complainant had performed conditions precedent is held erroneous, under evidence. 220AppDiv591, 222NYS172.
577–13 339 Ill 62, 170NE705.
577–15 150Md333, 134A124.
578–17 See also 252Mass574, 147NE 847.
578–24 338 Ill 172, 170NE430.
578–27½–New. That persons most concerned, who knew what was said and done, have nearly all died, is a matter to be considered in weighing the evidence and determining facts. 29F(2d)383.
578–35 [a] **Intervener.**–Where cause is not at issue, intervening defendant, setting up in his unsworn answer new matter, and praying affirmative relief, is not entitled to set cause down for hearing on bill and answer, and secure such affirmative relief without proof. 96Fla32, 117S704.
578–41 99Fla717, 127S336; 98Fla783, 124S374(3dcase) (expiration of time for taking testimony to foreclose mortgage). [a] **Application by mail** for hearing should furnish court with full and complete information. NJ 146A 32.
578–43 NJ 146A32.
578–43½–New. Where complainant sets case down for hearing on bill and answer alone all pertinent averments of answer are taken as true. 99Fla1296, 128S821 (rule unaffected by statute).
579–47 232Mich15, 204NW712. See also 96Fla32, 117S704.
579–47½–New. Rule requiring cause to be at issue before proof taken is waived by offering testimony. 215Ala465, 111S 22.
579–48 99Fla376, 126S290.
579–55 247 Ill A141.
579–57 170Ark771, 281SW379; 234Ky 558, 28SW(2d)737; 243Mich627, 220 NW757.
579–58 TexCivA 8SW(2d)730.
579–58½–New. Plaintiff is held entitled to ninety days to prepare for trial. 174Ark403, 295SW384.
579–58⅓–New. The record and report have been held to show ample time afforded for pleading and proof. 219Ala 439, 122S419.
580–70 See also WVa 155SE122.
580–73⅓–New. The filing of an intervention does not call for a postponement of the trial where the issues were completely made up more than ninety days before the date of trial as required by statute. 170Ark771, 281SW379.
580–78 But see 154Md414, 141A348.
581–93 321 Ill 134, 151NE550.
581–13½–New. Hearing on bill and answer. Where a cause is set down for hearing on bill and plea, the facts pleaded are, for the purposes of the hearing, assumed to be true. 90Fla7, 105S134.
581–13⅓–New. On hearing on bill and plea the sufficiency of the bill cannot be questioned. 90Fla7, 105S134.
582–17½–New. Rule that averments of answer must be taken as true where plaintiff ordered the case for hearing on bill and answer applied only to such well pleaded facts as are relevant. 283 Pa488, 129A563.
582–17⅓–New. Affirmative matter alleged in the answer to a bill, not supported by testimony, cannot be considered on final hearing. 94Fla1151, 115S 541.
582–17¼–New. The record showing ample time afforded for pleading and proof and no objection made to submission on merits showed no arbitrary action. 219Ala439, 122S419.
582–29½–New. Testimony taken by the master is part of the evidence on file to be used by the party in a position to offer it. 215Ala465, 111S22.
582–33 149Miss489, 115S594 (motion properly denied where newly discovered evidence is merely cumulative).
583–41½–New. Where plaintiff fails to support his bill by evidence but submits to hearing on answer, defendant should not be permitted to offer evidence. 151Md102, 133A893.
583–41⅓–New. Where the case is heard on bill and answer, all well pleaded averments of answer will be presumed true. 151Md102, 133A893.
583–41¼–New. In Alabama testimony is offered by causing it to be noted in the note of the testimony. 215Ala465, 111S22.
583–41⅕–New. Objection to testimony on file is available only to new parties brought in. 215Ala465, 111S22.
583–66⅓–New. Whether the chancellor will hear arguments is within his discretion. 94Fla218, 114S246.
583–67 51SD615, 216NW353; 100Vt 425, 138A780 (it is duty of chancellor to sift evidence and state facts). [a] **Analogous to verdict.**–125Me509, 131A 574.
584–73 See also Okl 291P524.
584–74 See also 11PaDist&Co 229. [a] **Disposition of requests.**–91PaSuper343.
584–77½–New. Requested rulings are properly denied when not pertinent to issues. 253Mass383, 149NE313.
584–81 100Vt425, 138A780.
584–82 106Conn411, 138A458. [a] (3) Finding that one of plaintiffs was guilty of laches prejudicial to defendant is necessarily finding that laches of other plaintiffs under same circumstances was prejudicial. 68CalA270, 228P1057.
585–87 82NH186, 131A836.
585–93½–New. County clerk's file mark controls as to time for filing exceptions to findings as against date of reporter's certificate. 100Vt99, 135A15.
585–93⅓–New. In Vermont, statute governing exceptions to findings in cases tried by county court is made applicable by Gen. L. 1511 to causes in chancery. 100Vt99, 135A15.
585–93¼–New. Legal conclusions and decree properly followed findings supported by sufficient evidence. 300Pa68, 150A90.
585–93⅕–New. It is the legal duty of the trial court to enter findings consistent with undisputed testimony of a witness. SD 227NW84.
585–94 51SD615, 216NW353.
585–98 NJCh 149A356(2dcase); NC 133SE472; TexCivA 273SW974, 975 [citCJ].
585–99 8F(2d)922; 16F(2d)473; 29 F(2d)230; 33Ariz466, 266P8; 69CalA 688, 232P499; 76CalA232, 245P235; 201Cal 155, 255P825; 261Mass409, 158 NE763; 167Minn494, 210NW66; 114 Nebr450, 207NW927; 115 Okl 298, 243 P137; 125 Okl 254, 257P372; 38 OklA CR598; 132SC360, 128SE172 (under court rule); TexCivA 273SW974, 975 [citCJ]; 147Va554, 137SE485; 147Va 478, 137SE511; 153Va165, 149SE467; Va 153SE807. [f] **In Virginia.**–147Va 1030, 133SE581.
586–2 166Minn328, 207NW641.
586–3 166Minn328, 207NW641.
586–8½–New. Submission of cause for final decree is held erroneous where new respondent was not served with process and no appearance was made. 214Ala 35, 106S168.
587–11 147Va478, 137SE511.
587–14 Sask [1927] 3DomLR555.
587–25 [a] **Counsel's affidavit** that case will be rendered doubtful by conflicting evidence, without stating supporting facts, is held insufficient to warrant issue out of chancery. 147Va478, 137SE 511.
588–27 147Va554, 137SE485.
588–28 TexCivA 273SW974.
588–33 147Va478, 137SE511.
589–45 [a] **Note of testimony** is held unnecessary for submission on register's report. Ala 113S294.
589–53½–New. A general verdict should not be submitted or received with special findings. 48Nev205, 228P 615, 239P801.
589–53⅓–New. Where a demand for a jury trial is made, the proper procedure is to send the issue to a court of law for determination and to retain the bill until determination is had. NJ 144A 636.
589–60 But see SC 155SE148.
589–61 NJClr 145A334(2dcase).
590–66 Mont 287P217.
590–73 151Va1, 144SE492.
590–83½–New. In an action for injunction and damages, it is not error for the court to refuse to submit to the jury questions other than the amount of damages. 179Minn110, 228NW548.
590–84 NJ 144A636; 243NY28, 152 NE454.
591–89 115 Okl 298, 243P137.
591–7 265Mass578, 164NE650.
592–16 48Nev205, 228P615, 239P801. 804 [citCJ].
592–16½–New. Jury must be given all the evidence which the court may use in order that they may give such advice intelligently. 29Ariz325, 241P515.
592–34 122Kan533, 253P578.
592–35 170Ga37, 151SE923 (instruction held proper).
592–37 170Ga37, 151SE923.
593–44 29F(2d)230.
593–47½–New. A motion for a directed verdict at the end of plaintiff's evidence is not allowed in equity. Iowa 227NW 526(3dcase).
593–52½–New. A court of equity, having jurisdiction of the class of cases of which the particular case is one, should determine whether pleading and proof entitle plaintiff to equitable relief and should not dismiss for want of jurisdiction to consider merits. 108WVa 203, 150SE607(1stcase).
593–60 15DelCh290, 136A885, 886 [cit CJ]. [c] **Where verdict not responsive to issues,** complainant may ask that issues be put in new form for retrial. 15 DelCh290, 136A885.
593–63 15DelCh290, 136A885, 886 [cit CJ].
594–72 151Va1, 144SE492.
594–77 69CalA688, 232P499; SD 230 NW805(3dcase) (court powerless to render judgment on verdict).
594–82½–New. Where no issue involving laches was submitted to a jury in an equity suit, the chancellor, regarding the question of laches as determinative, may properly proceed to dispose of the case on that ground, without reproach to the verdict. 158Tenn289, 13 SW(2d)51.
594–82⅓–New. Where the chancellor submitted certain issues to a jury, application or motion for a decree on the theory that the issues so submitted are

not determinative is not a motion for a decree non obstante veredicto. 158 Tenn289, 13SW(2d)51.

594–85 218Ala536, 119S662(1stcase); 29Ariz325, 241P515 (where evidence was conflicting); 35Ariz110, 274P775; 172Ark914, 290SW938; 76CalA232, 245 P235; 85CalA360, 259P460; 81Colo 58, 253P385; 48 Ida654, 284P840; Ida 290 P395; 330 Ill 106, 161NE99; 336 Ill 490, 168NE340; 256 IllA452; 230Ky 710, 20SW(2d)714; 232Ky741, 24SW (2d)560; 221MoA127, 294SW111; 114 Nebr450, 207NW927; 115 Okl 298, 243 P137; 116 Okl 192, 244P198; 125 Okl 254, 257P372; 126 Okl 93, 258P892; 128 Okl 183, 261P935; 128 Okl 222, 262 P205; 129 Okl 85, 263P456; 135 Okl 208, 275P331; 38 OklACR598; 42 Okl ACR70 [reh pending]; 125 Or428, 266 P875; 51SD615, 216NW353; TexCivA 273SW974; 146Va715, 132SE688. [d] **Express adoption held not necessary.**–128 Okl 222, 262P205.

596–86 146Va715, 132SE688, 133SE 492.

596–87 76CalA232, 245P235.

596–88 76CalA232, 245P235; 74Mont 420, 240P821; SD 230NW805(3dcase).

596–93 146Va715, 132SE688, 133SE 492.

596–95 33Ariz101, 261P969, 57ALR107.

596–97 33Ariz466, 266P8; 85CalA360, 259P460.

596–3 38 OklACR598.

596–10 128 Okl 222, 262P205.

597–13 51SD615, 216NW353, 354 [quot Cyc].

597–14 51SD615, 216NW353, 354 [quot Cyc].

597–15 51SD615, 216NW353, 354 [quot Cyc].

597–16 146Va715, 132SE688, 133SE492.

597–17 232Ky741, 24SW(2d)560; 48 Nev205, 228P615, 239P801; 91PaSuper 368.

597–19 30Hawaii 860.

598–27 155Tenn189, 291SW1064 (thirty days).

599–51½–**New.** Whether rehearing should be granted or denied on the ground of newly discovered evidence rests with the trial judge. 35F(2d)733 (1stcase).

599–52 30Hawaii860.

599–54 [c] **In Tennessee.**–155Tenn189, 291SW1064.

599–60 NJCh 151A289.

601–90 5PaDist&Co 181.

601–92 99NJEq461, 133A768.

601–4 276US6, 48SCt210, 72L ed441.

601–19. [a] **Master ordinarily has no duty** to make rulings of law. Mass 171 NE724.

601–19½–**New.** Party has right to have master proceed upon correct principles of law. Mass 171NE724.

602–20 98Fla559, 124S21 (take testimony, reduce it to writing, and return to clerk's office).

602–27 5PaDist&Co 181.

602–28 [c] **Appointment of special master in chancery after term had lapsed** and during vacation held valid. 181Ark954, 28SW(2d)715 (by statute).

602–31 99NJEq461, 133A768.

602–33 5PaDist&Co 181.

602–36½–**New.** Failure to record an order appointing a special master in chancery in the minutes of the court or in the chancery order book before such master took testimony and made his report does not affect the validity of the proceedings. 94Fla521, 114S665.

603–45 [b] **Objection must be promptly made.**–106WVa96, 144SE874.

603–47½–**New.** Whether special master is disqualified because called on to testify is within chancellor's discretion. 181Ark954, 28SW(2d)715.

603–49 [b] NJCir 145A334(1stcase).

603–55 262Mass26, 159NE444. [a] **There is no privity of contract** between judgment creditor and master in chancery as affects liability for taking poor debtor's recognizance with minor as surety. 262Mass26, 159NE444.

603–64 337 Ill 306, 169NE162. [d] **Till master's failure to annex verified certificate to report is corrected,** fees should not be allowed or paid. WVa 155SE664.

604–66 170Ark298, 280SW389. [d] (4) Where counsel fail to agree on amount of allowance, court must determine compensation of special master within its discretion. 34F(2d)470.

604–68 170Ark298, 280SW389; 333 Ill 31, 164NE194.

604–69 [a] 34F(2d)470; 41F(2d)277. [b] 29F(2d)506; 333 Ill 31, 164NE194. [c] **Court has power to determine reasonableness of fee.**–237 IllA428.

604–77 333 Ill 31, 164NE194. [a] **In Illinois.**–237 IllA428.

605–78 237 IllA428. [a] **Stipulation in excess of schedule** is invalid on objection, and scheduled fee must be assessed as to objecting party. 237 IllA428.

605–99 237 IllA428. [a] **Pleading or petition** for refund of excess amount not necessary. 237 IllA428.

605–99½–**New.** The court may require litigants to provide security for the master's compensation to be paid as the court shall determine on final adjustment and allotment. 170Ark298, 280SW 389.

605–99½–**New.** The master cannot accept compensation not sanctioned by proper order of court. 276US6, 48SCt 210, 72L ed441.

605–5 162Ga620, 134SE616; 162Ga 625, 134SE619; NJCh 145A641.

605–6 [c] **Where reference is waived by parties,** chancellor's finding is treated as concurrent finding of master and chancellor. 156Tenn571, 3SW(2d)1057.

606–9 219Ala652, 123S18; 100WVa272, 130SE444.

606–15 218Ala637, 119S844 (court cannot delegate duty of determining principal equities without consent of parties); 101NJEq636, 139A338.

606–23 232Mich15, 204NW712.

606–26½–**New.** It is within the discretion of the court to withdraw reference to master and proceed to a decision. 171Ark485, 284SW762.

606–27 102NJEq486, 141A452.

607–34 144Va533, 132SE344.

607–46 218Ala593, 119S631 (in suit for sale of mineral land for division, court's reference of determination of state of accounts growing out of alleged waste by cotenant held proper as not involving primary equity).

607–49 Mass 172NE243.

607–50 218Ala637, 119S844 (determination of right to specific performance).

607–51 100WVa272, 130SE444. [a] **Questions of breach of sales contract** should not be considered on question of its construction before reference. 147 Va125, 136SE673.

608–76 42F(2d)94 (order need not require all evidence be sent up). [d] **Until order is filed and recorded** master cannot act. 93Fla844, 112S766.

609–79½–**New.** A decree is not erroneous for failure to provide that the master should make a report to the court on matters referred to him. 149SC227, 146SE869.

609–79½–**New.** District court is vested with discretion in respect of motion to set aside order of submission. 42F(2d) 94.

609–82 264Mass355, 162NE773.

610–16 102NJEq66, 139A716; 102NJEq 486, 141A452.

610–19 [c] (4) Question as to whether there was mutual mistake in making up statement between parties constitutes issue of fact within province of master appointed to state account. 150Miss 827, 117S257.

611–36 [b] **Order in which evidence is presented** is subject to master's discretion, and he has power to admit testimony which, if not strictly competent when admitted, will become competent if other evidence is later introduced. 264Mass355, 162NE773.

611–43 Mass 168NE521(3dcase).

612–49½–**New.** Party who has not asked for reference to master need not deposit security for costs of reference so as to bar him from introducing evidence. 337 Ill 306, 169NE162.

612–61½–**New.** The master is justified in considering, on new issues raised by supplemental answer, evidence heard by him on the bill and original answer. 264Mass303, 162NE334.

613–72 Mass 168NE521(3dcase); 50RI 375, 147A891.

613–73 [b] **Exclusion of incompetent** evidence is not required by master of his own motion when evidence expected to make it competent is not presented or is insufficient. 264Mass355, 162NE 773.

613–75½–**New.** Where incompetent evidence is admitted in the expectation that it will be rendered competent by later testimony, an objection should be renewed and a motion to strike made in order that an exception may be taken. 264Mass355, 162NE773.

613–88 262Mass595, 160NE405; 264 Mass447, 162NE895.

614–1 149SC227, 146SE869.

614–1½–**New.** Master may change his rulings as often as he wishes before filing of report. 132SC136, 128SE841.

614–11½–**New. Parties cannot request master to make findings** after being informed of contents of draft report. 260 Mass45, 157NE82, 52ALR1125.

614–13 [a] (2) Form of decree must be submitted by master with his findings of fact and conclusions of law. 85Pa Super169.

614–15 [a] **Defendants are entitled to findings based on master's consideration of all** competent and material evidence. Mass 171NE724.

614–18 [a] (2) Mass 168NE521(3d case).

614–19 [a] **Findings held proper findings of fact.**–259Mass499, 156NE846.

614–20 260Mass265, 157NE532; Mass 169NE897(2dcase) (reference to find facts does not imply authority to make rulings of law). [a] **Reporting conclusions of law to show method of arriving at conclusions of fact** is not error. 5F(2d)77 (where no error in law is pointed out or is apparent).

615–24 Mass 168NE521(3dcase) (master is not required to state every circumstance supporting his conclusion as to facts); Mass 171NE42 (all subsidiary facts and circumstances supporting conclusions need not be set out).

615–29 See also Mass 168NE521(3d case).

615–36 265Mass262, 163NE767(2dcase). [a] **Finding held sufficiently specific.**–253Mass486, 149NE149.

615–37 [a] **Findings held not inconsistent.**–Mass 168NE777.

615–40½–**New.** Counsel and commissioners, after report, may call the court's attention to liens on a record inadvertently omitted. 151Va81, 144SE602.

615–52 244 IllA497.

615–53 Mass 172NE871.

616–56 260Mass265, 157NE532.

616–57 254Mass274, 150NE186; Mass 171NE324.

616–58 259Mass499, 156NE846; Mass 171NE724.

616–59 42F(2d)94.

616–64 Mass 169NE918(2dcase); Mass 170NE462(2dcase).

617–65 264Mass253, 162NE319.

617–69 260Mass265, 157NE532.

617–71 102NJEq66, 139A716.

617–74 Mass 165NE426.

617–79 But see 50RI 283, 146A634, 68 ALR303.

618–84 [b] **Sufficient cause not shown.**–331 Ill 225, 162NE833.

618–87 [b] **Exceptions to report held not to meet requirements** of statute. 216Ala569, 114S185.

618–88 217Ala176, 115S226; 85Pa Super169.

619–90 251 IllA454; 253 IllA274.

619–1 101NJEq636, 139A338.

620–11½–**New.** The time to raise the question of error of fact was in taking and arguing exceptions, and an error of law should be raised at the argument on a decree to be entered. 265Mass226, 163NE881.

620–13 [c] **In Alabama.**–128S215.

621–16 Mass 171NE724.

621–17 253Mass205, 148NE609, 41ALR 658. [c] **In Georgia.**–161Ga978, 133SE 512.

621–21½–**New.** An agreement to take testimony by oral deposition extended to the manner of objection and reservation of exceptions. 219Ala439, 122S419.

622-50½-New. Where case is of importance, exceptions to master's report will be considered aside from any presumptions of correctness of master's conclusions of fact. 5F(2d)77 (without committing court to similar course in future).

622-71½-New. Filing the master's return is not waiver of objection on the ground of void jurisdiction of the master. DelCh 139A762.

622-72 5F(2d)731; 18F(2d)815; 21F(2d)803; 33F(2d)743 (though parties consented that master report findings of fact and conclusions of law); 329 Ill 629, 161NE104; 224 IllA474; 251 IllA454; 253 IllA520; 126Me195, 137A63; 262Mass165, 159NE624. [c] **Master's report on matters of law is not conclusive.** 7F(2d)746.

623-74 252Mass492, 147NE854. [c] 258Mass74, 154NE839. [d] **Court not limited to ruling on legal effect of report.**-Mass 169NE489.

623-75 5F(2d)731; 7F(2d)746; 18F(2d)815; 214Ala53, 106S338; 126Me195, 137A63. [d] **When master's finding is inconsistent with his subsidiary finding,** his ultimate finding is not conclusive. Mass 167NE298. [e] **Where only part of evidence is reported,** findings must be accepted as true in absence of mutual inconsistency or plain error. Mass 171NE42.

623-76 7F(2d)746; 18F(2d)815; Ala 106S339; 217Ala176, 115S226; 126Me195, 137A63; NJCir 145A334(1stcase); 101WVa284, 132SE717. See also Mass 169NE489.

623-77 19F(2d)412; 262Mass595, 160NE405; 101WVa284, 132SE717.

624-84½-New. Findings as to the weight of testimony of a witness should not be disregarded when in accordance with testimony not contradicted or impeached. 20F(2d)791.

624-84⅓-New. Recital in the master's report of inability to state accounts without records held not to nullify a finding that defendant was accountable for the sum found due. 263Mass63, 160NE317.

624-84¼-New. Facts found by the master, not excepted to, must be regarded on exceptions to the report as true facts of the case. 29F(2d)288 (2dcase).

624-84⅕-New. The judge has been held to have the right to draw inferences of fact from facts found by the master. 265Mass199, 164NE69.

624-84⅙-New. Master's finding as to constitutional right of executive board to remove president has been held one of fact. Mass 172NE790.

624-84⅐-New. It is duty of judge to draw proper inferences from master's findings unaffected by master's conclusions. Mass 172NE599.

624-85 216Ala569, 114S185.

624-86 212Ala496, 103S558; 216Ala569, 114S185; 126Me195, 137A63; 149Miss135, 115S193.

624-87 224 IllA474.

624-89 253 IllA520.

624-90 251 IllA454.

624-91½-New. Ultimate facts which must be drawn from primary facts found by master will be treated as found. 16F(2d)911.

625-93 22F(2d)494 (not binding).

625-3½-New. Federal court has no jurisdiction of bill against state fish and game commission for interfering with fishing in state water. 15F(2d)862.

625-6 149Md217, 131A327.

625-7 149SC12, 146SE601 (order referring all issues of fact and law to master held not to affect power of court to frame issues on trial).

625-11 260Mass265, 157NE532.

626-15 260Mass265, 157NE532.

626-16 260Mass265, 157NE532.

626-18 260Mass265, 157NE532.

626-20 253 IllA520.

626-20½-New. Evidence taken before the master prior to entry of order of reference is held not to be considered in framing decree. 93Fla844, 112S766.

626-20¼-New. In Massachusetts, under statute, exceptions to findings of the master, contrary to admissions in the pleadings, must be sustained. 264Mass343, 162NE691.

626-20¼-New. Decree may not be entered on report of master who has excluded relevant evidence. Mass 171NE724.

626-20⅕-New. Master's findings sustained decree requiring restitution of funds. Mass 172NE871.

626-21 244 IllA497.

626-22 215Ala579, 112S207. [b] **Objections to rulings on evidence** not considered where master's report does not show that such evidence was either admitted or excluded. 254Mass478, 150NE215.

626-36½-New. Questions of law not raised in substantial conformance to rules prescribed therefor cannot be considered by court. Mass 166NE848.

626-37 6F(2d)243 (matters unnecessary for court's decision not considered); 161Ga978, 133SE512 (confirmation of report required, if ultimate finding is correct, regardless of reasons assigned by auditor).

627-40 255Mass52, 151NE167.

627-44 252Mass492, 147NE854; 254Mass274, 150NE186; 255Mass52, 151NE167; 257Mass509, 154NE175; 261Mass72, 158NE339, 55ALR330; 263Mass63, 160NE317; 264Mass511, 163NE193; 265Mass81, 163NE655; 265Mass549, 163NE711; Mass 167NE260; Mass 168NE521 (3dcase); Mass 169NE915; Mass 170NE453; Mass 171NE724. [a] 254Mass274, 150NE186.

627-50½-New. A motion to recommit should be granted where the master fails to include in the report evidence excluded by him. 260Mass45, 157NE82, 52ALR1125.

627-53 255Mass52, 151NE167.

628-68 See also Mass 172NE871.

628-75 [c] **Master authorized to find salary paid officer by corporation** on order of recommittal to make finding and report facts as to business and financial relations between corporation and such officer. Mass 167NE276.

628-77½-New. Moving before hearing to recommit report for correct rulings and findings presented to court everything defendants desired to urge. Mass 171NE724.

629-91 212Ala645, 103S850; 262Mass165, 159NE624.

629-93 But see 244 IllA497.

629-95 256Mass528, 152NE749.

630-15 Mass 167NE638.

630-23½-New. When plaintiffs moved to confirm the master's report and defendant to dismiss the bill because the master found that there was no fraud alleged as a ground of relief, the court should have ordered the entry of a decree concerning the report instead of a decree dismissing the bill. 265Mass396, 164NE453.

630-23¼-New. That the referee permitted plaintiff to examine the witnesses in defendant's absence will not justify withholding of confirmation. NJCir 145A334(1stcase).

630-24 254Mass488, 150NE323. [d] **Interlocutory decree** confirming report and omitting reference to exception made by court does not preclude court from acting on real situation. Mass 169NE489.

630-26½-New. In some jurisdictions it is necessary for the master to prepare a form of decree or for the court to prepare a decree nisi on findings before the case is ready for final decree. 85Pa Super169.

630-26⅓-New. A decree overruling exceptions to a master's report may be included in the final decree although it is not good practice. Mass 167NE638.

630-37 93Fla730, 113S110; 94Fla1159, 115S532; 98Fla117, 123S567(1stcase); 246 IllA590; 253 IllA351. [e] **Dismissal on agreement.**-102NJEq382, 140A889.

631-38 93Fla730, 113S110.

631-39 35F(2d)526.

631-40 93Fla730, 113S110; 99Fla302, 126S305.

631-44 Can [1925] 2DomLR828 (reference of issue of fact).

632-54 94Fla1159, 115S532.

632-55 99Fla302, 126S305.

632-69½-New. A party who has delayed requesting a dismissal for four years should not, without a strong showing of necessity, be allowed to withdraw. 48RI72, 135A402.

633-79½-New. Complainant may dismiss the bill if defendant is left in the same position he would have occupied if the cause had not been instituted. 94Fla1159, 115S532.

633-82 93Fla730, 113S110.

633-84 93Fla730, 113S110.

634-9 5F(2d)827 (answer filed at same time as motion to dismiss and involving same defense is waiver of motion); 79Mont198, 255P737.

634-10 40F(2d)963.

634-11½-New. On a motion to dismiss a bill in a suit for cancellation of a lease and for an injunction, the court may not determine the ultimate relief to which complainant is entitled, but may only determine its right to maintain the bill and have a temporary restraining order. 31F(2d)205.

634-12 13PaDist&Co 293.

634-13 13PaDist&Co 293.

634-17 6PaDist&Co 414; 153Tenn357, 284SW60; 155Tenn169, 290SW973.

634-19 159Tenn76, 16SW(2d)186. [a] 156Tenn459, 28W(2d)413; 159Tenn76, 16SW(2d)186.

634-20 [a] (4) Failure to bring action to trial until after four years and five months from filing of supplemental bill is not ground for dismissal. 6Pa Dist&Co 414.

635-37 [b] (2) In Florida, under Chancery Rules, rule 1, court must dismiss case after three years, unless otherwise directed for good cause. 94Fla236, 113S730.

635-38 26F(2d)696; Fla 130S38; 99NJEq356, 131A889; NJ 144A879; 98NJEq85, 129A617. See also 99NJEq381, 131A909. But see 246 IllA590.

635-39 333 Ill 58, 164NE208; 246 IllA590.

635-41 24F(2d)541 (but not conclusions contrary to common knowledge); 29F(2d)113; 101NJEq287, 137A440; 157Tenn316, 7SW(2d)990.

635-42 101NJEq287, 137A440; 157Tenn316, 7SW(2d)990.

635-43 26F(2d)821; 27F(2d)377; 30F(2d)7; 101NJEq287, 137A440; NJ 144A879; 157Tenn316, 7SW(2d)990.

636-44 28F(2d)971.

636-45 332 Ill 500, 163NE792. [a] (2) Replication, seeking to bring in view parties, is subject to dismissal as to them. 7F(2d)143.

636-47 13F(2d)321.

636-51 127 Or204, 270P499(1stcase).

636-54 Ala 128S158; 150Miss193, 116S540.

636-62 41F(2d)329 (absence of "proper parties").

636-69 [a] **That final decree of chancellor's predecessor** was not spread on records does not require trial de novo. 173Ark73, 291SW992.

636-69½-New. Where bill seeks general equitable relief, it should not be dismissed on ground that defendant's answer may tend to criminate him. 238Mich39, 213NW448, 52ALR136.

636-69⅓-New. A motion to dismiss a bill for variance, failing to specify the variance, is properly overruled. 290Pa566, 139A450.

636-69¼-New. A motion to dismiss a bill on the ground that it was prematurely filed will lie only where it appears on its face that it was filed before plaintiff became entitled to enforce his right. 241Mich101, 216NW458.

636-69⅕-New. It is no ground for dismissal of a bill against a person having possession of certain sums of money of an incompetent that a nonresident executor is a necessary party. 26F(2d)860.

636-69⅙-New. A bill should not be dismissed for defective allegations of damages where it is not attacked on that ground. 32F(2d)31.

636-69⅐-New. Defendant on motion to dismiss a bill for want of jurisdiction

may allege any facts not appearing on the face of the bill, and may introduce evidence of such facts. 333 Ill 58, 164 NE208.

636-71 215Ala488, 111S229.

637-74 But see 49RI 84, 140A193.

637-75 216Ala549, 114S43; 318 Ill 166, 149NE10; 251Mich684, 232NW223; 286 Pa114, 133A31; 48RI 271, 137A385; RI 139A651. [f] **Bill for reformation of contract** should be dismissed on failure to prove right of reformation, though money recovery is incidentally sought. 5F(2d)408. [g] **In absence of cross bill** by defendant entitled to relief decree will be for dismissal of bill of complainant not entitled to relief prayed. 15DelCh1, 130A34.

637-76 [a] 318Ill 166, 149NE10.

637-81½-New. Motion to dismiss is addressed to the discretion of the court. 264Mass511, 163NE193.

637-81¾-New. Where equitable relief is denied, the court may dismiss giving plaintiff a right to sue for damages. Mass 164NE921.

637-82 117 Or83, 243P78, 85 [quotCJ]; 99Vt65, 130A749.

637-83 117 Or83, 243P78, 85 [quotCJ]. [b] (1) 286Pa449, 133A642 (Equity Rules, rule 66). (2) Where no exceptions are filed to court's dismissal of bill at close of plaintiff's evidence, dismissal is not res judicata in subsequent suit. 286Pa449, 133A642. (3) Where answer is intended as in nature of demurrer, under Equity Rules, rules 48, 49, bill cannot be dismissed except in accordance with rule 49. 286Pa449, 133A642.

637-84½-New. There should be formal record showing warrant for dismissal. 286Pa449, 133A642.

638-99 NJ 146A32. See also 99NJEq 381, 131A909.

638-2½-New. An issue of fact which could not be determined on motion to dismiss held not presented. 35F(2d) 421.

638-3 205 Iowa382, 218NW62; 101WVa 445, 132SE879 (decree of dismissal held final).

638-5 101WVa445, 132SE879.

638-6 101WVa445, 132SE879.

638-7 [a] **Dismissal for nonresidence of defendant.**-After denial of motion to dismiss from nonresidence of defendant, court may properly set aside order at same term. 150Miss193, 116S540.

638-10½-New. The right to ask for dismissal for lack of jurisdiction is not waived by failure to move to set aside service of a subpœna. 26F(2d)860.

638-11 16F(2d)45; 204 Iowa1100, 216 NW712; 205 Iowa382, 218NW62.

638-12 37F(2d)114; 101NJEq809, 139 A170.

639-19 [b] **In Iowa.**-208 Iowa1364, 227 NW402.

639-20 16F(2d)45.

639-21 20F(2d)202; 20F(2d)786; 29 F(2d)296; 31F(2d)205; 31F(2d)994; 32F(2d)412; 36F(2d)244; 36F(2d)267; 332 Ill 500, 163NE792; 242Mich656, 219 NW620; 47RI 420, 133A802.

639-22 30F(2d)7.

639-22½-New. To authorize dismissal upon motion, it must clearly appear from the facts alleged that plaintiff's bill must be dismissed upon final hearing. 30F(2d)7.

639-22¾-New. Defendant's motion to dismiss bill tests sufficiency in law of causes of action exhibited. 42F(2d)541.

639-23 Fla 130S274 (defective pleadings); 149Md39, 129A887; 264Mass549, 163NE177; Mass 171NE451(1st case); 48RI 271, 137A385; 49RI 84, 140A193; 156Tenn523, 38W(2d)161 [quotCJ].

639-25 218Ala487, 119S209.

639-26 264Mass549, 163NE177. But see 34F(2d)396.

639-28 264Mass549, 163NE177.

640-32 [a] (2) 150Miss193, 116S540.

640-37 242Mich481, 219NW705.

640-44 328 Ill 148, 159NE222.

640-46 [a] **Bill to cancel mortgage** dismissed in view of dismissal as to parties sought to be brought in. 7F(2d)143.

640-46½-New. Court is without power to hear a motion to reinstate after the expiration of thirty days, in the absence of a showing of waiver under the Alabama statute. 218Ala554, 119S664.

640-48½-New. Where a paragraph of amended bill was answered and demurred to, and the court dismissed the bill on the evidence, it thereby also sustained demurrer to such paragraph. 156Md167, 143A708.

640-52 171Ark96, 283SW47; 176Ark 278, 2SW(2d)1096, 57ALR296. [a] (7) Where plaintiff, after ruling that suit was not within equity jurisdiction, waived right to amend or transfer to law side, dismissal was warranted. 5 F(2d)793. (8) Rule liberally construed. 40F(2d)679. (9) Other instances. 40 F(2d)679.

641-53 40F(2d)679. [a] (4) Rule liberally construed. 40F(2d)679. (5) Other instances. 40F(2d)216.

641-1 [a] (9) A judicial decision of a litigated cause by a court of equity. 105 NJL336, 146A372.

641-11½-New. Decree rendered without submission for final decree before answer and absent decree pro confesso may be void. Ala 128S443.

642-20 93Fla337, 112S45.

642-21 93Fla337, 112S45.

642-27 [a] **Rendition of judgment wholly pecuniary and personal,** collectible merely by execution, is opposed to general theory and principle governing equity courts. 219Ala478, 122S652.

642-28½-New. A decree can be had only on the facts proved at the hearing and sufficiently averred in the bill disclosing jurisdiction to proceed to the decree. 330 Ill 589, 162NE209.

642-28¾-New. The court having found that evidence did not establish alleged confederacy to obtain decedent's assets as against the maker of a missing note, nor any ground of liability except his indebtedness to the estate for a sum alleged to be due on his assumpsit, a decree in equity for recovery of the amount owed cannot be sustained. 330 Ill 589, 162NE209.

642-29¼-New. Equity will not enter a decree that binds no one and determines nothing. 32F(2d)892.

642-29 243Mich406, 220NW812.

642-41 152Va842, 148SE687.

642-42 [a] **Interlocutory decree held proper.**-262Mass247, 159NE909.

643-43 261Mass426, 158NE891; 149Va 1, 141SE134.

643-46 Va 138SE633.

643-47 Va 138SE633.

643-49 94Fla236, 113S730, 734 [CitCJ].

643-51 24F(2d)345; 253Mass391, 149 NE322; 243Mich406, 220NW812; Mo 28SW(2d)1017; TexCivA 28W(2d)324; 103WVa708, 138SE731. [c] **Final decree determines rights of parties** and differs from findings, rulings, and order for decree. Mass 171NE485.

644-52 TexCivA 28W(2d)324; 103WVa 708, 138SE731.

644-53 253Mass391, 149NE322.

644-54 [c] **Final order in habeas corpus proceedings after trial** is judgment, or decree for payment of money in court of record. 126Misc103, 231NYS476.

644-55 Mo 28SW(2d)1017.

644-60 243Mich406, 220NW812.

644-66 [a] **Order correcting errors in final decree** nunc pro tunc is not itself a final decree. 94Fla86, 113S745.

644-67 Mo 28SW(2d)1017.

644-70½-New. In some jurisdictions a decree cannot be considered final unless a decree nisi is first entered. 85PaSuper 421.

644-70¾-New. In some jurisdictions the master must prepare a form of decree or the court must prepare a decree nisi on the findings before the case is ready for final decree.* 85PaSuper169.

644-71 214Ala418, 108S253.

644-71½-New. or motion to strike out plea. 214Ala418, 108S253.

646-3 [a] **In Pennsylvania.**-91PaSuper 259.

646-3½-New. Exceptions to a decree nisi may be sustained in whole or in part and the decree changed accordingly. 91PaSuper333.

646-3¾-New. Where the only part of a decree nisi challenged by exception is the portion imposing costs on plaintiff and the exception is sustained, it is error for the court to reduce the amount of the award to plaintiff. 91PaSuper 333.

646-11 171Ark162, 283SW19; NJCh 150A436.

646-16 [a] **Rendition of decree** makes it final determination or decree of court. 126Misc103, 213NYS476.

647-26 157Tenn78, 6SW(2d)323. [e] **Where ruling has not been made on demurrer to bill,** cause is not at issue as to bill and rendition of final decree is error. Ala 130S381.

647-27 96Fla408, 118S167.

647-28 [b] **Hearing on decree on supplemental bill** for enforcement and, if necessary, revision of original decree requires consideration of pleadings and evidence in original cause. 212Ala667, 103S874.

647-32 171Ark162, 283SW19.

648-40 173Ark468, 292SW675.

648-48 338 Ill 245, 170NE285(2dcase) (substitution of one in place of decedent).

649-63 10PaDist&Co 149. [c] **Including unwarranted provisions in proposed decree** is not justifiable by counsel. 247 Mich490, 226NW236.

649-68 252Mass574, 147NE847 (defendant against whom interlocutory decree pro confesso is entered is entitled to be heard on form of final decree).

649-75½-New. Parties must take notice of pronouncement and signing of decree. 100NJEq1, 134A875.

649-77 197Cal 649, 242P725. [c] **In Arkansas.**-175Ark253, 299SW44.

649-78 82CalA202, 255P275; 98Fla103, 122S222; 98Fla627, 125S2.

650-83½-New. Requirement that chancellor sign a decree is waived by the parties signing it. 173Ark468, 292SW 675.

650-89 [c] 208 Iowa1241, 227NW118.

651-91 [a] **Equity will not enter incomplete decree.**-43F(2d)163.

652-95 [b] **Failure of clerk to enter or docket decree** has no effect on its character as decree. 126Misc103, 213NYS 476.

652-99½-New. Entry of decree is an act of the court and not the parties. 264 Mass549, 163NE177.

652-99¾-New. A complainant cannot refuse to enter a decree or to dismiss the bill, and thus stand off the defendant lien claimant indefinitely. NJ 144A 110.

652-99¼-New. Appellant filing claim of appeal waived notice of filing and entering decree. 250Mich556, 231NW76.

652-5 [a] **In Arkansas.**-170Ark22, 278 SW627.

652-12½-New. In Arkansas a decree entered within ninety days after completion of pleadings is erroneous. 172Ark 1176, 290SW62.

652-12¾-New. A decree entered on the pleadings on the same day that the answer of the guardian ad litem was filed was held premature. 176Ark658, 3 SW(2d)984.

652-12¼-New. On constructive service, a decree pro confesso may be entered against defaulting defendants by the court on the rule day succeeding the proper return day or by the clerk on the rule day during continuance of default. 94Fla1084, 114S778.

652-12½-New. Where the return day is the rule day, the court or clerk may then on default enter a decree pro confesso. 94Fla1084, 114S778.

652-12¾-New. Decrees overruling demurrer and on merits have been held entered within term time. 219Ala439, 122 S419.

652-14 171Ark162, 283SW19; 149Miss 349, 115S591; NJCh 150A436.

652-15 99NJEq825, 134A646, 649 [cit CJ].

653-17 171Ark162, 283SW19; 99NJEq 825, 134A646. [a] But see 173Ark73, 291SW992.

653-18 98Fla103, 122S222; 98Fla627, 125S2.

653-35 [b] **Decree not appealed from** became final and binding on parties thereto on lapse of term at which entered. 181Ark857, 28SW(2d)66.

653-37 245Mich246, 222NW111.

653-38 98Fla103, 122S222 (actual entry).

653-45 But see 175Ark253, 299SW44.

654-55½-New. A nunc pro tunc decree

is considered in force only from the time when it is actually entered. 98Fla627, 125S2.

654-65½-New. Judgment containing claims of parties and argument of counsel is held inartificial. 106Conn411, 138A458.

655-86½-New. "Final decree" must dispose of all issues between all parties and of all parties to suit, but parties and issues need not be specifically named. TexCivA 28SW(2d)324.

655-86½-New. Final decree may be so drawn as to dispose of issues and parties by implication. TexCivA 28SW(2d)324.

656-95 80Colo 536, 252P815; 338 Ill 481, 170NE723 (recital of ultimate facts may be sufficient). 334 Ill 406, 166NE52.

656-96 326 Ill 302, 157NE161; 334 Ill 406, 166NE52; 339 Ill 400, 171NE504. [c] (2) Successful party must preserve evidence in record. 324 Ill 47, 154NE450. (3) Recital held mere conclusion insufficient to support decree for affirmative relief. 329 Ill 585, 161NE53. (4) Decree held to contain sufficient facts to support it in absence of certificate of evidence. 338 Ill 481, 170NE723.

657-98 326 Ill 302, 157NE161. [c] In Alaska.-33F(2d)701.

657-99 [e] **Finding of ultimate facts sufficient.**-339 Ill 400, 171NE504.

657-2½-New. A general finding that all material allegations in a bill are proved and that the equities are with complainant will not alone sustain a decree. 324 Ill 47, 154NE450.

658-15 156Miss8, 125S912(2dcase); 157 Miss457, 128S342.

659-34 254Mass507, 150NE322.

660-61 193Wis554, 215NW592.

661-62 221AppDiv317, 223NYS164.

661-63 168Minn57, 209NW537, 539 [cit CJ].

661-65 82CalA202, 255P275; Del 141 A197; 168Minn57, 209NW537, 539 [cit CJ]; 218AppDiv632, 219NYS181; 221 AppDiv317, 223NYS164.

661-66 99Fla193, 126S282 (dismissal as to unnecessary parties defendant); 204 Iowa532, 215NW501; 37 OklACR676; 38 OklACR2.

661-67 37 OklACR676.

661-70 38F(2d)287.

661-74 226Ky353, 10SW(2d)1060; 168 Minn57, 209NW537, 539 [citCJ]; 221 AppDiv317, 223NYS164; 124 Okl 193, 255P577; 193Wis554, 215NW592.

662-75 226Ky353, 10SW(2d)1060; 193 Wis554, 215NW592.

662-75½-New. A partial or incomplete decree will not be entered. 90Fla595, 106S473.

663-88 80CalA377, 252P647, 651 [cit CJ]; 246NY152, 158NE56.

663-89 80CalA377, 252P647, 651 [cit CJ]; 221AppDiv317, 223NYS164.

663-90 268US121, 45SCt451, 69L ed876; 80CalA377, 252P647, 651 [citCJ]; 89 CalA107, 264P776; 247 IllA50; 168Minn 57, 209NW537; 246NY203, 158NE74; 127Misc104, 215NYS354, 365 [quotCJ]; 127Misc884, 217NYS297; 128Misc352, 218NYS46; 128Misc364, 218NYS669. [a] (14) In suit by city to enforce ordinance where ordinance had no legal existence where action was commenced, there is no foundation for suit. 127Misc 104, 215NYS354.

664-91 127Misc104, 215NYS354, 365 [quotCJ]; 127Misc884, 217NYS297.

664-92 127Misc104, 215NYS354, 365 [quotCJ].

664-93 246NY152, 158NE56; 127Misc 104, 215NYS354, 365 [quotCJ].

664-6 134 Okl 276, 273P361; 193Wis 554, 215NW592.

667-48 Mass 168NE919.

667-51 214Ala446, 108S345; 202 Iowa 1304; 211NW839, 842 [citCJ].

668-54 256Mass299, 152NE90.

668-57 202 Iowa1304, 211NW839.

669-90 [c] **In Massachusetts.**-254Mass 589, 150NE862.

670-8 220Ala411, 125S650 (cause not at issue as to all parties); 47RI 240, 132 A610; 157SC85, 153SE640.

671-9 30F(2d)313; 217Ala128, 115S 21; 219Ala3, 121S415; 220Ala411, 125 S650; 89Fla194, 103S825; 98Fla408, 118S167; 323 Ill 380, 154NE149; 127Me 428, 144A390; 315Mo 849, 288SW359; Mont 290P238(2dcase); 116 Or440, 241 P388; 120 Or427, 251P299. [e] **Decree held authorized.**-170Ga642, 153SE751.

672-13 22F(2d)627; 220Ala411, 125S 650; 171Ark1, 283SW13; 318 Ill 166, 149NE10; 323 Ill 380, 154NE149; 336 Ill 275, 168NE326; Ill 173NE348; 232 IllA596; 253Mass378, 149NE155; 255 Mass270, 151NE70; 264Mass181, 162NE 356; MoA 24SW(2d)229; 146Va758, 132 SE859; 150Va386, 143SE702. [k] **Allegations of bill are held to support final decree.** 254Mass274, 150NE186. [l] **Decree held warranted.**-244 IllA89. [m] **Where complainant forced to eliminate aspect of bill,** she could not be required to accept decree under that aspect over her protest. Ala 129S81.

674-14 215Ala546, 112S114; 323 Ill 380, 154NE149; 329 Ill 507, 161NE57; 232 IllA596; 249 IllA293; 146Va758, 132SE859.

676-30 323 Ill 380, 154NE149.

676-31 See also 30F(2d)313.

676-33 But see 264Mass475, 153NE162.

677-40 323 Ill 380, 154NE149.

677-45 250Mich196, 229NW405.

677-46 91Fla815, 109S468; 252Mass 354, 147NE885; 253Mass378, 149NE 155; 299Pa568, 150A169.

678-50 218AppDiv632, 219NYS181. [b] **Congress has power to authorize affirmative decree without prayer therefor.**-40F(2d)882.

696-51 34 OhA532, 172NE448.

678-54 91Fla815, 109S468; 317Mo 442, 297SW39.

679-61 171Ark1, 283SW13; 264Mass 355, 162NE773.

679-65 129Misc612, 222NYS315, 317 [quotCJ].

679-66 214Ala187, 106S815; 164Ga474, 139SE18; 129Misc612, 222NYS315, 317 [quotCJ].

679-67 5F(2d)421; 106Conn411 138A 458; 164Ga474, 139SE18; 323 Ill 269, 154NE101; 336 Ill 522, 168NE640; 265 Mass374, 164NE238; 234Mich252, 208 NW60; 129Misc612, 222NYS315, 317 [quotCJ]; 117 Okl 46, 245P641; 116 Or 440, 241P388; 296Pa141, 145A708; 47 RI 215, 132A439, 440 [citCJ]; TexCivA 294SW259; 65Utah571, 239P781; Vt 147A267(2dcase); 144Va848, 130SE784; 147Va921, 133SE614; 102WVa151, 135 SE16. [f] **Damages for such injury as** is immediate and consequential result of wrongful conduct complained of may be recovered. 264Mass355, 162NE773.

679-67½-New. although plaintiff is not entitled to all relief asked for, 234Mich 252, 208NW60.

680-68 144Va848, 130SE784.

680-69 323 Ill 269, 154NE101; 129Misc 612, 222NYS315, 317 [quotCJ]; 117 Okl 46, 245P641; 116 Or440, 241P388; 144 Va848, 130SE784 (not inconsistent with specific relief asked).

681-71 156SC203, 152SE878.

681-72 [g] **Damages** may be allowed under general prayer in bill seeking injunction against strikers. 264Mass355, 162NE773.

681-73 150Md397, 133A134; 129Misc 612, 222NYS315, 317 [quotCJ]; 147Va 921, 133SE614.

682-74 147Va921, 133SE614.

682-76 171Ark1, 283SW13; 315Mo 849, 288SW359; 116 Or440, 241P388; 47RI 215, 132A439, 440 [citCJ].

683-77 20F(2d)705.

683-79 116 Or440, 241P388; 144Va848, 130SE784; 102WVa151, 135SE16.

684-89 143Va291, 130S411 (fraud not distinctly pleaded cannot be basis of decree).

685-95½-New. Where the bill in an action by an agent for specific performance of a contract for the sale of his principal's land brings in the owner as a party, and the owner answers affirming the contract of sale and joining in the prayer of the bill, the court may decree specific performance without cross pleading. 103WVa733, 138SE449.

685-97 219Ala526, 122S841.

685-3 116 Or440, 241P388.

685-10 124 Okl 193, 255P577.

688-42 235 IllA89.

689-43 93Fla342, 112S75.

689-44 [b] **Court of equity has power** to construe and clarify its ambiguous decrees. 250Mich641, 231NW82.

689-45 See also 28F(2d)596.

689-50½-New. Decrees should be reasonably construed. 325 Ill 596, 156NE 769.

689-54 127 Or420, 272P554.

692-94 83NH225, 140A708, 709 [citCJ]. [b] **Where decree has become final,** supplemental decree changing intent of parties is void. 172Ark226, 288SW393. [c] **Court could set aside supplemental decree** after lapse of term at which rendered. 172Ark226, 288SW393.

692-1 See also 28F(2d)596.

692-1½-New. A decree is void where there is want of power. Where there is no lack of power but lack of equity in the case, the decree may be reversed on appeal but not by motion to vacate as void. 91Fla709, 109S677.

692-4 213Ala591, 105S588; 298Pa347, 148A504.

693-10 80Colo 452, 252P343.

693-13 [a] **Decree proper basis for execution.**-Mass 171NE482.

693-19 [a] **Existence of another remedy** does not affect equity's jurisdiction. 298Pa347, 148A504.

693-20 Mo 28SW(2d)1017.

693-21 298Pa347, 148A504.

693-25 29Hawaii340. [b] (2) Statute giving courts chancery jurisdiction and powers impliedly authorizes them to use any of ordinary methods for enforcing decrees. 298Pa347, 148A504. (3) Methods enumerated in equity rules. 298Pa347, 148A504.

694-27 Mo 28SW(2d)1017.

695-34 [a] (3) Where surviving partner receives price of partnership property conveyed by him and fails to account, executors of deceased partner are entitled to writ of capias ad satisfaciendum which will be satisfied in absence of proof of inability to obey decree. NJCh 147A378.

695-40½-New. although such opinion is based on value of securities some time after close of bank. 8F(2d)922.

695-41 274US640, 47SCt714, 71L ed 1270; 213Ala591, 105S588.

695-42 274US640, 47SCt714, 71L ed 1270.

696-50 274US640, 47SCt714, 71L ed 1270.

696-55 [b] **Proceeding to enforce** must be through proceeding in which decree was obtained. 298Pa347, 148A504.

696-56 [a] **Where defendant is nonresident.**-150Miss193, 116S540.

697-71 [d] **Original bill in nature of supplemental bill** is proper form when new parties and interests are to be brought before court. 213Ala591, 105 S588.

697-72½-New. An application at the foot of a bill is not equivalent to a supplemental bill and may relate only to matters adjudicated. 14F(2d)133.

697-72½-New. A motion at the foot of a decree is denied so far as it relates to matters not adjudicated. 14F(2d) 133.

698-3 154Md675, 141A387, 58ALR634.

699-13 251 IllA36.

699-16 [b] (3) Equity will stay execution of decree till defendant can recover at law and plead recovery as offset. NJCh 149A64(2dcase).

701-52 171Ark162, 283SW19; 181Ark 208, 25SW(2d)23(1stcase); 90Fla201, 106S430; 96Fla327, 118S60; 321 Ill 134, 151NE550; 256Mass99, 152NE75; Mass 165NE89; 239Mich110, 214NW 175; 241Mich119, 216NW373; 147Va 277, 137SE503. See also 31F(2d)424.

701-53 174Ark1127, 298SW507; 84 Colo 445, 271P177; 241Mich119, 216 NW373; 250Mich698, 231NW85; 121 Or582, 256P646 [citCJ]. **Erratum.**-Fla—"S 234" should read "31 S 234."

701-54 241Mich119, 216NW373.

701-55 92Fla503, 109S433, 434 [quot CJ]; 201 Iowa984, 206NW827, 828 [cit CJ].

701-56 121 Or582, 256P646, 648 [cit CJ].

701-57 240Mich646, 216NW442, 444 [quotCJ]; 240Mich661, 216NW446, 448 [quotCJ].

701-58 [a] (1) 255 IllA230.

701-61½-New. Remedy to correct the premature rendition of a decree is by

appeal and not by motion to vacate decree after adjournment for term. 169 Ark463, 275SW905.

701-61⅓-New. A petition for a rehearing is addressed to the court's discretion. Va 138SE633.

701-61¼-New. Until signing of final decree, the chancellor retains the cause before him with full power to alter, change or modify whatever attitude he might theretofore have adopted. 47 Ida 731, 278P218.

701-61½-New. Extent of power of court en banc to disregard findings of chancellor. 300Pa542, 151A15.

702-75 See also 94Fla236, 113S730, 735 [citCJ].

702-77 See also 94Fla236, 113S730, 735 [citCJ].

702-78 96Fla327, 118S60.

703-96½-New. On granting of rehearing cause stands as if no decree had been rendered. Ala 129S12.

703-97½-New. A motion for a new trial after a decree pro confesso is held an application for a rehearing on which extrinsic facts relevant to the case made by the record may be considered. 215 Ala610, 112S202.

703-97⅓-New. An order setting date for hearing on application for rehearing after a decree pro confesso is held a sufficient order of continuance. 215 Ala610, 112S202.

703-16 239Mich110, 214NW175.

703-21 94Fla236, 113S730, 734 [citCJ] (rule stated).

703-22 Ala 129S72; 94Fla236, 113S730, 734 [citCJ] (rule stated).

704-23 98Fla946, 124S719.

704-24 See also 194Fla236, 113S730, 734 [citCJ].

704-32 153Tenn40, 281SW932.

705-39 See also 94Fla236, 113S730, 734 [citCJ].

705-40 Va 138SE633.

706-59 262Mass247, 159NE909; Va 138SE633. [a] **Denial of rehearing held proper.**-Va 138SE633.

706-67½-New. Error on record or excuse for failure previously to present defense is essential to permit rehearing. Va 138SE633.

706-70 92Fla503, 109S433, 434 [quot CJ].

707-72 197Cal 649, 242P725; 97Fla 384, 120S851; 98Fla908, 124S810; 252 Mass244, 147NE676; 239Mich110, 214 NW175; 250Mich162, 229NW441(2d case).

707-73 Mass 165NE89. See also 96 Fla756, 119S131.

707-75 NJCh 151A766; 157Tenn697, 11SW(2d)896. [b] **Decree rendered in May can be set aside** in July where May term continued till November. 175Ark 633, 300SW408.

707-76 322Mo 281, 15SW(2d)809; 125 Or56, 265P800; 152Tenn360, 277SW 898; 103WVa708, 138SE731. [h] **Notwithstanding affirmance of decree,** relief may be had upon petition to open and vacate or modify final decree. NJCh 151A371.

708-77 181Ark857, 28SW(2d)66. [a] **After lapse of time provided by court rules and statutes** final decrees cannot be changed without resorting to recognized equity processes. 99Fla859, 128 S488.

709-85½-New. On making findings and giving notice thereof by referee, the effect of filing and entering a final decree is to postpone the effective date thereof for ten days after the receipt of notice of findings. 90Fla542, 106S 402.

709-85½-New. Where a second decree is made on the same matter, reference should be made to the first decree, but this is not essential. 98Fla908, 124S 810.

709-89 94Fla86, 113S745, 746 [citCJ]; 245 IllA575; 125 Or56, 265P800.

710-94 [a] (3) Decree may be set aside or stricken from court records at any time. 96Fla327, 118S60. (4) Mere lapse of time will not affect right to vacate decree where court never had jurisdiction. 98Fla1196, 125S694.

711-8 219Ala3, 121S415; 178Ark1073, 13SW(2d)291; 180Ark973, 23SW(2d) 983 (allegation of meritorious cause of action or defense necessary to vacate after term); 94Fla236, 113S730; 94Fla 1218, 115S516 (great care in vacating after specified period); 240Mich646, 216NW442; 247Mich438, 225NW929; 247Mich439, 225NW930.

711-9 NJCh 145A721(2dcase).

711-11 Ala 128S440 (decree void on face of record).

712-12 255 IllA230.

712-13 91Fla709, 109S677.

712-14 See also 94Fla236, 113S730, 734 [citCJ].

712-15 23F(2d)829.

712-26½-New. Judgment is final only as to main equities of parties to suits in equity, not to subsequent administration proceedings. 215Ala348, 110S 565.

712-29 29F(2d)167.

713-37½-New. A decree not shown to be void should not be set aside or stricken from the record on motion. 96Fla327, 118S60.

713-42 [a] **Petition to open final decree** and order to show cause thereon is substitute for bill of review. NJCh 151A766.

714-51 121 Or582, 256P646, 648 [cit CJ].

714-53 See also 94Fla236, 113S730, 734 [citCJ].

714-59 155Tenn189, 291SW1064.

714-62 [b] **In Illinois.**-320 Ill 423, 151 NE258. [c] **Bill to set aside decree not entertained** because of unexcused delay in bringing it. 320 Ill 423, 151NE 258.

715-84 92Fla503, 109S433, 435 [quot CJ].

715-85 92Fla503, 109S433, 434 [quot CJ]; 262Mass568, 160NE402; 241Mich 119, 216NW373; 101NJEq780, 138A 892; NJCh 145A721(2dcase).

715-86 92Fla503, 109S433, 435 [quot CJ]; 201 Iowa984, 206NW827, 828 [cit CJ].

715-87½-New. , or unless the moving party is aggrieved by the decree. 104 WVa482, 140SE325.

715-88 331 Ill 225, 162NE833; 104 WVa482, 140SE325. [e] **Where no exceptions filed to decree nisi,** and three years thereafter final decree is entered, latter will not be stricken off because no notice given to solicitor of adverse party. 6PaDist&Co 89.

716-89 254Mass507, 150NE322.

716-93½-New. Decree adjudging public rights under existing statutes may after term and after enactment of a curative and legalizing act be so modified as to express the public rights under the statutes as affected by the curative act. 201 Iowa476, 205NW847.

716-93⅓-New. A party is not entitled to have a decree vacated and a rehearing on the ground that he is unable to prepare a statement of evidence for an appeal because the stenographer has absconded, where the statute provides a plain and direct method for preparing a bill of exceptions in such case. 148 Miss478, 114S336.

716-98 Ala 129S12; 241Mich119, 216 NW373; 149Val, 141SE134.

716-99 241Mich119, 216NW373.

716-3 149Val, 141SE134.

716-4 149Val, 141SE134.

717-11 247Mich439, 225NW930; 149 Val, 141SE134.

717-19 125 Or347, 267P524.

718-29 125 Or347, 267P524.

718-32½-New. Change of counsel is not ground for a rehearing. 241Mich 119, 216NW373.

718-33 But see 98Fla1196, 125S694.

718-40½-New. Rehearing for newly discovered evidence is not looked upon with favor by the courts. 241Mich119, 216NW373.

718-41 102NJEq512, 141A679.

719-43 22F(2d)737; 241Mich119, 216 NW373 (modification of original testimony); 102NJEq512, 141A679.

719-49 29Hawaii340.

719-50 29Hawaii340.

719-51 22F(2d)737.

720-62-63½-New. Binder rests on petitioner to show materiality of new evidence and diligence in its procurement. 22F(2d)737.

720-64 12F(2d)710; Mo 28SW(2d) 1017. But see NJPrerog 151A67.

720-67 250Mich698, 231NW85.

720-71 NJCh 151A766.

721-92½-New. Opening of a decree rests in discretion of the chancellor. 99 NJEq409, 131A907.

721-92⅓-New. No order is necessary on denying motion for rehearing. 215 Ala434, 111S7.

721-92¼-New. An amendment to a decree to make defendant jointly liable with codefendant for costs and counsel fees, in accordance with a court's order, has been held valid. NJ 144A595.

721-92½-New. Failure to file findings on denial of a third petition for vacation of a decree is not error where the previous decisions in the proceedings settled all arguments requiring consideration. Mass 167NE656.

721-92⅙-New. Chancellor on review of case may reverse his decision regarding disputed question of fact. 300Pa256, 150A471.

721-99 NC 133SE472.

722-22 327 Ill 89, 158NE395; 253Mass 391, 149NE322; 291Pa421, 140A145. [a] (4) Bill of review is appropriate process merely, after final decree has been entered, to correct error of law in suit in equity. 260Mass369, 157NE693. [b] 253 IllA351.

723-25½-New. Bill of review cannot be made to function as writ of error. 318 Ill 169, 149NE16.

723-26 101NJEq753, 139A4.

723-27 253Mass391, 149NE322; Tex CivA 21SW(2d)309.

723-29 But see 291Pa421, 140A145.

723-40½-New. Where it was claimed that court erred in taking jurisdiction of partition suit, it was held that a bill alleging such error was a bill of review to that extent. 320 Ill 423, 151NE258.

723-40⅓-New. The court cannot review or restate a matter of the amount of a fee allowed to counsel in the original cause. 218Ala44, 117S469.

723-41 292Pa483, 141A296.

724-52 [a] **In Illinois.**-318 Ill 169, 149 NE16.

725-69 253Mass391, 149NE322; 85Pa Super169; 85PaSuper421; Va 138SE 633; 149Val, 141SE134. See also 96 Fla327, 118S60.

726-77½-New. A bill lies to review a decree vacating and setting aside a former decree. 104WVa482, 140SE325.

726-78 339 Ill 540, 171NE632 (bill in nature of bill of review); 234 IllA346, 349 [citCJ]; TexCivA 286SW954.

726-85 291Pa421, 140A145.

727-90 [b] **After affirmance of decree** District Court is without jurisdiction. 39F(2d)493(1stcase).

727-95 339 Ill 540, 171NE632.

727-2½-New. The commissioner in charge of an insolvent bank can recover assets consisting of warrants which the bank attempted to hypothecate to a depositor as security for a deposit in violation of statute. 45 Ida522, 263P632.

728-14 22F(2d)142; TexCivA 30SW (2d)364; TexCivA 30SW(2d)902.

729-25 253Mass391, 149NE322.

729-26 Fla 112S622.

729-28 320 Ill 423, 151NE258; 153Md 697, 142A380; 253Mass391, 149NE322; NJPrerog 151A67. See also 291Pa421, 140A145. [d] **In Illinois.**-320 Ill 423, 151NE258.

730-33 320 Ill 423, 151NE258.

730-35 253Mass391, 149NE322.

730-36 175Ark6, 298SW497.

731-62 253Mass391, 149NE322; 7Pa Dist&Co 767; TexCivA 10SW(2d)235. [b] (2) Bill of review has been held not barred by laches in absence of showing that delay operated to defendant's disadvantage. 218Ala44, 117S469.

732-77 291Pa421, 140A145.

734-88 291Pa421, 140A145.

734-90 93Fla709, 112S622; 327 Ill 89, 158NE395.

735-91 321 Ill 134, 151NE550.

736-6 22F(2d)142; 153Md697, 142A 380; 264Mass63, 161NE624. See also NJCh 145A539.

737-13 253Mass391, 149NE322; NJCh 145A539.

737-17½-New. Leave to file bill of review for taking evidence as to matter of which petitioners had knowledge at

time of trial will be refused. 15F(2d) 41.
738-25 TexCivA 286SW954.
739-36½-New. Petition to the circuit court of appeals for leave to file a bill of review should ask leave to file in the district court. 22F(2d)142.
739-37 248 IllA565.
739-38 253Mass391, 149NE322.
740-54 [a] (7) Other instances. Tex CivA 30SW(2d)364.
740-57 100WVa635, 131SE468, 469 [quotCJ].
740-58 100WVa635, 131SE468, 469 [quotCJ].
740-66 218Ala44, 117S469.
741-68 161Ga543, 132SE99 (decree should be set out or attached as exhibit).
741-84 237 IllA289.
742-85 100WVa635, 131SE468.
742-86 100WVa635, 131SE468.
742-88 93Fla709, 112S622.
742-89 93Fla709, 112S622.
743-5½-New. Usually, an offer to restore a part of the purchase money decreed is necessary. 218Ala44, 117S469.
744-33 253Mass391, 149NE322; 88Pa Super482; 100WVa635, 131SE468. [a] Error of law.-100WVa635, 131SE468.
744-34 170Ark22, 278SW627; 265Mass 226, 163NE881.
744-35 100WVa635, 131SE468.
744-36 But see 291Pa421, 140A145.
744-37 170Ark22, 278SW627; 291Pa 421, 140A145; 88PaSuper482. [c] Rule is inapplicable where facts relied on in petition were unknown to parties interested at time of determination. 88Pa Super482.
745-40 85PaSuper69; 85PaSuper421.
745-47½-New. Petitioner failing to show either fraud, accident, or mistake in the entry of a decree cannot maintain a petition for review. 258Mass199, 154 NE855.
745-55 [e] Bill must show fraud of respondent and diligence and lack of fault of plaintiff. 318 Ill 169, 149NE16.
746-60 [d] (2) Failure of plaintiff in suit to foreclose liens to have decree moulded so as to embrace absolute estate to which defendant, who was life tenant, would become entitled on remarriage, is not lack of diligence precluding modification of decree on happening of such contingency. 161Ga543, 132SE 99.
746-63 93Fla709, 112S622.
746-71 TexCommnA 276SW887.
746-72 22F(2d)142; Mass 165NE89; 150Va1, 142SE424; 152Va842, 148SE 687. [b] Whether error is apparent on face of record is question of law. 318 Ill 169, 149NE16.
747-74 170Ark22, 278SW627.
747-75 318 Ill 169, 149NE16.
747-77 318 Ill 169, 149NE16; 327 Ill 89, 158NE395; TexCivA 30SW(2d)364.
748-78 22F(2d)142.
748-79 176Ark629, 3SW(2d)690; 253 IllA351; 265Mass226, 163NE881.
748-82 22F(2d)142.
748-83 22F(2d)142; 170Ark22, 278SW 627; 318 Ill 169, 149NE16.
748-85 22F(2d)142; 170Ark22, 278SW 627; 152Va842, 148SE687. [b] In Illinois.-253 IllA351.
749-86 218Ala44, 117S469; 170Ark22, 278SW627. [c] 100WVa635, 131SE468.
749-87 176Ark629, 3SW(2d)690.
749-88 142Va31, 128SE599; 100WVa 635, 131SE468.
750-89 318 Ill 169, 149NE16; 152Va 842, 148SE687; 100WVa635, 131SE468.
750-90 170Ark22, 278SW627.
750-94 100WVa635, 131SE468.
750-96 100WVa635, 131SE468.
750-97 100WVa635, 131SE468. [a] In Illinois.-253 IllA351.
751-5 142Va31, 128SE599.
751-6 142Va31, 128SE599.
751-7 NJPrerog 151A67; 142Va31, 128 SE599. But see 318 Ill 169, 149NE16.
751-8 218Ala44, 117S469.
751-8½-New. and not mere error of judgment; 318 Ill 169, 149NE16.
755-66 14PaDist&Co 147.
760-9 161Ga543, 132SE99; 142Va31, 128SE599. [a] (14) That case not regularly set for hearing. 142Va31, 128SE 599. (15) Errors presenting questions of procedure are not open to consideration. 253 IllA351.
752-14 318 Ill 169, 149NE16; 253 IllA 351; 88PaSuper482.
752-21 But see 318 Ill 169, 149NE16. Contra 253 IllA351.
754-55 96Fla397, 118S157; 150Va1, 142SE424; 103WVa708, 138SE731.
754-57 291Pa421, 140A145.
755-62½-New. Advice of counsel that petitioner under former decision and case decided after entry of decree had good cause of action is not newly-discovered evidence pertinent to the bill. 258Mass199, 154NE855.
755-66 152Va842, 148SE687.
755-67 170Ark22, 278SW627; 291Pa 421, 140A145.
755-68 170Ark22, 278SW627; 150Va1, 142SE424.
756-71 93Fla709, 112S622.
756-74 170Ark22, 278SW627; 96Fla 397, 118S157; 150Va1, 142SE424.
757-75 96Fla397, 118S157.
757-76 96Fla397, 118S157.
757-77 96Fla397, 118S157.
757-78 96Fla397, 118S157.
757-79 96Fla397, 118S157.
757-83 96Fla397, 118S157; 150Va1, 142 SE424.
758-84 96Fla397, 118S157; 153Md697, 142A330; 150Va1, 142SE424.
758-86 96Fla397, 118S157; 150Va1, 142SE424.
759-87 14PaDist&Co 147.
759-88 96Fla397, 118S157.
759-94 96Fla397, 118S157.
759-96 14PaDist&Co 147.
760-9 253Mass391, 149NE322. [b] Petitions held to present matter newly arising.-253Mass391, 149NE322.
760-13 22F(2d)142.
761-23 Mass 165NE89. [a] Change in financial resources arising after decree has been held sufficient to justify bill. 253Mass391, 149NE322.
761-25 291Pa421, 140A145.
762-55½-New. Question of jurisdiction should be raised by demurrer and if not so raised may be disregarded. 258Mass 199, 154NE855.
762-55½-New. However, court is bound to take notice whether on the record it has jurisdiction. 258Mass199, 154NE 855.
765-52½-New. Party alleging fraud must prove it. 318 Ill 169, 149NE16.
765-52½-New. Fraud must be established by clear and satisfactory evidence. 318 Ill 169, 149NE16.
765-52¼-New. Evidence held to warrant decree refusing to vacate decree pro confesso for fraudulently preventing defense. 318 Ill 169, 149NE16.
765-54½-New. The court will not go into evidence at large to establish an objection based on a supposed error in deduction therefrom. 291Pa421, 140A 145.
765-54½-New. The court will not retry a case but will correct palpable mistakes in account or adjudication. 291 Pa421, 140A145.
765-54¼-New. Statements contained in a bill must be taken as true. 150Va1, 142SE424.
765-54½-New. On a bill of review, the court must indulge every reasonable presumption which the record does not affirmatively repel in favor of the correct ruling of the chancellor. 218Ala 44, 117S469.
766-57 170Ark22, 278SW627; 93Fla 709, 112S622.
766-64½-New. A bill of review does not empower the trial court to review its own proceedings during the trial. 253 IllA351.
766-70½-New. On a petition to change or modify a decree in an equity cause where no issues of fact were involved in the former cause and the facts entitling plaintiff to relief are undisputed and the determination rests on issues of law which are resolved in plaintiff's favor, it is proper for the court to grant relief without the introduction of further evidence or the intervention of a jury. 161Ga543, 132SE99.
766-85 253Mass391, 149NE322.
767-87½-New. After reversal and direction of rehearing on original petition all questions of present equity are open for consideration. 253Mass391, 149NE 322.
768-13 161Ga543, 132SE99, 102 [cit Cyc]. [a] Matters not violating rule.-161Ga543, 132SE99.
769-45 99NJEq551, 134A305; TexCivA 286SW954.
772-7 [a] Chancery court cannot set aside decree after adjournment of term of rendition, except for fraud, accident, or mistake. 144Miss674, 110S430.
773-9 214Ala320, 107S814; 169Ark 463, 275SW905.
773-10 169Ark463, 275SW905.
773-13½-New. A statute of limitation will not be applied to bar a proceeding to set aside a void decree. 142Va 173, 128SE541.
773-16 99NJEq551, 134A305. Contra 101NJEq753, 139A4.
774-24 214Ala320, 107S814.
775-36 214Ala320, 107S814.
776-62 Mass 165NE89; 103WVa708, 138SE731.
776-63 See 96Fla6, 118S57.
776-63½-New. Decree quieting title to lands as against unknown heirs will be set aside on an original bill for that purpose, if the heirs were known and the decree was obtained on false testimony that they were unknown. 99NJEq551, 134A305 (as against subsequent purchaser).
777-64 214Ala320, 107S814.
779-95½-New. Although fraud is alleged as a ground after expiration of the limitation, it should not be granted without a showing being made that the charge can be sustained. 245Mich124, 222NW118.
780-15 [a] Service of process.-169Ark 463, 275SW905.
780-15½-New. Before equity will grant relief against a decree for want of service it must be shown that a different result would obtain if relief was granted. 169Ark463, 275SW905.
781-30 214Ala320, 107S814.
781-36½-New. Evidence held sufficient to show service of process. 169 Ark463, 275SW905.
781-40 92Fla360, 109S458, 461 [citCJ perBrown,CJ].
781-41 92Fla360, 109S458, 461 [citCJ perBrown,CJ].
783-72 [a] Complaint held insufficient to support decree.-Miss 130S105.
784-93 214Ala552, 108S563.
784-98 91Fla824, 108S679; 250 IllA 192.
784-5 91Fla824, 108S679.
785-6½-New. Under statutes in some jurisdictions defendant may make appearance within three days after return of process. 154Tenn451, 289SW522.
785-6½-New. Final decree based on void pro confesso decree is void. 92 Fla1019, 111S118.
785-7 219Ala3, 121S415.
785-8 But see 219Ala3, 121S415.
785-9 [e] Rule providing that register must certify that publication has been made before decree entered is applicable only when decree pro confesso is entered by chancellor. 220Ala237, 124S519.
786-35 261Mass417, 158NE785.
788-63 261Mass417, 158NE785.
788-67 248IllA152.
788-73 But see 219Ala181, 121S548.
789-81½-New. Where a motion to strike a cross bill has been filed, decree pro confesso should not be rendered against complainant for failure to answer, plead, or demur. 91Fla275, 107S 342.
789-82 [d] But see 9PaDist&Co 296.
789-88½-New. A subpœna to answer having been made returnable the first Monday in June, the bill could be taken as confessed at the special term following. 153Tenn268, 283SW450.
789-90 157Tenn78, 6SW(2d)323.
790-96 NJ 144A110.
791-3 91Fla275, 107S342.
791-14 213Ky703, 281SW824.
791-22 See also NJCh 144A723.
791-25½-New. A decree pro confesso improperly entered against defendant at a time when its demurrer to the bill was not disposed of. 97Fla337, 120S 763.
791-25½-New. Counsel had no right to order prothonotary to enter decree on

failure of defendants to file answer after appeal taken. 300Pa21, 150A92.
791-29 21F(2d)893.
792-38 21F(2d)893; 219Ala3, 121S415; 220Ala411, 125S650; 93Fla1015, 113S89; 259Mass465, 156NE885; 264Mass475, 163NE162; Mass 172NE94.
793-54½-New. A decree pro confesso does not admit equity of the bill, and does not aid defective averments, or preclude defendant from appearing and contesting merits. 219Ala3, 121S415.
793-55 [c] **Truth of allegations in bill is established against such defendants** as confess it. Mass 171NE42.
793-57½-New. Indorsers, not being jointly liable, when bill was taken against them pro confesso, cannot avail themselves of defense made by party appearing. Mass 172NE94.
793-60 91Fla275, 107S342, 343 [citCJ].
793-62 [a] **Decree against nonresidents not personally served** held governed by law of date of their rendition. 216Ala641, 114S221.
793-63 91Fla275, 107S342; 96Fla688, 119S128; 261Mass417, 158NE785; NJ Ch 150A3.
794-69 NJCh 150A3; NJCh 150A436.
794-77 RI 136A766.
794-78 NJCh 150A3 (refused).
794-80 23F(2d)283 (defendants denying service of process or knowledge of suit).
795-98½-New. Refusal to set aside decree pro confesso for respondent's failure to give itemized statement of moneys received by them is held erroneous where complaint requested no such relief. 214Ala35, 106S168.
795-98⅓-New. A decree pro confesso, rendered while meritorious motion to strike is pending undisposed of, should be set aside on motion or by court sua sponte when brought to its attention. 91Fla275, 107S342.
795-4 214Ala35, 106S168.
796-21 RI 136A766.
797-53½-New. Entry of the final decree, based on testimony taken after expiration of the time allowed after the decree pro confesso, was error, but the decree was not void. 97Fla384, 120S851.
797-54 219Ala3, 121S415.
798-59 219Ala181, 121S548.
798-70½-New. **Time for entry of decree or judgment.** Under some statutes judgment may be entered at same term the bill is taken as confessed. 153Tenn268, 283SW450.
798-78 259Mass465, 156NE885.
799-83 21F(2d)893; 32F(2d)590; 153Tenn268, 283SW450; 147Va33, 136SE769; 101WVa742, 133SE618.
799-84 21F(2d)893; 32F(2d)590; 93Fla1015, 113S89; 153Tenn268, 283SW450; 147Va33, 136SE769.
799-85 147Va33, 136SE769.
799-92 93Fla1015, 113S89.
800-95 234 IllA183, 192 [citCJ].
800-99 21F(2d)893.
800-5 153Tenn268, 283SW450 (insufficiency of statements in bill to support decree not supplied by order pro confesso). See also 264Mass475, 163NE162.
801-8 214Ala552, 108S563.
801-10 101WVa742, 133SE618.
801-22 [f] **Demurrer accompanied by affidavit of one defendant and certificate of attorney.**-90Fla192, 105S404.
802-23 119 Or629, 250P745.
803-26 96Fla756, 119S131.
803-37½-New. If the court had jurisdiction of parties and subject matter and the decree is free from any other invalidating infirmity, a decree pro confesso, after the term, is conclusive of all matters of which it is the legal result. 153Tenn268, 283SW450.
803-44 98NJEq143, 130A228.
805-57 96Fla6, 118S57.
806-67 96Fla6, 118S57.
806-69 96Fla6, 118S57.
806-83 138Misc247, 245NYS298.
806-87 98NJEq143, 130A228.
806-89 98NJEq143, 130A228.
806-92 98Fla1004, 124S751; Fla 130S419(2dcase).
807-96 21F(2d)893.
807-1 NJCh 148A203 (for filing notice of report under court rule).
807-2 WVa 153SE507. [c] **Errors considered under statute.**-107WVa650, 150SE12 (any error for which supreme court of appeals might reverse). [d] **Where party materially interested was not party to bill,** decree is properly reversed. 107WVa650, 150SE12.
807-3 94Fla1218, 115S516 (death of indispensable defendant); 96Fla6, 118S57.
808-12½-New. A decree obtained on false allegations of jurisdictional facts may be vacated. 98Fla1196, 125S694.
808-13 32F(2d)590; 98Fla1196, 125S694; NJCh 148A203 (absence and illness of counsel).
808-17 98Fla1004, 124S751 (though there is some negligence); NJCh 148A203.
808-18 98NJEq143, 130A228. See also 96Fla6, 118S57.
809-31 98Fla1004, 124S751; 98Fla1196, 125S694.
811-62 101WVa742, 133SE618. [a] (1) 101WVa742, 133SE618.
811-62½-New. Where defendant was allowed a specified time to answer after vacation of pro confesso, an order reinstating it before expiration of the time is erroneous, 154Tenn451, 289SW522.
811-62⅓-New. and his motion to set aside the order of reinstatement accompanied by the answer with a good defense should be granted. 154Tenn451, 289SW522.
812-89½-New. No review can be had by bill of review in a lower court of matter which has been adjudicated in the final court of appeal. 265Mass226, 163NE381.
815-67½-New. Defendant in an action to enjoin construction of a dam is not estopped from constructing the dam at the place first planned by reason of a consent decree amounting to a contract where complainants did not furnish the money and land as agreed in such contract. 154Miss119, 122S205.
816-84½-New. Defendant's remedy for complainant's violation of the obligations undertaken by him in a consent decree is not confined to a proceeding to enforce the decree, where the court retained no control over the subject matter and expressly dismissed the bill. 154Miss119, 122S205.

EQUIVALENT

818-7 288Pa39, 135A724.

ERASURE

819-21 126Misc286, 213NYS656, 658 [citCJ].
819-22 126Misc286, 213NYS656, 658 [citCJ].

ERECT

819-37 31NM291, 244P1067, 1075 [quot CJ per Beckley, J dis. op.].

EROSION

822-76 121Kan511, 247P435 (gradual and imperceptible change).

ERRONEOUS

822-80 15F(2d)285.
822-86 [a] 191NC818, 133SE186.

ERROR

822-96 [c] **Legal error** is compound of both error and injury. 160Ga865, 129SE528.

ESCAPE

826-1 190NC319, 129SE802.
826-2 13F(2d)269; 192NC780, 136SE11, 12 [citCJ].
826-3 46 Ida112, 268P8. [b] (8) Departure of prisoner from custody. 190NC319, 129SE802. (9) Escape has two separate meanings in law, that is, allowing voluntarily or negligently of a prisoner lawfully in custody to leave his confinement; and going away of prisoner himself from place of lawful custody without breaking of prison. 190NC319, 129SE802.
827-15 46 Ida112, 268P8.
827-21 [a] 190NC319, 129SE802.
828-37 [a] **Crime of escape is substantive offense** and its punishment is not merely incidental to that for crime for which prisoner is confined. 229AppDiv419, 242NYS105.
828-37½-New. In some jurisdictions the crime is partly statutory. 68CalA522, 229P984.
828-40 13F(2d)269.
828-49 13F(2d)269.
828-54 264Mass490, 162NE908.
829-59½-New. "Prison guard," as used in statute relating to escape, does not mean position or office which exists at prisons. CalA 284P1066.
829-63 264Mass490, 162NE908.
830-98 69CalA520, 231P590. [b] **Unconstitutionality of statute** under which conviction had does not affect liability for escape. 229AppDiv419, 242NYS105.
831-10 [d] **Escape from prison farm** does not constitute escape from penitentiary under statute. 317Mo307, 295SW545. [e] **Statutory definition of "place of confinement"** does not apply to statute relating to escapes by persons confined in penitentiary. 317Mo307, 295SW545.
831-12 [b] **Conviction for indeterminate term** is within statute referring to escape when committed to state prison for term less than life. CalA 284P1066.
831-16½-New. Some statutes apply to escapes of prisoners confined upon conviction of misdemeanor as well as felonies. 68CalA522, 229P984.
831-16⅓-New. The legislature has power to limit punishment for escape to prisoners confined under sentence of felony only and except misdemeanor prisoners. 68CalA522, 229P984.
831-17 69CalA520, 231P590.
831-22 68CalA522, 229P984 (statute punishing escape held applicable to felony prisoner in county jail pending trial).
831-23 See also Miss 130S506.
832-30½-New. That a prisoner is confined under an unconstitutional statute does not afford justification for an escape where the statute has not been declared unconstitutional. 124 Or322, 263P903, 56ALR661.
833-38 [b] (3) Departure of prisoner who thought discharge was lawful is unlawful. 192NC780, 136SE11, 12 [cit CJ].
833-43½-New. A person who leaves a prison camp is guilty of escape from prison although his intention to escape may have been conceived after being away from prison. 76CalA101, 244P113.
834-64 [b] **Statutory crime.**-68CalA520, 229P984.
835-6 [b] **In Georgia.**-37GaA495, 141SE63.
835-6½-New. Legislature has power to limit punishment for attempt to escape to prisoners confined under sentence for felony only, and except misdemeanor prisoners. 68CalA522, 229P984.
835-22½-New. One committed under statute to a state hospital for narcotic addicts is a patient and not a prisoner, and in escaping or attempting to escape therefrom, is guilty of no offense under a statute relative to escape of prisoners. 100CalA292, 279P821.
835-22⅓-New. Neither the unsanitary condition of the jail nor the fear of inhumane punishment at the hands of the custodian excuse escape. 100CalA261, 279P1008.
835-31 121Kan817, 250P300.
836-34½-New. Any use of force or violence to overcome the jailor and go out without his consent is a breaking of jail. 121Kan817, 250P300.
836-42½-New. In Alabama statutes have been held not to apply where prisoners were taken from a town "calaboose" not complying with the requirements for a prison. 21AlaA558, 110S54.
836-47 24 Or322, 263P903, 56ALR661, (though illegally confined).
836-66 21AlaA558, 110S54.
837-78 [a] **Concealing or harboring escaped prisoner** is punishable under statutes in some jurisdictions. 147Wash555, 266P196 (requires affirmative act toward hiding prisoner from public view).
838-9 162Ga221, 133SE468 (convict working on roads is "confined in penitentiary" and superior court of county in which he makes his escape has jurisdiction to try offense).
839-19 37GaA495, 141SE63. [a] 190NC319, 129SE802.

839-20 121Kan817, 250P300.
840-37½-New. In some jurisdictions in prosecutions for crime of escaping from prison camp the only material allegation as to place of escape is allegation of its occurrence within confines of state. 67CalA445, 228P50 (county not required to be stated).
840-37¼-New. It is not necessary to state the commencement or expiration of imprisonment which defendant broke and sought to escape. 121Kan817, 250P300.
840-40 See also 76CalA101, 244P113.
841-66 20AlaA631, 104S676.
841-89 180Ark397, 21SW(2d)606.
842-28½-New. It is unnecessary to prove as alleged in the indictment that judgment had never been set aside or reversed, where a certified copy of the judgment was in evidence and that when he escaped he was undergoing a sentence imposed by the judgment. 76CalA 101, 244P113.
842-28¼-New. Under indictment for aiding escape of prisoner charged with felony, it is necessary to prove that prisoner was confined for felony as alleged. 23AlaA489, 127S677.
843-39½-New. In absence of showing to contrary it will be presumed that commitment was in due form as prescribed by statute, and that at least prima facie showing of lawful commitment was made. 90Fla25, 105S130.
843-58½-New. Evidence that witness found buttons of variety used on convicts uniforms in ashes of burned clothing in defendant's backyard has been properly admitted when other evidence connected defendant with the escape. 90Fla25, 105S130.
843-58¼-New. Evidence of a deputy sheriff as to conditions of escape is admissible, as a prisoner in the custody of a deputy sheriff is for all purposes in the custody of the sheriff. 159La820, 106S317.
843-58¼-New. Exclusion of evidence as to whether a deputy sheriff received a salary has been held proper in a prosecution for liberating a prisoner. 159La820, 106S317.
843-58½-New. Evidence that a deputy sheriff who had charge of the prisoner was employed by a police jury is properly excluded. 159La820, 106S317.
843-58¼-New. Evidence as to who paid a deputy sheriff who had charge of a prisoner in a prosecution for liberating the prisoner has been held properly excluded. 159La820, 106S317.
843-59 [a] (2) 76CalA101, 244P113; 264Mass490, 162NE908. (5) 106TexCr 290, 292SW216. (6) Causing escape. 180Ark397, 21SW(2d)606. [b] (4) 192 NC780, 136SE11.
844-92½-New. Sufficiency of evidence to corroborate accomplice of one on trial for aiding escape held for jury. 71CalA 402, 235P407.
844-92¼-New. Whether defendant was guilty of aiding prisoner charged with felony to escape is for jury. 23AlaA 489, 127S677.
845-97 [a] **Instructions held not erroneous.**-94PaSuper447.
845-6½-New. Under indictment for escaping from a prison camp and hospital in Rutland, the jury could find that camp and hospital were institution, as a prison camp and hospital at West Rutland. 264Mass490, 162NE908.
845-7 [a] **Construction of statutes.**-195 Cal 605, 234P883. [b] **In California.**-195Cal 605, 234P883.
845-13½-New. A statute declaring the penalty for attempting by force to escape from a county jail while lawfully imprisoned therein applies to one so attempting to escape from a county jail while lawfully imprisoned therein pursuant to a penitentiary sentence after conviction for robbery. 140Miss884, 105 S765.
845-13¼-New. Defendant should be required to serve term for offense of escape independent of original sentence. Miss 130S506.
845-17 322 Ill 390, 153NE688; 125Kan 804, 265P1101.

ESCHEAT

848-1 [e] **In United States** term "escheat" is sometimes used of all rights of property of whatever nature and is not always used in sense of reversion of real property alone. 111 OhSt269, 147NE602.
849-16 41F(2d)186 (owner not heard from for ten years); 68Utah344, 250P 469, 48ALR1322. [a] **In Utah.**-68Utah 344, 250P469, 48ALR1322.
850-18 128Misc439, 218NYS291.
851-39 79Mont299, 257P1002.
851-40 79Mont299, 257P1002. [a] **Gasoline tax erroneously collected** and subject to refund cannot be escheated by state on ground of unknown purchasers. 156Miss359, 126S44.
852-62 161Ga967, 132SE542, 543 [quot CJperRussell,C.J.].
852-63 161Ga967, 132SE542, 543 [quot CJperRussell,C.J.].
852-64 161Ga967, 132SE542, 543 [quot CJperRussell,C.J.].
852-65 161Ga967, 132SE542, 543 [quot CJperRussell,C.J.].
852-66 11PaDist&Co 777; 68Utah344, 250P469, 48ALR1322. [d] **Trading with Enemy Act** did not take from state right of escheating lands of aliens. 215 Ky413, 285SW224.
853-77 Imp [1928] 3DomLR849 (provincial statute preventing escheat ultra vires).
854-87 68Utah344, 250P469, 48ALR 1322.
854-88 79Mont299, 257P1002.
854-89 79Mont299, 257P1002.
854-90 161Ga967, 132SE542, 543 [quot CJperRussell,CJ].
854-91 161Ga967, 132SE542, 543 [quot CJperRussell,CJ].
854-92 161Ga967, 132SE542, 543 [quot CJperRussell,CJ].
854-93 161Ga967, 132SE542, 543 [quot CJperRussell,CJ].
854-3 41F(2d)186; 161Ga967, 132SE 542, 543 [quotCJperRussell,CJ].
855-4 143SC402, 141SE726.
855-5 161Ga967, 132SE542, 543 [quot CJperRussell,CJ].
855-8 161Ga967, 132SE542, 543 [quot CJperRussell,C.J.].
855-12½-New. Under the treaty with Greece, notice of the death of a Greek national dying without known heirs or testamentary executors by him appointed must be given to the consular officers of Greece in order that information may be forwarded to parties interested. 68 Utah344, 253P1117.
855-13 143SC402, 141SE726.
855-19 161Ga967, 132SE542, 543 [quot CJperRussell,C.J.]; TexCivA 286SW261.
855-20 117Nebr636, 222NW57. [b] 161Ga967, 132SE542.
855-21½-New. Where administration has been granted, there is no presumption that administration has been closed. TexCivA 286SW261.
855-22 79Mont299, 257P1002; 7PaDist &Co 245.
855-23 79Mont299, 257P1002.
856-35 283Pa520, 129A577 (actual or constructive notice and opportunity to examine witnesses is sufficient); 68Utah 344, 250P469, 48ALR1322.
856-36 79Mont299, 257P1002; 68Utah 344, 250P469, 48ALR1322.
856-44 68Utah344, 250P469, 48ALR 1322.
856-45 [c] **Petition held insufficient.**-TexCivA 286SW261.
857-51 161Ga967, 132SE542, 543 [quot CJperRussell,CJ].
857-61 150Md235, 133A723.
857-62 150Md235, 133A723; 117Nebr 636, 222NW57.
857-63 150Md235, 133A723.
857-67 See also 41F(2d)186.
857-69 41F(2d)186 (absence without probate proceedings).
858-73 150Md235, 133A723.
858-84 [b] 136Wash426, 240P554 (fraud in mortgages of lien not established); 136Wash432, 240P556 (fraudulent transactions to avoid law against alien ownership of land not established).
858-90½-New. To entitle the state to property, it is only necessary to establish the date of death of decedent and failure of anyone to claim succession within the statutory period. 68Utah344, 250P469, 48ALR1322.
858-95½-New. A finding that administration had been closed will not support a judgment in the absence of an allegation to that effect in the pleading. TexCivA 286SW261.
858-95¼-New. [§ 30a] 3½. **Distribution of Estate.** Where notice was duly published that the residue of the estate would be distributed, and the state applied for distribution to it, the court, under statute, must order distribution according to law. 68Utah344, 250P469, 48ALR1322.
858-95¼-New. and upon its appearing that no claim had been made during the period limited by the statute, the property should be distributed to the state. 68Utah344, 250P469, 48ALR 1322.
859-98 41F(2d)186.
860-29½-New. The state has no vested right in escheated property which prevents the legislature from determining as to disposition. 221Ky470, 298SW 1111.
860-36 221Ky470, 298SW1111.
861-48½-New. Alaska statute requiring banks to report escheated deposits held not invalid as interfering with business of national banks. 22 F(2d)377.
862-71 [b] **In New York.**-128Misc439, 218NYS291.

ESCROWS

865-1 177Ark31, 5SW(2d)726; 205Cal 309, 271P470, 60ALR630; 245 IllA547, 550 [quotCJ]; 118Nebr750, 226NW435; 105NJL595, 146A208; 216AppDiv665, 215NYS657, 662 [quotCJ]; 118 Okl 37, 246P865; 116 Or376, 239P818, 822 [quotCJ]. See also 122Kan666, 253P 235, 238 [citCJ]. [a] (6) Others. 88 IndA411, 164NE277.
865-2 See also 74CalA591, 241P897.
866-6 195Cal 377, 234P313; CalA 285 P392; Iowa 210NW797; 210Ky237, 275 SW691, 693 [citCJ]; 295Pa510, 145A 528; 52SD143, 216NW880; TexCivA 287SW117, 119 [citCJ]; TexCivA 298 SW318, 320 [citCJ]. See also 295Pa 510, 145A528. [d] **Agreement need not be in writing.**-Fla 129S328.
866-8 210Ky237, 275SW691, 693 [cit CJ]; 216AppDiv665, 215NYS657.
866-9 89CalA620, 265P346.
866-13 52SD143, 216NW880, 881 [cit CJ].
867-22 245IllA547.
867-33 210Ky237, 275SW691, 693 [cit CJ]; 52SD143, 216NW880.
867-35 210Ky237, 275SW691, 693 [cit CJ].
867-38 155Tenn44, 290SW985, 987 [cit CJ].
867-39 210Ky237, 275SW691, 693 [cit CJ]; TexCivA 288SW528.
867-40 234Mich322, 208NW41, 42 [quot CJ]; 155Tenn44, 290SW985, 987 [quot CJ].
868-41 155Tenn44, 290SW985, 987 [quotCJ].
868-42 155Tenn44, 290SW985, 987 [quotCJ].
868-50 11LaA323, 123S461, 463 [quot CJ]; 118 Okl 37, 246P865. [b] **Terms authorizing delivery may rest in parol** or be partly in writing and in part parol. 118 Okl 37, 246P865.
869-54½-New. A requirement that any modification of escrow instructions shall be in writing and consented to by the parties and the escrow holder is reasonable and binding. CalA 265P301.
869-54¼-New. Where escrow instructions contain such requirement and require a marketable title to be shown before completing the escrow, an attempted parol waiver by a subvendee who agreed to the escrow instructions is ineffective. CalA 265P301.
869-59½-New. The contingency upon which the deed is to be delivered may be in the nature of a condition subsequent, rather than precedent. Tex CommnA 280SW748.
869-61 210Ky237, 275SW691, 693 [cit CJ].
869-62 210Ky237, 275SW691, 693 [cit CJ].
869-63 205Cal 302, 271P104. [b] **Clear showing that party knew terms of deed** held essential to permit deed to vary terms of escrow agreement. 78Mont122, 252P796.
870-64 116 Or376, 239P818 (as deter-

mined by language of writing); **Wash** 288P919.

870-35 177Ark241, 6SW(2d)20; 195 Cal 377, 234P313; 197Cal 674, 242P713 (discrepancy in dates fixed for performance between plaintiff's and defendant's instructions construed to be due to clerical misprision); 205Cal 302, 271P 104.

870-66 94CalA124, 270P735. [a] **Escrow instructions** following sale contract are to be regarded as contract in writing between parties whether regarded as supplemental to sale contract or as subsequent contract in writing. 197Cal 674, 242P713.

870-66½-New. Separately executed escrow instructions signed on the same day as part of the same transaction should be construed together. 89CalA 620, 265P346.

870-66½-New. Escrow instructions must be read together as forming an entire contract. CalA 265P301.

870-66¼-New. Provisions in escrow instructions have been construed as requiring that the depositary have a guaranty, showing ownership with marketable and unencumbered title on the part of the vendor, before completion of the escrow. CalA 265P301.

870-66½-New. Escrow instructions are to be construed as favorably to party not preparing them as uncertainties therein permit. CalA 283P960.

870-66¾-New. Particular instructions in an escrow agreement construed. 100 CalA766, 281P102 ("condition and restrictions").

870-66½-New. An escrow providing that an initial payment under a contract of purchase shall be intrusted to the temporary custody of the depositary may imply conditions not performed by the seller at the time the contract of purchase was signed. 118Nebr750, 226 NW435.

870-68 210Ky237, 275SW691.

870-69 210Ky237, 275SW691, 693 [quot CJ].

870-70 201Iowa107, 204NW294, 296 [citCJ], 48ALR394; 210Ky237, 275SW 691, 693 [quotCJ]; 117Nebr1, 219NW 581, 583 [citCJ].

870-71 210Ky237, 275SW691; 98NJEq 728, 130A628; 216AppDiv665, 215NYS 657; 52SD143, 216NW880; TexCivA 287SW117, 119 [citCJ]; TexCivA 298 SW318, 320 [citCJ].

871-73 241Mich547, 217NW756; 98NJ Eq728, 130A628.

871-80 91CalA621, 267P565; 88IndA 411, 164NE277; 210Ky237, 275SW691.

872-82 IndA 158NE581.

872-84 [a] **Where grantor terminates escrow by withdrawing deed,** vendee who kept balance of purchase price in escrow is not placed in default by refusal to sign additional escrow instructions. 81CalA786, 254P684.

872-85½-New. A purchaser is entitled to rescind escrow instructions for unreasonable delay of the vendor in delivering a certificate of title and guaranty although no time limit is fixed by escrow instructions. 84CalA438, 258P 411.

872-85½-New. What constitutes a reasonable time for examination of title and issuance of certificate of guaranty within such rule is a question for the court or jury to decide on the circumstances of the particular case. 84CalA 438, 258P411.

872-85¼-New. Evidence has been held sufficient to sustain a finding of unreasonable delay in delivering such instructions authorizing rescission. 84 CalA438, 258P411.

872-85½-New. Purchasers are not required to return deeds before rescinding escrow instructions where the deeds never came under their control. 84CalA 438, 258P411.

872-91 116Or376, 239P818, 822 [quot CJ].

873-96 164Ga462, 139SE15; TexCivA 284SW705; TexCivA 288SW528.

873-97 76CalA530, 245P451.

874-3 148Va181, 138SE465, 466 [quot Cycl], 54ALR699.

874-5 216Ala534, 113S613; 236Mich 317, 210NW318.

874-6 216Ala534, 113S613; 169Ark649, 276SW595; 76CalA530, 245P451; 164Ga 462, 139SE15; 104NJL248, 139A900, 901 [citCJ] (contract of sale); 105WVa 284, 142SE253.

875-8 155Tenn44, 290SW985.

877-23 210Ky237, 275SW691.

877-24 210Ky237, 275SW691.

877-26 164Ga462, 139SE15; 210Ky237, 275SW691. But see 94CalA602, 271P 564. [b] **Agency must be one to obtain possession** of instrument. 164Ga462, 139SE15.

877-27 210Ky237, 275SW691.

878-32 197Cal 103, 239P847, 850 [quot CJ].

878-33 197Cal 103, 239P847, 850 [quot CJ]; 84CalA438, 258P411; 92CalA343, 268P408; CalA 293P136; 98Fla118, 123S519(2dcase) (holding depositary trustee of express trust); 246Mich473, 224NW368. See also 88IndA411, 164 NE277. But see 66Utah351, 242P408. [c] **Depositary does not become agent for purchaser as to deeds deposited by seller** where no satisfactory certificate of title has been produced, as required to entitle vendor to money deposited by purchaser, before rescission of escrow instructions. 84CalA438, 258P 411. [d] **Escrow holder is in effect trustee** of both parties. Fla 129S328.

878-34 197Cal 103, 239P847, 850 [quot CJ].

878-35 197Cal 103, 239P847, 850 [quot CJ]; 205Cal 309, 271P470, 60ALR630; 91CalA621, 267P565; TexCivA 299SW 304.

878-36 197Cal 103, 239P847, 850 [quot CJ].

878-36½-New. Where the depositary acted for the bank in accepting a deposit under an agreement for the deposit of money in the bank for the credit of grantor, waiver of payment by grantor could not vary the terms of acceptance. 52SD143, 216NW880.

878-36¼-New. Where escrow instructions assented to by the depositary provide that the escrow shall not be modified or rescinded without joint consent, the depositary is under liability to maintain the escrow. CalA 265P303.

878-37 205Cal 309, 271P470, 60ALR 630; 245IllA547.

879-39 205Cal 302, 271P104; Tex CommnA 280SW748, 750 [citCJ].

879-40 TexCivA 299SW304.

879-45½-New. Where vendee deposits money with escrow agent to be paid on delivery to him of title guaranty, but with liberty to deposit it in his own name, his bank account must be kept sufficient to cover such amount, and failure to do so is embezzlement. 196 Cal 141, 236P301, 39ALR1076.

879-46½-New. Where deed and part of purchase money were deposited in escrow, purchase money may not be used to pay off encumbrances. 116Oh 41, 155NE385.

879-46¼-New. Depositary of corporate stock has no implied authority to pay assessments thereon. 203Iowa1034, 213NW929.

879-46¼-New. Depositary is special agent, and person dealing with him is bound to know extent of his powers. 253IllA1.

879-53 173Ark368, 292SW126; 121Kan 51, 245P740 (failure of depositary to pay to vendor amount of check deposited by vendee); TexCivA 287SW149; TexCivA 299SW304; 136Wash42, 238P 915.

880-60½-New. Where papers deposited do not legally constitute an escrow, depositary held not to assume any liability except as bailor. 52SD143, 216 NW880.

880-60¼-New. A bank is not entitled to assert the defense that vendor resold at a profit, in an action to recover the deposit as liquidated damages. Tex CivA 299SW304.

880-61 218Ala296, 118S513; 29Ariz 156, 240P275; 177Ark31, 5SW(2d)726; 195Cal 377, 234P313; 78CalA334, 248P 526; 87CalA172, 261P727(3dcase); CalA 265P301; 89CalA764, 265P351; 122Kan 666, 253P235, 238 [quotCJ]; 234Mich 52, 207NW886; 116Or376, 239P818, 822 [quotCJ]; TexCivA 274SW288. [c] **Where oil and gas lease contract and bonus money to pay for it are deposited in escrow** to be delivered to respective parties on performance of certain conditions on part of lessor, lessee acquires no rights of possession in leased premises and is under no obligation to develop until such conditions are performed and contract is delivered or tendered to him. 118Okl 37, 246P865. [d] **Grantee is not entitled to delivery of deed from escrow** till conditions are satisfied. 208Cal 420, 281P613.

880-61½-New. Threat of grantor not to be bound by escrow agreement is not breach of the agreement by him. 169 Ark649, 276SW595.

880-62 205Cal 302, 271P104; 68CalA 166, 228P724; 74CalA591, 241P897; CalA 285P392; 125Or419, 267P527.

881-65 [a] (2) Where escrow instructions require delivery of lease containing unenforceable but not illegal provision, landlord is not entitled to change terms in such respect. 68CalA166, 228P 724.

881-67 206Iowa848, 218NW488, 490 [citCJ]; 11LaA323, 123S461.

881-68 CalA 283P960.

881-68½-New. Where an oil and gas lease contract and the bonus money to pay therefor are deposited in escrow to be delivered to the respective parties on performance of certain conditions on the part of the lessor, the lessee has the right to stand on the agreement and demand performance in accordance with its terms and cannot be prejudiced by any proposition by the lessor not assented to by him. 118Okl 37, 246P865.

881-68¼-New. Where money deposited in bank is to be paid to third person upon happening of contingency, and depositary agrees to terms provided proof of happening of contingency is made to it, such proof is not condition precedent to acquisition of any rights to deposit by the third person. 5ND66, 199NW 138.

881-72½-New. A grantor or his privies may, by waiving strict performance or nonperformance of a preëxisting condition, make delivery by the depositary effectual. TexCommnA 280SW748.

881-72¼-New. Both parties may disregard the escrow agreement and close the deal without regard to its provisions. 123Kan477, 255P971.

881-73 223Ky510, 4SW(2d)403.

881-76 195Cal 377, 234P313 (vendor, under escrow agreement calling for delivery free from encumbrances, except taxes for a certain year, having paid such taxes before they became delinquent, can insist that deed shall not be delivered until he is repaid the taxes by vendee).

882-84 83CalA596, 257P157; 87CalA 414, 262P400; CalA 286P487; 118Okl 37, 246P865; 135Okl 237, 275P341. [a] (3) Question of reasonable time for performance of conditions of escrow agreement for delivery of oil and gas lease limited by definite term for development is not determined by diligence or lack of diligence of lessor but depends upon fact of performance within sufficient time for lessee to carry out provisions of his contract before expiration of its term. 118Okl 37, 246P865.

882-86 83CalA596, 257P157.

882-88 72CalA748, 238P127.

882-91 43F(2d)467; 29Ariz156, 240P 275; Ariz 286P930; 177Ark31, 5SW (2d)726; 195Cal 377, 234P313; Iowa 210NW797. See also 122Kan666, 253P 235, 238 [citCJ]. [d] **Title to money deposited** by vendee to be paid to vendor when escrow holder could secure title guarantee is on vendee, who must bear loss on embezzlement by escrowholder. 196Cal 141, 236P301, 39ALR 1076. [e] **Provision that all disbursements** are to be made by escrowholder does not create relation of borrower and lender between him and vendee. 196Cal 141, 236P301, 39ALR1076. [f] **Right of possession** ordinarily follows title which remains in grantor. 38Wyo 140, 265P25.

883-92 TexCommnA 280SW748, 750 [citCJ]; TexCivA 278W(2d)639.

883-94 122Kan666, 253P235, 238 [cit CJ]; 349Mich410, 228NW737 (checks and notes held not assets of bank which did not fulfill condition).
883-98 324 Ill 131, 154NE715; 126 Okl 251, 259P268.
883-99½-New. Purchasers must bear the loss of an escrow deposit in a bank which failed while vendor was attempting to perfect her title without unreasonable delay. 176Ark974, 4SW(2d)946, 57ALR1244.
883-99½-New. Title to money deposited by vendee of real estate remains his property until performance of conditions of escrow. 27 OhNPNS235.
883-2 TexCommnA 280SW748; 136 Wash42, 238P915.
883-3 177Ark903, 8SW(2d)500; 196Cal 141, 236P301, 39ALR1076; 92Fla1, 109 S297, 48ALR401; 42 Ida479, 246P1; 232 IllA39; 253 IllA1; 201 Iowa107, 204NW 294, 48ALR394; Iowa 228NW574; 126 Okl 246, 259P219, 54ALR1237; 136 Okl 118, 276P718; SD 231NW900; Tex CommnA 280SW748, 750 [citCJ&Cyc]. But see TexCommnA 280SW748.
884-4 92Fla1, 109S297, 48ALR401; 126 Okl 246, 259P219, 54ALR1237. [a] **Suit by vendor against escrowholder** for purchase money without knowledge of its embezzlement by the latter does not satisfy wrongful delivery of deed to vendee. 196Cal 141, 236P301, 39ALR1076.
884-12 121Kan51, 245P740; 222MoA1, 300SW546. See also 42 Ida479, 246P1.
884-13 136Wash42, 238P915.
885-16 42 Ida479, 246P1, 5 [citCJ]; Iowa 228NW574; 222MoA1, 300SW546. [a] (3) Action for value of property brought against grantee was ratification of delivery of deed by depositary. 42 Ida479, 246P1. [b] 196Cal 141, 236P 301, 39ALR1076; 208Cal 420, 281P613.
885-20 208Cal 420, 281P613; 126 Okl 246, 259P219, 222 [quotCJ], 54ALR 1237.
885-21 92Fla1, 109S297, 48ALR401; 126 Okl 246, 259P219, 222 [quotCJ], 54 ALR1237.
886-23 171Ark912, 287SW373; 201 Iowa107, 204NW294, 296 [citCJ], 48 ALR394]; 126 Okl 246, 259P219, 222 [quotCJ], 54ALR1237.
886-24 92Fla1, 109S297, 48ALR401; 201 Iowa107, 204NW294, 296 [citCJ], 48ALR394; 126 Okl 246, 259P219, 222 [quotCJ], 54ALR1237.
887-36 126 Okl 246, 259P219, 54ALR 1237.
888-46 See also 227Ky451, 13SW(2d) 488.
888-49 205Cal 309, 271P470, 60ALR 630.
888-50½-New. Judgment is properly rendered against the depositary for the remainder of the deposit where it was his duty to return the full amount and he only returned a part. 169Minn123, 210NW859.
888-51 169Ark649, 276SW595; 204Cal 119, 266P948; CalA 291P663; 234Mich 322, 208NW41; 246Mich473, 224NW 368; 78Monti22, 252P796; 116 Or376, 239P818, 822 [quotCJ]. [d] **There is no delivery** where instruments are delivered to grantee for deposit in bank under escrow agreement, without grantee's compliance with such agreement. 169Ark649, 276SW595. [e] **Where escrow is abandoned,** delivery of instrument is ineffectual for any purpose. CalA 286P487.
889-52 116 Or376, 239P818, 822 [quot CJ].
889-53 116 Or376, 239P818, 822 [quot CJ].
889-54 177Ark815, 8SW(2d)443; 91 CalA621, 267P565; 88 IndA411, 164NE 277; 206 Iowa848, 218NW488, 490 [cit CJ]; 126 Okl 251, 259P268; 116 Or376, 239P818, 822 [quotCJ].
889-56 98NJEq728, 130A628.
889-57 98NJEq728, 130A628.
889-61 116 Or376, 239P818, 828 [quot CJ].
889-61½-New. Where a note bearing the absolute indorsement of the payee is deposited by him in escrow, a change of the indorsement by him after performance of the condition so as to make it without recourse is unauthorized and will be disregarded by the court in an action on the note. 126 Okl 251, 259P 268.
889-63 244 IllA148; 233Ky181, 25SW (2d)75; 116 Or376, 239P818. [b] **Grantor's breach of agreement will not vest title in grantee** so as to give him right to record instruments where agreement provided they could be delivered by escrowholder to grantee only on latter's compliance with agreement. 169 Ark649, 276SW595.
890-67 215Ala212, 110S308; 82CalA 255, 255P543; IndA 158NE581; 234 Mich322, 208NW41.
890-68 IndA 158NE581.
891-76 234Mich322, 208NW41.
892-92 42 Ida479, 246P1.
892-96½-New. Both vendee and escrow agent may be sued for specific performance where escrow becomes insolvent and receiver is appointed before conditions of escrow are carried out. 27 OhNPNS235.
892-98 42 Ida479, 246P1.
893-8½-New. Where the deposit of a sum of money, in escrow with a bank as plaintiff's agent in connection with oil leasing contract with defendants, was purely gratuitous, and defendants were not shown to have any interest therein, plaintiff's right of withdrawal may be enforced by injunction to prevent distribution of the fund in accordance with plaintiff's letter of instructions to the bank. 121 Or227, 252P954.
893-12 88 IndA411, 164NE277.
893-23½-New. Where plaintiff entering into a contract for the exchange of properties turned the title papers over to the depositary to hold in escrow pending fulfillment of a condition in the contract, the depositary was plaintiff's agent with respect to plaintiff's papers, and loss of plaintiff's paper evidence of title as the result of the depositary's disappearance fell on plaintiff. 246Mich 473, 224NW368.
893-24 88 IndA411, 164NE277.
893-24½-New. The grantor and depositary need not be joined in an action against a third person to whom property is wrongfully delivered. 91CalA 621, 267P565.
893-24¼-New. The grantor and depositary may be joined where they wrongfully convert property. 91CalA 621, 267P565.
893-28½-New. Allegations that the agreed price was just, fair, and adequate is a sufficient allegation of value in the absence of demurrer, if value and adequacy of consideration are necessary. 91CalA621, 267P565.
894-43 201 Iowa107, 204NW294, 48 ALR394.
895-46 But see 201 Iowa107, 204NW 294, 48ALR394.
895-54 [a] **Evidence held admissible.**–121Kan51, 245P740.
895-57 [a] (3) To sustain plaintiff's claim as to terms and conditions of escrow. 121Kan51, 245P740. (4) Deposit in escrow of note. 220MoA1276, 290 SW1009. [b] (2) Deposit by agreement of parties. 201 Iowa107, 204NW294, 48 ALR394.
895-59 295Pa510, 145A528. See also 173Minn616, 216NW783. [a] (2) To show that deeds were held by depository as security for debt, and that grantor had right to control of deeds as security for the debt. 167Minn389, 209NW263.
895-59½-New. Where one is sued in the capacity of a depositary to compel delivery of an instrument, it is incumbent upon plaintiff to show at least prima facie that he held the instrument under such circumstances as to make him a mere depositary thereof. Tex CivA 283SW1115.
895-62½-New. Evidence insufficient to show delivery by escrowholder to grantee was not fraudulent. 201 Iowa107, 204NW294, 48ALR394.
895-63 See also 222MoA1, 300SW546.
895-68 [a] **Evidence held sufficient** to show escrow agreement was not superseded by, or merged in, oil and gas leases deposited therewith. 122Kan666, 253P235.
896-70½-New. Evidence held not to show that deed was fraudulently delivered. TexCivA 288SW528.
896-70¼-New. Evidence has been held to sustain the trial court's finding that the contract was delivered to the contractor by an escrow holder against defendants' instructions. 94CalA602, 271 P564.
896-70¼-New. Testimony has been held to warrant a finding that an escrow holder was unable to comply with the terms of the escrow because of the purchaser's default. 95CalA106, 272P 307.
896-70⅕-New. Evidence has been held sufficient to show that assignment of an oil lease deposited in escrow was accepted by the assignee. 11LaA323, 123 S461.
896-70¼-New. Evidence has been held to support findings of performance of conditions. 91CalA621, 267P565.
896-72 [b] **Evidence held insufficient to go to jury.**–TexCivA 283SW1115.
896-74 126 Okl 246, 259P219, 54ALR 1237.
896-76½-New. [§ 46a] F. **Findings** that allegations of the complaint are true and of denials untrue is a sufficient finding of value and adequacy of consideration. 91CalA621, 267P565.

ESTABLISH

899-89 205 Iowa82, 217NW468.
899-93½-New. ; equivalent to prove; TexCivA 271SW293.
899-93½-New. to cause to be recognized as valid or legal. TexCivA 271 SW293.
899-99 216Ala85, 112S418.
900-27 14CustA38.
901-88½-New. "Establish his right to such property" evidence offered on issue at trial to prove possession rights. Tex CivA 271SW293.
902-2 Utah 286P947.

ESTABLISHMENT

904-46 142Wash377, 253P122.
904-57 142Wash377, 253P122.
904-58½-New. As used in a child labor statute it includes "any premises used for a restaurant or for publicly providing and serving meals." 261Mass226, 158NE759, 55ALR640.

ESTAFA

904-63 44Philippine471; 44Philippine 539; 50Philippine598 (matters constituting offense).

ESTATES

913-10 318 Ill 297, 149NE228; 327 Ill 381, 158NE720.
914-11 142Va840, 128SE247.
914-26 See also 199Cal 135, 248P517.
915-33 122 Or387, 259P290, 292 [quot CJ entire paragraph].
915-36 NH 149A866.
915-42 BC [1926] 4DomLR834, 840 [quotCJ].
915-43 114 Okl 10, 243P195. [b] (6) Freehold in such estate in lands as is conveyed by livery of seizin. 112 OhSt 306, 147NE513, 39ALR334. [g] **Estate, title, or interest.**–307Mo 576, 271SW365. [h] **There can be no other estates in land** than simple ownership and servitude including usufruct. LaA 128S304(2d case). [i] **Only such estates as law permits** may be created in land. 41F(2d) 552.
917-82 [a] **Estates divided into freehold** and less than freehold. 112 OhSt 306, 147NE513, 39ALR334. [b] **Estates of inheritance and estates for life could not by common law be conveyed** without livery of seizure, these are property estates freehold. 112 OhSt306, 147 NE513, 39ALR334.
917-84 112 OhSt306, 147NE513, 39ALR 334.
917-93 [c] 112 OhSt306, 147NE513, 39 ALR334.
918-94 17F(2d)357, 365 [citCJ]. [c] **Estate of inheritance is necessarily** freehold and freehold is necessarily real property. 112 OhSt306, 147NE513, 39 ALR334.
918-94½-New. Mere nonuser of a freehold estate of inheritance cannot of itself result in an extinguishment. Tex CivA 148W(2d)348.

918-95 17F(2d)357, 365 [quotCJ]. [c] (3) 153Md408, 138A258. (5) 82Mont393, 267P296. (9) 153Md408, 138A258.

919-99 [b] **Grant of land** from which is excepted and reserved to grantor minerals and rights relating thereto is fee simple in its nature. 197Cal 263, 240P 19.

919-3 197Cal 263, 240P19.

919-5 TexCommnA 168W(2d)255.

919-7 223Ky792, 48W(2d)745 (complete dominion and control); 82Mont 393, 267P296; 157Tenn429, 78W(2d) 40 (absolute estate, excluding every other interest).

919-8 [a] **As excluding encumbrances,** term "fee simple" means land in its entirety without any encumbrances or conflicting claims of others. TexCivA 283SW303.

920-12 122 Or246, 257P818.

921-31 197Cal 263, 240P19.

921-42 214Ky536, 283SW1019.

922-46 122 Or620, 260P206, 209, 59 ALR707 [citCJ].

923-48 83NH107, 139A294.

923-62 218Ala320, 118S553.

924-85 128 Or483, 275P45. [d] (2) See also 132NC306, 128SE31.

925-87 132NC306, 128SE31 (until issue born, takes life estate with reversion to grantor).

925-88 128 Or483, 275P45.

925-91 128 Or483, 275P45; 132NC306, 128SE31 (upon birth of issue reversion is barred and grantee may convey in fee simple).

925-4 132NC306, 128SE31.

926-7 132NC306, 128SE31 (dictum; descends subject to debts of grantee).

926-17 [a] **Estate is vested in interest when there is present fixed right of future enjoyment.** 235Mich555, 209NW 930.

926-19 235Mich555, 209NW930. [b] **Life estate commences** at death of testator unless otherwise appearing. 108Conn100, 142A851.

927-23 76CalA655, 245P803. See also TexCivA 286SW315.

927-24 76CalA655, 245P803. [a] 221 AppDiv502, 224NYS651. [b] 76CalA655, 245P803.

927-29 121Kan291, 246P1017.

927-31 121Kan291, 246P1017.

928-36½-New. Contingency based on the death of the life tenant without children has been held a contingency on event. 100NJEq528, 135A809.

929-60 126 Okl 3, 258P906.

930-63 126 Okl 3, 258P906.

930-68 109Conn529, 147A181 (reversion to grantor or heirs upon happening of event); 252 IIIA337.

931-86 214Ky320, 283SW103. [a] (5) Conditional limitation is created where, on happening of contingency, estate is carried over to stranger; that is, estate is granted till event shall have arrived, and not generally, with liability to be defeated by happening of event. 109Conn529, 147A181.

931-91 329 Ill 235, 160NE605; 124Kan 604, 261P840; Kan 289P433; 319Mo 1001, 5SW(2d)74, 77 [citCJ].

933-11 [a] **If limitation over is not postponed till indefinite failure of issue,** but on failure of children only, estate tail by conveyance is not created. Me 150A375.

934-32 **Tenant in tail has right to lease** entailed property for gas and oil development for any term within his own tenure. 121Kan312, 246P982.

934-50 [a] 124Kan604, 261P840.

935-63 15DelCh15, 130A32; 119Kan 773, 241P696; 121Kan312, 246P982; 124Kan604, 261P840; 126Kan344, 267 P963.

935-67 15DelCh15, 130A32 (where possessor of fee tail by conveyances in fee simple from and back to himself became seized of and in fee simple).

936-69 But see 124Kan604, 261P840.

936-72 15DelCh15, 130A32; 124Kan 604, 261P840.

936-73 15DelCh15, 130A32.

936-86½-New. Where the entailment of property covered by mortgage had been severed before execution of the mortgage, minor children as "issue of the body" of a tenant in tail cannot resist foreclosure of the mortgage. 129 Kan24, 281P888.

937-95 [b] 128 Or483, 275P45.

937-96 214Ala288, 107S838; 210Ky 824, 276SW977. But see 146Va134, 135 SE819. [e] **In Philippine Islands.**-50 Philippine888 (effect of Disentailing Law and conduct of interested parties upon particular mayorazgo stated).

937-97 170Ark679, 280SW993; 310Mo 684, 276SW39. [a] (3) Tenant can sell estate where there is no issue of her body. 82 OhA497, 168NE383.

937-99 219MoA271, 275SW965.

938-4½-New. Where none of the devisees named in a will as unborn were in existence, it was unnecessary to name them, as parties to an action brought to disentail property. 120 Oh524, 166NE 679.

938-7 [a] **Life estate includes all parts of land** included in remaindermen's interests. 218Ky537, 291SW757.

940-55 163Ga468, 136SE434.

940-61 81CalA176, 253P191.

940-62 211Ky842, 278SW137.

940-65 83Mont214, 271P433.

940-66½-New. A deed to A for life, and at his death to be divided between A's heirs, creates a life estate only in the first taker. 211Ky842, 278SW137.

940-74 314Mo 508, 284SW497; 144Va 375, 132SE347, 350, 45ALR738 [quot CJ].

940-75 144Va375, 132SE347, 45ALR 738.

940-76 144Va375, 132SE347, 45ALR 738.

940-77 SD 227NW479; 144Va375, 132 SE347, 45ALR738.

940-79½-New. Alienability is not an essential element of an equitable life estate. 314Mo 508, 284SW497.

940-79¾-New. and a valid restriction against its alienation by the donee, 314 Mo 508, 284SW497.

940-79¼-New. or against its sale under execution to pay the donee's debts, may be imposed by the donor by express provision. 314Mo 508, 284SW497.

941-80 142Va824, 128SE264.

941-82 142Va824, 128SE264 (limitation over on condition creditor attempts to subject property to debts).

941-84 217AppDiv210, 216NYS699, 702 [citCJ].

941-86 217AppDiv210, 216NYS699, 702 [citCJ].

941-87 81CalA176, 253P191; 128Misc 577, 219NYS619; 284Pa583, 131A361.

941-89 27F(2d)101; 127Misc399, 216 NYS267. [d] **Respecting realty and personality,** trust obligation of life tenant is exactly the same. 127Misc399, 216NYS267.

941-90 Me 150A531.

941-91 Me 150A531.

941-93 TexCivA 16SW(2d)366. [a] **Life tenant has same interest** during term as remainderman thereafter, except life tenant may not commit waste. 218 Ky557, 291SW757.

941-94 214Ky643, 283SW1015; 135 Misc70, 237NYS6 (exercise of act of ownership); 286Pa237, 133A252.

941-97 130Misc110, 222NYS532.

942-99 153Tenn215, 280SW1012 (life tenant, beyond child-bearing age, acquiring estate of those who would take in default of issue of life tenant is entitled to her share of proceeds of entire property absolutely on giving bond for repayment in event of her leaving children). See also 133Misc222, 231NYS 613.

942-99½-New. A life tenant, with power of disposing the principal during life, need not give security. 128Misc577, 219NYS619.

942-99¾-New. In New York, prior to 1914, the supreme court had jurisdiction to require a life beneficiary in possession of the principal to give security. 128Misc577, 219NYS619.

942-7 127Kan72, 272P106. [b] **Purchaser at mortgage foreclosure sale** to satisfy amount advanced to life tenant hold title for benefit of reversioners who contribute. 213Ala380, 104S824.

942-16 213Ala388, 104S824.

943-17 213Ala380, 104S824.

943-22 TexCivA 283SW288, 293 [cit CJ].

943-30½-New. After death of life tenant, none of methods for determining present value of life tenant in advance, is applicable. TexCivA 283SW288.

943-30¾-New. Computation may be from testator's death. 111Conn589, 151 A166.

943-30¼-New. Estimating life use before deducting legacies may be proper. 111Conn589, 151A166.

943-31 104WVa507, 140SE487. See also 128Misc577, 219NYS619.

943-32 See also 315Mo 442, 286SW385; TexCivA 298W(2d)416.

943-34 TexCivA 298W(2d)416.

944-40½-New. A life beneficiary of corporate stock under a will is not entitled to unconditional delivery of shares issued in place of the original shares. 169Ga80, 149SE702 (stock issued in place of original stock).

945-66 19F(2d)974; 110Conn150, 147 A562 (cash dividend regarded as income); 216Ky512, 287SW975, 976 [cit Cyc]; 217Ky632, 290SW497; Me 149A 626(2dcase); 150Md354, 133A128, 46 ALR231; 235Mich130, 209NW67; 99 NJEq207, 132A652; 127Misc399, 216 NYS267; 135Misc70, 237NYS6; 19 OhA 43; 287Pa354, 135A130; TexCommnA 276SW680; TexCivA 16SW(2d)366; 193Wis84, 213NW641. [l] **Statute giving executor right to possession of real estate** in certain cases does not deprive life tenant of right to accumulated earnings where personal property and money on hand are sufficient to pay debts as contemplated by will. 235Mich130, 209 NW67. [m] **Income from shares.**-193 Wis84, 213NW641. [n] **Life tenant is entitled only to payment of undivided partnership profits** rather than proportionate share of stock issued in lieu thereof. 19F(2d)974. [o] **Life tenant has been held entitled to interest** on accumulated undistributed net profits of property distributed. 19F(2d)974. [p] **"Wasting securities."**-130Misc313, 224NYS376. [q] **Corporation's resolution cannot change accumulated earnings into capital,** as between life tenant and remainderman. 253NY213, 170NE 895. [r] **Merger of two corporations is neither sale nor liquidation of corporate property,** so that receiving shares of merged corporation is not division of assets calling for apportionment between life tenant and remainderman. 297Pa537, 147A606. [s] **Life tenant is not entitled to increased value of stock** by merger till increased value is declared as dividend or affairs of bank are wound up or stock sold. 297Pa537, 147 A606.

945-66½-New. dividends from the net earnings of a corporation belong to the life tenant, whether in stock or cash; 15DelCh255, 136A149.

945-66¾-New. Judgment of appraisers that parent stock was of no value is not controlling in determining the source of dividend accruing from stock growing out of parent stock. 15DelCh 255, 136A149.

945-67 99NJEq207, 132A652; 134Misc 511, 236NYS275 (interest credited by savings banks); 294Pa331, 144A134. [a] 287Pa354, 135A130. [c] **Income not collected till after death of life tenant** is part of life tenant's estate and not part of remainder. 287Pa354, 135A130.

946-68 168Ga504, 148SE330; 169Ga 80, 149SE702 (appreciation in value of shares of stock issued in place of original shares is subject to same limitations as original shares); 317Mo 1028, 298SW 91, 97 [citCJ], 56ALR1276; 291Pa194, 139A867. [b] **"Wasting securities."**-130 Misc313, 224NYS376 (leaseholds).

946-71½-New. Life tenant is not prejudiced by being charged with payment of interest necessary to carry securities from which dividends are received exceeding the interest. 150Md354, 133A 128, 46ALR231.

946-71¾-New. The amount forfeited to testator's estate on nonperformance of a real estate contract is capital and not income. 128Misc577, 219NYS619.

946-71¼-New. The intention of testator governs in determining whether the life tenant must return a bequest to the remainderman in cash or otherwise,

127Misc399, 216NYS267.

946-71½-New. and intent of the parties in interest in distributing capital gain is immaterial and cannot affect adversely the rights of remaindermen; 127Misc399, 216NYS267.

946-71¼-New. and where a will devises a life estate in realty, there is no implication that the testator intended to bestow capital increment in the life tenant. 127Misc399, 216NYS267.

946-71½-New. Where trustees transfer property to a corporation and distribute to life tenants stock therein to the extent of their shares, the stock constitutes the corpus of the trust, and on the life tenant's death his estate may not retain the stock and account to the remaindermen for the amount recited in the certificate, but the stock itself reverts to the remaindermen. 127Misc 399, 216NYS267.

946-73 223Ky589, 48W(2d)392, 394 [citCJ].

947-87 [c] **Payment for surrender of lease** extending beyond life of life tenant is distributable as between life tenant's representative and remainderman as rent. Mass 171NE717.

947-93 31 OhA259, 165NE742.

947-94 See also TexCommnA 13SW (2d)345.

947-96 218Ky557, 291SW757; 223Ky 589, 48W(2d)392, 394 [citCJ].

947-98 168Ark682, 272SW367.

948-99 176Ark126, 28W(2d)63.

948-2 168Ark682, 272SW367; 85 IndA 428, 151NE700.

948-3 168Ark682, 272SW367.

948-9 31 OhA259, 165NE742.

948-9½-New. Where remaindermen execute an oil lease amounting to a conveyance of the entire title to oil in the land, a bonus received therefor constitutes part payment for interest of both remaindermen and life tenant, and both own such bonus in the same proportion as that in minerals before execution of the lease; TexCivA 283SW288.

948-9½-New. and in partitioning payment of the bonus, after death of the life tenant, as between his heirs and remaindermen, heirs are entitled to the net value of the use of payment during the life of the life tenant, not to the portion the life tenant could have secured by partition. TexCivA 283SW 288.

948-9¼-New. A widow taking a life estate in one third of decedent's one-sixth interest in land, subsequently leased, with her consent, by owners of the remaining interest to parties taking and selling oil therefrom, has been held entitled only to income from one third of such interest. 31 OhA259, 165NE742.

948-16 [a] **Life tenant has no right of user for his life in funds derived from waste of inheritance.**-214Ala593, 108S 536, 46ALR1201(2dcase).

949-27 180Ark342, 22SW(2d)25; 135 Misc70, 237NYS6.

949-29 135Misc70, 237NYS6.

950-37 135Misc70, 237NYS6.

950-43½-New. A person holding under a life tenant may be sued for waste by the remainderman. 226Ky82, 9SW(2d) 1095.

950-43½-New. In determining whether act of life tenant would constitute waste motives and purposes of objecting parties are immaterial. 135Misc70, 237 NYS6.

950-53 148Va503, 139SE286.

950-58 148Va503, 139SE286.

950-59 214Ala593, 108S536, 46ALR 1201.

951-80 148Va503, 139SE286.

951-82 135Misc70, 237NYS6.

951-86½-New. That maintenance of a dwelling is unprofitable is no ground for authorizing the life tenant against the will of the remaindermen to demolish the dwelling. 135Misc70, 237 NYS6.

951-87 214Ky267, 283SW111; 215Ky 57, 284SW410; Mo 12SW(2d)505; 126 Misc54, 213NYS286 (life tenant liable for ordinary repairs); 128Misc577, 219 NYS619; 133Misc322, 232NYS521; 137 Misc54, 242NYS733; TexCommnA 276 SW680; 118Tex343, 15SW(2d)589; Ont [1927] 1DomLR63. [a] (2) In absence of clear expression in will to contrary it is presumed that testator intended principal of trust to be kept intact for remainderman. 126Misc54, 213NYS286.

952-4 133Misc322, 232NYS521.

953-10 24F(2d)115, 118 [citCJ].

953-11 Ont [1927] 1DomLR63.

953-12 30Hawaii286.

953-13 161Ga495, 131SE470; 317 Ill 625, 148NE384; 214Ky267, 283SW111; 215Ky5, 284SW101; 220Ky413, 295SW 408; Mo 20SW(2d)26; NC 153SE602; 147SC12, 144SE586, 62ALR533. [a] (1) Mo 20SW(2d)26. (2) Same is applicable to wife of life tenant. 215Ky5, 284 SW101.

953-14 220Ky413, 295SW408.

953-15 But see 221MoA657, 284SW204.

953-21 137Misc54, 242NYS733.

954-41 317 Ill 625, 148NE384.

954-42 317 Ill 625, 148NE384; 180 Minn151, 230NW634.

954-43 307Mo 576, 271SW365; 221MoA 657, 284SW204. [b] **Knowledge of person claiming under life tenant.**-221MoA 657, 284SW204.

954-44 [b] **In Missouri.**-307Mo 576, 271SW365.

954-48 180Minn151, 230NW634 (agreement is no defense to remainderman's action in ejectment against widow of life tenant). [a] **Agreement creates no lien on property.**-180Minn151, 230NW 634.

954-52 219Ala319, 122S318; 124Kan 818, 262P589, 592 [citCyc].

954-53 219Ala319, 122S318; 124Kan 818, 262P589, 592 [citCyc].

954-54 124Kan818, 262P589, 592 [cit Cyc]; MoA 98W(2d)845.

955-55 124Kan818, 262P589, 592 [cit Cyc].

955-56 233Mich499, 206NW979.

955-57 214Ky267, 283SW111; 143 Miss427, 108S799.

955-60 124Kan818, 262P589, 592 [cit Cyc].

955-61 MoA 98W(2d)845.

955-62 MoA 98W(2d)845.

955-65 130Kan823, 288P591.

955-69 176Ark786, 48W(2d)897; 80 Colo 499, 252P816, 821 [citCJ]; 161Ga 495, 131SE470; 214Ky267, 283SW111; 215Ky57, 284SW410; 261Mass373, 158 NE791; Mass 159NE48; 241Mich583, 217NW889; 166Minn315, 207NW629; 315Mo 442, 286SW385; Mo 12SW(2d) 505; Mo 20SW(2d)26; 217AppDiv210, 216NYS699; 125Misc541, 211NYS391; 127Misc579, 217NYS323; 128Misc577, 219NYS619; 133Misc322, 232NYS521; 137Misc54, 242NYS733; 195NC339, 142 SE226; 124 Or443, 264P432; Tex CommnA 276SW680; 118Tex343, 15SW (2d)589. [j] **Where life tenant delays exercise of power of sale** in order to benefit from increased value of land, her estate is not entitled to reimbursement for taxes paid by her from proceeds of sale made under order of court. 261 Mass373, 158NE791. [k] **Where land is exempt,** life tenant is not obligated to pay taxes. Ind 165NE908.

956-70 TexCommnA 276SW680.

956-72 149Va597, 140SE810.

956-73 See also 127Misc579, 217NYS 323.

956-73½-New. **Where income not distributed to beneficiary,** tax thereon is payable from the principal. 130Misc296, 224NYS283.

956-75 217AppDiv210, 216NYS699; 133Misc322, 232NYS521. [a] **Limitations.**-125Misc541, 211NYS391.

956-75½-New. and a receiver may here also be appointed of rents and profits from which to reimburse remainderman. 125Misc541, 211NYS391.

956-75¼-New. The receiver appointed for such purpose should pay future taxes out of the income from the estate. 125 Misc541, 211NYS391.

956-75¼-New. The life tenant can defeat the receivership at any time by payment of the arrears. 125Misc541, 211 NYS391 (dictum).

956-75⅙-New. The remainderman is also entitled to a judgment against life tenant for amounts paid, in the action for a receiver under Civ. Pract. Act § 479. 125Misc541, 211NYS391.

956-75⅙-New. But he is not entitled to execution on the judgment as long as duties of the receiver covered payment of the judgment out of the income from the estate. 125Misc541, 211NYS391.

956-79 169Ga282, 150SE148; 9Allen Mass246. [a] **Assessed taxes not due and payable till after death of life tenant** are not chargeable to him. 221MoA 657, 284SW204.

957-80 133Misc168, 231NYS677. **Erratum.**-Strike out "Holmes v. Taber, 9 Allen(Mass.)246."

957-82½-New. A life tenant is not chargeable with taxes assessed during his life but not due and payable until after his death. 221MoA657, 284SW 204.

957-82¼-New. A minor child is not liable for taxes accruing during the continuance of the widow's homestead life estate where she occupied the land without assignment of dower or homestead. Mo 20SW(2d)26.

957-82¼-New. Where a tax sale under which a remainderman claimed forfeiture of a life estate was void, refusal of the trial court to declare forfeiture was held proper. 180Ark342, 22SW(2d) 25.

957-83 But see Mass 172NE106; 127 Misc579, 217NYS323.

957-85 166Minn315, 207NW629; 127 Misc579, 217NYS323.

957-94 180Ark342, 22SW(2d)25.

957-95 176Ark786, 48W(2d)897; 180 Ark342, 22SW(2d)25; 208 Iowa447, 226 NW70.

957-96 180Ark342, 22SW(2d)25.

958-1½-New. In some jurisdictions payment of assessments by life tenant is not properly chargeable against remaindermen. 161Ga495, 131SE470.

958-1¼-New. Where there is a refund of excessive assessments, the life tenant and remaindermen are entitled to share proportionately in the refund. 208 Iowa 447, 226NW70.

958-2 166Minn315, 207NW629; 171 Minn182, 213NW736; 320Mo 580, 8SW (2d)614; Mo 12SW(2d)505; 133Misc 322, 232NYS521.

958-3 166Minn315, 207NW629.

959-17 171Minn182, 213NW736.

959-18 171Minn182, 213NW736; 320 Mo 580, 8SW(2d)614.

959-21 171Minn182, 213NW736.

959-21½-New. Assessment for bettering of lands is not a tax, but it is an encumbrance the discharge of which must be apportioned ratably between the life tenant and remainderman. 316 Ill 345, 147NE248.

959-28 80Colo 499, 252P816, 821 [cit CJ]; 215Ky57, 284SW410.

960-36½-New. Counsel fees for collecting a note have been held properly divided between the life tenant of the income and the remainderman of the principal. 287Pa354, 135A130.

960-36¼-New. A life tenant is entitled to be indemnified out of the property for all expenses necessarily incurred in faithful performance of his duties. 131 Misc800, 228NYS323.

960-39 133Misc772, 234NYS234; Oh 172NE528. [d] **Liability for waste subsequent to assignment.**-Oh 172NE528.

960-40 147Va1030, 133SE581.

960-41 Oh 172NE528 (life estate per autre vie).

960-42 TexCivA 297SW509.

960-44 125Kan727, 265P1113.

960-45 Ala 127S843; 231Ky442, 21SW (2d)818; 322Mo 654, 15SW(2d)842; 286Pa520, 134A402; 147Va1030, 133SE 581.

961-47 222Ky584, 1SW(2d)1079.

961-49 252NY121, 169NE110; 8Pa Dist&Co 459 (power to consume real estate includes right to convey). [c] **Conveyance of life estate and reversion** may destroy contingent remainders and vest grantee with fee. 316 Ill 460, 147NE 433.

961-61 226Ky806, 11SW(2d)949.

961-63 [a] **Statute applies to equitable,** as well as legal, estates. 99NJEq 598, 133A866.

961-64 196NC282, 145SE398; NC 153 SE602. [d] (2) Where parties cannot agree. 196NC282, 145SE398. [j] (2) Statute authorizing allowance of costs in special proceedings in discretion of court does not apply to authorize allowance for services and disbursements in life tenant's proceeding for sale of

realty. 131Misc800, 228NYS323. [p] (3) One thousand dollars has been held proper allowance. 131Misc800, 228NYS 323. [t] **Allowance to life tenant for services and disbursements.**–131Misc800, 228NYS323. [u] **On sale of property sold for reinvestment,** purchaser need not look after disposition of purchase money after paying in court or to proper parties. 196NC282, 145SE398.

962–65 261Mass373, 158NE791; 242NY 237, 151NE218.

962–66 [b] **Where life tenant, father of infant remaindermen,** petitions for sale of portion of real property for payment of improvement made by him thereon, and no answer is filed either by guardian ad litem or remainderman over fourteen years of age, all proceedings under petition are void. 103WVa704, 138SE 399.

962–75½–New. Refusal of the court to accept a bid to purchase property from the life tenant in view of a larger bid of another has been held proper. 286 Pa520, 134A400.

962–76½–New. That income from the estate is insufficient for the support of the life tenant does not give the court jurisdiction to order a sale of the whole estate without the consent of the remaindermen. 118 Or96, 245P1069.

962–76⅓–New. In New York sale by order of court on petition of life tenant requires notice to persons designated as life tenants on death of petitioner without descendants and to living issue of such persons. 242NY237, 151NE218 (Real Prop. L. § 67).

962–76¼–New. Since sale is not for life tenant's exclusive benefit, no estoppel can be had because he has bound himself by acceptance of benefits to pay taxes for his lifetime. 99NJEq598, 133A866.

962–76⅓–New. Where a will authorizes sale for support, the life tenant must apply to the court for authority to sell, 223Ky702, 4SW(2d)693.

962–76¼–New. but it is otherwise where the will also expressly authorizes the life tenant to sell. 223Ky702, 4SW (2d)693.

962–76½–New. Jurisdiction of equity to decree sale of a life estate with remainder over rests on the occurrence of two conditions precedent which are that all parties in interest and in being who would be entitled if the contingency had happened at the date of decree, must be parties to the proceedings, and sale must be made to appear to be advantageous to the parties concerned. 156Md565, 144A836(2dcase), 927(2dcase).

962–76¼–New. Where a life tenant sold part of land before the birth of the remainderman under a sale which purported to extinguish the interest of the remainderman, and part of the proceeds were dissipated in paying the life tenant's lien obligations, and the life tenant made no improvements on the remaining lands, a decree authorizing sale of the property has been held void against a claim of the remainderman born after the decree. 148SC52, 145SE 623.

962–76⅓–New. The child of a life tenant, devised property with remainder to his children, not born until six months after a decree ordering a sale of part of the property conveyed for life, has been held en ventre sa mere at that time. 148SC52, 145SE623.

962–76 1/10–New. Equity will not take jurisdiction at the instance of a life tenant, against the remainderman, to aid the applicant by a sale of the property merely because the property, being a homestead, becomes unsuitable for occupancy and, if sold, the proceeds, reinvested, would produce a larger net income. 175Minn531, 221NW906.

962–82 261Mass373, 158NE791.

963–84 261Mass373, 158NE791.

963–85 261Mass373, 158NE791.

963–97 131Misc323, 227NYS526.

963–98 163Ga236, 135SE719.

963–6 240NY99, 147NE541.

964–7 [a] **In determining validity of lease** by life tenant with power of disposal, it is important to observe that case was of benefit to remaindermen in that present rental value had increased as result of stipulated improvements. 314Mo 214, 284SW121.

964–13 [a] **Attornment.**–240NY99, 147 NE541.

964–26 240NY99, 147NE541.

964–30½–New. Measure of damages for breach of covenant of quiet enjoyment is the difference between the rent and value. 240NY99, 147NE541.

964–30⅓–New. The burden is on the wrongdoer or his representatives to prove the existence of circumstances tending to mitigate the damages that would normally or commonly attach to a reckless or intentional default. 240NY 99, 147NE541.

964–30¼–New. A life tenant could purchase an outstanding lease as an individual and release the property beyond the period of his life. 286Pa237, 133A 252.

965–33 [a] (2) Where life tenant executed mortgage purporting to mortgage fee simple estate, purchaser at foreclosure is entitled to conveyance of life estate. SD 227NW479. (3) In such case remaindermen have right to object to issuance of deed on foreclosure which would injure inheritance. SD 227NW 479.

965–34 245NY613, 157NE880 (Real Prop. L. §§ 67–71).

965–38 But see 245NY613, 157NE880. [c] **Under Real Prop. L. § 70,** consent of all adult remaindermen not under disability must be filed before order directing sale can be made. 219AppDiv 337, 219NYS734.

965–39 TexCivA 18W(2d)684.

965–39½–New. Effect of unsatisfied mortgage of life tenant on right of remaindermen to recover in ejectment against strangers. 300Pa146, 151A339.

965–41 [f] **Entry by railroad company with its tracks by consent of life tenant** gives railroad company no greater estate than life tenant could convey. 203Cal 578, 265P220.

966–50 220Ky101, 294SW776; 133Misc 17, 231NYS355.

966–53 220Ky101, 294SW776.

966–54 DelCh 142A827. But see 330 Ill 624, 162NE164.

966–55 138Misc367, 245NYS647.

966–62 220Ky101, 294SW776.

966–64 Ill 171NE919(2dcase); 154Miss 529, 122S739 (may be required on proper showing). [b] **Failure to require security not erroneous.**–154Miss529, 122 S739.

967–77 195Cal 132, 231P987; SD 227 NW479.

968–93 131Misc323, 227NYS526 (removal of sand by lessee).

968–95 148Va503, 139SE286.

968–6 131Misc323, 227NYS526.

968–15½–New. A life tenant with express power to encroach on the principal may be compelled to make full disclosure to the trustee in bankruptcy of the remainderman of the property received, 201 Iowa918, 208NW341, 45ALR 515.

968–15⅓–New. ·, but may not be compelled to account as to his use of the property in the absence of allegation and proof of waste, fraud, or improper use, or disposal of the property. 201 Iowa 918, 208NW341, 45ALR515.

968–25 220Ky101, 294SW776.

968–28 220Ky101, 294SW776.

969–43½–New. Sale of property under an agreement between the remaindermen and life tenant, providing for distribution of a portion of the proceeds among the remaindermen and deposit of the rest with a right of the life tenant to make withdrawals, extinguishes a life estate. 204Cal 55, 266P538.

969–44 228Ky538, 15SW(2d)454.

970–78 286Pa237, 133A252.

970–82½–New. There is no absorption of a lesser interest by a greater, where the holder holds one for himself and the second for another. 286Pa237, 133A252.

971–20 181Ark719, 27SW(2d)512 (not forfeited where redemption perfected before question raised).

972–28 232 IllA86.

972–30 232 IllA86.

972–32½–New. Improvements made by life tenant become part of real estate and pass to remainderman. 180Minn 151, 230NW634 (may not be removed without remainderman's consent).

972–34 173Ark341, 292SW683; CalA 284P941; 327 Ill 538, 158NE694; 226Ky 116, 10SW(2d)613; 234Ky104, 27SW (2d)679; Mo 29SW(2d)1100; 141 Okl 212, 285P120; TexCommnA 292SW189; TexCivA 29SW(2d)416 (holding plaintiff with title to fraction of land not to be "stranger" or "trespasser").

973–35 218Ala160, 117S753; 171Ark 594, 285SW363; 167Ga448, 145SE875(2d case); 327 Ill 538, 158NE694; 335 Ill 156, 166NE498; 335 Ill 184, 166NE538; 200 Iowa398, 202NW434, 204NW156 (acquisition of life estate by conditionally vested remainderman in fee on sale under execution); 221Ky123, 297SW 1104; 222Ky584, 1SW(2d)1079; 224Ky 97, 5SW(2d)906; 226Ky82, 9SW(2d) 1095; 231Ky442, 21SW(2d)818; 251 Mich512, 232NW178; 137SC11, 134SE 859; TexCivA 297SW509. See also 141 Okl 212, 285P120.

974–36 214Ky643, 283SW1015; 228Ky 538, 15SW(2d)454. [a] **Adverse possession of grantee of life tenant and of contingent remainderman whose interest never vested** does not bar vested interest of remainderman. 224Ky97, 5SW (2d)906.

974–38½–New. A probated will is such constructive notice that neither limitations under a life tenant's deed nor a claim for improvements can be upheld in equity. 335 Ill 184, 166NE538.

974–39 327 Ill 538, 158NE694; 214Ky 643, 283SW1015; 46Philippine551, 557 [quotCJ].

974–40 195Cal 132, 231P987.

974–41 93Fla143, 112S378.

974–43 93Fla143, 112S378; 231Ky442, 21SW(2d)818.

975–48 [a] **Evidence held to show possession not adverse to remainderman.**–Mo 29SW(2d)1100.

975–49 315Mo 442, 286SW385, 389 [quotCJ].

975–50 165Ga200, 140SE507; 317 Ill 625, 148NE384; 315Mo 442, 286SW385, 389 [quotCJ]; 46Philippine551, 557 [cit CJ]. [a] **Claimant of life estate** cannot **ing adverse to first wife and children,** acquire title by limitation to larger estate. TexCommnA 292SW189. [b] **Husband acquiring life estate, by hold**has been held not to hold for benefit of children of second wife claiming remainder. TexCommnA 292SW189. [c] **Only where ineffectual attempt has been made to convey remainder interest** are limitations available against remainderman before death of life tenant. 224Ky 97, 5SW(2d)906.

975–54 150SC351, 148SE190.

975–57 327 Ill 538, 158NE694. But see 153Miss398, 121S109.

976–58 68CalA270, 228P1057. [a] **Evidence held sufficient** to sustain finding that holding was adverse. 68CalA270, 228P1057.

976–59 153Miss398, 121S109. [b] **Deed as notice.**–153Miss398, 121S109.

977–88 But see 100WVa368, 130SE461.

978–11 214Ky320, 283SW103.

978–14 329 Ill 604, 161NE141. [e] 179 Ark30, 13SW(2d)810; DC 39F(2d)502.

979–15 See also 129Misc201, 221NYS 656.

979–32½–New. Any form of expression indicating intention of a grantor or devisor to create such an estate is sufficient without using the term "remainder." 329 Ill 604, 161NE141.

979–33 108Conn339, 143A236; 93Fla 143, 112S378; 329 Ill 604, 161NE141; 330 Ill 238, 161NE525; 125Kan290, 264 P47; 125Me305, 133A689; 83NH225, 140A708; 24 OhNPNS338 (vested remainder not forfeited for nonuser during term of life tenant). See also 163Ga 884, 137SE386. [a] 179Ark30, 13SW (2d)810; 125Me305, 133A689; 89NJEq 333, 133A188; 190NC822, 130SE836; 192NC94, 133SE410. [g] (2) TexCivA 18W(2d)485. (8) Vested remainder is estate which is deprived of right of immediate possession by existence of another estate created by same instrument. 191NC203, 131SE575.

980–37 [a] (4) Remainderman's interest does not become contingent because his life expectancy is less than life tenant. 173Ark828, 293SW735.

980–38 329 Ill 604, 161NE141. See also 108Conn339, 143A236.

981–43½–New. In substance, the differ-

ence between vested and contingent remainder is that the former is a present estate whereas the latter is a possibility or a prospect of an estate. 191NC203, 131SE575.

981-44 330 Ill 238, 161NE525.

981-45½-New. or where an executor is given power of sale of the whole or a part of the property, 163Ga884, 137SE 386.

981-48½-New. A vested remainder defeasible by death before the life tenant is not substantially different from a vested remainder contingent on the remainderman's survival as respects value. 151 Md216, 134A502, 48ALR778.

981-49 179Ark30, 13SW(2d)810; 108 Conn339, 143A236; 327 Ill 91, 158NE 470; 329 Ill 604, 161NE141; 125Me305, 133A689; 83NH225, 140A708; 191NC 203, 131SE575; 192NC94, 133SE410. [a] 125Me305, 133A689; 89NJEq333, 133A 188. [b] See also 190NC822, 130SE836. [h] **It is uncertainty of right of enjoyment** and not uncertainty of actual enjoyment which makes remainder contingent. 181Ark439, 26SW(2d)113.

984-64 [a] (3) Under statute which provides, in case of conveyance to person and heirs of his body, that first donee is given life estate and persons answering description of heirs of his body at date of his death remainder in fee, remainder in fee is contingent. 219MoA 271, 275SW965.

984-73 327 Ill 91, 158NE470.

986-96 IndA 154NE682.

986-97 IndA 154NE682; TexCivA 276 SW776. [b] **Evidence held sufficient.**-IndA 154NE682.

986-2 TexCivA 276SW776.

987-10 246NY481, 159NE405.

987-12 93Fla143, 112S378.

987-15½-New. Cross remainders do not operate in case of joint tenancy. 233 Mich249, 206NW366.

988-29 101Vt242, 143A280.

988-37 214Ky320, 283SW103.

989-43½-New. A life tenant may have a vested interest in the remainder. 128 Misc582, 219NYS614.

989-53 20 OhA279, 151NE795.

991-86 319Mo 1001, 5SW(2d)74, 77 [cit CJ].

992-16 [c] **Interest during life of life tenant.**-Children of life tenant who would take property in fee upon termination of life estate in favor of father have, prior to father's death, some sort of interest in property, though it may be contingent. 68CalA270, 228P1057.

992-21 121Kan291, 246P1017. But see 327 Ill 91, 158NE470.

993-34 154SC78, 151SE199(2dcase).

994-46 249Mich238, 228NW703 (invalidity of precedent estate); NJCh 149 A822. [a] (2) Doctrine rests on presumed intention of testator. 121 Oh490, 169NE570. (3) Doctrine can never be applied when it is counter to intention of testator. 153Va614, 151SE300.

994-51 NJCh 149A822 (release).

994-53 98NJEq554, 131A302.

994-54 But see 98NJEq554, 131A302.

995-56½-New. Assignment of interest of a life tenant to the remainderman accelerates the remainder, and such acquisition of the life estates entitles the remainderman to present enjoyment of the estate. 98NJEq554, 131A302.

995-57 320 Ill 31, 150NE333, 336 [cit CJ]; 136Misc416, 241NYS398; 153Va 614, 151SE300.

995-57½-New. If time for distribution has actually arrived whether estate is vested or contingent is immaterial in determining if remainder can be accelerated. 153Va614, 151SE300.

995-60 [b] **Deed held not to grant remainder interest.**-231Ky831, 22SW(2d) 268.

996-3 165Ga200, 140SE507. See also Alta [1928] 4DomLR913.

996-14 165Ga200, 140SE507.

997-23½-New. A remainderman cannot acquire and hold as against a life tenant a title based on his own default. 173 Minn128, 216NW798.

997-23⅓-New. Thus he cannot disable the life tenant from redeeming and then redeem through the medium of a sham creditor without having the redemption considered one by the owners rather than a creditor. 173Minn128, 216NW 798.

997-24½-New. Where a remainderman agreed that tangible assets should be used in the business, the only effect of the agreement and the court's order based thereon was to waive the giving of security by the life tenant to protect the remainderman's interest in the remainder, under Pennsylvania statute. 294Pa331, 144A134.

997-26½-New. Where life tenant quitclaims to remaindermen, grantee of remaindermen is entitled to right of possession and rents and profits. 311Mo 208, 278SW686.

997-26⅓-New. A remainderman may not acquire a tax title and avail himself of it against his fellow remaindermen. 200 Iowa398, 202NW434, 204NW156.

997-26¼-New. Remaindermen are entitled to corporate stock constituting the corpus of the estate and any unused principal in banks remaining after the death of a life beneficiary empowered to invade the principal of the estate during his life. 134Misc511, 236NYS275.

997-26½-New. Remaindermen are not entitled to deposits of cash in a bank made at or about the time of a sale of realty by a life tenant empowered to invade the principal of the estate where they are not shown to represent money received from such sale. 134Misc511, 236NYS275.

997-26¼-New. Proceeds of a purchase-money mortgage, taken by a life tenant empowered to invade the principal of the estate, which are paid after the life tenant's death, belong to the remaindermen. 134Misc511, 236NYS275.

997-37½-New. Counsel fees for collecting a note are properly divided between a remainderman of the principal and a life tenant of the income. 287Pa354, 135 A130.

997-40 232Ky741, 24SW(2d)560; 125 Me305, 133A689; 233Mich249, 206NW 366; 311Mo 208, 278SW686; NH 129A 725 (or by assignment); 289Pa101, 137 A132. See also 232 IllA12. [e] **Conveyance of remainder to correct defect** does not entitle grantor to share of resale price. 100NJEq117, 135A547.

998-42 311Mo 208, 278SW686.

998-43 Me 150A375. [a] (1) 221MoA 317, 273SW229.

998-48 221MoA317, 273SW229.

998-49 233Mich249, 206NW366.

998-51 233Mich249, 206NW366; 190 NC822, 130SE836 (purchaser acquires indefeasible fee).

998-52 [a] **Where life tenant reconveys to remainderman,** latter has interest contingent on surviving life tenant. 221 MoA317, 273SW229.

998-61 311Mo 208, 278SW686; 314Mo 508, 284SW497.

999-62 130Kan634, 287P904; 224Ky 97, 5SW(2d)906; 311Mo 208, 278SW 686.

999-66 311Mo 208, 278SW686 (subject to defeat by subsequent events); 29 OhA296, 163NE573.

999-67½-New. Alienability is not a necessary attribute of a contingent remainder. 314Mo 508, 284SW497.

999-67⅓-New. but where the donor has the right of distribution by will he can give the property absolutely or impose restrictions not repugnant to the nature of estate he gives, 314Mo 508, 284SW497.

999-67¼-New. and can as founder of a trust provide that a contingent remainder shall go to the beneficiary with restriction that it shall not be alienable by anticipation. 314Mo 508, 284SW497.

999-67½-New. An assignment by legatees of rights in a trust fund contingent on the death of the cestui que trust, in favor of the life tenant, is not forbidden by statute or contrary to public policy. 89PaSuper47.

1000-70 [b] (2) Contingent remainders may be sold. 219MoA271, 275SW965.

1000-79 329 Ill 604, 161NE141. [c] **In Tennessee.**-153Tenn215, 280SW1012.

1001-86 41F(2d)700.

1001-88 Me 150A375.

1002-1 TexCivA 276SW776.

1002-2 161Ga495, 131SE470. [a] **Pleadings.**-161Ga495, 131SE470.

1002-5 99NJEq598, 133A866.

1002-16 But see 156Md565, 144A836(2d case), 927(2dcase).

1002-21½-New. Where restrictions placed on an unsold portion of land at the time of sale of the remainder by the life tenant were the same as those placed on the portion sold, and were necessary to carry out a plan or scheme of the trustee in selling the land, they are valid, and binding on the remaindermen who received benefits from the restrictions. 156Md565, 144A836(2dcase), 927 (2dcase).

1002-22 TexCivA 276SW776.

1003-36 TexCivA 276SW776.

1003-48 170Ark1181, 283SW16.

1004-77 121Kan291, 246P1017.

1005-86½-New. Contingent interest of son of grantee of life estate under deed with remainder to children of life tenant who are alive at life tenant's death terminates by his death before life tenant. 311Mo 208, 278SW686.

1006-17½-New. Contingent interests of remaindermen under will are destroyed by exercise of power of disposal by life tenants. 339 Ill 333, 171NE183.

1006-18 318 Ill 266, 149NE245; 321 Ill 291, 151NE900.

1006-21 321 Ill 291, 151NE900.

1006-26 321 Ill 291, 151NE900.

1006-27 321 Ill 291, 151NE900.

1006-28 [a] (6) Deed joined in by life tenant and remainderman is held not to cut off rights of after-born children of life tenant who were entitled to share in remainder. IndA 154NE682.

1007-30 Me 150A531.

1007-33 321 Ill 291, 151NE900.

1007-34½-New. An involuntary relinquishment by a life tenant of his life tenancy to a conditionally vested remainderman in fee, as by a sale under execution against the life tenant will not defeat the contingent remainder because of merger of the life estate in the fee. 200 Iowa398, 202NW434, 204NW156.

1007-34⅓-New. The question of merger by execution of power of appointment in life tenant will not be determined upon audit of account of his trustee filed upon the falling in of the life estate. 8Pa Dist&Co 116.

1007-34¼-New. Where the question arises, the practice is to award the fund to the donee's executor with instructions to segregate it and determine the question at the audit of his account. 8Pa Dist&Co 116.

1007-34½-New. Under a statute providing that no future estate shall be defeated by determination of any precedent estate, the right to destroy the contingent remainder by conveyance of the life estate and reversion to a third person is lost where not exercised before enactment of the statute. 321 Ill 291, 151NE900.

1007-34⅓-New. Where trust does not terminate during time remainderman was trustee, legal and equitable estates do not merge in remainderman. Mass 172NE865.

1009-68 [a] **Statutes not retroactive.**-318 Ill 266, 149NE245.

1010-91½-New. Infant remaindermen of a trust estate are wards of the chancellor, whose duty it is to protect their interests from any error of judgment on the part of the life tenant, or possible bias, where he is the purchaser of the trust estate. 226Ky483, 11SW(2d) 123.

1011-6 195NC734, 143SE541.

1011-20 TexCivA 29SW(2d)416.

1012-25 215Ala12, 108S858; 117 Or 125, 242P616, 620 [citCJ].

1012-29 215Ala12, 108S858; 219Ala 343, 122S413.

1012-32½-New. **What law governs.** In an action to recover remainders alleged to have been wrongfully transferred by executors and trustees of a New Jersey decedent, substantive rights of the heir will be determined by the law of New Jersey. 131Misc129, 226NYS162.

1012-32⅓-New. but plaintiff is not required to resort to the courts of New Jersey for remedy. 131Misc129, 226 NYS162.

1012-33 237Mich143, 211NW46; 117 Or125, 242P616.

1012-33½-New. or to quiet his title, 93Fla143, 112S378.

1013-55½-New. A statute authorizing a remainderman to maintain an action for

injury to the inheritance notwithstanding the intervening estate is permissive only. 203Cal 578, 265P220.

1013-55⅓-New. Such statute is inapplicable to an action of ejectment against a railroad company entering land by consent of the life tenant. 203 Cal 578, 265P220.

1013-57 287Pa105, 134A468.

1013-59 215Ala12, 108S858; 203Cal 578, 265P220; 131Misc129, 226NYS162; 287Pa105, 134A468; **TexCivA** 29SW (2d)416. See also 219MoA271, 275SW 965. [b] **Because of right of action in life tenant** or tenant in common the limitation does not begin against remainderman during life estate. **TexCivA** 29SW(2d)416.

1014-64 93Fla143, 112S378; 287Pa105, 134A468.

1015-76½-New. The remainderman who paid taxes can recover from life tenant only such payments made within six years prior to commencement of the action. 125Misc541, 211NYS391.

1015-86 100WVa368, 130SE461 (life tenant cannot be joined in action for injury from maintenance of nuisance).

1016-5-6½-New. A petition by a remainderman to recover land and for an accounting set out a cause of action. 169Ga282, 150SE148.

1016-14½-New. In an action by a remainderman against the life tenant to recover a portion of the proceeds of a fire insurance policy payable to the life tenant and covering the property as a whole, evidence as to payment of premiums by the life tenant has been held competent as tending to show lack of equity in the remainderman's case. **MoA** 9SW(2d)845.

1016-14⅓-New. In a remainderman's suit for forfeiture of a widow's estate, appointment of a receiver was held properly justified by the evidence. 180Ark 342, 22SW(2d)25.

1016-14¼-New. In action for damages for waste committed by life tenant, plaintiff must establish good and not doubtful title to remainder. **NC** 154SE 748.

1016-19 89Fla457, 105S106. [a] (3) 89 Fla457, 105S106. (7) 190NC822, 130SE 836, 837 [citCJ].

1017-20 89Fla457, 105S106; 161Tenn 187, 30SW(2d)227.

1017-24 190NC822, 130SE836, 837 [cit CJ].

1017-25 190NC822, 130SE836, 837 [cit CJ]. See also 129Misc201, 221NYS656.

1017-26 89Fla457, 105S106; 225Ky 699, 9SW(2d)1020; 236Mich565, 211NW 99; 149Miss327, 115S585, 586 [citCJ]; 79Mont432, 257P278; **Va** 155SE802.

1017-26½-New. The possibility is usually classed under two heads: (1) The possibility that a common-law fee may return to the grantor by breach of a condition subject to which it was granted. (2) The possibility that a common-law fee, other than a fee simple, may revert to the grantor by the natural determination of the fee. 89Fla457, 105S 106.

1018-30 89Fla457, 105S106 (but mere possibility of having an estate at some future time); 249NY111, 162NE601; 221AppDiv502, 224NYS651; 190NC350, 129SE826 (no right of action where there was no legal interest); **Va** 155 SE802.

1018-31 225Ky699, 9SW(2d)1020.

1018-31½-New. not a possibility coupled with an interest, 221AppDiv502, 224NYS651.

1018-32 221AppDiv502, 224NYS651; 190NC350, 129SE826; 156Tenn137, 299 SW776.

1018-33 221AppDiv502, 224NYS651.

1018-36 190NC350, 129SE826 (release in writing); 144 Okl 133, 289P763; 156 Tenn137, 299SW776 (grantor's heirs may release to owners of fee).

1018-47 127Misc498, 216NYS616, 618 [citCJ]. See also **Va** 155SE802.

1018-48 127Misc498, 216NYS616, 618 [citCJ].

1018-51 127Misc498, 216NYS616, 618 [citCJ].

1019-65 [a] **Reversioner not entitled to possession of bridge** when road ceased to exist as such. 222MoA1216, 4SW(2d) 480.

1019-71½-New. Timber cut before the expiration of a timber permit has been held not affected by the doctrine governing estates in reversion, since, as personal property, title was vested in the purchasers. 244Mich403, 221NW322.

1019-76 101WVa253, 132SE489, 490 [citCyc].

1019-79 101WVa253, 132SE489.

1021-16 225Ky60, 7SW(2d)512.

1023-95 214Ky320, 283SW103.

1023-1 214Ky320, 283SW103.

1024-8 214Ky320, 283SW103.

1024-19 214Ky320, 283SW103.

1027-52 See also 103WVa272, 137SE5.

1027-53 103WVa272, 137SE5, 6 [quot CJ].

1027-54 103WVa272, 137SE5, 6 [quot CJ].

1027-55 103WVa272, 137SE5, 6 [quot CJ].

1027-57 207 Iowa71, 218NW926, 930 [citCJ].

1029-69 215Ky14, 284SW109.

1032-15 103WVa272, 137SE5, 6 [cit CJ].

1033-24 160Ga854, 129SE105; 165Ga 200, 140SE507, 509 [citCJ]; 336 Ill 125, 168NE1; **IndA** 154NE682; 210Ky161, 275SW365; 157Miss284, 127S302; **MoA** 30SW(2d)635; 114Nebr809, 210NW278, 279 [citCJ]; 101NJEq64, 136A806; 55 ND94, 212NW515; 144 Okl 133, 289P 763; 195Wis488, 218NW826. [g] **Burden of proof is on party denying merger,** where two estates in same property unite in same person. 160Ga854, 129SE 105.

1034-29½-New. A merger will not be allowed where several interests are created or limited by the same instrument, and some other person is concerned, and absolute merger would alter the quality of one of two estates in same person or destroy the remainder intended for another person. **IndA** 154NE682.

1034-30 132Misc58, 228NYS666.

1034-33 253Mass586, 149NE620.

1034-34 **TexCivA** 25SW(2d)1108.

1034-35 253Mass586, 149NE620; 55 ND94, 212NW515.

1034-36 Mass 172NE865; 114Nebr809, 210NW278, 279 [citCJ]; 55ND94, 212 NW515; **TexCivA** 25SW(2d)1108.

1034-37 55ND94, 212NW515.

1035-38 121Kan75, 245P1064; 55ND 94, 212NW515.

1035-40 336 Ill 125, 168NE1; 114Nebr 809, 210NW278, 279 [citCJ]; 116Nebr 242, 216NW812; 250NY271, 165NE289; 55ND94, 212NW515; 294Pa221, 144A 91. [a] 165Ga200, 140SE507.

1035-42 Utah 268P781, 783 [citCJ]; **MoA** 30SW(2d)635; 286Pa237, 133A 252, 255 [citCJ]; 294Pa221, 144A91; 195Wis488, 218NW826.

1035-45 55ND94, 212NW515.

1035-47 250NY271, 165NE289; **Tex CivA** 25SW(2d)1108. [a] 55ND94, 212 NW515; 195Wis488, 218NW826.

1036-51 **TexCivA** 25SW(2d)1108.

1036-53 **TexCivA** 25SW(2d)1108.

1036-55 91Fla612, 108S689; 46ALR 870.

1036-56 132Misc58, 228NYS666. [a] (3) **IndA** 154NE682. (5) Interests held not merged. **TexCivA** 25SW(2d) 1108.

1036-57 91Fla612, 108S689, 46ALR870; 165Ga200, 140SE507; 198 Ind372, 153 NE776.

1036-58½-New. Mergers are not allowed where estates may well stand together. 253Mass586, 149NE620.

1036-61 106Conn514, 138A440; 168Ga 492, 148SE327(2dcase); 321 Ill 291, 151 NE900 (where conveyed to third party, at common law); 101NJEq105, 137A86, 88 [quotCyc]; 222AppDiv229, 226NYS 104. [b] (2) Where life tenant acquires reversion subject to be divested by taking effect of contingent remainder, there is no merger. 321 Ill 291, 151 NE900. [d] **Life estate merging in fee.**-101NJEq105, 137A86.

1037-62 101NJEq105, 137A86, 88 [quot Cyc]; 286Pa237, 133A252.

1037-62½-New. To effect merger of estate in remainder by joinder in conveyance of life tenant and immediate remaindermen, there must be a vesting of estate in remainder. **IndA** 154NE682.

1037-63 154Md27, 139A543.

1037-64 286Pa237, 133A252.

1037-65 286Pa237, 133A252.

1037-70 165Ga200, 140SE507; 286Pa 237, 133A252.

1037-70½-New. Before doctrine of merger can be invoked, estate in remainder must be vested both in quantity and quality. **IndA** 154NE682.

1037-82 163Ga604, 134SE613; 101NJ Eq64, 136A806; 192Wis642, 212NW292. [b] (3) One who consolidates legal and equitable interests in piece of land becomes owner entitled to possession. 163Ga604, 134SE613.

1038-84 192Wis642, 212NW292.

1038-89 165Ga200, 140SE507.

1039-5 [a] 157Miss15, 127S566.

1039-12 191NC347, 132SE2.

1040-21 Ill 171NE919(2dcase) (holding decree that life legacy be held by trustee was error).

1040-22½-New. Where will bequeaths income from fund to beneficiary for life, executor is entitled to hold fund. 98NJ Eq532, 131A521.

1040-22⅓-New. And the rule is the same where the will bequeaths life estate in property with right of life tenant to use income and such of principal as is necessary for living expenses. 98 NJEq532, 131A521.

1040-31 See also **TexCivA** 16SW(2d) 366.

1041-34 217Ala418, 116S116; 157Miss 15, 127S566.

1041-46 216Ky512, 287SW975, 976 [cit Cyc]; 142SC407, 141SE26 (profits from sale of stock).

1041-48 317Mo 1028, 298SW91, 97 [cit CJ], 56ALR1276.

1041-49 142SC407, 141SE26 (increased value of stock from undistributed surplus and undivided profits).

1042-54½-New. Personalty left as residuary bequest will be converted into money and paid during existence of estate. 191NC347, 132SE2.

1042-54⅓-New. Where a corporation pays dividends at no fixed time, the estate of a life beneficiary of stock is not entitled to apportionment of dividends to the time of death. 133Misc159, 232NYS212.

1042-54¼-New. Where a life beneficiary received corporate dividends in an amount that reduced the value of the corporate stock, she was not entitled, on an accounting to the remaindermen, to reduction of the amount owing by reason of the amount paid in by new stockholders in excess of the par value of the stock. 197Wis304, 222NW323.

1042-54⅕-New. A corporation cannot divest a life tenant or remainderman of the right to claim stock dividends by any resolution, or deprive the courts of power to determine the rights of the parties. 199Wis131, 225NW733.

1042-56 **TexCivA** 16SW(2d)366.

1042-62 **TexCivA** 16SW(2d)366.

1043-69 207 Iowa71, 218NW926, 930 [citCJ].

1044-90 217Ala418, 116S116.

1044-5 160Tenn229, 22SW(2d)1041.

ESTIMATE

1050-32 325 Ill . 156NE476.

ESTOPPEL

1059-1 74Mont558, 241P636, 646 [quot CJ]; 52ND553, 203NW903, 904 [quot CJ], 40ALR377; 50RI 419, 148A418 [cit CJ]; **TexCivA** 284SW705, 712 [quotCJ].

1059-2 74Mont558, 241P636, 646 [quot CJ]; **TexCivA** 284SW705, 712 [quot CJ].

1060-3 74Mont558, 241P636, 646 [quot CJ].

1060-8 197 Ind222, 150NE312; 55ND 184, 212NW848, 851 [citCJ]; 138SC 478, 137SE141, 143 [quotCJ]; 105WVa 174, 141SE791, 793 [citCJ].

1060-11 192NC371, 135SE288.

1060-12 27F(2d)254.

1060-14 315Mo 849, 288SW359, 363 [citCJ]; 55ND184, 212NW848, 851 [cit CJ]; **TexCivA** 284SW705, 712 [quotCJ]; **TexCivA** 286SW889. [b] **TexCivA** 286 SW889.

1061-16 **Mo** 281SW715, 719 [quot Cyc]; 52ND568, 204NW188, 195 [quot

CJ]; 55ND184, 212NW848, 851 [cit CJ].
1061-17 172Minn8, 214NW669, 670 [cit CJ].
1061-21 [e] **What constitutes.**–MoA 293SW794.
1061-22 211Ky26, 276SW975; 153 Tenn1, 282SW199, 201 [citCJ].
1061-23 153Tenn1, 282SW199, 201 [cit CJ].
1061-26 TexCivA 48W(2d)1041.
1062-34 74Mont558, 241P636; 198NC 229, 151SE270.
1062-40 198Cal 196, 244P335; 191NC 392, 131SE760.
1062-43 161Ga849, 133SE260.
1063-49 91Fla103, 107S261. [a] 91 Fla103, 107S261.
1063-50 214Ala593, 108S536, 46ALR 1201; TexCivA 283SW611, 613 [citCJ].
1064-51 214Ala593, 108S536, 46ALR 1201.
1064-54 33PortoRico 586, 592, 597 [quotCJ&CyperrFanco Soto.J]; Tex CivA 28W(2d)317.
1064-57 74Mont558, 241P636, 647 [quotCJ].
1064-62 7F(2d)177; 227Ky311, 12SW (2d)858; 13LaA277, 125S171; 159Tenn 103, 15SW(2d)742; 148Wash287, 268 P881. [f] **Estoppel must have basis in existing dispute.**–159Tenn103, 15SW(2d) 742.
1065-63 LaA 124S712. [i] **Plea for lien not sustained** does not raise estoppel against subsequent assertion of personal liability. Wash 288P927.
1065-64 74Mont558, 241P636; 159 Tenn103, 15SW(2d)742.
1065-64½-New. Although a complaint, in an action by a corporation which had forfeited its charter, alleged the corporation's existence, defendants, not denying such existence by answer, were not estopped from asserting the nonexistence of such corporation on a subsequent motion to have judgment rendered for plaintiff corporation vacated. 96CalA460, 274P769.
1065-65 5LaA445. [c] Wash 288P 927.
1065-66 170La249, 127S617.
1065-67 55AppDC319, 5F(2d)381; 166 La635, 117S745.
1065-68 91Fla103, 107S261; 202 Iowa 472, 210NW558; 204 Iowa290, 214NW 538; 160La605, 107S461; 13LaA277, 125S171; 310Mo 204, 274SW1049; 153 Tenn418, 284SW68; TexCivA 293SW 244; TexCivA 48W(2d)1046; TexCivA 27SW(2d)343. [c] **Disclaimer filed in foreclosure suit.**–48 Ida194, 281P471.
1066-71 219Ala638, 123S71.
1066-72 227Ky311, 12SW(2d)858.
1066-74 74Mont558, 241P636.
1066-75 319Mo 337, 48W(2d)776; 49 Nev145, 241P317, 43ALR1331.
1066-77 MoA 25SW(2d)539. [a] 83Mont 452, 272P998. [b] 13F(2d)6. [d] **Statements made in other proceeding outside state** do not estop husband from claiming interest in securities in wife's name. 126Misc1, 213NYS162.
1066-78 [b] TexCivA 9SW(2d)198.
1067-80½-New. Allegation for purpose of coming within statutes of state where the suit was brought that defendant was an association does not estop an attorney from denying it was an association within the meaning of the Internal Revenue Law. 12F(2d)998.
1067-80½-New. Parties are not bound by judicial allegations terminating unsuccessfully. 163La976, 113S167.
1067-80¼-New. Cross libelant by pleading libelant's corporate existence after voluntary dissolution held not estopped from thereafter denying its corporate status. 22F(2d)457.
1067-81 118 Or70, 245P1072, 45ALR 922.
1067-82 126Me299, 138A170; 118 Or70, 245P1072, 45ALR922.
1067-83 225Ky394, 9SW(2d)55; 126 Me299, 138A170; 118 Or70, 245P1072, 45ALR922; TexCivA 290SW818, 823 [citCJ].
1067-84 169Ga766, 151SE369; 118 Or 70, 245P1072, 45ALR922. See also 225 Ky394, 9SW(2d)55.
1067-85 74Mont558, 241P636; 118 Or 70, 245P1072, 45ALR922; 33PortoRico 586, 588 [citCJ].
1067-85½-New. An executor defending a suit is not estopped in his individual capacity from objecting to jurisdiction. 174Ark868, 296SW706.
1067-87 29Ariz276, 240P1029, 1031 [citCJ]; 189NC790, 128SE404.
1067-89½-New. Estoppel by deed arises only when suit is on deed or concerning right arising out of it and between parties or privies to the deed. Mass 169NE487.
1067-91 163Ga778, 137SE237.
1067-92 93Fla849, 112S846, 857 [quot CJ]; 169Ga543, 150SE912; 230Ky769, 20SW(2d)1002.
1067-93 93Fla849, 112S846, 857 [quot CJ]; 160Ga831, 129SE546; 213Ky363, 280SW1095; 223Ky321, 2SW(2d)405; 194NC15, 138SE403, 404 [citCJ]; 132 SC120, 128SE837 (estoppel by deed effective against grantors as to remainder, though remainder became personalty by equitable conversion); TexCivA 284SW 234. But see 24 OhNPNS101. [a] (7) Grantor is estopped to assert deed did not operate where he left blank space for grantee's name, impliedly authorizing name to be filled in. 315Mo 1046, 287SW1042. [g] **Estoppel to assert that use constitutes nuisance.**–Grantor is not estopped from complaining that grantee uses property so as to constitute nuisance. 336 Ill 100, 167NE782.
1067-93½-New. An unrecorded lease from a railroad to the owner of land adjoining the right of way does not estop an innocent owner. IndA 157NE 287.
1068-98 29Ariz276, 240P1029, 1031 [citCJ]; 167La647, 120S38; 150Md304, 133A141; 100NJEq1, 134A875; 32NM 108, 252P170; 297Pa317, 147A51 (existence of private street).
1068-99 Ala 129S53; Fla 130S57 (except on ground of mutual mistake in substituting one lot for another); 201 Iowa1118, 206NW668; 201 Iowa1317, 207NW567; 207 Iowa9, 216NW722.
1069-6 53SD533, 221NW255.
1069-11 TexCivA 48W(2d)572, 573 [cit CJ]. Contra 215Ala12, 108S858.
1070-13 213Ky482, 281SW480, 484 [quotCJ]; LaA 129S218.
1070-14 213Ky482, 281SW480.
1070-15 213Ky482, 281SW480, 484 [quotCJ].
1070-18½-New. One who accepts deed is bound by its terms and conditions. 198NC229, 151SE270.
1070-19 150Md333, 134A124; Mo 24 SW(2d)125 (cannot deny right of defendant to redeem from mortgage under which purchaser acquired title at foreclosure sale). [b] **Erratum.**–"**Reservations in favor of grantee.**"–should be "**Reservations in favor of grantor.**"–(2) Grantees, resting title on validity of grant, cannot attack validity of grant as to reversionary interest. 109Conn 529, 147A181.
1071-20 Conn 151A512; 219Ky143, 292SW743; 233Ky573, 26SW(2d)502 (neither claimant can assail title); 169 La577, 125S623; 195NC832, 143SE857. [a] (4) Where either pleadings or evidence show that parties trace their title to same source, neither will be permitted to attack the title of their common author. 158La982, 105S36. (5) Party cannot controvert the title of one under whom he claims. 158La982, 105S 36. (6) Where pleadings show that both parties derive their titles by deeds from common author, doctrine of estoppel by deed applies and neither can dispute the title of their common author. 158La982, 105S36.
1071-21½-New. One of two grantees from a common grantor is not estopped to assert that the other's use of his property constitutes a nuisance. 336 Ill 100, 167NE782.
1071-22 TexCivA 30SW(2d)807.
1072-27 160Ga831, 129SE546; NJCh 151A212. [c] **Rule is inapplicable** when mortgagor did not have legal power to pass title. Ala 129S53.
1072-35 [e] **Possessor claiming land may purchase adverse claims** without being estopped to deny title of such subsequent vendors. Ga 155SE183.
1073-39½-New. Mere signing and executing bond and mortgage do not amount to an estoppel. 133SC431, 131 SE598.
1073-45 161Ga711, 132SE547; 160La 175, 106S735.
1073-45½-New. , although the deed recites that it is made for the purpose of releasing all rights acquired by grantor under a quitclaim deed from a named party. 161Ga711, 132SE547.
1074-46 TexCivA 299SW522.
1074-57 214Ala230, 107S67; 177Ark 1194, 9SW(2d)83; 84Colo 592, 273P 17; 161Ga543, 132SE99; 169Ga543, 150SE912; 214Ky353, 283SW117; 223 Ky390, 3SW(2d)769; 214Ky643, 283 SW1015; 226Ky93, 10SW(2d)617; 83Mont68, 271P695; 192NC285, 134 SE849; 194NC15, 138SE403, 404 [quotCJ]; 20 OhA171, 151NE790; 29 OhA296, 163NE573; 133 Okl 275, 272 P366; 137Misc165, 241NYS552; 137 Misc165, 241NYS552; 122 Or285, 258P 205, 58ALR339; 156SC248, 153SE168 (2dcase); TexCivA 283SW1085; Tex CivA 286SW550; TexCivA 298SW154. See also 166La799, 118S24. But see Cal 287P466 (deed held not to include after-acquired property). [e] **Rule held not applicable** where there are no covenants of title. 122 Or285, 258P205, 58ALR 339.
1076-59 Mo 292SW12.
1076-70 29 OhA296, 163NE573.
1076-63 TexCivA 283SW1085.
1076-65 221Ky91, 297SW1109.
1076-69 172Ark1065, 291SW823.
1076-69½-New. to a conveyance of property not mentioning or reserving church property thereon, where the grantor subsequently acquires title to church property by reversion; 214Ky 353, 283SW117.
1077-78 But see Iowa 231NW358. [a] (11) Where wife, after husband conveyed homestead interest to herself and children conveyed property by warranty deed, she is precluded from setting up claim of interest as heir of child who died. TexCivA 286SW550. (12) Other instances. Iowa 231NW358.
1077-80 But see 38Wyo 414, 267P691.
1077-80½-New. Where interests of four brothers and sisters in land inherited from their mother was conveyed by warranty deed to another sister, who dies intestate, such grantors are not estopped to claim interest in portion inherited by such sister as against surviving husband entitled only to life estate under statute. 20 OhA171, 151NE 790.
1077-83 But see 221Ky91, 297SW1109 (holding that fact that parties misconstrued commissioner's deed as to extent of interest conveyed, when executing subsequent deed embodying all lands not theretofore conveyed, has been held not to constitute estoppel against subsequent purchaser from vendor).
1077-87 [a] 208Ky524, 271SW564; 208Ky684, 271SW1033; 214Ky353, 283 SW117.
1078-97 See also 29PortoRico 984.
1078-98 161Ga543, 132SE99; 48 Ida 711, 284P1034; SD 207NW654. [c] **Prospective heir executing mortgage on lands** of living father is not estopped to deny mortgage where it does not clearly express intention to cover after acquired title. 49SD575, 207NW654, 44 ALR1462.
1078-99 See also 32PortoRico 591.
1078-1 220Ala319, 125S28; Ark 7SW (2d)796; 98Fla1258, 116S642; 161Ga 543, 132SE99; 82Mont364, 267P299; ND 229NW357 (under statute). [b] **Estoppel is binding on mortgagor** and those in privity but not against others, not so related, who desire to contest lien on ground that property in question was acquired by another in its own right. 6F(2d)179. [c] **Purchase-money mortgage** is exception to rule. 98Fla 1258, 116S642.
1079-9½-New. Where upon foreclosure of a first deed of trust by mesne conveyances the property is reacquired by the grantor, title so reacquired inures to the beneficiary of the second deed of trust. 146Miss1, 111S448, 51ALR442.
1079-9½-New. Where a mortgagor permitted land to be sold under first

mortgage and purchased by the mortgagee and then accepted the property without paying or offering to pay the second mortgagee, and conveyed the property to others with notice of the second mortgage, the land was subject to the second mortgage. **Ark** 7SW(2d) 796.

1079-12 **TexCivA** 19SW(2d)808.

1080-15 215Ky88, 284SW419.

1080-19 5F(2d)816; 194NC15, 138SE 403, 404 [citCJ].

1080-21 194NC15, 138SE403, 404 [cit CJ]; **TexCivA** 286SW315.

1081-27 29Hawaii494; 207 Iowa882, 223NW888; **Me** 150A375. But see 194 NC15, 138SE403.

1082-29 [b] (1) 146Miss1, 111S448, 51 ALR442. (2) 146Miss1, 111S448, 51 ALR442.

1082-30 313Mo 514, 285SW433. [c] **When contingent remainderman** conveys estate by quitclaim deed, with warranty to defend against lawful claims remainder does not inure to grantee. **Me** 150A 375.

1083-33 5F(2d)816.

1083-34 215Ala212, 110S308; 105NJL 317, 144A720, 64ALR304; 150SC493, 148SE554; **TexCivA** 273SW957; **Tex CommnA** 282SW574; **TexCivA** 283SW 1085; **TexCivA** 286SW550; 145Va605, 134SE573. [b] **Contingent remainderman,** before life tenant's death, conveying estate by warranty deed, remainder inures to grantee. **Me** 150A375.

1083-34½-New. Rule that covenant of warranty passes after-acquired title is limited by rule that searches of title need go no further than origin of title claimed in such record. **TexCommnA** 282SW574.

1083-35 6LaA197, 199 [quotCyc].

1083-39 198NC730, 153SE316. [a] **Second mortgage.-ND** 229NW357 (bar of estoppel not removed by fact of mortgagor going through bankruptcy after foreclosure of first mortgage and prior to subsequently acquired title).

1084-49½-New. A covenant in deed to keep street terminating on navigable water open estops owner under such deed from claiming abandonment or destruction of easement of access to water because of his own construction of building across such street. 215App Div204, 213NYS486.

1084-54 226Ky82, 98SW(2d)1095; 146 Miss1, 111S448, 51ALR442; **Tex CommnA** 12SW(2d)175.

1084-56 82Mont364, 267P299.

1086-72 6LaA197, 199 [quotCyc].

1087-80 **TexCivA** 286SW315; 38Wyo 442, 268P185.

1088-89½-New. An after-acquired title passed under warranty deed and was superior to the title held under the son of the grantor who took the land by descent. 226Ky93, 10SW(2d)617.

1088-91 24F(2d)951; 164Ga279, 138SE 218 (dictum); 329 Ill 30, 160NE179; 226Ky806, 11SW(2d)949; 230Ky769, 20 SW(2d)1002; 321Mo 212, 98SW(2d)957; NJCh 151A212; 115 Okl 207, 242P264; **TexCivA** 4SW(2d)245, 246 [citCJ]; **Tex CivA** 13SW(2d)743.

1089-92 164Ga279, 138SE218 (dictum); 226Ky806, 11SW(2d)949; 307 Mo 462, 271SW370; **TexCivA** 5SW(2d) 802.

1089-93 164Ga279, 138SE218; 103NJ Eq552, 144A14; 120 Or96, 251P715. See also 157Md213, 145A554. [g] **Grantee has been held estopped** to deny easement for ingress and egress where his deed to lot first purchased recited easement, though his subsequent deed to adjoining lot did not. 193NC172, 136SE561.

1090-95 161Ga517, 131SE483.

1090-3 145Va605, 134SE573.

1091-14 **TexCivA** 23SW(2d)472.

1091-15 165Minn342, 206NW645, 646 [citCJ]. [a] **In action of ejectment** by adjoining landowner against E's grantee, E was held not estopped from denying his title to land in dispute by testifying that he used part of land under contract with plaintiff. 218Ky448, 291 SW727.

1092-16 205Cal 715, 272P1063.

1092-24 253Mass586, 149NE620. See also NJ 144A730.

1093-29 **TexCivA** 286SW315.

1093-35 162Ga302, 133SE239; 221MoA 127, 294SW111.

1093-36 162Ga302, 133SE239; 120 Or 96, 251P715.

1095-44 234Ky817, 29SW(2d)573.

1095-44½-New. Owner is estopped to deny public character of road adjoining his land where title papers refer to and recognize it as public road. 101WVa 636, 133SE363.

1095-46 164La77, 113S772.

1095-46½-New. Grantor falsely representing that land conveyed included improvements is estopped from claiming that deed did not convey land represented, but estoppel does not extend to heir of his deceased wife having interest in property. **TexCivA** 285SW832.

1095-49 See also 169Ga670, 151SE379. [g] **Reservation of easement of space** of rooms overhanging property conveyed. TexCommnA 292SW518.

1095-50 **Mass** 169NE487.

1095-55 **TexCivA** 25SW(2d)919.

1096-58 But see 52ND553, 203NW903, 40ALR377. [b] **Distinctions based on nature of actions.**-52ND553, 203NW903, 40ALR377.

1096-63 155SC414, 152SE640. [b] **Mortgagor is not estopped** to assert existence of prior mortgage which mortgagee's agent failed to pay as agreed. 178Minn514, 227NW852.

1097-69 105Conn230, 135A44; 169 Minn179, 210NW887; 125 Okl 272, 257 P788, 53ALR800; 288Pa211, 135A746.

1098-73 [d] **Bond of committee of insane person.-Va** 150SE413.

1098-78 102Conn684, 129A721.

1098-85 169Minn179, 210NW887.

1098-87 219Ala638, 123S271.

1098-91 8F(2d)932.

1099-9 165Minn342, 206NW645, 646 [citCJ].

1099-10 29 OhA310, 163NE575.

1099-10½-New. A surety is not estopped to contradict a recital of a generality to be done, 125 Okl 272, 257P 788, 53ALR800.

1099-10¾-New. where the condition is as to payment in the bond. 125 Okl 272, 257P788, 53ALR800.

1099-10¾-New. Where bond was illegally exacted of licensee neither he nor surety were estopped from denying liability when sued on bond. 200Wis576, 229NW53.

1099-14 **TexCommnA** 13SW(2d)683.

1099-18 151Va252, 144SE417; 259 Mass585, 156NE871.

1099-20 But see **MoA** 297SW457.

1099-21½-New. Grantors are estopped to deny delivery of a deed after achieving the purpose for which the deed was executed. 167Ga491, 145SE877.

1100-24 73CalA655, 239P56; 91Fla89, 107S350, 352 [citCJ&Cyc]; 164Ga279, 138SE218 (dictum); 166La57, 116S667; 166La1098, 118S453; 258Mass226, 154 NE579; **TexCommnA** 280SW748; 106 WVa126, 145SE42, 45 [citCJ].

1101-32 See also 244Mich309, 221NW 338.

1101-38 177Ark19, 6SW(2d)315; **Tex CivA** 299SW522.

1102-49 82Mont280, 267P214, 221 [cit CJ].

1102-59 160La605, 107S461. [a] (8) Where option to purchase mineral rights was not exercised within time limited therefor, estoppel is limited to time option was in force, and attempt to extend option without knowledge of grantor does not extend estoppel. 216 Ky599, 288SW326.

1103-60 189NC790, 128SE404.

1103-64½-New. A grantee does not convert an invalid portion of an earlier deed or an invalid attempted dedication of land to the public into an enforceable one, by acceptance of a deed which does not contain an express ratification. 103 NJEq552, 144A14.

1103-65 164La913, 114S834; 170La 343, 127S745; Md 147A718; 220MoA 1004, 274SW894, 898 [citCJ]; **NJSup** 134A910; 134Misc733, 236NYS194; 120 Or626, 253P522; **TexCivA** 290SW818; **TexCivA** 25SW(2d)685; 99Vt384, 133A 355; **Wis** 231NW276. [a] (2) Attesting witness estopped to assert claim adverse to title or interest conveyed. 163 Ga778, 137SE237. (3) **But there is no** estoppel unless witness knows contents of instrument. 163Ga778, 137SE237. (4) **Contractor signing security deed executed subsequent to his lien as witness, but denying knowledge of its contents** is not estopped from asserting lien on land against grantee. **Ga** 155 SE318. [d] **Merely taking acknowledgment of conveyance** does not estop person taking it from asserting title. 163 Ga778, 137SE237. [e] **Owner of undivided interest in realty** not party to deed conveying other owner's interest cannot invoke estoppel. 166La905, 118 S78.

1104-67½-New. Remote grantees claiming under chain of title recognizing superiority of grantor's title are estopped by claim of title or record relied on by them to claim that remote grantees of grantor failed to establish grantor's title. 217Ky789, 290SW713.

1104-72 219Ala616, 123S79, 64ALR 1550.

1104-73 **TexCivA** 4SW(2d)245; **Tex CommnA** 13SW(2d)345. [c] (1) **Tex CivA** 4SW(2d)245.

1106-84 162La846, 111S185.

1106-86 317 Ill 264, 148NE7; **TexCivA** 280SW292.

1106-86½-New. Counties. Acceptance of a bridge by the fiscal court held not to estop the county from recovering from the contractor for collapse of the bridge. 223Ky456, 3SW(2d)1083.

1107-88½-New. That village officers did not object to building of garage does not estop it from proceeding against owners of garage who knew construction was illegal. 216AppDiv 728, 214NYS253.

1107-89 99Vt384, 133A355.

1107-92 93CalA704, 270P216; 230Ky 769, 20SW(2d)1002 (lessees and latter's assignees).

1107-93 But see 164Ga279, 138SE218.

1107-94 **ND** 229NW357 (grantee of mortgagor).

1108-96 **Mass** 169NE487. But see 9 LaA14, 118S857.

1108-5 329 Ill 30, 160NE179; 167La 647, 120S38; 230Ky835, 20SW(2d) 1015; 231Ky442, 21SW(2d)818; **Mass** 166NE703; **TexCivA** 13SW(2d)743; 151Va322, 144SE497(2dcase). [a] (4) Where devise to mother is defeasible fee becoming absolute on her death without issue, her son takes by descent from her and not as purchaser by implication under will, and is estopped by mother's deed. 197NC488, 149SE731. [c] **Complainant's knowledge** that his grantor's deed to defendant's ancestor was to secure loan and reconveyance was to restore title does not prevent estoppel against defendant. **NJCh** 151A 212.

1108-6 **NJCh** 151A212.

1108-7 157Miss284, 127S302.

1109-10 **Mo** 7SW(2d)1010; 197NC488, 149SE731 (remainder by implication).

1109-12 See also 226Ky57, 10SW(2d) 469.

1109-16 83Mont68, 271P695; 191NC 133, 131SE311, 313 [citCJ]. [b] **Where privies in estate with heirs at law of grantee assert estoppel against privies in estate with grantor,** question is to be considered as if between grantor and heirs at law of grantee. 191NC133, 131 SE311. [c] **Equitable interest as result of conveyance by children** of testator of their vested interest to mother is subject to mortgage theretofore executed by mother covering estate property. 220Ala319, 125S28.

1110-17 **TexCivA** 6SW(2d)197.

1110-20 98Fla1258, 116S642, 644 [cit CJ].

1110-26 219Ala263, 122S27; 222Ky 132, 300SW327. See also **TexCommnA** 12SW(2d)187.

1111-27 **TexCivA** 295SW653.

1111-29½-New. Seller modifying contract of sale with consent of buyer is estopped from asserting that agreement was merely colorable and made because buyer obtained unjust advantage. 213 Ala526, 105S666 (where seller knew all facts).

1111-29¾-New. Under the code, a person may, by contract, waive any civil

right and benefit of any statute or code provision in respect to his rights and obligations unless against public policy. CalA 273P587.

1111-29¼-New. Declarations or admissions as to the amount of an estate taken under the terms of a will do not constitute a contract, and are not the basis or grounds of estoppel, where not based on consideration and the language used was not contractual. 128 Or211, 274P312.

1111-29 164La443, 114S90.

1111-30 29F(2d)904; 201Cal584, 258P47; Cal 290P1029; 164La443, 114S90; 12LaA301, 125S179; 170Minn495, 213NW40; MoA 14SW(2d)537; MoA 25SW(2d)539; 217AppDiv107, 216NYS191; 53ND249, 205NW684; 300Pa542, 151A15; TexCivA 295SW653, 660 [quot CJ]; TexCivA 295SW679, 694 [quot CJ]; 142Wash423, 253P638; 146Wash37, 261P800; WVa 153SE291. [b] 222MoA439, 7SW(2d)434 (real party in interest). [c] (5) Validity of law requiring warehousemen's bonds. 53ND249, 205NW684. [d] (2) Stockholder is held estopped to deny liability on note for pro rata share of guaranty agreement to repurchase stock. 142Wash423, 253P638. [f] (1) 46 Ida231, 266P659. [i] **Where author permitted defendant to produce play by extension agreement,** and defendant in good faith went on with production, author is estopped to deny existence of contract. 217AppDiv107, 216NYS191.

1111-31 TexCivA 295SW653, 660 [quot CJ]; TexCivA 295SW679.

1111-32 TexCivA 295SW653, 660 [quot CJ].

1111-35 TexCivA 283SW1085, 1092 [citCJ].

1111-36 217Ala524, 116S689; 82CalA793, 256P296; 56AppDC320, 13F(2d)292; TexCivA 284SW331. [d] 45 Ida522, 263P632.

1112-38 28F(2d)777; 234 IllA222; 53ND249, 205NW684. [a] **One who enters contract under unconstitutional** law and derives benefits thereunder is precluded from denying validity thereof. 53ND249, 205NW684.

1112-39 34F(2d)367.

1112-39½-New. A county is not estopped from denying liability on an authorized contract, even though benefits have been accepted. 284Pa138, 130A401.

1112-40 Cal 290P1029; CalA 273P587; 123Kan238, 254P1038; 164La443, 114S90; 222MoA439, 7SW(2d)434; MoA 12SW(2d)95; 101NJEq297, 137A887; TexCommnA 292SW518; TexCivA 13SW(2d)240. See also 36GaA109, 135SE509. [a] 120 Or501, 252P712. [h] **Remaindermen exercising right to additional corporate stock.**-27F(2d)101.

1112-42 See also 164Ga279, 138SE218. [b] **Where agreement intended** as matter of evidence, party is not estopped. TexCivA 295SW679.

1112-43 See also Va 155SE707.

1113-47 TexCivA 295SW679. See also Va 155SE707.

1113-47½-New. Plaintiffs were not estopped from questioning the validity of deeds by an oil and gas lease executed thereafter, reciting that the lessors owned only an undivided one-half interest in mineral rights. TexCivA 10SW(2d)149.

1113-52 268US252, 45SCt497, 69Led937; 8F(2d)382; 15F(2d)570; 19F(2d)110; 42F(2d)541; 216Ala243, 113S6; 172Ark870, 290SW597; Cal 290P1029; 329 Ill65, 160NE175; 333 Ill535, 165NE181; 211Ky26, 276SW975; 224Ky441, 6SW(2d)487; 235Ky197, 30SW(2d)882; Mass 165NE889; 315Mo849, 288SW359; 98NJEq174, 130A530; 129Misc431, 215NYS525; 198NC18, 150SE489; 50ND381, 195NW969, 971 [citCJ]; 52ND568, 204NW188; 121 Or236, 252P400, 403 [citCJ]; 124 Or276, 261P432; 286Pa393, 133A632; 300Pa555, 151A285(2dcase); 138SC478, 137SE141; 141SC265, 139SE625, 54ALR964; TexCommnA 25SW(2d)608; TexCivA 27SW(2d)631; 34Wyo119, 241P1068. See also NJCh 145A480. [a] (3) 114Nebr173, 206NW760. (7) "In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm, and that the other knew or had reasonable cause to know that such consequence might follow." 253Mass160, 148NE138. (8) Other instances. 13LaA515, 128S538. (9) Other definitions. 50RI419, 148A418. [b] See also 121 Or236, 252P400. [c] 142Va163, 128SE457. [e] **Distinguished from presumption of ouster.**-198NC229, 151SE270. [f] **Legal right not originated** by estoppel. 254NY268, 172NE494.

1114-53 31F(2d)27; 41F(2d)823; 33F(2d)788; 32Ariz545, 260P1096; 170Ark1146, 282SW995; 103Conn624, 131A420; 104Conn285, 132A459; 98Fla1258, 116S642; 41 Ida547, 240P593, 596 [quotCJ]; 240 IllA145; 197 Ind222, 150NE312; 165La385, 115S629; LaA130S122; 165Minn71, 205NW637; 177Minn132, 224NW847; 315Mo849, 288SW359, 364 [quotCJ]; 321Mo995, 15SW(2d)834; 79Mont485, 257P406; 217AppDiv26, 215NYS785; 198NC118, 150SE489; 198NC229, 151SE270; 50ND381, 195NW969, 971 [citCJ]; 52ND568, 204NW188 [quotCJ]; 53ND797, 208NW82, 91 [citCJc]; 121 Or236, 252P400, 403 [citCJ]; 121 Or64, 253P373, 375 [quotCJ]; 51Philippine908; 50Philippine490; 47RI47, 129A805; TexCommnA 294SW843; TexCivA 287SW283; 145Va391, 135SE21, 24 [citCJ]; 147Va802, 133SE595; 150Va244, 142SE528; 104WVa513, 140SE480; Sask [1928] 4DomLR302. [e] **Underlying principle of estoppel in pais is fraud** in conduct of one to prejudice of another. 180Ark671, 22SW(2d)553.

1115-54 315Mo849, 288SW359, 364 [quotCJ]; Utah 289P151.

1115-55 315Mo849, 288SW359, 364 [quotCJ entire section].

1115-55½-New. The doctrine of equitable estoppel always presupposes error on one side and fault or fraud on the other, and some defect of which it would be inequitable for the party against whom it is asserted to take advantage. NJ 146A303.

1115-56 TexCivA 288SW619.

1115-57 113Cal221, 227, 41P1017, 45P252; 75CalA299, 242P914; 200 Iowa220, 204NW456, 458; 94Minn365, 368, 102NW871; 225Mo228, 245, 124SW1109, 1115; 315Mo849, 288SW359, 364 [quotCJ]; 134AppDiv516, 119NYS455, 458; 114 Ohl, 150NE726, 730 [citCJ]; 23 OhCirCtNS518, 528; 87 Or560, 171P223, 224 LRA1918C1001; TexCivA 288SW619. [a] **Element of knowledge and reliance by adversary** need not be present in ratification. 114 Ohl, 150NE726.

1115-58 40F(2d)687 (holding basis of waiver is estoppel). See also Conn 152A297.

1115-60 208 Iowa1208, 227NW103; 100NJEq513, 136A339.

1115-61 216AppDiv409, 215NYS496.

1116-63 7F(2d)855; 20F(2d)214; 219Ala263, 122S27; 178Ark429, 10SW(2d)866; 200Cal204, 252P599; 94CalA729, 272P315; 102Conn529, 129A527; 203Iowa726, 213NW435; 127Me361, 143A465; 127Me406, 144A1; 250Mich540, 230NW929(2dcase); MoA 275SW566; 80Mont97, 257P1014; 100NJEq78, 135A83; 100NJEq513, 136A339; 216AppDiv409, 215NYS496; 129Misc431, 221NYS525; 138Misc307, 245NYS406; 194NC683, 140SE706; 198NC746, 153SE319; Oh 155NE187; TexCivA 10SW(2d)267; TexCivA 20SW(2d)1090(2dcase); 191Wis645, 211NW670.

1116-64 222Ky472, 1SW(2d)772, 773 [quotCJ]; MoA 275SW566. See also 22AlaA323, 118S264.

1116-65 TexCommnA 12SW(2d)539.

1116-66 124Me369, 129A488.

1116-67 But see 94CalA729, 272P315.

1116-69 218MoA10, 260SW552.

1116-70 216AppDiv409, 215NYS496; 138Misc307, 245NYS406.

1116-74 40GaA536, 150SE436(2dcase).

1116-75 196Cal686, 239P324. See also 313Mo268, 281SW402.

1116-75½-New. To constitute "promissory estoppel or waiver of a condition in a contract before a certain date, there must have been a promise before such date that such condition would not be insisted on and action on such promise by the other party. 127Me406, 144A1.

1116-75⅓-New. To constitute "waiver without consideration," there must be a promise or permission, express or implied in fact, supported only by action in reliance thereon, to excuse performance in the future of a condition or obligation not due at the time when the promise is made, or to give up a defense not yet arisen, and such facts do not constitute "estoppel" because there is no misrepresentation of existing facts, but it may be called "promissory estoppel." 127Me406, 144A1.

1117-79 46 Ida355, 267P611 (estoppel operates though statement on which it is founded was about a matter required by law to be of public record); 198NC18, 150SE489.

1117-82 35F(2d)312; CalA 287P573; 164Ga279, 138SE218 (dictum); 132Misc609, 230NYS364.

1117-86 91Fla103, 107S261; 9LaA302, 119S473; 53ND797, 208NW82, 92 [cit Cyc].

1117-89½-New. Estoppel, constitutes a valuable remedy for the promotion of justice. 132Misc609, 230NYS364.

1117-90 156Tenn167, 3SW(2d)167, 168 [citCJ]. [a] **Other statements of basis of doctrine.**-Cal 287P475.

1117-91 181Ark1004, 29SW(2d)272; 205Cal496, 271P898; 95CalA685, 273P585; 230Ky769, 20SW(2d)1002; 170Minn495, 213NW40; 79Mont485, 257P406; 53ND797, 208NW82, 92 [citCyc]; 123 Or33, 261P57; 288Pa264, 135A764; 141SC265, 139SE625, 54ALR964; TexCivA 28SW(2d)214. See also 132Misc534, 230NYS653. [d] **Defense of estoppel rests on doctrine** that party shall not be permitted to assert defense against another to latter's injury where it would be inequitable. Cal 278P840.

1118-92 229Ky806, 18SW(2d)277; 52ND568, 204NW188, 195 [citCJ]. [a] **Personal right to maintain action based on due process clause** of constitution may be lost by estoppel. 152Wash353, 277P829.

1118-93 IndA 165NE84.

1118-97 253Mass160, 148NE138. See also 191NC133, 131SE311.

1118-98 53ND797, 208NW82, 92 [quot Cyc]; 115 Okl275, 242P861, 862 [quot Cyc].

1118-99 73CalA612, 238P1066, 1069 [citCJ]; CalA 291P458; 241Mich547, 217NW756; 114Nebr134, 206NW741; 132Misc609, 230NYS364; 53ND797, 208NW82, 92 [quotCJ]; 115 Okl275, 242P861, 862 [quotCyc].

1118-1 35F(2d)649.

1118-2 15F(2d)570; 73CalA612, 238P1066, 1069 [citCJ]; 170Ga28, 152SE60; 132Misc534, 230NYS653 [citCJ]; 227AppDiv351, 238NYS577 (undue advantage); 129 Okl195, 264P151; Okl291P26; 123 Or33, 261P57; TexCivA 299SW522.

1118-2½-New. When the court cannot decree specific performance, it cannot indirectly accomplish the same result under the doctrine of equitable estoppel. 245Mich541, 222NW703.

1118-2⅓-New. Equitable estoppel in no way denies the truth of the thing which the person estopped seeks to assert. TexCommnA 15SW(2d)550.

1118-3 35F(2d)649; 216Ala243, 113S67; 180Ark671, 22SW(2d)553; 126Me7, 135A357; 234Mich74, 208NW47; 137Misc725, 244NYS437; 120 Orl, 251P258; 121 Or64, 253P373; 159Tenn192, 17SW(2d)8; 105WVa174, 141SE791. [b] **Doctrine may be applied in criminal cases.**-87CalA222, 261P1053.

1119-9 216Ala243, 113S6.

1119-12 7F(2d)855; 8F(2d)382; 15F(2d)839; 40F(2d)2; 218Ala341, 118S578; 219Ala616, 123S79, 64ALR1550; 179Ark752, 18SW(2d)327; 69CalA370, 231P380; 200Cal284, 253P137; 45 Ida595, 264P233, 235 [quotCJ]; 325 Ill452, 156NE307; 330 Ill548, 162NE191;

336 Ill 472, 168NE401; 243 IllA447, 449 [citCJ]; 221Ky566, 299SW197; 234Ky 518, 28SW(2d)777; 261Mass469, 159NE 461; 317Mo 15, 295SW772, 53ALR884; 114Nebr491, 208NW635; 118Nebr678, 225NW758; 127Misc470, 216NYS481, 485 [citCJ]; 136Misc500, 241NYS202; 198 NC169, 151SE102; 198NC18, 150SE489 (title); 53ND797, 208NW82, 92 [quot CJ]; 26 OhA478, 160NE93; 37 OklACR 676; 126 Okl 232, 259P224; 123 Or33, 261P57, 62 [quotCJ]; 124 Or276, 261P 432; 87PaSuper383; TexCivA 7SW(2d) 1103; TexCivA 293SW599, 604 [citCJ]; 147Va802, 133SE595; 101WVa522, 133 SE154. See also 132Misc786, 230NYS 621.

1119-13 19F(2d)399; 103Conn624, 131 A420; 206 Iowa527, 219NW318(2dcase); Iowa 229NW839; 143Miss146, 108S424, 47ALR45; 123 Or33, 261P57, 62 [quot CJ]; 124 Or276, 261P432; 139SC223, 137SE684; TexCivA 16SW(2d)891.

1120-14 83CalA317, 256P609 (promises not representations); 82Colo 297, 259P 517; 163Ga629, 137SE19; 127Misc470, 216NYS481, 485 [citCJ]; 123 Or33, 261 P57, 62 [quotCJ]; 124 Or276, 261P432. [b] **Estoppel does not exist in absence** of misrepresentation direct or indirect. Cal 287P466.

1120-15 123 Or33, 261P57, 62 [quot CJ].

1120-17½-New. But, conversely, although every sufficient consideration is not technically an estoppel in pais, it contains the substantial elements thereof. 103Conn624, 131A420(2dcase).

1120-18 200Cal 284, 253P137; 114Nebr 491, 208NW635.

1120-19 19F(2d)781; 83CalA18, 256P 298; 74Mont91, 238P884; 79Mont485, 257P406; 114Nebr491, 208NW635, 637 [quotCJ]; 217AppDiv26, 215NYS785; 37 OklACR676; TexCivA 284SW705, 716 [citCJ].

1121-20 19F(2d)781; 74Mont91, 238 P884; 114Nebr491, 208NW635, 637 [quotCJ]; 100NJEq403, 135A693; 217 AppDiv26, 215NYS785; TexCivA 284 SW705, 716 [citCJ].

1121-21 TexCivA 284SW705, 716 [cit CJ].

1121-23 219Ala150, 121S511; TexCivA 284SW705, 716 [citCJ]; TexCivA 2SW (2d)987; Utah 289P151.

1122-26½-New. So there can be no estoppel where a statement made in writing is not made with the intention that it should be exhibited to a third person claiming benefit thereof and there is no intention to influence such person's conduct thereby. 217AppDiv26, 215NYS 785.

1122-27 136Misc500, 241NYS202.

1122-27½-New. There can be no estoppel without fault. TexCivA 1SW(2d) 712.

1122-29 198NC18, 150SE489; 126 Okl 232, 259P224; 37 OklACR676.

1122-32 333 Ill 535, 165NE181; 337 Ill 122, 168NE886; 202 Iowa465, 210NW 596; 127Kan606, 274P227; 261Mass1, 157NE725; 123 Or33, 261P57. [b] Pr EdwIsl [1929] 3DomLR123, 129 [quot CJ].

1123-33 15DelCh231, 136A140; Tex CivA 7SW(2d)1103.

1122-35 198NC18, 150SE489.

1123-36 8F(2d)801; 15F(2d)570; 71 CalA779, 236P329; 73CalA655, 239P56; 74CalA637, 241P576; 98CalA690, 277P 752; 42 Ida458, 246P304; 46 Ida754, 270P1062; 233 IllA428; 330 Ill 373, 161 NE483; 339 Ill 504, 171NE494; 119Kan 502, 240P411; 226Ky82, 9SW(2d)1095; 230Ky769, 20SW(2d)1002; Me 149A 806 (knowledge necessary for assent and waiver); 155Md514, 142A710; 248Mich 695, 227NW681; 218MoA10, 260SW552; 315Mo 849, 288SW359; 74Mont91, 238P 884; 114Nebr491, 208NW635; 100 NJEq290, 134A673; 34NM127, 279P72; 37 OklACR676; TexCommnA 272SW 440; TexCivA 13SW(2d)923; Utah 276 P912; 152Va173, 146SE254; 108WVa 342, 150SE904. See also 75CalA212, 242 P518. [h] **Presence of one of sellers of** oil well casings at sale to third parties did not estop sellers to claim lien for price where he did not know sellers had claim. TexCommnA 272SW440. [i] **Wife without knowledge** that husband claimed to own lot purchased by him for son with latter's money, is not estopped to set up her ownership thereof under deed, executed by husband at son's direction. 28F(2d)255.

1125-40 Cal 290P1029; 114Nebr491, 208NW635; 100NJEq290, 134A673.

1125-44 110Conn49, 147A31.

1125-45 CalA 281P1043; 155Md514, 142A710; NJCh 145A480; TexCivA 297 SW334.

1125-46 123 Or33, 261P57; 149Wash 368, 271P65.

1126-47 220Ala344, 125S217; NJ 146A 303; 53ND249, 205NW684; TexCivA 286SW298.

1126-48 39F(2d)984.

1126-49 178Minn9, 225NW927; 102 WVa23, 135SE168, 169 [citCJ], 50ALR 426.

1126-51 8F(2d)382; 20F(2d)78; 22 F(2d)480; 175Ark1169, 300SW417; Ark 32SW(2d)172; 197Cal 43, 239P401; 76CalA1, 243P679; 200Cal 284, 253P 137; 15DelCh76, 132A144; 163Ga778, 137SE237; 326 Ill 425, 158NE127; 206 Iowa28, 217NW453; 206 Iowa556, 221 NW351; Iowa 229NW839; 119Kan502, 240P411; 231Ky36, 20SW(2d)1013; 234Ky788, 29SW(2d)557; 74Mont91, 238P884; 77Mont182, 250P812; 79 Mont485, 257P406; 114Nebr173, 206NW 760; 114Nebr491, 208NW635; 217 AppDiv26, 215NYS785; 127Misc470, 216 NYS481, 485 [citCJ]; 137Misc82, 242 NYS729; 191NC133, 131SE311; 37 Okl ACR676; 123 Or33, 261P57; 124 Or276, 261P432; 125 Or409, 267P530; 98 PaSuper440; TexCommnA 294SW843; TexCommnA 29SW(2d)967; 69Utah557, 257P658, 668 [quotCJ]; 152Va173, 146 SE254; 102WVa23, 135SE168, 50ALR 426; Can [1928] 1DomLR1069. See also 225AppDiv379, 233NYS364. [a] (3) Party making loan cannot set up estoppel against creditor alleged to have agreed to accept stock in lieu of indebtedness when loan was not made on faith of such representations. 15DelCh 76, 132A144. [c] **Facts showing reliance.**-15DelCh76, 132A144. [d] **Where plaintiff learned from other sources** that automobile was not paid for, she could not claim that she was misled by dealer's statement that car was paid for. TexCivA 21SW(2d)83.

1129-54 76CalA1, 243P679; 127Misc 470, 216NYS481, 485 [citCJ].

1129-56 217AppDiv26, 215NYS785.

1129-57 [a] **Only conduct on which others may reasonably be expected to** rely affords basis for estoppel. 34F(2d) 670.

1129-59 19F(2d)781; 75CalA212, 242P 518; 200Cal 284, 253P137; 163Ga778, 137SE237; 164Ga279, 138SE218; 333 Ill 535, 165NE181; 83 IndA94, 147NE 722; 206 Iowa39, 218NW56; 74Mont91, 238P884; 79Mont485, 257P406; 114 Nebr491, 208NW635; 136Misc500, 241 NYS202; 37 OklACR676; 127 Or34, 270 P907; 288Pa264, 135A764; Tex CommnA 291SW857; 142Va73, 128SE 640.

1130-60 86CalA142, 260P305; 246Mich 527, 224NW327; 121 Or249, 252P842.

1130-61 75CalA212, 242P518; 243 IllA 447, 449 [citCJ].

1130-63 103NJEq268, 143A428. See also 1LaA246 (recorded lease).

1131-65 104Conn285, 132A459.

1131-66 TexCommnA 291SW857; Tex CivA 295SW679.

1131-70 TexCivA 295SW679.

1131-71 36F(2d)747; 85Colo 255, 274P 926; 163Ga778, 137SE237; 164Ga279, 138SE218; 330 Ill 548, 162NE191 (from silence); 85 IndA196, 150NE67; 155Md 514, 142A710; 246Mich527, 224NW327; 174Minn554, 219NW864, 865 [citCJ]; 314Mo 474, 283SW990; 220MoA1004, 274 SW894, 898 [citCJ]; MoA 25SW(2d)484 (2dcase); 132Misc609, 230NYS364; 53 ND797, 208NW82, 92 [quotCyc]; 288Pa 264, 135A764; TexCivA 295SW679, 694 [citCJ]; TexCivA 3SW(2d)573, 575 [cit CJ]; 142Va73, 128SE640. [a] (2) Where parties enter into an act under unambiguous lease, both are cognizant of facts, preventing existence of estoppel. 314Mo 474, 283SW990.

1131-71½-New. , otherwise the doctrine of estoppel by acts in pais could easily be made an instrument of fraud. 314 Mo 474, 283SW990.

1132-73 253Mass1, 147NE848; 136Misc 500, 241NYS202.

1133-76 14F(2d)328, 329 [quotCJ]; 14 F(2d)524; 15F(2d)215; 19F(2d)781; 35 F(2d)365; 36F(2d)869; 69CalA319, 231P44; 73CalA655, 239P56; 103Conn 624, 131A420; 210Ky622, 276SW528; 222Ky132, 300SW327; 170La218, 127 S606 (held no estoppel); LaA 128S546; 241Mich547, 217NW756; 82NH543, 136 A400, 50ALR1276; 100NJEq493, 135 A518; 100NJEq403, 135A693; 33NM 251, 264P947; 191NC133, 131SE311; 116 Okl 178, 243P943; 37 OklACR676; 120 Or678, 253P539; 124 Or276, 261P 432, 437 [citCJ]; SD 227NW576; Tex CivA 272SW228; Wis 231NW276.

1135-79 TexCivA 2SW(2d)987.

1135-80 219Ala216, 121S517.

1135-83 14F(2d)328, 329 [quotCJ]; 19 F(2d)399; 19F(2d)781; 20F(2d)78; 22 F(2d)295; 22F(2d)480; 36F(2d)628; 31Ariz519, 255P164; Ark 32SW(2d)172; 73CalA147, 238P748; CalA 290P623; 83 Colo 533, 266P713; 15DelCh76, 132A 144; 163Ga778, 137SE237; 326 Ill 425, 158NE127; 233 IllA428; 233 IllA495; 206 Iowa28, 217NW453, 455 [citCJ]; 205 Iowa1345, 219NW483; 206 Iowa556, 221NW351; 121Kan312, 246P982, 986 [citCJ]; 130Kan379, 286P214; 233Ky 441, 26SW(2d)8; 155Md384, 142A515; 241Mich547, 217NW756; 165Minn71, 205NW637; 176Minn227, 222NW929, 930 [citCJ]; 315Mo 849, 288SW359; 217 MoA480, 268SW665; 221MoA936, 238 SW950, 954 [citCJ]; 74Mont558, 241P 636; 77Mont182, 250P812; 79Mont485, 257P406; 118Nebr411, 225NW25, 63ALR 493; 217AppDiv26, 215NYS785; 121 Or 236, 252P400; 300Pa555, 151A285(2d case); 50Philippine810; 154Tenn241, 290 SW39, 50ALR1369; 159Tenn175, 17 SW(2d)17; TexCommnA 294SW843; Tex CommnA 16SW(2d)530, 66ALR758; Tex CivA 275SW313; TexCivA 276SW448; TexCivA 280SW292, 294 [citCJ]; Tex CivA 288SW619; TexCivA 293SW859; TexCivA 3SW(2d)573; TexCivA 5 SW(2d)1015; TexCivA 19SW(2d)368; Utah 276P912; 152Va173, 146SE254; 150 Wash249, 272P714; 150Wash640, 274P 702; 99WVa544, 130SE142; 22AltaL415, [1927] 1DomLR1178, [1927] 1WestWkly 449. See also 4HawaiiFed166, 183 [cit Cyc]. [b] 11LaA323, 123S461, 463 [quot Cyc].

1137-84 14F(2d)328, 329 [quotCJ]; 20F(2d)78; 219Ala87, 121S91; 31Ariz 519, 255P164, 165 [citCJ]; 181Ark454, 26SW(2d)109 (delay must work prejudice); 170Ga28, 152SE60; 233 IllA495; 158La183, 103S733; 178Minn594, 228 NW159; 217AppDiv26, 215NYS785; 191 NC133, 131SE311; 121 Or236, 252P4007 TexCivA 280SW292, 294 [citCJ]; Tex CivA 16SW(2d)891; 195Wis258, 218NW 593. [c] **Where prejudice consisted in payment of money,** it is not necessary to show inability to recover same. Sask [1928] 4DomLR302.

1137-85 14F(2d)328, 329 [quotCJ]; 31 Ariz519, 255P164, 165 [citCJ]; 172Ark 1165, 291SW832; 83Colo 533, 266P713; Ill 233A495; 155Md384, 142A515; 252 NY226, 169NE286; 136Misc500, 241NYS 202 (held no prejudice); 47RI 47, 129A 805; TexCivA 280SW292, 294 [citCJ].

1138-86 194Wis583, 217NW423.

1138-88 CalA 291P458; 211Ky791, 278 SW124, 127 [quotCJ]; 115 Okl 275, 242 P861, 862 [quotCyc]; 126 Okl 232, 259P 224.

1138-89 CalA 291P458; 210Ky622, 276 SW528, 531 [quotCJ]; 115 Okl 275, 242 P861, 862 [quotCyc]; 126 Okl 232, 259 P224; TexCivA 1SW(2d)456, 459 [cit CJ].

1138-90 19F(2d)186, 191 [citCJ]; 173 Ark70, 291SW979; 211Ky791, 278SW 124, 127 [quotCJ]; 218Ky330, 291SW 754; 210Ky622, 276SW528; 101NJEq 297, 137A887.

1138-91 210Ky622, 276SW528.

1138-93 [c] **What constitutes knowledge of fraud on part of person asserting estoppel.** MoA 297SW1003. [d] **Person taking title to personal property conditionally sold without immediate delivery and possession** is guilty of constructive fraud preventing invocation of estoppel against true owner. CalA 291 P458.

1139-94 13F(2d)321; 215Ala218, 110 S24; 317 Ill 231, 148NE53; 137Misc725, 244NYS437; 113 Okl 265, 242P185. But see 198NC169, 151SE102. [a] (3) No estoppel can be predicated on promise which reserves to promisor privilege of nonperformance. 166Minn158, 207NW 815. [b] Infants.–317 Ill 231, 148NE53.

1139-96 76CalA232, 245P235; 78CalA 334, 248P526; 328 Ill 388, 159NE782; 136Misc500, 241NYS202. [a] (4) Alleged estoppel to deny plaintiff's right to easement for pipe line as plaintiff may deem advantageous to his purpose, unlimited as to time, is too indefinite and uncertain to give it force. 78CalA334, 248P526.

1139-1 1LaA389. [a] (3) Maker of note given to deceive bank examiner is not estopped from denying his obligation. 198Cal 252, 244P368.

1140-6 20F(2d)78; 29F(2d)46; 214 Ala214, 107S84 [citCJ]; Ark 31SW(2d) 136; 197Cal 43, 239P401; 103Conn624, 131A420; 213Ky824, 281SW1010; 217 Ky71, 288SW1014; 246 IllA137; Iowa 231NW376; 127Kan606, 274P227; 225 Ky727, 9SW(2d)1077; 230Ky769, 20 SW(2d)1002; 138Me376, 147A759(2d case); 176Minn227, 222NW929; 317 Mo 228, 295SW794; 222AppDiv639, 227NYS408; 224AppDiv444, 231NYS 303; 194NC363, 139SE593; 198 NC18, 150SE489; 286Pa393, 133A 632; 294Pa86, 143A500; Wash 289P 1008; 21SaskL32, [1926] 4DomLR561, [1926] 3WestWkly397. [a] (3) Vendor of land representing it has certain means of ingress and egress cannot deny existence of such easement. 160Ga350, 127SE758. [b] 42 Ida567, 248P447. [f] (3) Other instances. Mo 30SW(2d)1009.

1142-7 41GaA684, 154SE458.

1142-8 89CalA772, 265P397.

1142-10 128Me376, 147A759(2dcase); 317Mo 228, 295SW794; 222MoA503, 281 SW78; 252NY226, 169NE286.

1142-10½-New. Where a salesman of grantor selling a lot told the purchaser a second-story porch could be built and called attention to porches in the vicinity, the grantor is not estopped from refusing to approve plans for the erection of a porch different from those already built in the vicinity. 149Md271, 131A446.

1142-10½-New. A purchaser of realty alleging misdescription in the deed as ground of refusal to accept, but relying on the description as compliance with the statute of frauds, is not entitled to relief. 214Ala18, 106S181.

1142-12 19F(2d)74; 20F(2d)425; 228 AppDiv325, 239NYS551; 118Tex415, 16 SW(2d)269; TexCivA 293SW599, 604 [citCJ].

1142-14 170Ga28, 152SE60; 261Mass 264, 158NE786; 166Minn158, 207NW 315; 218MoA10, 260SW552; Man [1927] 2DomLR830, [1927] 1WestWkly985. But see 103Conn624, 131A420.

1143-15 7Alaska669; 286Pa393, 133A 632. [e] Exception not applied in contravention of statute.–166Minn158, 207 NW315 (promise of married woman to sign mortgage on homestead).

1143-17 213Ky689, 281SW823; NJCh 148A159; RI 147A749.

1144-18 213Ky689, 281SW823.

1144-32 53SD37, 219NW949, 952, 60 ALR1173 [quotCJ].

1145-40 22F(2d)230; 155Md384, 142 A515; RI 147A749.

1146-55½-New. Mortgagee agreeing to extend time for payment of installments on which mortgagor relied is estopped from asserting whole amount as due on default in payment. 215AppDiv564, 214 NYS239 (even though no consideration for agreement).

1146-55¼-New. A prior mortgagor representing to a prospective purchaser of a junior mortgage that the latter is the only valid and subsisting lien against the property is estopped to assert his priority. 217Ky71, 288SW1014.

1146-55¼-New. A purchaser of mortgaged premises is not justified in relying on a recital in an agreement for assignment of a senior mortgage to a junior mortgagee as showing the amount of encumbrance, and such recital does not estop the junior mortgagee. 217 AppDiv26, 215NYS785.

1146-55⅛-New. The holder of a first mortgage on the individual share of an heir is not estopped from insisting on his mortgage because, in answer to a later inquiry, he stated that there was no encumbrance on the estate. 204 Iowa 1227, 214NW535.

1146-55⅛-New. The mortgagee of a contractor, stating to the latter's surety that the contractor owned the mortgaged property, is not estopped to claim a lien where the surety had signed a bond and the contractor later assigned the property to the surety. 35Ariz392, 278P 384.

1146-55½-New. Representation as to the construction and effect of a judgment of obscure and doubtful meaning, if believed and acted upon, is good as an estoppel. 34NM127, 279P72.

1146-56 22F(2d)230; 28F(2d)459; 29 F(2d)288(2dcase); CalA 247P483; 222 MoA503, 281SW78; 38Wyo 244, 266P 109. [k] Signatures.–153Tenn400, 284 SW380, 48ALR1365.

1147-57 80CalA377, 252P647.

1147-58 TexCivA 291SW306.

1147-61 CalA 247P483; 130Kan379, 286P214; 195Wis258, 218NW593.

1147-62 CalA 247P483; 130Kan379, 286P214. [d] No estoppel arises where grantee executed mortgage and notes in grantor's name under power of attorney intending to rectify error. CalA 247P 483.

1147-65½-New. A creditor of a corporation is bound as to persons succeeding to control of the corporation where he furnishes a statement as to the balance due and accepts and cashes the check given by the corporation "for balance due as per statement." 153Miss22, 120S 193(2dcase).

1147-65⅛-New. Offer of compromise does not estop party from thereafter setting up any legal claim or defense to which offer related. Mo 31SW(2d)978.

1147-66 80CalA377, 252P647.

1148-67 166La1035, 118S125; 118Tex 415, 16SW(2d)269. [a] 218MoA10, 260 SW552.

1148-68 150Wash524, 273P959.

1148-69 35GaA29, 132SE117.

1148-70 191Wis645, 211NW670.

1148-71 174Ark50, 294SW272; 42 Ida 567, 248P447; 127Kan606, 274P227; 210Ky461, 276SW156, 157 [citCJ]; 231 Ky508, 21SW(2d)805; 261Mass1, 157 NE725; 223AppDiv35, 227NYS373; 34 NM127, 279P72; 194NC363, 139SE593; 286Pa393, 133A632; 47RI 47, 129A805; 143SC325, 141SE564; 118Tex415, 16SW (2d)269.

1149-72 210Ky461, 276SW156, 157 [cit CJ]; 211Ky26, 276SW975. [a] Vendor may be estopped by representations, though there is no covenant in reference thereto in executed contract of sale. Sask [1929] 3DomLR725.

1149-74 74Mont558, 241P636, 647 [quot CJ].

1149-75 74Mont558, 241P636, 647 [quot CJ].

1149-76 74Mont558, 241P636, 647 [quot CJ].

1150-78 145Miss1, 110S851; 74Mont 558, 241P636, 647 [quotCJ]; Utah 274 P136. [a] No estoppel against former corporation manager to share in income tax refund by disclaimer, where he was unaware of possibility of refund at time he sold his stock. 173Ark862, 293SW 746.

1150-79 74Mont558, 241P636, 647 [quot CJ].

1150-80 74Mont558, 241P636, 647 [quot CJ].

1150-81 74Mont558, 241P636, 647 [quot CJ].

1150-82 74Mont558, 241P636, 647 [quot CJ].

1150-83 74Mont558, 241P636, 647 [quot CJ].

1150-84 74Mont558, 241P636, 647 [quot CJ].

1150-85 86CalA239, 260P955.

1150-85½-New. The seller of a drilling rig is not estopped to claim title under repurchase from the purchaser by a prior representation to the repurchaser's creditor that the purchaser owned the rig. 172Ark386, 289SW1.

1150-85⅛-New. Representation that the purchaser owned the rig purchased on credit has been held not impliedly false where the seller retained no lien. 172Ark386, 289SW1.

1150-89 78CalA713, 248P750; 37GaA 559, 140SE770; 203 Iowa51, 212NW362; 169La973, 126S442; 140Miss745, 106S 257, 258, 45ALR341 [citCJ]; Mo 281 SW715; MoA 282SW729; TexCommnA 16SW(2d)530, 66ALR758; 107WVa151, 147SE542. [c] Silence of congress respecting executive acts is not ratification. 5F(2d)191.

1150-90 8F(2d)588; 168Ark53, 269SW 363; 174Ark818, 298SW204; 78CalA 713, 248P750; 86Colo 350, 281P746; 330 Ill 548, 162NE191; 333 Ill 535, 165 NE181; 233 IllA428 (dictum); 226Ky 676, 11SW(2d)713; 12LaA15, 123S430; 153Md666, 139A554; 178Minn296, 226 NW938 (failure to answer letter); 140 Miss745, 106S257, 258, 45ALR341 [cit CJ]; Mo 281SW715; 220MoA223, 282 SW729; 76Mont254, 246P168; 79Mont 485, 257P406; 82NH167, 131A354; 100 NJEq403, 135A693; 52ND568, 204NW 188; 27 OhA430, 161NE235; 118 Okl 163, 247P630; 120 Or202, 250P722; Pa 152A98; 101WVa522, 133SE154. [a] (3) Other instances. Minn 231NW926. [d] Lender may keep silent, though competing with borrower for object of loan. 150Md677, 133A843.

1151-91 170Ark1146, 282SW995; 181 Ark1004, 29SW(2d)272; 99Fla277, 126 S293; 140Miss745, 106S257, 258, 45 ALR341 [citCJ]; 100NJEq403, 135A 693.

1151-92 8F(2d)588; 41F(2d)823; 170 Ark1146, 282SW995; 76CalA232, 245P 235; 78CalA713, 248P750; 95CalA490, 273P103; 104Conn291, 132A464, 466 [citCJ]; 235Ky502, 31SW(2d)893; 6 LaA305, 308 [quotCyc]; 13LaA515, 128 S538; 11LaA323, 123S461, 463 [quot Cyc]; 237Mich133, 211NW83, 54ALR 351; 140Miss745, 106S257, 258, 45ALR 341 [citCJ]; 151Miss558, 118S623; Mo 281SW715; 220MoA223, 282SW729; 79 Mont485, 257P406; 118 Okl 163, 247 P680; TexCommnA 280SW174; WVa 155SE465. [c] (1) 214Ky643, 283SW 1015. (2) Rule is not applicable when apparent agreement with claim made prevents investigation. 6F(2d)845. [d] 136Misc500, 241NYS202. [e] 220 MoA223, 282SW729. [g] 259Mass570, 156NE723.

1152-93 202 Iowa465, 210NW596; 140 Miss745, 106S257, 258, 45ALR341 [cit CJ]; 126 Okl 232, 259P224; 37 Okl ACR676. [a] Principle of "equitable estoppel" proceeds on ground that he who has been silent as to his alleged rights when he ought, in good faith, to have spoken shall not be heard when he ought to be silent. NJ 146A303.

1152-94 203 Iowa51, 212NW362; 13 LaA515, 128S538; 153Md666, 139A554; 140Miss745, 106S257, 258, 45ALR341 [citCJ]; 52ND568, 204NW188; 37 Okl ACR676; 142SC247, 140SE581.

1152-95 6F(2d)845; 41F(2d)4; 219 Ala150, 121S511; 37GaA559, 140SE770; 202 Iowa465, 210NW596; 203 Iowa51, 212NW362; 217Ky71, 288SW1014; 235 Ky502, 31SW(2d)893; 13LaA515, 128 S538; 140Miss745, 106S257, 258, 45 ALR341 [citCJ]; MoA 20SW(2d)296; NJ 146A303; 247NY486, 160NE924; 196NC97, 144SE554; 142Va163, 128SE 457.

1152-97 333 Ill 535, 165NE181; 255 IllA314; 203 Iowa51, 212NW362; 220 MoA223, 282SW729 [quotCJ]; MoA 18 SW(2d)559; MoA 20SW(2d)296; 77 Mont182, 250P812; 193NC278, 136SE 879; 194NC363, 139SE593; 50Philippine477; 33PortoRico 499; TexCivA 288SW594; 103WVa240, 137SE7, 9 [quotCJ].

1153-98 170Ark1146, 282SW995; 46 Ida25, 266P1099; 166La656, 117S763; 145Miss1, 110S851; 220MoA223, 282 SW729; 133 Okl 252, 271P839.

1153-99 8F(2d)588; 17F(2d)17; 88 CalA238, 263P362; 103WVa240, 137SE 7, 9 [quotCJ].

1154-2 9F(2d)588; 172Ark952, 291 SW69; 145Miss1, 110S851; 315Mo 1119, 287SW442; 47RI 47, 129A805 (owner of money pays it to plaintiff

under mutual mistake of fact due to negligence of owner but not of plaintiff).

1154-3 128Kan55, 275P1077.

1154-3½-New. Defendants denying plaintiff's possession in a suit for slander of title need not elect to disclaim or assert title until such issue is decided. 163La529, 112S407.

1154-3½-New. One is not estopped from asserting title to real estate by reason of his conduct at a time when he had no interest therein. 107WVa255, 148SE76.

1154-4 174Ark50, 294SW372; 330Ill 106, 161NE99; 330Ill 548, 162NE191; Ky 286SW887; 126Me299, 138A170; 144Va113, 131SE217 (holds out or with knowledge of his own right allows another in possession to appear as owner).

1155-5 See also 144Va113, 131SE217.

1155-6 174Ark50, 294SW372; 209Ky 714, 273SW479 (defendant induced plaintiff to buy). [a] **Rule applies to heirs who assent to, and encourage sale of, land** not authorized by will. 144Va113, 131SE217.

1156-9 170Ark1146, 282SW995.

1156-10 Mo 29SW(2d)1100.

1156-18 41F(2d)76.

1156-22 Mo 29SW(2d)1100; 58ND66, 224NW661.

1157-24 217Ala321, 116S156; 255IllA 415; 130Kan30, 285P561; 1LaA50; 258Mass17, 154NE330, 49ALR267; 57 ND916, 224NW909; 145Wash656, 261 P386; Alta [1930] 3DomLR406. [e] **Sale of automobile by dealer.**—Man [1930] 4DomLR827.

1157-30 [c] **Mere silence of lien claimants at assignee's sale** held not to work estoppel where purchasers had actual or constructive knowledge of liens. 145 Wash664, 261P381, 55ALR989.

1158-42 See also TexCivA 22SW(2d) 533.

1158-43 [b] 56ND309, 217NW169.

1159-48½-New. The third opponent in a suit in which a creditor seized and sold property of the debtor is not estopped to sue on an indemnity bond given by the creditor, because the attorneys who subsequently represented him were present at the sale and made no protest. 10LaA179, 120S96.

1159-50 But see 50Philippine766.

1159-54 170La868, 129S374; 189NC 703, 128SE20.

1159-55 NJ 151A58.

1159-62 163Ga778, 137SE237.

1159-64 163Ga778, 137SE237.

1160-67 163Ga778, 137SE237.

1160-71 163Ga778, 137SE237.

1160-73 16F(2d)880; Cal 290P577; 105Conn488, 136A78; 45Ida369, 263P 988 (permission creating estoppel and vested right); 333Ill 535, 165NE181; 336Ill 530, 168NE676; 121Kan264, 246 P969; 130Kan367, 286P258; 216Ky 652, 288SW299; 226Ky794, 11SW(2d) 943; 232Mich77, 205NW172; 103 NJEq268, 143A428; 294Pa212, 144A 93; 297Pa583, 148A56; 10PaDist&Co 766; 141SC387, 139SE850; 143SC325, 141SE564; Utah 289P151; 103WVa 240, 137SE7. See also 85Colo 419, 276 P972. [q] **Expenditures in equipping hotel under contract entitling hotel keeper to option of renting** if terms can be agreed upon does not estop landlord from ousting hotel keeper upon failure to agree. 209Ky234, 272SW724. [r] **Lot owner held not estopped** to deny easement in driveway. 206Iowa1084, 221NW825.

1162-83 [a] **Acquiescence in building of pier under grant in lease will not estop lessor** from demanding its removal at end of term. 149Md163, 130 A46.

1162-85 228Ky206, 148W(2d)753.

1163-88 224AppDiv667, 229NYS522.

1163-95 103WVa240, 137SE7.

1163-96 314Mo 474, 283SW990.

1163-98 103WVa240, 137SE7.

1163-99 314Mo 474, 283SW990.

1164-5½-New. where the owner leased lands to a road under a lease subject to termination on six months' notice, 314 Mo 474, 283SW990.

1164-14 72Mont318, 233P607.

1164-16 72Mont318, 233P607.

1165-23 240Mich185, 215NW408 (contract purchaser estopped); 103NJEq 268, 143A428.

1165-27 6LaA552.

1165-31 203Iowa134, 209NW731.

1166-37 [b] **Failure to reply to letter** informing drawee that indorsee had purchased trade acceptance does not estop it from setting up infirmity, it having no duty to answer. Iowa 233NW103.

1166-39 [b] **That drawer of trade acceptance became financially embarrassed** does not estop drawee for failure to respond to notification of bank's acceptance. Iowa 233NW103.

1166-42 Ariz 285P263; 178Ark1150, 13 SW(2d)624; 84Colo 279, 269P894; 9LaA 293, 119S472; 154Md581, 141A343; 232 Mich49, 204NW713; 50Philippine490; TexCivA 2SW(2d)899; 39Wyo1, 269P 31. [h] **Defendants were not estopped to deny that conveyance to them was advancement** by reason of failure to assert claim against estate for services. 229 Ky476, 17SW(2d)407.

1167-44 [a] (3) Not estopped within agreed period of limitation. 102Conn 488, 129A384. (4) One not party is not estopped from claiming use of roadway by partition between heirs. 143Va98, 129SE354. [b] **Waiver is not imputed** where no duty is imposed. TexCivA 294SW331.

1167-45 213Ky305, 280SW1106; 168La 1107, 123S798; 145Miss1, 110S851; 127 Misc766, 217NYS452.

1167-45½-New. Failure of levee district to have land certified for many years does not estop it from insisting on conveyance. 161La1039, 109S830.

1167-45½-New. Where adverse claim is based on deed originating in actual fraud, the owner is not estopped from asserting title. 169Ga801, 151SE496.

1167-48 TexCivA 21SW(2d)83 (no duty to give information).

1167-51 206Cal 428, 270P931; 217Ky 71, 288SW1014; NJCh 151A103; Tex CivA 295SW955; [1926]CanSC566, [1926] 4DomLR625.

1168-52 [b] **Laborers and materialmen not estopped** from suing surety on bond because of failure to file claim where surety is not ordered to pay any claims. 191NC703, 133SE21.

1168-53 28F(2d)135; 218Ala341, 118S 578; 174Ark398, 295SW961; NJCh 151 A103.

1168-54½-New. The mortgagee informing the purchaser of mortgaged property that the right amount of the lien was a certain sum was estopped from claiming a greater sum. 247Mich 348, 225NW496.

1168-54½-New. Where a person waives a lien to enable another lienor to secure priority, he is not estopped from buying a superior title in the third person who is a bona fide purchaser for value. 154Miss726, 123S847.

1168-55 217Ky71, 288SW1014.

1168-56 127Me172, 142A580. [d] **Trustee under assignment for benefit of creditors** loaning automobile to assignor for temporary use is not estopped to recover automobile or its value from subsequent purchaser without notice of want of title in seller. 127Me172, 142 A580.

1169-58 44Ida643, 258P929; Ill 233A 428 (dictum); 209Ky279, 272SW740 (insurer estopped to set up defense that employer was not operating under Workmen's Compensation Act by its own negligent failure to file employer's papers in accordance with agreement); 157Miss365, 128S79; 47RI 47, 129A805; 146SC450, 144SE162; TexCivA 284SW 705, 715 [citCJ]; 102WVa23, 135SE168, 169 [citCJ], 50ALR426.

1169-59 TexCivA 284SW705, 715 [cit CJ].

1169-60 220Ky123, 294SW1093; 220 MoA1004, 274SW894, 898 [citCJ].

1169-61 232IllA186 (where neither drawee bank nor drawer was held to have duty to bank which paid check bearing forged indorsement so as to raise estoppel by negligence); 134Misc 351, 235NYS634; 21SaskL86, [1926] 4 DomLR93, [1926] 2WestWkly800.

1170-62 153Tenn113, 282SW194, 198 [citCJ]; 20SaskL148, [1925] 3DomLR 1176.

1170-63 220MoA1004, 274SW894, 898 [quotCJ]; TexCivA 284SW705, 715 [cit CJ].

1170-66 See also TexCivA 29SW(2d) 839.

1170-67 281US457, 50SCt382, 74Led 962; 23F(2d)667; 23F(2d)803; 23F (2d)939, 941 [citCJ]; 35F(2d)649; 212 Ala485, 103S460; 213Ala567, 105S585; Ariz 288P7; Ariz 285P263; 29Ariz44, 239P297; 168Ark6, 269SW370; 177Ark 243, 6SW(2d)305; 197Cal 296, 240P782; 205Cal 1, 269P610; 78CalA673, 248P770; 82CalA519, 255P881; 86CalA113, 260P 580; CalA 285P340; 82Colo 478, 261P 461; 82Colo598, 262P85; 87Colo 223, 286 P112; 87Colo 240, 286P275; 56AppDC 353, 13F(2d)959; 37GaA275, 139SE826; 44 Ida167, 255P907; 47 Ida166, 273P 947; 330Ill 136, 161NE306; 252IllA 612; 256IllA386; 203Iowa1001, 213 NW571; 123Kan477, 255P971; Kan 292 P798; 222Ky454, 1SW(2d)767; 225Ky 733, 9SW(2d)1089; 233Ky681, 26SW (2d)522; 149Md412, 131A780; 246Mich 527, 224NW327; 222MoA510, 281SW75; MoA 23SW(2d)205; MoA 30SW(2d) 1087; 80Mont524, 261P283; 115Nebr 547, 213NW829; 117Nebr262, 220NW 276; NH 150A739; NJCh 148A7; NJCh 148A733; 136Misc325, 240NYS5; 136 Misc500, 241NYS202; 229AppDiv550, 242NYS149; 137Misc700, 244NYS290; 190NC397, 130SE40; 198NC169, 151SE 102; 38OklACR570; 287Pa441, 135A214; 289Pa207, 137A232; 292Pa194, 140A 869; 39PaSuper34; 10PaDist&Co 305; 13 PaDist&Co 743; 135SC1, 133SE451; 136 SC267, 134SE252; 138SC354, 136SE 300; 142SC375, 140SE804; 147SC27, 144SE592; TexCivA 280SW840; Tex CivA 286SW889; TexCivA 294SW1113; TexCivA 3SW(2d)849; 70Utah11, 257 P677, 57ALR388; 145Va199, 133SE881; 155Wash673, 286P57; 108WVa422, 152 SE318; WVa 155SE307; Alta [1930] 3 DomLR985; BC [1930] 3DomLR915. See also 126Misc237, 213NYS227. But see TexCommnA 29SW(2d)1027. [b] (10) 151Va252, 144SE417. (11) Other instances. WVa 155SE307. [c] (2) Indorsee intrusting note to agent for collection is not affected by rule. 215Ala 235, 110S34.

1172-68 Iowa 228NW274; MoA 23SW (2d)205; 47RI 47, 129A805; 153Va484, 150SE403. See also TexCivA 7SW(2d) 678.

1172-69 101CalA204, 281P509; 238 Mich210, 213NW200, 51ALR1225.

1172-70 78CalA673, 248P770; 44Ida 167, 255P907, 909 [citCJ]; 202Iowa70, 209NW525.

1172-72 78CalA673, 248P770; 203Iowa 1001, 213NW571.

1172-73 238Mich210, 213NW200, 51 ALR1225.

1172-74 86CalA636, 261P324; 238Mich 210, 213NW200, 51ALR1225; 297Pa115, 146A595(2dcase). [b] (2) Bank is not liable on note indorsed by its president without authority. 189NC647, 127SE 693.

1172-74½-New. where both parties are equally culpable. 76Colo 550, 233P619.

1172-75 91CalA88, 266P836; 43Ida279, 251P615; Ida 290P377; 221MoA979, 295SW835 (obvious alteration of check); 153Tenn113, 282SW194.

1172-76 CalA 266P801; 44Ida167, 255 P907, 909 [citCJ]; 237Mich133, 211NW 83, 54ALR351; 238Mich210, 213NW200, 51ALR1225; MoA 25SW(2d)545; 153 Tenn113, 282SW194, 198 [quotCJ]. See also 150SC300, 148SE48. [b] (2) Son's forging of indorsement on note payable to mother held proximate cause of loss when no inquiry was made of mother on accepting note. 44Ida167, 255P907. (3) Rule that he who puts it in power of another to do wrong must bear loss has no application in case of forged instruments. 106WVa507, 146SE59.

1172-77 19F(2d)781; 31Ariz104, 250P 766; 197Cal 296, 240P782; 70CalA41, 232P489; 77CalA417, 246P1067; CalA 291P458; 223Ky386, 3SW(2d)786, 787 [citCJ]; LaA 128S546; 80Mont524, 261 P283; 194NC363, 139SE593; 124Or443, 264P432, 436 [quotCJ]; TexCivA 282 SW846.

1173-78 19F(2d)781; 124Or443, 264P 432, 436 [quotCJ].

1173-79 TexCivA 3SW(2d)911, 917 [cit CJ].

1173-81 19F(2d)781; 124 Or443, 264P 432, 436 [quotCJ].
1173-82 124 Or443, 264P432, 436 [quot CJ].
1173-83 19F(2d)781; 197Cal 296, 240P 782; 221MoA936, 288SW950.
1173-84 19F(2d)781; 206 Iowa28, 217 NW453; 221MoA936, 288SW950, 954 [citCJ].
1173-85 153Tenn113, 282SW194 (act outside apparent authority of officer will not raise estoppel against state).
1173-86 214Ala558, 108S370; 197Cal 43, 239P401; 164Ga96, 137SE833; 317 Ill 126, 147NE793; 201 Iowa107, 204NW 294, 48ALR394 (delivery by agent or holder in escrow); 223Ky348, 3SW(2d) 786; 226Ky676, 11SW(2d)713; Nebr 227NW148; 137Misc693, 244NYS300. [k] **Where owner executes deed to another who mortgages property to bona fide holder for value,** he is estopped from setting up as against mortgagee fraud of grantee in procurement of deed. 149Md 412, 131A780. [l] **One inducing forgery of deed from wife to another** cannot question transfer of interests in land by latter. TexCivA 283SW310.
1174-88 TexCommnA 298W(2d)1011.
1174-89 220MoA223, 282SW729.
1175-99 256 IllA386; 202 Iowa465, 210 NW596. [b] (1) 166Ga69, 142SE536.
1175-1 84CalA142, 257P606 (wife joining in deed).
1175-3 203 Iowa585, 213NW211, 212 [citCJ], 52ALR182.
1176-6 204 Iowa11, 214NW572.
1176-7 14F(2d)362; 19F(2d)781; 31 Ariz104, 250P766; 175Ark811, 300SW 434; 181Ark1031, 28SW(2d)1050; 68 CalA432, 229P968; 77CalA417, 246P 1067; 71CalA355, 234P919 (assignee of conditional sale vendor permitting automobile to remain registered in name of vendor as "legal owner"); 80CalA 571, 252P662; 86CalA113, 260P580; 90 CalA782, 266P620; CalA 284P736; CalA 285P340; 87 IndA252, 161NE298; 233 Ky681, 26SW(2d)522; 156Md662, 145A 342; 256Mass431, 152NE710; 259Mass 495, 156NE704; 155Miss328, 124S367; 223AppDiv511, 228NYS722; 198NC18, 150SE489; 8PaDist&Co 615; Utah 262 P294; Alta [1930] 3DomLR406; Man [1930] 3DomLR488.
1176-8 156Md662, 145A342.
1177-10 206Cal 334, 274P512; 69CalA 748, 232P495; CalA 291P684; 259Mass 495, 156NE704. But see 220MoA223, 282SW729.
1177-11 29 OhA486, 163NE640.
1177-13½-New. drafts, 177Ark656, 7 SW(2d)755.
1177-14 202 Iowa465, 210NW596; 149 Miss523, 115S707; 135SC1, 133SE451; TexCommnA 291SW857; 108WVa422, 152SE318. [a] (5) Assignee of one of two notes secured by second mortgage, by failing to take assignment of mortgage is bound by agreement of second mortgagee with owner to allow latter to increase his loan under first mortgage retaining priority therefor over second mortgage, first mortgagee having no knowledge of assignment of note. 200 Iowa377, 205NW525. [b] (3) Notes owned by plaintiff being nonnegotiable, it is not estopped to deny authority to sell them of its agent, who did so, and to assert its ownership, unless it appears that it clothed him with some authority to do so. 96CalA93, 273P871.
1177-14½-New. bills of lading, Tex CivA 282SW846.
1178-17 75CalA629, 243P468, 471 [quot CJ]; 173Minn554, 218NW106; 75Mont 412, 243P812, 813 [citCJ]; 244NY 340, 155NE665; 295Pa450, 145A511; Alta [1929] 2DomLR190. [a] 244NY 340, 155NE665. [g] **Maker of nonnegotiable note** is not estopped to deny liability on theory that he impliedly authorized payee to negotiate note, when entire transaction contemplated such transfer. 201 Iowa1143, 208NW730, 45 ALR1065.
1178-18 75CalA629, 243P468, 471 [quot CJ]; 244NY340, 155NE665.
1178-19 86CalA142, 260P305; 210Ky 104, 275SW25. [a] **Invoice** showing draft was attached to bill of lading, requiring payment before surrender title, did not pass and seller not estopped to claim proceeds of resale. 83 IndA94, 147NE722.
1178-20 75CalA629, 243P468, 471 [quot CJ]; CalA 280P1013.
1178-21 19F(2d)781. [c] **Failure to insert in conditional bill of sale** seller's agreement to take advertising in payment has been held not to estop seller from setting up agreement in action by assignee of seller. 142Wash190, 252P 920.
1179-22 CalA 291P684. [a] **Forgery of indorsement on stock.**-237Mich133, 211 NW83, 54ALR351.
1179-23 14F(2d)362; 215Ala235, 110S 34; 197Cal 296, 240P782; 75CalA629, 243P468, 471 [quotCJ]; 210Ky104, 275 SW25.
1179-24 210Ky104, 275SW25; 34Wyo 119, 241P1068, 1071 [citCJ].
1179-24½-New. One taking assignment of accounts receivable for security prior to assignor's bankruptcy, without notice to debtors, has been held not estopped to claim proceeds of accounts as against assignor's trustee in bankruptcy. 28F(2d)791.
1179-24⅓-New. A minority stockholder related to the majority stockholders has been held not estopped to claim that she did not authorize and is not bound by the transfer of the corporation's assets and business to a new company controlled by such stockholders because her stock stood on the corporation's books at the time of the transfer in the names of, and was voted by, two of them. 29 F(2d)383.
1179-25 34Wyo 119, 241P1068, 1071 [citCJ]; Man [1929] 4DomLR1075.
1179-30 5LaA741; 319Mo 787, 5SW (2d)70; 137Misc693, 244NYS300; 124 Or276, 261P432 (dictum). [b] (1) 230 Ky769, 20SW(2d)1002. [e] (2) Rule is applicable notwithstanding statutory reservation to maker of defenses or counterclaims. 206 Iowa1036, 220NW 364. [j] **Heir of grantee or privies cannot assert estoppel against grantor** who was commissioner in partition, against lawful claim of grantor, valid against ancestor because of recorded deed, merely because claim was not disclosed by grantor at time of division, where heir has not changed position in reliance on such conduct and neither equity nor good conscience requires that grantor be estopped. 191NC133, 131SE311.
1180-32 75CalA471, 242P1078, 1083 [citCJ]; 26 OhA478, 160NE93; 124 Or 276, 261P432.
1180-34 75CalA471, 242P1078, 1083 [cit CJ]; 174Minn554, 219NW864; 26 OhA 478, 160NE93; 124 Or276, 261P432; Can [1927] 3DomLR160.
1181-35 51ND202, 199NW582, 585 [cit CJ].
1181-36 51ND202, 199NW582, 585 [cit CJ].
1181-39½-New. A buyer's cause of action for the seller's representations inducing the purchase of stock in a Massachusetts trust held independent and not derived through the trust. 222AppDiv 639, 227NYS408.
1181-40 33F(2d)788; 35F(2d)526 (sharing and participation in profits); 219Ala150, 121S511; 75CalA471, 242P 1078, 1083 [citCJ]; 230Ky769, 20SW (2d)1002; 226Ky93, 10SW(2d)617; 243 Mich209, 220NW301; 286Pa405, 133A 551; 46Philippine897. [d] **Devisees** are bound by any transaction binding on testator in his life time as affecting his title. 201 Iowa878, 208NW310.
1181-40½-New. Estoppel in pais operates alike whether against conduct of man or woman. 124Me391, 130A233.
1182-42 99Fla833, 127S855.
1182-43 TexCivA 288SW599.
1182-43½-New. Estoppel is not available against one who did not make the representation or have knowledge of it. 15DelCh76, 132A144.
1182-43⅓-New. A federal rule, which prevents waiver or estoppel by a public service corporation, does not prevent a corporation from becoming estopped by reason of its own negligence or bad faith from asserting a contract right or from relying on a valid rule of the corporation. 39GaA152, 147SE151.
1182-45 168Ark718, 271SW970; 87 Colo 223, 286P112; 130Kan165, 285P 563; 231Ky442, 21SW(2d)818; 315Mo 872, 288SW54(2dcase); 217AppDiv701, 216NYS154.
1182-48 99Fla568, 126S778; Ga 155SE 513; 47 Ida568, 277P425; 248Mich419, 227NW698.
1183-50 TexCivA 298SW154.
1183-51 See also 150Wash249, 272P714.
1183-55 Cal 290P577; TexCivA 297SW 334.
1183-56½-New. Vendor, estopped from conveying land, cannot convey it, estoppel being binding on purchasers. 222 AppDiv164, 225NYS415.
1183-59½-New. Mortgagee accepting a mortgage with knowledge that the land was to be used to maintain an ice pond, without inducing the mortgagor to give the mortgage, has been held not estopped, on foreclosure of the mortgage, to deny the right of the mortgagor to continue to maintain it as such. Mass 166NE861.
1183-60 286Pa405, 133A551.
1184-64 153Md31, 137A482, 483 [cit CJ].
1184-65½-New. That evidence showed defendants acted as officers of a corporation would not detract from estopping effects of their conduct as individuals or militate against rights of plaintiff against defendants. 226Ky676, 11 SW(2d)713.
1184-68 9LaA420, 121S259. [a] (6) Letter written by builder who was owner's partner does not estop owner from denying architect's authority to change plans, contract with architect being with owner personally. 293Pa97, 141A638.
1185-69 286Pa405, 133A551.
1186-72 216Ala243, 113S6; 124Kan780, 262P607; 319Mo 149, 3SW(2d)1008; Mo 29SW(2d)64. [a] (2) It is well settled that doctrine of estoppel cannot be invoked against government. 19F (2d)531.
1183-74 TexCivA 31SW(2d)160.
1186-77 [a] (4) Government's acceptance of tax returns is not election estopping it from asserting claim in conflict with such returns. 19F(2d)531. [c] **Where controversy is between two classes of public,** and justice demands it, the doctrine applies. MoA 28SW(2d)384.
1186-79 16F(2d)374; 19F(2d)1009; 44 Ida353, 256P953, 955 [citCJ]; 165Minn 1, 205NW444; 127Misc170, 217NYS544; 291Pa216, 139A860. [a] **In Canada.**-[1929] 2DomLR641.
1187-80 CalA 290P480; 250 IllA6; 121 Kan105, 245P1030; 165Minn1, 205NW 444; 220MoA322, 286SW136; MoA 28 SW(2d)384; 127Misc170, 217NYS544; 291Pa216, 139A860; 298Pa276, 148A 308; TexCivA 284SW310; 104WVa391, 140SE344, 345 [citCJ]. [b] **Delay in recording paving assessment** does not estop municipality from collecting it from one who purchased property after paving but before recording. 104WVa 391, 140SE344. [c] **Authority of United States in administration of Indian reservation** is not lost or impaired under doctrine of estoppel. 33F(2d)608.
1187-83 216Ala243, 113S6; 81Colo 315, 255P453; 93Fla535, 112S274; 113Nebr 846, 205NW568; 127Misc170, 217NYS 544; 104WVa391, 140SE344.
1187-84 32F(2d)789; 35F(2d)765; 127 Misc170, 217NYS544.
1187-85 121Kan105, 245P1030 (county).
1187-86 Mo 20SW(2d)22, 66ALR1053; 220MoA322, 286SW136.
1187-87 220MoA322, 286SW136. [a] **State cannot be deprived of right** to legislate by estoppel. 216Ala243, 113S6.
1187-87¼-New. The federal government is not estopped from instituting equity proceedings to cancel naturalization. 13F(2d)376.
1187-88 124Kan780, 262P607, 608 [quotCJ]; 9LaA727, 120S249; 124 Or 54, 263P386. [e] (1) 124 Or54, 263P 386. [h] **Claims** cannot be created against state by estoppel. 216Ala243, 113S6.
1188-89 124Kan780, 262P607, 608 [quotCJ].
1188-90 196Cal 709, 238P1038; 117Kan 622, 233P508; 124Kan780, 262P607, 608 [quotCJ]; 319Mo 149, 3SW(2d)1008,

1018 [citCJ]; 50Philippine981; 104W Va[illegible]; [illegible]E344.

1183–91 124Kan780, 262P607, 608 [quot CJ].

1189–1 16F(2d)374; 21F(2d)673; 26F (2d)74; 170La531, 128S470; 165Minn 1, 205NW444 (compromise in sale of timber by state act in its proprietary capacity on which estoppel may be based). [a] **State held not stopped.**–155Wash 446, 284P1016.

1189–2½–New. The government is not estopped from proceeding under the Sherman Anti Trust Act because of a previous decision of the federal trade commission. 15F(2d)715.

1189–2½–New. Mistake of prohibition officer cannot estop government from enforcing legal rights. 21F(2d)99.

1189–6 219Fed858, 135CCA528; 37F (2d)545; 44F(2d)206; 72ColoA566, 216 P711; Mo 238SW(2d)1045; 125AppDiv 28, 109NYS414; 127Misc170, 217NYS 544; 27 OhNPNS564; 124 Or54, 263P [illegible]; [illegible]Pa[illegible]; 134A[illegible]; [illegible]Pa434, 136Pa669; 52SD458, 218NW599; Tex CivA 218SW(2d)284 (city); 148Va60, 138 SE502, 54ALR1485; 162WVa605, 135SE 839; Alta [1925] 3DomLR459, 466 [cit CJ]; BC [1925] 3DomLR171. But see Mo 288SW(2d)652. [a] (6) Where municipality in expropriation proceedings consents to submission of issue to sole arbitrator and deals with land so that restitution is impossible, it is estopped to deny validity of submission. Alta [1925] 3DomLR459. (7) Where municipality induced landowner to transfer to it land for use as highway by evincing intention, and permitting him to close another road across his land, it is estopped from subsequently opening road. BC [1925] 3DomLR171. [b] **In matters pertaining to governmental functions** doctrine of equitable estoppel is not generally applicable to municipal corporations. Mo 288SW(2d)652.

1190–7 26F(2d)74 (parish); 25F(2d) 859; 40F(2d)184; 180Minn422, 230NW 391; 121Misc555, 227NYS305. [d] **County clerk is not estopped from claiming salary lawfully due** by accepting warrants for lesser amounts. 312Mo 157, 279SW33. [e] **County cannot repudiate resolution** authorizing erection of dam by company after company had acted on resolution. 40F(2d)184.

1190–8 168Ga252, 148SE96.

1190–9 Minn 233NW236; 129 Or663, 63ALR1356, 277P563.

1190–10 20F(2d)250; 26F(2d)640; 35 F(2d)265; 111Conn510, 150A502 (that town used road after completion of itself afforded no ground of estoppel to deny liability); 85 IndA196, 150NE67; 218Ky246, 291SW409. [b] **County not having received any rent under invalid contract** has been held not estopped. 150Ga312, 150SE[illegible] (2d case). [c] **Estoppel against county's right to recover compensation paid sheriff under unconstitutional statute** cannot be predicated on theory that county contracted with sheriff. 160Tenn109, 228SW(2d) 239.

1190–11 73Mont442, 236P670 (inclusion by school board of name of nonresident pupil among resident children by mistake and thereby receiving increased amount of school money).

1190–11½–New. or on which it acted. 73Mont442, 236P670.

1190–12 319Mo149, 38W(2d)1008; Mo 238SW(2d)652.

1190–13 20F(2d)250; Mass 168NE78 (city not estopped).

1190–13½–New. Dereliction on the part of a public official never works an estoppel against a municipality. 218Ky 246, 252, 291SW409 [citCJ].

1190–14½–New. or a state, 165Minn1, 205NW444.

1190–15 25Fed202; NJSup 131A638. See TexCivA 48SW(2d)283, 287 [citCJ]. See also 28F(2d)265.

1191–18½–New. Whether a municipal corporation is subject to estoppel depends on the scope of authority of the city agency through which misrepresentation was made, and the relation of the misrepresentation to the execution of such authority. TexCommnA 291SW209.

1191–19 29F(2d)770; 216Ala243, 113S 6; 117Kan622, 233P508; 127Kan72, 272P106; 166Minn302, 207NW646; SD 224NW951; TexCivA 280SW292. But see 38Wyo427, 267P1060, 60ALR1233. [j] (3) United States is not bound by unauthorized statements of officer waiving statutory limitations as to suit against it. 28F(2d)265.

1192–20 29F(2d)662 [certiorari den 279US847, 49SCt345, 73Led991(4th case)]; 203Cal665, 265P806; 74CalA1, 239P702; 68CalA153, 228P726; 90CalA 519, 265P1032; Fla 130S28; 158Ga182, 123SE139; 44 Ida157, 255P643, 53ALR 191; Ida 290P399; 246 IllA152; 117 Kan622, 233P508; 222Ky598, 18W(2d) 1066; 229Ky213, 16SW(2d)1026; 318 Mo408, 300SW506; 220MoA322, 286SW 136, 140 [citCJ]; 51ND520, 200NW782, 783 [citCJ]; 53ND797, 208NW82; 53 ND797, 208NW82; 74 OhSt185, 78NE 269; 9PaDist&Co577; 160Tenn109, 23 SW(2d)239; TexCivA 12SW(2d)1074; 107WVa263, 148SE135. [o] **City is not estopped to raise objection that petition was not filed within one year,** where workmen's compensation bureau induced or caused complainant to delay. NJCh 146A366(2dcase).

1193–21 210Ky482, 276SW143. [a] 164 Minn390, 205NW277. [c] 220MoA322, 286SW136; SD 224NW951. [d] **Special road district.**–Mo 208W(2d)22.

1193–22 24F(2d)761; 29F(2d)776 [certiorari den 279US841, 49SCt254, 73Led 987(5thcase)]; 53ND797, 208NW82.

1193–23 117Kan622, 233P508; Tex CivA 138W(2d)184.

1193–24 TexCivA 31SW(2d)665.

1193–30 184Fed752 [aff 202Fed357, 120 CCA485].

1194–32½–New. A city may be estopped to deny the delegation to an agent of power which it possessed, and might validly have delegated. 63Conn495, 28 A32; 20NY212.

1194–32½–New. City is not estopped from enforcing plumbing code by permitting plumbing to be installed contrary to statute. 291Pa216, 139A860.

1194–35 But see TexCivA 27SW(2d) 343.

1194–38 203Cal665, 265P806.

1194–40 58ND867, 228NW226(2dcase).

1194–41 178Fed425, 102CCA401; 225 Fed21, 139CCA80; 238Fed827; 20F(2d) 250; 35F(2d)365; 67Ala588, 42AmR 118; 147Cal162, 81P537; 196Cal709, 238P1038; Cal 291P839; 1CalA461, 82 P637; 26CalA641, 147P1183; 45CalA 149, 187P163; 210 Ill575, 71NE626; 220 IllA250; 166 Ind613, 76NE536. 3 LRANS684; 43 Iowa48, 22AmR215; 133 Iowa688, 111NW25, 119AmSR650, 9 LRANS1014; 198 Iowa196, 198NW14; 200 Iowa139, 204NW216; Iowa 230NW 373 (where no public benefit derived); 116Ky108, 75SW251; 123Me505, 124A 213; 184Mass425, 68NE841; 91Minn 290, 97NW1049, 1AnnCas322; 82Miss 475, 34S84; 175Mo12, 75SW81; 179Mo 400, 78SW599; 184MoA296, 167SW645; 65NJL645, 48A529; 28NM179, 210P237; 59Misc204, 110NYS842; 132Misc534, 230NYS653; NY 6AbbPr273; 131NC 657, 43SE3; 23 OhCirCt96; 12 OhS&CP 762; 13 OhS&CP214; 284Pa138, 130A 401; SD 228NW800; 27TexCivA80, 65 SW653; TexCivA 247SW892; 115Wis 340, 91NW1004; 13QueKB19; 13SaskL 176, 52DomLR532, [1920] 1WestWkly 467. See also 127Misc710, 217NYS544; 132Misc609, 230NYS364. [d] **Recognition of validity or binding effect of contract** by merely showing some act or conduct by public corporation will not create estoppel where other party is not misled to his disadvantage. 35F(2d) 365.

1194–42 183Fed854; 200 Iowa139, 204 NW216; 123Me505, 124A213; 132Misc 609, 230NYS364; 58ND867, 228NW226 (2dcase); 284Pa138, 130A401.

1195–50 Alta [1925] 3DomLR459.

1195–51 93US502, 23Led957; 115Fed 866, 53CCA192 [certiorari den 187US 642, 23SCt843, 47Led346]; 116Fed13, 53CCA525; 116Fed838, 54CCA342; 117 Fed113, 54CCA499; 128Fed817, 63CCA 467; 26CalA641, 147P1183; 109Conn 700, 145A571; 11GaA533, 75SE903; 281 Ill264, 118NE3; 166 Ind613, 76NE536, 3LRANS684; 121 Iowa306, 96NW883; Iowa 230NW373; 64Kan163, 67P630; 91Minn290, 97NW1049, 1AnnCas322; 179Mo400, 78SW599; 144MoA137, 128 SW269; 193NY148, 85NE1070, 24 LRANS201; 12 OhS&CP762; 17 Oh NPNS481; 99Tex6, 86SW750; TexCivA 269SW463; 28Utah25, 76P1069; Eng [1893] 3Ch535; EngLR 9Exch13; 19 CanSC581; Alta [1925] 3DomLR459, 466 [citCJ] (submission to arbitration in expropriation proceedings); 5BC128 (seal); 39 OntL34, 11 OntWN440 (app dism 43 OntL17, 14 OntWN155. 43 DomLR263 [app dism 48DomLR151, [1919] 3WestWkly253]); 13 Ont421; Ont 42UCQB172; 13QueKB19.

1197–69 208 Iowa735, 225NW841(2d case); 124 Or54, 263P386. [i] **Where definite boundary line is disclosed** by presence of building or fence placed when improvement is made, by direction, or with consent of authorized officer, estoppel may be worked to prevent latter alteration to detriment of abutting owner. 286Pa351, 133A495.

1198–76 135Misc673, 238NYS187; 121 OhSt235, 167NE877. [a] (3) City was not estopped to assert right to waters of river by reason of its failure to object to diversions made theretofore. Cal 278P840.

1199–82½–New. Same rule applies to license granted by board of harbor commissioners. 196Cal709, 238P1038.

1199–84 216Ala679, 114S63; 80Colo 390, 252P808; 129Kan645, 284P386; 319Mo149, 38W(2d)1008; 135Misc673, 238NYS187; 124 Or54, 263P386 (dictum); 12PortoRicoFed152.

1199–85½–New. Thus a railroad company cannot claim a waiver of its duties imposed by law by reason of assessment of taxes for erection and maintenance of bridge across tracks. 125 Misc472, 211NYS334.

1200–88½–New. A statement of an auditor general, mistakenly based on an invalid statute, that no consent is required from his office for transfer of decedent's stocks, does not estop the state from levying transfer taxes where no large transfer has resulted in reliance on the statement and further transfer is restrained. 297Pa335, 147A71.

1200–91 155Md384, 142A515; 176Minn 227, 222NW929.

1200–92 NJSup 151A367.

1200–93 82NH489, 136A124.

1200–96 170Ga467, 153SE26. [c] **Doctrine of set-off of wrongs is unknown to law.** 170Ga467, 153SE26.

1200–97 See also 228Ky780, 15SW(2d) 528.

1200–98½–New. There can be no estoppel where waiver of rights would be against public policy. 51SD432, 214NW 838.

1200–98½–New. A person may be estopped to deny the genuineness of his signature. 154Tenn241, 290SW39, 50 ALR1369.

1200–98¼–New. There is no estoppel as to facts which the court finds are not facts. CalA 264P1104.

1201–99 TexCivA 28W(2d)895. [a] (3) Seller of lots, representing that water would be furnished and mains provided, cannot claim ownership of mains with right to remove them. 31 OhA452, 167 NE474.

1201–3½–New. The owner of property may estop himself from shutting up, or denying to another the use of, a private road or driveway. 206 Iowa1084, 221NW825.

1201–5 175Ark50, 297SW1022.

1202–10 201 Iowa174, 206NW819 (estoppel to contest binding force of agreement); 204 Iowa70, 214NW486; 205 Iowa271, 215NW649, 217NW874; 1LaA 17; 259Mass573, 156NE721; 170Minn 495, 213NW40; 125 Okl194, 257P295; TexCivA 290SW307.

1202–12 106Conn34, 137A13.

1202–18 162Ga664, 135SE195, 217 [cit CJ].

1202–19 72CalA468, 237P833, 837 [cit CJ]; 114 OhSt1, 150NE726; 153Tenn1, 282SW199, 201 [quotCJ].

1202–21 20F(2d)386; 26F(2d)394, 397, [citCJ]; 27F(2d)64; 38F(2d)444; 11 CustA84, 87 [citCyc]; 214Ala406, 108S 42; 175Ark417, 299SW753; 180Ark671, 22SW(2d)553; 76CalA530, 245P451; 86 CalA239, 260P955; CalA 285P1062(2d case); 163Ga629, 137SE19; 45 Ida296, 261P237; 318 Ill432, 149NE225; Ill

173NE343; 232 IllA523; 204 Iowa1006, 216NW731; Iowa 228NW12; 128Kan 65, 275P1084; 213Ky840, 281SW1007; 217Ky132, 289SW222; 225Ky699, 9SW (2d)1020; 166La216, 116S889; 10LaA 202, 120S223(2dcase); 170La1007, 129 S618; 256Mass226, 152NE615; 211Mich 404, 217NW68; 248Mich419, 227NW 698; 170Minn495, 213NW40 [citCJ]; 313 Mo 268, 281SW402; 219MoA195, 270SW 427; MoA 293SW794; 191NC392, 131 SE760, 762 [quotCyc]; 193NC172, 136 SE561, 564 [quotCJ]; 52ND568, 204 NW188; 114 OhSt1, 150NE726, 730 [cit CJ&Cyc]; 117 Okl 199, 246P225; 126 Okl 232, 259P224; 129 Okl 7, 263P121; 284Pa561, 131A471; 287Pa205, 134A 422; 153Tenn1, 282SW199, 201 [quot CJ]; TexCommnA 5SW(2d)754; Tex CommnA 25SW(2d)828; TexCivA 284 SW339; TexCivA 296SW987; TexCivA 9SW(2d)437; 150Va508, 143SE690; NB [1925] 3DomLR1063 (entering into and instrumental in enforcing contract to others detriment); Sask [1926] 3Dom LR329. See also TexCivA 8SW(2d)230. [a] (6) Creditor voting stock for sale of property cannot dispute validity or propriety of sale. 287Pa205, 134A422. (7) Party cannot seek to avoid articles of adoption and at same time claim that it operates as contract against adopted child. TexCivA 286SW749.

1204-22 116Nebr764, 219NW4; 114 OhSt1, 150NE726, 730 [citCJ&Cyc]; 153 Tenn1, 282SW199.

1204-23 170Minn495, 213NW40 [cit CJ]; 153Tenn1, 282SW199, 201 [quot CJ].

1204-24 216Ky611, 288SW347; 127 Or 147, 271P57, 62 [quotCJ]; 284Pa561, 131A471.

1205-26 20F(2d)425; 121Kan312, 246 P982; 124Kan646, 261P579; 114 OhSt 1, 150NE726; 154SC424, 151SE788; Tex CivA 272SW228; Alta [1925] 3DomLR 509 (holding that signing note under protest and in uncertainty of legal rights did not estop maker from denying indebtedness thereon).

1205-27 103Conn436, 130A668; 124Kan 646, 261P579; 114 OhSt1, 150NE726; TexCivA 272SW228; Alta [1925] 3DomLR509 (holding that signing note under protest and in uncertainty of facts did not estop maker from denying indebtedness thereon).

1205-28 203Cal 219, 263P1007; 72CalA 468, 237P833, 837 [citCJ]; 84CalA214, 257P890; 202 Iowa192, 209NW523, 525 [citCJ]; 158La804, 104S722 (holding that where plaintiff suing for profits in joint adventure was not party to erroneous tax return made by defendant nor bound thereby, he could not have been prejudiced thereby); 114 OhSt1, 150NE 726; 139SC223, 137SE684. [a] (3) Where bank receiving money knew it was in payment of lien note, party executing renewal note therefor is not estopped from denying indebtedness thereon. Alta [1925] 3DomLR509.

1205-29 72CalA468, 237P833, 837 [cit CJ]; 85Colo 276, 275P905; 318 Ill 432, 149NE225; 200 Iowa562, 203NW702; 202 Iowa192, 209NW523, 525 [citCJ]; 124Kan646, 261P579; 114 OhSt1, 150 NE726.

1205-30 121 Or373, 254P1012, 51ALR 1466.

1205-31 14F(2d)328; 217Ala128, 115S 21, 23 [citCJ]; 72CalA468, 237P833, 837 [citCJ]; 318 Ill 432, 149NE225; 336 Ill 80, 168NE6 (no change in position to disadvantage); 13LaA600, 128S44; 249 Mich633, 229NW602; 114 OhSt1, 150 NE726; 139SC223, 137SE684; 108WVa 612, 152SE6.

1205-32 72CalA468, 237P833, 837 [cit CJ].

1205-33 15F(2d)823; 40F(2d)841; 170 Ga615, 153SE763; 318 Ill 323, 149NE 256; 233 IllA30; 119Kan644, 239P607; 161La114, 108S305; 233Mich390, 206 NW549; Mo 31SW(2d)201; 79Mont327, 256P497; 137Misc512, 241NYS637; 33 OhA532, 170NE31 (paying over money and later asserting claim to portion thereof); 50RI 336, 147A754; 154SC 424, 151SE788; TexCivA 272SW228; TexCivA 16SW(2d)891; TexCivA 29SW (2d)930. [d] 245NY1, 156NE76. [i] That defendant on request gave to purchaser of land from testator's estate security against claim of grandson does not estop them from disputing validity of claim. TexCivA 292SW273. [j] Refusal to accept amicable settlement creates no estoppel. 166La635, 117S745.

1206-34 Alta [1925] 3DomLR509 (promising to settle indebtedness).

1206-35 72CalA468, 237P833; 287Pa 205, 134A422. See also 225Ky258, 8SW (2d)377.

1206-36½-New. A tenant by entiretics is not estopped from claiming land. 191 NC334, 132SE17.

1206-37 222AppDiv126, 225NYS609; 137 Okl 168, 278P640. [b] Executrix having defeated action on notes on ground that obligations were individual held estopped to deny personal liability in subsequent action. 222AppDiv126, 225NYS609.

1207-38 27F(2d)64; 39F(2d)193; 213 Ala156, 104S277; 175Ark934, 2SW(2d) 32; 76CalA530, 245P451; CalA 293P 168; 81Colo 513, 256P13; 84Colo 409, 270P875; 229Ky806, 18SW(2d)277; 204 Iowa70, 214NW486; 3LaA442; 147Miss 758, 113S341; 57ND381, 222NW256; 114OhSt1, 150NE726, 730 [citCJ&Cyc]; 124 Okl 82, 254P73; 124 Or332, 263P 391; TexCommnA 29SW(2d)1004; Tex CivA 28SW(2d)584; 144Wash494, 258P 335; 150Wash49, 272P67. See also 168 Ark38, 269SW375. But see 249Mich306, 228NW711. [a] Execution sale purchaser in accepting redemption money from one who believed she purchased redemption right cannot retain money and also claim title. 229Ky806, 18 SW(2d)277.

1207-40 44 Ida178, 255P903, 905 [quot CJ]; 122Kan408, 252P240, 242 [citCJ]; 315Mo 597, 286SW93, 94 [quotCJ]; 73 Mont442, 236P670, 673 [citCJ]; 114 Nebr173, 206NW760, 763 [quotCJ]; Tex CivA 31SW(2d)501.

1208-41 44 Ida178, 255P903, 905 [quot CJ]; 315Mo 597, 286SW93, 94 [quot CJ]; 73Mont442, 236P670, 673 [citCJ]; 114Nebr173, 206NW760, 763 [quotCJ]; 132Misc534, 230NYS653.

1208-42 114Nebr173, 206NW760, 763 [quotCJ].

1208-43 44 Ida178, 255P903, 905 [quot CJ]; 114Nebr173, 206NW760, 763 [quot CJ].

1208-44 31Ariz519, 255P164. See also MoA 274SW477.

1208-47 TexCivA 293SW577.

1208-49 44 Ida178, 255P903, 905 [quot CJ].

1208-50 31Ariz519, 255P164; 234Ky 296, 28SW(2d)22; Wash 286P89; Wash 287P11. [a] Creditor accepting part payment is not estopped to sue for balance. 6LaA46.

1208-51 Wash 292P99.

1208-51½-New. A director suing a corporation on a written contract to pay a note has been held not estopped by parol agreement to receive payment from profits only. 81Colo 402, 255P982.

1208-56 127Kan512, 274P210; 167La 647, 120S38; 191NC392, 131SE760; Tex CivA 297SW334; TexCivA 24SW(2d) 509.

1209-59 24F(2d)822; 26F(2d)636; 28 F(2d)173; 31F(2d)65; 214Ala452, 454, 108S69 [citCJ]; 216Ala367, 113S592; 89CalA361, 265P271; 96CalA772, 274P 1024; 106Conn243, 137A769; 313Mo143, 281SW47, 45ALR189; 222MoA165, 2 SW(2d)806; 134Misc95, 234NYS87; 134 Misc339, 235NYS416; 136Misc500, 241 NYS202 (vendor, held not estopped to deny liability for contractor with vendee, where vendor's title was of record); 191 NC392, 131SE760; 198NC477, 152SE 403; 115 Okl 73, 242P254; 124 Or332, 263P391; TexCivA 15SW(2d)722; NB [1925] 3DomLR1063. See also 83NH 365, 142A689. [b] Corporation accepting benefits of contract to aid its formation cannot raise question of fraud in procuring charter and in granting it, in action on contract. TexCivA 18SW(2d) 737.

1210-61 51SD225, 213NW3; NB [1925] 3DomLR1063 (unnecessary party).

1210-64 106Conn243, 137A769.

1210-64½-New. that the party against whom estoppel was claimed was doing business under a fictitious name in violation of a statute requiring it to be registered; 313Mo 143, 281SW47, 45 ALR189.

1210-66½-New. or delivered conditionally; 52ND568, 204NW188.

1210-74 259Mass242, 156NE673.

1210-77 But see 102NJL148, 130A559.

1210-78½-New. An attorney has been held not estopped from setting up a lien claim against remaining assets of a bank in liquidation by acceptance of a dividend. 159La936, 106S386.

1210-81 23F(2d)391, 394 [citCJ]; 44 Ida643, 258P929; 201 Iowa1236, 207NW 591 (mining lease); 222Ky132, 300SW 327; Minn 232NW511(2dcase); 147 Miss758, 113S341; 191NC392, 131SE 760. [a] (4) Children exchanging expectant interests in mother's estate for share of other children in father's estate have been held estopped from claiming mother's land as contingent remaindermen. 313Mo 672, 282SW696.

1211-86 222AppDiv674, 225NYS97.

1211-86½-New. The beneficiary under a trust by will requiring it to be established out of stocks and bonds of testatrix at the market value, accepting interest on the face value of the trust as a temporary arrangement, was not estopped from asserting rights under the will. 293Pa570, 143A214.

1211-86½-New. Parties who acquiesce in court's construction of will and advancement of money in pursuance thereof are estopped to claim reversal. 135 Misc774, 238NYS533.

1212-3 95CalA365, 272P1084; 93Fla 143, 112S378; 38 OklACR132, 133 [quot CJ]; TexCivA 274SW662 (proceeds of sale of note distributed to defendant and heirs). [a] (3) Mortgagee, who having received payments from plaintiff, agreed to purchase mortgaged property at sale, and give deed of plot released from mortgage to plaintiff who had contract to purchase plot, is estopped to deny plaintiff's title to plot. 226AppDiv456, 235NYS735.

1212-5 85Colo 154, 274P816.

1212-7 98Fla203, 123S561(1stcase); 219 MoA195, 270SW427. [b] Redeeming property sold at judicial sale held waiver of irregularities of sale and party redeeming is estopped to claim that sale was invalid. 253Mass75, 148NE442.

1212-9 84 IndA555, 151NE740; 142 Okl 265, 286P799.

1212-15½-New. After purchaser completes payment of purchase price, retains possession of deed, and claims benefit thereof, he will not be permitted to object to description of property. 100 WVa464, 130SE807.

1212-15¼-New. Mortgagor purchasing at foreclosure sale and accepting deed but protesting against sale as unnecessary to raise amount required is not estopped from moving for order to repay amount paid. 215AppDiv588, 214 NYS298.

1213-26 236 IllA68; 134Misc634; 235 NYS595.

1213-27 See also 96CalA341, 274P379. [b] Maker and payee of notes, who represented notes were good, and thereby induced their acceptance as security, held estopped to allege prior payment. 218Ky846, 292SW513.

1213-28 [c] Expenditure of moneys received.-57ND381, 222NW256.

1213-29 322Mo1219, 18SW(2d)77.

1213-30 171Ark173, 283SW979; 77 Colo 504, 238P64; 159La855, 106S329; 307Mo 462, 271SW370; 132SC288, 128 SE705 (wife is estopped to question validity of judgment of divorce obtained in another state).

1213-31 170Ga279, 152SE575.

1214-36 157Tenn326, 8SW(2d)367.

1214-38 70 Iowa202, 30NW483; 203Ky 481, 262SW628.

1215-48 107US348, 2SCt62, 27Led378; 87Fed829, 31CCA238; 98Fed549; 186 Fed360 (excess of benefits over payments to contractor); 79Ala233; 16Cal 255; 26CalA641, 147P1183; 42CalA246, 183 P706; 109Conn700, 145A571; 5Dak54, 37NW761; 38 Ill 266; 98 Ill 415, 38AmR 97; 179 Ill 167, 53NE627; 100 IllA409 [rev 198 Ill 571, 65NE104, 92AmSR276]; 202 IllA139; IndA 67NE460; 121 Iowa 306, 96NW883; 53Kan126, 35P1112;

142Ky609, 134SW1164; 173Ky26, 189 SW1122, AnnCas1918E1084; 203Ky481, 262SW628; Ky 18BMon41; 93Minn336, 101NW495; 54Miss499; 100Mo 69, 12 SW914; 86Nebr238, 125NW527, 27LRA NS1130; 104Nebr546, 172NW203; 4Nev 20; 80NH361, 117A286; 93NJEq207, 115A925 [aff 92NJEq100, 111A645]; 61 NJL112, 38A692 (violation of ordinance); 83NJL293, 85A223; 86NJL101, 91A324; 17NY449; 21NY196; 93NY 250; NY 35Hun564; 9Misc610, 30NYS 424; 58Misc264, 109NYS396; NY 19 Johns60, 10AmD193; 6 OhCirCt247, 3 OhCirDec438; 16 OhCirCt541, 9 OhCir Dec241; 14 Or3, 12P1; 16 Or334, 18P 835; 20 Or355, 25P1020; 222Pa311, 71 A211, 21LRANS474; TexCivA 28SW 1052; 19CanSC581; 18 Ont95; 25 Ont 465; 1 OntWR44; 14QueSuperl51. But see 258Mass111, 154NE552; 258Mass 115, 154NE554.

1215-49 TexCivA 139SW894. See also 169Ga313, 159SE153(2dcase).

1215-53 62Mo 247.

1215-54½-New. Where a municipality enabled one to hold himself out as having authority to receive payment, it will be estopped from denying actual receipt by its proper officer. Sask [1925] 2DomLR713.

1215-54½-New. , or was beyond the authority of the particular officer. 89 IndA349, 166NE437.

1215-55 255Fed136; 282Fed998; 26 Ariz438, 226P531; 161Minn178, 201NW 414; 164Minn72, 204NW544; 130Miss 512, 94S460; 95MoA28, 68SW605; 113 NY423, 21NE121; 134NY532, 32NE87; 203NY589mem, 96NE1112 [aff 139App Div936mem, 123NYS1111mem]; 57NY Super109, 5NYS567; 48Misc258, 96NYS 795; 166NYM29; 166NYS972; 13OhNP NS394; 19RI413, 34A359, 32LRA740; 22SD233, 117NW131, 18LRANS402; Tex CivA 28SW42; 118Wis456, 95NW1057; 34Man642, [1925] 1DomLR645, [1925] 1 WestWkly419.

1216-59½-New. When the city is not estopped to set up the invalidity of the contract, the contractor is not estopped from setting up the same defense. 53 Ala561 (action on contract); 198Ala25, 73S406, 3ALR242; 213Mich460, 182NW 146 (both suits being for specific performance).

1216-62 206Iowa556, 221NW351, 62 ALR1606.

1216-63 6F(2d)845; 17F(2d)751; 23 F(2d)303, 241Ala358, 108S370; Cal 287 P262; Cal 290P290; 81Colo 513, 256P 13; 99Fla456, 126S794; 201Iowa1236, 207NW591; Iowa 229NW691, 217Ky 698, 290SW507; 219Ky579, 293SW1064; 220Ky706, 295SW1033; 229Ky806, 18 SW(2d)277; 236Ky54, 328SW(2d)558; 236Ky81, 32SW(2d)567; 166La479, 117 S562; 6LaA305, 308 [quotCyc]; Minn 233NW16; 115Nebr547, 213NW229; NJ Ch 143A820; 114 OhSt1, 150NE726; 139 SC223, 137SE684; 141SC265, 139SE625, 54ALR964; TexCivA 118SW(2d)258; TexCivA 298SW(2d)872; 145Wash664, 261P381, 383 [cit CJ]; 55ALR989; 193 Wis554, 211NW391; 196Wis275, 220NW 538. See also 97CalA643, 275P998; 163 Ga551, 136SE528. [c] 12F(2d)701; 241 NY544, 150NE547.

1217-66 16F(2d)512. See also 163Ga 551, 136SE528.

1217-67 234Mich322, 208NW41; Ont [1925] 2DomLR889. See also 127Misc 59, 215NYS244.

1217-69 16F(2d)512; 22F(2d)256; 216 Ala72, 113S1; 160La694, 107S493; 234 Mich322, 208NW41; 74Mont476, 241P 229; 134Misc129, 234NYS147; 192Wis 338, 212NW646.

1217-71 Pa 152A98. [a] **Where injury did not occur at time of diversion** of water, city was not estopped to object to diversion. Cal 287P475.

1217-72 216Ala572, 113S1.

1217-73 42Ida458, 246P304; 224Ky 441, 6SW(2d)487 (warning given); 233 Mich627, 207NW913.

1218-76 TexCivA 10SW(2d)132; 150 Wash249, 272P714.

1218-77 See also TexCivA 48W(2d)289.

1218-78 42F(2d)541.

1218-80 253Mass205, 148NE609, 41 ALR658.

1218-81 16F(2d)512; 173Ark1181, 292 SW669.

1218-82 218Ala296, 118S513; 74Mont 476, 241P229.

1218-82½-New. Rendition of account by defendant not amounting to account stated, at close of joint venture, which was rejected by plaintiff, does not estop defendant from later claiming additional items. 241NY544, 150NE547.

1218-82½-New. One who sought election to office with knowledge that an amendment called for reduction of salary, was not precluded on the ground of estoppel from asserting that the amendment was unconstitutional. CalA 270P 697.

1218-83 Ark 318W(2d)132; 220MoA 1004, 274SW894, 898 [cit CJ].

1218-86 43F(2d)597; 218Ala296, 118S 513; 168La394, 122S122; MoA 297SW 985; 32PortoRico 591 (partner is estopped to assert title in himself to property previously recorded and mortgaged as firm property with his knowledge); 141SC265, 139SE625, 54ALR964; 193 Wis554, 214NW394; Ont [1925] 2DomLR889. [a] (4) Principal who expressly recognized broker's right to commission on sale of lot, and paid commission, could not claim that lot had been excepted from original listing contract. 193Wis554, 214NW394. [c] **Railroad accepting all government property for shipment at reduced rates** held not estopped to claim legal rates for particular shipments. 32F(2d)887.

1219-90 32Ariz545, 260P1096 (retention of part of leased premises); 127 Misc59, 215NYS244.

1219-91 72CalA462, 237P563; 241NY 544, 150NE547; 124 Okl 82, 254P73.

1219-91½-New. Acts of administrator in settling estate. 74Mont476, 241P229.

1220-2 219Ky579, 293SW1064, 1068 [cit CJ]; 192NC305, 136SE716.

1220-2½-New. Estopped against remaindermen, who were infants, to resist lien for improvements made by wife of life tenant, will not be invoked since there was no fraud, although the wife acted under mistake. 215Ky5, 284SW 101.

1220-4 Cal 265P216; 162Ga664, 135SE 195, 87IndA281, 156NE575; 210Ky161, 276SW156; 91LaA78, 119S81; 320Mo 120, 68W(2d)935; 84Mont601, 277P411; 99NJEq441, 131A832; 139 Okl 240, 281 P760; TexCivA 8SW(2d)319. But see TexCivA 58W(2d)594.

1221-5 40F(2d)91; 83Colo 282, 264P 662; 114 OhSt1, 150NE726; 118Tex415, 16SW(2d)269; TexCivA 298W(2d)461. [a] **Domiciliary administrator is estopped** from attacking decree after receipt of benefits of it by legatees. 40F(2d)91.

1221-6 GaA [155SE793; TexCivA 292 SW339.

1221-7 See also 204Cal 618, 269P645, 62 ALR1239.

1221-12 222Ky361, 300SW913.

1221-12½-New. Trustees for holders of mortgage bonds are not estopped to object to conduct of judicial sale by acquiescence of some of individual bondholders. 158La941, 105S21.

1221-12½-New. Trustee in bankruptcy held not estopped, by appearance in a foreclosure suit in the state court, from further questioning the validity of the assignment. 14F(2d)16.

1221-13 163La397, 111S799; 145Miss1, 110S851.

1221-14 84IndA555, 151NE740; 130 Kan103, 285P526; 307Mo 462, 271SW 370; Mo 293SW371; TexCivA 29 SW(2d)461; 102WVa59, 135SE171. See also 213Ala173, 104S530.

1222-18 But see 163La167, 111S664.

1222-18½-New. An infant remainderman not made a party to partition proceedings is estopped to assert title inconsistent therewith where, upon becoming of age, he accepted the benefits of the partition by joining with the life tenant in a warranty deed of a part of the lands set apart and mortgaged his interest in other parts and permitted his coparcener without protest to convey and incumber lands set apart to such coparcener. 114 OhSt1, 150NE726.

1222-19 42F(2d)440; 318Ill266, 149 NE215; 111Nebr764, 209NW609; 52SD 458, 218NW599; TexCommnA 272SW 440 (party treating property as personalty in selling it held estopped to deny it was personalty as against another claiming lien for price); TexCivA 283 SW1085. [d] (8) Refusal by mortgagee in possession of conditional offers of certain rental for premises does not estop him from claiming that reasonable rental value was less than such sum. 114Nebr764, 209NW609. (9) Grounds for refusal to transfer stock held not inconsistent. 253Mass8, 149NE112. (10) Other facts not within rule. 8F(2d)801; 222MoA503, 281SW78; 225AppDiv34, 232NYS1. [j] **Estoppel to assert relinquishment of rights under license.**–233 Mich587, 207NW905. [k] **Refusal to issue bills of lading.**–213Ala108, 104S33.

1222-20 TexCivA 297SW563.

1223-21 253Mass160, 148NE138 (thus, where one party refuses to deliver goods for which other has partly paid, fact that latter continues to pay interest on balance due does not estop him from rescinding contract and suing to recover back what he has paid).

1223-21½-New. Failure of party to divulge all of its defenses before suit was brought is not ground for estoppel. TexCivA 276SW448.

1223-21½-New. Grantors who conveyed property to a third person after broker refused to accept deed cannot claim that he did accept it. Conn 152A145.

1223-23 13F(2d)873; 25F(2d)271; 29 F(2d)712; 39F(2d)181; 214Ala582, 108 S450; 218Ala296, 118S513; 130Kan103, 285P526; 222Ky751, 28W(2d)365; 9 LaA509, 121S251; 153Md31, 137A482; 321Mo995, 15SW(2d)834; Mo 31 SW(2d)1059; MoA 296SW849; NJ 139 A703; 32NM252, 255P630; 191NC392, 131SE760; 197SC177, 148SE545; NC 154 SE746(2dcase); 26 OhNPNS347, 355 [quot Cyc]; 118 Okl 76, 246P844; 123 Or72, 260P999; 298Pa77, 148A41; 54 SD170, 222NW665; TexCivA 258W(2d) 274; 151Va954, 145SE722; 147Wash 602, 266P1053; 100WVa551, 131SE252; 39Wyo 414, 273P173. But see 202 Iowa 802, 211NW429.

1224-24 207 Iowa430, 223NW154; 249 Mich685, 229NW479. But see 13F(2d) 873. [a] (2) **Thus unsuccessful action by landlord in summary proceedings** does not estop him from receiving rent. 234Mich672, 209NW82.

1224-25 218Ala498, 119S229; 37GaA 564, 141SE659; 205 Iowa612, 218NW 282; 163La397, 111S799. [b] (4) Other positions held not inconsistent. 7 F(2d)855; 76CalA232, 245P235; 163Ga 138, 135SE734; 231Ky284, 21SW(2d) 445; 169La35, 124S137.

1225-27 222MoA503, 281SW78.

1225-28 36F(2d)869; 222MoA503, 281 SW78.

1225-30 35F(2d)273; 158La394, 104S 183; TexCivA 299SW659.

1225-35 81CalA176, 253P191; 247Mich 89, 225NW525; 142SC477, 141SE15; TexCivA 284SW339.

1226-36 23F(2d)325 (held not estopped); 298Pa77, 148A41. See also 222 MoA503, 281SW78.

1226-37 214Ala582, 108S450, 451 [quot CJ]; 29Ariz23, 239P290; 201 Iowa107, 204NW294, 48ALR394; 203 Iowa381, 213NW731; Kan 291P777; 160La683, 107S489; 162La123, 110S172; 147Miss 412, 112S24; NJ 144A169; RI 138A 184; TexCivA 218W(2d)744; 150Va 33, 142SE402; 151Va954, 145SE722. [d] (2) Sellers having right to recover on alleged compromise or modified contract will not be heard to contend there was no consideration therefor. 147 Miss412, 112S24. [m] 165La20, 1158 353. [q] **After damages have been allowed** landowner for laying out road under statutory condemnation proceedings, county commissioners cannot on appeal defeat recovery by showing previous dedication by prescription. 119Kan598, 240P591. [r] **Parties to compromise of trust estate,** with infant, based on child's illegitimacy, cannot adopt inconsistent position in seeking to support compromise by claiming that it was family settlement. RI 138A184. [s] **Objections inconsistent with granted requested submission of issues.**–TexCivA 78W(2d) 1110.

1226-40 TexCivA 218W(2d)744.

1227-42 31F(2d)535; 41F(2d)177; 215 Ala550, 112S115; 221MoA215, 300SW

1054. [a] (3) Pleas held not to estop defendant from denying that driver was his agent. 318 Ill 616, 149NE591, 42 ALR1406. [b] (2) Party obtaining injunction against action at law may not invoke laches. 215Ala550, 112S115.

1227-43 321Mo 995, 15SW(2d)834.

1227-45 TexCivA 297SW503.

1228-69 8F(2d)490; 13F(2d)873; 26 F(2d)394; 29Ariz325, 241P515; 68CalA 367, 229P873; 82Colo 503, 261P874; 162Ga44, 132SE639; 163Ga444, 136SE 410; 34GaA389, 129SE793; 35GaA562, 134SE182; 234 IllA332; 202 Iowa472, 210NW558; 127Kan777, 275P178; 227 Ky358, 13SW(2d)260; 245Mich351, 222 NW768(1stcase); 246Mich415, 224NW 374; MoA 272SW1087; NJPrerog 150 A52; 220AppDiv415, 221NYS630; 35 OhA452, 172NE563; 51SD225, 213NW 3; 115Tex93, 276SW424; 118Tex415, 16SW(2d)269; TexCivA 24SW(2d)87; TexCivA 25SW(2d)950; 100WVa551, 131SE252. [d] Legatee estopped to vacate distribution based on intestacy through her own petition. 162La546, 110S750.

1229-70 100CalA217, 279P810(2dcase); 164Ga96, 137SE833; 35GaA462, 133SE 295; 203 Iowa276, 211NW386; 297Pa 68, 146A448; 47RI274, 132A721, 45ALR 830. But see 13F(2d)873. [c] Defense in former action, to which there was no denial, and of which there was no trial, held not to estop later apparently inconsistent position. 203 Iowa276, 211NW 386.

1230-71 See also 160Ga556, 128SE766 (where applicant for injunction is not seeking to enforce prior application for mandamus). [f] (2) Where prior action discontinued. 106Conn41, 137A159.

1230-72 197Cal 396, 240P1010 (position in prior proceedings held not inconsistent with present claim); 160Ga556, 128 SE766 (remedy by mandamus may not be inconsistent with injunction); 121 Kan312, 246P982; 251Mich512, 232NW 178; 322Mo 450, 17SW(2d)505; 195Wis 458, 218NW834. [a] (2) Person claiming interest in property may be held to have lesser interest than that originally claimed. 251Mich512, 232NW178.

1230-73 [a] (7) 24F(2d)595. But see Wyo 290P561.

1230-74 47RI274, 132A721, 45ALR830.

1231-75 204 Iowa1378, 215NW754; 121 Kan312, 246P982.

1231-76 106Conn41, 137A159; 204 Iowa1378, 215NW754; Alta [1926] 3 DomLR145 [1926] 2WestWkly401.

1231-79 202 Iowa557, 210NW535.

1231-81 165La552, 115S747.

1231-85½-New. An offhand opinion on a legal question given by one of the attorneys of a party, at invitation of court, will not bind client in another case. 169Minn15, 208NW952.

1231-87 CalA 288P1111; 96Fla203, 118S54; 161Ga360, 130SE681; 234 IllA 332; 245Mich430, 222NW749(2dcase).

1232-91 213Ala173, 104S530; Cal 265 P929; 315Mo 872, 288SW54(2dcase); 319Mo 787, 5SW(2d)70; TexCommnA 12SW(2d)196; TexCivA 293SW304; 100WVa551, 131SE252. But see Mo 291SW485. [a] Validity of bail bond.-TexCivA 7SW(2d)949.

1232-92 19F(2d)277; 41F(2d)319; Ga 155SE7; 255 IllA175; 170La879, 129S515; Mo 31SW(2d)28; Tex 12 SW(2d)662.

1232-95 [c] Service by publication may not be set aside by plaintiff as unwarranted under statute, where counterclaim would be barred by limitations had there not been suit. 24 OhNP NS142.

1232-97 17F(2d)80; 34Ariz95, 268P 181; 238Mich261, 213NW120.

1232-98 35GaA40, 132SE108. [a] One invoking jurisdiction is not estopped to deny it in another proceeding. 281US470, 50SCt374, 74Led972.

1233-4 97CalA377, 275P840.

1233-8 163Ga444, 136SE410; 247 IllA 496; 292Pa378, 141A250; 146Wash 404, 263P593.

1233-9 [b] 235Mich240, 209NW124.

1235-32 204 Iowa1378, 215NW754 (where issues differed); 235Mich240, 209NW124. [d] Wrongful seizure.-166 La635, 117S745.

1235-33 MoA 256SW155; 80Mont214, 260P711.

1236-44 151Miss655, 118S138; 80 Mont214, 260P711.

1236-52 26 OhNPNS347, 355 [citCyc].

1237-56 56ND60, 215NW913, 917 [cit CJ].

1238-58 129Misc760, 223NYS701.

1238-63 5F(2d)816; 222MoA439, 7 SW(2d)434; RI 126A805; 47RI 299, 132A883; TexCivA 8SW(2d)726. [a] (6) Where one has represented to a legatee-executor, due to negligent failure to consult his own books, that certain stock belongs to estate and has paid executor dividends received thereon for years and legatee has altered his position in consequence thereof, he cannot afterward assert title in himself, nor recover dividends. 47RI 47, 129A805.

1238-63½-New. In ejectment action, defendant, holding under tax deed, is estopped to deny plaintiff's title where he recognized it by sending notice of right to redeem on procuring his tax deed. 237Mich361, 211NW634.

1239-64 219Ala216, 121S517; 228Ky 161, 14SW(2d)395; 300Pa303, 150A633.

1239-65 See also 218Ky346, 291SW 409.

1239-68 204 Iowa1378, 215NW754; TexCivA 291SW631.

1239-69 204 Iowa1378, 215NW754.

1239-70 5F(2d)816 (accepting deed and lease of portion of land in controversy does not estop from asserting title to remaining portions); 144Miss 256, 109S706. [a] Defendant contracting with one heir regarding his rights as grantee was not estopped from denying interests of other heirs. LaA 129 S218.

1239-71 2LaA124.

1240-74 34GaA321, 129SE565 (subagent intrusted with property of corporation by officer is not estopped to deny officer's title and assert title of corporation).

1240-76 32PortoRico 836.

1240-85 123Kan646, 650, 256P1012 [quotCJ]; TexCivA 272SW283, 288 [quotCJ].

1241-86 93CalA717, 270P232(2dcase); 318 Ill 266, 149NE245; 123Kan646, 650, 256P1012 [quotCJ]; 240Mich23, 214 NW951; TexCivA 272SW283, 288 [quot CJ]; 39Wyo 84, 270P167. [d] 106 Conn41, 137A159; 124Me369, 129A488. [e] Failure to assert claim, on inquiry, held waiver of rights to property and party is estopped from making any claim thereafter. 98NJEq70, 130A454. [f] Reliance on waiver must be shown. 229AppDiv443, 242NYS615.

1241-87 TexCivA 272SW283, 288 [quot CJ].

1241-89 205Cal496, 271P898; 208Ky 803, 272SW52; 154Tenn241, 290SW39, 41 [citCJ], 50ALR1369; TexCivA 288 SW580, 581 [citCJ].

1242-92 14F(2d)362; 19F(2d)781; 24 F(2d)791; 33F(2d)788; 40F(2d)2; 213 Ala95, 104S287 (estoppel held not ground for demurrer); 31Ariz347, 253 P626; 198Cal 196, 244P335; 200Cal 419, 253P715; 73CalA147, 238P748; 73CalA655, 239P56; 83CalA18, 256P 298; 87CalA188, 262P53(2dcase); 89 CalA209, 264P507; 90CalA83, 265P835; CalA 273P587; 99CalA327, 278P255; 101CalA310, 281P663; CalA 288P785; 83Colo 533, 266P713; 86Colo 493, 283 P1042; 163Ga694, 137SE17; 163Ga776, 137SE22; 47 Ida589, 277P548; 86 IndA653, 159NE469; 214Ky234, 282 SW1092; 229Ky173, 16SW(2d)759; 233Ky661, 26SW(2d)543; 2LaA734; 238Mich112, 213NW458; 314Mo 474, 283SW990; 315Mo 849, 288SW359; 316 Mo 129, 289SW814; 317Mo 505, 297 SW362 (must be pleaded); 319Mo899, 8SW(2d)834; 321Mo 639, 12SW(2d) 453 (waiver); 221MoA329, 273SW772; MoA 296SW1057; MoA 18SW(2d)114; 73Mont180, 235P770; 75Mont207, 243 P573; 79Mont485, 257P406; 115Nebr 493, 213NW587; 115Nebr882, 215NW 131; 55ND184, 212NW848; 120 OhSt 72, 165NE579; 25 OhA252, 157NE901; 26 OhA478, 160NE93; 115 Okl 1, 240P 1063; 116 Okl 245, 244P191; 118 Or 436, 246P733; SD 230NW229; 159Tenn 520, 19SW(2d)251; TexCommnA 14 SW(2d)834; TexCivA 274SW660 (necessary to plead estoppel); TexCivA 281 SW233; TexCivA 281SW646; TexCivA 282SW638; TexCivA 283SW626; Tex CivA 4SW(2d)605; TexCivA 9SW(2d) 374; TexCivA 10SW(2d)1023; Tex CivA 15SW(2d)661; 66Utah82, 240P 1105; Utah 274P136; Ont [1927] 3 DomLR302. [h] In equity, facts setting up estoppel in pais must be set out in pleading, though term itself need not necessarily be used. 154Tenn 241, 290SW39, 50ALR1369. [i] In California.-200Cal 419, 253P715.

1243-94 PrEdwIsl [1930] 1DomLR 838.

1243-99 TexCivA 286SW749.

1244-2 208Cal 420, 281P613; 101CalA 310, 281P663; CalA 285P1096.

1244-3 8F(2d)518; 83CalA18, 256P 298.

1244-4 239Mich354, 214NW87; 21 SaskLR6, [1926] 4DomLR93, [1926] 2 WestWkly800. But see 37GaA275, 139 SE526.

1244-6 18F(2d)611 (in equity); 220 Ala86, 124S234(2dcase) (trover); 75 CalA299, 242P914; CalA 285P1062 (2dcase).

1244-7 19F(2d)781; 41F(2d)319; 198 Cal 196, 244P335; Cal 289P844; CalA 284P736 (complaint not disclosing basis of plaintiff's claim); 73Mont180, 235P 770; 118 Or436, 246P733; Wis 230NW 605.

1245-8 19F(2d)781; 198Cal 196, 244P 335.

1245-10 19F(2d)781. [a] 75CalA299, 242P914.

1245-13 Cal 291P170; 86CalA239, 260 P955; 161Ga849, 133SE260.

1245-18 201 Iowa1118, 206NW668, 669 [citCJ]; Kan 291P777; MoA 16SW(2d) 1007; 129 Okl 222, 264P164.

1245-19 84Mont38, 274P296.

1246-22 101CalA310, 281P663.

1246-23 19F(2d)350; 92CalA334, 268P 438; 253 IllA20; 73Mont180, 235P770.

1246-24 161Ga849, 133SE260; 117Nebr 265, 220NW285.

1246-25 Ga 133SE260, 263 [citCJ].

1246-26 101WVa310, 133SE360, 361 [citCJ].

1246-29 [c] Mortgagee enforcing grantee's assumption of mortgage debt need not plead that grantee by taking and retaining possession is estopped to assert defect in title. 201 Iowa561, 207 NW610.

1246-31½-New. Where party does not know claim must ultimately rest on estoppel, rule as to specially pleading estoppel is inapplicable. Cal 289P844.

1246-33 198Cal 196, 244P335; 198Cal 645, 246P1043; 12LaA512, 126S577; 316Mo 129, 289SW814; 319Mo 899, 8SW (2d)834 (law of forum); 75Mont207, 243P573; TexCivA 286SW749; 143Va 291, 130SE411 (estoppel not available where not pleaded in equity suit); 101 WVa310, 133SE360, 361 [citCJ]. See also 74CalA637, 241P576.

1247-35 216Ala21, 112S428.

1247-36 216Ala21, 112S428.

1247-37 216Ala21, 112S428.

1247-38 216Ala21, 112S428.

1247-39 216Ala21, 112S428.

1247-40 216Ala21, 112S428.

1247-40½-New. Estoppel pleaded by way of reply does not ordinarily set up a cause of action amounting to departure. 315Mo 1007, 287SW455.

1247-45 [a] (1) 176Minn227, 222NW 929; 82Mont364, 267P299. (5) Complaint. 92CalA334, 268P438. [b] Forms held insufficient.-314Mo 474, 283SW990.

1247-46 8F(2d)518; Ala 127S844 (allegations held sufficient); 31Ariz347, 253P626, 629 [citCJ]; Cal 290P577; 90 CalA83, 265P835; 170Ga784, 154SE451; 47 Ida589, 277P548; 247 IllA532, 537 [citCJ]; IndA 173NE334; 10LaA212, 120S666; 314Mo 474, 283SW990; 315 Mo 849, 288SW359; Mo 28SW(2d)84(2d case); 79Mont485, 257P406; 140 Okl 210, 282P287; 144 Okl 176, 289P774 (allegations held sufficient); TexCivA 278 SW873; TexCivA 16SW(2d)891. [a] (3) Allegations that directors of bank which was county depository, upon whose bond such directors were sureties, knew that county treasurer was depositing money in such bank in re-

liance upon the bond and made no objections thereto nor effort to terminate their obligation is not sufficient plea of estoppel. 75Mont369, 243P1093. [c] **Facts constituting estoppel need not be pleaded as such.**-86Colo 493, 283P1042. [f] **Plea held not to allege estoppel.**-41 GaA537, 153SE615.

1248-47 315Mo 849, 288SW359, 364 [quotCJ].

1248-48 315Mo 849, 288SW359, 363 [citCJ].

1248-49 31Ariz347, 253P626; 315Mo 849, 288SW359.

1248-51 26 OhA478, 160NE93.

1248-52 197Cal 43, 239P401; 164Ga 474, 139SE18; 205 Iowa639, 216NW99; MoA 208W(2d)296; MoA 308W(2d)160; 118Nebr557, 225NW688; 55ND184, 212 NW848, 851 [citCJ]; 155Tenn169, 290 SW973; TexCivA 274SW288; TexCivA 289SW723; Utah 289P151. [a] (1) TexCivA 274SW288.

1249-54 42 Ida567, 248P447; 55ND184, 212NW848.

1249-59 219Ala616, 123S79, 64ALR 1550; 163Ga778, 137SE237.

1249-61 87Colo 207, 286P109; TexCivA 278SW873.

1249-62 13F(2d)607; 50Nev371, 261P 654.

1249-63 221MoA936, 288SW950.

1250-71 315Mo 849, 288SW359.

1250-73 161Ga849, 133SE260; 58ND 846, 228NW214.

1250-77 208 Iowa764, 224NW45; 216 Ky611, 288SW347.

1250-79 315Mo 849, 288SW359; 221 MoA329, 273SW772. See also TexCivA 168SW(2d)926.

1250-80½-New. Extraneous issues are immaterial in a case involving estoppel. 77CalA417, 246P1067.

1250-80½-New. Evidence admissible under defendant's denials and affirmative defense setting up tender of amount due. Mont 286P415.

1250-82 14F(2d)328, 329 [citCJ]; 19 F(2d)110; 200Cal 284, 253P137; CalA 266P801; CalA 280P1013; CalA 284P 736; CalA 287P573; 83Colo 533, 266P 713; 99Fla456, 126S794; 165Ga200, 140 SE507; 235Ky502, 31SW(2d)893; 36 GaA684, 137SE843; 320 Ill 308, 150NE 913; Ill 173NE281; 203 Iowa51, 212NW 362; 204 Iowa1378, 215NW754; Iowa 228NW77; 232Mich356, 205NW111; 143Miss146, 108S424, 47ALR45; 315Mo 849, 288SW359; MoA 279SW246; 225 AppDiv379, 233NYS364; 198NC433, 152 SE34; 22 OhA146, 154NE47; 140 Okl 210, 282P287; Pa 151A573; Tex CommnA 291SW857; TexCivA 271SW 233; TexCivA 284SW705; TexCivA 3 SW(2d)911; 143Va98, 129SE354. [b] 8F(2d)588; 117Nebr234, 220NW236 (knowledge of facts must be proved).

1251-84 [c] **Lender must be presumed to have relied on abstract of title when** he asked for no further showing of title. Mo 298SW(2d)100.

1251-87 TexCivA 299SW522 (estoppel by deed).

1251-88 136Misc500, 241NYS202 (presumption of honesty).

1251-89 101CalA781, 282P528.

1251-89½-New. One against whom the estoppel operates under the proofs has the burden of avoiding its effect. 203 Iowa51, 212NW362.

1251-90 170Gal, 152SE65; 37GaA559, 140SE770; 46 Ida754, 270P1062; 166La 479, 117S562; 256Mass431, 152NE710; 140 Okl 210, 282P287; TexCommnA 25 SW(2d)828.

1252-92 133 Okl 252, 271P839.

1252-93 42F(2d)541; 200Cal 284, 253 P137; 85CalA1, 258P690; 15DelCh76, 132A144, 147 [quotCJ]; 203 Iowa51, 212NW362; 205 Iowa474, 218NW329; 1LaA568; 241Mich547, 217NW756; Mo 308W(2d)1009; 82NH489, 136A124; 51 ND219, 199NW948; 53ND797, 208NW 82; TexCivA 291SW631. See also 127 Me406, 144A1. [a] 219Ala87, 121S91; 175Ark1169, 300SW417; 200Cal 81, 252 P607; 203Cal 347, 264P477; CalA 293P 93; 82Colo 264, 259P1033; 15DelCh76, 132A144; 317 Ill 126, 147NE793 (estoppel against claim of trust by person who allowed property to remain in name of another and made statements of record that such person owned property); 230Ky769, 20SW(2d)1002; 232Mich370, 205NW196 (estoppel to assert interest to defeat lease held established); 165 Minn1, 205NW444; 179Minn161, 228 NW603; MoA 256SW509; 116Nebr291, 216NW831; NJSup 151A367; 52ND 568, 204NW188; 128 Okl 286, 262P672; 123 Or215, 261P691; 139SC223, 137SE 684; TexCivA 274SW288; TexCivA 289 SW442; TexCivA 21SW(2d)531; Tex CivA 30SW(2d)511; 187Wis206, 204NW 476. [b] 44F(2d)192; 200Cal 81, 252P 607; 200Cal 284, 253P137; 74CalA333, 240P39; 76CalA232, 245P235; 78CalA 334, 248P526; 78CalA713, 248P750; 80 CalA1, 251P830; 85CalA80, 258P1003; CalA 286P700; CalA 290P458; CalA 292P157; 46 Ida181, 266P1089; 318 Ill 616, 149NE591, 42ALR1406 (evidence insufficient to show conduct estopping defendant from denying that driver of automobile was his servant); 201 Iowa 107, 204NW294, 48ALR394; 201 Iowa 722, 207NW745; 205 Iowa51, 217NW 557; Iowa 228NW77; Iowa 232NW496; 129Kan528, 283P638; Kan 292P757; 210Ky575, 276SW500 (listing of taxes of decedent in county by his brother held not to estop him from denying that county was domicile of decedent); 214 Ky193, 282SW1102; 126Me299, 138A 170; 241Mich547, 217NW756; 165Minn 239, 206NW405; 320Mo 474, 78W(2d) 691; Mo 30SW(2d)1009; 75Mont369, 243P1093; 117Nebr224, 220NW236; 225AppDiv379, 233NYS364; 160NC138, 129SE424; 194NC363, 139SE593; 196 NC79, 144SE559; 198NC433, 152SE34; 51ND219, 199NW948; 52ND169, 201 NW691; 291Pa497, 140A527; 142SC56, 140SE236; 150SC493, 148SE554; Tex CivA 21SW(2d)83; 143Va98, 129SE354; 35Wyo 10, 246P27 (evidence insufficient to show estoppel to deny passing of title to materials for construction of building). (2) To sustain judgment based on estoppel. 102CalA571, 283P 314. [c] 180Ark671, 22SW(2d)553; 167Ga655, 146SE475; 235Ky502, 31SW (2d)893; 178Minn103, 226NW192; 314 Mo 474, 283SW990; TexCivA 31SW(2d) 501; 135Wash384, 237P704.

1253-94 200Cal 284, 253P137; 15DelCh 76, 132A144, 147 [quotCJ]. See also 225AppDiv379, 233NYS364.

1253-94½-New. or upon mere inference; 51ND219, 199NW948.

1253-95 200Cal 284, 253P137; 76CalA 232, 245P235; 15DelCh76, 132A144, 147 [quotCJ]; Mo 308W(2d)1009.

1253-97 19F(2d)186; CalA 285P340; 85Colo 255, 274P926; 249 IllA337, 345 [quotCJ]; Minn 232NW519; MoA 16 SW(2d)1007; 52ND568, 204NW188, 194 [citCJ]; 156SC356, 153SE280. See also TexCivA 20SW(2d)1090(2dcase).

1253-98 178Ark1200, 108W(2d)33; 207Cal 600, 279P664, 64ALR1412; 77 CalA417, 246P1067; 37GaA559, 140SE 770; 45 Ida595, 264P233; 127Me406, 144A1; 128Me376, 147A759(2dcase); 157Md341, 146A223; 253Mass160, 148 NE138; 263Mass10, 160NE329; Mass 165NE873; Mass 165NE889; 198NC18, 150SE489; 52ND568, 204NW188; 132 SC16, 128SE876, 41ALR592; 143SC429, 141SE721; 156SC356, 153SE280; Tex CivA 282SW267; TexCivA 283SW626; TexCivA 284SW705. See also MoA 275 SW566. [a] 75CalA299, 242P914. [b] **Question of fact in trial by court.**-51ND 219, 199NW948; TexCivA 48W(2d)86.

1253-99 37GaA559, 140SE770.

1253-2½-New. Direction of verdict for defendant on the ground of estoppel not pleaded is not authorized, whether or not the evidence was sufficient conclusively to show grounds for estoppel. 163Ga776, 137SE22.

1253-4 52ND568, 204NW188; 123 Or 33, 261P57. [b] **Instructions held erroneous.**-174Minn554, 219NW864.

1253-7 See also 123 Or33, 261P57.

1254-9 176Minn227, 222NW929 (instruction held proper).

1254-14 101CalA310, 281P663; 121 Or 236, 252P400.

1254-15 14F(2d)362; 121 Or236, 252 P400. See also 20F(2d)462.

1254-18 201 Iowa506, 207NW761. [a] **Instruction held erroneous.**-170Gal, 152 SE65.

1254-20½-New. An instruction on waiver and estoppel is between the two in respect to the necessity for reliance. 201 Iowa506, 207NW761.

1254-21 [a] **Findings held not to establish estoppel.**-Cal 287P475.

1254-21½-New. Finding of estoppel may be implied from express findings. 198Cal 196, 244P335.

1254-22 73CalA655, 239P56; 95CalA 685, 273P585. [a] **Findings held not to sustain judgment.**-102CalA571, 283P 314.

1254-23 [a] **Findings not warranting conclusions of law such as to create estoppel.**-51ND219, 199NW948.

1254-23½-New. The findings established the fact that there was no estoppel. Cal 278P840.

ET AL

1255-27 77Mont182, 250P812.

ETC. or &C.

1255-29 66Utah550, 244P901, 904 [quot CJ].

1255-33 66Utah550, 244P901, 904 [quot CJ].

1255-34 66Utah550, 244P901, 904 [quot CJ].

1255-35 66Utah550, 244P901, 904 [quot CJ].

1255-36 66Utah550, 244P901, 904 [quot CJ].

1255-37 66Utah550, 244P901, 904 [quot CJ].

1256-50 66Utah550, 244P901.

EVENING

1259-12 216Ala4, 112S433.

1259-13 21AlaA571, 110S65.

EVERY

1260-61 285Pa16, 131A482, 483 [quot CJ].

1260-67 217Ky615, 290SW480; 51SD 262, 213NW500.

EVICTION

1263-57 [b] **Eviction if applicable to licensing patents** is conditioned on adjudication of patent's invalidity or decree enjoining practice of invention. 43F(2d)663.

1263-65 NJSup 135A350.

EVIDENCE

22 C. J.-65-2 [a] 146SC138, 143SE674.

65-8 [a] **General rule pertaining to evidence** is rule of law. 41F(2d)162.

65-9 121Kan601, 249P682, 683 [quot CJ].

65-10 22AlaA6, 113S648 [citCJ]; 121 Kan601, 249P682, 683 [quotCJ].

65-15 144SC452, 142SE725, 728 [quot CJ].

65-16 See also Mo 23SW(2d)1.

66-17 7F(2d)808; 51ND445, 200NW 20; 146Va574, 131SE841. [c] **Presumptive evidence** is indirect or circumstantial evidence. 7F(2d)808. [d] **Circumstantial evidence** is admissible to show **alleged defalcations of deputy county treasurer** in action against surety. 143 Va291, 130SE411. [e] **Other definitions.**-48 Ida439, 282P489.

66-24 But see 153Tenn84, 282SW376.

66-25 43 Ida180, 250P239.

67-27 90Fla381, 106S741; 47 Ida668, 279P291.

67-28 90Fla381, 106S741; 26 OhA442, 160NE478.

67-30 24 OhA66, 156NE616. [a] 33NM 193, 265P29.

67-32 138Ark517, 212SW319; 30 Ida 623, 166P567; 120Me114, 113 A11; 177 AppDiv596, 164NYS239; 27 OhA245, 160NE725; 64Wash47, 116P468; Greenleaf Evid. § 1 [cit 108C268, 273].

67-35½-New. "Proof" means competent, legal evidence. 104NJL87, 139A 419.

68-40 319Mo 835, 58W(2d)28; Wis 232 NW593.

68-42 51ND246, 199NW930.

68-43 30F(2d)951; 31F(2d)769; 213 Ala115, 104S28; 216Ala290, 113S18, 52 ALR1075; Ala 127S832; Ala 128S602; 69CalA301, 231P583; 82Colo 13, 257P 247; 163Ga778, 137SE237; 166Ga76, 142SE667 (usually plaintiff); 34GaA 263, 129SE108 (burden rests on plaintiff to prove his case); 35GaA528, 134 SE126; 208 Iowa970, 226NW117 (on

plaintiff to prove allegations of his petition); 119Kan399, 239P972; 208Ky591, 271SW668; 2LaA34; 2LaA472; 4LaA558; 5LaA82; 5LaA152; 8LaA70; 8LaA275; 12LaA698, 127S75; 13LaA374, 128S62; 241Mich297, 217NW12; 172Minn439, 215NW678; 175Minn398, 221NW529; 220MoA1067, 279SW727; 77Mont91, 250P11; 79Mont91, 254P1070; NH 149A746; 102NJEq347, 131A919, 920 [citCJ]; NJ 144A585(2dcase); 222AppDiv371, 226NYS309; 136Misc141, 239NYS568; 136Misc664, 240NYS502; 189NC482, 127SE593; 190NC209, 129SE585, 42ALR1299; 22 OhA44, 153NE919; 139 Okl 212, 282P622; 119 Or277, 241P46; TexCivA 283SW285; TexCivA 283SW288; TexCivA 288SW554; TexCivA 28W(2d)495; TexCivA 24SW(2d)478; TexCivA 27SW(2d)835. [g] **Plaintiff** has affirmative of every issue of fact raised by denials in answer. 216AppDiv260, 214NYS533.

69-44 216Ala290, 113S18, 52ALR1075; 82Colo 13, 257P247; 232Ky245, 22SW(2d)614 (whole pleading must be considered); 241Mich297, 217NW12; 221MoA621, 287SW813; 114Nebr230, 206NW770; 119 Or277, 241P46; 146SC322, 144SE66; TexCivA 22SW(2d)341; 143Va815, 129SE513. [b] 153SC309, 150SE789; 143Va815, 129SE513. [e] **Effect of misleading.**–141Miss199, 106S525.

69-48 30F(2d)80 [certiorari den 279US852, 49SCt348, 73Led995 (5thcase)]; 31F(2d)769; 33F(2d)902; 204 Iowa35, 214NW525, 53ALR662; 315Mo 987, 288SW777; 220AppDiv591, 222NYS172; 190NC209, 129SE585, 42ALR1299; 51ND246, 199NW930, 937 [citCJ].

70-52 228Ky11, 14SW(2d)214; 233Ky378, 25SW(2d)1036.

70-54 122Kan814, 253P600.

70-55 31 OhA161, 165NE305. [a] **When evidence is evenly balanced,** party having burden loses. TexCivA 27SW(2d)885. [b] **Where evidence as to any fact essential to plaintiff's case and as to which burden rests on him** is evenly balanced, judgment must go for defendant. 86Mont135, 282P855.

70-57 151Md514, 135A383, 49ALR1366.

70-59 NJ 144A585(2dcase); 26 OhNPNS347; TexCivA 273SW993; TexCivA 294SW941, 944 [quotCyc].

71-62 TexCivA 294SW941, 944 [quotCyc].

71-63 70CalA362, 233P359; LaA 130S267.

71-64 CalA 289P242.

71-66 166Ga176, 142SE667; TexCivA 283SW285; TexCivA 283SW288; TexCivA 30SW(2d)810.

72-67 150SC398, 148SE220; TexCivA 283SW285.

72-69 166Ga176, 142SE667; MoA 28SW(2d)125; 52SD528, 219NW206; TexCivA 19SW(2d)140; Va 153SE691. [f] **Generally burden is on complainant.**–Miss 128S757. [g] **General denial casts burden** of proving allegations on plaintiff, no matter what defendant pleads subsequently. TexCivA 25SW(2d)279.

73-70 105WVa287, 142SE259 (debt).

73-72 84CalA130, 257P586; 106Conn677, 138A788; 219Ky9, 292SW345; 236Mich197, 210NW260; 143Miss146, 108S424, 47ALR45; MoA 28SW(2d)125; 124 Okl 97, 254P75; 126 Okl 150, 259P125; Okl 291P38; 38 OklACR455; TexCivA 283SW285; 100Vt425, 138A780. [a] (16) Cancellation of agreement. 170Minn53, 212NW9.

74-74 TexCivA 283SW285.

74-75 124 Okl 97, 254P75; TexCivA 283SW285; TexCivA 30SW(2d)810; 100Vt425, 138A780.

75-84 122 Okl 240, 254P57.

75-88 But see 32PortoRico 117.

75-91 See also 32PortoRico 117.

75-92 Ark 294SW1002; 114 Okl 220, 245P879. See also 32PortoRico 117.

75-95 122 Okl 240, 254P57; TexCivA 272SW346 (that premium had been paid annually); TexCivA 281SW642.

75-98 9LaA198, 119S548; 11LaA159, 123S171.

75-99 106Conn677, 138A788; 324 Ill 249, 155NE26; 120Kan591, 244P867; 209Ky95, 272SW381.

76-4 121Kan728, 250P324.

76-6 NH 149A746 (burden of going forward with proof is not evidence). [a] **Matters determining burden of evidence.**–51SD157, 212NW872.

76-8 271US472, 46SCt564, 70Led1041.

77-15 119Kan494, 240P964, 42ALR893; 83NH397, 142A695.

77-16 MoA 22SW(2d)206. See also Mo 30SW(2d)1015.

78-18 121Kan728, 250P324; 233Ky169, 25SW(2d)37; 241Mich297, 217NW12; 315Mo 987, 288SW777; MoA 27SW(2d)1076; 117 Or286, 243P778, 783 [citCJ]; 51SD157, 212NW872.

78-19 119Kan399, 239P972; 241Mich297, 217NW12; 315Mo 987, 288SW777; 117 Or286, 243P778, 783 [citCJ]; 51SD157, 212NW872.

78-20 117 Or286, 243P778, 783 [citCJ].

78-21 143Va903, 129SE493, 45ALR280.

78-21½-New. Generally, where all material allegations of complaint are admitted, burden of going forward with the evidence is on defendant. 125Misc876, 212NYS393 (also burden of proof).

78-21¼-New. Although the burden of proof to establish the affirmative of issue rests upon the party alleging the facts constituting the issue, the burden, in the sense of duty of producing evidence, passes from party to party as the case progresses. 158Tenn148, 118SW(2d)900.

78-22 170Minn53, 212NW9; 155Miss207, 124S325.

79-23 315Mo 987, 288SW777.

79-24 89CalA275, 264P580; 315Mo 987, 288SW777; 152Tenn379, 277SW886, 887 [quotCJ]. [f] **Burden of proving insolvency** rests on party asserting it. 176Minn227, 222NW929.

79-25 45 Ida636, 264P377, 379 [citCJ]; 315Mo 987, 288SW777.

80-26 74Mont385, 240P391.

80-31 119Kan494, 240P964, 42ALR893; 315Mo 987, 288SW777. See also 130 Or294, 279P861. [b] 201 Iowa148, 205NW833 (where evidence presents issue of fact).

80-32½-New. Where defendant proves facts to be different than presumption of fact relied on by plaintiff, plaintiff must produce other evidence to meet facts proved. MoA 28SW(2d)125.

80-33 13CustA301; MoA 4SW(2d)847; TexCivA 294SW941, 944 [quotCyc].

81-38 196Cal 404, 238P363, 365 [quot CJ].

81-39 196Cal 404, 238P363, 365 [quot CJ].

81-40 196Cal 404, 238P363, 365 [quot CJ].

81-41 196Cal 404, 238P363, 365 [quot CJ].

81-42 25F(2d)225, 228 [citCJ]; Ala 127S832; 196Cal 404, 238P363, 365 [quotCJ]; 219Ky9, 292SW345; 4LaA691, 698, 699 [citCJ&Cyc]; 217MoA 302, 261SW340, 343 [citCJ]; TexCivA 299SW458; TexCivA 17SW(2d)1102; 144Wash543, 258P469. But see 220MoA 1067, 279SW727.

82-43 196Cal 404, 238P363, 365 [quot CJ].

82-50 172Ark932, 290SW966; 77CalA 509, 247P227; 48RI 106, 135A850.

82-51 48RI 106, 135A850.

82-51½-New. A "presumption" is a negative or affirmative inference as to the existence of a fact which probable reasoning and common sense draw from proved surrounding facts and circumstances. 229Mich663, 203NW110.

82-52 116 OhSt451, 157NE21, 53ALR1486.

82-53 TexCommnA 292SW531.

83-54 196Cal 547, 238P353; 77CalA 509, 247P227; 120 Or286, 249P627; 51 Philippine676; 152Tenn379, 277SW886. But see 109Conn507, 147A33; 336 Ill 11, 167NE807; Mo 30SW(2d)462; NH 149A746; 50RI 43, 144A884, 63ALR334.

83-55 329 Ill 59, 160NE147; 315Mo 987, 288SW777; 48RI 106, 135A850; TexCivA 296SW961. But see 30F(2d)80 [certiorari den 279US852, 49SCt348, 73Led995(5thcase)]; 333 Ill 267, 164NE685; 50RI 68, 145A101.

83-56½-New. Presumption is abandoned when basis is gone. 48RI 106, 135A850.

83-58 8F(2d)368; 77CalA509, 247P227; 335 Ill 335, 167NE35; Ill 172NE7; Ill 173NE394; MoA 30SW(2d)203; TexCommnA 290SW1083; TexCivA 4SW(2d)111; TexCivA 4SW(2d)320; 151Va333, 143SE884.

83-58½-New. Presumptive evidence is indirect or circumstantial. 76Mont278, 246P257.

83-59 45 Ida427, 262P881, 56ALR317.

83-60 42SD35, 173NW642.

83-61 49RI 18, 139A466. See also 89CalA275, 264P580.

83-63 228AppDiv27, 238NYS429; 189NC482, 127SE593; TexCivA 4SW(2d)666. [a] 41F(2d)691; 87CalA440, 262P380; 250 IllA22; 142Miss249, 106S884 (presumptions always yield to facts); 225AppDiv391, 233NYS252; 135Misc861, 239NYS722; 294Pa573, 144A743.

84-65 287Pa184, 134A472.

84-66 See also 37GaA423, 140SE525.

84-68 128Me346, 147A423; 153Miss212, 121S859; 320Mo 655, 8SW(2d)918; 131Misc383, 226NYS744; 225AppDiv391, 233NYS252; 52ND225, 202NW651; 124 Okl 7, 253P66; TexCommnA 280SW742; TexCivA 18SW(2d)476; TexCivA 18SW(2d)787; Utah 275P582; 151Va108, 144SE483.

84-68½-New. Ancillary receiver of a corporation will be presumed to be aware of the pendency of a suit in a civil district court of the state. 160La763, 107S566.

84-68¾-New. The original receiver of a corporation appointed by the federal court who is also an ancillary receiver in the state will be presumed to be aware of a suit in the state court. 160La763, 107S566.

84-68¼-New. Worth of security will be presumed to be its face value. 44 Ida370, 256P947.

84-68⅛-New. A carrier is presumed to know the condition of passenger cars under its control. 255Mass33, 150NE850.

84-68⅛-New. There is a presumption that a salesman who is a director of a corporation knows that such corporation has or has not complied with statutory requirements. 319 Ill 372, 150NE330.

84-68½-New. It is presumed that possessor of whisky had knowledge that basic production tax was unpaid. 41F(2d)782.

84-70 309Mo 241, 274SW437; 118 Okl 94, 246P853; 29PortoRico 909, 918 [quotCJ]; TexCivA 294SW941. [a] **It cannot be presumed** that one knowing of, and claiming interest in, estate knew extent of conflicting interests. TexCivA 27SW(2d)604.

84-71 331 Ill 559, 163NE313; 198 Ind422, 154NE7; 168Minn122, 209NW892; 147Miss509, 112S871; MoA 11SW(2d)750(2dcase); 5PaDist&Co 17; 29PortoRico 909, 918 [quotCJ]; 158Tenn148, 11SW(2d)900; TexCivA 280SW901; TexCivA 8SW(2d)815; TexCivA 12SW(2d)257. [d] **Where facts are of contrary import,** presumption cannot arise. TexCommnA 29SW(2d)1041.

85-72 24F(2d)399, 404 [citCJ]; 27F(2d)265; 42F(2d)997; 219Ala184, 122S661; Cal 293P30; 239 IllA479; 198Ind422, 154NE7; Iowa 228NW32; 147Miss509, 112S871; 309Mo 241, 274SW437; 319Mo 890, 5SW(2d)15; Mo 28SW(2d)97; MoA 30SW(2d)176; 81Mont442, 264P108, 114 [citCJ]; 134Misc715, 236NYS370; 114 OhSt423, 151NE323; 25 OhA328, 158NE199; 31 OhA161, 165NE305; 31 OhA38, 166NE248; 35OhA145, 171NE844; 116 Okl 202, 244P170; 118 Okl 94, 246P853; 129 Okl134, 263P1086; 120 Or117, 250P739; 126 Or532, 270P521; 298Pa142, 148A40; 5PaDist&Co 17; 29PortoRico 909,

918 [quotCJ]; Tex 272SW343; Tex 275 SW124; TexCommnA 248W(2d)10; TexCivA 280SW901; TexCivA 283SW 895; TexCivA 294SW941; TexCivA 2 SW(2d)958; TexCivA 108W(2d)782; TexCivA 22SW(2d)508; TexCivA 28SW (2d)611; Vt 150A138; 33Wyo 360, 239 P952, 955 [citCJ]. [a] (4) Application for administration of estates of three children presumed to be dead, which is based on presumption as to order of death, is denied. 134Misc715, 236NYS 370.

86-73 MoA 17SW(2d)621. [a] **Purchasers of timber land** are presumed to know amount of timber on it. Wash 287P878.

86-74½-New. When carriers calculated to produce a certain result are shown to have been in operation at a given time, inference is permissible that the natural result in fact followed, 82NH533, 136A 364.

86-74½-New. and that inference not verified merely goes to weight of evidence. 82NH533, 136A364.

86-74¼-New. The court must infer that which is inferable. 129Misc765, 222NYS724.

86-74½-New. A circumstance shown by direct evidence is a fact proved, and not one inferred, relative to rule against pyramided inferences. TexCommnA 285SW275.

86-74¼-New. Where an inference or presumption is based on such evidence that it may be regarded as a proved fact, although the evidence is circumstantial, it may form the basis of another inference of fact. 148Va699, 139 SE328.

86-75 13F(2d)453; 14F(2d)703; 216 Ala416, 113S35; 80CalA433, 251P935; 85CalA440, 259P774; 81Colo 163, 255P 447; 36GaA394, 136SE826; 331 Ill 465, 163NE338; 247 IllA345; 254 IllA289 (population of county and townships); 314Mo 438, 284SW471, 47ALR25; Mo 31SW(2d)21; 74Mont491, 241P626; 83 NH542, 145A139; 222AppDiv488, 226 NYS692; 22 OhA159, 153NE277; 122 Or 493, 259P778; 287Pa64, 134A413; 35 PortoRico 478; 157SC392, 154SE431; TexCivA 271SW293; 147Va660, 137SE 492; Wash 292P99; 194Wis489, 215 NW898; Wis 228NW144; 34Wyo 1, 242 P1107, 1108 [citCJ]; 39Wyo 314, 271 P13. See also 28F(2d)249; 136Wash 295, 239P831.

87-78 229Ky771, 17SW(2d)1029.

87-81½-New. Rule that object is presumed to continue in same position does not apply to movement of persons. MoA 28SW(2d)680.

87-82 150Md369, 133A117; Mass 172 NE87. [e] **Population** of sanitary district not presumed to have remained unchanged. 336 Ill 11, 167NE807.

87-85 80CalA433, 251P935; 81Colo 163, 255P447; 178Ark862, 12SW(2d)772, 68 ALR1303; TexCommnA 280SW742; Tex CivA 271SW293; TexCivA 295SW945.

87-87 MoA 14SW(2d)475.

87-89 Iowa 231NW353 (healthy condition of animal); 120 Or588, 253P363, 53ALR1052.

87-90 36GaA394, 136SE826. [a] 202 Cal 205, 259P755.

88-91 36GaA394, 136SE826; 201 Iowa 586, 207NW598; 208 Iowa582, 226NW 33, 34 [citCJ]; Mass 172NE87; Mo 26SW(2d)768; 104NJL519, 140A408; 119 OhSt166, 162NE740; 49RI 423, 143 A778; 144SC252, 142SE498; TexCivA 287SW668. But see 219Ala586, 123S 22, 63ALR942.

88-97 80CalA433, 251P935.

88-99 78Mont370, 254P179.

89-6 91CalA554, 267P375.

89-7 74Mont491, 241P626.

89-8 99Vt512, 134A710.

89-10 149Va140, 141SE836.

89-13 212Ala597, 103S884.

89-15 23F(2d)831; TexCivA 2SW(2d) 995.

89-18 74Mont491, 241P626.

89-18½-New. or banks; 74Mont491, 241P626.

90-19 82NH289, 133A22; 142Va285, 128SE550 (status of land converted to personalty by will presumed to continue till changed by parties).

90-24 But see 13F(2d)143.

90-25 83Colo 116, 262P1018; 220MoA 1099, 297SW108; 136Misc664, 240NYS 502; 150Wash1, 272P29. But see 126 Misc283, 213NYS25.

90-26 MoA 282SW490.

90-39 214Ala106, 106S601, 602 [cit Cyc]; 207 Iowa239, 222NW413; Miss 130S504; MoA 285SW104, 108 [citCJ]; 79Mont269, 256P373; 114Nebr230, 206 NW770; 152Wash534, 278P417.

91-40 245 IllA503; 128 Okl 293, 262P 693; 34PortoRico 590.

91-42 12CustA176; 165La680, 115S 823. But see Utah 269P103.

92-45 137Misc827, 245NYS865; 9PaDist &Co 571.

92-46½-New. Where a foreign corporation is shown to have been doing business within a state at a certain time, it will be presumed that it continued to do business therein during succeeding years. 80CalA433, 251P935.

92-46¼-New. When a statute of a sister state is shown to have existed, it will be presumed to remain in force in the absence of evidence showing its repeal. 86Mont513, 284P270.

92-47 6F(2d)818; 215Ala47, 109S278; 261Mass333, 158NE660; Mo 31SW(2d) 21; 136Misc664, 240NYS502; 136Misc 863, 242NYS464; TexCommnA 288SW 178; 143Wash168, 254P1091; 34Wyo 1, 242P1107 (evidence that X-ray machine was available four months after diagnosis does not justify inference that it was available at time of diagnosis). [a] (2) Other instances. Mo 31SW(2d) 21. [b] 298Pa1, 147A848; 153Va437, 150SE389. [e] **Proof of insolvency in 1921** is not proof of insolvency in 1919. 126Misc283, 213NYS25. [f] **There is no presumption** that one alleged to be infant was under fourteen years of age. 212Ala600, 103S887.

92-48 38F(2d)462; 233Ky579, 26SW (2d)532; 34Wyo 1, 242P1107, 1108 [cit CJ].

92-49 42F(2d)750; Ida 286P353. [a] (5) In subscribing to stock of trust company stockholders must be presumed to know the customs of business touching their liability as security for its saving depositors. 253Mass205, 148 NE609, 41ALR658. (6) Cash assets of insolvent bank are presumed not to have been lower than at time of closing. 54 ND315, 209NW782.

92-50 136Misc664, 240NYS502.

92-51 78Mont370, 254P179; 161Tenn 217, 30SW(2d)239, 70ALR569.

92-52 31F(2d)976; 93CalA36, 268P 1090; 333 Ill 267, 164NE685; 118Kan 184, 235P132, 135 [citCJ]; 241Mich67, 216NW398; 315Mo 972, 287SW485; 102 NJL74, 131A89, 90 [citCJ]; 92PaSuper 175; TexCivA 281SW1092, 1094 [cit CJ]; TexCivA 289SW721; NB [1930] 2DomLR547. But see 97Fla159, 120S 310; Mass 167NE332. [e] **Burden is on party asserting nonidentity** to prove facts alleged. 315Mo 972, 287SW485. [f] **It will be presumed that person was in telephonic communication with party asked for** where he talked with some one without objection. 54SD435, 223 NW354.

93-53 230Ky732, 20SW(2d)731.

93-54 NB [1930] 2DomLR547.

93-55 102NJL74, 131A89.

93-60 118Kan184, 235P132, 135 [cit CJ].

94-62 118Kan184, 235P132, 135 [cit CJ].

94-70 39F(2d)793 (letter must be accepted as genuine if its genuineness was not attacked).

94-72 [c] 41F(2d)691.

94-74 213Ala286, 104S643; 197Cal 82, 239P709, 41ALR1027; Fla 129S333; 202 Iowa1038, 208NW334; 13LaA194, 127S133(2dcase); 165Minn223, 206NW 436; TexCivA 3SW(2d)921; TexCivA 23SW(2d)516; 145Wash679, 261P792; 193Wis496, 211NW782, 783 [citCJ]. [a] **Injured man who becomes incurably insane** as result of accident is as one dead as regards presumption of due care. Mo 24SW(2d)154.

95-77 197Cal 82, 239P709, 41ALR1027; 202 Iowa1038, 208NW334.

95-79 16F(2d)243; 213Ala286, 104S 643; 173Ark937, 294SW353, 357 [quot CJ]; 176Ark879, 4SW(2d)536; 178Ark 906, 12SW(2d)893; CalA 287P540; 83 Colo 89, 262P526; 203 Iowa960, 211NW 238; 235Ky211, 30SW(2d)885; 160La 854, 863, 107S599 [citCJ]; 172Minn185, 214NW775; 175Minn489, 221NW913; 134SC435, 132SE828; TexCommnA 12 SW(2d)1002; Wash 290P222.

95-80 8F(2d)680; 16F(2d)243; 173 Ark937, 294SW353, 357 [quotCJ]; 203 Iowa960, 211NW238. See also 261Mass 121, 158NE350.

96-81 16F(2d)243; 213Ala286, 104S 643 (not overcome by verdict of jury); 160La854, 107S599; 172Minn185, 214 NW775.

96-82 16F(2d)243; 213Ala286, 104S 643; TexCivA 28SW(2d)902 [quotCJ].

96-83 16F(2d)243; 261Mass121, 158 NE350.

96-84 160La854, 107S599.

96-86 114Nebr783, 210NW165 [citCJ].

96-90 Iowa 233NW153 (prima facie evidence of arrival).

96-92 26F(2d)505; 40F(2d)673; 43 F(2d)446; 43F(2d)549; 219Ala81, 121 S66; 172Ark303, 288SW395; CalA 288 P814; 39GaA106, 146SE338; 36GaA 779, 138SE275; 37GaA203, 139SE362; 37GaA271, 139SE916; 43 Ida214, 250P 648, 50ALR1418; 205 Iowa742, 218NW 580, 583 [citCJ]; 170La879, 129S515; 3LaA794; 235Mich536, 209NW838; 242 Mich204, 218NW784; 180Minn570, 231 NW218; 222MoA1057, 7SW(2d)479; MoA 27SW(2d)1076; 114Nebr783, 210 NW165, 169 [citCJ]; NJSup 151A448 (1stcase); 98NJEq143, 130A228; 126 Misc292, 213NYS81; 126Misc491, 215 NYS24; 129Misc230, 220NYS213; 50 ND478, 196NW554; 117 Okl 73, 245P 885; 284Pa129, 130La322; 138SC208, 136SE230; SD 225NW721; TexCivA 275SW169; TexCivA 28SW(2d)842; TexCivA 27SW(2d)263; Vt 151A565; 142Va738, 128SE61; 142Wash73, 252P 535; 147Wash547, 266P177; 199Wis 115, 225NW738. [n] **Proof of essential elementary facts.**-205 Iowa742, 218NW 580 (proofs held insufficient). [o] **Testimony of account allegedly mailed held** erroneously admitted without proof of proper address and mailing. 37GaA271, 139SE916. [p] **Mere writing of letter** is insufficient to imply deposit stamped and addressed so as to raise presumption of receipt. Vt 151A565.

97-93½-New. That letter, received in due course of mail, is presumed to be the letter of party whose name is signed to it. 102NJL68, 130A457.

97-94 See also 142Va738, 128SE61, 64 [citCJ].

97-96 114Nebr783, 210NW165, 169 [cit CJ].

97-97 112 Okl 163, 239P651, 652 [quot CJ]; TexCivA 18SW(2d)646.

97-98 112 Okl 163, 239P651, 652 [quot CJ].

97-1 15F(2d)949; TexCivA 275SW169; 142Va738, 128SE61, 64 [citCJ].

98-2 15F(2d)949; MoA 27SW(2d)1076; 142Va738, 128SE61, 64 [citCJ].

98-3 See also 27F(2d)556.

98-8 36GaA779, 138SE275.

98-8½-New. The presumption is subject to control and limitation by other facts. 15F(2d)949.

98-8¼-New. The presumption that registered mail was forwarded as such yields to contrary proof. 12LaA531, 126S531.

98-9 Ark 31SW(2d)743; 35GaA196, 132SE646; 37GaA271, 139SE916; 153 Md312, 138A269, 271 [quotCJ]; 259 Mass564, 156NE734; 126Misc491, 215 NYS24; 129 Okl 188, 263P1105; 150 Wash640, 274P702. [c] (2) Testimony that witness forwarded letter addressed to carrier's agent "through due course of mail" imports that letter was properly addressed. TexCivA 275SW169, 170.

98-10 37GaA271, 139SE916; 153Md 312, 138A269, 271 [quotCJ].

98-11 37GaA271, 139SE916; 153Md 312, 138A269, 271 [quotCJ].

99-13 15F(2d)949; 24F(2d)399, 404 [citCJ]; 35GaA196, 132SE646; 37GaA 271, 139SE916; 259Mass564, 156NE734; MoA 287SW1064; 222MoA1057, 7SW (2d)479; 126Misc491, 215NYS24 (in

usual way); 129 Okl 188, 263P1105; TexCivA 275SW169; TexCivA 13SW (2d)981. [a] (2) Testimony that witness forwarded letter addressed to carrier's agent "through due course of mail" imports that it was properly deposited in mail. TexCivA 275SW169, 170.

99-14 6F(2d)300. [e] **Proof of finding of copy of letter on desk of bank official after his death** raises presumption of mailing and delivery where it related to matter within his employment and is transaction performed by him on day of its date. TexCivA 281SW632. [f] **Handling of matter in ordinary course of business.**-40F(2d)673.

99-15 127Me365, 143A274.

99-17 SD 225NW721.

99-18 252 IllA508 (inspection of chute not necessary).

99-21 20F(2d)748, 750 [citCJ].

100-26 35GaA196, 132SE646; 129 Okl 188, 263P1105.

100-27 [b] **Testimony that letter was forwarded "through due course of mail"** imports that it was properly stamped. TexCivA 275SW169, 170.

100-29 26F(2d)505; 37GaA203, 139SE 362; 199 Ind290, 157NE433; 153Md414, 138A402; 114Nebr783, 210NW165; 104 NJL1, 139A796; 126Misc491, 215NYS 24; 50ND478, 196NW554 (under statute).

101-30 129 Okl 83, 263P453, 454 [quot CJ].

101-31 129 Okl 83, 263P453, 454 [quot CJ].

101-40 15F(2d)949; 36GaA779, 138SE 275; 156Miss330, 126S4; 129Misc230, 220NYS213; 57ND598, 223NW350; 299Pa527, 149A887; 9PaDist&Co 514; 198Wis122, 223NW427. [a] **No presumption of receipt by addressee** where mailed notices were received by persons not shown to be authorized agents of addressee. 40GaA558, 150SE565.

101-41 15F(2d)949; 219Ala81, 121S 66; 39GaA106, 146SE338; 36GaA779, 138SE275; 37GaA203, 139SE362; 37 GaA200, 139SE431; 225Ky472, 9SW (2d)206; 10LaA234, 119S723; 126Misc 491, 215NYS24; TexCivA 275SW169; 151Wash201, 275P571. [c] (2) Denial of agent raises issue of fact. TexCivA 275SW169.

102-44 37GaA200, 139SE431; 98NJEq 31, 129A622.

102-45 15F(2d)949; 98NJEq143, 130 A228; 126Misc491, 215NYS24; 57ND 598, 223NW350. See also 142Va738, 128SE61. [b] **Evidence held to support presumption** that letter was received in due course. 126Misc491, 215NYS24.

102-47 15F(2d)949.

102-49 36GaA779, 138SE275; 37GaA 203, 139SE362.

102-50 37GaA203, 139SE362; 43 Ida 214, 250P648, 50ALR1418.

102-56 TexCivA 281SW632.

102-57½-New. In order for evidence of nonreceipt to be conclusive it must be clear. 36GaA779, 138SE275.

102-58 94CalA742, 271P1098.

103-62½-New. A message spoken over the telephone will be presumed to have been heard as it was spoken. 175Ark 167, 299SW377.

103-68 CalA 251P938; 87CalA440, 262 P380 (rebuttable presumption); 134 Misc733, 236NYS194 (purpose of restriction in deed); 118 Or22, 245P515; 151Va108, 144SE483; 147Wash661, 267 P47. [b] **That person takes ordinary care of his own concerns** is presumed. CalA 288P117.

103-69 118 Or22, 245P515; 122 Or225, 258P192.

103-70 41F(2d)691; 178Ark699, 11SW (2d)488; 199Cal 705, 251P311; 69CalA 574, 232P174 (gestation and birth of infant is presumed to have occurred in ordinary course of nature, that is nine months from time of insemination); 80 CalA411, 251P938; 88CalA10, 263P269; Mich 233NW417; 174Minn471, 219NW 757; 77Mont260, 250P823; 244NY168, 155NE88; 118 Or22, 245P515; 122 Or 225, 258P192; 50Philippine844; 51 Philippine184; TexCivA 11SW(2d)237; Utah 269P1020; 193Wis286, 214NW438.

103-71 15F(2d)37; 41F(2d)275; 169 Ark491, 276SW588; 244Mich59, 221NW 173; 315Mo 549, 286SW355; MoA 15 SW(2d)853; 244NY168, 155NE88; 135 Misc305, 237NYS171; SD 231NW288 (knowledge by officers of bank); Tex CivA 294SW610; 105WVa463, 143SE 160. But see Mo 30SW(2d)22. [b] **Insurance company issuing theft policy to fur-dressing company** is presumed to know that insured is not fur merchant, buying, selling, or keeping stock on hand. 216AppDiv252, 214NYS693. [c] **State enacting legislation presumed to know facts.**-132Misc45, 228NYS576.

103-72 Mo 23SW(2d)1034. [d] **Where confidential relationship exists,** rule does not apply. 226AppDiv82, 234NYS 392.

104-75 295Pa62, 144A824.

104-76 228Ky266, 14SW(2d)1090.

104-79 104NJL339, 140A448.

104-80 221MoA265, 28SW(2d)185. [a] **Minority stockholders** are presumed to know that majority exchanging stock for that of another corporation would control majority of stock. 50Nev56, 250P369. [b] **Minority stockholders of corporation selling assets** presumed to have full knowledge of advertised policy of purchasing corporation to exchange for issued stock of selling corporation. 50Nev56, 250P369.

104-80½-New. that one contracting with corporation is informed as to its powers; 145Miss330, 110S795.

104-80⅓-New. that a corporation has knowledge of facts which appear on its books; 21F(2d)515.

104-80¼-New. that directors constituting a board of audit of a corporation know what the books of the company contain; 21F(2d)515.

104-83 217Ala382, 115S869.

104-84½-New. that general custom of fraternal beneficiary society to accept overdue dues without claiming forfeiture was known to its members, especially those of long standing; TexCivA 282SW867.

104-88 82CalA503, 255P868; 234Mich 140, 207NW825.

104-90 308Mo 288, 271SW361.

104-96 205 Iowa266, 215NW737; Tex CivA 294SW317.

104-3½-New. that the payee's indorsement on a check paid by a bank was regular and that he received the money thereon; 141Wash623, 251P852.

104-6½-New. that the bank was induced to make a loan to a solvent person on the latter's agreement to repay the loan with interest; MoA 15SW(2d) 888.

105-20 51ND225, 199NW961.

105-24 See also 147Wash216, 265P466.

105-28 76CalA610, 245P455, 457 [cit CJ]. [a] 76CalA610, 245P455, 457 [cit CJ].

106-29 124 Okl 7, 253P66.

106-29½-New. or in the county of the official witness attesting it; 35GaA427, 133SE312.

106-37 [a] Mortgage is presumed to have been recorded on day of delivery. 218Ky473, 291SW760.

106-41 196Cal 686, 239P324; 76CalA 610, 245P455, 457 [citCJ]. [a] **Presumption is rebuttable.**-76CalA610, 245 P455, 457 [citCJ]. [b] **That date of acknowledgment is later than date of assignment** does not affect presumption that assignment was delivered on date it bears. 132Misc95, 228NYS289.

107-53 207Cal 561, 279P658.

107-53½-New. that deceased died intestate in absence of evidence that he left will; TexCivA 24SW(2d)542.

107-54½-New. Testimony that a man purchased a lot for a price named implies a voluntary action. 196 Ind323, 148NE413.

107-54⅓-New. That consideration was received will be presumed where bill of sale and lease attached recite payment. 214AppDiv296, 212NYS230.

107-54¼-New. By statute in some jurisdictions it is a disputable presumption that a person exercising acts of ownership over property is the owner thereof. 199Cal 305, 249P10.

107-54⅕-New. Under such statutes a person assuming to sell and convey property is presumed to be the owner thereof. 199Cal 305, 249P10.

107-54⅙-New. A person tendering payment by check is presumed to have knowledge of the usual method of making presentment through the bank at the place to which the check is sent. 80 Mont374, 260P734.

107-55 101CalA94, 281P396 (that face value of corporate stock is real value). [a] **That claimant intended to surrender** well secured claim for one no better secured will not be presumed. La 129S 671. [b] **No one is presumed to renounce a right** unless such intention clearly appears. 170La1044, 129S630.

107-56½-New. that stock was worth par value where it had been sold for less than par; Ida 286P923.

107-59½-New. that lumber dealers know breaking limit of all kinds of lumber in which they deal, 24F(2d) 313.

107-69½-New. , that entries in private books of partner are correct. 72CalA 468, 237P833.

107-70 203Cal 262, 263P801; Cal 289P 621; CalA 286P172; NJCh 151A95.

107-71 15F(2d)669; 98CalA206, 276P 578; CalA 286P172; 90Fla595, 106S 473; 136Misc893, 242NYS417; 137Misc 790, 244NYS502; NC 155SE445 (knowledge of corporation commission is presumed); Va 152SE562; 153Wash526, 280P9; 154Wash559, 283P173. [a] **In passing on presence of quorum,** intendments in favor of conclusiveness of meeting are indulged in. DelCh 151A 223.

107-71½-New. that a release, beneficial to the corporation, would be accepted by it; 83NH365, 142A689.

107-72 41GaA77, 152SE300. See also TexCommnA 286SW167.

107-72½-New. that an action by the majority stockholders is for the benefit of the corporation; Del 142A654.

108-74 NJCh 150A347.

108-77 See also 170Minn175, 212NW 408.

108-82⅞-New. Value of capital stock is not presumed to be at par. 104Conn 73, 131A412.

108-82⅛-New. Death benefit society is charged with knowledge of contents of its own records. 104Conn539, 133A666.

108-82¼-New. **With respect to water companies,** it will be presumed that they know that a rate preferential to them would be injurious to the public and illegal. 102NJEq276, 140A781.

108-91½-New. that change in rates was published as required by law; 104 Conn728, 134A220.

108-92⅛-New. that common carriers engaged in interstate commerce shipment of freight have made and filed a schedule of rates with the interstate commerce commission; 22AlaA613, 118 S502.

108-95½-New. Banks. In ordinary course of banking business it is presumed that a bank follows instructions given it as to collection of draft. 75 Mont72, 241P1077.

108-97 33F(2d)496 (financial condition); Cal 289P844; TexCivA 8SW(2d) 516.

108-98 Mass 172NE647; 219MoA632, 284SW515 (increase in assessment rate of fraternal benefit society).

109-4 CalA 289P946.

109-4½-New. It will be assumed that payments to sole stockholders charged as drawings were made in violation of the charter forbidding loans. 17F(2d) 79.

109-4⅓-New. A director is charged with knowledge of the identity of the corporation of which he is one of the managers. 178Minn9, 225NW927.

109-10½-New. , or acceptance by beneficiaries of promise to devise. 203 Iowa1183, 212NW343.

109-12 134 Okl 259, 273P235; Vt 147A 687.

109-18 208 Iowa677, 226NW38; 240 Mich266, 215NW392; 134 Okl 259, 273 P235.

110-21 134 Okl 259, 273P235.

110-25 134 Okl 259, 273P235.

110-41 85CalA388, 259P484.

110-44 83NH190, 139A753; 137SC319, 135SE473, 476 [quotCJ].

111-48 [a] **Fabrication of testimony**

justifies conclusion of fraud as to entire case.–34F(2d)848. [b] **Presumption of fraud in entire case not justified.** 34 F(2d)848.

111–50 [a] **Presumption that evidence does not exist may arise from failure to produce it.** 79CalA641, 250P710.

111–51 14F(2d)705; 36GaA779, 138SE 275; 251Mich309, 232NW369; Mo 14 SW(2d)444; 219MoA654, 269SW654; TexCommnA 285SW275, 282 [citCJ]; TexCivA 299SW458.

111–52 36GaA779, 138SE275; 219MoA 654, 269SW654; 92NJEq64, 111A675; 142 Okl 68, 285P968; 38 OklACR61. But see 265Mass289, 163NE755.

111–53 36GaA779, 138SE275; 219MoA 294, 269SW654; 38 OklACR61. [c] **Failure to produce favorable evidence** warrants conclusion that no such evidence exists. 39F(2d)730.

111–54 275US13, 48SCt1, 72Led137; 14F(2d)319; 15F(2d)906; 32F(2d)103; 172Ark991, 291SW74; 82CalA503, 255P 868; 89CalA275, 264P580; 102Conn 660, 129A777; 108Conn271, 142A891; 36GaA779, 138SE275; 46 Ida97, 266P 677; 48 Ida727, 285P472; Ill 173NE 372; 241 IllA229, 234 [quotCJ]; 166La 912, 118S81; 3LaA282; Me 151A725; 242Mich217, 218NW803; 251Mich329, 232NW232; 219MoA294, 269SW654, 657 [quotCJ]; MoA 274SW337; MoA 23SW(2d)1104 (X-ray pictures); MoA 30SW(2d)176; 105NJL657, 146A201; NJCh 140A454; 116 Okl 202, 244P170; 134 Okl 259, 273P235; 38 OklACR61; TexCivA 271SW108; TexCivA 272SW 601 (failure of insurer to prove policy was not issued); TexCivA 275SW423; TexCivA 275SW498; TexCivA 283SW 886; TexCivA 293SW302; TexCivA 299 SW458; TexCivA 30SW(2d)494; 150 Va406, 143SE692; 152Va150, 147SE537. But see 295Pa342, 145A293.

112–55 48Nev1, 226P309, 232P1080.

112–56 14F(2d)319; 26F(2d)621; 37 F(2d)516; 241 IllA229, 234 [quotCJ].

112–58 Mo 24SW(2d)1011; TexCommnA 285SW275, 282 [quotCJ].

112–59 14F(2d)705; MoA 271SW851 (presumption rebutted); TexCommnA 285SW275, 282 [citCJ].

113–60 12LaA121, 125S152(2dcase).

113–61 TexCommnA 15SW(2d)563.

113–62 9LaA750, 119S572(1stcase).

113–63 172Ark991, 291SW74; 176Ark 196, 2SW(2d)84; 329 Ill 253, 160NE 552; 134 Okl 259, 273P235; TexCivA 300SW102.

113–64 216Ala312, 113S59; 172Ark 991, 291SW74; 287Pa87, 134A384; 50 SD524, 210NW730.

113–65 44F(2d)1; 218MoA60, 262SW 66 (corporation minute books); 134 Okl 259, 273P235; IndA 155NE715; 116 Okl 202, 244P170; TexCivA 271SW108.

113–67 12LaA216, 125S778. But see 99 CalA372, 278P928.

113–75 39F(2d)378; 216Ala312, 113S 59; 319 Ill 437, 150NE435; 321Mo 414, 11SW(2d)729; 134 Okl 259, 273P235; 287Pa87, 134A384; 34PortoRico 745; 135SC149, 133SE463. [d] **Schedule of assets and inventory of bankrupt's estate,** not offered in evidence in action by bankrupt's assignee on assigned claim, will be presumed not to refer to such claim. 100CalA621, 280P1029.

114–76 TexCivA 7SW(2d)1112.

114–77 204 Iowa1186, 216NW769, 771 [citCJ].

114–80 218MoA60, 262SW66.

114–81 168Minn423, 210NW161.

115–84 CalA 284P685; Mo 24SW(2d) 1011; TexCivA 3SW(2d)921, 923 [quot CJ]. See also 319Mo 446, 276SW1020, 1025 [citCJ]. [a] (2) Other instances. Iowa 232NW655.

115–85 20F(2d)357; 37F(2d)352; 42 F(2d)997; 42F(2d)1003; Ala 130S775; 43 Ida149, 249P895; 219MoA294, 269 SW654; MoA 274SW911; MoA 282SW 62; MoA 23SW(2d)1104; 49Nev451, 248 P893; 45Philippine216; TexCommnA 285SW275, 282 [citCJ]; 142Wash98, 252P533. [a] TexCivA 271SW108.

115–86 15F(2d)906; DelCh 142A832; 43 Ida149, 249P895; 219MoA294, 269 SW654; 49Nev451, 248P893; TexCivA 271SW108; 142Wash98, 252P533.

116–87 43 Ida149, 249P895; 219MoA 294, 269SW654.

116–88 20F(2d)357; MoA 293SW449.

116–90 43 Ida149, 249P895; 49Nev451, 248P893; 127 Or276, 263P907; Tex CivA 271SW108; 153Va468, 143SE625; 142Wash98, 252P533; 154Wash57, 280 P932.

116–91 219MoA294, 269SW654; Tex CivA 271SW108.

116–92 15F(2d)906; 20F(2d)357; 31 F(2d)112(2dcase) [aff 31F(2d)115(1st case)]; 37F(2d)934; 38F(2d)1005; 179 Ark118, 14SW(2d)257; 197Cal 148, 239 P1061; 107Conn670, 142A461; 215Ky 613, 286SW696; 9LaA660, 119S772; 12 LaA160, 125S158(2dcase); 11LaA474, 123S900(2dcase); 11LaA480, 123S907; 3LaA297; 4LaA125; 219MoA294, 269 SW654, 658 [quotCJ]; MoA 271SW851; MoA 274SW911; 319Mo 769, 5SW(2d) 420; MoA 17SW(2d)670; Mo 28SW (2d)1035 (unfavorable); 49Nev451, 248 P893; NH 151A457; 45Philippine216 (Code Civ. Proc. § 334); 156SC181, 153SE133, 69ALR443; TexCommnA 285SW275, 282 [citCJ]; TexCivA 286 SW894; TexCivA 272SW594; TexCivA 3SW(2d)921, 923 [quotCJ]; TexCivA 15SW(2d)164; 142Wash98, 252P533; 100WVa290, 130SE481; 107WVa75, 146 SE885; 39Wyo 331, 271P217, 69ALR 840. But see 170Minn332, 212NW533. See also TexCivA 14SW(2d)881.

117–93 12LaA401, 125S460.

118–94 18F(2d)382; 103WVa545, 138 SE107.

118–95 151Md558, 136A61; TexCivA 21 SW(2d)686.

118–96 223Ky731, 4SW(2d)739 (adversary also failing to call eyewitness); 55ND546, 214NW857.

118–99½–New. It will not be presumed that a doctor if called as witness in personal injury case would have testified that he had put in a bill for a certain amount for the services rendered by him but that the services were not worth that much and that the bill was excessive. 29Ariz334, 241P518.

118–1 92CalA127, 267P736; 43 Ida149, 249P895.

118–2 223Ky731, 4SW(2d)739 (subpœna returned "not found"); 265Mass 245, 163NE863; TexCivA 299SW325. [b] (3) Where witness was disabled by illness from attending. 196Wis377, 220 NW380.

119–5 37F(2d)5; CalA 290P519(2d case); 88 IndA301, 158NE489; 12LaA 167, 125S294; NJ 146A332; 138 Okl 177, 280P808; 130 Or189, 279P633; 154 Wash57, 280P932.

120–9 35F(2d)49; MoA 271SW851. But see 265Mass245, 163NE863.

120–10 100Vt464, 139A210.

120–12 Mo 24SW(2d)1011.

120–16 11LaA474, 123S900(2dcase); 12 LaA49, 125S188(1stcase) (presumption insufficient to overcome positive testimony showing gross carelessness); 222 AppDiv350, 225NYS722.

120–16 50RI 68, 145A101.

121–17 MoA 256SW136.

121–20½–New. Defendant's failure to produce witness does not create inference that plaintiffs had not produced all evidence favorable to their claims. NH 151A57.

121–20⅓–New. Party's failure to produce absent witness cannot be invoked as substantive proof of facts essential to opponent's case. NH 151A57.

121–22 11LaA167, 123S174.

121–23 5F(2d)330; Conn 151A433; 86 IndA666, 152NE873; 11LaA602, 123S 367; Mass 171NE815; Mass 173NE524; MoA 284SW525; MoA 28SW(2d)375; MoA 29SW(2d)721; 115Nebr255, 212 NW540; 134Misc534, 236NYS100; Tex CivA 20SW(2d)224.

121–24 86Mont10, 281P548 (unusual delay in asserting mining claim); 115 Nebr255, 212NW540.

121–25 Mo 282SW392; 319Mo 1137, 6 SW(2d)886, 890 [quotCJ]; MoA 22SW (2d)61; 115Nebr255, 212NW540; 92 NJEq64, 111A675; 229AppDiv555, 242 NYS383; TexCivA 282SW305.

122–26 22AlaA541, 118S258; 11LaA 167, 123S174; MoA 24SW(2d)175. [d] **Noninference can be drawn from refusal** of nephew of deceased to testify in attachment proceedings against him by administrator. 146Va325, 131SE830.

122–29 319Mo 1137, 6SW(2d)886, 890 [quotCJ]; 134Misc534, 236NYS100. [c] **Failure of party to testify and deny agreement** to release does not raise presumption that agreement was made. CalA 290P45.

122–31 319Mo 1137, 6SW(2d)886, 890 [quotCJ]; 115Nebr255, 212NW540.

122–32 TexCivA 282SW305.

123–34 5F(2d)330.

123–35 6F(2d)585; TexCivA 8SW(2d) 815.

123–36 5F(2d)330; Mass 167NE332; 222MoA984, 6SW(2d)661; TexCivA 8 SW(2d)815.

123–42 Mass 165NE421; 219AppDiv 189, 219NYS548.

123–43 13LaA708, 129S182.

124–46 NJSup 149A39.

124–47 219MoA294, 269SW654 (failure to call physician); MoA 23SW(2d)1104.

124–51 [a] 294Pa573, 144A743; 208 Iowa1049, 226NW770.

124–52 16CustA50.

124–52½–New. The presumption is that the common law prevails in England in the absence of proof of statute. 219App Div495, 220NYS420.

125–56 222Ky566, 1SW(2d)968; 249 Mich238, 228NW703; 300Pa116, 150A 159; TexCivA 4SW(2d)268, 270 [citCJ].

125–60 16F(2d)269; 145Miss779, 111S 102, 103 [citCJ]. [a] (6) Where land is sold under bond for title. 37GaA737, 141SE914.

125–61½–New. Continuance of vested ownership is presumed. 325 Ill 296, 156 NE294.

126–66 TexCivA 296SW939.

126–68 192Ala351, 68S280; 196Ala110, 72S18; 196Ala513, 71S700; 208Ala411, 94S590; 212Ala56, 101S673; 50CalA 356, 195P428; 62CalA121, 216P634; 97 CalA434, 275P963; 86Conn263, 85A529, AnnCas1914A195; 55AppDC251, 4F (2d)444; 158Ga336, 123SE611; 33GaA 218, 125SE897; 26 Ida691, 146P107; 75 IndA560, 129NE19, 706; 81 IndA328, 143NE515; 188Ky302, 221SW1073; 192 Ky327, 233SW731; 121La60, 46S101; 189Mass139, 75NE147; 108Minn271, 121NW902; 137Minn454, 163NW779; Mo 222SW472; Mo 222SW1006; 36Nev 443, 136P705; 88NJL499, 97A149, 150 [citCyc]; 1NJMisc315, 123A762; 113 NY284, 21NE55; 160AppDiv588, 145 NYS787; 199AppDiv767, 192NYS239; 207AppDiv652, 202NYS601; 130Misc 131, 222NYS572; 175NC11, 94SE703; 18 OhA506; 85 Okl 1, 204P267; 92 Okl 45, 217P465; 98 Okl 250, 225P364; 133 Okl 34, 270P1098; 103 Or416, 205P822; TexCivA 212SW266; TexCivA 218SW 1115; 65Utah560, 238P280; 141Va757, 127SE89; 118Wash593, 204P194.

126–69 181Ala531, 61S299; 213Ala217, 104S390; 128 Okl 36, 261P165; 91 Okl 214, 217P202; 96 Okl 128, 220P887; 96 Okl 141, 220P592; 65Utah560, 238P280.

126–70 158Fed370; 186Fed997 [rev 196Fed5, 115CCA639]; 246Fed568, 158 CCA538; 23F(2d)159; 215Ala473, 110S 907, 908 [citCJ]; 202Ala599, 81S339; 4AlaA612, 58S959; 11AlaA530, 66S823; 16AlaA663, 81S183; 87Ark641, 112SW 402; 150Ark89, 233SW916; 4CalA219, 88P290; 24CalA27, 140P45; 44CalA410, 186P606; 86Colo121, 278P590; 81Fla 687, 88S876, 25ALR312; Fla 130S599; 5GaA585, 63SE638; 18GaA182, 89SE 161; 22GaA753, 97SE251; 33GaA218, 125SE897; 44 Ida786, 260P168; 37 Ill 197; 122 IllA609; 196 IllA378; 200 IllA 258; 201 IllA609; 41 IndA187, 83NE 655; 140 Iowa464, 118NW789; 167 Iowa535, 149NW621; 170 Iowa319, 152 NW606; 202 Iowa357, 208NW303; 1Ky Op22; 67Me169; 148Mass267, 19NE389, 12AmSR555, 2LRA80; 197Mass206, 83 NE412; 164Minn136, 204NW639; 255Mo 386, 164SW565; 87MoA330; 12MoA125 [aff 93Mo 331, 6SW246, 3AmSR531]; 208MoA189, 231SW1011; MoA 250SW 647; 62Mont1, 203P524; 62Mont246, 204P382, 383 [citCyc]; 110Nebr202, 193 NW331; 88NJL58, 95A739; 119NY380, 23NE864, 16AmSR843 [aff 48Hun537, 1 NYS163]; 215NY351, 109NE482; 160 AppDiv588, 145NYS787; 188AppDiv 655, 176NYS850; 227AppDiv146, 237 NYS242; 130Misc131, 222NYS572; 156 NC3, 72SE4; 50ND381, 195NW969, 971 [citCJ]; 17ND361, 117NW343, 138Am SR714; 126 Okl 139, 258P274; 38 Okl 65, 131P1093; 62 Okl 312, 162P744; 65 Okl 198, 166P139; 98 Okl 250, 225P364;

126 Okl 139, 258P274; 103 Or416, 205P 822; 131 Or653, 284P163 (statute held declaratory of common-law rule); 279 Pa160, 123A658; 12PaDist89; 19Porto Rico 265; 32PortoRico 248; 107SC461, 93SE142; TexCivA 194SW188; Tex CivA 271SW422; TexCivA 32SW(2d) 513; 123Wash521, 212P1052; 62WVa 442, 59SE1051. [c] **One paying indebtedness of another** due under conditional sales contracts of taking trust receipts from debts therefor is presumed to have taken necessary steps to obtain title from seller. 69CalA756, 232P748. [d] **Parol evidence sufficient** to show ownership of automobile. 32PortoRico 248.

127-75 98Vt466, 129A306, 309 [quot CJ].

127-76 98Vt466, 129A306, 309 [quot CJ].

127-80 TexCivA 273SW993.

128-83 279US377, 49SCt355, 73Led 747; 5F(2d)715; 32F(2d)159; 23F(2d) 668; 214Ala587, 108S529; 216Ala619, 114S208; 33Ariz225, 263P630; 171Ark 607, 286SW811; 172Ark914, 290SW938; 77CalA306, 246P816; 199Cal 523, 250P 397; CalA 279P1004 (where record is silent); 101CalA20, 281P518(2dcase); Ida 291P1051; 326 Ill 302, 157NE161; 196 Ind722, 149NE436; 40GaA848, 151 SE692; 222Ky725, 2SW(2d)391; 230 Ky33, 18SW(2d)862; 146Miss581, 111S 836; 311Mo 551, 279SW122; 315Mo 92, 285SW972; Mo 272SW928; MoA 286 SW832; 77Mont260, 250P823; 114Nebr 745, 209NW617; 49Nev101, 238P344; 58ND244, 225NW805; 128 Or94, 265P 1087; 122 Okl 157, 252P1090; 51SD379, 216NW351, 56ALR533 (that special fitness was basis of guardian's appointment); 155Tenn422, 295SW62; 161 Tenn165, 29SW(2d)261; TexCivA 273 SW993; TexCivA 292SW947; TexCivA 300SW225; 111TexCr363, 12SW(2d)790 (2dcase); TexCivA 12SW(2d)839; Tex CivA 17SW(2d)174; 143Va281, 129SE 327; 100WVa253, 130SE456. See also 146Wash283, 263P190 (court should not presume that parties intended invalid stipulation). [b] Ida 291P1051. [e] **Order vacating dismissal of action** carries presumption of validity. 199Cal 523, 250P397. [f] **That court was presided over by special judge** does not affect rule. 109TexCr218, 3SW(2d)816. [g] **In Massachusetts.**–111Conn178, 149 A774.

128-84 TexCivA 10SW(2d)733.

128-85 TexCivA 3SW(2d)576. [b] **Transcript of judicial record** of court of general jurisdiction, properly certified by authorized officer, raises presumption that proceedings were regular and that judge signed record. 87 IndA140, 154 NE680.

129-86 214Ala587, 108S529; 261Mass 209, 158NE836; 78Mont114, 252P803; TexCivA 15SW(2d)734; 33Wyo 374, 239 P1045.

129-87 Ariz 275P975; 1LaA9; SD 230 NW22.

129-88 But see 80Mont363, 260P1042.

129-88½-New. It will be assumed by the supreme court that rules governing the arrangement and distribution of business among the several judges promulgated by the judges of a particular circuit court are in accordance with applicable statute, Mo 272SW928.

129-88⅓-New. and that the proceedings in a particular case are in conformity to the rules. Mo 272SW928.

129-88¼-New. It will not be presumed that under rules of court if judge of division thereof did not have jurisdiction of case he would retain such case which had been transferred to his division, Mo 272SW928.

129-88⅓-New. or that when motion was filed to remand case to another division on ground of lack of jurisdiction in him that he would decide the motion incorrectly. Mo 272SW928.

129-90 168Ark112, 269SW365; 143Va 281, 129SE327.

129-91 155Tenn422, 295SW62; 67Utah 371, 248P83.

129-92 180Ark1167, 22SW(2d)398(1st case); 198NC733, 153SE323(1stcase); SD 230NW22; TexCivA 9SW(2d)426.

129-93 [a] **Action in conformity with constitution.**–It will be presumed that a court given jurisdiction by statute will act in conformity with constitution. TexCivA 294SW305.

129-94 93Fla1128, 114S425.

129-1 168Ark112, 269SW365.

130-2 168Ark112, 269SW365.

130-8 197Wis78, 221NW394.

130-11 212Ala522, 103S557.

130-15½-New. that order approving final report of guardian is correct; Iowa 214NW712.

130-15⅓-New. that orders necessary to confer jurisdiction on a probate court to authorize final settlement of an estate were made; MoA 18SW(2d)209.

130-20 219Ala453, 122S440; CalA 279 P1004.

130-21 168Ark112, 269SW365.

130-22 216Ala619, 114S208.

[a] **Instruments incorporated in petition for sale** are presumed regular when not complained of as not in conformity to statute. Ida 291P1051.

130-22½-New. that a trial judge, in an accounting suit, will await proposed amendments before signing proposed finding or judgment; 100CalA33, 279P 672.

130-24 TexCivA 292SW273.

130-26½-New. It will be presumed in support of a judgment that recital in an order overruling motion to vacate conflicting with judgment that such recital in order was erroneous. 31NM599, 248P1096.

130-26⅓-New. and that if called to the attention of the court the erroneous recital in the order would have been corrected. 31NM599, 248P1096.

130-26¼-New. It will be presumed that a recognizance was entered into where court gave order directing husband to pay weekly sum to his wife. 98NJEq151, 130A244.

130-26⅕-New. Every presumption is to be indulged to sustain proceeding of adoption by court of competent jurisdiction. 162GaA44, 132SE639.

130-26⅙-New. Other presumptions. 160La763, 107S566; 191NC430, 132SE 295; 136SC21, 134SE234; TexCivA 288 SW554.

130-26½-New. Unless denied, it will be assumed that a foreign court had power to modify a decree. 101NJEq523, 139A 385.

130-26⅓-New. Legal presumptions aid the record only as to acts or facts touching which it is silent. CalA 279P1004 (where record states what was done it will not be presumed that something different was done).

130-26⅙-New. Presumption as to construction of statutes in rendering decisions. CalA 291P670.

130-28½-New. There is no presumption in favor of exercise, by court of equity in receivership proceedings, of authority to shorten statutes of limitation or destroy causes of action. 82NH 170, 131A441.

130-28⅓-New. Parties to agreed judgment in trespass to try title are presumed to settle controversy on reasonable basis. TexCivA 295SW653.

130-28¼-New. There is no presumption that a trial judge will sign any proposed finding or judgment that is presented to him. 100CalA33, 279P672.

130-30 272US1, 47SCt1, 71Led131; 5 F(2d)330; 13F(2d)489; 29F(2d)213; 35 F(2d)601; 39F(2d)645; 40F(2d)500; 42F(2d)107; 42F(2d)810; 43F(2d)679; 44F(2d)101; 214Ala587, 108S529; 217 Ala439, 116S526; 30Ariz357, 247P126; 171Ark427, 285SW20; 171Ark547, 285 SW2; 199Cal 391, 249P517; 203Cal 150, 263P218; 205Cal 111, 270P201; 205Cal 413, 271P494; Cal 289P623; Cal 290P 569(2dcase) (rule inapplicable to acts or admissions of plaintiff of record); 70 CalA656, 234P125; 73CalA511, 238P 1048; 83CalA764, 257P203; Colo 292P 228(2dcase); 104Conn579, 134A169; 106 Conn254, 138A136 (that officers did their duty until contrary appears); 107Conn 133, 139A502; 107Conn211, 139A694; 110Conn319, 148A353; 95Fla289, 116 S470; 169Ga70, 149SE776; 37GaA268, 140SE767; 39GaA262, 146SE798; 40 GaA848, 151SE692; 44 Ida786, 260P 168; 321 Ill 612, 152NE539, 47ALR891; 329 Ill 467, 160NE841; 196 Ind436, 148 NE481; Ind 172NE887; Iowa 228NW 281; Iowa 232NW682 (improvement agreement between county and town); 122Kan709, 253P215; 215Ky440, 285SW 250, 252 [citCJ]; 216Ky266, 287SW736; 232Ky599, 24SW(2d)299; 161La699, 109 S393; 169La691, 125S856; 127Me365, 143A274; 156Md40, 143A666; 255Mass 160, 150NE892; 263Mass124, 160NE404; Mass 171NE826; 240Mich28, 215NW6; Miss 130S106; 315Mo 1336, 290SW123; Mo 271SW992; 322Mo 1230, 18SW(2d) 498; 77Mont182, 250P812; 78Mont516, 255P1043; 102NJL303, 131A915; 243 NY102, 152NE690; 246NY35, 157NE 922; 131Misc736, 229NYS26; 138Misc 108, 245NYS105; 192NC199, 134SE488; 194NC159, 138SE601; 193NC573, 137SE 666; NC 155SE445; 113 Okl 230, 241P 174; 116 Okl 202, 244P170; 125 Okl 194, 257P295; 125 Okl 217, 257P307; 126 Okl 275, 259P262; 128 Okl 280, 262 P680; 132 Okl 242, 269P297; 142 Okl 54, 285P100; 283Pa126, 129A78; 286 Pa137, 133A150; 286Pa351, 133A495; 5PaDist&Co 54; 13PaDist&Co 143; 44 Philippine186; 137SC11, 134SE859; 51 SD308, 213NW723, 724 [citCJ]; 53SD 191, 220NW613; 161Tenn324, 30SW (2d)250 (teachers' salaries in accord with budget); 117Tex73, 297SW219; TexCommnA 280SW742; TexCommnA 291SW886; TexCommnA 288SW182; TexCommnA 7SW(2d)65; TexCommnA 15SW(2d)594; TexCommnA 29SW(2d) 312; 113TexCr18, 18SW(2d)637(1st case); TexCivA 282SW642; TexCivA 289SW119; 140Wash433, 249P996; 144 Wash641, 258P479; 146Wash6, 262P 138; 198Wis349, 226NW301(1stcase); 100WVa394, 130SE478; 189Wis461, 205 NW388; 191Wis645, 211NW670. [b] 8 F(2d)635. [c] 75CalA591, 243P55. [f] 96Fla620, 119S333. [j] **Compensation to abutting owner** for damage by construction of highway presumed after lapse of many years, especially where owner failed to seek relief provided by statute. 286Pa351, 33A495. [k] **Right to certify legal effect or interpret act** is not conferred by presumption. Tex CommnA 29SW(2d)991.

133-31 272US1, 47SCt1, 71Led131; 13 F(2d)489; 22F(2d)294; 35F(2d)178; 40F(2d)500; 44F(2d)54; 44F(2d)70; 170Ark859, 281SW661; Colo 293P338; 104Conn579, 134A169; 162Ga471, 134 SE85; GaA 155SE81; 209Ky114, 272 SW393 (not presumed that officer signed contract he disapproved without noting disapproval); 225Ky358, 8SW(2d) 629; 229Ky419, 17SW(2d)255; 262 Mass404, 160NE285; 240Mich28, 215 NW6; 166Minn107, 207NW138; 152 Miss356, 119S819; 220MoA474, 274SW 945; 315Mo 1336, 290SW123; 78Mont 516, 255P1043; 48Nev299, 231P384; NH 152A279; 102NJL303, 131A915; 246NY 35, 157NE922; 128Misc642, 220NYS66; 225AppDiv371, 233NYS184; 230AppDiv 252, 243NYS644; 194NC159, 138SE601; 113 Okl 251, 241P138; 125 Okl 217, 257 P307; 135 Okl 253, 275P285; 116 Or 399, 241P393; 45SC196, 143SE31; 51 SD308, 213NW723, 724 [citCJ]; Tex CommnA 29SW(2d)991; TexCommnA 32SW(2d)181; TexCivA 298SW450; Tex CivA 28SW(2d)1107; TexCivA 32SW (2d)496; 140Wash433, 249P996. [d] **Where assistant director in charge takes possession of land and uses it in operation of government explosive plant,** it will be presumed he had authority to do so. 5F(2d)99. [e] **It will be presumed that public officers will act legally.**–81Mont170, 261P962.

134-32 51SD308, 213NW723, 724 [cit CJ].

134-33 315Mo 1336, 290SW123; 194NC 159, 138SE601; 51SD308, 213NW723, 724 [citCJ]; 152Tenn379, 277SW886, 887 [quotCJ]; 147Wash321, 266P150, 153 [quotCJ].

134-34 Cal 293P67; 78Mont516, 255P 1043; 113TexCr18, 18SW(2d)637(1st case).

135-38 8F(2d)155; 70CalA607, 233P 988; 104Conn579, 134A169; 158La81, 103 S517; 253NY243, 170NE905. See also 146Va426, 131SE689. [a] 135Misc290, 238NYS95. [c] **Facts held to uphold** rather than defeat presumption of good faith. 196 Ind436, 148NE481.

135-38½-New. Good faith of township committee in abolishing office may be presumed. NJSup 150A770.

135-38½-New. Fraudulent action of unqualified commissioners' court could not be presumed. **TexCivA** 28SW(2d) 921.

135-39 286Pa351, 133A495.

135-41½-New. Negligent conduct will not be presumed because statute has been violated by officer. 101WVa485, 133SE127.

135-42 116 **Okl** 202, 244P170.

135-44 216Ala527, 113S587.

135-45 **IndA** 165NE265. [b] **On direct attack on judgment,** there is no presumption that clerk properly performed official duty in proceeding under Park and Playground Act, though decree recites giving of due notice where record discloses motion for new trial supported by affidavits putting question in issue. 203Cal 44, 262P1084.

135-46 115 **Okl** 158, 241P776.

135-47 **IndA** 165NE265.

135-49 5PaDist&Co 17.

135-49½-New. The presumption that officials have done their duty is limited by the rule that a presumption cannot be based upon a presumption. 116 **Okl** 202, 244P170.

135-49½-New. The rule does not apply where the effect of the act is to deprive a citizen of his property or vested rights. 156Md40, 143A666.

135-50 125 **Okl** 194, 257P295; 6PaDist &Co 534, 536 [citCJ]; 147Wash321, 266P150; 108WVa293, 150SE745; 187 Wis410, 204NW576; 189Wis461, 205 NW388.

135-51 42F(2d)107; 95Fla289, 116S 470; 131Misc736, 229NYS26; 5PaDist &Co 54; 13PaDist&Co 143. [b] **To overcome presumption,** proof must be clear and convincing. 44Philippine192.

136-53 125 **Okl** 217, 257P307. [a] **Presumption not rebutted.**-35F(2d)365.

136-53½-New. Where there was no record of payment of purchase-money note given county and payable thirty-five years before suit was brought, it cannot be presumed that officers did duty and collected debts. **TexCivA** 285SW 340.

136-54 31F(2d)448; 335 Ill 11, 166NE 504; **Mo** 271SW992 (United States veterans' bureau); 102NJL303, 131A915; 243NY102, 152NE690; 131Misc581, 227 NYS570; 161Tenn324, 30SW(2d)250.

136-55 279US597, 49SCt452, 73L ed 867; 171Ark547, 285SW2; 97Fla710, 122S225; 161La675, 109S353; 157Tenn 71, 291SW837.

136-56 96Fla834, 119S140; 208 **Iowa** 698, 223NW756(2dcase); **Me** 149A623; **TexCommnA** 280SW742. [a] **SD** 227 NW568.

136-61 30F(2d)932; 29Hawaii820; 114 **OhSt**582, 151NE709; 157Tenn429, 7SW (2d)40.

137-63 216Ky266, 287SW735; **Tex CommnA** 29SW(2d)312; 147Wash321, 266P150, 153 [quotCJ].

137-64 50ND522, 197NW133.

137-66½-New. of health, **Mo** 26SW(2d) 773.

137-69 But see 152Wash417, 278P189.

137-72 **NJSup** 151A450.

137-72½-New. state board of prison directors; 201Cal 360, 257P439, 53ALR 615.

137-74 **CalA** 292P985.

137-75 34GaA93, 128SE231; 35GaA306, 133SE45; 322 Ill 174, 152NE597; 217 Ky419, 273SW720; 134Misc48, 234NYS 571; 35 **OhA**243, 172NE159; 119 **Or**543, 250P235.

137-77 170Ark859, 281SW661; 83CalA 764, 257P203; 89Fla499, 105S101 (accuracy of record made by clerk of court); 245 IllA132; 215Ky440, 285SW 250; 232Ky599, 24SW(2d)299; **Mass** 171NE672; 137SC11, 134SE859; **Tex CommnA** 15SW(2d)594; **TexCivA** 297 SW1089; **TexCivA** 31SW(2d)833; 144 Wash641, 258P479.

137-77½-New. county clerk; **TexCivA** 289SW119.

137-80 35F(2d)365; 37F(2d)617(2d case); 42F(2d)810; 214Ala587, 108S 529; 171Ark427, 285SW20; 83Colo 360, 265P94 (commissioners of soldiers' home); 116 **Or**399, 241P393; **Tex** 12 SW(2d)662; 147Wash224, 265P729 (parks).

137-81 220MoA474, 274SW945; **Tex CivA** 26SW(2d)1077.

137-82 317Mo 1133, 298SW773.

137-83 243NY102, 152NE690.

137-84 34GaA292, 129SE567; 165Ga 153, 140SE351; **Ind** 172NE119; 216Ky 33, 287SW228; 235Ky70, 29SW(2d)626; 75Mont369, 243P1093; 81Mont86, 261P 885; 126 **Okl** 103, 258P750; 131 **Or**168, 281P182(2dcase).

137-86 333 Ill 58, 164NE208; 206 **Iowa** 725, 221NW220; **Mass** 164NE654; 5Pa Dist&Co 54; **TexCommnA** 1SW(2d)587.

138-88 35F(2d)178.

138-90 208 **Iowa**552, 226NW171 (public officials establishing highways); 194NC 159, 138SE601.

138-91 **Mass** 169NE657.

138-94 **TexCommnA** 287SW47; **Wash** 286P89.

138-97 **Ind** 171NE65; 102NJL303, 131 A915.

138-1 **Mass** 167NE417.

138-3 43F(2d)782 (that signature of tax commissioner is on waiver by his authority); 147SC116, 144SE846.

138-4 152Miss171, 119S166.

138-7 192NC199, 134SE488.

138-9 100CalA201, 280P163; 44Philippine192.

138-10 98Fla1166, 125S375.

138-11 70CalA656, 234P125; **IndA** 165 NE265.

138-12 329 Ill 467, 160NE841; 221MoA 85, 290SW96; **TexCivA** 10SW(2d)438.

138-15 167La865, 120S480(2dcase); 240 Mich28, 215NW6; 127 **Okl** 20, 259P565; **TexCivA** 295SW288.

138-17 73CalA511, 238P1048; **TexCivA** 275SW111.

138-18 233Ky579, 26SW(2d)532; 286 Pa257, 133A379.

138-19 31Ariz485, 254P1060, 53ALR 258; **AlaA** 129S681; **TexCr** 25SW(2d) 334.

138-21 **TexCivA** 275SW179.

138-22 3F(2d)398; 32F(2d)447.

138-23 181Ark1046, 29SW(2d)268; 322 **Mo** 1230, 18SW(2d)498; 157Tenn71, 291 SW837.

138-24 **Ga** 155SE185; 103WVa148, 136 SE842.

139-25 234Ky751, 29SW(2d)17.

139-27 34GaA93, 128SE231; 35GaA306, 133SE45; 125 **Okl** 194, 257P295.

139-28 35GaA306, 133SE45; 41 **Ida**432, 242P297; 244 IllA132; 119Kan726, 241 P439; 162La121, 110S110; 172Minn454, 216NW222; 220MoA602, 287SW879; **MoA** 24SW(2d)183; **Pa** 152A102; 187 **Wis**405, 204NW478.

139-30 22F(2d)153; 178Ark18, 9SW (2d)785; 215Ky226, 284SW1052.

139-31 146SC496, 144SE233.

139-32 33F(2d)739 (commissioner of internal revenue); 10CustA244; 13 F(2d)489; 312Mo 581, 280SW37; 128 **Okl** 280, 262P680.

139-32½-New. the navy department; 27F(2d)863.

139-32⅓-New. the interior department; 28F(2d)76.

139-34 76Mont248, 245P947 (liquidation of bank).

139-37 **CalA** 287P982.

139-40 117Tex73, 297SW219.

139-44 122Kan709, 253P215.

139-46 265Mass353, 164NE91; 153Miss 476, 121S267; 315Mo 1336, 290SW123; 221MoA257, 28SW(2d)110; 84Mont461, 277P9; 85Mont141, 277P961(2dcase); 55ND767, 215NW267; 114 **Okl** 90, 243P 945; 125 **Okl** 217, 257P307; 159Tenn 69, 16SW(2d)25; 147Wash321, 266P150. [a] 147Wash321, 266P150. [c] 220MoA 388, 286SW726. See also **MoA** 16SW (2d)598. [d] 86CalA527, 261P723; 95 CalA307, 272P1068.

139-47 [a] **Failure of secretary of agriculture** to declare quarantine on transportation of agricultural products creates presumption that quarantine is not necessary. 270US87, 46SCt279, 70L ed 482.

140-48 **TexCivA** 290SW866.

140-49 47 **Ida**519, 277P562; 233Ky719, 26SW(2d)747; **Or** 289P495; 7PaDist& Co 549.

140-52 283Pa126, 129A78; 293Pa364, 143A10; 297Pa358, 147A62; 297Pa369, 147A64; 48Philippine185.

140-52½-New. state engineers; 45 **Ida** 380, 263P45.

140-54 35Ariz403, 279P257; 162Ga472, 134SE85; 120Kan365, 244P233; 228Ky 652, 15SW(2d)452; 161La699, 109S393; 128 **Okl** 280, 262P680; **TexCivA** 8SW (2d)239.

140-55 120Kan365, 244P233; 161La 699, 109S393; 246NY35, 157NE922.

141-62 35Ariz403, 279P257; 47 **Ida**89, 272P699; 166Minn109, 207NW138.

141-63 317Mo 1133, 298SW773.

141-64 50RI 242, 146A628.

141-67 174Ark1005, 298SW196; 152 Wash417, 278P189.

141-68 **TexCommnA** 29SW(2d)991.

141-70 207Cal 561, 279P658 (ratification by superintendent of state insane hospital of act of subordinate).

141-71 4F(2d)823 (office record of mailing of notice makes proof of actual mailing unnecessary). [b] **Contention that other than written notice** to constable of his election was sufficient overcomes presumption that proper notice was given. 310Mo 397, 276SW631.

141-71½-New. filing of return of service of citation by officer with whom it is deposited for filing; 199Cal 391, 249 P517.

141-73 28Hawaii395; 230Ky129, 18SW (2d)946; 240Mich28, 215NW6.

141-74 28Hawaii395; **TexCommnA** 2 SW(2d)834.

141-75 44 **Ida**786, 260P168; 206 **Iowa** 1301, 221NW932.

141-77½-New. **Presumption of omnia rita acta** rather than infer that clerk performed invalid and nugatory act. **Tex CivA** 273SW993.

141-77½-New. Other presumptions. 215Ky440, 285SW250; 102NJL303, 131 A915; 137SC11, 134SE859; 103WVa148, 136SE842.

142-79 [b] **Where one is seeking benefits of pension** system the presumption of regularity of appointment is inapplicable. **CalA** 288P143(2dcase). [c] Where one seeks to recover salary the presumption of regularity of appointment does not apply. **CalA** 288P143(2d case).

143-12 177Ark1023, 8SW(2d)462.

143-12½-New. Common-law presumptions are abandoned when basis for them is gone. 48RI 106, 135A850.

143-12½-New. Courts will not presume that persons will attempt impossible undertaking. **TexCivA** 2SW(2d)929.

143-13 38F(2d)10; 42F(2d)910; 97 CalA30, 275P448; 104Conn285, 132A 459; 29Hawaii625; 224 IllA430; 202 **Iowa**1291, 211NW716; 134Misc518, 235 NYS492; 33 **OhA**468, 169NE825; 50SD 428, 210NW507; **TexCommnA** 298SW 554. [c] **Reasonable consequences** of conduct and action intended. **Tex CommnA** 276SW653.

143-14 But see 40F(2d)599.

143-15 235 IllA180; 149Md689, 132A 265; 24 **OhA**57, 155NE815; 52SD183, 217NW203; **TexCommnA** 276SW653. See also 2F(2d)807; 40F(2d)606. [a] **Legal consequences of act intended** by one who knowingly places his signature on negotiable instrument. 51ND374, 199NW757.

143-15½-New. 104Conn291, 132A464.

143-19½-New. Inventor is conclusively presumed to know all that is present in the art at time his invention enters. 40 F(2d)879.

144-20 **Cal** 289P623; **CalA** 290P519(2d case); 109Conn529, 147A181; 161La 823, 109S504; **Miss** 128S755 (right doing); 78Mont370, 254P179; 229AppDiv 269, 241NYS712; 20 **OhA**298, 151NE 818; 50RI 288, 146A777, 66ALR1553; 147Va409, 137SE370.

144-21 [a] **This presumption is a principle of evidence** aiding jury in arriving at correct conclusion from conflicting or circumstantial evidence. **Ala** 128S 383.

144-22 [a] **Degree of proof required to overcome presumption in civil case** is mere preponderance, not that beyond reasonable doubt. **Vt** 146A812 (criminal negligence).

144-24 34F(2d)848; 68CalA139, 228P 676; 71CalA479, 235P673 (presumption that law was obeyed as to quality of grapes shipped); 80CalA271, 251P697; 87CalA199, 262P58; 205 **Iowa**114, 213 NW414; 234Ky591, 28SW(2d)787, 70 ALR335; 161La323, 109S504; 259Mass 490, 156NE687; 259Mass490, 156NE

687; 78Mont370, 254P179; 20 OhA298, 151NE818; 127 Or215, 271P596; 129 Or 216, 277P107; 291Pa18, 139A492; Tex CivA 21SW(2d)83; Vt 146A812; 147Va 409, 137SE370; 70Utah224, 259P326, 328 [citCJ]. [a] (3) Presumed that only fair and open means were used in presenting merits of any matter advocated before a legislative body. 199Cal 168, 248P658, 47ALR904. [d] (3) Where facts are as compatible to inference of innocence as of guilt, intention of corporation to violate law is not inferable. 244NY84, 155NE58. (4) Intention to conform with law is presumed, in absence of belying evidence. 244NY84, 155NE58. [e] (1) 99Vt327, 131A799. (2) Thus in ordinary action of trover for conversion of bonds, presumption of innocence is not to be weighed as evidence in defendant's favor. 99Vt327, 131A799. [f] **Where administrators are required to dispose of property for cash,** it is presumed that funds coming into administrators' hands were cash. 205 Iowa114, 213NW414.

144-25 80CalA271, 251P697.

144-26 DC 33F(2d)643; 322Mo 1050, 17SW(2d)977; TexCivA 296SW939.

145-27 79Mont226, 255P730; 196NC 484, 146SE204. But see 215Ala126, 100 S143.

145-34 [c] **That a child was conceived** 280 days before its birth will be presumed. 129Misc447, 221NYS714.

145-35 [a] (1) 91CalA394, 267P146; 176Minn227, 222NW929. (4) That bank was solvent at time it charged depositor's account with amount of note. 53 SD222, 220NW509, 61ALR940. (5) That corporation is solvent. 160Tenn 57, 22SW(2d)6. [b] **Insolvency is never presumed.**–126Misc283, 213NYS25.

145-37 NJCh 152A246.

145-39½–New. , and ordinary health. 91CalA715, 267P741.

145-40 [a] (6) That guardian ad litem was appointed for defendant. Va 152SE328.

146-46 217Ala364, 116S427; 207Cal 561, 279P658; 197 Ind236, 150NE361; 87 IndA462, 151NE735; 201 Iowa586, 207NW598; 204 Iowa1394, 213NW225; 207 Iowa707, 223NW473; 247Mich301, 225NW607; 131 Or23, 281P825; 46 Philippine957; 50Philippine844; Tex CommnA 293SW560; TexCommnA 25 SW(2d)597; TexCivA 287SW668; Tex CivA 290SW270; TexCivA 27SW (2d)287. [e] **Incompetency is not presumed from filing of information** alleging that individual is of unsound mind. 316Mo 665, 291SW481.

146-47 196NC484, 146SE204. [c] **Ordinary care.**–29PortoRico 768, 775 [cit Law of Evid. § 102 subd 4].

146-48 [a] **Jurors** are supposed to be men of sound common sense and average experience in affairs of life. Tex CivA 287SW87.

146-50 80CalA538, 252P638.

146-51 5F(2d)330; 15F(2d)719; 29 F(2d)254; 28Ariz518, 238P332; 70 CalA720, 234P336; 85Colo 289, 275P 896; 37GaA268, 140SE767; 39GaA262, 146SE798; 260Mass485, 157NE520; Miss 130S479; Miss 130S507; 307Mo 336, 270SW638; 49Nev101, 238P344; 38 OklACR61; 121 Or531, 255P606, 607 [citCJ]; 122 Or225, 258P192; 48Philippine104; SD 231NW933; TexCivA 14 SW(2d)348; 136Wash426, 240P554; 155Wash107, 283P1087. [a] 121 Or 531, 255P606.

147-52 20F(2d)333; 38F(2d)77; 195 Cal 655, 235P438; 77CalA306, 246P816; 96CalA549, 274P597; 110Conn319, 148 A358; 15DelCh119, 132A442; 167La658, 120842; 174Minn471, 219NW757; NJ Sup 129A432; 193NC36, 136SE612; 119 Or44, 247P155; 121 Or531, 255P606; SD 231NW933; TexCivA 272SW542. See also 90Fla452, 108S189. [a] (2) Good faith on part of directors as to diverting of cash from announced purpose will be presumed. 128Misc732, 219 NYS449. [b] **Bad faith not presumed.**–Iowa 232NW693.

147-53 32F(2d)103; 199Cal 641, 250P 676; 15DelCh198, 134A97; 42 Ida375, 245P399; 200 Iowa805, 204NW219; 203 Iowa372, 212NW678; Mass 168NE521 (3dcase); 239Mich1, 214NW113; 316 Mo 1310, 293SW414; 81Mont434, 263P 985; 132Misc666, 230NYS464; 115 Okl 233, 242P535; 120 Okl 282, 251P43; 123 Okl 33, 251P729; 123 Okl 95, 251P1015; 38 OklACR61; 40 OklACR71; 121 Or 531, 255P606, 607 [citCJ]; 48Philippine104; 136Wash426, 240P554. But see 326 Ill 398, 158NE138.

147-54 199Cal 641, 250P676; 94CalA 493, 271P383; 203 Iowa372, 212NW678; 10LaA590, 121S339; 123 Okl 95, 251P 1015; 39 OklACR304; 121 Or531, 255 P606, 607 [citCJ]; TexCommnA 27SW (2d)144(2dcase).

147-56 200Cal 318, 253P726; 330 Ill 48, 161NE68; 310Mo 104, 274SW770; 54SD175, 222NW670; 147Va409, 137SE 370.

147-57 215Ala426, 111S214; 200Cal 318, 253P726.

147-58 88PaSuper231; 146Va594, 131 SE850, 46ALR186.

147-59 200Cal 318, 253P726; 80CalA 271, 251P697; 80CalA411, 251P938; 37 GaA268, 140SE767; IndA 169NE880; 220Ky196, 294SW1039; Miss 127S696 (2dcase); 105NJL642, 146A370; 129 Okl 222, 264P164; 122 Or225, 258P192; TexCommnA 291SW206; 146Va594, 131 SE850, 46ALR186; 147Va409, 137SE 370. [a] 126 Okl 139, 258P274. [c] 214AppDiv296, 212NYS230 (bill of sale and lease attached is presumed to have been made for valid purpose).

148-61 DC 33F(2d)643; 225AppDiv 29, 232NYS84.

148-63½–New. In the absence of showing as to where a contract with a foreign corporation not licensed to do business in the state of the forum was executed, it will be presumed that it was made where it was lawful to make it, and not within the state. 233Mich597, 208 NW148.

148-67 [a] 7F(2d)54; 7F(2d)541; 8 F(2d)175; 20F(2d)425; 23F(2d)994; 24F(2d)704; 39F(2d)759 (treasury regulation); 36F(2d)171; 216Ala514, 113 S524; 22AlaA613, 118S502; 30Ariz599, 249P761; 31Ariz347, 253P626; 171Ark 11, 283SW17, 45ALR1396; 171Ark427, 285SW20; 201Cal 643, 258P945; 207 Cal 697, 280P360; 69CalA60, 230P456 (sureties on undertaking on appeal held chargeable with knowledge of law under which it was given); 196Cal 260, 237 P542; CalA 258P693; 86CalA277, 261 P328; 97CalA30, 275P448; CalA 276P 1060; 101CalA456, 281P717; CalA 289 P946; 78Colo 461, 242P634; 82Colo 173, 257P1086; 87Colo 144, 286P114(2d case); 107Conn52, 139A700; 111Conn 72, 149A231; 91Fla770, 108S820, 51ALR 731; 99Fla132, 126S142; 162Ga246, 134 SE42; 164Ga637, 139SE216; 36GaA817, 138SE267; 42 Ida678, 247P786, 48ALR 950; 330 Ill 121, 161NE300; 335 Ill 352, 167NE101, 68ALR350; 337 Ill 488, 169 NE237; 234 IllA296; 246 IllA496; 252 IllA262; 199 Ind687, 156NE552; Ind 172NE887; 204 Iowa274, 212NW551; 202 Iowa381, 210NW444; 203 Iowa76, 212NW374; 203 Iowa231, 212NW553; 204 Iowa290, 214NW538; 206 Iowa577, 218NW920; 208 Iowa1208, 227NW103 (dower rights); 231Ky731, 22SW(2d) 133; 167La505, 119S530; 154Md438, 140 A836; 154Md588, 141A337; 155Md265, 141A504; Md 149A566; Mass 170NE 416; 316Mo 621, 291SW136; 318Mo 373, 300SW778; Mo 26SW(2d)980; 220MoA 273, 286SW153; 220MoA388, 286SW726; 221MoA265, 2SW(2d)185; 76Mont537, 248P209 (assignee of nonnegotiable note); 78Mont308, 254P187; 82Mont280, 267P214; 114Nebr423, 207NW674, 45 ALR1418; 48Nev100, 227P1016, 232P 783; 100NJEq431, 136A187; NJ 143A 736(2dcase); NJCh 129A712; 100NJEq 447, 136A304; NM 242P440; 31NM220, 243P333; 244NY221, 155NE106; 253 NY243, 170NE905; 253NY313, 171NE 75; 130Misc556, 224NYS44; 134Misc 494, 236NYS331 (legal effect of declarations); 136Misc551, 241NYS364; 137 Misc451, 244NYS115; 194NC340, 139SE 448; 115 OhSt139, 152NE387; 117 Okl 1, 245P60; 117 Okl 133, 245P615; 117 Okl 224, 246P230; 117 Okl 195, 246P 472; 127 Okl 148, 260P52; 129 Okl 75, 263P105; 289Pa407, 137A627; 9PaDist &Co 554; 49Philippine19; RI 151A5; RI 151A131; TexCommnA 283SW779; TexCommnA 288SW171; TexCommnA 27SW(2d)144(2dcase); 118Tex650, 23 SW(2d)695; TexCivA 275SW137 (levee district); TexCivA 283SW645; TexCivA 284SW326; TexCivA 284SW654; Tex CivA 294SW610; TexCivA 17SW(2d)68; TexCivA 20SW(2d)1084; TexCivA 21 SW(2d)17; TexCivA 24SW(2d)751; TexCivA 30SW(2d)539; 147Va415, 137 SE496; 148Va585, 139SE478, 58ALR 193; 140Wash625, 250P52; WVa 153 SE293; 187Wis405, 204NW478; 189 Wis471, 205NW428; 191Wis645, 211NW 670; 199Wis230, 225NW331, 63ALR 1165; 33Wyo 374, 239P1045. See also 264Mass460, 163NE82. [a] (1) MoA 7SW(2d)1018; TexCommnA 276SW690; TexCivA 283SW645. (2) Md 150A793. (5) 196Cal 323, 237P1070 (that in case of lapse of legacy or devise it would fall into residuary estate). (5) 134Misc399, 235NYS683. (21) That one electing to serve sentence pending appeal knows statutes and rules of administrative board as to maintenance, management, and control of convicts. 20AlaA665, 104 S847. (22) That grantor knows legal effect of deed executed by him. 116 Okl 180, 244P813. (23) That any parol license given a corporation to enter on land is revocable at will of owner. 194 NC316, 139SE455. (24) That tenant is charged with knowledge of statute applicable to marketing contract of landlord. 82Colo 428, 260P1080. (25) That president of insurance company knew legal effect of terms of policy under statute. Iowa 224NW771. (26) That purchaser of note from bank in reliance on cashier's representation knew that oral promise to pay debt of another is within statute of frauds. 221MoA887, 289 SW34. (27) That grantee of security deed had knowledge that grantor's declarations were not binding on his coowner. 208 Iowa62, 224NW831. (28) That grantee of security deed had knowledge of grantor's and coöwner's rights as tenants in common. 208 Iowa62, 224 NW831. (29) That chief of police knew law making possession of cars with mutilated numbers a crime. NJSup 144 A608. (30) That testator knows law requires husband to support his wife and child. 254 IllA552. (31) That owner of real property knows provisions of mechanics lien law. 254 IllA569. (32) Other instances. Cal 287P974; 111Conn 1, 149A515; Iowa 232NW670; Mass 170 NE819; 136Misc566, 240NYS410; Tex CivA 26SW(2d)470. (33) Employer and employee are conclusively presumed to know when Workmen's Compensation Act went into effect. MoA 27SW (2d)44. (34) That everyone knows powers of municipal corporation. 339 Ill 491, 171NE526. (35) Officers of bank know its condition. SD 231NW 288. [c] (1) 92CalA656, 268P1083; 109Conn110, 145A758; Pa 151A583. (2) Legislature is presumed to know holdings of supreme court. 293Pa497, 143A209. [d] But see 204 Iowa473, 215 NW761. [f] **Public policy.**–133Misc 807, 234NYS274. [g] **General assembly is presumed to know** that it cannot legally violate constitution of United States by requiring private carriers of freight to become common carriers against their will. 152Va992, 147SE262. [h] **Town** is presumed to know law. 126Me205, 137A67.

149-68 37F(2d)870; 86Colo 580, 284P 334; Md 148A447; 156Miss171, 125S 96; MoA 4SW(2d)847; 31NM220, 243P 333; 223AppDiv426, 228NYS369; 226 AppDiv480, 236NYS89; 290Pa427, 139A 136 (provisions of constitution); 41Wyo 11, 281P188.

149-69 48RI 321, 138A39. [b] **Executor** is presumed to know statutory limitations on his compensation. 98NJEq 655, 130A195.

150-71 31Ariz347, 253P626; 338 Ill 46, 169NE809.

150-71½–New. A trustee is presumed to know his duties. 323 Ill 283, 154NE105.

150-71½–New. County commissioners are presumed to have knowledge of

statutes regulating county finances. **Tex CivA** 282SW642.

150-71¼-New. A presumption of a knowledge of the law exists whenever it is necessary to the administration of justice. 81**Colo** 513, 256P13.

150-71½-New. It is competent for the legislature to make exceptions to the general rule. 148Va585, 139SE478, 58 **ALR**193.

150-72 327 **Ill** 489, 158NE810; 317**Mo** 181, 296SW755; 221**MoA**999, 295SW847. [a] (2) Street car company is conclusively presumed to know ordinances establishing transfer points. 149Va882, 141SE829.

150-74 **TexCivA** 24SW(2d)542.

150-79 95**CalA**394, 273P72.

150-80 But see 171**Ark**427, 285SW20.

150-80½-New. It has been held, however, that publishers, in making bids to furnish textbooks, properly interpreted the law forbidding the inclusion of a central depository cost in the retail price. 171Ark427, 285SW20. [a] **Sufficiency of evidence to rebut presumption.** -(1) Evidence that part of retail price of textbooks went to central depository is held to rebut presumption that bid was made according to correct interpretation of law as requiring that company pay cost of depository. 171Ark 427, 285SW20. (2) Evidence that bid of company awarded textbooks contract was based on interpretation of statute as authorizing inclusion of central depository cost in retail price does not overcome presumption that other companies made bids according to legal interpretation thereof. 171Ark427, 285 SW20.

151-86 248**Mich**8, 226NW669.

151-88 84**Mont**38, 274P296.

151-88½-New. Attorney dealing with insane person in state hospital is presumed to know of existence of order prescribing method of obtaining signature to legal papers by such persons. 126Misc469, 214NYS85.

151-88¼-New. In civil actions the parties are not charged with knowledge of every criminal statute or ordinance which may be invoked as having some incidental bearing upon the issues of fact involved. 166Minn308, 207NW644.

151-92 234 **IllA**64; 205 **Iowa**108, 215 NW661; 76**Mont**445, 247P386 [citCJ]; 216**AppDiv**100, 214NYS528. [b] **MoA** 21 SW(2d)937. [d] **It is only in absence of pleading and proof** that it will be presumed that common law is in force in another state and that it is the same as common law of forum. 210**Ky**166, 275SW517.

151-94 216**AppDiv**100, 214NYS528; 136Misc863, 242NYS464.

151-95 23**AlaA**31, 120S297; 202**Cal** 215, 259P947; 203**Cal** 61, 263P200; 84**CalA** 387, 258P141; 95**CalA**535, 273P47; 104 **Conn**169, 132A902; 37**GaA**650, 141SE 328; 243 **IllA**367; 247 **IllA**81; 253 **IllA** 589; 202 **Iowa**1, 209NW412; 205 **Iowa** 108, 215NW661; 120**Kan**575, 244P1063; 213**Ky**81, 280SW483; 168**La**510, 122S 599; 5**LaA**391; 254**Mass**142, 149NE615; 261**Mass**1, 157NE725; 240**Mich**257, 215 NW397; 221**MoA**1243, 300SW841; **Nebr** 231NW141; **Nebr** 232NW590; 31**NM** 400, 246P748; 252NY284, 169NE386; 216**AppDiv**100, 214NYS528; 127**Misc** 508, 217NYS39; 134**Misc**274, 235NYS 195; 135**Misc**608, 238NYS154; 229**App Div**126, 241NYS302; 135**Misc**676, 241 NYS352; 52**ND**617, 204NW683; 126 **Okl** 144, 259P128; 283**Pa**573, 129A574; 286**Pa**226, 133A232; 47**RI** 299, 132A883; **TexCivA** 11SW(2d)352; **TexCivA** 13SW (2d)909; **Utah** 291P298; **Wash** 291P 1079; **Wis** 231NW585.

152-97 35**Ariz**392, 278P384; **CalA** 285 P868; 109**Conn**268, 146A727; 41**GaA** 124, 152SE295; **Ill** 173NE172; 234 **IllA** 64; 205 **Iowa**108, 215NW661; **Iowa** 233 NW126; **LaA** 129S185; 263**Mass**37, 160 NE324, 56**ALR**1320; **Mass** 172NE243; 240**Mich**257, 215NW397; **Nebr** 231NW 141; 31**NM**400, 246P748; 216**AppDiv** 368, 214NYS353; 216**AppDiv**100, 214 NYS528; 127**Misc**508, 217NYS39; 225 **AppDiv**256, 232NYS592; 134**Misc**250, 234NYS705; 136**Misc**863, 242NYS464; 283**Pa**573, 129A574; 286**Pa**226, 133A 232; 87**PaSuper**94; 8**PaDist&Co** 169; 49**SD**303, 207NW61, 51**ALR**287; 53**SD** 262, 220NW506, 61**ALR**940; **TexCivA** 8SW(2d)767; **TexCivA** 18SW(2d)231; **TexCivA** 23SW(2d)482; **TexCr** 25SW (2d)334; 150**Wash**192, 272P722. [g] **Applications.**-Action on oral contract made in foreign state cannot be maintained where contra law of forum, in absence of allegation that foreign law differed from law of forum. 216**AppDiv** 368, 214NYS353.

153-3 18F(2d)413; 25F(2d)984; **CalA** 287P560; 126**Me**409, 139A227; 127**Misc** 508, 217NYS39; 133**Misc**109, 231NYS 221; 136**Misc**141, 239NYS568; 154**Wash** 499, 282P830; **Ont** [1930] 3**DomLR**327; **Ont** [1930] 4**DomLR**820.

153-4 245NY116, 156NE634. [a] (6) Peru. 214**AppDiv**820, 211NYS143.

153-4½-New. The fact that the remedy is exclusively in equity does not compel the court to do inequity. 244NY 22, 154NE652.

154-6 18F(2d)413; 220**Ala**86, 124S234 (2dcase); 203**Cal** 61, 263P200; 203**Cal** 219, 263P1007; 203**Cal** 483, 265P190, 57 **ALR**696; 203**Cal** 569, 265P241; 199**Cal** 523, 250P397; 84**CalA**387, 258P141; 85 **CalA**323, 259P374; 86**CalA**409, 260P 813; 201 **Iowa**20, 206NW680; 202 **Iowa** 1, 209NW412; **Iowa** 226NW168; **Iowa** 229NW241; 120**Kan**575, 244P1063; 121 **Kan**363, 245P1022, 46**ALR**1200; 307**Mo** 234, 270SW658; **MoA** 287SW657; 221 **MoA**979, 295SW835; 222**MoA**825, 10SW (2d)344; **MoA** 16SW(2d)705; **MoA** 21 SW(2d)937; 76**Mont**445, 247P336 [cit CJ]; 77**Mont**395, 250P1112; 83**Mont** 501, 272P994; 84**Mont**285, 275P743; 117**Nebr**562, 221NW691; **Nebr** 231NW 27; 126 **Okl** 144, 259P128; 287**Pa**224, 134A460; 98**PaSuper**41; **TexCivA** 5SW (2d)829; 66**Utah**282, 241P840, 43**ALR** 136; 99**Vt**17, 130A701; 40**Wyo** 226, 276 P452; 40**Wyo** 226, 278P76. [c] 207 **Iowa**239, 222NW413. [f] **Where pleadings are inconsistent with presumption of uniformity,** presumption cannot be indulged. 201 **Iowa**378, 207NW351. [g] **There is presumption, in action for damages for negligence** in operation of automobile occurring in another state, that right to compensation is recognized by laws of all states. 133**Misc** 777, 233NYS543.

155-9 126**Me**7, 135A357; **MoA** 287SW 657; 134**Misc**274, 235NYS195.

155-12 11**LaA**676, 124S775.

155-14 219**Ala**81, 121S66; 39**GaA**155, 146SE514; 250 **IllA**184; 250 **IllA**587; 313**Mo** 448, 285SW459; 103**NJL**11, 135 A66; 250**NY**313, 165NE460.

156-18 41**GaA**394, 153SE203(2dcase); 130**Misc**306, 223NYS765.

156-30½-New. In absence of proof of statute altering common law in a common-law state, presumption is that common law prevails. 215**AppDiv**254, 213 NYS28.

156-30¼-New. Where the law of a country in which common law is not presumed to obtain is not proved, the law of forum will be applied. 127**Misc** 508, 217NYS39.

156-30¼-New. Where an offense has been shown to be a crime under the laws of a foreign country on a certain date, it will be presumed that it continued to be a crime several years later. 4 **HawaiiFed**266.

156-30½-New. In the Philippines it will be presumed that foreign laws on a particular subject are the same as those of the Philippines. 50**Philippine** 867.

156-32½-New. Foreign law need not be pleaded, presumption being that parties are entitled to whatever contract expressly provides. 125**Misc**417, 211NYS 270.

156-32¼-New. Foreign statutes are construed according to the rules applicable to the construction of domestic statutes, if no foreign decision is offered construing them. 153**Wash**427, 279P585.

156-33½-New. In an action to return premiums on policies, foreign law must be pleaded, there being no presumption that foreign law allows such recovery. 125**Misc**417, 211NYS270.

156-34 204 **Iowa**260, 214NW514, 515 [citCJ]; 287**Pa**87, 134A384; 48**RI** 106, 135A850; **RI** 150A460. [d] **Strength of presumption** depends on presence of full basis on which it rests. 214**Ala**243, 107 S210.

157-35 279**US**639, 49**SCt**445, 73**Led** 884; 204 **Iowa**260, 214NW514, 515 [cit CJ]; **MoA** 281SW116. [b] **Burden of overcoming presumption** is reasonable satisfaction from whole evidence, giving weight to presumption in light of judgment and experience. **Ala** 128S383.

157-36 **Ill** 167NE35; 108**WVa**686, 152 SE635.

157-37 325 **Ill** 229, 156NE306. [a] **Degree of proof necessary to remove presumption.**-118 **Oh**442, 161NE336.

157-38 **TexCivA** 28SW(2d)902; 21 **SaskL**81, [1926] 4**DomLR**631, [1926] 2 **WestWkly**805. [a] **Actual facts rebut presumption** regardless of which party offers such evidence. **RI** 150A460.

157-40 197**Cal** 82, 239P709, 41**ALR** 1027; 199**Cal** 523, 250P397; 87**CalA**440, 262P380; 137**Misc**790, 244NYS502; 122 **Or**225, 258P192; 142**Wash**73, 252P535.

157-41 35F(2d)113; 197**Cal** 82, 239P 709, 41**ALR**1027; 85**CalA**360, 259P460; 102**CalA**205, 282P968; 129**Misc**447, 221 NYS714; 225**AppDiv**391, 233NYS252; 298**Pa**101, 147A854; **RI** 150A460; 107 **WVa**192, 147SE877, 66**ALR**102. [a] **Term "rebutting" or "rebuttal" of presumption** may signify mere introduction of contradictory evidence, or disproof of facts presumed. 40**GaA**341, 149 SE657.

157-42 **Cal** 287P343; 199**Cal** 523, 250P 397; 87**CalA**440, 262P380; 144**Va**816, 130SE771 (where evidence for and against presumption of law are equal, presumption is not rebutted and will prevail). See also 288**Pa**140, 135A903. But see **TexCommnA** 280SW742.

157-43 36F(2d)747. But see 172**Minn** 349, 215NW781.

157-49 8**PaDist&Co** 369.

157-50½-New. The law will not indulge conflicting presumptions. 115 **Okl** 158, 241P776.

157-50¼-New. However, presumption of innocence is held to prevail over presumption of validity of alleged prior marriage. 78**Mont**370, 254P179.

158-51 217**Ala**32, 114S414, 417 [quot CJ].

158-52 217**Ala**32, 114S414, 417 [quot CJ]; **CalA** 277P350; 240**Mich**677, 216 NW391; **Wis** 231NW593 (reasonable, visible connection).

158-53 217**Ala**32, 114S414, 417 [quot CJ]; 174**Ark**130, 297SW856; 201**Cal** 715, 258P933; **CalA** 284P1056; 107 **Conn**535, 141A657; 3**Del** 541, 140A648; 36**GaA**149, 136SE319; 37**GaA**695, 141SE 511; **Mass** 170NE621; 56**ND**357, 217 NW531, 534 [citCJ]; 21 **OhA**124, 152 NE911; **TexCivA** 297SW1083; **TexCivA** 20SW(2d)829; 99**Vt**179, 130A591; 152 **Wash**646, 278P699, 66**ALR**77. [i] **To determine disputed date of injury** from falling limb of tree weather conditions on each disputed day are material. 21 **OhA**124, 152NE911. [j] **Evidence may be excluded though relevant,** where long experience and due consideration show it to be in practical effect harmful. 285 **Pa**561, 132A810.

159-54 15**CustA**147; 213**Ala**84, 104S3; 215**Ala**327, 110S716; 217**Ala**364, 116S 427; **AlaA** 130S516; 174**Ark**130, 297SW 856; 37**GaA**695, 141SE511; 40**GaA**633, 151SE42; 329 **Ill** 519, 161NE129; **IndA** 151NE33; **Iowa** 233NW63; 122**Kan**814, 253P600; 228**Ky**737, 15SW(2d)531; 234**Ky**637, 28SW(2d)970; 154**Md**63, 139A564; **Mass** 173NE549; **Miss** 130S 50; **MoA** 297SW425, 428 [citCJ]; **NJSup** 137A432; 249NY381, 164NE324; 190**NC**24, 128SE485; 198**NC**56, 150SE 665; 142 **Okl** 184, 286P304; **TexCivA** 290SW187; **TexCivA** 297SW258; **Tex CivA** 297SW1083; **TexCivA** 28SW(2d) 565.

161-61 82NH304, 133A16, 45**ALR**1409.

161-61½-New. Test is whether the evidence can throw light on the transaction or whether it is totally irrelevant. **TexCivA** 285SW920.

161-62½-New. In determining the issue of reasonableness, the question of what facts shall be considered is a question of substantive law. 82NH304, 133 A16, 45**ALR**1409.

161-65 [a] **Evidence not inadmissible** because another and different inference might be drawn therefrom. 256**Mass** 187, 152NE305.

161-67 219**Ky**119, 292SW765. But see

35GaA292, 133SE63. [a] **Where suit for discovery of deed is barred by laches**, evidence to prove existence of deed is irrelevant. 99NJEq369, 131A897.

161–68 [a] **Court cannot take judicial notice** of condition of city streets, or extent to which abutting land is developed in any section, or public necessities at any given place on given street. 126Me 235, 137A398.

162–69 22F(2d)622; 255Mass104, 151 NE84; 83NH23, 136A751; 135SC62, 133 SE533; 69Utah268, 254P142; 99Vt91, 130A758; 99Vt340, 132A39. [b] **Evidence held immaterial.**–255Mass104, 151 NE84.

162–70 218Ala354, 118S644; 165Ga451, 141SE306; 85 IndA450, 150NE31; IndA 148NE505; 83NH467, 144A266; Tex CommnA 12SW(2d)158; TexCivA 16SW (2d)932; 99Vt340, 132A39. See also 74 CalA585, 241P572. [a] **Evidence held to have no probative force** because of physical impossibility. TexCivA 283SW 627.

162–71 99CalA240, 278P476; 107Conn 156, 139A688; 82NH304, 133A16, 45 ALR1409; 52SD548, 219NW262; 147 Wash394, 266P138. [d] 43 Ida505, 256 P88; 153Md419, 138A324.

162–71½–New. or too remote as to place, 190NC24, 128SE485.

162–72 107Conn156, 139A688; 137SC 468, 135SE567.

162–73 [a] (4) **In action to enjoin encroachment on railroad's right of way,** testimony as to stopping of trains in front of home of defendant's predecessor, in attempt to prove written contract, held properly excluded. 137SC 468, 135SE567. [c] 201 Iowa1202, 203 NW284.

164–74 168Minn43, 209NW642; 137SC 468, 135SE567; 155SC526, 152SE699; 99Vt91, 130A758. See also 99Vt340, 132 A39.

164–75 214Ala479, 108S344; 163Ga471, 136SE440; 165Ga335, 141SE67; 165Ga 451, 141SE306; Ga 154SE891; 166Minn 7, 206NW934; TexCivA 6SW(2d)227; Wis 230NW612. [a] **Evidence held irrelevant and immaterial,** hence properly excluded. NJ 129A232.

164–76 36GaA149, 136SE319; 82NH 304, 133A16, 45ALR1409; 193NC73, 36 SE257 (in action involving title to land, where plaintiff claimed by adverse possession, but neither party claimed under grant from state, grant from state registered after commencement of action is admissible).

164–78 94Fla318, 113S689; 99Fla1195, 128S639(2dcase). [b] TexCommnA 13 SW(2d)351.

164–79 Ala 128S389(2dcase); Utah 263 P495. See also 197NC66, 147SE672.

165–80 TexCommnA 15SW(2d)1011, 67 ALR1324.

165–81 214Ala339, 108S29; 144Wash 60, 256P777. [a] **Circumstantial evidence** need not refer directly to main issue, reference to fact relevant to fact in issue being sufficient. TexCivA 6SW (2d)151.

165–82 220MoA429, 276SW96; 99Vt91, 130A758 (great latitude allowed in reception of circumstantial).

165–86½–New. A fact should not be received in evidence where it is so indefinite that no certain and definite inference can be drawn therefrom. 130 Or267, 278P99.

165–87 36GaA149, 136SE319; 115 Or 608, 239P105, 43ALR1285; RI 132A886.

165–91 150Md18, 132A258.

165–92 Ala 130S213. [c] **Evidence held inadmissible in absence of preliminary evidence.**–TexCivA 283SW568.

166–93 160Ga801, 129SE49 (hearsay admissible as explaining conduct of plaintiff); 160La143, 106S724; 99Vt91, 130A 758.

166–94 82NH304, 133A16, 45ALR1409.

166–95 249Mich76, 227NW759; MoA 17 SW(2d)557; 297Pa79, 146A443; Tex CivA 275SW226. But see 48 Ida727, 285 P472. [a] (1) TexCivA 290SW226.

167–99 162Ga743, 135SE95.

167–2 11F(2d)967; CalA 279P474; 37 GaA695, 141SE511; Ill 233A432. See 108Conn115, 142A812. [c] **Evidence apparently collateral** is often admitted when facts present such points of similarity as to afford reasonable data for conclusion. 190NC24, 128SE485.

167–4 [a] **Reason for suing for less than is actually due.**–127Kan399, 273P 458.

167–6 Ill 233A432.

167–11 Ill 233A432; 166Minn7, 206NW 934; 119 Or682, 250P1098; 115Tex490, 283SW769; TexCivA 5SW(2d)862. [a] **In action for injury** due to falling limb of tree, evidence as to whether wind was blowing or not is material. 21 OhA 124, 152NE911.

168–14 Ill 233A432; 218MoA563, 267 SW6; 81Mont509, 264P396.

168–16 233Ky198, 25SW(2d)373 (jury may consider circumstances in arriving at facts).

168–17 233 IllA432; 166Minn7, 206NW 934; 178Minn40, 226NW415.

168–20 332 Ill 627, 164NE142; 206 Iowa 1093, 221NW771; 217Ky148, 289SW215; 172Minn250, 215NW181; 83NH160, 139 A750; 247NY460, 160NE914.

168–21 180Ark844, 22SW(2d)1020; Mo 23SW(2d)1053; MoA 10SW(2d)75; TexCivA 32SW(2d)513.

168–22 218Ala566, 119S610(2dcase).

168–23 260Mass28, 156NE857; 262Mass 91, 159NE526; MoA 30SW(2d)626; 286 Pa439, 133A636; 153Tenn84, 282SW376; Utah 275P582; 99Vt366, 133A359.

169–25 45 Ida636, 264P377; 260Mass 28, 156NE857; 286Pa439, 133A636. See 153Tenn84, 282SW376. [b] **Negative testimony must be by person whose attention was actually** directed to fact. 91 Fla918, 109S193.

169–26 233Pa520, 129A577.

169–28 195Cal 49, 231P735; 137SC468, 135SE567.

169–29 [d] **Assessment rolls.**–Iowa 232 NW666. [e] **Financial statement.**–Iowa 232NW666.

169–30 180Ark671, 22SW(2d)553; 203 Iowa776, 209NW452; 13PaDist&Co 164. [c] **Competency of witness.**–139 Okl 195, 281P807 (that return of tax sale not on file may be shown by county treasurer as custodian of records).

169–31 203 Iowa776, 209NW452.

169–34½–New. Testimony that no cotton or a single bale thereof corresponding with warehouse receipts was found in a certain warehouse after thorough examination of cotton stored therein is admissible. 36GaA149, 136SE319.

169–34¾–New. Negative testimony to the effect that locomotive headlights were not burning before the collision and that automatic signals did not work. 43 Ida505, 256P88.

170–36 CalA 273P161.

170–37 237 IllA145; 191NC401, 132SE 14; 117 Or173, 242P1114.

170–40½–New. Extensive reading of hospital charts to show the record of treatment of a patent held error where parol testimony of nurses was available. 124Kan492, 260P643.

171–58 177Ark121, 6SW(2d)829; 73 CalA402, 238P794, 797 [citCJ]; 50SD 479, 210NW732. [c] 50SD479, 210NW 732.

172–96 253NY1, 170NE471.

173–19 Md 152A114; 259Mass453, 156 NE890.

173–20 214Ala373, 374, 108S5 [citCJ].

173–26 214Ala373, 374, 108S5 [citCJ].

173–26½–New. Other evidence as to identity. 203 Iowa776, 209NW452; 141 Wash74, 250P463.

173–31 [b] **Evidence of lack of mental capacity ten years before accident sued for** is admissible as not too remote. 82 NH472, 136A261.

173–38 [a] **Excluding testimony as to state of mind of stockholder, not communicated to director,** as to transferring stock has been held not error. Mass 169 NE268.

174–41 82NH304, 133A16, 45ALR1409.

174–44 Contra 3Del 206, 134A56.

175–68 171Ark315, 284SW20.

175–69 33 OklCr125, 243P251.

175–71 27F(2d)898; 33 OklCr125, 243P 251.

175–73 TexCivA 296SW902. See also 214Ala297, 107S849.

175–73½–New. Evidence of the financial worth of defendant is incompetent, in the absence of an allegation or proof warranting punitive damages. 196NC 462, 146SE89.

175–73¾–New. Evidence of payment of tax in certain year is inadmissible on question of financial condition several years before. MoA 27SW(2d)1052.

175–73¼–New. Ordinarily financial condition is inadmissible as material to any issue. SD 226NW644.

175–75 204 Iowa493, 215NW617; Tex CivA 18SW(2d)796. [a] (2) Where ten years elapsed before plaintiff, who had conveyed property to wife, asserted claim thereto, plaintiff's testimony that he did not intend to convey title to her is properly excluded. TexCivA 283SW 310.

175–76 6F(2d)712; 34F(2d)655; Ala 127S850; CalA 287P354; CalA 290P 898; 105Conn528, 136A76; 164Ga450, 139SE27; 165Ga446, 141SE212; 34GaA 151, 128SE781 (person's own testimony admissible though not conclusive); 215 Ky128, 284SW91; Mass 171NE724; 49 SD442, 207NW449; TexCivA 278SW483; TexCivA 278SW492; TexCivA 1SW(2d) 456; TexCivA 24SW(2d)99 (categorical denial); 155Wash564, 285P433. [d] **Intention to reduce agreement to writing before closing deal** may be admitted in evidence. TexCivA 278SW492.

176–78 164Minn490, 205NW442; 106 WVa471, 146SE383.

176–79 76CalA278, 244P916.

176–81 200Wis220, 228NW121.

176–86 168Ark1019, 273SW1 (authority of employee charged with attempting to influence witness not shown).

176–87 137SC319, 135SE473.

176–89½–New. Excluding evidence that one plaintiff told defendant the others forced him to bring suit is not error where plaintiff is still a party to the record. Mo 18SW(2d)445.

176–91 262Mass302, 159NE731; Tex CivA 288SW248; Utah 279P499.

176–93 212Ala542, 103S580; 22AlaA 211, 114S273; 313Mo169, 281SW422; 99Vt446, 134A603.

176–96 41F(2d)625; CalA 290P468.

177–97 TexCivA 283SW860.

177–97½–New. In dealing with future value of property, consideration should be given to all elements which intelligent buyer would consider. Ala 130S 87.

177–99 TexCivA 275SW90.

177–1 37GaA254, 139SE573; TexCivA 275SW90.

177–2 37GaA254, 139SE573; TexCivA 275SW90.

177–3 37GaA254, 139SE573; 222MoA 954, 10SW(2d)967; TexCivA 275SW90.

177–5 37GaA254, 139SE573.

177–11 TexCivA 275SW90.

177–16½–New. The intrinsic value of grass land is admissible where such land has no established market value. Tex CivA 283SW316 (forming land).

177–16¾–New. That mortgagee in foreclosure action stated that property was insufficient to pay mortgage debt and obtained appointment of receiver is no evidence of value. Iowa 229NW249.

178–19 166Ga176, 142SE667. [b] 137 Misc603, 244NYS508.

178–21½–New. The admission or exclusion of evidence as to the value of improvements on land taken is a matter largely within the discretion of the trial judge. 265Mass270, 163NE888.

178–29½–New. Trade value held not admissible on the issue. 204 Iowa197, 215 NW233.

178–32 125Me44, 130A737; 265Mass 270, 163NE888; TexCivA 283SW860; 69Utah323, 255P172.

178–33 Okl 278P828.

178–34 But see TexCivA 283SW860.

178–36 214Ky736, 284SW391; 229App Div245, 240NYS597; Va 155SE694.

179–41 336 Ill 390, 168NE370 (offerer must be able to consummate purchase); Mich 233NW325; 47RI 29, 129A594 [cit CJ] (competent as throwing some light on question of value); Ont [1930] 4Dom LR955.

179–42 CalA 284P1072; 37GaA216, 139 SE591; 126Kan1, 3, 266P107 [citCJ]; 229Ky627, 17SW(2d)748; NJ 150A387.

179–44 37GaA254, 139SE573, 575 [cit CJ]; 233Ky378, 25SW(2d)1036.

179–45 Ala 128S606; 37GaA216, 139 SE591. But see 265Mass270, 163NE 888.

179–46½–New. A proposed bid by a prospective purchaser of property of a

decedent not conforming to terms of sale made by the court in the notice and order for sale has no evidentiary value. 199Cal625, 250P669, 42ALR1308.

179-48 CalA 234P1072; Iowa 229NW249.

179-49 TexCivA 300SW250.

180-59 174Minn434, 219NW552, 554 [citCJ]; 132Misc594, 232NYS666; 26 Wyo166, 255P2, 5 [citCJ], 52ALR91. [c] **Price paid on subsequent sale** is inadmissible to show value on particular date. TexCivA 286SW518.

180-61 204Iowa197, 215NW232; 197NC556, 150SE240; TexCommnA 158SW(2d)562; Vt 145A258(2dcase). See also 170Minn105, 212NW18, 20 [citCJ].

180-62 204Iowa197, 215NW233; 195NC1, 141SE328; 50Philippine844; 99Vt464, 134A538.

180-64½-New. **Price at which owner offers** his land for sale is admissible as constituting in itself a circumstance tending to show actual value. TexCivA 298SW316.

181-70 37GaA216, 139SE591; 136Misc893, 242NYS417 (holding alterations of premises material in determining rental value of lease); 154Wash212, 281P494. [a] TexCivA 275SW90. [c] TexCivA 48W(2d)169. [f] **Value of particular crops** grown on land is inadmissible as showing rental value thereof. 40Ida782, 238P291. [g] **Whether lease has any value** depends on whether rental value is larger than rent reserve. 136Misc893, 242NYS417.

181-76½-New. Testimony that land was not of uniform value, without testimony as to value of leasehold interest, is inadmissible, in an action for trespass by owner of undivided interest in lease. TexCivA 299SW687.

181-76½-New. Evidence of the relative value of an oil lease and undivided interest therein is inadmissible where the value of the undivided interest involved is not shown. TexCivA 299SW687.

181-76¾-New. In an action by a lessor on a bond conditioned to pay the lessor for loss resulting from the lessee's violation of liquor laws, where the building had been closed for a year under a padlocking decree, the rent reserved in the lease was some evidence of the rental value of the premises for the year. 249NY287, 164NE101.

181-77 216Ala671, 114S849, 52 [quot CJ]; 50Philippine844.

181-81 164Ga552, 139SE31.

181-83 154Wash212, 281P494 (prior sales).

181-83½-New. Admission of evidence respecting price received for part of land assessed, two years after assessment in certiorari proceedings to review assessment, is held error. 221AppDiv248, 223NYS168.

181-87½-New. Other evidence as to sales. 216Ala102, 112S348; 164Ga552, 139SE31; 24ObA183, 156NE614; 47RI378, 133A618.

182-91 176Minn26, 222NW512.

182-99 50Philippine844; 154Wash212, 281P494.

182-1 21F(2d)298; 21AlaA252, 107S228, 229 [citCJ]; 122Kan695, 253P233.

182-2 229Ky527, 17SW(2d)748.

182-3 215Ky492, 284SW1110; Mass 172NE336.

182-4 See also 21F(2d)298.

182-4½-New. Price paid at foreclosure sale of corporation's property does not warrant an inference that it was of greater value when the purchaser bought a bond secured by corporate assets. 247NY34, 159NE670.

182-5 151Md664, 135A835; NJSup 135A58; TexCivA 278SW337.

182-6 151Md664, 135A835; 84Mont225, 274P1062; TexCivA 278SW337.

182-7 151Md664, 135A835; NJSup 135A58. [a] 24F(2d)191.

182-9 [a] **Condition of goods must have remained substantially the same** in order to authorize introduction of invoice in evidence to show value. 107WVa275, 142SE78.

183-11 151Md664, 135A835; 144Miss194, 109S704, 705 [citCJ]; 221AppDiv263, 223NYS127.

183-12 144Miss194, 109S704, 705 [citCJ]; 23NM440, 270P794, 796 [citCJ], 63ALR237.

183-13 151Md664, 135A835; 144Miss194, 109S704, 705 [citCJ].

183-15 221Ky442, 298SW1091.

183-19½-New. If there is no market for the property, the value must be established by laying the foundation for proof on some recognized theory or measure of value. 84Mont225, 274P1062.

183-20 144Miss194, 109S704, 705 [citCJ]; TexCivA 281SW1087.

183-21 268US146, 45SCt465, 69Led890 (cost of reproduction is element to be considered); 144Miss194, 109S704, 705 [citCJ]; 23NM440, 270P794, 796 [citCJ], 63ALR237; TexCivA 281SW1087.

183-21½-New. Purchase price of land at a sale on foreclosure five years after the transaction at issue is some evidence of the value of the mortgage, where the terms of the mortgage prevented earlier foreclosure. 192Wis343, 214NW501.

184-32 But see 31F(2d)701.

184-36 49ND235, 191NW347.

184-39 29Ariz346, 241P601; 73CalA391, 238P816.

184-42 167Minn362, 209NW27.

184-43 216Ala102, 112S348; 220Ala385, 125S403; 176Ark642, 38W(2d)685; 198Cal16, 243P21; 92CalA360, 268P459; 33GaA778, 127SE821; 36GaA241, 136SE167; 36GaA377, 136SE924; 233IllA64; 151Md664, 135A835; 167Minn362, 209NW27; 103NJL589, 137A549; NJ 141A10; 138Misc183, 244NYS409; 191NC821, 131SE739; 47RI172, 131A548; Vt 151A642. But see 200Iowa272, 204NW301.

185-44 83CalA128, 256P493 (evidence admissible). [a] (2) Price paid for automobile thirteen months prior to loss by fire. 167Minn362, 209NW27.

185-45 [a] **Place too remote.**-167Minn362, 209NW27.

185-47 111Conn178, 149A774.

185-48 83CalA128, 256P493.

185-50 204Iowa758, 216NW54; SD 230NW29(2dcase) (cattle). See also 27F(2d)32.

185-52 204Iowa758, 216NW54.

185-53 242Mich591, 219NW678; MoA 298SW(2d)423; NJSup 135A58.

185-54 [b] **Necessity of predicate.**-242Mich591, 219NW678.

185-56 176Minn26, 222NW512.

186-67 TexCivA 188SW(2d)782.

186-73 288Pa277, 135A856. [c] **Value of common stock of unorganized corporation held not entirely measured** by patents owned. 288Pa277, 135A856.

186-75 136Misc664, 240NYS502 (tax liens entered on books are to be disregarded in valuing stock); 136Misc893, 242NYS417.

186-78 288Pa277, 135A856.

186-84 Mass 169NE268; 136Misc664, 240NYS502 (items entered in corporation's books); 136Misc893, 242NYS417; 288Pa277, 135A856.

186-91 192NC159, 134SE412. [a] (3) "Market value is simply the potential patronage of buyers expressed in terms of money." 213Ala660, 106S142.

186-92 [a] (3) Though there is no fixed market value for parts of motor truck such as is established by contemporaneous sales of like articles in way of ordinary business, as in case of merchandise, testimony as to market value may be given by qualified witnesses where proof shows that such parts have some market value. TexCivA 290SW544.

187-95 192NC159, 134SE412.

187-96½-New. Evidence as to wholesale value is admissible as bearing upon fair market value. 165Minn282, 206NW446.

187-96¾-New. The market value of a staple product in good condition at a given time and place is a circumstance to be considered in determining the market value of the commodity at the same time and place in bad condition. 36GaA241, 136SE167.

187-97 15F(2d)897. [d] **Wholesale price at which goods were sold** is competent evidence of market value where no market is shown. 236IllA595. [e] **Corporate stock.**-Nebr 230NW835.

187-98 104Conn73, 131A412; 192NC159, 134SE412.

187-1 49RI329, 142A613.

187-5 24F(2d)191.

187-6 24F(2d)191; 246NY174, 158NE64 (competent but not conclusive).

187-8 314Mo438, 284SW471; 129Okl28, 263P448. [a] 161Ga93, 129SE778; 246NY174, 158NE64 (offers are of doubtful value as evidence of market value); 125Misc164, 210NYS472; 129Okl28, 263P448.

187-9 Contra 118Kan775, 236P647.

187-10 24F(2d)191; 43F(2d)1 (upon basis of number of sales contracts); 213Ala660, 106S142; 29Ariz346, 241P601; 29Ariz468, 242P1009, 43ALR1184; 36GaA241, 136SE167; 41GaA794, 154SE809; 218Ky508, 291SW718; Mass 169NE268 (price which stock uniformly brought); 151Miss102, 117S545, 59ALR285 (market value of stock of goods disposed of under Bulk Sales Law); 155Miss804, 125S338; 32NM518, 260P411, 55ALR261. Contra TexCivA 299SW687. [a] MoA 272SW1003.

188-11 See also 49ND867, 194NW113.

188-16 24F(2d)191.

188-16½-New. The contract price of a commodity sold is not necessarily its market value on the day of sale. 35GaA137, 132SE234.

188-18 16F(2d)358; 104Conn73, 131A412; 236IllA89; 232Mich8, 204NW708; Wash 290P999. [d] **Cotton exchange reports** are best evidence of market value of cotton. 141Miss199, 106S525.

188-19 39F(2d)933; 104Conn73, 131A412; 236IllA89; 125Kan117, 118, 263P786 [citCJ]; 32NM117, 263P504; 192NC159, 134SE412.

188-20 104Conn73, 131A412; 192NC159, 134SE412.

188-22 29Ariz468, 242P1009, 1011 [citCJ], 43ALR1184.

189-23 16F(2d)358 (trade journals); 83CalA128, 256P493 (price lists); 104Conn73, 131A412. See also 249NY60, 162NE584. [b] 29Ariz346, 241P601. [c] 29Ariz346, 241P601. [d] **How newspaper qualified as evidence.**-29Ariz468, 242P1009, 43ALR1184.

189-24 [a] **Witness may not read from market report** on issue of value. NJ 130A372.

189-26 165Minn282, 206NW446; TexCivA 284SW680. [a] **In suit by pledgor** to recover pledged property, value at place other than where it was purchased is immaterial. TexCivA 294SW238. [b] **Evidence without regard to place** is not admissible. 28ObA336, 162NE650.

189-27 15F(2d)897. [c] **Evidence of market value at place other than where property** was to be sold is inadmissible. MoA 272SW1003.

189-30 15F(2d)897; TexCivA 284SW680; TexCivA 258SW(2d)671.

189-32 47RI378, 133A618. [a] **Considerable latitude should be allowed.**-47RI378, 133A618. [b] **Abuse of discretion alone** gives rise to exceptions from rulings. 47RI378, 133A618.

190-38½-New. Testimony of market value is admissible where it tends to disclose relevant circumstances. 192NC159, 134SE412.

190-42 179Ark592, 17SW(2d)293; 165Minn282, 206NW446; 49ND235, 191NW347; 28ObA336, 162NE650.

190-43 221AppDiv263, 223NYS127. [b] (2) Testimony as to value of sheep six weeks before time involved held not too remote. SD 231NW904.

190-44 228Ky719, 15SW(2d)511; 128Okl29, 261P189; TexCivA 293SW869; 107WVa275, 148SE78. [a] (3) 82CalA233, 255P266 (corporate stock). (4) Resale of stock twenty-seven months after purchase. 6F(2d)818. (5) Three years before. MoA 68SW(2d)676.

190-47½-New. In an action for delay, where delivery after close of the shipping season would naturally depreciate the market value, evidence of the time of closing of such season is admissible. 92Fla442, 109S457.

190-48 TexCivA 118SW(2d)540.

190-49 27F(2d)32; 293Pa45, 141A631, 632 [quotCJ]. [a] **Value of service in management of farm.**-232Mich579, 206NW508.

191-61 23AlaA498, 127S786.
191-65 TexCivA 293SW842.
191-66 155Miss304, 125S338.
191-70 But see 237Mich264, 211NW661; 222MoA165, 28SW(2d)806; NJ 141A10.
191-70½-New. Evidence of an unaccepted offer is not admissible on issue of probable net income of deceased in action for death. 191NC130, 131SE400.
191-70¾-New. Oral evidence of reasonable value of work and materials is irrelevant under contract providing for another measure. CalA 288P792.
191-70¼-New. Evidence of client's wealth is admissible as bearing on the extent of his business experience. 247Mich560, 226NW338.
192-73 [a] **Commission of crime may be proved in civil actions** without a trial first had in criminal courts. 8PaDist&Co 73.
192-77 [a] **Evidence inadmissible without producing interpreter as witness.**–82Mont52, 264P933.
192-79 216Ala435, 113S306. [d] **Evidence held incompetent,** hence properly excluded. NJ 129A232.
192-80 TexCommnA 13SW(2d)351.
192-80½-New. There is a difference between competency of one to be a witness and the right to use the witness to prove certain facts in his knowledge. 117Or621, 245P321.
192-80¼-New. Testimony of experienced rivermen is competent to show low-water mark. 325Ill378, 156NE346.
192-81 19F(2d)842, 847 [quotCJ].
192-82 19F(2d)842; 32F(2d)195; 233Ky194, 25SW(2d)358; MoA 17SW(2d)658; Wis 231NW155. [c] (2) Held admissible. 19F(2d)842. [d] **In Kentucky.**–233Ky194, 25SW(2d)358.
192-84 46Philippine938; 21SaskL300, [1927] 1DomLR386.
192-85 202Iowa50, 209NW522 (evidence obtained by improper issuance of search warrant). [a] (1) 140Miss279, 105S520.
193-86 168Minn93, 209NW867; Mo 286SW120; 319Mo644, 5SW(2d)413; 221MoA537, 282SW1037, 1039, 1042 [quot&citCJ]; 222MoA346, 300SW845; MoA 17SW(2d)658; 82NH304, 133A16, 45ALR1409; SD 226NW644. But see 160Ga732, 129SE57; MoA 286SW428.
193-88 21OhA268, 153NE197, 199 [quotCJ]. [a] (2) Authority to act in investigating validity of note must be proved before telephone conversation is admissible to show notice to holder of fraud and bad faith in connection with transfer. MoA 20SW(2d)963.
193-89 215Ala282, 110S399; 75CalA537, 242P1089; 111Conn299, 149A668; 35GaA511, 133SE878; Iowa 232NW421; Mo 30SW(2d)462; MoA 20SW(2d)963; 21OhA268, 153NE197, 199 [quotCJ]; 89PaSuper508. [b] **Statement of deceased to witness that plaintiff's attorney telephoned plaintiff** in deceased's presence is inadmissible where evidence does not show that he knew whether proper telephone connection had been secured. Mass 167NE915. [c] **Governing rules.**–CalA 287P573.
193-90 75CalA537, 242P1089; 35GaA511, 133SE878; 246IllA538; 172Minn24, 214NW750; 198NC751, 153SE325; 21OhA268, 153NE197, 199 [quotCJ]; 86PaSuper71. [a] **Questions for jury.**–21OhA268, 153NE197.
193-91 260Mass45, 157NE82, 52ALR1125; Mass 167NE915; MoA 20SW(2d)963.
193-92 MoA 279SW253; MoA 20SW(2d)963.
193-94 35GaA511, 133SE878; 256IllA401; 172Minn24, 214NW750; MoA 20SW(2d)963; 114Nebr556, 208NW626; 86PaSuper71. [b] (2) Where person called responds that he is party desired, it may be sufficient to make prima facie case of identity. IndA 168NE126.
194-95 152Md241, 136A615; 255Mass104, 151NE84; 250Mich398, 230NW181; MoA 9SW(2d)672; MoA 20SW(2d)963; 114Nebr556, 208NW626. [d] **Evidence held sufficient for jury** on question whether telephone conversation was had with defendant's president and whether president was person answering. 255Mass104, 151NE84. [e] **Prima facie proof of identity of party to telephone conversation by proof of calling number is open to rebuttal.** 250Mich398, 230NW181.
194-96 MoA 20SW963; Wis 231NW252.
194-97 But see MoA 20SW(2d)963.
194-98 191NC447, 132SE157; TexCivA 22SW(2d)737; NB [1925] 3DomLR189 (may corroborate evidence of person telephoning though not knowing identity of person at other end).
194-99 49RI455, 143A673.
194-99½-New. In corroboration of testimony of conversation over telephone, a witness may detail that part heard by him. 203Iowa776, 209NW452.
194-99¼-New. although he did not know the identity of the other party to the conversation. 203Iowa776, 209NW452.
195-3 19F(2d)769; 41F(2d)122; 214Ala8, 106S49; Ala 128S796; 176Ark1188, 5SW(2d)916, 921 [quotCJ]; 85Colo149, 274P172; 13LaA186, 126S527; 253Mass424, 149NE159; Mich 233NW395; 143Miss551, 108S729; 308Mo453, 273SW95; 220MoA575, 287SW861; 86Mont553, 284P769; Nebr 233NW450; 191NC507, 132SE286; 142Okl202, 286P329; TexCommnA 18SW(2d)595, 63ALR1009; TexCivA 283SW341; TexCivA 290SW226; TexCivA 8SW(2d)750; TexCivA 28SW(2d)270; Va 154SE687; 145Wash19, 258P851; 103WVa366, 137SE539.
196-4 214Ala8, 106S49; 176Ark1188, 5SW(2d)916, 921 [quotCJ]; 143Miss551, 108S729; 319Mo644, 5SW(2d)413; 145Wash19, 258P851.
196-5 86IndA33, 155NE709; 77Mont124, 249P1070; 121Or604, 256P641; Vt 147A687. [c] **Remainder of conversation must be competent and material.**–121Or604, 256P641.
196-6 135Misc288, 239NYS13 (prior declaration admissible).
196-7 Mass 171NE668 (document admitted by stipulation); MoA 275SW769 (will); 77Mont124, 249P1070; 290Pa348, 139A114; TexCivA 283SW341, 343 [citCJ]; 147Wash589, 266P727. [a] 90CalA390, 266P320. [f] **Record of proceedings.**–31Mo28, 298SW817.
196-8 TexCivA 278SW873, 877 [quot CJ].
196-9 145Wash19, 258P851.
196-10 TexCivA 278SW873, 877 [quot CJ]; TexCivA 283SW341.
196-11 84Colo325, 270P650; TexCivA 283SW341, 343 [citCJ]; 103WVa366, 137SE539. [d] (2) 128Or263, 274P322. (4) Usually all correspondence between parties should be admitted after admission of part. 138SC318, 136SE297.
197-13 160Ga872, 129SE532; 77Mont124, 249P1070; TexCivA 272SW821; TexCivA 278SW873, 877 [quotCJ]; 103WVa366, 137SE539. [c] (2) Other evidence held not explanatory. Vt 147A687.
197-14 216Ala625, 114S292, 294 [citCJ]; 89CalA209, 264P507; 242IllA93, 98 [citCJ]; 233Ky435, 25SW(2d)1018; Mass 171NE668; 243Mich638, 220NW737; 77Mont124, 249P1070; 229AppDiv368, 241NYS710; 34OhA174, 170NE594; TexCivA 278SW873, 877 [quotCJ]; TexCivA 283SW341; 103WVa366, 137SE539. [a] Vt 147A687. [e] **Irrelevant matters, though part of admissible conversation,** should be excluded, notwithstanding rule. Mass 171NE668.
197-15 CalA 284P1056; 233Ky435, 25SW(2d)1018; TexCivA 278SW873, 877 [quotCJ]; TexCivA 283SW341; 103WVa366, 137SE539.
197-15½-New. Written memorandum by third parties on the document called for is admissible and the party who offers it has the burden of explaining it. 290Pa348, 139A114.
197-15⅓-New. The maker's self-serving indorsement on the back of an agreement is held not part of the agreement so as to compel its reception. 290Pa348, 139A114.
197-15¼-New. Evidence is not admissible unless shown to relate to the same transaction as that introduced. 290Pa348, 139A114.
197-15⅕-New. Reference in one document to another, to make both admissible, must be sufficient to incorporate the other in it. 290Pa348, 139A114.
197-16 See also 233Ky435, 25SW(2d)1018.
197-18 221MoA748, 286SW412, 416 [citCJ].
198-19 Conn 151A321; 242IllA93, 98 [citCJ]; 308Mo453, 273SW95 (permissible to exclude evidence offered by party on immaterial question, though adverse party has introduced evidence thereon out of order and for purpose of rebuttal).
198-23 31Ariz302, 252P1012; 135Misc288, 239NYS13; TexCivA 276SW795; TexCivA 290SW226.
198-24 Mo 29SW(2d)1100.
198-27 TexCivA 276SW795.
198-32 220AppDiv160, 221NYS11.
199-35 44Ida491, 258P362; 243IllA483; 163LaA458, 112S298; 239Mich404, 214NW195; Mo 30SW(2d)462 (telephone conversation); 77Mont477, 251P517; 191NC210, 131SE577; 191NC297, 131SE735; Tex 285SW638; TexCivA 288SW624. [a] **Evidence not hearsay.**–TexCivA 293SW892.
199-36 277US19, 48SCt417, 72Led761; 17F(2d)468; 18F(2d)492; 22F(2d)865; 24F(2d)3; 25F(2d)240; 36F(2d)337; 37F(2d)575; 41F(2d)122; 212Ala630, 103S689; 214Ala132, 107S73; 215Ala90, 109S754; 216Ala403, 113S265; 220Ala96, 124S222; 220Ala86, 124S234(2d case); Ala 124S284(2dcase); Ala 125S284(3dcase); Ala 127S812; Ala 128S596; 22AlaA483, 118S170; AlaA 130S520; 31Ariz302, 252P1012; 169Ark640, 276SW582; 172Ark108, 287SW1019; 178Ark1199, 10SW(2d)1; 68CalA326, 229P348; 71CalA251, 235P62; 74CalA576, 241P579; 74CalA585, 241P572; 78CalA751, 248P934; 85CalA149, 259P113; 87CalA199, 262P58; 89CalA157, 264P306; 92CalA258, 267P914 (identity); 95CalA12, 272P339(2dcase); 101CalA691, 282P390; CalA 289P863; CalA 291P879; 78Colo371, 242P51; 106Conn286, 137A753; 111Conn178, 149A774; 161Ga93, 129SE778; 161Ga329, 130SE566; 163Ga899, 137SE561; 164Ga552, 139SE31; 35GaA94, 132SE454; 36GaA570, 137SE104; 170Ga135, 152SE466; 44Ida491, 258P362; 329Ill410, 160NE765; 336Ill11, 167NE807; 233IllA262; Ind 162NE409; 86IndA164, 156NE467; 208Iowa537, 226NW5; 208Iowa588, 226NW66; 122Kan94, 251P397; 125Kan173, 263P796; 217Ky148, 289SW215; 217Ky371, 289SW270; 219Ky681, 294SW138; 219Ky824, 294SW460; 222Ky454, 1SW(2d)767, 768 [citCJ]; 222Ky621, 1SW(2d)1076; 224Ky300, 6SW(2d)244; 229Ky32, 16SW(2d)493; 234Ky373, 28SW(2d)34; 170La1083, 129S644; 126Me579, 140A377; 149Md474, 132A70; 259Mass272, 156NE254; 264Mass238, 162NE339; Mass 172NE855; 242Mich422, 218NW667; 244Mich99, 221NW162; 248Mich652, 227NW684; 250Mich99, 229NW403; 180Minn205, 231NW824; Miss 108S507; 145Miss191, 110S504; Mo 289SW591; 316Mo762, 291SW469; 318Mo969, 2SW(2d)733; 219MoA1, 268SW99; 219MoA294, 269SW654; MoA 278SW814; 222MoA495, 280SW1050; 221MoA923, 291SW142; 222MoA43, 299SW622; MoA 6SW(2d)961; MoA 22SW(2d)61; MoA 22SW(2d)81; MoA 22SW(2d)178(2dcase); MoA 24SW(2d)702; MoA 25SW(2d)499; 77Mont477, 251P517; 83NH160, 139A750; 99NJEq369, 131A897; 104NJL60, 138A893; 102NJEq85, 140A235; 104NJL394, 140A395; 101NJL419, 129A191; NJSup 147A641(1stcase); NJCh 130A24; 240NY317, 148NE535; 219AppDiv560, 220NYS369; 221AppDiv817, 224NYS209; 227AppDiv208, 237NYS235; 189NC638, 127SE635; 190NC833, 131SE42 (statement of agent as to past occurrence only hearsay and incompetent); 191NC210, 131SE577; 49ND777, 193NW481; 51ND946, 201NW687; 54ND543, 210NW19; 54ND897, 212NW51; 115OhSt67, 152NE188; 19OhA1; 28OhA356, 162NE746; 122Okl101, 251P495; 129Okl292, 264P827; 124Or157, 264P368; 283Pa520, 129A577; 9PaDist&Co411; 50RI1, 144A437; 144SC212, 142SE516, 517 [citCJ]; 50SD81, 208NW585; 50SD561, 210NW982; 155Tenn200, 291SW1069; TexCommnA 27SW(2d)144(2dcase); TexCivA 271SW401; TexCivA 274SW305; TexCivA 275SW198; TexCivA 278SW350; TexCivA 281SW335; TexCivA 283SW316; TexCivA 284SW594; TexCivA 287SW87;

TexCivA 288SW599; TexCivA 297SW682; TexCivA 118W(2d)254; TexCivA 198W(2d)29; TexCivA 218W(2d)347 TexCivA 228W(2d)737; TexCivA 238W(2d)842; TexCivA 258W(2d)629; TexCivA 258W(2d)902; TexCivA 288W(2d)214; TexCivA 288W(2d)250; TexCivA 318W(2d)319; 70Utah95, 258P216; 142Va350 128SE462 152Va38, 146SE353; 153Va437, 150SE329; 126Wash160, 239P1; 142Wash391, 253P452; 104WVa32, 138SE664, 665 [citCJ]; 188Wis30, 205NW407; 59 OntL205, [1926] 4DomLR74. See 87 IndA667, 162NE415. See also TexCivA 278SW476. But see TexCivA 273SW659 [r] Illustrations.–21AlaA65, 106SE56 (testimony of witness as to whether there were other complaints by plaintiff, or whether plaintiff proved particular fact in other action, is hearsay and inadmissible). [s] **Testimony on personal knowledge** and not derived from statements of others is not hearsay. 50ND813, 197NW854. [t] **Hearsay not admissible because other declarations were admitted** without objection or were not hearsay. TexCivA 300SW191. [u] **Computations of accountant.**–134Misc546, 236NYS1.

207-37 175Ark659, 300SW350; 74CalA576, 241P579; 107Conn287, 140A486; 34GaA72, 128SE237 (mere hearsay without probative value); 152Md439, 137A43; 191NC210, 131SE577; 54ND897, 212NW51; 155Tenn200, 291SW1069.

205-40 219Ala392, 122SE249; 221MoA670, 283SW994; NJ 151A877.

205-42 286Pa536, 134A446.

205-43 34Ariz230, 270P629; 166Ga670, 144SE206; 165Ga24, 141SE574, 34GaA72, 128SE237 (use of word "understanding" as to facts otherwise positively stated); 36GaA415, 136SE816; 40GaA158, 149SE73; 255 IllA428; IndA 167NE721; Iowa 223NW257; 157Md596, 146A759; Mass 167NE521; Mass 167NE749; 256Mich464, 231NW87; 164Minn317, 204NW953; 167Minn342, 206NW645, 221MoA448, 282SW1079; MoA 283SW1028; NJ 141A667; NJSup 147A83 (license); NJSup 151A549, 181NC42, 131SE336; 177Okl185, 245P558, 123Or280, 261P55; 286Pa26, 134A146, 151SE269, 149SE14, 198SD442, 207NW449; TexCivA 275SW224; TexCivA 284SW612; TexCivA 118W(2d)662; TexCivA 158W(2d)200; Vt 147A285. [b] (5) Where defendant contended that insured falsely warranted that she had never consulted physician, testimony of insured's daughter that she called physician for insured because latter complained of constipation was not hearsay. 249NY78, 162NE589.

206-44½-New. Admission of hearsay evidence is not erroneous where it is preliminary in character and not necessary to a complete understanding of the facts 247Mich59, 226NW33.

206-45 89CalA157, 264P306. See also 156Md146, 143A796.

206-46 174Ark194, 295SW38, 42 [quot CJ].

206-48 29F(2d)820; 213Ala616, 119S635; 99CalA66, 277P902; TexCivA 278SW350; TexCivA 118W(2d)608; TexCivA 158W(2d)120; TexCivA 168W(2d)154; TexCivA 168W(2d)554; TexCivA 168W(2d)908. But see 31F(2d)885.

206-49 150Wash278, 272P736.

206-50 36GaA415, 136SE816; GaA 155SE356 (license); TexCivA 296SW939; 145Wash77, 258P339. [a] (3) In relating conversation with defendant in which latter asked who had told witness that defendant had put her signature on note, answer that two other persons, named by witness, had told her, was competent. 200 Iowa961, 205NW838. [c] **In Georgia.**–164Ga450, 139SE27.

207-51 23F(2d)565; 25F(2d)791; 26F(2d)305; 35F(2d)104; 213Ala494, 106S150, 215Ala228, 110S465, 213Ala173, 118S327; 169Ark136, 273SW378; 170Ark650, 280SW667; 74CalA576, 241P579; 103Conn583, 131A432; 104Conn73, 131A412; 107Conn670, 142A461; 320 Ill 371, 151NE244; 324 Ill 249, 155NE26; 84 IndA646, 151NE37, 152Md439, 137A43; 253Mass383, 149NE313, 176Minn360, 223NW677; 149Miss155, 115S655; 322Mo218, 148W(2d)590, 62ALR385; 222MoA495, 280SW1050; MoA 138W(2d)578; MoA 328W(2d)118 (report of physician); 82Mont52, 264P933 (list of articles damaged by fire); 83NH160, 139A750; 102NJEq245, 140A419; NJ 141A590; NJ 151A77; 253NY124, 170NE517; 214AppDiv198, 212NYS26 (report made to one of result of creditors' meeting which was reduced to writing); 230AppDiv782, 244NY8697; 29OhA526, 163NE723; 49SD225, 207NW108; SD 231NW904; TexCommnA 291SW864; TexCivA 271SW641; TexCivA 284SW594; TexCivA 38W(2d)109; TexCivA 188W(2d)670(license); TexCivA 298W(2d)480; 38Wyo469, 269P40. But see TexCommnA 138W(2d)63. [d] **Exemplifications from court records held not inadmissible as hearsay.**–165Ga534, 141SE653.

207-52 26F(2d)376; 136Misc863, 242NYS464.

208-53 26F(2d)376.

208-55 30CalA390, 266P320.

208-59½-New. Restraining order held inadmissible. 102Conn708, 130A184.

208-59½-New. Injunction held inadmissible, accused not having been a party to original proceeding. 102Conn708, 130A184.

208-60 5F(2d)918 (county tax books and real estate tax statements).

208-61 144Miss505, 110S436.

208-62 172Ark330, 288SW709; TexCivA 296SW961.

208-63 26F(2d)525; 213Ala494, 106S150. [a] (4) Certificate held inadmissible on issue of whether employee's death was compensable, where it recited that all information contained therein was furnished by employee's widow. 152Md321, 136A644. [c] **Sheriff's indorsement** that he had served notice of employee's refusal to abide by determination of industrial accident board held hearsay as to employee's insurer. TexCivA 294SW247.

209-65 11LaA276, 123S379; 152Md439, 137A43; 245Mich353, 222NW723; 26OhA79, 159NE843; Wash 291P1101. But see 262Mass427, 161NE616. [b] **Chart held not hearsay.**–152Md439, 137A43.

209-68 254 IllA289; 83NH143, 139A367; 226AppDiv772, 234NYS328; TexCivA 284SW594; TexCivA 58W(2d)620. [c] **Flood control report of engineer** is inadmissible because opinions and statements therein are hearsay. 76CalA369, 244P609.

209-69 89PaSuper160 (records and time sheets). See also 168Ark41, 269SW569.

209-70 But see 134SC474, 132SE819.

209-71 78CalA785, 248P1031 (bill for repairs).

209-72 126Mc254, 137A692.

209-74 172Ark330, 288SW709; 74CalA576, 241P579; Mass 166NE879.

209-75 104Conn73, 131A412; MoA 11SW(2d)1055. But see 134SC474, 132SE819. [a] **Corroboration.**–132Misc583, 230NYS273.

209-76 225AppDiv819, 232NYS378. [c] **Bank book entries,** deposit slips, and other records concerning handling of bonds found in possession of son-in-law and partner of alleged conspirator held admissible in suit to cancel lease. 14F(2d)705.

209-76½-New. bills, 324 Ill 249, 155NE26.

209-76½-New. statements, 324 Ill 249, 155NE26.

209-76¼-New. vouchers; 324 Ill 249, 155NE26.

209-77 18F(2d)875; 215Ala278, 110S465; 170Ark650, 280SW667; 178Ark230, 108W(2d)873; CalA 273P161; 106Conn665, 138A790; 41GaA389, 153SE88; 324 Ill 249, 155NE26; 84 IndA646, 151NE37; 204 Iowa950, 216NW77; 130Kan743, 283P766; Mass 164NE486; 142Miss43, 107S195; Mo 256SW768; 315Mo1233, 288SW48; Mo 328W(2d)86; 193NC231, 136SE636; 52ND511, 204NW13; 115OhS468, 154NE727; 43OkiA0R291; 131Or57, 279P534; 49RI332, 142A536; TexCommnA 298W(2d)991; TexCivA 271SW641; 37Wyo432, 263P607. See also 191NC130, 131SE400.

210-79 TexCivA 284SW594.

210-83 [a] **Surveyor's unverified plat** is inadmissible as hearsay. TexCivA 25SW(2d)1001.

210-87½-New. Description of injuries noted on a doctor's bill is inadmissible as hearsay. 103Conn583, 131A432.

210-91 231Ky550, 21SW(2d)983; TexCivA 228W(2d)1073(litcase). [a] (1) Mo 256SW768. (6) TexCivA 297SW474.

211-92 TexCivA 268W(2d)711. [b] **Booklet** entitled "National Used Car Market Report" in common use by used automobile dealers in large cities throughout country is admissible. 167Minn362, 209NW27.

211-93 TexCivA 270SW1101, 1104 [cit CJ].

211-98 97PaSuper216.

212-15 38GaA357, 143SE925.

212-23 103NJL512, 138A377.

213-27 TexCivA 258W(2d)902.

213-29 166Ga792, 144SE286; TexCivA 248W(2d)524. But see TexCivA 288W(2d)246.

213-30 219Ala15, 121S34.

213-37 47 Ida211, 273P757; 260Mass344, 157NE684, 54ALR1422; 104WVa433, 140SE139, 141 [quotCJ].

214-38 260Mass344, 157NE684, 54ALR1422; 104WVa433, 140SE139, 141 [quot CJ] (admissible from necessity in few exceptional instances).

214-39 26F(2d)525.

214-41 TexCivA 268W(2d)672.

214-42 179Ark816, 19SW(2d)1010; 181Ark771, 27SW(2d)997; 206Cal653, 275P783; 74CalA585, 241P572; 106Conn286, 137A753; 37GaA216, 139SE591; 38GaA591, 144SE815; 325 Ill 378, 156NE346; 329 Ill 410, 160NE765; Ill 172NE40 (testimony held not based on hearsay); 233 IllA262; 219Ky824, 294SW460; Mo 152A84; 230Mich86, 203NW97; 149Md474, 132A70; 218MoA281, 269SW633; 320Mo1058, 10SW(2d)47; 221MoA676, 283SW994; MoA 208W(2d)963; MoA 28SW(2d)127; 82NH500, 136A134; NJCh 130A24; NJSup 139A343; NJSup 146A359; NJSup 148A636; Ok 170NE648; TexCivA 278SW350; TexCivA 228W(2d)955; TexCivA 228W(2d)1085; TexCivA 288W(2d)584; 142Wash391, 253P452. [e] **Testimony of conversation heard by witness is not hearsay,** though witness testified she had no personal knowledge of conduct thereafter. 162Ga743, 135SE95.

215-45 106Conn286, 137A753; 219MoA1, 268SW99; 19OhA243, (what witness saw and read in newspaper); 46RI394, 129A1.

215-47 74CalA585, 241P572; TexCivA 168W(2d)856. Contra 164Ga811, 139SE716.

215-48 19F(2d)989; 71CalA479, 235P673 (conversation of seller with buyer's agent); 152Md439, 137A43; TexCivA 298SW140. [b] (2) 218MoA698, 268SW102. [d] TexCivA 275SW224.

215-49 TexCivA 283SW316.

215-51 TexCivA 290SW292, 294 [cit CJ]; TexCivA 300SW206; TexCivA 21SW(2d)350.

216-58 173Minn51, 216NW311 (statements of husband to wife and vice versa); 117 Okl185, 245P858; 156SC397, 153SE473; TexCommnA 280SW574. Contra 106Conn286, 137A753.

216-61 27Hawaii65; 27Hawaii177.

216-66 14F(2d)616; 31F(2d)662; 168Ark479, 271SW221; 174Ark372, 295SW715; CalA 285P328; 110Conn540, 148A377; 3Del489, 139A254; 163Ga899, 137SE561; Ida 291P1055; 83 IndA482, 148NE496; 86 IndA164, 156NE467; 216Ky95, 287SW239; LaA 122892; MoA 21SW(2d)943; TexCommnA 28W(2d)834; TexCivA 274SW250; TexCivA 18W(2d)453; TexCivA 268W(2d)286; TexCivA 27SW(2d)838; TexCivA 32SW(2d)220; 192Wis124, 212NW280. Erratum.–Iowa. –"In re Jones, 180 Iowa177," etc., should read "In re Jones, 130 Iowa177," etc.

216-67 78Colo371, 242P61, 52 [citCJ]; 207 Iowa167, 216NW62, 62ALR31.

217-69 14F(2d)269; 259Mass272, 156NE254; Mass 167NE280. [d] **Fact that deceased's deposition might have been taken** has been held not to affect admissibility. 14F(2d)269 (construing Massachusetts statute). [e] **Statute should be liberally construed.**–Mass 167NE280.

217-70 14F(2d)269 (applying Massachusetts statutes). [a] **Finding of good faith** will be inferred from admission of

evidence. **Mass** 167NE280.

217-71 14F(2d)269.

217-72 14F(2d)269; **Mass** 167NE280.

217-74 **Mass** 167NE915 (declarations of plaintiff's attorney, since deceased, where attorney had no authority to bind plaintiff held inadmissible).

218-87 87**PaSuper**46; 145**Wash**77, 258 P839.

218-88 54**ND**91, 209**NW**204; 55**ND**321, 213**NW**488; 33 **OklCr**125, 243**P**251; **Tex CivA** 291**SW**966.

218-89 18**F(2d)**912; 221**MoA**114, 294 **SW**117. [a] (2) Hearsay evidence held admissible to prove ancient boundary line between counties established in 1868. 221**MoA**114, 294**SW**117 (on issue that crime took place in another county).

218-90 9**LaA**371, 119S281.

218-95 220**Ala**683, 127S500(2dcase).

218-96 20 **OhA**307, 152**NE**205.

218-99 218**Ala**616, 119S635; 220**Ala** 683, 127S500(2dcase); 319**Mo** 591, 4**SW (2d)**807; **Vt** 147A687.

219-1 222**Ky**454, 1**SW(2d)**767.

219-3 34**GaA**240, 129**SE**118; 319 **Ill** 35, 149**NE**588; **Me** 151A537; 99**NJEq**369, 131A897; 291**Pa**531, 140A522; 50**SD** 561, 210**NW**982; **TexCivA** 295**SW**198; **TexCivA** 31**SW(2d)**355.

219-9 42 **Ida**522, 247**P**740.

219-10 219**Ala**623, 123S27; 22**AlaA**211, 114S273; 82**NH**500, 136A134; 99**NJEq** 369, 131A897; 240**NY**317, 148**NE**535; 117 **Okl** 161, 245**P**863.

220-18 175**Ark**246, 298**SW**1029.

220-21 135**Misc**233, 237**NYS**361.

220-23 **Can** [1925] 3**DomLR**595 (argumentative report).

220-25 **Can** [1925] 3**DomLR**595 (argumentative report).

220-26 219**Ala**199, 121S718; 30**Ariz**197, 245**P**354; 32**Ariz**135, 256**P**507; 85**CalA** 419, 259**P**496; **Conn** 151A321; 36**GaA** 570, 137**SE**104; 324 **Ill** 346, 155**NE**343; 329 **Ill** 253, 160**NE**552; 253 **IllA**509; 253 **IllA**569; **IndA** 159**NE**436; 204 **Iowa** 1186, 216**NW**769; 125**Me**292, 133A164; **MoA** 273**SW**135 (conversation between joint defendants); **MoA** 279**SW**253; 221 **MoA**1029, 295**SW**816; 128**Misc**404, 219 **NYS**31; 30 **OhA**135, 164**NE**534(2dcase); 123 **Or**128, 261**P**66, 67 [citCJ]; 123 **Or** 310, 261**P**71; 50**RI** 400, 148A314; **SD** 231**NW**904; 161**Tenn**324, 30**SW(2d)**250; **TexCivA** 281**SW**577; **TexCivA** 10**SW (2d)**763; **TexCivA** 13**SW(2d)**240; **Tex CivA** 29**SW(2d)**480; 103**WVa**366, 137**SE** 539. [a] 33**F(2d)**60; 37**F(2d)**476 (where answer not required); 218**Ala**505, 119 S11; 168**Ark**572, 271**SW**333; **CalA** 293**P** 129; 167**Ga**843, 146**SE**835; 324 **Ill** 346, 155**NE**343; 255 **IllA**21; 255 **IllA**345; 167**La**995, 120S623; 252**Mass**383, 147**NE** 870 (self-serving letters not made admissible by failure to reply in absence of duty to reply); 77**Mont**30, 248**P**219; 213**AppDiv**616, 211**NYS**25; 123 **Or**128, 261**P**66, 67 [citCJ]; **TexCivA** 271**SW** 641; **TexCivA** 293**SW**584; **TexCivA** 4 **SW(2d)**651; **TexCivA** 10**SW(2d)**1012. But see 265**Mass**143, 164**NE**72. [c] 318 **Ill** 369, 149**NE**243. [i] **TexCivA** 9**SW (2d)**374. [l] **Affidavits.**–125**Me**292, 133 A164.

221-27 31**F(2d)**53; 36**F(2d)**337; 30 **Ariz**197, 245**P**354; 32**Ariz**135, 256**P**507; 168**Ark**572, 271**SW**333; 172**Ark**314, 288 **SW**723; **CalA** 293**P**149; 105**Conn**539, 136A85; **Conn** 151A351; **Conn** 151A512; 36**GaA**570, 137**SE**104; 326 **Ill** 120, 156 **NE**763; 87 **IndA**462, 151**NE**735; 204 **Iowa**638, 215**NW**713; 126**Kan**544, 268**P** 833; 216**Ky**796, 288**SW**738; 219**Ky**824, 294**SW**460; 224**Ky**75, 5**SW(2d)**280; 311 **Mo** 494, 279**SW**38 [citCJ]; **MoA** 289**SW** 970; **MoA** 22**SW(2d)**61; 77**Mont**30, 248 **P**219; **NJ** 141A590; 101**NJL**419, 129A 191, 128**Misc**404, 219**NYS**31; 134**Misc** 902, 236**NYS**720; 198**NC**433, 152**SE**34; 198**NC**746, 153**SE**319; 118 **Okl** 283, 248**P** 634; 144 **Okl** 186, 289**P**696; 123 **Or**128, 261**P**66, 67 [citCJ]; 33**PortoRico** 276; 48**RI** 221, 137A149; 152**SC**287, 149**SE** 750; **TexCommnA** 29**SW(2d)**1038; **Tex CivA** 271**SW**641; **TexCivA** 274**SW**250; **TexCivA** 281**SW**577; **TexCivA** 287**SW** 687; **TexCivA** 9**SW(2d)**407; **TexCivA** 11**SW(2d)**662; **TexCivA** 25**SW(2d)**902; 143**Va**884, 129**SE**727; 146**Va**325, 131**SE** 830; 142**Wash**213, 252**P**699; 103**WVa** 366, 137**SE**539; 104**WVa**461, 140**SE**329. [a] 32**Ariz**135, 256**P**507.

225-29 213**Ala**21, 104S228; 31**Ariz**169, 251**P**446; 224**Ky**300, 6**SW(2d)**244.

226-31 320**Mo** 146, 6**SW(2d)**920; 144 **Okl** 186, 289**P**696; 104**WVa**461, 140**SE** 329 (agent).

226-33 318 **Ill** 369, 149**NE**243.

226-36 174**Ark**194, 295**SW**38, 42 [quot CJ].

226-38 [a] (6) 203**Cal** 748, 265**P**926; 38**GaA**422, 144**SE**125. (27) 329 **Ill** 490, 160**NE**845; 104**WVa**461, 140**SE**329 (made to defendant's claim agent). (30) 275**US**120, 48**SCt**57, 72**L ed**75, 55**ALR** 457. (59) 249**NY**58, 159**NE**723. (60) Statements by deceased to third party and not in plaintiff's presence, that deceased did not agree to devise land to plaintiffs in consideration of their living with and taking care of him. 311 **Mo** 494, 279**SW**38. (61) Averments of bill in another suit. 143**Va**884, 129**SE** 727. (62) Report of surveyor, written argumentatively and intended to form basis of claim. **Can** [1925] 3**DomLR**595. (63) Matters occurring between parties, to which plaintiff was not party, and by which he could not be bound. 133**SC** 353, 131**SE**146. (64) Answer filed in district court on appeal from justice's court is not evidence of matters stated therein, in another action between same parties on same note where appeal was dismissed without prejudice. 119**Kan** 333, 239**P**1103. (65) Other statements excluded. 202 **Iowa**1236, 211**NW**868; 260**Mass**492, 157**NE**659; 136**SC**525, 134 **SE**497; **TexCivA** 287**SW**687; **TexCivA** 290**SW**251; 146**Va**325, 131**SE**830; 103 **WVa**366, 137**SE**539. (66) Other instances. 90**CalA**390, 266**P**320; **Me** 150 A494; 321**Mo** 124, 9**SW(2d)**923.

227-39 37**F(2d)**508; 255 **IllA**375; 165 **Minn**342, 206**NW**645; 32**PortoRico** 376; 151**SC**309, 149**SE**14; **SD** 227**NW**469; **TexCommnA** 25**SW(2d)** 828 (declaration immaterial and not reversible error to admit it); **TexCivA** 29**SW(2d)**872; **Tex CivA** 32**SW(2d)**513.

227-40 See also 32**PortoRico** 376, 384.

227-41 32**PortoRico** 376. [a] (35) Plaintiff's testimony that he contracted debts in reliance on defendant's alleged promise to pay bonus in addition to salary. 168**Ark**943, 272**SW**663. (36) Contractor's letters written to defendants after they had broken contract constituting merely contractor's account of his construction of contract. 143**Va**36, 129 **SE**239. (37) Declarations and notation in memorandum book by deceased executor are admissible to corroborate evidence of his payment to legatee of amount equivalent to value of legacy. 158**La**169, 105S31. (38) Statement partly self-serving. 32**Ariz**135, 256**P**507. (39) In action for profits from alleged breach of contract, letter reciting plaintiff's consent to defendant's assumption of work held properly admittted. **Tex CivA** 289**SW**169. (40) Letter reciting agreement, from buyer to seller, evoking no denial. 16**F(2d)**86. (41) In suit for specific performance to enforce parol gift, evidence of plaintiff's witness that he obtained permission from plaintiff to kill dogs on part of land and that plaintiff told him he was paying taxes on land. 165**Ga**103, 139**SE**870. (42) Orders received from customers. 24**F(2d)** 698. (43) In suit to recover land, evidence that defendant sold timber on land. 167**Ga**94, 144**SE**759. (44) Testimony of plaintiff's statements of pain to witnesses. **MoA** 296**SW**1036. (45) Report of attorney, written in course of duty and under circumstances negativing intent to make such use of it, to corroborate writer's testimony. 132**Misc** 583, 230**NYS**273. (46) Letter from sureties on employee's bond giving notice that they will no longer be bound. 57 **ND**598, 223**NW**350. (47) Testimony of alleged principal as to conversation with agent detailing extent of agency was not incompetent as self-serving declaration. 198**Wis**461, 224**NW**702. (48) Estimates previously used by party objecting thereto. **MoA** 21**SW(2d)**932. (49) Testimony that, save for stated belief, witness would not have made payment. **TexCivA** 22**SW(2d)**737. (50) Other instances. **CalA** 288**P**131; **NJ** 141A667.

228-42 204 **Iowa**638, 215**NW**713; 151 **SC**44, 148**SE**648; **TexCivA** 2**SW(2d)** 866, 869 [quotCJ]; **TexCivA** 13**SW(2d)** 905.

229-48 204 **Iowa**638, 215**NW**713.

229-49 **TexCivA** 2**SW(2d)**866, 869 [quot CJ].

229-50 173**Minn**529, 217**NW**933.

229-52 **TexCivA** 2**SW(2d)**866, 869 [quot CJ].

229-54 165**La**788, 116S186; 322**Mo** 633, 17**SW(2d)**270; **Can** [1925] 3**DomLR**595.

229-55 **Can** [1925] 3**DomLR**595 (report of surveyor intended as basis of claim).

229-55½-New. In action for salary, books held not inadmissible as self-serving, though plaintiff made entries therein. **CalA** 288**P**710.

229-56 37**F(2d)**476; 41**F(2d)**122; 36 **GaA**570, 137**SE**104.

229-59 **TexCivA** 281**SW**577.

229-61 232**Ky**741, 24**SW(2d)**560 (where opponent's predecessor not present); 240 **Mich**346, 215**NW**349; 137**SC**468, 135**SE** 567.

230-63 22**F(2d)**501.

230-64 111**Conn**415, 150A310; 163**Ga** 149, 135**SE**721.

230-65 214**Ala**102, 106S607; 216**Ala** 610, 114S204; 219**Ky**478, 293**SW**977.

230-67 123 **Or**310, 261**P**71.

230-69 152**SC**287, 149**SE**750.

230-71 See also 158**La**969, 105S31.

230-74 23**F(2d)**977; 177**Ark**47; 5 **SW(2d)**739; 177**Ark**718, 9**SW(2d)**6; 102 **CalA**286, 282**P**963; **CalA** 285**P**328; 220 **Ky**569, 295**SW**863; 223**Ky**600, 4**SW(2d)** 383; 12**LaA**415, 125S883; **Mo** 27**SW(2d)** 6; **MoA** 279**SW**253; 226**AppDiv**812, 234 **NYS**365; **ND** 231**NW**888; 123 **Or**310, 261**P**71; 299**Pa**25, 148A909; **TexCivA** 274**SW**250; **TexCivA** 282**SW**819; **Tex CivA** 3**SW(2d)**830; **TexCivA** 28**SW(2d)** 1100; 146**Va**325, 131**SE**830; 152**Va**38, 146**SE**353; 147**Wash**106, 265**P**153. [a] **Declarations held admissible.**–128 **Or**415, 274**P**1098(2dcase) (to show contract without consideration).

231-75 255**Mass**519, 152**NE**107.

231-75½-New. **Testimony that deceased stated that she was feme sole,** in connection with her income tax returns, held admissible. **TexCivA** 286**SW**749.

231-76 32**Ariz**135, 256**P**507.

231-77 **TexCivA** 28**SW(2d)**240.

231-78 **Conn** 151A512.

231-79 22**F(2d)**524; 212**Ala**325, 104S 808; **Ala** 128S596; 69**CalA**291, 231**P** 563; 101**CalA**147, 282**P**537; **CalA** 282**P** 958; 167**Ga**843, 146**SE**835; 327 **Ill** 294, 158**NE**687; 234 **IllA**183; 203 **Iowa**1183, 212**NW**343; 215**Ky**663, 286**SW**929; 151 **Md**253, 134A143; **MoA** 274**SW**868; 78**Mont**415, 258**P**236; 244**NY**168, 155**NE** 88; 221**AppDiv**524, 224**NYS**689; 191**NC** 297, 131**SE**735; 120 **OhSt**559, 166**NE**685; 286**Pa**114, 133A31; 299**Pa**25, 148A909; 8**PaDist&Co** 430; 152**SC**287, 149**SE**750; **TexCivA** 274**SW**250; **TexCivA** 291**SW** 631. [d] **But hearsay evidence is inadmissible** to prove declaration against interest. **TexCivA** 3**SW(2d)**563 (declaration to third person who repeated same to witness).

232-80 80**CalA**185, 251**P**666; 162**Ga**743, 135**SE**95; **Ill** 173**NE**470.

232-83 120 **Or**144, 251**P**763, 768 [quot CJ].

232-84 120 **Or**144, 251**P**763, 768 [quot CJ].

232-84½-New. **Declaration competent only if declarant was competent.** 5**Pa Dist&Co** 25.

232-85 192**NC**212, 133**SE**462; 120 **Or** 144, 251**P**763, 768 [quotCJ].

232-86 8**PaDist&Co** 430.

232-93 220**Ala**466, 126S873; 166**Ga**506, 143**SE**894; 220**Ky**569, 295**SW**863; 83 **Mont**100, 269**P**408 (statute construed to be consistent with other statutes); 244 **NY**168, 155**NE**88 (book entries); 192**NC** 212, 133**SC**462; 120 **Or**144, 251**P**763; 10 **PaDist&Co** 475; **TexCivA** 271**SW**116; 100**Vt**51, 134A853. [b] **In Virginia.**–142 **Va**789, 128**SE**268.

233-94 See also **MoA** 21**SW(2d)**202.

233-95 **Ala** 126S117; 220**Ala**466, 126 S873; 247**NY**176, 159**NE**902; 192**NC** 212, 133**SE**462; 46**Philippine**193.

233-96 **Mass** 173**NE**530.

233-3 22**F(2d)**524; 203 **Iowa**1183, 212 **NW**343; 46**Philippine**193; 143**Wash**537, 255**P**942; 149**Wash**600, 271**P**856.

234-5 [a] **Declaration of defendant in**

automobile collision suit made before accident, that she intended to make gift of automobile to daughter, is admissible. 212Ala325, 104S808.

234-6 80CalA185, 251P666.

234-12 162Ga743, 135SE95.

234-16 101WVa514, 133SE123. [b] TexCivA 271SW116.

234-22 99NJEq369, 131A897.

234-23 216Ala619, 114S208; 83Mont100, 269P408.

234-25 77CalA525, 247P240.

235-30 Ala 129S78; 195NC693, 143SE516; 12PaDist&Co 515.

235-35 39GaA609, 147SE901; 228Ky669, 15SW(2d)499.

235-36 235Ky429, 31SW(2d)709.

235-37 [a] TexCivA 271SW311.

236-51 78Mont415, 258P236.

236-52 MoA 274SW510; 120 ObSt559, 166NE685; TexCivA 8SW(2d)196.

237-62 MoA 274SW510; 12PortoRico Fed119.

237-64 TexCivA 273SW688 (receipt prepared long after event and during trial).

237-67½-New. Assessor's lists are inadmissible as admissions against interest on issue as to value in a civil action between owner and parties other than state. 39 OklACR70.

237-68 54ND91, 209NW204, 208 [quot Cyc].

237-70 78Mont415, 258P236; 48RI 160, 136A439, 440 [citCJ].

237-71½-New. Testimony of a party as to adversary's statements against interest is the weakest character of evidence. 219Ky438, 293SW1082.

237-72 Colo 293P342; 78Mont457, 254P432.

238-30 41 Ida129, 238P308 (approval of renewal note by one sued on original note, as member of loan, discount committee, is admissible to rebut claim that plaintiff by failure to procure other indorsers had no right of action against him).

238-86 198Cal 32, 243P423; 107Conn 287, 140A486; 152Md380, 136A900, 904 [quotCJ]; 78Mont370, 254P179; 191NC 297, 131SE735; NB [1930] 2DomLR547.

239-94 173Ark322, 292SW359; 177Ark 121, 6SW(2d)829; 39 OklACR292.

240-95 172Ark330, 288SW709; 165Ga 534, 141SE653.

240-96 165Ga534, 141SE653.

240-97 165Ga534, 141SE653.

240-98 78Mont370, 254P179.

240-99 203Cal 569, 265P241.

240-2 203 Iowa1103, 212NW559.

241-4 165Ga534, 141SE653.

241-7 254 IllA334 (where no controversy exists); 237Mich375, 211NW746; 253NY1, 170NE471.

241-8 93CalA36, 268P1090; 165Ga534, 141SE653.

247-9 NS [1930] 2DomLR996 (hearsay of living persons inadmissible). [b] NC 154SE674(2dcase).

241-10 237Mich375, 211NW746.

242-13 80 IndA556, 148NE643.

243-45 48RI 144, 136A308.

243-47 142 Okl 157, 286P14.

243-50 107Conn287, 140A486 (claimant's first cousin); 3Del 1, 129A238 (rejected where no family relationship is shown); 165Ga534, 141SE653 (by blood or marriage); 30Hawaii116; 329 Ill 458, 160NE847; 254 IllA334 (declarations of intestate and wife and of persons related by blood or marriage held admissible); 80 IndA556, 148NE643; 78Mont370, 254P179; 226AppDiv638, 236NYS489; 141 Okl 113, 284P52 (relationship of deceased declarant to plaintiff heirs held sufficient to admit declarations); TexCivA 275SW606. See also 330 Ill 172, 161NE493.

244-57 3Del 1, 129A238. [b] **True test** is whether declarant was sufficiently a member of family circle to have personal knowledge of family discussion or tradition on subject. 48RI 144, 136A308.

244-58 See also 30Hawaii116.

244-59 207 Iowa1229, 224NW597.

244-60 330 Ill 172, 161NE493.

245-71 TexCivA 275SW606.

245-72 107Conn287, 140A486. [d] **Declarant need not be shown to belong to same branch of family as** person to whom declaration relates. 107Conn287, 140A486. [e] **Declarations held admissible without independent proof of declarant's relationship.**-107Conn287, 140A486.

246-90 207 Iowa1229, 224NW597; 141 Okl 113, 284P52 (witness held competent).

246-92 3Del 1, 129A238.

246-94 3Del 1, 129A238; 85Mont114, 278P110.

247-95 329 Ill 458, 160NE847.

247-9 93CalA36, 268P1090 (declaration of deceased member of family held admissible); 329 Ill 458, 160NE847; 78 Mont370, 254P179; TexCivA 275SW606; TexCivA 281SW335. [c] **Due proof must be made of death of declarant.** TexCivA 275SW606.

249-24 40GaA491, 150SE465.

249-30 197Wis145, 221NW737.

249-36 [a] **Kinship may be proved in various ways,** and strict legal proof required in other issue is not demanded, but even repute is admissible. 225App Div562, 234NYS2.

249-39 198NC813, 150SE672(2dcase); 142 Okl 157, 286P14.

250-53 101WVa217, 132SE501.

251-69 78Mont370, 254P179.

251-70 [b] **Documentary evidence is entitled to greater consideration.**-136 Misc129, 238NYS778.

251-72 136Misc129, 238NYS778.

251-74 165Ga534, 141SE653.

252-78 104WVa134, 139SE642.

252-80 101WVa217, 132SE501; 104 WVa134, 139SE642.

252-89 198Cal 32, 243P423; 136Misc 129, 238NYS778. [a] **Where will has been refused probate on adjudication of mental incompetency** of testator, declarations in such will are inadmissible on question of pedigree. 193Cal 32, 243P 423.

253-93 132Misc205, 229NYS814.

253-95½-New. Signature of letter introduced to prove pedigree must be shown to be genuine to authorize admission. TexCivA 275SW606.

254-17 Conn 151A512.

254-19 191NC297, 131SE735.

255-37 85CalA149, 259P113; 167Ga 368, 145SE661.

255-43 213Ala494, 106S150; 105Conn 366, 135A391; 44 Ida686, 258P536; 85 IndA483, 154NE391; TexCivA 282SW 296.

256-48 Conn 151A512; 149Md318, 131 A444; TexCivA 282SW296; TexCivA 2 SW(2d)936 (letters between owners).

257-57 154Md213, 140A95.

257-66 213Ala494, 106S150; 85 IndA 483, 154NE391; 149Md318, 131A444.

257-68 191NC137, 131SE629.

258-71 TexCivA 31SW(2d)172.

258-72 191NC137, 131SE629.

258-77 44 Ida686, 258P536; 149Md318, 131A444; 191NC137, 131SE629.

258-88 27Hawaii28.

258-91 8LaA720.

259-96 33Ariz128, 262P995 (statement made in defendant's presence as to transaction in suit); 128 Or248, 275P 28.

260-99 161Ga517, 131SE483.

262-32 209Ky148, 272SW418; 259 Mass272, 156NE254.

263-49 219Ala162, 121S543.

263-52 ND 232NW754.

264-56 259Mass272, 156NE254; TexCivA 22SW(2d)1077.

266-65 [a] **It is not error to refuse to allow plaintiff to show exact language used** where evidence shows complaints of pain and suffering. 219Ala298, 122 S41.

266-67 219Ala201, 121S704, 64ALR553 (2dcase).

266-72 219Ala201, 121S704, 64ALR553 (2dcase).

267-76 219Ala162, 121S543.

267-84 221MoA626, 287SW1053.

267-85 219Ala201, 121S704, 64ALR553 (2dcase); 319Mo 8, 4SW(2d)762.

269-88 219Ala201, 121S704, 64ALR553 (2dcase); 209Ky148, 272SW418.

269-89 NJSup 150A575.

269-92 319Mo 8, 4SW(2d)762.

269-93 219Ala162, 121S543.

269-94 119Kan738, 241P246.

270-95 TexCommnA 273SW834.

270-96 TexCommnA 273SW834.

270-99 213Ala217, 104S390; 219Ala15, 121S34; Vt 148A481.

271-1 213Ala217, 104S390.

271-3 213Ala217, 104S390; 166Ga93, 142SE554; 84 IndA478, 151NE620.

272-5 133Misc382, 232NYS248.

272-8 219Ala15, 121S34.

273-15 321Mo 414, 118SW(2d)729.

273-19 Kan 247P845.

274-46 167Ga368, 145SE661.

274-48 168Ark654, 271SW18 (complaint to prove division had been made and what it was); 166Ga506, 143SE894.

274-52 See also TexCommnA 15SW (2d)575.

274-53 329 Ill 424, 160NE762.

275-57½-New. Declarations of defendant in fieri facias in possession at time of levy as to ownership of crops are admissible. 34GaA72, 128SE237.

275-57⅓-New. Declarations of one in possession of land are not admissible after his death to sustain or destroy record title. SD 231NW912.

275-60 149Md318, 131A444; 251Mich 175, 231NW115. [b] **Division of land.**-168Ark654, 271SW18.

275-61 Ala 130S537; 149Md318, 131A 444; 83Mont100, 269P408.

275-62 149Md318, 131A444.

275-65 149Md318, 131A444.

275-65½-New. Hearsay statement of a former owner against interest as to the location of boundaries is admissible in an action to which he is not a party. 105Conn139, 134A803.

275-65⅓-New. Such statement is not admissible if self-serving declaration. 105Conn139, 134A803.

275-65¼-New. Evidence of a remote grantor's declarations as to the moving of a government monument is not competent to show the common reputation as to disputed boundary or as hearsay of ancient boundaries. 83Mont100, 269P408.

275-65⅙-New. Public reputation and declarations of early settlers is competent to establish fact that a monument is one marking corner of section of land by government survey. Nebr 230NW 95.

275-71 198NC278, 151SE861.

275-72 Nebr 230NW95.

276-73 105Conn139, 134A803.

276-78 But see TexCivA 271SW116.

276-79 194NC675, 140SE749.

276-83 38GaA422, 144SE125; 84 IndA 478, 151NE620; 230Ky49, 18SW(2d) 873; 152Wash448, 277P988.

276-84 TexCivA 27SW(2d)610.

277-87 [a] 34GaA183, 129SE16.

277-88 240 IllA311, 319 [quotCJ].

277-93 16F(2d)880.

277-95 75CalA157, 241P910.

278-1 [b] **Evidence held insufficient** to make prima facie case of identity of plaintiffs as persons who made declarations at variance with application, as respects admissibility of declarations. 214Ala373, 108S5.

278-8 TexCivA 271SW311.

278-9 22 ObA369, 153NE261; TexCivA 271SW311.

278-10 228AppDiv19, 238NYS443; TexCivA 271SW311.

278-13 TexCivA 271SW311.

279-20 But see TexCivA 271SW311.

279-21 TexCivA 271SW311.

279-30 197Cal 82, 239P709, 41ALR 1027.

279-31 197Cal 82, 239P709, 41ALR 1027; 202Cal 326, 260P553; 28Hawaii 350; 46 Ida456, 268P1, 2 [citCJ]; 259 Mass272, 156NE254; Mo 32SW(2d)605; 191NC698, 132SE785; TexCivA 278SW 341.

280-35 But see TexCivA 284SW636.

281-50 197Cal 82, 239P709, 711, 41 ALR1027 [quotCJ].

281-51 197Cal 82, 239P709, 711, 41 ALR1027 [quotCJ].

281-52 30NM557, 240P303.

281-57 220Ala466, 126S873; Mass 165 NE426; 100NJEq403, 135A693 (self-serving letter); 130Misc865, 226NYS1; TexCommnA 15SW(2d)575; TexCivA 278SW341.

282-58 172Ark11, 287SW1022; 28 Hawaii350; 48Nev153, 238P402 (though conceded to be best evidence of intention, evidence of expressed intent is of no controlling weight, if inconsistent with acts and general conduct).

282-61 98CalA180, 276P634.

282-62 28Hawaii350.

282–63 28Hawaii350; TexCivA 17SW(2d)1093.
283–79 339 Ill 530, 171NE621 (holding ing statements before delivery competent, but statements thereafter incompetent to show past intention).
283–82½–New. Declarations of deceased donor is competent evidence on issue as to interest and meaning of words in trust agreement made by him. 215 AppDiv73, 213NYS277.
284–85 TexCivA 24SW(2d)786.
284–86 [a] **Statement held valueless.**–130Misc865, 226NYS1 (intention to make gift in future of property already conveyed to another).
284–90 Ala 126S117; TexCivA 278SW 341.
284–92 145Miss793, 110S833, 835 [quot CJ]; MoA 273SW764, 767 [quotCJ].
284–93 145Miss793, 110S833, 835 [quot CJ]; MoA 273SW764, 767 [quotCJ].
284–94 145Miss793, 110S833, 835 [quot CJ]; MoA 273SW764, 767 [quotCJ].
284–95 145Miss793, 110S833, 835 [quot CJ]; MoA 273SW764, 767 [quotCJ]. Contra 54ND397, 212NW51.
284–96 145Miss793, 110S833, 835 [quot CJ].
284–98 212Ky770, 280SW127.
284–99 89CalA551, 265P551.
285–2 212Ky770, 280SW127; 150Md 511, 133A322.
286–20 88 IndA327, 163NE842; TexCivA 278SW341.
286–22 Mass 164NE393; TexCivA 278 SW341.
286–24 TexCivA 4SW(2d)649, 651 [cit CJ].
287–25 TexCivA 4SW(2d)649, 651 [cit CJ].
287–27 251Mich309, 232NW369.
288–49 115 OhSt161, 152NE385.
288–50½–New. or abandonment, 142 Va789, 128SE268.
288–52 101CalA241, 281P661.
289–70 153Mo 600, 55SW147; 153Mo 600, 55SW147; 116Nebr141, 216NW173, 180 [quotCJ].
290–77 81Mont330, 263P421, 424 [quot CJ].
291–80 78Mont415, 258P236; 101WVa 217, 132SE501. See also 85Mont114, 278P110.
291–81 78Mont415, 258P236.
291–83 19F(2d)857.
291–84 19F(2d)857.
291–85 19F(2d)857, 860 [quotCJ]; 233Ky808, 27SW(2d)416; Mo 296SW 372; 78Mont370, 254P179; 130Misc865, 226NYS1; 227AppDiv146, 237NYS242; TexCivA 300SW191, 192 [citCJ].
294–38 TexCivA 6SW(2d)393 (contradictory self-serving declarations).
296–88 TexCivA 290SW912, 915 [cit CJ]. [b] **Distinguished from declarations against interest.**–Admission need not be contrary to interest of party at time it is made. 83NH236, 141A136.
296–93½–New. Inconsistent statements may be considered as admissions. 71 CalA752, 236P365.
297–4 TexCivA 290SW912, 915 [citCJ].
297–5 Ala 128S233; 22AlaA215, 114S 277, 278 [citCJ]; 36GaA538, 137SE286; 327 Ill 294, 158NE687; 125Kan636, 640, 266P33 [citCJ]; 223Ky600, 4SW(2d) 383; 191NC297, 131SE735; NC 155SE 452; 19 OhA346; 101TexCr545, 276SW 263; TexCivA 290SW912, 915 [citCJ]; TexCivA 6SW(2d)180. [a] (5) 22AlaA 215, 114S277, 278 [citCJ]. (15) 85CalA 332, 259P470.
298–6 19 OhA346; 154Wash241, 281P 991.
298–11 152Md536, 137A299, 305 [cit CJ].
298–12 35GaA25, 131SE916, 918 [cit CJ]; NH 149A746; 195NC693, 143SE 516; 27 OhA235, 161NE40; TexCivA 290SW912, 915 [citCJ]; TexCivA 32SW (2d)262.
298–13 35GaA25, 131SE916, 918 [cit CJ].
299–15 TexCivA 289SW712.
299–17 222Ky621, 1SW(2d)1076; 318 Mo 969, 2SW(2d)733, 742 [citCJ]. [c] **Admission of secretary of corporation that record is that of corporation** is not inadmissible against him because he states his belief that they are such as conclusion. 201 Iowa860, 208NW209.
299–19 39Ga214, 146SE512(2dcase); 180Minn205, 231NW824; TexCivA 12 SW(2d)811. [b] **Admission of secretary of corporation that record is that of corporation** is not inadmissible against him because he bases his belief that they are such on hearsay. 201 Iowa860, 208NW 209.
299–21 84Mont304, 275P281.
299–32 37GaA239, 139SE590; 151SC 484, 149SE246.
300–33 TexCivA 13SW(2d)950.
300–35 218Ala176, 118S330.
300–36 224AppDiv314, 230NYS640; 51 Philippine57.
301–43 [b] **Furnishing of attending physician's certificate** as to cause of death as part of proof of claim is not involuntary. 251NY208, 167NE223(2d case).
301–50 229 IllA36 (admission to police submitted to jury); TexCivA 6SW(2d) 180.
301–53 25F(2d)275; 40GaA791, 151SE 546 (answer to question as admission); Mass 172NE894; 117 Or278, 243P785.
301–61½–New. Oral admissions must be received with careful scrutiny of the circumstances under which they were made. 129Misc760, 223NYS701.
301–62 241Mich396, 217NW62; 218 MoA281, 269SW633, 634 [citCJ].
301–63 218MoA281, 269SW633, 634 [cit CJ].
301–65 198Wis315, 224NW102.
302–66 105NJL560, 143A347.
302–74 68CalA195, 228P675; IndA 152 NE288; 217Ky35, 288SW1027; MoA 30 SW(2d)190.
303–75 43F(2d)564; 200Wis200, 227 NW945.
303–81 98CalA242, 276P1042.
303–86 156Miss87, 125S565.
303–89 18F(2d)930; 37GaA254, 139SE 573; 45 Ida99, 260P1032; 319Mo 87, 5 SW(2d)383; 247NY1, 159NE700; 223 AppDiv533, 229NYS390; 136Misc394, 240NYS56; 24 OhA202, 156NE919; 288 Pa211, 135A746; 90PaSuper332. See also 295Pa306, 145A284.
305–97½–New. Where a letter is a mere expression of opinion, it is not admissible as a binding admission of fact. 127Misc444, 216NYS287.
305–1 32PortoRico 117.
305–2 36Wyo 310, 254P689, 690 [cit CJ].
305–3 32PortoRico 117.
305–6 36Wyo 310, 254P689, 690 [cit CJ].
305–8 203Cal 211, 263P806.
305–15 35F(2d)38; 4HawaiiFed16; 229 Ky572, 17SW(2d)756; TexCivA 278SW 255. [f] **Appraised reproduction value of corporation's property, by outside appraisers,** in profits tax return, signed by defendant president, was not binding on defendant, as admission. 32F(2d) 634.
306–16 34F(2d)297; 229Ky572, 17SW (2d)756; 232Ky24, 22SW(2d)278; Tex CivA 278SW255; TexCivA 13SW(2d) 416. But see 21AlaA27, 104S873.
306–20 Conn 152A148; 93Fla698, 112S 547; 38GaA586, 144SE825; Mass 172 NE579; 68Utah486, 251P16. [a] **Invoice.**–10CustA149. [b] **Railroads' bulletins.**–152Wash657, 279P114.
306–23 But see TexCivA 29SW(2d)899.
306–24 86Colo 580, 284P334.
306–24½–New. or an employer himself, 230Mich548, 203NW102.
306–27 89 IndA38, 165NE760(2dcase).
307–34 246 IllA538; 217Ky35, 288SW 1027; 221AppDiv248, 223NYS168.
307–38½–New. card signed by purchaser at auction; 165La106, 115S403.
307–60 213Ala286, 104S643; 232Mich 36, 204NW771; 232Mich101, 205NW 116; 218MoA281, 269SW633; 228App Div299, 228NYS354; 136Misc167, 238 NYS702; 137Misc542, 242NYS715. [a] But see CalA 291P436. [b] (1) 216Ala 537, 113S615; 232Mich101, 205NW116; 251NY208, 167NE223(2dcase). (2) Second certificate inadmissible for plaintiff unless shown to have been delivered to, and accepted by, insurer in place of original certificate. 216Ala537, 113S615.
307–62½–New. an official map; 218App Div686, 218NYS476.
307–65½–New. The record proceedings of a corporation are admissible against its secretary in an action against him individually. 201 Iowa860, 208NW209.
307–65½–New. The foregoing rule applies although he states that he does not know that they were correctly kept. 201 Iowa860, 208NW209.
307–65¼–New. A second death certificate substituting a contradictory statement is inadmissible against insurer unless accepted by him. 216Ala537, 113S 615.
307–65½–New. Financial statement to rating agency. TexCivA 22SW(2d)991.
308–66 80CalA1, 251P830, 837 [quot CJ]; 156Miss87, 125S565.
308–67 80CalA1, 251P830, 837 [quot CJ].
308–68 80CalA1, 251P830, 837 [quot CJ].
308–71 116Nebr131, 216NW299.
308–73 215Ala554, 112S122; 219MoA 81, 268SW645, 647 [quotCJ].
308–74 219MoA81, 268SW645, 647 [quotCJ].
308–75 219MoA81, 268SW645, 647 [quotCJ].
308–76 219Ala332, 122S346; 215Ala 554, 112S122; Ala 130S203; 174Ark 1025, 298SW198; 198Cal 16, 243P21; 99CalA17, 277P1053; 162Ga457, 134SE 87; 165Ga89, 139SE805; 167Ga98, 145 SE63; 37GaA239, 139SE590; 37GaA410, 140SE400; 257Mass559, 154NE70; 261 Mass65, 158NE267; 230Mich537, 203 NW122 (not admission that original claim was fraudulent); 219MoA81, 268 SW645, 647 [quotCJ]; 216MoA663, 272 SW101; MoA 10SW(2d)313; MoA 22 SW(2d)73 (offer to pay for release of possible cause of action and refusal constitute offer of compromise); 31NM457, 247P270; 218AppDiv669, 219NYS212; 137Misc885, 245NYS209; 229AppDiv 813, 242NYS640; 190NC577, 130SE203; 20 OhA191, 151NE802; 24 OhA202, 156 NE919; 39 OklACR259; 117 Or278, 243 P785 (held not offer of compromise, and admissible); 89PaSuper412; 46Philippine176; 48RI 56, 135A325; 137SC468, 135SE567; TexCivA 272SW821; Tex CivA 284SW680; TexCivA 13SW(2d) 747; TexCivA 23SW(2d)755; 142Wash 213, 252P699; 101WVa411, 132SE870. See also 6LaA861; MoA 296SW255.
310–77 212Ala515, 103S549; 177Ark 1195, 7SW(2d)782; Ark 30SW(2d)849; 162Ga457, 134SE87; 37GaA239, 139SE 590; 38GaA591, 144SE815; 253 IllA509; 257Mass559, 154NE70; Mass 171NE 651; 219MoA81, 268SW645; 92PaSuper 567. But see TexCivA 22SW(2d)1092.
310–78 219MoA81, 268SW645, 647 [quotCJ]; 218AppDiv669, 219NYS212.
310–79 219MoA81, 268SW645, 647 [quotCJ]; MoA 22SW(2d)73.
311–84½–New. That plaintiff submitted to an examination by physicians in the hope of effecting a compromise is no objection to permitting such physicians to testify as to the result of the examination. MoA 17SW(2d)658.
311–84½–New. An agreement between parties to an insurance policy to arbitrate loss is not inadmissible as a compromise offer. Iowa 228NW88.
311–85 93CalA725, 270P262; 218App Div669, 219NYS212; 142Va135, 128SE 546 (amount of offer made by condemning party to owner is not admissible in condemnation proceedings).
311–86 46Philippine176.
312–99 83CalA582, 257P156; MoA 285 SW1028; 126 Okl 238, 259P257; Tex CivA 3SW(2d)466, 467 [citCJ]; 101WVa 411, 132SE870.
313–10 76CalA293, 244P923. [b] 218 Ala176, 118S330.
313–11 76CalA293, 244P923; MoA 31 SW(2d)111; 126 Okl 238, 259P257; 46 Philippine176; 49RI 191, 141A461.
313–16 261Mass26, 158NE341 ("fix it up").
314–23 215Ala231, 110S31, 32 [citCJ]; 197NC66, 147SE672.
314–24 178Ark199, 10SW(2d)5.
314–29 169La797, 126S64; MoA 274SW 868; 192NC267, 134SE486; 20 OhA191, 151NE802, 804 [citCJ]; 24 OhA202, 156 NE919.
315–32 24 OhA202, 156NE919.
316–42 264Mass128, 162NE324; 24OhA 202, 156NE919.
316–43 24OhA202, 156NE919.
316–46 37GaA410, 140SE400.
316–50 37GaA410, 140SE400.
317–61 TexCivA 284SW680.

317-62 196Cal8, 235P981 [citCJ]. [e] **Where parties are different,** evidence of settlement of prior suits is inadmissible. 107Conn650, 142A461. [f] **Testimony** held not to involve offer of compromise. 41GaA178, 152SE293.

317-67 273US103, 47SCt302, 71L ed560; 16F(2d)512; 24F(2d)329; 230Ky157, 18 SW(2d)983; 13LaA272, 127S764 (under statute); Md 150A716; 27 OhA366, 161 NE553; TexCommnA 280SW189, 191 [quotCJ]; TexCommnA 3SW(2d)65; TexCivA 20SW(2d)334; TexCivA 20SW (2d)829; 99Vt337, 131A845. But see 259Mass46, 156NE61. [a] (23) Shipment by buyer of part of goods delivered is in nature of admission that they conformed to requirements of law as to quality. 71CalA479, 235P673. (24) Other instances. RI 149A584. [b] (3) Procuring doctor for plaintiff injured by defendant's son, taking plaintiff to hospital, and paying expenses held not admission of liability. 197NC222, 148 SE4l. (4) Other instances. Mass 173 NE524

318-68 TexCommnA 280SW189, 191 [quotCJ].

318-69 273US103, 47SCt302, 71L ed560; TexCommnA 280SW189, 191 [quotCJ].

318-70 16F(2d)512.

318-72 TexCommnA 280SW189, 191 [QuotCJ].

319-77 TexCommnA 280SW189, 191 [quotCJ].

319-78 Conn 151A433.

319-88 99Vt227, 131A16 (original suit on different claim).

319-89 82CalA141, 255P215; TexCivA 20SW(2d)829; TexCivA 24SW(2d)517; 99Vt337, 131A845.

319-90 TexCivA 20SW(2d)829.

319-91 TexCivA 20SW(2d)829.

319-92 RI 133A441; TexCivA 20SW (2d)829.

319-93 RI 133A441.

319-94½-New. , or sending a threatening letter to plaintiff warning him to discontinue the suit. 99Vt337, 131A 845.

319-97 88CalA393, 263P558.

320-12½-New. If a driver of an automobile truck striking a pedestrian knew that he struck the pedestrian and did not stop, his action in attempting to escape is tantamount to an admission of guilt. 12LaA236, 125S168(2dcase).

320-14 82NH225, 131A601; TexCivA 270SW1101; TexCivA 293SW224. [f] **Payments to other owners along stream for flowage caused by defendant's dam** may be shown, especially where such other owners owned land further up stream from dam than did plaintiff. 82 NH225, 131A601.

320-15 43F(2d)908; CalA 288P675; 154Md63, 139A564 (entirely different occurrence); MoA 30SW(2d)1101; 83 NH190, 139A753.

320-16 See also TexCivA 31SW(2d) 355.

321-17 137Misc885, 245NYS209.

321-19 154Miss325, 122S373; 82Pa537; 186Pa197, 40A410, 65AmSR849, 41LRA 805.

321-21 82NH500, 136A134. See also TexCivA 21SW(2d)41. [b] **Admission of liability on part of defendant** is not implied from statement of witness that defendant paid him to leave jurisdiction. 82NH500, 136A134.

321-23 321Mo 414, 11SW(2d)729.

321-29 [a] (2) Vt 148A874.

321-30 135Misc886, 238NYS707.

321-34 273US103, 47SCt302, 71L ed 560; Vt 148A874.

321-35 273US103, 47SCt302, 71L ed560; 216Ala299, 113S28; 171Ark469, 284SW 724; 27Hawaii28; 201 Iowa1202, 203 NW284; 205 Iowa302, 217NW851; LaA 130S135; Mass 165NE655; 130 Or15, 278P954.

321-35½-New. But party must in some way have adopted statement in his presence in order that it be admissible. 218 MoA281, 269SW633.

322-45½-New. Doctrine of acquiescence does not apply to admissions made in judicial proceedings. 198 Ind79, 151NE 385.

322-45½-New. and is inadmissible in a civil suit. TexCommnA 295SW592.

322-46 126Kan544, 268P833; Mo 280 SW1046; 135Misc886, 238NYS707.

323-48 226AppDiv406, 235NYS553.

323-49 TexCivA 6SW(2d)383.

324-73 42 Ida522, 247P740; 201 Iowa 1202, 203NW284 (where it is not shown that statement was made in plaintiff's presence); 261Mass255, 158NE771; 135 Misc886, 238NYS707. See also TexCivA 29SW(2d)434.

324-77 218MoA281, 269SW633.

325-86 TexCivA 29SW(2d)434.

325-87 220MoA924, 296SW452; 131 Misc69, 225NYS744.

325-92 Mo 280SW1046.

325-98 27Hawaii28, 52 [citCJ].

326-4 323 Ill 170, 153NE658; 164Minn 307, 204NW950; 32 OhA270, 167NE402; 132 Or533, 286P560 (unanswered letter inadmissible); 32PortoRico 117; 33 PortoRico 13; 188Wis30, 205NW407.

326-5 6F(2d)218.

326-8 24F(2d)329; 188Wis30, 205NW 407.

327-9 188Wis30, 205NW407.

327-25 188Wis30, 205NW407.

327-26 188Wis30, 205NW407.

328-29 16F(2d)512; 133Misc53, 231 NYS130; TexCivA 2SW(2d)967, 969 [quotCJ]. But see 253 IllA509.

328-30 CalA 258P642.

328-33 MoA 31SW(2d)86.

328-34 16F(2d)512; IndA 163NE240.

329-40 217Ala301, 116S154.

329-50 TexCivA 6SW(2d)158.

329-53½-New. in election contests, 166 Minn63, 206NW947.

329-55 42 Ida705, 247P794; 329 Ill 458, 160NE847; 49Nev161, 241P213; TexCommnA 280SW189; Wyo 290P561.

330-61 126Kan552, 268P813; 100Vt 210, 136A388.

330-64 TexCivA 26SW(2d)447.

330-67½-New. In an action for a fall from a defective ship's ladder, cross-examination of plaintiff by defendant's counsel as to whether plaintiff waited until workmen left before using the ladder has been held not an admission that defendant's men were doing the work. 32F(2d)545.

330-68½-New. Judicial admissions are admissible at a new trial of the same cause. 233 IllA240.

330-69 100Vt210, 136A388.

330-70 But see TexCivA 273SW655.

330-71 209Ky165, 272SW413 (statement that there is no controversy on matter of fact); TexCivA 286SW680.

330-73 126Kan552, 268P813.

330-74 248Mich545, 227NW688; 167 Minn437, 209NW317; 150Wash565, 273 P957; 101WVa602, 133SE333. See also 220MoA5, 285SW148. [b] **But dismissal of appeal in criminal case** of defendant and payment of fine by him is not admissible as equivalent of plea of guilty. 220MoA5, 285SW148.

331-82 19F(2d)769.

331-87 82NH408, 135A27.

331-97 269US283, 46SCt116, 70L ed 275; 163Ga444, 136SE410; 164Ga311, 138SE580; 241Mich396, 217NW62; Wash 288P927.

332-2 TexCommnA 280SW189.

332-3 43F(2d)564; 164Ga311, 138SE 580.

332-8 See also TexCivA 283SW212.

332-9 TexCivA 11SW(2d)821.

332-10 32F(2d)195 (attorney presumptively authorized to speak for client); 226AppDiv266, 235NYS1 (admissions in reply verified by attorney); TexCivA 1SW(2d)393.

332-11 29Ariz554, 243P405; 177Ark 55, 5SW(2d)742; 85Colo 218, 274P935; 164Ga311, 138SE580; MoA 285SW104, 108 [citCJ]; 191NC500, 132SE468; NC 155SE452; 127 Or276, 270P497, 498 [citCJ]; TexCivA 288SW554; 68Utah 85, 249P437, 445 [citCJ]. But see 98 PaSuper72. [a] (5) Admission of corporation in its answer in suit by manager for profits due as wages that president was authorized to make contract of employment sued on. 158La642, 104S484. [d] **Brief filed** on former appeal has been held inadmissible. 111Conn261, 149A772. [e] **Necessity of using entire paragraph of affidavit of defense.**-98Pa Super477.

333-12 43 OklACR213; TexCivA 273 SW655; TexCivA 1SW(2d)393; 68Utah 85, 249P437, 445 [citCJ]; Vt 151A642.

333-13 43 OklACR213.

333-15 70CalA336, 233P374. [c] 89Pa Super299. [d] TexCivA 10SW(2d)763.

333-15½-New. Allegations as to expenses reducing damages recoverable are not admissions against interest relieving pleader from proving amount of damages. TexCivA 4SW(2d)336.

333-16 104Conn519, 133A746, 748 [cit CJ].

333-17 44 Ida620, 258P555.

333-21 259Mass76, 156NE51.

333-22 32F(2d)195; 219Ala298, 122S 41; 83CalA621, 257P173; 163Ga444, 136SE410; 325 Ill 229, 156NE306; 233 IllA262; 6LaA837; 262Mass275, 159 NE617; 169Minn287, 211NW463; 150 Miss673, 116S534; 213AppDiv178, 210 NYS414; 194NC98, 138SE424, 426 [cit CJ]; 194NC279, 139SE433, 434 [citCJ]; 195NC418, 142SE325; 196NC265, 145SE 244; 53ND54, 205NW9; 130 Okl 111, 265P133; TexCivA 288SW554; Tex CivA 2SW(2d)967; TexCivA 16SW(2d) 897; TexCivA 25SW(2d)695; TexCivA 26SW(2d)299; 148Wash287, 268P881. But see Ala 130S786. [h] **Stipulation to withdraw answers** constitutes admission against interest, and record of proceeding under National Prohibition Act becomes admissible on ground that tenant used leased premises illegally. 125 Misc748, 211NYS301.

335-24 TexCivA 8SW(2d)767.

335-28 Mass 168NE806(2dcase); 221 MoA960, 289SW352; TexCivA 26SW (2d)299.

335-34 Vt 151A642.

335-35 TexCivA 28SW(2d)259 (incompetent as not signed). [b] **Petition not filed by present plaintiff** held properly excluded. TexCivA 4SW(2d)1023.

335-36 150Miss673, 116S534, 535 [cit CJ].

335-37 Mass 168NE806(2dcase).

335-38 169Minn287, 211NW463.

335-40 [a] 7F(2d)800.

335-41 178Ark736, 11SW(2d)473. [b] **Except where pleading has been amended,** party offering pleading in evidence is not required to show affirmatively that pleader authorized or directed insertion of particular statement. 169 Minn287, 211NW463.

335-41½-New. In the absence of repudiation, it is presumed that the statements in a pleading, although not verified, are made with approval of the party. 169Minn287, 211NW463.

335-41¼-New. They are admissible, although not conclusive, but subject to explanation. 169Minn287, 211NW463.

335-41¼-New. But when the relation of attorney and client exists, the pleading is to be received in evidence. 169 Minn287, 211NW463.

336-42 36GaA415, 136SE816.

336-43 169Minn287, 211NW463; Tex CivA 25SW(2d)950.

336-45 228AppDiv450, 240NYS170; TexCivA 282SW819.

336-48 128Kan220, 277P45 (relevancy too remote).

336-49 Ala 130S786.

336-56 TexCommnA 25SW(2d)290.

337-58 202 Iowa333, 208NW726; 118 Or568, 247P815; TexCivA 23SW(2d) 799.

337-59 32F(2d)195; 29Ariz554, 243P 405; 36GaA149, 136SE319; 41GaA38, 152SE136; 87 IndA619, 155NE622; 202 Iowa333, 208NW726; 164Minn507, 205NW436 (weight to be given to original answer, inconsistent with amended answer, is for jury); 165Minn 25, 205NW453 (admission in stricken part of original answer is admissible but not conclusive); Mo 31SW(2d)792; 131Misc514, 227NYS209; 227AppDiv 795, 237NYS161; 227AppDiv378, 237 NYS668; 118 Or568, 247P815; 128 Or 172, 273P953; TexCommnA 280SW189; TexCivA 273SW655; TexCivA 293SW 638; TexCivA 298SW642; TexCivA 6 SW(2d)202; TexCivA 7SW(2d)1096; TexCivA 25SW(2d)283; Wis 231NW 276.

338-60 36GaA149, 136SE319; Tex CommnA 280SW189.

338-62 36GaA149, 136SE319; MoA 282SW747.

338-63 [b] **Abandoned pleading** must be shown to have been filed by opposite

party. **TexCivA** 28SW(2d)312.

338-64 **TexCivA** 28SW(2d)312 (holding proof of filing by adverse party, attorney or agent necessary).

338-68 **Cal** 290P1036; 33PortoRico 276.

338-71 But see **TexCommnA** 280SW 189.

333-72 **TexCommnA** 280SW189.

339-96 [a] **Court, in rendering decision, is not required to ignore** other relevant facts of which it has judicial knowledge. **Mo** 19SW(2d)1063.

339-97 20F(2d)613; 233 IllA240.

339-99 212Ala540, 103S567; 233 IllA 240; 192NC87, 133SE427; 103WVa318, 137SE356.

340-2 231NYS635.

340-7 77Mont110, 250P819.

340-11 196NC265, 145SE244.

341-18½-New. Padlock proceedings. A stipulation withdrawing answer in padlock proceeding for violation of Prohibition Act is not an admission available to landlord in summary proceeding to recover possession of premises on ground of their being used for illegal purpose. 125Misc464, 211NYS445 (where defendant was not party to original proceeding).

341-18½-New. Where stipulation is not unqualified but assented to by both parties, it is ineffective as an admission of facts. 102NJL332, 131A884.

341-19 125Me292, 133A164.

341-31 **MoA** 30SW(2d)626.

341-33 **MoA** 28SW(2d)456.

342-35 **TexCivA** 8SW(2d)767.

342-46 **MoA** 17SW(2d)684.

342-46½-New. Plaintiff's deposition if made in false denial of negligence claimed against automobile driver is held not to make pleadings in such action independently admissible in action against street railway for same accident. 83NH190, 139A753.

343-52 [a] **Answers to interrogatories in action in federal court,** as required by state law, held admissible in state court action. 29F(2d)9 [certiorari den 279US 840, 49SCt253, 73L ed986(7thcase)].

343-58 162Ga508, 133SE622.

343-60 **TexCivA** 12SW(2d)265.

343-61 19F(2d)186; 215Ala200, 110S 286; 206 Iowa664, 221NW210.

344-68 **MoA** 7SW(2d)442.

344-82 7F(2d)324, 325 [citCJ] (police officer).

344-86½-New. The testimony may be inadmissible because it is not part of the res gestæ. 198 Ind79, 151NE385.

344-87½-New. Evidence on file before defendant became a party is competent as a judicial admission. 215Ala465, 111 822.

344-87⅓-New. Declarations of defendant to coroner as to conduct at time of accident are admissible. 105Conn453, 135A554.

344-91 **MoA** 30SW(2d)1101; 287Pa61, 135A210.

344-94½-New. [§ 393a] k½. **Replevin Bonds.** Replevin bonds are competent as admissions of value of property replevied. 102NJL359, 132A656.

345-98 **TexCivA** 268SW680.

345-98½-New. although it was later reversed on appeal, **TexCivA** 286SW680.

345-99 **TexCivA** 2SW(2d)967.

345-1½-New. Decree in padlock proceedings for violation of Prohibition Act is not available as an admission to landlord in summary proceeding to recover possession of premises on ground of their being used for illegal purpose. 125Misc464, 211NYS445 (where defendants were not named in decree).

345-1⅓-New. In an action by the buyer of an automobile against the seller for fraud, letters written to the buyer by a transferee of his obligation are not binding on the seller and are inadmissible. 239Mich118, 214NW187.

345-1¼-New. A creditor, by taking judgment against a partnership, does not admit anything concerning constituent members of such partnership. **Tex CivA** 285SW852.

345-2 101NJEq203, 137A657.

345-7 Contra. 224 IllA574.

345-9 [a] **Admission made by minor to police** while under arrest may be admissible. 229 IllA36.

345-11 **Vt** 148A481.

345-15 19F(2d)769; 22F(2d)530; 43 F(2d)499; 212Ala515, 103S549; 212Ala 503, 103S569; 219Ala399, 122S359; 219 Ala374, 122S630, 65ALR1473; 220Ala 220, 124S516; 220Ala664, 128S233; Ala 129S88; Ala 130S396; 169Ark192, 273 SW1028; 177Ark55, 5SW(2d)742; 178 Ark1046, 13SW(2d)306; 80CalA444, 251 P952; 85CalA332, 259P470; 88CalA393, 263P558; 97CalA39, 274P987; CalA 285 P1059; CalA 289P218; Ga 155SE484; 34GaA363, 129SE553; 36GaA228, 136SE 108; 327 Ill294, 158NE687; 207 Iowa 232, 222NW412; 208 Iowa228, 225NW 268; 214Ky441, 283SW401; 221Ky498, 299SW207; 228Ky385, 15SW(2d)267; 231Ky365, 21SW(2d)488; 261Mass26, 158NE341; 245Mich391, 222NW710; 247Mich522, 226NW213(2dcase); 153 Miss884, 122S103; 319Mo 214, 6SW(2d) 39; 322Mo 158, 16SW(2d)190; Mo 26 SW(2d)618; MoA 272SW105; MoA 15 SW(2d)964; MoA 18SW(2d)528; MoA 31SW(2d)394; NH 149A746; NH 151 A262; NJ 152A196; NJSup 130A439; 133Misc382, 232NYS248; 57ND844, 224 NW297; 58ND58, 225NW79; 30 OhA 21, 164NE59; TexCivA 286SW638; TexCivA 289SW712; TexCivA 17SW (2d)116; TexCivA 28SW(2d)1100; Utah 272P229; 98Vt437, 129A317; 141 Wash139, 250P955; 101WVa411, 132 SE870; 106WVa280, 145SE440; Wis 231NW155. [c] **Statement by defendant as to value of corporate assets** is proof of value of stock. 125Misc836, 211NYS577 (in action for damages for fraudulent sale of stock).

347-16 224AppDiv301, 230NYS131.

347-17 327 Ill 294, 158NE687; MoA 272SW105; NH 149A746; 98Vt437, 129 A317.

347-18 22F(2d)530; 257Mass272, 153 NE784.

348-19 41GaA707, 154SE463.

348-27 37Wyo 432, 263P607, 612 [cit CJ].

348-28 99CalA423, 278P1051; 207 Iowa 1293, 224NW820, 62ALR1419; 208 Iowa 933, 226NW43; 235Ky405, 31SW(2d) 729; 317Mo 782, 297SW20; MoA 298 SW254; MoA 21SW(2d)890; 155Miss 64, 123S873; 116Nebr18, 215NW556; 117 Or107, 241P62; TexCivA 281SW 1090.

348-30 317Mo 782, 297SW20. [b] **Where admissions are not competent as against coparty,** court should limit them as to declarant only. 215Ala250, 110S 390.

348-31 202 Iowa1391, 212NW122.

349-34 34Ariz87, 267P947, 949 [citCJ]; 90CalA764, 266P606; 252 IllA449; 198 Ind79, 151NE385; 86 IndA581, 159NE 15; 202 Iowa1391, 212NW122; 206 Iowa1280, 221NW930; 208 Iowa933, 226 NW43; 217Ky148, 289SW215; 168Minn 136, 209NW879; MoA 21SW(2d)890 (agency); 116Nebr18, 215NW556; 197 NC322, 148SE458; 117 Or107, 241P62.

350-36 [a] **TexCivA** 18SW(2d)765.

350-37 **CalA** 258P642.

350-40 108WVa293, 150SE745.

350-46 **Ill** 172NE765; 202 Iowa1391, 212NW122. [a] (1) 319Mo 87, 5SW(2d) 383. (2) 248Mich263, 226NW862. [f] **Letters written about same time.**–319Mo 87, 5SW(2d)383.

351-48 **TexCivA** 12SW(2d)811; 67Utah 553, 248P496.

351-53 86Mont150, 282P494; 117Nebr 488, 221NW101, 105 [citCJ].

351-54 78Colo 6, 238P29; **TexCivA** 281 SW1090.

352-58 200 Iowa1169, 206NW141; 154 Miss325, 122S373; 321Mo 724, 12SW (2d)920.

352-60½-New. Plaintiff's statement immediately after accident that one of two defendants was not negligent is admissible, although prejudicial to the other defendant. 141Wash139, 250P955.

352-61 **TexCivA** 7SW(2d)1096.

353-64 **MoA** 274SW868, 870 [citCJ].

353-65 101WVa411, 132SE870, 874 [cit CJ&Cyc]. [d] **Voter in quo warranto proceeding to oust one from political office** is considered a party and his declarations are admissible. **Wis** 231NW 155.

354-78 102NJEq288, 132A253; 22 OhA 369, 153NE261; **Wis** 233NW76.

354-79 336 Ill 594, 168NE666; **MoA** 281SW132, 133 [quotCJ]; 99Vt249, 131 A14; **Vt** 148A481; 199Wis503, 226NW 950.

355-81 23AlaA164, 122S614; **MoA** 281 SW132, 133 [quotCJ].

355-81½-New. Husband's heirs at law contesting an alleged will have been held bound by the husband's acts and declarations. **Vt** 147A687.

356-84 168Ark981, 272SW869.

356-86 168Ark981, 272SW869. [a] **Reason** is that declarations of donor in disparagement of title made subsequent to full execution of deed or gift are mere hearsay and neither part of res gestæ nor declarations against interest. 168Ark981, 272SW869.

356-90 **Del** 147A165; 86 IndA1, 152NE 285; 133Misc382, 232NYS248; **TexCivA** 25SW(2d)959 (admissible on issue of adverse possession); 99Vt384, 133A355.

357-97½-New. In an action involving plaintiff's interest in land, notes executed by plaintiff in behalf of another, expressly stated to be in payment for conveyance of property, were persuasive evidence against him. 226Ky776, 11 SW(2d)956.

357-98 216Ala29, 112S312; 197Cal 396, 240P1010; 68CalA153, 228P726; 77 CalA525, 247P240; CalA 291P663; 168 Ga248, 147SE574; 329 Ill 410, 160NE 765; 203 Iowa767, 210NW609; 156 Md221, 144A257; 314Mo 95, 282SW 1014; 173Minn314, 217NW115; 80 Mont40, 257P1022; 128 Or483, 275P 45; 296Pa568, 146A153; **TexCivA** 6SW (2d)383; 148Va616, 139SE291; 149 Wash573, 271P891; 101WVa514, 133SE 123. See 331 Ill 230, 162NE829. See also **TexCivA** 21SW(2d)532 (grantee). But see **TexCivA** 23SW(2d)414. [d] **Silence of grantees,** when declarations as to undue influence are made by grantor after alienation, renders them admissible. 314Mo 95, 282SW1014.

358-3½-New. Statement in deed of balance of tract of land of acreage conveyed is inadmissible against the grantee of previous portion in the absence of evidence that the latter knew of the grantor's claim. 82NH342, 134A 520.

358-3½-New. But the exclusion of the grantor's statements is not error in the absence of necessary independent evidence of fraud as a condition precedent. 80Mont40, 257P1022.

358-3¼-New. The rule is subject to exception where the conveyance is shown to have been made to defraud the vendor's creditors. 80Mont40, 257P 1022.

358-3⅓-New. Testimony regarding admissions of mistake in a deed by one signing it is admissible as to him. **Tex CivA** 19SW(2d)400.

358-5 But see **TexCivA** 11SW(2d)399.

358-6 197Cal 396, 240P1010; 296Pa 181, 145A808. [a] **Admissions by mortgagor** after execution of mortgage may be admissible in controversy between mortgagee and another on question whether certain property was after-acquired property of mortgagor. 6 F(2d)179.

358-8 147Wash106, 265P153.

358-12 220AppDiv276, 221NYS409.

358-13 130Misc865, 226NYS1 (intent).

359-15 See also 77CalA525, 247P240.

359-16 86Mont43, 281P749, 69ALR 416; 132 Or185, 282P241.

359-17 **TexCivA** 25SW(2d)881.

359-18 231Ky550, 21SW(2d)983; 133 Misc382, 232NYS248; 289Pa331, 137A 455.

359-18½-New. Conversations and letters of deceased member of partnership are admissible as evidence that partnership bank with record title held land in trust as security. **TexCivA** 300SW959.

360-26 **Mass** 172NE579.

360-28½-New. In an action on a note against one alleged to have assumed payment of it, statements of the maker that he did not own a business which he sold to defendant on an agreement that the seller pay the note is not admissible as an admission against interest. 221MoA923, 291SW142.

361-37 96CalA93, 273P871; 93CalA 202, 269P682; 195NC693, 143SE516.

361-40 **TexCivA** 17SW(2d)93.

362-47½-New. Admissions by bankrupt in schedules may be admissible against trustee in bankruptcy. 19F(2d) 769.

362-47½-New. An ex parte statement, without right of examination, that payment of notes was assumed by a bankrupt, is not binding on the trustee or other creditors. 34F(2d)334.

362-56 MoA 288SW970.

363-60 LaA 122892; Miss 130S145; ND 231NW888.

363-61 83NH467, 144A266; 149Wash 316, 270P1029.

363-62 107Conn535, 141A657.

363-64 168Ark981, 272SW869.

363-65 168Ark981, 272SW869; Miss 130S145.

364-68 37Wyo 78, 259P185.

364-71 [a] 37Wyo 78, 259P185, 187 [citCJ].

364-80 128Me96, 145A896, 64ALR790.

365-83 [b] **Where grantee is not present when declarations are made they are not evidence against him.** 338 Ill 172, 170NE430.

365-86 24F(2d)776.

366-90 143 Okl 260, 288P483; Tex CivA 68W(2d)383.

366-91 TexCivA 68W(2d)383.

367-99 216Ala210, 112S831; 218Ala 201, 118S393; 83CalA470, 256P1109; 85CalA204, 259P71; 37GaA271, 139SE 916; 37GaA558, 140SE892; IndA 153 NE179; 204 Iowa638, 215NW713; 210 Ky806, 276SW803; 223Ky821, 48W (2d)757; 320Mo 146, 6SW(2d)920, 928 [quotCJ]; NH 149A746 (dependent on law of agency); RI 136A765; 139SC 545, 138SE354; 156SC397, 153SE473; TexCivA 286SW599; TexCivA 290SW 912, 915 [citCJ]; TexCivA 218W(2d) 344; 148Va194, 138SE721; 142Wash73, 252P535; 155Wash526, 285P446. See also 125Misc841, 211NY488.

369-1 215Ala436, 111S17; 76CalA369, 244P609; 76CalA712, 245P768; CalA 242P179; 37GaA271, 139SE916; 37GaA 558, 140SE892; 339 Ill 504, 171NE494; Kan 292P805; 234Ky243, 27SW(2d) 952; 257Mass6, 153NE97; 117 Okl 161, 245P863; Or 292P93; TexCivA 286SW 599; TexCivA 290SW912, 915 [citCJ]; TexCivA 108W(2d)223; TexCivA 118W (2d)371; 150Va406, 143SE692; 142 Wash73, 252P535.

370-2 37GaA271, 139SE916; 37GaA 558, 140SE892; 222MoA912, 68W(2d) 1007; 138SC281, 136SE218; 151SC391, 149SE111; TexCivA 286SW599; Tex CivA 290SW912, 915 [citCJ]; 199Wis 503, 226NW950.

372-3 12F(2d)970; 13F(2d)417; 216 Ala400, 113S401; 219Ala53, 121S47; 76CalA712, 245P768; 37GaA558, 140SE 892; 323 Ill 389, 154NE117; 215Ky77, 284SW405, 47ALR483; 215Ky85, 284 SW105; 252Mass270, 147NE882; 146 Miss607, 111S575; 219MoA222, 269SW 942, 945 [quotCJ]; 99NJEq369, 131A 897; 125Misc841, 211NY488; 24 OhA 374, 157NE708; 116 Okl 106, 243P504; 132SC59, 128SE849; 151SC484, 149SE 246; TexCommnA 283SW161; TexCivA 292SW588; TexCivA 8SW(2d)301.

375-5 40GaA302, 149SE422; 286Pa 170, 133A148.

375-6 37GaA558, 140SE892; 323 Ill 389, 154NE117.

375-8 TexCivA 294SW625.

376-18 3Del 245, 138A277; 99NJEq 369, 131A897.

376-21 31F(2d)53; 212Ala542, 103S 580; 22AlaA211, 114S273; 196Cal 8, 235P981; 37GaA271, 139SE916; 253 IllA569; 203 Iowa467, 212NW886; 152 Md597, 137A276; 175Minn341, 221NW 62; MoA 297SW985; NH 149A746; 221AppDiv524, 224NYS689; 33 OhA 345, 169NE581; 117 Okl 161, 245P863; 124 Or157, 264P368; TexCommnA 283 SW161; TexCivA 280SW600; TexCivA 22SW(2d)492; 100Vt443, 138A782. [a] 80CalA724, 252P770; MoA 31SW(2d) 111. [b] 37GaA271, 139SE916; 221App Div524, 224NYS689; TexCommnA 283 SW161. [d] **Authority of agent to make admission binding principal must be shown.** 252Mass270, 147NE882.

377-22 3Del 245, 138A277; 37GaA271, 139SE916; 323 Ill 389, 154NE117; Mo 19SW(2d)700, 67ALR157; 221MoA733, 285SW779, 782 [quotCJ]; 144 Okl 186, 289P696; TexCivA 271SW256, 259 [cit CJ]; TexCivA 280SW600; 100Vt161, 135A702; 100Vt443, 138A782. [a] **Declaration that declarant worked for certain corporation does not bind corporation.** 171Ark51, 283SW7.

377-24 33 OhA265, 169NE308.

377-26 3Del 245, 138A277.

377-27 TexCivA 271SW256, 259 [cit CJ].

377-29 214Ala132, 107S73; 90CalA764, 266P606; CalA 291P591; 216Ky42, 287 SW219; 222Ky621, 18W(2d)1076; 228 Ky5, 148W(2d)216; 142Miss542, 107S 369; 221AppDiv524, 224NYS689; 198 NC589, 152SE697; 122 Or665, 260P441. [a] 215Ky267, 284SW1088. [c] Statement held not to be part of res gestae. 215Ky267, 284SW1088.

378-31 228Ky5, 148W(2d)216; 228Ky 385, 158W(2d)267; 238Mich649, 214NW 236; 242Mich676, 219NW734; 134Misc 39, 234NYS398; 192NC236, 134SE647; 24 OhA374, 157NE708; 122 Or665, 260P 441; TexCommnA 12SW(2d)552; Tex CommnA 16SW(2d)519(2dcase); Tex CivA 294SW625.

379-33 308Mo 288, 271SW361. But see Mass 169NE775.

379-34 Iowa 229NW244; 215Ky77, 284 SW405, 47ALR483; 215Ky85, 284SW 409; 218Ky497, 291SW737; 222Ky621, 18W(2d)1076; 156Md146, 143A706; 258Mass145, 154NE577; 151Miss393, 118S195; 222MoA518, 281SW64; 221 AppDiv524, 224NYS689; 144 Okl 123, 289P281; 138NC281, 136SE218. [c] But see 125Misc841, 211NY488.

380-35 TexCivA 294SW625.

380-37 258Mass145, 154NE577.

381-40 40GaA740, 151SE540; 207 Iowa 367, 223NW100; 164Minn323, 204NW 961; NC 131SE42 (letter of doctor written after suicide of insane patient is incompetent); TexCivA 272SW819 (admission made long after connection as agent for particular transaction ceased is purely hearsay). But see 199Wis503, 226NW950 (in specific performance declarations of plaintiff's agent are admissible on issue of defendant's discovery or knowledge of facts irrespective of continuance of agency).

382-53 [a] **Statement held within scope of authority.**-MoA 19SW(2d)758.

382-54 MoA 21SW(2d)890.

382-55 [c] 24F(2d)329.

382-56 [a] (2) 24F(2d)329.

382-62 38GaA487, 144SE403; 38GaA 790, 145SE888; 146Miss607, 111S575; MoA 281SW97.

383-66 TexCivA 286SW599.

383-73 TexCivA 286SW258.

383-76 Ill 172NE736.

383-78 MoA 31SW(2d)111; 151SC44, 148SE648.

384-87 18F(2d)295.

384-88 31F(2d)885.

384-89 18F(2d)295.

384-95 176Ark430, 3SW(2d)42; 234Ky 243, 27SW(2d)952. [c] **Condition of electrical equipment.**-TexCivA 275SW 430.

385-13 115 Okl 92, 241P765, 767 [quot CJ].

385-14 115 Okl 92, 241P765, 767 [quot CJ].

385-24 42 Ida567, 248P447, 448 [cit CJ]. [c] **Report of one to whom question was referred, with agreement to abide by his decision, is admissible as admission.** 6F(2d)332.

385-35 172Ark314, 288SW723.

388-41 212Ala531, 103S553; Mass 166 NE867; MoA 30SW(2d)638; 220AppDiv 186, 221NYS60; 134SC435, 132SE828; TexCivA 68W(2d)158; 141Wash278, 251 P571. [a] 220AppDiv186, 221NYS60. [d] (2) 169Wis408, 172NW791.

386-42 32F(2d)23; 261Mich630, 232 NW360; 104NJL405, 140A277; 294Pa 238, 144A100; TexCommnA 12SW(2d) 552; Utah 275P580.

387-43 261Mich630, 232NW360.

387-44 TexCivA 300SW218.

387-47 212Ky60, 278SW149; 222MoA 518, 281SW64; 222MoA43, 299SW622. [b] (2) Statement of defendant's agent, long after event, is not substantive evidence against defendant. 212Ky60, 278 SW149.

387-50 172Minn110, 215NW192.

388-51 14F(2d)466; 217Ky235, 289SW 308; 127Misc272, 215NYS798.

388-52 34Ariz230, 270P629, 633 [cit CJ]; 176Ark511, 3SW(2d)337; 127Misc 272, 215NYS798; TexCommnA 283SW 161.

388-52½-New. Declaration by person that he worked for a certain corporation does not bind the corporation as to the truth of such statement. 171Ark51, 283 SW7.

388-53 174Ark194, 295SW38; 172Minn 110, 215NW192; MoA 7SW(2d)298. [g] **Statements of president of mining corporation** as to abandonment held properly considered where not objected to. 29Ariz104, 239P789. [h] See also 222Ky621, 18W(2d)1076.

388-55 318Mo 969, 28W(2d)733.

389-59 MoA 273SW764; TexCivA 270 SW1101.

389-60 TexCivA 270SW1101. [a] MoA 273SW764.

389-61 TexCivA 270SW1101.

389-62 111Conn407, 150A303.

389-63 TexCivA 68W(2d)158.

389-64 MoA 27SW(2d)464 (insurance agent).

389-65 226Ky93, 10SW(2d)617.

389-66 234Ky243, 27SW(2d)952.

389-73 [a] **Statements held admissible.**-TexCivA 290SW912. [b] **Statements held inadmissible.**-TexCivA 290SW912.

389-74½-New. Stockbroker's circular for investors is inadmissible in corporation's tax abatement proceeding. Mass 172NE579.

390-77 174Ark122, 294SW714. [b] **Inspection report on locomotive** admissible only as bearing on explosion in question. 216Ala296, 113S54.

390-78 174Ark122, 294SW714.

390-79 174Ark122, 294SW714.

390-80 127Misc272, 215NYS798.

390-89 175Minn197, 220NW602. [d] 220MoA260, 285SW791. [k] 174Ark122, 294SW714.

391-90 54ND897, 212NW51. [b] 206 Iowa182, 220NW331. [f] 235Ky405, 31 SW(2d)729. [g] 235Ky405, 31SW(2d) 729; 317Mo782, 297SW20. [k] 137SC 468, 135SE567. [u] Porter.-127Misc272, 215NYS798.

393-3 235Ky283, 30SW(2d)958. [d] (3) Statements admitted. RI 151A130.

392-97 163Ga618, 137SE40.

392-98 35F(2d)301 (evidence not binding on county because not authorized by it). See also 74CalA585, 241P572.

392-99 157Md420, 146A577. [d] **Resolution of city council is not admissible** as admission against the interest of the city where at the time of its passage the council had no authority with respect to the work contemplated. 76 CalA369, 244P609.

393-2 Mass 169NE789. [c] **Letter to client expressing opinion as to law is inadmissible.**-207 Iowa374, 223NW106. [d] **Infant's attorney cannot make admission** against interest or waive his rights. MoA 27SW(2d)752.

393-3 Mass 167NE915; NC 148SE24.

393-4 [a] 235Ky283, 30SW(2d)958.

393-5 285Pa540, 132A718, 720 [citCJ].

394-6 235Ky283, 30SW(2d)958.

394-8 257Mass563, 154NE84.

394-10 246 IllA569.

394-15 TexCivA 286SW680.

394-19 TexCivA 286SW680; 100Vt210, 136A388. See also Mo 276SW26, 42ALR 1319.

394-21 [c] **Mere declaration by attorney during discussion at trial may not** be used against client unless it relates to management of litigation. 96 FaSuper180.

395-22 100Vt210, 136A388.

395-24 TexCivA 286SW680; 100Vt210, 136A388. [a] (1) Mass 169NE662 (statement not construable into an admission).

395-41 203 Iowa310, 210NW937.

396-47 100Vt210, 136A388.

396-51 28F(2d)1; 108Conn58, 142A 572; Ga 155SE61; 39GaA74, 146SE793; 122Kan533, 253P578, 582 [citCJ]; 10La A801, 120S637(2dcase); 262Mass348, 159NE922; Mass 172NE104; Mo 279 SW415, 424 [citCJ]; TexCivA 286SW 241; TexCivA 286SW638. [a] (1) 177 Minn240, 225NW84.

397-52 226AppDiv53, 234NYS429; NC 155SE452. But see NJCh 130A24.

397-53 TexCivA 14SW(2d)296.

397-54 [c] **Grantor's subsequent words and acts** are competent against grantee on basis of conspiracy only where there has been at least some slight prelimi-

nary proof of conspiracy. 296Pa568, 146A153.
397-55 . 84Mont141, 274P844.
397-56 Mo 279SW109, 113 [citCJ]; Mo A 25SW(2d)499; TexCivA 14SW(2d) 296; Vt 150A65.
397-56½-New. It is sufficient if the conspiracy is still in esse, although fraud had been completed. 28F(2d)1.
398-57 319 Ill 437, 150NE435; Mo 279 SW109, 113 [citCJ]; TexCivA 286SW 241.
398-58 51ND788, 200NW1016; Tex CivA 6SW(2d)383.
398-59 319 Ill 437, 150NE435; Tex CommnA 14SW(2d)818; TexCivA 6SW (2d)383.
398-60 TexCivA 286SW241. [a] Tex CivA 6SW(2d)383.
398-65 334 Ill 264, 165NE798; ND 229 NW282; TexCommnA 14SW(2d)818. See also 28F(2d)1; 17F(2d)468. [a] **Held to constitute act "in furtherance of conspiracy."**–28F(2d)1 [certiorari den 278US568, 49SCt81(4thcase), 73L ed510].
399-72 39F(2d)297.
399-75 51ND788, 200NW1016. See also 17F(2d)468.
399-78 105Conn429, 135A568.
399-79 215Ky128, 284SW91.
400-82 219Ala201, 121S704(2dcase), 64 ALR553; 89CalA6, 264P336; 105Conn 429, 135A568; 322 Ill 236, 153NE363; 329 Ill 148, 160NE117; 209Ky661, 273 SW501; 219AppDiv560, 220NYS369. [a] **Declarations of plaintiff's husband held recitals as to past event and conditions,** and inadmissible and incompetent as against plaintiff. 226AppDiv 190, 234NYS432.
401-94 115 Okl 92, 241P765.
402-10 MoA 17SW(2d)651; 99NJEq 369, 131A897; 147Wash251, 266P727.
402-12 NH 149A746.
402-14 204 Iowa638, 215NW713 (wife); 208 Iowa1315, 227NW141 (extent of partnership interest); 152Miss318, 119 S912.
403-25 Utah 282P1030.
403-26 NH 149A746.
403-27 174Ark1179, 297SW841.
404-30 See also 70Utah398, 260P855.
404-36 TexCivA 3SW(2d)484.
405-43 13F(2d)474; 177Ark638, 7SW (2d)332; 200 Iowa1169, 206NW141, 142 [citCJ] (stipulation by principal as to indebtedness); 173Minn613, 216NW792; 155Miss64, 123S873; 54ND91, 209NW 204; 55ND321, 213NW488; SD 224NW 951; TexCivA 4SW(2d)312 (entries by employee insured by fidelity bond).
405-47 177Ark953, 9SW(2d)33, 60ALR 1493; 54ND91, 209NW204; 55ND321, 213NW488.
405-49 13F(2d)474. But see 177Ark 953, 9SW(2d)33, 60ALR1493.
406-52 215Ala250, 110S390.
406-53 13F(2d)474.
406-54½-New. Declarations and acts of principal in action against himself do not represent surety and record of judgment is not competent against surety. 13PaDist&Co 491.
406-57 [a] **Guarantor of payment of principal accounts** for goods sold by plaintiff is bound by principal's written acknowledgment of account. 215Ala528, 112S102.
407-63 137Misc582, 244NYS244.
407-64 [a] **Admission of debtor,** setting out list of creditors and amounts due each was prima facie binding on trustees authorized to take charge of all assets. 98CalA242, 276P1042.
407-68 111Conn626, 151A168; 83NH 236, 141A136; TexCivA 12SW(2d)811.
407-69 228AppDiv56, 239NYS5.
407-70 53SD200, 220NW527, 529 [quot CJ].
407-71 163Ga149, 135SE721, 725 [cit CJ]. But see 223AppDiv461, 228NYS 354.
408-80 MoA 27SW(2d)752; 193NC738, 153SE323(2dcase).
408-81 [a] **Admission of next friend of infant made before appointment** is inadmissible. 198NC738, 153SE323(2d case).
408-82 85 IndA450, 150NE31; 207 Iowa167, 216NW62, 62ALR31; NJSup 147A651(2dcase). But see Ala 129S78.
408-84 85 IndA450, 151NE682; 257 Mass538, 154NE90. But see MoA 297SW 87. [a] **Application for reversal is** admissible as admission of lapse of policy. 257Mass538, 154NE90.
408-90 323 Ill 170, 153NE658; 243 IllA 129; 264Mass355, 162NE773; 30 OhA 572, 165NE862; 124 Or276, 261P432.
410-92 14F(2d)65.
410-94 215Ala465, 111S22; 219Ala353, 122S437; 92CalA285, 268P430; 84Mont 304, 275P281; 100Vt1, 134A706.
410-95 NJCh 130A24.
411-4 212Ala630, 103S689 (document containing figures from defendant's books at time when plaintiff was alleged to be present is inadmissible without proof that plaintiff admitted correctness of figures); 235Ky283, 30SW (2d)958; 218MoA281, 269SW633; NH 149A746; TexCommnA 283SW161. See also MoA 296SW255.
411-5½-New. Excluding writing unsigned embodying alleged settlement has been held not error, there being no evidence of acceptance by defendant's interests. 34GaA314, 129SE445.
411-6 NJCh 130A24.
411-8 NJCh 130A24.
411-14 93PaSuper217. See also 38F (2d)1005.
411-17½-New. Admission by counsel in open court on a former trial may be proved by judgment reciting such admission, although such judgment was subsequently reversed. TexCivA 286SW 680.
412-19 294Pa323, 144A141.
412-22 198NC494, 152SE393(2dcase); TexCivA 24SW(2d)517. But see MoA 282SW747.
413-29 MoA 21SW(2d)890.
413-30 MoA 21SW(2d)890.
413-32 316Mo 195, 289SW604, 607 [quot CJ]; TexCivA 275SW226; TexCivA 275 SW444.
413-33 316Mo 195, 289SW604, 607 [quotCJ].
413-34 316Mo 195, 289SW604, 607 [quotCJ].
414-35 MoA 10SW(2d)313.
414-38½-New. Unnecessary portions of admissions which are irrelevant or prejudicial should be excluded, although ordinarily the whole admission is to be construed together. 83NH143, 139A367.
414-39 252 IllA428; 100Vt161, 135A 702.
414-41½-New. Where the plain inference from cross-examination is that had plaintiff been seriously disabled he would not have settled with insurance company for so small a sum of money, it was not error to permit plaintiff to testify that he had a wife and three children and was in need of money so badly he had to settle on their terms. MoA 271SW851.
414-46 191NC727, 133SE7.
414-48 126Misc178, 213NYS195.
415-50 149Md140, 131A82, 85 [quot CJ]; 145Wash19, 258P851.
415-51 149Md140, 131A82, 85 [quot CJ].
415-52 149Md140, 131A82, 85 [quot CJ].
415-53 149Md140, 131A82, 85 [quot CJ].
416-56 82NH225, 131A601; NH 136A 251.
416-57 Cal 290P441; Mass 173NE430; 82NH225, 131A601; Vt 144A861. See also 192NC87, 133SE427. [a] (27) Maker's admission that plaintiff is holder and equitable owner of notes, but not holder in due course, is not admission that notes were negotiated by payee's indorsement before maturity, or evidence of genuineness of indorsement. 192NC 87, 133SE427. (28) Statement of witness that he did not remember whether he had made answers shown in deposition was not admission. MoA 28SW(2d) 456. (29) Admission that death was caused by automobile collision is not admission of efficient and proximate cause of collision. 132 Or290, 285P825.
416-58 CalA 288P698; 213Ky658, 281 SW796; 92PaSuper567.
417-59 43F(2d)355; CalA 288P698 (holding defendant's admission immaterial); 128Me428, 148A406(2dcase).
417-60½-New. Admission of validity of original assessment for water and sewer system was admission that the necessary steps preliminary thereto were had. 153Md68, 137A492.
417-61½-New. Fertilizer analysis possessed by plaintiff suing for deficiency in fertilizer is admissible in connection with plaintiff's admissions that it was good. Ga 155SE484.
417-62 144Wash676, 258P832. [a] (2) But see 36GaA228, 136SE108. (5) Denial itself does not destroy admission, jury must determine it. 256Mass157, 152NE245.
417-63½-New. **Denial by codefendant.** In suit against lessee and assignee of lease, fact that lessee denies co-defendant to be his assignee does not prevent admission in record by such co-defendant that she is assignee from supporting judgment against her. NJSup 131 A635.
417-64 126Me299, 138A170. [a] 222 MoA503, 281SW78.
417-65 216Ala388, 113S250; 217Ky35, 288SW1027; 170La763, 129S156; 256 Mass157, 152NE245; 256Mass431, 152 NE710; 232Mich101, 205NW116; 317 Mo 228, 295SW794; 222MoA1098, 14SW (2d)31; MoA 15SW(2d)964; MoA 274 SW868; MoA 30SW(2d)190; 82NH500, 136A134; 31 OhA18, 166NE143; 149 Wash316, 270P1029. See also 193Wis 32, 213NW630. But see 222MoA503, 281 SW78; 230AppDiv245, 244NYS295. [a] (2) Evidence of decedent's admissions will be carefully scrutinized before made basis of establishing decedent's contract. 126Misc436, 213NYS119. [d] **Defendant's statement of responsibility** of trustees, held not an admission of personal liability. 41GaA198, 152SE 310.
418-66 MoA 7SW(2d)719. [a] **Careful scrutiny** will be given alleged oral admissions. 132Misc613, 230NYS308.
418-67 176Minn198, 222NW931. [a] (5) MoA 285SW803. (15) Insured's and physician's statements in proof claim under policy of health insurance. 218MoA640, 266SW325. (16) Corporation minutes signed by officers not conclusive on them. 217Ky35, 288SW1027. (17) Certificate of registration of automobile. 84CalA130, 257P586 (year of model). [e] **Proofs of loss** under insurance policy. 152Wash272, 277P999 (2dcase).
419-68 TexCivA 291SW337.
419-69 40F(2d)417; 217Ky35, 288SW 1027; 231Ky591, 21SW(2d)985, 66ALR 1526; 13LaA318, 127S758 (uncontradicted testimony of declarant); MoA 271SW851; 126Misc573, 214NYS138; TexCivA 7SW(2d)1096. [b] But see 218MoA10, 260SW552. [e] **Jury may give credit** to prior admissions, where they conflict with testimony. CalA 285 P1059.
419-70 230Ky648, 20SW(2d)472; 226 AppDiv638, 236NYS489.
419-71 258Mass573, 155NE606; MoA 271SW851. [a] (7) While declarant was suffering from injury. 169La272, 125S121.
419-72 MoA 10SW(2d)313.
420-75 12LaA78, 125S321; 153Miss72, 117S881. [c] 232Mich101, 205NW116 (proofs of death of insured).
420-83½-New. Where an admission tends to show agreement, party thereto may introduce evidence showing whether it was complied with. 217Ky35, 288 SW1027.
420-86 142Miss77, 107S273; MoA 13 SW(2d)1088; MoA 30SW(2d)190; 228 AppDiv299, 228NYS354; 99Vt384, 133A 355. See also 94Fla1184, 116S4.
420-87 [a] **Illustration.**–103Conn285, 130A387.
420-89 102CalA42, 282P438. But see 257Mass538, 154NE90. [a] **Confession at least prima facie evidence** against privy. 177Ark953, 9SW(2d)33, 60ALR 1493.
420-90 107Conn716, 142A466; 126Me 299, 138A170. [a] (1) 126Me299, 138A 170.
421-92½-New. Beneficiary cannot claim that life policy did not lapse where insured admitted lapse in application for reinstatement. 259Mass573, 156NE721.
421-98 209Ky714, 273SW479; NJSup 131A635; TexCivA 18SW(2d)412; 108

WVa75, 150SE265. [d] **Though admission on record is denied by codefendant,** it is sufficient to support judgment against defendant admitting herself to be assignee of lease sued on. NJSup 121A625. [e] **Affidavit in replevin** is not conclusive admission as to value. 104Conn501, 133A576.

422-99 42 OklAC K213.

422-3 CalA 292P179; TexCivA 231SW 628, 629 [citCJ]; TexCivA 158W(2d) 159; Vt 151A642. But see 246Mich234, 224NW642. [g] **Plea of guilty of assault and battery** establishes gross negligence against automobile driver. NJ Sup 122A104.

422-6 69CalA652, 221P1065; 262 Iowa 222, 202NW726; Mo 218W(2d)21; MoA 148W(2d)21. [d] **Inference authorized by counterclaim.**–262 Iowa47, 209NW 446.

422-7 See also MoA 282SW747.

422-10 [illegible] 158W(2d)42 155 Miss234, 125S102 (testimony on motion for continuance)

422-12 MoA 68W(2d)72.

422-13 [illegible]

422-18 NH 126A251.

422-18½-New. **An admission in a replevin bond as to the value of property** replevined is not conclusive. 102NJL 259, 132A656.

422-19 241Mich296, 217NW62; MoA [illegible] 54, 205NW9; 120 Okl 111, 265P132; [illegible] 252, 133SE232, 236 [quotCJ]. See also 162Ga444, 153SE410. [b] (3) 241Mich296, 217NW62; Vt 151A642. (7) 111Conn200, 149A828 (where no offense was charged); 187Minn427, 209 NW217. [c] **When admission testified to by his adversary,** it is weakest character of evidence. 219Ky428, 293SW 1082.

424-20 78Mont415, 252P226. But see 84Mont424, 276P16, 62ALR528; 195Wis 625, 219NW275; Or [illegible] 51 (oral admissions are viewed with [illegible]).

424-21 209 Iowa1169, 206NW141 (stip- [illegible] test [illegible] 2d) [illegible]

424-22 78Mont415, 253P236; Or 277P 151. But see 15F(2d)648; LaA 122S 32.

425-24 166Minn62, 206NW947; Utah [illegible]

425-26 17F(2d)766; 22F(2d)524 (admission of person since deceased); 98 [illegible] CalA [illegible] 299 Iowa1169, 206NW141; Md 151A240; Mass 172NE524; Mass 172NE529. [a] (4) Admissions in letter written by corporation's attorney as agent. 247NY1, 159NE709. [g] (2) Other instances. CalA 252P642. [k] Oral admissions held insufficient to establish particular facts. CalA 291P591.

425-27 [b] **Evidence insufficient to vitiate admission.**–37F(2d)585.

426-28 But see 85CalA720, 260P342; [illegible] Mass [illegible] MoA 272SW [illegible] 22AppDiv145, [illegible] (admissions of deceased person should be acted on with caution); TexCivA 299 SW912; Utah 282P1024. [a] **Statements in nature of conclusions** and intentions have little weight when opposed to definite statements and specific conversations in favor of adverse party. 142Miss77, 107S272.

426-29 [illegible] 257P172; 210Ky 789, 276SW846; 256Mass157, 152NE 245.

426-30 56GaA723, 126SE168.

426-31 175SC418, 142SE325, 120 Okl 111, 265P132.

426-34 41CalA752, 236P365; 36GaA 22; 136SE108; 202 Iowa232, 209NW 726; 256Mass157, 152NE245; MoA 272 SW117; 7 Mont415, 252P236; 131Misc 65, 226NY744, 224N1234, 133A555.

426-35 LaA 125S748; 218MoA281, 269 SW633 (evidence of circumstance under which admission made has been held to overcome its force); 285Pa540, 132A 778; Sask [1920] 2DomLR142. [b] (10) Declarant injured on head and under influence of anesthetic administered for amputation of arm. 33Porto Rico 201.

426-35½-New. **Admissions** are sufficient evidence to support finding of other fact to which they were related. Tex CivA 284SW215.

426-35½-New. In a suit to determine the title to the property oral statements of defendant should be received with great caution. 216Ala29, 112S212.

426-38 22CalA567, 235P455.

426-39 229 Ill458, 160NE847.

426-41 NJSup 140A32; 123Misc53, 231 NY8120.

427-42 50ND528, 196NW755. [c] (2) Where issue is substantially the same and opportunity of direct examination was present, depositions used in former trial are admissible. 187Wis282, 202 NW701, 704 [citCJ]. [e] **If witnesses are present and will testify** their former testimony is inadmissible. 253NY41, [illegible]

427-57 82Colo 108, 257P348, 350 [cit CJ].

427-61 77Mont110, 250P819.

427-61½-New. Solemn judicial admissions at former trial of same case are admissible. 232 IllA240.

427-65 50ND528, 196NW755.

427-66½-New. Former testimony cannot be received where witnesses are present in court. 35PortoRico 132.

428-67 82Colo 108, 257P348, 350 [quot CJ]

428-69 82Colo 108, 257P348. [c] **Proceeding to inquire into validity of election** is at most no more under ban of secrecy than proceeding before grand jury. Wis 231NW155. [d] **Testimony given before grand jury** may be received whenever it becomes necessary to do so in course of justice. Wis 231 NW155.

428-77½-New. Testimony before senate investigating committee is admissible. 273US456, 47SCt416, 71LEd734.

428-79 41F(2d)387; Iowa 231NW361; LaA 127S408; 114 Okl 254, 246P595; 87 PaSuper260; 142SC445, 141SE688; Wash 292P426; 40Wyo 274, 276P532. [e] (1) See also 171Minn216, 213NW902. (2) Testimony of party on first trial and subsequently deceased, is admissible though dropped as party before second trial. 71CalA752, 236P365. [g] **Testimony of bankrupt** in former case is properly excluded in bankruptcy trustee's suit against third person. 151SC 209, 149SE14

429-80 125Me214, 132A423.

429-81 CalA 291P419; 82Colo 108, 257 P348, 350 [quotCJ]; 125Me214, 132A 423.

430-90 But see 31Ariz302, 252P1012.

430-95 82Colo 108, 257P348; 170Ga 585, 154SE149; 232 IllA295; 208 Iowa 623, 226NW32, 33 [citCJ]; 171Minn216, 213NW902; 87PaSuper260; 40Wyo 274, 276P532.

431-98 82Colo 108, 257P348.

431-99 82Colo 108, 257P348.

431-2 232 IllA295; 200 Iowa843, 205 NW511; 204 Iowa1278, 215NW754.

431-4 Ark 294SW1002; 208 Iowa623, 226NW32, 33 [citCJ]; 125Me214, 132A 423; 87PaSuper260; 48RI 99, 135A606, 607 [citCJ]; 123SC491, 131SE603, 607 [citCJ]; Wash 292P426. [e] (1) 187Wis 282, 202NW701. [g] **Opportunity of direct examination** is substantial equivalent of cross-examination, and, when present, renders deposition admissible. 187Wis282, 202NW701.

431-6 30HawaiiI16; 235Mich236, 209 NW63 [quotCJ]; 248Mich1, 226NW688; 87PaSuper260; SD 231NW521. [b] (1) 218MoA414, 277SW600.

432-7 235Mich236, 209NW63 [quotCJ]. [a] **In Oklahoma.**–143 Okl 260, 288P483.

432-8 235Mich236, 209NW63 [quotCJ].

432-9 34GaA5, 128SE74; 235Mich236, 209NW63 [quotCJ]. [a] 34GaA5, 128 SE74 (inaccessibility).

433-10 235Mich236, 209NW63 [quot CJ].

433-11 235Mich236, 209NW63 [quot CJ].

433-12 235Mich236, 209NW63 [quot CJ].

433-14 172Ark353, 289SW6.

433-15 172Ark353, 289SW6; 82Colo 108, 257P348; 250 IllA231; 218MoA414, 277SW600; 24OhNP565; 283Pa520, 129A577; 87PaSuper260; 196Wis426, 220NW194. See also 5OntWR104. [b] (1) 50RI 263, 146A774.

434-16 Ark 294SW1002; 171Minn216, 213NW902, 903 [citCyc]; 218MoA414, 277SW600; 50ND538, 196NW755. [c] Contra 120Kan444, 243P1051. [g] **That witness was in United States,** though out of jurisdiction of court, does not render former testimony inadmissible. 218MoA414, 277SW600.

435-17 218MoA414, 277SW600. See also 167Ga502, 146SE156. [a] (1) 218 MoA414, 277SW600.

435-18 39GaA207, 146SE503(3dcase).

435-19 141SC238, 139SE459; TexCivA 292SW574; 5 OntWR589, 805. [c] **Proof held sufficient.**–MoA 294SW731.

435-19½-New. It is within discretion of court to receive testimony of witnesses at former trial though there was opportunity to secure their attendance. Wis 231NW155.

435-21 31Ariz302, 252P1012.

436-25 218MoA414, 277SW600.

436-34 218MoA414, 277SW600.

437-36 218MoA414, 277SW600. But see 39GaA207, 146SE503(3dcase).

439-58 33Wyo 360, 239P952, 953 [cit CJ].

439-59 170Ark801, 281SW8, 10 [citCJ].

439-61 218MoA414, 277SW600.

440-67 218MoA414, 277SW600.

440-75 103Conn532, 131A399; 158La 57, 103S441; 219Ky595, 294SW135; 218MoA414, 277SW600; 47RI 235, 131A 554. See also TexCivA 118SW(2d)631. But see Mass 171NE651.

441-77 Vt 151A642.

441-78 103Conn532, 131A399; 245Mich 253, 222NW723.

441-79 47RI 235, 131A554.

441-80 But see 167Ga502, 146SE156.

441-80½-New. but other courts hold that due diligence to find witness must be shown before transcript is admissible. 218MoA414, 277SW600.

441-82 103Conn532, 131A399.

441-85 But see 83Colo 547, 267P200.

442-89 218MoA414, 277SW600 (this method is not exclusive).

442-98 176Ark212, 28W(2d)1109; 218 MoA414, 277SW600.

443-4½-New. A question to a witness who testified at a former trial as to what happened before the judge is too broad and general. 242 IllA145.

443-5½-New. Former testimony of defendant should be given effect, at least, of extrajudicial admission although qualified and explained on subsequent trial. 235Mich623, 209NW835.

443-7½-New. A party is not under duty to explain testimony of witnesses whose credibility he vouched for at a former trial, although there is an inconsistency between their testimony then and that offered by the party in the subsequent trial. MoA 148W(2d)701.

443-12 23AlaA595, 129S489; 34GaA 151, 128SE781 (surrounding circumstances constituting part of res gestæ may always be shown); Mass 172NE 104; 191NC297, 131SE735.

444-13 34GaA151, 128SE781; 241 IllA 11; 220MoA452, 276SW105; 100WVa 452, 130SE810. But see 115 Okl 153, 241 P342, 345.

444-14 30F(2d)586; 218Ala616, 119S 635; 20AlaA555, 103S713; SD 226NW 644.

444-15 34GaA151, 128SE781 (grow out of main fact).

445-24 29F(2d)331.

445-25 [d] **Mental and physical condition** at time of executing deed sought to be canceled. 197Cal 396, 240P1010.

445-27 22 OhA369, 153NE261; 23 OhA 535, 156NE231. [a] 217Ala66, 114S801.

446-30 241 IllA11, 19 [quotCJ]; 86 IndA228, 156NE567; 220MoA902, 296 SW228; 22 OhA369, 153NE261; 25 OhA 89, 157NE402; Okl 291P962(2dcase); 70Utah333, 260P271; 153Va392, 149SE 624.

448-31 TexCivA 271SW641, 642 [cit CJ].

448-32 250 IllA531, 537 [citCJ]; TexCivA 271SW641, 642 [citCJ].

448-33 85Colo 376, 275P937; 244Mich 99, 221NW162; 194Wis480, 215NW908.

449-34 37OklAC R409.

449-35 22F(2d)136; 34GaA151, 128SE 781; 38GaA297, 143SE773; 207 Iowa 167, 216NW62, 62ALR31; MoA 285SW 783, 786 [citCJ]; 50ND371, 196NW 104; 37 OklAC R409; TexCommnA 273 SW838; 100WVa452, 130SE810.

449-37 218Ala410, 118S755; 328 Ill 345, 159NE777; 85 IndA450, 150NE31;

245Mich44, 222NW126; MoA 68W(2d) 650; Utah 290P970.

449–38 8LaA720, 723 [citCJ].

449–39 TexCivA 295SW301.

450–41 TexCommnA 280SW753, 754 [citCJ]; TexCivA 271SW641, 642 [cit CJ]; TexCivA 48W(2d)999, 1002 [cit CJ]; TexCivA 88W(2d)301.

450–42 TexCommnA 280SW753, 754 [citCJ].

450–46 25F(2d)240; 84CalA337, 258P 397.

450–47 Iowa 231NW651; 220MoA452, 276SW105; 128Misc263, 219NYS295; 191NC297, 131SE735. See also 220Ky 219, 294SW1030.

450–49 310Mo 227, 274SW1025; 220 MoA452, 276SW105; 120 OhSt532, 166 NE682; Utah 290P970; 194Wis480, 215 NW908.

451–51 78Colo 371, 242P51, 52 [citCJ]; 40GaA397, 149SE814; 257Mass6, 153 NE97; 308Mo 288, 271SW361; 317Mo 782, 297SW20; Mo 318W(2d)774; 128 Misc263, 219NYS295; Or 292P93; SC 131SE42 (statement of agent relative to act being done within scope of agency); 136SC267, 134SE252; TexCivA 148W (2d)337. See also 151SC391, 149SE111. [a] Statements of one who is agent as to two distinct matters, as to one matter is not admissible as res gestæ as to the other. 219MoA222, 269SW942.

451–52 20 OhA307, 152NE205. [a] 120 OhSt532, 166NE682.

451–55 86 Ind458, 158NE514; Mo 271 SW749; 144Wash668, 258P824.

452–56 34GaA151, 128SE781; 328 Ill 345, 159NE777; 85 IndA450, 150NE31; IndA 160NE52; MoA 318W(2d)86; 191 NC297, 131SE735; 24 OhA374, 157NE 708; 35PortoRico 245; TexCivA 271SW 641, 642 [citCJ]. [a] (2) Testimony that witness heard plaintiff groan as though suffering seriously is admissible in action for injuries resulting in miscarriage at time referred to by witness. TexCivA 286SW526. [c] Telegraphic records of train movements on night of fire part of res gestæ. 215Ala 612, 111S901.

452–57 191NC297, 131SE735.

452–59 314Mo 352, 284SW499, 504 [cit CJ].

452–60 314Mo 352, 284SW499, 504 [cit CJ].

452–61 19F(2d)177; Ariz 287P440; Mo 30SW(2d)1077; 220MoA452, 276SW 105; 191NC297, 131SE735, 738 [quot CJ]; 194Wis480, 215NW908.

452–62 220MoA452, 276SW105; 191 NC297, 131SE735, 738 [quotCJ].

452–63 19F(2d)177; 21 OhA129, 152 NE796; 191NC297, 131SE735, 738 [quot CJ]; TexCivA 271SW641, 642 [citCJ].

453–64 TexCivA 271SW641, 642 [cit CJ].

453–65 315Mo 760, 287SW346.

453–67 335 Ill 164, 166NE530; 147 Wash251, 266P727. [a] (4) Declarations of conspirator prior to formation of conspiracy. 203 Iowa628, 213NW274.

453–68 105Conn528, 136A76; 34GaA 151, 128SE781; IndA 169NE60; 228Ky5, 14SW(2d)216; Mass 169NE775; 251 Mich309, 232NW369; 310Mo 227, 274 SW1025; 322Mo 813, 18SW(2d)467. [a] (15) Declaration by conspirator in absence of co-conspirator if made pursuant to conspiracy and prior to its consummation. 203 Iowa628, 213NW 274. (16) Other instances. Wis 229 NW860.

454–69 215Ala246, 110S402.

454–72 277US19, 48SCt417, 72L ed761; 212Ala325, 104S808; 214Ala597, 108S 509; 216Ala400, 113S401; 89CalA594, 265P580; CalA 284P1077; 83 IndA482, 148NE496; IndA 160NE52; 202 Iowa 565, 210NW813; 207 Iowa167, 216NW 62, 62ALR31; 219Ky478, 293SW977; 257Mass6, 153NE97; 232Mich399, 205 NW124; 238Mich669, 214NW236; 220 MoA260, 285SW791; 221MoA1158, 298 SW125; 222MoA43, 299SW622; 126 Misc858, 215NYS584; 127Misc272, 215 NYS798; 54ND897, 212NW51; 22 OhA 216, 153NE299; 284Pa260, 131A181; 294Pa238, 144A100; TexCivA 271SW 641, 642 [citCJ]; TexCivA 284SW664; TexCivA 288SW471; 188Wis30, 205NW 407. [a] (12) Testimony that truck driver, shortly after collision, stated that he had lantern on his truck, but was silent when asked why lantern was cold, though transaction occurred only minute and half after accident, since truck driver appeared to be acting deliberately. 29F(2d)807. (13) Statement of driver, forty minutes after accident, that he was going back to market, after delivery. 228Ky164, 14SW (2d)408. (14) Other instances. MoA 198W(2d)766; Mo 318W(2d)21.

455–73 22F(2d)136; 38GaA297, 143SE 773; 337 Ill 37, 168NE665; 219Ky478, 293SW977; TexCivA 271SW641, 642 [citCJ].

455–74 214Ala622, 108S600; 79CalA 406, 249P837; CalA 290P1062; 34GaA 151, 128SE781; Ill 173NE470; 83 IndA 482, 148NE496; IndA 171NE302; 214 Ky729, 283SW1052; 235Ky405, 31SW (2d)729; Md 148A453; 171Minn475, 214NW469; 308Mo 288, 271SW361; 315 Mo 177, 285SW708; 315Mo 166, 285SW 729; Mo 271SW500; 49ND915, 194NW 663; 131 Or27, 279P635, 67ALR1; 288 Pa140, 135A903; 132SC230, 128SE29; 156SC1, 152SE753; TexCivA 281SW 234; TexCivA 288SW471; TexCivA 14 SW(2d)88; 144Wash668, 258P824. [a] (12) Pursuit of person assaulted after flight. 214Ky729, 283SW1052. [b] (11) Mother's testimony that child cried at night and said that her arm hurt her. NJSup 130A206. (12) Exclamations or complaints which are spontaneous manifestations of distress or suffering are admissible as original evidence. TexCivA 284SW664. (13) Statement of injured employee to witness that he thought something was pulled loose in his side not admissible. TexCivA 288 SW471. (14) Statement of injured employee complaining of pains several months after accident not admissible. TexCivA 288SW471. (15) Other instances. 79CalA406, 249P837. (16) Other facts held admissible. 109Conn 706, 145A504; 228Ky5, 14SW(2d)216; 196NC484, 146SE204; TexCivA 11SW (2d)821. [c] (8) 317Mo 782, 297SW20. (9) Other facts held admissible. Mo 8 SW(2d)922; 120 OhSt532, 166NE682. [e] Malicious prosecution.–322Mo 746, 18SW(2d)500 (statement by detective to defendant).

458–75 79CalA406, 249P837; 105Conn 528, 136A76; 215Ky663, 286SW929; 218Ky488, 291SW723; 171Minn475, 214 NW469; 25 OhA89, 157NE402; 292Pa 509, 141A481; 138SC281, 136SE218; TexCivA 294SW282; Utah 290P970. [c] Evidence that decedent "complained all the time leg hurt him day and night" held admissible as showing condition of health. 189NC644, 127SE688.

458–76 308Mo 288, 271SW361 (thirty minutes to hour).

458–78 Mo 30SW(2d)1077; 20 OhA307, 152NE205; 25 OhA89, 157NE402; TexCivA 14SW(2d)1046; 154Wash241, 281 P991. [b] (2) Other instances. 12LaA 415, 125S883.

458–79 238Mich669, 214NW236; TexCivA 10SW(2d)782. See also TexCivA 21SW(2d)347.

458–82 23F(2d)745; 37GaA239, 139SE 590; 86 IndA228, 156NE567; 171Minn 475, 214NW469. [b] TexCivA 3SW(2d) 466; TexCivA 8SW(2d)196. [c] TexCivA 14SW(2d)337. [e] 37GaA239, 139 SE590; IndA 148NE505.

458–83 85 IndA450, 150NE31; 54ND 897, 212NW51; TexCivA 3SW(2d)109. [a] TexCivA 2SW(2d)866.

458–84 TexCivA 297SW267. [a] In libel suit, plaintiff's mental and physical pain and humiliation when she saw libelous publication are admissible as part of res gestæ. TexCivA 292SW594.

458–84½–New. Telephone conversation may be properly admitted as res gestæ. 216Ala645, 114S308.

458–85 212Ala531, 103S553; Iowa 226 NW922 (2dcase); Mo 271SW749; MoA 276SW81; TexCivA 271SW929; TexCivA 294SW295; TexCivA 297SW544; TexCivA 297SW267; TexCivA 48W(2d) 93 (purpose of employee driving car); TexCivA 6SW(2d)151; TexCivA 32SW (2d)513. [a] (40) In action against partners, where one defendant introduced letter by defendant company to another company, statement by same witness that latter company was threatening suit against writer was within res gestæ. 214Ala204, 106S858. [b] Declaration by one in possession of property is admissible. 216Ala610, 114 S204. [c] Rule does not extend to declarations touching past conversations which are hearsay, self-serving, and inadmissible. 216Ala610, 114S204.

460–86 329 Ill 490, 160NE845; TexCivA 271SW929; 100Vt395, 138A725, 54ALR1369.

460–87 MoA 285SW783, 786 [citCJ].

461–89 29F(2d)807; 35F(2d)667; 213 Ala78, 104S250; 99Fla483, 126S784; IndA 160NE52; 218Ky488, 291SW723; Mo 271SW749; 314Mo 352, 284SW499; 220MoA452, 276SW105; MoA 30SW(2d) 794; 191NC297, 131SE735, 738 [quot CJ]; TexCivA 3SW(2d)555; Utah 290 P970; 141Wash139, 250P955; 194Wis 480, 215NW908.

461–90 314Mo 352, 284SW499; 191NC 297, 131SE735, 738 [quotCJ].

461–91 328 Ill 345, 159NE777; 233Ky 840, 27SW(2d)422; 314Mo 352, 284SW 499; TexCivA 297SW267; 100WVa452, 130SE810.

461–95 232Mich399, 205NW124; 191 NC297, 131SE735, 738 [quotCJ]; 25 OhA89, 157NE402; TexCivA 284SW 664; TexCivA 297SW544.

462–96 314Mo 352, 284SW499.

462–97 37 OklACR685.

462–98 TexCivA 294SW282.

462–3 MoA 68W(2d)650.

462–5 Ariz 287P440; 79CalA406, 249P 837 (before excitement of occasion has subsided); 194Wis480, 215NW908.

463–11 MoA 68W(2d)650; 191NC297, 131SE735, 738 [quotCJ].

463–12 226Ky372, 10SW(2d)1073; 229 Ky284, 17SW(2d)233; 180Minn75, 230 NW468; 117Nebr186, 223NW21(2d case); 20 OhA307, 152NE205; 25 OhA 89, 157NE402; TexCivA 284SW664; TexCivA 23SW(2d)516.

463–13 214Ala597, 108S509.

463–19 36GaA34, 135SE319; 144Wash 668, 258P824.

464–29 24 OhNPNS533.

464–34½–New. eight minutes, Ariz 287 P440.

464–36 233Ky840, 27SW(2d)422; 235 Mich15, 209NW172; 191NC297, 131SE 735.

464–37 194Wis480, 215NW908.

464–33 308Mo 288, 271SW361.

464–40 308Mo 288, 271SW361.

464–49 144Wash668, 258P824.

464–50 35PortoRico 245; 144Wash668, 258P824.

465–54 22F(2d)136.

465–56 IndA 169NE354.

465–62 46 Ida326, 268P6; 151Miss635, 118S450; TexCivA 25SW(2d)902.

465–63 46 Ida326, 268P6.

465–63½–New. several days, 223Ky 600, 4SW(2d)383.

465–68 TexCivA 21SW(2d)583.

465–71 [a] Motorman's report over telephone five minutes after accident is not res gestæ. Utah 290P970.

465–72 228Ky385, 15SW(2d)267; MoA 68W(2d)650, 651 [quotCJ]; 221AppDiv 518, 224NYS640; 141Wash139, 250P 955.

465–73 MoA 68W(2d)650, 651 [quot CJ]; TexCivA 21SW(2d)583 (seven days).

465–75 314Mo 352, 284SW499; OhA 173NE263 (in workmen's compensation cases); Okl 291P962(2dcase); 92PaSuper445; 194Wis480, 215NW908.

466–76 35F(2d)667; 26 OhNPNS179; TexCivA 281SW234; TexCivA 21SW (2d)31.

466–87 221AppDiv518, 224NYS640.

467–94 197NC639, 150SE122.

467–96 37 OklACR685.

467–1 37 OklACR685.

467–2 Mo 30SW(2d)1077.

467–6 24F(2d)776; 329 Ill 490, 160NE 845; 207 Iowa367, 223NW100; 215Ky 663, 286SW929; 221MoA670, 283SW 994; MoA 288SW91; 221AppDiv518, 224NYS640; 189NC638, 127SE635; 191 NC297, 131SE735; 54ND897, 212NW51; 22 OhA216, 153NE299; 37 OklACR685; 123 Or310, 261P71; 125 Or80, 265P801; 96PaSuper521; SD 226NW644; 70Utah 549, 262P99; Utah 275P580; 144Wash 375, 258P314.

468–7 213Ala78, 104S250; 105Conn476, 136A93; Iowa 230NW570; 37 OklACR 685; 196NC84, 144SE542, 60ALR1091.

469-8 178Ark683, 11SW(2d)493, 61 ALR1192.
469-10 Iowa 230NW570; 54ND897, 212NW51; TexCivA 280SW882, 885 [quotCJ].
470-16 309Mo 683, 273SW1062, 1064 [citCJ]. [a] (13) Absence of front lights in rear-end automobile collision. 21 OhA322, 153NE302. (14) Other matters. Mo 28SW(2d)787.
470-18 202 Iowa1202, 211NW727, 730 [citCJperDeGraff,J]; 202 Iowa1321, 210 NW782, 783 [citCJ].
470-19 169Minn148, 210NW878; Mo 9 SW(2d)159; 321Mo 330, 11SW(2d)41; MoA 286SW738; 79Mont226, 255P730; 88PaSuper84; 156SC370, 153SE342; TexCivA 282SW819; TexCivA 4SW(2d) 169; 104WVa238, 139SE737. [b] (19) For trespass to try title, involving issue of heirship. TexCivA 282SW819. [c] In civil actions general charatter of defendant is not admissible as primary evidence. 220Ala237, 124S519.
472-23 TexCivA 293SW250.
472-24 169Minn148, 210NW878.
472-25 169Minn148, 210NW878. [b] Plaintiff's character was not put in issue by inquiry of his counsel as to whether he was armed on occasion in question or was in habit of carrying arms. 227Ky479, 13SW(2d)493.
472-26 29F(2d)551.
472-30 79Mont226, 255P730.
473-41 217Ala102, 115S1, 2 [citCJ].
473-43 135Misc350, 238NYS193 (reputation).
473-45 218Ala140, 117S647; 104WVa 238, 139SE737.
473-45½-New. criminal conspiracy, 218Ala140, 117S647.
474-53 TexCivA 293SW250.
474-54 TexCivA 275SW96.
474-55 TexCivA 275SW96.
474-59 37GaA704, 141SE498; 144Miss 505, 110S436; 152Va368, 147SE267. See also 227Ky479, 13SW(2d)493.
475-85 TexCommnA 288SW817; Tex CivA 275SW96.
477-39½-New. The carelessness or incompetency of a person as an automobile driver may not be shown by his reputation. 202 Iowa1038, 208NW334.
477-39¼-New. Reputation evidence held inadmissible as irrelevant. 213Ala 695, 106S37.
477-48 169Minn148, 210NW878.
477-49 Utah 273P303.
478-57 But see 97PaSuper216.
478-59 254Mass441, 150NE184.
478-59½-New. Testimony that owner and possessor of horse taken under writ is known as horse swapper is not relevant or proper in detinue action. 213 Ala695, 106S37.
478-64 141Wash364, 251P562, 563 [cit CJ].
479-69½-New. Reputation, to be admissible as evidence, is a common report about a person by others, showing the opinion in which he is held in the community. 254Mass441, 150NE184.
479-73 38Wyo 340, 266P1056, 1057 [quotCJ].
479-75 25F(2d)581, 584 [citCJ]; 215 Ala126, 110S143; 202 Iowa1321, 210NW 782, 783 [citCJ]. [b] 202 Iowa1321, 210 NW782. [d] Evidence as to reputation held incompetent. 254Mass441, 150NE 184.
480-88 34Ariz129, 268P611, 616 [quot CJ].
480-89 34Ariz129, 268P611, 614 [quot CJ].
480-93 TexCommnA 288SW817.
481-6 81CalA456, 254P281 (sufficient).
481-13 GaA 155SE789(2dcase); Iowa 213NW786 (where party was not witness).
483-46 316Mo 86, 289SW847, 850 [cit CJ].
483-47 81CalA456, 254P281; 316Mo 86, 289SW847, 850 [citCJ].
485-80 166Minn371, 208NW129; Tex CivA 275SW96.
485-81 172Ark69, 287SW595; 325 Ill 474, 156NE485; 232Ky44, 22SW(2d) 435; 154Md213, 140A95; MoA 26SW (2d)859(2dcase); TexCivA 289SW190.
485-82 16F(2d)108; 43F(2d)1005; 213 Ala84, 104S3; 213Ala494, 106S150; 214 Ala187, 106S809; 215Ala655, 111S907; 216Ala314, 113S25; 216Ala299, 113S28; 216Ala403, 113S265; 216Ala495, 113S 531; 216Ala645, 114S308; 217Ala82, 114S686; 217Ala364, 116S427; 218Ala 603, 119S841; 219Ala332, 122S346; 220 Ala158, 124S205; 21AlaA341, 108S622; 22AlaA231, 115S80; 172Ark69, 287SW 595; 181Ark1096, 29SW(2d)304; Ark 29SW(2d)1085; CalA 259P84; 85CalA 390, 259P479; 86CalA532, 261P732; 88CalA281, 263P383; CalA 284P681; 80Colo 355, 251P1049; 163Ga471, 136SE 440; 35GaA573, 134SE187; 38GaA443, 144SE143(2dcase); 40GaA813, 151SE 538; 40GaA171, 149SE76; 27Hawaii 537, 542 [citCycperPeters,CJ]; 320 Ill 449, 151NE239; 325 Ill 474, 156NE485; Ill 173NE70; 235 IllA469; 245 IllA248; Ill 173NE364; 246 IllA479; 246 IllA 538; Ind 169NE673; 202 Iowa1038, 208 NW334; Iowa 218NW470; 208 Iowa 1342, 227NW344(2dcase); Iowa 228NW 48; Iowa 233NW63; 210Ky5, 273SW 533; 213Ky664, 281SW1005; 215Ky 273, 284SW1082; 215Ky452, 284SW 1097, 47ALR347; 220Ky388, 295SW 445; 223Ky842, 5SW(2d)265; 232Ky 698, 24SW(2d)573; 155Md660, 142A503; Md 148A585; Md 149A290; Mass 159 NE635; 263Mass81, 160NE413; Mass 172NE68; Mass 173NE549; 165Minn 396, 206NW728; 172Minn250, 215NW 181; Mo 278SW361; MoA 279SW253; MoA 280SW716; MoA 297SW705; MoA 4SW(2d)843; MoA 7SW(2d)1032; MoA 22SW(2d)178(2dcase); 76Mont537, 248 P209; 77Mont477, 251P517; 51ND336, 199NW869, 36ALR465; 129 Okl 292, 264 P827; 130 Or267, 278P99; 131 Or393, 283P415; RI 133A241; 134SC435, 132 SE828; 50SD338, 210NW103; 51SD117, 212NW496; 52SD43, 216NW601; 52SD 548, 219NW262; TexCommnA 296SW 877; TexCommnA 27SW(2d)144(2d case); TexCivA 285SW638; TexCivA 283SW232; TexCivA 285SW889; Tex CivA 288SW624; TexCivA 289SW190; TexCivA 294SW625; TexCivA 5SW(2d) 170; TexCivA 10SW(2d)428; TexCivA 30SW(2d)492; 68Utah85, 249P437; 143 Va250, 129SE228; 107WVa440, 148SE 496; 200Wis616, 229NW194; Wis 231 NW593. See also 101NJL419, 129A191. But see TexCommnA 288SW169. [d] TexCivA 272SW517 (statement as to terms of contract of employment). [g] MoA 272SW117. [h] Testimony not objectionable as stating conclusion of fact. -53SD392, 220NW860. [i] Statements held not conclusions.-Ala 127S188.
491-83 19F(2d)781; 148Md628, 129A 915; TexCivA 278SW483; TexCivA 22 SW(2d)550. [a] (4) Mo 6SW(2d)903. (15) 291Pa379, 140A345. (17) 37GaA 716, 141SE513. (19) Conclude. Tex CivA 278SW483.
491-83½-New. Necessary fact depending on expert evidence must be supported by definite opinion of expert. 291Pa 379, 140A345.
491-84 215Ky273, 284SW1082; 129 Misc447, 221NYS714.
492-86 MoA 278SW(2d)448 (where witness previously testified he was unconscious at the time); 247NY460, 160NE 914.
492-87 136SC307, 133SE29.
494-88 212Ala597, 103S884; 256Mass 10, 152NE97.
492-89 RI 133A241 [citCJ].
492-96 MoA 31SW(2d)117.
493-4 216Ala495, 113S531.
493-7 MoA 23SW(2d)644; TexCivA 294SW625. [a] That one had no agency.-Iowa 231NW347.
493-16 Mo 289SW591.
493-20 But see 37GaA219, 139SE735.
493-21 216Ala495, 113S531.
493-31 23AlaA346, 125S795(2dcase). But see 217Ala278, 116S137.
494-61 31Ariz302, 252P1012. But see TexCivA 22SW(2d)157.
494-66 TexCivA 299SW935.
494-88 98CalA714, 277P759; TexCivA 283SW232.
494-89 156Md88, 143A651; 105NJL 504, 146A52.
495-12 NJCh 130A24 (impression of witness in divorce case that husband and alleged paramour gave impression of marriage).
495-13 73Mont456, 236P1093 (meaning of unambiguous contract).
495-15 29 OhA449, 163NE724; Tex CommnA 23SW(2d)316.
495-16 256Mass468, 152NE752 (condition of sidewalks).
495-21 264Mass276, 162NE312; Tex CivA 283SW232; TexCivA 9SW(2d) 407.
495-42 Ida 290P200; Vt 148A481.
495-44 [c] Nonexpert witness cannot testify that he thought deceased did not have pneumonia. 218Ky750, 292 SW297.
496-72 TexCivA 283SW232.
497-16 21AlaA623, 111S49.
498-79½-New. whether a dividend had been earned; 8 Colo 355, 251P1049.
498-83½-New. what was line fence; 297Pa442, 147A96.
498-83½-New. whether a person was a servant or independent contractor; MoA 22SW(2d)892.
498-84½-New. Where construction of a contract is in issue, the construction a witness would place on it is not admissible. TexCivA 272SW803.
498-84½-New. Testimony of a buyer as to promptness necessary in shipping goods to him is inadmissible as a conclusion. 218MoA597, 265SW993.
498-84¼-New. Whether there were separate establishments in a house occupied by the parties to an alienation of affection suit. 213Ala545, 105S867.
498-84½-New. Whether masonic bodies holding stock in masonic temple were charitable societies. 162Ga244, 133SE364.
498-84⅓-New. An attorney's testimony as to alteration of instrument has been held a conclusion from professional habits. 216Ala510, 113S525.
498-84½-New. , that a general scheme existed as to building restrictions. 163 Ga471, 136SE440.
498-84½-New. Even when secondary evidence is admissible, witness cannot state conclusions but must state facts. 235Ky529, 31SW(2d)899.
498-87 220Ala158, 124S205; 161La 827, 109S505.
498-90 Mo 3SW(2d)235, 239 [citCJ].
498-95½-New. Where a witness is competent to form an opinion which the jury or an ordinary witness could not, his opinion may be received. 241 Mich553, 217NW750.
498-96 161La827, 109S505; MoA 30 SW(2d)794; 293Pa97, 141A638; Tex CivA 274SW286; 155Wash526, 285P 446.
498-97 235 IllA22, 30 [quotCJ].
499-98 235 IllA22, 30 [quotCJ]; MoA 287SW650, 655 [citCJ].
499-99 172Ark729, 290SW942; 235 IllA22, 30 [quotCJ]; 203 Iowa467, 212 NW886; 219Ky119, 292SW765; 153Md 102, 137A506; 241Mich553, 217NW750; MoA 279SW241, 245 [citCJ]; Mo 28 SW(2d)84(2dcase); 102NJL307, 131A 905; 126 Okl 64, 258P918; 128 Okl 280, 262P680; 121 Or418, 255P464; TexCivA 20SW(2d)248; TexCivA 21 SW(2d)547; 101WVa535, 133SE131, 134 [citCJ]; 104WVa335, 140SE51; 107WVa440, 148SE496. [a] 131 Okl 155, 268P201.
501-63½-New. Claimant under life policy who desires not to have physician's statement in proofs of death used as evidence should submit protest of statement's untruth. 137Misc542, 242NYS 715.
502-8 4F(2d)826; 5F(2d)562; 34 F(2d)436; 216Ala1, 110S283; 216Ala 495, 113S531; 216Ala645, 114S308; Ala 127S850; Ala 130S552; 206Cal 273, 274P57; 95CalA781, 273P630; Ida 290P200; 317 Ill 401, 148NE274; 319 Ill 326, 150NE242; 244 IllA427; 205 Iowa51, 217NW557; 122Kan620, 253P 245; 212Ky763, 280SW123; 167Minn 53, 208NW410; 315Mo 760, 287SW346; 317Mo 1255, 298SW69 (question not objectionable); MoA 279SW241; 102 NJL307, 131A905; NJSup 129A204; 189 NC638, 127SE635; 193NC122, 136SE 289; 196NC129, 144SE698(2dcase); 56 ND607, 218NW862; 118 Or143, 246P 352, 358 [citCJ]; 118 Or210, 246P713, 717 [quotCJ]; 125 Or522, 267P519; 48SD493, 205NW239; TexCommnA 23 SW(2d)316; TexCommnA 10SW(2d) 977; TexCivA 275SW206; TexCivA 276 SW784; TexCivA 291SW279; 106 TexCr413, 292SW906; TexCivA 18W

(2d)471; TexCivA 18SW(2d)501; Tex CivA 16SW(2d)1109; TexCivA 28SW (2d)861; TexCr 27SW(2d)1098; 68 Utah85, 249P437; 69Utah452, 256P397; Vt 147A281; 108WVa553, 152SE197. [c] **Question held not to invade province of jury.**–MoA 14SW(2d)972.

504–10 217Ala506, 116S686; 233 IllA 262; 189NC644, 127SE688 (physician may answer hypothetical question based on proper facts as to what was cause of decedent's death); 68Utah85, 249P437. [a] **Question held not to invade province of jury.**–27F(2d)699.

504–11 86CalA704, 261P536.

505–12 84CalA42, 257P573; 130 Or282, 279P279.

505–13 [a] 33 OhA142, 168NE566. [b] **Inability to separate injury** caused by element not recoverable from other elements makes testimony inadmissible. TexCivA 13SW(2d)416.

506–14 86CalA704, 261P536. [a] **Severance damages cannot be established by fanciful guess of witness.**–86CalA704, 261P536.

506–16 127Kan234, 273P440, 62ALR 211.

506–17 151Md664, 135A835; TexCivA 30SW(2d)492.

506–20 112 Okl 23, 239P659.

507–30½–New. In a personal injury action, plaintiff, not an expert, cannot testify as to necessity of an operation, which is a question for the jury. Tex CivA 282SW850.

507–31 212Ala687, 103S859 (whether taking of right of way for electric power plant would injure value of remaining or contiguous lands held not to call for opinion as to amount of damages).

507–33 37GaA34, 138SE584; 151Md664, 135A835.

508–35 [b] **In condemnation proceedings various items of damage should be stated separately.** 339 Ill 212, 171NE 189.

508–43 151Md664, 135A835.

508–44 84CalA42, 257P573.

508–45 Ala 130S541; 86Colo 372, 282P 191; 322 Ill 11, 152NE491; 235Ky197, 30SW(2d)882.

509–46 Ariz 28SP1029.

509–48 181Ark517, 26SW(2d)579; Tex CivA 23SW(2d)771.

509–53 86CalA704, 261P536.

509–55½–New. electric power lines. 101WVa15, 131SE712.

509–59 35GaA511, 133SE878 (fruit trees); 232Mich399, 205NW124; 67Utah 553, 248P496.

509–60 [e] **Dogs.**–213Ala15, 104S222.

509–61 37GaA34, 138SE584; 151Md664, 135A835; MoA 31SW(2d)117.

509–62 181Ark1145, 28SW(2d)1077; 248Mich128, 226NW824; TexCivA 9 SW(2d)400.

510–65 217Ky491, 290SW333; Md 148 A124; 102NJL307, 131A905; 56ND416, 217NW666; 56ND607, 218NW862; 294 Pa585, 144A765 [citCJ]; 98PaSuper 131; 138SC113, 135SE877; 151SC537, 149SE241; TexCivA 8SW(2d)735; Tex CivA 30SW(2d)492; 100Vt268, 137A97; Va 154SE547; 147Wash76, 265P162, 164 [quot Cyc].

511–66 102NJL307, 131A905.

511–67 [a] Utah 273P515.

511–70 102NJL307, 131A905.

511–71 198NC36, 144SE364.

511–78 [d] MoA 14SW(2d)674. [k] **Ratchet of drum of hoisting engine.**–128 Me50, 145A400, 67ALR239.

512–82 231Ky72, 21SW(2d)135.

512–83 147Wash76, 265P162 (grade).

512–90 [a] **Throwing electric circuit breaker.**–33F(2d)876.

512–91 100Vt268, 137A97. [e] (2) Question whether accident was unavoidable is objectionable. 214Ala364, 107S 821.

513–3 102NJL307, 131A905 (improper).

513–6 150Wash278, 272P736.

514–15 TexCivA 13SW(2d)966.

514–17 30F(2d)794; 34F(2d)436 (receipt of expert testimony); 95CalA781, 273P630; 36GaA257, 136SE164; 317Mo 614, 296SW739; 222MoA578, 292SW 1075, 1077 [citCJ]; 33 OhA142, 168NE 566; 290Pa551, 139A266; TexCivA 289 SW190; 142Wash571, 253P797.

514–20½–New. Whether questions involve conclusions is matter resting in judge's discretion. 37F(2d)455.

514–21 317Mo 782, 297SW20.

515–30 56AppDC320, 13F(2d)292; 318 Mo 969, 2SW(2d)733, 738 [citCJ]; 129 Or98, 276P282.

515–33 97CalA676, 275P967.

516–41 TexCivA 21SW(2d)552.

516–42 MoA 27SW(2d)1052.

516–44 265Mass143, 164NE72.

516–50 216Ala645, 114S308.

516–59. Ala 127S519; 220Ky808, 295 SW1064; Mass 173NE515; MoA 28 SW(2d)127; 103NJL589, 137A549; 191 NC137, 131SE629; 23 OhA33, 155NE 166; 288Pa277, 135A856; TexCivA 284 SW691; TexCivA 291SW252. [d] **Testimony properly stricken.**–Md 149A4.

518–65 3Del497, 139A259; 165Ga335, 141SE67; 102NJL1, 131A92; TexCivA 285SW869; TexCivA 289SW190. [c] **One need not be expert** to testify to value of article if he has had opportunity for forming correct opinion. 214Ala187, 106S811.

519–67 27Hawaii28; TexCivA 289SW 190.

520–72 TexCivA 30SW(2d)364.

520–75 213Ala260, 104S509; Ala 127S 668; 161La827, 109S505; NJSup 149A 828; 284Pa277, 131A241; TexCivA 7 SW(2d)902.

521–76 214Ala420, 108S238; 214Ala 473, 108S339; 154Md204, 140A48; Tex CivA 289SW190. [a] (3) TexCivA 289 SW190. [c] (1) TexCivA 297SW630.

522–78 249 IllA164.

522–80½–New. There is no distinction between doctors admitted to practice profession as test of qualification for expert opinion testimony. TexCivA 289 SW190.

522–80½–New. A physician need not have practiced or lived in the community to qualify to give expert opinion in a malpractice suit. TexCivA 289SW190.

522–81 31 OhA273, 167NE407; Tex CivA 297SW301.

522–82 200 Iowa1063, 205NW979 (occupation of witness not per se disqualification).

522–83 215Ala491, 111S205; 284Pa277, 131A241.

522–84 216Ala296, 113S54; 22AlaA613, 118S502; Ark 31SW(2d)947; 320 Ill 449, 151NE239; 335 Ill 247, 167NE38; 200 Iowa272, 204NW301; 161La827, 109S 505; MoA 30SW(2d)1090; 58ND165, 225NW69; 286Pa427, 133A629; Tex CivA 25SW(2d)1004 (witness must show thorough acquaintance with subject); 67Utah553, 248P496. [a] (5) One testifying as to fitness of water for drinking. TexCivA 291SW252. [d] **Where knowledge of electrician is obtained solely by practical experience,** he is not qualified to give expert testimony as to death by lightning. 286Pa427, 133A629. [e] **Qualification of witness, called to give opinion evidence, affects only weight,** and not admissibility, of evidence. 29 OhA399, 163NE310. [f] **In malpractice case** testimony of physician of schools other than defendant's or experts in other lines held admissible on point as to which schools concur. Or 292P93. [g] **Question requiring opinion erroneous.**–Vt 151A568.

523–85½–New. Knowledge of handwriting limited to certain writings goes to weight, not admissibility, of expert's testimony. 214Ala239, 107S98.

523–91 205 Iowa283, 218NW66.

523–92 75CalA554, 243P33; TexCivA 294SW290. [c] **Insurance agents** could testify as to acceptability of applicant. 220Ky330, 295SW164. [d] **Opinion of truck driver** who had driven same make of truck involved for three years, as to distance in which truck can be stopped, is competent. 31 OhA273, 167NE407.

523–92½–New. On an issue as to fitness of water in a well for drinking and domestic purposes, testimony as to comparison of the water with other water in the vicinity is incompetent where it is not shown that the water sought to be compared was from wells of like depth or contained like ingredients. TexCivA 291SW252.

523–93 13F(2d)506; 16F(2d)261; 216 Ala43, 112S360; 30Ariz569, 249P751; 36GaA257, 136SE164; 41 Ida285, 238P 891; 318 Ill 445, 149NE507; 337 Ill 572, 169NE767; 244 IllA47; 200 Iowa495, 203NW794; MoA 28SW(2d)1044; 103 NJL440, 135A897; 103NJL589, 137A 549; 194NC289, 139SE443, 54ALR855; 128 Or409, 272P1027; 293Pa45, 141A 631; Pa 151A694; TexCivA 271SW233; TexCivA 285SW869; TexCivA 292SW 577; Vt 151A568. But see 33PortoRico 15.

524–94 46 Ida326, 268P6; 103NJL589, 137A549; 194NC289, 139SE443, 54ALR 855. [b] **Objection to failure to qualify comes too late** after testimony is given. 33PortoRico 15.

524–95 104Conn83, 132A467; 200 Iowa 272, 204NW301; 103NJL589, 137A549; 197NC772, 150SE363(1stcase); 297Pa 576, 147A830; TexCivA 22SW(2d)341.

524–96 318 Ill 445, 149NE507; 162La 471, 110S723, 726 [citCJ]; TexCivA 25 SW(2d)1004 (testimony excluded for lack of qualification).

525–97 16F(2d)261; 218Ala209, 118S 396; 165Ga335, 141SE67; 151Md375, 135A584; 155Md243, 141A706; Tex CivA 283SW294. [c] **Expert as to value of real property** may testify as to familiarity with sales of other property in neighborhood. 83CalA645, 257P123.

525–99 227AppDiv577, 238NYS575 (examination of speedometers by witness as to speed).

525–3 TexCivA 25SW(2d)1004.

526–7 19 OhA272.

526–10 TexCivA 271SW233.

526–11 13F(2d)506; 22F(2d)622; 36 F(2d)934; 214Ala663, 108S575; 33 Ariz64, 262P489; 181Ark626, 26SW(2d) 1107; 197Cal 702, 242P703; 101CalA 680, 282P419; CalA 290P146; 36GaA 257, 136SE164; 27Hawaii491, 503 [quot CJ]; Ida 286P616; 318 Ill 445, 149NE 507; 151Md375, 135A584; 154Md204, 140A48; 252Mass418, 147NE824; Mass 167NE247; 164Minn401, 205NW282; 168Minn259, 209NW905; 177Minn261, 225NW111(2dcase); 322Mo 514, 17SW (2d)960; Mo 30SW(2d)1018; 221MoA 478, 282SW97; 221MoA478, 282SW97; MoA 16SW(2d)1012; 113Nebr739, 204 NW784; 194NC289, 139SE443, 54ALR 855; 197NC772, 150SE363(1stcase); 127 Okl 273, 260P753; 128 Okl 29, 261P 189; 134 Okl 164, 272P461; 118 Or166, 246P707; 284Pa311, 131A229, 232 [cit CJ]; 295Pa120, 144A912; 49Philippine 801; 47RI 473, 134A9; 49RI 198, 141A 466; TexCivA 271SW233; TexCivA 275 SW423; TexCivA 283SW877; TexCivA 7SW(2d)902; TexCivA 8SW(2d)306; TexCivA 17SW(2d)110; TexCivA 18SW (2d)782; TexCivA 20SW(2d)266; Tex CivA 25SW(2d)1004; 145Va338, 133SE 776; 155Wash678, 286P286; 38Wyo 190, 266P117. [c] **Ruling as to qualification of witness held not error.**–Vt 147A352. [d] **Abuse of discretion not shown.**–155Wash678, 286P286.

527–12 Vt 147A352. [a] 27Hawaii491, 503 [quotCJ].

527–13 27Hawaii491, 503 [quotCJ]; 103NJL440, 135A897; TexCivA 283SW 877.

527–14 27Hawaii491, 503 [quotCJ].

527–15 27Hawaii491, 503 [quotCJ]; 50 RI 50, 144A883. [c] 128 Okl 29, 261P 189.

527–16 41F(2d)578; 27Hawaii491, 503 [quotCJ]; Mass 165NE1.

527–17 27Hawaii491, 503 [quotCJ]; MoA 16SW(2d)1012.

527–18 27Hawaii491, 503 [quotCJ].

527–19 27Hawaii491, 503 [quotCJ].

527–20 37GaA219, 139SE735.

528–25 38F(2d)391; 214Ala622, 108S 600; 219Ala112, 121S404, 64ALR640; Ala 129S9; Ala 130S537; 173Ark937, 294SW353; 88CalA322, 263P371; 92 CalA464, 268P453; 100CalA775, 281P 95; 35GaA438, 134SE122; 165Ga335, 141SE67; 164GaA811, 139SE716; 37 GaA219, 139SE735; 37GaA472, 140SE 780; 46 Ida497, 269P94; 233 IllA262; 207 Iowa113, 222NW416, 62ALR1174; 151Md525, 135A587; 156Md639, 144A 775; 245Mich319, 222NW740; 322Mo 218, 14SW(2d)590, 62ALR835; 81Mont

573, 264P394; NC 154SE674(2dcase); Or 288P207; 49SD563, 207NW539; Tex CivA 273SW874. See also 125Me58, 131 A1.

530-26 218Ala493, 119S21; 23AlaA294, 124S404.

530-27 152Md216, 136A609.

530-31 191NC690, 132SE788, 790 [quot CJ]; 196NC178, 145SE11; NC 154SE 847.

530-32 191NC690, 132SE788, 790 [quot CJ]; 198NC742, 153SE406; TexCivA 281SW234.

531-33 191NC690, 132SE788.

531-37 [a] (1) 101TexCr19, 274SW616. See also 202 Iowa450, 209NW468.

531-38 5F(2d)562; 214Ala396, 108S 26; 215Ala97, 109S751; 215Ala420, 110S895; 216Ala314, 113S25; 217Ala 506, 116S686; 219Ala366, 122S357; 220 Ala158, 124S205; 220Ala210, 124S420; 172Ark69, 287SW595; 164Ga231, 138SE 76; 37GaA219, 139SE735; 202 Iowa450, 209NW468; 128Kan618, 278P707; 120 Kan474, 244P2; 161La827, 109S505, 512 [quotCJ]; Mass 169NE775; 125Me88, 131A1; 150Md18, 132A258; 259Mass 272, 156NE254; 117Nebr786, 222NW 633; 145Va338, 133SE776, 780 [citCJ].

533-43 [a] **Testimony as to a horse's gentleness** is not incompetent because the witness had not observed the animal under conditions at the time of the accident. 261Mass29, 158NE336.

533-48½-New. Testimony that live stock depreciated specified amounts per head from the manner in which they were handled in shipment is not objectionable as a conclusion or as relating to a mixed question of law and fact. TexCivA 274SW305.

534-57⅙-New. Testimony that a witness, who had no relation with defendant until work was completed, did work for defendant, is not a fact but a conclusion invading province of jury, and is inadmissible. RI 133A658.

534-58 220Ala577, 126S872. Contra CalA 277P1107.

534-59 14F(2d)362; TexCivA 10SW (2d)196.

534-68½-New. , that the company knew nothing of a contract made by an agent; TexCivA 284SW322.

534-68⅓-New. or that the company did not agree to ship products to a certain place. TexCivA 284SW322.

534-71 173Ark921, 293SW1045.

534-72 218Ky750, 292SW297; Md 150 A263; TexCivA 278SW272.

534-72½-New. the appearance of a man running away from the scene of crime; 27Hawaii28.

534-72⅓-New. that the jaw of the witness was dislocated; 220MoA1302, 290 SW1012.

534-73¼-New. Question as to whether plaintiff was as able to work now as he was before injury held not erroneous. 213Ala554, 105S718.

534-74 TexCivA 25SW(2d)994 (saying a demand for payment was not complied with, held not a conclusion). See also Mass 165NE897.

534-75 TexCivA 288SW624.

534-76 90CalA311, 265P968; 116 Or83, 240P229. But see Ida 290P200.

534-77 116 Or83, 240P229. [b] **As ultimate fact,** ownership may be testified to by witness. SD 231NW601.

534-80 328 Ill 273, 159NE235.

534-83 Vt 148A481.

534-83½-New. Evidence as to what witness had told defendants as to his opinion that a certain promissory note was their property is not objectionable as expression of opinion as to ownership. 219MoA51, 266SW750.

534-84 218Ala348, 118S585; 170Ga135, 152SE466 (court properly required witness to state how ancestor controlled land). [a] 165Ga103, 139SE870.

534-85 [a] Ala 128S600.

534-86 [a] **Occupancy** is not legal conclusion and opinion. TexCivA 288SW 615.

535-90 220Ala158, 124S205.

535-91 220Ala158, 124S205.

535-94½-New. that cars were handled "very rough" in switching. 234Mich505, 208NW746.

535-96 See also 224AppDiv438, 231NYS 306.

535-7 152Md216, 136A609; MoA 10SW (2d)528.

535-11½-New. Injured passenger and companion of wide travelling experience are competent to testify as to what occurred and the results thereof. 27F(2d) 699.

535-11⅓-New. ; that a conductor was impolite, after having first stated some of his remarks. 37GaA219, 139SE735.

535-12 MoA 27SW(2d)1052. [a] 169Ga 608, 151SE31.

535-12½-New. , or of a bank. 236 IllA464.

535-18 220Ala68, 124S199.

535-31 TexCivA 4SW(2d)1023.

535-44 222MoA1003, 7SW(2d)470.

536-52 202 Iowa561, 210NW602.

536-59½-New. of testator's nonrecognition of witness; 153Md93, 137A479.

536-59⅓-New. of testator's anger when joked about certain matters; 153Md93, 137A479.

536-59¼-New. that testator acted as if he did not know where he was; 153Md 93, 137A479.

536-59⅕-New. that witness noticed difference in testator's collection of rent; 153Md93, 137A479.

536-60½-New. that skid marks were marks of certain automobile; 172Ark 69, 287SW595.

536-66½-New. or has hardpan in it, 80 CalA724, 252P770.

536-69 [b] **Agency.**-212Ala588, 103S 670.

536-73½-New. that one tried to do all the work he could after being injured; 125Me88, 131A1.

536-92½-New. ; whether testatrix regarded children of her half brother as her own and had a mother's love for them; TexCivA 273SW866.

536-92⅓-New. whether person had use of arm; Mo 271SW500.

536-92¼-New. whether witness acted as agent. TexCivA 273SW932.

536-92⅕-New. Testimony that the payee of a note in negotiating a settlement with a transferee acted as agent of the personal representatives of the deceased debtor is testimony as to a fact where there is other testimony that the payee acted as such agent. 35GaA126, 132SE 414.

536-92⅙-New. that lumber sold for a certain price at a place named; 36GaA 546, 137SE294.

536-92⅐-New. as to the meaning of trade service; 233 IllA262.

536-92⅛-New. that witness had undergone medical examinations. TexCivA 290SW292.

536-92⅑-New. Statement of a witness brought out on cross-examination, that insured was in doubt as to change in beneficiary, was not entitled to weight in action on policy, where witness failed to state what insured said. 289Pa 351, 137A621.

536-92 1/10-New. Any intelligent witness may testify that the person whose dead body he examined died of a broken neck. 125Kan252, 264P59.

536-92 1/11-New. ; that certificate of deposit was purchased before maturity. MoA 2SW(2d)123 (where date of maturity is established fact).

536-92 1/12-New. Owner of property damaged may testify whether too much explosive used. 235Ky41, 29SW(2d)592.

536-93 220Ala593, 127S153; 126Me244, 137A689; Tex 12SW(2d)599(2dcase); TexCivA 30SW(2d)492. [b] **Ordinary rule** is that, if jury could make certain inference from facts, no expert testimony is necessary and should be excluded. 33PortoRico 48.

536-94 86CalA704, 261P536.

537-95 126Me244, 137A689.

537-99 [e] **Opinions of witness** not shown to be better qualified than jury to form opinion on facts in evidence is not admissible. 101WVa3, 131SE862.

537-3½-New. Commissions and courts in determining rates of gas company must give great weight to opinion of experts. 14F(2d)209.

537-4 13F(2d)474; 194NC331, 139SE 604; 133 Okl130, 271P675, 679 [citCJ].

537-7½-New. The statement of an expert accountant, made from testimony, fixing the tonnage that the buyer was entitled to receive under fair apportionment during the existence of causes beyond the seller's control, preventing delivery, has been held inadmissible. 287 Pa232, 134A386.

537-11 213Ala260, 104S509.

537-11½-New. The quantity of hay on land. 31NM457, 247P270.

537-19 TexCivA 283SW294.

537-20 TexCivA 283SW294.

538-25 TexCivA 283SW294.

538-32 TexCivA 21SW(2d)754(2dcase).

538-33 129 Okl 295, 264P830.

538-35 157Md652, 147A790, 65ALR 1285.

538-37 220Ala587, 127S148.

538-39 TexCivA 8SW(2d)787.

538-41½-New. dampness, 214Ala286, 107S808.

538-42 220Ala593, 127S153. [b] **One who had never built a mausoleum** but was experienced in construction of similar walls in other buildings to those in mausoleum could testify that as built they constituted material defect. 194 Wis78, 215NW939.

539-47 [a] 318 Ill 230, 149NE297.

539-50 [a] (14) Danger of fire from defective transformer. TexCivA 275SW 430.

540-54 [c] **Practice in accepting or rejecting applications.**-228Ky399, 15SW (2d)242(2dcase).

540-56 [a] **Physicians who have acted** as medical examiners for insurers may testify whether particular applicant would have been accepted for life insurance if representation was true. 220 Ky626, 295SW900.

540-64 23AlaA416, 125S398; IndA 168 NE462.

540-65 136Misc141, 239NYS568.

541-67 Ala 127S155.

541-69 235Ky658, 32SW(2d)8 (deed); 98PaSuper279.

542-83 215Ala266, 110S389.

542-91 [b] **Possibility of guarding machine.**-MoA 279SW202.

542-1 222MoA578, 292SW1075, 1077 [quotCyc].

543-10 193Wis482, 214NW356.

543-14 103WVa156, 136SE837. [d] **Expert testimony of physician that abortion** was something of habit was properly admitted. 219Ala162, 121S543.

545-45 164Ga811, 139SE716.

545-47 [d] **Dentist** may state cause of death of doctor's patient if it appears to be his opinion. 218Ala609, 119S647.

545-48 320Mo 371, 8SW(2d)11.

545-52 164Ga811, 139SE716.

546-81 236Mich646, 211NW50.

547-88 But see MoA 7SW(2d)740.

547-96 TexCivA 272SW594 (noise made by stopping of train).

547-98 [a] (2) 236Mich646, 211NW50.

547-99 315Mo 409, 286SW45.

548-4 315Mo 409, 286SW45.

548-8 235Ky405, 31SW(2d)729.

548-12 218Ala384, 118S565.

549-15 252Mass418, 147NE824.

549-21 252Mass418, 147NE824; Tex CivA 297SW258.

549-22 252Mass418, 147NE824.

549-23 [a] (1) 197Cal 702, 242P703. (10) Proper method of bringing car to smooth stop. 117Nebr786, 222NW633.

549-29 101CalA153, 281P415; 245 IllA 350; 249 IllA34.

550-31 219MoA429, 275SW979.

550-38 [a] (2) Witness not familiar with general customs and practice cannot testify as to usual manner of doing work. MoA 30SW(2d)641.

551-42 39F(2d)578.

551-49 41GaA697, 154SE301; 161La 827, 109S505, 512 [quotCJ]; 36Wyo 473, 257P484.

551-50 173Ark921, 293SW1045; 36GaA 70, 135SE439; 192NC580, 135SE456; TexCivA 289SW190.

551-52 162Ga244, 133SE864; 35GaA 438, 134SE122; 36GaA70, 135SE439; 40 GaA834, 151SE665(2dcase); 156Md489, 144A698; 196NC129, 144SE698(2dcase) [quotCJ]; TexCivA 291SW252; Tex CivA 5SW(2d)230; TexCivA 14SW(2d) 939; Vt 147A346.

552-56 157Md492, 146A432; 130 Or267, 278P99; TexCivA 291SW252. [f] **Insufficient foundation for opinion.**-156Md 489, 144A698.

553-58 Mass 168NE924.

553-60 [a] 337 **Ill** 572, 169**NE**767; 20 **OhA**216, 151**NE**788.

553-61½-New. The conclusion of a witness supported by facts indicating a basis therefor is regarded as a fact rather than an opinion. 157**Md**492, 146**A**432.

553-62 [d] **Proximity of lightning stroke.-Vt** 147**A**352.

554-68 [b] 212**Ky**770, 280**SW**127.

554-70 195**Cal** 49, 231**P**735 (on issue of judgment of indebtedness statement of alleged debtor that he had never been asked for payment held not conclusion of law); 203 **Iowa**776, 209**NW**452; 232 **Ky**44, 22**SW(2d)**435.

554-71 203 **Iowa**776, 209**NW**452.

554-72 38**GaA**637, 144**SE**810.

554-73 99**CalA**557, 279**P**183 (if headlights were on, witness would have seen them).

554-78 [a] **Where physical facts are easily described,** conclusion is properly excluded. **MoA** 26**SW(2d)**859(2dcase).

554-81 212**Ala**531, 103**S**553; 122**Kan** 620, 253**P**245; **Mass** 164**NE**486; 192 **NC**580, 135**SE**456; 289**Pa**381, 137**A**665; **TexCivA** 20**SW(2d)**248; 36**Wyo** 473, 257**P**484.

555-82 105**NJL**477, 144**A**566.

555-83 122**Kan**620, 253**P**245.

555-96 [a] **Guard rail on bridge.-**40 **GaA**4, 148**SE**757.

556-14 [c] **Witness with expert knowledge of trucks** may state that truck destroyed by fire was "practically new." 212**Ala**649, 103**S**845.

557-49 169**Minn**148, 210**NW**878; **NH** 147**A**898(2dcase).

558-1 Contra 317**Mo** 782, 297**SW**20.

558-3 163**Ga**734, 137**SE**260; **TexCivA** 273**SW**974 (that plaintiff was fit man to raise child).

558-7 **MoA** 275**SW**586.

558-8 329 **Ill** 588, 161**NE**124.

559-14 47**RI** 378, 133**A**618. [a] 126 **Okl** 64, 258**P**918.

559-20 191**NC**507, 132**SE**286.

560-43 22**AlaA**72, 112**S**365; 34**Porto Rico** 313.

560-44 **Erratum.-N.J.**—Strike out "Ann Cas1918D284."

560-45 [c] **Erratum.-**Strike out "Ann Cas1918D284."

561-48 [d] **Tractor.-**213**Ala**260, 104**S** 509.

561-52 **TexCivA** 21**SW(2d)**1094.

561-56 **MoA** 273**SW**165.

562-62 69**CalA**669, 232**P**169 (that delay in shipment was due to strike held to be mere conclusion of witness).

562-66½-New. that defects caused engine to back-fire; **MoA** 10**SW(2d)**962.

562-67 **TexCivA** 25**SW(2d)**907(2dcase). [a] (3) **Mo** 287**SW**434. (6) That his skinned finger after coming in contact with ink tablets on which was bronze powder swelled up and pus started to form. 218**MoA**253, 267**SW**431.

562-68 38**F(2d)**599.

562-71 [a] (7) But see 212**Ky**770, 280 **SW**127. (11) Bursting of containers of sweet relish. **Or** 288**P**207. [b] (2) Witness may not testify to causal connection between fright and abortion. 219 **Ala**162, 121**S**543. [c] **Statements rejected as conclusions.-Iowa** 218**NW**470.

562-72 [a] (11) Where automobile received impact of collision with truck. 109**Conn**616, 145**A**31.

562-73 [b] (2) As to direct money loss to business as result of being away from store. **Iowa** 218**NW**470.

563-80 **Mo** 274**SW**377.

563-81 [a] (1) 35**GaA**87, 132**SE**106 (wrecking of automobile).

563-83 216**Ala**645, 114**S**308.

563-85 [a] (4) That loose sand and dirt have tendency to change course of automobile. 40**GaA**4, 148**SE**757. [c] (6) Night watchman held not competent to testify concerning his opinion as to cause of fire, but expert testimony was limited to facts within his knowledge. **TexCivA** 10**SW(2d)**1040.

564-87 **MoA** 296**SW**243.

564-91 **MoA** 296**SW**243.

564-95 But see 40**GaA**332, 149**SE**582.

564-1 216**Ala**218, 113**S**22.

565-8 **Utah** 273**P**515.

565-10 [b] (2) Testimony as to distance an object could be seen will be rejected when based on mere general knowledge. 149**Va**560, 140**SE**831. (3) Question to witness as to how far detour sign could be seen with lights on automobile has been held properly excluded, where evidence failed to show whether witness knew fact inquired about. 218 **Ala**566, 119**S**610(2dcase).

565-11 **TexCivA** 274**SW**200, 202 [cit CJ].

566-18 [a] **Capacity of magician.-**293 **Pa**45, 141**A**631. [b] **Person experienced and familiar with certain trade or business** may give opinion as to what duly qualified person can earn therein. 293 **Pa**45, 141**A**631. [c] **Witness need not be expert.-**293**Pa**45, 141**A**631.

566-19 22**AlaA**226, 114**S**285. [a] (1) 22**AlaA**226, 114**S**285. (4) 122**Kan**620, 253**P**245.

566-29 219**MoA**162, 272**SW**108; 287**Pa** 370, 135**A**127. [a] **Nonexpert witness** was permitted to testify that grade of street on which accident occurred was about three per cent. 219**MoA**162, 272 **SW**108.

566-30 But see 81**CalA**690, 254**P**671.

567-45 209**Ky**112, 272**SW**411.

567-49 82**CalA**20, 254**P**937.

567-52 213**Ala**627, 105**S**869 (need not be expert to give judgment as to whether trees were merchantable where his knowledge may be tested in cross-examination). But see 219**Ala**183, 121**S**701.

567-55 55**ND**321, 213**NW**488, 490 [cit CJ]. [a] (4) 318**Mo** 64, 298**SW**842.

567-59 55**ND**321, 213**NW**488, 490 [cit CJ].

567-60 55**ND**321, 213**NW**488, 490 [cit CJ].

567-61 55**ND**321, 213**NW**488, 490 [cit CJ].

567-62 318**Mo** 64, 298**SW**842, 847 [quot CJ]; 55**ND**321, 213**NW**488, 490 [citCJ].

567-63 **TexCivA** 22**SW(2d)**341 (testimony of nonexpert as to gold content of jewelry held inadmissible).

568-65 219**Ala**162, 121**S**543; **Tex CommnA** 291**SW**1094. [b] (2) Understanding of common factors of time and distance is sufficient. 227**Ky**486, 13 **SW(2d)**497.

568-68 91**Fla**989, 108**S**886 [citCJ].

568-69 208**Cal** 652, 284**P**443; 107**Conn** 91, 139**A**639; 38**GaA**619, 144**SE**827; 227 **Ky**486, 13**SW(2d)**497; **MoA** 272**SW** 117; **Nebr** 230**NW**769 (coming directly toward witness); 283**Pa**366, 129**A**88.

568-70 120**Kan**645, 244**P**1057 (speed of street car based on noise made held admissible).

568-76 29**F(2d)**687; 38**GaA**599, 144**SE** 831; **TexCommnA** 291**SW**1094; **Tex CivA** 285**SW**869; **TexCivA** 6**SW(2d)**432; **TexCivA** 21**SW(2d)**754(2dcase). [a] But see 237**Mich**232, 211**NW**734. [d] 237 **Mich**232, 211**NW**734, 735 [citCJ].

569-79 220**Ala**201, 124**S**740.

570-86 **MoA** 272**SW**117.

570-96 See also 82**CalA**141, 255**P**215.

570-98 **MoA** 272**SW**117; **Wis** 229**NW** 860 (real fast).

570-98½-New. or a mere flash, **MoA** 272 **SW**117.

570-98⅓-New. , or the fastest that witness has ever seen. 102**NJL**1, 131**A**92.

570-3 [a] **Admission of opinion evidence** as to reasonableness of speed of train over crossing was error. 28 **OhA** 88, 162**NE**623.

570-5 **TexCommnA** 291**SW**1094. [c] (5) Nonexpert witness properly permitted to testify as to speed where she stated knowledge on which judgment was based. 249**Mich**76, 227**NW**759.

571-6 83**NH**29, 137**A**445; 283**Pa**366, 129**A**88.

571-8 237**Mich**232, 211**NW**734; **MoA** 272**SW**117. [h] (2) Mechanic examining one of two wrecked cars is not qualified to testify as to speed of both cars at time of collision. 48 **Ida**310, 282**P**72.

572-12 But see 283**Pa**366, 129**A**88.

572-14 **TexCommnA** 291**SW**1094.

573-31 69**CalA**669, 232**P**169.

573-33 36**GaA**257, 136**SE**164; 36**GaA** 377, 136**SE**924; 36**GaA**538, 137**SE**286.

573-34 16**F(2d)**358; 215**Ala**407, 110**S** 818; 218**Ala**416, 118**S**662; 36**GaA**257, 136**SE**164; 36**GaA**377, 136**SE**924; 36**Ga A**538, 137**SE**286; 164**Ga**811, 139**SE**716; 38**GaA**591, 144**SE**815; 161**La**827, 109**S** 505; 150**Miss**857, 117**S**244; **MoA** 256**SW** 499; 122 **Or**579, 260**P**444; **TexCivA** 299**SW**277; **Vt** 151**A**642; 155**Wash**678, 286**P**286.

574-35 164**Ga**811, 139**SE**716; 47 **Ida** 119, 272**P**254.

575-41 See also 214**Ala**602, 108**S**508.

575-42 214**Ala**602, 108**S**508.

575-47 291**Pa**252, 139**A**848.

575-49 36**GaA**257, 136**SE**164; 216**Ky** 303, 287**SW**357, 359 [quotCJ]; 53**ND** 291, 205**NW**722, 725 [citCJ]; 122 **Or**579, 260**P**444.

576-51 36**GaA**257, 136**SE**164; 53**ND** 291, 205**NW**722, 725 [citCJ]; 122 **Or**579, 260**P**444.

576-56 53**ND**564, 207**NW**438.

576-60 **TexCivA** 30**SW(2d)**930.

576-61 Contra **TexCivA** 299**SW**949.

576-62 36**GaA**257, 136**SE**164.

576-63 100**CalA**611, 280**P**704.

576-64 But see **Vt** 151**A**642.

577-65 321 **Ill** 538, 152**NE**486; 69**Utah** 323, 255**P**172.

577-65½-New. The opinion of a witness as to the value of horses is inadmissible, where he knows of no market value, and no foundation is laid for proof of value other than market value. 84 **Mont**225, 274**P**1062.

577-66 265**Mass**494, 163**NE**255; 47**RI** 378, 133**A**618.

577-67 164**Ga**811, 139**SE**716.

577-68 47**RI** 378, 133**A**618.

577-71 47**RI** 378, 133**A**618.

577-72 47**RI** 378, 133**A**618.

577-73 53**ND**291, 205**NW**722, 725 [cit CJ].

578-74 53**ND**291, 205**NW**722, 725 [cit CJ].

578-76 248**Mich**473, 227**NW**718.

578-79 47**RI** 378, 133**A**618.

578-80 47**RI** 378, 133**A**618.

578-82 215**Ala**407, 110**S**818; 36**GaA**257, 136**SE**164; 126**Kan**39, 41, 267**P**19 [quot CJ]; 54**ND**322, 209**NW**379, 385 [citCJ]; 293**Pa**326, 142**A**867.

578-83 214**Ala**622, 108**S**600; 81**Colo** 121, 253**P**1066; 126**Kan**39, 41, 267**P**19 [quotCJ].

579-84 35**F(2d)**139 (opinion based solely on quotations from trade journals held properly rejected); 214**Ala**622, 108 **S**600; 216**Ala**321, 113**S**495; 36**GaA**257, 136**SE**164; 36**GaA**538, 137**SE**286; 126 **Kan**39, 41, 267**P**19 [quotCJ]; 224**Ky**383, 6**SW(2d)**480, 481 [quotCJ]; 259**Mass**46, 156**NE**61; 54**ND**322, 209**NW**379, 385 [cit CJ]; 122 **Or**579, 260**P**444; **TexCivA** 288 **SW**627; **TexCivA** 7**SW(2d)**665. See also 203**Iowa**485, 210**NW**767.

579-85 54**ND**322, 209**NW**212, 215 [quot Cyc].

579-86 29**F(2d)**801; 215**Ala**407, 110**S** 818; 54**ND**322, 209**NW**212, 215 [quot Cyc]; **Vt** 151**A**642.

580-87 80**CalA**724, 252**P**770; 99**CalA** 583, 278**P**912 (owners of land in vicinity); 54**ND**322, 209**NW**212, 215 [quot Cyc]; 118 **Or**166, 246**P**707. [b] **Mere fact that business is manufacturing business** does not limit testimony as to value of property to persons having knowledge of business. 293**Pa**326, 142**A** 867.

580-88 216**Ala**321, 113**S**495; **MoA** 256 **SW**499 (knowledge shown); 54**ND**322, 209**NW**212, 215, 45**ALR**1487 [quotCyc]. [a] **Mere knowledge that article does not correspond with warranty** does not qualify witness to testify that article is worthless. 202 **Iowa**475, 210**NW**584.

580-89 118 **Or**166, 246**P**707. [a] 126 **Okl** 139, 258**P**274.

580-89½-New. The only qualifications required of witnesses as to the value of property destroyed by fire are that they must exhibit a fair knowledge of the property and its value. 128 **Okl** 29, 261**P** 189.

580-95 **TexCivA** 4**SW(2d)**1032.

581-97 33**Ariz**23, 262**P**4, 5 [citCJ]; 36 **GaA**257, 136**SE**164; 47 **Ida**119, 272**P**254; 126 **Okl** 139, 258**P**274.

581-98 216**Ala**321, 113**S**495; **CalA** 290 **P**146; 37**GaA**34, 138**SE**584; 40**GaA**302, 149**SE**422 (corporate stock); 48 **Ida**727, 285**P**472; 236 **Ill**A601; 203 **Iowa**467, 212**NW**886; **Me** 149**A**618; 151**Md**375, 135**A**584; **Mass** 169**NE**268; 166**Minn**193, 207**NW**305 (rug); **MoA** 256**SW**499; **MoA** 272**SW**998, 999 [citCJ]; 220**MoA**919, 296**SW**190, 191 [quotCJ]; 82**Mont**52, 264**P**933 (purchase price of old property); 115**Nebr**848, 215**NW**140; 58**ND** 209, 225**NW**323; 141 **Okl** 90, 284**P**624; **TexCivA** 20**SW(2d)**266; **TexCivA** 23**SW (2d)**771.

581-99 21P(2d)298; 151Md664, 125A 235.

581-1 216Ala321, 112S495; Cal 292P 425; 48 Ida727 [illegible] 151Md663 [illegible] 244Mich551 [illegible] 8 SW159; Minn 233SW312; MoA 297SW175; 104 [illegible] 145A427 [illegible] 1328E826.

582-9 [illegible] 13A[illegible]

582-12 [illegible] 236 IIA 601.

582-12½-New. Iness and laces; MoA [illegible] (2d) [illegible] (long experience of plaintiff in buying and selling such goods).

582-18 [illegible] IIA65. (replacement cost) 116Nebr297, 216SW816. [a] **Objection that witness' knowledge is insufficient goes to weight and not to admissibility of evidence.** Mo 149A618.

583-23 216Ala321, 112S495; 26GaA 277, 126SE924; TexCivA 278SW950.

583-24 [illegible] (certificate); 26GaA277, 126SE924; 126 Okl 139, 258 [illegible] TexCivA [illegible] TexCivA 278SW414. TexCivA 26SW(2d)492.

584-25 216Ala321, 112S495.

584-26 213Ala625, 105S661. [b] 213 Ala15, 104S222; 207 Iowa1094, 224NW 951(dense).

584-27 [illegible] 216Ala321, 112S495; 220Ala [illegible] 26GaA277, 126SE924.

584-28 [d] **Former owner of truck may state value at time sold.** 150Wash 14; [illegible] (dense).

584-30 25GaA511, 123SE878 (value of fruit destroyed); 219MoA657, 284SW 510.

585-39 [illegible] 223SW654. [b] **Director of association controlling corporation held competent to give opinion on value of stock.** Vt 151A642.

585-45 [illegible] Rupp 34 IIA63 (house wife witness).

585-46 MoA 88SW(2d)88.

585-51½-New. Or moving picture films, TexCivA 278SW956.

585-51½-New. Oil well casing. 126 Okl 139, 258P274.

586-65 [b] Truck [illegible] Super46.

586-71 [illegible] 136A[illegible]

586-72 36P(2d)934; Cal 291P825; 97 [illegible] 151GaA536, 383P 419; 38GaA586, 144SE825; 47 Ida119, [illegible] 108SW(2d)451; 54 [illegible] 215 [illegible] 15ALR1487 [quotCJ]. TexCivA [illegible] [f] **Managing officer of corporate owner may testify as to market value of land owned by corporation where he shows qualifications required of ordinary owner.** [illegible] 15ALR1487.

587-73 54ND322, 209NW212, 216, 45 ALR1487 [quotCJ]. [a] 283Pa397, 129 A326.

587-74 54ND322, 209NW212, 216, 45 ALR1487 [quotCJ]. 293Pa385, 143A 129.

587-75 54ND322, 209NW212, 216, 45 ALR1487 [quotCJ].

587-76 54ND322, 209NW212, 216, 45 ALR1487 [quotCJ].

587-77 54ND322, 209NW212, 216, 45 ALR1487 [quotCJ]. But see CalA 283 P[illegible].

587-78 54ND322, 209NW212, 216, 45 ALR1487 [quotCJ]. 50RI159, 149A 596.

587-79 211Ala107, 1068599; 121Ark 626, 268W(2d)1107; 26GaA257, 126SE 164; 127 Okl 263, 260P777; 293Pa385, 143A129, 155Tenn147, 179SW(2d)22, 65 ALR440; TexCivA 281SW600, 604 [cit CJ]. TexCivA [illegible]SW518, 519 [citCJ]. TexCivA 278SW[illegible].

588-80 [a] TexCivA 286SW307.

588-81 TexCivA 281SW600, 604. [a] (1) 40P(2d)642 (held not erroneous as conclusional, remote and uncertain). 219MoA657, 284SW510.

588-82 214Ala107, 1068599; 215Ala68, 109S[illegible]; 26GaA257, 126SE164. TexCivA 276SW784. TexCivA 281SW600, 604 [citCJ]. TexCivA 286SW518.

588-85 36P(2d)934; 219Ala165, 122S 448; 26GaA703, 275P228; 200 Iowa 1068, 205NW979; 231Ky788, 228SW(2d) 281; 54ND228, 209NW1009. TexCivA 281SW600, 604 [citCJ]; TexCivA 286 SW518; TexCivA 293SW885. [b] TexCivA 286SW518, 519 [citCJ] (prima facie qualified). [c] (2) That opinion is given long after transaction occurs. Ala 127S527.

589-87 214Ala107, 1068599; TexCivA 286SW518, 519 [citCJ].

589-89 [a] (2) See also TexCivA 286 SW518. [b] **Lack of direct knowledge** of land at time in issue affected weight rather than competency. 40P(2d)897 (dense).

589-90 224Ky383, 68SW(2d)480, 481 [quotCJ]; TexCivA 286SW518, 519 [cit CJ]; TexCivA 48SW(2d)1032. But see 99CalA742, 279P670.

590-91 47RI 473, 134A9; TexCivA 286 SW518, 519 [citCJ]; TexCivA 48SW(2d) 227.

590-95 47 Ida119, 272P254; 230Ky 142, 18SW(2d)961; 50RI 489, 149A596. [b] **Sheriff who presided at tax sale is** not qualified to state value thereof. 168 [illegible] 148SE[illegible]

591-99 TexCivA 276SW784.

591-5 216Ala160, 112S763; 26GaA257, 126SE164.

592-7 197 Ind350, 149NE178.

592-8 197 Ind350, 149NE178.

592-9 [illegible] NJEq649, 138A569.

592-11½-New. The value of property with or without a drainage ditch may be stated by one acquainted with the property. 197 Ind350, 149NE178.

592-13½-New. Opinions of witnesses as to the value of land not taken in condemnation proceedings must be based upon elements of damage, which are recognized in law as proper to be considered. 333 Ill 218, 164NE182.

592-16 26 OhA546, 160NE97. [d] **Janitor in defendant's hotel and apartment** may testify to reasonable value of his services therein, where he had been employed as janitor in other buildings. 147Wash571, 253P797.

593-25 140Wash663, 250P64, 65 [quot CJ].

593-26 36GaA70, 135SE439; 140Wash 663, 250P64, 65 [quotCJ].

593-27 214Ala412, 108S233 (value of board and lodging); 36GaA70, 135SE 439; 46 Ida165, 267P232, 233 [quot CJ]; 140Wash663, 250P64, 65 [quot CJ]. [c] (3) Officer of corporation testifying as to value of services of income tax expert to company. 140Wash663, 250P64. (4) Person familiar, though only in general way, may state estimate as to value of services. 293Pa45, 141A 631. [h] **Though pay for services was usually fixed by special contract,** qualified witness may testify as to market value of services. 293Pa45, 141A631.

593-29 46 Ida165, 267P232 (farm laborer).

594-45 154Md698, 141A498; 154Miss 765, 122S776.

594-50½-New. Evidence dealing with fair value of services is opinion and not hearsay evidence. NJ 130A371.

594-52 [b] But see Mich 233NW325.

595-65 [a] (2) Witness testifying as to land's productivity may be questioned as to knowledge of production costs. 216Ala671, 114S49.

595-67 216Ala671, 114S49.

595-68 151Md375, 135A584; 49RI 50, 139A664, 665 [citCJ]; TexCivA 281SW 600; 104WVa589, 140SE685.

596-78½-New. Testimony of value, based entirely on a contingent possibility, held too speculative and remote to receive much weight. 86Colo 313, 281 P360.

596-80 Nebr 230NW102.

597-89 94Fla318, 113S689, 694 [citCJ].

597-90 94Fla318, 113S689, 694 [cit CJ]. 295Pa101, 144A328.

599-29 Mo 296SW391, 396 [citCJ]; 48 Nev184, 228P582, 584 [citCJ].

599-30 142Miss388, 107S520; 216MoA 644, 271SW875, 878 [quotCJ].

599-31 91Fla214, 107S260, 263 [citCJ]; 203 Iowa251, 212NW475; 121Kan324, 246P994, 996 [quotCJ]; Md 149A4; 142 Miss388, 107S520; 216MoA644, 271SW 875, 878 [quotCJ]; Nebr 227NW321; NJSup 144A799; 220AppDiv469, 221 NY8707; 192NC580, 135SE456, 283Pa 366, 129A88; 144NC452, 142SE725, 728 [citCJ]; 155Tenn549, 296SW20, 22 [cit CJ]; TexCivA 274SW185.

599-31½-New. But a mere unsupported conclusion to this effect should be excluded. 220Ky219, 294SW1030.

599-32 121Kan324, 246P994, 996 [quot CJ]. 142Miss388, 107S520; 216MoA644. 271SW875, 878 [quotCJ].

599-33 121Kan324, 246P994, 996 [quot CJ]; 216MoA644, 271SW875, 878 [quot CJ]; 155Tenn549, 296SW20, 22 [citCJ].

599-34 121Kan324, 246P994, 996 [quot CJ]; 216MoA644, 271SW875, 878 [quot CJ].

599-37 142Miss388, 107S520.

599-38 283Pa366, 129A88. [a] 155 Tenn549, 296SW20, 22 [citCJ].

599-40 But see 215Ala436, 111S17; TexCivA 286SW616. [a] But see 262Mass 13, 159NE459.

599-41 208Ky686, 271SW1034.

599-42 220Ala119, 124S292; 161Ga615, 131SE535; 163Ga734, 137SE260; 47 Ida 211, 273P757; 200 Iowa1180, 206NW 95; 122Kan294, 296, 252P256 [citCJ]; 208Ky686, 271SW1034; 217Ky846, 290 SW690; 233Ky636, 268SW(2d)506; 149 Md208, 131A463; 322Mo218, 148SW(2d) 590, 62ALR835; 48RI 341, 137A908; Tex 128SW(2d)625; TexCivA 288SW(2d) 941; 147Va478, 137SE511. Contra 3 Del 206, 124A56.

600-47 200 Iowa1180, 206NW95.

601-52 200 Iowa1180, 206NW95.

601-55 138SC169, 136SE209, 215 [cit CJ].

601-64 163Ga734, 137SE260. [a] **Condition few days after observance held inadmissible.**–TexCivA 286SW616.

601-65 149Md308, 131A463.

601-66 318 Ill 445, 149NE507; 208Ky 686, 271SW1034; 208Ky672, 271SW 1040; 149Md308, 131A463; 176Minn 360, 223NW677; 48RI 341, 137A908.

601-66½-New. To sign a release of claim under sick and accident policy. 235Mich80, 209NW95.

601-67 122Kan294, 252P256; 169Minn 386, 211NW306; NC 154SE752; 20 OhA 216, 151NE788.

601-69 165Ga724, 142SE96; TexCivA 258SW(2d)881.

601-71 166Ga632, 144SE18; 202 Iowa 807, 211NW495; TexCivA 15SW(2d) 166. [c] **Whether at time of making will** testator had mental capacity to know who his children were may be testified to by nonexpert witness who also testifies as to acquaintance and association with and observation of testator. 161 Ga615, 131SE535. [f] **Evidence inadmissible under rule.**–202 Iowa807, 211NW 495. [g] **When opinion is not limited to time of executing will, it is properly excluded.** 152Md407, 137A35.

602-74 TexCivA 258SW(2d)881.

602-78½-New. Whether nonexpert witness considered testator was right-minded; 20 OhA216, 151NE788.

602-81 202 Iowa807, 211NW495.

602-84 165Ga724, 142SE96; 214Ky769, 284SW389; 322Mo 218, 148SW(2d)590, 62ALR835; 20 OhA216, 151NE788; 48 RI 341, 137A908. [c] 161Ga615, 131SE 535.

603-85 214Ky769, 284SW389; 235Mich 80, 209NW95; 20 OhA216, 151NE788; 29 OhA449, 163NE724; 48RI 341, 137 A908. But see Vt 150A65.

603-86 251Mich117, 231NW79. See also 202 Iowa807, 211NW495.

603-88 318 Ill 445, 149NE507; 217Ky 846, 290SW690; 235Mich80, 209NW95. [a] (1) 214Ala663, 108S575. (2) No general rule can be laid down as to what constitutes sufficient opportunity for observation. 214Ala663, 108S575. (3) Circumstances must be such as to have afforded opportunity to form accurate judgment as to existence or nonexistence of disease. 214Ala663, 108S575. (4) Same degree of observation not necessary to qualify nonexpert witness to testify as to general insanity as would be required in case of partial derangement only. 214Ala663, 108S575. [c] (6) Witnesses who had known testator for many years and had been members of his household during last two weeks of his life possess sufficient knowledge to testify as to his capacity to make will. 149Md308, 131A463. (6) Constant observation by housekeeper, friend, or relative is sufficient to qualify witness. 169 Minn386, 211NW306.

604-91 See also 144Va559, 131SE131 [citCJ].

604-96 TexCivA 273SW866.

604-97 TexCivA 273SW866.

604-98 TexCivA 273SW866.

604-2 142Miss388, 107S520, [a] **Witness must qualify.** 220Ky388, 295SW445.

604-3 216Ala13, 112S360; 22AlaA483, 118S170; 88CalA336, 265P281; 43 Ida 256, 251P623; 210Ky559, 276SW547; 232Ky193, 23SW(2d)919, 165La174, 115S661, 662 [quotCJ]; 142Miss388, 107S520; 192NC580, 135SE156, 191NC583, 140SE193; **TexCivA** 208SW(2d)396; 147Va105, 136SE683; 147Va478, 137SE511; 152Wash192, 278P178.

605-7 165La474, 115S661, 662 [quot CJ].

606-12 165La474, 115S661, 662 [quot CJ].

606-17 216Ala43, 112S360; 200 Iowa 948, 205NW770; 118Nebr634, 225NW869, 64ALR1299; **TexCivA** 208SW(2d)396. [g] See also Mo 198SW(2d)1033. [h] **Testimony of family physician** and of attorney drafting will is entitled to great weight. 14Va105, 136SE683. [i] **Friends and neighbors of testatrix.**-228Ky83, 14SW(2d)113.

607-18 216Ala43, 112S360; Ala 129S51; 20ObA216, 151NE788; **TexCivA** 208SW(2d)396.

607-19 CalA 288P841. [a] 318 Ill 445, 149NE507.

607-21 CalA 288P841; 156Md489, 144A698. See also 217Ala506, 116S686. [a] (1) **TexCivA** 273SW866. (2) Other instances. 202Cal205, 259P755. [c] **Members of family and neighbors.**-229Ky103, 16SW(2d) 788. [d] **Long acquaintance.**-**TexCivA** 158SW(2d)166.

607-22 202Cal205, 259P755. [a] **Court should consider period of acquaintance and opportunity of observation.** CalA 288P841.

607-27½-New. or that there had been no change. **TexCivA** 273SW866.

607-28 217Ala364, 116S427; Ala 129S51; 161Ga651, 131SE507 (conclusion admissible when predicated on facts stated); 318 Ill 445, 149NE507; 200 Iowa1258, 206NW90; 208Ky686, 271SW1034; 208Ky672, 271SW1040; Md 149A283; 234Mich170, 207NW924; 146Miss547, 112S705; 118Nebr634, 225NW869, 64ALR1299; 194NC583, 140SE193; 20ObA216, 151NE788 (opinion that testator lacked mental capacity); **TexCommnA** 128SW(2d)978. See also 200 Iowa948, 205NW770. [b] **If detailed facts tend to show that mind of person is not acting normally opinion is admissible,** though such facts are not strong and persuasive proof of such unsoundness. 200 Iowa1258, 206NW90.

608-29 210Ky559, 276SW547.

608-30 146Miss547, 112S705 [citCJ]; Mo 198SW(2d)1033.

608-33 337 Ill 572, 169NE767; 239 Mich616, 215NW51; 239Mich630, 215NW55; Miss 107S527. [b] 200 Iowa 1258, 206NW90.

608-34 202 Iowa849, 211NW500; Miss 107S527; **TexCivA** 248SW(2d)786.

609-36 Miss 107S527.

609-39 216Ala43, 112S360; CalA 288P841; 122Kan294, 298, 252P256 [citCJ].

609-42 217Ala364, 116S427; Ark 32SW(2d)162; Me 152A84; Md 149A283.

610-44 176Minn360, 223NW677.

610-45 218Ala366, 118S547.

610-55 Mass 169NE513.

611-66 219Ala162, 121S543; 220Ala 220, 124S516 (memory affected since injury); **TexCivA** 286SW616.

611-70 197Cal674, 242P713; 252 IllA 92; 125Kan252, 264P59.

611-72 212Ala531, 103S553 (witness allowed to testify to having nightmares after unwilling detention in hospital); **TexCivA** 286SW616.

611-74 [a] 240Mich360, 215NW341.

611-76 28F(2d)687.

611-77 119Kan760, 241P259.

611-78 Ala 127S850; 73CalA565, 239P 60; 81CalA535, 254P310; 202 Iowa 1251, 211NW898; Mass 167NE641; Mo 188SW(2d)445; 117Nebr34, 219NW798; 116 Orl, 239P196; 142Wash213, 252P 699.

612-79 **TexCivA** 288SW248.

612-84 119Kan760, 241P259.

612-87 125Kan252, 264P59; 319Mo 644, 58W(2d)413; 58ND937, 228NW 432.

612-89 82NH423, 134A718.

613-1 219Ala623, 123S27; **TexCivA** 32SW(2d)513.

613-6 21AlaA389, 108S628; 207Cal 772, 279P478, 100CalA393, 280P560, 203 Iowa463, 212NW674. [a] 122 Or 637, 259P427.

613-7 217Ala108, 114S915.

613-8 217Ala108, 114S915, 52SD43, 216NW601.

613-9 219Ala623, 123S27; 52SD43, 216NW601.

613-11½-New. his reliance on representations; Ala 130S405.

613-13 **TexCivA** 32SW(2d)513.

613-14 229Ky339, 3SW(2d)611.

614-18 208Ky515, 2,2SW36, 192NC580, 135SE156; **TexCivA** 2,0SW1101.

614-19 208Ky686, 271SW1034, 208Ky672, 271SW1040, 208Ky515, 2,2SW36.

614-22 Nebr 230NW248; **TexCivA** 28SW(2d)941.

615-33 21AlaA551, 109S897; **MoA** 279SW158, 192NC580, 135SE156.

615-39 **TexCivA** 228SW(2d)550.

615-43 192NC580, 135SE456.

615-53½-New. , or that a person did not seem for long time to be as jolly and good natured as before accident. **TexCivA** 270SW1101.

616-68½-New. Testimony that certain persons objected to the presence of certain utility facilities near such persons' land is not a conclusion of witness, but a statement of fact. **TexCivA** 78SW(2d)937.

616-70 214Ala438, 108S255.

616-75 101WVa535, 133SE131.

616-76 233Ky105, 25SW(2d)54.

616-77 98NJEq381, 129A131 (abstract opinion on mental capacity of no weight).

616-88 73CalA565, 239P60; Utah 263P485.

616-89 208 Iowa1030, 226NW781; **MoA** 256SW105 (notice of defect in title to trade acceptances).

617-2 192NC580, 135SE456.

617-12 [b] **Necessity of operation on plaintiff** in personal injury case cannot be testified to by plaintiff who is not expert. **TexCivA** 282SW850.

617-14 162Ga718, 131SE781.

617-15 162Ga718, 131SE781.

617-19 5F(2d)936 (wife of dairy farmer assisting husband may testify as to his net income).

617-20 Iowa 231NW380; **TexCivA** 10SW(2d)1030. [b] **Conclusion of witnesses that debtor's statement of net wealth is untrue** is incompetent. Iowa 231NW380.

618-21 220Ala220, 124S516; Ala 130S786; 208Cal652, 284P443; 81CalA582, 254P582 (as to whether he ever had particular disease), 85CalA332, 259P470.

618-23 207 Iowa113, 222NW416, 62ALR1174.

618-26 **TexCivA** 228SW(2d)550. [a] 207 Iowa113, 222NW416, 62ALR1174. [b] **MoA** 248SW(2d)686.

618-28 212Ala531, 103S553; Ala 128S139 (continued nervousness and shock).

618-34 **TexCivA** 228SW(2d)780.

618-37 **MoA** 271SW851.

618-40 218MoA210, 265SW859 (plaintiff may testify dentist defendant dislocated her jaw).

618-42½-New. Witness not permitted to state that "through condition of office furnished her, she contracted neuritis." NJCh 129A399.

618-45 212Ky201, 278SW554; 219Ky 824, 294SW460.

618-46 153Md264, 138A1; 52ND688, 204NW344; 36Wyo473, 257P484.

619-47 216Ala426, 113S289; 219Ala 392, 122S349; 219Ala490, 122S621; Ala 128S139; 173Ark921, 293SW1045; 85CalA332, 259P470; 228Ky669, 15SW (2d)499; 153Md264, 138A1; Mo 271SW 500; 192NC580, 135SE456; 52ND688, 204NW344; 123 Or310, 261P71; 289Pa 381, 137A665; **TexCommnA** 248SW(2d) 347; **TexCivA** 274SW185; **TexCivA** 278SW272; **TexCivA** 58W(2d)230; **Tex CivA** 328SW(2d)703; 36Wyo473, 257P 484.

619-48 173Ark921, 293SW1045; **IndA** 171NE212; 218Ky750, 292SW297; 153 Md264, 138A1; 123 Or310, 261P71; **TexCivA** 274SW185; **TexCivA** 295SW 675.

620-49 52ND688, 204NW344; 123 Or 310, 261P71; **TexCivA** 270SW1101; **TexCivA** 274SW185.

620-51 265Mass186, 163NE742.

620-53 52ND688, 204NW344; 123 Or 310, 261P71; **TexCivA** 270SW1101.

620-55 123 Or310, 261P71; **TexCivA** 274SW185; **TexCivA** 275SW224; **Tex CivA** 28SW(2d)622. [a] (3) "Mental and physical wreck both" not objectional as a conclusion. **TexCivA** 275SW463.

621-56 39GaA597, 148SE12.

621-58 **TexCivA** 270SW1101.

621-59 Iowa 230NW570 (unable to work for two months); 52ND688, 204NW344. But see 219Ky824, 294SW460.

621-61 208 Iowa1157, 225NW346; **Tex CivA** 270SW1101. [a] 221MoA537, 282SW1037.

621-63 **TexCivA** 270SW1101.

621-64 **TexCivA** 270SW1101.

621-66 153Md264, 138A1. [f] **Scars.**-221MoA537, 282SW1037.

622-68 242 IllA93; NC 155SE247; 52ND688, 204NW344; ND 232NW754; **TexCivA** 286SW526; **TexCivA** 32SW(2d)703.

622-70½-New. that plaintiff was "awfully nervous" shortly after the alleged search of her home. 213Ala637, 105S899.

622-71 320Mo 371, 8SW(2d)11.

622-72 **TexCivA** 278SW772.

622-78½-New. Witness who was at scene soon after collision between automobile and boy riding bicycle, and who helped pick him up may testify as to what he saw at the time. 237Mich612, 213NW128.

622-81 212Ky201, 278SW554; 289Pa 381, 137A665.

622-84 192NC580, 135SE456. [c] 219 Ala23, 121S24.

624-12 [a] (3) Cannot state note written in handwriting of one other than maker would arouse suspicion and that variation in signature would support suspicion that it had been forged. 101WVa535, 133SE131.

624-15 Md 150A854.

624-18 164Ga575, 139SE34; 208Ky548, 271SW592; **TexCivA** 286SW673; 101WVa535, 133SE131, 134 [citCJ].

624-19 167Ga588, 146SE320; 208Ky548, 271SW592; 223AppDiv691, 229NYS336, 115Tex490, 283SW769. [f] **Witness knowing signature of testator,** although not familiar with his handwriting, is competent to testify. 215Ala402, 110S705.

625-20 28F(2d)459; 213Ala631, 105S886; 22AlaA633, 118S766(2dcase); 200 Iowa961, 205NW838 (opinion not incompetent, because witness had not done very much business with person, genuineness of whose signature was in question); 208Ky548, 271SW592; 215Ky613, 286SW696; 145Miss330, 110S795; 101WVa535, 133SE131.

625-21 145Miss330, 110S795.

625-25 215Ala402, 110S705. But see 213Ala631, 105S886.

625-28 208Ky548, 271SW592.

625-29 [a] See also 101WVa535, 133SE131, 134 [citCJ].

625-32 213Ala631, 105S886; 120Kan172, 243P266; **TexCivA** 286SW673.

626-33 120Kan172, 243P266.

626-34 120Kan172, 243P266; **TexCivA** 286SW673.

628-63 220Ala188, 124S416. [a] (6) Bank teller frequently paying out money on his signature. 96CalA465, 274P 566.

629-64 Mont 288P1023.

629-76 200 Iowa961, 205NW838.

629-77 295Pa120, 144A912.

629-80 318Mo 318, 300SW283, 290 [quotCJ].

630-83 200 Iowa961, 205NW838.

630-86 200 Iowa961, 205NW838.

630-88 200 Iowa961, 205NW838. But see 208 Iowa222, 225NW369.

630-97 152Md380, 136A900. [a] **Photostatic copies** for comparison purposes permissible only when impossible to obtain originals. 152Md380, 136A900 (must be exact copies of original).

630-98 101WVa535, 133SE131 (photographic enlargement admissible to facilitate comparison).

631-1½-New. Under some statutes ju-

ry may make comparison. 200 Iowa961, 205NW838.

631-13 [a] (8) Inadequacy of fire hose. TexCivA 298SW(2d)248.

631-14 Mo 287SW434.

632-19 298Pa130, 148A58.

632-23 55ND321, 213NW488; TexCivA 298SW(2d)853; TexCivA 298SW(2d)883.

633-24 168Minn259, 209NW905; 55ND 321, 213NW488.

634-28 Kan 289P456.

634-31 208Ky686, 271SW1034; Mo 19 SW(2d)483; 116 Or615, 241P843.

634-35 215Ala278, 1108465; 220Ala 155, 1248208; 110Conn319, 148A353; 215Ky487, 288SW1107; 150Md429, 133 A601; 47RI 125, 131A309; TexCivA 290 SW798.

635-36 Iowa 231NW347; 82Mont150, 266P869; TexCivA 275SW459; 100Vt 161, 135A702.

635-37 222AppDiv402, 226NYS317.

635-38 101CalA691, 282P390 (statement that one was witness' silent partner); Iowa 210NW791; 204 Iowa701, 215NW954, 956 [cit CJ].

635-39 215Ala509, 1108901.

635-40 77CalA82, 246P90.

635-41 [a] 20AlaA598, 1048444.

636-43 TexCivA 148SW(2d)335.

636-52 215Ala528, 1128102.

636-68 37GaA198, 139SE366; 132SC 488, 129SE428 (insured's application accepted); TexCivA 290SW798.

636-68 83Colo 562, 267P400.

637-70 255Mass563, 152NE321. [a] (5) Whether he knew that, if written contract was not changed, he could not recover. 255Mass563, 152NE321.

637-71 215Ala278, 1108465.

637-73 [a] (8) Effect of inserted members in application of insurance. 132 SC488, 129SE428.

637-73½-New. , as to rights of purchaser to take or leave cont purchased but not fully paid for. 47RI 125, 131 A309.

637-93 [a] (10) 31F(2d)396. (17) That requirements of statute governing sale were complied with by impounding officer. 9LaA313, 1198477.

638-94 150Md429, 133A601.

638-95 [b] **Statements held not objectionable as mental conclusions.**-Ala 130 8199.

638-99 MoA 285SW549; SD 226NW 339 (that witness bought certain article).

638-2 156Md662, 145A342 (that money was "borrowed" and property "pledged")

638-3 220Ala155, 1248208.

638-4 213Ala622, 1058811 (is fact to which witness may testify in general terms); 220Ala155, 1248208.

639-5 [a] Iowa 210NW791.

639-8 213Ala662, 1068144; 89 IndA 393, 166NE615; TexCivA 118SW(2d)594.

639-10 220Ala155, 1248208 (and terms thereof).

639-16 TexCivA 284SW322.

639-24½-New. "Decedent did not spend much money on himself as distinguished from his family" admissible as estimate based on observation and not objectionable as opinion. 190NC231, 129SE580.

639-25 [a] (1) TexCivA 281SW306. (3) TexCivA 281SW306. (5) TexCivA 281SW306.

639-26 217Ala282, 1168164. [b] 217 Ala282, 1168164.

639-27 168Minn259, 209NW905; Mo 288SW(2d)84(2dcase); MoA 188SW(2d) 545; 143 Okl101, 287P1014; TexCivA 275SW430; TexCivA 218SW(2d)541; 36 Wyo 473, 257P484. See also 294Pa585, 144A765. [b] **Where main issue in case involves expert testimony,** evidence on such issue must contain expert testimony or it will not suffice. 106Conn366, 138A153.

639-30½-New. The fact that a witness is an expert does not entitle him to testify as to ultimate facts in issue, and thus invade province of jury. 102NJL 307, 131A905.

639-30½-New. Expert opinions are admissible only when subject matter of controversy renders it proper to resort to opinion evidence. 234Ky639, 288W (2d)956.

640-33 [a] **Though based on inadmissible sources,** expert's testimony is entitled to credit because of his experience. CalA 285P896(2dcase).

640-35 173Ark362, 292SW657; 203 Iowa1305, 211NW735; 153Md547, 138A 415; 174Minn107, 218NW461; 129Misc 447, 221NYS714; 230AppDiv52, 243NYS 57. [a] **Evidence held not to show** opinion based on history of case obtained from plaintiff's family. 319Mo 1169, 8 SW(2d)580.

640-37 But see 5F(2d)77; 125Mo88, 131A1; 197Wis33, 221NW392. [d] **X-ray plates.**-220AppDiv284, 221NYS 181.

640-41½-New. That sources of knowledge derived from matters inadmissible in evidence does not render opinion inadmissible. 104Conn464, 133A579.

640-41½-New. An architect may base opinion as to the reasonable value of services on the standard of charges made by the American Institute of Architects. RI 137A467.

640-42 297Pa124, 146A562.

640-43 150Md429, 133A601.

640-44 150Md429, 133A601; MoA 279 SW761.

642-49 [a] **Question held to exceed range of expert opinion evidence.**-Ala 130SE788.

642-50 214Ala15, 1068239; 35GaA438, 134SE122; NJSup 152A182(1stcase); 194NC289, 139SE413, 54ALR855; TexCivA 281SW306. [a] 194NC289, 139SE 443, 54ALR855.

642-51 30F(2d)319; 40F(2d)708; Ala 130S203; Cal 291P173; CalA 288P716; 121Or418, 255P464; 70Utah72, 257P 1066. But see 220Ala593, 127S153. [a] (15) Whether fractures could be caused by coming in contact with end of box car. 70Utah72, 257P1066.

642-52 94CalA760, 271P113.

642-53 Mass 166NE638; 129Misc447, 221NYS714.

643-56 190NC24, 128SE485 (expression of opinion from assumed facts and not inference from testimony).

643-56½-New. The courts are vigilant to see that province of jury shall not be invaded and to this end exclude as far as possible any inference or conclusion as to ultimate fact in issue. 190NC24, 128SE485.

643-57 222Ky531, 18SW(2d)972. [b] (3) Farmer experienced in growing same variety of sorghum cane as that in suit, in same neighborhood and on similar soils and who knew plaintiff's crop. 213Ala260, 1048509. [c] **Real estate dealer** is not competent to testify what would be "proper improvements" on land especially adapted to raising fruit. 40F(2d)894.

643-59 CalA 290P486.

643-62 [a] (3) Extent and deterioration of loss in quantity and quality of syrup produced from given variety of sorghum cane by delay in working it up. 213Ala260, 1048509.

643-63 Ark 328SW(2d)439.

643-76 TexCivA 278SW479.

644-78 [b] **Shrinkage,** as result of negligence in transporting. TexCivA 278 SW179.

644-79 [b] 201 Iowa1202, 203NW284; 200 Iowa272, 204NW301.

644-81 200 Iowa272, 204NW301.

644-82 200 Iowa272, 204NW301.

645-93 155Miss198, 124S334(1stcase) (cargo of cattle). [c] **Qualifications of witness.** 155Miss198, 124S334(1stcase).

645-7 [a] (7) 201 Iowa647, 207NW750.

646-9 157Md652, 147A790, 65ALR1285.

646-10 TexCivA 218SW(2d)547.

646-17 But see 157Md652, 147A790, 65 ALR1285.

646-21½-New. meaning of marks and characters on an architectural drawing. 201 Iowa647, 207NW750 (on blueprint indicating presence of sewer).

647-26 But see 333 Ill 78, 164NE162, 60 ALR353.

648-43 234Ky639, 28SW(2d)956; Md 150A864; NJ 148A641; NJSup 149A 828; TexCivA 28SW(2d)622. [a] **Cause of collapse of roof.**-219Ala108, 1218388.

648-44 330 Ill 264, 161NE186; 153Md 102, 137A506; MoA 273SW213; 195NC 105, 128SE483; TexCivA 289SW190.

648-45 Ala 127S608.

648-45½-New. or fire, 262Mass469, 160 NE306.

648-49 TexCivA 88SW(2d)1104.

648-65½-New. In a personal injury action, where probable length of life as affected by injury was relevant, the opinion of physician that considering plaintiff's physical condition before the injury he would live about nine years, but because of accident he would probably live about four years from that time, is admissible. 257Mass575, 154NE 268.

648-66 Vt 147A352 (effect of wind on barn).

648-67 96CalA84, 273P820; 153Md102, 137A506; TexCivA 48SW(2d)328.

648-68 TexCivA 288SW(2d)622 (effect of pending law suit on person's health).

648-69 298Pa174, 148A67, 68ALR600; 98PaSuper250; 8PaDist&Co 366.

648-69½-New. Allowing physicians to testify that cause of neurasthenia was shock received on trial two and one-half years after offense was improper. 201 Iowa1202, 203NW284.

649-84 318 Ill 230, 149NE297.

649-87½-New. liability of scrap motion picture film to explode; Mass 167NE 235.

649-92 218Ala609, 1198647; 219Ala427, 1228416, 65ALR1097; 195Wis253, 218 NW186. [a] 218Ala609, 1198647.

649-95 [a] **In action to recover tax on rectified gin** evidence as to conduct of substances well known to chemists is admissible to base thereon argument as to conduct of substances confessedly used by plaintiff. 5F(2d)167.

649-97 140Wash663, 250P64.

650-1 31F(2d)717; 23AlaA454, 126S 886; 150Md429, 133A601; 298Pa560, 148A851; 192Wis249, 212NW796. [a] (5) 207Cal154, 277P481. (14) 222MoA 1146, 158SW(2d)970. (42) Railroad car wheels. MoA 148SW(2d)972 (whether wheels would fall from pipe used in raising them). (43) Construction of race track. Tex 128SW(2d)599(2dcase). (44) A roof. 219Ala108, 1218388. (45) Sewer. 208Cal19, 280P130 (effect of improper construction).

651-2 [a] (13) An electric transformer. 101CalA174, 281P634.

651-5 Conn 151A351.

652-28 166La681, 1178772.

652-32 219Ala298, 122841; 87Colo 401, 288P633; SD 231NW521; TexCivA 289 SW190; 36Wyo 473, 257P484. [a] (38) Sufficiency of one watchman at compress plant. TexCivA 108SW(2d)1040. (39) Testimony as to nature of injury in malpractice suit. TexCivA 289SW190. (40) Manner of treating patient. 36 Wyo 473, 257P484. (41) Leaving patient alone during treatment by diathermy machine. Or 292P93. [c] **Report of superintendent of buildings** that floor collapsed because of excessive weight is held to be not evidence of negligence on part of tenant. 242NY120, 151NE 150.

653-33 105Conn528, 136A76. [a] (8) Report of superintendent of buildings that floor collapsed because of excessive weight is not evidence of negligence, at most it is mere conclusion. 242NY 120, 151NE150.

653-34 Ala 1288433.

653-38 Ala 1308788; 315Mo 367, 286 SW106; MoA 38SW(2d)740; TexCivA 281SW306. [a] (2) 145Va409, 134SE 558. (9) Operation of X-ray machine as constituting negligence. 173Ark1104, 295SW16.

654-44 [a] (1) 38Wyo190, 266P117. [b] (2) That "bell traps" will not prevent water from sewer backing up and overflowing basement, in case of heavy rain, does not require expert testimony. 87 IndA333, 158NE294.

654-46 161Minn390, 205NW277.

654-51½-New. Whether area of greatest overflow with and without the dam could be determined from data specified without the use of text-book material; 331 Ill 277, 162NE865.

655-69½-New. A coroner claiming to have some experience may testify as to whether a right handed man could fire a pistol with his left hand. 173Ark937, 291SW353.

655-71 212Ky770, 280SW127. [b] (3) Local agent who has never worked for any other company is not qualified to testify concerning usual practice of insurance companies other than one he represented in accepting or rejecting applications for insurance. 228Ky399,

15SW(2d)242(2dcase).
655-73 Wis 228NW746.
655-81 But see 229AppDiv813, 242NYS 640.
655-86 CalA 266P307. But see Tex CivA 275SW248.
655-87 212Ky763, 280SW123.
655-87½-New. A witness should not be permitted to testify as to whether, in his opinion, answers to questions in an application for life insurance were substantially true. 212Ky763, 280SW123.
656-96½-New. Deputy auditor may state if mortgage had been properly indexed on records. 145Wash77, 258P 839.
656-96½-New. Whether a lease is ambiguous or not is not a subject for expert testimony. TexCivA 282SW930.
656-96¼-New. In Ontario opinion of lawyer of foreign country as to law thereof is not proof of such law. Ont [1929] 4DomLR643.
656-97 213Ala494, 106S150; 43 Ida111, 249P773; MoA 275SW586. See also 217Ala23, 114S406. [a] (7) 150Miss 245, 116S593. (12) That certain marks on trees were old marks. 148Md391, 129 A354. (13) Location of forest fire. 30 F(2d)642.
656-98 MoA 24SW(2d)682; 128 Or650, 275P666 (automobile mechanic).
656-99 214Ala15, 106S239; 83NH29, 137A445; 128 Or650, 275P666; 106WVa 717, 146SE882 (distance in which particular make and model of automobile could be stopped).
656-2 [a] Testimony as to method of using simple appliance incompetent.-MoA 7SW(2d)1032.
656-4 216Ala663, 114S182; TexCivA 29SW(2d)883.
657-57 310Mo 419, 276SW614 (scaffold rendered unsafe by use of nails).
658-60 Ark 31SW(2d)947. [a] Whether elbow pipe of dredge is classified as machinery. 31F(2d)149.
658-62 38GaA619, 144SE827 (speed of particular automobile).
658-63 215Ala554, 112S122.
658-67 310Mo 419, 276SW614 (scaffold for painting ceiling).
659-71 216Ala642, 114S298.
659-77 Vt 151A568.
659-78 216Ala642, 114S298 (radio).
659-79 TexCivA 284SW664.
660-80 215Ala554, 112S122; TexCivA 284SW664.
660-89 TexCivA 8SW(2d)527.
660-93 14F(2d)734.
661-6 26F(2d)975.
661-11 TexCivA 284SW664.
661-19 217Ky389, 289SW290; Mass 169NE797; MoA 288SW974, 977 [cit CJ]; 105NJL174, 143A315; NJSup 148 A154; TexCivA 283SW661. [a] (11) Ability to labor in certain vocations. 180Minn298, 230NW823.
662-20 264Mass217, 162NE337; MoA 27SW(2d)739.
662-24 248 IllA609.
662-25 [a] (3) Concussion of spinal cord. 157Md528, 146A851.
663-30 219Ala384, 122S322; 29Ariz405, 242P436; Iowa 218NW492; Minn 233 NW317; 34Wyo 1, 241P369.
663-32 219Ala384, 122S322; 87 IndA 433, 157NE456; 126 Or26, 268P750; 132 Or641, 285P819, 821 [citCJ].
663-33 338 Ill 596; 170NE685 (that abortion was unnecessary to save life).
663-35 Ala 128S233; 128Kan618, 278 P707 (that injury was disabling); 265 Mass444, 164NE448; 290Pa551, 139A 266; Vt 152A41 (explaining what X-ray pictures show). [a] (6) 107WVa181, 147SE759 (loss of eye). [b] (3) Electric burns in skull might cause nervousness, impaired mind, dizziness, and other complications. TexCivA 7SW(2d) 1112.
663-36 [a] (6) Effect of breathing monoxide gas by person with weak heart. NJSup 145A238.
663-37 Cal 291P173; 169Minn342, 211 NW580; Mo 273SW110.
664-38 42F(2d)804; MoA 273SW213.
664-39 [b] Credibility of drug addict. -48Nev205, 228P615, 230P801.
664-40 153Md680, 139A557.
664-41 37F(2d)230.
664-44 87Colo 297, 287P859; MoA 282 SW117; 295Pa342, 145A293; 96PaSuper336; 101Vt143, 141A684 (loss of vision). [d] Where injuries are of character requiring skilled and professional men to determine cause and extent thereof, question as to cause of injury is one of science necessarily to be proved by testimony of skilled professional persons. 113 Okl 179, 241P170.
664-45 218Ala290, 118S506(2dcase); 218Ala609, 119S647; 39GaA597, 148SE 12; 169Minn218, 210NW996; Mo 19SW (2d)679; Mo 20SW(2d)34; MoA 27SW (2d)739; TexCivA 297SW638. [c] (3) 12PaDist&Co 216. (8) 169Minn218, 210 NW996; Or 292P93 (nervousness). (12) Eye cataract. 218Ala384, 118S565.
665-46 227Ky841, 14SW(2d)174; 231 Ky60, 21SW(2d)125; 233Ky194, 25SW (2d)358; 319Mo 8, 4SW(2d)762; 297Pa 124, 146A562.
666-47 [d] That putrid odor from wound indicated gradual and not sudden growth of infection. 219Ala384, 122 S322.
666-51 197Wis83, 221NW392.
666-52 8PaDist&Co 366.
66-53 MoA 18SW(2d)520. Contra 96 PaSuper336. [b] (5) That invalidism of plaintiff could have resulted from injuries received in automobile collision. MoA 25SW(2d)491.
667-54 248 IllA287; 125 Or280, 266P 627; TexCivA 298SW666.
667-56 237Mich76, 211NW75.
667-57 224(2d)551; NoCalA332, 259P 470; CalA 285P751; MoA 285SW127; MoA 16SW(2d)649.
668-70½-New. Question requiring scientific knowledge can be answered only by those possessing such knowledge. 86 IndA294, 157NE101.
668-70⅓-New. Human ability in a customary connection is within the rule excluding opinion evidence. 242 IllA93 (whether injured person would be able to resume work as coal miner).
668-71 See also Kan 289P456.
668-72 Md 149A283; 249Mich653, 229 NW485; 286Pa536, 134A446; TexCivA 275SW206; TexCivA 286SW616.
668-73 217Ala364, 116S427; 218Ala 209, 118S396; 89CalA336, 265P281; 248 IllA545; 200 Iowa1180, 206NW95; 208 Ky686, 271SW1034; 157Md492, 146A 432; Md 150A263; Mo 278SW759; NJ 130A732; 229AppDiv687, 242NYS289; 116 Or467, 241P996; 131 Or27, 279P635, 67ALR1; 286Pa536, 134A446; TexCivA 275SW206; TexCivA 286SW616.
668-76 21AlaA289, 107S791.
669-77 286Pa536, 134A446.
669-78 TexCivA 286SW616.
669-83 Mo 278SW759.
669-83½-New. or whether his mind was sound or unsound, TexCivA 275SW206.
669-85 116 Or467, 241P996.
669-88 239Mich616, 215NW51; 116 Or 467, 241P996; TexCivA 275SW206.
669-89 TexCivA 271SW311; TexCivA 275SW206.
669-89½-New. or had mental capacity to understand or carry on a business transaction. TexCivA 275SW206.
669-95. [a] Mo 278SW759. [b] Physician may state grantor had capacity to understand nature and effect of action in business when matters are fully explained. TexCivA 271SW311.
670-97 200 Iowa1180, 206NW95.
670-98 247 IllA378; 19OhA262.
670-1 34Ariz458, 272P647; 160Ga886, 129SE539.
670-3 34Ariz458, 272P647. [b] Opinion based on admission against interest.-34Ariz458, 272P647.
670-7 MoA 288SW91.
670-8 131 Or27, 279P635, 67ALR1.
670-10 MoA 285SW151; 221MoA626, 287SW1053; 222MoA346, 300SW845; 286Pa536, 134A446.
671-11 Ill 173NE70 (conclusion based on both objective and subjective symptoms admissible).
671-13 221MoA626, 287SW1053; 131 Or27, 279P635, 67ALR1.
671-15 131 Or27, 279P635, 67ALR1. But see Md 148A814.
671-16 221MoA626, 287SW1053; 286 Pa536, 134A446.
671-17 219Ala201, 121S704, 64ALR553 (2dcase); 286Pa536, 134A446.
671-18 See also 128Kan618, 278P707.
671-20 153Md547, 138A415.
671-21½-New. The proper time to question validity of judgment issued on defective return is not later than the acknowledgment of the sheriff's deed. 284Pa32, 130A264.
671-22 128Kan524, 278P764, 65ALR 1213.
671-23 119Kan738, 241P246 (record held not to show testimony violative of rule); 19 OhA262. But see 235Ky335, 32SW(2d)411; 131 Or27, 279P635, 67 ALR1. [a] Testimony based partially on objective symptoms and partly on statements made by person under examination is inadmissible. 19 OhA262.
672-25 339 Ill 276, 171NE271; 319Mo 48, 274SW764. [a] (4) That injury is permanent. 128 Or409, 272P1027. [b] Pictures need not be present at time of testifying. 310Mo 48, 274SW 764.
672-26 89 IndA403, 164NE300.
672-29 Me 151A197.
672-36 21AlaA378, 108S646.
672-42 33PortoRico 48.
673-52 234Mich307, 207NW822.
673-57 [a] (1) 19 OhA262. (3) Physician who made examination for purpose of qualifying as witness may not testify as to exclamations of pain by injured person (234Mich307, 207NW 822). (4) but he may testify as to existing conditions calculated to produce pain (234Mich307, 207NW822).
673-70 214Ala314, 107S858; 207 Iowa 113, 222NW416, 62ALR1174; Md 148A 122; Mich 233NW365; 192NC638, 135 SE614; 120 Or181, 250P628; 147Wash 251, 266P727. [a] (11) CalA 285P751.
674-71 232Ky546, 24SW(2d)275; Mo 278SW361; Mo 298SW51; MoA 288SW 992; MoA 296SW1036; MoA 19SW(2d) 559; MoA 28SW(2d)1044; 120 Or181, 250P628; TexCivA 286SW661; TexCivA 8SW(2d)560.
675-72 TexCivA 286SW661.
675-75 CalA 290P80; 192NC638, 135 SE614.
675-76 [b] (4) "I think." 96PaSuper 221.
675-77 120 Or181, 250P628; 147Wash 251, 266P727. [c] Statement that it would be "hazardous guess" to say how long nervous condition would persist is admissible. TexCivA 286SW661.
675-78 120 Or181, 250P628.
675-81 CalA 288P692; CalA 288P716; 156Md88, 143A651; TexCivA 25SW(2d) 902. [e] Whether skilled witness is sufficiently expert is question for court. 33PortoRico 48.
676-82 216Ala43, 112S360. [f] Osteopath, legally qualified to practice medicine, is competent to give testimony as medical expert. 218Ala541, 119S672. [g] Propriety of treatment by naturopath.-Regular physician is qualified to testify whether treatment by naturopath was proper. 132 Or641, 285P819.
676-83 218Ala599, 119S644; 37GaA703, 141SE504; 261Mass40, 158NE270, 57 ALR974; Mo 273SW110; MoA 24SW (2d)166. [d] Analytical chemist may testify as expert as to poisonous effects of copper. 218MoA253, 267SW431. [e] Chiropractor who had studied X-ray could testify as to burns. 173Ark1104, 295SW16. [f] X-ray specialist who has studied anatomy may testify as to making X-ray pictures of certain bones and give his opinion therefrom as to whether bones have been injured. 37GaA703, 141SE504.
676-86 37GaA703, 141SE504; Mo 273 SW110.
676-87 37GaA703, 141SE504.
676-95 38F(2d)731 (chiropractor). [a] 105Wis253, 218NW186.
677-96 194NC289, 139SE443, 54ALR 855; NC 154SE667. [b] NJSup 136A 715; 194NC289, 139SE443, 54ALR855.
677-99 TexCivA 281SW1092.
677-2 See also 288Pa377, 135A722.
677-3 218Ala541, 119S672; 319Mo 1169, 8SW(2d)580; TexCivA 281SW895, 896 [citCJ].
678-18 49Nev90, 237P534 (in suit for annulment of marriage plaintiff's brothers and business associates may express opinion as to mental capacity to understand seriousness of marriage contract).
678-19 [a] Testimony of hospital interne not erroneous because interne was

not licensed physician. 293Pa441, 143A 131.
679-22 Miss 107S527.
679-28 NJSup 149A335 (as to which wheel of truck ran over person).
679-32 [a] (3) Physician may not testify as to degree of care required in X-ray treatment. 29Ariz405, 242P436. [b] Testimony held not inadmissible as upon ultimate question to be decided. 128Kan618, 278P707.
680-40½-New. Witness testifying to medical treatment employed on a particular occasion cannot testify that such treatment was the usual and ordinary practice of the profession at the time and place in question. 202 Iowa273, 209 NW393.
680-40½-New. Whether the results of medical treatment employed were satisfactory is inadmissible as a conclusion. 202 Iowa273, 209NW393.
680-40¼-New. Speculative conclusion of physician is inadmissible. 217Ala 108, 114S915 (action on different information).
680-51 161La827, 109S505.
680-54 274US225, 47SCt616, 71L ed 1013.
680-55 274US225, 47SCt616, 71L ed 1013.
680-66½-New. A person qualified as an expert may testify that one cotton market follows another as a general rule. TexCivA 274SW253.
680-66½-New. Such testimony is not objectionable as basing a conclusion on a conclusion. TexCivA 274SW253.
680-66¼-New. A person familiar with the rules governing buying and selling of cotton exchanges may testify as an expert as to which party under such rules is required to bear loss from breach of contract. TexCivA 274SW253.
681-70 [b] (21) Removal of ore had witness been permitted to do so, stating method and cost. 42 Ida458, 246P 304. (22) Whether water in plaintiff's oil wells came from near-by abandoned wells. 214Ky838, 284SW95.
681-75 274US225, 47SCt616, 71L ed 1013; 181Ark1096, 29SW(2d)304; 203 Cal 211, 263P806; Mass 167NE235; TexCivA 294SW984. See also MoA 294SW 132. [a] (18) Condition of onions. 223 AppDiv742, 228NYS23. [c] Qualification of witness as to quality of silk.-236Mich412, 210NW211.
682-76 Mo 29SW(2d)64. [a] (4) Whether sidewalk was reasonably clean. 200 Iowa1100, 205NW956.
683-2½-New. Where witnesses experienced in stowage approved particular stowage of cargo, the usage of trade, and not the opinion of chemists, is the test whether there was negligence in stowage thereof. 27F(2d)722.
683-13 287Pa232, 134A386; TexCivA 289SW190. [a] (12) Quality and utility of material and appliances. 200 Ind 616, 165NE911. [b] Physician and county health officer held qualified to testify that water was unfit for use, though he was no bacteriologist and had made no chemical analysis of water. 207Cal 8, 276P1017(2dcase).
684-23½-New. X-ray photograph made on doctor's order may be admissible. 101NJL554, 129A146.
684-23½-New. Expert testimony is admissible to explain significance of lights and shadows of radiograph. Iowa 229 NW210.
684-23¼-New. After dentist has testified concerning plaintiff's injuries, his testimony, based on disclosures of lost X-ray photographs, may be admissible. 198 NC130, 150SE717.
684-23½-New. Statement that X-ray cannot deceive admissible. NC 154SE 667.
684-24 23F(2d)447; RI 134A13. Contra 219Ky119, 292SW765. [a] (4) Amount of clay in pit. 217MoA502, 274 SW941. (5) Grossness of mistake in measurement of work on highway. 318 Mo 64, 298SW842.
684-26 4HawaiiFed539.
684-27 213Ala191, 104S397; 310Mo 1, 274SW1079; TexCivA 283SW689.
685-37 218Ala290, 118S506(2dcase).
685-39 [b] Testimony of expert that car furnished to transport strawberries was one of fifty constructed alike to produce proper refrigeration has been held admissible. 173Ark84, 291SW 1001.
685-44 Ala 128S228.
686-49 205 Iowa446, 214NW692.
686-50 205 Iowa446, 214NW692; Utah 275P582.
686-54½-New. duty of shop engine crew foreman to see that cars on track are left in clear for switch movements; 213Ala191, 104S397.
686-55 315Mo 409, 286SW45.
686-57 35GaA528, 134SE126.
687-74 TexCivA 283SW689. [c] Speed of hand car attached to gasoline motor car. 226Ky472, 11SW(2d)131.
687-88 216Ala89, 112S323.
687-92 TexCivA 274SW200. [a] Engineer dismissed from service of railroads is competent to testify as to distance within which train could stop while traveling at certain speeds, where dismissals were not for incompetence. Utah 275P582.
688-94 TexCivA 274SW200.
688-98 Ala 128S228; TexCivA 28SW (2d)611.
688-8 205 Iowa446, 214NW692.
688-12 38F(2d)751.
688-13 MoA 278SW814; MoA 294SW 439.
688-14 MoA 278SW814.
689-20 20AlaA617, 104S559.
689-21 20AlaA617, 104S559.
689-22 [a] (7) Question as to how suit cases in aisles of railway coaches might interfere with business of carrying passengers. 20AlaA617, 104S559. (8) Other instances. 158Tenn407, 15 SW(2d)1.
689-23 322Mo 386, 15SW(2d)335.
689-25 237Mich393, 212NW75.
689-27 218MoA563, 267SW6.
689-27½ [a] (2) 218MoA563, 267SW6.
690-41 100Vt334, 137A199.
690-48 214Ala194, 106S814; 100Vt334, 137A199.
690-51 123 Or370, 261P69, 70 [citCJ].
690-56½-New. In a disputed boundary case, an expert surveyor's testimony that in his opinion a boundary line is located as contended by plaintiff is inadmissible as invading the jury's province. TexCivA 291SW279.
691-63 [a] Express company's superintendent of car equipment held qualified to testify as to sufficiency of ice furnished to produce and maintain proper refrigeration. 173Ark84, 291SW1001.
691-66½-New. whether grain was in condition to be shipped without damage if handled with ordinary care; TexCivA 280SW611.
691-79 15F(2d)897; 21F(2d)298; 217 Ala524, 116S689; 104Conn464, 133A 579; 126Kan39, 267P19 (testimony of assistant receiver as to value of assets of bank); 173Minn436, 217NW483 (bank examiner held competent witness); 83NH411, 143A524. [a] (2) Evidence of value is generally matter of opinion. 176Ark684, 3SW(2d)999. [h] Question of value is opinion evidence. 212Ala503, 103S569.
692-80 43F(2d)345.
692-80½-New. It is only where value has in some way been liquidated that proof of value and cost becomes that of substantive facts and ceases to be opinion testimony. 35GaA8, 131SE543.
692-83 TexCommnA 280SW557. See also 21F(2d)298.
692-86 TexCivA 25SW(2d)671.
692-87 Wash 287P878. [e] Experienced engineer testifying as to depreciation in rate case may submit appraisement made on assumption of correctness of records, exhibits, and evidence. 19F(2d)547.
692-88 15F(2d)897.
692-92 215Ky77, 284SW405, 47ALR 483.
693-96 35GaA8, 131SE543; 128 Or476, 274P903(2dcase) (personal property). [a] Expert testimony held sufficient to sustain award of four thousand dollars damages for breach of contract to take lease. 193Wis350, 214NW349, 53ALR 2...
693-97 21F(2d)298; 22AlaA204, 114S 176; 151Md375, 135A584; NJSup 135 A58; 21 OhA255, 153NE86; 117 Or179, 242P1116; 122 Or579, 260P444; 50RI 50, 144A883; TexCivA 23SW(2d)851. [a] General building contractor.-41Wyo 402, 286P372 (qualified as to values of heating plant, plumbing and electric wiring).
693-99 123Kan533, 255P969; SD 231 NW904; TexCivA 8SW(2d)561. [c] Dealer in cattle not qualified to testify to market, intrinsic, or actual value of registered holstein bull. TexCivA 271 SW126. [d] Cattle dealer who auctioned cattle in question.-Nebr 230NW 102. [e] Veterinary.-50RI 192, 146A 773. [f] Cattle buyer who saw cattle immediately before delivery at destination.-Nebr 230NW102.
694-3 MoA 294SW439 (experienced stock shipper); TexCivA 18SW(2d)782.
694-8 [a] Witness engaged in buying and selling bottles for over twelve years is presumed competent to state market value of bottles as of given date. 214 AppDiv626, 212NYS444.
694-10 24F(2d)191; 78CalA561, 248P 990; 104Conn73, 131A412; Nebr 230 NW835; 296Pa568, 146A153.
694-11 TexCivA 30SW(2d)930.
694-14 [c] Shipper competent.-TexCivA 10SW(2d)400.
694-16⅓-New. sugar; 15F(2d)897.
694-17 128 Or476, 274P903(2dcase). [a] 83NH411, 143A524.
694-22 22AlaA204, 114S176; 122 Or 579, 260P444.
695-31 38F(2d)314.
695-36 Colo 292P601; 123Kan277, 255 P74; NJ 150A408; 21 OhA255, 153NE 86. [a] 123Kan277, 255P74. [d] Opinion of expert as to value, though uncontradicted, is not controlling in deciding jurisdiction of court. 129Misc152, 220 NYS42. [e] Mechanic having considerable experience with cars of same make held competent to testify as to value. NJSup 145A240.
695-38½-New. Evidence as to the value of a drug store is admissible on the question of damages for breach of a covenant in the lease. MoA 16SW(2d) 219.
695-40 40F(2d)277 (damage to vessels); 203 Iowa715, 211NW872.
695-44 258Mass456, 155NE452; 128 Or 476, 274P903(2dcase); 49RI 198, 141A 466; TexCivA 281SW622. [b] Corporate property.-49ND626, 193NW144. [c] Value of automobile before and after accident may be testified to by witness who has seen new and second-hand cars of same make bought and sold. 203 Iowa715, 211NW872.
695-45 15F(2d)897; 22F(2d)728; 58 ND812, 228NW212 (value of grain). See also 123Kan533, 255P969. [a] Coal dealer who has for a long time purchased coal at points in foreign state is competent to testify as to value at such points. 202 Iowa292, 209NW465.
695-46 22F(2d)515 (weight only affected); 107Conn365, 140A758.
695-46½-New. Testimony of a witness on cross-examination going only to the weight of his testimony does not require his testimony to be stricken. 203 Iowa715, 211NW872.
695-46½-New. State liquidating officer of an insolvent bank, in charge thereof from its close, may state whether in his opinion any equity remains in pledged bills receivable of bank after payment of loans secured by pledges. 8F(2d)922.
695-48 213Ala494, 106S150; 30Ariz569, 249P751; 321 Ill 538, 152NE486; 265Mass549, 163NE711; 265Mass270, 163NE888; NJSup 139A413; 118 Or 166, 246P707; TexCivA 275SW218; TexCivA 276SW784; TexCivA 291SW 317. [b] Mass 165NE1. [c] (3) Witness familiar with land values in vicinity could testify as to value, though he knew of no sales in neighborhood. 229 Ky345, 17SW(2d)203. (4) One knowing positive market value of property is prima facie qualified to testify. TexCivA 12SW(2d)263.
696-50 41GaA212, 152SE303 (sufficient knowledge presumed).
696-51 216Ala160, 112S763; 167Ga214, 144SE735; 337 Ill 555, 169NE753; 88 IndA339, 156NE571; 219Ky279, 292SW 790; 226Ky75, 10SW(2d)451 (timber);

104NJL385, 140A450 (market value); NJ 150A354; NJSup 139A413; Tex CivA 275SW218. [b] 30Ariz569, 249P751; 84CalA42, 257P573 (grazing land). [c] **Opinion must be as to value of property** in its entirety. 291Pa252, 139A848. [d] **Evidence of mere opinion as to value of land condemned** must be confined exclusively to subject as to which damages are claimed. 265Mass494, 163NE255.

696-52 172Ark151, 287SW738; 164Minn401, 205NW282; TexCivA 275SW218; TexCivA 276SW784. [a] Tex CivA 275SW90. [b] (1) 88IndA339, 156NE571; 226Ky75, 10SW(2d)451. [c] **Justice of peace and real estate agent** acquainted with real estate values in neighborhood are qualified to testify to market value of farm. TexCivA 276SW784.

696-60 Mass 172NE855.

696-64½-New. timber; 213Ala494, 106S150.

696-65½-New. probable life of new gas fields; 116OhSt596, 157NE72.

696-66 47RI473, 134A9.

697-72 181Ark318, 26SW(2d)572; 321Ill538, 152NE486; 190NC577, 130SE203; TexCivA 281SW577; 155Wash98, 283P667 (architect and contractor held qualified on difference in value because of defective construction).

697-73 216Ala160, 112S763; 176Ark253, 3SW(2d)969; 86CalA404, 261P536; Ida 290P393.

697-76 190NC577, 130SE203.

697-80 TexCivA 281SW577.

697-81 [c] **Spread of Johnson grass.**-TexCivA 275SW218.

698-96 200Iowa495, 203NW794 (witness who never saw land in question but once and lived three hundred miles from it held incompetent); 216Ky303, 287SW357; 105NJL165, 143A369; TexCivA 281SW604; TexCivA 295SW646. [d] **Testimony as to value of land infested with Johnson grass.**-TexCivA 275SW218. [e] **Testimony is admissible over objection that witness did not know condition of land** as infested with Johnson grass where he was acquainted with land and its value, and testimony was merely as to value if not infested with such grass and its value if so infested. TexCivA 275SW218. [f] **Testimony as to damages to land from construction of electric lines** is not limited to testimony of electric experts. 205Iowa283, 218NW66; TexCivA 291SW317. [g] **Landowners** who know value of land sought to be condemned for electric power line are competent to testify to amount of damages although not qualified as electrical experts. 205Iowa283, 218NW66. [h] **Qualifying knowledge of comparable sales** must be such as would be competent if testified to, or must be substantiated by other competent evidence. NJ 150A387.

698-96½-New. Witness qualified to testify as to market value of leasehold is competent to give opinion as to value of undivided interest therein, (TexCivA 299SW687).

698-96⅓-New. and where court had authority to find value of undivided interest from proof of value of entire leasehold testimony of such witness is admissible. (TexCivA 299SW687).

698-97 4HawaiiFed6; Ida 290P393; Mass 165NE1; 105NJL419, 144A809; NJSup 139A413; NJSup 139A415; 47RI473, 134A9; TexCivA 299SW277. See 331Ill322, 163NE17 (witness familiar with territory giving testimony as to value, though based largely on remote investigation, where he also testified as to more recent sales in surrounding territory).

698-98 TexCivA 275SW90 (county surveyor informed by others who had purchased land near semiarid sparsely settled land at distance competent).

698-1 NJSup 139A413; NJSup 139A415; 47RI473, 134A9.

698-2 TexCivA 299SW687, 690 [citCJ].

698-8 104Conn464, 133A579; MoA 279SW253; 142Wash571, 253P797.

699-9 181Ark1096, 29SW(2d)304; Mo 10SW(2d)651; 26OhA546, 160NE97.

699-11 95CalA772, 273P613; 104Conn464, 133A579.

699-18 [b] **Fact that witness testifying was physician** did not entitle him to testify as expert on reasonable value of care, board, and lodging in vicinity, nor did it disqualify him from so testifying. 119OhSt603, 165NE301.

699-23 33Ariz64, 262P489 (mining engineer).

699-25 87CalA538, 262P68; 120Okl199, 250P1015.

699-26 22F(2d)403.

699-27 [a] **Physician may value his own services,** though he has no knowledge of what others charge. '49RI470, 144A146.

700-29 [e] **Weight of testimony.**-214Ala243, 107S210.

700-38 23AlaA498, 127S786.

700-41 [a] (3) Answer of witness "Well some, yes" and "I reckon I was" in answer to question as to whether he was acquainted with market value of land is sufficient. 213Ky164, 280SW949.

701-43 220Mo518, 276SW1030; Tex CivA 297SW301 (definition of "market value" held unnecessary); TexCivA 25SW(2d)671.

701-45 104Conn73, 131A412; 219MoA1, 268SW99 (witness should not be permitted to state market prices where his knowledge is derived only from market reports without introducing such reports in evidence or establishing their character). [b] (2) Testimony of witness as to market value of property destroyed is inadmissible, where he has no personal knowledge of such values and acquired his knowledge only from market lists not in evidence. 88PaSuper433. [d] **Competency to state what market reports are accredited trustworthy.**-104Conn73, 131A412.

701-46 TexCivA 48W(2d)641 (though no fixed or definite market value).

701-51 41GaA212, 152SE303 (held sufficient to present issue).

701-55 MoA 32SW(2d)296. [a] (2) 87PaSuper489. (5) 220MoA518, 276SW1030.

702-56 82CalA289, 255P553 (value of real estate); 115Or608, 239P105, 43ALR1285.

702-59 [g] **Value of lands.**-82CalA289, 255P553. [h] **Insurance agent** who placed value on property for purpose of insurance only, and who secured part of his knowledge from property owner disqualified as expert as to market value. 293Pa326, 142A867.

702-64 218Ala416, 118S662; 242IllA166.

702-64½-New. Permitting a witness to testify as to facts showing his ability and standing in the community is not error. 216Ala43, 112S360.

703-70½-New. Witness should not be asked to identify handwriting without first laying a foundation for such testimony by asking if witness has ever seen person in question write and in whose writing instrument is. NJCh 130A24.

703-71 220Ky388, 295SW445; NJ 141A170 (hypothetical question incompetent); TexCivA 25SW(2d)881 (questions must not be too general).

703-73 [a] **Question concerning grantors mental capacity** to make deed should be directed to time deed was executed. TexCivA 25SW(2d)881.

703-77½-New. Opinion cannot be based upon abstract hypothetical question. Ala 129S51.

703-82½-New. Tenant, counterclaiming for value of alterations, must detail facts on which testimony as to value is based. 128Misc845, 220NYS376.

703-82⅓-New. A question asking a witness the value of goods consisting of over one hundred articles has been held too broad. 289Pa369, 137A612.

703-83 82Colo448, 261P6; 321Ill538, 152NE486; 120Kan474, 244P2 (to elicit details of statement of collective fact); Mass 169NE74; OklCr 269P390.

703-84 213Ala622, 105S811 (testimony as to "possession"); 213Ala630, 105S896 (witness testifying to value of land may be cross-examined as to what he assessed it for to contradict his testimony); 216Ala102, 112S348; 54SD184, 223NW41.

703-85 19F(2d)322; 181Ark626, 26SW(2d)1107.

704-87 109Conn451, 147A7; 101Vt124, 141A686.

704-95 160Ga886, 129SE539, 541 [cit CJ].

704-95½-New. A witness who has testified that a person was mentally sound may be asked on cross-examination as to his knowledge of rumors in the neighborhood as to such person's mental condition. 204Iowa881, 216NW258.

704-97½-New. Attorney testifying as to value of his services may be asked whether he will reduce charge for fee in such case because he has companion case for same plaintiff involving same questions. TexCommnA 276SW900.

704-98½-New. Cross-examination of owner of property sought to be condemned, as to whether he had been turning property in for assessment at a certain amount properly refused as not properly framed to elicit admission against interest, credibility, judgment, or memory. 21AlaA27, 104S873.

704-98¼-New. Where the issue in a condemnation proceeding is as to the value of property on a certain date and the direct examination of a witness has been confined to such date, it is not error for the court to confine the cross-examination to a period reasonably near such date. 74CalA473, 241P409.

704-98¼-New. In such case it is proper to exclude cross-examination as to value on a later date. 74CalA473, 241P409.

704-98½-New. A commissioner in condemnation proceedings may testify as to acting as such and as to the character of inspection made subject to same cross-examination as to damage as any other witness. 216Ky64, 287SW232.

704-98¾-New. Questions concerning collateral subjects which a prospective purchaser might ask are properly propounded on cross-examination. 86CalA704, 261P536.

704-98½-New. Different elements considered by witnesses in giving their opinions as to the market value of lands sought to be condemned may be inquired into on cross-examination. 96CalA708, 275P228.

704-98½-New. Condemnation witness giving opinion of land to be appropriated may be cross-examined as to general selling price of land in neighborhood. 27OhNPNS548.

704-1½-New. Where expert has testified to genuineness of signatures he may be cross-examined as to reasons for his opinion. 82Colo448, 261P6.

704-2 208Iowa70, 221NW941. See also CalA 288P93. [a] **Cross-examination held improper.**-219Ala465, 122S448.

704-3 101Vt124, 141A686.

705-6 GaA 155SE85 (cross-examination); 157Md652, 147A790, 65ALR1285; 264Mass571, 163NE189. See also 192NC638, 135SE614.

705-7 31F(2d)35; 160Ga886, 129SE539. [d] **Testimony from radiographs** held not objectionable as not having been offered in evidence, since it was defendant's privilege to offer such radiographs in evidence. IndA 166NE257.

705-8 217AppDiv415, 216NYS721.

705-9 But see 147Wash330, 266P156.

705-9½-New. Testimony otherwise admissible as to how far a switch light could be seen and as to whether there could be any opening in the switch without showing the light is not rendered inadmissible because given in reference to a model produced in the court room. TexCivA 274SW200.

705-9⅓-New. Permitting expert to testify to specific instances of leases, instead of confining testimony to his expert opinion of leasable value of premises in suit, is held error. 222AppDiv456, 226NYS734.

705-11 Ala 130S541 (re-examination); 178Ark943, 12SW(2d)916; 88CalA405, 263P573; NJSup 140A578; 33PortoRico15. [b] **Qualification.**-33PortoRico15.

705-14 47RI473, 134A9. [b] (1) 35PortoRico212. [d] (3) 214Ala420, 108S238; 157Md528, 146A851. [e] (1)

NJSup 130A639; (3) 219Ala298, 122S41; 128Me50, 145A400; 67ALR239.

706-15 See also 242 IllA93.

706-17 36F(2d)942. But see 27Hawaii 8.

706-18 217Ala71, 114S684.

706-18½-New. A question involving collateral issues is improper. 29 OhA 32, 163NE46.

706-19 Mo 20SW(2d)34 (question held proper as involving matter on which only expert could speak intelligently); 126 Or160, 269P210, 59ALR875. [b] **Question held not hypothetical.**-231Ky 60, 21SW(2d)125.

706-20 TexCivA 270SW1101; 103WVa 156, 136SE837.

707-21 252Mass418, 147NE824.

707-22 214Ala23, 106S242; Iowa 232 NW677; 220Ky330, 295SW164; Md 151A240; 236Mich136, 210NW314; MoA 285SW788; MoA 10SW(2d)75; 77 Mont505, 252P310; TexCommnA 296 SW509. [d] 207 Iowa895, 223NW745; 128Kan524, 278P764, 65ALR1213; 319 Mo 1169, 8SW(2d)580. [g] **Hypothetical questions based on conditions actually shown to exist** by evidence, are proper. TexCivA 10SW(2d)760.

707-24 236Mich136, 210NW314; 217 AppDiv415, 216NYS721.

707-25 152Md536, 137A299; 322Mo 386, 15SW(2d)335; TexCivA 270SW 1101 (hypothetical question authorized); TexCivA 300SW641, 646 [citCJ].

708-26 195Cal 699, 235P45; 123Kan 277, 255P74. [b] **Where physician is absent during testimony,** allowance of question is error. Md 151A400.

708-27 214Ala23, 106S242.

708-31 227Ky841, 14SW(2d)174.

708-32½-New. It is within the discretion of the court to permit expert testimony of an attorney of an adjoining state in a matter in which he has been interested in a suit for professional services. Conn 135A573.

708-32½-New. Where there is evidence of facts substantially as stated in a hypothetical question, a competent expert witness should be allowed to answer. 215Ala239, 110S5.

708-33 27F(2d)699; 233 IllA143; Iowa 232NW677; 161La827, 109S505; 264Mass276, 162NE312; 244Mich547, 222NW128. [b] **Rules of evidence, not being finical as to form,** do not require that question be more than substantially hypothetical. 233 IllA143.

708-34 TexCivA 300SW641, 646 [cit CJ].

708-35 233 IllA143 (hypothetical question should contain collocation of facts as questioner assumes evidence tends to prove); Iowa 227NW646; MoA 26 SW(2d)807; MoA 27SW(2d)739; 118 Nebr711, 226NW321; 19 OhA284; TexCivA 292SW577; 103WVa156, 136SE 837. See also 27F(2d)699. [a] **Question disclosing no connection between part stating facts and interrogating part** has been held defective in form. 152Md536, 137A299.

709-36 99Fla1086, 128S430; 206 Iowa 166, 220NW123.

709-37 161La827, 109S505.

709-38 49ND194, 191NW464; TexCivA 293SW932.

709-39 78Colo 6, 238P29; 19 OhA284. [a] 78Colo 6, 238P29. [c] **Physical conditions already before court and jury** need not be embodied in question. MoA 298SW134.

709-41 98CalA358, 276P1052.

709-45 206 Iowa182, 220NW331; 161 La827, 109S505.

709-45½-New. or is obviously problematical. 79CalA436, 249P840.

709-46 See also 106Conn99, 136A869.

709-48 152Md536, 137A299; 70Utah 72, 257P1066. See also MoA 298SW134.

709-54½-New. A question to an expert witness requiring a lien to show conclusions of fact from prior testimony is improper. 287Pa512, 135A301.

710-65 82Colo 448, 261P6 (questions not misleading).

710-67 34Wyo 415, 244P637, 650 [cit CJ].

710-72 119Kan837, 241P453; 152Md 536, 137A299; 19 OhA284; 70Utah72, 257P1066.

710-73 Ala 130S203; 106Conn86, 136A 871; 43 Ida661, 254P528; 231Ky60, 21 SW(2d)125; 153Md343, 138A244; Md 150A716; 244Mich547, 222NW128; 288 Pa377, 135A722; TexCivA 281SW289; TexCivA 295SW633; 103WVa156, 136 SE837. See also 144Va473, 132SE179. [c] **Question assuming facts properly permitted,** though defendant's connection therewith is for jury. 99Vt91, 130 A758.

710-74 212Ala580, 103S856; 106Conn 86, 136A871; 200 Iowa272, 204NW301; 215Ky283, 284SW1068; 152Md236, 137 A299; 153Md343, 138A244; 153Md547, 138A415; 235Mich627, 209NW842; MoA 293SW500; RI 136A11; 70Utah72, 257 P1066. But see MoA 19SW(2d)559.

711-76 213Ky164, 280SW949; 235Ky 121, 29SW(2d)637. See also 205 Iowa51, 217NW557. [a] **Requiring statement not yet proved** to be incorporated on question held reversible error. 21 OhA 516, 153NE234.

711-76½-New. Questions may properly be based on the testimony of the party proposing them. 135Wash260, 237P711.

711-77 21AlaA289, 107S791; 79CalA 436, 249P840; 68Utah323, 249P1064. [b] **Expert who has heard undisputed testimony** may be asked opinion based on assumption of its truth. 152Md536, 137A299.

711-78 21AlaA289, 107S791; 84 IndA 398, 150NE65; 243Mich309, 220NW710; 145Miss683, 110S237; Mo 19SW(2d) 679; TexCivA 293SW932; 136Wash312, 239P1011; 34Wyo 415, 244P637.

711-78½-New. Question assuming a fact contradicted by the evidence is defective, and answer thereto is improperly permitted. 153Md343, 138A244.

711-79 Mass 171NE462; MoA 27SW (2d)739; 190NC24, 128SE485 (not necessary to include all evidence bearing on fact); 32 OhA207, 167NE701; 144Va 473, 132SE179; 34Wyo 415, 244P637. See also 27F(2d)699. [c] **Facts inferable from facts stated** need not be included in question. 65Utah465, 238P259, 41 ALR1495.

712-81 TexCommnA 12SW(2d)552.

712-82 317Mo 1255, 298SW69; 118 Nebr711, 226NW321.

712-83 MoA 27SW(2d)739.

712-85 153Md343, 138A244.

712-89 See also 135Wash260, 237P711, 241P969.

712-91 244Mich547, 222NW128.

712-92 15F(2d)714; 233 IllA143; 171 Minn475, 214NW469; 65Utah465, 238P 259.

713-94½-New. Error in a hypothetical question in omitting a fact in evidence is cured where the attention of the witness is called to such fact on cross-examination and he states that it does not change his opinion. TexCivA 298SW 666.

713-95 15F(2d)714; 84 IndA398, 150 NE65; 125Kan518, 264P1078; 213Ky 164, 280SW949; 213Ky257, 280SW951; 220Ky330, 295SW164; 252Mass418, 147 NE824; 237Mich76, 211NW75; 241 Mich553, 217NW750; 246Mich36, 224 NW434; Mo 278SW759; 322Mo 11, 16 SW(2d)212; 220MoA367, 286SW445; 220MoA1122, 296SW457; MoA 22SW (2d)84; 33 OhA42, 168NE475; 134 Okl 145, 272P475; 126 Or26, 268P750; TexCivA 8SW(2d)527; TexCivA 22SW(2d) 329; 34Wyo 415, 244P637.

713-96 214Ala23, 106S242; 79CalA436, 249P840; 202Cal 490, 261P709; 96CalA 161, 273P875; 110Conn166, 147A561; 167Ga340, 145SE448; Iowa 232NW677; 153Md547, 138A415; 235Mich627, 209 NW842; MoA 30SW(2d)794; 118Nebr 711, 226NW321; 83NH236, 141A136; 34NM594, 288P1065(2dcase); 289Pa 369, 137A612; 70Utah72, 257P1066; 144 Va473, 132SE179; 193Wis570, 214NW 329; 38Wyo 190, 266P117.

714-97 36F(2d)330; 216Ala138, 112S 633, 53ALR840; 218Ala609, 119S647; 21AlaA289, 107S791; 98CalA358, 276P 1052; 99CalA310, 278P443; 78Colo 6, 238P29, 34 [quotCJ]; 107Conn380, 140A 724; 206 Iowa753, 221NW508; Md 150A 716; 235Mich627, 209NW842; 179Minn 325, 229NW136; 309Mo 1241, 274SW437; 319Mo 8, 4SW(2d)762; MoA 295SW517; MoA 21SW(2d)943; MoA 26SW(2d)50; 229AppDiv1, 240NYS645; 190NC24, 128 SE485 (hypothetical statement held neither irrelevant nor unsupported); NC 154SE667; 135 Okl 23, 273P207; 116 Or467, 241P996; TexCivA 10SW(2d) 220; TexCivA 19SW(2d)397; 68Utah 323, 249P1064; 70Utah72, 257P1066; 107WVa507, 148SE849 (question assuming facts unsupported by evidence should not be submitted); [g] **Evidence improperly admitted.**-TexCivA 5SW(2d) 816. [h] **Only provable facts** can form basis of opinion. TexCivA 5SW(2d)816. [i] **Evidence held sufficient** to support hypothetical question. MoA 22SW(2d) 84; TexCivA 22SW(2d)329.

715-98 78Colo 6, 238P29, 34 [quotCJ]. [a] **Opinion evidence based on records and opinions not in evidence** has been held of no probative value. 217AppDiv 415, 216NYS721. [b] **Where facts testified to and assumed are not proved,** opinion of witness is valueless. 32 OhA 207, 167NE701.

715-99 78Colo 6, 238P29, 34 [quotCJ].

716-1 135 Okl 23, 273P207. [a] 206 Iowa753, 221NW508; TexCivA 19SW (2d)397.

716-3 241Mich383, 217NW329, 57ALR 262.

716-4 264Mass276, 162NE312.

716-8 161La532, 109S56.

716-8½-New. Rational inferences deducible from testimony as well as positive testimony may form basis of hypothetical question. Okl 292P356.

716-11 [a] **It is not objectionable as hearsay** to ask medical witness whether he has made study of statistics relative to brain tumors resulting from fracture of skull. 70CalA34, 234P860.

716-12 207 Iowa1293, 224NW820, 62 ALR1419; 126 Or160, 269P210, 59ALR 875.

716-14 251 IllA342 (held not error to refuse to strike answer, though better course would be to instruct witness to disregard his observations in answering question).

717-16 161Ga651, 131SE507; 105NJL 174, 143A315.

717-17 Md 151A400; 319Mo 1153, 6SW (2d)860.

717-17½-New. Expert opinion based on testimony of others, to be admissible, must state sufficient facts to be the basis for a valid hypothetical question. 287Pa512, 135A301.

717-21 35Ariz205, 276P322.

717-23 33F(2d)876; Md 148A276; 48 RI 131, 136A243. [a] (3) Other instances. Mo 31SW(2d)4.

718-24 106Conn86, 136A871.

718-29 Md 151A240.

718-31 33F(2d)876.

718-32 5F(2d)167.

719-39 33F(2d)876; 106Conn86, 136A 871; 217AppDiv415, 216NYS721.

719-40 217AppDiv415, 216NYS721.

719-41 217AppDiv415, 216NYS721.

720-43 217AppDiv415, 216NYS721.

720-51 153Md547, 138A415; 288Pa377, 135A722.

720-55½-New. A medical expert may not be asked a question on evidence, which is not directed to his medical knowledge and experience, as to what would be the patient's condition under the circumstances testified to, but which calls for his opinion as to the actual condition of a patient whom he has not examined. 152Md439, 137A43.

720-55¼-New. Question to an expert witness based on state's evidence as to the cause of death should be based on all of such evidence. 287Pa512, 135A 301.

720-57 285Pa317, 132A122. [b] Md 149A4.

721-58 [b] 218Ala599, 119S644.

721-59½-New. In will contest court may properly permit handwriting expert to change his testimony as to date where he first saw and examined disputed olographic will after consulting letter in his possession which he showed to court. 198Cal 1, 242P939.

721-59¼-New. In giving their opinions, expressions "I imagine," "I guess," "I think," used by an expert witness, are proper as tantamount to saying "It is my opinion." TexCivA 283SW294.

721-59¾-New. The court may permit an expert witness to preface his testimony with scientific definitions of the subject concerning which he is testifying. Mass 167NE235.

721-60 MoA 30SW(2d)1044; Nebr 231 NW695.

721-61 MoA 275SW586 (probabilities and possibilities should be included).
721-65 169Ark1054, 278SW31. [b] **It is no objection to answer** that predicate for answer laid by interrogation had not been before jury. TexCivA 292SW577. [c] **Facts stated in question must be accepted as true.**–241Mich383, 217NW329, 57ALR262. [d] **Error in permitting doctor to answer** question was not shown by cross-examination. MoA 27SW(2d)739.
721-67 99Fla1086, 128S430. See also 244 IllA320.
721-71 Md 148A276. [a] 169Ark1054, 278SW31; TexCivA 283SW689.
721-72 219Ala384, 122S322; 83NH29, 137A445; 225AppDiv129, 232NYS103 [aff NY 166NE347(4thcase)]; 295Pa342, 145A293.
721-73 106Conn86, 136A871.
721-75 13PaDist&Co 639.
721-76 30F(2d)467; 119 OhSt603, 165 NE301.
722-78 82Colo 448, 261P6, 9 [citCJ]. [a] **Opinion of expert with personal knowledge of subject** may be given without detailing observations. 216Ala 138, 112S633, 53ALR840.
722-83½-New. Testimony as to the effect of shooting a pistol in the mouth dependent on conditions not stated in the question does not alone justify the submission of suicide issue to the jury. 32F(2d)567.
722-88 125Me88, 131A1 (on examination in chief); 118Nebr434, 225NW120.
722-91 212Ky56, 278SW162; 153Md 680, 139A557. [a] 214Ala23, 106S242; 96CalA236, 273P1080; 212Ky56, 278 SW162; 236Mich226, 210NW219; MoA 273SW213. [b] 218Ala336, 118S580; 107Conn681, 142A455; 156Md81, 143A 648; 247Mich667, 226NW650; MoA 271 SW851; MoA 273SW213; 220MoA367, 286SW445; 292Pa134, 140A632; 152 Wash10, 277P75. [c] **Cross examination improperly limited.**–MoA 258W(2d) 536.
723-93 88 IndA639, 165NE67; 156Md 581, 144A710; 103NJL200, 134A834. [a] **Thus** cross-examination of physician as to nervous condition of plaintiff is properly excluded where not inquired into on direct examination. 284Pa59, 130A398.
723-94 99CalA240, 278P476; Iowa 233 NW36; NC 154SE322; TexCivA 270SW 1101, 1104 [citCJ]. [a] (2) 103Conn 678, 131A838; 292Pa134, 140A632. [c] **Questions held proper.**–Md 150A716.
723-95 214Ala187, 106S811; 35Ariz 205, 276P322; 178Ark943, 128W(2d) 916; Iowa 233NW36; Mass 172NE71 (discretion not abused); TexCivA 270 SW1101, 1104 [citCJ]. [a] **Curtailment of cross-examination of expert** by fact that counsel might have sworn other expert witnesses and thereby shown what he expected to show by cross-examination of witness. 236Mich226, 210NW219.
723-96 214Ala187, 106S811.
723-98 99CalA240, 278P476; 88 IndA 639, 165NE67; Iowa 233NW36; 161La 532, 109S56; 247Mich361, 225NW508 (2dcase); 38Wyo 190, 266P117 (knowledge). [f] **Value of separate tracts.**–Iowa 233NW36.
723-99 24F(2d)153; 330 Ill 264, 161 NE486 (compensation of witness); MoA 296SW851; TexCivA 270SW1101, 1104 [citCJ]. [a] (2) Other instances. Mo 31SW(2d)81.
724-1 Mo 2SW(2d)760; 321Mo 952, 13 SW(2d)547; 221MoA537, 282SW1037; TexCivA 270SW1101, 1104 [citCJ].
724-2 176Ark253, 3SW(2d)969; MoA 273SW213. [b] 195NC1, 141SE338; 292Pa134, 140A632. [d] (2) Though witness testifies on cross-examination that opinion was based on things told him, testimony will not be excluded where he reiterates testimony given on direct examination that basis of opinion is his examination of plaintiff. 32 OhA207, 167NE701.
724-3 35Ariz205, 276P322; 168Minn 319, 210NW75.
724-4 31F(2d)717; 56ND553, 218NW 217.
724-5 195NC1, 141SE338.
724-6 291Pa252, 139A848.
724-8 243Mich309, 220NW710.
724-11 MoA 285SW549, 551 [citCJ]. [b] **Physician's report to insurance company.**–MoA 271SW851.
724-13 MoA 285SW549, 551 [citCJ].
725-14 MoA 285SW549, 551 [citCJ].
725-15 220MoA367, 286SW445; Vt 152 A41.
725-19 23F(2d)677; 220MoA367, 286 SW445.
725-21 218Ala209, 118S396.
725-25 212Ky56, 278SW162; 161La 532, 109S56; 312Mo 173, 279SW89; 322 Mo 765, 18SW(2d)42; 151SC542, 149SE 236. [a] **Usual foundation for impeachment** may be waived by objection to materiality by adverse party. 312Mo 173, 279SW89.
725-30 31F(2d)717. [a] (6) 261Mass 65, 158NE267. (7) Estimating distance by comparing length of court room. 243 IllA89. (8) Other illustrations of proper examination. 32F(2d)851. (9) Other instances. Mo 31SW(2d)792. [b] (4) Testimony of plaintiff's expert on cross-examination that land became more valuable toward certain square away from land taken did not authorize introduction of his opinion on redirect examination as to value of lot not taken. 265Mass494, 163NE255.
726-34 TexCivA 31SW(2d)319. But see TexCivA 27SW(2d)263.
726-45 328 Ill 282, 159NE353.
727-58 224AppDiv455, 231NYS385.
727-59 73Mont465, 236P1067 (testimony based on physical impossibility is no evidence whatever); 217AppDiv415, 216NYS721.
728-64 **Testimony of anyone reasonably experienced in values is sufficient** to enable jury to fix money loss on realty and personalty. 300Pa555, 151A285(2d case).
728-70 85CalA216, 258P1107; CalA 288 P841, 235Mich521, 209NW667; 225 AppDiv420, 233NYS373; 49RI 50, 139 A664. [b] **Weight of nonexpert's testimony** as to whether sign was properly constructed is for jury. 284Pa209, 130 A432. (where witness was competent).
728-71 31F(2d)600 (expert's estimate of value); 218Ala599, 119S644; 219Ala 108, 121S388; 35Ariz205, 276P322; 74 CalA239, 240P58, 59 [quotCJ]; 202 Iowa 328, 208NW374; 214Ky736, 284SW391; 125Misc741, 211NYS593 (for jury); 225 AppDiv420, 233NYS373; 49RI 50, 139A 664; TexCivA 6SW(2d)418; 105WVa 555, 144SE100; Can [1929] 4DomLR 57.
728-72 74CalA239, 240P58, 59 [quot CJ]; Mo 298SW51; 253NY23, 170NE 479.
728-73 32F(2d)490; 22AlaA54, 112S 179; 218Ala384, 118S565; 195Cal174, 231P996 (expert testimony is to be given weight to which in each case it is justly entitled); 74CalA239, 240P58, 59 [quotCJ]; 87CalA538, 262P68; 94CalA 441, 271P374; 94CalA703, 271P789; 101 CalA610, 281P1087; CalA 287P116; 107 Conn380, 140A724; 3Del 564, 140A659; 35GaA8, 131SE543; 35GaA526, 133SE 875; 39GaA597, 148SE12; 47 Ida119, 272P254; 88 IndA339, 156NE571; 200 Iowa495, 203NW794; 204 Iowa983, 216 NW112; 208 Iowa607, 224NW69; 123 Kan533, 255P969; 128Kan174, 277P54, 64ALR606; 166La487, 117S565; 125Me 88, 131A1; 151Md664, 135A835; 259 Mass113, 156NE30; Mass 169NE797; 237Mich76, 212NW75; 246Mich36, 224 NW434; 247Mich217, 225NW578; 145 Miss399, 110S782; 317Mo492, 297SW 353; 220MoA171, 281SW101; 78Mont 199, 253P260; 224AppDiv239, 229NYS 622; 50ND341, 195NW555, 557 [citCJ]; 126 Okl 139, 258P274; 120 Or286, 249P 627; 284Pa311, 131A229; 293Pa45, 141 A631; 52SD252, 217NW192; TexCivA 272SW283; TexCivA 281SW600; Tex CivA 285SW869; TexCivA 295SW628; TexCivA 7SW(2d)902; TexCivA 12SW (2d)263. [c] 203 Iowa471, 212NW884. [d] (2) Testimony held to support finding. CalA 289P863. [h] **Testimony that no one could tell positively** whether plaintiff would have been tubercular if he had not been injured has been held not to destroy opinion of expert witness. 288Pa377, 135A722. [i] **In personal injury suit, jury have right to accept physician's testimony** from his personal examination of plaintiff and inspection of X-ray plates as accurate description of injuries received. NJSup 145A7. [j] **In action involving question as to whether title to real estate** was merchantable, testimony as to what attorneys of respective parties stated as to merchantability of title, if admissible, was of little, if any, probative force. TexCivA 14SW(2d)335.
729-74 41F(2d)20; 74CalA239, 240P 58, 59 [quotCJ]; 123Kan533, 255P969. [c] (4) Testimony of attesting witness, county clerk, having long experience and familiar with legal requirements of wills, on issue of testator's mental competency, is entitled to unusual force and weight. 152Va411, 147SE251.
729-75 74CalA239, 240P58, 59 [quot CJ]; 120Kan123, 241P1090.
729-76 84CalA438, 258P411; 231Ky 219, 21SW(2d)258; 125Misc741, 211 NYS593; 127 Or320, 272P273; TexCivA 272SW283. But see 29F(2d)801; 157Md 492, 146A432.
729-77 218Ala97, 117S653; 22AlaA54, 112S179; 74CalA239, 240P58, 59 [quot CJ]; 74CalA473, 241P409; 87CalA684, 263P353; 101CalA680, 282P419; CalA 286P1097; 38GaA426, 144SE213; 321 Ill 538, 152NE486; Ind 169NE529; 120 Kan123, 241P1090 (evidence of value of barn destroyed by fire and fully described in evidence); 214Ky736, 284 SW391; 224Ky292, 6SW(2d)239; 232 Ky148, 22SW(2d)583; Mass 169NE797; 154Miss765, 122S776; Mo 293SW375; Mo 20SW(2d)31; 220MoA367, 286SW445; 78Mont199, 253P260; 247NY460, 160NE 914; 219AppDiv261, 219NYS709; 125 Misc741, 211NYS593; 50ND341, 195NW 555; TexCivA 272SW283; TexCivA 298 SW666; 152Va411, 147SE251; 135 Wash333, 237P706; 105WVa555, 144SE 100; Wis 228NW746. [b] 226AppDiv 490, 235NYS569.
730-78 218Ala489, 119S13; 181Ark363, 26SW(2d)124; 181Ark1096, 29SW(2d) 304; 74CalA239, 240P58, 59 [quotCJ]; 84CalA438, 258P411; 97CalA676, 275P 967; 101CalA680, 282P419; 111Conn 237, 149A783; 227Ky841, 14SW(2d) 174; 231Ky219, 21SW(2d)258; LaA 129 S379; 145Miss399, 110S782; 218MoA 10, 260SW552; 220MoA367, 286SW445; MoA 18SW(2d)129; 78Mont199, 253P 260; 222AppDiv554, 226NYS536; NC 153SE848; 110 Okl 297, 236P893 [cit CJ]; 49RI 470, 144A146; TexCivA 275 SW430; 108WVa293, 150SE745 (judgment of expert witness on subject requiring no special training). But see 40 F(2d)277. [b] (4) Jury in determining value of legal services rendered may disregard expert opinion and take into consideration their own judgment and experience. 125Misc741, 211NYS593. [c] **Industrial commission has powers of court or jury** in this respect. 74CalA 239, 240P58.
731-79 280US291, 50SCt89, 74Led431; 34F(2d)859 (held board improperly disregarded testimony); 74CalA239, 240P 58, 59 [quotCJ]; 98CalA358, 276P1052. [b] **Rule does not apply** when all experts admit doubt on the matter. 50ND 91, 194NW917. [c] **Expert medical evidence, though contradicted by nonexperts,** may be conclusive. 74CalA239, 240 P58. [d] **Proximate cause of death,** as stated in expert testimony, is not conclusive. 74CalA239, 240P58. [e] **Fixing of value by court** at more than witnesses testified to has been held error. TexCivA 293SW590. [f] **Court must be guided by medical expert's advice** in determining effect of trauma on lurking disease. 13LaA402, 128S321. [g] **Property values.**–Ala 130S87. [h] **Testimony as to reproduction cost** based on knowledge of prevailing cost of labor, materials, and conditions, not disputed, should be followed in proceeding to review assessments. 137Misc603, 244NYS 508.
731-81 81CalA772, 254P926 (that noise of train accentuates idea of speed); CalA 285P409; Mo 293SW375; 220MoA171, 281SW101; NJ 151A613; Wis 231NW 593.
731-83 34F(2d)859; 171Ark505, 284SW 743; 94CalA703, 271P789; 102CalA221, 282P1009; 164Ga811, 139SE716; 151 Md664, 135A835; 220MoA171, 281SW 101; 222AppDiv239, 229NYS622; 105 WVa555, 144SE100.

731-86 241Mich383, 217NW329, 57ALR 262. [d] **How nearly question reflects testimony** of other witnesses is for jury to say. 317Mo 614, 296SW739.

731-87 241Mich383, 217NW329, 57ALR 262. See also 217AppDiv415, 216NYS 721. [e] **Answer of physician to hypothetical question held insufficient** to overcome remaining testimony to contrary as to testator's sanity. 214AppDiv 500, 212NYS456.

732-89 29Ariz405, 242P436; 98CalA 126, 276P618; 99CalA310, 278P443; 253 NY23, 170NE479.

732-90 30F(2d)807; 197Cal 70, 239P 844 (entitled to some weight); 87CalA 199, 262P58; 205 Iowa1369, 219NW399, 400 [citCJ]; 208 Iowa1265, 227NW129 (2dcase); 213Ky580, 281SW525; 214Ky 769, 284SW389; 231Ky788, 22SW(2d) 281; 232Ky493, 23SW(2d)919; 133Misc 871, 234NYS185; 159Tenn86, 16SW(2d) 20. [a] (2) 337 Ill 572, 169NE767. (4) Where facts and circumstances on which opinion based are not given, opinion of witness is not of great weight. DelCh 147A257. [j] **Opinion of nonexpert unsupported by recital of facts** is insufficient to overcome presumption in favor of testamentary paper regularly executed and rational on its face. 214Ky 769, 284SW389. [k] **Opinion of lay witnesses** as to mental capacity, not warranted by data observed, is entitled to little weight. 147Va105, 136SE683. [l] **Proof that automobile traveled between twelve or fifteen miles per hour** did not establish anything beyond twelve miles per hour. NJ 147A384(2d case). [m] **Statement that trolley car was going "at great speed"** is entitled to little weight as definite statement of speed. 109Conn559, 147A20. [n] **Evidence given by occupants of car as to speed of another car** coming toward them from opposite direction at night has no probative value. LaA 130S229.

732-91 318Mo 444, 300SW1102.

732-93 171Ark505, 284SW743.

732-95½-New. It is a general rule of evidence that the opinions of skilled witnesses formed from personal examination of subject matter are generally more worthy of confidence than those elicited by hypothetical questions. 171 Minn254, 214NW29.

732-97 25F(2d)520; Ida 290P393; Iowa 229NW249; 150Miss857, 117S244; MoA 296SW243; 292Pa509, 141A481; 100Vt 26, 134A608; 142Wash101, 252P540. [c] **Cause of death.**-292Pa509, 141A481. [d] **Certainty.**-CalA 288P716. [e] **Expert testimony held insufficient.**-228App Div729, 239NYS110.

733-98 78CalA561, 248P990 (objection goes to weight and not to admissibility).

733-99 318Mo 444, 300SW1102; Tex CivA 284SW664.

733-1 82NH408, 135A27; 226AppDiv 426, 235NYS441. [d] **Opinion of witness** cannot make that proximate result of act which clearly as matter of law was not. TexCommnA 298SW399.

733-2½-New. Expert testimony contrary to physical laws will not support a verdict. 226AppDiv426, 235NYS441.

733-3 99CalA310, 278P443; 86Mont562, 284P539.

733-4 328 Ill 273, 159NE235 (opinions as to ownership of property held not sufficient).

733-5½-New. Value of expert's opinion as to genuineness of handwriting varies with circumstances of each particular case. 323 Ill 468, 154NE209.

733-5⅓-New. The question being one to be determined by expert witnesses, it was the trial court's duty to consider the testimony of all witnesses who qualified as experts in the subject. 206Cal 468, 274P966.

733-5¼-New. Opinion evidence should be given so much credit only as facts on which opinions are based will justify. 137Misc603, 244NYS508.

734-8 50ND341, 195NW555, 557 [cit CJ].

734-11 94Fla132, 113S664.

735-12½-New. Testimony as to mental capacity by attesting witnesses and others present at execution of contract is entitled to peculiar weight. 147Va 478, 137SE511.

735-12⅓-New. Lay witnesses' opinions based on observation, as to mental capacity to execute contract, are of little weight. 147Va478, 137SE511.

735-13½-New. Opinion of expert as to benefits of restrictions as to use of real estate is insufficient to sustain finding that restrictions were not an incumbrance. 48RI 66, 135A327.

735-24 See also 223AppDiv208, 227NYS 712.

735-26 235 IllA265; 292Pa213, 140A 867 (on motion for new trial).

735-28½-New. without persuasive force, 104Conn419, 133A209.

735-29 208 Iowa127, 224NW537.

735-34 227Ky841, 14SW(2d)174.

736-40 272US400, 47SCt144, 71Led316; Mo 28SW(2d)84(2dcase); 50ND341, 195 NW555, 557 [citCJ]; 47RI 473, 134A9. See also 13LaA378, 128S41. [a] (1) 317 Mo492, 297SW353. (2) Particular testimony considered substantial and not conjectural. Mo 31SW(2d)21. [c] **Expert medical testimony** strongly tending to show unchastity of woman suing for breach of promise to marry should not be disregarded by jury. 214AppDiv192, 211NYS883 (where defense is on ground of unchastity prior to promise).

736-41 34F(2d)5 (opinion should be based either on admitted facts or facts within knowledge of witness disclosed in record); 42F(2d)99; Conn 151A351 (weight of testimony is for court); 3 Del 564, 140A659; Iowa 230NW314; 125 Me88, 131A1; 315Mo 367, 286SW106. See also 188Wis82, 204NW582.

736-42 22F(2d)230 (expert's opinion on handwriting, unsupported by reasons, is of little value); 127Me214, 142A777; 136Misc141, 239NYS568; 295Pa120, 144 A912.

736-43½-New. When supported by unimpeached reasoning, handwriting expert's testimony is accepted as valuable. 22F(2d)230.

736-43⅓-New. The opinion of a witness on assumed facts differing from those shown by evidence cannot be given any probative force. 99CalA310, 278P 443.

736-43¼-New. Weight of testimony by experienced fireman as to result and effect on fire of fire apparatus is for jury. Nebr 231NW695.

737-56½-New. Testimony of attending physician as to mental capacity to execute contract is entitled to peculiar weight. 147Va478, 137SE511.

737-57 83CalA128, 256P493.

737-58 190NC24, 128SE485. [d] **Rebuttal testimony improper without proper foundation.**-It was error to permit plaintiff to testify to what doctor had told him. MoA 271SW851.

737-59 [a] **Evidence that physician was frequently called as expert witness** does not show or tend to show interest. 85 CalA385, 259P494.

737-61 Ala 130S402. See also 44F(2d) 226. But see MoA 271SW851. [a] **Proper predicate laid.**-Ala 130S402.

738-77½-New. An accountant's testimony that a taxpayer's books were kept on an accrual basis has been held of no probative value, where books of account were properly excluded. 29F(2d)502.

738-77⅓-New. An amendment of an answer by changing from feet to yards the alleged distance from which defendant first saw the approaching automobile, driven by the one for whose death plaintiff sued, has been held not to affect defendant's credibility as a witness, where he testified frankly that he made a mistake in the original answer and merely desired to make the correction to conform to the facts. 11LaA532, 121 S636.

738-78 7F(2d)628; 43F(2d)256; 101 CalA382, 281P639; CalA 291P903; 40 GaA416, 149SE793; Iowa 231NW323; 171Minn321, 214NW52; 73Mont219, 236 P250; 78Mont199, 253P260 [citCJ]; 117 Nebr186, 223NW21(2dcase); 33NM240, 264P960; 127Misc710, 217NYS544; 285 Pa34, 131A588; 289Pa51, 137A104; Tex CivA 10SW(2d)426; 152Va411, 147SE 251; 152Wash10, 277P75; 105WVa555, 144SE100; Wis 229NW656. But see 272US400, 47SCt144, 71Led316; CalA 288P692; 227AppDiv588, 237NYS611. [g] **Testimony of disinterested witnesses based on examination controls conflicting opinion of physician and others who made no special examination to determine mental capacity.** 172Ark176, 287 SW1001. [h] **Testimony of witnesses as to mental capacity based upon business transactions** is held entitled to more weight than that of casual observers. 172Ark176, 287SW1001. [i] **Owner's valuation held more correct than that of city's experts** in condemnation proceedings. 127Misc710, 217NYS544. [j] **Opinion of nonexpert** held not to create conflict with undisputed physical facts. 101CalA610, 281P1087.

738-79 99CalA417, 278P874; Iowa 231 NW323; 10LaA280, 120S107; LaA 129 S563(2dcase) (conflict between oral testimony and deposition); 171Minn321, 214NW52; 289Pa51, 137A104; TexCivA 275SW423; 105WVa555, 144SE100; 200 Wis504, 228NW126. [a] **Opinion of osteopath** as to whether operation for hernia would be more than ordinarily unsafe is not to be discounted in comparison with that of physician where both are required to pass same examination for license to practice. TexCivA 281SW895.

738-80 99CalA240, 278P476.

738-81 See also 9LaA132, 119S498.

738-81½-New. Conflicting statements of an expert are too uncertain to be made basis of a legal conclusion. 153 Md343, 138A244.

738-82 16F(2d)245; 26F(2d)19; 39 F(2d)933; 101CalA610, 281P1087; 204 Iowa1169, 216NW613; 232Ky148, 22 SW(2d)583; Mich 233NW209; 128Misc 662, 219NYS701; 137Misc668, 244NYS 250; 117 OhSt304, 158NE648; 286Pa 155, 133A144; 290Pa249, 138A764. See also MoA 281SW67. [b] 210Ky756, 276 SW828. [c] **Testimony of eyewitnesses who survived explosion** is entitled to greater weight than expert testimony. 43F(2d)750.

738-83 16F(2d)245; 29Ariz405, 242P 436; 156Miss693, 126S650; 220AppDiv 503, 221NYS686; 296Pa393, 145A907. [c] (2) Measurements and cross sections made during progress of road construction work by engines is best evidence of quantity and character of materials removed as against expert measurement of the completion of work. 114Nebr 612, 209NW221.

739-84½-New. Department rule fixing arbitrary tonnage post-war value for vessels for amortization under Federal Revenue Act cannot be followed by court as against testimony of competent witnesses. 16F(2d)164.

739-84⅓-New. In Louisiana, where the testimony of an equal number of veterinarians called as witnesses as to the cause of the lameness of a horse is conflicting, testimony of a veterinarian appointed by the court in corroboration of witnesses of one of the parties is conclusive. 6LaA6.

739-85 NJ 137A555.

739-86 TexCivA 270SW1101 (scientific books not received as evidence of matter they contain).

740-96 160Ga886, 129SE539.

740-98 160Ga886, 129SE539.

740-2 [a] TexCivA 272SW308.

740-6 176Minn138, 222NW904.

740-9 176Minn138, 222NW904.

741-12 8F(2d)5.

741-14 TexCivA 299SW325.

741-17 Mass 173NE515.

741-19 5F(2d)330; 5F(2d)570; 14 F(2d)705; 213Ala14, 104S130; 214Ala 396, 108S26; 215Ala90, 109S754; Ala 127S905; AlaA 130S313; 319 Ill 35, 149 NE588; 204 Iowa950, 216NW77; 208 Iowa222, 225NW369; 219Ky681, 294SW 138; 252Mass382, 147NE870; 115 Okl 153, 241P342; 124 Or276, 261P432; 136 SC389, 134SE292; TexCivA 281SW891; TexCivA 287SW87; TexCivA 290SW 800; TexCivA 292SW251; TexCivA 294 SW699; TexCivA 298SW649; TexCivA 1SW(2d)471; 148Va331, 138SE637. [c] **Rule held inapplicable.**-22AlaA605, 118S498.

742-20 29PortoRico 803.

742-21 50ND394, 196NW98, 99 [cit CJ].

742-28 21AlaA44, 104S887 (that commission was paid salesman inadmissible

in action on notes for selling price because not material and relating to transaction wholly res inter alios acta). [a] (11) What amount of cotton was raised on other land, on issue of landowner's damage from failure of water supply. **TexCivA** 8SW(2d)306.

743-29 137SC319, 135SE473, 474 [quot CJ].

743-30 See also **Mass** 173NE499.

744-39 208Ky535, 271SW576; 137SC 319, 135SE473 [quotCJ]; **Wash** 286P 856.

744-42 208Cal 114, 280P535; **Mass** 168 NE160; 169Minn106, 210NW846.

744-43 214Ala339, 108S29; 72CalA169, 236P979 (where surrounding circumstances differ); 77Colo 442, 237P151; 104Conn73, 131A412; 42 Ida604, 247P 12, 13 [citCJ]; 263Mass147, 160NE821; 242Mich413, 218NW688; **MoA** 276SW 93; 132 Okl 104, 269P354; 287Pa337, 135A105; **Pa** 152A98; 136SC423, 134 SE390, 394 [citCJ]; **TexCivA** 24SW (2d)776; 99Vt446, 134A603. [a] (13) In action on note part of answer that deceased stated that he had previously signed his wife's name to other notes is inadmissible. **Mass** 167NE521.

746-44 136SC56, 134SE226.

746-45 115 Or672, 239P112; 93PaSuper287.

746-47 136SC56, 134SE226.

746-48 287Pa337, 135A105.

746-48½-New. , nor, where intent to defraud is not an element involved, can fraudulent representations be proved by evidence of another similar fraud, 104 Conn73, 131A412.

746-48½-New. and similarly, one charged with committing wrongful act cannot show his commission of similar wrongful acts as an excuse therefor. 136SC423, 134SE390.

746-50½-New. In an action on account for goods purchased, plaintiff's testimony that defendant previously bought and refused to pay for goods, except on discount, has been held admissible where defendant's counsel told the jury in opening that the previous purchase was satisfactory. **MoA** 6SW(2d)984.

746-51 [b] **Testimony that other purchasers of cattle found them tubercular** is not admissible to prove plaintiff's cattle were tubercular when purchased. 52SD548, 219NW262.

746-53 214Ala565, 108S456, 47ALR 270; 72CalA169, 236P979. [a] **Fact that others than plaintiff ate food complained of without ill effects** is competent to show that it was not unwholesome. **Mass** 168NE160.

746-57 **TexCr** 285SW314.

747-58 218Ala49, 117S477; **Ala** 130S 335; 76CalA278, 244P916; 163Ga796, 137SE64; 35GaA126, 132SE414; 255 IllA127; 200 Iowa527, 202NW119; 202 Iowa333, 208NW726; 232Mich8, 204NW 708; 238Mich5, 213NW152; 242Mich 266, 218NW650; 242Mich413, 218NW 688; **Nebr** 231NW761; 83NH518, 144A 845; 215AppDiv516, 213NYS684; 138 Misc592, 245NYS696; 118 Okl 113, 247P 87; 128 Or70, 264P453, 458 [quotCJ]; **Vt** 146A72; 135Wash189, 237P305 (in suit to recover price paid for hotel fixtures based on rescission for false representations, proof that substantially same representations were made to third person held inadmissible). [b] (3) In action on note given for corporate stock defended on ground of fraudulent representations inducing purchase, testimony as to representations made long prior to transaction in question by agents other than those who made representations to defendant is inadmissible. 66Utah1, 239P29. [e] **Rejection of evidence held error.**–215AppDiv516, 213NYS684. [f] **Evidence must be kept within strict limits.**–14F(2d)940. [g] **Admission of evidence held error.**–14 F(2d)940. [h] **That others acting on fraudulent representations lost their money cannot be shown.** 218Ala49, 117 S477.

748-60 168Ark1028, 272SW856; 72 CalA169, 236P979; 96CalA478, 274P 568; 163Ga796, 137SE64; **Ga** 155SE1; 200 Iowa527, 202NW119; 202 Iowa333, 208NW726; 122Kan339, 252P468, 470 [citCJ]; 128 Or70, 264P453, 456 [quot CJ]; **TexCivA** 290SW270. [b] **Test of admissibility is** whether earlier act was sufficiently near in point of time to permit presumption that motive sought to be established existed. 242Mich413, 218 NW688. [c] **Evidence held too remote.**–242Mich413, 218NW688.

748-60½-New. or state of mind at time of committing act conceded to have been committed. 72CalA169, 236P979.

748-61 22 OhA44, 153NE919.

748-61½-New. But where intent to defraud is not involved, evidence of another similar fraud is inadmissible to prove the fraudulent representation alleged. 104Conn73, 131A412.

748-62 214Ala565, 108S456, 47ALR270.

749-63 181Ark649, 26SW(2d)1108; 102 Conn626, 129A782; **Ga** 155SE1; 208 Iowa70, 221NW941; 256Mass187, 152 NE305; 232Mich8, 204NW708 [citCJ]; **MoA** 25SW(2d)525 (payment by corporation of notes of other directors); 22 OhA58, 153NE269; **TexCivA** 11SW(2d) 350. See also **CalA** 277P350.

749-65 220Ala84, 124S216; **Ala** 130S 405; 23AlaA328, 125S64(1stcase); 169 Minn106, 210NW846; **MoA** 291SW172; 114 Okl 254, 246P595; 289Pa216, 137A 247; 142Wash213, 252P699, 702 [quot CJ entire section].

749-66 168Minn43, 209NW642; 121 Or 28, 253P879; 101Vt124, 141A686 (habit of fighting with feet).

749-68 225Ky635, 9SW(2d)998.

750-69 121 Or28, 253P879.

750-71 121 Or28, 253P879.

750-80 42F(2d)886; 68CalA770, 230P 203; 89CalA594, 265P580; 162Ga457, 134SE87; 41GaA207, 152SE260; 330 Ill 48, 161NE68; 233 IllA216; **MoA** 296SW 232; **MoA** 88W(2d)81 (admission held error); 98NJEq143, 130A228; 192NC 580, 135SE456; 198NC742, 153SE406; 50ND394, 196NW98, 99 [citCJ]; 300Pa 496, 150A899; 29PortoRico 856, 862 [quotCJ]; 146SC209, 143SE811(2d case); 51SD214, 213NW19; **TexCivA** 283SW299; **TexCivA** 4SW(2d)636; 103 TexCr578, 280SW1079. [a] (5) 33Ariz 64, 262P489. (15) Fact that some letters improperly addressed were delivered is no proof that others would also be delivered. 98NJEq143, 130A228. (16) Doctor's testimony that he had treated deceased for drunkenness is inadmissible to prove that he was not sober at time of accident causing his death. 192NC580, 135SE456. (17) In railroad's suit to enjoin encroachment in right of way, evidence as to width of right of way through adjoining tract of land held inadmissible. 137SC468, 135 SE567.

751-81 93CalA775, 270P382; 68CalA 244, 228P865; **CalA** 266P312; 155Md 384, 142A515; 167Minn369, 209NW33 (prior transaction admissible as bearing on legality of later ones); 192NC 330, 135SE141; 29PortoRico 856, 862 [quotCJ]; 48RI 288, 137A469.

752-82 19F(2d)850; 220Ala595, 127S 168; 205Cal 629, 271P1062, 62ALR825; 233 IllA216; 205 Iowa51, 217NW557 (evidence excluded under rule); 128 Kan32, 276P63; 215Ky452, 284SW1097, 47ALR347; 148Md403, 130A331; 156 Md662, 145A342; 198NC742, 153SE406 (holding event admissible if closely related); **Or** 292P1094(2dcase); **TexCivA** 293SW910, 912 [quotCJ]; 152Wash646, 278P699, 66ALR77. [b] **Reasonable inference exists that one who ate food** and suffered therefrom would complain, and that, if no one complained, no one suffered. **Mass** 168NE160.

752-83 **TexCivA** 293SW910, 912 [quot CJ].

753-85 25F(2d)843; **MoA** 31SW(2d) 123.

753-86 19F(2d)850, 852 [citCJ].

753-88 215Ky452, 284SW1097, 47ALR 347; **Mass** 168NE160.

753-89 8F(2d)5 [citCJ]; 85 IndA476, 154NE390; 262Mass469, 160NE306. See also 83Colo 225, 263P728, 730 [cit CJ].

754-90 215Ky452, 284SW1097, 47ALR 347; 175Minn445, 221NW679, 680 [cit CJ].

755-93 179Minn19, 228NW440.

755-98 14F(2d)734; 24F(2d)262; 46 Ida214, 267P222; 246Mich620, 225NW 601; **Mo** 30SW(2d)118.

755-1 131 Or140, 282P113. But see **Va** 154SE563.

755-8 234Mich119, 208NW145, 147 [quotCJ]; 101WVa356, 132SE728, 731 [citCJ].

756-12 88CalA313, 263P369; 263Mass 147, 160NE821; 101WVa356, 132SE 728, 731 [citCJ].

756-13 19F(2d)850; 92CalA52, 267P 724; 234Mich119, 208NW145; 101WVa 356, 132SE728, 731 [citCJ].

756-13½-New. , and where the conditions are not the same, exclusion of the evidence is proper. 38GaA337, 144SE 11.

757-24 **Or** 292P1094. [c] **Testimony of experiments as to inflammability of motion picture film** has been held admissible in action for injuries by explosion of film. **Mass** 167NE235.

758-30 24F(2d)262; 88CalA313, 263P 369.

758-31 235Ky613, 31SW(2d)915.

758-32 22F(2d)99; 233 IllA216; **Iowa** 203NW17; **Mo** 30SW(2d)118; **MoA** 282 SW153; **OhA** 173NE33.

759-33 233 IllA216; 228AppDiv820, 240NYS443.

759-35 88CalA313, 263P369; 234Mich 119, 208NW145, 148 [quotCJ].

759-36 234Mich119, 208NW145, 148 [quotCJ].

759-37 234Mich119, 208NW145, 148 [quotCJ].

759-40 46 Ida214, 267P222; **Mass** 167 NE235.

759-42 22F(2d)286.

760-43 **Ala** 128S596 (mining lease on royalty basis); 37GaA254, 139SE573; 197NC556, 150SE40; 197NC748, 150SE 495.

760-44 **Ark** 31SW(2d)297; 200 Iowa 272, 204NW301; **NJSup** 132A244; 49 Philippine801. See also **Kan** 291P768. [b] **Testimony of amount paid for land two years previous** inadmissible as too remote. **TexCivA** 300SW250.

760-45 328 Ill 610, 160NE226. [a] **Discretion limited** to deciding whether property sold is similar in quality, nature and improvements. 328 Ill 610, 160NE226.

760-45½-New. Where ice was sold as manufactured, evidence of corresponding season's sales is held inadmissible. 285Pa332, 132A177.

760-47 172Ark423, 288SW908; **DC** 36 F(2d)546; 337 Ill 555, 169NE753; 265 Mass494, 163NE255; **Mass** 164NE819; 222AppDiv554, 226NYS536; 33 OhA102, 168NE752; 151SC542, 149SE236; 105 WVa321, 142SE430; 38Wyo 190, 266P 117; **Ont** [1930] 4DomLR955. See also **Ala** 128S596; **Ala** 128S606. [a] (3) To show market value of dog, evidence of sales of similar dogs in nearby town is admissible. 172Ark423, 288SW908. [d] (5) Contracts of sale. 328 Ill 610, 160NE226.

761-49 But see 296Pa132, 145A703.

761-50 39F(2d)933; 83CalA128, 256P 493; 55ND331, 213NW492; 33 OhA102, 168NE752. [k] **Invoices showing prices to others on dates differing by several days from dates of defendant's purchases** held not competent as to price to defendant on such dates. 126Misc292, 213NYS81.

761-51 24 OhA183, 156NE614. [d] 212 Ala687, 103S859; 105WVa321, 142SE 430. [f] **Sale must have been voluntary.**–55ND331, 213NW492. [g] **Sales under decrees of court held not compulsory.**–337 Ill 555, 169NE753.

761-53 328 Ill 610, 160NE226; 265 Mass494, 163NE255; 265Mass270, 163 NE888; 220MoA135, 281SW148; 55ND 331, 213NW492.

761-54 328 Ill 610, 160NE226; 220 MoA135, 281SW148. [a] (2) 328 Ill 610, 160NE226.

762-56 328 Ill 610, 160NE226; 330 Ill 39, 161NE55; 220MoA135, 281SW148; 33 OhA102, 168NE752.

762-57 172Ark423, 288SW908; 328 Ill 610, 160NE226; 330 Ill 39, 161NE55; Mass 165NE115; 55ND331, 213NW492; 33 OhA102, 168NE752. [c] **Mere proximity is not test in determining admissibility of sales of other land in determining value of land.** 328 Ill 610, 160 NE226.

762-58 216Ky618, 287SW985, 988 [cit CJ].
762-62 263Mass147, 160NE821.
762-63 202Cal 731, 262P737; CalA 267 P326; CalA 284P1072; 168Ga451, 148 SE162; 336 Ill 390, 168NE370; 248 Mich473, 227NW718; NJSup 147A487; 101WVa165, 132SE380.
763-65 337 Ill 555, 169NE753; 265 Mass494, 163NE255; NJSup 147A487; 33 OhA102, 168NE752; 151NC542, 149 SE236.
763-65½-New. To render evidence of other sales of property competent evidence of the value in condemnation proceedings, the sales must have been for money and in whole or in part by way of exchange. 336 Ill 390, 168NE370.
763-66 [b] Services.-293Pa45, 141A 631.
763-67 203 Iowa518, 210NW453.
763-69 [c] Evidence rejected offer to show results from uncertified seed ten to fifteen miles from plaintiff's farm. 102NJL131, 130A612.
765-7 80CalA248, 251P686 [quotCJ]. [a] (2) Where intoxication was claimed to have been cause of certain conduct, it is competent to show other occurrences on other occasions indicating different cause. 80CalA248, 251P686.
766-15 16F(2d)552; 151Md658, 135A 838, 50ALR280; 221MoA537, 282SW 1037. [b] Court not bound to take a view. 33PortoRico 98.
766-16 151Md658, 135A838, 50ALR 280.
766-17 16F(2d)552.
767-33 103WVa186, 136SE840, 842 [citCJ].
767-35 221MoA537, 282SW1037, 1040 [citCJ]; 33PortoRico 98.
768-50 121 Or165, 254P817, 818 [quot CJ]; Wash 291P1101.
768-51 214Ala187, 106S811.
768-53 243 IIIA562.
768-56 83Colo 211, 263P933 (toy automobile).
769-64 80Colo 375, 251P224; 111Conn 521, 150A520; 118Kan775, 236P647; 208Ky507, 271SW570, 39ALR919 (samples of kerosene sold to neighbors and taken from same tank as that sold decedent); 235Ky197, 30SW(2d)882; 263 Mass252, 160NE792 (cont worn by injured pedestrian); 315Mo 367, 286SW 106, 117 [citCJ]. But see 203Cal 634, 265P487. [b] (37) Dishwashing machine. 83NH518, 144A845.
770-70 TexCivA 290SW825 (hammer).
770-71 80Colo 375, 251P224; 221MoA 537, 282SW1037. [a] 80Colo 375, 251P 224. [c] Second production of clothing of injured person on cross-examination of physician testifying for defendant is proper where cross-examination is proper. 221MoA537, 282SW1037.
771-72 RI 147A667; TexCivA 290SW 825. [a] TexCivA 300SW641.
771-82 215Ala507, 111S235. [a] There must be something to connect specimen with instrument whose authenticity defendant disputes. 85Colo 537, 277P784.
771-86 SD 229NW302.
772-95 43F(2d)549; 35GnA111, 132SE 114, 115 [citCJ]; 203 Iowa776, 209NW 452; 104WVa547, 140SE534, 58ALR 207.
772-96 7LaA206; 259Mass554, 156NE 855.
773-10 TexCivA 286SW673.
774-11 TexCommnA 178W(2d)805; TexCivA 286SW673.
774-12 TexCivA 286SW673.
774-16 47 Ida668, 279P291; 152Miss 466, 119S203; 54SD113, 222NW671.
775-25 295Pa120, 144A912.
776-26 TexCivA 286SW673.
776-28 152Miss466, 119S203.
773-44 203 Iowa776, 209NW452.
778-45 208Ky548, 271SW592; 213Ky 206, 280SW972; 215Ky613, 286SW696.
778-47 153Md235, 138A261, 53ALR 1165.
778-49 Nebr 231NW34.
778-51 230AppDiv580, 245NYS488.
779-55½-New. West Virginia, 104WVa 547, 140SE534, 58ALR207.
779-62 215Ala507, 111S235.
779-63 215Ala507, 111S235; 203 Iowa 776, 209NW452; TexCivA 286SW673.
779-64 Mass 171NE54.
780-66 215Ala507, 111S235; 75CalA 554, 243P33; Ida 286P616.
780-67 [a] (1) 75CalA554, 243P33. (2) 147Va208, 136SE591.
780-68 75CalA554, 243P33. [b] 104 WVa547, 140SE534, 58ALR207.
780-70 75CalA554, 243P33.
781-74 TexCivA 286SW673.
781-75 TexCivA 286SW673.
781-81 43F(2d)549; 85Colo 537, 277P 784; Iowa 233NW28; 215Ky613, 286SW 696; TexCivA 286SW673; 104WVa547, 140SE534, 58ALR207. [b] (2) Will properly admitted as standard, though record failed to show it was in custody of register and produced pursuant to order under statute. 153Md235, 138A 261, 53ALR1165. [d] Defendant's denial of authenticity does not relieve court from permitting introduction of evidence tending to establish genuineness of signatures. 85Colo 537, 277P 784. [e] Acknowledgment before notary of mortgage raises inference that defendant signed deed. Mass 169NE145.
782-83 TexCivA 286SW673. [c] Admission by party to witness that he signed specimen is sufficient to admit it as standard of comparison. TexCivA 286SW673.
782-84 TexCivA 286SW673.
782-88 19F(2d)506; 43F(2d)549. [a] Testimony of witness that he saw party sign specimen is sufficient to admit it as standard of comparison. TexCivA 286SW673.
782-89 208Ky548, 271SW592; 215Ky 613, 286SW696. [a] (6) "Most satisfactory proof." TexCivA 286SW673. [f] Mass 169NE145; 104WVa547, 140SE 534, 58ALR207. [l] Letter signed by party to be charged inclosing check is properly admitted. 259Mass554, 156NE 855. [m] Mere receipt of letter does not warrant its admission as standard of writing. 259Mass554, 156NE855.
783-90 43F(2d)549.
785-19 101WVa535, 133SE131, 134 [citCJ].
786-28 255 IIIA127.
786-49 Utah 285P285(2dcase).
787-56 See also 26F(2d)51.
787-60½-New. In some jurisdictions opinion of witnesses testifying alone from familiarity with signature and comparison has less weight on issue of forgery than expert opinion. Nebr 231 NW34.
787-60⅓-New. In some jurisdictions testimony of handwriting experts that signature is forgery may outweigh testimony of witnesses that they saw signature made. Nebr 231NW34.
787-61½-New. Permitting a handwriting expert to testify that the signatures on the papers purporting to be the contract sued on were not written by the same person held not error. 220Ala332, 124S884.
788-69 216Ala516, 113S581; 220Ala237, 124S519; Va 153SE832 (it is permissible for mother to point out physical likeness to alleged parent).
788-71 212Ky149, 278SW573; 55ND 353, 213NW841; 129 Okl 263, 264P621, 622 [citCJ].
788-72 212Ky149, 278SW573; 55ND 353, 213NW841; TexCivA 48W(2d)1023.
788-75 15F(2d)790.
788-76 299Pa79, 149A104.
788-77 212Ky149, 278SW573 (stub of arm).
789-78 229Ky37, 16SW(2d)489; Mo 291SW1014.
789-79 See also 132 Or106, 284P579.
789-80 55ND353, 213NW841; 99Vt512, 131A710.
789-84 See also MoA 31SW(2d)566.
789-86 234Mich551, 208NW695; 115 Nebr579, 213NW966, 52ALR1393; 55 ND353, 213NW841; 299Pa79, 149A104.
789-87 115Nebr579, 213NW966, 52ALR 1393; 55ND353, 213NW841.
790-95 190NC449, 130SE171, 175 [quot CJ].
790-96 190NC449, 130SE171, 175 [quot CJ].
790-97 190NC449, 130SE171, 175 [quot CJ].
790-98 190NC449, 130SE171, 175 [quot CJ].
790-1 Ark 30SW(2d)817(2dcase).
790-2 106WVa99, 144SE881, 60ALR 570.
790-3 Mass 168NE792.
791-7 106WVa99, 144SE881, 60ALR 570.
791-17 Compare 15F(2d)133.
791-18 40F(2d)831; Conn 152A136; 41GnA308, 153SE74; 252 IIIA184. See also 213Ala637, 105S899.
792-19 174Ark293, 295SW19.
793-33 150Wash242, 272P980.
794-36 17Colo 30, 28P460; 89 Ill 361; 47 IIIA115; 52 Iowa515, 3NW529; 72 Mo 380; 60MoA365; 3 OhCirDec493, 6 OhCirCt362; 6PaSuper542, 42WklyNC 18; 9PaSuper615, 7DelCo 395; 9PaSuper 620, 7DelCo 399; 9PaSuper621, 7DelCo 398; 90Tenn152, 16SW76; 115Va921, 78SE625.
794-37 105Ala170, 16S576; 4AlaA287, 58S949; 56Ark370, 19SW1053; 90Ark 292, 119SW287; 111Cal 46, 43P392; 90 Ga500, 16SE649; 115 Ill 120, 3NE443; 199 Ill 34, 65NE144; 9 IIIA339; 39 IIIA 592; 48 IIIA202; 68 IIIA288; 65 IIIA435; 107 Iowa90, 77NW532; 6KanA480, 50P 605; 19Mich352; 46Minn386, 49NW189; 120Mo 1, 25SW202, 41AmSR678; 175 Mo 161, 75SW86; 29ND480, 151NW36; 27SD626, 132NW242; 38TexCr233, 42 SW379; TexCivA 208SW207.
794-39 42F(2d)910; 213Ala24, 104S 230; 165Ga125, 139SE864; 170Ga495, 153SE37; Iowa 232NW490; 191NC821, 131SE739; 297Pa294, 147A56(3dcase); 51SD365, 213NW950; 54SD146, 222NW 690. [m] Bankruptcy proceedings are admissible to show title to automobile acquired from trustee by intervenor in suit to determine right to proceeds of its sale, pursuant to distress warrant deposited in registry of court. TexCivA 274SW1016. [n] Conflicting statements of file in clerk's office does not affect its admissibility to prove validity of proceedings. 51SD365, 213NW950. [o] Motion for production of rules, court order thereon, and oral testimony of production held properly admitted. 318 Mo 28, 298SW817. [p] Condensed statement, taken from United States supreme court opinion, is properly excluded. Mass 170NE619.
795-41 193NC541, 137NE658.
796-47 253Mass383, 149NE313; 52SD 436, 218NW148.
796-48 [a] Report of receiver.-Utah 273P303.
796-51½-New. In a suit to recover land, documentary evidence concerning partition of estate involving land has been held properly excluded, on the ground that the purported return had not been made judgment of a court of ordinary, and because it did not show what portion of the land the appraisers, were undertaking to set aside. 167 Ga94, 144SE759.
796-52 41F(2d)155 (party offering record need not be sworn); 198Cal 32, 243 P423; 166Ga857, 144SE728.
797-55 14PaDist&Co 292.
798-70 See also 220Ala664, 127S233. [c] Bench docket inadmissible to show judgment, where minute book not shown unavailable. 92Fla711, 109S807, 808 [citCJ].
798-71 See also 44 Ida192, 255P1095.
798-73 222MoA912, 68W(2d)1007.
799-82 94CalA463, 271P509; Ill 172NE 765.
799-83 107Conn156, 139A688; 167Ga 214, 144SE735. [f] Demurrer and motion to make petition more definite properly excluded as not part of record in proceeding to procure dissolution of injunction. 41Wyo 419, 286P383.
799-84 86Colo 493, 283P1042. [a] Petition in injunction suit is improperly admitted in conversion suit consolidated with it. TexCommnA 258SW(2d)290.
800-89 Contra 32PortoRico 442.
800-91 [a] In Porto Rico.-32PortoRico 442.
800-94 170La249, 127S617. [b] (3) Verity of execution issued out of court of limited jurisdiction must be proved. 45 Ida604, 264P384.
800-95 51SD365, 213NW950. [a] Fact that files have been in hands of one of attorneys and returned requires no additional foundation beyond clerk's identification to permit introduction of files. 51SD365, 213NW950.
801-4 107Conn156, 139A688.
801-9 128 Okl 71, 261P170; 32Porto Rico 442 (copy of former opinion by appellate court admissible to show result of former suit); 145SC53, 142SE828, 833 [quotCJ]. [b] As to documents

copied in opinion of appellate court in former suit see 32PortoRico 442. [c] **Certified copy of opinion** by appellate court in former suit admissible to show exact nature and scope of questions decided. 32PortoRico 442.

801-10 128 Okl 71, 261P170, 173 [cit CJ].

801-12½-New. An answer to a complaint in another action is inadmissible in a libel suit to show that the filing of the charge based on facts alleged was not inspired by malice, as it could only show tender of the issue whether the charge was true or false in the former action. 90CalA390, 266P320.

801-14 16F(2d)182; 26F(2d)534; 30F(2d)642; 43F(2d)814 (income tax assessment roll); 257Mass580, 154NE266; 218AppDiv584, 219NYS46; TexCivA 4SW(2d)201; 142Wash653, 254P445. [h] **Official report not made on personal knowledge of officer** is not admissible as substantive evidence of facts reported. 241Mich624, 217NW898. [i] **Record must be competent and relevant** notwithstanding statute declaring record admissible. 39Wyo 266, 270P1072.

802-20 319Mo 1040, 6SW(2d)591.

803-25 48RI 144, 136A308. [e] **In California.**-76CalA369, 244P609.

803-26 76CalA369, 244P609; 56AppDC 315, 13F(2d)287. [a] (3) Flood control report. 76CalA369, 244P609.

803-28½-New. An application for a driver's license is not evidential as to the age of the applicant. NJSup 139A343.

803-28⅓-New. Census is not evidence as to the age of a person, the source of information not being shown. NJSup 139A343.

804-31 [e] **Collusion on part of surveyor** destroyed official character of his report of survey. TexCivA 31SW(2d)172.

804-35 78CalA751, 248P934; 136SC525, 134SE497.

804-36 216Ala679, 114S63.

804-37 299Pa465, 149A741.

805-41 MoA 285SW797.

805-45 246 IllA100.

805-47 99Fla1086, 128S430 (weather report of thirty miles distant held inadmissible); 221MoA478, 282SW97.

805-52 218AppDiv584, 219NYS46. [e] **Fingerprints** on record in war department are admissible. 142Wash653, 254P445. [f] **Veterans' bureau report.**-42F(2d)804.

805-53 But see 123Kan4, 254P394. [e] **Report of state examiner** on examination of books and accounts of court clerk, when filed with county clerk is primary evidence. 38OklACR698. [f] **Flood control report excluded** as not being state document. 76CalA369, 244P609.

805-54 168Ga868, 149SE207.

806-55 74CalA378, 240P523.

806-56 16F(2d)182; TexCivA 17SW(2d)130(2dcase).

806-57 257Mass580, 154NE266.

806-58 218AppDiv840, 219NYS24. [d] **Certified copy of birth certificate,** shown to have been subscribed and sworn to before notary public, is not inadmissible in evidence because affidavit was signed by mark without showing any witnesses thereon. 135 Okl 214, 275P312.

806-59 Mo 21SW(2d)762 (medical certificate contained in certificate of death held inadmissible under statute when signed by coroner instead of by attending physician).

807-60 223AppDiv461, 228NYS354.

808-81 219Ala465, 122S448.

809-88 Tex 12SW(2d)641.

809-97 19F(2d)64; 228Mich416, 200NW155; 31NM188, 242P683; TexCivA 293SW593. [a] (3) 19F(2d)64. (4) NJ 133A83; 34PortoRico 234 (evidence of death and identity, and of other corroborated statements). (13) Clearance papers are competent evidence of destination of vessel. 122 Or644, 259P780. (14) Entry papers are competent evidence of port from which vessel came. 122 Or644, 259P780. (15) Certificate of military service in national guard. 35PortoRico 224. (16) Baptismal certificate of record made in 1882 by priest having registry in his custody. 35PortoRico 491. [c] (2) In Porto Rico certificate of marriage occurring prior to 1885 issued by keeper of parish books is sufficient without authentication of person who issued document. 35PortoRico 485. [e] **Where certificate is immaterial,** it is proper to exclude it. MoA 9SW(2d)655.

809-97½-New. Under Alabama statute, requiring freight tariff and other public records to be proved by the original or copy certified by legal keeper, a certificate furnished by the secretary of the public service commission is properly refused. 21AlaA245, 107S38.

810-98 [a] 35PortoRico 459. [b] (1) CalA 288P841 (that certificate is not in proper form is no obstacle); 232Mich 101, 205NW116; 237Mich76, 211SW75; 176Minn360, 223NW677. (4) Certificate made by coroner who was not present at time of death, instead of by attending physician, as required by statute, is properly excluded as evidence of cause of death. 237Mich76, 211NW75. [c] 237Mich76, 211NW75; 142Miss660, 107S881. [f] **Certificate of state chemist as to analysis of fertilizers** is not admissible in evidence where samples were not drawn in accordance with statute. 142Miss660, 107S881.

810-1 52ND806, 204NW673.

811-3 NJSup 139A343.

811-4½-New. In Alabama an official certificate need not have a seal to be introduced in evidence. 215Ala157, 110S1.

811-4⅓-New. Certificate of secretary of state of another state that certain record did not appear in that office is inadmissible. 3Del 495, 139A253.

813-21 218AppDiv840, 219NYS24.

813-22 [a] **Post-office receipts for registered letters** do not prove themselves. 205 Iowa742, 218NW580.

814-29 218AppDiv840, 219NYS24.

814-32 [d] **Sheriff's deed** without showing order of sale on which deed is based does not show title. TexCivA 273SW900.

816-41 81Mont408, 263P972, 975 [cit CJ].

816-45 81Mont408, 263P972.

816-47 92Fla711, 109S807, 808 [cit CJ].

819-77 275US279, 48SCt126, 72Led280; 215Ala157, 110S81; TexCivA 276SW448. [i] **Certificate of literal transcript required** where abstract not specifically authorized. 35PortoRico 433 (entries in registry of property under Mortgage Law).

820-78 255 IllA503; 234Ky276, 27SW(2d)980 (admissibility of original as pre-requisite).

820-81 10NJEq664, 139A33.

820-81½-New. In Alabama the chief clerk of the motor vehicle department may make certified transcripts of its records for use as evidence. 215Ala157, 110S81.

821-83 219Ala142, 121S504(2dcase).

821-88 78CalA751, 248P934 (map); 42Ida357, 245P691; 48 Ida680, 285P464; IndA 160NE52; Iowa 229NW829(2dcase); 219Ky272, 292SW805; 226Ky286, 10SW(2d)1091; Me 152A56; 253Mass200, 148NE441; 48SD535, 207NW53; TexCivA 288SW615; TexCivA 297SW900. [a] (5) Book of original entries of United States land office. 152Miss781, 118S904.

822-89 174Ark66, 294SW368; 176Ark435, 2SW(2d)1100; 92Fla543, 110S343; 199 Ind708, 160NE347; 226Ky621, 11SW(2d)434; TexCommnA 26SW(2d)196. [a] (4) MoA 10SW(2d)75.

822-90 ND 232NW310.

823-5 TexCivA 297SW900.

824-6 219Ala225, 121S526; 233Ky491, 26SW(2d)19; 32PortoRico 442 (certified copy of opinion of supreme court).

824-10 165Ga534, 141SE653.

825-17 Ind 162NE409.

825-20 252 IllA449.

825-22 167Ga588, 146SE320.

826-34 14PaDist&Co 292.

826-43 99NJEq527, 133A875.

830-93 213Ala494, 106S150.

830-96 161Ga517, 131SE483.

830-99 93Fla579, 112S549; 96Fla620, 119S333.

830-1 146Wash37, 261P800.

831-8 161Ga517, 131SE483.

831-11 [f] (1) TexCivA 5SW(2d)624.

832-13 168Ga356, 148SE84.

832-16 213Ala494, 106S150; 192NC634, 135SE612.

833-19 213Ala494, 106S150.

835-46 96Fla620, 119S333.

835-48 [a] **Private entries in abstract of title,** not complete copies of summons and return, are inadmissible to show service of summons. Ind 162NE409.

835-54 Ala 130S213; 226Ky1, 10SW(2d)467; 154Md77, 140A34; TexCommnA 1SW(2d)878.

835-55½-New. Changes in a certified copy by a stranger, not affecting original terms, do not render it admissible. TexCivA 292SW942.

835-55⅓-New. Chattel mortgage must be proved as at common law where certified copy is objected to by party not sought to be changed thereon. TexCommnA 1SW(2d)878.

836-68 [a] (2) Copies of declaration for widow's pension authenticated by signature of commissioner of pensions and attested by proper officer's seal are admissible in evidence. 85Mont114, 278P110.

838-89 116 Or562, 241P393, 395 [quot CJ]. But see 46Philippine386.

838-90 116 Or562, 241P393, 395 [quot CJ].

839-5 Ala 130S213.

841-34½-New. If authenticating certificate clearly refers to judgment roll with which it is presented it need not be attached thereto by brad or clip. 120Kan518, 243P1018.

841-35 TexCivA 28SW(2d)240.

843-64 ND 232NW310.

843-68 ND 232NW310 (certified copy of appointment of receiver).

843-72 [a] 104NJL375, 140A463, 57ALR596.

844-85 127Misc284, 215NYS796.

844-86 TexCivA 12SW(2d)247. [b] **Pleadings not relevant to issues or immaterial** are not admissible, even though properly authenticated. TexCivA 278SW507.

844-88 127Misc284, 215NYS796.

845-92 127Misc284, 215NYS796.

845-92½-New. In absence of provision in state statutes as to authentication of records of courts of other states, the federal constitution and statutes control. 127Misc284, 215NYS796.

845-95 39GaA53, 146SE42(2dcase); 127Misc284, 215NYS796; 117 Okl 93, 245P555; TexCivA 278SW507. [b] **Authentication held insufficient.**-TexCivA 278SW507.

845-1 83NH501, 144A787.

846-16½-New. Certification by the county clerk, instead of the clerk of the justice's court, where default judgment was taken, is not sufficient. 127Misc284, 215NYS796.

846-17 [d] **Seal of wrong court.**-127Misc284, 215NYS796. [e] **Clerk of court of another state** may affix seal of court to attest his signature on copy of record for use out of court. Mo 31SW(2d)1.

846-21 127Misc284, 215NYS796.

847-27 127Misc284, 215NYS796.

848-45 Ariz 275P975; 147Wash497, 266P688.

848-49 See also 136 Okl 107, 276P179.

849-50 135AppDiv194, 237NYS378; 117 Okl 93, 245P555. [b] **Where certificate shows that it was made by proper officer,** statement that he had charge of court records is unnecessary. Ariz 275P975. [c] **Attestation of clerk not required to be authenticated by judge's certificate.**-Ariz 275P975.

851-78 See also TexCivA 290SW559.

854-24 105WVa536, 143SE345. [b] **Statute providing how public records of another state may be authenticated is inapplicable** to chattel mortgages executed in another state when original instrument is offered. 84 IndA122, 150NE118.

855-38 [g] (2) Letter from governor of province in Syria, tending to show petitioner's birth in Syria, held inadmissible. 19F(2d)64.

855-48 83Mont511, 273P638. [c] 67Utah371, 248P83 (transcript of evidence and oral opinion of Canadian court certified only by official stenographer held inadmissible).

856-57 See also 255 IllA462.

856–59 168Minn280, 210NW15.
857–73 111Conn415, 150A310; Ga 155 SE755; Iowa 233NW26; Iowa 233NW 51; Mass 172NE113; 52ND925, 204NW 889; 55ND321, 213NW488; 122 Or579, 260P444. [f] **Part of document not competent.**–99WVa431, 129SE313.
858–78 220Ala188, 124S416; 34 Porto Rico 141.
858–79 CalA 290P458; 149Md533, 131 A762; MoA 281SW450; 122 Or579, 260 P444.
858–80 160Ga831, 129SE546 (deed excluded as irrelevant); 162Ga371, 134SE 69; 190NC108, 129SE181 (deed not competent on issue); 34PortoRico 141; Tex CivA 38W(2d)576 (guardian's deeds); TexCivA 30SW(2d)356 (confirmation deed is admissible to show good faith); Utah 289P151; 151Va976, 145SE735. [f] **Deeds to cemetery lots are admissible** notwithstanding rules they are subject to need not be introduced. TexCivA 25SW(2d)639.
858–84 84 IndA122, 150NE118.
858–85½–New. bank deposit slips; 56 ND87, 215NW921.
858–88 177Minn494, 225NW432.
858–90 198NC817, 151SE191(2dcase); 130 Or32, 273P711.
858–94 [a] (1) But see Del 147A165. (2) Church record, containing copy of agreement establishing boundary of land claimed, was competent to show character and extent of its claim, where line substantially corresponded to that in deed from record owner. Del 147A165.
859–98½–New. Where deed was excluded from evidence, there was no error in excluding mesne conveyances thereunder, where offered as muniments of title and not as color of title. 213Ala494, 106 S150.
859–1 TexCivA 13SW(2d)743.
859–3 189NC790, 128SE404 (to show intention of parties as to subject matter of conveyance). [a] TexCivA 299SW 450. See also 214Ala390, 107S863.
859–4 228Ky209, 14SW(2d)750; 189 NC790, 128SE404; 99Vt384, 133A355. [a] **Recitals in deed conveying dower interest** are evidence against grantees and their successors that dower or life estate was properly allotted and located as therein stated. 189NC790, 128SE404.
859–5 170Ga662, 153SE759.
859–8 79Mont550, 257P1016.
859–9 MoA 298SW1067.
860–11 201Cal 155, 255P825; 141SC 265, 139SE625, 54ALR964.
860–12 201Cal 155, 255P825.
860–16 [a] **Check revoked by death of maker** is corroborative evidence of claim against his estate. BC [1929] 4DomLR 240.
861–23 41F(2d)76; 86PaSuper303; TexCivA 24SW(2d)786; TexCivA 29SW (2d)872.
861–25 84 IndA122, 150NE118; 133 Okl 268, 272P1025; 34PortoRico 713; 34PortoRico 718. [a] In Idaho.–290P 200.
861–26 134 Okl 262, 272P1017.
861–28 142Wash565, 253P785.
861–32 329 Ill 253, 160NE552; 149Md 134, 131A31.
862–33 198Cal 32, 243P423; 106Conn 506, 138A442, 444 [citCJ] (police register); 27Hawaii161; 86PaSuper92. [c] **Admissibility and probative value of books of account in Porto Rico.**–32Porto Rico 509. [d] **Modern relaxation of rules of evidence.**–85PaSuper509.
862–34 215Ala548, 112S120; 217Ala441, 116S528; 27Hawaii161; 249 IllA432; 251 IllA139 (on issue of agreed value); Mass 168NE535; 238Mich242, 213NW 158, 159 [citCJ]; 174Minn558, 219NW 905 (applicable only to account books in strict sense); 145Miss87, 110S218, 49 ALR565; 78Mont457, 254P432; 244NY 168, 155NE88; 244NY251, 155NE116; 116 Okl 155, 243P758; 130 Okl 182, 266 P439; 32PortoRico 509; 154SC424, 151 SE788; Tex 286SW611. [c] **Books held not account books under rule.**–48 Ida538, 283P609.
863–41 [a] **Statute not applicable to policeman's report** based on hearsay information. 227AppDiv281, 237NYS550; 227AppDiv276, 237NYS547.
863–42 MoA 285SW755.
864–50 30F(2d)92; 34GaA166, 128SE 779; 149Md134, 131A31; 260Mass492, 157NE699; Miss 115S343; 320Mo 623, 8SW(2d)858; MoA 285SW755, 756 [cit CJ]; 78Mont457, 254P432; 244NY251, 155NE116; 26 OhA442, 160NE478; 114 Okl 101, 243P728; Vt 148A481; 99WVa 673, 129SE709. [a] 33F(2d)827; MoA 31SW(2d)86; TexCivA 31SW(2d)485. [c] **Where defendant had access to and frequently consulted books** and never questioned nor objected to amount standing against him, such books are admissible as evidence of admission by defendant of correctness of such books. 27Hawaii161. [d] **Noncompliance with requirements** of code of commerce regarding authentication and manner of keeping mercantile books does not affect their admissibility; but only their probatory value. 32PortoRico 509. [e] **Preliminary proof held competent.**–85 IndA450, 150NE31. [f] **Desk pad memoranda** held not account books. 233 IllA94.
865–51 27Hawaii161 (held if books were erroneously admitted such error was cured by subsequent action of defendant and his counsel by admitting item involved).
865–55 318Mo 139, 1SW(2d)127, 132 [citCJ]; MoA 18SW(2d)102; 244NY251, 155NE116; TexCivA 9SW(2d)394. But see 337 Ill 173, 169NE1. [f] **In Alabama.**–216Ala398, 113S256. [g] **Bookkeeper who made entries from sales tickets** may testify as to correctness of books and of account sued on. 37GaA716, 141 SE513.
865–56 49RI 455, 143A673.
866–70 29F(2d)502. See also 151Md 514, 135A383, 49ALR1366. [a] 54ND 91, 209NW204. [b] **Sufficiency of identification.**–MoA 31SW(2d)86.
866–78 33F(2d)827 (properly identified records of examination and treatment of patients are competent as to properly included matters).
866–87 150Miss245, 116S593.
867–95 19F(2d)273; 319 Ill 437, 150NE 435; 337 Ill 173, 169NE1; MoA 18SW (2d)102; 74Mont126, 238P603; 78Mont 457, 254P432; 131Misc490, 227NYS690; TexCivA 21SW(2d)746; Man [1929] 3 DomLR682. [a] **Order of proof.**–238 Mich242, 213NW158.
867–1 See also 37GaA271, 139SE916.
867–1½–New. or by the general manager under whose supervision entries therein were made, Tex 286SW611.
867–2 219Ala18, 121S23.
867–4 51Philippine757. See also 48RI 416, 137A879.
867–5½–New. Witness testifying as to correctness of books need not remember transactions recorded. 216Ala398, 113S256.
867–5½–New. The rule requiring proof of correctness does not apply to books kept by a bank cashier or by another under his direction so as to conceal defalcation where the entries are offered in evidence against such cashier's surety. TexCivA 8SW(2d)196.
867–7 131Misc490, 227NYS690.
868–10 319 Ill 437, 150NE435; 74Mont 126, 238P603; 139 Okl 181, 281P763 (entries in bank books of account admissible); TexCivA 294SW301; Tex CivA 17SW(2d)145; 153Va315, 149SE 409.
868–11 106Conn506, 138A442, 444 [cit CJ].
868–16 TexCivA 8SW(2d)196. [j] **Business organization and method of keeping records** must be sufficiently shown for records to speak for themselves. 290Pa21, 137A867.
869–29 22F(2d)33; Ala 130S545; Mass 173NE530; Tex 286SW611; TexCivA 16SW(2d)151.
870–30 [a] **In lieu of check-stub entries.**–32 OhA270, 167NE402.
870–36½–New. Ledger carrying balance forward from book not in evidence is admissible where no objection is made. 216Ala398, 113S256.
870–40 170Ark712, 280SW999; Iowa 222NW376; MoA 9SW(2d)655. [c] **Deposit slips** by cashier to bank patron are admissible to prove deposits where bank book fails to show deposit. Tex CivA 8SW(2d)196.
870–42 254Mass488, 150NE323.
871–43 41GaA505, 153SE531; 35Porto Rico 43. [a] 56ND674, 218NW860.
871–48 233 IllA94.
871–50 31 OhA28, 166NE151.
871–52 But see Mo 23SW(2d)1053.
872–64 IndA 168NE604 (entries not identifying particular checks held incompetent); TexCivA 294SW301.
873–73 5PaDist&Co 668; 99WVa673, 129SE709.
873–81 174Ark1180, 298SW195; 246 IllA100.
873–83 215Ala548, 112S120; 151Md514, 135A383, 49ALR1366; 114 Okl 101, 243 P728; 99WVa673, 129SE709. [g] **Original sales records** held to be original entries. 48RI 221, 137A149.
874–91 19F(2d)273; 41GaA505, 153SE 531; TexCivA 6SW(2d)183, 185 [cit CJ]; 135Wash512, 238P17.
875–97 235 IllA89.
876–99 135Wash512, 238P17.
876–2 131Misc490, 227NYS690.
876–3 [a] (2). Books of account are not admissible to show balance due for price of land. 187Wis640, 205NW402. (3) Books of account kept by partnership conducting summer resort are inadmissible to establish claim of surviving partner against estate of deceased partner for balance due on purchase price of farm purchased as separate and distinct transaction. 187Wis640, 205N W402.
876–5 196NC197, 145SE16; Tex 286 SW611; 187Wis640, 205NW402.
877–10 See also 48RI 221, 137A149.
877–16 104Conn54, 132A553; 83NH160, 139A750.
878–19 48RI 160, 136A439, 440 [citCJ].
879–30 233 IllA94; NJComPl 149A830; 26 OhA442, 160NE478 (gambler's book entries held not admissible); 98PaSuper 172.
879–31 41GaA505, 153SE531; 26 OhA 442, 160NE478, 479 [citCJ].
881–47 319 Ill 437, 150NE435; MoA 285 SW755, 756 [citCJ]; 74Mont126, 238P 603.
881–48 114 Okl 101, 243P728; 99WVa 673, 129SE709.
881–49 227AppDiv324, 237NYS563 (excluding evidence showing that entries as to separate transactions were made at same time held error); 149Wash360, 271P76.
883–75 175Minn341, 221NW62, 64 [cit CJ].
883–77½–New. The party against whom books of account are admitted has a right to inquire in relation to the source of the entries. 50Philippine132.
883–78 152Md439, 137A43 (dictum); MoA 285SW755.
884–79 152Md439, 137A43 (dictum).
884–80 333 Ill 588, 165NE199; 152Md 439, 137A43. [c] **In absence of person furnishing information to person making entry,** entry is not inadmissible. 152 Md439, 137A43.
884–81 85PaSuper7.
884–81½–New. Production of persons making the original entries may be excused where they would have no recollection of the transactions recorded and the burden of producing them would be unreasonably heavy. 18F(2d)934.
884–85 105NJL391, 144A805.
885–86 [b] 41GaA505, 153SE531.
885–87 85PaSuper7; Tex 286SW611; 154Wash450, 282P838.
885–88 174Minn558, 219NW905 (entries in register of bills payable and receivable).
886–96 IndA 148NE505; 198NC56, 150 SE665.
887–5 MoA 285SW755; TexCivA 294 SW301, 305 [citCyc]. [b] (2) Testimony of witness as to correctness of audit of account held hearsay, where he had made up account merely from another's work sheets, witness not having examined records himself. 174Ark 79, 294SW993, 52ALR1263.
887–8 TexCivA 16SW(2d)151. [c] **Sales tickets** made by salesmen in the regular discharge of their duties are presumptively correct. 37GaA716, 141 SE513.
887–10 216Ala381, 113S298, 299 [cit CJ].
888–13 215Ala612, 111S901; 41GaA 505, 153SE531; 232Mich36, 204NW771;

253NY124, 170NE517; TexCivA 294SW 301.
888-16 216Ala73, 112S437; 235 IllA 89; 222AppDiv494, 226NYS570; Tex CivA 271SW401.
888-17 152Md439, 137A43.
889-27 55ND321, 213NW488.
889-29 26F(2d)621; Ida 286P914; 55 ND321, 213NW488; TexCivA 288SW 624, 626 [citCJ]; TexCivA 4SW(2d) 312 (admissible against objection as to authentication); 149Wash360, 271P 76.
890-30 258Mass551, 155NE604; Tex CivA 288SW624, 626 [citCJ]. [b] (3) Deposit book is inadmissible where depositor did not use it. 151Md514, 135 A383, 49ALR1366.
890-34 TexCivA 288SW624, 626 [cit CJ].
891-37 94CalA104, 270P742; NJ 146A 377; 228AppDiv23, 238NYS394. [c] **Book entries kept by surviving partners** are evidence of actual value in accounting with widow of deceased partner. Iowa 230NW359.
892-62 But see 125Me471, 134A801.
893-67 216Ala547, 114S41; 219Ala18, 121S23; 21AlaA280, 107S716; 103NJ Eq170, 142A566; RI 136A841; SD 231 NW904; Wash 292P104. [a] (11) See also 81CalA747, 254P679. (14) Memorandum of articles destroyed by fire where witness testified that he made memorandum and "knew that said stuff was in there." 21AlaA280, 107S716. (15) Time cards kept by timekeeper and clerk as part of his work done. 262 Mass545, 160NE319. [f] (2) Copies of stock ledger and of weight slips may be admissible in action against carrier for short delivery. 21F(2d)656.
894-68 216Ala547, 114S41; 111Conn 415, 150A310.
894-69 13F(2d)847.
894-70 13F(2d)847; 30F(2d)962; Mass 173NE239; Wis 230NW137. [f] (2) Tables showing calculations based on conclusions from testimony of others held incompetent, though other tables based on knowledge were admitted to aid jury. 14F(2d)743.
895-71 13F(2d)847; 154Wash450, 282 P838.
895-74 230AppDiv172, 243NYS96.
895-76 68CalA326, 229P348.
896-77 221MoA1066, 295SW838; NJ 146A377; 48RI416, 137A879; 148Va 479, 139SE295. [a] (3) Schedule of firm's assets and liabilities in which disputed note was not included. 82NH 125, 129A876.
896-77½-New. Time cards containing daily entries of hours of work made by workmen held competent evidence when duly proved by foreman and bookkeeper. 287Pa425, 135A220.
896-77¼-New. Inventory made nine days after purchase of business held admissible in connection with oral testimony. 173Minn443, 217NW505.
896-78 TexCivA 275SW481.
896-81 92Fla1001, 111S113; 221MoA 428, 289SW349; TexCivA 12SW(2d) 613.
896-82 92Fla1001, 111S113; 317 Ill 334, 148NE32 (that contract has been canceled).
896-83 See also Can [1925] 3DomLR 595. [b] **Statements of account** in Alabama, are, by statute, admissible in evidence if verified by affidavit and attached to complaint, unless denied by defendant's sworn plea. 216Ala547, 114 S41.
896-84 54ND91, 209NW204.
896-85 218Ala619, 119S833.
897-86 34GaA5, 128SE74 ("ticket book" of railroad showing sales of tickets); 253Mass205, 148NE609, 41ALR 558; 166Minn478, 208NW190; Vt 151A 642. [g] 217Ky35, 288SW1027.
897-87 217Ky35, 288SW1027.
898-88 166Minn478, 208NW190. [c] **Letter in nature of official report** by one official of corporation to another is admissible. 318Mo 318, 300SW283.
898-88½-New. Report on locomotive kept under rule of interstate commerce commission held admissible. 216Ala 296, 113S54.
898-88¼-New. Corporation's books, after proper identification, were admissible to establish financial condition. 204 Iowa297, 213NW794.
898-88¾-New. trace proceeds of sale of stock. 204 Iowa297, 213NW794.
898-88⅞-New. and to show that stock sold to plaintiff as belonging to corporation was previously sold to its agents. 204 Iowa297, 213NW794.
898-89 287Pa337, 135A105; 107WVa 290, 148SE122.
899-96 But see 283Pa205, 129A71. [c] **As between officers**, corporation's minutes signed by them are competent as admissions, but not conclusive. 217Ky 35, 288SW1027.
899-97 54ND91, 209NW204.
900-98 319 Ill 437, 150NE435; 206 Iowa 201, 220NW36, 37 [citCJ]; 167Minn394, 209NW311, 46ALR1495; 320Mo 623, 8 SW(2d)858.
900-99 19 OhA225.
900-1 165La577, 115S757, 758 [quot CJ]. [a] **Identification held sufficient.**- 54ND91, 209NW204.
900-2 201 Iowa860, 208NW209.
900-3 176Ark1, 1SW(2d)818 (cashier); MoA 276SW93 (cashier).
900-4 333 Ill 588, 165NE199.
900-5½-New. The cashier of a large bank is the person most competent to vouch for the accuracy of the bank's books. 319 Ill 437, 150NE435.
900-6 [d] **Recorded copies.**-19 OhA225. [e] **Minute books** when identified held admissible. 176Ark1, 1SW(2d)818.
900-7 173Ark424, 292SW380. [b] (3) Documents in possession of corporation in collateral matter between third parties must be proved and cannot be certified under statute where corporation is not involved. 254 IllA334.
900-7½-New. That the copy of the bylaws is in altered and mutilated condition does not render it inadmissible where alterations are immaterial. 252 IllA298.
901-8 35 OhA443, 172NE561.
901-9 196Wis397, 220NW180 (records of lodge competent to prove trustees' lack of authority).
901-10 MoA 297SW730.
901-12 198Cal 32, 243P423.
902-17 255Mass369, 151NE839 (information furnished by others); 261Mass 40, 158NE270, 57ALR974; 232Mich36, 204NW771; 149Miss455, 115S555. [b] (1) See also 317 Ill561, 148NE293. (2) Admission in evidence of daily record of nurses' treatment of plaintiff's case known as bedside notes, which were unsigned and appeared to be in handwriting of different individuals, during time plaintiff was confined to hospital after receiving injuries sued for, has been held erroneous. 83NH538, 145A263(2d case).
902-18 Mass 170NE836. [e] **Entries made from information furnished by attending nurse** are admissible where attending nurse is inaccessible as witness. 152Md439, 137A43.
902-19 233Ky464, 26SW(2d)20; Mass 164NE478(1stcase); 30 OhA300, 165NE 47.
903-39 8F(2d)922; 214Ala314, 107S 858; 175Ark763, 300SW437; 176Ark 642, 3SW(2d)685; 109Conn662, 145A 50; 164Ga575, 139SE34; 167Ga843, 146SE835; 169Ga741, 151SE495; 126 Kan596, 270SW580; 255Mass243, 151NE 91; 164Minn401, 205NW282; MoA 274 SW917; 221MoA1066, 295SW838; MoA 17SW(2d)599; 81Mont509, 264P396; NJ Sup 152A186; 131Misc836, 228NYS314; RI 133A620; 157SC469, 154SE855; TexCivA 29SW(2d)899. [g] **Portions of letter** from attorney to defendant, relating to foreign personal matters, held properly excluded. 212Ala 542, 103S580. [h] **Letter written by witness, giving opinion of mental condition of intestate**, held incompetent and immaterial. 255Mass243, 151NE91. [i] **Letter of corporation president to secretary**, expressing regret at having to dispense with his services, held inadmissible in corporation's action for money paid on his unauthorized checks. TexCivA 286SW901. [j] **Res inter alios acta rule** held to bar letters not between parties. 148Va331, 138SE637.
904-41 84CalA611, 258P440; Me 149A 574; MoA 11SW(2d)1088; 56ND194, 216NW564; 294Pa347, 144A290; 32 PortoRico 676; 49RI 99, 140A3; Tex CivA 288SW552.
904-42 220Ala332, 124S884; Mass 170 NE621; 32PortoRico 676; 100WVa381, 130SE465.
904-43 176Ark966, 4SW(2d)926; 111 Conn178, 149A774; 320Mo 146, 6SW (2d)920. [b] (2) Letters between defendant and third person relating to independent contract which had no relation to that in suit. 168Ark1079, 272 SW660.
904-44 37GaA301, 139SE912; TexCivA 278SW873.
904-45 37GaA301, 139SE912.
904-46 167La995, 120S623; TexCivA 278SW873. [a] **Letter forming part of correspondence containing terms of contract not self-serving declaration** of party introducing it because it tends to support his (the writer's) theory. 32 PortoRico 676.
904-47 215Ala278, 110S465; 231Ky 550, 21SW(2d)983; 177Minn494, 225NW 432; 179Minn520, 229NW868; 49RI 392, 143A602; 108WVa365, 151SE326. [d] **Corporation's ownership of pledged bonds** may not be shown by pledgor's letter to corporation. 287Pa337, 135A 105.
905-48 221MoA550, 288SW69.
905-49 169Ga608, 151SE31; 258Mass 573, 155NE606; 260Mass265, 157NE 532; 288Pa211, 135A746; RI 133A620.
905-50 74CalA10, 239P429.
905-52 127Me21, 140A687.
905-54 214Ala565, 108S456, 47ALR270; 83 IndA519, 148NE177; 128Me364, 147 A655; 151SC484, 149SE246; TexCivA 278SW873; TexCivA 25SW(2d)678.
905-56 MoA 13SW(2d)578.
905-60 32PortoRico 676 (to prove negotiations through representative of sender).
905-61 167Ga843, 146SE835; TexCivA 278SW873.
905-62 172Ark11, 287SW1022; 176Ark 448, 3SW(2d)310 (fraud); 127Me21, 140 A687; TexCivA 278SW873.
905-63½-New. But parts of letter not sufficiently complete to reflect ideas of writer will be excluded. 36Wyo 310, 254P689.
905-63⅞-New. , or where the remainder was lost and the adverse party has full opportunity to explain the contents thereof. 335 Ill 494, 167NE117.
906-70 TexCivA 278SW873, 877 [cit CJ].
906-76 43 Ida265, 251P621; 171Minn 122, 213NW553, 52ALR580; 101WVa 535, 133SE131.
906-77 19F(2d)64; 215Ala282, 110S 399; 171Minn122, 213NW553, 52ALR 580; MoA 279SW755; 197NC322, 148 SE458; 32PortoRico 235; 101WVa535, 133SE131. See also 310Mo 446, 276SW 1020, 1025 [quotCJ].
907-78 172Ark314, 288SW723; 171 Minn122, 213NW553, 52ALR580.
907-79 86CalA402, 260P841; 121Kan 587, 249P597. See also 310Mo 446, 276 SW1020, 1025 [quotCJ].
907-80 See also 310Mo 446, 276SW 1020, 1025 [quotCJ].
907-81 171Minn122, 213NW553, 52 ALR580.
907-82 167Ga843, 146SE835; 121Kan 587, 249P597, 598 [quotCJ]; 171Minn 122, 213NW553, 555, 52ALR580 [quot CJ]; 9PaDist&Co 397. See also 310Mo 446, 276SW1020, 1025 [quotCJ].
908-83 121Kan587, 249P597, 598 [quot CJ]; 254Mass229, 150NE1; 171Minn 122, 213NW553, 52ALR580. See also 310Mo 446, 276SW1020, 1025 [quotCJ]. [a] **Discretion not abused** in exclusion of telegram and letters for lack of authentication. 171Minn122, 213NW553, 52ALR580.
908-84 [b] (1) Mass 170NE621.
908-94 Iowa 229NW173; 124Me384, 130A209; 171Minn122, 213NW553, 52 ALR580; 102NJEq68, 130A457, 458 [cit CJ]; 189NC445, 127SE533; TexCivA 5 SW(2d)567, 569 [citCJ].
909-96 40F(2d)835; 171Minn122, 213

NW553, 52ALR580.

909-5 235Mich536, 209NW838; 50ND 583, 197NW150; 10PaDist&Co 541; 103 WVa574, 138SE381, 382 [citCJ]; 36 Wyo 310, 254P689. [d] 35F(2d)689; 57ND598, 223NW350; TexCivA 281SW 632.

910-15 17F(2d)981; 30F(2d)642; 173 Ark322, 292SW359; 83Colo 211, 263P 933; Conn 152A136; 166Ga226, 142SE 861; 42 Ida645, 247P1069; 331 Ill 277, 162NE865; IndA 167NE721 (in action for death from typhoid due to impure water, map showing water main and river was admissible, though size of main was out of proportion); 126Kan 188, 268P119; 231Ky700, 22SW(2d)98; 180Minn509, 231NW202; 222MoA954, 10SW(2d)967; 191NC690, 132SE788, 790 [citCJ]; 30 OhA118, 164NE370; 131 Okl 242, 268P303, 307 [quotCJ]; TexCivA 282SW296; 107WVa440, 148 SE496. But see NJ 150A387. [a] But see 335 Ill 624, 167NE831. [j] **Exclusion of maps held not error.**–14F(2d) 304.

911-16 102Conn735, 130A102 (within sound discretion of court); Conn 152 A148; 29Hawaii240; 191NC690, 132SE 788; 30 OhA118, 164NE370; 132 Or243, 285P262 (showing skid marks of automobile). [b] (2) Placing of lines of engineer's vision preceding crossing accident on map before they were introduced in evidence gave them undue prominence over other oral testimony. 102Conn735, 130A102.

911-17 198Cal 560, 246P322; TexCivA 282SW296; TexCivA 10SW(2d)1054. [c] **Official maps admissible to supplement maps required by statute** to show property leased by state, to show that property in controversy was not included in state's lease to lessor. 198Cal 560, 246P322.

912-20 191NC690, 132SE788. [b] **Map not showing that lands involved were part thereof** held properly excluded. 101CalA164, 281P432.

912-21 191NC690, 132SE788.

912-22 Conn 152A148; 191NC690, 132 SE788.

912-23 214Ala194, 106S814; 163Ga471, 136SE440; 37GaA212, 139SE734; 150 Md18, 132A258; 153Md156, 138A7; 219 MoA195, 270SW427; Mo 29SW(2d)39; 191NC690, 132SE788; TexCivA 19 SW(2d)926.

912-24 214Ala194, 106S814.

912-25 89Fla296, 103S827. [b] **Where map prepared in land office,** by projecting lines of prior erroneous government survey, is shown to be inaccurate, though referred to in deed as official map, it is insufficient as survey. 90Fla 452, 108S189.

912-26 191NC690, 132SE788.

912-27 37GaA212, 139SE734(2dcase); 150Md18, 132A258.

913-29 160Ga281, 127SE848.

913-31 TexCivA 300SW641.

913-31½-New. A plat containing a disputed signature of a wife may be competent as bearing on the question of whether or not the wife ratified the acts of her husband in dealing with the land and is estopped to deny her signature on a deed in so far as intervening rights of lienholders are involved. 153Miss576, 121S131.

913-33 247 IllA352; 151Md658, 135A 838, 50ALR280; Minn 232NW795; 115 Nebr737, 214NW643, 644 [citCJ]; 82 NH225, 131A601; 191NC378, 131SE743, 747 [citCJ]; 24 OhNPNS565; 30 OhA 118, 164NE370.

914-35 [b] **Weight to be given to photograph is for jury.** 100WVa679, 131SE 563.

914-36 But see 196NC556, 146SE227.

914-37 154Md63, 139A564.

915-45 144Wash446, 258P508, 514 [cit Cyc].

915-46 144Wash446, 258P508, 514 [cit Cyc].

915-50 Ala 128S389(2dcase).

916-52 [a] **Photograph of young female in bed with wound covered with cloths was prejudicial** and its admission self-serving. Ala 128S389(2dcase).

916-56 3Del 541, 140A648; 339 Ill 276, 171NE271; 234 IllA502; 253 IllA498; 229Ky37, 16SW(2d)489; 229Ky284, 17 SW(2d)233; 220MoA355, 286SW718; 123 Or632, 263P400. [a] (1) 234 IllA 502. (5) Appearance of name written upon plates, and the testimony of operator who took them, and of father of plaintiff who retained them, furnished sufficient identification. 234Mich551, 208NW695. (6) Where physician testified that X-ray plates were made at his request, under his supervision, and in his presence, plates were properly admitted. MoA 293SW500.

916-57 214Ala476, 108S382; 339 Ill 94, 170NE845; 234 IllA502; 253 IllA498; 128Kan187, 276P820; 229Ky37, 16SW (2d)489; MoA 256SW1076; 220MoA 355, 286SW718; 115Nebr737, 214NW643, 644 [citCJ]; NC 154SE667; 130 Okl 122, 265P768; TexCivA 7SW(2d)1112.

917-58 Ala 130S557.

917-60 30F(2d)642; Ala 128S233; 180 Ark980, 23SW(2d)972; 96CalA597, 274 P614; 106Conn302, 138A147; 111Conn 521, 150A520; 212Ky770, 280SW127; 151Md658, 135A838, 50ALR280; MoA 285SW542; 82NH225, 131A601; 103 NJL419, 136A176; 104NJL26, 138A699; 223AppDiv698, 229NYS361; 190NC62, 128SE730 (to explain witnesses' testimony); 191NC378, 131SE743; 120 Okl 1, 249P742; 132 Or106, 284P579; 48 SD400, 204NW899; 144Va358, 132SE 316. [f] **Photograph of plaintiff's car not admissible** to show that break caused collision where photograph was taken after collision. 105Conn453, 135 A554.

918-62½-New. 168Ark191, 269SW576.

918-62⅓-New. or although it does not tend to prove the whole of plaintiff's case. 82NH225, 131A601.

918-63 MoA 273SW137.

918-64½-New. Admission of photograph of sisters taken eight months before accident is not prejudicial. 105 Conn392, 135A293.

918-72 35GaA538, 134SE134; 144Wash 446, 258P508.

919-80 168Ark884, 271SW967, 969 [quotCJ]; 99Fla1246, 128S839(2dcase); 329 Ill 445, 160NE752 (x-ray film); 253 IllA190; 234Ky396, 28SW(2d)467; MoA 297SW451; 191NC378, 131SE743; 141 Okl 133, 284P21. [h] See also 141 Okl 133, 284P21.

920-82 111Conn521, 150A520; NJSup 132A244; 126 Or532, 270P521; 289Pa 13, 136A856; 52SD302, 217NW383. [a] (4) Excluding insurer's photograph, taken five days after loss, held not error, in suit on windstorm policy. 289Pa 13, 136A856.

920-83 191NC378, 131SE743, 747 [cit CJ].

920-84 MoA 272SW703.

920-85 191NC378, 131SE743. [a] (5) See also 37GaA771, 142SE185. (6) Few days. 191NC378, 131SE743.

921-88 23F(2d)677; MoA 290SW621, 624 [citCJ]; MoA 272SW703, 704 [quot Cyc]; MoA 296SW1036, 1041 [citCJ].

921-90 87PaSuper260.

921-91 Ala 128S233; 212Ky770, 280 SW127; 151Md658, 135A838, 50ALR 280; MoA 272SW703, 704 [quotCyc]; NJSup 146A675; 87PaSuper260.

921-94 319 Ill 344, 150NE276; Tex CivA 18SW(2d)906.

922-95 106Conn302, 138A147; 191NC 378, 131SE743; 87PaSuper260. [c] **Foundation.**–168Ark884, 271SW967.

922-97 126Me583, 140A374; 151Md658, 135A838, 50ALR280; 179Minn325, 229 NW136 (properly excluded); NJSup 130A639; NJSup 139A317; 104NJL385, 140A450 (exclusion not error); 51ND 673, 200NW780; 289Pa13, 136A856; TexCivA 9SW(2d)388.

922-98 14F(2d)304, 305 [citCJ].

922-1 [a] **Discretion not abused.**–101 CalA503, 282P10(2dcase).

922-3 85Colo 17, 273P648.

922-6½-New. Baseball guide is admissible to show beginning and end of playing season in case where that is material. TexCivA 2SW(2d)505.

923-7 126Me572, 140A370; Mass 173 NE515; 176Minn138, 222NW904; 57ND 941, 224NW894. [f] **Medical illustrations of death of infant** from effect of morphine held inadmissible where it did not appear that death resulted from taking one thirty-second grain of morphine acetate as in instant case. 219Ala427, 122S416, 65ALR1097.

924-12 218Ala453, 118S807; 219Ala 427, 122S416, 65ALR1097.

924-13 [d] **Where parties specified in contract** that certain handbook be authoritative on disputed question, it was held properly admitted. 192NC166, 134 SE419.

925-23 89CalA477, 265P268, 271 [cit CJ]; 106Conn302, 138A147; 35GaA292, 133SE63; 217Ky21, 288SW761; 257 Mass575, 154NE268; Mich 233NW373; 318Mo 28, 298SW817; NJ 137A555; 153Wash14, 279P94. But see 299Pa380, 149A662. [a] **That other considerations may destroy value of tables as evidence** does not render tables inadmissible. 147 Wash672, 267P433.

926-23 NJSup 147A572(1stcase).

926-29 NJ 137A555.

927-32 [a] **Permitting attorney who has not been sworn to read Wigglesworth tables to jury** has been held error. 251 IllA192.

927-36 NJSup 138A206.

927-44 146Wash163, 262P119, 55ALR 1218.

927-44½-New. or that his condition would improve with time. 235Mich240, 209NW124.

927-46 146Wash163, 262P119, 55ALR 1218.

928-62 Ala 127S155; 23AlaA416, 125S 398; 95Fla321, 116S31 (unofficial reports).

929-71 114Nebr783, 210NW165, 169 [quotCJ].

929-73 37F(2d)476; 231Ky550, 21SW (2d)983; 114Nebr783, 210NW165, 169 [quotCJ].

929-75 213Ala494, 106S150; 219Ala 465, 122S448; 93Fla579, 112S549, 551 [citCJ]; 163Ga471, 136SE440 (map); 37GaA212, 139SE734; 164GaA301, 139 SE912; 317 Ill 401, 148NE274; 151Md 514, 135A383, 49ALR1366; 153Mich156, 138A7; Md 148A420; 238Mich8, 213NW 152; 167Minn394, 209NW311, 46ALR 1495; 222MoA495, 280SW1050; MoA 31 SW(2d)111; 105NJL375, 146A355, 65 ALR324; 217AppDiv777, 217NYS64; 9 PaDist&Co 411; 51Philippine954; 32 PortoRico 235; 48RI 144, 136A308; 114 Tex418, 267SW244, 270SW1001 (instrument cannot be proved by proving part of it); 115Tex490, 283SW769; TexCivA 287SW117; TexCivA 293SW577, 579 [cit CJ]; TexCivA 28SW(2d)259; TexCivA 32SW(2d)513. [c] **Admission in action to establish title to land of copy of adjudication in bankruptcy** is improper, there being no showing defendant in case at bar and bankrupt were same person. Me 152A56.

930-83 163Ga471, 136SE440.

930-86 TexCivA 295SW198.

930-88 TexCivA 287SW117.

930-90 213Ala494, 106S150; 161Ga517, 131SE483 (where affidavit of forgery filed); 164GaA301, 139SE912; 163Ga 766, 149SE138 (over objection to attestation where defective witnessing not apparent); 245 IllA423.

931-94 [b] **Insurance manual,** embodying classification of risks, rights, and premiums under accident insurance policy, is properly excluded where it had not been proved by corporate action of defendant company. NJ 147A196.

931-96 150Md24, 132A278; 115Tex 490, 283SW769, 771 [citCJ].

931-97 32PortoRico 235.

931-99 214Ala194, 106S814; 37GaA 212, 139SE734(2dcase) (plat of land).

931-9 225AppDiv819, 232NYS378.

932-16½-New. translation of ancient document, 213Ala494, 106S150.

932-19½-New. In order that conveyance may be received as muniment of title, grantor must have legal title to lands conveyed. 213Ala494, 106S150.

932-20 TexCivA 287SW117.

933-35 But see Iowa 232NW282; Tex CivA 8SW(2d)516.

933-36 See also 166Ga893, 144SE663 (2dcase). [b] 99Fla410, 128S831. [d] **Sufficiency of seal.**–100NJEq455, 136A 297.

933-38 Ga 155SE185. [a] 307Mo 682, 271SW489. [h] **Statute construed to mean that certificate of acknowledgment** takes place of proof that deed was signed and delivered and is prima facie evidence that deed was duly executed. 507 Mo 682, 271SW489.

934-42 53ND564, 207NW438.
935-50 84CalA142, 257P606; TexCivA 28SW(2d)936. [e] **To what instruments applicable.**-168Minn136, 209NW879.
935-51 231Ky36, 20SW(2d)1013; 222MoA165, 2SW(2d)806; TexCivA 9SW(2d)394.
935-52 33Ariz474, 266P3.
935-54½-New. Withdrawal of an objection to the introduction of a paper offered in evidence is not an admission of its genuineness. 93PaSuper314.
935-58 28F(2d)755.
935-59 213Ala631, 105S886 (under code execution may be proved by maker). [a] **Effect of statute.**-105NJL375, 146A355, 65ALR324.
936-60 179Ark118, 14SW(2d)257; 163Ga267, 135SE923; 168Ga650, 148SE585; 219AppDiv578, 220NYS401.
936-70 168Ga451, 148SE162.
936-75 [d] **In New Jersey.**-104NJL218, 141A92.
937-85 225AppDiv99, 232NYS232.
938-89 163Ga267, 135SE923.
938-93 See also 21AlaA130, 106S214.
939-4 NJ 130A456.
942-40 See also 168Ga451, 148SE162.
943-42 128Misc762, 219NYS479. [f] **Direct statement by surveyor as to acreage** was equivalent to saying that survey was correct. 214Ala187, 106S815.
943-43 213Ala631, 105S886; Iowa 233NW28; 115Tex490, 283SW769, 771 [cit CJ]. [c] **Recipient of letter,** not shown familiar with handwriting, cannot swear to writer unless something assures him in responsible way of genuineness. 43Ida265, 251P621.
943-44 215Ala667, 112S134.
943-46 [d] 176Ark1, 1SW(2d)818; 176Ark966, 4SW(2d)926; 99CalA347, 278P498; 322 Ill 519, 153NE617; 240 IllA50; 202 Iowa292, 209NW465; 226Ky82, 9SW(2d)1095; 33PortoRico 276; TexCivA 4SW(2d)1019. [e] 155Md210, 141A547; 51Philippine954.
944-47 Mich 233NW362.
944-48 38GaA753, 145SE471; TexCivA 293SW577.
944-49 288Pa389, 135A860; TexCivA 281SW339; TexCivA 9SW(2d)394.
944-50 213Ala631, 105S886 (testimony of witness to signatures of orders and freight receipts held competent to authorize their introduction in evidence).
944-53½-New. Mere contents of written instrument claimed to have been executed by a certain person are not sufficient evidence of execution; 217AppDiv777, 217NYS64.
944-53¼-New. but where the person claimed to have executed the instrument was unable to sign his name, and the contents are solely referable to him, the instrument is admissible as some proof of its execution, 217AppDiv777, 217NYS64.
944-53¾-New. and if the person claimed to have executed it denies execution thereof, an issue of fact is thus raised for the consideration of the jury. 217AppDiv777, 217NYS64.
944-53½-New. Where there are great numbers of instruments, a general identification of them is sufficient without segregation and examination of each item, where their correctness is challenged only by objection and full opportunity is given for cross-examination. 55ND321, 213NW488.
944-54 But see 168Ga451, 148SE162.
945-62 213Ala466, 105S562.
945-66 215Ala12, 108S858; 105Conn366, 135A391; 212Ky142, 278SW832; 191NC297, 131SE735; 86PaSuper49; 67Utah45, 245P695. [g] **Copy of document in Spanish** held not self-proving. 213Ala494, 106S150.
947-74 137SC468, 135SE567.
947-75 105Conn366, 135A391.
947-82 8F(2d)847.
947-84 141 Okl 113, 284P52; TexCivA 280SW911, 913 [citCJ].
947-85 TexCivA 280SW911, 913 [cit CJ]. [a] **Recital in deed less than thirty years old that grantor was heir held** merely claim of heirship. 128Me382, 147A816.
948-6 105Conn366, 135A391; Conn 151A512; Ga 155SE185; 212Ky142, 278SW832; 226Ky82, 9SW(2d)1095.
948-13 105Conn366, 135A391; 137SC468, 135SE567.
949-24 195NC155, 141SE580.
950-39 96Fla620, 119S333.
951-41 96Fla620, 119S333.
952-59 105Conn366, 135A391; Ga 155SE185; 216Ky599, 299SW326; TexCivA 296SW939. [c] **Undated document inadmissible,** age not having been shown or signature proved. 32PortoRico 235.
953-66 215Ala670, 112S136 (and absence of date not fatal if other evidence of age sufficient).
953-68 215Ala670, 112S136; 7PaDist &Co 157.
953-71½-New. But failure to be on public record does not affect admissibility. 215Ala670, 112S136.
954-84 48RI 144, 136A308.
954-85 105Conn366, 135A391.
957-19 [c] **Deed invalid because bond for title not recorded.**-197NC515, 149SE846.
958-38 [c] **Order** requiring production of all documents pertinent to revenue collectors transactions held reasonable. 181Ark954, 28SW(2d)715.
959-42 213AppDiv402, 210NYS92 (corporation's tax return must by statute in New York be kept secret save under certain circumstances).
959-51 104Conn508, 133A686. [e] **Imposing condition of using in evidence.**-104Conn508, 133A686.
959-54 104Conn508, 133A686; 29Porto Rico 836.
959-55 180Ark395, 23SW(2d)251; 30OhA512, 165NE751.
961-85½-New. In some jurisdictions the order will not be made unless the case is at issue. 3Del 252, 138A277.
962-97 136SC448, 134SE415.
962-99 83CalA100, 256P567.
963-11 32F(2d)195.
963-17½-New. Failure to require defendant to go to his distant home for pass books is not an abuse of discretion where part of the roads are to a large degree impassable. Iowa 228NW272.
965-53 [b] (1) Contra 104Conn508, 133A686.
966-56½-New. Where the party producing the document at the request of an adversary turns it over to the court, the court's handing it over to the adversary after its own inspection is a proper exercise of discretion. 104Conn508, 133A686.
966-64 See also 101NJEq733, 138A882.
966-67 180Ark895, 23SW(2d)251.
966-69 125Misc172, 210NYS423 (exclusion of otherwise admissible evidence for defendant on grounds that books not produced on notice were but evidences has been held error).
967-73 26F(2d)574; 105Conn392, 135A293; 126Me583, 140A374; Mass 172NE113; 30OhA118, 164NE370; 30OhA435, 165NE55; 296Pa493, 146A123; 49RI455, 143A673. [d] **Book materially erased or altered cannot go to jury** unless party who offers it explains erasures or alterations, except, however, where erasures are immaterial. 51Nev299, 274P811.
967-77 79CalA339, 249P533; 177Minn494, 225NW432.
967-80 214Ala473, 108S339.
967-81 TexCivA 13SW(2d)240.
967-82 [d] 168La37, 121S183.
968-89 216Ala619, 114S208; 146Miss600, 111S584; TexCivA 7SW(2d)613. [b] 336 Ill 125, 168NE1. [d] **Certified copy of amplified record** determines validity of judgment. 324 Ill 426, 155NE295. [e] **Entry made by sheriff or any officer of court** having jurisdiction of defendant and of subject matter of suit is prima facie conclusive as to all facts recited therein, but, under some statutes, may be traversed at first term after notice of such entry, and before pleading to merits. 38GaA470, 144SE395. [f] **Court clerk's record** showing that execution was issued on certain date held properly disregarded by chancellor in view of contradicting facts and circumstances. 180Ark57, 20SW(2d)305(2dcase).
968-92 126Or193, 268P75 (record in criminal case).
968-92½-New. In trespass to try title, partition cannot be established by descriptive calls in deeds without additional evidence. TexCivA 295SW679.
969-95½-New. Certified copy of probate proceeding of sale of property by a guardian is prima facie evidence of the amount of the guardian's indebtedness in a ward's action against the surety on the guardian's bond. TexCivA 275SW179.
969-98 321 Ill 504, 152NE591.
969-99 212Ky76, 278SW156; 135Misc796, 238NYS463; 235Ky613, 31SW(2d)915; TexCivA 275SW179. [e] **Certified copy of land warrant is presumptively** conclusive of existence of warrant. 212Ky76, 278SW156.
969-1 MoA 281SW67; 218AppDiv686, 218NYS476. [b] 116Nebr359, 217NW610 (federal census not conclusive). [d] **State geological survey map** held not conclusive as to boundary between adjoining municipalities. 101NJEq572, 138A99.
969-7 92Fla343, 110S343; 212Ky76, 278SW156; 26OhA96, 159NE487 (federal certificate of inspection report on car). But see Iowa 227NW902; 31OhA442, 167NE412. [c] **Chancery court held not bound to accept certificate of mayor attached to papers in proceedings as conclusive** that proceedings were regular, where they left allegation of fraud undenied. 178Ark507, 10SW(2d)906. [d] **Physician, who made out medical report embodied in certificate of insured's death, furnished by registrar of vital statistics, held competent witness** in rebuttal, if his evidence tends to impeach certificate. 226Ky621, 11SW(2d)434.
969-7½-New. Matters of opinion. Statutes making record of coroner's certificate of death prima facie evidence of facts therein stated do not apply to coroner's opinion as to the cause of death. 13F(2d)820.
970-9 213Ala665, 106S170; 216Ala504, 113S609, 54ALR1413; 217Ala124, 115S13 (renewal note); 213AppDiv607, 211NYS53; 217AppDiv644, 216NYS178; SD 231NW933; TexCivA 282SW298; 69Utah284, 254P781; Wis 230NW141 (inventory). [e] **Coal lease to defendant** by plaintiff lessee does not show ownership of leasehold requiring payment of royalties sued for. 220Ky769, 295SW1039.
970-11½-New. bills of sale, 207 Iowa1315, 224NW469.
970-13 85CalA633, 260P367; 69Utah284 254P781; 153Wash198, 279P395 (whether cash payment referred to in conditional sales contract was actually made is susceptible of proof). But see 93CalA411, 269P672.
970-13½-New. notes, 213Ala665, 106S170.
970-14 83CalA555, 256P1114; 94CalA755, 271P912; 339 Ill 568, 171NE618; 307Mo682, 271SW489; Mo 28SW(2d)1001 (trustee's deed); 137Misc674, 244NYS267; TexCivA 276SW947; TexCivA 282SW298; TexCivA 13SW(2d)743; TexCivA 22SW(2d)1096; TexCivA 29SW(2d)500 (recital of consideration). [d] (1) 80CalA185, 251P666 (mere declarations of grantor and not prima facie proof of valuable consideration); TexCivA 270SW1043. But see TexCivA 276SW947; TexCivA 20SW(2d)803. (2) Recital of valuable consideration paid by grantee is evidence of such payment only against grantor or against those claiming under grantor and no others. 80CalA185, 251P666. (3) Statement in deed that certain sum has been paid as consideration is admission or acknowledgment of grantor, and may be accepted as prima facie evidence of its truth. 97CalA628, 276P122. (4) Recital in deed that consideration was one dollar and love and affection constitutes admission by parties to transaction and prima facie evidence that consideration for alleged transfer other than of love and affection, was nominal. 207 Iowa1315, 224NW469. (5) Recitals of value in deeds in exchange of properties are not binding on principal in action by broker for commission. TexCivA 19SW(2d)104. [f] 314Mo175, 282SW1022. [i] (2) Other instances. CalA 289P221. [j] **Where not conclusive.**-TexCivA 18SW(2d)699. [k] **Re-**

cital of nominal consideration is insufficient to raise presumption thereof. 137 **Misc**674, 244**NYS**267.

970-15 198**NC**520, 152**SE**496 (map not alone sufficient to show general plan for development). [b] (2) Maps and plats introduced in evidence, which satisfactorily identified property under its designation of outlots, was all that was necessary, where certain parties to case pleaded trespass to try title against one another as to such lots. **TexCivA** 14**SW(2d)**94. [f] **Where correctness of survey is not questioned** by other testimony, court is due to find in accordance with survey. 214**Ala**187, 106**S**815. [g] **Map filed twenty years after execution of deed** is of no evidential value. 83 **CalA**555, 256**P**1114 (suit to quiet title).

970-16 90**Fla**595, 106**S**473; **TexCivA** 4**SW(2d)**635.

971-17 216**Ala**504, 113**S**609, 54**ALR** 1413; 11**LaA**18, 123**S**147; 12**LaA**124, 124**S**693; **Minn** 232**NW**519; **MoA** 284 **SW**863 (train sheets showing movement of trains); 136**Misc**664, 240**NYS**502. [a] **Books of bank** are not conclusive as to its assets and liabilities and are subject to contradiction by one having knowledge of facts. **TexCivA** 275**SW**75. [b] **Stock book of corporation** is prima facie evidence of ownership of stock, but may be impeached for fraud. 216 **Ala**504, 113**S**609, 54**ALR**1413. [c] **Certificate of organization committee that requisite number of signatures** had been procured for organization of association held properly admitted as conclusive proof. **TexCivA** 16**SW(2d)**413.

971-18 See also 83 **IndA**181, 147**NE**811.

971-20½-New. , or unauthenticated reports of contractor's employees as to labor and materials furnished. 219**App Div**107, 219**NYS**97.

971-21 246**Mich**25, 224**NW**377.

971-21½-New. When there is conflict in oral testimony, contemporaneous writings in evidence have great probative value. 213**NYS**541 (especially when intended by parties to be confirmation of oral conversations).

971-21½-New. Log book of vessel prepared after the vessel arrived at port, after a collision and after conversation and understanding between navigating officers, does not outweigh testimony of eyewitnesses and disinterested persons. 18**F(2d)**295.

971-23 13**F(2d)**732; 40**F(2d)**25; 41 **F(2d)**557 (accountant's report based on books); 218**Ala**171, 118**S**328(2dcase); 219**Ala**18, 121**S**23; 97**CalA**414, 275**P**500 (2dcase); 145**Miss**87, 110**S**218, 49**ALR** 565; **MoA** 286**SW**150; 228**AppDiv**23, 238**NYS**394; **TexCivA** 275**SW**75. See also 90**PaSuper**266.

971-25 187**Wis**640, 205**NW**402 (entries in partnership books held not to establish claim of surviving partner against estate of deceased partner).

971-26 **TexCivA** 275**SW**75.

971-27 97**CalA**414, 275**P**500(2dcase).

971-28½-New. **Books of account showing goods delivered** to one person and charged to another do not alone make out prima facie case that person charged was indebted. 48**RI** 416, 137**A**879.

972-30 126**Me**583, 140**A**374; 196**NC**435, 146**SE**70; 146**Wash**688, 264**P**990 (not binding on jury).

972-31 28**F(2d)**718 (not essential); 319**Mo** 139, 3**SW(2d)**374.

972-33 124**Kan**492, 260**P**643, 644 [quot CJ]; 180**Minn**134, 230**NW**575; **NJ** 137**A** 555.

972-37 100**CalA**96, 279**P**1045 (held not conclusive). But see 51**Philippine**212.

972-37½-New. Survey and plat of lots on town map held to support finding of sufficient description in case involving adverse possession. **TexCivA** 289 **SW**188.

972-38 150**SC**398, 148**SE**220.

972-39 See also **TexCivA** 11**SW(2d)**242.

972-40 96**Fla**620, 119**S**333; 212**Ky**76, 278**SW**156 (land warrant). See also **Man** [1930] 1**DomLR**590.

972-45 152**Miss**781, 118**S**904.

972-46 221**MoA**152, 297**SW**727. But see 298**Pa**322, 148**A**471.

973-50½-New. **One part of a record may always be impeached, contradicted, varied, or enlarged and explained by other parts of the record of equal dignity.** 309**Mo** 291, 274**SW**456.

973-51 53**SD**275, 220**NW**521, 524 [citCJ perBrown,J.,dis op].

973-55 313**Mo** 256, 281**SW**417, 419 [cit CJ]; **MoA** 299**SW**118. [a] 141**Miss**199, 106**S**525.

973-56-57 **MoA** 299**SW**118; **Sask** [1927] 3**DomLR**474.

974-58½-New. In absence of legislative definition of "malpractice" meaning given by courts is best evidence. 131**Misc** 248, 225**NYS**601.

974-59 32**F(2d)**732; 216**Ala**679, 114**S** 63; 219**Ala**18, 121**S**23; 175**Ark**944, 1**SW (2d)**88; 74**CalA**278, 240**P**32; 232 **IllA** 439 (dictum); 233 **IllA**56; 121**Kan**601, 249**P**682, 684 [quotCJ]; 217**Ky**15, 288 **SW**758; 2**LaA**698; **MoA** 290**SW**630; 191**NC**809, 133**SE**391; 193**NC**231, 136**SE** 636; 115 **Okl** 153, 241**P**342, 345 [citCJ]; 141 **Okl** 183, 284**P**288 (parol evidence held best evidence, and documentary evidence improperly admitted); 51**Philippine**954; 32**PortoRico** 134; **TexCivA** 282**SW**282; **TexCivA** 27**SW(2d)**263; 104**WVa**134, 139**SE**642.

975-60 193**NC**231, 136**SE**636; **Wash** 287**P**41. [a] **Staple and grade of cotton destroyed through defendant's fault** may be proved by testimony as to other cotton grown on same plantation. 141**Miss**199, 106**S**525.

975-61 101**NJL**546, 129**A**209.

975-62 30**F(2d)**630; 166**GaA**850, 144 **SE**665; 167**Ga**94, 144**SE**759; 50**SD**81, 208**NW**585.

976-65 **TexCivA** 30**SW(2d)**573.

976-66 **TexCivA** 8**SW(2d)**688 [quotCJ].

976-67 **CalA** 286**P**428; 336 **Ill** 11, 167 **NE**807; 251**Mich**701, 232**NW**373; 149 **Md**533, 131**A**762; 313**Mo**256, 281**SW**417; 79**Mont**566, 257**P**427; 104**WVa**134, 139 **SE**642. [h] **Rule expressly applicable to documentary evidence.**–251**Mich**701, 232**NW**373.

977-69 **Sask** [1927] 3**DomLR**474. [b] **Contents of lost document** must be proved by some one who knows contents. 137**SC**468, 135**SE**567.

977-70 203**Cal** 26, 263**P**240; 96**CalA**42, 273**P**595 (assignment of corporate debts not required to be in writing); 108**Conn** 74, 142**A**473 [aff dism **US** 49**SCt**82(2d case)]; **MoA** 29**SW(2d)**205(2dcase) (stenographer's notes not evidence); 81 **Mont**573, 264**P**394; 193**NC**305, 136**SE** 716; 112 **Okl** 114, 240**P**74; **TexCivA** 293 **SW**892, 893 [quotCJ].

978-74 213**Ala**336, 104**S**650 (if evidence incompetent only sub modo, objector has burden to prove incompetency under best evidence rule); 213**Ala**630, 105**S**896 (witness testifying to value of land may be asked on cross-examination what he assessed it for as contradictory of his testimony); 220**Ala**601, 127**S**173; 37 **GaA**407, 140**SE**638; 193**NC**583, 137**SE** 724; 293**Pa**45, 141**A**631, 633 [quotCJ]; 155**SC**63, 152**SE**18; 52**SD**201, 217**NW** 187; **TexCivA** 3**SW(2d)**484; 99**Vt**227, 131**A**16 (evidence of procurance of insurance as evidence of value).

980-83 21**AlaA**248, 108**S**870, 871 [cit CJ].

980-85 21**AlaA**248, 108**S**870, 871 [cit CJ]; 119 **Or**422, 249**P**1046, 1048 [cit CJ].

980-88 172**Ark**108, 287**SW**1019; **Ark** 29 **SW(2d)**1085; 173**Ark**777, 293**SW**723; 93**CalA**775, 270**P**382; 74**CalA**278, 240**P** 32; **CalA** 290**P**906; 233 **IllA**56; 234**Ky** 670, 28**SW(2d)**988; 170**La**249, 127**S**617; 164**Minn**425, 205**NW**286; 319**Mo** 1240, 6 **SW(2d)**565; 319**Mo** 1040, 6**SW(2d)**591; 217**MoA**326, 272**SW**1037; 220**MoA**507, 275**SW**984; **MoA** 299**SW**118; **MoA** 299 **SW**118, 120 [citCJ]; 191**NC**493, 132**SE** 282; 191**NC**809, 133**SE**391; 193**NC**583, 137**SE**724; 6**PaDist&Co** 780; 54**SD**575, 223**NW**831; 104**WVa**134, 139**SE**642. See also 108**Conn**173, 143**A**51; 210**Ky** 600, 276**SW**515.

982-89 13**LaA**8, 126**S**742; 193**NC**583, 137**SE**724; 104**WVa**134, 139**SE**642. See also 233 **IllA**56.

982-90 170**Ga**437, 153**SE**18 (testimony as to consideration); 89 **IndA**163, 166**NE** 9; 167**La**421, 119**S**413; 10**LaA**170, 120**S** 639.

983-96 **MoA** 298**SW**254.

984-97 82**CalA**289, 255**P**553; 36**GaA** 466, 137**SE**285; 240 **IllA**281, 285 [cit CJ]; 239**Mich**404, 214**NW**195, 197 [quot CJ]; **TexCivA** 24**SW(2d)**450.

985-98 85**CalA**440, 259**P**774; 98**Fla**132, 123**S**564; 46 **Ida**497, 269**P**94; 240 **IllA** 281, 285 [citCJ]; **MoA** 279**SW**253.

986-4 36**GaA**149, 136**SE**319.

986-6 74**CalA**278, 240**P**32; 233**Ky**623, 27**SW(2d)**427; **TexCivA** 16**SW(2d)**325 (2dcase).

986-9 213**Ala**24, 104**S**230; 170**Minn**341, 212**NW**599.

986-11 **TexCivA** 19**SW(2d)**848.

987-12 **CalA** 266**P**312 (plans).

987-20 90**Fla**178, 105**S**401 [citCJ].

987-21 36**GaA**149, 136**SE**319. See also 90**Fla**178, 105**S**401.

988-26 201 **Iowa**148, 205**NW**833.

988-27 163**Ga**471, 136**SE**440.

988-29 237**Mich**76, 212**NW**75; 318**Mo** 723, 300**SW**769.

988-31 247 **IllA**147; **Iowa** 231**NW**380; 223**Ky**842, 5**SW(2d)**265; 227**Ky**801, 14 **SW(2d)**155; 149**Md**19, 129**A**895 (admitted where possession was denied and prior order to produce would have been futile); 189**NC**445, 127**SE**533; **TexCivA** 16**SW(2d)**154; 102**WVa**595, 136**SE**47.

989-33 [a] **Best evidence rule** is not abrogated by presumption of receipt of letters properly sent. 189**NC**445, 127**SE** 533.

989-41 235**Ky**529, 31**SW(2d)**899.

989-46 160**Ga**831, 129**SE**546; 40**GaA**745, 151**SE**561; 233 **IllA**56; **IndA** 148**NE**505; 85 **IndA**450, 150**NE**31; 153**Miss**570, 121**S** 119; **NJSup** 130**A**536; 283**Pa**545, 129**A** 580 (though he was unable to produce books buyer's testimony was secondary, where he did not personally keep books and his knowledge of resales was limited); **RI** 133**A**658; **TexCivA** 271**SW** 401; **TexCivA** 275**SW**75; **TexCivA** 282 **SW**282; **TexCivA** 299**SW**649. But see 86**PaSuper**584. [a] (2) 123**Kan**4, 254**P** 394. (8) Entries in insurer's books held best evidence of their contents. 85 **IndA**450, 150**NE**31.

990-48 **CalA** 286**P**733.

990-50 36**GaA**466, 137**SE**285; 42 **Ida**1, 243**P**355; 239**Mich**404, 214**NW**195, 197 [quotCJ]; 291**Pa**211, 139**A**878; **TexCivA** 275**SW**75; 151**Wash**382, 275**P**737.

991-51 [c] **TexCivA** 275**SW**75.

991-52 191**NC**679, 132**SE**796; 30 **OhA** 184, 164**NE**644.

991-52½-New. Witness may testify as to what testator told draftsman to put in will, but not as to contents of will itself. 216**Ky**674, 288**SW**301.

991-55 See also 220**MoA**743, 276**SW**409.

992-63 319**Mo** 1040, 6**SW(2d)**591.

992-65 **IndA** 168**NE**709 (radiographs); 123 **Or**632, 263**P**400.

992-69 40**GaA**813, 151**SE**538; 200 **Ind** 298, 163**NE**89; 32**PortoRico** 134.

992-70 34**PortoRico** 849.

992-70½-New. written resolution of a corporation's board of directors assigning open account. **TexCivA** 282**SW**282.

993-82½-New. An available, original map of plotted lots is the best evidence of boundaries in a street when the purchaser bought in reliance on such map. **TexCivA** 282**SW**296.

993-89½-New. Parol evidence is admissible as to the value of livestock, despite the existence of market quotations in a trade journal. 203 **Iowa**1232, 210 **NW**770.

993-90 161**Ga**517, 131**SE**483; 162**Ga** 743, 135**SE**95; 328 **Ill** 273, 159**NE**235; 12**LaA**484, 126**S**599; **TexCommnA** 16**SW (2d)**255. [c] 221**MoA**121, 293**SW**789.

994-95 213**Ala**414, 104**S**817; 221**MoA** 121, 293**SW**789 (proof of legal paper title deemed waived and oral proof held sufficient); **TexCivA** 23**SW(2d)**806.

994-97 233**Ky**491, 26**SW(2d)**19.

994-2½-New. Parol evidence of an executed swap or trade of lands is not admissible to show permissive possession of one claiming adversely. 190**NC** 826, 130**SE**840.

994-4 162**Ga**743, 135**SE**95; 163**Ga**471, 136**SE**440; **TexCivA** 31**SW(2d)**350.

995-6 40**GaA**833, 151**SE**667(2dcase); **TexCivA** 270**SW**1099.

995-6½-New. , and to a release. **TexCivA** 270**SW**1099.

995-11 7**Alaska**171, 175 [citCJ].

995-15 165**Ga**103, 139**SE**870; **Ga** 155**SE** 24.

995-15½-New. Testimony that land was advertised for sale is admissible over an objection that the advertisement would be the best evidence. 168**Ga**766, 149**SE**138.

996-17 [b] **Where at time evidence was offered it had not appeared that there**

was a written lease, oral evidence of terms of contract were held admissible. 81**Mont**573, 264**P**394.

996–25 But see **NJ** 141**A**566 (parol evidence of ownership of automobile held sufficient in action for damages thereto in collision).

997–26 **NJ** 141**A**566 (parol evidence of ownership of automobile held sufficient in action for damages thereto in collision).

997–36 223**AppDiv**742, 228**NYS**23 (sale oral and invoice merely confirmatory).

998–46 37**GaA**664, 141**SE**422 (authority of finance committee to bind bank); **MoA** 5**SW(2d)**664.

998–50 **TexCivA** 281**SW**1106.

999–62 41**GaA**205, 152**SE**298.

999–64 13**LaA**39, 127**S**28(2dcase).

999–66 **TexCivA** 273**SW**655.

999–67 179**Ark**910, 18**SW(2d)**903. See also **Mo** 290**SW**145, 148 [citCJ].

1000–68 177**Ark**164, 6**SW(2d)**2 (testimony of credit manager). See also 97 **CalA**354, 275**P**881.

1000–72 104**WVa**134, 139**SE**642.

1000–73 See also 32**PortoRico** 334.

1000–74 [d] **In Porto Rico.**–34**Porto Rico** 313.

1000–75 [b] **In Porto Rico.**–32**Porto Rico** 334.

1001–82 But see 85 **IndA**327, 151**NE** 346.

1002–99 219**Ala**24, 121**S**30.

1002–1 167**Ga**657, 146**SE**485. [j] **Officer of bank,** having personal knowledge, may testify that depositor has checked out entire sum to his credit. 41 **Ida**160, 238**P**314.

1003–10 44 **Ida**76, 258**P**557.

1003–23 **NJCh** 130**A**24 (wife could testify in suit for divorce for adultery that she read in newspaper that her husband and another woman were arrested together).

1004–26 219**Ala**332, 122**S**342.

1004–29 **Colo** 292**P**1061(2dcase) (ballots).

1004–34 331 **Ill** 68, 162**NE**184; 228**Ky** 512, 15**SW(2d)**303; 154**Md**77, 140**A**34; 103**NJL**4, 135**A**77; 136**Misc**863, 242**NYS** 464 (holding affidavit not best evidence of contents); 32**PortoRico** 126; **TexCivA** 11**SW(2d)**358; **TexCivA** 27**SW(2d)** 918.

1005–39 **TexCivA** 1**SW(2d)**720.

1005–51 175**Ark**375, 1**SW(2d)**29.

1005–51 227**Ky**682, 13**SW(2d)**1007; **Mo** 23**SW(2d)**167.

1006–53 37 **OklACR**566.

1006–60 154**Md**77, 140**A**34 (conditional sale contract).

1006–64 168**Ga**248, 147**SE**574; 2**LaA** 164. [a] **TexCivA** 273**SW**655.

1006–66 149**Miss**368, 115**S**204.

1006–66½–New. ; the record of ministerial acts of a county board; 315**Mo** 1233, 288**SW**48.

1007–75½–New. Official tax digest in the office of the receiver of tax returns is primary evidence to show the property owner's return of property for taxation without first accounting for the original return filed by taxpayer. 163 **Ga**381, 136**SE**151.

1007–76 [c] **Testimony of title examiner as to location of boundary** proper where defendant did not call for production of records. **Conn** 151**A**351.

1007–77 **TexCivA** 297**SW**900.

1007–81 214**Ala**4, 106**S**239; 315**Mo** 1233, 288**SW**48; 83**NH**501, 144**A**787; 103**NJL**4, 135**A**77; **TexCivA** 282**SW**298; **TexCivA** 23**SW(2d)**421; **Wash** 286**P** 668.

1008–82 **TexCivA** 22**SW(2d)**1083. But see **TexCivA** 11**SW(2d)**662.

1008–87 103**NJL**4, 135**A**77; **TexCivA** 282**SW**298.

1008–88 **NJCh** 130**A**24 (conviction and sentence to prison).

1009–90 29**Ariz**554, 243**P**405; 103**NJL** 4, 135**A**77.

1009–92 168**Ga**382, 148**SE**98; 56**ND** 272, 217**NW**167 (return by sheriff of service of process).

1009–8 100**CalA**621, 280**P**1029 (private sale of bankrupt's estate).

1009–9 221**AppDiv**492, 224**NYS**660.

1009–15 **Iowa** 229**NW**721; **MoA** 286**SW** 353.

1010–31 214**Ala**4, 106**S**239. [c] **Where original papers are introduced in evidence and original entries were made** by clerk, it is not error to fail to require docket to be produced in absence of request. 221**MoA**834, 286**SW**144.

1011–38 107**Conn**670, 142**A**461.

1011–42 105**Conn**230, 135**A**44; **TexCivA** 7**SW(2d)**949.

1011–48 24**F(2d)**738; 220**Ala**61, 124**S** 96; 174**Ark**66, 294**SW**368; **MoA** 23 **SW(2d)**644; 190**NC**194, 129**SE**198; 191 **NC**809, 133**SE**391; 132 **Okl** 100, 269**P** 357, 359(3dcase) [quotCJ]; 139 **Okl** 278, 281**P**977; 50**SD**81, 208**NW**585. But see 30**F(2d)**630; 171**Ark**521, 285**SW**5. [a] (1) **NJSup** 135**A**663. [c] (2) Best evidence of assets and liabilities. **TexCivA** 275**SW**75. [f] **Minutes of corporation** are best evidence of contents. **MoA** 23 **SW(2d)**644.

1012–49 31**F(2d)**375; 31**F(2d)**379; 220 **Ala**194, 124**S**423; 165**Minn**417, 206**NW** 725; **MoA** 293**SW**66 (meaning of bank stamp on check); 132 **Okl** 100, 269**P**357, 359(3dcase) [quotCJ]. See also 202 **Iowa**924, 211**NW**232.

1012–52 [a] (3) One who signed contract as president, to show he was in fact acting president. **ND** 195**NW**953.

1013–53 230**Mich**260, 202**NW**991; 193 **NC**305, 136**SE**716; 139 **Okl** 278, 281**P** 977.

1013–55 230**Mich**260, 202**NW**991; 180 **Minn**338, 230**NW**795.

1013–56 52**SD**324, 217**NW**393.

1013–57 216**Ala**679, 114**S**863; 222**Ky**288, 300**SW**898; 32**PortoRico** 126.

1013–59 24**F(2d)**761; 80**Mont**111, 258**P** 250. [a] (2) But see 74**CalA**378, 240**P** 523. (6) 216**Ala**679, 114**S**63. (7) Vote by all directors of irrigation district board in favor of certain resolutions. 80**Mont**111, 258**P**250.

1014–60 **CalA** 261**P**723; 160**Ga**268, 127 **SE**868.

1014–61 216**Ala**679, 114**S**63; 32**Porto Rico** 126.

1014–64 105**NJL**142, 143**A**364.

1014–65 168**GaA**259, 147**SE**513(2dcase); 309**Mo** 546, 274**SW**683. [a] 309 **Mo** 546, 274**SW**683 (lost city ordinance not shown to have been recorded).

1015–75 213**Ala**256, 104**S**506; 193**NC** 583, 137**SE**724.

1015–76 7**Alaska**171, 175 [citCJ]; 108 **Conn**74, 142**A**473; **TexCivA** 8**SW(2d)** 306; **Wash** 290**P**984.

1016–78 172**Minn**508, 215**NW**855, 856 [citCJ].

1016–81 239**Mich**440, 214**NW**419, 420 [quotCJ]; 68**Utah**486, 251**P**16.

1016–82 239**Mich**440, 214**NW**419, 420 [quotCJ].

1016–83 239**Mich**440, 214**NW**419, 420 [quotCJ]; **Mo** 285**SW**1005.

1016–84 28**F(2d)**963.

1016–85 133**Misc**382, 232**NYS**248.

1017–88 7**F(2d)**800; 8**F(2d)**922; 34 **F(2d)**547; 219**Ala**560, 122**S**686; **Cal** 292 **P**970; 81**Colo** 389, 255**P**628; 337 **Ill** 173, 169**NE**1 (capable of ascertainment); 233 **IllA**56; 253 **IllA**51; **Ind** 153**NE**179; 211 **Ky**791, 278**SW**124, 127 [citCJ]; 234 **Mich**574, 208**NW**682; **ND** 209**NW**204; 55**ND**321, 213**NW**488; 35 **OhA**443, 172 **NE**561; 134 **Okl** 164, 272**P**461; 134 **Okl** 217, 273**P**257, 66**ALR**1203; 33 **OklCr**125, 243**P**251; 130 **Or**177, 279**P**550 (prior examination by expert of books subsequently destroyed); 287**Pa**232, 134**A** 386; **TexCivA** 8**SW(2d)**196; **TexCivA** 14**SW(2d)**88; **TexCivA** 16**SW(2d)**151; 99**Vt**12, 130**A**754; 192**Wis**283, 212**NW** 783. [f] **That audit of corporate books, records, and accounts** was made may be shown by parol evidence of accountant without production of documents themselves. 36**GaA**149, 136**SE**319.

1017–89 **ND** 209**NW**204. [c] **Where originals consist of numerous documents** not conveniently examined in court, exception to best evidence rule exists, especially if fact to be proved is result of examination. 219**Ala**560, 122**S**686.

1018–92 45**HunNY**575.

1018–95½–New. Parol evidence admissible to deny legal existence of note sued on. **Wyo** 292**P**1091.

1018–96 16**F(2d)**177; 219**Ala**560, 122**S** 686; 219**Ala**621, 123**S**25; 333 **Ill** 494, 165**NE**131, 65**ALR**1; **LaA** 127**S**635; 152 **Md**380, 136**A**900; **Md** 148**A**585; 220**App Div**242, 221**NYS**287; 134**Misc**494, 236 **NYS**331; 115 **Okl** 153, 241**P**342, 345 [citCJ]; 44**Philippine**817; **TexCivA** 282**SW** 296. [h] **Record, or copy thereof, of original plot map** held secondary evidence in absence of proof as to whether it was used or relied on by purchaser of property. **TexCivA** 282**SW**296.

1019–99 But see 329 **Ill** 637, 161**NE**118.

1019–99½–New. In an action for trespass where plaintiff claims under two different grantors, admitting of tract book, showing patent in one of grantors, is proper as being link in chain of title. 213**Ala**494, 106**S**150.

1019–3 216**Ala**642, 114**S**298.

1019–4 16**F(2d)**177; 216**Ala**398, 113**S** 256; 220**MoA**1312, 293**SW**453, 454 [citCJ]; 5**PaDist&Co** 634.

1019–9 170**Ga**321, 152**SE**829.

1019–10 227**AppDiv**742, 236**NYS**657.

1019–15 180**Ark**895, 23**SW(2d)**251; **TexCivA** 2**SW(2d)**866.

1020–16 [a] (1) 200 **Iowa**652, 204**NW** 256, 258 [citCJ]. [c] 200 **Iowa**652, 204 **NW**256, 258 [citCJ].

1020–17 **TexCivA** 282**SW**296.

1020–24½–New. filed copy of permit of fire warden to burn over lands, 16**F(2d)** 54.

1020–27 204 **Iowa**896, 216**NW**20.

1021–37 [a] **Where deposition of clerk of land office** conflicted with certified photographic copy, copy held conclusive. **TexCivA** 297**SW**900.

1021–38 [a] **Photographic copies,** duly authenticated, held admissible in view of Burns St. Annot. (1914) § 489. **IndA** 148**NE**505.

1021–39 [c] **In Porto Rico** copybook admissible as original under § 84 of law of evidence upon proof of due mailing of original letter. 32**PortoRico** 676.

1021–40 **Me** 152**A**56; 115 **Okl** 153, 241 **P**342, 345 [citCJ].

1022–48½–New. Copy of bank slip admissible, where original, which bank would not allow out of its possession, had been produced at trial. **Md** 148**A** 585.

1023–52½–New. Blank telegram is admissible to show uniform provisions on back thereof limiting transmitting company's liability for error in transmission. 218**MoA**364, 275**SW**570.

1023–53½–New. File of carbon copies of warehouse receipts issued by defendant's predecessor in business held admissible to show that original receipt was not in plaintiff's name. 160**La**909, 107**S**618.

1023–59 120**Kan**151, 242**P**129. [b] (1) 213**Ala**631, 105**S**886.

1024–62 329 **Ill** 467, 160**NE**841; 191**NC** 313, 131**SE**754, 756 [citCJ]. [b] 191**NC** 313, 131**SE**754, 756 [citCJ]. [c] 329 **Ill** 467, 160**NE**841.

1024–63 213**Ala**631, 105**S**886 (duplicate invoices and carbon copies); 213**Ala**534, 105**S**901 (carbon copy of insurance policy made at same time as one act); 165 **La**47, 115**S**363; 149**Md**19, 129**A**895; 191 **NC**313, 131**SE**754, 756 [citCJ]; 117 **Okl** 73, 245**P**885; 40 **OklACR**233 [reh pending]. [c] (2) Carbon copy of decree and evidence that original was lost, misplaced or destroyed and never entered is inadmissible. **TexCivA** 7**SW(2d)**949. [e] **Legislative intent to exclude carbon copies** of letters not copied into letter press now sent by mail but delivered by writer to addressee or his agent has been held not shown. 32 **PortoRico** 676 (construing § 84 of law of evidence).

1024–65 216**Ala**642, 114**S**298; 88**CalA** 322, 263**P**371; 41**GaA**505, 153**SE**531; 318 **Ill** 139, 149**NE**2; 217**Ky**15, 288**SW** 758; 169**Minn**199, 210**NW**880; **MoA** 272 **SW**1068; **MoA** 277**SW**973; 35 **OhA**519, 172**NE**634; 133 **Okl** 34, 270**P**1098; 123 **Or**632, 263**P**400; 44**Philippine**817; 151 **SC**114, 148**SE**704, 63**ALR**965; **TexCivA** 281**SW**244; 141**Wash**571, 251**P**885; 142 **Wash**73, 252**P**535; 104**WVa**134, 139**SE** 642. See also 40**GaA**4, 148**SE**757.

1027–70 226**Ky**776, 11**SW(2d)**956; 232 **Ky**741, 24**SW(2d)**560; **TexCommnA** 15 **SW(2d)**1011, 67**ALR**1324. [b] (4) Where plaintiff claiming loss of deed introduces record showing deed conveying entire interest, grantor may testify deed he signed conveyed only half interest. 80**CalA**176, 250**P**289.

1027–72 **NJCh** 145**A**725.

1027–73 [b] **Bond for title.**–197**NC**515, 149**SE**846.

1027-74 255 IllA127; **NJCh** 148A392 (2dcase).
1028-78 169Minn199, 210NW880.
1028-84 **Mo** 20SW(2d)494 (check book stubs admissible); 34PortoRico 849.
1028-85 34PortoRico 849.
1028-87 198NC309, 151SE641.
1028-87½-New. invoices; 173Ark437, 293SW730.
1028-88 173Ark437, 293SW730; 130 Kan735, 288P738 (pass book); MoA 285 SW755.
1028-89 173Ark437, 293SW730.
1028-90 221AppDiv443, 223NYS566.
1028-92 215Ala474, 111S7; 318 Ill 139, 149NE2; 166La648, 117S750; 142Wash 73, 252P535.
1029-93 TexCivA 295SW229.
1029-2 164La15, 113S748.
1029-3 164La15, 113S748.
1029-11 214Ala349, 107S907; 41GaA 462, 153SE781; 167La354, 119S254; Wis 229NW532.
1030-13 214Ala349, 107S907.
1030-24 Sask [1928] 3DomLR306.
1030-36 221MoA1225, 299SW819.
1030-40 179Ark293, 15SW(2d)991; TexCivA 273SW993; 145Wash172, 259 P32.
1031-41 TexCivA 273SW993; 145Wash 172, 259P32.
1031-47 39GaA462, 147SE720.
1031-48 TexCivA 7SW(2d)949.
1031-49 217Ky15, 288SW758.
1031-57 232Ky825, 24SW(2d)588.
1031-58 145Wash172, 259P32.
1033-33 177Ark718, 9SW(2d)6; 39GaA 462, 147SE720; 254 IllA289; Iowa 233 NW257; 128Me14, 145A395; 235Mich 536, 209NW838 (copy of letter admissible to sustain presumption of receipt); MoA 9SW(2d)672; TexCivA 31SW(2d) 362.
1034-85 But see Vt 152A41.
1035-94 219Ala191, 121S706; TexCivA 14SW(2d)330. [d] In Oklahoma.-Okl 268P706.
1036-1 33Ariz354, 264P1083, 1085 [cit CJ]; 170Ark650, 280SW667; 162La251, 110S340; 253Mass433, 149NE142; 35 OhA519, 172NE634; TexCivA 285SW 859; TexCivA 27SW(2d)263.
1036-2 132 Okl 11, 268P1111.
1038-16 6F(2d)332; 213Ala14, 104S 130; 178Ark304, 10SW(2d)882, 61ALR 914; 319 Ill 437, 150NE435; 333 Ill 588, 165NE199; 233Ky823, 27SW(2d)427; Mass 166NE561; 189NC445, 127SE533; OhA 172NE634; TexCivA 7SW(2d) 1112; 149Wash414, 271P78; 152Wash 131, 277P453.
1041-31 [b] To render copies of letters admissible identical person mailing need not positively so swear from his personal recollection. 6F(2d)300.
1042-35 189NC445, 127SE533.
1042-38 21F(2d)278; 37GaA212, 139 SE734; 337 Ill 173, 169NE1; TexCivA 19SW(2d)848.
1042-39 37GaA212, 139SE734.
1042-41 337 Ill 173, 169NE1.
1042-43½-New. Statute, excluding party as witness against administrator to oral contract with decedent, may make necessary proof by other witnesses. 69 CalA291, 231P563.
1042-44 309Mo 546, 274SW683 (alleged lost ordinance); 193NC231, 136SE636; TexCivA 285SW859. [g] Contents of municipal journal to show passage and existence of ordinance cannot be shown by parol till existence of journal entry is first proved. 309Mo 546, 274SW683. [h] Contents of lost ordinance cannot be proved by parol till it is first proved that there was ordinance. 309Mo 546, 274SW683. [i] Evidence held sufficient.-TexCivA 272SW601.
1042-45 21F(2d)278; 214Ala349, 107S 907; 215Ala225, 109S873; 46Philippine 282. [g] (1) 215Ala225, 109S873. [h] (4) Order of court. 169Ark645, 276SW 584.
1042-45½-New. and, in some cases at least, such as maps or plats of land, the correctness. 37GaA212, 139SE734(2d case).
1043-46 [a] 242 IllA574; 142Miss851, 108S139; 295Pa501, 145A507.
1043-48 21F(2d)278; 74CalA585, 241P 572; 165La577, 115S757, 758 [quotCJ].
1044-49 78CalA660, 248P774; 165La 577, 115S757, 758 [quotCJ]. [b] Evidence held insufficient.-78CalA660, 248P 774.
1045-56½-New. [§ 1341a] 1½. Notice of Intention To Introduce Secondary Evidence. Notice of intention to produce secondary evidence is not necessary where there is proof of unsuccessful search. 132SC398, 129SE199.
1045-57 14F(2d)696; 21F(2d)278; 219 Ala560, 122S686; 169Ark645, 276SW 584; 177Ark865, 8SW(2d)446; 37GaA 212, 139SE734; 39GaA654, 148SE296; 43 Ida675, 256P529; 244 IllA61; 204 Iowa896, 216NW20; Iowa 231NW380; 228Ky194, 14SW(2d)751; 173Minn424, 217NW486; 220MoA507, 275SW984; NJSup 146A589; 251NY321, 167NE457; 190NC128, 129SE153; 193NC231, 136 SE636; 193NC531, 137SE577; 46 Philippine282; TexCivA 9SW(2d)413; TexCivA 21SW(2d)350; 100Vt443, 138A 782; Sask [1928] 3DomLR306. See also TexCivA 278SW350. [b] (3) Record of recorded deed is not admissible as proof of title till preliminary proof is offered that original deed has been lost or does not belong to party wishing to use it and is not within his control. 204 Iowa896, 216NW20. [f] Without primary proof admission of secondary evidence is error. TexCivA 278SW350.
1046-58 216Ala679, 114S63.
1046-60½-New. Carbon copies have been held admissible without such proof. 82 IndA377, 149NE377.
1046-65 189NC445, 127SE533.
1046-68½-New. On proof of notice to produce an original notice to vacate, party need not prove originals are not in his possession where no claim is made that such is in possession of other party. 214Ala688, 108S746.
1046-69 189NC445, 127SE533.
1047-74 [a] Where ejectment suit was brought by nominal plaintiffs for use of another, such other has been held entitled to testify as to his lack of possession or control of deed to lay predicate for introduction of certified copy. 96 Fla620, 119S333.
1048-81 [b] Affidavit for introduction of secondary proof of several deeds must apply to each deed separately. 324 Ill 339, 155NE284. [c] Affidavit to prove deed dated more than two years before trial insufficient. 324 Ill 339, 155NE284.
1048-95 324 Ill 339, 155NE284.
1049-96 336 Ill 490, 168NE340; Mass 169NE805 (search for instrument).
1049-98 MoA 282SW105. [b] One neither officer nor employee of corporation is not qualified to account for loss of corporation's inventory, so as to render evidence of its contents competent. 34F(2d)709.
1049-7½-New. Proof that books, record of sales, were destroyed by fire, is proper. 173Ark437, 293SW730.
1049-14 MoA 275SW549; TexCivA 272 SW601; 104WVa134, 139SE642. [c] Evidence held sufficient.-232Mich658, 206NW495.
1050-15 214Ala239, 107S98; 169Minn 199, 210NW880.
1050-18 163Ga894, 137SE251.
1050-19½-New. Proof by a party seeking to introduce secondary evidence, that he has exhausted all of the sources of information and means of discovery which the nature of the case suggests and which were available to him, establishes a reasonable presumption of loss or destruction. 163Ga894, 137SE251.
1050-20 TexCivA 296SW939.
1050-25 219Ala186, 121S731; 23AlaA 454, 126S886; 179Ark293, 15SW(2d) 991; 163Ga894, 137SE251; 165Ga685, 142SE142; 35GaA507, 134SE139; 228 Ky194, 14SW(2d)751; 164La15, 113S 748; 254Mass494, 150NE300; 235Mich 542, 209NW827; Mont 290P259; 118 Or568, 247P815; 141Wash571, 251P885.
1051-26 169Ark645, 276SW584; 168Ga 126, 147SE75; 43 Ida675, 256P529; 223 Ky842, 5SW(2d)265; 145Wash172, 259 P32.
1052-27 163Ga894, 137SE251.
1052-31 151Md558, 136A61; TexCivA 296SW939. [b] Court must make finding where loss or destruction of letters is relied on as foundation for secondary evidence. 189NC445, 127SE533.
1052-32 Ark 294SW1002; 164Minn466, 206NW380; MoA 272SW1068; MoA 277 SW973; 189NC445, 127SE533.
1052-33 206Cal 213, 273P547; 39GaA 462, 147SE720; 164Minn466, 206NW 380; 141Wash571, 251P885.
1053-37 217Ala39, 114S470; 39GaA 462, 147SE720; 232Ky741, 24SW(2d) 560; 189NC445, 127SE533; 139 Okl 95, 281P259 (thorough search by person who last had possession of instrument); 104WVa134, 139SE642; 35Wyo 10, 246 P27.
1054-38 214Ala239, 107S98.
1054-39 193NC583, 137SE724.
1055-42 46 Ida379, 268P3, 5 [citCJ].
1055-43 34GaA361, 129SE554 (insufficient diligence in search for original mortgage).
1055-48 104WVa134, 139SE642.
1055-49 189NC445, 127SE533.
1058-66 39GaA462, 147SE720.
1059-69 219Ala560, 122S686; 172Ark 209, 287SW1010; 174Ark194, 295SW 38; LaA 129S431; 148Md200, 129A10; 142Miss851, 108S139; NJSup 137A833; 189NC445, 127SE533; 197NC322, 148SE 458; 190NC128, 129SE153; TexCivA 284SW322; TexCivA 16SW(2d)154.
1060-72 220Ala382, 125S396.
1060-76 TexCivA 275SW730; TexCivA 276SW941.
1061-78 169Minn478, 211NW952; 40 OklACR233 [reh pending].
1061-84 But see TexCivA 22SW(2d)964 (notice to person not in possession of documents held insufficient predicate).
1062-85 41GaA505, 153SE531.
1062-88 189NC445, 127SE533 (probable possession by defendant outside state is not sufficient foundation for secondary evidence).
1062-90 32Ariz135, 256P507; 173Minn 302, 217NW352.
1062-91 32Ariz135, 256P507.
1062-93 219Ala24, 121S30.
1064-16 TexCivA 22SW(2d)964.
1065-23 189NC445, 127SE533.
1065-26 214Ala688, 108S746.
1065-28 215Ala109, 100S7.
1066-40 177Ark865, 8SW(2d)446; 168 La1085, 123S721. [j] 172Ark303, 288 SW395.
1067-49 120Kan423, 243P1016.
1068-66 98Vt492, 129A234.
1068-67 23AlaA118, 121S690(2dcase); CalA 288P814; 169Ga801, 151SE496; 235Mich542, 209NW827; 221AppDiv 443, 223NYS566; 98Vt492, 129A234. But see 227Ky517, 13SW(2d)507. [a] 179Ark293, 15SW(2d)991; 150Wash449, 273P194. [d] (2) Contract identical except as to date and unimportant details held admissible. 100Vt161, 135A 702.
1069-70 Mass 169NE795. [c] But see 235Mich542, 209NW827.
1069-71 39Ga654, 148SE296; 147Wash 547, 266P177. [f] 214Ala688, 108S746. [g] Testimony of merchants familiar with destroyed goods, and prices of same, held admissible. 173Ark437, 293 SW730. [h] Certificate prepared from destroyed memorandum. TexCivA 295 SW234.
1070-72½-New. Affidavit of a justice of the peace who tried the case as to the basis of the action would not be competent as secondary evidence of the contents of lost records of the justice's court. 191NC369, 131SE731.
1070-34 24F(2d)12; 36F(2d)381; 43 F(2d)408; 215Ala327, 110S716; 216Ala 519, 113S535; 170Ark84, 278SW963; 170Ark1100, 282SW985; 200Cal 688, 254P1097; CalA 290P637; Colo 291P 1034; DC 40F(2d)802; 93Fla656, 112S 572; 34GaA313, 129SE306 (dictum); 232 IllA266; 235 IllA335; 84 IndA264, 151NE137; 122Kan699, 253P232; 124 Kan233, 257P949; 216Ky309, 287SW 890; 3LaA622; Me 149A801; 239Mich 118, 214NW187; 147Miss835, 112S795; 147Miss72, 112S869; 148Miss583, 114S 387; 157Miss187, 127S296; 318Mo 969, 2SW(2d)733; MoA 286SW399, 400 [cit CJ]; 114Nebr605, 209NW243; 100 NJEq543, 135A808; NJSup 133A772; NJSup 136A428; 242NY134, 151NE155; 27NC231; 29NC143; 30 OhA54, 164NE 237; 284Pa407, 131A187; 285Pa16, 131 A482; 291Pa335, 140A139; 6PaDist&Co 325; 45Philippine256 (Code Civ. Proc. § 285); 136SC496, 134SE505; 155SC 147, 152SE17; TexCommnA 295SW578; TexCivA 283SW676; TexCivA 20SW (2d)1076; 146Va357, 131SE803; 144Va 263, 132SE337, 46ALR485; 147Va802, 133SE595; 143Va815, 129SE513; 99 WVa419, 129SE317; 34Wyo 495, 245P

304, 306 [citCJ], 51ALR13.
1074-35 216Ala519, 113S535; 200Cal 688, 254P1097; 34Wyo 495, 245P304, 306 [citCJ]; 51ALR13. [a] **Object of rule is to prevent fraud and perjury.**–111Conn572, 150A499.
1074-39 34Wyo 495, 245P304, 306 [cit CJ], 51ALR13. [a] **Rule is inapplicable** where it would open door to, instead of preventing fraud. 111Conn572, 150 A499.
1074-41 216Ala519, 113S535.
1075-50 111Conn342, 149A851; 232 Ill A266; 123Kan236, 255P48; 258Mass 172, 154NE583; 145Miss585, 111S99; 148Miss583, 114S387; 243NY156, 153 NE33; TexCommnA 294SW537; 34Wyo 495, 245P304, 306 [citCJ], 51ALR13.
1075-51 16F(2d)902; 214Ala473, 108 S339, 341 [citCJ]; 200Cal 688, 254P 1097; 201Cal 597, 259P86, 88 [quot Cyc]; 88CalA393, 263P558; 47 Ida179, 276P315; 47 Ida578, 277P431; 148Miss 583, 114S387; 153Miss851, 121S847. [f] **Purchaser of personal property is not prevented from setting up implied warranty** under written contract of sale which stipulates that contract covers all agreements between parties, as such warranty arises by law and not from contract. 162Ga154, 132SE889.
1076-52 214Ala473, 108S339, 341 [cit CJ].
1076-56 204 Iowa290, 214NW538.
1076-60 But see 127Misc508, 217NYS 39.
1076-62 204 Iowa940, 216NW281, 284 [citCJ].
1077-63 35Ariz147, 274P1047(3dcase); 200 Iowa836, 205NW499; 204 Iowa940, 216NW281, 284 [citCJ].
1077-65 170Minn191, 212NW530.
1077-68 173Ark1121, 295SW1; 161Ga 287, 130SE580; 339 Ill 384, 171NE531; 123Kan420, 426, 256P155 [citCJ]; 216 Ky309, 287SW890, 891 [quotCJ]; NJ Sup 130A814; 125 Okl 212, 257P286; 7 PaDist&Co 634; TexCivA 288SW609; TexCivA 20SW(2d)849.
1078-69 216Ky309, 287SW890, 891 [quotCJ].
1079-70 216Ky309, 287SW890, 891 [quotCJ].
1079-71 216Ky309, 287SW890, 891 [quotCJ].
1085-72 255 IllA67; 216Ky309, 287SW 890, 891 [quotCJ].
1079-73 216Ky309, 287SW890, 891 [quotCJ].
1079-74 216Ky309, 287SW890, 891 [quotCJ].
1079-75 28F(2d)343; 216Ky309, 287 SW890, 891 [quotCJ]; 245Mich111, 222 NW137.
1079-76 216Ky309, 287SW890, 891 [quotCJ]; 97PaSuper510.
1079-77 216Ky309, 287SW890, 891 [quotCJ].
1085-78 Miss 130S106; TexCivA 7SW (2d)613.
1079-83 148Va424, 139SE252, 254, 55 ALR279 [citCJ]. [e] **In Missouri.**–222 MoA 389, 5SW(2d)681. [f] **Fraudulent entry.**–222MoA389, 5SW(2d)681.
1079-84 [c] **Records which justice of peace is not required to keep** may be impeached. 218MoA448, 279SW200. [d] **Entries required to be made by justice** may be collaterally attacked for fraud, accident, or mistake. 218MoA 448, 279SW200.
1080-90 See also 251 IllA382; TexCivA 11SW(2d)373.
1080-10½-New. An adjudication of insanity on the part of a testator which is silent as to the character of the insanity may not of course be contradicted. 201 Iowa586, 207NW598.
1080-10½-New. But such adjudication may be explained by showing the nature and extent of testator's affliction at the time of such adjudication. 201 Iowa 586, 207NW598.
1081-19 206Cal 439, 274P745(2dcase); TexCivA 290SW196. [c] **Omissions of motion** for order granting appeal from court's minutes may be shown by parol. 159La280, 105S343.
1081-30 256Mass47, 152NE67.
1081-36 157Tenn71, 291SW837.
1082-42 331 Ill 68, 162NE184.
1083-59 217 Ala381, 116S419; 75Mont 369, 243P1093; 80Mont111, 258P250.
1084-63 [b] 147SC116, 144SE846. [c] **Stipulation of counsel** contradicting recitals of senate journal will not be considered. 152Tenn306, 278SW59.
1084-64 171Ark427, 285SW20; 89Fla 361, 104S577.
1084-67 75Mont369, 243P1093; Tex CommnA 288SW182; TexCommnA 27 SW(2d)144(2dcase).
1084-68 157Tenn71, 291SW837.
1084-70 58ND867, 228NW226(2dcase).
1085-72 231 Ill 502, 83NE269; 321 Ill 504, 152NE591; 333 Ill 382, 164NE835; 337 Ill 111, 168NE908; 140Ky217, 130 SW1089; 156Ky37, 160SW751, 49LRA NS387; 229Ky843, 18SW(2d)305; 26 Mich44; Mo 23SW(2d)167; 134Misc48, 234NYS571; 152Wash657, 279P114.
1085-76 212Ala493, 103S471; 326 Ill 73, 157NE34. [b] **Condition on which consent to consolidated** school house was given may be shown by parol evidence. 212Ala493, 103S471.
1085-77 119Kan598, 240P591. See also 174Ark293, 295SW19.
1085-78 157Tenn71, 291SW837. See also 216Ala679, 114S63.
1085-79 [a] **Doubt as to sufficiency of description** of land in assessment and tax sale may be removed by evidence outside assessment and tax deed. 159 La158, 105S274.
1086-81 120 Okl 211, 251P84.
1086-82 120 Okl 211, 251P84.
1088-8 IndA 165NE265; 154Miss787, 122S762.
1088-11 [a] **Omission to state in bond that deputy officer was deputy sheriff may be cured by parol evidence.**–213 Ala637, 105S899.
1088-12 See also 243Mich478, 220NW 763.
1088-15 232 IllA102; 239Mich536, 215 NW38; 315Mo 1336, 290SW123.
1088-15½-New. Testimony of a township supervisor that he posted the notice requisite to the voting of a tax at a legal meeting of electors is admissible where the record was imperfectly kept and the evidence is offered to supplement, and not to contradict, the record. 239Mich536, 215NW38.
1088-20 191NC809, 133SE391; 200Wis 233, 227NW868, 66ALR1325.
1088-21 101CalA532, 281P1104 (where minutes are admittedly incomplete); 190NC194, 129SE198; 193NC367, 137SE 132. [c] **Ownership of stock.**–Oral evidence is admissible to show that real owner of stock is person other than person in whose name it stands upon corporation's books. SD 225NW657.
1089-23½-New. Minutes of meeting of board of directors, showing that proposal for sale to corporation was made and accepted, but not purporting to state what contract was made in regard to the sale, do not exclude parol evidence of the contract. 74Mont176, 240P829.
1089-30 23AlaA145, 122S802 [certiorari den 219Ala503, 122S804(1stcase)]; 29 PortoRico 788, 792 [quotCJ].
1089-31 30F(2d)445; 31F(2d)859; 219 Ala203, 121S733; 171Ark484, 284SW 779; 175Ark1134, 18W(2d)817; CalA 293P102; 102Conn558, 129A538; 169 Ga753, 151SE345; 35GaA262, 133SE53; 37GaA409, 140SE766; 39GaA516, 147 SE717; 40GaA768, 151SE654; 47 Ida179, 276P315; 234 IllA78; 234 IllA492; Iowa 232NW79; 123Kan155, 254P345; 2LaA156; 166Minn50, 207NW20; 141 Miss38, 106S209, 44ALR393; 147Miss 72, 112S869; 148Miss583, 114S387; 155 Miss91, 124S69; MoA 274SW861; 83 Mont573, 273P635; 114Nebr560, 210 NW101; 193NC470, 137SE320; 121 Oh St503, 169NE574; 144 Okl 254, 291P70; 127 Okl 10, 257P382; 132 Okl 267, 270P 317; 42 OklACR107 [reh pending]; 125 Or261, 264P852; 125 Or515, 266P1067; 283Pa406, 129A333; 14PaDist&Co 183; 45Philippine256; TexCommnA 288SW 826; TexCommnA 23SW(2d)307; Tex CivA 286SW481; TexCivA 13SW(2d) 234; TexCivA 15SW(2d)59; 146Va357, 131SE803; 145Wash66, 258P1035, 54 ALR1382; 34Wyo 495, 245P304, 307 [citCJ], 51ALR13; Alta [1925] 2Dom LR742. [c] 158La1032, 105S54 (evidence inadmissible against third party to contradict language of indorsement on vendor's lien notes). [h] **Memorandum on back of note** not variable by parol. MoA 290SW105.
1089-31½-New. Parol evidence is incompetent to show that the indorser is primarily liable. 192NC499, 135SE326.
1091-32 234 IllA492. But see 180Ark 118, 21SW(2d)421. [a] 234 IllA492.
1091-33 But see 169La412, 125S289.
1091-34 15DelCh9, 130A39 (in absence of fraud, misrepresentation, or mistake).
1091-36 45Philippine256 (promissory note considered as containing all terms stipulated for).
1091-38 TexCivA 271SW169.
1091-39 181Ark531, 26SW(2d)575; 37 GaA409, 140SE766; 43 Ida310, 251P 627; 234 IllA78 (alleged oral agreement not to look to maker for payment); 204 Iowa1049, 216NW709; 123Kan155, 254 P345; MoA 19SW(2d)541; 283Pa406, 129A333; 296Pa541, 146A126; 47RI78, 129A812; 34Wyo 495, 245P304, 307 [cit CJ], 51ALR13.
1092-40 37GaA409, 140SE766; 296Pa 541, 146A126.
1092-42 100CalA163, 280P174 (evidence varying unconditional nature of promise to pay held inadmissible, in absence of fraud or mistake); 200 Iowa 463, 203NW687; Mass 165NE127; MoA 174SW861. [a] (2) Defense that note was payable from funds received from maker of another note was not available to maker of note sued on, in absence of fraud or mistake. 100CalA163, 280P174.
1092-45½-New. Parol evidence is inadmissible to show the understanding at the time the note was signed, that joint and several makers should become liable for only part thereof, in the absence of fraud, accident, or mistake. TexCivA 286SW481.
1092-46 171Ark484, 284SW779; 144Va 263, 132SE337, 46ALR485.
1092-47 241 IllA576; 204 Iowa290, 214 NW538; 208 Iowa341, 223NW403; 208 Iowa1189, 225NW856; 114Nebr560, 210 NW101; 102NJL5, 131A105; 52ND793, 204NW678; 116 OhSt609, 157NE478, 54 ALR992; 117 Okl 81, 244P791; SD 225 NW713; TexCommnA 5SW(2d)972.
1093-48 170Ark583, 280SW372; 201 Iowa349, 207NW332; 82NH299, 133A 26; 191NC340, 132SE21. See also 192 NC262, 134SE643.
1094-50 102NJL5, 131A105.
1094-51 51ND909, 201NW509; SD 225 NW713.
1094-52 37 OklACR605.
1094-57 200 Iowa1000, 205NW776; 77 Mont422, 251P155; 34Wyo 495, 245P 304, 307 [citCJ], 51ALR13.
1095-58 TexCivA 272SW818 (dictum).
1095-63 34Wyo 495, 245P304, 307 [cit CJ], 51ALR13.
1095-68 203Cal 219, 263P1007; 204 Iowa290, 214NW538; 204 Iowa940, 216 NW281, 284 [citCJ]; TexCivA 294SW 624 [citCJ]; TexCivA 293SW874, 877 [quotCJ].
1095-69 55AppDC267, 4F(2d)879; 204 Iowa940, 216NW281, 284 [citCJ]; Tex CivA 294SW624 [citCJ].
1096-71½-New. **Where check is unconditionally delivered** parol evidence is incompetent to show agreement that it should not be presented until drawer should notify payee that deposit had been made to meet it. 173Minn504, 218 NW99.
1096-74 NJ 130A372; 51SD288, 213 NW507; BC [1928] 2DomLR145. [e] **Conditional delivery of note,** shown by collateral, unambiguous, written contract, cannot be modified by parol or extrinsic evidence in absence of fraud, mistake, or accident. 51SD288, 213NW 507.
1096-77 NJ 130A372.
1097-85 24F(2d)524.
1097-87 CalA 267P359, 361 [citCJ].
1097-88 But see 201Cal 597, 259P86, 87 [citCJ].
1097-89 205 Iowa975, 213NW612; 215 Ky286, 284SW1085; 173Minn255, 217 NW133; 100NJEq543, 135A808; 151 SC44, 148SE648; 200Wis115, 227NW 242. But see 337 Ill 111, 168NE908.
1098-93 34F(2d)572 (letters and telegrams prior to execution of charter parties held inadmissible to explain provisions as to vessel's speed under certain conditions).
1098-96 12F(2d)969; 24F(2d)48; 29 F(2d)493; 43F(2d)408; 214Ala268, 107 S746; 30Ariz172, 245P360; 34Ariz68,

267P794; 170Ark84, 278SW963; 171 Ark51, 283SW7; 171Ark719, 285SW 385; 172Ark1128, 291SW826; 173Ark 147, 293SW50; 176Ark597, 3SW(2d) 683; 180Ark947, 23SW(2d)611; 181Ark 994, 28SW(2d)1067; 204Cal 342, 268P 342, 58ALR1176; 206Cal 246, 274P65 (2dcase); 71CalA197, 234P926; 72CalA 497, 238P136; 83CalA537, 257P121; 83 CalA689, 257P211; 88CalA250, 263P 277; 94CalA335, 271P208; 99CalA438, 278P880; 100CalA1, 279P455(2dcase); CalA 288P785; 84Colo 234, 269P19; 15 DelCh9, 130A39; 95Fla928, 117S388; 99Fla132, 126S142; 161Ga468, 131SE 510; 164Ga706, 139SE337; 166Ga338, 145SE90; 35GaA19, 132SE125 (written novation of contract cannot be varied); 35GaA266, 133SE60; 37GaA412, 140SE 412; 39GaA633, 147SE909(4thcase); 40 GaA517, 150SE458; 40GaA680, 150SE 865(2dcase); Ida 292P239; 327 Ill 145, 158NE364; 329 Ill 637, 161NE118; 331 Ill 126, 162NE141; 235 IllA335; 242 IllA548; 255 IllA21; 255 IllA67; 84 IndA264, 151NE137; IndA 151NE7; 84 IndA666, 151NE338, 836; Iowa 213NW 442; 205 Iowa7, 215NW732; 207 Iowa 692, 223NW395; 208 Iowa458, 223NW 521; 122Kan215, 252P459; 123Kan286, 255P48; 209Ky600, 273SW434; 216Ky 782, 288SW745; 217Ky28, 288SW1031; 218Ky508, 291SW715; 220Ky454, 295 SW455; 224Ky438, 6SW(2d)473; 226 Ky479, 11SW(2d)147; 226Ky839, 11SW (2d)973; 230Ky194, 18SW(2d)1006; 231Ky103, 21SW(2d)131; 234Ky376, 28 SW(2d)43; 232Ky489, 23SW(2d)914; 235Ky54, 29SW(2d)581; 167La262, 119 S42; 9LaA403, 120S496; 170La602, 128 S649; 2LaA528; 2LaA577; 2LaA608; 4LaA279; 4LaA519; 7LaA272; 7LaA 680; 8LaA205; LaA 129S416; LaA 130S841; Md 149A270; 258Mass331, 155NE18; 264Mass238, 162NE339; Mass 166NE642; 235Mich304, 209NW 46; 235Mich648, 209NW819; 239Mich 118, 214NW187; 239Mich569, 215NW 11; 240Mich642, 216NW416, 417 [cit CJ]; 242Mich381, 218NW662; 244Mich 19, 222NW145; 170Minn191, 212NW 530; Minn 233NW296; 145Miss585, 111 S99; 146Miss651, 111S591; 148Miss533, 114S387; 308Mo 453, 273SW95; 314Mo 55, 282SW715; Mo 7SW(2d)387; MoA 286SW399; 222MoA307, 297SW129; MoA 7SW(2d)288; 77Mont524, 251P 1057; 77Mont539, 252P368; 79Mont 327, 256P497; 114Nebr88, 206NW155; 83NH281, 141A467; 104NJL394, 140A 395; NJSup 129A182; NJSup 133A70; NJSup 138A113; 31NM616, 249P1010; 242NY134, 151NE155; 247NY377, 160 NE646; 219AppDiv486, 220NYS340; 219AppDiv615, 220NYS409; 131Misc41, 226NYS113; 214AppDiv738, 211NYS 488; 132Misc819, 230NYS480; 138Misc 600, 245NYS527; 190NC776, 130SE845; 191NC218, 131SE579; 192NC144, 134 SE407; 192NC166, 134SE419; 52ND 910, 204NW621; 34OhA217, 170NE658; 115 Okl 53, 241P496; 115 Okl 199, 242 P201; 114 Okl 61, 242P1030; 116 Okl 255, 244P414; 117 Okl 65, 245P557; 114 Okl 293, 245P653; 114 Okl 237, 246 P238; 117 Okl 156, 246P833; 120 Okl 130, 247P673; 117 Okl 96, 245P571; 119 Okl 225, 249P420; 125 Okl 215, 257P 282; 126 Okl 28, 258P278; 126 Okl 251, 259P268; 128 Okl 14, 261P142; 131 Okl 166, 268P195; Okl 278P1081; 37 Okl ACR260; 120 Or96, 251P715; 122 Or 285, 258P205, 58ALR339; 122 Or498, 259P891; 127 Or134, 271P49; 129 Or 505, 277P821; 284Pa407, 131A187; 284 Pa414, 131A236; 285Pa16, 131A482; 288Pa579, 136A847; 291Pa53, 139A606; 291Pa497, 140A527; 92PaSuper292; 95 PaSuper273; 6PaDist&Co 780; 12Pa Dist&Co 732; 14PaDist&Co 293; 50 Philippine558; 51SD288, 213NW507; SD 231NW904; TexCommnA 280SW 521; TexCommnA 280SW742; Tex CommnA 284SW542; TexCommnA 14 SW(2d)805; TexCivA 272SW818 (dictum); TexCivA 274SW658; TexCivA 281SW608; TexCivA 283SW544; Tex CivA 283SW676; TexCivA 283SW1073; TexCivA 291SW301; TexCivA 5SW(2d) 215, 220 [citCJ]; TexCivA 7SW(2d) 115; TexCivA 7SW(2d)964; Utah 267P 1020; 144Va126, 131SE209, 48ALR628; 146Va617, 131SE793; 148Va181, 138SE 465, 54ALR699; 147Va125, 136SE673; Va 153SE879; 135Wash139, 237P17; 142 Wash624, 253P1070; 104WVa449, 140 SE285; 187Wis333, 203NW352 (as to contract to pay debts of corporation); 195Wis47, 217NW719; 34Wyo 495, 245 P304, 51ALR13; 36Wyo 249, 254P121. [h] **Act of integration,** that is, act whereby parties to transaction manifest intention that writing shall be sole memorial of contract, determines whether extrinsic evidence may be admitted to supplement contract. 195Wis47, 217 NW719.

1102–97 7F(2d)814; 32F(2d)343; 217 Ala27, 114S409; 31Ariz239, 251P891; 174Ark1115, 299SW18; 197Cal 674, 242 P713; 73CalA44, 238P177; 73CalA643, 238P1085; 83CalA183, 256P575; 84CalA 784, 258P724; 90CalA75, 265P527; 92 CalA457, 268P490; 99CalA663, 279P 167; CalA 288P1096; 77Colo 544, 237P 1115; 164Ga777, 139SE549; 33GaA791, 127SE806; 40GaA559, 150SE600; 334 Ill 281, 165NE793; 84 IndA666, 151NE 338, 836; 123Kan286, 255P48; 217Ky 28, 288SW1031; 218Ky508, 291SW715; 252Mass265, 147NE892; Mass 168NE 812; 233Mich425, 207NW16; 235Mich 268, 209NW85; 240Mich642, 216NW416, 417 [citCJ]; 251Mich402, 232NW177; 170Minn191, 212NW530; 314Mo 55, 282 SW715; 319Mo 401, 4SW(2d)438; MoA 274SW861; 221MoA923, 291SW142; 53 ND777, 208NW115; 115 Okl 53, 241P 496; 114 Okl 61, 242P1030; 116 Okl 255, 244P414; 117 Okl 156, 246P833; 120 Okl 130, 247P673; 119 Okl 225, 249P420; 126 Okl 28, 258P278; 128 Okl 14, 261P 142; 130 Okl 93, 265P633; 134 Okl 19, 272P418; 139 Okl 178, 281P769; 141 Okl 210, 284P642; 36 OklACR655; 38 OklACR615 (oil and gas lease); 120 Or 96, 251P715; 122 Or498, 259P891; 284 Pa414, 131A236; 285Pa16, 131A482; 288 Pa579, 136A847; 295Pa146, 144A904; 45Philippine256; RI 133A350; 151SC 44, 148SE648; 50SD606, 211NW444; 158Tenn452, 14SW(2d)714; TexCommnA 291SW876; TexCommnA 294SW537; TexCivA 281SW608; TexCivA 290SW 187; TexCivA 293SW833; Utah 267P 1020; 146Va617, 131SE793; 144Va263, 132SE337, 46ALR485; 148Va331, 138SE 637; 34Wyo 495, 245P304, 51ALR13. See also 169Ark1102, 278SW36. [f] **Whether law required agreement to be in writing is immaterial.**–126 Okl 28, 258P 278.

1104–98 43F(2d)408; CalA 288P74; 87 Colo 436, 288P627; 34GaA58, 128SE219 (parol evidence not admissible to vary clear and unambiguous contract as to broker's commissions); 203 Iowa1270, 212NW134; 122Kan699, 253P232; 210 Ky820, 276SW983; La 123S633(2dcase); 157Miss182, 127S271; MoA 3SW(2d) 263; 102NJEq20, 139A817; 240NY223, 148NE328; 250NY132, 164NE881; 114 Okl 61, 242P1030; 134 Okl 19, 272P418; 134 Okl 60, 272P420; TexCommnA 284 SW542.

1104–98½–New. Whether or not written contract may be varied by parol is question of substantive law. CalA 288P785.

1105–5 218Ala325, 118S570; Mass 173 NE429; 219AppDiv486, 220NYS340; 285 Pa16, 131A482; 33PortoRico 6. [a] (6) Tentative paper writing signed by prospective purchasers only. 220Ala317, 124S882.

1106–7 246 IllA137; 224AppDiv392, 231 NYS148. [c] **Proof of loss under automobile insurance policy** is not contract. MoA 20SW(2d)941.

1106–9 [a] 36Man193, [1927] 1DomLR 217, [1926] 3WestWkly741.

1107–15 284Pa407, 131A187. [d] **It was held error** to refuse to permit plaintiff's local manager to testify as to balance due for display advertising in street cars. TexCivA 294SW223.

1108–23 101CalA632, 281P1068; 39GaA 637, 148SE411; 251Mich38, 231NW92; NJ 136A910; 227AppDiv214, 237NYS 225; 119 Or498, 248P1090; 122 Or661, 260P240; 133SC249, 130SE755 (admission of parol evidence to explain unambiguous term in building contract error); TexCommnA 283SW154; Tex CivA 28SW(2d)247; 147Wash445, 266 P701. [a] (10) Other instances. 101 CalA470, 281P1062.

1109–25 104Conn430, 133A677; 319Mo 401, 4SW(2d)438.

1109–27 37F(2d)366; 214Ala268, 107S 746.

1109–29 171Ark698, 285SW372; 160La 992, 107S777; TexCivA 3SW(2d)109, 111 [quotCJ].

1109–30 21F(2d)618; TexCommnA 282 SW795; TexCivA 3SW(2d)109, 111 [quotCJ]. [c] **Reason for rule.**–Tex CommnA 282SW795.

1109–31 171Ark698, 285SW372; 160La 992, 107S777; 10LaA463, 120S786.

1110–33 171Ark698, 285SW372.

1110–39 171Ark51, 283SW7; 246 IllA 380; IndA 151NE7; 170Minn191, 212 NW530; 79Mont327, 256P497; 131Misc 41, 226NYS113 (hours of work); 128 Or 668, 275P682; 285Pa16, 131A482; Tex CivA 281SW301; TexCivA 14SW(2d) 870. [a] (2) 231Ky264, 21SW(2d)281. (3) NJSup 142A565; 91PaSuper129.

1111–40 166La685, 117S774.

1111–41 246 IllA14; 170Minn191, 212 NW530; NJ 148A644. [d] **Evidence is not admissible** to vary contract of employment superseding prior contract to show that liability still existed for work done under prior contract. 73Mont456, 236P1093.

1112–43 [b] **But where ambiguity is caused by incorporating indorsement** on back of contract, parol testimony to interpret it is inadmissible. Utah 293P1.

1112–44 8F(2d)847; 176Ark1073, 5SW (2d)305; 5LaA682; 263Mass295, 160NE 889; 241Mich23, 216NW370; 172Minn 508, 215NW855; 142Va738, 128SE61.

1112–45 122Kan767, 253P414.

1112–46 TexCivA 285SW663.

1113–47 43F(2d)885; 216Ala55, 112S 336, 52ALR838; 235 IllA335; 227Ky 639, 13SW(2d)775; 263Mass262, 160NE 807; 235Mich4, 209NW104; 239Mich 92, 214NW308; 318Mo 969, 2SW(2d) 733, 738 [citCJ]; MoA 25SW(2d)554; 225AppDiv346, 233NYS86; 229AppDiv 26, 240NYS755; 50SD606, 211NW444; TexCivA 272SW539; TexCivA 291SW 301; TexCivA 30SW715. [g] **Lease showing description covered other parcel** is inadmissible where description in policy is unambiguous. 242NY54, 150NE 599. [h] **Application** attached to life policy sued on is within rule. 137Misc 542, 242NYS715. [i] **Policy full and complete on its face** is presumed to contain whole contract. 229AppDiv670, 243 NYS579.

1114–43 13F(2d)745; 219Ala332, 122S 346. Contra TexCivA 294SW953.

1114–53 128Me512, 149A143 (evidence of negotiations).

1114–55 48SD549, 205NW377.

1114–56 121 Or64, 253P373.

1114–61 16F(2d)847; 16F(2d)893; 24 F(2d)12; 24F(2d)840; 170Ark84, 278 SW963; 173Ark1033, 294SW17; 174 Ark1072, 298SW353; 176Ark1146, 5SW (2d)335; 179Ark533, 17SW(2d)319; 98 CalA21, 276P371; 101CalA632, 281P 1068; 244 IllA330; 245 IllA291; 205 Iowa248, 216NW73; 122Kan699, 253P 232; 129Kan540, 283P507; 217Ky28, 288SW1031; 224Ky438, 6SW(2d)473; 226Ky479, 11SW(2d)147; 1LaA379; 12 LaA464, 125S307; LaA 128S546; 128 Me230, 146A705; 239Mich118, 214NW 187; Minn 233NW7; NJ 130A372; 104 NJL81, 139A3; 104NJL109, 139A10; NJSup 130A133; NJSup 138A113; 131 Misc770, 227NYS324; 227AppDiv418, 237NYS274; 230AppDiv436, 245NYS 219; 26OhA485, 160NE482; 128 Okl 14, 261P142; 297Pa576, 147A830; 86 PaSuper103; 91PaSuper604; 92PaSuper292; 32PortoRico 117 (Code Commerce art 51 held not to conflict with rule); SD 227NW435; 157Tenn275, 8 SW(2d)489, 60ALR693; TexCommnA 296SW481; 118Tex255, 14SW(2d)53; TexCivA 281SW226; TexCivA 293SW 629; TexCivA 297SW347; TexCivA 11 SW(2d)262; TexCivA 11SW(2d)551; TexCivA 22SW(2d)341; TexCivA 22 SW(2d)736(2dcase); 137Wash203, 242 P362. [f] See also 52SD245, 217NW 200. [k] **When rate of interest is specified in contract,** parol assent to rate stated in purported account is inadmissible. 52ND366, 203NW195.

1117–64 52SD612, 219NW479.

1117–65 217Ky28, 288SW1031; 128

Okl 14, 261P142; 139 **Okl** 178, 281P769; 108WVa226, 150SE607(2dcase).

1117–66 TexCivA 274SW266.

1117–68 94CalA335, 271P208; 235 IllA 335; 160La336, 107S130; MoA 272SW 894, 898 [citCJ]; 78Mont122, 252P796; NJ 130A372; 227AppDiv418, 237NYS 274; Wyo 293P381. [a] (6) Provision that coal company should furnish buyer's annual requirements estimated at two hundred thousand tons held not so ambiguous as to permit oral evidence. 147Va125, 136SE673.

1118–69 See also 216Ala9, 112S151.

1118–70 147Va125, 136SE673; 152 Wash226, 277P982.

1118–71 Iowa 213NW442; TexCivA 293SW286; 142Va769, 128SE55 (contract held not ambiguous as to time of making deposit); 145Wash66, 258P 1035, 54ALR1382. [b] **Parol agreement to pay in services** may not be shown where subsequent written agreement shows that payment was to be in money. Iowa 213NW442.

1119–83 180Ark12, 20SW(2d)313; 202 Cal 565, 261P1015; 69CalA384, 231P 567; 37GaA452. 140SE634; 217Ky28, 288SW1031; MoA 32SW(2d)116; Tex CivA 281SW226; 198Wis447, 224NW 729.

1119–84 171Ark994, 287SW185; 202 Cal 565, 261P1015; 69CalA384, 231P 567; 82CalA431, 255P772; 37GaA452, 140SE634; 210Ky806, 276SW803; 217 Ky28, 288SW1031; 160NC229, 129SE 449.

1120–85 CalA 267P359.

1120–87 123Kan310, 278P10.

1120–89 121Kan870, 250P262; 122Kan 416, 252P212.

1120–90½–New. Parol evidence is not admissible to show that vendor misrepresented amount of liabilities of business. 24OhNPNS510.

1120–92½–New. An apparently legal contract for support of wife with an expressed legal consideration may not be contradicted by a parol, collateral, and collusive understanding. 284Pa414, 131 A236.

1120–93 54SD99, 222NW661.

1121–95 99Fla132, 126S142; 128Kan 576, 279P7(2dcase); 212Ky163, 278SW 615; 239Mich295, 214NW110, 55ALR 1157; TexCivA 19SW(2d)445. [e] 212 Ky163, 278SW615.

1121–98 164Ga77, 137SE831; 205 Iowa 7, 215NW732; 148Miss583, 114S387; 313Mo 514, 285SW433; 120 Or96, 251P 715; TexCivA 290SW560; TexCivA 2 SW(2d)895.

1122–99 216Ala171, 113S11; 82NH342, 134A520.

1122–1 215Ala653, 112S235; 85CalA 475, 259P770; 88CalA769, 264P294; 81 Colo 452, 256P10; 164Ga77, 137SE831; 167Ga54, 145SE45; 245 IllA109; 200 Iowa768, 205NW366; 130Kan165, 285 P563; 215Ky373, 285SW198; 231Ky 36, 20SW(2d)1013; 168La723, 123S 304; 8LaA520; 256Mass311, 152NE 360; 148Miss583, 114S387; 155Miss 185, 124S270(2dcase); Miss 128S555; 317Mo 544, 297SW54; 120 Okl 130, 247 P673; 120 Or96, 251P715; 122 Or285, 258P205, 58ALR339; 86PaSuper185; 12PaDist&Co 374; TexCommnA 14SW (2d)1009; TexCommnA 23SW(2d)307; TexCivA 276SW444 (rule not violated by admission of parol evidence on question whether there was resulting trust); TexCivA 2SW(2d)895; TexCivA 17SW (2d)1092. [f] 190NC582, 130SE330 (inadmissible to locate road except as contemplated by conveyance).

1123–2 164Ga77, 137SE831; MoA 256 SW116; TexCommnA 15SW(2d)1037; TexCivA 8SW(2d)217. [a] (2) Evidence that plaintiff's titular predecessor was not real purchaser and that latter knew of building restrictions in deed is incompetent. 134Misc733, 236NYS194.

1123–4 148Miss583, 114S387.

1123–11½–New. Parol evidence is not admissible to create, although it is admissible under proper allegations to destroy a title. 1LaA354.

1124–13 But see 61 OntL363, [1928] 1 DomLR32.

1124–17 But see 11F(2d)971.

1124–29 161La313, 108S549; 170La 233, 127S611(2dcase).

1125–31 164Ga257, 138SE333; 166Ga 838, 145SE90; 256Mass311, 152NE360; 146Miss360, 111S841; TexCivA 2SW (2d)895; 145Va536, 134SE670; 135 Wash539, 238P576; 101WVa217, 132SE 501. [a] (1) 213Ala466, 105S562. (2) In such case another plan cannot be referred to and parol evidence is inadmissible to show that another map or plat was intended. 213Ala466, 105S562.

1125–32 94PaSuper62.

1125–33 164Ga257, 138SE333. But see TexCivA 13SW(2d)997.

1126–35 TexCivA 285SW897.

1126–35½–New. Where description in deed is so indefinite that land cannot be identified from it extrinsic evidence is not admissible. TexCommnA 2SW(2d) 431.

1126–36 172Ark108, 287SW1019; 144 Miss96, 109S674; 191NC194, 132SE12; 98PaSuper456; 99Vt384, 133A355. [b] 215Ala297, 110S391. [h] **Parol evidence** of compromise boundary line properly excluded. 191NC194, 132SE12.

1127–42 5F(2d)160; 93Fla849, 112S 846; 130Kan165, 285P563; 215Ky373, 285SW198; 220MoA1004, 274SW894, 898 [citCJ]; 148SC147, 145SE705; Tex CommnA 4SW(2d)961; TexCivA 297 SW888. [b] (2) Parol evidence inadmissible to show that wife joined with husband in deed containing covenants of warranty merely to convey marital rights. 156Tenn463, 2SW(2d)409.

1127–48 212Ky176, 278SW557.

1127–49 120Kan250, 242P1021.

1127–54 81Colo 452, 256P10.

1128–55 172Ark1128, 291SW826.

1128–58 216Ala534, 113S613; 164Ga77, 137SE831. [a] (1) 217Ala196, 115S237 (negative building easement).

1129–59 101NJEq761, 139A174.

1129–62 43F(2d)36; 43F(2d)49; 250 IllA136; 285Pa265, 132A125, 127 [quot CJperSchaffer,J]. [c] **Where letter was held incomplete** as accord and satisfaction, parol evidence was properly allowed. 285Pa265, 132A125.

1129–63 250Mich38, 229NW626.

1129–65 215Ala517, 111S10; 181Ark 467, 26SW(2d)69; 204Cal 643, 269P 655; 253 IllA574; 120Kan704, 244P 1038; 231Ky36, 20SW(2d)1013; 235Ky 767, 32SW(2d)325; 6LaA267; 6LaA 654; 154Md135, 140A76; 262Mass29, 159NE443; 265Mass335, 163NE876; 239 Mich65, 214NW219; 244Mich330, 221 NW293; 174Minn283, 219NW91; 150 Miss272, 116SW294; MoA 287SW781; 83NH107, 139A294; NJSup 135A348; NJSup 135A348; 38 OklACR615 (oil and gas lease); Pa 151A690; 10PaDist &Co 749; SD 226NW345.

1130–73 119Kan478, 240P400; 86Pa Super458; 88PaSuper151; 6PaDist&Co 325; 6PaDist&Co 718.

1131–76 163La272, 111S702.

1131–77 But see 224Ky245, 5SW(2d) 1077.

1131–82 35GaA262, 133SE53.

1132–86 262Mass29, 159NE443.

1132–87 NJSup 135A348.

1132–89 250 IllA112.

1132–90½–New. Where lease is silent as to intended use of premises, parol evidence is competent to show what use of premises was intended by the parties. 120Kan455, 244P16.

1132–93 285Pa265, 132A125; RI 132 A1.

1133–94 39F(2d)305; 285Pa265, 132A 125; RI 132A1.

1133–98 220Ala367, 125S212(2dcase); 119Kan835, 241P118; 129Kan540, 283P 507; 149Md689, 132A265; 156Md115, 143A712; 154Miss812, 123S825; 100 NJEq543, 135A808; 224AppDiv642, 232 NYS57; 226AppDiv827, 235NYS50; 155 SC47, 151SE920; TexCommnA 280SW 521; Utah 272P941; Utah 290P937. [h] **Contemporaneous or prior agreement** to release cotenant's interest in land mortgaged cannot be shown. 212Ala 481, 103S452.

1134–3 [a] 124Misc832, 210NYS331.

1134–6½–New. Parole evidence is inadmissible to supply omissions, 215App Div73, 213NYS277.

1134–6⅓–New. to control or explain intention, 215AppDiv73, 213NYS277.

1134–6¼–New. or vary the legal construction of a trust agreement conveying property on the donor's death. 215 AppDiv73, 213NYS277.

1134–8 Man [1926] 3DomLR894.

1134–9 178Ark355, 11SW(2d)465; 202 Iowa498, 210NW559.

1135–14 199 Iowa1331, 203NW715; 53 ND777, 208NW115.

1135–16 Iowa 227NW508.

1135–19 262Mass555, 160NE532; Tex CivA 295SW702.

1135–21 NJCh 148A630.

1135–22 216Ala666, 114S60; 130S409; 77CalA125, 245P1098, 1100; 95CalA85, 272P340; 43 Ida327, 251P757, 759 [cit CJ]; 202 Iowa1251, 211NW898; 10LaA 575, 121S353; 149Md593, 132A645; 235 Mich217, 209NW129; 244Mich557, 222 NW185; 248Mich24, 226NW660 (invoice stamped "Paid"); MoA 24SW(2d) 649; NH 146A529; NJ 150A417; NJ Sup 136A428; 285Pa265, 132A125; 288 Pa579, 136A847, 848 [citCJ]; SD 225 NW299; 100Vt246, 136A697; Wash 287 P41; 107WVa658, 150SE9; 195Wis47, 217NW719. But see LaA 129S384. [a] (11) 10LaA463, 120S786. (16) Receipt for services rendered to decedent. NJ Sup 136A428.

1137–24 288Pa579, 136A847, 848 [quot CJ].

1137–26 97CalA659, 275P1003; 88 IndA 655, 165NE329; 206 Iowa706, 219NW 401; Or 284P179; 288Pa579, 136A847; Wis 230NW83. [a] (1) TexCivA 32SW (2d)386. (2) 213Ky34, 280SW461. [e] **Where option not under seal,** recital of consideration is open to proof, same as any other receipt without contractual effect. 126Misc777, 215NYS549.

1138–28 [b] (2) 50SD54, 208SW219, 44 ALR1536.

1138–32 174Ark1115, 299SW18, 21 [quotCJ]; 30Hawaii313; 200 Iowa463, 203NW687; 123Kan420, 426, 256P155 [citCJ]; 10LaA463, 120S786; 259Mass 596, 156NE749; 238Mich25, 213NW118; 155Miss492, 124S649; 30 OhA54, 164NE 237; 295Pa146, 144A904; 288Pa579, 136A847; 10PaDist&Co 723. See also 166La704, 117S781. [b] 35GaA34, 132 SE123. [f] (2) Instrument acknowledging receipt of check but also containing terms of agreement. 288Pa579, 136A 847.

1139–34 174Ark1115, 299SW18.

1139–37 119Kan691, 241P242.

1140–41 35GaA29, 132SE117; 206 Iowa 514, 219NW305; 5LaA229, 232 [quot Cyc]; 6LaA714; 250Mich38, 229NW 626; MoA 20SW(2d)941; RI 148A32.

1140–42 5LaA754.

1140–44 217Ala105, 115S2; 178Ark 1100, 13SW(2d)309; 43 Ida327, 251P 757, 759 [citCJ]; Mass 173NE409; 138 Okl 126, 280P598 (unexecuted oral agreement to release note which was not surrendered).

1141–45 43 Ida327, 251P757, 759 [cit CJ]; Wash 287P41 (simple release). **Erratum.–Receipts generally** see supra "§ 1530" should be "§ 1520."

1141–47 12F(2d)895; 102CalA230, 282 P819 (fraud neither alleged nor proved); 220MoA1004, 274SW894, 898 [quotCJ]; 195NC873, 142SE589; 52SD292, 217NW 397, 59ALR947. See 166La704, 117S781. But see 177Ark66, 7SW(2d)758. [b] (1) Me 151A555. (5) Other instances. Me 151A555.

1142–53 239Mich274, 214NW104; 148 Va322, 138SE491.

1142–55½–New. As a general rule parole evidence is inadmissible to supply omissions, 215AppDiv73, 213NYS277.

1142–55⅓–New. or to explain or control the intention of the testator, 215 AppDiv73, 213NYS277.

1142–55¼–New. or to vary a legal construction of a will. 215AppDiv73, 213 NYS277.

1142–55⅕–New. Evidence is admissible to show that a will was executed on a date other than the date it bears, 8Pa Dist&Co 442.

1142–55⅙–New. but such evidence must be clear, precise, and indubitable. 8PaDist&Co 442.

1142–56 285Pa265, 132A125, 127 [quot CJ]; 288Pa579, 136A847; RI 132A1; TexCivA 278SW916.

1142–57 285Pa265, 132A125; TexCivA 278SW916. [e] **Bank deposit or account.–TexCivA** 278SW916.

1143–58 285Pa265, 132A125.

1143–60 37F(2d)711; 9LaA84, 118S 835 (unsigned memorandum); 285Pa 265, 132A125; TexCivA 275SW730 (unsigned order sheet constituting memorandum of previous oral agreement).

1143–62 NJ 138A705; 285Pa265, 132A 125.

1143–63 285Pa265, 132A125. But see 256 IllA210.

1143–64 285Pa265, 132A125, 127 [quot CJ entire paragraph] (dictum); Wis 230 NW141 (inventory). [j] **Letter relating to parol agreement** of accord and satisfaction. 285Pa265, 132A125. [k] **Bank pass book.**–95CalA347, 272P767.

1144–66 177Ark60, 5SW(2d)729; 81 Colo 402, 255P982; 243NY156, 153NE 33; 213AppDiv367, 210NYS682, 684 [quotCJ]; TexCommnA 17SW(2d)805.

1144–71 12F(2d)701; 17F(2d)867; 28 F(2d)658; 216Ala9 112S151; 216Ala 564, 114S135; 84CalA329, 258P148; 95 CalA575, 272P1108; 170Ga764, 154SE 353; 41GaA205, 152SE298; 42 Ida134, 243P825; IndA 168NE40; 205 Iowa 1099, 212NW473; Iowa 213NW442; 218Ky508, 291SW715; 168La578, 122S 856; 168La608, 122S866; 256Mass478, 153NE8; Mass 165NE416; Mich 233NW 329; MoA 17SW(2d)677; 129Misc460, 221NYS540; 57ND598, 223NW350; 112 Okl 280, 240P627; 285Pa265, 132A125; SD 225NW225; TexCommnA 27SW(2d) 115; TexCivA 295SW289; TexCivA 17 SW(2d)102; 142Va769, 128SE55 (dictum); 136Wash74, 239P4. [f] **But where court bases findings** on extrinsic testimony it is error and prejudicial. TexCommnA 25SW(2d)813.

1146–72 214Ala473, 108S339, 341 [cit CJ]; 205 Iowa1099, 212NW473; 256 Mass478, 153NE8; 34 OhA133, 170NE 581; RI 132A1; 157SC469, 154SE855; TexCivA 23SW(2d)527.

1146–74 250Mich38, 229NW626.

1146–76 216Ala564, 114S135; 90CalA 647, 266P565.

1146–76½–New. Question as to reasonable value of item of work held proper where it was issue for jury whether contract included such item. 259Mass439, 156NE740.

1147–77 222MoA276, 297SW138.

1147–81 16F(2d)54; 96CalA128, 273P 604(1stcase); MoA 16SW(2d)107.

1147–82 71CalA197, 234P926; 125Kan 461, 264P1044.

1147–83 71CalA197, 234P926; Mass 167NE646.

1147–85 71CalA197, 234P926, 928 [cit CJ].

1148–93 92PaSuper598.

1148–95 155SC304, 152SE522.

1148–96 309Mo 291, 274SW456. [a] (1) 309Mo 291, 274SW456.

1148–96½–New. Where the court clerk testifies that the entry of date of the date of filing of a pleading was not made by him and appeared to have been tampered with, testimony is admissible to show the actual date of filing. 35GaA 411, 133SE265.

1148–99 22F(2d)638; 24F(2d)3; 104 Conn645, 133A913; DC 40F(2d)802; 43 Ida337, 252P186; 232 IllA266; 246Mich 225, 224NW379; MoA 274SW107, 109 [citCyc]; 242NY134, 151NE155; 219 AppDiv486, 220NYS340; 196NC672, 146 SE708; 22 OhA146, 154NE47; TexCivA 278SW471; TexCivA 118W(2d)652; TexCivA 29SW(2d)507; 68Utah472, 251 P11; 146Va357, 131SE803; 148Va181, 138SE465, 54ALR699; 36Wyo 132, 253 P658. [a] (7) That plaintiff would not have signed contract with corporation unless individual defendants signed as principals. 219AppDiv486, 220NYS 340. (8) That note should have no validity till happening of certain event. 146Va357, 131SE803. (9) That proposition to exchange jointly owned realty was conditioned on securing signature of coöwners. 230Ky393, 20SW(2d)88.

1149–1 100CalA403, 280P218; 237 IllA 587; NJ 138A701; 91PaSuper129.

1150–3 24F(2d)688; 166Ga889, 144SE 772; IndA 167NE546; 204 Iowa940, 216 NW281, 283 [quotCJ]; 218Ky89, 290 SW1081; 220MoA1276, 290SW1009; 114Nebr88, 206NW155; 125Misc546, 211 NYS557 (condition precedent); 226App Div313, 235NYS143; 50ND465, 196NW 556; 52ND307, 202NW642, 644 [citCJ]; 22 OhA146, 154NE47; 31 OhA525, 166 NE698; 35 OhA514, 172NE621; 117 Okl 65, 245P557; TexCommnA 276SW185; TexCivA 278SW471; 68Utah472, 251P 11; 142Va769, 128SE55 (dictum); 194 Wis296, 215NW432; 197Wis622, 222NW 807; 36Wyo 132, 253P658. [c] 35 Oh A514, 172NE621.

1151–4 24F(2d)340 (absolute guaranty); 38GaA644, 145SE97; 204 Iowa 940, 216NW281, 283 [quotCJ]; 218Ky 89, 290SW1081; 174Minn173, 218NW 551; 114Nebr88, 206NW155; 118Nebr 231, 224NW21; 102NJEq245, 140A319, 320 [citCJ]; 125Misc546, 211NYS557 (condition subsequent); 226AppDiv313, 235NYS143; 125 Or362, 267P520; Tex CivA 281SW587. [e] **Parol evidence is not admissible to show that unconditional contract of agency for sale of land** was executed and delivered on condition that it should be taken in connection with similar contracts signed with others and other property included in sale. 190NC726, 130SE624.

1152–5 223AppDiv623, 229NYS216.

1152–7 215Ala187, 110S153; 219Ala 203, 121S733; 175Ark883, 300SW453; 95CalA720, 273P592; 40GaA833, 151SE 667(2dcase); Ida 291P1071; 237 IllA 587; 204 Iowa940, 216NW281; 226Ky 109, 9SW(2d)1091; 126Me434, 139A474; 264Mass208, 162NE368; Mass 169NE 787; 147Miss72, 112S869; MoA 274SW 107; 220MoA205, 282SW91; 221MoA 951, 288SW957; MoA 3SW(2d)1041; 253NY410, 171NE690; 53SD537, 221 NW260; TexCommnA 288SW826; 142 Va702, 128SE364; 192Wis566, 213NW 290; Alta [1926] 4DomLR248, [1926] 3 WestWkly486. See also 53SD153, 220 NW468. But see 179Ark39, 14SW(2d) 255; 226Ky109, 9SW(2d)1091; Tex CivA 11SW(2d)652.

1153–8 196NC672, 146SE708; 142Va 702, 128SE364.

1153–9 73CalA68, 238P169; CalA 291 P248; 237 IllA587; 253 IllA514; 255 IllA529; 203 Iowa396, 212NW693; 206 Iowa1258, 222NW10; 126Me434, 139 A474; 259Mass596, 156NE749; 245 Mich152, 222NW107; 165Minn82, 205 NW699; Mo 15SW(2d)935; MoA 274SW107; 220MoA1276, 290SW1009; NJ 150A414; 228AppDiv133, 239 NYS291; 52ND793, 204NW678; 117 Okl 65, 245P557; 125 Or515, 266P1067; 151SC354, 149SE12 (conditional delivery of check and contract of sale); 52 SD324, 217NW393; 53SD537, 221NW 260; TexCivA 18SW(2d)1097; TexCivA 4SW(2d)157; TexCivA 17SW(2d)463; TexCivA 23SW(2d)447; 144Va263, 132 SE337. 46ALR485; 148Va181, 138SE 465, 54ALR699; 105WVa405, 143SE 102; 36Wyo 132, 253P658. See also 144Va516, 132SE175.

1153–9½–New. Offer of proof showing conditional delivery of a note, inconsistent with a written agreement in the form of a receipt, is properly excluded. 259Mass596, 156NE749.

1154–15 102NJEq245, 140A319; 104 NJL248, 139A900; 142Va769, 128SE55 (evidence of parol agreement that deposit be made immediately held not admissible to show condition precedent).

1154–16 162La698, 111S65. But see Va 155SE707.

1154–17 130Kan96, 285P630; TexCivA 278SW471.

1154–18 24F(2d)688; 151SC354, 149 SE12 (conditional delivery of contract of sale and check); TexCivA 273SW 1019; TexCivA 278SW471; 194Wis296, 215NW432.

1154–21 [a] (1) 68Utah41, 249P125. (2) Such testimony goes to existence of bond and not to vary its contents. 68 Utah41, 249P125.

1155–23 177Ark31, 5SW(2d)726.

1155–24 216Ala534, 113S613.

1155–25 216Ala534, 113S613; 79CalA 252, 249P219; 101NJEq401, 138A693; 125Misc546, 211NYS557; TexCivA 11 SW(2d)844.

1155–27 TexCivA 273SW1019.

1155–28 213AppDiv367, 210NYS682 (sufficiency of delivery of deed held question of fact and parol evidence admissible); TexCivA 273SW1019.

1155–31 Contra 143Wash588, 255P 936.

1155–32 125 Or362, 267P520. [a] 223 AppDiv623, 229NYS216.

1155–33 220Ala578, 126S631. [a] **Assignment of lease is within rule.** TexCivA 8SW(2d)217.

1155–33½–New. and to show which of two leases was delivered as security, TexCivA 292SW953.

1156–36 165La235, 115S471; 22 OhA 146, 154NE47.

1156–38½–New. Testimony is admissible that parol promise to buy the stock was inducement for plaintiff's signing written contract to purchase. 6PaDist &Co 706.

1156–39 75CalA540, 243P487; 237 IllA 587; 11LaA323, 123S461, 463 [quot CJ]; 249Mich511, 229NW629; 219 AppDiv615, 220NYS409; 144Va263, 132 SE337, 46ALR485; 148Va181, 138SE 465, 54ALR699. See also 192NC312, 135SE34.

1156–40 165Minn82, 205NW699; 145 Wash341, 260P252.

1156–41 127Kan43, 272P115 (escrow instructions); 128Kan302, 278P28.

1156–41½–New. Rule that terms and conditions of delivery may be shown does not apply where evidence shows a written agreement for the return of a note if the agreement was not fully executed. 259Mass596, 156NE749.

1156–43 TexCivA 23SW(2d)527.

1156–45 96Fla568, 120S4; 128Kan797, 280P892 (parol evidence admissible to show completeness).

1157–47 25F(2d)576; 82CalA281, 255 P532; 164Ga231, 138SE76; Va 153SE 659.

1157–48 79CalA662, 251P814; 82CalA 710, 256P279; 164Ga231, 138SE76.

1157–50 151Miss1, 117S336; 11PaDist &Co 457.

1157–53 212Ala554, 103S574; 213Ala 274, 104S645, 42ALR981; 216Ala97, 112 S454; 30Ariz172, 245P360; 174Ark 1179, 297SW1012; Cal 290P14; 88CalA 393, 263P558; 102CalA623, 283P393; CalA 291P248; 56AppDC351, 13F(2d) 957; 201 Iowa1325, 207NW781; 204 Iowa732, 216NW39; 124Kan637, 261P 587; 214Ky278, 283SW83; 224Ky245, 5SW(2d)1077; 226Ky367, 10SW(2d) 1115; 164La488, 114S107; 165Minn 379, 206NW721; 165Minn446, 206NW 723; 147Miss835, 112S795; 79Mont 550, 257P1016; 242NY134, 151NE155; 25 OhA409, 158NE205, 206 [citCJ]; 38 OklACR154; 287Pa311, 135A227; 88 PaSuper592; 44Philippine327; 133SC 431, 131SE598; 50SD436, 210NW671; TexCivA 281SW587; TexCivA 2SW(2d) 987; TexCivA 9SW(2d)287; TexCivA 11SW(2d)844; TexCivA 14SW(2d)805; TexCivA 27SW(2d)880; 101WVa284, 132SE717; 188Wis4, 205NW486; 195 Wis47, 217NW719; Wis 230NW605. See also Va 153SE879.

1159–54 164La488, 114S107; 101WVa 452, 132SE877.

1159–55 216Ala97, 112S454; 30Ariz 172, 245P360; 164La488, 114S107; 101 WVa452, 132SE877.

1160–56 79Mont550, 257P1016.

1160–58 30Ariz172, 245P360; 93Fla 656, 112S572; 52SD597, 219NW560, 561 [citCJ].

1160–60 Cal 290P14; 88CalA393, 263 P558; 90CalA387, 266P294; CalA 284 P713; 39GaA785, 148SE542; 147Miss 835, 112S795; 222MoA915, 7SW(2d) 391; 242NY134, 151NE155; 139 Okl 246, 281P771; 289Pa331, 137A455; 88 PaSuper592; SD 227NW885; 153Tenn 546, 14SW(2d)963; 101WVa284, 132 SE717.

1161–61 218Ala557, 119S670.

1161–63 228Ky746, 15SW(2d)491; 5 PaDist&Co 207; TexCivA 281SW587; TexCivA 14SW(2d)116.

1161–65 101WVa284, 132SE717.

1162–67 218Ala296, 118S513; 171Ark 912, 287SW373; 172Ark198, 288SW4; 90CalA387, 266P294; 162Ga302, 133SE 239 (where statement in deed is by way of recital); 169Ga264, 149SE879; 170 Ga37, 151SE923; 335 Ill 101, 166NE495; 204 Iowa732, 216NW39; 121Kan204, 247P113; 124Kan155, 157, 257P926 [cit CJ]; 124Kan637, 261P587; 214Ky278, 283SW83; 222Ky361, 300SW913; 223 Ky597, 4SW(2d)382; 229Ky476, 17SW (2d)407; 232Ky816, 24SW(2d)601; 235 Ky767, 32SW(2d)325; 166La656, 117S

763; 165Minn379, 206NW721; 141Miss795, 105S850; 150Miss766, 117S365; 319Mo930, 5SW(2d)636; Mo 29SW(2d)103; 221MoA127, 294SW111; MoA 297SW995; 81Mont382, 263P967; 49ND207, 190NW815; 25OhA409, 158NE205; 28OhA283, 162NE682; 148SC147, 145SE705; TexCivA 275SW444; TexCivA 275SW468; TexCivA 9SW(2d)287; TexCivA 12SW(2d)613; TexCivA 18SW(2d)773; TexCivA 20SW(2d)803; TexCivA 22SW(2d)1096; 151Va655, 144SE645; 101WVa452, 132SE877; 101WVa514, 133SE123; 195Wis47, 217NW719; 199Wis263, 225NW138; 199Wis263, 225NW935(1stcase). But see TexCivA 26SW(2d)694. [a] (14) Actual consideration may be shown, though it is unexecuted promise if not inconsistent with any written promise in unilateral deed reciting mere money consideration. 165Minn379, 206NW721. (15) That, though money consideration is recited, real consideration was agreement to hold in trust for grantee's father, and after father's death to sell and divide proceeds among plaintiffs. 214Ky278, 283SW83. (16) That purchase price recited as paid was not paid. 34PortoRico59. [b] 178Ark851, 12SW(2d)785. [g] **Provisions in deed for payment of consideration** have been declared recitative or descriptive and not promissory or contractual. TexCivA 275SW444.

1163–68 TexCivA 275SW444 (in absence of estoppel consideration may be explained, verified, or contradicted by parol).

1163–68½–New. But a modern rule cannot be carried so far as to permit proof of the entire absence of consideration for the purpose of nullifying the effect of the deed as a conveyance of a specified title. 101WVa514, 133SE123.

1163–68½–New. If consideration is referred to so as to make it one of the terms or conditions of the contract, it cannot be varied by parol. 162Ga302, 133SE239.

1163–69 307Mo682, 271SW489; MoA 297SW995; 28OhA283, 162NE682.

1163–69½–New. Evidence is inadmissible to show that husband's conveyance to wife for cash consideration was intended as a donation inter vivos. 162La1054, 111S418.

1163–70 47Ida446, 276P309; 233IllA511; 155Md410, 142A598; MoA 256SW124, 125 [citCyc]; 52SD159, 216NW887, 890 [citCJ]. [b] **Grantee may deny by parol evidence recital in deed** of assumption and agreement to pay mortgages. 115Nebr88, 211NW615.

1163–72 317Ill227, 148NE57.

1164–73½–New. Where mortgagee pleads written contract of exchange, he cannot plead oral agreement as to assumption of mortgage. 199Iowa966, 203NW261.

1164–74 36F(2d)646; 219Ala607, 122S814; 23AlaA145, 122S802 [certiorari den 219Ala503, 122S804(1stcase)]; 37GaA564, 141SE59; 236Mich221, 210NW237; 240Mich549, 215NW364; 147Miss835, 112S795; 150Miss762, 116S885; 82NH125, 129A876; 29PortoRico788, 792 [quotCJ]; TexCivA 7SW(2d)915; Vt146A3; 105WVa405, 143SE102.

1164–76 203Iowa461, 212NW729; 129Kan203, 282P741; 241Mich46, 216NW448; MoA 8SW(2d)92; 114Nebr420, 207NW673; 117Nebr1, 219NW581; Nebr230NW673; 128Or673, 275P670; TexCivA 7SW(2d)915. But see 221MoA951, 288SW957.

1165–77 220Ala350, 124S904; 178Ark466, 10SW(2d)910; CalA 281P1043; 36GaA329, 136SE477; 37GaA564, 141SE59; 236IllA412; Iowa 231NW643; 147Miss835, 112S795; MoA 282SW749; MoA 3SW(2d)1041; 114Nebr420, 207NW673; 82NH125, 129A876; 190NC162, 129SE453; 49ND993, 194NW689; 56ND297, 217NW172; 131SC518, 128SE707 (under statute as against any person not holder in due course); 54SD492, 223NW713; 104WVa235, 139SE703.

1165–78 175Ark306, 299SW24; 104WVa235, 139SE703.

1165–80 36F(2d)646; 178Ark466, 10SW(2d)910; 35GaA553, 134SE115; 150Miss762, 116S885; MoA 282SW749; MoA 31SW(2d)234; 190NC162, 129SE453; 192NC330, 135SE141; 88PaSuper592; 29PortoRico788, 792 [quotCJ]; 131SC518, 128SE707 (under statute, as against any person not holder in due course); 54SD492, 223NW713; TexCommnA 27SW(2d)125; TexCivA 23SW(2d)445; 104WVa235, 139SE703.

1165–85 242IllA50; 52ND793, 204NW678.

1166–89 52ND793, 204NW678.

1166–97 43F(2d)51; 165Minn446, 206NW723.

1166–98 88CalA393, 263P558; TexCivA 293SW199.

1166–99 MoA 30SW(2d)186; 56ND385, 217NW516 (statutory undertaking); 133SC431, 131SE598.

1166–2 34F(2d)892; Vt146A3.

1166–6 98CalA21, 276P371; 100CalA424, 280P211; CalA 284P713; 164La488, 114S107; 289Pa331, 137A455; 34PortoRico632; 199Wis263, 225NW138.

1167–7 Ala 130S391; 178Ark355, 11SW(2d)465; 121Kan204, 247P113; MoA 30SW(2d)160; 56ND297, 217NW172 (no consideration); 86PaSuper299; 5PaDist&Co207; 133SC431, 131SE598.

1167–9 249Mich511, 229NW629.

1167–12 38OklACR154.

1167–13 56AppDC351, 13F(2d)957; TexCivA 281SW587, 589 [citCJ]; TexCivA 293SW199; TexCivA 14SW(2d)116.

1168–16 124Kan155, 157, 257P926 [citCJ].

1168–17 124Kan155, 157, 257P926 [citCJ].

1168–18 CalA 288P1096; 165Ga439, 141SE300; 124Kan155, 157, 257P926 [citCJ]; 14SaskL130, 58DomLR668 [1921] 1WestWkly1122.

1169–19 124Kan155, 157, 257P926 [citCJ].

1169–19½–New. Where unambiguous contract stated that payments were to be made monthly, it was inadmissible to show oral agreement to effect that purchaser could make lesser payments and let balance slide to end of year when new contract would be made. 186Wis515, 203NW337.

1169–20 178Ark1069, 14SW(2d)227; 161La378, 108S777; 157Tenn140, 7SW(2d)53.

1169–22 213Ala10, 104S1; 122Kan416, 251P1116, 1117 [citCJ]; 235Mich304, 209NW46; 88PaSuper592; 138Wis4, 205NW486.

1169–23 200Iowa787, 205NW460 (specifically stated consideration is presumptively correct).

1170–25 174Ark1179, 297SW1012; 178Ark1069, 14SW(2d)227; 93Fla656, 112S572, 574 [citCJ]; 317Ill227, 148NE57; 335Ill52, 166NE477; IndA 163NE517; 207Iowa692, 223NW395; 128Kan529, 278P746(2dcase); 158La610, 104S386; LaA 129S416; 166Minn50, 207NW20; 221MoA955, 288SW954, 956 [citCJ]; 221MoA951, 288SW957, 959 [quotCJ]; 284Pa414, 131A236; 291Pa297, 139A876; 188Wis4, 205NW486. [b] **Oral agreement to pay** less than definite amount stated in note cannot be shown. 166Minn50, 207NW20. [c] **Defendant cannot dispute** sufficiency of consideration for option under seal. 189NC610, 127SE706.

1170–27 101WVa452, 132SE877.

1170–29 214Ala536, 108S358; 39GaA785, 148SE542. But see 284Pa414, 131A236.

1171–30½–New. Where a contract is not invalid on its face, parol evidence is admissible to show its validity. 284Pa414, 131A236 (contract for wife's support held not against public policy precluding showing of absence of collusion).

1172–36 215Ala187, 110S153, 154 [citCJ]; 201Cal597, 259P86, 88 [quotCyc]; 93Fla656, 112S572, 574 [citCJ]; Iowa231NW334; 122Kan416, 251P1116, 1117 [citCJ]; 165Minn379, 206NW721, 723 [citCJ] (partition deed); 189NC610, 127SE706; 38OklACR372; 120Or96, 251P715; 50SD436, 210NW671, 673 [citCJ]; TexCommnA 14SW(2d)805; TexCivA 281SW587; TexCivA 9SW(2d)287; 195Wis47, 217NW719. [c] **Determination of contractual character.**–Legal effect of instrument and not its name controls question whether consideration named is contractual element. 199Wis263, 225NW935(1stcase).

1172–37 50SD436, 210NW671, 673 [citCJ].

1172–38 50SD436, 210NW671, 673 [citCJ].

1173–40 43F(2d)642; 216Ala564, 114S135; 200Cal688, 254P1097 (dictum); 201Cal225, 256P419, 55ALR157; 94CalA473, 271P353; 100CalA606, 280P711; 205Iowa1099, 212NW473; 127Kan732, 275P196; 251Mich38, 231NW92; 86Mont276, 283P213; 86Mont530, 284P264; 82NH342, 134A520; 132Misc848, 230NYS691; 254NY283, 172NE499; 120Okl108, 250P892; 124Okl174, 254P713; 133Okl104, 271P635(2dcase); 36OklACR467; 37OklACR260; 120Or381, 250P717; 124Or332, 263P391; 144SC417, 142SE593; TexCivA 27SSW453; TexCivA 283SW345; TexCivA 289SW155; TexCivA 11SW(2d)369; TexCivA 18SW(2d)787; 101WVa211, 133SE330; 103WVa366, 137SE539.

1174–41 24F(2d)12; 200Cal688, 254P1097 (dictum); CalA 262P774; 93Fla849, 112S846; 162La35, 110S79; 248NY28, 161NE319; 37OklACR260; 50RI75, 145A97; TexCivA 289SW155; TexCivA 5SW(2d)796; 194Wis78, 215NW939.

1174–42 128Kan310, 278P10; 129Kan453, 283P636.

1175–43 176Ark238, 3SW(2d)20; 253Mass451, 149NE156; 169Minn140, 210NW861; MoA 11SW(2d)1065; 37OklACR260.

1175–44 33F(2d)231; 43F(2d)408; 35Ariz535, 281P211 (written agreement held ambiguous); 180Ark729, 22SW(2d)1007; 201Cal225, 256P419, 55ALR157; 205Cal733, 272P740; 77CalA690, 247P536; CalA 262P774; 91CalA307, 266P989; 91CalA333, 266P1009; 100CalA315, 279P1076; CalA 290P146; 96Fla566, 119S146; 96Fla568, 120S4; GaA 155SE105(2dcase); 47Ida149, 273P945; 207Iowa597, 223NW400; 120Kan637, 245P119; 122Kan767, 253P414; 128Kan310, 278P10; 224Ky245, 5SW(2d)1077; 226Ky839, 11SW(2d)973; 235Ky574, 31SW(2d)910; Me 149A301; 157Md437, 146A275, 65ALR641; 258Mass331, 155NE18; 244Mich330, 221NW293; 150Miss322, 116S435; 310Mo104, 274SW770; 220MoA1070, 282SW74; MoA 288SW1004; MoA 7SW(2d)288; NJ 152A14; 248NY280, 162NE79; 219AppDiv615, 220NYS409; 226AppDiv178, 234NYS685; 196NC343, 145SE609; 117Okl96, 245P571; 133Okl104, 271P635(2dcase); 135Okl235, 275P1061; 37OklACR260; 38OklACR55; 122Or285, 258P205, 58ALR339; 128Or142, 273P954; 295Pa425, 145A525; 155SC488, 152SE644; TexCommnA 12SW(2d)189; 118Tex255, 14SW(2d)53; TexCivA 278SW453; TexCivA 282SW894; TexCivA 283SW345; TexCivA 289SW155; TexCivA 289SW199; TexCivA 8SW(2d)206; TexCivA 19SW(2d)71; TexCivA 26SW(2d)308; 101Vt220, 143A288; 151Va28, 144SE629; Va 154SE558; 103WVa366, 137SE539; 200Wis22, 227NW237. [e] 83CalA537, 257P121.

1176–45 205Iowa1099, 212NW473.

1177–46 258Mass331, 155NE18; 169Minn140, 210NW861.

1177–48 309Mo291, 274SW456.

1177–49 8F(2d)847; 12F(2d)895; 31F(2d)859; 219Ala344, 122S404; 33Ariz294, 264P471; 33Ariz474, 266P3; 200Cal688, 254P1097; 207Cal8, 276P1017(2dcase); 70CalA180, 232P755; 75CalA540, 243P487; 86CalA216, 260P596; 96CalA697, 274P761; CalA 288P1096; CalA 290P545; 93Fla849, 112S846; 167Ga66, 144SE903; 45Ida707, 266P1094; 252IllA17; 252IllA366; 256IllA480; 89IndA94, 163NE119; 207Iowa597, 223NW400; 122Kan699, 253P232; 124Kan233, 257P949; 226Ky750, 11SW(2d)933; 13LaA266, 127S638; 264Mass128, 162NE324; Mass 165NE7; Mass 165NE27; 236Mich683, 211NW48; 173Minn255, 217NW133; Miss 105S766; 141Miss38, 106S209, 44ALR393; 307Mo234, 270SW658; 317Mo505, 297SW362; 220MoA1004, 274SW894, 898 [citCJ]; MoA 5SW(2d)682; 73Mont456, 236P1093; Mont 289P388; 117Nebr219, 220NW238; NJ 144A585(2dcase); 51ND354, 199NW592; 30OhA15, 164NE65; 34OhA397, 171NE

117; 114 Okl 13, 242P760; Okl 278P 1081 (drilling contract held not ambiguous); Okl 291P501; 37 OklACR260; 120 Or381, 250P717; 120 Or202, 250P 722, 725 [quotCJ]; 122 Or285, 258P205, 58ALR339; 123 Or469, 259P1064, 260P 1099; 288Pa264, 135A764; Pa 145A63 (2dcase); 14PaDist&Co 293; Tex CommnA 280SW521; TexCommnA 280 SW742; TexCommnA 284SW542; Tex CivA 274SW272; TexCivA 281SW301; TexCivA 291SW301; TexCivA 295SW 274; TexCivA 12SW(2d)620; TexCivA 15SW(2d)72; TexCivA 17SW(2d)163; TexCivA 26SW(2d)308; 145Va191, 133 SE669; 147Va125, 136SE673; 151Va28, 144SE629; 135Wash307, 237P707 ("collision"); 152Wash480, 278P183; 101 WVa211, 133SE330; 108WVa443, 152SE 205; 187Wis333, 203NW352; 192Wis 275, 212NW657; 197Wis250, 221NW 743. [j] **Whether ambiguity exists is** question of law. TexCivA 15SW(2d)72.

1178–50 200Cal 688, 254P1097; 75CalA 540, 243P487; 220MoA1004, 274SW894, 898 [citCJ]; TexCommnA 280SW521; TexCivA 281SW301; TexCivA 28SW (2d)569 (word "valid").

1179–51 200Cal 688, 254P1097; 207Cal 8, 276P1017(2dcase).

1179–52 MoA 290SW105.

1179–55 200Cal 688, 254P1097; 72CalA 179, 236P972; CalA 293P149; Colo 293 P345; MoA 16SW(2d)107; TexCivA 14 SW(2d)958.

1179–57 28F(2d)687; MoA 5SW(2d) 682, 685 [citCJ]; 82NH342, 134A520; 191NC790, 133SE199; 102WVa587, 135 SE841.

1179–58 82NH342, 134A520; 101WVa 211, 133SE330; 102WVa587, 135SE841.

1180–60 28F(2d)687; 216Ala564, 114S 135; 72CalA179, 236P972; 104Conn430, 133A677; 41 Ida511, 239P1049; 202 Iowa976, 208NW343, 350 [citCJperMorley,J]; 258Mass331, 155NE18; 82NH 342, 134A520; 114 Okl 13, 242P760; Tex CivA 27SSW453; Utah 279P499; 106 WVa280, 145SE440; Can [1930] 2DomLR433.

1180–61 104Conn430, 133A677; 235 Mich268, 209NW85; Miss 105S766; 221 MoA923, 291SW142; 117 Okl 156, 246P 833; 120 Okl 130, 247P673; 119 Okl 225, 249P420; 101WVa211, 133SE330.

1180–62 82NH342, 134A520; 122 Okl 73, 250P890; Alta [1930] 2DomLR21.

1180–63 104Conn318, 132A910; 33GaA 579, 127SE819; 167La583, 120S15; 253 Mass451, 149NE156; 134Wash450, 235P 958, 136Wash695, 240P362; 187Wis232, 202NW34 (how parties themselves treated ambiguous contract).

1181–65 33GaA579, 127SE819; 220MoA 1004, 274SW894, 898 [quotCJ entire section]; McA 300SW324; 50ND573, 196 NW820, 822 [citCJ]; 148Va651, 139SE 325.

1181–66 187Wis232, 202NW34 (parol evidence admissible to apply agreement to subject matter).

1181–68 192NC40, 133SE173; 143 Okl 33, 287P722. [a] (3) "Attached specifications," not attached to contract, may be identified by parol evidence. 147Va 125, 136SE673.

1181–69 216Ala564, 114S135; 217Ala 196, 115S237 (circumstances admissible to give full effect to building restrictions in deed); 205 Iowa1099, 212NW473. But see 263Mass228, 161NE240.

1181–70 [a] (3) To warrant parol evidence to identify property in tax deed, it must furnish definite clue shown by official maps. 147Miss802, 111S838, [c] **Where reference is insufficient,** parol testimony is inadmissible. 147Miss802, 111S838.

1182–72 143 Okl 299, 288P960.

1182–73 43F(2d)337; 31Ariz147, 250P 993; 177Ark60, 5SW(2d)729; 178Ark 1073, 13SW(2d)291; 207Cal 8, 276P 1017(2dcase); 72CalA179, 236P972; 72 CalA497, 238P136; 83CalA537, 257P 121; 84CalA130, 257P586; 86CalA216, 260P596; 93CalA370, 269P710; CalA 286P510; 104Conn430, 133A677; 163Ga 468, 136SE434 (deed); 48 Ida798, 285P 673 (deed containing erroneous description through mutual mistake); 242 IllA 63; 84 IndA666, 151NE338, 836; 201 Iowa48, 206NW258; 202 Iowa927, 211 NW392; Iowa 224NW550; 121Kan204, 247P113; 224Ky245, 5SW(2d)1077; 226 Ky839, 11SW(2d)973; 232Ky195, 22 SW(2d)580; 160La963, 107S711; 169 Minn140, 210NW861; Mo 20SW(2d)650 (whether parties intended time to be of essence of contract); MoA 288SW 1004; MoA 7SW(2d)288; 77Mont524, 251P1057; 81Mont99, 261P880; 242NY 106, 151NE146; 224AppDiv81, 229NYS 543; 224AppDiv463, 231NYS238; 122 Okl 73, 250P890; 122 Or285, 258P205, 58ALR339; 284Pa414, 131A236; Tex CommnA 293SW815; TexCivA 286SW 624; Utah 250P1045; 152Va173, 146SE 254; 100WVa331, 130SE447; 107WVa 671, 150SE373 (intent in using word "failure"); 108WVa443, 152SE205; 187 Wis232, 202NW34; 194Wis78, 215NW 939.

1183–74 12F(2d)895; 177Ark60, 5SW (2d)729; 205Cal 284, 270P958; 72CalA 497, 238P136; 104Conn430, 133A677; Miss 111S605; 146Miss637, 113S184; MoA 16SW(2d)107; 224AppDiv525, 231 NYS524 [mod on other grounds 166NE 344(6thcase)]; 122 Okl 73, 250P890; TexCivA 8SW(2d)714; Utah 263P485; 101WVa211, 133SE330; 188Wis215, 205 NW812. [b] **Provision requiring "marketable title"** in contract for sale of realty cannot be varied by parol to show that conveyance was intended to be subject to right of way of which parties were aware. Mass 167NE680.

1183–75 TexCivA 282SW894.

1183–76 216Ala564, 114S135.

1183–77 160La143, 106S724, 725 [cit CJ].

1183–78 25F(2d)890; 35Ariz535, 281P 211; 160La143, 106S724, 725 [quotCJ]; Or 291P349.

1183–81 102WVa587, 135SE841.

1183–83 39F(2d)406; 205 Iowa1099, 212NW473; 121Kan385, 247P844, 845 [citCJ]; 258Mass282, 154NE769; 103 NJEq121, 142A441; Or 291P349.

1184–84 41F(2d)177; 300Pa428, 150A 620.

1184–86 25F(2d)890; 25F(2d)995; 88 CalA659, 263P1023; 111Conn572, 150A 499; 56AppDC351, 13F(2d)957; 42 Ida 720, 248P9; 121Kan204, 247P113 (deed as mortgage); 165La106, 115S403; 220 MoA1070, 282SW74; 77Mont524, 251P 1057; Nebr 230NW673; Nebr 231NW 141; NJCh 144A308; 243NY450, 154 NE307; 252NY366, 169NE612; Tex CommnA 16SW(2d)287; TexCivA 285 SW663; TexCivA 11SW(2d)652. [b] **Rule has never been extended to contradict nature of liability expressed in** instrument. TexCivA 285SW663.

1185–87 56AppDC351, 13F(2d)957; Mo 15SW(2d)935.

1185–88 208 Iowa658, 226NW93.

1185–89 207 Iowa692, 223NW395; 165 La151, 115S441.

1185–90 216Ala564, 114S135; 127Kan 732, 275P196; 228Ky522, 15SW(2d) 487; 253Mass451, 149NE156; 258Mass 282, 154NE769; Mich 233NW415(1st case); 170Minn434, 212NW937; 220 Mo 1057, 279SW720; NH 146A165; Tex CivA 273SW663; 101WVa211, 133SE 330.

1186–92 77CalA1, 245P799; 83CalA771, 257P185; 95CalA85, 272P340; 101CalA 709, 282P397; 104Conn447, 133A669; 96Fla566, 119S146; 40GaA680, 150SE 865; 130Kan96, 285P630; 166La28, 116 S582; 140Miss155, 106S17 (place of delivery of goods sold); 96PaSuper104; 98PaSuper65; TexCivA 294SW641.

1186–93 NJSup 130A372; 143Wash204, 255P101.

1186–94 143Wash204, 255P101. [c] **Failure by witness to deed to subscribe** cannot be supplied by parol evidence. 196NC657, 146SE713.

1186–94½–New. An omission may not be supplied by parol evidence where the matter resting in parol does not relate to the written contract but to an earlier contract. 127Misc508, 217NYS39.

1186–95 5F(2d)559; 7F(2d)535; 25 F(2d)576; 34F(2d)100 (contract provisions as to relative insurance on vessel under repair, ambiguous so as to justify evidence of surrounding circumstances); 43F(2d)337; 216Ala564, 114 S135; 200Cal 688, 254P1097; 201Cal 225, 256P419, 55ALR157; 72CalA179, 236P972; 86CalA209, 260P601; 88CalA 748, 264P289; 88CalA762, 264P332; CalA 289P934; CalA 290P545; 86 IndA632, 155NE712; 123Kan711, 256P 1008; 234Ky508, 28SW(2d)780; Mass 169NE435; Mass 169NE897(2dcase); 176Minn234, 223NW98(2dcase); 221 MoA577, 284SW156; 224AppDiv463, 231 NYS238; 134Misc801, 236NYS306; 191 NC809, 133SE391; 120 Or381, 250P717; 89PaSuper377; TexCommnA 276SW 187; TexCivA 286SW624; TexCivA 19SW(2d)171; 101WVa211, 133SE330; 103WVa366, 137SE539; 187Wis232, 202 NW34; Alta [1930] 2DomLR21; Alta [1930] 3DomLR1010; Can [1930] 2 DomLR433.

1189–96 216Ala564, 114S135; 200Cal 688, 254P1097; 86 IndA632, 155NE712.

1189–97 72CalA179, 236P972; 334 Ill 281, 165NE793; TexCommnA 276SW 187.

1189–98 200Cal 688, 254P1097; 71CalA 393, 235P461, 462 [quotCJ]; 150Md18, 132A258; 226AppDiv586, 236NYS172 (resort to surrounding circumstances is permissible only where doubt or ambiguity appears); 191NC809, 133SE391; 126 Okl 251, 259P268; Wis 230NW46.

1190–99 89PaSuper377.

1191–3 126 Okl 251, 259P268.

1191–4 126 Okl 251, 259P268.

1191–5 Mass 169NE499; 146Miss637, 113S184; NH 149A498; 126 Okl 251, 259P268; 128 Or359, 274P116(2dcase); SD 231NW904; TexCivA 285SW662. See also 13F(2d)607.

1191–7 71CalA393, 235P461.

1191–9½–New. Whether ambiguity is patent or latent is immaterial on question of admissibility of oral testimony. MoA 23SW(2d)1075 (insurance policy).

1192–10 104Conn318, 132A910; 122 Okl 73, 250P890, 891 [quotCJ]; 139SC223, 137SE684, 687 [citCJ]; TexCivA 2 SW(2d)895; 108WVa443, 152SE205. [c] See also 187Wis232, 202NW34.

1192–11 40F(2d)333; 43F(2d)885; 171 Ark11, 283SW17, 45ALR1396; 73CalA 44, 238P177; 79CalA662, 251P814; 123 Kan711, 256P1008; 9LaA674, 119S781; 246Mich318, 224NW366, 68ALR1; Mich 233NW329; MoA 272SW1071; NJ 150A399; NJSup 130A726; 192NC166, 134SE419; 122 Okl 73, 250P890, 891 [quotCJ]; 132 Okl 272, 270P329; 128 Or142, 268P748; Or 293P425; 10Pa Dist&Co 479; 139SC223, 137SE684; TexCommnA 295SW578; 187Wis232, 202NW34. See also 145Va429, 134SE 677. [d] **Where prior conduct and relation** of parties makes apparently clear contract ambiguous, parole evidence to explain it is admissible. 242NY106, 151 NE146.

1194–12 79CalA662, 251P814.

1194–12½–New. If the contract is not ambiguous, parol evidence is not admissible to explain it. 127Misc508, 217 NYS39.

1194–14½–New. Although the writing is ambiguous, parol evidence is not admissible to contradict it. 127Misc508, 217 NYS39.

1194–17 123Kan711, 256P1008; 234 Ky525, 28SW(2d)771; MoA 23SW(2d) 1075; NJCir 142A907; 29 OhA382, 163 NE584. See also 145Va681, 134SE692.

1195–21 TexCivA 292SW633. [a] **Description held not to contain latent ambiguity.–Conn** 151A357.

1195–24 171Ark11, 283SW17, 45ALR 1396; 187Wis232, 202NW34 (ambiguity arises from construing agreement literally because of unexplained difference in obligations imposed).

1196–25 [a] (2) Where contract of sale provides for payment when party thereto becomes postmaster, and provision may be construed either to refer to time of payment or to constitute illegal condition, parol evidence is admissible to explain latent ambiguity. 171Ark11, 283SW17, 45ALR1396.

1196–29 221Ky798, 299SW985.

1196–30 TexCivA 26SW(2d)308.

1197–38 37GaA564, 141SE59; 214Ky 259, 283SW76; 232Ky564, 24SW(2d) 296; 10PaDist&Co 475; TexCivA 283 SW345; TexCivA 30SW(2d)356.

1197–39 214Ky259, 283SW76; 222MoA 201, 297SW151, 156 [citCJ]; 191NC809, 133SE391; TexCivA 8SW(2d)206.

1198–40 TexCivA 283SW1073, 1076 [quotCJentiresection].

1198-41 Ill 173NE162. [b] **Description held not to contain patent ambiguity.**-Conn 151A357.

1199-44½-New. Description as "undivided interest" in land, described by metes and bounds, is not patent, and proof of identity may be made. Tex CivA 282SW935.

1199-45 NJ 150A399; TexCivA 283SW1073, 1076 [quotCJentiresection]. [b] **In bilateral agreements,** evidence as to intention limited to acts and statements from which intention may be inferred are inadmissible. 82NH342, 134A520.

1199-46 16F(2d)54; 17F(2d)196; 24F(2d)12; Ark 7SW(2d)791; 94CalA12, 270P400; 207Cal 534, 279P444(2dcase) (words "with the right to inherit," in settlement between spouses, explainable by parol); 70CalA351, 233P350; 72CalA179, 236P972; 79CalA621, 250P577; 104Conn430, 133A677; 40GaA522, 150SE457 (3dcase); 162La81, 110S96; 244Mich656, 222NW85; 224AppDiv463, 231NYS238; 133Misc312, 232NYS171; 26 OhA485, 160NE482; 130 Okl 48, 265P102; 50SD332, 210NW153; TexCivA 283SW345; TexCivA 8 SW(2d)206; TexCivA 11SW(2d)383; 144Va263, 132SE337, 46ALR485; 194Wis78, 215NW939. [b] 79CalA621, 250P577. [d] **Words held sufficiently indefinite and general to admit** parole evidence to show whether expense of entertaining customers was to be deducted from weekly drawings or included in "travelling expenses." 126Misc683, 214NYS476.

1201-7½-New. "net," 70CalA351, 233P350.

1201-12½-New. "our mill;" 49RI 99, 140A3.

1201-20½-New. reasonable rate, 105WVa138, 141SE639.

1201-33 161La641, 109S341.

1202-48½-New. "valid between," 16F(2d)54.

1202-57 [a] **Parol evidence held admissible** to show whether "working days" in construction contract included legal holidays, stormy days, and Saturday afternoons. TexCivA 292SW602.

1202-57½-New. "working days," 104Conn430, 133A677.

1202-58 108Conn465, 143A526; 169La838, 126S209; Mass 165NE389; 239Mich161, 214NW111; 126Misc874, 215NYS225; 144Va263, 132SE337, 46ALR485.

1203-59 5F(2d)549.

1203-10½-New. "uncollectable," 126Misc874, 215NYS225.

1203-16 12F(2d)885; 95CalA378, 272P803; 97CalA77, 275P257; 125Kan700, 266P26; 247NY465, 160NE916; 224AppDiv19, 229NYS371.

1205-26½-New. "Assortment to be furnished . . . such grades as he has available at times of shipment." 12F(2d)885, 887.

1205-39½-New. "cross with roses," 194Wis78, 215NW939.

1205-53½-New. "Grade-Barrels or equivalent." 12F(2d)885.

1206-67½-New. "Newburg special," 194Wis78, 215NW939.

1206-72½-New. "Price-22.50," 12F(2d)885.

1206-10 MoA 290SW630.

1207-17 16F(2d)880.

1208-19 79CalA621, 250P577; 256Mass397, 152NE621; 50ND573, 196NW820, 822 [citCJ].

1208-22 213Ala274, 104S645, 42ALR931; 218Ala296, 118S513; 87CalA301, 262P452; 287Pa420, 135A107; TexCr 26SW(2d)251(2dcase). [q] **Where instrument collateral issue.**-287Pa420, 135A107.

1209-28 207 Iowa278, 222NW846.

1209-29 240NY474, 148NE650 (modified or abandoned).

1209-30 138SC10, 135SE646; TexCivA 9SW(2d)1046; Wis 232NW883.

1209-32 TexCivA 9SW(2d)1046.

1210-33 2LaA288; 240NY474, 148NE650.

1210-34 See also 2LaA313; 8LaA591.

1210-39 Ariz 285P263; 68CalA688, 229P1017; 91CalA692, 267P555; MoA 275SW48; MoA 26SW(2d)999; NH 151A481; 30NM517, 239P865; 219AppDiv615, 220NYS409.

1211-40 13F(2d)745; 118 Okl 41, 246P381.

1211-44 52ND307, 202NW642.

1211-45 TexCivA 7SW(2d)115, 117 [quotCJ].

1211-46 87CalA301, 262P452.

1212-48 75CalA540, 243P487; 232 IllA439.

1212-53 Ala 129S20(2dcase); 219App Div486, 220NYS340; 10PaDist&Co 136. [d] MoA 16SW(2d)107.

1212-54 TexCivA 281SW587, 589 [cit CJ].

1213-55½-New. Where signing of contract is brought about by parol understanding that the obligation shall not be enforceable, such understanding is inadmissible as contrary to the writing. 53ND777, 208NW115.

1213-59 16F(2d)253; 21F(2d)280; 201Cal 219, 256P411; 71CalA192, 234P913 (grantor of property may testify he did not have title thereto); 106Conn468, 138A438; 111Conn572, 150A499; 41GaA98, 152SE485(2dcase); 147Miss835, 112S795; MoA 297SW985; 114Nebr88, 206NY155; 242NY134, 151NE155; 220App Div191, 221NYS181; 138 Okl 245, 280P826; 43 OklACR282, 284 [quotCyc]; 45 Philippine256 (where validity of agreement is fact in dispute); Tex 296SW693; TexCivA 281SW587, 589 [citCJ]; TexCivA 283SW544 [citCJ]; TexCivA 7SW(2d)115; 100Vt246, 136A697; 34Wyo 495, 245P304, 307 [citCJ], 51ALR13; Wyo 292P1091. [b] 166La57, 116S667. [g] **Questions emphasizing admitted fact** that defendant had made improvident contract held properly excluded. 213Ala156, 104S277.

1214-60 16F(2d)253; 21F(2d)280; 201Cal 219, 256P411; 43 OklACR282, 284 [quotCyc].

1214-61 83CalA399, 256P879, 880 [cit CJ&Cyc]; 36GaA788, 138SE256; 242NY134, 151NE155 (as to any matter affecting validity of contract). [b] (4) Accord and satisfaction. 26 OhA460, 160NE511.

1214-63 229AppDiv466, 242NYS583; 29 Oh382, 163NE584.

1215-65 20F(2d)364; 21F(2d)280; 36F(2d)771; 213Ala156, 104S277; 213Ala675, 106S171; AlaA 130S516; 171Ark719, 285SW385; 174Ark1179, 297SW1012; 176Ark448, 3SW(2d)310; 202Cal748, 262P322; 204Cal 342, 268P342, 58ALR1176; 205Cal 771, 272P1049; 70CalA279, 233P354; 76CalA278, 244P916; 84CalA784, 258P724; 90CalA193, 265P870; 99CalA323, 278P871; IndA 151NE7; IndA 163NE517; 206 Iowa328, 218NW568; 125Kan461, 264P1044; 217Ky28, 288SW1031; 235Ky54, 29SW(2d)581; 7LaA350; 8LaA412; 8LaA766; 127Me306, 143A173; 254Mass274, 150NE186; 254Mass411, 150NE216; 259Mass341, 156NE715, 52ALR1149; Mass 167NE635 (in suit for specific performance); 235Mich268, 209NW85; 239Mich118, 214NW187; 165Minn87, 205NW696; 170Minn373, 212NW602, 603, 56ALR1 [citCJ]; 147Miss835, 112S795; 309Mo 638, 274SW815; MoA 278SW830; 118Nebr318, 224NW687; 82NH232, 131A690; NJ 150A417; NJSup 129A182; NJSup 143A695; 103NJEq121, 142A441; 242NY134, 151NE155; 221AppDiv517, 224NYS666; 125Misc798, 211NYS718; 134Misc638, 236NYS337; 228AppDiv396, 240NYS123; 191NC218, 131SE579; 49ND441, 191NW762; 50ND78, 194NW925; 52ND112, 202NW280; 52ND793, 204NW678; 29 OhA382, 163NE584; 285Pa260, 131A858; 285Pa472, 132A579; 285Pa502, 132A707; 289Pa331, 137A455; 91PaSuper422; 97PaSuper510; 6PaDist&Co 168; 14PaDist&Co183; 136SC496, 134SE505; 139SC223, 137SE684; 51SD288, 213NW507, 509 [quotCJ]; 158Tenn546, 14SW(2d)963; Tex 285SW683; TexCivA 271SW233; TexCivA 274SW215; TexCivA 278SW943; TexCivA 281SW587, 589 [citCJ]; TexCivA 281SW646; TexCivA 283SW544; TexCivA 285SW655; TexCivA 299SW351; TexCivA 12SW(2d)257; 140Wash581, 250P34, 35, 51ALR39 [citCJ]; 153Wash127, 279P581; 34Wyo 495, 245P304, 307 [citCJ], 51ALR13. But see LaA 129S416. [a] 120Kan278, 243P316; 170Minn373, 212NW602, 56ALR1; 309Mo 638, 274SW815. [d] 120Kan278, 243P316. [i] (1) 291Pa297, 139A876. [k] **Parol testimony to show fraud** admitted, even though it tended to vary written instrument. 136SC496, 134SE505. [l] **Mere unfulfilled contemporaneous oral promises** do not authorize parol evidence to vary written contract. 291Pa53, 139A606. [m] **Prayer for reformation is necessary** to render admissible parol evidence of fraud or mistake in omitting portions of contract. 230Ky194, 18SW(2d)1006.

1217-66 168Ark1116, 272SW644 (stipulation against warrantees held not to preclude defense of fraudulent representations); 70CalA108, 232P986; 76CalA278, 244P916; CalA 284P496; GaA155SE206; Mass 167NE635; 239Mich118, 214NW187; 251Mich402, 232NW177; 156Miss157, 125S708; 49ND441, 191NW762; TexCivA 271SW233; TexCivA 281SW587, 589 [citCJ]. But see 202Cal 748, 262P322. [a] **Fraud which enters into making of contract,** as distinguished from that which is antecedent to it, cannot be excluded from reach of law by any phrase inserted in contract. 252Mass265, 147NE892.

1217-66½-New. by provision that purchaser inspected the property and accepted it in its present state without representations on the part of the seller. 3Del 259, 138A392.

1217-67 176Ark212, 2SW(2d)1109; 76CalA321, 244P958.

1217-67½-New. Fraudulent misrepresentation held not merged in a contract by a clause not coextensive in terms nor necessarily relating thereto. 259Mass341, 156NE715, 52ALR1149.

1217-68 213Ala156, 104S277; 122Kan416, 251P1116, 1117 [citCJ]; 258Mass483, 156NE37; MoA 24SW(2d)670.

1217-69 78Mont145, 252P872. But see 204Cal 342, 268P342, 58ALR1176.

1217-70 [c] **In tort action.**-153Wash127, 279P581.

1217-74 12LaA484, 126S599; 309Mo638, 274SW815; 222AppDiv627, 227NYS331; 285Pa502, 132A707.

1217-75 206 Iowa328, 218NW568; 127Me306, 143A173; 248Mich68, 226NW876; 83NH518, 144A845; 139 Okl 246, 281P771; 283Pa406, 129A333; RI 143A858; 54SD492, 223NW713; TexCivA 19SW(2d)800 (note covering employment contract induced by fraud). [a] **Exclusion of parol testimony that real consideration for note and mortgage was fraudulent,** agreement to cancel judgment held erroneous. 191NC218, 131SE579.

1218-76 TexCommnA 282SW570.

1218-77 125Me31, 130A509; RI 133A349.

1218-80 36F(2d)771; 213Ala675, 106S171; 171Ark698, 285SW372; 95CalA327, 272P772; 97CalA452, 275P1005; IndA 151NE7; 84 IndA666, 151NE338, 836; 12LaA570, 126S522 (exclusion held error); 263Mass76, 160NE408; 170Minn373, 212NW602, 56ALR1; 82NH232, 131A690; ND 232NW609; 296Pa541, 146A126; RI 143A858; 158Tenn546, 14SW(2d)963; TexCivA 282SW651; TexCivA 11SW(2d)250; TexCivA 12SW(2d)257; TexCivA 12SW(2d)1102; TexCivA 26SW(2d)449; TexCivA 27SW(2d)616.

1218-80½-New. contracts of exchange, 239Mich118, 214NW187.

1218-81 152Miss320, 120S188.

1218-82 125Misc798, 211NYS718. But see NJCh 150A564. [a] 104WVa353, 140SE61.

1218-83 AlaA 130S516; Ariz 286P180; 171Ark719, 285SW385; 176Ark212, 2SW(2d)1109; 176Ark448, 3SW(2d)310; 76CalA278, 244P916; 99CalA323, 278P871; 100CalA43, 279P680; CalA 287P139; 163LaA442, 112S40 (simulate sale); 10LaA158, 120S240; 13LaA646, 127S445; 254Mass411, 150NE216; Mass 170NE467; 180Minn334, 230NW796 (though contract stated buyer had examined article and was satisfied with results); MoA 256SW520; MoA 295SW474, 475 [citCJ]; MoA 4SW(2d)501; 80Mont82, 258P1085; 103NJEq560, 144A19; 228AppDiv138, 239NYS178; 49ND441, 191NW762; 131 Okl185, 282P546; 285Pa260, 131A858; 295Pa492, 145A586; 151SC506, 149SE271; 49SD

1, 205NW710; 158Tenn546, 14SW(2d) 963; Tex 285SW683; TexCivA 283 SW544; TexCivA 299SW351; Tex CivA 300SW240; 151Va865, 145SE331; Wash 292P406. But see 202Cal 748, 262 P322. [a] 40Wyo 411, 278P551. [c] 213Ala260, 104S509; 84CalA784, 258P 724.

1219-84 21F(2d)280; 235Ky54, 29SW (2d)581; 52ND112, 202NW280, 282 [cit CJ]; 91PaSuper422; TexCivA 1SW(2d) 938.

1219-85 169Ga187, 149SE910 (though terms cannot be varied, deed may be proved to have been induced by fraud); 147Miss808, 112S591; 12PaDist&Co 374.

1219-86 242NY134, 151NE155 (contract to lease).

1219-87 134SC493, 133SE437; Tex CivA 278SW943.

1219-88 82NH232, 131A690; TexCivA 286SW958.

1220-93 120Kan278, 243P316; 217Ky 28, 288SW1031; 218Ky508, 291SW715; 120 Okl 130, 247P673; Va 154SE515. [c] **Pleading of fraud** affecting written contract need not be direct, but may be changed by stating facts from which it is necessarily inferred. 139SC223, 137 SE684.

1220-94 139SC223, 137SE684.

1220-96 170Minn373, 212NW602, 56 ALR1; TexCivA 299SW671. See also 128 Or668, 275P682.

1220-96½-New. Ordinarily it is necessary that some legal fraud, accident, or mistake be established to show the nullity of the written instrument. 296 Pa541, 146A126.

1220-97 78Mont145, 252P872.

1220-99 147Miss835, 112S795; 82NH 232, 131A690; 242NY134, 151NE155; 284Pa414, 131A236; TexCivA 271SW 145. [d] **Form and expression in writing are not estoppel** on parties and do not inhibit court from declaring its invalidity. 82NH232, 131A690. [e] **That performance was subject to illegal contingency** may be shown by parol. 82NH232, 131A690 (payment contingent upon illegal transportation of liquor).

1222-7½-New. Ignorance of stakeholder of terms and illegality of contract pursuant to which money was deposited with him are no bar to admission of evidence as to the true terms thereof and the intention of the parties. 82 NH232, 131A690.

1222-8 242NY134, 151NE155.

1222-14 75CalA540, 243P487; 232 IllA 266, 271 [quotCyc]; 229Ky173, 16SW (2d)759; 135SC33, 133SE222; TexCivA 293SW609.

1223-15 75CalA540, 243P487 (deed).

1223-16½-New. In a suit to enjoin the issuance of county bonds and annul the order calling an election to approve it, parol testimony is admissible to show that the order calling the election was signed after the election. 230Ky316, 19 SW(2d)994.

1223-19 52ND307, 202NW642. But see 85CalA475, 259P770.

1223-20 75CalA540, 243P487.

1223-21 Ala 129S43; 75CalA540, 243 P487; 79CalA252, 249P219; 220MoA 1276, 290SW1009; 52ND307, 202NW 642; TexCommnA 16SW(2d)287; Wis 231NW276.

1223-22 256 IllA274.

1224-30 21F(2d)280; 169Ark1102, 278 SW36; 174Ark179, 297SW1012; 217 Ky28, 288SW1031; 253Mass451, 149NE 156; 261Mass412, 158NE753; MoA 278 SW830; 103NJEq121, 142A441; 242NY 134, 151NE155; 289Pa381; 137A455; 299Pa39, 148A907 (mistake in book valuation); 45Philippine256; 50Philippine558; 48RI 33, 134A849; 49SD416, 207NW213; TexCivA 12SW(2d)257; 136Wash74, 239P4; 34Wyo 495, 245P 304, 307 [citCJ], 51ALR13.

1225-31 169Ark1102, 278SW36.

1225-32 [a] (2) In absence of prayer for reformation, parol evidence of mistake is inadmissible. 230Ky194, 18SW (2d)1006.

1226-36½-New. Parol evidence is admissible to show that the section in the ordinance was included through inadvertence. 323 Ill 359, 154NE148.

1226-37 169Ark1102, 278SW36; 151Va 287, 144SE450. [a] (2) Statements made by grantor prior to execution of deed. 169Ark1102, 278SW36.

1226-38 169Ark1102, 278SW36.

1226-42 169Ark1102, 278SW36; 8LaA 492.

1226-43½-New. It is permissible to show mutual mistake in the execution of a deed. TexCivA 118SW(2d)380.

1226-50 122Kan793, 253P214.

1226-52 169Ark1102, 278SW36; Tex CivA 12SW(2d)257; 136Wash74, 239P4.

1227-53 171Ark698, 285SW372.

1227-57 261Mass412, 158NE753; 243 Mich550, 220NW667.

1227-58 166La28, 116S582; 242NY134, 151NE155 (contract to lease).

1227-59 Ariz 285P271.

1227-59½-New. bonds, 165Minn342, 206NW645.

1227-60 Mo 289SW550.

1227-61 204 Iowa965, 216NW122 (tax receipts).

1227-62 21F(2d)280.

1227-65 146Miss651, 111S591.

1227-65½-New. Where the maker of a note signs it in reliance upon the promise of the payee to revise it so as to change the amount to that of a debt owing by the maker and with knowledge that the amount named in the note is not the correct amount there is no mistake which may be shown to defeat the instrument as written. 35GaA336, 133SE650.

1228-66 217Ky28, 288SW1031; 218Ky 508, 291SW715; 120 Okl 130, 247P673; TexCivA 299SW671.

1228-69 47 Ida589, 277P548. [a] **Date of recorded deed.**-47 Ida589, 277P548.

1228-71 191NC840, 132SE21.

1228-77 250 IllA405; 128Kan681, 280 P782 (purpose of transfer of notes); 170Minn230, 212NW196; MoA 31SW (2d)234 (that maker was accommodation party); 219AppDiv486, 220NYS 340; 197NC572, 150SE32(2dcase); 108 WVa85, 150SE235.

1229-78 7F(2d)228; 219Ala203, 121S 733; 200 Iowa938, 205NW767; Iowa 231NW643; 125Me485, 135A98; 157 Miss187, 127S296; 224AppDiv634, 232 NYS147; 191NC340, 132SE21; 197NC 572, 150SE32(2dcase). [c] **Order of indorsements** may be shown by parol. LaA 125S310.

1229-79 218Ala390, 119S4; 220MoA 514, 275SW964.

1229-80 191NC340, 132SE21.

1229-81 125Me485, 135A98; 191NC340, 132SE21.

1229-82½-New. Parol evidence is admissible to rebut any presumption that transfer of part of series of vendor's lien notes by mortgagee to mortgagor subordinated remainder of notes. 158 La1032, 105S54.

1229-82½-New. Parol evidence is admissible to show whether a party is an accommodation party and which party is accommodated. 56ND33, 216NW206.

1229-83 128Kan164, 276P807; Mo 19 SW(2d)290 (that directors of bank signing note were not to be held personally liable): 300Pa468, 150A892; 145Wash 66, 258P1035, 54ALR1382.

1230-85 33 OhA250, 169NE38.

1230-85½-New. In an action by an indorsee of a certificate of deposit against an indorser, parol evidence is inadmissible to show that defendant was not to be liable on his indorsement even if plaintiff accepted the certificate as cash. SD 227NW460.

1230-86 MoA 6SW(2d)633; 75Mont516, 244P494; 131Misc74, 225NYS739; 191 NC340, 132SE21; 133SC304, 130SE890.

1231-88 33GaA700, 127SE664; 103 WVa40, 136SE690.

1231-89 Fla 130S6(2dcase).

1231-91 82CalA240, 255P254.

1231-97 103WVa40, 136SE690.

1231-1 198NC89, 150SE676(2dcase); 51ND399, 200NW505, 37ALR1186 (intent to be bound in some capacity other than defined by statute as to accommodation indorsers); 153SC251, 150SE765.

1232-14 218Ala390, 119S4; 33GaA793, 127SE891; 34GaA247, 129SE119 (one signing contract of sale as purchaser); 34GaA310, 129SE296 (relative position of makers' names being immaterial if one is surety); 38GaA641, 144SE804; 220MoA514, 275SW964; 219AppDiv486, 220NYS340; 192NC262, 134SE643; 53 SD268, 220NW515; 98Vt481, 129A155 (notwithstanding Negotiable Instrument Act, wife may show she was surety where no person signed with whom she was competent to contract). [h] **In Oklahoma.**-218MoA39, 264SW1000 (construing Oklahoma statute).

1233-15 135Wash139, 237P17.

1233-18 AlaA 130S516; 206 Iowa83, 218NW480, 482 [citCJ].

1233-22 216Ala564, 114S135; 220MoA 1057, 279SW720; 218AppDiv665, 219 NYS108; 126 Or615, 268P1012; 48RI 184, 136A764; TexCivA 16SW(2d)141. [g] **If corporation name appeared above individual guarantor's,** evidence that letter of guarantee was written solely on behalf of corporation is admissible. 216 AppDiv92, 214NYS705.

1234-23 136Misc342, 240NYS654.

1234-25 218AppDiv22, 217NYS652; Ont [1925] 3DomLR217.

1234-26 35F(2d)309; 176Ark597, 3SW (2d)683; 161La313, 108S549; Mass 171 NE448; 219AppDiv486, 220NYS340; 52 ND504, 203NW673 (payee of note). [a] 218AppDiv22, 217NYS652.

1235-28 12LaA9, 125S77; 165Minn446, 206NW723; NJSup 130A726; 119 Or 691, 250P1101.

1235-29 53SD1, 219NW791.

1235-31 215Ala474, 111S7; 220MoA 1057, 279SW720; 218AppDiv665, 219 NYS108; 53SD1, 219NW791; TexCivA 299SW272. [b] **Where owner signed contract between contractor and subcontractor,** parol evidence held admissible to show that he signed to show assent and not as principal to contract. 218AppDiv665, 219NYS108.

1236-32 215Ala474, 111S7; 36GaA537, 137SE119; 37GaA70, 139SE365; 220 MoA1057, 279SW720.

1236-33 105WVa405, 143SE102, 106 [citCyc].

1236-34 NJSup 151A399.

1236-36½-New. Where a contract guaranteeing performance of another contract of a corporation is signed by the corporation alone by its officers, and there is no ambiguity therein, parol evidence is inadmissible to show that it was intended to bind the officers personally. 230Mich498, 202NW933.

1237-37 MoA 24SW(2d)235; 218App Div22, 217NYS652; 144Va263, 132SE 337, 46ALR485.

1237-41 176Ark1206, 3SW(2d)297; MoA 3SW(2d)1039; 144Va263, 132SE 337, 46ALR485.

1237-45½-New. Where note reads "we promise to pay" and is signed in corporate name "by" individuals, parol evidence is inadmissible to show signing in representative capacity. 253 IllA536.

1237-46 13LaA253, 126S534(2dcase).

1237-48 25F(2d)361.

1237-49 92CalA203, 268P396; 37GaA 646, 141SE420; 218AppDiv22, 217NYS 652; Ont [1925] 3DomLR217 (party signing not given particular descriptions).

1238-50. Ont [1925] 3DomLR217.

1238-51 88CalA349, 263P550.

1238-52 8F(2d)704; 51ND374, 199NW 757.

1239-62 218AppDiv22, 217NYS652; TexCivA 286SW253.

1239-65 105WVa405, 143SE102, 106 [citCyc].

1240-70 218AppDiv22, 217NYS652.

1241-82 218AppDiv22, 217NYS652.

1241-83 105WVa405, 143SE102.

1242-89 Cal 288P69.

1242-93 15F(2d)726; 142Wash306, 252 P934.

1242-94 CalA 292P978.

1243-4½-New. Parol evidence held admissible to show parties bound by contract made in trade name. TexCivA 23 SW(2d)484.

1243-5 170Ga37, 151SE923; LaA 130 S122; Mass 170NE62; 105NJL580, 147 A537; NJCir 142A907 (grantee); Tex CivA 11SW(2d)533. [a] (1) MoA 23SW (2d)1075. (4) Parol evidence is admitted to prove identity of accommodated party in suit on note. TexCommnA 282 SW570.

1243-6 CalA 290P146; Ida 292P590; NJCir 142A907.

1244-9 SD 224NW937.

1244-13 220Ala350, 124S904; 33GaA 700, 127SE664; 155Miss91, 124S69; 53

SD1, 219NW791. [b] **One apparently principal on note** may be shown to be surety when payee knew facts. Tex CivA 292SW262.

1244-14 33GaA700, 127SE664.

1245-19 CalA 290P146.

1245-22½-New. Maker of promissory note cannot testify that he thought he was making the note to another than plaintiff payee. 36GaA329, 136SE477.

1245-24 12F(2d)895; 215Ala398, 110S822; Ala 130S396; 172Ark723, 290SW579; 205Cal 22, 269P536; 77CalA1, 245P799; CalA 286P165(4thcase); 164Ga77, 137SE831; 27Hawaii122, 124[citCJ]; IndA 151NE7; IndA 172NE198; 206 Iowa514, 219NW305; 208Iowa458, 223NW521; 148Miss137, 114S257; 221MoA951, 288SW957; 247NY377, 160NE646; 191NC291, 131SE757; 193NC470, 137SE320; 117 Okl 96, 245P571; 285Pa265, 132A125; 287Pa431, 135A103; 289Pa331, 137A455; Tex CivA 278SW916; TexCivA 281SW608; TexCivA 294SW641; TexCivA 2SW(2d)485; TexCivA 15SW(2d)25; TexCivA 27SW(2d)558; Vt 146A250(2dcase); 143Va133, 129SE341; 145Wash477, 260P664; 149Wash419, 271P80. But see 300Pa60, 150A103. [f] **Where contract specified ten per cent commission,** oral agreement that it was to be eight per cent is inadmissible. 200 Iowa479, 203NW247. [g] **Matters occurring subsequent to signing of written contract** may be considered when establishing admissions of prior understandings. 287Pa431, 135A103. [h] **Evidence inadmissible** where parol agreement is without consideration. 74CalA254, 240P298. [i] **In Alberta.**-[1929] 4DomLR107.

1248-25 22 OhA129, 153NE345; 50 Philippine387.

1248-27 12F(2d)895.

1248-28½-New. Prior negotiations which have become merged in a written contract cannot operate as a waiver of the terms of the writing. 53ND777, 208NW115.

1248-28½-New. Affidavit of defense, denying liability under written contract only by attempting to set up alleged oral agreement extending defendant's powers, held insufficient. 288Pa579, 136A847.

1248-28¼-New. Statute held to permit introduction of parol evidence to modify contract unless executed as therein described. 22F(2d)384.

1248-29 13F(2d)607; 28F(2d)963; 32F(2d)969; 38F(2d)948; 35F(2d)110; 43F(2d)1; 215Ala187, 110S153; 218Ala336, 118S580; Ala 130S396; 31Ariz239, 251P891; 34Ariz68, 267P794; 177Ark832, 9SW(2d)310; 73CalA527, 238P1077; 73CalA643, 238P1085; 75CalA212, 242P518; CalA 288P135; CalA 288P683; 85Colo 419, 276P972; 109Conn593, 145A58; 90Fla65, 105S113; 34GaA247, 129SE119 (plea of alleged inconsistent parol agreements properly stricken on demurrer); 164Ga77, 137SE831; 37GaA412, 140SE412; 37GaA409, 140SE766; 40GaA517, 150SE458; 40GaA680, 150SE865(2dcase); 40GaA744, 151SE556(2dcase); 41GaA24, 152SE122; 45 Ida707, 266P1094; 83 IndA652, 149NE452; 200 Iowa479, 203NW247; Iowa213NW442; 207 Iowa597, 223NW400; 119Kan796, 241P462; 212Ky163, 278SW615; 216Ky782, 288SW745; 218Ky508, 291SW715; 227Ky639, 13SW(2d)775; 228Ky748, 15SW(2d)1008; 169La893, 126S228; LaA 129S431; 124Me347, 129A4; 128Me472, 148A687(2dcase); 265Mass182, 163NE740, 62ALR506; Mass 169NE783; Mass 170NE52; Mass172NE510; 233Mich428, 206NW992; 234Mich610, 208NW690; 238Mich25, 213NW118; 166Minn50, 207NW20; 148Miss583, 114S387; 153Miss851, 121S847; 154Miss663, 122S741; 220MoA205, 282SW91; 221MoA1096, 295SW506; 221MoA951, 288SW957; 118Nebr231, 224NW21; 102NJL322, 134A86; 100NJEq543, 135A808; 104NJL428, 140A310; NJSup 150A537; 247NY377, 160NE646; 213AppDiv117, 210NYS83; 127Misc508, 217NYS39; 229AppDiv345, 242NYS369; 191NC291, 131SE757; 192NC144, 134SE407; 192NC280, 135SE26; 54ND696, 210NW638, 48ALR1219; ND231NW604; 117 Okl 81, 244P791; 117Okl 96, 245P571; 126 Okl 28, 258P278; 128 Okl 14, 261P142; 289Pa331, 137A455; 295Pa146, 144A904; 295Pa237, 145A129; 299Pa372, 149A647; 151SC44, 148SE648; SD 225NW218; Tex CommnA 295SW557; TexCivA 278SW916; TexCivA 281SW608; TexCivA 299SW351; TexCivA 3SW(2d)911; Tex CivA 23SW(2d)871; 70Utah124, 258P342, 64ALR368; 143Va133, 129SE341; 146Va357, 131SE803; 145Wash477, 260P664; Wis 228NW519. [h] **Proof of broker's contract prior to written agreement** that he would handle all nitrate that buyers could not dispose of is inadmissible under parol evidence rule. 143Va469, 130SE393. [i] **That plaintiff declares on claimed oral contract** which, if made, would be merged in written contract, does not render admissible evidence of oral contract to vary or contradict terms of written contract. 233Mich428, 206NW992.

1248-29½-New. Nor can such evidence vary the terms of a written instrument, although admitted without objection. 253Mass451, 149NE156.

1251-31 35F(2d)110; 219Ala366, 122S357; Ark 292SW364; 111Conn342, 149A851; 164Ga77, 137SE831; 35GaA262, 133SE53; 38GaA614, 144SE819; 200Iowa479, 203NW247; 218Ky508, 291SW715; 221AppDiv740, 225NYS270; 192NC144, 134SE407; 192NC166, 134SE419; 138 Okl 126, 280P598; 285Pa265, 132A125; 50SD436, 210NW671. [b] But see 219AppDiv353, 220NYS115. [c] **Oral collateral agreement must ordinarily relate to matters not covered** by written contract. 200 Iowa479, 203NW247. [d] **Where contract is not required to be in writing** but part is written, evidence of remainder, if not contradictory of written part, is admissible. 192NC166, 134SE419.

1251-32 114Nebr605, 209NW243. [a] 110Conn49, 147A31. [j] **Where written assignments of causes of action sued on** do not assign same to plaintiff, oral testimony to prove oral assignments thereof to plaintiff is admissible. 12F(2d)895.

1252-33 41F(2d)684; 28Ariz505, 238P330; 31Ariz239, 251P891; 180Ark288, 21SW(2d)185; Ark 31SW(2d)132; 199Cal386, 249P513; 205Cal 556, 271P1053; 81Colo 402, 255P982; 34GaA345, 129SE555; 35GaA262, 133SE53; 27Hawaii122; 334 Ill 281, 165NE793; 119Kan492, 240P406; 123Kan368, 255P78; 210Ky309, 275SW784; 225Ky836, 10SW(2d)276(1stcase); 235Mich648, 209NW819; 154Miss222, 122S473; 100NJEq543, 135A808; 127Misc508, 217NYS39; 225AppDiv651, 231NYS114; 230AppDiv15, 242NYS541; 285Pa265, 132A125; 284Pa407, 131A187; Tex CommnA 283SW154; TexCivA 283SW676, 679 [citCJ]; TexCivA 283SW874; 101WVa41, 131SE874. [a] (3) 131Misc41, 226NYS113. (4) TexCivA 283SW676. [d] **Intention to be governed only by written contract** is shown by postscript reciting that, if "this" contract is terminated, parties will enter into "new" contract, and parol evidence of agreement to revive earlier contract is therefore inadmissible. 127Misc508, 217NYS39.

1253-35 NJ 144A585(2dcase).

1253-36 218Ala324, 118S545(2dcase); 241 IllA102; 253 IllA431; 123Kan286, 255P48; 239Mich295, 214NW110, 55ALR1157; 143Miss800, 109S856; 145Miss488, 111S106; 157Miss167, 127S271; 155Miss876, 125S248; 127Misc508, 217NYS39; 194NC344, 139SE694; 284Pa407, 131A187; 87PaSuper100. See also 263Mass228, 161NE240. [a] (4) Where contract to be sent to home office for acceptance or rejection provided that no agent had made any representation other than those embraced in contract. 141Miss328, 105S744. (5) Where contract expressly rescinds all previous agreements, parol evidence of oral agreement to revive earlier contract is inadmissible. 127Misc508, 217NYS39. (6) Where contract provided that terms should not be changed except in writing executed by parties. 214Ky76, 282SW769.

1253-37 219AppDiv353, 220NYS115; TexCivA 8SW(2d)569.

1253-39 53ND777, 208NW115; Tex CivA 281SW587, 589 [citCJ]; TexCivA 2SW(2d)987; 145Wash477, 260P664.

1253-40 36F(2d)646; Iowa 233NW118; 246Mich225, 224NW379; 53ND777, 208NW115; 296Pa541, 146A126; 154SC424, 151SE788; 54SD421, 223NW338; 159Tenn187, 17SW(2d)16; Tex CivA 274SW658; TexCivA 281SW587, 589 [citCJ]; TexCivA 281SW608; 149Va798, 141SE776; 145Wash477, 260P664. But see 168Ga291, 147SE390(2dcase); 284Pa407, 131A187.

1254-44 164Ga77, 137SE831; 52ND910, 204NW621; 53ND777, 208NW115.

1254-45 319Mo 401, 4SW(2d)438.

1254-46½-New. A definite, contemporaneous agreement must be clearly shown by the parol evidence to render it admissible to modify the terms of the written agreement. 287Pa431, 135A103.

1254-47 174Ark560, 298SW30; 247NY377, 160NE646; 36 OklACR467; 143Va815, 129SE513 (evidence admissible under rule). [b] **Oral agreement to apply proceeds** of sale of mortgaged property to sale expenses held not to vary written agreement of mortgagor and mortgagee to sell property at public auction. 51SD13, 211NW976. [c] **In determining whether parol evidence involves distinct collateral agreement** or modifies written contract substance and not form of transaction is considered, together with policy followed by courts. 247NY377, 160NE646.

1254-51 221MoA420, 279SW764; 221MoA420, 279SW764; TexCivA 2SW(2d)888. But see 90CalA75, 265P527; Tex CivA 15SW(2d)194. [b] **Written assignments of causes of action,** not showing that they were assigned to plaintiff, may be proved by oral testimony to have been so assigned by oral assignments. 12F(2d)895.

1254-51½-New. Verbal agreement not to partition made before assignment of undivided interest in contract to purchase held by defendant is not admissible in evidence in action for partition. 214AppDiv383, 212NYS196.

1254-51¾-New. Even though such evidence is admitted without objection, partition should be decreed. 214AppDiv383, 212NYS196.

1255-52 219Ala607, 122S814; Ala 130S396; 23AlaA145, 122S802 [certiorari den 219Ala503, 122S804(1stcase)]; 101CalA532, 281P1104; 35GaA262, 133SE53; 40GaA532, 150SE442(2dcase); Iowa 233NW118; Mass 166NE857; MoA 10SW(2d)971; Nebr 230NW673; 253NY410, 171NE690; 193NC470, 137SE320; 49ND542, 191NW1014; 141 Okl 169, 284P5 (want of consideration); 127 Or302, 272P271. [d] **Indorser in blank** may show that indorsement was merely to pass title and not to guarantee payment. 171Ark681, 285SW353. [e] **Agreement must be executed resulting in extinguishment of note** to be admissible. NJSup 150A50.

1255-53 36F(2d)646; 35Ariz523, 281P216; 33Ariz466, 266P8; 179Ark334, 15SW(2d)408; 96CalA90, 273P1104; 82CalA793, 256P296; 86Colo 169, 279P42 (where note recited that it was issued under special agreement, plaintiff cannot contradict it by parol); 207 Iowa729, 223NW493; 208 Iowa1189, 225NW856; 35GaA336, 133SE650; 119Kan796, 241P462; 130Kan322, 286P228; 229Ky383, 17SW(2d)253; 233Ky457, 26SW(2d)15; 235Ky526, 31SW(2d)901; Md149A270; 253Mass486, 149NE149 (not admissible); 265Mass182, 163NE740, 62ALR506; Mass 165NE424; 233Mich428, 206NW992; 236Mich221, 210NW237; 246Mich365, 224NW332; 148Miss583, 114S387; 220MoA1276, 290SW1009; 221MoA951, 288SW957; 220MoA1276, 290SW1009; 222MoA633, 300SW834; 220MoA915, 7SW(2d)391; MoA 22SW(2d)860; MoA 24SW(2d)235; NJSup150A50; 135Misc819, 238NYS522; 198NC89, 150SE676(2dcase); 49ND993, 194NW689; 54ND696, 210NW638, 48ALR1219; 34 OhA217, 170NE658; 117 Okl81, 244P791; 143 Okl 299, 288P960; 151SC383, 149SE105; 53SD369, 220NW878; SD 225NW713; TexCivA 272SW321; TexCivA 289SW730; TexCivA 3SW(2d)911; TexCivA 25SW(2d)913,

Vt 146A3; 142Va702, 128SE364; 146 Va357, 131SE803. [a] 201 Iowa349, 207 NW332. [e] **Defense of contemporaneous parol agreement** among parties that holder would discount and extend time of payment of note, accepted by payee for past-due indebtedness, held subject to demurrer as within rule excluding evidence of such agreements varying valid written instruments. 90 Fla65, 105S113. [f] **Evidence held inadmissible.**–136SC389, 134SE292. [g] **Statute authorizing proof that delivery was conditional** does not permit proof of contemporaneous parol agreement contradicting or varying plain terms of note after title has passed. 204 Iowa940, 216NW281; TexCivA 289SW730. (2) Such statute does not permit proof that note was not to be paid according to its terms (204 Iowa940, 216NW281), (3) as that it was to be paid out of assessment on stockholders or future earnings of corporation (204 Iowa940, 216 NW281).

1255–54 36GaA788, 138SE256; MoA 6 SW(2d)633; 56ND297, 217NW172, 173 [citCJ]; TexCivA 4SW(2d)183 (trade acceptance).

1255–55 81Colo 402, 255P982; 193NC 470, 137SE320; 195NC183, 141SE575; 196NC672, 146SE708; 198NC263, 151 SE252; TexCommnA 292SW165; Tex CivA 286SW258. But see 204 Iowa940, 216NW281; 236Mich221, 210NW237; MoA 15SW(2d)935 (evidence held inadmissible); 51ND685, 200NW795 (inadmissible to show money represented by notes was to be payable only from net earnings of threshing outfit). [a] (2) Executed parol agreement for payment in services may be shown. TexCivA 272SW818. [b] **Petition seeking to add parol agreement** as to method of payment of note is not demurrable. 166Ga635, 144SE103.

1256–58½–New. Oral agreement, destroying contemporaneous written agreement forbidding transfer of notes, is inadmissible. TexCivA 7SW(2d)1095.

1256–59 [a] **Demand note.**–In an action, on a note payable on demand, evidence that the parties agreed when the note was delivered that it would not mature until actual demand for payment was made is inadmissible. 47 Ida179, 276 P315.

1256–60½–New. Parol evidence is not admissible to prove a contemporaneous, collateral agreement that collection of a promissory note, payable on its face on demand, would not be pressed for a definite time. 54ND696, 210NW638, 48ALR1219.

1256–60½–New. Admission of parol evidence of contemporaneous agreement that a demand note was to be returned and plaintiff was to take tenant's note, if defendant secured a satisfactory tenant, was held error. 243NY156, 153NE33.

1256–60¼–New. Evidence of a collateral, oral contract that unconditional indorser was not to be held liable if maker did not pay note has been held inadmissible. 102NJL5, 131A105.

1256–60½–New. Evidence is properly excluded as to an oral agreement that a note should become binding only on a condition. 255Mass558, 152NE337.

1256–60¼–New. Where an administrator sought to collect a note, defendant's contention that decedent never intended to collect could not be established by parol evidence. MoA 8SW(2d)1027.

1256–61 171Ark698, 285SW372; 143Va 815, 129SE513; 143Va811, 129SE525.

1256–64 Ala 129S88; IndA 151NE7; 136Misc840, 241NYS70; NS [1925] 2 DomLR926.

1256–65 93CalA717, 270P232(2dcase); 200 Iowa479, 203NW247; 9LaA195, 119 S480; 144Va126, 131SE209, 48ALR628 (parol agreement contradicting agency contract improperly admitted).

1256–65½–New. Where an employment contract expressly rescinds all previous agreements, parol evidence of oral agreement to revive an earlier contract is contradictory thereto and inadmissible. 127Misc508, 217NYS39.

1256–66 TexCivA 278SW916. [b] **Prior testimony held inadmissible.**–IndA 169NE57.

1256–67 36GaA461, 137SE126; NJSup 130A543.

1256–68 30F(2d)42; 36GaA461, 137SE 126; 218Ky89, 290SW1081; 229AppDiv 2, 240NYS749; TexCivA 278SW916; Utah 290P979. [a] (2) Written application for fire insurance signed by applicant and containing provision that insurer shall not be bound by act done or statement made by agent or other person not contained in application cannot, in absence of fraud, accident, or mistake be varied or added to by testimony of applicant as to oral agreement between him and insurer's agent. 35GaA358, 133SE280.

1256–68½–New. But testimony amounting to voluntary unilateral offer or contract is not admissible, 318Mo 969, 2 SW(2d)733.

1256–69 97CalA285, 275P476; 204 Iowa 363, 213NW779 (as to shares of partners).

1256–70 DC 40F(2d)802; LaA 129S 178; 170Minn430, 212NW908; 134Misc 96, 234NYS491; OhA 173NE214; 150 SC490, 148SE549. [d] **Evidence relative to negotiations for option for lease** held incompetent to vary subsequent writing containing agreement for lease. 242NY134, 151NE155.

1257–71 73CalA527, 238P1077; 168La 475, 122S586; 83Mont244, 271P455; 249 NY381, 164NE324; 228AppDiv99, 239 NYS257; 86PaSuper458. [a] See also 222MoA1126, 17SW(2d)677. [b] **Thus** evidence as to prior negotiations relative to option is incompetent to vary subsequent writing evidencing lease. 242NY 134, 151NE155.

1257–73 85Colo 357, 276P329.

1257–79 119Kan835, 241P118; 100NJ Eq543, 135A808; 224AppDiv642, 232 NYS57; 53ND777, 208NW115; 135 Okl 131, 275P1040. But see CalA 266P823.

1257–80 Ala 130S396. See also 74CalA 254, 240P298.

1257–82 178Ark957, 12SW(2d)903; 180 Ark523, 21SW(2d)956; 204Cal 225, 267 P693; 77CalA1, 245P799; CalA 285P 1048(2dcase); 109Conn593, 145A58; 111Conn544, 150A700; Ga 155SE192; 229Ky818, 18SW(2d)281; 10LaA727, 123S158; 148Miss137, 114S257; Miss 130S157; 242NY106, 151NE146; 253 NY41, 170NE486; 196NC208, 145SE5; TexCivA 274SW658 (duplication of item in inventory in written contract for exchange of drug store properties); Tex CivA 26SW(2d)449; Wis 230NW83. [a] **Bonds.**–228Ky359, 15SW(2d)298.

1258–83 206Cal 246, 274P65(2dcase); 73CalA643, 238P1085; 75CalA609, 243 P41; 88CalA250, 263P277; 95CalA378, 272P803; 99CalA438, 278P880; CalA 291P856; 47 Ida675, 277P1112; Iowa 213NW442; 208 Iowa458, 223NW521; 210Ky806, 276SW803; 161La496, 109S 43; 9LaA137, 119S483; MoA 286SW 399; MoA 16SW(2d)107; NJSup 134 A721; 224AppDiv19, 229NYS371; 140 Okl 129, 282P343; 127 Or647, 271P996; 292Pa122, 140A774 (inadmissible where no fraud, accident, or mistake); SD 225 NW218; SD 227NW374; SD 227NW 438; 118Tex255, 14SW(2d)53; Tex CivA 21SW(2d)350; TexCivA 25SW(2d) 671; 187Wis95, 203NW908.

1258–84 28Ariz505, 238P330; 170Ark 1037, 282SW370; 180Ark1116, 24SW (2d)321; 78CalA652, 248P732; 95CalA 378, 272P803; 82Colo 320, 259P1027; 133SC369, 131SE33 (where contract contained no express warranty); Tex CivA 16SW(2d)871. But see 41F(2d) 217 (express warranty); 177Ark223, 7 SW(2d)772; 47 Ida794, 279P302 (contemporaneous oral warranty cannot be engrafted on written contract of sale, where agreement purports to evidence whole agreement of parties); 83 IndA 652, 149NE452; 228AppDiv396, 240 NYS123 (evidence not admissible); Sask [1929] 4DomLR65 (contract made in form provided by Farm Implement Act). Contra Utah 267P1020. [h] **Parol warranty beyond that implied in law cannot be proved where contract is for specific style, lot, and manufacture** of goods. 215AppDiv435, 213NYS681. [i] **Where contract contains express warranties,** evidence of oral warranties not made subsequent to execution of contract for additional consideration is inadmissible. 141Miss328, 105S744. [j] **Ignorance of clause providing for no warranties** may be shown by parol. 11 LaA541, 121S617. [k] **Where writing contains express warranty** proof of additional parol warranty is not allowable. TexCivA 26SW(2d)1095.

1258–85 78CalA652, 248P732.

1258–86½–New. Parol evidence permitted to show that the sale was by sample. 218AppDiv654, 219NYS331.

1258–87 Contra 121Kan870, 250P262.

1259–88 219Ala450, 122S424; 197Cal 733, 242P718 (testimony as to grantor's representations prior to sale inadmissible); 86CalA454, 260P925; 96Fla568, 120S4; 164Ga77, 137SE831; 166Ga506, 143SE894; 36GaA529, 137SE288; 39 GaA243, 146SE649; 329 Ill 555, 161NE 91 (inadmissible); Iowa 227NW529; 124Kan618, 261P590; 226Ky747, 11SW (2d)910, 61ALR453; 148Miss583, 114S 387; 103NJEq560, 144A19; 240NYS 772; 56ND698, 219NW112; 115 Okl 227, 242P770; 120 Okl 130, 247P673; 289Pa331, 137A455; 148SC147, 145SE 705; TexCivA 271SW188; TexCivA 275 SW444; TexCivA 6SW(2d)229; Vt 146 A250(2dcase); 144Va355, 132SE178; 151Va655, 144SE645; 145Wash477, 260 P664; WVa 153SE915; 41Wyo 476, 287 P433; Can [1930] 4DomLR1026(2dcase). See also 75CalA212, 242P518. [e] 321 Mo 47, 9SW(2d)897. [f] 247NY377, 160 NE646. [g] **Where contract of sale was made with husband and deed was made to wife,** she is treated as principal in determining whether proof of vendor's alleged collateral agreement is admissible. 247NY377, 160NE646. [h] **Condemnation proceedings.**–Disposition of proceeds of award. 206Cal 682, 275P 808. [i] **Prior oral statement that price could be paid after due date** is inadmissible. 89CalA202, 264P493. [j] **Oral agreement held inadmissible** as varying written contract. 247Mich109, 225NW 562. [k] **Oral agreement enlarging meaning of written contract** held inadmissible. Ida 292P239.

1259–89 Mich 233NW341; TexCivA 291 SW961. [a] **Executory agreement to take automobile** in part payment for house held to be merged in subsequent agreement whereby purchaser assumed obligation of paying remainder of purchase price. 213Ala156, 104S277.

1259–91 124Kan618, 261P590.

1259–95 177Ark579, 7SW(2d)318; 178 Ark355, 11SW(2d)465; 202 Iowa1362, 212NW125, 50ALR1216; 158La61, 103 S443; 261Mass412, 158NE753; 57ND 916, 224NW909; 284Pa414, 131A236; 99Vt170, 130A709; 145Wash477, 260P 664; Can [1930] 2DomLR433.

1260–96 261Mass412, 158NE753; 285 Pa557, 132A798. [a] **Notes shown** to have been given merely as acknowledgment of money received. 73CalA68, 238 P169.

1260–97 But see TexCivA 271SW188.

1260–98 200 Iowa1206, 206NW123; 227 AppDiv105, 237NYS156; 51ND858, 201 NW163; 101WVa407, 132SE876.

1260–1 101WVa407, 132SE876; 145 Wash477, 260P664.

1261–6 CalA 267P359, 361 [quotCJ]. But see CalA 259P86.

1261–11 18F(2d)379; 29F(2d)916; Ariz 288P7; 172Ark667, 291SW68; 163 Ga842, 137SE49; 164Ga706, 139SE337; 165Ga125, 139SE864; 170Ga764, 154SE 353; 220Ky54, 294SW783; 161La378, 108S777; 252Mass265, 147NE892; 83 NH459, 144A67; 98NJEq602, 131A585; 100NJEq147, 135A88; 105NJL580, 147 A537; 219AppDiv410, 219NYS163; 129 Misc154, 220NYS122; 284Pa414, 131A 236; 285Pa260, 131A858; 295Pa108, 145A63(2dcase); TexCivA 4SW(2d)597; TexCivA 13SW(2d)234; TexCivA 18SW (2d)224. [e] **Testimony that people generally called land in controversy "the Crouch tract"** is held competent in view of description in deed. 193NC73, 136 SE257.

1263-12 38F(2d)197; 119 Or297, 247P 761.

1263-14 Mass 172NE890; 143Miss661, 109S670; 146Miss360, 111S841; Tex CivA 283SW1073, 1076 [quotCJ entire section].

1263-17 219AppDiv410, 219NYS163.

1263-18 197Cal 43, 239P401; CalA 290 P304; 161Ga468, 131SE510; 252Mass 265, 147NE892; MoA 16SW(2d)107; 98NJEq602, 131A585; 100NJEq147, 135 A88; 285Pa260, 131A858. [b] "Requirements" of buyer may be shown by parol evidence. 147Va125, 136SE 673.

1263-19½-New. or for work and labor, 256Mass187, 152NE305.

1263-20 172Ark704, 290SW46; CalA 290P64; 89Fla321, 104S583; 98NJEq 602, 131A585; 100NJEq147, 135A88; 119 Or297, 247P761; 285Pa260, 131A 858.

1264-21 83CalA689, 257P211; MoA 290 SW83; 219AppDiv410, 219NYS163; 151 SC484, 149SE246 (evidence is admissible to prove that machine contracted for was ball-bearing and not babbit-bearing where description might fit either).

1264-22 Ark 291SW68; 201Cal 225, 256 P419, 55ALR157; 207Cal 643, 279P772; 246Mich318, 224NW366, 68ALR1; 12 PaDist&Co 230. [d] (1) La 130S350.

1264-24 104Conn318, 132A910; 163Ga 842, 137SE49; 164Minn516, 205NW446; 129Misc154, 220NYS122; TexCivA 15 SW(2d)698.

1265-25 35Ariz299, 277P67 (chattel mortgage); 179Ark661, 17SW(2d)877; TexCivA 18SW(2d)848; TexCivA 19SW (2d)71.

1265-31 Iowa 230NW851.

1265-33 260Mass594, 157NE700.

1267-59 18F(2d)379; Ala 127S671; 170Ark908, 281SW671; Cal 271P471; 92CalA178, 267P898; CalA 284P1050; 163Ga842, 137SE49; 86 IndA632, 155NE 712; 220Ky54, 294SW783; 220MoA171, 281SW101; 317Mo 951, 298SW39; MoA 274SW951, 960 [citCJ]; TexCivA 3 SW(2d)109; 136Wash74, 239P4. [h] 89 Fla321, 104S583; TexCivA 286SW604.

1269-61 213Ala494, 106S150; CalA 288 P146; CalA 290P64; 89Fla321, 104S 583; Fla 129S748; 170Ga408, 153SE 53; 170Ga600, 153SE516; 170Ga764, 154SE353; Minn 231NW790; 54ND322, 209NW379; 151Va287, 144SE450.

1269-62 100NJEq147, 135A88; Tex CivA 283SW1073, 1076 [quotCJ entire section].

1270-65 172Ark569, 289SW766; 201Cal 225, 256P419, 55ALR157; 90CalA387, 266P294; 91CalA213, 266P956(2dcase); 104Conn318, 132A910; 166Ga226, 142 SE861; 165Ga685, 142SE142; 220Ky 54, 294SW783; 1LaA106; 2LaA12; 2 LaA292; 255Mass136, 150NE876; 164 Minn516, 205NW446; 220MoA507, 275 SW984; MoA 11SW(2d)1065; 100NJEq 147, 135A88; 98NJEq602, 131A585; 34 NM10, 275P92; 33NM651, 275P370; 112 Okl 210, 239P246; 285Pa260, 131A858; TexCivA 4SW(2d)597; TexCivA 6SW (2d)396; 103WVa12, 136SE509; 195 Wis69, 217NW700. [c] Written contract reciting "to transfer my interest" in corporation was held ambiguous, and extrinsic evidence was admissible to aid in ascertaining meaning of parties. 255 Mass136, 150NE876.

1270-66 199Cal 386, 249P513; Miss 111 S605; 242NY54, 150NE599; WVa 153 SE915.

1270-67 Conn 151A357; 161Ga468, 131 SE510; TexCivA 290SW560; 145Va749, 134SE548; 152Va533, 147SE196. [g] (2) Evidence held admissible to define boundaries of lots described by lot number. 259Mass288, 156NE251. [h] (3) Parol evidence inadmissible to explain "proposed maximum capacity." Tex CommnA 295SW578. [i] (2) To show meaning of "proposed maximum capacity" in contract to sell land above lake level. TexCivA 290SW239.

1271-68 136Wash74, 239P4.

1271-72 172Ark667, 291SW68; 151Va 287, 144SE450.

1271-77 170Ark908, 281SW671; 92Fla 560, 109S580; 33GaA627, 127SE617; 147Miss802, 111S838; Mo 7SW(2d)347; 119 Or297, 247P761; 157Tenn667, 11 TexCommnA 291SW214; TexCommnA SW(2d)906; TexCommnA 288SW143; 1SW(2d)592; TexCivA 31SW(2d)168. [b] (7) Other instances. CalA 290P64.

1272-79 CalA 290P64; 163Ga842, 137 SE49; NM 291P922; 119 Or297, 247P 761; TexCivA 282SW935; TexCivA 290 SW239; TexCivA 293SW690. [b] (13) Other descriptions held sufficient. 157 Tenn667, 11SW(2d)906. [c] (21) Other descriptions held sufficient. 166Ga226, 142SE861.

1273-82 See also 83CalA415, 256P1103 (word "official" in deeds referring to town map treated as surplusage and map identified by parol).

1273-83 235 IllA335.

1274-85 213Ala274, 104S645, 42ALR 981; 172Ark255, 288SW897; 70CalA30, 232P759; 97CalA235, 275P446(2dcase); 34GaA313, 129SE306; 37GaA452, 140SE 634 (dictum); 40GaA385, 149SE791 (subsequent oral agreement to credit shortage in acreage on purchase-money notes was erroneously stricken as defense to vendor's suit for full amount of such notes); 42 Ida403, 245P683 [cit CJ]; 236 IllA426; 204 Iowa363, 213NW 779; 120Kan704, 244P1038; 231Ky630, 21SW(2d)1006; 3LaA231; 13LaA11, 127S87; LaA 130S838; 127Me442, 144 A207; 241Mich534, 217NW909; 148 Miss583, 114S387; 221MoA1096, 295SW 506; MoA 299SW105, 110 [citCJ]; 83 NH47, 138A297; 194NC244, 139SE376; 294Pa212, 144A93; 295Pa146, 144A904; 85PaSuper245 (new agreement or actions involving it); 97PaSuper37; 138 SC10, 135SE646, 648 [citCJ]; 54SD34, 222NW487; TexCivA 286SW958; Tex CivA 14SW(2d)368; 146Va617, 131SE 793; 147Wash106, 265P153. But see 32 PortoRico 117; Wyo 293P381. [d] Statutory change of common law as to alteration of contracts by contemporaneous, parol agreements held not to affect rule. 146Va617, 131SE793.

1275-86 172Ark255, 288SW897; 40GaA 385, 149SE791.

1275-87 89CalA202, 264P493; 101CalA 470, 281P1062; CalA 282P435; 138 Okl 142, 280P584.

1275-87½-New. Where a chattel mortgage given to secure a note for the purchase price of property provides that the terms of the contract cannot be altered except in writing and that no verbal agreement concerning the same then or thereafter made shall be binding upon the parties, evidence is inadmissible to show a subsequent oral agreement affecting the writing. 118 Okl 41, 246P381.

1275-88 172Ark255, 288SW897.

1275-89 213Ala274, 104S645, 42ALR 981 (mutual assent sufficient consideration); 34GaA313, 129SE306; 37GaA452, 140SE634; 148Miss583, 114S387.

1275-93 Ga 154SE783.

1275-94 131SC433, 127SE561 (agreement that mortgage, given to secure initial purchase-money payment on sale of land, may be held as security for vendee's notes given in place of purchase contract is valid). [a] 245 IllA 68.

1276-97 217MoA502, 274SW941; Tex CivA 275SW858 (evidence of oral agreement releasing guarantor from undertaking on performance of other undertakings which he performed).

1276-99 85PaSuper245.

1276-1 35Ariz226, 276P521; 236 IllA 426; 120Kan704, 244P1038; 196NC672, 146SE708; 85PaSuper245.

1276-10 69CalA763, 232P465.

1276-15½-New. agreement relating to character of tenancy after expiration of lease. 153SC118, 150SE478.

1276-19 194NC244, 139SE376 (promissory note).

1277-20 MoA 7SW(2d)723.

1277-22 34GaA313, 129SE306 (compensation of attorney).

1277-26 But see 215AppDiv73, 213NYS 277.

1277-28 205 Iowa1099, 212NW473 (matter not referred to in record); 315 Mo 1336, 290SW123; 190NC194, 129SE 198; 191NC809, 133SE391.

1278-43½-New. or to show delivery, 125Misc546, 211NYS557.

1278-43½-New. or acceptance of a deed. 125Misc546, 211NYS557.

1278-44 101WVa452, 132SE877.

1279-55 TexCivA 295SW653, 656 [quot CJ].

1279-63 309Mo 291, 300, 274SW456 [citCJ].

1280-66 309Mo 291, 300, 274SW456 [citCJ].

1280-67 309Mo 291, 300, 274SW456 [citCJ].

1280-68 153Miss796, 121S823. [a] Parol evidence of voluntary appearance is inadmissible where judgment, in connection with process served on defendant, shows affirmatively that court failed to obtain jurisdiction of defendant. 153 Miss796, 121S823.

1280-69 153Miss796, 121S823.

1281-74 191NC809, 133SE391.

1281-75 215Ala297, 110S391.

1281-79 111Conn342, 149A851.

1281-80 198NC148, 150SE386.

1282-82 [a] Declarations of party to contract, as to what he considered a reasonable time, held admissible. 103NJL 440, 135A897.

1282-83 111Conn342, 149A851.

1282-86 215Ala327, 110S716, 717 [cit CJ]; 77CalA125, 245P1098, 1100 [quot CJ]; 41GaA697, 154SE301; 42 Ida48, 246P12; 221MoA577, 284SW156; MoA 17SW(2d)677; 285Pa265, 132A125, 127 [quotCJ]; TexCivA 32SW(2d)668. [a] 31F(2d)708; 285Pa265, 132A125.

1282-87 77CalA125, 245P1098, 1100 [quotCJ]; 285Pa265, 132A125, 127 [quotCJ].

1282-89 77CalA125, 245P1098, 1100 [quotCJ]; 285Pa265, 132A125, 127 [quotCJ].

1283-91 106Conn677, 138A788; 31NM 616, 249P1010; 222AppDiv502, 226NYS 582.

1283-93 22F(2d)920; 216Ala645, 114S 308; 31Ariz147, 250P993; 71CalA661, 236P176; 200Cal 348, 254P532; 201Cal 219, 256P411; 204Cal 225, 267P693; 99 CalA323, 278P871; CalA 284P713; CalA 290P146; 84Colo 234, 269P19; 104Conn 366, 132A895; 104Conn447, 133A669; 106Conn468, 138A438; 109Conn593, 145 A58; 110Conn49, 147A31; 93Fla656, 112S572; 164Ga77, 137SE831; 35GaA 784, 134SE841; 37GaA412, 140SE412; 201 Iowa751, 206NW254; Iowa 232NW 689 (parol acceptance of orders for goods); 120Kan137, 242P126; 128Kan 310, 278P10; 259Mass439, 156NE740; 261Mass412, 158NE753; 234Mich356, 208NW437 (receipt by bank for money to be deposited by it in foreign bank); 310Mo 665, 276SW49; MoA 17SW(2d) 591; 101NJEq536, 138A371; 242NY134, 151NE155; 243NY156, 153NE33; 219 AppDiv615, 220NYS409; 228AppDiv 304, 239NYS446; 130 Okl 30, 264P907; 38 OklACR613; 119 Or55, 248P158; 132 SE34, 129SE129; SD 227NW193; Tex CommnA 12SW(2d)130; TexCommnA 16SW(2d)287; TexCivA 276SW779; Tex CivA 281SW608; TexCivA 298SW649; TexCivA 1SW(2d)749; Can [1930] 4 DomLR266.

1286-94 TexCivA 23SW(2d)527.

1286-95½-New. authorizations to repair automobile; 104Conn447, 133A669.

1286-96 38GaA644, 145SE97; 220MoA 1019, 278SW793; 228AppDiv133, 239 NYS291.

1286-97 234Mich505, 208NW746.

1286-98 47 Ida766, 278P1015.

1286-1 22F(2d)920; 180Ark1036, 24 SW(2d)879; 96Fla568, 120S4; 37GaA 412, 140SE412; 12PaDist&Co 501.

1287-2 180Ark947, 23SW(2d)611; 310 Mo 419, 276SW614; 58ND532, 226NW 640; 99WVa419, 129SE317.

1287-3 [b] Receipt for money for ticket and Pullman berth.—127 Or461, 271P 976, 62ALR644.

1287-4 216Ala645, 114S308; 120Kan 137, 242P126; MoA 298SW1067.

1287-8 43F(2d)63; 220Ala300, 124S 874; 28Ariz505, 238P330; 31Ariz147, 250P993; 177Ark60, 5SW(2d)729; 177 Ark486, 9SW(2d)81; 200Cal 348, 254P 532; Conn 152A145; 35GaA784, 134SE 841; LaA 124S596; 261Mass412, 158 NE753; 129 Or505, 277P821; TexCivA 298SW649.

1288-11 132SC34, 129SE129.

1288-12 TexCivA 276SW779; TexCivA 299SW272.

1288-16½-New. Parol evidence is admissible to show that the parties did not intend to embody the entire oral agreement in writing. 104Conn366, 132 A895.

1288-19 [a] 195Wis47, 217NW719.

1288-21 155Wash171, 283P1091.

1288-25 [b] **Where telephone conversation** is referred to in writing which does not purport to set date of delivery, telephone conversation is admissible. 217Ala280, 116S125.

1288-28 120Kan137, 242P126 (term of employment); 131Misc813, 227NYS459.

1289-46½-New. , a matter of description of lands. 200Cal 348, 254P532.

1289-50½-New. As to conditions upon which policy might be canceled see 132 SC34, 129SE129.

1289-51 39F(2d)305; CalA 274P383; 164La741, 114S637; 252 IllA366; 231 Ky392, 21SW(2d)482; 170Minn191, 212 NW530; 242NY134, 151NE155; 243NY 156, 153NE33; 96PaSuper104 (written agreement presumed to contain whole contract); 118Tex111, 12SW(2d)111.

1290-52 174Ark1115, 299SW18. [b] **Where writing erroneously described as embodying entire agreement,** parol evidence is admissible where it is manifestly incomplete. 22F(2d)920. [c] **Fraudulent representations as to material matter** by which party was induced to enter into contract may be shown, though writing purports to be complete. 202Cal 701, 262P730.

1290-53 256Mass47, 152NE67; Tex CivA 1SW(2d)749.

1290-54 39F(2d)305; 111Conn342, 149 A851; 35GaA262, 133SE53; Wis 230 NW83 (intent of parties).

1290-55 35GaA362, 133SE53.

1290-55½-New. Where a contract refers to an attached sheet and the sheet is not attached, evidence may be introduced to show its contents. 127 Okl 214, 260P480.

1290-56 120Kan137, 242P126 (letter confirming telephone conversation); 285 Pa265, 132A125 (letter referring to parol agreement for settlement of claim for extra work held not to prevent parol evidence that amount due for goods sold was taken into account in fixing sum agreed to be paid).

1290-57 120Kan137, 242P126.

1290-59 35GaA262, 133SE53.

1290-60 104Conn447, 133A669; 233 Mich428, 206NW992; 242NY134, 151NE 155; 196NC208, 145SE5; 155Wash171, 283P1091.

1291-61 199Cal 386, 249P513.

1291-62 119 Or55, 248P158.

1291-64 14PaDist&Co 293.

1292-71 216Ala367, 113S592; 77CalA 125, 245P1098, 1100 [quotCJ]; 203 Iowa 288, 211NW398; 205 Iowa783, 218NW 466, 467 [citCJ]; 163La442, 112S40; 159La620, 105S792, 793 [quotCJ]; 7 LaA256; 7LaA693. See also 5LaA616; Mass 171NE643; 168Minn168, 209NW 883; 117Nebr6, 219NW583, 590 [quot CJ]; 83NH281, 141A467; 31NM616, 249 P1010; ND 224NW668; 222AppDiv627, 227NYS331; 121 Or64, 253P373; Tex CivA 294SW921, 923 [citCJ]; TexCivA 19SW(2d)193; TexCivA 30SW(2d)399.

1293-72 14F(2d)459; 97CalA452, 275P 1005; 101CalA552, 281P1097; 101CalA 532, 281P1104; 200 Iowa1, 201NW787; 200 Iowa1206, 206NW123; 203 Iowa288, 211NW398; 202 Iowa1362, 212NW125, 50ALR1216; 159La620, 105S792; 168 Minn168, 209NW883; 170Minn430, 212 NW908; 172Minn171, 215NW225; 31 NM616, 249P1010; 243NY450, 154NE 307; 134Misc733, 236NYS194; 121 Or 64, 253P373; TexCivA 294SW921; Tex CivA 9SW(2d)401; TexCivA 20SW(2d) 1076; 143Va815, 129SE513; 143Va811, 129SE525; 142Wash306, 252P934; Wash 290P820; 187Wis60, 203NW921; BC [1925] 3DomLR223. [f] TexCivA 30 SW(2d)399.

1294-73 205 Iowa563, 218NW251; 226 Ky347, 10SW(2d)1112; 159La620, 105S 792 (to show that purchaser of mortgaged property was entitled to subrogation to rights of mortgagee); 134 Misc733, 236NYS194; 101WVa452, 132 SE877.

1294-74 202 Iowa1362, 212NW125, 50 ALR1216; Mo 20SW(2d)63; 187Wis60, 203NW921.

1294-77 14F(2d)459; BC [1925] 3 DomLR223 (real purchaser in conditional sales agreement).

1294-80½-New. and judgments, Tex CivA 294SW921.

1294-83 53ND777, 208NW115.

1294-90 53ND777, 208NW115.

1295-92 96Fla568, 120S4; 240NY474, 148NE650.

1295-95 But see 145Miss585, 111S99.

1295-96 215Ala187, 110S153; 78Mont 56, 252P368; 114 Okl 13, 242P760.

1295-96½-New. The beneficiary of a mortgage cannot object to oral evidence varying its terms where his beneficial interest is shown only by oral evidence. Iowa 228NW268.

1295-98 Ariz 292P1020. [c] **Purpose of rule is to protect third persons.** 12 LaA9, 125S77.

1295-98½-New. Parol evidence to show real contract between charterer and manager of vessel is admissible in action by employee. 240NY474, 148NE 650.

23 C. J.—9-7 26 OhA225, 158NE558.

9-8 26 OhA225, 158NE558.

9-9 112 OhSt506, 148NE82 (opinion by divided court majority adheres to rule of text); 26 OhA225, 158NE558. [a] 210Ky782, 276SW799. [b] **View that scintilla of conflicting evidence** necessarily requires submission to jury has been disapproved by federal courts. 234 Ky276, 27SW(2d)980.

9-13 93Fla579, 112S549; OklCr 279P 911; 147Va263, 137SE465.

9-14 86CalA390, 260P913.

9-15 329 Ill 11, 160NE197. [a] **Weight of controverting evidence** is to be determined by trial court. CalA 290P 1042.

9-16 204 Iowa1216, 216NW728.

9-20 See also 143Va46, 129SE219.

10-24 12CustA307; 13CustA387; Tex CivA 296SW939.

10-26½-New. **Vague and unsatisfactory testimony** is that which is dim and shadowy and fails to relieve the mind of the trier of facts from doubt or uncertainty. 125Me147, 131A860.

11-32 20F(2d)10; 181Ark1146, 30SW (2d)853; 9LaA325, 120S501(1stcase); 4 LaA573; 6LaA378; 8LaA5; 8LaA400; 241Mich297, 217NW12; Miss 129S599; 79Mont91, 254P1070; 22 OhA44, 153NE 919; 27 OhA245, 160NE725; 153SC309, 150SE789; 157SC359, 154SE645; SC 155SE136; TexCommnA 280SW762; TexCivA 283SW285; TexCivA 15SW (2d)657; 99Vt327, 131A799; 136Wash 332, 239P1009. See also 74CalA646, 241 P581. [c] **Defendant is not required to** prove by preponderance of evidence any defense except one of affirmative nature. 151Miss711, 118S441.

11-32½-New. Preponderance of evidence refers to the effect of evidence rather than the medium by which the truth is established. 115Nebr795, 215 NW122.

11-33 232Mich476, 205NW600 (prima facie evidence not sufficient where substantial controverting evidence is introduced).

11-34 CalA 257P577; 163La257, 111S 697; 165Minn223, 206NW436; 79Mont 91, 254P1070; 31 OhA229, 166NE916; 17 OhCirCtNS49; TexCivA 26SW(2d) 377.

12-35 46 Ida181, 266P1089, 1092 [cit CJ].

12-36 2LaA805; 3LaA190; 6LaA323; 7LaA554; 165Minn223, 206NW436; 31 NM616, 249P1010; 35Wyo 188, 247P 1071.

12-39 29Ariz121, 239P795; 68CalA244, 228P865; 36GaA359, 137SE100; 232 IllA430; 123Kan62, 254P317; 3LaA 469; 7LaA584, 586 [citCJ]; 116Nebr 131, 216NW299; 127Misc24, 215NYS 217; 130Misc229, 224NYS275; 99Vt327, 131A799; 136Wash332, 239P1009. But see 95Fla73, 116S30.

13-40 69CalA301, 231P583 (rule codified); 3LaA295; 3LaA347; 116Nebr131, 216NW299; 127Misc24, 215NYS217; 133SC342, 131SE616, 43ALR971.

13-41 TexCivA 28SW(2d)902.

14-48 TexCommnA 298SW554.

14-51 247 IllA275.

14-61 99Vt327, 131A799.

14-66 232 IllA430; 254 IllA445 (misdemeanor); 127Kan469, 274P203, 62ALR 1446; 236Mich214, 210NW326; 85Mont 149, 278P116; 20 OhA385, 153NE238; 94PaSuper1; 134SC435, 132SE828. [c] **As affected by grade of crime.**—252 IllA 550.

15-72 205Cal 252, 270P672.

16-81 199Cal 641, 250P676; 123 Okl 33, 251P729.

16-83 239Mich1, 214NW113; 20 OhA 385, 153NE238.

16-84 20 OhA385, 153NE238.

16-86 42 Ida375, 245P399; 200 Iowa 805, 204NW219; 120 Okl 282, 251P43.

16-90 93Fla30, 111S525, 528 [citCJ]; 123 Okl 33, 251P729; 123 Okl 95, 251P 1015.

16-91 3Del 450, 139A66; 24 OhA374, 157NE708; 5PaDist&Co 287; 5PaDist& Co 559. [a] (2) 181Ark674, 27SW(2d) 516. (12) That part of evidence which carries to minds of jury conviction of truth. 157SC359, 154SE645. [f] **"Greater weight" of evidence** is greater amount of facts. 138SC318, 136SE297.

18-21 136Wash332, 239P1009.

18-22½-New. In determining whether plaintiff has met the burden of proving his case by a preponderance of the evidence, all the evidence must be considered, not merely that which seems to favor one side or the other. 151Wash 187, 275P543.

18-23 127Misc24, 215NYS217; 123 Okl 48, 251P1046; TexCommnA 298SW554; TexCivA 275SW200, 203 [citCJ]; Tex CivA 275SW218, 221 [citCJ]. [a] **Where party has established probable truth** of his affirmative contentions, he has met burden resting on him. 82NH 225, 131A601.

18-24 2LaA351.

19-25 TexCivA 275SW200, 202 [citCJ]; 34Wyo 1, 242P1107.

19-27 172Ark230, 288SW8.

19-28 See also 97CalA414, 275P500(2d case).

19-31 86AppDiv140, 83NYS499. [b] **Testimony based on physical impossibility** is of no value. 73Mont465, 236P 1067.

19-32 93NJEq653, 117A140; 213App Div390, 210NYS553. See also 3LaA265.

19-34 165La777, 116S182; 121 Or422, 253P5. [b] **That which has appearance** of improbability is not always untrue. 165La777, 116S182.

19-35 77Colo 442, 237P151, 152 [citCJ].

19-35½-New. Probable verity in the light of circumstances determines weight, not number. 318Mo 1089, 2SW (2d)593.

20-37 102WVa567, 135SE667, 669 [cit CJ].

20-39 133La126, 62S599; 2LaA357.

20-45 180Ark342, 22SW(2d)25; 181 Ark674, 27SW(2d)516; 84CalA599, 258 P616; 88CalA430, 263P846; CalA 288 P1096; 163Ga553, 136SE526; 243 IllA 129; 180 Iowa721, 163NW463; 226Ky 290, 10SW(2d)1101; 9LaA561, 121S213; 12LaA557, 126S540; 125Me513, 131A 860; 153Miss437, 121S118; 80Mont431, 261P253; NJ 144A190; NJSup 136A 196; NJSup 137A881; NJSup 146A430; NJCPl 134A123; 127Misc24, 215NYS 217; 135Misc886, 238NYS707; 25 OhA 157, 157NE825; 121 Or519, 254P809; 5 PaDist&Co 287; 5PaDist&Co 559; 8Pa Dist&Co 343; 99WVa677, 129SE752; 36 Wyo 37, 253P17. [b] Iowa 218NW492; Can [1929] 4DomLR57.

22-47 125Me513, 131A860 (quality of evidence); 5PaDist&Co 287.

22-50 8LaA526.

23-52 210Ky795, 276SW800.

23-53 210Ky795, 276SW800.

23-54 15F(2d)258; 86CalA382, 260P 898; 89CalA157, 264P306; 160Ga865, 129SE528; 42 Ida451, 245P934; Me 149 A386; 76Mont160, 248P864; 81Mont 311, 263P683; 84Mont225, 274P1062; 85Mont492, 279P374; 127Misc24, 215 NYS217; 99WVa677, 129SE752.

23-55 165La777, 116S182; 127Misc24, 215NYS217.

26-56 178Ark1200, 13SW(2d)585; 86 CalA226, 260P566; 228Ky357, 15SW (2d)298; Md 149A462; NJ 152A14; 299Pa39, 148A907; TexCivA 12SW(2d) 257. [a] 96PaSuper104.

24-75 180 Iowa721, 163NW463.

24-81 175Ark874, 1SW(2d)66.

24-90 [a] **Court may consider circumstances under which rebutting witnesses**

testify. 288Pa140, 135A903.

24-92, 116Nebr131, 216NW299 (equity cases); 112 Okl 27, 239P465. [b] (1) 116Nebr131, 216NW299.

25-4½-New. to prove that mortgage whereby alien was in possession of land was fraudulent, 136Wash426, 240P 554.

25-35 [a] **Proof of fraud or mistake** in omitting part of written contract must be clear and satisfactory. 218Ky 508, 291SW715.

25-39½-New. to impeach by parol testimony, a legal title regular on its face, 203 Iowa1114, 211NW986.

26-56 300Pa468, 150A892. [f] **Evidence held sufficient.**-131Misc813, 227 NYS459.

27-65½-New. Where parol evidence is insufficient to prove fraud, accident, or mistake, contract will stand according to its terms regardless of parol evidence. 205 Iowa7, 215NW732.

27-65¼-New. Evidence to vary the **record** showing the time of commencement of the action should be substantial, clear, and cogent. MoA 284SW525.

27-66 262Mass437, 160NE249; 236 Mich214, 210NW326; 123 Okl 48, 251P 1046; 299Pa163, 149A186; 133SC242, 131SE616, 43ALR971; 136Wash332, 239 P1009. [a] (6) To enforce liability upon fidelity bond. 133SC242, 131SE616, 43ALR971. b] **Denial of execution of written instrument** does not constitute charge of forgery against party relying thereon within rule requiring criminal charge in pleadings to be proved beyond reasonable doubt. 323 Ill 468, 154NE 209.

27-67 See also 8LaA16.

27-67½-New. The expression "proof beyond a reasonable doubt" refers to the effect of evidence rather than the medium by which the truth is established. 115Nebr795, 215NW122.

27-68 [a] **Negative evidence** will not preponderate over positive evidence. 91 Fla948, 108S889.

27-69 83CalA725, 257P175.

27-69½-New. Testimony of witnesses who were listening for signals approaching, that they did not hear any, amounts to positive testimony that signals were not sounded. TexCivA 285SW869.

32-46 15F(2d)241.

33-53 TexCommnA 28SW(2d)422. See also 164Ga311, 138SE580.

34-63 [b] **Discrepancies in testimony** are significant only as basis for determining witness' credibility. 39F(2d) 895.

35-71 90CalA453, 265P1025.

35-74 79CalA234, 249P223.

35-75 206Cal 15, 272P1059 (insufficient as proof of denial of affirmative proof of fact); 79CalA234, 249P223.

36-97 TexCommnA 285SW283, 284 [quotCJ]; TexCivA 275SW295, 297 [quotCJ].

36-98 TexCommnA 285SW283, 284 [quotCJ].

36-99 TexCommnA 285SW283, 284 [quotCJ].

36-1 TexCommnA 285SW283, 284 [quotCJ]; TexCivA 275SW295, 297 [quotCJ].

36-6 124 Or61, 262P859. [b] See also 124 Or61, 262P859.

37-7 217Ky231, 289SW257.

37-12 217Ky231, 289SW257; 236Mich 226, 210NW219; 95PaSuper127.

37-25 275US13, 48SCt1, 72L ed137; 25 F(2d)225; 103Conn667, 131A392; 107 Conn670, 142A461; 1LaA741; 246NY 63, 158NE21; 134 Okl 259, 273P235.

38-26 204 Iowa153, 214NW522; 284Pa 342, 131A245; 293Pa537, 143A192. [a] 78CalA526, 248P930; 231Ky591, 21SW (2d)985, 66ALR1526; MoA 22SW(2d) 858. But see 205 Iowa666, 216NW733.

38-27 172Ark386, 289SW1; CalA 285 P910; CalA 291P907; Fla 129S341; 203 Iowa1183, 212NW343; 9LaA330, 120S486(2dcase); 9LaA343, 120S489; 9 LaA561, 121S213; LaA 122S92; MoA 274SW864; MoA 274SW911; MoA 283 SW729; 101NJEq15, 137A787; 134Misc 188, 234NYS722; Or 290P747 (in direct conflict); 284Pa342, 131A245; Tex CommnA 14SW(2d)794; TexCivA 16 SW(2d)337; 67Utah45, 245P695; 198 Wis542, 224NW479; Alta [1925] 2 DomLR949 (interpretation of conflicting evidence reconciling all of it, without imputing perjury to some of the witnesses, will be accepted as correct). See also 200Wis110, 227NW246. [e] 283Pa577, 129A585; 98Vt437, 129A317. [f] **Inconsistent physical facts** are insufficient to overcome evidence. 299Pa 380, 149A662. [g] **Inherent probability** is to be tested by circumstances surrounding main transaction and laws of human conduct. NJ 148A156.

38-29 81Mont543, 264P675 (understanding of witness).

38-31 15DelCh24, 140A654.

38-32 AlaA 130S162(1stcase); 200Cal 396, 253P134; CalA 286P172; 111Conn 237, 149A783; IndA 168NE495; Iowa 232NW504 (circumstances and inferences therefrom); 243Mich429, 220NW 781; 85Mont481, 280P641; 101Vt143, 141A684 (testimony of plaintiff).

38-33 34F(2d)859; Ala 130S87; 181 Ark780, 27SW(2d)992; 181Ark1146, 30 SW(2d)853.

38-34 Ala 130S63; 178Ark862, 12SW (2d)772, 68ALR1303; Ark 31SW(2d) 421; 87CalA406, 262P396; 90CalA764, 266P606 (statements of expert or lay witnesses not in accord with common sense or sound judgment); 109Conn 589, 145A271; 9LaA124, 118S779; 126 Me601, 138A628; 157Md464, 146A279; Mass 168NE183(2dcase); Mass 170NE 833; MoA 285SW104; 101NJEq15, 137 A787; 241NY460, 150NE516 (of interested witnesses); BC [1930] 4DomLR 73. See also 92CalA715, 268P948. [a] 176Minn120, 222NW646(2dcase); 83NH 210. 140A176. [b] **Testimony, if disbelieved, is not equivalent** to proof of facts contrary to that testimony. Mass 170NE77. [c] **Jury may take evidence in light most favorable to plaintiff.**-MoA 19SW(2d)902.

38-35 22F(2d)728; 111Conn661, 151A 161; 126Me601, 138A628; MoA 282SW 97; 221MoA568, 282SW1033; 221MoA 1123, 298SW107; TexCivA 283SW562; Utah 271P226; 98Vt437, 129A317. [b] **That plaintiff's reputation for truth was impeached** and he was not sustained by character evidence did not necessarily outweigh other evidence. Iowa 219NW 489. [c] **Testimony of attorney engaged in case.**-Va 154SE687.

38-35½-New. Jury may disregard testimony of interested witnesses. 241NY 460, 150NE516.

38-35⅓-New. Doubt of verity of evidence of interested witnesses may be reasonably based on some of its content. 241NY460, 150NE516.

38-35¼-New. The weight of evidence in any particular case is dependent on its relation to all the evidence in the case and is not aided or governed by precedent. 200 Iowa768, 205NW366.

38-35⅕-New. Evidence introduced by adverse party. The court is not bound to believe evidence of a party and other witnesses, given on a former trial, introduced by the adversary. 103Conn 624, 131A420.

38-35⅙-New. Testimony must be credible in order that there be necessity for weighing it. 125Me147, 131A860.

38-35⅐-New. Quality of evidence, and not number of witnesses, is criterion in determining weight to be given evidence. 125Me513, 131A860.

38-35⅛-New. Evidence of improper conduct of a party in his cause is merely persuasive, and not probative. 82NH 543, 136A400, 50ALR1276.

38-35⅙-New. Lack of conclusive proof of defendant's case is not a substitute for affirmative proof of plaintiff's claim. 82NH543, 136A400, 50ALR1276.

38-35⅒-New. Interested witness' testimony is not conclusive on jury or court. TexCivA 289SW111.

38-35⅑-New. Jury may find disputed facts against party testifying disingenuously and evasively, or reject such testimony, unless conclusively corroborated. 126Me84, 136A459.

38-35⅓-New. To be valid, inference from evidence must be reasonable. Tex CommnA 283SW489.

38-35⅓-New. Inference, to be indulged, must be based on facts in evidence and not upon other inferences. Tex CommnA 283SW489.

38-35¹⁄₁₄-New. Testimony has probative force, even though the witness does not speak with such certainty as to exclude all doubt in his mind. Tex CommnA 285SW283.

38-35¹⁄₁₅-New. Surmises and suspicions are not evidence. 83Colo 118, 263 P18.

38-35¹⁄₁₆-New. Self-contradictory testimony of party should be received with great caution. 223Ky842, 5SW(2d)265.

38-35¹⁄₁₇-New. Sworn testimony of a highway contractor's representative as to the amount due to a subcontractor for road construction will be accepted as correct by the court, as against the subcontractor's figures as to the amount due not supported by any testimony showing the correctness thereof. 10LaA 474, 120S655.

38-35¹⁄₁₈-New. Testimony of defendant is entitled to no greater credit than plaintiff's testimony. 129 Or138, 276P 1086.

38-35¹⁄₁₉-New. The testimony of a party is construed most strongly against him. 40GaA304, 149SE388(2dcase).

39-48 23F(2d)825; 68NJEq446, 59A 470 [aff 68NJEq734, 62A698]. But see 109Conn559, 147A20.

39-49 176Ark1, 18SW(2d)818. [a] **Oral evidence held sufficient.**-13LaA11, 127S 87.

39-51 33NM176, 262P931; 136Misc167, 238NYS702. But see 38GaA42, 144SE 125. [c] **Court may have findings on hearsay evidence** if admitted without objection. 286Pa473, 133A819.

40-52 48 Ida771, 284P1030.

40-53 165Ga362, 141SE55; 148Miss 583, 114S387; TexCommnA 290SW529.

40-58 181Ark85, 24SW(2d)972; 37GaA 423, 140SE525; TexCivA 32SW(2d)480.

40-59 See also 250Mich99, 229NW403.

40-60 67Utah45, 245P695 (testimony of interested and hostile witness as to transaction with decedent).

40-62 TexCivA 23SW(2d)871.

40-63 204Mich670, 171NW513; Can [1925] 3DomLR113 (nonproduction of documents).

40-65 327 Ill 339, 158NE724.

40-66 327 Ill 339, 158NE724; 206 Iowa 1093, 221NW771; 262Mass91, 159NE 526.

41-69 Mo 30SW(2d)37.

41-70 151Md679, 135A827.

41-71 3Del 375, 138A617; Iowa 211NW 892; 151Md679, 135A827; 262Mass91, 159NE526; Mass 165NE406; 149Miss 543, 115S782, 784 [citCJ]; 286Pa439, 133A636; 70Utah29, 257P1050, 1053 [citCJ]. [b] (1) 151Md679, 135A827. (2) Testimony of witnesses that they looked and listened but heard no warning given by approaching train is not mere negative testimony. 236Mich173, 210NW309.

41-73 151Md679, 135A827; 236Mich 173, 210NW309; 125 Or428, 259P299; 151Va302, 144SE424.

41-74 35F(2d)704; 151Md679, 135A 827; NH 146A714 (as to gong being rung on street car); 99Vt366, 133A359; 149Va318, 141SE228, 230 [quotCJ]. [b] (3) Testimony that witness did not hear whistle until train had passed whistling point held substantive evidence that whistle was not sounded at statutory distance. Mo 30SW(2d)37.

42-75½-New. Testimony that a witness who testifies that he was the nearest person to the speaker and did not hear the words spoken is not evidence that others did not hear. MoA 22SW (2d)73.

42-75¼-New. Negative evidence, where facts justify it, is substantive evidence of fact. Mo 30SW(2d)37.

42-77 5F(2d)425; 43F(2d)750; 212 Ala499, 103S463; 77CalA509, 247P227; 3Del 450, 139A66; 327 Ill 339, 158NE 724; 205 Iowa16, 212NW138; 13LaA 292, 125S877; 10LaA608, 120S235 (reh den 10LaA608, 121S357(3dcase)]; 155 Md210, 141A547; 125 Or428, 266P875; 66Utah587, 245P338; 70Utah29, 257P 1050, 1053 [citCJ]. [f] **Positive evidence that headlight of train was burn-**

ing and signal given held not contradicted by witnesses who were in position to hear or see. 5F(2d)31.

43-79 327 Ill 339, 158NE724; Mont 289 P1028; 135Misc886, 238NYS707. See also 126 Or99, 266P1073.

43-81 212Ala499, 103S463; Iowa 227 NW828; Iowa 232NW666; 151Va302, 144SE424.

43-83 83CalA408, 256P870; 116Nebr 835, 219NW235; 128 Or248, 275P28.

43-84 29F(2d)479 [certiorari den 279 US851, 49SCt347, 73Led994(8theso)]; 327 Ill 339, 158NE724; 9LaA232, 120S 122; 9LaA586, 119S710; 237Mich232, 211NW734; 179Minn480, 229NW797; Mo 30SW(2d)989; 83NH210, 140A176; 293Pa537, 143A192; 299Pa63, 149A85; 70Utah29, 257P1050, 1053 [citCJ]; Utah 289P146.

44-85 82Colo 47, 256P658; 10LaA72, 120S271.

44-86 But see 149Md140, 131A82.

44-87 40GaA745, 151SE561; 233Ky 309, 25SW(2d)733; 155Md210, 141A 547; 216AppDiv243, 215NYS156.

44-88 149Md140, 131A82; 174Minn404, 219NW554; Miss 130S499; MoA 21SW (2d)907 (negative testimony of witnesses, where reasonably doubtful that they could hear signal, may be insufficient to contradict those who could and did hear signal).

44-89 14F(2d)580; 45 Ida636, 264P 377; 206 Iowa1093, 221NW771. [b] Locomotive signals.–Mont 289P580.

44-92 74CalA10, 239P429, 434 [citCJ]; 79CalA234, 249P223; 286Pa439, 133A 636.

45-93 79CalA234, 249P223; 207 Iowa 1303, 224NW514; 70Utah29, 257P1050, 1053 [citCJ].

45-93½–New. The witness' opportunity for observation is a factor properly considered in weighing his testimony as to whether he did or did not see a certain thing. 258Mass446, 155NE432.

45-93¾–New. The witness' opportunity for observation is a fact properly considered in weighing his testimony as to whether he did or did not see a certain thing. 258Mass446, 155NE432.

45-94 29F(2d)18; 74CalA10, 239P429, 434 [citCJ]; 91CalA470, 267P346; 203 Iowa715, 211NW872; 151Md679, 135A 827; 286Pa439, 133A636; 70Utah29, 257P1050, 1053 [citCJ].

45-95 75CalA129, 242P97.

45-96 74CalA10, 239P425, 434 [citCJ]; 75CalA129, 242P97; 215Ky639, 286SW 693; Mont 289P580; 286Pa439, 133A 636; 70Utah29, 257P1050, 1053 [citCJ].

45-99 35Ariz87, 274P779; 74CalA10, 239P429, 434 [citCJ].

45-99¼–New. Direct evidence must control over mere conjecture. 230Mich 173, 203NW129.

46-3 49SD442, 207NW449; 70Utah29, 257P1050; 151Va302, 144SE424.

46-5 247 IllA48; 237Mich232, 211NW 734; 20 OhA26, 153NE187.

46-7 70Utah29, 257P1050.

46-8 101NJEq15, 137A787.

46-10 13LaA292, 125S877; 153Va93, 149SE444 (negative testimony presents no conflict with positive testimony where none of witnesses was listening for signals).

46-11 102Conn626, 129A782 (evidence of custom of sending "sales slip" may be preferred to negative evidence to effect that witness had never seen and could not find it in files); 101NJEq15, 137A787; 293Pa537, 143A192.

47-24¼–New. Jury's disbelief of denials of facts which must be proved is not equivalent to affirmative evidence of those facts. 255Mass297, 151NE320.

47-26 180Ark671, 22SW(2d)553 (testimony that record did not disclose certain procedure held sufficient to void tax sale); 197Cal148, 239P1061; Tex CivA 299SW458; Utah 289P146.

47-29 See also 265Mass420, 164NE608.

47-29½–New. Evidence by party who claims to have looked and not seen is not to be believed where, if she had looked, she would have seen. 149Md140, 131 A82.

47-29¾–New. The absence of the record of facts, which it would be the duty of a public officer to record, is some evidence of the nonexistence of the facts. 78Hun280, 28NYS858 (establishment of road).

47-30 18F(2d)200, 202 [citCJ]; 34 F(2d)377; 212Ala621, 103S576; 180 Ark413, 21SW(2d)611; Cal 269P657(2d case); 72CalA513, 237P814; CalA 240 P47; 80CalA520, 252P334; 102CalA67, 282P518; 107Conn681, 142A455; 215 Ky226, 284SW1052; 232Ky87, 22SW (2d)444; 7LaA381; 7LaA429; LaA 124 S712; 165Minn169, 205NW953; 168 Minn514, 209NW626; 154Miss265, 122 S200; 153Miss809, 122S755; 154Miss 713, 123S865; RI 135A855; 50RI 375, 147A891; TexCommnA 282SW798; Tex CommnA 288SW178; TexCivA 196SW 626; TexCivA 280SW844; TexCivA 16 SW(2d)341; TexCivA 19SW(2d)568 103 WVa404, 137SE746. See also 96CalA 772, 274P1024; 152Va165, 146SE268. [a] (3) Very slight evidence is sufficient to sustain finding if uncontroverted. 85 IndA476, 152NE183, 154NE390. [b] 7F(2d)293.

47-31 72CalA513, 237P814; CalA 240 P47; CalA 258P125; 87CalA654, 262 P438; CalA 262P815; 243 IllA129; 217 Ky738, 290SW677; 165Minn169, 205NW 953; 171Minn284, 213NW911; 175Minn 368, 221NW430; Mo 23SW(2d)112; Mont 292P253; Mont 292P725; 129 Misc421, 221NYS457; TexCommnA 24 SW(2d)367; TexCivA 24SW(2d)478; 149Va140, 141SE836. See also 226App Div354, 233NYS89. [c] That witness knew that he was to leave defendant's employ does not justify disregard of his testimony. 12LaA190, 123S184.

47-32 18F(2d)200, 202 [citCJ]; 22 AlaA24, 111S755; 72CalA513, 237P814; 161Ga832, 132SE206; 34GaA380, 129SE 297 (dictum); 179Ky248, 15SW(2d) 310; 231Ky591, 21SW(2d)985, 66ALR 1526; 126Misc436, 213NYS119 (positive testimony of disinterested and unimpeached witness); 296Pa393, 145A 907; TexCivA 24SW(2d)478; TexCivA 26SW(2d)298; 188Wis82, 204NW582.

47-33 129Misc421, 221NYS457; Tex CivA 281SW339; TexCivA 22SW(2d) 533. [a] Testimony of party interested will not be regarded as undisputed. 177 Ark1023, 8SW(2d)462. [b] Uncontroverted evidence of claimant in claim case must be construed most strongly against him. 41GaA211, 152SE264.

47-34 232 IllA439, 445 [citCJ]; 215Ky 226, 284SW1052; 242Mich217, 218NW 803; 320Mo146, 6SW(2d)920; 147Va 960, 133SE685, 694 [citCJ].

47-35 18F(2d)200, 202 [citCJ]; 19 F(2d)857, 860 [quotCJ]; 28F(2d)880; 85CalA360, 259P460; 86CalA523, 261P 721; 88CalA322, 263P371; CalA 285P 325; CalA 287P559; CalA 288P1086 (uncertain generally); 94Fla656, 114S 429, 431 [citCJ] (dictum); 41GaA263, 153SE96(2dcase); Ill 172NE917(2d case); 87 IndA69, 158NE646; 122Kan 601, 253P546; Mass 172NE349; Mass 173NE524; 169Minn409, 211NW473; 308Mo 288, 271SW361; MoA 285SW 538; 221MoA930, 288SW788; 81Mont 393, 264P115; 133Misc745, 234NYS239; 218AppDiv418, 218NYS500; 286Pa344, 133A508; TexCivA 276SW302; Tex CommnA 128SW(2d)536; TexCivA 288 SW1092; TexCivA 291SW273; TexCivA 328SW(2d)708; 136Wash534, 240P902; 144Wash609, 258P493. [a] Jury may disbelieve such evidence either from appearance, demeanor, or testimony of witness. 41GaA428, 153SE237.

48-36 19F(2d)857, 860 [quotCJ]; 41 F(2d)542; 338 Ill 322, 170NE273; 153 Miss809, 122S755; Mo 16SW(2d)100. [b] When rejection permissible.–322Mo 514, 17SW(2d)960. [c] To make rule applicable there must be no doubt as to physical facts, and testimony must clearly conflict with some rule of physics. MoA 18SW(2d)1038.

48-37 19F(2d)857, 860 [quotCJ]; 153 Miss809, 122S755; 195Wis203, 217NW 116.

48-38 18F(2d)200, 202 [citCJ]; 19 F(2d)857, 860 [quotCJ]; 72CalA513, 237P814 (testimony not inherently improbable); 97CalA414, 275P500 (d case); 327 Ill 139, 158NE371; 329 Ill 445, 160NE752; 338 Ill 322, 170NE 273; 175Minn287, 221NW10; 81Mont 393, 264P115; 82Mont52, 264P933; 286 Pa344, 133A508; TexCivA 291SW273; 144Wash609, 258P493. But see 294Pa 406, 144A294.

48-39 19F(2d)857, 860 [quotCJ]; 203 Cal 543, 264P1100; 208Cal578, 283P 67; 72CalA513, 237P814; 33GaA748, 127SW888; 34GaA380, 129SE297 (rule means that jury are to consider testimony of every witness and not arbitrarily disregard testimony of any); 223Ky674, 4SW(2d)684; 234Mich140, 207NW825; 169Minn409, 211NW473; 171Minn284, 213NW911; 175Minn368, 221NW430; 179Minn120, 228NW751; 308Mo 288, 271SW361; 81Mont393, 264 P115; 286Pa344, 133A508; TexCivA 291SW273; 105WVa416, 143SE695, 64 ALR839; 188Wis82, 204NW582; 195 Wis203, 217NW116.

48-40 19F(2d)857, 860 [quotCJ]; 33 GaA693, 127SE775; 327 Ill 139, 158NE 371; 81Mont393, 264P115; TexCivA 291SW273; 144Wash609, 258P493.

48-41 19F(2d)857; 178Ark183, 108W (2d)14; 172Ark1053, 292SW120; 88 CalA481, 263P826; CalA 292P996; 33 GaA748, 127SE888; 207 Iowa1315, 224 NW469; 129Kan743, 284P472; 265 Mass531, 164NE472; Mass 167NE235; Mass 172NE595; 169Minn409, 211NW 473; 308Mo 288, 271SW361; MoA 288 SW798; 81Mont393, 264P115; 218App Div418, 218NYS500; 286Pa344, 133A 508; TexCivA 285SW859; TexCivA 288 SW1092; TexCivA 291SW273; TexCivA 7SW(2d)611; TexCivA 9SW(2d)501; TexCivA 11SW(2d)662; TexCivA 15SW (2d)1053; 144Wash609, 258P493; 153 Wash514, 280P46; Wash 287P658. See also 133Misc745, 234NYS239; TexCivA 11SW(2d)549. But see 175Minn287, 221 NW10.

48-41½–New. or hostile; TexCivA 288 SW1092.

48-42 19F(2d)857, 860 [quotCJ]; 308 Mo 288, 271SW361. [a] Evidence as to transactions with decedent of such nature that it cannot be contradicted by direct evidence should be subjected to close scrutiny. Iowa 228NW311.

48-44 Ariz 286P817; 180Ark994, 23 SW(2d)624; 75CalA323, 242P887; 255 IllA127; 160La548, 107S402; Mo 149A 606; 152Miss476, 119S881; MoA 298 SW1065; 222MoA1146, 15SW(2d)970. See also 279US639, 49SCt345, 73Led 884; TexCommnA 158SW(2d)1011, 67 ALR1324.

49-45 231Ky591, 21SW(2d)985, 66ALR 1526; 41Wyo382, 286P377.

49-48 243 IllA337; 201 Iowa636, 207 NW795; 205 Iowa291, 217NW880; 208 Iowa882, 226NW178; 152Miss476, 119 S881; 41Wyo382, 286P377. [d] Burden is on party maintaining conclusion to show that proof is inconsistent with other reasonable theories. 32PortoRico 554.

49-50 236Mich300, 210NW311; 123 Okl48, 251P1046; 125 Okl260, 257P 797.

49-51 78CalA733, 248P727; 88CalA313, 263P369; 142 Okl283, 286P769; 37 OklACR409.

50-53 243 IllA129; 160La529, 107S 395.

50-54 35GaA752, 134SE637; 41Wyo 382, 286P377. See also 207 Iowa1287, 224NW554. [a] Burden of proving failure of motorist to warn held not met by inference from silence of witnesses. 111Conn219, 149A671

50-56 152Miss476, 119S881; 156Miss 463, 125S819; 125 Okl260, 257P797; 129 Okl134, 263P1086; 142 Okl276, 286P787.

50-59 24F(2d)23; Cal 292P451; 265 Mass344, 163NE860; Mass 168NE180; 317Mo 86, 296SW764; 221MoA338, 273 SW424; MoA 288SW988; MoA 7SW (2d)740; MoA 19SW(2d)758 (if previous witnesses were directly or inferentially contradicted); 135 Okl63, 273 P1000; 143Wash444, 255P666. But see 171Ark912, 287SW373. [b] Plaintiff is bound by testimony of his opinion witness.–317Mo782, 297SW20. [c] Party offering evidence is concluded by it. TexCivA 23SW(2d)501.

50-61 37GaA99, 139SE89; GaA 155SE 500; 150Md494, 133A158; Mass 168 NE924; MoA 16SW(2d)649; NJ 148A 156; Ont [1930] 2DomLR565. But see

136Misc581, 240NYS380.

50–62½–New. Party is not precluded by her answer to hypothetical question as to what she might have done under certain circumstances, though her answer can properly be considered by jury. 225Ky625, 9SW(2d)1011.

50–63 212Ala624, 103S674; 35GaA55, 132SE249 (construed most strongly against him); 262Mass542, 160NE300; Mass 165NE386; Mass 165NE421; Mass 169NE484; Mass 170NE923; Mass 171NE435; Mass 171NE441; Mass 172NE 216; Mass 172NE602; 82NH506, 136A 128, 50ALR973; 249NY272, 164NE49 [rearg den 166NE316(1stcase)]; 295Pa 301, 145A303; TexCivA 18SW(2d)412; 146Va654, 132SE700. See also 317Mo 782, 297SW20. [a] (4) Where sale of standing timber is not in writing as required of immovables by statute of frauds, denial by either party under oath is conclusiveness between them. 158La621, 104S476. [c] **Plaintiff's own testimony** is construed most strongly against her. 41GaA198, 152SE310.

50–63½–New. The testimony of a person who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal. 34 GaA115, 128SE213.

50–64 41F(2d)914; Cal 287P343 (as against presumption); 93CalA252, 269 P755; CalA 288P1086; CalA 292P996; 35GaA573, 134SE187 (construed most strongly against him where self-contradictory, vague, or equivocal); Mass 171 NE443; MoA 20SW(2d)912 (introduction of testimony of adversary given on former trial); 217AppDiv602, 216 NYS704. See also 321Mo 414, 11SW(2d) 729; 296Pa474, 146A107. But see 245 Mich657, 224NW393; Va 153SE691. [a] (1) 221MoA338, 273SW424; MoA 289 SW358. (4) Testimony of one of two defendants. 128Misc677, 219NYS654. [b] (1) 20F(2d)632; Cal 276P338; 207 Iowa1187, 224NW517; 290Pa14, 137A 800; 292Pa219, 140A905; 296Pa474, 146A107; TexCivA 275SW295. (2) Bound if adversary called for cross-examination, and his statements were uncontradicted. 289Pa193, 137A187. [c] **Litigant is not bound** where adversary's pleadings are offered on plea of res judicata. TexCivA 27SW(2d)588.

50–64½–New. , unless he permits such testimony to go uncontradicted, 258 Mass446, 155NE432.

50–64¼–New. 258Mass446, 155NE432.

51–65 [a] **As against presumption,** jury may disregard testimony. Cal 287P343.

51–66 321Mo 414, 11SW(2d)729. [b] **Plaintiff vouches for integrity of witness** called by him. 213AppDiv526, 210NYS 651.

51–67 178Minn568, 227NW896. See also 80Mont537, 261P341.

51–68 28F(2d)405; 99CalA401, 278P 898(2dcase); CalA 285P382; Mass 165 NE122; TexCivA 14SW(2d)330. [e] 31 Ariz169, 251P446. [g] **Answer.**–34GaA 190, 128SE922.

51–69 31Ariz169, 251P446; Ill 173NE 470; Mich 233NW375. [c] 10PaDist& Co 575.

51–70 See also 91CalA222, 266P996.

51–72 Mo 31SW(2d)21. [b] **Testimony of party's witness must be taken as true** on question of party's rights. Tex CommnA 24SW(2d)354.

51–72½–New. That insured claimed benefits of part of insurer's agent's memorandum held not to preclude him from contesting the truth of other disconnected parts. 48RI 274, 137A470.

51–72⅓–New. Testimony of a party in his own behalf is construed most strongly against him when it is self-contradictory, vague, or equivocal, 37GaA99, 139SE89.

51–72¼–New. and unless there is other evidence establishing the right to recover, one is not entitled to finding in his favor if a most unfavorable version of his testimony shows that the verdict should be against him. 37GaA99, 139 SE89.

51–72⅕–New. Party calling a witness certifies to his credibility. 223AppDiv 858, 228NYS485.

51–72⅙–New. In a partnership accounting suit, the court's action in charging plaintiff with her full share of the cost of a water system purchased by defendants for sudivision, based on defendant's own estimate, has been held not improper as to defendants, although the testimony of one of the defendants indicated that the cost of the system would exceed that amount. 96CalA152, 273P845.

51–72⅐–New. Plaintiff introducing testimony given on examination in bankruptcy was bound thereby. Iowa 230 NW407.

51–72⅛–New. A prima facie case of an owner's responsibility established by statute is not waived by calling witnesses who testify to facts contradictory of prima facie evidence. Mass 168NE180.

51–72⅑–New. Party introducing his adversary's deposition does not make adversary his witness. MoA 27SW(2d) 1039.

51–72⅒–New. Rule that party is bound by testimony of own witness merely confines method of impeaching own witness within certain narrow limits. CalA 288P1086.

51–76 180Ark1056, 24SW(2d)340; 196 Cal 639, 238P944; 44 Ida544, 258P547; 180Minn467, 231NW194; Nebr 233NW 458 (sufficient); 144 Okl 49, 289P335; 287Pa87, 134A384, 385 [quotCJ]; 143 Va46, 129SE219 (jury cannot find verdict without evidence or not based on evidence). [a] **Failure to prove essential facts may be cured** by stipulation that evidence given by defendant shall be treated as part of plaintiff's case. 102CalA280, 282P990.

51–77 179Ark1015, 19SW(2d)1102; Cal 291P173; Cal 291P190; CalA 288P716; 40GaA611, 150SE850; Iowa 231NW380 (insufficiency of hearsay statement); 124Kan443, 260P647; 318Mo 123, 300 SW737; 322Mo 830, 16SW(2d)38; 287 Pa87, 134A384, 385 [quotCJ]; 70Utah 552, 262P100; 149Wash109, 270P422. See also 97CalA414, 275P500(2dcase). [a] TexCommnA 280SW740; Tex CommnA 290SW529; 152Wash297, 277 P691. But see 19 OhA467. [c] **Substantial evidence** is evidence which if true would have probative force upon issue. 317Mo 614, 296SW739. [d] **Vague, equivocal, or self-contradictory testimony of a party** must be construed against him. 40GaA573, 150SE470. [e] **Evidence held insufficient.**–300Pa468, 150A892.

52–78 124Kan443, 260P647; 127Kan 568, 274P225; Mass 166NE556; 194NC 656, 140SE598; 287Pa87, 134A384, 385 [quotCJ]; TexCommnA 280SW740; 98 Vt437, 129A317.

52–79 124Kan443, 260P647; NJSup 142A821; 249NY60, 162NE584; 125 Or 316, 266P252; 287Pa87, 134A384, 385 [quotCJ].

52–80 200Cal 410, 253P697; CalA 285P 1059; 109Conn343, 146A609; 44 Ida544, 258P547; 124Kan443, 260P647; 127 Kan568, 274P225; 262Mass469, 160NE 306; Mass 166NE556; 236Mich300, 210 NW311; 238Mich87, 212NW965; 173 Minn483, 217NW596; 154Miss381, 122S 496, 63ALR1188; Mo 280SW1046; 318 Mo 123, 300SW787; MoA 17SW(2d)639; 77Mont124, 249P1070; 77Mont446, 251 P546; 83NH246, 141A227; NC 154SE 740; 287Pa87, 134A384, 385 [quotCJ]; 292Pa237, 140A903; 292Pa348, 141A 150; 98Vt437, 129A317; 105WVa287, 142SE259; 200Wis388, 228NW513; Wis 231NW593; Wis 232NW540. See also 30F(2d)803.

52–81 44 Ida544, 258P547; 124Kan443, 260P647; Me 151A146; 238Mich87, 212 NW965; 77Mont124, 249P1070; 77Mont 446, 251P546; 287Pa87, 134A384, 385 [quotCJ]; TexCommnA 280SW740; TexCommnA 290SW529; TexCivA 7SW (2d)625; TexCivA 11SW(2d)371; 98Vt 437, 129A317; 143Va46, 129SE219.

52–82 Iowa 231NW380; 128Me453, 148 A677; MoA 24SW(2d)673; 287Pa87, 134A384, 385 [quotCJ]; TexCommnA 290SW529.

52–83 CalA 290P660; 127Me80, 141A 183; Mo 31SW(2d)1010; 223AppDiv 511, 228NYS722; 137Misc668, 244NYS 250; 117 OhSt406, 159NE479; 287Pa87, 134A384, 385 [quotCJ]. See also Mass 165NE386. [b] 113Nebr739, 204NW 784; Ont [1930] 3DomLR269 (especially where charge of crime involved).

53–84 124Kan443, 260P647; 31 OhA 390, 166NE592; 287Pa87, 134A384, 385 [quotCJ]; 34Wyo 1, 242P1107.

53–85 15DelCh100, 141A319; 124Kan 443, 260P647; 83NH246, 141A227; 287 Pa87, 134A384, 385 [quotCJ].

53–88 TexCivA 282SW325.

53–89 See also 198Wis542, 224NW479.

53–90 TexCivA 300SW114.

53–91 81Colo 379, 256P4; 4LaA492; 221MoA773, 287SW885.

53–92 83Colo 528, 266P1112; Tex CommnA 280SW740.

53–93 200Cal 396, 253P134; 41Wyo 382, 286P377 (defendant's direct testimony and circumstances relied on by plaintiff). [a] **Jury are authorized to find for either party** where evidence is in conflict on controlling issue. 169Ga 734, 151SE506.

53–94 175Ark944, 1SW(2d)88; 109 Conn559, 147A20.

53–95 Mo 31SW(2d)1010.

53–96 160Ga763, 129SE65 (duty of juries is to seek to arrive at truth under evidence); Utah 282P1040. [e] **Inconsistencies in testimony of witness** do not render it insufficient to support finding. 85CalA181, 259P112. [f] **In absence of legally responsible answers,** averments of claim are sufficient to sustain verdict for plaintiff. 297Pa294, 147 A56(3dcase).

53–1½–New. Evidence will not be disregarded as a physical impossibility where it appears that witness' statement is a mere estimate. 127Misc24, 215NYS217.

53–1⅓–New. In Alberta, the corroboration of an infant required where his testimony is not taken under oath must be by evidence material to the issue, as to which the party whose witness the infant is has the burden of proof. Alta [1928] 2DomLR562. [a] **In action for negligence** corroboration must be as to negligence alleged. Alta [1928] 2 DomLR562.

53–2 Cal 292P960; CalA 287P518; CalA 288P1096; 222Ky332, 300SW861; 1LaA533; 3LaA72; 127Misc24, 215NYS 217; 8PaDist&Co 343; TexCivA 2SW (2d)864. See also 158La1052, 105S63. [a] (7) Capacity of plaintiffs to sue. 92 CalA618, 268P665.

53–2½–New. That plaintiff is his only witness will not preclude a recovery for his injuries. 218AppDiv553, 218 NYS589.

54–4 [a] (3) Reconventional demand for filling premises in action for rents and profits is not within statute requiring proof by one witness and corroborating circumstances in actions relating to movable property and contracts to pay money involving more than five hundred dollars. 165La536, 115S742. [b] **In Ontario.**–62 OntL128, [1928] 2 DomLR838.

54–5 172Ark947, 291SW66; Ark 31SW (2d)421; 77Colo 442, 237P151; 127Misc 24, 215NYS217; 152Va883, 148SE694 (testimony held not inherently improbable). But see 41GaA317, 152SE847.

54–6 19F(2d)857, 860 [quotCJ]; 84 CalA180, 257P877; 9LaA349, 118S894; MoA 287SW852; 285Pa251, 132A120 (where witness' testimony conflicts with that given at former trial, case is for jury); TexCivA 273SW688; TexCivA 297SW520; TexCivA 31SW(2d)192; Va 153SE664; 104WVa156, 139SE648.

54–7 19F(2d)857, 860 [quotCJ]; 147 Wash419, 266P169; 104WVa156, 139SE 648 (where there is other evidence in case).

54–9 19F(2d)857, 860 [quotCJ]; 91 PaSuper254. [a] **One witness is sufficient if corroborated** by facts. See also 5PaDist&Co 207. [b] **Corroboration must go to execution of writing.**–91Pa Super254.

54–10 19F(2d)857, 860 [quotCJ].

54–11 19F(2d)857, 860 [quotCJ].

54–12 19F(2d)857, 860 [quotCJ].

54–13 19F(2d)857, 860 [quotCJ].

54–14 19F(2d)857, 860 [quotCJ].

54–14½–New. In Louisiana, a contract for payment of more than five hundred dollars, not in writing, must be proved by credible witness and corroborative circumstances. 161La84, 108S133.

54-14½-New. Where the only person who could directly dispute the witness is dead, testimony of that witness should be clearly scrutinized and reasonable probability carefully considered in view of the surrounding circumstances. SD 227NW884.

54-14¼-New. In Canada the testimony of a solicitor having no personal interest in a claim against an estate need not be corroborated. Can [1929] 3DomLR 197.

54-16 196Cal 639, 238P944; Cal 274P 72; 207Cal 652, 279P765; 75CalA323, 242P887; 96CalA674, 274P766; CalA 250P497; CalA 291P848; 236Mich300, 210NW311; 242Mich464, 219NW717; 247Mich157, 225NW609; 320Mo 371, 8 SW(2d)11; 120 Or286, 249P627; 297Pa 79, 146A443; TexCivA 282SW854, 859 [citCJ]; TexCivA 15SW(2d)657; TexCivA 178W(2d)1102. See also 105NJL 183, 143A375. [h] **Judgment or finding may not be rested upon inferences.**–235 Ky534, 31SW(2d)903.

55-17 TexCivA 282SW854, 859 [citCJ].

55-18 75CalA323, 242P887; 91CalA715, 267P751; 236Mich300, 210NW311; 320 Mo 146, 6SW(2d)920; Mo 30SW(2d) 1018. [b] **Where there is not enough testimony to predicate inference,** such inference does not justify verdict. Tex CivA 4SW(2d)1058. [c] **Where evidence presents ultimate inference** entitling recovery as only one compatible with basic facts, that it also presents ultimate inference fatal to recovery does not prevent recovery. 221MoA773, 287 SW885.

55-21 224AppDiv455, 231NYS385.

55-22 98CalA126, 276P618; 235Ky534, 31SW(2d)903; 221MoA773, 287SW885; MoA 4SW(2d)477(2dcase); SD 230NW 805 (3dcase) (fraud). [a] **Where witness states that he does not know which of two inconsistent things are true,** no inference is raised that either one is fact. 87CalA207, 262P61(1stcase).

55-23 44 Ida544, 258P547; 232Ky107, 22SW(2d)452; 117 Or411, 244P313; 34 Wyo 1, 242P1107. [a] (1) 117 Or411, 244P313; TexCivA 275SW124; 98Vt 437, 129A317. But see 75CalA323, 242P 887.

56-24 85CalA455, 259P455; 124Kan 443, 260P647; 157Md18, 145A190; MoA 98SW(2d)96; NC 154SE740; 118 ObSt 217 160NE704; TexCivA 10SW(2d)220; TexCivA 148SW(2d)867; 34Wyo 1, 242P 1107. [a] **Inference distinguished from supposition.**–227Ky339, 13SW(2d)257. [b] **Experiment** disclosing that object on railroad track could be recognized as human being in time to stop train does not authorize inference that engineer did so. Mo 30SW(2d)22.

56-25½-New. No inference of fact or of law is reliable if drawn from premises which are unreliable. 165Minn223, 206NW436.

56-27 198Cal 32, 243P423. [b] (2) Notation on reverse side of exhibit, introduced by one party, is competent evidence in adverse party's behalf. 227 AppDiv200, 237NYS881.

56-28 198Cal 32, 243P423.

56-30 142 Okl 286, 286P879; 98Vt437, 129A317.

57-35 10LaA537, 120S227; 195Wis78, 217NW927 (sufficiency of evidence to show stated value).

57-36 111 Okl 239, 239P623; Vt 151A 642; 105WVa530, 143SE301, 303 [citCJ].

57-39½-New. Evidence of par value of bonds is some evidence of their value. 201Cal 322, 256P1099.

57-39½-New. In a case involving the issue of the reasonable value of personal services rendered in settling a pending lawsuit by one not an attorney at law, there should be introduced some special or opinion evidence as to the value of such or similar services, by witness or witnesses familiar with their value. 133 Okl 196, 271P1026.

57-39¼-New. Accounts are prima facie with face value. AlaA 130S516.

57-42 43F(2d)256; MoA 256SW1088; 105WVa530, 143SE301, 303 [citCJ].

57-46 But see 104Conn73, 131A412.

57-47 57ND668, 223NW694.

57-48 Mass 169NE268.

57-49½-New. Fact that corporate stock has never been offered for sale in a market is not evidence that it has no value. 104Conn73, 131A412.

57-49½-New. The book value of assets is not conclusive of the present value of stock. 296Pa568, 146A153.

57-49¼-New. Evidence insufficient to authorize increase in value of corporate stock. 101CalA20, 281P518(2dcase).

57-49½-New. , and that it had certain value at stated time. Vt 151A642.

57-49½-New. Evidence has been held sufficient to show that corporate stock was not valueless. Vt 151A642.

57-50 246NY174, 158NE64. [c] **Evidence held sufficient** to show market value of automobile. 205 Iowa508, 218NW 298.

57-51 [a] **Price of staple food produce, f. o. b. shipping point,** is some evidence that market value at destination is such price plus freight. 36GaA241, 136SE 167. [b] **A single sale is not enough** to show market value to constitute basis of condemnation award. 229AppDiv617, 243NYS665.

57-52 24F(2d)191. [b] **Stock quotations** are not conclusive of actual value. 6F(2d)818.

57-54½-New. Testimony of witness who derived his information from reports in a single newspaper published in remote city is not sufficient to establish the market value. 192NC159, 134 SE412.

57-54½-New. Such evidence is sufficient to show the state of the distant market. 192NC159, 134SE412.

57-56 [a] **Similarity of names alone** is not enough to establish identity. Mass 170NE62.

57-58½-New. Evidence in a suit in trespass to try title has been held sufficient to establish a prima facie case of identity between a corporation purchasing property on tax sale, and the corporation subsequently conveying title thereto. TexCivA 8SW(2d)790.

57-64 Utah 269P1020.

58-80 TexCivA 15SW(2d)698. [i] **Usual time for railroad trip.**–Expert testimony as to usual time for making certain railroad trip held admissible, though none of witnesses had made such trip during year involved. TexCivA 294 SW290. [j] **Ability to pay.**–46 Ida97, 266P677. [k] **Evidence as to whether coöperative association obtained best prices** obtainable for cotton held insufficient to take question to jury. 179Ark 338, 16SW(2d)177. [l] **Disease.**–Less certainty is required in proof thereof because of very subtleness of origin and development of disease. Cal 291P173.

58-2 198 Ind574, 154NE384; 101TexCr 386, 276SW432, 433 [quotCJ]. [a] 112 TexCr152, 15SW(2d)650.

58-3 101TexCr386, 276SW432, 433 [quotCJ].

58-3½-New. Judicial notice is based upon convenience and expediency. 74 CalA411, 240P1021.

59-11½-New. The court cannot take judicial notice of the fact that it does not in fact judicially know. 213Ala494, 106 S150.

59-11½-New. On motion to dismiss a patent infringement suit on the ground that patents in the suit are void, the court cannot judicially notice prior art. 20F(2d)261.

59-12 116 Or615, 241P843.

59-13 35PortoRico 224.

59-17-21 83Mont162, 271P446.

59-22 276US182, 48SCt276, 72Led 523; 6F(2d)516; 11F(2d)881; 13F(2d) 246; 16F(2d)349; 18F(2d)755; 23F (2d)905; 31F(2d)869; 31F(2d)976; 32 F(2d)271; 35F(2d)987; 36F(2d)716; 37 F(2d)83; 37F(2d)622; 38F(2d)755; 39 F(2d)123; 39F(2d)145; 39F(2d)720; 44 F(2d)244; 44F(2d)253; 217Ala128, 115 S21; 219Ala546, 122S677; 23AlaA595, 129S489; Ala 130S402; 35Ariz334, 278 P68; 170Ark322, 280SW1001, 44ALR 871; 171Ark155, 283SW365; 181Ark 1117, 29SW(2d)668; Ark 31SW(2d)403; 195Cal 404, 234P82; Cal 245P946; 201 Cal 299, 257P60; 203Cal 238, 263P1009; 206Cal 148, 273P797; 206Cal 273, 274P 57; 206Cal 366, 274P544; Cal 291P173; Cal 292P1076; Cal 293P67; 75CalA 709, 243P455; 76CalA267, 244P919; 88 CalA174, 263P255; 91CalA375, 267P 178; 93CalA56, 268P1068; 95CalA162, 272P591; 95CalA456, 273P50; 96CalA 250, 273P1111; 96CalA345, 274P407; 96CalA708, 275P228; CalA 283P891; CalA 290P684; CalA 291P606; CalA 292P988; 77Colo 478, 238P53; 82Colo 86, 257P265; 82Colo 509, 261P864, 55 ALR1285; 85Colo 17, 273P648; 85Colo 125, 274P831; 87Colo 489, 289P603; DelCh 150A174; 94Fla528, 114S438; 97Fla1, 119S513(2dcase); 98Fla731, 124 S279; 160Ga620, 128SE891; 36GaA241, 136SE167; 37GaA425, 140SE419; 47 Ida490, 276P964; 337 Ill 555, 169NE 753; Ill 173NE361; 235 IllA198 (economic conditions of times); 197 Ind498, 150NE413; IndA 151NE22; 202 Iowa 225, 206NW815; 201 Iowa826, 208NW 499; 203 Iowa960, 211NW238; 202 Iowa1109, 211NW479; 204 Iowa1246, 214NW879, 54ALR474; 206 Iowa314, 217NW545; 206 Iowa1298, 221NW953; 206 Iowa1291, 222NW12; 121Kan109, 245P1019; 123Kan10, 254P401; 125Kan 117, 118,–263P786 [citCJ]; 212Ky770, 280SW127; 213Ky52, 280SW467; 213 Ky167, 280SW937, 45ALR544; 218Ky 84, 290SW1064; 229Ky293, 16SW(2d) 1046; 235Ky822, 32SW(2d)410; 167La 701, 120S57(1stcase); 169La427, 125S 437; La 130S866; 10LaA409, 121S372; 11LaA647, 124S628; LaA 129S413; 126 Me32, 135A824; 257Mass541, 154NE89; 263Mass215, 160NE797; Mass 172NE 643; 230Mich628, 203NW484; 235Mich 117, 209NW127; 239Mich401, 214NW 132; 239Mich204, 214NW316, 53ALR 273; 240Mich94, 214NW968; 241Mich 240, 217NW2; 242Mich402, 218NW795; 157Miss374, 128S96; 157Miss243, 128S 105; Miss 130S910; 312Mo 1, 278SW 769; 315Mo 1336, 290SW123; Mo 300 SW710, 711 [quotCJ]; 321Mo 370, 13 SW(2d)40; 321Mo 1244, 148W(2d)583; Mo 29SW(2d)692; MoA 273SW237; MoA 273SW749; MoA 282SW113; MoA 8SW(2d)1038; MoA 16SW(2d)687(2dcase); 80Mont431, 261P253; 84Mont 61, 274P148; 113Nebr745, 204NW791; 82NH304, 133A16, 45ALR1409; NJ 143 A740; 105NJL51, 143A859; NJSup 151 A369; 241NY405, 150NE497, 43ALR 909; 213AppDiv451, 210NYS676; 218 AppDiv584, 219NYS46; 127Misc56, 215 NYS209; 127Misc354, 216NYS128; 127 Misc515, 216NYS713; 127Misc477, 217 NYS265; 127Misc604, 217NYS284; 128 Misc127, 245NYS346; 129Misc714, 223 NYS24; 221AppDiv263, 223NYS127; 133Misc353, 232NYS33; 226AppDiv235, 234NYS463; 226AppDiv241, 235NYS189; 226AppDiv434, 235NYS534; 136Misc 555, 241NYS513; 245NYS156; 198NC 551, 152SE693; 54ND141, 208NW840; 126 Okl 265, 259P523; 128 Okl 17, 261P 183; Okl 261P962; 37 OklACR557; 116 Or310, 241P50; 121 Or277, 254P806; 122 Or597, 260P222, 55ALR180; 124 Or 1, 263P886; 126 Or1, 267P1035; Or 289P503; 284Pa444, 131A356; 286Pa 364, 133A565, 47ALR1172; 296Pa212; 145A818; 149SC424, 147SE315; 149SC 234, 147SE346; 48SD482, 205NW72; SD 224NW925; TexCommnA 11SW(2d) 778; 118Tex433, 13SW(2d)358; Tex CommnA 15SW(2d)553; TexCivA 273 SW1113; TexCivA 274SW335; TexCivA 276SW347; TexCivA 278SW252; Tex CivA 280SW260; TexCivA 281SW242; TexCivA 291SW281; TexCivA 8SW(2d) 271; TexCivA 14SW(2d)337; 101TexCr 386, 276SW432, 433 [quotCJ]; 67Utah 25, 245P381, 45ALR882; 68Utah251, 249P1016; 100Vt314, 137A194; 144Va 244, 132SE303; 145Va184, 133SE672; 151Va934, 145SE833; 152Va533, 147SE 196; Va 154SE479; 140Wash459, 249P 977; 140Wash499, 249P989; 144Wash 440, 258P321; 150Wash157, 272P723, 63ALR200; Wash 287P7; 103WVa180, 136SE780; 189Wis471, 205NW428; 192 Wis102, 212NW269; 192Wis319, 212 NW523; 193Wis49, 213NW625; 195Wis 494, 218NW845; 198Wis89, 223NW429; 199Wis440, 223NW559; 200Wis512, 228 NW118; Wis 231NW628(2dcase); Wis 233NW91. [a] (3) That different climatological conditions may exist in different parts of same city. 82Colo 86, 257P265. [b] (106) Utah 262P269. (133) That unoccupied business premises fall out of repair and deteriorate much more rapidly that where occupied by reasonably careful tenant. 120Kan

455, 244P16. (134) That people owning automobiles have them insured. 236 Mich1, 209NW918. (135) That people are lawfully assembled on sidewalks of city of New York. 126Misc838, 214NYS 787. (136) That court takes judicial notice that many bridges and viaducts are narrower than roadbed on which they are located. 213AppDiv451, 210 NYS676. (137) That photographs may be taken from different angles so as to exaggerate distances or make space more compact. 126Misc372, 123NYS 601. (138) That amounts lawfully paid by business enterprise for damages sustained by its employees as personal injuries are part of expenses of business. TexCivA 273SW676. (139) That transit problems in New York City are exceptionally complicated. 240NY354, 148 NE548. (140) Of purposes of parents-teachers associations. 209Ky710, 273 SW529. (141) That water pipes and gas pipes frequently cross lands belonging to individuals. 213AppDiv496, 211NYS 5. (142) Of removal of plumbing fixtures without material injury to house. TexCivA 275SW190. (143) That stores abound in thickly populated communities. 14DetCh392, 129A512. (144) That experience is required to handle articles of great weight. MoA 273SW 749. (145) That state highways are used by resident and nonresident owners of automobiles. 81NH566, 129A 117, 39ALR1023. (146) That while courts are fond of sustaining wills, juries readily seize opportunity to break them. TexCivA 273SW961. (147) That brush and refuse are carried down stream and lodge against obstructions. 98Vt405, 130A137. (148) That in loading or unloading freight-carrying vessel certain workmen engaged therein work wholly on shore and certain others work wholly on vessel. 135Wash260, 237P711, 241P969. (149) That property values were higher in 1919 than theretofore. 208Ky803, 272SW52. (150) That boys of fifteen years of age are not watchful. 230Mich8, 203NW151. (151) That branch banks are exception and not general rule. 152Tenn67, 274 SW539. (152) That exhaust from gasoline engine similar to report of small fire arms. 208Ky597, 271SW689. (153) That brokers make practice of procuring funds to complete purchase of property, as distinct from service rendered seller in procuring sale. 197Cal 269, 240 P289. (154) That artificial lights have their eccentricities and even temporary lapses from functioning. 215AppDiv 28, 213NYS58. (155) That many convicts would remain in jail at state's expense pending appeal, but for statute authorizing election to serve part of sentence. 20AlaA665, 104S847. (156) That era of unprecedented industrialism has presented rare opportunities for exploitation of nefarious schemes at expense of uninformed public. 216App Div250, 214NYS670. (157) That there were reasons for adoption of constitutional amendment granting local government to cities. 125Misc1, 210NYS786. (158) That named town located on beach, prospers mostly by summer visitors who go there for health and recreation. 189NC679, 128SE17. [b] (159) Other matters of which judicial notice is taken. 6F(2d)964; 31Ariz 503, 254P1056, 52ALR244; 76CalA267, 244P919; 237Mich215, 211NW742; 218 AppDiv584, 219NYS846; 121Or277, 254 P806; 286Pa364, 133A565, 47ALR1172; TexCommnA 293SW811; TexCivA 293 SW842; 193Wis49, 213NW625; 37Wyo 4, 257P245, 53ALR560. (160) That school terms begin in fall. 80Mont431, 261P253. (161) That to-day's modern buildings are obsolete to-morrow. 310 Mo 602, 275SW957. (162) That weapon fired against human body leaves powder marks only in and immediately around wound. 22F(2d)99. (163) That windows are used for light, air, and possible symmetry and ornamentation. 37 GaA425, 140SE419. (164) That public opinion has been aroused in opposition to acquisition by municipalities of land in counties other than those in which situated for obtaining water supplies and developing electric power. 78CalA 117, 248P272. (165) Of public acts of trustees in conferring awards pursuant to terms of trust. 42F(2d)616. (166) That motor vehicles are subjects of larceny. Mo 30SW(2d)447. (167) That automobile identifying number is sometimes destroyed to prevent tracing or recovery of stolen motor vehicles. Mo 30SW(2d)447. [c] (14) Other matters of common knowledge. 7F(2d)461; 12F(2d)951; 13F(2d)510; 13F(2d)997; 14F(2d)852; 19F(2d)850; 23F(2d) 673; 214Ala79, 107S45; 214Ala391, 108S11; 216Ala4, 112S433; 216Ala 290, 113S18, 52ALR1075; 21AlaA 280, 107S716; 21AlaA530, 109S617; 170 Ark996, 282SW364; 171Ark155, 283SW 365; 171Ark863, 286SW1009; 171Ark900 286SW1035, 287SW404; 173Ark1128, 293 SW1041; 176Ark253, 3SW(2d)969; 176 Ark731, 4SW(2d)505; 84CalA137, 257P 590; 78CalA173, 248P532; 82Colo 189, 257P1094; 107Conn304, 140A751; 90Fla 625, 106S418; 91Fla118, 107S146; 97Fla 1077, 116S644; 324 Ill 179, 154NE893; 324 Ill 285, 155NE318; 197 Ind498, 150 NE413; IndA 151NE22; 215Ky452, 284 SW1097, 47ALR347; 217Ky205, 289SW 204; 223Ky461, 3SW(2d)1067; 223Ky 517, 3SW(2d)1095; 159La738, 106S287; 160La371, 107S143; 161La1045, 109S 832; 162La277, 110S421; 164La77, 113 S772; 125Me334, 133A905; 126Me32, 135A824; 126Me186, 137A58, 53ALR 834; 152Md398, 136A822, 51ALR1291; 257Mass541, 154NE89; 258Mass303, 154 NE853; 258Mass508, 155NE435; 261 Mass523, 159NE55; 262Mass539, 160NE 259; 172Minn204, 214NW922; 315Mo 1136, 287SW1031; 220MoA854, 294SW 751; 83NH253, 141A142; NJSup 135A 67; NJSup 137A563; 103NJL512, 138A 377; 98NJEq548, 131A122; 99NJEq 288, 133A184; 241NY405, 150NE497, 43ALR909; 222AppDiv642, 227NYS279; 223AppDiv237, 227NYS671; 128Misc422, 220NYS200; 128Misc875, 220NYS281; 131Misc475, 227NYS160; 131Misc820, 227NYS430; 131Misc874, 227NYS550; 131Misc909, 228NYS579; 191NC643, 132 SE792; 134SC147, 132SE39; 50SD633, 211NW448; 52SD302, 217NW383; 116 Tex82, 286SW458; TexCommnA 6SW (2d)96; TexCivA 278SW252; TexCivA 283SW259; TexCivA 287SW670; Tex CivA 287SW677; TexCivA 293SW259; TexCivA 295SW670; TexCivA 18W(2d) 760 (value of wife's services is matter of common knowledge); TexCivA 3SW (2d)514; TexCivA 5SW(2d)590; 100Vt 314, 137A194; 146Va475, 131SE827; 144Va244, 132SE303; 146Va773, 132SE 709; 145Va489, 134SE576; 148Va48, 138SE467, 53ALR990; 149Va523, 140SE 641, 56ALR214 (that abutting owners erect fences along public sidewalks); 193Wis561, 214NW353; 36Wyo 339, 255 P350, 53ALR73. (15) That one will be electrically shocked where connection is formed between two electric wires. 19F(2d)122. (16) That recognition of voices over telephone depends upon many and diverse conditions. 19F(2d) 850. (17) That interest rate on loans varies according to circumstances. 175 Ark716, 300SW401. (18) Running at large of hogs in town. 63 Ill 50. (19) Custom of drummers in taking orders and submitting them to their houses for action. 61SW9, 22KyL1528. (20) That certain Massachusetts statute imposing additional legacy taxes was extraordinary and special. 256Mass512, 153NE1. (21) It is matter of common knowledge that much land in New York City is subject to ancient restrictive covenants against use. 221AppDiv538, 224NYS481. (22) That chains on automobiles are valueless to protect against skidding when once started. 222AppDiv 310, 226NYS311. (23) That rope and wire is simple appliance to be used in holding steel tank. 192NC736, 136SE1. (24) As to what constitutes more economical way of caring for street than old method. 21OhA1, 153NE174. (25) That trustee in deed of trust is often named without his knowledge or consent. 146Va197, 135SE882. (26) That likelihood of forming contact increases with moisture. 19F(2d)122. (27) That keeping gunpowder in a building increases fire risk. 258Mass508, 155NE 435. (28) That paved state highways are heavily traveled. 251 Ill364. (29) That automobiles have seriously affected earnings of street railways. 37F(2d) 910. (30) That operation of automobiles impose hazards on practically entire population. Cal 284P209. (31) Existence and use of modern improvements in rural sections. Ala 128S454. (32) Drainage is usually through streams fed by tributaries made up by smaller tributaries. MoA 278SW(2d) 1081. (33) Radio stations broadcast varied programs. 40F(2d)784. (34) When improvements are contemplated taxpayers in neighborhood know of it for months before. NJSup 150A763. (35) Endowment of hospital bed requires setting aside of minimum specified sum. 136Misc627, 241NYS661. (36) That oil became more important than gas for leasing purposes and that casinghead gas became more important than natural gas after July 3, 1918. TexCivA 28SW (2d)914. (37) Other instances. 39F(2d) 974; 13LaA680, 128S670; TexCivA 25 SW(2d)717. (38) Other matters. 220 Ala605, 127S178; 228AppDiv596, 240 NYS766; TexCivA 26SW(2d)389. (39) That people speaking of property mean to include both land and buildings on it. 97PaSuper267. [f] **Judicial eye may not be blind to obvious actualities.**–127 Misc56, 215NYS209.

60–23 CalA 289P203; 111Conn433, 150 A811; TexCivA 299SW512; 101TexCr 386, 276SW432.

60–24 131Misc514, 227NYS209; 101 TexCr386, 276SW432.

60–25 318Mo 17, 298SW777, 781 [quot CJ]; 240NY354, 148NE548; TexCivA 19SW(2d)68; 101TexCr386, 276SW432, 433 [quotCJ].

60–26 15F(2d)929 (that no one would drive six miles for drink of liquor); 41F(2d)53 (character of Communist Party); 75CalA709, 243P455; 99CalA 81, 277P878(2dcase); Ill 172NE35; 204 Iowa1348, 217NW264; 179Minn321, 229 NW138 (facts known only by specially informed class of persons); 82NH225, 131A601; 83NH246, 141A227 (limitation fixed by natural laws); 248NY145, 161NE450; TexCivA 22SW(2d)467; TexCivA 29SW(2d)484(2dcase); 34Wyo 1, 242P1107 (that X-ray instruments were so commonly owned and used in community that they were available to physician held not judicially noticed). [a] **Tanamoshi.**–30Hawaii606.

60–27 Ala 130S402.

60–28 218Ala420, 118S912; Ala 130S 402; 207Cal 106, 277P118; 84Colo 576, 272P629; 85Colo 17, 273P648; 97Fla 127, 120S361(2dcase); 39GaA185, 146SE 510(2dcase); 153Miss91, 120S437; 222 MoA768, 8SW(2d)98; TexCivA 278SW 508; TexCivA 275SW190; 112TexCr 650, 15SW(2d)650 (court of criminal appeals has no judicial knowledge of any occupation, for which no bond is required, similar to operation of gin for commercial purposes). [a] (8) Courts cannot judicially notice time required to repair automobile injured in collision. 158La43, 103S436. (9) That timber granted in deed was in existence at time of deed. TexCivA 278SW508.

61–37½–New. Where there is reasonable doubt as to whether sufficient notoriety exists, the doubt must be resolved in the negative. MoA 282SW 113.

61–37¼–New. It is common experience that an automobile will skid on a slippery hill but not that it will slide broadside down the hill and across a level space. 291Pa205, 139A858.

61–39 287Pa92, 134A490.

62–50 23F(2d)789, 791 [quotCJ]; 24 F(2d)642; 258Mass133, 154NE549; 131 Misc514, 227NYS209, 218 [citCJ].

62–53 35F(2d)987; CalA 288P53 (handbill advertisements); 15DetCh 119, 132A442; 207Iowa461, 221NW 364; 12LaA508, 126S452; 127Misc515, 216NYS713; 131Misc331, 226NYS656; 34OhA169, 170NE377; TexCommnA 20 SW(2d)759; TexCivA 26SW(2d)1077; Utah 289P151; 144Wash440, 258P321. [i] **Consideration for commercial paper.**–142Miss444, 107S669. [j] **That patients**

are not placed in dentist's chair for treatment while wearing overcoats or wraps will be judicially noticed. 125 **Misc**868, 212**NYS**298. [k] **That shrewd business men, even bankers, are often swindled through passing of forged instruments** is matter of common knowledge. **TexCivA** 274**SW**1002. [l] **Fluctuation in volume of sales** may be taken to be common knowledge. 199**Wis** 552, 227**NW**30, 68**ALR**1320.

62–55 TexCivA 276**SW**746; **TexCivA** 295**SW**223. [e] **Selection of employees and payment** according to their capacities is common knowledge. **Tex CommnA** 30**SW(2d)**305.

63–56 13**F(2d)**71; 180**Ark**770, 22**SW (2d)**993, 68**ALR**1018 (use and sale of ice); 202 **Iowa**67, 209**NW**415 (that exchange of secondhand cars for new ones is part of business of selling automobiles); 219**Ky**238, 292**SW**814; 140**Miss** 155, 106**S**17 (cotton trade); 156**Miss**99, 125**S**710 (cotton industry); 116 **Or**310, 241**P**50 (hop industry in Washington); **TexCivA** 27**SW(2d)**868 (gasoline filling station).

63–57 36**F(2d)**140.

63–61½–New. It is a matter of common knowledge that it was difficult to procure articles of commerce to supply the demand in 1918, 1919, and the early part of 1920, and that during that time all classes of buildings were occupied. 133**SC**43, 130**SE**550.

63–61⅓–New. The court can take judicial notice of distinction between character of home, private office, or factory, and streets and public places. 242 **NY**467, 152**NE**264.

63–61¼–New. The court will not take judicial notice that oleomargarine is fraudulently sold as butter. 193**Wis**311, 214**NW**369, 53**ALR**463.

63–61⅕–New. Court will not take judicial notice of terms of employment of professional baseball players. **Tex CivA** 28**W(2d)**505.

63–65 See also **Mo** 274**SW**1067.

63–70 250**Mich**491, 230**NW**909 (judicial notice taken that employers and insurers commonly continue medical treatment beyond statutory period). [a] **Court cannot judicially notice** that amounts paid under Workmen's Compensation Law for partial disability as compared with total amounts paid are so insignificant that they cannot afford justification for assessing premiums for compensation fund on total pay roll without regard to number of employees. 114 **OhSt**221, 151**NE**171.

63–76½–New. that public work is undertaken by every contractor on the basis of the then cost of labor at the place of performance; 157**Md**576, 146 **A**797.

63–79 [a] (10) That farms are rarely if ever sold for sum in cash laid down on barrel head. 179**Ark**154, 15**SW(2d)** 399.

64–90½–New. that agreements and obligations are extended or renewed perhaps as frequently after maturity as before; 51**ND**917, 201**NW**514.

64–92½–New. That hiring of towboats is for short service and by many different parties whose financial responsibility cannot be easily ascertained is a matter of common knowledge. 6**F(2d)** 516.

64–92⅓–New. It is common knowledge that people are allowed to negotiate transactions and write depositor's names on checks without authority finally to pass title to property. 23**F(2d)**605.

64–93 26**F(2d)**508; **CalA** 291**P**233; 44 **Ida**332, 257**P**31, 54**ALR**1527; 50**Philippine**387; 69**Utah**473, 256**P**405.

64–94 130**Misc**359, 223**NYS**785.

64–95 [c] **That fertilizers must be used** in order to farm profitably will be judicially noticed. 33**SC**353, 131**SE** 146. [d] **Branches of husbandry and uses of land therefor** are judicially noticed as existing in state and certain localities therein. **SD** 227**NW**839 (cutting of hay and raising and grazing of live stock).

64–1 74**CalA**286, 240**P**529.

64–3½–New. The courts will take judicial notice that waters rapidly receding do less damage to growing crops than waters remaining standing for a long time. 201 **Iowa**826, 208**NW**499.

64–3⅓–New. The supreme court of appeals of Virginia will not take judicial notice of the price per day of farm labor. 144**Va**244, 132**SE**303.

64–3¼–New. Courts take judicial notice that certain sprays and germicides are most effective in eradicating germs and pests which infest orchards, vineyards, and gardens. 73**CalA**268, 238**P** 787.

64–3⅕–New. It is common knowledge in some states that agriculture is the state's chief source of wealth. 315**Mo** 560, 286**SW**381.

64–3⅙–New. It is common knowledge that milk producers have suffered serious losses in selling to financially irresponsible retail milk dealers. 134**Misc** 542, 236**NYS**70.

64–6 TexCommnA 291**SW**206.

64–7 131**Misc**188, 226**NYS**415.

65–8 94**Fla**528, 114**S**438; **Mass** 172**NE** 111; 99**WVa**544, 130**SE**142. [a] 143 **SC**51, 141**SE**103 (mortgages).

65–9 253**NY**227, 170**NE**900 (purchasing securities).

65–10 [a] (5) 147**Wash**42, 264**P**1000. (6) That it is common practice for bank to be agent for both mortgagor and mortgagee in payment of mortgage. 36**Wyo** 279, 254**P**123. (7) Courts know judicially that neither bank nor customer anticipates that bank will prevent check for collection personally. 29 **Ariz**89, 239**P**785.

65–11 31**Ariz**161, 251**P**458; 94**Fla**528, 114**S**438. [a] (3) Courts take notice that moneymen of honor, integrity, and good reputation on occasions have been unable to borrow money at banks. 119 **Kan**321, 239**P**769. (4) It is common knowledge that banks lending money on security require signature of both husband and wife. 98**CalA**408, 277**P** 146. (5) It is common knowledge that banks do not usually discount notes running for period of six months. **NJ Sup** 145**A**461. (6) Courts may notice common practice among banks, on taking of renewal or collateral form notes, to retain possession of original note and mortgage as unsatisfied security for balance of debt due to bank. 150 **SC**267, 148**SE**54.

65–12 233**Ky**156, 25**SW(2d)**41.

65–14 99**WVa**544, 130**SE**142.

65–15 127**Misc**515, 216**NYS**713; **Tex CommnA** 284**SW**540. [a] (2) **Tex CommnA** 284**SW**540. (6) That corporation officers usually draw checks payable "to cash" for payroll and other purposes. 127**Misc**515, 216**NYS**713.

65–15½–New. Judicial notice taken that men of honor, integrity, and good reputation have failed at times to get their checks cashed. 119**Kan**321, 239 **P**769.

65–15⅓–New. , and that banks of a state keep double entry system of bookkeeping. 50**SD**524, 210**NW**730.

65–16 43**F(2d)**950 (dealing in U. S. securities greater than any other type); 126 **Okl** 265, 259**P**523.

65–16½–New. It is common knowledge that many depositors deal directly with their bank in purchasing stock on Stock Exchange. 252**NY**430, 169**NE**635.

65–18 269**US**341, 46**SCt**135, 70**L ed**295 (practice of banks in making farm loans as agents of their customers not judicially noticed). [a] **Court will not take judicial notice** of custom of banks at particular place to receive drafts in payment of obligations. 137**Wash**335, 242**P**356.

65–23 21**AlaA**289, 107**S**791. [a] **It is common knowledge** that cashier or assistant cashier examines signatures to determine genuineness. 215**Ala**507, 111 **S**235.

65–24½–New. Court cannot take judicial notice that member of federal reserve bank was not free to collect checks deposited with it directly from the nonmember bank on which they were drawn or through any agency other than a branch bank of federal reserve bank. 75**Mont**582, 244**P**883.

65–25½–New. That broader latitude has been allowed in the matter of similarity of names in banking institutions than perhaps in ordinary commercial enterprises. 125**Misc**735, 211**NYS**785.

65–25⅙–New. It is common knowledge that a bank theoretically solvent may be subjected to a condition of panic and practical insolvency by frozen assets. 152**SC**242, 149**SE**401.

65–30 128**Misc**654, 219**NYS**676.

66–43½–New. Court cannot judicially know that plumbing fixtures and equipment were incapable of being detached and removed from premises without injury to the other property. **TexCivA** 275**SW**190.

66–43⅓–New. On the contrary it is a matter of common knowledge that ordinarily such fixtures and equipment as were installed may be detached and removed without material injury to house or premises. **TexCivA** 275**SW**190 (rule applied to closet, lavatory, tub, sink, heater, and installation equipment).

66–43¼–New. It is common knowledge that floors in factory buildings last for upward of twenty years. 146**Wash**119, 262**P**125.

66–50½–New. , that a railroad is an interstate carrier 125**Misc**801, 212 **NYS**1.

66–50⅓–New. subject to federal control. 125**Misc**801, 212**NYS**1.

66–54 219**Ala**223, 121**S**716.

66–56 29**PortoRico** 909.

67–60½–New. It is a matter of common knowledge that it would take an immense amount of money for a railroad to comply with smoke ordinance prohibiting operation of trains by smoke or steam producing vehicles; 125**Misc** 801, 212**NYS**1.

67–60⅓–New. that it would take more than a day or even a month to prepare plans to comply with such ordinance; 125**Misc**801, 212**NYS**1.

67–60¼–New. that railroad has no means of financing operations required by such ordinance except by collecting funds from patrons of the road in return for service, 125**Misc**801, 212**NYS**1.

67–60⅕–New. or borrowing upon its bonds. 125**Misc**801, 212**NYS**1.

67–60⅙–New. Courts take judicial notice that consent of interstate commerce commission must be obtained before railroad may float bond issue. 125**Misc** 801, 212**NYS**1.

67–60⅐–New. The court takes judicial notice that the United States government relinquished its management and control of railroads on a certain date. **TexCivA** 284**SW**594.

67–60⅛–New. The court takes judicial notice of increasing tonnage carried and tendency to build a double track and use the whole right of way. 13**F(2d)** 255.

67–66½–New. It is common knowledge that different engineers often differ in their judgment as to form of structure advisable and safe to carry railroads over streets. 113 **OhSt**138, 148**NE**689.

67–66⅓–New. That a railroad has knowledge of protective methods and devices may be judicially noticed. 83 **NH**401, 143**A**68.

67–74½–New. , or that federal grant of right of way attached to particular land, 76**Mont**452, 248**P**190.

67–74¼–New. or that particular tract of land was public at time of taking effect of grant. 76**Mont**452, 248**P**190.

67–81½–New. Courts will not judicially notice the invincibility of pine saplings holding logs on flat cars. **Tex CommnA** 300**SW**35.

67–83 [g] **Basis of rates and charges** includes as part of "necessary expenses of operation" sums paid for damages for injuries to employees. **TexCivA** 273 **SW**676.

68–89½–New. that highly perishable products shipped in iced car by fast freight bear higher tariff rate; 150**Va** 219, 142**SE**409.

68–94 [a] **Condition at termination of federal control** and struggle to keep railroad from receivership may be judicially noticed. 111**Conn**634, 151**A**171. [b] **Facts relating to surplus and dividends** are not judicially noticed. 111 **Conn**634, 151**A**171.

68–96 22**AlaA**613, 118**S**502.

68-5 MoA 12SW(2d)767.
68-5½-New. Court takes judicial notice that passengers do not seek conductor to tender fares but that he visits them and calls for fare. Iowa 230NW 390.
68-6 213Ky831, 281SW1018, 45ALR 1537; Mass 166NE633; Mass 168NE 171; 143Miss726, 109S665; MoA 256 SW152; TexCivA 291SW281. [j] **Courts judicially notice** that in leading countries of Europe and in Canada government owns and operates railways. 5F(2d)659. [k] **That moving heavy trains with helper engine at rear with its air hose unconnected was common** and not considered dangerous is common knowledge. 34F(2d)812.
69-7 68Utah323, 249P1064.
69-8 TexCivA 22SW(2d)492.
69-12 [a] **Amount of noise** made by train of four box cars moving two or three miles an hour cannot be judicially known. 215Ala576, 112S148.
69-13 168Ark966, 272SW360 (that jolting and jarring are incident to operation of freight trains); 45Ida313, 262P873; Mass 169NE780; 142Va96, 128SE538 (common knowledge that railroad cars will lurch going around curves).
69-18½-New. It is matter of common knowledge that car doors may be left open without exposing passengers to unusual dangers. 218MoA306, 273SW 1104.
69-18⅓-New. , that railroad coaches must have steps; 220AppDiv503, 221 NYS686.
69-18¼-New. that there must be some open space between a station platform and a train. 220AppDiv503, 221NYS 686.
70-33½-New. Judicial notice will not be taken that railroad operates specific number of trains daily in a city, 125 Misc801, 212NYS1.
70-33⅓-New. although everybody knows that many trains are operated, 125Misc801, 212NYS1.
70-33¼-New. and that a good deal of switching is necessary when local freight trains stop at a station. 168 Ark966, 272SW360.
70-35 [a] **Court cannot hold as a matter of law** that duty to ventilate potato shipments requires closing of ventilators when temperature falls to thirty degrees above zero and opening when it rises above that degree. 71CalA42, 234 P328.
70-37 83NH246, 141A227.
70-41 154Miss182, 122S371.
71-48 321Mo1080, 15SW(2d)762. usually started in such manner as to
72-64 265Mass589, 164NE441(2dcase).
72-64½-New. It is a matter of common knowledge that street cars are not throw passengers about the car. 116 OhSt291, 156NE133.
72-70½-New. The court will not take judicial notice of the extent to which passengers undertake to leave a street car while it is moving. 83NH136, 139A 370.
72-70⅓-New. It is common knowledge that street cars run on approximately schedule time. DC 32F(2d)957.
72-72 255Mass571, 152NE94.
72-73½-New. It is a matter of common knowledge that transit problems in New York City are exceptionally complicated. 240NY354, 148NE548.
72-77½-New. It is common knowledge that jitneys are not equipped with sufficient means and facilities to enable the operator himself to take into his custody and control the baggage of passengers. TexCivA 276SW347.
72-77⅓-New. It is common knowledge that operators of jitneys or automobiles carrying passengers place and take care of baggage of their passengers on the running board. TexCivA 276SW347.
72-77¼-New. that a seven passenger motor bus is different from a sixteen passenger one, 117 OhSt64, 157NE475.
72-77⅕-New. and that interstate commerce by motor vehicle is a recent development. 254Mass240, 150NE206.
73-85½-New. Gas Filling Stations. Courts will take judicial notice of what a so-called gas filling station consists. 109Conn422, 147A124.
73-85⅓-New. It is a matter of common knowledge that the modern filling station was entirely unknown in 1913 and that retail dealers sold gasoline as an accommodation. 98Fla486, 123S834.
73-85¼-New. The court will take judicial notice that wholesale dealers in gasoline at a certain time had distributing stations in a given county accessible by railroad. 98Fla486, 123S834.
73-86½-New. The court takes judicial notice that it is not the invariable practice for grain to be discharged from Buffalo elevators at once for further transportation upon being lifted from vessel. 250NY345, 165NE805.
73-88 [b] **It is common knowledge** that ambulance carrying injured person requires attendant on inside. TexCivA 297SW327.
73-95 204Iowa606, 215NW615 (loan value of policies); 212Ky770, 280SW 127; MoA 272SW105; 130Misc808, 224 NYS575; 135SC48, 133SE227; 103WVa 574, 138SE381, 383 [citCJ]. [a] (3) His common knowledge that fire insurance policy may be canceled by insured as well as insurer or by mutual consent. 217MoA630, 274SW503. (4) It is common knowledge that insurance policy on which premium has been paid may be canceled before it has run full time. 217MoA630, 274SW503. (5) It is common knowledge that on cancellation of policy part of premium paid must be returned to insured. 217MoA630, 274 SW503. (6) Notice of injury. MoA 272 SW105. (7) It is common knowledge that many insurance policies not only insure against loss by reason of damage to automobiles owned by insured and described in policies, but also cover liability to third persons. 88IndA564, 165NE77(6thcase). [c] **That no reputable company would issue automobile insurance** after one had been denied or canceled on ground that applicant was running questionable hotel, had been in jail, and was convicted for driving car while intoxicated. 147Wash390, 266P 178.
73-96 48RI321, 138A39. [b] **It is well known** that agent customarily renews policies and sends statements for premiums to insured, frequently not until after policy has expired. 51ND917, 201 NW514. [c] **Cognizance taken of blind reliance** on general agents. 48RI321, 138A39.
73-2 242NY54, 150NE599.
74-3½-New. Court may take judicial notice, that most failures of mutual insurance companies are due to inability to collect assessments. 232Mich210, 205 NW165.
74-3⅓-New. Courts will take judicial notice that cancer tends to shorten life and that a cancer victim does not enjoy "good health" as the term is used by a life insurance company. 214Ala4, 106S 335.
74-3¼-New. It is common knowledge that there are many companies engaged in the indemnity insurance business, and that many citizens of the state are stockholders. 84IndA512, 151NE620.
74-3⅕-New. It is common knowledge that, where loss is covered by several fire insurance companies, an adjuster seldom appears for each company. 25 F(2d)415.
74-3⅙-New. It is common knowledge that a person applying for insurance does not nominate the company in which the insurance shall be carried, but this is usually left to the insurance agent. 132Misc440, 232NYS351.
74-3⅐-New. It is common knowledge that insurance contracts are but contracts of indemnity. Iowa 229NW667.
74-5½-New. The ordinary method of procuring insurance of property is judicially known. 192Wis319, 212NW523.
74-11½-New. It is common knowledge that paper profits from timber operations are illusory. 133SC395, 131SE18.
74-11⅓-New. The court judicially notices that in cutting and removing timber it is usually necessary to damage or destroy some of the other growth upon the land. 136SC423, 134SE390.
74-15 31Ariz137, 250P995; 74CalA286, 240P529; Okl 261P962. [a] (3) That a geologist is needed in discovering oil. 173Ark1128, 293SW1041. [h] **In Texas.** –116Tex356, 291SW860. [i] **Nature of oil well** is subject of judicial notice. 5 PaDist&Co 351. [j] **That coal mining is seasonal employment** may be judicially noticed by Industrial Commission in determining average weekly wage. 85 Colo588, 277P777. [k] **Trial judge not familiar with customs** relating to development of oil lands and drilling of offset wells is not required to take judicial notice thereof. 168La183, 121S737. [l] **Oil wells.**–41F(2d)458.
74-18 [a] (2) That in some fields, one or more producing wells afford little evidence that another well will produce in like manner. TexCivA 18SW(2d) 256.
74-24½-New. Character of stock is not subject of judicial notice. 5PaDist&Co 351.
74-24⅓-New. [§ 1844a] (21½). **Oil Wells.** The court will take judicial notice that casing head gas or gasoline is oil. TexCivA 288SW264.
74-26½-New. Common knowledge that newspapers cease publication and go out of business. 114Nebr580, 208NW 737.
75-32½-New. It is common knowledge that numerous evening newspapers are published in New York City, each conducted under its distinctive policy. 127 Misc604, 217NYS284.
75-32⅓-New. Court cannot judicially know that "daily" newspaper was not issued on Sundays. Mo 24SW(2d)125.
75-33 316Mo770, 293SW362. [a] **That school teachers,** notwithstanding short-term contracts, often remain at one place for long periods, is a matter of common knowledge. Iowa 231NW422.
75-34 [a] (8) That successful prosecution of criminal action by former state's attorney proceeded against for disbarment is not proof of proper ethical standards. 49SD78, 206NW427. (9) That lawyers do not furnish service for clients accused of crime without assurance of compensation. TexCivA 298SW 142.
75-35 Cal 291P173; TexCommnA 29 SW(2d)980. [b] **Chiropractors.**–187Wis 25, 203NW918. [c] **Dentist,** as part of duty, should treat bleeding socket after extracting tooth, is of common knowledge. CalA 288P716.
75-36½-New. It is common knowledge that in the past male public school teachers have commanded larger salaries than women teaching the same subjects. 127Misc477, 217NYS265.
75-39½-New. Judicial notice will be taken that many cities and towns have owned water and light plants. TexCivA 7SW(2d)942.
76-58½-New. It is common experience that when one receives a wrong number and asks for specific service he wishes rendered, he will be immediately notified by person called that an incorrect call has been given. 214AppDiv186, 212 NYS53.
76-59 40F(2d)106 (that "groceries" include relishes, spreads, salads, coffee, tea). [a] (3) It is common knowledge that grocers sell vegetables, fresh and canned. 214AppDiv628, 212NYS430.
76-62½-New. It is commonly known that retail merchants are in the habit of borrowing from banks to take advantage of discounts offered by wholesalers for payment within a stated period after delivery. 147Va802, 128SE46.
76-71½-New. It is commonly known that wholesalers sell to retailers for a stated price less a discount if paid within a stated period from time of delivery. 147Va802, 128SE46.
76-73 25F(2d)742; 83CalA249, 256P 618; CalA 263P532; 90CalA151, 265P 574; 244IllA185; IndA 168NE242; 153Miss722, 121S156; 127Misc515, 216 NYS713; SD 225NW661; SD 228NW 400; TexCivA 286SW315; 140Wash459, 249P977; 147Wash42, 264P1000; 103 WVa574, 138SE381. [o] **Custom of attaching bills of lading to drafts** will be judicially noticed. 201Iowa129, 206 NW672. [p] **In sale of automobile,** court takes notice that new, rather than

used, car may be presumed prima facie, at least, as intended to be subject matter of sale. 192Wis343, 212NW670.

77-78 [a] (5) Bank's practice of receiving drafts in payment of obligations. 137Wash335, 242P356. (6) Of custom of cleaning restaurants and other public places during business hours. 176 Minn210, 222NW924. (7) Of custom of putting lights on bicycles used at night. MoA 17SW(2d)608(3dcase).

77-82 127Misc515, 216NYS713. But see 243 IllA65.

77-87½-New. Of foreign countries. Court cannot take judicial notice of foreign customs. 22F(2d)554.

77-96 199Wis320, 226NW392. [a] (3) That one stepping from moving vehicle should face in direction of its motion. 152Va883, 148SE694.

78-99 32F(2d)550; 210Ky135, 275SW 374; Mass 167NE749; 318Mo 17, 298 SW777; 31NM120, 241P1027; 116Tex 603, 297SW225, 53ALR1147; TexCivA 291SW322; TexCivA 299SW512. [a] (6) By supreme court that Chino is a sparsely settled farming district of limited area. 201Cal 456, 257P505. (7) Of area of state and proportion of virgin timber. 34F(2d)682.

78-1 206Cal 148, 273P797 (coast lines within state); 157Tenn667, 11SW(2d) 906.

78-5 125Kan117, 118, 263P786 [citCJ].

79-10 118Tex633, 158SW(2d)1023.

79-11 [b] Courts judicially notice that back lands on lower stretches of the Mississippi River are not cultivatable. 158La137, 103S537.

79-23½-New. It is judicially known that cotton is the chief money crop of the state of Texas. 112TexCr152, 15 SW(2d)650.

79-24 Ala 128S170; 143SC223, 141SE 375; 114Tex501, 273SW785, 40ALR833; 116Tex603, 297SW225, 53ALR1147; Tex CivA 291SW322. [a] (6) Court takes judicial notice of Mobile Bay, its shores and islands. 215Ala499, 111S231. (7) Court takes notice of course and characteristics of Navasota River. 116Tex 603, 297SW225, 57ALR1147.

80-28 33Ariz197, 263P589; 168Ark565, 270SW963; 241Mich240, 217NW2; 143 SC104, 141SE180; TexCivA 291SW322. [a] (12) That flood waters of Texas are not only of no value to riparian owners, but detrimental to them. 116Tex82, 286SW458. (13) Court will judicially notice length, width, and depth of Mississippi River and its encroachment on adjacent lands during flood (175Ark934, 28W(2d)32), (14) also, vast area draining into Mississippi River and result of action of flood waters on banks and levees (175Ark934, 28W(2d)32). (15) That violent squalls are frequent in and about New Orleans Harbor in early spring. 34F(2d)783. [b] (1) 143SE223, 141SE375. (6) It is common knowledge that San Antonio River follows winding course through city of San Antonio. TexCivA 291SW1112.

80-30 325 Ill 378, 156NE346.

80-31 131Misc514, 227NYS209.

80-38 [a] Court judicially knows that water for irrigation purposes is needed in western part of United States. 5 F(2d)466.

80-39 96Fla860, 119S134(2dcase).

81-44½-New. It is not common knowledge that retardation of discharge of the water in a stream will not raise the level of the pond above a dam. 82NH225, 131A601.

81-46 TexCivA 28W(2d)1012 (Rio Grande).

81-47 175Ark1059, 1SW(2d)563. [a] (12) Great Salt Lake. Utah 286P626 (22 per cent salt).

81-48 217Mo 342, 275SW67.

81-54 290Pa322, 138A860.

82-57 114Tex501, 273SW785, 40ALR 833; 116Tex603, 297SW225, 53ALR 1147.

82-64 42F(2d)899.

82-65 97CalA588, 276P113(2dcase).

82-69 23AlaA18, 121S427(2dcase) [certiorari den 219Ala154, 121S428(1st case)].

82-73 NJSup 134A843 [citCJ].

83-77 72CalA484, 237P763.

83-83 Ala 128S158; 136Wash74, 239 P4. [f] Court takes judicial notice that county is within state. 136Wash74, 239 P4.

83-88 315Mo 298, 286SW705; 113 Okl 101, 239P249. [a] (2) 120Kan612, 244P1042.

83-91 Ala 128S158; 232Mich433, 205 NW151; 13PaDist&Co 248. [a] (2) Judicial notice taken that only consolidated city and county in state of California is San Francisco. 202Cal 110, 259P730.

84-95 136Wash74, 239P4.

84-97 42F(2d)899; 177Ark474, 7SW (2d)13; NJSup 147A720; 113 Okl 101, 239P249; 140 Okl 176, 282P608; Tex CivA 283SW638, 640 [citCJ]; TexCivA 293SW677. [b] That particular place not county seat is in certain county is not judicially known. TexCivA 16SW (2d)917.

84-99 217Ala511, 116S681; 228Ky471, 15SW(2d)286; 25 OhNPNS69; TexCivA 19SW(2d)68. [a] 319Mo 976, 5SW(2d) 83, 88 [citCJ].

84-3-4 210Ky135, 275SW374.

84-5 214Ala591, 108S534; 217Ala511, 116S681; 76CalA267, 244P919; CalA 274P1028; 210Ky135, 275SW374; LaA 130S254; 238Mich119, 213NW143; 315 Mo 298, 286SW705; TexCivA 2SW(2d) 1012.

84-7 214Ala591, 108S534; 170Ark908, 281SW671; 98Fla417, 123S817; 161Ga 524, 131SE517, 44ALR534; 336 Ill 297, 168NE305; IndA 148NE163; 238Mich 119, 213NW143; 74Mont398, 240P825; TexCivA 283SW638, 640 [citCJ].

85-10 208Cal 286, 280P980 (Florence, California, is outside of Los Angeles).

85-11 232Mich433, 205NW151.

85-22 128Misc575, 218NYS667. But see 107Conn587, 141A654.

85-22½-New. It has been judicially noticed that the city of St. Louis is surrounded by the county of St. Louis, 315 Mo 298, 286SW705.

85-22⅓-New. and that no city other than St. Louis can be within the confines of the county. 315Mo 298, 286SW 705.

85-23 22AlaA63, 112S184; NJSup 134 A843.

85-24 202 Iowa1140, 211NW568.

85-26 202 Iowa1140, 211NW568; Tex CivA 297SW689. [a] Court takes judicial notice of location of land described by township and range, with reference to town in which land conveyed was to be situated under agreement. 95CalA 117, 272P614.

85-29 202 Iowa1140, 211NW568.

86-32 CalA 283P982.

86-34 232Mich433, 205NW151.

86-36 22AlaA63, 112S184.

86-49 Ala 127S506.

86-51-53 136Wash74, 239P4.

86-54 214Ala591, 108S534.

87-62 237 IllA416.

87-63 79CalA339, 249P533; 237 IllA 416.

87-67½-New. Courts will not take cognizance that a street is a "boulevard" except where so designated by ordinance. 209Ky218, 272SW755.

87-67⅓-New. Courts have taken judicial notice that a designated avenue is not a post office in the state. 89 IndA 431, 155NE539.

87-68 126Me32, 135A824. [b] Residential character of neighborhoods traversed by streets best suited for use of vehicles is matter of common knowledge. 201Cal 530, 258P60.

87-72 86CalA13, 260P798.

87-74 201Cal 57, 255P500; 86CalA13, 260P798; 126Me32, 135A824; 213 AppDiv595, 211NYS382; 124Misc886, 210NYS102 (that East Avenue is chief residential street of Rochester).

87-79 77Colo 130, 235P343.

88-92 72CalA484, 237P763; 83 IndA 493, 148NE425; 219Ky794, 294SW463; NJSup 147A720. [a] (9) That distance between Norris and Helena, Montana, is more than thirty miles. 75Mont317, 243P1063.

88-95 114Nebr496, 208NW615.

89-99 76Mont128, 245P518; TexCivA 286SW526, 527 [citCJ].

89-7 TexCivA 286SW526.

89-15½-New. , or that a certain railway passes, and is the only railway to pass, through certain towns. TexCivA 286SW526.

89-19 TexCivA 286SW526, 527 [citCJ]; TexCivA 4SW(2d)641.

90-28 247NY211, 160NE13.

90-29 98Fla417, 123S817.

90-31 39F(2d)247 (personnel of Tariff Commission at a particular time).

90-33 [a] (6) Court judicially knows that industrial school established under statute is used for reformation of delinquent children convicted of felonies. 175Ark217, 299SW5.

90-35 159Tenn290, 17SW(2d)908; Wash 286P839. [a] (9) That there are two opposing schools of thought relating to improvement of city streets by competitive bids. TexCivA 284SW251. (10) That for number of years state has been constructing system of highways. 143SC104, 141SE180. (11) Public operations of city. 219Ala19, 121S14.

90-36½-New. The supreme court takes judicial notice of the uncertainty of a litigation over a contested will. 126Me 167, 136A814.

90-36⅓-New. Courts know judicially that there are naval vessels under war department jurisdiction. 288Pa36, 135 A650.

90-38 136Wash74, 239P4; 192Wis646, 212NW295.

90-38½-New. The courts of the state will take judicial notice that a sister state of the Union is a sovereign state. 58ND643, 227NW52.

91-40 217Ky305, 289SW312.

91-44½-New. The court takes judicial notice that in the majority of school districts levy of maximum constitutional rate is necessary for operating expenses of a school. 312Mo 1, 278SW769.

91-44⅓-New. Purpose of creating school districts is judicially known. 165 La256, 115S479.

91-44¼-New. All courts were required to take judicial notice of the establishment of a fresh-water supply district. TexCivA 11SW(2d)837.

91-47 14F(2d)877; 214Ala132, 107S73; 220Ala172, 124S211; 198 Ind574, 154NE 384; 311Mo 32, 276SW872; 319Mo 316, 4SW(2d)467; 322Mo 1050, 17SW(2d) 977; 220MoA708, 293SW471; 31NM576, 249P242, 248 [citCJ]; 138 Okl 295, 281 P126; 9PaDist&Co 366; TexCivA 24 SW(2d)61; TexCivA 28SW(2d)243 (judicial notice of city charter); 199Wis 575, 224NW748. [b] (1) TexCivA 297 SW496.

91-48 31NM576, 249P242, 248 [citCJ]. [b] 198 Ind574, 154NE384.

92-49 335 Ill 299, 167NE106; 31NM 576, 249P242, 248 [citCJ].

92-51 TexCivA 281SW642.

92-52 Contra 140 Okl 105, 282P332.

92-53 201Cal 327, 257P40; 174Minn 410, 219NW760; 317Mo 1208, 298SW 833; TexCivA 8SW(2d)249.

92-53½-New. The supreme court will take judicial notice of the number of townships in the state. 113 OhSt434, 149NE392.

92-53⅓-New. It is common knowledge that towns generally take out compensation insurance to protect employees working on highways. 214AppDiv345, 212NYS410.

92-53¼-New. It is common knowledge that experts are employed by municipalities, and no question as to payment of their compensation is raised. 127Misc 354, 216NYS128.

92-54 6F(2d)742; 12PaDist&Co 222. [b] Lack of treaty judicially noticed.—That there is no treaty of extradition between Greece and United States is judicially noticed. 264Mass318, 162NE 345, 59ALR891.

92-68 84Colo 472, 271P627.

92-69 CalA 292P662; 200 Ind506, 165 NE239; NC 155SE616.

92-71 214Ala356, 108S18.

92-79 TexCivA 9SW(2d)747.

92-82 214Ala353, 107S854; Mass 164 NE654; 319Mo 848, 5SW(2d)54; Tex CivA 18SW(2d)212.

93-85½-New. The court takes judicial notice of mechanical means whereby a voter registers his choice of candidates on voting machines. 128Misc163, 218 NYS3.

93-85⅓-New. Referendum. The court must take judicial notice of the required form of ballot for referring a legislative measure to the people. 130 Or304, 280P495(2dcase).

93-86 170Ark10, 278SW649.
93-87 170Ark10, 278SW649.
93-89 3LaA127, 130 [quotCyc].
93-91 Cal 245P946.
93-91½-New. It is a matter of common knowledge that county officers are nominated by political parties, 70Utah156, 258P1016.
93-91½-New. and that such nominations are usually made within three months prior to the general election. 70 Utah156, 258P1016.
93-92 213Ala494, 106S150.
94-95½-New. official translator, 213Ala 494, 106S150.
94-6 169Ark97, 273SW389, 41ALR782 (court knows that "it is not likely that any county in the state has ever or will ever, pay the total cost of a courthouse out of the revenues of the county for a single year").
94-10 181Ark450, 26SW(2d)111; 68 CalA393, 229P876; 104Conn579, 134A 169; 128Misc875, 220NYS281. See also Or 292P813. [a] (4) 143Miss870, 108S 288. (7) That tendency of assessments in Louisiana is to fluctuate upwards. 158La251, 103S757. (8) That real estate taxes in borough of Manhattan are assessed and imposed in March of each year. 132Misc329, 229NYS560. (9) Assessments of property in state of Louisiana made in spring and summer of year. 27F(2d)766. (10) It is within common knowledge that no express statutory remedy is required for taxpayers to restore to commissioner of internal revenue right to assess income taxes on their returns after statute of limitations has deprived him of such authority. 29F(2d)865. (11) That wherever listings of property for taxation are made with reference to individual, his name appears but once, and need not be repeated. 98CalA557, 277P741.
94-12 252 IllA5. [a] (2) Judicial notice is taken that there is no collection till tax rolls are filed. 27F(2d)766. [b] (3) Court may take cognizance that many millions of dollars were due in delinquent taxes. TexCivA 297SW1055.
94-13½-New. and of general belief that amendment of a constitutional prohibition of contracting debt for internal improvement was necessary. 187Wis180, 204NW803.
95-18½-New. The court cannot take judicial notice of the practice of counties of the state under former statutes similar to existing statutes relating to taxation of insurance companies. 37Wyo 189, 260P180.
95-20 217Ala128, 115S21; 169Ga781, 151SE490; 243Mich266, 220NW733; TexCivA 198SW(2d)68 (of land on which city located).
95-22 TexCivA 218SW(2d)716.
95-24 136Wash74, 239P4. [a] (4) That certain range number could not be in named county. 136Wash74, 239P4.
96-25 92CalA708, 268P959, 961 [citCJ].
96-34 136Wash74, 239P4.
96-35 165La433, 115S646.
96-38½-New. , that at all section corners permanent monuments exist. 321 Ill 346, 151NE896.
96-41½-New. It is common knowledge that present day surveys often fail to follow original lines. 212Ala515, 103S 549.
96-41½-New. , that the court will take judicial notice of the fact that at each section corner a permanent monument exists. 319 Ill 351, 150NE250.
96-41¼-New. The courts take judicial cognizance of the location of permanent landmarks and fixed monuments. 98Fla 417, 123S817.
96-43 43 Ida214, 250P648, 50ALR1418.
96-43½-New. Judicial notice is taken that a post office of a certain city in the state is a registry office. 43 Ida214, 250P648, 50ALR1418.
96-48 253 IllA29.
97-53 See also 232Mich639, 206NW573.
97-58 223Ky285, 38SW(2d)641 (presumed to know).
97-59 261Mass510, 159NE599.
97-63 261Mass510, 159NE599.
97-64 213Ala494, 106S150.
97-79 220Ala172, 124S211; 220Ala309, 125S51; 121 OhSt511, 169NE599 (official roster of officers); 116 Okl 236, 244 P422.
97-82 116 Okl 236, 244P422.
97-85 SD 225NW54.
98-90 40GaA314, 149SE389 (name of sheriff). [a] (6) That many deputies, such as deputy sheriffs, are appointed at their own request to serve their personal interests. 199Cal 221, 248P912, 47 ALR359. (7) Election of new sheriff and his assumption of office. 151Md 553, 135A1367, 49ALR1303.
98-96½-New. boards of public instruction, 98Fla81, 123S545.
98-5 215Ala587, 112S195.
98-22 40F(2d)500 (assistants to Secretary of Labor).
98-29 223Ky285, 38SW(2d)641.
98-30 261Mass510, 159NE599.
99-44 But see 253 IllA135.
99-45 120 OhSt47, 165NE537. See also Wash 286P36. [b] 100CalA66, 279P831.
99-45½-New. regulations of governmental and quasi-governmental agencies. 86 IndA709, 159NE771.
99-51 [a] Regulation of weights and measures bureau in Porto Rico not judicially noticed by insular courts, 29 PortoRico 970.
99-52½-New. or code of ethics of police department. 102Conn708, 130A184.
99-52½-New. Nor whether rule relieving telegraph company from free delivery of messages beyond certain limits was adopted by interstate commerce commission. 39GaA152, 147SE151.
99-53 TexCivA 288SW(2d)611.
99-56 TexCivA 273SW676 (interstate commerce commission's rules).
99-57 [a] Utah 290P776.
100-58 44Philippinc14 (United States department of labor regulations judicially noticed). [a] 24F(2d)392 (relating to war savings certificates). [e] Rulings of state department will be judicially noticed by court of appeals of District of Columbia. 55AppDC295, 5 F(2d)119. [f] Regulations of post office department will be judicially noticed by federal courts. 14F(2d)280. [g] Court of appeals of District of Columbia will take judicial notice of rules of board of tax appeals promulgated under Revenue Act (1924) § 900. 23 F(2d)972.
100-59 [b] Rules and regulations of interstate commerce commission are not judicially noticed. 15F(2d)28.
100-67 24 OhA272, 156NE510.
100-68 21F(2d)673; 32F(2d)627; 34 F(2d)843; 41F(2d)305; CalA 292P175; 142Wash653, 254P445. See also 73 Mont219, 236P250. [c] War department rules for presentation of finger prints of members of army held judicially noticed. 142Wash653, 254P445.
100-69 212Ala494, 106S150.
100-70 19F(2d)722; 78CalA209, 248P 275; 96CalA753, 275P225; 199 Ind708, 160NE347; 89 IndA369, 164NE499. [c] Judicial notice not taken (1) of specific acts of translator. 213Ala494, 106S150. (2) That certain individual was official translator, when certificate did not purport to be official and record did not show official identity. 213Ala494, 106 S150.
100-71 232Ky218, 228SW(2d)607(2d case) (court takes judicial notice that certain roads are included in state highway projects).
100-76 154Wash682, 283P198.
100-77 TexCivA 118SW(2d)358.
101-83 [a] (8) Courts may judicially notice United States patents. 22F(2d) 214. (9) That workmen's compensation commission has never recognized certain claim as within purview of Compensation Act. 145Wash263, 259P720.
101-86½-New. It is common knowledge that a sheriff in any of the populous counties of the state must have an automobile at his command for immediate use. 136Wash403, 240P560.
101-86½-New. Judicial notice is taken that the commission will not issue a permit to transport liquor into bone dry territory. 22F(2d)441.
101-86¼-New. It is common knowledge that application for reclamation of land under statute is subject to much procedure. Or 286P563.
101-89 42F(2d)331; TexCivA 271SW 242; Va 152SE358.
101-90 6F(2d)742.
101-92 37F(2d)49; 154Miss233, 122S 475.
101-93½-New. The courts take judicial notice of the fact that on Nov. 14, 1921 the president proclaimed a treaty of peace terminating the World War. 55 ND445, 214NW249.
101-94 310Mo 184, 274SW827.
102-6 310Mo 184, 274SW827.
102-9 Mo 268SW(2d)980. But see OhA 173NE445.
102-14 32Ariz532, 260P1023.
102-18 [a] Weather report for particular day will be judicially noticed. Tex CivA 291SW929.
102-21 22F(2d)214.
102-24 15F(2d)823; IndA 152NE287 (acts of congress); 128Misc345, 217NYS 883; 254NY179, 172NE462.
102-28½-New. Other matters relating to legislature which are judicially noticed. 8F(2d)883; 37 OklCr24, 255P 1022.
102-29 37 OklCr24, 255P1022.
102-30 37 OklCr24, 255P1022.
102-37½-New. But see 143SC283, 141 SE454 (court cannot take judicial notice of legislative intent of act adopted by general assembly, but vetoed by governor).
102-39 169Ark97, 273SW355, 41ALR 629; 171Ark547, 285SW2; 174Ark214, 295SW9; 176Ark139, 28W(2d)44; 176 Ark1130, 5SW(2d)346; 181Ark537, 26 SW(2d)581; 89Fla361, 104S577; 92Fla 543, 110S343; Nebr 231NW772; 213 AppDiv206, 211NYS306; TexCommnA 283SW146. [c] Courts in construing statute will take judicial notice of failure of attempted amendment thereof. 147Va593, 136SE565, 50ALR1043.
103-42 169Ark97, 273SW355, 41ALR 629.
103-49 Nebr 231NW772.
103-58 16F(2d)206; 7PaDist&Co 663.
103-59 21AlaA516, 109S762; 98Fla339, 123S780; Ind 164NE715; 234Ky199, 27 SW(2d)959; TexCivA 19SW(2d)578. [c] 51SD464, 214NW850.
104-67 SD 230NW22.
104-70 [a] In Washington the Supreme Court takes judicial notice of courts of sister state and their jurisdiction. Wash 288P223.
104-72 16F(2d)206.
104-73 [b] Referee in bankruptcy.-8F (2d)146.
104-80 179Ark984, 19SW(2d)1020; 90 Fla769, 107S174.
104-81 98Fla417, 123S817; IndA 169 NE89; Mo 27SW(2d)21.
104-88 NC 155SE719; 113 Okl 101, 239 P249.
105-89 TexCivA 17SW(2d)1114.
105-93 36F(2d)5; 212Ala480, 103S460; 180Ark567, 22SW(2d)373; 225Ky100, 7 SW(2d)849.
105-95 215Ala47, 109S278; 176Ark 1204, 299SW998; IndA 169NE89; 232 Mich420, 205NW177 (courts will notice that in Wayne County terms are one month apart and trial judges are as rule very busy); 320Mo 746, 8SW(2d) 824 (calendar date); MoA 298SW99; 131 Or242, 276P281; TexCivA 271SW 936; TexCivA 284SW654; TexCivA 23 SW(2d)514.
105-97 212Ala645, 103S850 (courts judicially notice that court adjourned on particular day by operation of law).
105-2 216Ala423, 113S309; 218Ala364, 118S739(2dcase).
105-2½-New. Supreme court takes judicial notice of fact that trial court did not preside at a certain term. 167Minn 323, 209NW32.
105-4 90Fla769, 107S174; 48 Ida572, 285P456; 197NC472, 149SE685 (particular person special judge); NC 155SE 719; 121 Okl 262, 249P710; 10PaDist& Co 577; Vt 135A600. [a] That Cook County Court's business for many years necessitated having outside judges is common knowledge. 339 Ill 610, 171NE 737.
106-5 121 Okl 262, 249P710.
106-8 198NC702, 153SE263.
106-10 OklCr 269P384.
106-16 Ariz 284P521.
106-32 TexCivA 285SW933.
106-33 218Ala390, 119S4; 220Ala309, 125S51.
107-51 MoA 148SW(2d)692.
107-55 151Md553, 135A367, 49ALR 1303.

107-58 151Md553, 135A367, 49ALR 1303.

108-67 But see 220Ala189, 124S417 (court could not judicially know that one was attorney).

108-73 220Ala189, 124S417 (court could not judicially know that one was attorney for certain party).

108-75½-New. The supreme court will take judicial notice that an attorney was for many years practicing in a state court although his name does not appear on the roll of attorneys. 198 Cal 46, 243P657.

108-77½-New. Receiver's knowledge obtained after appointment concerning receivership estates is not imputed to the court in absence of disclosure. 13 F(2d)158.

108-78 50Nev99, 256P1058; TexCivA 30SW(2d)539. [a] 245 IllA307. See also 11LaA301, 123S392; 11LaA295, 123S394. [b] In New York.-125Misc561, 211NYS588.

108-80 [a] (9) Notice taken that examination of witnesses often requires counsel to approach them and move between stand and counsel's desk. 72CalA258, 236P975. (10) That examination of witness often requires near approach of counsel. 72CalA258, 236P975. (11) That strictness of pleading has been lessened materially. 92CalA203, 268P396. (12) That in closely contested cases, where there is conflict of testimony it is difficult to detect where truth lies. NJSup 149A526. (13) Other instances. 207 Iowa944, 223NW868; Wash 286P654.

108-84 218Ala354, 118S644; 97CalA452, 275P1005; 188 IllA569; 248 IllA396; 127Mc167, 142A377; Mo 272SW928; 320Mo 280, 68SW(2d)849; MoA 1SW(2d)848; MoA 3SW(2d)735; 222MoA894, 68SW(2d)668; 73Mont180, 235P770. [a] (2) But see 255 IllA479. (5) Rules of superior court are not judicially known by supreme court. 317 Ill 561, 148NE293. (6) Court on review will not take judicial notice of rules of municipal court, same not being shown by record. 185 IllA386; 185 IllA400. (7) Supreme Court may take notice of proceedings on application for judgment against lands for taxes in county court of Cook County. 338 Ill 335, 170NE216.

109-88½-New. Courts do not judicially notice to what extent suits for false claims are instituted or successful. NH 150A540

109-88¼-New. In disposing of a motion to sever issues of law and fact in a carrier rate case, jud vial notice may be taken of the large number of rate cases theretofore considered by the courts where experience has demonstrated the magnitude of the labors involved and the time required. 134Misc827, 236NYS449.

109-89 269US121, 46SCt41, 70Led193; 279US553, 49SCt423, 73Led838; 281US331, 50SCt288, 74Led881; 14F(2d)557; 24F(2d)66; 34F(2d)353; 214Ala587, 108S529; 215Ala150, 110S46; 215Ala538, 112S105; 72CalA484, 237P763; 56App DC381, 15F(2d)895; Ind 166NE265; 206 Iowa766, 221NW449; 247Mich192, 225NW632; 220MoA115, 279SW740; 117 OhSt327, 158NE748; 125 Okl 66, 256P704, 52ALR1270; TexCivA 292SW947; TexCivA 26SW(2d)364 (case involving same subject matter and same parties). [j] Court of civil appeals can and will take judicial notice of what has been decided in opinions returned by it and by commission of appeals. TexCivA 11SW(2d)237.

109-92 [b] 208Ky519, 271SW598.

110-7½-New. Judgment has been reversed on which a garnishee action is based. 144Miss899, 110S839.

110-8 93CalA277, 270P270.

110-14½-New. Judicial notice is taken of the many actions being brought against municipality. 214AppDiv142, 211NYS721.

110-15 214Ala15, 106S239; 217Ala128, 115S21; 218Ala390, 119S4; 74CalA411, 240P1021; 110Conn208, 147A675; Conn 151A512; 122Kan755, 253P556; MoA 272SW1032; MoA 275SW599; 34NM431, 283P49; NC 154SE832; 222AppDiv422, 226NYS491; NC 153SE845 (only what record discloses); 154SC445, 151SE792; TexCivA 271SW199; TexCivA 278SW520; TexCivA 281SW326; TexCivA 287SW117; TexCivA 293SW655; TexCivA 10SW(2d)178; TexCivA 13SW(2d)979; Utah 255P430, 431 [citCJ]; 154Wash363, 282P201. [a] (1) TexCivA 8SW(2d)291. [h] Judicial notice will not be taken of evidence at earlier trial which has not been offered and is not before jury on motion for directed verdict. 175 Minn411, 221NW526.

111-16 TexCivA 271SW199.

111-21 37F(2d)571; 213Ala494, 106S150; 214Ala15, 106S239; 215Ala545, 112S119; 321Mo 1052, 15SW(2d)329; 220MoA115, 279SW740; 222AppDiv422, 226NYS491; 145Va653, 134SE675. [d] That last verdict materially exceeds prior verdict may be judicially noticed. 214Ala15, 106S239.

112-27½-New. The court judicially knows, from a referee's certificate, that a claim for a specific sum was allowed and approved by the court. 5F(2d)75.

112-27¼-New. Affirmative defenses will not be judicially noticed. 86Colo 330, 282P193.

112-30 [a] In mandamus to annul decree fixing alimony pendente lite supreme court will notice certified and original record in cause on prior appeal. 212Ala496, 103S558.

112-32 [b] 152Wash323, 277P850.

112-33 35Wyo 430, 251P460.

112-34 244 IllA218; 144Miss899, 110S839; TexCivA 22SW(2d)1083.

112-37 [b] Where all of the record is before the court no proof thereof is necessary to sustain judgment against garnishee. 255 IllA456.

113-40 29F(2d)92; 214Ala587, 108S529; 83CalA74, 256P595, 600 [citCyc]; 336 Ill 506, 168NE294; 208 Iowa623, 226NW32; 156Miss199, 125S406; 73Mont297, 236P553; 50Nev269, 257P618 [citCJ&Cyc]; 30 OhA236, 164NE776; 20 OhA493, 152NE731; 23 OhA481, 155NE699; SD 227NW487; 69Utah376, 255P430, 431 [citCJ]. But see 321Mo 1052, 15SW(2d)329; 117 OhSt327, 158NE748. [e] (7) Appellate court will not take judicial notice of interlocutory judgment in connected case pending below. 50Nev269, 257P618. (8) Suit to open and vacate judgment foreclosing deed of trust lien held not so connected with original suit as to authorize court to take judicial knowledge of such judgment. TexCivA 13SW(2d)979.

113-41 11PaDist&Co 120, 124 [quot CJ].

114-46 81CalA499, 253P1112; 81Colo 468, 256P305; 207 Iowa581, 223NW383; 168La547, 122S845; Mo 19SW(2d)1063; 144Okl 213, 291P80; TexCivA 278SW520; TexCivA 28SW(2d)305; Tex CivA 23SW(2d)449; 149Va262, 141SE138. [a] (15) Reference in pleading to another suit between same parties and involving same subject matter enables court judicially to notice such other suit. 213Ala38, 104S328. (16) In proceedings to set aside judgment of prior suit. TexCivA 278SW520. (17) In action to recover collateral securing bond indemnifying plaintiff on opening of default judgment, court may take notice that action may never be tried. 131 Misc679, 227NYS189. (18) In quo warranto proceedings, supreme court takes judicial notice of record of supreme court in another action between same parties. 119 OhSt308, 164NE233.

114-47 213Ala38, 104S328; 313Mo 130, 280SW1035, 44ALR1328. See also MoA 28SW(2d)115.

114-50 156Miss199, 125S406; 313Mo 130, 280SW1035, 44ALR1328; Mo 31SW(2d)1041; 22 OhA282, 153NE897; 117 OhSt327, 158NE748.

115-52 Ala 127S155; 39GaA225, 146SE856; 202 Iowa866, 211NW410. But see 104NJL260, 140A883. [e] In Texas.-CivA 284SW991.

115-53 Mass 170NE619 (statement of facts from opinion of U. S. Supreme Court).

115-53½-New. , or of courts in other states. 160Tenn208, 22SW(2d)356.

115-57½-New. In Ohio the court of appeals may take judicial notice that the supreme court has decided a certain matter in a certain way on a named date and time. 22 OhA282, 153NE897.

115-58 27F(2d)159; 37GaA307, 140SE41; 203 Iowa995, 213NW609; 240Mich646, 216NW442.

115-60 84 IndA373, 150NE391. [b] As regards right of court to recognize existence of government originating in revolution or revolt, where it has not been recognized by political department of government, courts must take judicial notice of material change in situation affecting such question since trial below. 30F(2d)278.

116-66½-New. The court must judicially recognize that state of Russia survives, notwithstanding changes in government. 21F(2d)396.

116-66¼-New. In an action by a Russian bank to recover a deposit with defendant bank, the court must recognize the fact that the corporate life of the Russian bank has been terminated, although it cannot recognize decrees of the Soviet government. 133Misc527, 233NYS255.

116-82 84 IndA373, 150NE391.

116-84 42F(2d)620; 200Cal 235, 252P722; Cal 278P840; Cal 287P475; 95 Fla530, 116S449; 206Ky643, 271SW695; Mass 172NE218.

117-85 91Fla118, 107S146; 318Mo 17, 298SW777.

117-85½-New. Judicial notice of impossibility of performance of decree two hundred and sixty-two dollars in twenty days in year 1834, and that such decree did not impair the function of the alcalde under decree thirty-nine dollars on March 24, 1834. TexCivA 273SW993.

117-96 [a] Rights of colored people.-Court takes judicial notice that prior to Civil War colored people had no civil rights. 161Ga110, 129SE783.

117-98 8F(2d)175; 33F(2d)969; 88 IndA309, 152NE609; Mo 28SW(2d)1001. [b] Banking situation and manner and method of conduct prior to 1920 will be judicially noticed. 32F(2d)315.

117-99 34F(2d)5 (decrease in purchasing price of dollar).

117-1 173Ark147, 293SW50.

117-2 19F(2d)547.

118-5 20F(2d)837 (changes in building art).

118-12½-New. It is matter of common knowledge that certain oath-bound societies have been revolutionary and menace to established government. 241NY 405, 150NE497.

118-12¼-New. Courts will take judicial notice that certain treaties of peace have been signed. 84 IndA373, 150NE391.

118-13 84 IndA373, 150NE391.

118-20 2LaA675.

119-40 Mo 31SW(2d)1045.

119-43 [d] Interruption or cessation of communication between this country and foreign countries of the east from time United States became involved is matter of common knowledge. 68Utah 383, 250P651.

119-44 17F(2d)34; 202Cal 345, 260P881 (limited marketing of municipal securities); 159Tenn314, 18SW(2d)1 (losses by banks from post-war defination); 68Utah421, 250P1033. [c] (1) 8F(2d)106. [g] TexCivA 274SW1023 (deflation in 1920). [h] Prices falling and money scarce.-68Utah421, 250P 1033 (after war). [i] That failures not necessarily due to fraud or mismanagement of enterprise.-68Utah421, 250P 1033.

119-48 84 IndA373, 150NE391.

120-59½-New. Court judicially knows that after Armistice millions of discharged soldiers found former positions filled. Wash 288P913.

120-61 328 Ill 377, 159NE811.

120-62 219MoA34, 269SW955.

120-64 See also 234 IllA234. [b] (4) Purchasing power in 1928 has been judicially noticed to be much less than that twenty or even fifteen years before. 176Ark737, 4SW(2d)528.

120-71 118Tex433, 13SW(2d)358.

121-78 [a] (3) Court judicially knows that San Antonio was established in 1717 or 1718 and received grant of land within its limits from king of Spain. TexCivA 291SW1112.

122-91 91CalA542, 267P323. [a] (11) That school district boundaries frequently change. 317 Ill 477, 148NE247. (12) To Texas history as to establishment of San Antonio and grant of land by Spain to such city, and public acts recognizing validity of grant. 117Tex 73, 297SW219.

122-92½-New. or that many controversies have arisen in state respecting dates of appropriations of state waters. 66Utah25, 239P479.

122-94½-New. That oil and gas in paying quantities were not discovered in the state until certain year. 158La629, 104S479.

122-94⅓-New. Court judicially knows that up to about July 3, 1918, casinghead gas was by-product of oil wells often wasted. TexCivA 28SW(2d)914.

122-95 8F(2d)595; 73CalA268, 238P787; 49ND597, 192NW977; 187Wis180, 204NW803. [a] (7) That the Klu Klux Klan exercises its activities largely under cover of darkness, with its members disguised by hoods and gowns, burning crosses in manner to annoy large class of people, parading through public streets in night in automobiles decorated with banners, all of which practices have tendency to excite and terrorize people. Also that organization is opposed to certain classes because of their race or religion. 213App Div414, 210NYS269. (8) Reason for enactment of law putting automobiles transporting passengers for hire under public service commission. 82NH327, 133A451, 47ALR218.

123-7½-New. The court will take judicial notice that the government in the exercise of its sovereign right, took over the Chicago, Burlington & Quincy Railroad during a portion of the time from 1912 to 1922. 30F(2d)803.

123-8 248 IllA35.

124-21½-New. The court takes judicial notice of commonly used abreviations of christian names. TexCivA 295SW698.

124-25 16F(2d)105; 16F(2d)349; 16F(2d)598; 20F(2d)328; 15CustA156; 16CustA257; 16CustA353; MoA 22SW(2d)215; 76Mont248, 245P947. [a] (13) "Lease." TexCivA 284SW1057. [b] (2) Judge knows of common knowledge that many people use words "children and heirs" as meaning same thing. 209Ky63, 272SW48. [d] **Definition of words in standard dictionaries** is taken as matter of common knowledge, which jury is supposed to possess. 218Ala493, 119S21.

124-26 16F(2d)105.

124-27 16F(2d)349; 251NY467, 167NE705 (in law and common speech); TexCivA 284SW1057.

125-29 16F(2d)598 (term long in use).

125-35 76Mont248, 245P947; TexCommnA 291SW206. [a] (10) "Life membership" in social club. 12F(2d)951. [c] 16F(2d)105 ("sporting woman").

125-36 76Mont248, 245P947. [b] **"Executive departments of government"** is judicially noticed as including all acts required of public officials by legislative authority and all persons on whom are imposed duties in administration of public affairs. 314Mo 33, 282SW1007.

125-47 [b] **"606."**–It is matter of common knowledge that "606" is a name frequently used for salvarsan, a specific for syphilis. 95CalA617, 273P165. [c] **Decimals.**–TexCivA 8SW(2d)206.

126-56½-New. **"9¾" in price clause of contract** is not judicially noticed. TexCivA 295SW263.

127-71 13F(2d)356; 13F(2d)997; 15F(2d)28; 15F(2d)942; 22F(2d)622; 25F(2d)979; 30F(2d)466; 34F(2d)284 (2dcase); 34F(2d)660(2dcase); 34F(2d)808; 35F(2d)421; 40F(2d)323 (as to bridges over navigable streams).

128-83 CalA 266P307; Ind 172NE887; 260Mass250, 157NE358; Utah 262P987.

128-89 8F(2d)428; 37F(2d)49; 42F(2d)331; 214Ala47, 106S175; 216Ala314, 113S25; 32Ariz102, 255P1092, 1093 [citCJ]; 34Ariz308, 271P411; 332 Ill422, 163NE823; 198 Ind633, 154NE485; 86 IndA709, 159NE771; 205 Iowa306, 218NW74, 76 [citCJ]; 73Mont219, 236P250 (decision based on statute); TexCommnA 291SW206; TexCivA 271SW242; TexCivA 20SW(2d)815; Va 152SE358; 142Wash653, 254P445. [b] (2) Federal statutes providing for maintenance of marine hospital service, where seaman may be treated at minimum expense, or, in proper cases, free of cost. 145Wash460, 261P115. [f] **Judicial notice of statute at large granting right of way** to Northern Pacific Railroad Company may be taken by state courts. 76 Mont452, 248P190. [g] **Particular statutes judicially noticed.**–Statute creating Atlantic and Pacific Railroad Company. 32Ariz102, 255P1092.

129-90 8F(2d)428; TexCivA 293SW271.

129-96 43F(2d)222; 214Ala47, 106S175; Ala 128S158; 169Ark33, 273SW711; 198Cal 278, 245P178; CalA 292P662; 85Colo 146, 274P826; Fla 129S870 (2dcase); 207 Iowa652, 223NW529; 162La823, 111S177; 126Me537, 140A382; 263Mass51, 160NE335; 315Mo 156, 285SW718; 319Mo 848, 5SW(2d)54; 319Mo 976, 5SW(2d)83; 322Mo 376, 158SW(2d)815; Mo 23SW(2d)130; Mo 27SW(2d)21; MoA 21SW(2d)922; 50Nev99, 256P1058; 31NM576, 249P242; 193NC496, 137SE669; 114 OhSt98, 150NE621; 122 Okl 285, 254P719; 139 Okl 52, 281P222; 149SC234, 147SE346; 51SD464, 214NW850; TexCommnA 291SW206; TexCommnA 299SW883; TexCivA 295SW941; 66Utah612, 245P329; 136Wash322, 239P1015. But see TexCivA 20SW(2d)822 (local laws of Legislature are not judicially noticed). [b] (3) That judgments become inoperative after six years. 136Wash322, 239P1015. [g] NJ 141A670.

130-97 86CalA558, 261P1080.

130-2 231Ky244, 21SW(2d)291; 198Wis134, 223NW417.

130-3 34F(2d)808; Ala 128S158 (court's own decision).

130-4 139 Okl 165, 281P776.

130-4½-New. and of fact that particular statute has given general satisfaction. 235Mich95, 209NW195.

131-7½-New. Court is required to take judicial notice of general conditions to which statute applies. 187Wis290, 203NW721.

131-7⅓-New. It is well-known that many acts have been passed during a number of years containing emergency clauses which were attached to the act for the sole purpose of expediting its going into effect, whereas in fact there was no emergency. 320 Ill 507, 151NE510.

131-8 125Me432, 134A561; 299Pa297, 149A490.

131-9 135Misc368, 237NYS689.

131-10 220Ala428, 125S807; 220Ala452, 125S903(2dcase); 33Ariz45, 262P11; 203Cal 219, 263P1007; 249 IllA544; 203 Iowa430, 212NW751; 10LaA626, 119S735; 126Me7, 135A357; 220MoA1205, 299SW132; Mo 28SW(2d)1023; 221MoA679, 283SW738; 220MoA1213, 299SW145; MoA 6SW(2d)60; 222MoA777, 9SW(2d)865; 31NM400, 246P748; NM 288P604; 216AppDiv368, 214NYS353; 132Misc343, 229NYS791; 229App Div126, 241NYS302; 136Misc863, 242NYS464 (holding foreign law can only be learned as fact from evidence and court is confined to record); 137Misc271, 242NYS486; 137Misc113, 243NYS127; 196NC69, 144SE533; 129 Or44, 276P244; 286Pa226, 133A232; 7PaDist&Co 286; 66Utah282, 241P840, 43ALR136; Wis 231NW585.

131-11 7PaDist&Co 286; 14PaDist&Co281. But see 249Mass440, 144NE443.

131-12 260Mass202, 156NE875; 260Mass250, 157NE358; 156Miss567, 126S395; MoA 21SW(2d)937.

131-13 29PortoRico 836 (L. of Evid. § 53).

131-15 Wash 288P223.

132-17 229AppDiv126, 241NYS302; 152Wash78, 277P383.

132-18 [a] **Circuit court of appeals** may take notice of the judicial opinion of federal and state courts and examine records for grounds on which they are based. 5F(2d)218.

132-19 [a] **In Porto Rico.**–29PortoRico 836, 839 [citCJ].

132-21 [b] **Jurisdiction of another state's courts and effect of its decrees** under the law of such state are not judicially known. 131Misc129, 226NYS162.

132-22 179Ark361, 16SW(2d)7; 260Mass250, 157NE358. [a] See also NJ Sup 140A429. [c] **Testator's intention as controlling will.**–260Mass250, 157NE358.

132-23 23AlaA416, 125S398.

132-25 9LaA651, 120S250; 248Mich85, 226NW883 (common law of sister state may be noticed); MoA 287SW657; 29PortoRico 836.

133-29 179Ark361, 16SW(2d)7; Cal292P474; 103Conn503, 131A25; 106Conn683, 138A804; 248Mich85, 226NW883 (statutory law may be noticed); 151Miss82, 117S360.

133-30 Ala 127S155; 90CalA675, 266P817; 120Kan75, 242P123; 9LaA651, 120S250; 126Me7, 135A357; 313Mo448, 285SW459; 221MoA979, 295SW835; 221MoA1243, 300SW841; 137Misc863, 242NYS464; 113 Oh546, 149NE876; 116 Or399, 241P393; 116 Or464, 241P976; 66Utah161, 241P1058.

134-33½-New. Courts take judicial notice that state incorporation statutes differ widely. 198Cal 618, 246P796.

134-33⅓-New. **Courts sometimes notice** that a constitutional amendment is patterned largely after that of another state. 170Ark1160, 282SW971.

134-33¼-New. The United States courts must take judicial notice of state statutes in considering matters of transfers, title, etc., depending on a local statute. 21F(2d)434.

134-33⅓-New. Under Tennessee statute authorizing the supreme court to take judicial notice of laws and statutes of another state, the court cannot do so unless the laws are at least proved in the trial court. 160Tenn1, 22SW(2d)1.

134-35 43F(2d)124. But see 29Porto Rico 836.

135-37 22F(2d)554; 33F(2d)202; 164La15, 113S748; 127Me182, 142A481; 245NY116, 156NE634; 245NY152, 156NE647; 252NY24, 168NE450; 31 OhA482, 166NE423 (that Jews had very limited civil rights in Russia in 1901); 29PortoRico 836; TexCivA 15SW(2d)194; Ont [1929] 2DomLR945.

135-37½-New. Recovery cannot be had in a state court upon a contract made in Mexico without proof of relevant law of Mexico. 245NY152, 156NE647.

135-38 29PortoRico 836. [a] **Present state of law of foreign country** must be proved by experts. 29PortoRico 836.

135-39 29PortoRico 836.

135-40 26F(2d)193.

135-41 263Mass51, 160NE335; 191NC677, 132SE660; TexCivA 281SW642.

136-44 32Ariz102, 255P1092, 1093 [cit CJ].

136-49 170Ark10, 278SW649.

136-52 117 Okl 87, 246P868.

137-54 51ND399, 200NW505, 37ALR1186.

137-61 29PortoRico 836. [b] **Private International Law** may be judicially noticed. 29PortoRico 836.

137-70 3LaA127, 130 [quotCJ].

137-71 [a] (1) MoA 178SW(2d)613.

137-72 Nebr 232NW767; 102NJL489, 133A524.

138-79 214Ala47, 106S175 (dictum); 111Conn27, 149A205; 253 IllA135; 216Ky366, 287SW927; 235Ky842, 32SW(2d)413; 10LaA796, 122S888; 126Me469, 139A671, 55ALR1191; 263Mass51, 160NE335; 237Mich232, 211NW734; MoA 277SW605; 220MoA1161, 297SW137; 78Mont415, 258P236; 83Mont370, 272P243; 103NJL403, 135A869, 870 [citCJ]; TexCivA 285SW869; TexCivA 16SW(2d)914; 199Wis575, 224NW748.

139-85 [b] **Ordinances of city of Louisville** will be judicially noticed. 219Ky595, 294SW135.

139-86 219Ala19, 121S14; 223Ky269, 3SW(2d)606; 228Ky300, 14SW(2d)1079.

140-91 102NJL489, 133A524.

140-93 254 IllA514 (under statutory requirement).

140-94 237Mich232, 211NW734.

140-98 160La963, 107S711; 12LaA35, 124S694; 234Mich614, 208NW679; 250

Mich478, 231NW41; 318Mo 17, 298SW 777; MoA 282SW97; 122 Or285, 258P 205, 58ALR339; 298Pa101, 147A854; TexCommnA 11SW(2d)778; TexCivA 274SW193; TexCivA 281SW306; 98Vt 437, 129A317. [a] (3) When snow and freezing follow rain, numerous places in general use by pedestrians become slippery. 275US426, 48SCt177, 72L ed 351. [b] (1) 269US177, 46SCt42, 70 L ed222. (6) Manner in which person will fall is not matter of common knowledge nor subject to invariable operation of gravitation. 94PaSuper599.

141-99 206Cal635, 275P803; 160La 963, 107S711.

141-1 125 Or323, 267P398.

141-2 See also MoA 282SW97 (local showers in summer).

141-2½-New. It is common knowledge that streams usually decline gradually after subsidence of high water until late fall. 77Mont229, 250P963.

141-8 But see 83CalA204, 256P848. [a] 99Fla1086, 128S430. [b] (4) That during month of February temperature in Michigan may become freezing within few hours will be judicially noticed. 234 Mich614, 208NW679.

142-9 116 Or615, 241P843; 126 Or621, 270P781.

142-10 19F(2d)122, 125 [citCJ]; 95Fla 530, 116S449; 255Mass297, 151NE320; 315Mo 1336, 290SW123; MoA 282SW97; 144Wash528, 258P323.

142-11 19F(2d)122, 125 [citCJ]; 35 F(2d)113; 98Vt437, 129A317.

142-12 37 OklAOR557; 192Wis249, 212 NW796.

142-13 250Mich478, 231NW41.

142-15 147Wash678, 267P436. [c] (6) Effect of wind on fire. 255Mass297, 151 NE320. (7) Common knowledge that sea winds increase in intensity after early morning hours in certain communities. 84CalA33, 257P569. [d] (3) Tendency of fire to persist when once started in wood. 255Mass297, 151NE 320. (4) That fire set to burn logging slashings creates wind which increases as fire increases and that lulls and draws give draft to fire and velocity to wind. 144Wash528, 258P323. [h] **Streams.**–98Vt405, 130A137. [i] **Common knowledge that great conflagrations** spread from falling of sparks on inflammable roofs. NJSup 132A335. [j] **Air currents.**–MoA 282SW97.

142-17 TexCivA 281SW306. [a] (2) 28 OhA434, 162NE765 (uninsulated wires). (13) It is matter of common knowledge that shock may be received from electric appliance in good order. 19F(2d)732.

143-19 [e] (2) Other instances. MoA 158SW(2d)901.

143-20 [a] **Distance at which automobile may be stopped** travelling at given speed. 317Mo 782, 297SW20.

143-24 17F(2d)999; 35F(2d)120; 318 Mo 17, 298SW777, 781 [citCJ]; 321Mo 92, 11SW(2d)48; TexCivA 48W(2d)616. [n] (6) It is common knowledge that wood saturated with oil becomes slippery, if moisture collects on its surface. Mass 164NE486. [q] TexCommnA 11 SW(2d)778. [r] Gas.–6F(2d)866. [s] Water is heavier than oil. 215Ky838, 284SW95. [t] **Snow and ice.**–19 OhA 429.

144-27 279US582, 49SCt430, 73L ed856.

144-28 243 IllA562.

144-30 255Mass297, 151NE320; TexCommnA 298SW554 (nitroglycerine). [a] (6) Is consumed for purpose of furnishing heat, light, and power. 79Mont 269, 256P373. [d] TexCivA 19SW(2d) 111. [e] (1) Mass 164NE612; 221MoA 93, 290SW91; 50RI 226, 146A484. (3) Explosive quality and menace to life and property. TexCivA 28SW(2d)178. (4) Other matters. 144 Okl123, 289P 281. [h] **Electricity.**–Ark 294SW1002. [i] **Oil storage tanks.**–81CalA61, 252P 1082.

145-33 16CustA382.

145-35½-New. It is a matter of common knowledge that properly prepared cane syrup is continually shipped over railroads without being spoiled. 159La 946, 106S451.

145-35¾-New. Adhesive quality of rubber and effect of its application to smooth surfaces as retarding progress are common knowledge. Md 137A58.

145-39 99CalA417, 278P874; 108Conn 659, 144A473; TexCivA 12SW(2d)1070. [h] (10) Other instances. IndA 172NE 129.

145-39½-New. Courts judicially know that oleomargarine is healthful, nutritious food. 193Wis311, 214NW369, 53 ALR463.

145-44 22F(2d)214; 215Ala678, 112S 230; 223AppDiv200, 228NYS183; 101 Vt124, 141A686. [c] (2) Court takes judicial notice that radiograph of internal conditions of person does not ordinarily interpret itself to nonexperts. Iowa 229NW210. [f] **Infectious diseases.**–232Mich183, 205NW159. [g] **Oil land.**–214Ky838, 284SW95. [h] **Structure of earth.**–214Ky838, 284SW95.

146-46 24F(2d)313.

146-52 80CalA494, 251P943; 129Misc 447, 221NYS714, 722 [quotCJ]; Vt 151A 504.

146-53 166La912, 118881.

146-53½-New. that a woman cannot be pregnant with anything but a child; 116 Or615, 241P843.

146-54 234Ky207, 27SW(2d)950; 129 Misc447, 221NYS714, 722 [quotCJ].

146-57 But see 82Mont170, 266P400.

146-61 216Ala529, 113S540; 219Ky92, 292SW758.

146-62 TexCivA 21SW(2d)78. [e] 217 AppDiv316, 217NYS173. [h] **That milk is prolific source of disease** will be judicially noticed. 195Wis148, 217NW 703.

147-63 214Ala447, 108S840; 180Ark 505, 21SW(2d)851; 80CalA494, 251P 943; 89 IndA518, 167NE149; NJSup 147A400 (injury to sacroiliac region). [a] (3) Judicial notice will be taken that leprosy is commonly believed to be infectious disease. 50Philippine595. [b] (1) 219Ky92, 292SW758. [c] (2) But court will not take notice that sarcoma is form of cancer. 258Mass127, 154NE563. [f] (2) That lunatics have lucid intervals, and are sometimes thereby better adapted to perpetrate fraud. 228NYS711. [h] (2) Court takes judicial notice that tuberculosis increases risk of loss under life insurance policy. 214Ala447, 108S840. (3) That tuberculosis is a lingering disease, which may and usually does creep upon its victim and secures a firm hold before he realizes it will be judicially noticed. 34Ariz458, 272P647. (4) That tuberculosis existing at time policy of insurance was issued increased risk of loss will be judicially noticed. 219Ala197, 121S714. [l] **That man without physical defects** will find employment more readily than one who is physically defective will be judicially noticed. TexCivA 285SW848. [m] **Tortious injuries.**–It is common knowledge that tortious injuries may result in damages exceeding in amount and varying in kind from any damages recoverable under Workmen's Compensation Act. 128Me50, 145A400, 67ALR 239. [n] **Cardio-nephritis.**–Ala 130S402.

147-63½-New. , and that with advancing years faculties grow dim and mental processes are slower. 202 Iowa849, 211NW500.

148-76½-New. that one may have soreness or tenderness in the region of the appendix and yet live to a ripe old age; TexCivA 290SW895.

148-81 75CalA709, 243P455, 457 [cit CJ].

148-81½-New. Notice is taken of the effect of being in a serious accident. 203 Iowa430, 212NW751.

148-81⅓-New. The court takes judicial cognizance of increasing encroachment of garages on peace and health of community. 131Misc581, 227NYS570.

148-81¼-New. It is common knowledge that people, although deeming their position safe, often are made aware of peril by warning. Mo 18SW(2d)401(2d case).

148-81⅕-New. Matter of common knowledge that sacroiliac joint is part of back. Mo 31SW(2d)792.

149-8 249Mass440, 144NE443; 135Misc 861, 239NYS722.

149-9 227AppDiv57, 237NYS885; Or 289P503. [h] **That ordinarily prudent person** does not ordinarily do injury willfully or commit acts reasonably likely to injure others is matter of common knowledge. 199Wis320, 226NW 392.

149-11 179Ark993, 18SW(2d)1026 (interest and feeling aroused by submission of questions); 206 Iowa939, 221NW567; 213AppDiv414, 210NYS269 (that activities of Ku Klux Klan tend to excite and terrorize those opposed to it).

149-12 24F(2d)541 (day and night oil well drilling).

149-16 [c] **Use of automobiles.**–132SC 212, 128SE423. [d] **That in 1901 women did not submit to hair cutting** as commonly as in 1926. 142Wash329, 253P448, 59ALR539. [e] **Walking over tracks.**–29F(2d)52 [certiorari den 279 US844, 49SCt264, 73L ed989(8thcase)]. [f] **That public has become accustomed to seven- or eight-inch stairway treads** may be judicially noticed. 207Cal 657, 280P118.

150-22 150Md79; 132A424.

150-23 Ind 168NE10 (impossibility of work in limited time); Mo 21SW(2d) 762.

150-26½-New. Common knowledge that attorneys are reluctant to complain of misconduct of other attorneys. 202 Iowa157, 209NW417.

150-26⅓-New. Common knowledge fixes ordinary speed of pedestrian at two and one-half to three miles per hour. 215AppDiv628, 214NYS398.

150-26¼-New. It is a well known fact that when a child of tender years is taken from its own home and placed with foster parents new adjustments are very rapidly made; 202 Iowa1077, 209NW 282.

150-26⅕-New. that to permit conflict of authority or of claims upon affection between natural parents and foster parents often breeds unhappiness, discontent, and greatly militates against proper care, training, and development of child of tender years; 202 Iowa1077, 209NW282.

150-26⅙-New. that people in forgetfulness trip over unusual obstacles upon a floor with which they are familiar; 15F(2d)166, 48ALR1420.

150-26⅐-New. that persons often drive in automobiles as relief from heat of a summer day. 153Md343, 138A244.

150-26⅛-New. Judicial notice will not be taken that no one would drive six miles for a drink of liquor. 15F(2d) 929.

150-26⅛-New. An occupant's reliance on the automobile driver to use ordinary care is matter of common knowledge. Mo 284SW141.

150-26 1/10-New. It is a fact of common knowledge that the same person's handwriting at different times and on different occasions varies noticeably. Mo 20SW(2d)523.

150-26 1/11-New. That ordinary walking speed of average man is two or three miles an hour. Mo 24SW(2d)633.

150-26 1/12-New. That appreciable time required for motorman's mind and muscular system to act on seeing pedestrian crossing tracks and for brakes to be set. Mo 24SW(2d)633.

150-32 222MoA865, 6SW(2d)48. [a] (4) abandoned radio wires (322Mo 1050, 17SW(2d)977), (5) or unguarded and unlocked places where toilet facilities may be found (322Mo 1050, 17SW(2d) 977).

150-33 82NH294, 133A24; Utah 272P 207.

150-40½-New. It is not common knowledge of which court can take judicial notice that fifteen-year-old girl is incompetent to drive an automobile. 197 Cal 132, 239P1056.

150-41 83NH426, 143A687.

151-51 26F(2d)567; 221MoA93, 290SW 91. [a] **Silent policemen.**–108WVa222, 151S174. [b] **Court cannot take judicial notice** that it is customary to use kerosene oil stoves in barns. NH 149A498.

151-57 [a] **That employer should use cleats on ladder** to prevent slipping cannot be judicially noticed. 41F(2d)738.

151-58 26F(2d)567.

151-62 [b] **Aerial navigation.**–Mass 170 NE385.

151-63 Cal 289P160; 109Conn206, 145 A890; 206 Iowa1291, 222NW12; Iowa 229NW223; 245Mich88, 222NW155, 62 ALR1528; 153Miss327, 121S144; MoA

30SW(2d)626; 103NJEq552, 144A14. [a] (8) That electric auto truck driven on smooth street makes little noise. 215 AppDiv308, 213NYS743. (9) It is matter of common knowledge that automobiles and garages, as ordinarily used, are not nuisances. TexCivA 276SW471. (10) That unusual noises are caused by starting and stopping of gasoline motor vehicles. 37 OklACR628. (11) That new and dangerous conditions have arisen in extended use of motor vehicles at highway crossings in city and country. 313Mo 42, 281SW737. (12) That automobiles traveling certain number of miles an hour can be stopped within certain number of feet and within shorter distance when going up grade. 317Mo 782, 297SW20. (13) Other instances. 160Tenn294, 23SW(2d)669.

152-72½-New. radio aërial wire, Tex CivA 19SW(2d)816.

152-83½-New. The court will take judicial notice that in April 1924 radio receiving sets were not perfected and that many things entered into the success of their operation. 239Mich42, 214NW162.

152-85 133 Okl 20, 270P559; 196Wis 339, 220NW192, 59ALR1232.

152-85½-New. It is not matter of common knowledge that fires do not ordinarily occur at gasoline filling stations except from negligence of proprietor. Mo 25SW(2d)777.

153-92½-New. The fact that wires obstruct streets is judicially known. 204 Iowa1246, 214NW879, 54ALR474.

153-96½-New. It is not a matter of common knowledge that a gasoline filling station is a place where noisy and disorderly people congregate. 50RI 108, 145A451.

153-98 [a] **For example,** dangerous character of ocean for bathing and swimming at certain times and places. 101 NJL481, 129A761.

153-13½-New. It is a matter of common knowledge that dwelling houses used primarily as places of residence for families are also frequently used for incidental accommodation of guests, boarders, or roomers. TexCivA 290SW 912.

153-13½-New. It is common knowledge that a cook is more wasteful than the woman of the home. MoA 256SW525.

153-15 26F(2d)501 (changing auto tire or fixing car at side of road); 12LaA 518, 124S781 (automobilists risk slippery roads); 217AppDiv316, 217NYS 173; Vt 147A694. [a] (7) Slender derrick dangerous to surrounding buildings in storm, and production of oil and gas as fire hazard. 24F(2d)541.

153-16 [a] (5) Courts judicially know that person standing on track in front of approaching train would, when struck, be probably injured in some other way than by cutting off arm by wheels of cars so that such injury will not warrant inference that train struck him. 213Ala620, 105S809.

154-18 32Ariz350, 258P306; 101CalA 769, 282P820; 79Mont52, 255P337.

154-19½-New. **That horseplay of some kind** is to be expected in groups of employees is a matter of common knowledge. 115Tex371, 283SW127, 46ALR 1137.

154-35½-New. The courts may take judicial notice of the fact that a strike by employees of a railroad company is a species of industrial warfare designed to compel concessions. TexCivA 286SW 766.

154-37 144Miss304, 109S731.

155-39 45 Ida313, 262P873; Or 289P 503; 148Wash93, 268P145. [b] 45 Ida 313, 262P873. [c] (4) Appellate court will not take judicial notice of conduct of mule under any given circumstances. 150Va95, 142SE385. (5) It is matter of common knowledge that mules do not drive themselves, but it is necessary for some one to control their work. 179Ark 954, 18SW(2d)916.

155-41 MoA 48W(2d)475.

155-49 97Fla749, 122S239 (that cattle in certain locality were infested with cattle fever tick and that such condition was cause of Texas fever); 154Miss765, 122S776.

156-61 82CalA641, 256P287 (that quantity of alfalfa produced per acre is widely divergent).

156-62 154Miss765, 122S776.

156-63 44 Ida332, 257P31, 54ALR1527.

156-66 TexCivA 13SW(2d)204.

156-67 150Miss729, 116S731.

156-68 149SC424, 147SE315. But see MoA 286SW405. [a] (2) Court will judicially notice that cotton cannot be planted immediately on arrival of fertilizer. 149SC424, 147SE315. [b] 130 Misc359, 224NYS344, 347 [citCJ].

156-71 179Ark43, 14SW(2d)233.

156-72 201 Iowa327, 207NW372.

157-92 73CalA268, 238P787.

157-92½-New. , and of the sprays and germicides most effective in eradicating germs and pests infesting orchards, vineyards, and gardens. 73CalA268, 238 P787.

157-1 Iowa 230NW359; 253NY17, 170 NE477. [a] (7) Financial distress of particular railroad in state held matter of common knowledge. 253Mass391, 149NE322.

157-2 [c] **Courts will not take judicial notice** that certain insurance companies were doing business in state during particular period of time. 37Wyo 189, 260 P180.

158-3 [a] **General character of corporation's business** as common carrier by canal and railway under various statutes will be judicially noticed. 126 Misc349, 214NYS123.

159-14 51Nev32, 267P827, 828 [citCyc].

159-15 [a] (2) Court will not take judicial notice that contract is beyond corporation president's power of ratification. 247NY332, 160NE388.

159-18 105NJL375, 146A355, 65ALR 324.

159-18½-New. Court cannot judicially know what the principles and degrees of free-masonry are, 142Miss894, 108S 298.

159-18½-New. or of any particular brand of doctrine known as free masonry, if there be differences of organizations and principles. 142Miss894, 108 S298.

159-18¼-New. A court will not take judicial notice that a foreign corporation suing for breach of marketing agreement was purchasing defendant's tobacco for shipment into another state. 84 IndA 51, 150NE106.

159-18½-New. Judicial notice is not taken of the fact that plaintiff in an action is a corporation. 35Wyo 319, 249P 795.

159-18⅙-New. The court cannot take judicial notice of the existence of a foreign corporation. 240 IllA100.

159-22 CalA 263P271.

159-23 86Colo 330, 282P193 (no judicial notice of masonic existence of particular masonic body).

159-27½-New. The court takes judicial notice that the American Red Cross is a corporation authorized to receive gifts. 86 IndA709, 159NE771.

159-27¼-New. It is common knowledge that religious congregations maintain organizations and engage in church activities, and appoint or elect from membership officers to transact business. 154Miss516, 122S732.

160-34 86 IndA709, 159NE771.

160-37 175Ark1143, 2SW(2d)22.

160-40½-New. The court takes judicial cognizance of the fact that charters of banks, by mere formality in procedure, may be extended from time to time indefinitely. 228Ky594, 15SW(2d)456.

160-41 [b] **Judicial notice may be taken** that word "Klan" means "Ku Klux Klan" and word "Klansman" refers to member thereof. 11F(2d)881.

160-48 But see 76Mont452, 248P190.

160-53 33 OhA150, 168NE763.

161-72 [b] **That at present a highway extensively travelled is place of greater danger than railroad track as to duty of** pedestrian to use reasonable degree of care is a matter of common knowledge. 237Mich424, 212NW97.

161-72½-New. It is matter of common knowledge that traffic on highways has in recent years undergone radical change in speed and manner of conveyance. 121Kan109, 245P1019.

161-72⅓-New. That many of the streets in cities and towns are part of the state highway system is a matter of common knowledge of which judicial notice will be taken. 119 Or264, 240P 233.

161-72¼-New. It is common knowledge that grade crossings are being avoided as much as possible in building roads. 324 Ill 113, 154NE707.

161-72½-New. It is common knowledge that, unless motor cycles are allowed in emergencies to travel at rapid speed, a motor cycle squad would be practically useless. TexCivA 297SW682.

161-72⅙-New. It is matter of common knowledge that there are few places where an intersecting highway is obscured so that a driver exercising reasonable care cannot discover its existence. 207 Iowa1018, 222NW420.

161-72⅙-New. Courts take judicial notice that travel by automobile has greatly increased. MoA 17SW(2d)608 (3dcase).

161-72⅛-New. That highway construction contracts are generally performed by persons engaged in the general contracting business, who maintain considerable equipment intended and designed to be used in that business over a period of several years in performance of numerous contracts, is matter of common knowledge. SD 224NW925.

161-72 1/10-New. Court takes judicial notice that everywhere highways are being straightened and curves eliminated. Ida 290P717(4thcase).

161-72 1/10-New. It is common knowledge that motor vehicles travel highways in great numbers and at frequent intervals both night and day. Ark 318SW(2d) 403.

161-73 197Cal 448, 241P264 (court will notice that in many rural settlements no newspaper is published); 49SD220, 207 NW87 (court will notice that revenues will not permit guard rails on roads on thinly settled portions of state).

161-79½-New. It is a matter of common knowledge that school patrons may and often do reside in one school district and patronize a school in another district. 141Miss444, 106S768.

161-79⅓-New. The court judicially notices that, in the majority of school districts, levy of maximum constitutional rate is necessary for operating expenses of school. 312Mo 1, 278SW769.

161-79¼-New. Maintenance of laboratories, domestic science rooms, manual training shops, and playgrounds in schools at stated time is matter of common knowledge. Mont 28SP188.

161-80 175Ark1089, 1SW(2d)548; 336 Ill 11, 167NE807; 196 Ind436, 148NE 481; 199 Ind78, 155NE198; 311Mo 32, 276SW872; 222MoA782, 9SW(2d)867; NH 152A279. [a] 21AlaA516, 109S762. [b] (2) Court judicially knows no state census taken prior to certain time. 149 Wash173, 270P306.

161-83 21AlaA516, 109S762; 179Ark 984, 19SW(2d)1020; 35GaA744, 134SE 801; 254 IllA289; 319Mo 976, 5SW(2d) 83.

162-84 213Ala321, 108S787; Cal 293P 67; 199 Ind78, 155NE198; 88 IndA498, 164NE637(2dcase); 311Mo 32, 276SW 872; 322Mo 1050, 17SW(2d)977; Mo 24SW(2d)125; 126 Okl 275, 259P262, 264 [citCyc]; 51SD464, 214NW850.

162-85 207 Iowa702, 223NW527; 126 Okl 275, 259P262, 264 [citCyc].

162-86 254 IllA289.

162-89 IndA 170NE83.

162-90 35GaA744, 134SE801.

162-97 146Wash449, 263P735, 737 [cit CJ]. See also 336 Ill 11, 167NE807.

162-97½-New. , or of a county commissioner district. 146Wash449, 263P735.

162-2½-New. Court will take judicial notice of fact that there is and has been for several decades a general drift of population from rural parts of state to its cities. 308Mo 444, 272SW921.

163-13 214Ala23, 106S242; 123Kan206, 254P396; 124Kan492, 260P643; 34NM 146, 278P361; 144Wash440, 258P321; 147Wash672, 267P433.

164-19 [a] **Court takes judicial notice that dementia præcox causes eight year decrease** in normal life expectancy, as fixed by normal mortality tables. 218

AppDiv7 217NYS673.

164-28 23AlaA23; 12,8442(2dcase); 22 AlaA21, 126S297; **Mo** 218SW(2d)1002.

164-28 **TexCivA** 284SW654, 659 [cit CJ].

164-30 215Mo525, 289SW825.

164-31 28 OhA205, 161NE563 (that Sunday is first day).

164-33 122Me223, 147A121(2dcase); 41 OhAC[illegible].

164-34 **Utah** 286P267.

164-35 **Mo** 248SW(2d)125; **Utah** 273P311.

165-40 275Mo[illegible], 288SW[illegible]; 23CalA557, 279P132; **Mo** 248SW(2d)632; 126 Or522, 270P521; 34PaSuper167; 8D 221NW540.

165-56 210Mo602, 275SW957; 143SC 104, 141SE180. [a] **It is matter of common knowledge** that it takes much time to work out the details of a comprehensive zoning plan. 195Cal477, 224P 281, 28ALR1479. [b] **Court judicially notices** that population of city of Winston Salem is increasing. 192NC207, [illegible].

165-57 21 OhA1, 152NE174; 154Wash 547, 283P186. [a] (3) That crosswalk in snowy weather, is likely to have irregularities in surface. 105Conn447, [illegible].

166-58 212Mo42 281SW737; **Tex** CivA 58SW(2d)24. See also 92CalA145, 267P[illegible].

166-58½-New. , of real estate developments necessitating building regulations. 14F(2d)453.

166-59½-New. That buildings in congested districts are constructed so as to permit additions upward and downward. 187Wis567, 204NW499, 41ALR 1192.

166-61 But see 174Ark529, 296SW33.

166-65 **Ala** 129812; 178Minn622, 227 NW662; NJCh 135A266. But see **MoA** 296SW161. [c] 214Ky736, 284SW391.

166-69 26F(2d)30; 207Cal8, 276P1017 (2cases), [illegible]; 222 Ky627, 178W(2d)748; 124Misc210, 235 NYS204; 149SC224, 147SE246. [a] (12) It is matter of common knowledge that price of gasoline fluctuates from day to day. 126Misc292, 212NYS81. (13) That secondhand or used automobile has lesser sale price than new car, even though it is substantially in same or as good mechanical condition and as fit for actual service as new car. 192Wis 343, 212NW670. (14) Court takes judicial notice that value of taxicabs necessarily decreases in three and one-half year period. 223AppDiv44, 227NYS 215. (15) Conditions at time of mechanic's lien foreclosure sale affecting value of property. 98Fla451, 123S918. (16) That market values are usually greatly in excess of assessed values. 208Iowa709, 226NW41. (17) That all machinery depreciates in value from wear and tear. 156Miss157, 125S708.

167-70 25F(2d)968(2dcase). [b] **It is common knowledge that lots covered wholly or partly with rock are not as** valuable as those without rock above street grade. 222AppDiv554, 226NYS 526.

167-72½-New. that chickens are at least a basis for finding of inferential value. 116Nebr1, 215NW159.

167-76 [a] **Effect on stock prices of** financial depression is matter of common knowledge. 6F(2d)818.

167-76½-New. that the market value of corporate stocks fluctuates. **Utah** 269 P102.

167-76¼-New. that values of real estate were fluctuating and unstable at a stated time. 241Ill597, 138N[illegible].

167-79 40F(2d)67 (holding fluctuating value of oil and gas leases is of common knowledge).

167-80 187Wis567, 204NW499, 41ALR 1192 (vacant city lots).

167-80½-New. that an interurban electric railway benefits property through which it passes. 239Mich401, 214NW 132.

167-81 251Mich669, 232NW209; 178 Minn622, 227NW662 (general rise or depression); **Or** 292P1029.

167-83 **TexCivA** 38W(2d)559 (four or six months).

167-83½-New. or general depreciation of land values since March 1, 1920, 203 Iowa480, 212NW933.

167-84½-New. Courts take judicial notice of great financial change coming over country at certain time and that it is ruinous to debtors and especially to purchasers of high-priced land on credit. 201 Iowa190, 206NW828.

167-84½-New. It is common knowledge that land values vary somewhat according to local conditions. **TexCivA** 276 NW784.

167-84¼-New. It is common knowledge that business property has a value peculiar to itself, that residential property has a value peculiar to itself, and that a combination of the two has a depreciating effect on the values of either of the other kinds. 96CalA597, 274P 634.

167-84½-New. The court takes judicial knowledge that all lands even of the same character are not of the same value. **TexCivA** 158W(2d)715.

167-91½-New. Court will take judicial notice that costs in 1920 were at their peak and so abnormal as not to be controlling in fixing rates; 126Misc382, 212NYS829.

167-91½-New. of index numbers of wholesale prices of United States department of labor, 126Misc382, 212NYS 829.

167-91¼-New. that live stock may have elements of value ascertainable only by inquiry. 99Vt45, 130A580.

167-91½-New. The court may notice that there has been no material decline in values of labor and materials for a certain period. 272US400, 47SCt144, 71 LEd216.

167-91½-New. Courts recognize depreciation in value of farm lands and distillery stocks between 1922 and 1924. 16F(2d)177.

167-91½-New. The court will take judicial notice that many investments between certain dates had increased in value. 106Conn627, 138A809.

167-91¼-New. The court takes notice of the material depreciation in value of a used car. 122 Or597, 260P222, 55ALR 180.

167-91½-New. Illinois courts judicially know that the lowest pension payable to a widow, if accumulated from December, 1916, to January, 1923, would amount to more than two hundred dollars. 332 Ill 422, 163NE823.

167-94½-New. Under circumstances, the court, aided by common knowledge, could judicially know that eleven thousand one hundred and twenty-one bushels of wheat was worth at least five thousand dollars. 152Wash89, 277P 289.

167-96 220Ala568, 126S637 (influence of Exchange on market price).

167-96½-New. that the New Orleans cotton market follows the New York market as a general rule; **TexCivA** 274 SW253.

167-97 [a] (2) That price of cotton is affected by its color will be judicially noticed. 177Ark60, 58W(2d)729.

167-98 **TexCivA** 284SW680. [a] **Particular value on particular day** will not be judicially noticed. 146SC355, 144 SE673.

168-1 223AppDiv226, 227NYS653. But see 127Me269, 143A58. [b] (3) Court will take notice that labor and material costs have increased since the World War. 38F(2d)77.

168-12 49RI470, 144A146.

168-16 240NY501, 148NE659.

168-18½-New. The court will take judicial notice of the depreciation in value of German marks between March, 1917 and July, 1919. 240NY501, 148 NE659.

168-18½-New. **Change in the value of** the dollar materially during the past ten to fifteen years is judicially noticed in passing on excessiveness of a verdict. 204Cal354, 268P334, 60ALR1381.

169-19 [c] **Ford car.**—Court of appeal can take judicial notice that Ford car involved in collision could not have weighed over two thousand pounds. 11 LaA532, 121S636.

169-23 **TexCivA** 295SW263. [a] (2) A court cannot take judicial notice of size of trial court room. **MoA** 128W (2d)930.

169-31½-New. Court judicially knows that eighty rods is four hundred and forty yards, or quarter of mile. **Mo** 30 SW(2d)37.

169-35 **CalA** 289P881.

169-37 215Ala678, 112S230; **94CalA** 260, 271P113.

170-46 16CustA50.

170-48 206Cal148, 273P797.

170-52 16CustA50; **50Philippine**387; **TexCivA** 281SW306. [c] **In Oregon.**—116 Or615, 241P843. [d] **Almanacs.**—128Misc375, 220NYS281.

170-65 16CustA257.

171-81 [b] **Legislative history of acts** may be examined into. 86CalA558, 261 P1080.

171-82 139 Okl165, 281P776.

171-94 215Ala678, 112S230. [b] **IndA** 152NE287.

171-95 113Nebr745, 204NW791.

172-96 198 Ind633, 154NE485; **IndA** 152NE287.

172-97 220Ala172, 124S211.

172-98 **TexCommnA** 118SW(2d)778.

172-3 147Wash672, 267P433. [b] **In Oregon,** when knowledge of court is by code made evidence of fact, court must declare it to jury who are bound to accept it as conclusive. 270P781.

172-5½-New. The court cannot, by taking judicial notice of facts not alleged, change the case from that stated by the complaint relative to the right to removal. 17F(2d)642.

172-6 74CalA411, 240P1021, 1023 [cit CJ].

172-7 74CalA411, 240P1021, 1023 [cit CJ].

172-8 74CalA411, 240P1021, 1023 [cit CJ].

172-9 **CalA** 289P881. [a] (2) **Mo** 19 SW(2d)1063 (presumption in favor of validity of judgment).

172-15 66Utah360, 242P945, 946 [cit CJ]. [a] 66Utah360, 242P945, 946 [cit CJ].

173-23 **Wash** 286P654.

173-28 [a] (7) City officers are charged with knowledge that ponds are places attractive to children. 208Mo513, 273 SW401.

174-31 37GaA425, 140SE419.

EVIDENCE OF INDEBTEDNESS

174-1 290Pa526, 139A199.

EXAGGERATION

178-55½-New. An exaggeration is defined as an undue or excessive enlargement, an amplification, an unreasonable or extravagant overstating or overdrawing in the representation of things; 112 Oh429, 147NE650.

178-55½-New. enlarged beyond the truth; overstated; 112 Oh429, 147NE 650.

178-55¼-New. something at variance with the truth; 112 Oh429, 147NE650.

EXAMINING COURT

179-71 31NM485, 247P828, 833 [quot CJ]. [b] **Synonyms.**—"Committing magistrate" is synonymous with "examining court." 31NM485, 247P828.

EXCESSIVE

181-20 315Mo367, 286SW106.

181-21 315Mo367, 286SW106.

181-22 315Mo367, 286SW106.

EXCHANGE

181-30 87 IndA83, 154NE29; 25 OhNP N8178.

EXCHANGE OF PROPERTY

184-1 6F(2d)43. (immaterial that money value is given to property).

184-3 25 OhNPNS178.

184-7 25 OhNPNS178.

185-16 87 IndA83, 154NE29, 31 [cit CJ]; 25 OhNPNS178; [1926]CanSC 558, [1926] 4DomLR779.

185-17 87 IndA83, 154NE29, 31 [cit CJ]; 25 OhNPNS178.

185-18 87 IndA83, 154NE29, 31 [cit CJ]. [b] **Buyer's return of merchandise**

to seller with understanding that he was to receive other undetermined merchandise of equal value has been held sale of property returned and not exchange. 87 **IndA**83, 154**NE**29.

185-19 87 **IndA**83, 154**NE**29, 31 [cit CJ].

186-22 [1926] **CanSC** 558, [1926] 4 **DomLR**779.

186-30 151**Va**655, 144**SE**645.

186-32½-New. Whether a transaction constituted a sale or exchange of properties depends on the intent of the parties at the time, and cannot be conclusively determined by the fact that there was a fixed price at which exchange was to be made. 207 **Iowa**142, 222**NW** 354.

187-41½-New. A party to a contract for the exchange of real property has a right to contract in another's name. 321**Mo** 47, 9**SW(2d)**897.

187-47 34 **OhA**133, 170**NE**581.

187-48 216**Ala**9, 112**SI**151; 200**Cal** 222, 252**P**593; **TexCivA** 21**SW(2d)**39 (acceptance by delivering telegram for transmission to offerer).

187-49 94**CalA**527, 271**P**546.

187-50 86**CalA**74, 260**P**298 (conditional acceptance operates as rejection of offer).

187-51 200**Cal** 222, 252**P**593; 86**CalA** 74, 260**P**298. [b] **After acceptance, offer cannot be revoked.**–136**Wash**74, 239 **P**4.

188-52 136**Wash**74, 239**P**4.

188-52½-New. A notice of revocation given to one's own agent is ineffective. 200**Cal** 222, 252**P**593.

188-53½-New. Offeror need not have actual personal notice of acceptance to bind him. 136**Wash**74, 239**P**4.

188-53¼-New. An offer to exchange land is not revoked by unreasonable delay in acceptance, where the offeror recognized that the offeree was in a foreign country and would not return until the expiration of a certain period within which period the offer is accepted. 200**Cal** 222, 252**P**593.

188-56 216**Ala**9, 112**SI**151; 136**Wash**74, 239**P**4. [a] **Bilateral contract of mutual promises** to exchange needs no other consideration. 136**Wash**74, 239**P**4.

188-57 **MoA** 21**SW(2d)**203.

188-61 200**Cal** 222, 252**P**593.

188-62 See also 216**Ala**9, 112**SI**151.

188-67 299**Pa**190, 149**A**193 (inadequacy of price alone not sufficient to justify rescission).

189-81 216**Ala**9, 112**SI**151.

189-97 **Iowa** 229**NW**249; **TexCivA** 24 **SW(2d)**499.

190-17½-New. Where an oral agreement provides that exchange of property is conditional on two coöwners signing the contract, defendant is not liable where plaintiff takes the contract with knowledge of the condition and the condition is not complied with, but is liable where knowledge by plaintiff is not proved. 230**Ky**393, 20**SW(2d)** 88.

190-18 6**PaDist&Co** 133.

191-29 259**Mass**605, 156**NE**695.

191-35½-New. Misapprehension by a party as to the amount of encumbrance on property, which he was not to assume but which was to be paid by the other party at consummation of the exchange can not become the basis for a claim that the parties did not agree on the terms of the contract. 333 **Ill** 31, 164**NE**194.

191-42 **TexCivA** 16**SW(2d)**325(2dcase).

191-44 **MoA** 22**SW(2d)**845.

191-47 338 **Ill** 552, 170**NE**756.

191-49 [a] **Representation** that there was plenty of water on land for irrigation is of fact, not opinion. 91**CalA** 664, 267**P**578.

192-50 125 **Or**419, 267**P**527.

192-55 245**Mich**694, 224**NW**407.

192-56 See also **TexCivA** 287**SW**1107.

192-58 **MoA** 22**SW(2d)**845.

193-64 92**CalA**596, 268**P**694.

193-65 94**CalA**230, 270**P**993.

193-66 [a] (3) Shortage in acreage of land cultivated, of one hundred and twenty-five acres, held material discrepancy. 173**Ark**583, 294**SW**12.

193-67 173**Ark**583, 294**SW**12; 208**Cal** 82, 280**P**368 (though no independent investigation is made); **Mass** 173**NE**495.

193-70 92**CalA**596, 268**P**694.

193-73 173**Ark**583, 294**SW**12; 86**CalA** 535, 261**P**744; **Iowa** 228**NW**562; **MoA** 22**SW(2d)**845; 125 **Or**419, 267**P**527.

194-76 40**Wyo** 411, 278**P**551 (brief and cursory examination).

194-78 215**Ky**678, 286**SW**983; 145 **Wash**338, 260**P**250.

194-81 145**Wash**338, 260**P**250.

194-82 94**CalA**230, 270**P**993; 86**Colo** 313, 281**P**360; **Vt** 145**A**258(2dcase).

195-91½-New. Party held not bound by representations of his own unreliable agent who inspected property. **Iowa** 233**NW**21.

195-92 92**CalA**596, 268**P**694.

196-99 169**Minn**118, 210**NW**868.

196-3 **Iowa** 233**NW**21; 246**Mich**82, 224 **NW**404; 169**Minn**118, 210**NW**868. See also **TexCivA** 18**SW(2d)**1098.

196-7 155**Wash**333, 284**P**77.

197-15 **Mo** 282**SW**392.

197-23 [c] **Use of "more or less"** does not excuse disparity where property is described by metes and bounds. 91 **CalA**664, 267**P**578 (where excluded part contained valuable improvements).

198-34 82**CalA**532, 255**P**854.

198-36 82**CalA**532, 255**P**854.

198-37 82**CalA**532, 255**P**854; **TexCivA** 287**SW**1107.

198-37½-New. excellent condition of land for farming. 165**Minn**181, 206**NW** 390.

198-39½-New. that land was not infested with foul weeds and seeds to an extent that would interfere with its productiveness. 165**Minn**181, 206**NW** 390.

198-43 **TexCivA** 286**SW**326, 328 [cit CJ].

199-60 122**Kan**74, 251**P**175, 176 [cit CJ]; 172**Minn**381, 215**NW**676; **Mo** 282 **SW**392.

199-61 245**Mich**694, 224**NW**407; 172 **Minn**381, 215**NW**676; 155**Wash**333, 284 **P**77.

199-64 169**Minn**118, 210**NW**868.

200-67 169**Minn**118, 210**NW**868; **Mo** 282**SW**392.

200-73½-New. An exchange of property for mortgages may be set aside for fraudulent representation as to the financial responsibility of one of the bondsmen. **NJCh** 145**A**473.

200-76½-New. A representation of the owner that he has a buyer who will purchase the property for a stated amount does not constitute actionable fraud so as to warrant rescission, where the representation, although untrue, was based on the expectation that the person named would purchase the property with insurance money to be received by his prospective wife. 245**Mich**694, 224 **NW**407.

200-77 **Vt** 145**A**258(2dcase).

201-81 [b] 145**Wash**485, 260**P**988.

201-82 95**CalA**352, 272**P**805; 85**Colo** 9, 273**P**653; 338 **Ill** 552, 170**NE**756; 261 **Mass**103, 158**NE**504; **Mass** 170**NE**42.

201-87 **TexCommnA** 280**SW**571. [a] **Where exchange was induced by fraud,** court will ignore value of property. **TexCivA** 288**SW**489.

201-94 **Mo** 276**SW**374; **MoA** 22**SW(2d)** 845; 155**Wash**333, 284**P**77.

202-1 **MoA** 22**SW(2d)**845.

202-6 **MoA** 22**SW(2d)**845.

202-8½-New. Provision in contract whereby both parties waived claims arising from representations made is vitiated by fraudulent representations. 140**Wash**538, 250**P**57.

202-10 259**Mass**605, 156**NE**695.

203-27½-New. Drunkenness. Where contracts resulting in exchange of property were made during period of several months in which plaintiff was on drunken spree to knowledge of defendant, contracts are voidable at plaintiff's election. 172**Ark**268, 288**SW**881.

203-28 170**Ark**1194, 282**SW**17.

203-30 [1926] **CanSC**558, [1926] 4**DomLR**779.

203-32 90**CalA**625, 266**P**367.

203-41 108**Conn**465, 143**A**526.

203-47 [b] **Contract held entire.**–**Cal** 289**P**821.

204-52 **Utah** 267**P**1020 (evidence held insufficient to show agreement).

204-56½-New. Where a contract contains a provision that it shall be void if recorded, a party concluding not to perform cannot defeat specific performance by recording the contract. 241 **Mich**173, 216**NW**376.

204-60 [b] **Contract construed as not requiring owner to pay assessments** not delinquent at time exchange was to take effect. 129**Wash**92, 224**P**592.

206-86 6**PaDist&Co** 133.

206-96 216**Ala**9, 112**SI**151.

206-99 **RI** 148**A**808 (where quantity specified in bill of sale).

206-1 114**Nebr**173, 206**NW**760 (recital of value not contract to pay such value in money but simply basis to determine marginal differences represented by notes and mortgages).

207-12 [a] (3) "Perfected" in agreement to exchange properties as soon as papers can be signed and perfected refers not to title, but solely to papers. 49**Nev**438, 248**P**887. (4) To be closed in thirty days after delivery of abstract, provided longer time is not required to cure title. 216**Ala**9, 112**SI**151.

207-15½-New. A contract providing thirty days in which to remedy a defect in title means thirty days in which to remedy a defect found after examination. **TexCommnA** 28**W(2d)**416.

207-17 216**Ala**9, 112**SI**151.

209-47 23**AlaA**19, 121**S**699(2dcase) [certiorari den 219**Ala**197, 128**S**700].

209-61½-New. Title to a chattel delivered under agreement to transfer title in exchange for title to another chattel does not pass where the other party fails to convey title to the chattel to be transferred by him. 23**AlaA**25, 119 **S**861(3dcase).

209-65 163**Ga**439, 136**SE**409. [b] **Exchange instrument held not conveyance of land.**–163**Ga**439, 136**SE**409.

209-67 See also 102**CalA**119, 282**P**423.

210-83½-New. A grantee of mineral rights is not entitled to rents of a lot exchanged therefor between the date of the conveyance and the date of the judgment upholding the deed of mineral rights. 229**Ky**767, 17**SW(2d)**1014.

210-83¼-New. Delay beyond 30 days specified in passing deeds under tripartite exchange agreement has been held not as matter of law to destroy provisions relative to rentals. **TexCivA** 25 **SW(2d)**205.

210-83¼-New. Fact that plaintiff has not agreed to pay defendant anything for services in collecting rent is immaterial in suit to recover rent actually collected. **TexCivA** 25**SW(2d)**205.

211-89 113**Nebr**821, 205**NW**250 (vendor in land contract taking quitclaim deed from assignee of his vendee held not to assume obligations of contract of exchange of such land between assignee and third person for other lands).

211-98 83**CalA**148, 256**P**440; **Utah** 250 **P**1045.

211-2 91**CalA**333, 266**P**1009.

211-3 83**CalA**148, 256**P**440 (sufficient); **Utah** 267**P**1020.

212-8 **Utah** 250**P**1045, 1049 [quotCJ].

212-10 **Utah** 250**P**1045, 1049 [quotCJ].

212-11 173**Ark**1181, 291**SW**805; **Utah** 250**P**1045, 1048 [quotCJ]; **Utah** 267**P** 1020.

212-12 [b] **Where agreement to rescind is executory,** it does not reinvest original owner of land with title. **TexCivA** 218**SW(2d)**705.

212-14 **Utah** 250**P**1045, 1049 [quotCJ].

212-23 177**Ark**1194, 9**SW(2d)**796.

212-27½-New. Remedy is not lost by mere facts that title to property was taken in the name of the wife of the party seeking rescission, and that she gave a note secured by mortgage as part consideration. 261**Mass**103, 158 **NE**504.

212-27¼-New. A party is not entitled to rescind a contract for the exchange of property because deeds have been prematurely delivered by a third person, where it did not appear that injury has resulted. **TexCivA** 13**SW(2d)** 151.

212-30 168**Ark**1, 268**SW**356; 94**CalA** 230, 270**P**993; 122**Kan**1, 251**P**438; 261 **Mass**103, 158**NE**504; 232**Mich**251, 205

[illegible] 24 Mass222, 2[illegible]; 244 Mich652, 222NW110; 165Minn121, 206 [illegible] ... ute to rescind held not waiver of defense of fraud); 109MAg215, 135A69; 57MD 474, 222NW2012d-per); 126 Or222, 270 P758; TexCivA 235SW232; 154Wash 135, 281P331 (notwithstanding plaintiff's opportunity to investigate).

212-22 239Pa150, 145A132 (inadequacy of price); TexCivA 1[illegible]W(2d)657.

212-23 [illegible]

212-24½-New. Drunkenness of one party when making contracts to knowledge of other is ground of rescission [illegible]

212-26 [illegible]

212-27 Cal [illegible] 480; Iowa 225NW249; 127Kan29, 272 [illegible]

212-29 [a] **Matters not constituting failure of consideration.**—That executive agreed to be resolved in exchange did not prove to be of value expected or became substantially worthless does not constitute failure of consideration Utah 251P1026.

214-44½-New. A party is not entitled to rescind a contract for exchange of real estate because of the other party's failure to deliver an abstract of title in the time fixed therefor, where the time was not of the essence of the contract, and neither of the parties treated the time in which the abstract should be furnished as of any importance. TexCivA [illegible]

214-56½-New. Comparative value of property is immaterial, except upon the question of tender as a condition precedent to rescission. TexCivA 235SW226.

214-57 [illegible] ... prompt; 109MAg215, 135A69; 94 MAg650. (b) (4) Two years after delivery of deed not reasonable time, 200 Iowa205, 204NW213. (5) Delay of nine months held not conclusive on demurrer. 261Mass102, 158NE594. (6) Two months held not unreasonable. 92MIA 715, 262P948. (c) **Evidence held sufficient** that plaintiff acted with reasonable promptness in offering to rescind. 163 Ark1, 262SW256. (d) **Time held unreasonable** [illegible]

214-67½-New. Under statutes party may rescind if he does so promptly upon discovery of facts giving him right to [illegible]

215-58 [illegible]

215-59 [illegible]

215-60½-New. Ratification cannot be presumed where delay was requested by adverse party to permit him to perfect title. TexCivA 235SW232.

215-67 224CalA725, 257P175 (notice suf- [illegible]

215-70 [illegible] 111 Wis[illegible] (c) **Bill of sale for reconveyance** is tendered in sufficient time at trial when defendant had refused to accept return of [illegible] TexCivA [illegible]

215-71 222 Ill 227, 154NE111; 247Mich [illegible] 125A69; 130Or590, 280P511; [1926] CanSC55, [1926] 4DomLR779. But see 126Mich485, 241NW222. (b) (5) One exchanging city property for farm and personal property thereon cannot rescind for fraud where he has sold all personal property on farm. 321 Ill 254 151NE271. (6) Noble that plaintiff would restore property and tender of deed is sufficient compliance with statute. 21CalA664, 267P578. (d) **As dependent upon whether relief is sought at law or equity.**—241Mich192, 217NW 22.

216-79½-New. A written offer to rescind an exchange of realty, on the ground of fraud, [illegible] is ineffective without [illegible] of the deed reconveying the land to keep the offer alive. 130Or590, 280P511.

216-80 21CalA72[illegible] 257P[illegible] 222 Ill [illegible] 1[illegible]P[illegible] 30 [illegible]W292

216-84 21CalA725, 257P175.

217-91½-New. A sale received under an independent agreement need not be tendered. 51CalA554, 267P578.

217-92 222 Ill 552, 170NE756, 126Mich 46a, 241NW322

217-97 [illegible] 125A69 TexCivA 12SW(2d)627.

217-93 [b] **Where party is entitled to** cancellation of whole transaction except as to store and judgment for its value, his failure to recovery property free from mortgage does not preclude relief where defendant is given credit for amount of mortgage on price of store which he was required to pay. 145Wash522, 259P57.

217-7 242Mich1, 217NW762; 215Mo 1046, 227NW1042; MoA 21NW(2d)214; 130Or590, 280P511; 142Wash555, 253 P732. (c) **Inability to tender had released** because of insanity of defrauded party's husband to whom title was conveyed held not to excuse offer to make what realization court in equity would decree. 222 Ill 227, 154NE111.

218-4 155Wash533, 284P77.

218-10 296CalA222, 252P592

218-11 [illegible] (2d)[illegible]

218-14 222 Ill 552, 170NE756; 127Kan [illegible] 40 [illegible] 49Wyo [illegible]

218-15 222 Ill 552, 170NE756.

218-16 49Wyo411, 272P551.

218-23 [c] **Where party to contract did not have title and did not convey, contract was never executed to pass title of other land to such party.** 162MeA429, [illegible]

219-27½-New. In a suit for liquidated damages, a contract providing thirty days for perfecting title is breached by representation of defendant's attorney that it is useless to continue. Tex CommsA 2[illegible](2d)416.

219-38 [illegible]

219-48 [illegible] 12SW(2d)[illegible] 136 Wash74, 232P4. (c) **Party is not required to deliver hay** not mentioned in contract. 132Wash[illegible], 231P[illegible].

220-50½-New. Where parties placed value on property, but afterward exchanged without regard to the value set, no damages can be recovered because the property was without value. 222Ky 640, 4SW(2d)412.

220-57 [illegible] 149Wash 23, 270P119.

220-59½-New. Lack of sole ownership in property by defendant does not relieve him from liability in damages to plaintiff [illegible] and knowledge thereof. 230Ky492, 20 SW(2d)[illegible]

220-64½-New. It is competent for the parties to agree that no obligation to proceed shall accrue if a lease of property, of which a chattel mortgage securing the rent is a material part, is found reasonably subject to objections. 75CalA610, 245P455.

220-73½-New. "Merchantable" means a good or marketable title such as would be conveyed by ordinary warranty deed. 112Wis17, 265NW[illegible]

221-30 [illegible] 45Wash25, 276P116.

221-31 202 Iowa1024, 212NW929; 127 Kan26, 272P144; 119Wis[illegible] 255NW[illegible]

221-32 223AppDiv[illegible], 22[illegible]Ky456.

222-10 But see 181Ark654, 27[illegible]W(2d) 56.

223-18½-New. Where a contract for the exchange of properties provides for the course to be pursued in case the abstracts disclose defects in the title, the parties are bound thereby. 241Mich173, 216NW272.

223-27 202 Iowa1024, 212NW929.

224-45½-New. Where, under an agreement for the exchange of properties, a deed was tendered subject to sixty thousand dollar mortgages contrary to the provisions of the agreement, the failure to return such deed left with an agent, who had refused to accept it, has been held not to constitute an acceptance thereof, in that the agent was not the voluntary custodian in behalf of the grantee. 102Conn465, 142A526.

224-56 155Wash74, 283P4

224-56 155Wash74, 283P4

225-55 102CalA651, 283P272(2dcase).

225-60 TexCivA 2[illegible]W(2d)499

225-62 MoA 21SW(2d)792

225-65 202 Iowa1024, 212NW929

225-70 109CalA[illegible] 279P459

226-72 155Wash74, 283P4 (a) (2) Tender of deed with encumbrances of [illegible] thousand dollars has been held [illegible] ... Conn[illegible] 142A[illegible] ... 227 Mass[illegible] 1[illegible]NE[illegible] ... 20[illegible] Conn[illegible] 142A[illegible]

227-5 [illegible]

227-6 255Mich[illegible] 224NW[illegible] (Obstruction of buildings on property by fire).

227-1 See also 221Mo629, 12SW(2d) [illegible]

227-4 See also 224Ky[illegible] 5SW(2d), 1029, 1090 [ctCA]. (a) **Injured party** is entitled to full performance or compensation for delayed [illegible] TexCivA [illegible]

227-11 [illegible]

227-14½-New. Tender consisting for the exchange of properties through a commission agent who conveyed the property to a bona fide purchaser and accepted the bonded notes and deed of trust in exchange on the agent's assurance concerning his security [illegible] not entitled to recover the amount of the notes from the agent under the theory of implied obligation through receipt of the property. 22MoA 47, 5SW(2d)[illegible]

227-15 230CalA742, 127P[illegible]

227-16 Mass 1[illegible]

228-17 [b] (1), 23ObA[illegible] 182NE[illegible] (where plaintiff breaches contract or is [illegible] to defendant's breach).

228-18 See also 224Ky[illegible] 5SW(2d), 1029, 1090 [ctCA].

228-19 [c] **Verdict permitting plaintiff to recover both land and sum of money in addition thereto in action on quantum meruit is erroneous.** MoA 218SW(2d) 202.

228-22 Cal 233P[illegible]

228-24 TexCivA 12SW(2d)1[illegible]

228-27½-New. Where one party has obtained a decree for specific performance on failure of the other to convey and deliver possession at the time fixed by the contract, he is entitled to recover for use and occupation from the time fixed by the contract for delivery of possession, and not from the date of the decree. 123Kan72, 254P[illegible]

228-27½-New. In such case the party in default is entitled to recover taxes paid by him which did not become a lien until after the time fixed for conveyance and delivery of possession. 123 Kan72, 254P[illegible]

229-35½-New. Where defendant admits that the only reason for failure to carry out exchange was plaintiff's refusal to take a deed conveying what ever interest he may have had all other defenses become immaterial. TexCivA 2[illegible]W[illegible]

229-40½-New. A party who has obtained a decree for specific performance on failure of the other to convey and deliver possession at the time fixed by the contract is not precluded from recovering for use and occupation from the date fixed by the contract because the notary's certificate of acknowledgment to the deed rendered by him did not state that the wife acknowledged the deed where the defect was corrected and the deed was accepted. 123Kan72, 254P[illegible]

230-58½-New. A grantee, entitled to rentals from a house after exchange, can maintain an action for money had and received, although the agreement provided that future rentals would go to the grantee. 102CalA119, 282P422.

230-58½-New. Such action for money had and received can be brought, aside from the contractual relation, against the grantor's wife who received rentals after the exchange. 102CalA119, 282P 422

230-63 [a] (2) Complaint embodying contract representing part of transaction held sufficient. 89CalA649, 265P 531. (b) (2) In general. Ga 155SE150.

230-64 IndA 162NE517.

230-79 CalA 265P[illegible]

230-80 89CalA649, 265P531.

231–82½–New. Allowing an amendment at the trial, whereby allegations of fraud are merely made more specific, is not error. 97**CalA**452, 275**P**1005.

231–88 [a] (6) Conversation as to rental values is immaterial. 48 **Ida**30, 279 **P**407.

231–4 Mass 173**NE**549. [a] (6) Evidence that plaintiffs were ready, able, and willing is admissible. 216**Ala**9, 112 **S**151. (7) In determining question of false representations inducing agreement, false representations made at beginning of negotiations are admissible, though original propositions failed. 208 **Cal** 82, 280**P**368. (8) Other instances. 91**CalA**333, 266**P**1009; 321**Mo** 639, 12 **SW(2d)**453. [c] **Evidence held properly excluded.**–170**Ark**1194, 282**SW**17.

232–5 [a] (6) Defendant should have been permitted to prove fair market value of property exchanged. 231**Ky**498, 21**SW(2d)**815. (7) Excluding testimony as to personalty on plaintiff's farm when defendant inspected it held error. 231 **Ky**498, 21**SW(2d)**815.

232–8 [a] (5) 91**CalA**333, 266**P**1009; 108**Conn**465, 143**A**526; 321**Mo** 639, 12 **SW(2d)**453; **Utah** 273**P**319. (14) To show that sale was one in gross and not by acre. 68**CalA**341, 229**P**65. (15) Other evidence held sufficient. **Cal** 243 **P**21; 122**Kan**544, 253**P**205; **RI** 131**A** 81. (16) To show actual damage from breach of contract to exchange real estate, approximating stipulated damages. **TexCivA** 296**SW**641. (17) To show that assignment of plaintiff's equity in property was valid as representing consummation of agreement for exchange of properties. 248**Mich**195, 226**NW**828. (18) To show mutual abandonment of contract justifying directed verdict for defendant. 33 **OhA**108, 168**NE**749. (19) To sustain finding that time fixed was not of essence of contract. **TexCivA** 24 **SW(2d)**499. (20) To support judgment for defendant for specific performance and against plaintiff for stipulated damages. 86**Colo** 479, 282**P**1067. (21) Other instances. 12**LaA**625, 125**S**759; **RI** 148**A**808. (23) To justify finding that representations were not relied on. **Mass** 171**NE**727. (24) To show plaintiff's fraud precluding specific performance. **Iowa** 233**NW**21. (25) To show that parties agreed to rescission of contract to exchange automobiles. **Wash** 290**P**693. [b] (12) To establish contracts for exchange of lands. 201 **Iowa** 733, 206**NW**283. (13) Other matters. **Minn** 231**NW**613; 155**Wash**333, 284**P** 77.

232–10 [a] (4) In action for damages for failure to deliver furnishings for house. 198**Cal** 16, 243**P**21. (5) Other instances. **Mass** 173**NE**549. [b] **Instructions held erroneous.**–**TexCivA** 27 **SW(2d)**631.

232–11 IndA 163**NE**517.

232–12 IndA 163**NE**517.

232–16½–New. Disputed issues where defendant sets up counterclaim for amount due him under contract. 49**SD** 62, 206**NW**422.

232–17 MoA 299**SW**105 (evidence insufficient for jury).

232–20½–New. , or whether contract of exchange was accepted according to its terms. 136**Wash**74, 239**P**4.

232–20⅓–New. or whether offer was withdrawn before acceptance. 136**Wash** 74, 239**P**4.

232–20¼–New. , or whether the time for delivery of the abstract was of the essence. **TexCivA** 9**SW(2d)**756.

232–20⅙–New. Where the exchange of lands was made by deeds executed by the parties, it was for the court, not the jury, to construe a written contract growing out of the exchange and deeds to determine from their contents whether the deeds were executed pursuant to the written contract, especially where there was a variation between the deeds and the written contract which was therefore superseded by a subsequent agreement. **IndA** 163**NE**517.

232–20⅛–New. Whether title was marketable is law question. 181**Ark**654, 27 **SW(2d)**90.

232–20⅐–New. A directed verdict for defendant is properly refused where personal property received by plaintiff as part of an exchange and sold by him is of inconsequential value. 247**Mich**498, 226**NW**656.

232–22 224**Ky**649, 6**SW(2d)**1089, 1090 [citCJ].

232–23 TexCivA 296**SW**641. , [a] **Right to recover attorney's fees.**–**TexCivA** 32 **SW(2d)**660.

233–24 49**Nev**438, 248**P**887.

233–25 104**Conn**366, 132**A**895; 33**GaA** 742, 127**SE**819; 223**Ky**640, 4**SW(2d)**412. [b] **Where plaintiff has partly performed,** he is entitled to value of goods to be delivered to him, less sum still due from him. 104**Conn**366, 132**A**895.

233–26 But see **IndA** 163**NE**517.

233–31 192**Wis**635, 212**NW**405. [a] (3) In exchange of automobiles in which difference in price is fixed by agreement of parties, measure of damages against defaulting party for breach of contract is stipulated price. 13**PaDist&Co** 6. [c] 114**Nebr**173, 206**NW**760.

233–35½–New. In an action for damages for breach of a contract relating to an exchange of properties, loss of rental caused by delay in performance is a proper element of damages. 198**Cal** 16, 243**P**21.

233–35⅓–New. A party to a contract for the exchange of personal property suing on an implied contract for the return of his property on defendant's refusal to perform cannot recover for depreciation of the market value of such property when later restored to plaintiff with no showing that such depreciation resulted from use by defendant or from failure properly to care for it. **TexCivA** 12**SW(2d)**1059.

233–35¼–New. A party to a contract for the exchange of personal property for corporate stock, treating the contract as discharged, and suing on an implied contract to return the property delivered, cannot recover for salary provided for in a stipulation in the contract of exchange. **TexCivA** 12**SW(2d)**1059.

233–35½–New. An agreement of defendant expressed in the original contract for exchange as to the value of plaintiff's property could not, of itself, independently of other terms of the contract, furnish a basis of recovery for such agreed value on defendant's repudiation of the contract after plaintiff delivered the property to him. **TexCivA** 12**SW(2d)**1059.

233–37 But see 198**Cal** 16, 243**P**21.

234–47 104**Conn**366, 132**A**895; **Tex CivA** 12**SW(2d)**1059.

234–48 231**Ky**498, 21**SW(2d)**815.

234–52 [a] **Contract valuation is not conclusive** as to fair market value, though it is proper for jury to consider it. 231**Ky**498, 21**SW(2d)**815.

234–54 But see 231**Ky**498, 21**SW(2d)** 815.

234–60 [c] **Evidence held insufficient.**–137 **Okl** 143, 278**P**349.

236–96 Cal 293**P**30.

236–97 [b] **Evidence held admissible.**–**SD** 226**NW**339.

236–98 [a] (3) That consent of parties to agreement was given by mutual mistake. **SD** 226**NW**339. (4) Other instances. **Me** 150**A**120.

236–4½–New. Findings held to sustain judgment for defendants. **CalA** 286**P** 480.

237–40½–New. Sufficiency of pleading in action for damages is governed by general rules of pleading. **TexCivA** 4 **SW(2d)**227 (petition not subject to general demurrer).

237–43 [c] **Evidence held to establish** that exchange of property was within rule of gross sale. 235**Ky**1, 29**SW(2d)** 571.

239–66 100**NJEq**315, 135**A**69; **TexCivA** 286**SW**326. [b] 91**PaSuper**157.

239–67 TexCivA 286**SW**326.

239–76 232**Mich**251, 205**NW**155; 100 **NJEq**315, 135**A**69; [1926] **CanSC**588, [1926] 4**DomLR**779.

240–79 125 **Or**419, 267**P**527; **TexCivA** 286**SW**326; **TexCivA** 10**SW(2d)**213 (complaint held sufficient). [d] **Petition held to state cause of action for rescission** and not for replevin. 122**Kan**1, 251 **P**438. [e] **Complaint held insufficient.**–100**NJEq**315, 135**A**69. [f] **Offer to restore status quo.**–**Mo** 282**SW**392. [g] **Condonation of fraud and election to stand on contract** is not effected by alternative prayer for accounting. **Mo** 282 **SW**392. [h] **Petition held sufficiently to state excuse** for failure to return property. **Kan** 293**P**385.

240–79½–New. , or an action for damages for misrepresentations as to land exchanged. **TexCivA** 4**SW(2d)**227.

240–80½–New. A petition to rescind a contract for the exchange of property has been held to make a case for recovery of damages for fraud. 167**Ga**828, 146**SE**849.

240–82 See also 94**CalA**230, 270**P**993. [b] (7) Under allegations of misrepresentations as to value of land, evidence as to rough and rocky and untillable character and lack of water is admissible. **TexCivA** 285**SW**1100. [c] (3) 83**CalA**725, 257**P**175 (worthless stock); 91**CalA**664, 267**P**578; 92**CalA**715, 268**P** 948; 338 **Ill** 552, 170**NE**756; 234**Mich** 337, 207**NW**802; 234**Mich**331, 207**NW** 895; 165**Minn**181, 206**NW**390; 165 **Minn**241, 206**NW**393; **Mo** 282**SW**392; 114**Nebr**150, 211**NW**19; 125 **Or**275, 264 **P**361; **TexCivA** 286**SW**326; **TexCivA** 18**W(2d)**1098. (4) Evidence showed that defendants accepted fruits of transaction with agents' knowledge of fraud, thereby justifying rescission. 35**F(2d)**475. [d] 181**Ark**504, 26**SW(2d)** 582; 321 **Ill** 336, 151**NE**865; 200 **Iowa** 805, 204**NW**219; 231**Ky**363, 21**SW(2d)** 433(1stcase); 258**Mass**240, 155**NE**5; 233**Mich**47, 206**NW**329; 165**Minn**433, 206**NW**711; 172**Minn**381, 215**NW**676; **NJCh** 140**A**574. [f] (5) To support finding of fraudulent representations as to income and value. 145**Wash**485, 260**P** 988. [g] (6) To raise presumption of fraud, duress, or undue influence. 171 **Ark**1189, 285**SW**354. (7) To prove estoppel sought to be set up against complainant by acceptance of deed. 215**Ala** 205, 110**S**384. [h] **Finding** that party to exchange of property is not mentally incapable of making a contract is not against weight of evidence. 171**Ark** 1189, 285**SW**354. [i] **Rescission held not shown.**–321 **Ill** 354, 151**NE**871. [j] **Evidence held sufficient:** (1) To sustain verdict for plaintiff in action of replevin. 91**PaSuper**157. (2) To show fraud. 126 **Or**683, 270**P**753. [k] **Evidence held insufficient** to establish defense of plaintiff's estoppel and ratification of fraud. 35**F(2d)**475. [l] **Evidence showing ratification** notwithstanding fraud. 181**Ark** 504, 26**SW(2d)**582.

240–85 [a] (3) Instruction as to measure of damages. 165**Minn**241, 206**NW** 393.

240–87 TexCivA 10**SW(2d)**213. [a] (3) Value of property. **TexCivA** 286**SW**326.

240–87½–New. Question of damages for fraud is improperly submitted to jury in absence of evidence on which to determine measure of damages. 200 **Iowa** 495, 203**NW**794.

240–89 238**Mich**236, 213**NW**133; **MoA** 22**SW(2d)**845.

240–90½–New. Judgment that property be reconveyed to defendant subject to encumbrance is proper. 91**CalA**664, 267**P**578 (lien foreclosed after notice of rescission).

240–90⅓–New. Judgment reconveying property or payment of damages is proper. 91**CalA**664, 267**P**578.

240–90¼–New. Where judgment is rendered in the alternative, the ability of plaintiff to restore the property may not be raised as an objection. 91**CalA**664, 267**P**578.

240–93 155**Wash**333, 284**P**77. [a] (9) In action to rescind exchange of property plaintiff is not entitled to recover expenses going to and property agreed to be received in exchange. 232**Mich**251, 205**NW**155. (10) Vendor on rescission held entitled to recover unpaid lien of taxes accruing during purchaser's possession pending action to rescind. 40**Wyo** 411, 278**P**551. (11) Vendor on rescission may recover interest on mortgage accruing during purchaser's possession. 40**Wyo** 411, 278**P**551. (12) Purchaser of hotel property on rescission of exchange agreement held entitled to recover value of services in managing hotel. 40**Wyo** 411, 278**P**551. (13) In rescission, measure of damages is difference between actual value of land

and value as represented. 91CalA664, 267P578.

241-95 [d] **Measure of damages** for procuring exchange by fraud is difference between actual value of property transferred and value if as represented. 114Nebr150, 211NW19.

241-95½-New. Decree for reconveyance of all properties except a store and judgment against defendant for value thereof is not open to objection where reconveyance was impracticable. 140 Wash538, 250P57.

241-95½-New. In such case it is improper to refuse plaintiff recovery of commission paid a broker negotiating the exchange although ultimate result was sale of the store. 140Wash538, 250 P57.

241-95¼-New. Party on cancellation for fraud of adverse party is entitled to recover for moving expenses incurred, 140Wash538, 250P57.

241-95½-New. and to interest on value of store reconveyance of which was impracticable from date of trade to date of judgment. 140Wash538, 250P57.

241-99 222AppDiv617, 226NYS560. See also TexCivA 32SW(2d)660. [a] **Absence of finding of damages** does not invalidate judgment decreeing cancellation. CalA 288P448.

EXCHANGES

245-24 121Kan348, 246P511, 1120, 54 ALR295 (facts held to show board of trade affected with public interest).

245-24½-New. Some exchanges are membership corporations and not stock corporations and therefore are not within the requirement of the Stock Corporation Law as to filing annual reports. 226AppDiv496, 235NYS58.

246-29 243 IllA71.

246-30 [g] 35F(2d)851. [i] **Rules held valid.**-148Va140, 138SE471.

247-46 243 IllA71.

247-53 243 IllA71.

248-60 252Mass306, 147NE740 (valid contract may be made with reference and subject to rules of stock exchange); 98PaSuper103.

248-64 See also 20F(2d)951.

248-67 243 IllA71.

249-91 213AppDiv625, 211NYS13.

251-17 [a] (3) Exchange cannot expel member for suing nonmember for commission on sale after arbitration committee had made unauthorized finding that he was not entitled thereto. NJ Sup 134A289.

256-2 NJSup 130A662 (expulsion wrongful).

261-75 [b] (6) Assignee of certificate of membership is not entitled to recover benefit where certificate provides for payment of fund at death of member. MoA 16SW(2d)722. (7) Such assignee permitting assignor to remain in complete dominion over value of property waives right of lien to any benefit. MoA 16SW(2d)722.

261-75½-New. **Rights of creditors.** A claim of absolute property as the widow of a member is superior to the rights of creditors. MoA 16SW(2d)722.

262-91 MoA 16SW(2d)722.

263-92 Man [1930] 4DomLR1028(2d case).

263-97 But see 19F(2d)764.

264-8 19F(2d)764.

265-25 148Va140, 138SE471. [1] **Rule of Texas Cotton Association forbidding sales** after 8 P. M. held not to apply to contract between members. TexCivA 278SW278.

267-31 [a] **In Porto Rico.**-33PortoRico 165.

268-44 [d] **Award before copy of seller's statement of facts** was submitted to buyer as required by rules held invalid and error not cured by chairman of exchange after award sending the statement to buyer with opportunity to reply. 198Cal685, 247P207. [e] **Remedy of person dissatisfied with award** is in courts, where remedy of appeal is lacking in by-laws and rules of association. 198Cal685, 247P207.

268-49 198Cal685, 247P207. [b] Proceeding before three members where by-laws provide for five. NJSup 130 A662.

270-77½-New. Certificates of government examiners conclusively establish the eligibility of cotton for delivery against contracts made on the New York Cotton Exchange, and the exchange owes no duty to nonmembers to examine cotton tendered for delivery against contracts entered into by them. 132Misc659, 230NYS355.

270-77½-New. Plaintiff's affidavits have been held insufficient to establish that any substantial quantity of cotton available for tender on plaintiff's contracts made on the New York Cotton Exchange was ineligible for tender under the Cotton Futures Act. 132Misc659, 230NYS355.

271-95 13F(2d)673.

273-6 270US593, 46SCt367, 70Led750, 45ALR1370.

273-10 13F(2d)673.

EXCLUSIVELY

275-77 11PaDist&Co 503, 504 [citCyc]. [b] 102WVa374, 135SE399. [c] **As used in statute.**-115Nebr535, 213NW839. [d] **"Only" synonymous.**-102WVa374, 135SE399.

276-84 102WVa374, 135SE399.

276-87½-New. "Exclusively used" is a phrase to be construed in light of context of statute in which it appears, 21 OhA168, 152NE776.

276-87½-New. and may refer to primary and inherent use as against secondary and incidental use. 21 OhA168, 152NE776.

EXCUSION

277-32 45Philippine107.

EX DOLO MALO NON ORITUR ACTIO

277-40 [c] 19F(2d)751; 152Tenn329, 279SW257; 159Tenn520, 19SW(2d)251.

EXECUTION

278-49 162Ga280, 133SE471 (means "made").

278-52 37Wyo98, 259P520.

278-53 162Ga280, 133SE471.

278-54 213Ala12, 104S128.

278-56 213Ala12, 104S128; 83CalA87, 256P479; 37Wyo98, 259P520.

280-65 104WVa226, 139SE711.

280-67 104WVa226, 139SE711.

EXECUTIONS

305-3 205Iowa508, 218NW298.

308-62 39OklACR68, 69 [quotCJ].

308-64 154Wash163, 281P327.

308-66 39OklACR68, 69 [quotCJ].

308-67 39OklACR68, 69 [quotCJ].

308-68 39OklACR68, 69 [quotCJ].

309-89 126Misc735, 215NYS409.

310-1½-New. In Saskatchewan the assignee of a judgment and execution has no right to enforce the execution but must obtain leave to issue execution on his own behalf. Sask [1929] 2DomLR77.

310-3 11LaA631, 124S580.

311-13 246Mich278, 224NW341. See also 7LaA150, 158 [citCJ].

311-22½-New. A joint tort-feasor cannot, by paying and obtaining an assignment of judgment, issue execution thereon against his cotort-feasor. Ont [1929] 1DomLR275.

312-47 [a] 103Conn29, 130A76 (dictum).

313-64 [a] **In Texas.**-CivA 16SW(2d)309.

314-87 49Philippine271.

314-90 254 IllA211.

314-91 254 IllA211.

316-30½-New. A general execution cannot issue on a decree in an action to determine adverse interests in personal property containing mandatory provisions and assessing a certain sum in case of failure to comply therewith, thereby conferring judicial powers on the sheriff. 201Cal87, 255P827.

316-34 TexCommnA 276SW218; 118 Tex149, 12SW(2d)550.

317-38 49Philippine634, 644 [citCJ].

317-40 [a] **Conditions may be such as to delay execution,** in which case prevailing party may apply for attachment. 33PortoRico110.

317-42½-New. In a suit for specific performance, a decree that, on return to plaintiff of the sum paid by him as deposit, the bill be dismissed, is not a "final decree," and plaintiff's motion for execution in his favor is properly denied. Mass 164NE921.

318-58 169La743, 125S875.

318-61½-New. Where judgment is entered by confession on note given to secure liability contingent on future business, execution cannot issue until default, and then only for the amount due. 287Pa454, 135A122.

319-78 BC [1930] 2DomLR663.

319-86 TexCivA 12SW(2d)608.

319-88 SD 226NW270, 272 [citCJ].

321-16 Okl 293P209.

322-29 NJSup 147A333.

323-36½-New. **Where there are two judgments** and the money applied is insufficient to discharge both, execution may properly issue for the deficiency. Iowa 219NW511.

323-47½-New. Transfer of a judgment to an agent of the judgment debtor constitutes payment of the judgment as against a claim of right to enforce further execution. TexCivA 17SW(2d)1093.

323-48 [a] (1) 33GaA797, 127SE795.

325-87 204Iowa401, 213NW769 (where location or character does not exempt).

325-90 [b] **Lessor's interest in fixtures** in possession of lessee is subject to execution. 217MoA554, 272SW1006.

325-5½-New. Cattle on farm are subject to levy. 94PaSuper570.

325-7 108WVa58, 150SE366 (diamond ring worn by debtor).

326-10 164Ga302, 138SE223. [f] **In Porto Rico.**-33PortoRico319.

326-12 See also NJCh 152A236. [b] **Right to recover definite sum of money** is subject to seizure and sale to satisfy judgment against owner. 74Mont355, 240P667.

326-13 [b] **In Montana.**-74Mont355, 240P667.

326-15 TexCivA 288SW580.

326-19 TexCivA 288SW581.

327-25 Contra Mass 168NE737. [b] **In Missouri.**-222 MoA1228, 3SW(2d)1046.

327-29 [c] (2) Alimony judgment cannot be taken on execution by divorced wife's preexisting judgment creditor. 177Minn178, 225NW104.

328-44 Man [1930] 1DomLR580.

328-46 97CalA398, 275P861.

329-50 [b] **Power of legislature to fix situs.**-150Miss164, 116S740.

329-61 174Ark880, 298SW25, 27 [cit Cyc]; 204Iowa401, 213NW769; 80Mont593, 261P278; 50Philippine512. But see 130Kan415, 286P217. Contra 126 Kan714, 271P302.

329-62 34GaA269, 129SE112 (mature crops subject to levy and sale); 123Kan441, 256P133; 130Kan415, 286P217. [c] (3) Immature crop cannot be levied on separately from land except where debtor absconds or removes from county or state in view of statute making such crops personalty but restricting levies thereon. 34GaA269, 129SE112. (4) Cotton which does not mature on stalk at one time is subject to levy as it matures and is ready for harvest. 34 GaA169, 129SE112. [d] (2) Under Mississippi statute lien acquired by levy attaches to cotton crop ready for harvest. 150Miss729, 116S731. [e] **Construction of statutes.**-150Miss729, 116S731.

330-64 37GaA477, 140SE778.

330-68 Sask [1929] 4DomLR900. [a] **In Saskatchewan.**-[1929] 4DomLR900.

331-83 Miss 108S158 (franchise of being corporation).

331-84 128Misc863, 220NYS349. [b] **In Mississippi.**-108S158.

333-1½-New. Public funds of school district are not subject to execution. 58 ND934, 228NW435.

334-21 166Minn363, 207NW736.

334-23 166Minn363, 207NW736.

334-25 6LaA222; 140Miss615, 105S745, 746 [citCJ]. [b] **Effect of assignment of salary.**-140Miss615, 105S745.

334-27 139SC66, 137SE331.

334-31 139SC66, 137SE331.

334-33 124Kan425, 260P658; 131Okl 45, 267P844; 139SC66, 137SE331; TexCivA 273SW957.

335-41 But see 180Ark238, 218SW(2d)162.

335-47 [b] **"Real property," "real estate,"** "land," and "premises," as respects execution sale and redemption, are interchangeable terms. 174Ark880, 298SW25.

335-52 See also 245Mich6, 222NW109.

335-53½-New. Where land is conveyed by deed to trustee for use of beneficiary during his life to be kept free from incumbrance and on death of beneficiary to be conveyed by trustee to life beneficiary's children they took no interest in the land subject to execution prior to death of life beneficiary. 20 OhA209, 151NE778.

335-55 37GaA395, 140SE417; 137Misc420, 242NYS308.

336-57 181Ark439, 26SW(2d)113; 207Iowa526, 220NW344, 60ALR786.

336-59 314Mo508, 284SW497; Mo 30SW(2d)607; 137Misc420, 242NYS308.

336-59½-New. Founder of a trust may provide that contingent remainder shall go to his beneficiary with restrictions that it shall not be subject to sale under execution in advance of vesting of legal title. 314Mo508, 284SW497.

336-65 314Mo508, 284SW497; 194NC324, 139SE453 (under statute); SD 227NW479.

337-67 314Mo508, 284SW497.

337-73 [b] **Leasehold interest,** being personalty, is not redeemable from execution sale. 174Ark880, 298SW25. [c] **In Arkansas.**-174Ark880, 298SW25.

338-84 12LaA147, 125S601.

338-88½-New. Inchoate right of dower is not subject to execution. 23 OhA484, 156NE146.

338-96 166Minn435, 208NW184 (land in name of husband and wife as tenants in common).

339-97 157Md249, 145A779.

341-27 Man [1930] 1DomLR580.

341-28 33 OhA350, 169NE602 (statutory provision).

341-30 124Kan425, 260P658.

342-42 Ont [1929] 2DomLR904.

342-44 But see, Mass 166NE763.

342-47 240Mich661, 216NW446.

343-52 241NY401, 150NE496; 87PaSuper184 (proper exercise of police power). [b] Contra 87PaSuper184. [d] (2) Income need not be due at time order is served, it is sufficient if income will or may become due in future. 214NY401, 150NE496. (3) Lien attaches whenever income becomes due. 241NY401, 150NE496. (4) Income to be distributed at discretion of trustees among beneficiaries is subject to execution against one beneficiary. 214NY401, 150NE496 (though court may not interfere with discretion of trustees to allot income among beneficiaries). [e] **Statute construed** to apply to income after day of payment arrives, whether it is paid or not. 241NY401, 150NE496. [f] **Income of trust fund to be distributed at discretion of trustee** held subject to execution. 241NY401, 150NE496. [g] **Issuance of execution based on foreign judgment** is not authorized by provisions of statute. 87PaSuper184.

343-53 [b] **But on expiration of period of trust,** property vested in beneficiaries without conveyance is subject to seizure and sale on execution. Nebr 233NW249.

344-62 204Cal391, 268P637, 639 [citCJ].

345-70 122Kan781, 253P210; 123Kan746, 256P997; 79Mont246, 256P176, 57ALR1122.

345-73 339 Ill426, 171NE514 (club membership). But see NJ 148A881.

345-76 204 Iowa401, 213NW769 [citCJ]; 123Kan484, 256P139.

346-83 136Misc49, 239NYS221; Tex CivA 282SW832. [k] **In Oklahoma.**-129 Okl86, 263P458 (secured notes and accounts held by separate interveners).

347-84 TexCivA 282SW832.

347-86 33 OhA350, 169NE602.

348-94 19FCasNo11,115, 2MacLean267 [aff 3How333, 11Led622]; 10Conn243, 26AmD390; 6Fla711; 166Ga102, 142SE532; 69 Ill632; 52 IllA376; 270 Ill552, 110NE876; 18 Ind420; 35 Iowa248; 83Me168, 21A829; 146Mass17, 15NE129; 78Mont395, 255P1049; 82Mont338, 267P292; 186NC191, 194, 119SE210, 32ALR870 [citCyc]. [g] (2) Property is not subject to levy and sale on judgment for secured debt till it has been reconveyed to debtor, and till such reconveyance has been filed and recorded in office of clerk of superior court. 166Ga818, 144SE381. [k] **Where levy on right of redemption is made after sale,** and sale is thereafter set aside, levy fixes no lien on right of redemption where levy on property would give no paramount lien. 217Ky778, 290SW700.

349-96 78Mont395, 255P1049. See also 166Ga818, 144SE381.

349-96½-New. Mortgagor's statutory right to possession during year for redemption is not subject to execution. 200 Iowa990, 205NW760.

349-96½-New. Judgment creditor cannot reach, by execution, mortgagor's statutory right to possession during year for redemption, to satisfy a judgment, lien of which is junior to that of mortgage. 200 Iowa990, 205NW760.

349-5 270 Ill552, 110NE876.

350-13 [a] (1) 36GaA225, 136SE177. (2) 162Ga507, 134SE164; 36GaA225, 136SE177. (3) 162Ga507, 134SE164; 36GaA225, 136SE177.

350-18 CalA 288P884; 166La626, 117S741; TexCivA 297SW1089. [c] **Neither sheriff nor judgment creditor** may be held to be trespassers in levy of execution on pledged property, levy and sale being subject to pledgee's lien. Tex CivA 297SW1089.

351-22 205Cal715, 272P1063; 176Minn461, 223NW776; 75Mont557, 244P506. See also 8LaA822.

351-23 Man [1928] 4DomLR917.

351-29½-New. Sale of personal property to another is not effective as against an execution creditor without delivery of possession to the vendee. 94PaSuper570.

352-39 31Ariz84, 250P564, 565 [citCJ].

353-46 170LaS26, 129S217. [f] **In Pennsylvania.**-286Pa449, 133A642. [g] **Nonrecorded sale of lease** by broker could not be taken advantage of by him in enforcing judgment against vendor for commissions. 170LaS26, 129S217.

353-49 94PaSuper570.

354-57 153Wash457, 279P597.

354-62 [c] **No interest subject to execution.**-27F(2d)74.

354-63 NJ 141A575 (property in hands of agent).

355-72 202Cal264, 259P1101; 49 Philippine52.

356-75 CalA 286P743.

356-78 49Philippine61, 69 [quotCJ].

357-91 NJ 148A881; NJCh 152A236; 136 Okl222, 277P216; 38 OklACR424 [citCJ]; TexCivA 297SW1089; TexCivA 188SW(2d)772. [c] **Property of plaintiff** who has caused appointment of receiver of corporation in suit to assert debt against it can be made subject to heir by plaintiff's creditor, though debt sued for is only asset. 101WVa728, 133SE628. [d] **Money voluntarily deposited** with clerk of court is subject to levy. 73 CalA455, 238P1110. [e] **Property is "in custody of law"** when lawfully taken by authority of legal process and remaining in possession of public or court officer empowered to hold it. Mo 28SW(2d)670. [f] **Trustees.**-Mo 28SW(2d)670. [g] **Effect of statute.**-NJCh 152A236. [h] **Leave of court.**-44F(2d)218.

358-94 [a] **Different divisions of same court.**-Mo 28SW(2d)670.

358-95 NJ 148A881 (enforcement of mechanic's lien claim).

360-22 But see 35 OhA499, 172NE631.

360-24 315Mo872, 288SW54. [c] (1) 3LaA737. [e] **In Manitoba.**-[1930] 1 DomLR49.

360-28 TexCommnA 26SW(2d)179.

360-33 181Ark439, 26SW(2d)113.

361-38 19 OhA499; 155Tenn313, 292SW459, 461 [quotCJ]. [d] **In Oregon.**-131 Or507, 282P1086.

362-46 TexCommnA 296SW871, 876 [citCyc].

362-67 332 Ill427, 163NE820; 339 Ill230, 171NE178. See also 146Wash679, 264P988.

363-68 332 Ill427, 163NE820.

363-74 218Ala621, 119S657.

363-84 [a] **Where judge is also clerk,** he acts as clerk in issuing execution. 80Colo425, 252P357.

365-16 80Colo425, 252P357 [citCJ].

365-17 80Colo425, 252P357.

365-20 80Colo425, 252P357 [citCJ].

366-24 158La361, 104S115.

366-27 TexCivA 273SW993 (execution properly issued).

366-29 48Philippine768.

367-36 215AppDiv277, 213NYS463 (where judgment authorized execution against property).

367-42½-New. In Saskatchewan the assignee of a judgment and execution must obtain leave to issue execution on his own behalf. Sask [1929] 2DomLR77.

367-44 [b] (6) After lapse of five years, judgment creditor may bring action on judgment. 214AppDiv786, 210NYS703.

368-50 214AppDiv786, 210NYS703.

368-52 [b] **Leave to issue execution** after lapse of five years should be denied, where agreement between parties has been carried out. 214AppDiv786, 210NYS703.

368-53½-New. Upon application to issue execution more than six years after acknowledgment of the judgment debt, leave will only be granted to issue execution for the amount of the judgment and six years interest thereon. NS [1929] 1 DomLR238.

369-70½-New. Motion for execution on judgment does not lie within an injunction proceeding to restrain marshal resulting in dismissal of injunction proceeding on appeal. 35PortoRico298.

370-99½-New. Order quashing former execution is not res judicata on motion for writ of execution. 41Wyo263, 284P1001.

371-8½-New. It is an abuse of discretion to vacate an order authorizing issuance of execution on the debtor's affidavit that he had, during a period of nine years, property subject to execution and that no levy was made thereon. 89CalA748, 265P389.

374-57 234 IllA455; 155Tenn614, 298SW263.

375-69 [b] 214AppDiv786, 210NYS703.

377-78 102CalA286, 282P963; 214AppDiv786, 210NYS703 (motions for leave to issue after five years within court's discretion).

378-96 TexCivA 274SW255, 257 [citCyc].

378-99 But see 46Philippine827.

379-4 135 Okl61, 273P893.

379-6 142Miss357, 107S423.

379-9 234 IllA455.

380-19 [g] **In South Dakota.**-52SD570, 219NW257 (evidence sufficient to show judgment unsatisfied warranting execution).

381-30 13F(2d)572.

382-38 [d] (5) Execution may issue against real estate on which judgment has become lien, regardless of whether debtor died seized thereof. 13F(2d)572. (6) Period of twelve months provided by statute will be excluded in computing limitation. 13F(2d)572.

382-41 MoA 98SW(2d)538; MoA 21SW(2d)777.

383-45 [a] **In Montana.**-289P566.

387-2 332 Ill427, 163NE820. [a] **In Illinois.**-332 Ill427, 163NE820.

387-6½-New. The validity of proceedings in the circuit court to sell land to satisfy a judgment of the justice of the peace depends on compliance with the statute. 218Ala155, 117S667.

389-34 But see Okl 293P209.

389-38 [a] (3) Where transcript shows rendition of judgment on certain date and that all papers had been transmitted to circuit court, it sufficiently shows transmission of judgment to circuit court. 218Ala155, 117S667. [d] **Abstract giving date as 10-14-1927** held not void for failure to specify date of judgment. Okl 293P209.

391-69 Okl 293P209.

391-75 [b] **What judge may issue writ.**-238Mich253, 213NW150.

398-83 264Mass592, 163NE178.

402-66 20F(2d)444.

402-68 318 Ill182, 149NE21; 48 Philippine284.

403-75 TexCivA 17SW(2d)1114. [a] 127Kan587, 274P239.

404-95 [b] **In Porto Rico.**-32PortoRico740.

405-16 318 Ill182, 149NE21.

407-33 39GaA220, 146SE500(2dcase);

127Kan587, 274P239.
408-45 141Wash297, 251P578, 580 [citCJ].
408-51 TexCivA 273SW1016.
409-56 127Kan587, 274P239.
410-67 But see 157Miss358, 128S93. [d] In Mississippi.-154Miss631, 122S 773.
410-69 318 Ill 182, 149NE21.
410-72 TexCivA 118SW(2d)826.
410-76½-New. Designation of plaintiff in execution as a named company imports a corporation, and the execution is not void on its face for failure to disclose whether plaintiff in execution was in fact a corporation or a partnership. 154Miss631, 122S773.
411-84 318 Ill 182, 149NE21.
411-89 See also TexCivA 273SW1016.
414-46 36GaA347, 136SE554.
415-51 [c] **Execution authorizing sheriff to levy on all property of judgment debtor** is not fatally defective because of failure to limit sheriff's authority to levy only on property subject to execution as expressly required by statute. TexCivA 118SW(2d)826.
418-12 See also TexCivA 273SW1016.
422-86 [a] (7) Amendment to execution by clerk of court, without complying with terms of statute, is inadmissible, and levy is properly dismissed. 169 Ga391, 150SE582.
423-91 127Misc114, 215NYS328.
423-92 TexCivA 273SW1016.
424-16 74Mont355, 240P667.
425-36 [b] **Failure to direct sheriff to sell or to put in funds** does not amount to direction not to execute writ. NJCh 147A376.
426-44 51ND808, 201NW169 [citCJ]; 57ND17, 220NW130.
426-46 See also 84Colo 528; 271P1116.
427-51 GaA 155SE64.
427-61 209Ky372, 272SW906.
429-79 167GaA448, 145SE875(2dcase).
429-84½-New. Several executions against same debtor should be levied at same time. NJCh 152A236.
429-85 NJCh 152A236.
430-98 [c] **Seizure without sale is levy.-Ont** [1930] 1DomLR47.
431-15 242Mich64, 217NW785. [d] **"Dwelling house"** within rule is given its ordinary and generally understood meaning and does not include outbuildings although within curtilage. 242 Mich64, 217NW785.
432-17 242Mich64, 217NW785 (garage).
433-43 83Colo 222, 263P411, 57ALR 834.
434-50 But see 183Pa17, 38A476.
435-71 Ariz 292P1020; 207 Iowa860, 223NW751; TexCivA 296SW970.
435-72 84Colo 528, 271P1116.
436-74 200 Iowa901, 205NW468.
436-76 See also 84Colo 528, 271P1116.
436-82 138Misc69, 244NYS320.
436-83 138Misc69, 244NYS320. [a] (5) Other instances of seizure. NS [1929] 1DomLR964.
437-87 [b] **There is no valid levy** where bailiff told person having possession of judgment debtor's truck to deliver it to judgment creditor. 207 Iowa 860, 223NW751.
437-91 45 Ida499, 263P481, 483 [cit CJ]; NJCh 152A236; 300Pa580, 151A 341; 95PaSuper491.
439-12½-New. Upon writ of fieri facias against contents of safe deposit box, rule to show cause for examination thereof will be made absolute in absence of proper excuse and after reasonable opportunity given bank to assert special rights as bailee. 12PaDist &Co 422.
441-36 74Mont355, 240P667.
441-37 [d] In Montana.-74Mont355, 240P667.
441-37½-New. In some jurisdictions a levy of an execution on a cause of action is invalid when no copy of the writ or notice of levy is given to the judgment debtor. 74Mont355, 240P667.
442-41 160Ga372, 127SE729; 102NJL 251, 131A622.
442-43 102NJL517, 133A81.
442-44 [d] (2) Law has been changed in New Jersey to provide that, to be valid levy, certificate of stock must be either actually seized by officer making levy, or surrendered to corporation or its transfer by holder enjoined. 102 NJL251, 131A622. (3) Under such statute, if valid, levy by merely taking possession of certificate for few minutes and then returning it to pledgee in whose hands it was is invalid. 102 NJL251, 131A622.
443-45½-New. In New Jersey Uniform Stock Transfer Act making levy invalid until certificate is seized or surrendered or its transfer enjoined held constitutional. 103NJL470, 136A209.
444-61 [a] In Iowa.-200 Iowa901, 205 NW468.
444-64 55ND132, 212NW817.
445-72 27F(2d)74; 32Ariz580, 261P 42, 43 [quotCJ]; 240Mich28, 215NW6, 7 [quotCJ].
445-73 32Ariz580, 261P42, 43 [quot CJ].
445-76 32Ariz580, 261P42, 43 [quot CJ].
446-81 28Hawaii395.
446-89 28Hawaii395.
446-92 18F(2d)455.
448-7 220Ky464, 295SW442; Ont [1929] 1DomLR142.
449-22½-New. The seizure of the lessee's rights cannot prejudice those of the lessor against him and it is essential to place the seizing creditor in a situation where the lessor can demand the payment of delinquent rent or cancellation of the lease. 12LaA147, 125 S601.
449-22¾-New. The sheriff's seizure of a lease for a judgment creditor by taking possession of the instrument in the recorder's office is invalid. 12LaA147, 125S601.
451-48 12LaA147, 125S601 (notice to lessor does not divest lessee); 46Philippine358.
451-50 57ND17, 220NW130 (levy of execution on land).
452-55 36GaA55, 135SE222; 74Mont 355, 240P667; 46Philippine358.
452-63 Iowa 228NW272.
453-71 Iowa 228NW272.
453-73 [b] In Iowa.-228NW272.
454-92 57ND17, 220NW130.
455-99 223Ky574, 48W(2d)385.
456-11 223Ky574, 48W(2d)385, 387 [citCJ].
457-24 212Ky118, 278SW557. But see 90PaSuper560.
458-38 40GaA819, 151SE695 (entry on fieri facias of date of levy anterior to that of fieri facias).
459-54 122Kan114, 251P427. Contra 116Nebr627, 218NW423.
461-83 But see 14PaDist&Co 177.
463-12 [a] **It is presumed that there was sufficient legal evidence as to value of real estate** to enable jurors to perform their duty. 14PaDist&Co 177.
464-30 225Ky648, 9SW(2d)988. [b] (4) Value of property condemned need not be set forth in return, and setting forth that yearly rental is not sufficient to satisfy debt within seven years is conclusive. 14PaDist&Co 177.
465-35 222Ky702, 2SW(2d)392.
467-54 [g] **That sheriff held other fieri facias not levied** cannot be considered on question whether levy was excessive. 167Ga448, 145SE875(2dcase).
468-75 297Pa136, 146A548.
469-12½-New. Refusal to dismiss a levy on real estate for insufficiency of a description reciting an impossible boundary is not error where it is not specified how or in what way the boundary is impossible. 168Ga607, 148SE 515.
470-17 Iowa 229NW662.
470-23 99Fla1165, 128S483.
470-28 12PaDist&Co 666.
471-34 86Mont331, 283P420. [b] **As to unencumbered chattels** of the judgment debtor and the proceeds thereof an execution creditor is in the position of a bona fide purchaser. 83Colo 78, 262P919.
471-35½-New. Execution creditor does not stand in place of bona fide purchaser for value. Wis 230NW135.
471-44 La 130S472(1stcase).
472-61 10LaA571, 121S646.
474-79 37GaA767, 142SE199. See also 144Wash661, 258P853.
476-35½-New. Where a bond is accepted by the levying officer without court order or authority of law it is unenforceable against a surety as a conventional obligation. 12LaA266, 125S 502.
478-94 33GaA654, 127SE780.
480-22 [b] (2) Demand and advertisement is not necessary to establish breach of bond where property of perishable nature has been consumed. 41 GaA88, 151SE925.
480-33½-New. nor because the property was cumbersome, 34GaA131, 128 SE703.
480-33¾-New. or that on day of sale it was tendered to the levying officer as being at place of sale. 34GaA131, 128SE703.
482-54 37GaA462, 140SE785.
484-19 34GaA131, 128SE703 (on defendant to account for all property levied on).
484-24 41GaA88, 151SE925.
486-50½-New. [§ 326½] 1½. **Transfers Pending or Subject to Execution.** Grantee having full knowledge of grantor's debt and of judgment and levy of execution on land conveyed is not an innocent purchaser and acquires no rights as against execution plaintiff. 214Ky381, 283SW384.
491-58 215Ala632, 112S209; 80Colo 385, 252P255; 84Colo 528, 271P1116; 234Ky613, 28SW(2d)959; 150Va394, 143SE713. But see 233Ky749, 26SW (2d)1043.
492-64½-New. In Georgia, where the execution is recorded within ten days from the date judgment was rendered, the lien thereof relates back to such date: 35GaA692, 134SE479.
492-64¾-New. but if not recorded until after expiration of ten days, it takes effect as of date of recording. 35 GaA692, 134SE479.
492-68 202Cal 264, 259P1101.
492-69 [b] In New York.-250NY484, 166NE175.
493-77 245 IllA582; 234Ky613, 28 SW(2d)959.
493-78 23 OhA50, 154NE358.
493-79 23 OhA50, 154NE358; 116 Okl 245, 244P191.
493-80 23 OhA50, 154NE358; 116 Okl 245, 244P191.
493-81 23 OhA50, 154NE358.
493-82 23 OhA50, 154NE358.
495-5 234Ky613, 28SW(2d)959.
495-9 234Ky613, 28SW(2d)959.
498-36 13LaA618, 128S705 (presumption). [m] **Seizures made on same day** did not destroy presumptions that sheriff made seizure first under writ first received. 13LaA618, 128S705.
503-96 [a] (1) But see 35GaA692, 134 SE479. [b] In Georgia.-35GaA692, 134 SE479.
503-2 37GaA402, 140SE511.
504-9 NJCh 147A376.
504-20½-New. **Priority according to recording of executions.** In some states executions take priority according to dates upon which they are recorded, with the qualification that, if they are recorded within a stated time after rendition of judgments, they relate back to dates of such rendition. 35GaA692, 134SE479.
504-20¾-New. Under such a rule, a recorded execution is superior to an unrecorded execution when based on a prior judgment. 35GaA692, 134SE479.
506-50 212Ala655, 103S839; 8LaA39; 103NJEq315, 143A373.
506-52 [c] **Trust deed upon matured ungathered crop of cotton** executed after levy by virtue of execution cannot prevail against judgment creditor. 150 Miss729, 116S731.
507-58 221MoA152, 297SW727. See also 245 IllA582.
507-66 226AppDiv343, 234NYS357. But see 136Misc283, 240NYS642.
507-66½-New. **Transfer for security.** A bill of sale for security, although executed prior to date of rendition of a judgment, is junior to the execution on such judgment recorded at the same time as bill of sale, where the execution relates back to date of judgment, 35GaA 692, 134SE479.
507-66¾-New. but superior to such execution when recorded after the bill of sale. 35GaA692, 134SE479.

509-84 230Ky129, 18SW(2d)946. [a] (2) Execution which, by statute, takes effect as of prior date when judgment was rendered is superior to bill of sale for security not recorded till same time as that of recording execution, though executed prior to date of judgment. 35 GaA692, 134SE479.

510-10½-New. A judgment creditor of the vendor has been held to acquire no lien upon lands sold by reason of a judgment and levy of execution taking priority over rights of the purchaser under an unrecorded deed, where the possessory right of the purchaser was complete under the Tennessee statute. 158Tenn143, 11SW(2d)853.

510-11 See also 35GaA692, 134SE479.

511-20½-New. On constable's failure to post written notice, execution becomes dormant only as to liens attaching subsequently and to certain bona fide purchasers. 219AppDiv193, 219 NYS541.

512-23 245 IllA582. [b] **On return of execution as wholly unsatisfied** plaintiff cannot impress trust on proceeds of property on theory that it was once validly levied upon. 200 Iowa901, 205 NW468.

512-26½-New. Under statute declaring that release for valuable consideration of property subject to execution is satisfaction of execution to extent of value of property the term "valuable consideration" means consideration founded on money or something convertible into money or having value in money. 165 Ga558, 142SE127.

512-26½-New. Plaintiff in execution must receive benefit from release under such statute and statute does not operate where only a third person incidentally receives a benefit from the release. 165Ga558, 142SE127.

512-30 93CalA97, 269P468.

512-33 157Md249, 145A779.

514-40 16F(2d)109.

516-62 97PaSuper281.

517-78 155Tenn614, 298SW263.

518-83 34Man14, [1926] 4DomLR262, [1926] 2WestWkly780.

520-6 But see 297Pa74, 146A569.

521-25½-New. Where it appears that prior execution and other liens will exhaust the fund, the court will not determine priority as between remaining liens not sharing in fund. 35GaA692, 134SE479.

521-29 133 Okl 173, 271P833.

521-36½-New. In Louisiana suspensive appeal and suit to enjoin sale are the only methods by which execution can be stayed. 11LaA208, 123S513.

521-37 8LaA385.

521-41 31Ariz460, 254P232; 208Cal 376, 281P496 (setting aside prior order staying execution); CalA 288P127; 160 La631, 107S471; 291Pa15, 139A585. See also 49Philippine605.

522-61½-New. Where sheriff's return on a summons was insufficient properly to identify defendant and bring him under the jurisdiction of the court, but judgment was taken by default, execution is without a proper predicate, and should be stayed. 97Fla256, 120S357 (1stcase).

522-63½-New. In Philippines circumstances may arise after return of case justifying stay of execution. 51Philippine624.

522-66 51Philippine624.

523-76 [d] **Order directing sheriff to postpone execution sale on judgment against garnishee** held void as beyond court's jurisdiction. 31Ariz460, 254P 232.

523-78 MoA 178W(2d)560. [a] **Assistance rendered garnishing creditor by debtor in collecting debt from judgment creditor** does not constitute collusion. MoA 17SW(2d)560.

524-97 100CalA462, 280P173. [d] **Acceptance of chattel mortgage** reciting that it was given to secure judgment extends time for payment of judgment till due date and invalidates outstanding execution. 220AppDiv507, 221NYS776.

524-99 231Ky223, 21SW(2d)269(2d case).

526-28 5PaDist&Co 528.

526-42 5PaDist&Co 528.

526-46 [c] **Receiver.**-160La631, 107S 471.

527-53½-New. Appeal from judgment is waiver of stay. 5PaDist&Co 528.

528-74 97Fla256, 120S357(1stcase).

528-75 74Mont558, 241P636 (pending motion for new trial).

528-92 See also 1LaA607.

528-93 See also 247 IllA449; 1LaA762.

530-11 See also 220AppDiv507, 221NYS 776.

531-29½-New. Where judgment is enforcible against defendant, it is enforcible against the sureties on a stay bond. 90CalA416, 265P956.

531-30 8F(2d)455, 458 [quotCJperGilbert,CJ].

532-66 [g] **Substituted plaintiff** may enforce obligation against sureties where undertaking shows obligation inuring to benefit of plaintiff in action and not to any particular person. 90CalA416, 265P 956.

534-91½-New. Third person having rights under judgment may move to set aside that part of an order of attachment which stays execution of judgment. 35 PortoRico 362.

534-93 155Tenn614, 298SW263.

535-28 220Ky464, 295SW442.

537-57 30Ariz375, 247P132.

537-58 88PaSuper568.

537-60 MoA 287SW794. See also 7 Alaska560, 562 [citCJ].

540-8 MoA 17SW(2d)586.

540-15 46Philippine41.

541-33 87Colo 541, 289P598. [f] **Utterly void execution** will be quashed by court of its own motion, when invalidity is brought to its attention from any source, and disqualifications of moving parties to urge motion is immaterial. 195Cal 37, 231P730.

542-34 195Cal 37, 231P730 (party to action, who has been adjudged entitled to statutory lien subject to plaintiff's lien may move to recall void execution, though he has ceased to be interested in property).

542-49 [g] **Motion filed after execution sale** but before return term of execution is within jurisdiction, which is not lost by continuance to term subsequent to return term. MoA 287SW794.

545-3 [a] MoA 318SW(2d)93; 112 Okl 173, 240P124 (motion to recall execution on ground that default judgment had been vacated). [b] **Evidence held sufficient.**-70Utah163, 259P191.

545-4 114 Okl 110, 243P499 (matter rests largely in discretion of court).

545-15½-New. The court may determine the disposition of money paid into court by the garnishee pending the proceeding where the levy is quashed because of exemption. MoA 98W(2d)257.

546-35 200Cal 316, 253P136.

546-42 36GaA336, 136SE479.

547-51 [b] **Defendant's discharge in bankruptcy** is no ground of illegality in levy of execution. 41GaA713, 154SE388 (1stcase).

547-54½-New. or property is exempt, 36GaA787, 138SE262.

547-56 33GaA687, 127SE666.

547-59 36GaA336, 136SE479.

547-60 But see 170Ga65, 152SE74.

547-62 36GaA55, 135SE222.

547-63 36GaA55, 135SE222.

547-66½-New. Existence of an outstanding preexisting security deed on the same property in favor of a third person is not ground for an affidavit of illegality. 36GaA347, 136SE554.

547-66½-New. It is not a ground of affidavit of illegality that after levy defendant's wife filed equitable claim to the property levied on and sought to enjoin a sale under the levy and that plaintiff is proceeding under the levy to have the land advertised for sale before remittitur from the supreme court on affirmance of judgment denying injunction. 39GaA 220, 146SE500(2dcase).

548-72 36GaA55, 135SE222.

548-74 33GaA626, 127SE668; 36GaA 55, 135SE222; 36GaA776, 138SE250; 37 GaA394, 140SE425; 38GaA507, 144SE 353; 38GaA526, 144SE670; 41GaA551, 153SE624; 41GaA713, 154SE388(1st case).

548-75 35GaA236, 133SE519; 36GaA 776, 138SE250. [a] (5) Default judgment rendered without introduction of evidence. 33GaA626, 127SE668.

548-76 36GaA776, 138SE250. [a] **Absence of defendant.**-39GaA220, 146SE500 (2dcase).

548-78 38GaA507, 144SE353.

549-82 37GaA393, 140SE518.

549-86 160Ga652, 128SE786.

549-87 37GaA393, 140SE518.

549-89 35GaA484, 134SE125.

549-91 37GaA393, 140SE518.

549-94 160Ga691, 128SE889.

549-95 160Ga691, 128SE889.

550-7½ 41GaA285, 152SE605. [a] **Affidavit of illegality must be verified positively;** verifying to best of one's knowledge is not enough. 170Ga612, 154SE 139.

550-14½-New. The affidavit need not allege that the property levied upon is the property of defendant in execution. 37GaA737, 141SE673.

550-15 39GaA220, 146SE500(2dcase); 39GaA64, 146SE28(3dcase).

550-20 35GaA484, 134SE125.

551-38 GaA 155SE498.

551-39 [a] **Amendment to affidavit of illegality** reciting denial of constitutional rights and of day in court is not equitable petition. 166Ga614, 144SE17.

552-57 38GaA573, 144SE406.

552-63 41GaA470, 153SE434(2dcase).

552-65½-New. Instructions have been held not objectionable as excluding issues from the jury. 37GaA737, 141SE 673.

552-65½-New. Where only testimony on issue was that of plaintiff in execution, issue has been held to be one of fact for jury. GaA 155SE81.

552-71 41GaA462, 153SE781 (original affidavit is admissible).

553-75½-New. Evidence which is irrelevant to the issue on trial is properly rejected. 37GaA737, 141SE673.

553-77 35Ga236, 133SE519; GaA 155 SE81. [b] (2) 41GaA701, 154SE294(2d case). (3) 41GaA701, 154SE294(2d case).

553-80 37GaA13, 138SE795; 37GaA139, 139SE110; 37GaA394, 140SE425; 41 GaA326, 152SE915. See also 38GaA573, 144SE406.

553-88½-New. Dismissal of a levy against the maker of a note and the return of property to the maker cannot be made the basis of a claim for discharge by the indorser of the levy on his property. 37GaA139, 139SE110.

553-96 38F(2d)561; 98Fla186, 123S 699(2dcase); 160Ga819, 129SE100 (adequate remedy at law by claim); 164Ga 878, 139SE799; 168Ga77, 147SE95; MoA 13SW(2d)581; 127 Or578, 273P334; 85 PaSuper99; 103WVa490, 138SE116. [a] (5) 218MoA611, 265SW991. (6) 218MoA 611, 265SW991.

554-97 28 OhA387, 162NE708; 115Tex 576, 285SW1060. [c] **Sureties on supersedeas bond** are entitled to enjoin execution against them where appellee released property from attachment lien to their prejudice. Tex 285SW626.

555-99 156Md16, 142A488.

555-1 169Ga332, 150SE202.

555-3 160Ga652, 128SE786. See also 167Ga122, 144SE902.

555-3 145Miss78, 111S129.

555-9 See also 115Tex576, 285SW1060.

556-14 TexCivA 48W(2d)580.

556-17 Ga 154SE787; TexCivA 148W (2d)931.

556-19 195Cal 569, 234P371. [a] (6) Seller of engine who took it back from buyer and resold it before seizure by first buyer's judgment creditors could not compel second buyer to exercise his right to arrest seizure and sale by injunction. 161La114, 108S305.

556-20 127 Or578, 273P334; 183Pa17, 38A476 (levy against part of defendants enjoined where plaintiff attempted to interfere with right to contribution); 85 PaSuper99.

556-21 162La205, 110S202.

556-21½-New. , or where execution of judgment would be inequitable because of matters arising either from, or subsequent to, the judgment. 74CalA524, 241 P108.

556-22 TexCivA 28SW(2d)279. See also TexCivA 278SW858.

556-23 TexCivA 23SW(2d)804.

556-27 170Ga65, 152SE74 (depressed financial conditions).

556-31 But see 149Miss892, 116S299.

557-37½-New. Where deceased husband's land was set apart for support

of widow and minor children subject to his debts which were not paid during her use of the property for several years, judgment enjoining sale thereof until second year's support set apart where creditors obtained judgment against estate will be refused. 161Ga818, 131SE893.

557-37½-New. One furnishing a bond has been held entitled to an injunction against executory process, on a ground not enumerated in the statute which is applicable only where bond is given. 160La839, 1078593.

557-37¼-New. Reversal of appeal from overruling of affidavit of illegality held to warrant denial of injunction. 165Ga448, 141SE203.

557-40½-New. Temporary injunction of execution should be perpetuated pending appeal of order enjoining execution where appellee sought to proceed. Tex CivA 278SW858.

557-41 See also 115Tex576, 285SW1060.

557-43 TexCivA 308W(2d)403.

557-44 244Mich525, 221NW619.

557-52 [a] **Form of judgment valid** precluding injunctive relief against sale thereunder. TexCivA 268SW(2d)281.

557-53 161Ga895, 132SE74.

558-54½-New. or is irregularly served TexCivA 278SW858.

558-55 85PaSuper99. [a] **Sale of life interest of debtor on ground that statute was not followed** will not be enjoined since validity of sale and interest of debtor can be determined in ejectment suit. 85PaSuper99.

558-64 170Ga65, 152SE74.

558-66 TexCivA 38W(2d)461.

560-87 164Ga878, 139SE799.

560-88 164Ga878, 139SE799; 162La647, 1108890.

560-92 162La647, 1108890.

560-93 195Cal569, 234P371; 142Miss591, 1078764 (execution on judgment against corporation by wrong name which may be applied to either one of several corporations); 48Ri267, 137A221. See also TexCivA 278SW239.

560-94 195Cal569, 234P371.

561-7 33NM593, 273P12.

561-9 235 Ill475.

561-11 TexCivA 272SW317. See also 163Ga444, 136SE410.

561-13 TexCivA 272SW317.

561-20 See also 85PaSuper99. [b] **In Philippines.**-45Philippine252.

562-34 164Ga861, 139SE674.

562-40 98Fla186, 123S699(2dcase).

562-41 98Fla186, 123S699(2dcase).

563-42 98Fla186, 123S699(2dcase); 99NJEq610, 133A514.

563-52 See also 85PaSuper99.

564-62 [c] (1) 194NC324, 139SE453. (2) 194NC324, 139SE453. (3) 194NC324, 139SE453.

564-68½-New. A petitioner, who is in effect a claimant of the property, seeking to enjoin levy of execution against a defaulting tax collector, cannot attack the validity of fieri facias on grounds which could not then be urged by defendant in execution. 168Ga77, 147SE95.

565-71 116 Okl245, 244P191.

565-74 [a] 160Ga691, 128SE389.

566-80½-New. Where defects in deeds under which plaintiff claims affirmatively appear and deeds are void as to judgment creditor, plaintiff is not entitled to injunction. MoA 248W(2d)175.

567-2 [c] 286Pa449, 133A642.

568-3 286Pa449, 133A642.

568-7 286Pa449, 133A642.

568-11 130Kan856, 288P543.

569-21½-New. In some jurisdictions judgment debtor is not entitled to injunction in action in which judgment was rendered after judgment has become finality notwithstanding action to cancel judgment. ND 229NW921.

569-21¼-New. In suit to restrain sale of realty court will determine the true character of the judgment in order to ascertain equitable circumstances. MoA 248W(2d)175.

569-28 152Tenn682, 280SW694. [d] **In Tennessee.**-152Tenn682, 280SW694.

569-31 130Misc752, 225NY8171.

570-34 44Philippine182.

570-35 TexCivA 284SW606.

570-46½-New. **Enjoining execution although judgment affirmed.** 115Tex576, 285SW1060.

570-46¼-New. In some jurisdictions suit to restrain defendant from proceeding with an execution sale, and to require that attachment be discharged and levy declared void, is properly brought in the superior court. 265Mass403, 164NE613, 63ALR231.

570-48 48Ri267, 137A221.

570-51 TexCivA 278SW858. [a] (2) Day of default judgment is not included in computation of statutory year. Tex CivA 278SW239. (3) Statute does not apply to invalid judgments. TexCivA 278SW858.

571-55 167Ga380, 145SE665.

571-57 168Ga77, 147SE95; TexCivA 278W(2d)567

571-61½-New. An owner's indemnity insurer and surety on his appeal bond, offering to pay judgments against the owner and lessee for injuries sustained through negligence of the lessee, agreeing to save the owner harmless, is entitled to a temporary injunction restraining the injured person from issuing execution against the owner and satisfying the judgment, in order to enable such insurer to be subrogated to the owner's rights against the lessee and under such subrogation to collect the judgment from the lessee's surety on appeal. 224AppDiv553, 231NYS494.

572-70 99NJEq610, 133A514; 132 Or415, 286P151 (upland owner).

572-73 160Ga565, 128SE668. [a] 160Ga565, 128SE668.

573-94 216Ala597, 114S1; TexCivA 278SW239. [d] TexCivA 278SW239; TexCivA 308W(2d)403. [e] **Allegation that writ is unauthorized or violates legal or equitable right of plaintiff or that officer has acted in excess of powers** is necessary. 131 Or554, 284P172 (execution on judgment in ejectment issued under L. § 215). [f] **Mere allegation that sheriff threatens to act in excess of authority** is insufficient. 131 Or554, 284P172. [g] **Bill held insufficient.**-98Fla186, 123S699(2dcase).

573-98 132 Or415, 286P151 (that sheriff would exceed authority).

574-14 Md 150A723; TexCivA 28SW(2d)279.

574-18 98Fla186, 123S699(2dcase).

574-19 98Fla186, 123S699(2dcase).

575-24 160Ga819, 129SE100 (demurrer to petition properly sustained where plaintiff's interest in land not set out with sufficient definiteness); 167Ga248, 145SE73; Ga 155SE6 (conditional vendor); MoA 248W(2d)175.

575-40 [a] (3) Allegation that judgment and court costs thereon had been fully paid to sheriff is too indefinite, and demurrer to petition properly sustained. 209Ky372, 272SW906. [c] **Petition is insufficient** when based on payment of judgment with something other than money. 137 Okl8, 278P625.

577-78 NJ 146A332.

577-81 NJ 146A332.

578-87 120Kan99, 242P471; MoA 24SW(2d)175; NJ 146A332. [d] **Dissolution of temporary injunction** held proper under evidence. TexCivA 198W(2d)462.

578-88 See also 163Ga444, 136SE410.

578-93 TexCivA 278SW239; TexCivA 218W(2d)30 (temporary injunction held improperly granted); 155Wash510, 285P449 (postponement of sale).

578-95 [a] (2) Refusal to dissolve upheld on ground inter alia, that it merely preserves status quo until rights are finally determined. TexCivA 273SW665.

578-96 [a] **Partition.**-TexCivA 168W(2d)844.

578-98 170Ga65, 152SE74; 129 Or520, 278P986(1stcase). [b] **Decree depriving judgment creditor of right to sue to cancel deeds under which plaintiff claims** is erroneous where judgment is valid. MoA 248W(2d)175.

579-5 Contra 33NM593, 273P12.

579-8½-New. Where plaintiff in an action to enjoin a sale of property under an execution issued against a third person alleges ownership in himself and defendant answers by general denial and plaintiff introduces evidence in support of his title and defendant offers no evidence, it is error for the court to enter judgment denying injunctive relief. 116 Okl245, 244P191.

579-8¼-New. Where deeds under which plaintiff claims are void as to defendant, he is entitled to have them declared void without resorting to independent suit. MoA 248W(2d)175.

579-15 TexCivA 278W(2d)849 (dissolution on court's own motion). [d] **Refusal to dissolve held not abuse of discretion.**-TexCivA 58W(2d)1007.

580-32 [e] (2) Where injunction is sought because seizure was invalid, attorney's fees held not recoverable. 12 LaA147, 125S601.

580-34 TexCivA 58W(2d)847.

581-48 [a] **Sureties not liable till damages are assessed.**-Or 287P223.

581-51 [c] **In Mississippi.**-155Miss368, 1248359 (may issue within seven years after dissolution, though original decree barred).

581-52 Or 287P223.

581-56½-New. An execution may issue under a judgment on an injunction bond regardless of error of the clerk in ordering execution under the prior judgment which had become barred. 145Miss528, 111893.

581-66½-New. Decree permanently enjoining execution sale and releasing lien of levy is self-executing. Iowa 232NW835.

581-66¼-New. Innocent purchaser buying stock during pendency of appeal from injunction enjoining sale and releasing liens of levies is not affected by subsequent reversal of decrees. Iowa 232NW835.

583-10 CalA 284P1035; Fla 130S599 (jury trial); 33PortoRico17; TexCivA 271SW[illegible].

583-18 [a] (3) Action of trespass by claimant allowed though sheriff's interpleader pending. 12PaDist&Co 498. [b] **In Oregon.**-Or 291P387.

584-21½-New. That another proceeding is pending does not preclude intervening claimant's immediate possession on giving bond. 300Pa580, 151A341.

584-28 12PaDist&Co 498.

584-34 [a] Sheriff cannot give priority as between two claimants where both are in his hands at same time. 298Pa463, 148A513.

585-54 12PaDist&Co 498.

585-56 12PaDist&Co 498.

585-57 12PaDist&Co 498 (upon rule to show cause to claimant and execution creditor). [a] **Where exceptions are filed to rule to show cause** and it appears from depositions taken on rule that there is no fact in dispute issue should be refused. 12PaDist&Co 501. [b] **If exceptions filed on rule to show cause are sustained** sheriff will be directed to surrender property to exceptants. 12PaDist&Co 501. [c] **If hearing on exceptions is ex parte** court on its own motion will pass on admissibility of evidence offered solely by exceptant who was plaintiff in execution. 12PaDist&Co 501 (if improperly rejected court may consider it as admitted in finally disposing of rule).

585-58 12PaDist&Co 498.

585-59 12PaDist&Co 498.

585-60 12PaDist&Co 498.

585-61½-New. The onus is on the execution creditor to show goods seized were in debtor's possession before burden can be cast on claimant to show title. Sask [1928] 1DomLR842.

585-62 88PaSuper346.

585-65 9PaDist&Co 756.

586-85 [a] 35GaA375, 133SE278.

586-93½-New. An action for money had and received is the proper remedy where money in the hands of an agent has been levied upon by a judgment creditor of the agent. NJ 141A575.

586-94 Cal 265P216. [c] **In California.**-265P216.

587-14 Fla 130S599; 170Ga30, 152SE49; 37GaA201, 139SE358; 37GaA537, 140SE902; 36Man1, [1926] 3DomLR964, [1926] 2WestWkly771.

587-18 215Ala672, 112S211; MoA 78W(2d)726.

588-19 215Ala672, 112S211.

588-20 37GaA201, 139SE358.

588-21 153Wash457, 279P597.

588-23 99CalA762, 279P666.

588-28 22AlaA282, 115S221.

588-35 39GaA286, 146SE654. [a] **Person against whom judgment was obtained under assumed or trade name** is not entitled to file claim to property levied on to satisfy judgment. 39GaA 286, 146SE654.
589-49 40GaA556, 150SE563.
589-50 6LaA827; 7LaA417; 8LaA23. See also 158La921, 105S14. [a] See also 36GaA194, 136SE166.
589-51 39GaA286, 146SE654.
589-54 39GaA286, 146SE654.
589-55½-New. Claimant without possession, right, title, or interest in property cannot attack levy by setting up defensive matter in behalf of defendant. 37GaA201, 139SE358.
589-55½-New. and, where defendant has possession, such claimant cannot attack levy on ground of invalidity of judgment against defendant. 37GaA201, 139SE358.
589-64 33GaA654, 127SE780 (claim filed after violation of forthcoming bond given by previous claimant dismissed on motion); 2LaA121.
590-70 138Misc69, 244NYS320.
590-76½-New. The primary object of an affidavit of ownership is to notify the officer that others than the judgment debtor own the property. 222MoA503, 281SW78.
590-77 [a] See also BC [1928] 3DomLR292. [c] (1) 212Ala524, 103S588. (8) Defect in affidavit in not stating claim based on mortgage is not cured by subsequent foreclosure. 212Ala524, 103S588. [f] **Affidavit held insufficient.**-214Ala431, 108S347.
590-83 89PaSuper329.
591-96 298Pa463, 148A513 (allowing possession under bond by claimant held within equitable powers).
592-23 [a] **Bondsman being in court and consenting thereto,** claim bond may be amended. 41GaA283, 152SE608.
593-39 Man [1929] 4DomLR1075. [c] (5) Present rule in Kansas is that giving forthcoming bond does not estop third person from claiming title. 126Kan456, 268P857.
593-40 29Ariz293, 241P305 (held not estopped); 165Ga200, 140SE507.
594-65 [a] **In Alabama.**-22AlaA282, 115S221.
594-77 222MoA503, 281SW78; NJSup 144A596. [b] (2) Filing of affidavits and claim bond held equivalent to personal service. 220Ala113, 124S291.
595-96 165Ga200, 140SE507.
595-98 22AlaA252, 114S422; 143Wash 537, 255P942.
595-7 170Ga699, 154SE268 (must be germane to issue).
596-17 39GaA214, 146SE512(2dcase); 36GaA194, 136SE166; 36GaA766, 138SE274. [a] (6) Other matters not in issue. 167Ga228, 145SE61.
596-18 167Ga228, 145SE61.
596-19½-New. Where plaintiff in execution does not succeed in establishing that personal property is liable to execution, claimant's issue and right between third persons and defendant in execution is not triable. 140Miss615, 105S745.
597-27 36GaA763, 138SE280.
597-28 TexCivA 298SW618.
597-29 [a] (4) 35GaA81, 132SE136; 34PortoRico 254 (admissible as pleaded). (7) Lack of title of claimant's grantor. 34PortoRico 254.
597-39 220Ala113, 124S291; 98Fla920, 124S814; Fla 130S599; 36GaA763, 138SE280; 329 Ill 403, 160NE545; 246 IllA368; Man [1929] 4DomLR1075.
597-42 36GaA194, 136SE166.
598-44 36GaA763, 138SE280; 37GaA 538, 140SE901.
598-45 36GaA763, 138SE280; 39GaA 41, 145SE910. [d] (1) 39GaA594, 147SE915.
598-47 [a] (1) 39GaA214, 146SE512 (2dcase).
598-47½-New. Evidence that crops were grown on land rented from another by defendant and were produced by the labor of defendant and his sons is sufficient to show prima facie that title to the crops was in defendant. 39GaA594, 147SE915.
598-49 TexCivA 298SW618.
598-49½-New. or the entry of levy fails to show that the property at the time of the levy was found in the possession of defendant in execution, 35GaA128, 132SE105.
599-63 165Ga416, 141SE51; 168Ga317, 147SE711; 166La626, 117S741.
599-64 214Ala431, 108S347; 39GaA 214, 146SE512(2dcase).
599-65 161Ga416, 141SE51. But see 165Ga651, 141SE646.
599-66 165Ga416, 141SE51.
600-88½-New. Statute as to admissibility of admissions of defendant in fi. fa. does not render such defendant incompetent as a witness in trial of claim case. 37GaA538, 140SE901.
600-89 See also 38GaA422, 144SE125.
601-5 [a] **In Georgia.**-37GaA779, 142SE176 (schedule in bankruptcy held admissible).
601-6 36GaA1, 135SE319; 113Wash 537, 255P942, 943 [citCJ].
601-23½-New. Testimony of sheriff as to who was in possession when land levied on admissible. 170Ga847, 154SE251.
601-24 22AlaA265, 114S673; 143Wash 537, 255P942, 943 [quotCJ].
601-25 143Wash537, 255P942.
602-27 166Ga132, 142SE665; 39GaA211, 146SE351(2dcase); 168Ga607, 148SE 515; 169Ga288, 150SE149; 36GaA810, 138SE243; 38GaA422, 144SE125; 40GaA158, 149SE73; Alta [1930] 3DomLR393.
602-28 37GaA407, 140SE399; 36GaA 194, 136SE166.
602-29 169Ga801, 151SE496; 35GaA334, 132SE783; 222MoA503, 281SW78; 222MoA503, 281SW78; 87PaSuper477; TexCivA 298SW618; Sask [1928] 3DomLR276. See also 22AlaA282, 115S221.
602-30 165Ga416, 141SE51; 170Ga321, 152SE829; 34GaA72, 128SE237 (verdict against claimant not unsupported); 36GaA766, 138SE274; 36GaA763, 138SE 280; 12LaA273, 125S763 (evidence supported finding goods seized belonged to debtor and not to claimant); MoA 30SW(2d)643; 87PaSuper239.
602-34 See also 37GaA538, 140SE901.
603-39 40GaA556, 150SE563; 41GaA 707, 154SE463.
603-41 [a] **Evidence held insufficient** to sustain finding that wife claiming land was in possession at time of levy against husband. 170Ga321, 152SE829.
603-46 [a] **Order putting over hearing few days** after having been set for certain date is in violation of statute although not in excess of jurisdiction. CalA 285P732.
603-50½-New. On claimant's failure to appear, the claim should be dismissed, or plaintiff permitted to make out case subjecting property. 165Ga252, 140SE 366.
603-54 35GaA81, 132SE136.
603-55½-New. Where possession is not admitted or shown or is uncertain, the trial court should hear evidence and direct which party shall assume the burden of proof. TexCivA 178SW(2d)1114.
603-57 214Ala627, 108S573; 98Fla920, 124S814; 165Ga416, 141SE51; 36GaA 763, 138SE280; 37GaA407, 140SE399; 39GaA594, 147SE915. [a] (1) 143Wash 537, 255P942. [b] (2) 35GaA81, 132SE 136; 36GaA810, 138SE243. [g] **Reasonableness, probability, weight and credibility** of testimony is for jury. 40GaA782, 151SE535(2dcase).
604-58 161Ga403, 131SE44 (where claimant asserted title under void tax sale); 166Ga132, 142SE665; 166Ga818, 144SE381.
604-59 165Ga200, 140SE507; 37GaA 548, 140SE895; 37GaA538, 140SE901.
604-61 37GaA548, 140SE895; NJ 144A115.
604-62 166Ga818, 144SE381.
604-66 36GaA766, 138SE274; 36GaA 763, 138SE280.
605-72 37GaA237, 139SE580. [a] (2) Other instances. 165Ga694, 141SE900.
605-72½-New. Instructions not pertinent to the issues are properly refused. 168Ga317, 147SE711.
605-73 168Ga317, 147SE711; 37GaA 237, 139SE580.
605-74 167Ga228, 145SE61; 40GaA 158, 149SE73. [a] (5) Charge that rights of creditors should be favored by court and every remedy afforded to detect and defeat effort to defraud, being direct quotation from civil code, is abstractly correct. 40GaA158, 149SE73.
605-78 See also 35GaA81, 132SE136.
605-80 35GaA81, 132SE136.
605-81 40GaA556, 150SE563 (verdict held certain).
606-89 167Ga655, 146SE475.
607-24 [a] **On failure of claimant to return property within statutory time,** money judgment automatically stands. 34Ariz556, 273P725.
607-7 220Ala113, 124S291.
607-14 169Ga288, 150SE149.
607-17½-New. Principal relying on agent's promise to advise it of necessity for prosecuting claim to machine condemned to satisfy judgment against another, is responsible for agent's neglect. Ala 129S37(2dcase).
607-17½-New. Reasonable diligence required active prosecution of seller's claim to machine condemned to satisfy judgment against purchaser. Ala 129S37(2dcase).
607-26 [a] (1) TexCivA 298SW618.
608-31½-New. An execution creditor relevying on the property under the original judgment should credit claimant with the net proceeds. 34Ariz556, 273P725.
608-43½-New. An award of a first new trial to plaintiff in fieri facias will not be disturbed under evidence placing the burden of proof on claimant, and indicating that defendant in fieri facias was in possession of the property at the time of levy, and that defendant purchased part of the property after issuance and recordation of the execution. 39GaA41, 145SE910.
608-44 [c] **In Porto Rico.**-33PortoRico 17.
609-51 37GaA407, 140SE399.
609-58 37GaA779, 142SE176.
609-63 TexCivA 298SW618.
609-70 TexCivA 298SW618.
610-82 159La498, 105S598.
611-14½-New. Where intervening claimants found to have no interest in land court trying by consent without jury did not err against claimants in ordering fieri facias to proceed. 160Ga 807, 128SE90.
611-32½-New. Where claimant failed to return the property within the statutory time after adverse judgment, the execution creditor does not waive his right to a money judgment against claimant by relevying on the property where execution against claimant was taken out before relevy. 34Ariz556, 273P725.
612-48 37GaA794, 141SE919.
613-73½-New. The principal in a replevy bond may be deemed the statutory agent for surety, and, like any other agent, is bound to exercise the utmost good faith toward his surety. 197NC452, 149SE585(2dcase).
614-8 [a] (3) 37GaA794, 141SE919. [d] **To sustain judgment in favor of bondsmen.**-126Kan456, 268P857. [e] **To sustain finding that property belonged to claimant.**-100CalA669, 280P 1034.
614-15½-New. Payments by execution defendant presumed to have been applied on main indebtedness. 41GaA 788, 154SE720.
615-26½-New. Where property levied on under a distress warrant is claimed by a third person, from whom the sheriff accepts damage and claim bonds, and to whom the sheriff delivers the property, the sheriff can not subsequently discharge or waive any terms of the claim bond so as to affect interest therein of plaintiff in fieri facias without his consent. 39GaA206, 146SE500(1stcase).
616-57 321Mo 654, 12SW(2d)438.
617-71 32PortoRico 740.
617-73 32PortoRico 740. b] **Endorsement of writ to another officer** does not confer upon latter authority to sell. 32PortoRico 740.
617-79½-New. The judgment and execution prove the authority of the officer to make the sale. 80CalA393, 252P337.
617-79½-New. An execution sale and the sheriff's deed are sufficient evidence of title where the sheriff was authorized to sell. 80CalA393, 252P337.

617-79¼-New. In some jurisdictions a sheriff's sale of rights and credits cannot be made without leave of court or a judge thereof. **NJCh** 146A419.

618-81 77**CalA**179, 246P140, 142 [cit CJ].

620-27 207 **Iowa**610, 223NW393; 208 **Iowa**145, 224NW571.

620-31 318 **Ill** 182, 149NE21.

621-40 **Ariz** 292P1020; 97**CalA**398, 275 P861.

623-75 See also 166**La**626, 117S741.

623-78 57**ND**17, 220NW130.

625-10½-New. The acts of the execution creditor in pressing the sale to secure an advantage is not unlawful. 47**RI** 317, 132A881.

625-5 [a] (2) Irregularity in holding execution sale before expiration of period of redemption not shown. 339 **Ill** 230, 171NE178.

626-23 5**LaA**464.

626-25 160**La**1089, 108S100; **Tex CommnA** 295SW590.

628-48 [a] **Failure to postpone sale** is abuse of discretion. 207 **Iowa**610, 223 NW393 (sale invalidated).

628-58 47**RI** 317, 132A881.

629-66 But see 47**RI** 317, 132A881.

630-90 57**ND**17, 220NW130.

632-19 **Mich** 233NW216; 52**ND**740, 204NW182, 183 [citCJ].

632-20 164**Ga**858, 139SE666; 52**ND** 740, 204NW182, 183 [citCJ].

633-21 3**Del** 89, 130A676.

633-22½-New. and will enable debtor to redeem one or more parcels without being compelled to redeem all. 52**ND** 740, 204NW182.

633-22½-New. One of the purposes of statutes requiring sale in parcels is to protect the judgment debtor's right of redemption and enable him to redeem any one or more parcels without being compelled to redeem the whole. 52**ND** 740, 204NW182.

633-22¼-New. Sale in parcels is proper where no one would advance aggregate bid nor accept less acreage and pay debt. 222**Ky**702, 28W(2d)392.

633-22½-New. If tract is divisible only so much thereof as is necessary to realize balance due should be sold. 222**Ky** 702, 28W(2d)392.

633-22½-New. Where sale of six tracts brought more than required and sixth tract was indivisible but amount of execution would have been realized with third, or fifth excluded, one of such lots should be excluded, at owner's option. 222**Ky**702, 28W(2d)392.

633-24 3**Del** 89, 130A676.

633-26 3**Del** 89, 130A676; 196NC268, 145SE281(2dcase).

633-33 **Effect of division by street.-Mich** 233NW216.

633-35 **TexCommnA** 26SW(2d)179.

634-41 See also **Mich** 233NW216.

634-44 52**ND**740, 204NW182, 183 [cit CJ].

635-58 **CalA** 287P523; 52**ND**740, 204 NW182, 183 [citCJ].

635-60 164**Ga**858, 139SE666.

636-69 **TexCivA** 26SW(2d)924(2d case). [g] (2) Evidence showing notice of sale was mailed to wrong address, sheriff's sale set aside. **TexCivA** 26 SW(2d)924(2dcase). (3) Mailing of statutory notice of sale with wrong address does not raise presumption notice will be received by addressee. **TexCivA** 26SW(2d)924(2dcase).

637-75 218**Ky**589, 291SW1033.

637-81 31**Ariz**370, 253P633; **Mass** 169 NE800 (publication in adjoining town); 57**ND**17, 220NW130.

638-84 See also 31**Ariz**370, 253P633.

638-86 [a] (3) Where party at whose instance execution or order of sale is issued presents to sheriff receipt of publisher of any newspaper showing full payment for publication of notice of sale, sheriff is required by statute to publish notice in that paper. 90**Wash** 487, 156P404 (objection that newspaper is not one of general circulation cannot be raised by sheriff).

639-94 57**ND**17, 220NW130.

639-96 **TexCivA** 38W(2d)461. But see **TexCivA** 6SW(2d)129 (statement of excessive amount held to render sale voidable).

639-6 97**CalA**398, 275P861. [a] **Owner entitled to have description** show special use for which property is adapted. 6**PaDist&Co** 64. [b] **Want of necessary information to make full and complete description** does not excuse failure to give sufficient description of property on part of judgment creditor. 97**CalA**398, 275P861.

639-9 6**PaDist&Co** 64.

640-13 But see 3**Del** 146, 132A737.

640-14 57**ND**17, 220NW130.

640-17 57**ND**17, 220NW130.

640-18 39**GaA**789, 148SE754 (advertisement naming original plaintiff is sufficient, though property is owned by transferee); 6**PaDist&Co** 64.

641-26 32**PortoRico** 858 (construing 82 Spec. Leg. Proc. Act § 82 and Code Civ. Proc. § 251).

642-35 **TexCivA** 6SW(2d)129.

642-37 **CalA** 287P523; 39**GaA**789, 148 SE754.

642-42 7**LaA**147.

644-58 77**CalA**179, 246P140, 142 [cit CJ].

644-63 77**CalA**179, 246P140, 142 [cit CJ].

644-71 179**Ark**259, 15SW(2d)396(2d case).

646-14 217**Ky**815, 290SW659.

646-19½-New. Judgment debtor has right to require from purchaser benefit of bid at least up to value of land. **Iowa** 231NW309.

647-34 [a] **In Louisiana.-11LaA**406, 122S915.

649-56 126**Kan**516, 518, 268P823 [cit CJ].

649-63½-New. Sale is not complete until compliance with bid. **TexCommnA** 295SW590.

649-64 **Iowa** 227NW97 (not required by law to pay money to sheriff); 131 **Or**648, 284P177.

649-68 13**LaA**413, 127S640.

650-73 [b] (3) Surety may enjoin sale of his land in execution under bond where bond of purchaser ran to sheriff instead of plaintiffs in execution. 218 **Ky**566, 291SW781.

650-82 218**Ky**566, 291SW781.

650-83½-New. In some jurisdictions, where a purchaser fails to execute a bond, the commissioner may at once disregard the bid and proceed to sell the property to another bidder, or he may, in his discretion, readvertise the property for sale and sell it on another day, entirely disregarding the purchaser who refused to give bond. 228**Ky**554, 15SW (2d)492.

650-83½-New. A purchaser is released when he does not give bond and this is acquiesced in and no proceeding is had to enforce his bid within a reasonable time. 228**Ky**554, 15SW(2d)492.

651-87 **TexCivA** 273SW993 (twelve month bond).

651-93 222**Ky**596, 1SW(2d)1062; 34 **Wyo** 332, 243P394, 397 [citCJ].

651-94 98**CalA**784, 277P1050; 34**Wyo** 332, 243P394, 397 [citCJ].

651-97½-New. Right of transferee of secured note to compel compliance with bid. 40**GaA**677, 150SE858.

651-97½-New. Creditor's seizure of property under another judgment has been held not to amount to acquiescence in a decree withdrawing the rule to compel compliance with a bid which, in effect, released the property from previous seizure. 12**LaA**412, 124S578.

652-11 [e] 159**La**864, 106S333. [f] **That purchaser's default was due to reliance on another to finance transaction** does not relieve him from liability. **NJSup** 146A40(2dcase).

654-39 126**Kan**516, 518, 268P823 [cit CJ].

655-50½-New. That constable delivered possession of goods sold under execution did not debar him from pursuing purchaser for price. 13**LaA**413, 127S640.

655-51 36**GaA**225, 136SE177, 178 [quotCJ].

655-56 219**Ky**775, 294SW482.

656-77 [c] **Constable not estopped from suing** for price of goods sold on execution, where sale was made for benefit of all judgment-creditors. 13 **LaA**413, 127S640.

657-92½-New. Leave to amend an answer so as to deny that the bid was authorized is properly denied where the evidence shows that defendant refused a deed when he found it impossible to finance the purchase. **NJ** 146A40(2d case).

658-15½-New. Certificate must conform to judgment. 318 **Ill** 182, 149NE 21.

659-32 [b] **In Oregon.-119 Or**573, 250 P218.

659-37 135**Wash**37, 237P314.

659-40 135**Wash**37, 237P314.

660-43 See also 32**PortoRico** 858.

660-49 50**Philippine**670.

660-50½-New. In the Philippines registration is required merely as a means of notification of the purchaser's rights to the public. 50**Philippine**670.

660-50½-New. The right of a holder of a certificate of sale to have it registered is not affected by the fact that similar certificates issued on prior sales have been registered. 50**Philippine**670.

660-51½-New. [§ 640a] O½. **Effect of Sale.** Purchaser at execution sale, having acquired good title, has no cause of action against judgment creditor. 219 **AppDiv**193, 219NYS541.

660-52 [b] **Purchaser relying on sheriff's deed** must prove things which the law requires to be recorded and all other matters will be presumed. 152 **Tenn**379, 277SW886.

661-66 [c] (2) Execution sale held sufficiently confirmed where deed executed and acknowledged by sheriff in compliance with statute was introduced in support of sale. 176**Ark**941, 5SW(2d) 360.

661-67 57**ND**17, 220NW130.

662-71 52**ND**315, 202NW472.

662-81 135 **Okl** 61, 273P893.

662-85 52**ND**315, 202NW47; 137 **Okl** 50, 278P327; 139 **Okl** 56, 281P238 (not required to go behind execution and look into regularity of judgment).

662-89 **Nebr** 228NW541.

663-95 132 **Okl** 180, 269P1052.

664-18 196NC268, 145SE281(2dcase).

664-20 13**PaDist&Co** 516.

665-30 **Iowa** 221NW830.

665-31 **Iowa** 221NW830.

665-34½-New. One purchasing property prior to execution sale is entitled to have the sale set aside on motion. **Iowa** 226NW52.

666-46 219**Ky**775, 294SW482.

666-62 81**Colo** 513, 256P13, 14 [citCJ]; 5**LaA**212.

667-67 73**CalA**441, 238P1104.

668-84 81**Colo** 513, 256P13, 14 [citCJ].

669-93 **TexCivA** 273SW993.

669-94 **TexCivA** 273SW993.

669-98½-New. Heirs and privies could not raise question ancestor waived. **TexCivA** 273SW993.

670-8 74**Mont**355, 240P667, 672 [quot CJ]; 52**ND**315, 202NW472.

670-9 74**Mont**355, 240P667, 672 [quot CJ]; 196NC268, 145SE281(2dcase).

670-10 74**Mont**355, 240P667, 672 [quot CJ].

670-15 57**ND**17, 220NW130.

671-31 [b] 21 **OhA**218, 153NE195.

671-32 [b] **Mistake of purchaser as to amount of his bid** is not alone sufficient to justify setting aside sale. 201 **Iowa** 389, 207NW389.

672-36½-New. It is not an abuse of discretion to set aside a sale where the purchaser bid off property under misapprehension that he could apply a mortgage held by him on the property in payment of the price. 21 **OhA**218, 153NE195.

672-37 74**Mont**355, 240P667, 672 [cit CJ]. [a] (9) That writ or process was prematurely issued. 159**La**498, 105S 598.

672-42 159**La**498, 105S598 (sale on execution prematurely issued cannot be annulled solely on that ground).

672-43 74**Mont**355, 240P667.

673-47 52**ND**740, 204NW182.

673-48 **TexCivA** 30SW(2d)511.

674-60 227**Ky**174, 12SW(2d)281.

674-69 162**La**703, 111S66.

674-70 294**Pa**309, 144A136.

675-75 6**PaDist&Co** 64.

676-81 See also 225**Ky**746, 9SW(2d) 1090. [c] 52**ND**740, 204NW182. [d] **Where devisee requested bulk sale,** exe-

cution sale in bulk is not invalid. **Tex CommnA** 26SW(2d)179.

676-85 18F(2d)455; **3Del** 89, 130A676; 218Ky589, 291SW1033; 219Ky656, 294 SW181; 240Mich468, 215NW360, 362 [citCJ]; 196NC268, 145SE281(2dcase); 52ND315, 202NW472, 474 [citCJ]; 13 **PaDist&Co** 516; 47RI 317, 132A881; **TexCommnA** 16SW(2d)280. [a] **Inadequacy caused by debtor or claimant** is not ground for setting aside sale. 206 Iowa649, 221NW186.

677-88½-New. Where the price offered by the judgment creditor is insufficient to pay preferred mortgages the adjudication is null. 12LaA401, 125S460.

677-90 TexCommnA 26SW(2d)179. [a] (5) Sale of property appraised at four thousand nine hundred dollars for four hundred and forty-eight dollars and forty-seven cents where property was subject to mortgage of one thousand five hundred dollars and homestead exemption of one thousand five hundred dollars. 240Mich468, 215NW360, 362 [citCJ]. (6) Land worth three thousand dollars but encumbered for more than its value sold for two hundred dollars. **TexCivA** 18SW(2d)690. (7) Other instances. **CalA** 287P523; 154Miss 726, 123S847 (property heavily encumbered); **TexCivA** 30SW(2d)511.

678-92 97CalA398, 275P861; 47RI 317, 132A881; **TexCivA** 15SW(2d)1085. [a] **Purchaser need not have been guilty of fraud** in bringing about such circumstances. **TexCivA** 15SW(2d)1085.

678-93 90CalA547, 265P1030; 97CalA 398, 275P861; 318 Ill 182, 149NE21; 146Miss246, 111S353. [a] (8) Sale of land for one twentieth to one fiftieth of its value. 146Miss246, 111S353.

678-94 TexCivA 18SW(2d)690.

678-2 122Kan114, 251P427. [a] **That mortgage added to purchase money exceeds statutory proportion of appraised value** is immaterial. 228Ky554, 15SW (2d)492.

678-3 206 Iowa649, 221NW186.

678-6 337 Ill 605, 169NE741; **Tex CommnA** 26SW(2d)179; **TexCivA** 18SW (2d)772; 141Wash297, 251P578.

679-7 47RI 317, 132A881.

679-10 TexCivA 297SW578.

680-18 32Ariz580, 261P42; **NJCh** 146 A419. [a] (7) 32Ariz580, 261P42.

680-20 101NJEq813, 138A899.

681-22 180Ark326, 21SW(2d)424; 339 Ill 628, 171NE629.

681-24 207 Iowa610, 223NW393. But see **TexCommnA** 26SW(2d)179.

681-27 74Mont355, 240P667.

682-35½-New. Where appellants from executory process order remain silent and permit execution of process irregular because prematurely issued, they are estopped from complaining after the sale. 159La498, 105S598.

682-40½-New. Judge having jurisdiction of case cannot give person acquiring stock interest under execution sale right to bring proceedings elsewhere so as to bind execution debtor without his consent. **Mo** 27SW(2d)21.

682-41 73CalA441, 238P1104; 90CalA 547, 265P1030; **Mo** 27SW(2d)21; 74 Mont355, 240P667, 670, 671, 672 [quot &citCJ]; 196NC268, 145SE281(2dcase).

682-42 74Mont355, 240P667, 671 [quot Cyc].

682-48 **Mo** 27SW(2d)25 (court with jurisdiction in suit to which writ returnable has exclusive jurisdiction to determine validity of sale).

683-49½-New. Appeal from modification of decree of alimony under which execution sale took place did not oust court of jurisdiction to hear motion to set aside sale. **Mo** 27SW(2d)21.

683-49⅓-New. Filing of application for change of venue held not to oust court of jurisdiction to determine motion to set aside execution sale. **Mo** 27SW(2d) 21.

683-52 [b] (9) Nearly two years after expiration of redemption period. 57ND 17, 220NW130. (10) Other instances. 57ND17, 220NW130.

683-56 **Mo** 27SW(2d)21; **Mo** 27SW(2d) 25 (held filed in time).

684-62 339 Ill 230, 171NE178.

684-66 [d] **Corporation whose stock had been sold on execution sale to** satisfy alimony was neither necessary nor proper party. **Mo** 27SW(2d)25.

684-72 **Mo** 27SW(2d)21; **Mo** 27SW(2d) 25. [c] **Persons not entitled to notice.-Mo** 27SW(2d)21 (transferee of stock sold at execution sale unknown to judgment debtor). [d] **Transferee of stock sold at execution sale** unknown to judgment debtor is not entitled to notice of motion. **Mo** 27SW(2d)25.

684-73 **Mo** 27SW(2d)21; **Mo** 27SW(2d) 25.

685-74 **Mo** 27SW(2d)21; **Mo** 27SW(2d) 25.

685-78 **Mo** 27SW(2d)21; **Mo** 27SW(2d) 25.

685-78½-New. The grant of an order nisi to set aside a sale in a proceeding by motion operates as soon as the parties have notice of it to stay any further action. 196NC270, 145SE283(1stcase).

685-85½-New. Motion need not be verified under some statutes. **Mo** 27SW(2d) 21.

685-93 74Mont355, 240P667, 671 [cit CJ].

686-94 74Mont355, 240P667, 670 [cit CJ].

686-3½-New. Where the execution creditor presses the sale to secure advantage for his claims, he has no strong claim for the aid of equity to retain the property. 47RI 317, 132A881.

687-15 93CalA97, 269P468.

687-15½-New. or until payment of the judgment, interest, and costs where the judgment creditor is purchaser. 32Ariz 580, 261P42 (execution sale of real property).

688-19½-New. Persons claiming under the judgment debtor were not required, as a condition precedent to setting aside a judicial sale under a void execution, to reimburse the purchaser at such sale for taxes and assessments against realty paid by him. 93CalA97, 269P468.

688-23 [f] **In Pennsylvania.-13Pa Dist&Co** 516.

688-23½-New. or any time within redemption period. 52ND740, 204NW182.

688-25⅓-New. Ordinarily, an attack on a sale under execution on account of irregularities in the same is timely if made within the redemption period. 52 ND740, 204NW182.

688-26 See also 339 Ill 230, 171NE178.

689-39 **TexCivA** 297SW578. [b] (3) Allegations held sufficient. 101NJEq 813, 138A899.

691-62 315Mo 525, 289SW825. [a] (8) Other evidence held sufficient. 73CalA 441, 238P1104; 47RI 317, 132A881; **TexCivA** 289SW146.

691-67 3Del 146, 132A737; 74Mont355, 240P667; 52ND315, 202NW472.

691-72 52ND315, 202NW472.

692-78½-New. Where preliminary injunction is granted on payment of judgment and other sums by complainant, and the receiver collects rents and manages the property, a final decree which is silent as to these payments will be reversed and the receiver required to account. 47RI 317, 132A881.

692-78⅓-New. Denial of a stranger's motion to set aside the sale has been held not to preclude a later motion by defendant. 79CalA199, 249P37.

692-78¼-New. Upon full hearing afforded all parties appointment of receiver refused where necessity not shown. **Mo** 27SW(2d)25.

692-82 But see 339 Ill 628, 171NE629.

692-87 244Mich179, 221NW289.

692-88 164La894, 114S725. See also 7 LaA184.

692-91 339 Ill 628, 171NE629; 227Ky 602, 13SW(2d)756.

692-94 164La894, 114S725.

693-99½-New. Setting aside an adjudication at a sheriff's sale does not affect the validity of seizure of property by the sheriff. 164La894, 114S725.

693-4 **BC** [1930] 2DomLR663.

693-7 339 Ill 230, 171NE178.

694-9 339 Ill 230, 171NE178 (premature sale).

694-12 128 Or64, 264P439.

694-15 206 Iowa649, 221NW186. [a] **Where there is no direct issue** of nullity of sale because price offered was insufficient to pay preferential mortgages, collateral attack can not be maintained. 12LaA401, 125S460.

694-16 [a] **After acknowledgment of sheriff's deed** purchaser's title cannot be collaterally attacked in proceeding involving title, except for fraud or absence of authority. 284Pa32, 130A264.

694-21½-New. A motion by a judgment debtor to set aside an execution sale is a direct and not a collateral attack on the sale. 74Mont355, 240P667.

694-21⅓-New. Proceedings to set aside a sale and to cancel the certificate to the purchaser by motion in the original action constitute a direct and not a collateral attack on the sale. 74Mont355, 240P667.

695-27 12LaA143, 125S477 (with interest from date of judicial demand).

695-33 [a] (2) Where there is statutory short-order sale proceeds, less costs should be credited on indebtedness. 37 GaA767, 142SE199. [e] **In Philippines.-51Philippine**992.

696-40 [a] 103Conn7, 130A249.

696-42 9LaA355, 118S831.

697-60 161Ga535, 131SE280; 35GaA13, 132SE233. See also 2LaA393. [c] **Sale of perishable property** under fieri facias pursuant to statute is subject to rule, and mortgagee cannot thereafter foreclose on property. 35GaA13, 132SE233.

698-67 See also 33PortoRico 66.

698-68½-New. In Philippines Civil Code article 1121 does not grant any preference but only allows action for preservation of credit. 51Philippine992.

698-70 12PaDist&Co 666.

698-71 10PaDist&Co 19.

700-89 See also 10PaDist&Co 812.

701-4 [a] (1) 12PaDist&Co 666. [b] **Apportionment of taxes** on execution sale of undivided half interest. **OhA** 172 NE683.

701-7 35GaA692, 134SE479; 162La864, 111S261. But see 12PaDist&Co 322.

704-36½-New. Life tenant who conveyed his life estate prior to judgment for debt against him has no homestead to be set off at execution sale by sheriff. 311Mo 208, 278SW686.

704-45 **TexCivA** 20SW(2d)238.

706-72 8LaA12.

707-77½-New. A sheriff's response to a motion to require him to pay to the execution creditor the amount withheld together with the penalty, stating that the amount was withheld in payment of just claims due to third persons by the execution creditor, does not state a defense. 229Ky148, 16SW(2d)791.

708-99 [b] **It is not necessary to pray for recognition of privilege** where averred preference which was not answered was deemed admitted. 13LaA302, 126S 591.

711-55½-New. Where, on the journal, an order for distribution is followed by an order reading "and for any balance remaining due to the said plaintiff, execution is awarded," such award for execution is void for uncertainty where the record fails to disclose against whom it is directed. 20 OhA101, 106, 151NE793.

712-65 79Mont246, 256P176, 57ALR 1122.

712-66 31Ariz370, 253P633; 203Cal 286, 264P810; 235 IllA75; 127Me5, 140 A378; 74Mont513, 241P523; 78Mont56, 252P386; 52ND740, 204NW182. [d] **In Arkansas.-174Ark880, 298SW25.**

712-66½-New. The right to redeem is not a property right but a mere privilege. 74Mont513, 241P523.

712-67 [a] **Illness of debtor** and inability to raise money to pay execution or to attend to business not alone sufficient ground for permitting redemption in equity. 171Mich5, 137NW91. [b] **Title in third person cannot be set up to defeat right** to redeem land sold on execution. 127Me5, 140A378.

712-69 Iowa 216NW762; 74Mont513, 241P523; 78Mont56, 252P386.

712-70 74Mont513, 241P523.

712-70½-New. An owner of property at the time of sale under execution loses power to regain the property, if it is not subject to redemption. 227Ky3, 12 SW(2d)358.

712-70⅓-New. An "equity of redemption," or legal right to redeem, is that right which the owner of property has to regain complete title to his property by payment to the purchaser of the amount for which the property was sold, with interest and penalties, in accord-

ance with statute. 227Ky3, 12SW(2d) 358.

712–73 Iowa 216NW762 (purpose of statute stated).

713–80 79Mont246, 256P176, 57ALR 1122.

714–1 Iowa 216NW762; 204 Iowa1116, 216NW764. [c] (3) Code (1924) § 11775, providing that "no party" who has appealed from district court shall be entitled to redeem does not embrace junior mortgagee in foreclosure proceeding. 200 Iowa1384, 206NW271. [d] **Trustee for creditors,** who paid judgment, cannot redeem. 235 IllA75. [e] **In Arkansas.**–174Ark880, 298SW25.

714–6 179Ark259, 15SW(2d)396(2d case); 79Mont246, 256P176, 57ALR1122. [c] (3) Title to property sold under execution does not pass till year for redemption has expired where the price was less than two thirds of the appraised value. 225Ky309, 8SW(2d)398.

715–7 216Ala556, 114S52; 179Ark259, 15SW(2d)396(2dcase); 79Mont246, 256 P176, 57ALR1122.

715–13½–New. That the court ordered the clerk to issue and deliver to the sheriff a "specific execution," and also ordered the sheriff to levy such execution on all realty of the debtors in the county when judgment was rendered, does not change the nature of the writ as an execution so far as the right of redemption thereunder was concerned. 179Ark259, 15SW(2d)396(2dcase).

715–14 39Wyo 414, 273P173. [b] **Homestead.**–Husband transferring property in homestead to wife after levy under execution is entitled to redeem, since as head of family he has joint possessory right in homestead with wife. 39Wyo 414, 273P173.

715–15 107Conn52, 139A700.

715–20 Iowa 228NW357. [a] (2) One entering judgment on order dismissing appeal is judgment creditor entitled to redeem. 214AppDiv292, 212NYS381.

716–42½–New. In some jurisdictions by statute the holder of a claim against a deceased execution defendant whose claim has been legally established in the probate court may become a redemptioner of real estate sold under execution and which is subject to redemption by creditors by pursuing, within the statutory period, the course prescribed for redemption by creditors in general and by applying during such period to the district court, or a judge thereof, of the county where the land is situated for an order permitting and confirming such right of redemption. 201 Iowa389, 207 NW389.

716–43 255 IllA51.

717–50 (c) **Mortgagee reconveying statutory right of redemption** to judgment debtor vested in him right to redeem property from purchaser at execution sale. 214Ala659, 108S853.

717–54½–New. Attaching creditor is not entitled to redeem where property was not levied on until nine months from the date of sale. 204 Iowa1116, 216NW 764.

717–64 74Mont513, 241P523, 525 [cit CJ]. [c] **Judgment creditor accepting satisfaction of his judgment** before completion of redemption loses right to redeem. 74Mont513, 241P523.

718–69 50Philippine738.

718–73 But see 50Philippine738. [c] **Purchaser at execution sale,** by failing to furnish itemized statement of debt and lawful charges on demand, forfeited all claims for compensation for improvements. 214Ala659, 108S853.

718–75 See also 127Kan304, 273P401 (mortgage interest paid by execution purchaser).

718–84½–New. A judgment creditor, failing to realize the value of property sold under execution because he bid only a nominal amount and the property was redeemed by the judgment debtors' grantees for the price at which it was sold, is not entitled to injunction against acquisition of the lands by such grantees or issuance of redemption deeds by the clerk of court. 179Ark259, 15SW (2d)396(2dcase).

719–90 78Mont56, 252P386.

719–3 201 Iowa389, 207NW389; Iowa 216NW762; 51Philippine695. [e] See also Iowa 228NW357.

720–8½–New. or a general creditor of a deceased execution debtor, 201 Iowa 389, 207NW389.

720–10½–New. In some jurisdictions the time for making tender is dependent upon whether an accounting of rents and profits by the purchaser is demanded. 74Mont513, 241P523.

720–10⅓–New. Under such statutes tender of the amount paid by the purchaser with interest must be made within one year from the date of the execution sale if no accounting is demanded, 74Mont 513, 241P523.

720–10¼–New. but, if an accounting is demanded, no tender is necessary until after the accounting is made. 74Mont 513, 241P523.

720–10⅕–New. Under some statutes providing for redemption by creditor of a deceased execution defendant, whose claim has been established in probate, by pursuing the course prescribed for redemption by creditors in general and by application to the district court or a judge thereof for an order permitting redemption, it is immaterial that the time for hearing on such application is set for a time subsequent to the expiration of such period. 201 Iowa389, 207 NW389.

720–10⅙–New. In some jurisdictions, a purchaser at a sale under execution acquires only a lien on the property, and the debtor's right of redemption is not limited to one year, but he may redeem at any time until the lien is enforced and the property sold under it. 228Ky554, 15SW(2d)492.

721–17 214Ala659, 108S853; 78Mont56, 252P386.

721–35 [a] **Payment of statutory amount due,** under protest, makes sheriff bailee of excess, and does not invalidate tender. 78Mont56, 252P386.

721–46 74Mont513, 241P523.

722–50 Iowa 216NW762.

722–53 204 Iowa594, 215NW639; 204 Iowa1116, 216NW764; 78Mont56, 252P 386.

722–52½–New. The sheriff's receipt of the redemption money does not necessarily constitute an acceptance of it by the purchaser. 74Mont513, 241P523.

722–53 201 Iowa389, 207NW389 (statutory requirements for redemption by creditor of deceased execution defendant held substantially complied with). [a] **Election between different statutes.**–74Mont513, 241P523.

722–55 78Mont56, 252P386.

723–76 216Ala556, 114S52; 83CalA542, 257P140; 78Mont56, 252P386.

724–85 74Mont513, 241P523.

724–92 74Mont513, 241P523. [a] **Officer to whom certificate** of redemption is issued cannot determine whether judgment obtained by redeeming creditor was based upon bona fide claim. 325 Ill 53, 155NE765.

724–94 74Mont513, 241P523 (purchaser has right to contest right of assignee of subsequent judgment to redeem); 78 Mont56, 252P386.

725–22 216Ala556, 114S52.

726–25½–New. Where a deed made by an execution debtor was void, the money the grantee paid to the clerk for redemption should be returned. 225Ky 309, 8SW(2d)398.

726–26 127Me5, 140A378.

726–36½–New. Purchaser may contest the right of the debtor to redeem, as he becomes the owner subject only to such right. 78Mont56, 252P386.

726–40 See also 78Mont56, 252P386.

726–46½–New. Failure to allege tender renders the bill insufficient, and precludes consideration of bona fides of purchaser's account. 78Mont56, 252P386.

727–66 74Mont513, 241P523; 50Philippine766 (person redeeming recovers same interest that was reached by levy).

727–68 74Mont513, 241P523.

727–72½–New. Where a person entitled to redeem has fully complied with the statutory requirements, such compliance results in a completed redemption. 74 Mont513, 241P523.

728–78 Iowa 228NW357; 135Wash37, 237P314. But see 179Ark259, 15SW(2d) 396(2dcase). [c] (5) Where grantee of debtor redeems after failure of junior judgment lienholder to redeem within prescribed time, latter's lien does not reattach. Iowa 228NW357 (provision in deed of judgment debtor that deed was subject to liens of record held not applicable to junior judgment lien).

728–83½–New. Where judgment debtor at time of levy had no interest in the property, redemption will not clothe him or his successor with any better right. 50Philippine766.

729–3½–New. Under Alaska statute, execution sale of property of lessor to satisfy specific liens exhausts such liens, and after redemption by lessee, property cannot be resold to satisfy same demands. 13F(2d)118.

730–19 46 Ida657, 270P621, 624 [cit CJ]; TexCivA 296SW658.

730–20 TexCivA 296SW658.

731–24½–New. In some jurisdictions a purchaser's title is effective to support a recovery of the land as a legal title, although no sheriff's deed has been executed. TexCivA 15SW(2d)1085.

733–63½–New. Confirmation of sale is not a condition precedent to the right to a deed. 31Ariz370, 253P633.

733–64 [b] **In Kentucky.**–228Ky554, 15 SW(2d)492. (2) Sheriff's deed does not render sale void. 228Ky554, 15SW(2d) 492.

733–76 IndA 152NE839.

734–90 Iowa 216NW762; TexCivA 296 SW658.

735–8½–New. Improper execution or execution without legal authority has been held not to render a deed void. Tex CivA 6SW(2d)129.

736–52 318 Ill 182, 149NE21. But see TexCivA 6SW(2d)129.

737–60 [b] **Failure to recite that judgment debtor was known to be inhabitant of state** does not invalidate notice of sale or render deed inadmissible in evidence. 128Me96, 145A896, 64ALR790.

737–73 80CalA393, 252P337.

738–84 But see 223Ky574, 4SW(2d)385.

738–86 TexCivA 273SW993. [b] Tex CivA 273SW993.

739–95 But see 223Ky574, 4SW(2d)385.

740–5 80CalA393, 252P337, 340 [citCJ].

740–6 80CalA393, 252P337, 340 [citCJ].

740–22 164Ga231, 138SE76. [e] **Inadequacy of price.**–29Ariz173, 239P1028.

741–24 204 Iowa1167, 216NW621.

741–26½–New. A sheriff's deed of property sold under execution of a judgment foreclosing an attachment on all of the attached property cannot be canceled because of excessive levy, the attachment being directly before the court. 29Ariz 173, 239P1028.

741–26⅓–New. Nothing done or omitted before judgment can be questioned in an action to set aside a sheriff's deed of property sold on execution. 29Ariz 173, 239P1028.

741–32 289Pa184, 137A254.

741–38 201 Iowa923, 208NW366.

741–41 ND 229NW3 (prima facie evidence of grantee's claim to property).

741–47 [a] **In Iowa.**–201 Iowa327, 207 NW372.

741–47½–New. Irregularities prior to execution cannot be considered in view of immunity from collateral attack. NJ Ch 150A847.

742–61 180Ark1168, 20SW(2d)305(2d case); 339 Ill 230, 171NE178; 152Tenn 379, 277SW886. [a] 128Me96, 145A896, 64ALR790; 152Tenn379, 277SW886.

743–62 90PaSuper560.

743–70 80CalA393, 252P337 (deed proves sale). [a] (1) 311Mo 208, 278SW 686.

744–80½–New. Recitals in sheriff's deed take precedence over those of return or execution. TexCivA 289SW146.

744–81 NJCh 150A847 (immune from collateral attack).

744–82 But see Mass 169NE800.

745–7 NJDistCt 136A923.

746–11 25F(2d)271, 274 [citCJ]; 84 Mont276, 275P278.

746–12 51Philippine930.

746–15 31Ariz370, 253P633; Ariz 286P 191; 176Ark941, 5SW(2d)360; 77CalA 535, 247P261; CalA 269P944; CalA 286 P741; Colo 293P333; 98Fla186, 123S 699(2dcase); 28Hawaii395; 46 Ida724,

271P5; 332 Ill 561, 164NE23, 63ALR 658; 201 Iowa923, 208NW366; 207 Iowa 882, 223NW888; 126Me397, 138A770; 311Mo 208, 278SW686 (life estate); 78 Mont56, 252P386; 79Mont166, 255P340, 60ALR1; 79Mont246, 256P176, 57ALR 1122; 190NC14, 128SE494, 498, 40ALR 273 [citCJ]; 133 Okl 152, 271P683; 32 PortoRico 740; TexCommnA 26SW(2d) 179 (devisee's interest). [h] **Sheriff's deed on execution based on judgment in suit against individuals, members of partnership,** held to transfer title of individual partner. TexCivA 5SW(2d)579. [i] **Sheriff can sell only assets** of judgment debtor. Ariz 290P155.

747-16 Ariz 290P155; 77CalA535, 247 P261; 85Colo 572, 277P471, 68ALR656 (2dcase); 2LaA29; SD 228NW466.

748-23½-New. In some jurisdictions the purchaser's rights are fixed by statute and not by the decree of the court. 29Ariz51, 239P299.

748-23¼-New. The grantee in a sheriff's deed stands in the same relation to the judgment debtor as though he were purchaser under a voluntary conveyance. 201 Iowa327, 207NW372.

748-23¼-New. The purchaser of real property on execution sale becomes the actual owner subject only to the right of redemption. 74Mont513, 241P523.

748-23½-New. Sale of heir's interest in reversion held not to convey interest in contingent remainder, notwithstanding subsequent verdict in his favor. 327 Ill 291, 158NE570.

750-70½-New. Presumption as to grantor's intent in aid of description or identity of property has no application to execution sale. 116Tex180, 288SW 181.

751-79 201 Iowa327, 207NW372. [a] **Where land is leased,** lessor's share of crop passes to purchaser. 201 Iowa327, 207NW372.

751-84 201 Iowa327, 207NW372.

751-92½-New. A sale of land under execution on a judgment conveys to the purchaser both the land and interests of the judgment debtor in growing timber, subject to the lien of the judgment. 167Ga489, 145SE840.

754-44½-New. In some jurisdictions title does not pass to the purchaser until the year allowed for redemption expires, if the property does not sell for two thirds its appraised value. 227Ky3, 12SW(2d)358.

754-44¼-New. When title passes on range levy and sale of portion of cattle herd. Ariz 292P1020.

754-45 167Ga633, 146SE444; 133 Okl 152, 271P683. [b] (2) Sale of realty relates back to date of levy. 18F(2d)455. (3) In general. CalA 286P741.

754-50 85Mont375, 278P832, 65ALR 968.

755-62 164Minn416, 205NW274; 74 Mont355, 240P667; 90PaSuper560.

755-64 TexCivA 30SW(2d)511.

756-70 32PortoRico 740 [citCJ]; TexClvA 291SW271, 272 [citCJ].

756-71 90PaSuper560; 32PortoRico 740.

757-72 32PortoRico 740 [quotCJ].

757-73 32PortoRico 740 [quotCJ].

757-75 32PortoRico 740 [quotCJ].

757-76 32PortoRico740 [quotCJ].

757-79 170Ga666, 153SE757.

757-83 74Mont355, 240P667.

757-86½-New. or of return to state that property levied on was mortgaged. 164 Minn416, 205NW274.

758-99 136Misc265, 239NYS639.

758-99½-New. Failure of notice of sale to state that property was mortgaged makes sale voidable but not void. 164 Minn416, 205NW274.

759-14 See also TexCivA 7SW(2d)674.

759-26 TexCivA 272SW830 (where on sale of land worth six thousand dollars credit of ninety dollars was given on judgment).

759-29 [a] **Purchaser of land stands on same basis respecting notice as purchaser at voluntary sale.**-TexCivA 29 SW(2d)849.

759-31 164Ga96, 137SE833; 38 Okl ACR424.

759-33 296Pa340, 145A901. [a] **Notice read at sheriff's sale that third person has title and right of possession** is not notice of unrecorded deed where defendant in execution has record title. 296Pa340, 145A901.

760-42 339 Ill 628, 171NE629 (rights of judgment debtor in continuous possession of premises).

760-50 332 Ill 561, 164NE23, 63ALR 658; Pa 151A676.

761-63 164Ga96, 137SE833; 244Mich 179, 221NW289; 56ND309, 217NW169; 296Pa540, 145A901. [b] **That purchaser is nonresident of state** does not affect rule. 219Ala191, 121S706.

761-70 296Pa340, 145A901.

761-73½-New. Notice of tenant's possession held sufficient. 164Ga96, 137SE 833.

761-75 219Ala191, 121S706; 296Pa340, 145A901.

761-76½-New. A tenant in possession of land has the burden of proving that the judgment creditor has knowledge of assignment of lease to the mortgagee, in order to avoid the judgment creditor's recovery of rent. 99CalA692, 279 P170.

761-78 80CalA393, 252P337.

761-79 80CalA393, 252P337.

761-80 80CalA393, 252P337; 38 Okl ACR424.

762-94 220MoA1219, 298SW1052.

763-2 [b] **Rule of caveat emptor** does not apply where purchaser was induced to purchase by fake representations of judgment creditor that title was good. 42 Ida567, 248P447. [c] **That purchaser receives sheriff's deed pending trespass to try title instituted by purchaser** gives him no greater rights as against equities of which he had notice. Tex CivA 15SW(2d)1085.

764-15 TexCivA 289SW116; Wash 290 P1005.

764-16 Tex 293SW658; Wash 289P 1016; Wash 290P1005.

765-19 99CalA692, 279P170.

765-35 296Pa340, 145A901.

766-41 32PortoRico 740 (sale by official other than one to whom writ directed).

766-51 99CalA692, 279P170 (no instrument showing mortgagee's claim to rent is recorded); 296Pa340, 145A901.

767-59 102CalA71, 282P801; 98Fla 186, 123S699(2dcase); 164Ga861, 139 SE674; Iowa 228NW357. [b] **In Kentucky.**-228Ky216, 14SW(2d)761.

767-61 161Ga535, 131SE280.

767-64 14PaDist&Co 151.

768-75 168Ga101, 147SE32 (sale of property under legal process will not divest municipality of lien for taxes, under Georgia statute).

768-82 35PortoRico 20 (not liable for debt in personal action in absence of foreclosure).

768-82½-New. A statute providing that the purchaser at execution sale of lands encumbered by a vendor's lien shall acquire a lien on the property for purchase money does not apply where execution issued to satisfy such lien. 222 Ky702, 2SW(2d)392.

769-84 14PaDist&Co 151.

770-20 201 Iowa327, 207NW372; Pa 151A676.

771-23 25F(2d)271; 99CalA692, 279P 170.

771-24 TexCivA 15SW(2d)1085.

771-27 325 Ill 590, 156NE758; 49Philippine349.

772-39½-New. Every one taking title under process of court takes subject to power of court to set aside proceeding for cause shown. Mo 27SW(2d)21.

772-39¼-New. Every one taking title under process of court takes subject to power of court to set aside proceeding for cause shown. Mo 27SW(2d)25.

774-63 241Mich191, 216NW433.

774-70 13LaA413, 127S640 (until purchase price is paid delivery of goods may be refused).

774-78½-New. The lessee of a hotel is entitled to possession of electric light fixtures therein during the term of the lease as against a purchaser under execution on a general judgment against the lessor for the balance due on the purchase price. 217MoA554, 272SW 1006.

774-79 39GaA789, 148SE754; 9LaA 282, 119S888. [c] **Right of possession in purchaser implies** correlative duty by defendant to vacate premises on notice or demand. 39GaA789, 148SE754.

774-79½-New. Where the purchaser agrees to accept a sum in redemption, there is no duty to surrender possession to him. 216Ala556, 114S52.

775-82½-New. Where the sale is in gross and should have been in parcels, the purchaser is not entitled to possession. 164Ga858, 139SE666.

775-83 51Philippine355; 50Philippine 738.

775-92 [b] (1) 210Ky836, 276SW973.

776-6 34Ariz438, 272P641; Cal 284P 905.

776-9 See also 1LaA706.

777-13 208 Iowa15, 221NW537. [b] **In Philippines.**-51Philippine695.

777-21½-New. At common law the purchaser at a sheriff's sale was entitled to recover for use and possession against the judgment debtor remaining in possession. 201 Iowa923, 208NW366.

779-65 222Ky374, 300SW889.

780-76 228Ky554, 15SW(2d)492.

783-51 [a] **In Alabama.**-219Ala213, 121 S519. [b] **Statute authorizing forcible detainer** does not exclude suit in ejectment. 181Ark412, 26SW(2d)87.

783-53 [a] (5) Writ of possession issued in absence of proper defense shown. 11PaDist&Co 251.

784-56½-New. In some jurisdictions, where the judgment debtor retains possession of land after sale under writ of fieri facias, the purchaser is entitled to a writ of possession commanding the judgment debtor to vacate the property within three days. 9LaA282, 119S888.

784-56¼-New. In some jurisdictions, where the sheriff fails to put the purchaser in possession of premises within thirty days after sale, it is the duty of the clerk of the district court rendering the judgment to issue a writ of possession under which the sheriff can place the purchaser in possession. Tex CivA 12SW(2d)839.

784-56¼-New. In Porto Rico, where the action in which a default judgment was rendered was one of debt notwithstanding an allegation that the debt was secured by mortgage, the writ of execution cannot have the effect of a writ of possession as would be the case in summary or ordinary foreclosure proceedings. 33PortoRico 305.

784-56½-New. **In Georgia,** under statute, possession may be obtained by a writ of possession. 39GaA789, 148SE 754.

786-95 210Ky836, 276SW973 (statute must be strictly complied with).

786-99 [a] (3) Notice is insufficient which fails to show right to possession by virtue of execution sale, fails to state in whose favor and against whom execution issued, execution book where recorded, or court of clerk's office from which execution was issued. 210Ky836, 276SW973.

787-20½-New. Property owners by inheritance are proper parties defendant and their answer should not be refused consideration. 210Ky836, 276SW973.

787-30 [a] (4) Conveyance by sheriff must be shown. 210Ky836, 276SW973.

787-41½-New. In an action of unlawful detainer, recitals of the sheriff's deed are alone insufficient to make out plaintiff's right or title, but independent proof of judgment, execution, or levy is required. 219Ala213, 121S519.

787-41¼-New. In an unlawful detainer action the purchaser is not entitled to recover where the judgment was not introduced in evidence, although the recorded certificate is introduced. 219 Ala213, 121S519.

787-43 99CalA692, 279P170.

788-55 166Ga228, 142SE885.

788-65 [a] **Evidence held sufficient** to establish prima facie case that sale was made under alias execution issued by clerk of court rendering judgment. Tex CivA 25SW(2d)942.

788-68½-New. Execution and judgment held admissible. TexCivA 289SW 146.

788-81 See also 12LaA401, 125S460.

788-84 But see 32PortoRico 740.

789-99 [a] **Corporation which sold its property to debtor corporation** (1) cannot complain of mode of such transfer in action by it to quiet its title to such property against purchaser at sale of

property on execution under judgment against transferee. 83CalA679, 257P209. (2) Plaintiff cannot attack sale in such action on ground that transfer was not assented to by stockholders in manner required by statute, where officers and stockholders in fact consented and no creditor is involved. 83CalA679, 257P209.

789-5 32PortoRico740. [a] **In Porto Rico.**–32PortoRico740.

789-10½-New. A petition, alleging that the sheriff sold plaintiff's property on execution after announcing that the successful bidder must assume a lien thereon, that the lienholder bid in the property and praying that the amount of the lien was deducted from the proceeds and credited on the judgment, states a cause of action. 161Ga354, 130SE563.

789-13½-New. Evidence in an action by a corporation to quiet title to property purchased by defendant at sale on execution under a judgment against another corporation has been held sufficient to show that the judgment debtor was owner of the property under a sale made by plaintiff. 83CalA679, 257P209.

789-13⅓-New. In the notes are cited cases in which the evidence has been held sufficient to sustain plaintiff's claim of ownership. 99CalA87, 278P241.

790-17 32PortoRico740.

790-18 134Okl107, 272P380.

790-19 See also Mo 19SW(2d)654.

790-27½-New. To establish prima facie case party claiming title under execution sale must produce judgment, execution sheriff's return, certificate of sale and sheriff's deed. Mont 286P140.

791-49 174Ark715, 297SW817 [quot CJ].

791-51 46Ida657, 270P621, 624 [quot CJ].

791-59 80CalA393, 252P337; 46Ida 657, 270P621, 624 [citCJ]; TexCivA 25SW(2d)942.

792-79 [d] See also 2LaA16. [g] **Postponement of return until second term** after issuance of execution is authorized under statute. Mo 27SW(2d)21.

793-98 311Mo32, 276SW872 (merely erroneous and not void).

794-21 Mass 169NE800.

795-42½-New. Insertion of word "evening" in description of paper on return of execution does not affect validity of notice of sale. Mass 169NE800.

795-56 [a] (10) Other instances. 57ND426, 222NW480.

798-32 80CalA393, 252P337; 164Minn 416, 205NW274; 85Mont375, 278P832, 65ALR968; TexCivA 22SW(2d)688.

799-42½-New. Sheriff may correct the date of return on an execution subsequent to the return date although he was not then in office. TexCivA 289SW 146.

799-46 102CalA172, 282P984.

804-79½-New. Entry of receipt by sheriff of money for execution deed has been held an election by him to treat the sale as final and to preclude resale. 164Ga462, 139SE15.

805-96½-New. Return nulla bona is not evidence of nonexistence of property beyond jurisdiction. Vt 151A642.

805-10 35OhA499, 172NE631; 86Pa Super508.

805-12 [c] **Common knowledge** replacement or repair may not compensate insured. Or 291P498.

807-39 164Minn416, 205NW274.

807-46 164Ga462, 139SE15.

812-53 137Misc824, 245NYS34.

812-62½-New. Conveyance expressly in satisfaction of half of judgment held not to relieve codebtors of liability to grantee for other half. 214Ky381, 283SW 384.

812-64 [a] (5) Entry on execution of payment by codefendant, as required, cannot be made by clerk of court. 33GaA797, 127SE795.

812-67½-New. Payment transfers the lien to a third person who must record the transfer or lose the lien. 164Ga861, 139SE674.

814-97 255IllA161.

814-3 33GaA797, 127SE795.

816-34 [a] (4) Duty of sheriff to return execution satisfied on acceptance and use of check. 137Misc824, 245NYS 34.

816-45½-New. Payment of the amount for which original action was brought, rather than amount of judgment, is insufficient and not a defense against levy of execution on such judgment. 103Conn744, 131A736.

816-45⅓-New. Where execution was not satisfied, but only judgment debt was paid, and judgment and execution lien assigned to person paying, return of execution was held not to extinguish debt. 214Ky381, 283SW38.

817-49 [a] (2) Relative to right to set-off claim for fees to attorney not appearing in suit. 338Ill154, 170NE250.

817-53 33GaA787, 127SE823.

817-61 37GaA139, 139SE110.

819-74 37GaA139, 139SE110.

826-27 6PaDist&Co483; Man [1930] 3DomLR810.

826-40½-New. The judgment creditor is not permitted to harass the judgment debtor to no purpose. 94CalA19, 270P391.

826-40⅓-New. Supplementary proceedings are proceedings before magistrate, not proceedings in court. 137Misc754, 244NYS671.

826-41 152Wash323, 277P850.

827-55 155Wash510, 285P449.

828-62 134Misc645, 236NYS363.

828-66½-New. The statutes must be construed so as to give force and effect whenever possible to each and every one of them. 126Misc735, 215NYS409.

828-70½-New. Statute providing for supplementary proceedings with power of contempt for failure to answer is constitutional. 159La831, 106S321.

828-70⅓-New. A statute authorizing commitment for contempt for failure to answer questions relative to property in another state is not unconstitutional as providing for imprisonment for debt. 98Fla52, 123S3.

828-83 57OntL256, 28OntWN250, [1925] 3DomLR957.

829-4 245NYS283.

830-23 But see **Ont** [1927] 3DomLR563.

830-38 9PaDist&Co3. [a] **Statute authorizing examination of "judgment debtors" does not embrace** debtor corporations or their officers as such. 9PaDist&Co3.

831-46 57OntL256, 28OntWN250, [1925] 3DomLR957.

831-46½-New. his mother-in-law, 57OntL256, 28OntWN250, [1925] 3DomLR957.

832-68 155Wash510, 285P449.

832-96½-New. An unliquidated claim for personal injuries is not subject to attachment under a statute empowering plaintiff in execution to subject a chose in action, to the satisfaction of the judgment. 228Ky679, 15SW(2d)461.

832-96⅓-New. Under a statute providing for an equitable action by plaintiff in execution to discover money or choses in action, and subject the same to the satisfaction of the judgment, the term "chose in action" does not include any right of action that may not be assigned. 228Ky679, 15SW(2d)461.

833-9 248NY18, 161NE315 (money received under Workmen's Compensation Law by injured employee and placed on deposit).

833-20 [a] **Sufficiency of evidence** as to amount subject to lien. Iowa 231NW 444.

834-50 33OhA204, 168NE768.

838-31 134Misc645, 236NYS363.

838-36 134Misc645, 236NYS363.

838-37 137Misc754, 244NYS671.

839-42 127Misc832, 217NYS542. [a] (5) Order requiring insurance company to pay judgment creditor, not made by same justice who issued supplementary order, is void. 127Misc832, 217NYS542.

839-43 217AppDiv756, 216NYS463.

839-50½-New. In California an order should issue out of the superior court sitting in the county in which judgment was entered, and if the judgment debtor neither resides nor has his place of business in such county, the same court should appoint a referee to hear the matter in the county of the debtor's residence or place of business. 94CalA 19, 270P391.

839-51 127Misc832, 217NYS542.

840-58 [b] **Present** liability on judgment is necessary. 23OhA233, 155NE 396. [c] **Claim of judgment debtor** payable on a contingency cannot be reached by proceedings in aid of execution. 23OhA233, 155NE396.

840-61 23OhA233, 155NE396.

841-83½-New. A judgment valid on its face is sufficient to support the proceedings until satisfied, superseded, or set aside. 135Wash640, 238P639.

842-99 126Misc735, 215NYS409.

842-9 Okl293P209.

843-14 Okl293P209 (order issued before return of alias execution held valid).

843-19 126Misc735, 215NYS409; 34OhA518, 171NE369.

845-38 205Iowa778, 218NW475; NJ 137A430.

845-45 [a] 88IndA430, 164NE319; 152Wash323, 277P850.

845-46 195Cal766, 235P995.

846-62 126Misc735, 215NYS409.

846-73 227AppDiv390, 236NYS361.

847-97 NJCh147A583 (allegation held sufficient). But see **Alta** [1929] 3DomLR292.

849-32 34OhA518, 171NE369.

849-33 195Cal766, 235P995.

849-34 195Cal766, 235P995.

851-64½-New. Failure of affidavit to recite sufficient facts to sustain an order authorizes the judgment debtor's discharge. 126Misc735, 215NYS409.

851-70 94CalA19, 270P391.

851-73½-New. In Alberta a judgment creditor may without an order examine the judgment debtor before a clerk of the court. **Alta** [1929] 3DomLR292.

851-82 195Cal766, 235P995 (order to assistant cashier of bank held insufficient as not reciting that he was an "officer or member" of bank). [a] **Order to assistant cashier** of bank to show cause why he should not turn over money of bank alleged to belong to judgment debtor held invalid. 195Cal766, 235P995.

852-12 [a] **Order fixing price of examination outside county is void.**–126Misc589, 214NYS58.

853-14 [a] **In California.**–195Cal766, 235P995.

853-14½-New. Under some statutes giving the court discretion as to the place of examination, such discretion in cases of any moment will be exercised in accordance with established practice limiting examination to the county of residence or place of business of the person to be examined. 133Misc751, 233NYS118.

853-14⅓-New. Where proceedings supplementary to execution are on a judgment of the city court of New York, an the judgment debtors in the county of the city where they reside and have their place of business. 133Misc476, 233NYS 120.

853-16 But see **Sask** [1928] 4DomLR 144 (where order for examination orders debtor's attendance).

853-28½-New. It is not necessary to serve a subpœna before serving an order, the latter being the original process. NJCh147A583.

857-39½-New. The validity of a restraining order can be tested only in a motion to set it aside. 133Misc357, 232NYS22.

857-49 136Misc458, 241NYS196.

858-62 [c] (2) Under Remington Comp. St. §§ 613, 615, hearing may be before judge. 148Wash376, 268P1038.

858-63 148Wash376, 268P1038.

859-90 But see 152Wash323, 277P850 (garnishee judgment debtor).

859-92 See also 94CalA19, 270P391.

859-4 135Misc545, 239NYS303.

860-16 141SC265, 139SE625, 54ALR 964.

861-41 [a] **Adjournment without order of court** causes proceedings to lapse subject to revival. 228AppDiv360, 239NYS 593.

861-62½-New. The proceeding cannot be employed to pry into the debtor's private affairs in the absence of reasonable or well founded belief of concealment or fraudulent transfer. 98Fla52, 123S3.

861-62⅓-New. The debtor may be examined as to the property located without the boundaries of the state. 98Fla 52, 123S3.

862-82 86CalA377, 260P937 (issue as to ownership should be tried in appropriate action).

863-95 See also 10PaDist&Co156.

863-2 Man [1930] 3**DomLR**810.
864-20 155**Wash**510, 285**P**449. [b] (2) Under Civ. Pract. Act § 793, requiring delivery of money to sheriff, where it belongs to debtor, but is in possession of third party, judgment debtor's money on deposit in bank is not money belonging to judgment debtor. 133**Misc** 750, 233**NYS**126. (3) On motion by judgment creditor for order directing bank to pay to sheriff money held by bank on deposit for judgment debtor, and to apply sum in satisfaction of judgment and for further relief as may be deemed proper, creditor, under Civ. Pract. Act § 793, is entitled only to order requiring debtor to turn over to sheriff amount on deposit to his credit in bank, with direction to sheriff to apply same in satisfaction of judgment. 133**Misc**624, 233**NYS**128.
864-27 195**Cal** 759, 235**P**992. [a] **In California.**–195**Cal** 759, 235**P**992.
864-28 195**Cal** 759, 235**P**992 (service of subpœna on employee of bank to appear before referee for examination regarding deposit of money claimed by third person does not give referee power to order bank to pay money to judgment creditor).
864-30 [a] **In New York.**–133**Misc**750, 233**NYS**126. (3) 133**Misc**624, 233**NYS** 128.
864-34 118 **OhSt**319, 160**NE**906. [c] **Property in hands of nonresident.**–That property belonging to, and in absolute control of, debtor is in hands of nonresident of state does not defeat jurisdiction of court to order debtor to apply it to judgment. 118 **OhSt**319, 160 **NE**906.
866-75 143**SC**98, 141**SE**155. [a] **In California.**–82**CalA**634, 256**P**431.
867-79 **Ill** 173**NE**61.
868-6½-New. In Saskatchewan a local master has no jurisdiction to make an order for payment by a judgment debtor. **Sask** [1929] 2**DomLR**640.
870-54 166**Minn**363, 207**NW**736; 168 **Minn**102, 209**NW**754.
871-74 133**Misc**397, 232**NYS**663.
872-91 129**Misc**838, 223**NYS**446.
877-30½-New. Receiver may not, without the court's permission, settle the judgment debtor's claim against a corporation. 129**Misc**377, 221**NYS**404.
879-81 134**Misc**645, 236**NYS**363 (surrogate's court has been held to have jurisdiction).
880-8½-New. But beneficiary of insurance policy is entitled to possession of such policy, even though there is possibility of her predeceasing policy holder and his transferring beneficial ownership to himself. 214**AppDiv**196, 211**NYS**881 (after decision that receiver is not entitled to cash surrender value of policy).
880-9 125**Misc**369, 212**NYS**369. See also 129**Misc**838, 223**NYS**446.
880-10 7**F(2d)**9; 125**Misc**871, 212**NYS** 369. [a] (4) Receiver in supplementary proceedings obtains right to money which becomes due judgment debtor after beginning of proceedings but before his appointment of receiver. 125**Misc** 871, 212**NYS**369.
881-18 [c] **Receiver succeeds only to property possessed by debtor** at time of receiver's appointment. 135**Misc**774, 238 **NYS**533.
882-46 166**Minn**363, 207**NW**736.
882-52 129**Misc**838, 223**NYS**446.
883-73 129**Misc**838, 223**NYS**446.
885-94 129**Misc**838, 223**NYS**446.
886-26 [a] **Complaint held not to state cause of action.**–129**Misc**377, 221**NYS** 404. [b] **Must allege sufficient facts** to satisfy statutory requirement. 129**Misc** 838, 223**NYS**446.
886-29 [b] **Complaint on claim assigned** by third person has been held defective in not alleging ownership of claim by debtor. 129**Misc**838, 223**NYS**446.
887-67 [a] **Attachment** issues as matter of right and without bond or affidavit in such action. 223**Ky**405, 3**SW(2d)**779.
883-75 [b] **Petition to enforce lien of execution** held sufficient. 231**Ky**682, 22 **SW(2d)**111.
888-78½-New. In some jurisdictions it is not necessary to allege in a bill filed in aid of execution that defendant is insolvent. 240**Mich**28, 215**NW**6.
888-78½-New. When such bill affirmatively shows that the debtor has personal property subject to execution, it will be dismissed. 240**Mich**28, 215**NW**6.
889-19 [b] **Evidence held sufficient** to overcome prima facie case of judgment creditor. 247**Mich**595, 226**NW**220(1st case).
889-30 23 **OhA**484, 156**NE**146.
890-35½-New. Third party order against bank did not give judgment creditor lien on deposit enforceable on debtor's bankruptcy. 43**F(2d)**870.
890-42 23 **OhA**484, 156**NE**146.
890-48½-New. Ownership of property cannot be set up by the devisee in remainder as against a judgment creditor of the life tenant because of the mother's promise to devise it to him. 231**Ky**682, 22**SW(2d)**111.
891-64½-New. On dismissing an application for supplementary proceedings against judgment debtors, the district judge need not file a statement of his reasons. **Mass** 169**NE**410.
891-66 [a] (2) Service of subsequent order after ineffectual adjournment revived original proceedings on notice to judgment debtor. 228**AppDiv**360, 239 **NYS**593.
891-74 But see 228**AppDiv**360, 239**NYS** 593.
892-1 135**Misc**230, 237**NYS**503.
893-4 178**Minn**158, 226**NW**188.
893-5 [b] **Refusal to answer questions unless in presence of counsel** is not contempt. 135**Misc**545, 239**NYS**303.
893-8 But see 138**Misc**326, 244**NYS**667.
893-9½-New. Repeated evasions and untrue answers to material questions constitute refusal to answer. 178**Minn** 158, 226**NW**188.
893-12 227**AppDiv**390, 236**NYS**361.
893-18 136**Misc**692, 240**NYS**589.
894-25 136**Misc**692, 240**NYS**589. See also 136**Misc**367, 240**NYS**881.
894-50½-New. An attorney will be adjudged in contempt for misconduct in preparing for a judgment debtor an agreement by which the judgment debtor transferred certain of his property for a nominal consideration in violation of a third party restraining order. 133 **Misc**357, 232**NYS**22.
894-51 172**Minn**102, 214**NW**776; 118 **Oh St**319, 160**NE**906. [c] **Where it is doubtful whether order for examination was served,** maximum fine should not be imposed. 131**Misc**851, 228**NYS**376.
896-79½-New. In New Brunswick a judgment debtor may be attached for contempt for failure to comply with an order for payment by installments, although he has made an assignment under the Canadian Bankruptcy Act. **NB** [1929] 2**DomLR**380.
896-80 170**Ark**41, 278**SW**654, 657 [quot CJ].
896-81 172**Minn**102, 214**NW**776.
897-7 [a] **Application for order adjudging defendant in contempt** must be by one authorized to institute proceedings. 227**AppDiv**390, 236**NYS**361.
898-18 227**AppDiv**390, 236**NYS**361 (application for order, though entitled in action, is not proceeding in action).
898-26 135**Misc**230, 237**NYS**503.
898-31½-New. Validity of an order in supplementary proceedings, restraining a judgment debtor and his attorney from making any transfer or other disposition of, or interference with, the judgment debtor's property, cannot be questioned in a motion to punish such attorney for contempt of court, for violating such order. 133**Misc**357, 232**NYS** 22.
898-39 230**AppDiv**783, 244**NYS**697.
898-42½-New. In Manitoba, where application for commitment for failure to make instalment payments asks in alternative for further order for instalment payments alternative relief may be granted. **Man** [1929] 4**DomLR**1006.
898-42½-New. Order adjudging debtor guilty of contempt and imposing fine need not be personally served before court can sign commitment order. 136 **Misc**719, 242**NYS**710.
899-48 136**Misc**367, 240**NYS**881 (there must be positive proof that creditor's rights were actually impaired and prejudiced).
899-50 136**Misc**367, 240**NYS**881.
902-15 [c] (3) Where salary due New York salesman of foreign corporation not present in state for process purposes is paid from home office, situs of debt is in state of home office and salary is not subject to garnishee execution. 129**Misc**512, 221**NYS**758.
902-16 137**Misc**420, 242**NYS**308.
903-17 166**Minn**363, 207**NW**736 [citCJ] (no such statute in Minnesota).
903-19 [g] **Authority of court.**–Order of court summarily fixing reasonable salary of judgment-debtor working for corporation as president without remuneration is not binding on employer corporation. 136**Misc**195, 240**NYS**663.
903-20 [a] (5) Fund due debtor from city representing salary earned during previous years can be reached. 136**Misc** 694, 240**NYS**585.
903-21 [d] **Provision limiting to ten per cent inapplicable** where salary earned during preceding year is due. 136**Misc**694, 240**NYS**585.
904-25 129**Misc**512, 221**NYS**758.
904-28 **NJSup** 152**A**240 (statute construed).
905-40 [d] **In Colorado.**–85**Colo** 594, 277**P**767.
905-49 [g] **In Louisiana.**–11**LaA**467, 123**S**391.
907-77½-New. Execution will not issue where the judge cannot determine whether action is ex contractu or ex delicto. 77**Colo** 289, 236**P**777.
907-82 77**Colo** 289, 236**P**777 (statute authorizing body execution in tort actions held not repealed by statutory provision for release of all civil prisoners from such execution).
907-87 77**Colo** 289, 236**P**777.
909-10 243 **IllA**281; 251 **IllA**389; **NC** 154**SE**735. [a] (5) Fraud and deceit. 251 **IllA**569. [b] (1) 255 **IllA**230. [b] (2) Malice as gist of action becomes material only when judgment debtor makes application for release under Insolvent Debtors' Act. 239 **IllA**240. [c] **In Colorado.**–85**Colo** 530, 277**P**306. [d] **Constructive or legal willfulness is not sufficient** to show that malice was gist of action. 251 **IllA**389. [e] **Malice constituting gist is not spite or hatred,** but intentional perpetration of injury or wrong. 251 **IllA**569.
909-11 83**Colo** 528, 266**P**1112; 255 **IllA** 230; 133**Misc**607, 232**NYS**519. But see **NJ** 145**A**620(1stcase).
910-13 111**Conn**225, 149**A**770; 197**NC** 189, 148**SE**36 (complaint in action for injuries in automobile collision held to state cause of action for willful injury to person). [c] **Owner of automobile not present at accident** resulting from negligence of driver. 125**Misc**775, 211 **NYS**305.
910-15 [a] **Defendant cannot be arrested after judgment,** unless record shows affirmatively actual malice and issue thereon submitted to jury. 190**NC**113, 129**SE**151.
910-18 But see 193**NC**583, 137**SE**724.
910-19 5**PaDist&Co** 22.
910-20 [a] 98**Vt**429, 129**A**302.
910-23 [a] 243**Mich**603, 220**NW**766.
910-24 243**Mich**603, 220**NW**766.
911-37 255 **IllA**230 (jury trial not necessary).
912-41 77**Colo** 289, 236**P**777, 781 [cit CJ].
912-47½-New. If property is insufficient to satisfy judgment, capias ad satisfaciendum will issue. 5**PaDist&Co** 22.
912-48 130 **Or**631, 280**P**660 (judgment obtained in action is not cause of action referred to in statute permitting body execution where record shows that cause of action is also cause of arrest).
914-56½-New. Statute prohibiting another execution against person imprisoned under execution against his person does not prohibit execution in favor of another judgment creditor whose claims were litigated in same action. 215**AppDiv**277, 213**NYS**463.
914-56½-New. Under some statutes the right to body execution against a woman is restricted to cases where an order of arrest has actually been granted and executed. 134**Misc**347, 235**NYS** 624.
916-6 141**SC**407, 139**SE**842 (statute held not void as discriminatory).

916-7 [a] (5) **Body execution cannot** be issued against woman unless order of arrest has been granted and executed in action. 134Misc347, 235NYS624. (6) Whether action involves willful injury does not affect right to issue body execution against woman, which is governed by Civ. Pract. Act §§ 764, 765. 134Misc347, 235NYS624. (7) Woman is subject to body execution in action for actual fraud and deceit. 133Misc 607, 232NYS519.

917-17 But see 98Vt429, 129A302.

917-21 197NC189, 148SE36 (evidence in action for injuries from automobile collision held to raise jury question as to constructive intent to injure); 130 Or631, 280P660 (must be something more than pleadings presenting issue of fraud).

917-23 130 Or631, 280P660.

920-70 See also 237 IIIA537.

920-77½-New. Where judgment authorizes execution against property and if execution is returned unsatisfied against the person, leave of court to issue execution against person is not necessary. 215AppDiv277, 213NYS463.

922-22½-New. Execution is not void for failure definitely to fix the time of imprisonment where the judgment provides for imprisonment for period not to exceed one year or until amount of judgment has been paid. 85Colo 594, 277P767.

922-40 See also 10PaDist&Co 230.

925-9 [c] **In Colorado.**-85Colo 594, 277 P767.

929-89 NJSup 144A451.

929-91 85Colo 594, 277P767.

929-93½-New. Insolvency of defendant against whom judgment is sought to be enforced by capias ad satisfaciendum is immaterial on the question of his right to have the writ set aside. NJSup 144A451.

929-93½-New. That the judgment creditor has instituted proceedings in the court of chancery to set aside conveyances made by the judgment debtor to others does not require setting aside of capias ad satisfaciendum to enforce payment of judgment. NJSup 144A 451.

929-15 9PaDist&Co 665.

932-67½-New. Deposit in lieu of bond. Under statutes in some jurisdictions defendant, instead of undertaking, may deposit with the sheriff the sum specified or indorsed on the process or which might be required under the undertaking. 128Misc449, 218NYS523.

932-67½-New. The deposit is held to the account of the prisoners. 128Misc 449, 218NYS523.

932-67¼-New. An order on the city chamberlain to pay over a deposit to a party may be made only when there is no dispute as to the right of the party to the fund. 128Misc449, 218NYS523.

932-67½-New. Plaintiff is not entitled to have the deposit applied to his judgment against defendant. 128Misc449, 218NYS523.

932-68 [a] **Recognizances of debtor stand as security for payment** in place of execution. 262Mass372, 160NE281.

934-13 246Mich73, 224NW351; 198Wis 104, 223NW565.

936-38 198Wis104, 223NW565. But see 246Mich73, 224NW351.

936-51½-New. Right to enforce recognizances of debtor becomes absolute on breach thereof. 262Mass372, 160NE281.

937-85½-New. Pending bankruptcy proceeding against debtor does not bar action against surety. 262Mass372, 160 NE281.

939-25 [a] **Where writ of capias ad satisfaciendum is void on face,** its validity may be attacked in action on bond for jail limits. 243Mich603, 220 NW766.

939-26 Mass 165NE403.

939-37 [c] **In Massachusetts.**-262Mass 372, 160NE281.

940-51 [d] **Surety binds himself to pay amount of judgment,** in action where arrest was made, upon debtor's default. Mass 169NE548.

942-94 [b] **Surety not liable for breach** by debtor if such breach is with consent of creditor. 254Mass356, 150NE 202.

943-4 Mass 169NE548.

943-5 Mass 165NE403.

947-82 [c] **Adjudication or discharge in bankruptcy** held not shown so as to defeat action on bond. Mass 169NE 548.

947-88½-New. That the debtor was released on an insufficient return in a poor debtor's proceeding is no defense. 255 Mass494, 152NE48.

949-37 198Wis104, 223NW565.

949-42 96PaSuper38.

949-46½-New. Liberality toward poor debtors, must be exercised strictly within the statutory limitations. 128Me451, 148A691.

950-60 237 IIIA537; 239 IIIA240; 239 IIIA250; 241 IIIA484; 245 IIIA392; 245 IIIA542; 246 IIIA166; 248 IIIA492.

950-61 237 IIIA537; 241 IIIA484; 246 IIIA587; 249 IIIA19.

951-67 252 IIIA273. [c] **Record showing malice.**-252 IIIA273.

952-84 48RI 250, 137A7; 48RI 437, 138 A210.

953-87 NJ 131A387.

953-88 96PaSuper38.

953-89 NJ 131A387.

953-90 222Ky734, 28W(2d)389.

953-96 NJ 129A418 (misspelling of petitioner's name will not bar discharge).

953-2 NJ 129A418 (failure to list two small creditors did not bar discharge).

954-12 [a] (2) Automobile owned by another properly omitted. NJ 129A 418.

954-19 See also 246 IIIA587.

957-73 125Me4, 130A504.

957-74 125Me4, 130A504.

957-74½-New. Where use of a seal is required by statute, collateral attack will not avoid its absence from a debtor's citation. 125Me4, 130A504.

957-74½-New. Where failure to fix a seal is not covered by statute prohibiting abatement of process for errors in form, the omission of the seal may not be corrected. 125Me4, 130A504.

957-78 NJ 129A418.

957-82 255Mass494, 152NE48.

957-82½-New. The debtor must show insufficiency of the first notice to entitle him to a new notice, 255Mass494, 152 NE48.

957-82½-New. and must show that reasonable effort was made to serve the first notice within the prescribed time. 255Mass494, 152NE48.

958-85 255Mass494, 152NE48.

958-86 255Mass494, 152NE48.

958-86½-New. Process delivered to an officer too late for timely service does not affect a creditor's rights. 255Mass 494, 152NE48.

958-90 NJ 129A418 (service sufficient).

958-90 [b] **Where original citation was served instead of copy** and officer made return on copy the justices were held to be without authority to proceed. 128 Me451, 148A691.

958-97 255Mass494, 152NE48.

958-98 [a] 255Mass494, 152NE48.

960-23½-New. Debtor is not entitled to jury trial. 237 IIIA537.

960-35 [b] **In Maine.**-128Me451, 148A 691.

961-54 [b] **Evidence sufficient to show** petitioner entitled to discharge under Insolvent Debtors' Act. NJ 129A418.

961-57 [a] (2) That prisoner went outside prison limits will not bar discharge. NJ 129A418.

962-63½-New. Under British Columbia statute, where the debtor swears that he has no means to pay the debt and the creditor introduces no direct evidence to the contrary, the debtor should be discharged. BC [1929] 3DomLR 410.

962-69 251 IIIA569.

962-70 245 IIIA542.

962-75 [a] **Evidence held sufficient.**-241 IIIA484.

965-54 [b] **Acquisition of property fraudulently** does not constitute fraudulent conveyance, and is not inconsistent with oath. 127Me286, 143A101.

966-67½-New. Discharge on a return not showing that the statutory time was allowed the creditor before hearing is void. 255Mass494, 152NE48.

969-61½-New. If the debtor is released on improper service of notice, the discharge is no defense to an action on recognizance. 255Mass494, 152NE48.

972-11 43 Ida265, 251P621, 623 [citCJ]; 7LaA603.

974-60 11LaA224, 123S483(2dcase); 13LaA488, 127S418.

975-76 222MoA503, 281SW78; 222 MoA503, 281SW78.

976-3 43 Ida265, 251P621, 623 [citCJ].

976-15 [a] **In suit to restrain sheriff** from selling on execution, judgment creditor has been held necessary party defendant. TexCivA 297SW1089.

976-16½-New. Purchaser at execution sale of mortgaged personal property should be made a party defendant in an action against a sheriff. TexCivA 284SW299.

976-18 [c] **Showing gravamen of action.**-In action by mortgagee of personal property against sheriff, petition should state that such property was not sold subject to mortgage. TexCivA 284SW 299. [d] **Complaint held insufficient** to state cause of action. CalA 284P1035.

976-21½-New. Facts entitling plaintiff to exemplary damages must be affirmatively pleaded in order to recover therefor. TexCivA 288SW1109.

976-23 85Colo 140, 274P737, 63ALR 227.

977-28 Sask [1925] 3DomLR1079 (where property in debtor's possession).

977-34½-New. So, also, where property levied upon is not in possession of the execution debtor, the burden is on the execution creditor to establish the debtor's title therein; Sask [1925] 3 DomLR1079.

977-34½-New. But where property is in actual or apparent possession of the execution debtor, the presumption is that the debtor has title and the burden is on claimant to show his own title. Sask [1925] 3DomLR1079.

977-38 [a] (5) Letters from bank held not to show that wrongful levy was cause of bank's holding up loan. 43 Ida 265, 251P621.

978-43 [a] (4) To show ownership in plaintiff. 164Ga231, 138SE76. (5) To overcome presumption of ownership of automobile arising from registration. 219AppDiv732, 220NYS41.

978-44 11LaA224, 123S483(2dcase).

978-61½-New. Interpleader attempted by the purchaser of property to protect it from levy of execution will not prevent his recovery for injury suffered by unlawful seizure. 292Pa464, 141A298.

979-88 TexCivA 288SW1109.

979-89 TexCivA 288SW1109.

979-89½-New. In some jurisdictions, if plaintiff takes a money judgment, he is limited to the value of property plus six per cent interest, and is not entitled to damages for loss of the use of the property. 202 Iowa305, 208NW859.

979-90 TexCivA 288SW1109. [b] **Value of use as measure of damages.**-TexCivA 288SW1109.

979-93 11LaA224, 123S483(2dcase) (commercial value). [d] **Plaintiff can recover** amount he would have received for cotton if defendant had not seized it. 11LaA224, 123S483(2dcase).

980-94 Contra 49Philippine349.

980-96 144Miss292, 109S792.

980-97 [a] **Damage for wrongful levy of execution** on automobile is any excess of what it would have been worth had owner kept and used it, over value as returned plus reasonable amount for loss of use. 144Miss292, 109S792.

980-4 TexCivA 288SW1109.

980-5 TexCivA 288SW1109.

980-10 43 Ida265, 251P621. But see 167Ga176, 145SE71; 13LaA488, 127S 418.

981-11½-New. Where a party is forced into court to obtain a release of wrongful seizure, he is entitled to attorney's fees as damages; 159La498, 105S598.

981-11½-New. but to be entitled thereto, he must show adequate proof of the value of services of attorney rendered, or the amount agreed to be paid. 159La 498, 105S598.

981-11¼-New. Cost of printing briefs and value of time spent testifying are not recoverable. 13LaA488, 127S418.

981-21 11LaA224, 123S483(2dcase).

981-22 11LaA224, 123S483(2dcase).
981-26 43 Ida265, 251P621; 11LaA 224, 123S483(2dcase).
981-27½-New. Injury to financial credit and loss of business are recoverable only on affirmative pleading of exemplary damages. TexCivA 288SW1109.

EXECUTIVE

982-14 [g] 99Vt1, 130A276, 277 [cit CJ].

EXECUTORS AND ADMINISTRATORS

996-3 TexCivA 24SW(2d)531.
996-10 127Misc437, 217NYS313.
996-11½-New. Trust arising from appointment as executor or administrator is not contractual, and is not a property right, and involves no pecuniary interest on the part of the fiduciary. 263 Mass444, 162NE217.
996-12 [c] (1) 85CalA518, 260P351.
997-13 158La1093, 105S76.
997-15 198Cal 746, 247P906.
997-19 204 Iowa355, 213NW938.
997-22 [d] **Administration in Porto Rico** under Spec. Leg. Proc. Act see 32 PortoRico 40 (Comp. St. [1911] § 1562 et seq).
997-23 53SD499, 221NW257.
998-32 TexCivA 291SW340.
998-36 118 Okl 259, 247P389. [b] (1) TexCivA 281SW616. [k] **Where there is nothing to go into hands of personal representative,** appointment of administrator for deceased person is unnecessary. 210Ky343, 275SW804. [l] **No administration** can be had where remainderman is entitled to property directly, as on death of life tenant. 27F(2d)101.
999-39½-New. Administration of part only of estate is improper. TexCommnA 283SW153.
999-39¼-New. The law does not make administration indispensable merely for the sake of administration. 327 Ill 346, 158NE709.
999-39¼-New. The pendency of an appeal which would decide the character of certain properties of the estate is no obstacle to granting administration. 33 PortoRico 221.
999-39½-New. The existence of a community formed by certain heirs does not prevent another heir from obtaining administration. 33PortoRico 221.
999-39¼-New. The law favors expeditious settlement of estates. NH 148A21.
999-40 32PortoRico 146; TexCivA 281 SW616. [i] **No administration proper** without property to be administered. 32PortoRico 40. [j] **In PortoRico.**–32 PortoRico 146.
999-41, 168La191, 121S740. See also 13 PaDist&Co 686.
1000-50 TexCivA 281SW616.
1000-51 13F(2d)252; 220Ala634, 127S 199; 327 Ill 346, 158NE709; 122Kan 563, 253P426, 429 [citCJ]; 226AppDiv 162, 235NYS213; 50Philippine149; 115 Tex273, 280SW531; TexCivA 32SW(2d) 666; 196Wis344, 220NW206.
1001-53½-New. In Missouri, where no debts appear against the estate of nonresident, administration need not be had to give notice to creditors. 13F(2d)252.
1002-60 122Kan563, 253P426; 46Philippine317; 50Philippine149; 196Wis 344, 220NW206 (children assigning to widow). [f] **Where heirs partitioned estate without satisfying debt,** court properly rendered judgment against heirs for paving assessment without administration. TexCivA 27SW(2d)877.
1002-63 122Kan563, 253P426.
1003-70 See also 50Philippine149.
1003-76 [a] (1) 299Pa293, 149A492. [b] **In Porto Rico.**–32PortoRico 40.
1003-77 [b] **Creditor is not bound to cause administration to be had** for purpose of enforcing his cause of action. 83CalA87, 256P479.
1004-88 163Ga899, 137SE561.
1004-89 163Ga899, 137SE561. [c] (2) In order for widow to be entitled to use as personal representative of deceased husband who left no lineal descendants, it is essential that at time of suit there are no outstanding debts against estate. 163Ga899, 137SE561. (3) In such case it is not sufficient that debts are subsequently paid. 163Ga899, 137SE561.
1005-3½-New. Some statutes authorizing the probate judge to receive and distribute a personal estate of five hundred dollars or less are applicable only to instances in which creditors of estate are not concerned, and involving simply the distribution of untrammeled assets. 150SC125, 147SE646.
1005-4 [d] **Court of county of absentee's last residence.**–Under Washington statute, on petition of absentee's widow, superior court of county where absentee last resided alone has jurisdiction to determine whether absentee died in that county and whether administration upon his estate as upon estate of deceased person was properly necessary. 151Wash289, 275P694(2dcase).
1005-5 [b] (3) Other instances. 223 AppDiv636, 229NYS176.
1005-6 220Ala634, 127S199 (remote interest insufficient).
1005-6½-New. Issuance of letters for purpose of enabling action to be continued after death of defendant is without prejudice to right of estate to raise question of laches. 299Pa293, 149A492.
1005-7 32PortoRico 40; TexCivA 26 SW(2d)288 (naming of independent executor).
1006-10 220Ala634, 127S199.
1006-13 207Cal 381, 278P1033.
1006-14 207Cal 381, 278P1033; 207 Iowa84, 218NW537; 176Minn433, 223 NW683; 198Wis128, 223NW434.
1006-19 212Ala522, 103S557 (probate court in granting letters testamentary or of administration is a "court of general jurisdiction"); 212Ky2, 278SW545; 151Wash289, 275P694(2dcase).
1007-24 174Minn28, 218NW235; 134 Misc715, 236NYS370; 189NC703, 128SE 20; 37 OklACR698.
1008-27 166La122, 116S722; 175Minn 493, 221NW876. [i] **Statute for conserving property of persons who abscond or disappear** is not bar to administration by probate court. 175Minn 493, 221NW876. [j] **Courts should exercise extreme conservation** in granting administration of estates of absentees presumed dead. 135Misc861, 239NYS 722.
1008-29 135Misc861, 239NYS722.
1008-32 41GaA428, 153SE237 (holding invalidity is only from date of knowledge of fact that person is not dead).
1008-33 51Nev69, 268P769; 37 OklA CR698; 32PortoRico 40; 32PortoRico 146. [d] (2) Where estate left was less than funeral expenses, appointment of administrator is wholly unnecessary. 239 IllA618. [e] **Error to refuse administrator** where opposing party fails to prove allegation that there is no property to administer. 32PortoRico 146. [f] **In Porto Rico.**–32PortoRico 146. [g] **Where it appears prima facie that there is community property** in which deceased had some interest, administrator should be appointed. 32PortoRico 146.
1009-35 215Ky774, 286SW1071; 233 Ky441, 26SW(2d)8; 117Nebr52, 219NW 808.
1010-47 114 Okl 177, 245P632.
1010-48 Ark 31SW(2d)955; 43 Ida 466, 258P166; 162La92, 110S100; 163 La537, 112S408; 1LaA156; 3LaA772; 10LaA553, 120S643; 317Mo 1078, 298 SW83; 221MoA675, 283SW727, 729 [citCJ]; 135Misc486, 238NYS723; 135 Misc861, 239NYS722; 50ND662, 197 NW862, 864 [citCJ]; 19 OhA404; 114 Okl 177, 245P632; 37 OklACR698; Tex CommnA 25SW(2d)804; TexCivA 48W (2d)588; 195Wis128, 217NW709. [a] 143Va267, 129SE235 (may have several residences but only one domicile). [j] 114 Okl 177, 245P632. [k] 178Ark937, 12SW(2d)889; 228Ky790, 15SW(2d) 1005; 233Ky441, 26SW(2d)8; 135Misc 733, 240NYS691; 56ND793, 219NW562. [l] (2) Place of death is immaterial where decedent was resident of state. 114 Okl 177, 245P632. [m] (3) Succession proceedings by heir of deceased in parish created after death of deceased, but covering place of his residence, where instituted and carried on at instance of plaintiff's father and acquiesced in by plaintiff, who contributed to administration expenses, are valid as to her, and are properly confirmed by monition, in suit to set aside succession and judgment therein. 10LaA553, 119 S785. [q] **Statute providing for administration in county of residence, if any,** not to be construed as limiting appointment of decedent's administrator to court having jurisdiction over his legal domicile, as distinguished from residence. 143Va267, 129SE235.
1012-51 19 OhA404.
1012-57½-New. Where deceased was shown to be mentally incompetent after appointment of guardian, it was held she was incapable of choosing legal residence and hence the court of the county of her residence at the time of appointment had jurisdiction to appoint a general administrator. 143Wash358, 255P376.
1012-59 180Ark959, 23SW(2d)629.
1012-61 55AppDC319, 5F(2d)381; IndA 173NE338; 135Misc861, 239NYS 722. [g] **Funds in custody of alien property custodian** belonging to nonresident decedent are considered as having situs in any state of union. Nebr 217 NW618.
1013-65 213Ala27, 104S234; 263Mass 549, 161NE605; Nebr 217NW618. But see IndA 173NE338. [a] 213Ala27, 104 S234. [i] (2) Insurance policy, issued by foreign insurance company doing business and having process agent in state, to nonresident, decedent, payable to insured's executor or administrator, is "assets" of decedent for purpose of founding administration on his estate in state. 88 IndA540, 164NE713. [n] **Right of action to recover money in custody of alien property custodian** is sufficient basis for appointment of administrator to prosecute action to recover it. 117Nebr52, 219NW808.
1014-67 [d] **Notes for purchase price of devised land** are subject to jurisdiction of situs of land for purposes of administration. 213Ala27, 104S234. [e] **In case of domiciliary and ancillary administration** real assets are distributed in jurisdiction under whose laws succession is to be determined. 213Ala27, 104S234. [f] **Personal estate** bequeathed to beneficiaries, wholly separate from those who take property subject to jurisdiction of domicile is, in cases of domiciliary and ancillary administration, to be distributed where succession is to be determined. 213Ala 27, 104S234. [g] **Notes for devised land** sold by testator before death are subject to administration and distribution, within state where land is located. 213 Ala27, 104S234. [h] **In Virginia.**–143 Va267, 129SE235.
1015-74 [d] **In Virginia.**–143Va267, 129SE235.
1015-79 See also 78CalA79, 247P1091. But see 135Misc861, 239NYS722.
1016-86 [a] **Funds of nonresident decedent in custody of alien property custodian** may be considered as having situs in any state of United States. 117 Nebr52, 219NW808.
1016-87 80Mont574, 261P356, 60ALR 551.
1017-88 80Mont574, 261P356, 60ALR 551.
1017-93 206 Iowa149, 220NW16.
1018-4½-New. Situs of corporate stock is in state of its incorporation. 338 Ill 245, 170NE285(2dcase)
1018-11 176Minn433, 223NW683.
1019-17½-New. Personal property in state must be administered according to that state law, 125Misc629, 211NYS 845.
1019-17⅓-New. and pursuant to will and codicil is probated, even though will was held invalid in state where testator was domiciled when he died. 125Misc629, 211NYS845.
1019-17¼-New. The validity of the acts of an administrator must be determined by the law in force at the time of administration of the estate. Tex CommnA 280SW742.
1019-18 323 Ill 269, 154NE101.
1019-19 134Misc399, 235NYS683.
1019-20½-New. Estate, in case no por-

tion thereof is validly conveyed by will is to be administered as intestate property. 86Colo 576, 283P1041.

1019–21 323 Ill 269, 154NE101.

1020–24 132 Or122, 283P745.

1020–25 132 Or122, 283P745; **TexCivA** 5SW(2d)816.

1020–29 203Cal 424, 264P765.

1020–30 196Cal 623, 238P938.

1021–32½–New. The words "custodian and administrator" in a will directing the appointment of a named person as such must be construed to mean "executor." 83Colo 188, 263P413.

1021–33 157SC407, 154SE426.

1021–34 196Cal 623, 238P938; 202Cal 138, 259P431; 135Misc93, 236NYS709; 197NC215, 148SE175; 157SC407, 154SE 426. [b] (10) Appointment as executor of person directed to act as custodian of property for children and as guardian is proper. 203Cal 424, 264P765.

1022–44 [b] **Where two executors, one resident in Ireland, one in United States,** are designated by will of decedent who dies seized of estate part in Ireland, part in United States, it was held that presumption is that testator intended each to act in respect of property situate in country of his respective residence. 134Misc399, 235NYS683.

1022–46 200Cal 247, 252P591.

1023–54 291Pa304, 139A839.

1023–63 323 Ill 269, 154NE101. But see 149Wash307, 270P1020.

1023–64 323 Ill 269, 154NE101.

1024–65 323 Ill 269, 154NE101; 220Ky 458, 295SW452; 149Wash307, 270P 1020. [c] **Order of county judge pro tem** held valid. 220Ky458, 295SW452.

1024–66 201 Iowa876, 208NW358; 204 Iowa927, 216NW55.

1024–70 233Ky663, 26SW(2d)526.

1024–71 [b] **An executor deserves greater consideration than an administrator** when his right to qualify is contested. 233Ky663, 26SW(2d)526.

1024–72 136Misc793, 242NYS249.

1025–81 204 Iowa355, 213NW938.

1025–88 201 Iowa876, 208NW358; 233 Ky663, 26SW(2d)526.

1026–92 [c] **Designation of state bank as executor** does not authorize national bank to act, notwithstanding consolidation. Va 153SE656.

1026–3 See also 263Mass444, 162NE 217.

1028–10 320 Ill 50, 150NE337.

1029–38 202Cal 490, 261P709; 86 IndA 607, 159NE167; Utah 285P299.

1030–44 See also 32PortoRico 40.

1030–45 Utah 285P299.

1030–54 14PaDist&Co 317. [a] **But where executor in renouncing requests** that co-executor and trustee be made sole executor and trustee, both are renounced. 14PaDist&Co 317.

1030–56 233Ky663, 26SW(2d)526.

1031–59 233Ky663, 26SW(2d)526.

1031–63 32PortoRico 40.

1031–64 196Cal 339, 238P76; Cal 278P 1032.

1032–70½–New. Where decedent left a will which was established and admitted to probate, application for letter of administration first filed should be denied. 196Cal 339, 238P76.

1032–71 [a] **Statute giving deceased's children preference** held not to confer absolute right. 143Wash358, 255P376.

1032–72 13F(2d)252 (in Missouri only interested parties can be appointed); 215Ala445, 111S35; 83 IndA524, 149 NE373; 225Ky718, 9SW(2d)1078; 256 Mass177, 152NE341; 32PortoRico 40. See also 169Ga101, 149SE786(2dcase). [b] (2) Person not entitled to take or share in personal property is not entitled to administer. 128Misc518, 219 NYS763. (3) Policy not to give administration to persons not interested in estate is not changed by statute. Wash 291P481. [d] **In Georgia.**–33GaA628, 127SE779. [e] **Policy of law.**–128Misc 518, 219NYS763. [f] **"Several,"** as used in statute providing for selection of administrator, where there are several of next of kin equally near in degree, means any number not less than two. 40GaA1, 148SE762.

1033–74 But see MoA 16SW(2d)737.

1033–75 RI 136A842.

1033–77 See also 161La981, 109S784.

1033–80 MoA 16SW(2d)737.

1034–84 83 IndA524, 149NE373; 225 Ky718, 9SW(2d)1078; 163La149, 111S 658; MoA 16SW(2d)737. But see Mass 167NE274. [f] **Selection of nominee of nonresident heirs.**–77Mont164, 250P447.

1034–85 Iowa 230NW552. [c] See also 32PortoRico 40. [d] **Request by heir** is entitled to consideration. 163La149, 111S658.

1034–86 44Philippine711; 46Philippine726.

1035–87 220Ala634, 127S199.

1035–88 136Misc236, 242NYS232; RI 136A842.

1035–90 44Philippine711.

1036–4 220Ala634, 127S199; 128Misc 518, 219NYS763.

1036–6 [d] **Son by first wife is preferred to widow.** 163La149, 111S658.

1037–11 131Misc266, 227NYS543.

1037–13 135Misc486, 238NYS723.

1037–18 See also 128Misc518, 219NYS 763.

1037–22 220Ala634, 127S199; 40GaA 669, 151SE118; 149Md401, 131A770; 7 PaDist&Co 483. [b] (2) Next of kin ordinarily means those taking personal estate under statutes of distribution. Iowa 230NW552 (sister and nieces of intestate included). [h] **Brothers of deceased's husband are next of kin,** under statute, where deceased came into property from predeceased husband. 128Misc100, 218NYS233.

1038–23 Wash 291P481.

1038–26 [a] **In Louisiana.**–10LaA294, 120S403(1stcase).

1038–27 225Ky718, 9SW(2d)1078; 161 La981, 109S784.

1039–28 149Md401, 131A770. But see Iowa 230NW552. [c] **When next nearest of kin entitled.**–149Md401, 131A770.

1039–30 161La981, 109S784.

1039–33½–New. If heirs are members of the same class, the court may take the view that the strongest ground for preference was preponderance of interest. 77Mont164, 250P447.

1039–34 149Md401, 131A770.

1039–35 149Md401, 131A770.

1040–41 40GaA1, 148SE762; 41GaA769, 154SE722. [b] **Distributees not next of kin entitled to vote for choice.**–41GaA 769, 154SE722.

1040–45 [g] **In Indiana.**–85 IndA156, 149NE101.

1041–48 256Mass177, 152NE341.

1041–57 220Ala634, 127S199; 181Ark 433, 26SW(2d)74; 122Kan563, 253P 426; Mass 170NE796; 145Wash99, 258 P857. [b] 263Mass549, 161NE605.

1042–67 220Ala634, 127S199.

1043–71 263Mass549, 161NE605.

1044–88 100CalA730, 280P1016(1st case); Mass 166NE747.

1044–89½–New. In Massachusetts, by statutes, the probate court has no power to appoint a stranger as administrator. 256Mass177, 152NE341.

1044–90 127Misc794, 217NYS698; 134 Misc158, 235NYS703. [a] (2) Italian consul has right, under clause, and not decedent's brother, where decedent left wife and son, residents of Italy. 127 Misc794, 217NYS698.

1044–94 126Misc90, 213NYS431; 133 Misc582, 233NYS317. [a] **In New York.**–126Misc90, 213NYS431.

1044–96 205Cal 506, 271P1067; 208Cal 498, 282P500(2dcase); Cal 291P193; 77 Mont164, 250P447. [a] (2) In some jurisdictions right to request appointment of third person is limited to surviving spouse. Wash 291P481. [o] **One incompetent to serve by reason of nonresidence** if falling within one of favored classes enumerated in statute, may nominate resident to serve. 77 Mont164, 250P447. [p] **Right to nominate is absolute** as to all of the classes enumerated in statute, in order of their priority. 77Mont164, 250P447. [q] **In Saskatchewan.**–[1929] 4DomLR1082. [r] **Surviving spouse** has absolute right to nominate competent person regardless of residence of surviving spouse. 86Mont455, 284P143. [s] **If other members of class object,** court cannot grant letters to nominee of single member of class. Cal 291P193. [t] **Where several members of class are entitled to letters,** words "person entitled" refers to class as whole, not to single member thereof. Cal 291P193.

1045–97 But see Mass 167NE274.

1045–99 86Mont455, 284P143 (appointment of nominee of three nonresident daughters in preference to resident daughter held not abuse of discretion).

1045–3 86Mont455, 284P143.

1046–7 Cal 291P193.

1046–13 220Ala634, 127S199 (administrator need not be directly interested in estate). See also 41GaA769, 154SE722. [b] Mass 166NE747.

1046–14 [a] (2) Unfitness may arise without proof of physical or mental incapacity, as where execution of trust is difficult. Mass 166NE747.

1047–16 44Philippine711.

1047–17 Nebr 227NW147. [a] 44Philippine711.

1048–34 Iowa 228NW886; 212Ky2, 278 SW545. [i] **Statute giving any person right to apply for letters** is to be construed with statute prescribing residence in county as qualification. Tex CommnA 25SW(2d)804.

1048–35 163Ga525, 136SE545; Tex CommnA 25SW(2d)804.

1049–37 212Ky2, 278SW545.

1049–41 307Mo 674, 271SW755 (construing Missouri statutes).

1049–48 149Md401, 131A770.

1050–54 [b] **Foreign corporation.**–Nev 280P321(2dcase).

1050–55 205 Iowa114, 213NW414; Nev 280P321(2dcase) (foreign corporation may qualify as administrator). [b] See also Nev 280P321(2dcase) (as to foreign corporations organized as trust companies).

1050–63 Cal 291P193.

1050–65½–New. Mental capacity sufficient for execution of a valid deed or contract is sufficient to entitle applicant to letters. 149Md401, 131A770.

1050–67 149Md401, 131A770. [a] **Paralysis and confinement to bed for some months before appointment** are insufficient to disqualify applicant for letters, having clear mind and intelligent mental processes. 149Md401, 131A770.

1051–70 See also 263Mass444, 162NE 217.

1051–71 [b] **Failure to support infant son** for short period is no bar. 163La 149, 111S658.

1051–72 33GaA628, 127SE779.

1052–81 TexCivA 22SW(2d)727(2d case) (power of attorney to collect funds has been held not to constitute renunciation).

1052–83 TexCivA 299SW931.

1052–86½–New. Renunciation or waiver of right to letters of administration does not result from appointment of agent to whom to delegate authority by person anticipating and asserting rights to letters. 149Md401, 131A770.

1052–90 149Md401, 131A770.

1053–4 245 IllA407.

1053–5 89CalA469, 265P295. [d] **Relief to first appointee.**–89CalA469, 265P 295.

1054–12½–New. An administrator first appointed may move to vacate a judgment in an action to quiet title against an administrator subsequently appointed in another county. 89CalA469, 265 P295.

1055–19 216Ala66, 112S529; Cal 291P 193; 256Mass177, 152NE341; 174Minn 28, 218NW235; 317Mo 1078, 298SW83; 37 OklACR698.

1055–27 122Kan563, 253P426.

1056–30 See also 26 OhNPNS580.

1056–34 MoA 20SW(2d)550 (appointment held void).

1056–42 [a] **Creditor of heir who has assigned his share of estate to one in possession of it has no standing in proceeding.** 176Minn223, 223NW133.

1057–46 See also 196Wis125, 218NW 193. [a] **County court may proceed upon consent or waiver.**–196Wis125, 218 NW193.

1057–47 114 Okl 177, 245P632.

1057–48 But see 157Md127, 145A355.

1057–50½–New. Where a temporary administrator had been appointed, failure of the clerk to issue a citation, returnable to the next term, has been held not to terminate temporary administration or deprive the probate court of ju-

risdiction to appoint him permanent administrator at a later time after citation had been issued. **TexCivA** 283SW 540.

1057-50½-New. In Porto Rico service of summons on heirs by leaving a copy is sufficient without delivering a copy of the petition. 33**PortoRico** 221.

1057-50¼-New. Heirs appearing at hearing, introducing evidence, and proposing candidates for appointment as administrator, waive objections to the summons. 33**PortoRico** 221.

1057-52 174**Minn**28, 218**NW**235.

1057-57½-New. **Personal notice** to heirs and next of kin is not required. 256**Mass**177, 152**NE**341.

1057-58 48**RI** 81, 135**A**699.

1058-73 174**Minn**28, 218**NW**235 (sufficient).

1058-74 [b] (2) Petition for appointment of administrator of estate of absentee, alleging presumption of death by reason of facts surrounding absentee's disappearance, has been held not within statute relating to conservation and distribution of estates of absentees. 151 **Wash**289, 275**P**694(2dcase).

1059-79 169**Cal**101, 149**SE**786(2dcase).

1060-88½-New. A creditor applying for letters of administration of the estate of a nonresident testator need not present a copy of the will which had been probated in another state. 263**Mass**549, 161**NE**605.

1060-96 **Nev** 280**P**321(2dcase) (officer of corporation appointed administrator may make affidavit required).

1061-98 293**Pa**351, 143**A**9.

1061-3 **Iowa** 228**NW**886. But see **Tex CommnA** 25**SW(2d)**804.

1061-14 **Iowa** 228**NW**886.

1062-18 244**Mich**532, 221**NW**618.

1062-22 86 **IndA**607, 159**NE**167.

1062-34½-New. Presumption of competency rests in favor of petitioner for administration, burden resting upon one claiming otherwise. **Cal** 291**P**193.

1063-47 [a] **Evidence held insufficient** to support finding that widow was hostile to other heirs justifying refusal to appoint her administratrix. **Utah** 279 **P**901.

1063-50 203**Cal** 411, 264**P**752.

1063-56 [a] **In California.**-99**CalA**660, 279**P**208(2dcase).

1064-57 **TexCivA** 4**SW(2d)**588 ("domicile" held for jury).

1064-58½-New. Persons entitled under statute to apply for letters are entitled to be heard in respect of their claims. 157**Md**127, 145**A**355.

1064-61½-New. **Power to declare applicant unsound.** 149**Md**401, 131**A**770.

1064-62 **Cal** 291**P**193; 114 **Okl** 177, 245**P**632.

1064-64 145**Wash**99, 258**P**857.

1064-65 **Mass** 166**NE**747.

1064-66 See also **Cal** 291**P**193.

1064-67 174**Minn**28, 218**NW**235. [f] **Impeachment of order** would be had only for want of jurisdiction on face of proceedings. **Cal** 287**P**450.

1065-80½-New. A court order in term time confirming one made during vacation, granting letters of administration to deceased's widow, renders former order valid ab initio. **MoA** 261**SW** 725.

1065-80¼-New. Under Iowa statute, where appointment can be made only by the court, appointment by a clerk is not void in the absence of a contest by the party aggrieved. **Iowa** 228**NW** 886.

1065-81½-New. Letters issued by the clerk in vacation are valid until rejected. 174**Ark**1148, 298**SW**485.

1065-87 See also 174**Minn**28, 218**NW** 235. But see 46**Philippine**557. [h] **Jurisdiction of appellate court.**-**TexCivA** 283**SW**297.

1066-88 209**Ky**289, 272**SW**759, 763 [citCJ]. [c] 169**La**72, 124**S**150(1st case). [d] **Supersedeas** issued by clerk of circuit court upon appeal from orders of county judge appointing administrator suspends right of appointee to perform as administrator pending appeal. 209**Ky**289, 272**SW**759.

1066-89 [b] **Denial by court on its own motion of ex parte application for appointment as administrator** is not appealable under statute providing for appeal from order refusing letters of administration by notice to adverse party, there being no adverse party to be served. 29**Ariz**377, 242**P**435.

1066-89½-New. Where a widow contesting her husband's will did not refer to community property in her petition for letters of administration, she is not entitled to a peremptory writ of certiorari to review a denial of letters pending appeal from such denial. 135 **Wash**202, 237**P**301.

1066-89¼-New. Proceedings to review a ruling on an ex parte petition denying an appointment as administrator should take such form as to make the court or judge a party. 29**Ariz**377, 242 **P**435.

1066-90 [k] **Heirs losing suit to annul will** lose also their interest in appeal from order appointing universal legatee testamentary executor. 158**La** 917, 105**S**12.

1067-97 But see **Cal** 291**P**193.

1067-3½-New. A statute requiring provisional execution of judgments appointing curators of vacant successions or other administrators of successions notwithstanding appeal includes appointment of executors. 163**La**831, 112 **S**802.

1067-8½-New. Acts done in contravention or disregard of plain letters of statutes will be reviewed. 157**Md**127, 145**A**355.

1067-8¼-New. The petitioner cannot urge insufficiency of allegations, putting his competency in issue, where he did not demur to opposition in the trial court. 99**CalA**660, 279**P**208(2dcase).

1067-10 99**CalA**660, 279**P**208(2dcase).

1067-11 145**Wash**99, 258**P**857.

1067-11½-New. Where contest was dismissed reviewing court must conclusively presume that facts alleged in contest were true. **TexCommnA** 25**SW (2d)**804.

1067-12 33**GaA**628, 127**SE**779; 77**Mont** 164, 250**P**447; 145**Wash**99, 258**P**857. [e] **Finding that petitioner was incompetent** held not supported by record. **Cal** 291**P**193.

1068-23½-New. Under a statute, authorizing the probate court to make allowance for services rendered in connection with administration of the estate of a deceased person, the court cannot make allowance for services rendered and expenses incurred in opposition to the appointment of an executor or administrator. **Mass** 164**NE** 917(2dcase).

1069-29 10**LaA**541, 120**S**709.

1069-29½-New. A person denying that the requisite oath was taken by an administrator to whom letters of administration were issued, has the burden to disprove that the oath was taken. 10**LaA**541, 120**S**709.

1069-35 118 **Or**308, 246**P**720.

1070-41 157**Miss**38, 127**S**561 (not only for benefit of creditors).

1070-48 217**Ala**97, 114**S**909 (prejudicial waste is criterion); 157**Miss**38, 127 **S**561. [d] **Executrix who is life tenant under will** and who asserts absolute estate in all of property bequeathed has been held required to give bond. 157 **Miss**38, 127**S**561. [e] **Statute is not for benefit of creditors only.**-157**Miss**38, 127**S**561.

1071-58 [g] (2) Expenditures in excess of current income shown to have been occasioned by necessary repairs. 146**Wash**324, 262**P**646.

1072-60 [a] **Bond may be required** by receiver of legatee's property, appointed in supplementary proceedings on return of execution unsatisfied, where legatee as executor is about to come into possession of his share of estate. 125**Misc**859, 213**NYS**174.

1072-61 **Oh** 171**NE**333.

1073-74 [a] **Value of personalty held by secretary of interior** cannot be excluded in determining amount of administrator's bond. 143 **Okl** 288, 288**P** 955.

1075-8½-New. Failure to require the sureties to make affidavits as to qualifications held not to invalidate a bond or appointment, or be subject to collateral attack. 116**Nebr**254, 216**NW**826.

1075-16 116**Nebr**254, 216**NW**826, 827 [citCJ].

1077-32 [a] **Examination and approval of executrix's bond by assistant register of probate held authorized** under statute prescribing assistant's duties. **Mass** 166**NE**831.

1077-45 116**Nebr**254, 216**NW**826, 827 [citCJ].

1078-53 [1] **Adopting father of decedent** has no such interest in latter's estate as entitles him to require new statutory bond under Missouri statutes. 219**MoA**665, 284**SW**843.

1079-61½-New. But in Missouri court cannot on own motion, in proceeding under statute by adopting father of decedent as alleged heir, enter order increasing bond, since proceeding to require bond to be given in amount as provided by Rev. St. (1919) § 17, must be under § 31. 219**MoA**665, 284**SW**843.

1079-73 [e] **Receiver of legatee's property** appointed in supplementary proceedings after return of execution unsatisfied. 125**Misc**859, 213**NYS**174.

1080-76 [d] **Quantum of distributee's share** is immaterial on question of right to demand bond. 217**Ala**97, 114**S**909.

1080-84½-New. Averments substantially in the terms of the statutory affidavit sufficiently present the issue whether a bond dispensed with by will is required. 217**Ala**97, 114**S**909.

1080-84¼-New. even though averments are alleged on information and belief. 217**Ala**97, 114**S**909.

1080-84¼-New. A request for an allowance of attorney's fees is sufficient if contained in the prayer or in the petition upon costs adjudication. 217**Ala** 97, 114**S**909 (holding bill therefor not demurrable).

1080-85½-New. The executor has the burden of showing no necessity for a bond where the question is raised. 217 **Ala**97, 114**S**909.

1081-87½-New. Fees of an attorney representing the distributee bringing the proceedings are allowable only under statute as part of costs. 217**Ala** 97, 114**S**909.

1081-87¼-New. The right to, and the measure of, such attorney's fees depend on the results obtained for common benefit. 217**Ala**97, 114**S**909.

1081-87¼-New. The distributee bringing the proceedings is primarily liable to his attorney for his services. 217 **Ala**97, 114**S**909.

1082-3 174**Ark**1148, 298**SW**485.

1082-7 [a] **In Texas.**-117**Tex**302, 3 **SW(2d)**408.

1082-13 212**Ala**597, 103**S**884.

1082-17 [b] **In action to recover assets** letters of administration are prima facie evidence on issue of death of intestate. 212**Ala**522, 103**S**557.

1083-25½-New. Evidence has been held sufficient to show due appointment of administrator first appointed, 89 **CalA**469, 265**P**295.

1083-25¼-New. and that administrator subsequently appointed in another county was not duly appointed. 89**CalA** 469, 265**P**295.

1083-30½-New. **TexCommnA** 280**SW** 742.

1083-36 170**Ark**842, 281**SW**910; **Mass** 172**NE**590; 37 **OklACR**698; 116**Nebr** 254, 216**NW**826, 827 [citCJ]. [a] (3) Failure to notify consul of death of alien. 164**Lal**, 113**S**658. [f] **Though appointment of administrator is improper where will exists,** it cannot be said to have been made without jurisdiction. 208 **Iowa**698, 223**NW**756(2d case).

1084-38 117 **Or**505, 243**P**89.

1084-39 117 **Or**505, 243**P**89.

1084-43 43 **Ida**400, 252**P**676, 677 [cit CJ].

1084-46 212**Ala**522, 103**S**557 (are prima facie evidence of intestate's death); 96**CalA**455, 274**P**566 (death of testator).

1084-49 43 **Ida**400, 252**P**676, 677 [cit CJ]; 317**Mo** 1078, 298**SW**83 (residence of decedent).

1085-53 317**Mo** 1078, 298**SW**83, 89 [cit CJ].

1085-56½-New. Heirs of deceased, acquiescing in the appointment of an administrator, are estopped from there-

after questioning the right of the probate court to appoint an administrator for the estate of a less value than five hundred dollars. 150SC125, 147SE646.

1085-57 164La1, 113S658; 167La875, 120S581; 10LaA541, 120S709; 196Wis 125, 218NW193 (where will is probated after appointment of administrator).

1086-58 37 OklACR698.

1086-61 13F(2d)252; 7Alaska489; 198 Cal 329, 245P176; CalA 279P817; 234 IllA105; 245 IllA407; Iowa 230NW 859; 233Ky441, 26SW(2d)8; 10LaA 52, 120S538; 254Mass359, 150NE230; 196NC322, 145SE612; 37 OklACR698; 51Philippine283; 150SC125, 147SE646; SC 155SE740; TexCivA 296SW917.

1088-62 234 IllA105; 95WVa615, 129 SE459. [a] (6) Residence of decedent. 317Mo 1078, 298SW83. (7) Failure of application to state county of decedent's residence. Iowa 230NW859. [f] **Appointment of administrator by probate court of wrong county** is valid until vacated. MoA 27SW(2d)58.

1088-66 37 OklACR698.

1089-68 198Cal 329, 245P176; 101 CalA49, 281P108; Iowa 230NW859. [a] 114 Okl 177, 245P632. [b] (1) 114 Okl 177, 245P632. (2) Determination of deceased's residence cannot be attacked collaterally. 101CalA49, 281P 108.

1089-69 212Ala597, 103S884 (granting administration on estate of noninhabitant of county); 37 OklACR698.

1090-80 198Cal 329, 245P176 (no fraud claimed).

1090-81½-New. Where proceedings for appointment of administrator constitute collateral attack on prior appointment, it is unnecessary to show jurisdictional facts before court making prior appointment. Iowa 230NW859.

1090-82 TexCivA 286SW261.

1092-2½-New. A statute providing for consolidation of state banks with national banks and for vesting of interests of state banks in national banks on consolidation does not transfer the office of executor from a state trust company to a succeeding national bank. 279US347, 49SC368, 73Led733, 61ALR 987.

1092-5 TexCivA 273SW637; 193Wis 20, 213NW639. [c] **Statutory limitation** does not relieve executor from duty finally to settle estate thereafter. 193 Wis20, 213NW639.

1092-9 203 Iowa224, 212NW481.

1093-22 76Mont143, 245P529.

1093-23½-New. Entry of order of discharge after full distribution closes administration proceeding. 76Mont143, 245P529.

1094-29½-New. On entry of order of discharge court loses jurisdiction of property, except so far as may be necessary to compel executor or administrator to obey decree and deliver property to distributee. 76Mont143, 245P 529.

1094-32½-New. A decree settling accounts and purporting to discharge executors relates merely to matters accounted for in the proceeding, and does not revoke letters testamentary, vacate their office, or absolve them from future duties as executors. 217AppDiv 150, 217NYS145.

1094-34 [a] **Order of discharge is not subject to collateral attack.**-34NM209, 279P944 (under facts of case).

1094-35 330 Ill 624, 162NE164.

1094-36½-New. One who has been sued for having caused the death of decedent is not so interested in the estate as to be entitled to move to vacate the discharge of the decedent's administrator. 175Ark1036, 18SW(2d)76.

1094-37 217AppDiv150, 217NYS145; 192NC652, 135SE781.

1098-83 [d] **In Missouri,** under statute, representative is required to publish notice of intention to resign. A 17 SW(2d)629.

1100-3½-New. The probate court acts within its judicial authority in correcting the record during the same term at which executors have attempted to resign without publishing notice of intention by entering an order that they have not legally resigned. MoA 17 SW(2d)629.

1100-12 48RI 81, 135A699.

1101-22 MoA 17SW(2d)629; 293Pa 351, 143A9; 143Wash358, 255P376.

1101-23 [b] **Statutory grounds** must be established. 125Misc386, 211NYS 514.

1101-24 [a] **Evidence held not to establish** statutory ground for revocation of letters testamentary. 125Misc386, 211NYS514.

1101-26 135Misc486, 238NYS723.

1101-27 144 Okl 245, 291P83.

1102-30 220Ala634, 127S199.

1102-32 220Ala634, 127S199.

1102-33 [d] (2) In Montana. 86Mont 455, 284P143.

1102-38 [a] **Nonresidence of executor nominated by will.**-201 Iowa876, 208NW 358.

1103-44 212Ky2, 278SW545. [c] **Revocation for removal from state** is no violation of Fed. Const. Amend. XIV. 212Ky2, 278SW545.

1103-46½-New. , that executors have wasted, 125Misc386, 211NYS514.

1103-46½-New. or improperly applied assets of estate in their hands; 125Misc 386, 211NYS514.

1103-46¼-New. otherwise improperly managed, 125Misc386, 211NYS514.

1103-46⅛-New. or injured property committed to their charge, 125Misc386, 211NYS514.

1103-46⅛-New. or that they have been guilty of dishonesty. 125Misc386, 211 NYS514.

1103-48½-New. Where an executor deposited funds of the estate in a bank account in the name of a personal employee in violation of statute, and continued the violation for six years, his letters should be revoked; 127Misc485, 217NYS335.

1103-48⅛-New. and the fact that the executor made advances for the benefit of the estate from his personal funds does not excuse disobedience of statutory duties. 127Misc485, 217NYS335.

1103-57½-New. Letters testamentary will not be revoked for payment of attorney's fees over objection of testator's widow where there is due to attorneys a sum in excess of amount paid. 125Misc386, 211NYS514.

1103-57⅛-New. Denial of motion by intestate's sister, niece, and nephew for removal of administrator appointed on application of another niece held not abuse of discretion. Iowa 230NW552.

1103-57¼-New. Where a husband, deserting his wife, is not heard of for seventeen years and the wife has remarried upon receiving news of his death, and borne two children, and is appointed administratrix of the second husband on his death, the court will refuse to set aside the appointment on application of the first husband's child by a previous marriage on the sole ground that the first husband is alive and undivorced. 138 Okl 103, 280P424.

1104-69½-New. Receiver of legatee's property appointed in supplementary proceedings on return of execution unsatisfied is "person in interest" who may maintain proceedings to revoke letters testamentary. 125Misc859, 213NYS 174.

1104-76½-New. Creditors may intervene to prevent revocation. 5PaDist&Co 571.

1105-81 55AppDC319, 5F(2d)381 (widow applying for appointment on ground that husband was resident within District of Columbia held not precluded year later from denying this fact); 129 Misc541, 222NYS250.

1105-81½-New. A probate court has no power to set aside its order appointing an administrator for invalidity not appearing on its face, where motion therefor is not made within the time limited for granting relief from judgments not applied for during the term. 13 Ida400, 252P676.

1105-84 7PaDist&Co 112. [g] **Register of wills.**-10PaDist&Co 479.

1105-92 322Mo 258, 14SW(2d)646; 48 RI 81, 135A699.

1106-93 48RI 81, 135A699.

1106-99 [a] (4) other petitions. 169 Ga712, 151SE340. [c] **Petition has been held demurrable.**-169Ga712, 151SE340. [d] **Right of guardian to make motion sufficiently disclosed.** 220Ala175, 124S 247.

1106-8 178Ark937, 12SW(2d)889.

1107-12 212Ala597, 103S884 (evidence that decedent had personalty and money on deposit in another county admissible on question of domicile).

1107-13 94CalA647, 271P760; 166Ga 673, 144SE168; Miss 130S91; 138 Okl 103, 280P424. [a] **Evidence that will was forgery authorized removal of administratrix.**-220Ala175, 124S247.

1107-24½-New. The surrogate's court has no jurisdiction to determine whether a judgment against legatee has been outlawed in proceeding to remove legatee as executor by receiver of legatee's property appointed after return of execution unsatisfied. 125Misc859, 213 NYS174.

1107-31 132 Or122, 283P745.

1108-48½-New. Where no copy of the petition for appointment or evidence introduced thereunder is shown by the record, the appellate court will conclusively presume the sufficiency of the original petition and of proof sustaining the same. Nev 280P321(2dcase).

1108-50 131Misc266, 227NYS543.

1109-64½-New. Appointment and qualification of the general administrator has been held, in effect, a revocation of the special administrator's authority. 100CalA702, 280P995.

1109-64⅛-New. Appeal from an order appointing an administrator has been held not effective to restore or continue the official character or powers of a special administrator. 100CalA702, 280P 995.

1110-69 [h] **Executor cannot be removed without legal cause.**-134Miss676, 99S142.

1110-71 210Ky694, 276SW556.

1110-73 225Ky814, 10SW(2d)300; 153 Md81, 137A487.

1111-75 214Ky370, 283SW444.

1111-78 142Wash300, 252P932. [d] 142Wash620, 254P254.

1111-82 175Minn619, 221NW648.

1111-83 [e] **It is not waste to justify removal** for executors to vote themselves additional compensation as officers of corporation controlled by the estate, where amount is small and easily recoverable. 125Misc386, 211NYS514.

1111-84 [a] 119 Or90, 247P324. [e] **Mere negligence not resulting in loss** to applicant not ground for removal. Or 292P1029.

1111-85 [e] **Paying attorney out of fund** to enforce own claim warrants removal. Utah 290P947.

1112-86 But see 95PaSuper302.

1112-87 129Misc293, 221NYS305. [f] **Payment of excessive bonuses** and salaries from business controlled by him in his own right and as administrator. 55 AppDC309, 5F(2d)270.

1112-89 [a] **It is not dishonesty** to justify removal for executors to vote themselves additional compensation as officers of corporation controlled by estate, where amount is small and easily recoverable. 125Misc386, 211NYS514. [b] **Dishonesty** as used in statute means dishonesty in money matters from which reasonable apprehension may be entertained that funds of estate would not be safe in hands of executors. 125Misc386, 211NYS514.

1113-99 Nebr 227NW147. [c] (2) Claim to money of estate. Utah 290P 947.

1113-1 331 Ill 442, 163NE460.

1113-2 215Ala445, 111S35.

1114-4 107Conn535, 141A657 (refusal to remove held not abuse of discretion).

1114-6½-New. And an administrator's delay in accounting and settling an estate, which was due to the fault of both sides, is not ground for his removal. 153Md81, 137A487.

1114-7 7PaDist&Co 289.

1114-8 Mass 167NE291.

1115-19 [c] **In New York.**-125Misc386, 211NYS514.

1115-20 299Pa200, 149A179.

1116-29 210Ky694, 276SW556 [citCJ]; 95PaSuper302; Utah 290P947.

1116-30 Or 292P1029. [a] (3) Other instances. Or 292P1029.

1116-32 [a] **Executor dilatory, but not**

unfaithful to trust improperly removed. Or 292P1029.

1116-34 5F(2d)582 (holding removal of executrix for failure to keep accounts free from confusion was unwarranted).

1117-51 12PaDist&Co 801 (conviction of crime nine years before appointment).

1117-54 210Ky694, 276SW556, 557 [cit CJ].

1117-56½-New. Payment of claims for doctor's bills and funeral expenses out of the estate, without claims having been filed, held not ground for removal of administratrix when she was entitled to all the estate. 142Wash620, 254P254.

1117-57 215Ala445, 111S35, 36 [citCJ]; 245 IllA407.

1118-68 201 Iowa1021, 206NW674. [b] **That surety had given notice of its election to terminate bond** does not in itself remove its interest in preservation of estate. 201 Iowa1021, 206NW674.

1118-71 Cal 287P450. [a] **In Ontario.**-62 OntL255. [1928] 3DomLR197.

1119-74 121 Okl 275, 249P924.

1119-75 208 Iowa1193, 225NW261.

1119-77½-New. An administrator is not subject to removal by a grand jury accusation under a statute providing for the removal of public officers. 121 Okl 275, 249P924.

1119-79 121Okl 275, 249P924; TexCivA 298SW643.

1119-81 But see 220Ala175, 124S247.

1119-84 [a] **Title to real estate** cannot be adjudicated in removal proceeding where decedent's grantee is not party. 142Wash300, 252P932.

1119-85 201 Iowa1021, 206NW674; 153 Md81, 137A487.

1120-86 [a] **Where situation arising from administrator's application** for letters testamentary called for his removal, an order for his removal, without citation is not in excess of jurisdiction. Cal 287P450.

1120-87 Cal 287P450.

1120-91 Del 143A489. [b] (2) Petition for removal for refusal to inventory land may be considered amended to pray for inventory and removal for unfaithfulness after hearing. 142Wash300, 252 P932.

1120-94 168Ga738, 148SE913 (allegations held sufficient). [f] **Petition held insufficient** as not stating facts indicating that petitioner will be successful. 129Misc541, 222NYS250.

1120-96 TexCivA 11SW(2d)214.

1120-97 Utah 290P947 (holding petition not demurrable as ambiguous).

1121-9 128Misc219, 219NYS124.

1121-10 220Ala175, 124S247 (statute providing for removal of administrator as unsuitable person).

1121-12 82Colo 245, 259P4. [b] 210 Ky694, 276SW556. [c] **Evidence held to establish** cause for removal. Cal 287P 450.

1121-13 201 Iowa1021, 206NW674 (court should hear evidence); 153Md81, 137A487. [c] **Court may direct** certain property to be inventoried, though without power to adjudicate title. 142Wash 300, 252P932.

1122-18 See also 201 Iowa1021, 206NW 674.

1122-20½-New. Upon an application by bonding company surety on administrator's bond praying for an order removing him or requiring filing of a report and distribution, jurisdiction of the court is not exhausted by filing of a report under mutual agreement between the parties where notice of the application was duly served on all interested parties and no part of prayer was withdrawn of record. 201 Iowa1021, 206NW 674.

1122-20½-New. Quære, whether a mere finding by the court as to the extent of the administrator's liability to the estate is an adjudication binding on the surety on the bond of the administrator. 201 Iowa1021, 206NW674.

1122-23 199Cal 98, 248P507. [a] **Order entered on insufficient evidence** to establish cause therefor is in excess of court's jurisdiction. Cal 287P450.

1122-31½-New. Order of removal will not be vacated where there is no showing of any defense thereto, when administrator has held estate open beyond time contemplated by law, is largely indebted to estate in stated amount admitted to be correct and is financially embarrassed. 201 Iowa1021, 206NW 674.

1122-33 195Cal 375, 233P342 (order denying petition to remove executor).

1123-36½-New. That order removing executors was not germane to, or authorized in, proceeding for reduction of executor's compensation does not preclude appeal therefrom. 208 Iowa1193, 225NW261.

1123-39½-New. Guardian not party to proceeding need not be served with notice of appeal. 208 Iowa1193, 225NW 261.

1123-41½-New. Whether the finding and order of the court, if valid, has the effect of an adjudication of the personal liability of the administrator to the estate, will not be discussed where record does not show a formal judgment was entered against administrator for any amount. 201 Iowa1021, 206NW674.

1123-41½-New. Surety's application for removal of administrator or for filing of report will not be deemed dismissed as to prayer for removal merely because surety informed administrator that it would not insist on his removal if he filed final report and accounting at once where such matter is not made part of record. 201 Iowa1021, 206NW674.

1124-53½-New. By an appeal from a probate court order, refusing to remove an administrator and appoint appellant as administrator, the district court only obtains jurisdiction to try the question originally presented to the probate court, and acquires no jurisdiction over money subsequently paid into registry as funds of the estate in obedience to its order, except to vacate such order and return the money to depositor. 118 Tex386, 15SW(2d)602.

1124-54 199Cal 98, 248P507; 81Colo 411, 255P985; Utah 290P947.

1124-62 [a] **Remainderman is not entitled to attorney fees** in suit for removal of executor and trustee. Wis 230NW 715.

1125-64 [i] **Formal removal proceedings** ignored in mandamus to require trial of removal proceedings where grounds for such former proceedings did not sufficiently appear. 142Wash300, 252P932.

1125-65 [e] **His account must be so specific in character** as to enable court upon his removal, to specify property which he must turn over to new and fix the administrator's liability to estate. 74Mont468, 241P655. [f] **Administrator's attorney** may be ordered to turn over property to register of wills for safe custody. 299Pa200, 149A179.

1126-74 205Cal 496, 271P898.

1126-75½-New. The good will of an illegal business does not constitute an asset of decedent's estate. 254Mass366, 150NE225.

1127-80 280US327, 50SCt115, 74Led 457; 216Ala66, 112S529; 216Ala623, 114S223; 220Ala302, 125S36; 226Ky5, 10SW(2d)460; Mass 168NE87; 156Miss 736, 126S656; 129Misc460, 221NYS540; 113 Oh543, 149NE868; 22 OhA55, 153 NE756; 23 OhA87, 154NE811; 22 OhA 55, 153NE756; 131 Or653, 284P163; 144Va727, 130SE794; 146Wash657, 264 P422.

1128-85 247Mich372, 225NW573; 156 Miss736, 126S656; 251NY439, 167NE 580.

1128-89 138Misc10, 245NYS305.

1128-93 Mass 168NE87.

1128-99 SD 231NW933 (judgment or decree of foreclosure).

1128-1 251NY439, 167NE580.

1128-2 136Misc566, 240NYS410.

1129-16 252Mass518, 148NE141.

1129-17 22 OhA55, 153NE756. See also 226Ky5, 10SW(2d)460.

1130-22 252Mass518, 148NE141.

1130-23 216Ala623, 114S223; 86CalA 671, 261P486; 243 IllA497; 221Ky633, 299SW560; 222MoA510, 281SW75; 113 Oh543, 149NE868; TexCivA 29SW(2d) 524. [g] **Legal title to chose in action** evidenced by note passes to representative notwithstanding bequest. 326 Ill 326, 157NE245.

1131-25 [b] (2) Where check given by decedent was paid after his death, amount must be returned to estate and claim filed against estate for amount. 132Misc910, 231NYS16.

1131-28 But see 51Nev69, 268P769 (fees for services as administrator which final account showed had been rendered does not constitute property of estate).

1131-33 156Miss122, 125S541.

1131-33½-New. A right to refund of taxes paid by deceased entryman, 52SD 334, 217NW508.

1131-38 See also 222MoA510, 281SW75.

1132-53½-New. Administrator of deceased who transferred bonds to nephew in order to prevent wife's attorneys from getting them could not have the transfer set aside, since the administrator had such rights as deceased had. 146Va325, 131SE830.

1133-64 22 OhA345, 153NE281.

1134-66 22 OhA345, 153NE281; 91Pa Super183.

1135-71 71CalA22, 234P851.

1135-76 216Ala623, 114S223; TexCivA 284SW636.

1136-86 NH 146A395(2dcase).

1136-87 215Ala88, 109S882; 216Ala66, 112S529; 100CalA469, 280P171; 103 Conn352, 130A472; 90Fla441, 106S470; 37GaA279, 139SE922; 201 Iowa284, 207 NW116; 124Kan230, 257P962; 247Mich 372, 225NW573; 83Mont68, 271P695; 101NJEq241, 137A541; 297Pa17, 146A 260; TexCivA 48SW(2d)144; 99Vt294, 131A794; 134Wash525, 236P274. But see 151Va773; 145SE317. [c] (2) Where realty not devised to be sold for payment of debts, executrix has no power over it, and it can be subjected only in invitum in equity, after personalty is exhausted, at suit of creditors or legatees. 144Va727, 130SE794.

1137-88 34F(2d)312; 215Ala88, 109S 882; 100CalA177, 280P187; 201 Iowa 284, 207NW116; 124Kan230, 257P962; 86Mont340, 283P761; TexCivA 278SW 238; 99Vt294, 131A794. [d] **In Alabama.**-Right of administrator to land vesting in heirs is limited to right to sell it for payment of debt, if necessary, or for division among heirs or devisees, in event only that adult heir or devisee files his written consent that land may be sold under Code (1923) § 5849. 219Ala 157, 121S538.

1138-90 34F(2d)312; 165Ga853, 142SE 450.

1138-91½-New. Where a deed of conveyance to children is canceled by the court, property not passed to innocent purchasers became a part of decedent's estate. 215Ky492, 284SW1110.

1138-91½-New. Property devised to life tenant with power of sale which he attempted to convey by gift has been held not assets of his estate. 260Mass 162, 157NE338.

1138-97 261Mass373, 158NE791; 141 Wash526, 252P534.

1139-4 37GaA279, 139SE922; 124Kan 230, 232, 257P962 [quotCJ]; 144Va727, 130SE794.

1139-5 37GaA279, 139SE922; 263Mass 534, 160NE275; 56ND927, 220NW128; TexCivA 293SW264; 144Va727, 130SE 794.

1140-7 124Kan230, 232, 257P962 [quot CJ].

1142-30 87PaSuper177.

1142-34 99Fla968, 128S33.

1144-52 TexCivA 278SW238. [a] (3) Patent to heirs after death of claimant does not change rule, where deceased had right to land in lifetime. TexCivA 278SW238.

1145-55 321 Ill 442, 151NE877; 48RI 401, 137A699; 150SC368, 148SE211; 141 Wash526, 252P534.

1145-56 Compare PEI [1926] 4DomLR984.

1145-57 27 OhNPNS96.

1145-58 141Wash526, 252P534.

1145-60 99Vt294, 131A794.

1145-64 161Ga403, 131SE75; 129Misc 190, 220NYS689.

1146-72 Wyo 293P354 (widow and estate).

1146-76 MoA 295SW522. [b] **Finding** that decedent's property was mortgaged exceeding value and purchase price was sustained by evidence. Wyo 293P354.

1147-84 205Cal 658, 272P567. [c] (2) Where real property described in deed of trust given to secure note which constitutes asset of decedent's estate is purchased at trustee's sale by executrix and becomes asset of estate, legal title to such property vests eo instanti on acquisition in persons entitled to succeed thereto under provisions of decedent's last will, or, in cases of intestacy, in heirs at law according to laws of succession. 205Cal 658, 272P567.

1147-87 258Mass502, 155NE641.

1147-88 [c] **In New York.**-226AppDiv 108, 234NYS349. [f] **Net profits earned by surviving partner while liquidating business** must be shared with representatives of deceased partner. 300Pa280, 150 A599.

1148-91 [c] **Situs of stock** held not in state of grant of administration. 251 IllA240.

1148-92 [b] 110Conn36, 147A290.

1149-1 198Cal 440, 245P422. [c] **In Iowa.**-Iowa 229NW152.

1149-2 198Cal 440, 245P422; **TexCivA** 286SW298. [a] 124 Okl 170, 254P1. [c] (3) Money appropriated by congress for payment of pensions and placed in special deposit account of branch treasurer of soldiers home is pension money within federal statute. 38F(2d)112. (4) Pension fund allowed to accumulate in hands of pensioner's guardian and turned over to pensioner's administrator is not accrued pension within federal statute. Iowa 229NW152. (5) Balance of such fund due to member of home on his death is subject to distribution as pension money and is not part of personal estate of pensioner. 38F(2d)112. (6) Federal statute exempting pension money while in pension office or in course of transmission does not exempt it in hands of pensioner's administrator. Iowa 229NW152. [f] 51ND733, 200NW 904.

1149-3 216Ala686, 114S301; Mass 171 NE651; Utah 284P992. [f] 175Ark341, 299SW34. [i] **Unexpended portion of moneys appropriated to blind person** by county officers under statute and held by overseer of poor in trust, to be expended for his benefit, revert to county on beneficiary's death. 203 Iowa607, 213NW 239.

1150-7 [b] **Quitclaim deed conveyed to deceased's daughter after his death** under his instructions is part of estate subject to deceased's debts. 250Mich637, 231NW89(2dcase).

1150-9 MoA 68W(2d)961 (despite wrongful sale); 135Misc56, 237NYS531 (though contestants had previously refused same sum from decedent direct); 92PaSuper602. See also 232 IllA86.

1151-10 92PaSuper602. [a] (2) If testator revoked tentative trust of bank account, executor was entitled to receive moneys standing in accounts at time of death. 134Misc174, 235NYS747.

1151-15 132Misc910, 231NYS16.

1152-23 149Wash618, 272P55.

1152-26 33 OhA200, 168NE774(2dcase) (note pledged as collateral security for loan). [i] **Donee of land** has right to dispose of land in manner agreed between him and donor, and administrator cannot recover property as part of estate. 68CalA448, 229P993.

1153-27 [a] (2) Money delivered by decedent to custodian must be returned to administrator without prejudice to right of third parties therein. 213AppDiv460, 210NYS646.

1153-33 [d] **Rights of personal representative** are coextensive with rights of decedent. 83CalA1, 256P294.

1153-37 IndA 167NE617(2dcase); 22 OhA17, 153NE255; 51Philippine75; 157 SC85, 153SE640; 200Wis211, 228NW 135, 68ALR267.

1154-39 221AppDiv838, 224NYS343.

1155-40 221AppDiv838, 224NYS343.

1155-48 IndA 167NE617(2dcase); Iowa 232NW816; 221AppDiv838, 224 NYS343; 22 OhA17, 153NE255. [a] (3) In Philippines, 51Philippine75. [k] (1) 22OhA17, 153NE255. (2) Creditor cannot maintain such action unless administrator refuses to do so. 205 Iowa203, 217NW857. [m] **Where deficiency of assets was caused by void order allowing claim after expiration of time for presenting claims,** suit to recover property fraudulently conveyed will be dismissed. 235Mich516, 209NW561. [n] **After foreclosure of mortgage** assigned to intestate's sister without consideration administrator cannot sue for reconveyance of land. 128Me546, 149A297. [o] **Creditors need not have reduced claims to judgments** to entitle administrator to sue. Iowa 232NW816.

1156-49 169Ga595, 151SE5; 252 IllA 449; 316Mo 968, 293SW116; Can [1930] 3DomLR431.

1157-50 216Ala170, 113S15; 232 IllA 20; 221AppDiv697, 224NYS609; 227 AppDiv146, 237NYS242 (possession one week before death); TexCivA 32SW (2d)513. [e] **Sworn statements denying husband's ownership** of property failed to meet burden of showing title. 216Ala170, 113S15.

1157-51 But see 227AppDiv146, 237 NYS242.

1157-55 TexCivA 27SW(2d)610 (holding widow could testify executors did not sue her for notes payable to husband).

1157-56 86Colo 524, 283P547; 4LaA 210; LaA 130S132; Mass 168NE87; Nebr 230NW111; 247NY447, 160NE 910; 214AppDiv802, 210NYS588; 221 AppDiv697, 224NYS609; 153Wash620, 280P85; Wash 292P737. [b] **Evidence held to justify finding** that money withdrawn from bank accounts belonged to estate of testatrix. 252NY155, 169NE 122. [c] **Evidence held to establish ownership of money** in possession of respondent, in decedent. 227AppDiv146, 237NYS242. [d] **Evidence held sufficient** to sustain finding that certificate of deposit represented money belonging to widow. 234Ky353, 28SW(2d)35.

1158-60 Mass 168NE87. See also Nebr 230NW443.

1158-61½-New. Claimant decreed owner of bonds in safe deposit vault leased jointly by claimant and decedent. 12 PaDist&Co 611.

1158-62 101WVa374, 132SE716, 717 [quotCJ].

1158-67 But see NJPrerog 146A656. [l] **Executor also trustee.**-213AppDiv 395, 211NYS128.

1159-68 102WVa537, 135SE600.

1159-76 But see 149Md22, 130A337.

1160-80 Or 292P1029.

1160-86 [b] **Signing by only two appraisers not invalidating inventory.**-Or 292P1029.

1160-90 MoA 13SW(2d)1076. [d] 6Pa Dist&Co 178. [g] **Widow's exemption,** though no part of estate of deceased for any purpose, must be set forth in inventory as property belonging to widow under statute. 226AppDiv162, 235NYS 213. [h] **Bank account amounting to survivor account** need not be included in inventory by administratrix. CalA 279 P817.

1161-97 91PaSuper183.

1161-10½-New. Property conveyed away by deceased to daughter need not be included in a "true inventory." 100 Vt51, 134A853.

1161-18 [c] **Land to which administrator has equitable title** must be inventoried where decedent had record title. 108Conn37, 142A407.

1162-25 **Erratum.**-Strike out "In re Moore, 198 Pa. 611, 48 A 884."

1162-27 NJ 134A684.

1162-31 6PaDist&Co 178.

1162-36 [b] **Compensation.**-Appraiser's fee is controlled by statute, and court cannot allow different amount. 142 Wash324, 253P455.

1163-40 [e] **Increase in value and increased rental** must be taken into consideration in appraising value of leaseholds. 130Misc313, 224NYS376.

1163-43 [a] **Appointment is discretionary with court.**-145Wash99, 258P 857.

1164-54 NJPrerog 146A656 (child adopted by decree of New York court).

1165-65 84Colo 275, 269P903.

1165-68 CalA 279P817.

1165-70 [a] 208Cal 394, 281P607. [c] **Claimants of stock** alleged to have been wrongly inventoried as assets may raise question of ownership by direct proceeding in probate court. 22 OhA324, 153NE864. [d] **Discretion of court in overruling objections to inventory held not abused** where made six months after appointment of administratrix and where facts showed bad faith of objector. CalA 279P817. [e] **Contention of objector held without merit.**-Cal 279P 817.

1166-72 29Ariz203, 240P343, 346 [cit CJ]; Del 143A489; 127Misc518, 217 NYS341; 133Misc322, 232NYS521. [g] (1) 119 Or90, 247P324. [h] **Distributors of estate are without authority** to distribute property which has not been inventoried. 110Conn36, 147A290.

1166-73 La 129S801; Wis 230NW141. [k] **Burden of showing incorrectness** is on party objecting to inventory. 127 Misc518, 217NYS341. [l] **Adjudication as to property inventoried as belonging to third persons.**-206 Iowa527, 219NW 318(2dcase) (order holding that testator's sons were owners of notes is not binding on creditor of estate).

1167-75 TexCommnA 280SW742; 67 Utah45, 245P695 (persons in possession of land conveyed to them by deceased not divested of title by inventory which through mistake, or intention, includes land).

1167-76 108Conn37, 142A407.

1168-78 TexCommnA 280SW742.

1169-9 46Philippine200.

1169-11½-New. Judgment entered on a note belonging to the estate of decedent, not appraised as required by statute, is erroneous and will be reversed on appeal. 102WVa537, 135SE600.

1170-12 96Fla834, 119S140; Mass 167 NE291; 74Mont449, 241P648; 86Mont 340, 283P761; 103NJEq487, 143A771; 136Misc538, 241NYS212; 24 OhNPNS 361; 45Philippine216; 193Wis20, 213 NW639. [a] But see 172Minn68, 214 NW895. [c] **In Michigan.**-232Mich100, 205NW115. [d] **Administrators as agents.**-120 Okl 294, 251P502. [e] **Administrator's duty** is to close estate. 250Mich501, 231NW123.

1170-13 136Misc261, 241NYS82 (limited by grant in will); 45Philippine216.

1170-14 14PaDist&Co 364.

1170-14½-New. One of the primary duties resting on a personal representative is to effect a speedy settlement of the estate as soon as it is reasonably possible. 103Conn226, 130A157.

1170-14¾-New. An executor or administrator is bound to the exercise of such care and diligence as prudent and judicious men ordinarily bestow upon their own important affairs and for a failure to exercise such degree of care and prudence he and his surety are liable in damages. 29Ariz203, 240P343.

1170-14¼-New. The duties of an executor or administrator and those of a trustee are well recognized in the law as being distinct. 103NJEq487, 143A 771.

1170-15 84CalA114, 257P611; Ga 155 SE32; 205 Iowa114, 213NW414, 416 [citCJ]; 222MoA474, 280SW711; 120 Okl 294, 251P502. [b] **Representative of estate,** having taken possession unconditionally, is subject to all obligations and rights of deceased. 166La626, 117S741. [i] **Intention to act in representative capacity** may be shown by language of deed to which administrator is party. 109Conn529, 147A181.

1170-16 199Cal 625, 250P669, 48ALR 1308; 103Conn352, 130A472; 47 Ida 582, 277P565; 205 Iowa114, 213NW414, 416 [citCJ]; 124 Or193, 264P371. See also 316Mo 968, 293SW116. But see 222 MoA474, 280SW711.

1170-17 199Cal 625, 250P669, 48ALR 1308; 103Conn352, 130A472; 109Conn 529, 147A181; 160Ga469, 128SE582 (legal party on behalf of legatees to conduct litigation involved in caveat); 327 Ill 448, 158NE706; 205 Iowa114, 213 NW414, 416 [citCJ]; 125 Or38, 263P 54, 56 [citCJ]; 124 Or193, 264P371; 300Pa64, 150A98. But see Wash 287P 21.

1170-17½-New. The executors of a solvent estate are without interest or authority to champion the rights of the heirs. 162La758, 111S86.

1170-18 17F(2d)716; 215Ala131, 110S 135; 199Cal 625, 250P669, 48ALR1308;

109Conn529, 147A181; 327Ill448, 158NE706; 205Iowa114, 213NW414, 416 [citCJ]; MoA 168SW(2d)681 (must protect interest of all parties); 125Or38, 263P54, 56 [citCJ]. See Ont [1926] 4DomLR705.

1171-19 11F(2d)948, 48ALR207; 203Cal335, 264P242; 99CalA113, 277P1068; 109Conn529, 147A181; 205Iowa114, 213NW414, 416 [citCJ]; 129Misc283, 221NYS462; 100Vt366, 137A321; 100Vt351, 137A329.

1171-20 205Iowa114, 213NW414, 416 [citCJ].

1171-21½-New. The executor or administrator acts in a representative capacity. 200Iowa620, 203NW307.

1171-21⅓-New. By fiction of identity the executor or administrator is the person of the testator, and it is to him all interested parties must look. 200Iowa620, 203NW307.

1171-21¼-New. An executor or administrator represents all parties and all interests in the estate. 200Iowa620, 203NW307.

1171-21⅕-New. Personal representatives are officers of the court. 172Minn68, 214NW895.

1171-21⅙-New. An administrator is not strictly an agent of the heirs of decedent but rather an agent of the probate court. 316Mo953, 292SW419.

1171-21⅐-New. Personal representatives are officers of the court. 207Iowa84, 218NW537.

1171-22 128Okl179, 261P973.

1171-23 But see 128Okl179, 261P973.

1171-23½-New. An executor may employ counsel to assist him where the probate of the will is contested, 128Okl179, 261P973.

1171-23⅓-New. although he is himself an attorney, 128Okl179, 261P973.

1171-23¼-New. and although he is required by the will to render professional services. 128Okl179, 261P973.

1171-24 86IndA607, 159NE167; 120Or223, 251P711, 712 [citCJ].

1171-25½-New. other authorities held that an administrator is not interested in litigation over allowance of will. 232Mich100, 205NW115.

1171-27 45Philippine216; Ont [1930] 4DomLR255.

1171-28 45Philippine216.

1172-30 122Kan563, 253P426; 129Misc283, 221NYS462; 24OhNPNS361. [d] **Status of universal executor** in Spanish law see 29PortoRico943.

1172-33 Mass 165NE701; 24OhNPNS361.

1173-37 86IndA607, 159NE167; 127Misc238, 216NYS598; 130Misc339, 224NYS435; 190NC476, 130SE115. [m] **Discretionary power under will** must not be abused to injury of beneficiaries. 198NC642, 153SE114.

1173-40½-New. Where a will directs the executor to act with the advice of another person, the executor may act without such advice where the position has so altered that such person's interests conflict with his duty to the estate. Ont [1929] 1DomLR116.

1173-41 231Ky122, 21SW(2d)153.

1174-43 38BC211, [1927] 1DomLR900, [1927] 1WestWkly1000.

1174-44½-New. Under statute in some jurisdictions an executor or administrator may, within certain limits, delegate his authority to an agent. 149Md401, 131A770.

1174-45 [b] **Joint Executor.**-240NY125, 147NE609.

1174-47 204Iowa355, 213NW938, 940 [citCJ]; 191NC347, 132SE2; 196NC398, 145SE776; 198NC225, 151SE189. [e] (2) It is for probate judge, in executor's petition for instructions under will, to determine what weight should be given to testimony of witnesses. 265Mass285, 163NE877.

1174-47½-New. and should do so where there is doubt as to policy to be pursued. 198Cal163, 244P340, 44ALR1341.

1175-48 220Ala149, 124S202; 207Iowa84, 218NW537; Iowa 231NW376 (consent and approval of court); 198NC225, 151SE189; Oh 171NE595 (administrator's duty to follow orders of probate court). [m] **Directions construed** as to property subject to equitable distribution. 162Ga280, 133SE471. [n] **It is duty of court** to see that officers administering estate are faithful and ordinarily diligent to preserve estate from loss. 287Pa499, 135A112.

1175-53 See also 222MoA276, 297SW138 (probate's order controlling).

1176-56 Ga 154SE883.

1176-57 Ga 154SE883.

1176-57½-New. But court is charged with duty of preventing spoliation of estate by representative. 74Mont449, 241P648.

1176-58 99NJEq67, 132A517.

1176-62½-New. Discretion lodged in the executor as to payments to be made under a will may be reviewed by courts. 289Pa407, 137A627.

1176-62⅓-New. Instructions can be obtained only as to present duties. 262Mass321, 159NE919.

1176-64 [a] (4) To maintain action to cancel mortgage on decedent's property and set aside foreclosure. 41Ida690, 241P1023.

1178-74 [b] (9) Grantor's consent to grantee's use of road over land of estate of which grantor was executor could not bind estate as regards claimed estoppel. CalA 292P157.

1178-77 153Md31, 137A482, 483 [quot CJ].

1179-78 153Md31, 137A482, 483 [quot CJ].

1180-82 128Okl179, 261P973.

1180-85½-New. A contract by an executor before appointment agreeing that the other party to the contract shall collect rents and pay expenses of certain property and hold the net proceeds until the will is admitted to probate and an executor is appointed and thereafter in trust until the person appointed shall demand them is a valid contract between the parties as individuals. 196Cal260, 237P542.

1180-85⅓-New. A power of attorney appointing an agent executed, delivered, and filed by applicant for letters, before the letters are granted, is inoperative. 149Md401, 131A770.

1180-85¼-New. An executor may, before he qualifies, pay the funeral charges. 128Okl179, 261P973.

1180-85⅕-New. Where it appears necessary for an executor to employ an attorney to preserve the estate under the terms of a valid will, he may be authorized to do so, and the attorney's fees may be allowed as necessary expenses. 128Okl179, 261P973.

1181-90 215Ala674, 112S251, 253 [quot CJ]; 35Ariz457, 281P38. [e] (1) 102NJL288, 132A253.

1182-91 215Ala674, 112S251, 253 [quot CJ].

1182-93 100CalA702, 280P995; 209Ky289, 272SW759 (supersedeas on appeal from county court to circuit court held to suspend right to act as administrator); 319Mo1105, 8SW(2d)905 (institution of suit to contest will revoked right of executor to control real estate); 322Mo258, 14SW(2d)646.

1182-95 322Mo258, 14SW(2d)646; 132Or122, 283P745.

1182-97½-New. Pending appeal from an order revoking probate of a will the executor's rights, powers, and duties are at an end. 132Or122, 283P745.

1182-99 128Misc422, 220NYS204.

1183-1 256IlA401.

1183-3 22OhA141, 153NE297; 126Misc673, 215NYS141 (purpose stated); 128Misc422, 220NYS204; 21OhA314, 153NE221. [f] **In Massachusetts.**-254Mass180, 150NE9.

1183-11 But see NJ 147A44(2dcase).

1184-13½-New. Under some statutes the public administrator is entitled to demand of a public service company a list of all deposits with it, unclaimed and uncalled for, for a period of ten years, together with the last known residence or addresses of the depositors, notwithstanding the list demanded comprehends deposits made to its predecessors as security for the payment of gas and electric bills. 9LaA319, 120S525.

1184-15½-New. An executor, unable to pay a greater portion of an individual debt to the estate, has been held not chargeable in representative capacity with the amount owing as for money on hand. 79Mont445, 257P418.

1184-15⅓-New. A son's petition, alleging that deceased father's administrator had goods belonging to the estate which he omitted to return to inventory, entitled him to relief under statute. 153Md81, 137A487.

1184-15¼-New. Upon the administrator's death, the executrix must state an account of his administration of the estate and account for property possessed and omitted from inventory. 153Md81, 137A487.

1184-15⅕-New. Where the executrix's report of her testator's administration of the estate did not account for personal property, issue of the omission is for the jury. 153Md81, 137A487.

1184-15⅙-New. That a son became the administrator de bonis non does not prevent him from prosecuting a proceeding to compel a former administrator to account. 153Md81, 137A487.

1184-15⅐-New. The probate court does not have sole jurisdiction to quiet title to property, because defendant estate was in the course of probate. 205Cal184, 270P211.

1184-15⅛-New. Failure to procure service of summons on executors, made parties defendant, has been held to require reversal of judgment entered in a suit against the testator's second wife and her descendant, to recover interest in real estate of their deceased mother and of testator. TexCivA 9SW(2d)758.

1184-21 129Misc803, 221NYS461.

1184-23 [a] **Possession of specific money** cannot be recovered by administrator upon claim of concealment, embezzlement, or conveying away of money of decedent. 22OhA141, 153NE297.

1184-28½-New. The court has the right to compel discovery whether the insurance company has funds belonging to decedent's estate under an insurance policy. 133Misc34, 231NYS95.

1184-28⅓-New. Administrator may require his surety to deliver stock purchased from assets of estate. 137Misc549, 244NYS143.

1184-30 51Nev125, 269P913, 914 [cit CJ].

1185-32 132Misc910, 231NYS16 (gift not recoverable in discovery proceeding).

1185-35 51Nev125, 269P913, 914 [cit CJ]; Utah 269P135. [g] **Where property is not in possession of person sought to be examined,** court will not determine question of title. 215NYS141, 126Misc673 (where property is in hands of petitioner).

1185-36 132Misc568, 230NYS567; 134Misc507, 236NYS237.

1186-38 316Mo1094, 295SW563; 248NY202, 161NE471; 128Misc718, 221NYS205; 132Misc910, 231NYS16.

1186-39 316Mo1094, 295SW563; 137Misc549, 244NYS143.

1186-39½-New. Jurisdiction is limited to delivery of specific personal property. 215AppDiv516, 213NYS684.

1186-39⅓-New. Where apparent purpose of proceedings is to obtain testimony for use in later action to determine ownership of property in possession of petitioner, it should be denied. 126Misc673, 215NYS141.

1186-39¼-New. Under statutes providing summary proceeding for recovery of judgment and penalty against one claimed to have concealed, embezzled, or conveyed away money of decedent, the administrator cannot recover possession of specific money, but only a money judgment. 22OhA141, 153NE297.

1186-39⅕-New. Sufficiency of evidence to establish an agreement to pay for decedent's support and maintenance cannot be determined by a surrogate in discovery proceedings. 128Misc718, 221NYS205.

1186-42 [a] (2) Beneficiary of tentative trust cannot be deprived of his interest through discovery proceedings against bank, where beneficiary was not party. 134Misc507, 236NYS237. [c] **Heirs of decedent** held not necessary parties to action by administrator of husband dying testate against administrator of wife in which construction of will was mere incident. 104WVa507, 140SE487.

1186-45½-New. A bill was not defective in making several alleged fraudulent

grantees parties defendant on the ground of misjoinder. 218Ala170, 118S173.

1186-49 [b] **Unsworn statement** that sworn allegations in verified petition are untrue could not be basis of claim for relief. 134Misc728, 236NYS406.

1186-50 232 IllA109.

1187-51½-New. Allegations in an affidavit have been held sufficient to set forth causes of actions for accounting and therefore to preclude an examination before trial. 221AppDiv158, 222 NYS3.

1187-51½-New. Interrogatories and answers constitute the pleadings in some jurisdictions. 319Mo 835, 5SW(2d)28.

1187-51¼-New. Where the interrogatories and answers raise a general issue, a motion for judgment on the pleadings should be overruled. 319Mo 835, 5SW (2d)28.

1187-54½-New. Pleadings should be appropriately amended before decree to show claim for restoration of property, where bill by executor seeks direction of the court. NJ 147A44(2dcase).

1187-55 [b] **Answer alleging decedent's intestacy** as respects bonds sought to be recovered held to raise no issue of title. 129Misc283, 221NYS462.

1187-57½-New. An answer denying the petitioner's right to possession and decedent's ownership raises the issue of title. 131Misc172, 227NYS133.

1187-60 131Misc172, 227NYS133. [a] **Burden is not sustained** where evidence shows that decedent surrendered property to defendant during lifetime. 131 Misc172, 227NYS133. [b] **Constructive fraud** doctrine puts on one claiming property the burden of proving full knowledge of act by deceased and absence of undue influence. 137Misc564, 241NYS759.

1187-61 244Mich246, 221NW156; 319 Mo 835, 5SW(2d)28 (gift); MoA 8SW (2d)110 (gift); MoA 13SW(2d)1076; 215AppDiv516, 213NYS684 (gift); 224 AppDiv363, 231NYS218. See also 219 MoA51, 266SW750.

1187-61½-New. The burden is on decedent's administrator to make a prima facie case of right to possession of money in respondents. 227AppDiv146, 237 NYS242.

1187-63 97CalA264, 275P533; NJ 147 A44(2dcase) (objection to testimony is valid, though made by counsel for other legatees); 53SD499, 221NW257. [a] **Evidence held immaterial.**-135Misc389, 237NYS715.

1187-64 330 Ill 589, 162NE209; 244 Mich246, 221NW156; 174Minn61, 218 NW163 (that property belonged to plaintiff's intestate); MoA 8SW(2d)110 (evidence sufficient to go to jury); 224 AppDiv363, 231NYS218; 226AppDiv162, 235NYS213 (necessity of recovery must be shown); 22 OhA141, 153NE297; 22 OhA141, 153NE297; 134 Okl 79, 272P 868. [b] **Weight of evidence.**-128Misc 718, 221NYS205.

1187-64½-New. In statutory summary proceedings against one claimed to have concealed, embezzled, or conveyed away money of decedent, fraudulent or criminal intent is not a necessary element in making out a case for plaintiff. 22 OhA 141, 153NE297.

1187-68 [a] (2) Interrogatories need not be numerically answered. 319Mo 835, 5SW(2d)28. [b] 316Mo 483, 291SW 132.

1187-76½-New. A jury trial is essential where the court determines title to property. 232 IllA109.

1187-76½-New. In proceedings against a widow to discover the assets of her husband's estate, the question whether a certain sum which the widow had received from her husband was repayment of a loan or was a gift from her husband has been held to be a question for the jury. MoA 13SW(2d)1076.

1187-76¼-New. A jury's finding as to the value of chickens in a proceeding for discovery of assets has been held sufficient under an instruction. MoA 13SW(2d)1076.

1187-76½-New. The question whether deceased made a gift of personal property to defendant is generally one for the jury. 319Mo 835, 5SW(2d)28.

1188-89 252NY155, 169NE122; 137 Misc564, 241NYS759 (withdrawal of money from account).

1188-91½-New. Service of a certified copy of a surrogate's decree, determining ownership of decedent's bank deposits, is sufficient to permit the executor to receive deposits although the bank is not party. 128Misc718, 221NYS205.

1188-91½-New. The surrogate's court may enter a decree in discovery proceedings although no answer is filed. 129 Misc840, 223NYS812.

1188-91¼-New. A son not establishing a claim to a gift must repay the father's estate and have a trust imposed for the amount expended. 129Misc840, 223NYS 812.

1188-91½-New. One not a party is not bound by judgment. 132Misc910, 231 NYS16.

1188-91¼-New. Where the administrator sues officially for conversion by a bank of money belonging to the estate applied on the administrator's personal debt, the bank is not entitled to affirmative relief confirming payment of the debt. 53SD499, 221NW257.

1188-93 [d] **Appellate court can decide all questions of fact or modify decree as justice requires.**-226AppDiv162, 235NYS213.

1189-95½-New. On trial in the appellate court before a jury the question whether decedent intended a transfer of bonds to defendant as a gift should not be withdrawn from the jury where defendant's claim is supported by evidence. 316Mo 1094, 295SW563.

1189-95½-New. In proceedings in which defendant claimed assets of the estate as a gift, an instruction placing the burden on plaintiff to establish by preponderance or greater weight of evidence facts necessary to a verdict in his favor is prejudicial error. 319Mo 835, 5SW(2d)28.

1189-97 243 IllA497; 252Mass510, 147 NE845; 86Mont340, 283P761. [i] **"Paid-up stock" in mutual building association,** buying of which is merely deposit of money at fixed interest rate, principal and interest being subject to withdrawal at any time, may be withdrawn by executor. 167La875, 120S581.

1190-3 253 IllA229; 227Ky665, 13SW (2d)1019; 180Minn97, 230NW272; 32 OhA419, 168NE217 (assets of estate resulting from sale of security given by decedent); 197Wis347, 222NW228. [l] **Note of distributee.**-222MoA713, 7SW (2d)737.

1190-11 131Misc21, 227NYS296.

1191-15 27Hawaii655.

1191-19 Ga 155SE764. [h] 222MoA713, 7SW(2d)737.

1192-28 83CalA1, 256P294; 214Ky785, 284SW83; 222MoA930, 10SW(2d)969; 53SD499, 221NW257.

1192-29 [b] But see Ill 173NE77. [i] **Nature of proceeding.**-Proceeding is not civil action. 21 OhA396, 153NE285. [j] **Summary proceeding is not intended to afford means of collecting debts.** -Ill 173NE77.

1193-30 [a] **Property must have belonged to decedent at his death.**-Ill 173 NE77.

1193-31½-New. A probate court is not required to hear controversy, as to which of two estates is entitled to certain property, in a probate proceeding other than the one in which the personal representative has possession of the property. 135Wash636, 238P898.

1193-31½-New. No allegation of criminality is necessary. 22 OhA395, 153 NE857.

1193-31¼-New. A complaint alleging that, prior to the death of deceased, defendants came into possession of deceased's property as his agents and in trust, to hold it and deliver it to him on demand, and that in violation of their trust they secreted, concealed, and embezzled all of such property, and seeking return of the property to deceased's administrator, and the appointment of a receiver, states an equitable cause of action. 97CalA264, 275P533.

1193-31½-New. Recitals in an answer, denying that the personal property sought to be recovered was the property of deceased, or that he had any right, title, or interest therein at any time while the property was in defendant's possession, and that one of defendants had exclusive adverse possession of the property and proceeds thereof, do not change such cause of action to an action at law. 97CalA264, 275P533.

1193-31½-New. Such cause of action is not changed to one at law by an answer denying that decedent was ever owner during his lifetime of the property sought to be recovered. 97CalA264, 275 P533.

1193-31½-New. A proceeding for a donor's conversion of stock held legal and not equitable. 332 Ill 126, 163NE319.

1193-31½-New. Petition setting out record of former action by defendant against plaintiff executor of decedent for specific performance of contract to convey land and set aside a will, together with judgment for defendant under process against plaintiff in his representative capacity, has been held to show that defendant had superior title to the executor, and the petition was properly dismissed. 166Ga667, 144SE204.

1193-32 47RI 47, 129A805, 809 [quot CJ]. [c] **Executor held entitled to enforce contract** of guaranty for benefit of residuary legatees, though not heirs at law and though contract read to "heirs" and "administrators." 198Cal 746, 247 P906. [d] **Personal representative,** either executor or administrator, though not named in contract, may enforce it. 198Cal 746, 247P906.

1193-33 47RI 47, 129A805, 809 [quot CJ]. [a] **Court of equity** has jurisdiction of action brought for benefit of estate by beneficiaries under will, on refusal of executor to act, to recover personal property held and claimed by one claiming it as gift from decedent. 82 Mont73, 265P15.

1193-34½-New. Naked legal title will not prevail in equity where administration is unnecessary or the property is gone. 216Ala623, 114S223.

1193-35 221Ky679, 299SW576.

1193-36½-New. In an action by a personal representative to recover property conveyed by decedent to his son without consideration, under an agreement to reconvey on the happening of a contingency, no demand is necessary where the event upon which a reconveyance was to be made has transpired. 83CalA 1, 256P294.

1193-46 98CalA349, 276P1069(2dcase).

1194-51 222MoA930, 10SW(2d)969; 22 OhA395, 153NE857; Wash 292P737.

1194-52 98CalA349, 276P1069(2dcase); 256 IllA401; 207 Iowa1287, 224NW554; Wash 292P737. [a] **Evidence held sufficient:** (1) To sustain finding that delay in bringing suit did not prevent recovery. 263Mass63, 160NE317. (2) To sustain finding that decedent was of unsound mind when transferring property to defendant. 83NH262, 141 A132.

1194-53½-New. Court may determine ownership in a direct proceeding against a person claiming property as a gift causa mortis although the executor is in possession, by agreement, of the property involved. 27 OhA34, 160NE 735.

1194-53½-New. Requested instructions held properly refused. 83NH262, 141 A132.

1194-57½-New. Court may order delivery of property or proceeds or value if converted. Ill 173NE77.

1194-60 118 Okl 231, 247P353, 356 (statute held not applicable); 124 Okl 280, 256P34. [a] **Questions for jury.**-Whether property in controversy was partnership property. 124 Okl 280, 256 P34.

1194-61 118 Okl 231, 247P353, 356.

1194-62 263Mass63, 160NE317. [a] **Liability of son for conversion of securities** is that of agent to account to estate for principal and interest received or lost. 200Wis347, 228NW476.

1194-63 146Wash657, 264P422.

1194-65 165Ga176, 140SE373; 204 Iowa927, 216NW55, 58 [citCJ]; 105WVa 263, 142SE68.

1194-67 28Hawaii203; Iowa 232NW72.

1196-88½-New. Assignee of interest of heir in estate has been held entitled to superior right over that of surety of such heir as administrator misusing funds. 207**Cal** 556, 279**P**655.
1196-89 32**F(2d)**189.
1196-98 **Iowa** 213**NW**417.
1198-21½-New. Administrator of mortgagee, having ratified payments made by a volunteer to his agent, must create payments in mortgage debt. 137**SC**337, 135**SE**357.
1198-23 But see 200**Wis**288, 227**NW**266. [m] **Settlement by attorney of sole heir,** who ratifies it, may not be questioned by administrator. 178**Minn**409, 227**NW** 426(1stcase). [n] **Temporary administrator** has no power to compromise claims. 227**AppDiv**87, 236**NYS**653.
1199-24 [d] **Settlement of claim for death held not inadequate.**-157**Miss**326, 128**S**87.
1199-31½-New. Compromises are not allowed unless the claim is disputed and doubtful. 167**Ga**867, 147**SE**44.
1199-32 227**AppDiv**87, 236**NYS**653; **TexCivA** 274**SW**662, 665 [quotCyc].
1199-33 167**Ga**867, 147**SE**44.
1200-34 **TexCivA** 274**SW**662, 665 [quot Cyc]; **TexCivA** 294**SW**227.
1200-35 168**Minn**283, 210**NW**85; 157 **Miss**326, 128**S**87. But see 227**AppDiv** 87, 236**NYS**653.
1200-36 223**Ky**35, 2**SW(2d)**1053. [b] **Whether administrators appreciated effect of settlement** was for chancery court's determination when approving it. 157**Miss**326, 128**S**87.
1200-37½-New. Order of probate court consenting to compounding of claim due from insolvent debtor of estate is not invalid because made without notice to persons interested in estate. 168**Minn** 283, 210**NW**85.
1200-37½-New. Surrogate cannot compel executors to petition for consummation of settlement which they disapprove. 227**AppDiv**87, 236**NYS**653.
1200-39½-New. Settlement agreement between devisees and legatees, in which a minor son of deceased legatee was represented by an administrator, has been held binding on the son. 218**Ala**186, 118 **S**333.
1200-39½-New. Settlement by administrator of claim for wrongful death, properly authorized by court, is binding on all interested parties. 157**Miss**326, 128 **S**87.
1201-47 107**Conn**535, 141**A**657. But see 151**Miss**784, 119**S**301.
1201-48 157**Miss**326, 128**S**87 (holding averments of fraud insufficient to render release void).
1202-56 27**Hawaii**655, 662 [citCJ].
1202-57 27**Hawaii**655, 662 [citCJ]; **Iowa** 232**NW**169.
1203-63½-New. Executor should be credited with dues paid by him on his note to testatrix prior to testatrix's death, in addition to amount paid as interest and premiums, but not for moneys so paid after testatrix's death, under statute. 224**AppDiv**431, 231**NYS**333 (payments to homestead and association).
1203-67 29**Ariz**203, 240**P**343; 130**Misc** 684, 225**NYS**190; 119 **Or**90, 247**P**324.
1204-68 27**Hawaii**655.
1205-71 130**Misc**684, 225**NYS**190.
1205-78 130**Misc**684, 225**NYS**190.
1205-80 130**Misc**684, 225**NYS**190.
1206-81 27**Hawaii**655, 662 [quotCJ].
1206-82 29**Ariz**203, 240**P**343.
1206-82½-New. Testimony of appraisers that notes appraised in the inventory as worthless had only a prospective value is insufficient to overcome the prima facie evidence of worthlessness furnished by the inventory. 29**Ariz**203, 240 **P**343.
24 C. J.—48-90 **CalA** 285**P**753; 129 **Misc**293, 221**NYS**305; 134**Misc**11, 235 **NYS**78; 190**NC**491, 130**SE**193 (liable only for mala fides or want of reasonable diligence); 287**Pa**499, 135**A**112; 100**Vt** 366, 137**A**321.
48-91 134**Misc**11, 235**NYS**78; 190**NC** 491, 130**SE**193.
48-92 177**Ark**977, 8**SW(2d)**464, 60**ALR** 484; 222**MoA**276, 297**SW**138; 86**Mont** 340, 283**P**761; 129**Misc**218, 221**NYS** 711; 130**Misc**684, 225**NYS**190; 287**Pa** 499, 135**A**112; 46**Philippine**200; **Tex CivA** 258**SW(2d)**224. See also 246 **Ill**A 283, 289 [citCJ]. [c] See also **Iowa** 213 **NW**417.
48-92½-New. Active vigilance is required, according to some decisions. 129**Misc**218, 221**NYS**711.
49-93 287**Pa**499, 135**A**112.
49-95½-New. Statutory provisions control the acts and conduct of a bank in relation to property received by it as administrator. 205 **Iowa**114, 213**NW** 414.
49-95½-New. An administrator must settle the estate with reference to the situation of assets at the time of decedent's death. 86**Mont**340, 283**P**761.
49-95¼-New. In testing conduct of executor, his relations with testator and provisions of will must be taken into consideration. **Iowa** 232**NW**72.
49-96 [h] **Notwithstanding receivership,** executor is representative of estate. 169**Ga**858, 151**SE**796.
49-99 207 **Iowa**84, 218**NW**537, 540 [cit CJ].
50-2 205 **Iowa**114, 213**NW**414; 74**Mont** 449, 241**P**648.
50-4 96**Fla**834, 120**S**1(2dcase); 201 **Iowa**337, 207**NW**374; 206 **Iowa**706, 219 **NW**401; 79**Mont**445, 257**P**418. [c] **In Arkansas.**-177**Ark**977, 8**SW(2d)**464, 60 **ALR**484.
50-5 [c] **Deposit in coexecutor trust company.**-9**PaDist&Co** 702 (opinion of attorney-general).
50-7 177**Ark**977, 8**SW(2d)**464, 60**ALR** 484; 207 **Iowa**800, 218**NW**533; 79**Mont** 445, 257**P**418; 79**Mont**299, 257**P**1002; **Nebr** 231**NW**513.
50-8 206 **Iowa**706, 219**NW**401; 79**Mont** 299, 257**P**1002. [a] 207 **Iowa**800, 218 **NW**533. [b] 177**Ark**977, 8**SW(2d)**464, 60**ALR**484.
51-9 [c] **Bank as executor, administrator, or trustee.**-**Iowa** 213**NW**417.
51-16½-New. A beneficiary is not bound by an executor's agreement not to withdraw a deposit until a certain time made after the beneficiary had become entitled to the fund. 132**SC**158, 128**SE**872 (right of beneficiary to question validity of agreement not waived).
51-17 [a] **Loss from withdrawal.**-206 **Iowa**706, 219**NW**401.
52-20 86**Mont**340, 283**P**761.
52-22½-New. An administrator remains liable for the share of an infant until actual transfer of it to the infant's guardian pursuant to order of court. 120 **Okl** 294, 251**P**502.
52-23 **TexCivA** 8**SW(2d)**558.
53-30 198**Cal** 163, 244**P**340 [quotCJ], 44**ALR**1341; 100**Vt**468, 139**A**250. [c] (1) 198**Cal** 163, 244**P**340, 44**ALR**1341.
54-31 198**Cal** 163, 244**P**340 [quotCJ], 44**ALR**1341.
54-32 198**Cal** 163, 244**P**340 [quotCJ], 44**ALR**1341.
54-33 198**Cal** 163, 244**P**340 [quotCJ], 44**ALR**1341.
54-34 198**Cal** 163, 244**P**340, 44**ALR** 1341 [quotCJ].
54-35 203**Cal** 693, 265**P**920, 58**ALR**430; **MoA** 281**SW**144.
55-39 167**Ga**867, 147**SE**44.
55-40 **CalA** 285**P**720 (not necessary to restore consideration). [a] (1) **CalA** 285**P**720.
55-42 See also 90**PaSuper**512.
55-46 198**Cal** 163, 244**P**340, 44**ALR** 1341.
55-48 219**Ala**140, 121**S**402; 70**CalA**552, 233**P**995; 106**Conn**602, 138**A**795; 74 **Mont**449, 241**P**655; 137**Misc**735, 244 **NYS**357; 122 **Or**605, 260**P**203, 55**ALR** 504. See also 103**Conn**226, 130**A**157.
55-48½-New. nor is he under obligation to continue business. 198**Cal** 163, 244**P**340, 44**ALR**1341.
56-50 198**Cal** 163, 244**P**340, 44**ALR**1341; 70**CalA**552, 233**P**995; 74**Mont**449, 241**P** 648; 119 **Or**90, 247**P**324; 122 **Or**605, 260**P**203, 55**ALR**504. [g] But see **Tex CivA** 258**SW(2d)**224. [h] **Proceeds of merchandise sold** are impressed with trust for remainderman, life tenant having died. 127**Misc**647, 217**NYS**381.
56-51 122 **Or**605, 260**P**203, 55**ALR**504.
56-52½-New. An administrator, carrying on an unlawful business, is not chargeable with any fees received therefrom. 254**Mass**366, 150**NE**225.
57-55½-New. Administrator is liable for rents, issues, and profits which farm which he conducts as going concern without court authority should have yielded during period of such operation. 74**Mont**449, 241**P**655.
57-58 70**CalA**552, 233**P**995.
57-59 119 **Or**90, 247**P**324. [d] **In Georgia.**-167**Ga**248, 145**SE**73.
57-62 74**Mont**449, 241**P**648, 651 [cit CJ].
57-63 74**Mont**449, 241**P**648, 651 [cit CJ].
58-67 See also 222**MoA**276, 297**SW**138.
58-69 106**Conn**602, 138**A**795; 207 **Iowa** 84, 218**NW**537. [b] **Under statute authorizing any interested person to obtain order of court** regarding continuing hotel business, widow had duty to apply for such order. **TexCivA** 294**SW** 227. [c] **Notice to creditors.**-207 **Iowa** 84, 218**NW**537. [d] **Failure to limit continuance of business to winding up decedent's affairs** does not render order void. 207 **Iowa**84, 218**NW**537. [e] **Validity of order directing continuance of private banking business is to be determined** in view of nature of business and how it appeared from apparently complete records. 207 **Iowa**84, 218**NW**537.
58-69½-New. In other jurisdictions a court of probate jurisdiction is deemed to have power to continue a retail business during administration. 37**Wyo** 313, 261**P**130.
58-72½-New. In Porto Rico mother needs no authority of court to continue business of father for minor children authorized by statute. 34**PortoRico** 366.
58-73 135**Misc**93, 236**NYS**709. [d] **Authority must be found in direct and unequivocal language of will.** 126**Misc**54, 213**NYS**286.
59-74 135**Misc**93, 236**NYS**709.
59-75 8**F(2d)**700; 70**CalA**552, 233**P** 995; 167**Ga**248, 145**SE**73; 135**Misc**220, 237**NYS**409. [h] **Manner of exercise.**-135**Misc**93, 236**NYS**709 (usual manner unless otherwise directed).
59-77 8**F(2d)**700.
59-78 8**F(2d)**700; 106**Conn**602, 138**A** 795; 164**Ga**474, 139**SE**18, 21 [citCJ]; 167**Ga**68, 144**SE**912; 167**Ga**248, 145**SE** 73. See also **TexCivA** 8**SW(2d)**558.
60-79 106**Conn**602, 138**A**795; 135**Misc** 93, 236**NYS**709; 190**NC**190, 129**SE**413.
60-81 135**Misc**93, 236**NYS**709.
60-84½-New. If direction in will for continuance of business is strictly pursued, the executor will be free from responsibility for losses incurred without negligence. 135**Misc**93, 236**NYS**709.
61-85 103**Conn**352, 130**A**472; 167**Ga** 248, 145**SE**73; 135**Misc**93, 236**NYS**709; **TexCivA** 8**SW(2d)**558.
61-86 135**Misc**93, 236**NYS**709.
61-88½-New. Property separately devised apart from business trust not subject to business debts of trust after death of testator because devisee had knowledge of the continuance of the business. 103**Conn**352, 130**A**472.
61-90 **Ga** 154**SE**791; 74**Mont**449, 241 **P**655; 134**Misc**291, 235**NYS**299; 137 **Misc**735, 244**NYS**357 (executor permitting testator's wife to operate business is liable for losses). [b] **Administrator continuing hotel business** without court's authority, purchasing interest in it, and assuring authority of conducting it, acts at his own peril. **TexCivA** 294 **SW**227. [c] **Testator's widow qualifying as executrix** and managing testator's business without authority is liable for loss. 137**Misc**735, 244**NYS**357.
61-91 [a] **Legatees, not acquiescing in running of business** are not estopped from objecting thereto. 137**Misc**735, 244**NYS**357. [b] **Legatee's acquiescence in executor's continuing business** must be proved, and legatees must be shown to have been apprized of their rights. 137**Misc**735, 244**NYS**357.
62-99 [a] 29**Ariz**487, 242**P**1005. [c] (3) Administrator of deceased partner, in interest of widow, may have partner's lien impressed on partnership assets for widow's protection. **Iowa** 230**NW**359. [i] **Surrogate's court has jurisdiction to order liquidation** of firm assets on presentation of claim by surviving partner against estate of deceased partner. 248 **NY**67, 161**NE**421. [j] **Surrogate's court**

has jurisdiction to pass on claim of surviving partner against deceased partner's estate based on liquidation. 136 Misc69, 242NYS490.

63-7 198Cal 163, 244P340, 44ALR1341; 73CalA229, 238P736; 70CalA552, 233P995, 996 [citCJ]; CalA 290P309; 78CalA751, 248P934; 242 IllA459; 202 Iowa833, 211NW407; 114Nebr126, 206NW749 (declaration or promise not binding on estate without sanction of proper court); 135Misc93, 236NYS709. [k] **To indemnify himself for incurring personal obligation** beneficial to estate, executor must look to assets of estate under his control. 73CalA229, 238P736. [l] **Heirs of deceased stockholder** are not personally liable on stockholders' agreement signed by stockholder's administratrix. 181Ark260, 25SW(2d)429.

64-8 73CalA229, 238P736; 331 Ill 442, 163NE460; 51Philippine494.

64-9 70CalA552, 233P995 (executor held liable on his contract of employment of plaintiffs to conduct business with property of estate); 202 Iowa833, 211NW407.

64-10 51Philippine494.

65-12½-New. Where a power of attorney shows that it is executed by an executor as such, the omission of the official designation after the signature does not invalidate the instrument. 99NY1, 1NE33.

65-12¼-New. One contracting with a personal representative does so subject to legal limitations on his authority. 231Ky219, 21SW(2d)258.

66-21 36Man46, [1926] 4DomLR126, 132, [1926] 2WestWkly854 [citCJ]. [h] **When and from what source** brokers commissions recoverable. CalA 289P658.

66-26 90Fla441, 106S470; 120Kan95, 242P138; 31 OhA18, 166NE143; 118 Or210, 246P713. [i] **Will empowering executor and trustee to employ all persons necessary** for management of trust estate, includes employment of competent counsel. Miss 126S18.

68-28 207Cal 63, 276P1008.

68-30 169Ga631, 151SE372.

68-31½-New. The probate court must authorize employment of counsel in case of contest. 230Mich455, 203NW158.

68-31¼-New. Where an executor may be allowed for fees paid to an attorney out of the estate, it is immaterial whether the item is first allowed to the executor or whether it is allowed direct to the attorney. 128 Okl 179, 261P973.

68-33 242 IllA459.

69-44 106Conn602, 138A795; 37GaA695, 141SE511; 221Ky783, 299SW958, 959 [citCJ]; 74Mont449, 241P648; 213 AppDiv319, 210NYS531 (where no showing of necessity, interest will not be allowed in executor's account, even though repayment of loan is approved).

69-46 But see 229Ky90, 16SW(2d)800.

69-47 TexCivA 286SW889.

69-48 86Mont340, 283P761; TexCivA 286SW889; TexCivA 286SW893.

70-51 TexCivA 18SW(2d)915.

70-53 157Miss543, 128S755.

71-59 TexCivA 18SW(2d)915.

71-61 202 Iowa654, 210NW785; Iowa 232NW640.

71-68 MoA 38SW(2d)1039.

71-70 213AppDiv338, 210NYS218, 220 [citCJ].

72-73 135Misc674, 238NYS375; 5Pa Dist&Co 573. [c] (2) Where will limited reinvestments to securities prescribed by law, executors and trustees are not authorized to subscribe to stock owned by testator. 134Misc769, 236NYS437.

72-74 GaA 155SE55 (necessity of court order).

72-75 NJ 130A733. [b] **Administrator held not liable for depreciation of securities** in which he invested estate's funds. 128 Or317, 272P906.

72-76 99NJEq607, 133A537.

72-77 135Misc674, 238NYS375.

72-77½-New. On allowance against a husband's estate of his wife's claim for alimony during her lifetime, the purchase of annuity by the executors was improper; the executors were required instead to set aside sufficient funds of the estate to make monthly payments. 94CalA97, 270P732.

72-78 GaA 155SE55; 143Miss666, 109S707; NJ 130A219; Wis 230NW715. See 166Ga639, 144SE27. [a] (3) Other instances. Kan 292P802.

73-81 NJ 130A733.

73-82 NJ 130A733; 128 Or317, 272P906. [f] **Interest on funds deposited to public administrator's account** as county treasurer belongs to owner of funds. 47 Ida200, 273P938.

73-83 252Mass510, 147NE845; NJ 130A733; 127Misc16, 215NYS775; 299Pa509, 149A743; TexCommnA 293SW165. [a] (4) Executrix was not liable for interest, because of long delay after filing of master's report for which both parties were responsible. 252Mass510, 147NE845. [i] **Decedent's heirs are not estopped from claiming interest** because they failed to make claim till after executors filed final settlement. Mo 20SW(2d)517. [j] **Legatees signing receipts in full settlement of respective shares are not estopped** from claiming interest unaccounted for by executor without their knowledge till after final settlement was filed. Mo 20SW(2d)517.

75-85½-New. Bank appointed administrator of depositor's estate is under duty to insist on payment of interest on deposit. Ariz 285P266.

75-85¼-New. In such case bank cannot notify itself as administrator that it will no longer pay interest on deposit. Ariz 285P266.

75-85¼-New. Where interest on mortgage was property of one executor, executors cannot be surcharged therewith. Pa 151A697.

75-87 233Mich467, 206NW988; NJ 130A733; 127Misc16, 215NYS775; 134Misc112, 235NYS455. [a] (7) Where deposit was made in noninterest-bearing bank, under belief that administratrix owned funds as gift inter vivos. 127Misc16, 215NYS775. [i] 128 Or317, 272P906.

76-89 NJ 130A733 (that legatees might call for money when not in hand will not exempt administrator from payment of interest on fund retained).

76-92 128 Or317, 272P906.

77-94 157Miss448, 128S330; 37Wyo107, 259P815, 817 [citCJ], 55ALR941. But see 99CalA96, 278P488. [c] (3) Statute requiring payment of interest is mandatory and not inapplicable to trust company acting as executor. Mo 20SW(2d)517. (4) Trust company is not absolved from liability for interest by fact that it had sufficient funds on hand at all times to meet demands of decedent's creditors and legatees. Mo 20SW(2d)517. (5) That delay in final settlement was caused by necessary suit to construe will will not affect liability of trust company as executor for interest. Mo 20SW(2d)517.

78-7 37Wyo107, 259P815, 817 [citCJ], 55ALR941.

80-15 218Ala186, 118S333.

80-19 But see 299Pa509, 149A743. [f] 128 Or317, 272P906.

81-20 128 Or317, 272P906.

81-22 128 Or317, 272P906.

81-23 128 Or317, 272P906.

82-30 218Ala186, 118S333; Iowa 232NW72; 128 Or317, 272P906.

83-36 128 Or317, 272P906.

83-57 Iowa 232NW72.

84-74 133Misc72, 230NYS774.

85-93 130Misc684, 225NYS190; 133Misc240, 232NYS322. [h] **In absence of bad faith** current note allowed by banks should be charged. 241NY374, 150NE148. [i] **Executor charged with three per cent current rate of interest** allowed by banks acting as depositaries. 241NY374, 150NE148.

86-94 Iowa 232NW82; 233Mich467, 206NW988 (four per cent held proper charge where executor permitted ten thousand dollars to remain in commercial account in bank of which he was officer and which paid four per cent semiannually on savings accounts); Mo 20SW(2d)517 (legal rate held proper). [c] **Where executrix withdrew fund from savings bank paying four per cent** and deposited it in checking account not paying interest, she is chargeable with four per cent interest. 134Misc112, 235NYS455.

86-97 132Misc384, 229NYS638.

87-1 37Wyo107, 259P815, 816 [quot CJ], 55ALR941.

87-10 CalA 284P705; 37Wyo107, 259P815, 55ALR941.

88-11 149Md22, 130A337 (where information as to profits is lacking); 37 Wyo107, 259P815, 819 [citCJ], 55ALR941. [i] **Administrator using funds for own purposes** may be charged compound interest whether or not money was used for purpose of making profit. 149Md22, 130A337 (where information as to profits is lacking).

89-21 29Ariz203, 240P343; 79Mont445, 257P418.

90-24 [c] **Money illegally loaned to corporation by executors of sole stockholder** may be recovered from receiver of corporation to extent that money was paid for taxes which was traceable to real property. 24F(2d)644.

90-27½-New. A statute giving the court discretionary power to order an executor or administrator to lend out surplus money in his hands that will not shortly be required for the expense of administration or the payment of debts, confers no authority on the probate court to order an administrator to lend money which is ready for distribution after all debts and administration expenses have been paid. 178Ark772, 12SW(2d)395.

90-28 245NYS186.

90-29 164La488, 114S107; 149Md263, 131A329; 74Mont449, 241P655.

90-30 331 Ill 442, 163NE460; 164La488, 114S107; 149Md263, 131A329; 131Misc800, 228NYS323; ND 231NW550.

90-31½-New. As between income and principal of residuary estate, income is generally liable for the expense of administering the fund, 287Pa354, 135A130.

90-31¼-New. but the rule has an exception where unusual or extraordinary expenses are necessarily involved. 287Pa354, 135A130.

90-31¼-New. Expenses of administration are not an obligation of the estate until allowed by the probate court. 241Mich583, 217NW889.

91-32 Mass 170NE384(2dcase).

91-34 300Pa64, 150A98.

91-35 [a] 119 Okl 157, 244P444.

91-38 198Cal 163, 244P340, 44ALR1341 (not always necessary); 203Cal693, 265P920, 58ALR430; 203 Iowa224, 212NW481.

91-43 Ala 130S898; 29Ariz203, 240P343; 167Ga68, 144SE912; 168La887, 123S608; 74Mont449, 241P655.

91-45 202 Iowa259, 209NW273.

91-47 70CalA752, 234P426.

92-49 78CalA209, 248P275.

92-50 [a] (6) Secret commissions on sale of bonds. 128 Or317, 272P906. (7) Payment of insurance premiums. 300Pa64, 150A98.

92-52 249NY229, 164NE33.

92-54 CalA 284P705; Mass 170NE384(2dcase). [c] **Where representatives individually agreed to support testator** during his lifetime, they are not entitled to credit for expenses of last illness. 223Ky799, 4SW(2d)752.

92-59 Mass 170NE384(2dcase). See also 217Ala323, 116S161.

93-63 Del 143A489; TexCommnA 276SW680, 683 [citCJ].

93-65 Del 143A489.

93-69 Mass 170NE384(2dcase).

93-78 217Ala323, 116S161; 256 IllA523. [b] Del 143A489.

94-81 130Misc36, 223NYS846.

94-84 157Miss15, 127S566; NJ 129A434; 99NJEq328, 132A758.

94-85 But see 154Wash130, 281P337.

95-88 [f] **Bequests for maintenance may properly be made** by executor and included and settled in his annual accounts. 199Cal742, 251P805

95-89 107Conn535, 141A657.

95-91 CalA 284P705. But see 167Ga68, 144SE912.

95-92 Iowa 232NW640.

95-94½-New. An order, authorizing an administrator to execute a note in renewal of decedent's note without limitation to avoid sale of collateral, authorizes payment of the renewal note from moneys of the estate as soon as realized. Iowa 228NW274.

96-98 203Cal693, 265P920, 58ALR430; 203 Iowa224, 212NW481; 164La

488, 114S107 (duty to preserve property). [e] **In Louisiana.**–164La488, 114S107.

96-10 249NY229, 164NE33. See also Iowa 232NW72. [c] (1) 223Ky799, 4SW(2d)752. (4) Expenditure must have been proper and made in good faith. 85CalA518, 260P351.

97-11 168La887, 123S608. [c] **Notary fee** for inventory for life insurance which formed no part of assets of estate is improper charge. 168La887, 123S608.

97-11½-New. , or where service rendered was the duty of the administrator's attorney who was allowed compensation out of the estate. 79Mont256, 255P1058.

97-12 168La887, 123S608 (amount held excessive). [b] **Item for appraiser's fee held excessive** under statute fixing fee of appraisers. 168La887, 123S608.

97-15 90Fla441, 106S470; 246 IllA283; 164La488, 114S107; 233Mich467, 206NW988; 148Miss397, 114S613; 79Mont256, 255P1058. [e] **Only one fee should be allowed** for services during same period. 118 Or210, 246P713. [f] **In Mississippi.**–148Miss397, 114S613.

98-16 169Ga762, 151SE377 (petition for construction of will).

98-17 120Kan95, 242P138; 149Md263, 131A329; 151Md126, 134A24.

98-18 214Ala243, 107S210; 205Cal757, 272P1060; 90Fla441, 106S470; Iowa 232NW640; 234Ky597, 28SW(2d)760; 164La488, 114S107; 120Kan95, 242P138; 149Md263, 131A329; 148Miss397, 114S613; 118Nebr568, 225NW705; 241NY374, 150NE148; 118 Or210, 246P713; Or 292P1027; 154Wash130, 281P337 (though irregularities in proceedings). [i] **Fees of attorneys employed in contest over guardianship** should not be allowed where they are of character not ordinarily required of attorney for executor. 118 Or210, 246P713.

99-19 214Ala243, 107S210.

99-21 214Ala243, 107S210.

99-24 120Kan95, 242P138. [b] **Question of fact.**–128 Okl179, 261P973.

99-26½-New. An executor obtaining ancillary letters in a foreign state may employ an attorney of the state where his original letters were issued. 118 Or210, 246P713.

99-26⅓-New. Fees must have been paid or liability incurred therefor in order to entitle an executor to an allowance for attorney's fees. 148Miss397, 114S613.

99-27 151Md126, 134A24.

99-27½-New. Some statutes make no provision for a motion for a rehearing or new trial on an application for an allowance of attorney's fees. 219MoA482, 279SW188.

99-27⅓-New. Under such statutes a motion for a rehearing does not carry an order allowing attorney's fees over to the succeeding term of the probate court. 219MoA482, 279SW188.

99-27¼-New. Such order becomes final at the end of the term. 219MoA482, 279SW188.

99-27½-New. An appeal from such order is not premature because taken before a motion for a rehearing is acted upon. 219MoA482, 279SW188.

100-34 233Mich467, 206NW988; 79Mont256, 255P1058; 118 Or210, 246P713 (employment held necessary). [a] **Executor may employ counsel** at expense of estate to contest action to set aside probate in addition to counsel employed to advise him as to his ordinary duties. 201Iowa1154, 208NW723. [b] **Where services rendered by attorney are necessary,** omission by administratrix to take advantage of technical defense against attorney should not defeat credit for payment to attorney. 251NY265, 167NE437.

100-34½-New. benefit to estate, 79Mont256, 255P1058.

100-37 300Pa64, 150A98.

100-39 233Mich467, 206NW988.

100-40½-New. Court has wide discretion in fixing fees which should be paid to attorneys for their services in estate matters, dependent upon the character and value of the services. 74Mont449, 241P655.

100-40⅓-New. But such discretion must be employed within rules prescribed by law. 74Mont449, 241P655.

100-45 128 Okl179, 261P973; 118 Or210, 246P713. But see 233Mich467, 206NW988.

101-46 40GaA624, 150SE863(2dcase); 249NY229, 164NE33. But see 30F(2d)310.

101-47 201 Iowa1154, 208NW723; 149Md263, 131A329; 233Mich467, 206NW988; 131Misc495, 227NYS682; 128 Okl179, 261P973; 149Wash291, 270P1030. [i] Iowa 203NW385. [j] **Personal interest of executive** in sustaining will does not deprive him of allowance of expenses of contest. 201 Iowa1154, 208NW723.

102-48 151Md126, 134A24; Va 152SE330.

102-54½-New. Attorneys, representing the executor in a proceeding for the probate of paper purporting to be the last will and testament of deceased, have no rights superior to those of the executor in respect to an award of counsel fees from the estate. 30F(2d)310.

102-55 [b] **Widow reappointed after revocation of original letters** is not entitled to allowance of counsel fees incurred in procuring reappointment where she was member of class eligible. Md 149A552. [c] **Person having exclusive right to administer** is entitled to allowance of reasonable counsel fees incurred in defense of right. Md 149A552.

102-56 209Ky289, 272SW759, 761 [quotCyc]. [b] **Where appointed over protest of party entitled to nominate** and qualified pending motion to set aside its appointment, counsel fees incurred in endeavor to sustain appointment will not be allowed. 209Ky289, 272SW759.

102-58 118 Or210, 246P713 (assets in foreign jurisdictions). [a] **Reimbursement from income and principal.**–287Pa354, 135A130.

102-60 233Mich467, 206NW988.

103-62 [a] 233Mich467, 206NW988.

103-65 [a] **Resisting charges of bad faith.**–241NY374, 150NE148.

103-66 149Md263, 131A329; 151Md126, 134A24.

103-67 149Md263, 131A329.

103-68 [b] **In Maryland.**–149A552.

103-82 See also 222MoA545, 292SW81.

103-94½-New. Other decisions as to propriety of counsel fees. 214Ala243, 107S210; 149Md263, 131A329; 219AppDiv131, 219NYS436.

104-95 148Miss397, 114S613; 251NY265, 167NE437; 118 Or210, 246P713. [a] 233Mich467, 206NW988. See also Iowa 228NW658. [c] **Administratrix paying attorney one third** of amount recovered for estate is entitled to reasonable sum as attorney's fee. 251NY265, 167NE437. [d] **Surcharging administrator** amount of fee given by attorney to another who suggested him is proper. 300Pa64, 150A98.

104-96 Iowa 227NW913; 223Ky799, 4SW(2d)752; 118Nebr568, 225NW705; 117 Or76, 242P820; 118 Or210, 246P713; 154Wash130, 281P337. [b] 201 Iowa1154, 208NW723; 118 Or210, 246P713. [c] 117 Or76, 242P820. [g] **Estate should be given benefit of doubts** in determining reasonable value of services. 118Nebr568, 225NW705. [h] **Where evidence supports court's finding,** such amount will be allowed. 97PaSuper582.

104-97 223Ky799, 4SW(2d)752; 161La762, 109S482; 151Md126, 134A24; 118 Or210, 246P713. [f] **Standard for determining value is same** as that used in fixing compensation for services rendered to individual in individual capacity. 118 Or210, 246P713. [g] **Customary percentage fee allowed by court** is not iron clad rule, but greater fee may be allowed where unusual features are present. 161La762, 109S482.

104-97½-New. The question of amount is one of fact, 128 Okl179, 261P973.

104-97⅓-New. and the finding of the court thereon will not be disturbed when it is clearly supported by the evidence. 128 Okl179, 261P973.

104-98 214Ala10, 106S188; 228Ky719, 15SW(2d)511; 161La762, 109S482; 151Md126, 134A24 (three hundred dollars for defending suit); 134Misc112, 235NYS455; 117 Or76, 242P820.

104-1 168La887, 123S608; 233Mich467, 206NW988; Sask [1928] 2DomLR338. [a] **Amount has been held not excessive.**–Wash 286P650.

104-1½-New. Evidence of customary compensation for similar services is admissible in fixing the amount of counsel fees. 151Md126, 134A24.

105-5½-New. By statute, in New York, fees of executors' attorneys are limited to ten dollars per day for time spent by each attorney on the accounting and trial. 218AppDiv845, 219NYS552.

105-6½-New. The trial court could apportion an allowance for fees as between the attorneys of a special administrator, although an additional attorney employed outside of the attorneys of record might not have acted as an attorney during the entire period covered by the order. 94CalA617, 271P762.

105-10 200Wis84, 227NW280.

105-13 [a] **Payments are not "unnecessary"** because services were rendered under champertous retainer. 251NY265, 167NE437.

106-19 51Philippine935.

106-25 74Mont449, 241P655 (money paid court reporter for transcript of evidence taken on hearing of objections to his account).

107-28 208Ky441, 271SW600.

107-29 331 Ill442, 163NE460; 216Ky261, 287SW720; 200Wis84, 227NW280. [a] (8) Attorney's fees incurred in resisting removal of administrator improperly appointed are not chargeable against estate where they did not benefit estate. 117 Or505, 243P89.

107-30 216Ky261, 287SW720; Wash 287P21.

107-31 222MoA545, 292SW81.

108-38 200Cal132, 251P907, 909, 49ALR1025 [citCJ]; 148Miss397, 114S613, 614 [citCJ]; 213AppDiv338, 210NYS218.

108-39 200Cal132, 251P907, 49ALR1025. [a] (1) See also 200Cal132, 251P907, 49ALR1025. (2) In absence of agreement to contrary, presumption is that executor or administrator employing law firm shares in fees received by it from him. 200Cal132, 251P907(2d case), 49ALR1025.

108-40 103NJEq535, 143A870; 96Pa Super242. But see 299Pa509, 149A743. [b] (2) 214AppDiv323, 212NYS82 (Surrogate's Court Act, § 285, as amended by L. [1921] c 440 and L. [1923] c 649). [d] (2) One thousand dollars held reasonable fee for handling all legal matters of thirty-five thousand dollars estate. 214AppDiv323, 212NYS82.

109-41 [a] (7) Study of stock market in order to make advantageous sale of shares of stock belonging to estate. 200Cal132, 251P907, 49ALR1025.

109-42 200Cal132, 251P907, 49ALR1025.

109-42½-New. An executor who is an attorney cannot charge as attorney for services which as executor he was required to perform. 214AppDiv323, 212NYS82.

109-42⅓-New. "Executorial duties" are those which any layman could perform or was capable of performing. 214AppDiv323, 212NYS82.

109-44 120Kan95, 242P138 (charge to specific legatees whose bequests were not, by the will, to be diminished by expense of administration, is improper).

110-52 200Cal646, 254P269; 203Cal693, 265P920, 58ALR430; 203 Iowa224, 212NW481; 223Ky799, 4SW(2d)752; 164La488, 114S107; 299Pa509, 149A743; 193Wis20, 213NW639. But see 167Ga68, 144SE912. [h] **In Louisiana.**–164La488, 114S107. [i] **Executor paying tax on legacy given to legatee for life with remainder to others** has been held erroneously surcharged as to amount of tax on life interest but proper for tax on remainder. 299Pa509, 149A743.

110-54½-New. or that property on which taxes were paid is later established not to belong to estate, where on face of record it was a part thereof. 117 Or76, 242P820.

110-55 299Pa509, 149A743.

110-57½-New. Penalty for executor's failure to pay federal tax within the statutory period is chargeable to execu-

tor even though he was not negligent. 127Misc779, 217NYS6.8.

110-57½-New. Rentals from property held properly applied to pay taxes to preserve property, although not lawfully received by the administrator. 130Misc789, 226NYS436.

110-62 79Mont445, 257P418.

111-66 300Pa29, 150A86 (holding taxes on securities for charitable uses improperly paid).

111-69 164La488, 114S107; Tex CommnA 276SW680, 683 [citCJ].

111-71 Iowa 232NW640; 164La488, 114S107. [b] In Louisiana.-164La488, 114S107.

111-81 203 Iowa224, 212NW481; 193 Wis20, 213NW639.

111-82 74Mont449, 241P648 (such payment is irregular and may be disallowed unless to advantage of estate).

112-85 CalA 284P705; Iowa 232NW 640.

112-88 7Alaska312; 234Ky597, 28SW (2d)760; 79Mont256, 255P1058; 249NY 229, 164NE33.

112-94½-New. Administrator entitled to credit for payment of premium on his bond issued by company of which he was agent. Iowa 232NW640.

113-97 Iowa 228NW274 (incumbered chattels). [b] Unfiled claim secured by collateral.-Iowa 228NW274.

113-99½-New. for automobile hire for appraisers in viewing estate, 214Ala10, 106S188.

113-2½-New. expense of second inventory and appraisement, 79Mont256, 255 P1058.

113-19 74Mont449, 241P648 (even though money borrowed for such purpose without permission of court).

114-30½-New. or charges for telephone service to testator's widow who was also executrix, where not to benefit of estate, 126Misc479, 214NYS167.

114-30½-New. or auctioneer's fees in sale of estate not beneficial to estate. 126Misc479, 214NYS167 (sale being disaffirmed by contestants, executrix is personally liable).

114-35½-New. Where, after removal of administrator, suit was brought against him as an individual and his surety by his successor, the estate is not liable for payment of attorney's fees for unnecessary services, although action is without foundation. 79Mont256, 255P1058.

114-37 TexCivA 294SW227.

114-39 327 Ill 448, 158NE706; 125Kan 449, 265P50; 135Misc4, 237NYS635; 134Misc11, 235NYS78; 125 Or38, 263P 54; 300Pa68, 150A90; 141Wash86, 250 P947.

115-40 327 Ill 448, 158NE706.

115-41 125Kan449, 265P50; NJ 130A 733; 300Pa68, 150A90 (holding purchase a fraud on creditors).

115-49 90PaSuper512; Wis 230NW 715.

116-52 Iowa 232NW72.

117-62 [c] Administrator controlling business in his own right and as administrator is liable to account for excessive salaries and bonuses paid to himself. 55AppDC309, 5F(2d)270.

117-64 104Conn271, 132A461; 331 Ill 442, 163NE460.

117-65 Ala 130S898; 104Conn271, 132 A461.

117-66 221Ky783, 299SW958.

118-69 TexCivA 48W(2d)262.

118-74½-New. When an administrator carried on an unlawful business of his intestate, it was held that the heirs of the estate had no right to an accounting of the profits from such business. 254Muss366, 150NE225.

119-88 143Miss666, 109S707.

119-99½-New. Wrongful distribution of assets by executors to life tenant is waste. 151Md59, 133A851.

120-13 [a] Executor is liable only secondarily to remainderman for waste consisting of wrongful distribution of assets to life tenant. 151Md59, 133A 851.

120-22 [a] Evidence held insufficient.-203 Iowa1045, 213NW781.

121-31 143Miss666, 109S707; 126 Or 301, 269P861. [d] Defenses.-131Misc 129, 226NYS162.

121-38½-New. The use of a bank deposit belonging to decedent's estate as collateral security for money borrowed on the executor's personal notes and for his own benefit is a conversion of the deposit. Mass 165NE119.

121-43½-New. , or taking inventory of property and leaving it in the widow's possession. MoA 278SW1057.

121-47 [c] Identical money received need not be kept in specie under statute requiring trust funds to be kept separate. 205 Iowa114, 213NW414.

122-53 136Misc664, 240NYS502; Sask [1929] 2DomLR516.

122-56½-New. An allowance of interest has been upheld. TexCivA 48W(2d) 262 (ten per cent).

123-66 241 IllA446; 85 IndA234, 150 NE418; 206 Iowa706, 219NW401 (under statute); 79Mont445, 257P418, 423 [quotCJ]; 242NY1, 150NE581; Or 292 P1027; 46Philippine200; Wis 230NW 141; 21SaskL91, [1926] 4DomLR293, [1926] 2WestWkly830.

124-67 74Mont476, 241P229; 79Mont 445, 257P418, 423 [quotCJ]; 249NY 335, 164NE242. [a] (10) Failure to enforce equitable lien. 74Mont476, 241P 229. [h] Subscription right to stock.-129Misc218, 221NYS711.

124-68 [b] Question for probate court. -83NH422, 144A523.

125-69 79Mont445, 257P418; 129Misc 218, 221NYS711.

125-69½-New. Executor owes no duty to sell stock pledged to secure his debt to testator, after debt was paid. 79 Mont445, 257P418.

125-71 85 IndA234, 150NE418; 131 Misc495, 227NYS682.

126-82 74Mont476, 241P229.

126-83 [g] Money collected by attorney.-Miss 130S294.

126-85 [a] (3) Where administrator, knowing that bank in which he is about to deposit trust funds is on verge of bankruptcy, deposits money in such bank. 123 Or234, 261P685.

126-86 29Ariz203, 240P343; 134Misc 11, 235NYS78; 287Pa499, 135A112; 51 Philippine935. [i] Whether executor should sell or hold securities is question of fact. Mass 165NE422.

127-87 29Ariz203, 240P343.

127-90½-New. Where a will gives the executor large discretion as to time of sale, and heirs agreed to keep stock to provide fund for paying charges, the executor is not liable for loss from delay in selling. 287Pa499, 135A112.

127-93 74Mont476, 241P229. [b] (2) knowledge of heir as to management of estate is essential to relieve administrator and mere consent to his appointment does not estop him to object to acts of administrator. 74Mont476, 241 P229.

128-97 74Mont476, 241P229; 129Misc 218, 221NYS711.

128-99½-New. Failure to collect and account for good will will be excused as mere error in judgment where it is of doubtful or insignificant value and will of testator relieves executors of responsibility for such errors. 242NY1, 150 NE581.

128-99½-New. Liability for loss from delay in selling securities is the difference between what they should have brought in exercise of business judgment, and what they sold for. 287 Pa499, 135A112.

128-1 219AppDiv569, 220NYS293; Tex CivA 290SW909.

129-11 [a] (1) Iowa 227NW913; 11 PaDist&Co 549.

130-14 37GaA279, 139SE922; 86 IndA 717, 159NE769; 128Me546, 149A297; Mass 171NE713; NJCh 134A360; 142 Va840, 128SE247 (executor has no power as such).

131-15 36GaA519, 137SE290; 37GaA 279, 139SE922; 125Kan223, 264P50; 171Minn423, 214NW267; 77Mont182, 250P812; 86Mont340, 283P761; 102 NJEq178, 140A28.

131-18 37GaA279, 139SE922.

131-31 333 Ill 643, 165NE208; 142Va 840, 128SE247 (must be conferred by will in terms or by implication). [e] "Authority" to sell distinguished from "direction." 215Ala76, 109S166.

132-32 333 Ill 643, 165NE208.

132-39 333 Ill 643, 165NE208.

133-42 165Ga853, 142SE450; 165Ga 870, 142SE458; 164La488, 114S107; 171Minn423, 214NW267; 49Nev319, 245 P703; SD 226NW740 (for purposes of administration).

133-44 165Ga853, 142SE450.

133-45 Ark 31SW(2d)426; 165Ga853, 142SE450; 25 OhA7, 158NE207; 300Pa 64, 150A98. [c] That other lands of decedent have not been sold for payment of debts does not prevent executor from recovering lands wrongfully withheld. Ark 31SW(2d)426.

133-49 But see 219Ala652, 123S18.

134-50 86Mont340, 283P761.

134-52 26F(2d)47, 50 [citCJ]; 109Conn 529, 147A181; 171Minn423, 214NW267. [e] Allegations not necessary.-Ga 155 SE8.

134-53 Mass 171NE713 (in absence of license to sell).

135-57 161La162, 108S322; 102NJEq 178, 140A28; 129Misc297, 221NYS468; TexCivA 293SW888; 193Wis196, 214 NW497, 53ALR359. [e] Executor of donee of power of sale, failing to execute power, has duty of turning over property to representatives of testator creating power. 287Pa448, 135A119.

135-62 220Ala149, 124S202; 103Conn 226, 130A157; 235Mich130, 209NW67; 171Minn423, 214NW267; 86Mont340, 283P761; 49Nev319, 245P703; 129 Misc297, 221NYS468; TexCivA 296SW 917; TexCivA 24SW(2d)531. [f] In Michigan.-241Mich583, 217NW889. [g] Proceeds of sale.-241Mich583, 217NW 889.

136-63 235Mich130, 209NW67; 252NY 121, 169NE110 (equitable conversion).

136-64 214Ala329, 107S830.

136-64½-New. In some jurisdictions the personal representative is under a duty to assert his right against persons in actual possession to prevent liability for permitting them to occupy premises without paying rent. 103Conn226, 130 A157.

136-65 129Misc297, 221NYS468.

137-76 TexCivA 296SW917.

137-80 41 Ida690, 241P1023; 171Minn 423, 214NW267; ND 231NW888. See also 214Ala329, 107S830. [c] Petition not demurrable.-Ga 155SE8.

137-81 166La453, 117S552. [d] 169 Ark60, 272SW846. [e] Petition not demurrable on ground that administrator had no title. Ga 155SE8.

138-83 [g] Heirs may not sue administrator in possession under order of probate court. 316Mo 953, 292SW419.

138-84 169Ga378, 150SE552(2dcase).

139-86 49Nev319, 245P703.

139-90 37GaA279, 139SE922; 36GaA 519, 137SE290.

139-91 TexCommnA 293SW165 [cit CJ].

139-92 86Mont340, 283P761; 49Nev 319, 245P703; 51Philippine654; Tex CivA 24SW(2d)531. [d] In Connecticut.-103Conn226, 130A157 (dictum).

140-95½-New. An administrator as such is under no duty to collect rents accruing after the death of his intestate. 37GaA279, 139SE922.

140-95½-New. and if he does so, it is not in his capacity as administrator. 37 GaA279, 139SE922.

140-95½-New. An administrator is under no duty to rent lands of his intestate and is not liable for his failure to do so. 37GaA279, 139SE922.

140-95½-New. Although a will required the executor to collect rent and pay it to the widow, the children could be allowed, with her consent, to occupy portions coming to them after her death without paying rent. Iowa 228NW658.

140-95½-New. Under will bequeathing remainder interest to daughter, payable when she attained twenty one, not disposing of income, executors should not make accumulation. 137Misc449, 243 NYS751.

140-98½-New. Lease signed by one of several executors is sufficiently ratified by all where suit for rent is brought by all of the executors. 125Misc866, 212 NYS302.

140-9 203 Iowa224, 212NW481; 263 Mass300, 160NE815; 157Miss448, 128S 330; 74Mont449, 241P655; 193Wis20,

213NW639. [e] 74Mont449, 241P648. [j] **Provision of will** that daughters have home for two years free of any charges absolves executor of liability for rents for two years. 153Va540, 150 SE238.

141-10 [c] **Executor is chargeable** with duty of enforcing accounting as against all persons in adverse possession or who may claim adverse title or interest as against estate. **Nebr** 230NW443.

141-13½-New. A personal representative where abundant assets are apparent may be justified in permitting occupation of the lands by heirs without permission from the court. 103Conn226, 130A157 (dictum).

141-13½-New. Where the personal representative without adequate reason permits estate to remain open and without authority from the court permits heirs of deceased to occupy realty under his control, he is liable for reasonable rental value where the assets were insufficient to discharge a valid claim against the estate. 103Conn226, 130A157.

141-16 74Mont449, 241P648.

142-17 36GaA519, 137SE290.

142-18 36GaA519, 137SE290.

142-22 169Ga762, 151SE377; 158La 637, 104S481 (chargeable with net rental value if he could have rented and neglected to do so); 74Mont449, 241P 648. [e] **Evidence as to amount.**–Tex CivA 4SW(2d)262.

143-25 158La637, 104S481 (entitled under statutes to deduct expenses for repairs and improvements).

143-25½-New. Administrator operating farm of estate as his own is liable for produce of live stock and stock killed for own use. 74Mont449, 241P 648.

143-25⅓-New. Where occupation was necessary to care for child, and administratrix paid off a mechanic's lien, she was not charged with rent. 215Ky5, 284SW101.

143-25¼-New. An administrator, although a tenant in common with deceased, cannot continue to occupy the land without paying rent. 217Ala323, 116S161.

143-26 74Mont449, 241P648.

143-29 92CalA521, 268P486; TexCivA 12SW(2d)659. But see 133Misc322, 232 NYS521. [f] **Purchase of farm machinery.**–74Mont449, 241P648. [g] **Alterations contracted for by decedent prior to death** may be completed by administratrix. 136Misc893, 242NYS417.

143-30 169Ga9, 149SE568 (will construed to authorize contracting debts reasonably necessary to keep realty entire); Iowa 228NW658 (brooder houses not improvement under will). [d] (2) Will may authorize executor to improve real estate by construction of apartment house. TexCivA 12SW(2d) 659. [f] **Executor, in individual capacity,** receiving benefit of rent, should be charged with his share of upkeep. 157 Miss448, 128S330.

143-31 164La488, 114S107.

144-35½-New. An administrator who is also a tenant in common as a distributee will be allowed credit for improvements on real estate, not for the cost thereof, but for the value of such improvements to the premises. TexCivA 12SW(2d)659.

144-36 But see 133Misc322, 232NYS 521.

144-40 86Mont340, 283P761; 241NY 374, 150NE148; 193Wis20, 213NW639. [c] **Executor entitled to lien on estate** where he has paid from income of life estate in order to preserve such life estate. 241NY374, 150NE148.

144-41 ND 231NW550.

145-49½-New. or to sue to cancel mortgage satisfaction executed by decedent; 172Minn274, 215NW176.

145-51 [b] **Administrator, paying mortgage covering both separate property of widow and deceased,** is entitled to credit only for amount apportionable to estate. ND 231NW550.

145-52½-New. Orphans' court has discretion to strike out decree inadvertently entered permitting administrator to abandon mortgaged real estate. 299Pa 200, 149A179.

145-52⅓-New. Decree setting aside such previous order should be without prejudice to intervening rights. 299Pa 200, 149A179.

145-52¼-New. Order authorizing administrator to discharge mortgage indebtedness of deceased is not prerequisite to approval of payment after fact. ND 231NW550.

145-52½-New. In some jurisdictions it is the duty of an administrator to exercise the right of redemption and protect the estate from loss where a mortgage on decedent's realty in the administrator's possession is foreclosed for far less than the value of the property. 86Mont340, 283P761.

145-54 See also **Alta** [1928] 1DomLR 581.

145-56 87PaSuper173.

145-57 288Pa547, 136A860.

146-61 [f] 87PaSuper173 (express provision unnecessary).

147-64½-New. Executor paying sums from income to preserve life estate from threatened foreclosure to benefit of plaintiff, on payment to latter of amounts so paid out, executor has binding lien on any interest of testator coming to plaintiff in remainder. 241NY 374, 150NE148.

147-64⅓-New. Where a life tenant has no income and is unable to pay interest on a mortgage on the property, the executor's payment of interest is proper as against the remainderman. 133Misc 322, 232NYS521.

147-69 [b] **Not authorized to remit any** part of agreed price for an extension. TexCivA 271SW244. [c] **Privity of contract is basis of liability of estate** for rent. 73CalA229, 238P736.

147-73 But see TexCivA 271SW244.

147-76 73CalA229, 238P736; Mass 169 NE777 (restriction in lease as to sole occupancy by lessees); Ont [1929] 1 DomLR545.

148-82½-New. in such case privity of contract is basis of liability of executor for such use and occupation, 73CalA 229, 238P736.

148-82⅓-New. and he is personally liable therefor although the lease did not terminate on death of his decedent. 73 CalA229, 238P736.

148-82¼-New. Promise by executor to pay rent followed by remaining in possession creates relation of landlord and tenant continuing during such possession. 73CalA229, 238P736.

148-82½-New. Payment of rent for testator's interest in a coöperative apartment building is proper as carrying out the plan and purpose initiated by his entering into the arrangement. 128Misc51, 217NYS318.

148-86 8F(2d)39. See also 141SC387, 139SE850.

149-87 [c] **That property purchased by deceased proved of less value than originally supposed** does not prevent allowance of payments on purchase price made by administrator in good faith. 203Cal 693, 265P920, 58ALR430. [d] **That vendor's title subsequently failed** does not preclude allowance of disbursements made by administrator of deceased purchaser on purchase price. 203Cal 693, 265P920, 58ALR430.

149-92½-New. Personal representative of vendee under executory contract for purchase of land cannot have legal title adjudged in him without complying with conditions of contract. 144 Okl 150, 289P721.

150-95 [j] **Statutory affidavit.**–83Colo 95, 262P923. [k] **Application of vendee's heirs for order authorizing conveyance** must be made against or through vendor's representative and not his assignee. 131Misc912, 229NYS301. [l] **Failure of petition to allege performance of acts not required by contract** does not render it insufficient. 83Colo 95, 262P923. [m] **Heirs not made parties to statutory proceedings for specific performance** are not bound by decree or by deed given thereunder. 83 Colo 95, 262P923.

150-97 But see 130Misc62, 223NYS613.

150-3 Kan 293P392. But see 80Mont 159, 260P128. [e] (2) Under summary proceedings provided by some statutes, if, after full hearing, right to specific performance is found to be doubtful, court or judge must dismiss petition. 80Mont159, 260P128. [g] See also 80 Mont159, 260P128. [q] **Summary nature of proceedings.**–80Mont159, 260P 128. [r] **Vacation of order for conveyance.**–39Wyo 163, 270P1068.

151-4 57ND368, 221NW889 (county court).

151-5 80Mont159, 260P128; 39Wyo 163, 270P1068.

151-5½-New. and decedent has bound himself to make a conveyance and the contract could have been enforced against him if living, 80Mont159, 260P 128.

151-6½-New. , or where the right to specific performance is found to be doubtful. 57ND368, 221NW889.

151-7 [d] **Heirs and devisees have right to be heard** upon question of validity of deceased's contract to convey and performance thereof, 229AppDiv 302, 241NYS589.

152-9 [c] **Md** 149A113(2dcase). [g] **Confirmation by court necessary.**–229 AppDiv302, 241NYS589. [h] **Proceedings by administrator to convey land under deceased's contract.**–229AppDiv 302, 241NYS589.

152-10 135Misc124, 237NYS54. [b] **Necessity of valid contract by decedent.**–125 Okl 270, 257P782.

152-18 193Wis196, 214NW497, 500 [citCJ], 53ALR359.

153-24½-New. Effect of death of an intestate holding the legal title to real property under an executory contract of purchase. 40 OklACR317 [reh pending].

153-28 94CalA175, 270P745; 202 Iowa 833, 211NW407; 227Ky665, 13SW(2d) 1019; 24 ObA117, 156NE223; Tex CommnA 280SW742. See also 163Ga 754, 137SE14.

154-33 Okl 292P60.

154-34 NJSup 151A479.

154-35½-New. Where executors have power of sale under will, a contract of sale entered into by them is binding on the estate and will be enforced by specific performance. 217AppDiv150, 217 NYS145.

154-35⅓-New. Heirs who refuse to be bound by executor's contract for sale of land and refuse to sign deeds thereto are entitled to bring action testing the validity of the purchaser's possession. 149Wash221, 270P823.

154-37½-New. Grantee under administrator's deed cannot prevail against adverse possessor where such possession was active at time of sale. 163Ga754, 137SE14.

154-38 See also 29Ariz203, 240P343; 202 Iowa833, 211NW407. [b] **Administrator's sale of property** for purchaser's note and later compromise by taking smaller note, all without court's sanction, has been held illegal. TexCivA 294SW227.

155-40½-New. Parties who are entitled to share in decedent's estate should not be compelled to assent to sale of mortgage at reduced price where they are willing to accept undivided shares therein. 126Misc479, 214NYS167.

155-40⅓-New. Where devisee acquiesces in sale by executors unauthorized by will and accepts his share of purchase money, his action constitutes ratification and is conclusive on all who claim under him. 144Va113, 131SE217.

155-46 333 Ill 643, 165NE208; NJCh 150A674; 247NY307, 160NE380; 217 AppDiv150, 217NYS145; 193NC794, 138 SE161. [h] **Minor devisee** is not bound by assent to executor's sale of real property. 261Mass489, 159NE437.

156-54 See also 29PortoRico 764.

156-55½-New. Under a direction in a will to pay interest of devisees in principal upon their reaching a certain age, devisees take no vested interest in realty on reaching such age, but their interests are subject to the power of sale with the right to enforce the trust and compel sale and division of proceeds. 217 AppDiv250, 217NYS145.

156-55⅓-New. Beneficiaries may elect to take property and defeat naked pow-

er of sale given to executors. 130Misc 12, 223NYS626.

157-56 323 Ill 269, 154NE101; 128 Misc96, 218NYS239; 129Misc1, 220NYS 772.

157-57 323 Ill 269, 154NE101; 77Mont 182, 250P812; 128Misc96, 218NYS239; 129Misc1, 220NYS772; 133Misc519, 232 NYS204; 27 OhNPNS403. [a] (1) See also 218Ky267, 291SW399. (14) Will directing division of residue for brothers and sisters living or leaving issue held to confer power of sale. 129Misc 1, 220NYS772.

158-58 323 Ill 269, 154NE101; 77Mont 182, 250P812. [a] (7) Will devising entire estate in undivided interests is not susceptible of construction giving implied power of sale to executor. 77 Mont182, 250P812.

158-61 See also 127Misc361, 216NYS 750.

159-67 10PaDist&Co 144.

159-70 323 Ill 269, 154NE101. [a] (2) Direction for division of property, consisting wholly or partly of real estate which could be effected by actual partition, was held not to confer power to sell. 323 Ill 269, 154NE101.

159-71 323 Ill 269, 154NE101; 133 Misc519, 232NYS204; 197NC215, 148SE 175. [e] **Delay of six months after letters testamentary** held not unreasonable. 323 Ill 269, 154NE101.

159-73 323 Ill 269, 154NE101.

159-74 128Misc96, 218NYS239.

160-76 333 Ill 643, 165NE208; 24 OhA 117, 156NE223.

160-81 [a] (3) Word "lots" is construed so as to give executor power to sell all but one parcel. 82NH503, 136A 266. (4) Executor held not restricted to selling only when proceeds are to be invested. 82NH503, 136A266. [c] **Will will be construed as granting unconditional power** of sale rather than limited power. 82NH503, 136A266.

160-82 168Ga32, 147SE41 (sale to secure debts incurred in partnership business held authorized); 321 Ill 266, 151 NE893; NJCh 139A711; 293Pa511, 143 A181.

161-83 See 49RI 308, 142A605. [a] **Essential quality of estate devised cannot be destroyed** by exercise of power of sale where there are no debts and no necessity of sale for division. 169Ga 869, 152SE53(2dcase).

161-84 96Fla455, 118S216; 9PaDist& Co 706. [b] 207 Iowa264, 222NW843 (2dcase) (will construed as giving power to sell real estate to pay debts and legacies).

161-85 96Fla455, 118S216.

161-87 [a] **Provision that widow, as executrix,** might sell realty, liquidate debts, and retain for her own benefit balance of proceeds held to give power to convey in fee simple after satisfying indebtedness, notwithstanding prior devise of remainder to children subject to power of sale. 173Ark1069, 294SW16.

162-89½-New. To determine the extent of power granted an executor, intention of the testator must be gathered from the language of the will, 321 Ill 266, 151 NE893.

162-89⅓-New. and effect will be given to such intention if it can be done consistently with the rules of law. 321 Ill 266, 151NE893.

162-91 321 Ill266, 151NE893; 217App Div337, 216NYS716. [a] (4) Discretionary power of sale of residuary estate gives power to sell mineral rights which are part thereof. 217AppDiv337, 216NYS716.

162-92 Miss 130S288; 99NJEq762, 134 A357; 217AppDiv150, 217NYS145.

162-96 217AppDiv150, 217NYS145; 130Misc12, 223NYS626.

162-96½-New. If an executor, upon conversion of realty, fails to sell the property converted, the court may order a sale to accomplish the purposes of the will. Mo 19SW(2d)898.

163-98 173Ark250, 292SW150, 152 [cit CJ]; 163Ga884, 137SE386. But see 283 Pa476, 129A565; 292Pa177, 140A865.

163-2½-New. It is the court's duty in enforcing a sale of decedent's property to see that fair value has been received. 283Pa476, 129A565.

163-2⅓-New. Specific performance of executor's contract denied for inadequacy of price. 283Pa476, 129A565.

163-2¼-New. Where a contract of sale is expressly made subject to the court's approval, the purchaser is estopped to deny the court's power to disapprove the contract and approve a later contract with others. 207 Iowa264, 222NW 843(2dcase).

164-7 See also 283Pa476, 129A565.

164-8 321 Ill 266, 151NE893. [b] **Though residuary legatees enter into subsequent contract to sell,** executor's prior contract will be specifically enforced instead, where executor's contract is at higher price refused. 321 Ill 266, 151NE893.

164-10 NJCh 146A593; 152AppDiv431, 137NYS343.

164-21 226AppDiv586, 236NYS172.

165-25 But see 298Pa438, 148A506.

165-29 293Pa21, 141A644. [a] (6) When testator gave power of sale to executors and provided that conveyance executed by wife should be sufficient and wife alone qualified as executrix, she alone may execute power of sale. 163Ga884, 137SE386.

167-45 127Misc361, 216NYS750; 136 Misc43, 239NYS250; 50RI 252, 146A 857; RI 151A193. [f] **Power to sell residue "except store fixtures"** held not to authorize their sale when they were part of homestead property devised in same will. 127Misc361, 216NYS750.

168-50 163Ga884, 137SE386.

168-57½-New. Under a direction to distribute an equally divided share, intention of testator is that realty incapable of partition should be sold and the proceeds distributed. 217AppDiv150, 217NYS145.

168-60 [a] (4) Provision that executor might sell property after two-year period, further time not to exceed five years, held directory merely. 263Mass 534, 160NE275. (5) Will construed to give executor power to sell at any time from moment of testator's death. 50RI 252, 146A857. [i] **Direction to sell as soon as convenient and fair price can be obtained** should be complied with within reasonable time. MoA 31SW(2d)283.

169-61 290Pa107, 138A81. [c] **If sale of real estate is necessary to pay debts and legacies** because of insufficiency of personalty, executor can and should sell necessary portion of realty for such purpose though five-year period allowed by testator for administering estate has expired. Mo 19SW(2d)898.

169-63 217AppDiv150, 217NYS145. [d] **Sale at inopportune time** when there is no necessity is abuse of discretion and may be enjoined. 169Ga869, 152 SE53(2dcase).

169-64 323 Ill 269, 154NE101; 245NYS 617.

171-75½-New. On expiration of time limit, direction to sell becomes mandatory. 290Pa107, 138A81.

171-77 [d] **Sales held valid** though procedure was unusual. 131Misc495, 227NYS682.

171-81 163Ga884, 137SE386; 48RI 127, 136A15.

172-92 321 Ill 266, 151NE893. [b] **Equity will aid executor in performance of duty** to sell at highest price by denying specific performance of contract of residuary devisees made subsequent to, and at lower price than, contract of executor. 321 Ill 266, 151NE893.

172-99½-New. Where private sales by the administrator are made upon specific contracts, the terms of the contracts are binding. SD 228NW798.

173-9 69CalA429, 231P591.

174-21 214Ala684, 108S864; NJ 129A 429; 116 OhSt327, 156NE450; 290Pa 107, 138A81.

175-25 116 OhSt327, 156NE450; 299Pa 333, 149A473. [c] **Judgment of executors authorized to sell to one of themselves** is conclusive in absence of fraud, accident, or mistake. 299Pa333, 149A 473.

175-27 214Ala684, 108S864.

175-28 214Ala684, 108S864; TexCivA 298SW(2d)872.

175-36 214Ala684, 108S864. But see 290P107, 138A81. [a] **Sale must be challenged** by proper and timely application. 214Ala684, 108S864.

176-44 44 Ida461, 259P3 [citCJ].

176-45 44 Ida461, 259P3 [citCJ].

176-50 But see 103NJEq165, 142A430.

176-52 See also 241Mich29, 216NW378, 379 [quotCJ].

176-52½-New. Where an executor selling real estate under a testamentary power fraudulently sells to his wife through an intermediary for less than its value, he may be surcharged with the difference. 241Mich29, 216NW378.

177-63 290Pa107, 138A81.

177-70½-New. Deed made after time limit in will held valid. 290Pa107, 138 A81.

180-13 TexCivA 48SW(2d)262.

181-21 217AppDiv150, 217NYS145. See 49RI 308, 142A605.

181-22 [a] But see 87PaSuper173.

181-30 218Ky267, 291SW399.

184-65 [a] 226AppDiv586, 236NYS172.

184-66 218Ky267, 291SW399; 261Mass 489, 159NE437. See also 5PaDist&Co 573.

184-68 252NY226, 169NE286.

184-69½-New. Where it was only after possession was taken and moneys advanced that certain heirs disclaimed the right to be bound and refused to sign the deeds, one contracting with the executor of the estate for the purchase of land has been held not a trespasser. 149Wash221, 270P823.

185-72 169Ga672, 151SE385.

185-81 NJCh 146A593 (deed stating consideration of one dollar).

186-86 11PaDist&Co 32.

186-88 292Pa177, 140A865.

186-94 [c] **Evidence insufficient to show bad faith.**-NJCh 150A674.

186-98 But see 292Pa177, 140A865.

186-99 11PaDist&Co 32.

187-9 [b] (2) Legatees are not estopped to seek setting aside sale by remarks to third persons not acted on by purchasers. 292Pa177, 140A865.

188-19 [b] (2) Filing petition within six months of sale does not amount to laches where not prejudicial to purchasers. 292Pa177, 140A865.

189-31 292Pa177, 140A865.

189-34 252NY226, 169NE286.

190-50 See also 61 OntL457, [1928] 1 DomLR254.

191-58 103Conn226, 130A157 (under statute giving personal representative control of deceased's realty during time of settlement of estate); 316Mo 953, 292 SW419; TexCivA 24SW(2d)531.

192-68 See also 117Nebr657, 221NW 898.

192-68½-New. Some statutes give power to lease only from year to year. 233 Mich108, 206NW513.

193-82 TexCivA 24SW(2d)531.

193-83½-New. but he is not chargeable with neglect merely for failure to lease, 103Conn226, 130A157.

193-83⅓-New. although he should exercise ordinary prudence in light of circumstances surrounding him with respect to leasing the real estate. 103Conn 226, 130A157.

193-83¼-New. Where the personal representative has in his possession realty rentable by him and he has reason to anticipate that the estate cannot be settled for a considerable length of time, ordinary prudence may require him to make reasonable effort to rent the realty. 103Conn226, 130A157.

193-89 204Cal 51, 266P532; Ont [1927] 3DomLR199. [n] **Specific trusts created by will** are overridden by statutory power to mortgage land charged with debts of estate. Ont [1928] 4DomLR 390. [o] **Court order authorizing mortgage to pay debt** impliedly authorizes application of proceeds of mortgage to payment of debt. Iowa 228NW274.

194-94 Ark 32SW(2d)622.

195-99 [b] **Necessity of consent of remaindermen.**-219Ky731, 294SW499.

198-30 139 Okl 240, 281P760; 68Utah 524, 251P29.

198-32 139 Okl 240, 281P760.

199-34 68Utah524, 251P29.

199-38 297Pa17, 146A260. [f] **Joint executor who made advances in subdivision of property under agreement with heirs** may purchase at sale under trust deed where advances and encumbrances

equal value of property. **Va** 152SE350.
200–41 169Ga672, 151SE385. See also 29 OhA265, 163NE223.
200–42 5PaDist&Co 573, 574 [quotCJ]; TexCivA 4SW(2d)262. [a] **One acting as executor without taking oath** is trustee for estate in repurchase of land with estate's funds. TexCivA 4SW(2d)262.
200–47½–New. Evidence held not to show that purchase by executrix was induced by fraud. 99NJEq607, 133A537.
201–62 30F(2d)604; 111Conn452, 150A526; 99Fla1056, 128S250; 123Kan638, 256P961; 259Mass76, 156NE51; 172Minn274, 215NW176; 86Mont340, 283P761; 113 OhSt543, 149NE868; 100Vt217, 136A389.
202–63 253NY256, 170NE910; 113 OhSt543, 149NE868; Or 292P1027. [b] **Contract providing for payment as work progressed** did not prevent executrix from recovering value of benefits. 253NY256, 170NE910. [c] **Parties to contract are presumed to intend** to bind their personal representatives. 253NY256, 170NE910.
202–64 172Minn274, 215NW176.
203–67 216Ala686, 114S301.
203–68 30F(2d)604; Mass 171NE713; 172Minn274, 215NW176; 53SD499, 221NW257.
204–69 100Vt217, 136A389.
204–78 227Ky476, 13SW(2d)499; 136Misc86, 242NYS447.
205–79 But see 167La21, 118S488.
205–80 259Mass76, 156NE51; 7PaDist&Co 242.
206–89 172Minn274, 215NW176; ND 231NW888.
206–90 172Minn274, 215NW176.
206–92 Ga 155SE32; Okl 245P595. [d] **Invalidity of chattel mortgage for failure to file renewal affidavit** cannot be raised by administrator of insolvent estate. 200Wis211, 228NW135, 68ALR267. [e] **Administrator is charged with constructive notice** of recorded bill of sale by intestate. Ga 155SE32.
207–93 Okl 245P595.
207–95½–New. Administrators of a deceased mortgagor have authority without order of court, to agree with the mortgagee for a sale of the mortgaged property and payment of the proceeds to the mortgagee. MoA 22SW(2d)836.
207–96 SD 231NW933 (certificate of sale).
209–16 7Alaska630; 86Mont340, 283P761.
210–19 333 Ill 643, 165NE208; 196NC4, 144SE372.
210–22 [a] (2) Executrix, also life tenant, with power to dispose of property for her support and comfort, has no power to dispose of merchandise in business which she has conducted as executrix. 127Misc647, 217NYS381.
210–29 84CalA605, 258P614; 99Fla1056, 128S250. But see Oh 171NE595. [b] (3) Other instances. SD 231NW933.
211–32 202 Iowa654, 210NW785.
211–34½–New. Indorsement of note and mortgage by executors carries with it the same burden as that of another indorser for value. 202 Iowa654, 210NW785.
211–36 Or 292P1027.
212–43 TexCivA 274SW662.
213–51 125Misc909, 212NYS616.
213–52½–New. , and subscription rights to additional stock accruing after decedent's death should also be sold, where this can be done. 129Misc218, 221NYS711.
213–58½–New. A residuary legatee who causes the executor to obtain a new mortgage as security for an indebtedness due the estate and thereupon to cancel a pre-existing mortgage securing the same debt is precluded from holding the executor liable in case the new security proves inadequate. 204 Iowa867, 216NW46.
213–60 299Pa32, 148A912.
213–62 287Pa499, 135A112. [c] 287Pa499, 135A112.
214–63 287Pa499, 135A112.
214–70½–New. Where investments have no fixed value or open market, judgment of executor, acting in good faith, is controlling as to time of sale. 287Pa499, 135A112.
214–73 Del 143A489.
215–75 [a] **Will directing executor to divide securities in residue** held to contemplate division on notice to, and consent of, all residuary legatees. 128Misc639, 220NYS392.
215–83 Del 143A489; 300Pa68, 150A90.
215–84 See also Del 143A489.
215–85 See also Or 292P1029.
216–92 130Misc684, 225NYS190 (especially where will gives authority to sell).
216–94 29Ariz203, 240P343.
217–99½–New. Executors are not negligent in selling stock at a price fixed by the testator but on longer terms. 130Misc684, 225NYS190.
217–10 133Misc322, 232NYS521; 122Or84, 253P1048. [e] **Sale under authority of court.**–122 Or84, 253P1048.
218–14 122 Or84, 253P1048.
218–16 212Ala506, 103S543.
219–18½–New. Persons interested in the estate may treat the property as actually transferred from them and recover whatever damages they are able to show. 122 Or84, 253P1048.
219–24 122 Or84, 253P1048.
219–25 Mo 31SW(2d)28.
220–31 122 Or84, 253P1048.
220–35½–New. Where an executor sells stock owned by the estate to himself, but the corporation was dissolved and the stock was no longer in existence, the sale will not be set aside, but the executor will be surcharged for the difference between the value and the amount received on the sale of the stock. 133Misc322, 232NYS521.
220–35½–New. Where an executor purchases stock from one to whom he sold it but who failed to pay the purchase price, he should be surcharged with the difference between the value of the stock and the amount received on sale. 133Misc322, 232NYS521.
221–50½–New. Administrator is liable for amount of dishonored check received for purchase price of property sold. 74Mont449, 241P648.
222–70½–New. Where executors under a will were given the right to sell when they should deem it expedient, and to pay out of the proceeds a fixed sum to the legatee, the sale necessarily inures to the benefit of the legatee to the extent of its interest. 196NC4, 144SE372.
222–73 109Conn529, 147A181.
222–78 [a] **Purchase of note of fourteen thousand dollars for eight thousand five hundred dollars held for fair and reasonable consideration** where no interest had been paid for seventeen years and executors had offered it for ten thousand dollars. 126Misc534, 213NYS593 (note secured by remainderman's interest in trust).
222–79 [a] **Pledgor cannot object** to sale by administrator of pledged bonds that purchase money was not paid in and bonds remained in hands of pledgee's administrator. 212Ala506, 103S543.
222–84½–New. A sale is not sustained where the administrator and the buyer colluded to obtain property at a low price, the administrator getting part of the purchase price. 231Ky727, 22SW(2d)122(2dcase).
225–18½–New. One who has notice of equities is not a purchaser for value. MoA 281SW144.
225–18½–New. Such purchaser takes subject to all equities at the time of transfer. MoA 281SW144.
226–42 [b] (2) Administrator, in absence of negligence or bad faith, is chargeable only with real values ascertained at sale, though sum realized is much less than appraised value. 6PaDist&Co 457.
226–42½–New. or with market value, 74Mont449, 241P648.
227–52½–New. Executors, who transferred security to coexecutor as residuary legatee, at inventory price, without knowledge of other legatees, have been held chargeable with other profits. 128Misc639, 220NYS392.
229–77 125Kan449, 455, 265P50 [quot CJ]; 125 Or38, 263P54. [c] **Public policy forbids purchase at discount** by executor administering solvent estate in some jurisdictions. 125 Or38, 263P54.
230–80 125Kan449, 455, 265P50 [quot CJ]; 125 Or38, 263P54.
230–81 125Kan449, 455, 265P50 [quot CJ].
230–84 See also 125 Or38, 263P54.
230–90 207Cal 666, 279P805, 65ALR266; 33Wyo 317, 239P286.
231–95 198 Ind372, 153NE776; 86Pa Super245; 89PaSuper531; 33Wyo 317, 239P286.
231–96 73Mont560, 238P599 (widow's allowance not in nature of interest in property but preferred claim); 33Wyo 317, 239P286.
231–97 Contra 254 IllA55.
232–2 166Minn315, 207NW629. [c] **Where will directs executors to settle estate in accordance with intestate laws,** widow is entitled to exemption and allowance. 13PaDist&Co 42.
232–5½–New. Husband cannot, by voluntary conveyance without wife's consent, deprive her of her right to widow's award. 254 IllA55.
232–6 128Me191, 146A439 (allowance to widower). [d] **In Texas.**–CivA 25SW(2d)264.
232–9½–New. It is the widow's financial circumstances at the time of her husband's death, and not her physical condition or ability to earn money, that determine her right to the allowance as widow in necessitous circumstances. 9LaA211, 120S93.
233–15 26F(2d)450; 169Ga658, 151SE336; MoA 31SW(2d)103; Wash 290P218. [d] **Parallel and overlapping statutes,** one providing for exemption allowance, another for quarantine rights, held not invalid. 134Misc166, 235NYS690.
233–16 [c] **Word "family,"** in statute providing that family of deceased may occupy his dwelling house until sold, designates the collected body of relatives by blood or marriage who together form the deceased's household. 103Conn226, 130A157. [d] **Two daughters living in decedent's house** at time of death who did not appear to be dependent on her is not finding that daughters were members of household within statute. 103Conn226, 130A157. [e] **Canadian statutes construed.**–BC [1930] 1DomLR945.
233–17 See also 218Ala203, 118S391.
233–18 199Cal 103, 247P1082.
233–22 218Ala109, 117S623.
234–36½–New. The widower's quarantine is in the nature of a tenancy at will. 106WVa703, 147SE26.
235–41 MoA 31SW(2d)103.
235–43 MoA 31SW(2d)103.
235–50½–New. Defendants who entered into possession and deprived the widow of her right of quarantine in decedent's premises were liable for the reasonable rental value of the land during the time her right of quarantine was in force, under some statutes. MoA 11SW(2d)1096.
236–52 See also 106WVa703, 147SE26.
236–55 MoA 11SW(2d)1096.
236–56 Mo 20SW(2d)26; MoA 11SW(2d)1096.
236–61½–New. In a suit for rent of decedent's premises during the period when the widow's right of quarantine was in force, a general judgment against defendants is proper under some statutes. MoA 11SW(2d)1096.
236–67 163Ga291, 135SE922; 166Ga857, 144SE728. [l] **In Philippine Islands.**–50Philippine128.
237–69 200Wis590, 229NW65.
237–75 205Cal 276, 270P939, 60ALR730; 163Ga291, 135SE922; TexCivA 293SW342. [d] **Pending construction of will,** during which estate is kept together and there are no debts, widow is entitled to support for each year estate is kept together. 36GaA327, 136SE480. [e] **Defenses to application for first year's support,** which could have been, but were not, pleaded to such application, cannot be pleaded to application for second year's support. 36GaA327, 136SE480. [f] **No debts.**–Where year's support was granted to widow but attached only to portion of proceeds of certain land left after payments of debts, there being no debts widow was entitled as against administrator to whole year's support. 38GaA405, 144SE45.
237–77 134Misc166, 235NYS690.
237–78 41 OklACR63. [b] **Discretion of court.**–96CalA243, 274P76.
237–78½–New. Such allowance ceases

to be a charge on the estate at the widow's death. 41 **OklACR**63.

237–78½–New. A claim by a widow to a family allowance "during progress of settlement of estate" should be determined in the light of facts and circumstances existing as of the time an order discontinuing the allowance was made. 96**CalA**243, 274**P**76.

238–86½–New. A statute giving the supervisors of a county a right to claim provision for the support of a minor child from a deceased parent's estate can be invoked only where the minor has become or is about to become a public charge and has been left unprovided for by a deceased parent chargeable with its support. 70**CalA**680, 234 **P**412.

238–86½–New. The rule applies whether the child is legitimate or illegitimate. 70**CalA**680, 234**P**412.

238–89 20**AlaA**594, 104**S**287 (in Alabama administrator is not entitled to recover personal property where total of personal estate is less than three hundred dollars); 134**Misc**166, 235**NYS**690; **WVa** 154**SE**874. [b] **In North Carolina.**–189**NC**742, 128**SE**145.

238–90 76**CalA**315, 244**P**629; 127**Me** 423, 144**A**218.

239–9 [a] 76**CalA**315, 244**P**629; 37**GaA** 171, 139**SE**111; 79**Mont**256, 255**P**1058; **TexCivA** 258**SW(2d)**264.

239–10 134**Misc**166, 235**NYS**690 (amount rests in sound judicial discretion).

240–20 [b] (3) Widow is entitled to deceased's domestic animals to value of one hundred and fifty dollars and personal property of one hundred and fifty dollars, though by entering into agreement with executors she is estopped to claim household goods. 244**NY**400, 155 **NE**685.

241–22 TexCivA 293**SW**342. [a] (2) What constitutes reasonable allowance for deficiency of grain, meat, and other provisions on hand at time of inventory is largely within court's discretion. **MoA** 1**SW(2d)**230.

241–27 8**PaDist&Co** 161.

241–28 201**Cal** 36, 255**P**800. See also 113 **Okl** 182, 240**P**727.

242–35½–New. Where proceedings are contested by the state, it is not error to allow consul of decedent's nativity to appear and offer evidence in behalf of unknown heirs against the petitioner's application. 201**Cal** 36, 255**P**800.

242–38 231**Ky**308, 21**SW(2d)**459. But see 207**Cal** 666, 279**P**805, 65**ALR**266.

242–41 79**Mont**256, 255**P**1058.

242–43 93**PaSuper**472 (sufficient).

242–44 90**PaSuper**448.

242–44½–New. Surviving childless third wife is entitled to decedent's land where the estate is less than the specified amount. 87 **IndA**136, 156**NE**410.

243–47 MoA 256**SW**525. [a] (2) Widow is not entitled to delivery of entire amount of personalty exemption, minor children being entitled pro rata. 219 **Ala**425, 122**S**636.

243–49½–New. Widow is not entitled to provisional support in addition to her share in estate. 34**PortoRico** 120.

243–51 165**Ga**682, 142**SE**93; 79**Mont** 256, 255**P**1058. See also 3**LaA**513.

243–53 9**PaDist&Co** 532. [c] (1) 34 **GaA**131, 128**SE**688. (2) Allowance illegal, though daughter separated from her husband. 34**GaA**131, 128**SE**688.

243–54 10**PaDist&Co** 279. [c] **In British Columbia.**–[1928] 2**DomLR**421.

244–70 218**Ala**203, 118**S**391; 44**Philippine**921.

245–73 207**Cal** 666, 279**P**805, 65**ALR** 266. [b] **Administrator of decedent's surviving husband** held entitled to husband's exemption where application therefor was made within period of limitation. 134**Misc**564, 236**NYS**326.

245–74 150**Wash**242, 272**P**980.

245–83½–New. Year's support provided under statute must be set apart from the estate of deceased husband or father. 163**Ga**291, 135**SE**922.

245–83½–New. The surviving widow of the beneficiary given an income from trust property for life is not entitled to statutory allowance on termination of the trust. 223**Ky**49, 2**SW(2d)**1057.

245–83¼–New. Property set aside as exemption to bankrupt and passing to payee of note under provision therein cannot be assigned to bankrupt's wife. 170**Ga**180, 152**SE**234.

245–83½–New. Where certificate of deposit payable to husband or his daughter or survivor was, by bank, paid to daughter after death of husband leaving insolvent estate, widow may maintain bill against bank to subject money to claim of widow's allowance. 254 **IllA**55 (properly brought by widow and administrator jointly).

245–84 169**Ga**753, 151**SE**345 (note payable to widow); **MoA** 27**SW(2d)**1064 (widow is entitled to receive part of insurance paid administrator for household furniture destroyed by fire after insured's death). [f] **Term "wearing apparel"** held to include watch of moderate value worn and used by decedent. 214**Ala**10, 106**S**188. [g] **Term "household furniture" held to include:** (1) Piano. 214**Ala**10, 106**S**188. (2) Phonograph. 214**Ala**10, 106**S**188. (3) Pistol. 214**Ala**10, 106**S**188. [h] **Term "household decorations"** held to include mounted deer horns. 214**Ala**10, 106**S**188. [i] **Bank deposit.**–150**SC**125, 147**SE**646. [j] **Note payable belonging to widow** cannot be set apart to her as year's support. 169**Ga**753, 151**SE**345.

246–86 128**Me**191, 146**A**439.

246–87½–New. A widow is not entitled to have shares of stock set apart to her as a year's support as against a grantee in an assignment passing title. 168 **Ga**339, 147**SE**766.

246–95 49**Philippine**271, 275 [citCJ]. [a] **In Texas.–CivA** 258**SW(2d)**264.

246–97 22**AlaA**377, 115**S**860.

247–1 198 **Ind**372, 153**NE**776. [e] (2) Where equity in land subject to security deed is set apart to widow, she may redeem by payment of debt. 163**Ga**204, 135**SE**747. [f] (4) **Property to which** decedent, by reason of conveyance, retained no title cannot be set apart as year's support for widow. 163**Ga**291, 135**SE**922. (5) This is true of deed made to defraud creditors, and void as to them. 163**Ga**291, 135**SE**922.

247–2½–New. Allowance of a sum to a widower in lieu of a provision out of the proceeds of sale of real estate is erroneous. **MoA** 282**SW**173.

247–5½–New. A widow is entitled to rent for a tract of land devised to her absolutely and which is occupied by her as a homestead. 56**ND**927, 220**NW**128.

247–8 127**Me**423, 144**A**218.

247–9 169**Ga**758, 151**SE**482; **Ga** 155**SE** 40; 41 **OklACR**63; 11**PaDist&Co** 581. See also 254 **IllA**55.

248–11 [a] 169**Ga**758, 151**SE**482.

248–12 Ga 154**SE**879.

249–23 But see **TexCivA** 11**SW(2d)**325.

249–30 But see **TexCivA** 16**SW(2d)**848.

249–34 169**Ga**758, 151**SE**482.

250–47 83**Colo** 494, 266**P**497.

250–48 244**NY**400, 155**NE**685. [a] (5) Where widow, by full warranty deed, conveyed realty of deceased husband, she was thereafter without interest in such land and could not sue to have same set apart as exempted. 213**Ala** 401, 104**S**765. (6) By entering into agreement with executor to take certain enumerated articles in full of all interest in deceased's household furniture that widow was elected to dispense with. 244**NY**400, 155**NE**685.

250–49 [a] (5) Widow's right to piano as exempt property is not waived by failure to assert right before referee in contested accounting, she being administratrix. 129**Misc**218, 221**NYS**711. (6) Joinder in husband's mortgage before homestead was set apart and dower assigned. 218**Ala**109, 117**S**623. [g] **Matters constituting estoppel.**–163**Ga**267, 134**SE**923.

251–51½–New. Waiver of exemption of insurance money after acknowledgment to the administrator of the receipt thereof is ineffectual. 89**CalA**148, 264**P**304.

251–57 See also **OhA** 172**NE**626. [a] (4) Antenuptial contract to accept stated sum annually from date of marriage to date of husband's death in lieu of dower or other interests does not bar right to allowance for year's sustenance. **MoA** 1**SW(2d)**230. (5) **Such contract** does not bar right to allowance of four hundred dollars as absolute property under Rev. St. (1919) § 107. **MoA** 1 **SW(2d)**232. [b] (2) Widow will not be deprived of allowance for year's sustenance by antenuptial contract not expressly so providing nor unmistakably showing intention to bar right. **MoA** 1**SW(2d)**230. (3) Widow is entitled to statutory bounties in addition to provisions made for her in lieu of dower in antenuptial contract not expressly barring or unmistakably showing intent to bar such bounties. **MoA** 1**SW(2d)** 232.

251–59 83**Colo** 494, 266**P**497, 498 [cit CJ]; 231**Ky**740, 22**SW(2d)**124; 73**Mont** 560, 238**P**599. [c] **Right to allowance is waived** by antenuptial contract, releasing wife's dower rights in all real estate now owned by husband or hereafter to be acquired, and all other rights, title, interest, property, claim and demand at law or in equity in such real estate, and assigning and transferring to husband any claim that she may be entitled to after becoming his wife or widow in any personal property which he owns and may hereafter acquire, and agreeing that she will make no further claim against him or his estate for any share therein to which as his widow she may be entitled. 73**Mont**560, 238**P**599.

252–64 201**Cal** 36, 255**P**800; 83**Colo** 494, 266**P**497, 498 [citCJ].

252–67 MoA 284**SW**186.

253–68½–New. Where a wife, by property settlement, surrendered her right in the husband's estate, revocation thereof by resumption of marital relations must be established by satisfactory evidence of intent thereby to effect the same. 201**Cal** 36, 255**P**800 (evidence held insufficient).

253–73 216**Ala**286, 113**S**42.

254–79 79**CalA**69, 248**P**1039.

255–85½–New. Before the court may deny a widow a family allowance, it must appear that she has not only ceased to constitute a member of her husband's family by separation or an interlocutory decree of divorce, but has also lost the right to seek support from him by reason of her conduct. 201**Cal** 36, 255**P**800.

255–85½–New. such as her abandonment of him or her voluntary surrender of the right to support. 201**Cal** 36, 255 **P**800.

255–87 Me 139**A**685; 53**ND**631, 207**NW** 434; 300**Pa**217, 150**A**606; 86**PaSuper** 245; 9**PaDist&Co** 153. [a] 89**PaSuper** 531. [b] (1) 83**Colo** 494, 266**P**497, 498 [citCJ] (agreement held to waive allowance). (3) Widow's allowance need not be specifically referred to in agreement in order to be waived. 83**Colo** 494, 266 **P**497. (4) Separation agreement waiving widow's allowance is not contrary to public policy. 83**Colo** 494, 266**P**497. [d] **In Mississippi.**–147**Miss**460, 112**S** 578.

255–88 147**Miss**460, 112**S**578; 9**PaDist &Co** 153. See also 10**PaDist&Co** 674.

255–89 201**Cal** 36, 255**P**800; 69**CalA** 424, 231**P**351; 162**La**214, 110**S**326; 2 **LaA**413.

256–96 69**CalA**424, 231**P**351.

256–96½–New. An interlocutory decree does not limit the wife's privilege to claim benefit of a right to statutory family allowance or of a right to have the husband's estate of less than a certain prescribed amount set aside to her. 201**Cal** 36, 255**P**800.

256–99 [a] (2) Right is waived by wife allowing, in own interest, exempt property to be sold and proceeds applied to decedent's debts. 202 **Iowa**611, 210**NW** 810.

256–1 221**Ky**732, 299**SW**729.

256–4 219**Ala**425, 122**S**636.

256–6 See also 205**Cal** 276, 270**P**939, 60 **ALR**730.

256–9½–New. Widow's second marriage does not deprive her of right to sell land set aside for support of family, for the purpose of supporting herself and children. 163**Ga**297, 136**SE**68.

257–13 [k] **After estate has been closed** (1) widow is not entitled to widow's allowance. **Iowa** 228**NW**571 (order, stating that estate was closed for all

purposes except collection of certain notes, payment of monthly allowance to widow, and final distribution, held final closing of estate).

257-14 166Ga857, 144SE728; 330 Ill 624, 162NE164 (seven years).

258-17 [a] **In Alberta.**-[1928] 2DomLR 948.

258-19 9PaDist&Co 820.

258-27 [a] **Right did not devolve upon widow's administrator,** where she held as life beneficiary for fourteen years without having exemption set apart. 215Ala374, 110S699.

258-28 MoA 1SW(2d)230; MoA 1SW (2d)232.

259-43½-New. A widow, having executed a mortgage on the property of her deceased husband, retained equity of redemption which constituted a property interest sufficient to sustain a petition for setting apart exemptions. 218Ala 192, 118S385.

259-46 169Ga753, 151SE345. [b] **Construction.**-169Ga781, 151SE490.

260-58 9PaDist&Co 820.

260-63 [c] **Relationship to applicant within fourth degree** held to render appraisement voidable. 165Ga125, 139SE 864. [d] **Relationship to widow** held insufficient to warrant setting aside allowance. 161Tenn165, 29SW(2d)261.

261-83 [a] **Where widow dies before administrator appointed of husband's estate** and administrators are then appointed for both estates, appraisers of husband's estate should make allowance for first year's support of widow. 27 OhNPNS142.

261-85½-New. Appraisers are not required to set apart year's support to residents of county other than that in which administration is had. 170Ga 675, 153SE744.

261-88 165Ga125, 139SE864. [a] 161 Ga311, 130SE914.

261-89½-New. In such case the fact that all of the land owned by deceased was allotted must appear on the face of the judgment and cannot be shown by extrinsic evidence. 161Ga311, 130 SE914.

261-90 165Ga125, 139SE864; 166Ga 301, 143SE400; 169Ga753, 151SE345. [a] (3) "400 acres of land $8,000.00." 161Ga311, 130SE914. [c] **Return of all deceased husband's personal property has been held not void** for uncertainty as it could be identified by extrinsic evidence. 169Ga753, 151SE345.

261-92 [a] (3) Description, "500 A. of land including homestead at Buckhead, Ga. Morgan County," is not void for indefiniteness. 168Ga126, 147SE75.

262-99½-New. After a report which is void as to the land set aside for insufficiency of description has been made the judgment of the ordinary, it cannot be so amended as to supply a description and a plat of the land as against the interest of heirs who were sui juris at the time the year's support was set aside. 161Ga311, 130SE914.

262-99¼-New. Where such amendment has been allowed by the ordinary, evidence of the amendment is not admissible in an action to recover an interest in the land brought by children who were not beneficiaries of the year's support. 161Ga311, 130SE914.

262-99¼-New. After a return has been made, adverse parties to be affected by an amendment must have legal notice. 161Ga311, 130SE914.

262-4 See also 165Ga125, 139SE864. [a] **No appeal or exception being taken** from return of appraiser's setting aside twelve months' support, return is final. 169Ga858, 151SE796.

262-4½-New. Report of appraisers cannot be attacked after three years because land set aside as year's support was not in county of appraiser's residence. 170Ga675, 153SE744.

262-8 161Tenn165, 29SW(2d)261 (not subject to collateral attack).

263-17½-New. Judgment confirming report of appraisers setting apart real and personal property for support of widow and minor children subject to decedent's debts is not void where not appealed from. 161Ga818, 131SE893.

263-17⅓-New. Nor is such judgment void because no plat of the land set apart was filed by appraisers with their report. 161Ga818, 131SE893.

263-20 See also 11PaDist&Co 447 (costs).

263-22½-New. Judgment of ordinary allowing report of appraisers cannot be set aside for failure to record plats of lands set apart. 170Ga675, 153SE744.

263-23 161Ga818, 131SE893.

263-25 [a] **Trial.**-37GaA369, 140SE520.

263-31½-New. Appraiser's report may be sent to the jury. 37GaA369, 140SE 520.

263-33 31NM366, 246P910 (widow cannot appropriate without allowance by court).

263-34 96CalA243, 274P76; 151Miss 23, 117S371; 79Mont256, 255P1058. [g] **Amount is in discretion of court.**-151 Miss23, 117S371 (twenty-four hundred dollars held not excessive).

263-37½-New. Payment by the administrator of an allowance to the widow for support of herself and child, without previous order, does not deprive him of right to credit therefor where the court found the allowance reasonable and proper. 79Mont256, 255P1058.

263-37⅓-New. The court is without jurisdiction to deny an application for exemption duly made and noticed as to exempt property. 89CalA148, 264P304.

264-38 [a] **Proceedings to set apart** widow's exemption are in rem. 212Ala 635, 103S692.

264-38½-New. By statute, widow may proceed by summary proceedings to obtain allowance. 163La541, 112S410.

264-39 37GaA171, 139SE111 (not necessarily within twelve months); 11Pa Dist&Co 581.

264-42 [a] **In New York.**-129Misc218, 221NYS711 (Surr. Ct. Act §§ 200, 201).

264-45½-New. The court has jurisdiction to allow and have paid an award at a subsequent term where not previously done because of fraud, accident, or mistake. 330 Ill 624, 162NE164.

264-51½-New. In Indiana administrator's notice of appointment confers jurisdiction on circuit court to make allowance to widow. 87 IndA136, 156NE 410.

265-56 107Conn101, 139A685.

265-59 [b] **Administrator need not be party** to caveat to year's support set aside for widow. 41GaA538, 154SE159.

265-66 151Miss23, 117S371.

266-81 166Ga857, 144SE728.

266-84½-New. The residuary legatee is entitled to require the court to ignore sentiment in granting an allowance. 128Me191, 146A439.

266-85 166Ga857, 144SE728. [b] **Evidence held sufficient.**-(1) MoA 284SW 186. (2) To support finding that widow waived right to take exempt property. 202 Iowa611, 210NW810. (3) To entitle widow to quarantine. MoA 31SW(2d) 103.

266-86 [b] (2) To show petitioner lawful widow. 213Ala336, 104S650.

266-87 79CalA69, 248P1039 (sufficient).

266-91 [a] **Evidence held sufficient.**-107 Conn101, 139A685.

266-99½-New. Testimony that, prior to the consummation of a sale to the mortgagee's immediate predecessor, the former husband told the purchaser that he could not buy the property without the widow's assent, and that the purchaser replied that "he could," has been held properly admitted. 166Ga857, 144SE 728.

266-2½-New. It is proper to exclude an undated advertisement in which decedent gave his wife's place of residence as his residence, offered as a material fact of resumption of marital relations, where evidence of the date was unsatisfactory. 201Cal 36, 255P800.

266-2⅓-New. In proceedings to enjoin a widow from prosecuting her application for a year's support, evidence held not to demand a finding that the widow was estopped from asserting the right to a child's part in the estate left by deceased. 166Ga857, 144SE728.

267-8 But see 202 Iowa611, 210NW810.

267-9 26F(2d)450.

267-10 41GaA538, 154SE159 (credibility of witnesses). [a] **Instruction held not reversible error.**-41GaA538, 154SE 159. [b] **Submission of verdict for widow** if finding for her, with blank for jury to write in property widow is entitled to, is proper. 41GaA538, 154SE 159.

267-10½-New. Form of verdict held proper. 41GaA538, 154SE159.

267-14 WVa 154SE874.

267-16 161Ga311, 130SE914. [a] (2) Judgment setting apart year's support is insufficient to divest title to land where description is so vague and indefinite that it cannot be identified. 161 Ga311, 130SE914. [b] **Description must be as definite as in deed.**-161Ga311, 130 SE914.

267-20 161Ga311, 130SE914.

268-32 130 Okl 148, 265P1056.

268-33½-New. Widows and their minor children who invoke and obtain judgments granting year's support out of estates of deceased husbands and fathers cannot afterward repudiate the judgments secured. 161Ga311, 130SE914.

268-33⅓-New. Widow becomes in effect judgment creditor with claim allowed against estate. 254 IlA55.

268-33¼-New. It has been held not error to allow payments on order of monthly allowance without formal allowance of claim for each payment. 41 F(2d)155.

268-36 151Miss23, 117S371; Wash 290 P218. [a] **Death of surviving spouse** will not prevent vacation. Wash 290 P218.

268-39½-New. Court may consider that order appointing appraisers had not been signed at time of attempted appraisement. Wash 290P218.

268-39¼-New. Order awarding property to surviving spouse will be set aside where appraisement preceded appointment of appraisers. Wash 290P218.

268-40 87 IndA136, 156NE410; 127Me 428, 144A218.

268-42 MoA 282SW173 (allowance to widower). [e] **Record.**-MoA 284SW186. [f] **Appeal will not be dismissed on failure to perfect** since duty of court is to stay proceedings and permit appeal to be perfected. 200Wis590, 229NW65.

269-46 52SD472, 218NW633, 59ALR 1549; 200Wis590, 229NW65.

269-50 Iowa 228NW571. See also 218 Ala292, 118S342.

269-53 96CalA243, 274P76; 208 Iowa 333, 223NW510.

269-56½-New. Appellate court will presume that administrator gave statutory notice of appointment. 87 IndA136, 156 NE410.

269-61½-New. In some jurisdictions the reviewing court may consider the case on the merits although it was tried in probate court without objection instead of being brought in equity as contemplated by statute. Iowa 228NW571.

269-70½-New. Under British Columbia Testator's Family Maintenance Act costs are properly imposed on unsuccessful claimant and not on estate. BC [1930] 2DomLR413.

270-71 155Tenn461, 295SW472. See also 166Ga857, 144SE728.

270-72 165Ga125, 139SE864; 165Ga 682, 142SE98; 155Tenn461, 295SW472. But see 168Ga451, 148SE162.

270-74 155Miss237, 124S323. [a] **Executor cannot litigate widow's right to allowance** in proceeding involving determination of ownership of property claimed by both. 155Miss237, 124S323.

270-77½-New. Where a widow accepts a year's support subject to a security deed, she is estopped to contest the validity of the deed. 163Ga204, 135SE747.

270-78 165Ga125, 139SE864; 165Ga 682, 142SW98.

271-87 208 Iowa333, 223NW510. [c] **Proceedings for additional allowance.**-208 Iowa333, 223NW510.

272-98 205Cal 276, 270P939, 60ALR 730.

272-5 See also MoA 284SW186.

272-7 36GaA612, 137SE799; 150Wash 242, 272P980.

273-10½-New. That stock in a bank has been set aside to the widow as a year's support has been held no ground for

exempting the stock as the property of the widow from assessment for the benefit of creditors of the insolvent bank. 38GaA508, 144SE385.

273-11 169Ga658, 151SE336.

273-11½-New. Where children have left, and widow has remained, on premises, incurring debt for necessary fertilizer, vendor thereof could enforce debt against land. 163Ga297, 136SE64.

273-11½-New. **Debts incurred for support of widow and children** are enforceable against property subsequently set apart for a year's support. 165Ga682, 142SE98.

273-11¼-New. Personal property set aside to the surviving wife in lieu of her homestead and exemption rights in property of the estate is not exempt from execution in satisfaction of the wife's separate debt. 149Wash659, 272 P28.

273-11½-New. Real estate awarded to surviving widow in lieu of homestead is not exempt from execution upon a judgment subsequently obtained against widow. 155Wash239, 283P1089.

273-14 146Wash507, 263P956.

273-16 169Ga781, 151SE490.

273-19½-New. Under code widow in possession under quarantine right cannot cut off title of heirs. 215Ala12, 108 So52.

273-20 251NY429, 167NE580; 284Pa384, 131A378.

273-24 167La255, 119S40 (debts assumed by decedent on purchase of business); 135Misc547, 239NYS582. [b] **Direction in will that business be continued** does not interfere with rights of existing creditors to payment of their debts. 135Misc93, 236NYS709.

273-25 284Pa384, 131A378.

273-26 284Pa384, 131A378. [g] **Interest in cooperative apartment house.**–128 Misc51, 217NYS318.

274-27 255Mass99, 150NE880; 251NY 257, 167NE434; 128 Or415, 274P1098 (2dcase); 199Wis545, 226NW957 (unsuccessful attempt to adopt plaintiff). [a] (2) Decedent's written promise to pay claim against her husband's estate, exacted by threat to contest his will, held unenforceable as without consideration. 255Mass99, 150NE880. (3) Promise of decedent to pay claim against her mother out of her share in her mother's estate held unenforceable when there was no evidence that she received a share. 255Mass99, 150NE880. (4) Persons furnishing property to decedent without intention or expectation on part of participants in transaction that charge would be asserted cannot recover therefor against recipient's estate. 228Ky420, 158W(2d)254.

274-27½-New. Claims for services to decedent will be denied, where claimant, by filing a false claim and destruction of bank vouchers, evidencing payment, attempted to get the bulk of the estate. 99NJEq631, 134A358.

274-29 181Ark986, 268W(2d)97; 135 Misc419, 239NYS273; 284Pa384, 131A 378. [b] 134Misc321, 235NYS228. [c] 198NC161, 150SE381(2dcase). [h] **Contract to pay purchase price of real property.**–128Misc288, 218NYS382.

275-30 [b] **Necessaries furnished infants.**–24 OhA408, 157NE494.

275-35 144Miss233, 109S601; 284Pa 384, 131A378.

275-36 See also 29 OhA322, 163NE511.

275-38 [c] (1) 151Md644, 135A841, 50 ALR232; Wash 289P1000. [e] **Widow's claim against estate of husband for** unpaid alimony cannot be subject to award in special proceeding. 128Misc 362, 219NYS485.

276-57 49RI137, 140A913, 915 [citCJ].

277-62 126Misc465, 214NYS465; 118 Or1, 245P503; 130 Or669, 281P840; 299Pa452, 149A705. [b] **Mere fact that coinsured paid one half of premium** charges would not of itself raise inference of special agreement to share premium cost equally. 299Pa452, 149A705.

277-64 126Misc467, 214NYS465. [b] **Representative of insolvent estate** may not be joined as party defendant by executor of other deceased joint maker in action against latter as being solely liable on joint liability. 126Misc467, 214 NYS465.

277-66 IndA 167NE617(2dcase); 260 Mass165, 156NE870; 130 Or669, 281P 840. [b] (1) But see 228AppDiv456, 240NYS121. [d] **Where claim is filed against estate of one of joint debtors,** administrator can sue to set aside conveyance by deceased, since debt became, as against estate, joint and several. IndA 167NE617(2dcase).

277-67 260Mass165, 156NE870; 299Pa 452, 149A705. See also Md 148A444.

277-67½-New. Estate of deceased husband alone is liable on joint note of husband and wife to bank where purpose of her joining was practice of bank to have wife of borrower join and proceeds were credited to husband's account. 142Va149, 128SE450.

277-67½-New. **Where a husband and wife executed notes** and mortgages to secure them, the estate of the deceased husband is primarily liable. TexCivA 280SW879.

277-67¼-New. A contract whereby claimant and his sister were to purchase property, taking a two-thirds interest in the sister's name, and by which deceased was to pay to claimant and his sister a part of the purchase price of such property, was incomplete until the sister accepted its terms, and then constituted a joint contract, and a joint claim against the estate on her acceptance. 128 Or415, 274P1098(2dcase).

277-68 261Mass109, 158NE539; 118 Or1, 245P503, 504 [quotCJ]. [a] **Allowance of whole of joint and several note** does not absolve surviving comaker from liability and heirs of deceased from right of contribution. 199Cal107, 248 P248.

278-70 107Conn691, 142A398; 204 Iowa857, 216NW33; 217Ky603, 290SW 483; 228Ky32, 148SW(2d)189; 12LaA 66, 125S320; 6LaA663; MoA 276SW 89; 220MoA102, 278SW806; MoA 17 SW(2d)369 (meeting of minds held unnecessary); NJSup 132A669; 127Misc 518, 217NYS341; 132Misc811, 231NYS 4; 135Misc442, 240NYS215; 134Misc 857, 236NYS514; 134Misc902, 236NYS 720; 228AppDiv860, 240NYS802; 229 AppDiv614, 243NYS476; 24 OhA408, 157NE494; 148Wash72, 268P132; Wis 231NW165. [d] (2) One nursing and caring for decedent could rely on implied or express contract. 231Ky308, 218SW(2d)459. [m] **In construing note** for payment of services rendered decedent all parts of note must be considered. 188Wis4, 205NW486. [n] **Note for services construed** as unconditional contract for payment of certain sum for present indebtedness. 188Wis 4, 205NW486. [o] **Verdict held not excessive.**–220MoA102, 278SW806. [p] **Ascertainment of reasonable value.**–127 Misc518, 217NYS341. [q] **Action on quantum meruit is not precluded** by promise to pay for services rendered without definite arrangements as to compensation. 20 OhA127, 151NE782. [r] **Legal services** of attorney in and about real property of client, to extent they were performed before client's death, are proper subject of action against representatives. 90Fla441, 106S 470. [s] **Claim based on contract with deceased wife** will be allowed against her estate though services were of kind for which husband is ordinarily liable. 132 Misc61, 229NYS567.

278-71 228Ky354, 158W(2d)289; 242 Mich668, 219NW743. See also 1LaA192.

278-73 203 Iowa144, 212NW327; 195 NC856, 142SE7. [b] **Claims against decedent's estate for services should be closely scrutinized** because of ease of spoliation. 233Ky808, 278W(2d)416.

278-74 203 Iowa62, 212NW314; 203 Iowa144, 212NW327; 206 Iowa514, 219 NW305; 242Mich668, 219NW743; Mo 108W(2d)651. But see 24 OhA408, 157 NE494. [j] **Contract not vitiated by undue influence.**–203 Iowa62, 212NW314. [k] **Evidence held not to warrant presumption** of immoral relations precluding recovery for services. 233Ky808, 278W(2d)416.

279-76 13PaDist&Co 391.

279-77 See also MoA 297SW79.

279-78 217AppDiv602, 216NYS704; 294 Pa323, 144A141; 6PaDist&Co 553.

279-78½-New. Claims for services rendered a decedent in his lifetime, as to which claimants were silent in decedent's lifetime, are not favored in law. 198Wis 500, 224NW741(2dcase).

279-80 89CalA445, 265P289; 228Ky 430, 158W(2d)254; 126Misc741, 215NYS 419; 198NC147, 150SE875; 294Pa323, 144A141; 6PaDist&Co 297; 48RI 24, 134A645; Ont [1930] 3DomLR205.

280-82 MoA 297SW425.

280-86 284Pa73, 130A304.

280-87 233Ky808, 278W(2d)416 (holding testator's deed of trust not to constitute satisfaction of contingent beneficiary's claim for services).

281-88 201 Iowa871, 208NW297; 204 Iowa857, 216NW33; 216Ky369, 287SW 919; 231Ky308, 218SW(2d)459 (strength and conclusiveness of presumption); 234Ky448, 28SW(2d)494; 162La880, 111 S267; 240Mich291, 215NW358; 167Minn 417, 209NW1; 170Minn451, 212NW815; MoA 293SW480[citCJ]; MoA 295SW495; NJ 133A884; NJSup 132A669; NJCh 134A360; 126Misc741, 215NYS419; 136 Misc245, 242NYS266; 133Misc77, 230 NYS781; 138Misc101, 244NYS764 (claim by husband for painting and repair work on house occupied by his wife and himself); 134SC42, 131SE771. [d] 232Mich 579, 206NW508. [f] (1) 201 Iowa871, 208NW297; MoA 138W(2d)560; 136 Misc245, 242NYS266. (2) 197NC243, 148SE240; 294Pa323, 144A141; 195Wis 46, 217NW703.

282-89 219Ala94, 121S82; 216Ky369, 287SW919; 234Ky448, 28SW(2d)494; 240Mich291, 215NW358. [a] 231Ky308, 218SW(2d)459.

282-90 MoA 297SW79.

282-91 201 Iowa871, 208NW297; 232 Mich579, 206NW508; 235Mich613, 209 NW816; 170Minn451, 212NW815; 170 Minn499, 212NW943; 307Mo234, 270 SW658; NJCh 134A360; 197NC243, 148 SE240; 153Va540, 150SE238. [e] **That mother lived in house occupied by daughter and ate at same table** does not per se establish family relation raising presumption that daughter's services were gratuitous. 201 Iowa871, 208 NW297.

283-92 But see 151Va785, 145SE249.

283-96 [b] **Child's estate liable for necessaries** unless clearly shown services rendered were gratuitous. 24 OhA408, 157NE494.

283-97 216Ky369, 287SW919; 240Mich 291, 215NW358.

283-98 133Misc77, 230NYS781 (particular circumstances considered). But see 135Misc442, 240NYS215.

283-99 [a] **Claim allowed.**–136Misc245, 242NYS266.

283-1 204 Iowa857, 216NW33; 167Minn 417, 209NW1; MoA 293SW480 [citCJ].

283-5½-New. or against the estate of a sister-in-law, 222MoA260, 296SW183 (insufficient to raise presumption of gratuitous services).

283-6 134SC42, 131SE771; SD 228NW 377. [b] **Relationship of nephew by marriage** raises no presumption that services were voluntarily performed. 96 PaSuper185.

284-11 234Mich679, 209NW141; 242 Mich668, 219NW743 (second cousin).

284-11½-New. Rule that express contract must be proved between relatives embraces remote kindred where there is a household. NJ 133A884.

284-14 204 Iowa857, 216NW733; 231Ky 308, 218SW(2d)459; 170Minn499, 212NW 943; MoA 218SW(2d)635; 198NC147, 150 SE875; 108WVa81, 150SE233.

284-15 204 Iowa857, 216NW33; 216Ky 369, 287SW919; 234Mich471, 208NW 611; 240Mich291, 215NW358; 170Minn 499, 212NW943; NJCh 134A360; 132 Misc335, 230NYS332; 198NC147, 150SE 875; TexCivA 148SW(2d)865. [a] 82 Mont9, 264P944. [r] **Evidence sufficient to show contract.**–170Minn499, 212NW 943. [s] **Illicit cohabitation of woman and testator** will not deprive her of rights for compensation for services after such relationship ceased. 233Ky808, 278W(2d)416.

285-16 234Mich471, 208NW611; 235 Mich613, 209NW816; 151Va295, 144SE 471.

285-17 174Ark262, 295SW20; 204 Iowa 857, 216NW33; 231Ky308, 218W(2d) 459; 235Mich613, 209NW816; 170Minn 415, 212NW815; 170Minn499, 212NW

943; NJSup 132A669; NJCh 134A360; 135Misc442, 240NYS215 (amount of allowance); 198NC147, 150SE875; 151Va 785, 145SE249; 108WVa81, 150SE233. [g] **Claimant must have intended to charge for services.** 307Mo 234, 270SW 658.

286-19 86 IndA31, 155NE720; 96PaSuper185; 67Utah474, 248P122 (that daughter left her own home at request of parents to care for them in illness rebuts presumption of gratuitousness).

286-20 235Mich613, 209NW816; 126Misc741, 215NYS419.

286-21 307Mo 234, 270SW658; 126Misc 741, 215NYS419.

286-22 216Ky369, 287SW919; 239Mich 432, 214NW407.

286-22½-New. Rule against implied promise to pay for services rendered between members of a family is not applicable in a suit for compensation for farm labor. NJSup 132A669.

287-24 126Misc741, 215NYS419.

287-26 218Ky57, 290SW1048; 12LaA 66, 125S320; 234Mich471, 208NW611 (reasonable value of services allowed under contract to convey certain property in return for services not enforceable by suit for specific performance under statute). [a] **Special contract to pay reasonable value of services** is immaterial and amounts only to formal recognition of what law presumes. 136Misc581, 240 NYS380.

287-27 87CalA736, 262P800; 242Mich 668, 219NW743.

287-28 176Ark533, 38SW(2d)301; 94 CalA441, 271P374; CalA 279P1019; 206 Iowa514, 219NW305; 170La828, 129S 361; 12LaA66, 125S320; 263Mass583, 161NE592; Mo 10SW(2d)651; 11Pa Dist&Co 485; 151Va295, 144SE471; Wis 230NW714 (allowance held excessive). [a] (4) 170La828, 129S361. [c] 69CalA 87, 230P453 ($25,000 held excessive); 216Ky95, 287SW239; 228Ky354, 15SW (2d)289; 234Mich679, 209NW141; MoA 275SW769; MoA 279SW253; NJCh 134 A360; NJSup 132A669; 135Misc442, 240 NYS215; 134Misc902, 236NYS720.

287-29 13PaDist&Co 391.

287-30½-New. Claimant for services rendered to deceased under express oral contract can recover only amount remaining unpaid. Iowa 230NW330.

287-31 See also 206 Iowa514, 219NW 305.

287-36 99CalA671, 279P168; Ill 172 NE32; 233Ky576, 26SW(2d)491; Me 149A833(2dcase); 234Mich471, 208NW 611; MoA 300SW1035; 196NC247, 145 SE233; NS [1930] 4DomLR208; Ont [1930] 3DomLR205; Sask [1930] 2Dom LR700. [f] **Claim based on broken promise to compensate by will** may also be sufficient to support action on quantum meruit. 99CalA671, 279P168. [g] **Agreement to give personal estate on death** in consideration of services covers gross personal estate in kind regardless of debts. Iowa 229NW159. [h] **Failure to give muniment of title by will or otherwise** constitutes breach of contract to pay for services by gift of land on death. Iowa 229NW159.

288-39 Sask [1928] 4DomLR286.

288-43 233Ky576, 26SW(2d)491; Tex CivA 287SW110. [e] **Under contract to give son** in return for maintenance all personal property owned at death, son is entitled to all cash accumulations. 191Wis557, 211NW791.

289-44 84 IndA446, 151NE342; 234 Mich471, 208NW611; TexCivA 287SW 110. But see 233Ky576, 26SW(2d)491.

289-45 307Mo 234, 270SW658. [c] (2) Wife who had provided necessaries under belief that husband could not provide is entitled to enforce claim against estate. 132Misc582, 230NYS311. [d] **Only payments proved** can be allowed. 138Misc101, 244NYS764.

289-48 [c] **Payment of taxes.**-125Kan 707, 265P1104.

289-51½-New. Where notes were executed by husband in children's favor, they are properly disallowed as claim against wife's estate where she did not sign notes and money was not advanced to her, although claimed to have gone toward her support. 217Ky733, 290SW 694.

289-51⅓-New. A mother who borrowed money to loan to her son cannot recover from the son's succession the amount of interest paid by her for the loan. 168La534, 122S718.

289-51¼-New. A wife joining in execution of a loan agreement for a loan on a policy to her husband cannot require payment of the loan from insured's estate. 252NY148, 169NE120.

290-54 Mass 165NE494 (covenants in lease, binding lessee and his administrator to pay designated annual rental over fifteen-year term and to pay taxes in excess of specified amount, held to constitute "claims of creditor" against estate of deceased lessee, under which lessor was entitled to require administrator to retain sufficient assets for their satisfaction).

291-60½-New. A covenant of a testator who guaranteed a lease is satisfied by the executor's deposit of bonds under method provided in guaranty for terminating liability. 255Mass262, 151 NE109.

291-60⅓-New. The bringing of a petition to have an executor retain assets to satisfy a claim of petitioners was held not to be an expense, in carrying out the terms of a covenant of guaranty, to be borne by testator. 255Mass 262, 151NE109.

292-71 200Cal 681, 254P557; 208Ky 441, 271SW600; 235Ky658, 32SW(2d) 8 (where decedent received notes impressed with trust); 135Wash124, 237 P21, 22, 41ALR163 [quotCJ].

292-72 200Cal 681, 254P557; 151Va 156, 144SE447; 135Wash124, 237P21, 22, 41ALR163 [quotCJ]. [a] 208Ky441, 271SW600. [c] **Claimant need not trace funds.**-200Cal 681, 254P557.

292-78 151Miss56, 117S354.

292-80 34F(2d)700.

293-82 [c] (2) Note payable at death valid. 188Wis4, 205NW486.

293-84 [b] (4) Other instances. 87 CalA736, 262P800. [g] **Accommodation makers or indorsers on notes** due from estate cannot have payment to holders by estate postponed until their contingent liabilities are fixed. 128Misc515, 219NYS494.

293-86 [a] (2) That part of claim contingent would not invalidate entire claim but merely require such part to be particularized. 87CalA736, 262P800.

294-89 12PaDist&Co 503 (destruction of property); 147Wash661, 267P47.

294-91 Mo 31SW(2d)788; 217AppDiv 210, 216NYS699; 26 OhNPNS431, 438 [citCyc].

294-92 217AppDiv210, 216NYS699.

294-93 124Kan230, 257P962; Or 292P 1027. [b] 124Kan230, 257P962. [c] **Not debts against estate** unless assessed against it rather than administrator. Mo 31SW(2d)788.

295-95 197NC511, 149SE740.

295-96 26 OhNPNS431.

295-98 [a] (2) Contract, whereby decedent agreed to pay sanitarium "every four weeks in advance" for care and treatment of his incompetent wife, has been held mere personal agreement to pay specified rate four weeks in advance for treatment and maintenance binding on decedent only so long as he left wife in sanitarium during his life, and did not survive his death. 133Misc244, 232 NYS314. (3) Such contract has been held not modified by subsequent letters to sanitarium instructing it not to discharge wife in absence of decedent nor to permit anyone to take her out of sanitarium without his consent. 133 Misc244, 232NYS314.

295-1 213Ky575, 281SW530.

296-6 199Cal 625, 250P669, 48ALR 1308; 216Ky454, 288SW285. [f] **Executor's duty is to raise bar of statute against claims.**-217AppDiv602, 216NYS 704.

296-9½-New. An administrator is not estopped to plead the statute of limitations in behalf of the estate by any rule different than that applied to an individual. 127Kan593, 274P284.

297-16 195Cal 319, 232P972; 199Cal 625, 250P669, 48ALR1308; 90CalA220, 265P833; Md 148A585; 222MoA474, 280SW711; MoA 16SW(2d)681; 34NM 431, 283P49; 126Misc638, 214NYS378.

299-39 34NM431, 283P49.

299-44 199Cal 625, 250P669, 48ALR 1308. [f] **Mortgage.**-199Cal 625, 250P 669, 48ALR1308.

305-11 27Ariz484, 232P56 (claims, not based on act of decedent, are demands against estate as such, only when expressly made so by statute). See also TexCivA 8SW(2d)558.

305-13 [a] (5) 54SD334, 223NW212 (whether obligation is owing from deceased in lifetime or originating against estate after his death).

305-13½-New. Where widow continued business without leave of court, payments for purchases from decedent's creditors were not in discharge of claim against estate. 187Wis347, 203 NW360.

305-13⅓-New. Where widow continued business without leave of court, payments for purchases from decedent's creditors were not in discharge of claim against estate. 187Wis347, 203NW360.

305-14 255Mass519, 152NE107. [d] **In action on testator's alleged contract** to see that plaintiffs were cared for during their lives in return for services, court's ruling that recovery could not be based on nature of services, time required, adequacy of wages, or relation of parties is correct. 255Mass519, 152 NE107.

306-17 7Alaska312; 256IllA523. [a] 169Ark173, 273SW705. [k] **Provision in will controls** as to how expense shall be raised. TexCivA 28W(2d)997. [l] **Housekeeper may bind estate.**-256 Ill 523. [m] **Nature of claim.**-NC 154SE 731.

306-18 [e] (2) Allowance of claims for expenses of last illness and funeral of wife is improper, if husband survives, though upon proper showing court may make allowance to husband for such expenses. 68CalA367, 229P873.

307-22 168Minn298, 210NW105; 226 AppDiv162, 235NYS213 (reimbursement offset against claim). [a] 169Ark173, 273SW705. [g] **Estate not discharged** by payment of funeral expenses by widow. 169Ark173, 273SW705.

307-28 196Cal 757, 239P49, 40ALR 1457. [a] (10) 196Cal 757, 239P49, 40 ALR1457.

308-29 [f] 253 IllA380.

308-34 But see 133Misc322, 232NYS 521. Contra 217AppDiv210, 216NYS 699.

308-35½-New. The estate of a deceased husband is not liable for funeral expenses of his wife, 214Ky267, 283 SW111.

308-35¼-New. and a son paying therefor cannot charge same against property held by him as tenant in common with other heirs. 214Ky267, 283SW 111.

308-37 TexCommnA, 276SW680. See also 46Philippine809. [h] (2) In absence of provision in will testator's interest in community property is primarily liable. TexCivA 28W(2d)997.

309-39 TexCommnA 276SW680.

309-40 TexCommnA 276SW680. [a] TexCommnA 276SW680.

309-41 But see Iowa 228NW11.

309-44 [a] **Charge for perpetual care of lot.**-Twenty-five dollars to be paid to cemetery association held reasonable. 134Misc112, 235NYS455.

310-48 161La162, 108S322; 161La762, 109S482. [a] (4) Services of expert accountants. 161La162, 108S322.

310-49 214Ala243, 107S210; 161La762, 109S482. [a] (2) Under Nevada statute fee of attorney for services rendered to estate of decedent is charge on estate to be allowed by court. 50Nev16, 248P 891. (3) Where legatees employed attorney to compel decedent's daughter to restore to estate proceeds of certificate of deposit, services were for benefit of estate and claim therefor is properly allowed. 226AppDiv291, 234NYS680. [c] (2) Superior court, in settling accounts of joint administrators, has discretion to apportion allowance of attorney's fees between their attorneys. 94CalA 617, 271P762. [d] **Estate receiving benefit of executor's contract for construction of building** is liable therefor. Tex CivA 12SW(2d)659.

311-55 233Ky568, 26SW(2d)487 (at-

torney's fees for defeating claims against estate); 136Misc110, 240NYS 532. See also 133Misc72, 230NYS774. [a] (2) Other instances. 136Misc110, 240NYS532. [b] But see 161La762, 109 S482.

311-57 Utah 283P1055. [b] **That heirs required employment of accountants to audit estate's accounts** is conclusive on them on question of necessity for services. 161La162, 108S322.

311-61 161La762, 109S482; **Miss** 126S 18; 50Nev16, 248P891 (attorney's services to estate); 195NC822, 143SE835. [e] (3) Fee of one thousand dollars held reasonable when estate amounted to nearly forty thousand dollars and its affairs almost monopolized time for year. 161La162, 108S322. (4) Allowance of four thousand dollars to attorneys for services in defending will contest has been held reasonable. 87CalA80, 261P 1044. (5) Fee of twenty thousand dollars is reasonable where services extended over period of nine years involving estate of over four hundred thousand. 234Ky597, 28SW(2d)760. (6) In general. **Wis** 229NW539. [i] **Extraordinary services.**–50Nev16, 248P891. [j] **In Maryland.**–155Md1, 141A396.

312-62 94CalA617, 271P762.

312-63½-New. Court is not justified in decreeing to plaintiff's attorney to be paid out of funds in his hands as special commissioner the proceeds of sale of lands to pay debts of estate a sum for services rendered in the suit prosecuted for such sale where will gave executor power to sell to pay debts if necessary and suit was unnecessary for any purpose in view of statute. 100 WVa612, 131SE455.

312-63½-New. This is especially true where attorney undertook to represent creditors of estate in a way wholly inconsistent with his duty to the estate. 100WVa612, 131SE455.

312-64 99Vt353, 132A136.

312-65 98NJEq218, 130A222. [a] (8) Husband's executor who paid taxes and interest on property left to husband by wife with remainder to mother by will making husband executor is entitled to reimbursement from estate of wife who died before husband. 217Ky733, 290 SW694.

313-70 126Misc54, 213NYS286 (principal).

313-71 27Ariz484, 232P56.

313-72 27Ariz484, 232P56.

314-76 126Misc54, 213NYS286 (legal expenses chargeable to estate).

314-77 126Misc54, 213NYS286 (compensation fixed by will).

314-79 27Ariz484, 232P56; **Iowa** 224 NW543 (fees for services in litigation); 13PaDist&Co 354 (amount of fee is within discretion of auditing judge).

315-95½-New. Attorneys for executrix are not entitled to fees for services in contesting a claim of heirship through an alleged illegitimate son of deceased. **Iowa** 224NW543.

315-96 151Md644, 135A841, 50ALR932.

315-99 Iowa 224NW38. [i] (2) Interest not allowed upon unliquidated claim. 56ND927, 220NW128.

316-3 178Ark63, 10SW(2d)35.

316-8½-New. Under the common law, a creditor, becoming the executor or administrator of a debtor's estate, may retain so much of the assets in his hands as may pay his debts. 178Ark63, 10 SW(2d)35.

316-8½-New. After the executor enters on and performs his duties, he has a claim against the estate based on a legal consideration. 153SC203, 150SE693.

317-19 Ark 32SW(2d)622; **CalA** 285P 753; 241 IllA216; 222MoA474, 280SW 711; **MoA** 29SW(2d)191; **Wash** 290P 870. [a] (2) Purpose of exhibiting claim to personal representative is for classification. **MoA** 18W(2d)235. [e] 82Mont574, 268P787. [f] **In Texas.**–CivA 27SW(2d)284.

318-22 Wash 290P870.

318-23 207 Iowa84, 218NW537 (administrator may voluntarily pay valid claim not filed).

319-32 [a] **Liberal construction** must be given statute relating to filing claims to effectuate justice. **Iowa** 231NW344.

319-35½-New. Under some statutes exhibition of a claim to the administrator for the purpose of an allowance, and presentation of the demand to the court, are necessary preliminaries to a formal notice of the intent to establish the claim. **MoA** 14SW(2d)710.

321-59 Contra **NJSup** 151A385.

321-60 152Miss320, 120S188 (statute construed as not applying to claims on which suit had been brought against decedent).

321-61 NJSup 151A385.

321-62 38Wyo 481, 269P418, 421 [quot CJ].

321-65½-New. A statute requiring presentation of a claim on which a suit is pending at the time of death is mandatory. 55ND680, 215NW151.

321-65½-New. and no recovery can be had on such claim without proof of presentation. 55ND680, 215NW151.

321-66 SD 228NW380.

322-70 135Wash124, 237P21, 41ALR 163.

322-71 80Mont159, 260P128.

323-73 87Colo 207, 286P109; 140Miss 779, 106S519. [a] (5) Claim against deceased director of national bank for damages for violation of banking laws. 36F(2d)367.

323-78 111Conn649, 151A179; **Wash** 291P717.

323-79 205 Iowa748, 218NW280.

323-82 166Minn200, 207NW326. [d] **Covenant against encumbrances.–SD** 228 NW380. [e] **Statute making heirs and devisees of covenantor liable to extent of land descending and devised** does not authorize suit unless claim is presented in ordinary course of administration. **SD** 228NW380.

323-83 MoA 22SW(2d)209 (where stranger to partnership acts as administrator of partnership estate); 82Mont 406, 267P952.

323-85 145Miss652, 110S211.

324-99 37F(2d)527; 45 Ida724, 265P 697.

324-1 Cal 286P1008.

324-2 Me 149A833(2dcase).

324-3 69Utah130, 252P891, 50ALR641.

324-9 200 Iowa620, 203NW307.

324-12 141Miss795, 105S850.

325-15½-New. Where a will particularly directs payment of a certain claim, such claim need not be presented for allowance. 58ND501, 226NW485, 65 ALR852.

325-23 117Nebr189, 220NW265, 266 [quotCJ].

325-27 172Minn231, 215NW223; 140 Miss779, 106S519; 80Mont159, 260P128; 56ND207, 216NW895. [q] (1) 16F(2d) 997 (stockholder of national bank). [cc] **Uncertainty as to amount.**–172Minn231, 215NW223.

327-29 140Miss779, 106S519; **MoA** 281 SW144.

327-30 [g] **Claim against deceased stockholder of bank on his agreement indemnifying bank** not filed prematurely, though demand against bank to collect and for payment not made until after claim filed. 201 Iowa670, 207NW785.

328-34 56ND207, 216NW895; **SD** 228 NW380; **Wash** 291P717. [b] See also 170Minn101, 212NW29.

329-39 111Conn649, 151A179; 241 IllA 216; 201 Iowa670, 207NW785.

330-43½-New. A claim for payments in lieu of alimony falling due under a contract therefor, after the expiration of the time allowed for presentation of claims and before the closing of administration, may be presented as a supplemental claim without notice to the personal representatives. 172Minn231, 215NW223.

330-47 80Mont27, 257P1025.

330-51 174Ark1052, 298SW870; 207 Iowa84, 218NW537; 34NM501, 284P 1019; 152Wash47, 277P79. [a] (10) 54 SD334, 223NW212; 54SD339, 223NW 214. (11) Claim by vendee for refund of purchase money paid upon default in contract by vendor's heir. 81CalA786, 254P684. (12) Claim for collateral for debt satisfied by decedent's death. 150 Wash391, 273P524. (13) Claims for sums properly disbursed by administratrix in course of administration. 219 Ala70, 121S80. [b] **Claims arising from continuance of decedent's business.**–207 Iowa84, 218NW537.

331-54½-New. Where the widow who was surety on the husband's mortgage paid deficiency judgment on foreclosure after his death, she became subrogated to the rights of the creditor with immediate right to file a claim against the husband's estate and have it established as a claim of third class. 202 Iowa611, 210 NW810.

331-54½-New. A claim against an administrator, who gave a warranty deed to land to which the estate did not have a good title, is a claim against the estate only when so adjudicated and need not be presented to the executor and approved by the probate court in the first instance. **TexCivA** 280SW911.

331-55 Miss 130S484; 133Misc72, 230 NYS774. [f] **Approval and allowance by surrogate held necessary.**–132Misc 748, 230NYS329; 132Misc749, 230NYS 330; 132Misc335, 230NYS332. [g] **Filing of claim not prerequisite to allowance and payment.**–Iowa 232NW640.

331-56 213Ala206, 104S420.

332-59 MoA 21SW(2d)777. [i] **Judgment for attorney's fees** in action pending at time of defendant's death and not filed against his estate is barred. 208 Cal 453, 281P1022.

332-62½-New. Holder of judgment lien on specific property may present claim to personal representative for allowance; claim to be satisfied out of property subject to judgment. **Mont** 289P566.

332-66 See also 175Minn224, 222NW 68.

332-67 [b] **In Arizona.**–289P989.

333-69 213Ala206, 104S420; 181Ark 620, 27SW(2d)83; 43 Ida789, 255P305; **Ind** 165NE547; **ND** 232NW894; **Okl** 245P595. [a] (6) Attorney's claim for fees secured by lien on money held by administrator. 69Utah130, 252P891, 50 ALR641. (7) Assignment of life insurance policy as security. **ND** 232NW894. [b] (4) Vendor in executory contract reserving legal title may subject property to payment of purchase price without presenting claim. 144 Okl 150, 289P721. [k] **CalA** 273P1070.

334-72 [a] **Foreclosure by suit where claim is not presented and approved** is required under some statutes. 80Colo 223, 249P1095.

334-73 175Minn524, 222NW68; 116 Okl 74, 243P512; 49RI 137, 140A913, 915 [citCJ].

335-76 195Cal 132, 231P987; 135Wash 124, 237P21, 22, 41ALR163 [quotCyc]; 193Wis286, 214NW438.

335-77 77Colo 141, 235P345; 135Wash 124, 237P21, 22, 41ALR163 [quotCyc] (son's claim for money paid to father as guardian and misappropriated by him).

335-79 135Wash124, 237P21, 22 [quot Cyc].

335-80 135Wash124, 237P21, 22 [quot Cyc].

335-81 135Wash124, 237P21, 22, 41 ALR163 [quotCyc] (statute applies to every character of claim).

335-82 135Wash124, 237P21, 22 [quot Cyc].

336-83 135Wash124, 237P21, 22 [quot Cyc].

336-85 135Wash124, 237P21, 22 [quot Cyc].

336-86 135Wash124, 237P21, 22 [quot Cyc].

336-89 [f] (2) Foreign corporation which has designated agent in state for service of process is not considered "out of state" so as to be permitted to file claim more than specified time after notice to creditors. 45 Ida159, 261P239.

336-89½-New. Statute of nonclaim does not apply to decree against personal representative of deceased administratrix for amount due estate of latter's intestate. 214Ala155, 107S64.

336-90 217Ala374, 115S877; 168Ark 251, 270SW537; 180Ark68, 20SW(2d) 645; 244 IllA302; 248 IllA379; **IndA** 169NE469; 202 Iowa611, 210NW810; 122Kan577, 253P606; 222MoA474, 280 SW711; 220MoA332, 286SW146; 53 ND257, 205NW682, 41ALR177; 99Vt 294, 131A794; 153Wash625, 280P70; **Wash** 292P116 (strict compliance); 194 Wis275, 215NW584. See also 244 IllA 276. [c] (2) Washington statute ap-

plies to every character of claim against executors and administrators. 135**Wash** 124, 237**P**21. [e] 135**Wash**124, 237**P**21. [f] (6) Statute barring claims not presented in time, except those not due or contingent, does not bar superadded liability of deceased on shares in bank, where bank's insolvency occurred after death. 53**ND**257, 205**NW**682, 41**ALR** 177; (7) Ten-year statute held applicable only where estate not probated. 248**Mich**393, 227**NW**752. (8) Statute of nonclaim is generally more rigorously applied than general statute of limitations. **Nebr** 231**NW**833. [g] **Held timely.**–48**Philippine**861. [h] **Claim for deficiency after foreclosure of chattel mortgage** must be presented within one month after deficiency is ascertained. 116 **Okl** 74, 243**P**512. [i] **Is in effect statute of limitation** and also rule of law and rule of property. 45 **Ida**159, 261**P**239. [j] **Claim exhibited and filed on last day of limitation period** satisfies statute as to time though affidavit of officer as to fact of service is not made till day after expiration of period limited. **MoA** 1**SW(2d)**235. [k] **Administratrix's payment of claim against estate before filing** has been held not acknowledgment estopping administratrix to assert failure to comply with statute of nonclaim. **Wash** 292**P**116.

337–91 116**Nebr**254, 216**NW**826.

337–92 329 **Ill** 93, 160**NE**172; 56**ND** 207, 216**NW**895; 135**Wash**124, 237**P**21, 22 [quotCJ].

337–93 216**Ky**557, 288**SW**312.

337–95½–New. In some jurisdictions statutes require claims to be exhibited within time limited by the court. 237 **Mich**225, 211**NW**663.

337–99 202 **Iowa**611, 210**NW**810.

338–1½–New. In Illinois, a recovery on claim against decedent, not filed within statutory period, is limited to property not inventoried. 319 **Ill** 437, 150 **NE**435.

338–1⅓–New. After expiration of time allowed original administrator had expired during his lifetime, time for payment of debts cannot be extended to new administrator. 99**Vt**294, 131**A**794.

338–1¼–New. Where sister's delay in presenting claim on note of deceased brother operated to advantage of deceased and his devisees, plea of laches could not be sustained. 233**Ky**540, 26**SW(2d)** 32.

338–7 But see 33**NM**248, 264**P**959. [d] **Claim for board and services rendered testator** must be presented either before or within twelve months after defendant's qualification as executrix. 128**Me** 272, 147**A**159.

338–11 [b] (2) In Mississippi filing of proof of publication of notice is necessary to start statute running under amendment to statute. 147**Miss**673, 112 **S**692. (3) Limitation of six months is not set in motion unless such proof is filed within six months after first publication of notice. 147**Miss**673, 112**S**692. (4) In Mississippi filing of proof of publication of notice is necessary to start statute running under amendment of statute. 151**Miss**585, 118**S**420.

339–20½–New. An heir's equitable claim for contribution or exoneration from a personal estate for the amount paid on decedent's mortgage to prevent foreclosure, filed within the statutory time from the time of such payment, is timely. 219**Ala**70, 121**S**80.

339–22 321 **Ill** 612, 152**NE**539, 47**ALR** 891; 127**Kan**593, 274**P**284 (pendency or dismissal of former action held not to toll statute); 220**MoA**332, 286**SW**146.

339–23 122**Kan**577, 253**P**606.

339–24½–New. Gifts are not barred by nonclaim for seven years. 106**Conn**276, 137**A**767.

341–51 222**MoA**474, 280**SW**711.

341–52 But see 122**Kan**563, 253**P**426.

341–59 77**Colo** 191, 235**P**344 (wife of decedent).

341–65 196**Wis**275, 220**NW**538.

342–68 253 **Ill**229.

343–87 45**Philippine**246.

343–2 **Miss** 130**S**484; 143**Wash**449, 255 **P**1035, 53**ALR**564. [a] **Effect of notice.**–**SD** 231**NW**942.

344–13 284**Pa**500, 131**A**381, 383, 42**ALR** 922 [quotCJ].

345–38 See also 45**Philippine**246.

346–51½–New. A claimant who litigated his claim against a general administrator will be deemed to have had knowledge of notice to creditors. 34 **Wyo** 317, 243**P**130.

346–54 [g] (2) Where exhibition of claim to administrator and presentation of demand to court are made within one year, as required by statute, notice of intent to present claim for allowance at next term is waived by administrator's appearing in court on merits, even though year has then expired. **MoA** 14**SW(2d)**710. (3) Where claim is so exhibited and presented, notice to administrator of intent to present claim for allowance at next term is waived by administrator's voluntary appearance on only issue involved in case, which was sufficiency of exhibition of claim and of its presentation in court. **MoA** 14**SW(2d)**710.

346–55 **Miss** 130**S**486.

347–58 147**Miss**673, 112**S**692; **MoA** 29 **SW(2d)**191. See also 46**Philippine**63; 46 **Philippine**908. [c] **In Missouri.**–321**Mo** 1126, 14**SW(2d)**990. [d] **Acts not amounting to presentation.**–**Ark** 32**SW** (2d)622.

347–59 [b] **Sufficient presentation.**–**MoA** 1**SW(2d)**235.

347–64 [g] **Presentation to representative's agent.**–83**NH**467, 144**A**266. [h] **Delivery of claim to administrator by probate judge** after it has been presented to him and filed is sufficient service of notice on administrator. **MoA** 14**SW** (2d)710.

348–71 **Wash** 290**P**870.

349–82 37**F(2d)**527; 219**Ala**70, 121**S** 80; 83**CalA**87, 256**P**479; 87**CalA**736, 262 **P**800; **CalA** 290**P**309; 111**Conn**649, 151 **A**179; 206 **Iowa**514, 219**NW**305; 151 **Miss**585, 118**S**420; 315**Mo** 1091, 287**SW** 610; 221**MoA**355, 273**SW**240; 86**Mont** 260, 283**P**423(2dcase); 83**NH**467, 144**A** 266; 129 **Okl** 37, 263**P**443; 32**Wyo** 167, 238**P**540, 541 [citCJ]. [u] **Motion to revive action as against executor** is not presentation of claim under statute. 38 **Wyo** 481, 269**P**418. [v] **Sufficiency is not tested by rules of pleading.**–98**CalA** 278, 276**P**1081. [w] **If executor desires more information,** he must demand proofs before acting on claim. 86**Mont** 260, 283**P**423(2dcase).

350–83 111**Conn**649, 151**A**179; 141 **Okl** 188, 284**P**638 (nature, amount, and enough to bar another action for same demand held sufficient); **TexCivA** 10**SW** **(2d)**136; **Wash** 289**P**1000. [a] (1) 214**Ala** 81, 106**S**496. (10) Other statements held sufficient. **CalA** 258**P**125; 87**CalA**736, 262**P**800; 83**CalA**87, 256**P**479; **CalA** 283 **P**949; 86**Mont**260, 283**P**423(2dcase); 83 **NH**467, 144**A**266; 141 **Okl** 188, 284**P** 638. [b] (2) failure to set forth provisions of contract on which claim was based. 37**F(2d)**527.

351–87 317**Mo** 972, 298**SW**56; 13**PaDist &Co** 237.

351–95 221**MoA**355, 273**SW**240.

352–96½–New. Sworn claim of widow setting forth promise by husband to keep up life insurance payable to her has been held not inconsistent with proof of former agreement to same effect. 284**Pa**384, 131**A**378.

352–1 77**CalA**584, 247**P**211. [e] **Sufficiency of copy.**–53**SD**200, 220**NW**527.

354–21 **Ala** 130**S**196; **Miss** 130**S**486; 141 **Okl** 188, 284**P**638 (claim not materially changed); 284**Pa**384, 131**A**378. [f] **Statute requiring court order authorizing amendment** of affidavits applies to amendments after expiration of six months' period. **Miss** 130**S**486.

354–25 **Iowa** 229**NW**235 (amendment must be germane to original claim and must not change cause of action).

355–27½–New. The question of the right of a creditor to make substantial change in his demand by amending his claim after the period for presenting claims is expired is immaterial where the claim sued on is substantially the one exhibited. 83**NH**467, 144**A**266.

355–30 214**Ky**691, 283**SW**1066; 124 **Or** 193, 264**P**371.

355–34 208**Ky**594, 271**SW**666.

356–38 [a] 219**Ala**327, 122**S**340.

356–39½–New. Where a personal representative wishes to raise the question of insufficiency of, or lack of, verification and demand for payment, the proper procedure is to file a motion for the rule to require verification. 226**Ky**722, 11 **SW(2d)**912.

356–45 209**Ky**247, 272**SW**720 (additional affidavit held essential). [a] (2) The additional affidavit may be in form of deposition. 209**Ky**247, 272**SW**720.

356–48 See also 203 **Iowa**447, 212**NW** 684. But see **MoA** 296**SW**269; 134**Misc** 112, 235**NYS**455. [b] 168**Ark**251, 270 **SW**537.

356–50 214**Ky**691, 283**SW**1066.

357–66 85 **IndA**361, 151**NE**15.

357–67 **Md** 148**A**585.

357–74 227**Ky**71, 11**SW(2d)**990.

358–92 [a] **Deposition** is sufficient where statute provides for affidavit. 227 **Ky**71, 11**SW(2d)**990.

358–94 216**Ky**454, 288**SW**285.

359–95½–New. , an affidavit asserting a contingent or unliquidated claim must show the facts on which based. 129 **Misc**845, 223**NYS**470.

359–96 168**Ark**251, 270**SW**537.

359–98 168**Ark**251, 270**SW**537. See also 128 **Or**183, 272**P**278.

359–1 221**MoA**355, 273**SW**240; **TexCivA** 5**SW(2d)**793.

359–3 168**Ark**251, 270**SW**537.

359–5 221**MoA**355, 273**SW**240 (where credits are not shown).

360–25 118 **Okl** 73, 246**P**611 (affidavit held sufficient).

360–30 219**Ala**70, 121**S**80; 231**Ky**808, 22**SW(2d)**259 (court could require amendment of affidavit defective for failure to state absence of usury, at any time before distribution).

361–36 6**PaDist&Co** 297.

361–37 218**Ala**500, 119**S**232.

361–37½–New. Presumption is that executor's payment to legatee is in settlement of his obligation, in absence of evidence explaining payment. 158**La**969, 105**S**31.

361–37⅓–New. Due presentation, including verification, of a claim recognized and paid by the executor, is presumed, in the absence of contrary proof. 218**Ala**500, 119**S**232.

361–50 [a] **RI** 129**A**337.

361–51 [a] **Evidence held sufficient** to show authority of attorney to receive claim. 83**NH**467, 144**A**266.

361–53½–New. Evidence held sufficient to support finding that there was no consideration for deceased mother-in-law's note to son-in-law. 217**Ky**258, 289 **SW**275.

362–56½–New. In Philippines the court should permit withdrawal of a claim secured by a real estate mortgage which, through mistake, was presented and allowed as unsecured claim. 50**Philippine** 579.

362–65 168**Minn**298, 210**NW**105. [d] **Mortgage lien not waived** by filing claim with administrator. 200**Wis**211, 228 **NW**135, 68**ALR**267.

363–62 **Nebr** 231**NW**833.

363–68½–New. Under statutes in some jurisdictions no pleading to presentation of claim is required to be made by executor. 315**Mo** 1091, 287**SW**610.

363–72 **Ariz** 285**P** 684; **CalA** 284**P** 222; **CalA** 285**P**753 (applicable to State); 321 **Ill** 612, 152**NE**539, 47**ALR** 891; 132 **Okl** 286, 270**P**554; **Tex CommA** 15**SW(2d)**557; 143**Wash**449, 255**P**1035, 53**ALR**564; **Wash** 292**P**116; 34**Wyo** 317, 243**P**130. But see 93**CalA** 97, 269**P**468; **NJSup** 151**A**385. [p] **Rule held not applicable** to wife's claim for alimony. 215**Ala**581, 112**S**190. [q] **Executor's knowledge of decedent's liability** makes executor responsible for not protecting creditor although creditor failed to present claim. 137**Misc**727, 244**NYS**363.

364–75 329 **Ill** 93, 160**NE**172.

364–83½–New. A statute requiring affidavits supporting a claim to be filed with an administrator and payment of claim demanded of him applies only in cases where a personal representative of a deceased debtor is sued, and has no bearing on a case where only others jointly liable with decedent are made parties defendant. 227**Ky**61, 11**SW(2d)** 994.

364–90 **CalA** 285**P**753; 222**MoA**474, 280**SW**711; 50**RI** 347, 147**A**872. [b] (10) Creditor's absence from state. 54 **SD**153, 222**NW**686 (where he had notice

of time for filing claims).

365-91 [a] (4) Where testator's son, by fraud of one appointed by will to assist trustee and give son information, was prevented from presenting just claim to commissioners of claims, equity may entertain jurisdiction in suit against trustee for accounting. 241**Mich** 216, 217**NW**71.

366-92 203 **Iowa**503, 211**NW**234; **Iowa** 231**NW**344 ("special circumstances" in statute construed); 116**Nebr**254, 216 **NW**826. [c] **Merits of claim** are not open on petition to revive commission. 228**Mich**393, 227**NW**752. [d] **Foreign surety company has been held not out of state within statute** excusing failure to file claim. **SD** 231**NW**942.

366-93 38**F(2d)**457. [c] (1) 203 **Iowa** 503, 211**NW**234; 205 **Iowa**16, 212**NW** 138; **Iowa** 229**NW**679 (statute liberally construed). (2) 203 **Iowa**503, 211 **NW**234. (4) **Iowa** 229**NW**679. (8) That claimant against unsettled solvent estate did not know of death of debtor and had no reason to know it warrants relief under statute. 203 **Iowa**503, 211 **NW**234. (9) That executor promised that claim would be paid is sufficient excuse. 208 **Iowa**785, 225**NW**848. (10) Mistake of law not sufficient. **Iowa** 229 **NW**679. (11) Justness of claim is not in itself sufficient equity. **Iowa** 229 **NW**853. [d] **In New York.**–134**Misc**393, 235**NYS**756. [e] **Circumstances not warranting equitable relief.–Iowa** 229**NW** 853.

366-93½-New. Some statutes provide that claimants who, through peculiar circumstances, have failed to file claims within the statutory time may file them thereafter. 202 **Iowa**117, 209**NW**297. [a] **Circumstances sufficient to excuse failure.**–202 **Iowa**117, 209**NW**297.

366-93⅓-New. Ill health of claimant is not necessarily such peculiar circumstance as will justify equitable relief from failure to file a claim in time. 205 **Iowa**16, 212**NW**138.

366-93¼-New. Permission to file claim after expiration of time limit is essential to allowance of belated claim. **Nebr** 231**NW**833.

366-95 116**Nebr**254, 216**NW**826.

367-98 197**Wis**319, 222**NW**314 (county court is governed by St. [1927] § 313.03 (1), regarding extension of time for filing claims against estate). See also 204 **Iowa**847, 216**NW**25.

367-4 201 **Iowa**324, 207**NW**355 (evidence insufficient); 208 **Iowa**1172, 227 **NW**93, 66**ALR**1410; **Nebr** 231**NW**833; 195**Wis**41, 217**NW**708. [b] (2) Showing of nonresidence and want of knowledge of notice to creditors is insufficient where creditor was chargeable with knowledge by reason of litigation with administrator. 34**Wyo** 317, 243**P**130. (3) Petitions showing that only cause for extension was fact that petitioners lived in San Francisco and did not learn of testator's death till some time after his death, and that claimant did not know probate proceedings had been instituted, is insufficient to show good cause for extension. 197**Wis**319, 222 **NW**314. (4) Evidence held insufficient to warrant relief. 208 **Iowa**1172, 227 **NW**93, 66**ALR**1410. (5) Mere assertion of validity of claim and ignorance of order barring claims. **Nebr** 231**NW**833. [d] **Affidavit of creditor** (1) alleging nonresidence and want of knowledge of notice to creditors makes prima facie case for filing of claim before distribution. 34**Wyo** 317, 243**P**130. (2) Court is not bound by such affidavit where it appears that creditor had knowledge of notice to creditors or must be deemed to have such knowledge. 34**Wyo** 317, 243 **P**130. [e] **Peculiar circumstances of each case** determine claimant's right to relief. 208 **Iowa**1172, 227**NW**93, 66**ALR** 1410. [f] **Good cause is analogous to that required by equity in granting new trial.–Nebr** 231**NW**837(1stcase).

367-5 208 **Iowa**1172, 227**NW**93, 66**ALR** 1410 (mere fact of estate being solvent and unsettled held insufficient).

367-6 208 **Iowa**1172, 227**NW**93, 66**ALR** 1410 (knowledge of facts sufficient to put claimant on his guard and suggest filing of claim).

368-10 205 **Iowa**16, 212**NW**138; 174 **Minn**102, 218**NW**456; 195**Wis**41, 217 **NW**708. But see 204 **Iowa**847, 216 **NW**25.

368-11 50**RI** 23, 144**A**673.

368-14 50**RI** 23, 144**A**673 (discretion held not abused).

368-15½-New. It is not the policy of the law to render solvent estates insolvent by allowance of claims presented after expiration of one year from notice of administration. 207 **Iowa**84, 218 **NW**537.

368-17 See also 204 **Iowa**847, 216 **NW**25.

368-18½-New. Order granting permission to file belated claim is not final or appealable. **Nebr** 231**NW**833.

368-19 **Nebr** 231**NW**833. [a] **Trial de novo on appeal** is authorized under some statutes. **Nebr** 231**NW**833.

370-31 201 **Iowa**670, 207**NW**785; **Iowa** 228**NW**274; 132 **Okl** 286, 270**P**554.

370-34 124 **Or**193, 264**P**371.

370-35 222**MoA**474, 280**SW**711; 124 **Or** 193, 264**P**371; 143**Wash**449, 255**P**1035, 53**ALR**564; 38**Wyo** 481, 269**P**418, 422 [quotCyc]. [a] (2) Personal representative cannot dispense with filing of claim by agreement with creditor. 222 **MoA**474, 280**SW**711.

371-36 But see 205**Cal** 276, 270**P**939, 60 **ALR**730.

371-40 222**MoA**474, 280**SW**711.

371-44 98**Fla**914, 124**S**464 (executor's payment of interest on decedent mortgagor's notes held waiver of formal presentation thereof).

372-45 87**CalA**736, 262**P**800.

372-46 208**Ky**594, 271**SW**666 (verification waived). [a] (2) Right to written notice is waived by appearance in court relative to merits. **MoA** 1**SW(2d)**235. [c] **In Missouri.**–321**Mo** 1126, 14**SW(2d)** 990.

372-47½-New. Where demand has been exhibited to an agent of an administrator or executor and receipt of bill is admitted or established, lack of registration of notice of claim is immaterial. 83**NH**467, 144**A**266.

372-47⅓-New. Neither the executor nor the heirs are estopped to set up failure to file claim within the time limited in the absence of false representations or reliance thereon. **SD** 228**NW**380.

372-49 [e] **Apprizing probate court of claims allowed** is commendable, though statute requires only return of claims presented. 103**Conn**226, 130**A**157. [f] **Executor must have claims satisfactorily established before allowing them.**–217 **AppDiv**602, 216**NYS**704. [g] **Executors are under duty** to resist payment of moral obligations which do not impose legal liability against estate. 251**NY**257, 167**NE**434. [h] **Proof necessary in allowing claims.**–Executors paying claims are bound to exercise proper care, and must act on satisfactory proofs that claim is justly due, and cannot shift burden of proof on objectors merely by allowing claims. 251**NY**257, 167**NE**434. [i] **Executors cannot escape responsibility for inquiry** into validity of notes executed by deceased, payable at death, by relying on words "for value received." 251**NY**257, 167**NE**434.

372-50 See also 207 **Iowa**84, 218**NW** 537.

372-51½-New. A personal representative is authorized under statutes to require presentation of evidence in support of a claim before passing thereon. **SD** 227 **NW**845.

373-56½-New. Payment by administrator of his personal claim against estate with approval of heirs and after consultation with coadministrator. **Iowa** 232**NW**640.

374-74 46 **Ida**74, 266**P**421.

375-82 249**Mich**461, 229**NW**431 (proceedings may be ex parte and without notice).

375-82½-New. In Connecticut appointment of commissioners is in court's discretion in case of solvent estate. 105 **Conn**595, 136**A**111.

375-95½-New. In Connecticut beneficiary under will is not entitled to notice of meeting of commissioners appointed to determine claim. 105**Conn**595, 136**A** 111.

375-95⅓-New. Neither is a public notice of their meeting required. 105**Conn** 595, 136**A**111.

375-95¼-New. Beneficiary under a will, not objecting to the doings of commissioners, cannot object to notice of meeting given as court directed. 105**Conn** 595, 136**A**111.

375-95⅙-New. Executor appearing at meeting of commissioners represents all the persons interested in the estate. 105 **Conn**595, 136**A**111.

376-3 105**Conn**595, 136**A**111.

376-12 250 **Ill**A82; 122**Kan**577, 253**P** 606; 225**AppDiv**689, 231**NYS**378. [l] **Court has no power** to allow claims barred by limitation or not presented. 195**Cal** 319, 232**P**972. [m] **Claim has been held erroneously dismissed.**–228 **AppDiv**860, 240**NYS**802.

377-13 202 **Iowa**611, 210**NW**810.

377-14 [a] **Court has no authority to allow claim** filed against estate except in regular manner. **CalA** 258**P**120.

377-18½-New. After exhibition of a claim to the court for classification and bare notice of the fact of the claim to an administrator, it is necessary for claimant to serve a second notice for actual hearing of the claim. **MoA** 14 **SW(2d)**710.

377-24½-New. Claims must be supported by direct and positive evidence. 284**Pa**384, 131**A**378.

377-24⅓-New. Under statutes in some jurisdictions the probate judge is not precluded from postponing hearing under his power to limit the time for presentation of claims. 237**Mich**225, 211 **NW**663.

377-24¼-New. Auditing judge is not bound to allow claim against decedent's estate merely because supported by some oral evidence. 291**Pa**223, 139**A**865.

377-24⅕-New. A court is authorized under statutes to require presentation of evidence in support of a claim before passing thereon. **SD** 227**NW**845.

377-26 **TexCivA** 31**SW(2d)**860. [e] **Order authorizing continuance of decedent's private banking business** constitutes allowance of claims of depositors. 207 **Iowa**84, 218**NW**537.

378-33 34**NM**431, 283**P**49.

378-41 9**PaDist&Co** 182.

379-44½-New. A personal representative cannot set off a claim in his favor against a claim which a creditor of decedent has filed in the probate court. 172 **Minn**68, 214**NW**895.

379-45 97**CalA**529, 275**P**977 (claim of executor); 250 **Ill**A82; **TexCivA** 31 **SW(2d)**860 (during term of which order was granted).

380-56½-New. In some jurisdictions the county court may set aside an allowance of claims at any time before approval of the final report or final settlement of the administrator, 82**Colo** 245, 259**P**4.

380-56⅓-New. and even after the term at which the judgment of allowance was made. 82**Colo** 245, 259**P**4.

380-62 82**Colo** 245, 259**P**4; **MoA** 11 **SW(2d)**1066; 45**Philippine**246 (fraud held not established).

381-72 45**Philippine**246.

381-77 **MoA** 11**SW(2d)**1066; 45**Philippine**246 (fraud never presumed).

382-86 But see **Mont** 289**P**566; 118**Tex** 526, 18**SW(2d)**1049. [b] **Not personal judgment.–TexCommnA** 280**SW**543.

382-87 127**Kan**847, 275**P**173; 316**Mo** 1213, 293**SW**405. [g] **Where order allowing claim was unauthorized and void,** court had full jurisdiction to pass on validity of claim on settlement of final account of administrator. **CalA** 258**P**120.

383-90 116**Nebr**84, 215**NW**796.

383-90½-New. **Return of claims allowed** while not conclusive as between personal representative and claimant is high evidence on which court may rely in absence of showing that it should not bind him. 103**Conn**226, 130**A**157.

383-90⅓-New. A claim for certain items of services is barred by allowance of the original bill for other items not including such items. **MoA** 16**SW(2d)** 681 (executor held not to have waived splitting of claimant's demand).

383-90¼-New. A judgment disallowing an application for an order nunc pro tunc allowing a claim against a partnership estate is not res judicata against

the claim of the administrator for credit for payment thereof in proceedings on exceptions to his final account. **MoA** 22 **SW(2d)**209.

383–93 [a] (1) 127**Kan**619, 274**P**256.

383–96 48**Philippine**202; 49**Philippine** 528. But see 45**Philippine**246.

384–5 217**AppDiv**602, 216**NYS**704.

384–6 76**CalA**162, 244**P**156. [a] (3) After administrator's rejection of claim on ground that it was outlawed on its face, court may determine whether statute of limitations prevents enforcement. 98**CalA**278, 276**P**1081. [b] **There is no remedy by motion** to require representative to approve claim which he has rejected. 76**CalA**162, 244**P**156. [c] **Rejection of surviving partner's claim** is in effect denial of his effort to account and denial of his claim to any property in hands of representative. 82**Mont**406, 267**P**952.

384–7½–New. A claim may be abandoned on rejection by the executor and a new one filed and served if done within the prescribed period. 145**Wash**379, 260**P**248.

384–12 But see 68**CalA**367, 229**P**873.

385–14 105**Conn**595, 136**A**111; 45**Philippine**246 [quot Code Civ. Proc. arts 773–776]; 54**SD**153, 222**NW**686.

385–15 MoA 299**SW**80; 45**Philippine** 246; **TexCommnA** 270**SW**1013 (approval has force and effect of final judgment). [b] **In Philippines.**–45**Philippine**246.

385–16 SD 229**NW**520.

385–19½–New. In Connecticut no appeal lies from an action of the probate court accepting report of commissioners. 105**Conn**595, 136**A**111.

385–23 [e] **One asserting claim for injuries due to decedent's negligence** is creditor entitled to appeal. 251**Mich**461, 232**NW**393.

386–25 179**Minn**133, 228**NW**551. [a] **In Philippines.**–45**Philippine**246.

386–27 251**Mich**167, 231**NW**94; 45**Philippine**246 (twenty-five days; Code Civ. Proc. art. 775). [b] **In Philippines.**–45 **Philippine**246. [c] **Delayed appeal for disallowance of claim** against estate is properly refused where debts have been paid. 250**Mich**684, 230**NW**950. [d] **Refusal to reinstate appeal** dismissed for failure to perfect appeal in time is not abuse of discretion. 251**Mich**167, 231 **NW**94.

386–28 [b] **Denial of petition for delayed appeal** held not abuse of discretion. 249**Mich**461, 229**NW**431.

386–28½–New. Writ of certiorari is properly quashed where not issued within statutory time after applicant therefor had admitted due service of notice of order sought to be reviewed. 170 **Minn**101, 212**NW**29.

386–37½–New. Amendment of statement on appeal. **MoA** 28**SW(2d)**425.

387–46 [a] 82**Colo** 448, 261**P**6.

387–47 Wis 230**NW**137.

387–50 MoA 299**SW**80; 45**Philippine** 246. [b] **In Philippines.**–45**Philippine** 246.

387–51 105**Conn**595, 136**A**111.

387–56½–New. Where judgments of dismissal of suits in equity in district court and at law in county court for same relief are reversed in the supreme court and decree for allowance of claim directed in suit in equity, such decree may be certified to county court for allowance as claim against estate with mandate showing reversal of judgment of county court. 114**Nebr**726, 209**NW** 617.

387–56¼–New. Issues of fact arising on the evidence on a claim for services should be submitted to the jury. 234 **Mich**679, 209**NW**141.

387–56¼–New. It is not error to refuse requests to charge where their substance, so far as they are applicable to the issues presented, is fairly covered by the instructions given. 234**Mich**679, 209**NW**141.

387–56⅛–New. A motion for a new trial is properly denied where the verdict is not against the great weight of the evidence. 234**Mich**679, 209**NW**141.

387–56⅛–New. Decision of orphan's court as to sufficiency of evidence to support claim is entitled to same weight as verdict of jury; 284**Pa**384, 131**A**378.

387–56½–New. but its findings, not supported by evidence, will not be sustained. 284**Pa**384, 131**A**378.

387–56⅛–New. When record of proceedings on claim against estate is too hopelessly confused to determine merits, judgment will be reversed and cause remanded for trial de novo. 193**Wis**392, 214**NW**344.

387–56⅛–New. The supreme court is concluded by auditing judge's and orphans' court's finding, supported by evidence. 291**Pa**223, 139**A**865.

387–56⅒–New. Exclusion of evidence cannot be considered in absence of exception. 291**Pa**223, 139**A**865.

387–57 [e] **In Ohio.**–(1) 25 **OhA**426, 158 **NE**279.

387–58 TexCivA 31**SW(2d)**860.

388–66½–New. Where an heir contested a claim allowed by the administrator with partial success, it was held that the probate court should allow attorney's fees to be paid by the estate. 25 **OhA**426, 158**NE**279.

388–67½–New. Auditor may preserve rights of suing creditor for consideration in final settlement. 13**PaDist&Co** 644 (equalization).

388–69 132**Misc**335, 230**NYS**332.

389–75 TexCivA 28**SW(2d)**1108(2d case).

389–77 49**RI** 137, 140**A**913.

389–80 49**RI** 137, 140**A**913.

390–10 [a] **In case of fraud by executor or administrator** heirs not estopped to contest claim by failure to make timely appeal from allowance by commissioners. 45**Philippine**246.

395–19 288**Pa**541, 136**A**798.

395–36 222**Ky**339, 300**SW**881.

395–38½–New. That a nonresident infant was not represented at a hearing on claims against decedent's estate does not make the proceeding irregular in the absence of exceptions to the master's report. 222**Ky**339, 300**SW**881.

396–48 103**Conn**226, 130**A**157.

397–60 87**F(2d)**527.

397–63 121**Kan**346, 246**P**516; 263**Mass** 121, 160**NE**424; 121 **Or**462, 255**P**901; **SD** 227**NW**845. [f] 131**Misc**490, 227 **NYS**690.

397–65½–New. The probate court has no jurisdiction of a claim of a creditor of decedent against the personal representative, although it arose out of transactions between them while the representative was carrying on decedent's business. 172**Minn**68, 214**NW**895.

397–66 See also **Ark** 31**SW(2d)**956.

398–73 220**AppDiv**480, 221**NYS**675.

398–74 But see 144**SC**3, 141**SE**720.

398–78 204 **Iowa**857, 216**NW**33 ("family services" held special defense).

398–81 254**Mass**65, 149**NE**598. [a] **Special statute of limitations** does not bar proof of claim against estate, if executor has not given due notice of appointment. 254**Mass**65, 149**NE**598. [b] **Facts showing applicability of general statute of limitations,** notwithstanding a special statute. 254**Mass**65, 149**NE**598.

398–83 145**Miss**652, 110**S**211.

398–86½–New. Where the executrix did not comply with the statute in paying herself, and otherwise a surplus would have been left, all parties must be before the court for adjudication. 132**Misc**749, 230**NYS**330.

399–90 [a] **Infant,** having interest therein, cannot consent to have evidence taken before his appearance treated as taken since appearance and supplemental citation should issue to him. 132**Misc** 749, 230**NYS**330.

399–93 Iowa 212**NW**371; 204 **Iowa**857, 216**NW**33; 145**Miss**652, 110**S**211; 127 **Misc**238, 216**NYS**605.

399–94 204 **Iowa**857, 216**NW**33 (evidence need not be set out).

399–96 204 **Iowa**857, 216**NW**33; 136 **Misc**581, 240**NYS**380.

399–98 200**Cal** 681, 254**P**557 (averments held sufficient); 127**Misc**238, 216**NYS** 605.

400–10 200**Cal** 681, 254**P**557; **CalA** 290 **P**887(2dcase). But see 136**Misc**581, 240 **NYS**380. [a] **On claim for balance due on open account,** claimant cannot recover upon account stated. 131 **Or**242, 282 **P**772. [b] **Claim for reasonable value of services** does not preclude recovery on book account. **CalA** 290**P**887(2d case).

400–10½–New. In a proceeding to enforce a quantum meruit recovery, based on a contract by decedent to give property in return for services, there must be proof that such a contract has been breached by failure to give the property. 224**AppDiv**754, 230**NYS**33.

400–19 204 **Iowa**857, 216**NW**33. See also 196**NC**39, 144**SE**300(2dcase).

400–20½–New. In a proceeding by a daughter against her mother's estate on a claim for services rendered under an agreement a provision of a codicil to the mother's will stating that she forgave a debt of the daughter in discharge for services is inadmissible to reduce the daughter's claim in the absence of plea of set-off or of allegation that the daughter accepted the provisions of the codicil. 21 **OhA**496, 153**NE**252.

400–20⅓–New. Sworn claim of widow setting forth promise of husband to keep up life insurance payable to her has been held not inconsistent with proof of former agreement of same effect. 284**Pa** 384, 131**A**378.

400–21 245**NYS**626; 284**Pa**73, 130**A** 304; 286**Pa**578, 134**A**442; 148**Va**132, 138**SE**513. [b] (3) That decedent intended executor to have lien on insurance fund for debt due executor, so that executor would not be required to share as other general creditors, if estate was insufficient to pay debt, does not relieve executor from burden of proving claim before surrogate's court. 133**Misc** 424, 232**NYS**675. [c] **Compromise agreement.**–Signer of compromise agreement as to claims has burden of proving that agreement does not bind because other parties did not sign. 132**Misc**335, 230 **NYS**332.

401–23 See also 245**NYS**626.

401–24 222**MoA**912, 6**SW(2d)**1007.

401–26 203 **Iowa**447, 212**NW**684.

401–26½–New. Claim on note properly verified and with check attached showing payment of amount of note to decedent makes a prima facie case for claimant. 216**Ky**454, 288**SW**285.

401–26½–New. Claim on oral promises to pay represented by checks drawn on claimant's bank account and properly verified is properly allowed. 216**Ky**454, 288**SW**285.

401–29½–New. The burden is on the executor to show payment. 204 **Iowa** 490, 215**NW**607.

401–29½–New. The executor has the burden of the defense of payment of a claim. 204 **Iowa**857, 216**NW**33.

401–29¼–New. In proceedings against an estate to establish a claim, it is presumed that one who is not before the court as plaintiff, claimant, or witness is entirely satisfied with the results of the transaction on which the claim is based. 128 **Or**415, 274**P**1098(2dcase).

401–29½–New. In proceedings for the allowance of a claim on an open account in which no technical allegation of account stated is made, the burden rests on claimant to prove his claim by the usual course of evidence. 131 **Or**242, 282**P**772.

401–29⅛–New. In such case proof that the creditor furnished an itemized account to decedent which was not objected to by him does not change the burden of proof. 131 **Or**242, 282**P**772.

401–30 87**CalA**736, 262**P**800; 217**App Div**602, 216**NYS**704.

401–31 136**Misc**245, 242**NYS**266.

401–33 231**Ky**308, 21**SW(2d)**459; **MoA** 276**SW**89; **MoA** 295**SW**495; 227**AppDiv** 637, 235**NYS**731; 11**PaDist&Co** 176. See also **MoA** 297**SW**79. But see **CalA** 279**P**1019. [a] **Periodic payments** for services raises the presumption that these payments were in full satisfaction. 284**Pa**73, 130**A**304.

401–34 CalA 279**P**1019; 204 **Iowa**857, 216**NW**33; 240**Mich**291, 215**NW**358; **MoA** 15**SW(2d)**908; **MoA** 283**SW**461; **MoA** 221**MoA**715, 285**SW**524; **MoA** 297**SW**79; **NJ** 133**A**884. See also 222**MoA**260, 296 **SW**183. [b] **Evidence sufficient** to overcome presumption. 85 **IndA**545, 154 **NE**699. [c] **Rule held not applicable.**–**MoA** 15**SW(2d)**908.

401–34½–New. Where decedent's agreement entitled a child to a sum for "services rendered," the burden of proving that it was an executory gift was on contestants. 132**Misc**335, 230**NYS**332.

401–35 284**Pa**410, 131**A**360; 286**Pa**578, 134**A**442; 96**PaSuper**185 (presumption not applicable to nephew by marriage nursing uncle).

401–33½–New. It will be presumed that receipt of certain sums of money monthly in payment of services rendered for deceased was in full satisfaction of any demand. 286**Pa**578, 134**A**442.

401–38½–New. In an action to recover for boarding and caring for a party, claimant must prove the value of the services. 221**MoA**715, 285**SW**524.

401–40 See 132**Misc**335, 230**NYS**332 (burden is on contestants).

402–41 290**Pa**348, 139**A**114.

402–42 219**Ala**94, 121**S**82.

402–43 201**Cal** 155, 255**P**825; 84 **IndA** 463, 151**NE**349; **Iowa** 212**NW**371; **Mo** 10**SW(2d)**651; **MoA** 275**SW**769 (services); **MoA** 21**SW(2d)**635; 217**AppDiv** 602, 216**NYS**704; 134**Misc**902, 236 **NYS**720 (amount of decedent's estate). [a] (4) Claimant for services rendered decedent, his mother, properly asked whether any part of claim was paid, and whether he was administrator. 85 **IndA**545, 154**NE**699. [d] **Parol evidence.**–8**LaA**426.

402–46 201**Cal** 155, 255**P**825 (invalid will held admissible). See also **CalA** 279**P**1019.

402–46½–New. Evidence as to reasonableness of charge for services rendered decedent is admissible to permit recovery on quantum meruit. **MoA** 17**SW(2d)** 369.

402–47 **CalA** 279**P**1019; 84 **IndA**446, 151**NE**342; 155**Md**243, 141**A**706; **MoA** 21**SW(2d)**635; 21 **OhA**496, 153**NE**252; 187**Wis**640, 205**NW**402. [h] **Where payment is not pleaded.**–40**GaA**571, 150 **SE**561.

402–48 21 **OhA**496, 153**NE**252.

403–51½–New. Evidence of the amount of decedent's estate is inadmissible, 255 **Mass**519, 152**NE**107.

403–51½–New. as is evidence as to injury sustained by claimant in decedent's service. 255**Mass**519, 152**NE**107.

403–52 110**Conn**217, 147**A**673 (purported will). [a] (1) 206 **Iowa**514, 219**NW** 305 (letter held admissible). (2) Admissible to rebut presumption that services were gratuitous. 88 **IndA**138, 161 **NE**571.

403–53 [a] **Admissibilty as corroborative evidence.**–61 **OntL**426, [1928] 1**Dom LR**339.

403–64 [a] **Checks of same amount and date as notes** upon which claim is founded are admissible to prove consideration for notes. 82**Colo** 448, 261**P**6. [b] **Deposit slips** in bank of same amount and date as notes are admissible on question of consideration. 82**Colo** 448, 261**P**6.

403–64½–New. Testimony of letter from executrix's attorney inclosing check, with promise to remit balance, is admissible. **TexCivA** 289**SW**102.

403–66 110**Conn**217, 147**A**673; **DC** 33 **F(2d)**370; 40**GaA**571, 150**SE**561.

404–63½–New. Evidence of declaration or admission of an heir to the estate is admissible to prove claim, when such heir is sole person interested adversely to claimant. 120 **Or**542, 252**P**947.

404–70 [b] **In Ontario.**–62 **OntL**128, [1928] 2**DomLR**838.

404–71 19**F(2d)**857; **NJCh** 134**A**360; 217**AppDiv**229, 216**NY**673; 126**Misc** 741, 215**NYS**419; 132**Misc**335, 230**NYS** 332 (clear, convincing, satisfactory, and fair preponderance of evidence); 245 **NYS**389; 245**NYS**488; 128 **Or**415, 274 **P**1098(2dcase); 284**Pa**73, 130**A**304; 284 **Pa**384, 131**A**378; 286**Pa**578, 134**A**442; 298**Pa**235, 148**A**83 (proof of agreement to give son child's share of estate); 13 **PaDist&Co** 237 (claim for money received by decedent for use of claimant); 187**Wis**425, 204**NW**579. But see 225**App Div**804, 232**NYS**440; 134**Misc**857, 236 **NYS**514. [b] 204**Cal** 55, 266**P**538; 40 **GaA**739, 151**SE**536. (1) 204 **Iowa** 490, 215**NW**607; 216**Ky**454, 288**SW**285; 217**Ky**603, 290**SW**483; **La** 121**S**332; 237 **Mich**225, 211**NW**663; **Miss** 109**S**276; 307**Mo** 234, 270**SW**658; **MoA** 15**SW(2d)** 908; 217**AppDiv**229, 284**NYS**673; 127 **Misc**238, 216**NYS**605; 284**Pa**384, 131**A** 378; 299**Pa**452, 149**A**705. (2) To sustain finding that memorandum entitled claimants to twelve and one half shares, not twelve hundred and twelve as claimed. 87**Colo** 432, 288**P**890. [c] 97**CalA**529, 275**P**977; 99**CalA**579, 278**P** 927; 233 **IllA**94; 203 **Iowa**447, 212**NW** 684; 216**Ky**454, 288**SW**285; 217**Ky**733, 290**SW**694; **Md** 148**A**585; 168**Minn**43, 209**NW**642; 149**Miss**222, 115**S**427 (amount not shown); 307**Mo** 234, 270 **SW**658; **NJCh** 134**A**360; 217**AppDiv** 602, 216**NYS**704; 135**Misc**442, 240**NYS** 215; 136**Misc**581, 240**NYS**380; 136**Misc** 221, 241**NYS**98; 284**Pa**500, 131**A**381; 286**Pa**578, 134**A**442; 298**Pa**235, 148 **A**83 (to establish irrevocable agreement that testator's son should receive child's share); 13**PaDist&Co** 237; **RI** 147**A**875 (to sustain plaintiff's burden of proof); 152**Wash**432, 278**P**156(2d case); 152**Wash**437, 278**P**157; 187**Wis** 425, 204**NW**579 (to prove alleged agreement to will property to illegitimate son); 187**Wis**640, 205**NW**402. [e] **Evidence given by claimant's mother** in support of claim that decedent agreed to make claimant beneficiary of will in consideration of mother's care and education of claimant not sufficient where it does not harmonize with surrounding facts and circumstances. 187**Wis**425, 204**NW**579. [f] **Degree of proof at law and in equity.**–(1) In equity cases involving contract with decedent, proof of contract must be clear, convincing, and satisfactory. 204 **Iowa**231, 213**NW** 380.

405–72 216**Ky**95, 287**SW**239; 284**Pa**73, 130**A**304; 288**Pa**541, 136**A**798; 187**Wis** 425, 204**NW**579 (holding mother's testimony on issue of agreement to will property to illegitimate son must be harmonized with surrounding circumstances to establish credibility). [c] **Declarations insufficient basis for contract to bequeath property** unless corroborated fully by disinterested witnesses. 126**Misc**741, 215**NYS**419.

405–73 [b] (2) To show that payment by administrator of taxes and insurance was made with expectation of reimbursement. 217**MoA**587, 272**SW**1056. [d] **Evidence held insufficient** to sustain claim of husband for payment of debts of wife's estate where evidence showed moneys of both parties were intermingled as a common fund and bills of both parties paid out of such fund. 217 **MoA**587, 272**SW**1056.

405–74½–New. , or where the evidence of interested witnesses is uncorroborated. 126**Misc**741, 215**NYS**419.

405–79 1**LaA**734; 126**Misc**741, 215**NYS** 419; **NB** [1928] 4**DomLR**214.

405–80 34**NM**383, 281**P**463 (contract for attorney's contingent fee); 120 **Or** 542, 252**P**947; 121 **Or**462, 255**P**901; 126 **Or**456, 270**P**534; 128 **Or**415, 274**P**1098 (2dcase); **BC** [1930] 3**DomLR**966. See also 8**LaA**704. [a] (3) Claimant's testimony that claim had not been paid is not required to be corroborated. 120 **Or**542, 252**P**947. (4) Corroboration as to one item does not constitute corroboration as to another. **Alta** [1928] 1**DomLR**839. (5) Corroborative evidence held insufficient to warrant recovery. 153**Va**254, 149**SE**478. [e] **Corroboration held sufficient.**–120 **Or** 542, 252**P**947. [f] **Testimony of employee of corporation regarding corporation's claim** is not testimony of claimant within statute. 131 **Or**242, 282**P** 772. [g] **Uncorroborated testimony of copartner of assignee of partnership claim** held insufficient. 153**Va**254, 149 **SE**478.

405–81 See also **NB** [1928] 1**DomLR**72.

405–81½–New. Sufficiency of corroboration of testimony by plaintiff, seeking to recover loans to deceased, depends on the facts of the particular case. 148**Va** 132, 138**SE**513.

405–81½–New. Plaintiff cannot recover loan to deceased, unless his testimony is corroborated on material elements. 148 **Va**132, 138**SE**513.

406–83 167**Minn**417, 209**NW**1; 13**Pa Dist&Co** 237.

406–84 167**Minn**417, 209**NW**1; 170**Minn** 451, 212**NW**815; **MoA** 17**SW(2d)**369; 126**Misc**741, 215**NYS**419. [a] 159**La**814, 106**S**315. [b] **NJ** 133**A**884.

406–85 231**Ky**308, 21**SW(2d)**459 (any facts that are equivalent to agreement are sufficient); **MoA** 275**SW**769; 217 **AppDiv**602, 216**NYS**704. [a] **To establish express contract,** evidence must establish expectation of compensation and agreement to pay. 228**Ky**354, 15**SW** **(2d)**289.

406–86 228**Ky**354, 15**SW(2d)**289; **NJCh** 134**A**360; 126**Misc**741, 215**NYS** 419; 224**AppDiv**754, 230**NYS**33; 131 **Or** 261, 282**P**556; 284**Pa**410, 131**A**360; 134 **SC**42, 131**SE**771; 147**Wash**686, 267**P**432. [f] **Loose declarations of decedent** are insufficient to establish oral agreement to pay for services rendered him by plaintiff during lifetime. 284**Pa**410, 131 **A**360.

406–87 231**Ky**308, 21**SW(2d)**459; 217 **AppDiv**602, 216**NYS**704; 286**Pa**578, 134 **A**442. [a] **Claim for wages held enforceable,** but not claim for allowance. 217**AppDiv**602, 216**NYS**704.

407–88 170**Minn**451, 212**NW**815; **MoA** 276**SW**89; 222**MoA**260, 296**SW**183. [b] **Claimant's statement that he had no agreement** with decedent would not affect his right to recover on quantum meruit. 134**Misc**902, 236**NYS**720.

407–89 94**CalA**441, 271**P**374; 126**Misc** 741, 215**NYS**419.

407–90 **MoA** 276**SW**89.

407–91 [a] **Degree of proof should be diminished** as natural obligations and duties are lessened. 231**Ky**308, 21**SW** **(2d)**459.

407–93 [b] **That claimant received small checks** from her aunt, decedent, who lived at niece's rooming and boarding house, tended to show that agreement, though evidence of express contract, was wanting. 231**Ky**308, 21**SW** **(2d)**459.

407–94 198**NC**147, 150**SE**875. [a] **CalA** 258**P**125; 166**Ga**673, 144**SE**168; 88 **IndA**138, 161**NE**571; **IndA** 169**NE**347 (2dcase); 216**Ky**454, 288**SW**285; 217 **Ky**603, 290**SW**483; **Md** 151**A**240; 174 **Minn**272, 219**NW**151; 145**Miss**652, 110 **S**211; **MoA** 276**SW**89; 82**Mont**9, 264**P** 944; 135**Misc**442, 240**NYS**215 (preponderance of evidence); 134**Misc**902, 236**NYS**720; 230**AppDiv**776, 244**NYS** 416; 24 **OhA**408, 157**NE**494; 126 **Or**456, 270**P**534; 96**PaSuper**185; 67**Utah**474, 248**P**122; 188**Wis**4, 205**NW**486. [b](1) **MoA** 293**SW**480; **NJ** 133**A**884; **NJCh** 134**A**360; 222**AppDiv**550, 226**NYS**528; 126**Misc**741, 215**NYS**419; 224**AppDiv** 754, 230**NYS**33; 134**Misc**902, 236**NYS** 720; 136**Misc**581, 240**NYS**380; 119 **Or** 87, 248**P**156; 284**Pa**73, 130**A**304; 288**Pa** 541, 136**A**798; 95**PaSuper**363; 151**Va** 785, 145**SE**249; 147**Wash**686, 267**P**432. (2) To show relationship between parties justifying inference that services were gratuitous. 222**MoA**260, 296**SW** 183.

407–95 204 **Iowa**857, 216**NW**33; 217 **AppDiv**602, 216**NYS**704.

407–96 217**AppDiv**602, 216**NYS**704; 288**Pa**541, 136**A**798.

407–99 100**CalA**593, 280**P**550; 167**Minn** 417, 209**NW**1; 221**MoA**715, 285**SW**524; 133**Misc**77, 230**NYS**781. [a] 234**Ky**448, 28**SW(2d)**494 (to sustain verdict allowing claim); 240**Mich**291, 215**NW**358; 170**Minn**451, 212**NW**815; 221**MoA**715, 285**SW**524; 136**Misc**245, 242**NYS**266. [b] 100**CalA**593, 280**P**550; 167**Minn**417, 209**NW**1; **MoA** 283**SW**461; 133**Misc**77, 230**NYS**781; 134**SC**42, 131**SE**771. [c] **Family relationship not shown.**–170**Ark** 670, 280**SW**635; 20 **OhA**127, 151**NE**782. [d] **Where presumption is overcome,** claimant is then in same position as if services had been rendered by stranger. 126**Misc**741, 215**NYS**419.

403–1½–New. , and statement by grandmother that she did think of charging for services rendered grandchild at time is not conclusive. 24 **OhA** 408, 157**NE**494.

408–2½–New. Testimony not identifying any particular time when care or board was furnished fails to show necessary element for recovery on quantum meruit. 136**Misc**581, 240**NYS**380.

408–9 288**Pa**541, 136**A**798. [d] **In absence of definite evidence** as to offer and acceptance of alleged services, court had duty of determining claimant's right or

of submitting claim to jury. 231Ky308, 21SW(2d)459.

408–11 204 Iowa857, 216NW33.

408–12 206 Iowa514, 219NW305 (in will); 231Ky308, 21SW(2d)459 (case properly submitted to jury).

408–13 231Ky308, 21SW(2d)459 (no recovery authorized on negative finding); 263Mass121, 160NE424; MoA 297 SW79. [a] **Whether amount claimed by child** for care of parents during illness is excessive is for trial court. 67Utah 474, 248P122.

408–15½–New. Court may submit cause to jury on any theory which found substantial support on facts. Iowa 212 NW371.

408–15¼–New. Conflicting testimony as to whether an assignment by decedent to claimant of an indebtedness from a third person was accepted as cash presents a jury question. 131 Or242, 282 P772.

408–17 [g] 217Ky603, 290SW483. [h] **Instructions held sufficient.**–204 Iowa 857, 216NW33. [i] **Instructions held erroneous.**–240Mich291, 215NW358. [j] **Instruction held erroneous.**–MoA 207 SW79.

408–17½–New. Verdict properly directed for plaintiff on uncontradicted testimony. Iowa 233NW28.

408–17½–New. **Further hearing; discretion.** Denial of an application for further hearing, after disallowance of claim to produce absent witnesses is discretionary with court and will not be interfered with in absence of abuse. 187Wis425, 204NW579 (holding no abuse of discretion).

408–17¼–New. Where evidence supporting claim does not meet standard required by higher courts to warrant recovery, motion to dismiss should be granted. 126Misc741, 215NYS419.

410–38 See also 196Wis348, 220NW196.

410–46 121 Or462, 255P901; SD 227 NW845.

411–66½–New. The assignee of the sole heir and of an allowed claim has an interest entitling him to appeal from the allowance of another claim. 33NM102, 263P509.

412–70 46Philippine457.

412–75½–New. The right of circuit judge to allow a delayed appeal under statute is discretionary. 237Mich102, 211NW91 (sufficiency of petition for appeal).

412–84 But see 180Minn195, 230NW 584.

413–87 245 IllA286.

413–92 CalA 290P887(2dcase). [c] **Error in exclusion of evidence** not considered where record does not show questions asked, offer to prove, exclusion by court, or exceptions to rulings. 85 IndA545, 154NE699.

413–93 [a] **In Minnesota.**–170Minn221, 212NW167 (motion to strike case from calendar held properly denied).

413–96½–New. Claimants entering a general appearance in the circuit court approximately three years before moving to dismiss an appeal thereto from the commissioners' allowance of claims against decedent's estate waived appellant's failure to include a certified copy of the commissioners' report in the record of appeal. 245Mich270, 222NW194.

413–97 See also 178Ark63, 10SW(2d) 35.

413–2 245 IllA286.

413–6 MoA 296SW269.

414–10 233Mich346, 206NW480. [d] **Amendment after expiration of time for filing claims** is barred where it states different cause of action than original claim filed in probate court. 317Mo 972, 298SW56.

414–12 [f] (3) Under claim on quantum meruit for services, express contract may be shown to establish that services were to be paid for and as bearing on value parties put on them. 242Mich668, 219NW743. (4) Evidence of claimant in probate court admissible when introduced by adversary. 255 IllA127. (5) Parol contract, by father, to leave to son and son's wife in compensation for services, though void under statute of frauds, may be proved to show that services were not gratuitous. 241Mich39, 216NW384. [i] (3) Evidence held to sustain verdict for full amount of claim for services under express contract for services. 170Minn221, 212NW167. (4) Verdict for services in favor of one not related to deceased, but living in family since childhood, held sustained by evidence. 174Minn272, 219NW151. [k] (2) Delay in framing issues is mere irregularity. 170Minn221, 212NW167. [l] **Complaint.**–170Minn221, 212NW167. [m] **Evidence held sufficient to go to jury:** (1) On question of existence of contract to pay for services and advances. 240Mich506, 215NW370. (2) On question of value of services rendered. 240Mich506, 215NW370. [n] **Requested instructions properly refused.**–174Minn272, 219NW151 (that there could be no recovery for services unless agreement to compensate was established with definiteness as to terms, and by clear, satisfactory, and convincing evidence). [o] **Questions for jury.**–242Mich668, 219NW743. [p] **Sufficiency of evidence.**–242Mich668, 219NW743. [q] **Instructions held not to assume fact in issue.**–MoA 18SW(2d)235. [r] **Instruction held not to permit finding of liability on implied contract not alleged in claim.** MoA 18SW(2d)235. [s] **Evidence held sufficient** to sustain finding that decedent made no payment under antenuptial contract. MoA 18SW(2d)232. [t] **Evidence held sufficient** to sustain finding as to amount due on daughter's claim against father's estate. 180Minn 122, 230NW273.

415–24 [a] (1) 121 Or462, 255P901.

415–25 145Miss652, 110S211.

415–26 187Wis425, 204NW579 (no abuse of discretion shown in denying application to reopen case after decision was made, for purpose of receiving additional evidence). [a] **Administrator procuring unnecessary pleading** by order of court cannot complain of its form or claim it to be abandonment of claim. 145Miss652, 110S211.

415–31½–New. , but if findings are supported by evidence they will not be reversed. 284Pa384, 131A378.

415–31⅓–New. Decision of lower court as to sufficiency of evidence to support claim is entitled to same weight as verdict of jury. 284Pa384, 131A378.

415–31¼–New. Any error by probate court allowing claim against estate upon approval of administrator rather than upon proofs is corrected by full hearing in circuit court. 237Mich225, 211NW 663.

416–40½–New. On reversal of a judgment disallowing a claim against an estate on a note given for corporate stock, the case may be remanded to enable the estate to prove nondelivery of the stock. 192Wis124, 212NW280.

416–44 Mass 164NE917(2dcase); 126 Misc741, 215NYS419; 127Misc238, 216 NYS605; 117 Or505, 243P89 (contested claims against estate are, as regards costs, in same class as other money demands).

416–45 126Misc741, 215NYS419. [b] **Costs to unsuccessful claimant.**–126Misc 741, 215NYS419.

416–46 [a] **Unsuccessful claimant** is not entitled to costs out of estate. 219 AppDiv131, 219NYS436.

416–46½–New. In the absence of statutory authority therefor, probate courts are without authority to order payment from the estate of expenses and counsel fees of claimants who have been parties to adversary proceedings against executors or administrators. 49RI 452, 144 A148.

418–68 106Conn602, 138A795; 86Mont 340, 283P761; 113 OhSt543, 149NE868. See also 103Conn226, 130A157. [e] **Creditor's claim is legally established** when recognized by personal representative or established by judgment. 26 F(2d)860.

418–70 251NY439, 167NE580 (executrix is bound to apply only assets received from decedent to payment of decedent's debts); RI 151A193.

418–71 196NC398, 145SE776.

418–72½–New. Sale of encumbered property by legatee's representative to one assuming encumbrance does not relieve executor from payment of debt. 162Ga280, 133SE471.

418–76½–New. Under a will exempting personalty from payment of debts of testator's business, which debts exceed the assets of the business and are otherwise unprovided for, the executor is not required to adjust contribution among specific devisees and the widow who stands on parity with them, but could proceed in a most judicious manner for settlement of the estate. 196NC398, 145 SE776.

418–76⅓–New. An executor is not required to await adjustment of ratable contribution for payment of decedent's debts among those standing on a parity in this respect before proceeding to settlement. 196NC407, 145SE780.

418–76¼–New. Where assets are insufficient to pay debts, it is the administrator's duty to take all necessary steps to raise money for that purpose. 86 Mont340, 283P761.

421–12 [a] 172Minn231, 215NW223. [d] **In Minnesota.**–172Minn231, 215NW 223.

421–14 15DelCh459, 136A147, 148 [cit CJ].

421–16 But see 58ND501, 226NW485, 65ALR852.

421–22½–New. General statute providing for order of payment of debts must yield to extent of repugnancy, to special statute providing for enforcement of attachment after defendant's death. Mont 289P566.

422–25 167Ga68, 144SE912. See also 8LaA777.

422–26 Ariz 289P989.

422–28½–New. **Advance by representative.** Claims for reimbursement by an executor who, prior to his appointment, partially paid the debts of deceased from his own funds is not entitled to preference. 33NM626, 274P47.

422–28⅓–New. Creditors in state are entitled to be paid out of deceased's property in state. 250Mich637, 231NW 89(2dcase).

422–29 DelCh 139A453. [a] **Claim based on workmen's compensation award** has no preference over general debts. 10PaDist&Co 129.

423–30 201 Iowa389, 207NW389.

423–31½–New. Acknowledgment in will of debt owing cannot be contract or obligation giving priority in distribution of assets. DelCh 139A453.

423–32 126Misc715, 215NYS134; 226 AppDiv162, 235NYS213.

423–34 126Misc715, 215NYS134.

423–40 127Kan129, 272P564.

423–45 164La488, 114S107. [g] **Provision directing payment of testamentary expense showed intention** not to postpone payment until accumulation from income trusts. 227AppDiv554, 238NYS 678.

424–48 164La488, 114S107.

424–56 126Misc715, 215NYS134. [d] 126Misc715, 215NYS134. [j] **Reasonable funeral expenses of deceased** are not debts of decedent over which United States has preference. 126Misc715, 215 NYS134.

425–76 141SC290, 139SE633.

426–78 DelCh 139A453.

426–79 159Ala853, 106S328; DelCh 139 A453; 8LaA820.

426–85 DelCh 139A453; 124Kan546, 261P824.

426–86 [c] **Preference denied** where services stopped four years before employer's death. 124Kan546, 261P824.

426–89½–New. Persons caring for testator cannot acquire status of creditors by will provision recognizing debt. Del Ch 139A453.

426–92 315MoA1046, 287SW1072. [d] **Wages are preferred to realty mortgage debts** where proceeds are derived from sale of personalty. 159La814, 106S315.

427–94 Contra 220MoA596, 287SW1072.

427–98½–New. Under some statutes the word "servants" means domestic. 220 MoA596, 287SW1072.

427–5 167Ga68, 144SE912.

428–22 [c] **In Kentucky.**–213Ky556, 281 SW535.

428–25 247 IllA226.

429–40 106Conn602, 138A795.

429–41 207 Iowa84, 218NW537 (not deciding question).

430–49 MoA 18SW(2d)235. [d] **Depositors in private bank of decedent, business of which was continued under order of court, establishing claims as third class claims,** must be paid in full before payment of fourth class claims filed and proved by grace of court after expiration of one year from notice of administration. 207 Iowa84, 218NW537.

431–51½–New. Approval of claim after expiration of statutory time, but before estate becomes insolvent, establishes it as a claim filed after the statutory time. Iowa 228NW274.

431–52 141SC290, 139SE633, 636 [quot CJ].

431–53 141SC290, 139SE633, 636 [quot CJ].

431–54 141SC290, 139SE633, 636 [quot CJ]; Wyo 293P354.

431–58 MoA 9SW(2d)538; 136Misc22, 239NYS741 (assets which cannot be reached by execution); 141SC290, 139SE633, 636 [quotCJ]; 142SC112, 140SE310, 57ALR483.

431–59 141SC290, 139SE633, 636 [quot CJ].

431–60 141SC290, 139SE633, 636 [quot CJ].

432–62½–New. Judgment need not have been obtained during deceased's lifetime. 15DelCh459, 136A147.

432–62¼–New. The statute giving judgments priority is not affected by practice of bar giving them no priority. 15 DelCh459, 136A147.

432–67½–New. A decree not authorizing issuance of execution does not rank as final judgment as affecting administration of estate. 142SC112, 140SE310, 57 ALR483.

432–67¼–New. A decree of foreclosure ascertaining the amount of a debt and directing the sale of property is not final judgment as affecting administration of deceased mortgagor's estate. 142SC112, 140SE310, 57ALR483.

433–76 142SC112, 140SE310, 57ALR 483.

433–77 141SC290, 139SE633, 636 [quot CJ]. See also 167Ga68, 144SE912.

433–78½–New. Claimant is not entitled to preference by reason of a bill of sale which was not filed as provided by the Lien Law. 130Misc553, 224NYS717.

433–79 Mont 289P566.

433–80 [c] **Chattel mortgage, recorded after death of mortgagor** leaving insolvent estate, has no preferential standing over its status as unrecorded mortgage at time of death. 204 Iowa961, 216NW 272. [f] **In Louisiana.**–168La349, 122 S62.

434–81 141SC290, 139SE633. [c] **On presentation to, and rejection of,** lien under mortgage by administrator mortgagee may foreclose without waiving right of recourse to general assets for deficiency. 41 Ida172, 238P515.

434–82 168La349, 122S62.

434–84 [a] (3) Debt secured by conventional mortgage on realty not granted as security for purchase price is not entitled to preference in payment over funeral charges. 11LaA239, 122S154.

435–1½–New. A probate creditor cannot change his status from that of mere general creditor of an estate to that of redemptioner from the sale of realty in a mortgage foreclosure suit, without complying with the statute requiring application for, and obtaining of a court order. 204 Iowa439, 215NW716.

435–11 MoA 21SW(2d)777.

436–24½–New. Primarily it is the duty of claimant to separate items of his claim for the purpose of determining priorities thereof. 106Conn602, 138A795.

436–27½–New. Use by administrator of his statutory fees to retire personal indebtedness to estate. Iowa 232NW640.

438–58 207 Iowa1074, 224NW82.

440–82½–New. In Louisiana an amount borrowed from the mortgagee by the administratrix to pay attorney's fees is a preferred debt, and properly credited as such. 164La488, 114S107.

440–85 Can [1930] 3DomLR431.

441–98 106Conn602, 138A795.

441–99 49RI137, 140A913, 915 [citCJ].

442–11 56ND927, 220NW128, 129 [cit CJ].

443–15 241 IllA446.

443–22½–New. The heir of real estate, paying a mortgage debt to avoid foreclosure, has the equitable right to contribution or exoneration from the personal estate of decedent, in so far as the same is sufficient to pay such debt. 219 Ala70, 121S80.

443–22¼–New. One voluntarily paying a claim against an estate pursuant to an agreement with decedent's widow for negotiating a settlement thereof is not entitled to recover against the estate on the theory of subrogation. Utah 283P 1055.

443–23 161La84, 108S133.

444–24 82Colo 448, 261P6, 8 [citCJ].

444–25 56ND927, 220NW128.

444–26 [a] **On claim additional to legacy,** interest will begin one year after testator's death when it would have been payable if made as legacy. 134Misc902, 236NYS720.

444–26½–New. Obligation to pay interest is implied on loan to decedent who promised to give note therefor but failed to keep promise. 82Colo 448, 261P6.

444–26¼–New. Interest is not allowed on claims where money on hand for distribution is not sufficient to pay claims in full. 130Misc553, 224NYS717.

444–26¼–New. Allowance of interest on a just claim is proper, although much of the entire claim was alleged to be fraudulent and the administrator was justified in contesting it all. 82Colo 448, 261P6.

444–30 187Wis347, 203NW360 (from date of demand).

444–33½–New. Interest on advances after decedent's death for the benefit of the estate, made with knowledge and acquiescence, is properly allowed. 82Colo 448, 261P6.

445–34 See also 170Minn175, 212NW 408.

445–40½–New. Interest runs from date of demand for payment and not from date of furnishing last item. 187Wis 347, 203NW360.

445–48 159Ala853, 106S328.

446–50 74Mont449, 241P648.

446–53 Ga 155SE32; 74Mont449, 241P 648.

446–55 But see 203Cal 693, 265P920, 58ALR430.

446–61 [a] (2) Where mortgage by widow and heirs to decedent's creditor showed no recital of satisfaction of claim, and evidence showed no release or agreement to release, it was held error to refuse decree of insolvency. 214 Ala422, 108S253.

446–62 [b] **Payment to clerk of court** will discharge creditor's claim under some statutes. Iowa 227NW585.

447–85 218Ky187, 291SW27; 167La 255, 119S40.

448–86 49RI137, 140A913.

448–93 132Misc335, 230NYS332.

448–95 227Ky670, 13SW(2d)1025; Tex CivA 294SW227. [a] **In Kentucky.**–227 Ky670, 13SW(2d)1025.

448–96 247Mich192, 225NW632.

448–96½–New. A party claiming interest in an estate, who under a compromise agrees to release all rights in the estate, may be forced to execute a release in accordance with the agreement. 125Misc359, 211NYS533.

448–96¼–New. An attempt by a widow to confer authority on another to make settlement of a claim against her husband's estate and to reimburse himself out of funds of the estate is not binding on the estate. Utah 283P1055.

449–5 27Ariz203, 240P343; 49RI 137, 140A913, 915 [citCJ].

449–6 116Tex388, 292SW169. [a] Ariz 285P684. [h] **Administrator is allowed credit on final account** for payment of debts due and owing by deceased without compliance with statutes relating to affidavits. 116Tex388, 292SW169.

449–8 49RI137, 140A913. But see Tex CivA 10SW(2d)136.

450–9 Iowa 232NW640; 49RI 137, 140 A913, 915 [citCJ]. [g] **Administrator's payment of note secured by mortgage on intestate's realty against protest of heirs** is not justified in order to sell realty free of debts where arrangements could have been made to guarantee title. 49RI 137, 140A913. [h] **Payment of note** signed by decedent and others where estate still open and contribution obtainable. Iowa 232NW640.

450–9½–New. Payment, although irregular, may be allowed if to advantage of estate. 74Mont449, 241P648.

450–11½–New. Allowance to administratrix of credit for accounts due by estate filed within time and paid by administratrix is proper, although not verified. 214Ala10, 106S188.

450–11¼–New. An executor, using moneys belonging to the estate appropriated by the testator for the specific purpose to discharge other obligations, may be directed to reimburse the estate. 58ND501, 226NW485, 65ALR852.

450–11¼–New. Payment of valid and enforceable claims which have not been filed against estate is nonprejudicial irregularity. Iowa 232NW169.

451–16 Wyo 292NW246.

452–34 193Wis20, 213NW639.

452–35 46Philippine200, 206 [quotCJ].

452–40 51Philippine494.

453–43 74Mont449, 241P648 (where representative uses money in own business).

453–46 103Conn226, 130A157.

453–51 88 IndA493, 164NE635.

454–61½–New. Evidence has been held sufficient to show that payment by administratrix was for goods purchased by her individually and not in discharge of claim against estate. 187Wis347, 203 NW360.

454–68 219AppDiv530, 220NYS323.

455–77 See also 74CalA226, 239P859.

455–81 TexCivA 287SW110.

456–92 [c] (3) Claim for possibility of deficiency judgment on mortgage running years beyond mortgagor's life. 129Misc845, 223NYS470. [d] (4) "Contingent and unliquidated" in act refers to liability of such nature that court can make definite computation and practical provision for securing satisfaction. 129Misc845, 223NYS470. [h] **Evidence held insufficient.**–129Misc845, 223NYS 470.

456–97 106Conn602, 138A795.

456–98 106Conn602, 138A795.

456–99 154Md456, 140A834. [a] (1) But see 154Md456, 140A834 (equity, not law, proper forum). [n] **After suggestion of insolvency** and notice to creditors to file claims, creditors thereafter paid in full can be compelled in equity to restore excess of pro rata due them. 152Tenn594, 280SW34.

457–5 [a] **Evidence held insufficient** to warrant decision on recovery by estate of part of fees charged by attorney and paid by executrix. 136Misc110, 240NYS 532. [b] **Probate court is without judisdiction to order refund** in absence of prior order in reference to counsel. Cal 290P448.

457–9 See also 136Misc110, 240NYS 532.

457–13 36F(2d)309.

457–13½–New. Under some statutes, a payment by an administrator relieving a debt from bar by lapse of time where not barred during the lifetime of intestate will be deemed voluntary, and cannot be recovered, although made in ignorance of law governing the time when execution became barred. 39GaA 600, 148SE16.

457–13¼–New. Such payment is not voluntary if made under an honest mistake of fact. 39GaA600, 148SE16.

457–13¼–New. A payment by an executor on a fieri facias held against another as principal and the executor's testator as surety at a time when there had been actual nullification and release of execution can be recovered as made under a mistake of fact. 39GaA 600, 148SE16.

458–23 131 Okl 1, 267P650. [f] **Insurance payable to children** under terms of policy and will is not chargeable with debts of testator by reason of provision of will for payment of testator's debts where testator clearly indicated that such insurance was to be considered part of his estate only on refusal of children to take under will or to bring insurance into trust fund. Tex

CivA 281SW580. [g] **Proceeds of insurance exempt under statute** cannot be appropriated to payment of debts. **Iowa** 231NW327.

459-29½-New. Generally intestate property and property set aside by a testator to pay his debts are first to be used to pay such debts. 213Ky179, 280SW921.

459-30 **TexCommnA** 280SW742.

459-32 [c] (2) Debts and expenses of administration of estate are properly charged to intestate one half of residue of estate. 205**Cal** 757, 272P1060. [d] 103**Conn**352, 130A472; **Iowa** 230NW519; 196NC398, 145SE776.

459-33 133**Misc**647, 233NYS667.

459-34 106**Conn**602, 138A795; **Tex CivA** 24SW(2d)531; 99Vt294, 131A794. [g] (2) Where surplus proceeds remaining after sale of property under mortgage were apportioned among adult heirs, administrator may subject part of surplus remaining in hands of clerk for payment of minor heirs to payment of debts of intestate. 195NC181, 141SE549. [n] (1) 317 **Ill** 625, 148NE384 (not lien on realty); 99Vt294, 131A794. [t] **Realty may be resorted to** when life tenant is liable to remainderman for debt. 151Md59, 133A851.

460-37½-New. Where the rights of an unsecured creditor are contingent on the existence of a surplus on a sale of nonexempt land after discharging liens and it appears that no surplus will result, they may be permitted to pay off the liens and take the land. **TexCivA** 281SW580.

460-37⅞-New. Rights of creditors of decedent whose claims exceed the value of intestate's personalty are superior to the rights of the heir's creditors on a sale of the realty. 207 **Iowa**1074, 224NW82.

461-38 **Ala** 130S801; 105**Conn**230, 135A44; 106**Conn**602, 138A795; 317 **Ill** 625, 148NE384; 319 **Ill** 320, 150NE284; 247 **IllA**175; 201 **Iowa**389, 207NW389; **Iowa** 230NW519; 217Ky171, 289SW250; 234Ky597, 28SW(2d)760; 10**LaA** 109, 119S768; **Mass** 172NE106 (note is debt); 156**Miss**736, 126S656; 135**Misc** 421, 239NYS360 (lawyer's fees); 192**NC** 243, 134SE645; 113 **OhSt**543, 149NE868; 119 **OhSt**17, 162NE42; 298**Pa**405, 148A496; 99Vt294, 131A794.

462-40 219**Ala**70, 121S80; **DC** 40F(2d) 806; 192NC243, 134SE645; 119 **OhSt**17, 162NE42; 27 **OhA**400, 161NE366; 49 **RI** 117, 140A467, 468 [citCJ]; 49**RI** 137, 140A913. [e] 129**Misc**845, 223NYS470.

462-46 133**Misc**647, 233NYS667.

463-52 135**Misc**170, 237NYS390 (rule applied to prevent invalidation of trusts).

463-54 200**Cal** 646, 254P269; **CalA** 285P753; 227Ky665, 13SW(2d)1019; 136**Misc**261, 241NYS82 (testator's intention is of paramount importance in determining propriety of distribution); 45**Philippine**216. [e] **In Philippines.**–45 **Philippine**216.

463-55 200**Cal** 646, 254P269; 291**Pa** 304, 139A839. [h] **Widow's legacy in lieu of dower** is payable from such funds coming into executor's hands for the purpose. 190NC476, 130SE115.

463-56 227Ky665, 13SW(2d)1019; 86 **Mont**340, 283P761; 135**Misc**730, 241NYS94 (depends on quality of decedent's estate at death).

464-57 252**Mass**510, 147NE845.

464-60 166**Ga**166, 142SE663.

466-91 130**Misc**339, 224NYS435; 219 **AppDiv**131, 219NYS436; 129**Misc**845, 223NYS470; **TexCivA** 3SW(2d)864.

467-97½-New. Clause "after payment of debts and funeral charges" does not enlarge creditors' rights nor rights of devisees or legatees. **Mass** 172NE228.

468-6 See also 8F(2d)700.

469-26 39**GaA**164, 146SE559(1stcase).

469-27 [c] (3) It is beyond power of executors by assenting to devises or legacies to interfere with rights of creditors where debts were incurred pursuant to will directing continuance of business by executors. 8F(2d)700.

470-29 136**Misc**91, 242NYS453.

470-33 162**Ga**528, 134SE301; 169**Ga** 382, 150SE552(2dcase) (allowing life legatee to retain possession for ten years).

471-38 **Me** 150A531.

471-46 See also **Me** 150A531.

471-47½-New. Where executors were given the residue of the estate for their services after payment of certain bequests, an executor administering the estate after the death of the other executor is not required to complete administration before asking for partial distribution of the property to him. 205**Cal** 757, 272P1060.

471-47½-New. Widow in possession of life estate devised to her for over five years holds title to realty under devise, not as executrix. **Me** 150A531.

471-50 **Iowa** 231NW470.

472-54½-New. Where an executor has been guilty of a devastavit by permitting a firm of which he is a member to collect debts due to the estate and use the proceeds, his individual liability for such misappropriation should be set off against a legacy to him under the will. 165**Ga**494, 141SE311.

472-54⅞-New. In such case, where both the executor and his firm have become bankrupts, the executor's trustee in bankruptcy cannot oppose such set-off on the ground that the liability to the estate is that of the firm alone. 165 **Ga**494, 141SE311.

472-60 83NH422, 144A523. But see 154Md125, 140A87. [a] **Common-law rule is in force when not changed by statute.**–228Ky73, 14SW(2d)397. [b] **Allocation of funds given in trust.**–Under will giving specific bequest of securities and pecuniary legacy in trust for hospital, named securities and necessary cash to make amount of legacy should be definitely allocated to hospital trust at expiration of year after testator's death, and managed thereafter as trust fund. 83NH422, 144A523.

472-61 88 **IndA**595, 163NE531. [a] **In Oklahoma.**–40 **OklACR**97 [reh pending]. [b] **Kentucky statute.**–228Ky73, 14SW(2d)397.

472-62 [e] 41 **OklACR**63.

473-64 74**Mont**449, 241P648; 77**Mont** 182, 250P812; **NH** 148A21. [b] **Will creating trust fund** to be distributed to heirs on happening of condition on lapse of ten years does not require executors to retain trust fund for ten years, as the trustees can make distribution. 198 **NC**642, 153SE114.

473-66 166**La**879, 118S69; **NH** 148A21 (does not give executor power to make time for paying legacies indefinite); 25 **OhA**265, 158NE9.

473-68½-New. Where there is inconsiderable indebtedness and no harassing litigation and a large amount of cash is on hand, the estate should be distributed promptly at the end of the statutory period. 77**Mont**182, 250P812.

473-68⅛-New. Some statutes requiring the delivery of real estate to devisees after the expiration of the time for presenting claims are mandatory and the court has no discretion where all debts have been paid. 77**Mont**182, 250P812.

473-68¼-New. Property to go into trust under a will cannot be transferred into it until the estate has been settled. 106**Conn**602, 138A795.

473-68½-New. A clause in a will allowing such time, not exceeding a certain period, as the executor might deem for the best interest of the estate, to administer it and make distribution, refers to domiciliary administration. **Mo** 198SW(2d)898.

473-68⅞-New. Devisee not filing application for closing of estate cannot complain because estate was not closed within statutory time. **Iowa** 232NW169.

473-69 220Ky613, 295SW893; 135**Misc** 203, 237NYS417 (under stipulation, by counsel for all parties, for paying portion passing to remainderman's representatives). [l] **Partial distribution held improper.**–110**Conn**658, 149A223. [m] **Only such distribution should be ordered** as can be made without danger of loss to anyone. 228**AppDiv**873, 240NYS 266.

474-71½-New. Under some statutes the probate court is not authorized to make distribution of any part of the estate until the expense of the last illness, funeral charges, and expense of administration have been paid. 69**Utah**484, 256P409.

474-75 171**Ark**514, 284SW775; 196**Cal** 29, 235P725 (will construed not to require payment of income from trust till trust property had passed to trustee); 25 **OhA**265, 158NE9(2dcase). See also 113 **OhSt**543, 149NE868.

474-77 23 **OhA**87, 154NE811. But see 25 **OhA**265, 158NE9(2dcase).

474-77½-New. Execution of estate of stockholder in bank is liable for full amount of stockholder's statutory liability without administration for assets voluntarily distributed. 259**Mass**162, 156NE7.

475-79 38**Wyo** 382, 267P424. [k] **Charitable gifts.**–130**Misc**1, 223NYS321. [l] **Preliminary decisions held unnecessary.**–38**Wyo** 382, 267P424.

475-87 118 **Oh**346, 161NE49.

476-93 216**Ala**686, 114S301.

476-96½-New. Administrators, trustees, etc., are conclusively presumed to have made settlements after twenty years, 216 **Ala**686, 114S301.

476-96¼-New. and payment of a claim is presumed twenty years after settlement should have been made. 216**Ala** 686, 114S301.

476-98 25 **OhA**265, 158NE9(2dcase).

478-19 25 **OhA**265, 158NE9(2dcase).

478-20 136**Misc**86, 242NYS447. [j] **In Oklahoma.**–37 **OklACR**551.

478-21 25 **OhA**265, 158NE9(2dcase).

480-47 But see 135**Misc**726, 238NYS271.

480-48 **NJ** 129A742 (statute permissive and not mandatory); 12**PaDist&Co**185 (statute inapplicable where gift absolute).

480-49 135**Misc**726, 238NYS271; 191 **NC**347, 132SE2.

480-50 191NC347, 132SE2.

480-50½-New. Where unable to give security court should appoint receiver and pay interest to infant legatee. 191 **NC**347, 132SE2.

480-52 **NJ** 129A742 (not liable for failure to require).

481-55 **NJ** 129A742.

481-73 215**Ala**674, 112S251, 252 [cit CJ]; 218**MoA**458, 279SW170, 171 [cit CJ].

482-75 [g] **Computation.**–157**Md**357, 146A791.

482-77½-New. An executor or administrator may at his own risk advance payment of a legacy to a donee or an inheritance to an heir before an order of distribution has been entered. 197**Wis** 347, 222NW228.

483-87 29**Ariz**203, 240P343.

483-92 193**Wis**305, 214NW345.

484-96 224**AppDiv**431, 231NYS333; 113 **OhSt**543, 149NE868.

484-98 [g] **Discretion as to manner of carrying out testator's intention** rests in executors where will does not designate property to go to beneficiary. **Tex CivA** 291SW924. [h] **Distribution as exercise of power of sale under will.**–137 **Misc**504, 244NYS126.

484-1 113 **OhSt**543, 149NE868.

485-7½-New. In Ontario, it is the duty of the executor to allocate tax-free securities in such manner as to obtain the minimum succession duty. 62 **OntL**33, [1928] 2**DomLR**415.

485-10 104**Conn**271, 132A461, 463 [cit CJ].

485-11½-New. Where estate consists of closely held corporation, distribution should be made by legal action in form of dividends, 125**Misc**386, 211NYS514.

485-11⅛-New. or other proper mode to executors, 125**Misc**386, 211NYS514.

485-11¼-New. and the amount paid out by them as income to the beneficiaries. 125**Misc**386, 211NYS514.

485-11⅞-New. It is improper to make distribution by payment of salaries to interested parties out of the treasury of the corporation. 125**Misc**386, 211NYS 514.

485-12 102**NJEq**178, 140A28.

485-13 [c] **Election for minor** to be made by court, not guardian. 102**NJEq** 178, 140A28.

486-17 198**NC**790, 153SE401.

487-34 215**Ala**674, 112S251, 252 [cit CJ]; 202 **Iowa**842, 211NW254, [citCJ]; 205 **Iowa**1311, 217NW441; **Iowa** 231NW

470; 222MoA713, 7SW(2d)737; MoA 31 SW(2d)585; 114Nebr126, 206NW749; 191NC96, 131SE377 [citCJ] (applied where legacy is bequeathed absolutely); 46RI 470, 129A263; SD 226NW740 (advancements during lifetime of decedent). [h] See also 191NC96, 131SE377. [o] **Indebtedness of beneficiary cannot be deducted from trust fund** in which others will be interested on happening of certain contingencies. 191NC96, 131SE 377. [p] **Unliquidated demands.**–Right of retainer exists, though debt of legatee to estate is unliquidated. 30F(2d) 178. [q] **Claims personal to estate or representative.**–Money and claims growing out of contracts made by deceased in his lifetime, and on which his executors are attempting to realize, are personal to estate, and contracts not existent at his death are personal to executors. 30 F(2d)178. [r] **Approval or disapproval by court.**–222MoA713, 7SW(2d)737.

488-35 114Nebr126, 206NW749. [a] **Where assignee is insolvent,** equity will not require estate or its executors to pay him legacy, if he owes estate that much or more. 30F(2d)178.

488-35½-New. without notice, 114Nebr 126, 206NW749.

488-36 253 IllA229. [a] (2) Heirs of deceased executor. 203Cal 335, 264P242. (3) Deduction from share of deceased distributee of amount owing by him to creditor's estate does not involve question of preference or priority over other creditors of debtor's estate. 253 IllA229.

488-37 Cal 273P822; 156Md420, 144A 342.

488-37½-New. The right exists independently of statute. 114Nebr126, 206 NW749.

488-38 30F(2d)178; 114Nebr126, 206 NW749.

488-40½-New. Corporation executor is not estopped by any act or declaration of its officer to maintain a proceeding seeking to have a legacy applied as partial payment of judgment of the estate against the legatee. 114Nebr126, 206 NW749.

488-40¼-New. The rule applies where devisee owing testator dies before the testator and is then applied as against the heirs of the predeceased devisee. 202 Iowa842, 211NW254.

489-41 30F(2d)178; 202 Iowa842, 211 NW254 [citCJ]; 114Nebr126, 206NW 749. See also 191NC96, 131SE377, 379 [citCJ].

489-45 22F(2d)860.

490-63 [e] **Life tenant's agreement with executor** cannot effect distribution of securities after life tenant's death. 137 Misc237, 244NYS465.

491-65 But see 96CalA767, 274P991.

492-82 198NC790, 153SE401 (settlement made with guardian and approved by court).

493-93 154Md638, 141A390.

494-12 [b] **Executor cannot compel retransfer** where necessities of estate do not require it. 6PaDist&Co 219.

495-25½-New. Estate ceases to exist when distribution is accomplished. 76 Mont143, 245P529.

496-40 218Ala186, 118S333; Ga 155SE 32; 213AppDiv319, 210NYS531 (executor surcharged for premature payment but entitled to credit on final accounting where interest had vested and payment had been made in good faith). [e] **Mere placing of assets to life tenant,** alleged incapable, is not necessarily negligence. 151Md59, 133A851.

497-41 236Mich197, 210NW260.

497-44½-New. Debiting on individual legatee's accounts of amount of dividend received before actual transfer of stock, as improperly paid, is technically correct, notwithstanding delay in delivery. 142Va229, 128SE533.

497-44¼-New. Interest items on dividends improperly paid are properly charged in individual legatee accounts as due executors notwithstanding duty of executors to charge themselves in subsequent settlement with estate. 142 Va229, 128SE533.

497-44¼-New. The executor need not inquire into the solvency of a minor legatee's guardian before payment. 194Wis 15, 215NW573, 54ALR1271.

497-49 See also 130Misc324, 224NYS 312.

498-65 171Ark514, 284SW775.

499-70 [a] **Administrator should be credited with sums** advanced to widow without court order and not on excess of her community interest. TexCivA 294 SW227.

499-72 107Conn535, 141A657, 659 [cit CJ].

499-73 See also 194Wis15, 215NW573, 54ALR1271.

499-77 See also 101Vt343, 143A302.

500-84 215Ala674, 112S251, 252 [cit CJ].

501-88 215Ala674, 112S251.

501-92½-New. In a suit by a trustee to recover bankrupt's distributive share in estate, the administrator is not liable for advancements made the bankrupt, although antedating qualification. 215Ala 674, 112S251.

502-99 131Misc21, 227NYS296.

502-2 [a] **Erroneous payment** to life tenant not irrevocable. 151Md59, 133A 851.

503-9½-New. The distribution of funds by an executor may be viewed as done by mistake, and the executor or special administrator may be ordered to repossess himself of overpayments. 207 Iowa 20, 222NW564.

503-10 207 Iowa20, 222NW564. [g] **Laches.**–207 Iowa20, 222NW564. [h] **Conditions precedent.**–207 Iowa20, 222 NW564.

503-14 [b] **Receipt in full.**–Ala 130S77.

503-17 218Ala186, 118S333.

504-28 133Misc240, 232NYS322.

505-29 252 IllA620.

508-36 137Misc844, 244NYS640 (year from issuance of letters).

506-41 37Wyo 107, 259P815, 55ALR 941.

507-52 102NJEq393, 141A16.

507-53 [b] **That there is no personal property except such as has been set aside to widow as exempt** does not deprive her of right to bring action for settlement. 213Ky75, 280SW481.

507-54½-New. Administrator of estate of married woman cannot sue for legacy when personalty descended to husband. 216Ala686, 114S301.

508-64 Cal 289P841; 317Mo 1078, 298 SW83, 89 [citCJ]; Mo 30SW(2d)1005.

508-65 46Philippine847. [d] **Summary proceeding to assign realty** is not authorized by Oklahoma statute. Okl 293 P231.

508-66 99Fla782, 128SE258 (not exclusive).

508-72½-New. Where no money belonging ex aequo et bono to beneficiary under will, actually or constructively remains in hands of executor, trover will not lie. Ala 130S77.

508-78½-New. A suit to determine heirship is not a condition precedent to an order for distribution where there are no foreign heirs and the persons entitled are fully determined. 77Mont182, 250P812.

508-79 TexCivA 3SW(2d)864.

508-80 178Ark63, 10SW(2d)35. But see 317Mo 1078, 298SW83.

509-85 216Ala686, 114S301; 130Misc 285, 224NYS299. [d] **Twenty years after first accounting** has been held too late to assert claim. 130Misc285, 224 NYS299.

509-86 200 Iowa620, 203NW307.

509-87 200 Iowa620, 203NW307.

509-92½-New. Bill, filed in 1924 for collection of legacy from property of estate conveyed in 1917 by executor appointed in 1908, held not barred by limitations. 216Ala686, 114S301.

509-94½-New. That a legatee deferred the enforcement of his legacy pending litigation over other identical claims is material on the issue of laches. 200 Iowa620, 203NW307.

509-94⅓-New. Thirty years' wait after executor's refusal of demand for payment held barred by laches. 130Misc 285, 224NYS299.

510-98½-New. That distribution of real property to devisees will result in loss and inconvenience to them is not sufficient to defeat their petition for delivery of possession of the property on the ground that for such reason a prior order for sale should be permitted to stand. 77Mont182, 250P812.

510-99 117Nebr52, 219NW808; 101NJ Eq37, 136A738; NJOrphans'Ct 148A 193; 143 Okl 57, 287P414. [j] **In Oklahoma.**–143 Okl 57, 287P414.

510-1 [b] **Where construction of trust not involved.**–Where testator left property in trust to one person and on his death to testator's heirs then living, and beneficiary predeceased testator, orphans' court has jurisdiction to distribute estate as against contention that it involved construction of trust. 157 Md100, 145A361.

511-2 123 Okl 193, 252P847.

512-13 74Mont558, 241P636. [f] **In Montana.**–74Mont558, 241P636.

512-16 Mo 30SW(2d)1005; 74Mont558, 241P636; 39 OklACR253. But see 317 Mo 1078, 298SW83. [j] **Service on unknown parties by publication.**–Mo 30SW (2d)1005. [k] **Adjudication on ex parte hearing without notice void** except as heirs to whom legacy awarded. Mo 30 SW(2d)1005.

513-17 [a] **Waiver of defects in service.**–Heirs, voluntarily coming into court and invoking court's powers for partition and distribution of proceeds of estate realized by sales made under administration, waive question of manner of service of citation on them. Tex CivA 12SW(2d)615.

513-17½-New. Where the court sets a day for hearing on a petition for final decree of distribution and orders the clerk to give notice thereof, the clerk's notice properly filed and posted is a sufficient compliance with a statute requiring the clerk to set the petition for hearing and give notice of the time appointed therefor. 76CalA409, 244P942.

513-17⅓-New. When, in an action for construction of a will the executor gives notice of his appointment, all parties interested in the estate from that time are in court for all purposes incident to the settlement of the estate. 207 Iowa 20, 222NW564.

513-20 80CalA20, 251P232; 107Conn 281, 140A721 (no actual notice immaterial); 140 Okl 260, 283P236.

513-20½-New. Statutory notice to an insane heir not mentioned in the petition and for whom no guardian has been appointed is a nullity. 74Mont558, 241 P636.

514-28½-New. Under some statutes the county court is not authorized to appoint an attorney for a nonresident legatee to be paid for his services out of the funds of the estate to be charged on final distribution to the party represented unless such party is otherwise unrepresented. 41 OklACR63.

514-30 [d] **In Oklahoma.**–140 Okl 260, 283P236.

515-37 See also 85CalA21, 258P986.

515-41 199Cal 113, 248P519. [a] **Petition to declare** to whom distribution should be made can be entertained only for claims for determination of rights in privity with estate. 199Cal 113, 248 P519. [b] **Adverse claimant to estate,** who has not brought suit before time for distribution, is not entitled to have distribution delayed. 199Cal 113, 248P 519.

515-47 167Ga248, 145SE73; Okl 250P 847.

523-56 317Mo 1078, 298SW83, 87 [cit CJ]. [i] **Decree assigning real property to devisee by name** is not violative of statute requiring assignment to "such persons as are by law entitled to the same," though devisee died after death of testator and before making of decree. 240Mich661, 216NW446.

516-56½-New. Under a statute requiring delivery of possession of real estate to heirs or devisees after the expiration of the time for presenting claims, no application for distribution need be made. 77Mont182, 250P812.

516-58½-New. Where a petition for distribution fails to mention an insane heir residing without the state and for whom no guardian has been appointed, the decree of distribution is voidable as to him, although statutory notice is given to him. 74Mont558, 241P636.

516-63 123 Okl 193, 252P847.

517-73½-New. Where a legatee was insolvent when he assigned a legacy to an assignee having notice of insolvency,

allegations in the executors' answer asserting the right of retainer against the assignee should stand as defenses to plaintiff's right of action, rather than as counterclaims. 30F(2d)178.

517–75 198Wis128, 223NW434.

518–85 NJCh 130A11; 296Pa436, 146 A111(2dcase).

518–88 [a] **In action by legatee for conversion and money had and received,** ratification of administration without order of probate court is provable under general issue. Ala 130S77.

518–90 Ala 130S77.

518–91 196Cal 294, 237P744; 94CalA 113, 270P708; 164Ga34, 137SE556. [a] **Oral testimony not recorded** is insufficient basis for order authorizing distribution of estate. 110Conn658, 149A 223.

518–92 [c] (2) Designation as "distributors" is immaterial. 111Conn589, 151 A166. [d] **Court should not refer** sale of undevised realty to regular commissioner, where he is party to suit to construe will and settle estate, but to special commissioner. 220Ky613, 295SW 893.

518–94 111Conn589, 151A166.

518–1 [a] **Judgment leaving to commissioner's discretion** subdivision, or sale as a whole or subdivision, of undevised realty is erroneous. 220Ky613, 295SW893.

519–19 [e] **Method of trial.**–200 Iowa 620, 203NW307. [f] **Framing of issues as in will contests** is authorized by statutes. CalA 258P118.

519–20 94CalA113, 270P708. [a] (4) To determine whether estate was community property. CalA 258P118. (5) Orphans' court may determine right to proceeds of life insurance policy, as between estate originally named as beneficiary and claimant under attempted change of beneficiary, who consented that policy be inventoried as assets of estate. 91PaSuper466.

520–22 199Cal 199, 248P666; 102CalA 178, 283P331. [j] **Rights of devisee's widow,** party to distribution proceeding only as administratrix cannot be adjudicated. 111Conn683, 151A265.

521–29 102CalA178, 283P331 (stay proceedings).

522–32½–New. In action by legatee against executor to recover share of improper disbursements made by executor settling estate without probate, requested instructions have been held properly refused. Ala 130S77.

522–32¼–New. , or improperly refused. Ala 130S77.

522–34 177Ark518, 7SW(2d)770; SD 226NW740.

522–44½–New. The executor of a deceased life tenant is entitled to specific findings as to the income of the entire estate and the disbursements up to the time of the death of the life tenant, as a basis for determination of the amount to which the life tenant was entitled at the time of death, where he was entitled to the income of the entire estate during his life. 166Minn315, 207NW629.

523–53 [d] **Assets of estate** cannot be collected on distribution. 195Cal 319, 232P972.

523–57 [j] **Judgment held valid.**–MoA 31SW(2d)585.

524–61 [b] **Decreeing distribution of principal before time fixed for distribution is improper.** Vt 151A654. [c] **Limited interest proceeding and determining time of distribution** may be decreed to person entitled. Vt 151A654.

524–69½–New. Any decrees made in a suit against executors and legatee to enforce an assignment by the legatee of his interest in the estate will run against the executor personally. 30 F(2d)178.

524–69⅓–New. An order construing a will is interlocutory in character. 207 Iowa20, 222NW564.

524–70½–New. Where persons who otherwise would be entitled to share are presumed to have predeceased intestate, court may award fund to other heirs and require refunding bond. 14PaDist &Co 34.

525–71 [d] **Failure to notify parties before entering order** does not affect its validity. 317Mo 1078, 298SW83.

525–76 74Mont558, 241P636 (decree may be set aside for fraud); TexCivA 12SW(2d)615. [e] (2) Fraud must be in very procurement of judgment. MoA 31SW(2d)585. [j] **Fraudulent representations of heirship.**–74Mont558, 241 P636. [k] **That decedent's son had no actual notice of filing of account audit and adjudication** is not ground for opening adjudication declaring him indebted to estate in excess of his share where he lived in county and requirements of statute and rules of court were complied with. 13PaDist&Co 63. [l] **That decedent's son was deprived of his share by reason of barred note** is not ground for opening adjudication where he admitted his signature to note and never paid note. 13PaDist&Co 63.

526–79 125Mel71, 132A211; 292Pa483, 141A296; 196Wis125, 218NW193. But see 107Conn281, 140A721.

526–81 [e] **Findings.**–81Mont330, 263P 421.

526–81½–New. Construction of will cannot be raised in proceeding to expunge final decree construing will and assigning estate. 187Wis105, 203NW 748.

527–83½–New. Where a final decree of distribution made by a probate court has been set aside in an equity action for want of notice to an interested party, the entry by the probate court without notice of a corrected decree to conform to that rendered in the equity suit is a nullity. 74Mont558, 241P636.

527–83⅓–New. Where the time to appeal from a decree of distribution rendered without jurisdiction has expired, and an heir seeking to set it aside has not been guilty of laches, and title to the property remains in the original distributees, a court of equity may properly grant relief from the decree. 74Mont 558, 241P636.

527–83¼–New. In an equity suit to set aside a decree of distribution for want of jurisdiction, the petitioner, for distribution claiming the property as his own, although it stood of record in decedent's name, must prove such fact by clear and convincing evidence. 74Mont 558, 241P636.

527–85 99CalA191, 278P485 (delay after oral request unexcused).

527–86 292Pa483, 141A296.

527–87 See also 175Minn524, 222NW 68.

527–93½–New. 49ND553, 192NW176.

527–93⅓–New. Allegation that the petitioner had no knowledge of the proceedings is not equivalent to an allegation that statutory notice was not given. 107Conn281, 140A721.

527–94½–New. Where a decree of distribution is set aside before distribution, the court may order payment of moneys constituting a part of the estate into court. 92CalA352, 268P426.

527–94⅓–New. Order setting aside decree opens up administration so that others can establish heirship. Cal 289 P841.

528–99 32F(2d)756; 199Cal 199, 248P 666; 200Cal 252, 252P1039; 80CalA20, 251P232; 99CalA191, 278P485; 205 Iowa1062, 219NW39; 234Ky50, 27SW (2d)408; 163La831, 112S802; 76Mont (2d)408; 163La831, 112S802; 76Mont 143, 245P529; 102NJEq393, 141A16; 50Nev371, 261P654; 114 Okl 113, 245P 636; 124 Okl 63, 253P1014; 122 Okl 295, 254P966; 140 Okl 260, 283P236; 52SD193, 217NW196; TexCivA 12SW (2d)615; 155Wash308, 284P89 (res judicata). [b] (1) 52SD193, 217NW196. (10) Whether property was impressed with status as homestead. 124 Okl 63, 253P1014. (11) Right of wife for whom provision was made in accordance with antenuptial settlement. 205 Iowa 1062, 219NW39. [j] (4) Final order of probate court, adjudging that widow had conveyed to third person her interest in real and personal property of decedent and that such person was owner thereof, does not preclude widow from suing to set aside her deed and bill of sale where personalty was sufficient to pay decedent's debts and question of validity of bill of sale was not passed upon in probate court. 125Kan 223, 264P50. (5) Right of remainderman under will to establish community character of property retained by widow acting as executrix is not concluded. Cal 265P929. [l] **Agreement of heirs for distribution** is not nullified by decree for different distribution entered on agreement of heirs without disclosure of previous agreement. 174Minn173, 218NW551. [m] **Rights of third persons not interested in estate against heirs** are not affected by decree of distribution entered on agreement of heirs for distribution different from that provided for in prior agreement not disclosed to court. 174Minn173, 218NW 551. [n] **Order of distribution is merely declaratory as to persons entitled thereto** and requires additional act by administrator to carry out order. 251 Mich49, 231NW67.

529–1 146Wash354, 262P959. See also 114 Okl 5, 242P766.

529–2 [b] 43 Ida354, 253P849.

529–4 [a] **Decree of distribution concludes** nothing except correctness of executor's account and amount to be distributed to trustee. 196Cal 29, 235P725.

529–6 177Minn606, 225NW902.

529–6½–New. A decree settling accounts, construing a will, and making disposition of the estate but failing to direct distribution of the residue on the happening of a contingency, is not res judicata so as to foreclose construction thereafter. 195Wis88, 217NW726.

529–6⅓–New. Powers and duties of trustees in regard to trust property devised by will are to be measured by terms of the decree of distribution by virtue of which the trustees received the property in trust. 206Cal 439, 274P745 (2dcase).

529–6¼–New. Omission of some heirs is a mistake of law or of fact, which makes the decree erroneous, but not void. 101 Vt343, 143A302.

529–6⅕–New. The probate court's want of jurisdiction to render a decree could not be aided or cured by failure to appeal therefrom. 101Vt343, 143A302.

529–8 175Minn524, 222NW68; 74Mont 558, 241P636. [b] (1) See also 74Mont 558, 241P636 (decree of distribution of probate court). (2) Decree of distribution relates back to legatee's original right, and distribution gives him no new title, but merely asserts property to which title attaches. 30F(2d)604. (3) Decree confers no new right but merely evidences their right and title which relates back to decedent's death. 280US 327, 50SCt115, 74L ed457. [m] **Decree of final distribution of decedent's realty** merely confirms heir's title and releases property from conditions to which it was subject as decedent's estate. 76Mont143, 245P529. [n] **Where testatrix had only life estate,** decree does not create title in devisees. 146Wash354, 262P959. [o] **Function of decree** is to declare title accruing under law of descents or under will. 146Wash354, 262P959. [p] **Will** is entitled to no further consideration after entry of decree of distribution for purpose of determining rights of parties interested in estate, except on direct appeal from decree. 206Cal 439, 274P745 (2dcase).

530–10 175Minn524, 222NW68 (real estate); MoA 14SW(2d)521.

530–12 10PaDist&Co 789.

531–20 50Nev371, 261P654; 123 Okl 38, 251P1028.

531–23 76CalA409, 244P942; 100Vt51, 134A853. [a] (8) Under decree distributing property to one person for life, and, upon his death, remainder to two others, estate vests in one of such others, where both are in existence at time of entry of decree. 97CalA27, 274P1030.

532–25 70Utah258, 259P919.

532–27 249Mich326, 228NW717; 70Utah 258, 259P919.

532–29 195Cal 132, 231P987; 80CalA 20, 251P232; 46 Ida379, 268P3; 249 Mich326, 228NW717; 175Minn68, 220 NW406; 317Mo 1078, 298SW83; MoA 31SW(2d)585 ("final judgment"); 50 Nev371, 261P654, 655 [citCJ]; 124 Okl 63, 253P1014; 122 Okl 295, 254P966; 139 Okl 240, 281P760; 140 Okl 260, 283

P236; 40 OklACR97 [reh pending]; 283 Pa464, 129A458; TexCivA 12SW(2d) 615; 100Vt51, 134A853. [a] (3) Decree cannot be attacked on ground that court erroneously interpreted terms of will or law applicable thereto. 76CalA409, 244 P942. [f] **Collateral attack can prevail only** where proceedings are void on face of record or fraud is shown. 123 Okl 38, 251P1028. [g] **Presumptions.**–80CalA 20, 251P232.

532–30 74Mont558, 241P636; Okl 291P 529. But see 317Mo 1078, 298SW83.

533–34½–New. Where a corporate executor allowed judgment to go against it without setting up any claim on a note for an advancement, it cannot hold up execution of the judgment merely by commencing action on the note and to enforce the lien. 229Ky162, 16SW(2d) 756.

534–47½–New. Where, after appeal was taken from a decree directing partial distribution to persons who could take only under the will, additional testimony was taken showing a will contest, the decree will be reversed. 94CalA113, 270 P708.

534–49 48 Ida288, 282P90; Mo 30SW (2d)1005. [c] (3) Appeal does not lie from order determining only that adoption proceedings attacked in petition were valid. 187Wis90, 203NW720.

534–50 [a] (1) 199Cal 199, 248P666. (7) Order denying petitioner's kinship to part of estate, though made on hearing of petition for final settlement and distribution. 29Ariz138, 240P280. (8) On appeal from decree of distribution, orders determining who are next of kin and only heirs of deceased may be reviewed. 199Cal 199, 248P666. [c] (4) Order either minute or final purporting to determine certain named parties to be next of kin and only heirs of deceased is not appealable prior to decree of distribution. 199Cal 199, 248P666. [c] (5) Order declaring nature of property. 48 Ida288, 282P90. (6) Order apportioning net amount realized in death action. 35 OhA321, 172NE450.

534–52½–New. In some jurisdictions a decree of distribution is treated and reviewable as a judgment. 74Mont558, 241P636.

534–52½–New. That a decree of the county court for final distribution was made before the executors had rendered their final account does not deprive the district court on appeal of jurisdiction to construe the will and direct distribution where all of the interested parties were sui juris and stipulated in writing in the county court that decree of distribution should be entered without prejudice to the rights of the executors to have a reasonable time after decree to convert the property into money and pay legacies. 41 OklACR63.

534–55 [e] **Generally several persons with distinct and independent interests** cannot prosecute joint appeal from decree of distribution. 299Pa348, 149A 598. [f] **Appellants not appearing on hearing of application for final distribution** are not entitled after distribution to perfect appeal. Wis 232NW549.

535–56 200Cal 252, 252P1039; 299Pa 348, 149A598.

535–60 200Cal 252, 252P1039; 203Cal 569, 265P241; 166Ga719, 144SE275.

535–61 299Pa348, 149A598.

535–65 200 Iowa620, 203NW307 (order for payment of legacies directly affecting residuary legatees).

536–76½–New. Where probate court after hearing bases construction of will upon evidence presented, appellate court without evidence before it cannot say that different construction should have been given, unless no evidence was admissible. 76CalA723, 245P776.

536–76½–New. Failure to file a judgment roll or bill of exceptions is sufficient to require affirmance of order of final distribution appealed from. 76 CalA723, 245P776.

536–77 [a] **Failure to make devisee's widow party to proceeding** after appeal from distribution order cannot be cured by remand to superior court. 111Conn 683, 151A265.

536–78½–New. On appeal by a legatee denied the right to take the bequest willed to him, the other legatees are not necessary parties. 207 Iowa20, 222NW 564.

536–83 197Cal 189, 240P21.

536–84½–New. A judgment authorizing distribution in accordance with the terms of the will is suspended by appeal. 163La831, 112S802.

537–87 193Wis305, 214NW345; CalA 258P118. See also Minn 233NW305. [d] **Jurisdiction of probate court** to determine that property was community property may be questioned for first time on appeal. CalA 258P118.

537–88½–New. Jurisdiction of the probate court to determine title to personalty cannot be considered on appeal from a decree of distribution, 79CalA262, 249 P208.

537–88⅓–New. but only on an appeal from the order settling the account. 79CalA262, 249P208.

537–89 [a] (2) Evidence held inadmissible. 111Conn589, 151A166.

537–92 195Wis332, 218NW437.

537–93 197Cal 276, 240P498.

537–93½–New. Construction of will will be sustained in appeal through the same as that made in petition of which the court did not have jurisdiction, in the absence of a showing that the court did not give full consideration thereto. 187 Wis105, 203NW748.

537–93⅓–New. Credibility of witnesses is a matter for auditor to determine. 289Pa579, 137A728.

537–93¼–New. Where the executors were present personally and by counsel on the hearing on a petition for distribution, failure to give them personal notice of the hearing is harmless. 240 Mich661, 216NW446.

538–96½–New. A decision refusing partial distribution to legatees based upon the judgment of the court as to whether the condition of the estate is such as to justify the distribution will not be reversed. 196Cal 294, 237P744.

538–96½–New. On appeal by a specific legatee aggrieved by a portion of a decree of distribution erroneously charging him with a part of the expenses of administration but not aggrieved by an erroneous distribution of property to which he was not entitled, the decree may be modified so as to relieve him from such expenses. 200Cal 252, 252P 1039.

538–96¼–New. On motion to dismiss appeal from an order dismissing a petition to open a distribution decree, allegations of the petition must be taken as true. 107Conn281, 140A721.

538–96⅓–New. Such motion will be granted where it appears that the lower court had no jurisdiction to entertain a petition to open the decree. 107Conn281, 140A721.

538–96½–New. Review of order amending decree see Minn 233NW305.

538–3 107Conn281, 140A721.

538–4 [d] (7) In some jurisdictions probate courts, in absence of statutory authority, are without jurisdiction to order payment from estate of counsel fees of heirs or distributees who have been parties to adversary proceedings against executors or administrators. 49 RI 452, 144A148.

539–6 107Conn281, 140A721 (costs on appeal).

539–8 [k] **Deposit with clerk.**–Ariz 289 P989.

539–9 129Misc845, 223NYS470.

539–10 See also 94CalA113, 270P708.

540–18 154Md638, 141A390; 35 OhA 374, 172NE537. [f] **Application alleging payment of claims by executor** and order permitting transfer of assets to him will not satisfy debts. 35 OhA374, 172NE537. [g] **Shares of stock held subject to trust for payment of debts.**–35 OhA374, 172NE537.

542–24½–New. The superintendent of banks, in charge for liquidation purposes, cannot maintain an action against distributees of the estate of a deceased bank director to enforce liability for excessive loans, where the claim was not presented to the executor. 53SD250, 220 NW485.

542–26 102Conn644, 129A854.

542–37 102Conn644, 129A854.

543–44½–New. However, sureties cannot be made parties at the request of the executor in a later claimant's action. 165Ga283, 140SE266.

543–46 165Ga283, 140SE866.

544–60 124Kan230, 257P962. [g] **Statutes** must be strictly followed. 219App Div471, 220NYS44. [h] **Procedural matters** are not "rights, defenses, or limitations lawfully accrued or established" and are governed by code of civil procedure. 219AppDiv471, 220NYS 44.

544–61 217AppDiv210, 216NYS699. [d] **Presumption is that property sold by executor** is sold to pay costs and expenses of administration, or debts or legacies. 85CalA21, 258P986.

544–62 217AppDiv210, 216NYS699.

545–63½–New. Proceedings for sale of decedent's realty to pay debts governed by statute in effect when process was served. 219AppDiv471, 220NYS44.

545–64 141Wash475, 252P145.

545–65 170La828, 129S361. [i] **Upon consent of life tenant** estate may be sold and interest of infant remainderman will attach to proceeds. 131Misc323, 227 NYS526.

545–66 9PaDist&Co 564.

546–68 Ida 292P592. [c] **Abuse of discretion not shown.**–Ida 292P592.

546–69 220Ala149, 124S202; 89 IndA 177, 166NE29; 1LaA205. TexCommnA 280SW742. See also 48Philippine982.

547–73 217AppDiv210, 216NYS699; 25 OhA7, 158NE207.

549–84 235 IllA63; 217AppDiv210, 216 NYS699. But see 126Kan729, 271P299.

549–85 [a] (6) Cost of funeral and last sickness of decedent's widow. 217App Div210, 216NYS699. (7) Taxes on decedent's estate which life tenant neglected to pay. 217AppDiv210, 216NYS 699.

550–88 TexCommnA 280SW742. [d] **Nonexempt personal property** may be sold for payment of expenses of administration. 69Utah484, 256P409.

550–90 130Misc789, 226NYS436, 440 [quotCJ].

550–94 TexCivA 281SW616.

552–5 201 Iowa389, 207NW389.

554–15 192NC484, 235SE353.

552–5 49RI117, 140A467.

554–17 130Misc789, 226NYS436, 440 [quotCJ].

555–27 [a] TexCivA 291SW924.

555–28 TexCivA 291SW924.

555–31 218Ala109, 117S623; 142 Okl 163, 286P327.

558–56 147Miss621, 111S743.

559–58 147Miss621, 111S743.

560–63 210Ky343, 275SW804 (heir held included in word "representative" as used in statute).

560–65 210Ky343, 275SW804.

560–70 TexCommnA 280SW742. [j] **Community property** may not be sold to pay separate debt of husband. 158 La822, 104S728. [k] **Realty alienated by devisee eighteen months after issue of letters testamentary** is not subject to sale for decedent's debts. 217AppDiv 210, 216NYS699. [l] **Land which decedent had contracted to sell** is not liable for his debts where he dies before title passes. NJCh 146A583.

561–74½–New. Life estate given by will with absolute power of disposition for life tenant's benefit is changed into absolute fee by Real Prop. L. § 149. 242NY196, 151NE205 (as respects creditors).

561–74⅓–New. Creditors may compel sale of such property to satisfy debts. 242NY196, 151NE205 (Surrogate Court Act § 233).

561–74¼–New. A life estate which has been changed to an absolute fee by statute is subject to sale for payment of debts after life tenant's death. 242NY 196, 151NE205.

561–74½–New. Where there was an executory contract for the sale of land owned by decedent, the land cannot be sold to pay decedent's debts, since it has been equitably converted into personalty. NJCh 146A583.

561–76 167La293, 119S54.

563–96½–New. A gin owned by decedent in common with another may be sold, and the claim of the heirs for the value thereof is properly rejected. 158 La822, 104S728.

563-98½-New. All lands devised in trust are subject to sale if necessary to discharge obligations of an estate where the executor is empowered to carry on the business of the testator. 106Conn 602, 138A795.

565-8 162Ga403, 134SE98.

565-9 162Ga403, 134SE98.

566-16 178Ark28, 9SW(2d)793; Mo 256 SW1066. Mo 7SW(2d)1010; 222MoA 1084, 11SW(2d)1093; 117Tex474, 8SW (2d)633, 66ALR916; TexCivA 7SW(2d) 620. [n] **Conclusiveness of determination of probate court** that land not homestead see 114 Okl 136, 244P417.

567-18 121Kan229, 246P521.

567-22½-New. Homestead allotment of deceased adopted white citizen of Cherokee Nation of Indians may be sold for payment of debts arising after restrictions on alienation removed. 114 Okl 136, 244P417.

569-37 233Ky109, 25SW(2d)56.

569-40 217Ala323, 116S161.

570-46 [d] **Entire tract covered by mortgage properly sold** to pay decedent's debt, though owner of part of tract offered his share of mortgage debt. 196 Ind520, 148NE474.

571-55 84CalA605, 258P614; 132 Okl 14, 269P289, 68ALR649.

572-58½-New. The court is the vendor and can direct the administrator. 217 Ala323, 116S161.

572-64½-New. In some jurisdictions a suit by an administrator to sell real estate to pay debts is a civil action. 19 OhA499.

573-67 But see 217Ala85, 115S4.

573-68½-New. An application for sale of realty to pay debts will be denied if made before the amount of debts is ascertained and the necessity of sale is not shown. 203 Iowa393, 212NW689.

573-76½-New. Under the West Virginia statute no suit to subject realty to payment of debts may be instituted by a general creditor of the estate during six months from the date of the qualification of the executor. 106WVa 626, 146SE876.

573-76½-New. An order of sale to pay decedent's debts has been held not invalid because obtained less than thirty days after appointment of an administrator. 11LaA32, 120S804.

574-81 [n] **Limitation for commencing** proceeding not applicable to decedent dying before statute became effective. 219AppDiv471, 220NYS44.

575-86 203 Iowa393, 212NW689. [f] **Application for sale to pay debts made within reasonable time after discovery of necessity is timely.** 203 Iowa393, 212 NW689.

575-87 203 Iowa393, 212NW689.

575-88 203 Iowa393, 212NW689. [a] 203 Iowa393, 212NW689.

576-91 But see 203 Iowa393, 212NW 689.

576-98 181Ark27, 24SW(2d)865; 254 Mass491, 150NE324; TexCommnA 280 SW742. [j] **That life tenant's interest was fixed at twenty three years' expectancy, whereas she died three years after administration,** held not to affect surrogate court's jurisdiction to order sale of realty. 131Misc323, 227NYS526. [k] **Petition reciting lapse of legacy** is not outside of jurisdiction of county court as application to construe will. TexCivA 25SW(2d)171.

577-99 TexCommnA 280SW742.

578-1 25 OhA32, 158NE499. [a] **Order removing administration.**-218Ala143, 117S665.

578-3 208 Iowa1226, 227NW116 (jurisdiction conferred on district court includes power to determine whether property is in whole or in part exempt).

579-16 18F(2d)813.

579-18 213Ky230, 280SW973.

581-33½-New. The rule is otherwise in some jurisdictions. 213Ky230, 280 SW973.

581-38½-New. In some jurisdictions all persons who have a lien upon all or any part of the real estate sought to be sold by an administrator to pay debts are necessary parties to the proceeding, 19 OhA499.

581-38½-New. , whether the liens existed at the time of decedent's death or were acquired thereafter upon the share of an heir at law before the petition for sale was filed. 19 OhA499.

582-41½-New. Judgment directing sale of decedent's land is void where report of warning order attorney does not show that he has examined infant's case. 222Ky325, 300SW880; 222 Ky339, 300SW881.

582-42 213Ky230, 280SW973; 19 OhA 499.

583-48 219AppDiv471, 220NYS44. [g] 203 Iowa393, 212NW689; 149Md217, 131A327.

584-70 219AppDiv471, 220NYS44.

584-75 219AppDiv471, 220NYS44.

585-78 219AppDiv471, 220NYS44.

585-80½-New. Infant is properly made defendant in proceedings to sell decedent's real estate, although the petition incorrectly stated the county of residence. 222Ky325, 300SW880.

587-86 219AppDiv471, 220NYS44.

587-87 18F(2d)813; 222Ky339, 300SW 881.

588-95 219AppDiv471, 220NYS44.

589-97 219AppDiv471, 220NYS44.

589-98 219AppDiv471, 220NYS44.

591-25 [m] **Statute providing for service or publication held all inclusive.**-Ida 291P1051.

592-32 219AppDiv471, 220NYS44.

593-34 12PaDist&Co 705 (where testator may have died intestate with respect to premises sought to be sold). But see 29Hawaii284.

594-51 [a] 120Kan305, 243P274.

594-53 120Kan305, 243P274.

594-53½-New. Claimant becomes defendant in the trial. 22AlaA252, 114S 422.

594-57 Ida 291P1051. [a] **In Idaho.**-291P1051.

595-71 141 Okl 60, 283P1004 (under statutes formerly in force).

596-78 [a] (3) Statute requiring publication "at least four successive weeks" does not require publication for full term of four weeks, but publication each week of consecutive four. Ida 291P 1051.

596-85 [d] **Affidavit held to show publication in newspaper directed.**-Ida 291 P1051. [e] **Affidavit signed by publisher's chief clerk** held not objectionable as not signed by principal clerk. Ida 291P 1051.

599-18 [a] (2) Exceptions to answer of heir, alleging that he built garages on real estate pursuant to agreement with decedent, whereby garages with right of ingress and egress were to be property of heir should be overruled. 334 Ill43, 165NE159.

601-29 235 IllA63.

601-36 154Miss800, 122S784.

601-38½-New. A creditor seeking the sale of realty in which deceased debtor had a life estate, on the ground that the life estate had been changed into an absolute fee, must show that decedent received absolute power of disposition within the statute, and that the future estate limited on his death is subject to creditor's rights to sell after his death. 242NY196, 151NE205.

601-42 154Miss800, 122S784.

602-49½-New. Creditors seeking sale of deceased life tenant's realty to pay debts on ground that estate had been changed to absolute fee must show that decedent received absolute power of disposition and that the future estate limited on his death was subject to creditors' rights to sell. 242NY196, 151NE 205.

602-58 166Ga717, 144SE210.

602-62 See also 235 IllA63.

603-65½-New. In some jurisdictions it is the duty of the court to adjudicate a vendor's lien on the land asserted on cross petition of a party in interest. 154 Miss800, 122S784.

604-68½-New. In North Carolina judgment creditors may intervene in ex parte proceedings to sell real estate and show claim fraudulent. 192NC484, 135SE353.

604-82 [b] **Where heir or devisee contests claim allowed ex parte in probate court,** claimant must establish claim by competent evidence. 127Kan619, 274P 256.

604-84 127Kan619, 274P256.

605-96 [a] **Evidence held sufficient to show** that claim of petitioning creditor had been presented and allowed. 41 Wyo 189, 283P1097.

607-15 [a] 217Ala323, 116S161.

607-25 25F(2d)412.

607-28 [j] **Presumption of possession accompanying title in administrator.**-41 GaA667, 154SE375.

608-41 86Mont340, 283P761; 49Nev 319, 245P703 (no sale of any property of estate is valid under Nevada statute, unless made under order of district court); TexCommnA 280SW742; Tex CivA 281SW616.

609-52 See also 235 IllA63.

610-57 49RI 117, 140A467 (should fix minimum sale price of land).

610-64 323 Ill 269, 154NE101.

610-68½-New. Decree is not invalid because omitting statement of widow's percentage of proceeds. 222Ky339, 300 SW881.

611-76½-New. An order to sell property free from liens is abortive as respects lien for alimony on property. 215 Ala581, 112S190.

611-76½-New. The order should safeguard the interests of creditors. 217 Ala85, 115S4.

611-76¼-New. Under some statutes order is not objectionable because not providing for sale of personalty at public auction where property operated as unit constitutes realty. Ida 291P1051.

612-93 202Cal 612, 262P34. See also 208 Iowa1226, 227NW116.

612-94 11LaA32, 120S804.

612-95 76Mont476, 248P362 (order in effect a judgment).

612-96 202Cal 612, 262P34; Ind 164NE 494. [c] (3) Order is binding on contesting legatee both in individual capacity and as trustee for another. 202 Cal 612, 262P34.

612-3½-New. Where sale of homestead property of a widow's estate in probate proceedings was for the payment of all of the debts of the estate, including debts which were not chargeable against it, the order of sale was void and conferred no rights on the purchaser, even if there may have been unpaid taxes on the homestead. 117Tex474, 8SW(2d) 633, 66ALR916.

612-4 218Ala230, 118S460.

613-14 49RI 137, 140A913.

614-21½-New. New judgment is not res judicata on issue of title as against adverse claimants. 25F(2d)412.

614-27 [b] See also 208 Iowa1208, 227 NW103.

615-41½-New. But a decree ordering conveyance by an administrator and fixing the time is not a modification of prior order fixing no time, since reasonable time is to be inferred. 198Cal 341, 244P1084.

615-44½-New. Order modifying order of sale is not void in collateral attack to enjoin sale, because made by judge who made original order. IndA 157NE450.

616-51½-New. Alleging conspiracy to defraud does not show ground for independent relief, where the gist of the action was fraud in procuring probate decree for sale. 261Mass209, 158NE836.

616-51½-New. Allegation that plaintiff did not receive notice of sale does not show noncompliance with an order that notice must be given. 261Mass209, 158 NE836.

616-54 181Ark27, 24SW(2d)865; Ark 31SW(2d)955 (presumed court made jurisdictional findings); IndA 157NE450; 254Mass491, 150NE324; 76Mont476, 248 P362; 192NC484, 135SE353. [b] 254 Mass491, 150NE324. [f] **Subsequent probate of decedent's will** does not render void administrator's proceeding to sell realty nor deed made pursuant thereto. 31 OhA502, 166NE692. [g] **Estoppel of executor to deny validity of order.**-39Wyo 163, 273P176.

616-55 202Cal 612, 262P34; 166Ga166, 142SE663; IndA 157NE450; 117Tex 474, 8SW(2d)633, 66ALR916. [e] **That affidavit of publication of order to show cause for sale was not executed till after hearing** does not render order for sale invalid on collateral attack. Ida 291P1051.

617-64 [h] **Statute providing for appraisement of land sold at judicial sales** applies to sales of decedent's real property to pay debts. 233Ky109, 25SW(2d) 56.

617-65 SD 228NW798.

617-73 [a] **Reappraisal is properly ordered** where original appraisal was too high. **Ida** 292P592. [b] **Reappraisal on day of confirmation of sale** held not improper. **Ida** 292P592.

618-75 331 **Ill** 102, 162NE155; 234 **Ill** A183. [a] (2) When joint appeal is allowed, all of appellants must sign appeal bond. 331 **Ill**102, 162NE155. (3) Terms of appeal, whether fixed by order or by statute, must be strictly complied with. 331 **Ill** 102, 162NE155. (4) Defect in perfecting appeal cannot be cured by filing new bond after time for filing bond has passed. 331 **Ill** 102, 162NE155. (5) Failure to comply with order allowing appeal by filing defective bond goes to jurisdiction of court to hear appeal. 331 **Ill** 102, 162NE155. (6) Where order allowing joint appeal provided for filing of bond by any of appellants, and subsequent order extending time within which to file bonds provided for filing of "their joint and several appeal bond or bonds," bond in which only two of three defendants joined has been held insufficient to give appellate court jurisdiction. 331 **Ill** 102, 162NE155.

619-1 [b] **Where appeal from original decree was dismissed,** such decree cannot be attacked on appeal from subsequent order approving sale. 337 **Ill** 378, 169NE176.

619-5 254**Mass**491, 150NE324. [a] (3) Sale by executrix held unauthorized and improperly approved, though appeal bond was defective. 337 **Ill** 378, 169NE 176. (4) That original decree is in force, due to defective appeal bond, does not prevent setting aside sale by executrix pending appeal. 337 **Ill** 378, 169 NE176.

619-8 **IndA** 157NE450; 215**AppDiv**210, 213NYS699.

620-13½-New. Decree ordering sale is reviewed for errors. 234 **IllA**183.

620-15 222**Ky**339, 300SW881.

620-20½-New. A receipt ordering dismissal of appeal without prejudice is a final disposition of the case on appeal and reveals the jurisdiction of the whole matter in the probate court. 254**Mass** 491, 150NE324.

620-23 **Ind** 158NE516; 129**Kan**244, 282 P732 (demurrer to administrator's answer held well founded). But see **IndA** 157NE450. [d] **One who sues to enjoin sale** has burden of proving invalidity of order directing sale. **Ind** 158NE 516.

621-30½-New. In North Carolina it was held that judgment creditors may not maintain independent action to enjoin sale of lands to pay debts, although alleging fraud in allowing of claim. 192NC134, 135SE352.

622-43½-New. Acts of an administrator under a valid order for sale of real estate, before a will has been duly probated, are valid. **Ind** 164NE494.

622-44 193NC794, 138SE161.

622-53 But see 164**La**1, 1138658.

622-59 [g] **Proceeds of contract for sale of real estate** which owner entered into before death held personal property and distributable as such by administrator without necessity of bond. 109**Conn** 307, 147A4, 66**ALR**1036.

623-62 [a] **In Montana.**–86**Mont**340, 283P761.

623-62½-New. A trust company acting as administrator is not required to give a bond on the sale of decedent's realty. **Ind** 158NE516.

624-79 See also 225**Ky**228, 78**W(2d)** 863.

624-98 See also 178**Minn**401, 227NW355.

625-6 But see 29**Hawaii**284. [b] **Under statutory power of court to direct manner and terms of sale,** court is not controlled by requirements of notice governing other judicial sales. 149**Md** 217, 131A327.

626-22½-New. Under general statutory power to direct manner and terms of sale, the court is not required to follow the rules governing the length of publication in other judicial sales, and an order of publication short of such period is valid. 149**Md**217, 131A327.

626-26 [a] **Posting by personal representative held unobjectionable.**–**Ida** 291P1051.

626-27 [a] **Realty in different counties.**–**Ida** 292P592.

629-71½-New. Policy of law being to administer estates with dispatch to save needless expense incident to delay, 76 **Mont**476, 248P362.

629-71¼-New. Although the court may have some discretion to delay the sale to await a favorable market, 76**Mont**476, 248P362.

629-71¼-New. Such discretion should be exercised only after showing that by a reasonable delay the property may at not too distant a time be disposed of to better advantage. 76**Mont**476, 248P362.

629-71½-New. Such discretion is exhausted when the court determines the necessity for a sale and orders the property sold at a specified time. 76**Mont** 476, 248P362.

630-88½-New. That a private sale of merchandise was at retail instead of in bulk is not conclusive evidence of mismanagement of the estate. 222**MoA**276, 297SW138.

630-94 217**Ala**85, 115S4. [a] 120**Kan** 305, 243P274.

631-10 109**Conn**529, 147A181.

631-14½-New. In some jurisdictions, complaint that a sale was made for a price less than the appraised value is never well founded when the sale was for two thirds of the appraised value of the property and was made on application of an administrator for the purpose of paying debts. 167**La**103, 120 S872.

632-20 166**Ga**166, 142SE663.

633-40½-New. An order for sale subject to liens may be amended for sale free of encumbrance without making lienholders parties defendant where they appear and file consent. **IndA** 157NE 450.

633-48 But see 98**WVa**607, 128SE124.

633-50 158**La**637, 1048481 (in case not within statute permitting purchase by administrator); 126**Misc**479, 214 **NYS**167 (executrix). [d] 158**La**637, 1048481 (administrator as mortgage creditor).

634-51 105**Conn**557, 136A108.

635-62 160**Ga**694, 128SE900, 901 [cit CJ]; 10**LaA**553, 1198785. [e] (2) Administrator's appointment of third person to bid in property with understanding that he will convey it to administrator who is heir at law of intestate does not constitute fraud where nothing is done to prevent property from bringing fair price. 160**Ga**694, 128SE 900. [f] **Administratrix wife of deceased** may purchase at commissioner's sale and sale is valid till claim of fraud or proper vacation. 225**Ky**228, 78**W(2d)** 863.

636-70 See also 158**La**637, 1048481.

636-71 105**Conn**557, 136A108; 44 **Ida** 461, 259P3; 225**Ky**228, 78**W(2d)**863; **Mo** 318**W(2d)**28; 131**Misc**323, 227NYS 526.

637-73 158**La**637, 1048481.

637-79 **Mo** 318**W(2d)**28.

638-92 See also 218**Ala**186, 1188333.

640-9 [a] **Formal written bid and required deposit** constitute contract to purchase property on terms stated in petition for confirmation. 102**CalA**152, 282P986.

641-38 194**NC**613, 140SE215.

641-38½-New. An administrator cannot allow a reduction of the sale price by the amount of a mortgage barred by the statute of limitations. 199**Cal** 625, 250 P669, 48**ALR**1308.

644-76 102**CalA**152, 282P986 (action to recover possession and forfeit deposit may be maintained).

644-77 102**CalA**152, 282P986 (specific performance or other appropriate remedy). [f] **Estoppel of purchaser to assert rescission of sale.**–166**Ga**166, 142SE 663.

644-83 [a] **Purchaser waives claim and title** by breaching agreement to purchase. 102**CalA**152, 282P986.

645-87½-New. After a purchaser is notified of his breach and acknowledges his inability to fulfill the sale conditions, his equity ceases and his pretended lease is void. 102**CalA**152, 282P986.

645-87¾-New. A purchaser who takes possession of and assumes to lease the property after acknowledging his inability to fulfill conditions is a trespasser and acquires no title to the crops planted by his alleged tenant. 102**CalA** 152, 282P986.

645-88 102**CalA**152, 282P986.

645-92 178**Ark**130, 10SW(2d)37.

645-97 166**Ga**166, 142SE663.

647-26½-New. Complaint held sufficient. 102**CalA**152, 282P986.

647-33 178**Ark**130, 10SW(2d)37; 38 **GaA**584, 144SE671(2dcase).

648-50½-New. Where purchase price is not paid on the day of sale and the crowd has not dispersed within the legal hours of sale, the executor may resell on the same day. 166**Ga**166, 142SE663.

648-50¾-New. In such case, if the crowd has dispersed, the land must be readvertised for sale. 166**Ga**166, 142SE 663.

650-89½-New. A purchaser at a private sale is bound by the contract reported to the court and cannot make a different contract with the administrator who could not sell without the court's consent. **SD** 228NW798.

650-97 216**Ala**619, 114S208. [a] **After twenty years,** report is presumed to be true. 216**Ala**619, 114S208.

651-2 94**CalA**175, 270P745; **TexCivA** 282SW298, 301 [citCJ].

651-4 338 **Ill** 309, 170NE212.

652-11 84**CalA**605, 258P614.

652-14½-New. Administrator's recommendation when making return of sale that sale be not confirmed may be insufficient to give the court jurisdiction to make order refusing to confirm. 76 **Mont**476, 248P362.

652-14½-New. But where bidders by petition filed subsequent to return asked that a hearing be had thereon under the statute as parties interested, the court is vested with jurisdiction to proceed. 76**Mont**476, 248P362.

652-14¼-New. The court is authorized to confirm a sale of a decedent's realty to satisfy debts only when the sale is legally made. 86**Mont**340, 283P 761.

652-29 [a] (1) 76**Mont**476, 248P362. (2) Administrator not one of "persons interested in the estate" who may file objections. 76**Mont**476, 248P362. [c] (3) That sale would result in substantial loss to estate. 338 **Ill** 309, 170NE 212.

653-37½-New. Purchaser cannot urge failure to advertise hearing on claims against decedent's estate as ground for setting aside sale, 222**Ky**339, 300SW881.

653-37¼-New. or that bond requirement for nonresident defendant was not complied with. 222**Ky**339, 300SW881.

653-39 See also **Va** 143SE759.

653-40 149**Md**217, 131A327. [d] (2) It is duty of court to refuse confirmation if asserted untenable claims held down sale price to appreciable extent. 199 **Cal**625, 250P669, 48**ALR**1308.

654-41 222**Ky**339, 300SW881.

654-42 149**Md**217, 131A327. [a] **Fraud, misconduct, or unfairness not shown.**–149**Md**217, 131A327.

654-43 [a] **Where property materially appreciates in value before confirmation,** the sale should be set aside and bidding reopened. 105**WVa**563, 143SE759.

654-45 155**Md**167, 141A558.

654-49 338 **Ill** 309, 170NE212.

654-51 286**Pa**520, 134A402.

655-56½-New. A surviving cotenant who managed the property as decedent's agent is not required to inform the court of their joint affairs in order to procure confirmation of a sale to him. 203**Cal** 766, 265P941.

656-75 218**Ala**186, 1188333.

656-76 178**Ark**130, 10SW(2d)37.

656-83 141 **Okl** 60, 283P1004.

657-88½-New. Confirmation by the court and not the act of the personal representative in making sale divests the heirs of title. 86**Mont**340, 283P761.

657-89 218**Ky**221, 291SW29.

657-4½-New. Judgment in monition proceedings confirming titles acquired by sale of the property of a succession is res judicata as to an heir who acquiesced in the appointment of an administrator and contributed funds to assist

in expenses of administration. 10LaA 553, 119S785.

657-4½-New. A decree confirming an administrator's purchase at his own sale, has been held conclusive in a subsequent suit for an accounting by the administrator, in which the parties in interest, other than the administrator and objecting heirs and devisees, were not parties, where the administrator had interest in the estate. 218Ala186, 118S333.

657-4¼-New. Where notices of sale were regular and the petition for confirmation was sufficient to give the court jurisdiction, no errors in the exercise of jurisdiction can render the sale void. CalA 259P102.

657-6½-New. Order of probate court approving sale is not subject to collateral attack. Mo 26SW(2d)603.

657-7 TexCivA 282SW298. [b] **Conveyance by administrator prior to entry of decree of confirmation on court's minutes** held to vest no title in purchaser. TexCivA 282SW298.

658-12 76Mont476, 248P362.

658-20 76Mont476, 248P362.

659-31 76Mont476, 248P362.

659-32½-New. Objections not raised on first sale will not be considered as grounds for setting aside subsequent sale. 222Ky339, 300SW881.

659-39 105Conn557, 136A108. [d] **Where decedent's realty was sufficient to pay not more than one half of his debts,** children could not complain of failure to show indivisibility of land sold. 216Ky257, 287SW701.

660-40 [d] (2) Remainderman, owning interest in realty, held entitled to maintain action to set aside sale. 131Misc323, 227NYS526. [i] (1) 164LaI, 113S658.

660-44 SD 228NW798 (validity of mortgage to which sale was subject as reported).

661-56 154Wash130, 281P337. But see 131Misc323, 227NYS526.

662-75 131Misc323, 227NYS526.

663-77 [c] **Remainderman need not restore amount received** which was less than he was entitled to receive. 131Misc 323, 227NYS526.

663-88 216Ala619, 114S208; 231Ky 401, 21SW(2d)654 (confirmation of commissioner's sale cannot be attacked after term); 49ND553, 192NW176.

664-90 164LaI, 113S658; 141 Okl 60, 283P1004.

664-94 [a] (1) 99CalA113, 277P1068. (2) Reasonable time for settlement is question for trial court, to be determined under all circumstances of case. 99CalA113, 277P1068 (lapse of thirty-four years held to bar remainderman's suit).

664-1 218Ala186, 118S333. [b] (3) Long delay on part of widow of deceased heir without notice. 105Conn 557, 136A108.

665-8 Ark 31SW(2d)955; 317 Ill 625, 148NE384; 218Ky221, 291SW29; 217 AppDiv210, 216NYS699. [a] (1) 317 Ill 625, 148NE384 (vested remaindermen). (2) 117Tex474, 8SW(2d)633, 66 ALR916; 117Tex580, 8SW(2d)640.

666-9 203CalA766, 265P941; 231Ky 401, 21SW(2d)654; 114 Okl 136, 244P 417; 33PortoRico 980, 984 [citCJ]. [d] (6) Failure to require additional bond of administratrix. Ida 291P1051.

666-10 129Kan547, 283P626; 219App Div471, 220NYS44.

667-14 217AppDiv210, 216NYS699.

667-15 216Ala619, 114S208; 219App Div471, 220NYS44.

668-23½-New. A proceeding to be declared owners of realty is a collateral attack on a voidable judgment in settlement of the estate. 225Ky228, 7SW (2d)863.

668-26 231Ky401, 21SW(2d)654 (unless judgment is void).

668-28½-New. Under statutes in some jurisdictions the court cannot vacate sale to pay debts unless it finds that proceedings were unfair or the bid was disproportionate to the value and that on a new sale on advance the bid may be obtained. 76Mont476, 248P362.

668-28⅓-New. Where record shows indivisibility of land, sale could not be successfully challenged because no evidence of indivisibility was offered or heard. 216Ky257, 287SW701.

668-29 33PortoRico 980, 985 [citCJ].

668-30 164Ga332, 138SE785.

669-45 213Ky230, 280SW973; 218Ky 221, 291SW29.

669-45½-New. or because a buyer of the interest of the widow and some of the heirs were not made parties, 213Ky 230, 280SW973.

669-46½-New. Where judgment under which a sale was had was void for failure to join an infant heir of the intestate and such heir was not before the court at the time of confirmation, the sale may be set aside at the suit of the purchaser notwithstanding the order of confirmation. 218Ky221, 291 SW29.

669-48 216Ala619, 114S208.

670-61 164LaI, 113S658.

671-69 33PortoRico 980, 984 [citCJ].

671-72 121Kan229, 246P521. [a] 164 LaI, 113S658.

672-75 105Conn557, 136A108.

673-93 76Mont476, 248P362.

673-94 76Mont476, 248P362.

673-97 131Misc323, 227NYS526.

673-3 [d] 120Kan305, 243P274 (sale by administrator to his surety at private sale under order of court permitting public or private sale).

674-13 Ida 292P592.

675-20 231Ky401, 21SW(2d)654.

675-26 105Conn557, 136A108.

676-38 10LaA541, 120S709.

676-40 165La453, 115S653.

676-49 164Ga332, 138SE785; 141 Okl 60, 283P1004 (demurrer properly sustained).

676-50 [a] (5) Other allegations held insufficient. 11LaA32, 120S804. (6) Insufficient allegation of damage from alleged fraudulent reappraisal. Ida 292P 592.

676-52 See also 162Ga35, 132SE389.

676-53 137 Okl 297, 279P331 (petition held demurrable).

677-54 Ida 292P592. [b] **Where petition charged fraud fully and notice to purchaser,** general demurrer held erroneously sustained. 163Ga433, 136SE 279.

677-57 217AppDiv210, 216NYS699. [d] **Presumption is rebuttable.**-217App Div210, 216NYS699.

677-60 217AppDiv210, 216NYS699.

677-66 [f] **Finding that publication of order to show cause for sale was sufficient** will be presumed correct in absence of contrary showing in record. Ida 291P1051.

678-74 76Mont476, 248P362.

678-74½-New. Participation of purchaser in alleged fraud must be proved. Ida 292P592.

678-75½-New. Burden is on person attacking sale under statutes in same jurisdiction to show that sale was fraudulent. 76Mont476, 248P362.

678-75⅓-New. was not fairly conducted. 76Mont476, 248P362.

678-75¼-New. or that bids were disproportionate to the value of the property, 76Mont476, 248P362.

678-75⅕-New. and that on resale bids exceeding bids made by at least ten per cent exclusive of expense of new sale may be obtained. 76Mont476, 248P 362.

678-76 164Ga332, 138SE785.

679-83 212Ky142, 278SW832.

679-84 212Ky142, 278SW832.

679-86 [a] 76Mont476, 248P362. [d] 158La822, 104S728 (evidence held insufficient to show); 120Kan205, 243P 274; 88PaSuper153. [g] 105Conn557, 136A108. [n] **Evidence held sufficient** to support allegations of invalid appointment of administrator. 164Ga332, 138SE785. [o] **Deed not declared void for lack of order** for sale where only evidence before court is ancient deed, there being no transcript of record. 212Ky142, 278SW832.

679-86½-New. Facts that sales of mining property were duly noticed, and that sales were fairly and legally conducted after ample time to secure bidders, and that bids received were the highest and best made is some evidence that the bids were not disproportionate to the value of the property. 76 Mont476, 248P362.

680-5 [b] Mo 7SW(2d)1010.

680-13½-New. Purchaser entitled to amount of taxes he has paid. 220Ky 413, 295SW408.

681-21 53SD108, 220NW495, 496 [cit CJ].

682-33 220Ky413, 295SW408. [a] (3) 131Misc323, 227NYS526.

682-36 See also 47RI 8, 129A732.

682-38 220Ky413, 295SW408; 47RI 8, 129A732. [c] **Improvements as compensation for rents and profits.**-158La822, 104S728.

682-38½-New. But it has been held that, where the purchaser was a possessor in good faith, he is not liable for rents and revenues prior to judicial demand. 158La822, 104S728.

683-44 177Ark101, 5SW(2d)723; 178 Ark130, 10SW(2d)37.

683-45 216Ala619, 114S208; 166Ga639, 144SE27. [j] **Transfer of individual interest of representative** cannot operate to divest rights of other heirs. 84CalA 605, 258P614.

683-46 216Ala619, 114S208.

684-52½-New. A decree of sale void as to remaindermen not made parties has no effect to charge debts of estate against their interests. 317 Ill 625, 148 NE384.

684-52⅓-New. Where such remaindermen received no part of the purchase money and no benefit from it the sale was void and not merely voidable as to them. 317 Ill 625, 148NE384.

684-55 Mo 20SW(2d)26.

685-65 215Ala581, 112S190.

686-73½-New. A mortgage barred by lapse of time before sale is not assumed by a purchaser by reason of a provision which was not made part of the notice or order of sale by the court. 199Cal 625, 250P669, 48ALR 1308.

687-84 121Kan229, 246P521; 137Misc 11, 242NYS558 (interest as tenant in common); 142 Okl 163, 286P327; TexCommnA 280SW742. [d] **Sale of all interest in land includes any interest** whatsoever owned by decedent, whether separate or community in character. TexCommnA 283SW153.

687-85 132 Okl 14, 269P289, 68ALR649. [g] **Action to quiet title and for damages.**-132 Okl 14, 269P289, 68ALR649 (suit by grantee of purchaser).

688-86 TexCivA 7SW(2d)620.

688-94 169La1127, 126S681.

689-1½-New. Purchaser at administrator's sale had title to remainder of proceeds of sale under heir's security deed executed before administrator's judicial order to sell. 34GaA325, 129SE 439.

689-1⅓-New. Sale by executors to pay debts under order of court is valid, although will is afterward set aside. 149Md217, 131A327.

689-1¼-New. Where sale is void because of the invalidity of an order appointing administrator de bonis non, purchaser acquires no title. 164Ga332, 138SE785.

689-1⅕-New. Purchaser loses lien where he commits greater waste than debts for which sale is held. 220Ky 413, 295SW408.

689-1⅙-New. Where title to property held in trust by an executor for use and benefit of all heirs of decedent did not pass to decedent's estate, an attempted conveyance by a subsequently appointed administrator conveys no title. 86Mont322, 283P1110.

689-2 177Ark101, 5SW(2d)723; 178 Ark130, 10SW(2d)37; 166Ga166, 142SE 663; 317 Ill 625, 148NE384 (void order of sale); 86Mont340, 283P761; 19 OhA 499. [f] **Exception to rule in case of fraud.**-162Ga403, 134SE98.

689-4 [d] **Where part of property held adversely.**-36GaA529, 137SE288

690-6 177Ark101, 5SW(2d)723; 36GaA 529, 137SE288; 132 Okl 14, 269P289, 68 ALR649. [d] (1) 132 Okl 14, 269P289, 68ALR649 (may recover consideration paid or quiet title). (2) Where purchaser has right to rely on fact that he was in possession, he may rescind and recover purchase money paid to administrator's agent upon administra-

tor's failure or inability to put him in possession. 163Ga525, 136SE545.

690-11 [b] 190NC354, 129SE820.

691-15 TexCivA 294SW616; TexCivA 297SW891; TexCivA 58W(2d)224.

691-16 44 Ida461, 259P3. [b] **Claimant of land** through administrator's sale has been held not required to show affirmatively that heirs knew identity and price of lands. 216Ala619, 114S208.

691-17 44 Ida461, 259P3; TexCommnA 38W(2d)67. But see 117Tex566, 8SW(2d)641. [d] (2) Possession by daughter of deceased husband and wife has been held constructive notice of her claim that land was separate property of mother. TexCivA 297SW891. (3) Purchaser is charged with notice of what application for sale discloses. TexCivA 297SW891. (4) Where application of community land for sale showed that debts were contracted after death of wife, purchaser acquired no title to community land of wife. TexCivA 297SW891.

691-18½-New. Knowledge of a purchaser at sale of property of an estate under a decree of the probate court that the property was homestead is unavailing to protect him as a bona fide purchaser, where the order of the probate court for sale was void for lack of jurisdiction under a constitutional provision exempting a homestead from forced sale for debts of deceased. 117Tex474, 88W(2d)633, 66ALR916.

691-18¼-New. Lack of knowledge of the purchaser of a homestead as to the homestead character of the property does not render the sale valid. 117Tex580, 88W(2d)640.

691-18¼-New. One purchasing the homestead of minors must investigate the records to ascertain whether the court has jurisdiction. 178Ark28, 98W(2d)793.

691-18½-New. A decree in probate proceedings ordering sale of a homestead for debts incurred after the death of the parents, as shown by the record, has been held void under a constitutional provision, giving a purchaser at a sale no rights as an innocent purchaser, since the record showed that the property was not subject to administration. 117Tex580, 88W(2d)640.

692-27 [b] **Sale in furtherance of fraudulent scheme does not operate** to divest heirs of title where purchaser know of fraud. 163Ga433, 136SE279. [c] **Purchaser with knowledge of fraud** derives no title, although order of sale has not been set aside. 163Ga433, 136SE279.

692-32 167La1103, 120S872.

692-33 [a] TexCivA 286SW298.

693-37 317 Ill 625, 148NE384.

693-44 See also TexCivA 294SW616.

694-45 [a] **If purchaser has paid consideration,** he is entitled to return thereof or to have title quieted in him where title did not pass because defective. 132 Okl 14, 269P289, 68ALR649.

695-62 49Nev319, 245P703. [a] **Application of rule.**-49Nev319, 245P703.

695-69 94CalA175, 270P745; 49Nev 319, 245P703.

696-79 See also 164Ga135, 137SE828.

696-91 [a] **Deed from executor is inoperative** to pass title to purchaser of lands from testator, where bond or contract for sale had not been recorded. 157NC315, 149SE846.

697-93 Ga 155SE624.

697-2 [b] (3) Where decedent could not be compelled to correct deed, conveyance by executrix of corrected deed without suit for reformation will not be set aside. 498D10, 205NW704.

699-20½-New. Administrator purchasing land has been held, on face of record, to hold title. 216Ala619, 114S208.

700-46 162Ga743, 135SE95. [b] 162Ga 743, 135SE95.

701-66 TexCivA 78W(2d)620.

701-66½-New. Recitals of an administrator's deed may show that it was not one merely quitclaiming the land, although the words of the granting clause are appropriate to a mere quitclaim deed. TexCivA 294SW616.

701-66½-New. An administrator's deed has been construed as showing a sale of a reversionary estate in land out of which dower was assigned. 167Ga537, 145SE 879(1stcase).

701-66¼-New. Where decedent's realty is conveyed, subject to condition, with reversion back on abandonment of premises, reversionary interest must run to heirs from whom title is appropriated. 109Conn529, 147A181.

702-80 161Ga401, 131SE176.

703-91 191NC190, 131SE656.

704-95½-New. The court has jurisdiction to adjudicate rights of parties realized from fund. 154Md378, 140A100.

704-95½-New. Where proceeds of the sale of realty in the hands of an attorney of the executor have been levied on by attachments in actions against the executor personally, an order requiring the attorney to pay the proceeds into court is proper. 92CalA352, 268P426.

704-97 168La349, 122S62.

704-98 105Conn230, 135A44.

704-5 NH 149A864.

704-7 155Tenn313, 292SW459. [e] (2) Homestead association having lien on realty and paying taxes thereon can be reimbursed by amount paid by previous owner, as pro rata share of taxes and balance can come only out of proceeds of sale of property subject to lien. 168La349, 122S62. [f] 155Tenn313, 292SW459. [j] **Waiver of right to priority.**-168La349, 122S62. [k] **Taxes on land subject to vendor's lien.**-168La349, 122S62. [l] **Contribution by lienholder to costs of administration.**-168La349, 122S62.

705-13½-New. Where the administrator of the maker of a deed as security for a debt, the holder of the deed, and decedent's widow agree that the land be sold by the administrator and he sells it under order of the ordinary at the courthouse door to the highest bidder, announcing that it is free of all liens, it is proper for him to pay off the secured loan out of the proceeds before applying part thereof to the year's support of the widow. 34GaA184, 128SE923.

705-13½-New. The foregoing rule applies, although the deed is on record uncanceled and the title is in the grantee. 34GaA184, 128SE923.

705-14 105Conn230, 135A44, 47 [cit CJ].

706-15 But see 24 OhA45, 156NE241.

706-16 100CalA469, 280P171. [c] **Failure of heirs to object to sale** did not waive right of heirs to have balance of proceeds distributed to them exempt from creditors' claims, since objection would have availed them nothing. 100 CalA469, 280P171.

706-19½-New. An administrator appointed to sell lands cannot be treated as a debtor of the owners of shares and proceeds arising from the sale. 167Ga 470, 146SE22.

708-53 164La1, 113S658.

709-56 But see 218Ala186, 118S333.

709-64 126Misc479, 214NYS167.

710-80 [c] **In Alabama.**-214Ala422, 108 S253.

710-81 157Tenn18, 58W(2d)633. [a] **Jurisdiction of administration will be transferred to chancery** though will gives executor power to sell real estate for debts and bequests. 157Tenn18, 58W(2d)633.

711-96 [a] **Under statute** creditor cannot report estate insolvent before expiration of six months from date of qualification of executor or administrator. 157Tenn18, 58W(2d)633.

713-47 But see 205Cal 276, 270P939, 60 ALR730.

713-52½-New. Where the executrix is displaced by the appointment of a receiver, the receiver succeeds to the rights of the executrix to sue in equity to recover overpayment made to the creditor under the belief that estate was solvent. 154Md456, 140A834.

714-64½-New. Administrator of insolvent estate holds property in trust for creditors. 216Ala170, 113S15.

715-75 116Nebr33, 215NW559.

715-76 116Nebr33, 215NW559.

715-77 116Nebr33, 215NW559.

716-5 [i] **Statute requiring presentation of personal tax not mandatory.**-Mo 318W(2d)1069.

723-27 251NY439, 167NE580; 157Tenn 18, 58W(2d)633; TexCivA 284SW673.

723-30½-New. A creditor consenting to marshaling of assets by a court of equity and to turning of assets over to a receiver appointed by the court does not waive any right or estop himself from asserting any right which he might have against the executor in his personal capacity growing out of the executor's conduct in administration of the estate. 39GaA294, 147SE137.

723-37 Contra 43 Ida789, 255P305.

724-48 222AppDiv123, 225NYS561; 22 OhA17, 153NE255.

724-53 136Misc118, 238NYS749.

726-82 But see 215Ky5, 284SW101.

726-90 [b] (3) Credit to administrator for payment of merchandise given workmen on store orders. 300Pa64, 150A98.

726-96 300Pa68, 150A90.

726-96½-New. In some jurisdictions debts due employees are not entitled to priority where no petition in bankruptcy was filed or assignment for creditors was made. 137Misc646, 244NYS197.

730-52½-New. A provision of an order settling the account of the executrix of a deceased stockholder, indebted to the corporation, that the amount of dividends retained by the corporation should constitute partial payment of distribution or the dividend payable to the corporation, is correct. 251NY439, 167NE580.

730-74 Utah 289P146. [r] **Mortgagee's administrator, not his legatee's executor,** may maintain scire facias on mortgage. 288Pa547, 136A860. [s] **Breach of contract by heir to pay sum to other heir.**-Executor may maintain action for breach of contract between deceased and heir whereby latter agreed to pay, as part of estate, named sum to another heir. 205Iowa1311, 217NW441. [t] **Where policies are payable to named beneficiaries** and not to estate, administrator cannot sue thereon. 220Ala537, 126S108.

731-75 148Md620, 129A898 (executor qualified and empowered to assert and protect interest of estate and joinder of legatees superfluous). [l] **Right to sue dependent on statute.**-70CalA680, 234P 412.

732-77½-New. In equity, one executor is entitled to maintain suit against his coexecutor upon a claim alleged to be due to the estate of the decedent. TexCommnA 12SW(2d)114, 63ALR435.

732-80 [a] (2) Special administrator appointed to preserve personal property and manage real estate had authority to maintain action to have attorney, alleged to have obtained property from deceased by fraud, declared trustee of property. 208Cal 134, 280P531.

732-84 93PaSuper457.

732-85 228Ky346, 14SW(2d)1067.

734-94 [h] **Advice of counsel not excuse for wrongful conduct** where administrator did not act in good faith. NJ 130A733.

735-3 100Vt86, 135A3.

735-6½-New. In a suit by an administrator in his representative capacity, he may recover on a note payable to him personally by alleging and proving that the debt was contracted on behalf of the estate. 40GaA386, 149SE721.

736-23 See also 96Fla203, 118S54.

737-48½-New. An administrator as such generally has no right to maintain an action for trespass for injuries to real estate of his intestate. 112 Iowa 210, 83NW963.

737-49 313Mo182, 281SW411.

737-51 But see 126Me599, 138A560.

737-57½-New. **Sole legatee should bring bill for construction of will** as executor and in individual capacity instead of making herself complainant as representative and respondent as individual. 48RI 304, 137A878.

737-58 93PaSuper457; TexCivA 290SW909, 910 [quotCJ]. [k] **Administrator cannot create right to sue estate** for surplus proceeds of mortgage foreclosure by bidding more than mortgage debt including reasonable cost and expenses of sale. 213Ala510, 105S654. [l] **Where executor was sole devisee** and had possession, it is unnecessary to sue him as executor for claim against estate. TexCivA 27SW(2d)893. [m] **Spe-**

cific legatee may maintain replevin to recover specific chattel bequeathed. 136 **Misc**91, 242**NYS**453.

739-62½-New. Suit to recover specific funds in hands of administrator cannot be maintained unless it is shown that the money has not been intermingled with other funds of estate. 34**Ga**42, 128 **SE**585.

739-65 166**Ga**667, 144**SE**204; 220**MoA** 821, 278**SW**822.

739-66 190**NC**870, 129**SE**801.

739-67 27**Ariz**484, 232**P**56; 224**AppDiv** 846, 230**NYS**759; 190**NC**870, 129**SE**801.

741-90 216**Ala**586, 114**S**194; 219**App Div**569, 220**NYS**293; **TexCivA** 290**SW** 909, 910 [quotCJ]. [a] (9) Constructive eviction. 219**AppDiv**569, 220**NYS**293. (10) Personal injuries to driver of automobile in collision. **TexCivA** 290**SW** 909.

742-93 216**Ala**586, 114**S**194; 162**Ga**243, 133**SE**238. [a] **Attorney may sue administrator personally** for contingent fee where latter holds proceeds of judgment recovered. 69**Utah**130, 252**P**891, 50**ALR**641.

742-94 140**Wash**472, 249**P**992, 993 [quotCJ]. See also 44**Philippine**186.

742-95 140**Wash**472, 249**P**992, 993 [quotCJ].

742-96 140**Wash**472, 249**P**992, 993 [quotCJ].

742-97 140**Wash**472, 249**P**992, 993 [quotCJ].

743-1½-New. Where there is no personal representative of a deceased person, a devisee of personal property seeking payment of his devise must make application to have the county court appoint one before bringing an action for conversion under the statute. 226**Ky**5, 10**SW(2d)**460.

743-2 [a] **Mortgage owned jointly by decedent and plaintiff held personalty** as affects administratrix's liability. 216 **Ala**439, 113**S**296.

743-7 See also 11**PaDist&Co** 38.

743-12 **DC** 33**F(2d)**370.

743-14 100**Vt**351, 137**A**329. [a] **After final decree** legatee may maintain action in tort against executor for misappropriation of money of estate before decree. 100**Vt**362, 137**A**334.

744-20½-New. Suit by deceased husband's administrator against divorced wife to recover proceeds of life insurance is cognizable in equity. 234**Ky**227, 27**SW(2d)**940.

744-21 46**Philippine**566. [a] **In North Dakota.**-58**ND**49, 224**NW**676.

744-23½-New. Settlement of administrator's account in the probate court held not a condition precedent to a suit in equity to recover assets wrongfully withheld. 22**F(2d)**380.

744-23½-New. Where the refusal of a bank to pay a deposit is predicated on denial of liability, coupled with a stipulation for production of the representative's letters, production of the letters is not a condition precedent to suit. 23 **AlaA**23, 122**S**311(2dcase) [certiorari den 219**Ala**366, 122**S**312].

744-23¼-New. Settlement of an account in probate by a removed executor at the instance and request of an administrator with the will annexed is necessary before suit will lie against the executor for money had and received. 96**CalA**590, 274**P**442.

744-26 177**Ark**1060, 9**SW(2d)**1062.

744-27 **Mass** 167**NE**291.

745-39 **CalA** 290**P**309; 223**Ky**561, 4**SW (2d)**380; 128**Me**272, 147**A**159; **MoA** 29 **SW(2d)**191; 121 **Or**462, 255**P**901; 122 **Or**519, 259**P**1063; 69**Utah**130, 252**P**891, 50**ALR**641; 70**Utah**124, 258**P**342, 64 **ALR**368; 38**Wyo** 481, 269**P**418. [f] (2) Under some statutes contingent claim is barred if not presented within statutory time, though such time expired before breach of contract gave rise to cause of action. 70**Utah**124, 258**P**342, 64**ALR**368. [i] **No presentation to particular judge of court** who at time happens to be sitting to hear probate matters is necessary prerequisite to suit on claim in such court. 121 **Or**462, 255**P**901.

745-43 122 **Or**519, 259**P**1063.

746-44 70**Utah**124, 258**P**342, 64**ALR** 368. But see 104**Conn**169, 132**A**902.

746-48 **CalA** 290**P**309; 116 **Okl** 155, 243**P**758; 70**Utah**124, 258**P**342, 64**ALR** 368; **Wash** 291**P**717.

746-61 116 **Okl** 155, 243**P**758.

746-64 [a] (6) Where claim is asset and not liability of decedent at time of his death, statute as to filing of claims is inapplicable. 202 **Iowa**654, 210**NW** 785. (7) Hence mortgage transferred to plaintiff by general blank indorsement of executor of decedent's estate is not within statute. 202 **Iowa**654, 210**NW** 785. (8) Compliance with statute relative to presentation of verified claim is not condition precedent to action by bank commissioner to recover assessment on bank stock. 174**Ark**66, 294**SW** 368.

747-66½-New. A statute requiring presentation of a claim to an administrator before suing to sequester property of the succession, does not apply, when no administrator has been appointed and claimant is in danger of losing the claim because the effects of succession have been taken possession of by decedent's heirs or strangers. 167 **La**255, 119**S**40.

747-67 181**Ark**409, 26**SW(2d)**84; 46 **Ida**74, 266**P**421; 76**Mont**143, 245**P**529.

747-68 144 **Okl** 150, 289**P**721.

747-69 [a] **Attorney's lien.**-69**Utah**130, 252**P**891, 50**ALR**641.

747-71 48 **Ida**454, 282**P**868.

747-79 **NJSup** 142**A**909.

748-82 82**NH**453, 136**A**126.

748-86 [a] (2) Petition, alleging rendition of services to decedent pursuant to agreement to make provision by will therefor and failure of decedent to comply with agreement, does not state different claim from one filed with executor for reasonable value of services rendered. 131 **Okl** 219, 268**P**291. (3) Other instances. 83**NH**467, 144**A**266.

748-87 83**NH**467, 144**A**266. [b] **Plaintiff is not limited to recovery of amount of interest demanded.**-203**Cal** 219, 263**P** 1007.

748-88 69**CalA**291, 231**P**563.

748-94 122 **Or**519, 259**P**1063. [c] 50 **ND**446, 196**NW**750.

748-95 226**Ky**722, 11**SW(2d)**912; 227 **Ky**71, 11**SW(2d)**990; 50**ND**446, 196**NW** 750; 27 **OhNPNS**409. [a] 50**ND**446, 196**NW**750.

748-95½-New. fails to defend, 122 **Or** 519, 259**P**1063.

749-98 222**MoA**474, 280**SW**711; 50**ND** 446, 196**NW**750.

749-99 82**NH**453, 136**A**126.

749-3 168**Ark**251, 270**SW**537. [a] 168 **Ark**251, 270**SW**537.

749-10 But see 209**Ky**675, 273**SW**548.

749-13 168**Ark**251, 270**SW**537.

749-20 144**Wash**33, 256**P**74.

750-26 200**Cal** 681, 254**P**557; 38**Wyo** 481, 269**P**418.

750-27 [b] **Ratification of rejection by attorney.**-83**NH**467, 144**A**266.

750-28½-New. In North Dakota notice of rejection of claim is necessary to start statute of limitations running. 52 **ND**273, 202**NW**852.

751-45 171**Ark**514, 284**SW**775.

751-51½-New. No cause of action is stated against estate where filing of claim not alleged, unless converted property can be traced into hands of personal representative of deceased administrator. **Ariz** 285**P**684.

752-70½-New. Fact that note was not included in inventory is not a defense in an action thereon. 100**Vt**86, 135**A**3.

752-70½-New. In an action in the circuit court on a note by the payee's executor, it is no defense that defendant is a legatee under decedent's will and that the amount of his legacy, would be more than sufficient to cancel the note sued on. 197**Wis**347, 222**NW**228.

752-83 126**Misc**638, 214**NYS**378 (including statute of limitations). [a] **Difference between executors and widow as to who should possess bracelet** could not affect plaintiff's right to recover. 227**AppDiv**452, 238**NYS**230.

753-91 See also 93**Fla**258, 112**S**62.

753-95 [a] **Where statute authorizes creditors to bring suit in equity to** reach and apply any right of debtor, liable to be attached on execution in legal action against him, which he has conveyed in fraud of creditors, bill against alienee executrix is not authorized. **Mass** 167**NE**291.

753-9½-New. A representative, sued in his individual and representative capacities on a note made by himself and his decedent, cannot assert failure to present the claim against the estate as a defense to his individual obligation. 122 **Or**519, 259**P**1063.

755-40½-New. In the absence of receipt of rents by the administrator, deceased, or his assignee, they cannot be counterclaimed in the administrator's action to foreclose a lien for repayment of money advanced for taxes. 78**CalA** 751, 248**P**934.

755-41 96**CalA**576, 274**P**445.

755-44 176**Ark**1163, 5**SW(2d)**334.

756-50 227**Ky**788, 14**SW(2d)**181.

757-60 96**CalA**576, 274**P**445; **Tex CommnA** 280**SW**573. [d] **That there are other claims against estate entitled to priority of payment out of general assets** does not affect right of set-off. **TexCommnA** 280**SW**573. [e] **Liquidated claim sounding in tort** may be set off. **TexCommnA** 280**SW**573.

757-61 **MoA** 8**SW(2d)**1027; 134**Misc** 470, 235**NYS**675.

759-89 50**RI** 493, 149**A**592.

760-3 50**RI** 493, 149**A**592.

761-15 109**Conn**1, 144**A**471.

761-16 38**GaA**503, 144**SE**383.

762-18 172**Minn**68, 214**NW**895. [b] **Notes due decedent** and barred by limitation cannot be set off against fees due maker for services as attorney to administratrix. 195**Cal** 319, 232**P**972.

762-25½-New. Administrator sued for services rendered to decedent cannot counterclaim for payments by decedent to plaintiff. **Iowa** 230**NW**330.

762-23 13**PaDist&Co** 436; 100**Vt**86, 135 **A**3; 197**Wis**347, 222**NW**228. [a] **Courts in which decedent might have sued.**-Under North Dakota statute, action founded upon contract may be maintained by administrator in all cases and in same courts in which same might have been maintained by intestate. 58 **ND**49, 224**NW**676.

763-29 199**Cal** 113, 248**P**519.

763-30 220**MoA**821, 278**SW**822.

763-31 121 **Or**462, 255**P**901.

763-37 See also 151**Va**295, 144**SE**471.

763-38 151**Va**156, 144**SE**447.

764-44½-New. Where a bill by an administratrix for accounting concerning transactions between defendant and deceased contains an issue involving the right of defendant to retain certain household furniture, such issue may properly be heard as incidental to the exercise of underlying equitable jurisdiction. 29**F(2d)**440.

764-52 [a] (2) In Pennsylvania orphans' court has exclusive jurisdiction over enforcement of all kinds of legacies. 85**PaSuper**292.

765-74 100**Vt**351, 137**A**329.

766-78½-New. Where an executor has received from a bank money deposited by his testator in trust for a third person and has not included such fund in his account, an action by the cestui que trust to recover the fund need not be brought in the orphans' court, but may be brought in a court of ordinary jurisdiction. 92**PaSuper**602.

767-4 69**Utah**130, 252**P**891, 50**ALR**641.

767-7½-New. Defendant, sued in replevin for property obtained as administrator, may interplead executors appointed under will probated after defendant's appointment. 26 **OhA**552, 160**NE**516.

768-22½-New. Probate court has not exclusive jurisdiction to decide all questions between personal representative and third persons as to title to property. 46**Philippine**664.

768-24 313**Mo** 182, 281**SW**411, 416 [quotCJ]; 35**Man**569, [1926] 2**DomLR** 540, [1926] 2**WestWkly**67.

768-25 313**Mo** 182, 281**SW**411, 416 [quotCJ].

768-26 **Ark** 31**SW(2d)**286; 313**Mo** 182, 281**SW**411, 416 [quotCJ].

768-27 313**Mo** 182, 281**SW**411, 416 [quotCJ].

768-28 [c] (2) Statute providing that suits against executors "may" be brought where estate is administered held not mandatory, though statute

read "must" prior to revision; that "must" was changed to "may" shows intention to make exception permissive. **TexCivA 18SW(2d)**670.

769-45½-New. Under statute the situs of action against an administrator was properly laid in the county of plaintiff's residence. 24 **OhNPNS**494.

769-46 TexCivA 18SW(2d)675.

769-49½-New. The essential elements of an action involving an administrator in an official capacity within venue statute are, asserting claim against the estate, settlement of administrator's account and distribution of estate. 193**NC** 323, 136**SE**875.

770-66 122 **Or**519, 259**P**1063.

770-69½-New. In some jurisdictions a suit to foreclose a mortgage executed by a person since deceased may be brought after the expiration of one year from the death in case his executor or administrator is made a party defendant thereto. **Ind** 165**NE**547.

770-82½-New. an action for tort committed by decedent, 149**SC**417, 147**SE** 439.

772-18 See also 287**Pa**105, 134**A**468.

773-28½-New. Executors have the right to waive the statute of limitations relative to a refund of overpayment in an income tax by deceased, pursuant to the statutory right granted by congress, where in their judgment it seems for the best interest of the estate to waive the statute for the purpose of collecting the money due. 27**F(2d)**630.

774-46 332 **Ill** 316, 163**NE**707.

775-52½-New. Statute barring actions against administrators ten years after dismissal of administrator does not apply to action to recover inherited interest in land not sold by administrator. 170**Ga**135, 152**SE**466.

775-60½-New. Executor held guilty of laches in bringing suit to enjoin waste by successors of devisee as it would restrain owners from the ordinary use of their property. 103**Conn**352, 130**A**472.

775-62 See also 118 **Okl** 73, 246**P**611.

775-63½-New. Extension of time may be had without notice. 263**Mass**121, 160**NE**831.

775-63½-New. The defense of the statute of limitations, when interposed by a personal representative, operates alike on personal and real assets of decedent's estate. 105**WVa**29, 141**SE**444.

775-64 See also **MoA** 300**SW**1035.

775-65½-New. That a claim for services as presented to an administrator showed on its face that it was barred by statute has been held not to prevent claimant from showing that the time of payment for the services was subsequent to the date on which rendered, taking the claim out of the statute. 94 **CalA**271, 271**P**109.

775-66 291**Pa**574, 140**A**552.

776-67 252**Mass**188, 147**NE**558.

776-70 MoA 68**SW(2d)**961.

776-81 252**Mass**188, 147**NE**558.

777-99 252**Mass**188, 147**NE**558; **Miss** 130**S**298.

777-1 40**GaA**305, 149**SE**293; 252**Mass** 188, 147**NE**558.

777-4 209**Ky**675, 273**SW**548; **Miss** 130 **S**298.

778-12 See also **Mass** 166**NE**831.

778-13 [a] **In Kansas.**-129**Kan**485, 283 **P**623.

778-23 252**Mass**188, 147**NE**558 (action of tort).

779-46 200**Cal** 681, 254**P**557; 134**Misc** 393, 235**NYS**756; 198**NC**395, 151**SE**868; 31 **OhA**518, 167**NE**490; **TexCivA** 218**W** **(2d)**326 (provisions are mandatory); 146**Wash**148, 262**P**232. But see **Md** 148 **A**585. [b] **Law does not require suit to be brought against heirs,** requesting rejection within six months after such rejection by administrator. 31 **OhA**518, 167**NE**490.

780-52 41 **Ida**694, 242**P**977.

780-55 80**Mont**27, 257**P**1025.

780-61 But see 46 **Ida**74, 266**P**421.

780-63 TexCivA 275**SW**200.

780-66 [e] **Rejection of claim administrator could not allow** does not set in motion ninety-day limitation. **TexCivA** 275**SW**200.

781-76½-New. Under some statutes action on a rejected claim is not barred where the representative's account of the proceedings did not refer to the rejected claim, and claimant was not cited to appear, as required by statute. 133**Misc**723, 233**NYS**451.

782-82½-New. Where a personal representative allowed a claim in full, but rejected credit allowed for sums collected subsequent to decedent's death, there was no rejected claim requiring suit within three months after rejection. 96**CalA**576, 274**P**445.

782-87 81**CalA**440, 253**P**962; 83**CalA** 87, 256**P**479; 41 **Ida**694, 242**P**977 (by statute notice must be given to claimant or his agent or attorney personally or by mail).

782-89½-New. The mere fact that claimant may know informally that his claim has been rejected will not take the place of statutory notice. 41 **Ida**694, 242**P**977.

782-90 46 **Ida**74, 266**P**421, 423 [citCJ].

782-97½-New. In some jurisdictions notice by registered mail must be made in order to start the statute running. 52**ND**28, 202**NW**852.

782-98 81**CalA**440, 253**P**962.

783-99 81**CalA**440, 253**P**962.

783-5 See also 146**Wash**148, 262**P**232.

784-28 83**CalA**87, 256**P**479.

785-31 But see 149**SC**417, 147**SE**439.

785-32 See also 218**Ala**97, 117**S**653.

785-35 231**Ky**808, 228**SW(2d)**259.

785-36½-New. Exhibiting a claim within the limitation period removes the bar of the statute without the necessity of bringing suit on the claim within a year from the granting of letters. 251 **IllA**105.

786-40 220**Ala**529, 126**S**102.

786-42 230**AppDiv**239, 243**NYS**720. [c] **Proceeding so commenced not abandoned** by creditor's proceedings for judicial settlement of account. 230 **AppDiv**239, 243**NYS**720.

787-56 209**Ky**675, 273**SW**548.

787-60½-New. Such suspension has been held not to apply to actions for tort committed by decedent. 149**SC** 417, 147**SE**439.

787-61½-New. A petition to decree a trust in decedent's property, presented after the time for filing claims has expired, is not barred where the proof is sufficient to establish the creation of a trust. 196**Wis**301, 220**NW**379.

788-74 158**Tenn**463, 148**SW(2d)**722.

789-38 [c] **In New York.**-134**Misc**393, 235**NYS**756.

790-2½-New. Institution of suit by an executor to recover a fund held by defendant as a trust fund belonging to the estate has been held not to suspend the running of the statute of limitations against a claim of defendant for board and lodging furnished deceased, where such claim was not pleaded in set-off in the suit by the executor, but was reserved for independent action. 158**Tenn**463, 148**SW(2d)**722.

790-6 195**Cal** 319, 232**P**972.

790-9½-New. Notice that a claim against an estate is disputed is a waiver of the six months' statutory exemption from suit. **NJSup** 139**A**416.

792-47 198**NC**395, 151**SE**868 (funeral expenses cannot be regarded as legacy, rather than claim).

794-76 19**F(2d)**683; 106**Conn**602, 138 **A**795. [b] (2) Other illustrations. 133 **Misc**663, 233**NYS**246.

794-76½-New. Under statutes in some jurisdictions, the mere fact that a statute has run is not conclusive in determining whether obligations incurred in carrying on testator's business should be paid from the assets of the estate, 106**Conn**602, 138**A**795.

794-76½-New. but the matter should be determined upon equitable principles. 106**Conn**602, 138**A**795.

794-76¼-New. Such claims as regards delay are subject only to the defense of such laches as is prejudicial. 106**Conn** 602, 138**A**795 (delay held to preclude recovery).

795-79 216**Ala**686, 114**S**301; 258**Mass** 502, 155**NE**641.

795-87 251**Mich**49, 231**NW**67.

795-88 219**AppDiv**425, 219**NYS**166.

795-89½-New. In action to determine claim against estate for payments made to widow, the widow, being entitled to share in deceased's estate, is proper party defendant. 126**Misc**17, 211 **NYS**864.

795-89½-New. Distributees of proceeds of an estate's cause of action, may be substituted as plaintiffs in an action thereon by the administrator with the will annexed. 178**Cal** 606, 174**P**37.

795-89¼-New. Where an administrator brings an action for damages for injuries to real estate of his intestate, the heirs should be substituted as plaintiffs on motion. 112 **Iowa**210, 83**NW** 963.

795-89½-New. In an action on a policy of life insurance by the mother of deceased, who has no cause of action, the deceased's administrator may be made party plaintiff after a demurrer at the close of the evidence has been overruled. 220**MoA**913, 296**SW**209.

795-89¼-New. Where all parties are before the court, heirs in whose name an action should be prosecuted may be substituted for an administrator who has no right to maintain it. 13 **Okl** 159, 74**P**96 [cit 4 **Okl** 661, 46**P**573].

795-91 37**GaA**73, 138**SE**915; 44**GaA** 737, 154**SE**655; 32 **OhA**419, 168**NE**217.

796-92 But see **TexCivA** 258**SW(2d)**934.

796-93 [b] **Legatee of decedent's estate cannot maintain suit against personal representative and debtor** to estate except under special circumstances. 142**Va**218, 128**SE**510.

796-5½-New. In action to impress trust on securities set aside by decedent, the executrix of decedent is a necessary party. 214**AppDiv**424, 212 **NYS**417.

796-5¼-New. The executrix of the owner of securities, sought to be impressed with a trust on the basis of a written agreement, is a proper party to the action. 214**AppDiv**424, 212**NYS** 417.

797-17 216**Ala**570, 114**S**192. See also 142**Va**218, 128**SE**510.

797-22 See also **TexCivA** 48**W(2d)**144. [c] **Decedent's estate has been held not necessary party** to action by maker of note against donee of deceased holder. **Wash** 290**P**870.

798-38½-New. On an executor's petition to determine title to a diamond ring, in which it appeared that the ring belonged to defendant's husband at the time of his death, the personal representative of defendant's husband was a necessary party. **Mass** 168**NE**87.

798-47 But see 167**Ga**248, 145**SE**73.

798-48 NJCh 147**A**559(1stcase) (partition among children).

798-49 87 **IndA**281, 156**NE**575.

798-52½-New. In a suit to cancel a deed of a deceased husband to his wife, the administrator is merely a nominal party. 164**Ga**772, 139**SE**537.

798-52¼-New. In an action by a wife to set aside a divorce granted testator and establish interest in lands owned by him, executrices of his will are necessary parties. **TexCivA** 18**W(2d)**708.

798-52¼-New. The personal representative of an estate should be made a party to litigation involving a controversy between a lessee and the estate, as lessor, as to who should be charged with a sum expended to release the estate from a contract to deliver fruit to a marketing association. **CalA** 274**P**377.

798-53 169**Ark**60, 272**SW**846; 130**Misc** 12, 223**NYS**626; **TexCivA** 22**SW(2d)**961 (beneficiaries).

799-59 See also **TexCivA** 98**W(2d)**758.

799-60½-New. In an action for an accounting of the proceeds of a sale of land deeded to decedent to secure loans, the heirs of decedent are the proper, if not the necessary, parties defendant. 32 **OhA**419, 168**NE**217.

799-67½-New. An executor, without joining heirs or devisees, may maintain an action in ejectment against the maker of a trust deed in favor of decedent under which property was conveyed by the trustee to the heirs and devisees of decedent. 205**Cal** 658, 272**P**567.

800-82 16**F(2d)**856.

800-83 181**Ark**409, 26**SW(2d)**84.

800-88 Ark 30**SW(2d)**845; **Tex CommnA** 27**SW(2d)**130.

803-42 Mass 171NE713 (administrator improperly joined).
803-44½-New. In a suit to quiet title by the administrator of one settlor, involving the validity of a trust instrument, the trustee could not represent all the parties concerned. 208Cal 463, 281P1026, 65ALR1059.
803-51½-New. In an action to enforce a trust and cancel a deed by the intestate to a third person, the petition properly is dismissed where the personal representative of the intestate is not made a party. 161Ga838, 131SE 891.
803-51⅓-New. Legatees and heirs at law are not necessary parties to a suit to impress trust on proceeds of sale of decedent's realty. DelCh 141A223.
804-56½-New. In suit for proceeds of timber the administrator of sheriff who sold the timber and paid the proceeds into the registry of the court against whom or his decedent no judgment was sought need not be made a party. 163 Ga37, 135SE487.
804-64½-New. In a suit to force executors to pay installments due under a will, the bank designated to receive the money and pay it to the beneficiary has been held not a necessary party. 166La879, 118S69.
806-99 See also 216Ala686, 114S301.
807-6 99NJEq605, 133A522.
807-18 82CalA307, 255P541 (lessee of decedent on crop share basis not necessary party).
812-96 87 IndA281, 156NE575.
812-97 103Conn352, 130A472.
812-2½-New. Sheriff a nominal party as administrator was not a necessary party in an action to subject realty of decedent to payment of judgment, there being no funds of estate in his hands. 143Va281, 129SE327.
812-11½-New. Where the executor not named in the petition filed and urged a plea of privilege and answered on the merits, he made himself a party. Tex CivA 1SW(2d)672.
813-18 163La1087, 113S544.
813-21½-New. Creditor of estate cannot maintain suit in equity against heirs to recover on debt of ancestor or ancestor's property, without making administrator party. 170Ga691, 153SE 767.
813-22½-New. An administrator is not a necessary party in an action between two devisees for specific performance of agreement to devise. 30 Ariz522, 249P76, 48ALR1347.
813-22⅓-New. The personal representative of a decedent is a necessary plaintiff in an action brought within six months of his qualification to settle the estate. 231Ky423, 21SW(2d)658.
813-25 230Ky172, 18SW(2d)989.
814-27 [e] **Failure to make order of revival and to issue warring order against nonresident infant defendant,** on substitution of administrator de bonis non as plaintiff in action to sell land to pay debts, does not render judgment of sale invalid where debts exceeded value of land and sale was for benefit of creditors. 230Ky172, 18SW (2d)989.
815-47½-New. In Manitoba in action against two of three executors named in will, plaintiff may apply by originating notice for order declaring that other executor is dead. Man [1930] 2 DomLR146.
815-50 26 OhA186, 159NE851.
816-73½-New. Although nonresident executor or administrator is not properly served by publication, courts of state have power to compel him to come in and be made party under proper circumstances. 163Ga525, 136SE 545.
816-73⅓-New. Nonresident who has applied for letters of administration and has obtained order for sale of property of his intestate, although individually a nonresident is officially an administrator of the state, 163Ga525, 136SE545.
816-73¼-New. and he will not be heard to say that courts of state have no jurisdiction over him as to affairs of his intestate, 163Ga525, 136SE545.
816-73⅙-New. at least so far as property located in state is concerned. 163 Ga525, 136SE545.
817-78½-New. Where an administrator sells a claim due to the estate and sues thereon for the benefit of his assignee, the court in its discretion may allow the writ to be amended by striking out the name of the administrator and substituting that of the assignee. 133Mass421.
817-87 See also 94CalA79, 270P710.
817-90½-New. Plaintiff suing in his individual capacity cannot be permitted to amend the writ so as to sue in capacity as executor on a cause of action accruing to the estate. 98Me401, 57A 592, 99AmSR414.
818-8½-New. General appearance of defendant cured any defect in the jurisdiction of the court over the parties. 252Mass188, 147NE558.
818-8⅓-New. General appearance of defendant does not relate back to the date of the writ and it could not operate as a waiver of the special statute. 252 Mass188, 147NE558.
818-10 [a] **Change of rule.-NJCh 131** A100.
819-24 104Conn271, 132A461. Contra 51SD124, 212NW498.
824-79 225AppDiv221, 232NYS560.
825-88½-New. Va 149SE568.
826-99½-New. A petition against an executrix for the price of fertilizer purchased by the executrix for the estate has been held properly amended. by alleging that the fertilizer was purchased by the executrix in accordance with authority conferred by will and for purposes specified therein. 169Ga9, 149SE568.
827-11 TexCivA 13SW(2d)456 (allegations held sufficient).
827-14 Ala 130S900.
828-43 161Ga588, 131SE487, 43ALR 1045 (petition held to show that suit was brought in representative capacity).
831-4 See also Sask [1928] 4DomLR 919.
832-22½-New. Allegation of plaintiff's representative capacity is matter of public record, and must be denied positively in answer, and denial on ground of lack of information and belief is insufficient. 96CalA455, 274P 566.
834-50 99WVa673, 129SE709.
838-20½-New. Must be pleaded specially under statute. NJSup 139A416.
840-60½-New. Demurrer to a bill to quiet title to land, not pointing out that the bill failed to allege an executor's due appointment, has been held properly overruled. 218Ala440, 118S 638.
840-61 1GaA162, 58SE106; 173Minn 302, 217NW352; 110Miss249, 70S347. [b] (2) Change definitely stating time of payment under contract sued on. 20 OhA483, 152NE681. [e] **Amendments not allowed.**-Permitting amendment of complaint for constructive eviction by deceased landlord, by adding allegation that executrix individually continued such eviction, is held error. 219AppDiv 569, 220NYS293. [f] **Action brought by administrator appointed by court not having jurisdiction** cannot be given life by amendment injecting therein administrator appointed by proper court after commencement of action. 43 Ida466, 258P166. [g] **Amendment setting up another cause of action** cannot be made. CalA 290P309.
840-62½-New. A statement of claim by an administrator as such cannot be amended by substitution as plaintiffs of the administrator and others as heirs of deceased. 196Pa541, 46A927.
840-66½-New. A complaint alleging appointment as former administrator, and his misappropriation of the estate's property, is sufficient to state a cause of action. 53SD518, 221NW249.
841-78½-New. Bill for accounting, alleging that defendant had wrongfully secured possession of certain property belonging to deceased's estate, together with allegations of fraud and overreaching by defendant in transactions with decedent, states a cause of action within the jurisdiction of equity. 29 F(2d)440.
841-81 But see Mo 29SW(2d)79.
842-92 216Ala610, 114S204. [a] **Complaints held to state cause of action.**-82Colo 61, 256P1093; 52ND28, 202NW 852.
842-93 39GaA822, 148SE604; 147Miss 621, 111S743. [a] **Amended complaint held not demurrable** for vagueness and uncertainty in alleging terms of contract between plaintiff and decedent for operation of farm. 163Ga288, 136SE81.
842-94 Ala 130S196; Mass 172NE246; 135Misc626, 238NYS147.
842-97½-New. A complaint alleging that property was turned over to decedent who agreed to give the proceeds to plaintiff but not alleging any agreement to pay a specific rate of interest does not state a cause of action either for a hiring of property at a stated per cent for its use. 73CalA504, 239P51.
842-97⅓-New. , or one on an oral promise to pay interest. 73CalA504, 239P51.
842-97¼-New. A claim against an estate for care, stating the reasonable and agreed value of services, will support an action on contract or quantum meruit. CalA 258P125.
842-6 200Cal 681, 254P557; CalA 258 P125.
843-10½-New. The petition need not pray that a claim be paid in due course of administration. 200Cal 681, 254P 557.
843-10⅓-New. Complaint to recover value of trust property conveyed in violation of trust is insufficient where it fails to allege adverse determination of action alleged to be pending to recover the property. Nev 287P272.
843-13 83NH467, 144A266; 38Wyo 481, 269P418.
843-14 Ala 130S196.
843-15 38Wyo 481, 269P418.
845-50½-New. A petition in a suit against an executrix is not subject to special exception as stating offer in compromise of balance of account. TexCivA 289SW102.
845-51½-New. One asserting a claim based on contract which was void should be permitted to amend the complaint by setting up a claim based upon the reasonable value of services rendered. 105NJL210, 143A351.
846-65 IndA 172NE128. [a] **Answer construed not to plead counterclaim.**-MoA 290SW119.
846-67½-New. An answer alleging that statements made to procure decedent's signature to a written pledge constituting the basis of the claim were false and known to be false when made and were made to deceive decedent and that he believed them and relied on them to his injury is sufficient as against demurrer. 201 Iowa818, 208NW301.
846-67⅓-New. An action by executors to recover shares of stock belonging to the estate, on answer disclosing that the stock belonged to decedent at the time of his death but came into defendant's hands through pledge agreements by some of the devisees individually as security for a bond executed by defendant in behalf of the individuals and not of the estate, is bad on demurrer. 163Minn209, 203NW620.
846-67¼-New. An answer in an action for services specifically denying that deceased made a contract employing plaintiff to render certain services for stated compensation as alleged in the petition has been held sufficient. 229 Ky335, 17SW(2d)196.
846-67⅙-New. Claims filed and not expressly admitted in writing properly signed and approved by court considered denied without pleading. Iowa 232NW282.
847-77 33Ariz261, 263P943. See also 200Cal 681, 254P557.
847-80 47 Ida582, 277P565.
847-85 [a] **Allegation sufficient.**-157SC 85, 153SE640.
848-99½-New. In a suit against an administrator to foreclose a mortgage on realty, failure of the original prayer to waive all recourse against other property of deceased's estate is not fatal where the express waiver is contained in the body of an amended petition and

the court strikes out a demand for counsel fees. 29Ariz276, 240P1029.

851–63½–New. A plea of former suits pending must allege that case, parties, rights asserted, and relief prayed for are the same. 85PaSuper292.

851–66½–New. Plaintiff suing administratrix personally on note must aver in declaration that note was executed without authority. 157Miss543, 128S755.

852–95½–New. In trial of an action on a claim filed against the estate of deceased, defendant under general denial was entitled to prove the defense that money sent by claimant to decedent was decedent's own money. 207 Iowa605, 223NW480.

853–5 Mo 298SW(2d)79.

853–5½–New. In an action against an estate for services rendered deceased recovery has been held not precluded by failure to introduce testimony as to the reasonable value of the services. 94CalA441, 271P374.

854–31 90CalA220, 265P833; **TexCivA** 228SW(2d)961.

854–41 128Me272, 147A159.

854–47 39GaA610, 147SE902; 229Ky 335, 17SW(2d)196; 155Md157, 141A538. [a] **Drafts designated in petition as demand notes** is not variance. **TexCivA** 29SW(2d)529.

854–48 87CalA379, 262P347; 20 OhA 127, 151NE782.

857–93 216Ala686, 114S301. [a] (2) Where it appeared that executor distributed all assets not required for payment of debts and expenses and thereafter for thirteen years paid out income received to legatees, it will be presumed in absence of evidence that there are no outstanding debts. 47RI 47, 129A805.

857–95½–New. Presumption that payments by decedent to claimant were credits on decedent's obligation is controlling in absence of rebutting evidence. Iowa 230NW330.

857–1 SD 231NW933. [a] (7) In action to recover assets of estate, administratrix must prove that one possessing intestate's stock certificates prior to his death did not have title. 323 Ill 545, 154NE457.

858–2 203Cal 543, 264P1100; 90Fla 141, 106S470; 169Ga830, 152SE673; 167 La255, 119S40; 155Md157, 141A538; 100Vt362, 137A334. [d] **MoA** 297SW 425; 103WVa665, 138SE376.

859–13½–New. In a suit by an administrator to recover the amount of a deposit in a bank the burden of proof is upon him to show that deceased never indorsed certificates or that indorsement was illegally procured to bank's knowledge. 214Ky24, 282SW555.

859–15 83NH467, 144A266.

859–22 **TexCivA** 218SW(2d)326.

859–22½–New. Proof of receipt of letter makes evidence of registering unnecessary. 82NH453, 136A126.

859–24 [a] But see 294Pa323, 144A141.

859–28 231Ky308, 218SW(2d)459; **Md** 148A585.

859–27 [a] **RI** 129A501.

859–30 Contra **MoA** 296SW269.

861–46 216Ala586, 114S194.

861–48 **Vt** 144A861. [a] (18) Other evidence held admissible. 125Me191, 132A417, 44ALR1333; 259Mass499, 156 NE846; 99Vt329, 132A37.

862–57 234Mich471, 208NW611 (in action for reasonable value of services based on contract to convey specific property unenforceable by suit for specific performance, evidence of value of such property properly limited is admissible); **MoA** 279SW253; **MoA** 297 SW425; 49RI 1, 139A465; **TexCivA** 283SW927.

862–58 **NJ** 146A39.

862–60 214Ala412, 108S233; **NJ** 146A 39.

862–63 214Ala412, 108S233.

862–64 **MoA** 297SW425; 219AppDiv 632, 220NYS788; **RI** 144A434.

863–76 35GaA126, 132SE414 (letters written by executrix to creditors offering to pay less than full amount of claims); **Iowa** 232NW282. [b] (6) In suit by administrator in representative capacity to recover indebtedness due estate, promissory note payable to administrator in his individual name, was properly admitted in evidence. 40GaA 386, 149SE721.

865–87½–New. In an action for goods sold to decedent the inventory is not admissible where it does not tend to prove any fact not admitted. 48Nev441, 233 P846.

865–90 172Ark932, 290SW966; 96CalA 576, 274P445; 204 Iowa867, 216NW 46; 83NH467, 144A266; 52ND28, 202 NW852; 131 Or653, 284P163; **TexCivA** 283SW927; **TexCivA** 13SW(2d)456. [a] (15) 213Ky692, 281SW813. (43) To justify conclusion by jury that claim for board, lodging, and nursing of deceased was paid by him. 210Ky38, 275 SW7. (44) Other evidence held sufficient. 73CalA504, 239P51; 87CalA 379, 262P347; 93Fla67, 111S541; 323 Ill 545, 154NE457; 214Ky24, 282SW 555; 218Ky785, 292SW317; 162La758, 111S86; **MoA** 28SW(2d)203; 128 Or661, 275P598; 100Vt351, 137A329; 100Vt 360, 137A333. (45) Bonds found in deceased wife's deposit box were husband's property. **CalA** 290P668. [b] (11) 82NH453, 136A126. (28) Express promise to pay board to decedent. 209 Ky173, 272SW415. (29) Regular retail price of goods sold and delivered. 48 Nev441, 233P846. (30) To show contract to convey land. 252Mass411, 147 NE836. (31) To show title by adverse possession by devisee. 103Conn352, 130 A472. (32) Other evidence held insufficient. 73CalA504, 239P51; 323 Ill 545, 154NE457; 233 IllA94; 203 Iowa144, 212NW327; 225Ky832, 10SW(2d)282; 258Mass502, 155NE641; **MoA** 282SW 735 (bar of claim by limitation); 137 Okl 136, 278P630; 100Vt357, 137A332. (33) To establish counterclaim based on loan set up in action by administrator. Utah 283P1055.

866–7 [c] **Where confidential relationship** existed between claimant and deceased, former must prove full and fair disclosure of material facts in order to validate transactions made before death of deceased. 93Fla67, 111S541.

867–8 107Conn691, 142A398; 202Cal 598, 261P999; 109Conn507, 147A33. [b] 289Pa579, 137A728.

867–11 35GaA242, 132SE781; 216Ky 95, 287SW239; 173Minn38, 216NW 245; **NJSup** 136A428; 133Misc663, 233 NYS246; 133SC1, 130SE57; 146Va747, 132SE694.

868–12 203Cal 543, 264P1100; 210Ky 38, 275SW7; 218Ky57, 290SW1048; 218Ky495, 291SW710; 155Md157, 141A 538; 289Pa579, 137A728; 294Pa323, 144A141.

868–13 128 Or661, 275P598.

869–14 [a] **RI** 144A434.

869–19 228Ky32, 14SW(2d)189; 230 Ky244, 18SW(2d)978; **NJSup** 146A653. [a] 18F(2d)813; 219AppDiv469, 220 NYS107; 119 OhSt603, 165NE301. [b] 219Ala94, 121S82; 216Ky369, 287SW 919; 230Ky244, 18SW(2d)978; 235 Mich613, 209NW816; 197NC243, 148SE 240; 50ND114, 194NW938; 294Pa323, 144A141; **SD** 228NW377. [c] **MoA** 297 SW425.

869–24 See also **MoA** 296SW269.

871–60 [a] (2) In claim against estate in surrogate's court, jury trial not of right and merely advisory. 220AppDiv 480, 221NYS675.

872–79 220Ala587, 127S148; 35GaA 126, 132SE414; 39GaA164, 146SE559 (istcase); 232 IllA109; 86 IndA440, 157 NE10; **Iowa** 231NW457; **Md** 148A585; 261Mass109, 158NE539; **Mass** 172NE 246; **MoA** 282SW735; **MoA** 28SW(2d) 203; 83NH467, 144A266; 247NY447, 160NE910; 196NC247, 145SE233; 20 OhA483, 152NE681 (direction of verdict properly refused); 131 Or653, 284P163; **RI** 129A501 (credibility of defendant's testimony that he had repaid certain money); 45SC155, 143SE15.

872–81 213Ky206, 280SW972; 229Ky 335, 17SW(2d)196; 230Mich388, 202NW 929 (where husband is suing to recover for services rendered wife and he has rebutted presumption arising from relationship); **MoA** 13SW(2d)560.

873–85 **MoA** 3SW(2d)1039.

873–85½–New. whether an alleged loan to defendant by decedent was a gift, 261Mass381, 158NE794.

873–86 203 Iowa144, 212NW327; 126 Me590, 136A123; **MoA** 17SW(2d)670; 20 OhA483, 152NE681; **TexCivA** 274SW, 204.

873–86½–New. whether the signature and indorsement of deceased on a note was genuine. 202 Iowa328, 208NW374.

873–89 **MoA** 283SW461; **NJSup** 136A 428. But see Iowa 230NW330.

873–90 176Ark533, 3SW(2d)301; 86 IndA31, 155NE720; 261Mass109, 158NE 539; **Mo** 10SW(2d)651; **MoA** 276SW89; **NJSup** 132A669; **NJSup** 136A428; **RI** 148A32 (whether decedent had impliedly agreed to pay reasonable worth of services as nurse-housekeeper).

873–90½–New. and extent and value thereof, 86 IndA31, 155NE720.

873–91 206 Iowa514, 219NW305; 210 Ky38, 275SW7; 225Ky15, 7SW(2d)487; 234Mich471, 208NW611; 236Mich5, 209 NW916; **MoA** 297SW425; **MoA** 17SW (2d)369; 149Wash316, 270P1029. See also 225Ky15, 7SW(2d)487. But see 228 Ky32, 14SW(2d)189.

873–92 234Mich471, 208NW611; **MoA** 300SW1035.

873–95 **RI** 148A32.

873–98½–New. whether a note payable to defendant's deceased wife had been paid; 131 Or653, 284P163.

873–99½–New. or to try title to bonds claimed by third party. 232 IllA109.

873–1 96CalA455, 274P566; 203 Iowa 144, 212NW327; 146Va325, 131SE830. [b] **Evidence held insufficient to warrant submission to jury.**–146Va325, 131SE 830.

873–3 See also 205 Iowa16, 212NW138 (proof of publication held to warrant peremptory instruction). Contra 82NH 453, 136A126.

874–7½–New. Evidence has been held insufficient to present jury question as to whether payment for services was to be deferred until decedent's death. **Iowa** 229NW159.

874–7½–New. In an action for breaching an oral agreement to devise realty, it is unnecessary to submit any question of rescission to the jury. 231Ky550, 21 SW(2d)983.

874–9 [b] **Charge held proper.**–170Ga 530, 153SE415. [c] **Charge held erroneous.**–170Ga530, 153SE415. [d] **Instructions held proper.**–41GaA610, 154 SE206(2dcase).

874–11 203 Iowa144, 212NW327. [b] **In action for services rendered decedent** where plaintiff received and cashed checks marked in payment for services to date which she was permitted to read, administrator is entitled to instructions that acceptance of check was not procured by fraud. 192NC494, 135SE331.

874–13 [b] **Instructions held applicable to issues.**–35GaA126, 132SE414.

874–14 **MoA** 283SW461; **MoA** 28W(2d) 203; **MoA** 8SW(2d)1027; 103NJL410, 135A803; 31 OhA518, 167NE490.

874–16 **MoA** 283SW461.

874–17 165Ga89, 139SE805. See also 190NC491, 130SE193.

874–18 201 Iowa871, 208NW297.

874–20 169Ga9, 149SE568; 35GaA126, 132SE414; 210Ky38, 275SW7 (limitations of actions); 228Ky430, 15SW(2d) 254; 233Ky576, 26SW(2d)491; 221MoA 355, 273SW240; **TexCivA** 27SW(2d) 610; 148Va132, 138SE513.

874–21 214Ala412, 108S233; **CalA** 279 P1019; **DC** 33F(2d)370; 210Ky38, 275 SW7 (erroneous as furnishing no guide for fixing amount of recovery); 229Ky 335, 17SW(2d)196; 315Mo478, 286SW 36; **Mo** 10SW(2d)651; 221MoA355, 273 SW240; 222MoA260, 296SW183; **MoA** 297SW425; **MoA** 21SW(2d)635 (instruction held not broader than pleading); **MoA** 24SW(2d)183; 103NJL410, 135A 803; 131 Or261, 282P556.

874–22 201 Iowa871, 208NW297; 228 Ky430, 15SW(2d)254; 103NJL410, 135 A803.

875–24 **Iowa** 230NW330; 31 OhA28, 166NE151.

875–32½–New. Five thousand dollars for nursing, board, and lodging as covering periods of time when no services were required or rendered is excessive. 210Ky38, 275SW7.

875–32½–New. Finding, in an award, "for estate" is finding for executor and against same person acting as administrator. 35GaA710, 134SE625.

875-32¼-New. The verdict may be against defendant both as administratrix and individually. 104WVa156, 139SE648.

876-37 165Ga197, 140SE357; MoA 24SW(2d)183; 195NC856, 142SE7.

876-43 226Ky722, 11SW(2d)912.

876-44 252Mass188, 147NE558 (where action was not brought within one year from date of executor's qualification).

877-61 [a] **In vendor's action to recover unpaid balance on lot,** judgment directing sale of lot for any deficiency after application of funds of estate is not erroneous. 83CalA87, 256P479.

877-65½-New. A personal decree may be rendered in a proper case against the husband of a decedent for wrongful appropriation of funds of the estate while acting as administrator. 144Miss233, 109S601.

877-65⅓-New. Relief for double claim may be granted by single decree, as claim for share in estate and claim as substituted administrator for an accounting of predecessor's stewardship. NJCh 131A100.

877-65¼-New. Judgment establishing a chattel mortgage lien on property of a decedent's estate, should be as full and specific as a judgment of foreclosure. TexCivA 19SW(2d)400.

877-65⅙-New. Where no pleading or evidence described the property coming within the blanket clause of a chattel mortgage, it is error for the court to adjudicate a lien on the property of deceased's estate in the general language of the mortgage. TexCivA 19SW(2d)400.

877-65¼-New. Judgments held erroneous. CalA 285P328.

877-66 216Ky674, 288SW301.

878-67½-New. Where claim not proved and payment demanded for more than one year after execution qualified, interest should be allowed only from the date of proving and demand. 209Ky675, 273SW548.

878-74 122Or519, 259P1063.

878-75 [b] (3) In scire facias sur mortgage, where administrator entered plea of payment, judgment could not be entered against him for failure to file affidavit of defense. 294Pa86, 143A500. (4) In scire facias sur mortgage, rule providing that plaintiff may take judgment by default unless affidavit of defense is filed has been held applicable to heirs and terre-tenants, but not to executors and administrators. 294Pa86, 143A500.

878-77 Ariz 289P989.

879-80 228Ky32, 14SW(2d)189; 116Okl74, 243P512; TexCivA 287SW110. See also 231Ky550, 21SW(2d)983.

882-5 90Fla441, 106S470.

884-43½-New. Judgment in favor of administrator who was discharged as such pending action and before judgment is neither void nor valid, but voidable. 74CalA704, 241P584.

884-44 [a] (10) One asserting claim based on contract has been held not entitled to recover on quantum meruit, where no issue of implied contract was presented by pleadings or tried. 105NJL210, 143A351. [f] **Judgment within issues.**-In suit to settle estate, judgment allowing claims and directing sale of property to pay same is within issues. 231Ky808, 22SW(2d)259.

885-45 [a] **Awards held proper under evidence.**-82Colo61, 256P1093.

886-58 [a] **Mere recital that "execution shall issue"** does not render judgment erroneous nor affect validity though statute forbids execution upon judgment against estate of deceased person. Mo 27SW(2d)6.

887-68 34Wyo317, 243P130, 132 [cit CJ].

887-71 Ariz 289P989.

888-84 167Ga248, 145SE73.

889-96 116Okl74, 243P512. [e] **Judgment merely fixes amount due payable in due course of administration.**-35OhA347, 172NE440.

889-97 See also 166Ga667, 144SE204.

889-2½-New. Creditor procuring appointment to foreclose security deed covering entire estate is not liable for all costs of administration to administrator who allowed judgment for full amount of claim without setting up his liability for such costs. 34GaA37, 128SE202.

889-2⅓-New. Judgment not subject to collateral attack by administrator. 41GaA763, 154SE721.

890-7 10LaA52, 120S538.

891-17 39GaA294, 147SE137 (judgment de bonis testatoris); 41GaA763, 154SE721. [c] **Presumption as to devastavit.**-39GaA294, 147SE137.

893-26 91CalA554, 267P375 (not binding on heirs).

893-31 198Cal440, 245P422; 15DelCh459, 136A147.

893-43½-New. Judgment against administrator is more restricted in its effect than judgment against executor. 13F(2d)321.

893-45 [a] (1) 171Minn423, 214NW267. [e] (1) See also 198Cal440, 245P422.

894-47 But see 167Ga248, 145SE73.

894-50 167Ga248, 145SE73.

894-54 205Iowa203, 217NW857.

897-93½-New. Administrator not pleading want of assets cannot claim status as to assets differed from that conclusively presumed from judgment. 41GaA763, 154SE721.

897-93⅓-New. Plea stricken, in action on judgment against administrator, denying devastavit but not excusing failure to plead want of assets to original suit. 41GaA763, 154SE721.

897-6 Ariz 289P989 (judgment carries with it no coercive means of security or payment); 200Cal681, 254P557. [a] **In Arizona.**-289P989.

898-7 81Colo459, 256P10; 205Iowa203, 217NW857; 37OhA347, 172NE440; 50Philippine152. [c] 81Colo459, 256P10. [f] TexCivA 284SW673. [g] **Where assets have been distributed and administration closed,** execution cannot be levied on property pertaining to estate. 50Philippine152.

902-83 [c] (1) TexCivA 273SW908; TexCivA 284SW673.

903-85 But see 50Philippine152 (property cannot be taken on execution on judgment against personal representative).

903-86 [a] **In Philippine Islands.**-50Philippine152.

903-88 [b] **Execution against executor as such and individually** cannot be levied on property of estate. 169Ga391, 150SE582.

907-41 46Philippine809.

907-43 [e] **Attempted appeal as executor** from order denying new trial does not present issue solely between executor in individual capacity and defendant. 84CalA114, 257P611. [f] **Appeal by surviving wife as executrix from judgment** in favor of brother of deceased in action by her as executrix against such brother and herself individually held to present no reviewable question where estate has no interest. 84CalA114, 257P611.

909-74 MoA 295SW495; NJ 129A742.

910-83½-New. An executors' appeal from denial of new trial is not dismissed where a stipulation of two of them for dismissal was opposed by the executrix. 178Minn509, 227NW660.

910-90 205Iowa662, 216NW700; 49Nev319, 245P703 (finding not disturbed when there is substantial conflict in evidence on question of fact); 121Or462, 255P901. See also 225Ky15, 7SW(2d)487.

910-91 90Fla441, 106S470; 102WVa537, 135SE600. [a] 84IndA446, 151NE342.

910-95 [b] **Judgment awarding execution against executor for services rendered decedent has been held not reversible error,** though erroneous in not being ordered certified to probate court for classification against estate. 222MoA260, 296SW183.

910-2½-New. In a suit by a widow against decedent's administrator individually and as representative of the estate, the reviewing court cannot adjust the account between decedent's estate and the administrator. 128Me324, 147A415.

910-2⅓-New. Where a petition by a personal representative failed to show a right to sue, judgment in his favor will be reversed and the cause will be remanded for amendment of the petition and for new trial. Mo 21SW(2d)762.

910-4 But see NB [1929] 4DomLR15.

913-41 PEI [1926] 4DomLR1106.

913-47½-New. An executor sued in replevin in its individual capacity and making no motion to be substituted in its representative capacity may be taxed with costs on plaintiff's recovery. 200Wis220, 228NW121.

917-10 77Mont260, 250P823.

917-16 See also 10PaDist&Co144.

919-65 See also Sask [1929] 2DomLR944.

919-66 See also Sask [1929] 2DomLR944.

924-57 74Mont449, 241P648. But see 10PaDist&Co399. [g] **Executors or administrators may not by "law tricks"** discharge their obligations as officers of court, by payment of sum much less than they owe. 221AppDiv321, 223NYS174.

925-63½-New. Court is not justified in summarily ordering administrator to account upon mere suspicion as to existence of fraud, 199Cal351, 249P184.

925-63⅓-New. but foundation for existence of fraud to justify such an order must be established by competent and sufficient evidence. 199Cal351, 249P184.

925-70 96PaSuper510.

925-78 122Kan577, 253P606; 161La162, 108S322. [i] **Administrator de bonis non.**-35OhA347, 172NE440.

926-81 128Or317, 272P906; 193Wis20, 213NW639.

926-82 See also 8PaDist&Co746.

926-83½-New. If an account is filed prematurely, it must be stricken and readvertised. 8PaDist&Co746.

926-84 Mo 31SW(2d)788. [a] **Refusing final account.**-103Conn226, 130A157. [b] **Effect of delay of representative in prosecuting suit.**-MoA 1SW(2d)209.

926-85 122Kan577, 253P606; 193Wis20, 213NW639.

927-86 193Wis20, 213NW639. [a] **"Full administration of estate,"** within Missouri statute authorizing probate court to make final settlement after estate has been fully administered, contemplates collection of all claims due estate, as well as payment of all debts owing by estate. MoA 1SW(2d)209.

927-89½-New. Unusual delays need explanation. 193Wis20, 213NW639.

927-93 Mass 170NE465.

927-94 [a] (9) Italian Vice Consul. 245NYS85.

928-96 98NJEq218, 130A222; Wash 286P650 (executors are accountable to creditors for debts due from estate). [m] **Attorney for executor** may cite executor to account. 7PaDist&Co123.

929-3 240Mich661, 216NW446.

930-27 125Me242, 132A697.

932-47½-New. Appointment of an administrator, although there was a will in existence, made it the duty of the administrator appointed to account for all of the personal property belonging to the estate of decedent. 208Iowa698, 223NW756(2dcase).

933-61 203Cal335, 264P242.

933-61½-New. A surviving administrator need not charge himself with assets coming into his hands at the time of his appointment as coadministrator with another. 149Md22, 130A337 (where his accounting and that of deceased administrator covered whole estate).

933-65½-New. A surviving executor must account. 288Pa458, 137A170.

933-66 214Ala155, 107S63; 71CalA22, 234P851; Mass 170NE465.

934-73 See also 203Iowa224, 212NW481.

935-78 Iowa 229NW721; 256Mass78, 152NE71. [c] **Executors authorized by will to use certain property to establish indicated trusts** could, without appraisal, deliver property to themselves as trustees. 135Misc1, 236NYS627.

935-80 213AppDiv395, 211NYS128.

935-82 213AppDiv395, 211NYS128 (it is executor's duty, who is also trustee, to account as executor and then turn estate over to himself as trustee).

935-85½-New. Executors not trustees

are not required to account as such, notwithstanding terminology used on certificate of stock. 136Misc615, 241 NYS648.

935–36 199Cal 351, 249P184; 74Mont 449, 241P655, 656 [citCJ]. [f] (2) Whether good will is asset to be accounted for must be decided only after careful scrutiny of business. 242NY1, 150NE581. [v] **Money and property received by agent for alleged ancillary administrator** in foreign country and claimed to have been remitted to such ancillary administrator must be accounted for, even though he may not be charged with it. 199Cal 351, 249P184. [w] **Time deposit slip** held part of decedent's estate where it stood in her name, and evidence held not to sustain claim that it had been given away by her. 221Ky633, 299SW560. [x] **Proceeds of sale of widow's separate property** is not chargeable to deceased administrator. ND 231NW550.

936–93 [a] **Executrix of deceased executrix** should not be charged in accounting with realty received by latter as life tenant under original testatrix's will. 252NY121, 169NE110.

936–94 191NC190, 131SE656; 49RI 137, 140A913.

936–96 See also DelSuper 143A407. [d] **Sums never actually coming into his hands** are wrongfully charged to executor in accounting. TexCommnA 276SW 680.

936–96½–New. Whether "good will" of a business is an asset to be accounted for is question of fact requiring careful scrutiny of business to determine intention. 242NY1, 150NE581.

936–96⅓–New. Executor of owner of life estate with power to sell for own support need not account for all such estate coming into life tenant's hands. 219MoA694, 284SW145.

937–10 [a] 101NJEq705, 138A585.

938–19½–New. That the executor of an estate is likewise an heir does not relieve him from responsibility as trustee of funds of the estate coming into his hands. 218Ala559, 119S676.

939–38 [a] **Noncompliance with statutory requirements** does not require court to exclude evidence offered to justify administrator's actions. TexCivA 294 SW227.

939–39½–New. Executor who has sent his account to commissioner cannot be penalized because of possible failure of commissioner to act in accordance with statute. Va 152SE350.

939–41 194NC698, 140SE622.

939–45½–New. Filing of a claim against the estate of a deceased executor is not a prerequisite to proceedings by the surviving executor for an accounting by the representative of the deceased executor. 203Cal 335, 264P 242.

939–48 See also 246 IllA283.

940–49½–New. In adjustment of accounts, court is not fettered by rules of law from doing exact justice. 79Mont 445, 257P418.

940–50 214Ala155, 107S63.

940–52 214Ala155, 107S63; NJCh 134 A360.

940–57 214Ala155, 107S63; 77CalA321, 246P334; 129Misc293, 221NYS305; 290 Pa107, 138A81. [f] **Removal to equity court** after probate court has assumed jurisdiction will not be permitted. 215 Ala51, 108S850. [g] **Concurrent jurisdiction** of probate court will not be disturbed without special equity. 215Ala 51, 108S850.

941–59 [b] (9) Issues involved in claim under inter vivos deed of trust. 134 Misc532, 235NYS476.

941–60 101NJEq222, 137A157.

941–67 [a] **Validity of claims.**–103Conn 226, 130A157.

941–68 77CalA321, 246P334; 223App Div654, 229NYS414. [a] (14) Compelling executor to account for loss sustained by estate through fraudulent sale of real estate to his wife for less than its value. 241Mich29, 216NW378. (15) Contest by heirs for cause shown of all matters including allowed claims not passed on. SD 227NW845 (statute held still in force).

942–72 132 Okl 21, 269P282.

942–74 132 Okl 21, 269P282.

942–75 203Cal 613, 265P214; 299Pa 440, 149A728.

943–80 77CalA321, 246P334.

943–85 [a] **In Arkansas.**–171Ark514, 284SW775.

943–87½–New. Deceased administrator's representative may insist that account of deceased's administration be taken in probate court in which deceased was appointed. Mass 170NE465.

943–99 195Cal 95, 231P739.

944–6 203Cal 335, 264P242.

944–9½–New. Within the meaning of the statute of limitations the failure of an executor to include certificates of deposit in his inventory is a nonfeasance and not a misfeasance. 135Wash468, 238P5.

946–27 128 Or317, 272P906.

946–33 291Pa574, 140A552; 299Pa333, 149A473. [b] 128 Or317, 272P906.

947–34 137Misc299, 242NYS499 (refusal of title companies to insure title to property and proceedings for construction of will).

947–40 See also 79Mont256, 255P1058.

947–41 25 OhA265, 158NE9(2dcase).

948–43 [b] **Administrator filing final account is plaintiff**, an opposition is answer, and all parties cited are defendants. 168La909, 125S588.

949–69 204 Iowa355, 213NW938; 238 Mich679, 214NW320; 222MoA713, 7SW (2d)737. [j] **Time.**–160La223, 106S835.

950–77 101Vt343, 143A302.

950–92 238Mich679, 214NW320.

951–2 Wis 230NW715. See also 2LaA 136.

951–7 [e] **Incompetent executor.**–131 Misc420, 226NYS32. [f] **Substitution of parties.**–131Misc420, 226NYS35.

953–28 [k] **Personal service on executors** may be ordered to be made outside territorial jurisdiction. NS [1924] 2 DomLR900.

954–50½–New. Face of proceedings showing petitioner not entitled to order, surrogate should deny petition. 135 Misc877, 240NYS203.

954–59½–New. Costs may be assessed against attorney personally, who by unauthorized special appearance for an incompetent executor delayed accounting. 131Misc420, 226NYS32.

954–64 169Ga869, 152SE53(2dcase).

954–65 See also 331 Ill 442, 163NE460. [a] **Removal from orphans' court or probate to court of equity held proper under circumstances.** Ala 118S333; 103 NJEq156, 142A424.

954–65½–New. In some jurisdictions a circuit court in equity, after removal of administration into that court according to statute, has complete jurisdiction of the estate and of the administrator as such. 219Ala157, 121S538.

954–65⅓–New. In some jurisdictions the circuit court acting in equity, upon removal into it of administration, has jurisdiction to determine whether the estate owes debts and who is entitled to the estate after the debts are paid, or at once, on proof that there are no debts, and to order property of the estate, if the administrator has taken possession, turned over to the true heir. 219Ala157, 121S538.

954–65¼–New. An administrator, accepting letters of administration from the probate court and taking possession of land to which he has no right as owner or administrator, is estopped to deny such jurisdiction. 219Ala157, 121S538.

954–65½–New. In proceeding in equity to compel accounting court may require executor to give bond. 169Ga869, 152 SE53(2dcase).

954–66 Ala 129S8; Ala 129S23; 47RI 8, 129A732; 157SC85, 153SE640. See also 214Ala580, 108S509. [b] **Where authority of orphans' court under Code Pub. Gen. L. (1924) art 93 § 271** is inadequate, equity has jurisdiction to require accounting for property. 155Md 538, 142A719. [c] **Where former administratrix had property of deceased** of probable value in excess of bond, equity may continue injunction order restraining disposition by defendant, pending action by orphans' court. 155Md538, 142A719.

954–69 157SC85, 153SE640.

955–72½–New. Under some statutes, where an administrator has not brought a suit for settlement within six months after qualification, a creditor is entitled to bring an action in equity for settlement of the estate and to recover on his claims in one action. 209Ky247, 272SW 720.

955–78 125Misc365, 211NYS521. See also 169Ga869, 152SE53(2dcase).

955–79 132Misc613, 230NYS308.

955–81½–New. The representative of an estate cannot account to himself as the representative of the estate of a deceased beneficiary. 125Misc365, 211NYS521.

955–81⅓–New. In such case persons interested in the beneficiary's estate must be made parties. 125Misc365, 211NYS 521.

955–81¼–New. Thus where an executor accounting for estate of a deceased beneficiary is also administrator cum testamento annexo of the estate of which the beneficiary is executrix, all persons interested in the beneficiary's estate are necessary parties. 125Misc365, 211NYS 521.

956–9½–New. In a suit to reinstate rights renounced under will, defendants may attack validity of will without making legatee a defendant. 162La571, 110 S759. [a] **Where validity of will is put in issue by plaintiff**, defendant may give proof of forgery. 162La571, 110S759.

956–15 209Ky247, 272SW720 (under statute where administrator has not brought suit for settlement within six months after qualification).

957–34 [b] (2) Other petitions held sufficient. 170Ga156, 152SE462. [c] **Insolvency of representative** need not be alleged. 169Ga869, 152SE53(2dcase). [d] **Complaint held to state cause of action** in nature of creditor's suit to marshal assets. 157SC85, 153SE640.

958–43 [a] **Petition for removal of administration to court of equity** must be formal petition addressed to court or judge thereof. Ala 129S23. [b] **Petition held not demurrable.**–170Ga472, 153 SE188.

959–69½–New. Motion does not constitute filing of action so as to require allowance of time equal to that allowed for answering petition. 234Ky597, 28 SW(2d)760.

960–82 221Ky633, 299SW560.

960–84 But see 208Ky441, 271SW600.

960–84½–New. In the absence of evidence to the contrary, it will be presumed that mortgages held by an estate were payable on the dates on which they are shown to have been satisfied. 218 Ala500, 119S232.

960–84⅓–New. That decedent's assets came into the hands of her administrator has been held to raise the presumption that such assets were in his hands at the time of his death so as to require his executors to account therefor. 224 AppDiv139, 229NYS706.

960–85 208 Iowa698, 223NW756(2d case); 114Nebr230, 206NW770.

960–89 208Ky441, 271SW600.

960–94 114Nebr230, 206NW770.

961–8½–New. An executor, claiming that an indebtedness to him from decedent was payable from the proceeds of insurance policies, may prove his claim to moneys due from such proceeds as of the date of decedent's death. 133Misc 424, 232NYS675.

961–15 55AppDC309, 5F(2d)270 (shares of stock in administrator's name held not property of decedent); 136Misc664, 240NYS502; TexCivA 10SW(2d)136.

962–21½–New. Interest charges on mortgages held by the estate, 218Ala500, 119 S232.

962–22½–New. Evidence did not warrant the inference that a husband borrowed money from his wife to purchase stock so that such stock passed to the wife's daughter under a bequest of property. 208Ky441, 271SW600.

962–22⅓–New. , and the ownership by decedent of money standing to her credit in a bank. 221Ky633, 299SW560.

962–22¼–New. Evidence has been held to sustain a finding of deceased's mental capacity to make a sale of cattle. TexCivA 10SW(2d)136.

962–22½–New. Evidence has been held to sustain a finding that deceased's sale

of cattle to one later becoming executor was not obtained by undue influence. **TexCivA** 10**SW(2d)**136.

962-22¼-New. In creditor's suit to marshal deceased debtor's assets, nulla bona return is evidence of debtor's insolvency. 157**SC**85, 153**SE**640.

962-22½-New. Charging executor with losses in operation of decedent's business. **Iowa** 232**NW**72.

962-25 See also 164**Ga**203, 138**SE**80.

962-25½-New. Refusal to grant additional time for preparation for hearing has been held not abuse of discretion. 234**Ky**597, 28**SW(2d)**760.

963-44½-New. A decree requiring an administrator's executors to account for moneys of administrator's decedent has been held binding on the administrator's legatees, notwithstanding they were not parties to the proceeding in which such decree was rendered. 224**AppDiv**139, 229**NYS**706.

963-45 WVa 155**SE**664.

963-47½-New. A chancellor's ruling, sustaining a register's report disallowing compensation to an executor on grounds, sustained by the evidence, will not be disturbed on appeal. 218**Ala**500, 119**S**232.

963-47⅓-New. A decree confirming a register's report in a suit for accounting cannot be reversed for the register's error in disallowing vouchers showing payment of claims, where the complainant received the benefit thereof in deduction from interest charges. 218**Ala**500, 119**S**232.

964-64 WVa 155**SE**664.

964-67 132**Misc**335, 230**NYS**332.

964-70 But see **NJ** 129**A**434.

964-71 See also 103**NJEq**339, 143**A**361.

964-72 160**Tenn**229, 22**SW(2d)**1041.

964-76 [a] **In allowing attorney's fee** court will look at who is representing the estate rather than who is representing the executor. 235**Ky**658, 32**SW(2d)**8.

964-78½-New. Persons without interest, and not parties to the suit by any act of complainants, are not entitled to counsel fees. 103**NJEq**339, 143**A**361.

964-79 85 **IndA**234, 150**NE**418; 126 **Or** 301, 269**P**861; 48**Philippine**857; **Wash** 286**P**650. [a] **NJ** 129**A**434. [l] **Diamond ring.-NJ** 129**A**434.

965-85 11**PaDist&Co** 85.

965-85½-New. Domiciliary administrator cannot be charged with property he claims to have remitted to an ancillary administrator in a foreign country where he has accounted for it in the proper forum. 199**Cal** 351, 249**P**184.

965-86 NJ 129**A**434.

965-87 NJ 129**A**434.

965-89 NJ 129**A**434.

965-92 NJ 130**A**733 (payment to one not entitled to participate).

966-97 [d] **Duty of court** to charge executor with debts owed to estate, regardless of how debt is brought to its notice. 203**Cal** 335, 264**P**242.

966-1 [d] See also 96**PaSuper**242.

966-2 [d] **Creditors permitting administratrix** to carry on business cannot charge her, unless loss has occurred. 119 **Or**90, 247**P**324. [e] **Costs and expenses** accruing through administrator's negligence are chargeable to him. **TexCivA** 294**SW**227.

967-6 224**AppDiv**431, 231**NYS**333.

967-11½-New. Administrator must account for full value of property purchased by him in violation of statute. 158**La**637, 104**S**481.

967-12 130**Misc**865, 226**NYS**1.

968-17 135**Misc**417, 239**NYS**375 (computation); 160**Tenn**229, 22**SW(2d)**1041. [b] 218**Ala**186, 118**S**333.

968-22 214**Ala**10, 106**S**188, 191 [cit Cyc]; 181**Ark**424, 26**SW(2d)**95; 85 **IndA** 234, 150**NE**418; 133**Misc**322, 232**NYS**521. But see 224**AppDiv**31, 229**NYS**523. [b] (1) **NJ** 129**A**434. (6) Money borrowed to carry on business and properly used by executor in performance of his duties. 106**Conn**602, 138**A**795. [f] (1) **Mass** 170**NE**384(2dcase). [h] **NJ** 129**A** 434 (where not allowed without court order). [n] 214**Ala**10, 106**S**188, 191 [cit CJ]. [s] **Credits claimed but not allowed** disallowance based on evidence intended to establish right to credit. **NJ** 129**A**434. [t] **Amounts paid executor as agent of deceased for taxes** should not be credited on his account as executor. 218**Ky**187, 291**SW**27.

970-23 205**Cal** 276, 270**P**939, 60**ALR** 730 (reimbursement for personal advancements). [a] (2) Executor is entitled to credit for amount of judgment recovered against him personally on contract which he had authority to make for benefit of estate. 90**Fla**441, 106**S** 470.

970-25 5**PaDist&Co** 163. See also 70 **CalA**552, 233**P**995.

970-26 218**Ala**500, 119**S**232; 178**Ark** 772, 12**SW(2d)**395; 49**RI** 137, 140**A**913. [b] See also **CalA** 258**P**120.

971-32½-New. Credit for an executor's payment of money belonging to the payee and never part of the estate nor charged to the executor should be disallowed. 218**Ala**500, 119**S**232.

972-36 [b] (2) Against objection of personal representative, probate court has no authority to make allowance of attorney's fee. 27**Ariz**484, 232**P**56. (3) Legal expenses are properly chargeable against gross of estate received by executors. 126**Misc**54, 213**NYS**286. [d] (1) 233**Mich**467, 206**NW**988; 96**PaSuper** 242 (where executor attorney for estate); 37**Wyo** 107, 259**P**815, 55**ALR**941. (3) Where executor paid costs though successful party in action to quiet title and charged estate therewith, disposition of such item in the account must await decision of court in which such action was brought. 96**PaSuper**510. [g] **Compensation to appraisers who signed inventory and appraisement.-Or** 292**P** 1027.

972-37 74**Mont**449, 241**P**648; 37**Wyo** 107, 259**P**815, 55**ALR**941.

972-38 NJ 129**A**434; **NJ** 130**A**733 (chargeable with interest where commission is taken before due).

972-39 See also 224**AppDiv**431, 231**NYS** 333.

972-48½-New. Where executors mistakenly deduct state inheritance taxes deposited by them, they should deduct amount thereof from shares of respective beneficiaries who are liable therefor and credit them to estate when distribution is made. 127**Misc**579, 217**NYS** 323.

973-53 TexCivA 294**SW**227.

973-56 NJ 129**A**434.

973-58½-New. Where delay in paying legacies is not satisfactorily accounted for, the representative may be denied credit for interest paid on legacies during the period of delay. 233**Mich**467, 206**NW**988.

973-60 331 **Ill** 442, 163**NE**460; **Or** 292 **P**1027; 51**Philippine**935. [f] **Right to compensation is personal to administrator.-29Ariz**203, 240**P**343. [g] **In Virginia.-142Va**229, 128**SE**533.

974-61½-New. Executor who to avoid probate and administration costs distributed estate under agreement with beneficiaries, held entitled to compensation. **Ala** 130**S**80.

974-62 74**Mont**449, 241**P**655.

975-78 [a] **In Missouri.-MoA** 28**SW** (2d)378.

975-85½-New. An administrator appointed over the protest of the person entitled to nominate is not entitled to compensation for services between the time of qualification and suspensive appeal from appointment, 209**Ky**289, 272 **SW**759.

975-85⅓-New. at least where he did not perform any specific administrative acts during such period. 209**Ky**289, 272**SW**759.

975-85¼-New. Nor is such administrator entitled to compensation for services continued after such appeal. 209 **Ky**289, 272**SW**759.

975-87 [a] **NJ** 130**A**733.

976-92 128**Misc**906, 220**NYS**509; 7**Pa Dist&Co** 545.

976-94 128**Misc**906, 220**NYS**509. [d] **Will making bequest for executor's kindness** during testatrix's life and providing that executors should not receive compensation is held not to deprive executor of right of compensation. 128**Misc**906, 220**NYS**509.

976-94½-New. A renunciation of a legacy in lieu of commissions is not too late if made at the time of accounting, provided no injustice is done by the delay. 103**NJEq**535, 143**A**870.

976-94⅓-New. Acceptance of a legacy given in lieu of commissions is not an election to accept it in lieu of commissions, where it is taken on account of commissions. 103**NJEq**535, 143**A**870.

976-2 120**Kan**95, 242**P**138; 143**Miss** 666, 109**S**707; 142**Va**229, 128**SE**533 (distribution of stock in kind). [f] **Services as trustee as well as executor.-137Misc** 237, 244**NYS**465.

977-3 SD 227**NW**886.

977-4 98**NJEq**655, 130**A**195.

977-15½-New. Special fees of administrator and attorneys fees held chargeable against interest of legatees receiving money and not against devisees of specifically described land. **Iowa** 230 **NW**519.

977-16 51**Philippine**935; **NS** [1927] 2 **DomLR**344. [a] **Rate.-MoA** 22**SW(2d)** 209.

977-16½-New. Fact that one executor takes possession of the assets and transacts all the business of the estate does not entitle him to commissions to exclusion of coexecutor. 129**Misc**297, 221 **NYS**468.

977-17 27**Hawaii**736; 150**Md**354, 133**A** 128, 46**ALR**231; 224**AppDiv**31, 229**NYS** 523; 135**Misc**118, 236**NYS**685; 13**PaDist &Co** 536; **NS** [1927] 2**DomLR**344. [k] **Where transaction is merely exchange of receipts** without actually handling any money, administrator may be entitled to commissions. 27**Hawaii**736. [l] **Commissions to same person as executor and trustee.-137Misc**237, 244**NYS** 465.

978-18 94**PaSuper**70 (commissions allowed on proceeds of sale of corporate stock to administrator made pursuant to order of court); **TexCr** 5**SW(2d)** 610.

978-19 200**Cal** 646, 254**P**269 (realization loss cannot be included in aggregate amount upon which commission is computed); 34**PortoRico** 120 (on sums received); **TexCr** 5**SW(2d)**610. [d] **Checks received held not cash** for purpose of determining commissions. **TexCr** 5**SW(2d)**610.

979-31 200**Cal** 646, 254**P**269. [a] 223 **Ky**799, 4**SW(2d)**752.

979-33½-New. Executors are not entitled to commissions on amount paid as dower to testator's widow electing to take dower. 128**Misc**51, 217**NYS**318.

979-34 128**Misc**263, 219**NYS**295. See also 142**Va**229, 128**SE**533 [quotCJ].

979-35 See also 142**Va**229, 128**SE**533, 536 [quotCJ].

980-46½-New. Commissions not allowed on stock dividend unless estate is increased in value. 274**US**91, 47**SCt** 497, 71**L ed**942, 55**ALR**705.

980-48 [a] (4) Executors paying mortgage debt under testamentary authority and thereafter selling property for price paid partly in cash and partly by mortgage are entitled to commissions on sum paid in discharging mortgage and entire price received. 226 **AppDiv**180, 234**NYS**700 [rev 133**Misc** 554, 233**NYS**326].

981-56 98**NJEq**655, 130**A**195; **TexCivA** 6**SW(2d)**209.

981-57 161**La**162, 108**S**322. [a] (2) 135**Misc**93, 236**NYS**709 (in absence of agreement by all concerned). [c] **In New Jersey.-98NJEq**655, 130**A**195.

981-58 NJ 130**A**733.

982-66 252**NY**381, 169**NE**616; 128**Misc** 263, 219**NYS**295 (passing to residuary legatee).

982-67 133**Misc**904, 234**NYS**734.

982-68 [a] (6) Executrix is entitled to commissions on rent collected and accounted for from time of testator's death and enactment of statute authorizing commissions. 126**Misc**479, 214**NYS**167. (7) Executor is not entitled to commissions in absence of duty respecting realty imposed by will. 129**Misc**297, 221 **NYS**468. (8) Statute gives additional commission of five per cent on amount of rents collected. 127**Misc**579, 217 **NYS**323. (9) Executors are entitled to commissions on realty received in same manner as upon personalty. 136**Misc** 823, 242**NYS**230. [b] (2) Administratrix collecting rents is entitled to com-

missions thereon. 136Misc893, 242NYS417.

982-70 But see 252NY381, 169NE616.

982-71 98NJEq655, 130A195.

982-75 127Misc579, 217NYS323; 137Misc54, 242NYS733. But see 132Misc904, 234NYS734. [c] **Where there is no equitable conversion of the realty and power of sale is not exercised, executors are not entitled to commission.** [27Misc579, 217NYS323.

982-79 [illegible]

982-4 [illegible]646, 254P269; **Iowa** 227NW913; 98NJEq655, 130A195; 127Misc579, 217NYS323; **Ia** [illegible]; 13PaDist&Co526; 48Philippine[illegible]; **TexCivA** 168W(2d)136. **Erratum.**—"Mass.—Cabell v. Cabell. 1 Metc. 319". should be "Ky.—Cabell v. Cabell, 1 Metc. 319".

986-5 74Mont449, 241P655; 113NC322, 142SE825; 287Pa448, 135A119; 148Va860, 139SE490; **Sask** [1928] 2DomLR238; **Sask** [1928] 4DomLR410. See also 142Va229, 128SE533. [h] **Fees of executor held reasonable.**—234Ky597, 28SW(2d)760.

986-6 148Va860, 139SE490. But see **Sask** [1928] 1DomLR221. [a] **Statute not specifying rate construed, in view of practice to allow five per cent, to mean that such rate is allowable in case of sale or authority to sell, but in case of delivery in kind only reasonable compensation is allowable.** 142Va229, 128SE533.

986-8 200Cal646, 254P269; **Iowa** 227NW913 (allowance of two hundred dollars held adequate and proper); 287Pa448, 135A119; 96PaSuper242; 97PaSuper582.

987-9 79Mont256, 255P1058; 79Mont445, 257P418; 148Va860, 139SE490; **Wash** 286P650. [b] **Allowance held proper.**—79Mont445, 257P418.

988-24 181Ark424, 26SW(2d)95; 50New16, 248P891, 892 [citCJ].

988-25 200Cal132, 251P907, 49ALR1025; 200Cal646, 254P269; 223Ky799, 48W(2d)752; 250Mich5, 229NW425 (special petition and order required by statute must be strictly complied with); **TexCivA** 258W(2d)224. [b] **Statutes not retroactive.**—200Cal132, 251P907, 49ALR1025.

988-23 223Mich467, 206NW98; 245NYS169 (double compensation not allowed); 300Pa64, 150A98 (holding reduction of item not error, no extraordinary services being shown).

988-31 245NYS169.

989-33 48Ida210, 281P5; 136Misc823, 242NYS230; 117Or76, 242P820, 821 [citCJ]. [a] (8) Legal services to executor who acted as his own attorney. 200Cal132, 251P907, 49ALR1025. (9) Legal services to law firm of which executor was a member. 200Cal132, 251P907, 49ALR1025. (10) Services in resisting caveat to appointment as permanent administratrix and in collecting rents. 38GaA413, 144SE43. (11) Managing interests of estate in partnership business. 251NY115, 167NE190.

989-35 117Or76, 242P820, 821 [citCJ].

989-36 200Cal646, 254P269; 117Or76, 242P820, 821 [citCJ].

989-37 167Ga68, 144SE912; 233Mich367, 206NW988; 117Or76, 242P820, 821 [citCJ].

989-41½-New. Executors of estate of which practically all assets are shares of stock of closed corporation may not, in absence of extra duties actually rendered, vote themselves additional compensation, 125Misc386, 211NYS514.

989-41½-New. or profit indirectly by virtue of their office as executors. 125Misc386, 211NYS514.

989-43 245NYS156 (will held not to authorize double commissions). [j] **Designation as "executor" and "trustee" may be immaterial.** 245NYS169.

990-46 153SC203, 150SE693 (not entitled to two commissions).

990-46½-New. Testator's intent determines whether commission be allowed executor as executor and as trustee. 245NYS156.

990-47 153SC203, 150SE693 (commissions bequeathed held compensation and not gift).

991-50 85CalA518, 260P351. [d] **Renunciation at earliest possible time required.**—147Wash381, 266P137 (not entitled to renounce after lapse of several years).

991-51 137Misc504, 244NYS126 (agreement construed).

991-53 **Iowa** 227NW913; 137Misc237, 244NYS465; 147Wash381, 266P137, 138 [quotCJ]. [a] **Where settlement and waiver of any further allowance,** executor is not entitled to additional commissions. 215Ala76, 109S166.

991-56 See also 137Misc504, 244NYS126.

991-59½-New. In arriving at commission on agreed valuation value of widow's dower paid by distributee held not deductible. 137Misc504, 244NYS126.

992-61 98NJEq655, 130A195.

992-66½-New. Executrix of deceased executor is not such a representative as to be entitled to commission for "care and management of estate." 219AppDiv131, 219NYS436.

992-67 127Misc579, 217NYS323.

992-71½-New. Allowance to executor of commission to be deducted from his indebtedness to estate is held proper. 79Mont445, 257P418.

992-72 91CalA350, 266P1022.

993-73 223Ky799, 48W(2d)752, 756 [citCJ]. But see 127Misc579, 217NYS323.

993-74 127Misc579, 217NYS323.

993-75 223Ky799, 48W(2d)752.

993-78 91CalA350, 266P1022, 1023 [citCJ].

994-98 103NJEq535, 143A870; 219AppDiv131, 219NYS436; 88PaSuper43; 153SC203, 150SE693 (where compensation fixed by will for dual capacity). [d] **Where executor is also life beneficiary** of income, he will be allowed trustee's compensation on income. 219AppDiv131, 219NYS436.

994-99 103NJEq535, 143A870; 213AppDiv395, 211NYS128; 135Misc20, 237NYS630. [a] (2) Other instances. 136Misc538, 241NYS212. [e] **Trustee** may be allowed extra commission in addition to that he received as executor and such commission must be apportioned between capital and income. 213AppDiv395, 211NYS128. [f] **Trust company appointed successor executor and substituted trustee** held entitled to proper proportions of commissions in both capacities. 135Misc20, 237NYS630.

995-1½-New. A person acting as executor and trustee is not entitled as executor to commissions on unconverted assets when he has done nothing to entitle him to such compensation. 88PaSuper43.

995-1½-New. In such case the question of the amount of compensation as to such assets should await determination until the accountant files his account as trustee. 88PaSuper43.

995-9 29Ariz203, 240P343.

995-11 [c] **Voluntary dismissal of appeal from judgment denying compensation** constitutes waiver. 29Ariz203, 240P343.

996-25 214Ala10, 106S188; **Iowa** 232NW82; 74Mont449, 241P655; **Wis** 230NW715. [a] **Falsifying accounts,** retaining part of rents collected, buying realty from estate unknown to those interested resulting in personal profits, deprives executrix of commissions except for rents collected and accounted for. 126Misc479, 214NYS167. [b] **Failure to comply with statute requiring notice** by publication of appointment is held ground for disallowance of compensation. 214Ala10, 106S188.

997-26 **TexCr** 58W(2d)610.

997-27 241NY374, 150NE148; 131Misc495, 227NYS682. [a] (3) Where executor made payment to wrong party. 241NY374, 150NE148. [d] **Paying balance in hand to wrong party under decree,** in absence of bad faith, does not deprive executor of commission. 241NY374, 150NE148.

997-27½-New. or a mere technical breach of duty, 74Mont449, 241P655.

997-30½-New. Misconduct which would not justify removal may result in denial of compensation on accounting if such conduct is persisted in. 125Misc386, 211NYS514.

997-31 218Ala500, 119S232; **Iowa** 232NW82; 74Mont449, 241P655; 135Misc417, 239NYS375; **TexCivA** 94SW227.

998-32 203Cal693, 265P920, 58ALR430.

998-33 **Iowa** 232NW72; 74Mont449, 241P655. [f] **Court has discretion to determine what compensation** if any was due executor and attorneys where executor failed to keep accounts and commingled trust funds. **Iowa** 232NW82.

998-34 218Ala500, 119S232; **NJ** 130A733.

998-35 218Ala500, 119S232; **Wis** 230NW715.

998-36 283Pa277, 129A104, 105 [citCJ].

998-39 **NJ** 130A733 (failure to pay over or invest sufficient ground for forfeiture of commission).

998-42 157Miss448, 128S330; 133Misc72, 230NYS774.

998-42½-New. as to sums misappropriated or illegally disbursed, 143Miss666, 109S707.

999-46 153SC203, 150SE693 (legacy held forfeited); 160Tenn229, 22SW(2d)1041.

999-48 [d] **Estate administered fully to approval of court** may permit allowance of commission. 149Md22, 130A337.

1000-54 37GaA483, 140SE776.

1000-66 See also 94CalA206, 270P1005.

1000-67 99CalA96, 278P488.

1001-73 99NJEq328, 132A758.

1001-74 133Misc72, 230NYS774.

1001-80 48Ida210, 281P5. [b] **Legal services.**—214AppDiv323, 212NYS882. [c] **Administrator has burden of showing** nature, extent, and value of services claimed. 38GaA413, 144SE43 (evidence insufficient). [d] **Refusal of extra allowance held proper.**—48Ida210, 281P5.

1001-81 74Mont449, 241P655 (compensation of administrator or his attorney's fees not included in final account).

1001-81½-New. It is error for the court without such notice to fix fees of administrator and his attorneys which were not included in his final account. 74Mont449, 241P655.

1002-97½-New. Evidence in a proceeding for reduction of compensation should be confined to the issue made by the pleadings. 208Iowa1193, 225NW261.

1002-1½-New. Objections to allowance of commission for wrongful conduct and little work done are addressed to the discretion of the orphans' court. 149Md22, 130A337 (statute).

1002-1½-New. An order of the orphans' court refusing to grant additional time to procure witnesses to prove misconduct of administrator is within the discretion of the court. 149Md22, 130A337.

1003-7½-New. In the absence of an express declaration of apportionment of compensation between executors, the decree cannot be held to apportion equally a sum specified to be paid to them. 91CalA350, 266P1022.

1003-9 But see **Iowa** 230NW519.

1003-10½-New. When a stated sum is allowed without apportionment between several representatives, the question of apportionment is left open to future determination. 91CalA350, 266P1022.

1003-14 99CalA96, 278P488; 11PaDist&Co373.

1003-19 117Or76, 242P820.

1003-21 55AppDC375, 6F(2d)678.

1004-27½-New. An order allowing or refusing commissions to an administrator who has not filed inventory is not ordinarily appealable. 149Md22, 130A337.

1004-31 168La887, 123S608.

1004-32 170La118, 127S384.

1005-35 [b] (2) Statement of legal services need not be itemized. 81OhA18, 166NE143.

1005-33½-New. **Account containing only money from sale** must show authority of administrator. 5PaDist&Co285.

1005-43 [a] **Under statute** administrator should file itemized statement of ordinary expenses showing necessity therefor, and that they were incurred for benefit of estate. 181Ark424, 26SW(2d)95.

1006-64 [a] **Separate account required** where duties are separate. 213AppDiv395, 211NYS128.

1006-65 [a] **In simple estate** where same person is executor and trustee, combined account is permitted. 213**App Div**395, 211**NYS**128. [b] **Accounts held sufficiently complex** to require separate accounts by person acting in two capacities and warrant employment of expert accountant. 213**AppDiv**395, 211**NYS** 128.

1006-67 [a] **Account not separately stating income to be distributed to beneficiaries** held improper. 131**Misc**495, 227**NYS**682.

1006-73 200**Cal** 646, 254**P**269.

1006-76 **Ariz** 285**P**684; **Iowa** 232**NW** 169.

1007-83 30 **OhA**236, 164**NE**776. [c] **State has sufficient interest** to warrant it in objecting. 79**Mont**299, 257**P**1002. [d] **Any rights of child** in estate of parent assigned to administrator under an agreement to reassign are not basis for objection. 245**NYS**186.

1007-84 30 **OhA**236, 164**NE**776.

1007-86½-New. A foreign administrator had no standing on the final accounting of a local administrator, without proof of his appointment as such. **Vt** 144**A**861.

1007-87 [e] **Beneficiaries of testamentary trust** may become parties to proceeding by joining with trustee, or independently. 202**Cal** 612, 262**P**34. [f] **Legatee has no interest in estate** so as to object to lawyer's fees where personal property is exhausted. 135**Misc**421, 239 **NYS**360.

1007-90 85**PaSuper**523 (surety on note or obligation of decedent).

1008-93 161**La**511, 109**S**49. [a] (2) Attorney for administrator is not entitled to file exceptions, since he is not interested in estate. 27**Ariz**484, 232**P**56.

1008-97 51**Philippine**935.

1008-99½-New. Objections to account may be considered, although not filed until after account had been taken under advisement. 79**Mont**445, 257**P**418.

1009-7 [b] **Objection to extra compensation** overruled. **NJ** 129**A**434.

1009-18½-New. Exceptions to a final account as to executors' fraudulent acquisition of property are properly stricken where they present issues tried and adjudicated in prior proceedings. 208 **Cal** 193, 281**P**61.

1009-26 99**CalA**96, 278**P**488.

1010-28 **Mass** 167**NE**258.

1010-29 [a] **TexCommnA** 15**SW(2d)**557.

1010-29½-New. In some jurisdictions a petition, after a final account, for an order requiring personal representative to pay attorney's fee, must be treated by the court, if it has any jurisdiction thereof, as an exception to final account. 27**Ariz**484, 232**P**56.

1010-36 87 **IndA**281, 156**NE**575; 164 **La**488, 114**S**107 (acquiescence); 166**La** 479, 117**S**562 (heir signing act of compromise settling estate); 157**Miss**15, 127 **S**566; 135**Misc**877, 240**NYS**203. [a] (4) Other instances. **Or** 292**P**1027. [b] (2) Withdrawal of objection to distribution in kind and acceptance of benefits thereunder precludes same objection on subsequent accounting. 214**App Div** 586, 212**NYS**688. [c] (8) Legatee not estopped, where she previously accepted informal accounting, from excepting item where there appears to be misunderstanding relative to that item. **NJ** 130**A**219. (9) Mere failure of heirs to object to manner of administration does not estop them. 74**Mont**449, 241**P**648. (10) Mere knowledge that administratrix is carrying on decedent's business will not estop creditor or interested person from objecting to losses sustained thereby. 85**PaSuper**523. (11) That attorneys for heirs participated in and drew up administrator's agreement to sell realty free from encumbrances for payment of debts does not estop heirs to question administrator's payment of mortgage note where same attorneys notified administrator that they would object and some of heirs were minors. 49**RI** 137, 140**A**913. [f] **To estop party from objecting to losses incurred** by administratrix's carrying on business of decedent he must have actively encouraged such action or consented that losses should be borne by estate, not by administratrix. 85**PaSuper**523. [g] **Failure to file claim.**–Claim not filed against decedent's estate within year after appointment of executor and thirty days before filing of latter's final report, as provided by statute, cannot be presented in form of exceptions to such report. 88 **IndA**493, 164**NE**635.

1011-38½-New. An estate is not estopped to require an administrator to make good losses by reason of his administration by an agreement between the widow and certain creditors preferring such creditors where there are other creditors representing the greater portion of the debts of the estate and she represented them as trustee only in presenting their claims. 29**Ariz**203, 240**P** 343.

1011-38½-New. Such agreement does not constitute an estoppel on the ground that it is a family settlement. 29**Ariz** 203, 240**P**343.

1011-44 [b] **In Missouri.–A** 18**W(2d)** 209.

1011-47 [a] **Offer of evidence.**–Statement of legal services attached to account is not properly before court till offered in evidence. 31 **OhA**18, 166**NE** 143.

1011-57½-New. Executor is not entitled to reopen case after briefs on his motion to dismiss objections to his account were filed, to prove by his own cross-examination that interest was paid on claimant's demand. 127**Misc**518, 217 **NYS**341.

1011-57½-New. In Philippines where opponents fail to specify objections and submit question of approval of accounts to court, court should not reset case for hearing without request. 51**Philippine** 935.

1012-66 94**CalA**617, 271**P**762.

1012-67 [a] (2) Whether any part of moneys on deposit were lost because of negligence of administrator in failing to enforce payment is to be determined on accounting. 180**Minn**97, 230**NW**272.

1012-71 See also **Mo** 20**SW(2d)**517.

1012-72½-New. Not abuse of discretion to reserve determination of certain questions. **Iowa** 232**NW**640.

1013-83½-New. Final adjudication as to rents chargeable to administrator should come in final settlement of estate. 217**Ala**323, 116**S**161.

1014-7 101**NJEq**705, 138**A**585.

1014-8½-New. Objections to account and order to show cause raising only questions of law should be determined by the court and by referee. 214**App Div**586, 212**NYS**688.

1014-16½-New. A referee, in an accounting of estate of deceased beneficiary by an executor who is also administrator cum testamento annexo of estate of which deceased beneficiary was executrix, has power to pass on objections as to what property the administrator cum testamento annexo was chargeable with. 125**Misc**365, 211**NYS**521 (in view of Surrogate Court Act § 40).

1016-43 220**Ky**9, 294**SW**786.

1016-50 205**Cal** 276, 270**P**939, 60**ALR** 730.

1016-53 220**Ky**9, 294**SW**786.

1017-74 **TexCivA** 295**SW**227. [a] **Administrator, negligent as to accounts,** must show claims for which he claims credits were just by testimony of disinterested persons. **TexCivA** 294**SW**227.

1017-75½-New. Except where objections are of affirmative nature, there is no presumption of correctness of account. 74**Mont**449, 241**P**648.

1017-76½-New. Executor who is son of testator is assumed to have had access to deceased's papers. 130**Misc**865, 226**NYS**1.

1017-77 **Iowa** 232**NW**82; 74**Mont**449, 241**P**648, 651 [citCJ]; **NJ** 129**A**434; 25 **OhA**265, 158**NE**9; 132 **Or**1, 279**P**850. [a] (5) 218**Ala**559, 119**S**676.

1018-80 74**Mont**449, 241**P**648, 651 [cit CJ] (consent not shown).

1018-80½-New. The burden of proof is on an accounting executor to explain delay in distribution of estate. 133**Misc** 240, 232**NYS**322.

1018-80½-New. A personal representative must show his conduct to be that of an ordinarily prudent man having knowledge of the business which he has assumed to transact. **CalA** 258**P**120.

1018-81 74**Mont**449, 241**P**648, 651 [cit CJ]; **NJ** 129**A**434; 130**Misc**330, 224**NYS** 309. [a] (1) 127**Misc**518, 217**NYS**341. [c] **Executor's fraud, negligence, collusion, and bad faith in allowing and paying claims** must be proved by objector by facts and actual circumstances, not by speculation or detached events. 127 **Misc**518, 218**NYS**341.

1018-83 130**Misc**330, 224**NYS**309; 136 **Misc**893, 242**NYS**417.

1018-86 **GaA** 155**SE**55; 74**Mont**449, 241 **P**648, 651 [citCJ].

1018-87 79**Mont**445, 257**P**418.

1018-89 202 **Iowa**259, 209**NW**273; 74 **Mont**449, 241**P**648. [e] 41**F(2d)**155.

1019-90 41**F(2d)**155; 56**ND**90, 215**NW** 913, 916 [citCJ]; **TexCivA** 294**SW**227, 230 [citCJ].

1019-91 **Iowa** 228**NW**658 (attorney's fees); 233**Mich**467, 206**NW**988; **Tex CivA** 294**SW**227.

1019-93 130**Misc**684, 225**NYS**190.

1019-95 99**CalA**96, 278**P**488.

1019-97 126**Me**84, 136**A**459; 251**NY**265, 167**NE**437; **ND** 232**NW**300; 299**Pa**509, 149**A**743. [d] **Rental value of premises** is admissible in evidence as basis for determining amount chargeable to executor for failure to rent. 103**Conn**226, 130**A**157. [e] **Duty to affix stamps on transfer of stock.**–129**Misc**424, 222**NYS** 348.

1020-98 74**Mont**449, 241**P**655 (so-called final account inadmissible on hearing of objection to final account); **Vt** 144**A**861. [c] **Administrator not charged** with fraud cannot testify that he acted in good faith where he flagrantly violated his statutory duties. **TexCivA** 294**SW** 227.

1020-1 218**Ala**186, 118**S**333; 181**Ark** 424, 26**SW(2d)**95; 99**CalA**96, 278**P**488; **Iowa** 227**NW**913; **Iowa** 232**NW**82; **Kan** 292**P**802; 236**Ky**77, 32**SW(2d)**556; **Mich** 233**NW**233(2dcase); 114**Nebr**230, 206 **NW**770; 251**NY**257, 167**NE**434; 130 **Misc**865, 226**NYS**1; 133**Misc**240, 232**NYS** 322; 133**Misc**72, 230**NYS**774; 25 **OhA** 265, 158**NE**9; **Vt** 144**A**861. [c] (2) Objection to failure to include mortgage in account will be dismissed where evidence showed that testator satisfied mortgage with intention of making gift to executor. 130**Misc**865, 226**NYS**1. [d] (2) To sustain action of court, in fixing attorney's fees at five hundred dollars. 35 **IndA**234, 150**NE**418. (3) To show there were no real profits from sale by administrator. 254**Mass**366, 150**NE**225. (4) To establish gift of Liberty Bonds from decedent to widow, and she was not chargeable therewith as administratrix. 226**AppDiv**10, 221**NYS**309. [f] (2) To support finding that executor could have sold bank stock, reverting to him, and paid personal debt to estate. 79 **Mont**445, 257**P**418. [g] **Evidence held to warrant judgment** sustaining exceptions to final settlement. 315**Mo** 972, 287**SW**485. [h] **Corroboration.**–160**La** 223, 106**S**835. [i] **Evidence held insufficient.**–(1) To overcome evidence. 232 **MoA**545, 292**SW**81; 230**NYS**166. [j] **Evidence held sufficient:** 250**Mich**501, 231**NW**123; 230**NYS**159; 242**NYS**417.

1020-2 168**La**887, 123**S**608. [a] **Evidence held to sustain finding** that executrix had accounted for all property for which she was accountable. 100 **Vt**51, 134**A**853.

1020-3 **TexCivA** 294**SW**227, 230 [cit CJ].

1020-4½-New. Under a statute making admission and allowance of debt by executor proof of its validity in the absence of fraud, negligence, or collusion, allowance of claim for care given testatrix cannot be overthrown by mere proof that others were taken care of for less money; 127**Misc**518, 217**NYS** 341.

1020-4½-New. and the fact that testatrix gave some property to claimant's children is no proof that claimant's services to testatrix were gratuitous. 127**Misc**518, 217**NYS**341.

1020-5 **TexCivA** 294**SW**227, 230 [cit CJ].

1020-6 **TexCivA** 294**SW**227. [d] But see 134**Misc**112, 235**NYS**455. [k] (2) Canceled checks and receipts, though not

disclosing for what given, are admissible, whether properly termed "vouchers" or not. 74Mont449, 241P648.

1021-7 160La223, 106S835.

1021-9 TexCivA 294SW227. [a] **On showing of valid excuse** for failing to secure vouchers court may hear other competent evidence as to claims. **Tex CivA** 294SW227, 230 [citCJ].

1021-10 [a] 205Cal 276, 270P939, 60 ALR730.

1022-18 217AppDiv128, 216NYS166; 222AppDiv725, 225NYS227; 51Philippine935. [b] **Examination must be confined to matters relating to administration** of estate or fund. 217AppDiv128, 216NYS166. [c] **Claimants cannot require executors to produce** deceased's account books so they can bring action on such information. 217AppDiv 128, 216NYS166.

1023-49 TexCivA 22SW(2d)948; 101 Vt343, 143A302. [c] **Conditions precedent to entry of decree.**–137Misc735, 244NYS357.

1023-50 199Cal 351, 249P184; 133Misc 72, 230NYS774; 148Wash684; 270P108.

1023-53 130Misc330, 224NYS309.

1023-55 130Misc330, 224NYS309.

1024-62. [a] **Void provision does not invalidate entire order.–TexCivA** 22SW (2d)948.

1025-70½-New. The language of the order should be construed to be in harmony with, rather than antagonistic to, the provisions of the will as to trustees for one of the heirs if that can reasonably be done. 121Kan57, 245P1039.

1025-77 13PaDist&Co 644.

1025-77½-New. A decree on accounting ordering an administrator to deliver bonds in a specified sum to a general guardian not appealed from or modified, is final. 133Misc565, 233NYS432.

1025-77½-New. A transcript issued on such decree which, through inadvertence, refers to it as resettled by an order in contempt proceedings, will be corrected by issuance of a new transcript nunc pro tunc. 133Misc565, 233 NYS432.

1025-79½-New. Interest will be charged against an administrator where he retains possession of the cost representing the total value of the estate for a year and a half after the date of the order of distribution. 30Ariz25, 243P 611.

1025-79½-New. Statutes providing for enforcement of decrees in probate court or for collection of judgment against estates do not apply to decrees against personal representative of deceased administrator for settlement of former estate. 214Ala155, 107S63.

1025-81 199Cal 742, 251P805; 217App Div150, 217NYS145; 40 OklACR97 [reh pending]. [e] **Where no appeal is taken from approval of attorney's fees** it is error for court to afterwards disapprove them. 51Philippine935.

1027-82 149Va518, 140SE663.

1027-84 238Mich679, 214NW320.

1027-86 238Mich679, 214NW320. But see 222MoA713, 78SW(2d)737.

1027-90½-New. A decree void for lack of jurisdiction is not cured or aided by failure to appeal. 101Vt343, 143A 302.

1027-90½-New. After settling an estate and directing the executor to transfer all estate assets, the executor was not authorized to prosecute an action on written acknowledgment of a debt due decedent. 28 OhA413, 162NE762.

1027-90¼-New. A decree against personal representative of deceased administratrix in settlement of former administrator is held a primary charge against the assets of deceased administratrix. 214Ala155, 107S64.

1028-96 214Ala155, 107S66.

1028-97 207 Iowa707, 223NW473; 94 PaSuper45.

1028-98 127Misc705, 217NYS633. [c] **Where executor gratuitously undertook to represent beneficiary** in settlement of estate, beneficiary was bound as to third persons by what executor did. 215Ala131, 110S135.

1028-99 See also 218AppDiv612, 219 NYS34. [a] (2) Judgment creditors failing to show ground for setting aside judgment discharging administrators are not entitled to accounting. 170Ga 675, 153SE744.

1028-1 [a] **Statutes construed.**–48Nev 100, 227P1016, 232P783.

1028-2 165Ga384, 141SE42; 203 Iowa 497, 211NW358; 238Mich679, 214NW 320; 137Misc727, 244NYS363. [g] **Estoppel.**–238Mich679, 214NW320. [h] **Executor knowing of claim by creditor not party to accounting proceeding** is not discharged from liability to creditor because of advertising for claims. 137Misc727, 244NYS363. [i] **Mere acquiescence in executor's accounting proceedings** does not give court jurisdiction over party by court not otherwise acquiring jurisdiction. 137Misc727, 244 NYS363.

1029-5 214Ala155, 107S66; 199Cal 742, 251P805; 203Cal 335, 264P242; 217App Div150, 217NYS145. [a] (4) Everything which might have been litigated as incidental to money belonging to estate. 208 Iowa698, 223NW756(2dcase). (5) Lack of personal property to pay legacies. 135Misc421, 239NYS360. (6) Release to railroad for testator's death. 156SC529, 153SE568.

1029-6 7Alaska582; 178Ark63, 10SW (2d)35; 55AppDC319, 5F(2d)381 (first and final settlement of account is not conclusion that residue should be distributed as stated therein); 251NY265, 167NE437; 217AppDiv150, 217NYS145; 100Vt86, 135A3. [a] (7) 208 Iowa698, 223NW756(2dcase).

1030-7 [a] (9) Title to fund. 132 Okl 21, 269P282.

1030-8 245NYS186.

1031-10 Nebr 233NW456; 100Vt351, 127A329.

1031-11½-New. Where the court had jurisdiction to appoint an administrator, and had jurisdiction of all necessary parties at the time of approval of the final report and discharge, the order of discharge constituted an adjudication. 208 Iowa698, 223NW756(2d case).

1031-12 29Ariz487, 242P1005 (unless made without jurisdiction or obtained by fraud); 30Ariz310, 246P1036 (decree reciting that giving of notice was proved to court's satisfaction); 173Ark 38, 291SW814; 46 Ida379, 268P3; 28 OhA413, 162NE762; 40 OklACR97 [reh pending]. [a] 313Mo 182, 281SW411. [c] **Rule has no application** to suit against surety on administrator's bond by heir at law who was not party to proceeding in which administrator was granted final discharge. 132SC45, 128 SE40.

1031-13 [a] But see 30Ariz310, 246P 1036 (want of notice cured by appearance). [c] See also Ariz 285P684.

1031-14 TexCommnA 18SW(2d)1086.

1033-26½-New. The allowance of the first annual account of an executor on notice is not binding and conclusive where the fact that he had made a fraudulent sale of real estate to his wife resulting in loss to the estate was not known at the time and therefore was not challenged. 241Mich29, 216NW 378.

1033-27 202Cal 612, 262P34; 170Minn 338, 212NW902. [a] **In Massachusetts.**–165NE422.

1033-28 199Cal 742, 251P805.

1033-29 See also 35 OhA224, 172NE 383.

1034-35 Mo 20SW(2d)517 (interest on estate funds).

1034-44 215Ala555, 112S117; 50ND 677, 197NW778; 128 Or317, 272P906; 300Pa64, 150A98.

1035-47 32NM419, 258P817.

1035-51 331 Ill 442, 163NE460; 213 AppDiv395, 211NYS128. See also 7 Alaska322, 328 [citCJ]. [f] **In Pennsylvania.**–88PaSuper482.

1035-51½-New. That other parties to a suit to falsify the administrator's settlements consented to filing a petition setting up a purely legal claim against the estate has been held not to give the court jurisdiction of the subject matter. 151Va156, 144SE447.

1035-53 7Alaska322; 202 Iowa7, 209 NW447; 204 Iowa355, 213NW938; 92 PaSuper492; 193Wis20, 213NW639. [j] **Disqualification of judge who had previously appeared as attorney for party** is sufficient ground for proceeding. 208Cal 77, 280P122.

1036-56 Ariz 285P684.

1036-58 204 Iowa355, 213NW938; 208 Iowa698, 223NW756(2dcase).

1036-59 215Ala555, 112S117; 208 Iowa 698, 223NW756(2dcase); 128Misc710, 220NYS782.

1036-60 204 Iowa355, 213NW938; 136 Misc430, 240NYS413 (decree will not be opened to permit widow accepting payment of legacy in paper marks to claim payment in gold marks).

1037-65½-New. Absence of haste or secrecy in settling account and no showing of fraud held to warrant vacating of settlement. 125Misc505, 211NYS774.

1037-66 215Ala555, 112S117; 122Kan 577, 253P606; 128Misc710, 220NYS 782; 52ND262, 202NW138 (statutory grounds for rehearing held exclusive); 55ND700, 215NW152; 88PaSuper482; 92PaSuper492; 151Va156, 144SE447.

1038-67 215Ala555, 112S117; 52ND262, 202NW138; 55ND700, 215NW152. [c] **Where application is made within statutory period,** it is sufficient, though made before notice to adverse party was or could be given. 208Cal 77, 280P122. [d] **Mere filing, within statutory period, of notice of intention to move** to set aside order approving administrator's account on day subsequent to expiration of period, is not sufficient. 208Cal 77, 280P122. [e] **Order of annulment held valid** as having been taken within period limited. 208Cal 77, 280P122.

1038-68 122Kan577, 253P606.

1038-72 198Wis518, 224NW713(2d case). See also 82Colo 251, 258P1114.

1038-73 216Ala686, 114S301; 136Misc 430, 240NYS413. [g] But see 12PaDist& Co 297.

1039-74½-New. That an order vacating a previous order allowing a broker's commissions for a sale of property is made at a time subsequent to confirmation of sale does not affect the validity of the order. 98CalA763, 277P886(1st case).

1039-76 215Ala131, 110S135; 29Ariz 203, 240P343. But see 156Miss766, 126 S901; 98PaSuper22. [a] (6) 134Misc 291, 235NYS299. (7) Real estate agent employed to effect sale of property of estate. 98CalA763, 277P886(1stcase). [e] (1) 7Alaska582; 29Ariz203, 240P 343 (where surety was not party and administrator refused to prosecute appeal). [k] **Legatee not named in notice of hearing on executor's final report** may move to set it aside. 203 Iowa497, 211NW358. [l] **Beneficiary does not lose interest in estate sufficient to maintain this bill by final settlement.**–215Ala 131, 110S135.

1040-77 216Ala686, 114S301.

1040-80 [b] (2) Ordinarily in action to set aside final settlement administrator or executor should be made defendant. 313Mo 182, 281SW411.

1040-89 198Wis518, 224NW713(2d case).

1040-89½-New. Bill is held not objectionable as seeking removal of administration from probate to circuit court. 215Ala131, 110S135.

1041-95 [a] **It is not necessary to charge fraud.**–215Ala131, 110S135.

1041-99 [d] **Allegations on information and belief** are sufficient in petition for review, where facts are peculiarly within knowledge of accountant. 88Pa Super482.

1042-4 [a] **Application held to show no such fraud or secrecy** to warrant vacation of settlement. 125Misc505, 211 NYS774.

1042-6 207 Iowa707, 223NW473.

1042-7 [c] **Evidence held sufficient.**–228Ky719, 15SW(2d)511.

1042-13 [b] **After judgment setting aside** allowance of final account, judgment discharging administrator rests on no basis and should be set aside. 158 La123, 103S532.

1042-14 134Misc291, 235NYS299.

1043-23 256Mass45, 152NE79.

1043-25½-New. An order for partial distribution cannot be set aside after

the time for appeal has expired, CalA 248P1091.

1043-25¼-New. except on the ground of mistake, inadvertence, surprise, or excusable neglect. CalA 248P1091.

1043-25¼-New. The rule applies where the ground of attack is that the property was not subject to distribution under the terms of the will. 78CalA79, 247P1091.

1044-26 256Mass45, 152NE79.

1044-29 32NM419, 258P817; 35 OhA 224, 172NE383.

1044-33 200Cal 646, 254P269; MoA 282SW173. [c] (6) Order dismissing citation to testamentary trustee. 77 CalA321, 246P334. (7) Order for partial distribution of estate. 78CalA79, 247P1091. (8) Order in proceeding to compel administrator to account, rejecting his report and declaring balance due from him to estate. 86Mont340, 283P 761. (9) Account by administrator which was confirmed where it showed no balance in accountant's hands. 300 Pa64, 150A98. [d] (2) Where order is only overruling exception to account. 200Cal 646, 254P269.

1045-36 MoA 282SW173.

1045-37 170Minn338, 212NW902.

1045-38 See also 32PortoRico 646.

1045-39 79Mont73, 254P1067. [a] **Failure of probate court to act on petition** for distribution of estate does not authorize appeal. 102CalA178, 283P331.

1045-42½-New. Order directing representatives of estate to pay attorney's fees is not appealable. Minn 232NW 788(1stcase).

1045-50 168La909, 125S588. [f] **Party who is competent to file exceptions to account** has capacity to appeal from adverse ruling thereon. 30 OhA236, 164 NE776.

1046-53 [e] **Legatees who assigned rights prior to decree** are not parties aggrieved so as to be entitled to appeal. 202Cal 612, 262P34. [f] **Legatees.-Mo** 20SW(2d)517.

1047-66 GaA 155SE55; 85 IndA234, 150NE418; 50Nev16, 248P891; Tex CommnA 276SW680 (finding of master conclusive in absence of exception to his report).

1047-70 148Mich397, 114S613.

1048-79 [a] (4) In executor's appeal, where surety on bond given on prior partial distribution did not voluntarily appear in settlement of account, and there was no suit on bond, it has been held that there was no necessity for serving surety with notice of appeal. 148Wash684, 270P108.

1048-81 [e] **Sufficiency of recognizance.**-101Vt474, 144A455. [f] **Effect of invalid recognizance.**-101Vt474, 144A 455. [g] **Creditors failing to object to sufficiency of bond in lower court** have been held to have waived objection. 168 La909, 125S588.

1048-83½-New. A petition for leave to appeal is held sufficient as against demurrer under liberal rule of construction. 100Vt366, 137A321.

1048-87½-New. An administrator's surety is not a necessary party to a certiorari proceeding to set aside a final order or judgment of the probate court closing administration and discharging the administrator. TexCommnA 15 SW(2d)557.

1048-89 [i] **Court's findings** must be reported in order that decision be reviewable. 261Mass321, 158NE756.

1049-91 261Mass321, 158NE756.

1049-94½-New. Final account may be amended by listing as ordinary creditor a claim duly attested as correct and unpaid, and not contested, where omitted from the original judgment approving the account. 164La488, 114S107.

1049-97 Mo 20SW(2d)517 (trial de novo).

1049-98 202 Iowa157, 209NW447 (fact questions not considered where not passed on by court below); MoA 22 SW(2d)209. [b] But see 126Me495, 139 A670. [c] **If justified on any ground,** order disallowing expenditures and claim for fees of administrator will be upheld. CalA 258P120. [d] **Questions not suggested in statement of questions involved in appeal** will not be considered. Pa 151A697.

1050-1 246 IllA283, 293 [citCJ]. [a] (9) That orders of court approving annual accounts were made upon proper and legal proof and that all legal requirements had been complied with. 199Cal 742, 251P805. [b] **Where allowance is excessive** under statute, presumption of reasonableness does not apply. 222MoA545, 292SW81.

1050-2½-New. On review of order charging administrator's account appellate court cannot in the absence of evidence presume that ancillary proceedings were pending. 199Cal 351, 249P 184.

1050-2⅓-New. nor can it presume that ancillary administrator was authorized to confer on domiciliary administrator power to act as his attorney in fact. 199Cal 351, 249P184.

1050-2¼-New. On appeal from an order disallowing items of expenditure, it will be assumed that previous orders permitting such expenditures were made without notice. CalA 258P120.

1050-4 246 IllA283, 293 [citCJ]; Mass 165NE422; Mass 170NE384(2dcase) (allowance of items of account); 124 Or 540, 264P1119.

1050-5½-New. Whether administrator advisedly completed deceased's building contract or should have breached it where contract was binding on administrator, 198Cal 163, 244P340, 44ALR 1341.

1050-6 94CalA617, 271P762; Wash 286P650.

1050-12 79Mont256, 255P1058; 251NY 265, 167NE437; 154Wash130, 281P337.

1050-13 220Ky9, 294SW786; 213App Div338, 210NYS218; 37Wyo 107, 259P 815, 55ALR941.

1050-14 204 Iowa1331, 217NW245.

1050-15 25 OhA265, 158NE9.

1050-16 199Cal 351, 249P184; 77Mont 445, 257P418; TexCommnA 276SW680.

1050-16½-New. In some jurisdictions, where findings of fact and conclusions of law of the circuit court on appeal from an allowance of an executor's account are properly attacked by proposed amendments and exceptions, the supreme court on writ of error must determine whether the conclusions of law are supported by the findings of fact and whether the findings of fact are supported by the evidence. 233Mich 467, 206NW988.

1050-16½-New. Slight discrepancies in account have been held to be insufficient to warrant reversal of order dismissing exceptions thereto in view of circumstances adequately explaining same. 149Md263, 131A329.

1051-17 170Minn338, 212NW902.

1051-22 118Nebr568, 225NW705; 132 Or1, 279P850; 298Pa235, 148A83 (unbarred claim on note allowed on appeal). But see 204 Iowa1331, 217NW 245; Iowa 232NW82; Iowa 232NW 169. [d] **In Michigan.**-233Mich467, 206 NW988.

1051-25 99NJEq328, 132A758.

1051-27 200Cal 646, 254P269; 164La 488, 114S107.

1051-28 199Cal 351, 249P184.

1051-30 199Cal 351, 249P184.

1052-33 218Ala500, 119S232; Iowa 232 NW169; Vt 144A861. [a] (3) Error in current account in not covering full period between settlement of first account and filing of second is harmless where omitted period is covered by schedules and exhibits of petition for sale of property. 202Cal 612, 262P34.

1052-33½-New. A finding that a claim approved by personal representative was a valid charge against estate was held not error. 103Conn226, 130A157 (appeal from order of superior court on appeal from probate court).

1052-33⅓-New. The rejection of evidence by the superior court of payment in deceased's lifetime of a claim allowed by a personal representative has been held proper where such evidence was not material to the issue. 103Conn226, 130 A157 (on appeal from probate court's order disallowing administrator's final account).

1052-33¼-New. A decree of the supreme court of probate must be based on the proof before it. 126Me495, 139A 670.

1052-33⅕-New. Judgment will not be rendered in favor of an objector because of failure of the personal representative to file an answer in the appellate court. Vt 144A861.

1052-34 181Ark424, 26SW(2d)95; 338 Ill 294, 170NE229.

1052-37 252Mass510, 147NE845.

1052-37½-New. A rehearing by a surrogate, to whom proceedings for settlement of accounts of the administrator of a deceased stockholder's estate are remitted, should not be limited to ascertainment of claims of creditors of the corporation whose funds he misappropriated, but the surrogate should ascertain the value of stock as of the time of the administrator's appointment and depreciation due to his illegal acts. 249 NY335, 164NE242.

1052-41 25 OhA265, 158NE9.

1053-46 25 OhA265, 158NE9.

1054-53 233Ky441, 26SW(2d)8; 157 Miss788, 128S560. [f] (2) In absence of itemized statement of expenses allowance therefor will not be disturbed. 223 Ky799, 4SW(2d)752. [j] **Statutes relating to costs in civil actions against administrator** are held not to apply to proceedings on administrator's account. 79Mont73, 254P1067.

1054-55 79Mont73, 254P1067.

1054-56 Sask [1928] 3DomLR860.

1055-60 CalA 284P705. [h] **Payment of attorney's fees is not warranted** by mere fact that accounting was compelled. 132Misc611, 230NYS326.

1055-61 151Md126, 134A24.

1056-69 223Ky799, 4SW(2d)752; 233 Mich467, 206NW98 (allowance held reasonable).

1056-70 132Misc611, 230NYS326.

1056-71 223Ky799, 4SW(2d)752. See also Sask [1928] 1DomLR221.

1056-72 233Mich467, 206NW98; 98 NJEq655, 130A195.

1056-75½-New. In New York, an attorney's fee for services in bringing a proceeding to compel accounting cannot be paid out of the estate, where it was not of such nature as to have resulted in advantage to the estate, under Surrogate's Court Act § 278. 132Misc611, 230NYS326.

1056-77 134Misc112, 235NYS455. [a] (1) 131Misc21, 227NYS296.

1057-83½-New. Under statute contestants are not entitled to costs on judicial settlement of account of administrator. 220AppDiv472, 221NYS771.

1057-84 See also 223Ky799, 4SW(2d) 752.

1057-85 But see 223Ky799, 4SW(2d) 752.

1057-87 246 IllA283, 292 [citCJ]; 133 Misc72, 230NYS774.

1057-90 154Wash130, 281P337 (cost of audit on behalf of distrustful beneficiaries held not chargeable to administrator).

1058-97 79Mont73, 254P1067.

1058-98 79Mont73, 254P1067.

1058-2 246 IllA283 [citCJ]; Or 292P 1027.

1058-5½-New. Upon modification, costs are taxed to the estate. 200Cal 646, 254 P269.

1058-9 36GaA519, 137SE290.

1061-40 203 Iowa1045, 213NW781.

1061-44 But see 207 Iowa800, 218NW 533.

1061-46 86Mont340, 283P761; 48SD 581, 205NW717.

1061-60 See also 222MoA276, 297SW 138.

1062-69 160Ga1, 127SE290.

1062-70 27Hawaii655.

1062-71 36GaA519, 137SE290; 86Mont 340, 283P761.

1062-72½-New. The sureties on an administrator's bond are responsible for his faithful administration of property coming into his hands by virtue of his office under orders of the probate court. 120 Okl 294, 251P502.

1062-77 22 OhA345, 153NE281.

1063-78 22 OhA345, 153NE281.

1063-89 TexCommnA 14SW(2d)829.

1064-91 SC 155SE844.

1064-1 109Conn307, 147A4, 66ALR1036 (property conveyed pursuant to contract

made by decedent); 86Mont340, 283P 761.

1064-4½-New. A sale under an invalid order imposes no liability on the surety. 36GaA519, 137SE290.

1064-4½-New. Bond by executor on sale of real estate is effectual although dated prior to order directing sale. 105 Conn230, 135A44.

1065-16 89CalA148, 264P304.

1066-26 36GaA519, 137SE290.

1066-27 35GaA106, 132SE130; 36GaA 519, 137SE290.

1066-31 29Ariz487, 242P1005. [b] **Insurance money.**-29Ariz487, 242P1005.

1067-47 CalA 285P753; 36GaA519, 137 SE290; Mo 318SW(2d)788 (liable for failure to pay taxes); 86Mont340, 283 P761. See 177Ark977, 8SW(2d)464, 60 ALR484. See also 48RI 306, 137A874.

1067-48 105Conn230, 135A44; Ga 155 SE32; 86Mont340, 283P761; 249NY335, 164NE242. [d] **Fraudulent failure of administrator to inventory lands held in trust by him belonging in part to estate** renders sureties liable for loss to estate. 29Ariz487, 242P1005.

1067-49 29Ariz487, 242P1005; 86Mont 340, 283P761.

1068-50 29Ariz487, 242P1005.

1068-52 29Ariz487, 242P1005. But see 249NY335, 164NE242.

1068-52½-New. or misappropriations before execution of the bond, 150Va 336, 143SE881.

1068-53 See also 35 OhA224, 172NE 383.

1068-57½-New. Surety on bond of auxiliary administrator is not liable where assets have been collected and delivered to domiciliary administrator. 56AppDC378, 15F(2d)892.

1068-60 But see Ariz 285P684. [b] **Insolvency of executor.**-27Hawaii655.

1069-67 48RI 306, 137A874. [b] Tex CommnA 18SW(2d)1086.

1069-70 215Ala555, 112S117.

1069-71 105Conn230, 135A44.

1069-71½-New. Where account of executor had been submitted but not approved the rule that law regards debt by person in one capacity to himself in another capacity as paid does not apply. 105Conn230, 135A44.

1070-84½-New. Writings have been construed as not constituting releases so as to discharge cosureties. 168Ga 59, 147SE53.

1070-86½-New. Where a legal revocation is not effected by an ex parte order of the court, there is no discharge of the bond given under original appointment. 203 Iowa1045, 213NW781.

1071-10 [c] **Where executor who was debtor of decedent is removed and appointed administrator de bonis non and gives bond as such,** sureties on his bond as executor are not liable for amount of his unpaid debt to estate. 22 OhA 345, 153NE281.

1071-11 [d] **Where executor is removed and subsequently appointed administrator de bonis non and gives bond as such,** sureties on his bond as executor can be held liable for shortage existing at time of removal. 22 OhA 345, 153NE281.

1071-12 203 Iowa1045, 213NW781.

1072-24 168Ga59, 147SE53.

1073-40 207 Iowa800, 218NW533, 535 [citCJ]; 126Kan637, 638 [quotCJ].

1074-44 207 Iowa800, 218NW533; 126 Kan637. [a] 207 Iowa800, 218NW533.

1074-47 MoA 278SW1057. [d] **Administrator's nonpayment of taxes** assessed against him and not against estate is not breach of bond. Mo 31 SW(2d)788.

1076-66 144Miss309, 109S801.

1077-93 36GaA519, 137SE290.

1078-4 223AppDiv654, 229NYS414.

1078-7 36GaA519, 137SE290; Iowa 232NW82.

1079-18 42F(2d)266; 214Ala155, 107 S63; 7Alaska179, 184 [citCJ]; Iowa 231NW376 (findings of probate court); 48SD581, 205NW717. [e] (2) Finding of probate court that decedent was nonresident, made in passing on application for order of distribution, is conclusive on administrator's surety. 317 Mo 1078, 298SW83. (3) Surety may assert its nonliability under terms of administrator's bond for loss of title to realty. 86Mont340, 283P761. (4) Administrator's excuse for failure to raise funds to satisfy mortgage which was foreclosed is not available to surety after judgment in proceedings on administrator's report. 86Mont340, 283P 761. (5) Finding in proceeding for accounting that loss of realty through foreclosure resulted from administrator's fraud and disregard of his duties is conclusive on surety. 86Mont340, 283 P761. (6) Amount not included in such adjudication is improperly imposed on surety. Iowa 231NW376.

1080-19 46 Ida379, 268P3, 5 [citCJ]; Iowa 231NW376; 86Mont340, 283P761.

1080-20 7Alaska179, 184 [citCJ]; 86 Mont340, 283P761; 48SD581, 205NW 717. [a] **Defenses which personal representative might have made against judgment fixing his liability** are not available to surety on his bond. 86Mont 340, 283P761.

1080-24 86Mont340, 283P761.

1081-31 144Miss309, 109S801.

1081-33 214Ala155, 107S63.

1082-40 See also 36GaA734, 137SE847.

1082-44 48SD581, 205NW717. [a] **Distributee** named in final decree may sue in his own name for his own share. 48 SD581, 205NW717.

1083-57 41GaA428, 153SE237.

1084-69 36GaA734, 137SE847.

1084-77 143Miss666, 109S707.

1084-80½-New. Remedy against surety for devastavit by deceased administrator not maintainable at law only in equity. 214Ala155, 107S63.

1085-92 [b] **Notice to surety** to show cause why judgment should not be rendered against him is proper. Iowa 231 NW376.

1086-98 [a] **After order approving administrator's final settlement,** thereby establishing that expenses and demands have been paid in full, that unpresented demands have been barred, and that nothing remains to be done but to distribute balance, widow may sue on bond for her share, though no order of distribution has been made. 317Mo 1078, 298SW83.

1086-99½-New. Determination of claims of creditors and showing of surplus are conditions precedent to recovery of the funds converted. 223AppDiv 654, 229NYS414.

1086-1 Iowa 232NW82; 73Mont12, 234 P1099 (rule applied to sureties).

1086-7 See 27F(2d)11.

1086-13 247NY25, 159NE710.

1087-18 168Ga59, 147SE53.

1088-28 167Ga865, 147SE63.

1088-28½-New. Where action against surety on administrator's bond is brought in a court of concurrent jurisdiction, judgment of probate court establishing devastavit or breach of bond is not a prerequisite. 132SC45, 128SE40.

1089-31 [d] **Heir may maintain suit without order of distribution** where estate is otherwise fully administered. 222 MoA713, 7SW(2d)737.

1091-83 See also 132SC45, 128SE40.

1091-87 132SC45, 128SE40 (date of breach).

1092-2½-New. Consolidation of a trust company with a national banking association extinguishes the identity of the trust company appointed as executor. 263Mass444, 162NE217.

1093-25½-New. Administrator claiming that no time was given to comply with demand, such claim is without merit where he stated that he would pay no attention to it. 48RI 306, 137A 874.

1093-25½-New. It is no defense that not all the personalty was reduced to cash, where the administrator has delayed the final settlement of the estate. 48RI 306, 137A874.

1093-32 41GaA428, 153SE237.

1095-59 [b] **In Alabama.**-214Ala155, 107S63.

1095-62 214Ala155, 107S64.

1095-63 144Miss309, 109S801. [a] **Equity jurisdiction not exclusive.**-Action at law may be maintained. 144Miss 309, 109S801.

1095-66 [a] **Statute requiring proceedings relative to settlement of estates to be had in county of administration does not apply** to action against surety on administrator's bond. 132SC45, 128SE 40.

1095-74 29Ariz487, 242P1005; 207 Iowa800, 218NW533.

1097-97 168Ga59, 147SE53.

1097-3 [c] 167Ga865, 147SE63. [f] **In Georgia.**-167Ga865, 147SE63.

1097-8 214Ala155, 107S64.

1097-18½-New. Liability of a surety on an executor's bond for commissions paid to an insolvent executor cannot be determined in a suit in which the surety is not a party. 156Md420, 144A 342.

1097-20 Ga 155SE32. [a] **Petition held not to state cause of action.**-MoA 295SW132.

1098-24 46 Ida379, 268P3 (sufficient).

1099-37 But see 132SC45, 128SE40.

1099-52 [d] (4) Allegation that no claims were filed or proved against estate and that no receipts or vouchers were filed is not sufficient allegation of fraud. 29Ariz487, 242P1005. (5) Allegation that former administrator failed to settle partnership business between himself and decedent and to account for intestate's interest does not set up breach of duty as administrator. 29 Ariz487, 242P1005.

1099-54 168Ga59, 147SE53.

1099-55 [a] (6) Failure to pay heirs at law entitled. 132SC45, 128SE40.

1100-60 168Ga59, 147SE53.

1103-39½-New. The presumption as to an executor holding funds as trustee is of fact, and rebuttable. 105Conn230, 135A44.

1103-39½-New. The rental value of property in the petition is not evidence of its value. 204 Iowa397, 213NW784.

1103-40 204 Iowa397, 213NW784.

1103-47 105Conn230, 135A44.

1103-53 [d] **Copy of administrator's bond** is inadmissible in suit to enforce claim against estate after approval where copy of bond was not annexed to, or filed with, declaration as required by statute. 144Miss309, 109S801.

1105-74 29Ariz487, 242P1005; 46 Ida 379, 268P3; 204 Iowa397, 213NW784 (evidence held insufficient); 127Kan9, 272P175; 79Mont256, 255P1058; 136 Misc664, 240NYS502.

1106-96½-New. Conclusion that executors did not hold funds as trustee is held established by evidence. 105Conn 230, 135A44.

1107-20½-New. A judgment based partly on acts for which the surety cannot be held liable cannot be sustained. 29Ariz487, 242P1005.

1107-20½-New. Court will not determine whether there has been a binding settlement between the administrator and an heir. 203 Iowa1045, 213NW781.

1107-36 207 Iowa800, 218NW533.

1108-52½-New. Where executor gives general bond and bond for sale of real estate, excess of defalcation by executors over proceeds of real estate is chargeable to surety on general bond. 105Conn230, 135A44.

1109-81 Iowa 228NW886.

1109-82½-New. Appointment of foreign administrator for decedent domiciled in Kentucky is conclusively entitled to full faith and credence. 215Ky 774, 286SW1071.

1109-83 37F(2d)527; 91Fla958, 109S 209; 218Ky229, 291SW54; Nebr 228NW 852; 134Misc399, 235NYS683; TexCivA 12SW(2d)811.

1110-84 91Fla958, 109S209.

1110-86 91Fla958, 109S209.

1110-87 91Fla958, 109S209.

1110-89 91Fla958, 109S209.

1110-90 91Fla958, 109S209.

1110-93 [a] **In Nebraska.**-228NW852.

1110-94 91Fla958, 109S209.

1110-95 122Kan577, 253P606.

1110-96 218Ky229, 291SW54, 55 [cit CJ]; 233Ky441, 26SW(2d)8; SC 155 SE740.

1111-3 [a] **Fact that local administrator of decedent residing in foreign state collected assets in other state** has been held not to charge ancillary into domiciliary administration. 233Ky441, 26SW(2d)8.

1111-6 218Ky229, 291SW54, 55 [cit

CJ]; 129Misc832, 223NYS780.
1112-10 36GaA681, 137SE800.
1112-14 Nebr 217NW618.
1112-16 218Ky229, 291SW54, 55 [cit CJ]; NJ 148A882 (phonograph record royalties is insufficient property for ancillary appointment). [a] 129Misc832, 223NYS780. [b] 225AppDiv286, 232 NYS609. [c] **Appointment of public administrator.**–221MoA984, 295SW504. [d] **Situs of stock of domestic corporation** having place of business within state is in county where corporation has place of business. 221MoA984, 295SW504.
1114-27 134Misc399, 235NYS683.
1114-29 [b] **Pendency of will contest in foreign court** deprives local court of jurisdiction in ancillary proceeding till validity of will has been determined. Ariz 285P266.
1114-31 [f] **Person designated as American executor** is entitled to letters in preference to foreign executor where will of nonresident testator appoints as executors resident of country of his domicile and resident of forum. 134Misc399, 235NYS683.
1114-34 212Ky2, 278SW545. [a] NJ Ch 151A546. [e] **Appointment of ancillary administrator is governed** by laws of decedent's domiciliary state as to priority of persons eligible. 212Ky 2, 278SW545.
1115-35 [a] **In Georgia.**–164Ga36, 137 SE632.
1115-40 [a] (3) Resident daughter to whom deceased bequeathed all property within state is entitled to letters of administration with will annexed in preference to appointee of nonresident wife. 203Cal 753, 265P924.
1115-42½-New. In California, the general provisions of the code relating to the issuance of letters control, in the absence of special provisions to the contrary in the article relating to foreign wills. 203Cal 753, 265P924.
1115-58½-New. While an application for original letters of administration remains undisposed of, ancillary letters cannot be sued under same statutes. 129Misc113, 221NYS535.
1115-59¼-New. A proceeding for ancillary administration is not strictly a proceeding in rem. 225AppDiv286, 232 NYS609.
1115-59½-New. When local court is informed of pendency of foreign will contest it should continue hearing to give objector opportunity to produce authenticated copy of proceedings. Ariz 285 P266.
1115-59¼-New. Local court deciding that it would ultimately have jurisdiction to admit foreign will to probate notwithstanding such contest should treat showing as plea in abatement. Ariz 285P266.
1116-62½-New. Under the Georgia statute the foreign will must be probated in Georgia before Georgia property can be administered thereunder. 164Ga36, 137SE632.
1116-76½-New. A decree can have no effect, except as it may be satisfied by property within reach of process of the state courts. 225AppDiv286, 232 NYS609.
1116-76½-New. Administrator accepting appointment with notice that court has been advised of foreign will contest is charged with notice of consequences of successful contest. Ariz 285 P266.
1118-92 151Miss585, 118S420, 421 [quotCJ].
1118-99 [b] **In British Columbia.**–[1928] 2DomLR971.
1118-6 91Fla958, 109S209, 211 [citCJ perBrown,J].
1119-10 NJCh 151A546.
1119-11 91Fla958, 109S209, 211 [citCJ perBrown,J].
1119-13 91Fla958, 109S209, 211 [citCJ perBrown,J].
1119-18½-New. A domiciliary executor cannot, by failing to sue out ancillary administration, claim title to lands in another state adversely to those entitled to them. TexCivA 15SW(2d)86.
1119-19 181Ark433, 26SW(2d)74.
1119-22 249Mich403, 228NW796; 10Pa Dist&Co 539.
1120-25 218Ky229, 291SW54.
1120-28½-New. As between a domestic and a foreign administrator, irrespective of which is the principal administratorship, an asset will be ordered paid to the domestic administrator where the only claims against the estate are on file with him and he has assets to pay them, when some of the distributees reside within the state, and the convenience of the parties will be subserved by such order. 205Iowa237, 216NW12.
1120-30 136Misc261, 241NYS882.
1120-34 91Fla958, 109S209, 211 [citCJ perBrown,J]; 124Kan163, 257P714; 218Ky229, 291SW54.
1120-35 124Kan163, 257P714.
1121-36 91Fla958, 109S209, 211 [citCJ perBrown,J]; 124Kan163, 257P714; 218Ky229, 291SW54.
1121-37 124Kan163, 257P714. [d] **Compromise and settlement.**–124Kan163, 257P714.
1121-43 136Misc631, 241NYS525 (assignment of interest held binding). [a] **Sale not stayed by nonresident claimant** seeking ancillary letters to sue in state. NJCh 151A546.
1121-44 91Fla958, 109S209, 211 [citCJ perBrown,J].
1122-49 220AppDiv309, 221NYS547.
1123-62½-New. Statutes sometimes authorize conveyance. 95Fla1010, 117S786.
1123-66 173Ark250, 292SW150. [d] **Deed of local administrator** of lands which foreign executrix alone could sell is subject to cancellation as cloud on title. 173Ark250, 292SW150.
1123-67 328Ill431, 159NE780.
1123-68 101NJEq167, 137A318, 319 [cit CJ].
1123-73 Nebr 228NW852 (statute construed as not authorizing foreign representative to institute proceedings to sell land).
1124-92 [a] **In New York.**–244NY598, 155NE913.
1124-94 181Ark433, 26SW(2d)74.
1124-95½-New. In New York it has been held that ancillary administration is for the protection of New York creditors. 125Misc361, 211NYS525.
1124-95½-New. or of New York beneficiaries of an estate. 125Misc361, 211 NYS525.
1124-95¼-New. It is a matter of judicial discretion whether claims of foreign creditors will be recognized by the surrogate. 125Misc361, 211NYS525.
1124-96 TexCommnA 280SW543, 544 [quotCJ].
1125-98 151Miss585, 118S420, 421 [quotCJ]; TexCommnA 280SW543, 544 [quotCJ].
1125-99 TexCommnA 280SW543, 544 [quotCJ].
1125-3 130Misc789, 226NYS436.
1125-14½-New. In Georgia, where a resident of another state dies testate leaving assets in Georgia sufficient to discharge indebtedness to citizens of such state and the executors have instituted proceedings in the state of the testator's domicile to declare an insolvency of the estate, a Georgia court having equitable jurisdiction in the county in which assets of the testator are situated may impound such assets and enjoin their removal until local creditors have been paid. 161Ga884, 132SE70, 44ALR795.
1125-14½-New. **In New York** the surrogate may in his discretion direct a reservation by the ancillary representative of a sum sufficient to pay judgments against residuary legatees of local creditors who have established their rights through an attachment which has been subsequently merged in a judgment. 125Misc357, 211NYS535.
1126-20½-New. Expenses incurred in an Ohio action for an estate held chargeable on interest of distributees in New York. 130Misc789, 226NYS436.
1126-21 44Philippine212.
1126-22 22F(2d)869; 218Ky229, 291 SW54; Nebr 217NW618; 44Philippine 212. [j] **Delivery to domiciliary administrator** sojourning in ancillary jurisdiction ordered. 44Philippine212. [k] **Property located outside of state of ancillary administration** should be transmitted to domiciliary administrator to administer. 144Miss233, 109S601.
1126-23 44Philippine212; Vt 144A861.
1126-23½-New. The remaining assets, after reservation of sum to pay local creditors, must be transmitted to domiciliary jurisdiction. 125Misc357, 211 NYS535.
1126-23½-New. the decree directing such transmission properly identifying funds so transmitted, 125Misc357, 211 NYS535.
1126-23¼-New. and specifying the retention of the other assets for the account of the local creditors of the named residuary legatees. 125Misc357, 211 NYS535.
1127-28 44Philippine212 (delivery to domiciliary administrator ordered).
1127-30½-New. Assets subsequently discovered in ancillary jurisdiction must be administered under the supervision of the domiciliary jurisdiction, 125Misc 361, 211NYS525.
1127-30½-New. it being assumed in the absence of proof to the contrary that the representative continues to function in the domiciliary jurisdiction as he does in the ancillary jurisdiction. 125 Misc361, 211NYS525.
1128-31½-New. There can be no distribution in the original and principal administration of real estate situated in a foreign jurisdiction unless it is, by order of court, brought from the ancillary to the principal jurisdiction. 110Conn 36, 147A290.
1128-32 136Misc261, 241NYS82; 285 Pa60, 131A652. [a] **Partial retention** in custodia legis ordered, pending establishment of adverse heirship claim by ancillary administrator. 44Philippine 212.
1128-33 Md 136A901.
1128-35 NJ 134A684. Contra 177Minn 334, 225NW152(2dcase). [d] **Administration** of estate held single undertaking especially where final distribution is in court having exclusive jurisdiction of property. 130Misc789, 226NYS436.
1128-35½-New. Thus final distribution of funds retained by ancillary representative must await future decree, after final settlement of principal foreign estate. 125Misc357, 211NYS535.
1128-35½-New. or after some other determination of the interests of the beneficiaries of the estate to the satisfaction of the surrogate. 125Misc357, 211NYS535.
1128-35¼-New. Final distribution is ordered only where convenience will be served. 125Misc365, 211NYS525.
1128-35½-New. or where there are no debts, 125Misc361, 211NYS525.
1128-35¼-New. or where a local distribution will avoid expense of a double administration. 125Misc361, 211NYS 525.
1128-35½-New. Where surrogate does not pass on ancillary administration, local assets should be remitted to foreign executor. 244NY598, 155NE913.
1129-38 218Ky229, 291SW54; 249Mich 403, 228NW796; 137Misc203, 242NYS 598; TexCivA 26SW(2d)283 (plaintiff cannot do indirectly what foreign executor could not do directly). [g] **Possession of estate's assets by legatees** precluded representative action in replevin against ancillary administrator by domiciliary administrator. 40F(2d) 91.
1130-39 249Mich403, 228NW796.
1131-53 154Md638, 141A390, 394 [cit CJ].
1132-84 91Fla958, 109S209; 95Fla1010, 117S786; SD 231NW933.
1133-96 [a] **Local administrators cannot be substituted for foreign administrators** by nunc pro tunc order which would revive statutory liability which had expired. 36F(2d)591.
1134-3 40F(2d)91; NJ 139A825.
1134-7 212Ky2, 278SW545.
1134-8 212Ky2, 278SW545.
1134-9 212Ky2, 278SW545. [b] **Bond must be executed** to pay local residents debts due out of assets recovered. 212 Ky2, 278SW545.
1135-19½-New. Replevin action against ancillary administrator to recover assets is premature where full distribu-

tion had not been made in state of ancillary administration. 40F(2d)91.

1136-51½-New. [§ 2717a] 7½. **Evidence.** The circuit court should admit any competent evidence offered to determine claims against an estate and distributees in an action for conversion of property of the estate, unless and until shown that the foreign court where plaintiff was appointed administrator has determined such questions and how it has determined them. 53SD499, 221 NW257.

1136-56 255 IllA51; NJ 139A825; 240 NY379, 148NE556, 40ALR792; 131Misc 129, 226NYS162; 225AppDiv286, 232 NYS609. [f] (2) Other instances. Ont [1930] 4DomLR820. [h] **Action against ancillary administrator.**-(1) 136Misc515, 240NYS20.

1137-57 NJ 139A825; 240NY379, 148 NE556, 40ALR792.

1138-68 131Misc129, 226NYS162.

1138-73 131Misc129, 226NYS162.

1139-78 [f] **Statute relating to substitution of foreign executors and administrators** for deceased defendant in action in personam held unconstitutional. 240 NY379, 148NE556, 40ALR792.

1139-83 131Misc129, 226NYS162.

1139-87½-New. Foreign executors as parties to suit against administrator of nonresident. 338 Ill 245, 170NE285(2d case).

1140-92 125Misc361, 211NYS525; 131 Misc129, 226NYS162; 135Misc906, 241 NYS666.

1140-93 NJ 134A684.

1140-95 NJ 134A684.

1140-97½-New. Conclusiveness of ancillary accounting as against domiciliary administrators and creditors. 122Kan 577, 253P606.

1141-2 NJ 134A684.

1141-3½-New. Phonograph company directed to pay royalties from sale of records is not necessary party to ancillary administratrix's proceedings for settlement of accounts. NJ 148A882.

1141-7½-New. Allowance should be made for filing and publication fee where application for appointment was made before institution of foreign will contest. Ariz 285P266.

1141-9½-New. The surrogate of ancillary jurisdiction is not obliged to compel filing of account by ancillary representative, 125Misc361, 211NYS525.

1141-9¾-New. nor is he obliged to settle claims in conjunction with an account, where decedents and all parties are nonresidents, 125Misc361, 211 NYS525.

1141-9¼-New. and no part of claim arises within the state. 125Misc361, 211 NYS525.

1141-10 NJ 134A684.

1141-19½-New. Intermediate account. The surrogate has power to compel filing of an intermediate account by ancillary representative, 125Misc361, 211NYS525.

1141-19¾-New. and direct that funds in possession of ancillary representative be remitted to representative under original letters for administration in court of original jurisdiction. 125Misc 361, 211NYS525.

1141-22½-New. Yet it has been held that the mere fact that executrix has been discharged by decree in original jurisdiction is not a bar to the administration by her, there, of further assets, 125Misc361, 211NYS525.

1141-22¾-New. it being assumed that the law of the domiciliary jurisdiction is the same as that of the ancillary jurisdiction, in absence of proof to the contrary. 125Misc361, 211NYS525.

1142-30½-New. Provision of an act that on consolidation of state and national banks, the right of succession as executor shall continue in the national bank is construed as permitting transfer of fiduciary positions from state to national bank without resort to the probate court. 263Mass444, 162NE217.

1142-32 164Ga332, 138SE785.

1142-37 220Ala175, 124S247; 164Ga 332, 138SE785.

1143-41 164Ga332, 138SE785.

1143-42 164Ga332, 138SE785; 322Mo 258, 148SW(2d)646; 247NY25, 159NE 710; 220AppDiv738, 221NYS521.

1143-42½-New. Where a state trust company consolidates with a national bank in conformity with the act of congress authorizing consolidation, it is proper for the national bank to apply to the state probate court for appointment as succeeding fiduciary. 279US 347, 49SCt368, 73Led733, 61ALR987.

1143-44 Tex 299SW346.

1145-55 26 OhNPNS449. [a] **Where husband joins** in contract, agreeing to release dower, his interest in proceeds on death of wife is interest in her personal estate. 26 OhNPNS449.

1146-66 181Ark424, 26SW(2d)95.

1146-70½-New. Discovery of cause of action for testator's death after final discharge of executrix is ground for obtaining letters de bonis non. 156SC 529, 153SE568.

1146-71 [d] **Widow resigning as administratrix has further right to have her nominee appointed** as administratrix de bonis non in preference to nominee of decedent's children. 242 IllA89.

1147-84½-New. An heir, by procuring partition and distribution of proceeds of the estate realized from sales under administration thereof, waives his preference right to act as administrator, and is therefore not entitled subsequently to be substituted as such. TexCivA 12SW(2d)615.

1147-86½-New. Jurisdiction of the court to appoint an administrator de bonis non is directly affected by false, although innocent, misrepresentation in the petition that the original administrator had been removed. 247NY25, 159NE710.

1149-10½-New. Certiorari. Where the probate court exceeded jurisdiction in appointing administrator de bonis non while one was lawfully appointed executrix, certiorari to quash the record making the appointment is proper. 322 Mo 258, 148SW(2d)646.

1149-14 See also 247NY25, 159NE710.

1149-16 247NY25, 159NE710.

1149-19½-New. The court of appeals acquires no jurisdiction, on review of the district court's judgment denying an heir's petition against an administrator for review and for substitute letters of administration, to determine whether the administrator could charge for the premium paid by him for his administrator's bond, a matter not acted on by the probate court. TexCivA 12 SW(2d)615.

1156-66 [c] **Termination of lease.** Administratrix de bonis non cannot terminate lease for years made by authorized agent of administratrix. 233 Mich108, 206NW513.

1156-73 22F(2d)380; Mass 170NE465.

1156-75 Mass 170NE465; Oh 171NE 333 (may sue former administrator or sureties on bond).

1157-85 9PaDist&Co 479.

1159-8½-New. Payment of legacy as directed by residuary legatee without appointment of administrator de bonis non is proper where debts of either estate were paid. 259Mass465, 156NE 885.

1159-9 157SC407, 154SE426.

1160-11 200Cal 247, 252P591.

1160-16 158La370, 104SE119 (appointment, sub nomine testamentary executor, held warranted, when one of heirs would not accept succession unconditionally, and there were crops to be harvested, debts to be paid, and tenants with whom settlement had to be made).

1160-17 86 IndA607, 159NE167.

1160-18 Cal 287P450.

1161-22 84Colo 275, 269P903; 158La 370, 104S119. [c] **Right to appointment** of administrator with will annexed is derived from provision of law rather than by act of decedent. Cal 287P450.

1161-24 86 IndA607, 159NE167; 125 Okl 104, 256P725, 727 [quotCJ&Cyc].

1162-32 86 IndA607, 159NE167.

1162-41½-New. Under some statutes, a surviving spouse is entitled to appointment only when entitled to succeed to the personal estate or some part thereof. 85CalA675, 259P1014. [a] **Husband expressly excluded from succession by wife's will** cannot assert dower rights under law of state of his domicile as basis of right of appointment. 85CalA 675, 259P1014.

1163-42 100NJEq277, 134A732.

1163-43 [b] **Where daughter, sole legatee, applies for letters of administration,** alleged creditor is not entitled to letters cum testamento annexo. 126 Misc672, 215NYS140.

1163-45 86 IndA607, 159NE167.

1163-46½-New. Appointment of stranger who managed testator's business has been held not error where nephews having no beneficial interest claimed appointment. Wash 291P481.

1163-47 125 Okl 104, 256P725, 727 [quotCJ].

1163-52 125 Okl 104, 256P725, 727 [quotCJ].

1164-56 84Colo 275, 269P903. [b] **Husband is not entitled to nominate** where he is expressly excluded from succession under wife's will, though he claims dower rights under laws of his domicile in lands situated in state of her domicile and in state where appointment is sought. 85CalA675, 259P 1014. [i] **In New York.**-133Misc570, 233NYS415.

1164-59 But see Sask [1929] 4DomLR 1080.

1164-61 85CalA675, 259P1014.

1164-61½-New. Where widow was appointed sole executrix and will provides that if testator and wife should die at the same time other persons should be appointed and the widow survives the husband, the court may appoint her nominee as administrator with the will annexed regardless of the validity of her nomination. 200Cal 247, 252P591.

1164-69 [h] **Nonresident alien legatees** are incompetent. 133Misc254, 232NYS 325(1stcase).

1165-76 79CalA468, 250P195.

1165-78 86 IndA607, 159NE167 (application must state that no legatee is competent and willing to accept trust). [a] **Petition** must be deemed application for general letters, or for letters with will annexed, according to whether deceased died testate or intestate. Cal 287P450.

1165-79½-New. Dismissal of petition for appointment after hearing evidence involves finding against petitioner on every essential issue. 258Mass502, 155 NE641.

1165-79¾-New. In a proceeding for the appointment of an administrator with the will annexed, a final judgment revoking probate of the will cannot be attacked on the ground that some of the legatees were not served with citation where the record is silent as to who were served. 79CalA468, 250P195(2d case).

1165-79¼-New. In such proceeding the court has no jurisdiction to determine the validity of such will. 79CalA468, 250P195.

1165-79⅞-New. Such jurisdiction cannot be conferred by consent of the parties or their counsel. 79CalA468, 250P 195.

1165-80 [b] **Petition and notice** held to give court jurisdiction for appointment. Cal 287P450.

1165-81 86 IndA607, 159NE167.

1165-84 35GaA42, 132SE119.

1165-89½-New. Decree appointing administratrix cum testamento annexo should not direct payment of counsel fees to attorney as creditor of estate. 126Misc672, 215NYS140 (as he may have fees fixed under surrogate's court act).

1166-96 86 IndA607, 159NE167 (cannot set up adverse interest); Mass 167 NE281.

1166-98 [e] **Action for damages to land.**-89 IndA177, 166NE29. [f] **Action to have deed declared void and property declared assets** cannot be maintained by administrator with will annexed without order showing necessity to sell realty. Iowa 232NW813.

1167-1½-New. An administrator with the will annexed may bring suit to get advice from the court as to the construction of the will and as to his duties in administration of the estate. 193 NC294, 136SE733.

1167-2 See also 219AppDiv425, 219NYS 166.

1168-10 [d] **Approval of sale** must be on application of administrators. **NJ** 150A568.

1168-11 236Ky45, 32SW(2d)539.

1169-14 136Misc793, 242NYS249 (necessity of emergency).

1170-20 [b] **Public administrator may be appointed,** but not within thirty-five days after death. 307Mo 674, 271SW 755. [c] **Where appointment was in violation of statute,** court could revoke it ex more notice under its inherent powers, without complaint by one interested. 307Mo 674, 271SW755.

1171-31 310Mo 267, 275SW534.

1172-33 **Utah** 272P562.

1172-35 **Cal** 287P450. [b] **Sole duty to conserve** estate. 101NJEq222, 137A 157.

1172-36 310Mo 267, 275SW534. [a] **Power is discretionary** except as limited by statute. 310Mo 267, 275SW534. [b] **Determination as to existence of contest** must be made on hearing on evidence. 310Mo 267, 275SW534.

1172-39½-New. Administrator pendente lite must account, if ordered, to administrator or court appointing administrator. 101NJEq222, 137A157.

1172-46 [f] **Administrator ad litem** should sue in own name as such. 99Fla 968, 128S833.

1173-49½-New. Appointment of administratrix ad litem is not prejudicial to rights of former administrator. 19 F(2d)686.

1173-49¼-New. In Maryland, it is only for the purpose of providing, when reasonably necessary, for defense of a will offered for probate, that appointment of an administrator ad litem is permissible. 156Md32, 143A585.

1173-49¼-New. That none of the persons interested in sustaining a will appeared and answered a caveat in pursuance of the court's order was not ground for appointment of an administrator ad litem to defend the will against the caveat. 156Md32, 143A585.

1173-59 See also 32PortoRico 40.

1173-63 209Ky289, 272SW759, 762 [cit CJ]; 225Ky718, 9SW(2d)1078; 137Misc 271, 242NYS486.

1174-70 31Ariz252, 252P515; 136Misc 793, 242NYS249. [c] **Disputed status of claimant** contending she was common-law wife of deceased justifies denial of application for appointment as temporary administrator. 136Misc793, 242 NYS249.

1174-72 [a] **Interest of state treasurer in collecting inheritance tax** does not disqualify him to act as special administrator for purpose of collecting tax where parties interested take no steps to comply with law. 31Ariz252, 252P515.

1174-74 228AppDiv418, 239NYS653.

1175-75 228AppDiv418, 239NYS653 (discretionary with surrogate). [a] **Special circumstances of estate** have been held to warrant appointment of executor as temporary administrator. 136 Misc793, 242NYS249. [b] **Hostility of executor named in will to claimant** is not disqualification preventing appointment as temporary administrator. 136 Misc793, 242NYS249.

1176-95 **Iowa** 224NW38.

1176-2½-New. Petitioner waiting over thirteen months before seeking temporary administration is guilty of laches. 137Misc271, 242NYS486.

1176-3 But see **Cal** 292P964.

1176-4½-New. Under statute permitting appointment under such notice as court deems reasonable, notice cannot be dispensed with. **Cal** 292P964.

1176-11½-New. Temporary administration is unauthorized where probate of will in foreign state could have been prevented. 137Misc271, 242NYS486.

1176-20½-New. It may be presumed that the court appointed a person as special administrator to maintain an action to recapture funds paid to legatees under an erroneous distribution order for the reason that the acting executor was closely related to the legatees. 207 Iowa20, 222NW564.

1176-22 156Md32, 143A585.

1177-26½-New. The probate court, in proceedings to probate a will, has jurisdiction to grant an appeal from its judgment appointing an administrator pendente lite and suspending the executor upon determining that a proceeding was pending in the circuit court contesting the will. 310Mo 267, 275SW534.

1177-26⅓-New. On such appeal the hearing is de novo. 310Mo 267, 275SW 534.

1177-37 208 Iowa1300, 227NW169.

1177-40½-New. Removal. Disobedience to court orders and gross negligence in management of estate justified removal of temporary administrator. TexCommnA 23SW(2d)673.

1178-44 322Mo 258, 14SW(2d)646.

1180-89 264Mass499, 163NE184; 141 Wash475, 252P145.

1180-90 164Ga474, 139SE18.

1180-91 239 IllA539.

1180-92 TexCommnA 26SW(2d)195.

1180-95½-New. By consent of all parties special administrator may continue business of intestate in view of prospective sale thereof. 164Ga474, 139SE18.

1180-95⅓-New. Special administrator has no power to distribute estate to heirs. 164Ga474, 139SE18.

1180-96 86 IndA717, 159NE769.

1181-13 141Wash475, 252P145. [b] **Expenditures properly made in preservation of estate held allowable.**-141Wash 475, 252P145.

1181-17⅓-New. A charge for services of an attorney in litigation growing out of a will contest is properly disallowed where the special administrator was not concerned in the litigation and was not a party thereto. 31 OhA18, 166NE143.

1181-19 164Ga474, 139SE18; 141Wash 475, 252P145.

1182-20 141Wash475, 252P145.

1182-21 164Ga474, 139SE18.

1182-30 227AppDiv87, 236NYS653 (surrogate may impose such duty upon him). See also 85Mont56, 277P631.

1183-31 [d] **Action to recover real estate voluntarily conveyed by decedent** cannot be maintained under Michigan statute where no claims have been proved and established against estate. 247Mich372, 225NW573.

1183-38 264Mass499, 163NE184.

1183-38½-New. Where a special administrator brings an action for an accounting and, while it is pending, becomes administrator with the will annexed and prosecutes the action to final judgment, he cannot claim as such administrator that he had no authority to bring the action as special administrator and that the judgment is therefor void and he will be deemed to have prosecuted the action from the beginning as administrator with the will annexed. 166Minn 320, 207NW639.

1183-38⅓-New. The right of action by a special administrator for the recovery of money paid by an executor to legatees of will under erroneous distribution order is not personal but in administrator's representative character. 207 Iowa20, 222NW564.

1183-43 See also 141Wash475, 252P145. [a] **Funds in hands of temporary administrator,** where needed and possibly insufficient to satisfy legacies, not considering taxes and expenses, will be directed to be paid to executor and not city chamberlain. 134Misc310, 235NYS304.

1183-44½-New. Actions brought by a special administrator do not abate upon the issuance of letters testamentary or of administration, 166Minn320, 207NW 639.

1183-44⅓-New. but may be prosecuted to final judgment by the executor or administrator. 166Minn320, 207NW639.

1184-56 253NY1, 170NE471.

1184-57 MoA 22SW(2d)836; TexCivA 286SW889; TexCivA 286SW893.

1185-66½-New. An executor, by abandoning the management of the estate and leaving it entirely to his coexecutor, is not estopped from asserting a mismanagement of the estate and a misappropriation of the funds by his coexecutor. 37GaA782, 142SE178.

1185-71 107Conn716, 142A466.

1186-87 214Ala605, 108S513, 514 [quot CJ].

1186-99 Ga 154SE791.

1187-5 [a] **Effect of issuance and transfer of certificate of deposit.**-37GaA782, 142SE178.

1189-45 See also 14PaDist&Co 364.

1193-87½-New. Executor's failure to transfer deposit to bank is not negligence where coexecutor fails to surrender certificate on request. 79Mont445, 257P418.

1196-26 98NJEq218, 130A222.

1197-48 **Miss** 130S288 (exercise of power of sale).

1199-63½-New. An executor accounting for the estate of a deceased beneficiary, who was also administrator cum testamento annexo, of the estate of which beneficiary was executrix, is the representative of both estates. 125Misc365, 211NYS521.

1199-64 **Mass** 170NE465. [f] **Representative of deceased executor may make valid settlement** of claim against his decedent as executor. 253Mass502, 155NE 641. [g] **Personal representative of deceased executor is liable for commissions** of executor not applied in payment of his indebtedness to estate. 203Cal 335, 264P242

1200-75½-New. The estate of an executor, who had deposited a fund in his own name, as guardian, in a solvent bank, is liable to the beneficiary for loss of the fund by reason of the insolvency of the bank after the executor died intestate, provided the assets of the estate are sufficient to pay the fund in accordance with priority fixed by law. 40 GaA380, 149SE918(2dcase).

1200-81 219AppDiv131, 219NYS436. [c] **In New York.**-219AppDiv131, 219 NYS437.

1201-82 219AppDiv131, 219NYS436.

1201-85 253NY1, 170NE471.

1202-1 221MoA984, 295SW504.

1203-8 [d] **No will being found,** it is not error to dismiss oppositions to appointment of public administrator to estate of decedent leaving no heirs. 170 La744, 129S150.

1203-13 307Mo 674, 271SW755 (statutory provision, forbidding appointment of public administrator until after thirty days from death of intestate and citation of persons entitled to distribution of estate, is applicable in case all persons entitled to distribution are minors); 126Misc90, 213NYS431.

1204-16 307Mo 674, 271SW755.

1204-26 But see 126Misc90, 213NYS 431.

1205-33 221MoA984, 295SW504.

1205-38½-New. The probate court may of its own motion revoke erroneous appointment of public administrator. 307 Mo 674, 271SW755.

1207-60 99WVa615, 129SE459 (estate properly committed to sheriff by court on its own motion).

1207-66 [e] **Facts not authorizing appointment.**-Ga 154SE889.

1208-72 TexCivA 24SW(2d)531 (duty to conform to probate law). [a] **Probate court has no jurisdiction of independent executor** so long as he is faithfully carrying out provisions of will. TexCivA 298SW643.

1208-73 142Wash324, 253P455.

1208-73½-New. In Porto Rico, under Spec. Leg. Proc. Act § 24, judicial administration should not be decreed where decedent has expressly prohibited it by his will to the voluntary heirs and has appointed one or more executors with power to partition estate; or when the creditors either have their credits secured or have received a bond from the debtors sufficient to secure their credits independently of the estate. 32Porto Rico 40.

1208-74 [b] TexCivA 22SW(2d)338. [g] **Will, not providing in case of dispute how matter should be determined,** gives probate court jurisdiction of administration of estate. TexCivA 22SW (2d)338.

1208-78 [a] **Final decree is unnecessary** in case of nonintervention will. Wash 288P265.

1208-81 142Wash324, 253P455. [b] **Others than executor may invoke probate court's jurisdiction** only as provided for in statute. 142Wash324, 253P 455.

1208-87 [a] **District court has power**

to appoint receiver of estate of decedent leaving will appointing independent executor. TexCivA 28SW(2d)297.

1208-89 [c] **Payment of debts.**–TexCivA 3SW(2d)864.

1209-90 TexCommnA 280SW748; Tex CivA 3SW(2d)864; 142Wash324, 253P455.

1209-95 TexCivA 24SW(2d)531.

1209-96 [a] **There being no debts,** independent executor must distribute moneys coming into his hands among beneficiaries named in will. TexCivA 2[illegible]SW(2d)2[illegible].

1209-97 [a] **Relation between independent executor and beneficiaries of estate** is one of trust. TexCivA 28SW(2d)297.

1209-97½-New. When independent executors and trustees are acting more particularly in capacity as trustees, rules of law governing acts of trustees and the liability of the trust estate for their acts are applicable. 115Tex222, 280SW499, 44ALR627.

1209-97½-New. An independent executor is entitled to exclusive control and management of the estate until proceedings for his removal are begun. Tex CivA 2[illegible]SW643.

1209-97¾-New. Personal judgment against independent executrix cannot be had where it is not shown that she disposed of property of deceased and converted proceeds to her own use. Tex CivA 58W(2d)570.

1209-97½-New. Independent executor held not accountable to creditors after distribution in good faith, and not in fraud of creditors. TexCivA 4SW(2d)144 (person asserting claim must bring suit).

1209-98 [b] **Where estate appears to be hopelessly insolvent,** executor may sell capital stock to exclusion of posthumous pretermitted child. 33F(2d)856.

1209-4½-New. Evidence in action against independent executors was held to sustain finding that grantor intended to convey entire wall described in deed. TexCivA 299SW718.

1209-4½-New. and that the purchaser had no notice that wall conveyed was party wall. TexCivA 299SW718.

1209-4¼-New. Independent executors authorized to sell and convey property are without authority to bind estate by general covenant of warranty. TexCivA 299SW718.

1209-4½-New. Evidence held to show that independent executors did not intend to bind themselves personally by covenant of warranty. TexCivA 299SW718.

1209-4½-New. Power of attorney, by heirs and devisees to independent executors, authorized them to bind the heirs and devisees on general covenant of warranty and rendered heirs and devisees liable under such covenant. Tex CivA 299SW718.

1209-4½-New. Purchaser from independent executor and sole legatee before expiration of period for filing claims takes only legatee's title subject to debts of estate. TexCivA 4SW(2d)144.

1209-8½-New. **Payment of claims.** Independent executor cannot pay any but valid claims against the estate, or legally authorized expenses. TexCivA 22SW(2d)313(2dcase).

1210-9 TexCivA 4SW(2d)144 (district court has jurisdiction); TexCivA 10SW(2d)196. [a] **Proof of representative capacity** is essential to authorize judgment against independent executor as such. TexCivA 58W(2d)816. [b] **Suit may be maintained on constructive service.**–TexCivA 4SW(2d)144. [c] **Right to have all claims adjudicated in single action.**–TexCivA 38W(2d)864.

1210-10 TexCivA 4SW(2d)144.

1210-21½-New. An executor cannot be forced into probate court to settle claim for his attorney's fees. 142Wash324, 253P455.

1210-21½-New. An executor administering an estate free of control by the probate court is bound in his true representative capacity by a judgment rendered against him as administrator. TexCivA 284SW673.

1210-21¼-New. Service of nonresident notice, under some statutes, gives jurisdiction of suit against nonresident independent executor who has appeared and invoked jurisdiction of the probate court. TexCivA 4SW(2d)144.

1210-21½-New. Purchaser from independent executor, to defeat a claim against estate, must show the existence of claims which would authorize order of sale. TexCivA 4SW(2d)144.

1210-21½-New. The measure of recovery for services to decedent, under oral contract within statute of frauds, is the value of services. TexCivA 4SW(2d)144.

1210-21½-New. In an action against an independent executor on a note executed by his decedent, where defendant admits that he is such executor, it is unnecessary for plaintiff to adduce evidence of his right to sue defendant in his representative capacity. TexCivA 13SW(2d)905.

1210-21½-New. In such action the court may render judgment against decedent's estate, where defendant answers in his representative capacity. TexCivA 13SW(2d)905.

1210-27 [b] **Jurisdiction.**–TexCivA 298SW643.

1210-30½-New. The probate court which appointed an independent executor is the proper and only court having jurisdiction to require him to give bond. TexCivA 298SW643.

1211-32 93Fla67, 1118541, 546 [quot CJ]; Wyo 293P354; 21SaskL32, [1926] 4DomLR561, [1926] 3WestWkly397.

1211-36 93Fla67, 1118541, 546 [quot CJ].

1211-38 279US347, 49SCt368, 73Led 733, 61ALR987.

1212-45 93Fla67, 1118541, 546 [citCJ].

1212-48 154Miss713, 123S865.

1212-50 254Mass180, 150NE9.

1212-54 93Fla67, 1118541, 546 [citCJ].

1213-57 Wyo 293P354.

1216-5 38GaA596, 144SE673; 223App Div636, 229NYS176; 117Or505, 243P 89 (not entitled to remuneration for services).

1216-6 93Fla67, 1118541, 547 [citCJ].

1216-10½-New. Where a legatee, under a will of personal property, distributes the estate in accordance with the will and with the approval of all other legatees, he need not account to a subsequently appointed executor. 204 Iowa927, 216NW55.

1216-10½-New. especially where he offers to pay the costs of the unnecessary administration. 204 Iowa927, 216NW 55.

1216-10¼-New. In such case the court should accept an offer to pay the costs of administration, ratify the agreement between the beneficiaries, dismiss proceedings for accounting, and close the estate. 204 Iowa927, 216NW55.

1216-10½-New. A national banking association, with which a trust company was consolidated under federal statute, has been held not entitled to render an account as executor after the consolidation. 263Mass444, 162NE217.

1217-22 13LaA289, 1278767. [c] (2) Chargeable with net rental value. 158La 637, 1048481.

1217-27 93Fla67, 1118541.

1217-28 93Fla67, 1118541; Sask [1928] 4DomLR854(2dcase).

1218-31 93Fla67, 1118541, 547 [citCJ].

1218-32 93Fla67, 1118541.

1218-33 See also 223AppDiv636, 229 NYS176.

1218-35 Alta [1930] 3DomLR985.

1218-38 Alta [1930] 3DomLR985; 21 SaskL32, [1926] 4DomLR561, [1926] 3 WestWkly397.

1218-39 93Fla67, 1118541.

1218-42 Alta [1930] 4DomLR1032 (good title does not pass).

1219-45½-New. Purchaser in good faith of property before administration is not liable for statutory double damages. Wyo 293P354.

1220-60 Sask [1928] 4DomLR854.

1220-75 223AppDiv636, 229NYS176.

1221-90 93Fla67, 1118541, 547 [citCJ].

1221-94 93Fla67, 1118541, 547 [citCJ].

1223-28 223AppDiv636, 229NYS176.

EXEMPTIONS

25 C. J.—8-1 8F(2d)451, 452 [citCJ].

8-4 Iowa 230NW545.

8-9 Ga 155SE678.

8-10 23 OhA1, 154NE748.

8-11 82Colo364, 260P109, 111 [citCJ]; 203 Iowa1385, 214NW676; 6PaDist&Co 725.

8-12 203 Iowa1385, 214NW676; 221Ky 562, 299SW194.

8-14 [a] (2) If, when debts are incurred, creditor has no right to subject particular property of debtor because it is by law exempt from creditor's claim, such creditor is not injured by exemption and is not deprived of any rights by exemption. 97Fla916, 123S 668(2dcase).

9-15 See also 97Fla916, 123S668(2d case). [a] **Exemption of benefits of fraternal benefit societies from debts of members or beneficiaries** is not within constitutional provision governing general exemptions of residents. SD 229NW294.

9-18 LaA 130S634.

9-22½-New. Territorial exemption laws construed in force by state constitution may be modified by statute but not destroyed. 135Wash71, 237P5.

9-22½-New. Exemption rights granted by constitution cannot be abrogated by statute. 135Wash71, 237P5.

9-39 85 IndA523, 154NE501; TexCivA 283SW277.

10-50½-New. Phrase "income, claim, or demand" which is specifically exempt as used in statute relating to executions is held to contemplate pensions and workmen's compensation claims. 85 IndA523, 154NE501.

10-50½-New. Statutes providing for the setting aside to a surviving spouse of personal property of deceased's estate in lieu of homestead and exemption rights in the estate, are not strictly exemption statutes, being viewed by the courts more in the nature of distribution or preferred creditor statutes. 149 Wash659, 272P28.

10-51 167La416, 119S411.

10-52 33F(2d)873; 43F(2d)666; 173 Ark949, 294SW64; CalA 292P678; 97 Fla916, 123S668(2dcase); 199 Ind24, 155NE42; 85 IndA523, 154NE501; 202 Iowa1278, 211NW847; 203 Iowa1385, 214NW676; 205 Iowa701, 216NW288; 206 Iowa1382, 222NW370; 208 Iowa490, 226NW22, 23 [citCJ], 63ALR1016; 125 Kan623, 624, 266P55 [citCJ]; 221Ky 562, 299SW194; 148Miss885, 114S818 (in favor of exemptionist); 150Miss 476, 116S879; MoA 31SW(2d)103; 32 NM361, 257P999; 221AppDiv624, 225 NYS46; 140SC114, 138SE626; 53SD 246, 220NW489; 156Tenn306, 300SW 567; 115Tex393, 283SW472, 474 [quot Cyc]; TexCivA 283SW277; TexCivA 272SW509.

11-57½-New. Where claim to exemption can be brought within the spirit and purpose of the statute by fair and reasonable interpretation, exemption should be allowed. 167La416, 119S411.

11-58 84CalA730, 258P433; 48 Ida163, 280P220 (construction must be liberal, though reasonable).

11-60 84CalA730, 258P433.

12-61 85 IndA523, 154NE501.

12-62 140SC114, 138SE626.

12-63 41F(2d)766; 83CalA72, 256P 444 [citCJ].

12-65 220Ky464, 295SW442, 444 [cit CJ].

12-66 220Ky464, 295SW442, 444 [cit CJ].

12-70 220Ky464, 295SW442.

14-99 23 OhA1, 154NE748; 143Miss 498, 108S498.

14-1 23 OhA1, 154NE748.

18-84 [b] **Where status of debtor fixed.** –27 OhA86, 160NE875.

18-85 5F(2d)326; 203 Iowa1261, 213 NW235; LaA 130S634; Sask [1929] 4 DomLR1083(2dcase). [b] (4) Statute exempting proceeds of judgment recovered for personal injuries applies to both residents and nonresidents. 137 Miss221, 102S263.

19-89 203 Iowa1261, 213NW235; 117 Nebr110, 219NW844.

19-2 LaA 130S634.

20-7½-New. Where the debtor was a resident at the time of seizure of his exempt property and at the time of the commencement of an action by him to enforce his rights to exemptions, the

fact that he subsequently became a nonresident does not deprive him of such rights. 121Kan218, 246P1010.

20–8 121Kan218, 246P1010, 1012 [cit CJ]; 58ND200, 225NW310.

21–32½–New. Where husband moves to another state and remains, and his wife had no marital relations with him and does not go with him, she is not entitled to exemption. 6PaDist&Co 725.

21–32½–New. A wife's right under some statutes to assert exemption of part of her husband's property when he is defendant in attachment proceedings and is in jail is lost where she is about to become a nonresident of the state. MoA 286SW407.

22–55 [d] **Laborer living with and supporting his sister, brother-in-law,** and their family is entitled to exemption of earnings where family was dependent on him for support. 129 Okl 103, 263P669.

23–66 117Nebr110, 219NW844.

28–43 MoA 297SW459.

28–52 TexCivA 298SW(2d)447. Contra 202 Iowa718, 210NW969.

35–94 [a] (4) Where farmer was evicted and lost possession of mules and implements and had to work at another occupation during litigation, it was held his exemptions were protected. TexCivA 293SW210.

36–13 155Md51, 141A434, 58ALR767.

36–15 See also 155Md51, 141A434, 58 ALR767.

36–20 48 Ida206, 280P1036.

36–29 203 Iowa1385, 214NW676. [a] **Test in determining whether workman is "laborer"** is nature and character of work rather than his class or profession. 160La489, 107S316.

36–32½–New. bricklayers, 203 Iowa 1385, 214NW676.

37–41 160La489, 107S316.

37–49 160La489, 107S316.

39–87 167La416, 119S411.

41–42 [a] **In Hawaii.**–30Hawaii51.

41–46 16F(2d)290.

41–51 [b] (5) Bricklayer is laborer within statute. 203 Iowa1385, 214NW 676.

41–53 203 Iowa1385, 214NW676.

42–58 51SD588, 215NW884. [c] **Statute, exempting proceeds of judgment for personal injury** from liabilities for debts of person injured, has been held inapplicable as to money recovered against insurance company on disability provision of indemnity contract. 153 Miss276, 120S450, 62ALR999. [d] **Articles included.**–48 Ida163, 280P220. [e] **Musical instruments exempt.**–208 Iowa 490, 226NW22, 63ALR1016 (radio receiving set is not musical instrument).

42–59 9LaA504, 119S728.

42–60½–New. Sum paid to injured employee as lump sum award under Workmen's Compensation Act deposited in bank upon receipt, and unmixed with other funds is exempt from garnishment. 115Tex393, 283SW472.

42–63 [a] **"Such other household articles"** in statute refers to same character of article in language immediately preceding it. 40F(2d)560.

43–99½–New. Furniture does not include typewriter or phonograph. 40 F(2d)560.

45–55 28F(2d)396.

46–77 [a] **Contrary rule where suitable for feeding stock.**–48 Ida206, 280P1036.

47–96 108WVa58, 150SE366 (necessary to decent appearance and protection and reasonably proper and customary in community).

48–38½–New. Future as well as past use is considered in determining question of exemption. 100Vt314, 137A194.

49–40 29PortoRico 718.

49–42 125Kan623, 266P55.

50–50 202 Iowa1278, 211NW847; 125 Kan623, 624, 266P55 [citCJ].

51–76 Man [1928] 3DomLR478.

52–27 [a] **An automobile** used incidentally in business of machinist is not exempt. 29Ariz116, 239P794.

52–86 202 Iowa1278, 211NW847.

52–87 202 Iowa1278, 211NW847.

52–88 202 Iowa1278, 211NW847.

52–10 See also 122Kan278, 252P260.

52–14 [a] **Automobile truck** used by fuel dealer is exempt. 122Kan460, 252 P262.

52–34½–New. Gum machine is not exempt as proper tool in business of a barber. 202 Iowa1278, 211NW847.

53–48 202 Iowa1278, 211NW847, 848 [citCJ]. [b] (1) But see 202 Iowa1278, 211NW847. [e] **Statute does not extend to tools which are in effect capital,** owned and used for purpose of profit in operation of extensive business. 202 Iowa1278, 211NW847.

53–53 167La416, 119S411.

54–57½–New. Some statutes do not require a showing that the trade, calling, or profession in which a tool or instrument is used was the exclusive means by which the debtor obtained a living for himself and family to entitle him to exemption thereof from seizure. 167La 416, 119S411.

56–8 171Minn108, 213NW538, 539 [cit CJ]. [a] **Exemption restricted to resident heads of family.**–See Nebr 219NW 844 [overr in part 30Nebr683, 46NW 1013, 27AmSR425].

56–14 22 OhA516, 154NE62. [a] **Exemption restricted to resident heads of family.**–See also 117Nebr110, 219NW 844 [overr in part 52Nebr813, 73NW 276].

56–19 22 OhA516, 154NE62.

56–23½–New. also an automobile as "equipment," 29PortoRico 718.

56–25 84CalA730, 258P433 (automobiles not exempt as "other equipment").

56–27½–New. Equipment and apparatus of private hospital owned and operated by a practicing physician is not exempt. 171Minn108, 213NW538.

57–65 82Colo 318, 259P613.

57–65½–New. Plow exempted by statute is held to embrace any plow, although too large for operation by the two horses, exempted. 19F(2d)308.

57–67 [g] **Three and one-half ton truck** is exempt. TexCivA 272SW509.

58–75 32 OhA199, 166NE915; 112 Okl 22, 239P595. But see 167La416, 119S 411. Contra 128Kan210, 276P811.

58–76 But see 82Colo 318, 259P613.

58–79 29PortoRico 718.

58–79½–New. , also under statute exempting one horse with vehicle and harness, "or other equipment," used by a physician. 29PortoRico 718.

58–81½–New. 112 Okl 22, 239P595.

58–81½–New. Farmer claiming team, wagon and harness exempt cannot also claim as exempt automobile used in operation of farm. Iowa 229NW215.

59–92 203 Iowa1385, 214NW676.

60–24 [a] **Automobile used by bricklayer** in going to work carrying tools and hauling material is habitually used to earn his living within statute. 203 Iowa1385, 214NW676.

62–63½–New. Rice apparently held for the purpose of sale, as any other agricultural crop, and not shown to have been held for seed, is not exempt as supplies necessary for carrying on a plantation. 28F(2d)396.

63–72 85 IndA523, 154NE501. [a] 49 ND405, 192NW97.

63–74 40GaA257, 149SE317.

63–76½–New. Compensation received under Workmen's Compensation Act is under some statutes exempt from garnishment, attachment, judgment, and all other suits or claims. TexCivA 283 SW277.

63–83½–New. Under some statutes actual residents are entitled to exemption regardless of time residence was commenced. 22F(2d)591.

63–85 See also 247 IllA89.

63–88 [a] **Time of residence.**–22F(2d) 591.

64–92 160La489, 107S316.

64–93 160La489, 107S316. [b] (10) Millwright. 160La489, 107S316. (11) Street car motorman. 10LaA17, 120S 401; 6LaA423. (12) Railroad patrol. 7 LaA88.

66–14 77Colo 340, 236P1001, 1002 [cit CJ]; 96PaSuper305 (employment contemplating use of instrumentality incidental to labor).

67–34 155Md51, 141A434, 58ALR767.

67–36 But see 155Md51, 141A434, 58 ALR767.

67–41 296Pa265, 145A846. But see Ont [1929] 4DomLR674.

67–47 77Colo 340, 236P1001, 1002 [cit CJ].

68–50 77Colo 340, 236P1001, 1002 [cit CJ]. See also 86CalA414, 260P930. [c] **Keeping roomers.**–133Misc397, 232NYS 663.

68–56 133Misc397, 232NYS663; 129 Okl 103, 263P669.

68–57 CalA 288P41 (holding income from operation of trucks not "earnings for personal services" without showing employment to render personal services).

68–59 77Colo 340, 236P1001.

68–60 77Colo 340, 236P1001.

69–62 129 Okl 103, 106, 263P669 [quot CJ].

69–69 GaA 155SE497.

69–73 GaA 155SE197; Iowa 229NW 763.

69–79 115 Okl 224, 242P550.

70–86 115 Okl 224, 242P550.

70–88 22F(2d)591 (District of Columbia statute).

70–92 49ND405, 192NW97. [a] **In Oklahoma.**–130 Okl 140, 265P1078 (affidavit in garnishment proceedings held not "process" within statute). [b] **Exemption of ninety per cent of wages** provided for by some statutes. 34 OhA518, 171NE369.

70–92½–New. In Missouri if head of family selects wages as exempt from execution, he can hold only ninety per cent of any sum up to three hundred dollars. MoA 9SW(2d)257.

70–97 DC 38F(2d)541.

70–6 Iowa 229NW763. [b] (2) Under Iowa statute deposit of earnings in bank does not deprive them of exempt character. Iowa 229NW763. (3) Under Iowa statute earnings within statutory period do not lose exempt character because deposited in bank in name of husband and wife. Iowa 229NW763.

71–7 [b] **Wages cease to be "current wages"** exempt from garnishment, when paid, though kept in separate fund. Tex CivA 292SW581. [c] **Salary of county auditor,** placed by him in bank, is subject to garnishment. TexCivA 292SW 581.

71–11 [b] **Wages of husband paid on land contract taken in names of husband and wife** are not exempt from levy, though previously exempt from garnishee process. 241Mich528, 217NW 911.

71–12 221Ky763, 299SW957.

71–15 9LaA331, 119S295; 140Miss615, 105S745.

71–18 163La292, 111S710; 6LaA222. [a] **All employees engaged in public service** are officers within statute. 6LaA 222.

71–23½–New. a fireman, 9LaA331, 119 S295.

71–23½–New. a sheriff's keeper, 6LaA 222.

72–41 20F(2d)236; 169La877, 126S223 (no claim by heirs or no heirs); 153 Miss276, 120S450, 62ALR999; MoA 22 SW(2d)206; 246NY133, 158NE48; 251 NY189, 167NE217; 131Misc806, 229NYS 113 (widow beneficiary); 38 OklACR 405. See also 97Fla916, 123S668(2d case). [a] **Statute applies in favor of wife.**–251NY189, 167NE217. [b] **It is within legislative power to provide** that proceeds of life insurance policy shall in no case be subject to legal process of creditors unless effected for their benefit. 97Fla916, 123S668(2dcase). [c] **Deposit of insurance moneys confusedly with funds of estate** does not cause exemption of moneys to cease. 169La877, 126S223. [d] **Such statutes must be liberally construed.** Iowa 231NW327.

72–43 But see 54ND19, 208NW549.

72–50 144 Okl 188, 290P177; 38 OklA CR405.

72–53 156Tenn306, 300SW567, 569 [cit CJ].

73–56 246NY133, 158NE48 (insurance on husband for benefit of wife); 136 Okl 294, 277P928. [b] **Terms of policy used in designating beneficiaries** determines question whether policy falls within terms of statute. 56ND545, 218 NW209. [c] **Policy payable to partnership** does not fall within statute exempting proceeds of policies in which personal representatives, heirs, or estate of

insured are designated as beneficiaries, though insured became successor of partnership. 56ND545, 218NW209. [d] **Statute exempting life insurance proceeds,** if payable to deceased, assigns or estate do not prevent garnishing proceeds payable directly to widow. SD 232NW29.

73-57 38 OklACR405 (wife and children).

73-62½-New. Life policy payable to insured's wife is not exempt from a judgment procured against her alone, on a note signed by her and her husband. 140Miss315, 105S534.

73-62½-New. Nonresident beneficiaries are exempt. 203 Iowa1261, 213NW235.

73-62¼-New. Fact that insured was guardian of minor beneficiary under policy does not make insurance liquidate debt owed by guardian to ward. 148 Miss885, 114S818.

73-62½-New. A statute exempting proceeds of beneficiary certificates issued by fraternal beneficiary associations applies to all beneficiaries whether residents or nonresidents of the state. 179 Minn255, 228NW919.

73-66 [a] **In North Dakota.**-56ND545, 218NW209. [b] **Controlling purpose of statute** is to enable husband or father to provide fund for family after his death. 157Tenn43, 5SW(2d)957. [c] **Exemption may be defeated by assignment or will** (1) where intention to do so is explicitly declared. 157Tenn43, 5SW(2d)957 (will held not sufficiently expressive of testator's intention). (2) Burden is on administrator to show such intention. 157Tenn43, 5SW(2d)957. [d] **By other statutes avails of policy payable to personal representatives, heirs, or estate** are not subject to debts of decedent except by special contract. 57ND412, 222NW459. [e] **In Iowa.-Iowa** 230NW545.

74-82 148Miss885, 114S818.

75-91 148Miss885, 114S818 (ten thousand dollars exemption). [a] **Constitutional provision exempting specified amount of personal property** does not limit or prohibit exemption of life insurance proceeds. 97Fla916, 123S668 (2dcase).

75-94 41F(2d)766; 137Misc895, 244 NYS56 (statute not repealed).

75-97 41F(2d)766 (insolvency of deceased immaterial); 224AppDiv504, 231 NYS100.

75-98 224AppDiv58, 229NYS140 (statute held not impliedly repealed); 137 Misc895, 244NYS56 (right fixed at insured's death). [b] **Method of payment.**-137Misc895, 244NYS56. [c] **Liability of insurer after notice of claims.**-137Misc895, 244NYS56. [d] **Statute applicable only to premiums paid after insured and wife became residents.**-137 Misc895, 244NYS56. [e] **Law repealing statute not applicable where death prior to enactment.**-137Misc895, 244NYS56.

75-1 But see 224AppDiv58, 229NYS140.

75-8 144 Okl188, 290P177.

75-9 Iowa 230NW545. [b] **Joint note of insured and beneficiary.**-140Miss315, 105S534.

76-10 [f] (1) 246NY133, 158NE48. [j] **In Iowa.**-230NW545.

77-25½-New. Order under Nova Scotia Collection Act directing person whose only income is pension to make monthly payments on judgment does not violate Canadian Pension Act. NS [1929] 4DomLR130.

77-27 205 Iowa872, 219NW62 (exemption available only as against creditors of pensioner).

77-31 207 Iowa835, 223NW876.

77-32 See also 207 Iowa835, 223NW 876.

78-47½-New. Persons and agencies dealing with incompetent World War veterans are chargeable with knowledge that government allowances to veterans are protected against creditors' claims. 134Misc683, 236NYS343.

78-47½-New. Under the World War Veterans' Act of 1924 and statute, the monthly allowance made by the United States government to an incompetent World War veteran is free from the reach of creditors even after the money has been received by him, his committee, or guardian, and only the federal government can legally deduct a claim it has from the allowance made to a veteran. 134Misc683, 236NYS343.

80-95 220Ala390, 125S635.

80-2 293Pa390, 143A111.

81-19 Contra 36BC142, [1925] 3DomLR1142.

82-36 LaA 130S634.

82-44 36GaA787, 138SE262; 221App Div624, 225NYS46.

82-49½-New. Interest on government pension money in the hands of a guardian of an insane person is not exempt, under federal statute, from execution on judgment. 207 Iowa835, 223NW876.

83-60 Contra 35GaA790, 134SE806.

83-61 But see TexCivA 293SW638.

83-67 127 Okl 4, 259P561.

83-68 127 Okl 4, 259P561.

83-70½-New. Judgment assigned by insolvent husband to wife is not exempt by the fact that judgment for injuries which the wife assigned the husband may have been exempt. TexCivA 295SW640.

84-85 221Ky562, 299SW194, 195 [quot CJ]; 167La1024, 120SE634, 63ALR1283.

84-92 TexCivA 293SW638.

84-92½-New. Entire proceeds of insurance are not exempt where, at the time of judgment, the debtor possessed similar property acquired and paid for without anticipating the proceeds. 221Ky 562, 299SW194.

84-92¼-New. In such case the debtor is only entitled to retain the value of specific destroyed articles which were exempt and were not later substituted by acquired similar ones. 221Ky562, 299SW194.

84-99 156Miss724, 126S830.

84-1 156Miss724, 126S830.

85-4 Oh 170NE650.

85-8 151Wash504, 276P545.

85-10 [a] (2) Under such statute automobile salesman receiving commission only, which was drawn at irregular times, is entitled to be allowed exemption out of commissions due. 151Wash 504, 276P545. (3) Deposit for judgment debtor is money due him and cannot be exempted in lieu of homestead. Oh 170NE650.

86-28½-New. Such compensation has been held exempt after receipt and deposit in bank by surviving wife of employee. TexCivA 285SW941.

86-35 [b] **Possession by guardian.-Iowa** 229NW152.

86-37 121Kan218, 246P1010.

87-47 Alta [1930] 4DomLR69. But see 9LaA504, 119S728.

87-51½-New. Where exemption does not attach to an undivided interest in personalty, it is immaterial that there was a partition after seizure to which the creditor was not a party. 9LaA504, 119S728.

87-53 20AlaA642, 104S776.

88-42 [a] 41GaA476, 153SE433.

89-93 Nebr 230NW501.

90-2 [a] **If articles claimed exceed stated limit,** court must deliver as exempt articles not exceeding such limit and sell balance only. 173Ark949, 294SW 64. [b] **Statute construed.**-19F(2d)308.

92-55 56ND329, 217NW523.

94-79 [a] **Complaint held to state action in contract.**-Ark 31SW(2d)539.

96-25 Contra 13PaDist&Co 167.

97-36 202 Iowa718, 210NW969.

100-98 TexCivA 4SW(2d)630. [a] **In Oklahoma.**-115 Okl 224, 242P550.

103-60 175Minn161, 220NW421.

103-66½-New. In an action for services rendered defendant as assistant in clinical laboratory and office attendant defendant's property garnished is subject to his claim of exemption as head of a family. 50SD450, 210NW743.

108-17 164Ga302, 138SE223; 199 Ind 24, 155NE42.

108-53 198Wis300, 224NW117. But see 125Kan623, 266P55.

109-74 164Ga302, 138SE223 (transfer for consideration made before discharge in bankruptcy).

109-75 235Mich258, 209NW66.

109-76 235Mich258, 209NW66.

109-92 22 OhA67, 153NE293.

110-94 5F(2d)326.

111-25 8LaA806, 809 [quotCJ].

111-37 8LaA806, 809 [quotCJ].

113-68 164Ga49, 137SE771.

113-70 [a] (2) 215Ala256, 110S273.

113-84 135Wash389, 237P729 (assignment of deposit in bank).

114-87 See also 168Ark850, 271SW948.

115-32 Iowa 231NW327.

116-44½-New. Where a garnishee discloses property of defendant, right to timely statutory exemptions of property garnisheed is not waived by defendant's transferring all his other property to other creditors as permitted by statute. 55ND741, 214NW911.

116-50 168Ark850, 271SW948.

116-51 168Ark850, 271SW948.

116-52 But see 168Ark850, 271SW948 (where not waived).

117-62 40GaA305, 149SE302; Miss 119 S503; 22 OhA67, 153NE293.

117-65 22 OhA67, 153NE293.

118-82 36GaA746, 138SE282.

119-89½-New. The use by a debtor of a portion of the proceeds of sale of exempt personal property to pay debts and maintain his family does not destroy his rights to exemption in the balance. 127 Okl 4, 259P561.

121-44 SD 232NW29. [a] **Subsequent refusal to apply money to debt** revokes waiver. SD 232NW29.

121-55 220Ky464, 295SW442.

123-80½-New. A widow, by voluntarily instituting divorce proceedings in lifetime of husband forfeits her right to statutory exemptions. 6PaDist&Co 386.

123-87 Sask [1928] 4DomLR865.

126-22 MoA 26SW(2d)800 (holding claim of exemption by wife after husband has absconded does not apply where he assigned his wages).

127-27 40GaA761, 151SE522; 27 OhA 86, 160NE875.

127-28½-New. Impounding and sale of cattle running at large has been held not to violate rights under exemption statute. 99Fla496, 126S117.

128-44 220Ky464, 295SW442.

128-45 56ND329, 217NW523.

128-49 32NM361, 257P999, 1000 [cit CJ].

128-49½-New. Whether property in hands of garnishee is exempt is determined as of date of service of garnishee summons. Nebr 230NW682.

128-51 144SC386, 142SE514.

128-64 144 Okl 188, 290P177.

129-78 40GaA761, 151SE522.

130-83 MoA 31SW(2d)93.

130-88 MoA 31SW(2d)93.

131-6 22 OhA67, 153NE293; 22 OhA67, 153NE293.

131-7 207 Iowa835, 223NW876.

131-8 129 Okl 103, 263P669; 53SD246, 220NW489.

131-15 82Colo 364, 260P109, 111 [cit CJ]; 245 IllA602. [b] **Where debtor selling stock of goods** without notifying creditors or claiming exemption, buyer cannot claim exemption. 181Ark 969, 28SW(2d)725.

132-14 MoA 30SW(2d)645.

132-17 219Ala571, 123S61; 82Colo 364, 260P109, 111 [citCJ].

133-35 21AlaA584, 110S323.

133-38 53SD246, 220NW489.

133-42 216Ala120, 112S449.

133-42½-New. or before payment to the judgment creditor, 148Miss748, 114 S885.

133-47½-New. After debtor has selected property claimed as exempt and officer has levied upon other property, debtor is estopped to claim latter as the exempt property. 202 Iowa305, 208 NW859.

134-49 [a] (3) Nine months. 53SD246, 220NW489. [b] **Whether delay has prejudiced creditor should be considered** in determining whether wife's claim for exemptions was made within reasonable time. 53SD246, 220NW 489.

134-54 148Miss748, 114S885.

135-66½-New. Application by defendant's wife for exemption and release of property garnished made eighteen days after service of garnishee summons on ground that principal defendant had failed to make claim is timely. 50SD450, 210NW743.

135-90 [b] **In North Dakota.**-55ND279, 213NW27.

136-92 39GaA646, 148SE288; 56ND 329, 217NW523.

136-99 But see 83CalA72, 256P444.
137-12 [a] **In South Dakota.**-53SD86, 220NW148 (claim held insufficient).
137-13 See also 54SD367, 223NW315.
138-38 38GaA412, 144SE40.
139-54 213Ala547, 105S691.
139-62 [a] **Affidavit claiming exemptions in language of statute** is mere conclusion of law. CalA 288P41.
139-68 [c] (3) 38GaA412, 144SE40. (7) Schedule regarded as sufficient where aided by parol proof that articles constituted household effects possessed and used by applicant as head of family at named domicile. 38GaA412, 144SE 40. (8) Description, "one mule value $50," in schedule of personal property, held insufficient to constitute constructive notice that mule on which person afterward acquired mortgage was mule described in schedule. 40GaA305, 149 SE302, 303.
140-75 [c] **In North Dakota.**-55ND279, 213NW27.
141-7½-New. On motion to strike inventory as not legally made and not showing purpose for which filed held too general as not stating particular defect. 213Ala547, 105S691.
145-16 [a] **Where bankrupt refuses to exercise his choice,** commissioners should be appointed so to choose. 319 Mo672, 4SW(2d)769.
147-59 5F(2d)326.
147-65 34GaA245, 129SE117. [a] **Property described and not owned is not exempt** when afterward acquired by debtor. 34GaA245, 129SE117 (holding corn scheduled in 1921 and produced in 1922 not exempt).
147-67½-New. Where a borrower executed a bill of sale of personal property to secure a debt and, in a proceeding to foreclose the bill of sale, filed a claim to the property as exempt, setting aside the property as exempt does not affect the previously acquired title of the lender. 39GaA646, 148SE288.
147-69 56ND329, 217NW523 (notice to opposite party).
148-95 See also **TexCommnA** 18W(2d) 1090.
148-1 29Ariz116, 239P794.
152-70 56ND496, 217NW657, 659 [cit CJ].
155-31 Ga 155SE678.
156-55 TexCivA 300SW247, 249 [cit CJ].
157-62 9LaA504, 119S728.
157-73 See also 220Ala448, 126S110.
158-80 CalA 288P41; 55ND741, 214 NW911; 56ND496, 217NW657, 658 [cit CJ].
158-80½-New. Since the principal of government pension money in the hands of the guardian of an insane person is exempt from execution under statute, whereas the interest is nonexempt, it will be presumed, in claiming exemption, until the contrary appears, that the guardian in making expenditures did so from the nonexempt interest and not from the exempt principal. 207 Iowa835, 223NW876.
158-84 [a] **That property of debtor was same before and after his bankruptcy** will not be presumed as regards wife's right to exemptions. 53SD246, 220NW489.
158-85 52SD528, 219NW206.
158-90 83CalA72, 256P444.
159-5 Ala 127S816.
159-10 36GaA45, 135SE111.
161-47 TexCivA 293SW638.
161-55 146Miss291, 111S364. [c] **Evidence held sufficient** to support finding that certain machinery was not exempt. 125Kan623, 266P55. [d] **Evidence held insufficient.**-56ND496, 217 NW657. [e] **Evidence held sufficient** to show that funds in bank were exempt earnings. Iowa 229NW763.
161-58½-New. Registration of automobile in the name of the debtor's wife is of no force and effect on the question of the husband's claim of exemption. 203 Iowa1385, 214NW676.
161-58⅓-New. Evidence has been held sufficient to support a finding that the debtor's wife claiming property as exempt was about to move from the state with intent to change her domicile. MoA 286SW407.
161-70 216Ala133, 112S911; 40GaA 257, 149SE317.
162-82 121Kan218, 246P1010.
162-84 202 Iowa1278, 211NW847; 121 Kan218, 246P1010.
163-92 206 Iowa1018, 221NW504.

EXHIBIT

167-34½-New. Mailing of a paper to designated official may be considered exhibiting it under statutes. 79Mont 385, 256P1071; 79Mont417, 256P1082.

EXIST

168-67 [a] 153Tenn451, 284SW365.
168-68 153Tenn451, 284SW365.

EX NIHILO NIHIL FIT

169-95 [a] 190NC397, 130SE40; 190 NC471, 130SE154.

EXPENSE OR EXPENSES

172-77 131Misc182, 227NYS115.
173-84 [b] **"Service" distinguished.**-4 HawaiiFed661.
173-85 [b] **Meaning of term, although broad enough to include counsel fees,** must be determined in light of object of statute where it occurs. Mass 170 NE795.
175-60 161La1, 108S104.
175-67½-New. "traveling expenses," 75 CalA680, 243P697.

EXPERT

176-86 194NC289, 139SE443, 54ALR 855.
177-98 194NC289, 139SE443, 54ALR 855; TexCivA 281SW306.
177-99 194NC289, 139SE443, 54ALR 855.
177-2 37GaA703, 141SE504; TexCivA 281SW306.
177-4 TexCivA 281SW306.

EXPLOSIVES

181-1 25F(2d)555, 559 [quotCJ]. [b] (7) Mo 26SW(2d)980. (18) Smokeless powder. 8F(2d)552. (19) Blasting caps. 26OhA7, 159NE585.
181-3½-New. Power to make regulations.-323 Ill 368, 154NE131; 242NY 330, 151NE637.
182-5 Alta [1928] 2DomLR46.
182-9 255 IllA592.
182-11 235Mich15, 209NW172; Tex CommnA 298SW554.
182-12 See also Mass 167NE235.
182-16 255 IllA494 (city fireman held within protection of ordinance).
182-19 Mass 167NE235.
183-23½-New. Requirement of license that unoccupied space between garage and street shall be inclosed with wall is held reasonable. 259Mass406, 156NE 540.
183-23⅓-New. Accused must comply with requirements of statute. 259Mass 406, 156NE540.
183-30 191NC23, 131SE314, 317, 43 ALR426 [quotCJ].
184-37 320Mo 586, 9SW(2d)606, 60 ALR1064. See also TexCivA 274SW 986.
184-37½-New. The borough may regulate storing gasoline, but the power must be exercised reasonably. 104NJL 13, 139A718.
184-37⅓-New. The owner of premises owed no duty to an invitee with respect to the selection of a place for the storage of dynamite. 320Mo 586, 9SW(2d) 606, 60ALR1064.
184-39 228AppDiv118, 239NYS47.
184-40 See also 194Wis175, 215NW 894. [b] **Leaving pieces of motion picture film accessible to child** burned by ignition thereof is not violation of ordinance regulating storing refuse material of nitrocellulose in quantities greater than three hundred and fifty pounds. 242NY168, 151NE195 (in absence of proof that film exceeded such weight or was made of such material). [c] **Electrical exploder,** filled with fulminate of mercury and designed to be exploded by means of current of electricity and thereby to discharge dynamite, is "explosive" and "detonator" within statute regulating storage of explosives. 89CalA602, 265P374.
184-41 255 IllA494. [e] **Leaving pieces of motion picture film** accessible to child burned held not actionable under ordinance regulating storing refuse material of nitrocellulose products. 242NY168, 151NE195.
185-42 255 IllA494.
185-46½-New. Ordinance, relating to storage and sale of gasoline within certain limits held void as unreasonable. 42F(2d)88.
185-47 222AppDiv67, 225NYS276; 191 NC23, 131SE314, 317, 43ALR426 [quot CJ]; NC 154SE1.
185-48 191NC23, 131SE314, 317, 43 ALR426 [quotCJ].
185-49 Mass 167NE235; 220AppDiv 173, 221NYS123.
185-50 172Ark947, 291SW66; 216Ky 85, 287SW215; 223Ky296, 3SW(2d)613; 10LaA604, 120S696; 320Mo 586, 9SW (2d)606, 60ALR1064 (duty to give notice to invitee); 191NC23, 131SE314, 43 ALR426; 150Wash578, 274P188.
185-51 145Miss172, 110S244; 191NC23, 131SE314, 43ALR426; 126 Okl 285, 259 P232, 233; 116 Or317, 241P40; 150 Wash578, 274P188.
185-53 116 Or317, 241P40; 126 Okl 285, 259P232, 233.
185-53½-New. One storing powder owes a duty even to a technical trespasser of a higher degree than not willfully to harm him. 191NC23, 131SE 314, 43ALR426.
186-56 12LaA405, 123S384, 388 [cit CJ]; 191NC23, 131SE314, 43ALR426. [b] (2) Injury to onlooker from broken glass of windows shattered by explosion of barrel of neolite on defendant's premises held natural and probable consequence of the explosion. 222MoA180, 296SW817.
186-57 105WVa463, 143SE160, 161 [cit CJ] (negligence of irresponsible children). [a] (5) Negligence of employees of gas filling station in permitting gasoline from plaintiff's automobile to stream into street was proximate cause of destruction of automobile by fire resulting from lighted match being thrown into street. 172Ark947, 291SW66. (6) Act of adult in attaching dynamite cap taken by children from place of storage to magneto does not break causal connection between original negligence in storing in place attractive to children and injury. 322Mo 1050, 17SW(2d)977.
186-60 208 Iowa1338, 212NW154; 121 Kan251, 246P509; 216Ky85, 287SW215; 217Ky235, 289SW308; 223Ky296, 3SW (2d)613; 145Miss388, 110S842, 843 [cit CJ]; 156Miss813, 127S287; 322Mo 1050, 17SW(2d)977; 116 Or317, 241P40, 42 [quotCJ]; 150Wash578, 274P188; 105 WVa463, 143SE160, 162 [citCJ]. "Children," etc. 116 Or317, 241P40, 42 [quot CJ]. [a] (1) 217Ky235, 289SW308; 236 Mich300, 210NW311. (6) Gasoline stored by plumber under house where he was working. 10LaA604, 120S696. [c] 223Ky296, 3SW(2d)613 (exposed near highway). See also 236Mich300, 210NW311. [d] (1) 116 Or317, 241P 40, 42 [citCJ].
187-61 121Kan251, 246P509; 116 Or 317, 241P40, 42 [citCJ].
187-62 116 Or317, 241P40, 42 [citCJ].
187-63 217Ky235, 289SW308; 235Ky 252, 30SW(2d)952; 8LaA640, 643 [quot CJ]; Mass 168NE206; 242NY168, 151 NE195; 116 Or317, 241P40, 42 [quot CJ]; 194Wis175, 215NW894. [a] (9) Dynamite caps in car, 217Ky235, 289SW 308. (10) Leaving pieces of motion picture films accessible to child burned by ignition held not negligence. 242Ky168, 151NE195.
187-64 242NY168, 151NE195; 116 Or 317, 241P40, 44 [citCJ&Cyc]; 194Wis 175, 215NW894 (defendant held not responsible for pool of water attracting child). [a] **Mere passive acquiescence** by owner of exposition ground, in allowing children to use grounds as playground, and injury to thirteen-year-old boy while playing therein, in explosion of powder found on premises, can be held at most licensee. Mass 168NE206.
187-67 223Ky296, 3SW(2d)613; 116 Or 317, 241P40. [a] 116 Or317, 241P40, 43 [quotCJ].
187-67½-New. Infant injured by ignition of motion picture film picked up on

vacant lot where film was being burned by defendant may not recover on ground of negligence, such film not being inherently dangerous. 242NY168, 151NE195.

187-67½-New. The attractive nuisance doctrine is inapplicable to an injury to an older companion of an eighteen-year-old boy from an explosion of a dynamite cap taken by the latter from a shed in a quarry. 316Mo782, 291SW475.

187-67¼-New. A boy injured by a dynamite cap left on a highway had absolute public right to the use of the highway. 150Wash578, 274P188.

187-68 208Iowa1338, 212NW154; 121Kan251, 246P509, 510 [quotCJ]; 223Ky296, 3SW(2d)613 (held proximate cause); 10LaA604, 120S696; 8LaA640, 642 [citCJ]; 191NC23, 131SE314, 318, 43ALR426 [quotCJ]; 116Or317, 241P40, 42 [citCJ]. [g] **Abandoning dynamite caps** in public highway was held proximate cause of injury to child who found them. 208Iowa1338, 212NW154. [h] **It is not intervening independent cause** destroying causal connection between defendant's negligence and death of child that child companion of decedent informed him of location of powder. 223Ky296, 3SW(2d)613.

188-69 316Mo782, 291SW475; 191NC23, 131SE314, 318, 43ALR426 [quotCJ]. But see 121Kan251, 246P509, 510 [quot CJ].

188-70 But see 121Kan251, 246P509, 510 [quotCJ].

188-71 121Kan251, 246P509, 510 [quot CJ]; 236Mich300, 210NW311.

188-72½-New. If owner should have anticipated danger to school children who often used land where shed containing dynamite caps stood as a playground he owed them duty to remove explosive or safeguard its use in a reasonable way. 236Mich300, 210NW311.

188-73 208Iowa1338, 212NW154.

188-77 169La1156, 126S691 (original vendor is not liable for negligence of subsequent vendor on theory of agency).

188-78 215Ala370, 110S805; 235Mich15, 209NW172. [c] **In actions of tort** (1) negligence or knowledge of seller can have no effect to absolve appellant from liability to ultimate consumer, except so far as such negligence or knowledge breaks chain of causation. 208Ky507, 271SW570, 39ALR919. (2) Hence negligence or knowledge of grocer can have no effect to absolve appellant from liability to ultimate consumer except in so far as such negligence or knowledge breaks chain of causation. 208Ky507, 271SW570, 39ALR979.

189-79 12LaA405, 123S384.

189-82 [a] **A vendor** of steel drums was not held to duty and liability of manufacturer. 169La1156, 126S691.

189-83 169La1156, 126S691 (drums held not intrinsically dangerous).

189-85 154Miss475, 122S735. [a] **Motorist does not assume risk** of seller's negligence in overflowing tank of automobile. 154Miss475, 122S735.

189-85½-New. The law imposes a high degree of care upon dealers selling such combustible commodities as kerosene and gasoline to prevent their mixture. 235Mich15, 209NW172.

189-85⅓-New. Seller of kerosene to be liable must have known of latent defects of kerosene prior to having bought it from reliable dealer. 145Va448, 134SE588.

189-85¼-New. That the buyer furnished jugs for hydrofluoric acid does not relieve the seller from ascertaining that they were suitable. 104NJL93, 139A19, 55ALR187.

189-85⅕-New. One engaged in sale and distribution of gasoline is not as to tanks and pumps furnished and installed free to retailers, a manufacturer or vendor. 144Okl123, 289P281.

189-86 [d] **Where men examining steel drums had knowledge of danger** and were warned, it is immaterial that drums were not labeled. 169La1156, 126S691.

189-87 175Ark944, 1SW(2d)88, 93 [cit CJ]; 208Ky507, 271SW570, 39ALR919.

190-90 26F(2d)14.

190-92 154Miss475, 122S735.

190-95 [b] (2) Code (1923) §§ 2715, 2716, regulating sale of illuminating oils, violation of which would be per se negligent, was repealed by conflicting Agricultural Code of 1923 (Acts [1923] p 445 et seq) and complaint based thereon is based on demurrer. 215Ala370, 110S805.

191-5½-New. A statute, prohibiting the sale for illuminating purposes of kerosene which will flash at a temperature of less than 115° Fahrenheit, makes dealers warrantors of such oils irrespective of inspection of such oils as provided by law. 38OklACR35.

191-5⅓-New. In an action to recover for injuries caused by an explosion of oil not conforming to such test it is not a defense that the seller was ignorant that it did not so conform, 38OklACR35.

191-5¼-New. or that an authorized inspector had certified that it did so conform. 38OklACR35.

191-5⅕-New. In such action plaintiff is entitled to recover compensation for the injuries sustained where he used such care as would have been proper if the oil had conformed to the statutory standard. 38OklACR35.

191-5⅙-New. Such statutes are police regulations designed to promote protection from hidden and serious dangers. 82NH408, 135A27.

191-5⅐-New. Under a statute making seller liable for damage for explosion of oil below standard explosion need not be shown due to defective character. 82NH408, 135A27.

191-6 215Ala370, 110S805; 82NH408, 135A27; 38OklACR35. [a] (2) Basis of liability rests on duty to do no unnecessary and negligent acts, in their nature dangerous, to lives and safety of others. 215Ala370, 110S805. [b] (1) 215Ala370, 110S805. (3) Oklahoma statute makes jobbers and manufacturers liable to retail dealers and all other persons for damages of every kind and nature caused by inferior quality of oil sold by such jobbers or manufacturers to such retail dealers and other persons. 38OklACR35.

191-10½-New. Liability does not rest on whether use to which article is subjected is usual or unusual or dangerous or not but on fact of negligence of seller in selling dangerous article without warning. 215Ala370, 110S805.

192-14½-New. Sale of benzine to an infant is not a sale under circumstances jeopardizing life or property within the statute where the boy was authorized by his mother to purchase it and knew the character of the article. 251IlA226.

192-16 208Iowa1338, 212NW154; 145Miss172, 110S244; TexCommnA 298SW554; TexCivA 300SW641; TexCommnA 12SW(2d)552. [c] **Care required** is to anticipate and guard against all things that might happen within range of reasonably prudent human foresight. 208Iowa1338, 212NW154.

192-17 208Iowa1338, 212NW154.

192-18 [a] **Dynamite.**-141Miss346, 106S281.

192-23¼-New. However, one on highway not used for ordinary travel is not trespasser. 208Iowa1338, 212NW154.

192-27 158La763, 104S707.

192-32 102NJL354, 131A873.

192-33 19F(2d)32; CalA 286P445; 228Ky156, 14SW(2d)418; 20OhA261, 151NE798; NJ 141A25.

193-34 128Okl106, 261P551 (dictum).

193-35 178Ark375, 10SW(2d)865 (concussion of air or earth); 102NJL354, 131A873; 128Okl106, 261P551; 54SD643, 224NW184.

194-37 228Ky156, 14SW(2d)418; 235Ky41, 29SW(2d)592; 128Okl106, 261P551 (dictum); TexCommnA 298SW554, 560 [citCJ].

194-38 218Ky626, 291SW1021.

195-46½-New. The liability for injuries caused in the absence of negligence may be waived in advance by express contract. 218Ky286, 291SW375.

195-52 NJ 141A25.

195-55 [c] **Statutes held inapplicable.**-10LaA692, 122S165.

195-59 102NJL354, 131A873.

195-60 178Ark375, 10SW(2d)865. [f] (2) If defendant negligently discharged blast while plaintiff in position of peril known to defendant, liability would exist for damages caused by frightening of horse by noise alone causing runaway. 219MoA81, 268SW645. [g] **Highest degree of care** is required of persons possessing and using explosives. 145Miss172, 110S244. [h] **Employment of modern, progressive method** of blasting is essential in order that work be proper, efficient, and safe. 102NJL354, 131A873.

196-62 235Ky41, 29SW(2d)592.

196-64½-New. Contractor doing work for city cannot escape liability on ground that he was performing a governmental duty. 102NJL354, 131A873.

196-65 218Ky626, 291SW1021; 219MoA81, 268SW645. [c] **Evidence held not to authorize** submission of question whether slide due to blasting might have been discovered in time to warn trainmen. 218Ky626, 291SW1021.

198-89 147Wash653, 267P43. [a] (2) Those who transport gasoline over public highways must use that degree of care commensurate with dangers involved. 147Wash653, 267P43.

198-91½-New. One standing by gasoline from overturned tank cars so near hoisting engine that sparks can reach it is in imminent peril within humanitarian doctrine. Mo 26SW(2d)980.

198-91⅓-New. Interstate commerce commission's regulations for transportation of explosives protect all individuals of public who may be endangered by violation. Mo 26SW(2d)980.

198-91¼-New. Railroad company cannot plead ignorance nor unreasonableness of interstate commerce commission's regulations respecting explosives certified by secretary. Mo 26SW(2d)980.

198-91⅕-New. One delivering an article which he knows or should know to be dangerous, should give notice of its character. Mass 167NE235.

199-97½-New. Under statutes in some jurisdictions explosives are required to be inclosed in containers in transporting same. 8F(2d)552.

199-99 243IlA562.

201-38 107Conn568, 141A652.

201-44½-New. The purchaser of a jug of hydrofluoric acid which exploded is not guilty of contributory negligence where he has no knowledge of danger. 104NJL93, 139A19, 55ALR187.

201-45 222MoA180, 296SW817.

201-48 154Md188, 140A40.

202-53 171Ark863, 286SW1009; 22OhA440, 153NE860. [b] 22OhA440, 153NE860.

202-54 171Ark863, 286SW1009 [citCJ].

202-55 171Ark863, 286SW1009.

202-66 See also NC 154SE1.

203-79 144Okl123, 289P281. [a] 215Ala370, 110S805; 103WVa15, 136SE512.

203-80 215Ala370, 110S805.

203-82 215Ala370, 110S805.

203-84 [a] **Facts alleged held sufficient** to cover allurement and implied invitation. 116Or317, 241P40.

204-91½-New. Complaint showing seller's violation of duty, violation thereof and proximate injury to dealer's customer are sufficient without alleging how or for what purpose purchased oil was being used. 215Ala370, 110S805.

204-91⅓-New. Contributory negligence must be specifically pleaded and need not be negatived in complaint. 215Ala370, 110S805.

204-91¼-New. Defendant must prove plaintiff's violation of a statute relative to handling gasoline where he does not allege it and it does not appear from plaintiff's evidence. 129Or118, 276P695.

204-1½-New. Evidence that the lid was off the coil box of a gasoline engine's tank at the time the tank was being filled is admissible in an action for damages from fire alleged to have been caused while filling the tank while the motor was in operation and surface parts were hot. 45Ida509, 263P477.

204-5 26F(2d)14.

204-7 236Mich300, 210NW311.

205-9 88CalA698, 264P259; 164Minn314, 204NW943 (res ipsa loquitur rule applied to unexplained explosion of gasoline filling station); NJ 151A598.

205-11 TexCivA 300SW641. See also 164Minn314, 204NW943.

206–25½–New. An employee of the buyer has the burden of showing that the injury would not have resulted if the flash point of the explosive was not lower than as represented by the seller. 26F(2d)14.

206–25½–New. In an action by a storekeeper to recover for damages caused by an explosion of a liquid sold to him for kerosene, the burden is on plaintiff to show that defendant was negligent in furnishing him with a highly gaseous and explosive fluid in violation of statute. 175Ark944, 1SW(2d)88.

206–25¼–New. A person selling for coal oil a highly combustible fluid not of the grade required by statute is presumed to have known such fact and the purchaser's ignorance thereof. 175 Ark944, 1SW(2d)88.

206–36 235Mich15, 209NW172.

206–38 Mass 168NE206.

206–38½–New. or other acts of negligence; 145Miss388, 110S842.

206–40½–New. of evidence as to the burning of wires on the motor of a gasoline engine alleged to have caused a fire; 45 Ida509, 263P477.

206–40½–New. of evidence of interstate commerce commission's regulations requiring inflammable liquids spilled from tank cars to be covered; Mo 26SW(2d) 980.

206–41 Ala 127S668; Mass 167NE235; 50RI 226, 146A484. See also 81CalA61, 252P1082. [a] **Evidence admissible of defendant's knowledge** of interstate commerce commission's regulations concerning transportation of films. Mass 167 NE235.

206–43½–New. Evidence as to whether compensation payments were made to plaintiff for permanent disability and whether he took appeal when payments ceased is inadmissible in an action for injuries. 107Conn568, 141A652.

206–43½–New. In an action for damages to property from blasting, evidence that defendant's laborers laughed and made sportive remarks regarding plaintiff's fright at the time the blasts were being discharged is incompetent. 228Ky446, 15SW(2d)271.

207–47 220Ala328, 124S892.

207–48 50RI 226, 146A484.

207–58 [a] (3) Testimony of temperature in room where explosion occurred, without proof that it was taken at time proximate to time of accident. 26F(2d) 14. [b] (3) Failure to warn purchaser of danger of using matches in neighborhood of fluid sold to him as coal oil. 175Ark944, 1SW(2d)88. (4) Other instances. 38F(2d)159.

207–64 But see 208Ky507, 271SW570, 39ALR919.

207–65 208Ky507, 271SW570, 39ALR 919.

208–72½–New. In an action for death caused by an explosion of kerosene sold by defendant testimony as to tests by a state inspector of kerosene taken from defendant's tank shortly after the sale and explosion when the supply was low is admissible where it is shown that no kerosene was unloaded into the tank in the meantime. 235Mich15, 209 NW172.

209–98 [a] (3) 168Minn248, 210NW55. (5) 168Minn248, 210NW55. (10) That mixture sold for kerosene was of more inflammable character than kerosene of legal grade. 168Minn347, 210NW78. (11) That neglect of defendant's employees to remove dynamite caps from shed or properly to safeguard danger was proximate cause of injury to child while playing with one of the caps. 236Mich300, 210NW311. (12) Knowledge and warning. 169La1156, 126S691. [b] (1) 288Pa443, 136A223. [c] (10) That defendant's alleged negligence in spilling gasoline on ground was proximate cause of fire. 158La763, 104S707 (where third party threw match there). (11) That kerosene sold was of grade required by statute. 175Ark944, 1SW (2d)88. (12) That storage of gasoline on plaintiff's premises was without his authority. 127 Or276, 263P907. (13) Freedom from negligence. 50RI 226, 146A484. (14) That defendant failed to exercise ordinary care. 199Wis310, 226 NW301(2dcase). [d] (5) 168Minn347, 210NW78. (13) NC 154SE1. (15) Maintaining oil storage tanks and furnace. 81CalA61, 252P1082. (16) Ignition of gasoline by spark from cigar lighter. 129 Or118, 276P695. (17) Other instances. 88CalA698; 264P259. [e] (8) Sale of kerosene below legal test. 235Mich15, 209NW172. [f] (1) 10LaA 692, 122S165. (4) 216Ky85, 287SW215; 253Mass497, 149NE147. [g] 251 IllA 226; 147Wash653, 267P43. [i] (4) 168 Minn347, 210NW78. [k] **Evidence held sufficient to support verdict.**–145Va448, 134SE588. [l] **Evidence held insufficient for jury:** (1) Whether defendant violated any duty owing to plaintiff in failing to warn him of danger that such accident might happen. Mass 168NE 206. (2) Whether defendant created or caused dangerous condition of its premises, designedly arranged to cause injury. Mass 168NE206. (3) Whether plaintiff was on defendant's premises as invitee or was there for any purpose except his own amusement. Mass 168 NE206.

209–99 294Pa334, 144A286 (mere conjecture as to defendant's negligence is insufficient). [a] **Proximate cause** of death held to be third person's negligence, not failure of defendant to inspect. 169La1156, 126S691. [b] **Evidence held sufficient.**–234Ky243, 27SW (2d)952.

209–2 TexCivA 300SW641.

209–3 [a] **Opinion evidence as to proper care under circumstances** is unnecessary, where there was sufficient direct evidence to support jury's finding as to ultimate fact of negligence. 81CalA61, 252P1082.

209–4½–New. An inspector's certificate of test and approval of kerosene released for sale is prima facie evidence that the kerosene was up to the legal standard when inspected and released and so continued. 235Mich15, 209NW172.

209–4½–New. Such certificate is not conclusive of such facts. 235Mich15, 209 NW172.

209–7 38F(2d)159; 235 IllA146; 316 Mo 782, 291SW475; 222MoA180, 296SW 817. [b] 191NC23, 131SE314, 43ALR 426. [c] **Ownership of explosives is jury question.**–208 Iowa1338, 212NW154. [d] **Evidence insufficient to make case for jury.**–MoA 287SW780. [e] **Whether film was inherently dangerous** held for jury. Mass 167NE235. [f] Liability of defendant under evidence authorizing inference of knowledge is for jury. 156 Miss813, 127S287.

210–8 174Ark813, 296SW708; 208 Iowa 1338, 212NW154; Mass 167NE235; 235 Mich15, 209NW172; 236Mich300, 210 NW311; Mo 26SW(2d)980; 221MoA93, 290SW91; 219MoA81, 26SSW645; 82 NH408, 135A27; 126 Okl 285, 259P232, 233; 129 Or118, 276P695; 288Pa443, 136A223. [b] **Evidence insufficient** to take question of proximate cause to jury in action for damage to oil well by premature explosion of shot of nitroglycerin. 37 OklACR685.

210–9 171Ark863, 286SW1009; 81CalA 61, 252P1082; 105Conn1, 134A243, 49 ALR154; 235 IllA146; 208 Iowa1338, 212NW154; 217Ky235, 289SW308; 223 Ky296, 3SW(2d)613; 235Ky252, 30SW (2d)952; Mass 167NE235; 235Mich15, 209NW172; Mo 26SW(2d)980; 221MoA 93, 290SW91; 222MoA180, 296SW817; 82NH408, 135A27; 104NJL93, 139A19, 55ALR187; NJ 151A598; 126 Okl 285, 259P232, 233; 144 Okl 123, 289P281; 50 RI 226, 146A484. [a] (1) 228Ky446, 15 SW(2d)271; 235Ky41, 29SW(2d)592; 102NJL354, 131A873. [b] (1) 217Ky 235, 289SW308. (2) 322Mo 1050, 17SW (2d)977; 191NC23, 131SE314, 43ALR 426; 126 Okl 285, 259P232, 233; 106 WVa402, 145SE748. [c] (1) 175Ark944, 1SW(2d)88.

210–10 Ala 127S668; 172Ark947, 291 SW66; 175Ark944, 1SW(2d)88; 121 Kan251, 246P509; 223Ky296, 3SW(2d) 613; 236Mich300, 210NW311; 220App Div173, 221NYS123; NC 154SE1; 38 OklACR35; 288Pa443, 136A223; 50RI 226, 146A484; TexCivA 300SW641. [a] (6) Starting fire with kerosene. 208Ky 507, 271SW570, 39ALR919.

210–10½–New. of knowledge of imminent peril. Mo 26SW(2d)980.

211–13 218Ky626, 291SW1021. [a] (3) In action for negligence in shooting oil well, evidence as to contributory negligence held insufficient to take issue to jury. TexCommnA 12SW(2d)552. [c] **Attractive nuisance.**–Mo 26SW(2d)980.

211–13½–New. Although evidence of qualities of explosive came from plaintiff's witnesses nonsuit is not required, for plaintiff is entitled to have jury weigh evidence. 82NH408, 135A27.

211–13½–New. The question of whether the absence of paraffin on cork caused explosion of a jug of hydrofluoric acid is for the jury. 104NJL93, 139A19, 55 ALR187.

211–15 218Ky286, 291SW375; 128 Okl 106, 261P551. [a] (2) In case of injury to child in habit of playing, or known to be likely to play, on premises where explosives were kept, instruction was erroneous that plaintiff, in order to recover, must show that he was on premises by express invitation. 116 Or 317, 241P40. (3) Instruction confined to express invitation in action for injuries to child from explosion of dynamite cap picked up by him on premises of one defendant where other defendant was using explosives is erroneous, where complaint and evidence tend to show allurement of plaintiff to premises and implied invitation. 116 Or317, 241P40.

211–16 22 OhA440, 153NE860. [b] **Instructions held authorized by evidence.**–322Mo 1050, 17SW(2d)977. [c] **Instruction held warranted by evidence.**–233Ky 198, 25SW(2d)373.

211–18 50RI 226, 146A484.

211–19 [a] (2) Instruction that failure to warn of danger of explosion of powder magazine was not negligence held not error where danger was known. 138 SC113, 135SE877. [b] (2) Other instances. 235Ky41, 29SW(2d)592.

212–29½–New. Instruction that, if explosion occurred while decedent was pouring oil on fire in stove, recovery was barred is proper. 82NH408, 135A 27.

212–35½–New. Where plaintiff has by contract waived liabilities of defendant for injuries due to the blasting, he cannot complain of the form of a requested instruction presenting this defense if defendant was operating in the usual and customary way in exercise of due and proper care. 218Ky286, 291SW 375.

212–41 [a] **Mitigation of damages.**–Contributory negligence of motorist in driving car which seller of gasoline had overflowed goes only in mitigation of damages. 154Miss475, 122S735.

213–54 [a] (5) 165La229, 115S469 (distribution through metal lined hose).

214–61½–New. The act relating to explosives should be reasonably construed. 26 OhA7, 159NE585.

214–61½–New. The section of the statute making possession of explosives a felony controls in cases falling within the section covering general provisions. 26 OhA7, 159NE585.

214–64½–New. Where defendant incited, procured, or aided another in placing dynamite, he is guilty. 255Mass510, 152NE377.

214–64½–New. The offense of inciting or procuring another to place dynamite is a felony, and one present may be an accessory before the fact. 255Mass510, 152NE377.

215–81 46Philippine857. [d] **Under statute prohibiting the carrying of cartridges** containing dynamite, a charge that defendant carried nitroglycerine or dynamite caps has been held insufficient. 197 Ind189, 150NE49. [e] **Indictment insufficient** under statute punishing for injury to property by explosives. 318 Ill 188, 149NE269.

215–87 [c] (6) To authorize finding of defendant's guilty knowledge of plot, and that some one else placed dynamite, with assistance of defendant, knowing his criminal intent. 255Mass510, 152NE 377.

EXPORTATION

217–13 34F(2d)133.

EXPRESSIO EORUM QUAE TACITE INSUNT NIHIL OPERATUR

220-16 [a] 66Utah394, 243P114, 44ALR 1348.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

220-17 93Fla470, 112S253, 256 [cit Cyc]; 93Fla611, 112S768 [citCJ]; 123 Or57, 261P77; 66Utah394, 243P114, 44 ALR1348. [a] 311Mo 664, 279SW395, 400 [quotCJ]; 152Tenn451, 278SW417. [b] (1) 94Fla1128, 115S537, 538, 539, 540 [citCJ&Cyc]. (8) 311Mo 664, 279 SW395, 400 [quotCJ]. (9) 311Mo 664, 279SW395, 400 [quotCJ]. (11) 311Mo 664, 279SW395, 400 [quotCJ]. [c] 33 Ariz1, 261P629, 631 [citCyc]; 116Nebr 61, 215NW798. [e] 103Conn138, 130A 96 (does not apply to permissive provision enlarging common law); 311Mo 262, 278SW398; 123 Or144, 261P694, 699 ("great caution is necessary in dealing with the maxim"); 135Wash109, 237P12. [f] 273US593, 47SCt531, 71 Led793; 22F(2d)256; 105Conn94, 134 A248; 117Kan755, 233P510; 311Mo 262, 278SW398; 220MoA575, 287SW861; 74 Mont346, 240P837; 76Mont150, 245P 962; 77Mont62, 249P573; 78Mont1, 252 P301; 116Nebr170, 216NW182; 101NJ Eq227, 137A429; 190NC732, 130SE861; 191NC84, 131SE413; 24 OhNPNS145; 38 OklACR232 [reh pending]; 122 Okl 211, 253P500, 50ALR1232; 125 Okl 1, 256P340; 125 Okl 66, 256P704; 52ALR 1270; 123 Or57, 261P77; 126 Or395, 270P474(2dcase); 8PaDist&Co 267; 29 PortoRico 776; 132SC182, 128SE36; 132 SC241, 128SE172; TexCommnA 283SW 141; 135Wash109, 237P12; 142Wash 450, 253P805; 37BC336, [1926] 4DomLR 139, [1926] 3WestWkly265. [g] **Is not applied to instruction to jury** which must be considered as a whole. 312Mo 635, 281SW29.

EXTEND

225-71 NJ 150A581.
225-81 250 IllA258.

EXTINGUISHMENT

230-87 45 Ida229, 261P673, 676 [citCJ].

EXTORTION

233-2 17F(2d)339.
233-3 87PaSuper61. [b] **Term implies** that money paid was extorted by one receiving it and unwillingly paid. 17F (2d)339.
233-8 93Fla5, 112S289; 33 OklCr436, 244P206; 93PaSuper274. [a] **Construction of particular statutes.**–93Fla5, 112 S289.
234-10 34 OklCr381, 246P659.
235-36 [b] **Joint or separate trials** is within discretion of court, whether one indictment is joint for conspiracy or there are two indictments charging separate and distinct felonies. 89Pa Super454.
235-41 231Ky54, 20SW(2d)1011(2d case).
236-43½-New. A justice of the peace is guilty of extortion where he charges innocent persons on the highway with commission of an offense and accepts a fine from them and appropriates it to his own use. 103TexCr358, 280SW1065.
236-45 33 OklCr436, 244P206.
237-60 6PaDist&Co 497 (tax collector).
238-74 242NY313, 151NE631.
238-83 242NY313, 151NE631.
239-97 36GaA266, 136SE333; 127Misc 300, 216NYS116.
239-99 127Misc300, 216NYS116. [b] NJSup 150A253. [e] **Substance of threat used** must be set forth with some particularity, 127Misc300, 216NYS116.
241-42 GaA 136SE333.
241-51 See also 21 OhA26, 152NE788.
242-66½-New. Other evidence admissible. 242NY313, 151NE631.
242-66½-New. Other evidence inadmissible. 242NY313, 151NE631.
242-66¼-New. 103TexCr358, 280SW 1065.
242-73 17F(2d)339; 21 OhA26, 152NE 788 (whether person from whom excessive costs were obtained paid them himself or procured payment by another immaterial); 87PaSuper61; 93Pa Super193; 93PaSuper274. [c] **Evidence held insufficient** to sustain conviction. 75CalA365, 242P906.
249-34 [a] **Where nature of threat is alleged** in indictment charging attempted extortion, it must be proved as alleged and a variance as to such matter is material and not curable by amendment. 127Misc300, 216NYS116.

EXTRACT

251-44 See also 10CustA216; 12CustA 189.

EXTRADITION

254-2½-New. Extradition proceedings are not criminal nor is extradition punishment for crime. 16F(2d)955.
254-3 91Fla197, 107S409; 91Fla413, 107S541; 318Mo 928, 2SW(2d)612; 217 AppDiv514, 217NYS288. [d] **Constitutional provision** for interstate extradition is to be liberally construed. 6F(2d) 13.
255-10 217AppDiv514, 217NYS288.
255-15½-New. Laws of extraditing state have no effect beyond its borders. 105Conn374, 135A396.
255-18 MoA 9SW(2d)544.
256-27 22F(2d)1003.
256-29 199 Ind630, 158NE593; 160 Tenn44, 22SW(2d)222.
256-30 199 Ind630, 158NE593.
256-35 [a] **Charge of abandonment** of minor children is an extraditable offense. 54ND415, 209NW1006.
256-44 137Misc905, 244NYS590.
256-46½-New. Prisoner paroled to live in another state may be extradited by third state. 105Conn374, 135A396.
256-48 220AppDiv212, 221NYS323.
257-49 310Mo 355, 275SW923 (affidavit sufficient).
257-51 310Mo 355, 275SW923; 12Porto Rico Fed77.
257-52 218AppDiv461, 218NYS432. [a] **Paroled convict,** before expiration of sentence is under "charge" within statute. 126Misc591, 214NYS211. [b] **"Charge" is not abrogated by, or merged into, conviction.**–126Misc591, 214NYS 211.
257-55 93Fla963, 113S103; 220AppDiv 212, 221NYS323; 11PaDist&Co 356.
257-57 93Fla963, 113S103; 116Nebr 308, 217NW87; 218AppDiv461, 218NYS 432; 54ND415, 209NW1006, 1007 [cit CJ]; 33PortoRico 561, 564 [citCJ].
257-58 Ill 172NE168; MoA 9SW(2d) 544; Mont 287P636; 217AppDiv514, 217NYS288; 54ND415, 209NW1006, 1007 [citCJ]; TexCr 27SW(2d)815(1st case). See also 321Mo 268, 10SW(2d) 521. [c] **Person in demanding state though not in county therein** after alleged day of offense is fugitive subject to extradition. Mont 287P636.
257-59 246NY249, 158NE510; 217App Div514, 217NYS289; 112TexCr495, 17 SW(2d)1047; 112TexCr602, 17SW(2d) 1049.
258-61 217AppDiv514, 217NYS289.
258-63 MoA 9SW(2d)544.
258-65 93Fla963, 113S103.
258-65½-New. Leaving of state must have been voluntary to be extraditable. 126Misc591, 214NYS211.
258-65¼-New. Permission by federal authorities to bring prisoner to Texas for trial then taking him back to federal penitentiary does not take away status as fugitive from justice. 12F(2d) 976.
258-65¼-New. A person who has never been in the country from which he is said to have fled is not a fugitive from justice. 33PortoRico 561.
258-66 17F(2d)669; 244NY196, 155NE 98; 126Misc591, 214NYS211; 121 Or 202, 253P1042.
258-67 25F(2d)929 (to escape mob violence); 318Mo 928, 2SW(2d)612; 244 NY196, 155NE98; 126Misc591, 214NYS 211.
259-74 33NM324, 267P58 (though convict is in another state by express condition of parole and though revocation of parole was because of conduct in such state); 126Misc591, 214NYS211; 49SD 416, 207NW213. [a] **Overt act toward violating parole** done in demanding state, completed in state for which he departed is fugitive from justice. 126 Misc591, 214NYS211.
259-76½-New. That the parole agreement of a violator was made with the prison board of the requisitioning state and that the pardon board of such state initiated the extradition proceedings is immaterial where it is shown that the two boards are the same, the name having been changed. 49SD416, 207NW213.
259-76½-New. Violation of parole by entering private service of president of corporation in another state instead of service of corporation as directed by parole board is inconsequential to warrant extradition. 126Misc591, 214NYS 211.
259-76¼-New. Where a person convicted and paroled in another state voluntarily comes into a state, and thereafter his parole is revoked, he then has the status of an escaped convict, a fugitive from justice, OklCr 273P286.
259-76½-New. although he left the state in which he was convicted and paroled with the consent of the authorities. OklCr 273P286.
259-76½-New. One who has left the state becomes a fugitive from justice immediately upon revocation of parol. 101CalA251, 281P651.
259-77 TexCr 29SW(2d)357. See also 105Conn374, 135A396.
259-79 SD 227NW74; TexCr 25SW (2d)334.
259-79½-New. Previous agreement not to extradite made by representative of demanding state is valid and is no defense against extradition and waiver or estoppel will not apply. 105Conn374, 135A396.
259-80 126Misc591, 214NYS211.
259-81 NJCh 146A423(2dcase).
259-81½-New. Paroled convict who came to New York by express direction of parole board to accept employment is not extraditable as "fugitive from justice" within statute. 126Misc591, 214 NYS211. Contra 218NYS432 [rev 126 Misc591, 214NYS211].
259-81½-New. Paroled convict who came to Connecticut by permission of California parole board is nevertheless extraditable from Connecticut to Michigan. 105Conn374, 135A396.
259-83 OklCr 268P321.
259-87 [a] **Effect of honoring requisition.**–OklCr 268P323.
259-89 [a] (2) But prisoner paroled by one state to go into another is while in the second state, free, as the first state's parole laws have no effect in second state, and such person may be extradited by a third state. 105Conn 374, 135A396. (3) Under Oklahoma statute, governor, without concurrence of judicial branch of government, may waive jurisdiction of state over person at liberty by judicial parole or suspended sentence. OklCr 268P321.
260-95 316Mo 372, 289SW898.
260-98 129Misc327, 220NYS529.
266-1 126Misc591, 214NYS211; 129 Misc327, 220NYS529. [a] **Statute fixing maximum time for custody** is mandatory. 167La407, 119S408.
260-3 101NJEq540, 138A369.
260-4½-New. Where a fugitive is arrested without a warrant, sanction for his detention must be obtained from a magistrate of competent authority. 316 Mo 372, 289SW898.
260-4½-New. In such a case the jurisdiction of the magistrate or court sitting as a committing magistrate depends on the concurrence of a complaint made as required by law and the custody of the person complained against. 316Mo 372, 289SW898.
260-4¼-New. In some jurisdictions a committing magistrate has no jurisdiction to entertain a complaint in such case where the person accused, after having been arrested and given bond, fled to another state before the complaint was filed. 316Mo 372, 289SW 898.
261-7 148Miss335, 114S744 (affidavit held in proper form).

261-8½-New. A warrant of a justice of the peace of a sister state, without proof of its authenticity, is not proof such as is essential to commitment. 129 Misc327, 220NYS529.

261-8½-New. In some jurisdictions, in order to justify the holding of a person as a fugitive from justice to await requisition, a complaint must be on file before the committing magistrate, showing that a crime has been committed in another state, that accused has been charged in such state with such crime, that he has fled from justice, and that he is present in the asylum state. 316Mo 372, 289SW898.

261-9 [a] **Extradition demand** in so far as it named agent to receive fugitive must be sealed with state seal and attested by secretary of state. TexCr 25 SW(2d)334.

261-23 AlaA 129S681.

261-24 [a] **Recitals of jurisdictional facts** are prima facie evidence of facts. AlaA 129S681.

261-25 82CalA719, 256P250.

261-26 82CalA719, 256P250.

261-27 251NY33, 166NE795; 160Tenn 44, 22SW(2d)222.

261-28½-New. Requisition, petition, and annexed copy of proceedings are held not to show former jeopardy, precluding trial, if extradited. 17F(2d) 669.

261-28½-New. Sufficiency of requisition is to be measured by terms of federal Constitution and acts of congress. TexCr 25SW(2d)334.

261-30 27F(2d)842; 93Fla963, 113S 103; 217AppDiv514, 217NYS289; 220 AppDiv212, 221NYS323; 160Tenn44, 22 SW(2d)222.

262-35 172Minn401, 215NW863.

262-42 Ill 172NE168.

262-44 22F(2d)1003; 39F(2d)870 (indictment in language of statute held sufficient); 93Fla963, 113S103.

262-45 27F(2d)842.

262-47 22F(2d)876; 243NY417, 153NE 853.

262-48 27F(2d)842; 39F(2d)870; MoA 9SW(2d)544; 247NY238, 160NE357; 110TexCr58, 290SW170.

263-49 101NJEq75, 137A422; 243NY 417, 153NE853.

263-50 178Minn368, 227NW176.

263-52 27F(2d)842.

263-53 [b] **Affidavit held sufficient.**-251 NY33, 166NE795.

263-54 137Misc905, 244NYS590.

263-55 243NY417, 153NE853; 225App Div156, 232NYS217.

264-60 93Fla963, 113S103.

264-62 82CalA719, 256P250.

264-63 23F(2d)761; 27F(2d)842; Mo 31SW(2d)1. [a] (2) 172Minn401, 215 NW863. (8) Judge of district court. Mo 31SW(2d)1. [b] **Affidavit presumed made in court** where copy of record certified by clerk. Mo 31SW(2d)1.

264-64 243NY417, 153NE853.

264-65 170Ga826, 154SE342.

264-68 [a] **Failure to affix seal of court to jurat not invalidating affidavit.**-Mo 31SW(2d)1.

264-69 See also Mo 31SW(2d)1.

264-70 27F(2d)842; 93Fla963, 113S 103; 217AppDiv514, 217NYS289; 220 AppDiv212, 221NYS323; TexCr 25SW (2d)334. See also 112TexCr638, 18SW (2d)156(2dcase).

264-71 22F(2d)1003.

264-72 MoA 9SW(2d)544.

265-77 318Mo 928, 2SW(2d)612; 157 Tenn641, 12SW(2d)368.

265-79 157Tenn641, 12SW(2d)368.

265-84½-New. What state executive must have before him before issuing warrant is tested by federal constitution and act of congress. 93Fla963, 113 S103.

265-85 93Fla963, 113S103, 107 [cit CJ]; 258Mass289, 155NE12, 51ALR789; 318Mo 928, 2SW(2d)612; 157Tenn641, 12SW(2d)368.

266-86 258Mass289, 155NE12, 51ALR 789; 220AppDiv212, 221NYS323.

266-87 258Mass289, 155NE12, 51ALR 789; 220AppDiv212, 221NYS323.

266-88 MoA 9SW(2d)544; 160Tenn44, 22SW(2d)222.

266-89 95Fla37, 116S21. [a] **Strict compliance with the common-law rules of evidence** is not required. 265Mass 101, 163NE870.

266-1 258Mass289, 155NE12, 51ALR 789.

266-2 258Mass289, 155NE12, 51ALR 789; 246NY249, 158NE510; 227AppDiv 755, 237NYS31.

266-4 258Mass289, 155NE12, 51ALR 789.

267-13 318Mo 928, 2SW(2d)612.

267-14 318Mo 928, 2SW(2d)612.

267-15½-New. 258Mass289, 155NE12, 51ALR789.

267-20 110TexCr454, 10SW(2d)94(1st case).

267-24½-New. Issue of former jeopardy cannot be raised since that is matter of defense before court in which indictment is pending. 228AppDiv427, 240NYS27.

267-25 258Mass289, 155NE12, 51ALR 789.

268-29 310Mo 355, 275SW923.

268-30½-New. Where indictment in demanding state is pending in county court which is without jurisdiction, it will be presumed that proper order of transfer existed. TexCr 25SW(2d)334.

268-31 196NC662, 146SE599(2dcase).

268-34 157Tenn641, 12SW(2d)368.

268-36 91Fla413, 107S541, 544 [citCJ]; 196NC662, 146SE599(2dcase); 106Tex Cr94, 290SW1117. See also Mo 24SW (2d)111(3dcase).

268-38 95Fla37, 116S21. [b] **Middle initial of name of accused** is mere surplusage. Ill 172NE168.

268-42 217AppDiv514, 217NYS288.

268-43 93Fla963, 113S103; 113TexCr 20, 18SW(2d)647.

269-49 160Tenn44, 22SW(2d)222.

269-52 23AlaA238, 124S249(3dcase).

269-55 91Fla413, 107S541.

269-56 27F(2d)842.

269-66 93Fla963, 113S103; 54ND415, 209NW1006, 1007 [citCJ]; 106TexCr58, 290SW170. See also 110TexCr454, 10 SW(2d)94(1stcase).

269-67 93Fla963, 113S103; 54ND415, 209NW1006, 1007 [citCJ].

269-68 91Fla197, 107S409; 93Fla963, 113S103; 151Miss267, 117S596, 61ALR 709; 310Mo 355, 275SW923; 110TexCr 454, 10SW(2d)94(1stcase).

270-69 23AlaA238, 124S249(3dcase); 93Fla963, 113S103; 310Mo 355, 275SW 923; 54ND415, 209NW1006, 1007 [cit CJ]; 160Tenn44, 22SW(2d)222.

270-70 23AlaA423, 126S416(2dcase) (warrant is subject to such lawful claims to relief as petitioner may have); 91Fla413, 107S541; 217AppDiv514, 217 NYS289.

270-73 217AppDiv514, 217NYS289.

270-80 93Fla963, 113S103.

270-82½-New. Evidence should be regarded liberally in favor of demanding state, technical rules being inapplicable. 17F(2d)669.

270-82⅓-New. Courts will not inquire whether governor had application for requisition sworn to. 93Fla963, 113S 103.

270-82¼-New. It must be assumed by court that affidavits accompanying extradition demand showed sufficient facts. 258Mass289, 155NE12, 51ALR789.

270-82½-New. Where accused is charged with offense in another state, order remanding him to custody of extradition officer is held not unwarranted merely on testimony of accused and his wife denying that former was in that state on day charged as that of commission of offense. 104TexCr14, 282 SW223.

270-82⅙-New. Review is confined to the question of whether an executive exceeded his authority. 318Mo 928, 2SW (2d)612.

270-82⅓-New. Where it appears from requisition papers that there was a substantial compliance with the statutes of the demanding state for issuance of a warrant, the governor's determination will not be reviewed by the courts of the asylum state. 178Minn368, 227NW 176.

270-82⅛-New. The executive's finding of fact of result of erroneous application of the law is reviewable. 126Misc 591, 214NYS211.

271-91 91Fla197, 107S409.

271-95 TexCr 25SW(2d)334 (where extradition demand is insufficient as commission to agent of demanding state).

272-14 109Conn394, 146A837.

274-59 12PortoRicoFed50 (with Cuba).

276-91 [f] **Seduction** is not within treaty provisions establishing extraditable offense of kidnapping. 33F(2d)181.

276-92 [a] **Murder** held included in treaty with Canada. 38F(2d)862.

276-97 [k] 12PortoRicoFed77. [u] **Kidnapping** held included in treaty with Canada. 38F(2d)862.

277-6 PrEdwIsl [1929] 3DomLR737.

277-7 33F(2d)181.

277-12 16F(2d)955.

277-14 35F(2d)687.

279-55½-New. The Republic of France, intrusted by the League of Nations with protection of inhabitants of the Saar Basin of Germany, is not the proper government to apply for extradition of person to the Saar Basin. NS [1928] 3 DomLR240.

280-73 38F(2d)862.

281-90 12PortoRicoFed50.

284-41 See also 12PortoRicoFed77.

284-46 [a] **Proceedings need not be sworn to before judge.**-36F(2d)565.

284-55½-New. A complaint made on information and belief is sufficient where the source of information is given as affidavits which are properly authenticated and introduced in evidence and are sufficient to sustain the charge. 18 F(2d)503.

285-83 38F(2d)862.

285-84½-New. The sufficiency of the complaint or warrant issued thereon in a foreign country is not in issue. 18F (2d)503.

286-9 [a] **Indictment founded on incompetent evidence** is held not to support application for extradition. 39 QueKB359, [1926] 1DomLR639, 45Can CrCas181.

286-10 But see NS [1928] 4DomLR615.

286-11 But see 20SaskL571, [1926] 3 DomLR423, [1926] 2WestWkly504.

286-13½-New. Admission as to identity obtained from accused without warning is admissible whether or not admissible at trial. BC [1928] 1DomLR558.

288-45 [b] **Mode of authentication by consular certificate is not exclusive.**-18 F(2d)503. [c] **Power of consular officer to authenticate papers as evidence is not limited** to depositions on which original warrant of arrest in foreign country was based. 18F(2d)503.

288-47 18F(2d)503.

289-62 18F(2d)503, 505 [citCJ].

290-77 36F(2d)565. [c] **Evidence held not to warrant finding** of reasonable belief of fugitive's guilt of murder. 38F (2d)862.

290-78 33F(2d)181; 38F(2d)862. [c] **Evidence held to warrant** commissioner's belief that crime took place in foreign country. 38F(2d)862.

290-81 [a] **Evidence held not warranting** finding of reasonable belief of guilt of kidnapping. 38F(2d)862.

290-82 [a] **Where the state in which the fugitive was apprehended** has no statute of limitations for crimes charged, proceedings are not barred by lapse of five years. 38F(2d)862.

290-83 36F(2d)565; 38F(2d)862.

290-87 20SaskL575, [1926] 3DomLR 426. [i] **Sufficiency of prima facie case.**-PrEdwIsl [1929] 3DomLR737. [j] **Violation of Narcotic law.**-Man [1930] 1 DomLR752.

291-95½-New. Any doubt is to be resolved in favor of extradition. PrEdwIsl [1929] 3DomLR737.

291-97 36F(2d)565.

291-98 8F(2d)42.

292-22 27F(2d)362.

292-23 See also 27F(2d)362.

292-28 Man [1930] 1DomLR800.

292-32 12PortoRicoFed50; 12Porto RicoFed77.

295-75 [a] **Variance between actual and charged value of stolen property** does not sustain contention that defendant was tried on different charge from that for which he was extradited. 87CalA 236, 261P1103.

295-88½-New. The finding of an English magistrate that charge for which one was extradited was an extraditable offense is conclusive on the court of

this county. 240NY455, 148NE634.
296-94 240NY465, 148NE634.

EXTRAORDINARY

296-17 126Misc140, 212NYS890.
297-18 126Misc140, 212NYS890.
297-25 126Misc140, 212NYS890.
297-26 126Misc140, 212NYS890.
297-27 126Misc140, 212NYS890.
297-28 126Misc140, 212NYS890.

EXTRINSIC

232-16 [c] **Extrinsic fraud means fraud** which deprives a party of opportunity properly to present his case to court and jury. TexCivA 291SW605.

EX TURPI CAUSA NON ORITUR ACTIO

232-17 [b] (5) 152Tenn339, 279SW257. [c] 244 IllA224.
232-18 [a] 190NC829, 130SE609.

FACE

233-39 33Wyo 474, 240P683.

FACE VALUE

234-55 273US100, 47SCt263, 71L ed558.

FACILITY

234-70 193Wis528, 213NW633, 637 [cit CJ]. [a] 193Wis538, 213NW633.

FACTORS

240-2 200Cal 419, 253P715, 50ALR 1297; 82CalA474, 255P775; 235Mich 502, 209NW660; 127Misc855, 217NYS 595; 135SC123, 133SE205, 207 [quot CJ]. [c] (8) For sale of automobile. 200Cal 419, 253P715, 50ALR1297. (9) Where plaintiff appointed defendant as his exclusive agent for selling grapes and agreed to deliver grapes to defendant and promised to pay certain sum per crate as compensation. 100CalA611, 280P704.
241-10 235Mich502, 209NW660, 661 [quotCJ]; 127Misc855, 217NY8595. [b] 240NY223, 148NE328.
242-11 162NJL394, 136A202.
242-22 127Misc855, 217NYS595.
242-25 36GaA219, 136SE104, 105 [cit CJ].
242-25½-New. Factor's remuneration need not be by way of commission. 36 GaA219, 136SE104.
242-26 83CalA339, 256P839 (packing).
242-32 81CalA317, 253P757.
243-52 218AppDiv402, 218NYS423.
243-57 81CalA304, 253P331; Conn 152 A280.
244-58 87CalA642, 262P415.
244-64 235Mich502, 209NW660 (arrangement with automobile dealer held to make him a del credere factor); 240 NY223, 148NE328.
244-67 315Mo 823, 290SW416. [b] **Federal Packers & Stockyards Act of 1921** does not require commission company or its agent dealing in live stock on premises of stockyards company to deal only with stockyards company. 153Tenn225, 280SW1015. [c] **Where agency only furnished information to** customers and transmitted orders it was not subject to license as factor or broker. 170La337, 127S743.
244-69 315Mo 823, 290SW416. [c] **Construction of bond.**–178Minn136, 226 NW396 (governed by same rules as ordinary life and fire insurance policies). [d] **Such bond is not subject to cancellation** as an "official bond." Wash 227P333.
245-79 315Mo 823, 290SW416.
245-80 315Mo 823, 290SW416.
245-83½-New. Statutes requiring licenses, bonds, accurate bookkeeping, and records, and submission to official supervision have been held proper exercise of the state's police power. 315Mo 823, 290SW416.
246-94½-New. Provision making it misdemeanor for commission merchant to purchase goods received by him for sale on commission without written authority from consignor is not unreasonable. 315Mo 823, 290SW416.
246-0 [b] **"Your consigned cotton"** means cotton was delivered for sale, title to remain with consignor. 216Ala 314, 113S825.
246-6½-New. A letter written by a principal to a factor, but not attached to or in any manner referred to in the contract of consignment, does not modify the contract, especially in view of a provision in the contract that full and entire agreement between the parties was contained in the contract, which supersedes all previous contracts between the parties. 96CalA697, 274P761.
247-10 MoA 281SW144.
247-11 35GaA788, 134SE792.
247-14½-New. A provision in a contract for consignment of goods to a factor that either party could terminate the contract on sixty days' notice is valid and binding on the parties. 96 CalA697, 274P761.
247-17 MoA 281SW144.
247-17½-New. Death does not terminate such relationship. MoA 281SW144.
248-32 MoA 281SW144.
250-86 528D30, 216NW586, 587 [citCJ].
250-87 235Mich502, 209NW660; 52SD 30, 216NW586, 587 [citCJ].
251-94 258Mass17, 154NE330, 49ALR 267.
256-90 220MoA135, 281SW148.
257-7 124 Or71, 263P66, 69 [quotCJ].
257-8 124 Or71, 263P66, 69 [quotCJ].
257-12 204 Iowa255, 214NW583; 217 MoA691, 275SW62, 65 [citCJ].
258-15 204 Iowa255, 214NW583; 217 MoA691, 275SW62, 65 [citCJ]; TexCivA 275SW216.
258-17 204 Iowa255, 214NW583.
258-22 204 Iowa255, 214NW583; Tex CivA 275SW216, 218 [citCJ]. [a] Tex CivA 275SW216.
258-23 TexCivA 275SW216, 218 [cit CJ].
259-38½ 83CalA339, 256P839; 201 Iowa621, 207NW767, 768 [citCJ]; 204 Iowa255, 214NW583; 217MoA691, 275 SW62, 65 [citCJ]; 124 Or71, 263P66, 69 [quotCJ].
259-42 169Ark88, 272SW853.
260-44 169Ark88, 272SW853; 83CalA 339, 256P839.
260-56 204 Iowa255, 214NW583; 124 Or71, 263P66, 69 [quotCJ].
260-57 124 Or71, 263P66, 69 [quotCJ].
260-58 124 Or71, 263P66, 69 [quotCJ].
260-60 204 Iowa255, 214NW583; 124 Or71, 263P66, 69 [quotCJ].
260-61 124 Or71, 263P66, 69 [quotCJ].
260-63 83CalA339, 256P839.
261-71 168Ark547, 271SW342, 40ALR 383 (on decline in price and demand for margin factor had right to sell cotton in the usual course of trade to reimburse for advances and only bound to exercise good faith). [a] **General rule is that** under circumstances factor has right acting with good faith and reasonable discretion with regard both to reimbursement of himself and interest of his principal to sell property after reasonable notice to owner. 168Ark547, 271 SW342, 40ALR383.
262-85 220MoA135, 281SW148; MoA 272SW1003, 1004 [citCJ].
262-90 124 Or71, 263P66, 69 [quotCJ]. [b] (2) Duty of factor to know true condition of market before advising principal. TexCivA 275SW216. (3) If through negligence false statement is made to principal as to state of market whereby he is damaged factor is liable therefor. TexCivA 275SW216.
263-1 124 Or71, 263P66, 69 [quotCJ].
263-2 124 Or71, 263P66, 69 [quotCJ].
263-12 124 Or71, 263P66, 69 [quotCJ].
265-46 204 Iowa255, 214NW583.
265-50 31Ariz515, 254P1065; 201 Iowa 621, 207NW767, 768 [citCJ].
265-52 44Fed845; 201 Iowa621, 207 NW767.
266-54 31Ariz515, 254P1065.
266-57 31Ariz515, 254P1065; 201 Iowa 621, 207NW767; TexCivA 275SW216.
266-64½-New. Contracts have been construed as giving the consignor the option to demand a return of the goods and payment of ten per cent of the invoice price in case of failure of the factor to sell the goods within a stated time. 35GaA279, 133SE40.
267-81½-New. In the absence of showing of fraud presumption is that sale was fairly made and for best price available at time. 31Ariz515, 254P1065.
267-82 215Ala547, 112S124. [d] **As affected by condition of goods.**–6LaA46.
268-92 223AppDiv434, 228NYS414.
270-27½-New. Where a contract calls for consignee's settlement for goods within a specified period and for payment of interest, death of the consignee does not terminate interest and carrying charges on the unpaid balance. 247 Mich82, 225NW585.
271-42 81CalA317, 253P757. [d] **Factor cannot set up adverse claim to** proceeds as against principal. 81CalA317, 253P757.
271-52 81CalA317, 253P757.
272-75 81CalA317, 253P757; Or 281P 834 (factor not relieved by statute relating to public marketing agencies enacted for benefit of shipper).
273-91 Or 281P834.
273-2 CalA 290P590 (interest from date of last sale).
273-7 [a] **If agent has accounted to principal in accordance with agreement,** so that principal has received net profits of transaction, principal cannot recover for unpaid drafts. 81CalA304, 253P331.
274-17 LaA 129S399.
277-80 155Wash182, 283P695. [a] (2) Where contract pursuant to which goods were consigned to factor provided that they were to remain property of principal and subject to its control till sold by factor, latter could not claim ownership of goods consigned to him. 96CalA689, 274P758.
278-84 CalA 280P1013.
278-85 81CalA317, 253P757.
278-88 81CalA317, 253P757.
278-96½-New. Letter of shipper of cotton to consignee who had made advancements to shipper, after learning of sale on failure to forward additional margin, is held not such as to waive shipper's legal rights. 136SC79, 134SE217.
278-96½-New. Under contract to store cotton after making advancements to shipper thereon and requiring additional margin at option of consignee, consignee had right to sell cotton to protect himself from loss on shipper's failure to furnish margin required. 136SC79, 134 SE217.
279-6 222AppDiv28, 225NYS239.
279-14½-New. Where selling agent assisted in sale and was promised commission, he is so entitled on sale and delivery by principal directly to customer. LaA 129S399.
280-34 181Ark166, 25SW(2d)17. [d] **Interest allowed sales company on** amount due from date of demand. 136 Wash155, 239P2.
280-34½-New. The secretary of agriculture is authorized by statute to prescribe a schedule fixing the maximum commission rates chargeable for the purchase and sale of live stock by market agencies at stockyards. 29F(2d)750 (rates fixed held reasonable. [a] **Mathematical mean between two extremes is** not essential to such schedule. 29F(2d) 750. [b] **Penalties.**–29F(2d)750.
280-34½-New. Possibility of inadequate rate as so fixed by the secretary will not authorize the court's interference. 29F(2d)750.
280-34¼-New. Secretary of argiculture is authorized to fix schedule of charges for market agencies. 280US420, 50SCt 220, 74L ed524 (construction and review of order).
282-67 125Misc898, 211NYS819 (following express instructions).
286-36 96CalA689, 274P758; 258Mass 17, 154NE330, 49ALR267. [b] **Duty to resort to lien.**–240NY223, 148NE328.
289-79 [e] **Trust receipts issued by refiner of sugar** construed to recognize title in complainant bank, which had advanced money for purchase of sugar and to prevent refiner from deduction from proceeds of sale of sugar after refining indebtedness due to it from importer at whose instance bank had made the advances. 6F(2d)203.
290-86 [a] **One advancing money and** taking title acquires rights of owner, though purchase was for ultimate use and profit of another, having right to acquire ownership on complying with stated conditions. 6F(2d)203.
297-87½-New. Statute requiring filing of notice of lien upon merchandise or proceeds to procure repayment of loans

or advances is inapplicable to assignment of accounts receivable. 38F(2d)40.

398-95 245NY625, 157NE884. [a] (3) Where factor reported as valid sales purchases never completed, principal can recover damages thereby caused him in unnecessarily manufacturing goods. 245 NY625, 157NE884.

399-11 100CalA611, 280P704.

399-17 169Ark88, 272SW853.

399-28 83CalA339, 256P839.

400-39½-New. Where a factor sold at a point contrary to the terms of the contract with the principal, the remedy of an action for breach of contract is not the only remedy available to the principal. 100CalA611, 280P704.

400-53 92Fla470, 112S48; 223AppDiv 434, 228NYS414; TexCivA 25SW(2d) 323. See also 127Misc855, 217NYS595.

401-56 But see 36GaA459, 137SE106.

402-81 83CalA339, 256P839 (sufficient).

402-91½-New. Count failing to plead that contract has been held demurrable. 216Ala314, 113S25.

402-99 See also 100CalA611, 280P704.

403-7 83CalA339, 256P839 (ratification).

403-18 [a] (5) Where written contracts leave time of delivery and prices to be fixed thereafter, evidence of oral agreement as to delivery and prices is admissible. 42 Ida403, 245P683.

404-31 35GaA279, 133SE40. [a] (13) To show that factor's statement that there was no demand for cotton like plaintiff's was fraudulent. TexCivA 275 SW216. (14) To show that factor's statement that it was impracticable and almost impossible to obtain bids on cotton to be submitted to interior for acceptance or rejection was fraudulent. TexCivA 275SW216. (15) To show factor's negligence in failing to sell as ordered by plaintiff. 83CalA339, 256P 839; TexCivA 275SW216. (16) To show fraudulent representations inducing countermand of order to sell. Tex CivA 275SW216. (17) To show negligence. TexCivA 275SW216. (18) To show fraudulent representation that it was impossible to obtain bids. TexCivA 275SW216. (19) To support finding, that principals gave specified directions as to price. 42 Ida403, 245P683. (20) To show defendant knew plaintiff was owner of peaches shipped for sale. 36 GaA459, 137SE106. (21) To warrant defendant in avoiding liability on plea of accord and satisfaction by third party. 43 OklACR291. (22) To justify recovery of balance due on sale. 167Ga 654, 146SE477(2dcase). (23) In action for amount due for coffee sold by defendant for account of plaintiffs' intestate, evidence has been held to show that intestate, and not third party, broker, as claimed by defendant, was owner of coffee. 167La995, 120S623. [b] (3) To overcome factor's admission as to delivery of goods. LaA 129S399.

405-32 220Ky409, 295SW410.

405-33 36GaA459, 137SE106.

405-35 124 Or71, 263P66 (instruction warranted by evidence). [b] **Instructions held not to assume controverted facts.**–217MoA691, 275SW62. [c] **Instructions held justified by evidence.**–217 MoA691, 275SW62.

405-36 [a] (3) In action by principals to recover balance for goods delivered under contracts, question was for jury whether principals designated to whom goods were to be sold and price. 42 Ida403, 245P683.

405-37 217MoA691, 275SW62.

405-38 22F(2d)728.

405-44½-New. Instructions held correct. 42 Ida403, 245P683.

405-50½-New. Under consignment by which consignor was to deliver from time to time to consignee such goods as consignor saw fit, there was no liability on part of consignor for failure to ship goods. 298Pa530, 148A865.

405-51½-New. Excessiveness of charges is no defense to action in absence of limitation in instructions to factor as to amount. 125Misc898, 211NYS819.

406-57 35GaA788, 134SE792.

406-70 [c] **Pleas held insufficient.**–35 GaA788, 134SE792.

407-78 213AppDiv607, 211NYS53.

407-79 MoA 272SW1003.

407-82 [b] (3) Duplicate carbon copies held admissible. 120Kan423, 243P 1016. [d] **Letter written by principal to factor** held properly admitted. 120 Kan423, 243P1016. [e] **Evidence held admissible.**–221MoA135, 281SW148.

407-91 [a] (8) To require finding that plaintiff induced defendant to ship cotton on promise that it would net forty cents a pound. 168La567, 122S852. (9) Other evidence held sufficient. 77Mont 524, 251P1057. [b] (2) To show that any sum was due plaintiff on contract to supply equipment and handle grain for cost plus commission. 213AppDiv 607, 211NYS53.

408-93 [a] **Instruction held erroneous, which ignores factor's interest.**–220MoA 135, 281SW148.

408-94 201 Iowa621, 207NW767 (whether sale made within reasonable time); 176Minn480, 224NW146. [a] (2) 204 Iowa255, 214NW583. (6) Whether shortage in wool consigned for sale was due wholly to shrinkage. 204 Iowa255, 214NW583. [b] 204 Iowa255, 214NW583. [d] **Chancellor's finding of facts not disturbed** under circumstances, though low price was some evidence of bad faith. 168Ark547, 271SW342, 40 ALR383.

409-20 [b] **Authority of factor to sue in own name** is limited to period before he receives compensation. 39F(2d)80.

412-81½-New. A factor selling crops on which a landlord has a lien is liable to the landlord as a purchaser under some statutes. 152Tenn166, 274SW 544.

412-83 221MoA420, 279SW764, 766 [cit CJ].

416-39 CalA 280P1013.

416-41 Cal 286P1014 (assignee held chargeable with notice).

416-49 200Cal 419, 253P715, 50ALR 1297.

416-51 200Cal 419, 253P715, 50ALR 1297.

416-57 Cal 286P1014; 81CalA317, 253 P757, 763 [quotCJ].

420-92 [c] **In Tennessee.**–152Tenn528, 279SW390.

420-97 [a] **In Canada.**–[1926]CanSC 129, [1926] 1DomLR257.

421-9½-New. The statute does not protect junior claimants, since it inures only to those obtaining valid liens on specific security. 30F(2d)555.

423-38½-New. Where possession is obtained honestly, and subsequently there is formed an intent to convert the goods, the rights of a third person are not affected by such intent. 132Misc455, 230NYS102.

423-40 156Tenn229, 299SW1039. [a] (4) **Factors** intrusted with merchandise for storage merely, and who took warehouse receipts in their own name, could not, by negotiating receipts, convey title to bona fide purchaser. 156Tenn229, 299SW1039. [c] **Receipt of automobile for sale to customer who refuses it** constitutes holding under consignment with authority to sell or pledge under statute. 259Mass302, 156NE440. [d] **Repledge held not substitution.**–259Mass 302, 156NE440. [e] **Pledge held not for antecedent debt.**–259Mass302, 156NE 440.

423-41½-New. The fact that factors paid freight charges on cotton shipped to them for storage only, and also storage and insurance premiums, does not render their possession as security for advances. 156Tenn229, 299SW1039.

425-61 132Misc455, 230NYS102; 136 Misc325, 240NYS5.

427-86½-New. The principal is not required, in a suit against one to whom the factor assigned a conditional sale contract after unauthorized sale for credit, to elect between a cause of action for quieting title and for recovery of possession of the sale contract. CalA 280P1013.

428-94 [b] (2) To sustain finding that former owner delivered automobile to agent for sale. 200Cal 419, 253P715, 50 ALR1297.

FACTORY

428-1½-New. Any building, room or inclosure, premises, place, or establishment where any goods, wares, merchandise, commodities or products are manufactured, made, finished, printed or engraved, worked on, altered, repaired, polished, cleaned, renovated, or assorted in whole or in part for sale or for wages or compensation. 316 Ill 519, 147 NE384, 38ALR1533.

FAILURE

430-60 320Mo 189, 6SW(2d)883, 885 [quotCJ].

FAIR

431-93 99CalA240, 278P476.

431-23 51SD603, 216NW346.

431-24½-New. "Fair damages for the wrong suffered," 142Va197, 128SE644.

432-34 19F(2d)202.

FALSE

435-16 113 ObSt450, 149NE551.

436-18 113 ObSt450, 149NE551.

436-22 192Wis102, 212NW269.

436-25 See also 4HawaiiFed113.

438-91½-New. "false words," 327 Ill 85, 158NE356.

438-94½-New. , "false written statement." 22F(2d)131.

FALSE IMPRISONMENT

443-1 205 Iowa752, 218NW499; 255 Mass340, 151NE317. [a] (3) 149Va906, 141SE860. (10) Any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere. 143Va 71, 129SE244. (11) False arrest or imprisonment is any unlawful physical restraint by one of another's liberty whether in prison or elsewhere. 121Kan 42, 245P1054. [b] (2) Criminal Code par 227. 324 Ill 131, 154NE715.

443-2 15F(2d)314; 121Kan42, 245P 1054; 143Va71, 129SE244 (without lawful process).

443-2½-New. , or the unlawful execution of lawful process. 143Va71, 129SE 244.

443-3 TexCommnA 12SW(2d)118.

444-5 Wis 229NW83.

444-6 86 IndA462, 158NE583.

444-14 158La874, 104S747, 750 [quot CJ].

444-15 158La874, 104S747, 750 [quot CJ]. [a] 219Ala225, 121S526.

444-16 158La874, 104S747, 750 [quot CJ]; 198NC23, 150SE492; 56ND227, 216NW898, 56ALR1217.

448-44 117 Or492, 244P543, 544 [cit CJ].

448-46½-New. The action may have for its primary basis a written statement under oath or otherwise. 93Fla1085, 113 S378.

448-50 15F(2d)314; 153Va348, 149SE 453.

449-53 Ala 128S447; 252NY202, 169 NE277; 198NC23, 150SE492.

450-55 MoA 3SW(2d)1033; 117Nebr 813, 223NW4; 129 Or224, 277P101; WVa 155SE127.

450-57 20AlaA316, 101S811, 813 [cit CJ].

451-60 Ala 128S447; WVa 155SE127. But see 1LaA702 (liability of corporation).

451-67 215Ala116, 110S28; 255Mass 340, 151NE317; NJSup 138A205. [d] **To constitute false arrest** there must first be arrest which necessitates actual taking into custody. 158La874, 104 S747. [e] **Actual arrest or conduct raising reasonable apprehension that force will be used** is necessary. MoA 286SW 738. [f] **Charge held proper.**–31 OhA 340, 167NE469.

452-74 Ala 128S447; 23AlaA168, 123 S237, 244 [citCJ]; 243 IllA251; 168 Minn77, 209NW532, 533 [citCJ]. [b] **Restraint, however slight, on another's liberty constitutes "arrest."** GaA 155 SE112.

452-75 TexCommnA 24SW(2d)378.

452-75½-New. But to constitute a false arrest there must be an arrest necessitating an actual taking into custody. 158La874, 104S747.

452-76 324 Ill 131, 154NE715; 168Minn 77, 209NW532, 533 [citCJ]; Tex CommnA 24SW(2d)378; 153Va348, 149 SE453 (neither confinement in jail, nor placing under armed guard, nor resistance to maintain freedom, is essential); 150Wash380, 273P198.

453–83½–New. Going in search of one to arrest him is not an arrest where he is not taken into custody. 158**La**874, 104**S**747.

453–85½–New. Constitutions, in some states, provide that imprisonment in violation of law, gives right to redress. **TexCommnA** 12**SW(2d)**118.

453–86 68**Utah**507, 251**P**23, 24 [quot Cyc].

454–87 324 **Ill** 131, 154**NE**715; 168**Minn** 77, 209**NW**532, 533 [citCJ]; 103**NJL** 213, 136**A**425.

454–91 239**Mich**224, 214**NW**310 [quot CJ].

454–93 239**Mich**224, 214**NW**310, 311 [quotCJ].

454–94 168**Minn**77, 209**NW**532, 533 [cit CJ]; **NJSup** 138**A**205; 252**NY**202, 169 **NE**277; **TexCivA** 276**SW**298.

454–95 168**Minn**77, 209**NW**532, 533 [cit CJ]; **NJSup** 138**A**205; **TexCivA** 276**SW** 298; 149**Va**906, 141**SE**860; 153**Va**348, 149**SE**453.

455–99 **TexCivA** 276**SW**298.

455–4 198**NC**23, 150**SE**492; **TexCivA** 276**SW**298. [a] (2) Act of conductor of train in placing passenger in custody of marshal is sufficient reasonably to cause belief by passenger that he is under arrest. **MoA** 286**SW**738.

455–6 **TexCivA** 276**SW**298; **BC** [1930] 1**DomLR**805 (effect of subsequent search of plaintiff).

456–9 [b] **Voluntary surrender** to officer who holds no warrant is not arrest. 158**La**874, 104**S**747.

456–12 **TexCivA** 276**SW**298.

456–13 **TexCivA** 276**SW**298.

456–14 121**Kan**42, 245**P**1054; **Kan** 289 **P**472 (filling station).

456–15 121**Kan**42, 245**P**1054; 255**Mass** 340, 151**NE**317.

457–33 **GaA** 155**SE**112; 198**NC**23, 150 **SE**492; 31 **OhA**340, 167**NE**469 (department store agent has no right to detain customer on mere petit larceny charge); 152**Wash**580, 278**P**681. [a] **Illustrations.–GaA** 155**SE**112.

457–38 [h] **NS** [1929] 1**DomLR**989.

458–41 [c] **Officer acting according to his precept** in making arrest is not trespasser, though person arrested is privileged from arrest. 124**Me**391, 130**A**233.

458–50 321 **Ill** 305, 151**NE**911, 45**ALR** 1457 (recognizing rule).

458–51 321 **Ill** 305, 151**NE**911, 45**ALR** 1457.

459–54 **Ariz** 284**P**149.

459–55 321 **Ill** 305, 151**NE**911, 45**ALR** 1457.

459–57½–New. Officer arresting person on suspicion of insanity without filing complaint and obtaining order for arrest can justify only by showing reasonable grounds for belief and belief that person was insane and that it would not be safe to delay arrest. **Ariz** 284 **P**149.

459–62 See also 321 **Ill** 305, 151**NE**911, 45**ALR**1457.

460–66 93**Fla**1085, 113**S**378, 382 [cit CJ].

462–19 243 **IllA**251; **TexCommnA** 12 **SW(2d)**118; 152**Wash**580, 278**P**681. [a] (6) Imprisonment by jailer without mittimus or other legal process. 101 **WVa**650, 133**SE**365, 46**ALR**799. [e] **Street car conductor had no right to detain passenger** finding money on floor of street car who refused to turn money over to him. 31 **OhA**248, 166**NE**909.

463–21½–New. Courts are liberal in construing the rights of an officer to arrest without a warrant for an offense committed in his presence. 218**Ky**147, 291**SW**15.

463–23 160**La**21, 106**S**660; 2**LaA**213, 216 [quotCyc]; 255**Mass**340, 151**NE** 317; 136**Wash**624, 241**P**1.

463–24 255**Mass**340, 151**NE**317; 199 **Wis**115, 225**NW**738.

464–35 299**Pa**109, 149**A**159.

464–41 324 **Ill** 131, 154**NE**715; 222**MoA** 296, 297**SW**163.

465–43 152**Wash**580, 278**P**681. [i] **Misdemeanor committed in another state.–** 86**CalA**269, 260**P**952.

466–46 243 **IllA**251.

468–74 217**Ala**295, 116**S**145.

469–85 **MoA** 38**W(2d)**1033; **Alta** [1928] 3**DomLR**319.

469–88 222**MoA**296, 297**SW**163.

470–94 [a] (2) Dentist, who called policeman solely to remove obstreperous patient, is not liable for false imprisonment because officer detained patient, though dentist failed to swear out complaint. 100**CalA**188, 279**P**840.

470–96 **MoA** 291**SW**159.

471–98 [c] **Furnishing aid which facilitates unlawful arrest** subjects one to liability for false imprisonment. 23**AlaA** 12, 121**S**437(2dcase) [certiorari den 219 **Ala**139, 121**S**441(1stcase)].

471–2 121 **Or**492, 256**P**197; 136**Wash** 624, 241**P**1.

471–5 121 **Or**492, 256**P**197.

471–6 121 **Or**492, 256**P**197.

471–8 121 **Or**492, 256**P**197; 299**Pa**109, 149**A**159; 136**Wash**624, 241**P**1.

471–14 [a] 233**Ky**97, 25**SW(2d)**65.

472–15 324 **Ill** 131, 154**NE**715; 121 **Or** 492, 256**P**197.

473–22 121 **Or**492, 256**P**197.

473–24 But see 220**Ala**227, 124**S**512.

473–25 218**Ala**468, 118**S**794.

473–26 218**Ky**147, 291**SW**15.

473–34 219**Ala**225, 121**S**526; 39**GaA**773, 148**SE**534; **Mass** 167**NE**748; 157**Miss** 77, 127**S**718 (arrest of discharged employee who refuses to leave premises as requested); **TexCivA** 4**SW(2d)**999.

474–35 177**Minn**307, 225**NW**148.

474–37 93**Fla**1085, 113**S**378.

474–39 93**Fla**1085, 113**S**378.

474–43 177**Minn**307, 225**NW**148.

477–76 **Ark** 30**SW(2d)**223; 105**Conn** 177, 134**A**810.

478–77 105**Conn**177, 134**A**810.

478–91 [a] **"Jurisdiction"** in false imprisonment cases includes jurisdiction of person imprisoned and jurisdiction to enter particular judgment. 82**Colo** 173, 257**P**1086.

481–22½–New. But where defendant is not responsible for the issuance of a void warrant upon valid indictment for an arrest, it is held he cannot be held liable for false imprisonment. 219**Ala** 225, 121**S**526.

482–31 82**Colo** 173, 257**P**1086.

484–59 82**Colo** 173, 257**P**1086.

486–92 213**Ala**139, 104**S**260, 40**ALR**285; 82**Colo** 173, 257**P**1086; 39**GaA**773, 148**SE** 534.

486–93 15**F(2d)**314.

486–94 213**Ala**139, 104**S**260, 40**ALR**285; 82**Colo** 173, 257**P**1086. [g] **Officer arresting is protected,** though warrant is not returnable to county where crime was committed. 213**Ala**139, 104**S**260, 40 **ALR**285.

483–10 99**Vt**219, 131**A**21, 49**ALR**1382. See also **NS** [1928] 1**DomLR**861.

491–62 216**Ala**235, 113**S**49; **Ida** 290**P** 208.

491–63 30**F(2d)**530; 220**Ky**246, 294**SW** 1069; 117 **Or**492, 244**P**543, 544 [quot CJ].

492–70½–New. Officer making arrest without warrant must put prisoners in jail and attempt to secure attendance of absent magistrate. 33**F(2d)**431.

492–74 71**CalA**112, 234**P**869; 299**Pa**109, 149**A**159. [e] **Ignorance of statute** requiring person arrested without warrant to be taken without unnecessary delay, before nearest or most accessible magistrate, does not lessen duty or obviate results of unnecessary delay. 71**CalA**112, 234**P**869. [f] **Reasonable delay** may be justified by circumstances. **Ida** 290**P**208.

493–81 117 **Or**492, 244**P**543, 544 [cit CJ].

493–83 71**CalA**112, 234**P**869 (delay held unreasonable).

494–91½–New. Plaintiff cannot avail himself of delays due to fault of himself or agents. 38**F(2d)**431.

495–2 [a] **Statute providing for confinement to county jail during adjournments** may not prevent incarceration in city prison between arrest and examination. 233**Ky**97, 25**SW(2d)**65.

495–4 [a] **Confinement in uncomfortable cell** does not give one right of action against officers arresting him. 251 **Mich**265, 231**NW**579.

495–18 [a] But see 30**F(2d)**530.

496–19½–New. Plaintiff could recover damages from defendants who made false representations to bondsmen on a bail bond to effect that all the other bondsmen had withdrawn, thereby inducing the bondsmen to withdraw from the bond with result that plaintiff was compelled to remain in jail. 84**Mont** 338, 275**P**753.

496–21 [d] **Writ of habeas corpus** will not relieve a sheriff, falsely imprisoning plaintiff, from liability for continuance of imprisonment subsequent to issuance and service of the writ, especially where after the bond had been made and accepted he continued to detain plaintiff because of a telegram from the sheriff of another county. **TexCommnA** 12**SW (2d)**118.

496–24 229**Ky**32, 16**SW(2d)**493; 229 **Ky**53, 16**SW(2d)**505, 64**ALR**648; **MoA** 286**SW**738.

496–26 229**Ky**32, 16**SW(2d)**493; 229 **Ky**53, 16**SW(2d)**505, 64**ALR**648.

496–29 229**Ky**32, 16**SW(2d)**493.

497–41 100**CalA**188, 279**P**840; 216**Ky** 479, 287**SW**914; **TexCivA** 4**SW(2d)**999, 1003 [citCJ].

497–42 [b] **Defendant who arrested plaintiff is not liable for delay after** prisoner turned over to sheriff. 38**F(2d)** 431.

497–43 105**Conn**177, 134**A**810. [a] 101 **WVa**650, 133**SE**365, 46**ALR**799 (detention over night under outrageous conditions).

497–48 101**WVa**650, 133**SE**365, 46**ALR** 799 (defendant is liable only for his part in wrong committed).

498–53 192**NC**749, 136**SE**6; 117 **Or**492, 244**P**543, 544 [citCJ].

498–54 **TexCommnA** 12**SW(2d)**118.

498–55 239**Mich**224, 214**NW**310.

499–61 **TexCivA** 286**SW**276.

499–63 220**Ala**227, 124**S**512; 23**AlaA**12, 121**S**437(2dcase) [certiorari den 219**Ala** 139, 121**S**441(1stcase)]; 82**Colo** 173, 257 **P**1086, 1092 [citCJ]; 205 **Iowa**752, 218 **NW**499, 502 [citCJ]; 117 **Or**492, 244**P** 543, 544 [citCJ]; 283**Pa**356, 129**A**99.

499–65 239**Mich**224, 214**NW**310; **MoA** 291**SW**159; 117 **Or**492, 244**P**543, 544 [citCJ].

499–76 82**Colo** 173, 257**P**1086, 1092 [cit CJ].

500–79 22**AlaA**448, 116**S**915.

500–80 [b] **Police chief liable for false imprisonment by jailer.–**152**Wash**580, 278**P**681.

500–81 [f] **Merely informing officers what another had told him,** which officers act on own initiative, does not render conductor liable. 261**Mass**255, 158**NE**771.

500–82 36**F(2d)**460; 284**Pa**117, 130**A** 306; 103**WVa**627, 138**SE**331.

500–83 **GaA** 155**SE**112; 190**NC**406, 130 **SE**32 (scope of employment and not intent to benefit). [b] **Implied authority.–** 148**Md**279, 129**A**348. [c] **While servant does not require special authority** to protect his master's property from felony or to recover it back, he has no implied authority to punish one whom he supposes has done something with reference to it. 148**Md**279, 129**A**348.

501–91 243 **IllA**251.

501–92 36**F(2d)**460.

502–93 But see 220**Ala**227, 124**S**512.

502–97 **NJSup** 140**A**8; **TexCommnA** 24 **SW(2d)**378; 101**WVa**480, 133**SE**73. [g] 148**Md**279, 129**A**348.

503–2 212**Ala**608, 103**S**658.

503–5 214**Ala**257, 107**S**825. [a] (2) Detective employed to investigate and report facts is not authorized to arrest or cause arrest. **MoA** 286**SW**738.

503–6 But see **MoA** 286**SW**738.

504–12 299**Pa**109, 149**A**159.

504–14 299**Pa**109, 149**A**159.

505–18 [b] **Rule is not applicable** where special officer is not public officer. 212**Ala**608, 103**S**658.

505–19 164**Ga**594, 139**SE**52. [a] (2) Where officer arrested plaintiff for embezzlement at instigation of third party, company is not liable therefor where railroad property was not involved, and where there was no proof of authority or ratification given by company. 284 **Pa**117, 130**A**306.

505–20 299**Pa**109, 149**A**159.

505–22 299**Pa**109, 149**A**159.

505–28 164**Ga**594, 139**SE**52.

506–38 299**Pa**109, 149**A**159.

506–41 212**Ala**608, 103**S**658; 164**Ga**594, 139**SE**52.

507-45 174Ark529, 296SW33.
507-48 MoA 272SW984.
507-49 200Wis15, 227NW235.
508-53 174Ark529, 296SW33.
509-62 MoA 286SW738.
509-64 174Ark529, 296SW33.
509-66 180Ark684, 22SW(2d)408.
510-71 MoA 293SW791.
511-85 220Ala227, 124S512 (showing of corporate act); 299Pa109, 149A159.
511-93½-New. Ratification. Ordering detention is a ratification of arrest, 214 AppDiv259, 212NYS189.
511-93½-New. and constitutes a technical false imprisonment by corporation. 214AppDiv259, 212NYS189.
512-5½-New. An agent is personally liable to an injured person for wrongs or injuries inflicted outside the scope of his authority. 103WVa627, 138SE 331.
512-8 82Colo 173, 257P1086, 1089 [cit CJ].
513-18 117 Or492, 244P543, 544 [cit CJ]. But see NJSup 135A795.
513-24 TexCivA 4SW(2d)999.
514-29 86CalA269, 260P952. [b] **Mere fact that arresting officer is subject to orders of city marshal** does not make latter liable for arrest or imprisonment. 86CalA269, 260P952.
514-32 But see 101CalA365, 281P1051.
514-41 79Mont82, 255P18, 19 [quotCJ].
514-42 79Mont82, 255P18, 19 [quotCJ].
515-43 99Vt219, 131A21, 49ALR1382.
515-55 82Colo 173, 257P1086; 78Mont 114, 252P803; 117 Or558, 245P318, 320, 45ALR600 [quotCJ].
516-56 117 Or558, 245P318, 45ALR600.
516-59 78Mont114, 252P803; NJ 149 A766 (assistant prosecutor); 120 Okl 105, 250P519.
516-63 117 Or558, 245P318, 319, 45 ALR600 [citCJ].
517-64 117 Or558, 245P318, 319, 45 ALR600 [citCJ].
517-65 15F(2d)314; 78Mont114, 252P 803.
517-66 [a] (5) County attorney. 120 Okl 105, 250P519.
517-70 117 Or558, 245P318, 45ALR600.
518-78 117 Or558, 245P318, 45ALR600.
518-79 117 Or558, 245P318, 45ALR600.
519-91 117 Or558, 245P318, 45ALR600.
521-24 78Mont114, 252P803.
521-29 78Mont114, 252P803.
522-36 Sask [1930] 2DomLR576.
522-39 78Mont114, 252P803.
523-50 41GaA750, 154SE816.
523-59 41GaA750, 154SE816.
523-65 82Colo 173, 257P1086.
524-71 See also Alta [1928] 1DomLR 941.
524-81 255Mass340, 151NE317.
525-86 68Utah507, 251P23.
526-98 219AppDiv291, 219NYS724.
527-14 261Mass255, 158NE771.
527-14½-New. whether plaintiff was aware of his legal rights when he signed a release as a condition to being freed, 261Mass255, 158NE771.
527-21 219Ala155, 121S510.
529-52 [c] **In Montana** defendant is entitled to have action tried in county where tort was committed. 74Mont393, 240P823.
530-55½-New. Where the statute provided that the action shall be brought in the court where the tort happened, the court of such county does not lose jurisdiction of nonresident officers by the discharge of resident officers. 239 Mich224, 214NW310.
530-59 86 IndA462, 158NE583.
530-61 205 Iowa752, 218NW499. [a] 212Ala608, 103S658; 40GaA492, 150SE 468; NJSup 141A570; 90PaSuper305; 68Utah507, 251P23. [b] 101CalA365, 281P1051; 234Ky751, 29SW(2d)17. [c] **Petition held demurrable** as to magistrate, in action against magistrate, constable, and others. 234Ky751, 29SW (2d)17.
530-62 6Alaska448; 84CalA269, 257P 888; 25Del 312, 80A235; 93Misc332, 157 NYS103, 34NYCr191; 117 Or492, 244P 543. [b] (5) Allegation that plaintiff was restrained of liberty without justification. 120 Or117, 250P739.
531-73 117 Or492, 244P543, 544 [quot CJ]; 120 Or117, 250P739.
531-74 [a] **Allegation officer acted under color of authority,** when contradicted by specific allegations, is insufficient as respects subsequent illegal detention. 234Ky751, 29SW(2d)17.
532-99 93Fla1085, 113S378, 382 [cit CJ]; 221AppDiv50, 222NYS290; 117 Or 492, 244P543 (complaint held sufficient). [c] Contra 221AppDiv50, 222NYS290. [f] **Petition charging detention against request to be taken before magistrate** held sufficient. 220Ky246, 294SW1069.
533-1 Ala 130S552.
533-3 93Fla1085, 113S378.
533-5 Contra 221AppDiv50, 222NYS 290.
533-8 78Mont114, 252P803.
533-12½-New. Allegations of excess of jurisdiction are insufficient. 78Mont114, 252P803.
535-41 120 Or117, 250P739, 740 [cit CJ].
535-52½-New. In some jurisdictions the fact that plaintiff unnecessarily anticipates the defense of justification does not relieve defendant of the necessity of pleading it. 120 Or117, 250P739.
535-53 68Utah507, 251P23.
536-61½-New. A plea failing to show probable cause held demurrable. 216 Ala235, 113S849.
536-63 68Utah507, 251P23, 25 [quot Cyc].
536-65 68Utah507, 251P23, 25 [quot Cyc].
536-67½-New. Defense that after plaintiff was arrested by a citizen for misdemeanor he was set free at his request has been held proper. 219App Div291, 219NYS724.
537-90½-New. A reply, admitting plaintiff's subsequent arrest on a charge of an improper use of license plates, and alleging that defendant did not arrest or attempt to arrest plaintiff for such offense, constituted a sufficient denial of the allegations in the answer that plaintiff had violated the law in the officer's presence. 229Ky53, 16SW (2d)505, 64ALR648.
538-3 [b] (3) Mode of arrest held unessential. 212Ala608, 103S658.
538-8½-New. Evidence of lawful arrest for probable cause is admissible under general issue. 216Ala235, 113S 49.
538-8¼-New. Where complaint alleges conjunctively unlawful arrest and imprisonment of plaintiff, proof of both is required. 215Ala116, 110S28.
538-8¼-New. In action for false imprisonment based on arrest for sale of mortgaged chattels by mortgagor, that mortgage was given for fraudulent purpose is immaterial. 130Kan707, 288P 582.
538-10 22AlaA448, 116S915; 149Va 882, 141SE829; 199Wis115, 225NW738. [a] **Unnecessary allegations need not be proved.-Mass** 168NE722.
538-13 283Pa356, 129A99.
538-14 283Pa356, 129A99; 284Pa117, 130A306.
539-17 233 IllA373 (dictum); 205 Iowa 752, 218NW499; 255Mass340, 151NE 317; 155Miss207, 124S325; MoA 272 SW984; 142Wash236, 252P922; WVa 155SE127. [a] 155Miss207, 124S325.
539-19 [b] 149Va882, 141SE829.
540-26 143Va71, 129SE244.
540-26½-New. A person making the arrest must be held to have known facts easily ascertainable. MoA 3SW(2d) 1033.
540-27½-New. Injury to reputation may not be presumed from the fact of unlawful imprisonment. 129 Or224, 277 P101.
541-29 84 IndA192, 149NE651; 201 Iowa1083, 205NW972; 177Minn307, 225 NW148; 152Va368, 147SE267; 199Wis 115, 225NW738. [a] (20) Other evidence held irrelevant. 214Ala257, 107S 825; 217Ala66, 114S801.
541-33 Ala 130S552; Kan 289P472.
541-37 [a] (5) Ordinances relative to transfers on street cars. 149Va882, 141 SE829. (6) Evidence as to conduct of plaintiff continuously trespassing on school grounds up to time of arrest was erroneously excluded. 153Va228, 149 SE619.
542-43½-New. Plaintiff by own testimony may identify herself by showing ownership of property and that she was wife of highly respected citizen. 143 Va71, 129SE244.
543-49½-New. Criminal complaint and warrant subsequently secured by the officer arresting a person without a warrant are admissible. 177Minn307, 225 NW148.
544-75½-New. Statements by officers other than defendants in defendants' absence are incompetent. 261Mass255, 158 NE771.
544-84½-New. Additional evidence of plaintiff's innocence held admissible. 121 Or492, 256P197.
544-85 MoA 286SW738; 143Va71, 129 SE244 (where right of recovery relied on merely unlawful act, evidence of good character inadmissible). [c] **Testimony that plaintiff violated law** does not put character in issue so as to make evidence of good reputation admissible. MoA 286SW738.
544-87 MoA 3SW(2d)1033. See also 143Va71, 129SE244. [a] (4) Other instances. 155Miss207, 124S325. [d] (3) Other instances. 155Miss207, 124S325.
545-90 120 Or117, 250P739.
545-92 120 Or117, 250P739.
545-94 But see Ala 130S552.
546-5 120 Or117, 250P739.
546-6 [a] (1) 174Ark529, 296SW33.
546-7 214Ala257, 107S825; 120 Or117, 250P739. [a] (2) Exclusion of evidence as to information whereon defendant ordered plaintiffs' arrest was error. 153Va228, 149SE619.
546-13 Ala 130S552 (aggregation of damages).
547-15 [c] (1) 205 Iowa752, 218NW 499. [d] (1) 86CalA269, 260P952. [g] (2) That plaintiff lost time in attending court to defend prosecution and value thereof. Ala 130S552. [h] **That plaintiff had wife and eight children** held admissible. 121Kan42, 245P1054. [i] **Loss of position by employee** may be shown. 121Kan42, 245P1054. [j] **Fact and incidents of** imprisonment outside county are admissible under counts for abuse of process. 213Ala139, 104S 260, 4ALR285. [k] **Injury to reputation.-MoA** 3SW(2d)1033.
547-20 Utah 279P401. [a] (1) Kan 289P472; 239Mich295, 214NW310, 55 ALR1157; 77Mont110, 250P819; NJ 141A170; 103NJL213, 136A425; 128 Misc263, 219NYS295; 22 OhA520, 155 NE151; TexCivA 32SW(2d)363; 149Va 906, 141SE860. (3) 176Minn203, 223NW 94. (5) 170La552, 128S513. (7) Tex CivA 286SW276; 149Va906, 141SE860. (8) 212Ala608, 103S658; MoA 286SW 738; 31 OhA248, 166NE909. (16) To create fact issue as to whether corporation was bound by acts of cashier. 214AppDiv259, 212NYS189. (17) To send to jury question whether defendant corporation instigated arrest and detention by cashier. 214AppDiv259, 212NYS189. (18) Whether defendant ratified arrest and ordered detention. 214AppDiv259, 212NYS189. (19) To show unreasonable delay in taking plaintiff before magistrate. 71CalA112, 234P869. (20) To sustain finding that dentist, in calling policeman to remove obstreperous patient, exercised only necessary restraint to prevent assault; and finding held conclusive on appellate court. 100CalA188, 279P840. (21) To sustain finding that commitment was defective and that mayor acted in bad faith in issuing it. 41GaA750, 154SE816. [b] (1) 215Ala116, 110S28; 168Minn77, 209NW532; 144Miss366, 109S865; NJSup 138A205. (2) 144 Miss366, 109S865. (5) 160La21, 106S 660. (8) 216Ky479, 287SW914. (10) To show responsibility for arrest. 214 Ala257, 107S825; 283Pa356, 129A99. (11) To show ratification. 216Ky479, 287SW914; 145Va175, 133SE759, 47 ALR300. (12) To warrant finding of conspiracy. 164La1094, 115S281. (13) To show probable cause. 149Va882, 141SE829. [c] (14) As to whether defendant instigated arrest. 213AppDiv 436, 213NYS219. [e] **Prima facie case.-** 205 Iowa752, 218NW499.
547-21 MoA 291SW159; 222MoA296, 297SW163; 164La1094, 115S281.
547-22 121 Or492, 256P197.

548-23 250Mich110, 229NW454. But see 156Miss410, 1248786.

548-30½-New. Evidence sufficient. Submission for jury's determination whether arrest, search, imprisonment, and prosecution after leaving store was continuation of tort committed within store. 190NC406, 130SE322.

548-30½-New. Evidence of plaintiff's insanity justifying forcible commitment to asylum held not shown. 321 Ill 305, 151NE911, 45ALR1457.

548-30¼-New. In an action against an officer who arrested plaintiff on suspicion of insanity, plaintiff makes prima facie case by showing arrest without warrant. Ariz 284P149.

548-31 MoA 38SW(2d)1033; 149Va882, 141SE829.

548-33 MoA 38SW(2d)1033.

548-34½-New. A discharge for insufficiency of evidence upon a motion of the county attorney does not establish or tend to establish a malicious or otherwise wrongful motive. 120 Okl 105, 250 P519.

548-36 Ariz 284P149; Kan 289P472; MoA 286SW738; NJSup 140A8; Tex CivA 278SW(2d)262.

548-37 22AlaA448, 116S915; 233Ky97, 258W(2d)65. [a] **Verdict properly directed for defendant.**–261Mass255, 158 NE771.

548-39 192NC749, 136SE6. [b] Ariz 284P149; TexCivA 48W(2d)999. [c] 283Pa256, 129A99.

548-40 Ida 290P208. [b] 245Mich657, 224NW355.

548-41 128Misc263, 219NYS295; Tex CommnA 248W(2d)378.

549-42 255Mass340, 151NE317; 150 Wash280, 273P132. [d] (3) Whether plaintiff was intimidated on street, returned to defendant's store against her will, and signed confession under duress and fright. 31 OhA340, 167NE469.

549-44 212Ala608, 103S658 (ratification by defendant is for jury); 23AlaA 12, 121S427(2dcase) [certiorari den 219 Ala139, 121S441(1stcase)]; 120 OhSt 599, 167NE868 (direction of verdict for defendant held error); 142Wash236, 252 P922 [citCJ]. [b] **Who instigated arrest** is question of fact. 213AppDiv436, 213 NYS219. [c] **Whether conductor or motorman caused arrest** of passenger held for jury. 174Ark529, 296SW33.

549-45 164Ga594, 139SE52; 242 IllA 251; 148Md279, 129A348; 255Mass340, 151NE317; MoA 38SW(2d)1033. [a] (2) 164Ga594, 139SE52; 252NY102, 169NE 277. (7) Authority of motorman to arrest passenger. 174Ark529, 296SW33.

549-46 Ariz 284P149; 229Ky53, 16 SW(2d)565, 64ALR642.

550-47 Wis 232NW593.

550-51 Ida 290P208.

550-52 177Minn207, 225NW148.

550-53 324 Ill 121, 154NE715; 233Ky 97, 258W(2d)65.

550-54 MoA 293SW791; MoA 38W(2d) 1033.

550-55 157Miss77, 127S718 (peremptory instruction held proper).

550-56 233Mich452, 206NW982.

550-58 255Mass340, 151NE317.

551-60 222MoA296, 297SW163; MoA 3 8W(2d)1033.

551-62 155Miss207, 124S325.

551-63 Mass 168NE722.

551-66 Kan 289P472; 218Ky147, 291 SW15. [a] (4) 121 Or492, 256P197. (9) 25GaA202, 133SE42. (10) 212Ala608, 103S658. (11) 130Ark684, 228W(2d) 408. (29) Liability of constable making arrest outside of state. 121Kan42, 245 P1054. (30) Plaintiff's innocence or guilt immaterial if officer acts in good faith. 136Wash624, 241P1. (31) That claim for original liability for arrest was not released by waiver of right to go before court. 261Mass255, 158NE 771. (32) Arrest for parking in violation of city ordinance. 192NC749, 136 SE6. (33) Burden of proof. 130Ark 684, 228W(2d)408. [b] (1) 233Ky97, 258W(2d)65; 156Miss410, 124S786; 149 Va882, 141SE829. (12) Instruction failing to qualify detention as unlawful or involuntary. 31 OhA340, 167NE469. [c] (2) Legality of restraint of supposed insane person. 321 Ill 305, 151NE911, 45 ALR1457. [f] **Instructions held erroneous.**–145Va175, 133SE759, 47ALR308.

552-67 121Kan42, 245P1054; MoA 271 SW1005 (instruction within pleadings); MoA 293SW791. [d] **Instruction not erroneous as broader than pleadings.** MoA 271SW1005.

552-68 23AlaA18, 121S427(2dcase) [certiorari den 219Ala139, 121S441(1st case)]. [b] 25GaA202, 133SE42; 155 Miss207, 124S325; MoA 293SW791.

552-69 41GaA750, 154SE816; 321 Ill 305, 151NE911, 45ALR1457. [b] **Instructions held correct.**–121Kan42, 245P 1054. [c] **Instructions properly refused.**–130Kan707, 288P582. [d] **Instruction held correct.**–41GaA750, 154SE 816.

553-70 229Ky32, 16SW(2d)493.

553-71 [a] (3) Refusal to instruct as to plaintiff's liability to fine for trespassing on school grounds, where he was arrested, held erroneous. 153Va 228, 149SE619. (4) Other instances. 38 F(2d)431.

553-72 255Mass340, 151NE317.

553-72½-New. , or refuse to give an instruction which ignores material evidence. 217Ala295, 116S145.

553-74 121Kan42, 245P1054.

553-75 MoA 271SW1005.

554-82 [a] (3) Instruction on punitive damages is properly refused where evidence does not show that defendant store owner ratified or authorized acts of detective agency operative. 31 OhA 340, 167NE469.

554-83 [c] (2) Instruction making liability for exemplary damages depends on whether there was just basis for suit. 99Vt219, 131A21, 49ALR1382. [d] MoA 271SW1005. But see 117Nebr812, 223NW4.

554-88 201 Iowa1083, 205NW972 (where defendants acted in concert).

554-89 Utah 279P501. But see 233Ky 238, 258W(2d)381.

554-91½-New. General verdict held to have properly given credit for set-off in accordance with special findings. 130 Kan707, 288P582.

554-91¾-New. Operation and effect of findings. Wis 232NW593.

554-92 NJSup 141A570.

554-94 [a] (3) Refusing to strike out evidence of good character of plaintiff, reversible error, where no claim of malice. 143Va71, 129SE244.

556-13 Ida 290P208; Mass 168NE722; NJSup 135A795; Utah 279P501; WVa 155SE127.

556-14 NJSup 135A795; Utah 279P501.

556-16 198NC23, 150SE492.

557-24 68Utah507, 251P23.

557-27½-New. In an action for false imprisonment and malicious prosecution an award of damages is not objectionable as allowing a double recovery where the pleading and proof showed two distinct arrests followed by imprisonment and distinct arrests without warrants, and the damages awarded for false imprisonment were based on the arrests without warrants and the damages awarded for malicious prosecution were based on the prosecutions in which warrants were issued. 71CalA112, 234P869.

557-29 [a] **Newspaper publication of** account of arrest is natural and ordinary consequence. 86CalA269, 260P952.

557-30 [c] **Unexplained loss of property.**–156Miss410, 124S786.

557-35 120 OhSt599, 167NE868 (under statute, mistaken arrest and imprisonment of depositor for nonpayment of valid check constitute actual damage).

557-38 143Va71, 129SE244.

558-42 205 Iowa752, 218NW499, 501 [citCJ].

558-43 180Ark684, 228W(2d)408.

558-46 121Kan42, 245P1054; 143Va71, 129SE244.

558-48 121Kan42, 245P1054.

558-51 Ala 130S552.

558-52 143Va71, 129SE244.

559-53 Ala 130S552; 143Va71, 129SE 244.

559-54 Ala 130S552.

559-57 Ala 130S552 (fees for defending against prosecution after discharge from imprisonment).

559-65 121Kan42, 245P1054; 239Mich 295, 214NW310, 311 [citCJ], 55ALR 1157; MoA 271SW1005 (proximate and natural result); MoA 271SW1005; 143 Va71, 129SE244.

560-67 MoA 271SW1005.

560-69 GaA 155SE112; 121Kan42, 245 P1054; MoA 271SW1005; 149Va906, 141SE860.

560-70 [a] (2) Where declaration alleges physical injuries from assault and battery and false imprisonment, damages for mental suffering are recoverable, though lacerations of body are not shown. 153Va348, 149SE453.

562-97 Mass 168NE722.

562-98 [a] (3) Attempted justification held not to enhance damages. BC [1930] 1DomLR805.

563-5 201 Iowa1083, 205NW972; 22 OhA520, 155NE151.

563-6 Wash 292P106. See also 117 Nebr813, 223NW4.

564-8 22 OhA520, 155NE151. See also 143Va71, 129SE244.

564-13 22 OhA520, 155NE151.

564-14 22 OhA520, 155NE151; 149Va 882, 141SE829.

564-16 22 OhA520, 155NE151.

564-18 222MoA296, 297SW163.

565-20 201 Iowa1083, 205NW972.

565-35 99Vt219, 131A21, 49ALR1382 (acting under writ, though void).

566-41 But see NJSup 141A570.

566-47 145Va175, 133SE759, 47ALR 308.

566-49 [c] **Matters constituting ratification.**–149Va882, 141SE829.

567-67 99Vt219, 131A21, 49ALR1382.

568-83 [d] **Statutes may impose maximum recovery** permissible. 30F(2d) 530.

568-84 120Kan719, 244P1044 (nominal damages). [a] (7) $1,500. 212Ala531, 103S553 (detention in hospital for 11 hours for failure to pay bill). (8) $300. 129 Or224, 277P101 (assault and battery and false imprisonment).

568-86 NJ 141A170. See also 145Va 175, 133SE759, 47ALR308. [a] (9) 84 IndA192, 149NE651; 239Mich295, 214 NW310, 311 [citCJ], 55ALR1157. (15) MoA 38W(2d)1033 (punitive damages for two hour detention; reduced to $1,000). (16) 145Va175, 133SE759, 47ALR 308. (26) $11,000 (reduced to $5,000). 49SD39, 206NW477. (27) $5,000 reduced to $3,000. 98NJEq22, 133A73. [b] (10) 151WVa650, 133SE365, 46ALR 799. (12) Kan 289P472; 229Ky53, 16 SW(2d)505, 64ALR648; 222MoA296, 297SW163; MoA 38W(2d)1033. (13) 174Ark529, 296SW33. (16) 153Va348, 149SE453 (on conflicting evidence, for ejection from store). (19) 211AppDiv 443, 207NYS395. (20) 149Va906, 141 SE860. (23) 86CalA269, 260P952. (25) 201 Iowa1083, 205NW972. (32) 180Ark 684, 228W(2d)408. (40) $1,089.05. 124 Me391, 130A233 (to married woman who was kept away from children). (41) $2,250. 121Kan42, 245P1054. (42) $7,500. TexCivA 276SW298. (43) $8,000. 212Ala608, 103S658. (44) $8,000. 77 Mont110, 250P819 (imprisonment in insane asylum). (45) $250. 9LaA44, 118 S787 (illegal detention in barber's parlor for twenty minutes).

571-89 206Cal504, 274P971; 120Kan 719, 244P1044; 121Kan42, 245P1054 (no passion or prejudice shown); 229 Ky32, 16SW(2d)493.

572-11 229Ky32, 16SW(2d)493.

574-52 [a] (3) 104TexCr485, 284SW 957.

575-59 [b] **Instruction in effect putting peace officer in same category as private citizen,** with regard to authority to arrest without warrant held not prejudicial in view of other instructions and facts. 33GaA818, 128SE224.

FALSE PERSONATION

576-1 [b] (1) 17F(2d)923. (3) 17F (2d)923.

576-7 [a] (13) Overt act is necessary to complete either offense. 25F(2d)294.

577-22 17F(2d)923; 42F(2d)835.

578-24 17F(2d)923.

578-32 113 OhSt450, 149NE551.

579-38 [b] **Prohibition agent** can be convicted of aiding and abetting others in falsely assuming to be prohibition agents, though incapable himself of committing offense. 5F(2d)224.

579-49 [b] (2) 25F(2d)294.

581-63 [a] (1) 5F(2d)224. [b] (2) To show false personation. 220AppDiv141, 221NYS182.

581-65 [c] **Instructions held not mis-**

leading.–318Mo 687, 1SW(2d)96. [d] **Sufficiency of evidence for jury.**–318Mo 687, 1SW(2d)96.
581–66 113 OhSt450, 149NE551.

FALSE PRETENSES

585–15 32PortoRico 149; 156Tenn85, 299SW799.
585–16 CalA 284P487.
585–19 See also CalA 290P470. [d] **In California.**–A 289P890.
588–68½–New. Statutes providing punishment for false pretenses in giving a check or draft do not violate state or federal constitutions. 22AlaA220, 114 S281.
588–70 Utah 262P294. [a] 169Ga515, 151SE23; 203 Iowa221, 212NW570.
589–71 Fla 129S703.
589–73½–New. Maxim, Expressio unius est exclusio alterius is not applicable to statute where enumeration is by way of example and not for purposes of exclusion. 86CalA86, 260P582 (certain county boards and officers held state boards within statute).
589–73½–New. Validity of statutes. Statute making fact that drawer of check, draft, or order does not have on deposit sufficient funds at time instrument is presented and not paid, prima facie evidence of fraudulent intent, is unconstitutional. 213Ala351, 104S 901.
589–73¼–New. A statute providing punishment for fraud amounting to false pretense, in obtaining money by order which is not paid is within the provisions of the state and federal constitutions. 20AlaA654, 104S906.
589–86 43 Ida745, 254P525; 335 Ill 539, 167NE323. [a] (1) 327 Ill 270, 158NE 448. [d] **Held to constitute false pretense and not forgery.**–Mo 292SW440.
589–87 CalA 288P430; CalA 289P890; 36GaA674, 137SE854; 43 Ida745, 254P 525; 328 Ill 35, 159NE187; 338 Ill 406, 170NE202; 170La488, 128S286; 195NC 506, 142SE775; 196NC454, 146SE64; 115 OhSt127, 152NE186; 95PaSuper102; 33PortoRico 764; TexCr 29SW(2d)359; Utah 262P294; 200Wis636, 229NW54. See also 92CalA245, 267P942. [b] **Means used in obtaining money** determine criminal character of act. 251Mich367, 232 NW404.
589–87½–New. Offense of larceny by false pretense is distinct from offense of bribery. 257Mass 590, 154NE326.
590–88 80CalA138, 251P672; 43 Ida745, 254P525.
590–92 170La488, 128S286.
590–93 7Alaska246; 34Ariz363, 271P 725, 726 [citCJ]; 76CalA192, 244P94; CalA 288P430; CalA 290P470; 36GaA 674, 137SE854; Mo 289SW560; 80Mont 141, 259P829; 244NY472, 155NE745; 88PaSuper451. [a] (21) That defendant, selling "divine healing" business, had patients sufficient to fill an eleven-room house. 76CalA192, 244P94. (22) Other instances. 202Cal 409, 261P303. [b] (16) That purchasers of interest in certain business could and would realize therefrom certain income per month or more. 76CalA192, 244P94. (17) That purchaser could sell memberships at profit. CalA 288P430.
592–95 69CalA475, 231P572 (statements by defendant as inducement to buy interest in her business that she had two contracts of substantial value held material though plaintiffs were not to participate therein); 210Ky340, 275SW827; 318Mo 1068, 2SW(2d)589, 592 [citCJ]. [a] (2) False statement as to collateral matter held no ground for indictment. 5PaDist&Co 41. [b] **False statement that surety on note desired another to sign as surety** is not sufficient to warrant conviction of obtaining signature of such other by false pretense. 210Ky 340, 275SW827.
592–96 Sask [1930] 3DomLR901.
592–7 327 Ill 270, 158NE448. [d] NJ Sup 131A675.
593–8 254Mass320, 150NE7.
593–15 34Ariz363, 271P725, 726 [cit CJ]; CalA 288P430 (promise to do something and not called upon to do it); 36GaA674, 137SE854; 229AppDiv451, 242NYS623; 21 OhA417, 153NE245. [a] (19) That postdated check would be all right by time check got to bank. 75 Mont315, 243P355.
594–16 36GaA674, 137SE854; 88PaSuper451.
594–17 135Misc564, 238NYS712.
594–21 34Ariz363, 271P725, 726 [cit CJ].
594–22 82CalA739, 256P266; 21 OhA 417, 153NE245, 246 [citCJ]; 100TexCr 455, 273SW565. [a] (4) Other instances. 82CalA739, 256P266.
595–27 CalA 291P251.
595–28½–New. When a person enters into a contract to buy goods, he impliedly represents that he intends to make a genuine contract; if such is not his intention, he may be found to have made a false representation, 252Mass116, 147NE588.
595–28½–New. The intention not to pay for the goods is merely incidental; the false pretense is the assumption of the false character as a contracting party. 252Mass116, 147NE588.
595–29 252Mass116, 147NE588.
595–30 85CalA241, 259P76.
595–33 76CalA192, 244P94; 85CalA241, 259P76; CalA 288P430; 92Fla483, 109 S417; 338 Ill 406, 170NE202; 222Ky 225, 300SW619, 621 [citCJ], 56ALR 1209; 147Miss446, 111S148; 244NY472, 155NE745. [a] (1) 222Ky225, 300SW 619, 56ALR1209. (10) Amount of profit which could and would be realized from business. 76CalA192, 244P94. [b] (8) Statements by defendant claiming to be divine healer, as to number and income-producing value of her patients. 69CalA 475, 231P572. (9) That defendant was divine healer. 69CalA475, 231P572.
596–37 Utah 280P1046. [b] **By presenting indorsed corporate certificates of stock** to have them transferred to him, defendant impliedly represented that he had authority to have such transfer made. Utah 280P1046.
596–41 71CalA10, 234P841 (furnishing list of debts is implied statement that there are no other debts); 201 Iowa159, 205NW534 (false statement of indebtedness to procure loan). [a] (5) Defendant need not have expressly stated he was solvent, if his statements reasonably create belief to that effect. 71CalA10, 234P841.
596–42 8F(2d)692.
596–50 But see 135Misc564, 238NYS712.
597–54 179Minn502, 229NW801.
597–55 92Fla483, 109S417.
597–56 147Miss446, 111S148.
597–57 69CalA139, 230P675 (condition and income of business); 147Miss446, 111S148 (quality). [a] (6) As to quality of soil, and price paid for land. 200 Wis636, 229NW54.
598–74 94Fla918, 114S781, 782 [citCJ].
598–76 210Ky340, 275SW827; 222Ky 225, 300SW619, 56ALR1209; TexCr 31 SW(2d)445(2dcase).
598–77 79CalA413, 249P832; Fla 129S 703.
599–79 69CalA524, 231P612 (defrauded persons held to have shown reasonable diligence in endeavoring to discover whether fraud had been practiced).
599–83 [a] (2) 222Ky225, 300SW619, 56ALR1209.
599–89 21AlaA630, 111S194; 34Ariz 363, 271P725, 726 [citCJ]; 76CalA192, 244P94; CalA 288P430; 43 Ida745, 254 P525; 200 Ind24, 161NE3; 252Mass116, 147NE588; 80Mont141, 259P826; 221 AppDiv184, 223NYS373; NC 153SE923; 49SD483, 207NW484 [quotCyc]; 103 TexCr550, 281SW849.
600–90 248Mich639, 227NW781; 197 NC601, 150SE25(1stcase).
600–93 76CalA192, 244P94.
601–97½–New. One obtaining a loan by making a false pretense in writing has been held to be guilty of a statutory offense, although the person to whom representation was made could have ascertained falsity, the general rule being inapplicable. 215Ky547, 286SW691.
601–99 49SD483, 207NW484 [quotCyc].
601–1 244NY472, 155NE745; 104TexCr 550, 281SW849; TexCr 31SW(2d)445 (2dcase).
602–6½–New. The making of a first false representation does not render accused immune from punishment for subsequently obtaining from the same person other property parted with under the influence of a representation then operating on the mind of the defrauded person. 202Cal 409, 261P303.
602–7 94Fla1165, 115S505; 43 Ida745, 254P525; 201 Iowa159, 205NW534; 210 Ky340, 275SW827; 221Ky232, 298SW 681; 75Mont315, 243P355; 113Nebr839, 205NW570; NJSup 131A675; 195NC 506, 142SE775; NC 155SE866; 115 Oh St127, 152NE186.
603–8 43 Ida745, 254P525; 210Ky340, 275SW827; 169La684, 125S854; 248 Mich639, 227NW781; 80Mont141, 259P 826; 226AppDiv500, 234NYS688.
603–9 167Ga495, 146SE189. [a] (2) Instruction that absence of proof of motive favors innocence is properly refused. 339 Ill 415, 171NE554.
603–12 20AlaA622, 104S837 (evidence of intent to subsequently repay immaterial).
603–13 218AppDiv254, 218NYS249.
604–14 201 Iowa159, 205NW534.
604–15½–New. Intent to defraud need not involve criminal intention from the beginning, but may consist of mere misrepresentation. NJSup 131A675.
604–15¼–New. Intent to defraud need not be of a criminal nature beyond all doubt, but may be of a civil nature. NJ Sup 131A675.
604–16 205 Iowa1321, 217NW814; 80 Mont141, 259P826; NJSup 131A675; 244NY472, 155NE745. But see 49SD 483, 207NW484.
604–17 92Fla483, 109S417.
604–18 244NY472, 155NE745.
604–19 79CalA413, 249P832.
604–20 79CalA413, 249P832 (gist of offense); 43 Ida745, 254P525. [a] AlaA 129S707.
605–22 202Cal 409, 261P303; 170La 488, 128S286; 241NY128, 149NE221.
605–24 83CalA321, 256P611; TexCr 27 SW(2d)240. [d] 82CalA739, 256P266; 83CalA321, 256P611.
605–25 21 OhA403, 153NE218.
605–27 TexCivA 11SW(2d)254.
606–29½–New. Purchase of stock in reliance upon false representations completes the crime. 241NY128, 149NE221.
606–30 Mo 256SW456. See also 12Pa Dist&Co 160 (obtaining credit).
606–32 170Ark484, 280SW398.
606–37 75CalA421, 243P39; 150Md687, 133A847.
606–43 See also 75CalA421, 243P39.
607–58 But see TexCivA 11SW(2d)254.
607–59 [a] **In Kansas.**–122Kan165, 251 P401, 402 [citCJ].
607–79 181Ark730, 27SW(2d)518.
607–90½–New. Obtaining deposit slip as obtaining money. AlaA 129S707.
607–92 22AlaA220, 114S280; Ont [1930] 2DomLR855.
607–93 AlaA 129S718. [i] **In Arkansas.**–170Ark484, 280SW398.
608–1 78CalA62, 247P916. But see 102 CalA169, 282P996.
608–2 202Cal 409, 261P303.
608–3 156Md382, 144A497. [b] Contra 226AppDiv500, 234NYS688.
609–4 Utah 262P294, 296 [quotCJ].
609–5 77Colo 498, 238P51.
609–6 CalA 290P1083.
609–7 69CalA524, 231P612.
609–8 178Minn564, 227NW893 (financial responsibility of maker of note secured by mortgage sold to prosecutor under false pretense is immaterial); NJ Sup 140A13 (note of defendant); Utah 262P294.
609–11 82CalA739, 256P266.
610–22 252Mass116, 147NE588.
610–28 202Cal 409, 261P303.
611–29 [a] (12) Acts held not to constitute obtaining money by means of confidence game. 328 Ill 35, 159NE187.
611–33 170Ark105, 278SW965. [a] (2) Seller's failure to disclose lien on cotton sold not sufficient to constitute offense. 170Ark105, 278SW965. [c] **Distinction made** between statutory offense of nondisclosure and offense of obtaining money by false pretense. 254Mass320, 150NE7.
612–34 170Ark105, 278SW965.
612–36 202 Iowa954, 211NW252; NJ Sup 131A675; 116 Or509, 241P983.
612–38 232Ky232, 22SW(2d)618; 112 TexCr281, 16SW(2d)243.
612–40 248Mich639, 227NW781.
612–42 198NC522, 152SE504 (postdated check).

613-53 94Fla1165, 115S505 (express promise); 198 Ind187, 152NE800; 229 AppDiv451, 242NYS623. [b] **Maker postdating check and telling payee that he has no funds to meet it** is not guilty of issuing check with intent to defraud within statute, though he fails to have funds in bank on given date as promised. 83CalA779, 257P458. [c] **Where postdated check to secure extension of time** for payment is given, there is no intention to defraud. 97PaSuper149.

613-57 80CalA159, 251P315; 203 Iowa 1351, 214NW496; NC 155SE447 (obtaining goods by means of worthless check is not synonymous with uttering false check); OklCr 276P237; OklCr 276P239(1st case). See also 49RI 107, 140A359. [b] **In Iowa.**-203 Iowa221, 212NW570.

613-58 NJSup 131A675; 158Tenn209, 12SW(2d)528(2dcase); 103WVa594, 138SE322. [a] **Protest for nonpayment and notice thereof to defendant** are necessary to conviction. 103WVa594, 138SE322. [b] **That defendant was arrested before expiration of time allowed by statute for notice** is no defense. 112TexCr281, 16SW(2d)243.

613-58½-New. In California the making and passing of a fictitious instrument may be prosecuted under a section of the Penal Code relating to forgery and counterfeiting, 80CalA159, 251P315.

613-58½-New. or under a section relating to the making, passing, or uttering of fictitious instruments. 80CalA159, 251P315.

613-60 69CalA524, 231P612 (receipted bill obtained by worthless check is false token); 71CalA10, 234P841 (written list of debts used in application for loan is not false token. [f] **In Iowa.**-203 Iowa 376, 212NW698.

614-62 32PortoRico 149. But see 22 AlaA443, 116S709.

614-65 79CalA413, 249P832, 250P1104.

614-66 79CalA413, 249P832, 250P1104.

614-72 204 Iowa179, 214NW491; 116 Or509, 241P983. [b] **Statute making punishment same as for feloniously stealing money** does not make offense felony regardless of amount or value obtained. Mo 289SW560. [c] **In New York.**-227AppDiv758, 236NYS429.

614-73½-New. The obtaining, by false pretenses of a check for $80.60 is a felony notwithstanding it carries an insurance premium on a policy covering the life of the injured party and also on a policy covering the life of his wife. 100TexCr455, 273SW565.

614-78 151Miss229, 117S517.

614-79 318Mo 772, 300SW807.

615-86 318Mo 772, 300SW807, 811 [quotCJ].

615-91 142SC62, 140SE232.

615-1 100TexCr455, 273SW565.

615-3½-New. or that certificate of stock was given to person after parties with his money. 241NY128, 149NE221.

615-3½-New. Folly of defrauded party is no defense. 241NY128, 149NE221.

615-3¼-New. or that accused later gave party defrauded property in return for that obtained. 241NY128, 149NE221.

616-8½-New. It is no defense that the acts charged were acts of a corporation where defendants did such acts under the name of the corporation. 8F(2d)692.

616-8½-New. An attempt to clear title to a lot to be conveyed and offering other lots is no defense in obtaining money on the false pretense of ownership and a promise to convey. 82CalA 739, 256P266.

616-8¼-New. Payment before trial of all but one of various checks issued on a bank in which defendant had no funds or credit did not relieve the acts of defendant in issuing the checks of their criminality, although such fact might be considered in mitigation of punishment. 96CalA1, 274P361.

616-8½-New. Written option to purchase, procured by fraud, is no defense in prosecution for false pretenses in procuring note and mortgage given for release of option. 251Mich359, 232NW 358.

616-15 241NY128, 149NE221.

617-24½-New. In conspiracy to create artificial demand and induce victims to purchase, it is no defense that money was paid under an ostensible contract. 252Mass116, 147NE588.

617-39 252Mass116, 147NE588.

618-45½-New. A corporation organizer may be held criminally liable for stock purchased from a salesman only on proof of conspiracy or that he directed or authorized the misrepresentation made by his agent. 80Mont141, 259P 826.

618-45½-New. When false pretenses are made by an agent, they must be directly authorized or consented to in order to hold the principal. 80Mont141, 259P826.

618-45¼-New. Principal cannot be convicted of issuing bad check where principal's agent issued check in absence of principal, there being no evidence that principal had knowledge of insufficiency of funds. NC 155SE249.

618-47 Ind 170NE325; 80Mont141, 259 P826; 115 OhSt127, 152NE186; 33Porto Rico 764. [b] (16) Indictment held to charge felony, under Code (1924) § 13045, and not misdemeanor under § 13047. 204 Iowa64, 214NW734. [j] (1) 220Ala112, 124S284(1stcase); 22AlaA 220, 114S280; 23AlaA332, 125S201(2d case); 75CalA38, 241P892; 82CalA739, 256P266; 83CalA321, 256P611; 95CalA 92, 272P786; 40GaA141, 149SE157; 48 Ida335, 282P93; 221Ky232, 298SW681 (knowledge of falsity of pretense held sufficiently alleged); Mo 297SW388; 320 Mo 209, 7SW(2d)269; NJSup 135A813; 115 OhSt127, 152NE186 (form set out); 22 OhA310, 153NE757; TexCr 290SW 534; 108TexCr606, 2SW(2d)261; TexCr 29SW(2d)359; TexCr 31SW(2d)445(2d case); Utah 280P1046; 144Wash363, 258P23; NS [1928] 4DomLR778. (13) Agreement to convey lot free from encumbrances. 82CalA739, 256P266. (14) Information for uttering and publishing fictitious check. 80CalA159, 251P315. [k] 7Alaska241; 7Alaska246; 202 Iowa 954, 211NW252; 203 Iowa1374, 214NW 717; Iowa 227NW140; 196NC357, 145 SE691; 33PortoRico 764; 106TexCr341, 292SW239; 113TexCr164, 18SW(2d)920.

620-48 79CalA413, 249P832.

621-51 204 Iowa186, 214NW675.

621-56 [a] **Use of hyphen in place of "&"** in "Wisconsin-Arkansas Lumber Company" instead of "Wisconsin & Arkansas Lumber Company" held not material error. 173Ark1071, 294SW66.

621-59 22AlaA220, 114S280; 88Pa Super451.

621-64½-New. The fact that information charges statutory offense of uttering check on bank in which maker has no funds does not prevent it from charging also the statutory offense of obtaining goods by false pretenses. 116 Or 509, 241P983.

621-65 [d] **Offense committed in part in different counties of state** may be laid in county where false representations to obtain money were made and in which check was obtained, though money on check was obtained in another county. 201 Iowa159, 205NW534.

622-71 [a] (6) Amendment striking out all reference to real property alleged to have been obtained by defendant and reducing alleged value of property obtained to amount alleged to be value of bonds obtained. 80CalA138, 251P672.

622-74 80CalA159, 251P315.

622-76 80CalA159, 251P315.

622-77 80CalA159, 251P315.

622-80 Mo 297SW388.

623-86 37GaA113, 138SE922; 160La 268, 107S105; 80Mont141, 259P826. [d] (4) Indictment held not deficient for failing explicitly to aver that paper was forged. 176Minn175, 222NW906. (5) Indictment held insufficient. 178Minn 446, 227NW495, 65ALR1253. [f] (1) 78 CalA561, 248P990; 85CalA241, 259P 76. [g] (6) Charging that defendant fraudulently represented that he was agent authorized to take orders for clothing without alleging whom defendant claimed to represent. 37GaA113, 138SE922.

624-97 [b] 163La13, 111S474.

625-1 170Ark484, 280SW398.

625-2 170Ark484, 280SW398.

625-5 201 Iowa159, 205NW534.

625-11 80Mont141, 259P826.

625-14 8F(2d)692; 80Mont141, 259P 826 (to person injured). [d] **Allegation held sufficient.-SC** 155SE849.

625-15 AlaA 129S718; 159La840, 106S 325.

626-18 159La840, 106S324.

626-20 168La153, 121S607.

626-22½-New. Use of initials of the person defrauded does not make the indictment demurrable. 22AlaA220, 114S 281.

626-26 [a] 147Miss446, 111S148.

626-29 215Ky547, 286SW691; 80Mont 141, 259P826. [b] (1) But see 97Fla 382, 120S848.

627-31 [a] (1) 78CalA561, 248P990; 82 CalA739, 256P266; SC 155SE849.

628-35 113TexCr513, 22SW(2d)941.

628-38 82CalA739, 256P266 (facts held sufficiently stated by inference).

628-39½-New. Failure of the indictment to allege the nonpayment of a check issued with insufficient funds is not a fatal defect. 22AlaA220, 114S281.

623-39½-New. Where the information charges the passing of a fictitious check knowing it to be fictitious, the necessity of also informing defendant that he passed it as true and genuine is obviated. 80CalA159, 251P315.

628-40 215Ky547, 286SW691.

628-42 212Ky758, 280SW106; Mo 278 SW992, 994 [citCJ]; 80Mont141, 259P 826. [a] 34Ariz363, 271P725; 170Ark 484, 280SW398; 69CalA524, 231P612; 75CalA38, 241P892; IndA 168NE202; 212Ky758, 280SW106; 147Miss446, 111 S148.

629-43 Ind 170NE325; 212Ky758, 280 SW106; Mo 14SW(2d)452; TexCr 31 SW(2d)821(1stcase). Contra 159La840, 106S324.

629-44 212Ky758, 280SW106.

629-45 212Ky758, 280SW106.

629-46 212Ky758, 280SW106; 147Miss 446, 111S148; 22 OhA310, 153NE757.

630-62 96Fla813, 119S137(2dcase).

631-64 [j] NJSup 135A813. [k] **Not alleging custom of trade** by which defendant obtained check does not render indictment defective. TexCr 29SW(2d) 359.

631-67 [a] (1) 180Ark280, 21SW(2d) 183. [b] (12) "Stock of merchandise consisting of groceries, dry goods, drugs and fixtures." 202 Iowa431, 210NW423, 424.

632-68 113TexCr164, 18SW(2d)920.

632-71 201 Iowa159, 205NW534. [b] 326 Ill 11, 156NE772.

633-76 326 Ill 11, 156NE772.

633-81 [a] (4) Other instances. 113 TexCr546, 22SW(2d)676.

633-84 113TexCr513, 22SW(2d)941.

633-85 93Fla110, 111S350. [c] (1) 75 CalA38, 241P892. [d] (2) Other instances. Ind 170NE325.

634-87 93Fla110, 111S350.

634-88 93Fla110, 111S350.

634-99 93Fla110, 111S350.

634-1 93Fla110, 111S350.

634-3½-New. By statute in some jurisdictions, ownership may be alleged in special owner. 104TexCr550, 281SW 849.

634-7 112TexCr15, 13SW(2d)863. [b] **Allegation of value of note** is sufficient for value of indorsement also. 113 TexCr546, 22SW(2d)676.

635-9 163La13, 111S474; 113TexCr 546, 22SW(2d)676.

635-14 228Ky730, 15SW(2d)421; 160 La268, 107S105; 80Mont141, 259P826; 115 Oh127, 152NE186. [b] (1) 8F(2d) 692; IndA 168NE202; 115 Oh127, 152 NE186. [f] **Repetition** of averment of intent in connection with obtaining of property is unnecessary where intent averred in connection with allegation of pretense. 115 Oh127, 152NE186.

636-24 228Ky468, 15SW(2d)276; OklCr 289P785. [a] (1) 78CalA561, 248P990; 80CalA159, 251P315 (uttering and publishing of fictitious check knowing it to be fictitious); Mo 297SW388; OklCr 289P785. [b] (1) 334 Ill 444, 166NE47.

637-28 [b] 151Miss229, 117S517 (charging overt act); 318Mo 772, 300SW 807. [c] **Indictments held insufficient.**-151Miss229, 117S517.

637-32 151Miss229, 117S517 (sufficient to charge both defendants).

637-36 80Mont141, 259P826. [b] (1) 92CalA245, 267P942. [d] (3) Indictment may lay venue wholly in one county and be supported by evidence that it was committed in part in that county

and in part in another county. **Iowa** 205NW535. [e] (5) Other instances. 202Cal409, 261P303; 79CalA413, 249P832.

638-37 113TexCr546, 22SW(2d)676.

638-39 NC 155SE447.

638-45½-New. Sufficient to prove that defendant did the act with intent to defraud. 159La840, 106S325.

638-46 [a] (11) Proof that defendant stated that he owned land does not sustain charge that he represented that he was owner and holder of record title. 118Nebr485, 225NW466. (12) Other instances. **AlaA** 129S717. [b] (6) Allegation of presentation of check delivered to witness is evidence of check payable to another or bearer. 100TexCr156, 272SW448. [c] **Proof of one material misrepresentation** is sufficient to warrant conviction. 92CalA245, 267P942.

639-47 85CalA241, 259P76. [a] (12) Allegation that money was obtained for worthless stock and proof that defendant gave prosecuting witness his note, later exchanged for stock, note being mere receipt for money paid. 75CalA38, 241P892.

640-48 86PaSuper434, 436 [quotCJ].

640-49 **Mo** 278SW992; 86PaSuper434, 436 [quotCJ] ("book value" of stock).

640-53 202Cal409, 261P303; 76CalA192, 244P94; 81CalA281, 253P340; 85CalA241, 259P76; 48 Ida335, 282P93.

640-55½-New. Evidence of false pretenses sufficiently referred to in the indictment to show their relevancy is admissible, although they are not set out in extenso. 170Ark484, 280SW398.

640-56 191NC751, 133SE14.

640-57 22AlaA220, 114S280; 96CalA1, 274P361; 115 Oh127, 152NE186.

641-62 48 Ida335, 282P93; 201 Iowa159, 205NW534; 115 Oh127, 152NE186. [d] **Under indictment charging obtaining of "lawful money of the United States,"** proof was unnecessary whether money was gold, silver, or paper. 173Ark1071, 294SW66.

641-63 334 Ill 564, 166NE34.

642-71 See also 75CalA421, 243P39.

642-71½-New. If allegation is that a mortgage ran to one individually, there is no fatal variance in proof that it ran to him as trustee. 254Mass320, 150NE7.

642-73 159La840, 106S325.

642-74 326 Ill 11, 156NE772. [b] **Proof held sufficient.**-326 Ill 11, 156NE772.

642-82 [a] But see 191NC751, 133SE14.

642-85 22AlaA443, 116S709; 252Mass55, 147NE548; 194NC377, 139SE701. [a] 86PaSuper464.

643-89½-New. Where the prosecution proved that accused had not purchased land from a certain corporation as represented, it was defendant's duty after proof of such falsity to show, if such was the fact, that he or his associates had purchased such land from sources not covered by his representation. 202Cal409, 261P303.

643-89¼-New. The burden is on the person creating a false belief in the mind of another of the existence of a fact to show that it has been removed. 202Cal409, 261P303.

643-90 194NC377, 139SE701.

643-91 But see 169La684, 125S854.

643-92 But see OklCr 276P237; OklCr 276P239(1stcase).

643-97 200Wis636, 229NW54.

643-98½-New. Giving a note is not payment within the statute relating to presumption of intent. NJSup 140A13.

643-98¼-New. Only after written notice of nonpayment does presumption of fraudulent intent arise. 157Miss1, 127S684(1stcase).

644-2 [f] **That testimony as to false representations was given in former proceeding in which defendant was acquitted** does not render it inadmissible. 88PaSuper451.

644-3 23AlaA264, 124S282; 77CalA231, 246P147; 124Kan245, 259P691; 112TexCr281, 16SW(2d)243; TexCr 31SW(2d)445(2dcase). [a] (1) 8F(2d)692; 80CalA159, 251P315 (evidence of similar transactions); 80CalA138, 251P672 (statements other than precise representations made at same time); 48 Ida335, 282P93; 156Md382, 144A497 (loss to prosecutor); SC 155SE849. (21) On question of intent evidence of similar transaction in which the victim was induced to purchase is admissible. 252Mass116, 147NE588. (22) That accused in transaction subsequent to one charged reiterated pretense charged is admissible, though subsequent transaction reveals no crime. 201Iowa159, 205NW534. (23) Other evidence held admissible. 150Md687, 133A847; NJSup 136A338. [b] (4) Other instances. 95PaSuper153. [g] (1) 108TexCr114, 299SW263. [h] (5) Telegrams through which purchase of stock was made and individual sales of stock were competent in determining market value of stock purchased and sold. 78CalA561, 248P990. (6) Prospectus held admissible to show representations as to value of stock. 80CalA138, 251P672. (7) In prosecution for false pretenses in connection with sale of stock, evidence of witness that stock had no market value is admissible. 156Md382, 144A497. (8) Refusal to permit proof of wholesale price of articles purchased by defendant for which he gave worthless check was not error. 112TexCr281, 16SW(2d)243.

645-4 170La488, 128S286; 109TexCr325, 4SW(2d)563. [c] (1) 75CalA38, 241P892; 77CalA231, 246P147.

646-6 CalA 289P890; 48 Ida335, 282P93 (letter). [b] 48 Ida335, 282P93. [c] **Telegrams.**-252Mass116, 147NE588. [d] **Checks.**-22AlaA171, 113S650.

646-9 71CalA10, 234P841; 48 Ida335, 282P93; 156Md382, 144A497. [c] **Statements showing preparation, though made outside of jurisdiction,** are admissible in prosecution for conducting confidence game. 160La579, 107S433.

647-17 75CalA38, 241P892; Mo 278SW683; Mo 278SW992; 241NY128, 149NE221; 105TexCr563, 289SW385. [a] (3) Solvency of similar corporation where false representations were concerning particular corporation. 241NY128, 149NE221.

647-18 21AlaA630, 111S194; 241NY128, 149NE221; TexCr 29SW(2d)359. [a] (7) Solvency of similar corporation to one concerning which false representations were made. 241NY128, 149NE221. (8) In prosecution for larceny, in sale of property as free from encumbrances, evidence that one lien claimant had never before in dealing with defendant filed lien and had lost his right by limitation held properly excluded. 166Minn453, 208NW415. (9) 150Md687, 133A847.

647-22 180Ark280, 21SW(2d)183; 69CalA475, 231P572 (on issue of whether defendant was divine healer testimony of witnesses who had been treated and not cured by her is admissible); 48 Ida335, 282P93; 201 Iowa159, 205NW534 (written statements of accused made both before and after transaction charged); 156Md382, 144A497; 95PaSuper153; 112TexCr281, 16SW(2d)243. [d] **Evidence held inadmissible.**-170Ark484, 280SW398. [e] **Corporation's records admissible,** when there is representation that check was not in payment of debt due stockholder. 150Md687, 133A847. [f] **On issue as to falsity of pretense as to price paid for property,** evidence of its value is inadmissible. 88PaSuper451.

648-23 72CalA611, 237P824.

648-24 72CalA611, 237P824. [a] **Evidence of prior mortgage admissible** where giving of new note by defendant was not equivalent to discharge of mortgage. 254Mass320, 150NE7.

648-25 [a] 252Mass55, 147NE548.

648-27 [a] **Statement that defendant in her absence** allowed her minor daughter to conduct her business as divine healer is inadmissible to show that defendant did not possess power of divine healing. 69CalA475, 231P572.

648-28 180Ark280, 21SW(2d)183; 71CalA10, 234P841; 206 Iowa826, 221NW344 (letter); 168La153, 121S607; 173Minn23, 216NW316; 195NC506, 142SE775; 95PaSuper153; TexCr 31SW(2d)636. [a] (3) Evidence of nonpayment of checks is admissible on question of intent in prosecution for false pretenses. 22AlaA220, 114S280. (4) In fictitious check prosecution, it was not error to admit testimony that check deposited by defendant was taken only for collection. 100CalA464, 280P184.

649-29 124Kan245, 259P691; 170La488, 128S286; 194NC377, 139SE701. [a] (6) Evidence of other unpaid bills due for construction of house is admissible to meet contention that prosecuting witness had not been prejudicial by reliance on receipted lumber bill fraudulently presented to her. 69CalA524, 231P612. (7) In prosecution for false pretenses in obtaining money on bad check, signed in partnership name, as "by" defendant, evidence that other checks so signed were paid is admissible on intent. 194NC377, 139SE701.

649-30 CalA 290P470; 201 Iowa159, 205NW534.

649-31 See also 77CalA231, 246P147.

650-35 69CalA524, 231P612 (evidence that defendant in building permit erroneously stated prosecuting witness' address is admissible as showing intent to obtain money due on house without paying construction bills).

650-36 251Mich359, 232NW358. [g] **Conversation of defendant with witness as to how goods were obtained** is admissible to show plan. 149Md298, 131A452.

650-37 109TexCr325, 4SW(2d)563 (belief).

650-38 TexCr 29SW(2d)359 (holding evidence immaterial). [d] **Testimony that cashier did not intend** defendant to get money is properly excluded as immaterial. TexCr 29SW(2d)359. [e] **Refusing testimony on bank's contention** that draft drawn by defendant was valid against drawee is properly refused as not operating to negative guilt. TexCr 29SW(2d)359. [f] **Evidence held inadmissible.**-CalA 291P251.

650-39 156Md382, 144A497; 86PaSuper464.

650-42 TexCr 29SW(2d)359. [a] 170Ark484, 280SW398; 201Cal568, 258P49; 202Cal409, 261P303; 96CalA186, 273P837; 75CalA29, 241P596; 75CalA421, 243P39; 77CalA231, 246P147; 79CalA413, 249P832; 81CalA281, 253P340; 83CalA321, 256P611; 88CalA403, 263P548; 90CalA476, 265P1040; 92CalA245, 267P942; 100CalA587, 280P708 (issuing check, without funds, though payee suffered no loss); CalA 289P890; CalA 290P131; CalA 290P1083; CalA 291P251; 82Colo541, 261P661 (confidence game); 86Colo456, 283P47; 40GaA10, 148SE769; 40GaA145, 149SE64; 48 Ida335, 282P93; 324 Ill21, 154NE446; 326 Ill 11, 156NE772; 326 Ill 496, 158NE149; 333 Ill 554, 165NE196; 339 Ill 415, 171NE554; IndA168NE202; 201 Iowa159, 205NW534; 124Kan245, 259P691; 252Mass116, 147NE588; 257Mass590, 154NE326; Mich233NW227; 172Minn208, 215NW206; NJSup 131A675; NJSup 135A813; NJSup 140A13 (showing that person was defrauded); OhA 173NE447; 88PaSuper451; 94PaSuper584; 35PortoRico787; 49RI107, 140A359; 103TexCr655, 281SW1062; 108TexCr606, 2SW(2d)261; 113TexCr546, 22SW(2d)676; TexCr 25SW(2d)864. [b] 181Ark730, 27SW(2d)518; CalA 288P20; CalA 290P131; 94Fla918, 114S781; 35GaA394, 133SE272; 36GaA674, 137SE854; 326 Ill11, 156NE772; 327 Ill 270, 158NE448 (confidence game); 334 Ill 351, 166NE37; 338 Ill 406, 170NE202; 221Ky232, 298SW681; 173Minn23, 216NW316; 80Mont141, 259P826; 6PaDist&Co 628; 109TexCr375, 5SW(2d)156; 111TexCr417, 13SW(2d)113; 112TexCr477, 17SW(2d)1073; TexCr 25SW(2d)846; TexCr 27SW(2d)240; 144Wash629, 258P501; 103WVa594, 138SE322. [c] (5) To establish that money was lawful money of United States. 326 Ill 11, 156NE772.

651-45 87CalA145, 261P740. [a] (1) 75CalA38, 241P892; 92CalA245, 267P942; 43 Ida745, 254P525. (5) 69CalA139, 230P675. (7) Evidence of prosecuting witness held sufficiently corroborated. 69CalA524, 231P612; 75CalA38, 241P892. (8) Uncorroborated testimony of complaining witness is insufficient

to support conviction under count charging grand theft. CalA 290P131.

651-46 75CalA29, 241P596 (sufficient); 75CalA421, 243P39; 76CalA192, 244P94 (sufficient); 82CalA739, 256P266; 328 Ill 35, 159NE187; 222Ky225, 300SW619, 56ALR1209. [a] **Proof of single pretense is sufficient to sustain finding on different counts** where pretense was made under general plan to obtain property and was still operating on mind of person imposed upon when various items were obtained. 201Cal 568, 258P49.

651-47 75CalA421, 243P39; 90CalA94, 265P365; CalA 290P131; 39GaA137, 146SE327(2dcase); 206 Iowa826, 221 NW344. [b] 171Ark58, 283SW27; 202 Cal 409, 261P303; 75CalA29, 241P596; 75CalA421, 243P39; 76CalA192, 244P94; 80CalA159, 251P315 (nonexistence of drawer of check claimed to be fictitious); 87CalA145, 261P740; 257Mass590, 154NE326; 166Minn453, 208NW415; 135Wash361, 237P723 (that defendant had no funds in bank on which check drawn). [c] (1) 85CalA241, 259P76; 206 Iowa826, 221NW344; 179 Minn502, 229NW801; Mo 278SW683; 243NY589, 154NE617; 107TexCr422, 296SW568. [f] **Want of funds in bank** or fact that check would not be paid if presented may be shown by more direct testimony than by formal presentation of check to bank. 135Wash361, 237P723.

652-48 171Ark58, 283SW27; 75CalA421, 243P39; 48 Ida335, 282P93; 212 Ky758, 280SW106; 252Mass116, 147NE588. [a] 96CalA1, 274P361.

652-50 170La488, 128S286. [a] 201 Cal 568, 258P49; 75CalA421, 243P39; 96CalA1, 274P361; 257Mass590, 154NE326; 166Minn453, 208NW415. [b] 22AlaA220, 114S280; 75Mont315, 243P355; 226AppDiv500, 234NYS688; 116 Oh111, 155NE649; TexCr 31SW(2d)636.

652-52 200Wis636, 229NW54.

652-53 [a] 78CalA561, 248P990; 172 Minn208, 215NW206.

652-53½-New. Evidence that a check issued on insufficient funds covered a sale of goods turned over to the bank without profit to defendant negatives fraudulent intent. 22AlaA220, 114S280.

653-58 [a] 202Cal 409, 261P303; 75 CalA421, 243P39; 200 Ind24, 161NE3; 257Mass590, 154NE326; 22 OhA310, 153 NE757. [b] 21AlaA630, 111S194; CalA 288P430.

653-59 202Cal 409, 261P303 (sufficient); 75CalA421, 243P39; 92CalA245, 267P942.

653-60 See also 333 Ill 554, 165NE196.

653-62½-New. **Delivery** ample evidence to warrant conclusion that alleged crimes were committed without evidence concerning delivery. 252Mass116, 147 NE588.

653-62½-New. In prosecution for obtaining draft payable to another by false pretenses, evidence has been held properly excluded as immaterial. TexCr 31SW(2d)445(2dcase).

653-65 92CalA245, 267P942.

653-66 191NC751, 133SE14.

653-67 251Mich265, 231NW579.

653-68 196NC454, 146SE64.

653-69 23AlaA264, 124S282; 23AlaA 332, 125S201(2dcase); 96CalA1, 274P 361; 101CalA396, 281P629; 48 Ida335, 282P93 (guilt of defendant); 147Miss 446, 111S148; 320Mo 209, 7SW(2d)269; NJSup 136A338; 88PaSuper451; 94Pa Super460; 95PaSuper153; SC 155SE 849; 144Wash363, 258P23. [b] **Evidence held sufficient** for submission to jury. 173Ark1071, 294SW66. [c] **Evidence held insufficient to take case to jury.-Mo** 14SW(2d)452.

653-70 201Cal 568, 258P49.

653-71 95PaSuper102.

653-72 252Mass55, 147NE548. See also 49RI 107, 140A359.

653-73 23AlaA332, 125S201(2dcase); 75CalA29, 241P596; 82CalA739, 256P 266; NJSup 140A13; 103WVa446, 137 SE885; 200Wis636, 229NW54.

653-74 252Mass55, 147NE548; 86Pa Super464.

654-81 173Ark1071, 294SW66; 244 Mich603, 222NW201; 112TexCr281, 16 SW(2d)243.

654-84 [a] (1) 75CalA421, 243P39. [c] (1) NJSup 135A813; 144Wash363, 258 P23. (2) 144Wash363, 258P23. [e] **General charge** should be given for defendant in absence of evidence that he made or uttered check. 23AlaA550, 129 S308(2dcase). [f] **Refusal of instructions not prejudicial.-CalA** 290P600.

654-85 34Ariz363, 271P725; 85CalA 241, 259P76; TexCr 29SW(2d)359. [a] 221Ky232, 298SW681.

655-92 80CalA159, 251P315 (instruction held not objectionable).

655-1 170Ark484, 280SW398; 205 Iowa 1321, 217NW814 (without request). [a] **Definition** of "cheating" held not erroneous for failure to require use of token. 49RI 107, 140A359. [b] **Nature of pretense.-Mo** 289SW560.

655-2 [a] 180Ark280, 21SW(2d)183; 169 La684, 125S854. [c] **Instructions as to intent held erroneous.**-121 Oh147, 167NE 385.

655-3 69CalA475, 231P572 (instruction that falsity need not be proved by direct evidence, issue being whether defendant was divine healer, held correct); 80CalA 159, 251P315; Utah 280P1046 (proper instruction that act of defendant was wrongful as matter of law).

655-4 205 Iowa1321, 217NW814 (instruction held insufficient).

655-5 180Ark280, 21SW(2d)183.

655-6 77Colo 498, 238P51 (instruction that pecuniary loss to prosecutor was not essential element of offense held erroneous).

656-7 [a] **Instructions held erroneous.**-76CalA192, 244P94.

656-10 [b] **Conviction for felony not authorized.-Mo** 289SW560.

656-13 75CalA421, 243P39.

656-15 103WVa446, 137SE885. [b] 49 SD483, 207NW484. [d] **Punishment held not excessive.**-118Nebr184, 223NW 951.

656-16 202Cal 409, 261P303. [a] 103 WVa446, 137SE885.

656-17 202Cal 409, 261P303.

657-24 122Kan1, 5, 251P438 [citCJ]. [a] **In California.-A** 291P698.

657-25 CalA 266P853, 858 [citCJ]; 122 Kan1, 5, 251P438 [citCJ]; 170Minn43 211NW947, 948 [citCJ]; 111TexCr417, 18SW(2d)113; 103WVa446, 137SE885, 886 [quotCJ]. [b] (1) 72CalA102, 236 P944; 122Kan1, 251P438. (2) 201Cal 568, 258P49; 72CalA102, 236P944. [e] **Where owners surrendered money** to be used to accomplish specific purpose, and it was not so used, title to money did not pass so that appropriation of money constitutes larceny. 201Cal 568, 258P 49.

658-28 201 Iowa159, 205NW534.

658-35 113Nebr352, 204NW967, 968, 41 ALR227 [citCJ].

659-47 [b] **Intent to part unconditionally with possession and title** precludes contention that transaction constitutes "larceny by trick or device." CalA 290 P131.

661-86½ [a] 48Philippine183.

661-87 Fla 129S703; 338 Ill 631, 170 NE678 (gist of offense).

661-89 324 Ill 331, 155NE308; 338 Ill 631, 170NE678; 339 Ill 415, 171NE554; 109TexCr62, 2SW(2d)849 (intent to pass title is essential).

661-91 324 Ill 331, 155NE308; 327 Ill 270, 158NE448; 334 Ill 351, 166NE37.

661-92 327 Ill 270, 158NE448.

661-93 335 Ill 539, 167NE823; 338 Ill 631, 170NE678; 339 Ill 415, 171NE554.

661-94 327 Ill 270, 158NE448.

661-95 324 Ill 331, 155NE308.

661-96½-New. Recommendation upon which money was invested does not constitute confidence game. 324 Ill 331, 155 NE308.

661-96⅓-New. The offense is distinguished from that of obtaining money, under the false pretense statute, by the means employed to obtain the money, and not by the title or benefit obtained. 335 Ill 539, 167NE823.

FALSUS IN UNO, FALSUS IN OMNIBUS

662-18 [b] 94Fla656, 114S429. [c] **Not an imperative rule as a matter of law.**-126Misc342, 215NYS170.

FAMILY

664-41 242 IllA405, 413 [citCJ]. See also 86PaSuper409.

664-45 204 Iowa857, 216NW38; 43 OklACR50 [reh pending].

665-46 204 Iowa857, 216NW33.

665-48 43 OklACR50 [reh pending].

665-48½-New. a self-governing entity under discipline and direction of father as its head; 47RI 131, 131A198, 42ALR1360.

666-78½-New. "Family" includes only those persons whom head of family is bound by law to support. Vt 150A133.

666-80 See also 6LaA673.

667-94 [a] 146Miss308, 111S829.

667-96 [a] (1) 146Miss308, 111S829. (2) 146Miss308, 111S829.

668-99 [a] 146Miss308, 111S829.

668-11 [a] Vt 150A133.

669-53 146Miss308, 111S829.

FARM

673-45 315Mo 823, 290SW416 (hay and straw).

673-48 315Mo 823, 290SW416.

FARMER

674-73½-New. One who owns plantation upon which cotton is raised. 160 La294, 107S117.

FARMHOUSE

674-79½-New. A dwelling of a farmer; a farmer's residence. Miss 114S36.

F. A. S.

675-1½-New. 8F(2d)689.

FAST

675-5½-New. ; "immovable;" RI 135A 603.

675-5⅓-New. "not easily moved." RI 135A603.

FAULT

676-34 78CalA526, 248P930.

FAVOR

677-42 [a] **Agreement "to favor" manufacturer** held to express binding contractual intent. 128Misc690, 219NYS 252.

FEDERAL COURTS

688-23 [b] **Appeal to United States court of customs appeals from findings and recommendations of tariff commission under Tariff Act (1922) § 316** calls for exercise of judicial powers. 16 CustA191.

690-44 277US274, 48SCt507, 72L ed 880; 17F(2d)305; 25F(2d)160 (federal district court); 26F(2d)403. [h] **Construction and maintenance of state highways and bridges.**-25F(2d)851. [i] **Judicial nature of proceeding.**-279 US716, 49SCt499, 73L ed918. [j] **Actual cases or controversies.**-279US716, 49SCt499, 73L ed918. [k] **Judicial judgments.**-279US716, 49SCt499, 73L ed 918. [l] **Investment of judicial power in inferior courts** comes from constitution, not from act of congress creating court. 33F(2d)137.

690-45 41F(2d)385.

690-49 17F(2d)155; 30F(2d)211; 30 F(2d)636 [certiorari den 279US851, 49 SCt347(7thcase), 73L ed994]; 41F(2d) 385 (limitation of power); 43F(2d)175.

690-50 29F(2d)915.

690-51 23F(2d)519.

690-52 [b] **Congress has power** by giving jurisdiction to court of claims to consider claim against United States to waive effect of former judgment as res judicata. 270US476, 46SCt428, 70 L ed694. [c] **Status may be changed to that of inferior court.**-16CustA191.

691-55 13PortoRicoFed265.

691-55½-New. **In determining jurisdiction as federal court,** liberality of practice should be indulged. 23F(2d) 287.

691-55⅓-New. An express grant of life tenure of judges in the creation of a court points unmistakably to the kind of court created and to the source of power invoked in its creation. 16CustA 191.

691-56 7F(2d)177.

691-58 7F(2d)373; 14F(2d)104. [b] **Federal courts have no power to act in administrative, legislative, or executive capacity.**-37F(2d)862.
691-60 281US18, 50SCt175, 74Led673; 281US121, 50SCt270, 74Led737; 5 F(2d)967, 970 [citCJ]; 7F(2d)499; 7 F(2d)917; 13F(2d)51; 14F(2d)861; 16F(2d)902; 17F(2d)305; 20F(2d) 707; 22F(2d)851; 34F(2d)305; 36 F(2d)781; 41F(2d)542; 42F(2d)362; 43F(2d)214. [a] (3) State statute for enforcement of arbitration agreements held not to affect rights of nonresidents to maintain action in federal courts. 14 F(2d)861. (4) Other instances. 43 F(2d)214.
692-61 7F(2d)177; 36F(2d)661; 36 F(2d)886; 37F(2d)114.
692-63 7F(2d)917; 15F(2d)171.
692-63½-New. Ohio statute (Gen. Code § 9487), providing that applications for injunctions against insurance companies in certain cases must be by attorney-general, is not invalid as regulating jurisdiction of federal courts. 13F(2d)51.
692-65 15F(2d)660; 17F(2d)155; 13 PortoRicoFed237.
693-80 18F(2d)584.
693-80½-New. If doubt exists, it should be resolved in favor of the party denying jurisdiction, but if no doubt exists in the mind of the judge, it is the duty of the court to exercise jurisdiction. 12PortoRicoFed287.
693-81 [a] **Objection that evidence does not make case in equity** does not go to jurisdiction of federal court. 19 F(2d)300.
693-82 273US207, 47SCt357, 71Led 612; 275US393, 48SCt180, 72Led329; 5F(2d)514; 14F(2d)871; 16F(2d)401; 18F(2d)985; 34F(2d)163; 41F(2d)521 (1stcase); 43F(2d)195; 43F(2d)521. [d] 39F(2d)455. [e] 43F(2d)521.
693-86 25F(2d)851.
693-87 275US393, 48SCt180; 13F(2d) 510; 16F(2d)401; 31F(2d)617; 40 F(2d)323.
694-88 16F(2d)401; 32F(2d)639; 32 F(2d)904.
694-89 32F(2d)639; 32F(2d)904.
694-90 See also 30F(2d)539.
694-91 270US378, 46SCt236, 70Led 641.
694-94 123Or406, 262P833, 844 [cit CJperMcBride,J, dis op].
694-99 18F(2d)985.
694-1 18F(2d)985.
695-7 18F(2d)614; 30F(2d)707.
695-8 22F(2d)147; 27F(2d)11; 263 Mass444, 162NE217.
695-11 18F(2d)614; 22F(2d)147.
695-11½-New. Federal courts have no probate jurisdiction. 34F(2d)18.
696-13 267US276, 45SCt261, 69Led 609; 16F(2d)236; 19F(2d)903; 20 F(2d)295; 23F(2d)287; 27F(2d)368.
696-14 270US107, 46SCt221, 70Led 490.
697-16 279US218, 49SCt310, 73Led 669; 19F(2d)903; 30F(2d)893; 32 F(2d)706; 39F(2d)341; 43F(2d)521 (claims involving title to property). [a] (3) Suit by receiver in winding up affairs of receivership is ancillary to main suit. 21F(2d)168. (4) So also in suit by receiver for collection of assets (21F(2d)168). (5) or suit in defense of property in his hands (21F(2d) 168). [b] **No power exists in federal court in receivership proceedings** to restrain or stay suit against receivers, which does not threaten property in receivers' hands. 35F(2d)189.
697-19 5F(2d)610; 21F(2d)56; 23 F(2d)287; 24F(2d)66.
697-20 21F(2d)333.
697-23 21F(2d)168.
697-25 270US107, 46SCt221, 70Led 490; 19F(2d)529; 21F(2d)168; 24 F(2d)66; 43F(2d)521 (controversies between codefendants in foreclosure). [b] **Determination of title to leasehold** in foreclosure of mechanic's lien thereon. 43F(2d)521.
698-26½-New. It is not controlling that ancillary issue proves to be more important than matter conferring federal jurisdiction. 15F(2d)745.
698-28 16F(2d)744. [a] (5) Partition for intervener is not ancillary to suit to establish plaintiff's interest in land. 16F(2d)744. (6) Other instances. 41F (2d)326.
698-29 267US276, 45SCt261, 69Led 609.
699-33 41F(2d)326.
699-37½-New. Exercise of inherent power of the court to control misconduct of officers is discretionary. 22F (2d)837.
699-38 18F(2d)856. [a] 18F(2d)856.
699-50 22F(2d)577; 41F(2d)823. [b] (9) To compel compliance with demand for access to records of packers under Packers and Stockyards Act. 15F(2d) 133. (10) To compel registration of surgeon under Internal Revenue Law. 14F(2d)749. (11) By supreme court to any courts appointed or persons holding office under United States or in federal matters. 41F(2d)823.
700-51 14F(2d)749; 14F(2d)976; 21F (2d)144.
700-55 [b] (1) 33F(2d)360 (alien deportee in custody of ship master on seas).
701-68 273US418, 47SCt426, 71Led718, 58ALR1236; 278US300, 49SCt150, 73 Led390; 7F(2d)917; 8F(2d)739; 18F (2d)453; 21F(2d)333; 33F(2d)978; 37F(2d)342. [i] 30F(2d)600.
702-69 273US418, 47SCt426, 71Led718, 58ALR1236; 21F(2d)333; 25F(2d)412.
702-70 17F(2d)55; 21F(2d)333. [f] 7 F(2d)917. [j] **Receiver appointed by federal court** to enforce stockholder's liability has same rights and powers as if proceedings were in state court. 7F (2d)917.
703-72 21F(2d)333.
703-73 21F(2d)333.
703-78 5F(2d)956; 19F(2d)589; 42F (2d)515. See also 26F(2d)403; 86Pa Super145. [c] **Congress may fix venue in one district for given cause,** and authorize service of process where defendant resides. 273US359, 47SCt400, 71 Led684.
704-82 42F(2d)515.
704-86 [a] **Suit to annul order of interstate commerce commission permitting railroad** to acquire control of another system must be brought in district of residence of party on whose petition order was made. 271US456, 46 SCt545, 70Led1033.
704-87 179Fed556; 19F(2d)589; 36F (2d)989. [d] 32F(2d)295. [g] **Requirement cannot be nullified by implication** but only by express statutory provision. 36F(2d)989.
704-88 179Fed556.
705-89 37F(2d)695. [a] (2) Within meaning of rule, personal, and not official, residence controls. 26F(2d)860. [b] (3) Where stockholders of national bank, who were sued to enforce assessment, filed cross bill, and impleaded comptroller, service must be made on him in the district. 29F(2d)329.
705-90 270US496, 46SCt397, 70Led 703; 179Fed556; 26F(2d)860; 31F(2d) 383; 38F(2d)566.
705-94 16F(2d)1011.
707-11 [b] **Requisite diversity of citizenship** exists where all defendants are citizens and residents of state or states other than state of which plaintiff is citizen and in which he resides. 26F (2d)884.
707-16 But see 7F(2d)783.
707-17 35F(2d)779 (must be suable in jurisdiction where action is brought). See also 36F(2d)989.
708-26 270US363, 46SCt247, 70Led 633.
708-27 [a] **Right cannot be defeated** by charge of unfair competition occurring in another district. 38F(2d)671.
708-28 274US208, 47SCt578, 71Led 1002; 17F(2d)305.
708-30 24F(2d)299; 36F(2d)781.
709-31 270US363, 46SCt247, 70Led 633; 24F(2d)454; 31F(2d)383; 31F (2d)484. But see 36F(2d)783.
709-32 31F(2d)383; 38F(2d)671.
709-34 24F(2d)987; 41F(2d)767. [b] **In action under anti-trust laws,** foreign manufacturer has been held not "found" nor "transacting business of any substantial character" within district. 41 F(2d)767.
709-35 5F(2d)500.
710-48 35F(2d)779.
712-81 See also 26F(2d)403. [b] **Existence of property** of deceased, where claim against estate is not of special nature or different from general creditor's claim or action for tort, confers no venue when defendant neither resides nor is found within district. 26 F(2d)860.
712-82 26F(2d)403.
712-85 179Fed556.
712-86 179Fed556.
713-87 31F(2d)484. [b] (4) Scope of statute is not extended by constructions. 32F(2d)350. [d] (1) 26F(2d)884. (14) Shares of stock belonging to decedent, resident of district, certificates of which, within district, may be ordered transferred by corporation, having transfer office within district. 7F(2d) 158. (15) Other instances. 26F(2d) 884. [e] See also 32F(2d)350. [j] (9) 26F(2d)860. (16) Bill based on deceased's negligence in management of estate of incompetent, not charging misappropriation, is in personam. 26F(2d) 860.
718-10½-New. The federal court's jurisdiction in a patent infringement suit is not divested by disclosure of a dispute as to the title of the patent. 15F (2d)745.
718-10½-New. Jurisdiction of an action based on an act of congress is not defeated by a plea denying the merits of the claim. 29F(2d)493.
718-11 27F(2d)304.
718-20 But see 24F(2d)66.
718-21½-New. Where the allegation states a cause of action within the jurisdiction of the court, failure to prove such allegations will not affect the jurisdiction. 5F(2d)99.
718-29 17F(2d)193. [b] (1) 29F(2d) 897. [f] **Where remedy enforceable in courts** is pursued, a "case" arises whether subject of litigation is property or status. 270US568, 46SCt425, 70 Led738.
720-30 13F(2d)814; 28F(2d)195; 32F (2d)570; 13PortoRicoFed393.
720-31 13F(2d)814; 33F(2d)957 (property questions arising in suit involving bankruptcy).
720-33 13F(2d)814; 17F(2d)193.
720-35 22F(2d)206; 27F(2d)304; 33 F(2d)396; 33F(2d)719. [b] **Denial of right to be confronted with witnesses,** under Sixth Amendment, presents no substantial federal question where right is waived by stipulation. 33F(2d)396.
721-37 43F(2d)236. [a] 43F(2d)236.
721-39½-New. All remedies under state law need not be exhausted before invoking jurisdiction of the federal court. 13F(2d)814.
722-41 30F(2d)106.
722-48 278US92, 49SCt40, 73Led198; 13F(2d)814; 16F(2d)401; 16F(2d) 763; 19F(2d)500; 21F(2d)355; 24F (2d)299; 29F(2d)897; 32F(2d)570; 43 F(2d)236; 13PortoRicoFed268.
722-49 16F(2d)401; 17F(2d)143; 27F (2d)406. [l] **Court is not without jurisdiction** merely because of failure expressly to allege that statute is unconstitutional. 270US426, 46SCt331, 70 Led664.
723-50 270US378, 46SCt236, 70Led 641; 13F(2d)814; 27F(2d)618.
723-51 270US378, 46SCt236, 70Led 641; 275US393, 48SCt180, 72Led329 (bill held to state claim under constitution); 13F(2d)814; 13F(2d)852; 16 F(2d)401; 17F(2d)167; 21F(2d)355; 25F(2d)164; 28F(2d)5; 28F(2d)195; 28F(2d)441; 32F(2d)570; 32F(2d)639; 32F(2d)819; 37F(2d)938(2dcase); 39 F(2d)822; 123Or406, 262P833; 12 PortoRicoFed269. [a] (4) Bill to protect, by injunction, public service corporation against confiscatory rates where public service commission had failed to act. 26F(2d)912. [e] **Failure of state supreme court to notice in its written opinion assignment of errors** is not such denial of constitutional right as to give federal court jurisdiction. 27F(2d)847. [f] **Suit to enjoin enforcement of state court judgment** on ground that decision is erroneous and oppressive does not give federal court jurisdiction as involving denial of due process. 28F(2d)493.

723-57 See also 43F(2d)169.
724-61 17F(2d)143; 37F(2d)938(2d case).
724-62 13F(2d)852; 33F(2d)719. But see 16F(2d)401.
724-63 13F(2d)852.
724-64 16F(2d)401; 36F(2d)816.
725-70 13F(2d)814; 21F(2d)355; 32F(2d)904; 34F(2d)185 (injunction sought against state officials); 34F(2d)480. But see 13F(2d)852.
725-72 17F(2d)143.
725-77 43F(2d)169.
725-78 [b] **When municipality acts in purely proprietary capacity,** jurisdiction of federal courts in respect of confiscatory rates is lacking. 39F(2d)822.
726-83 123 Or406, 262P833.
726-85 274US195, 47SCt566, 71L ed996; 14F(2d)166; 16F(2d)431; 24F(2d)299; 35F(2d)248 (validity of ordinance involving interpretation of Prohibition Act); 43F(2d)236. But see 38 OklACR443. [k] **Cases involving operation of national prohibition laws** come within federal jurisdiction. 274US195, 47SCt566, 71L ed996. [l] **Pleadings must affirmatively show jurisdiction on this ground.**-16F(2d)431. [m] **Allegations in petition, in action of ejectment,** that defendants asserted ownership under guardian's deed which is void under congressional legislation regulating allotment of lands to Chickasaw freedman do not present case arising under laws of United States. 132 Okl141, 269P1067. [n] **Where principal issue involves construction of federal statute,** it is one arising under laws of United States. 25F(2d)85.
726-86 18F(2d)203.
726-87 [a] **Suit by minority stockholders** to enjoin railroad from controlling other railroad companies in violation of Sherman & Dayton Acts held improperly dismissed for want of jurisdiction. 271US228, 46SCt496, 70L ed920.
726-89 271US259, 46SCt530, 70L ed934.
727-92 18F(2d)584.
727-98½-New. Claim that state regulatory statute violates state constitution is not ground for invoking jurisdiction of the federal court in a rate base case. 13F(2d)510.
727-98⅓-New. The federal court has no jurisdiction over a suit seeking pronouncement that one was an enlisted man in the army and was entitled to war risk insurance. 34F(2d)881.
728-9 270US496, 46SCt397, 70L ed703; 271US232, 46SCt505, 70L ed922; 29F(2d)493; TexCivA 297SW290.
728-11 252NY107, 169NE105.
728-12 TexCivA 297SW290. [b] **Breach of contract.**-Mass 172NE586.
728-14 270US496, 46SCt397, 70L ed703; 15F(2d)889.
728-18 252NY107, 169NE105.
729-19½-New. Question as to whether jurisdiction arises under the Patent Law or by reason of diversity of citizenship is immaterial where both are alleged. 13F(2d)6.
729-19⅓-New. The federal court having jurisdiction on a bill for infringement also has jurisdiction to decide a counterclaim arising out of the subject matter. 29F(2d)493.
729-19¼-New. Counterclaim in patent infringement suit will be stricken where no federal question is involved and there is no diversity of citizenship. 39F(2d)200.
729-21 But see 31F(2d)157.
729-29 [a] **Bill for cancellation of contract** involving title to trade-mark and for injunctive relief is not within provision of statute giving federal court jurisdiction. 28F(2d)115 (allegations as to infringement of trade-mark were incidental).
729-32 7F(2d)113; 34F(2d)291. [b] 22F(2d)522. [c] (4) Where separate allegations and proof are required to support suit for unfair competition, joined with suit for infringement of trade-mark, former will be dismissed. 27F(2d)531 [aff 27F(2d)538]. [d] **That causes of action of which federal court has jurisdiction are joined** does not give jurisdiction of action for unfair competition between citizens of same state. 34F(2d)43.
729-35 13F(2d)950; 17F(2d)193; 43F(2d)198. But see 26F(2d)615. [f] (3) Jurisdiction of state supreme court is same as jurisdiction of supreme court of United States, under act. 336Ill560, 168NE686. [j] 32F(2d)14. [l] 38F(2d)284; 43F(2d)236. [n] **Action to recover interstate freight charges** is within jurisdiction of federal court without regard to amount involved. 13F(2d)950. [o] **Suits for violation of Anti-Trust Act** do not depend on diversity of citizenship. 7F(2d)481. [p] **Air Commerce Act.**-35F(2d)761.
731-45 24F(2d)763.
731-46 40F(2d)323.
731-51 See also 41F(2d)728.
731-52½-New. The federal court is without authority to grant a preliminary injunction to restrain the erection and operation of a power transmission line. 23F(2d)508.
731-52⅓-New. Matter of constructing and maintaining dam solely to generate electricity for commercial purposes is not within federal court's jurisdiction. 42F(2d)692.
731-56 [a] (3) Whether railroad had lost its proprietary interest in right of way granted by congress, with reverter in case not sold to settlers, has been held federal question, and United States decision is binding, where loss of right to public as highway by prescription is claimed. 216Ala656, 114853. [f] **Actions held not to involve construction of federal law.**-38F(2d)230.
732-57 16F(2d)431.
732-58 16F(2d)431.
733-67 19F(2d)961; 34F(2d)700.
733-72½-New. An action by the federal Intermediate Credit Bank is not within the jurisdiction of the federal court as one arising under laws of the United States. 21F(2d)51.
733-72⅓-New. St. Febr. 13, 1925, § 12 (Comp. St. § 991d) has been held not intended as an implied repeal of prior acts affecting jurisdiction of suits by or against corporations created under the act of congress. 21F(2d)51.
734-76 15F(2d)612.
735-84 277US213, 48SCt449, 72L ed854; 19F(2d)486.
735-85 43F(2d)866.
735-85½-New. Jurisdiction is not taken away where the United States owns more than one half of the stock of the corporation. 19F(2d)486.
735-91 13F(2d)206; 37F(2d)234.
735-92 15F(2d)612.
736-97 13F(2d)330; 28F(2d)755.
736-98½-New. Jurisdiction under Judicial Code § 24 subd 16 extends to suits by stockholders of an insolvent national bank on behalf of themselves and all other stockholders, to enjoin the comptroller of currency. 13F(2d)206.
736-2 [a] **Cause of action against directors of national bank for making excessive loans** held not to arise as result of oaths taken under federal law. 15F(2d)612.
738-29 255Fed488 (tort action).
738-31 21F(2d)168.
738-32 21F(2d)168.
739-42 32F(2d)308.
740-60 [b] **Suit to quiet title against United States and others** is not maintainable in federal court where there is no statute authorizing such suit against government and no diversity of citizenship as to other defendants. 33F(2d)224.
741-73 281US163, 50SCt275, 74L ed784.
742-85 13F(2d)500; 16F(2d)322; 21F(2d)333.
742-86 13F(2d)500.
742-87 13F(2d)500.
742-88 13F(2d)500; 16F(2d)150; 16F(2d)322; 21F(2d)333.
742-90 13F(2d)500; 22F(2d)147.
742-91 278US194, 49SCt104, 73L ed262; 21F(2d)333; 22F(2d)147.
742-96 25F(2d)480.
742-97 40F(2d)532.
742-98 21F(2d)333 (suit to recover taxes paid).
743-1½-New. Whether the state attorney-general's appearance in a federal suit against the state constitutes appearance by the state depends on his authority. 22F(2d)147.
743-1⅓-New. The attorney-general of Nebraska has no general authority to appear in suits against the state in a federal court and consent that the state be sued. 22F(2d)147.
743-4 13F(2d)500; 16F(2d)290; 17F(2d)196; 17F(2d)710; 38F(2d)625. [a] (12) Action against state highway commission on construction contract. 23F(2d)638.
743-5 278US194, 49SCt104, 73L ed262; 13F(2d)500; 14F(2d)166; 16F(2d)322; 153Md607, 139A291. [a] (8) Suit to enjoin state superintendent of insurance from revoking license of foreign insurance company held to be against defendant as state officer and not against state. 13F(2d)500.
744-6 271US426, 46SCt552, 70L ed1019; 13F(2d)500; 16F(2d)290; 27F(2d)377; 43F(2d)198.
745-20 [a] See also 12PortoRicoFed64.
745-21 30F(2d)636 [certiorari den 279US851, 49SCt347(7thcase), 73L ed994].
745-22 19F(2d)500.
746-26 35F(2d)779.
746-29 [a] **Corporation incorporated in territory** is not alien subject to federal jurisdiction. 24F(2d)383.
747-37 16F(2d)464; 16F(2d)502; 18F(2d)614; 27F(2d)457; 28F(2d)441; 37F(2d)527.
747-39 7F(2d)772. [a] (18) Enforcement of reconstruction of bridge tending to increase flood hazards and requiring payment therefor by county. 25F(2d)851.
747-40 16F(2d)290.
747-42½-New. A cross complaint against a corporation will be set aside where the parties thereto are residents of the same state and the controversy is dependent on facts not involved in the original action. 21F(2d)872.
747-43 6F(2d)812; 16F(2d)322. [a] **Suit by department of a state** is suit by state, not within jurisdiction of federal court. 6F(2d)812. [b] **Record determines** whether state is actual party. 6F(2d)812.
747-44 278US194, 49SCt104, 73L ed262; 16F(2d)322.
747-44½-New. State officer may be sued by a citizen of another state to restrain enforcement of a statute. 16F(2d)290.
748-47 24F(2d)299.
748-48 8F(2d)149; 24F(2d)299 (synonymous with "inhabitant").
748-51½-New. A state is not a "citizen" within federal statutes relating to suits by citizens of different states. 22F(2d)147.
748-59 19F(2d)300.
749-63 See also 43F(2d)599.
749-71 15F(2d)462; 16F(2d)744; 26F(2d)233; 34F(2d)566; 37F(2d)338; 41F(2d)74; 41F(2d)326; 41F(2d)728; 43F(2d)201; 43F(2d)205.
750-73 13F(2d)246.
750-73½-New. Where a nonresident plaintiff sued to cancel an oil, gas, and mineral lease and for damages for breach of covenants in the lease, in so far as the action for damages was between plaintiff and nonresident defendants, the court had no jurisdiction to determine the issue. 31F(2d)484.
750-75 19F(2d)300.
750-77 4F(2d)867; 5F(2d)181; 15F(2d)990; 16F(2d)744; 19F(2d)300; 27F(2d)156; 30F(2d)574. [c] **Test to determine proper alignment.**-38F(2d)284.
751-78 15F(2d)990.
751-79 [a] (3) Citizens of one state will be placed on opposite sides. 30F(2d)574.
751-80½-New. Defendant seeking the same relief as plaintiff will not be aligned with plaintiff to defeat the federal court's jurisdiction. 15F(2d)797.
751-80⅓-New. By bringing defendants into the record as parties, plaintiff concedes that they are adverse in interest. 34F(2d)566.
752-87 7F(2d)548; 16F(2d)744; 25F(2d)95.
752-88 6F(2d)922; 13F(2d)36; 16F(2d)68; 16F(2d)657; 27F(2d)457; 28F(2d)895; 32F(2d)184; 33F(2d)481;

33F(2d)159. [a] (7) Corporation, citizen of same state as plaintiffs, controlled by defendant, foreign corporation, is not indispensable party under decree appointing receiver for foreign corporation and authorizing resort to courts of state of plaintiffs' residence. 33F(2d) 703.
753-89 25F(2d)95; 36F(2d)37. [b] **Parties held not indispensable.**-33F(2d) 481.
753-90 4F(2d)867.
753-91 16F(2d)744; 26F(2d)244; 32 F(2d)100; 41F(2d)74.
753-92 16F(2d)657.
753-93 4F(2d)867; 16F(2d)657; 24 F(2d)169; 32F(2d)100. [d] **In suit to cancel contract** between corporation, having right to grant sublicenses to its stockholders, and a sublicensee, which under contract became stockholder, other sublicensees having similar contracts are not indispensable parties. 4F(2d)867.
753-94 16F(2d)657; 32F(2d)184. [b] **Holder of mortgage** held not necessary party to action to enforce vendor's rights. 16F(2d)657.
754-95½-New. The state is not an indispensable party in a suit to determine heirship so as to defeat the federal court's jurisdiction. 22F(2d)147.
754-97 24F(2d)951 (nonresident successor to resident trustee).
754-2 13F(2d)13, 47ALR314.
755-5 41F(2d)858.
755-7½-New. Administrator of a deceased alien may sue the alien property custodian in the federal court, although the estate is being probated in another court. 17F(2d)321.
755-13 16F(2d)645; 18F(2d)265; 19 F(2d)97.
755-14 13F(2d)988; 15F(2d)10; 15 F(2d)652; 16F(2d)121; 17F(2d)785; 19F(2d)439; 21F(2d)333 (domestication held not to preclude operation of rule); 24F(2d)299; 31F(2d)383; 39F(2d)341. See also 42F(2d)387.
756-15 14F(2d)181.
756-16 24F(2d)299. But see 42F(2d) 362.
756-17 But see 23F(2d)852.
757-19 13F(2d)988. [c] (2) Stockholder's bill for benefit of portion may be brought in federal court on ground of diversity of citizenship. 6F(2d)922.
757-19½-New. Corporation transferring all property to a corporation organized in a different state may become a citizen of the latter state for jurisdictional purposes. 19F(2d)439.
757-19¼-New. The district court has jurisdiction of a suit by a corporation in a district in which it has not filed a certificate under the state law. 24F(2d) 577.
757-19¼-New. A corporation suing because of diversity of citizenship need not allege compliance with the state law governing foreign corporations. 34 F(2d)820.
757-20 277US213, 48SCt449, 72L ed854.
757-22 21F(2d)333.
758-23 34F(2d)480.
758-26 13F(2d)947.
759-31 34F(2d)897.
759-31½-New. That a corporation which is the bona fide owner of land was organized in a state other than that in which the land is situated for the purpose of giving jurisdiction of a suit to grant title to a federal court does not defeat the jurisdiction of such court. 18F(2d)265.
759-34 8F(2d)149.
759-35 243Fed555, 156CCA253.
759-43 8F(2d)428.
759-44 24F(2d)383 (Philippine corporation).
767-45 270US456, 46SCt338, 70L ed 682.
760-51 [d] **Assignment of sum of money to defendant** under agreement to distribute and pay over such sum to assignor's creditors is not assignment of chose in action. 37F(2d)235.
761-52 12F(2d)758; 43F(2d)866.
762-56 12F(2d)758; 18F(2d)574. See also 40F(2d)577.
762-64½-New. Under the Judicial Code as amended, an assignee of a note may sue the maker in the district in which the assignee resides, when the assignor, a citizen and resident of a different state from that of defendant, does not reside in that district. 32F(2d)823.
762-65 44F(2d)11.
762-66½-New. An action by a nonresident indorsee of notes delivered to a bank in the same state under an agreement that the maker should not have credit until the notes were negotiated; 31F(2d)877.
764-5 18F(2d)265.
764-5½-New. One paying delinquent irrigation taxes and receiving a deed from the county, to whom the land was sold under a void tax deed, is not an assignee of the county or irrigation district. 32F(2d)984.
764-7 18F(2d)574.
764-12 12F(2d)991; 28F(2d)895; 34F (2d)580.
764-13 16F(2d)744; 27F(2d)156.
764-16 16F(2d)744; 23F(2d)605.
764-17 27F(2d)156; 28F(2d)897.
764-18 27F(2d)156.
765-21 16F(2d)744; 38F(2d)284. [e] 276US518, 48SCt404, 72L ed681, 57ALR 426; 13F(2d)708; 17F(2d)841.
765-24 15F(2d)509.
765-25 6F(2d)922; 13F(2d)708.
765-27 16F(2d)805.
765-27½-New. An assignment of notes by payees after maturity and without consideration is not colorable merely for the purpose of giving the federal court jurisdiction where the assignors would have been entitled to sue in the federal court. 32F(2d)823.
766-37 15F(2d)509.
766-39 13F(2d)988.
766-40 13F(2d)988; 17F(2d)841.
767-44 14F(2d)181; 32F(2d)100; 40F (2d)161.
767-45 14F(2d)406; 21F(2d)333; 25F (2d)326; 27F(2d)753; 30F(2d)211; 33 F(2d)123; 42F(2d)387; 43F(2d)175.
767-46 15F(2d)660; 28F(2d)115.
767-47 7F(2d)404; 17F(2d)733; 41F (2d)305.
767-54 12F(2d)986; 19F(2d)463; 19F (2d)500; 39F(2d)800; 41F(2d)74; 12 PortoRicoFed301.
769-74 22F(2d)851 (on face of complaint).
770-82 16F(2d)856.
770-92 22F(2d)638.
770-95 16F(2d)856. [a] (1) 15F(2d) 660.
771-99 15F(2d)660.
771-4½-New. **Amendments.** Evidence as to citizenship of parties held insufficient to show diversity authorizing court to permit amendment. 15F(2d)660.
772-13 [a] (3) Complaint, alleging that plaintiff is North Carolina corporation and defendant town municipal corporation organized under laws of South Carolina, is sufficient. 34F(2d)480.
773-26½-New. A complaint which discloses that the foreign corporation sued has ceased to function and cannot be served with process requires dismissal of the cause. 34F(2d)66.
774-37 [a] **Allegations held insufficient** to establish defendant's residence in district. 33F(2d)123.
774-50½-New. To give a court jurisdiction over a defendant served in another district of the state, the facts which bring the case within the provision of the judicial code must be alleged. 18F (2d)629.
774-51 26F(2d)884.
774-57 12PortoRicoFed189.
775-66 Mass 172NE614.
775-69½-New. In suits to recover income taxes wrongfully exacted, petitions not alleging that the country of which plaintiff was alleged to be a citizen accords citizens of the United States the right to prosecute claims against the government of such country in its courts must be dismissed for failure to allege a necessary jurisdictional fact. 28F(2d) 913.
776-71 270US456, 46SCt338, 70L ed682 (bill to determine conflicting claims of lessees of Quapaw Indian allottee held not to show federal jurisdiction); 15F (2d)488; 15F(2d)612; 15F(2d)889; 16 F(2d)763; 17F(2d)193; 22F(2d)559; 24F(2d)798; 27F(2d)304; 32F(2d)550; 33F(2d)719; 35F(2d)351(1stcase); 37F (2d)938(2dcase); 42F(2d)500; 252NY 107, 169NE105.
776-72 16F(2d)763. But see 252NY107, 169NE105.
776-74 17F(2d)193.
777-75 23F(2d)63; 32F(2d)550. [a] 23F(2d)277.
777-76 16F(2d)763; 22F(2d)559. [a] 22F(2d)559; 22F(2d)851; 123 Or406, 262P833. [b] 275US440, 48SCt174, 72 L ed357; 33F(2d)719; 34F(2d)224.
777-78 275US440, 48SCt174, 72L ed357; 27F(2d)304; 28F(2d)115; 33F(2d)719.
777-80 17F(2d)193; 23F(2d)277; 94 Fla427, 115S261, 263 [citCJ].
778-82 17F(2d)193.
778-83½-New. Failure to allege facts stating a cause of action under a federal statute is not fatal to jurisdiction, since the court in its discretion may permit an amendment. 25F(2d)164.
778-86 16F(2d)744; 17F(2d)725; 21F (2d)497; 38F(2d)524; 35F(2d)351(1st case); 41F(2d)305. [c] **Effect of decision on amount of defendant's taxes** for other years cannot increase amount involved for jurisdictional purposes. 22F (2d)997. [d] **Averments held sufficient.**-44F(2d)11.
778-87 19F(2d)463.
778-89 41F(2d)728.
778-90 16F(2d)92; 41F(2d)728; 42F (2d)927.
779-95 16F(2d)45; 26F(2d)284 (amount held sufficiently averred); 41F(2d)305. [a] (6) Insufficient allegations in general. 41F(2d)728.
779-1½-New. A prima facie case for jurisdiction is made where the jurisdictional amount was alleged and not attacked by the pleadings. 32F(2d)184.
779-3 25F(2d)326.
779-4 12PortoRicoFed64.
779-6 270US456, 46SCt338, 70L ed682. [a] **Bill held treated as amended** by leave of supreme court to show uncontroverted jurisdictional facts. 270US 456, 46SCt338, 70L ed682.
779-7½-New. **Bill in stockholder's suit** may be amended by adding allegations required by Equity Rules, rule 27. 7F(2d)548.
779-9 [c] 13F(2d)246; 13F(2d)644.
781-21 7F(2d)548; 13F(2d)644.
781-27 33F(2d)703. [c] **Question of court's jurisdiction is not matter of discretion.** 39F(2d)618.
781-29 274US684, 47SCt755, 71L ed 1297 (dictum); 24F(2d)383; 41F(2d) 74.
782-30 14F(2d)406. [a] **Court authorized to pass on its jurisdiction when raised.**-43F(2d)254.
782-38½-New. However, objections to merits may be waived. 274US684, 47 SCt755, 71L ed1297.
782-38½-New. A motion to quash service of summons challenging the federal court's jurisdiction as fraudulently invoked held deficient in fact statement. 17F(2d)841.
782-38¼-New. Objection to equity jurisdiction over case does not go to power of court. 274US684, 47SCt755, 71L ed 1297.
782-39 19F(2d)196.
782-43½-New. An objection that the pleadings do not present an equity case is not an objection to jurisdiction. 27 F(2d)304.
783-54 270US456, 46SCt338, 70L ed682.
785-71 [c] **Treating motion assailing jurisdiction** as plea in abatement cannot be objected to. 41F(2d)767.
786-80 25F(2d)988.
787-92 [a] **Motion to dismiss will raise question of jurisdiction** under Equity Rules, rule 29, and it need not be by answer. 8F(2d)428.
787-97 13F(2d)644.
787-7 13PortoRicoFed175.
787-9 25F(2d)988.
787-11½-New. On motion to dismiss, allegations of answer are not considered. 25F(2d)988.
787-12 35F(2d)555; 41F(2d)767.
788-13 13F(2d)255.
788-16 16F(2d)856.
788-17 34F(2d)480.
788-17½-New. Where complaint does not allege necessary jurisdictional fact, burden is not shifted to defendant to negative jurisdiction. 16F(2d)856.
789-23 35F(2d)555.
789-28 [a] **Evidence of residency** held sufficient to establish diversity of citi-

zenship. 21F(2d)497. [b] **Evidence held sufficient** to show foreign corporation was not present through nor represented by person upon whom process was served as agent. 36F(2d)783.

789-35 27F(2d)304. [a] **In determining jurisdictional power** to enjoin alleged constitutional violation, allegations on merits are considered only as to whether substantial case is stated. 28F(2d)5.

789-36 13PortoRicoFed365; 13PortoRicoFed368.

790-42 7F(2d)373; 14F(2d)181; 36F(2d)832(2dcense); 41F(2d)74. See also 43F(2d)214.

790-43 See also 43F(2d)214.

790-44 15F(2d)660.

791-46 31F(2d)283.

792-61 [a] 42F(2d)927.

792-67½-New. Dismissal required where further proceedings unnecessary or unavailing. 43F(2d)214.

792-67½-New. Bill dismissed where judgment paid and money placed in registry of state court at complainant's disposal. 43F(2d)214.

792-68 44F(2d)234.

794-85 278US177, 49SCt98, 73Led252; 11F(2d)975; 13F(2d)797; 18F(2d)357; 33F(2d)568; 34F(2d)671; 40F(2d)937.

794-87 [a] 22F(2d)350; 36F(2d)954 (2dcense).

794-88 278US177, 49SCt98, 73Led252; 13F(2d)797; 14F(2d)475; 37F(2d)527.

[b] **Appearance for purpose of obtaining extension of time to plead** constitutes waiver of right of internal revenue collector to be sued at his domicile. 18F(2d)357.

794-89 13F(2d)797; 35F(2d)779. [d] **Excepting to sufficiency** of petition as stating no cause of action waives objection to venue. 5F(2d)967.

795-89½-New. or permits default judgment after personal service of summons, 278US177, 49SCt98, 73Led252.

796-2 28F(2d)913.

796-5½-New. Whether defendant is doing business in the district in which suit is brought will not be considered unless defendant raises the issue. 32F(2d)323.

796-7 [b] 24F(2d)299.

796-18 See also 41F(2d)213.

796-23 11F(2d)975 7F(2d)756; 15F(2d)660; 37F(2d)188; 37F(2d)527. [c] **Peculiar rules applicable to particular city courts** have no bearing on proper practice. 17F(2d)105. [d] **Conversely**, federal courts in other districts need not conform to procedure prescribed by state act. 41F(2d)645.

796-25 34F(2d)829

799-30½-New. Conformity Act does not require the use of identical phraseology of state procedural statutes. 15F(2d)364.

800-48½-New. Declaratory judgments form no basis for jurisdiction. 273US70, 47SCt282, 71Led541.

800-48¼-New. State decisions are not controlling on questions of general jurisprudence. 13F(2d)[illegible]

800-48¼-New. Rendering of declaratory judgment is not within power of federal court. 41F(2d)30.

800-49 7F(2d)756; 28F(2d)895; 38F(2d)[illegible]; 11F(2d)767.

801-55 28F(2d)895. [b] **Searches and seizures.**—In determining whether search of automobile by state trooper was reasonable, so as to authorize use of evidence in federal prosecution, federal court must have regard to constitution, which controls, even though officer gets his authority under state law. 29F(2d)172 (certiorari den 279US849, 49SCt346 (3dcense), 73Led992).

801-58 [b] 33F(2d)976.

802-61 34F(2d)790; 34F(2d)820; 42F(2d)362.

802-63 7F(2d)620

802-66 13F(2d)770, 16F(2d)[illegible]; 17F(2d)296; 39F(2d)191, 42F(2d)616.

802-67 But see 6F(2d)602; 19F(2d)496.

802-68 18F(2d)617; 20F(2d)295; 23F(2d)317; 25F(2d)847.

803-69 11F(2d)968; 31F(2d)405. [a] 8F(2d)781; 29F(2d)162, 29F(2d)296; 29F(2d)366 (certiorari den 279US839, 49SCt253(3dcense), 73Led986), 29F(2d)566; 30F(2d)7; 30F(2d)178; 30F(2d)204 (certiorari den 279US858, 49SCt352(9thcense), 73Led999); 30F(2d)971; 31F(2d)211; 31F(2d)745; 31F(2d)969; 32F(2d)349; 32F(2d)481; 42F(2d)541.

803-70 18F(2d)617; 24F(2d)951; 34F(2d)163.

804-77 273US388, 47SCt385, 71Led699; 29F(2d)535. [c] **Doctrine of balance of convenience** will be applied by federal courts in absence of local law requiring application of different rule. 14F(2d)736.

804-85 [a] (2) State law and decisions considered. 40F(2d)679.

804-86½-New. Federal courts have jurisdiction to determine the validity of equitable liens irrespective of the validity of such liens under the state law. 18F(2d)617.

805-91 14F(2d)269; 15F(2d)625; 15F(2d)955; 4HawaiiFed466.

805-92 15F(2d)625; 37F(2d)203(rules of evidence).

805-96 40F(2d)820.

805-97½-New. The federal court is not required to follow the state practice in reference to the manner in which the judge performs his duties. 18F(2d)850.

805-97¼-New. In the matter of sequestering the jury. 18F(2d)850.

805-97¼-New. the opening statements of counsel. 18F(2d)850.

805-97½-New. or the instructions. 18F(2d)850.

805-98 19F(2d)378; 29F(2d)92.

805-98½-New. Sufficiency of bond is determined by state law. 26F(2d)104.

805-99 26F(2d)123; 39F(2d)89(1st case) (competency of witnesses).

806-16 29F(2d)582.

806-21 [a] **Joinder of defendants.**—8F(2d)83.

806-23 16F(2d)266. See also US 47SCt282.

806-27 [d] (2) Suit to quiet title or right of possession to real estate cannot be maintained in federal court by complainant out of possession against defendant in possession, whatever practice in state courts may be. 132Okl141, 269P1067; 35F(2d)309. [g] **Joinder of causes of action by plaintiff.**—37F(2d)675.

807-29 19F(2d)481; 21F(2d)657 (action for damages for violation of national Bank Act).

807-30½-New. In federal courts, legal and equitable causes may not be joined. 274US684, 47SCt755, 71Led1297.

807-30½-New. Plaintiff may elect the nature of the cause as legal or equitable. 274US684, 47SCt755, 71Led1297.

807-30¼-New. Causes of action under federal statute and at common law may not be united. 24F(2d)591.

807-30½-New. The nature of the suit, for jurisdictional purposes, must be determined from the allegations of the bill of complaint. 29F(2d)493.

807-30¼-New. An action involving the right to recover damages for breach of contract must proceed under the practice obtaining in courts of the state. 31F(2d)38.

807-33 18F(2d)968.

807-37 39F(2d)194. [b] **Cause transferred to equity** under act in order to first dispose of equitable defense. 39F(2d)194.

807-40 13F(2d)895.

808-41 13F(2d)895; 17F(2d)232.

808-43½-New. Under Equity Rules, rule 30, matter set up as a counterclaim must involve a controversy within the jurisdiction of the United States courts. 32F(2d)920.

808-51 2F(2d)220, 222 [cit(J]; 24F(2d)683; 41F(2d)329 (discretion).

808-52 23F(2d)813.

808-53 20F(2d)220.

808-54 15F(2d)774; 17F(2d)710.

808-55 275US481, 48SCt144, 72Led354.

808-59 41F(2d)329.

808-60 34F(2d)927.

808-63 21F(2d)180; 24F(2d)169.

808-64 See also 35F(2d)736.

808-64½-New. Intervention authorized by state statute as to action at law in state courts. 8F(2d)706.

808-65½-New. **Intervention.** Under new Equity Rules, rule 37, intervention is within the discretion of the court. 12F(2d)747.

808-65¼-New. An intervener admitted under federal Equity Rules, rule 37 cannot litigate questions outside of issues made by the original pleadings. 6F(2d)666.

808-65¼-New. Only natural persons or corporations may sue or be sued by their respective names in federal courts. 8F(2d)149.

808-65⅛-New. Judgment creditor of plaintiff in equity suit without any interest in remedy and having adequate remedy at law is without right to intervene. 35F(2d)1009.

808-66 19F(2d)286.

809-72 20F(2d)46.

809-79½-New. The process of a federal district court cannot run outside of the district. 18F(2d)677.

809-79⅛-New. The state law is without effect in fixing the return day of a writ of seire facias issued by a federal court. 18F(2d)856.

809-79¼-New. The statute permitting process to run from one district to others in actions against resident and nonresident defendants is remedial, to be liberally construed. 24F(2d)500.

809-79⅛-New. An affidavit to quash service on defendant's agent containing mere general denials or conclusions as to relationship is insufficient. 25F(2d)225.

809-79⅛-New. especially where made by a party deemed to have full knowledge of the facts. 25F(2d)225.

809-82 [b] **Marshal cannot serve process directed to marshal of another district.**—18F(2d)997. [c] **Direction of writ to marshal of Southern district** when action was brought in Northern district does not void writ. 37F(2d)695.

809-85 [a] **Process may be directed to marshal of another district** in cases where service of process in other federal districts is authorized. 18F(2d)997.

810-91 [d] (1) 17F(2d)305; 20F(2d)707; 44F(2d)214. (3) 42F(2d)362. (7) Service by publication against corporation incorporated outside federal district is bad. 34F(2d)66. (8) Suit held not of local nature. 36F(2d)781.

810-94 36F(2d)781.

810-94½-New. 18F(2d)997.

810-94⅛-New. The amendment to Judicial Code § 51, enlarging the venue of suits by the United States and authorizing process in such suits to be served in any district where defendant might be found, ceased to be operative on Sept. 19, 1926. 18F(2d)997.

810-94¼-New. In a suit by the United States, a district court did not acquire jurisdiction in personam over nonresident defendants where service of process was not completed before such date. 18F(2d)997.

810-94⅛-New. Where a writ of attachment is served on some defendants before the statute ceases to be effective, the suit is begun within the operation of the statute, although nonresidents are served thereafter. 24F(2d)500.

810-94¼-New. The court obtained jurisdiction over the nonresidents although service upon them was not obtained until the statute ceased to be effective. 24F(2d)500.

810-94½-New. The court may take jurisdiction although nonresident defendants who are not indispensable parties are not served. 25F(2d)303 (suit to enjoin threats of infringement suit).

810-94⅛-New. A provision of the Judicial Code as to service of process in any district where the cause of action arose applies only in case there is more than one defendant. 30F(2d)564.

810-94⅛-New. Constructive service can bring nonresidents within a court's jurisdiction only where there is a res in the court's control, and then for the sole purpose of adjudicating rights in the res. 34F(2d)66.

810-94 1/10-New. Process of federal court may be served anywhere in country. 38F(2d)212.

811-96 15F(2d)157.

811-97 19F(2d)589. [f] **Statute applies to nonresident remainderman** having interest in personal property within district in which suit is brought, and corporate stock is personalty within meaning of statute. Action is in rem in so far as to confer jurisdiction under § 57. 11F(2d)854. [g] **Judgment for**

mandatory injunction to abate nuisance cannot be entered against nonresident defendant served constructively. 39F(2d)800. [h] **Bill to remove cloud on title** may be had against nonresident defendant served constructively. 39F(2d)800. [i] **Counterclaim filed seven years after original answer** requires additional service of process on nonresident defendant. 39F(2d)800. [j] **Creditors bill by judgment-creditor with execution returned unsatisfied** is suit to enforce equitable lien or claim, warranting service by publication upon absent judgment-debtor. 43F(2d)762. [k] **Limited jurisdiction quasi in rem** is conferred by service by publication. 43F(2d)762.

811-99 19F(2d)589. [b] See also 43F(2d)762.

813-25 37F(2d)141.

813-27 24F(2d)106.

814-45 37F(2d)141.

814-57 279US405, 49SCt360, 73Led762.

814-63 17F(2d)605; 43F(2d)991. [a] 34F(2d)642 (held not multifarious). [d] **Federal statute should not be construed to put aside state laws** and practice in respect of pleading unless intention of Congress is plain. 281US14, 50SCt200, 74Led670. [e] **Counterclaim held sufficient.**–39F(2d)800.

815-64 24F(2d)598.

815-65 15F(2d)660; 15F(2d)774; 16F(2d)32; 23F(2d)347; 36F(2d)277; 36F(2d)781. [e] **Pleading of intervener.**–6F(2d)666. [f] **Bill held not objectionable as multifarious.**–37F(2d)904. [g] **Bill cannot be maintained in equity** against several defendants on separate causes of action. 37F(2d)904.

815-66 24F(2d)996.

815-69 280US351, 50SCt107, 74Led470. But see 40F(2d)442.

815-71½-New. or sham pleadings, 15F(2d)193.

815-73 [a] **Under Federal Equity Rules, rule 20,** motion to make bill more definite and for bill of particulars are not identical. 6F(2d)235.

815-75 17F(2d)605.

815-76½-New. motion for judgment upon the pleadings; 31F(2d)65.

815-78½-New. A demurrer is not applicable to an equitable plea filed in an action at law. 15F(2d)726.

815-81 41F(2d)305.

815-83½-New. Under Equity Rules, rule 30, defendant may set up by counterclaim any equitable cause of action he may have against complainant, of which the court has jurisdiction. 13F(2d)797.

815-83⅓-New. In federal courts, a bill of particulars cannot be used to obtain evidence. 16F(2d)210.

815-83¼-New. A general prayer for affirmative relief in the answer in a patent infringement suit, in the absence of special demurrer, is sufficient to support appropriate specific relief in view of Equity Rules, rule 30. 15F(2d)745.

815-83½-New. Under Equity Rules, rule 25, no address to the court is required in a bill in equity, 15F(2d)880.

815-83¾-New. but under the rule complaint must plead facts instead of evidence. 15F(2d)880.

815-83⅞-New. A bill of particulars cannot be used to secure evidence in federal courts. 16F(2d)210.

815-83⅛-New. A portion of defendant's answer will not be stricken out because of the filing of a lengthy answer, where the complaint flagrantly violated the rules and necessitated the lengthy answer. 18F(2d)567.

815-83⅛-New. A bill of particulars will not be granted when the information sought is, or is likely to be, within movant's knowledge. 33F(2d)991.

815-83 1/10-New. Claim for compensation for legal services is not proper subject of counterclaim. 37F(2d)76.

815-83 1/11-New. Counterclaim cannot be filed asking damages against trustee in its individual capacity for fraudulent conduct. 37F(2d)572.

816-88 8F(2d)576; 13F(2d)977; 23F(2d)371.

816-90 41F(2d)728 (filing entirely new bill on leave to amend).

816-93 See also 40F(2d)228.

816-1 15F(2d)660.

817-9 19F(2d)620.

817-14 34F(2d)828; 34F(2d)829.

817-19 17F(2d)232.

817-20 18F(2d)934.

818-21 6F(2d)218; 8F(2d)5; 14F(2d)269, 272 [citCJ]; 15F(2d)306; 17F(2d)232; 21F(2d)207; 28F(2d)718; 35F(2d)73; 37F(2d)711 (admissibility of evidence). [c] **Federal displacement** of rules of state courts that tax receipts are inadmissible in ejectment as evidence of title or proof of possession will not be readily allowed. 26F(2d)841.

818-30½-New. Judicial notice cannot be taken of whether agreement between shippers came within exemption clause of Shipping Act. 39F(2d)204.

819-36 13F(2d)412; 14F(2d)1 (equity rule held applicable to cases pending at time rule became effective); 31F(2d)777. [a] **Equity Rules, rule 46** as to taking testimony orally in open court, held not to preclude use of transcribed testimony at preliminary hearing. 5F(2d)883. [b] **Equity Rules, rules 47, 56,** requiring order of court for taking of depositions and providing for strong showing where application is not made within prescribed time, are not in violation of rights conferred by federal statute. 18F(2d)281.

819-37 31F(2d)777. [a] **Provision does not give federal courts discretion** to take depositions not authorized by federal law. 17F(2d)951.

819-38 22F(2d)73 (state statutes do not control).

819-42 See also 20F(2d)791. [a] (3) 37F(2d)168.

819-43 But see 38F(2d)68.

819-53 [a] **There must be substantial evidence** as distinguished from scintilla or modicum of evidence. 41F(2d)342. [b] **Defense of contributory negligence** as jury question is not binding on United States courts. 41F(2d)342.

820-57½-New. The time for placing cases on trial is governed by the district court rules. 20F(2d)132.

820-57⅓-New. The time for hearing a case is subject to the rules and discretion of the district court. 20F(2d)132.

820-57¼-New. It is no objection that a hearing of a motion on the issue of whether plaintiff had title to assignments sued on was had before trial where course pursued was consented to by all the parties concerned. 12F(2d)895.

820-59 [b] **Stipulation** that trial be continued held insufficient under Equity Rules, rule 57, unless all costs were paid, when continuance was to be till after term. 14F(2d)1. [c] **Parties** in action commenced before enactment of Equity Rules, rules 56, 57, who did not proceed under such rules, held not to come under them. 14F(2d)1.

820-60½-New. Purpose of Equity Rules, rule 57, relating to continuance beyond term, is to prevent continuance from term to term by mere consent of parties. 16F(2d)977.

820-63 [c] **Instructions held proper or not erroneous.**–27F(2d)286.

820-70 But see 34F(2d)547.

820-71 22F(2d)33.

820-74½-New. Under federal practice, the district judge may, in a proper case, refer the cause to the auditor. 22F(2d)33.

820-74⅓-New. The procedure prescribed by state law on reference, being similar to federal practice, may be properly followed by the federal court. 22F(2d)33.

820-74¼-New. Federal equity rules do not require the trial judge to refer every proceeding for accounting to a master. 32F(2d)732.

820-77 27F(2d)286.

820-78 20F(2d)714; 37F(2d)865. Contra 40F(2d)228. [a] 42F(2d)461. (2) Provision of state constitution that defense of contributory negligence or assumption of risk shall be left to jury has been held rule of substantive law which conformity statutes do not require federal court to apply. 20F(2d)714. [c] **Court has authority** to instruct jury to return general verdict. 36F(2d)219. [d] **In Pennsylvania,** federal court, on motion for directed verdict, cannot decide disputed questions of fact. 35F(2d)113. [e] **Conformity Act does not deprive federal judge of duty** of determining sufficiency of evidence to take case to jury, under pleadings. 40F(2d)228.

821-83½-New. Federal courts will follow the state statute regulating procedure as to requests for court to state findings. 1F(2d)975 (time for making request).

821-85 24F(2d)3.

821-88 27F(2d)502.

821-90 13F(2d)13, 47ALR314; 15F(2d)364; 22F(2d)431; 24F(2d)89; 25F(2d)758; 27F(2d)531 [aff 27F(2d)538]; 31F(2d)617; 32F(2d)689; 41F(2d)329. [b] **Order dismissing bill is final decree** from which appeal could have been taken within meaning of Equity Rule as to rehearing. 41F(2d)733. [c] **Petition to set aside order of dismissal,** filed nearly two years after order was entered is too late. 41F(2d)733.

821-94 26F(2d)242; 42F(2d)461.

822-96½-New. Under equity rules a motion to dismiss performs the office of demurrer. 16F(2d)45.

822-96⅓-New. The court has jurisdiction to grant plaintiff affirmative relief after formally dismissing the bill of complaint where it retained jurisdiction to grant such relief. 18F(2d)700.

822-96¼-New. The district court has discretion to refuse dismissal of a suit not reinstated on calendar within the year, and may during the term vacate an order entered through inadvertence. 16F(2d)977.

822-96⅛-New. Notice of a motion to vacate an order of dismissal is properly served on plaintiff's solicitors under Equity Rules, rule 57. 16F(2d)977.

822-96⅛-New. On granting a motion to vacate dismissal of cause, the court may properly reinstate a temporary injunction. 16F(2d)977.

822-96⅛-New. Where surety filed consent, a new bond is not required on reinstatement of a preliminary injunction previously dismissed. 16F(2d)977.

822-96⅛-New. Plaintiff cannot dismiss his bill without prejudice where one of two defendants has filed a sufficient answer and cross bill. 8F(2d)121.

822-96⅛-New. Where a bill to cancel policies of life insurance and restrain assignment and prosecution of a law action does not allege possession of policies by defendants, such allegation in attorney's affidavit for warning is not admitted for the purpose of a motion to dismiss. 18F(2d)599.

822-96 1/10-New. A motion to dismiss a bill which is insufficient because the character of the contract involved is not shown will be sustained only to the extent of treating it as a motion to make the bill more specific. 18F(2d)614.

822-96 1/11-New. Motion to dismiss supplants demurrer under Equity Rules, rule 29. 33F(2d)88.

822-2 But see 21F(2d)659.

822-3 24F(2d)310 (survival of action by dissolved corporation).

822-15 25F(2d)397.

822-25 274US434, 47SCt698, 71Led1139; 308Mo422, 272SW964. [a] **Registering, recording, docketing, and indexing** in accordance with state law are not necessary to validity of lien of judgment of federal district court on real estate within its territorial jurisdiction. 24F(2d)646.

823-26 274US434, 47SCt698, 71Led1139; 24F(2d)646; 117Nebr229, 220NW244. [b] **Duration of lien.**–24F(2d)646.

823-28½-New. Under federal and Missouri statutes, judgment of federal district court is not lien on real estate, until transcript is filed in office of clerk of circuit court where real estate is situated, although the clerk of the district court is required by law to have permanent office and judgment record open at all times for public inspection in the county. 308Mo422, 272SW964.

823-28⅓-New. A state statute, providing that judgments by any court of record shall be a lien on real estate of person against whom they are rendered, situate in the county for which court is held, does not dispense with filing transcript of judgment of federal district court sitting in the county, since district court is not a court for the county.

308Mo 422, 272SW964.

823–34 [b] **Court may vacate judgment inadvertently entered of its own motion.** 14F(2d)104.

823–36 13F(2d)969.

823–38 13F(2d)969.

823–42 32F(2d)275.

824–46 24F(2d)646.

824–58 24F(2d)931; 34F(2d)892; 36F(2d)5; 37F(2d)849; 40F(2d)463.

825–59 24F(2d)3; 43F(2d)312.

825–60 44F(2d)40.

825–61 24F(2d)3; 37F(2d)849.

825–67 36F(2d)5.

825–69 16F(2d)856; 23F(2d)253. [a] **Equity Rules, rule 75b.**–275US372, 48SCt183. [b] **Contents of record.**–43F(2d)312.

825–71 5F(2d)608 (evidence heard in court below not considered unless authenticated by trial judge). [a] **Where no request is made for findings or conclusions and no motion for judgment** sufficiency of evidence and findings are not reviewable. 24F(2d)816. [b] **Reviewing court cannot assume** city will appropriate plaintiff's riparian rights without just compensation in determining whether federal question arises. 41F(2d)728. [c] **Whether there is substantial evidence upholding trial court's finding** is question of law reviewable on appeal. 43F(2d)355. [d] **Whether judgment is sustained by any substantial evidence** is question of law. 43F(2d)312. [e] **Parties desiring appellate review of question of law** in case tried to court without jury should request declaration of law. 43F(2d)355.

825–76½–New. An interlocutory order, denying a motion to vacate receivership, is not appealable. 34F(2d)836.

825–76¼–New. Appellate court has power of its own motion to transfer cause to equity and send it back for hearing in accordance with equitable rights of parties. 40F(2d)626.

825–76¼–New. Seaman as citizen has right to prosecute appeal as poor person without payment of costs or security therefor. 41F(2d)861(1stcase).

825–79 16F(2d)688; 37F(2d)345; 38F(2d)824. [a] 35F(2d)211.

826–80 16F(2d)688; 35F(2d)211.

826–81 [a] **Federal equity courts** have jurisdiction to allow costs between solicitor and client in proper cases, irrespective of statutes or rules. 28F(2d)233.

826–86 But see 32F(2d)740. [a] **State statute authorizing allowance of attorney's fees** may be enforced in federal courts. 18F(2d)223.

826–87½–New. It is common practice for a federal court of equity to make allowances for trustee's fees and attorney's fees in cases of mortgage foreclosure. 12F(2d)718.

826–87¼–New. The general rule governs in the absence of a contract provision governing the matter. 12F(2d)718.

826–94½–New. , and arbitration and award. 17F(2d)232.

826–94¼–New. An attorney has no lien for a fee on a cause of action in the federal court. 22F(2d)832.

826–95 [a] **Substantive law.**–Federal rule controls. 24F(2d)996.

826–6½–New. Instruction that in a libel case the jury is sole judge of law and facts held properly refused notwithstanding conformity act. 15F(2d)595.

826–6¼–New. ; and permitting a private party to plead immunity from a suit as agency of a foreign government. 32F(2d)195.

827–15 16F(2d)751; 40F(2d)442.

827–17 16F(2d)751. [c] **Equity Rules, rule 75b** (1), prescribing method of making evidence part of record, held within law granting supreme court right to regulate district court practice. 275US372, 48SCt183, 72Led318. (2) Law relating to transcript for review in circuit court of appeals held not to preclude supreme court rules for procedure in district court. 275US372, 48SCt183, 72Led318.

827–20½–New. Setting aside of pro confesso is within the sound discretion of the district court under Equity Rules, rules 5–17. 13F(2d)124.

828–24½–New. Local court rule fixing time within which defendant in criminal prosecution must be brought to trial is not binding on federal court. 13PortoRicoFed199.

828–25 16F(2d)751; 40F(2d)442. [b] (1) 42F(2d)904; 43F(2d)485 (rule governing intervention). (2) Equity Rules, rule 74 does not authorize injunction pending appeal from denial of injunction. 21F(2d)172.

828–29 13F(2d)895; 14F(2d)269, 272 [citCJ]; 16F(2d)288; 26F(2d)698; 37F(2d)482 (concurrent jurisdiction of law and equity).

828–32 32F(2d)570.

828–33 [a] 30F(2d)364.

829–39 29F(2d)844; 36F(2d)661; 37F(2d)124; 42F(2d)362. See also 40F(2d)820 (form of proceeding controlled by federal law).

829–46 12PortoRicoFed203.

829–48 21F(2d)333 (as to jurisdiction); 12PortoRicoFed144.

829–50 [c] **Enforcement may not conflict** with laws of United States. 281US121, 50SCt270, 74Led737. [f] **Transfer of stock.**–111Conn475, 150A693.

829–52 32F(2d)608.

830–60 277US438, 48SCt564, 72Led944, 66ALR376.

830–61 29F(2d)517.

830–64 26F(2d)594; 35F(2d)113. [b] **In matters affecting remedy in action on contract,** federal court will be governed by law of state where remedy is sought without regard to place of making or performance of contract. 32F(2d)800.

831–66 277US389, 48SCt553, 72Led927; 278US429, 49SCt196, 73Led441; 13F(2d)895; 20F(2d)139; 29F(2d)40 [certiorari den US 49SCt179(12thcase)]; 41F(2d)617. [a] (8) Internal revenue. 20F(2d)139. (9) Other instances. 41F(2d)542.

831–68 272US306, 47SCt86, 71Led248; 272US494, 47SCt179, 71Led372, 49ALR713; 273US269, 47SCt353, 71Led639; 274US651, 47SCt669, 71Led1279; 13F(2d)257; 14F(2d)56; 15F(2d)509. But see 43F(2d)881. [d] 34F(2d)174. (2) Decision may not be binding, but persuasive, on question of fixing amount of federal estate tax where collector was not party to probate. 34F(2d)174. [e] **In admiralty cases,** where decisions of state court conflict with federal court decisions, district court is bound by latter. 26F(2d)836.

831–69 271US1, 46SCt415, 70Led795, 44ALR1432 (meaning and proper application of state Transfer Tax Law); 272US306, 47SCt86, 71Led248; 272US494, 47SCt179, 71Led372, 49ALR713; 273US269, 47SCt353, 71Led639; 274US651, 47SCt669, 71Led1279; 281US470, 50SCt374, 74Led972; 5F(2d)529; 7F(2d)772; 8F(2d)678; 8F(2d)883; 12F(2d)909; 13F(2d)200; 13F(2d)227; 17F(2d)503; 19F(2d)974; 20F(2d)202; 21F(2d)333; 29F(2d)712; 29F(2d)844; 30F(2d)686; 31F(2d)117; 31F(2d)317; 31F(2d)514; 31F(2d)711; 31F(2d)828; 34F(2d)171; 39F(2d)165; 41F(2d)312; 42F(2d)541. [e] **Dissent from decision** by minority cannot affect its binding force in federal court. 22F(2d)781.

831–69½–New. But the state supreme court cannot determine effect of local law or decision upon a statute of the United States so as to be binding on the federal court. 8F(2d)883.

832–72 269US190, 46SCt90, 70Led229; 271US440, 46SCt384, 70Led818; 271US583, 46SCt605, 70Led1101, 47ALR457; 272US306, 47SCt86, 71Led248; 272US295, 47SCt88, 71Led243; 272US494, 47SCt179, 71Led372, 49ALR713; 273US195, 47SCt338, 71Led602; 273US269, 47SCt353, 71Led639; 273US274, 47SCt355, 71Led642; 273US407, 47SCt393, 71Led709; 274US380, 47SCt655, 71Led1108; 274US651, 47SCt669, 71Led1279; 276US97, 48SCt223, 72Led483; 277US32, 48SCt423, 72Led770; 278US191, 49SCt160, 73Led259; 279US159, 49SCt282, 73Led652; 280US145, 50SCt71, 74Led234; 4F(2d)865; 5F(2d)905; 6F(2d)33; 6F(2d)288; 7F(2d)218; 8F(2d)546; 15F(2d)509; 17F(2d)143; 17F(2d)394; 19F(2d)74; 19F(2d)182; 20F(2d)295; 21F(2d)440; 22F(2d)341; 24F(2d)1; 24F(2d)926; 25F(2d)964; 26F(2d)47; 26F(2d)753; 26F(2d)855; 26F(2d)912; 27F(2d)406; 27F(2d)573; 29F(2d)555; 29F(2d)582; 29F(2d)712; 29F(2d)891; 30F(2d)106; 30F(2d)121; 30F(2d)406; 30F(2d)510; 30F(2d)895; 30F(2d)974; 31F(2d)756; 31F(2d)837; 32F(2d)513(2dcase); 33F(2d)1; 33F(2d)440; 33F(2d)918; 35F(2d)649; 36F(2d)882; 37F(2d)564; 41F(2d)38; 41F(2d)559; 42F(2d)21; 42F(2d)775; 43F(2d)513 (statute of descent); 43F(2d)169; 43F(2d)513; 44F(2d)31; 97CalA442, 275P870; TexCivA 286SW264; 103TexCr318, 280SW202. [e] **Statute declaratory of common law.**–19F(2d)74. [f] **Construction by state insurance commissioner** of state statute taxing foreign insurance companies will be followed by courts in determining how retaliatory tax legislation of another state shall operate against Iowa insurance company. 30F(2d)918. [g] **Determination of which of conflicting constitution provisions is dominant** is for state court. 27F(2d)406.

833–73 272US306, 47SCt86, 71Led248; 272US295, 47SCt88, 71Led243; 272US494, 47SCt179, 71Led372, 49ALR713; 273US195, 47SCt338, 71Led602; 273US274, 47SCt355, 71Led642; 273US407, 47SCt393, 71Led709; 274US380, 47SCt655, 71Led1108; 276US260, 48SCt225, 72Led565; 276US567, 48SCt396, 72Led703; 5F(2d)398; 7F(2d)470; 8F(2d)480; 12F(2d)909; 12F(2d)986; 13F(2d)572; 14F(2d)353; 14F(2d)411; 14F(2d)524; 16F(2d)90; 17F(2d)4; 17F(2d)70; 17F(2d)417; 17F(2d)729; 18F(2d)650; 21F(2d)434; 22F(2d)341; 23F(2d)668; 27F(2d)377; 27F(2d)439 (public service law); 27F(2d)470; 27F(2d)573; 27F(2d)609 (exemption statutes); 28F(2d)228; 28F(2d)328; 28F(2d)489; 28F(2d)684(2dcase); 28F(2d)710; 31F(2d)547; 32F(2d)69; 32F(2d)658; 33F(2d)162; 33F(2d)765; 34F(2d)303; 35F(2d)421; 35F(2d)439; 35F(2d)459; 35F(2d)638; 38F(2d)28; 38F(2d)739; 38F(2d)850; 39F(2d)462 (2dcase); 39F(2d)800; 40F(2d)368; 41F(2d)12. See also 28F(2d)56. But see 18F(2d)739; 33F(2d)440. [m] **Where facts are different from those in state decision,** construction, though not binding on federal court, is entitled to great respect. 22F(2d)341. [n] **Construction of particular statutes.**–37F(2d)635; 37F(2d)695.

837–74 27F(2d)439; 27F(2d)470.

837–78 272US494, 47SCt179, 71Led372, 49ALR713; 17F(2d)394.

838–80 272US494, 47SCt179, 71Led372, 49ALR713; 277US32, 48SCt423, 72Led770; 17F(2d)394; 27F(2d)377; 27F(2d)439; 28F(2d)56; NH 146A511.

838–80½–New. or where the decision is interpreting state statutes codifying the common-law rule. 28F(2d)788.

838–81 269US190, 46SCt90, 70Led229; 34F(2d)533.

838–82 272US295, 47SCt88, 71Led243; 272US494, 47SCt179, 71Led372, 49ALR713; 6F(2d)288; 27F(2d)609. [d] **Supreme court** will accept decision of state court as to what constitutes doing business within state, but will determine what constitutes commerce. 269US148, 46SCt59, 70Led204.

838–83 27F(2d)439. See also 272US494, 47SCt179, 71Led372, 49ALR713.

838–87½–New. The supreme court construes the state statute where there has been no construction by the state court. 274US630, 47SCt692, 71Led1243.

838–87¼–New. In determining whether a state statute violates the federal constitution the federal court will consider its real nature and effect rather than its form. 17F(2d)394.

838–88 8F(2d)845.

839–90 27F(2d)478.

839–91 269US315, 46SCt148, 70Led285 (wife's interest in income of community property); 273US113, 47SCt271, 71Led566; 274US651, 47SCt669, 71Led1279; 281US497, 50SCt356(2dcase), 74Led991; 17F(2d)472; 22F(2d)781; 23F(2d)897; 24F(2d)162; 24F(2d)951; 25F(2d)701; 29F(2d)149; 29F(2d)712; 29F(2d)844; 30F(2d)202; 33F(2d)39; 38F(2d)850; 40F(2d)583; 43F(2d)953; 44F(2d)31. [c] 23F(2d)481. [g] **Decision of state court,** after rights and liabilities have accrued, is not binding on federal court as rule of decision. 22F(2d)644. [h] **Rule not without exception and depends**

on circumstances of case. 23F(2d)481.
840-92 25F(2d)699.
840-94 274US651, 47SCt669, 71L ed 1279; 11F(2d)958; 15F(2d)774; 24F (2d)221; 25F(2d)701.
840-95 24F(2d)541.
840-1 17F(2d)472.
840-4 271US65, 46SCt357, 70L ed838; 40F(2d)333.
840-8 273US113, 47SCt271, 71L ed566; 22F(2d)781; 27F(2d)433.
840-13 5F(2d)157; 5F(2d)633; 13F (2d)86; 35F(2d)840 (upon after-acquired property).
840-16 [a] **Decision of state court** as to adequacy of memorandum of sale contract followed. 7F(2d)513.
840-18 16F(2d)865; 35F(2d)339 (estate by entirety).
841-29 7F(2d)461.
841-29½-New. ; apportionment of stock dividends between life tenant and remaindermen; 32F(2d)608.
841-30 7F(2d)406.
841-31 13F(2d)252; 22F(2d)791.
841-32 22F(2d)791.
841-33 22F(2d)791; 34F(2d)528; 36 F(2d)972. [b] **Decision of intermediate court may be nonappealable** without changing rule. 22F(2d)791.
841-34 13F(2d)252; 13F(2d)585; 13F (2d)667.
841-37 271US577, 46SCt627, 70L ed 1093.
842-48 43F(2d)513.
842-51 270US378, 46SCt236, 70L ed 641; 36F(2d)661.
843-59 5F(2d)690; 23F(2d)481.
843-61 4F(2d)865; 13F(2d)628; 15F (2d)145; 17F(2d)444; 23F(2d)287; 41 F(2d)433.
843-61½-New. even where the suit in the federal court to enforce such rights is commenced after such state court decisions, 17F(2d)444.
844-64 13F(2d)257.
844-65 34F(2d)927. See also 13F(2d) 585. [b] **On retrial court must follow decision of appellate court** reversing its judgment though state statute on which it was based has since been given contrary construction by state supreme court. 22F(2d)712.
844-63 5F(2d)13; 14F(2d)453. [a] (1) 8F(2d)155; 21F(2d)521. (2) 8 F(2d)155.
844-70 17F(2d)472.
845-76 38F(2d)850; 39F(2d)21; 37F (2d)513. [a] **General principles of equity jurisprudence.**-Rights, as distinguished from remedies, included in term "general principles of equity jurisprudence" mean rights cognizable by courts of equity as distinguished from rights recognized solely by courts of common-law jurisdiction. 32F(2d)608.
845-77 17F(2d)758.
845-78 21F(2d)434; 32F(2d)608.
845-80 43F(2d)222.
845-85 14F(2d)418; 16F(2d)150; 23 F(2d)682; 34F(2d)790; 38F(2d)889 (1stcase); 40F(2d)357; 44F(2d)214. [a] But see 40F(2d)951.
846-93 8F(2d)678; 15F(2d)1; 15F(2d) 509; 16F(2d)654; 17F(2d)444; 18F (2d)360; 18F(2d)650; 19F(2d)74; 21 F(2d)434; 24F(2d)712; 27F(2d)377; 27F(2d)523; 29F(2d)539; 29F(2d)844; 36F(2d)176; 36F(2d)189; 38F(2d)393; 38F(2d)557; 44F(2d)31.
847-94 15F(2d)509; 15F(2d)725; 26F (2d)51; 42F(2d)384; 43F(2d)953. [b] **Decision of state court is followed** where law is not general, but has become established in state. 7F(2d)513.
847-94½-New. Federal courts will recognize state statutes modifying general commercial law principles, and will follow state court decisions interpreting such legislation. 19F(2d)74.
847-94¼-New. Federal courts are not bound by state court decisions interpreting contracts, unless rules of property have been settled by local interpretation. 19F(2d)74.
847-95 276US518, 48SCt404, 72L ed 681, 57ALR426 (validity); 17F(2d)444; 38F(2d)850. But see 38F(2d)117. [h] **Suretyship.**-8F(2d)678. [i] **Obligation of Massachusetts trust on Florida contract.**-39F(2d)621.
848-96 16F(2d)159; 16F(2d)654; 19F (2d)74; 26F(2d)411.
848-97 30F(2d)929; 31F(2d)862; 32F (2d)611; 36F(2d)176. [d] **Right of insured's divorced wife to recover on life insurance policy.**-24F(2d)712.
848-98½-New. the existence of an agency; 26F(2d)164.
848-2 15F(2d)509; 36F(2d)189.
848-4½-New. character of right of way of interstate railroad and rights of use of adjoining fee owner; 28F(2d)163.
848-5½-New. liability for special injuries to individual from public nuisance; 33F(2d)690.
848-7 8F(2d)455; 20F(2d)803 (rights of claimants under performance bond to United States).
849-24 5F(2d)912; 37F(2d)480.
849-28 40F(2d)488.
849-36½-New. Whether interest coupons payable to bearer are interest bearing. 16F(2d)654.
849-37 See also 16F(2d)525.
849-38 21F(2d)33 (as to equity jurisdiction in federal courts); 32F(2d)513 (2dcase); 43F(2d)881.
849-39 [c] **Decisions by highest state courts** are very persuasive, but do not control federal courts in construing federal statutes. 27F(2d)304.
849-40 5F(2d)690; 15F(2d)412; 15F (2d)467; 21F(2d)165; 23F(2d)481; 35 F(2d)963.
849-41 5F(2d)75; 13F(2d)969; 15F (2d)405; 15F(2d)843; 18F(2d)908; 23 F(2d)870; 24F(2d)370; 24F(2d)636; 24F(2d)981; 30F(2d)202; 36F(2d)367; 37F(2d)482; TexCivA 298W(2d)489. [g] **Liability of stockholder of national bank for assessment** is not barred by Minnesota Gen. St. (1923) §§ 8811, 8812 where receiver did not know of stockholder's death till too late to file claim prior to closing of estate. 32F(2d)665.
850-43 36F(2d)183.
850-45 16F(2d)45; 39F(2d)793.
851-51 15F(2d)794.
851-52 23F(2d)331 (action against directors of national banking association).
851-53 32F(2d)756; 39F(2d)793; 37F (2d)332.
852-57 [c] **By statute** judgment is deemed satisfied after six years and hence court of equity cannot apply bankrupt's property in its custody to satisfy claims thus made nonexistent. 5F(2d) 75.
852-61 [d] **Revenue laws of one state** will not be enforced in another state by federal court. 28F(2d)997.
852-63 32F(2d)639. But see 280US 363, 50SCt121, 74L ed478.
852-66 34F(2d)174.
852-69 18F(2d)736; 28F(2d)887; 32F (2d)69.
853-72 18F(2d)722; 27F(2d)504.
853-81½-New. what constitutes estate of bankrupt; 8F(2d)437.
853-81¼-New. how estate of bankrupt may be reached by creditors; 8F(2d) 437.
854-82 32F(2d)913.
854-82½-New. authority and duties of the state department of public works; 276US97, 48SCt223, 72L ed483.
854-85 12F(2d)909.
854-86 12F(2d)909.
854-87 17F(2d)503. [e] **Decision of state supreme court** as to when defense of ultra vires is available to corporation will be followed by federal court. 5F(2d)451.
855-94 28F(2d)331.
855-96 But see 12PortoRicoFed5.
855-99 34F(2d)305 (fraternal benefit).
855-14 279US587, 49SCt442, 73L ed861.
856-19 43F(2d)36.
856-28 16F(2d)654; 43F(2d)355.
857-33 18F(2d)719.
857-35 31F(2d)507.
857-45 17F(2d)472.
857-46 40F(2d)208.
857-48 34F(2d)168 (highway contractor's bond); Mo 28SW(2d)356. But see 17F(2d)444.
858-55 44F(2d)172.
858-56 36F(2d)367.
858-66½-New. Whether the schedule, attached to the complaint in an action on bankruptcy depositary's bond, may be resorted to for the names of bankrupt estates, is determined by state laws. 26F(2d)4.
858-66¼-New. Federal practice is generally more liberal than the practice of the state courts. 12PortoRicoFed 192.
858-67 [b] **United States, as guardian of Indians,** may sue in supreme court state to recover swamp land claimed to have been set apart for Indians and erroneously potential to state. 270US 181, 46SCt298, 70L ed539.
858-70 4CranchUS75, 2L ed554; 34F (2d)295 (no authority to issue order requiring district court to reinstate restraining order).
859-81 [f] **Citizens are improper parties** in such a suit. 281US163, 50SCt 275, 74L ed784. [g] **State is deemed to represent** all its citizens. 281US163, 50SCt275, 74L ed784.
859-82 155Miss55, 122S747.
860-83 278US367, 49SCt163, 73L ed426.
860-94 272US701, 47SCt286, 71L ed481. [c] **Supreme court is without jurisdiction** of mandamus proceedings against United States consul general at Montreal, Canada. 269US302, 46SCt112, 70 L ed280.
860-95 272US701, 47SCt286, 71L ed 481; 282US10, 51SCt8. See also 27F (2d)945. [a] (1) 271US461, 46SCt557, 71L ed1036. (3) To prevent lower court from nullifying equity rules. 272US 701, 47SCt286, 71L ed481.
861-99 271US461, 46SCt557, 70L ed 1036.
861-4 4CranchUS75, 2L ed554.
861-8 [a] **All questions pertaining to contract involved** must be determined in suit between states, though involving local legislation. 281US163, 50SCt275, 74L ed784.
862-29½-New. **Objections by individuals, not sponsored by state,** in suit against another state will not be considered. 281US163, 50SCt275, 74L ed 784.
863-42 [f] **"Cases and controversies"** are necessary for jurisdiction of Supreme Court. 281US464, 50SCt389, 74 L ed969.
864-59 [a] **Question arising on petition to review decision of board of tax appeals.**-Petition in circuit court of appeals to review decision of board of tax appeals, approving action of tax commissioner and finding deficiency in federal income tax return, confers jurisdiction on supreme court to answer question certified by circuit court of appeals, though appeal had been taken to board of tax appeals and was pending at time of enactment of Revenue Act of 1926. 279US716, 49SCt499, 73L ed 918.
864-63 [a] **Appellate jurisdiction of supreme court is invoked.**-279US716, 49 SCt499, 73Led918.
865-74 US 41F(2d)745.
865-76 275US179, 48SCt39, 72L ed225.
865-83 281US339, 50SCt291, 74L ed 887.
866-96 277US239, 48SCt472, 72L ed 866.
867-98 [a] **Litigant's admission in supreme court** that he has no right to make counterclaim based on bond held to require dismissal of question certified as to construction of bond. 271 US342, 46SCt534, 70L ed977.
867-4 273US113, 47SCt271, 71L ed566.
867-6 274US123, 47SCt511, 71L ed959; Iowa 232NW445. [b] 274US123, 47SCt 511, 71L ed959.
869-14 270US456, 46SCt338, 70L ed 682. [b] **Suit to determine claims** between lessees of Quapaw Indian allottee held one on which appeal would lie to supreme court, where taken before enactment of Act of 1925 changing federal appellate jurisdiction. 270US456, 46 SCt338, 70L ed682.
869-14½-New. Judgment must be judicial. 272US693, 47SCt284, 71L ed478.
869-14¼-New. Mere denial of jurisdiction to entertain an appeal from the commissioner of patents is not "judicial judgment." 272US693, 47SCt284, 71 L ed478.
869-17 282US10, 51SCt8.
871-52 273US52, 47SCt255, 71L ed534.
871-53½-New. An action to enjoin enforcement of an ordinance is not properly presented where there are no findings of fact or statement of the grounds of the decision. 275US164, 48SCt66, 72

L ed218; 275US173, 48SCt70, 72L ed 222.
872-59 [d] **Under Act Febr. 3, 1925, § 8a (43 St. at L. 936 c 229)**, running of time for petition in supreme court for certiorari is suspended by petition for rehearing, but begins again on denial thereof and is not suspended by motion for leave to file second request. 275US 498, 48SCt112, 72L ed393.
873-65 23F(2d)897 (not equivalent to affirmance).
873-63 273US52, 47SCt255, 71L ed534; 274US117, 47SCt482, 71L ed955; 278US 85,49SCt45, 73L ed195. See also 272 US359, 47SCt125, 71L ed298.
873-69 274US640, 47SCt714, 71L ed 1270.
874-70½-New. Where a jury has been waived in writing, review is limited to sufficiency of the facts specially found and to rulings excepted to and presented by the bill of exceptions. 275US243, 48 SCt63, 72L ed262.
874-70½-New. Supreme Court need not examine grounds on which Circuit Court of Appeals put correct decision. 281US642, 50SCt443, 74L ed1086.
874-83 274US543, 47SCt663, 71L ed 1193. [f] See also 274US543, 47SCt663, 71L ed1193.
874-84 274US543, 47SCt663, 71L ed 1193.
878-16 276US358, 48SCt380, 72L ed 610.
879-37 279US553, 49SCt423, 73L ed838.
880-39 See also 279US461, 49SCt384, 73L ed798.
880-40½-New. Act of March 4, 1925 giving circuit court of appeals jurisdiction of appeals in actions on war risk insurance has been held inapplicable to pending suit in which appeal to supreme court had already been taken. 270US175, 46SCt274, 70L ed530.
880-40½-New. The supreme court has exclusive jurisdiction of appeal from judgment of the district court on petition for mandamus to compel certification of negro voters for presidential election. 15F(2d)488.
880-40¼-New. An application for restitution based on erroneous refusal to set aside an order of the interstate commerce commission is reviewable under the Urgent Deficiencies Bill of October 22, 1913. 279US781, 49SCt492, 73L ed 954.
880-40½-New. Plaintiff has no standing in Supreme Court on direct appeal under Urgent Deficiencies Act where it had no right to bring suit under Act. 281US479, 50SCt378, 74L ed980.
880-47 [c] (11) Question of jurisdiction to grant particular remedy held not jurisdictional issue under statute. 273US665, 47SCt550, 71L ed829.
882-50 6F(2d)874.
882-56 272US317, 47SCt105, 71L ed 273; 272US652, 47SCt221, 71L ed460; 273US388, 47SCt385, 71L ed699; 274 US554, 47SCt702, 71L ed1199. [b] **Interlocutory injunction order** held essential before appeal from decree. 273US 388, 47SCt385, 71L ed699.
884-82 [a] (1) But see 6F(2d)559.
886-9½-New. A recent enactment provides for the transfer of an appeal to the proper court instead of dismissal, where it was originally taken to the wrong court. 6F(2d)559.
886-15 273US665, 47SCt550, 71L ed829.
887-26 267US326, 45SCt242, 69L ed 629; 273US665, 47SCt550, 71L ed829.
887-30 267US326, 45SCt242, 69L ed629.
887-31 273US665, 47SCt550, 71L ed829.
897-80 16F(2d)368.
898-86 16F(2d)368.
898-87 16F(2d)368.
902-45 273US665, 47SCt550, 71L ed829.
903-48½-New. The supreme court may limit its decision to federal or state questions in constitutional issues. 273 US113, 47SCt271, 71L ed566.
911-89½-New. A case improperly "pending" in the supreme court may be sent back to the circuit court of appeals. 273US665, 47SCt550, 71L ed829.
911-2 272US542, 47SCt173, 71L ed398; 273US113, 47SCt271, 71L ed566.
912-6 [a] **No appeal lies** from order of single judge acting without jurisdiction in granting interlocutory injunction involving validity of state legislation. 282US10, 51SCt8.
912-7 [a] (7) 273US113, 47SCt271, 71 L ed566. [h] (3) By admission of alleged hearsay evidence. 272US542, 47 SCt173, 71L ed398. (4) By withdrawal of part of charge. 272US542, 47SCt173, 71L ed398.
912-10 278US92, 49SCt40, 73L ed198. [a] **Where order from which appeal is sought was made by a single judge**, court being of opinion that case was not one for a three-judge court, appeal does not lie therefrom direct to United States supreme court. 27F(2d)945.
914-34 267US432, 45SCt345, 69L ed 699, 37ALR1407; 269US514, 46SCt172, 70L ed384; 273US119, 47SCt308, 71L ed 569.
915-42 276US245, 48SCt230, 72L ed551.
916-69 272US542, 47SCt173, 71L ed398.
916-74 272US542, 47SCt173, 71L ed398.
916-80 277US229, 48SCt486, 72L ed862 (statute construed).
919-2 See also 273US284, 47SCt406, 71L ed646.
919-2 [d] **Federal questions.**-33Porto Rico 554.
920-8 273US541, 47SCt451, 71L ed762. [a] (1) 271US500, 46SCt619, 70L ed 1059. (2) 271US500, 46SCt619, 70L ed 1059.
920-10 273US541, 47SCt451, 71L ed 762; 279US139, 49SCt317, 73L ed642.
920-13 279US211, 49SCt308, 73L ed 665; 280US1, 50SCt5, 74L ed131.
921-17 [c] **Suspension of Philippine senator** has been held moot question where period had expired before hearing on certiorari. 271US528, 46SCt600, 70 L ed1071. [d] **Injunction of Philippine supreme court** to compel rescinding of resolution to suspend senator held moot question where period had expired. 271 US528, 46SCt600, 70L ed1071. [e] **Incidental question** of right of suspended senator to emolument should be tried in separate proceedings after main question of validity of suspension became moot. 271US528, 46SCt600, 70L ed1071. [f] **Supreme court, after validity of suspension** of Philippine senator became moot, not having sufficient information to pass on right to emoluments, treated whole case as moot. 271US528, 46SCt 600, 70L ed1071. [g] **Where question became moot**, judgment was reversed with directions to dismiss without costs. 271US528, 46SCt600, 70L ed1071.
921-20 See also 272US533, 47SCt186, 71L ed394. But see 280US43, 50SCt22, 74L ed157.
921-20 [e] (2) Judgment pending interlocutory motions held final. 272US 533, 47SCt186, 71L ed394.
921-22 [b] **Judgment rendered before Act of Febr. 13, 1925** abolishing appeals held not appealable where motion for new trial was subsequently denied. 270 US103, 46SCt242, 70L ed489.
921-25 [b] **Motions for leave to file motion** for new trial to amend findings will not extend time for appeal. 270US151, 46SCt241, 70L ed518.
921-26 [a] 272US533, 47SCt186, 71L ed 394. [e] (2) 272US533, 47SCt186, 71 L ed394.
922-27 269US144, 46SCt37, 70L ed202; 269US422, 46SCt131, 70L ed347; 270US 154, 46SCt275, 70L ed520; 270US124, 46SCt308, 70L ed497; 272US533, 47SCt 186, 71L ed394; 273US200, 47SCt339, 71L ed608; 273US386, 47SCt388, 71L ed 698; 281US357, 50SCt251, 74L ed901; 281US385, 50SCt343, 74L ed921. [c] **Determination of mixed questions** of law and fact are not reviewable unless mistake of law is apparent. 269US144, 46 SCt37, 70L ed202. [d] **Supreme court** cannot reëxamine questions of fact. 272 US533, 47SCt186, 71L ed394.
922-28 269US102, 46SCt33, 70L ed180. [a] **Supreme court will not consider validity of accepted award** under canceled government contract in absence of finding of loss to appellant. 270US375, 46SCt211, 70L ed639.
922-28½-New. Certification of whole case by Court of Claims cannot be entertained by Supreme Court. 281US 572, 50SCt419, 74L ed1047.
922-35 [a] (1) 271US323, 46SCt521, 70 L ed969. (2) Motion to dismiss suit to enjoin conveyance of land to negro in violation of covenant between grantor and others held not to raise constitutional question. 271US323, 46SCt521, 70 L ed969. (3) Decrees of trial and intermediate denying motion to dismiss suit to enjoin conveyance of land to negro in violation of covenant held not to violate Const. Amends. V, XIV. 271US323, 46SCt521, 70L ed969.
923-36 271US323, 46SCt521, 70L ed969 (contention held frivolous); 274US106, 47SCt499, 71L ed949.
923-41 274US106, 47SCt499, 71L ed949.
924-47 [a] **Judgment requiring Federal Radio Commission to renew broadcasting license** is not reviewable by Supreme Court. 281US464, 50SCt389, 74L ed969.
924-56 [c] **Question not raised by petition for writ of certiorari** is not considered by Supreme Court. 281US90, 50 SCt231, 74L ed720.
925-65 [a] **In Illinois.**-269US190, 46SCt 90, 70L ed229.
925-66 269US354, 46SCt149, 70L ed 305; 273US269, 47SCt353, 71L ed639; 277US302, 48SCt519, 72L ed891; 281US 673, 50SCt451, 74L ed1107; 136SC337, 134SE385. [b] **Order of railroad commission fixing rates** is treated as act of legislature on review by supreme court. 269US354, 46SCt149, 70L ed305.
926-68 274US651, 47SCt669, 71L ed 1279.
926-73 269US186, 46SCt71, 70L ed227; 269US262, 46SCt108, 70L ed266; 276US 284, 48SCt299, 72L ed574; Iowa 232NW 445.
926-74 271US220, 46SCt526, 70L ed915. [c] **Writ of error to Ohio court of appeals** does not lie unless record shows that supreme court has passed on merits. 269US262, 46SCt108, 70L ed266.
927-77 [a] **Refusal of writ of certiorari by state supreme court** gives federal supreme court jurisdiction to grant writ to review judgment of lower appellate court. 280US102, 50SCt42, 74L ed207.
927-78 272US295, 47SCt88, 71L ed243; 273US380, 47SCt372, 71L ed692; 274US 123, 47SCt511, 71L ed959; 152SC322, 150SE309. [j] 273US380, 47SCt372, 71 L ed692; 274US123, 47SCt511, 71L ed 959. [k] **Judgment need not require process of execution** to be reviewable. 274US123, 47SCt511, 71L ed959. [l] **Order refusing writ of certiorari**, if made upon merits, where facts are fully stated in petition, is sufficient to authorize appeal to United States supreme court. 21 F(2d)221.
928-86 274US123, 47SCt511, 71L ed959. [a] **Usual form of remedy need not be invoked** to confer jurisdiction. 274US 123, 47SCt511, 71L ed959.
928-91 271US323, 46SCt521, 70L ed969 (mere assertion that federal question involved is insufficient); 271US461, 46 SCt557, 70L ed1036; 273US126, 47SCt 311, 71L ed575; 273US269, 47SCt353, 71 L ed639; 274US544, 47SCt706, 71L ed 1194; 276US128, 48SCt264, 72L ed497; 198Cal 508, 245P1089; 136SC337, 134 SE385.
929-96 274US651, 47SCt669, 71L ed 1279; 276US71, 48SCt291, 72L ed473. [e] **Essentials to jurisdiction** to review judgment of state court sustaining order of railroad commission as to water rates stated. 269US354, 46SCt149, 70L ed305. [f] **Supreme court's power and concern** are specially directed to rulings on federal question. 269US341, 46SCt135, 70 L ed295.
930-98 267US255, 45SCt315, 69L ed 601; 274US651, 47SCt669, 71L ed1279; 281US537, 50SCt401, 74L ed1023. [d] 267US255, 45SCt315, 69L ed601.
931-1 274US651, 47SCt669, 71L ed1279. [a] **State court decision though on nonfederal ground** must be inquired into by Supreme Court on whether it rests on fair or substantial basis. 281US537, 50SCt401, 74L ed1023.
931-2 274US651, 47SCt669, 71L ed1279.
931-3 274US651, 47SCt669, 71L ed1279.
931-5 267US352, 45SCt317, 69L ed652.
931-10 281US673, 50SCt451, 74L ed 1107.
932-13 274US544, 47SCt706, 71L ed 1194; 279US347, 49SCt368, 73L ed733, 61ALR987; 23F(2d)381.
932-16 277US135, 48SCt505, 72L ed820;

278US63, 49SCt61, 73L ed184, 62ALR 785.
932-19 273US269, 47SCt353, 71L ed639.
933-25 281US537, 50SCt401, 74L ed 1023; 281US673, 50SCt451, 74L ed1107.
933-29 [a] 279US737, 49SCt485, 73L ed 931.
934-31½-New. On petition for certiorari the supreme court may determine not only whether a federal right was denied in direct terms but also whether it was denied in substance by interposing a nonfederal ground of decision without fair support. 279US737, 49SCt 485, 73L ed931.
934-32 273US269, 47SCt353, 71L ed639; 273US536, 47SCt446, 71L ed759; 276US 272, 48SCt246, 72L ed568.
934-33 281US74, 50SCt228(2d case), 74 L ed710; 280US108, 50SCt41, 74L ed 212. [g] **Question of sufficiency of evidence** held to raise no due process question. 274US357, 47SCt641, 71L ed1095.
935-34 273US536, 47SCt446, 71L ed759.
935-36 281US397, 50SCt338, 74L ed 926.
935-37 271US364, 46SCt569, 70L ed 992; 275US129, 48SCt94, 72L ed196; 277US100, 48SCt489, 72L ed801.
937-44 275US129, 48SCt94, 72L ed196.
939-57 144Miss113, 109S862.
941-71 [a] (5) State statute taxing national bank shares. 269US341, 46SCt 135, 70L ed295.
941-72 See also 94Fla427, 115S261, 263 [citCJ]. [f] **Present existence of state statute** taxing stockholder of national banks held to present no federal question. 271US461, 46SCt557, 70L ed1036.
942-73 107Conn454, 140A818. See also 190NC45, 128SE500. [a] (7) Existence of evidence to support finding in state court of negligence in action under Federal Employer's Liability Act. 271US 472, 46SCt564, 70L ed1041.
942-75 279US80, 49SCt321, 73L ed621. See also 275US129, 48SCt94, 72L ed196.
942-76 272US494, 47SCt179, 71L ed372, 49ALR713; 274US76, 47SCt542, 71L ed 934; 276US260, 48SCt225, 72L ed565; 279US620, 49SCt432, 73L ed874, 65ALR 866.
942-79 103TexCr318, 280SW202.
943-83 269US341, 46SCt135, 70L ed295; 272US306, 47SCt86, 71L ed248; 272US 295, 47SCt88, 71L ed243; 272US494, 47 SCt179, 71L ed372, 49ALR713; 273US 195, 47SCt338, 71L ed602; 273US274, 47SCt355, 71L ed642; 273US407, 47SCt 393, 71L ed709; 274US380, 47SCt655, 71 L ed1108; 274US651, 47SCt669, 71L ed 1279; 276US71, 48SCt291, 72L ed473; 279US347, 49SCt368, 73L ed733, 61ALR 987; 281US537, 50SCt401, 74L ed1023; 281US673, 50SCt451, 74L ed1107; 253 Mass529, 149NE407; 103TexCr318, 280 SW202. [g] **Construction of railroad commission's order** by state supreme court is conclusive on United States supreme court. 279US125, 49SCt325, 73 L ed637. [h] **State tax statutes.**-281US 673, 50SCt451, 74L ed1107.
944-85 272US306, 47SCt86, 71L ed248; 272US494, 47SCt179, 71L ed372, 49ALR 713; 273US274, 47SCt355, 71L ed642; 273US407, 47SCt393, 71L ed709; 274US 651, 47SCt669, 71L ed1279.
944-86 272US295, 47SCt88, 71L ed243. See also 273US541, 47SCt451, 71L ed762.
944-86½-New. The Arkansas statute, when extended over Indian territory, became in effect a law of the United States, and its construction and effect present federal questions, to be determined by the supreme court in the exercise of its own independent judgment on certiorari to the state court. 279US300, 49 SCt306, 73L ed700.
944-88½-New. A federal question arises where there is a conflict of jurisdiction between a state and federal court. 144 Miss113, 109S862.
944-89 274US651, 47SCt669, 71L ed 1279.
944-91 272US465, 47SCt133, 71L ed354, 47ALR1044; 273US274, 47SCt355, 71 L ed642; 276US71, 48SCt291, 72L ed 473.
945-92 [a] (5) Treating case as cognizable in equity. 269US341, 46SCt135, 70L ed295.
945-97 274US357, 47SCt641, 71L ed 1095.
945-99 273US548, 47SCt462, 71L ed 767, 59ALR1.
946-8 [c] **Final judgments reviewable by certiorari.**-278US492, 49SCt207, 73 L ed470; 279US415, 49SCt358, 73L ed 770.
947-9 277US267, 48SCt523, 72L ed877.
947-10 274US499, 47SCt668, 71L ed 1170 (dictum).
947-12 274US380, 47SCt655, 71L ed 1108.
947-13 273US380, 47SCt372, 71L ed692.
947-14 [a] 267US352, 45SCt317, 69L ed 652 (writ of error dismissed).
947-14½-New. **Federal supreme court will direct certiorari to state court of appeals** where the state supreme court had denied certiorari on the face of the record. 276US252, 48SCt234, 72L ed555.
947-15 274US380, 47SCt655, 71L ed 1108.
947-16 274US499, 47SCt668, 71L ed 1170.
947-17 274US76, 47SCt542, 71L ed934.
947-19 But see 274US499, 47SCt668, 71 L ed1170.
947-20½-New. However, where the petition presents no ground for a writ of error, certiorari will be granted where the papers show adequate reason for review. 275US449, 48SCt142, 72L ed149, 53ALR1141.
947-21 [c] **After expiration of term of office,** Federal Agent has no right to review of judgment against him. 280US 406, 50SCt171, 74L ed514.
948-28 274US357, 47SCt641, 71L ed 1095; 103TexGr318, 280SW202.
948-29 276US71, 48SCt291, 72L ed473; 279US692, 49SCt457, 73L ed903; 103 TexCr318, 280SW202.
949-30 [a] **Objection not made on constitutional grounds** will not be considered by federal court. 281US397, 50SCt 338, 74L ed926.
949-33 274US357, 47SCt641, 71L ed 1095. [a] 277US1, 48SCt410, 72L ed749.
951-35 [a] **Supreme court** must determine for itself sufficiency of pleadings to present federal question. 269US341, 46 SCt135, 70L ed295.
952-41 281US397, 50SCt338, 74L ed926.
952-42 But see 281US313, 50SCt326, 74 L ed870; 281US673, 50SCt451, 74L ed 1107.
952-45 See also 274US357, 47SCt641, 71L ed1095.
953-52 [b] **Refusal of application for writ of certiorari** does not imply any expression as to correctness of decision attempted to be reviewed. 37F(2d)188. [c] **Denial of petition for writ of certiorari by Supreme Court** is conclusive in respect to federal question involved. 42 F(2d)775.
953-52½-New. Mandamus proceeding by Japanese citizens to compel the secretary of state of California to file articles of incorporation for a hospital is within the jurisdiction of the supreme court on certiorari from a decision of the state supreme court. 278US123, 49SCt47, 73 L ed214.
953-52¼-New. Denial of writ is not equivalent to affirmance of decree. 38F (2d)852.
953-54 204Cal470, 270P1117 (appeal not allowed because statute involved affects no substantive right and hence no federal question).
953-61 280US406, 50SCt171, 74L ed514.
953-62 274US12, 47SCt480, 71L ed898.
953-63 273US110, 47SCt437, 71L ed749, 50ALR1243. [a] (5) Where highest court declines to entertain appeal from conviction, writ is properly directed to it. 273US110, 47SCt437, 71L ed749, 50 ALR1243.
954-74 220MoA484, 276SW84, 85 [cit CJ].
955-81 269US354, 46SCt149, 70L ed305 (record held insufficient). [e] 275US 212, 48SCt62, 72L ed245.
957-95 274US499, 47SCt668, 71L ed 1170.
957-98 220MoA484, 276SW84.
957-99 273US126, 47SCt311, 71L ed575.
958-2 267US352, 45SCt317, 69L ed652 (only opinion of state court on rehearing, after withdrawal of original opinion, will be considered); 274US357, 47 SCt641, 71L ed1095; 275US274, 48SCt 124, 72L ed277. [a] **That record contains question, which if raised below,** would have been of federal nature, held not to warrant review. 274US357, 47 SCt641, 71L ed1095.
958-3 273US126, 47SCt311, 71L ed575.
958-3½-New. Where five justices of the California supreme court concurred in judgment, and the record fails to disclose the names of those present at the argument or entitled to participate in the decision, the circuit court of appeals, on appeal from a decree dismissing suit to set aside judgment, must presume, in the absence of a clear showing to the contrary, that judgment was concurred in by four justices, as required by the state constitution. 28F (2d)869.
958-5 273US548, 47SCt462, 71L ed767, 59ALR1.
958-6 267US126, 45SCt320, 69L ed538; 267US352, 45SCt317, 69L ed652; 274US 357, 47SCt641, 71L ed1095.
959-7 274US380, 47SCt655, 71L ed1108.
959-8 274US380, 47SCt655, 71L ed 1108.
959-10 274US380, 47SCt655, 71L ed 1180; 275US455, 48SCt151, 72L ed370; 279US34, 49SCt210, 73L ed601; 279US 787, 49SCt490, 73L ed957; 282US1, 51 SCt54.
960-12 [b] **Writ of error to review state judgment** generally dismissed where judgment is supported by determination of local question. 269US354, 46SCt149, 70L ed305.
960-17 127 Okl127, 260P25.
960-19 271US251, 46SCt509, 70L ed931.
961-22 273US126, 47SCt311, 71L ed 575.
961-23½-New. In reversing a case involving the construction of a state law, the supreme court should not go beyond the necessity of the case. 272US295, 47 SCt88, 71L ed243.
961-23¼-New. Where petitions to the supreme court of Massachusetts were dismissed in accordance with the rescript of a court in banc after the case was reserved for determination by a full court, a writ of error by the federal supreme court was properly directed to the supreme judicial court dismissing the petitions pursuant to such rescript. 277 US413, 48SCt534, 72L ed935.
961-24½-New. or the case may be remanded. 273US126, 47SCt311, 71L ed 575.
961-26 [b] **Creation of tenth circuit court of appeals and transfer of causes thereto.**-34F(2d)396.
961-33 [a] **Appellate jurisdiction is wholly statutory.**-14F(2d)104.
961-36 23F(2d)615.
961-40 [a] (6) 44F(2d)26.
962-42 14F(2d)418; 34PortoRico 578 (appeal allowed by divided supreme court of Porto Rico on new question involving jurisdiction of circuit court). [h] **In Porto Rico.**-Decisions of supreme court. 6F(2d)3. [i] **Cases involving federal questions.**-29F(2d)517. [j] **Necessity for federal question to be involved.**-41F(2d)740. [k] **Charge under territorial statute** does not involve federal question. 41F(2d)740.
963-47 274US123, 47SCt511, 71L ed 959.
963-48 [a] (1) US 18F(2d)410.
963-54½-New. The circuit court of appeals has no jurisdiction of an appeal from the district court, disposing of equitable defenses interposed under the judicial code. 14F(2d)104.
963-54¼-New. The circuit court of appeals may entertain jurisdiction of any case or controversy which comes before it, provided no advisory or executive action is required. 279US716, 49SCt499, 73L ed918.
963-55 7F(2d)796; 15F(2d)137.
963-58 43F(2d)472.
964-61 274US123, 47SCt511, 71L ed 959.
965-67 16F(2d)68.
965-67½-New. Under recent statute, an appeal which should have been originally taken to the circuit court of appeals may be transferred to that court by the supreme court to which it was erroneously taken. 6F(2d)559.
965-70 282US10, 51SCt8.
966-73 276US1, 48SCt203, 72L ed439; 13F(2d)462; 14F(2d)360; 14F(2d)903; 38F(2d)182.
966-77 276US1, 48SCt203, 72L ed439; 12F(2d)667; 13F(2d)462; 14F(2d)418;

14F(2d)903; 16F(2d)463; 20F(2d)793; 26F(2d)153; 29F(2d)832; 30F(2d)636 [certiorari den 279US851, 49SCt347(7th case), 73L ed994]. But see 38F(2d)235. [b] **Court of appeals** may issue writ where trial court refuses to try action pending therein. 7F(2d)796. [c] **On mandamus to allow amendments** merits of question will not be considered. 16 F(2d)463. [d] **Motion to quash indictment** for failure to prosecute authorized circuit court of appeals to entertain mandamus petition to compel action by trial court. 7F(2d)796. [e] **Time.**–16F (2d)463.

966-78 14F(2d)903. [a] **To protect its appellate jurisdiction,** writ of prohibition will be granted in case where motion to vacate orders was made to district court after notice of petition to revise was made. 5F(2d)65.

966-80 15F(2d)137.

966-83 16F(2d)856.

966-84 20F(2d)32; 20F(2d)115; 22F (2d)925; 42F(2d)1009; 43F(2d)472. But see 40F(2d)475. [c] **Petition for naturalization** is "case" within statute relating to appellate jurisdiction of circuit court of appeals. 270US568, 46SCt 425, 70L ed738. [d] **Review of board of tax appeals' decision** is authorized by statute. 38F(2d)764 (statute construed).

966-86 270US568, 46SCt425, 70L ed738 (granting or denying petition for naturalization); 282US10, 51SCt8; 15F (2d)660; 20F(2d)845; 24F(2d)310; 42 F(2d)362.

967-87 20F(2d)32; 20F(2d)115; 22F (2d)925; 23F(2d)91; 27F(2d)48; 43F (2d)472.

968-98 16F(2d)368. [c] (1) But see 32 F(2d)748. (2) Under Judicial Code § 266, as amended by act of Febr. 13, 1925, appeal lies to circuit court of appeals from order dissolving restraining order and dismissing bill in suit to have state statute declared unconstitutional and to enjoin enforcement where no application for preliminary injunction was pressed and no request for three judges was made. 32F(2d)669.

969-1 29F(2d)179; 33F(2d)285.

971-26 17F(2d)768; 24F(2d)102. But see 25F(2d)301; 26F(2d)935; 32F(2d) 736. [d] **Delay held inexcusable.**–17F (2d)768.

971-28 20F(2d)873.

971-30½-New. Suing out writ of error instead of taking appeal cannot enlarge the time for taking appeal. 29F(2d)829.

971-34 [a] **Rules abrogated by statute.** –29F(2d)701 (statute providing that no petition for appeal is required).

971-35 [f] **Where transcript does not comply with Equity Rule, rule 75b** court may refuse to examine evidence. 276US 305, 48SCt317, 72L ed584. [g] **Filing of return to appeal.**–33F(2d)119. [h] **Literal transcript of evidence** in trial proceedings is not "bill of exceptions" required for appellate review. 43F(2d) 355.

971-37½-New. Assignment that the court erred in reversing judgment on notes, without assigning any ground therefor, is too general to raise any question for consideration of the circuit court of appeals. 30F(2d)588.

971-38 [a] **Circuit court of appeals** cannot correct judicial errors charged to state court. 7F(2d)875. [b] **In absence of tender of amendment,** appellate court cannot say that refusal of permission to amend complaint by District Court was error. 28F(2d)869.

971-41 [a] **Circuit court of appeals** could not consider assignments of error relating to liability, where there was judgment in favor of plaintiff in error. 28F(2d)874(2dcase).

971-41½-New. The amount of the verdict cannot be questioned in the circuit court of appeals. 15F(2d)790.

971-41⅓-New. The first inquiry is as to the jurisdiction of the district court, despite the absence of a plea as to jurisdiction. 16F(2d)250.

971-41¼-New. A decision of the trial court on motion for a new trial is not reviewable in the circuit court of appeals. 15F(2d)790.

971-41⅕-New. Conviction in the Alaska district court cannot be reviewed on the theory of improper joinder under the United States statute. 20F(2d)32.

971-41⅙-New. The grant or refusal of a new trial is not subject to review where the case is clearly dependent on the correct determination of facts from conflicting evidence. 18F(2d)563.

971-41⅐-New. The United States circuit court of appeals cannot weigh evidence. 32F(2d)576.

971-41⅛-New. The question whether findings are supported by evidence is not reviewable. 32F(2d)576.

971-41⅑-New. A jury's finding supported by evidence is binding. 32F(2d) 1000.

971-41⅒-New. The circuit court of appeals, in a case involving a view of the premises in Porto Rico, is bound by the judgment of the district judge and of the supreme court of Porto Rico. 29 F(2d)900.

971-41 1/11-New. Contention that a verdict in a personal injury action is excessive cannot be considered by the circuit court of appeals. 26F(2d)619.

971-41 1/12-New. Where the district court passed on the question of jurisdiction, only the circuit court of appeals will not review the other questions on appeal from an order of dismissal. 31 F(2d)877.

971-41 1/13-New. The trial court's denial of application for declaration of law that plaintiff was entitled to recover on uncontradicted evidence may be considered by the circuit court of appeals on writ of error to review judgment. 28F(2d)693.

971-41 1/14-New. Holdings of the supreme court of Porto Rico on questions which are purely of fact and of local law are not to be disturbed by the circuit court of appeals, unless shown to be clearly erroneous. 29F(2d)517.

971-41 1/15-New. The district court's estimate of value of good will will not be disturbed where the circuit court of appeals cannot say it is not supported by the evidence. 29F(2d)383.

971-41 1/16-New. A decision of the trial court on motion for a new trial is not reviewable in the circuit court of appeals. 26F(2d)890.

971-41 1/17-New. In law action, only questions of law are reviewable on appeal. 42F(2d)976.

971-41 1/18-New. Statements of supreme court of Porto Rico in law action, so far as containing findings of fact, are conclusive. 42F(2d)976.

972-47 12F(2d)909.

972-49 12F(2d)909; 15F(2d)10; 20 F(2d)826; 24F(2d)3.

972-55 13F(2d)977; 15F(2d)660; 15 F(2d)774. But see 11F(2d)913. [a] **Remanding for issue to be framed and for trial on question of jurisdiction** should be allowed only where no reversible error appears in record in respect of merits. 15F(2d)660. [b] **Effect of decision.**–22F(2d)787. [c] **Evidence held insufficient** to justify overturning verdict against government on war risk policy. 35F(2d)350.

972-58 [a] But see 42F(2d)646. [b] **Circuit court of appeals may deal with record** as it finds it, irrespective of limitations of theory on which trial judge rendered decision. 27F(2d)810.

972-59 41F(2d)542.

973-69 12F(2d)649; 23F(2d)257; 27 F(2d)253. See also 41F(2d)183.

973-70 36F(2d)159.

973-71 27F(2d)321; 36F(2d)159.

973-71½-New. The circuit court of appeals will not reverse judgment of the district court and the supreme court of Porto Rico, reaching practically the same result on a matter involving Porto Rican law. 8F(2d)115.

973-71⅓-New. The circuit court of appeals cannot set aside a decree on newly discovered evidence. 35F(2d)733(1st case).

973-71¼-New. The circuit court of appeals has power to retain jurisdiction of appeal until settlement of bill of exceptions. 35F(2d)452.

973-71⅕-New. Court of appeals will not reverse finding of referee affirmed by district court unless well satisfied as to error. 38F(2d)40.

973-71⅙-New. Rulings of Porto Rico supreme court relating to construction and application of local laws will not be set aside where not clearly wrong. 42 F(2d)976.

973-76 [c] **In Oklahoma.**–22F(2d)760.

973-78 279US63, 49SCt257, 73L ed615; 14F(2d)369; 32F(2d)108; 36F(2d)327. [b] **Transfer of causes.**–33F(2d)512(1st case); [c] **Right to transfer cause to new district** may be waived. 33F(2d)46 (acts constituting waiver).

973-79½-New. A law relating to the transfer of causes to a different division of a district is inapplicable where the divisions were created by rule of court. 21F(2d)106.

973-79¼-New. A civil transitory action, removed by nonresident defendant from a state to a federal court, may be transferred from the division to which removed to another within the district created by a rule of court. 21F(2d)106.

973-79¼-New. The district court of a district created after the offense charged in the indictment has no jurisdiction. 25 F(2d)324.

974-81 [a] **Duty to call in assistance of other federal judges.**–277US267, 48SCt 523, 72L ed877. [b] **Necessity of calling additional judges.**–277US565, 48SCt585, 72L ed990.

974-89 [a] **Place of holding special term.**–42F(2d)812.

974-90½-New. District courts may extend terms by special order or general rule. 16F(2d)977.

974-90⅓-New. The district court rule extending term ninety days for taking any action required during the term is valid. 16F(2d)977.

974-90¼-New. Term of United States district court of Florida is continuous throughout year. 39F(2d)208.

974-92 38F(2d)581.

974-93½-New. The district court in cases in which it has jurisdiction should dispose of all issues presented. 18F(2d) 607.

975-5 22F(2d)206; 34F(2d)881. [b] **District court of Porto Rico.**–12PortoRico Fed189. [c] **District court in one state exercises jurisdiction that is independent** of, and under sovereignty that is different from that of any other state. 281 US18, 50SCt175, 74L ed673.

975-5½-New. In the absence of justifiable controversy, the court has no jurisdiction. 273US70, 47SCt282, 71L ed541.

975-10 41F(2d)958. [b] (1) 35F(2d) 889. [c] **Patentee suing United States for infringement** is not limited in his recovery to amount not exceeding ten thousand dollars. 37F(2d)111.

975-13 [a] 43F(2d)653 (claim exceeding ten thousand dollars where collector no longer in office). [e] **District court has jurisdiction** of claim for war risk insurance only after demand by United States veterans' bureau. 5F(2d)678. [f] **Suit for coal commandeered** by fuel administrator under Lever Act is within jurisdiction of district court. 267US302, 45 SCt258, 69L ed620. [g] **Jurisdiction of suits not brought by or against corporations** organized under act of congress on ground that they are controversies arising under federal law not deemed restricted. 277US213, 48SCt449, 72L ed 854. [h] **Action to recover fines paid by vessel** bringing in aliens subsequently deported comes within provision. 26 F(2d)195. [i] **Action to recover fines imposed** under Immigration Act for bringing in aliens subsequently deported is within jurisdiction of district court. 33F(2d)343.

975-15 32F(2d)90. [b] **"Implied contract,"** in order to give federal district court jurisdiction to give judgment against United States, must be one implied in fact, and not one based merely on equitable consideration and implied in law. 26F(2d)746. [e] **Implied contract** must be implied in fact, not in law. 271US212, 46SCt501, 70L ed911.

975-16 [a] **District court has jurisdiction** of case removed from state court against corporation organized by United State for damages because of requisition of equipment for production of airplane timber. 267US462, 45SCt357, 69L ed 738. [b] **Under Lever Act** district court has jurisdiction of claims against United States for differences between market value of coal requisitioned and price paid by government. 5F(2d)439.

976-21½-New. An action for deposit taken for a fine for bringing an illiterate immigrant is maintainable as founded upon "law of congress," 21F(2d)465.
976-21⅓-New. as is also an action for bringing a quota immigrant specified as a nonquota. 21F(2d)465.
976-25 18F(2d)607.
976-27½-New. The federal district court has jurisdiction of a suit in equity to recover a trust fund. 25F(2d)397.
976-33 7F(2d)373; 13PortoRicoFed 268.
977-34 16F(2d)464; 17F(2d)90; 17 F(2d)486.
977-35 16F(2d)250.
977-36 15F(2d)449; 15F(2d)612; 16 F(2d)250; 16F(2d)274; 16F(2d)744; 17 F(2d)486; 21F(2d)594; 23F(2d)225; 43F(2d)175; 43F(2d)205 (suit held within federal jurisdiction).
977-41 18F(2d)607.
977-44 13PortoRicoFed131.
977-49 18F(2d)607.
977-50 25F(2d)303.
977-54 15F(2d)532; 15F(2d)612; 16 F(2d)250; 16F(2d)744; 21F(2d)172; 28F(2d)441.
978-56½-New. The amount necessary to confer jurisdiction in an equity case is the same as in a law case. 34F(2d) 666.
978-70 16F(2d)274.
979-78 15F(2d)532.
979-92 42F(2d)553.
980-4 12PortoRicoFed448.
980-12 [a] **Jurisdiction is limited to** such cases and controversies as are specified in U. S. Const. art 3 § 2. 16CustA 191.
980-13½-New. The United States court of customs appeals is an inferior court created by congress under constitutional grant of power. 16CustA191.
981-21 7Alaska51.
981-32 [a] **Action for alimony due under decree of state court** is within jurisdiction of district court of Canal Zone, where defendant had lived in hotel in Canal Zone for six months while engaged in business in Republic of Panama. 18F(2d)690.
981-41 [a] (2) Under statute allowing direct appeal from decision of district magistrate to supreme court on points of law certificate of appeal is required. 13 Hawaii702. See 14Hawaii300 (certificate held sufficient). [e] **On appeal from land court to circuit court,** jurisdiction is limited to issues framed by land court. 30 Hawaii846. [f] **Territorial court not "court of the United States."**-30Hawaii 860.
982-42 4HawaiiFed739.
982-43 16F(2d)273. [a] (1) 16F(2d) 273.
982-44½-New. Equity courts in Hawaii need not follow the English practice to the exclusion of the American practice. 29Hawaii571.
982-53 [b] **Amount in controversy as determining jurisdiction of divisions** is amount involved at time jurisdiction is invoked by perfecting appeal. 51Philippine789.
983-58 44Philippine182 (different branches are coördinate and may not interfere with each other's judgments); 50 Philippine552 (matters relating to termination of testamentary trusts).
983-63 33PortoRico 949, 958 [quotCJ].
983-65 12PortoRicoFed279. [a] **Removal of causes.**-12PortoRicoFed355; 12 PortoRicoFed367.
983-66 33PortoRico 949, 958 [quotCJ].
983-69 12F(2d)761; 12PortoRicoFed 570. [b] 12PortoRicoFed338. [d] **District court** has no jurisdiction of suit to quiet title to land. 7F(2d)106. [e] **Copyrights.**-12PortoRicoFed340.
984-71 12PortoRicoFed278. [b] **Removal from local district court.**-12Porto RicoFed309.
984-72 7F(2d)106; 18F(2d)918; 12 PortoRicoFed301; 12PortoRicoFed336; 12PortoRicoFed570; 13PortoRicoFed 131; 13PortoRicoFed268. [a] **Taxpayers' actions.**-12PortoRicoFed397.
984-75 [a] 12PortoRicoFed358. [b] **Process.**-12PortoRicoFed340.
984-81 12PortoRicoFed362. [a] **Removal of cause.**-12PortoRicoFed362 (motion to remand denied). [b] **Receivership.**-13PortoRicoFed17. [c] **Federal court will not interfere with litigation pending in insular court** except in limited classes of cases. 13PortoRicoFed 56.
984-81½-New. Concurrent jurisdiction over offenses against the National Prohibition Act has been granted to territorial magistrates and courts in Porto Rico. 12F(2d)761.
984-84 126 Okl 12, 257P761.
985-91 114 Okl 121, 244P436; 128 Okl 32, 261P146. [a] **Effect of statehood on pending guardianship proceeding.**-113 Okl 265, 242P185.
985-94 [a] **Rulings in United States court for China** to be considered on appeal must be excepted to at time and presented by bill of exceptions. 7 F(2d)581.
986-6 274US145, 47SCt557, 71L ed972.
986-8 [a] **Court of appeals of District of Columbia** is circuit court of appeals within meaning of some statutes. 276 US311, 48SCt311, 72L ed587.
986-8½-New. Congress has plenary power as the local legislature of the District of Columbia in the matter of conferring jurisdiction and powers on its courts. 22F(2d)1003.
986-9 [e] **Order denying motion to vacate consent decree** under Anti-Trust Act is not appealable to court of appeals. 276US311, 48SCt311, 72L ed587.
987-22 [a] (2) Appeal will not lie from order of supreme court in probate overruling motion to vacate order approving executor's account. DC 33F(2d)648.
987-24½-New. , in absence of which the court must assume that evidence at the trial was sufficient to justify the order appealed from. 55AppDC375, 6 F(2d)678.
987-24⅓-New. The court has jurisdiction to entertain appeals from the federal trade commission. 274US145, 47 SCt557, 71L ed972.
987-24¼-New. Probate proceedings of the supreme court are reviewable by the court of appeals only in accordance with the practice of the common law; 55AppDC375, 6F(2d)678.
987-24½-New. and in such cases evidence must be brought up in a bill of exceptions; 55AppDC375, 6F(2d)678.
987-24⅙-New. The court of appeals possesses appellate jurisdiction over federal matters in cases appealed to it from the supreme court, similar to that possessed by the circuit court of appeals in cases appealed to it from a district court. 6F(2d)701.
987-24⅐-New. The court of appeals cannot entertain original suit to annul judgment of the claim court in cause not otherwise before it. 19F(2d)670.
987-24⅛-New. Appellate jurisdiction of a court of appeals of a district corresponds to that of a circuit court of appeals. 279US553, 49SCt423, 73L ed 838.
987-28 [d] **Court of appeals is only part of administrative machinery of patent office,** in appeals from commissioner. 39F(2d)196.
987-34 [a] **Enforcement of federal trade commission orders.**-6F(2d)701.
987-35 16F(2d)515.
987-37 See also 16F(2d)515.
987-38 279US553, 49SCt423, 73L ed 838; 6F(2d)701. [b] **Supreme court has jurisdiction** of suit under **Anti-Trust** Act. 276US311, 48SCt311, 72 L ed587.
988-44 55AppDC375, 6F(2d)678.
989-67 37F(2d)763.
989-69 274US341, 47SCt611, 71L ed 1083.
989-70 [e] **Railroad's claim for compensation** for taking by government held founded on law of congress and not on contract, express or implied. 270US280, 46SCt253, 70L ed585.
990-72 [i] **Implied contract** to give jurisdiction to court of claims to give judgment against government must be implied in fact, and not in law. 271 US212, 46SCt501, 70L ed911.
991-74 41F(2d)415.
992-94½-New. Act conferring jurisdiction to consider claim of Cherokee Nation for interest on funds arising from former judgment held to waive effect of former judgment as res judicata. 270US476, 46SCt428, 70L ed694.
993-8 [c] **Senate resolution** referring specific claims held not to enlarge or affect jurisdiction to have contract claim against United States. 271US43, 46SCt 389, 70L ed822.
998-62 40F(2d)781.
999-84 267US338, 45SCt278, 69L ed 643. [b] **Acts constituting and persons participating** in alleged fraud should be specifically stated. 270US347, 46SCt 225, 70L ed619. [c] **Allegation of contract** by government to pay cost of mining oil storage tanks and losses held not sufficiently specific. 270US65, 46SCt219, 70L ed473.
999-85 270US347, 46SCt225, 70L ed 619 (petition held not sufficiently specific in allegations of fraud).
1003-65 [f] **Findings that packing company** on revocation of contract for army bacon had disposed of it at prices equal to those received by government held to show due diligence. 270US124, 46SCt308, 70L ed497.
1003-68 [b] **Findings as to subsidiary circumstantial facts will not support judgment** unless ultimate fact necessarily follows therefrom. 278US282, 49SCt129, 73L ed379.
1004-84 [e] **Nominal damages** are not recoverable in court of claims. 270US 280, 46SCt253, 70L ed585.
1007-33 276US36, 48SCt268, 72L ed 457; 38F(2d)144; 12PortoRicoFed287. [b] 44Philippine243.
1008-36½-New. The owner or master of a ship unlawfully seized on the high seas may bring possessory action in admiralty. 19F(2d)358.
1008-36⅓-New. A bill in equity will not lie against government officials for seizing and holding a foreign vessel under claimed authority of revenue laws. 19F(2d)358.
1008-36¼-New. A bill in equity will not lie for unlawful seizure and holding of a vessel on the ground that condemnation proceedings by government officials might be indefinitely delayed. 19F(2d)358.
1008-36⅕-New. District judge's ruling on preliminary motion to jurisdiction has been held not to prevent another judge from announcing contrary conclusion. 36F(2d)405.
1008-39 16F(2d)942; 28F(2d)615.
1008-44½-New. Federal courts may enjoin proceedings in state courts invalidating adjudications and sales by federal courts. 15F(2d)884.
1008-44⅓-New. A suit in a state court to impress trust on property sold in a federal court is not subject to be enjoined. 15F(2d)884.
1008-44¼-New. A federal court may, in a proper case, enjoin state court proceedings before or after judgment. 16F(2d)917.
1008-44⅕-New. The district court has no jurisdiction to circumvent or restrain execution of a valid order of another judge of such court. 13F(2d)851.

FEE

1009-12 TexCivA 288SW518.
1009-19 132Misc109, 228NYS248.

FEED

1011-61 206 Iowa1251, 222NW31.

FENCE

1012-16 327 Ill 194, 158NE431.

FENCES

1018-53 7PaDist&Co 516.
1018-59 3Del 211, 134A52, 56 [citCJ].
1018-64 227AppDiv273, 237NYS665. [d] **Parol contract for construction and repair of fence** bounding right of way has been held not to run with land. 227AppDiv273, 237NYS665.
1019-82 15 OhA395.
1020-87 120Kan273, 243P311, 312 [quotCJ].
1020-88 120Kan273, 243P311, 312 [quotCJ].
1020-89 120Kan273, 243P311, 312 [quotCJ].
1021-8 3Del 211, 134A52.
1021-10½-New. Some statutes apply

to all lands, whether inclosed or not. 84 IndA303, 149NE377.

1023–31 202 Iowa1358, 212NW151.

1023–32 202 Iowa1358, 212NW151.

1023–33 202 Iowa1358, 212NW151.

1023–35 But see 202 Iowa1358, 212NW 151.

1023–38½–New. In the absence of a division of a partition fence by agreement of the parties or by a proper order of fence viewers, either of the adjoining owners has the right to build and maintain any part of the fence and may not be restrained from doing so. 201 Iowa292, 207NW129.

1024–49 MoA 300SW1034.

1026–95½–New. Claim that fence was not divisional may be raised at trial and need not have been made to selectmen. 101Conn280, 125A470.

1026–3½–New. Evidence held insufficient, under Delaware statute, to show that lands were inclosed. 3Del 211, 134 A52.

1027–31 202 Iowa1358, 212NW151. But see 201 Iowa292, 207NW129.

1027–39 206 Iowa917, 221NW462.

1028–66½–New. Under some statutes fence viewers are given authority only to determine controversies. 201 Iowa 292, 207NW129.

1028–66½–New. Written request of a landowner to an adjoining owner to build or repair a fence is prerequisite to give fence viewers jurisdiction to compel such adjoining owner to contribute to the construction or maintenance of such fence. 201 Iowa292, 207 NW129.

1028–66¼–New. A landowner by appearing with an attorney to object to the jurisdiction of fence viewers on the ground of the absence of such request does not waive the making of such request. 201 Iowa292, 207NW129.

1028–66½–New. Fence viewers have no jurisdiction before written request from one landowner to adjoining landowner creates "controversy." 202 Iowa 1358, 212NW151.

1029–73 206 Iowa917, 221NW462.

1031–36½–New. Only questions of law will be considered on appeal from an order confirming the decision of fence viewers. 204 Iowa1072, 216NW673.

1031–36½–New. Error in the order of fence viewers cannot be raised for the first time on appeal. 206 Iowa917, 221 NW462.

1033–67 204 Iowa1072, 216NW673. [citCJ entire section].

1033–80 Vt 150A70 (title and possession sufficient to authorize suit).

1034–91 [a] (1) See also 108Conn97, 142A460. (2) Neither of adjoining proprietors has any right to trim or cut hedge in part not set to him by lawful division so as to impair its natural sufficiency as fence. 108Conn97, 142A460 (trimming off five or six feet of division hedge held improper).

1036–29 [a] **Evidence held sufficient to support verdict for plaintiff.**–Vt 150A 70.

1036–36½–New. A finding that damage to plaintiff's fence was not caused by defendant's acts held not warranted by the evidence. 261Mass236, 158NE 666.

1036–39 [a] (3) Cutting of plaintiff's fence by defendant's orders, making it possible for plaintiff's mule to escape, held proximate cause of injury to such mule for which defendant is liable. TexCivA 17SW(2d)838.

1037–61 NC 155SE451.

1038–66 99TexCr661, 271SW608.

1038–70 99TexCr661, 271SW608.

1040–45 180Ark408, 21SW(2d)186.

1043–93 223AppDiv192, 227NYS739.

1044–10 181Ark560, 26SW(2d)878 (propriety of consolidating separate petitions and sufficiency of notice). [c] **Construction** of fencing statute. 181Ark560, 26SW(2d)878.

FERRIES

1048–1 204Cal 305, 268P355, 361 [quot CJ].

1049–3 [b] (2) Ferry is but continuation of road from one side of water to other. 145Va28, 135SE561.

1049–4 204Cal 305, 268P355, 361 [cit Cyc]. [b] **All ferries are regarded as publici juris.**–41F(2d)920.

1049–8 Wash 287P52.

1050–14½–New. Ferry service was not rendered by steamer merely because passengers and vehicles were carried. Wash 287P52.

1051–20 168Ga883, 149SE182; 40GaA 241, 149SE432; 134Wash677, 236P288, 289 [citCJ]. See also 146SC225, 143SE 796. [a] **Private person held not authorized** by statute to operate ferry across stream which is boundary between two counties. 142Wash284, 252 P906.

1052–24 [b] **Railroad operating passenger ferry cannot operate vehicular** ferry over different route without certificate of public convenience and necessity. 204Cal 305, 268P355.

1052–25 145Va28, 133SE561, 564 [cit CJ]. [b] **Incident to railroad.**–145Va 28, 133SE561.

1052–26 168Ga883, 149SE182.

1052–39 235Ky540, 31SW(2d)932.

1053–48 [c] **Legislature has power to establish public ferry** to be used only in connection with railroad business. 145Va28, 133SE561. [d] **Holder of certificate of public convenience and necessity to operate ferry under statute cannot be required to establish and maintain new service** over different route at loss as condition precedent to holding existing route without competition. 152Wash417, 278P189.

1053–52 40GaA241, 149SE432 (under statute franchise can be granted only by proper county authorities); 134 Wash677, 236P288, 289 [citCJ].

1053–53 141Miss701, 105S541.

1053–55 274US676, 47SCt758, 71L ed 1292; 134Wash677, 236P288.

1053–57 [b] **Fiscal court without implied power.**–235Ky540, 31SW(2d)932.

1053–58 235Ky540, 31SW(2d)932.

1054–64 134Wash677, 236P288, 289 [citCJ].

1054–66 274US676, 47SCt758, 71L ed 1292; 169La122, 124S308.

1055–77 175Ark801, 300SW395. [a] **Where river divides two counties,** privilege is not wholly within jurisdiction of either county. 175Ark801, 300SW 395. [b] **Where one county** decided against granting ferry privileges, matter is res judicata for both counties. 175Ark801, 300SW395.

1055–80 134Wash677, 236P288.

1055–80½–New. Power to construct and operate a ferry over boundary water does not include power to grant franchise to an individual for that purpose. 134Wash677, 236P288.

1055–82 218Ky346, 291SW409.

1057–18½–New. The superior court has no original jurisdiction under statute to decide whether an application for a certificate of necessity to operate a ferry under the law is for a territory already served by a certificate holder. 152Wash417, 278P189.

1058–24 [b] **Ferry certificate cannot be granted** till department determines whether operation would invade territory already served. Wash 287P52.

1058–28 Cal 292P640.

1058–29 100WVa399, 130SE522 (imperative public need of additional service is first question to be considered). [a] **Franchise should be refused** where it is not shown that travelling public will be benefited by ferry to render substantially same service as established ferry. 100WVa399, 130SE522.

1058–30 [a] **Applicant held not entitled** to good faith ferry certificate. Wash 287P52.

1058–33 Cal 292P640.

1059–58 [b] **Superior court erred** in deciding case on point not considered by public works department. Wash 287P 52.

1059–59½–New. Some statutes give the right to appeal to anyone interested. 210Ky532, 276SW131.

1059–59¼–New. Under such statutes persons interested are entitled to appeal although they were not parties to the proceedings and filed no written pleadings. 210Ky532, 276SW131.

1059–59¼–New. Under some statutes no bill of exceptions is necessary on appeal to the circuit court from an order of the county court concerning a ferry franchise. 210Ky532, 276SW131.

1059–60½–New. Where a statute prohibits the establishment of a ferry within four hundred yards of another, on application for a franchise within the prohibited distance on the sole ground that the existing ferry is without right is a collateral attack on the existing franchise. 210Ky532, 276SW131.

1059–60½–New. In such proceeding the only matter for inquiry is whether the existing franchise is void. 210Ky532, 276SW131.

1059–60¼–New. In such proceeding the question of abandonment or forfeiture of the existing franchise is not open to inquiry. 210Ky532, 276SW131.

1059–60½–New. In a collateral attack on a franchise granted by the county court it is presumed that all statutory and jurisdictional requirements were complied with. 210Ky532, 276SW131.

1059–69 235Ky540, 31SW(2d)932 (franchise obtained by county court's judgment establishing ferry).

1062–24 128Me108, 146A10.

1062–33 But see 179Ark561, 18SW(2d) 337. [a] **In Kentucky.**–210Ky532, 276 SW131.

1062–36 274US676, 47SCt758, 71L ed 1292; 168Ga883, 149SE182 (ten-year franchise held not exclusive); 128Me 108, 146A10; 142Wash284, 252P906.

1062–37 274US676, 47SCt758, 71L ed 1292. [a] **State's right to build bridge.**–168Ga883, 149SE182.

1063–38 152Wash417, 278P189.

1063–42½–New. Under such an act, franchise will not be refused because of operation of another ferry without franchise within prescribed distance. 218Ky346, 291SW409.

1063–44½–New. Prior use of bank for landing held not to create exclusive privilege. 274US676, 47SCt758, 71L ed1292.

1063–44½–New. Nor does ownership of land adjoining the bank of a navigable stream entitle the owner to an exclusive right to operate a ferry. 274US676, 47SCt758, 71L ed1292.

1063–55 171Ark943, 287SW163.

1063–57 128Me108, 146A10.

1063–58 128Me108, 146A10.

1064–66 6F(2d)21.

1065–80 51SD561, 215NW880; 142 Wash284, 252P906.

1037–15 [b] **Ferry operator** deprived of right to use frontage held entitled to equitable relief, though he charged exorbitant rates. 6F(2d)21.

1071–14 128Me108, 146A10.

1071–17½–New. A statute creating a franchise and for revocation when public interest demands merely authorizes revocation after petition and hearing, not by way of collateral attack. 128Me 108, 146A10.

1072–27 204Cal 305, 268P355.

1073–54 128Me108, 146A10.

1073–57 141Miss701, 105S541; 156Miss 273, 125S828. [b] **Municipal corporation** may fix status for continued operation of ferries. 6F(2d)21.

1073–61 [b] **Town in assigning landing places** for ferries cannot discriminate and put ferry operator out of business. 6F(2d)21.

1073–67 [b] **One operating ferry under contract with highway commission** is not "owner or lessee of a toll ferry" subject to license tax. 13LaA249, 127S472.

1073–69½–New. Under statute, licenses may be revoked at the pleasure of officials given control of ferries. 128Me108, 146A10.

1073–71 [g] **In Washington.**–134Wash 677, 236P288. [h] **Contracts between carrier and ferry lines** after filing and establishing tariff schedule, establishing rates for carrying stages contrary to schedules, not attempting to establish new general rate applicable to transportation of stages over ferry line, is in violation of statute as discriminating in favor of bus company. 151Wash67, 274 P1056. [i] **Commutation tickets** may be issued by ferry companies in some jurisdictions for vehicles and freight. Wash 287P672. [j] **Ferry rates established for auto stages are not private,** special rates for particular shippers, but order applies to all in similar service. Wash 289P1006. [k] **Question what is**

granted by departmental order is governed by what order provides regarding alleged discriminatory rates, not by relief asked for. **Wash** 289P1006.
1074–73 173Ark301, 292SW353; **Wash** 289P1006 (court order construed). [b] **Burden is on party complaining of rates** fixed by county court to show their unreasonableness. 173Ark301, 292SW353.
1074–74 [a] **Matters to be considered** in fixing rates. 173Ark301, 292SW353.
1074–75 173Ark301, 292SW353.
1074–76½–New. Tariff establishing shipping rates for "touring autobusses or stages" of a specified capacity over a ferry shows applicability to stages having a regular schedule of operation, 151Wash67, 274P1056.
1074–76½–New. and the intention of officials to limit the schedule to buses not having a regular schedule is not controlling in the light of the tariff language. 151Wash67, 274P1056.
1074–77 173Ark301, 292SW353.
1074–80 173Ark301, 292SW353. [b] **Evidence held to establish** unreasonableness of rates fixed by county court. 173Ark301, 292SW353.
1074–86½–New. Judgment reversing an order requiring a receiver of ferry lines to transport stages of a bus company for compensation specified in a special contract between the bus company and the ferry line, on the ground that the contract made after tariff schedule establishing shipping rates is discriminatory, does not preclude the establishing of a new general tariff of rates chargeable for transportation of stages over ferry lines. 151Wash67, 274P1056.
1074–94 26F(2d)19; 146Wash377, 262P975.
1075–2 146Wash377, 262P975.
1076–13½–New. The terminal tract of a ferry may be used by the ferry company or it may permit others to use it for any lawful purpose that does not interfere with obligations as a ferryman. 102NJEq450, 141A161.
1076–26 14F(2d)529; 24F(2d)967; 13LaA159, 127S661; 146Wash377, 262P975. But see 150Wash148, 272P66.
1077–29 26F(2d)19.
1077–30 26F(2d)19.
1078–43 13LaA159, 127S661 (boat may be constructed by methods in ordinary use which have been found safe).
1078–47 26F(2d)19. [b] **Mere conjecture** as to what would have happened had proper barriers been provided cannot excuse duty to provide barriers. 26F(2d)19.
1078–54 102NJEq450, 141A161.
1082–30 [a] (2) To make out prima facie case of negligence. 129Misc301, 221NYS3. (3) In some cases evidence has been held to sustain judgment. 26F(2d)19. [b] **Evidence held not to show** negligence in operation of ferryboat. 13LaA159, 127S661.
1083–39 CalA 288P151.
1083–40 CalA 288P151.
1083–51½–New. Negligence as to barriers held for the jury. 146Wash377, 262P975.

FEUD

1084–15½–New. Feuds were clearly classed as corporeal hereditaments. 112OhSt306, 147NE513, 39ALR334.

FIBER

1086–64½–New. A fine filament; 11CustA163.
1086–64½–New. a thread or filament. 10CustA74.

FICTIO JURIS NON EST UBI VERITAS

1086–70 32PortoRico 836.

FICTITIOUS

1086–81 80CalA159, 251P315.

FIDEI-COMISO

1087–98 50Philippine888.

FIDEI-COMISSARIO

1087–99 50Philippine888 (cestui que trust).

FIDEI-COMMISSARIUS

1087–1 44Philippine292.

FIDEI-COMMISSUM

1087–4 [a] (1) 163La467, 112S301.

FIDELITY INSURANCE

1089–1 13F(2d)474; 85IndA169, 151NE396, 399 [quotCJ].
1089–1½–New. **Statutory regulations.** Statute requiring bonding company, on cancellation or refusal to renew bond, to state reasons therefor in writing on request and providing a penalty for refusal, is for the benefit of the person whose fidelity is guaranteed and may be waived either before or after its violation. TexCivA 272SW234.
1089–1½–New. In action to recover statutory penalty, exceptions to special answer erroneously sustained. TexCivA 272SW234.
1089–2 85IndA169, 151NE396, 399 [quotCJ].
1089–3 85IndA169, 151NE396; TexCivA 278SW956, 957 [quotCJ].
1089–4 TexCivA 278SW956, 957 [quotCJ].
1089–5 TexCivA 278SW956, 957 [quotCJ].
1089–6 13F(2d)474; 85IndA169, 151NE396, 399 [quotCJ]; 52SD149, 216NW883; TexCivA 278SW956, 957 [quotCJ]; TexCivA 5SW(2d)626; 187Wis270, 202NW665, 666 [citCJ].
1089–7 TexCivA 278SW956, 957 [quotCJ].
1089–8 13F(2d)474; 85IndA169, 151NE396, 399 [quotCJ]; TexCivA 278SW956, 957 [quotCJ]; 187Wis270, 202NW665, 666 [citCJ]. [b] **In determining whether contract is suretyship or insurance,** courts will consider substance rather than form of contract. 118Tex469, 17SW(2d)774(2dcase).
1089–9 13F(2d)474; 215Ala198, 110S277; 23AlaA246, 123S265 (insurable interest); 85IndA169, 151NE396, 399 [quotCJ]; TexCivA 278SW956, 957 [quotCJ]; TexCivA 2SW(2d)1000.
1090–10 13F(2d)474; 85IndA169, 151NE396, 399 [quotCJ]; TexCivA 278SW956, 957 [quotCJ]; TexCivA 2SW(2d)1000. [a] **But where, at employee's request,** indemnity company guarantees his fidelity to employer, relation of principal and surety arises also. 187Wis270, 202NW665. [b] **That employee whose fidelity is guaranteed signed fidelity bond** is not conclusive that contract is one of suretyship. 118Tex469, 17SW(2d)774(2dcase).
1090–12 254Mass305, 150NE94. [b] **Signing by employee after defalcation** is not compliance with condition. 254Mass305, 150NE94.
1090–13 [a] (4) 254Mass305, 150NE94. (9) Where bond provided that it was to be invalid unless signed by employee, delivery of bond unsigned held not waiver of condition. 254Mass305, 150NE94.
1091–16 TexCivA 278SW956, 957 [quotCJ].
1091–22½–New. Limiting clauses in a bank president's bond, conditions of which are prescribed by statute, are void. IndA 161NE573.
1091–22½–New. A bond guaranteeing that a bank cashier would faithfully and honestly discharge his duties as such was an official bond, given for the benefit of the stockholders and creditors of the bank, and is to be regarded as one in which the public has an interest. IndA 165NE439.
1091–27 13F(2d)474; 41F(2d)171; 122Kan235, 252P201; 150Miss386, 116S605; 149SC402, 147SE444; 52SD149, 216NW883.
1091–28 150Miss386, 116S605, 608 [citCJ]; 56ND398, 217NW538, 540 [citCJ], 56ALR1257; 114Oh24, 150NE921 [citCJ]; 52SD149, 216NW883; Tex 12SW(2d)611.
1092–29 221AppDiv184, 223NYS373.
1092–31 221AppDiv184, 223NYS373.
1092–33 258Mass353, 155NE10. [b] **"Embezzlement."**–149Wash343, 270P799.
1092–33½–New. Words defining "liability" should be given a broad meaning 13F(2d)474.
1092–33½–New. and taken most strongly against a surety company. 13F(2d)474.
1092–34½–New. Collateral agreement that securities shall be under joint control of employer and employee cannot be given construction inconsistent with purpose of bond. Mo 25SW(2d)783.
1092–39 233Ky217, 25SW(2d)359. [a] (7) To render surety liable on bond of indemnity to bank against loss by embezzlement, wrongful abstraction or willful misapplication of funds or securities by employed, employee need not have derived any personal profit or advantage. TexCivA 276SW302. (8) Assistant cashier of bank, affirmatively aiding and assisting cashier to abstract and misapply and appropriate to his own use money and securities of bank, with knowledge of his unlawful purpose, in manner materially contributing to success of cashier's action, is guilty of breach of bond indemnifying bank against loss by embezzlement, wrongful abstraction, or willful misapplication of bank's funds or securities. TexCivA 276SW302. (9) Other instances. 233Ky217, 25SW(2d)359. [d] (4) Willful misapplication means willful, unauthorized, and illegal application of funds to use and benefit of person making application or of another with former's knowledge and consent. TexCivA 276SW302. [e] (2) Wrongful abstraction means unauthorized and illegal taking or withdrawing of funds from employer's possession and control and appropriation thereof to benefit of taker or another with taker's knowledge and consent. TexCivA 276SW302. [e] **Employees actually in service of employer** have been held to include holding company's vice president. Del 151A665.
1093–45½–New. It is not necessary that employees of a corporate employer occupying and performing the duties of any position named in schedule forming part of bond insuring against loss through their fraud or dishonesty while so occupying and performing shall have been elected to the positions in question. 114Oh24, 150NE921.
1093–45½–New. [a] **Meaning of "occupy."**–One who has exclusive possession and control of a position in a private corporation "occupies" such position. 114Oh24, 150NE921.
1093–45¼–New. Payment of loss by another insurer is immaterial where it was not based on the same items and total loss exceeded the amount of both bonds. 122Kan334, 252P199.
1093–45½–New. Loss from injudicious acceptance of notes by cashier held not covered by bond for faithful performance of duties. 85IndA390, 154NE296.
1093–45½–New. Loss sustained by cashier's secreting notes and permitting overdraft held recoverable under cashier's bond for faithful discharge of duties. 85IndA390, 154NE296.
1093–46 177Minn65, 224NW451; TexCivA 270SW1062. [a] **Dishonest or criminal act or omission.**–207Iowa652, 223NW529.
1093–47 321Mo140, 9SW(2d)929. See also 197Wis180, 221NW653. [a] (2) Fact that county collector used funds which he diverted to make good shortages in preceding year did not absolve surety on bond indemnifying against embezzlement by collector, notwithstanding provision of bond that its acceptance released surety from liability under any prior bond. 177Ark638, 7SW(2d)332. (3) Other instances. 40F(2d)34; 181Ark954, 28SW(2d)715. [b] **Acts not constituting larceny.**–40F(2d)34. [c] **Acts not constituting embezzlement.**–40F(2d)34.
1093–48 207Iowa652, 223NW529.
1094–50 133SC342, 131SE616, 617, 43ALR971 [quotCJ].
1094–51 98PaSuper523; 133SC342, 131SE616, 617, 43ALR971 [quotCJ]. [a] (2) 133SC342, 131SE616, 617, 43ALR971 [citCJ].
1094–55 13F(2d)474; 41F(2d)586. But see 238Mich405, 213NW685.
1094–56 13F(2d)474.
1094–57 13F(2d)474; 41F(2d)586; IndA 161NE573; TexCivA 285SW951. [a] (4) Bond insuring against dishonest

acts of employee covers loss sustained by breaches of employee. **IndA** 154**NE** 672. [c] **False entries.**–207 **Iowa**652, 223 **NW**529. [d] **Misapplication of funds constitutes loss** under bond from employee's dishonesty though money went into bank's assets. 207 **Iowa**652, 223 **NW**529.

1094–58 41**F(2d)**171 (claim against another held not to preclude suit on bond); **IndA** 151**NE**622. But see **Ind** 169**NE** 524. [a] **Acts in connivance with others.**–41**F(2d)**586.

1094–59 [a] **Necessity of felonious intent.**–205 **Iowa**830, 218**NW**474.

1094–61 150**Miss**386, 116**S**605, 609 [quotCJ].

1095–62 85**Mont**149, 278**P**116. See also 220**AppDiv**524, 221**NYS**619; 220**AppDiv** 524, 221**NYS**619 (facts held sufficient). [a] **Conversion of money by means of fraudulent scheme and appropriation to employee's use** is within bond undertaking to reimburse employer for loss by larceny or embezzlement. 85**Mont** 149, 278**P**116.

1095–67 [a] (3) As regards liability on fidelity bond, generally, when bank cashier acts on his own judgment, he is bound to exercise that degree of skill and care and diligence required of agent generally. **IndA** 165**NE**439. [b] **Recovery could be had without regard to fact that loss was occasioned by incompetency** of cashier rather than by reason of unfaithful or dishonest performance of his duty, since surety guaranteed that cashier would fulfill contract with reasonable skill and diligence. **IndA** 165 **NE**439.

1095–70½–New. Where property is intrusted to a business manager who is to account therefor and return the property at the end of the term less interest and increment, his relation to his employer is one of trust based on contract within the meaning of a fidelity bond. 22 **OhA**369, 153**NE**261.

1095–70⅓–New. Surety is not liable on bank president's bond indemnifying against fraud or dishonesty for irregularities known to bank officials. 193**Wis** 338, 214**NW**361.

1095–70¼–New. Surety on bank president's indemnity bond may assume that the bank will be managed in a legal manner. 193**Wis**338, 214**NW**361.

1095–70⅙–New. Surety company, agreeing to indemnify a brokerage firm for loss from dishonesty of employees, except losses from "trading," is not liable for loss on an insufficiently secured account carried by an employee in a customer's name. 258**Mass**353, 155 **NE**10.

1095–70⅛–New. Where the surety executed a bond conditioned that the cashier of the bank would fulfill his contract, no words could be relied on to restrict the liability of the bondsman to mere personal honesty and integrity, unless these terms or their equivalents were used. **IndA** 165**NE**439.

1095–70½–New. In a bank receiver's action on a fidelity bond protecting the bank against loss as the result of dishonest or criminal acts of employees, it was immaterial whether any or all of the bonded officers of the bank benefited personally by transactions by which the bank's funds were misapplied. 207 **Iowa**652, 223**NW**529.

1095–70⅛–New. Losses resulting from wrongful and fraudulent acts of the employee, imposing liability on plaintiff to third persons, which it is compelled to pay, are held covered by the bond. 177**Minn**65, 224**NW**451.

1095–70⅕–New. Under a bond given to reimburse a corporation for any direct loss sustained through its treasurer's failure to perform honestly and faithfully the duties of his office and to account for all funds coming into his hands, there can be no recovery for funds lost through the insolvency of a bank selected by the corporation in which the treasurer deposited them. 177**Minn**575, 225**NW**724.

1095–70 1/10–New. That bank president as managing officer, received no profits from wrongdoing is immaterial in determining liability under bond. **Mo** 32 **SW(2d)**86.

1095–72 169**Ark**7, 272**SW**867; 105**NJL** 330, 144**A**576. [f] **After termination of employment** there is no liability though conspiracy was hatched while bond was in force. 27**F(2d)**455.

1096–75 **TexCommnA** 25**SW(2d)**822.

1096–76 169**Ark**7, 272**SW**867.

1096–79 122**Kan**235, 252**P**201.

1096–79½–New. Bond written for indefinite period at pleasure of parties goes on year after year until canceled, and each premium is part of consideration for entire risk. 153**Tenn**176, 281 **SW**785, 45**ALR**610.

1096–79⅓–New. Where bond, by terms, is to run until notice to terminate is given, annual premium is to be enforced as part of consideration and not as condition. 153**Tenn**176, 281**SW**785, 45**ALR** 610.

1096–79¼–New. A continuing bond may run not to any specified time, but until the happening of any one of several enumerated events. 122**Kan**334, 252**P** 199.

1096–80 56**ND**398, 217**NW**538, 540 [cit CJ], 56**ALR**1257.

1097–82 56**ND**398, 217**NW**538, 540 [cit CJ], 56**ALR**1257. [a] **Where original bond and continuances constitute one bond covering three-year period,** bond covers losses occurring any time within period and discovered within stipulated time thereafter. **Mo** 25**SW(2d)**783.

1097–85 56**ND**398, 217**NW**538, 56**ALR** 1257.

1097–88 27**F(2d)**552. [a] **Bank held estopped to deny change.**–27**F(2d)**552.

1098–94½–New. Where a bond permitted interchange or substitution among employees, a claim for indemnity has been held not limited as to a certain employee to services in the conduct of business at the location specified in the bond. 215**Ala**198, 110**S**277.

1098–97½–New. On the issue whether a surety of a bank president is liable for his acts as cashier, the court must look, in the absence of by-laws of the bank, to the principles of law defining the duties of the respective offices. 27**F(2d)**552.

1098–6 But see 227**Ky**652, 13**SW(2d)** 1005.

1098–9 20**F(2d)**661.

1099–11 85**Mont**149, 278**P**116.

1099–12 39**GaA**337, 147**SE**171. See also 150**Miss**386, 116**S**605.

1099–13½–New. A continuing bond may, according to its terms, run until terminated by dismissal or retirement of the employee, discovery of loss, or cancellation by one of the parties. 122**Kan**334, 252**P**199.

1099–13⅓–New. Insurer is primarily liable and not entitled to protection of the statute governing sureties. **TexCivA** 2**SW(2d)**1000.

1099–13¼–New. Receipt indorsed on back of draft given in payment of shortage of school district clerk held not contract releasing surety from liability on policy for preceding year. 132 **Or**673, 288**P**196.

1099–13⅕–New. Fidelity bond of bank cashier terminates on directors' discovery of his overdrafts where bond provides for termination on bank's discovery of principal's failure to faithfully perform duties. 43**F(2d)**532.

1099–14 43**F(2d)**532.

1099–18 But see 144**SC**105, 142**SE**45. [f] **Warranty that bank directors will make monthly examination of books is not breached** where bond terminated before failure to make examinations. 43 **F(2d)**532.

1100–23 [b] **Warranty that bank directors will approve loans by cashier** held not false because loans were not approved till consummated. 43 **F(2d)**532.

1100–24 See 21**SaskL**106, [1926] 4**DomLR**37, [1926] 2**WestWkly**737.

1100–27 171**Minn**305, 214**NW**47; 85 **Mont**149, 278**P**116; 114 **Oh**24, 150**NE** 921. [c] (2) Other instances. 181**Ark** 954, 28**SW(2d)**715. [d] 171**Minn**305, 214**NW**47 (dictum). [e] **Notice sufficient.**–**IndA** 154**NE**672. [f] **Meeting of finance committee** some of whom were engaged in unlawful acts was not lawful meeting as respected notice to surety required by fidelity bond. 154**SC**267, 151**SE**579.

1101–28 171**Minn**305, 214**NW**47, 48 [cit CJ].

1101–29 114 **Oh**24, 150**NE**921. [c] **Tex CommnA** 300**SW**638.

1101–30 37**F(2d)**550; 177**Minn**65, 224 **NW**451; 114 **Oh**24, 150**NE**921; 294**Pa** 446, 144**A**424.

1101–33 164**La**95, 113**S**779.

1101–34 181**Ark**954, 28**SW(2d)**715.

1101–35 [a] (3) Other instances. **IndA** 151**NE**622. [c] **Notice held timely.**–321 **Mo** 140, 9**SW(2d)**929.

1101–36 114 **Oh**24, 150**NE**921. But see 154**SC**267, 151**SE**579.

1101–37 See 164**La**95. 113**S**779.

1102–39 40**F(2d)**34; **Ind** 168**NE**869.

1102–48½–New. Policies have been construed as not precluding recovery because insured failed to use reasonable diligence to discover defalcations. 18 **F(2d)**934.

1102–48¼–New. The fact that timely notice was not given on the item of the insurance account did not release defendant on other losses thereafter discovered, on which timely notice was given. 177**Minn**65, 224**NW**451.

1102–49 85**Mont**149, 278**P**116. [a] (3) Invitation to file proof of loss. **IndA** 154**NE**672. (4) Invitation to obligees in bond to file proof of loss when surety knew that employee had committed acts creating liability against it. **IndA** 151**NE**622.

1102–50 [b] **Fidelity insurer waived requirement of bond that claim be presented within three months,** after expiration thereof by failing to disclaim liability on ground of failure to present claim within such time, by undertaking to investigate claim and by putting insured to trouble and expense of making proof of loss after learning of such defense. 321**Mo** 140, 9**SW(2d)**929.

1102–54 [a] 18**F(2d)**934.

1103–57 122**Kan**334, 252**P**199.

1103–64 122**Kan**235, 252**P**201.

1103–72 [b] (2) Provision that truth of representations relative to employee in connection with issuance of bond is warranted is insufficient reference to statements relative to employer's future conduct. **Mo** 25**SW(2d)**783. [c] **Statements or agreements not made part of bond** are not part of contract. **Mo** 25**SW(2d)**783. [d] **Answers must be construed** in plain and unambiguous words used, and in light of attendant circumstances. 40**F(2d)**374.

1104–74 52**ND**752, 204**NW**818, 40**ALR** 1021.

1104–77 52**ND**752, 204**NW**818, 40**ALR** 1021. [b] **Falsity.**–(1) 43**F(2d)**532.

1105–78 52**ND**752, 204**NW**818, 40**ALR** 1021.

1105–79 52**ND**752, 204**NW**818, 40**ALR** 1021.

1105–81½–New. When a banking corporation, in taking part in procuring a bond of an employee, answers questions as to his record in his existing employment, it is its duty to disclose correctly any knowledge it may have of past or existing defaults. 52**ND**752, 204**NW**818, 40**ALR** 1021.

1105–81⅓–New. To forfeit bond because of affirmative warranty true when made was not true on issuance of bond, contract must stipulate for intervening period. 43**F(2d)**532.

1105–81½–New. Whether payment of bank officer's overdraft created "shortage" within fidelity bond depends on financial condition of person receiving indirect loan notwithstanding violation of statute. 43**F(2d)**532.

1105–84 21**SaskL**106, [1926] 4**DomLR** 37, [1926] 2**WestWkly**737.

1105–86 **Mo** 25**SW(2d)**783 (where statements not made part of bond).

1105–87½–New. Representation is not part of bond while warranty enters into and forms part of bond itself. **Mo** 25**SW(2d)**783.

1105–89 **Mo** 25**SW(2d)**783.

1106–94 43**F(2d)**532.

1107–9½–New. In Canada, where an insurer propounds a question and insured gives an answer which is true on a fair construction of the question, insurer cannot claim a construction which would vitiate the answer. **Can** [1928] 2**DomLR**829.

1107–11 Sask [1927] 3DomLR647.
1107–18 Mo 25SW(2d)783.
1108–27½–New. A surety sending a representative to investigate an apparent shortage of a bank officer after notification, and thereafter inviting discussion and disclosure of substantial merits of claim with acknowledgment of some liability, thereby extended the time for notice by implication, and was estopped to rely on the provisions requiring notice of loss within ten days after discovery. 321Mo 1104, 14SW(2d) 425.
1108–29 [c] (1) 85Mont149, 278P116. (4) General reference in bond to statements and representations as whole will not incorporate them into bond so as to make them warranties. 85Mont149, 278 P116.
1109–33 244Mich72, 221NW140. See also 122Kan334, 252P199, 201 [citCJ].
1109–34 See also 122Kan334, 252P199, 201 [citCJ].
1109–35 153Tenn176, 281SW785, 45 ALR610 (bond to run till notice to terminate).
1109–42 13F(2d)474.
1109–44 See also 27F(2d)496.
1109–45 122Kan334, 252P199.
1109–46 122Kan334, 252P199.
1110–51 13F(2d)474.
1110–55 244Mich72, 221NW140.
1110–55½–New. Where sureties on an official bond of a county collector were unable to make a settlement for the collector's shortage until after the right to make payment and save commissions which the collector was entitled to had expired, they are entitled to recover sums paid by them without deduction of such commissions, if the collector embezzled such funds. 177Ark638, 7SW (2d)332.
1110–61½–New. Although defendant's agreement in an application on which plaintiff bonding company signed an injunction bond as surety for defendant was blank as to the amount for years after the first year, it was not void as to such years. TexCivA 15SW (2d)682.
1110–65 See also IndA 170NE108 (wrongful payment of checks).
1110–65½–New. The basis of an action on a contract indemnifying an employer for fraud or dishonesty of an employee is a contract of insurance, 85 IndA169, 151NE396.
1110–65½–New. and not the judgment taken against the employer and employee because of the dishonest act of the employee. 85 IndA169, 151NE396.
1110–65¼–New. Insured held not to have waived the right to action upon the bond of a sheriff and against the state bonding department because of judgment against the sheriff sued alone. 52SD149, 216NW883.
1111–68½–New. Bank in absence of showing of ratification of acts of cashier did not become equitable owner of checks wrongfully paid by cashier after appointment of receiver for depositor. IndA 170NE108.
1111–68⅓–New. Terms of bank official's fidelity bond held not to require accounts to be fully settled before liability would accrue on bond. Mo 32SW (2d)86.
1111–73 But see 56ND14, 215NW875.
1111–76 19F(2d)110. [a] **Facts held not to show waiver.**–19F(2d)110.
1111–77½–New. Where a bond requires suit to be brought within one year after discovery of any act of larceny or embezzlement and gives the surety three months within which to pay the loss after being furnished with proof of loss, the time within which suit is required to be brought begins to run on denial of liability. 105WVa138, 141SE626.
1111–79 56ND398, 217NW538, 56ALR 1257 (defenses not waived).
1112–83½–New. Insolvency of agent, who mingled his own with principal's funds, is not a defense. TexCivA 270 SW1062.
1112–83⅓–New. A surety who pays the amount of public deposit in an insolvent bank on demand of the government pursuant to surety's obligation has a right of set off against the secretary of banking assuming control of the bank upon the latter's insolvency and suing the surety of the fidelity bond. 8Pa Dist&Co 93.
1112–83¼–New. Defendant may plead that the employee was an infant when the contract was made and the contract was void as containing stipulations not for the infant's benefit. PrEdwIsl [1928] 3DomLR198.
1112–88½–New. Defendant's obligation is primary, and an embezzling cashier, although named as principal in the contract, need not be joined as party defendant. TexCivA 278SW956.
1112–88⅓–New. In a suit on a fidelity bond given by a bookkeeper, the bookkeeper is not a necessary party. Tex CivA 5SW(2d)626.
1112–92 85 IndA169, 151NE396; IndA 154NE672; 56ND262, 216NW561. [a] 162La855, 111S258. [d] **Bad faith of insurer sufficiently alleged.**–39GaA337, 147SE171. [e] **Waiver of delay in presenting proof of loss** held sufficiently alleged. 85Mont149, 278P116.
1112–93 12PaDist&Co 380.
1112–94 [b] **Employer suing on fidelity bond** may allege and prove all defalcations by employee, but prayer for recovery should be limited to penalty of bond. 17F(2d)527.
1113–9 52SD149, 216NW883.
1113–13 Contra 85 IndA169, 151NE396.
1113–18 [a] **Under petition charging,** and answer denying, embezzlement by employee, his general character is not in issue. 308Mo 109, 271SW757.
1113–18½–New. Preliminary trial of issue of law. Where, in action by municipality for loss suffered through embezzlement, defendant pleads that employee was acquitted of embezzlement in a criminal trial therefor, plaintiff may have point of law as to whether or not this is a good defense tried and decided before proceeding with other issues was raised. Sask [1925] 3DomLR440.
1113–18⅓–New. In a bank receiver's action against a surety on a bond covering losses sustained through fraud or dishonesty of employees, directly or in connivance with others, proof of conspiracy has been held not essential to plaintiff's recovery for losses sustained resulting from a joint wrongdoing of the employees, although conspiracy was alleged. 207 Iowa652, 223NW529.
1113–20 19F(2d)969; 321Mo 140, 9SW (2d)929. [a] (2) Plaintiff must establish exact fiduciary relation and capacity specified in bond. 27F(2d)552.
1114–21 Mo 25SW(2d)783. [a] (3) Employer's knowledge or reason to believe of employee's dishonest practices. 27F(2d)496.
1114–23½–New. Insurer has the burden of proving compliance with a provision that insured shall, within three months after discovery of loss, furnish affirmative proof of loss. TexCommnA 300SW638.
1114–24 [a] **Burden of proving that loss was caused by larceny or embezzlement** rests on insured where such were acts insured against. Mo 25SW(2d)783.
1114–25 215Ala198, 110S277; 177Ark 638, 7SW(2d)332; Ill 172NE57; 207 Iowa652, 223NW529; 238Mich405, 213 NW685; 150Miss386, 116S605; Mo 32 SW(2d)86; 22 OhA369, 153NE261; Tex CivA 276SW302. [a] (4) Evidence of repayments by delinquent employee is admissible. 220Ala6, 123S271. [b] (4) In suit against surety on assistant bank cashier's fidelity bond, bank's books and monthly statements to depositors and testimony as to discrepancies between, and irregularities in, them is admissible though it is not shown that entries were made by such officer. Tex CivA 276SW302. (5) In action against surety of bank cashier, his records, reports, and statements, and conclusions of experts from records and reports, are admissible. 13F(2d)474. [d] **In action on fidelity bond, employee's alleged confession,** shown to have been brought to defendant's knowledge before its refusal to pay loss, was admissible on issue of vexatious refusal to pay. 321Mo 140, 9SW(2d)929.
1114–26 25F(2d)934 (evidence of another policy, not pleaded); 37F(2d)550; 207 Iowa652, 223NW529. [a] (3) Surety cannot show general reputation of employee for veracity, honesty, or morality, when not attacked. 308Mo 109, 271SW757.
1114–30 But see 197NC410, 149SE380.
1115–33 [a] (1) 181Ark954, 28SW(2d) 715; 85 IndA390, 154NE296; 122 Kan334, 252P199; 165La646, 115S811; 238Mich405, 213NW685; 177Minn65, 224NW451; TexCivA 278SW956; Tex CivA 23SW(2d)765. (2) Interest. Tex CommnA 25SW(2d)822. [b] 19F(2d) 969; 153Md188, 137A902; 133SC342, 131SE616, 43ALR971. [c] 22 OhA369, 153NE261. [d] (4) 247NY52, 159NE 720; TexCommnA 14SW(2d)794. (5) 177Minn65, 224NW451. (12) Taking of assets of bank by cashier before effective date of cashier's bond. 19 F(2d)969. (13) That employer was awarded amount less than he was entitled to. 25F(2d)934. (14) That bookkeeper was confederate of cashier in misapplication of funds. TexCivA 5SW (2d)626. (15) Waiver of delay in furnishing claim. 85Mont149, 278P116. (16) Cause of action. 177Ark638, 7SW (2d)332. (17) Employee guilty of embezzlement. 321Mo 140, 9SW(2d)929. (18) Appropriation of money by treasurer of fraternal society. Mo 25SW(2d) 783. (19) That neither cashier nor directors had ever discovered any loss within meaning of bond requiring notice within given time. 154SC267, 151SE 579. (20) Other instances. 44F(2d) 31; Ark 28SW(2d)715. [f] (8) That defendant assistant cashier of plaintiff had defrauded plaintiff by means of cashier's checks and by exchange of certain promissory notes. 165Minn462, 206NW706. (9) To show that bank officials and directors had knowledge or reason to believe that official was engaged in hazardous speculations. 27 F(2d)496. (10) To show that bank was chargeable with knowledge of fraudulent action of official. 27F(2d)496. (11) Falsity of warranty. 43F(2d)532. [l] **Prima facie case of conspiracy.**–207 Iowa652, 223NW529. [m] **Evidence held sufficient to sustain finding of larceny or embezzlement.**–177Ark638, 7SW (2d)332.
1115–34 238Mich405, 213NW685; 22 OhA369, 153NE261; 133SC342, 131SE 616, 617, 43ALR971 [citCJ]; 154SC267, 151SE579. [a] 238Mich405, 213NW 685; 321Mo 140, 9SW(2d)929; Tex CivA 23SW(2d)765.
1115–35 Mo 25SW(2d)783.
1115–36 238Mich405, 213NW685; 133 SC342, 131SE616, 617, 43ALR971 [cit CJ].
1115–36½–New. But something more than the mere fact of loss is required to be established before assured can recover. 133SC342, 131SE616, 43ALR971.
1115–38½–New. Agency of bank president in wrongful transaction may be shown by circumstantial evidence. Mo 32SW(2d)86.
1115–41 40F(2d)374; 207 Iowa652, 223 NW529; 238Mich405, 213NW685; 177 Minn65, 224NW451; 321Mo 140, 9SW (2d)929; Mo 32SW(2d)86; 220AppDiv 524, 221NYS619; 144SC105, 142SE45 (waiver of violations of policy); Tex CivA 276SW302. [a] (8) Whether plaintiff's losses were caused by acts of larceny or embezzlement, where proof showed receipt of money, failure to remit, admission of shortage, and express refusal to pay, coupled with intimation that money in fact had been appropriated by another. 220AppDiv524, 221NYS 619. (9) Whether defaults could reasonably have been found. 220AppDiv 524, 221NYS619.
1116–43 Ind 168NE869.
1116–45 [a] **Sufficiency of excuse for** delay held for jury. Ind 168NE869.
1116–46 Ind 168NE869.
1116–47½–New. In an action on an employee's surety bond, the question whether the surety company waive the

benefit of a provision of the bond as to giving notice, by requiring or inducing plaintiff to incur trouble or expense to prove embezzlement, and the amount of loss sustained by plaintiff thereby, is for the jury. 30F(2d)882.

1116-47½-New. Whether delay of the surety in respect of a claim under an indemnity bond was unreasonable within Rev. St. (1919) § 6337, so as to warrant assessment for vexatious delay, has been held a question of fact for the court sitting as a jury. 321Mo 1104, 14SW(2d)425.

1116-49 Mo 32SW(2d)86.

1116-51 See also 85IndA169, 151NE396.

1116-51½-New. , incorrect, 177Ark953, 9SW(2d)33, 60ALR1493.

1116-61½-New. Interest is in chancellor's discretion. 153Tenn176, 281SW785, 45ALR610.

1116-61¾-New. Interest. A bank deprived of the use of money by reason of embezzlements by its teller has been held entitled to recover interest from the surety company indemnifying against such loss at the rate of six per cent on the money embezzled. TexCivA14SW(2d)88.

1116-61¼-New. A beneficiary, making an agreement to reduce his loss after notifying insurer and its failure to act, is entitled to submit the loss on a readjusted basis to the jury. 25F(2d)31.

1116-62 But see Mo 25SW(2d)783. [b] **Good faith** in refusal to pay precludes recovery of penalty. 27F(2d)496.

1116-63 321Mo 140, 9SW(2d)929; 321Mo 1104, 14SW(2d)425; Mo 19SW(2d)691. [a] **In Oregon.**-132 Or673, 288P196.

1116-64½-New. A verdict for the amount of the bond with interest at six per cent from the day when defendant disclaimed liability until the date of the verdict has been held not excessive. 321Mo 140, 9SW(2d)929.

1117-68½-New. The same has been held where an employee misappropriated funds by depositing to his own credit checks payable to his employer and withdrawing the money. 230Ky482, 20SW(2d)71 (assignment by employer of claim to insurer held immaterial).

1117-71½-New. In some jurisdictions an insurer guaranteeing against loss by forgery of an employee and, after paying the loss, taking an assignment of the employer's cause of action against a bank which cashed forged drafts, has a cause of action against the bank. Iowa 228NW635.

FIDUCIARIO

1118-6 44Philippine292.

FIDUCIARY

1118-8 90Fla234, 107S175.

1118-10 90Fla234, 107S175.

1118-11 25F(2d)47; 44Philippine292 (applied in sense of trustee).

1118-13 90Fla234, 107S175.

1118-15 [a] **Term does not include tax collector.**-14PaDist&Co 268.

1119-37 [a] **"Fiduciary relationship"** is said to exist where confidence is reposed on one side and resulting superiority and influence on the other. 321Ill 436, 152NE217.

1119-38 93Fla805, 113S419, 54ALR1173.

1119-39 262Mass595, 160NE405.

1119-41 29Hawaii 304; 323Ill 510, 154NE235; 325Ill 47, 155NE763; 334Ill 168, 165NE605; 125Kan223, 264P50, 54[quotCJ].

1119-43 19OhA165, 168 [citCJ].

1119-50 323Ill 510, 154NE235.

1119-54 323Ill 510, 154NE235; 254Mass57, 149NE626.

1119-58 323Ill 510, 154NE235.

1119-59 93Fla805, 113S419, 54ALR1173; 323Ill 510, 154NE235; 19OhA165, 168 [citCJ].

1119-60 323Ill 510, 154NE235; 325Ill 47, 155NE763; 329Ill 637, 161NE118; 19OhA165.

1119-61 [a] Iowa 227NW529.

1120-66 91CalA554, 267P375; 93Fla805, 113S419, 54ALR1173; 323Ill 510, 154NE235.

1120-67 323Ill 510, 154NE235; 329Ill 637, 161NE118.

1120-68 323Ill 510, 154NE235; 329Ill 637, 161NE118.

1120-69 323Ill 510, 154NE235; 329Ill 637, 161NE118.

1120-70 323Ill 510, 154NE235; 329Ill 637, 161NE118.

1120-71 323Ill 510, 154NE235; 325Ill 47, 155NE763.

1120-73 125Kan449, 265P50; Miss 126S18; 102NJEq371, 140A795 (independent advice is essential).

1120-76 249IllA346; 153Va392, 149SE624.

1120-76½-New. , but it will not disturb a transaction accruing to the advantage or best interest of a subordinate or supported by adequate consideration. Iowa 227NW529.

1120-77 252IllA575.

FIGURE

1122-33 See also 14CustA234(2dcase).

FILE

1123-76 16F(2d)206.

1123-77 16F(2d)206.

1123-78 16F(2d)206.

1123-83 16F(2d)206.

1124-2 10F(2d)926.

1124-3 10F(2d)926; 33PortoRico 851, 854 [quotCJ]. [d] (7) Failure of clerk to sign filing mark on instrument held indicia that it was not filed. 80Mont524, 261P283.

1125-7 10F(2d)926.

1125-8 33PortoRico 851, 854 [quotCJ].

1126-25 [a] 33PortoRico 851, 854 [quotCJ].

1126-38 16F(2d)206.

1126-39 16F(2d)206.

1126-40 16F(2d)206.

1126-46 16F(2d)206. [a] 9PaDist&Co443. [b] (3) Filing and recording are not synonymous. 159La244, 105S305.

1127-49 12CustA288. See also 12CustA28.

FINAL

1130-62½-New. "final conclusion," 52SD240, 216NW946.

1130-79 215Ky186, 284SW1020.

FIND

1133-82 273US359, 47SCt400, 71L ed684.

FINDING

1133-9 104Conn660, 133A915. See also 9PaDist&Co 766.

FINDING LOST GOODS

1134-1 169Ark561, 275SW899, 42ALR574.

1136-21 169Ark561, 275SW899, 900, 42ALR574 [citCJ]; 31OhA248, 166NE909.

1138-51 [d] **Where goods are found by police officer and sold,** he must turn over proceeds to city treasury. 89CalA47, 264P529.

1139-57 169Ark561, 275SW899, 900, 42ALR574 [citCJ].

1139-58 169Ark561, 275SW899, 900, 42ALR574 [citCJ].

1139-65 21AlaA136, 106S220.

1140-69 21AlaA136, 106S220.

1140-72 21AlaA136, 106S220.

FINES, FORFEITURES AND PENALTIES

1148-4 158La209, 103S742; 119Or658, 250P834, 835, 49ALR384 [citCJ].

1148-4 Pa 151A801.

1149-14 Mass 172NE84.

1150-31 [a] **Provision as to fines** held repealed by subsequent act. 223Ky553, 3SW(2d)1099.

1150-39 9PaDist&Co 333.

1150-41 See also 166La689, 117S775.

1151-57 [b] **Sentence to pay fine, providing no alternative** of imprisonment creates mere civil judgment. Ariz 293P23.

1151-66½-New. Statutes should be strictly construed. 173Ark833, 293SW740.

1152-79½-New. A constitutional provision prohibiting excessive fines applies ordinarily only to criminal or quasi criminal proceedings. 316Mo 398; 289SW925.

1153-87 214Ala414, 108S241. [a] (3) 214Ala414, 108S241.

1154-16 78CalA11, 247P917.

1155-30 42F(2d)26. [d] **Time of issuance.**-253IllA114.

1156-36 [b] (2) 223Ky405, 3SW(2d)779. [i] **Bill of discovery** is proper practice where execution is returned unsatisfied. 223Ky405, 3SW(2d)779.

1157-54 13F(2d)827; 23F(2d)333; 331Ill 20, 162NE113.

1157-56 102CalA24, 282P406; 228App Div279, 239NYS206; 24OhA272, 156NE510.

1158-60 NS [1928] 1DomLR528.

1158-61 205Cal 411, 271P202; 73CalA78, 238P112; 102CalA24, 282P406; 24OhA272, 156NE510. See also 98CalA723, 277P745.

1158-61½-New. A statutory provision excepting counties not having poor farms must be disregarded as meaningless. 111TexCr431, 15SW(2d)16.

1158-63 42F(2d)43.

1159-68 118Oh582, 162NE38, 40 [cit CJ]; 143Okl 280, 288P467.

1159-69 119Or658, 250P834, 49ALR384.

1159-70 158La209, 103S742; 164Minn287, 204NW942.

1159-72 Ariz 282P276 (cannot be imprisoned for failure to pay where no provision therefor in sentence); Ill 173NE355; OklCr 281P813.

1159-75 13F(2d)827; 99Fla1275, 128S814. [b] **House of correction.**-335Ill570, 167NE852.

1160-76 See also 335Ill 570, 167NE852.

1160-76½-New. , or federal penitentiary. 13F(2d)827.

1160-78 24OhA272, 156NE510.

1160-81 CalA 260P363; 119Or658, 250P834, 49ALR384; 9PaDist&Co 632.

1160-84½-New. Credit on unpaid fines cannot apply concurrently on two fines in separate sentences on the same individual. 117Oh393, 159NE372.

1161-86 119Or658, 250P834, 835, 49ALR384 [citCJ].

1161-87 119Or658, 250P834, 49ALR384.

1161-89 See also 331Ill 20, 162NE113.

1161-97 [b] **Prisoner may be "otherwise discharged according to law"** by pardon, parole, or credit on fine and costs imposed. 118Oh582, 126NE38.

1161-97½-New. That fine and costs do not exceed one hundred dollars condition of release under some statutes. 99Fla1021, 129S106(1stcase).

1161-3 See also 118Oh582, 126NE38.

1161-4 24OhA272, 156NE510.

1162-5 24OhA272, 156NE510. [d] **Act prohibiting remittance of fine or sentence** does not apply to commissioner of insolvents acting under statute empowering him to release one imprisoned for nonpayment of fine. 24OhA272, 156NE510.

1162-5½-New. Rev. St. c 137 § 50 does not apply to convictions for illegal transportation of liquor, and defendant sentenced therefor is not entitled to release upon giving note for fine. 125Me432, 134A561.

1162-10½-New. Release by the commissioner of insolvents, declaring prisoner insolvent and ordering his discharge, is the only remedy of the prisoner where officers fail unanimously to consent to his parole. 24OhA272, 156NE510.

1162-10¾-New. As discharging fine. Release from imprisonment on taking a poor debtor's oath does not relieve defendant from payment of fine. 23F(2d)333.

1162-16 168Ga770, 149SE48 (sentence is discharged and officer becomes liable for fine and is bound for collection).

1162-18 36GaA341, 136SE537.

1163-19 97CalA288, 275P495.

1163-20 [a] **In Kentucky.**-222Ky198, 300SW606; 111TexCr431, 15SW(2d)16.

1163-22½-New. Where fine and costs are part of the penalty, imprisonment on one discharges a fine on second where sentences run concurrently. 38OklACR646.

1163-29 245IllA94; 245IllA100; 119Or658, 250P834, 49ALR384; 22AlaA

263, 114S631. But see 245 IllA202. [e] **Application of working statutes** held not restricted to classes specifically mentioned. 223Ky553, 3SW(2d)1099.

1163–31 [a] **Statute applicable to conviction of conspiracy to injure property.**–335 Ill 570, 167NE852.

1164–57 9PaDist&Co 314.

1164–59 26 OhA317, 159NE854.

1165–77 239 IllA273, 279 [citCJ].

1165–85 14PaDist&Co 205.

1166–86 Pa 151A583. [f] (2) Provisions of Municipal Court Act, relating to dispositions of fines for violation of Crabbe Act, were superseded by latter act. 115 Oh484, 154NE738.

1166–87 23AlaA343, 125S385; 218App Div443, 218NYS370. [b] **State treasurer.**–224AppDiv309, 230NYS183.

1166–88 14PaDist&Co 205. [b] 72CalA 356, 237P560.

1166–92 See also 225Ky224, 7SW(2d) 858.

1167–93 37GaA146, 139SE122.

1167–6½–New. Violator of the law is in no position to object to payment of a fine on the ground that it may be improperly used. 288Pa81, 135A651.

1168–18½–New. The actual informer has been held entitled to recover under the statute rather than the prosecutor, although he refused to make the complaint upon which to base a warrant. 220MoA1238, 290SW459.

1168–25 [a] (2) To show that informer did not attempt to aid in escape. 220 MoA1238, 290SW459.

1168–32 [a] **Statute prohibiting remission of fines** held not unconstitutional. 24 OhA146, 156NE916.

1168–36 272US734, 47SCt276, 71L ed 499. [a] 108TexCr653, 2SW(2d)270. [c] **Unconstitutionality of statute,** under which fine was paid, held no ground for remission. 272US734, 47SCt276, 71 L ed499.

1169–47½–New. On declaration of statute as invalid, fine need not be remitted. 272US734, 47SCt276, 71L ed499.

1169–47⅓–New. Parole of one imprisoned for nonpayment of fines can only be had by unanimous consent of designated officers, under some statutes. 24 OhA272, 156NE510.

1169–2 232Ky199, 22SW(2d)587 (held not punishment for crime).

1169–4 272US321, 47SCt154, 71L ed279, 47ALR1025.

1170–6 [a] (1) 80Mont239, 260P119. (5) 97NJEq555, 129A624. (10) 80Mont 239, 260P119. (14) Something lost by commission of crime. 97NJEq555, 129 A624. (15) Something paid for expiation of crime. 97NJEq555, 129A624. (16) That which is lost or right to which is alienated by crime. 97NJEq555, 129A 624.

1170–15 29Ariz304, 241P307 (intent is not essential element of forfeiture and there can be forfeiture against and contrary to intention); 38 OklACR465.

1171–32 50SD408, 210NW194, 196 [cit CJ].

1171–34 50SD408, 210NW194, 196 [cit CJ]. [b] **Rights of owner or lessee** in automobile may be forfeited where he knows or has reasonable cause to know that it is used or may be used to commit crime. 6F(2d)288.

1171–46 [a] **In Porto Rico.**–32Porto Rico 822.

1172–48½–New. There can be no forfeiture not authorized by law. 159La 864, 106S333.

1172–51 272US321, 47SCt154, 71L ed 279, 47ALR1025. [a] **Failure to provide for protection of interests** of innocent owners or lienors does not render unconstitutional statute providing for forfeiture of property used in violation of law by possessor. SD 224NW176.

1172–54 258Mass103, 154NE570.

1172–57 17F(2d)879; 156Tenn216, 300 SW12; 69Utah250, 253P900.

1172–59 See also 86Mont58, 282P32.

1172–61½–New. Courts do not favor forfeitures. 156Tenn216, 300SW12.

1172–63 156Tenn216, 300SW12.

1173–66 IndA 166NE603. [b] **One's property cannot be forfeited** upon mere inference of guilt. 5F(2d)971.

1173–75½–New. However, unlawful seizure by one without authority may be the basis of a valid forfeiture. 272 US321, 47SCt154, 71L ed279, 47ALR 1025.

1173–76 272US321, 47SCt154, 71L ed 279, 47ALR1025.

1173–77 272US321, 47SCt154, 71L ed 279, 47ALR1025.

1173–78 272US321, 47SCt154, 71L ed 279, 47ALR1025.

1173–79 272US321, 47SCt154, 71L ed 279, 47ALR1025.

1173–86 7Alaska334, 340 [citCJ].

1173–89 1MetcMass225; Wis 229NW48 (2dcase) (legislature determines nature of action).

1174–93 Wis 229NW48(2dcase).

1174–99 24 OhNPNS225, 229 [quot CJ].

1174–4 See also 200Cal 546, 253P1108.

1175–18 [a] **Answer not alleging** that seizure was unlawful or designed to thwart or harass defendant has been held insufficient. 37F(2d)578.

1175–25½–New. Validity of order forfeiting boat cannot be collaterally attacked by answer in action on bond. 37 F(2d)578.

1176–45 7Alaska218; 7Alaska334; Wis 229NW48(2dcase).

1178–4½–New. It has been held that the legislature has the same power to authorize a court to set aside a forfeiture either before or after final judgment. 320 Ill 336, 150NE634, 43ALR 1230.

1178–4⅓–New. A statute authorizing the court to set aside forfeiture of a recognizance after judgment does not authorize the court to release or extinguish an obligation but merely adds conditions and extends the time within which they may be fulfilled. 320 Ill 336, 150NE634, 43ALR1230.

1178–5 153Miss783, 121S856.

1178–6 70CalA663, 234P339, 343 [cit CJ].

1179–9 37F(2d)269.

1179–14½–New. The determination of the question as to whether a statute imposes a penalty is not controlled by the name given to it by the legislature, but the intrinsic nature of the exaction will control. 153Miss783, 121S856.

1179–15 40F(2d)472; 69Utah250, 253P 900; 36Wyo 406, 256P336. See also 168 La271, 121S863. [a] **Repeal of statute** abates any right of action for penalty previously accruing. TexCivA 23SW (2d)820.

1179–15½–New. Where a statute imposes a penalty for failure to comply with a particular statutory requirement, the penalty so provided is exclusive of any other. 127 Okl 249, 260 P450.

1179–16 Ark 31SW(2d)739; 230App Div252, 243NYS644.

1180–23 316Mo 398, 289SW925.

1180–26½–New. **Statutes should be strictly construed.**–173Ark833, 293SW 740.

1181–44 145Miss399, 110S782.

1181–46 167Ga880, 147SE77; 230App Div252, 243NYS644.

1181–49 26F(2d)706.

1186–16 100WVa531, 131SE7, 9 [citCJ].

1186–16½–New. Revocation of a permit, 100WVa531, 131SE7 (for use of public highway by motor vehicles for hire).

1187–21 See also 247 IllA39.

1192–98 192Wis558, 213NW332.

1196–88 16AbbNCasNY230.

1198–6½–New. In a suit for penalty, charges and allegations appearing on the face of the petition are taken as true on defendant's plea of former jeopardy. 26F(2d)706.

1203–1 238Mich39, 213NW448, 449, 52 ALR136 [quotCyc].

1213–92 8MartLa310; 10JohnsNY118; 15JohnsNY474; 24NC44.

1215–28½–New. A statute appropriating one half of police court forfeitures, fines, and costs to the maintenance of free public libraries in cities and towns of named classes is applicable to cities and towns in which libraries were already established as well as to those thereafter established. 210Ky482, 276 SW143.

1215–28⅓–New. Such statute is within the power of the legislature. 210Ky 482, 276SW143.

1215–28¼–New. Expenses of operating the police court cannot be deducted in determining the sum one half of which is appropriated. 210Ky482, 276SW143.

1215–28⅙–New. In an action by trustees of a library against a city to recover the amount appropriated by such statute, it is no defense that the money, with the exception of a percentage paid to the prosecuting attorney, has been paid into the general revenue fund and disbursed. 210Ky482, 276SW143.

1215–28⅙–New. An agreement between **a city** and a donor of a library building **whereby the city was only bound to** expend a stated sum per year does not result in a contractual relation which can be invoked as a defense in such action. 210Ky482, 276SW143.

1215–28⅞–New. In such action the city cannot set off the amount raised annually by special tax for the use of such library. 210Ky482, 276SW143.

FIRE INSURANCE

26 C. J.—17–2 329 Ill 158, 160NE222; 172Minn122, 214NW926; 48RI 321, 138 A39. [a] (5) Insurance taken by one with insurable interest, who pays premiums, is personal indemnity to insured. 219Ala319, 122S318.

17–4 6F(2d)533, 43ALR496; 39GaA 680, 148SE286(2dcase); 200 Iowa44, 204 NW235, 40ALR603; 79Mont166, 255P 340, 60ALR1; 82Mont264, 266P640; 247 NY176, 159NE902; 127Misc1, 215NYS 151.

18–5 6F(2d)533, 43ALR496; 27F(2d) 616; 329 Ill 158, 160NE222; 246 IllA 574; 200 Iowa44, 204NW235, 40ALR 603; Iowa 215NW244; 172Minn122, 214NW926; 137Misc263, 241NYS727; 118 Or649, 245P505. [a] 205 Iowa119, 217NW258; 118 Or649, 245P505.

18–6 200 Iowa44, 204NW235, 40ALR 603; 172Minn122, 214NW926; 82NH 167, 131A354. [a] **Contract of insurance on improvements** does not run with land. 131 Or302, 282P764.

18–7 172Minn122, 214NW926.

18–9 82NH167, 131A354.

18–11 200 Iowa44, 204NW235, 40ALR 603; 79Mont166, 255P340, 60ALR1; 129 Okl 204, 264P142; TexCommnA 285SW257; 197Wis136, 221NW654. Que [1925] 2DomLR882.

19–12 MoA 295SW509.

19–13 [a] 141SC64, 139SE176, 178 [cit CJ], 53ALR1119.

20–16 Ala 130S180; 9LaA28, 118S790; 79Mont166, 255P340, 60ALR1.

20–24 36F(2d)9; 36GaA497, 137SE277; 43 Ida222, 253P379, 383 [citCJ]; MoA 285SW144, 146 [quotCJ]; 223AppDiv 6, 227NYS326; 122 Or665, 260P441, 444 [citCJ].

21–26 43 Ida222, 253P379, 383 [citCJ].

22–27 43 Ida222, 253P379, 383 [citCJ].

23–28 43 Ida222, 253P379, 383 [citCJ]; 131Misc305, 226NYS630.

23–31 43 Ida222, 253P379, 383 [citCJ].

24–42½–New. Validity of prima facie owner's title is not looked into. NJSup 135A274.

24–47 Ont [1930] 1DomLR284 (registered owner).

24–54 299Pa86, 149A163; NJSup 146A 679.

25–64½–New. Persons lending money on invoices representing anticipated orders for goods not manufactured have no insurable interest. 223AppDiv6, 227 NYS326.

25–65 11F(2d)961; 215Ala587, 112S 195; AlaA 130S313.

26–69 226Ky706, 11SW(2d)968. [d] **Effect of payment to owner by another insurer.**–Public warehouseman liable under statute to owner of stored grain from loss thereof by fire may recover from his insurer though owner of grain was paid for loss by another insurer. 114Nebr53, 207NW528.

26–77 215Ala587, 112S195, 196 [citCJ].

27–79 [b] **One in possession of premises** sold for taxes with right to redeem has insurable interest. Alta [1924] 2DomLR836.

27–89 Ala 128S225.

27–92 See also 299Pa86, 149A163.

28–6 [a] (2) Building on land with owner's consent gives insurable interest. 148Md257, 129A214.

28-8 86Colo 293, 281P366, 66ALR1166 (trustor in deed of trust); 122Kan328, 252P263; 234Mich119, 208NW145 (mortgagor has insurable interest after foreclosure proceedings are begun); 172Minn122, 214NW926. [a] **That property is mortgaged to full amount of insurance** does not affect rule. MoA 32SW(2d)111. [b] **Grantee, acquiring property in trust, executing mortgage** has insurable interest superior to beneficiary. Iowa 233NW153.

29-15 86 IndA363, 156NE581; 81Mont 271, 263P93, 96 [citCJ].

29-17 81Mont281, 264P132.

29-21 160Ga755, 129SE53 (mortgagor has insurable interest after transfer subject to security deed and notice to insurer).

29-22 87CalA473, 262P436, 437 [cit CJ]; 122Kan328, 252P263; 167Minn 146, 208NW816, 818 [citCJ]; 172Minn 122, 214NW926; 197NC68, 147SE691; 37 OklACR584 (insurable interest of mortgagee affected by mortgage clause is lien created by mortgage); 87Pa Super349; TexCivA 278SW907.

30-23 87CalA473, 262P436, 437 [cit CJ].

30-24 TexCivA 278SW907.

30-40½-New. Mortgagee of life tenant's tenant at will has no insurable interest in mortgaged dwelling. 130 Kan556, 287P266.

30-41 212Ala649, 103S845, 847 [cit CJ]; Iowa 227NW523 (during period of redemption); 122Kan328, 252P263.

31-42 122Kan328, 252P263.

31-47 234Mich119, 208NW145. See also 14F(2d)524.

31-49 244Mich668, 222NW116.

31-51 CalA 289P865.

31-52 Contra 129 Okl 204, 264P142.

31-54 212Ala649, 103S845 (conditional seller indorsing purchaser's notes has insurable interest); 220Ala693, 127S 170; 200 Iowa44, 204NW235, 40ALR 603; 129Misc190, 220NYS689; 50RI 203, 146A763 (assignees of conditional seller).

32-58 200 Iowa44, 204NW235, 40ALR 603.

32-61 200 Iowa44, 204NW235, 40ALR 603; MoA 295SW509; 129Misc190, 220 NYS689; 107WVa687, 150SE7 (purchaser by deed, vendor retaining lien).

32-62 [a] **Purchaser in good faith** of land sold by guardian of insane person, but not obtaining title because of defect in insanity proceedings, yet having lien for purchase money, interest etc., has insurable interest in property. 218MoA98, 262SW450.

32-63 See also 36GaA497, 137SE277.

32-64 181Ark854, 28SW(2d)336; 226 AppDiv343, 234NYS357.

33-76 But see 306Mo 537, 268SW87 [rev 215MoA386, 257SW178].

33-91½-New. Grantee in bond for deed held not unconditional owner. 237 IllA 103.

33-91½-New. Grantee in bond for deed has insurable interest. 237 IllA103.

33-91¼-New. In Ontario when a sale of liquor is illegal under the Liquor Control Act, the buyer has no insurable interest therein. Ont [1929] 4DomLR 486.

34-98 42F(2d)53.

34-2 36F(2d)9.

34-8 100CalA109, 279P1050; 131Misc 305, 226NYS630.

34-16 198NC303, 151SE628.

34-18 233Mich499, 206NW979 (whether interest vested or contingent).

35-25 Ill 173NE479; 255 IllA209 (only one having insurable interest); 122 Or 665, 260P441, 444 [citCJ]. [e] **Trustee under quitclaim deed** conveying property for benefit of creditors. Ill 173NE 479.

35-39 91Fla565, 108S165.

35-40 91Fla565, 108S165. [a] 91Fla 565, 108S165; 178Minn305, 227NW39, 68ALR359 (regardless of who is separate owner for other purposes).

35-42 35GaA467, 133SE652; 216Ky 535, 287SW969, 971 [citCJ].

36-52 But see Ala 128S225.

36-56 MoA 30SW(2d)1090.

36-59½-New. Wife may insure household furnishings owned in community with husband and used in homestead owned by wife alone. TexCivA 31SW (2d)850.

36-61 178Minn305, 227NW39, 68ALR 359.

36-63 215Ala587, 112S195, 196 [quot CJ]; 44 Ida249, 256P523, 529 [citCJ].

36-64 130Kan556, 287P266 (rule of estoppel inapplicable).

37-67 9LaA28, 118S790; 222MoA1010, 7SW(2d)463. But see 43 Ida222, 253P 379.

37-68 6F(2d)533, 43ALR496; 9LaA 28, 118S790.

37-75 MoA 285SW144.

37-77 43 Ida222, 253P379. [a] **Deed by mortgagor to mortgagee.**–200 Iowa 1206, 206NW123.

38-78 43 Ida222, 253P379. [a] **Executory agreement of buyer under conditional contract to resell** to seller on specified date, seller to return notes, held not to divest interest of buyer as respects insurance. 243NY95, 152NE 476. [b] **Contract of buyer under conditional sale to resell property** held not to affect insurable interest where latter refused to accept title and former treated contract as abandoned. 243NY 95, 152NE476.

38-79½-New. Trustee of a deed to whom insurance was payable retains insurance interest after sale of property to the extent of the purchase price. 150 Md211, 132A635, 45ALR582.

38-92 27F(2d)616; 219MoA121, 272 SW79; 160Tenn208, 22SW(2d)356.

38-97 27F(2d)616.

39-4 160Tenn208, 22SW(2d)356.

40-10 TexCommnA 285SW257; Tex CivA 288SW487; TexCivA 6SW(2d) 211, 215 [quotCJ]; TexCivA 30SW(2d) 563; TexCivA 30SW(2d)563. But see 38F(2d)197.

40-11 TexCivA 6SW(2d)211, 215 [quot CJ].

40-17 31Ariz340, 253P440.

43-77 97PaSuper137 (liable as insurer). [b] **Bank's obligation to borrower as regards procuring insurance** on cotton securing loans is that of agent. 157 Miss298, 127S716.

43-85½-New. The owner of a building in the course of construction carrying insurance largely exceeding the total cost does not breach his contract to insure by failing to consider the subsequent replacement cost. 154Miss587, 122S544.

43-85½-New. Contract by vendor to procure insurance may impose duty on him to collect insurance. 220Ala693, 127S170.

43-88 5F(2d)169; 19F(2d)177; 38 F(2d)229; CalA 289P865; 48RI 274, 137A470; 135Wash547, 238P565.

44-57 Man [1925] 3DomLR205.

45-93 19F(2d)177; 35GaA143, 132 SE238; 36GaA325, 136SE535.

45-94 See 27F(2d)616.

45-1 135Wash547, 238P565.

46-18 237 IllA103. But see 222MoA 1057, 7SW(2d)479.

47-19 But see 222MoA1057, 7SW(2d) 479.

47-19½-New. Custom of insurer to issue policies covering period from date of application clothes agent with apparent authority to make preliminary contract. 199 Iowa1358, 203NW826.

47-20 237 IllA103.

49-43 9PaDist&Co 175; 135Wash547, 238P565.

50-53 MoA 8SW(2d)1090.

50-55 MoA 8SW(2d)1090; 9PaDist &Co 175.

51-76 [c] (3) Objection to complaint held not available after trial on theory of contract to insure. 171Minn363, 214 NW58. [e] **Contract and breach held shown by evidence.**–171Minn363, 214 NW58.

52-79 257Mass240, 153NE792.

52-85 19F(2d)177; 104WVa580, 140 SE552.

53-97½-New. Where application provides that it should not be binding on the company until accepted in writing or a policy issued, and it is duly mailed by the agent to the company and lost in transit, the company is not liable for negligence. 122Kan352, 252P218.

53-98 TexCivA 275SW313 (omission of agent's report, not essential to application, is immaterial).

54-2 142Miss397, 107S417.

54-9 [a] (2) Binding contract of insurance is not effected by correspondence, showing request for change in form of coverage, and promise to do so, coupled with condition that assured furnish additional forms and furnish rate of insurance which has not been fixed. 135Wash547, 238P565.

54-20½-New. An application must be accepted within a reasonable time or may be treated by the applicant as rejected. 34GaA19, 128SE70.

54-20½-New. Where correspondence between insurer and insured shows a request to make a change in the form of coverage in policies theretofore issued, and a willingness to comply with such request on conditions to be performed by insured which are not complied with, there is no new contract of insurance. 135Wash547, 238P565.

55-22½-New. Where insurer, under duty to accept application within a reasonable time, remains silent for six months, presumption that it was rejected may become conclusive. 34GaA 19, 128SE70.

55-26½-New. Delay of company in accepting application may be waived by insured. 36GaA789, 138SE276.

56-47½-New. Statutes prohibiting insurer from making any agreement other than as expressed in policy issued are not applicable to fire insurance companies. TexCivA 275SW313.

56-47½-New. Under statutes in some jurisdictions the entire contract must be expressed in the policy. 217Ky826, 290SW673.

56-47¼-New. Where insurer knows nature and hazard of occupancy of premises, it is unnecessary to stipulate those facts. 39F(2d)25.

56-49 31Ariz340, 253P440; 172Minn 122, 214NW926; 81Mont271, 263P93; 103NJL589, 137A549; Va 155SE699. [e] **In Texas.**–TexCommnA 271SW393.

56-50 217Ky826, 290SW673. [a] (2) Object was to make insurance contracts clear and intelligible to ordinary understanding of men. 103NJL589, 137 A549.

56-53 Minn 233NW310; 49ND235, 191 NW347.

57-54 MoA 8SW(2d)1090.

57-59 31Ariz340, 253P440; 115Tex351, 282SW563, 45ALR1016. [d] **Statute not applicable** to fire insurance companies. TexCivA 275SW313. [e] **Clause exempting insurer from loss by fire originating in motion picture machine** held inconsistent with standard form prescribed by commission. 115Tex351, 282SW 563, 45ALR1016. [f] **Limitations of liability.**–TexCivA 286SW287. [g] **Statutory provisions are mandatory as to** prescribed details of form and content of standard policy. 200Wis118, 227NW 255.

57-60 31Ariz340, 253P440; 115Tex351, 282SW563, 45ALR1016. [a] **Ontario Insurance Act** applies to insurance against theft as well as fire, and any variation therefrom must comply with provisions of act. Can [1924] 2DomLR935.

57-62 200Wis118, 227NW255.

57-63 38 OklACR11. [a] (4) Some statutes permit insurer to print or use in policy printed forms for insurance against loss of rents, rental values, and leasehold interests. 166Minn273, 207 NW625. (5) Provision in rider providing for ascertainment of loss of business during partial or total suspension due to fire on per diem basis held valid. 33F(2d)460. [e] **Rating law.**–Statute permitting attachment to standard policy of clause insuring against consequential loss does not make insurance against indirect or consequential damages subject to rating law. 196Wis472, 220NW929.

57-65½-New. Where the statute authorizes the issuance of a short or different form of a policy for farm or dwelling house property to the standard form, the terms of such short form when approved by the insurance commissioner will govern in cases of insurance on such property. 121 Okl 124, 247 P990.

57-65½-New. Regulations of the insurance commission requiring a distribution average clause to be attached to

policies of fire insurance are binding on insurance companies. **TexCivA** 281SW 217.

57-65¼-New. The intent of the parties and of the law as embodied in standard form policy is to put the entire contract into one instrument that shall be in the hands of insured. 50SD519, 210 NW744.

57-65½-New. Under a statute making a company issuing a policy without authority liable to a policyholder in the same manner as if it was authorized to issue the policy, a fire policy expressing the intention of the parties is binding on insurer although it violates rules of the insurance commission. **TexCivA** 281SW217.

57-65⅛-New. Statutes prescribing form of standard fire policy is not intended to cut off estoppels theretofore enforced by courts. **Va** 155SE699.

58-69 221**MoA**1193, 300SW556.

58-81 5**F(2d)**589.

58-83 35**GaA**143, 132SE238; 36**GaA** 461, 137SE126.

58-84 81**Mont**271, 263P93, 96 [citCJ]; **TexCivA** 295SW1109.

59-85 8**F(2d)**389; 192**NC**312, 135SE34, 35 [citCJ].

59-87½-New. Delivery by insurer to its own agent with instructions "to fix it up" and then deliver to insured is not delivery to insured. 34**GaA**19, 128 SE70.

59-87⅛-New. Delivery by insurer to its own agent will not constituté delivery to insured, in absence of any fact tending to show authority of the agent to receive policy in behalf of insured. 34 **GaA**19, 128SE70.

59-90 192**NC**312, 135SE34, 35 [citCJ].

59-92 36**GaA**461, 137SE126.

59-95 5**F(2d)**589; 192**NC**312, 135SE 34, 35 [citCJ].

59-96 **TexCommnA** 15SW(2d)223.

59-99 171**Ark**1066, 287SW587. [b] 171 **Ark**1066, 287SW587.

59-5 171**Ark**1066, 287SW587; 257**Mass** 240, 153NE792.

60-6 171**Ark**1066, 287SW587.

60-10 318 **Ill** 350, 149NE247; **MoA** 16 SW(2d)699; 190**NC**867, 129SE727. [c] **Neglect to read and become familiar with terms of policy** furnishes no legal excuse to insured. 229**AppDiv**26, 240**NYS** 755.

60-14 **TexCivA** 23SW(2d)775.

60-15 120 **Or**411, 252P75, 79 [citCJ].

63-69 [a] **There is no mutual mistake** as to sole and unconditional ownership clause where insured knows facts and terms of policy. 24**F(2d)**221.

63-72 See also 45**Philippine**122.

63-73½-New. A clause in the policy cannot be evaded because of failure to read it, unless insured was prevented from doing so. **TexCivA** 9SW(2d) 432.

63-74 218**Ky**473, 291SW760, 762 [quot CJ]. [c] **Provision in policy insuring lumber** that insurer would not be liable unless there was clear space of one hundred feet between it and mill held not against public policy. 218**Ky**327, 291SW705.

64-94½-New. Limitation of fire insurance recoverable to three fourths of loss by special entry on the printed form of the binder is valid, in the absence of contrary statute. 27**F(2d)**616.

64-96½-New. Under statutes in some jurisdictions insurer cannot allow one man any special advantages over another in issuing a fire policy. 217**Ky**826, 290SW673.

66-18 218**Ky**169, 291SW9; **Va** 155SE 699.

66-19 **Va** 155SE699.

66-21 218**Ky**169, 291SW9.

66-22 218**Ky**169, 291SW9.

66-26 45**Philippine**122 (insurer is estopped to deny liability on policy covering building when insurance of merchandise therein is intended by insured).

66-32 **MoA** 6SW(2d)66.

67-43 29**F(2d)**291.

67-46 120 **Or**1, 251P258.

67-49 192**NC**8, 133SE337, 47**ALR**645; **Va** 155SE699.

67-55 [b] **Acts not constituting waiver. -TexCivA** 23SW(2d)775.

68-57 See also 145**Wash**489, 261P106, 109 [citCyc].

69-76½-New. Statement in policy that insured was insured for three years does not estop insurer from claiming lapse of policy for nonpayment of premium, where insured gave a note and under the provisions it had lapsed on insured's failure to pay the note when due. **TexCivA** 275SW313.

69-78 318 **Ill** 350, 149NE247; 86 **IndA** 240, 156NE833; **TexCivA** 23SW(2d)775.

69-80 318 **Ill** 350, 149NE247.

69-88 220**MoA**1112, 296SW257.

70-91 220**MoA**1112, 296SW257.

70-95 215**Ala**564, 112S154; 31**Ariz**340, 253P440; 102**CalA**510, 283P338; 318 **Ill** 350, 149NE247; 37 **OklACR**584.

70-96 216**Ala**55, 112S336, 52**ALR**838; 31**Ariz**340, 253P440; 234**Ky**525, 28SW (2d)771; 153**Md**253, 138A33, 53**ALR** 669; 222**AppDiv**219, 225NYS615.

70-97 31**Ariz**340, 253P440; 318 **Ill** 350, 149NE247; 37 **OklACR**584; **TexCivA** 2 SW(2d)329.

71-98 25**F(2d)**398; 82**CalA**131, 255P 220; **Fla** 129S748; 125**Me**255, 132A745; 263**Mass**262, 160NE807; 222**AppDiv**219, 225NYS615; 155**Wash**6, 283P177.

71-99 156**Miss**865, 127S298; **TexCivA** 275SW316; **TexCivA** 23SW(2d)775. See also 31**Ariz**340, 253P440.

71-1 **NH** 149A498.

71-2 27**Hawaii**326, 328 [citCJ]; **Md** 148A252; 48**RI** 321, 138A39.

71-5 31**Ariz**340, 253P440.

71-7 30**F(2d)**794.

71-9 **Wis** 228NW746.

71-10 13**F(2d)**745; 14**F(2d)**524 (Nebraska statute held part of contract); 217**Ala**168, 115S156, 56**ALR**1075; **NJ** 137A549.

72-11 103**NJL**589, 137A549; 46**Philippine**424.

72-13 318 **Ill** 350, 149NE247; 81**Mont** 271, 263P93; 115**Tex**351, 282SW563, 45 **ALR**1016.

72-13½-New. Where a loss paying clause containing spaces left blank is ambiguous and meaningless, it may be disregarded. **TexCivA** 281SW283.

72-16 82**CalA**131, 255P220; 103**NJL** 589, 137A549.

72-19 25**F(2d)**398; 39**F(2d)**477; 215 **Ala**587, 112S195; 200**Cal** 70, 251P922; 77**Colo** 408, 236P1013; 162**Ga**313, 133SE 741; 37**GaA**203, 139SE362; 39**GaA**528, 147SE725; 329 **Ill** 158, 160NE222; 234 **IllA**1; 237 **IllA**103; 201 **Iowa**266, 207 NW243, 44**ALR**863; 221**Ky**668, 299SW 545; 234**Ky**525, 28SW(2d)771; 158**La** 601, 104S383; **MoA** 290SW456, 457 [quotCJ]; 79**Mont**166, 255P340, 60**ALR** 1; **Nebr** 227NW925; 217**AppDiv**197, 216 NYS564; 131**Misc**141, 226NYS278; 128 **Misc**223, 218NYS221; 190**NC**867, 129SE 727; 198**NC**174, 151SE98; 115 **Oh**426, 154NE723; 120 **Or**1, 251P258; 125 **Or** 571, 267P815; 285**Pa**332, 132A177; 296 **Pa**552, 146A135, 63**ALR**504(2dcase); 50 **RI** 118, 145A448; 50SD519, 210NW744, 746 [citCJ]; **TexCivA** 275SW316; **Tex CivA** 278SW907; **TexCivA** 281SW283; **TexCivA** 293SW279; 104**WVa**353, 140 SE61. [g] **Rule of strict construction against insurer is applied** (1) where it is difficult to determine whether provisions for concurrent insurance of specified amount gives right to obtain insurance in addition to policy containing stipulation. 158**La**601, 104S383. (2) "Total concurrent insurance permitted, including this policy, $7000," is ambiguous and will be construed most strongly against insured as referring to other insurance in addition to that provided in policy not exceeding seven thousand dollars. 158**La**601, 104S383.

73-20 173**Ark**437, 293SW730; 234 **IllA** 1; **TexCivA** 278SW907.

74-21 226**Ky**534, 11SW(2d)148; 218 **MoA**395, 277SW349 (appraisal clause); 115 **Oh**426, 154NE723.

74-22 **NJ** 151A613.

74-23 200**Cal** 70, 251P922, 923 [citCJ]; 79**Mont**166, 255P340, 60**ALR**1.

74-25 77**CalA**429, 247P505; 79**Mont** 166, 255P340, 60**ALR**1.

74-26 25**F(2d)**415; 39**F(2d)**477; 215 **Ala**587, 112S195; 162**Ga**313, 133SE741; 39**GaA**528, 147SE725; 329 **Ill** 158, 160 NE222; 158**La**601, 104S383; **MoA** 290 SW456, 457 [citCJ]; 79**Mont**166, 255P 340, 60**ALR**1; 141SC64, 139SE176, 53 **ALR**1119; **TexCivA** 275SW316; **Tex CivA** 278SW907; **TexCivA** 281SW283; **TexCivA** 290SW912; **TexCivA** 16 SW(2d)360; 151**Wash**545, 276P537. See also 128**Misc**223, 218NYS221.

75-27 **MoA** 290SW456.

75-28 200**Cal** 70, 251P922, 923 [citCJ]; 79**Mont**166, 255P340, 60**ALR**1.

75-29 82**CalA**131, 255P220; **TexCivA** 275SW907.

75-31 226**AppDiv**596, 236NYS205.

75-34 229**AppDiv**26, 240NYS755; **Wis** 230NW706.

76-46 [c] **Indorsement on standard policy** held not part thereof in view of statutory prohibition. 200**Wis**118, 227 NW255.

76-49 85**CalA**542, 259P1108, 1111, 1112 [quotCJ]; 202 **Iowa**1270, 211NW860; 158**La**601, 104S383; 153**Md**253, 138A33, 53**ALR**669.

77-50 170**Ark**1039, 282SW975; 85**CalA** 542, 259P1108, 1111, 1112 [quotCJ]; 158**La**601, 607, 104S383 [quotCJ]; 153 **Md**253, 138A33 53**ALR**669; 103**NJEq** 521, 143A815 (rider construed with attached noncontribution clause); 230**App Div**477, 245NYS240 (rider held to permit vacancy of 4 months). [a] (3) Three-fourths valuation clause in rider is construed to relate to value of house and not amount of mortgage indebtedness. 125 **Okl** 291, 257P774. [d] **Liberal construction will be given to permits** attached to policy. **Wis** 230NW706.

77-51 85**CalA**542, 259P1108, 1111, 1112 [quotCJ]; 202 **Iowa**1270, 211NW860; 158**La**601, 607, 104S383 [quotCJ].

77-52 85**CalA**542, 259P1108, 1111, 1112 [quotCJ].

77-57 235 **IllA**335; 152**Miss**344, 118S 295; 48**RI** 321, 138A39.

77-58 192**Wis**319, 212NW523. [b] **Expired policies inadmissible** to show property included. 158**La**601, 104S383.

77-59 235 **IllA**335, 337 [citCJ].

78-60 200**Cal** 70, 251P922; 6**PaDist& Co** 557.

78-73 125**Me**255, 132A745.

79-75 225**Ky**280, 8SW(2d)408.

79-79½-New. Manual exchange of policies following loss after agent had written new policy held ineffective when usage was not shown to cover such cases. **TexCommnA** 285SW257.

79-80 See also 45**Philippine**122.

79-83 **TexCivA** 275SW313.

79-84 208 **Iowa**716, 224NW50; **Tex CivA** 275SW313.

79-85 **TexCivA** 275SW313.

80-1½-New. Agent's report on back of application is not a part thereof. **Tex CivA** 275SW313.

80-1½-New. To make answers in the application binding on insured as part of the contract, the policy delivered, or some paper attached or appended thereto, must clearly show an intent of the parties to incorporate such application in the contract. 104**WVa**353, 140SE61.

80-1¼-New. A ninety-day fire insurance certificate on grain owned by insured, reciting that it was accepted subject to all the terms, conditions, and stipulations embraced in the standard fire insurance form, has been held to make the terms of the standard policy part of the insurance agreement by reference. **MoA** 8SW(2d)1090.

80-3 107**WVa**304, 148SE125.

81-8 But see **TexCivA** 275SW313.

81-9 **TexCivA** 275SW313. [a] **But language of policy may be such as to include copy of application** as part of policy though copy does not contain copy of name of applicant. **TexCivA** 275SW 313.

81-10 35**F(2d)**213 (South Dakota statute); 98**Fla**933, 124S722; 252**Mass**432, 147NE904; 221**MoA**999, 295SW847; 82 **Mont**264, 266P640; 283**Pa**397, 129A326. But see 322**Mo** 342, 15SW(2d)343. [c] **Presumed commission in preparing forms of policy** did so in light of judicial construction that had been given to different provisions of policy. **Tex CommnA** 271SW893.

81-11 219**MoA**121, 272SW79.

81-12 252**Mass**432, 147NE904.

81-14 125**Kan**10, 262P552; 232**Mich** 204, 205NW163. See also **Mo** 292SW58.

82-29 241**Mich**637, 217NW755.

82-37 But see 107**WVa**687, 150SE7.

82-41 **MoA** 20SW(2d)705 (not entitled to strict construction).

83-47 **MoA** 20SW(2d)705.

84-66 172Minn122, 214NW926, 927 [cit CJ].
84-68 172Minn122, 214NW926, 927 [cit CJ]; 37 OklACR584.
84-70 172Minn122, 214NW926, 927 [cit CJ]. See also 27F(2d)508.
84-71 14F(2d)524.
84-73 Contra 57ND462, 222NW609(3d case).
84-74 172Minn122, 214NW926, 927 [citCJ].
84-77 172Minn122, 214NW926, 927 [cit CJ].
85-82 37 OklACR584.
85-90 249NY258, 164NE43; 9PaDist&Co 130.
86-3 235 IllA335; 89 IndA22, 165NE554(2dcase); 225AppDiv346, 233NYS86. [a] (4) Fire policy on all goods of warehouseman or held by it in "trust" covers all goods stored in warehouse. 222AppDiv237, 225NYS714. [b] (2) Where policy by insuring clause clearly covers article, and exemption clause does not clearly exclude it, article will be held to be covered by policy. Nebr 227NW925.
87-4 17F(2d)26; 235 IllA335, 337 [cit CJ].
87-4½-New. "Blanket insurance" covers every item of property described in the policy to its whole amount. Tex CivA 28SW(2d)329.
87-5 235 IllA335, 337 [citCJ]; 144Miss749, 111S366; 49RI112, 140A469. [a] (3) Policy on "stock of groceries in general" of commercial establishment does not cover furniture thereof. 34Porto Rico370.
88-20 But see 28F(2d)968.
88-22 [c] **Building occupied as "day school and dwelling only"** has been held to refer to convent occupied in that manner though evidence shows that building used as day school was never used as dwelling. 158La601, 104S383. [d] **Merchandise insurance** held intended, under policy covering building, contract being in English, of which language insured, who had no interest in structure, is ignorant and insurer having acknowledged prior to loss that policy covered merchandise. 45Philippine122. [e] **Words "building and premises,"** in application, do not amplify intent to insure building only. 222MoA1010, 7SW(2d)463.
88-23 [l] **Adjoining building.**-161La102, 108S228. [m] **Rear building.**-161La102, 108S228.
89-33 131Misc141, 226NYS278; Tex CivA 148SW(2d)372. See also Fla 129S748. [g] **Intention of parties controlling.**-Fla 129S748.
89-38 82CalA131, 255P220.
90-45 See also 131Misc305, 226NYS630.
90-46 226Ky498, 118SW(2d)141.
90-48 Miss 107S377 (electric ceiling fans and chandeliers held covered by policy where they could not be removed without damage to building); 144Miss749, 111S366.
90-61½-New. Under policy excluding liability for loss of "awnings," a metal shed attached to building and extending over sidewalk held not covered. Miss 107S377.
92-83 9LaA337, 120S511.
92-92½-New. The term "automobile accessories" includes batteries. 44 Ida491, 258P362.
92-96 222MoA31, 4SW(2d)871. [c] **Horse blankets used as bedding** in logging camp are not included in term "household goods." Wis 229NW537.
93-12½-New. Grain has been held not to include cottonseed meal. 129Kan332, 282P757.
93-20 31Ariz340, 253P440; Mass 166NE749. [a] (5) Clear space clause held to bar recovery for cotton lost in fire, where clear space specified was one hundred feet about gin, and goods lost were within ten feet thereof. 31Ariz340, 253P440. [e] **Description of location construed.**-Cement insured location description "about 250 ft. west of Berry St., running abt. 175 ft. on N. 13th and 80 ft. deep" means area all of which is two hundred and fifty feet from B Street and eighty feet deep from boundary street. 242NY54, 150NE599.
94-26 200Cal70, 251P922; 89 IndA22, 165NE554(2dcase); 6PaDist&Co 557.
94-28 200Cal70, 251P922.
95-29 [c] **Recovery on policy** held unwarranted in view of implied "distribution average clause" and state of proof. TexCivA 298SW178.
95-30 See also 200Cal70, 251P922.
96-46½-New. Goods displayed for retail sale in hotel have been held within exception of fire policy excepting goods in "business premises of assured." Fla 129S327.
96-56 237Mich202, 211NW641.
98-81 32PortoRico622, 627 [quotCJ]. [e] **Undertaking to pay all losses occasioned by fire not to exceed amount for which each article insured** is not promise to pay fixed sum in case of total loss. 32PortoRico622.
99-84 130Misc165, 223NYS441.
99-85 130Misc165, 223NYS441.
99-91 [a] (2) Policy reciting "automobile insured is valued at sum insured" held valued policy. 130Misc165, 223NYS441.
100-97 [c] **Builders' risk policies,** providing that property will be insured only during construction of building, are not effective before construction has begun. 152Miss344, 118S295.
100-10 199 Iowa1358, 203NW826.
100-11½-New. Entry of a future date for insurance to begin, if a mistake, has been held mistake of insurer, in view of insured's agent's limited authority. 48RI274, 137A470.
100-13 178Ark1106, 13SW(2d)303; 40GaA246, 149SE308. [b] (5) Policy intended to insure only for period during process of erection of building. 229AppDiv26, 240NYS755. (6) Casual storage of goods did not cause building to become "occupied" within builder's risk clause. 229AppDiv26, 240NYS755.
101-15 82NH318, 133A340; 97PaSuper376.
101-28 103NJL529, 138A97.
101-30 217Ala510, 116S693; 141SC64, 139SE176, 53ALR1119.
102-34 [a] 22AlaA51, 112S95; 192NC8, 133SE337, 47ALR645.
102-36 318 Ill350, 149NE247; 216Ky535, 287SW969, 971 [citCJ]; 192NC8, 133SE337, 47ALR645. [a] (1) 318 Ill350, 149NE247.
103-37 TexCivA 285SW904.
103-40 173Ark960, 294SW58; 118 Or22, 245P515.
103-41 158La695, 699, 104S620 [quot CJ].
103-42 201 Iowa363, 207NW334; 158La695, 699, 104S620 [quotCJ].
103-43 19F(2d)419; 25F(2d)847, 849 [citCJ]; 158La695, 699, 104S620 [quot CJ]; 118 Or22, 245P515; 192Wis319, 212NW523. [d] 118 Or22, 245P515. [e] **Right is not barred** by fact that insured could have secured reinsurance. 192Wis319, 212NW523.
104-45½-New. a distribution average clause; TexCivA 281SW217.
104-46 [a] (1) 29F(2d)291.
104-47 Iowa 233NW153; 233Mich305, 206NW503. [a] (1) 173Ark960, 294SW58; 205 Iowa1294, 217NW816.
104-48 25F(2d)847; 158La695, 104S620.
104-49 158La695, 104S620.
105-51 19F(2d)277; 223Ky533, 4SW(2d)372; 229Ky613, 17SW(2d)711; 158La695, 104S620; 10LaA612, 120S218(2d case); 82NH318, 133A340; 118 Or22, 245P515.
105-52 226Ky376, 10SW(2d)1074; 158La695, 104S620; 196NC546, 146SE216.
105-53 35F(2d)675; 118 Or22, 245P515; 124 Or560, 264P859.
105-54 118 Or22, 245P515; 124 Or560, 264P859.
105-55 [a] 118 Or22, 245P515.
105-56½-New. That the agent, in informing insured that the policy would be in effect from the date of application, said nothing of a subsequent encumbrance clause, does not warrant reformation where insured held the policy a year before fire. 223Ky533, 4SW(2d)372.
106-57 35F(2d)253 (failure of agent to transmit notice of chattel mortgage); 201 Iowa363, 207NW334; 158La695, 104S620 (policy reformed where accepted in belief it conforms to contract made with agent); 154Miss418, 122S551; 192Wis319, 212NW523. [a] **Mistake in stating information given by applicant.**-Trial court may reform fire insurance application and policy when it finds that agent failed to state correctly in application answers and information given by applicant and general agent issuing policy had full knowledge of such facts at time he accepted application and issued policy. 127Kan787, 275P211.
106-62 82NH318, 133A340; 6PaDist&Co 557; 192Wis319, 212NW523.
106-63 233Mich305, 206NW503.
106-64 49RI112, 140A469, 471 [citCJ].
106-67 196NC546, 146SE216.
106-69½-New. In an action by a vendor to reform a policy issued to vendee by mutual mistake and to recover for loss thereunder, the defense that the fire was set by the vendee held properly stricken out. 172Minn486, 215NW835.
106-70 See also 86 IndA358, 158NE248 (insurer held not entitled to reformation for mistake as to premium after loss).
107-73 229Ky613, 17SW(2d)711.
107-74 201 Iowa363, 207NW334; Mont 287P217 (insured unable to read).
107-79 TexCivA 275SW316.
107-80 43F(2d)885; 120 Or1, 251P258, 259 [citCJ].
107-81 25F(2d)847, 848 [citCJ].
107-82 MoA 277SW596.
107-83 49RI112, 140A469.
107-84 120 Or1, 251P258, 259 [citCJ]; TexCivA 275SW316.
107-87 But see 25F(2d)847.
108-1 [b] 229AppDiv2, 240NYS749. [d] 216AppDiv654, 216NYS65. [e] **Riders bind ng on insured when signed by his agent** without knowledge of their meaning because printed in Spanish. 8F(2d)134 (as to making and keeping inventory).
108-2 Ariz 286P183; 171Minn118, 213NW539; 82NH318, 133A340.
108-5 [a] **Insured attaching indorsement slip** showing additional premium to fire policy, accepted proposed modification. 229AppDiv2, 240NYS749.
108-7 [b] 229AppDiv2, 240NYS749 (modification by increasing premium, relieving danger of cancellation).
108-8 38F(2d)197; 171Minn118, 213NW539; 216AppDiv654, 216NYS65.
108-10 198Wis214, 223NW437.
108-11 216AppDiv654, 216NYS65.
108-14½-New. Insurance agent's agreement to transfer policies when trade was consummated is not enforcible as executory agreement to insure where policies were never presented for transfer. 43F(2d)467.
109-16 51ND917, 201NW514; TexCivA 6SW(2d)211, 214 [citCJ].
109-17 125Kan10, 262P552.
109-18 TexCivA 6SW(2d)211.
109-21½-New. There is no conflict of interests precluding recovery on oral renewal by the company's agents by reason of the fact that such agents were also insured's agents for renting his property, TexCivA 6SW(2d)211.
109-21½-New. and such agency for insured does not make the renewal contract the individual act of the agents rather than that of the company. Tex CivA 6SW(2d)211.
109-23 [a] (2) See also 132SC398, 129SE199. (5) Acceptance on part of insured must be complete and unequivocal to create new contract. 229AppDiv26, 240NYS755.
110-26 49SD33, 206NW419 (no contract where residence policy was issued by wife of company's agent without knowledge of insured who had sold building to one who obtained insurance on commercial risk).
110-30 But see 125Kan10, 262P552.
110-30½-New. Company has power to contract for renewal even after the expiration of the policy. 51ND917, 201NW514.
110-30½-New. Where the policy does not indicate any understanding to the contrary, the parties may by express agreement enter into a contract subsequent to termination of policy and by reference renew the policy without the formality of a new application. 51ND917, 201NW514.
110-32 [a] **Insured's retention of void**

fire policy did not give it life nor failure of insurer to return unearned premium prolong its existence. 229**AppDiv** 26, 240**NYS**755.

110-40 **TexCivA** 6**SW(2d)**211; **Tex CivA** 28**SW(2d)**1088 (renewal to cover new location).

110-40½-New. In the absence of evidence to the contrary, the agents' agreement to renew implies that the renewal will be by the old company. **TexCivA** 6**SW(2d)**211.

110-41 **IndA** 169**NE**342 (rights of parties measured by policy in force at time of loss); **Mass** 166**NE**749; **TexCivA** 20 **SW(2d)**399. [b] **Failure of agent to attach clause making loss payable to mortgagee** is not available to insurer. 131 **Okl** 108, 267**P**840.

110-42 **TexCivA** 6**SW(2d)**211, 214 [cit CJ]; **TexCivA** 20**SW(2d)**399; **TexCivA** 28**SW(2d)**1088.

111-44 [b] **Mass** 166**NE**749.

111-47 [b] **Insured's broker having retained new policy without reading it** till after loss, insured cannot complain of provisions limiting stock covered which was not in original policy, and they will not be disregarded. **Mass** 166 **NE**749.

112-61 51**ND**917, 201**NW**514. But see **TexCivA** 10**SW(2d)**799.

112-62 [b] **Authority of alleged insurance agent to enter into verbal contract for renewal of fire insurance** in behalf of insurance company has been held not established by operation of law. 32 **OhA** 138, 167**NE**695.

112-64 **TexCivA** 20**SW(2d)**399.

112-65½-New. An authorized agent's oral agreement for renewal is binding on the company although original policy had expired several days before making of renewal agreement. 51**ND**917, 201**NW**514.

112-67 **TexCivA** 271**SW**441.

112-68 **TexCivA** 271**SW**441.

112-69½-New. Authority to countersign a renewal policy, fill in blanks, and collect the premium, purely mechanical acts, may be delegated by a qualified agent to a subagent so as to bind the insurance company. 85**Mont**419, 279**P** 243.

112-71 171**Ark**1066, 287**SW**587.

113-79 [a] **Policy requiring mortgagee to pay premium if not paid by mortgagor** (1) is condition noncompliance with which will prevent recovery on policy. 157**Tenn**99, 7**SW(2d)**52. (2) Mere knowledge by mortgagee that property had been insured as provided in mortgage would not make him liable for premiums in absence of his express or implied agreement to pay them. 157 **Tenn**99, 7**SW(2d)**52.

113-86 41**GaA**257, 152**SE**606; 152**Miss** 522, 120**S**214.

113-87 77**CalA**429, 247**P**505; 194**NC** 281, 139**SE**456, 56**ALR**674; 28 **OhA**139, 162**NE**641; 35**Wyo** 334, 249**P**555, 47**ALR** 1114.

113-88 77**CalA**429, 247**P**505; 28 **OhA** 139, 162**NE**641; 35**Wyo** 334, 249**P**555, 47**ALR**1114.

114-16½-New. If insured directs broker to apply checks on policy premiums are thereby paid. **Mo** 26**SW(2d)**962.

114-16½-New. Company is bound if policy is delivered and time of payment of premium deferred. 229**AppDiv**2, 240 **NYS**749.

114-23 See also 36**GaA**461, 137**SE**126.

115-25 22**AlaA**273, 114**S**785.

115-28 217**MoA**368, 266**SW**736.

115-49 161**Ga**559, 131**SE**359; 36**GaA** 601, 137**SE**304.

116-52 217**MoA**368, 266**SW**736.

116-53 See also 134**SC**96, 131**SE**428.

116-65 132**SC**34, 129**SE**129 (failure of consideration); 132**SC**488, 129**SE**428.

116-65½-New. A plea of nudum pactum in an action on premium note alleging no delivery of fire policy is good as against general demurrer. 34**GaA**19, 128 **SE**70.

116-65½-New. An allegation that there has been no delivery of a fire policy is equivalent to an allegation that there has been no legal delivery, either actual or constructive. 34**GaA**19, 128**SE**70.

116-66½-New. Evidence of a universal custom of agents to issue renewal policies may be admissible. 132**SC**398, 129 **SE**199.

116-66½-New. Defense that rate is unreasonable cannot be raised after insured has accepted benefits of policy under definite contract. **TexCivA** 286**SW**287.

116-66½-New. Defense that rate is exorbitant is of no avail where fixed by state insurance commissioner. **TexCivA** 286**SW**287.

117-83 **MoA** 282**SW**478.

118-21 120 **Or**411, 252**P**75.

119-25 120 **Or**411, 252**P**75.

120-53½-New. A member of a mutual association, under statutes, is also an insurer of other members. 143**Wash**508, 255**P**664, 53**ALR**340.

124-31 251**Mich**407, 232**NW**187.

125-68½-New. **Who entitled to sue.** 143**Wash**508, 255**P**664, 53**ALR**340.

127-27 [c] (1) 180**Ark**1167, 22**SW(2d)** 1013.

128-44 218**Ky**169, 291**SW**9.

128-46 **IndA** 169**NE**342.

129-54 218**Ky**169, 291**SW**9.

130-74½-New. Insured cannot maintain an action to recover the unearned premium paid on a forfeited policy. 192 **Wis**204, 212**NW**67.

130-74¼-New. Whether an agent of insurer authorized a third person to countersign and issue policies for which the agent collected premiums is a question for the jury. **MoA** 299**SW**1107.

130-74¼-New. A mortgagee may recover unearned premiums where insurer canceled the policy after payment by the mortgagee on insurer's demand and the mortgagor was insolvent. 152**Miss**522, 120**S**214.

130-76 **Iowa** 215**NW**244; 137**Misc**263, 241**NYS**727.

130-77 **Iowa** 215**NW**244; 82**NH**167, 131**A**354; 118 **Or**649, 245**P**505.

130-78 6**F(2d)**533, 43**ALR**496; 246 **IllA** 574; **Iowa** 215**NW**244; 205 **Iowa**119, 217**NW**258; 150**Md**211, 132**A**635, 45**ALR** 582; **TexCivA** 26**SW(2d)**474. [a] 239 **Mich**642, 214**NW**962.

130-80 **Md** 148**A**252.

131-91 217**Ky**56, 288**SW**1030.

131-92 217**Ky**56, 288**SW**1030.

132-22 205 **Iowa**119, 217**NW**258.

132-29½-New. Where insurance solicitor without authority consents to assignment, ratification after fire is valid. 202 **Iowa**1291, 211**NW**716.

132-29½-New. A provision that property of applicant for insurance shall be insured until applicant is notified of modification or rejection has been held to apply to applicants for transfers of existing policies. 216**AppDiv**654, 216 **NYS**65.

132-33 128**Kan**416, 277**P**793; 216**App Div**654, 216**NYS**64. [c] **Provision requiring waivers to be in writing attached to, or indorsed on, policy** is not conclusive as to whether promise of local agent to transfer policy bound company, question depending on extent of authority. 216**AppDiv**654, 216**NYS**65.

132-34 218**Ky**163, 291**SW**6.

132-36 216**AppDiv**654, 216**NYS**65.

133-49 See also 198**NC**303, 151**SE**628.

133-50 [a] 81**Mont**281, 264**P**132. [d] **Acceptance by assignee necessary.**-75 **Mont**1, 241**P**631.

133-55 **Iowa** 227**NW**523.

134-74 [b] **Provision for payment to vendor as his interest may appear** contained in clause attached to policy amounts to assignment to policy to secure vendor in performance of contract. 155**Tenn**25, 290**SW**8.

134-84 But see 160**Ga**755, 129**SE**53, 56 [quotCJ] (mortgagor had insurable interest after transfer); 246 **IllA**574; **MoA** 285**SW**144, 147 [citCJ]; **MoA** 27**SW(2d)** 464; 192**NC**8, 133**SE**337, 47**ALR**645.

135-86 [a] **Taking policy as collateral security** does not ipso facto create relation of assignor and assignee. 131**SC** 498, 127**SE**570.

135-91 **Iowa** 227**NW**523; **TexCivA** 5 **SW(2d)**602. But see **MoA** 285**SW**144.

135-98½-New. Validity of pledgee's lien on fire policies is not affected by redelivery thereof to the owner for collection of proceeds. 217**Ky**56, 288**SW** 1030.

135-98½-New. Upon assignment of a policy, assignee stands in the place of insured and is subject to all defenses available as against insured. 127**Misc**1, 215**NYS**151.

135-98¼-New. The assignee of a fire insurance policy can acquire no greater rights under the assignment than the assignor had at the time of the assignment. 135 **Okl** 47, 273**P**889.

135-99 173**Ark**668, 293**SW**1018; 131**SC** 498, 127**SE**570 (mortgagee taking policy as collateral security does not become party to contract of insurance).

136-1 221**MoA**764, 285**SW**761.

136-6½-New. The right of an agent taking a note for premiums to proceeds of insurance recovered by insured is superior to that of assignee of the policy. 173**Ark**668, 293**SW**1018.

136-6¼-New. Agent advancing premiums under contract for repayment is entitled to be paid out of the fund recovered before mortgagee, under a loss payable clause. 173**Ark**668, 293**SW**1018.

136-18 134**SC**1, 131**SE**781.

137-25 170**Ga**46, 152**SE**41.

137-28½-New. A policy may be canceled only by insured, 125**Misc**896, 212 **NYS**759.

137-28¼-New. or his proper representative. 125**Misc**896, 212**NYS**759.

137-30 **TexCivA** 22**SW(2d)**978.

137-31 125**Misc**896, 212**NYS**759. [a] **Attempted cancellation** by representative of broker is ineffectual. 125**Misc**896, 212 **NYS**759. [b] **Brokers employed to keep property insured** and empowered to select insurer may cancel policies. 218**Ky** 378, 291**SW**776.

137-38 192**NC**312, 135**SE**34.

137-44 8**F(2d)**389; 41**GaA**49, 152**SE** 146; 50**SD**519, 210**NW**744; 153**Wash** 594, 280**P**13.

138-50 46**Philippine**424.

138-52 **Iowa** 233**NW**153.

138-54 46**Philippine**424.

139-64 83**Colo** 126, 262**P**927.

139-65 **Iowa** 233**NW**153.

139-67½-New. or where notice by mail is authorized. 83**Colo** 126, 262**P**927.

139-69 133**SC**472, 131**SE**22 (insured held to have had insufficient notice); 153**Wash**594, 280**P**13 (statutory provision for notice five days before fire). [b] 133**SC**472, 131**SE**22. [d] **In computing time,** first day will be excluded and whole of last day counted. 133**SC** 472, 131**SE**22.

139-74 35**PortoRico** 408.

139-75 35**PortoRico** 412.

139-77½-New. Insurer is bound by a statement in the notice that cancellation will be effective on receipt of the notice. 83**Colo** 126, 262**P**927.

139-80 218**Ky**378, 291**SW**776; 153 **Wash**594, 280**P**13.

140-85½-New. But where statute requires notice to be given to insured owner, a mortgagee who has received notice may assume that notice has been given owner. 235**Mich**70, 209**NW**120.

140-87 [b] **Agent authorized to receive and deliver registered letter** is not authorized to receive notice of cancellation contained therein. 83**Colo** 126, 262 **P**927. [c] **But where agency terminates before loss,** notice to former representative is not effective. **Iowa** 233**NW**153.

140-89 218**Ky**378, 291**SW**776, 777 [cit CJ]; **TexCommnA** 285**SW**257. See also **TexCivA** 22**SW(2d)**978.

140-93 180**Ark**500, 22**SW(2d)**45. But see **TexCivA** 26**SW(2d)**295.

141-5 41**GaA**49, 152**SE**146; 40**GaA**322, 149**SE**433; 203 **Iowa**282, 211**NW**383; **MoA** 24**SW(2d)**206; 38**OklACR**339; 50 **SD**519, 210**NW**744; 153**Wash**594, 280**P** 13 (statutory provision).

141-7 46**Philippine**424.

142-8 203 **Iowa**282, 211**NW**383; 235 **Mich**678, 209**NW**803 (under statutory stipulation); 38 **OklACR**339; 50**SD**519, 210**NW**744. [b] **Notice of cancellation stating excess premium was held subject to order of third party** and which did not tender excess premium is not sufficient to effect cancellation. 235**Mich**678, 209**NW**803. [c] **Under fire policy providing for cancellation by insurer on giving notice thereof** which shall state that excess premiums if not tendered will be refunded on demand, insurer is bound, as condition precedent to cancellation, to tender unearned premium or

give notice that it will be refunded on demand, with notice of cancellation. 133 SC472, 131SE22. [d] **Failure to tender unearned premium** has been held no bar to defense of breach of warranty by insured. **TexCivA** 30SW(2d)715.

142–8½–New. Where policy provides that it may be canceled with or without tender of unearned premium tender is not necessary. **Mo** 26SW(2d)962.

142–11 133SC472, 131SE22. [a] **Tender of insufficient amount** does not satisfy requirement of tender of unearned premiums or notice that it will be returned on demand. 133SC472, 131SE22. [b] **Insurer may not deduct disputed amount** from unearned premium in exercising its conventional method of cancellation. 133SC472, 131SE22.

142–17 [b] **Where mortgagee paid premium,** its return is not prerequisite to cancellation as to insured under policy payable to insured and mortgagee and authorizing cancellation with or without return of excess premium. 317Mo 1119, 298SW63.

143–24 See also 40GaA322, 149SE433.

143–29 203 Iowa282, 211NW383.

143–34 13F(2d)375; 180Ark500, 22SW (2d)45; Vt 148A869(2dcase).

143–37 230Ky19, 18SW(2d)303.

144–47 TexCivA 274SW299, 302 [cit CJ].

144–48 TexCivA 274SW299, 302 [cit CJ].

144–49 Vt 148A869(2dcase). See also TexCivA 22SW(2d)978.

144–54 116 Okl 56, 243P194; 131 Okl 39, 267P639.

144–57 230Ky19, 18SW(2d)303.

144–60½–New. If proper notice is given but demand for payment of excess premium within five days is refused, cancellation does not become effective. 235 Mich678, 209NW803.

144–62 317Mo 1119, 298SW63; 35Porto Rico 412; 35PortoRico 623.

144–64 8F(2d)389.

145–79 151Wash494, 276P549.

145–80 40F(2d)384.

145–83 8F(2d)389.

145–84 192NC312, 135SE34. [a] **Authority may be given prior to, or contemporaneously with,** issuance of policy. 192NC312, 135SE34. [b] **Act of insurer's agent in becoming insured's agent** for purpose of requesting cancellation of policy is not inconsistent with agent's duty to insurer. 192NC312, 135SE34.

145–87 217MoA368, 266SW736.

145–91 217MoA368, 266SW736.

146–95 56ND116, 216NW209.

146–99 41GaA423, 153SE229(2dcase) [quotCJ].

146–2 See also 56ND116, 216NW209.

146–3 170Minn273, 212NW451, 453 [citCJ]; SD 231NW902.

146–17 TexCivA 21SW(2d)88.

147–32 Mass 168NE741 (notice to insured and mortgagee and tender of ratable portion of premiums is not necessary); 135 Okl 47, 273P889. See also 216Ky463, 287SW964. [b] **Immediate payment of unearned premium** is not essential where it is otherwise agreed. 135 Okl 47, 273P889.

147–38 192NC312, 135SE34, 36 [citCJ].

148–43 See also 216Ky463, 287SW964.

148–48 203 Iowa282, 211NW383. [a] **Insurer must prove notice of cancellation** given mortgagee, in suit by mortgagee to set aside cancellation. Iowa 233NW153.

148–50 [d] 82NH318, 133A340.

148–51 [a] 135 Okl 47, 273P889. [d] 37GaA203, 139SE362; 133SC472, 131SE 22 (to show necessary tender of unearned premium or notice that it would be returned on demand); TexCivA 38W (2d)597. [e] **Evidence held insufficient to sustain burden** of proving notice of cancellation. Iowa 233NW153.

148–53 [a] **Sufficiency of pleading.–Vt** 145A147 (inadequate delivery).

148–55 See also 34GaA19, 128SE70.

148–56 202 Iowa1270, 211NW860.

152–30 205 Iowa1085, 217NW268, 271 [citCJ], 56ALR463.

153–34 205 Iowa1085, 217NW268, 272 [citCJ], 56ALR463.

153–50 [e] **Admissibility of evidence.–** 236Mich243, 210NW258. [f] **Issues, proof, and variance.–**236Mich243, 210NW 258.

154–57½–New. Violations of reinsurance contract, not discernable to defendant from information furnished by plaintiff, if done with fraudulent intent and not inadvertently, render the reinsurance void. 236Mich243, 210NW258 (recovery of payments made).

154–57⅛–New. Remedies provided by contract. Violations of reinsurance contract which should be readily apparent to both parties from their own records should be readjusted in accordance with the remedy provided therefor in the contract. 236Mich243, 210NW258.

154–57¼–New. But where the parties dealt under the contract and not at arm's length, the fiduciary relation demanded fairness, 236Mich243, 210NW 258.

154–57⅝–New. and if plaintiff suing on the contract of reinsurance intentionally deceived defendant, the latter could recover therefor regardless of a provision in the contract providing remedy for inadvertent discrepancies. 236Mich243, 210NW258.

154–62 179Minn289, 229NW88(1stcase).

154–64 120 Or1, 251P258.

154–67½–New. Where the agent representing defendant and another company takes an application containing alleged misrepresentations addressed to such other company, and a special agent of defendant company changes it so as to address it to defendant company, such misrepresentations constitute no defense. 85Mont405, 279P239.

155–76 150Wash443, 273P527(2dcase).

155–78 CalA 289P865; 235Ky289, 30 SW(2d)1105.

156–83 221MoA741, 285SW1024.

156–87 179Minn289, 229NW88(1stcase).

156–91 [a] **Agent taking insurance on own property** held bound to reveal facts as to pending foreclosure thereon. 16F (2d)251.

156–92 16F(2d)251. [a] **Failure of insured,** insuring building for three thousand dollars, to disclose purchase for nine hundred dollars, held not to invalidate policy as matter of law. Tex CivA 295SW1109.

156–95 232Ky548, 24SW(2d)292.

157–98 37GaA229, 139SE522.

157–4 15F(2d)946 (dictum).

157–7 219Ky727, 294SW489; 234Ky 183, 27SW(2d)699; 127Me182, 142A481.

158–13 84CalA130, 257P586.

158–15 [b] **Valuation clause in policy constitutes warranty.–Fla** 129S748.

158–17 134Misc90, 234NYS40.

159–25 [a] 202Cal 743, 262P329.

161–43 242NY54, 150NE599; 49RI 112, 140A469.

161–53½–New. A provision in a policy as to avoidance for fraud, misrepresentation, or concealment of material facts, made before or after loss, is valid. 53 ND273, 205NW672.

162–64 165Minn468, 206NW940.

163–80 [a] **Statute held not to apply to** ownership provision. TexCivA 297SW 575.

163–83 251NY312, 167NE454; 49RI 112, 140A469.

163–85 NJSup 145A236.

163–87 CalA 289P865 (date of purchase of truck).

163–91 84CalA130, 257P586; 258Mass 210, 154NE768; 259Mass205, 156NE54; 132Misc122, 228NYS537. But see CalA 289P865; 317Mo 1119, 298SW63; 130 Misc420, 224NYS409.

164–98 242NY54, 150NE599 (though not knowingly made). [c] **Description is warranty,** truth of which is condition precedent to receiver's liability. 242NY 54, 150NE599.

164–99 242NY54, 150NE599.

164–2 49RI 112, 140A469.

165–7 39F(2d)477. [e] **Vacancy permit clause held not inconsistent with occupancy clause** relating to building at date of issuance of policy. 39F(2d)477.

165–12 [a] (2) That building stated to be used as dwelling house was occupied as bawdyhouse constitutes defense. 212 Ky770, 280SW127.

166–19 39F(2d)477.

166–24 229Ky216, 16SW(2d)1028; 259 Mass205, 156NE54; 285Pa589, 132A706; 59NS81, [1927] 1DomLR435. [a] 3LaA 587; 285Pa589, 132A706.

166–33 285Pa589, 132A706.

167–38 221MoA741, 285SW1024.

167–42 TexCivA 281SW622.

168–44 49RI 112, 140A469, 471 [citCJ].

168–47 Ala 129S470; Alta [1926] 3 DomLR528, [1926] 2WestWkly541. See also 142Miss249, 106S884. [b] (2) Warranty that property was fully paid for. 256Mass221, 152NE320. [e] **Representations as to sole ownership** are warranties and not within ante-technicality statute. TexCivA 31SW(2d)850.

168–48 219AppDiv110, 219NYS103; Tex CivA 297SW575.

168–50 37GaA739, 141SE674; 237 IllA 103. But see 219AppDiv110, 219NYS 103.

169–54 219AppDiv110, 219NYS103.

170–60 79Mont166, 255P340, 343 [quot CJ], 60ALR1.

170–61 226Ky706, 11SW(2d)968; 79 Mont166, 255P340, 343 [quotCJ], 60 ALR1.

170–62 13F(2d)745; 172Ark715, 290 SW594; 318 Ill 350, 149NE247; 86 IndA 240, 156NE833; 233Ky337, 25SW(2d) 738; 141Miss394, 106S529; 79Mont166, 255P340, 343 [quotCJ], 60ALR1; 190 NC867, 129SE727; 128 Okl 71, 261P170; 166Tenn436, 300SW7, 8 [citCJ]; Tex CivA 274SW176. [a] (1) 172Ark715, 290SW594; 100WVa728, 132SE714. [c] **Fee simple.–**318 Ill 350, 149NE247.

170–63 11F(2d)961; 13F(2d)745; 318 Ill 350, 149NE247; 233Ky334, 25SW(2d) 743; 10LaA672, 121S205(1stcase); 141 Miss394, 106S529; 79Mont166, 255P340, 343 [quotCJ]; 60ALR1; 128 Okl 71, 261P170; 156Tenn436, 300SW7, 8 [cit CJ]; TexCivA 274SW176. [a] (2) Policy held not void since it did not cover property purchased under conditional sales contract. CalA 285P1072. [f] **Chattel mortgage.–**127Kan768, 275P214.

171–64 79Mont166, 255P340, 343 [quot CJ], 60ALR1. But see 57ND462, 222 NW609(3dcase).

171–65 79Mont166, 255P340, 343 [quot CJ], 60ALR1; TexCivA 26SW(2d)701.

171–66 79Mont166, 255P340, 343 [quot CJ], 60ALR1.

171–67 233Ky337, 25SW(2d)738; 79 Mont166, 255P340, 343 [quotCJ], 60 ALR1; 219AppDiv110, 219NYS103; 156 Tenn436, 300SW7, 8 [quotCJ].

171–68 237 IllA103.

171–69 Wis 228NW749.

171–71 See also 224AppDiv249, 229NYS 678.

171–76 Ala 130S180; Cal 285P849; 79 Mont166, 255P340, 60ALR1; 57ND462, 222NW609(3dcase).

172–79½–New. Applicant need not settle questions of title with great precision. 217Ala89, 114S690.

172–81 180Ark500, 22SW(2d)45; 165 Minn468, 206NW940; TexCommnA 12 SW(2d)971.

172–82 226Ky706, 11SW(2d)968.

172–83½–New. Strict compliance with sole and unconditional ownership clause is not required. 172Ark715, 290SW594.

172–84 24F(2d)221, 225 [quotCJ]; 217 Ala89, 114S690, 691 [quotCJ]; 171Ark 733, 286SW804, 48ALR349; 90Fla620, 106S879; 141Miss394, 106S529, 530 [cit CJ]; 79Mont166, 255P340, 60ALR1, NJSup 135A274. [a] 79Mont166, 255P 340, 60ALR1. [c] (6) CalA 286P486; 255 IllA209; TexCivA 26SW(2d)295 (insured a corporation). [e] **Insured not sole and unconditional owner.–**79 CalA257, 249P215.

173–85 90Fla620, 106S879; 263Mass 262, 160NE807 (conditional sales contract); 79Mont166, 255P340, 60ALR1.

173–86 24F(2d)221, 225 [quotCJ]; 218 Ky365, 291SW353; NJSup 135A274; TexCivA 274SW176, 178 [quotCJ].

173–87 TexCivA 274SW176, 178 [quot CJ]. [a] **Title under mortgage foreclosure sale.–**TexCivA 274SW176.

173–88 TexCivA 274SW176, 178 [quot CJ].

173–89 32F(2d)631; TexCivA 274SW 176, 178 [quotCJ].

173–90 TexCivA 274SW176, 178 [quot CJ].

173–92 219AppDiv110, 219NYS103; TexCivA 26SW(2d)701.

173–94 190NC867, 129SE727, 731 [cit Cyc].

173-95 243 **IllA**546, 550 [quotCJ].
173-96 79**Mont**166, 255**P**340, 60**ALR**1; 190**NC**867, 129**SE**727, 731 [citCJ].
173-97 216**Ky**535, 287**SW**969.
173-99½-New. Contract of sale under which insured claims must be capable of enforcement at date of insurance, to support the claim of unconditional ownership. 190**NC**867, 129**SE**727.
173-99⅓-New. That statutory requirements with relation to transfer of automobiles were not observed has been held not to prevent the purchaser from being invested with ownership so as to defeat recovery on a policy. 116**Tex** 132, 287**SW**50.
173-99¼-New. Acquisition of title three days after amendment of policy substituting insured is practically contemporaneous with policy in determining his sole ownership. 35**F(2d)**916.
173-99½-New. Contract void because insured's interest was not sole, and unconditional ownership remains void unless revived by consent of insurer. **Ala** 130**S**180.
173-2 35**F(2d)**916; 217**Ala**89, 114**S** 690; 90**Fla**620, 106**S**879; 222**Ky**757, 2 **SW(2d)**397, 399 [quotCJ]; 150**Md**211, 132**A**635, 641, 45**ALR**582 [quotCJ]; 145 **Miss**842, 111**S**362; 122 **Or**665, 260**P**441; 124 **Or**521, 264**P**862; 143**Va**884, 129**SE** 727; 100**WVa**728, 132**SE**714.
174-7½-New. No right to recover under policy where bill does not show right to specific performance. 143**Va** 884, 129**SE**727.
174-7⅓-New. Where a store employee was to become a partner when half of the profits equaled half of the value of the goods, there is no equitable title within a policy conditioned on his sole and unconditional ownership of the goods. 79**CalA**257, 249**P**215.
174-8 222**Ky**757, 2**SW(2d)**397.
174-12 79**Mont**166, 255**P**340, 60**ALR**1; 122 **Or**665, 260**P**441; **NS** [1930] 4**DomLR**763.
175-15 237 **IllA**103.
175-16 **MoA** 295**SW**509.
175-22 **Wis** 228**NW**749.
175-23 **MoA** 295**SW**509.
176-31 105**WVa**375, 143**SE**113, 61**ALR** 657.
176-33 172**Ark**715, 290**SW**594. [a] **Policy on property including one or two articles bought on conditional sale** is not void, especially where insured did not know that seller retained title and insured was charged with knowledge of agent. 172**Ark**715, 290**SW**594.
176-34 79**Mont**166, 255**P**340, 60**ALR**1.
176-35 27**F(2d)**64. [a] **After vendee's forfeiture** and relation reduced to that of landlord and tenant, contract is not breach of vendor's warranty. 27**F(2d)** 64.
176-39 202**Cal** 743, 262**P**329.
177-47 35**F(2d)**916; 37**GaA**229, 139**SE** 322; 86 **IndA**363, 156**NE**581; 299**Pa** 86, 149**A**163.
177-51 **NS** [1930] 4**DomLR**763.
177-52 176**Ark**1188, 5**SW(2d)**916.
177-58 86 **IndA**240, 156**NE**833.
178-69 156**Tenn**436, 300**SW**7.
178-71 156**Tenn**436, 300**SW**7; **Tex CommnA** 284**SW**920, 921 [citCJ].
178-72 **TexCommnA** 284**SW**920, 921 [citCJ].
178-73 156**Tenn**436, 300**SW**7.
178-77 But see **Cal** 285**P**849.
178-86 Contra 176**Ark**1188, 5**SW(2d)** 916.
178-86½-New. A judgment debtor is not the unconditional and sole owner within a policy after execution sale and during the redemption period. 79**Mont** 166, 255**P**340, 60**ALR**1.
178-86⅓-New. In the absence of proof that land had not been redeemed, there is no concealment and misrepresentation in not disclosing forfeiture for nonpayment of taxes. 176**Ark**1188, 5**SW(2d)** 916.
178-87 **TexCivA** 297**SW**575, 577 [cit CJ]. See also 79**CalA**257, 249**P**215. [a] **But trustee's interest under quitclaim deed** and bill of sale giving property for benefit of creditors is that of "unconditional and sole owner" under policy. **Ill** 173**NE**479.
179-88 **Ill** 173**NE**479.
179-96 17**F(2d)**26 (agreement with creditors held not to avoid policy); 190 **NC**867, 129**SE**727, 731 [citCJ].
179-6 **TexCommnA** 284**SW**920, 921 [cit CJ].
180-23 [a] **Husband occupying as homestead** property in which wife had life interest held not invested with "fee simple title." **TexCivA** 297**SW**575, 577 [citCJ]. [b] **When family homestead is composed wholly or partly of separate property of wife,** homestead rights of husband are same as when homestead is composed entirely of community property. **TexCommnA** 14**SW(2d)**816.
180-24 **TexCivA** 297**SW**575.
180-25 [b] **That homestead was purchased in part with money paid from separate funds of wife** did not render interest of husband in homestead other than "unconditional and sole ownership." **TexCommnA** 14**SW(2d)**816.
180-32 171**Ark**733, 286**SW**804, 806, 48 **ALR**349 [citCJ]; 219**AppDiv**110, 219 **NYS**103; **TexCivA** 5**SW(2d)**602. But see 24**F(2d)**221; 35**F(2d)**675; 145**Miss** 842, 111**S**362. [a] **But where resulting trust** in husband's favor arises, husband may recover on policy notwithstanding sole ownership provision. **MoA** 30**SW** **(2d)**870.
181-40 **TexCivA** 5**SW(2d)**602.
181-42½-New. That small portion of furnishings on which wife procured insurance was community property does not avoid policy where wife was sole owner of homestead. **TexCivA** 31**SW** **(2d)**850.
181-46 217**Ala**89, 114**S**690.
181-49 165**Minn**468, 206**NW**940.
181-53½-New. Nor is her grantee who takes only her dower interest. **Ala** 130 **S**180.
182-76 13**F(2d)**745; **MoA** 16**SW(2d)** 699.
183-93 16**F(2d)**251; **MoA** 287**SW**488.
183-94 **MoA** 287**SW**488, 490 [citCJ].
183-2 **Kan** 293**P**402.
184-11 [c] **In Wisconsin.**-192**Wis**623, 211**NW**776.
185-15½-New. Rider providing that "existing chattel mortgage" shall not invalidate policy has been held to permit more than one mortgage. 128**Misc** 223, 218**NYS**221.
185-26 **MoA** 285**SW**1012, 1015 [citCJ]; **MoA** 8**SW(2d)**1090.
185-28 219**AppDiv**560, 220**NYS**369.
186-30 77**Colo** 408, 236**P**1013, 1015 [cit CJ]; 146**SC**123, 143**SE**663, 666 [citCJ]. Contra 15**F(2d)**1. [b] 77**Colo** 408, 236**P** 1013. [c] **Second chattel mortgage,** specifically subject to first, held not to avoid policy in interest of first mortgagee. 192**Wis**623, 211**NW**776.
186-36 146**SC**123, 143**SE**663 (instrument construed as chattel mortgage).
186-45½-New. A fire policy, prohibiting a chattel mortgage on personal property insured, does not cover machinery affixed to realty. 35**F(2d)**916.
187-60 **NS** [1930] 4**DomLR**763. [a] **Failure to release vendor's lien** of record, after lien note was paid, does not constitute lien forbidden by policy. 219 **Ky**44, 292**SW**491.
187-75 226**Ky**534, 11**SW(2d)**148; 157 **Tenn**546, 11**SW(2d)**887.
187-76 171**Ark**733, 286**SW**804, 48**ALR** 349; 219**Ky**817, 294**SW**470; 136**SC**144, 134**SE**263.
188-78 212**Ky**107, 278**SW**581; 157**Tenn** 546, 11**SW(2d)**887. [c] **Negligence in failure to discover overinsurance** is viewed from situation as it appeared to parties at time. 157**Tenn**546, 11**SW** **(2d)**887.
188-94½-New. Clause providing for cancellation after notice may be named by insured by acquiescence in issuance of second policy. 177**Ark**678, 7**SW(2d)** 324.
188-1½-New. However, a maximum concurrent insurance clause is not a waiver of the policy. **TexCivA** 294**SW** 953.
188-1⅓-New. Prior insurance issued to a former owner will not constitute a defense unless it appears that it was assigned to plaintiff and was in force. 192**Wis**160, 212**NW**301.
188-4 87**PaSuper**349.
189-6 122 **Or**665, 260**P**441.
189-7 122 **Or**665, 260**P**441.
189-9 167**Minn**146, 208**NW**816. See also **TexCivA** 21**SW(2d)**1106. [a] **Policies on different interests** in property are not concurrent. 192**Wis**623, 211**NW**776.
190-34 180**Ark**1030, 23**SW(2d)**988.
190-43 But see **CalA** 289**P**865.
191-65 **Ala** 129**S**470; 56**ND**116, 216**NW** 209.
191-69 43**F(2d)**467; 93**PaSuper**242. [d] **Mortgagee's rights are not affected** by husband's conveyance to wife in fraud of creditors. 32**F(2d)**631.
192-70 167**Minn**146, 208**NW**816; 131 **SC**498, 127**SE**570; 105**WVa**147, 141**SE** 634.
192-78 245 **IllA**124; 312**Mo** 111, 278**SW** 772. [a] (4) On policy covering horses, mules, vehicles, harness, etc., misrepresentation as to ownership of some items does not avoid policy as to others. 312**Mo** 111, 278**SW**772.
193-81 318 **Ill** 350, 149**NE**247.
193-83 318 **Ill** 350, 149**NE**247.
193-84 318 **Ill** 350, 149**NE**247; 32 **OhA** 229, 167**NE**473.
194-87 229**Ky**216, 16**SW(2d)**1028.
194-91 218**Ky**473, 291**SW**760; 196**NC** 546, 146**SE**216; **Ont** [1928] 4**DomLR** 415.
194-92 178**Ark**1, 10**SW(2d)**497.
195-9 169**La**63, 124**S**147; 296**Pa**552, 146**A**135, 63**ALR**504(2dcase).
195-13 [1927]**CanSC**3, [1927] 1**DomLR** 17.
196-14 218**Ky**473, 291**SW**760; 245**Mich** 566, 222**NW**737. But see 30 **OhA**458, 165**NE**506.
196-15 8**F(2d)**439 (Virginia statute not impliedly repealed).
196-21½-New. Statute does not apply to contractual provisions in a policy. **TexCivA** 278**SW**488.
197-26 37**GaA**229, 139**SE**822.
197-27 27**F(2d)**508.
197-29 85**Mont**248, 278**P**509.
197-31 37**GaA**229, 139**SE**822.
197-38 37**GaA**229, 139**SE**822.
197-39 217**Ky**826, 290**SW**673; **Tex CivA** 290**SW**912, 915 [citCJ].
197-43 217**Ala**168, 115**S**156, 160, 161 [citCJ&Cyc], 56**ALR**1075; 224**AppDiv** 136, 229**NYS**682; **TexCivA** 281**SW**624. See also 82**NH**167, 131**A**354.
198-44 218**Ky**327, 291**SW**705; 145**Va** 776, 134**SE**710, 714 [citCJ].
198-48 215**Ala**587, 112**S**195; 215**Ky** 644, 286**SW**846; 83**NH**200, 140**A**169; 37 **OklACR**611; 193**Wis**72, 213**NW**669.
198-49 218**Ky**473, 291**SW**760.
198-49½-New. The language of forfeiture clauses will not be extended beyond the plain meaning of the words used. 215**Ky**644, 286**SW**846.
198-51 37**GaA**203, 139**SE**362.
199-57 **IndA** 169**NE**342.
199-58 **IndA** 169**NE**342.
199-58½-New. Insurer learning after loss, of breach, need not act affirmatively or repay premiums before suit; 86 **IndA**240, 156**NE**833.
199-58⅓-New. nor need insurer notify insured of an intention to avoid the policy. 86 **IndA**240, 156**NE**833.
200-63 See also 167**La**74, 118**S**697(2d case).
200-65 **TexCivA** 290**SW**912.
201-92 217**AppDiv**197, 216**NYS**564, 567 [quotCJ].
201-93 217**AppDiv**197, 216**NYS**564, 567 [quotCJ].
202-13 [a] (1) 23**F(2d)**322 (clause held breached). (6) Violation of "clear space" clause in fire policy prevents recovery on policy unless there was waiver by insurer. 31 **OhA**82, 166**NE**393.
203-27 16**F(2d)**798.
203-33 16**F(2d)**798; 227**AppDiv**103, 237**NYS**120; **TexCommnA** 23**SW(2d)** 681. [b] (14) Conversion of dwelling into boarding house. 16**F(2d)**798. [c] (10) Operation of cooker in farm building primarily to obtain food for hogs. 195**Wis**615, 219**NW**357. (11) Order closing hotel for violation of Prohibition Act. 36**F(2d)**625. (12) Other instances. 129**Kan**225, 282**P**571 (farm purposes). [d] (3) See also **TexCivA** 290**SW**912.
205-36 **SD** 231**NW**900, 901 [quotCJ].
205-39 195**Wis**615, 219**NW**357.
205-40 30 **OhA**458, 165**NE**506; **Tex CivA** 290**SW**912.
205-47 151**Wash**545, 276**P**537.
205-48½-New. A fire insurance contract covering a building is issued upon

the hazard incident to the use to which it is being put when, and as, insured. 217Ky590, 290SW500.

205-48½-New. A fire policy stipulating for insurance on a building while "occupied by owners and not otherwise" has been held to cover risk while occupied by the tenant, in view of a further provision that change of possession "except change of occupants with increase of hazard" should avoid liability. **TexCommnA** 285SW265.

206-52 85Mont248, 278P509; **TexCivA** 290SW912; 151Wash545, 276P537.

206-58 22F(2d)671; 195Wis615, 219NW357.

206-61 200Wis255, 227NW873 (manufacturing liquor on premises).

206-62 [b] **Increase of hazard held within control** and knowledge of owner of premises. 39F(2d)25. [c] **Storage of gasoline and alcohol** and use in manufacture of alcoholic spirits has been held not justified under work and material clause. 39F(2d)25.

206-63 But see 39F(2d)25.

206-66 218Ky124, 290SW1073.

207-84 202 Iowa1270, 211NW860.

209-1 196NC335, 145SE616.

209-2 **MoA** 32SW(2d)111; 196NC335, 145SE616; **TexCivA** 278SW488. See also 155Wash6, 283P177. [e] **Insured is bound to know condition.**-194Wis325, 216NW654.

209-8 See also 195Wis494, 218NW845.

210-15 243NY72, 152NE469.

210-15½-New. In Ontario, where a policy covers a building only while occupied as a private dwelling, a loss occurring while the building is unoccupied is not within the policy. 62 OntL311, [1928] 2DomLR1007.

210-15¼-New. Vacancy clause has been held applicable to dwelling located in fire protection district under California statute. 102CalA510, 283P338.

210-24 102CalA510, 283P338.

210-25 222MoA1010, 7SW(2d)463; 193 Wis72, 213NW669.

210-27 **TexCivA** 278SW488; 194Wis 325, 216NW654.

211-33 25F(2d)398.

211-36 222MoA1010, 7SW(2d)463.

211-39 **TexCivA** 13SW(2d)717.

211-40 241Mich413, 217NW8, 9 [citCJ].

211-41 See also **TexCivA** 278SW488.

211-49 **TexCivA** 278SW488.

212-61 125 Or571, 267P815.

212-62 125 Or571, 267P815.

212-67 125 Or571, 267P815.

213-73 See also 195Wis494, 218NW845.

213-75 **MoA** 32SW(2d)111. [a] **Any occupancy satisfying letter of condition** is sufficient. **MoA** 32SW(2d)111.

213-85 102CalA510, 283P338; **MoA** 32 SW(2d)111; 125 Or571, 267P815; **Ont** [1930] 1DomLR284 (occupation must be actual). [c] **Altering, repairing, or moving building** does not constitute occupancy. 102CalA510, 283P338.

214-86 155Wash6, 283P177.

214-88 172Ark767, 290SW367; 127Me 528, 145A243.

214-89 195Wis494, 218NW845.

215-6 **MoA** 32SW(2d)111.

215-15 102CalA510, 283P338 (storing tools in room).

215-16 **MoA** 32SW(2d)111.

216-21 33PortoRico773; **Ont** [1930] 2DomLR265.

217-28 174Ark772, 296SW724, 727 [cit CJ].

217-39 [a] (4) Barn isolated by removal of dwelling and insured taking up residence elsewhere. **Ont** [1930] 1 DomLR241.

218-54 See also **NH** 149A498.

218-56 39F(2d)25; 219Ky119, 292SW 765; 125Me255, 132A745; **NH** 149A498. [a] (3) Language of provision in policy permitting use of kerosene oil stove has been held equally applicable to any part of insured premises. **NH** 149A498. [b] **Custom of doing business** is no excuse for violation. 97PaSuper27.

219-61 97PaSuper27. [d] (4) Keeping gunpowder in fireworks in building held to violate term of policy. 258Mass508, 155NE435. (5) Keeping gunpowder in fireworks in building held to violate terms of policy. 258Mass508, 155NE 435.

219-62 [d] (5) **Construction of statutory prohibition as to keeping.** 43Que KB122, [1928] 1DomLR526.

220-68 125Me255, 132A745.

221-76 96PaSuper521.

221-77 125Me255, 132A745; 83NH200, 140A169; 253NY64, 170NE495.

222-90 125Me255, 132A745, 746 [cit CJ]. See also 6LaA767, 769 [citCyc].

223-2 See also **MoA** 277SW588.

223-5 25F(2d)555, 559 [quotCJ].

225-22 329 Ill158, 160NE222; 232Ky 785, 24SW(2d)616; **NH** 149A498 (reasonable construction); 228AppDiv33, 238NYS389. [a] **Order closing hotel for violation of National Prohibition Act** is not increase of hazard. 36F(2d)625. [b] **Alteration must be material.**-**NH** 149 A498.

225-23 **Wis** 230NW711.

225-30 **NJSup** 147A481.

225-32 265Mass181, 160NE668, 57ALR 944; 85Mont248, 278P509.

226-33 263Mass181, 160NE668, 57ALR 944 (negligent use of sulphur candles in fumigating).

227-64 **NJSup** 148A170.

227-68 **NJSup** 148A170.

227-70 152Wash637, 278P702.

227-75 [a] **Locality of insured property** is essential part of fire risk. **NJ Sup** 148A170.

228-88 238Mich112, 213NW458; **Tex CivA** 13SW(2d)895.

228-93 But see 145Miss494, 111S135.

228-96½-New. Oral consent given by an agent is sufficient, regardless of a policy provision for writing. 238Mich 112, 213NW458.

228-3 79Mont166, 255P340, 60ALR1. But see 82NH167, 131A354.

229-6 See also 82NH167, 131A354.

229-7 216Ala55, 112S336, 52ALR838; 227Ky3, 12SW(2d)358; 81Mont281, 264 P132; **TexCivA** 13SW(2d)465. [b] **Object of stipulation against sale of property** is based upon idea that risk and hazard of loss may be increased by change of ownership. 82NH167, 131A 354.

229-10 79Mont166, 255P340, 60ALR1.

229-12½-New. Conveyance subsequent to fire does not affect insurer's liability. **MoA** 32SW(2d)111.

229-13 79Mont166, 255P340, 60ALR1.

229-14 220Ala103, 124S215(2dcase); 41 GaA586, 153SE796 (transfer of property held under conditional sale); 79Mont 166, 255P340, 60ALR1.

230-24 43 Ida222, 253P379, 383 [citCJ entire section].

230-24½-New. General language in a mutual policy avoiding insurance on change of ownership does not control against a particular clause saving insurance to the mortgagee. 177Minn509, 225NW445.

230-35 Contra 129Kan225, 282P571.

231-40 **LaA** 130S828; 37 OklACR611, 612 [quotCJ]. [a] **As long as interest of insured owner is of such nature that he must suffer entire loss if property be destroyed,** there has been no such change in title or interest of insured as forfeits insurance containing provision against change of interest or title. 227 Ky3, 12SW(2d)358.

231-41 37 OklACR611, 612 [quotCJ].

231-51 See also 43 Ida222, 253P379.

231-56½-New. Transfer by owner to husband so as to create joint tenancy violates condition against change of title. 187Wis432, 204NW331.

231-56⅓-New. A sale of an undivided interest in insured property is a change in insurable interest of insured within a policy prohibiting such change. **Tex CivA** 281SW624.

231-56¼-New. Ratification of sale under a deed of trust to holders of secured notes affects change of ownership. 150Md211, 132A635, 45ALR582.

231-56⅙-New. A fire policy, payable to trustee under a deed of trust, does not inure to the benefit of holders of negotiable notes under a trust deed purchasing the premises. 150Md211, 132A 635, 45ALR582.

231-56⅛-New. Change in title to a detached portion of insured's land on which insured's house and barn are not located is not within the condition against change in title. **MoA** 17SW(2d) 397.

231-56½-New. Policy void for change in interest is not reinstated by insured's reacquisition of the property before loss. 216Ala55, 112S336, 52ALR838.

231-58 37GaA229, 139SE822.

232-61 210Ky237, 275SW691; 220Ky 326, 295SW158.

232-63 **LaA** 130S828 (deed in escrow). [a] (1) **SD** 231NW900. See also 226 AppDiv596, 236NYS205. [a] (2) Where husband, as part of property settlement with wife, executed deed to her which he deposited in bank without directions and later withdrew deed and delivered it to wife after destruction of property by fire, there was no valid delivery in escrow before fire so as to relieve insurer from liability. 210Ky237, 275SW 691.

232-68½-New. Where insured accepts payment of the purchase price and delivers a deed under an oral agreement that the deed shall not take effect to vest title until a stated later date, and a fire occurs before such date, insured cannot recover. 222Ky257, 300SW608.

232-72 82NH167, 131A354. [a] **Foreclosure of mortgage after loss** does not affect forfeiture resulting from sale in violation of condition and taking back mortgage, since rights of parties are fixed at moment of loss. 82NH167, 131 A354.

232-73 **TexCivA** 13SW(2d)465.

232-75½-New. Under policy, conditional sale of an automobile has been held a "sale" and not a bailment, thereby excluding such property from risk. 220Ky6, 294SW773.

232-79 43F(2d)467 (substitution of wife instead of husband as grantee).

233-86 79Mont166, 255P340, 60ALR1; **NJ** 151A613.

233-89 150Md211, 132A635, 45ALR 582; 79Mont166, 255P340, 60ALR1; **TexCivA** 13SW(2d)465.

233-90 See also **TexCivA** 22SW(2d) 548.

233-92 79Mont166, 255P340, 60ALR1.

234-97 43F(2d)467 (contract for exchange); 220Ala103, 124S215(2dcase); 105NJL422, 144A797; **TexCivA** 278SW 959; **TexCivA** 13SW(2d)465.

234-99 216Ala55, 112S336, 52ALR838; 79Mont166, 255P340, 60ALR1. But see 57ND462, 222NW609(3dcase).

234-6½-New. An unauthorized contract of sale by an agent, not expressly ratified by the owner, does not work change of interest avoiding the policy. 15F(2d) 957.

234-8 43 Ida222, 253P379.

234-10 35F(2d)916; 215Ky644, 286 SW846.

234-10½-New. It has been held that, where a mortgage is for but a small part of the value of real property, it is not sufficient to affect the owner's real interest. 215Ky644, 286SW846.

235-14 48RI321, 138A39.

235-15 [a] **Validity of mortgage.**-**Tex CommnA** 285SW265.

235-17 128Kan323, 278P48.

235-24 See also 37GaA229, 139SE822.

235-26½-New. A conditional sale of personal property accompanied by a change of possession is a change of interest therein. **TexCivA** 281SW624.

235-31½-New. There can be no recovery for the loss of an automobile by fire while being operated by the lessee under contract in violation of express terms of the policy. **Nebr** 227NW821.

236-33 222AppDiv219, 225NYS615.

236-57 **TexCivA** 271SW256.

237-59 **TexCivA** 271SW256.

237-62 226Ky554, 11SW(2d)427.

237-70 226Ky554, 11SW(2d)427.

238-81 [b] **Commencement of suit** by trustee of husband to set aside deed to wife, insured, is not change of interest. 32F(2d)631.

238-84 43 Ida1, 249P89, 48ALR1225.

238-85½-New. A mechanic's lien does not constitute a change in interest, title, or possession so as to avoid the policy. 216Ky329, 287SW896.

238-87½-New. Voluntary partition of land by the heirs, one of whom becomes the sole owner, is not a sale. 129Kan 283, 282P582.

238-89 **Wis** 228NW746. [a] **Provision of foreclosure by reason of mortgage or deed has been held inapplicable** to fore-

closure of land contract or lien. **Wis** 228NW746.

238-98 329 **Ill** 158, 160NE222; 122**Kan** 328, 252P263; 221**Ky**668, 299SW545; 153**Va**416, 150SE257.

239-3 221**Ky**668, 299SW545.

239-4 122**Kan**328, 252P263; **TexCivA** 275SW316, 320 [quotCJ].

239-5 **TexCivA** 275SW316.

239-6 234**Ky**183, 27SW(2d)699.

239-14 234**Ky**183, 27SW(2d)699.

239-18 153**Va**416, 150SE257 (where there is more than one trust deed against property, knowledge of advertisement under any trust deed is sufficient).

239-23 81**Mont**281, 264P132, 135 [cit CJ]. See also 234**Ky**183, 27SW(2d)699.

239-25 But see **NC** 154SE9; 106**WVa** 85, 144SE879.

239-26½-New. Failure to notify the insurance company of foreclosure proceedings against the premises, as required by the policy, has been held to avoid liability of insurer as to the owner. 150**Md**211, 132A635, 45**ALR**582.

239-28 **MoA** 11SW(2d)1101.

239-29 See also **TexCivA** 275SW316.

240-31 **TexCivA** 275SW316, 320 [quot CJ].

240-33 **MoA** 11SW(2d)1101.

240-43 See also 145**Va**776, 134SE710.

240-49 36F(2d)225.

240-51 227**Ky**3, 12SW(2d)358; 232**Ky** 548, 24SW(2d)292 (buildings destroyed before day advertised for sale). But see 224**Ky**360, 6SW(2d)477.

240-52 Contra 224**Ky**360, 6SW(2d)477.

240-53 **MoA** 25SW(2d)1075.

240-54 142**Miss**199, 106S633. [b] **If owner of property sold under judgment was entitled to redeem property,** there was no such change of interest or title as would forfeit insurance. 227**Ky**3, 12 SW(2d)358.

241-60 12F(2d)660.

241-67 250**NY**116, 164NE876 [rearg den 250**NY**587, 166NE334(3dcase)].

242-85 33**Ariz**288, 264P103.

243-15 57**ND**462, 222NW609(3d case).

243-17½-New. Under provisions for forfeiture, change of possession may avoid the policy where the owner leases the building to be, or with knowledge that it will be, used for a purpose that would increase the hazard. 217**Ky**590, 290SW500 (when change takes place).

243-22 24F(2d)491; 218**Ky**473, 291SW 760; 220**Ky**802, 295SW1054; **MoA** 23 SW(2d)1095; 153**Wash**635, 280P57 (that insured cannot read or write English is immaterial where no misrepresentation was made regarding provisions against encumbrances).

244-23 [a] **In Nebraska.**-114**Nebr**194, 206NW765.

244-23½-New. But some statutes declare void a provision that a policy shall become void if property is encumbered. **TexCivA** 272SW611 (provision that insurer shall not be liable for loss while encumbered held within statute).

244-23⅓-New. Such a statute precludes the defense of breach of such a provision regardless of statute barring defense of breach of condition or warranty unless such breach contributed to loss. **TexCivA** 272SW611.

244-34 208 **Iowa**1030, 226NW781.

244-39 35F(2d)916; 222**Ky**757, 2SW (2d)397.

244-44 [b] **Statute that only material or fraudulent misrepresentation shall preclude recovery does not apply to** breach of condition by mortgaging insured property. 218**Ky**473, 291SW760.

244-45 220**Ky**802, 295SW1054.

245-49½-New. A mortgage on a part of the property has been held not to forfeit the right to recover for loss of property not covered by the mortgage. 91**Fla**565, 108S165.

245-49⅓-New. Decrease in value of land increasing the ratio between such value and the amount of encumbrances does not offend a provision of a policy limiting encumbrances. 192**Wis**160, 212 NW301.

245-49¼-New. Execution of a mortgage on insured realty for the sole purpose of securing claims which are already liens against the property in the hands of executors does not increase the hazard so as to vitiate the policy. 205 **Iowa**1294, 217NW816.

245-49⅙-New. A clause that the policy shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage does not apply to new chattels bought and mortgaged as the policy went into effect. 6**LaA**163.

245-51 31**Ariz**8, 250P248; 192**Wis**160, 212NW301.

245-52 31**Ariz**8, 250P248.

245-53 192**Wis**160, 212NW301.

245-54 192**Wis**160, 212NW301.

245-62 220**Ky**234, 294SW1070; 223**Ky** 583, 4SW(2d)372.

245-64 31**Ariz**8, 250P248.

246-78 [b] **MoA** 23SW(2d)1095.

246-83 **TexCivA** 281SW283.

246-87 153**Wash**635, 280P57.

246-88 208 **Iowa**1030, 226NW781.

248-29 36F(2d)69.

248-35 135**Wash**547, 238P565 (warranty concerning maintenance of sprinkler system).

249-36 135**Wash**547, 238P565.

249-52 25F(2d)415; 215**Ala**564, 112S 154; 217**Ala**292, 116S142; 33**GaA**715, 128SE13 (failure to comply will prevent recovery); 169**La**63, 124S147; 50 **SD**285, 209NW652; 160**Tenn**208, 22 SW(2d)356; **TexCivA** 271SW256; **Tex CivA** 294SW953; **TexCivA** 298SW178.

249-54 226**Ky**246, 10SW(2d)829.

250-57 213**Ala**132, 104S224, 39**ALR** 1436 [citCJ]; 215**Ala**564, 112S154; 217 **Ala**168, 115S156, 160 [citCJ], 56**ALR** 1075; 33**GaA**715, 128SE13 (stipulations condition precedent to action); 160**La** 683, 107S489; 50**SD**285, 209NW652.

250-62 163**La**284, 111S707; 169**La**63, 124S147.

250-65 25F(2d)415; 172**Ark**715, 290 SW594. See also 33**GaA**715, 128SE13. [c] **Resort may not be had to extraneous sources of information** to determine whether record clause of policy has been complied with. **TexCivA** 298SW178.

251-68 217**Ala**292, 116S142; **TexCivA** 293SW279.

251-70 217**Ala**168, 115S156, 56**ALR** 1075.

251-70½-New. While a clause in a fire policy requiring insured to keep a set of books clearly presenting a complete record of business transacted should be given full legal effect to prevent fraud or imposition on insurer, the parties' intent should be sought, and reasonable, practicable application of clause made to the facts of the case, substantial compliance therewith being sufficient. 28 F(2d)658.

251-72 **TexCivA** 30SW(2d)715.

251-73½-New. A policy avoided by failure to comply with the iron safe clause can be revived only by mutual consent of the contracting parties to a reinstatement of the policy. 217**Ala**168, 115S156, 56**ALR**1075.

251-73⅓-New. Compliance with provisions requiring keeping of books and inventories must be sufficient reasonably to show the quantum and value of personal property on hand and destroyed. 217**Ala**168, 115S156, 56**ALR**1075.

251-73¼-New. Under record warranty clauses, inventory and books are sole depository of data contracted for, which cannot be supplied from extraneous sources. **TexCivA** 31SW(2d)859.

251-75 130**Kan**735, 288P738. [a] 22 F(2d)793; 28F(2d)658; 162**Ga**313, 133 SE741; 192**NC**8, 133SE337, 47**ALR**645; **TexCivA** 272SW634; **TexCivA** 293SW 279. [b] 168**La**696, 123S295.

251-77 217**Ala**168, 115S156, 56**ALR** 1075; 168**La**696, 123S295; **TexCivA** 289SW703; **TexCivA** 292SW922. [a] **Operative effect of iron-safe clause** is not postponed for thirty days where inventory was taken within twelve months prior to issuance of policy. 50**SD**285, 209NW652.

252-78 217**Ala**168, 115S156, 56**ALR** 1075.

252-83 **TexCivA** 20SW(2d)399 (where policy renewed).

252-85½-New. Where a policy requires an inventory to be taken once in each calendar year and within thirty days after the date of the policy, if none has been taken within twelve months prior thereto, an assignee must take inventory within thirty days after assignment. 217**Ala**168, 115S156, 56**ALR**1075.

252-88 33**GaA**715, 128SE13 (at time of making inventory). [a] (3) Inventory sufficient without stating expressly that separate items of goods were of specified "actual value" at time inventory taken. 35**GaA**586, 134SE201. (4) Inventory designating items by names of brands is substantial compliance. **TexCivA** 287SW281. (5) Other instances. **MoA** 285SW803. [b] (6) Inventory showing original purchase price but not value at time of making inventory. 33**GaA**715, 128SE13. (7) Inventory itemizing only fifty per cent of stock is insufficient. **TexCommnA** 280SW538. (8) Statement placing many kinds of stock in two groups. **TexCivA** 289SW703. (9) Entry of lump sum paid for merchandise is insufficient. 217**Ala**168, 115S156, 56 **ALR**1075.

252-89 **TexCivA** 272SW634.

252-90½-New. The rule requiring complete itemized list in inventory is to be reasonably construed. **TexCivA** 272SW 634.

252-90⅓-New. Inventory is sufficient if, with reasonable certainty, class, kind, and amount of various articles and value thereof can be ascertained by persons familiar with such matter and stock. **TexCivA** 272SW634.

252-91 **TexCivA** 289SW703.

252-92 But see 162**Ga**313, 133SE741.

253-97½-New. Valuation of stock adopted as a means of settling a prior loss and including only part of the goods subsequently insured does not relieve insured from making an itemized inventory as required by the policy, where none is on hand. **TexCivA** 289SW703.

253-97⅓-New. A stipulation requiring insured to keep inventories must be interpreted with reference to usages of the particular business involved. 18F(2d) 457.

253-97¼-New. Such requirement does not require that lists of quantity and sizes of lumber should specify grades, where it appears that insured, in manufacturing lumber, relied on average grades. 18F(2d)457.

253-97⅕-New. The inventory required is such that an ordinary person, familiar with the system employed, can ascertain therefrom, with reasonable certainty, the quantum and value of the business and property insured. 217**Ala**168, 115S156, 56**ALR**1075.

253-8 But see **TexCivA** 289SW703.

253-9 25F(2d)415. [a] **Books kept by insured covering stock of merchandise covered by fire policy sufficiently complied with warranty** requiring maintenance of books clearly and plainly presenting record of business transactions, where they showed items of credit sales and amounts collected from cash sales. 218**Ala**627, 119S834.

254-11 163**La**284, 111S707.

254-16 16F(2d)774, 775 [citCJ]; 213 **Ala**132, 104S224, 39**ALR**1436 [citCJ]; 217**Ala**168, 115S156, 56**ALR**1075; 217 **Ala**292, 116S142; 218**Ala**627, 119S834; 35**GaA**586, 134SE201; 169**La**63, 124S 147. [b] (5) Sufficient if amount of purchasers and amount of sales can be ascertained and cash transactions distinguished from those on credit. 35 **GaA**586, 134SE201. [d] (2) Entry of lump sum paid for merchandise at opening of books, not supported by inventory required by policy, is insufficient. 217**Ala**168, 115S156, 56**ALR**1075. (3) Where books kept do not furnish complete record of business transactions. 168**La**696, 123S295. [e] **Requirement as to record of grades of rice and of transactions, if any.**-174**Ark**84, 294SW 378.

254-17 217**Ala**292, 116S142; 35**GaA** 586, 134SE201.

254-18 25F(2d)415.

254-19 28F(2d)658.

254-22 130**Kan**735, 288P738.

255-23 See also 28F(2d)658.

255-29 213**Ala**132, 104S224 (loose leaf memoranda kept in drawer and not designed for keeping in fireproof safe held not sufficient).

255-32 13F(2d)612; 160**La**683, 107S

489; **TexCivA** 294SW953. [a] (2) **Unlocked safe is sufficient complaint.** 163 **La**284, 111S707. [b] **Where policy requires keeping in safe place away from store, if not in safe,** insured cannot recover where he kept books in store, though insurer waived iron-safe clause. **MoA** 284SW161. [c] **Violation of iron-safe clause affects only merchandise** in policy covering merchandise, store building, and furnishings. **LaA** 130S 828.

255-34 16F(2d)774.

255-35 218Ala627, 119S834.

256-46 See also 172Ark715, 290SW594.

256-49½-New. , nor by the fact that cash sales slips were not so preserved. 28F(2d)658.

256-51 8F(2d)134; 217Ala168, 115S 156, 56ALR1075.

256-53½-New. Keeping records safely. Under a requirement to keep records safely and securely, insured has the duty only of using due care in keeping them safely, 22F(2d)882.

256-53¼-New. and he is not obligated to keep the records safely and produce them at all events, 22F(2d)882.

256-53¼-New. and failure to produce the records is not breach of such condition when destroyed without intent or negligence of insured. 22F(2d)882.

256-53½-New. Clause is not complied with by keeping only one book containing entry of purchases but not sales. 34 **PortoRico** 370.

256-53¾-New. [§ 320a] 8½. **Periodical Reports of Average Values.** Insurance will be defeated by insured's willful and persistent failure to make accurate records and reports of values and the location of the property as required by the policy, although not from inadvertent or occasional errors or omissions. 251NY98, 167NE184.

256-55 **MoA** 285SW144, 147 [citCJ]; **MoA** 287SW1084, 1086 [citCJ]. [b] **Amount of insurance.-TexCivA** 278SW 907.

256-57 119 **Oh**550, 165NE41.

257-59 30F(2d)20; **Kan** 293P402; 176Minn31, 222NW514; 130Misc420, 224NYS409; **TexCommnA** 284SW927; **TexCivA** 282SW656; **TexCivA** 21 SW(2d)1106; 197Wis487, 222NW831. [a] **In Texas.-CivA** 282SW656

257-63 208 **Iowa**450, 224NW524; 251 NY72, 167NE176.

257-64 197Wis487, 222NW831.

257-66 208 **Iowa**450, 224NW524.

257-72 8F(2d)439. [b] **Provision in standard fire policy, resulting from statute enacted in 1917,** that other insurance on same property, "whether valid or not," will relieve insurer from liability, if in contract with statute, providing that warranty shall not defeat policy, unless breach exists at time of loss, would prevail over such statute. 197Wis 487, 222NW831. [c] **Provision of standard fire policy, that, in absence of written agreement added thereto, insurer shall not be liable while insured has any other insurance on property covered,** is not "warranty," within statute providing that no warranty relating to fact prior to loss shall avoid policy, unless breach exists at time of loss. 197Wis 487, 222NW831.

259-93 222MoA892, 6SW(2d)645.

260-28 148Miss659, 114S730, 732 [cit CJ].

260-29 148Miss659, 114S730, 732 [cit CJ].

260-30 148Miss659, 114S730, 732 [cit CJ].

260-31 148Miss659, 114S730, 732 [cit CJ].

260-32 **TexCivA** 289SW726.

260-34 35F(2d)147 (pastor insuring church in furtherance of his own fraudulent designs); 215Ala587, 112S195; 227Ky741, 13SW(2d)1040; 11LaA430, 123S507; 134SC1, 131SE781; **TexCivA** 5SW(2d)844. [a] **Knowledge of county board of education held not imputable to school district trustees.-**215Ala587, 112S195.

261-40½-New. Where insured procured additional insurance in the belief that a prior policy had expired, it became his duty upon discovery of facts to repudiate his additional insurance in order to claim the benefit of the prior policy. 148Miss659, 114S730.

261-43 208 **Iowa**450, 224NW524; 59 **OntL**641, [1927] 1**DomLR**477. Contra 251NY72, 167NE176.

262-51 30F(2d)20.

262-58 30F(2d)20; **Miss** 115S346 (policy not delivered).

263-70 11LaA430, 123S507; **MoA** 290 SW456; **TexCivA** 278SW907.

263-80 148Miss659, 114S730.

264-95 **MoA** 290SW456; 251NY72, 167NE176; **TexCivA** 278SW907, 912 [citCJ].

264-96 86**Colo** 293, 281P366, 66**ALR** 1166 (trustee and cestui que trust); 222MoA892, 6SW(2d)645; **TexCivA** 278 SW907, 912 [citCJ].

265-2 **TexCivA** 278SW907.

265-9½-New. Insurance on wife's goods does not invalidate a policy insuring all property in the house, prohibiting further insurance. **MoA** 290SW456.

265-12 **TexCivA** 278SW907. [a] **Mortgagee's interest** held separately insurable without violation of "concurrent insurance" clause. **TexCivA** 278SW907.

265-14 [a] **In Texas.-CivA** 298SW451.

266-22 134SC1, 131SE781.

266-24½-New. Mortgagor with notice has been held estopped to deny that he had no part in continuance of insurance taken out by mortgagee. **TexCommnA** 284SW927.

266-24½-New. A policy taken out by mortgagee under a clause in a chattel mortgage is not taken out as agent for the mortgagor. **TexCivA** 278SW907.

266-42 82NH167, 131A354.

267-48 **TexCivA** 281SW283.

267-48½-New. A provision prohibiting assignment is based on the idea that risk and hazard of loss may be increased by a change of ownership. 82NH167, 131A354.

267-59 **TexCivA** 281SW283.

268-77 5F(2d)489; 215Ala107, 110S 30; 178Ark566, 11SW(2d)475; 181Ark 824, 28SW(2d)63; **Kan** 293P402; 217 Ky826, 290SW673; 227Ky88, 11SW(2d) 976; 234Ky748, 29SW(2d)1; 235Ky 439, 31SW(2d)699; 121 **Okl** 124, 247P 990; **TexCivA** 275SW313 (premium note); **TexCivA** 288SW257.

269-81 30F(2d)929.

269-83 44**Philippine**98 (insurance by warehouseman).

269-84 50SD519, 210NW744.

269-86 **TexCivA** 275SW313.

269-88½-New. Attaching indorsement showing additional premium to policy effected valid insurance though additional premium not paid. 229**AppDiv** 2, 240NYS749.

269-89 208 **Iowa**1020, 226NW777.

269-93 213Ala488, 105S553 (not forfeiture); 178Ark566, 11SW(2d)475; 161 **Ga**559, 131SE359; 121 **Okl** 124, 247P 990; 122 **Okl** 53, 250P918, 920 [citCJ]; 89**PaSuper**569; **TexCivA** 11SW(2d)395; 106WVa177, 145SE181.

270-95 161Ga559, 131SE359.

270-5½-New. Where a local soliciting agent had, by the terms of a policy, no authority to reinstate a policy for nonpayment of premium, it is immaterial that insured in making payment to him for such reinstatement did not know that his agency had been revoked. **Tex CommnA** 276SW219.

270-5¾-New. A renewal supplement, issued to insured after default, simply continues the policy for an extended term subject to its then conditions. 106 WVa177, 145SE181.

270-5¼-New. Under some statutes, where insured fails to pay an assessment due to a county mutual insurance company after notice and before destruction of the property by fire, the policy is suspended. **SD** 225NW721.

270-5⅚-New. Delay in paying premium installments does not extend policy so as to cover period not provided for in contract. 235Ky439, 31SW(2d)699.

270-6 **LaA** 129S404 (stipulation requiring notice before cancellation is not applicable to suspension).

270-15 208 **Iowa**1020, 226NW777 (statute is not applicable to mutual associations).

270-17½-New. Nonpayment of an assessment duly levied and noticed automatically suspends a policy issued by an assessment insurance association and denies the policy holder the right of recovery for loss while he is delinquent in payment of assessment where the policy so provides.. 201 **Iowa**263, 207NW117.

270-17½-New. A statutory provision for cancellation on five days' notice has no application to such policy provision for suspension. 201 **Iowa**263, 207NW 117.

271-25 40F(2d)384.

271-29 40F(2d)384.

271-39 [a] (2) See also 208 **Iowa**716, 224NW50.

271-47 But see 181Ark824, 28SW(2d) 63.

272-62½-New. Notice that liability under a policy would be suspended if a note was not paid in thirty days is ineffective where the premium had been paid up to and beyond the due date of the note. 50SD519, 210NW744.

272-63 But see **TexCivA** 11SW(2d)395.

272-72½-New. Failure to pay premiums where amount was in dispute does not cause forfeiture of policy. 229**App Div**2, 240NYS749.

272-73 213Ala488, 105S553. [b] **Matters not constituting extension.-SD** 225 NW721.

273-74 213Ala488, 105S553.

273-78 [a] (2) Insurer was not liable to creditors named, since they were merely appointees to whom any loss due to insured was payable. 196NC546, 146SE216.

273-80½-New. Where the purchaser of an insured stock of goods enters into possession and operates the business as owner, subject to the seller's contract of sale, and a renewal of the policy provides for payment of loss to the seller to the extent of his unpaid contract debt and the balance to the purchaser, the seller and purchaser are joint adventurers as to the insurance. 217**Ala**168, 115 S156, 56**ALR**1075.

273-80½-New. Where a policy is taken in the name of one person and the loss is payable to another who obtains the policy and pays the premium, the latter person is insured and the one to whom the conditions of the policy apply. 87**PaSuper**349.

273-87 But see 217**Ala**168, 115S156, 56 **ALR**1075.

274-94½-New. Conditional sellers are mere appointees under a loss payable clause of a policy issued to a conditional buyer. 43 **Ida**1, 249P89, 48**ALR**1225 (rights of appointee).

274-96 19F(2d)134; **Ala** 129S470; 221 Ky668, 299SW545; 317**Mo** 1144, 298SW 741, 56**ALR**842; 134Misc90, 234NYS40; 226**AppDiv**596, 236NYS205; 56ND319, 217NW273; 37 **OklACR**584; 136**Wash** 686, 241P292. But see 101**CalA**334, 281 P668(2dcase); **Md** 148A252; 50**RI** 203, 146A763. [a] **Fact that embezzlement rider was issued in favor of mortgagee** held not to change relationship in main policy between mortgagor and insurer. 136**Wash**686, 241P292.

275-97 168**La**850, 123S596 (mortgagor's failure to furnish proofs of loss).

275-99 [a] **Standard mortgage clause attached to fire policies** operates as separate insurance of interest of respective mortgagees. 197NC68, 147SE691. [b] **Insurance companies are liable to mortgagee under standard mortgagee clauses inserted in fire policies** as provided by Insurance Law, notwithstanding appointment and transfer of possession to receiver in bankruptcy. 250NY116, 164 NE876 [rearg den 250NY587, 166NE334 (3dcase)].

275-1 **Kan** 293P402; 220Ky234, 294 SW1070; 127Me528, 145A243; 37 **OklA CR**584; **SD** 225NW721; **TexCivA** 21SW (2d)1106.

275-2 127Me528, 145A243.

275-3 See also 127Me528, 145A243.

275-4 127Me528, 145A243; 222**AppDiv** 219, 225NYS615. [b] **Failure to pay assessments.-SD** 225NW721.

276-6½-New. Failure of insured's bankruptcy receiver to give prompt notice of fire loss held not to affect mortgagee's right. 222**AppDiv**219, 225**NYS** 615.

276-6¼-New. Under statute no act of neglect of the mortgagor or owner will prejudice the interest of the mortgagee

or trustee under any fire insurance contract. **TexCivA** 16**SW(2d)**360.

276–6¼–New. Insurer, under a policy containing a loss payable clause to the mortgagee, could not permit insured on occurrence of the loss to make a settlement with the wrongdoer and then defeat the contractual rights of the mortgagee by invoking a settlement. 227**Ky**652, 13**SW(2d)**1005.

276–6½–New. Banks holding trust receipts for merchandise insured by fire policies are not mortgagees, within mortgagee clauses providing that insurance shall not be invalidated as to the mortgagee's interest by the mortgagor's neglect. 250**NY**116, 164**NE**876 [rearg den 250**NY**587, 166**NE**334(3dcase)].

276–11 39**F(2d)**826; 101**CalA**334, 281**P**668(2dcase). [a] **Bank holding trust deed** held not chargeable with knowledge of director. 39**F(2d)**826.

276–15 219**Ala**332, 122**S**346; 9**LaA**337, 120**S**511.

276–16 160**La**683, 107**S**489. [e] 163**La** 284, 111**S**707.

277–24 107**WVa**304, 148**SE**125.

277–25 103**NJL**529, 138**A**97; 192**NC**8, 133**SE**337, 47**ALR**645.

278–4 55**ND**112, 212**NW**518, 520 [cit CJ].

278–5 216**Ala**55, 112**S**336, 52**ALR**838.

278–7 194**NC**683, 140**SE**706.

279–8 221**Ky**668, 299**SW**545; 194**NC** 683, 140**SE**706.

279–9 234 **IllA**1; 150**Md**211, 132**A**635, 45**ALR**582.

279–23 **TexCivA** 273**SW**628; **TexCivA** 273**SW**629.

279–27½–New. Waiver of the iron-safe clause cannot be based on what occurred before the policy was issued. **MoA** 284 **SW**161.

279–28 48**RI** 321, 138**A**39.

280–30 48**RI** 321, 138**A**39, 42 [citCJ].

280–32 48**RI** 321, 138**A**39, 42 [citCJ].

280–33 48**RI** 321, 138**A**39.

280–34 216**Ky**589, 288**SW**321.

280–35 **TexCivA** 289**SW**1032.

280–36 25**F(2d)**398; **TexCivA** 294**SW** 953.

281–47 234 **IllA**1; **Iowa** 215**NW**244; 150**Md**211, 132**A**635, 643, 45**ALR**582 [quotCJ]; **Minn** 231**NW**401 (option to rebuild); 102**NJL**414, 131**A**910; **NJSup** 133**A**513; **TexCivA** 294**SW**953.

281–48 177**Ark**109, 5**SW**719.

281–50 22**AlaA**467, 116**S**898; 171**Ark** 733, 286**SW**804, 48**ALR**349; 217**Ky**612, 290**SW**493; 55**ND**112, 212**NW**518, 520 [citCJ].

281–51 202 **Iowa**1172, 211**NW**710; **Iowa** 215**NW**244; 205 **Iowa**119, 217**NW** 258; 150**Md**211, 132**A**635, 643, 45**ALR** 582 [quotCJ]; **TexCommnA** 271**SW**893; 107**WVa**687, 150**SE**7.

281–52 152**Wash**637, 278**P**702.

281–53 234 **IllA**1; **TexCivA** 273**SW**628; **TexCivA** 289**SW**1032; **TexCivA** 294**SW** 953; **TexCivA** 20**SW(2d)**399; **TexCivA** 30**SW(2d)**715.

282–54 **TexCivA** 8**SW(2d)**787.

282–70 **TexCivA** 8**SW(2d)**787.

282–71 25**F(2d)**415; 177**Ark**109, 5**SW** **(2d)**719; 202 **Iowa**1172, 211**NW**710; **NJ Sup** 147**A**481 (vacancy and occupancy permit in fire policy). [b] **Policy providing for waiver in writing** is not violated by agent's agreement to waive provisions of policy by attaching forms for protection of mortgagees. 34**F(2d)**53.

282–74 **TexCivA** 289**SW**1032.

283–77 251**NY**98, 167**NE**184; 122 **Okl** 53, 250**P**918, 920 [citCJ]; 120 **Or**411, 252**P**75.

283–78 22**F(2d)**882; 177**Ark**109, 5**SW** **(2d)**719; 122 **Okl** 53, 250**P**918, 920 [cit CJ]. [d] **Changes made in policy by insurer after loss without consent of insured** do not estop insurer from denying liability when accompanied with denial of liability for loss. 194**Wis**325, 216**NW** 654.

283–79 122 **Okl** 53, 250**P**918, 920 [cit CJ].

283–80 177**Ark**109, 5**SW(2d)**719; 122 **Okl** 53, 250**P**918, 920 [citCJ].

283–81 150**Md**211, 132**A**635, 643, 45 **ALR**582 [quotCJ].

284–83 48**RI** 321, 138**A**39.

284–84 48**RI** 321, 138**A**39.

284–85 41**GaA**49, 152**SE**146; **LaA** 130 **S**839. [a] **Thus** denial by insurer of existence of insurance contract covering subject matter destroyed by fire is waiver of other defenses and estoppel to set up any other defense. 213**Ala**334, 105**S**901.

284–86 217**Ky**612, 290**SW**493; **Minn** 231**NW**401.

284–88 41**GaA**49, 152**SE**146.

284–92½–New. The question of waiver of breach of policy conditions depends on the facts of the particular case. 150**Md**211, 132**A**635, 45**ALR**582.

284–96 81**Mont**281, 264**P**132; 48**RI** 321, 138**A**39. See also 193**Wis**72, 213**NW**669. But see 146**SC**123, 143**SE**663. [b] **Assurances by agent to person other than insured** held not to preclude forfeiture. 48**RI** 321, 138**A**39.

284–97 81**Mont**281, 264**P**132; **TexCivA** 289**SW**1032. [b] **Statement held not assurance.**–213**Ala**488, 105**S**553.

284–98 317**Mo** 1119, 298**SW**63; 48**RI** 321, 138**A**39.

285–1 212**Ala**624, 103**S**674.

285–8 **TexCivA** 289**SW**1032.

285–10 **TexCivA** 278**SW**488.

285–11 **MoA** 284**SW**161.

286–30 48**RI** 321, 138**A**39.

286–34 **NJSup** 133**A**513.

287–41 22**AlaA**467, 116**S**898; 202 **Iowa** 1172, 211**NW**710; 219**Ky**119, 292**SW** 765; 150**Md**211, 132**A**635, 643, 45**ALR** 582 [citCJ]; 102**NJL**414, 131**A**910. [a] **Imprudent practices of those insured** as to reliance on agents' authority held not to bar operation of laws of agency. 48**RI** 321, 138**A**39.

287–43 102**NJL**414, 131**A**910.

287–44 202 **Iowa**1172, 211**NW**710; 192**NC**8, 133**SE**337, 47**ALR**645.

287–46 232**Mich**561, 205**NW**480.

287–48 216**AppDiv**654, 216**NYS**65; 90**PaSuper**527. But see **TexCivA** 9**SW** **(2d)**138.

287–50 216**AppDiv**654, 216**NYS**65; 48 **RI** 321, 138**A**39.

287–50½–New. Irrespective of whether an agent is called a "general agent" or a "special agent," the extent of his authority is determined by whether waiver is within actual or apparent authority. 216**AppDiv**654, 216**NYS**65.

287–55 219**Ala**96, 121**S**84; 233 **IllA** 566; 81**Mont**281, 264**P**132, 136 [cit CJ]; 102**NJL**414, 131**A**910; 216**App Div**654, 216**NYS**65; 49**ND**176, 191**NW** 350; 135 **Okl** 47, 273**P**889; 48**RI** 321, 138**A**39; 193**Wis**72, 213**NW**669. [g] **Letter from general agent,** leaving decision as to waiver to higher authority, held insufficient as waiver. 48**RI** 321, 138**A**39. [h] **Company's agent acts as insured's agent** in attempt to have company reconsider forfeiture. 48**RI** 321, 138**A**39. [i] **Mere fact that agent is called "general agent"** is insufficient to show extent of authority which must be determined by whether act is within actual or apparent authority. 216**AppDiv**654, 216**NYS**65.

288–56 215**Ala**481, 110**S**909, 910 [quot CJ].

288–57 215**Ala**481, 110**S**909, 910 [quot CJ]; 102**NJL**414, 131**A**910; 49**ND**176, 191**NW**350, 351 [citCJ].

288–59 **MoA** 284**SW**161.

288–63 216**AppDiv**654, 216**NYS**65.

289–70 [a] (2) Limitation on face of policy is notice. 48**RI** 321, 138**A**39.

289–85 215**Ala**481, 110**S**909; 215**Ala** 564, 112**S**154; 178**Ark**566, 11**SW(2d)** 475; 249 **IllA**327; **Iowa** 215**NW**244; 205 **Iowa**119, 217**NW**258; 221**AppDiv** 144, 223**NYS**155; **TexCivA** 288**SW**257. But see 213**Ala**488, 105**S**553; 231**Ky** 426, 21**SW(2d)**794 (local agent, taking and forwarding applications and collecting premiums on fire policy, had authority to waive provisions of policy).

289–87 215**Ala**564, 112**S**154; **TexCivA** 291**SW**257.

290–88 217**Ala**168, 115**S**156, 56**ALR** 1075; **TexCivA** 289**SW**1032.

290–89 **TexCivA** 289**SW**1032.

290–90 193**Wis**72, 213**NW**669.

290–94 34**F(2d)**53 (agent's authority to waive no mortgage clause and to attach loss payable clause to policy).

290–94½–New. Where insurer notified insured that policy was suspended for failure to pay premium note installment, he cannot assert waiver by local agent. 235**Ky**529, 31**SW(2d)**899.

290–2 [a] **TexCivA** 271**SW**256. [b] **Evidence held to show adjuster's authority** to waive forfeiture. **TexCivA** 294**SW** 953.

291–10 **TexCivA** 294**SW**953, 958 [quot CJentire section].

291–13 [a] 13**F(2d)**745.

291–18 13**F(2d)**745; 48**RI** 321, 138**A**39, 41 [citCJ].

291–22 13**F(2d)**745; 226**Ky**534, 11**SW** **(2d)**148; 148**Va**363, 138**SE**487. See also 192**NC**8, 133**SE**337, 47**ALR**645.

291–23 **TexCommnA** 12**SW(2d)**539.

292–27 102**NJL**414, 131**A**910. Contra **TexCivA** 3**SW(2d)**505.

292–28 150**Md**211, 132**A**635, 45**ALR**582.

292–29 49**ND**176, 191**NW**350.

292–31 150**Md**211, 132**A**635, 45**ALR**582; 102**NJL**414, 131**A**910; 194**NC**683, 140**SE** 706; 194**NC**775, 140**SE**709.

292–38 **TexCivA** 3**SW(2d)**505.

292–39 25**F(2d)**398.

292–40 25**F(2d)**398; 169**Minn**1, 210**NW** 385.

293–42 100**WVa**728, 132**SE**714.

293–44 161**Ga**849, 133**SE**260.

293–46 161**Ga**849, 133**SE**260.

293–47 25**F(2d)**847.

293–52 86 **IndA**240, 156**NE**833; 148**Md** 257, 129**A**214; 150**Md**211, 132**A**635, 45 **ALR**582; 82**NH**167, 131**A**354; 148**Va** 363, 138**SE**487. [d] **Incumbrances.**–220 **Ky**802, 295**SW**1054.

294–54 86 **Ind**240, 156**NE**833; 242**NY** 54, 150**NE**599; 251**NY**312, 167**NE**454. [d] **That exercise of sufficient diligence** would have revealed falsity of representation cannot relieve insured from effect of misrepresentation in application. 242**NY**54, 150**NE**599. [e] **Possession of maps** by insurer showing location of insured property which on study would have revealed true location does not relieve insured of effect of misdescription of location of property. 242 **NY**54, 150**NE**599.

294–55 [a] (2) Where letter requesting assignment of policy not then in force is mailed to agent long since dead, there is no estoppel, especially where request is not answered. 82**NH**167, 131**A**354. [b] 197**NC**120, 147**SE**815. [i] **Fact that insurer had maps showing location of insured property** and might have discovered true location of property did not relieve insured from effect of erroneously describing location of property. 242**NY**54, 150**NE**599.

295–60 107**WVa**687, 150**SE**7 (provision making loss payable to vendor).

295–72½–New. Insurer is not precluded from declaring forfeiture for foreclosure by an allegation in the answer that, when purchased, interest was due on the property. **TexCivA** 300**SW**223.

295–73 86 **IndA**240, 156**NE**833.

296–82 208 **Iowa**1030, 226**NW**781.

296–90 219**Ala**96, 121**S**84; 176**Ark**1188, 5**SW(2d)**916; 161**Ga**849, 133**SE**260; 37 **GaA**739, 141**SE**674; 235 **IllA**344; 217**Ky** 612, 290**SW**493; 234**Ky**340, 28**SW(2d)** 14; 234**Ky**525, 28**SW(2d)**771; 148**Md** 257, 129**A**214; 150**Md**211, 132**A**635, 45 **ALR**582; 154**Miss**418, 122**S**551; 312**Mo** 111, 278**SW**772; **MoA** 256**SW**120; 197 **NC**139, 147**SE**812; 95**PaSuper**453; 146 **SC**351, 144**SE**71; **TexCivA** 278**SW**907; **TexCivA** 291**SW**257, 258 [citCJ]; **TexCivA** 13**SW(2d)**435; **TexCivA** 24**SW(2d)** 501; 100**WVa**728, 132**SE**714.

297–91 201 **Iowa**363, 207**NW**334; 202 **Iowa**1172, 211**NW**710; 208 **Iowa**450, 224 **NW**524; 217**Ky**612, 290**SW**493; 81**Mont** 281, 264**P**132; 194**NC**683, 140**SE**706; **TexCivA** 278**SW**907; **TexCivA** 5**SW(2d)** 844; **Vt** 148**A**869(2dcase).

297–92 139 **Okl** 1, 281**P**234 (misdescription of property); 120 **Or**1, 251**P**258.

297–93 127**Kan**787, 275**P**211; **MoA** 4 **SW(2d)**895; **TexCivA** 278**SW**907.

298–94 312**Mo** 111, 278**SW**772.

298–95 208 **Iowa**450, 224**NW**524; 154 **Miss**418, 122**S**551; 117 **Okl** 73, 245**P**885; **TexCommnA** 12**SW(2d)**539; **TexCivA** 291**SW**257, 258 [citCJ]; 100**WVa**728, 132**SE**714. Contra **Iowa** 215**NW**244.

298–96 30**F(2d)**20.

298–98 **Cal** 285**P**849; 234**Ky**95, 27**SW** **(2d)**675; **MoA** 25**SW(2d)**1075; 192**NC**8, 133**SE**337, 47**ALR**645; **TexCivA** 5**SW** **(2d)**602; 193**Wis**72, 213**NW**669. But see 11**F(2d)**961.

298–99 205 **Iowa**119, 217**NW**258; 122 **Kan**328, 252**P**263; 193**NC**446, 137**SE** 310; 196**NC**335, 145**SE**616; 197**NC**139, 147**SE**812; 51**SD**3, 211**NW**970; **TexCivA** 3**SW(2d)**505, 506 [quotCJ].

299-1 97PaSuper27.
299-9 TexCivA 289SW1032, 1034 [cit CJ].
299-12 208 Iowa1030, 226NW781; 197 NC120, 147SE815.
299-14 IndA 169NE342.
300-15 Ala 130S180.
300-17½-New. Insurer is liable for loss at the location to which the agent had assented after oral notice of loss, although the policy provided that no notice should be binding unless written in, or attached to, the policy. 251 IllA 150.
300-20 192Wis623, 211NW776.
300-26 Iowa 215NW244.
301-40 MoA 20SW(2d)299.
301-44 13F(2d)745; 16F(2d)798; 43 F(2d)467; TexCivA 30SW(2d)715.
302-52 48RI 321, 138A39.
302-53 5F(2d)489; 13F(2d)745; 196 NC335, 145SE616; 48RI 321, 138A39; 192Wis204, 212NW67.
303-54 13F(2d)745.
303-63 13F(2d)745.
303-67½-New. A provision that waivers must be in writing is not conclusive as to whether a local agent's promise to transfer a policy bound the company, the question depending on extent of authority. 216AppDiv654, 216NYS65.
303-68 102NJL414, 131A910.
303-69 See also 238Mich112, 213NW 455.
303-70 173Ark437, 293SW730.
304-75 81Mont281, 264P132.
304-77 81Mont281, 264P132.
307-23 251Mich105, 231NW61; 102 WVa638, 135SE903. But see TexCivA 294SW953.
307-27 192Wis204, 212NW67.
307-28 43F(2d)467; 192Wis204, 212 NW67.
308-38 22AlaA467, 116S898; 120 Or1, 251P258, 261 [citCJ]; 45Philippine122; TexCivA 278SW907; 187Wis15, 203NW 743.
308-39 Okl 292P829; TexCivA 19SW (2d)848. [b] Where policy referred to building whereas merchandise, and not structure containing it in which insurer had no interest, intended to be insured, insurer held liable. 45Philippine122.
308-40 Mont 287P217.
308-41 187Wis15, 203NW743.
309-42 Me 149A143; TexCivA 278SW 907.
309-43 221MoA741, 285SW1024; 120 Or1, 251P258.
309-46 120 Or1, 251P258, 261 [citCJ]; 187Wis15, 203NW743, 744 [citCJ].
309-47 219Ky44, 292SW491; 120 Or1, 251P258, 261 [quotCJ]; TexCivA 278 SW907; 187Wis15, 203NW743, 744 [cit CJ].
309-49 120 Or1, 251P258, 261 [quot CJ].
309-51 120 Or1, 251P258, 261 [quot CJ]; TexCivA 278SW907.
309-53 120 Or1, 251P258, 261 [quot CJ].
309-54 120 Or1, 251P258, 261 [quot CJ].
310-57 193Wis72, 213NW669.
310-63 MoA 282SW478; TexCivA 278 SW907; TexCivA 291SW257, 258 [cit CJ].
311-67 235Ky289, 30SW(2d)1105; 127 Me182, 142A481; Me 149A143; Tex CivA 278SW907; TexCivA 291SW257, 258 [citCJ]; 187Wis15, 203NW743, 744 [citCJ].
311-68 187Wis15, 203NW743, 744 [cit CJ].
311-68½-New. Insured has been held responsible for answers in an application signed in blank, although the agent filled in false answers to questions material to risk. 148Va363, 138 SE487.
311-68¾-New. Where insured has notice of limitation of agent's authority, knowledge of the agent that material warranties are untrue cannot be imputed to insurer. Va 134SE487.
312-80 187Wis15, 203NW743.
312-83 187Wis15, 203NW743.
312-86 See also 49RI 112, 140A469.
313-6 161Ga849, 133SE260; 144Miss 749, 111S366; Miss 116S743; MoA 30 SW(2d)870; Mont 287P217; TexCivA 275SW316; TexCivA 286SW913; Tex CivA 295SW1109; Va 155SE699; 192 Wis160, 212NW301. [d] Reason for rule.-226Ky246, 10SW(2d)829.
316-23 161Ga849, 133SE260; 232Ky 142, 22SW(2d)571; 148Md257, 129A 214; 57ND462, 222NW609(3dcase); 117 Okl 73, 245P885; Va 155SE699; 107WVa687, 150SE7 (sole ownership provision). [c] (5) Other instances. 205 Iowa1294, 217NW816.
317-24 53ND391, 206NW225.
317-26 224AppDiv249, 229NYS678.
317-27 135 Okl 47, 273P889.
317-28 161Ga849, 133SE260.
317-31 Contra 205 Iowa1294, 217NW 816.
317-39 215Ky644, 286SW846; 227Ky 741, 13SW(2d)1040; 117 Oh145, 158NE 93; 146SC123, 143SE663; 50SD502, 210NW739; 51SD36, 211NW805; Tex CivA 275SW316; 192Wis623, 211NW 776; 192Wis160, 212NW301. [c] Attachment of four hundred dollars on three thousand five hundred dollars property held immaterial particularly where agent testified he would have issued policy had he known of attachment. 216Ky329, 287SW896.
317-39½-New. And this is so even though there is a clause in the policy that no agent or representative has the power to waive provisions unless indorsed on the policy. 117 Oh145, 158 NE93.
318-40 But see 153Wash635, 280P57.
318-43 86 IndA240, 156NE833.
319-43 37GaA739, 141SE674; 208 Iowa450, 224NW524; 158La601, 104S 383 (both insurers represented by same agent); TexCommnA 284SW927; Tex CivA 291SW257; TexCivA 20SW(2d) 399.
319-49 Me 149A143.
319-51 240 IllA324; 154Wash77, 280P 743.
320-55½-New. A company, issuing a policy after an agent has agreed to inspect to determine whether the policy clause was infringed is estopped to assert forfeiture on such ground. 178Ark 1, 10SW(2d)497.
320-57 MoA 285SW144.
320-59 TexCivA 30SW(2d)715. [b] Insurer's affirmative consent necessary to waiver.-TexCivA 30SW(2d)715.
320-68½-New. Where insurer waives breach by the mortgagor of a condition as to change of title, the assignee of the mortgagee may take advantage thereof. 98Fla362, 123S736(2dcase).
320-69 217Ky612, 290SW493.
321-70 208 Iowa450, 224NW524; 217 Ky612, 290SW493.
321-73 TexCivA 20SW(2d)399.
321-75 213Ala132, 104S224, 39ALR 1436 (waiver of "iron-safe clause" is not waiver of provision as to keeping books).
321-78 Miss 107S377. [c] Nonwaiver agreement on which amount of loss was submitted to arbitrators held not to destroy insured's right arising from waiver of gasoline clause by issuance of policy with knowledge that gasoline was kept on premises. Miss 107S377.
322-81 16F(2d)798.
322-85 174Ark772, 296SW724; 220 MoA1337, 296SW464.
323-88 193Wis72, 213NW669.
323-91½-New. Knowledge of insurer's agent that insured intended to move from the house insured on completion of another house does not constitute a waiver of, or estoppel to assert as a defense, the failure of insured to obtain a vacancy permit. 194Wis325, 216NW 654.
323-92 22F(2d)882; 174Ark84, 294SW 378; CalA 289P865; 39GaA528, 147SE 725; IndA 168NE699; 235 IllA344; 202 Iowa1172, 211NW710; 216Ky589, 288SW321; 220MoA115, 279SW740. See also 181Ark824, 28SW(2d)63. But see 235Ky529, 31SW(2d)899. [d] Acceptance of premium and deposit in court of amount of loss constitutes waiver of any defense. 127Misc534, 217 NYS409.
324-93 [d] (3) 222MoA1057, 7SW(2d) 479.
324-94½-New. Insurer accepting payment of premiums is estopped from claiming that they were not agreed premiums because calculated on wrong rate. Ariz 286P183.
324-98 202 Iowa1172, 211NW710.
324-7 123Kan342, 255P40, 41 [citCJ].
325-9 MoA 10SW(2d)957.
325-10 123Kan342, 255P40, 41 [citCJ].
325-12 123Kan342, 255P40, 41 [citCJ].
325-21 123Kan342, 255P40, 41 [citCJ].
325-23½-New. The collection of a premium without knowledge of facts constituting a forfeiture is not a waiver of insurer's rights. 123Kan342, 255P40.
325-24 11F(2d)961; 30F(2d)887; 34 F(2d)53; 202 Iowa1172, 211NW710; 122Kan736, 253P433; 217Ky612, 290 SW493; 217Ky826, 290SW673; 219Ky 727, 294SW489; 220MoA115, 279SW 740; MoA 256SW120; MoA 256SW531; MoA 282SW78; MoA 282SW478; MoA 285SW144; MoA 295SW509; MoA 5 SW(2d)660; 222MoA1010, 7SW(2d) 463; 222MoA1057, 7SW(2d)479; MoA 20SW(2d)299; MoA 30SW(2d)1090. See also 1LaA119, 122 [citCyc]. [b] (1) MoA 284SW161.
326-27 216Ala55, 112S336, 52ALR838; 123Kan342, 255P40, 41 [citCJ]; 217Ky 612, 290SW493; 82NH489, 136A124. See also 315Mo 266, 285SW961, 965 [citCJ], 54ALR1336.
326-30 48RI 321, 138A39.
326-31 48RI 321, 138A39.
326-33½-New. Failure of insurer to return unearned premium on a forfeited policy does not estop it from claiming forfeiture. 192Wis204, 212NW67.
327-46 120 Or411, 252P75, 79 [citCJ].
327-47 But see 181Ark824, 28SW(2d) 63.
327-52 120 Or411, 252P75, 78 [citCJ].
327-53 120 Or411, 252P75, 78 [citCJ].
327-54 216Ky589, 288SW321; Tex CivA 11SW(2d)395.
328-56 120 Or411, 252P75 [citCJ].
328-62 177Ark109, 58SW(2d)719.
328-63 121 Okl 124, 247P990.
328-66 216Ky589, 288SW321.
328-67½-New. A mutual company does not waive the right to suspend a policy for nonpayment of assessments by counterclaim to recover assessments apparently earned before suspension of the policy. 208 Iowa1020, 226NW777.
328-70 213Ala488, 105S553, 554 [quot CJ]; 215Ala107, 110S30, 31 [citCJ]; 161Ga559, 131SE359.
328-70½-New. Where a policy provides that payment of a premium note after default revives the policy, revivor to begin from the time of payment, payment of a defaulted premium note after a loss by fire has occurred does not render insurer liable for the loss, unless such payment is made and accepted under such circumstances that the conditions of the contract are waived. 121 Okl 124, 247P990.
329-78 161Ga559, 131SE359.
329-79 235Ky439, 31SW(2d)699 (essential elements of rule stated); 120 Or 411, 252P75, 78 [citCJ]; 158Tenn237, 12SW(2d)707. But see 235Ky439, 31 SW(2d)699.
329-80 158Tenn237, 12SW(2d)707.
329-81 217Ky826, 290SW673.
329-82 See also 217Ky826, 290SW673.
329-84 192NC8, 133SE337, 47ALR645. See also Cal 285P849.
329-85 Cal 285P849; 192NC8, 133SE 337, 47ALR645.
330-1 86 IndA240, 156NE833; 216Ky 589, 288SW321; 82NH489, 136A124; 136Wash686, 241P292.
330-3 IndA 169NE342; 234Ky95, 27 SW(2d)675; 251Mich105, 231NW61. See also TexCivA 272SW555.
330-5 82NH489, 136A124; TexCommnA 12SW(2d)539; TexCivA 13SW(2d)717; TexCivA 24SW(2d)501 (failure to assert forfeiture when sued on policy). [e] Failure to correct wrong interpretation as to property insured, whether building or merchandise therein, has been held to estop insurer from asserting defense that building only was covered by policy, the latter having been drafted in English, of which language insured was ignorant. 45Philippine122.
331-7 86 IndA240, 156NE833.
331-13½-New. Additional insurance. Insurance company waives the right of forfeiture by silence after notice of additional insurance. 213Ala626, 106S172.
331-14 217Ky826, 290SW673.
331-15 136Wash686, 241P292.

332-17½-New. a change in title; 122 Kan736, 253P433.
332-19 231Ky426, 21SW(2d)794.
332-24 TexCivA 13SW(2d)916.
332-26 32F(2d)451; MoA 295SW509.
333-31 238Mich112, 213NW458; MoA 256SW531.
333-35 MoA 272SW700.
333-37½-New. Application of the rule has been made to breach of record warranty clause contained in the policy. TexCivA 289SW1032.
333-37¼-New. Acceptance of reports under a floating policy, with knowledge that they did not comply with the requirements of the policy, constitutes waiver of breach. 22F(2d)882.
333-37¼-New. The fact that the adjuster of an insurance company, in adjusting a loss, assumed the attitude that the company's policy was void because of prior insurance, did not of itself imply that the insurance company treated the policy as invalid. 208 Iowa450, 224 NW524.
333-41 234Mich119, 208NW145. [a] (2) Insurer not denying validity of policy till after action was brought cannot rely on acquittal of insured in criminal case partly on ground that policy was not properly signed by insurer and president. 234Mich119, 208NW145.
334-46 218Ala503, 119S15(2dcase). [a] **Statement that there is no contract of insurance** constitutes estoppel as to failure to give notice and proof of loss. 213 Ala534, 105S901.
334-51½-New. Where policy lapses and is suspended before fire, nothing done by the agent has the effect of restoring it. 216Ky589, 288SW321.
334-53 TexCivA 294SW953, 958 [quot CJ].
334-54 TexCivA 271SW118, 119 [cit CJ]; TexCivA 27SW(2d)571.
334-55 212Ala624, 103S674; 208 Iowa 450, 224NW524; TexCivA 294SW953, 958 [quotCJ]; TexCivA 31SW(2d)859. [c] **Conduct of adjuster** must be inconsistent with denial of validity of policy to support contention of waiver. 212 Ala624, 103S674. [d] **Consideration for agreement** found in insured's efforts to prove loss. TexCivA 294SW953.
335-57 Mass 166NE749; 152Wash637, 278P702.
335-61 144Miss749, 111S366; TexCivA 294SW953. But see 197Wis487, 222NW 831.
335-62½-New. An agreement to pay a loss on personalty is not a waiver of forfeiture as to a building covered by additional unauthorized insurance. 176 Minn31, 222NW514.
335-64 212Ala624, 103S674 (statement that company would treat insured right and pay what was due, considered in connection with nonwaiver agreement, held not waiver of such agreement). See also 219Ala332, 122S346.
335-71 22F(2d)882; 202 Iowa1291, 211 NW716; 150Md211, 132A635, 643, 45 ALR582 [quotCJ]; SD 231NW292; TexCivA 294SW953; TexCivA 27SW(2d) 571.
336-72½-New. But where there is no contractual relation between claimant and insurer, estoppel does not arise from latter's request for proofs of loss. 187 Wis432, 204NW331.
336-77 See also 152Wash637, 278P702.
336-80 150Md211, 132A635, 643, 45ALR 582 [citCJ].
337-84½-New. Inducing insured to present proof of loss does not waive forfeiture. Va 155SE699.
337-88 SD 231NW292 (holding breach waived where adjusting agent was fully informed before adjustment).
337-92 212Ala624, 103S674.
337-94 212Ala624, 103S674 (insured may agree that proceeding with investigation shall not be construed as waiver).
337-95 212Ala624, 103S674 (nonwaiver agreement protecting defenses of insurer may be waived by subsequent conduct).
337-96 39F(2d)25; 219AppDiv110, 219NYS103.
338-6 217Ala168, 115S156, 56ALR1075.
338-17 220MoA115, 279SW740; SD 231 NW292.
338-18 220MoA115, 279SW740.
338-21 130Misc420, 224NYS409; 219 AppDiv110, 219NYS103.
339-30 TexCivA 18SW(2d)1117.
339-34 212Ala624, 103S674. [a] **Such agreement will be strictly construed** against insurer and liberally in favor of insured. 173Ark437, 293SW730.
339-41 212Ala624, 103S674.
340-46 See also 153Md253, 138A33, 53 ALR669.
340-48 219Ala208, 122S23; 219Ala211, 122S25; 218MoA31, 260SW490, 491 [quotCJ]. [a] (2) Where fire causing damage entered and burned in furnace compartment intended for air only, such fire was hostile. TexCivA 78SW(2d)588. [b] **Fire from oil burner held hostile.**-Nebr 229NW327(2dcase) (setting aside former holding rep 118Nebr303, 224NW 684).
340-49 218MoA31, 260SW490, 491 [quotCJ]. [b] (2) Chimney is not part of "heating apparatus," relieving insurer from liability. 32 OhA465, 168NE 234.
340-50 219Ala208, 122S23; 219Ala211, 122S25; 218MoA31, 260SW490.
340-52 218MoA31, 260SW490; Nebr 229NW327(2dcase).
340-56 118Nebr303, 224NW684, 68ALR 222.
340-58½-New. Insurer is liable where property burned while in possession of thief, except on showing that the owner would never have recovered it. Tex CivA 272SW611.
341-59 216AppDiv435, 215NYS378. [b] **Ordinary expectations of business men** determine what is included within proximate results of fire. 153Md253, 138A33, 53ALR669.
341-60 TexCivA 25SW(2d)911.
341-63½-New. Where fire is the primary, real, producing, predominant, or responsible cause for the loss, it is the proximate cause thereof. 207 Iowa1042, 222NW447.
342-73 156Miss865, 127S298.
342-75 See also 153Md253, 138A33, 53 ALR669.
342-83 220Ala162, 124S239, 65ALR921.
342-84½-New. Damage to a building by concussion, as the result of an explosion of dynamite placed under another building to prevent the spread of fire, is not within the terms of the policy. 220Ala162, 124S239, 65ALR921.
342-84¾-New. Loss resulting from explosives used as a means to stop the spread of fire is within the terms of a fire policy. 220Ala162, 124S239, 65ALR 921.
343-88 [b] **Fire originating in electrical appliances.**-TexCivA 289SW726.
343-91½-New. **Effect of concurrent causes of loss.** 50SD502, 210NW739.
344-11 [b] 218MoA587, 265SW855.
345-13 But see 174Minn122, 218NW457.
345-14 218MoA587, 265SW855; 77Mont 505, 252P310.
345-14½-New. Damages resulting solely from an explosion which is caused by a hostile fire in an insured building are recoverable under a policy which insures against all direct loss or damages by fire although the policy exempts insurer from loss caused directly or indirectly by explosion of any kind unless fire ensues and in that event for damages by fire only. 201 Iowa266, 207NW 243, 44ALR863.
345-23 MoA 285SW741. See also 153 Md253, 138A33, 53ALR669.
346-25 153Md253, 138A33, 53ALR669.
346-31 [a] **Insurer is liable for entire loss till building fell because of tornado.** 23F(2d)443.
347-37 259Mass450, 156NE696; 259 Mass450, 156NE696; 262Mass469, 160 NE306; 151Miss189, 117S524, 527 [quot CJ].
347-39 CalA 287P529; Md 148A252; 48Philippine592; 149Va82, 140SE314, 57ALR490. [c] (3) Corporation cannot recover where property was willfully burned by the general manager who owned one fourth of the stock and was a large creditor. 18F(2d)563.
348-43½-New. If owners of insured property destroy it, there is no liability to the insured, 142Va412, 128SE445.
348-43¼-New. although the company may be liable under policy to creditor of insured under mortgage clause. 142 Va412, 128SE445.
348-49½-New. The right of recovery on behalf of stockholders and owners of a corporation is not necessarily defeated or prejudicially affected by improper action of an officer of the corporation in the absence of fraud or wrongdoing on the part of the corporation's representative. 18F(2d)563.
348-50 MoA 256SW531.
348-51 160La439, 107S298.
348-52 160La439, 107S298.
349-54 See also Wis 229NW537.
349-55 [a] **Insurance on goods in transit** requiring "custody and control" by insured does not require actual physical dominion over property. 50RI 118, 145A448.
349-55½-New. Insurance of property in the hands of a carrier does not attach to goods on fire at the time of shipment. 262Mass469, 160NE306.
349-62 Minn 231NW401; 219MoA121, 272SW79.
349-63 Ark 29SW(2d)304; 219MoA 121, 272SW79; 221MoA999, 295SW847. See also 197Wis136, 221NW654 (in order for recovery loss must have resulted).
350-64 232Ky548, 24SW(2d)292; 219 MoA121, 272SW79; MoA 30SW(2d) 1090.
350-65 227Ky314, 12SW(2d)688; 219 MoA121, 272SW79.
350-69 TexCommnA 26SW(2d)162. [b] **Loss held total,** though part of ruins is used in reconstructing building. 33F (2d)675.
350-70 TexCivA 290SW912.
350-70½-New. The statutory definition of the term, "total loss," as applied to a building which has lost its character as such, is not applied to personal property. 307Mo 194, 270SW113.
350-71 222MoA1010, 78SW(2d)463.
351-73½-New. Where the lessee, after damage to a building by fire, repaired the building in accordance with authority of the lease and recovered from insurer, the lessors having additional insurance as to their interest in the property did not have any actual loss sufficient to authorize recovery thereunder, whether or not insurance companies had prorated the loss. 197Wis136, 221NW 654.
351-74 12F(2d)880, 881 [quotCJ]; 98 Fla933, 124S722 (ordinance regulating repair of frame buildings damaged by fire); 227Ky314, 12SW(2d)688. [b] **Insurer of old building assumes risk** that partial loss by fire combined with antecedent defect may render it incapable of repair under building regulations and therefore is liable as for total loss. 12F(2d)880.
351-75 12F(2d)880, 881 [quotCJ]; 27 OhNPNS151. [a] **Insured need not contest order of city inspector requiring demolition** in order to be entitled to recover for total loss where situation is such as to justify order. 221MoA999, 295SW847. But see 322Mo 342, 15SW (2d)343. [a] **Conclusiveness of condemnation order.**-City commissioners' order condemning building partially destroyed by fire as unsafe is not conclusive on either property owner or insurer. 227Ky314, 12SW(2d)688.
351-75½-New. A city's requirement for the reconstruction of a building is not within a policy creating liability for the actual value not exceeding the cost of repair or replacement. 145Wash199, 259P387.
351-81 44 Ida249, 256P523; 82Mont 264, 266P640.
351-83 [a] **In North Dakota.**-49ND235, 191NW347.
351-84 23F(2d)443; 44 Ida249, 256P 523; 227Ky613, 13SW(2d)784; 160La 275, 107S108; 312Mo 111, 278SW772; Nebr 230NW105; NJ 145A633 (where proof of loss was based on two fires); 227AppDiv103, 237NYS120 (means actual value expressed in terms of money); 49SD225, 207NW108 (provision in admittedly open policy insuring against theft of automobile that recovery is limited to ninety per cent of factory list price and to be reduced if list price is reduced is invalid). [a] 44 Ida249, 256P523. [d] (1) 247NY176, 159NE 902. (3) NJ 145A633. (5) Other in-

stances. 300Pa555, 151A285(2dcase). [f] **In West Virginia** rule applies in case of insurance on personal property. 104WVa353, 140SE61.

351-85 19F(2d)134; 148Md257, 129A214; 312Mo111, 278SW772; 82Mont264, 266P640; Nebr230NW105. [b] **In West Virginia.**–104WVa353, 140SE61.

352-88 See also 300Pa555, 151A285(2dcase).

352-90 300Pa555, 151A285(2dcase).

352-91½-New. Damage recoverable under a fire insurance policy is to be determined as of the date of the fire. 197Wis136, 221NW654.

352-96 44Ida249, 256P523.

352-97 MoA 27SW(2d)464.

352-98 247NY176, 159NE902; 227App Div103, 237NYS120 (is element going to make up actual value).

353-2 44Ida249, 256P523; 244IllA379; TexCivA 293SW869. See also 35GaA606, 134SE336 [citCJ].

353-3 220MoA1337, 296SW464, 467 [citCJ].

354-9 166Minn273, 207NW625; 312Mo111, 278SW772; 49ND270, 191NW480; 150SC289, 148SE49. [b] **Standard fire policy statute** does not prohibit issuance of valued policy of insurance on personal property. 166Minn273, 207NW625. [c] **Loss of leasehold interest.**–166Minn273, 207NW625 (provision held to fix value of property).

354-10 312Mo111, 278SW772.

354-13 16F(2d)127; 171Ark574, 285SW5; 172Ark767, 290SW367; 227Ky613, 13SW(2d)784; 222MoA31, 4SW(2d)871; 113Nebr830, 205NW642; 114Nebr194, 206NW765; 251NY230, 167NE426; 104WVa353, 140SE61. [d] (1) 220MoA1337, 296SW464. (3) In West Virginia. 104WVa353, 140SE61.

355-14 229Ky216, 16SW(2d)1028.

355-15 25F(2d)40; 218MoA98, 262SW450; 49ND270, 191NW480, 481 [citCJ].

355-17 307Mo194, 270SW113; 222MoA467, 280SW726; 222MoA467, 280SW726; MoA 285SW741. But see 251NY230, 167NE426. [a] **In case of total loss under valued policy** due to two or more fires, recovery for final loss is amount of policy less amounts paid in settlement of previous losses. 113Nebr830, 205NW642.

355-17½-New. as insurer may show increase in value; MoA 293SW504.

355-20 226Ky498, 11SW(2d)141; 119Oh550, 165NE41; 104WVa353, 140SE61. [b] **Building, bought only to be torn down** for salvage, is personal property, making three-fourths loss clause in policy applicable. TexCivA 295SW1109. [c] **Building permanently fixed to ground** constitutes real estate within policy. 42F(2d)53.

355-22 114Nebr194, 206NW765 (grain elevator erected with privilege of removal).

355-26 171Ark574, 285SW5.

356-28 171Ark574, 285SW5.

356-34 [b] **Three-fourths value clause in policy** is not forbidden by statute forbidding coinsurance clause. 115Tex351, 282SW563, 45ALR1016. [c] **Where legislature acquiesces** to three-fourths value clause for many years, it was held to show legislative intent not to prohibit three-fourths value clause under statute prohibiting coinsurance clauses. 115Tex351, 282SW563, 45ALR1016. [d] **Relief against abuse of three-fourths clause** may be given by insurance commission in prescribing forms of insurance contracts. 115Tex351, 282SW563, 45ALR1016. [e] **Where insurance does not equal value of property,** insurer cannot complain under clause limiting liability to three-fourths of actual value of property. TexCivA 20SW(2d)399.

356-35 MoA 285SW144.

356-38½-New. Where riders containing a three-fourths valuation clause and a mortgage clause are attached to a policy, the three-fourths valuation clause relates to the value of the house insured and not to the amount of the indebtedness secured by the mortgage indebtedness. 40OklACR169 [reh granted].

356-39 127Misc1, 215NYS151; 225App Div326, 233NYS160; 132SC427, 128SE865. [d] **Extent of recovery under statute providing for recovery of proportionate amount.**–132SE427, 128SE865.

357-42 [a] **Rule held not applicable** to adjoining buildings, subject to same fire risk. TexCivA 295SW343.

357-43 227Ky613, 13SW(2d)784; SD231NW902; TexCivA 12SW(2d)235; TexCivA 31SW(2d)850; 105WVa226, 141SE871.

357-44½-New. Under a fixed value policy, after two-thirds loss, insured is entitled to two thirds of the fixed value, not the actual value. 139SC212, 137SE678.

357-47 [a] (2) Under other sections of code, rider providing for coinsurance may be made part of policy on request therefor signed by insured. 202Iowa1172, 211NW710. (3) Coinsurance rider must be signed by both agent and insured. 202Iowa1172, 211NW710. [e] **In Texas.**–CivA 275SW203.

357-48 [a] (1) TexCivA 275SW203.

357-49 219MoA307, 269SW701 (under Kansas statute). See also TexCommnA 284SW927.

358-52 [a] (2) TexCivA 275SW203. [a] (3) Such clause is valid. TexCommnA 284SW927. [c] **Insurer, allowing no credit on premium** under seventy-five per cent valuation clause, held not entitled to rely thereon. TexCivA 298SW451.

358-53 139SC212, 137SE678.

358-53½-New. Where the statute prohibits coinsurance clauses, a three-fourths value clause in a fire policy is not invalid. 115Tex361, 282SW562.

358-58 86Colo293, 281P366, 66ALR1166; 131Misc305, 226NYS630.

359-63 114Nebr53, 205NW942.

359-65 [b] **Where lessee had insurance on improvements made by him** which became property of lessor, lessee could recover only for loss of right to use insured property for remainder of term. 179Minn510, 229NW792.

359-65½-New. That a fire policy insured unpaid interest in machinery sold, under a contract of conditional sale and not in terms, the property itself was held not to require credit against loss for salvage value where the debt had not been extinguished when the indemnity became due. 243NY95, 152NE476.

360-74 40OklACR169 [reh granted].

360-80 285Pa332, 132A177. [d] **Loss recoverable under policy** insuring profits held not limited by temporary operations producing no profit. 4F(2d)835.

360-81 129Or688, 278P967. [a] (5) Though insured is prevented from repairing by city ordinance, insurer is only liable for rent loss to period required, with due diligence, to restore premises to tenantable condition. 33F(2d)785.

361-82 But see 219Ala106, 120S912 (policy insuring sublessee against loss of rents "actually sustained").

361-83½-New. Under a policy covering the actual loss of the net profits of a business and fixed charges and expenses, liability for such fixed charges and expenses is dependent upon a showing that insured would have earned the wherewithal to meet such obligations. 193Wis638, 215NW440.

361-84 226Ky498, 11SW(2d)141. See also NJ 143A552.

361-88 But see 231Ky426, 21SW(2d)794.

362-90½-New. Every rule of construction in apportioning the loss must bend to the right of insured to be fully indemnified. TexCivA 28SW(2d)329.

362-91 37GaA229, 139SE822; Kan291P935; 212Ky107, 278SW581; MoA 27SW(2d)464; NJCh 151A105(2dcase); 40OklACR169 [reh granted]; 118Or22, 245P515 (provision held valid); 85PaSuper24; TexCommnA 284SW927. [a] 40OklACR169 [reh granted]. [d] **Insurer held liable** for damage to partition wall between storerooms in proportion that its insurance bore to total insurance carried on both rooms. 220Ky566, 295SW855, 54ALR86. [e] **Contract clause inoperative as to prior policies unknown to insured.** 212Ky107, 278SW581.

362-92 TexCivA 19SW(2d)599.

362-94½-New. Under some statutes insurer under a valued policy is liable only for proportionate sum of the policy as compared to agreed valuation. 136SC144, 134SE263.

362-94½-New. A statute which prohibits coinsurance clauses is not intended to make all policies liquidated demands for the fixed sum stated on their face. 115Tex351, 282SW563, 45ALR1016.

362-94¼-New. The mortgagee's right to recover the entire loss is not affected by another policy taken out by the mortgagor without the mortgagee's knowledge or consent. MoA 15SW(2d)939.

363-95 119Oh550, 165NE41. See also TexCivA 27SW(2d)581. But see 103NJL184, 134A861.

363-97 220Ky566, 295SW855, 54ALR86.

363-99 6F(2d)533, 43ALR496; 85PaSuper24; 107WVa555, 149SE605 (same specific coverage). [d] **Policy on "furniture and fixtures of hotel"** held to cover same property as other policy on "household furniture and fixtures of every description" where both referred to goods at same location and owned by same insured. 85PaSuper24.

363-1 6F(2d)533, 43ALR496; 86Colo293, 281P366, 66ALR1166 (cestui que trust); 125Okl291, 257P774. [a] (3) Policy, covering interest of one partner only, and not inuring to benefit of partnership, does not require pro rating in adjustment of liability on another policy, issued to both partners. 232Mich415, 205NW149.

363-2 125Okl291, 257P774. [a] **Landlord's insurance on greenhouse cannot be prorated** because of tenant's insurance on same property. NJSup146A679.

364-3 6F(2d)533, 43ALR496; 87CalA473, 262P436; 198NC174, 151SE98; 125Okl291, 257P774; 192Wis623, 211NW776. But see TexCivA 19SW(2d)599. [a] 93PaSuper242. [c] **Mortgagor's interest is extinguished by sale,** and as a result neither it nor interest of mortgagee may be counted as coinsurance with later policies procured by purchaser. 6F(2d)533, 43ALR496.

364-5 [a] (3) Where assignee of mechanic's lien and owner of property took out separate policies of fire insurance, loss is proratable between such policies. TexCivA 19SW(2d)599.

364-7 110Conn332, 148A135.

364-8 107WVa555, 149SE605 (specific insurer for loss from damage to elevator motor caused by electrical breakdown is not entitled to prorate with other insurers carrying general fire risks on building).

365-13 [a] **Rule inapplicable** where policies cover entire stock of merchandise in single building. Kan291P935.

365-14 225AppDiv326, 233NYS160; TexCivA 2SW(2d)329.

365-15 35F(2d)213; 82NH533, 136A364.

365-15½-New. In a suit on a policy insuring property situated in a dwelling against loss by fire, it is immaterial whether the goods remain in the building after the fire or are removed. TexCivA 7SW(2d)963.

365-16 25F(2d)415, 418 [quotCJ]; 29F(2d)988; 169Minn1, 210NW385; TexCivA 7SW(2d)963. [c] (3) Where policy specifies no time for inspection, reasonable time is required. 56ND841, 219NW467 (period held reasonable). [f] **Not excused by act of adjuster.**–Failure of insured to comply with provision of fire policy, was not excused by fact that adjuster's agent took negligible part of damaged merchandise, stating that he would take care of it, and there was no evidence that such agent did not preserve and account for it as promised. 29F(2d)988.

366-23 169Minn1, 210NW385. [c] **Matters not constituting waiver.**–169Minn1, 210NW385.

366-29 [c] **Amount of judgment recovered on another policy** covering same property. 299Pa86, 149A163.

366-32 See also 137SC248, 134SE370.
367-45 234Ky340, 28SW(2d)14 (condition subsequent); Mass 167NE252; 235Mich147, 209NW42; 234Mich651, 209NW119 (purpose of notice); 75Mont 1, 241P631; 32PortoRico 622. [a] **Requirement valid in law.**–234Mich651, 209 NW119. [b] **Requirement held not to apply to mortgagee.**–223AppDiv6, 227 NYS326.
368-56 [b] **Statute forbidding insurer to rely on failure to make statement of loss** held inapplicable where policy not statutory standard form. Mass 172NE 99.
368-57½-New. The requirement of the statutory form of policy that proof of loss shall be given in a specified time and manner is not abrogated by a statute declaring that a policy shall be deemed a valued policy. 201 Iowa378, 207NW351.
369-81 But see 44 Ida249, 256P523.
369-89 149Wash148, 270P437.
370-98 [a] **Where policy is assigned after loss,** proof of loss may be made by either assignor or assignee. 135 Okl 47, 273P889.
370-1 135 Okl 47, 273P889.
370-5 265Mass509, 164NE442.
370-10 16F(2d)774, 775 [citCJ]; Tex CivA 281SW283. [a] 85Mont405, 279P 239.
371-25 85Mont405, 279P239; 250NY 16, 164NE876 [rearg den 250NY587, 166 NE334(3dcase)].
371-26 250NY16, 164NE876 [rearg den 250NY587, 166NE334(3dcase)].
372-28 81Mont271, 263P93 (sufficient compliance with requirement that notice must be given without unnecessary delay).
372-31 See also 234Ky340, 28SW(2d) 14.
372-33 [a] (1) 223Ky842, 5SW(2d) 265. [e] **Amended proofs may relate back** to date original proofs were submitted. 234Ky95, 27SW(2d)675.
373-34½-New. Insured property is not deemed destroyed until cessation of fire in determining the time for filing proof of loss. 176Ark183, 2SW(2d)4.
373-41 1F(2d)43; 223Ky842, 5SW(2d) 265, 266 [quotCJ]; 226Ky594, 11SW (2d)415; 265Mass509, 164NE442; Mich 233NW417; 101NJEq437, 139A523; 115 Tex351, 282SW563, 45ALR1016. But see TexCivA 7SW(2d)963.
374-42 TexCivA 6SW(2d)151, 155 [cit CJ]; 193Wis72, 213NW669.
374-43 35F(2d)213; 44 Ida491, 258P 362, 365 [citCJ]; 233Ky337, 25SW(2d) 738; 153Md253, 138A33, 53ALR669; MoA 282SW78; 222MoA1010, 7SW(2d) 463; 73Mont169, 235P406, 408 [citCJ]; 44Nev359, 195P809; NJ 151A869; Tex CivA 6SW(2d)151, 155 [citCJ]; 106 WVa85, 144SE879, 881 [citCJ]; 193 Wis72, 213NW669.
374-45 153Md253, 138A33, 53ALR669; Sask [1929] 2DomLR609.
375-51 But see 208Ky731, 271SW1042.
375-53 [b] (2) 142Miss369, 107S523.
375-56 [b] **In Iowa.**–201 Iowa378, 207 NW351.
375-56½-New. by mistaken assumption of insured's agent that policies had lapsed; 127Misc408, 216NYS315.
375-63 265Mass509, 164NE442.
376-69 See also 34PortoRico 388.
376-87 153Md253, 138A33, 53ALR669.
376-88 Sask [1925] 3DomLR1109. [g] **Substantial compliance necessary.**–MoA 273SW192. [h] **Proofs of loss held sufficient.**–TexCivA 16SW(2d)360.
377-89½-New. Lack of particularity does not vitiate proof of loss unless it is shown that better particulars could have been given, Sask [1925] 3DomLR 1109.
377-89¾-New. and absence or insufficiency of proof cannot be taken advantage of where insurer was not prejudiced thereby. Sask [1925] 3DomLR1109.
377-93 16F(2d)774.
378-96½-New. A letter by insured to insurer asking what steps he should take to prove his claim is not sufficient proof of loss. 201 Iowa378, 207NW351.
378-96¾-New. Defects in proofs may be remedied by insured. 153Md253, 138 A33, 53ALR669.
378-97 172Ark767, 290SW367; Tex CivA 6SW(2d)151; TexCommnA 26SW (2d)162. Contra 34PortoRico 388.
378-6 See also 32PortoRico 622.
378-8 Contra TexCivA 282SW656.
378-9 201 Iowa378, 207NW351.
378-10 16F(2d)774, 775 [citCJ].
378-13 16F(2d)774.
378-13½-New. No recovery will be allowed for those items upon which no proof of loss is given. 115Tex351, 282 SW563, 45ALR1016.
379-15 16F(2d)774, 775 [citCJ]; Sask [1925] 3DomLR1109 (itemized statement furnished).
379-23 [a] **Under valued policy** no proof of value is required in case of total destruction of property. 201 Iowa 378, 207NW351.
380-36 Sask [1925] 3DomLR1109.
380-39 Sask [1925] 3DomLR1109.
381-56 Sask [1925] 3DomLR1109.
381-57 Sask [1925] 3DomLR1109.
381-60 36GaA538, 137SE286. See also 52SD513, 219NW119.
381-69 52ND324, 202NW657.
381-75 But see 37GaA229, 139SE822; 148Miss659, 114S730; TexCommnA 15 SW(2d)223.
382-81 See also 27 OhA334, 161NE351.
382-82 27F(2d)64; 84CalA130, 257P 586 (encumbrances).
382-84 See also 27 OhA334, 161NE351.
382-86½-New. The fact that members of a committee, appointed by a church to collect fire insurance, joined in making proofs of loss under unauthorized policies did not prevent recovery under the authorized policy. 35F(2d)147.
382-87 216Ky715, 717, 288SW674 [cit CJ]; 126Me478, 139A681, 56ALR834; 179Minn289, 229NW88(1stcase); 53ND 273, 205NW672, 673 [quotCJ]. [b] (3) Under provisions of policy false statements by insured in proof of loss that no other insurance had been issued on automobile rendered policy void. 130 Misc420, 224NYS409. (4) One so falsely swearing is acting in furtherance of his own fraudulent designs and not as agent. 35F(2d)147. [c] **Such clause is valid** though it provides for forfeiture because of fraud before or after loss. 53ND273, 205NW672.
382-89 22F(2d)671; 23F(2d)270; CalA 287P529; 126Me478, 139A681, 56 ALR 834; 82Mont52, 264P933; NH 149A78 (2dcase); 218AppDiv187, 218NYS164; 51Philippine231; 35PortoRico 136.
383-91 126Me478, 139A681, 56ALR834; 218AppDiv187, 218NYS164 [citCJ].
383-97 51Philippine212.
383-99 155Tenn621, 299SW776 [quot CJ].
383-1 105WVa226, 141SE871.
383-2 NH 151A817.
383-7 167Minn479, 209NW490.
383-8 22F(2d)793; 90CalA668, 266P 376; 77Colo 408, 236P1013; 44 Ida249, 256P523; 218Ky568, 291SW725; 234Ky 183, 27SW(2d)699; 235Ky419, 31SW (2d)625; 126Me475, 139A681, 56ALR 834; 167Minn479, 209NW490; NH 149 A78(2dcase); 218AppDiv187, 218NYS 164 [citCJ]; 53ND273, 205NW672; 91 PaSuper327; 51Philippine212. [b] **Illustration.**–25F(2d)415.
384-9 77Colo 408, 236P1013; 167Minn 479, 209NW490; MoA 11SW(2d)1101; 53ND273, 205NW672; 91PaSuper327.
384-10 105NJL477, 144A566.
384-11 22F(2d)793; 77Colo 408, 236P 1013; 243 IllA546; 218Ky568, 291SW 725; 226Ky706, 11SW(2d)968; 227Ky 314, 12SW(2d)688; 227Ky613, 13SW (2d)784; 234Ky183, 27SW(2d)699; 220 MoA1337, 296SW464 (mere version of occupancy held not false swearing); MoA 11SW(2d)1101; NH 151A817 (evasion intended to mislead); 218AppDiv 187, 218NYS164; 51Philippine212. [b] 51Philippine212.
385-14 5F(2d)318; 77Colo 408, 236P 1013.
385-21 27F(2d)64; 300Pa555, 151A285 (2dcase).
385-22 77Colo 408, 236P1013; MoA 273 SW192; 218AppDiv187, 218NYS164; 124 Or521, 264P862 (statute).
385-23 77Colo 408, 236P1013; 218Ky 568, 291SW725; 227Ky613, 13SW(2d) 784; 51Philippine212.
386-26 167Minn479, 209NW490.
386-27 77Colo 408, 236P113; 27F(2d) 64.
386-28 218AppDiv187, 218NYS164.
386-29 167Minn479, 209NW490; NH 149A78(2dcase).
386-34 109Conn686, 145A42; 35Porto Rico 136.
388-73 296Pa552, 146A135, 63ALR504 (2dcase). [e] **Later production** is not sufficient. 163La284, 111S707.
388-75 296Pa552, 146A135, 63ALR504 (2dcase). [c] **All not destroyed by fire** is sufficient. 163La284, 111S707.
388-77 See also 24F(2d)216.
388-81 296Pa552, 146A135, 63ALR504 (2dcase).
389-89 [a] **Notwithstanding nonwaiver agreement,** where insured is required to submit to examination, insurer held to waive provision requiring inventory, and books to be kept in safe. 173Ark437, 293SW730. [b] **Provision held to apply** while policy is running. 173Ark437, 293 SW730.
390-18½-New. A provision of a fire policy requiring insured to submit to examination is inapplicable after fire loss. 176Ark183, 2SW(2d)4.
390-19 75Mont1, 241P631; 102NJL414, 131A910; 115Tex351, 282SW563, 45 ALR1016; TexCivA 6SW(2d)151.
391-21 43 Ida222, 253P379; 102NJL 414, 131A910.
391-24 160Tenn152, 22SW(2d)362.
392-37 CalA 290P525.
392-43 127Misc408, 216NYS315.
392-44 127Misc408, 216NYS315.
393-48 300Pa555, 151A285(2dcase); 104WVa605, 140SE681, 684 [citCJ].
393-54 215Ala481, 110S909; 43 Ida222, 253P379; Mass 172NE99; 102NJL414, 131A910.
393-55 32F(2d)451; Ill 173NE479; 256 IllA1; 102NJL414, 131A910.
393-56 215Ala481, 110S909; 102NJL 414, 131A910.
393-57 175Ark1170, 300SW448; 180 Ark638, 22SW(2d)165; 233 IllA566; 222 Ky608, 1SW(2d)1063; 24 OhA29, 155 NE806.
394-59 43 Ida222, 253P379; 231Ky31, 20SW(2d)1023; 165Minn442, 206NW 655. See also 38GaA597, 144SE668; 160 Tenn152, 22SW(2d)362.
395-61 249 IllA327; 234Mich651, 209 NW119.
395-63 25F(2d)398; 102NJL414, 131 A910.
395-65 300Pa555, 151A285(2dcase).
396-68 16F(2d)774; 204 Iowa335, 213 NW762 (insurer is bound to know that such conduct may amount to waiver); 232Ky548, 24SW(2d)292; 165Minn442, 206NW655, 656 [citCJ]; 131Misc141, 226NYS278; 24 OhA29, 155NE806; 300 Pa555, 151A285(2dcase); 160Tenn152, 22SW(2d)362; TexCivA 281SW217.
396-69 IndA 168NE464; 220Ky326, 295SW158; Mich 233NW417; 165Minn 442, 206NW655, 656 [citCJ]; 24 OhA29, 155NE806; 300Pa555, 151A285(2dcase); 50SD519, 210NW744. [d] **Retention of insured's policies** until after expiration of time for making proofs of loss bars defense of failure to file. Mich 233NW 417.
397-71 160La683, 107S489. [b] (1) TexCivA 281SW283.
397-75 CalA 290P525; 201 Iowa378, 207NW351; 157Md426, 146A239. [b] **Conduct must induce reliance thereon** to extent rendering it fraud to recede. Mich 233NW417.
397-78½-New. Conversation between insured's attorney and local agent of insurer which occurred more than five months after expiration of time fixed in policy for filing proof of loss cannot be made basis of waiver excusing failure to file such proof in time. 234Mich 651, 209NW119.
398-79 But see 85Mont419, 279P243.
398-83 142Miss369, 107S523. [d] **Where insurer waives written notice of loss,** proof of loss is waived by failure to furnish blanks therefor. 142Miss369, 107S523.
398-84 142Miss369, 107S523.
399-98 16F(2d)774, 775 [citCJ]; 30 F(2d)18; 30F(2d)794; 219Ala332, 122 S346; 172Ark767, 290SW367; MoA 277 SW588; 85Mont405, 279P239; SD 231

NW902; 160Tenn152, 22SW(2d)362. [b] (2) But see 127Misc408, 216NYS315.
400-2 40GaA275, 149SE318; 52ND324, 202NW657; 160Tenn152, 22SW(2d) 362.
400-3 131Misc305, 226NYS630.
401-5 85Mont405, 279P239.
401-11 73Mont169, 235P406, 131Misc 305, 226NYS630; 52ND324, 202NW657, 659 [citCJ].
402-17 73Mont169, 235P406.
403-23 255 IllA209; 204 Iowa335, 213 NW762; 73Mont169, 235P406; 24 OhA 29, 155NE806.
403-24 176Ark183, 28SW(2d)4.
403-28 167La608, 120S24.
403-29 75Mont1, 241P631; TexCivA 6 SW(2d)151; 152Wash199, 277P443.
403-30 16F(2d)774; 40F(2d)379; CalA 290P525; IndA 168NE699; 123Kan692, 695, 256P1002 [citCJ]; 234Ky340, 28 SW(2d)14; 165Minn442, 206NW655; 33 PortoRico 773; 152Wash241, 277P834 (2dcase); 104WVa605, 140SE681.
404-31 172Ark767, 290SW367.
404-33 Contra 127Kan787, 275P211.
404-34 205 Iowa1294, 217NW816 (receiving and taking proofs under advisement).
404-37 124 Or521, 264P862, 863 [cit CJ].
405-46 34PortoRico 370.
406-58 172Ark971, 291SW60; 43 Ida 222, 253P379; 85Mont405, 279P239 (agent's retention of proofs of loss).
406-65 19F(2d)828; 300Pa555, 151A 285(2dcase); 104WVa605, 140SE681.
406-66 19F(2d)828.
406-67 165Minn442, 206NW655. But see TexCommnA 274SW123.
406-72 25F(2d)398; 170Ark1194, 280 SW629; Fla 129S748; 41GaA49, 152SE 146; 253 IllA76; 84 IndA643, 151NE 734; IndA 168NE464; IndA 168NE702; 129Kan225, 282P571; 223Ky842, 58W (2d)265, 266 [citCJ]; 232Ky785, 24SW (2d)616; 192NC612, 135SE463; 24 OhA 29, 155NE806; 52SD513, 219NW119; TexCivA 281SW283; TexCivA 26SW (2d)474; TexCivA 28SW(2d)1088.
408-73 167Minn146, 208NW816; MoA 277SW588; 85Mont419, 279P243; 300 Pa555, 151A285(2dcase).
408-75 25F(2d)398; 102NJL414, 131A 910; 52ND324, 202NW657, 659 [citCJ]; 300Pa555, 151A285(2dcase); 50SD502, 210NW739.
410-76 24 OhA29, 155NE806.
410-79 [a] (2) 52ND324, 202NW657, 659 [citCJ].
411-85 245 IllA124; Iowa 233NW153 (statement that policy had been cancelled). [a] (3) Letter by company stating that no premiums had been paid to its office and that no report of issuance of policy had been received, and inviting insured to take action, constitutes waiver. 85Mont419, 279P243. [c] 234 Mich651, 209NW119 (cancellation of policy if void).
411-90 TexCivA 28SW(2d)1088.
412-2 NJ 151A869.
412-4 256Mass221, 152NE320 (adjuster held without general or special power to bind insurer by promise to pay).
412-18 MoA 15SW(2d)939.
413-28 TexCommnA 288SW137.
413-29 TexCommnA 288SW137.
413-33½-New. An agreement by an adjuster of insurers, waiving the right to have a distribution average clause applied to a loss under a policy, is without consideration where insured gives up no right and receives more than he is entitled to receive. TexCivA 281SW217.
413-42 TexCivA 290SW912, 915 [cit CJ].
414-50 TexCivA 290SW912, 915 [cit CJ].
414-56 152Wash637, 278P702.
414-59½-New. An adjuster's expense clause is valid, Alta [1928] 1DomLR 1040.
414-59¼-New. and traveling expenses under such clause include living expenses at the place of adjustment. Alta [1928] 1 DomLR1040.
414-59¼-New. Referee cannot recover from insurance company expenses of attending hearings and attorney's fees in defending company's unsuccessful suit to prevent award and remove plaintiff. Mass 170NE795.
414-61 38F(2d)153; Mass 168NE741. But see MoA 30SW(2d)780.
414-67 27 OhNPNS151.
414-68 [a] **Where immediate payment is part of consideration for settlement,** it is of essence of contract and condition precedent to its validity. 222MoA467, 280SW726.
415-75 229AppDiv541, 242NYS562 (insured entitled to summary judgment).
415-76 103NJL184, 134A861.
415-78 251Mich105, 231NW61. [a] (2) Settlement and accord, based on partial loss through mutual mistake when there was total loss, has been held void. 34 OhA453, 171NE345.
416-89½-New. If insurer refuses to pay the amount agreed on in the settlement, insured has the right to sue on the policy. MoA 297SW982.
416-89⅓-New. Insured's acceptance of settlement under written policy has been held not accord and satisfaction of undisputed claim for loss, including claim under oral policy. Wash 292P409.
416-89¼-New. Insured is not estopped to assert claim under oral policy after settlement under written policy where insured was not prejudiced. Wash 292P 409.
416-91 32PortoRico 73 [quotCJ].
416-92 32PortoRico 73, 74 [quotCJ].
416-93 35GaA720, 135SE107; 170Minn 215, 212NW449; 32PortoRico 73, 74 [quotCJ]; TexCivA 281SW275; Tex CivA 298SW658. [b] (2) Where parties have agreed on appraisal, award is condition precedent to recovery by insured. 35GaA720, 135SE107. [c] **Policy, with arbitration provision,** is voluntary contract though form prescribed by statute. 7F(2d)833. [d] **In Georgia.**-35GaA 720, 135SE107. [e] **Compulsory arbitration in standard policy,** applicable on disagreement as to loss, is not revocable. Minn 233NW310.
416-96½-New. An arbitration agreement attempting to change the measure of recovery for partial loss laid down by statute is invalid. 132SC427, 128SE 865.
416-96⅓-New. The provisions of some standard policies give insured as well as insurer the right to an appraisal. 170 Minn215, 212NW449.
416-96¼-New. An agreement to submit to appraisal and award is an agreement to submit to award in accordance with statute. 137SC248, 134SE870.
416-96½-New. An agreement for the submission of a dispute to the appraisers, differing from an appraisement clause in the fire policy, abrogated it. 101NJEq692, 139A399.
416-96⅓-New. An insurance policy with a statutory provision for a board of appraisal is a contract voluntarily made. 175Minn73, 220NW425.
416-96½-New. Agreement to submit loss to appraisal need not necessarily provide that all items of loss shall be appraised. Pa 152A95.
416-97 [c] **Appraisement affords speedy and inexpensive method** of settling dispute between insurer and insured as to amount of loss or damage. 237Mich665, 213NW70.
416-97½-New. The purpose of a provision for arbitration is to afford a speedy and inexpensive way of settling the question in dispute affecting the liability of insurer. 237Mich646, 213NW161.
417-98 222AppDiv302, 226NYS243; 145 Wash199, 259P387. [a] **"Loss or damage"** construed to apply to total or partial loss respectively. 222AppDiv302, 226NYS243.
417-99 TexCivA 15SW(2d)81. But see 222AppDiv302, 226NYS243.
417-2 222MoA31, 48W(2d)871; 251NY 230, 167NE426.
417-3 251NY230, 167NE426.
417-5 235 IllA344; 232Mich295, 205NW 83.
417-6 TexCivA 298SW658.
418-7½-New. An absolute denial of liability by insurer does not deprive insured of the right to an appraisal. 170 Minn215, 212NW449.
418-13½-New. , except where the policy makes demand optional. 115 Oh426, 154NE723.
419-22 TexCivA 12SW(2d)235.
419-24 TexCivA 281SW275.
419-36 36GaA586, 137SE570; 237Mich 665, 213NW70; 318Mo 1089, 2SW(2d) 593, 601 [quotCJperWalker,CJ]; 101 NJEq692, 139A399. [h] **Fact that arbitrator appointed by insured, immediately on his selection, went to work,** and among other things consulted manufacturers, to determine actual value of articles destroyed, does, as respects right to compensation for services, not make him in "employment" of insured, and therefore ineligible as arbitrator. 152Va 405, 147SE222.
420-37 101NJEq692, 139A399; 126 Misc75, 213NYS407.
420-38 36GaA586, 137SE570; 318Mo 1089, 2SW(2d)593, 601 [quotCJper Walker,CJ]; 126Misc75, 213NYS407; 137Misc349, 242NYS201.
420-39 237Mich665, 213NW70; Tex CivA 298SW658; Va 153SE731.
420-40 265Mass305, 163NE908.
420-41 237Mich665, 213NW70.
420-46¼-New. Business relations of parties with their appraisers do not render them ineligible. 237Mich665, 213 NW70.
420-50 145Wash199, 259P387.
420-53 [a] **After good-faith failure** to agree as to third man, parties need not appoint other arbiters. TexCivA 297SW 474.
420-54½-New. Insured need not be consulted in the selection of an umpire. 145Wash199, 259P387.
420-55 318Mo1089, 2SW(2d)593.
420-56½-New. Appointment of umpire by court is a nullity where there has been waiver of arbitration. 232Mich 295, 205NW83.
420-57½-New. **Power of appointment is not exhausted** by appointment of an umpire who subsequently resigned. 195 Wis509, 218NW814.
421-58 Mass 166NE758.
421-60 318Mo 1089, 2SW(2d)593, 601 [quotCJperWalker,CJ].
421-62 29F(2d)988.
421-70 101NJEq692, 139A399. [c] **Where umpire acted without being advised** of differences of appraisers, new umpire should be appointed. 101NJEq 692, 139A399. [d] **Where appraisers went together to scene of fire and examined property,** and then or thereafter examined bills for merchandise, made figures on the entire loss, and concluded that "we cannot agree," and submitted same to umpire, who afterwards participated in award, that constituted disagreement of appraisers as to loss before umpire acted. NJ 144A726.
422-81 See also 169Minn1, 210NW385.
422-87 Mass 171NE448; 318Mo 1089, 2SW(2d)593, 601 [quotCJperWalker, CJ].
422-88 See also Mass 166NE758. [a] (1) 7F(2d)833.
422-89 137Misc349, 242NYS201.
422-90 86Colo 72, 278P602. [a] **Appraisers may properly use their own expert knowledge** of subject matter. 194 Wis579, 217NW322.
422-91 Mass 166NE758.
422-98 150SC289, 148SE49. But see 145Wash199, 259P387. [a] **Statute held to impliedly require** notice and hearing. Mass 171NE448 (requisites of notice).
423-99 Mass 166NE758.
423-3 [a] **Notice not required** when appraisers are experienced and there is small damage. 150SC289, 148SE49.
423-9½-New. Evidence has been held sufficient to show that insurer's appraiser received notice of the meeting at which the award was made. 237Mich 665, 213NW70.
423-16½-New. Appraisal clause in a policy is not a waiver of right of insured to appear before the board of appraisers. 86Colo 72, 278P602.
423-17 142SC348, 140SE696. [d] **In Minnesota.**-7F(2d)833. [e] **Finding that actual value** of building destroyed was less than stipulated value in "fixed value" policy rejected as surplusage. 139 SC212, 137SE678.
424-18 See also 35GaA606, 134SE336, 339 [citCJ].
424-19 See also MoA 293SW504.
424-20 33F(2d)675; Minn 214NW65; 82NH533, 136A364.
424-21 127Kan564, 274P243; MoA 293 SW504; 142SC348, 140SE696. See also

175Minn73, 220NW425.

424-26 150SC289, 148SE49.

424-26½-New. Irregularity in appointing an umpire invalidates an award. 35 GaA720, 135SE107.

424-26⅓-New. An award by an umpire without disagreement between the appraisers is valid. 145Wash199, 259P 387.

424-26¼-New. An award is not void because taking no evidence as to the amount of the loss suffered. 145Wash 199, 259P387.

424-26⅕-New. The court will not weigh the technicalities of the method of arriving at the award. NJ 144A726.

424-27 33F(2d)675; 82Mont264, 266P 640, 643 [citCJ]; NJ 144A726.

424-32 Mass 166NE758; NJ 144A726.

424-33 86Colo 72, 278P602. [a] **Act of umpire** in excess of authority renders his award void. 101NJEq692, 139A399.

425-37 33F(2d)675 (authorization of both arbitrators and appraisers is binding on parties as contract); 175Minn 73, 220NW425; 56ND841, 219NW467; 36Man110, [1926] 4DomLR1173, [1926] 3WestWkly563. [d] **Appraisal under valued policy.**-130Misc165, 223NYS441.

425-38 See also 28F(2d)968; 175Minn 73, 220NW425.

425-39½-New. Part of an award not in accordance with the policy may be disregarded as surplusage. 139SC212, 137 SE678.

425-40 97PaSuper137 (holding findings unappealed from are conclusive).

425-41 218MoA395, 277SW349 (award beyond powers of arbitrator); 137SC 248, 134SE870.

425-42 150SC289, 148SE49 (award not made according to statutory requirements). See also 35GaA606, 134SE336 [citCJ].

425-44½-New. Appraisal award, though not binding because not complying with submission agreement, is persuasive evidence of items appraised. Pa 152A95.

425-45 318Mo1089, 2SW(2d)593, 601 [quotCJperWalker,CJ].

425-48 See also 179Minn510, 229NW 792. [a] **In such action insurer may litigate** question adversely passed upon. 175Minn73, 220NW425 (coverage).

425-53 265Mass440, 164NE383; 131SC 498, 127SE570. [a] **Method of determining amount of loss** is binding on holders of policy as collateral security. 131SC498, 127SE570.

425-55 [a] **Award fair on its face** can be impeached only by showing fraud or such gross mistake as will imply bad faith. 168Minn431, 210NW289.

425-56 235Mich446, 209NW569. [a] 168Minn431, 210NW289.

426-58½-New. Invalid award did not preclude court from determination of amount of insured's loss and insurer's liability. TexCivA 275SW203.

426-58⅓-New. Fraud may be proved by direct evidence or by proving such a state of facts as lead the mind to the conclusion that the award was influenced by dishonest motives. 168Minn 431, 210NW289.

426-60 [c] **Insured not estopped** by having accepted payment and receiving new policy on remainder of stock. Kan 291P935.

426-64 101NJEq491, 138A664. See also 194Wis579, 217NW322. [a] **Verdict of jury much greater than award** held not ground for setting aside award. 194 Wis579, 217NW322.

426-65 179Minn510, 229NW792.

426-66 127Kan564, 274P243. [a] **Award set aside because of inadequacy and improper appraisers.**-126Misc75, 213 NYS407.

426-67 167Minn479, 209NW490.

426-68 36GaA586, 137SE570; 127Kan 564, 274P243; 126Misc75, 213NYS407 (professional appraiser of insurance companies, where disinterested men were to be chosen); TexCivA 275SW203. See also 318Mo 1089, 2SW(2d)593. [a] **Acting under direction of and as agent for one party,** instead of as impartial judge, constitutes misconduct. 237Mich 646, 213NW161. [b] **Whether insured justifiably believed referee's statement** as to not acting as referee within four months held for jury. Mass 172NE108.

426-71 36GaA586, 137SE570; 127Kan 564, 274P243; Kan 291P935; 222Ky 298, 300SW900; Mass 166NE758; 82 Mont264, 266P640; TexCivA 297SW584. [b] **Refusal of insured's appraiser to act with insurer's appraiser and umpire appointed on insurer's application** does not disqualify him from further acting so as to avoid award in which he participated. 195Wis509, 218NW814. [c] **Evidence held insufficient for jury to decide that arbitrators were guilty of misconduct.**-265Mass305, 163NE908.

427-72 NJ 144A726.

427-74 [a] **Evidence held not to show** that threats of insured's attorney caused failure to agree. 36GaA538, 137SE286.

427-79 33F(2d)675.

427-81 232Mich295, 205NW83.

427-82 237Mich646, 213NW161.

428-90 35GaA720, 135SE107. [b] **Court declaring award invalid** cannot fix amount due under policy, as new appraisal must be had. 35GaA720, 135SE 107.

428-91 36GaA538, 137SE286; 56ND 841, 219NW467; 283Pa397, 129A326; TexCivA 275SW203.

429-3 224AppDiv690, 228NYS710; Tex CommnA 26SW(2d)162. [a] 102NJL 414, 131A910.

429-4 104WVa605, 140SE681.

429-6 224AppDiv690, 228NYS710.

429-7½-New. , or by arbitrary appointment of adjuster in its service instead of a director mutually agreed upon, in accordance with charter provision. 233 Mich305, 206NW503.

430-17½-New. But where authorized adjuster of insurer tells insured, who has refused to accept amount tendered, to go ahead and sue for full amount claimed as threatened by insured, there is a waiver. 232Mich295, 205NW83.

430-17⅓-New. Where insurer assumes to fix a limit beyond which it will not submit to liability, such action is waiver of appraisal. 232Mich295, 205NW83.

430-28 167La608, 120S24; TexCivA 281SW275.

431-31 125Me234, 132A523; 233Mich 305, 206NW503; 221MoA741, 285SW 1024; 102NJL414, 131A910. But see 28 F(2d)968. [a] (2) Denial of liability expressly calling attention to arbitration clause is not absolute denial of liability. 249Mich121, 227NW765.

431-35 175Minn73, 220NW425.

432-41 [b] **Agreement of arbitration after loss,** if loss was total, was without consideration and unenforceable. TexCivA 15SW(2d)81. [c] **Such agreement will be construed** as requiring loss to be ascertained in accordance with statute. 150SC289, 148SE49.

432-43 See also 35GaA606, 134SE336, 339 [citCJ].

432-43½-New. A nonwaiver agreement required of insured as condition for submission to arbitrators did not destroy insured's rights under claimed waiver by insurer of conditions of policy as to gasoline on premises where declared purpose of such agreement was to preserve rights of all parties. 144 Miss749, 111S366.

432-43⅓-New. Immediate payment, made part of the settlement, is a condition precedent to its validity. 222MoA 467, 280SW726.

432-48 90PaSuper540.

432-52 90PaSuper540.

432-61 37GaA751, 141SE676. [e] (2) Allegation that plaintiff's claim had been satisfied by payment, by evidence that such claim had been transferred to third person, and that indebtedness was still unpaid and unsatisfied. 37GaA751, 141SE671. [g] **Evidence** insufficient to impeach award. 167Minn479, 209NW 490. [h] **Amended answer** held sufficient as to fraud. 167Minn479, 209NW 490. [i] **Admissibility of evidence.**-In action to enforce award of arbitrators, books and records kept by insured not shown to be relevant to issues are not admissible simply because they were used by arbitrators in determining amount of loss. 168Minn431, 210NW 289.

433-69 195Wis509, 218NW814.

433-69½-New. Answer must allege specific facts and not general conclusions that arbitrators acted erroneously and incorrectly. 167Minn479, 209NW490.

433-72 [a] NJ 144A726 (participation of umpire). [d] 82Mont264, 266P640. [h] **Court may properly inquire** into method by which appraisers arrived at their decision. 82Mont264, 266P640. [i] **Admissibility of evidence.**-82Mont 264, 266P640. [j] **Matters constituting misconduct.**-82Mont264, 266P640. [k] **Evidence held sufficient.**-127Kan564, 274 P243.

434-74½-New. or because of incompetency of appraisers. 127Kan564, 274P 243.

434-75 [a] **Evidence held insufficient** to set aside award. Va 153SE731 (burden of proof).

434-80 82Mont264, 266P640.

434-88 [a] **Court may hold award invalid** where neither party asks for submission to jury. TexCivA 297SW584.

434-88½-New. In the notes will be found cases in which the evidence has been held sufficient to justify the court in dismissing a bill filed by an insurer to set aside an award. 237Mich665, 213 NW70.

434-91 [c] **Where loss is made payable to insured and another,** there is at most mere joint agency to receive payment for loss suffered by insured. 317Mo 1119, 298SW63.

435-96 But see 151Wash592, 276P559 (priorities).

435-99 147Miss335, 112S469, 53ALR88.

435-1 CalA 289P865 (refers to interest at time of fire); 135Misc56, 237NYS531.

435-1½-New. Person paying consideration for property taken in name of another does not become equitable owner for purpose of claiming proceeds of policy thereon where statute provides that alienee, in such case, takes title without resulting use or trust in favor of party making such payment. 187Wis432, 204 NW331.

435-2 6F(2d)533, 43ALR496. [a] **Payee has superior right to recover to extent of his interest** and insured can only recover excess. Ala 130S180.

435-3½-New. Where nothing is due insured under the policies, nothing can be recovered under the "loss payable clause." 192NC312, 135SE34.

435-3⅓-New. Such provision must be construed in view of the existing situation of which both parties had notice. 18F(2d)457.

435-3¼-New. Such provision is notice to, and recognition by, insurer of interest in the property then or thereafter of whatever kind it might be. 18F(2d) 457.

435-5 MoA 294SW433, 435 [quotCJ].

436-14 29Hawaii304, 316 [quotCJ].

436-16 29Hawaii304, 316 [quotCJ].

436-23 [a] (2) Where tenant insures both his and landlord's interest, tenant is not required to account to landlord for portion of proceeds representing value of landlord's estate. 131Or302, 282 P764. [b] **Rule of public policy against overinsurance** is not available where landlord sues to procure portion of proceeds from policy procured by tenant. 131Or302, 282P764.

437-25½-New. A contract provision that a lessor railroad company shall have the full benefit of insurance effected by the lessee on structures erected on the leased premises is valid and enforcible if the lessor has an insurable interest in the property. 201Iowa1072, 206NW804.

437-26 219Ky827, 294SW792, 794 [cit CJ].

437-27 6F(2d)533, 43ALR496.

437-28 6F(2d)533, 43ALR496; 200Wis 331, 228NW505 (purchaser having right to rescind where buildings materially damaged). But see 200Iowa44, 204NW 235 [citCJ], 40ALR603. [d] **Rule applicable to mutual companies.**-239Mich642, 214NW962.

437-29 But see 6F(2d)533, 43ALR496.

437-30 219Ky827, 294SW792, 794 [cit CJ]. [c] (1) 129Kan337, 282P577 (purchaser assuming mortgage). (3) Fact that purchasers become principal debtors and mortgagor only surety does not make proceeds of policy trust fund. 129Kan337, 282P577.

437-30½-New. Where an administrator with beneficial interest insures property as the owner, and transfers the property and the policy, the estate will not be entitled to a proportionate part of the proceeds upon notice to insurer, after loss, of the estate's interest. NS [1929] 1DomLR543.

437-34 But see NS [1930] 4DomLR588.

438-36 142Wash601, 254P240.

438-38 219Ky827, 294SW792, 794 [cit CJ].

438-39 204 Iowa901, 216NW292; Iowa 227NW523; Md 148A252; 197NC68, 147SE691; TexCivA 21SW(2d)1106.

438-41 125Me465, 134A689. [a] (3) Notice held insufficient. 125Me465, 134 A689. [c] **Consent of mortgagor** that funds held by established lien be paid to a mortgagee who has no effective lien cannot defeat lien. 125Me465, 134A689. [d] **Priorities between mortgages.**-125 Me465, 134A689. [e] **Judgment** under some statutes may be rendered for what is found due from insurer upon the policy notwithstanding mortgage debt has not matured. 125Me465, 134A689.

438-44½-New. Where insured owner's failure to recover on policy was due to his neglect to furnish proofs of loss, he may not recover insurance from mortgagee on theory that it was liable therefor because it failed to notify owner that policy has been canceled. 235 Mich70, 209NW120.

438-44⅓-New. Insurer does not assume payment of mortgage debt by issuance of policy with standard mortgage clause therein. 136SC144, 134SE 263.

438-44¼-New. Standard mortgage clause in policy does not constitute new and independent contract between insurer and mortgagee. 136SC144, 134SE 263.

438-44½-New. Open mortgage clause in policy does not create new and independent contract between insurer and mortgagee. 136SC144, 134SE263.

438-44⅔-New. An owner who, for his own protection and at his own expense, takes insurance on property which he has conveyed by deed in escrow to a mortgagee on condition that the deed shall be surrendered to him if he pays the mortgage by a stated date, but who is not otherwise a party to the mortgage, is entitled to the proceeds of the policy in case of loss before such date. 204 Iowa901, 216NW292.

438-44½-New. Standard mortgagee clause as to proof of loss will be read into fire policies payable to insured and mortgagees as interests may appear. 222AppDiv219, 225NYS615.

438-44⅞-New. Rights stated under policy payable to mortgagee and vendor as interest appear procured in purchaser's name by mortgagee loaning part of price and taking assignment of policy as security. Alta [1929] 4DomLR640.

438-45 6F(2d)533, 43ALR496; 14 F(2d)524; 43 Ida222, 253P379, 382 [cit CJ]; 166La457, 117S554; Md 148A252; 50ND621, 197NW592 (assignee of mortgage held entitled to insurance money as against mortgagor); TexCommnA 284SW927; TexCivA 78W(2d)144, 145 [citCJ]. [c] (2) Where policy was in name of husband of owner, it is not enforceable by mortgagee. 35GaA467, 123SE652. [e] **Mortgagee held appointee of mortgagor,** right to recover being measured by that of insured. 43 Ida222, 253P379. [f] **As contract between insurer and mortgagee** mortgage clause of policy providing payment to mortgagee in event of loss creates separate and distinct binding agreement between insurer and mortgagee. 6 F(2d)533, 43ALR496. [g] **Mortgagor may recover** where mortgagee released mortgage. TexCivA 278SW907. [h] **Where policy void for want of insurable interest,** mortgagee cannot recover. 129 Okl 204, 264P142.

439-46 43 Ida222, 253P379, 382 [cit CJ]; Md 148A252.

439-47½-New. In suit by mortgagor against mortgagee for accounting of insurance money collected by it, court's conclusion that relief should be denied held justified by proofs. 235Mich70, 209NW120.

439-51 Ala 129S470.

439-53½-New. Mortgagee has not greater right than insured. 173Ark668, 292SW1018.

439-53⅓-New. After sale of premises, policy ceases to be effective except as to interest of mortgagee and mortgagor may not recover any part of proceeds. 6F(2d)533, 43ALR496.

439-53¼-New. Second mortgagee who buys at foreclosure of second mortgage and then redeems from sale under foreclosure of first mortgage is entitled to insurance under first mortgage payable to first mortgagee as his interest might appear. 203 Iowa763, 210NW544, 52 ALR895 (fire occurring during period of redemption).

439-55 [a] **Basis of mortgagor's right** in policy after discharging mortgage arises from restoration of rights as insured. 136SC144, 134SE263. [b] **Where mortgagee refuses to proceed against insurer under standard mortgage clause in policy,** mortgagor has right to bring action against mortgagee and insurer to compel collection and application on mortgage. 136SC144, 134 SE263.

440-63 173Ark1016, 294SW19.

440-64 6F(2d)533, 43ALR496.

440-65 122Kan328, 252P263.

440-66½-New. Where a policy of insurance is voided, a chattel mortgagee, having a loss payable clause therein, cannot be subrogated to the rights of insured, since he has none. 119 Oh550, 165NE41.

440-68 197NC68, 147SE691.

440-69 197NC68, 147SE691. [c] **Second mortgagee cannot come in under standard mortgagee clause** attached to policies in favor of first mortgagee except by consent of first mortgagee. 103 NJEq521, 143A815.

441-74 See also TexCommnA 284SW 927. But see 108Conn588, 144A36, 63 ALR1521.

442-79½-New. Where mortgagee agrees to permit mortgagor to apply the proceeds on a new residence, and mortgagor relies on the agreement, mortgagee waives the right to the proceeds. 177Ark150, 5SW(2d)933.

442-79⅓-New. and mortgagee cannot recover the proceeds to protect himself against liens on the new residence paid for by insured, 177Ark150, 5SW(2d) 933.

442-79¼-New. and the fact that the new residence is cheaper than the old is immaterial where the agreement called for a new residence costing more than the insurance merely. 177Ark150, 5SW (2d)933.

442-80 TexCivA 278SW907; TexCivA 275SW316. See also 14F(2d)524. [e] **Policies taken out direct to mortgagees** as intended, though paid for by mortgagors, may not after loss, as against insurers, be treated as taken out payable to mortgagor with loss payable clause. 192Wis623, 211NW776.

442-81 TexCivA 278SW907.

442-82 TexCivA 275SW316.

442-84 197NC68, 147SE691; 6PaDist& Co 271; 135SC391, 133SE913, 47ALR 1001; TexCivA 299SW943. [d] **Sale after mortgage.**-127Misc534, 217NYS 409. [e] **Purchaser of mortgaged premises.**-135SC391, 133SE913, 47ALR1001. [f] **Assignee of mortgage** requiring insurance on premises is entitled to lien. 135SC391, 133SE913, 47ALR1001. [g] **Where mortgagor agreed in writing to carry insurance for benefit of one mortgagee,** and he was "required" to do same thing for benefit of another mortgagee, that agreement was in writing and "requirement" in parol did not imply that duty with which mortgagor was charged was less exacting in one case than in the other. 197NC68, 147 SE691.

443-90 156SC453, 153SE385.

443-93 AlaA 130S313; 29Hawaii304, 316 [quotCJ]; 44Philippine98.

443-94 44Philippine98.

444-97 See also 44Philippine98.

444-99 249NY258, 164NE43.

444-1 187Wis432, 204NW331, 333 [cit CJ]. [c] **Husband as surviving joint tenant** of wife in property insured is not her legal representative within policy. 187Wis432, 204NW331.

445-15½-New. Insurer paying holder of note secured by mortgage on property insured is not entitled to recover full amount of note with interest and attorney's fees but only amount actually paid to creditor. TexCivA 287SW76.

445-15⅓-New. Where a loss payable clause makes the policy payable to a creditor holding a note of insured, an indorsee of the note is entitled to the proceeds. TexCivA 281SW283.

445-15¼-New. When a company pays insurance to a creditor holding an unpaid note and receives a transfer of the note, such company becomes an assignee of the note. 229Ky674, 17SW(2d)726.

445-17 81Mont271, 263P93; 82Mont 574, 268P787; 137Misc263, 241NYS727.

446-24½-New. Assignment of part of claim for fire loss without consent of insurer is void as to insurer, although effective as between assignor and assignee. 75Mont1, 241P631.

446-29 See also 49SD33, 206NW419.

446-30 79CalA257, 249P215; 127Misc 1, 215NYS151. [b] **Restoration of property.**-127Misc1, 215NYS151.

446-32 218Ala221, 118S404; 173Ark 668, 293SW1018.

446-34 218Ala221, 118S404.

447-37 328 Ill 571, 160NE145; 137 Misc263, 241NYS727.

447-44½-New. A provision in a policy making loss payable to a third person does not constitute an assignment of the policy to him. Can [1929] 4DomLR 1028.

448-47 45Philippine122 (instance of assignment in favor of mortgagee).

448-49 See also Colo 292P602.

448-51 197Wis136, 221NW654.

448-52 113Nebr830, 205NW642.

448-53 46Philippine592.

448-54 [a] **Placing for sale sign on premises** does not prevent insurer's exercise of option to repair. 219Pa119, 139A627.

449-67 46Philippine592.

449-73½-New. Adjuster's notice after loss and placing of locks on store of insured is held specific notice that insurers would take over damaged goods at their appraisal value. 19F(2d)828.

449-73⅓-New. Insurer's acts in placing locks on doors of insured's store after appraisal agreement held to result in practical eviction of insured. 19F(2d) 828.

450-81 221MoA741, 285SW1024. [a] 283Pa397, 19A326.

450-83 56ND841, 219NW467.

450-88 19F(2d)828.

450-89 19F(2d)828. [a] **Insured is not obligated to make repairs** on payment of damage by insurer who was obligated to repair damage or pay therefor. 229AppDiv541, 242NYS562.

450-98½-New. Offer of third person to repair will not be considered as exercise of option to repair by insurer unless insurer assumes responsibility. 291Pa119, 139A627.

451-3 291Pa119, 139A627.

451-6 [a] **Insurer cannot limit insured's recovery** to estimated cost of repairs by third party. 291Pa119, 139A 627.

451-8 207 Iowa4, 222NW368.

451-11 207 Iowa4, 222NW368.

451-12½-New. Interest should be allowed on a claim from sixty days from the date of notice of loss if the policy provides for payment then, rather than from the date of the fire. TexCivA 9SW (2d)432.

451-13 221MoA741, 285SW1024.

451-14 291Pa119, 139A627; 207 Iowa 4, 222NW368.

451-21 291Pa119, 139A627.

451-23 222MoA31, 48W(2d)871.

453-59½-New. Under an insurance policy containing a warranty by insured that he will not enter into any special agreement with carriers releasing them from common-law or statutory liability, but that insured might accept without prejudice to insurance ordinary bills of lading on merchandise insured, insured was privileged to accept ordinary bills

of lading, although they might contain stipulations limiting carriers' liability, which would otherwise void the policy. 132Misc679, 230NYS340.

454-63 225AppDiv279, 232NYS586.

454-70 122Kan736, 253P433; 226Ky706, 118W(2d)968; 194Wis322, 216NW507.

454-75 [b] **Insurance company, paying more than its proportionate amount of insurance loss** under coinsurance clause on account of adjusters' calculations based on assumption that company had three outstanding policies instead of two, has been held not entitled to recover overpayment from insured on ground of mistake of fact, where company apparently accepted adjusters' method and insured all along made no claim to third policy. TexCivA 138W(2d)409.

454-82 [b] **Evidence insufficient** to establish insured's fraud in action by insurer to recover payments made in settlement of claim. 12LaA649, 126S711.

454-83 122Kan736, 253P433.

455-87 205Iowa1085, 217NW268, 271 [citCJ], 56ALR463.

455-89½-New. Insurer cannot prorate its liability with other insurance where other insurance had provision voiding it if more insurance was taken out. TexCivA 26SW(2d)474.

455-92 MoA 20SW(2d)705 (not subrogated to rights against one secondarily liable); 243NY95, 152NE476; 127Or276, 263P907; 141Wash534, 252P98; 192Wis623, 213NW632, 633 [citCJ]; Ont [1927] 2DomLR659, 668 [citCJ].

456-95 49RI426, 143A779.

456-95½-New. Application to water companies. An insurance company compelled to pay fire losses caused by the breach of a water company's contract with the municipality to furnish water is not subrogated to insured's cause of action against the water company, 223Ky54, 28W(2d)1027.

456-95½-New. since the water company is not a party to the insurance contract and such subrogation would be against public policy. 223Ky54, 28W(2d)1027.

456-98 136Misc594, 240NYS372; 298Pa53, 148A35(2dcase); Ont [1927] 2DomLR659.

456-3 Ind 166NE668.

457-4 [a] 252Mass432, 147NE904. [b] **Where policy provides against liability** if carrier is given benefit of insurance, shipper may sue carrier for benefit of insurer, under agreement whereby latter advanced cost of goods and shipper was to repay to extent of its recovery. 170Ark1039, 282SW975.

457-9 215Ky465, 284SW1094.

457-11 243NY95, 152NE476.

457-16 MoA 20SW(2d)705.

457-17 See also 148Miss627, 114S865.

457-20 TexCommnA 38SW(2d)419 [cit CJ]. [b] **Where lessee who owned building on leased premises took out insurance in lessors' names** and paid premium, and, upon destruction of building, turned over proceeds to lessors as rent together with policy, lessee was insured, and, since lessors were not insured, they could not subrogate insurance company to their right. 9LaA295, 119S543.

458-28 114Nebr53, 207NW528 (right against warehouseman for loss of grain by fire).

458-29 MoA 9SW(2d)255. But see 9LaA295, 119S543.

458-32½-New. Statute prohibiting assignment of building and loan mortgage does not apply to assignment effectual as subrogation. 220Ala428, 125S807.

458-33 MoA 9SW(2d)255.

460-50 59OntL444, [1926] 4DomLR540.

461-57 220Ala428, 125S807; 237IllA269 (dictum); 192Wis623, 213NW632, 633 [citCJ]. See also 23F(2d)548; 160Ga755, 129SE53.

461-58 39F(2d)25 (provision held valid); 101NJEq437, 139A523. [a] **Payment as condition precedent.**-37OklACR584. [b] **Insurer entitled to subrogation** on payment to mortgagee if mortgage clause provides for forfeiture of insurance by mortgagor on breach of some terms of policy. 220Ala428, 125S807. [c] **Court can conclude right does not exist under policy,** in absence of proof. TexCivA 28SW(2d)193 (burden of proof of facts entitling insurer to subrogation).

461-59 8F(2d)439; 43F(2d)467; 220Ala428, 125S807; 237IllA269; 254IllA1; 142Va412, 128SE445.

462-61 237IllA269; 219AppDiv110, 219NYS103.

462-69½-New. Where an insurance policy provided that interest of the mortgagee should not be invalidated by foreclosure, insurer could not contend that foreclosure defeated insurer's rights to subrogation to the extent of payment made. 298Pa53, 148A35(2dcase).

462-70 150Md211, 132A635, 45ALR582. [a] (2) Where excess of mortgage debt over sale price of insured premises was greater than amount of insurance, insurer cannot avoid liability by claiming subrogation to purchase price. 150Md211, 132A635, 45ALR582.

462-72 254IllA1 (denial of liability must be in good faith and claim of nonliability on reasonable grounds); Kan293P402; 192Wis623, 213NW632. See also 149Wash148, 270P437.

463-74½-New. The discharge of insurer's obligation under policy payable to mortgagee and ensuing subrogation by assignment do not constitute payment of the mortgage debt by insured so as to give him any right to cancellation and satisfaction of record lien created by trust deed. 142Va412, 128SE445.

463-78 But see 220Ala428, 125S807.

463-82½-New. Where insurer, sued with a carrier by insured, permits judgment in favor of the carrier to become final, it cannot recover from the carrier on the subrogation theory. TexCommnA 38SW(2d)419.

463-83 [b] 62OntL25, [1928] 2DomLR412.

464-85 148Miss627, 114S865. [a] (2) Other instances. TexCommnA 23SW(2d)681. [c] **Bill held insufficient.**-220Ala428, 125S807.

464-86 [b] **Insurer must allege and prove nonliability to mortgagor** under clause giving it right to subrogation on payment to mortgagee. 220Ala428, 125S807.

464-88 148Miss627, 114S865 (evidence held insufficient to warrant subrogation). [b] **Evidence insufficient** to show fire caused by one installing furnace. LaA130S842.

464-89 [a] (4) Contributory negligence of owner of cotton destroyed. 193NC404, 137SE309.

466-17 49RI426, 143A779.

466-17½-New. nor a proper party, 49RI426, 143A779.

466-20 [a] **Before payment of loss.**-170Ark1039, 282SW975.

466-28 Ind 166NE668.

468-55 190NC801, 130SE864 (all companies who have issued policies on property destroyed are proper but not necessary parties).

468-65 34PortoRico388.

469-76½-New. Insurer seeking forfeiture of a fire policy for breach of conditions was not obligated to return an uncarned premium before insisting on forfeiture. TexCivA 300SW223.

469-77 34PortoRico388.

469-78 208Ky731, 271SW1042.

469-80 30F(2d)94 [certiorari den 279US852, 49SCt348(1stcase), 73Led995]; 226Ky594, 118W(2d)415; 234Ky95, 27SW(2d)675; 157Md426, 146A239; 85Mont419, 279P243; TexCivA 58SW(2d)244; TexCivA 78SW(2d)963. See also 193Wis72, 213NW669. But see TexCivA 98SW(2d)132.

469-82 82NH533, 136A364; 32PortoRico73, 74 [citCJ].

469-83 34GaA246, 129SE116; 35GaA720, 135SE107; TexCommnA 26SW(2d)162.

470-84 TexCommnA 26SW(2d)162 (lack of fault on part of insured's appraiser).

470-85½-New. or by frauds. 36GaA497, 137SE277.

470-87 See also 235IllA344.

470-88 See also 249Mich121, 227NW765.

471-91 115Oh426, 154NE723.

472-24½-New. An unincorporated company may be sued at law on a policy although having insufficient funds to pay the loss, without being first sued in equity to compel levy of assessment. MoA 282SW478.

473-30 MoA 256SW120; 130Okl128, 265P759.

473-38 87CalA28, 261P499; Minn 214NW539.

474-41 MoA 282SW478.

474-44½-New. The accrual of a mortgagee's cause of action does not depend on the extent of damages suffered by him. 37OklACR584.

474-44½-New. An action by a mortgagee on a loss payable clause is governed by the general statute of limitations relating to actions on contract and not by the special statute. 43OklACR413.

474-45 Minn 214NW539; 192NC809, 136SE117; 46Philippine345. [a] **Provisions held not limitations of time to sue.**-192Wis160, 212NW301.

474-46 90PaSuper186.

476-57 223AppDiv6, 227NYS326.

476-61 But see 87CalA28, 261P499.

476-65 SD 231NW292.

477-74 See also 107WVa666, 150SE2 (1st case). [a] (1) GaA155SE782.

478-78 [b] **Limitation period does not begin** till ninety days after notice of loss, where by-laws allow that time to pay loss. Iowa 233NW153.

478-83½-New. Where a policy has a valid proviso for appraisal and award, the period of limitation does not run during the pendency of the appraisment proceedings. 35GaA720, 135SE107.

479-10½-New. Plaintiff suing in derivative right of insured against whom he had obtained a judgment for loss of goods while in transit, where the suit was brought upon the policy within one year after return of execution against insured unsatisfied, has been held excused for delay. 50RI118, 145A448.

480-16 33GaA694, 128SE669; 35PortoRico136.

481-36 11PaDist&Co711.

481-49 118Ark139, 246P210.

481-53 171Ark1066, 287SW587; 41GaA49, 152SE146; 52SD433, 218NW17. But see NS [1928] 2DomLR867. [b] (1) 192NC809, 136SE117, 118 [citCJ]. But see Wis 211NW301. (2) Nor, where right of action is expressly reserved by insured, does it constitute waiver of such right, but where insurer denied liability within sixty days of loss, insured can immediately sue. 178Ark378, 10SW(2d)859. [d] 192NC809, 136SE117, 118 [cit CJ]. [g] See also NS [1928] 2DomLR867.

482-54 NJ 151A869.

483-65 176Ark1188, 58SW(2d)916.

483-67 CalA 289P865 (substantial interest in property); 233IllA566.

484-71 [c] **Building contractor** is not necessary or proper party in action on parol builder's risk insurance policy. 5F(2d)169.

484-77 233IllA566 (wife); 222AppDiv237, 225NYS714; 50RI118, 145A448. But see Mass 171NE448.

484-79 212Ala649, 103S845.

484-80 25F(2d)847.

484-80½-New. Conditional payment of entire loss by two insurers to become absolute only on failure to recover from third insurer does not preclude insured from suing latter company. 43F(2d)885.

484-81 TexCivA 168SW(2d)360. See also 27F(2d)508.

485-82 219Ala332, 122S346.

485-90 See also 27F(2d)508.

485-91 173Ark1016, 294SW19; 37OklACR584.

485-92 MoA 32SW(2d)111.

486-99½-New. One who has acquired a note indorsed in blank and recognized in a loss paying clause of a policy and in a chattel mortgage on the insured property regarded as security therefor is properly allowed to intervene. TexCivA 281SW283.

486-99½-New. Insured paying the premium on a fire insurance policy reciting a mortgage on the property but not making the loss payable to the mortga-

gee may sue on the policy. **MoA 5SW(2d)660.**

486-99½-New. Mortgagor is entitled to sue as real party in interest, although indebtedness to mortgagee precludes mortgagor from sharing in proceeds. **MoA 32SW(2d)111.**

486-4 81Mont281, 264P132.

486-5 170Ga28, 152SE60. [a] **Necessity of written transfer of policy** cannot be avoided by alleged estoppel of parol promises of insurance agents to make written transfers. 170Ga28, 152SE60.

486-7 168La850, 123S596 (mortgagee assigning note and rights under "loss payable clause" held entitled to sue for benefit of assignee); **TexCommnA 14SW(2d)1020(2dcase).** See also 36GaA538, 137SE286.

486-8 But see 222MoA439, 7SW(2d)434 (assignor of proceeds with power of attorney to collect, but not of claim, held real party in interest as holder of legal title).

486-12 [b] **Assignment by mortgagee of note as collateral security and delivery of fire policy** do not preclude mortgagee from suing on policy. 168La850, 123S596 (pledgee's acquisition of note after commencement of action on policy held not to deprive mortgagee of right to sue).

486-15½-New. Defendant is estopped to assert misjoinder of plaintiff in an action by the buyer and seller of merchandise where insurer consented to an assignment of the policy by the buyer to the seller. 217Ala168, 115S156, 56ALR1075.

486-16 129Kan225, 282P571 (purchaser of claim at receiver's sale). [d] **Necessity for assignment before suit.-Mass** 167NE252.

487-17 33Ariz288, 264P103.

488-37 90PaSuper121.

488-42 [a] **Liability of fire insurance companies held not joint,** though common questions were involved. 15F(2d)725.

488-51 [a] (5) Allegations sufficient. 220Ala664, 127S233.

488-52 [a] (1) 120 Okl 7, 249P908. (3) 38 OklACR23; 39 OklACR287. [d] **Allegations held sufficient.-214Ala520, 108S331.**

489-59 36GaA767, 138SE336; 37GaA366, 140SE893; 35PortoRico623; **TexCivA** 271SW256; **TexCivA** 275SW316 (prayer or request for reformation is unnecessary in action on policy insuring mortgagee's interest); **TexCivA 5SW(2d)244.** See also 204 Iowa335, 213NW762. [a] **In action by mortgagee,** allegations of existence of lien, ownership by plaintiff, and damages to premises by fire, make out cause of action. 37 OklACR584.

489-60 37 OklACR584 (plaintiff must tender issue on all material elements of fact involved in action). [a] **Statement of claim on oral policy** held insufficient. 9PaDist&Co 175.

489-65 But see **TexCivA 20SW(2d)405.**

490-68 212Ala649, 103S845 (complaint naming insurer as named in policy is not demurrable for failure to state whether corporation or partnership); 43 OklACR213; **TexCivA 5SW(2d)244.** [d] **Where life insurance policy sued on** was not made exhibit to petition, sufficiency of petition must be determined from allegations therein without reference to stipulations in policy. **TexCivA 15SW(2d)97.**

490-77 43 OklACR213. See also **Tex CivA** 278SW488.

490-80 43 OklACR213. [a] (2) Not available as defense where it appears that insurer or agent inspected property and prepared policy from facts ascertained. 43 OklACR213.

490-80½-New. Sufficiency of pleading cannot be tested by reference to the terms of the policy in evidence. **Tex CivA 5SW(2d)244.**

490-82 38GaA660, 145SE100(2dcase); 124 Or521, 264P862. [d] 212Ala649, 103S845.

491-89 **MoA** 285SW144.

491-91 38 OklACR23, 25 [quotCJ].

491-92 38 OklACR23, 25 [quotCJ]; **Tex CivA 5SW(2d)244.**

491-93 See also 38GaA660, 145SE100 (2dcase).

492-94 38 OklACR23, 25 [quotCJ].

492-95 **MoA** 285SW144.

492-95½-New. Married woman is not required to allege her separate ownership of separate household articles where she alleges that value of property owned separately exceeds total insurance. **Tex CivA 31SW(2d)850.**

492-97 11F(2d)961; 246 IllA574. [b] **Petition failing to show assignment in writing,** failed to allege cause of action. 170Ga28, 152SE60. [c] **Doctrine of estoppel** cannot be invoked where petition failed to show assignment in writing. 170Ga28, 152SE60.

492-98 **TexCivA** 275SW316.

492-1 [e] 33PortoRico 773.

494-15 233Ky337, 25SW(2d)738.

494-17 35F(2d)213 ("proof of loss" signifies good and sufficient proof of loss).

494-18 120 Okl 7, 249P908.

494-21 35GaA720, 135SE107.

494-23 [a] See also 35GaA720, 135SE107.

495-36 235Ky289, 30SW(2d)1105; 220MoA1337, 296SW464; 37 OklACR584; 120 Okl 7, 249P908; 43 OklACR413. See also 225Ky838, 10SW(2d)311. [b] 219Ala332, 122S346; **TexCivA 13SW(2d)895.** [c] **In action by mortgagee value** of improvements at time of loss must be alleged. 37 OklACR584.

495-40 222MoA31, 4SW(2d)871.

495-41 222MoA31, 4SW(2d)871.

496-55 Mo 26SW(2d)962. [c] **Allegation that fire was not due to fault or negligence of plaintiff** is not necessary. 33PortoRico 773.

496-56 246 IllA574; 75Mont1, 241P631. [d] (3) Waiver of condition need not be alleged in declaration. 238Mich112, 213NW458. [f] (4) 166Minn74, 207NW24. [i] CalA 290P525; 166Minn74, 207NW24 (double insurance); 11PaDist&Co711 (as to required time to bring action).

497-58 235 IllA344; 238Mich112, 213NW458.

497-59 253 IllA76; 120 Okl 7, 249P908. But see 245 IllA124.

498-75½-New. Insurer is not required to plead limitation of liability in accordance with the distribution clause. 18F(2d)457.

498-76 **TexCivA** 290SW912.

499-78 Vt 147A352.

499-79 [e] **Forfeiture** as defense must be pleaded and proved. **TexCivA** 271SW256. [f] **Failure to protect property from further damage after fire.-TexCivA 7SW(2d)963.**

499-81 [a] (3) Cross bill, failing to allege that plaintiff gave notice within reasonable time after discovery of falsity of representation, held insufficient under statute. **TexCivA 13SW(2d)717.**

499-86 219Ky727, 294SW489.

499-88 [d] **Answer held sufficient.-114** Okl 254, 246P595.

500-91 [a] (1) 291Pa119, 139A627.

500-93½-New. An affidavit of defense stating that merchandise destroyed was not the property of plaintiff but was the property of customers left with plaintiff at the owners' risk and for which plaintiff had assumed no liability is sufficient to prevent judgment. 92PaSuper500.

500-96 215Ala564, 112S154; 220Ala428, 125S807; 217Ky590, 290SW500; Miss 116S743; 49ND176, 191NW350, 351 [cit CJ]. [b] (1) Ala 122S658; 90Fla620, 106S879; 225Ky838, 10SW(2d)311. (7) Other instances. 227Ky651, 13SW(2d)1001. [c] (1) 213Ala488, 105S553 (default in payment of installment on note for premium); 86 Ind240, 156NE833. (5) 215Ala564, 112S154. (6) Other instances. 88 IndA658, 165NE327.

501-98 217Ala168, 115S156, 56ALR1075.

502-99 **TexCivA** 13SW(2d)895.

502-1 218Ky473, 291SW760.

502-3 See also **TexCivA 7SW(2d)963.** [e] **Failure to furnish proof of loss held sufficiently pleaded.-201 Iowa378,** 207NW351.

502-10 See also 34GaA246, 129SE116.

502-11½-New. Affidavit of defense has been held sufficiently to plead appraisal agreement and award. Pa 152A95.

503-27 49ND176, 191NW350, 351 [cit CJ]. [a] **MoA** 285SW741; 104WVa353, 140SE61. [b] **Motion to strike.-MoA,285** SW741. [c] **Reply has been held insufficient.-233Ky337, 25SW(2d)738.**

504-43½-New. Where defendant files a statement of defense, relying solely on fraud in making the application, plaintiff may reply generally denying the charges of fraud. 104WVa353, 140SE61.

504-45 219Ky817, 294SW470. [a] **Replication as to waiver held good in avoidance of defense.** 213Ala626, 106S172.

504-50 49ND176, 191NW350.

504-55 See also 213Ala534, 105S901. [b] **Replication to charge of willful burning,** of promise to pay with knowledge thereof, held demurrable. 219Ala530, 122S658. [c] **Overruling demurrer to reply held not error.-IndA** 169NE342. [d] **Reply held sufficient.-Ala** 128S436.

505-65 215Ala481, 110S909.

505-65½-New. and should show agent's authority. 215Ala564, 112S154.

505-66 [b] **Reply held insufficient.-215** Ala564, 112S154.

505-66½-New. , and should give notice to insurer of his reliance on the waiver or estoppel where defendant has given notice of its reliance upon plaintiff's breach of condition requiring indorsement on policy of consent to remove goods. 102WVa638, 135SE903.

505-66⅓-New. Waiver must be charged directly against insurer, or agent's authority to bind principal alleged specifically. 215Ala564, 112S154.

505-73 33GaA694, 128SE69.

506-79½-New. A petition is demurrable where plaintiff avers an invalid award and fails to allege refusal by insurer to make a valid appraisal and award. 35GaA720, 135SE107.

506-93 41GaA49, 152SE146.

506-93½-New. by supplying an averment of the value of the property destroyed, 220MoA1337, 296SW464.

506-96 But see 37GaA229, 139SE822.

506-98 [a] 38GaA597, 144SE668.

506-98½-New. by pleading the law of the state where the stock of goods was located, 160Tenn208, 22SW(2d)356.

506-1 43 OklACR190; 43 OklACR213. [a] **Extent of damages.-37 OklACR584.**

507-17½-New. It is an abuse of discretion for court to allow defendant to amend its answer so as to set up plea in abatement involving incidentally the conventional limitation of time to sue stipulated in policy where defendant waited until such limitation of time had expired. 118 Or139, 246P210.

507-21 44 Ida491, 258P362, 363 [citCJ].

507-27 126Misc738, 214NYS179; 226 AppDiv789, 243NYS176 (items required).

507-29 126Misc738, 214NYS179.

507-29½-New. Plaintiff is entitled to bill of particulars upon which defendant bases claim that fire was caused or procured by plaintiff. 126Misc738, 214NYS179.

503-41 37 OklACR584. [b] (2) 120 Okl 7, 249P908. [c] **Extent of loss.-128 Or** 554, 275P608, 64ALR166.

509-48½-New. In an action by a mortgagee, ownership of the property by the mortgagor is merely one of the links in the chain of facts which plaintiff is required to prove to support the allegations of the existence of his lien. 37 Okl ACR584.

509-51 LaA 129S379; 43 OklACR413.

509-52 215Ky487, 284SW1107; 82Mont52, 264P933; 225AppDiv346, 233NYS86; 122 Or665, 260P441; 102WVa638, 135SE903. [e] 256 IllA210. [l] **Parol evidence to vary writing** held not admissible in absence of allegations of fraud, etc. 37GaA366, 140SE893.

509-54 38Ga597, 144SE668; 44 Ida491, 258P362; 9LaA622, 121S666. [a] (1) **TexCivA 5SW(2d)244** (rule stated conversely).

511-63 Ala 128S225.

511-65 Fla 129S748.

512-71 [g] **That feed is more hazardous than groceries** will not be presumed. **TexCivA 20SW(2d)399.** [h] **That it is unusual for country grocery store to carry feed** will not be presumed. **Tex CivA 20SW(2d)399.**

513-72 171Ark1066, 287SW587. [a]

Presumption may be rebutted.–171Ark 1066, 287SW587.

513–74 197NC139, 147SE812.

513–76 Fla 129S748.

513–76½–New. , that insured, whose agent orally contracted to renew a policy knew that it paid no premiums for renewal, **TexCivA** 10SW(2d)799.

513–83½–New. that an owner, redeeming property sold under judgment, had the right to redeem; 227Ky3, 12SW(2d) 358.

513–83⅓–New. that insurer, accepting premiums without misrepresentation by insured, insured property with knowledge of insured's title; 100CalA109, 279 P1050.

513–90 [a] **There is no presumption** that insurer knew that insured had mortgaged property. 218Ky473, 291SW 760.

514–94½–New. It is presumed that insured redeemed land sold for nonpayment of taxes. 176Ark1188, 5SW(2d) 916.

514–95½–New. The burden of proof is the same whether insurance contract is oral or written. 213Ala534, 105S901.

514–97 13F(2d)745; 39F(2d)826; NC 155SE870; **TexCivA** 289SW726.

514–98 202 Iowa1270, 211NW860; 214 Ky1, 282SW553; 263Mass181, 160NE 668, 57ALR944; 243Mich458, 220NW 783; Mo 26SW(2d)962.

514–2 See also 224Ky837, 7SW(2d)502. [a] 39 OklACR287.

514–3 246 IllA574.

515–10 Ala 130S180.

515–14 218MoA98, 262SW450; 190NC 867, 129SE727. See also MoA 11SW(2d) 1101. [d] **Redemption from tax sale.**– 176Ark1188, 5SW(2d)916.

515–15 18F(2d)457; 202 Iowa1270, 211 NW860.

515–22 127Me182, 142A481; 82Mont52, 264P933; **NJSup** 145A236; **TexCivA** 281SW622.

516–26 **TexCivA** 281SW622.

516–27 [b] **Defendant sustains burden by proof of fraudulent statements,** relevant, material and intentionally false, and it need not prove injury to itself. 218AppDiv187, 218NYS164.

516–30 MoA 10SW(2d)957; **TexCivA** 292SW922.

516–33 101CalA334, 281P668(2dcase); 157Tenn546, 11SW(2d)887; **Tex CommnA** 285SW265; **TexCivA** 278SW 907.

516–34 218Ala627, 119S834; **TexCivA** 278SW907.

517–36 210Ky237, 275SW691; **Tex CommnA** 285SW265.

517–39 217Ala292, 116S142, 144 [cit Cyc].

517–39½–New. of a warranty requiring insured to take an inventory, **Tex CommnA** 274SW123.

517–41 144SC183, 142SE348; **TexCivA** 6SW(2d)151. [b] **Vacancy having been established,** insured has burden of showing release from obligation imposed. by vacancy clause. 102CalA510, 283P 338. [c] **Presumption.**–MoA 20SW(2d) 299.

517–42 27F(2d)508; 224Ky837, 7SW (2d)502; LaA 129S379; 263Mass181, 160NE668, 57ALR944; SD 231NW900. [c] **Plaintiff's knowledge of increase of hazard** must be proven by defendant. Wis 230NW711.

517–42½–New. Where policy permitted cessation of operation of plant for period in excess of prescribed time as exigencies of business required, insurer has burden of showing such exigencies did not exist for period plant was idle in order to preclude recovery. 202 Iowa 1270, 211NW860.

517–43 **TexCivA** 278SW907.

517–48 226Ky594, 11SW(2d)415. But see 245 IllA124.

518–49 [a] **Plaintiff need not prove reliance on denial of liability** by defendant in not filing proofs of loss. **TexCivA** 26 SW(2d)474.

518–62 24F(2d)491; 37GaA43, 138SE 864; 24 OhA29, 155NE806; 122 Okl 53, 250P918, 920 [citCJ]. [a] (1) 318 Ill 350, 149NE247.

518–64 208 Iowa1030, 226NW781.

518–65 37GaA43, 138SE864; Mich 233 NW417.

518–66 202 Iowa1270, 211NW860; 216 AppDiv435, 215NYS378; **TexCivA** 289 SW726.

519–69 39GaA680, 148SE286(2dcase).

519–70 116 Okl 137, 243P929 (riot); 49 Philippine753. [b] (2) Under policy exempting from loss by explosion burden is on plaintiff to show préexisting fire, to which explosion was incident and that fire was proximate cause of loss. 77Mont505, 252P310.

519–71 126Me478, 139A681, 56ALR834; 251Mich71, 231NW137; **TexCivA** 287SW 281. [a] **Burden of proving willful burning** rests on insurer asserting it. 18F(2d)563.

519–75 18F(2d)457; 35F(2d)213; Fla 129S748; 202 Iowa1270, 211NW860; 318Mo 1089, 2SW(2d)593; 222MoA467, 280SW726. But see 221MoA930, 288SW 788. [a] See also 105WVa353, 142SE 518.

519–78 See also MoA 285SW1012.

520–81 154Miss418, 122S551; **TexCivA** 5SW(2d)829. [a] 222MoA467, 280SW 726. [b] **Burden of proving deterioration in value of appurtenances to realty** rests on insurer. 222MoA467, 280SW 726.

520–84 222MoA467, 280SW726. [a] **In Missouri.**–307Mo 194, 270SW113.

520–85½–New. Where plaintiff shows prima facie that a building was a total loss, insurer has the burden of proof on the issue whether a reasonably prudent uninsured owner would have used a remnant of the structure remaining after the fire as a basis for restoring the building. **TexCivA** 8SW(2d)787.

520–85⅓–New. Where evidence shows total loss of stock, insured is not required to show specific loss to specific articles. **TexCivA** 20SW(2d)399.

520–87½–New. The burden of showing that the damaged property could have been repaired, rebuilt, or replaced rests on insurer. **TexCivA** 281SW283.

520–87⅓–New. When insured shows that a building has been damaged by fire and remains condemned by proper authorities because of the condition occasioned by the fire, insurer, to avoid liability for total loss, must show that facts do not justify condemnation, and that the building could be repaired and restored without violating building laws or regulations at the time of the fire. 227Ky314, 12SW(2d)688.

520–87¼–New. Where policy bound insurer to pay value of property destroyed not exceeding fixed amount plaintiff has burden of proving fair market value of merchandise at time of fire. 35Porto Rico 623.

520–90 111Conn415, 150A310; 201 Iowa266, 207NW243, 44ALR863; Me 149A143. [a] (9) In action on parol policy, offer of defendant to insure is admissible. 5F(2d)169. (10) As to whether hostile fire existed in building and was cause of explosion. 201 Iowa 266, 207NW243, 44ALR863. (11) Rate of insurance covering stock in basement and on first floor. Mass 166NE749. (12) Condition of premises before fire and removal of skins therefrom. 227 AppDiv324, 237NYS563.

520–91 MoA 27SW(2d)464; 141SC417, 139SE846; 192Wis160, 212NW301. [a] (7) Evidence of transactions between insured and agent after latter ceased to be insurer's agent. 215Ky487, 284SW 1107. [d] **Where insurer pleaded false statement in application,** error to exclude evidence of what other reputable companies did in such cases. 215Ky 487, 284SW1107. [e] **Testimony as to general knowledge.**–Va 155SE699.

522–18 Me 149A143.

522–23 **TexCivA** 275SW313 (language of policy sufficient to include copy of application though copy of name of applicant omitted from copy of application).

522–28 [b] **To establish a parol contract,** prior written contract is admissible, where it is obvious that terms were same. 5F(2d)169.

522–36½–New. Plaintiff may show that inclusion of its grantor's name in policies was mistake. 221AppDiv180, 222NYS671.

522–37 36GaA461, 137SE126; 256 IllA 210; MoA 284SW161 (iron safe provision).

522–37½–New. or of an assignment thereof; 43 OklACR282.

523–43½–New. Parol proof is admissible to show agreement at time of execution that assignment was not absolute and unconditional but was made to expedite collection of loss. 43 OklACR 282.

523–50 251Mich144, 231NW138.

524–73 45Philippine122 (to show that merchandise intended to be insured, and not building containing it, under policy covering building only).

524–80½–New. Plaintiff may testify that the automobile destroyed by fire was the only one of that make ever owned by him. MoA 277SW596.

525–82 MoA 281SW132.

525–83 [b] **Evidence that act at time of application** for insurance mortgage foreclosure proceedings had been begun by publication was properly excluded in absence of evidence of knowledge by insured. 234Mich119, 208NW145.

525–98½–New. Rejection of evidence as to the existence of mortgages on other tracts than that as to which representations as to encumbrances were made is not erroneous. 208 Iowa1030, 226NW 781.

526–99 **TexCivA** 300SW223; **TexCivA** 6SW(2d)151; Wis 230NW706. [a] (1) 27 OhA366, 161NE553. [c] (1) **TexCivA** 20SW(2d)399. [g] **Use of premises as bawdyhouse.**–212Ky770, 280SW127.

526–1½–New. Evidence of conviction of plaintiff's husband for violating laws against use of explosives or inflammable fluids held properly excluded. **NJSup** 134A116.

527–6 NH 149A498 (common use).

527–7½–New. Insured may testify that he did not know renting of rooms by his tenant to others was material to risk to show that there was no reason why any objective evidence of such renting would attract his attention on visits to the house. **TexCivA** 290SW912.

527–19 122 Or665, 260P441.

527–22 122 Or665, 260P441.

528–36½–New. Evidence that check given sheriff to recover possession of property levied upon was not paid is immaterial. 145Va776, 134SE710.

528–38 See also **TexCivA** 24SW(2d)501.

528–44 204 Iowa335, 213NW762; 88Pa Super433.

529–50 88PaSuper433.

529–54 [f] **Proofs of loss** are admissible to show false proofs by plaintiffs, though not signed by plaintiffs, but by purchaser acting for plaintiffs and with their knowledge. 212Ala649, 103S845. [g] **Contracts of prior sales** of trucks insured are admissible to show falsity of insured's representations that they were new. 212Ala649, 103S845.

529–62 Iowa 203NW17 (correspondence after loss between insurer and its adjuster); 150Md211, 132A635, 45ALR 582; **NJSup** 134A116; 197NC139, 147 SE812; 135SC62, 133SE533; 51SD36, 211NW805. [a] (2) MoA 284SW161. (5) Evidence admissible to show that agent knew that full ownership of property was not in insured. 161Ga849, 133 SE260. [b] (3) That fire policy was signed by insurer's agent and executed in agent's office. 198NC568, 152SE792. (4) Other evidence held inadmissible. 285Pa589, 132A706.

530–71 See also **TexCivA** 294SW953.

531–74 Ill 233 IllA566.

531–74 27 OhA366, 161NE553. [b] **Conversations, after sixty day period** for filing proofs of loss, between insured and insurer's agent is incompetent to establish waiver within that period. Ill 173 NE479.

531–75 142 Okl 246, 286P797.

531–77 233 IllA566; Vt 147A352.

531–86 Ala 130S335; 126Me478, 139 A681, 56ALR834. [a] (7) That fire marshal searched plaintiff's house shortly after fire without finding goods. 218 Ala627, 119S834.

532–37 Ala 130S335; 222MoA1165, 13 SW(2d)1086. [b] (3) Other fires to be admissible must be logically and naturally connected, showing a plan or scheme to defraud insured. 114 Okl 254, 246P 595. (4) Evidence that other buildings in neighborhood of plaintiff's property and covered by insurance had burned is inadmissible, where there is no prima

facie showing of conspiracy. 84Mont 141, 274P844. [d] **Plaintiff's "fire record"** with other insurance companies is inadmissible where they were not charged with responsibility for loss. 212Ala649, 103S845. [e] **Cancellation of other policies.**–84Mont141, 274P844.

532–88 Ala 130S335; CalA 287P529.

532–92 [a] (8) It is error to exclude evidence of substantial profits at time of fire, offered to show lack of motive. 164Minn490, 205NW442.

533–93 173Ark437, 293SW730; 44 Ida 491, 258P362; 227Ky314, 12SW(2d)688; MoA 30SW(2d)1090; 247NY176, 159NE 902; 227AppDiv103, 237NYS120; TexCivA 28SW(2d)1088; TexCivA 31SW (2d)850. But see 142 Okl 246, 286P797. [b] 283Pa397, 129A326. [c] **Loss of unthreshed grain.**–49ND235, 191NW347.

533–4½–New. Evidence of financial condition of insured which prevented his preservation of property after fire is material on question of liability of insurer for future loss. 82NH533, 136A 364.

534–12 105NJL477, 144A566.

534–13 See also 105NJL477, 144A566.

534–16 25F(2d)415.

535–23 148Md257, 129A214.

535–26 22F(2d)671; 82Colo 408, 260P 685; 36GaA538, 137SE286; 207 Iowa4, 222NW368; 121 Or165, 254P817; 32 PortoRico 73; TexCivA 27SW(2d)571; 150Wash443, 273P527(2dcase). [d] (4) Government's table of rates for depreciation of property. 219Pa119, 139A627. [e] **Valuation for purposes of taxation** is admissible to prove value. 32Porto Rico 73. [f] **Value of rice.**–160La275, 107S108. [g] **Effect of national Prohibition Act** and adaptability or inadaptibility of buildings formerly used as breweries to other commercial purposes may be considered. 247NY176, 159NE 902. [h] **Price paid for truck when new** is properly admitted in connection with care given to truck and condition when turned over to insured. 150Wash443, 273P527(2dcase).

535–28 142 Okl 246, 286P797; 137SC 248, 134SE870.

536–32 222MoA467, 230SW726.

536–33 227Ky613, 13SW(2d)784.

536–42 84Mont141, 274P844; 227App Div103, 237NYS120. But see SD 231NW 902.

537–45 137SC248, 134SE870.

537–49½–New. In case of partial loss, testimony as to estimated cost of replacement is inadmissible, 137SC248, 134 SE870.

537–49¼–New. as is also actual cost of remodeling. 137SC248, 134SE870.

537–51 [b] **Value of personal property.**–222MoA467, 230SW726.

537–56 36GaA586, 137SE570.

537–57 36GaA586, 137SE570.

537–60 See also 44Philippine98.

537–61½–New. Exclusion of adjuster's testimony and letters between insurer and adjuster relative to loss showing authority to execute appraisal agreement held error. Pa 152A95.

537–64 204 Iowa335, 213NW762; 220 MoA1337, 296SW464; TexCivA 58SW(2d) 550. But see 30F(2d)18.

538–65 36GaA538, 137SE286.

538–65½–New. to show that condition of fire policy was met; TexCivA 58W (2d)550.

538–68½–New. Right of defendant to prove value though pleading did not controvert damage alleged in affidavit of claim. 256 IllA210.

538–69 36GaA538, 137SE286; 157Tenn 546, 11SW(2d)887.

538–70 NH 149A498. [a] (1) 22F(2d) 882 (floating policy); 37GaA229, 139 SE822; 125 Okl 291, 257P774; 120 Or 411, 252P75; 45Philippine122. (9) To establish complete oral contract of insurance prior to loss. 218MoA84, 262 SW686. (10) To sustain finding that insurer refused to proceed with arbitration. 237Mich646, 213NW161. (11) To show demand by insured after insurer's refusal to pay loss. 25F(2d) 415. (12) Other findings. 36F(2d)625. [b] (1) Wis 229NW537. [c] **Evidence held insufficient** to warrant verdict for defendant. 37GaA203, 139SE362.

538–71 263Mass181, 160NE668, 57ALR 944; MoA 256SW120 (adjustment). [c] **Evidence held to sustain finding** that insurer elected not to take salvaged goods. 25F(2d)415. [d] **Evidence held sufficient** to show that mortgagee received notice of assessment. SD225NW721. [e] **Evidence held insufficient.**–CalA 289P865; 208 Iowa1030, 226NW781; 127Me182, 142A481; 33PortoRico 773.

538–72 246 IllA574; 108WVa512, 152 SE11 (evidence insufficient). [d] **Evidence held insufficient** to show that local agent had authority to promise, on behalf of association, to have policy transferred to purchaser of property. 216 AppDiv654, 216NYS65.

539–74 MoA 10SW(2d)957.

539–75 [a] (1) 11LaA430, 123S507; 169 Minn507, 211NW830; 130Misc420, 224 NYS409. (2) 42F(2d)53. (7) 213 AppDiv798, 211NYS198. (8) To show that plaintiff was not owner. 142Miss 249, 106S884. (9) That house furnishings in value exceeding amount of policy were separate property of married woman. TexCivA 31SW(2d)850. [d] **Evidence held insufficient** to show agent's knowledge of third party's interest. 220MoA115, 279SW740.

539–77 142Miss249, 106S884.

539–78 NJSup 135A274.

539–80 CalA 289P865. [a] (1) 251Mich 144, 231NW138. (6) To show that insurance of merchandise, and not of building as stated in policy, was intended. 45Philippine122. (7) To show that policy was not new contract of insurance, but change in previous one, affecting only amount of insurance and assessments. 232Mich204, 205NW163. (8) To warrant inference by jury that insurer knew of mortgage on property insured and that mortgagee should be payee so far as interest may appear. 213Ala534, 105S901. (9) To sustain finding that rider was not on policy at date of loss. 170Minn273, 212NW451. (10) To support conclusion that there was previous valid oral contract pursuant to which policy was issued. 19F(2d) 177. (11) To show no agreement for insurance. 36F(2d)276. [b] (1) 29F(2d) 291; 178Minn526, 227NW850. (7) To show that policy had been amended. 177 Minn509, 225NW445. (8) To show that renewal agreement by agent was personal obligation. TexCivA 20SW(2d) 399. (9) Other findings. TexCivA 23 SW(2d)775. (10) Other instances. Mass 171NE327(1stcase).

540–86 [a] (1) MoA 25SW(2d)131. (6) To show that minds of parties met as to continuance of previous contract. 213 Ala534, 105S901. (7) To establish duration of, and premium payable under, parol insurance contract. 5F(2d)169. (8) To show duration of risk and premium. 178Ark319, 11SW(2d)772. (9) Other instances. TexCivA 28SW(2d) 1088. [b] (1) 226Ky376, 10SW(2d)1074; 234Ky95, 27SW(2d)675. (5) To establish parol agreement to insure. 108WVa 512, 152SE11.

540–90 [a] (1) 91CalA460, 267P132 (gross exaggeration of loss); 51Philippine212. (2) 126Me478, 139A681, 56 ALR834. (4) TexCivA 58SW(2d)829. (6) To sustain finding that misrepresentations as to nature of interest in property and nature of title thereto were not made with intent to deceive and did not increase risk. 165Minn468, 206NW940. (7) To sustain findings negativing fraud. 179Minn289, 229NW 88(1stcase). (8) Other instances. NH 149A78(2dcase); NH 151A817. [b] (1) 152Wash199, 277P443. (7) To show that statements of value in proofs of loss were willfully false or made to defraud insurer. 90CalA668, 266P376.

541–91 [a] (1) 229Ky216, 16SW(2d) 1028; 51SD40, 211NW973. (5) 49ND 270, 191NW480. [b] (1) 192Wis160, 212NW301. (6) 84CalA130, 257P586. (7) To show fraudulent intent of insurance broker in stating location of property. 127Me182, 142A481. [c] (3) 187Wis15, 203NW743.

541–94 44 Ida250, 256P523, 528 [cit CJ]; 128Misc223, 218NYS221.

542–96 199Wis220, 225NW735.

542–2 [a] (1) 219Ky41, 292SW504; 33 PortoRico 781, 783 [citCJ]; 199Wis220, 225NW735. (2) 223Ky691, 4SW(2d) 697. (4) To justify verdict for insurer where evidence of incendiarism was found. NJSup 147A504. [b] (1) 251 Mich71, 231NW137.

542–7 [a] (4) To show that sufficient records of sale were kept within record warranty clause. TexCivA 292SW922. (5) To show compliance with warranty that insured premises are only used as warehouse. Can [1928] 3DomLR465. (6) To show compliance with iron-safe provision. 7LaA20. [b] (4) To show actual disagreement between insured and insurer's adjuster making operative provision for arbitration. TexCivA 298 SW658. (5) Evidence held insufficient to show that failure of appraisers to select umpire was due solely to neglect or default of insurer's appraiser. TexCivA 298SW658. [d] **Evidence held sufficient** to support finding of jury that occupant of premises was salaried employee of insured under warranty that property should be occupied only by owner of title, members of owner's family, or by salaried employee of owner. 75Mont16, 241P611.

543–9 [a] (2) Increase of hazard to knowledge of insured not shown. Miss 107S377. [b] (2) To show violation as matter of law of provision in policy overunning lumber requiring one hundred feet of clear space between lumber and mill. 218Ky327, 291SW705. (3) To show knowledge of insured that property had been advertised for sale under deed of trust. 153Va416, 150SE 257. [c] (2) NJSup 134A116. [d] **Evidence held insufficient.**–35F(2d)213; 200Wis255, 227NW873.

543–11 Miss 116S743 (schedule of rates held not to show that rate was not proper one for moss in warehouse in which moss gin was operated).

543–12 [b] (1) 171Ark1066, 287SW587. (3) To establish insured had made or procured additional insurance. 169La 1150, 126S689.

543–14 [a] (3) To support finding that not more than fifty tons of hay were stored in barn at time of fire. TexCivA 5SW(2d)550. (4) To sustain finding of want of knowledge of increased hazard. 27F(2d)508. (5) To show existence of idle, unused sawmill breaching "clear space" clause of policy. 31 OhA82, 166 NE393. (6) To charge owner with knowledge of unlawful use increasing hazard. 39F(2d)25. (7) To show dynamite kept in place of business. 97Pa Super27. (8) Other instances. LaA 129S379. [b] (3) To show violation of provision because of charcoal burner in building without insured's knowledge. 144Miss749, 111S366. (4) To show that owner and mortgagee knew of change in use increasing fire hazard. 30 OhA 458, 165NE506. (5) To show means by which hazard was increased was within knowledge of insured. Wis 230NW 711. (6) To support finding that insured did not know of presence of alcohol and stills on insured premises, increasing risk. 228AppDiv33, 238NYS 389.

543–15 [a] (1) 172Ark767, 290SW367; 53ND708, 208NW104; TexCivA 6SW (2d)151. (3) To show fire hazard was increased by vacancy of insured building. Wis 230NW630. [c] **Evidence insufficient** to show cessation of occupancy. Wis 230NW706.

543–16 [d] **Evidence held sufficient** to show that mortgage never became lien. MoA 285SW1012. [e] **Insured's testimony that she made agreement for cancellation of chattel mortgage** held against probabilities in view of testimony at former trial. 222AppDiv241, 225 NYS733.

543–17 [a] (4) To support finding that mortgagee did not have knowledge of transfers of title. 101CalA334, 281P668 (2dcase). [b] (1) 37GaA229, 139SE 822; 128Kan323, 278P48; 210Ky237, 275SW691; 130Misc420, 224NYS409; TexCivA 22SW(2d)548; TexCivA 13SW (2d)165. (2) 90CalA668, 266P376.

544–18 [a] 5F(2d)495; 141Miss394, 106S529. [b] (1) 90CalA668, 266P376; 130Misc420, 224NYS409; TexCivA 5SW (2d)550.

544–18½–New. taking of inventory, **TexCommnA** 274**SW**123 (evidence held insufficient to show performance).

544–19 [a] (1) 234 **IllA**1. [b] **Evidence held insufficient** to show that plaintiff had kept books and complete records of transactions. 212**Ala**624, 103**S**674.

544–20 [a] (1) 172**Ark**715, 290**SW**594. [b] 212**Ala**624, 103**S**674.

544–21 [a] (1) **TexCivA** 272**SW**611. [b] (1) 37**GaA**43, 138**SE**864.

544–23½–New. Evidence showing that proofs were delivered to adjuster of insurer is held to support finding that proof of loss was received by insurer. **TexCivA** 282**SW**656.

544–29 48**RI** 321, 138**A**39. [a] (1) 25 **F(2d)**415; 30**F(2d)**887; 233 **IllA**566; 234 **IllA**1; 197**NC**139, 147**SE**12; 30 **OhA**458, 165**NE**506; **TexCivA** 13**SW(2d)** 895. (2) **Miss** 116**S**743. (3) 150**Md** 211, 132**A**635, 45**ALR**582; 154**Miss**418, 122**S**551. (4) 36**F(2d)**9. (5) **TexCivA** 273**SW**628; **TexCivA** 291**SW**257. (8) 25**F(2d)**398; 215**Ala**481, 110**S**909; 172 **Ark**971, 291**SW**60; 175**Ark**1170, 300**SW** 448; 38**GaA**597, 144**SE**668; **IndA** 168 **NE**464; 223**Ky**842, 5**SW(2d)**265; 24 **OhA**29, 155**NE**806; **TexCivA** 6**SW(2d)** 151; **TexCivA** 26**SW(2d)**474. (9) 196 **NC**335, 145**SE**616. (10) **TexCivA** 273 **SW**628; **TexCivA** 273**SW**629. (15) Of notice of removal of insured's property. **TexCivA** 288**SW**255. (16) To show knowledge of return of premium by solicitor after loss, as bearing on denial of liability. 24 **OhA**29, 155**NE**806. (17) To show knowledge of acts and conduct of solicitor, as bearing on waiver of notice and proof of loss. 24 **OhA**29, 155 **NE**806. (18) As to violation of clear-space warranty. 154**Wash**77, 280**P**743. (19) Other provisions. 198**NC**303, 151 **SE**628. [b] (1) 30**F(2d)**169; 214**Ala** 520, 108**S**331; **TexCivA** 1**SW(2d)**712. (3) 318 **Ill** 350, 149**NE**247. (4) 171**Ark** 1066, 287**SW**587; 176**Minn**31, 222**NW** 514. (5) **TexCivA** 23**SW(2d)**775. (7) 37**GaA**43, 138**SE**864; **TexCivA** 5**SW(2d)** 244. (13) To show promise to pay loss after execution of nonwaiver agreement protecting defenses of insurer. 212**Ala** 624, 103**S**674. (14) Of payment of premium note. 216**Ky**589, 288**SW**321. (15) Other evidence held insufficient. 220**MoA**115, 279**SW**740. (16) To support finding that agent issuing policy knew that insured did not own property. **TexCivA** 297**SW**575. (17) Of notice of premium notes' due dates under alleged custom. **TexCivA** 9**SW(2d)**138. (18) To establish waiver of right to suspend policy for nonpayment of assessment. 208 **Iowa**1020, 226**NW**777. (19) As to defense that insured was not owner of premises. 32 **OhA**229, 167 **NE**473. (20) Other instances. **Mass** 172**NE**99. [d] **To establish estoppel** misleading conduct by insurer must be shown. 48**RI** 321, 138**A**39.

545–42½–New. Evidence held to show agent's authority to waive proofs. 233 **IllA**566.

545–42¾–New. Date of cancellation on policy has been held evidence of denial of liability of insurer, making failure to furnish proof of loss immaterial. 24 **OhA**29, 155**NE**806.

545–43 [a] (4) To support finding that fire was caused by sparks in bale when shipped. 262**Mass**469, 160**NE**306. (5) To warrant finding that damage to electric automobile was caused by fire rather than by electrical current without fire. 27 **OhA**84, 160**NE**864. (6) To show that fire in mine was caused by underground explosion. 30**F(2d)**794. (7) To show turpentine claimed was destroyed by fire. 170**La**193, 127**S**598. (8) To sustain finding that entire damage was caused by lightning, and not by wind. **Vt** 147**A**352. [b] (5) To show loss was caused by fire. 216 **AppDiv**435, 215**NYS**378. (6) To show that preëxisting fire caused explosion of acetylene generator. 77**Mont**505, 252 **P**310. (7) That goods had been stolen before fire did not establish theft as cause of loss precluding recovery under policy. 50**RI** 118, 145**A**448.

546–44 [a] (4) To show coals from exploded hot water plant were aflame when blown on floor and caused damage to property. 218**MoA**31, 260**SW** 490. (5) To show that loss was caused by lightning and not by cyclone. 3 **Del** 200, 134**A**50.

546–45 222**MoA**467, 280**SW**726; **Tex CivA** 273**SW**884. [a] (1) 22**F(2d)**882; 30**F(2d)**794; 33**F(2d)**675; 212**Ky**107, 278**SW**581; 126**Me**478, 139**A**681, 56**ALR** 834; **MoA** 5**SW(2d)**659; **MoA** 5**SW(2d)** 660; **TexCivA** 5**SW(2d)**550; **TexCivA** 12**SW(2d)**235; **TexCivA** 20**SW(2d)**399; **Vt** 147**A**352. (2) 219**MoA**121, 272**SW** 79; **TexCivA** 15**SW(2d)**81. (7) To sustain recovery for full amount of policy. **NJ** 143**A**552. (8) To show fire did not cause total loss. **TexCommnA** 26**SW(2d)**162. (9) To show building was completely destroyed. **TexCivA** 26 **SW(2d)**474. [b] (1) 39**F(2d)**21; 34 **GaA**361, 129**SE**554 (verdict for face of policy unauthorized). (2) **TexCivA** 290 **SW**912. (5) To limit amount recoverable. 11**LaA**547, 123**S**408. [d] (1) 220**MoA**1337, 296**SW**464.

546–46 222**MoA**467, 280**SW**726; **MoA** 31**SW(2d)**111; **TexCivA** 300**SW**185. [a] (1) 22**F(2d)**515 (use and occupancy); 22**F(2d)**671; 212**Ky**107, 278**SW** 581; 222**MoA**1010, 7**SW(2d)**463; 53**ND** 391, 206**NW**225; 219**Pa**119, 139**A**627; **TexCommnA** 15**SW(2d)**223; **TexCivA** 272**SW**611; **TexCivA** 281**SW**283; **Tex CivA** 287**SW**120. (4) To show value of rice insured under policy. 160**La**275, 107**S**108. [b] 39**F(2d)**477; 82**Mont**52, 264**P**933. [d] (5) In order to recover under policy plaintiff must show exact stock of insured goods at time of damage or destruction. 35**PortoRico** 623. [l] **In Missouri.**–222**MoA**467, 280**SW** 726.

548–59 [a] **Statement of plaintiff's claim containing items of which there is no evidence** should not be permitted to go to jury. 88**PaSuper**433.

549–31 31**Ariz**340, 253**P**440. [a] (3) Meaning of "vacant and unoccupied." 223**Ky**707, 4**SW(2d)**716.

549–82 31**Ariz**340, 253**P**440.

549–84 31**Ariz**340, 253**P**440; **Mass** 166 **NE**749.

549–85 213**Ala**534, 105**S**901 (statement by agent that plaintiff had no insurance held one of fact and could not be basis of affirmative charge); 234 **IllA**1; 148**Md**257, 129**A**214. [a] (8) Where auto was bought from partnership on conditional sale, and insurance taken in names of purchaser and one of partners, and latter testified he was not financially interested in firm. 258**Mass** 210, 154**NE**768. (9) Whether fire caused explosion, or whether explosion occurred before fire. 243**Mich**458, 220 **NW**783. (10) Whether there had been change of title or interest. 227**Ky**3, 12 **SW(2d)**358. [b] (1) 259**Mass**450, 156 **NE**696; 50**RI** 118, 145**A**448. (3) Whether fire was hostile or friendly fire. 219**Ala**208, 122**S**23; 219**Ala**211, 122**S**25.

550–86 19**F(2d)**134, 137 [citCJ]; 23 **F(2d)**443; 234 **IllA**1; 122**Kan**136, 251 **P**631; 223**Ky**842, 5**SW(2d)**265; 233**Ky** 337, 25**SW(2d)**738; 259**Mass**450, 156 **NE**696; 167**Minn**509, 209**NW**325; **MoA** 285**SW**803; **MoA** 27**SW(2d)**464; **MoA** 22**SW(2d)**364; **MoA** 27**SW(2d)**716; 102 **NJL**647, 133**A**407; 120 **Or**1, 251**P**258; 293**Pa**9, 141**A**623; 90**PaSuper**274; 98 **PaSuper**335; 48**RI** 274, 137**A**470; 146 **SC**351, 144**SE**71; **Vt** 147**A**352. [a] (1) 104**NJL**316, 140**A**461; 229**AppDiv**2, 240 **NYS**749. (5) 42**F(2d)**53; **MoA** 256 **SW**120; **MoA** 287**SW**1084; **MoA** 295 **SW**509; **MoA** 5**SW(2d)**660. (7) 23 **F(2d)**669. (12) 201 **Iowa**266, 207**NW** 243, 44**ALR**863. (25) Fact of oral contract to renew insurance. 213**Ala**534, 105**S**901; **TexCivA** 6**SW(2d)**211. (26) Whether settlement made by adjuster was in full settlement of two policies covering property. 175**Ark**1170, 300 **SW**448. (27) Vexatious delays and attorney's fees. **MoA** 6**SW(2d)**648. (28) Whether damage to automobile, turning over in ditch, was caused by fire. 207 **Iowa**1042, 222**NW**447. (29) Agreement as to additional insurance. 27 **F(2d)**64. (30) Whether mortgagee received notice of assessment. **SD** 225 **NW**721. (31) Other instances. 251 **IllA**150. (32) As to fraudulent collusion between defendant's agent and plaintiff. **TexCivA** 26**SW(2d)**295. [b] (2) Whether premiums had been paid. **Mo** 26**SW(2d)**962.

551–87 41**F(2d)**640; 42**F(2d)**816; 37 **GaA**739, 141**SE**674; **MoA** 277**SW**596; **MoA** 11**SW(2d)**1101; 82**NH**318, 133**A** 340; 227**AppDiv**324, 237**NYS**553 (directed verdict for insured held against weight of evidence); 105**WVa**353, 142 **SE**518.

551–88 39**F(2d)**826; 212**Ala**624, 103**S** 674; **Iowa** 203**NW**17; 202 **Iowa**1270, 211**NW**860; 235**Mich**147, 209**NW**42 (verdict directed for defendant on failure to furnish proof of furnishing proofs of loss or of waiver); 142**Miss** 249, 106**S**884; **Nebr** 227**NW**821 (verdict directed for defendant); **NH** 149 **A**78(2dcase); 116 **Okl**137, 243**P**929; 125 **Or**571, 267**P**815; 86**PaSuper**517. [f] **Motion for judgment as of nonsuit** erroneously refused, absent evidence showing waiver of forfeiture for nonpayment. 197**NC**621, 150**SE**114.

551–88½–New. Where evidence not supported by pleading, refusal to withdraw such evidence from the jury is error. 215**Ky**487, 284**SW**1107.

552–89 25**F(2d)**415; 213**Ala**534, 105**S** 901; 84 **IndA**643, 151**NE**734; 231**Ky** 31, 20**SW(2d)**1023.

552–91 104**NJL**316, 140**A**461; **NJ** 151 **A**869; 120 **Or**1, 251**P**258; **TexCivA** 24 **SW(2d)**501. [a] **Dual agency.–Mo** 26 **SW(2d)**962.

552–93 213**Ala**534, 105**S**901; 240 **IllA** 324; **TexCivA** 271**SW**256.

552–94 148**SC**238, 146**SE**15.

553–96 36**GaA**538, 137**SE**286.

553–7 15**F(2d)**1.

553–8 16**F(2d)**774; 19**F(2d)**134; 33 **F(2d)**231; 84**CalA**130, 257**P**586; 83**NH** 200, 140**A**169 (control of premises); **TexCivA** 287**SW**281; 151**Wash**545, 276 **P**537. [a] (1) 16**F(2d)**774. (2) 218 **Ala**627, 119**S**834; 144**Miss**833, 110**S**681. (4) 30**F(2d)**20. (6) Whether inventory, required by policy, was prepared subsequent to fire. 218**Ala**627, 119**S** 834. [b] (4) Whether deed to premises had been delivered in escrow is question for jury on conflicting evidence. **SD** 231**NW**900.

554–9 223**Ky**707, 4**SW(2d)**716, 717 [cit CJ]. [f] **Whether vacancy permit substantially complied with** held for jury under evidence. 222**MoA**1010, 7**SW(2d)** 463.

554–10 123**Kan**342, 255**P**40.

555–12 219**Ala**96, 121**S**84; **Ala** 130**S**180; 227**Ky**88, 11**SW(2d)**976; 144**Miss**833, 110**S**681; **MoA** 256**SW**531; **MoA** 295**SW** 509; 198**NC**568, 152**SE**792; 142**SC**457, 141**SE**20; 146**SC**123, 143**SE**663. [a] (6) Whether vacancy provision was waived. 220**MoA**1337, 296**SW**464. [b] (1) 148 **SC**238, 146**SE**15.

555–13 38**GaA**814, 145**SE**891(2dcase); 218**Ky**327, 291**SW**705; 223**Ky**691, 4**SW** **(2d)**697.

556–14 24**F(2d)**491; **MoA** 295**SW**509; **NH** 149**A**498; 102**NJL**647, 133**A**407; 49 **ND**176, 191**NW**350; **TexCivA** 291**SW**257.

556–15 181**Ark**1096, 29**SW(2d)**304; 227 **Ky**314, 12**SW(2d)**688; 307**Mo** 194, 270 **SW**113; **TexCivA** 290**SW**912. [a] **Whether remnants remaining after fire** constituted substantial part as compared with value of entire building is for jury. **TexCivA** 290**SW**912.

556–16 19**F(2d)**134; 22**F(2d)**515 (use and occupancy); 244**Mich**391, 221**NW** 119; **MoA** 277**SW**588; 221**MoA**741, 285 **SW**1024; **MoA** 31**SW(2d)**111; 293**Pa** 385, 143**A**129; **TexCivA** 5**SW(2d)**829. [a] (3) Where finding of appraisers as to value of property as stated in their award was without binding force and effect, value of buildings destroyed was properly submitted to jury. 218**MoA** 395, 277**SW**349.

556–17 36**F(2d)**9 (amount of recovery by lessee); 153**Md**253, 138**A**33, 53**ALR** 669; 222**MoA**467, 280**SW**726; **MoA** 5**SW** **(2d)**659; 82**Mont**52, 264**P**933; 82**NH** 533, 136**A**364; 283**Pa**397, 129**A**326; 285 **Pa**332, 132**A**177; 291**Pa**119, 139**A**627. [b] (2) On policy covering truck which burned after going over embankment, jury should determine, if possible, what injuries, if any, truck received from upset and before fire. 50**SD**502, 210**NW**

739. [d] **Whether merchandise was stolen during progress of fire and as incident thereto is for jury.** 156Miss865, 127S298.

556-18 222MoA467, 280SW726; 105 WVa147, 141SE634.

556-19 TexCivA 8SW(2d)787.

556-20 See also 293Pa385, 143A129.

556-20½-New. Where an old building partially destroyed by fire is condemned and taken down by municipal authorities because of antecedent defects, it is a question for the jury whether such total loss was the result of the fire. 12F (2d)880.

556-20¾-New. What occurred between adjuster and insured is question of fact for the jury. 176Ark1188, 5SW(2d)916.

556-21 229Ky216, 16SW(2d)1028.

557-22 22AlaA51, 112S95; 212Ky770, 280SW127; 225Ky838, 10SW(2d)311; 225Ky898, 10SW(2d)665; 235Ky289, 30SW(2d)1105; 148Md257, 129A214; NJSup 147A481; 224AppDiv249, 229 NYS678; TexCivA 281SW622.

557-23 229Ky216, 16SW(2d)1028; 150 Md211, 132A695, 45ALR882.

557-26 20CalA688, 261P278; CalA 287 P520; 218Ky668, 291SW725; MoA 284 SW162; NeMont26, 244P933, 1926 [cit CJ]; 168NC498, 127SE570; 150Wash 448, 273P327(2dcase); 107WVa608, 149 SE8[illegible].

557-27 41F(2d)549; 216Ky715, 288SW 674; 218Ky668, 291SW725.

558-29 43F(2d)[illegible]; MoA 277SW596 (automobile); 122 Okl 53, 250P918, 920 [quotCJ].

558-30 122 Okl 53, 250P918, 920 [quot CJ].

558-31 21SAla627, 119SS34; Ala 130S 335; 176Ark1188, 5SW(2d)916; CalA 287P529; 37GaA780, 141SE674; 128 Kan342, 266P48; 212Ky77, 280SW127; 199Me478, 139A381, 56ALR864; Md 148 A252 (that mortgagor set property on fire without mortgagee's privity and consent); 164Minn485, 207NW942; MoA 288SW1022; 107WVa608, 149SE[illegible]. [a] See also 178Minn305, 227NW[illegible], 68 ALR859.

558-32 217AppDiv197, 216NYS664; 228 AppDiv83, 238NYS[illegible]

558-33 89F 2d[illegible]; 208Ky785, 24SW (2d)616; 127Me[illegible], 142A181; 222MoA 1010, 7SW(2d)4[illegible]; NH 146A4[illegible]; Tex CommnA 28[illegible]; Wis 228NW7[illegible]. [b] (181) By tenant's company. Tex CommnA 28[illegible]

558-34 218AppDiv[illegible], 218NYS[illegible]; 91 PaSuper[illegible]

559-37 [illegible]F 2d[illegible]; 148Md277, 129A214. [b] 293Pa[illegible], 146A[illegible], 69ALR[illegible] 24 cases.

559-38 199Me478, 139A381, 56ALR864; 199NJL477, 144A[illegible]; 30ND273, 205NW 672.

560-39 250NY116, 164NE[illegible] (reages [illegible] 250NY[illegible], 164NE[illegible]); [illegible] Okl 7, 244P[illegible]; 293Pa[illegible], 146A[illegible], 69ALR [illegible] (case).

560-41 222AppDiv216, 227NYS615; Tex CommnA 19SW 2d[illegible]

560-44½-New. Proof that insured was paid to furnish and expense of making supplemental proof of loss held for jury. 214Ala[illegible], [illegible]

560-45 12F 2d[illegible]; 176Ark1194, 2[illegible] SW[illegible]; 176Ark[illegible], 291SW[illegible]; CalA 2[illegible] P[illegible]; Ill 2[illegible]NE[illegible]; [illegible] 204 Iowa[illegible], 2[illegible]NW[illegible]; 212Ky[illegible]; 1 SW(2d)[illegible]; 1[illegible]Miss[illegible], 2[illegible]; [illegible] NC512, 135SE463; 19 OkA[illegible], 1[illegible]NE 806; 90PaSuper142. See also 244Mich 391, 221NW119.

561-46 235Mich147, 209NW42 (evidence of waiver insufficient for jury).

561-51 [a] **Instruction as to effect of failure immediately to pay amount of settlement held proper.**–222MoA467, 280 SW726.

561-52 MoA 30SW(2d)1090.

561-53 212Ky107, 278SW581; 232Ky 785, 24SW(2d)616; MoA 273SW192; 222 MoA467, 280SW726. [b] **Instructions held erroneous.**–205 Iowa450, 224NW 524 (on additional insurance).

561-54 MoA 295SW509. [a] **Instructions defining proximate cause of damage held proper.** 207 Iowa1042, 222NW 447. [b] **Instruction in language of policy as to appurtenances is not erroneous.** 91CalA460, 267P142.

563-55 151Ark1096, 29SW(2d)304; 169 Minn507, 211NW830. [a] (7) Measure of damages to stock of merchandise and fixtures. 39 OklACR287. (8) Instruction under valued policy law. 171Ark 574, 285SW5. (9) Instruction that insured could recover interest from date sixty days after insurer's denial of liability. Vt 147A352. (10) Instruction that amount expended in restoring property might be considered by jury was applicable to issues. 32 OhA465, 168NE 234. (11) Instruction as to recovery as for total loss. 235Ky419, 31SW(2d) 625. [b] (1) 247NY176, 159NE902; 50 SD502, 210NW739.

562-56 53ND273, 205NW672. [a] (1) 91PaSuper327. (2) Instruction that false sworn statement as to amount of loss is immaterial, where loss actually amounted to certain sum, held error. 53 ND273, 205NW672. [c] **Instruction properly refused on question of alleged fraudulent concealment.** 231Ky31, 20 SW(2d)1023.

562-57 224Ky837, 7SW(2d)502; 91Pa Super327; 131SC498, 127SE570.

562-59 [b] MoA 6SW(2d)648.

562-60 3Del 200, 134A50. [b] **Instruction held sufficient.**–30F(2d)794.

562-62 213Ala534, 105S901 (definition of waiver held not defective in failing to state that denial of existence of contract was causa causans of failure of assured to do affirmative act); 176Ark1188, 5 SW(2d)916; TexCivA 291SW257. [a] (1) See also 222Ky608, 1SW(2d)1063. (2) Instruction not erroneous as not limiting waiver. Ill 173NE479.

563-65 34GaA361, 129SE554 (charge not objectionable as vague).

563-67 213Ala626, 106S172; 34GaA 361, 129SE554 (charge not objectionable as confusing); 224Ky837, 7SW(2d)502. [a] (10) As to encumbrance of property by chattel mortgage. 222MoA439, 7SW (2d)434. (11) Other instances. 222MoA 439, 7SW(2d)434. [b] (6) Generally. 37GaA366, 140SE893.

564-69 219Ala208, 122S23; 219Ala211, 122S25; 307Mo194, 270SW113; NJSup 187A274.

564-71 212Ky107, 278SW581; 212Ky 77[illegible], 280SW127; 53ND273, 205NW672.

564-72 213Ala626, 106S172; 34GaA 361, 129SE554 (instruction not objectionable); MoA 295SW509.

565-73 [b] (2) Other instances. MoA 285SW803.

565-74 MoA 295SW509.

565-78 135SC62, 133SE533.

566-79 221MoA691, 288SW977.

566-80 233 IllA566; 122Kan136, 251P 631. [b] **Instructions held not abstract.**–172Ark767, 290SW367.

566-81 37GaA366, 140SE893; 227Ky 613, 13SW(2d)784. [c] **Insurers are not required to allege damage resulting from neglect of property after fire was not covered by policy, to warrant instruction thereon.** 236Ky1, 32SW(2d) 548.

566-82 37GaA366, 140SE93; 227Ky 613, 13SW(2d)784; 221MoA691, 288SW 977; 222MoA1057, 7SW(2d)479; 43 Okl ACR190. [c] **Instruction on arson held not authorized by evidence.** 216Ky715, 288SW674. [d] **Instruction as to vexatious refusal to pay loss held justified by evidence.** 222MoA1057, 7SW(2d) 479. [e] **Instructions held warranted.**–MoA 27SW(2d)716.

566-83½-New. **Directing a verdict,** where there is a breach of condition in the policy, is proper. 103NJL529, 138A 37.

566-84 244 IllA379; NJSup 135A274. [b] **Instructions held properly refused.**–MoA 293SW504.

567-87 122Kan136, 251P631; 104NJL 316, 140A461; 120 Orl, 251P258. See also MoA 284SW161.

567-91 MoA 284SW161; MoA 10SW (2d)957.

568-97 [a] (4) To show insured performed conditions of policy. IndA 169 NE342.

568-98 [b] (3) Finding that plaintiff was owner of property subject to liens is sufficient finding of beneficial and insurable interest. IndA 169NE342. [d] **Court's finding that policies were issued "in lieu of" binder** does not imply that, because binder was issued by mistake, policies were also so issued. 221 AppDiv180, 222NYS671.

569-10 See also 218AppDiv187, 218NYS 164.

569-18 See also MoA 277SW596.

570-23 [d] **Interest is recoverable under prayer for loss caused by fire and for general relief.** TexCivA 274SW299.

570-24 TexCivA 293SW279. [c] **In suit for reformation, unpaid premiums must be deducted from judgment for value of destroyed property.** 173Ark960, 294SW 58.

572-51½-New. Where plaintiff failed to prove the value of the goods burned, the case may be remanded for the purpose of establishing their value. 6LaA163.

572-54 52ND324, 202NW657.

572-55 34PortoRico 311.

572-57 244 IllA379.

573-58 [b] 43 OklACR190 (instructions).

573-60 104NJL316, 140A461. [a] (5) Where court assumes undisputed fact in instruction, it has been held not reversible error. MoA 6SW(2d)648.

574-70 128Kan323, 278P48; 219MoA 121, 272SW79; 114Nebr194, 206NW 765; Nebr 226NW914 (statute is based on considerations of public policy); 121 Orl65, 254P817. [f] **Matters considered in determining amount.**–Court may consider labor, time, and trouble involved, as well as extent of services rendered and nature and importance of litigation. 127Kan787, 275P211.

574-72 121 Orl65, 254P817.

574-75 See also 33Ariz288, 264P103. [a] **Amounts held reasonable.**–33Ariz 288, 264P103; 128Kan323, 278P48.

575-77 31Ariz340, 253P440; 235 IllA 344.

575-78 44Philippine98.

575-80 [b] **Nominal damages.**–Fla 129 S748.

575-81 [a] (2) Automobile destroyed. 165Minn411, 206NW653. [b] **Damages held excessive.**–318Mo1089, 28SW(2d) 593.

575-84 40F(2d)379; 44Philippine98; TexCivA 275SW299; TexCivA 4SW(2d) 88 (total loss).

575-88½-New. Where a house and furniture are totally destroyed by fire and the respective amounts for which each was insured is not shown, rendering judgment on the whole amount of insurance from the time of loss is erroneous. TexCivA 20SW(2d)405.

576-90 GaA 155SE782; Iowa 233NW 153; SD 227NW71. [b] **Insurer is not liable for interest** where loss was paid within time allowed by policy after award upon insured's voluntary submission to arbitration. SD 227NW71.

576-91 GaA 155SE782 (holding interest not due from date of loss under policy).

576-92 [b] 187Wis15, 203NW743.

576-94 195Wis509, 218NW814.

576-95 44 Ida491, 258P362.

576-96 Ala 130S180; 132SC427, 128 SE865; TexCommnA 15SW(2d)223; TexCivA 5SW(2d)844; TexCivA 13SW (2d)916; TexCivA 16SW(2d)360. See also TexCivA 272SW611 (no interest allowed where no proofs of loss made).

576-98 44 Ida491, 258P362; MoA 277 SW588; TexCivA 28SW(2d)1088.

577-99 TexCommnA 27SW(2d)111. [a] (2) Insured never preparing and forwarding proof of loss to insurer, which did not deny liability before filing of suit on policy, but did so in answer, held entitled to legal interest on amount of policy, not from date of fire, but only from time answer was filed. TexCivA 13SW(2d)435.

577-3½-New. The date on which liability is denied by insurer has been held the proper time from which to compute interest. TexCivA 6SW(2d)151 (date of filing plea is bar).

577-4 44Philippine98.

577-6 33Ariz288, 264P103; 171Ark 1066, 287SW587; 36GaA497, 137SE277; 41GaA49, 152SE146; 169La63, 124S 147; MoA 282SW78. [b] (2) Twenty-five per cent in actions for insurance of motor vehicles. 163La284, 111S707. (3) Twelve per cent in actions for insurance of store and goods. 163La284, 111S707. [d] **Computation of penalty is on principal of debt and not on interest as well.** 170La193, 127S598.

577-7 33Ariz288, 264P103; 171Ark

1066, 287SW587; 176Ark1188, 5SW(2d) 916; 178Ark378, 10SW(2d)859; 36GaA 497, 137SE277; 41GaA49, 152SE146; 163La284, 111S707; 9LaA337, 120S511; LaA 129S379 (award of one hundred dollars held reasonable); LaA 130S828; MoA 277SW939; MoA 20SW(2d)299; 121 Or165, 254P817. [d] **Attorney's fee of 10 per cent of principal and interest** has been held sufficient. 170La193, 127 S598.

578-9 [c] (1) MoA 285SW741; MoA 30 SW(2d)1090. [d] 173Ark960, 294SW58; 36GaA767, 138SE336.

578-11 42F(2d)53; 36GaA538, 137SE 286; 222MoA439, 7SW(2d)434; 222MoA 439, 7SW(2d)434.

578-12 MoA 295SW509. [b] **Refusal to pay founded on mere possibility** that later investigation may develop facts justifying refusal to pay is vexatious. 42F(2d)53.

578-13 18F(2d)457; 33F(2d)675; 173 Ark668, 293SW1018; 36GaA538, 137SE 286; MoA 15SW(2d)939; MoA 284SW 161; 222MoA439, 7SW(2d)434; 158 Tenn237, 12SW(2d)707.

578-14 18F(2d)457; 37GaA187, 139SE 158.

578-16½-New. or where delay is due on notice of assessment liens from government. 25F(2d)1007.

578-19 218MoA395, 277SW349.

578-22 18F(2d)457; 37GaA187, 139SE 158.

579-23 36GaA497, 137SE277; 36GaA 538, 137SE286; 3LaA691.

579-26 [c] **Statute held inapplicable to fire insurance.**-TexCivA 20SW(2d)405.

579-29½-New. The statute of the state of the place where the property is located does not apply where the contract of insurer was made in another state. 27F(2d)616.

579-31½-New. Upon removal of the case to the federal court, attorney's fees for nonpayment of loss may be taxed as costs. 25F(2d)415.

579-32½-New. Right of insured to penalty does not attach until the amount of loss becomes payable under the terms of the policy. SD 227NW71.

FIREPROOF

579-10 [e] 172Ark715, 290SW594. [g] **"Fireproof storage warehouse"** connotes building of at least medium height for storage of goods and materials. 126 Misc260, 213NYS18.

FIRES

581-6 [a] (4) Stalks, stems, and other residue left after threshing bean plants are not "hay" within statute prohibiting malicious burning of hay. 41 Ida251, 238P538.

582-18½-New. Under federal statute, failing to extinguish a fire near a public domain attaches criminal culpability even if the fire was not on such public domain. 274US264, 47SCt597, 71L ed 1040.

582-18⅓-New. Congress has power to legislate as to offenses by such conduct. 274US264, 47SCt597, 71L ed1040.

582-37 [b] (3) To sustain conviction. TexCr 29SW(2d)371. [c] **Propriety of admitting** before jury agreement of defense to admit burned automobile was insured is for trial judge. TexCr 29 SW(2d)371.

583-51 See also 2LaA239.

585-78 176Minn472, 223NW912.

588-36 2LaA239.

588-42 [a] (2) Other instances. Kan 289P412.

588-46 TexCivA 287SW153. [a] (8) To warrant finding of negligence in failing to take precautions to prevent fire. 177 Ark1193, 8SW(2d)471. [d] **Mere proof of damage is insufficient.** 91Fla539, 108 S186, 45ALR865.

590-83½-New. Expenses incurred in fighting fire may be recovered under British Columbia statutes by crown in the right of the Dominion. BC [1925] 3DomLR79.

590-83⅓-New. Under statutes in some jurisdictions forest fires burning uncontrolled and without proper precaution being taken to prevent their spread are declared to be a public nuisance. 122 Or323, 259P201 (liability of person responsible for fire).

590-85 TexCivA 31SW(2d)850.

590-86 [b] **Fire marshal is not bound to advise accused** as to constitutional right to refuse answers. Wis 231NW 266.

590-87 See also 11PaDist&Co 199 (opinion of attorney-general).

FIRST

591-30 206Cal 723, 276P107 (distinguished from "second degree burns").

FISCAL

592-11 194NC1, 138SE418.

FISH

594-3 28Hawaii43.

594-5 96Fla799, 119S376.

595-11 10PaDist&Co 202.

595-12 [d] **Other definitions.**-Can [1928] 4DomLR190.

596-46 [a] **"Fishpots"** are contrivances like nets, screens, and traps placed in streams so as to entrap fish in screens, etc., as water flows through. 149Md621, 132A48.

596-49 238Mich130, 213NW195; 191 NC305, 131SE724.

597-53 172Ark866, 291SW89; 195Cal 548, 234P398; 202 Iowa638, 210NW 774; 124Me365, 129A444 (property of first taken).

597-54 74Mont587, 241P328, 42ALR 937.

597-55 22F(2d)977; 202 Iowa638, 210 NW774.

597-56 74Mont587, 241P328, 333 [cit CJ].

597-57 22F(2d)977.

597-58 181Ark1089, 29SW(2d)294.

598-61 195Cal 548, 234P398.

598-61½-New. Fresh food fish can become subject of private ownership only in such qualified way and to such limited extent and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose. 195Cal 548, 234P 398.

598-63 74Mont587, 241P328, 331, 42 ALR937 [citCJ]; TexCivA 21SW(2d) 569.

598-66 74Mont587, 241P328, 331, 42 ALR937 [citCJ]; 118 OhSt360, 161NE 12. [g] **Nontidal lake.**-NB [1926] 3 DomLR779.

599-73 Tex 295SW211, 212 [citCJ].

599-77 251Mich67, 231NW70.

600-93 237Mich38, 211NW115, 125 [quotCJperWiest,J].

600-94 237Mich38, 211NW115, 125 [quotCJperWiest,J].

600-97 153Va730, 151SE130.

601-3½-New. Right to take fish in unnavigable waters follows the ownership of the water where such ownership is separated from ownership of soil. 281 US261, 50SCt296, 74L ed840.

601-6 See also 29Hawaii750.

601-9 170Ga279, 152SE575.

601-10 170Ga279, 152SE575.

601-11 170Ga279, 152SE575; MoA 282 SW473.

601-14 170Ga279, 152SE575.

602-19 237Mich38, 211NW115; 248 Mich410, 227NW741; 74Mont587, 241 P328; Wis 228NW144.

603-21 124Me365, 129A444; 237Mich 38, 211NW115. [a] **Person fishing in waters of navigable stream is not trespasser** where he gains access thereto without going upon uplands of riparian owner. 237Mich38, 211NW115.

603-23 194NC351, 139SE614. But see 237Mich38, 211NW115.

603-25 [c] **Right of riparian owners to** dig drainage ditch lowering level of lake is not affected by fishing rights. 179Ark102, 14SW(2d)1101.

604-29 [a] **Such persons may take fish therefrom** subject only to right of state to regulate and preserve for public. 181 Ark1089, 29SW(2d)294.

604-34 118 OhSt360, 161NE12.

604-36 124Me365, 129A444.

604-41½-New. The right of fishing in navigable waters, where it can be done without trespassing on the land of riparian owners, is subject only to such restraints as the state may impose. 237 Mich38, 211NW115.

604-41⅓-New. One having no rights in the river frontage around an island cannot complain of the use of the island by another having no rights thereon. 131 Or522, 284P189.

604-43 30Hawaii841; 194NC351, 139 SE614.

604-44 194NC351, 139SE614.

605-48 [a] See also 7Alaska635.

605-50 See also 74Mont587, 241P328.

605-60 191NC305, 131SE724.

606-70½-New. The grant of a right of way for an irrigation project, including a public natural lake as a reservoir, does not carry exclusive fishing rights in the lake. 17F(2d)357.

608-88 See also 155Md252, 141A714.

608-89 23AlaA228, 124S912(2dcase).

609-8 35F(2d)193; 23AlaA228, 124S 912(2dcase); 155Md252, 141A714.

610-10 155Md252, 141A714.

612-26 [a] **Beds erroneously assigned.**-152Va616, 148SE789.

612-27 [a] **Extent of right depends** on legislative intent. Conn 152A210.

612-30 Conn 152A210.

615-83 149Md621, 132A48. [a] (7) Compact does not apply to law prohibiting use of fish pots in unnavigable waters of Potomac, and Maryland law to that effect needs no assent by Virginia. 149Md621, 132A48.

616-84 [b] (4) Rights of residents of Washington to fish in Columbia River cannot be denied by legislative enactment of Oregon. 131 Or522, 284P189. (5) It is within province of legislature of Oregon to provide that residents of Washington desiring to land seines on Oregon side of Columbia River must be licensed in state of Oregon, and to discriminate in favor of Oregon citizens. 131 Or522, 284P189.

617-98½-New. The fact that a schooner is licensed only for coasting trade does not prevent it from carrying on sealing operations in Bering Sea. 24 F(2d)933.

618-25 131 Or522, 284P189. See also 143Wash397, 255P146.

620-50 [b] **Damages directly and proximately resulting from wrongful act** are recoverable. 131 Or522, 284P189.

621-55 [c] (2) To sustain findings on interference action. 124Me365, 129A 444. [d] **Evidence held inadmissible.**-(1) 124Me365, 129A444.

621-63½-New. On the question of punitive damages, plaintiff's good faith in reliance on the boundary line fixed by the federal court in a temporary restraining order in invading defendant's fishery rights may be considered, 131 Or522, 284P189.

621-63⅓-New. but good faith is immaterial on the question of compensatory damages. 131 Or522, 284P189.

622-74½-New. Injunction denied if no right to fish is shown. TexCivA 295SW 211.

623-92 30F(2d)111; 31F(2d)617; 172 Ark866, 291SW89; 195Cal 548, 234P 398; 78CalA58, 247P923; 200Cal 474, 253P918; 93Fla905, 113S94; 28Hawaii 43; 149Md578, 132A73; Mich 233NW 205; 169Minn374, 211NW577; 318Mo 560, 300SW675; 191NC305, 131SE724; 50RI 175, 146A482; 136Wash210, 239P 552. [e] (2) Acts of congress granting to Iowa and Nebraska concurrent jurisdiction "on" Missouri River do not prevent Nebraska, without concurrence of Iowa, from enacting and enforcing law that forbids use of fishing nets, traps, and seines in that part of river west of boundary line in middle of channel. 118Nebr174, 224NW18. (3) Exercise of police power to protect food at source of supply within state boundaries may extend to protection of fish in river where boundary line between two states is middle of channel. 118Nebr174, 224NW18. [h] **Legislature may limit fishing in state waters to citizens.** 136Wash210, 239P552. [i] **Statute construed** to bar aliens who had declared intention to become citizens prior to Jan. 1, 1924. 136Wash210, 239P552. [j] **Statutes as to right to fish in state waters** held not to conflict. 136Wash 210, 239P552.

624-97 Mass 169NE806.

624-97½-New. In some jurisdictions constitutional provisions permit the legislature to divide the state into fish and

game districts. 200Cal 474, 253P918.

624-97½-New. Such provision is remedial in character and is to be liberally construed. 200Cal 474, 253P918.

624-97¼-New. The purpose of such a constitutional provision is to take from the local authorities the right to regulate the fish of the state and to invest such power exclusively in the legislature. 200Cal 474, 253P918.

624-97½-New. One purpose of legislation with reference to fish in some jurisdictions is to permit the largest use of fish compatible with the reasonable protection thereof. 200Cal 474, 253P918.

625-98 6F(2d)500. [b] **Delegation of authority to secretary of commerce to mark boundary.**-6F(2d)500.

625-98½-New. Congress, establishing a refuge for migratory birds, may make reasonably necessary regulations concerning nonmigratory fish. 31F(2d)617.

625-99½-New. Statutes regulating salt water fishing will be construed as limited to waters within the state's jurisdiction. 93Fla905, 113S94.

625-1 170La435, 128S37 (not repealed).

625-2 See also Can [1928] 4DomLR190. [a] (4) Giving riparian owners preference as to weir locations. 149Md578, 132A73. (5) Statute granting power to fish and game commission to hold hearings and determine facts incidental to regulation of fish and game and to grant permits to take and use fish is valid as conferring administrative or regulatory power and does not transgress exclusive functions of judiciary. 200Cal 276, 252P1038. (6) Other instances. 39F(2d)111; 96Fla799, 119S 376. [d] **Fishing incident to navigation** is not protected by ordinance of 1787 nor by constitution of state, incorporating such ordinance therein, phrase "forever free" therein referring to "common highways," and protecting such highways from any tax, duty, or impost therefor, and not relating to fish. 197Wis394, 222NW300, 62ALR 466.

625-5 35F(2d)193; 28Hawaii43. [a] **Statute prohibiting commercial fishing** in particular lake held valid. 169 Minn374, 211NW577. [b] **Statute authorizing fish commissioner to set aside waters for fish propagation** is constitutional. 172Minn179, 215NW215. [c] **Statute prohibiting fishing with nets, traps, or seines** and making possession thereof unlawful is constitutional. 281 US261, 50SCt296, 74L ed840.

625-6 172Ark866, 291SW89. [a] (3) Statute of prohibiting use of food fish for reduction purposes except that persons engaged in catching, packing, and preserving fish or fish products for human consumption may use such fish in reduction plant or sell them for such purpose by obtaining permit is based on reasonable classification and is not unreasonable or discriminatory as against person operating reduction plant exclusively. 195Cal 548, 234P398. (4) Statute extending to every resident right to fish upon payment of certain license fee contains proper classification embracing all bona fide residents and excluding temporary residents. 172Ark 866, 291SW89. (5) California statute giving packers of sardines in one pound oval cans special privilege of using sardines for reduction purposes unlawfully discriminates against other kinds of fish packers. 76CalA445, 244P946. (6) Law prohibiting taking of freshwater fish from fresh waters of state with any device except as specifically permitted by act has been held not invalid as discriminatory because of exception in favor of Confederate soldiers. 96Fla799, 119S376.

625-8 200Cal 474, 253P918.

625-9 35F(2d)193; 78CalA58, 247P 923; 28Hawaii43 (exclusion of resident aliens is not violation of equal protection).

626-10 191NC305, 131SE724. [a] (2) State may deny alien's right to fish within its borders. 6F(2d)237. [b] **Statute prohibiting aliens** from fishing within state limits does not deny constitutional right to engage in lawful occupation or their employers of right of contract. 6F(2d)237.

626-11½-New. Initiated Law of Oregon of 1926, prohibiting the use of certain appliances in the waters of the Columbia River within the state of Oregon, is valid. 21F(2d)76.

626-12 [b] **Legislation to conserve fish** may be made applicable only to particular lake. 169Minn374, 211NW577.

626-13 191NC305, 131SE724.

626-18 96Fla799, 119S376.

627-19½-New. The public policy of some states in reference to food fish within state waters is to protect, conserve, and devote them to human consumption. 195Cal 548, 234P398.

627-19¼-New. A statute prohibiting the use of food fish for reduction purposes except that those engaged in catching, packing, and preserving fish or fish products for human consumption may use such fish in a reduction plant or sell them for such purpose by obtaining a permit is intended to prohibit preventable waste of food fish and to discourage the use thereof for purposes other than human consumption. 195Cal 548, 234P398.

627-19¼-New. The purpose of the proviso of such statute excepting persons engaged in catching, packing, and preserving fish or fish products for human consumption upon conditions specified is to aid and encourage persons so engaged. 195Cal 548, 234P398.

627-19⅓-New. Such statute does not prohibit the operation of a reduction plant. 195Cal548, 234P398.

627-19⅙-New. nor the use therein of fish offal or fish not fit for human consumption. 195Cal 548, 234P398.

627-19⅐-New. , but prohibits only the use in such plants of fish fit for human consumption. 195Cal 548, 234P398.

627-19⅛-New. Such statute is not in conflict with an earlier statute excepting individual fisherman unable to sell his catch from its provisions against diversion or destruction of food fish, and prohibits such diversion by individual fishermen unable to sell their catch. 195 Cal 548, 234P398.

627-19⅛-New. Engaging in fishing for food fish with the direct purpose of delivering the catch to a reduction plant for the manufacture of fish meal and fish oil is a violation of such statute. 195 Cal 548, 234P398.

627-19 1/10-New. A reduction plant within the meaning of such statute includes any plant engaged in the reduction of fish into other products which are not intended to be used, and are not in fact used, for human consumption. 195Cal 548, 234P398.

627-19 1/11-New. The term waste "as used in such statute" includes the use of food fish for any purpose other than human consumption. 195Cal 548, 234P 398.

627-19 1/12-New. The use of food fish in a reduction plant in violation of such statute constitutes a nuisance. 195Cal 548, 234P398.

627-19 1/13-New. Prohibition against aliens fishing for food fish has been held not applicable to alien cooks on a fishing boat, without interest in "catch." 143 Wash364, 255P122.

627-20 238Mich130, 213NW195.

628-33 99Fla1067, 128S499.

628-34 [b] 181Ark1089, 29SW(2d)294.

628-35 281US261, 50SCt296, 74L ed840; 28Hawaii43; 151Miss778, 119S303(2d case). [b] (6) Use of dip net or minnow seine over four feet in diameter for bait fishing is violation of statute. 8PaDist &Co 87. [h] **Statute has no application** to counties newly formed. 91Fla889, 108S895. [i] **Traps.**-145Wash1, 258P 838. [j] **Person raising and propagating fish** may take them with seine. 202 Iowa638, 210NW774(2dcase).

629-37 318Mo 560, 300SW675.

629-38 [b] **"Snag pole"** includes pole with only one hook. Wis 232NW593.

630-40 [b] **Intent as element of offense.** -202 Iowa638, 210NW774(2dcase).

631-49 [c] (5) It is no defense to prosecution for violation of statute that sawdust is not injurious to fish. OklCr 276P240(1stcase). [e] **Construction of statute.**-Va 154SE477.

631-50 Va 154SE477. But see 13PaDist &Co 680.

631-57 74Mont587, 241P328.

632-65½-New. Statute held not to permit trespass on private lands. TexCivA 295SW211.

632-70 [a] (2) Notice that certain area was so contaminated that shellfish taken therefrom were not fit for food needed no signature, being public proclamation. 261Mass510, 159NE599. (3) Under statute of 1926, no new newspaper publication is essential to prosecution for taking shellfish from area proscribed under earlier statutes. 261Mass510, 159NE599. (4) Action of department of public health toward declaring area contaminated and requesting that taking of shellfish therefrom be prohibited held sufficient under statute. 261Mass510, 159 NE599. (5) Conviction for taking clams from area proscribed under prior statute may be had without promulgation of regulations thereunder or examination under later statute. 261Mass510, 159 NE599.

632-70½-New. to transport crabs from one district to another; 78CalA58, 247 P923.

632-71 23AlaA18, 121S427(2dcase) [certiorari den 219Ala154, 121S428(1st case)].

633-74 [c] 125Me9, 130A352.

633-79½-New. Statutes in some jurisdictions prohibit transporting crabs caught in designated districts to any point outside such districts. 200Cal 474, 253P918 (statute valid).

633-80 [d] **Repugnant provisions.**-172 Ark866, 291SW89.

633-81 See also 155Tenn55, 290SW380. [f] **"Fishing season"** held coextensive with license year. 145Wash1, 258P838. [g] **In Arkansas.**-178Ark849, 12SW(2d) 776.

634-82 28Hawaii43. [f] **Agents.**-28 Hawaii43. [g] **Harbor commission, under statute, is free to make its own rules** of procedure in determining questions of priority of applicant for license to set fish traps, and its rules will not be interfered with provided they are reasonable. 50RI 175, 146A482.

634-87 155Md252, 141A714. [b] **Conditions imposed held not unconstitutional.**-155Md252, 141A714.

634-88½-New. To obtain a license to seine under some statutes it is necessary that applicant have title or interest in real property on which to land seines. 131 Or522, 284P189.

634-89 155Wash411, 284P805 (location of appliances held unreasonable).

634-92 155Wash411, 284P805.

635-96 48Philippine415.

635-98½-New. There can be no refund of a license fee voluntarily paid into a special fund. 156Miss227, 125S534.

635-99 Imp [1930] 1DomLR194 (qualified applicant entitled to license on proper application and tender of fee).

635-3½-New. A qualified person cannot be refused a license. Can [1928] 4Dom LR190.

635-3⅓-New. While applicant to operate fish trap keeps tender and application good, enforced failure to build trap will not forfeit right or constitute abandonment. Or 289P1061.

635-6 318Mo 560, 300SW675 (may dynamite fish obnoxious to propagation of food fish). [e] **Statute giving fish commission judicial powers** is unconstitutional in some jurisdictions. 75CalA 764, 243P702. [f] **Legislative power is not delegated** by statute authorizing fish commissioner to set aside waters for fish propagation. 172Minn179, 215NW215.

636-22½-New. It is the duty of conservation commission to keep adequate records and files of its activities. 238 Mich130, 213NW195.

636-22⅓-New. An office temporarily located within the territory does not have to be permanently established in one fixed place, but the board can, in exercise of its sound discretion, remove and locate the office of commissioner to some convenient place in the territory that is best suited for its purposes. 167Ga848, 146SE767(1stcase).

636-23 173Minn559, 218NW123. [b] 172Minn179, 215NW215. [c] **Determination of capacity of fish cannery.**-76 CalA445, 244P946. [d] **Commissioner not authorized** to buy fish for purpose

of reselling them. 173Minn559, 218NW 123.

636-25 [a] **Order of conservation commission authorized by statute regulating taking of fish in certain waters** held valid when it complied with mandatory essentials of act though it did not contain detailed reasons for order. 238Mich 130, 213NW195.

636-29 See also 6LaA615, 620 [citCyc].

636-29½-New. Appointment of a fish warden shown by card from fish commissioner is sufficient authority for him to act. 8PaDist&Co 87.

636-29⅓-New. Conservation commission may exercise powers authorized by statute regulating the taking of fish on recommendation of the director of conservation after thorough investigation by him has been made. 238Mich130, 213 NW195 (recommendation not requisite).

637-35 91Fla889, 108S895.

639-80 See also 7Alaska215 (release).

639-83 148Wash651, 269P805. [d] 148 Wash651, 269P805.

640-94 [a] **Sufficiency of evidence.**–7 Alaska260.

640-97½-New. In Florida sheriff held not authorized to sell frozen and stored mullet lawfully caught, vessel with which they were caught not having been seized. 94Fla943, 114S521.

641-1 Mass 169NE806 (statute giving municipality power to control and regulate shellfish has been held not to deprive court of jurisdiction).

641-6½-New. Master is liable for the possession by an employee of a fish of forbidden size. 94Fla809, 114S448; 108 TexCr352, 300SW947.

641-6⅓-New. One fishing upon lands of another without catching any fish is not guilty of offense against game laws. 108TexCr353, 300SW940.

641-9 7Alaska356; 155Tenn55, 290SW 380. [a] (8) Alleging "inside waters" where statute reads "inside salt waters." 91Fla889, 108S895. (9) For failing to mention streams requiring license and that offense was in one of such streams. 155Tenn55, 290SW380. [b] (5) Charging defendant used beach seine contrary to statute. 195Cal 774, 235P735. (6) For dynamiting fish. 314Mo 567, 284 SW806. (7) Transporting and carrying crabs from fish and game district. 200 Cal 474, 253P918. (8) For dynamiting waters to kill fish. 200 Ind531, 165NE 322. (9) Other instances. 170Ga638, 153SE749.

642-10 155Tenn55, 290SW380. [c] **Closed season for fishing** in particular county need not be specified in indictment. 170Ga638, 153SE749.

642-12 170Ga638, 153SE749 (reference to publication of action of fishing board).

642-14 21AlaA353, 108S272.

643-20 200 Ind531, 165NE322.

643-27 [d] (1) Contra. 21AlaA353, 108S272.

644-29 170Ga638, 153SE749. [a] (2) Evidence as to weight is not admissible in prosecution for possession of short lobsters where statute fixed explicit standard for measuring size. 125Me9, 130A352. (3) Evidence as to season short lobsters were caught is not admissible where statute provides that any short lobsters caught be immediately liberated. 125Me9, 130A352. (4) Testimony tending to refute determined conditions on which conservation commission's orders regulating taking of fish in certain waters were based held properly excluded in prosecution for violating its provisions. 238Mich130, 213NW 195. [d] **Evidence held admissible.**–261 Mass510, 159NE599.

644-30 [a] (1) 109TexCr411, 4SW(2d) 976; TexCr 5SW(2d)150. (7) To go to jury in prosecution for dynamiting fish. 314Mo 567, 284SW806. (8) To show public notice that certain area was contaminated. 261Mass510, 159NE 599.

644-33 See also 314Mo 567, 284SW806.

644-38 TexCr 26SW(2d)635. [a] (3) Charge questioning whether accused immediately liberated short lobsters, though word "alive" not used, held not erroneous in view of whole charge. 125 Me9, 130A352. (4) Instruction based on information and statute in prosecution for dynamiting fish. 314Mo 567, 284SW 806. [b] (2) On trial for maintaining fish traps in, and taking fish from, alleged prohibited area, where such area cannot be ascertained till secretary of commerce determines boundary as provided by statute, instruction that it is for jury to determine boundary is erroneous. 6F(2d)500.

644-39 [a] **Evidence held sufficient for jury.**–261Mass510, 159NE599.

644-40 [a] **Not necessary for jury to find** definite number of short lobsters in possession of accused where possession of any amount would justify verdict of guilty. 125Me9, 130A352.

645-45 [b] **Number of short lobsters in possession of accused** justified by evidence fixes penalty which court must impose. 125Me9, 130A352.

FIT

646-16½-New. ; in correspondence with some other thing. 15 OhA520.

646-18 [d] **Equivalents to term "fit".**–38 OklACR120.

646-42½-New. , "fit for beverage purposes." 15 OhA520.

FIXTURES

651-1 176Ark864, 4SW(2d)901; 98Fla 410, 123S814(2dcase); Fla 130S608; 239 Mich161, 214NW111; 133SC383, 131SE 37 [citCJ]; TexCivA 10SW(2d)173.

652-11 Mo 31SW(2d)993.

652-17 [a] 83CalA696, 257P189; 98Fla 410, 123S814(2dcase); 201 Iowa569, 207 NW581; 247Mich580, 226NW225.

653-22 259Mass319, 156NE693; 239 Mich161, 214NW111; 218AppDiv263, 218NYS143; 133SC383, 131SE37. See also 83CalA696, 257P189.

653-24 241Mich379, 217NW10; Tex CivA 18SW(2d)707.

654-25 81CalA387, 253P752; 241Mich 379, 217NW10.

654-28 11PaDist&Co 479.

654-30 83CalA696, 257P189; 151Miss 475, 118S303.

654-30½-New. Installation of chattels on realty by owner of realty raises presumption of intention to make them part of the realty. 235Mich674, 209NW801.

654-31 21F(2d)136; 22F(2d)773; 33F (2d)162; 41F(2d)404; 176Ark752, 4SW (2d)27; 176Ark864, 4SW(2d)901; 178 Ark504, 10SW(2d)898; 81CalA387, 253 P752; 233Ky77, 24SW(2d)947; 156Md 368, 144A641, 62ALR358; 80Mont12, 257P478; 51Nev291, 274P196; 128Misc 507, 219NYS432; 113 Okl 195, 240P1045; 258Pa358, 135A216; 97PaSuper236; 132 SC16, 128SE876, 41ALR592; 133SC383, 131SE37 (general rule relaxed in modern cases); SD 227NW469; TexCivA 31 SW(2d)472; 148Va528, 139SE317, 321 [citCJ]; 103WVa132, 136SE697; 107 WVa397, 148SE383; WVa 153SE309; 192Wis214, 212NW266; 196Wis581, 219 NW439; Wis 230NW51. [a] **Effect of Uniform Sales Act.**–NJCh 146A346. [b] **Presumption of intention.**–Wash 287P 658. See also 36GaA261, 136SE166; 218 AppDiv263, 218NYS143. [a] **As between mortgagor and mortgagee,** intent of party making annexation can be considered only if annexation was made after execution of mortgage. 132SC16, 128SE876, 41ALR592.

655-32 22F(2d)773; 38F(2d)10.

655-34 201 Iowa569, 207NW581, 582 [citCJ]; 222MoA1029, 9SW(2d)808(2d case).

655-35 22F(2d)773; 201 Iowa569, 207 NW581, 582 [citCJ]; 222MoA1029, 9 SW(2d)808(2dcase); 220AppDiv595, 222 NYS176; 148Va528, 139SE317. [a] **Apparent intent reasonably appearing to third party** whose rights are concerned is sufficient. 84CalA701, 258P 612.

656-39 22F(2d)773; 98Fla410, 123S 814(2dcase); 132SC16, 128SE876, 41 ALR592; Utah 266P1033; 148Va528, 139SE317. See also 81CalA387, 253P 752.

656-40 83CalA696, 257P189 (expressed intention).

656-41 80Mont12, 257P478.

656-44 222MoA1029, 9SW(2d)808(2d case).

656-45 201 Iowa569, 207NW581; 235 Mich674, 209NW801 (as between mortgagee of land and trustee in bankruptcy of original annexor).

657-50 39GaA384, 146SE918; 156Md 186, 143A795.

657-56 133SC383, 131SE37, 39 [quot CJ].

657-57 133SC383, 131SE37, 39 [quot CJ].

657-58 133SC383, 131SE37, 39 [quot CJ].

657-59 133SC383, 131SE37, 39 [quot CJ].

658-60 133SC383, 131SE37, 39 [quot CJ].

658-61 133SC383, 131SE37, 39 [quot CJ].

658-62 [a] (10) Kitchen cabinets, refrigerators, and gas stoves in apartments. 176Ark752, 4SW(2d)27. (11) Equipment in coal mine tipple. 107 WVa397, 148SE383.

658-66 6F(2d)844; 132SC16, 128SE 876, 41ALR592.

658-67 132SC16, 128SE876, 41ALR592.

658-69 22F(2d)773; 218Ky691, 291SW 1054; 233Ky77, 24SW(2d)947; 113 Okl 195, 240P1045; 132SC16, 128SE876, 41 ALR592. See also 214Ala425, 108S239. [a] **To defeat right of removal,** accession to realty must affirmatively appear. Wis 230NW51.

659-70 287Pa358, 135A216.

660-74 202 Iowa833, 211NW407; 196 Wis581, 219NW439. See also NJCh 148 A899.

660-78 41F(2d)404.

660-79 32F(2d)737; 201 Iowa190, 206 NW828.

661-81 84CalA701, 258P612; 117 Okl 207, 246P228.

661-82 Sask [1930] 3DomLR955. [a] (1) 83CalA696, 257P189.

661-83 201 Iowa190, 206NW828; 321 Mo 212, 9SW(2d)957. [a] (13) **Part of realty though not attached.**–Removable flagpole resting on cement base and supported by rods affixed to realty. 142 Wash222, 252P926, 50ALR635; 147 Wash264, 266P162.

662-85 201 Iowa569, 207NW581, 582 [citCJ].

663-91 [b] 41Wyo 402, 286P372.

663-92 196W's581, 219NW439.

664-99 36GaA261, 136SE166; 239Mich 161, 214NW111; 133SC383, 131SE37.

664-1 19F(2d)305, 308 [citCJ]; 41F (2d)405; 227Ky657, 13SW(2d)1009, 62 ALR208; 168La349, 122S62; 250Mich 535, 231NW128; 218AppDiv263, 218 NYS143. [b] **Evidence held sufficient** to show frigidaire equipment remained personalty. TexCivA 30SW(2d)364.

664-2 See also Ont [1925] 3DomLR107.

664-3 131Misc519, 227NYS414.

664-4 [a] **Whether sloping false floor** installed by tenant could be removed with little injury to building held question of fact for jury. 169Minn253, 211 NW13, 15 [citCJ].

664-5 53ND104, 204NW972.

664-6 178Ark454, 12SW(2d)10; 10LaA 409, 121S372; 221MoA814, 288SW95.

664-6½-New. Where the owner of realty annexes chattels, the presumption that they should become part of the realty renders immaterial the question as to whether they could be removed without injury. 235Mich674, 209NW801.

665-7 203 Iowa748, 211NW225.

665-8 19F(2d)305, 308 [citCJ].

665-9 36GaA261, 136SE166.

665-16 176Ark752, 4SW(2d)27 (gas cooking stoves). See also NJCh 148A 899. [b] **Furniture.**–98Fla410, 123S814 (2dcase).

666-23 201 Iowa569, 207NW581.

666-27 22F(2d)773; 201 Iowa569, 207 NW581; 233Ky77, 24SW(2d)947; 239 Mich161, 214NW111; 51Nev291, 274P 196; 132SC16, 128SE876, 41ALR592; TexCommnA 29SW(2d)1062.

667-28 83CalA696, 257P189; 218App Div263, 218NYS143; 132SC16, 128SE 876, 879 [citCJ], 41ALR592; TexCivA 31SW(2d)472; 196Wis581, 219NW439.

667-29 218AppDiv263, 218NYS143.

667-30 156Md368, 144A641, 62ALR358.

668-32 218Ky691, 291SW1054.

668-34 41F(2d)404; 85 IndA78, 151 NE361.

669-37 218AppDiv263, 218NYS143; 97 PaSuper236; BC [1930] 2DomLR672.

669-42 239Mich161, 214NW111.

669–43 See also 151Miss475, 118S303.
669–44 36GaA261, 136SE166.
670–46 NJCh 148A899.
670–48 171Ark1097, 287SW384; 36GaA261, 136SE166; 5LaA45; 239Mich161, 214NW111. [d] **Furnace held integral part of building.**–202 IowaS33, 211NW407. [e] **Dough mixer** as immovable by destination. 3LaA481. [f] **Machinery attached to real estate** held not within purview of Uniform Conditional Sales Act. 294Pa376, 144A283. [g] **Mirrors** hung in place by moulding are not fixtures. 97PaSuper236.
670–51 113 Okl 195, 240P1045.
671–52 110Conn516, 148A358; 151 Miss475, 118S303.
671–53 19F(2d)305, 308 [citCJ]; 175 Ark977, 1SW(2d)71. [a] 83CalA696, 257P189.
671–54 Sask [1929] 2DomLR470.
671–57 143Va439, 130SE385.
671–58 [e] (1) Minn 215NW943.
672–63 53ND104, 204NW972.
672–65 246 IllA184; 201 Iowa190, 206 NW828 (house erected from materials sold purchaser of realty whose contract was forfeited); 117 Okl 207, 246P228.
673–67 5LaA467.
673–69 246 IllA184.
673–70 171Minn318, 214NW59.
673–72 171Minn318, 214NW59.
674–86 See also 133SC383, 131SE37 [citCJ].
676–21 31Ariz1, 250P246, 248 [citCJ]; 176Ark864, 4SW(2d)901; 36GaA470, 137 SE642, 645 [citCJ] (dictum); 41 Ida561, 240P446; 222MoA1068, 9SW(2d)840; 86Mont150, 282P494; 51ND901, 201NW845, 847 [citCJ]; 53ND104, 204NW972; TexCommnA 29SW(2d)1062; TexCivA 10SW(2d)173; TexCivA 18SW(2d)747; Utah 266P1033; Wis 231NW181. [e] **Buildings on leased land** are presumed to be real property subject to be mortgaged as such in absence of agreement to contrary. 42 Ida560, 247P751.
677–23 41 Ida561, 240P446.
677–24 41 Ida561, 240P446.
677–25 41 Ida561, 240P446.
677–25½–New. The parties to a chattel mortgage on an oil well casing and other material have the right to agree that such property should continue to be personalty, even where the mortgagor was not the owner of the land but only an oil lessee thereof. 118Tex498, 18SW(2d)1052.
677–28 166Ga158, 142SE551; 166Ga173, 142SE887; TexCivA 31SW(2d)472.
678–38 132SC16, 128SE876, 881 [quot CJ], 41ALR592.
678–41 Wis 230NW46 (owner may reimpress fixtures with character of personalty by agreement); Wis 230NW51.
678–44 [a] **Conditional seller to make chattel mortgage good** against any person must allege removability of chattels and assent to reservation. 137Misc16, 242NYS125.
679–46 [a] **Evidence held sufficient** to sustain findings of no agreement by seller and purchaser of building materials that structure should remain personalty and subject to chattel mortgage later to be executed. 53ND315, 205NW621.
673–46½–New. Where the debt secured by chattel mortgage has been paid, an agreement that the property shall remain personalty will not affect its character as a fixture. 132SC16, 128SE876, 41ALR592.
679–47 8F(2d)95; 98Fla410, 123S814 (2dcase) (refrigerator installed in hotel); 85 IndA78, 151NE361; 128Kan 580, 278P719; 263Mass112, 160NE330; 222MoA1068, 9SW(2d)840; NJCh 148A 899; 253NY450, 171NE703; 137Misc 485, 242NYS594; 51ND901, 201NW845; Can [1930] 4DomLR996. But see CalA 292P660. [b] 137Misc672, 244NYS324. [d] **Statute invalidating reservation of title** against party not assenting applies only to personalty which would become realty except for different intent. 137 Misc485, 242NYS594.
679–48½–New. Under the terms of the conditional sales contract it has been held in some cases that the status of personalty was not preserved for either party but only a contract right in the vendor to retake the article by severance and so reconvert it into personalty. 165Minn252, 206NW385.
679–49½–New. Under some circumstances a subsequent mortgage on the land to the conditional vendor expressly including the subject of the conditional sale will pass title thereto to purchaser under foreclosure as part of the realty. 165Minn252, 206NW385.
679–50 7Alaska131, 147 [citCJ]. [f] **Mistake.**–171Minn318, 214NW59.
680–51 83CalA696, 257P189.
680–52 But see TexCivA 18SW(2d)707. [a] 83CalA696, 257P189.
681–65½–New. Under some statutes, a person having a mortgage or lien or judgment against the realty, not expressly assenting to the conditional sale, is entitled to priority as against conditional vendor; 3Del 129, 131A696.
681–65⅓–New. and the reservation of title is void as against such mortgagee or judgment creditor even in actions not by or against such persons, as in a suit by vendor against receiver of vendee. 3Del 129, 131A696.
681–66 176Ark864, 4SW(2d)901; NJ Ch 150A196 (where removal will cause no damage to realty); 51ND901, 201NW845, 847 [citCJ]; Utah 266P1033, 1035 [citCJ]; 154Wash25, 280P742. But see 3Del 129, 131A696. [e] **Exclusion of evidence** of constructive notice held error. 51ND901, 201NW845.
681–67 Mo 31SW(2d)993; 222AppDiv 338, 226NYS60 (purchaser at foreclosure sale); NC 153SE861.
681–70 31Ariz1, 250P246, 248 [citCJ]; 3Del 129, 131A696; GaA 155SE97; 41 Ida561, 240P446, 447 [citCJ]; 85 IndA 78, 151NE361; 137Misc332, 244NYS 455; NJCh 146A346; 128Misc507, 219 NYS432; 157Tenn676, 11SW(2d)855; TexCommnA 29SW(2d)1062. [e] **Parts of property not physically annexed but which are necessary** to operation of machinery and equipment physically attached are also within application of rule. 85 IndA78, 151NE361. [f] **Purchaser on foreclosure of mortgage** obtains no greater rights than mortgagee had. 137Misc332, 244NYS455.
682–71 85 IndA78, 151NE361.
682–72 136Misc720, 241NYS632; TexCivA 18SW(2d)747. [d] (3) 137Misc 332, 244NYS455. (4) Purchaser without notice acquires no title to chattels unless deed or mortgage expressly covers sale of chattels. 137Misc332, 244 NYS455.
683–73 8F(2d)35; 42F(2d)515; 156 Md186, 143A795; 259Mass319, 156NE 693; 222AppDiv338, 226NYS60; 222 AppDiv378, 226NYS209; 137Misc332, 244NYS455; TexCommnA 29SW(2d)1062 (mortgagee). See also 227AppDiv 400, 237NYS456. [a] (1) 251NY12, 166 NE787. (2) 134Misc118, 235NYS438. (3) Statute must be strictly construed. 134Misc118, 235NYS438. (4) Where realty mortgage recites that it covers all fixtures, and is taken prior to filing of conditional sales contract, reservation in contract held void as against mortgagee. 251NY24, 166NE792. (5) Construction of statute. 137Misc332, 244NYS455.
683–74 [a] (2) 41 Ida561, 240P446. (3) Mortgagee whose mortgage was not taken for valuable consideration. 41 Ida561, 240P446.
683–77 180Ark739, 22SW(2d)906 (duty to make inquiry).
683–81 GaA 155SE97.
684–83 31Ariz1, 250P246; 156Md186, 143A795; 128Misc507, 219NYS432; 135 Misc259, 238NYS448. See also 156Md 186, 143A795. But see 156Md186, 143A 795.
684–85½–New. Where the Uniform Conditional Sales Act provides that reservation of property in vendor shall be void unless a contract is properly filed, it applies to a case of the sale of goods to a contractor to be affixed to realty owned by a person other than such contractor, not to a case where the owner is the purchaser. NJCh 146A 346.
684–85⅓–New. Under the Uniform Conditional Sales Act, a receiver has been held not to be the "owner" of realty as against a vendor of chattels subsequently affixed. NJCh 146A346.
684–87 156Md368, 144A641, 62ALR 358; 243Mich415, 220NW786; 173 Minn121, 216NW795, 797 [citCJ]; MoA 29SW(2d)161; NJ 144A188; 287Pa 358, 135A216; TexCivA 31SW(2d)472; WVa 153SE309. [h] **Testimony that articles were installed as permanent arrangement** held not to contravene intention shown by conditional sales contract. TexCivA 31SW(2d)472.
685–89 See also 3Del 129, 131A696.
685–95 135Misc158, 237NYS258; 157 Tenn676, 11SW(2d)855.
685–96 137Misc332, 244NYS455; 287 Pa358, 135A216.
686–97 MoA 29SW(2d)161.
686–2 But see Mass 171NE14.
686–5 Mass 171NE14. [a] **Notice has been held too late** where goods were delivered 10 days before notice was filed. Mass 171NE14.
686–6 [a] **Mortgagee did not waive invalidity of notice** of conditional sale of range by making further advances after seeing it. Mass 171NE14.
686–7 227Ky657, 13SW(2d)1009, 62 ALR208; 137Misc485, 242NYS594 (statutory changes). See also 180Ark 654, 22SW(2d)377; 3Del 129, 131A696. [b] **Loosening plaster on removing** heating plant has been held not material injury. 137Misc485, 242NYS594. [c] **Evidence held insufficient** to show that articles could not be removed without injury to realty. TexCivA 31SW(2d)472.
687–12 [a] (4) Elevators in building. 23F(2d)152.
687–15 23F(2d)152.
687–18 But see 3Del 129, 131A696. [a] 294Pa376, 144A283.
688–20 240Mich413, 215NW343. [c] **Purchaser at foreclosure sale of land contract by vendor** acquires only rights of vendor, and has no rights to chattel affixed to realty, but severable therefrom, though conditional bill of sale was not recorded. 222AppDiv338, 226 NYS60.
688–21 222AppDiv338, 226NYS60. [a] **That removal of elevator from apartment building** will prevent use of building as seven-story apartment house is not such material injury as prevents its removal. 240Mich413, 215 NW343.
688–22 222AppDiv338, 226NYS60.
688–25 204 Iowa274, 212NW551.
688–28 50ND408, 196NW312. [a] **Provision in contract for sale of land that buildings erected shall not be removed** does not invalidate chattel mortgage on building constructed from materials purchased under agreement that building should remain personalty. 50ND 408, 196NW312.
688–29 50ND408, 196NW312 (where there was agreement that house to be constructed should remain personalty).
688–33 TexCivA 30SW(2d)364.
688–35 222MoA1029, 9SW(2d)808(2d case).
688–38 TexCivA 30SW(2d)364.
689–45 31Ariz1, 250P246, 248 [quot CJ]; 55AppDC302, 5F(2d)125; 173 Minn121, 216NW795; 115Nebr515, 213 NW824; 287Pa358, 135A216.
689–46 31Ariz1, 250P246, 248 [quot CJ]; 156Md368, 144A641, 62ALR358.
689–47 31Ariz1, 250P246, 248 [quot CJ]; 151Wash344, 275P733.
689–49 But see 55AppDC302, 5F(2d)125.
689–51½–New. The rights of the conditional seller are not affected by subsequent assignment of the lease. 55App DC302, 5F(2d)125 (even as regards assignee who gave renewal note for balance due on fixture sought to be removed).
690–61 TexCommnA 272SW440.
690–64 Iowa 231NW358; 41Wyo 402, 286P372 (law governs where lease silent).
690–65½–New. A statute, authorizing removal of an improvement if done without material injury, has no application where the buildings removed are new and not attached to buildings formerly on the land. SD 226NW343.
690–66 294Pa376, 144A283.
690–70½–New. Acceptance of deed and payment of purchase price does not es-

tablish waiver of right to cabin removed after vendor had contracted to sell and before title transferred. Utah 284P997.

691-76 321Mo 212, 9SW(2d)957.

691-77 Iowa 231NW358.

692-83 321Mo 212, 9SW(2d)957; 122 Or531, 259P911..

692-84 84Mont571, 276P944.

692-93 [c] **Unauthorized severance.**–NJCh 146A878.

693-2 Iowa 231NW358.

693-7 Iowa 231NW358.

695-17 218Ky691, 291SW1054.

695-20 218Ky691, 291SW1054.

695-21 21F(2d)136; 178Ark504, 10SW (2d)898; 201 Iowa569, 207NW581; 218 Ky691, 291SW1054, 1057 [citCJ]; 141 Miss617, 106S881; 142Wash93, 252P 121, 52ALR795. [d] **Many things are not fixtures between vendor and purchaser which may be** such between mortgagor and mortgagee. 142Wash93, 252P121, 52ALR795.

696-24 249Mich31, 227NW672; [a] (13) MoA 16SW(2d)699. (36) Show windows and shelving in store. 117 Okl 207, 246P228. [b] (3) Beaver boards attached to walls of restaurant by strips of wood securely nailed. 241Mich379, 217NW10.

696-25 [e] **Landlord does not acquire ownership of movables** merely because tenant owes rent. 170La638, 128S661.

696-26 250Mich535, 231NW128. [a] (6) See also 84CalA665, 258P417. (43) Movable hog houses and feed bunks on farm. 201 Iowa569, 207NW581. (44) Other instances. NJSup 149A66.

697-32 See also 81CalA387, 253P752.

697-33 81CalA387, 253P752 (hardwood floor in grillroom of tavern).

699-51 21F(2d)136.

699-60 21F(2d)136; 213Ky312, 280 SW134; 115Nebr515, 213NW824; NJ Sup 149A66; 10PaDist&Co 175; 142 Wash93, 252P121, 52ALR795; Wis 230NW46; 192Wis214, 212NW266; 39Wyo 1, 269P31. [c] **"Fixtures" as distinguished from movable trade fixtures** means chattels annexed to realty so as to become part thereof. 169Minn 253, 211NW13.

699-63½-New. Rule as to removal of trade fixtures is more favorable when relation of landlord and tenant exists than it otherwise is. 171Ark552, 285 SW12.

700-63½-New. In determining the removability of trade fixtures questions of physical annexation, adaption to realty, nature of fixtures, legal policy, situation of parties, and purpose of annexation are considered. 21F(2d)136.

700-71 115Nebr515, 213NW824. See also 142Wash93, 252P121, 52ALR795.

700-76 41Wyo 402, 286P372.

701-85 171Ark552, 285SW12.

701-86 171Ark552, 285SW12.

702-95 [a] 169Minn253, 211NW13.

702-97 [a] (1) 171Ark552, 285SW12. [a] (17) See also 135 Okl 135, 276P218 (2dcase). (28) Machinery for making soft drinks. 171Ark552, 285SW12. [c] **Automobile service station.**–142Wash93, 252P121, 52ALR795.

702-98 [a] (20) Soda fountain apparatus. 8F(2d)95. (21) Brass railing around orchestra in theater pit. 223Ky 603, 48W(2d)388.

702-99 [a] (8) 135 Okl 135, 276P218 (2dcase). (15) Dwelling houses for mill employees. 173Ark100, 291SW990.

703-1 [a] (7) Mirrors attached to posts and electrical fixtures in clothing store. TexCivA 292SW596.

703-8 201 Iowa569, 207NW581; 141 Miss617, 106S881. [b] **Hay carrier system held fixture.**–57ND404, 222NW262. [c] **Light plant in farm dwelling house held fixture.**–57ND404, 222NW262.

703-10½-New. Evidence held to show that the tenant was to have the right to remove a silo. 21F(2d)136.

704-12 21F(2d)136. [a] **Held not fixtures.**–201 Iowa569, 207NW581.

704-13 103WVa132, 136SE697, 698 [cit CJ].

704-16 103WVa132, 136SE697, 698 [citCJ].

705-27 [b] (4) Show windows, desks, shelving, and partitions annexed to store building by nails, spikes, bolts and screws. 117 Okl 207, 246P228.

705-28 [c] **In Mississippi.**–147Miss437, 111S847.

705-31 126Me284, 138A68, 69 [citCJ].

705-32 57ND404, 222NW262.

705-33 TexCivA 17SW(2d)170. [a](4) Depends on circumstances. TexCivA 17 SW(2d)170. [b] (2) Mixed question of law and fact. TexCivA 17SW(2d)170. [c] **Mortgagees held entitled to reasonable time** after notice of termination of lease to remove mortgaged fixtures. 151 Wash344, 275P733.

705-34 126Me284, 138A68, 69 [citCJ] (dictum).

706-36½-New. Under a lease giving a tenant the right to remove fixtures before termination of the lease, the time for removal is a material part of the covenants. 47RI 327, 133A85.

706-36¼-New. The act of the lessor in terminating a large number of leases in the same day is not an accident or mistake entitling lessees to relief against forfeiture of buildings. 47RI 327, 133A 85.

706-37 126Me284, 138A68, 69 [citCJ].

706-41 126Me284, 138A68.

706-44 126Me284, 138A68 (dictum).

707-53 126Me284, 138A68, 69 [citCJ].

708-62 145Wash584, 261P101.

709-81 Ont [1927] 3DomLR604.

710-89 178Ark504, 10SW(2d)898.

710-94½-New. Owner of railroad tracks has right to presume that status quo of rails remained unchanged after use discontinued, in absence of objection, notice or claim by owners of servient estates. 143Va439, 130SE385.

710-96 168Ark863, 271SW957; 174 Minn87, 218NW242; 39Wyo 1, 269P31. [k] **Provision that certain buildings erected by tenant may not be removed** implies right to remove other buildings. 147Miss556, 113S180, 53ALR288. [l] **Evidence held to show oral agreement.** Wis 230NW51.

711-97½-New. It is not to be inferred that one selling machinery to a tenant intended to enhance the value of the freeholder. TexCivA 271SW196.

711-99 TexCivA 271SW196.

711-2 TexCivA 300SW253.

711-7 [b] 168Ark863, 271SW957.

711-10 TexCivA 273SW944.

712-12 [b] **Oil and gas lease.**–(1) TexCivA 273SW944.

712-14 TexCivA 271SW196 (removable without damage to realty).

712-19 148Md560, 129A836 (failure to remove within time prescribed, fixtures become part of realty).

712-23 Kan 292P754.

713-28 Wis 230NW51.

713-33 Kan 292P754; Sask [1927] 3 DomLR326.

713-34 TexCivA 17SW(2d)170.

714-40 41GaA402, 153SE86; 142Wash 93, 252P121, 52ALR795; 39Wyo 1, 269 P31.

715-64½-New. Lessee's repudiation of lease containing stipulation for delivery of fixtures to lessor if lessee should quit before expiration of term is insufficient to transfer title to lessor. Fla 130S462.

715-65 [1] **Trade fixtures,** used in auto service station. 142Wash93, 252P121, 52ALR795.

717-80 Va 154SE518 [quotCJ].

717-87 39Wyo 1, 269P31.

718-94 41GaA402, 153SE86.

718-3 151Wash344, 275P733.

718-9 192Wis214, 212NW266.

720-29½-New. [§ 108½] X½. **Fixtures as between Seller and Buyer of Chattels.**–Where personal property sold under conditional sale cannot be removed without practically destroying it, intent of parties as to character of property does not control. 243NY477, 154 NE530.

720-29¼-New. Seller of personal property attached to realty under conditional sale is not entitled to lien on real property. 243NY477, 154NE530.

720-35 132SC16, 128SE876, 41ALR592.

720-38 36GaA261, 136SE166; 227Ky 657, 13SW(2d)1007, 62ALR208.

721-39 196Wis581, 219NW439.

721-40 36GaA261, 136SE166; GaA 155 SE97; 121Kan469, 247P631; 3LaA452; 5LaA47; 235Mich674, 209NW801 [quot Cyc]. [b] **Evidence held sufficient to** enjoin sale and removal of scales, water tanks, light plant, etc., as fixtures. IndA 169NE71.

721-41 41F(2d)404; 36GaA261, 136SE 166; 222MoA1068, 9SW(2d)840; SD 227NW469.

721-44 235Mich674, 209NW801 (as between mortgagee of land and trustee in bankruptcy of original annexor).

721-47 218AppDiv263, 218NYS143. [b] **Burden of proof is on purchaser of farm and silo to prove silo is fixture** (1) in action for conversion brought by conditional vendor. 218AppDiv263, 218 NYS143. (2) Burden not sustained by purchaser in absence of evidence that farm was mortgaged after erection of silo. 218AppDiv263, 218NYS143.

721-47½-New. Water heater held not removable after sale. 161La1017, 109S 822, 48ALR1143.

722-54 36GaA261, 136SE166.

722-55 [a] (2) 36GaA261, 136SE166. (11) 196Wis581, 219NW439. (14) 22F (2d)773. (40) Scales, gasoline tank, and pump. 235Mich674, 209NW801. (41) Other structures held to be realty. 36GaA261, 136SE166.

723-56 [a] (7) Refrigerators. 137Misc 332, 244NYS455.

724-57 [a] (1) NC 154SE733. (16) Corn grinder. NC 154SE733. (17) Pumping engine on rice farm. Ark 31 SW(2d)541 (notwithstanding mortgagor gave third person notes purporting to reserve title). [b] **Held not part of realty.**–218AppDiv263, 218NYS143.

724-58 122 Or531, 259P911; Utah 284 P997 (cabin); Sask [1929] 2DomLR470. See also 137Misc332, 244NYS455. But see Wis 231NW181.

724-60 [a] (3) 147Miss437, 111S847. (7) Kitchen sink. 147Miss437, 111S 847.

724-63 NJCh 151A282.

725-65 Mass 169NE789.

725-69 137Misc672, 244NYS324; 137 Misc332, 244NYS455.

725-72 147Miss437, 111S847.

725-77 179Minn362, 229NW349 (electric stoves).

726-83 [a] (34) Steel windmill tower. 121Kan469, 247P631. (35) Flagpole resting on concrete base and supported by rods affixed to realty. 142Wash222, 252P926, 50ALR635. (36) Apparatus, fastened to barn, for unloading hay. 171Ark1097, 287SW384. (37) Windmill. 36GaA200, 136SE165. (38) Carpets, specially made for hotel rooms, glued and nailed in place. 33F(2d)162. (39) Wall beds. 179Minn362, 229NW 349. (40) Other instances. 233Ky77, 24SW(2d)947.

726-84 [a] (27) Hotel furnishings consisting of tapestries, draperies, shades, tables, beds, chairs, and lamps. 33F (2d)162. (28) Frigidaire. 135Misc259, 238NYS448.

727-86½-New. Thus a mortgage of land and all "machinery thereon, immovable by nature or destination" does not cover articles which were formerly immovable but which had become movable on detachment. 158La838, 104S 734.

727-90 36GaA261, 136SE166; 122 Or 531, 259P911.

727-91 36GaA261, 136SE166 (dictum).

728-93 GaA 155SE97; TexCommnA 29 SW(2d)1062.

728-94 33F(2d)162 (chattel mortgage on hotel furnishings); 222MoA1029, 9 SW(2d)808(2dcase). See also 218App Div263, 218NYS143.

728-99 Fla 130S608 (where purchaser of mortgagor's interest subsequently attaches chattels to land); 128Me41, 145 A255; 259Mass319, 156NE693; MoA 29 SW(2d)161; 57ND404, 222NW262; 132 SC16, 128SE876, 41ALR592. But see 137Misc332, 244NYS455; 228AppDiv 141, 239NYS286. [d] **Purchaser at foreclosure takes subject** to conditional sales agreement. 224AppDiv37, 229NYS 519. [e] **Where article was purchased under title reservation contract** special equitable property right of owner of building is subject to prior trust deed. WVa 153SE309.

729-1 148Va528, 139SE317. [d] (2) As between mortgagor and mortgagee, intent of party making annexation can

be inquired into only if annexation was made after execution of mortgage. 132 SC16, 128SE876, 41ALR592.
729-5 Fla 130S608.
729-9 204 Iowa274. 212NW551. See also 204 Iowa737, 215NW943.
729-10 See also 6LaA337.
730-11 36GaA261, 136SE166.
730-13 Alta [1930] 3DomLR800.
730-17 [c] **Where building is sold under execution,** ordinary post-office equipment and furniture housed therein is personalty not leviable upon where already sold by owner. 47 Ida10, 271P934.
730-19 [a] (18) Power and light plant under unrecorded conditional sales contract. 249NY224, 164NE31.
732-31 [a] (9) Building. 138Misc69, 244NYS320. (10) House. Can [1930] 1DomLR786 (right of landowner to acquire title from execution purchaser).
733-39 [f] **Whether conditional sellers waived or were estopped to assert rights by delay in asserting them** held question of fact. 263Mass112, 160NE330. [g] **Conditional sellers, without knowledge of chattel mortgages on fixtures, or sale thereof,** held not estopped to assert rights as against subsequent buyer. 263Mass112, 160NE330.
734-59 36GaA200, 136SE165; 321Mo212, 9SW(2d)957.
734-60 36GaA200, 136SE165; 294Pa376, 144A283 (measure of damages).
735-63½-New. **Questions of law or fact.** Gasoline pumps used at automobile service station are held not fixtures to building as matter of law. TexCivA 282SW286.
735-64 Alta [1930] 3DomLR800. [d] **Evidence held sufficient** to warrant findings as to time to remove fixtures. 126Me284, 138A68. [e] **Measure of damages** for injury to real property applies to removing fixtures which have become part of realty. TexCivA 292SW596.
735-67 201 Iowa190, 206NW828 (burden of proof is on chattel mortgagee seeking recovery of dwelling house apparently part of defendant's land); 204 Iowa737, 215NW943; 53ND104, 204NW972. [e] **Damages.**-204 Iowa737, 215NW943.
735-68 222MoA1068, 9SW(2d)840.
736-75 Utah 266P1033.
736-77 171Ark1097, 287SW384.
736-81½-New. **Evidence.** Conditional sales contract is admissible in a proper case to prove title of vendor and nature of chattels. 173Minn121, 216NW795.
736-81½-New. Evidence held sufficient to sustain verdict. 173Minn121, 216NW795.
736-81¼-New. Jury question whether there was actual annexation and whether owner intended to make permanent annexation. Wash 287P658.
736-85½-New. **Evidence.** Presumption is that railroad tracks remained on right of way with consent of owners of servient estates after use discontinued in absence of evidence of their abandonment or assertion of title by servient owners. 143Va439, 130SE385.
736-86 117 Okl 207, 246P228, 230 [quot CJ]. [c] (1) 40Wyo 498, 280P98 (application for loan secured by foreclosed mortgage held inadmissible). [d] **Evidence held sufficient** to sustain findings and decree. 115Nebr515, 213NW824.
737-87 117 Okl 207, 246P228, 230 [quot CJ].
737-87½-New. Mandatory injunction to restore chattels real, wrongfully removed from mortgaged premises by a stranger, was held unenforceable, and the proper remedy was to appoint a receiver to restore such chattels. NJCh 146A878.
737-91 See also TexCivA 271SW196.
737-92½-New. [§ 132a] H. **Other Remedies.** A suit in equity to have adjudication of rights may be maintained under some circumstances. 26F(2d)664.
740-9 [a] **Other definitions.**-38F(2d)159.

FLESH

741-50 13CustA542.

FLEXIBLE BAR

741-56½-New. Bar which can be bent without breaking. 37F(2d)562.

FLOCK

742-80½-New. Wool dust. 14CustA280.

F. O. B.

745-73 161La198, 108S414, 416 [cit CJ]. See also 6LaA793.
745-73½-New. The term f. o. b. does not always imply a delivery at the point of shipment, but in many instances it does. TexCivA 275SW161.

FOLIO

746-19 135 Okl 69, 273P1002.

FOOD

752-20 214Ala38, 106S231; 111Conn433, 150A811; 243NY458, 154NE309.
754-34 134Misc652, 236NYS293; 228AppDiv420, 239NYS63; 199Wis338, 226NW310.
754-35 44 Ida440, 258P171, 172 [cit CJ].
754-38 CalA 292P988.
754-38½-New. A statute regulating the condition and manner in which fruit when delivered for shipment or offered for sale shall be packed does not apply to wine or juice of grapes. CalA 273P161.
754-39 44 Ida440, 258P171.
754-40 44 Ida440, 258P171.
755-44 111Conn433, 150A811. [a] **Requiring license and bond** to operate milk gathering station is valid exercise of police power. 253NY305, 171NE72.
755-68½-New. A state may establish reasonable grades for farm products when sold in containers usually employed and require that when so packed for sale, they shall conform to grades so established. 44 Ida440, 258P171.
756-74 193Wis311, 214NW369, 53ALR463. [a] **Statute held not valid** as protecting dairy industry from unfair competition. 193Wis311, 214NW369, 53ALR463.
756-83 314Mo 80, 282SW437.
756-84 195Wis148, 217NW703.
756-86 314Mo 80, 282SW437. [b] (2) 314Mo 80, 282SW437. [c] **Statute regulating restaurants** does not deprive city of power to regulate sale of milk within city limits. 195Wis148, 217NW703. [d] **Failure of state to regulate sale of milk** does not deprive city of power to do so. 195Wis148, 217NW703.
756-87 314Mo 80, 282SW437; 290Pa117, 137A664. [a] (5) Ordinance forbidding sale of unpasteurized milk. 314Mo 80, 282SW437. (6) Regulation of board of health, making possession of milk churn without permit from board a misdemeanor. 132Misc349, 230NYS295. (7) Ordinance requiring bakery products baked outside of city limits to be unwrapped, inspected, and then rewrapped. TexCivA 19SW(2d)459.
757-90 97CalA131, 274P1039; 314Mo80, 282SW437; 224AppDiv483, 231NYS368; OklCr 287P776; 290Pa117, 137A664; 195Wis148, 217NW703.
757-91 97CalA131, 274P1039; 224AppDiv483, 231NYS368.
757-95 166Ga266, 142SE891; OklCr 287P776.
757-3 314Mo 80, 282SW437.
757-4 OklCr 287P776.
757-12 See also 150Wash203, 272P517.
757-16 120 Oh225, 165NE844.
757-19 150Wash203, 272P517.
757-19½-New. A city, having authority to provide for the inspection of places where fresh meats were sold, has the right to charge a fee for such inspection without express legislative authority, in that the right to make the inspection carried with it by necessary implication the right to charge a cost thereof to the business inspected. 167La625, 120S30 (fee held not excessive).
758-36 67Conn541, 35A506, 52AmSR301 (milk); 124 Ill 359, 16NE260; 75Mich527, 42NW977, 13AmSR468, 4LRA809 (fresh meats); 70Miss560, 12S828; 72MoA214; 79AppDiv402, 79NYS449; 7PaDist318; 29SCL523; 29Wis307, 9AmR576 (sale of lemonade at temporary stands). [a] (2) **Board of health** may issue or revoke permits based on such information as it obtains. 128Misc280, 219NYS143. (3) Retail milk dealer cannot escape requirement of license and bond by contracting with coöperative milk producers' corporation. 134Misc542, 236NYS70. (4) Retail milk dealer, by giving bond to cream producers' association, does not substantially comply with statute requiring bond to commissioner. 134Misc542, 236NYS70. (5) Milk producers' association is not "producer" under statute requiring purchasers of milk from producers to be licensed and bonded. 134Misc542, 236NYS70. (6) Milk-gathering stations may be required to be licensed. 134Misc652, 236NYS293. (7) Action of board is reviewable only if arbitrary or tyrannical. 128Misc280, 219NYS143. (8) Under Agriculture and Market Law § 252, requiring license from person buying milk or cream from producers, word "producer" refers to those who obtain milk from cows. 228AppDiv314, 239NYS71. (9) Dairymen's League Co-operative Association receiving milk from many producers and divided funds received among all who delivered milk to association was not producer within statute. 228AppDiv314, 239NYS71. (10) License to sell milk may be refused if applicant does not show that pasteurization was properly conducted and that sources of milk were sanitary. 251NY343, 167NE464. [b] **Mandamus lies to compel issuance of milk dealer's permit where it was revoked** without showing of illegal acts. 128Misc280, 219NYS143. [c] **To insure purity and lowest price permit holders** may legally deliver milk free to certain dealers and pay others to obtain their business. 128Misc280, 219NYS143.
758-42 120 Oh225, 165NE844.
759-45 243NY458, 154NE309. [h] **Statute requiring conformity to grade and branding when farm products are sold in usual receptacles** does not prohibit sale of such products unless of established grade and do not apply to articles not packed in such receptacles. 44 Ida440, 258P171.
760-56 243NY458, 154NE309.
760-59 32F(2d)904.
760-60 [f] **Statute may be void if** not involving consideration of public health, safety, or interest. 224AppDiv111, 229NYS369.
761-61 193Wis113, 213NW664. [a] **"Cheese."**-193Wis113, 213NW664 (what included in term as used in statute). [b] **Where forty-three per cent of butter fat remains in milk** used for cheese, making other removal of fat is held immaterial. 193Wis113, 213NW664.
761-62 157SC359, 154SE645. [c] **Brine exceeding amount necessary** to preserve peas is adulteration under Federal Pure Food and Drug Law. 191Wis635, 211NW764, 50ALR69.
761-66 [a] (2) Article described on carton as "nut product" made from vegetable fats and unexcelled for "cooking, baking and seasoning" held not adulterated, though over one per cent of water and salt had been added, and not violative of act concerning content of "mixed edible fat." 32F(2d)904.
761-73½-New. Whether the commissioner of agriculture abused his discretion in limiting the number of standards under which a farm product should be graded and labeled involves a question of fact. 44 Ida440, 258P171.
761-73½-New. Standards prescribed, under which potatoes shall be graded and labeled for sale, must be sufficiently comprehensive to permit the sale of potatoes usually grown and sold in various sections of the state, without unnecessary interference. 44 Ida440, 258P171.
762-74 214Ala38, 106S231 ("mill oats"). [c] **Officer exercising power confined by ordinance** to reject unfit milk is held not subject to approval of sanitary board in exercise of duty. 164Ga278, 138SE154. [d] **Food held not unwholesome.**-Ga 138SE154; 160La443, 107S299.
762-75 120 Oh225, 165NE844.
762-78½-New. City cannot declare unwholesome a food that is found to be

wholesome. 314Mo 80, 282SW437 (raw milk).

762-79 [c] **"Imitation"** indicates something intentional rather than incidental, and imports more than mere resemblance or similitude. 32F(2d)904.

763-86 [b] **Under act prohibiting manufacture or sale of adulterated or misbranded foods,** sale of article in cartons describing it as "nut product" held not prohibited as "imitation in package" of creamery butter because packed in square pound cartons, containing four quarter-pound cubes and colored like creamery butter. 32F(2d)904.

763-90½-New. Statute prohibiting manufacture and sale of butter substitute must be regarded as prohibiting manufacture and sale of oleomargarine. 193Wis311, 214NW369, 53ALR463.

763-95 See also 261Mass86, 158NE342.

763-96 261Mass86, 158NE342.

764-8 247 IllA39.

764-9 243NY458, 154NE309.

764-10 243NY458, 154NE309.

764-11 39GaA228, 147SE184. [a] (4) Product consisting of nut oils, salt, and vegetable coloring, distinguishable from butter and not usable as substitute therefor is not prohibited by statute. 239 IllA604.

765-21½-New. Court will not assume that legislature intended to limit duties of violators of food statute by any technical rules of contractual privity but that duty be broad and far-reaching so as to protect public from harm. 243NY458, 154NE309.

765-27½-New. Negligence is not essential to cause of action, violation becomes actionable default. 243NY458, 154NE309.

766-40 14F(2d)171.

766-42 See also 36GaA119, 135SE518.

766-44½ 32F(2d)904.

767-53 [a] (5) "Cherry Soda Artificial Flavor and Color" held violation of Farm and Markets Law because though distinctive, label failed to show its constituents and character. 226AppDiv220, 235NYS218.

767-61 157SC352, 154SE424. [c] **Sale of adulterated milk by restaurant proprietor** constitutes offense to same extent as if he sold milk principally or exclusively. 33PortoRico 331.

767-62 NY Lalor146, (sale of "putrid meat, poultry, or other provisions").

768-80 214Ala38, 161S231.

768-83 See also 244 IllA341.

768-84½-New. In an action for penalty for violating pure food laws, a motion to amend the summons so as to conform with the statute may be allowed. NJ 143A736(2dcase).

769-88 247 IllA39.

769-99½-New. A retail milk dealer cannot escape the penalty for selling milk without a license because he purchased all his dairy products from a coöperative dairymen's corporation. 134Misc542, 236NYS70.

770-8 226AppDiv220, 235NYS218.

770-13½-New. The court has power to amend pleadings in an action for penalty for keeping unfit meats for sale, in the matter of penalty. NJ 143A736 (2dcase).

774-94 MoA 8SW(2d)1084.

777-57 See also 29PortoRico 970.

778-73½-New. Burden of proving unreasonableness or invalidity of ordinances regulating sale of milk rests on party asserting it. OklCr 287P776.

779-83 164Ga278, 138SE154; 195Wis 148, 217NW703.

779-84 MoA 8SW(2d)1084.

780-99 [b] (1) 35GaA119, 135SE518.

782-43 [a] **Under Pure Food and Drugs Act** monitions and attachments may issue on information unverified except on information and belief. 5F(2d) 979.

783-69 129Misc765, 222NYS724; 157SC392, 154SE431.

784-73 22AlaA210, 114S278; 129Misc 765, 222NYS724.

784-74 215Ala559, 112S125; 129Misc 765, 222NYS724 (dictum).

784-75 194Wis142, 215NW905.

784-78 GaA 135SE324.

784-79 41GaA705, 154SE385; 192NC 542, 135SE464, 465 [citCJ]; 296Pa114, 145A700; 157SC352, 154SE424; 157SC 392, 154SE431. But see 157SC359, 154 SE645. [a] **Bottler was bound to know** whether bottle sold to retailers was wholesome and complied with statute. 157SC352, 154SE424.

784-79½-New. Bottler is not insurer against fragments of glass being in bottles, but the bottler must exercise due care as to the bottles. 145Miss876, 111 S305.

784-81 129Misc765, 222NYS724.

785-83 296Pa114, 145A700; 157SC392, 154SE431. [a] **Negligence per se.**-157 SC352, 154SE424.

785-84 157SC392, 154SE431.

785-84½-New. A manufacturer owes the duty of reasonable inspection before placing a commodity on the market. 296Pa114, 145A700.

785-85 [a] (1) 27 OhA475, 161NE557.

785-86 22AlaA210, 114S278; 41GaA 705, 154SE385; 262Mass516, 160NE325; 151Miss366, 118S177(3dcase); 157Miss 746, 128S563 (joinder of manufacturer's agent); 129Misc765, 222NYS724; 132 Misc896, 230NYS743; 50RI 43, 144A884, 63ALR334; 157SC392, 154SE431; 157 SC359, 154SE645; TexCivA 32SW(2d) 227. [a] (1) 145Miss876, 111S305. [h] **Illness caused by sight of cockroaches in pie** is actionable against baker. 215 AppDiv240, 213NYS553. [i] **Sickness caused by fright** and not by actual injury is not sufficient for recovery. NJ 147A110.

785-87 145Miss876, 111S305.

785-88 27 OhA475, 161NE557. Contra 235NY468, 139NE576, 27ALR1533 [rev 200AppDiv864mem]. [d] **Liability exists irrespective of question of negligence.**-145Miss876, 111S305. [e] **That method of bottling was complete and perfect** does not relieve manufacturer from liability for injuries resulting from broken glass in bottle of beverage at time it left factory. 145Miss876, 111S 305.

785-89 145Miss876, 111S305; 129Misc 765, 222NYS724; 196NC175, 145SE14; 27 OhA475, 161NE557. [a] **Basis of liability** of manufacturer holding foodstuffs out as fit for human consumption to consumer for negligence irrespective of privity of contract is that distributor would be liable on contract to consumer and would then have right to recover against manufacturer. 129Misc765, 222 NYS724.

786-92 See also 129Misc765, 222NYS 724.

786-95½-New. Action against manufacturer for selling falsely labeled containers is held not based on warranty, but on statute. 243NY458, 154NE309.

786-95¾-New. Dealer, purchasing from wholesaler, may sue food manufacturer for injuries from falsely labeling quantity. 243NY458, 154NE309.

786-97 25F(2d)449; DC 40F(2d)803; 3Del 253, 138A273; 103NJL464, 135A 805, 806 [quotCJ], 50ALR227; 29 OhA 220, 163NE210. [a] (3) 3Del 253, 138A 273; 103NJL464, 135A805, 50ALR227. See also 10PaDist&Co 362.

786-97½-New. Innkeeper is not insurer of food served to guests. 25F(2d)449.

786-98 83 IndA551, 149NE182, 183 [cit CJ]; 222AppDiv191, 225NYS449.

786-99 83 IndA551, 149NE182. Contra 103NJL464, 135A805, 50ALR227.

786-99½-New. However, it has been held that a restaurant keeper is not liable for injury to a guest from a tack in strawberries served, in the absence of negligence. 25F(2d)449.

786-7 103NJL464, 135A805, 50ALR 227. [a] 103NJL464, 135A805, 50ALR 227.

786-8 83 IndA551, 149NE182; 29 OhA 220, 163NE210.

787-16 157Miss746, 128S563.

787-25 157SC392, 154SE431. [a] (2) Other instances. 157SC359, 154SE645.

787-29 216Ala239, 113S53. [a] 22AlaA 210, 114S278.

788-30 39GaA228, 147SE184; 102NJL 188, 130A540.

788-34½-New. Petition not alleging when, where, and by whom food was sold to a retailer who sold to a purchaser is subject to demurrer. 39GaA228, 147SE184.

788-36½-New. Complaint alleging damage from drinking a bottled drink containing a mouse states cause of action. 22AlaA210, 114S278.

788-36¼-New. In an action for injuries sustained in which the declaration contained two counts, of which the first alleged negligence in the manufacture of the cream and the second asserted the presence of glass without averring defendant's negligence, the second count should be disregarded. 50RI 43, 144A 884, 63ALR334.

788-36¼-New. The doctrine of res ipsa loquitur cannot be relied on as an aid to defective pleading. 39GaA228, 147SE 184.

788-41 216Ala239, 113S53; 22AlaA 605, 118S498; 180Ark193, 20SW(2d) 862; 36GaA255, 136SE324; 39GaA228, 147SE184; 143Miss590, 108S732; 197 NC661, 150SE198; 296Pa114, 145A700. [e] **Burden on plaintiff** to prove damage due to manufacturer's negligence. 262 Mass516, 160NE325.

788-42 216Ala239, 113S53; 170Ga817, 154SE243; 36GaA255, 136SE324; 41 GaA705, 154SE385; 145Miss876, 111S 305; 196NC690, 146SE805; 157SC392, 154SE431. [a] (6) Evidence of negative character and so remote as to be without probative value inadmissible. 217Ala302, 116S147. (7) Exclusion of testimony of witness explaining failure to use milk purchased from defendant was erroneous. MoA 296SW235. [b] (3) Admission of evidence that flour sold by defendant miller to another retailer on same day as sale causing decedent's illness held prejudicial in absence of proof that such retailer, while flour was in his possession, exercised highest degree of care to prevent poison from getting into it. 228Mich416, 200 NW155. [d] **Proof of another sale of flour** by defendant retailer, resulting in illness, though stricken out with instructions to disregard is held prejudicial. 228Mich416, 200NW155.

788-43 [a] (3) 180Ark193, 20SW(2d) 862; 262Mass516, 160NE325; 102NJL 188, 130A540. (5) 22AlaA605, 118S498; 129Misc765, 222NYS724; 132Misc896, 230NYS743; 196NC175, 145SE14. (12) To show that bread containing glass was product of baker named on loaf. 102NJL188, 130A540. (13) To take case to jury on question of negligence. 36GaA255, 136SE324. (14) To support finding that illness of plaintiff's decedent was caused by arsenate of lead in flour used in goods consumed by him. 228Mich416, 200NW155. (15) To show that poison in flour was proximate cause of death of plaintiff's decedent from pulmonary tuberculosis several months later. 228Mich416, 200NW155. (16) To go to jury as basis for inference that bottle from which plaintiff drank was defendant's product. 217Ala302, 116S 147. (17) To show that name on wrapper complied with statute. 262Mass516, 160NE325. (18) To show that defendant was manufacturer. 262Mass516, 160NE325. (19) To sustain verdict for plaintiff. 50RI 43, 144A884, 63ALR334. (20) To warrant finding for plaintiff for injury caused by biting metal in cocoanut. Mass 167NE308. (21) To sustain finding of death caused by unfit food through restaurant proprietor's negligence. DC 40F(2d)803. (22) To warrant verdict for plaintiff made ill by drinking soft drink bottled by defendant. 40GaA269, 149SE316. [b] (1) 255 Mass553, 152NE57, 47ALR146; 197NC 661, 150SE198. (4) To justify award of punitive damages. 196NC690, 146SE 805. (5) To overcome prima facie negligence. 180Ark193, 20SW(2d)862. (6) To show liability to customer who bit into slice of bread containing cockroach. 34F(2d)141.

788-49½-New. Presence of foreign matter deleterious to health, in a sealed bottle, is evidence of negligence. 217Ala 302, 116S147.

788-53 143Miss590, 108S732; 197NC 661, 150SE198; 198NC448, 152SE405;

296Pa114, 145A700; 157SC352, 154SE 424; 157SC392, 154SE431. [a] (1) 262 Mass516, 160NE325. (2) Whether consumer's illness was caused by drinking poisonous insect in Coca-Cola or by subsequently drinking whisky to relieve condition. 157SC352, 154SE424. [b] (1) 22AlaA605, 118S498; 180Ark193, 20SW(2d)862; 27 OhA475, 161NE557; 50RI 43, 144A884, 63ALR334; 194Wis 142, 215NW905. [b] (2) Evidence held insufficient to take to jury question of negligence. 192NC542, 135SE464.

789-54 [b] Instruction that defendant is only required to use same skill and diligence as others in similar business held proper. 217Ala302, 116S147.

789-55 228Mich416, 200NW155; 50RI 43, 144A884, 63ALR334; 157SC352, 154 SE424; 194Wis142, 215NW905.

789-56 [a] **Instructions held not misleading.**–145Miss876, 111S305. [b] **Instruction held confusing.**–217Ala302, 116 S147.

789-63 145Miss876, 111S305.

789-63½-New. Dealer, prosecuted for selling falsely labeled food containers, may recover from manufacturer expenditure for legal services. 243NY458, 154 NE309.

789-63½-New. Damages will be allowed for expenditure for legal services by plaintiff to extricate himself from legal liabilities covered by defendant's violation of statute. 243NY458, 154NE 309.

789-65½-New. Damages will be allowed for general figurative allegation of damages to plaintiff's business. 243NY458, 154NE309.

790-86½-New. Where defendant, knowing plaintiff had furnished bond to government to insure sale of gelatine as technical and not edible, resells same as edible gelatine, it is liable to plaintiff for amount latter paid for violation of bond. 220AppDiv676, 222NYS283.

FOOT

790-3½-New. Within Workmen's Compensation Act "foot" is that part of the leg at or below ankle joint. 214Ky675, 283SW1010.

790-3½-New. The terminal part of the leg of a man or of an animal; the part of an animal upon which it rests when standing, or upon which it moves. In man the foot is the pes, or part of the leg below the ankle joint or tibiatarsal articulation. Webster Int. D. [quot238 Mich572, 214NW174].

FOR

793-36 92Fla375, 109S648.
794-81 92Fla375, 109S648.

FORBEARANCE

794-92 242 IllA438.
794-99 [d] **Other definitions.**–92CalA 468, 268P480.

FORCE

795-12 TexCivA 294SW900.
795-24 But see 203 Iowa155, 212NW 382.

FORCED HEIRS

795-36 160La555, 107S425.

FORCED SALE

795-38 [f] "Sale at a sacrifice" synonymous.–243Mich406, 220NW812.

FORCE MAJEURE

796-46 15F(2d)1017.

FORCIBLE ENTRY AND DETAINER

801-3 91Fla514, 108S556.
801-4 91Fla514, 108S556; 143Wash 622, 255P945.
801-6 91Fla514, 108S556; 143Wash 622, 255P945.
801-10½-New. Purpose of statutes is to prevent subversion of actual possession by use of force. 91Fla514, 108S 556.
802-18 91Fla514, 108S556, 558 [citCJ].
802-19 91Fla514, 108S556.
802-22 91Fla514, 108S556, 558 [citCJ].
802-25 91Fla514, 108S556, 558 [citCJ].
802-30 194NC42, 138SE342.
802-31 [a] **In Florida.**–91Fla514, 108S 556.
803-41½-New. The fact that doors are left open and unlocked does not prevent possession by actual oversight and control. 213Ala622, 105S811.
805-90 215Ky154, 284SW1042, 1043 [quotCJ].
805-91 215Ky154, 284SW1042, 1043 [quotCJ].
805-97 192NC559, 135SE451.
806-2 91Fla514, 108S556, 558 [citCJ].
808-68 [b] (3) To sustain conviction of unlawful entry. 194NC42, 138SE342.
808-79 194NC42, 138SE342.
809-2 91Fla514, 108S556, 558 [citCJ].
809-3 91Fla514, 108S556, 558 [citCJ].
811-35 91Fla514, 108S556.
811-36 69CalA40, 230P24 (unlawful detainer); 91Fla514, 108S556; 233 IllA 48; 151Va72, 144SE466.
811-37 69CalA40, 230P24 (unlawful detainer).
811-38 **Or** 288P1053.
811-41 101CalA762, 282P515; 91Fla 514, 108S556.
811-41½-New. Forcible detainer is not the appropriate remedy to enforce unpaid consideration for debt in the nature of rent or otherwise, where the deed to defendant contains no provision for payment of rent or other consideration nor for forfeiture of defendant's right to occupy the property, although if consideration has been agreed upon, but omitted from the deed, the grantor will be entitled to unpaid consideration. 228Ky250, 14SW(2d)784.
812-42 213Ala622, 105S811; 216Ala 76, 112S458; 69CalA40, 230P24 (unlawful detainer); 91Fla514, 108S556; 256 IllA531; 212Ky816, 280SW131; 118 Okl 21, 246P392; SD 226NW345 (involves only immediate right to possession, and no equitable rights of parties to possession under agreement can be determined).
812-44 216Ala76, 112S458.
812-49½-New. Forcible detention is not a necessary element to authorize an action for unlawful detainer under some statutes. 178Minn282, 226NW 847.
812-50 233 IllA48.
812-52 213Ala622, 105S811; 69CalA 40, 230P24 (unlawful detainer); CalA 266P823; 91Fla514, 108S556; 239 IllA 596; 250 IllA231; 212Ky816, 280SW 131; 149Miss885, 116S94; 118Nebr442, 225NW119; TexCommnA 13SW(2d)71; 151Va72, 144SE466. [c] **Rule otherwise in equity.**–160Tenn374, 24SW(2d) 894.
814-53 69CalA40, 230P24. See also 94Fla457, 113S722.
814-56 91Fla514, 108S556.
815-61½-New. Holder of tax deed cannot maintain action against one in possession. 239 IllA312.
815-62 212Ky816, 280SW131; 135 Wash414, 237P1014.
815-67 [a] **In Texas.**–CommnA 13SW (2d)71.
815-69 MoA 98SW(2d)549; Tex CommnA 13SW(2d)71. But see 169La 1170, 126S695.
816-72 146Wash645, 264P425.
816-74 35GaA93, 132SE107.
817-79 168Ark642, 271SW9; 91Fla 514, 108S556; MoA 24SW(2d)652.
817-80 NJSup 143A726.
817-81 216Ala76, 112S458; 91Fla514, 108S556; NJSup 143A726; 144SC137, 142SE247.
817-82 212Ky816, 280SW131.
817-87 [a] **That church suing for forcible entry and detainer had not of late years functioned with continuous regularity** did not destroy continuity of possession of premises in church and its deacons. Mo 98SW(2d)949.
818-93 216Ala76, 112S458; 91Fla514, 108S556; 135Wash414, 237P1014.
818-95½-New. An owner who makes peaceable entry of premises is entitled to judgment as against one occupying the premises without a lease or a rental agreement. 247Mich48, 225NW485 (2dcase).
819-98 91Fla514, 108S556.
820-24 91Fla514, 108S556.
821-31 91Fla514, 108S556.
822-33 212Ky816, 280SW131.
822-36 239 IllA596.
822-38 212Ky816, 280SW131.
822-39 239 IllA596; 212Ky816, 280 SW131.
824-54 91Fla514, 108S556; 136SC214, 131SE681.
825-56 91Fla514, 108S556.
826-67 [a] 241Mich209, 217NW36, 60 ALR276.
829-84 82CalA356, 255P537; CalA 287 P142 (breaking locks).
831-14 136Wash518, 240P924.
831-14½-New. Action for restitution of farm does not necessarily involve ownership of crops growing or grown on premises by defendant during occupancy. 118 Okl 21, 246P392.
831-15 127 Okl 30, 259P559. [a] 127 Okl 30, 259P559.
831-21 See also 46Philippine488.
831-25½-New. A statute providing that the beneficiary is considered the sole party on record in a suit brought for his benefit is held inapplicable to forcible entry and detainer. 216Ala76, 112S458.
832-32½-New. Where plaintiff in unlawful detainer conveys the property pending the action, the action may proceed in the name of his grantee by leave of court. 33PortoRico 243.
833-66 254 IllA498.
833-69 236 IllA303.
834-75 168Ark642, 271SW9.
834-79 See also 248 IllA171.
834-82½-New. Tenants cannot assert they went into possession by virtue of a written agreement when it appears that it was never executed. 224 IllA 538.
834-82½-New. Where the lease expired and a new one was not executed, the tenant was in wrongful possession and the lessor was entitled to maintain an action for forcible detainer. 224 IllA 538.
836-11 NJ 143A726.
836-21 135Wash414, 237P1014. [a] **Defendants keeping plaintiffs out of possession** till court ordered reinstatement are responsible for damages caused thereby. 135Wash414, 237P 1014.
837-37½-New. One entering and remaining in possession as a member of the family of the purchaser may be either joined as defendant or proceeded against in a separate action of unlawful detainer after judgment of restitution against the purchaser. 178Minn 282, 226NW847.
838-51 82CalA356, 255P537.
838-60½-New. Demand is unnecessary where defendant's seizure and detention of property under executory process is wrongful. 169La1170, 126S695.
839-96 [a] (2) Under statute requiring three days' notice before suit, service is insufficient when served on 15th of month and suit commenced on 18th. 50SD147, 208NW781. [b] **Statute construed** to mean three days' notice must be given before summons can be issued. 50SD147, 208NW781.
840-97 50SD147, 208NW781.
841-28½-New. In a statutory proceeding for summary eviction of intruder on land, his claim in good faith of legal right to possession is a defense. 35GaA93, 132SE107.
841-28½-New. Renewal of lease under option is good defense. 232 IllA287.
841-28¼-New. It is not a defense that defendant was holding under a contract for purchase of the property and that plaintiff, assuming to forfeit the contract, did not serve notice of forfeiture on a third person who held an assignment of the contract from defendant as security. 202 Iowa658, 210NW753.
841-28½-New. In an action by a landlord against one alleged in possession under an invalid assignment of a forfeited lease, defendant may show plaintiff's conduct, waiving forfeiture of the lease. 261 IllA572.
841-31 See also MoA 3SW(2d)279. [b] (2) Suit is not subject to abatement where prior action has been dismissed. Iowa 229NW673.
841-33 69CalA40, 230P24 (unlawful detainer); CalA 266P823; 202 Iowa 658, 210NW753.

841-34 69CalA40, 230P24 (unlawful detainer). But see 206Cal125, 273P581.
842-39 127Okl30, 259P559; 51Philippine333.
842-42½-New. district courts, NJSup143A726.
842-43 22OhA426, 154NE57. But see 24OhNPNS152.
842-50 [a] (2) In Philippines justice of peace court has jurisdiction unless title is so necessarily involved that question of possession cannot be decided without first settling ownership. 51Philippine333.
843-52½-New. The question of jurisdiction may be raised at any stage of the proceedings. MoA286SW410.
843-54½-New. In some states substantial compliance is required. 50SD147, 208NW781.
844-77½-New. 118Nebr167, 223NW797(1stcase).
844-85½-New. Under statutes relating to removal of intruder on land, in some jurisdictions no process is required, 35GaA93, 132SE107.
844-85½-New. nor is return of service required, 35GaA93, 132SE107.
844-85¼-New. Under statute, the summons need not allege that possession has not been withheld over three years. 151Va72, 144SE466.
844-91 [c] In Iowa.-200Iowa261, 204NW439.
845-9 Or 288P1053.
846-20½-New. Complaint held sufficient to show that executory proceedings were wrongfully issued. 169La1170, 126S695.
848-56 169La1170, 126S695.
848-80 [b] (28) Other sufficient descriptions. 132Okl234, 270P52.
850-6 94CalA691, 271P916.
850-9 [b] **Sufficient averments.**-41Wyo509, 287P316.
852-45½-New. Prayer for rent in complaint will not defeat plaintiff's right of recovery. 169La1170, 126S695.
854-7½-New. Time for appearance is controlled by last statute enacted on that subject where repugnant to former statute. 200Iowa261, 204NW439.
854-14 33PortoRico243.
857-84 151Va72, 144SE466.
857-89 91Fla514, 108S556.
858-13 [a] **All evidence of relations of parties shedding light upon actual possession** at time of bringing suit is admissible. 213Ala622, 105S811.
859-33½-New. In contract regarding construction of house, showing and admitting actual possession is admissible in connection with other evidence to show possession by plaintiff. 213Ala622, 105S811.
859-40 213Ala622, 105S811 (monuments of title admissible to fix boundaries of actual possession).
859-51 230Ky339, 19SW(2d)991; 149Miss885, 116S94.
860-57½-New. On issue whether property claimed by plaintiff under trust deed was property occupied by defendants, evidence that defendants owned no other property in that locality was held admissible. 219MoA195, 270SW427.
861-93½-New. Indorsements on back of lease held improperly admitted. 254IllA60.
861-95 [a] 219MoA195, 270SW427; MoA279SW173; MoA286SW410; 139Okl26, 280P1083. [d] 94CalA691, 271P916. [e] CalA284P221(1stcase). [j] 135Wash414, 237P1014. [p] 35GaA93, 132SE107. [v] **To show defendants responsible** for subsequently accruing damages though never in possession or assisting in maintaining possession. 135Wash414, 237P1014. [w] **To support finding plaintiff not in peaceable possession** at time defendant went into possession nor at any time within five days next preceding that date. 136Wash518, 240P924.
862-96 [a] 91Fla514, 108S556; MoA286SW410; 222MoA422, 6SW(2d)1002.
862-97 Utah292P206.
862-99 168Ark642, 271SW9.
862-4 77Colo343, 237P154 (statutory recovery not penalty but compensation for use of premises); 46Philippine664.
862-14 MoA286SW410; Utah292P206.
863-27 Utah292P206.
863-29 135Wash414, 237P1014. See also Utah292P206.
863-39 Utah292P206.
864-44 [a] **Rents accruing before termination of tenancy** may not be trebled in unlawful detainer. Utah292P206. [b] **Rental value of unlawful possession after termination of tenancy** may be trebled in suit for unlawful detainer. Utah292P206.
864-48 219AppDiv260, 219NYS431.
864-52 45Ida299, 261P773.
864-54½-New. New York statute as to treble damages does not apply as to injury to personalty. 219AppDiv260, 219NYS431.
865-76 213Ala622, 105S811 (defendants not entitled to affirmative charge); 222MoA422, 6SW(2d)1002; NJSup143A726.
865-88 256IllA531.
867-34 CalA268P441.
868-60 Or288P1053.
868-61 Or288P1053.
868-62 117Okl155, 245P593.
869-92 [a] (2) Successful defendant, failing to seek restitution, cannot in subsequent action on bond recover for deprivation of use of property. 147Wash237, 265P734. (3) Attorney's fees not recoverable in action on bond. 147Wash237, 265P734.
870-2 Contra 46Philippine664.
870-3 206Iowa680, 218NW375.
870-7 241IllA159.
870-10 69CalA40, 230P24 (unlawful detainer). [b] **Judgment that defendant was not guilty of forcible entry or detainer** does not determine right of possession or title, or preclude plaintiff from subsequently asserting title or right of possession. 89CalA494, 265P344.
870-12 69CalA40, 230P24 (unlawful detainer); CalA266P823; 46Philippine664. [a] See also CalA266P823.
870-20 See also 46Philippine851.
870-23 [d] **In North Dakota.**-53ND460, 206NW777.
871-54 233IllA48.
872-55 [a] 241IllA159.
872-55½-New. Statutory appeal is exclusive. 233IllA48.
872-58½-New. A statute declaring the county court's final judgment conclusive and prohibiting appeal unless judgment is for more than one hundred dollars is not invalid as allowing appeal only to defendant. TexCommnA14SW(2d)1022.
872-72½-New. Failure of the justice's court to enter judgment in accordance with its opinion, that defendant was guilty of forcible detainer, does not deprive the circuit court of jurisdiction of the proceedings, where the parties treat the opinion as a finding of the court and as conclusive, and defendant traversing the finding fails to raise the question in the circuit court either during trial or in motion and grounds for new trial whether the circuit court lacked jurisdiction. 228Ky250, 14SW(2d)784.
873-77½-New. The appeal must be prayed for before the justice of the peace who tries the case. 224IllA538.
873-77½-New. By moving a rule on appellants to file a good and sufficient bond, the appellee waived his right to have the appeal dismissed because the bond was filed with the circuit court instead of with the justice of the peace. 224IllA538.
873-81 [f] **In Kentucky.**-226Ky152, 10SW(2d)629.
874-99 93Fla319, 111S630.
875-32½-New. Motion for execution of judgment on ground of failure to pay value of use and occupation is properly denied where judgment did not show such value. 46Philippine56.
875-32½-New. An order fixing rental in addition to damages awarded in lower court and in advance of trial is held in excess of jurisdiction. 46Philippine409.
875-44 165Minn262, 206NW168.
876-53 [a] **Judgment affirming judgment for plaintiff** not executed to extent of restoring possession where defendant may be entitled to possession under decree in suit to quiet title. 135Wash414, 237P1014.
878-12 213Ala622, 105S811; 46Philippine409. [c] **If statutory supersedeas bond is not given,** no judgment shall go against defendant or his sureties for rents pending appeal. 213Ala622, 105S811. [d] **Judgment for rents pending appeal is not contemplated** by code provision for damages for wrongful holding over, without bond or unless statutory supersedeas bond is given. 213Ala622, 105S811.
878-13 But see 213Ala622, 105S811.
879-16½-New. Failure to file bond may be waived. 82Colo294, 259P1041.
879-19 TexCommnA13SW(2d)355. [a] **Requirement of sureties.**-TexCommnA13SW(2d)355.
879-22½-New. Phrase in appeal bond "or comply with such other order" is not the equivalent of "pay such other damages." 213Ala622, 105S811.
879-40 [a] **Conclusiveness.**-TexCommnA13SW(2d)355.
879-40½-New. Defendants, being parties, cannot act as sureties for each other on an appeal bond. TexCommnA13SW(2d)355.
880-49 224IllA538 (justice of peace).
881-84 221Ky542, 299SW161.
881-89½-New. In an action on a traverse bond plaintiff cannot recover the value of crops such as might have been grown on the farm. 221Ky542, 299SW161.
881-98½-New. As a defense defendant may show that parties other than plaintiff have been placed in possession under sheriff's deed in foreclosure of mortgage on the premises so as to extinguish plaintiff's right to damages based on rental value pending appeal. 118Okl21, 246P392.
882-4½-New. Evidence of what were reasonable profits and earnings from a farm held incompetent because speculative. 221Ky542, 299SW161.
882-5½-New. Defendant may show that one other than plaintiff has acquired ownership of premises and has received rentals therefrom. 118Okl21, 246P392.
882-6½-New. In an action on a traverse bond evidence should be confined to reasonable rental value and waste, if any. 221Ky542, 299SW161.
882-18½-New. In Porto Rico, where defendant in unlawful detainer files a memorandum of costs ten days after the date on which a judgment dismissing the complaint for lack of jurisdiction has become final because no appeal was taken, the court is without jurisdiction to award costs. 33PortoRico913.
886-30 [a] **Summary process for ejectment** of one who takes possession of property without right or title is not available where not specially authorized by statute. 11LaA48, 122S871 (1stcase).

FOREIGN

889-50 216AppDiv362, 215NYS184. [a] **"Laws of Moses and Israel" held not "foreign laws."**-216AppDiv362, 215NYS184.
889-62 216AppDiv362, 215NYS184.

FORFEIT

891-44 97NJEq555, 129A624 [quotCJ].
891-45 97NJEq555, 129A624 [quotCJ].
891-46 97NJEq555, 129A624 [quotCJ].
891-48 97NJEq555, 129A624 [quotCJ].
891-49 97NJEq555, 129A624 [quotCJ].
891-58 TexCivA289SW158.
891-60 TexCivA289SW158.
892-68 80Mont239, 260P119. See also 156Tenn119, 299SW1043.

FORGERY

896-4 217Ky129, 288SW1044; 217Ky801, 290SW702; 229Ky60, 16SW(2d)498; 245Mich14, 222NW134; 245NY368, 157NE269; 100WVa652, 131SE706, 46ALR1528. [a] (6) 335Ill352, 167NE101, 68ALR350; 99WVa544, 130SE142; 100WVa652, 131SE706, 46ALR1528. (10) Fraudulent falsifying of an instrument to another's prejudice. 1 Wharton Cr. L. (8th ed) § 653. 99WVa544, 130SE142. (11) Making false instrument with intent to defraud. 32NM191, 252P1003.

897-7 [a] **What constitutes forgery must be determined from statute.**–217 **AppDiv**102, 216**NYS**169.
897-12 [d] **In Texas.**–108**TexCr**358, 300 **SW**82.
897-12½-New. A statute defining third degree forgery is construed in all respects in accordance with common sense. 313**Mo** 114, 280**SW**697.
897-17 82**Mont**89, 265**P**21.
897-18 143**Miss**38, 108**S**282; 82**Mont**89, 265**P**21.
897-19 82**Mont**89, 265**P**21, 23 [citCJ].
897-19½-New. False statement in genuine writing by which another is defrauded is not forgery. 171**Ark**510, 286 **SW**880.
897-21 **Ill** 172**NE**716; 73**Mont**329, 236**P** 542, 543 [cit CJ]; 113**Nebr**352, 204**NW** 967, 41**ALR**227.
898-24 199 **Ind**540, 156**NE**555.
898-25 15**F(2d)**899; 161**La**423, 108**S** 794; 113**Nebr**352, 204**NW**967, 41**ALR** 227 [citCJ]; 198**NC**423, 152**SE**154; 109 **TexCr**136, 3**SW(2d)**445. [a] (2) Essential element of forgery is that signature was not made by hand of person whose signature it purports to be, and that it was made by another wrongfully. 15 **F(2d)**899.
898-26 180**Ark**266, 21**SW(2d)**156(1st case); 113**Nebr**352, 204**NW**967, 41**ALR** 227 [citCJ]. [a] (8) Warrant of county, if making is genuine, is not generally a forgery, though warrant itself is false and intended to defraud. 113**Nebr** 352, 204**NW**967, 41**ALR**227.
898-27 113**Nebr**352, 204**NW**967, 41**ALR** 227 [citCJ].
898-27½-New. Genuine making of false instrument is not generally within criminal statute against false making of instrument. 113**Nebr**352, 204**NW**967, 41 **ALR**227.
898-28 106**WVa**507, 146**SE**59.
898-29 213**Ala**1, 104**S**40.
898-34 13**F(2d)**325; 32**F(2d)**402; 27 **Hawaii**209, 213 [citCJ]; 73**Mont**329, 236 **P**542, 543 [citCyc]; **TexCivA** 5**SW(2d)** 547; 100**WVa**652, 131**SE**706, 46**ALR** 1528.
898-38 315**Mo** 1314, 290**SW**130, 131 [quotCJ], 51**ALR**564; 198**NC**423, 152**SE** 154.
898-39 27**F(2d)**523; 166**La**784, 117**S** 829; 315**Mo** 1314, 290**SW**130, 131, 132 [quotCJ&Cyc], 51**ALR**564.
899-40 27**Hawaii**209. [a] **Authority from husband to sign wife's name to check against account on which each is authorized to draw checks** does not justify signing her name to check. 90**CalA** 266, 265**P**826.
899-41½-New. A member of a partnership, indorsing a negotiable instrument in the firm name without the knowledge and consent of the other partner, did not commit forgery. 159**Tenn**401, 19 **SW(2d)**244.
899-42 245**NY**368, 157**NE**269.
899-43 213**Ala**1, 104**S**40; 245**NY**368, 157**NE**269.
899-47 202**Cal** 159, 259**P**750; 74**CalA** 125, 239**P**419; 80**CalA**159, 251**P**315; 203 **Iowa**833, 211**NW**542, 52**ALR**1297; 217 **Ky**801, 290**SW**702, 704 [citCJ]; 137**SC** 444, 135**SE**377; 105**TexCr**81, 286**SW** 1086. But see 168**La**932, 123**S**624. [c] 171**Ark**375, 284**SW**36. [i] **Use of fictitious name in drawing of check** without intent to defraud is forgery. 74**CalA** 125, 239**P**419.
900-50 217**AppDiv**102, 216**NYS**169. See also 161**La**423, 108**S**794.
900-50½-New. Where fictitious name is used for maker's own purposes, there is no forgery. 15**F(2d)**899.
901-55 106**WVa**507, 146**SE**59.
901-56 [e] **Alteration to give apparent legal effect never intended** by party signing paper constitutes forgery. 127**Misc** 187, 215**NYS**230.
901-63 But see 44**Philippine**484.
901-64 100**CalA**550, 280**P**555 (addition of clause); 116**Nebr**45, 215**NW**564; 127 **Misc**187, 215**NYS**230.
901-66 127**Misc**187, 215**NYS**230.
902-82 32**Ariz**182, 256**P**1048, 1050 [cit CJ].
903-91 213**Ala**1, 104**S**40; 179**Ark**1047, 20**SW(2d)**130; 217**Ky**129, 288**SW**1044; 143**Misc**38, 108**S**282; 73**Mont**329, 236**P** 542; 198**NC**423, 152**SE**154; 198**NC**600, 152**SE**791.
904-92 233**Mich**565, 207**NW**813 [citCJ]; 249**Mich**553, 229**NW**469; 195**Wis**551, 218**NW**811, 812 [citCJ].
904-93 [c] **GaA** 155**SE**344.
904-94 100**WVa**652, 131**SE**706, 46**ALR** 1528.
904-95 229**Ky**60, 16**SW(2d)**498; 100 **WVa**652, 131**SE**706, 46**ALR**1528.
904-98 229**Ky**60, 16**SW(2d)**498; 100 **WVa**652, 131**SE**706, 46**ALR**1528.
904-2 32**NM**191, 252**P**1003.
906-40 213**Ala**1, 104**S**40; 21**AlaA**41, 104**S**882 (instrument void on face because executed on Sunday is not subject of indictment for forgery); 202**Cal** 159, 259**P**750; 318**Mo** 623, 18**SW(2d)**151; 73 **Mont**329, 236**P**542. [a] (5) Other instances. 92**CalA**628, 268**P**923. [g] **False making of bill of exchange, void by statute,** will not constitute offense of forgery. 21**AlaA**41, 104**S**882. [h] **Signing ostensible maker's name to check drawn by third party at defendant's request** relates back to third party's acts, not otherwise possessing apparent legal efficacy, and makes them part of offense thus completed. 217**Ky**129, 288**SW**1044. [i] **Though collateral facts exist that may render it void,** instrument valid on its face may be subject of forgery. **Tex Cr** 29**SW(2d)**367.
906-41 112**TexCr**16, 13**SW(2d)**862. But see 82**Mont**89, 265**P**21.
906-42 5**F(2d)**671; 6**F(2d)**668; 96**Pa Super**13.
907-44 5**F(2d)**671.
907-48 82**Mont**89, 265**P**21; 14**PaDist& Co** 387; 144**Va**559, 131**SE**131.
907-49½-New. Under some statutes, a notary public who knowingly, willfully, and falsely certifies that the execution of a mortgage was acknowledged by the persons therein named as mortgagors is guilty of forgery, although the mortgage is never recorded in the proper county. 171**Minn**345, 214**NW**262.
908-58 94**Fla**264, 114**S**241.
909-72 217**Ky**801, 290**SW**702.
909-73½-New. Name of person who cannot write may be forged. 217**Ky**801, 290**SW**702.
910-95 202**Cal** 159, 259**P**750.
910-4 79**CalA**373, 249**P**536.
910-9½-New. That a demand against a road district, alleged to have been forged, was not verified is immaterial where accused certified to it as verified by claimant, and accepted and approved it as genuine, and so represented it to others. 79**CalA**373, 249**P**536.
913-72 91**Fla**79, 107**S**416.
914-80 149**Miss**223, 115**S**429.
914-90 215**Ala**148, 109**S**849.
914-95 5**F(2d)**321; 217**Ky**129, 288**SW** 1044; 217**Ky**801, 290**SW**702; 82**Mont** 89, 265**P**21.
914-1 217**Ky**801, 290**SW**702.
914-2 82**Mont**89, 265**P**21.
915-30 [a] (16) "Salary assignment" directing employer to pay to third person specified amount recited to be due as salary. 36**GaA**310, 136**SE**329.
918-69 127**Misc**187, 215**NYS**230.
918-75 32**Ariz**182, 256**P**1048; 316**Mo** 591, 292**SW**63 (false entry in books of county collector held not within statute). [l] **Filing forged application for state loan.**–32**Ariz**182, 256**P**1048.
919-83½-New. The statute prohibiting the offering of false or forged instruments for filing covers the instrument, not the statements therein. 134**Misc**357, 234**NYS**591.
919-84 [c] **Taking advantage of official position** is necessary element of form of falsification defined in Pen. Code art 300. 44**Philippine**275.
919-89 94**Fla**264, 114**S**241.
919-93 54**ND**5, 208**NW**394. [d] **In Texas.**–113**Tex**130, 19**SW(2d)**52. [e] **In Arkansas.**–179**Ark**1047, 20**SW(2d)**130.
921-32 99**WVa**544, 130**SE**142.
921-34 171**Minn**345, 214**NW**262.
921-47 203 **Iowa**833, 211**NW**542, 52 **ALR**1297; 115 **Oh**340, 154**NE**244, 245 [citCJ]. [a] (1) 115 **Oh**340, 154**NE**244, 245 [citCJ]. [b] **Where payee is fictitious person** false indorsement is forgery. 203 **Iowa**833, 211**NW**542, 52**ALR** 1297.
922-53 84**CalA**26, 259**P**116 (indorsement, on pay roll voucher in favor of Luis Sanchez, of name "Luis Gouzales" held not forgery of name Sanchez).
922-75 92**CalA**615, 268**P**672.
922-81½-New. escrow instructions; 100**CalA**550, 280**P**555.
924-30 See also 44**Philippine**275. [b] (2) 218**Ala**427, 118**S**595. (10) Uttering forged rent receipt. 212**Ala**561, 103**S** 651. [c] (7) Other instances. 313**Mo** 114, 280**SW**697.
924-33 23**AlaA**378, 125**S**793; 161**Tenn** 177, 29**SW(2d)**255.
924-35 171**Ark**480, 284**SW**537.
925-45 200 **Iowa**1225, 206**NW**250; 213 **Ky**617, 281**SW**803.
925-50 200 **Iowa**1225, 206**NW**250; 245 **NY**368, 157**NE**269.
925-54 [a] (3) Altering and selling altered liberty bonds is offense though alteration makes them void. 5**F(2d)**671.
926-57 217**Ky**801, 290**SW**702. [a] **To authorize conviction of forgery** in second degree, under Oklahoma statute, based on sale of forged instrument with intent to defraud, it is not necessary that any fraudulent advantage accrue to defendant. **OklCr** 277**P**259.
926-58 217**Ky**801, 290**SW**702.
927-80 320 **Ill** 287, 150**NE**628.
927-84 6**F(2d)**668; 144**Va**559, 131**SE** 131 [quotCyc].
927-87 213**Ala**1, 104**S**40.
927-89 217**Ky**129, 288**SW**1044.
927-90 213**Ala**1, 104**S**40; 179**Ark**1047, 20**SW(2d)**130; 202**Cal** 159, 259**P**750; 199 **Ind**540, 156**NE**555; 217**Ky**129, 288 **SW**1044.
927-91 213**Ala**1, 104**S**40.
928-93 217**Ky**129, 288**SW**1044; 12 **PortoRicoFed**77. [b] **Presence of accused not necessary.**–170**Ark**1119, 282 **SW**992.
928-95½-New. It is not forgery if one signs his own name to deed, although he procures others to sign fictitious names. 12**PortoRicoFed**77.
928-96½-New. , nor is a partner, signing the firm name to a check on firm funds, guilty of forgery although he uses the money to the prejudice of firm. 100 **WVa**652, 131**SE**706, 46**ALR**1528.
928-96¼-New. But if a partner signs his own and partner's name to a check on fund, which by agreement can be checked out only for agreed purpose upon signature of both personally, he is guilty if criminal intent is present. 100**WVa**652, 131**SE**706, 46**ALR**1528.
928-99 199 **Ind**540, 156**NE**555.
928-4 106**TexCr**236, 291**SW**1105. [b] **Where one offender makes erasure** and another fills in items erased, in conspiracy to defraud, both are principals. 170 **Ark**1119, 282**SW**992.
928-10 161**Tenn**177, 29**SW(2d)**255.
928-11 161**Tenn**177, 29**SW(2d)**255.
929-20 **Iowa** 227**NW**140 (Tama county district court held to have jurisdiction of prosecution for uttering forged instrument); 114 **Oh**190, 150**NE**733.
929-27 **OklCr** 287**P**736.
929-28½-New. Conversely, venue is properly laid in county where first step is taken irrespective of whether forgery is completed there causing another to fill in payee and amount of check. 217 **Ky**129, 288**SW**1044.
929-31 120**Kan**172, 243**P**266, 267 [cit CJ].
930-33 120**Kan**172, 243**P**266, 267 [cit CJ]; 114 **Oh**190, 150**NE**733.
930-46 [a] **Mo** 273**SW**726; **Mo** 274**SW** 47.
930-47 164**Ga**702, 139**SE**344. [a] **Indictment held sufficient.**–**TexCr** 29**SW** (2d)367.
930-50 110**TexCr**550, 9**SW(2d)**1034; 103**WVa**392, 137**SE**538.
931-68 92**CalA**628, 268**P**923; 313**Mo**66, 280**SW**1033; 103**WVa**392, 137**SE**538. [a] (6) Indictment alleging false entry in book of county collector held not to charge crime under statute. 316**Mo** 591, 292**SW**63. [b] 54**ND**5, 208**NW**394.
931-71 22**AlaA**590, 118**S**594.
932-78 199 **Ind**540, 156**NE**555; 163**La** 34, 111**S**486; **Mo** 273**SW**726.
932-82 [b] (2) Indictment charging that defendant forged name of maker of check, without charging that name of payee also was forged, is sufficient. 82 **CalA**778, 256**P**251.
932-85 115 **Oh**340, 154**NE**244.
933-93 73**Mont**329, 236**P**542.
933-94 **TexCr** 30**SW(2d)**316.

933-9 316Mo 591, 292SW63.
933-11 316Mo 591, 292SW63.
933-16 [a] **Failure to allege scienter** does not deprive defendant of any legal right, since it must be proved. 14Pa Dist&Co 387.
933-21 40F(2d)502; 73Mont329, 236P542; 104TexCr105, 283SW168. But see 87PaSuper53. Contra 124Kan505, 260P629 [over 36Kan322, 13P554]. [a] (5) Indictment under general statute alleging act was done "with intent to injure or defraud" sufficiently charges intent and it is unnecessary to further follow language of statute. 104TexCr 105, 283SW168.
934-22 110TexCr190, 8SW(2d)169.
934-28 8F(2d)849; 87PaSuper53.
934-31 106TexCr236, 291SW1105 (forgery of land title).
935-35 [a] (2) Allegation that defendant made false entry on books of "a certain state bank, known as Bluffdale State Bank" is held sufficient description of corporate name. 105TexCr55, 285SW322. [b] **Indictment need not aver forgery of name of real person,** nor need there be proof that such name was name of real person. 312Mo 373, 278SW 1016.
936-56 171Ark375, 284SW36; Mo 278 SW665; 103WVa653, 138SE318. But see 318Mo 742, 300SW680.
936-64 CalA 290P1054.
937-85 TexCr 30SW(2d)316. [b] **Allegation as to indorsement** need not be set out on charge of forging maker's name. 171Ark375, 284SW36.
938-92 324 Ill 445, 155NE299.
938-94 324 Ill 445, 155NE299.
938-95 324 Ill 445, 155NE299.
938-97 316Mo 591, 292SW63.
939-17 32NM191, 252P1003.
939-18 91Fla79, 107S416.
939-24 312Mo 373, 278SW1016; 87Pa Super53. [a] (3) Averment that mortgage purported to "transfer," etc., held sufficient. 312Mo 373, 278SW1016. (4) Indictment for forgery of deed need only describe it as such with names of parties, purport, and description of property. 312Mo 373, 278SW1016.
939-32 22AlaA590, 118S594.
940-36½-New. Count not averring purport of instrument must be construed in ordinary sense of language used. TexCr 30SW(2d)316.
940-37 315Mo 1314, 290SW130, 51ALR 564.
940-38 [a] (3) Indictment for making false entry on books of bank charging that entry meant that customer had deposited sum of three thousand four hundred dollars is held not material enlargement of sense and meaning of words and figures. 105TexCr55, 285SW 322.
940-46½-New. Where a note is correctly set out according to its tenor, inaccuracy in the purport clause as to the amounts of the installment payments provided for is immaterial. 120Kan172, 243P266.
941-54 324 Ill 445, 155NE299.
941-55 324 Ill 445, 155NE299.
941-61 312Mo 373, 278SW1016; 11Pa Dist&Co 653.
942-77½-New. or as a "check," under statute denouncing forging of "order for the payment of money." 163La34, 111S486.
942-81 73Mont329, 236P542 (information charging forgery of traveller's check, which showed authority to "make" checks by inserting date, amount, and name of selling bank and that purchaser was not fictitious person held insufficient). [a] (2) Allegation that note was falsely and feloniously forged is sufficient. 120Kan172, 243 P266.
942-83 103WVa653, 138SE318.
942-84 110TexCr550, 9SW(2d)1034.
943-10 21AlaA41, 104S882 (where legal force is not apparent, extrinsic facts must be alleged with certainty); 313Mo 66, 280SW1033.
943-13 21AlaA41, 104S882.
944-15 313Mo66, 280SW1033, 1034 [cit CJ].
944-28 313Mo66, 280SW1033.
945-47 [e] **Cashier of bank.**-113TexCr 130, 19SW(2d)52.
946-50½-New. A failure to allege that the purported grantor had interest in land described in the deed so that the instrument is apparently capable of defrauding the alleged grantor rendered the indictment insufficient. 334 Ill 630, 166NE529.
947-76½-New. Allegations have been held sufficient to show that property sought to be obtained had value. 35GaA 366, 133SE270.
949-88 TexCr 30SW(2d)316.
949-92 97Fla290, 120S561.
949-1 80CalA709, 252P779.
949-2 34GaA174, 128SE586 (error to admit in evidence check bearing date different from that alleged in indictment).
949-5 80CalA709, 252P779; 105TexCr 549, 289SW412.
950-9½-New. There is a material variance where the indictment charges forgery of a check drawn on a named bank and the proof shows a check drawn on a different bank. 107TexCr 5, 294SW598.
950-12 116Nebr45, 215NW564; 115 Oh 340, 154NE244; 105TexCr81, 286SW 1086.
950-13 80CalA709, 252P779; 116Nebr 45, 215NW564.
950-14 104TexCr105, 283SW168.
950-15 119Kan446, 239P981.
950-16 116Nebr45, 215NW564. [a] (4) Variance between "H. A. Tinnerman" and "H. A. Timnernan" held immaterial. 116Nebr45, 215NW564.
950-18 119Kan446, 239P981.
951-23 324 Ill 445, 155NE299; 116 Nebr45, 215NW564.
951-24 [a] (5) Where name of bank is "First State Bank, Sulpher Springs, Tex.," and indictment alleges name as "First State Bank," variance is not fatal. 113TexCr130, 19SW(2d)52.
951-31 171Ark375, 284SW36; 107Tex Cr125, 295SW189.
952-51½-New. In a prosecution for knowingly keeping a false account of public money by making certain false entries, failure to prove that defendant previously made such entries does not result in a variance where it is shown that he directed or coöperated in falsification of other records resulting in the false entries in question. 68CalA 457, 229P974.
952-51½-New. Proof that payee's name was forged on back of check with intent to defraud and utter is held not at variance with indictment charging forgery and uttering forged check. 115 Oh340, 154NE244.
953-55 Iowa 227NW140 (indictment substantially in language of statute); 318Mo 672, 300SW752.
953-61 [a] 101WVa123, 132SE368.
953-62 KanA 251P315; 101WVa123, 132SE368.
953-66½-New. Indictment must contain averment identifying transaction. TexCr 26SW(2d)258.
953-73 101WVa123, 132SE368.
954-81 [c] **Allegations sufficiently describing recipient** of forged instruments. TexCr 26SW(2d)258.
954-82 103WVa653, 138SE318.
954-83 103WVa653, 138SE318.
954-84½-New. Failure to allege legal relation between company and individual on whom instrument was passed is not ground for quashing indictment. 109TexCr556, 5SW(2d)998.
956-16 120Kan172, 243P266.
956-35½-New. An indictment containing more than one count is sufficient if one count alleges the person prejudiced and the person to whom the property alleged to have been converted belonged. 87PaSuper53.
956-36 202Cal 159, 259P750; 120Kan 172, 243P266, 267 [citCJ].
956-37½-New. Charges of forgery of separate and distinct instruments on the same day cannot be joined in one indictment. 144Wash341, 258P13.
956-37½-New. An indictment charging a chairman of a county board of supervisors with forgery in connection with a demand for work for a road district has been held to charge a single offense as against a contention that the demand warrant and indorsements on it were separate instruments. 79CalA373, 249 P536.
956-40 Ind 164NE272.
956-41 202Cal 159, 259P750; 101WVa 123, 132SE368.
957-52 44Philippine275.
957-54 44Philippine275.
958-75 120Kan172, 243P266, 267 [cit CJ].
958-79 318Mo 672, 300SW752, 755 [cit CJ].
958-83 TexCr 26SW(2d)258.
959-1 313Mo 114, 280SW697.
959-4½-New. Other decisions as to burden of proof. 32Ariz182, 256P1048; 171Ark510, 286SW880.
959-10 114Nebr257, 207NW207; 115 Nebr325, 212NW625.
959-17½-New. The fact that accused denies indorsing a check does not relieve the state of the burden of proving that he was not authorized to indorse it. 114Nebr257, 207NW207.
959-18 320 Ill 287, 150NE628.
960-21 See also 320 Ill 287, 150NE628.
960-24 320 Ill 287, 150NE628.
960-25½-New. On trial for passing forged check prosecution must prove that check was forged. 320 Ill 287, 150 NE628.
960-34 105TexCr549, 289SW412; 109 TexCr617, 6SW(2d)364.
961-53 312Mo 373, 278SW1016, 1022 [citCJ].
961-55½-New. Presumed instrument was forged in county where uttered or attempt made. 312Mo 373, 278SW 1016.
961-56 119Kan446, 239P981, 982 [quot CJ]; 120Kan172, 243P266, 267 [citCJ]; 152Miss282, 119S808(1stcase); 51Nev 82, 269P489, 490 [citCJ]; 144Va559, 131SE131 (refusal of instructions that possession raised no presumption is not error).
961-57 119Kan446, 239P981, 982 [quot CJ].
962-72 120Kan172, 243P266, 267 [cit CJ]; 92PaSuper295.
962-73 114Nebr257, 207NW207.
962-74½-New. Intent is presumed where another lost money by forgery, whether or not defendant profited. 312 Mo 373, 278SW1016.
962-77 120Kan172, 243P266, 267 [cit CJ]; 152Miss282, 119S808(1stcase).
962-78½-New. Forgery is presumed to have been committed in the place where instrument was found in forged state. 23F(2d)226.
962-82 79CalA373, 249P536; 200 Iowa 1225, 206NW250 (forged certificates set out in indictment are admissible); 120 Kan172, 243P266. [a] (5) Testimony that note and mortgage purported to have been given for insurance premium and that amount due company from agent charged with forgery as its part of premium had been sent it. 21AlaA 339, 108S620. (6) Other instances. TexCr 27SW(2d)246.
962-84 113TexCr512, 22SW(2d)934(1st case).
962-85 CalA 290P1054; 313Mo 114, 280SW697.
962-91½-New. Testimony that defendant was authorized to sign forged name to other instrument held inadmissible. 174Ark472, 295SW397.
962-91½-New. In a prosecution for forgery in making a false certificate of acknowledgment of a mortgage the fact that the registration tax was not paid on the mortgage does not render it inadmissible. 171Minn345, 214NW262.
962-91¼-New. In a prosecution for forging a demand against a road district evidence that the demand was not in the form required by law is properly excluded where defendant allowed the claim knowing of the forgery and certified to it as a valid claim. 79CalA 373, 249P536.
962-91½-New. Evidence showing unwillingness of the parties whose names were alleged to be forged to pay a note is incompetent. 229Ky60, 16SW(2d) 498.
962-91¼-New. Checks having no material bearing on the issues are inadmissible, unless supported by expert testimony. 334 Ill 590, 166NE481.
962-91¼-New. The amount of the notes

which defendant claimed to have received for his interest is improperly excluded. 111TexCr411, 13SW(2d)370.

962-91½-New. A contract showing that defendant possessed a contingent interest in a ranch is admissible to show that the motive for prosecution was to place defendant in the penitentiary, so as to make compliance impossible with the terms of the contract so that all his interest would forfeit under its terms to the prosecuting witnesses. 111TexCr411, 13SW(2d)370.

962-91½-New. Evidence that the purported maker, at the time defendant claimed he negotiated the sale of interest in a ranch to him, had power to negotiate for its purchase, and had in his possession a blank note to be filled in for the purchase price is improperly excluded. 111TexCr411, 13SW(2d)370.

963 2 106TexCr65, 290SW175.

963-4 318Mo 623, 1SW(2d)151, 152 [citCJ].

963-16 [b] (5) Other evidence held admissible. 22AlaA531, 117S502.

964-33½-New. Genuine vendor's note is admissible in a prosecution for forging a release of vendor's lien which secured the note, to show no genuine release had been executed. 104TexCr105, 283SW168.

965-45½-New. In a prosecution for filing a forged application for state loan, evidence of genuineness of signature to accompanying affidavits is admissible on issue whether affiants had actually sworn. 32Ariz182, 256P1048.

965-47 CalA 290P1054.

966-59 179Ark1047, 20SW(2d)130; 104 TexCr105, 283SW168.

966-62 [a] (2) In prosecution for forging release of vendor's lien evidence that defendant was paid for forged release and for forged copy of note at time of delivery is admissible as bearing upon intent. 104TexCr105, 283SW168.

966-63 104TexCr105, 283SW168.

966-63½-New. In a prosecution for knowingly keeping false accounts of public money, evidence of defendant's earning and financial condition is irrelevant in his behalf on the question of intent. 68CalA457, 229P974.

967-69 313Mo 114, 280SW697.

967-71 233Mich565, 207NW813; 313 Mo 114, 280SW697.

967-81 198NC600, 152SE791 (that proceeds belonged to son of defendant). [b] **Evidence that no one was defrauded** may be considered on question of intent. 32NM191, 252P1003.

968-89 229Ky60, 16SW(2d)498; 111 TexCr357, 12SW(2d)1036(2dcase).

968-93 [b] (2) Where company which received proceeds of forged deed was shown solvent, evidence of its assets is held properly excluded. 312Mo 373, 278SW1016.

969-18 202Iowa150, 209NW404; 51 Nev82, 269P489, 490 [citCJ].

969-20 202Iowa150, 209NW404.

969-34 But see 96CalA215, 273P1087.

970-45 77CalA783, 247P535; 144Va 559, 131SE131 (evidence that blanks converted into forged certificates of deposit were ordered printed by another and charged to accused held admissible).

970-47 77CalA783, 247P535; 144Va 559, 131SE131.

970-57 77CalA783, 247P535; 202Iowa 150, 209NW404.

971-64 TexCr 26SW(2d)639 (state is not required to establish deed to person whose name is forged on deed as grantor).

971-66 114Nebr257, 207NW207; Tex Cr 27SW(2d)246; 144Va559, 131SE131; 100WVa652, 131SE706, 46ALR1528.

971-69 32Ariz182, 256P1048; 176Ark 1203, 4SW(2d)947; 68CalA610, 230P 13; 72CalA570, 237P793; 77CalA783, 247P535; 96CalA657, 274P560; 101 CalA723, 282P403; 102CalA353, 282P 971; CalA 285P1073; CalA 286P448; 36GaA678, 137SE864; 217Ky801, 290 SW702; 171Minn345, 214NW262; 148 Miss62, 114S123; 322Mo 188, 14SW(2d) 439; 115Nebr325, 212NW625; 116 Nebr45, 215NW564; 243NY166, 153NE 36; 245NY521, 157NE842; 54ND5, 208 NW394; OklCr 288P489; 92PaSuper 295; 105TexCr81, 286SW1086; 106Tex Cr536, 293SW819; 110TexCr114, 7SW (2d)551; 111TexCr567, 15SW(2d)21(2d case); 144Va559, 131SE131 (verdict not without evidence to support it or plainly contra to evidence); 195Wis 416, 217NW711.

971-70 312Mo 373, 278SW1016.

971-73 177Ark1031, 9SW(2d)236; 77 CalA783, 247P535; 118Kan620, 236P 849; 152Miss282, 119S808(1stcase); 113TexCr357, 23SW(2d)382(2dcase); TexCr 26SW(2d)258; TexCr 29SW(2d) 367 (forgery of indorsement); 100WVa 652, 131SE706, 46ALR1528.

971-76 OklCr 283P579(2dcase) (note and mortgage of realty).

971-78 115Nebr325, 212NW625.

971-82 176Minn349, 223NW452(4th case); 248NY255, 162NE24; OklCr 287 P788(2dcase).

971-83 Mo 292SW440.

971-83½-New. to sustain conviction of offering forged lease for record and causing it to be recorded; OklCr 291P 991.

971-84½-New. to identify check offered in evidence as that set out in the indictment; 101TexCr467, 276SW270.

971-86 23AlaA369, 125S787; 205Iowa 1043, 218NW939; 225Ky72, 7SW(2d) 845; 114Nebr257, 207NW207; OklCr 271P1045; TexCr 27SW(2d)246.

972-87 195Wis551, 218NW811.

972-95 206Iowa347, 218NW477; 114 Nebr257, 207NW207.

972-12 84CalA685, 258P463.

973-19 100WVa652, 131SE706, 46ALR 1528.

973-22 120Kan172, 243P266.

973-25½-New. Forgery cannot be established by merely showing that defendant once possessed the forged instrument where the instrument passed through the hands of others. 225Ky72, 7SW(2d) 845.

973-33½-New. Evidence is not sufficient to sustain conviction of forgery of check where record does not show that check was put in evidence, described, or accounted for as lost. 105TexCr217, 287 SW245.

973-34 44Philippine471.

973-39 107TexCr4, 294SW587.

974-44 5F(2d)671; 206Iowa347, 218 NW477; 148Miss62, 114S123; 318Mo 672, 300SW752; Nebr 226NW793 (forging and uttering note); 96PaSuper13 (promissory note); 109TexCr296, 4 SW(2d)40; TexCr 15SW(2d)621(1st case).

974-44½-New. of advising and encouraging passing of fictitious checks; CalA 290P1054.

974-45 GaA 155SE344; 161Tenn177, 29 SW(2d)255.

974-46 312Mo 373, 278SW1016.

974-47 206Iowa347, 218NW477.

974-48 171Ark480, 284SW537; 320Ill 287, 150NE628; OklCr 287P770; 112 TexCr140, 15SW(2d)621(2dcase).

974-49½-New. Reference is made in the notes to cases in which the evidence was held insufficient to sustain a conviction of selling, exchanging, and delivering a forged note with the intention to have it entered. 120Kan172, 243P266.

974-49¼-New. Conviction for uttering or publishing cannot be sustained where the evidence is insufficient to show that the instrument was forged. 171Ark480, 284SW537.

974-49¼-New. Mere proof of forgery is not proof of uttering. 206Iowa347, 218NW477.

974-53 92CalA547, 268P674.

974-55 334Ill 590, 166NE481.

974-57 92CalA615, 268P672.

974-62 [a] **Evidence held sufficient to show guilty knowledge.**-206Iowa347, 218NW477.

974-64½-New. Evidence held sufficient to show intent necessary to sustain a conviction of an attempt to pass a forged instrument. 103TexCr391, 280SW1064.

974-64¼-New. Evidence that money obtained from forgery of deed of trust went to company in which defendant had interest is held to show intent to defraud. 312Mo 373, 278SW1016.

974-64¼-New. Evidence held sufficient to show knowledge. 107TexCr125, 295 SW189.

975-70 102CalA353, 282P971.

975-79½-New. Evidence of general usage in making loans on basis of mortgage deeds as security is sufficient to show instrument forged was operative in fraud. 312Mo 373, 278SW1016.

975-91½-New. Evidence sufficient to show that implied authority of one partner to sign a check for withdrawal of firm assets had been withdrawn by special agreement. 100WVa652, 131SE706, 46ALR1528.

975-93½-New. Where an individual and two corporations were alleged prospective victims, proof of corporate existence is unnecessary when the existence of the individual is proved. 102CalA353, 282 P971.

975-94 [a] **Evidence held sufficient** to prove venue. 36GaA678, 137SE864.

975-99 88CalA591, 264P263, 265 [cit CJ]; 120Kan172, 243P266.

976-1 88CalA591, 264P263, 265 [citCJ].

976-2 120Kan172, 243P266.

976-4½-New. Evidence has been held insufficient to show that alteration of stolen liberty bonds occurred in district where stolen. 23F(2d)226.

976-23 22AlaA590, 118S594. [a] 114 Nebr263, 207NW209.

977-23 179Ark1047, 20SW(2d)130; 21 AlaA339, 108S620; 217Ky801, 290SW 702; 114Nebr263, 207NW209; OklCr 271P1045; 149Wash522, 271P330.

977-29 21AlaA339, 108S620; 23AlaA 378, 125S793; 14PaDist&Co 387.

977-29½-New. passing, as true, a forged instrument. 106TexCr536, 293 SW819.

977-30 149Miss223, 115S429.

977-31 217Ky801, 290SW702; 106Tex Cr506, 294SW202.

977-32½-New. where the actual forgery was committed; 120Kan172, 243P 266.

977-33½-New. whether the instrument was so nearly illegible as to deprive it of legal efficacy; 318Mo 623, 1SW(2d) 151.

977-38 318Mo 623, 1SW(2d)151.

977-43½-New. the motive of accused for procurement of the alleged forgery, 195Wis416, 217NW711.

977-46 96CalA657, 274P560. See also 334 Ill 516, 166NE97.

977-47 [a] 101CalA723, 282P403; 100 WVa652, 131SE706, 46ALR1528.

977-50 111TexCr567, 15SW(2d)21(2d case).

977-51 170Ark1119, 282SW992; 96 CalA657, 274P560; 103TexCr383, 278 SW196; 144Va559, 131SE131 (evidence held to warrant instruction as to making or assisting in making instrument). [c] **Instructions held sufficient** as to defenses on evidence. 102TexCr383, 278 SW196. [d] **Instruction held properly refused.**-Mo 274SW47.

977-55½-New. But an instruction which combines the crime of forgery with that of uttering has been regarded as erroneous. 225Ky72, 7SW(2d)845.

977-55¼-New. Refusal to instruct that if check issued by defendant was signed as his own, although with a fictitious name, forgery is not committed, has been held error. 168La932, 123S624.

978-60 143Miss38, 108S282.

978-72 32NM191, 252P1003.

978-78½-New. Instruction to convict if defendant and another, in conspiracy to defraud, each participated in some part of acts constituting forgery, is not objectionable as directing conviction upon mere finding of conspiracy. 170Ark 1119, 282SW992.

978-79 230Ky48, 18SW(2d)880(1st case); 100WVa652, 131SE706, 46ALR 1528.

978-82 104TexCr92, 282SW598.

979-89 32NM191, 252P1003.

979-90 143Miss38, 108S282. [d] **Refusal to instruct held error.**-That defendant is not guilty of forgery if X mark on check made by him was placed thereon under belief that check bore his correct name. 168La932, 123S624.

979-96½-New. [8½] **As to injury.** Where forged check was paid by bank, leaving account of maker overdrawn, request for instruction based upon theory that bank only was defrauded was properly refused. 170Ark1119, 282SW992.

979-1½-New. Not error to refuse instruction that comparison of defendant's signature alone is insufficient to convict where defendant has denied signature under oath. 103TexCr383, 278SW196.
979-4 32NM191, 252P1003.
980-41 207 Iowa427, 223NW253.
981-46½-New. Where convictions are had under separate counts charging forgery of a note, forgery of a mortgage, and guilty possession of the note, the court may impose separate sentences on each count to be served cumulatively. 120Kan172, 243P266.
981-50 201 Iowa8, 206NW114.
981-54 44Philippine275 (necessary element erroneously considered as aggravating circumstance).

FORM

982-12½-New. the outward or visible shape of a body; Standard D. [quot 8 PaDist&Co 125].
982-12½-New. the appearance or character in which a thing presents itself; Standard D. [quot 8PaDist&Co 125].
982-15½-New. the established or prescribed method; Standard D. [quot 8 PaDist&Co 125].
982-16 36F(2d)591.
982-16½-New. ; the shape and structure of anything, as distinguished from the material of which it is composed; Webster D. [quot 8PaDist&Co 125].
982-16½-New. particular disposition or arrangement of matter, giving it individuality or distinctive character. 8PaDist &Co 125.
982-17 202 Iowa450, 209NW468.

FORNICATION

987-25 161Ga492, 131SE503.
987-29 4HawaiiFed266, 277 [citCyc]; 152Va965, 146SE289.
987-31 [a] 161Ga492, 131SE503.
988-43 161Ga492, 131SE503; 7PaDist &Co 670.
989-54½-New. A woman in whose favor divorce has been entered may successfully prosecute man for fornication, although she did not pay costs in divorce suit until after the offense had been committed. 6PaDist&Co 92.
990-79 4HawaiiFed582.
990-84 121Kan844, 250P233.
990-86 5PaDist&Co 19.
991-8 See also 171Minn222, 213NW920, 921 [citCJ]. [a] (1) TexCr 29SW(2d) 383.
991-9½-New. Where evidence shows that the parties are not married to each other, the state need not further prove that the woman is unmarried. 171Minn 222, 213NW920.
993-34 121Kan844, 250P233 (letters).
993-40 [a] (1) 36GaA299, 136SE335; 121Kan844, 250P233; 193NC786, 138 SE134; 193NC787, 138SE135; 92Pa Super53. (5) To show corroboration required by statute. 121Kan844, 250P833.
995-59 95PaSuper568 (prosecution for fornication and bastardy).
997-94 [b] In Pennsylvania.-12PaDist &Co 708.

FORTHWITH

998-18 115Nebr287, 212NW619, 621 [citCJ]; NJ 129A466.
998-19 115Nebr287, 212NW619, 621 [citCJ].
998-24 115Nebr287, 212NW619, 621 [citCJ].
998-27 236Mich383, 210NW338; 99 NJEq97, 133A190, 192 [citCJ].
998-28 115Nebr287, 212NW619, 621 [citCJ]; NJ 129A466.
998-34 But see NJ 129A466.
998-34½-New. While the consensus of opinion is that it does not mean instanter, it does require the doing of an act promptly. NJ 129A466.
998-37 NJ 129A466.
998-38 115Nebr287, 212NW619, 621 [citCJ].
998-41½-New. as soon as practicable; 253Mass378, 149NE155.
999-49 NJ 129A466.
999-57 253Mass378, 149NE155.
999-58 NJ 129A466.
999-60 115Nebr287, 212NW619, 621 [citCJ]; NJ 129A466.

1000-63 [a] (3) "Forthwith" is usually construed to mean within twenty-four hours. 196Wis113, 219NW380.
1000-70 NJ 129A466.

FORTUNE

1001-7½-New. Fortune telling means engaging in foretelling future events. 26 OhA340, 159NE575.

FOUND

1002-52½-New. As used in United States statute concerning jurisdiction, one is not necessarily "found" in district where he transacts business. 14 F(2d)864.

FRAME

1004-14 13CustA90.

FRANCHISES

1008-1 37F(2d)545; 206 Iowa9, 216 NW683; 210Ky170, 275SW634; Miss 108S158; 114Nebr483, 208NW123; 82 NH561, 138A284; 126Misc829, 215NYS 159; 129Misc811, 222NYS169; Okl 288 P316; 157SC1, 153SE537. [a] (29) Contract between city and public utility binding on each. 215Ky384, 285SW 228. (30) "Grant under authority of government conferring special right to do an act or a series of acts of public concern which, when accepted and exercised, becomes an irrevocable contract." 128Misc863, 866, 220NYS349.
1010-22 Miss 108S158.
1011-38 82NH561, 138A284.
1011-39 82NH561, 138A284.
1011-48 220AppDivl, 220NYS467.
1012-59 37F(2d)545.
1012-60 37F(2d)545.
1012-61 37F(2d)545.
1012-62 37F(2d)545.
1012-63 37F(2d)545.
1012-77 82NH561, 138A284.
1013-90 82NH561, 138A284.
1013-92 210Ky170, 275SW634.
1017-54 [a] (3) To operation of dance halls. 5PaDist&Co 281.
1018-58 [b] License to operate dance hall is renewable permit, not franchise. 5PaDist&Co 281.
1019-56 128Misc863, 220NYS349; Tex CivA 283SW281.
1020-87 128Misc863, 220NYS349; 129 Misc811, 222NYS169 (privilege or right of special franchise is fixed, not transitory).
1020-97 Me 151A440.
1022-14 128Misc863, 220NYS349; Tex CivA 283SW281.
1022-21 TexCivA 283SW281.
1023-30½-New. Where a franchise is invalid in part, as a general rule the whole franchise is not invalidated if the invalid portion can be properly eliminated. 146Wash55, 261P640.
1025-67 [a] Act of legislature authorizing conversion of limited franchise into perpetual franchise is violation of constitutional provision against perpetuities. 140 Okl 88, 282P640.
1025-75½-New. The Porto Rico Organic Act, providing that all grants of franchises shall be made by the public service commission, is not violated by a statute making it the duty of the commission to see that a stated policy is not impaired by grants of franchises. 18 F(2d)918.
1025-75½-New. Power to grant, renew, or extend franchise beyond the prescribed period is reserved in some constitutions by the people to themselves. 140 Okl 88, 282P640.
1025-75¼-New. In Oklahoma power is reserved in the constitution to the electors of municipalities to grant, renew, or extend franchises for not exceeding twenty-five years. 141 Okl 100, 284P12 (statute held invalid); 141 Okl 82, 284 P38; 141 Okl 80, 284P40; 141 Okl 98, 284P70.
1025-75½-New. Statute authorizing utilities to surrender municipal franchises and receive in exchange state permit revocable only by legislature violates constitutional reservation of power to municipal electors. 143 Okl 32, 287 P1029; 143 Okl 32, 287P1030; 143 Okl 33, 287P1032.
1025-75½-New. Such statute is violative of constitutional provision entitling twenty-five per cent of electors to demand granting, extension, or renewal of franchises. 143 Okl 32, 287P1029; 143 Okl 32, 287P1030; 143 Okl 33, 287P 1032.
1026-85 [d] Railroad commission has power to grant franchise to erect transmission lines. Iowa 231NW461.
1026-86 [b] 210Ky170, 275SW634.
1026-87 210Ky170, 275SW634.
1026-90½-New. The state may delegate authority to grant franchises either by general statute or by constitutional provision. 210Ky170, 275SW634.
1027-17 126Misc829, 215NYS159.
1027-18 126Misc829, 215NYS159.
1028-30 See also Ind 163NE489.
1029-49 TexCivA 282SW912, 918 [cit CJ].
1029-51 TexCivA 282SW912, 918 [cit CJ].
1030-64 98Vt508, 129A303 (compliance required regardless of financial loss).
1030-74 TexCivA 138W(2d)184.
1031-83 [a] Ordinance extending franchise and stipulating same rates prescribed in former resolution held void as legislative measure. TexCivA 282 SW912.
1031-94 281US537, 50SCt401, 74Led 1023; 323 Ill 246, 154NE112; 250Mich 614, 231NW52; 32NM397, 258P573; TexCivA 282SW912, 918 [quotCJ].
1032-96 32NM397, 258P573; 36 OklA CR595.
1032-97 323 Ill 246, 154NE112; 250 Mich614, 231NW52; 32NM397, 258P 573.
1032-99 36 OklACR595.
1033-9 278US429, 49SCt196, 73Led441.
1033-11 231Ky820, 22SW(2d)289, 66 ALR1238 (powers necessary to accomplish purpose and object of its creation).
1034-21 [c] Privilege to do public utility business once granted will not be duplicated. NH 149A321.
1034-24 11F(2d)887.
1037-74 146Wash55, 261P640, 641 [cit CJ].
1037-78 142Wash284, 252P906, 910 [cit CJ].
1040-33 141 Okl 100, 284P12; 141 Okl 82, 284P38; 141 Okl 80, 284P40; 141 Okl 98, 284P70 (all holding grant in perpetuity unconstitutional).
1041-42½-New. Statute authorizing utilities to surrender municipal franchises and receive in exchange state permit revocable only by legislature is violative of constitutional provision against perpetuities. 143 Okl 32, 287P 1029; 143 Okl 32, 287P1030; 143 Okl 33, 287P1032.
1043-77 128Misc130, 217NYS839.
1043-78 128Misc130, 217NYS839.
1043-82½-New. An intent of the legislature to repeal or alter a franchise must be clearly expressed and will not be implied from doubtful or ambiguous language. 193Wis457, 214NW435.
1043-82½-New. A statute specifically designating public utilities, franchises of which are made indeterminate permits, applies only to utilities specifically mentioned. 193Wis457, 214NW435.
1043-92 128Misc130, 217NYS839.

FRAUD

1059-2 13LaA661, 128S730; Me 150A 378; MoA 25SW(2d)529; 82Mont434, 268P512, 516 [quotCJ]; 191NC710, 133 SE85; NC 155SE452 (a generic term); 115 Okl 289, 243P147; 38 OklACR461, 464 [citCJ]; 32PortoRico 280, 282 [quotCJ]; TexCivA 270SW1062. [a] (10) Additional cases where fraud has been defined. 83CalA137, 256P484. [b] Legal act.-It is not fraud to do what one has legal right to do. 308Mo 237, 271SW508, 39ALR1149.
1059-3 52ND112, 202NW280; 116 Okl 199, 244P176; 128 Okl 27, 261P167; TexCivA 270SW1062. [a] (2) 310Mo 378, 276SW877. (10) Fraud is such conduct as trick or device by which person is induced to sign paper under impression that it is something else, or to its alteration after it is signed. 323 Ill 328, 154NE156.
1059-4 17F(2d)386; 83CalA137, 256P 484; 203 Iowa1060, 213NW777, 57ALR 1165; 190NC397, 130SE40 (part of

equity doctrine not to define fraud).

1059-7 214Ala376, 108S43; 203 Iowa 1060, 213NW777, 57ALR1165; 190NC 397, 130SE40; NC 155SE452; 115 Okl 289, 243P147; 117 Okl 199, 244P176; 128 Okl 27, 261P167.

1059-7½-New. Fraud vitiates all things. 159La652, 106S20; 148Miss 783, 114S820.

1060-11 [a] 190NC397, 130SE40.

1060-12 TexCivA 270SW1062.

1060-13½-New. breach of warranty, 203 Iowa1073, 211NW894.

1060-17 But see MoA 274SW112.

1060-19 146Va504, 131SE692.

1060-22 130Misc900, 226NYS152, 156 [quotCJ]; 100Vt395, 138A725, 54ALR 1369; 104WVa561, 140SE537, 543 [cit CJ].

1060-23 19F(2d)260; 31Ariz73, 250P 367; 165Ga252, 140SE366; 130Misc 900, 226NYS152, 156 [quotCJ]; 146Va 504, 131SE692, 697 [quotCJ]. [a] (1) 115 Okl 248, 242P854. [b] Deceit is actual fraud. 152Tenn512, 279SW385.

1061-24 82Monti, 264P930.

1061-25 75Mont317, 243P1063.

1061-27 165Ga252, 140SE366; 49SD 341, 207NW155, 157 [citCJ]. [a] Breach of trust is constructive fraud. 118 Okl 167, 247P692. [b] There must be more than mere confidence in another's honesty and integrity to sustain presumption of constructive fraud. 98CalA112, 276P391.

1061-28 31Ariz73, 250P367; 165Ga252, 140SE366; 197 Ind236, 150NE361, 363 [citCJ]; TexCivA 48SW(2d)280, 281 [cit CJ].

1061-29 100Vt395, 138A725, 54ALR 1369.

1061-30 IndA 167NE625.

1061-32 19F(2d)260; 31Ariz73, 250P 367; 146Va504, 131SE692, 697 [quot CJ].

1062-39 TexCivA 275SW137, 141 [cit CJ]. [a] 41GaA788, 154SE716.

1062-41 49SD135, 206NW695, 700 [quotCJ].

1062-42 49SD135, 206NW695, 700 [quotCJ].

1062-43 49SD135, 206NW695, 700 [quotCJ].

1062-44 49SD135, 206NW695, 700 [quotCJ].

1062-46 49SD135, 206NW695, 700 [quotCJ].

1062-47 49SD135, 206NW695, 700 [quotCJ].

1062-48 49SD135, 206NW695, 700 [quotCJ].

1062-49 49SD135, 206NW695, 700 [quotCJ].

1062-50 31Ariz347, 253P626, 628 [cit CJ]; 175Ark839, 1SW(2d)3; 36GaA 462, 137SE275; 205 Iowa417, 216NW 68, 69 [citCJ]; 205 Iowa244, 216NW 551; 222Ky405, 300SW885; 125Me31, 130A509; MoA 30SW(2d)171; 75Mont 317, 243P1063, 1065 [citCJ]; 80Mont 82, 258P1085, 1089 [quotCJ]; 115Nebr 49, 211NW343; 104NJL65, 139A31 [cit CJ]; 195NC685, 143SE525; 114 Okl 13, 242P760; 116 Okl 3, 243P160; 102WVa 475, 135SE597. [a] (1) 128 Okl 247, 262 P654. [b] 32Ariz457, 259P884; 169Ark 210, 275SW524; CalA 283P879; 219 MoA112, 268SW675; MoA 23SW(2d) 1102; 116Nebr346, 217NW586; 22 OhA 379, 153NE877; 247NY1, 159NE700; 194NC316, 139SE455.

1064-51 164Ga311, 138SE580; 335 Ill 363, 167NE54; 218AppDiv313, 218NYS 139; 49SD135, 206NW695, 700 [quot CJ]. [a] 126Misc263, 212NYS756.

1064-52 131 Or185, 282P546.

1064-57 74CalA598, 241P422.

1064-60 49SD135, 206NW695, 700 [quotCJ]; 140Wash650, 250P59.

1065-61 218AppDiv313, 218NYS139 (personal injury); 49SD135, 206NW 695, 700 [quotCJ].

1065-62 114 Okl 13, 242P760; 128 Okl 247, 262P654; 131 Or185, 282P546; 49 SD135, 206NW695, 700 [quotCJ].

1065-63 114 Okl 13, 242P760; 128 Okl 247, 262P654; 49SD135, 206NW 695, 700 [quotCJ].

1065-63½-New. Where timely established, all acts which are the direct result of fraud at once become void or voidable. 162La123, 110S172.

1065-65 19F(2d)260; 31Ariz347, 253P 626; 87Colo 199, 286P865; 10LaA517, 120S661; 129Misc25, 220NYS711; 192 NC585, 135SE449; 116 Okl 3, 243P160; 128 Okl 247, 262P654; 130 Okl 142, 265 P1054; TexCivA 28SW(2d)219; 66 Utah128, 240P175, 178 [citCJ].

1065-66 19F(2d)260; 31Ariz347, 253P 626; 104Conn355, 132A913; 105Conn 631, 136A479; 106Conn41, 137A159; 36GaA462, 137SE275; 253 IllA491; 9 LaA137, 119S483; LaA 129S416; Tex CivA 293SW874; 147Va415, 137SE496.

1066-67 196Cal 8, 235P981; 99CalA 283, 278P462.

1066-69 118 Okl 113, 247P87; 124 Okl 37, 254P64; 37 OklACR543, 545 [cit CJ]; Vt 145A258(2dcase). [b] Prospectus circulated to induce purchase of corporate stocks or bonds is to be interpreted by effect produced on ordinary mind. 126Misc845, 214NYS452 (ambiguous language therein cannot shield one's fraud, since law goes beyond form). [c] One on whom fraud is perpetrated is not remediless, irrespective of guise fraud may assume. 159La652, 106S20.

1066-71 215Ala297, 110S391; 85Colo 9, 273P653; 36GaA462, 137SE275; 127 Misc50, 215NYS281.

1066-72 MoA 24SW(2d)1083.

1067-76 216Ky685, 288SW678; 133 Okl 145, 271P643.

1067-77 202 Iowa764, 211NW257.

1067-79 203 Iowa1073, 211NW894; 205 Iowa929, 218NW912.

1067-79½-New. There must be a false statement, or acts, conduct, or representations which suppress the truth and induce a false impression. 175Ark839, 1SW(2d)3.

1067-80 133 Okl 145, 271P643; 37 Okl ACR543, 545 [citCJ]; 126 Or317, 269P 981. But see 43F(2d)509.

1068-91 165Ga252, 140SE366 (signs and tricks).

1068-92 321Mo 1, 9SW(2d)967.

1069-95 126 Or317, 269P981; 194Wis 85, 216NW134.

1069-98 [b] Fraud may not be predicated on failure to act, unless duty exists to act. 137Misc407, 244NYS473.

1069-1 6F(2d)818; 233Ky370, 25SW (2d)1032; 50RI 236, 146A636.

1070-3 150Md52, 132A381; Mass 165 NE873.

1070-5 150Md52, 132A381.

1070-7 95CalA490, 273P103.

1071-11 MoA 300SW1020. See also 202 Iowa764, 211NW257.

1071-12 196Cal 179, 237P33; 309Mo 638, 274SW815; 51Nev226, 273P657; 147Va415, 137SE496.

1071-14 150Md52, 132A381.

1071-15½-New. Where statements are insufficient to show fraud, evidence of concealment may be sufficient. 230 Mich504, 202NW955.

1071-17 MoA 25SW(2d)529.

1071-22 202 Iowa764, 211NW257; 205 Iowa929, 218NW912; 215Ky606, 286 SW884; 162La949, 111S339; 309Mo 638, 274SW815; 321Mo 1, 9SW(2d) 967; 133 Okl 145, 271P643; BC [1930] 2DomLR96.

1072-23 36F(2d)634; 83CalA137, 256 P484; 215Ky606, 286SW884; 309Mo 638, 274SW815.

1072-24 196Cal 179, 237P33; 9LaA540, 121S306; 196NC685, 146SE803(3d case).

1073-28½-New. Vendor's fraud in representing a farm to contain permanent water supply has been held to have become complete on signing a contract for sale. 215Ky606, 286SW884.

1074-34 99NJEq719, 134A291.

1074-42 118 Or192, 244P1093, 1097 [citCJ].

1074-43 118 Or192, 244P1093, 1097 [citCJ].

1075-44 205 Iowa929, 218NW912; 118 Or192, 244P1093.

1075-45 20 OhA156, 153NE183.

1075-50 118 Or192, 244P1093.

1076-54 162La949, 111S339; 141Wash 86, 250P947.

1076-54½-New. Relation of confidence depends on duty. 147Va415, 137SE496.

1076-55 [a] "Confidential relation" is said to exist when one person is bound to act for benefit of another and can take no advantage to himself. 295Pa 501, 145A507.

1078-80 226AppDiv195, 234NYS449.

1079-85 295Pa501, 145A507; 10Pa Dist&Co 541.

1080-87 26F(2d)209; 203Cal 776, 265 P946; 74CalA598, 241P422; 81CalA 164, 253P352; CalA 291P907; 164Ga 311, 138SE580; 241 IllA102; 203 Iowa 1073, 211NW894; 120Kan380, 244P 236; 123Kan82, 254P391; 208Ky20, 270SW457; 125Me31, 130A509; Mass 171NE732; 312Mo 111, 278SW772; Mo 25SW(2d)84; 134Misc638, 236NYS337; 8PaDist&Co 300; TexCivA 278SW496, 498 [citCJ]; TexCivA 293SW599, 604 [citCyc]; TexCivA 29SW(2d)845; 36 Wyo 12, 252P790.

1081-88 74CalA598, 241P422; Tex CivA 29SW(2d)845.

1082-89 76CalA278, 244P916; 105Conn 631, 136A479; 164Ga311, 138SE580; 36 GaA462, 137SE275; 203 Iowa1073, 211 NW894; 123Kan82, 254P391; 128Me79, 145A744; 150Md52, 132A381; 228App Div396, 240NYS123; 8PaDist&Co 300; 50RI 236, 146A636; TexCivA 272SW 266; TexCivA 276SW932; 145Va536, 134SE670.

1082-90 36Wyo 12, 252P790.

1082-91 164Ga311, 138SE580.

1082-93 TexCivA 278SW496.

1082-96½-New. Nor, as it has been held, will errors of business judgment constitute fraud. 167La432, 119S417.

1082-1½-New. or misrepresentation as to legal rights, 82 IndA621, 147NE300.

1082-2 126 Or317, 269P981.

1082-3 76CalA278, 244P916; 164Ga 311, 138SE580; 36GaA462, 137SE275; TexCivA 272SW266.

1083-5 30NM566, 240P469.

1083-6 196Cal 8, 235P981; 91CalA664, 267P578; 97CalA452, 275P1005; 164 Ga311, 138SE580; 206 Iowa90, 219NW 44, 47 [citCJ]; 208 Iowa254, 225NW 411; TexCivA 276SW932; TexCivA 285SW949; 36Wyo 12, 252P790.

1083-7 196Cal 8, 235P981; 81CalA164, 253P352; 206 Iowa606, 219NW512; 36 Wyo 12, 252P790.

1083-8 206 Iowa606, 219NW512.

1083-9 196Cal 8, 235P981.

1083-12 76CalA278, 244P916; 203 Iowa1073, 211NW894; 140Wash581, 250 P34, 51ALR39. [a] (7) 206 Iowa606, 219NW512; 140Wash482, 249P984. (8) Seller's statement that cows are free from disease. 74CalA598, 241P422. (9) What business would earn. TexCivA 278SW496. (10) Statement as to value. 312Mo 111, 278SW772. (11) As to adaptability of property for certain uses. 74CalA598, 241P422. [b] (5) 36 F(2d)929; CalA 288P702; 76CalA278, 244P916; 83CalA69, 256P594 (that automobile was 1922 model); 99CalA519, 278P915; 200 Iowa1009, 205NW851; MoA 279SW226; 152Va868, 148SE785.

1084-13 203 Iowa1073, 211NW894; 206 Iowa90, 219NW44; 140Wash581, 250P 34, 51ALR39.

1084-14 140Wash581, 250P34, 51ALR 39.

1085-17½-New. Statement by agent that cost of handling cotton would not exceed two dollars per bale is statement of an opinion. TexCivA 285SW 949.

1085-19 TexCivA 276SW932.

1085-20 74CalA598, 241P422; 82CalA 233, 255P266; 312Mo 111, 278SW772.

1085-22 76CalA278, 244P916; CalA 289P185; 206 Iowa90, 219NW44; MoA 17SW(2d)563; TexCivA 276SW932; 66 Utah128, 240P175, 184 [per Straup, J, dis op citCJ].

1085-23 TexCivA 285SW949, 950 [cit CJ].

1085-24 76CalA278, 244P916; 66Utah 128, 240P175, 184 [per Straup, J, dis. op. citCJ].

1085-25 76CalA278, 244P916.

1086-27 206 Iowa90, 219NW44, 47 [cit CJ].

1086-29 140Wash581, 250P34, 51ALR 39.

1086-32 249Mich500, 229NW587; Tex CivA 29SW(2d)845.

1086-38 140Wash581, 250P34, 51ALR 39.

1087-40 238Mich300, 212NW970, 972 [quotCJ].

1087-41 76CalA278, 244P916; 164Ga

445, 139SE2; 238Mich300, 212NW970, 972 [quotCJ].

1087-43 6F(2d)818; 26F(2d)209; 176 Ark511, 3SW(2d)337; 77Colo 289, 236P 777; 98Fla166, 123S569; 35GaA287, 133 SE67; 45Ida270, 261P683; 88 IndA426, 164NE318; 204 Iowa297, 213NW794; 123Kan82, 254P391; 9LaA137, 119S 483; LaA 129S416; 4LaA312, 317 [cit Cyc]; 252Mass383, 147NE870; 258 Mass172, 154NE583; Mass 168NE812; Mass 171NE732; 240Mich64, 214NW 964; 171Minn492, 214NW666, 668 [cit CJ]; Mo 25SW(2d)84; Mo 25SW(2d) 783; 216AppDiv307, 214NYS759 (fraudulent intent may not be reasonably inferred from representation entirely promissory in character); 134Misc638, 236NYS337; 50ND494, 196NW953, 957 [citCJ]; 141 Okl 169, 284P5; 127 Or 647, 271P996; 131 Or185, 282P546; 298 Pa447, 148A516; 300Pa513, 150A882; 86PaSuper458; 8PaDist&Co 300; Tex CivA 278SW496; TexCivA 286SW273; TexCivA 292SW626; 99Vt262, 133A745; 140Wash482, 249P984; 150Wash615, 274P98; Wash 290P708. [c] **Statutory modification of rule** held not violative of due process. 273US119, 47SCt308, 71L ed569.

1088-44 TexCivA 278SW496; TexCivA 285SW949.

1089-47 [a] (7) Statement by debtor's trustee to creditor that debtor's note would be paid at maturity is expression of opinion. 142Va810, 128SE255.

1090-62 77Colo 289, 236P777; 120Kan 510, 243P1045; 213AppDiv430, 210NYS 346; 191NC814, 133SE193; TexCivA 278SW496.

1090-63 82Mont1, 264P930.

1090-64 191NC814, 133SE193.

1090-68 155SC47, 151SE920.

1090-73 273US119, 47SCt308, 71L ed 569; CalA 286P1050; 206 Iowa90, 219 NW44; 249Mich500, 229NW587; 316 Mo474, 290SW425, 428 [citCJ]; MoA 282SW525, 532 [citCJ]; 228AppDiv396, 240NYS123; 136Misc910, 241NYS229; 66Utah128, 240P175, 180 [perStraup,J, dis. op. citCJ]; 140Wash581, 250P34, 51ALR39. [a] **Promise made by one who knows it to be impossible** is fraudulent promise. CalA 275P828.

1091-75 18F(2d)817; 228AppDiv396, 240NYS123; 66Utah128, 240P175, 180 [perStraup,J, dis op citCJ]; 128Misc 434, 219NYS216.

1091-76 100NJEq389, 135A681; 128 Misc434, 219NYS216.

1091-77 140Wash581, 250P34, 51ALR 39.

1091-82½-New. If fraudulent promise induces a person to act in such way as to affect his legal right or alter his position, to his injury, it is actionable. 136Wash410, 240P355.

1091-86½-New. By statute in some jurisdictions actionable fraud may be predicated on promises to be performed in the future when made as a material inducement to a contract in relation to real estate or corporate stock. TexCivA 274SW166; TexCivA 287SW1107.

1092-87 [a] (14) Other representations. 197NC664, 150SE195.

1092-88 [a] (13) Other representations of material fact. 102CalA16, 282P534. (14) Other instances. 131 Or185, 282P 546.

1092-89 42F(2d)76; 140Wash581, 250 P34, 51ALR39.

1092-91 134SC493, 133SE437, 439 [quotCJ].

1093-93 136Wash410, 240P355; 136 Wash410, 240P355, 359 [quotCJ].

1093-95 13F(2d)544; 105Conn631, 136 A479; 253 IllA491; 254Mass480, 150 NE329; 248Mich312, 226NW869; Mo 25SW(2d)84; 309Mo 638, 274SW815, 823 [citCJ] (misrepresentation of state of mind may constitute misrepresentation of fact); 216AppDiv307, 214NYS 759; NC 142SE363, 366 [citCJ]; 51 ND581, 199NW1017; 49RI 107, 140A 359, 360 [citCJ]; TexCommnA 282SW 570; TexCivA 286SW531; 136Wash410, 240P355, 359 [quotCJ]; 136Wash410, 240P355, 359 [quotCJ].

1093-96 50SD492, 210NW733; 136Wash 410, 240P355, 359 [quotCJ].

1093-97 50SD492, 210NW733; 136Wash 410, 240P355, 359 [quotCJ].

1093-98 200 Iowa1009, 205NW851; 225 AppDiv582, 233NYS535; 136Wash410, 240P355, 359 [quotCJ].

1094-99 176Ark511, 3SW(2d)337; 204 Iowa297, 213NW794, 797 [citCJ]; 120 Kan510, 243P1045; 229Ky649, 17SW (2d)736; 171Minn492, 214NW666, 668 [citCJ]; 83Mont452, 272P998; 103NJEq 145, 142A344; 223AppDiv682, 229NYS 398; 51ND581, 199NW1017; 51ND634, 200NW818; 141 Okl 169, 284P5; 127 Or 647, 271P996; 131 Or185, 282P546; 50 RI 351, 147A882; 134SC493, 133SE437, 439 [quotCJ]; TexCommnA 276SW197; TexCommnA 291SW868; TexCivA 286 SW273; TexCivA 286SW531; TexCivA 291SW296; TexCivA 17SW(2d)128 (but fact that promise is not kept is not evidence that there was no intention to keep it); TexCivA 27SW(2d)616; 136 Wash410, 240P355, 359 [quotCJ]; 136 Wash410, 240P355, 359 [quotCJ]; 140 Wash482, 249P984. But see 309Mo 638, 274SW815. [c] (2) 137Misc177, 243NYS 322. (5) False statement of intent to do act to induce one to enter into agreement is actionable if found knowingly false when made. 216AppDiv307, 214NYS759.

1095-7 85Colo 9, 273P653; Mo 25SW (2d)84; 136Wash410, 240P355, 359 [quotCJ].

1095-9 CalA 289P859; Utah 274P856.

1095-10 254Mass480, 150NE329.

1095-12 [a] **In Texas** statute declaring noncompliance with promise within reasonable time to raise presumption of fraud held violation of due process. CommnA 291SW871. 51ALR1135.

1096-14 96CalA674, 274P766; 309Mo 638, 274SW815; 51ND581, 199NW1017; TexCivA 275SW732.

1096-15 51ND581, 199NW1017.

1096-16 333 Ill 478, 165NE231; MoA 16 SW(2d)749. [c] (2) MoA 24SW(2d) 670.

1096-19 101CalA741, 282P399. [a] (1) 95CalA327, 272P772. [d] **In Texas.**–CommnA 291SW868; CivA 8SW(2d)217. [e] **In Georgia.**–168Ga182, 147SE494.

1097-20½-New. Under some statutes a false promise made as a material inducement to enter into a contract is actionable unless excused as provided by the act. TexCivA 284SW624.

1097-22 164Ga311, 138SE580; 241 IllA 102; 228AppDiv396, 240NYS123.

1097-23 199 Iowa1375, 203NW796.

1098-27 164Ga311, 138SE580; Or 288P 200.

1098-32 [b] 164Ga311, 138SE580; 254 Mass411, 150NE216.

1098-34 103Conn390, 130A794; 253NY 183, 170NE571.

1098-35 103Conn390, 130A794.

1098-42 206 Iowa606, 219NW512.

1099-44 6F(2d)818; 16F(2d)265; 31 Ariz347, 253P626; 77CalA381, 246P824; 104Conn355, 132A913; 105Conn631, 136 A479; Iowa 230NW851; 215Ky606, 286 SW884; 214AppDiv216, 212NYS89; 129 Misc25, 220NYS711; 192NC171, 134SE 406; 192NC585, 135SE449; 22 OhA379, 153NE877; 116 Okl 3, 243P160; 128 Okl 247, 262P654; 130 Okl 142, 265P1054; 66Utah128, 240P175, 180 [citCJ]; Sask [1925] 3DomLR1117 (actual dishonesty).

1100-60 90CalA291, 265P873, 875 [quot Cyc]; 85Colo 9, 273P653.

1101-70 [c] TexCivA 275SW75 (representations of bank's financial condition by officers). [d] **Legal decision, adverse to statements and representations** made prior thereto, cannot establish deceit for which party may be held liable in action for damages. 83Mont452, 272P998.

1101-71 32PortoRico 280, 282 [citCJ].

1102-79 214Ala452, 108S69; 31Ariz347, 253P626; 172Ark1013, 291SW437; Ark 31SW(2d)539; 101CalA566, 281P1091; 241 IllA102; 215Ky606, 286SW884; MoA 273SW192, 193 [quotCJ]; 214 AppDiv216, 212NYS89; 131Misc786, 228NYS166, 170 [citCyc]; 221AppDiv 685, 225NYS358; 116 Okl 3, 243P160; 130 Okl 142, 265P1054; 123 Or563, 263P 75; TexCommnA 282SW571; 66Utah 128, 240P175, 180 [citCJ]; Man [1925] 3DomLR205. [a] (4) Misrepresentation that defendant had good job for plaintiff which paid one hundred and twenty-five dollars but required plaintiff to have his own car was held to be of material fact. 214AppDiv216, 212NYS89.

1103-80 MoA 273SW192, 193 [quotCJ].

1103-81 Me 151A725.

1103-84 MoA 273SW192, 193 [quotCJ].

1104-98 205 Iowa306, 218NW74, 77 [cit CJ]; TexCivA 281SW301.

1104-99 TexCivA 286SW531.

1105-5 MoA 25SW(2d)566.

1105-11 [a] **Representations held material.**–Colo 291P822.

1106-18 15F(2d)306; 31Ariz347, 253P 626; 172Ark1013, 291SW437; 68CalA 341, 229P65; 104Conn355, 132A913; 105 Conn631, 136A479; 239 IllA609; IndA 167NE731; 202 Iowa1049, 210NW447; Iowa 232NW483; 208Ky20, 270SW457; 219Ky848, 294SW805; 221Ky494, 299 SW181; 222Ky405, 300SW885; 154Md 366, 141A121; 83Mont452, 272P998; 129Misc25, 220NYS711; 192NC171, 134 SE406; 192NC585, 135SE449; NC 153 SE858; 23 OhA266, 153NE905; 116 Okl 3, 243P160; 130 Okl 142, 265P1054; 66 Utah128, 240P175, 180 [citCJ]; Wis 231 NW593. [b] (7) Under Code (1923) § 8049, in action for fraud in sale of stock, knowledge of falsity of representations of solvency is not essential. 215 Ala200, 110S286. [c] (3) 35GaA55, 132 SE249. [d] (5) In equity, knowledge is not necessary element of fraud. 203 Iowa1060, 213NW777, 57ALR1165. [e] But see 134Misc518, 235NYS492.

1108-27 219Ky848, 294SW805; 225App Div582, 233NYS535.

1108-28 32Ariz457, 259P884; Ariz 286 P180; 101CalA566, 281P1091; 102CalA 16, 282P534; CalA 291P907; 103Conn 237, 130A108; 36GaA462, 137SE275; 199 Iowa1277, 203NW802; 203 Iowa 1073, 211NW894; 215Ky606, 286SW 884; 219Ky848, 294SW805; 259Mass159, 156NE23; 214AppDiv216, 212NYS89; 192NC585, 135SE449; 32 OhA537, 168 NE547; 133 Okl 145, 271P643; 153 Wash641, 280P41.

1109-33 175Ark839, 1SW(2d)3; 206Cal 526, 275P440; 199 Iowa1277, 203NW 802; 116 Okl 3, 243P160; 131 Or185, 282P546; 66Utah128, 240P175, 184 [per Straup,J dis op., citCJ].

1109-34 231Ky386, 21SW(2d)474; 154 Wash646, 283P179.

1109-35 13F(2d)961; 23F(2d)796; 208 Iowa254, 225NW411; 215Ky606, 286SW 884; 219Ky848, 294SW805; MoA 274 SW926; 116Nebr346, 217NW586, 588 [citCJ]; 216AppDiv322, 214NYS366; 192NC585, 135SE449; 125 Or245, 266P 626; TexCommnA 291SW868; 140Wash 482, 249P984; 143Wash168, 254P1091.

1110-36 218Ala684, 119S685; 264Mass 102, 162NE4; 216AppDiv322, 214NYS 366; 140Wash482, 249P984.

1110-37 103Conn237, 130A108 (without belief in its truth); 206 Iowa252, 220NW 318; TexCivA 30SW(2d)930; 140Wash 482, 249P984.

1110-38 219Ky848, 294SW805; 219 MoA112, 268SW675.

1110-39 218Ala684, 119S685.

1111-41 199 Iowa1277, 203NW802; 203 Iowa1073, 211NW894; 208 Iowa254, 225 NW411.

1112-43 [a] 73CalA622, 238P1054.

1112-45 [a] (2) But fraud will not be imputed to one making representation in reasonable belief that it is true because afterward shown to be untrue. 82 CalA233, 255P266.

1112-46 36F(2d)454.

1112-47 192NC171, 134SE406; 192NC 585, 135SE449. [c] 143Wash168, 254P 1091.

1112-48 13F(2d)327; Ariz 286P180; 101CalA566, 281P1091; 103Conn237, 130 A108; 126Me413, 139A231; NH 149A 78(2dcase); 216AppDiv322, 214NYS 366; 134Misc614, 235NYS617; 192NC 171, 134SE406; 130 Okl 142, 265P1054; Wis 231NW593.

1114-49 192NC171, 134SE406.

1114-53 203 Iowa1073, 211NW894; 104 WVa238, 139SE737.

1114-58 147Miss808, 112S591; 133 Okl 145, 271P643; 141Wash422, 251P868.

1115-64 151Va976, 145SE735.

1115-69 TexCivA 4SW(2d)280, 281 [cit CJ].

1116-83 8F(2d)6; 31Ariz347, 253P626; IndA 167NE731; 219Ky848, 294SW805; 133Misc607, 232NYS519; 22 OhA379, 153NE877; 154Tenn521, 290SW391, 50

ALR1023; 66Utah128, 240P175 [citCJ].

1117-84 15F(2d)306; 19F(2d)260; 31 Ariz347, 253P626; Ark 31SW(2d)539; 239 IllA609; 205 Iowa306, 218NW74; 219Ky848, 294SW805; 168Minn70, 209 NW484; 170Minn366, 212NW892; 100 NJEq92, 135A511; 253NY369, 171NE 574; 225AppDiv582, 233NYS535; 229 AppDiv581, 243NYS179; 192NC585, 135 SE449; NC 153SE858; 22 OhA379, 153 NE877.

1118-91 205 Iowa306, 218NW74.

1119-92 205 Iowa306, 218NW74; 170 Minn366, 212NW892.

1119-94 CalA 275P828; 170Minn366, 212NW892; 99NJEq719, 134A291.

1120-12 31Ariz347, 253P626; 105Conn 631, 136A479; 192NC171, 134SE406; 192NC585, 135SE449.

1121-15 31Ariz347, 253P626; 172Ark 1013, 291SW437; 241Mich524, 217NW 786; 116 Okl 3, 243P160; 130 Okl 142, 265P1054.

1121-16 31Ariz347, 253P626; 196Cal 8, 235P981 (intent to deceive is immaterial if knowingly false statements were made with intent to induce action); 101 CalA566, 281P1091; 104Conn355, 132A 913; 215Ky606, 286SW884; 217Ky148, 289SW215; 198NC730, 153SE316.

1121-20 291Pa60, 139A611.

1121-21 164Ga888, 139SE802, 804 [quot CJ]; 117 Or83, 243P78, 82 [quotCJ].

1122-22 164Ga888, 139SE802, 804 [quot CJ]; 117 Or83, 243P78, 82 [quotCJ].

1122-23 164Ga888, 139SE802, 804 [quot CJ]; 117 Or83, 243P78, 82 [quotCJ].

1122-24 117 Or83, 243P78, 82 [quot CJ].

1122-28 164Ga888, 139SE802; 117 Or 83, 243P78, 82 [quotCJ].

1123-29 96CalA192, 273P1074; 117 Or 83, 243P78, 82 [quotCJ].

1123-30 117 Or83, 243P78, 82 [quot CJ].

1125-63 36F(2d)907(2dcase); 150Md 333, 134A124; TexCivA 293SW599. See also 103Conn237, 130A108.

1126-65 150Md333, 134A124.

1127-72 83 IndA608, 149NE355.

1128-77 TexCivA 284SW624.

1128-80 125 Or7, 265P441, 443 [citCJ]; TexCivA 284SW624; 140Wash482, 249P 984.

1129-84 103Conn237, 130A108; 82NH 157, 131A141; 229AppDiv581, 243NYS 179; 131 Or185, 282P546. [e] **In New Hampshire, however** negligent misrepresentations, whether based on negligent words or negligent deeds, constitute actionable fraud. 82NH157, 131A141.

1130-91 170Minn366, 212NW892, 893 [citCJ]. But see 238Mich5, 213NW152.

1130-92 153Miss237, 120S823. But see Wash 287P878.

1131-7 15F(2d)306; 239Mich229, 214 NW82.

1131-15 [b] (1) 241Mich540, 217NW 783. [c] (1) TexCivA 274SW175; TexCivA 25SW(2d)255. (3) TexCivA 4 SW(2d)230; TexCivA 25SW(2d)255. (10) Other instances. TexCommnA 27 SW(2d)139.

1134-23 308Mo 237, 271SW508, 39ALR 1199.

1134-24 308Mo 237, 271SW508, 39ALR 1199.

1134-32 66Utah128, 240P175 [citCJ].

1135-33 31Ariz347, 253P626; 101CalA 566, 281P1091; 66Utah128, 240P175 [citCJ]; 143Va291, 130SE411; 152Va 868, 148SE785.

1135-34 22F(2d)56; 175Ark1118, 1SW (2d)823; 166Ga71, 142SE543; Iowa 230 NW851; 213Ky529, 281SW513; 264 Mass102, 162NE4; 34 OhA233, 170NE 885; 66Utah128, 240P175 [citCJ]; 99Vt 464, 134A588.

1136-42 196NC538, 146SE231; 155 Wash333, 284P77.

1137-65 95CalA251, 272P791.

1137-78 16F(2d)265; 22F(2d)56; 29 F(2d)707; 31Ariz347, 253P626; 172Ark 1013, 291SW437; 173Ark291, 292SW 664; 208Cal246, 280P962; 68CalA341, 229P65; 74CalA598, 241P422; 82CalA 123, 254P1116; 97CalA329, 275P819; 101CalA566, 281P1091; CalA 289P173; 104Conn355, 132A913; 105Conn631, 136 A479; 36GaA462, 137SE275; 41GaA815, 155SE101; 236 IllA4; 205 Iowa244, 216 NW551; Iowa 230NW851; Kan 290P1; 214Ky488, 283SW947; 215Ky606, 286 SW884; Mass 165NE873; 178Minn574, 228NW152; MoA 24SW(2d)1083; 129 Misc25, 220NYS711; 214AppDiv216, 212 NYS889; 192NC171, 134SE406; 192NC 585, 135SE449; 22 OhA379, 153NE877; 19 OhA161; 116 Okl 3, 243P160; 36 Okl ACR655; 128 Okl 247, 262P654; 130 Okl 142, 265P1054; 50RI 351, 147A882; 151 SC506, 149SE271; TexCivA 276SW932; TexCommnA 282SW570; TexCivA 26SW (2d)1095; TexCivA 32SW(2d)205; Tex CivA 30SW(2d)797; 66Utah128, 240P 175; 99Vt179, 130A591; Vt 147A287; 143Va291, 130SE411; 147Va415, 137SE 496; 135Wash189, 237P305. See also 126Misc263, 212NYS756.

1140-79 236 IllA4; 214Ky488, 283SW 947; 32 OhA537, 168NE547; 143Va291, 130SE411.

1140-80 16F(2d)265.

1140-81 143Va291, 130SE411.

1140-83 TexCommnA 12SW(2d)184; Wis 231NW593.

1140-91 See also 32PortoRico 800.

1140-92 178Minn574, 228NW152. [a] (3) Action for fraud or deceit in sale of corporate stock based on misrepresentations made to securities commission to obtain permission to sell cannot be maintained where plaintiff does not claim to have known or relied on truthfulness of representations. 234Mich436, 208NW 701. [b] **Representations need not have been made directly** to party claiming to have relied thereon. 197Cal 176, 239P 1090.

1141-93 89CalA258, 264P546, 548 [quot CJ]; 150Md52, 132A381.

1141-94 74CalA598, 241P422; 317 Ill 165, 147NE785; 150Md52, 132A381; 220AppDiv609, 222NYS396; 151Wash 535, 276P557.

1141-95 74CalA598, 241P422; 236 IllA4.

1141-97 CalA 291P681; TexCivA 286 SW531. [a] **Fact of reliance** may be inferred from circumstances attending the transaction. 197Cal 176, 239P1090.

1141-97½-New. Complaint alleging fraud in inducing retention of bonds purchased states a cause of action, although plaintiff had not determined on action but was merely lulled into passivity. 222AppDiv181, 225NYS488.

1141-87½-New. As respects liability for fraudulent representations inducing inaction, the test is whether there was a reasonable probability that fraud accomplished the result intended. 222 AppDiv181, 225NYS488.

1141-3 31Ariz347, 253P626; 219Ky 848, 294SW805; 150SC476, 148SE476; TexCivA 274SW1023; TexCivA 278SW 503; 154Wash646, 283P179.

1142-12 104Conn650, 134A62.

1142-13 333 Ill 41, 164NE205; 235 Mich268, 209NW85; 153Miss874, 121S 844; 117 Or173, 242P1114 (purchase of property); 146SC385, 144SE82; TexCivA 276SW932; 36Wyo 12, 252P790, 794 [quotCJ].

1142-14 70CalA108, 232P986.

1143-15 117 Or362, 243P1114, 1116 [citCJ].

1143-16 85Colo 530, 277P306; 83 IndA 647, 149NE449; 50ND347, 195NW573; TexCommnA 12SW(2d)184; TexCivA 278SW503; TexCivA 30SW(2d)397. [a] **One contracting on another's representations** may assume that he was honestly dealt with till receiving contrary knowledge. 36F(2d)948(2dcase).

1143-18 36Wyo 12, 252P790. See also 219AppDiv694, 220NYS545.

1143-19 83Colo 254, 263P406; 83 IndA 647, 149NE449; MoA 14SW(2d)465; 136 Okl 197, 277P231; 36Wyo 12, 252P 790.

1143-20 74CalA598, 241P422.

1143-22 36F(2d)937; 36F(2d)941.

1143-25 226Ky444, 11SW(2d)99. [a] But see 226Ky444, 11SW(2d)99.

1144-28 AlaA 130S516.

1144-30 83 IndA647, 149NE449; 134 Misc518, 235NYS492.

1144-35 [a] (4) AlaA 130S516; 194 Wis85, 216NW134. [b] (2) Purchasers, accepting land without verifying acreage, relied at peril on statement of vendors. 154Wash646, 283P179.

1145-42 But see 238Mich312, 213NW 88.

1145-44 215Ala200, 110S286.

1145-45½-New. That the assignor of a mortgage indorsed a note without recourse is held not to place the duty on the assignee to suspect fraud. 194 Wis85, 216NW134.

1145-46 204Cal 342, 268P342, 345, 58 ALR1176 [citCyc].

1145-50 168Ark1116, 272SW644, 645 [quotCyc].

1146-58 CalA 292P148; 219Ky848, 294 SW805; TexCivA 287SW1101.

1147-65 181Ark876, 28SW(2d)704; 83 Colo 254, 263P406, 407 [quotCJ]; 83 Colo 528, 266P1112, 1113 [citCJ]; 333 Ill 41, 164NE205; 156Miss157, 125S708; 216AppDiv78, 214NYS697; TexCivA 271 SW233; TexCivA 274SW175; 104WVa 238, 139SE737, 738 [citCyc].

1148-71 175Ark839, 1SW(2d)3.

1149-76½-New. Nor will one, erroneously making false representations, inducing another to act, be heard to claim that the latter should have made inquiry. TexCommnA 138W(2d)69.

1150-79 213Ala205, 104S396; 74CalA 598, 241P422; 87Colo 597, 290P281; 35 GaA595, 134SE355; Kan 292P777; 215 Ky606, 286SW884; 333 Ill 41, 164NE 205; 205 Iowa72, 217NW563; 128Me 79, 145A744; 262Mass573, 160NE426; Mass 165NE873; 236Mich147, 210NW 264; 238Mich312, 213NW88; 242Mich 486, 219NW637; 75Mont317, 243P1063, 1065 [citCJ]; 84Mont413, 276P667; 194 NC340, 139SE448; 113 OhSt164, 148NE 641, 643 [citCyc]; 118 Or347, 246P349, 351 [citCyc]; 125 Or7, 265P441; 292 Pa371, 141A241; 147Va415, 137SE496; 152Wash595, 278P676; Wash 286P654 (as affecting right to recover for loss of profits); Can [1927] 2DomLR102. [j] **Duty to investigate rests upon party seeking rescission** amounting to ordinary diligence at law. 164Ga581, 139 SE56.

1151-80 74CalA598, 241P422; 206 Iowa 606, 219NW512; 224Ky659, 6SW(2d) 1084, 1086 [citCJ].

1151-81 215Ky606, 286SW884.

1151-82 80CalA724, 252P770; 96CalA 674, 274P766; 101CalA728, 282P416; 240 IllA567; 215Ky606, 286SW884; Mo 282SW392, 411 [citCJ]; MoA 14SW (2d)465; 132 Okl 70, 269P255; TexCivA 272SW266 (as where representations were made to induce purchase); TexCivA 278SW503; TexCivA 285SW 670. But see 74CalA598, 241P422.

1151-83 99CalA283, 278P462; Mo 282 SW392, 411 [citCJ].

1151-84 70CalA108, 232P986.

1151-86 23F(2d)420; 219Ky848, 294 SW805; Mo 282SW392, 411 [citCJ]; TexCivA 271SW233.

1152-87 23F(2d)420; 70CalA108, 232 P986.

1152-88 70CalA108, 232P986.

1152-89 Mo 282SW392, 411 [citCJ].

1152-92 168Ark1028, 272SW856; CalA 292P148; 111Conn53, 149A237; 42 Ida 369, 246P311; 219Ky848, 294SW805; 156Miss157, 125S708; MoA 279SW226; 227AppDiv337, 238NYS67; TexCivA 274 SW175; 141Wash422, 251P868; 146 Wash31, 261P636. [b] (14) Representations by insured as to number and grade of apples destroyed by fire. 42 Ida369, 246P311.

1153-93 70CalA108, 232P986; 215Ky 606, 286SW884; 219Ky848, 294SW805; 54ND141, 208NW840.

1154-99 70CalA108, 232P986; 80CalA 724, 252P770; 91CalA201, 266P1005; 99CalA360, 278P907; 248Mich312, 226 NW869; 134Wash636, 236P276.

1154-1 70CalA108, 232P986.

1154-4½-New. Deflated estimates of the value of property made by one having superior knowledge are not sufficient basis for a charge of fraud when the other party is put into possession of all data asked for. 32F(2d)634.

1154-4½-New. But the mere fact that the seller has a better opportunity to acquire knowledge is of no consequence, in the absence of a confidential relation. 295Pa501, 145A507.

1154-6 168Ark1028, 272SW856.

1154-9 232 IllA295.

1155-18 312Mo 111, 278SW772 [quot Cyc]; 104WVa238, 139SE737, 738 [citCyc].

1155-19 104WVa238, 139SE737, 738 [citCyc].

1155–21 Mo 282SW392, 411 [quotCJ].
1156–23 215Ala200, 110S286; MoA 30 SW(2d)171.
1156–32 MoA 30SW(2d)171.
1156–38 But see 128Me79, 145A744.
1157–41 164Ga445, 139SE2; 121 Or15, 253P877.
1157–42 218Ala684, 119S685; AlaA 130 S516.
1158–56 164Ga445, 139SE2; 240Mich 156, 215NW350; 136Wash216, 239P 557.
1158–57 240Mich156, 215NW350; 216 AppDiv78, 214NYS697.
1158–62 136Wash216, 239P557. See also 166Minn195, 207NW305.
1158–63 295Pa501, 145A507 (evidence to sustain confidential relation must be certain, and it cannot arise from suspicion or from infrequent or unrelated acts).
1159–64 169Ga187, 149SE910; 207 Iowa11, 219NW503.
1159–65 136Wash216, 239P557. [a] (8) Relation of trust and confidence held established between joint owners of vineyard apart from relationship as partners. 68CalA789, 230P458. (9) Aged husband and wife who reposed confidence in real estate brokers. 136Wash 216, 239P557.
1159–67 136Wash216, 239P557.
1159–68 136Wash216, 239P557.
1160–84 216AppDiv78, 214NYS697.
1161–91 240Mich156, 215NW350.
1161–92 171Ark338, 284SW45.
1161–2 204 Iowa297, 213NW794, 798 [citCJ]; 50SD492, 210NW733; Can [1927] 2DomLR102.
1162–5 234Mich436, 208NW701; Tex CivA 48W(2d)280. [b] Agent, to whom representations are made, is stranger to transaction and cannot rely, in individual capacity, on statements. 228 Ky101, 14SW406.
1162–6 Kan 292P752.
1162–8 74CalA598, 241P422; 75Mont 317, 243P1063, 1065 [quotCJ].
1162–9 74CalA598, 241P422; 75Mont 317, 243P1063, 1065 [quotCJ].
1162–10 40F(2d)899; 74CalA598, 241 P422; 81Colo 358, 255P627; 87Colo 199, 286P865; 47 Ida468, 276P320; 205 Iowa 244, 216NW551; 121Kan55, 245P1012; 75Mont317, 243P1063, 1065 [quot CJ]; 84Mont413, 276P667; 194NC765, 140SE734, 736 [citCJ]; 196NC454, 146 SE64; 116 Or1, 239P196; 118 Or621, 247P765; 119 Or344, 248P849; TexCivA 276SW932; 136Wash216, 239P557; 143 Wash162, 254P846.
1163–13 74CalA598, 241P422.
1163–14 153Miss237, 120S823; 113 Oh 164, 148NE641.
1163–16 203 Iowa1073, 211NW894; Tex CivA 290SW844; 142Wash555, 253P 788.
1163–17 203 Iowa1073, 211NW894; 242 Mich1, 217NW768; 116 Or1, 239P196; 142Wash555, 253P788.
1163–30 97CalA452, 275P1005; 136 Wash216, 239P557.
1163–31 134Wash636, 236P276.
1164–32 136Wash216, 239P557.
1164–35 142Wash128, 252P683.
1164–36 134Wash636, 236P276; 142 Wash128, 252P683. [b] 3Del 259, 138A 392.
1165–47 124Kan575, 261P563, 564 [citCJ]; 249Mich500, 229NW587; 165Minn 117, 205NW885, 886 [citCJ]; 172Minn 412, 215NW833; 299Pa251, 149A488; 104WVa238, 139SE737.
1166–49 124Kan575, 261P563; 165 Minn117, 205NW885, 886 [citCJ]; 12Pa Dist&Co 269. [b] (1) 104WVa238, 139 SE737.
1166–52 NJ 143A819; 298Pa588, 148A 864.
1166–53 124Kan575, 261P563; 165 Minn117, 205NW885; TexCivA 11SW (2d)187.
1167–62 268US121, 45SCt451, 69L ed 876; 13F(2d)932; 214Ala452, 108S69; 31Ariz347, 253P626; 172Ark1013, 291 SW437; 197Cal176, 239P1090; 73CalA 622, 238P1054; 74CalA254, 240P298; 74CalA598, 241P422; 82CalA233, 255P 266; 101CalA20, 281P518(2dcase); CalA 289P874; 104Conn355, 132A913; 105 Conn631, 136A479; 90Fla234, 107S175, 180 [citCJ]; 99Fla795, 128S408; 236 IllA4; 200 Iowa1353, 206NW613; 208 Iowa348, 223NW366; Iowa 231NW387; 215Ky606, 286SW884; 264Mass102, 162 NE4; 165Minn117, 205NW885; 117Minn 386, 225NW281; MoA 28SW(2d)127; 129Misc25, 220NYS711; 214AppDiv216, 212NYS889; 221AppDiv685, 225NYS358; 192NC171, 134SE406; 192NC585, 135 SE449; 54ND141, 208NW840; 22 OhA 379, 153NE877; 116 Okl 3, 243P160; 117 Okl 131, 245P852; 130 Okl 142, 265P 1054; 36 OklACR655; 128 Or359, 274P 116(2case); TexCommnA 282SW570; TexCivA 8SW(2d)230; 66Utah128, 240 P175 [citCJ]; 150Va132, 142SE363, 368 [citCJ]; 155Wash333, 284P77; Alta [1929] 1DomLR992.
1169–66½–New. Where plaintiff tendered stock received and demanded the return of the security deposited therefor, the fact that he did not show that the stock was worth less than represented is not a bar to rescission. 221 AppDiv779, 223NYS642.
1169–68 101CalA566, 281P1091; 136 Misc910, 241NYS229.
1169–69 87CalA28, 261P499, 501 [quot CJ]; 41GaA823, 155SE78 (purported assignment of salary to secure antecedent debt); 258Mass456, 155NE452; 117 Okl 131, 245P852; 151Wash273, 275P561. [a](8) Employer's representation inducing employee to surrender contract of employment. BC [1929] 4DomLR580.
1170–76 But see 4LaA167.
1171–89 32PortoRico 800 (ratification of corporate lease).
1171–94 74CalA598, 241P422; 216App Div307, 214NYS759 (actual loss). See also 218AppDiv313, 218NYS139.
1172–97 41GaA721, 154SE386.
1173–8 19F(2d)412.
1173–16 CalA 275P828.
1174–27 [a] (2) Inducing judgment creditor not to issue execution and not to have receiver appointed warrants recovery of actual damage suffered by reason of debtor's subsequent insolvency. 216AppDiv307, 214NYS759.
1174–32 265Mass413, 164NE609, 62ALR 525.
1175–42 83Colo 254, 263P406; TexCivA 291SW296, 298 [citCJ]. [a] (3) Tex CivA 291SW296, 298 [citCJ].
1176–50 196Cal 8, 235P981.
1176–52 99Vt464, 134A588.
1177–55 13F(2d)932; 47 Ida468, 276P 320; 119 Or344, 248P849. [c] 13F(2d) 932. [d] (3) 13F(2d)932.
1177–61 74CalA254, 240P298; IndA 167NE731.
1178–65 236 IllA4; 216AppDiv307, 214 NYS759 (actual loss must result from fraud).
1178–66 236 IllA4; 218AppDiv313, 218 NYS139; 117 Okl 131, 245P852.
1178–67 236 IllA4; 117 Okl 131, 245P 852.
1180–71 [a] (5) Purchaser of security not obliged to foreclose mortgage. 193 Wis164, 213NW464.
1180–73 213Ky417, 281SW152; 245 Mich24, 222NW215; TexCivA 30SW(2d) 930; 102WVa475, 135SE597.
1180–74 102WVa475, 135SE597.
1180–76 102WVa475, 135SE597.
1182–91 215Ala297, 110S391; 100NJEq 92, 135A511.
1182–93 But see 77CalA18, 246P126; 77CalA78, 246P126.
1183–99½–New. , or as defense, 76CalA 785, 246P121; 77CalA18, 246P126.
1183–4½–New. Defendant held liable for false representations, although plaintiff did not believe falsehood, but accepted it as true to obtain note withheld. 81Colo 413, 255P989.
1183–11 41GaA815, 155SE101.
1187–54 83Colo 528, 266P1112; 202 Iowa1002, 210NW129; 291Pa60, 139A 611.
1187–55 294Pa176, 144A84.
1189–68 253NY183, 170NE571.
1189–74 165Minn117, 205NW885.
1189–76 165Minn117, 205NW885.
1191–92 101NJEq466, 138A385.
1192–3 [a] (1) 215Ala200, 110S286.
1192–4 [b] Absence of dividends after purchase of stock immaterial. 298Pa 588, 148A864.
1192–5 IndA 167NE731.
1192–7 291Pa60, 139A611, 612 [citCJ]; 125 Or111, 265P1094.
1192–9 [a] See also 117 Or583, 245P 510.
1193–16 IndA 167NE731.
1193–19½–New. That a corporation was not authorized to do business in the state does not render false the representation that it is an incorporated, solvent, and successful going concern. 85CalA667, 260P340.
1193–21 250Mich525, 231NW135.
1193–22 253NY183, 170NE571.
1196–58 234Mich331, 207NW895.
1197–76 CalA 289P173. [a] Representation that stock sold is treasury stock is material. MoA 25SW(2d)566.
1197–80 30NM566, 240P469.
1198–81 [a] (1) 30NM566, 240P469.
1198–82 142Wash555, 253P788.
1198–86 30NM566, 240P469 (surreptitious payment to buyer's agent).
1199–97 147Miss808, 112S591.
1199–2½–New. But it has been held a misrepresentation as to acreage will not exist unless the sale is made by the acre and not in gross. TexCivA 13SW (2d)997.
1200–8 142Wash555, 253P788.
1200–11 147Miss808, 112S591.
1200–13 128 Or359, 274P116(2dcase).
1200–15 See also 125 Or7, 265P441. But see 142Wash555, 253P788.
1200–18 54ND141, 208NW840.
1200–19 176Ark448, 3SW(2d)310. [a] (2) In such case buyer need not give notice to seller of intended use. 176 Ark448, 3SW(2d)310. [e] 41F(2d)691.
1201–21 166Minn457, 208NW200.
1201–23 CalA 290P486.
1202–24 80CalA724, 252P770; 97CalA 452, 275P1005; CalA 292P699.
1203–35 54ND141, 208NW840.
1203–44 201 Iowa134, 206NW671; 203 Iowa1073, 211NW894; 142Wash555, 253 P788.
1203–46½–New. False promise and representation of landlord that he would improve farm leased made with no intention of being kept are actionable fraud. TexCivA 286SW531.
1203–47 80CalA724, 252P770; CalA 292P699.
1204–62 232 IllA295; 146Wash31, 261 P636.
1204–66 Mass 169NE913; TexCivA 11 SW(2d)187.
1204–68 232 IllA295.
1205–75 146Wash31, 261P636.
1206–82 232 IllA295.
1207–87 176Ark565, 3SW(2d)322; 206 Iowa90, 219NW44; 231Ky660, 21SW (2d)1019; 170Minn29, 211NW964 [cit CJ]; MoA 21SW(2d)633; MoA 25SW (2d)566; 33 OhA371, 169NE315; 118 Or192, 244P1093; TexCivA 6SW(2d) 387, 390 [citCJ]; 142Wash111, 252P 686; Wis 231NW585; Wis 232NW566; 36Wyo 12, 252P790; Alta [1928] 4Dom LR907. [a] (4) False statement as to time within which claim against insolvent bank may be filed is not actionable. 142Wash111, 252P686.
1207–89 333 Ill 41, 164NE205; MoA 274SW112, 115 [citCJ]; 222MoA964, 6 SW(2d)51, 55 [citCJ]; 33 OhA371, 169 NE315.
1208–91 142Wash111, 252P686.
1208–92 222MoA964, 6SW(2d)51; 142 Wash111, 252P686.
1208–93 Iowa 232NW156.
1208–96 Ala 127S538.
1209–98 118 Or192, 244P1093.
1209–1 321Mo 1, 9SW(2d)967.
1209–2 206 Iowa90, 219NW44; 265 Mass413, 164NE609, 62ALR525; MoA 274SW112, 115 [quotCJ]; 222MoA964, 6SW(2d)51; MoA 27SW(2d)58; 142 Wash111, 252P686; Wis 232NW875.
1209–3 265Mass413, 164NE609, 62ALR 525; 321Mo 1, 9SW(2d)967; MoA 27 SW(2d)58; 142Wash111, 252P686. [b] Relations held not confidential.–Between deputy superintendent of banks in charge of liquidation of insolvent bank and claimant. 142Wash111, 252P686.
1210–16 125Kan657, 266P104.
1210–36 [a] (6) Other instances. Iowa 224NW771.
1210–36½–New. Failure to inform tenant of void order condemning building not fraud. TexCivA 30SW(2d)707.
1211–37 208 Iowa254, 225NW411.
1213–57 118 Or192, 244P1093.
1213–61 118 Or192, 244P1093 [citCJ] (failure to disclose width of railroad right of way).
1215–81 118 Or192, 244P1093 (as af-

fected by width of railroad right of way).

1215–82 CalA 292P148.

1215–84 122Kan74, 251P175, 176 [cit CJ]; 123Kan82, 254P391; 215Ky606, 286SW884; 251Mich469, 232NW229; 128Me79, 145A744; 170Minn466, 212NW939; Mo 25SW(2d)84; MoA 277SW953; 223AppDiv244, 228NYS308; 126Misc845, 214NYS452; 42 OklACR59; 120Or607, 253P531; 121 Or15, 253P877; 123 Or111, 261P72; 50SD492, 210NW733; TexCivA 284SW624; Utah 289P112; 155Wash333, 284P77.

1216–85 36F(2d)907(2dcase); 199 Iowa1375, 203NW796; 122Kan74, 251P175, 176 [citCJ]; 123Kan82, 254P391; 251Mich469, 232NW229; 114 Okl 220, 245P879; 132 Okl 70, 269P255; 42 OklACR59; 120 Or607, 253P531; 123 Or111, 261P72; 124 Or89, 262P948; 292Pa371, 141A241; 50SD492, 210NW733; Utah 289P112; Alta [1928] 1DomLR361.

1216–86 166Minn457, 208NW200; Utah 289P112.

1216–87 242Mich1, 217NW768.

1216–88 199 Iowa1375, 203NW796.

1217–90 215Ky606, 286SW884; 166Minn457, 208NW200; 170Minn466, 212NW939; 42 OklACR59; 50SD492, 210NW733; 66Utah128, 240P175, 181 [per Straup,J,disop, citCJ].

1217–91 170Minn466, 212NW939; 66Utah128, 240P175, 181 [perStraup,J, disop, citCJ].

1217–92 66Utah128, 240P175, 181 [per Straup,J,disop citCJ].

1217–93 NJCh 130A651.

1217–94 36F(2d)938.

1217–99 181Ark876, 28SW(2d)704; 18F(2d)817, 820 [citCJ]; 122Kan74, 251P175; 245Mich24, 222NW215; 169Minn118, 210NW868; 119 Okl 233, 249P398; 124 Or89, 262P948; 50SD492, 210NW733; Vt 145A258(2dcase).

1218–1 170Minn259, 212NW457; 121 Or15, 253P877; Utah 289P112.

1218–2 126Misc845, 214NYS452; 124 Or89, 262P948; 50SD492, 210NW733; Utah 289P112.

1218–3 18F(2d)817, 820 [citCJ]; 80 CalA724, 252P770; 85Colo 9, 273P653; 199 Iowa1375, 203NW796; 122Kan74, 251P175; Me 151A725; MoA 277SW953; TexCivA 274SW175; TexCivA 284SW624. [b] **Statute providing for construction to be placed on affirmation of value** held not to impair right for fraudulent representations as to value. 254Mass411, 150NE216.

1218–6 18F(2d)817, 820 [citCJ]; 249Mich306, 228NW711; 169Minn118, 210NW868; MoA 300SW1020; 132 Okl 70, 269P255; 66Utah128, 240P175, 181 [per Straup,J,dis op,citCJ]; Utah 289P112.

1219–7 124 Or89, 262P948.

1219–8 66Utah128, 240P175, 181 [per Straup,J,dis op,citCJ].

1219–9 169Minn118, 210NW868; 170Minn259, 212NW457; 180Minn88, 230NW262; 119 Okl 233, 249P398; 121 Or15, 253P877; 124 Or89, 262P948.

1219–10 50SD492, 210NW733.

1219–11 215Ky606, 286SW884; 170Minn466, 212NW939.

1219–12 124 Or89, 262P948. [a] **Fact that defendants were experts in value,** and engaged in business of selling securities, negatives claim that statements of value were mere opinions. 126Misc845, 214NYS452.

1219–13 126Misc845, 214NYS452; 121 Or15, 253P877; 66Utah128, 240P175, 181 [perStraup,J,dis op,citCJ].

1220–14 215Ky606, 286SW884; 66Utah128, 240P175, 181 [perStraup,J,dis op, citCJ].

1220–15 124 Or89, 262P948.

1220–16 171Ark1187, 287SW385.

1220–18 IndA 169NE355; 169Minn118, 210NW868; Mo 25SW(2d)84; 124 Or89, 262P948.

1220–19 36F(2d)907(2dcase); 170Minn466, 212NW939.

1220–20 121 Or15, 253P877; 124 Or89, 262P948.

1221–26 201 Iowa134, 206NW671.

1221–34 254Mass411, 150NE216.

1221–39 MoA 25SW(2d)566; 42 Okl ACR59.

1222–40 199 Iowa1375, 203NW796; Utah 289P112 (apartment).

1222–44 114 Okl 220, 245P879.

1222–46 97CalA452, 275P1005; MoA 277SW953 (value of corporate stock); 151Wash535, 276P557. [a] (16) Representation of value of real property complied with false statement that three thousand dollars was least owner would take. 121 Or15, 253P877.

1222–47 169Minn118, 210NW868; 50SD492, 210NW733. [a] **Buyer has right to know true relation to transaction** of one giving opinion of value where opinion is given to influence buyer. 50SD492, 210NW733.

1222–48 169Minn118, 210NW868; 50SD492, 210NW733.

1223–58 170Minn466, 212NW939.

1223–60 115 Okl 53, 241P496.

1223–61 115 Okl 53, 241P496.

1223–65 205 Iowa306, 218NW74. [a] **Doctrine of parity of value** is not applicable in action for damages for alleged misrepresentation as to property exchanged for other specific property. Wash 287P878.

1224–66 Colo 291P822; 156Miss157, 125S708; 126Misc845, 214NYS452; Alta [1928] 1DomLR361. [a] (4) One falsely representing corporate bonds as secured by valuable collateral to induce sale is liable to purchaser for loss. 126Misc845, 214NYS452. [b] (16) Other instances. Kan 292P752.

1224–67 175Ark839, 18SW(2d)3; 223AppDiv244, 228NYS308; 126Misc845, 214NYS452.

1225–77 175Ark839, 18SW(2d)3, 5 [cit Cyc]; 291Pa35, 139A586.

1226–87 120 Or607, 253P531.

1228–99 255 IllA230; 121 Or15, 253P877.

1228–6 SD 224NW937.

1228–9 CalA 286P714.

1228–12 126 Or317, 269P981. [a] (2) Fraud charge not sustained where evidence showed party complaining eventually contracted with party other than he originally intended to. 32PortoRico 800.

1229–13½–New. Representing Massachusetts trust as corporation is not fraudulent or deceitful. 77Colo 289, 236P777.

27 C. J.—5–19 178Minn574, 228NW152 (assignee of mortgage); 222AppDiv533, 226NYS474, 476 [citCJ].

6–26 171Ark1005, 287SW189; Wyo 292P1091.

6–28 228Ky101, 14SW(2d)406.

6–30 228Ky101, 14SW(2d)406. But see 99CalA283, 278P462.

7–47 316Mo 968, 293SW116.

7–51 102CalA16, 282P534; CalA 292P148; 83 IndA647, 149NE449; 203 Iowa203, 212NW547; 214AppDiv378, 212NYS330; 291Pa35, 139A586; TexCivA 272SW550 (seller of land knowing buyer's intention to resell not liable for latter's misrepresentations). [a] (6) That corporate officers have power to sell stock and are stockholders does not render each liable for independent fraud of the other. 215Ala200, 110S286.

9–65 181Ark876, 28SW(2d)704; Tex CivA 272SW266.

9–66 101CalA566, 281P1091; 164Ga888, 139SE802; LaA 124S688; 248Mich312, 226NW869; Mo 18SW(2d)445; 43 OklACR247 [reh pending]; TexCivA 31SW(2d)350.

10–67 164Ga888, 139SE802; 43 Okl ACR247 [reh pending].

10–68 43 OklACR247 [reh pending].

10–69 168Ark1028, 272SW856.

10–72 254Mass274, 150NE186.

10–75½–New. Promoters, officers, directors, and corporation participating in preparing and circulating prospectus issued by corporation are liable for damages resulting therefrom. 126Misc845, 214NYS452.

10–75¼–New. Officer of investment company who was moving spirit in preparing and circulating prospectus for sale of bonds of a corporation is liable, as promoter, for false statements therein. 126Misc845, 214NYS452.

10–75¼–New. Whoever participates in the fraud is liable. 167Minn327, 209NW16.

10–75½–New. One of vendors of a farm, selling an interest to the other vendor before making the deed, but after signing the contract for sale, cannot thereby release himself from liability for fraud practiced on vendee. 215Ky606, 286SW884.

10–75¾–New. Parties acting together and for each other in sale of land are responsible for fraudulent representations made by one of them. 215Ky606, 286SW884.

10–76 203 Iowa203, 212NW547.

11–80 215Ala200, 110S286; 47 Ida542, 277P554(2dcase). [a] (4) Corporation principal of agent who made the fraudulent representation. 192NC48, 133SE174. [c] **Plaintiff's agent conspiring with defendant.–Mo** 31SW(2d)998.

11–82 TexCivA 30SW(2d)930.

11–83 142Wash128, 252P683.

12–86 35F(2d)475; Wash 290P708. [b] **Where claimants have participated in alleged fraud of another claimant,** they may be required to restore fruits of fraud. TexCommnA 16SW(2d)526.

12–87 35F(2d)475; TexCivA 31SW(2d)350.

12–89 220AppDiv541, 221NYS661; 292Pa114, 140A768.

12–91 [a] (4) Party, in exchange of property, suffering loss through misrepresentations both in contract and by agent as to amount of land, may recover damages. TexCivA 297SW588.

12–93½–New. Statutory provisions which apparently make one deriving benefit from fraud practiced by others liable for exemplary as well as actual damages are void as unreasonable and discriminatory. TexCivA 272SW824.

12–93¾–New. No person can claim interest under fraud committed by another. 291Pa175, 139A734.

13–99 96CalA192, 273P1074; 164Ga888, 139SE802.

14–8½–New. An innocent assignor of a leasehold should not be allowed to reap the benefits of an assignment procured by fraudulent representation of the co-assignor. 102CalA16, 282P534.

14–10 13F(2d)794; 83 IndA608, 149NE355; Md 150A801; 249Mich400, 228NW765; 250Mich525, 231NW135; Wash 286P654 (constructive fraud); 192Wis343, 212NW670. [b] 83Colo 254, 263P406.

16–11 [c] **Counterclaim by purchaser of** land for misrepresentation held not action on warranty requiring introduction of deed. 216Ky685, 288SW678.

16–12 206 Iowa35, 217NW879.

16–20 215Ala561, 112S127, 128 [cit Cyc]; 150Md52, 132A381; 167Minn327, 209NW16; MoA 274SW926; TexCivA 32SW(2d)255(2dcase). [b] **Right to rescission** not involved in action for deceit. 258Mass456, 155NE452.

17–22 103Conn390, 130A794; 48 Ida727, 285P472; 83 IndA385, 148NE486; Me 151A667; 309Mo 638, 274SW815; 118 Or192, 244P1093; TexCivA 271SW188.

17–23 309Mo 638, 274SW815; Mo 31SW(2d)998.

17–28½–New. Action for damages in causing plaintiff to substitute an irresponsible corporation in place of defendant as contractee is not inconsistent with action against contractee for breach of contract. 103Conn390, 130A794.

17–29 38GaA509, 144SE400; 39GaA204, 146SE655(1stcase); 40GaA302, 149SE422. But see TexCivA 293SW874.

18–31 [a] See also Ariz 286P180.

18–32 See also 215Ala561, 112S127, 128 [citCyc].

18–33 214Ala452, 108S69; 215Ala561, 112S127; 23AlaA326, 126S622; 80CalA122, 251P657; CalA 290P486; 97Fla392, 121S475; 166Ga71, 142SE543; 40GaA559, 150SE600; 43 Ida64, 249P254; 202 Iowa961, 211NW215; 203 Iowa1073, 211NW894; 206 Iowa35, 217NW879; 157Md411, 146A221; 232Mich251, 205NW155; 234Mich128, 207NW839; 245Mich100, 222NW88; 245Mich348, 222NW743; Mich 233NW421; Minn 233NW241; 309Mo 638, 274SW815; Mo 31SW(2d)998; 84Mont238, 275P267; 102NJL85, 132A106; 100NJEq315, 135A69; 104NJL148, 139A23; 247NY486, 160NE924; 221AppDiv517, 224NYS666; 124Misc906, 210NYS320; 226AppDiv235, 234NYS463; 228AppDiv402, 240NYS139; 230AppDiv505, 245NYS273; 193NC769, 138SE143; 197NC296, 148SE318; 50ND78, 194NW925; 50ND347, 195NW573; 51ND1, 198NW546; 54ND141, 208NW846; 117 Okl 233, 245P850; Okl 291P521; 118 Or192, 244P1093; 119 Or344, 248P849; 120 Or607,

253P531; 125 Or7, 265P441; 285Pa472, 132A579; 141SC98, 139SE190; Tex CommnA 291SW1095; TexCommnA 298 SW520; TexCommnA 12SW(2d)184; TexCivA 281SW646; TexCivA 285SW 683; TexCivA 297SW545; TexCivA 16 SW(2d)969; 69Utah161, 253P196; Vt 146A72; 37Wyo 282, 264P91. [b] **Other statements of rule of election.**—130 Or 590, 280P511.

18-33½-New. , or resort to specific remedy in equity. 136Wash410, 240P 355.

18-34 AlaA 130S516.

18-35 99CalA283, 278P462.

18-38 215Ala561, 112S127, 128 [cit Cyc].

18-40 21F(2d)515; 206 Iowa35, 217 NW879; 232Mich251, 205NW155; 100 NJEq315, 135A69; 247NY486, 160NE 924; 51ND1, 198NW546; ND 233NW 808(2dcase); 136 Okl 214, 277P274; Okl 291P521; 118 Or192, 244P1093; 120 Or607, 253P531; Sask [1929] 2DomLR 556. See also 74CalA254, 240P298. [e] 83Colo 528, 266P1112.

18-42 154Md519, 141A355; 309Mo 638, 274SW815. [b] **In Saskatchewan.**—[1929] 3DomLR676.

18-44 But see 200 Iowa419, 203NW697.

18-44½-New. A person who bases his action on the breach of a contract thereby affirms the contract and may not recover damages for fraud in the inception of the contract. 200 Iowa419, 203 NW697.

18-44¼-New. Vendee of land is not limited to suit on covenant of warranty in deed where acreage is misrepresented by vendor but may sue in action for deceit. 83 IndA608, 149NE355.

19-47½-New. Action for rescission is not necessary to enable a party to recover the value of stock which he was induced by fraud to exchange for worthless stock. 101CalA53, 281P87.

19-49 215Ala200, 110S286; 220Ala41, 126S624; 204Cal141, 267P102; 205Cal 11, 269P612; 78CalA133, 248P295; 148 Md242, 129A218; Mo 31SW(2d)998; MoA 30SW(2d)171; 125Misc836, 211 NYS577; 50ND123, 195NW300 (action on crop insurance policy construed not to be one for damages for fraud); 50 ND347, 195NW573, 575 [citCyc]; Tex CivA 272SW266; TexCivA 280SW622.

20-52 201Cal683, 258P380; 50ND347, 195NW573, 575 [citCyc].

20-55 [b] (2) Minn 231NW826.

20-56 TexCivA 9SW(2d)407. See also 176Ark448, 3SW(2d)310.

20-56½-New. It was not necessary that a partnership should have been fully settled and all matters adjusted between the partners, before suit could be instituted by the purchasers of a partnership interest against one selling such interest for damages for alleged fraudulent representations. 228Ky201, 14SW (2d)755.

20-58 50ND347, 195NW573, 575 [cit Cyc]; TexCivA 272SW266 (doctrine of laches does not apply); 193Wis164, 213 NW464. [a] (5) Right of action for deceit, based on fraudulent representations as to amount due on assigned debt, accrues at time fraudulent representation is made. 214AppDiv395, 212NYS216.

20-61 94CalA327, 271P211.

20-63 250Mich525, 231NW135.

21-72 Iowa 224NW771.

21-76 299Pa251, 149A488. [a] (9) Payment under contract is no defense. 104Conn355, 132A913.

22-81½-New. Where plaintiff sues in tort for fraud to recover money obtained by fraudulent representations, it is no defense that the contract was contrary to public policy. 190NC829, 130SE609.

22-81¼-New. Defendant cannot take advantage of own wrong as defense to action for fraud. 80Colo 420, 252P346.

22-81¼-New. Acceptance of note of corporation after failure for money invested in stock is held no defense to action against officers for fraudulent sale. 215Ala200, 110S286.

22-81¼-New. It is no defense that plaintiff might have discovered fraud if he exercised reasonable diligence and care. 240 IllA567.

22-81¼-New. The purchaser of land who subsequent to purchase pays the contract price by reconveying to the vendor is not thereby necessarily estopped to sue for false representation in the original sale. 203 Iowa1073, 211 NW894.

22-81¼-New. Rights of corporation transferring interest in mine to plaintiff cannot be set up in action against defendant for obtaining money by false representations. 285Pa502, 132A707.

22-81¼-New. Retention of interest in mine does not require deduction from recovery of money obtained by false representation where interest was worthless. 285Pa502, 132A707.

22-81¼-New. Negligence of the party defrauded in signing instruments without reading them is no defense where actual fraud was perpetrated in inducing the signature. 179Minn147, 228NW 554.

22-83 252Mass265, 147NE892.

22-85 103Conn237, 130A108; 90Fla 234, 107S178, 180 [citCJ]; TexCommnA 298SW520; TexCivA 28SW(2d)899. [b] **Waiver of fraud in one contract** does not waive fraud in separate agreement. CalA 289P173.

22-87 155Md178, 141A550 (waiver not shown).

23-89 234Mich128, 207NW839. [c] **Delay in notifying wrongdoer of discovery of fraud** does not constitute ratification or waiver of fraud. 206 Iowa90, 219 NW44; 50ND347, 195NW573, 575 [cit Cyc]; TexCommnA 298SW520; Tex CivA 281SW646; TexCivA 29SW(2d) 893.

23-90 CalA 291P422; 133Misc14, 231 NYS335; TexCivA 28SW(2d)899.

23-91 95CalA327, 272P772; 254Mass 274, 150NE186; 195NC867, 142SE475; 50ND347, 195NW573, 575 [quotCyc]; TexCommnA 298SW520; TexCommnA 12SW(2d)184; TexCivA 293SW632, 637 [citCJ].

23-92 220Ala41, 126S624; CalA 290P 486; 103Conn237, 130A108; 205 Iowa 306, 218NW74; Mass 169NE913; Mo 31SW(2d)998; MoA 30SW(2d)171; 30 NM566, 240P469 (waiver of right to rescind does not necessarily waive right to damages); 50ND347, 195NW573; 285 Pa472, 132A579; TexCommnA 298SW 520; TexCivA 300SW240, 241 [citCyc]. [d] 171Ark338, 284SW45.

23-93 3Del 259, 138A392; 260Mass541, 157NE698; 227AppDiv337, 238NYS67; 56ND786, 219NW472, 474 [citCJ].

24-94 103Conn237, 130A108 (must make payments with knowledge); 41 GaA788, 154SE716; 133Misc14, 231NYS 335.

24-97 166Ga71, 142SE543; 51ND287, 199NW945, 948 [citCJ]; TexCivA 2SW (2d)899.

24-98 206 Iowa35, 217NW879; Mass 169NE913.

24-99 Contra 202 Iowa961, 211NW215.

24-3½-New. Continued performance of the contract by the party injured after knowledge of fraud in procurement of the contract does not of itself establish waiver of right of action for damages. TexCommnA 298SW520.

24-4 202 Iowa961, 211NW215; 42 Okl ACR59; TexCommnA 12SW(2d)184. [b] **Reservation of right to recover damages** does not affect rule. 232Mich699, 206NW323.

24-6 232Mich699, 206NW323.

24-8 42 OklACR59.

25-11 248Mich387, 227NW764. [a] (6) Seller's collection of purchase money note not waiver. 68CalA789, 230P 458.

25-14 103Conn390, 130A794. [a] (5) Buyer of autotruck who made substantial payment before delivery does not lose right to sue for fraud by trying it out after defects became apparent and making several monthly payments. 129 Or342, 277P815.

25-18 199 Iowa1375, 203NW796; 232 Mich699, 206NW323.

26-20 232Mich699, 206NW323; Tex CommnA 12SW(2d)184.

26-21 205Cal 484, 271P744; 99CalA283, 278P462; 203 Iowa1073, 211NW894; 233Mich390, 206NW549; 234Mich128, 207NW839; 240Mich569, 215NW772; TexCivA 271SW233; TexCivA 291SW 587; TexCivA 2SW(2d)899; 143Wash 168, 254P1091. But see 249 IllA456.

26-26 TexCivA 286SW531.

26-29 136Misc910, 241NYS229.

27-37 43 Ida64, 249P254, 256 [citCJ].

27-37½-New. Where contract for sale of tractor was made with plaintiff who purchased it to carry out his part of joint adventure by which he was to share in net proceeds, he is sole proper party in action to recover damages for fraud and other joint adventurer is not necessary party. 213Ala260, 104S509.

27-43 259Mass341, 156NE715, 54ALR 616; 155Md178, 141A550; 50ND78, 194 NW925. [a] (1) 226Ky444, 11SW(2d) 99.

27-45 259Mass341, 156NE715, 54ALR 616; 33 OhA353, 169NE591.

27-47 See also 178Ark1011, 13SW(2d) 314.

27-47½-New. Former ward may be entitled to maintain a suit against one conveying property to his guardian, which the guardian conveyed to plaintiff, for fraudulent resale by inducing the guardian to convey the property to innocent third persons before plaintiff's deed was recorded. 178Ark1011, 13SW(2d) 314. [a] **Where guardian is under bond,** his bondsmen need not be joined. 178Ark1011, 13SW(2d)314.

28-50 200Cal 550, 254P542; 202Cal 143, 259P735; 81CalA164, 253P352; 82Colo 13, 257P247; 43 Ida327, 251P757, 759 [citCJ]; 47 Ida468, 276P320; 219Ky 349, 293SW543, 548 [citCJperClay,CJ]; 239Mich563, 215NW1; 148Miss536, 114 S397; 321Mo 235, 11SW(2d)278, 62ALR 858; Mo 19SW(2d)1049; 49Nev375, 247 P545, 47ALR569; 195NC268, 142SE10; 116 Or641, 242P613; 50RI 84, 145A306; 150Va132, 142SE363; Va 153SE865; W Va 152SE780.

28-51½-New. But where the law presumes fraud as a necessary consequence of alleged facts, they need not be alleged as fraudulent. 30F(2d)313.

28-52 30F(2d)313.

28-57½-New. Where liability is based upon alternate grounds, each must be good. 215Ala200, 110S286.

28-59 117 Or583, 245P510 (in action for loss of deposit in bank by false representation of officer as to solvency of bank).

29-63 43 Ida64, 249P254, 257 [citCJ]; Mass 168NE812. [a] 104Conn355, 132 A913; 36GaA462, 137SE275; 254Mass 480, 150NE329; 168Minn277, 209NW 904; MoA 25SW(2d)566; MoA 28SW (2d)127; 133Misc320, 232NYS124; 117 Okl 233, 245P850; Utah 273P303; 136 Wash410, 240P355; 193Wis164, 213NW 464. [c] **Form of action and relief asked** determine assignability of cause. 43 Ida64, 249P254.

29-64 193Wis382, 214NW366.

29-69 96CalA192, 273P1074.

29-73½-New. To allege that a bill or declaration is for fraud or sounds in fraud means that it rests on actionable wrongdoing. 16F(2d)4.

30-75½-New. Purchaser suing for money paid on land for vendor's fraudulent representation must, if he desires advantage accorded to action ex contractu, disclose fact in petition. MoA 28SW (2d)127.

30-75¼-New. If petition charges that false representations were made to cheat or deceive, action is in tort. MoA 28 SW(2d)127.

30-76 259Mass341, 156NE715, 54ALR 616; 114 Okl 254, 246P595; 126 Okl 93, 258P892; 124 Or468, 263P71; TexCivA 286SW531. But see 150Va386, 143SE 702.

30-77 71CalA389, 235P653; 97CalA153, 274P1001; CalA 286P507; 82Colo 13, 257P247; 87Colo 199, 286P865; Fla 108S299; 38GaA509, 144SE400; 115 Nebr49, 211NW343; 192NC494, 135SE 331; 192NC585, 135SE449; 50RI 84, 145A306; TexCivA 282SW651; Tex CivA 12SW(2d)1102; TexCivA 13SW (2d)997. [a] (1) 6F(2d)536; 13F(2d) 794; 218Ala684, 119S685; Ala 127S 538; 176Ark448, 3SW(2d)310; 178Ark 1011, 13SW(2d)314; CalA 284P496; CalA 286P507; 36GaA462, 137SE275; 40GaA302, 149SE422; 83 IndA85, 147 NE728; IndA 157NE64; IndA 170NE 101; 118Kan761, 236P658; 120Kan452, 243P1052; Kan 292P752; 228Ky201, 14 SW(2d)755; 13LaA646, 127S445; 254

Mass480, 150NE329; 173Minn174, 216 NW943; 222AppDiv134, 225NYS552; 223AppDiv682, 229NYS398; 128Misc 434, 219NYS216; 132Misc838, 230NYS 508; 135Misc550, 239NYS241; 136Misc 913, 242NYS618; 57ND926, 224NW901 (1stcase); 114 Okl 21, 242P1027; 144 Okl 25, 288P942; 43 OklACR247 [reh pending]; 8PaDist&Co 300; TexCivA 275SW137; TexCivA 286SW531; Wash 286P654; YukonT [1926] 4DomLR433. (2) 205Cal 484, 271P744; 221MoA486, 282SW1051. (7) 215Ala200, 110S286; TexCivA 24SW(2d)805. (8) MoA 16SW (2d)749; TexCivA 9SW(2d)407; Wash 287P41. (10) IndA 168NE706. (23) 83Colo 528, 266P1112. (36) Supplemental complaint in foreclosure action by assignee of mortgage alleging concealment by assignor of release of part of land. 194Wis85, 216NW134. (37) Other instances. 83CalA566, 257P199. (38) Performance of conditions need not be alleged. 134Misc459, 234NYS643. (39) Misrepresentation as to condition of bank. 149SC540, 147SE645. (40) Communication of disease to poultry through misrepresentation of cockerels purchased. 99CalA473, 278P902. (41) Falsely representing indebtedness to others. 41 GaA815, 155SE101. [b] (1) 102WVa 475, 135SE597. (6) Petition charging fraud and conspiracy in cheating plaintiff out of his property. TexCivA 282 SW651. (7) Misrepresentation as to connection of broker with transaction. 259Mass341, 156NE715, 54ALR616. (8) Demurrer for uncertainty and ambiguity. 79CalA728, 250P1109. [c] (5) 71 CalA517, 236P660. (8) 28F(2d)720. (16) Misrepresentation as to time when contract would be completed, there being no allegation that any time was agreed upon or that time was of essence of contract and it appearing that remedy, if any, was ex contractu. 213 AppDiv430, 210NYS346. (17) Breach of contract to deliver stock as security for loan. 77Colo 289, 236P777. (18) Foreclosure sale under trust deed. 74 CalA254, 240P298. (19) Breach of contract. 258Mass172, 154NE583. (20) Reconveyance of land. 150Va132, 142SE 363. (21) Fraud inducing purchase of corporate stock and bonds. 241Mich 524, 217NW786. (22) Payment of certified check. 134Misc863, 237NYS230. (23) Other instances. Cal 290P450; 169 Ga495, 150SE828; 130Kan539, 287P 605; 155Wash640, 285P662.

31-78 Fla 108S299.

31-80 MoA 274SW112; 6PaDist&Co 522.

31-81 318 Ill 500, 149NE495.

31-82 16F(2d)4; 24F(2d)617; 215Ala 598, 111S641; IndA 167NE625; 157 Md521, 146A758; Mo 19SW(2d)1049; MoA 285SW741; 114Nebr230, 206NW 770; 102WVa484, 135SE606, 607 [cit CJ]; WVa 152SE780; Alta [1929] 1 DomLR862.

31-85 215Ala200, 110S286.

31-85½-New. It is not necessary to show that defendant was in any way benefited by the making of the representation. 102WVa475, 135SE597.

31-85½-New. or that he was in collusion with some one else who was benefited. 102WVa475, 135SE597.

31-86 215Ala398, 110S822; 36GaA462, 137SE275; 40GaA367, 149SE664; 123 Kan119, 254P381; TexCivA 9SW(2d) 407.

32-87 See also Mo 19SW(2d)1049.

32-91 218Ala49, 117S477.

32-92 But see 146Wash31, 261P636.

32-94 TexCivA 286SW531. [a] (5) Complaint for inducing expenditures. 36GaA462, 137SE275. (6) Other instances. 136Misc910, 241NYS229. [c] **Held insufficient.**-258Mass172, 154NE 583.

32-95 130 Or590, 280P511.

32-96½-New. Representations in pleading should be taken as a whole and should be considered sufficient although some are insufficient. 218Ala49, 117S 477.

33-97 But see 215Ala200, 110S286.

33-1 16F(2d)32; 215Ala398, 110S822; 71CalA617, 235P660; 77Colo 289, 236P 777 (averments insufficient); 35GaA14, 132SE115, 117 [citCyc]; 43 Ida64, 249 P254; 120Kan380, 244P236; 174Minn 356, 219NW451 (sufficient); 130 Or590, 280P511 (in what particulars false). [a] (3) That contract would be made. 36GaA462, 137SE275. (4) As to intention to keep promise. TexCivA 286SW 531. [c] **Allegation of falsity of material representations** charged held sufficient. 43 Ida64, 249P254. [d] **Averments held insufficient.**-MoA 25SW(2d) 566.

33-4 173Minn174, 216NW943.

33-7 28F(2d)720; 35GaA14, 132SE115, 117 [citCyc]; 36GaA462, 137SE275; 221 Ky494, 299SW181; MoA 281SW116; 192NC585, 135SE449.

33-8 178Minn375, 227NW214.

34-17 71CalA517, 235P660; 19SNC730, 153SE316; 192NC585, 135SE449. But see 99CalA473, 278P902. [a] (2) Petition held to sufficiently charge that representations were made with intention to deceive. 309Mo 638, 274SW815. (3) Allegations that representations were made in pursuance of conspiracy to defraud in procuring assignments of contract were held sufficient in absence of motion to make more specific and certain. 309Mo 638, 274SW815.

34-19 178Minn375, 227NW214; 309Mo 638, 274SW815; 149SC540, 147SE645.

35-28 194Wis92, 215NW889.

36-39 215Ala398, 110S822; 97CalA153, 274P1001; 35GaA14, 132SE115, 117 [cit Cyc]; 36GaA462, 137SE275; 258Mass 483, 156NE37; 125 Or111, 265P1094 (sufficient); 135Wash189, 237P305. [a] (2) False promise inducing entry into form lease. TexCivA 286SW531. (3) Other instances. TexCivA 30SW(2d) 397. [b] **Complaint held insufficient** in not alleging reliance. 126Misc263, 212 NYS756.

36-43 335 Ill 363, 167NE54; 291Pa60, 139A611. [b] **In absence of motion to make more definite and specific allegations held sufficient to show** (1) that plaintiff was deceived by misrepresentations. 309Mo 638, 274SW815.

37-47 215Ala398, 110S822; 74CalA254, 240P298; 76CalA785, 246P121; 120Kan 380, 244P236; MoA 30SW(2d)171; 218 AppDiv513, 218NYS631; 128Misc434, 219NYS216; 131Misc786, 228NYS166; 66Utah128, 240P175; 193Wis164, 213 NW464. [f] (14) Other allegations held sufficient. 18F(2d)817; 36GaA462, 137 SE275; IndA 157NE64; 259Mass341, 156NE715, 54ALR616; 128Misc434, 219 NYS216. (15) False representations inducing sale at reduced price. 259Mass 341, 156NE715, 54ALR616. (16) Promise and fraudulent misrepresentations inducing acceptance of notes in lieu of claim for indebtedness. 194Wis92, 215 NW889. [g] (8) 126Misc597, 214NYS 202 (sale of stock). (17) Preventing earning of commissions by broker. 117 Okl 131, 245P852. (18) Dissuading withdrawal of deposit from insolvent bank. 40GaA430, 149SE810(1stcase). [h] **Precise amount of damages** should be alleged in order to warrant recovery. 97CalA153, 274P1001.

37-48 215Ala200, 110S286; 215Ala398, 110S822 (allegation sufficient); TexCivA 9SW(2d)407; 150Va132, 142SE363. [a] (5) Fraud and deceit in inducing plaintiff to purchase security. 193Wis164, 213NW464. [b] (4) Allegation that, when plaintiff was dissuaded from withdrawing deposit, bank was insolvent excluded inference that bank would or could pay anything to plaintiff at time. 40GaA430, 149SE810(1stcase).

38-49 TexCivA 297SW596. [a] (3) Value of property with which plaintiff parted must be alleged and proved in his action to recover damages for fraud inducing contract of exchange of properties. TexCivA 274SW658.

38-50 78CalA472, 248P760.

38-51 78CalA472, 248P760.

38-52 106WVa224, 145SE277.

38-53 [a] **Allegation of buyer of business,** claiming damages for fraudulent sale, as to "thousands of dollars loss" held insufficient. TexCivA 297SW596. [b] **Allegation that business bought by plaintiff** suffered loss from obligation to redeem inferior goods sold "under a guaranty" held insufficient. TexCivA 297SW596.

38-62 MoA 277SW953 (complaint held to show affirmance of contract).

38-64 TexCivA 271SW186.

38-66 TexCivA 12SW(2d)1102.

39-82 54ND141, 208NW840; TexCivA 27SW(2d)616 (necessity of pleading waiver).

39-84 [a] TexCivA 280SW622.

39-84½-New. Where no fraud is alleged there is no necessity of pleading nonfraud. 155Wash280, 284P80.

39-85 151SC506, 149SE271. [a] (2) For example, allegation of buyer of business that he paid certain sum held sufficient to let in proof that he paid shares of stock and promissory notes. TexCivA 297SW596.

39-86 116Tex160, 288SW115, 47ALR 876. [c] **Fraud must be alleged** to be available as defense, as general rule. 138SC295, 136SE222.

39-90½-New. Where the petitioner states a cause of action at law for damages for fraud in the sale of property, plaintiff may show that he rescinded the contract and restored or offered to restore what he received thereunder before commencement of the action or he may show affirmance of the contract and retention of what he received. 117 Okl 233, 245P850.

39-92 153Miss237, 120S823.

40-10 TexCivA 9SW(2d)407.

40-11 94CalA327, 271P211.

40-11½-New. [§ 164a] e. **Matters Not in Issue.** In a purchaser's action against the vendors' broker for deceit in inducing them to execute a land contract, the trial court did not err in refusing to submit or decide the question of the broker's claim for commission against the vendors since the claim for commission neither affected nor was affected by the original cause of action. 226Ky444, 11 SW(2d)99.

40-12 82Colo 13, 257P247, 257 [citCJ]; 339 Ill 400, 171NE504; 233 IllA522; 291 Pa35, 139A586 (proof sufficient); Tex CivA 28SW(2d)219. [b] 82Mont1, 264 P930. [d] (7) Other allegations. Mo 8 SW(2d)1082. [f] (3) In action to recover one thousand dollars for release of mortgage, because of false representation that indebtedness was twenty eight hundred dollars, proof of indebtedness of one thousand dollars held not to defeat action. 212Ala630, 103S 689. (4) Allegation that defendants stated that they would notify plaintiff when money due was paid over, and proof showed that such notice would be given when notice of completion of building was filed, and also when warrants were drawn for payment. CalA 275P828.

41-13 214Ala458, 108S53.

41-14 [a] **Thus** damages could be recovered only for proof of false representations alleged, and for none other. 36 F(2d)928.

41-17 [a] **Under general allegation of fraudulent representation** to employer, transactions of employee, whether carried on alone or with president of employer, can be proved under such allegation. 225AppDiv412, 233NYS404.

41-19½-New. There is no material variance between a pleading alleging that defendant's brokers made false and fraudulent representations and proof that defendant made some of them personally. 142Wash128, 252P683.

42-31½-New. Where the complaint in an action for inducing plaintiff to purhase bank stock by fraudulent representations alleged that the bank was insolvent when plaintiff purchased the stock, and this allegation is denied by the answer, evidence respecting the solvency of the bank at the time of purchase is admissible. Utah 273P303.

42-34½-New. Plaintiff must prove the amount of his damages in accordance with rule of damages applicable to his cause of action. 193Wis164, 213NW464.

42-35 102CalA16, 282P534; 103Conn 390, 130A794; 233 IllA522; 285Pa502, 132A707. [a] 205Cal 484, 271P744.

42-39 CalA 284P719.

43-40 134Misc459, 234NYS643.

43-46 TexCivA 9SW(2d)407.

44-54 153Wash654, 280P60.

44-55 148Va616, 139SE291.

44-57 14F(2d)705; 16F(2d)4; 23F(2d)76; 27F(2d)1; 32F(2d)81; 32F(2d)147; 34F(2d)203; 40F(2d)374; 43F(2d)509; 214Ala567, 105S585; 169Ark210, 275SW524; 174Ark1179, 297SW1012; 180Ark1110, 25SW(2d)438; Ark 31SW(2d)539; 199Cal 641, 250P676; 200Cal 550, 254P542; 205Cal 252, 270P672; 85CalA667, 260P340; 101CalA20, 281P518(2dcase); CalA 293P156; 15DelCh198, 134A97; 93Fla30, 111S525; 42 Ida375, 245P399; 47 Ida468, 276P320; 318 Ill 500, 149NE495; 332 Ill 484, 163NE328; 334 Ill 19, 165NE147; Ill 173NE118; Ill 173NE343; 237 IllA156; 239 IllA515; 250 IllA178; 200 Iowa805, 204NW219; 203 Iowa372, 212NW678; 204 Iowa66, 214NW595; 205 Iowa1203, 219NW517; 207 Iowa11, 219NW503; 206 Iowa606, 219NW512; 206 Iowa252, 220NW318; 121Kan388, 247P443; 129Kan528, 283P638; 209Ky609, 273SW447; 217Ky815, 290SW659; 229Ky396, 17SW(2d)252; 234Ky697, 27SW(2d)975; 164La514, 114S116 (recognizing rule); 6LaA309; 10LaA517, 120S661; 3LaA618; 4LaA537; Me 150A531; 156Md401, 144A486; 234Mich367, 208NW450; 241Mich632, 217NW777; 152Miss413, 118S826; 148Miss536, 114S397; Mo 281SW695; 82Mont1, 264P930, 932 [citCyc]; 86Mont180, 282P1050; 114Nebr230, 206NW770; 102NJL705, 133A408; NJ 146A332; NJ 146A377; NJ 151A858; 98NJEq444, 131A576; 101NJEq664, 139A33; 126Misc845, 214NYS452; 220AppDiv340, 221NYS414; 136Misc500, 241NYS202; 115Okl 233, 242P535; 123 Okl 33, 251P729; 123 Okl 95, 251P1013; 116 Or641, 242P613; 120 Or29, 251P255; 121 Or531, 255P606; 125 Or245, 266P626; 7PaDist &Co654, 655 [quotCJ]; 46Philippine179; 13PortoRicoFed313; 34PortoRico 141; 34PortoRico 338; TexCivA 271SW188; 68Utah585, 251P374; 146Va504, 131SE692; 148Va616, 139SE291; 153Va554, 149SE519; 153Va392, 149SE624; 151Wash344, 275P730; 99WVa544, 130SE142; 106WVa265, 145SE384; 108WVa321, 150SE749; WVa 152SE780; BC [1928] 4DomLR183. See also 83NH370, 142A700.

44-57½-New. by either direct or circumstantial evidence. 126Misc845, 214NYS452.

45-58 85Colo 419, 276P972; 42 Ida375, 245P499; 237 IllA156; 234Mich367, 208NW450; 239Mich1, 214NW113; 241Mich416, 217NW42; 98NJEq444, 131A576; 220AppDiv340, 221NYS414; 28OhA289, 162NE653; 120 Or29, 251P255; 121 Or531, 255P606; 146Va758, 132SE859; 145Va422, 134SE690. [b] **Where in suit on note, purchaser counterclaimed for damages** for misrepresentations, they were not required to show amount they agreed to pay. 228Ky201, 14SW(2d)755.

45-61 98NJEq444, 131A576; 121 Or531, 255P606.

46-62 94CalA493, 271P383; IndA 167NE731; 85Mont78, 277P622, 64ALR772; 121 Or531, 255P606; 127 Or647, 271P996; 49SD619, 208NW170. [a] 68Utah585, 251P374.

46-63 229Ky836, 18SW(2d)285.

46-64 213Ala567, 105S585 (holding, also, that law does not impose on persons duty to presume fraud in absence of suspicious circumstances); 205Cal292, 270P961; 127Me182, 142A481; 115Okl 248, 242P854; 149Wash70, 270P86. [b] **In equity it** suffices to show facts and circumstances from which fraud may be presumed. 115 Okl 248, 242P854; 115 Okl 289, 243P147.

46-64½-New. Intent to deceive cannot be presumed. 224AppDiv336, 230NYS684.

46-66 Ala 130S550; Mass 169NE913; 126Misc845, 214NYS452 (burden of establishing always on asserter). [a] **Thus** on proof of facts from which unavoidable inference of fraud results burden of going forward shifts to defendant, 126Misc845, 214NYS452.

46-66½-New. Under some statutes, a promise is presumed fraudulent when made as inducement to contract with regard to real property and not complied with within a reasonable time. TexCivA 287SW1107.

46-66½-New. Fraud may be presumed from circumstances and conditions of contracting parties. 203 Iowa1060, 213NW777, 57ALR1165.

46-66¼-New. Where one person profits by transaction with another over whom he had influence by reason of confidential relation, the law presumes undue influence in the absence of a showing of independent advice. 99CalA96, 278P488.

46-66½-New. Plaintiff need not prove that each of several defendants was his authorized agent or that the fraudulent representations of each deceived him. Mo 18SW(2d)445.

46-66⅙-New. In an action for deceit in inducing exchange of properties by defendant's representation that the sale value of his farm was double the assessed value, plaintiff is not required to show the value of his farm. MoA 17SW(2d)563.

46-68 219AppDiv694, 220NYS545; 220AppDiv340, 221NYS414; 153Wash620, 280P85. See also 92CalA618, 268P665.

46-70 [a] **Burden of proving fairness, good faith, and adequacy of consideration** is on defendant where position of trust and confidence between parties has been established. 68CalA789, 230A458.

46-72 133 Okl 137, 271P632, 634 [quot CJ].

47-73 258Mass585, 155NE589; 133 Okl 137, 271P632, 634 [quotCJ]. [a] (4) No presumption of confidential relations between experienced buyer of securities and bond dealer. 295Pa501, 145A507. [c] **Evidence held not to establish agency** between plaintiff and dealer, from whom former received commission as gratuity. 10LaA517, 120S661.

47-75 29F(2d)207.

47-76 39F(2d)297; 33Ariz536, 266P1; Iowa 232NW156; 248Mich260, 226NW816(2dcase); 115Nebr49, 211NW343; 126Misc845, 214NYS452; 121 Or531, 255P606, 607 [citCJ]; 298Pa447, 148A516; 155Wash280, 284P80.

47-77½-New. Plaintiff is bound to prove intentional fraud as distinguished from mere breach of duty. 126Misc845, 214NYS452 (such as misjudgment or omission to use care).

47-80 [d] **Party claiming ratification of fraudulent transaction** has burden of proof. 95CalA327, 272P772. [e] **Evidence held insufficient** to establish ratification of contract after knowledge of fraud in inducing written contract. 95CalA327, 272P772.

47-84 74CalA598, 241P422; TexCivA 32SW(2d)205. But see 291Pa35, 139A586.

47-85 CalA 275P828; TexCivA 284SW636.

48-91 6F(2d)818; 36F(2d)912; 74CalA598, 241P422; Iowa 232NW156; 126Misc845, 214NYS452; 145Va536, 134SE670. But see Me 151A725.

48-94 126Misc845, 214NYS452; 145Va536, 134SE670.

48-98 219Ky848, 294SW805; Iowa 232NW156; MoA 281SW116; 126Misc845, 214NYS452; 192NC585, 135SE449.

48-3 82Mont1, 264P930; 136Misc594, 240NYS372; BC [1928] 4DomLR183.

49-4 See also TexCivA 286SW273.

49-8 74CalA598, 241P422; 89CalA258, 264P546; 87Colo 199, 286P865; 229Ky242, 16SW(2d)1057; ND 229NW282; 145Va536, 134SE670.

49-10 89CalA258, 264P546, 548 [quot CJ]. [a] **Mere proof of being defrauded** does not support presumption that person was misled by representations never made to him. 89CalA258, 264P546.

49-13½-New. Evidence showing that plaintiff relied on own judgment relevant. 99Vt179, 130A591.

49-13⅓-New. Evidence that plaintiff relied on own judgment and not on representation held not objectionable as collateral matter. 99Vt179, 130A591.

49-16 76CalA785, 246P121; MoA 30SW(2d)171; TexCivA 32SW(2d)255(2dcase); 66Utah128, 240P175 (right of party defrauded to rely on statements of other party does not relieve former from burden of proving damage); 145Va536, 134SE670; BC [1928] 4DomLR183. [b] **Where land taken in exchange is worthless** no market value can be proved as basis of damages. TexCivA 275SW90. [c] **Essential element in proof** of damages is to show value of property when fraud was discovered. 102NJL161, 130A539. [d] **In action for damages in sale of stock** for misrepresenting value of assets plaintiff must prove how much less property was worth than represented. 6F(2d)818.

50-19 111Conn178, 149A774; 233Mich494, 207NW1.

50-18½-New. In an action for damages for fraud in the sale of a used automobile the automobile will be presumed to be of the value of the amount of a replevin bond given by the buyer to obtain its return when requested. Tex CivA 280SW622.

50-19 14F(2d)705; 215Ala200, 110S286; 77CalA709, 247P597; 93Fla30, 111S525; 238Mich74, 213NW456; 37 Okl ACR539; 38 OklACR61, 63 [citCyc]; 128 Okl 188, 261P941; 128 Or359, 274P116(2dcase); 285Pa472, 132A579; 294Pa347, 144A290; 136SC496, 134SE505; 151SC506, 149SE271; 153SC168, 150SE652(2dcase). [a] **Charge of fraud** renders admissible all evidence necessary to sustain it. 136SC496, 134SE505.

50-20 36F(2d)921; 198Cal 500, 246P53; 215Ky606, 286SW884; 233Mich494, 207NW1; 238Mich74, 213NW456; Tex CivA 284SW643.

50-21 87Colo 199, 286P865; 251 IllA192; Mass 165NE492; 238Mich74, 213NW456; 83Mont452, 272P998; Wis 231NW593. [b] **Common-law rules of evidence.**–TexCivA 271SW188.

50-23 174Ark1179, 297SW1012; CalA 290P486; 251 IllA192; 87 IndA19, 154NE510; 258Mass137, 154NE832; Mo 18SW(2d)445; 38 OklACR61, 63 [citCyc]; 124 Okl 37, 254P64; 137 Okl 218, 278P1111; Pa 151A676; TexCivA 281SW244; TexCivA 4SW(2d)159; Wis 231NW593.

50-24 77CalA709, 247P597. [a] **Evidence held inadmissible.**–247 IllA336.

51-25 Mo 275SW949; 124 Okl 37, 254P64.

51-26 Mo 275SW949.

51-27 [a] Mass 165NE492 (real estate expert). [d] **Final disposition of property** may be shown. 104WVa238, 139SE737. [e] **Condition of shipment after arrival.**–41F(2d)691.

51-28 220Ala194, 124S423; 215Ala200, 110S286; 77CalA709, 247P597; 40GaA302, 149SE422; 203 Iowa1073, 211NW894; Mo 18SW(2d)445. See also 43 OklACR247 [reh pending]. [a] (6) Evidence of acts of parties subsequent to closing of fraudulent deal for exchange of property held admissible. Mo 18SW(2d)445.

52-34 77CalA709, 247P597; 89 IndA393, 166NE615; 136SC496, 134SE505.

52-37 309Mo638, 662, 274SW815 [cit CJ]; 136SC496, 134SE505.

52-38 82Mont1, 264P930, 933 [citCJ].

52-43 88 IndA267, 163NE613; 219Ky848, 294SW805; Wash 287P878. [d] 125 Or245, 266P626.

53-44½-New. Representations made to agent of plaintiff in purchase of stock, where such agent also purchased stock, is held admissible in action for fraudulent sale. 215Ala200, 110S286.

53-46 TexCivA 4SW(2d)280, 281 [cit CJ].

53-50 104WVa238, 139SE737, 741 [cit CJ].

53-50½-New. But where representations at the time of closing transaction are relied on to support claim of fraud, evidence of representations made thereafter is inadmissible. 222AppDiv144, 226NYS184.

53-51 220Ala194, 124S423; 32Ariz457, 259P884. [b] (8) Testimony of water shortage to prove falsity of representations made two years previous as to water supply. 143Wash168, 254P1091.

54-53 140Wash482, 249P984.

54-61 88 IndA267, 163NE613.

54-62 229AppDiv162, 241NYS282.

55-70 [a] (6) In action for false representations in sale of land as to solvency of tenant, pendency of bankruptcy proceedings against him at time may be shown. 285Pa260, 131A858. (7) To show false statements as to property ex-

tending to alley, statement that door could be cut into alley is admissible. 285Pa260, 131A858. (8) Corporation's bankruptcy schedules filed three months after false representations inducing stock purchase. 220AppDiv186, 221NYS 60. (9) Value of stock at time of purchase is held admissible to show financial condition of corporation at that time. 171Ark338, 284SW45.

55–74 317 Ill 165, 147NE785. [a] (2) Evidence, that corporation charged off stock accounts after transactions between plaintiff and defendant corporation, is competent on issue whether stock accounts were actual assets. 317 Ill 165, 147NE785.

55–77 88 IndA267, 163NE613.

55–79 240Mich156, 215NW350.

56–81 219Ky848, 294SW805.

56–86 77CalA709, 247P597. But see 219Ky848, 294SW805.

56–92 MoA 281SW116.

57–95 68CalA789, 230P458; 77CalA709, 247P597; 219Ky848, 294SW805; 205 Iowa306, 218NW74; 156Miss157, 125S 708; 140Wash482, 249P984; 197Wis 233, 221NW650.

57–96 219Ky848, 294SW805.

57–97 219Ky848, 294SW805.

57–98 51ND581, 199NW1017, 1022 [quotCJ].

57–99 51ND581, 199NW1017, 1022 [quotCJ].

57–5 Alta [1930] 2DomLR937(2dcase).

58–26 171Ark338, 284SW45.

58–28 69CalA789, 230P458 (relation of partners).

58–29 220AppDiv269, 221NYS387; Mo 274SW1046.

58–32 220AppDiv269, 221NYS387. [f] (2) Evidence that plaintiff was led into purchase of business by arrangement to become son-in-law of seller. 116Nebr 297, 216NW810.

58–34 CalA 284P719.

58–35 MoA 31SW(2d)117.

59–43 171Ark338, 284SW45.

59–52 41F(2d)514; 220Ala194, 124S 423; Ala 130S550; 228AppDiv402, 240 NYS139; 99Vt464, 134A588. But see 36F(2d)949. [b] 200 Iowa1353, 206NW 613.

60–55 262Mass63, 159NE458; Mo 275 SW949.

60–56½–New. Where sale includes real and personal property for lump sum evidence as to value of personal property is admissible to show value of real property. 99Vt464, 134A588.

60–56¼–New. The price for which an apartment house was formerly sold is inadmissible on the issue of value. 99 CalA742, 279P670.

60–58 224AppDiv336, 230NYS684.

60–62 285Pa472, 132A579.

60–63 285Pa472, 132A579.

60–65 77CalA709, 247P597; 234Mich 385, 208NW609.

60–66 168Ark1028, 272SW856; 76CalA 278, 244P916; 77CalA709, 247P597; Ga 155SE1; 122Kan339, 252P468, 470 [cit CJ]; 232Mich8, 204NW708 [citCJ]; MoA 28SW(2d)127; 225AppDiv582, 233 NYS535; 118 Okl 113, 247P87.

61–67 KanA 247P597.

61–69 Ga 155SE1.

61–70 104Conn73, 131A412; 217Ky 148, 289SW215; 234Mich385, 208NW 609; 118 Okl 113, 247P87.

61–71 29F(2d)233.

61–72 29F(2d)233; 104Conn73, 131A 412. [c] **Evidence offered by defendant** that in suit for similar false representations brought by third party verdict was for defendant held properly excluded. 122Kan695, 253P233.

62–73 97CalA51, 274P1016; 225AppDiv 582, 233NYS535.

62–74 Wis 231NW593.

62–78 217Ky148, 289SW215.

62–83 Wis 231NW593.

62–85 12F(2d)942; 169Ark210, 275SW 524; 79CalA212, 249P41; 93CalA745, 270P374; 206 Iowa252, 220NW318; MoA 28SW(2d)417; 126Misc845, 214 NYS452 (fair preponderance); 28 OhA 289, 162NE653; 128 Okl 247, 262P654; 125 Or245, 266P626; 285Pa472, 132A 579; 34PortoRico 141. See also 27F (2d)1. [a] **Identity of goods** sufficiently shown. 41F(2d)691.

63–87 233 IllA421; 205 Iowa612, 218 NW282; 126Me35, 135A825; 54ND141, 208NW840; 19 OhA243; 49SD619, 208 NW170; TexCivA 278SW476. But see 164La514, 114S116. [e] **Fraud is proved like any other fact,** and under same rules of evidence. TexCivA 278SW476.

63–88 79CalA212, 249P41; 200Cal 550, 254P542; 205Cal 252, 270P672; 54ND 141, 208NW840; 49SD619, 208NW170.

63–89 5F(2d)330; 6F(2d)43; 12F(2d) 942; 37F(2d)633; 82Colo 13, 257P247; 42 Ida375, 245P399; 47 Ida468, 276P 320; 318 Ill 500, 149NE495; 319 Ill 392, 150NE272; 321 Ill 336, 151NE865; 200 Iowa805, 204NW219; 221Ky44, 297SW 936; 9LaA553, 119S288; 128Me79, 145 A744; 148Miss536, 114S397; 152Miss 413, 118S826; 153Miss237, 120S823; Mo 281SW695; 128 Okl 188, 261P941; TexCivA 272SW550; 146Va504, 131SE 692; 145Va536, 134SE670; 145Va422, 134SE690; 153Va554, 149SE519; 153 Va392, 149SE624; Va 154SE538; 135 Wash189, 237P305; 135Wash614, 238P 629; 136Wash426, 240P554; 136Wash 426, 240P554; 143Wash162, 254P846; 153Wash127, 279P581; Wash 290P423.

64–90 CalA 293P156; 82Colo 13, 257P 247; 125Me31, 130A509; 116 Or641, 242 P613; 34PortoRico 509; Wash 290P708.

64–91 14F(2d)705; 40F(2d)374.

64–92 260Mass178, 156NE903; 234 Mich367, 208NW450; Nebr 232NW590; 123 Okl 33, 251P729; 123 Okl 95, 251P 1015; 118 Or135, 246P348; 120 Or29, 251P255; 148Va616, 139SE291; 37Wyo 432, 263P607.

64–93 129Misc25, 220NYS711; Pa 151 A683; 148Va616, 139SE291.

64–94 152Wash595, 278P676.

64–95 319 Ill 392, 150NE272.

64–96 205Cal 252, 270P672.

64–97 164La514, 114S116; 197Wis233, 221NW650.

65–98 [a] **Fraud must reasonably and naturally follow** from circumstances proved. 174Ark179, 297SW1012.

65–1 14F(2d)705; 233 IllA421; 89 IndA393, 166NE615; 164La514, 114S 116; 148Va616, 139SE291. But see 164 La514, 114S116 (proof beyond reasonable doubt held essential).

65–3½–New. Evidence held insufficient to sustain defendant's burden of proving fairness, good faith, and adequacy of consideration where relation of trust and confidence had been established between parties. 68CalA789, 230P458.

65–3½–New. Fraud is established by evidence from which it results as unavoidable inference. 126Misc845, 214 NYS452.

65–7 [d] **Positive testimony of one witness** is sufficient to require case to go to jury but not necessarily sufficient to sustain finding of fraud. 93Fla30, 111S525. See also 5LaA492.

65–10 51Philippine507.

65–11 14F(2d)705; 169Ark210, 275SW 524; 180Ark1110, 25SW(2d)438; 181 Ark876, 28SW(2d)704; 87CalA707, 262 P463; CalA 289P859; 93Fla30, 111S 525; 318 Ill 500, 149NE495; Ill 172NE 164; 124Kan575, 261P563; 213Ky403, 281SW178; 229Ky836, 18SW(2d)285; 234Ky697, 27SW(2d)975; 11LaA27, 122 S503; 13LaA468, 126S733; 126Misc845, 214NYS452; 117 Okl 199, 244P176; 128 Okl 188, 261P941; 37 OklACR539; 143 SC505, 141SE732; TexCivA 28W(2d) 987; 146Va758, 132SE859; 136Wash 426, 240P554; 136Wash426, 240P554. [b] **Constructive fraud** (1) may be inferred from intrinsic nature and subject of bargain itself. 146Va504, 131SE 692. (2) Fraud may be presumed from circumstances and conditions of immediate parties to transaction. 146Va 504, 131SE692.

66–12 169Ark210, 275SW524; 93Fla30, 111S525, 528 [citCJ]; 338 Ill 433, 170 NE199(2dcase); 129Kan528, 283P638.

66–13 12F(2d)942 (not to be lightly inferred); 169Ark210, 275SW524; 199 Cal 641, 250P676; 164La514, 114S116; 126Misc845, 214NYS452.

67–14 35F(2d)475; 169Ark210, 275 SW524; 199Cal 641, 250P676; 85 CalA667, 260P340; 93Fla30, 111S 525; 82Mont1, 264P930; 86Mont 180, 282P1050; 137Misc744, 244NYS 337; 120 Or29, 251P255; 34PortoRico 141; 34PortoRico 338; 145Va422, 134 SE690; 148Va616, 139SE291; 136Wash 426, 240P554; 136Wash432, 240P556; 136Wash426, 240P554.

67–15 14F(2d)705; 79CalA212, 249P 41; 93Fla30, 111S525; 128 Okl 188, 261 P941; 136Wash426, 240P554; 136Wash 432, 240P556; 136Wash426, 240P554; 37Wyo 432, 263P607.

67–16 200Cal 550, 254P542 (dictum); 79CalA212, 249P41.

68–17 145Va422, 134SE690; 148Va 616, 139SE291; 136Wash432, 240P556.

68–19 35F(2d)475; 127 Or647, 271P 996 (circumstances from which no other reasonable inference may be drawn).

68–20 [a] **Inference of fact** (1) cannot be drawn from other inferences of fact or rebuttable presumptions but must arise from circumstances proved. 14F(2d)705. (2) Important inferences, however, may legitimately arise from slight circumstances. 14F(2d)705.

68–24 197NC664, 150SE195.

68–25 16F(2d)926; 114 Okl 13, 242P 760; 130 Okl 142, 265P1054; Tex CommnA 12SW(2d)184; TexCommnA 14SW(2d)812. See also 233 IllA522; 116 Okl 3, 243P160. [b] (4) 101CalA 53, 281P87 (stock); 114Nebr42, 205NW 937; Nebr 209NW507 (farm stock); 144 Okl 25, 288P942; 193Wis343, 214 NW501. (5) IndA 169NE355; Nebr 209NW507. (10) 83Colo 528, 266P1112; 106WVa605, 146SE620. (25) SD 228 NW182. (27) 167Minn327, 209NW16; 125 Or245, 266P626; 152Va868, 148SE 785. (30) 204Cal 515, 269P433; 318 Ill 500, 149NE495; 233 IllA421; 126Me 35, 135A825; 114Nebr88, 206NW155; 219AppDiv694, 220NYS545. (47) Sale of automobile. 70CalA108, 232P986. (48) Fraudulently obtaining from plaintiff team to haul lumber and refusing to compensate him for it. 120 Kan452, 243P1052. (49) Other evidence to show fraud. 174Ark24, 294 SW364; 33Ariz536, 266P1; 81Colo 413, 255P989; 83 IndA647, 149NE449; 254 Mass274, 150NE186; 220AppDiv340, 221NYS414; 54ND811, 211NW687; 285 Pa502, 132A707; 50SD492, 210NW733; TexCivA 281SW244. (50) Sale of business. 118Nebr318, 224NW687. (51) Sale of telephone exchange. MoA 290 SW83. (52) Sale of boiler. CalA 260 P810. (53) Other cases. IndA 168NE 706. (54) Obtaining money. 143 Okl 66, 287P716. (55) Sale of locomotive with knowledge of defects. 151SC506, 149SE271. (56) Inducing surrender of contract of employment. BC [1929] 4DomLR580. (57) Other instances. CalA 284P719. (58) Assignment of lease of furnished apartments infested with vermin. BC [1930] 2DomLR96. (59) Misappropriating partnership property. Cal 292P970. [c] (3) False representation in inducing purchase of stock. 220AppDiv186, 221NYS60. (4) Procuring money by deceit. 248Mich 585, 227NW716. [d] (3) 200 Iowa805, 204NW219; 125 Or240, 266P251; Utah 289P112 (farm); 143Wash162, 254P 846. (9) 240Mich234, 215NW524 (land); 230Ky78, 18SW(2d)866 (motor truck); 197Wis233, 221NW650. (10) 26F(2d)209; 96CalA219, 274P93; 198Cal 500, 246P53; 161Ga877, 132SE 81 (land); 236 IllA4; 199 Iowa1375, 203NW796; 128Me79, 145A744; 239 Mich229, 214NW82; 251Mich548, 232 NW243; 166Minn457, 208NW200 (farm); 103NJEq560, 144A19 (land). (11) 248Mich260, 226NW816(2dcase). (13) Fraud inducing vendee to consent to placing of mortgage on property by vendor. 235Mich481, 209NW576. (14) Sale of cotton. NC 131SE417. (15) Other evidence insufficient to show fraud. 163Ga629, 137SE19; 163La257, 111S697; 115Nebr49, 211NW343; Tex CivA 284SW636. (16) Representations by defendant that his wife had agreed to allow plaintiff right of way over land owned by her. 194NC316, 139SE 455. (17) Exchange of properties. 151Wash344, 275P730. (18) That seller of busses was party to fraud of purchaser on those investing money. 177 Minn295, 225NW146. (19) Other instances. 176Minn559, 223NW925; MoA 24SW(2d)1083; Utah 275P1108. (20) Substitution of defendants as principal debtors by false statements. 208

Cal 246, 280P962. (21) Negotiation of loan. 178Minn103, 226NW192. [e] **Evidence held sufficient to show fiduciary relationship.**–136Wash216, 239P557.

69–26 Mass 171NE732 (statement of opinion); 221AppDiv685, 225NYS358. [a] (2) 78CalA289, 248P281. (4) 70CalA279, 233P354. (8) 124Kan575, 261P563 (bank stock). (18) Other evidence held established. 105Conn631, 136A479; 54ND811, 211NW687; 137Wash311, 242P11. (19) Other instances. 126Or317, 269P981. (20) As to condition of lunch counter property and quantity of stock. 173Minn443, 217NW505. (21) As to productivity of land. 97CalA452, 275P1005. (22) As to quality and value of land. 181Ark876, 28SW(2d)704. (23) As to value of acre. CalA 292P699. [b] (4) MoA 256SW116. (16) Good condition of furniture sold. 116Or641, 242P613. (17) That net income from rooming house was not less than certain amount per month and tenants law-abiding. 116Or641, 242P613. (18) As to fireproofness of engine. 125Me31, 130A509. (19) Statements by which plaintiff was induced to pledge securities for debts of husband. 214Ky488, 283SW947. (20) As to value of land given in exchange. 172Minn381, 215NW676. (21) Sale of corporate stock. 157Md273, 145A609. (22) Other instances. Minn 231NW611; Wash 290P423. [c] (3) As to agency. 263Mass274, 160NE827. [d] (2) That bonds were in fact purchased by bank in behalf of company which had refused to perform former contract to purchase them at higher rate. 309Mo 638, 274SW815. (3) That assignment of contract to purchase bonds was in fact procured by bank for protection of buyer from suit for breach of contract. 309Mo 638, 274SW815. (4) That assignment of contract to purchase bonds was procured under agreement to deliver it to buyer who had refused to perform. 309Mo 638, 274SW815. [e] (2) Withholding information to induce plaintiff to pledge securities for husband's debts. 214Ky488, 283SW947. [f] (1) 124Kan575, 261P563. [g] (1) 155Md178, 141A550. (7) Sale of debentures. 115Nebr49, 211NW343. [h] (5) As to workmanship and foundation of house sold. 91CalA201, 266P1005. [m] 199Iowa1375, 203NW796. [n] **Responsibility of two different parties for deceit** should be established affirmatively as to both, if both are to be penalized, and not in alternative. TexCivA 16SW(2d)855.

69–30 Wash 290P706. [a] (1) 78CalA289, 248P281; 233IllA421; 87IndA19, 154NE510; 247Mich587, 226NW220(2d case); 248Mich312, 226NW869; 229AppDiv162, 241NYS282; 124Or89, 262P948. (14) 177Ark589, 9SW(2d)19; 54ND811, 211NW687. (15) 124Kan575, 261P563. (22) That purpose of defendant was not to purchase bonds for itself but for its codefendant. 309Mo 638, 274SW815. (23) As to amount of cleared land. 118Or192, 244P1093. (24) That defendant had good job for plaintiff. 214AppDiv216, 212NYS889. (25) Financial ability of corporation. 103Conn390, 130A794. (26) As to rental received for real estate. 253Mass440, 149NE123. (27) Statement of intention. 05Conn631, 136A479. (28) As to profitability of business. 239Mich229, 214NW82. (29) As to condition of steam roller sold to plaintiff. 176Ark448, 3SW(2d)310 (though no evidence of condition at time of delivery to carrier). (30) As to other matters. 92CalA127, 267P736; 129Or342, 277P815. (31) Other cases of fraudulent misrepresentations. 101CalA566, 281P1091. (33) Other instances. TexCivA 27SW(2d)616. [b] (6) 224AppDiv336, 230NYS684. (8) 198Cal500, 246P53. (10) 173Ark291, 292SW664; 155Wash333, 284P77. (13) Qualifications of instructors of commercial college and individual character of instruction. 200Iowa1202, 206NW81. (14) As to financial condition of corporation. 77CalA381, 246P824. (15) As to peculiarity of pattern or cost of rug. 120Or607, 253P531. (16) Books of corporation showing false financial condition. 128Me79, 145A744. (17) As to value of used car. 10LaA517, 120S661. (18) As to patent. 28OhA309, 162NE701. (19) Other instances. 85CalA667, 260P340; 298Pa447, 148A516.

70–34 [a] (4) 233IllA421. (15) Statement of intention. 105Conn631, 136A479. (16) As to genuineness of article sold. 220AppDiv609, 222NYS396. (17) As to value of bank stock. 124Kan575, 261P563. (18) Other instances. 157SC464, 154SE657. [b] (8) Value of farm and character of soil. 199Iowa1375, 203NW796. (9) As to extent to which a farm was tilled. 202Iowa1049, 210NW447. (10) On sale of taxicabs. 239Mich229, 214NW82. (11) On transfer of vendor's lien notes. TexCivA 18SW(2d)689.

70–35 [a] **Finding of knowledge of falsity** held justifiable under evidence. 214AppDiv216, 212NYS89.

70–37 44Ida249, 256P523. See also 82CalA233, 255P266.

70–38 39F(2d)297; 83Mont452, 272P998; NJSup 130A15.

70–40 49SD619, 208NW170. [b] (6) Sale of cotton. NC 131SE417. (7) Purchase by part owner of vineyard of other part owner's interest. 68CalA789, 230P458. (8) Other instances. CalA 289P859. [c] (6) To induce plaintiff to part with his money. 105Conn631, 136A479; 214AppDiv216, 212NYS889. (7) Subsequent conduct. CalA 275P828. [e] **Intent not to perform promise** may be inferred from failure, refusal, or evasion of performance. 51ND581, 199NW1017.

71–43 82Mont1, 264P930; 49SD619, 208NW170.

71–46 MoA 272SW85, 90 [quotCJ].

71–47 MoA 272SW85, 90 [quotCJ]. [a] (9) 78CalA289, 248P281. (10) 233IllA421. (28) Induce plaintiff to part with his money. 105Conn631, 136A479; 214AppDiv216, 212NYS889. (29) Solvency of banking firm issuing travelers' checks. 54ND811, 211NW687. (30) Good workmanship on house sold. 91CalA201, 266P1005. (31) Genuineness of orders purchased. 248Mich206, 226NW817(2d case). (32) Amount of mortgage and interest. 179Minn147, 228NW554. (33) Promise to convey premises. 101CalA741, 282P399. (34) Other cases of reliance on representations. 102CalA16, 282P534. (35) Quality of land. CalA 292P699. [b] (1) Mo 30SW(2d)71. (2) 155Wash333, 284P77; 193Wis324, 214NW431. (6) 201Iowa134, 206NW671 (exchange of real estate). (12) As to acreage. MoA 256SW116. [c] (6) That orchard not liable to killing frost. 134Wash636, 236P276. (7) Where evidence failed to show plaintiff's knowledge. 232IllA295. [e] (12) Indebtedness of corporation. 77Colo 289, 236P777. (13) Sale of note and deed of trust. 99CalA742, 279P670. (14) False tests of milk. Vt 147A287. [f] **Evidence held to show** plaintiff was induced to buy corporate bonds by belief in prospectus and oral representations of defendants. 126Misc845, 214NYS452. [g] **Evidence held to show** requisite diligence by plaintiff to ascertain facts. 232IllA295.

71–47½–New. but not from mere finding of fraud where evidence of reliance thereon is conflicting. TexCivA 276SW932.

71–48 MoA 272SW85, 90 [quotCJ]; MoA 272SW85, 90 [quotCJ]. [c] **From evidence of offer of third person to sell stock and divide profits,** it does not follow that purchaser of stock was not also induced to accept it by reason of representations of corporation as to its financial standing. 317Ill165, 147NE785. [d] **Evidence held sufficient to show reliance on own judgment.**–99Vt179, 130A591.

71–49 TexCivA 290SW548. [b] (9) Fraud in sale of travelers' checks. 54ND811, 211NW687. (10) Land title. 233IllA421. (11) Indorsing check. 105Conn631, 136A479. (12) Incurring of pecuniary obligations and payment thereon of more than amount of verdict. 179Minn147, 228NW554. [c] (2) 82CalA233, 255P266; 66Utah128, 240P175. (6) Purchase of cotton. NC 131SE417.

71–50 221AppDiv263, 223NYS127.

71–52 223Ky685, 4SW(2d)677 (concealment); TexCivA 4SW(2d)280, 281 [cit CJ].

72–54 36F(2d)907(2dcase); 171Ark338, 284SW45; 172Ark1013, 291SW437; 174Ark24, 294SW364; 77CalA709, 247P597; CalA 285P1062(2dcase); 163Ga815, 137SE240; 233IllA522; 250IllA359; 202Iowa412, 210NW455; 205Iowa417, 216NW68; 206Iowa90, 219NW44; 207Iowa239, 222NW413; 127Kan673, 275P181; 213Ky417, 281SW152; 219Ky848, 294SW805; 260Mass178, 156NE903; 236Mich90, 210NW222; 240Mich156, 215NW350; 249Mich500, 229NW587; 175Minn190, 220NW550; Minn 233NW241; MoA 16SW(2d)749; NJSup 137A881; 191NC710, 133SE85; 195NC867, 142SE475; 114Okl30, 243P206; 137Okl82, 277P1026; 43OklACR247 [reh pending]; 121Or15, 253P877; 125Or245, 266P626; 126Or317, 269P981; 136SC496, 134SE505; TexCivA 6SW(2d)165; 102WVa475, 135SE597; 193Wis54, 213NW644.

73–55 229Ky836, 18SW(2d)285; 102WVaA475, 135SE597.

73–57 Okl 291P546; Or 288P200. [a] NJSup 143A864. [d] (5) 121Or15, 253P877. (6) 144Okl25, 288P942. (14) 140Wash412, 249P780. (16) 43OklACR247 [reh pending]. (19) 118Kan761, 236P658; 120Kan575, 244P1063. (24) Agreement by president of bank to sell good bankable paper to another bank. 164Minn293, 204NW963. (25) Misrepresentations inducing purchase of stock. 317Ill165, 147NE785. (26) Value of truck at time of sale. 83IndA385, 148NE486. (27) Liability of seller for fraudulent representations as to value. 254Mass411, 150NE216. (28) Misrepresentations inducing taking over of dealers' accounts. 220AppDiv269, 221NYS387. (29) Sale of hogs. 32Ariz457, 259P884. (30) Loan of depositor's money. MoA 287SW835. (31) Inducing contract to purchase carbide plant. TexCivA 12SW(2d)1102. (32) Other instances. Iowa 224NW771. (33) Misrepresentation of model and running condition of exchanged automobile. 198NC98, 150SE676(1stcase).

73–59 [b] 83Mont452, 272P998.

73–60 133Okl137, 271P632; 121Or15, 253P877. [a] (1) 15F(2d)306. (2) Fraud in exchange of coal business for farm land. MoA 299SW105. (3) Fraud in sale of iron mining lease. 43F(2d)786. [b] **Order of nonsuit held erroneous.**–CalA 285P871(1stcase).

73–60½–New. to sustain a demurrer to the evidence. 114Okl13, 242P760.

73–61 161Ga877, 132SE81; 75Mont317, 243P1063 (evidence insufficient to go to jury as to alleged fraudulent representations as to amount of goods stored with defendant); 121Or15, 253P877; 48RI183, 136A763. [a] **Isolating testimony.**–204Iowa297, 213NW794; TexCivA 13SW(2d)139. [b] **Evidence held insufficient for jury** in action for fraud in procuring release. Iowa 232NW156.

73–61½–New. Demurrer to evidence should be sustained where plaintiff fails to prove damages from fraud. MoA 28SW(2d)127.

73–62 174Ark24, 294SW364; 74CalA598, 241P422; 205Iowa417, 216NW68; 205Iowa929, 218NW912 (evidence insufficient for jury); 207Iowa239, 222NW413; 226Ky444, 11SW(2d)99; 235Ky496, 31SW(2d)715; Mass 169NE913; 251Mich469, 232NW229; Mo 31SW(2d)998; MoA 20SW(2d)915; NJSup 137A881; 129Or342, 277P815; 142Wash128, 252P683. See also 22OhA379, 153NE877.

74–67½–New. Whether fraudulent representations were made before or after purchase of stock is for jury. 217Ky148, 289SW215.

74–68 82CalA233, 255P266; 251Mich469, 232NW229; 146Wash31, 261P636.

74–69 80CalA724, 252P770 (for trial court); 81CalA164, 253P352; 89CalA628, 265P378, 384 [citCyc]; CalA 289P185; 206Iowa90, 219NW44; Mass 171

NE732; 228AppDiv396, 240NYS123; TexCivA 275SW75; Wis 231NW593.

74-70 36F(2d)917; 97CalA452, 275P 1005.

74-71 175Ark839, 1SW(2d)3.

75-76 239Mich118, 214NW187.

75-77 77Colo 289, 236P777; 205 Iowa 306, 218NW74; 207 Iowa239, 222NW 413; NJSup 132A500.

75-79 220Ala68, 124S199; 205 Iowa 306, 218NW74; 254Mass411, 150NE216; MoA 20SW(2d)915; 142Wash128, 252 P683; Wash 290P706. [c] (1) 317 Ill 165, 147NE785. (3) As to representation as to talking machines. 254Mass 411, 150NE216.

75-80 83Mont452, 272P998.

75-82 43F(2d)786; 32Ariz457, 259P 884; 97CalA452, 275P1005; 203 Iowa 1073, 211NW894; 207 Iowa239, 222NW 413; Mo 275SW949; MoA 21SW(2d) 946; 83Mont452, 272P998. [a] 175Ark 839, 1SW(2d)3; 248Mich206, 226NW 817(2dcase); TexCommnA 288SW119.

75-85 Ariz 286P180.

75-87 CalA 275P828; 205 Iowa306, 218 NW74; 207 Iowa239, 222NW413; 236 Mich90, 210NW222; 249Mich306, 228 NW711; 177Minn354, 225NW276; 118 Nebr318, 224NW687; 153SC168, 150 SE652(2dcase) (good faith); 140Wash 482, 249P984. [e] **Common intent of two defendants to defraud plaintiff for jury.**–Mo 31SW(2d)998.

76-91 174Ark24, 294SW364; 176Ark 448, 3SW(2d)310; 236Mich90, 210NW 222; Me 151A725; 249Mich306, 228NW 711; 179Minn147, 228NW554; NJSup 134A500; 129 Or342, 277P815; Tex CivA 276SW932; TexCivA 287SW1101; 99Vt464, 134A588; 134Wash636, 236P 276. [d] **Evidence insufficient to take case to jury.**–29F(2d)707.

76-92 TexCivA 276SW932; 99Vt464, 134A588.

76-94 236Mich90, 210NW222.

76-95 36F(2d)932; 126Me413, 139A 231.

77-96 87 IndA19, 154NE510; 199 Iowa 1375, 203NW796; 205 Iowa306, 218NW 74; 207 Iowa239, 222NW413; 127Kan 673, 275P181; 265Mass413, 164NE609, 62ALR525; 118Nebr318, 224NW687; TexCivA 274SW1023 (ordinarily question of fact).

77-99 See also TexCivA 274SW1023.

77-2 207 Iowa239, 222NW413; 236 Mich90, 210NW222; 128 Or359, 274P 116(2dcase).

77-3 127Kan673, 275P181; 128 Or359, 274P116(2dcase); 66Utah128, 240P175. [a] 33Ariz536, 266P1; 233Mich390, 206 NW549; TexCivA 32SW(2d)255(2d case).

77-6 Mass 169NE913. [a] 203 Iowa 1073, 211NW894; Mass 171NE445; 249 NY46, 162NE580; 195NC867, 142SE 475.

77-7 317 Ill 665, 147NE785 (prompt action on discovery of fraud is for jury); NJSup 132A500.

77-9 250Mich469, 231NW109; 251Mich 469, 232NW229; Mo 275SW949; MoA 23SW(2d)1102. [b] (1) 232 IllA295; 125Me31, 130A509; 240Mich156, 215 NW350; MoA 287SW835; 191NC710, 133SE85; 118 Okl 113, 247P87; Utah 273P303. (2) 233Mich23, 206NW491; MoA 20SW(2d)915. (4) Other instances. 36F(2d)932. (7) Fraudulent representation as to rock on farm land. 203 Iowa1073, 211NW894. [c] (1) 83Colo 204, 263P713. (2) Omitting element of ordinary care. 226Ky444, 11SW(2d) 99. [h] **Instructions held erroneous.**–52 ND54, 203NW322. [i] **Instructions erroneously refused.**–MoA 28SW(2d)127.

78-11 309Mo 638, 274SW815 (defendant's instruction properly modified).

78-13 317 Ill 165, 147NE785; 309Mo 638, 274SW815; 118 Okl 113, 247P87; 142Wash128, 252P683. See also 70Utah 385, 260P415.

78-14 72CalA63, 236P344. [a] (8) Confusion of promises with statements of fact. 77Colo 289, 236P777. (9) Liability of defendants for torts of others. 77Colo 289, 236P777. (10) As to right of jury to infer that representations made to other by defendant showed that they were made to plaintiff. 234 Mich385, 208NW609. (11) Other instances. 36F(2d)929. [b] (6) As to necessity of damage. 165Minn117, 205 NW885. (7) As to value of autotruck, purchase of which was alleged to have been induced by fraud. 129 Or342, 277 P815.

78-15 72CalA63, 236P344; Mo 18SW (2d)445. [b] (2) Burden of proving fraud. 114Nebr42, 205NW937.

78-16 199 Iowa1375, 203NW796; MoA 16SW(2d)749.

78-17 317 Ill 165, 147NE785; Mo 274 SW1046; Mo 31SW(2d)998; MoA 300 SW1020; MoA 8SW(2d)1082; 37 Okl ACR543; 70Utah385, 260P415; 136 Wash410, 240P355. [a] (3) Instructions held proper under evidence. Mo 18SW(2d)445 (fraud in exchange of property). [b] 153Miss237, 120S823; 309Mo 638, 274SW815 (not erroneous as submitting case as one for breach of assigned contract instead of action for fraud and deceit); MoA 287SW835. [c] **Instructions properly refused under evidence.**–Mo 18SW(2d)445. [d] **Instructions not warranted by evidence.**–MoA 19 SW(2d)303.

78-18 Utah 273P303.

78-19 TexCivA 295SW323.

78-20 See also 309Mo 638, 274SW815.

79-21½–New. It is error to instruct jury to consider value of personal property in action for fraud in farm sale. 99 Vt464, 134A588.

79-24 Mo 18SW(2d)445. [d] **Instructions held not erroneous.**–Mo 18SW(2d) 445 (not conflicting with petition or proof).

79-25 [b] MoA 274SW926 (instruction erroneous). [c] **Instruction properly refused.**–36F(2d)941.

79-26 203 Iowa1073, 211NW894; 206 Iowa90, 219NW44, 49 [citCJ]. [d] **It is not error to submit to jury statements of opinion where defendant has so interwoven them with statements of fact that separation is practical impossibility.** 201 Iowa1179, 207NW235.

79-27 36F(2d)939.

79-28 104WVa238, 139SE737.

79-29 254Mass411, 150NE216.

79-29½–New. Instruction using word "and" instead of "or" is held erroneous as requiring finding of all fraudulent representations alleged. 217Ky148, 289 SW215.

79-30 297Pa576, 147A830. [e] 199 Iowa1277, 203NW802.

80-32 225AppDiv582, 233NYS535.

80-34 116Nebr346, 217NW586. [a] 241 Mich540, 217NW783.

80-35 175Ark839, 1SW(2d)3.

80-36½–New. An instruction should not authorize recovery as for fraud based on representations merely negligently made. 103Conn237, 130A108.

80-38 36F(2d)907(2dcase); Ala 127S 538; Ala 130S395; 172Ark1013, 291SW 437; MoA 274SW926; MoA 23SW(2d) 1102. [c] **Instruction held erroneous.**–36F(2d)929.

80-41 150Md52, 132A381. [b] 249Mich 306, 228NW711; 165Minn117, 205NW 885. [f] **Instruction held erroneous.**–ND 229NW282. [g] **Instruction properly refused.**–36F(2d)938.

80-41½–New. Court may instruct that if vendee knew actual physical condition of land purchased he did not rely on statements of vendor relating to those conditions. 121Kan55, 245P1012.

81-46 36F(2d)932.

81-48 See also 92CalA127, 267P736; Mo 274SW1046.

81-48½–New. An instruction, placing upon plaintiff the duty of using diligence to discover the untruthfulness of representations if they had the means of discovering it, is erroneous. 241Mich 540, 217NW783.

81-48½–New. An instruction that plaintiff had a right to rely on defendant's statements as manager of a corporation was held proper. MoA 20SW(2d) 915.

81-49 [a] 49SD619, 208NW170. [e] **Instructions held erroneous.**–MoA 19SW (2d)303.

81-55 [a] (16) Charge that proof must be more than mere preponderance, it must be clear and convincing has been held proper when considered with other instructions, one of which defines preponderance of evidence. 135Wash614, 238P629. (17) Requested charge that **fraud needs proof beyond reasonable doubt is held properly refused.** 233 IllA 421.

82-63 [a] (1) 97CalA452, 275P1005; 83CalA69, 256P594; 246Mich117, 224 NW613; TexCivA 272SW266. (4) As to misrepresentations. 96CalA192, 273P 1074. (5) That representation was false. 151Wash535, 276P557. [b] TexCivA 30 SW(2d)797.

82-67 [d] **Finding that future promises, inducing purchase of stock, were made in good faith is held to conflict with finding that they were fake.** Tex CommnA 291SW868.

82-70 [a] **Finding that material and false representations induced purchase** of stock held finding of actionable fraud. TexCommnA 291SW868.

83-75½–New. Finding that vendors breached contract is not inconsistent with finding of fraud on their part. 80 Colo 420, 252P346.

83-75⅓–New. Finding that title to cement passed at time of sale made seller merely general creditor of purchasing corporation. TexCivA 30SW(2d)797.

83-80 236Mich90, 210NW222. [a] (3) Where vendor fraudulently represented that he had deed and was owner of land sold, whereas he had only contract interest, purchaser is entitled to recover at least nominal damages. 233Mich390, 206NW549.

83-84 219Ky848, 294SW805. [b] **Damages held not excessive.**–CalA 290P 486.

83-85 CalA 290P496; 83 IndA647, 149 NE449; 219Ky848, 294SW805; 37 Okl ACR543 (fraud perpetrated by pretending to be physician); TexCivA 281SW 301.

84-87 40F(2d)894; 130 Or139, 279P 289. [b] (6) Damages by reason of assessment on bank stock purchased in reliance upon representations that bank was solvent and that stock was worth amount paid therefor. TexCivA 274SW 175. [c] (7) Other instances. Minn231 NW611.

85-90 Minn 231NW611.

85-93 233Mich390, 206NW549, 551 [quotCJ]; 130 Or139, 279P289.

85-94 233Mich390, 206NW549, 551 [quotCJ].

85-95 233Mich390, 206NW549, 551 [quotCJ]; TexCommnA 12SW(2d)184.

85-96 233Mich390, 206NW549, 551 [quotCJ].

85-97 233Mich390, 206NW549, 551 [quotCJ].

85-98 233Mich390, 206NW549, 551 [quotCJ].

86-99 233Mich390, 206NW549, 551 [quotCJ].

86-4 222AppDiv533, 226NYS474.

86-5 232Mich8, 204NW708 (rule more liberal in respect to damages for tort than for breach of contract).

86-7 26F(2d)209.

87-10 CalA 290P496; 130 Or139, 279P 289.

87-15 130Kan785, 288P749.

88-24 But see 108Conn511, 144A43.

88-25 Cal 291P167.

88-28 [a] **In action for representation that lots were restricted against colored people,** purchasers cannot recover for annoyances from Japanese. Colo 291P 822.

88-30 124Kan575, 261P563.

89-31 91CalA201, 266P1005.

89-32 Mass 170NE467.

89-35 13F(2d)932; 31F(2d)932; Ala 130S395; 204Cal 529, 269P453; 103 Conn390, 130A794; 124Kan575, 261P 563; 219Ky848, 294SW805; 216Ky685, 288SW678; 309Mo 638, 274SW815; 100 NJEq315, 135A69 (dictum); 216AppDiv 307, 214NYS759 (indemnity for actual pecuniary loss sustained); 126Misc367, 213NYS130 (indemnity for actual loss directly resulting from fraud); SD 231 NW943 (measure of damages relating to conversion held inapplicable); TexCommnA 27SW(2d)139; TexCivA 272SW266; TexCivA 284SW624; 154 Wash490, 282P913; 107WVa406, 148 SE382. [a] (6) Measure of damages for fraudulently representing nature of instruction given to students in commercial college is difference between value of represented instruction and value of instruction actually received. 200 Iowa

202, 206NW81. (7) Damages for inducing plaintiff to accept less stock than he was entitled to, where he and defendant organized company, are difference in value at time of fraud and value thereafter. **IndA** 157NE64. (8) Where assignor of mortgage concealed release of part of mortgaged land, allowance of damages only for value of land released is held proper. 194Wis85, 216 NW134. [b] (2) One, induced to make investment by fraudulent promises, was held entitled to recover amount invested. 96CalA674, 274P766.

90-36 103Conn390, 130A794 (defendant liable for losses presumed to be within contemplation of parties at time).

90-37 13F(2d)932; 132 Okl 169, 270P 17. [a] (5) Joint adventurer suing for fraud in sale of tractor to him is not limited to his share of profits where other joint adventurer relied on him for losses resulting from failure to buy proper machinery. 213Ala260, 104S509. (6) Measure for withholding property exchanged is reasonable market value thereof at time of exchange. **Mo** 18SW (2d)445. [b] **Values placed on property** to determine difference to be paid in exchange are held not binding on either party in action of fraud. 114Nebr150, 211NW19.

90-38 13F(2d)932; **SD** 231NW943 (measure of damages for constructive fraud held inapplicable). See also 216 AppDiv307, 214NYS759. [a] (3) Damages for debtor's false representation that he would retain property, to induce creditor to refrain from issuing execution is actual loss depended on property which could have been reached, plus expenses and interests. 216App Div307, 214NYS759. [d] **Damages not excessive.**–83 IndA85, 147NE728.

91-39½-New. In an action to recover damages for false representations inducing an exchange of property the true measure of damages is difference between value of property parted with by person defrauded and value of property received by him. **TexCivA** 274SW 658.

91-40 **Mo** 18SW(2d)445.

91-42 But see 177Ark589, 9SW(2d)19.

91-43 124Kan575, 261P563; 54ND141, 208NW840; 193Wis164, 213NW464, 467 [citCJ]. But see **TexCivA** 11SW(2d)608.

92-46 [a] (5) One sued for damages for deceit in exchange of properties may recoup damages suffered by him through fraud of plaintiff. 197Cal 176, 239P1090.

92-51 30F(2d)285 [certiorari den 49 SCt265(3dcase)]; 68CalA789, 230P458; 207 Iowa711, 223NW541; 293Pa577, 143 A202; Tex 285SW683.

92-52 30F(2d)285 [certiorari den 279 US844, 49SCt265(3dcase), 73Led989]; 262Mass63, 159NE458.

92-57 124Kan575, 261P563 (exchange).

92-57½-New. or the face value of worthless bank stock received in payment, 124Kan575, 261P563.

92-60 215Ala561, 112S127; 78CalA472, 248P760; 90CalA193, 265P870; 102 CalA16, 282P534; CalA 284P496; CalA 290P591(2dcase); CalA 292P699; 103 Conn759, 131A404; 108Conn511, 144A 43; 35GaA668, 134SE350, 351 [citCJ]; 232 IllA295; 83 IndA385, 148NE486; 200 Iowa1009, 205NW851; 200 Iowa 1202, 206NW81; 200 Iowa1353, 206NW 613; 124Kan575, 261P563; 219Ky848, 294SW805; 241Mich279, 217NW26; 173 Minn174, 216NW943; 173Minn617, 216 NW944; MoA 277SW953; MoA 298SW 101; MoA 28SW(2d)127; 114Nebr42, 205NW937; 116Nebr297, 216NW810; 197NC296, 148SE318; 50ND573, 195NW 573; 52ND54, 203NW322; 54ND141, 208NW840; 33 OhA353, 169NE591; 136 Okl 214, 277P274; 49SD135, 206NW695; TexCivA 284SW624; TexCivA 284SW 643; TexCivA 299SW949; 142Wash128, 252P683; Wash 286P654; Wash 287P 878. See also Mass 173NE551; Mich 233 NW177. [b] **Where purchase did not pay full amount** then amount not paid is to be deducted from measure of damages. 83 IndA385, 148NE486.

94-61 103Conn759, 131A404. [a] 78 CalA472, 248P760.

94-65 124Kan575, 261P563; MoA 300 SW1020; 114Nebr42, 205NW937; 140 Wash650, 250P59.

94-67½-New. In suit for fraud in procuring assignment of contract by which defendant was to buy at par city bonds deliverable to plaintiff for paving, measure of plaintiff's damages is value of his contract with defendant which is difference between price of bonds in contract and price plaintiff was obliged to sell them for. 309Mo 638, 274SW815.

94-67⅓-New. Test of damage for fraud in representing automobile sold is fair market value. 221AppDiv685, 225NYS 358.

95-77 246Mich465, 224NW630; Oh 171 NE593; 151Va976, 145SE735.

95-84 116Nebr297, 216NW810.

96-92 Me 151A725; 242Mich198, 218 NW761 (mortgage); 248Mich387, 227 NW764 (stock); 49SD135, 206NW695.

96-96 13F(2d)932; 26F(2d)209; IndA 167NE731; 215Ky606, 286SW884; 126 Misc367, 213NYS130 (plus interest); 126Misc845, 214NYS452 (difference between amount fixed as selling price and actual value); 298Pa588, 148A864; 299 Pa251, 149A488 (where purchaser does not promptly rescind); TexCivA 32SW (2d)255(2dcase).

96-97 205Cal 484, 271P744; Nebr 209 NW507, 510 [quotCJ]; 125Misc836, 211 NYS577; TexCivA 275SW90; TexCivA 32SW(2d)255(2dcase).

97-8½-New. ,,or, it has been held, the face value of the worthless bank stock received by plaintiff. 124Kan575, 261 P563.

97-11 181Ark876, 28SW(2d)704.

97-13 76CalA321, 244P958; 78CalA 472, 248P760; CalA 288P702. [b] **Additional damage.**–78CalA472, 248P760.

97-14 76CalA321, 244P958.

98-21 Colo 291P822.

98-25 101NJEq279, 137A408.

98-27 103Conn390, 130A794.

98-30 247NY84, 159NE870.

98-31 247NY84, 159NE870; 224AppDiv 29, 229NYS545 (purchase of stock); 227 AppDiv51, 236NYS87 (measure of damage does not represent down payment made on contract); 228AppDiv402, 240 NYS139 (with interest from date of purchase). [a] **Rule not always applied.**–247NY84, 159NE870.

98-33 TexCivA 275SW90; TexCivA 11 SW(2d)608.

98-35 TexCivA 275SW90; TexCivA 25 SW(2d)255. But see TexCivA 11SW(2d) 250. [c] **Where land had no ascertainable market value,** its intrinsic value considered in determining measure of damages. TexCivA 275SW90. [d] **No market value** could be proved for land wholly worthless. TexCivA 275SW90.

99-36 TexCivA 280SW622.

99-42 TexCivA 29SW(2d)434.

99-48 TexCivA 295SW323.

99-51 TexCivA 11SW(2d)187.

100-54 [b] (3) Where false representation is as to street frontage, measure of damage is difference between value as it is and value as represented. 215 Ala561, 112S127.

100-57 TexCivA 13SW(2d)997.

100-59 99Vt464, 134A588.

101-73½-New. Where the vendor falsely represented that he was owner in fee whereas he had only a contract interest, the purchaser affirming the contract is entitled to recover the damages caused by the fraud, not what he parted with. 233Mich390, 206NW549.

101-73⅓-New. In such case, where the owner of the fee took the land under writ of restitution, the purchaser is entitled to recover the value of the property less the amount owing on the purchase price and the amount realized from the land during the period of possession. 233Mich390, 206NW549.

102-91 49SD135, 206NW695.

103-4 299Pa251, 149A488.

103-5 TexCivA 4SW(2d)280, 281 [cit CJ].

103-8 [a] **Principal and interest of notes is recoverable.**–Where notes are taken because of fraud of indorser. 250 Mich525, 231NW135.

103-10½-New. Fraudulent representations inducing contract "expenditures made and obligated to make" recoverable as part of loss not exceeding contract price, subject to deduction of sums reasonably to be realized under contract. 103Conn390, 130A794.

103-10⅓-New. Seller of business must reimburse buyer for moneys paid seller's creditors beyond amount seller represented to be his indebtedness. WVa 153SE252.

103-11 207Cal 102, 276P990.

103-13 130 Orl139, 279P289.

104-16½-New. In an action for falsely representing to plaintiff that his claim under the Workmen's Compensation Act had been filed in apt time, the jury should be guided by the provisions of the act in arriving at an actual amount of loss. 251 IllA192.

104-25 246Mich117, 224NW613.

104-26 246Mich117, 224NW613.

104-26½-New. Damages, to which purchasers of an interest in a partnership were entitled by reason of misrepresentation by the seller as to the partnership affairs, was the difference between the fair market value of interest at the time of the purchase if the affairs of the partnership had been as represented, and the value of such interest at the time with condition of partnership as it actually was. 228Ky201, 14SW (2d)755.

104-27 6PaDist&Co 522.

104-29 233 IllA421; 37 OklACR543; 6 PaDist&Co 522; TexCivA 30SW(2d)397.

105-30 233 IllA421; TexCivA 282SW 651.

105-32 TexCivA 282SW651.

105-38 131Misc786, 228NYS166.

105-39 200 Iowa1202, 206NW81; Tex CivA 290SW548.

105-40 TexCivA 275SW90. [a] (3) In arriving at basis for measure of damages consisting of difference between value of land parted with in exchange and value of land received in exchange it is necessary to prove values of respective lands in order to sustain recovery. TexCivA 275SW90. (4) If lands have no market value their intrinsic value must be shown. TexCivA 275 SW90.

106-42 213Ala260, 104S509; Me 151A 725. [a] (5) Evidence of cost in making and marketing syrup is admissible to determine loss per gallon on portion of crop of sorghum cane lost to plaintiff for want of power of tractor purchased by plaintiff. 213Ala260, 104S 509.

106-43 213Ala260, 104S509.

107-57 Me 151A725; 221AppDiv263, 223NYS127; Oh 171NE593.

107-67 TexCivA 275SW90. Contra Mo 274SW1046.

108-71½-New. Defendant's statement as to value of corporate assets is proof of value of stock. 125Misc836, 211NYS 577.

108-71⅓-New. Events subsequent to sale induced by fraud may be considered in determining value of bonds at time of sale, on issue of damages. 126 Misc845, 214NYS452.

108-72 230Ky78, 18SW(2d)866. But see TexCivA 284SW643.

108-74 122Kan695, 253P233; MoA 8 SW(2d)1082. [a] **Buyer of business** must show market value of stock and note given in exchange for business. TexCivA 297SW596.

108-75 251Mich469, 232NW229.

108-76½-New. If land has no ascertainable market value its intrinsic value may be shown. TexCivA 275SW90.

108-76⅓-New. This may be shown by evidence of its character, location, use, availability, rental value and such other facts and circumstances as would influence a person buying the land in arriving at its value. TexCivA 275SW90.

108-76¼-New. Evidence of the actual or intrinsic value of a used machine is admissible in an action for fraud based on representations that it was new. TexCivA 284SW643.

108-77 MoA 290SW83.

108-78 [a] (1) 78CalA289, 248P281; CalA 288P702; 239Mich118, 214NW187; 229AppDiv162, 241NYS282; 50ND78, 194NW925; 100Vt464, 139A210. (3) To support finding that stock bought was of less value than price paid therefor. 125Misc836, 211NYS577. [b] 73CalA 622, 238P1054; 78CalA472, 248P760; 232 IllA327; 177Minn354, 225NW276;

Minn 232NW739; 104NJL65, 139A31; TexCivA 272SW550; 142Wash128, 252 P683.

108-84 68CalA789, 230P458.

108-86½-New. In case of exchange of property, values placed on properties by party to determine balance to be paid is not binding in case of fraud. Nebr 209NW507.

108-87 Colo 291P822; 216AppDiv307, 214NYS759; 221AppDiv263, 223NYS 127.

109-91½-New. Where evidence is sufficient if believed to establish all material averments of sufficiently pleaded cause of action for deceit, case should be submitted to jury. 13F(2d)794.

109-91¼-New. Whether confidential relation existed between the parties is question for the jury. IndA 157NE64.

109-91¾-New. In the absence of evidence upon which damages may be computed the court properly directs a verdict for defendant. 26F(2d)209.

109-92 [a] 41F(2d)691; 197Cal 176, 239P1090; 121Kan18, 245P1041; 232 Mich599, 206NW491; 165Minn241, 206 NW293; 173Minn617, 216NW944; 37 OklACR548; 121 Or15, 253P877. [b] 213Ala260, 104S509 (properly refused); 200 Iowa495, 203NW794; 262Mass63, 159NE458; MoA 17SW(2d)563; MoA 28SW(2d)127; 116Nebr297, 216NW810.

109-95 197Cal 176, 239P1090 (failure to request instructions as to mitigation of damages because of plaintiff's fraud prevents consideration on appeal); 121 Or15, 253P877.

109-98 [b] (4) One thousand dollars. Mo 287SW600. [d] (15) One thousand five hundred dollars. 215Ala561, 112S 127. (16) One thousand nine hundred seventy-five dollars. 126Me35, 135A825. (17) Twelve thousand dollars. RI 136 A689. (18) One thousand dollars. 91 CalA201, 266P1005. (19) Seven hundred twenty-five dollars. 92CalA127, 267P736. (20) Defendant induced to purchase stock by misrepresentations held properly awarded one hundred dollars a share as credit on notes sued on where he had parted with stock. 208 Iowa56, 221NW214. [e] Verdict in amount of deficiency judgment, in action for fraud in trade of mortgage, has been held not excessive. 193Wis343, 214NW501. [f] Sum expended by plaintiff in endeavor to carry out purposes of transaction may be recovered in action based on fraud inducing plaintiff to enter into contract. 50ND78, 194NW925.

110-99 TexCivA 280SW622.

110-1½-New. Damages awarded not ground for appeal where less than plaintiff was entitled to under the evidence. 103Conn390, 130A794.

110-9½-New. to advertise falsely concerning real property; 80CalA647, 252 P730. [a] Essentials of offense.-80CalA 647, 252P730. [b] Distinguished from larceny by trick.-80CalA647, 252P730.

111-22 6F(2d)668; 42F(2d)133. [b] Loss of money or property need not necessarily be involved to constitute fraud against United States; engagement in activity to frustrate administration of statute or impair functions of government is sufficient. 6F(2d)668.

111-24 220AppDiv462, 221NYS545.

111-27½-New. to make or sell any article of merchandise composed wholly or in part of any metal, with word "platinum," or any abbreviation of such word, marked or stamped on it unless 925/1000 of component parts of metal are pure platinum: 219AppDiv555, 220NYS 428. [a] Marking "Plat. Top-18K" on bracelet only top of which was platinum is violative of statute. 219AppDiv555, 220NYS428.

111-29½-New. to exhibit to prospective purchasers leases not fairly stating rent being paid; 323 Ill 580, 154NE427.

111-30½-New. The terms false and willfully exaggerated are similar in meaning and must necessarily be proved by some evidence. 112 OhSt429, 147NE 650.

111-30½-New. Statement of financial affairs of corporation may be false or willfully exaggerated oral statement within the statute. 112 Oh429, 147NE 650.

111-30¼-New. Making false financial statement. 243NY589, 154NE617.

111-30½-New. Representing oneself to be fortune teller. 26 OhA340, 159NE575. [a] Statute held not unconstitutional.-26 OhA340, 159NE575. [b] Absence of license statute held immaterial.-26 OhA 340, 159NE575.

111-30½-New. Under some statutes it is an offense not to indicate by label that goods are manufactured from material previously used. Mass 170NE63.

111-32½-New. Temporarily driving automobile at request of another serial number being mutilated is not a defense, although it might be considered in mitigation of punishment. 163Ark396, 270 SW945.

111-32¼-New. Claim that defendant was an ordained minister is no defense to a prosecution for representing herself as a fortune teller. 26 OhA340, 159NE 575.

111-34 112 OhSt429, 147NE650. [a] (3) Under Blue Sky Law for selling realty situated outside state. 100WVa 674, 131SE554. [b] (6) Knowingly conveying land without title. 24 OhA188, 157NE298. (7) For false advertising concerning real property. 80CalA647, 252P730. [c] (5) Information for swindling trustees, advertisement held insufficient. 106TexCr341, 292SW239. (6) Other instances. 318Mo 859, 300SW 1083.

111-38 [a] (3) Matter constituting variance. 318Mo 859, 300SW1083.

112-40 [a] (9) Evidence admissible to show intent in prosecution for fraudulently executing chattel mortgage. 318 Mo 859, 300SW1083. (10) Other instances. 42F(2d)133. [b] Evidence not admissible.-243NY589, 154NE617; 112 OhSt429, 147NE650. [c] Evidence held sufficient.-42F(2d)133.

112-42 323 Ill 580, 154NE427. [a] (5) To warrant conviction for possessing automobile with mutilated serial number. 163Ark396, 270SW945. (6) Conveying property without title. 24 OhA188. 157 NE298. (7) As to exhibiting to prospective purchasers leases not fairly stating rent being paid because of rent concession. 323 Ill 580, 154NE427. [b] (5) To show prior mortgage void for usury in prosecution for fraudulently executing chattel mortgage without reciting outstanding mortgage. 318Mo 859, 300 SW1083. (6) To warrant conviction for making false financial statement. 221AppDiv79, 222NYS616. (7) In conviction for accepting full payment without giving notice of outstanding indebtedness, as required by statute. 89 IndA 46, 165NE762. (8) Statutory offense of false advertisement. MoA 21SW(2d)895.

112-44 Conn 151A325.

112-52½-New. Issues or prosecutions for fraudulent representations of corporate financial condition value of shares of stock is not in issue, the real issue is whether the stock was less in value at the time than the false statement represented it to be. 112 OhSt429, 147 NE650.

FRAUDS, STATUTE OF

123-5 318 Ill 500, 149NE495; Iowa 228 NW639; 130Misc416, 224NYS251. [a] Limited to cases in which contractual obligation is basis of recovery. 201 Iowa 651, 207NW764.

124-23 [b] (3) 30F(2d)5.

125-24 220AppDiv160, 221NYS11. [a] (2) Pennsylvania sale contract, though unenforceable in Pennsylvania for failure to comply with statute, may be enforced in New York. 220AppDiv160, 221 NYS11.

125-26 7F(2d)470.

125-31 8F(2d)601.

126-43 30F(2d)5.

126-48 233Ky27, 24SW(2d)917 (antenuptial contract).

126-50 CalA 288P870; 137Misc177, 243 NYS322.

127-55 197Cal 577, 241P861; Kan 289 P464; SD 226NW641; 152Wash448, 277 P988.

128-66½-New. Parol antenuptial agreement whereby each of parties renounced interest in the other's estate as survivor, retaining control of his or her separate estate, is void. 227Ky628, 13SW (2d)776.

129-84 Me 150A491.

129-85 175Ark784, 300SW388; 72CalA 481, 237P756; 37GaA318, 140SE394; 255Mass99, 150NE880; 310Mo 104, 274 SW770; 118Nebr17, 223NW467; 37 OklACR195. See also 6LaA82.

129-86 2LaA707; 235Mich668, 209NW 846; 52SD43, 216NW601; TexCivA 281 SW328; TexCivA 32SW(2d)252.

129-88 290Pa79, 137A910.

130-90½-New. Liability in the nature of a guaranty which is imposed by law is not within provision of statute requiring contract of guaranty to be in writing. 75Mont213, 245P956.

130-91 263Mass168, 160NE786; 137 Misc480, 244NYS10.

130-92 201 Iowa1167, 206NW806, 807 [citCJ]; 131 Okl 20, 267P473; 52SD43, 216NW601; Ont [1925] 3DomLR334. See also 8LaA221, 224 [citCyc].

131-93 140Miss643, 106S433; 117Tex 107, 298SW419.

131-99 118Nebr17, 223NW467; Tex CivA 27SW(2d)248 (promise held not original as matter of law).

131-2 [a] (1) 213Ky417, 281SW152. (12) Agreement by seller to take municipal warrants off buyer's hands if buyer would sue municipality in courts of state where located. 164Minn175, 205 NW59.

131-4 137Misc573, 243NYS117; 190NC 195, 129SE197 (collateral promise merely superadded to promise of another does not create original obligation and statute applies).

132-14 44F(2d)152; 214Ala441, 107S9; 93Fla698, 112S547; 205 Iowa783, 218 NW466, 467 [citCJ]; Iowa 227NW833; 128Kan220, 277P45; Kan 292P774; LaA 122S133; 13LaA610, 128S318; 1 LaA623; Mich 233NW213; 155Miss825, 125S418; 219AppDiv486, 220NYS340; 137Misc573, 243NYS117; 192NC811, 133 SE454; 119 Or116, 248P154; 120 Or 396, 252P563; 290Pa79, 137A910; 89 PaSuper463; 9PaDist&Co 716; TexCivA 278SW916, 918 [citCJ]; TexCivA 27 SW(2d)248; 147Va566, 137SE371. [c] (14) 137Misc573, 243NYS117.

134-15 [c] (14) 206Cal 571, 275P430; 73CalA229, 238P736; 82CalA12, 254P 914; 253 IllA569; Iowa 227NW833; 122 Kan767, 253P414; 125Kan436, 265P61; 128Kan267, 277P44; 234Ky173, 27SW (2d)695; 160La12, 106S657; 10LaA567, 121S635; 151Miss189, 117S524; MoA 297SW158; 222MoA1118, 13SW(2d) 1097; MoA 30SW(2d)645; NJ 149A764; 89PaSuper463; RI 147A750; SD 226 NW263, 264 [quotCJ]; TexCivA 271 SW290; TexCivA 278SW916. (19) Promise of landlord to pay for medical services of child of tenant, even though father of child considered himself solely liable. 34GaA185, 129SE11. (20) Bookkeeper's agreement to charging account to employer by another. 172 Ark117, 288SW377. [b] (17) 214Ala441, 107S9; Miss 114S36; 154Miss587, 122 S544; 119 Or116, 248P154; 87PaSuper 102; 10PaDist&Co 41; Wis 233NW76.

135-16 72CalA363, 237P552; Mo 26 SW(2d)951; 222MoA1118, 13SW(2d) 1097; 136Misc915, 242NYS505; 290Pa 79, 137A910; TexCommnA 291SW864; TexCivA 280SW600.

135-17 253 IllA569; 83 IndA631, 149 NE460; 222MoA1118, 13SW(2d)1097; 119 Or116, 248P154; TexCivA 278SW 916.

135-18 181Ark986, 26SW(2d)97; 83 IndA631, 149NE460; 201 Iowa1167, 206 NW806; Iowa 227NW833; 119 Or116, 248P154; TexCivA 278SW916, 918 [quot CJ].

135-19 83 IndA631, 149NE460; 201 Iowa1167, 206NW806.

135-20 TexCivA 27SW(2d)248 (promise called guaranty construed as not original). [a] (1) 248NY28, 161NE319. [b] (1) 21 OhA118, 152NE778; TexCivA 280SW600. [c] (1) TexCivA 281SW297. [e] Promise to pay.-21 OhA118, 152NE 778.

136-22 137Misc573, 243NYS117.

136-24 19F(2d)991; 170Ark809, 281 SW366; 81Colo 501, 256P312; IndA 168NE769; 201 Iowa1167, 206NW806; 205 Iowa774, 218NW486; 208 Iowa949, 225NW414, 65ALR817; 165La136, 115 S413; 221MoA898, 295SW1083; 294Pa 503, 144A525; 95PaSuper441; Tex

CommnA 291SW364; TexCivA 283SW 537; 102WVa320, 135SE185, 187 [cit CJ]; 195Wis477, 218NW726, 727 [cit CJ]. [a] (6) Where directors of corporation agreed to assume corporation's liabilities on its conveyance of its property to them. TexCivA 283SW537.

137-31 23F(2d)567; Ark 30SW(2d) 215; 123Kan119, 254P381, 382 [quot CJ]; 151Miss12, 117S328, 329 [citCJ]; 137Wash280, 242P42.

138-34 123Kan119, 254P381.

138-34½-New. The promisor must have been authorized by the debtor to make the payment from the debtor's property in the hands of the promisor. 123Kan 119, 254P381.

139-41 13LaA327, 127S637 (promise to pay for care of incompetent sister).

139-50 107Conn51, 139A269.

140-55 255Mass99, 150NE880. [b] **Oral promise to pay debt of mother during lifetime of mother** is held unenforceable. 255Mass99, 150NE880. [c] **Oral promise to pay debt of mother after death of mother** is held unenforceable when such promise was one to pay creditor's claim against her mother and not to pay sum of money equal to amount claimed to be due from mother. 255 Mass99, 150NE880.

140-58 34Ariz49, 267P598; 205Iowa 733, 218NW466; 227AppDiv32, 237NYS 20; Or 284P179; TexCivA 16SW(2d) 340; TexCivA 4SW(2d)599. [b] (3) Railroad's agreement to pay plaintiff cost of repairs on another's automobile struck by train. TexCivA 297SW532.

140-60 170Ark1193, 281SW668; 81Colo 501, 256P312; Miss 130S157; MoA 31 SW(2d)86; 138 Okl 136, 280P579; 119 Or116, 248P154; 88PaSuper162; Tex CivA 278SW916, 918 [citCJ]. [a] **Promise by insurance company to take up discounted premium notes** not paid by maker is held original promise. TexCivA 278SW916.

142-61 78Colo 6, 238P29; 81Colo 501, 256P312; 201 Iowa167, 206NW806; MoA 296SW849, 850 [citCJ].

142-65 83 IndA631, 149NE460; Mo 26 SW(2d)951; 119 Or116, 248P154; 53 SD374, 220NW872, 873 [quotCJ]; 106 WVa463, 145SE821. [c] **Allegation** that plaintiff would not have made loan except for defendant's guaranty does not prevent application of statute. 179Ark 437, 16SW(2d)585.

143-69 83 IndA631, 149NE460; MoA 296SW849, 850 [citCyc].

144-77 131Misc635, 228NYS435.

144-83 115 Okl 222, 242P559.

145-84 Mo 26SW(2d)951 (recovery of judgment against patient prevents contention that credit was not extended to him).

145-90 144Wash150, 257P241. See also 23F(2d)567.

145-91 123Kan119, 254P381, 382 [cit CJ].

146-93 214Ala282, 107S801; 203Cal 444, 264P763; 164Minn175, 205NW59; 221MoA898, 295SW1083; MoA 21SW (2d)202; 219AppDiv486, 220NYS340; 137Misc480, 244NYS10; Ont [1929] 2 DomLR877.

147-94 34Ariz49, 267P598, 600 [citCJ]; Iowa 232NW724; 96PaSuper234.

147-99 220Ala171, 124S412; 181Ark 768, 27SW(2d)990; Ark 30SW(2d)215; 43 Ida55, 249P893; 43 Ida149, 249P895; 154Miss720, 123S855; MoA 15SW(2d) 888; 120 Or396, 252P563, 566 [quot CJ]; 95PaSuper92; TexCivA 280SW 600; TexCivA 18SW(2d)224; 144Wash 150, 257P241; 192Wis141, 212NW278. [a] (9) Promise to pay rent due plaintiff by another in consideration of plaintiff's forbearing to sue tenant and attach goods some of which had been sold by promisor and were only partly paid for and were thereupon removed by promisor. 43 Ida149, 249P895.

149-9 123Kan119, 254P381, 382 [cit CJ]; Me 150A491; 52SD43, 216NW601; SD 224NW949; TexCivA 3SW(2d)855. See also 28F(2d)857. [a] **Insufficient beneficial consideration.**-137Misc480, 244 NYS10.

149-13 MoA 13SW(2d)1087.

149-14 MoA 28SW(2d)456.

150-15 Iowa 228NW639.

150-16 214Ala441, 442, 107S9 [citCJ]; 43 Ida55, 249P893; MoA 15SW(2d)888. [a] (3) Where benefit to stockholder in return for promise to be responsible for bank deposit is remote, undertaking is collateral. 214Ala441, 107S9. (4) Promise of stockholder that if creditor of corporation would accept certain amount less than his claims, stockholder would pay it does not create original obligation of promisor so as to take promise out of operation of statute. 43 Ida55, 249P893.

150-17 144Wash150, 257P241.

150-22 220AppDiv663, 222NYS386.

150-23 126Kan640, 643 [quotCJ]; MoA 15SW(2d)888; 137Misc480, 244NYS10.

151-30 Iowa 228NW639; 126Kan640, 643 [quotCJ].

151-31 82CalA685, 256P428; 124Me 411, 130A242; TexCivA 3SW(2d)855.

151-33 255Mass533, 152NE66.

151-34½-New. An oral agreement of compromise is not effective to charge a person with the debt of another. Iowa 228NW639.

151-35 82CalA685, 256P428. But see 180Minn441, 231NW16.

151-39 125Kan436, 265P61; 252Mass 303, 147NE737; 255Mass99, 150NE880. [a] **Landlord's permission to remove tenant's property on which landlord had no lien** not consideration for oral promise of third person to pay tenant's note on which landlord is surety. 34 GaA310, 129SE296.

152-43 39 OklACR386.

153-44 [a] 39 OklACR386.

154-54 33GaA723, 127SE803; 36GaA 130, 135SE755; 227Ky369, 13SW(2d) 271; 154Miss720, 123S855; 196NC675, 146SE716.

154-57½-New. Assent to, and acceptance of, the terms of a novation contract need not always be in writing. 105WVa20, 141SE398.

154-59 36GaA707, 137SE852; NJSup 129A233 (holding where owner of building, on which contractor has abandoned work promises to pay contractor's workmen what is due them if they will prosecute the work, it is not within statute); 290Pa79, 137A910; 292Pa 400, 141A235.

155-60 [a] (1) 227AppDiv32, 237NYS 20.

155-60½-New. An agreement of directors, officers, and stockholders of a bank to hold plaintiff harmless against loss and to repay to plaintiff moneys borrowed by him or on his credit and advanced by him for use and credit of the bank, has been held to be an original undertaking. 320Mo 57, 6SW (2d)576, 582 [quotCyc], 67ALR489.

155-68 320Mo 57, 6SW(2d)576, 67ALR 489.

155-73 41F(2d)319; 217Ky683, 290SW 494, 498 [quotCJ]; 13LaA37, 127S104 (where promise was not inducement); 158Tenn7, 12SW(2d)364; TexCivA 29 SW(2d)493.

156-74 29 OhA19, 162NE751; 290Pa79, 137A910.

156-81 122Kan767, 253P414.

157-96½-New. In a contract for reorganization of a corporation, a promise of defendants to pay the stockholders the amount invested in the company as part of the purchase price of the company is not within the statute of frauds. 245Mich599, 223NW218.

157-99½-New. Subscription contract by which stockholder agrees to pay certain money in payment of debts of corporation is not within statute. 130 Kan622, 287P242.

157-2 198NC385, 151SE875, 63ALR345.

158-25 Utah 290P979.

159-35½-New. An oral guaranty of a renewal note, merely a renewal of the guaranty of the original note, is as much within the statute as the original guaranty. 179Ark437, 16SW(2d)585.

159-46 245Mich632, 223NW226.

160-47 TexCommnA 291SW864; Ont [1929] 2DomLR877.

160-49 226AppDiv280, 235NYS220.

160-52 215Ala97, 109S751.

160-54 MoA 28SW(2d)456.

160-55 46 Ida471, 268P570; TexCivA 283SW596; TexCivA 28SW(2d)1113.

161-61 [a] (1) 214Ala282, 107S801.

161-62 214Ala308, 107S455.

161-68 88CalA393, 263P558, 560 [quot Cyc]; 97CalA499, 275P993; 82Colo 59, 256P1091; Iowa 232NW724; LaA 122 S133; Tex 288S260; TexCommnA 280 SW548; TexCivA 25SW(2d)929. See also 197NC344, 148SE545.

163-71 TexCommnA 280SW548.

163-72 20F(2d)644.

163-74 165Ga534, 141SE653, 659 [cit CJ]; 47 Ida446, 276P309; 47 Ida794, 279P302; 124Kan136, 257P941. But see IndA 152NE839.

163-77 [a] (2) Oral agreement of prospective purchaser entered into with contractor to pay mechanics' liens is unenforcible. 180Minn441, 231NW16.

164-83 13LaA277, 127S748.

164-85 TexCivA 293SW199.

164-86½-New. The same is true of an agreement with the seller to pay the balance due. 148Wash435, 269P496.

164-94 TexCivA 16SW(2d)432.

164-99 165Ga534, 141SE653, 659 [cit CJ]. [a] **Promise enforceable.**-149Va 798, 141SE776.

164-1 165Ga534, 141SE653, 659 [cit CJ]; 146SC281, 143SE875, 59ALR174.

165-6 97PaSuper499.

165-8 TexCivA 30SW(2d)668.

166-35 140Miss643, 106S433. See also 35GaA749, 134SE846.

166-37 TexCivA 8SW(2d)806.

167-39 220AppDiv670, 222NYS382.

167-45½-New. Lawyer's oral agreement to secure client against loss on loans made through him is void under statute of frauds. 143SC135, 141SE174, 56ALR953.

167-49 221MoA898, 295SW1083; 50 Nev346, 259P417.

167-52 163Ga807, 137SE45.

168-62 [a] **In suit to dissolve joint adventure and settle liabilities,** fraud not being pleaded, agreement to apply amount realized from securities pledged by one party to supply capital to payment of debts of business, must be in writing, signed by parties to be charged. 99CalA17, 277P1053.

168-66 NJSup 133A174; 23 OhA367, 155NE500. [a] (2) Oral promise by corporation president to pay employee share of net profits from contracts procured by him held unenforceable. NJSup 133A174.

168-70 CalA 286P507; 26 OhA104, 159 NE842; 120 Or396, 252P563; 98Pa Super406.

168-71 But see Utah 274P856.

169-75 117 Or583, 245P510, 514 [cit CJ].

169-76 117 Or583, 245P510, 514 [cit CJ].

169-80 117 Or583, 245P510.

170-85 117 Or583, 245P510.

170-95 46 Ida614, 269P586.

171-5 225Ky394, 9SW(2d)55; 264Mass 102, 162NE4.

171-15 MoA 14SW(2d)6.

172-16 MoA 14SW(2d)6.

172-17 MoA 14SW(2d)6.

172-19 See also 221MoA887, 289SW34.

172-23 MoA 277SW953, 958 [citCJ].

173-30 MoA 277SW953, 958 [citCJ]; Ont [1929] 3DomLR54 (statute held no bar to rescission).

173-40 117 Or583, 245P510, 514 [cit CJ].

174-43 62 OntL65 [1928] 2DomLR485.

174-50 114Nebr284, 207NW204.

174-53 100WVa433, 130SE657, 659 [cit CJ].

174-54 100WVa433, 130SE657.

174-62½-New. Where a contract is not one capable of performance within one year from the date of an asserted novation, the novation contract is within the statute of frauds. 105WVa20, 141SE 398.

174-64 [a] (5) **Employment for one year beginning at once.** 166Minn214, 207NW319.

175-67 171Ark456, 284SW535; 223App Div388, 228NYS500; 228AppDiv133, 239 NYS291; NC 148SE549; 122 Or360, 257 P685; TexCivA 293SW874; 135Wash 174, 237P317, 240P565. [a] (14) Oral agreement to reconvey property within eighteen months on payment of certain sums. 100CalA373, 280P191.

176-69 70CalA157, 232P767; CalA 284 P935(2dcase); GaA 155SE369; 223App Div134, 227NYS449.

176-74 26F(2d)755.

177-75 26F(2d)755.
177-81½-New. An oral agreement to provide for a widow and give her a free pew in church for her life is not within the statute. 40Wyo 297, 276P930.
177-82 24F(2d)617.
177-89 220AppDiv774, 222NYS150; 223 AppDiv134, 227NYS449; 129Misc623, 222NYS1; 141Wash593, 252P141.
178-97 24F(2d)617; 30F(2d)893; 169 Ark309, 275SW333; 171Ark456, 284SW 535; Ind 166NE434; 217Ky195, 289SW 282; 222Ky476, 18W(2d)532; 223Ky 331, 28W(2d)405; 226Ky655, 11SW(2d) 705; 226Ky823, 11SW(2d)940; Mass 170NE621; 234Mich292, 207NW872; 76 Mont375, 247P328; 114Nebr284, 207NW 204; 227AppDiv32, 237NYS20; 135Misc 419, 239NYS373; 153SC118, 150SE478; TexCivA 275SW200; TexCivA 11SW (2d)344; 141Wash593, 252P141; 142 Wash118, 252P680; 36Wyo 106, 252P 1024, 1025 [citCJ]; 40Wyo 297, 276P 930.
179-96 169Ark309, 275SW333.
180-1 127Me282, 143A64; 156Miss36, 125S410; 40Wyo 297, 276P930.
180-6 TexCivA 275SW200; 137Wash 148, 242P3.
180-11 172Ark642, 290SW353; 77Mont 260, 250P823; 40Wyo 297, 276P930.
180-15 77Colo 574, 238P58, 59 [quot CJ]; 322Mo 435, 16SW(2d)46, 69ALR1.
181-16 77Colo 574, 238P58, 59 [quot CJ]; 126Misc845, 214NYS452.
181-17 77Colo 574, 238P58, 59 [quot CJ].
181-20 77Colo 574, 238P58, 59 [quot CJ] (promise of discharged bankrupt to pay debts if he should inherit one quarter interest in father's estate).
181-22 [a] (3) Statute does not apply to agreement made before its enactment. CalA 277P1107.
182-23 Kan 292P774; 26 OhA181, 159 NE377; 40Wyo 297, 276P930.
182-27 TexCivA 3SW(2d)482.
182-30 76Mont375, 247P328; TexCivA 275SW200, 202 [quotCJ]; TexCivA 3 SW(2d)911. But see 156Miss36, 125S 410.
183-31 TexCivA 275SW200, 202 [quot CJ].
183-32 TexCivA 275SW200, 202 [quot CJ]; TexCivA 3SW(2d)911; 142Wash 118, 252P680.
183-35½-New. An oral agreement to do a particular act during, at, or after one year from the agreement is within the statute. 40Wyo 297, 276P930.
184-37 125Me411, 134A506, 47ALR 1156; 146Va325, 131SE830, 832 [cit CJ].
184-45 MoA 256SW1088, 1091 [citCJ].
185-54 77CalA241, 246P152.
185-57 See also 194Wis578, 217NW328.
185-58 See also 141Wash593, 252P141.
185-59 230AppDiv568, 245NYS470.
185-62 34Ariz49, 267P598.
185-65 32F(2d)576.
186-68 80CalA1, 251P830; 214Ky317, 2SSW87; 222Ky415, 300SW906; 258 Mass65, 154NE572; 221AppDiv490, 224 NYS648; 127Misc508, 217NYS39; 200 Wis373, 228NW522.
186-71 23AlaA246, 123S265, 270 [cit CJ]; Man [1927] 3DomLR146.
186-75 173Ark1128, 293SW1041; MoA 295SW477.
186-78 TexCivA 272SW230.
186-79 155Miss825, 125S418.
186-81 225AppDiv829, 232NYS564.
186-82 70CalA157, 232P767; 127Kan 89, 272P112; 214Ky317, 283SW87; 222 AppDiv197, 225NYS593. Contra 234 Mich292, 207NW872; SD 226NW345.
187-87 137Misc599, 244NYS169.
187-91 137Misc599, 244NYS169.
187-92 226Ky655, 11SW(2d)705.
187-93 [a] (2) Employment to secure reduction in freight rates. 169Ark309, 275SW333.
188-94 226Ky655, 11SW(2d)705.
188-3 Contra Sask [1929] 4DomLR 1076(2dcase).
188-4 TexCivA 3SW(2d)911.
188-11 148Va762, 139SE483. [a] 148 Va762, 139SE483.
188-14½-New. Agreement to pay commission for renewal of lease is not within statute where exercise of option to renew might be performed within one year of making of original lease and brokerage contract. 126Misc176, 212NYS685.
188-14¼-New. Compensation contingent in amount and payable for three years after completion of service, not within statute. 169Ark309, 275SW333.
189-18 But see 52SD292, 217NW397, 59 ALR947.
189-21 179Ark71, 14SW(2d)240; 155 Md654, 142A508; 151Va590, 144SE642. But see 169Ga313, 150SE158(2dcase); IndA 168NE703.
189-22 Mass 171NE226 (agreement as to personalty covered in lease of theater); 198NC109, 150SE704(1stcase).
189-24½-New. The statute does not apply where a tenant, in possession under a lease containing a provision for renewal on a written notice, exercises the option by oral notice and the landlord waives written notice. 222Ky277, 300 SW612.
190-34 76Mont375, 247P328.
190-36 See also MoA 27SW(2d)464.
190-38 See also 157Miss316, 128S107.
190-42 Md 148A536 (partnership at will); 137Wash274, 242P359.
192-71 [b] (4) 8PaDist&Co 67.
192-72 36F(2d)198; 41F(2d)336; 89 CalA764, 265P351; 55AppDC330, 5 F(2d)753; 164Ga706, 139SE337; 164 Ga628, 139SE339; 165Ga359, 140SE869; 165Ga799, 142SE134; 317 Ill 173, 147 NE791; 321 Ill 76, 151NE599; 213Ky 333, 280SW1115; 149Md548, 131A810; 254Mass429, 150NE200; 236Mich197, 210NW260; 73Mont456, 236P1093; 99 NJEq14, 131A683; 216AppDiv431, 215 NYS534; 127Misc487, 216NYS509; 132 Misc428, 230NYS91; 134Misc598, 236 NYS255 (statute is mandatory); 189NC 775, 128SE349; Okl 292P60; TexCivA 18SW(2d)699; 199Wis440, 223NW559. [a] Declarations against interest are of no effect where parties hold clear title to land. TexCivA 15SW(2d)72. [b] Agreement held not for purchase of interest in property within statute. 199 Wis440, 227NW26.
193-74 219Ky615, 294SW183.
193-76 216AppDiv431, 215NYS534.
193-77 220Ala561, 126S635 (common understanding that person would inherit).
193-80 99NJEq14, 131A683. See also 190NC794, 130SE858.
193-82½-New. A contract for the sale of clay to be delivered at a railroad station is not a contract for the sale of land within the statute of frauds, but is a contract for the sale of personalty. 217 MoA592, 274SW941.
193-83 75Mont202, 243P568.
193-83½-New. or by operation of law; 75Mont202, 243P568.
193-85 245 IllA175; 212Ky176, 278SW 557; 153Miss185, 120S814; 309Mo 142, 274SW679; MoA 15SW(2d)957; 75 Mont202, 243P568; 103NJEq167, 142A 645; 190NC582, 130SE330; 137 Okl 86, 278P292; 121 Or591, 256P186; 286Pa 413, 133A627; TexCivA 273SW969. [a] Negative easements restricting use of property must be in writing. 189NC 589, 127SE697.
194-86 248Mich652, 227NW684; 190 NC582, 130SE330; 286Pa413, 133A627.
194-92½-New. restrictions in the nature of easements, 217Ala196, 115S237.
194-93½-New. , and to covenant placing restriction on grantor's land. 212 Ky176, 27SSW557.
195-2½-New. The right of entry to dig for and remove gravel under a contract of present sale is a license and not an easement within the statute. TexCivA 280SW908.
195-3 75Mont202, 243P568.
195-17 Utah 266P1033, 1035 [citCJ].
196-33 TexCivA 26SW(2d)739.
196-35 246Mich219, 224NW428.
197-43 45NH313, 86AmD173.
197-45 238Mich373, 213NW106; 144 Wash558, 258P488.
197-47 Mo 10SW(2d)663; 144Wash 558, 258P488.
198-55 26 OhNPNS328.
198-63½-New. A written contract for the sale of timber may be assigned orally. 130 Or385, 280P497.
198-65 158La621, 104S476.
201-11 99NJEq14, 131A683; 157Tenn 140, 7SW(2d)53.
201-14 115Tex193, 280SW158.
201-17 242Mich73, 218NW789.
202-24 168Minn43, 209NW642 (agreement to pay vendee to abandon executory contract not within statute).
202-32 41F(2d)336; MoA 272SW83; 99NJEq14, 131A683; 189NC589, 127SE 697; TexCivA 27SW(2d)639.
202-35 99NJEq14, 131A683.
202-37 124 Okl 188, 255P566.
202-38 TexCivA 27SW(2d)639 (agreement to assign interest in oil leases).
202-52½-New. Fact of possession or occupancy of land, not involving title or right to possession, is not within the statute. 48 Ida80, 279P1097.
203-69 TexCivA 13SW(2d)131.
203-71 234Ky558, 28SW(2d)737.
203-74 TexCivA 12SW(2d)648; Tex CivA 15SW(2d)72 (abandonment).
203-75 TexCivA 281SW889.
204-80 286Pa457, 133A638.
204-80½-New. A contract for the sale of a contingent mineral interest in land is within the statute of frauds. TexCivA 274SW242.
204-80¼-New. An agreement to share profits derived from a mining location in consideration of the privilege of perfecting the location is not within the statute of frauds. 138 Okl 156, 280P 616.
204-81 202 Iowa1358, 212NW151.
204-82 89 IndA460, 165NE328.
204-91 242Mich639, 219NW641.
204-92 286Pa457, 133A638.
205-10 290Pa107, 138A81.
205-10½-New. An agreement to purchase land and then convey to another is within the statute, even though the purchaser is an agent for that other. 254Mass429, 150NE200.
205-10¼-New. Where a parol contract relating to disposition of real and personal property is indivisible, it is subject to the statute. TexCivA 16SW(2d) 400.
205-10¼-New. Oral agreement between father and son that father would furnish money to purchase land on certain conditions and agreement by son is within statute. 130Kan85, 285P584.
205-11 213Ky333, 280SW1115; 213Ky 473, 281SW467; 6LaA565; 238Mich189, 213NW163; 245Mich541, 222NW703; 124 Okl 193, 255P577; 290Pa107, 138A 81; TexCivA 278SW518. See also 10 LaA424, 121S366. See also 300Pa334, 150A640.
205-14½-New. Agreement, providing that in consideration of services to be furnished to party during his life time he would convey real property, is within statute of frauds. 69CalA291, 231P 563.
205-14¼-New. Where an interest in real estate rests upon a parol agreement, it is not necessary in order to divest the grantee of title, that he make a conveyance thereof in writing. 121 Kan490, 247P449.
205-23 72Mont318, 233P607, 611 [cit CJ].
206-32 TexCivA 286SW315; TexCivA 300SW648.
206-34 172Ark381, 288SW890; Tex CivA 282SW638; TexCivA 293SW690; TexCivA 300SW648.
206-37 172Ark381, 288SW890.
207-44 161La949, 109S773.
207-48 [b] Vendee's interest in land may be released only by written instrument. 242Mich301, 218NW779.
207-51 24F(2d)776; 100CalA373, 280 P191; 35GaA83, 132SE105; 80Mich120, 259P609; 134Misc623, 235NYS609; TexCivA 281SW889; TexCivA 18W(2d) 649. See also TexCommnA 23SW(2d) 675. [a] Promise to resell land purchased from defendant is not within statute. 166Minn18, 208NW1.
207-53 317Mo 246, 295SW105.
208-66 174Ark412, 295SW375; MoA 272SW83; 292Pa339, 141A159; Wash 291P334.
208-78 86 IndA726, 154NE771; 233 Mich346, 206NW480; 124 Okl 188, 255 P566; 294Pa436, 144A413.
208-80½-New. Agreement to devise or bequeath any property or to make any provision for any person by will is within statute. 197Cal 577, 241P861.
208-82 30Ariz63, 243P913; 197Cal 577, 241P861; 55AppDC330, 5F(2d)753; 321 Ill 76, 151NE599; 122Kan814, 253P600; 222Ky396, 300SW876; 231Ky682, 22

SW(2d)111; 233Mich346, 206NW480, 487 [citCJ]; 241Mich39, 216NW384; 83 Mont214, 271P433; NJCh 150A232(2d case); 213AppDiv439, 210NYS208; 131 Okl 219, 268P291, 292 [citCJ]; 121 Or 432, 253P869; 124 Or574, 265P425; 146 SC59, 143SE552, 59ALR1297; TexCivA 278SW518; TexCivA 292SW273; 33 Wyo 439, 240P927, 929 [citCJ], 43ALR 1010. But see CalA 277P1107.

209-83 TexCivA 278SW518; 152Wash 448, 277P988.

209-84½-New. A devise under the law is treated as a sale in which the devisee is regarded as purchaser. 30Ariz522, 249P76, 48ALR1347.

209-85½-New. A parol agreement to make one an heir cannot be enforced. 216Ky674, 288SW301.

209-87 105NJL210, 143A351.

209-88 233Mich346, 206NW480, 481 [citCJ]; 124 Or574, 265P425.

210-20 115Nebr420, 213NW813; 121 Or500, 255P474.

210-21 [b] In New Mexico.-31NM110, 241P1026.

210-22 77CalA82, 246P90; CalA 290P 309; 165Ga359, 140SE869 (seven-year lease); 324 Ill 454, 155NE278; 248 IllA 297; 79Mont550, 257P1016; 115Nebr 420, 213NW813, 815 [citCyc]; NJSup 137A793; NJSup 143A726; 250NY221, 165NE271; 288Pa56, 135A639; 296Pa 493, 146A123; 51Philippine520; TexCivA 278SW873; TexCivA 12SW(2d) 252.

211-23 176Ark1204, 4SW(2d)14; 56ND 94, 216NW197; 294Pa300, 144A280.

211-33½-New. A tenant's partial defense that he abandoned possession on the landlord's agreement to let the premises for the residue of the term and apply rent received or rent reserved by the lease, and that thereafter the tenant produced a suitable tenant, whom the landlord refused to accept, because the proposed tenant refused also to hire premises adjoining the demised premises, has been held improperly stricken out, in the absence of an objection to the mere form thereof. 133Misc192, 231 NYS443.

211-33½-New. Lease giving option to purchase during the leasing period is not required to be in writing as a contract for transfer of interest in land. 127 Or612, 271P600, 61ALR1441.

211-34 80CalA98, 251P658; NJSup 137 A793; 131Misc340, 225NYS767; 20 OhA 16, 153NE117; 116 Or210, 240P877; 49 Philippine276; 51Philippine520. [a] (1) NJSup 137A793.

212-37 153SC118, 150SE478.

213-43 121 Or407, 255P471.

213-45 15F(2d)323; 215Ky153, 284SW 1023; 79Mont550, 257P1016; 112 Okl 105, 240P76; TexCommnA 17SW(2d) 786(1stcase); TexCivA 278SW873. [b] Mineral lease for five years and thereafter, as long as oil is found, is within statute. TexCivA 278SW873. [c] Oil lease conveying title to minerals is in effect a deed or conveyance of real estate and must be in writing. TexCivA 283SW1115.

213-46 112 Okl 105, 240P76; TexCommnA 276SW678; TexCivA 1SW(2d) 353.

213-47 26F(2d)698; 79Mont550, 257P 1016.

213-52 169Ark169, 273SW396.

214-57 51Philippine520.

214-69 232 IllA287.

214-70 232 IllA287.

214-72 232 IllA287.

214-73 Contra 232 IllA287.

214-75 116 Or189, 239P814.

214-76 TexCommnA 276SW678.

215-78 NJSup 131A619; 95PaSuper139 (unexpired term for less than three years may be assigned).

215-81 229Ky818, 18SW(2d)281; 13 LaA277, 127S748.

215-84 BC [1930] 3DomLR449.

215-94 95CalA589, 273P145; CalA 287 P113; 236Mich511, 211NW263; 288Pa 56, 135A639; TexCivA 278SW873.

215-95 126Misc570, 214NYS45.

216-8½-New. Contract by owner of house on another's lot to pay owner of lot portion of rentals or cause same to be paid at death need not be in writing. 20 OhA483, 152NE681.

216-8½-New. A verbal agreement by a vendor reserving rentals to become due is not within the statute. 116Tex337, 291SW219.

216-10 [a] (22) License to dig for and remove gravel under contract for present sale. TexCivA 280SW908.

217-12 99NJEq627, 134A553.

217-24 35GaA262, 133SE53, 54 [citCJ]; TexCivA 295SW239. But see 127 Or612, 271P600, 61ALR1441.

217-28 90Fla407, 106S127, 129, 43ALR 1409 [citCyc]; 206 Iowa680, 218NW575; 225Ky155, 7SW(2d)1057. But see 225 AppDiv771, 232NYS288(2dcase).

217-30 TexCivA 12SW(2d)613.

218-37 103NJEq386, 143A531; TexCivA 283SW657.

218-38 216Ala572, 113S1; 206 Iowa680, 218NW575, 578 [citCJ]; 166Minn158, 207NW315; 216AppDiv431, 215NYS534.

218-40 216AppDiv431, 215NYS534.

218-42 238Mich236, 213NW133, 135 [cit CJ].

218-42½-New. Where the lien of a mortgage has been extinguished, the mortgage can be renewed only by writing executed with the formalities required in case of a grant of real property. 199Cal 625, 250P669, 48ALR1308.

218-42¼-New. Deed as security. Parol agreement to deed land as security for debt is unenforceable. 238Mich189, 213 NW163.

218-42¼-New. An oral agreement by which the mortgagor surrendered possession of land to the mortgagee is valid, as against a person making advancements and taking a crop lien, with notice of the oral agreement and of the relationship existing between the parties by virtue of such agreement. 196NC 163, 144SE691.

218-49 SD 229NW925.

218-55 See also 260Mass15, 156NE689.

218-58 See also 100NJEq493, 135A518.

218-59 [b] Construction of building, different from plans under void oral promise to release property from mortgage securing purchase price, does not warrant equitable interference. 103 NJEq386, 143A531.

219-83 200 Iowa862, 205NW505.

220-89 168Ark613, 271SW347; 205Cal 642, 272P573; 248NY404, 162NE296; 294Pa203, 143A913. But see 288Pa16, 135A254. [a] 288Pa16, 135A254 (dictum). [b] (2) In dissolution and division of real property assets, statute of frauds does not apply. Wash 287P55.

220-90 TexCivA 294SW928, 930 [cit CJ].

220-93 TexCivA 294SW928, 930 [cit CJ].

220-1 See also TexCivA 293SW231.

221-4 CalA 286P442.

221-5 259Mass546, 156NE841; 288Pa 16, 135A254 (dictum). See also 204 Iowa1367, 217NW456.

221-6 168Ark613, 271SW347 (alleged partner claiming interest, paying no money); 219Ky329, 292SW824; 99 NJEq14, 131A683; TexCivA 294SW928, 930 [citCJ]. [a] 168Ark613, 271SW347.

221-13 248Mich8, 226NW669.

221-15 CalA 264P772; 26 OhNPNS560; 118 Or359, 244P308; 288Pa16, 135A254; TexCivA 2SW(2d)347.

222-16 101NJEq477, 138A529.

222-17 CalA 288P114(2dcase); 236 Mich633, 211NW59; 294Pa203, 143A 913. But see 288Pa16, 135A254. [c] Contract held not for profits in real estate but for interest therein and therefore within statute. 99NJEq14, 131A 683.

223-19 168Ark613, 271SW347 (where land purchased and owned by one of parties).

223-21 36GaA564, 137SE129.

223-28 227AppDiv32, 237NYS20.

223-29 170Ark908, 281SW671; 264 Mass18, 161NE621; 145Miss815, 111S 302. Contra 116 Oh631, 157NE491.

224-32 Contra 116 Oh631, 157NE491.

224-37 32 OhA59, 167NE598; 117 Or 455, 244P509, 46ALR245. See also 130 Okl 93, 265P633. [a] (2) Nor is a sales deposit receipt, constituting contract between purchaser making deposit and real estate broker as agent of purchaser, for deposit of funds to be used as therein designated, otherwise to be returned to plaintiffs, "agreement for sale of real estate," within statute, so as to render it invalid. 95CalA1, 272P343.

224-38 [a] Statute is not applicable to authority of agent to waive timely delivery of abstract. MoA 26SW(2d)999.

224-40 245Mich93, 222NW183.

224-41 NJSup 146A682.

224-45 TexCivA 271SW417, 421 [quot CJ].

225-48 214Ala18, 106S181; Mass 169 NE64.

225-65 Ga 154SE911. [a] (9) Agreement that on sale in partition all liens shall be charged against shares of parties in fund raised by sale is not within statute of frauds. 8PaDist&Co 259.

225-66½-New. Parol evidence was admissible to establish an oral contract between vendor and purchaser to the effect that, if the vendor should assist in making certain improvements on the land, he was to have one half of any profit made by the purchaser by a subsequent sale of the property. 246Mich 219, 224NW428.

226-75 203 Iowa144, 212NW327; 213 AppDiv439, 210NYS208. Contra 98 NJEq126, 130A833. [b] Agreement to devise, entered into with knowledge and approbation of decedent's devisee, was held immaterial where not proved by legal evidence, but was oral. 213AppDiv 439, 210NYS208.

227-80 TexCivA 272SW231.

227-81 Ala 128S796; TexCivA 272SW 231.

227-85 218Ala270, 118S658.

227-90 See also 141SC265, 139SE625, 54ALR964.

227-91½-New. Statute requiring contracts for conveyance of land to be in writing does not apply to agreement for transfer of husband's real estate set forth in divorce decree. 144Va692, 130 SE902.

227-94 116Nebr789, 219NW142.

227-99 241Mich416, 217NW42 (matters held to constitute surrender of land contract by operation of law).

229-25½-New. Agreement for surrender of lease having more than one year to run is within statute. TexCivA 1SW (2d)649.

229-25½-New. Surrender of oil lease granting vested interest can be effected only by instrument in writing. TexCivA 1SW(2d)649.

229-30½-New. Statutory formalities are held not required in the execution of a release by a corporate lien claimant in view of practice under lien statute. 194Wis504, 217NW313.

229-34 TexCivA 2SW(2d)888. But see 234Ky376, 28SW(2d)43.

230-46 260Mass15, 156NE689.

230-47 203 Iowa1114, 211NW986; TexCivA 20SW(2d)409.

231-62 12F(2d)724; 199Cal 386, 249P 513; 72CalA786, 238P155 (requirements stated for sale of goods at price not less than two hundred dollars); Mich 233NW202; 149Miss340, 115S562; 137 Okl 35, 277P643; 10PaDist&Co 431.

231-63 TexCivA 294SW928.

231-68 [a] (1) 93PaSuper246. (2) Nothing added to sales act by interpretation. 283Pa434, 129A559.

231-76 85PaSuper279.

232-83 85PaSuper279.

232-85 85PaSuper279.

232-89 7F(2d)441; 315Mo 1165, 289SW 609. [a] (26) Transaction whereby guarantor of notes with agreement for repurchase became liable to repurchase renewal notes. 165Minn285, 206NW459. (27) Oral agreement to furnish labor and materials for single price held not within statute. 110Conn234, 147A709. (28) Other instances. MoA 2SW(2d) 176.

233-91 256Mass66, 152NE347.

233-92 [a] Unwritten promise of seller after delivery of goods to seller to take goods back which were in buyer's possession under executed sales is unenforceable under statute. 34GaA345, 129 SE555.

233-95½-New. An agreement to sell personalty need not be in writing. 226 Ky367, 10SW(2d)1115.

233-96 [c] Requirement of Sales Act § 4 (1) are disjunctive and not cumulative and where buyer receives part of goods statute has no application. 283Pa434, 129A559. (2) The section relates only to contracts which are wholly executory.

283Pa434, 129A559.

233-99½-New. An alleged oral contract for the sale and discount of notes of the aggregate value of ten thousand dollars has been held void, where no part of the notes was delivered and no part of the consideration for the sale and discount of the notes was paid. 26F(2d)696.

234-11 240NY209, 148NE212.

234-13 [a] **That goods were to be manufactured specially** for seller held insufficient to take contract out of statute. 240NY209, 148NE212.

235-16 256Mass167, 152NE59; 227App Div452, 238NYS230.

235-18 69CalA384, 231P567.

235-20 [b] (1) 67CalA488, 227P787 (contract for services or employment); NJ 141A3.

235-21 [b] (3) Contract is not within statute where furniture ordered was manufactured in particular styles especially for buyer and would not be suitable for sale to others. Iowa 230 NW356.

236-23 See also 176Ark463, 3SW(2d) 295.

236-24 133Misc27, 231NYS3.

236-26 49RI144, 141A77.

237-38 99CalA270, 278P876; 114Nebr 284, 207NW204; 105NJL278, 145A318; 38Wyo 267, 267P86. [a] **Where officer of corporation selling its stock** agrees to repurchase, contract is enforceable as not within statute. 38Wyo 267, 267 P86.

237-39 38Wyo 267, 267P86.

237-48½-New. Leaseholds are neither contracts of sale nor choses in action. 296Pa449, 146A119.

233-68 7F(2d)435; 328 Ill 368, 159NE 815; 241 IllA454, 462 [citCJ].

238-69 NB [1930] 1DomLR219 (through broker); NB [1930] 4DomLR421.

238-70 241 IllA454, 462 [citCJ].

238-75 263Mass288, 160NE892.

239-88 200Cal 428, 253P320; 201Cal 587, 258P382; 160Ga387, 128SE190 (all of goods); 34GaA73, 128SE207 (all of goods); 217MoA592, 274SW941; 104 NJL218, 141A92; NJSup 130A823; NJ Sup 135A335; Okl 292P12; 6PaDist&Co 706; 50Philippine387; 133SC274, 130 SE886 (acceptance and use of part of goods shipped on memorandum).

240-94 217AppDiv647, 216NYS174; 291 Pa85, 139A615.

242-3 [b] **Acceptance by purchaser,** when made, operates on contract so as to validate it as of date entered into. CalA 286P723.

242-8 12F(2d)724; 176Ark375, 3SW (2d)38; MoA 11SW(2d)67; MoA 16SW (2d)602; 139 Okl 88, 281P293 (must be transfer of possession actually, symbolically, or constructively).

242-9 MoA 11SW(2d)67.

243-11 See also 93CalA685, 270P239.

243-15 217AppDiv647, 216NYS174.

243-23 91PaSuper436.

243-24 [b] **Letter by plaintiff** to third person, confirming sale of interest, together with acceptance of third person noted on letter, was acceptance and receipt of chose in action by defendant, within Personal Prop. L. § 85 subd 1. 133Misc597, 233NYS182.

244-26 149Miss340, 115S562.

245-37 290Pa486, 139A147.

245-42 133SC458, 131SE620.

246-50 200Cal 428, 253P320; 133SC 458, 131SE620.

246-55½-New. A buyer's request to the seller to see if he could sell stock orally contracted for is not acceptance of the stock. MoA 11SW(2d)67.

246-58 192Wis174, 212NW262.

246-64 But see 132Misc907, 230NYS561.

247-66 7F(2d)441.

247-75 139 Okl 88, 281P293.

248-78 149Miss340, 115S562, 563 [cit CJ].

248-84 Man [1929] 4DomLR337.

249-88 CalA 268P443; 102Conn626, 129 A782; 35GaA33, 132SE142; Iowa 230 NW371; 141Wash50, 250P456.

249-93 85PaSuper279.

250-96 290Pa486, 139A147.

250-2 220AppDiv679, 222NYS472.

250-5 See 241 IllA416.

251-11 139 Okl 88, 281P293.

251-22 MoA 11SW(2d)67.

251-27 41GaA183, 152SE273.

252-29 See also MoA 16SW(2d)602.

252-40 201Cal 587, 258P382; 255Mass 591, 152NE83; 217MoA592, 274SW941; 315Mo 1165, 289SW609; NJSup 130A 823; 130Misc416, 224NYS251. [a] (2) "Earnest" and "part payment" are synonymous. 130Misc416, 224NYS251. (3) Earnest refers to payment of sum of money or delivery of thing or token upon making of contract to mark assent of both parties to contract. 14PaDist& Co 1.

253-41 7F(2d)435. [a] **Payment of interest on balance carried on seller's** books does not take contract out of statute. NJSup 148A153(2dcase).

253-47 90CalA421, 265P1042, 1044 [cit CJ].

254-58 130Misc416, 224NYS251. [a] **Telegraphed guaranty** is not compliance with statute. 14PaDist&Co 1.

254-68 130Misc416, 224NYS251.

255-73 216Ala49, 112S335.

255-79 130Misc416, 224NYS251.

255-80 256Mass397, 152NE621; 130 Misc416, 224NYS251.

255-84 328 Ill 368, 159NE815; 241 IllA 454, 466 [citCJ]. But see 133Misc597, 233NYS182.

255-87½-New. Payment of checks drawn on a bank constitutes no payment of any part of the consideration to the bank making an oral contract for sale and discount of notes valued at ten thousand dollars, and such payment does not take the transaction out of the operation of the statute of frauds. 26F(2d)696.

256-98 226Ky106, 10SW(2d)620; 316 Mo 989, 292SW65; TexCivA 288SW619.

256-99 108Conn683, 145A273; Iowa 230NW356.

256-1 108Conn683, 145A273; 219App Div455, 220NYS104; TexCivA 293SW 921.

256-4 IndA 169NE596.

256-9 CalA 290P304; 151Md348, 133A 836, 47ALR195; 239Mich81, 214NW160; 115 Okl 53, 241P496; 153Va98, 149SE 509; Wis 233NW79 (stock subscription contract).

257-11 151Md348, 133A836, 47ALR195.

257-18 But see 80Mont120, 259P609. [b] (5) Payee's indorsement on back of note extending time of payment, together with signature on face of instrument, constituted signed agreement for extension of maturity date so as to take case out of statute of frauds. Tex CommnA 10SW(2d)698.

257-21 5F(2d)809; 235Mich306, 209 NW97; 83NH509, 144A853.

257-22 136Misc206, 240NYS492 (contract authorizing sale by broker held sufficient to show intent to convey free from encumbrances).

257-25 228AppDiv361, 240NYS31. But see 169Ark169, 273SW396.

257-27 7F(2d)513; 43F(2d)309; 226 Ky106, 10SW(2d)620; Wis 233NW79.

258-28 6PaDist&Co 534, 535 [citCJ]; TexCivA 5SW(2d)598.

258-30 202 Iowa1251, 211NW898; 173 Minn225, 217NW136.

258-32 But see 290Pa79, 137A910.

258-33 92Fla689, 110S256; NH 149A 73.

258-36½-New. Minute books of drainage board are held sufficient. 174Ark 293, 295SW19.

259-37 153Va591, 151SE146 (undelivered deed).

259-39½-New. As between parties orally agreeing that property owned jointly should be divided between them in accordance with a certain map and executed quitclaim deeds, the rights defined on the map are in effect incorporated into the deed, and constitute a sufficient memorandum to comply with the statute. 108Conn538, 144A32.

259-40 124Kan745, 747, 262P1025 [cit CJ]. See also 30F(2d)5.

259-41 124Kan745, 747, 262P1025 [quotCJ].

259-41½-New. or, in case of mutual wills, they contain nothing to indicate that they were made in pursuance to a contract. 33Wyo 439, 240P927, 43ALR 1010.

259-42 124Kan745, 747, 262P1025 [quotCJ].

259-43 30Ariz522, 249P76, 48ALR1347; 124Kan745, 747, 262P1025 [quotCJ]; 146SC59, 143SE552, 59ALR1297.

259-44 100CalA373, 280P191 (verified answer, setting forth facts, is insufficient where made after expiration of parol agreement); 228Ky338, 14SW(2d) 1093. But see 247Mich503, 226NW251.

259-52 26F(2d)698; 170Ark908, 281SW 671; 77CalA257, 246P151; 127Kan16, 272P108; 210Ky146, 275SW383; 256 Mass66, 152NE347; 221MoA600, 283SW 65; MoA 5SW(2d)699; 82NH449, 136A 257; 103NJEq121, 142A441; NJCh 148 A630; 193NC454, 137SE311, 312 [quot CJ]; 112 Okl 105, 240P76; 129 Okl 58, 263P145; 144 Okl 254, 291P70; 11Pa Dist&Co 333; 157Tenn140, 7SW(2d)53 (wills); 67Utah202, 246P949; BC [1929] 4DomLR178.

260-55 8F(2d)601; 170Ark908, 281SW 671; 75CalA569, 243P445; 84CalA669, 258P663; 89Fla321, 104S583; 92Fla 689, 110S256; 94Fla1097, 115S498; 98 Fla604, 124S30; 160Ga321, 127SE872; 157Md196, 145A487; 256Mass66, 152 NE347; 221MoA600, 283SW65; 193NC 454, 137SE311, 312 [quotCJ]; 112 Okl 105, 240P76; 115 Okl 53, 241P496; 129 Okl 58, 263P145; 139 Okl 53, 281P228; TexCivA 274SW323; TexCivA 293SW 921; 100WVa331, 130SE447. But see Iowa 229NW756. [a] **Cable messages** held sufficient compliance with statute. 126Misc306, 212NYS557.

261-56 Iowa 230NW356; 193NC454, 137SE311, 312 [quotCJ].

261-57 193NC454, 137SE311, 312 [quot CJ].

261-58 Iowa 230NW356; 193NC454, 137SE311, 312 [quotCJ].

261-59½-New. written instrument containing offer to exchange properties and deeds of the parties subsequently executed, 67Utah202, 246P949.

261-64 86CalA324, 260P890.

261-66 77CalA257, 246P151.

261-68 315Mo 980, 287SW624, 625 [quotCJ entire section]; 193NC454, 137 SE311, 312 [quotCJ].

261-68½-New. A memorandum of the terms of a lease signed only by landlord and delivered to broker and an identical memorandum signed by the broker as agent for tenant is insufficient to bind the landlord. 126Misc39, 212NYS 471.

261-69 7F(2d)513; 43F(2d)309; 35 GaA683, 134SE627 (reference in letter to original unsigned order); Iowa 230 NW851; 240Mich475, 215NW302; 315 Mo 980, 287SW624, 625 [quotCJ].

262-71 126Misc39, 212NYS471 (all papers connected with alleged lease may be construed together, though not referring to each other). See also 11Pa Dist&Co 701, 703 [citCJ].

262-72 30F(2d)172; 87IndA644, 151 NE739; 240Mich141, 215NW339; 283 Pa429, 129A324 [quotCJ]; 291Pa85, 139A615. [a] 315Mo 980, 287SW624; 157Tenn140, 7SW(2d)53. [b] 87IndA 644, 151NE739; 220AppDiv679, 222NYS 472; 127Misc508, 217NYS39 (latter merely referring to contract answered by other letter not specifically denying claim); 291Pa85, 139A615.

262-75 240Mich475, 215NW302.

262-81 35GaA683, 134SE627; Iowa 230 NW356.

262-82 170Ark908, 281SW671; 35GaA 683, 134SE627 (letter referring to original unsigned order); 142Miss409, 107 S556; 220AppDiv160, 221NYS11; 115 Okl 53, 241P496.

263-84 35GaA683, 134SE627 (recognition of, and specific reference to, unsigned paper).

263-93 142Miss409, 107S556.

263-95 124Kan745, 747, 262P1025 [quotCJ]; 148Miss137, 114S257.

264-96 124Kan745, 747, 262P1025 [quotCJ]; 221MoA600, 283SW65.

264-99 But see 220AppDiv663, 222NYS 386.

264-6½-New. Transaction whereby offeree accepts renewal of a written offer previously rejected is not within statute. 66Utah487, 243P798 (renewed offer deemed resubmission of former written offer).

264-7 But see 202 Iowa976, 208NW343 (purported antenuptial agreement signed after marriage and not reciting that it was to be executed for purpose of furnishing evidence of previous oral antenuptial contract, or that it was executed in consideration of previous oral

antenuptial contract).

265-13½-New. Memorandum signed by agent after he has ceased to be agent in that behalf is insufficient. Can [1929] 4DomLR416.

265-13½-New. After revocation of authority and notice thereof agent who made oral contract cannot bind principal by signing memorandum. Can [1929] 4DomLR416.

265-24 82CalA407, 255P521; 255Mass 599, 152NE87; MoA 272SW83; 220App Div679, 222NYS472; 127Misc508, 217 NYS39; 199Wis79, 225NW750(2dcase). [a] 201Cal 605, 258P85; 321Mo 287, 11 SW(2d)26; 98NJEq602, 131A585. (2) Other instances. CalA 290P304.

265-25 98NJEq602, 131A585; 128Misc 618, 219NYS99; 222AppDiv31, 225NYS 355. [a] (1) 128Misc618, 219NYS99. (2) Quitclaim deed held insufficient memorandum. 254NY114, 172NE260. [b] **Where intention of parties to sell and purchase is clear,** memorandum is sufficient, though it does not in terms state agreement to sell. 98NJEq602, 131A585.

265-28 [c] **Certain agreement** made long after alleged oral agreement to devise lands construed not to supersede such oral agreement and false promise as to nature of devise to defendant rendered them abortive to bind defendant. 122Kan814, 253P600.

265-29 128Misc618, 219NYS99.

265-30 256Mass397, 152NE621; 249NY 117, 162NE603.

265-30½-New. or where it merely identifies a contract without itself constituting the entire contract, 127Misc508, 217 NYS39.

265-31 210Ky65, 275SW366; 128Misc 618, 219NYS99.

265-31½-New. Memorandum is not inadequate for failure to reproduce words of preliminary agreement unless such words were condition of bargain. 245 NY305, 157NE148.

266-33 MoA 15SW(2d)961. See also 29F(2d)916.

266-34 102Conn558, 129A538.

266-37 168Ark713, 271SW345. [a] **Written option to sell held not contract of sale** between signers and corporation orally agreeing to purchase. 36F(2d) 198.

266-38 167Ga867, 147SE44. [a] 210 Ky146, 275SW383.

267-52 7F(2d)513; 283Pa429, 129A324 [citCJ].

268-57 170Ark908, 281SW671; 317 Ill 173, 147NE791; 329 Ill 246, 160NE142; 210Ky146, 275SW383; MoA 272SW83; 218AppDiv142, 217NYS870; 128Misc 618, 219NYS99; 112 Okl 105, 240P76; 130 Okl 104, 265P108; 291Pa85, 139A 615; TexCivA 294SW612. [a] (1) 12 F(2d)885; 73CalA612, 238P1066; 247 Mich650, 226NW665. (2) Contract evidenced by letters indicating space to be occupied, stating consideration properly signed by owner, and subsequently acted upon by tenant is sufficiently complete. 242NY134, 151NE155. [b] **Particular memorandum held to be incomplete.**-168Ark713, 271SW345. [c] **Memorandum of sale contract failing to state time of delivery** is sufficient, if parol agreement fixed no time for delivery. 240NY209, 148NE212.

268-58 108Conn683, 145A273; 125Me 411, 134A506, 47ALR1156; 127Misc508, 217NYS39; 128Misc618, 219NYS99; 130 Okl 104, 265P108; TexCivA 294SW612.

268-59 35GaA12, 131SE921 (contract for sale of land); 125Me411, 134A506, 47ALR1156; 141SC126, 139SE219; TexCivA 19SW(2d)936.

268-61 128Misc618, 219NYS99; 144 Wash558, 258P488. [d] **Particular writings held sufficient.**-TexCivA 297SW 524.

268-62 214Ala18, 106S181; 215Ala209, 110S306; 170Ark908, 281SW671; 92 Fla689, 110S256; 160Ga321, 127SE872; 83NH509, 144A853; 99NJEq490, 133 A718; 244NY395, 155NE683; 218App Div322, 218NYS301; 127Misc508, 217 NYS39; 218AppDiv142, 217NYS870; 128Misc618, 219NYS99; 123 Okl 225, 253P81; 291Pa85, 139A615; 144Wash 558, 258P488. [d] 214Ala481, 108S385; 216Ala265, 113S233; 151Md348, 133A 836, 47ALR195; MoA 287SW1064; MoA 158SW(2d)961; 98NJEq602, 131A585; 130Misc64, 223NYS634; 133Misc312, 232NYS171. [f] 214Ala18, 106S181; 168Ark713, 271SW345; 241 IllA146; 252 IllA145; Me 150A491; Mass 169 NE915; 230AppDiv18, 242NYS612. [g] 80Mont120, 259P609.

268-63 160Ga321, 127SE872. [b] Okl Cr 292P1046(2dcase).

269-71 MoA 287SW1064; 247NY465, 160NE916.

269-72 168Ark713, 271SW345; 105 Conn636, 136A382; 246 IllA433; 264 Mass102, 162NE4 (insufficient); 144 Miss666, 110S232; MoA 272SW83; MoA 287SW1064; 93PaSuper227; 141SC126, 139SE219; 67Utah202, 246P949 (instrument held insufficient in absence of evidence explaining ambiguities); 151 Wash613, 276P562. [b] (3) Contract held uncertain in not showing whether it is contract of sale and whether warranty or quitclaim deed was to be executed. 144Miss666, 110S232. [c] 8 F(2d)601; 12F(2d)885; 242NY134, 151 NE155.

269-72½-New. The memorandum must identify the contract sued upon. 126 Misc39, 212NYS471 (not merely contract).

270-74 170Ark908, 281SW671; 83NH 509, 144A853; TexCivA 12SW(2d)1097. [a] **Reference to oral words** in memorandum insufficient where writing itself is insufficient as not being specific. 215 AppDiv385, 213NYS630.

270-75 216Ala472, 113S529; 92Fla689, 110S256; 252Mass162, 147NE585 (word "slice" signifying indeterminate part or portion created incurable uncertainty); Mass 165NE885; MoA 272SW83; TexCommnA 272SW128.

270-76 172Ark667, 291SW68.

270-78 168Ark713, 271SW345 (holding memorandum insufficient); 170Ark908, 281SW671; 264Mass102, 162NE4; MoA 272SW83; 112 Okl 105, 240P76; Tex CivA 278SW866; 144Wash558, 258P488. [a] **Memorandum held sufficient.**-Mich 216NW920; 242NY134, 151NE155.

270-79 216Ala472, 113S529; CalA 291 P644; 92Fla1110, 111S386; 99Fla173, 125S909; 329 Ill 246, 160NE142; 210Ky 237, 275SW691; 218Ky731, 292SW318; 219Ky468, 293SW950; 228Ky338, 14SW (2d)1093; 251Mich124, 231NW114; 119 Or297, 247P761; TexCivA 278SW866; TexCivA 290SW239; TexCivA 12SW (2d)1097; 198Wis43, 223NW579. [b] 119 Or297, 247P761. [f] (8) "Land lying in Harlan County, Kentucky, on Fork ridge of Catrons creek so as to reach the Jane Dean's line and being on northeast side of Catrons creek." 218Ky 731, 292SW318. (9) "Farm of T. C. S.," not generally so known. 321Mo 688, 12SW(2d)719. (10) Receipt describing property as water frontage lot starting from center of Market Street, thence thirty feet north of some addition to Seattle. 151Wash529, 276P564. (11) Other instances. 99Fla173, 125S909; 222MoA524, 293SW476; TexCivA 278 SW866. [g] **Description by lot number and plot in which lot is located** is sufficient in some jurisdictions, though no city, county or state is mentioned. 241 Mich306, 216NW920. [h] **Date line** of certain place in written proposal creates presumption that lands are located there. TexCivA 12SW(2d)1097.

272-81½-New. Bond in statutory language is not within statute of frauds. 87 IndA264, 159NE551.

272-83½-New. Presumption that mortgagor intended to convey only such land as he ordered does not render mortgage containing insufficient description of land constructive notice. TexCivA 286 SW657.

272-88 TexCommnA 289SW993.

272-89 195Wis69, 217NW700.

273-91 171Ark168, 283SW360; Ind 147 NE635; MoA 278SW781, 783 [citCJ].

273-95 240Mich141, 215NW339.

273-96 241Mich306, 216NW920.

273-97 119 Or297, 247P761, 764 [quot CJ].

273-98 119 Or297, 247P761, 764 [quot CJ].

273-99 119 Or297, 247P761, 764 [quot CJ].

273-2 119 Or297, 247P761, 764 [citCJ].

273-8 But see TexCivA 278SW866.

274-16 217MoA592, 274SW941, 943 [cit Cyc]; 218AppDiv142, 217NYS870. [a] **Description in mortgage lien on restaurant property held insufficient,** under statute, where it generally specified property covered. 211Ky849, 278SW 133.

274-18 217MoA592, 274SW941, 943 [cit Cyc].

274-21 217MoA592, 274SW941. [a] **Cargoes of coal** is sufficient designation of quantity where meaning is fixed by past dealings of parties. 34F(2d)616.

274-21½-New. Where the property is definitely described, the fact that some act such as weighing or counting must be done before the amount can be ascertained does not invalidate the contract. 217MoA592, 274SW941.

274-22 [d] (2) Contract for sale of two cars of apples is valid, trade custom establishing amount of "car-load." 151 Wash613, 276P562.

274-24 141SC126, 139SE219.

274-28 245NY305, 157NE148; 141SC 126, 139SE219.

274-29½-New. Where contract was for sale of all paper stored in seller's warehouse at named price per ton and provided for determination of exact weight, it is not void if property could be located and ascertained by extrinsic evidence. 214AppDiv537, 212NYS318.

274-30 Ont [1926] 4DomLR1052. [c] **Writing held sufficient.**-GaA 155SE345.

275-32 214Ala18, 106S181; 157Md196, 145A487; 264Mass102, 162NE4; MoA 272SW83; 99NJEq490, 133A718; 253 NY472, 171NE747. [a] (2) 99NJEq490, 133A718. (3) 99NJEq490, 133A718. [g] **Owner** sufficient name. 160Ga321, 127SE872. [h] **Description held sufficient.**-222MoA201, 297SW151.

275-33 160Ga321, 127SE872, 876 [quot CJ].

275-34 83NH509, 144A853; NJ 151A 55.

275-35 329 Ill 246, 160NE142, 144 [quotCJ]; 99NJEq490, 133A718. [a] 99NJEq490, 133A718. [b] (1) Ont [1926] 4DomLR1052.

275-36 126Misc39, 212NYS471 (memorandum must show both parties).

276-37 99NJEq490, 133A718; 253NY 472, 171NE747.

276-38 214Ala18, 106S181.

276-39 214Ala18, 106S181.

276-40 253NY472, 171NE747.

276-41½-New. Agent must have written authority to insert name of grantee. 172Ark129, 287SW745.

276-45 149Md548, 131A810; NJ 151A 55; 99NJEq490, 133A718.

276-46 149Md548, 131A810.

276-46½-New. Where contract designates buyer as certain person "or his nominal," and contract is signed by such person followed by word "agent," writing is sufficient in suit by such person to enforce contract. 99NJEq490, 133A 718.

276-47 MoA 3SW(2d)399, 400 [citCJ].

276-48 MoA 3SW(2d)399, 400 [citCJ].

277-51 6F(2d)984.

277-52 NJCh 146A200.

277-55 214Ala18, 106S181; 80CalA98, 251P658; 264Mass102, 162NE4; 141 Miss648, 107S277; MoA 272SW83; 144 Wash558, 258P488.

277-56 80CalA98, 251P658.

277-57 29F(2d)916; MoA 278SW781; 290Pa486, 139A147; 12PaDist&Co 1; TexCivA 16SW(2d)400.

277-58 80CalA98, 251P658; 35GaA12, 131SE921; 256Mass397, 152NE621; TexCivA 16SW(2d)400. [a] (1) MoA 272SW83.

277-59 80CalA98, 251P658.

277-60 35GaA12, 131SE921; 144Wash 558, 258P488.

278-61 283Pa429, 129A324 [quotCJ].

278-62 108Conn683, 145A273; 283Pa 429, 129A324 [quotCJ]; TexCivA 294 SW612; TexCivA 16SW(2d)400; 144 Wash558, 258P488.

278-63 283Pa429, 129A324 [quotCJ].

278-64 219AppDiv455, 220NYS104; 283Pa429, 129A324 [quotCJ].

278-65 283Pa429, 129A324 [quotCJ]. [a] (6) Balance in one, two, and three years with interest at six per cent 215 Ala596, 112S128. (7) Memorandum held

insufficient where purchase money mortgage was made payable when building was put up but not fixing time. 105Conn 636, 136A382. [b] **Failure to prescribe security for balance not fatal.** 215Ala 596, 112S128. [c] **No presumption** arises that price was to be in cash or that contract was to be completed within reasonable time, where memorandum indicates that terms not stated were agreed on. 108Conn683, 145A273.

278–66 [a] **Where time for removal of timber is fixed by oral agreement,** written agreement silent as to time cannot be aided by implication of a reasonable time. 144Wash558, 258P488.

278–67 247NY465, 160NE916. [c] **Cable transactions.**–126Misc306, 212NYS 557.

278–67½–New. A collateral agreement cannot be aided by usage, although not contradicting or varying the terms of the written contract. **TexCivA** 294SW 612.

278–71 **TexCivA** 294SW612.

278–72 246NY79, 158NE27 (duration of mortgage).

278–72½–New. , and the fact that an oral agreement later reached regarding such omitted matter does not affect the original contract. 246NY79, 158NE27.

278–75 215Ala596, 112S128; 108Conn 683, 145A273; 92Fla689, 110S256; 165 Ga534, 141SE653; 246Mich659, 225NW 620; 144Miss666, 110S232. [a] **Statement of terms held sufficiently clear.**–133 SC320, 131SE590

279–78 214Ala18, 106S181; 170Ark 908, 281SW671.

279–80 35GaA12, 131SE921; 256Mass 66, 152NE347. [a] 215Ala209, 110S 306.

279–82 131Misc573, 227NYS576; 291 Pa85, 139A615; 144Wash558, 258P488.

279–83 141SC126, 139SE219.

279–84 [a] (2) Contracts for sale of sugar, as explained by custom of trade relating to basic price fixed, is sufficient memoranda. 247NY465, 160NE 916; 220AppDiv160, 221NYS11.

279–85 215Ala596, 112S128; 35GaA12, 131SE921.

279–87½–New. It is immaterial on question of sufficiency of writing whether or not independent provision be set forth with certainty. 218AppDiv322, 218NYS301.

279–88 [a] **Memorandum of option held sufficient.**–TexCivA 284SW253.

279–90 7F(2d)513.

279–95 141SC126, 139SE219.

279–96 80CalA98, 251P658; 160Ga321, 127SE872; 131Misc340, 225NYS767; 123 Okl 225, 253P81. [b] **Kind or character of improvements** must be designated. 80CalA98, 251P658. [c] **Agreement held insufficient,** for lack of definiteness as to terms and conditions. 80 CalA98, 251P658.

279–97 80CalA98, 251P658; 160Ga321, 127SE872; MoA 297SW423; 123 Okl 225, 253P81. But see 134Misc467, 235 NYS45.

279–98 80CalA98, 251P658; 160Ga321, 127SE872.

279–99 160Ga321, 127SE872.

280–14 214Ala18, 106S181; 218App Div322, 218NYS301.

281–26 35 OhA139, 172NE158.

281–27 Mass 165NE885; 83NH509, 144 A853.

281–37 168Minn308, 210NW84.

281–44 214Ala441, 107S9; 7Alaska374; 129Misc213, 221NYS127.

282–45 100WVa350, 130SE472.

282–46 248NY28, 161NE319 (sufficient).

283–52 62 OntL65, [1928] 2DomLR485.

283–55 103WVa394, 137SE543.

283–58 **TexCivA** 293SW921.

283–60½–New. Where the memorandum for lease provides for annual rental but does not stipulate when it shall be paid, it is generally payable at the end of each rent year. 160Ga321, 127SE 872.

283–64 214Ala18, 106S181; 170Ark 908, 281SW671; 264Mass102, 162NE4; 141Miss648, 107S277; 168Minn308, 210 NW84 [citCJ]; 194Wis591, 217NW302. [b] **RI** 137A699; 194Wis591, 217NW 302. [d] **Provision for credit voucher.**–218AppDiv322, 218NYS301.

286–97 200Wis412, 228NW515, 67ALR 875.

287–4 264Mass102, 162NE4.

287–9 15DelCh19, 129A919; 208Ky 715, 718, 271SW1049 [citCJ]; 219Ky9, 292SW345 [citCJ].

287–11 208Ky715, 718, 271SW1049 [cit CJ].

287–15 MoA 3SW(2d)399, 400 [citCJ].

287–18 41 Ida547, 240P593.

288–22½–New. Sale contract, sufficiently describing land, and signed by all parties, is held not unenforceable because survey contemplated was not signed by vendors. 153Md62, 137A477.

288–23 73CalA612, 238P1066. 106S [cit CJ]; 208Ky715, 718, 271SW1049 [cit CJ]; 219Ky9, 292SW345, 348 [citCJ]; 245NY305, 157NE148; 230AppDiv514, 245NYS410. [a] (1) 208Cal 162, 280P 684. [d] **Adoption of principal's name by agent.**–252 IllA145. [e] **Original signature may be adopted after alteration of instrument.**–34 OhA133, 170NE 581.

288–24 **Iowa** 230NW356.

288–27 73CalA612, 238P1066.

288–29 250NY221, 165NE271. [a] **Signature at or near beginning of instrument makes instrument invalid.** 225Ky 70, 7SW(2d)852.

289–30 73CalA612, 238P1066.

289–31½–New. Printed name in heading is not signature where dotted line was provided for seller's signature. 245NY305, 157NE148.

289–33 But see 208Cal 162, 280P684.

289–38 179Ark437, 16SW(2d)585.

289–39 29F(2d)916; 256Mass66, 152 NE347; 80Mont120, 259P609; **NJSup** 140A244; 99NJEq490, 133A718; 100 NJEq75, 134A838; 224AppDiv435, 231 NYS315; 159Tenn103, 15SW(2d)742. [c] **Memorandum, not contract,** is required to be signed. 7F(2d)513.

290–43 **Ida** 288P167.

291–44 238Mich373, 213NW106.

291–45 329 Ill 637, 161NE118; 239 Mich216, 214NW245; 254NY114, 172 NE260; 127Misc164, 215NYS322. [b] (3) Option to purchase, if signed by vendor and accepted by vendee, is sufficient. 10PaDist&Co 261.

291–46 226Ky106, 10SW(2d)620; 231 Ky122, 21SW(2d)153; 157Tenn140, 7 SW(2d)53.

291–47 213Ky333, 280SW1115; 99NJ Eq490, 133A718; 98NJEq602, 131A585. [b] **Contract signed before alterations are made with consent of signer** is enforceable where accepted by other party. 34 OhA133, 170NE581.

292–50 223AppDiv267, 228NYS44; 137 Misc637, 244NYS231. See also 250NY 221, 165NE271.

292–52½–New. An agreement for a lease for a term within the statute of frauds is unenforceable where it is not signed by an owner of an undivided interest sought to be charged. 252 IllA 145.

292–59 12F(2d)885; 165Ga534, 141SE 653; 149Md548, 131A810; 253Mass368, 149NE118; 264Mass102, 162NE4; 172 Minn40, 214NW759; 216AppDiv362, 215NYS184; 189NC775, 128SE349; 23 OhA426, 155NE154; 11PaDist&Co 333. [b] **When evidence shows contract was in writing and was executed by agents** it is not within statute, though writing was not introduced. 169Ark532, 275 SW912. [c] **Where revision of trade agreement was signed by agent of association** of which defendant was member, it was held not void under statute. 23 OhA426, 155NE154.

293–61 39Wyo 285, 270P1077, 1080 [quotCJ].

293–64 143Va722, 129SE499, 503 [quot CJ].

293–65 72CalA786, 238P155; 330 Ill 548, 162NE191; 117Nebr92, 219NW 837; 101NJEq232, 137A524; 134Misc 598, 236NYS255; 26 OhA181, 159NE 377; 143Va722, 129SE499, 503 [quot CJ]; Can [1929] 4DomLR416. [a] **Execution within apparent scope of authority** of agent is sufficient. 169Ark 532, 275SW912. [b] **Authority to draw up memorandum of terms** is held not authority to sign it as agent. 151Md 348, 133A836, 47ALR195.

293–66 143Va722, 129SE499, 503 [quot CJ].

293–67 230AppDiv514, 245NYS410.

293–69 151Md348, 133A836, 47ALR 195; 83NH509, 144A853.

293–75 214Ala18, 106S181; 157Md196, 145A487; Mass 169NE64; 49RI 125, 140A779; 151SC114, 148SE704, 63ALR 965. [a] (1) 214Ala18, 106S181. [b] **Memorandum held insufficient.**–214Ala 18, 106S181.

294–80 158Tenn109, 11SW(2d)869.

294–87 8F(2d)601; MoA 290SW616, 618 [citCJ]; 215AppDiv617, 213NYS 468, 474 [citCyc]. [b] **Entry of sale property entered on broker's books** constitutes valid contract under statute. 215AppDiv617, 213NYS438. [c] **Broker for one party.**–91PaSuper436.

294–87½–New. A broker under an oral contract to sell real estate is not authorized to sign the principal's name to a contract of sale. 322 Ill 67, 152NE 584.

295–2 79Mont550, 257P1016. [a] **Power to execute such contract must be in writing** when law requires contract to be in writing. 13LaA337, 125S507.

295–3 151Md348, 133A836, 47ALR195; **NJCh** 148A630; 21 OhA268, 153NE197; 93PaSuper227. But see 165Ga397, 141 SE48.

295–4 72CalA78, 236P956 (sufficient writing); 75CalA540, 243P487; 239 Mich637, 214NW947; 192NC552, 135SE 452; 52SD318, 217NW390.

296–7 208Cal 162, 280P684; 72CalA78, 236P956; 90CalA450, 266P303; 317 Ill 173, 147NE791; 162LaI117, 110S109; 291Pa53, 139A606; 300Pa334, 150A640. [f] **Tenant-in-common cannot bind other tenants** by grant of fishing rights. 98 NJEq184, 130A830.

296–11 92Fla731, 110S358; 94Fla159, 113S685; 226Ky106, 10SW(2d)620; 228 Ky338, 14SW(2d)1093 (husband).

297–12 **TexCivA** 5SW(2d)529; 39Wyo 285, 270P1077, 1080 [quotCJ].

297–16 92Fla731, 110S358; **NH** 149A 73.

297–20 72CalA78, 236P956 (sufficient).

297–21 337 Ill 111, 168NE908. See also 31 OhA537, 166NE595.

297–23 CalA 290P509; 165Ga397, 141 SE48, 51 [citCJ]; 79Mont550, 257P 1016; 98NJEq59, 130A839; 288Pa264, 135A764; 293Pa513, 143A227. See also 206Cal 231, 273P766.

298–29½–New. Mutual agent may sign the memorandum when authority so to do has been by both parties actually conferred, with knowledge of each that he is acting for both, or where it is deemed conferred because of the nature of his office. 160Ga321, 127SE872.

298–32 239Mich637, 214NW947.

298–33 [a] 172Minn40, 214NW759.

298–35 12F(2d)885; 92Fla731, 110S 358; 151Md348, 133A836, 47ALR195. See also 293Pa513, 143A227.

298–37 218NYS277.

298–40½–New. Knowledge of tenants in common that one tenant granted fishing rights, amounted, under statute, to ratification of a lease at will. 98NJEq 184, 130A830.

298–42 72CalA78, 236P956 (instrument by which principal agreed to sell land subject to deed of trust to agent sufficient ratification); 75CalA540, 243P487; 288Pa264, 135A764; 293Pa513, 143A 227.

298–46 [a] 151Md348, 133A836, 47ALR 195. [c] **Facts held to constitute ratification.**–82Colo 529, 261P463.

298–50 **NH** 149A73.

298–51 12F(2d)885; 149Md548, 131A 810; 151Md348, 133A836, 47ALR195; 216AppDiv362, 215NYS184; **TexCivA** 5 SW(2d)529; 143Va722, 129SE499.

299–52 149Md548, 131A810. [b] **Statute is inapplicable** where owners can enforce lease by compliance with it. **Pa** 151A879.

299–52½–New. , and especially where the agent signs in the presence of principal and at his direction. 216AppDiv 362, 215NYS184.

299–59½–New. Where a broker deals on behalf of both the seller and the buyer, the memorandum must show that he signed for the purchaser or the contract will not be binding. 91PaSuper 436.

299–59½–New. A broker's signature to

a telegram is not sufficient where he does not purport to sign as agent. 208 Cal162, 280P684.

299-60 239Mich637, 214NW947. [b] **Corporate seal.**-100NJEq455, 136A297.

299-61 337 Ill 111, 168NE908.

299-64½-New. But manager of corporation has been held to have no implied authority to sign lease under statute requiring written authority. 98NJEq 59, 130A339.

299-67 239Mich637, 214NW947.

300-70 39Wyo 285, 270P1077, 1080 [quotCJ]. [a] **Written authority** is not necessary. 39Wyo 285, 270P1077.

300-72 39Wyo 285, 270P1077, 1080 [cit CJ].

300-83 142Miss409, 107S556; 157SO 469, 154SE855. [o] **Delivery insufficient.**-210Ky65, 275SW366.

300-84 But see 231Ky122, 21SW(2d) 153.

300-84½-New. Statute is not satisfied by delivery of unsigned memorandum with intent not to sign. 245NY305, 157 NE148.

300-87 221Ky745, 299SW723; 315Mo 980, 287SW624.

301-97 195NC238, 141SE572.

301-2 But see 144 Okl 254, 291P70.

301-12 221MoA600, 283SW65; 58ND 455, 226NW501 (mutual agent).

302-21½-New. Statute is limited to cases in which contractual obligation is basis of recovery, 201 Iowa651, 207NW 764.

302-21½-New. and does not include cases in which basis of recovery is breach of duty in fiduciary relationship. 201 Iowa651, 207NW764.

302-21¼-New. A statute of frauds does not abrogate settled canons of construction applicable to contracts. 245NY305, 157NE148.

302-21½-New. Statute is not applicable to action to quiet title based on alteration of deed by forgery. 80CalA176, 250 P289.

302-21⅝-New. As against innocent purchasers, an agreement by a bank official to take up paper wrongfully sold is not void under the statute of frauds. 27 F(2d)496.

302-21½-New. Statute inapplicable to question whether agent authorized to collect may receive merchandise in payment. AlaA 129S711(2dcase).

302-23 337 Ill 520, 169NE324; 236 IllA 426; 77Mont260, 250P823; 218AppDiv 149, 218NYS31; 20 OhA117, 153NE117; TexCivA 290SW815.

302-24 172Ark381, 288SW890; 178Ark 1056, 14SW(2d)219; Ark 30SW(2d) 215; 161Ga398, 132SE422; 318 Ill 500, 149NE495; 330 Ill 548, 162NE191; 128 Kan55, 275P1077; 227Ky628, 13SW(2d) 776; MoA 296SW1057; 77Mont260, 250 P823; 117Nebr93, 219NW837; 246NY 79, 158NE27; 218AppDiv149, 218NYS 31; 229AppDiv184, 241NYS290; 49Philippine857; 54SD107, 222NW667; Tex CivA 297SW524; 145Wash561, 261P86. See also 101NJL452, 145A866. But see 228AppDiv133, 239NYS291. [a] (3) Statute cannot be used to permit one who takes realty in his own name under oral trust agreement to defraud one who supplied purchase money. 218App Div149, 218NYS31.

303-25 See also 20 OhA16, 153NE117. But see 12F(2d)724.

303-26 254Mass407, 150NE158.

303-27 197Cal 577, 241P861; 73CalA 612, 238P1066; Mass 166NE876; 137 Misc249, 243NYS25.

303-28 216AppDiv431, 215NYS525.

304-34 208Cal 578, 283P67; 26 OhA 383, 160NE491; 137Wash148, 242P3, 5 [quotCJ].

304-38 214Ala226, 107S57; 35GaA767, 134SE831; 318Mo 292, 300SW1108; MoA 29SW(2d)176; 194NC736, 140SE 738; TexCivA 274SW176, 178 [citCyc]; TexCivA 5SW(2d)844. [d] (2) Parol contract voidable only at instance of person against whom contract is invoked. 157Tenn140, 7SW(2d)53.

305-41 218Ala341, 118S578.

306-48 [a] **Indorser of demand note** after delivery may plead the statute. 213Ala97, 104S19.

306-50 TexCivA 28SW(2d)240.

306-51 133Misc312, 232NYS171.

306-57 TexCivA 28SW(2d)240.

306-57½-New. Statute applies to defendant in ejectment action who seeks to enforce contract for sale of land involved the same as it does to plaintiff. 120Kan510, 243P1045.

306-58½-New. Plaintiff may attack instrument relied on in cross-bill. Ill 173 NE162.

307-59 TexCivA 290SW815.

307-60 Utah 280P1042.

307-65 117 Or455, 244P509, 511, 46ALR 245 [citCJ].

307-70½-New. Statute of frauds has no application to action for deceit in making fraudulent promise. 136Wash410, 240P355.

307-71 173Minn225, 217NW136.

307-72 122Kan357, 358, 252P249 [cit CJ]. [a] See also 122Kan357, 252P249.

308-78 But see TexCivA 28SW(2d)240.

308-85½-New. A devisee of part of testator's property may plead statute in suit against him to establish trust by another devisee to whom testator had agreed to will all his property. 30Ariz 522, 249P76, 48ALR1347.

308-86 129Kan351, 282P737 (holder of sheriff's deed on execution sale).

309-93½-New. Where negotiations for the sale of certain leases and personal property are being had, and where there is no definite contract of sale at the time of the taking effect of the amendment to the statute providing that a contract for commissions for the sale of an interest in real estate is valid only when the contract therefor is in writing, a contract for commissions based upon such sale is subject to the provisions of the statute. 29 OhA253, 163NE562.

309-98⅓-New. Legal title is not divested from the creditor nor reinvested in the debtor by latter's failure to plead the statute or object to evidence establishing an oral agreement to take back lands conveyed in settlement of a note. TexCivA 8SW(2d)759.

309-99 110Conn392, 148A328.

309-99½-New. Where deed is taken, grantee is liable for mortgage mentioned therein, as his own debt. 93Fla223, 111 S731, 51ALR976.

310-4 30Ariz522, 249P76, 48ALR1347; 69CalA291, 231P563; 197Cal 577, 241P 861, 864 [quotCJ]; 75CalA737, 243P 686; 80CalA1, 251P330; 110Conn392, 148A328; 36GaA707, 137SE852; 226 Ky453, 11SW(2d)91; 264Mass166, 162 NE300; MoA 29SW(2d)230; 80Mont 120, 259P609; 125Misc330, 211NYS575; 191NC616, 132SE575; 25 OhA130, 157 NE398, 399 [quotCJ]; 129 Or457, 278P 83; TexCommnA 23SW(2d)675; Tex CivA 284SW1057; TexCivA 288SW494; TexCivA 28SW(2d)240. [c] (2) 231Ky 454, 21SW(2d)825. [d] (2) 223AppDiv 134, 227NYS449. [g] **In Washington,** statute affects validity of contract itself and not merely remedy. 137Wash 148, 242P3. [h] **Contract remains valid between parties** other than contracting parties, for purposes other than recovery thereon, 35GaA767, 134SE831.

312-7 70CalA157, 232P767; 137Misc 249, 243NYS25; 292Pa339, 141A159; 135Wash174, 237P317, 240P565. See also 32F(2d)576.

312-8 80CalA1, 251P830; 201 Iowa651, 207NW764; 35 OhA519, 172NE634; 24 OhNPNS459 (rule of procedure and not of property).

314-25 136Misc915, 242NYS505.

314-27 116 Okl 63, 243P216 (contract for sale of oil and gas mining lease); TexCivA 281SW889. [b] (2) Oral contract to convey land is not specifically enforceable. 252Mass354, 147NE885. [d] (2) Where check given by purchaser as first payment on contract for sale of land is not paid and vendor sues on contract to recover such payment and not on check, nonsuit is properly granted. 92PaSuper324. [e] **In Porto Rico.**-33PortoRico 6.

315-29 Utah 274P856.

315-30 125Misc41, 210NYS42 (action for maliciously preventing another from executing memorandum in proof of oral sale of land).

315-31 216Ala558, 114S46.

315-32½-New. In all actions for recovery under parol contracts in which fraud is alleged, it must be actual fraud that reaches back to the original contract. 293Pa379, 142A914.

315-34 317Mo 246, 295SW105; 220MoA 831, 272SW1084; 52ND886, 204NW 663. Contra 256Mass66, 152NE347.

316-45½-New. The statute of frauds is not a defense to an action on a check given as part payment on parole contract of sale. 125Misc830, 211NYS575.

316-48½-New. Where plaintiffs sell oil under a parol contract by which defendant was to convey an oil lease, the statute of frauds cannot be successfully invoked by plaintiffs as an excuse for not accepting the lease if defendant offers to comply with his obligation to convey. TexCivA 12SW(2d)843.

316-49 40Wyo 297, 276P930.

317-52 129 Or457, 278P83.

317-54 125Misc830, 211NYS575 (check given as part payment).

317-55 80Mont120, 259P609.

317-62 87 IndA264, 159NE551, 553 [quotCJ].

318-66 133Misc507, 231NYS654.

318-69 41F(2d)336; 317Mo 246, 295 SW105; NJSup 137A793.

319-70 218AppDiv322, 218NYS301; 124 Okl 220, 255P693.

320-77 41F(2d)336; NJSup 137A793.

320-78 80Mont120, 259P609.

321-86 17F(2d)325; 213Ala609, 105S 800; 216Ala558, 114S46; 218Ala128, 117S643; 173Ark1128, 293SW1041; 201Cal 438, 257P521, 525 [citCJ]; 88 CalA528, 264P516; 87 IndA42, 155NE 528 [citCJ]; 124Kan319, 259P785; 228 Ky450, 15SW(2d)270; Mich 233NW 372; 170Minn105, 212NW18; Mo 5SW (2d)405; MoA 256SW1088; 130Misc229, 224NYS275; 194NC784, 140SE721; OhA 173NE308; 122 Or360, 257P685; 288Pa 16, 135A254 [quotCJ]; 136SC410, 134 SE373. [b] **Construction.**-Whether contract is executed or remains executory depends on intention of parties. 100WVa433, 130SE657. [c] **Performance by one of contracting parties** will take contract out of statute and such party may sue upon it. 222MoA1118, 13SW(2d)1097.

322-87 214Ala226, 107S57.

322-95 215Ala179, 110S291, 294 [cit CJ]; CalA 288P870; 216AppDiv362, 215NYS184; 121 Okl 259, 249P692.

322-96 121 Okl 259, 249P692.

323-4 217Ky615, 290SW480; TexCivA 275SW858, 859 [citCJ]. But see 136 Misc915, 242NYS505.

323-14 173Ark1128, 293SW1041.

323-15 33F(2d)812; CalA 286P723; 118 Okl 69, 246P404.

324-16 201Cal 587, 258P382. [a] **Where goods are in possession of buyer for repairs at time of sale,** his possession becomes that of owner and change constitutes delivery taking sale out of operation of statute. 70CalA458, 233P 415.

324-18 17F(2d)325; 22F(2d)611, 613 [citCJ]; 214Ala226, 107S57; 168Ga317, 147SE711; 36GaA176, 136SE326; 205 Iowa1264, 216NW278; 205 Iowa1264, 216NW278, 219NW318; 213Ky473, 281 SW467; 223Ky668, 4SW(2d)686; 238 Mich272, 213NW67; 117 Okl 19, 246P 380; 48Philippine67; TexCivA 288SW 494.

325-22 249Mich63, 227NW789; 136 Misc206, 240NYS492 (execution and delivery of deed ratifies contract).

325-23 87 IndA42, 155NE528.

325-24½-New. An oral contract for the conveyance of land is not taken out of statute by establishing a past and executed consideration for the contract. 203 Iowa144, 212NW327.

325-25 153Va746, 151SE295.

325-26 TexCivA 30SW(2d)522; 153Va 746, 151SE295.

326-36 84CalA365, 258P108; MoA 15 SW(2d)957; Utah 276P912. [c] **Dikes and ditches.**-125Kan149, 629, 264P35, 266P35.

326-43 337 Ill 111, 168NE908.

327-44 227Ky73, 11SW(2d)991; Tex CivA 22SW(2d)741.

327-47 40F(2d)497; 29Ariz383, 241P 957; 16SArk1133, 272SW860 (material modification); 80CalA185, 251P666; 165 Ga799, 142SE134; IndA 158NE906; 217 MoA592, 274SW941; MoA 4SW(2d)484;

101NJEq757, 139A223; 242NY425, 152 NE250; 251NY146, 167NE201; 122 Or 360, 257P685, 687 [quotCJ]; TexCivA 275SW858; Utah 267P1020; 196Wis 25, 219NW373; Wis 229NW639. But see SD 229NW925. [c] A contract modified by parol as to mode of performance is not enforceable. 98NJCh 28, 129A487.

327-48 122 Or360, 257P685, 687 [quot CJ].

328-49 122 Or360, 257P685, 687 [quot CJ].

328-50 122 Or360, 257P685, 687 [quot CJ].

328-54½-New. Where a vendee in possession of property assigned the contract but remained in possession and made improvements and subsequently required the contract, a subsequent agreement between the vendor and vendee on foreclosure of a deed of trust given by the assignee, that, if the vendee would not bid at the foreclosure sale, the vendor would sell the property to him at a price larger than that fixed by the original contract does not change the position of the parties except that the amount of the debt is increased and the original contract remains alive and measures the rights of the parties. 68 CalA121, 228P740.

328-55 324 Ill 346, 155NE343; 242NY 425, 152NE250; 132Misc460, 230NYS 380; 122 Or360, 257P685. [d] (5) Oral extension of right to cut timber for one year in consideration of grantee's making advance payment of money not due is within statute. 217MoA567, 272SW 1014. (6) Alleged conversations extending time for delivery under written contract of sale could not result in substitution of different time of delivery than that agreed on in writing. 242NY425, 152NE250. [e] But where change was secured by purchaser, he cannot set up the statute. 324 Ill 346, 155NE343.

328-57 168Ark1133, 272SW860; 255 Mass563, 152NE321; NJSup 138A517; 130 Or385, 280P497.

329-59 6F(2d)984.

329-60 168Ark1133, 272SW860.

329-63 83NH47, 138A297.

330-65 [a] (3) Extension of time for removal of timber under written contract for sale thereof already cut involving no interest in realty. 136Wash 562, 240P905.

330-80 251Mich654, 232NW386; 122 Or360, 257P685; Wis 229NW639.

331-83 [g] Oral permission to enter premises to install equipment before occupancy does not constitute modification of lease providing that lessees shall not be liable for rent until premises are ready for occupancy. 242Mich662, 219 NW595.

332-93 233Ky27, 24SW(2d)917 (antenuptial contract); NS [1930] 1DomLR 983.

332-3 200 Iowa1265, 206NW657.

333-10 102Conn475, 129A45 (enforceable where lessee admits execution); 35 GaA767, 134SE831; 215Ky153, 284SW 1023.

333-21 288Pa264, 135A764.

335-33½-New. Writing held sufficient so as not to create tenancy at will. 100 Vt318, 137A196.

335-34 Ariz 292P1097; 73CalA612, 238 P1066, 1069 [citCJ]; 236Mich511, 211 NW263; 142Miss409, 107S556; 98NJEq 64, 130A546; 137Misc599, 244NYS169; 51Philippine520. [a] (2) "A contrary rule would, in effect, defeat the purpose of the statute." 236Mich511, 211NW 263, 266.

336-35 125Misc41, 210NYS42 (auction).

336-35½-New. or standing timber thereon, 142Miss409, 107S556.

336-38 51Philippine520. See also 236 Mich511, 211NW263.

336-39 [b] Effect of renunciation of right to insist on written contract as substitution of new contract. 137Misc 599, 244NYS169.

336-44 202 Iowa1251, 211NW898; 148 Miss137, 114S257.

336-45 148Miss137, 114S257.

336-47 46 Ida744, 271P931.

336-48 SD 226NW641.

336-50 85CalA87, 258P969.

337-51½-New. Equity will reform land contract void under statute only to defeat inequitable suit for breach. 98 NJEq64, 130A546.

337-51½-New. For reformation, fraud must be shown. 101NJL452, 145A866.

337-54 75CalA737, 243P686; 236 IllA 426; 263Mass199, 160NE790; 243NY 473, 154NE314; 35 OhA139, 172NE158; 8PaDist&Co 259; TexCivA 284SW1057; TexCivA 288SW494; TexCivA 288SW (2d)240. [b] Waiver of statutory requirement would not suspend operation of statute and give plaintiff relief beyond recovery of consideration plus interest. TexCivA 24SW(2d)751.

337-55 But see 142Wash630, 253P 1074.

337-56 [a] (1) TexCivA 28SW(2d)240; 142Wash630, 253P1074.

338-59 87CalA414, 262P400.

338-61 But see 4LaA288.

338-64 205Cal715, 272P1063; 73CalA 612, 238P1066; 80CalA1, 251P830; 90 CalA421, 265P1042; 106Conn243, 137A 769; 236 IllA426; TexCivA 278SW475; TexCivA 8SW(2d)726. But see 137Misc 249, 243NYS25.

338-65 [a] 14F(2d)937. [b] 106Conn 243, 137A769; 251NY146, 167NE201. [c] (1) 217Ala196, 115S237; 169Ark1162, 278SW22; 73CalA612, 238P1066; 90 CalA421, 265P1042; 101CalA781, 282P 528; CalA 291P279; 260Mass15, 156 NE689; TexCivA 278SW475. (20) Landowner guaranteeing his contractor's account is held not estopped from denying liability under statute. Tex CommnA 291SW864. (21) Gratuitous statement to pay bankrupt's creditors has been held not converted into guaranty because relied on by creditors. 41 F(2d)8. [d] Reprehensible moral conduct, not amounting to fraud in law, is not sufficient to raise estoppel. 169Ark 1162, 278SW22. [e] Failure to pay debt of another does not preclude defense of statute, in absence of legal fraud. 169 Ark1162, 278SW22.

339-67 327 Ill 564, 158NE806. [a] Vacating premises by vendor, necessary in any event, is not change of position within meaning of rule. 132Misc460, 230NYS380.

339-67½-New. Decedent's failure to carry out oral agreement to devise realty held not to show abuse of confidential relationship, so as to bar setting up statute of frauds. 213AppDiv439, 210NYS208.

339-68 106Conn243, 137A769; TexCivA 278SW475. [d] Leases.-TexCivA 278 SW475.

340-72½-New. A subsequent oral agreement entered into after the commencement of the term of a contract invalid under the statute of frauds to cancel such agreement upon the happening of a specified condition does not constitute a ratification of the invalid agreement. 70CalA757, 232P767.

340-72½-New. An oral agreement which is void under the statute of frauds because not to be performed within a year cannot be validated by ratification. 70CalA157, 232P767.

340-72¼-New. To validate such agreement there must be some act equivalent to the execution of a new contract or which operates as an estoppel. 70CalA 157, 232P767.

340-72½-New. An oral agreement which is void under the statute of frauds because not to be performed within a year is not taken out of the operation of the statute because one party offered to put the agreement in writing and the other expressed a willingness to proceed under the contract without reducing it to writing. 70CalA157, 232P767.

340-72¼-New. Mere fact that agent who executed lease within statute of frauds later became owner of property does not validate lease either on theory of estoppel or otherwise. 288Pa264, 135 A764.

340-75 Mass 166NE876; Mass 169NE 61; 134Misc623, 235NYS609.

340-77 321 Ill 76, 151NE599; 337 Ill 271, 169NE222; 319Mo 930, 5SW(2d) 636, 643 [citCJ]; TexCivA 278SW873. See also 147Miss296, 111S874. [h] Surrender of lease.-TexCivA 278SW873. [i] Specific performance is not prevented by statute where one of two vendors executed contract for resale of portion of premises to extinguish balance of purchase price at request of other vendor. 249NY46, 162NE580.

341-78 319Mo 930, 5SW(2d)636, 643 [citCJ].

342-83½-New. The statute of frauds is not a defense to the right of the mortgagor to an accounting by the mortgagee under an equitable mortgage. 264Mass 181, 162NE356.

342-84 147Miss296, 111S874 [quotCJ].

342-85 147Miss296, 111S874, 883 [quot CJ].

342-86 147Miss296, 111S874, 883 [quot CJ].

342-87 213AppDiv439, 210NYS208.

342-90½-New. The rule that a defectively executed mortgage creates an equitable lien or mortgage, where valuable claims have been extinguished as a consideration therefor, does not extend by analogy to an ambulatory lien attempted to be given by oral contract to make a will binding decedent's estate to pay plaintiff a specified sum in consideration of plaintiff's agreement to support and care for decedent until his death. 30F(2d)5.

343-92 147Va921, 133SE614.

343-94 151Wash529, 276P564.

343-95½-New. Relief denied when under juice of reformation new contract is attempted to be proved. TexCivA 295 SW229.

343-96 82Colo346, 259P515; 106Conn 243, 137A769; 15DelCh19, 129A919; 161 Ga898, 132SE422; 164Ga628, 139SE339; 165Ga359, 140SE869; 40GaA185, 149SE 89; 317 Ill 173, 147NE791; 321 Ill 76, 151NE599; 205 Iowa474, 218NW329; 236Mich633, 211NW59; 242Mich37, 217 NW905, 906 [citCJ] (contract for exchange of property); 322Mo 435, 16SW (2d)46, 69ALR1; 72Mont318, 233P607, 611 [quotCJ]; 80Mont120, 259P609; 85Mont389, 278P836; 243NY473, 154NE 314; 128Misc151, 218NYS323; 137Misc 693, 244NYS390; 50ND256, 195NW558; 141SC265, 139SE625, 54ALR964; TexCivA 275SW858, 859 [citCJ]; TexCivA 290SW266; TexCivA 30SW(2d)522; TexCivA 30SW(2d)930. See also 35GaA 683, 134SE627. [c] Equitable title may be acquired by possession, payment and improvements. TexCivA 25SW(2d)642.

343-97 72Mont318, 233P607, 611 [quot CJ]; 127 Okl 9, 251P641.

343-98 72Mont318, 233P607, 611 [quot CJ].

343-99 203 Iowa1124, 212NW147; 50 ND256, 195NW558.

343-6 32F(2d)576; 20 OhA16, 153NE 117; 141SC265, 139SE625, 54ALR964.

344-7 164Ga628, 139SE339; 321 Ill 76, 151NE599; 141SC265, 139SE625, 54ALR 964.

344-10 171Ark156, 284SW535; Minn 232NW919; 113Miss409, 107S556; 321 Mo 688, 12SW(2d)719; 20 OhA16, 153 NE117.

345-14 [a] 8PaDist&Co 67.

345-23 Pa 151A796; Wash 202P403. [b] Statute expressly provides in some jurisdictions that payment of part of purchase price and transfer of possession withdraws transaction from statute of frauds. 213Ala609, 105S800.

346-27 30Ariz522, 249P76, 48ALR1347; 137Misc177, 243NYS322. [b] 197Cal 577, 241P861.

346-28 30Ariz522, 249P76, 48ALR1347.

346-35 32F(2d)576; CalA 284P935(2d case); 223AppDiv388, 228NYS300. But see TexCivA 138SW(2d)432.

347-36 30F(2d)172; 89 IndA640, 166 NE607.

347-39 TexCivA 275SW858, 859 [cit CJ].

347-41 12F(2d)724; 219Ala62, 121S873; 30Ariz522, 249P76, 48ALR1347; 197 Cal577, 241P861; 106Conn243, 137A 769; 108Conn683, 145A273; 15DelCh19, 129A919 (giving check not part performance as payment of consideration); 329 Ill 148, 160NE117; 332 Ill 422, 163NE 823; 334 Ill 43, 165NE159; 337 Ill 271, 169NE222; 203 Iowa144, 212NW337; 252Mass364, 147NE885; 254Mass407, 150NE158; 317Mo 246, 295SW106; 222 AppDiv825, 227NYS34; 128Misc151, 218 NYS323; 20 OhA117, 153NE117; 141 SC265, 139SE625, 54ALR964; 151Wash 675, 282P920. [a] (1) 93PaSuper619. (2) 8PaDist&Co 67. [c] That relative

permitted decedent to live with plaintiff and care for decedent is not part performance sufficient to support oral contract to devise realty, especially where plaintiff charged board. 213AppDiv439, 210NYS208. [d] **Where party performs acts on faith of agreement,** other party cannot insist that agreement is bad. 108 Conn683, 145A273.

348-42 106Conn243, 137A769; 108Conn 683, 145A273; 320 Ill 597, 151NE514; 332 Ill 422, 163NE823; 334 Ill 43, 165NE 159; 317Mo 246, 295SW105; 222AppDiv 197, 225NYS593; TexCivA 278SW518.

348-42½-New. The acts must be such as cannot be fairly compensated in an action at law. 320 Ill 597, 151NE514.

348-43 264Mass102, 162NE4.

348-52 [a] (17) Possession by widow for life of lands of deceased husband under parol agreement, with heirs held sufficient. 212Ala635, 103S692. (18) Only exception to statute is where part of purchase money is paid and possession given by vendor. Ala 128S600 (payment may be anything of money value). [b] (2) GaA 155SE369. (4) Parol agreement by father to give son tract of land as advancement in full of prospective share in estate after his death is not rendered ineffective by fact that father at time he gave land to son and put him in possession did not execute conveyance to land, where father at instance of son conveyed land to another, to whom son sold land, and son received full amount of purchase money. 168Ga317, 147SE711.

349-53 [a] (1) 216Ala49, 112S335. [c] (1) 171Ark576, 286SW873; 205 Iowa 474, 218NW329; 322Mo 435, 16SW(2d) 46, 69ALR1; 296Pa449, 146A119; Tex CivA 16SW(2d)1110; 155Wash328, 284 P87. (2) 82Colo 346, 259P515. (3) Tex CivA 293SW587; TexCivA 16SW(2d) 563. (4) 332 Ill 422, 163NE823; 89 IndA361, 166NE301; TexCivA 15SW (2d)672. (5) 85Mont389, 278P836. (6) MoA 17SW(2d)670; TexCivA 297SW 524. (11) TexCivA 16SW(2d)1110. (17) As against subsequent grantee of mineral rights, held that adverse possession for forty-seven years, with improvements, took gift out of operation of statute. 145Va731, 134SE696. (18) Possession of cotenants pursuant to parol partition expenditures for permanent improvements. 129 Or128, 276P680. (19) Other instances. CalA 288P114(2dcase). [d] (1) 12F(2d)724; 73CalA114, 238P 166; 108Conn683, 145A273; 86 IndA 726, 154NE771; 203 Iowa144, 212NW 327; Mass 164NE466; 317Mo 246, 295 SW105; 131Misc573, 227NYS576; 8Pa Dist&Co 67; TexCivA 27SW(2d)904. (2) 108Conn683, 145A273; 329 Ill 246, 160NE142; 142Miss409, 107S556; 132 Misc423, 230NYS91. (3) 108Conn683, 145A273; 321 Ill 76, 151NE599; 246 Mich659, 225NW620. (4) 254Mass407, 150NE158; 151Wash529, 276P564 (inexpensive improvements). (5) 219Ala 62, 121S78; 134Misc623, 235NYS609. (17) 254Mass407, 150NE158. (23) Possession together with vendor. 254Mass 407, 150NE158. (24) Payment of interest in advance where not agreed consideration. 194Wis578, 217NW328. (25) Possession and improvements are insufficient where possession is not under authorized agreement and improvements may be compensated for in damages. 94 PaSuper175. [f] **Possession referred to in statute relating to sale of lands** must be notorious and exclusive. 219Ala62, 121S78.

350-54 NJCh 150A232(2dcase); 135 Wash174, 237P317, 240P565.

350-56 171Ark791, 286SW1022; 174 Ark560, 298SW30; 106Conn243, 137A 769; 161Ga898, 132SE422; 35GaA683, 134SE627; 165Ga359, 140SE869; 43 Ida 354, 253P849, 850 [citCJ]; 203 Iowa62, 212NW314; 136SC410, 134SE373; Tex CivA 275SW858; TexCivA 290SW266. [a] 161Ga898, 132SE422. [g] (2) Improvements must be in proportion to value of property to remove bar of statute. TexCivA 278SW518. [i] **Effect of giving of check.**-15DelCh19. 129A919.

351-57 87CalA260, 261P1038; GaA 134 SE627; 153Miss700, 121S820; Miss 126 S471; 136SC410, 134SE373.

351-58 337 Ill 271, 169NE222.

351-59 37F(2d)527; 106Conn243, 137A 769; 109Conn521, 147A36; IndA 157 NE7; 204 Iowa378, 213NW410; 247 Mich451, 226NW222(2dcase) [citCJ]; TexCivA 294SW948.

351-60 37 OklACR33 [citCJ]; 46Philippine514, 518 [citCJ].

353-69 46Philippine964.

353-73 But see 34Ariz49, 267P598.

353-74 193Wis554, 214NW394. [a] (2) Purchaser's down payment on property is insufficient to take contract out of statute. 193Wis554, 214NW394.

353-75 TexCivA 294SW948. See also TexCivA 10SW(2d)745.

353-76 217MoA567, 272SW1014; 49RI 78, 139A791, 792 [citCJ].

353-77 202 Iowa1251, 211NW898.

353-78 260Mass15, 156NE689; 146SC 59, 143SE552, 59ALR1297. But see 204 Iowa378, 213NW410.

354-79½-New. Acceptance of part of the purchase money does not give validity to parol contract for sale of land nor estop the acceptor from refusing to carry out the contract. 142Miss409, 107 S556.

354-80 Mass 166NE876; 141SC126, 139SE219. But see 55AppDC330, 5 F(2d)753.

354-81 203 Iowa1124, 212NW147; 141 SC126, 139SE219. [a] (1) 13PaDist& Co 293 (previous possession by tenant insufficient). (2) Possession taken under lease insufficient. CalA 291P279.

354-82 Mass 169NE915.

354-83 218Ala128, 117S643; 219Ala 503, 122S815.

354-84 110Conn392, 148A328; Tex CivA 26SW(2d)422 (possession, payment, and improvements held necessary to take oral sale or lease out of statute of frauds). See also TexCivA 291SW 631. But see 329 Ill 148, 160NE117; TexCivA 286SW958; TexCivA 8 SW(2d)267.

354-85 337 Ill 271, 169NE222 (improvements must be valuable).

354-85½-New. Where the grantee of a right to cut timber remains in possession and continues cutting operations under an oral extension, there is not such a taking of possession or performance as to take the oral extension out of the operation of the statute. 217MoA 567, 272SW1014.

354-85⅓-New. Where one of two parties, who have agreed to execute mutual wills devising real estate each to the other, executes a will in pursuance of such agreement and leaves it in custody of third person, there is not such performance as to take transaction out of operation of statute of frauds. 33Wyo 439, 240P927, 43ALR1010.

354-85¼-New. Deposit of check in escrow to be delivered on making of deed of land sold and improvements made takes contract out of statute. 318 Ill 259, 149NE239.

354-85½-New. Causing property to be assessed in the name of an alleged purchaser under an oral contract and payment of taxes by him for a few years do not constitute such part performance as will take the contract out of the statute of frauds where the purchaser never entered into possession and it does not appear that nonperformance would be a fraud on the seller. 80Mont120, 259P 609.

354-85⅙-New. Where an oral contract for transfer of real property is void under the statute of frauds and binding on neither party, the tender of a quit claim deed long after the making of the contract is insufficient to take the case out of the statute. 80Mont120, 259P 609.

354-85⅐-New. The mere fact that the buyer enters upon land under a license pursuant to an oral sale of growing timber and cuts the timber does not entitle the owner to recover therefor under the oral contract. 153Miss700, 121S820.

354-86 But see 30Ariz63, 243P913.

354-90 TexCivA 26SW(2d)739.

355-93 26F(2d)698; 95Fla952, 116S 857; 36GaA594, 137SE637; 136SC410, 134SE373; 153Va746, 151SE295.

355-94 136SC410, 134SE373.

356-5 153SC118, 150SE478 (payment of rent).

356-7½-New. Oral agreement to convey a one-half interest in the net profits of a lease is taken out of the operation of the statute by the performance of the condition of payment in behalf of grantor. TexCivA 284SW253.

356-9 88CalA657, 263P1030; 228Ky 522, 15SW(2d)487.

356-15 Ariz 288P3; 172Ark642, 290 SW353; 77Mont260, 250P823; 36Wyo 106, 252P1024, 1025 [citCJ]. [f] **Contract to repurchase.**-100WVa433, 130SE 657.

357-16 230AppDiv568, 245NYS470; 200 Wis373, 228NW522.

357-18 172Ark642, 290SW353.

358-21½-New. A verbal lease of real property for a term of one year to commence at a future date, although not binding between the parties, is validated by taking possession and payment of rent as agreed. 218Ala341, 118S578.

358-22 80CalA1, 251P830; 82CalA35, 255P235; 82Colo 529, 261P463; 146SC 59, 143SE552, 555, 557 [quotCJ], 59ALR 1297; 147Va921, 133SE614.

359-25 147Va921, 133SE614.

359-26 37GaA640, 141SE331; MoA 296 SW1057.

359-28 246NY79, 158NE27.

360-32½-New. The time for adjustment between the parties is when the verbal contract relating to the realty is repudiated, where part of the consideration has been paid. 231Ky454, 21 SW(2d)825.

360-33 77Colo 539, 238P38; 321 Ill 76, 151NE599; 227Ky628, 13SW(2d)776; 231Ky454, 21SW(2d)825; MoA 296SW 1057; NJSup 133A178 [quotCJ]; 146 SC59, 143SE552, 555, 557 [citCJ], 59 ALR1297; TexCivA 276SW795. [j] **On destruction of subject matter of contract of sale** so that delivery cannot be made, purchaser can recover money paid after making of contract. 90CalA 421, 265P1042. [k] **Husband renouncing parol antenuptial agreement** is entitled to take portion of wife's estate as husband on ground of invalidity of antenuptial agreement, under statute of frauds, only on condition of restoring proceeds of insurance policy to her estate. 227Ky628, 13SW(2d)776.

361-37 99Fla173, 125S909.

361-39 NJSup 133A178, 179 [quotCJ].

361-40 [a] **Details left for future adjustment.**-246NY79, 158NE27.

361-41 222MoA524, 293SW476; 246 NY79, 158NE27.

361-42 199Wis79, 225NW750(2dcase).

362-47 56ND512, 218NW227.

363-54 70CalA157, 232P767; 80CalA 1, 251P830; 321 Ill 76, 151NE599; 255 Mass519, 152NE107; 145Miss652, 110S 211; 243NY473, 154NE314; TexCivA 4SW(2d)144.

363-55 231Ky550, 21SW(2d)983; 82 NH209, 131A597; NJSup 146A653; 198NC161, 150SE881(2dcase).

364-58 80CalA1, 251P830.

364-65 82CalA35, 255P235; 231Ky 454, 21SW(2d)825; 149Wash227, 270P 825.

366-84½-New. To recover, proof of amount expended on faith of oral lease must be clear and unambiguous. 291 Pa223, 139A865.

366-96 80CalA1, 251P830; 153Miss700, 121S820.

368-7 [a] **Where consideration partly paid,** recovery for rental is measured by interest on agreed consideration. 231 Ky454, 21SW(2d)825.

368-10 200Cal 348, 254P532; 37GaA 239, 139SE590; MoA 256SW1088; Mont 290P238(2dcase); 243NY473, 154 NE314; 221AppDiv341, 223NYS424; 189NC775, 128SE349; 52ND146, 202 NW645, 52ND16; 48RI 33, 134A849; TexCivA 284SW253; TexCivA 293SW 921; 102WVa539, 135SE653, 654 [cit CJ]; 38Wyo 530, 269P27. But see 137 Misc576, 243NYS88. [a] (2) Defense is not waived under general denial by not pleading it till evidence is offered to prove oral contract. 31 OhA67, 166 NE384.

369-13 214Ala226, 107S57; 200Cal 348, 254P532; Colo 291P1036; 37GaA239, 139SE590; MoA 29SW(2d)726; 148NY

206, 161NE472; 217NYS33; 221AppDiv 341, 223NYS424; TexCivA 28SW(2d) 831. [d] **Objection that promise sued on did not comply with statute of frauds** must be pleaded or supported by affidavit under Civ. Pract. Rules, rule 10. 132Misc597, 230NYS360.

370-14 231Ky122, 21SW(2d)153; 100 NJEq493, 135A518; 189NC775, 128 SE349; 198NC109, 150SE704(1stcase); 93PaSuper246; 37Wyo 412, 263P605. See also 290Pa79, 137A910.

370-15 168Ark613, 271SW347; 178 Minn330, 227NW46; 100NJEq493, 135A 518; 290Pa486, 139A147; 151Wash529, 276P564.

371-17 26 OhA383, 160NE491.

371-24 15DelCh19, 129A919.

371-25 229AppDiv278, 241NYS697.

372-31 26F(2d)696; 179Ark437, 16SW (2d)585; Ida 288P167; 325 Ill538, 156 NE806; 218Ky731, 292SW318; 222Ky 415, 300SW906; 231Ky122, 21SW(2d) 153; 252Mass354, 147NE885; 260Mass 15, 156NE689; 263Mass199, 160NE796; 100NJEq493, 135A518; 31 OhA67, 166 NE384; TexCivA 198W(2d)936; 135 Wash174, 237P317, 240P565. [a] (1) TexCivA 22SW(2d)741. (4) Complaint in action on contract for assignment of oil and gas leases is good as against general demurrer, though contract sued on violates statute of frauds, where complaint contains allegation of performance on part of plaintiff. 85Colo 327, 275P908.

372-32 191NC616, 132SE575; 152SC 305, 149SE243; 37Wyo 412, 263P605.

373-35 215Ala179, 110S291; 179Ark 437, 16SW(2d)585; 81Colo 90, 253P 1056; 325 Ill 538, 156NE806; 336 Ill 337, 168NE316; 252Mass354, 147NE885; 263Mass199, 160NE790; 30NM524, 239P 1034; 50ND443, 196NW503; 117 Or583, 245P510; 37Wyo 412, 263P605.

373-37½-New. But where defendant serves an answer failing to set up the statute as a defense, he waives the objection and cannot thereafter move to dismiss the complaint. 217NYS33.

373-38 217NYS33; 31 OhA67, 166NE 384.

373-42 MoA 29SW(2d)726.

373-44 MoA 29SW(2d)726.

373-45 MoA 29SW(2d)726; 135Wash 174, 237P317, 240P565.

373-55½-New. A motion to strike out is available to remove from the record testimony introduced to establish a purported agreement which is void under the statute of frauds. 70CalA157, 232P 767.

373-55¼-New. Where the court reserves decision on such motion, it is proper for the movant to introduce evidence to rebut testimony received. 70 CalA157, 232P767.

373-55¼-New. Objection must in some manner call the court's attention to defendant's reliance on the statute. 37 Wyo 412, 263P605.

374-56 Mont 290P238(2dcase); 8Pa Dist&Co 259; 37Wyo 412, 263P605, 606 [citCJ].

374-64½-New. In some jurisdictions the right to defeat the evidentiary effect of an agreement which is invalid under the statute of frauds is not lost or waived by failure to object to testimony introduced to prove it at the time the evidence is offered. 70CalA157, 232P 767.

374-64¼-New. , especially where the agreement is pleaded as a special defense which, by statute, is deemed controverted. 70CalA157, 232P767.

374-67 MoA 29SW(2d)726.

374-71 26F(2d)696. See also 41GaA 183, 152SE273.

374-75½-New. In New York benefit may not be claimed on a motion to dismiss. 132Misc597, 230NYS360.

374-76½-New. , or by a request for a direction or finding. 8PaDist&Co 259.

374-78 220Ala455, 126S113; TexCivA 17SW(2d)136.

374-78½-New. Pleadings must show a contract enforceable in law. 290Pa486, 139A147.

374-79 213Ky333, 280SW1115; 222Ky 415, 300SW906. [b] **Allegations held sufficient.**-29Hawaii669.

375-80 215Ala363, 110S801; 160Ga831, 129SE546; 163Ga557, 136SE550; 34GaA 102, 128SE203; 263Mass199, 160NE790; MoA 11SW(2d)1088; 100NJEq493, 135 A518; 136Misc747, 240NYS451; 116 Or 210, 240P877; 117 Or583, 245P510. [a] (2) Allegations that agreements and contracts are partly oral and partly written render petition insufficient. TexCivA 19 SW(2d)936.

375-81 CalA 286P507; 163Ga577, 136 SE550; 34GaA102, 128SE203; 35GaA 262, 133SE53; MoA 11SW(2d)1088; MoA 29SW(2d)726; 116 Or210, 240P 877.

376-84 43 Ida55, 249P893.

376-88 108Conn683, 145A273; Ida 288 P167 (allegations held insufficient). [a] (2) Okl 292P12. (3) 84CalA1, 257P545. (4) As to part performance. 40GaA185, 149SE89. [c] 291Pa85, 139A615. [d] **Failure to allege possession or erection of valuable and permanent improvements** has been held insufficient to take action out of statute. TexCivA 24SW(2d)751. [e] **Petition held not demurrable.**-41GaA 293, 152SE593(2dcase).

377-91 100NJEq493, 135A518.

377-93½-New. A bill to enforce a parol sale of land charging defendant with fraudulently refusing to reduce the agreement to writing, although agreed to be so reduced, may be demurred to without an answer to the charge of fraud. 142Miss409, 107S556.

377-94 329 Ill 246, 160NE142. [b] **Allegations held insufficient.**-168Ark603, 271SW327; 331 Ill107, 162NE375.

377-98½-New. Motion to dismiss complaint. 217AppDiv402, 216NYS134.

377-98¼-New. Defense of statute of frauds is waived if not pleaded. 243NY 473, 154NE314.

377-99 81Colo 90, 253P1056.

377-2½-New. A new contract as to matters covered by an agreement void under the statute of frauds is not available as a special defense, unless pleaded. 70CalA157, 232P767.

377-3½-New. Demurrer. Defense of lack of consideration for oral promise to pay the debt of another may be raised by general demurrer. 34GaA310, 129SE296.

378-7 Va 153SE722.

378-8 218Ala619, 119S833.

378-8½-New. Petition showing that contract to convey land is partly in parol is demurrable. 35GaA12, 131SE921.

378-8¼-New. Where a bill shows that an agreement was not in writing, the defense of the statute is available on demurrer. 260Mass15, 156NE689.

378-11 37GaA318, 140SE394.

378-14 81Colo 90, 253P1056.

378-17 [c] (2) Motion after trial and before judgment properly refused. Ont [1930] 1DomLR475. [f] **Effect.**-218App Div322, 218NYS301.

378-26 220AppDiv414, 221NYS592.

379-28½-New. Issues raised.-Where vendor moves to dismiss purchaser's action for specific performance on ground contract did not comply with statute, purchaser's answering affidavit alleging memorandum was signed by vendor's authorized agent raises an issue of fact as to agent's authority. 217NYS33.

379-28½-New. Testimony is admissible to prove that a contract made on or "about" December 24, covering employment for one year from the following January, was later confirmed so as to be within the statute. 142SC386, 140SE702.

379-31 See also 200Cal 348, 254P532.

379-32 MoA 29SW(2d)726.

379-33 172Ark763, 290SW355; 179Ark 437, 16SW(2d)585; Mass 169NE64; 189 NC775, 128SE349; TexCivA 281SW297; TexCivA 291SW631. See also 220Ala 455, 126S113. [b] (1) 203 Iowa144, 212 NW327. (2) Must show such part performance was referable solely to the alleged contract. 203 Iowa144, 212NW 327.

379-34½-New. In states in which the English Act §§ 1, 2 are in force, a person, relying on parol lease for less than three years, need not show affirmatively in the first instance that rent reserved is at least two thirds of the full rental value of the demised premises. 31NM110, 241 P1026.

379-34¼-New. Defense of statute of frauds is presumed waived if not pleaded. 243NY473, 154NE314.

379-38½-New. Under plaintiff's general denial, the statute of frauds was an available defense without express pleading; and objection to proof was a proper way to interpose the defense. MoA 272SW83.

379-40 80CalA1, 251P830, 837 [quot CJ]; 35GaA767, 134SE831; 241Mich39, 216NW384.

380-42 133Misc507, 231NYS654; 140 Okl 80, 282P635 (declarations of purchaser); TexCivA 275SW200; TexCivA 288SW260.

380-47 35 OhA519, 172NE634.

380-52½-New. Oral testimony only tending to prove that a contract was entered into more than a year prior to the date of performance is not inadmissible. TexCivA 275SW200.

380-52¼-New. Such testimony to be inadmissible must prove that the contract was entered into more than a year prior to being made. TexCivA 275SW200.

380-52¼-New. Oral testimony has been held not inadmissible as actually showing that the contract could not be performed within a year from time it was made. TexCivA 275SW200.

380-52¼-New. Evidence of part payment is admissible. 82Colo 346, 259P 515.

380-52½-New. Admission of bills in an action for labor and materials, none of which exceeded the statutory amount, does not violate statute. NJ 141A667.

380-58 80CalA1, 251P830, 835 [citCJ].

381-63 258Mass65, 154NE572.

381-63½-New. Thus evidence of a buyer's interest in the seller's financial condition is admissible as material to show the benefits derived from forbearance to sell by the creditor of the seller. 124 Me411, 130A242.

381-65 202 Iowa976, 208NW343; 293 Pa513, 143A227; TexCivA 8SW(2d) 815; 191Wis624, 211NW757; BC [1928] 4DomLR79. See also 166La704, 117S781. [c] **Prior negotiations.**-218 AppDiv322, 218NYS301.

381-66 216Ala472, 113S529; 35GaA83, 132SE105.

381-67 6LaA82; 117Tex107, 298SW 419.

381-71½-New. Parol evidence as to performance of agreement taken out of statute by performance is held admissible. 106Conn243, 137A769; 165Ga359, 140SE869.

381-71¼-New. Where a contract is shown not to be within the statute of frauds, and is partly oral and partly written, the oral terms are admissible if not at variance with the written. 194NC244, 139SE376.

381-73 202 Iowa976, 208NW343, 350 [citCJperMorling, J].

381-74 202 Iowa976, 208NW343, 350 [citCJperMorling, J].

381-76 216Ala472, 113S529; 198 Ind 393, 153NE768; 211Ky849, 278SW133; 321Mo 688, 12SW(2d)719; 218AppDiv 322, 218NYS301; 144 Okl 254, 291P70; 291Pa85, 139A615; 141SC126, 139SE 219; TexCivA 278SW866.

382-78 218AppDiv322, 218NYS301.

382-79 222MoA201, 297SW151.

382-80 12F(2d)885; 247NY465, 160 NE916.

382-82 35GaA767, 134SE831.

383-86 170Ark908, 281SW671; 288Pa 98, 135A609; 87PaSuper557; 93PaSuper227; 49RI 78, 139A791.

383-87 218Ky731, 292SW318; 153Md 685, 139A559; 49RI 78, 139A791.

383-88 216Ala472, 113S529; 92Fla689, 110S256; 211Ky849, 278SW133; 228 Ky338, 14SW(2d)1093; TexCivA 278 SW866.

383-89 252Mass162, 147NE585 (meaning of word "slice" could not be shown by what testator did at later time); TexCivA 278SW866.

383-94½-New. Testimony is admissible as to a real transaction where the real obligation was that of a bank other than the one to which the note was given as subterfuge to satisfy the bank examiner. Iowa 228NW670.

383-95 [a] **Agency may be proved by parol, prior delegations, or subsequent**

satisfaction. 151Md348, 133A836, 47 ALR195.

383-96 162La117, 110S109; NH 149A 73; 99NJEq490, 133A718 (dictum); 228AppDiv361, 240NYS31; 230AppDiv 724, 243NYS479. [b] (1) 165Ga359, 140 SE869.

384-97 194Wis591, 217NW302.

384-4 218AppDiv322, 218NYS301.

384-6 35 OhA139, 172NE158.

384-7 81Mont382, 263P967.

384-14 256Mass66, 152NE347.

385-17 202 Iowa976, 208NW343, 350 [citCJperMorley, J]; 258Mass65, 154 NE572; 245NY305, 157NE148.

385-18 258Mass65, 154NE572.

385-19 245NY305, 157NE148.

385-25 [a] (1) 14F(2d)61. (17) To show that oral contract was for sale of mineral interest and unenforceable. TexCivA 274SW242. (18) To show that landlord's promise to pay for threshing tenant's grain was original. 201 Iowa1167, 206NW806. (19) To show partial delivery. 35GaA33, 132SE142. (20) To show part performance of contract to purchase sawmill and cut timber taking contract out of statute. 35 GaA132, 132SE244. (21) To show check sued on was given in part performance of prior oral understanding when drawer and plaintiff became engaged to marry and, hence, without consideration. 125Me292, 133A164. (22) To show possession and improvements by vendee. TexCivA 294SW948. (23) To show case taken out of statute by performance. 165Ga359, 140SE869. (24) Promise to answer for debt of another. 131 Okl 20, 267P473. (25) To show part performance. 141SC265, 139SE625, 54 ALR964. (26) To sustain verdict of jury that oral lease was not within statute. 178Minn460, 227NW656. (27) To take contract for sale of land out of operation of statute of frauds. Mo 20SW(2d)899. (28) Other evidence held sufficient. 90CalA421, 265P1042; 94 CalA241, 270P1008; 99CalA534, 278P 932; 128Kan220, 277P45; Mass 165NE 878; 118Nebr17, 223NW467; 51Nev 242, 274P2; 83NH509, 144A853; 132 Misc907, 230NYS561; 133 Okl 27, 271P 145; TexCivA 158SW(2d)688; TexCivA 16SW(2d)563; 40Wyo 411, 278P551. [b] (1) 148Md354, 129A366; 240Mich 141, 215NW339. (2) 176Ark375, 3SW (2d)38. (9) 168Ark613, 271SW347 (alleged partnership to purchase and cultivate land). (10) 240NY209, 148NE 212. (12) To show ratification of agent's unauthorized contract of sale. 72CalA786, 238P155. (13) Oral acceptance of bill of exchange not brought within any exception to statute by proof. 34GaA102, 128SE203. (14) To show that deeds were received and retained till produced in court. 80Mont 120, 259P609. (15) To show sufficient delivery to take oral contract out of statute of frauds. TexCivA 26SW(2d) 422. [d] **To substitute oral lease for written one** requires clear evidence. 288 Pa56, 135A639.

385-25½-New. Acceptance of the surrender of a lease may be shown by proof of facts fairly inconsistent with the idea of acceptance only. 296Pa449, 146A119.

385-25¼-New. To take a case out of the operation of the statute of frauds, evidence should establish with reasonable certainty not only that an agreement was made, but also its terms clearly and specifically. 334 Ill 43, 165NE 159 (contract between parent and child).

385-26 [a] **To satisfy statute of frauds, it** is sufficient for seller, suing for breach of contract, to produce note received by him from broker making contract and show latter's employment by buyer, presumption being that bought and sold notes corresponded, in absence of contrary evidence. 83NH 509, 144A853. [b] **While broker's authority to execute memorandum** cannot be proved by memorandum itself, though admitted without objection, his acts may constitute links in chain of circumstances from which such agency may be inferred. 83NH509, 144A853. [c] **Broker's memorandum** does not prove authority of broker to execute it. NH 149A73. [d] **Evidence held sufficient** to justify finding that defendants gave broker actual authority to sign telegram. NH 149A73.

385-27 151Md348, 133A836, **47ALR** 195.

386-52 83 IndA631, 149NE460.

386-53 83 IndA631, 149NE460; 119 Or 116, 248P154. [a] **Charge for services of physician on his books** and recovery of judgment against patient will prevent recovery against one who requested treatment. Mo 26SW(2d)951.

386-54 83 IndA631, 149NE460; 119 Or 116, 248P154.

387-59 83 IndA631, 149NE460.

387-60 82CalA12, 254P914.

387-73 160La12, 106S653; 13LaA37, 127S104; 87PaSuper102; 106WVa463, 145SE321. [b] (1) 170Ark1193, 281SW 668; 252Mass303, 147NE737. (7) To show defendant's promise was collateral. 83 IndA631, 149NE460. (8) To show that person buying goods was running business for defendant so that transaction was not within statute. 155 Miss459, 124S495. (9) To show collateral obligation within statute. 13LaA 610, 128S318. [c] 106WVa463, 145SE 821.

388-80 203 Iowa1124, 212NW147; 329 Ill 424, 160NE762; 127 Okl 9, 251P611; 151SC114, 148SE704, 63ALR965 (uncontroverted evidence assumed to be true). [a] 168Ark613, 271SW347; 203 Iowa 1124, 212NW147; 213AppDiv439, 210 NYS208. [b] 203 Iowa1124, 212NW147; Wash 292P403. [c] (6) Evidence sufficient to show agreement to devise in consideration of services to be rendered in care of devisor. 98NJEq126, 130A833. (7) Evidence sufficient to show performance of services by devisee. 98NJEq126, 130A833. [e] **Evidence insufficient to go to jury** on question whether agent affixed signature to memorandum as agent of seller or as witness. 189NC775, 128SE 349.

388-81 320 Ill 597, 151NE514; 329 Ill 424, 160NE762; [b] 48RI 33, 134A849; 141SC265, 139SE625, 54ALR964. [c] Ala 128S600; 203 Iowa144, 212NW327. [d] **If circumstantial evidence is relied on** to prove part performance circumstances in evidence must permit no other rational hypothesis than that of such part performance. 203 Iowa144, 212NW 327.

388-84 99NJEq627, 134A553.

389-88 217MoA567, 274SW941. [a] **Sufficiency of evidence.**–139 Okl 88, 281 P293.

389-92½-New. Correspondence between attorneys for buyer and seller tending to establish a written admission, under authority of the seller of the existence of the contract is admissible in an action against the seller for breach of contract. 35GaA137, 132SE234.

389-93 192Wis174, 212NW262.

389-99 GaA 155SE369; 248 IllA297; 256Mass397, 152NE621; 136Misc525, 241NYS61 (sufficiency of signature held for jury). [b] 93PaSuper227. [d] 231 Ky454, 21SW(2d)825; TexCivA 25SW (2d)642. [e] 170Minn105, 212NW18; TexCivA 280SW908. [o] **Signature by agent.**–189NC775, 128SE349. [p] **Whether there is evidence from which** jury could affirmatively find that agent signed memorandum is for court. 189 NC775, 128SE349. [q] **Effect of admission.**–258Mass65, 154NE572. [r] **Whether new contract is collateral or original** is mixed question of law and fact. 219AppDiv486, 220NYS 340. [s] **Submission of issues of fact on motion to dismiss.**–Where defendant moves to dismiss complaint because contract sued on did not comply with statute and plaintiff's answering affidavit raises issue as to whether agent who signed memorandum was duly authorized, such issue of fact should be submitted to jury for determination before deciding on motion. 217AppDiv 402, 216NYS134. [t] **Plaintiff's proof** having disclosed contract within statute, there is no question for jury as to implied contract. 222AppDiv197, 225NYS 593.

390-1 252Mass303, 147NE737; MoA 297SW158; TexCivA 27SW(2d)248.

390-2 [a] **Evidence held insufficient to** present issue to jury. 175Ark734, 300 SW388.

390-3 99CalA534, 278P32; 83 IndA631, 149NE460; 131 Okl 20, 267P473; 119 Or116, 248P154.

390-4 170Ark1193, 281SW668; 171Ark 45, 283SW362; 72CalA481, 237P756; 201 Iowa1167, 206NW806; 155Miss459, 124S495; MoA 297SW158; 138 Okl 136, 280P579; 131 Okl 20, 267P473; 119 Or 116, 248P154. [b] (2) Whether promise of agent of seller of oil rig to see that employees of buyer received back wages was independent and made to advance interest of seller held for jury. 171Ark45, 283SW362.

390-5 170Ark1193, 281SW668; 83 IndA631, 149NE460; 88PaSuper162. But see 106WVa463, 145SE821.

391-8 Mass 165NE878; 217AppDiv647, 216NYS174; 225AppDiv829, 232NYS 564.

391-10 139 Okl 88, 281P293; 140 Okl 80, 282P635.

391-12 MoA 11SW(2d)67; MoA 16SW (2d)602.

391-14 172Ark117, 288SW377; MoA 29 SW(2d)726; NJSup 137A793.

391-15 214Ala232, 107S801; 172Ark 763, 290SW355; 202 Iowa1251, 211NW 898; 21 OhA118, 152NE778.

392-20 214Ala308, 107S455; 170Minn 105, 212NW18; 218AppDiv142, 217NYS 870; 198NC385, 151SE875, 68ALR345; 141SC56, 139SE182.

392-28½-New. Finding that contract is void under statute of frauds is conclusion of law. 242NY134, 151NE155.

392-28½-New. If sustained only by facts founded on incompetent evidence, it is brutem fulmen. 242NY134, 151NE 155.

392-28¼-New. In determining whether alleged rights to purchase property are predicated upon a written contract of purchase or upon a verbal agreement, the court must construe the whole transaction from the facts presented irrespective of the name by which it may have been designated or of any particular isolated feature of it. 68CalA121, 228P740.

392-28⅕-New. Finding authorized that contract was within the statute. Tex CivA 272SW230.

392-28⅙-New. A finding that a contract is void under the statute of frauds is a conclusion of law. 242NY134, 151 NE155.

392-30 242NY28, 150NE591.

392-34 MoA 297SW158; 138 Okl 136, 280P579.

FRAUDULENT

393-2 [a] **Use of word "fraudulent" without qualification** suggests actual and intentional wrong. 121Kan159, 246 P971.

393-5 4HawaiiFed113.

393-15 121Kan159, 246P971 (suggests actual and intentional wrong).

FRAUDULENT CONVEYANCES

414-16½-New. Contra Sask [1925] 3 DomLR125 [over Sask [1925] 1DomLR 38].

414-17 37 OklACR423; 117 Or107, 241 P62; 118 Or685, 248P143; TexCivA 28 SW(2d)931.

414-19 33Wyo 326, 239P531.

415-20 33Wyo 326, 239P531, 533 [cit CJ].

415-22 84Mont384, 276P432; 225App Div137, 232NYS94; 137Misc420, 242NYS 308.

415-24 251NY1, 166NE783.

415-28 128Misc901, 220NYS495. [b] **Statutes held not inconsistent.**–292Pa74, 140A615.

415-29 229Ky836, 18SW(2d)285.

416-35 229Ky836, 18SW(2d)285.

416-35½-New. Unless grantor is insolvent at time of transfer or indebted to others than grantee, conveyance is not in fraud of creditors. Iowa 232NW813.

416-47½-New. "Fraudulent" is sometimes applied to conduct which, although not actuated by wrongful intent, will not be upheld by the courts. 121Kan 159, 246P971.

418-67 Ariz 289P512.

418-71 217Ala25, 114S408.

418-72 217Ala25, 114S408.

418-73 225Ky309, 8SW(2d)398.

418-78 Wash 292P262.
418-79 202 Iowa1109, 211NW479; Wash 292P262.
419-81 202 Iowa679, 210NW906; 202 Iowa1109, 211NW479; 57ND810, 224 NW220.
419-82 229Ky431, 17SW(2d)419.
419-94 Iowa 216NW649.
421-8 215Ky3, 284SW87.
421-27 [a] **Garnishee procuring release of liability under policy indemnifying debtor against judgment** with knowledge of debtor's insolvency is liable to judgment creditor for difference between amount paid and amount owed by garnishee. 221MoA868, 287SW819.
422-31 226Ky713, 11SW(2d)964.
422-34 85Colo 212, 274P924.
426-78 Contra 217Ala25, 114S408.
427-90 194NC628, 140SE303.
427-91 220Ala529, 126S102.
427-93 But see 216AppDiv100, 214NYS 528.
432-62 163Ga434, 136SE317; 234Mich 252, 208NW60; 250Mich408, 230NW152 (husband's equity in land contract from wife).
433-71 Iowa 216NW649; NJCh 151A 550. [b] (10) Corporation holding as trustees. NJCh 151A550.
434-77 Mass 166NE709.
434-79 91CalA88, 266P836; 84Colo 64, 268P526.
434-81 116Nebr846, 219NW233.
435-83 107WVa280, 148SE114, 64ALR 1246.
436-96½. See also Mich 233NW221.
436-99½-New. A gift to the wife of the debtor by a third person with title taken in the names of the husband and wife by entireties is not fraud on the husband's creditors. 247Mich595, 226 NW220(1stcase).
438-23 58ND200, 225NW310; TexCivA 296SW658.
438-24 130Kan147, 285P525 (chattel mortgage); 57ND810, 224NW220; 51 SD157, 212NW872; TexCivA 296SW 658; Alta [1928] 4DomLR772.
439-25 TexCivA 293SW638, 640 [cit CJ].
439-26 152Miss590, 120S737.
439-33 MoA 23SW(2d)205 (policy in company doing business on assessment plan); 136 Okl 294, 277P928. See also 116Nebr33. 215NW559. [b] In New York.-216AppDiv100, 214NYS528.
441-46 Iowa 228NW295; TexCivA 296 SW658.
441-48 TexCivA 296SW658, 661 [cit CJ].
441-52½-New. Judgment cannot be rendered against garnishee for value of exempt property included under fraudulent chattel mortgage. Iowa 229NW 813.
441-56 34F(2d)268; 214Ala580, 108S 509; 170Ark445, 280SW380; 181Ark4, 24SW(2d)852; 163Ga604, 136SE914; 44 Ida293, 256P371; 214Ky499, 283SW 434; 223Ky29, 2SW(2d)1033; 224Ky 414, 6SW(2d)474; 233Ky122, 25SW(2d) 48; 319Mo 672, 4SW(2d)769, 771 [cit Cyc]; 320Mo 754, 9SW(2d)880; Nebr 230NW665; 50ND949, 198NW673, 674 [citCJ]; 51ND148, 199NW444 (from husband to wife); 51SD157, 212NW872; SD 227NW466; TexCivA 282SW321; TexCivA 293SW264; TexCivA 296SW 658; TexCivA 31SW(2d)519; Alta [1930] 4DomLR506; Alta [1930] 4Dom LR69.
443-57 44 Ida293, 256P371; TexCivA 282SW321.
443-59 201 Iowa59, 206NW301.
444-67 214Ala580, 108S509; 201 Iowa 59, 206NW301.
444-70 163Ga604, 136SE914; TexCivA 282SW321.
445-79 50ND949, 198NW673.
445-79½-New. It is error to set aside a transfer of a husband to his wife as far as it affects the homestead. 50 ND949, 198NW673.
445-83 203 Iowa1368, 214NW542; 219 Ky471, 293SW959; Nebr 230NW665; TexCivA 282SW321; TexCivA 296SW 658, 661 [citCJ]. See also 126Kan173, 267P1003.
446-86 170Ark445, 280SW380.
446-91 220Ky365, 295SW140.
447-96 Iowa 228NW295.
449-25 25F(2d)211; 216Ala503, 113S 522; 174Ark184, 295SW353; 160Ga763, 129SE65. [e] **Transfer of proceeds of insurance policy as result of death of insured** is not fraudulent. CalA 292P 678 (statute relative to exemptions held inapplicable).
450-26 216Ala503, 113S522; TexCivA 296SW658.
450-27 [c] **Instrument releasing interest** in estate sought to be subject to judgment is "conveyance" within statute. 137Misc420, 242NYS308.
450-28 See also 150SC398, 148SE220. But see 177Ark1060, 9SW(2d)1062.
450-29 176Ark1082, 5SW(2d)318.
450-42 [e] **Debtor, paying part of proceeds of sale of realty** purchased by her two years before her husband's death, to pay one who had loaned money to husband, has been held liable therefor to her creditors, such debt being her husband's, and realty no part of his estate. 250NY56, 164NE741. [f] **Attempted alienation of future income** in rents and profits constituting res of trust by judgment debtor is void. 137Misc 420, 242NYS308. [g] **Attempted release of interest in father's estate by judgment debtor** is fraudulent against creditors. 137Misc420, 242NYS308.
451-44 41F(2d)736.
451-45 203 Iowa1103, 212NW559; 128 Kan132, 276P70; TexCivA 10SW(2d) 415. [h] **Deed and trust agreement,** executed at different times are considered as one transaction where plaintiffs acquired no rights in interim and trustee and beneficiaries claim no greater right than those given by trust agreement. 203 Iowa1103, 212NY559. [i] **Operating mortgage.**-146Va158, 135SE 689.
451-47 160Ga763, 129SE65 (conveyance to secure debt open to attack for fraud); Mass 172NE884 (chattel mortgage); MoA 281SW98.
451-48 Ala 130S680; 170Ark1146, 282 SW995; 203 Iowa271, 211NW217; 260 Mass151, 157NE40. [b] **Mortgage on condition** that court finds real estate not homestead is held to show lack of fraudulent intent. 203 Iowa271, 211NW217. [c] **Collection of interest after default** has been held not to affect validity of mortgage. Ala 130S680.
452-49½-New. A chattel mortgage will be upheld if not a mere sham to defeat a contract. 215Ala388, 110S711.
452-56 213Ky138, 280SW928; 145 Wash561, 261P86.
453-58 234Ky130, 27SW(2d)668.
454-70 213Ky138, 280SW928; TexCivA 296SW658.
454-80 [a] In Texas.-CivA 284SW288.
454-80½-New. Pretended reservation or limitation of use of property by way of condition, reversion, remainder, or otherwise in goods and chattels, the possession of which remains two years in another, is fraudulent as to the creditors and purchasers of the persons remaining in possession under statutes in some jurisdictions. TexCivA 275SW211.
454-80½-New. Lessor's claim to a shoe machine is superior to a mortgage by lessee having possession less than three years, although the lease is unrecorded. 22AlaA213, 114S275.
455-81 233 IllA90.
456-3½-New. Judgment recovered by a son against his parents for loans of money clearly established will not be set aside. 108WVa78, 150SE229.
456-4 170La898, 129S522.
458-19 Cal 292P448; 83Colo 242, 263P 719. [a] (7) Attempt by mortgagee to acquire title to property with knowledge of debtor's insolvency. 112 Okl 35, 239P660. [d] (3) Second mortgagee discouraging bidding by announcement of mortgage and failing to make bid cannot claim that foreclosure for amount of first mortgage was part of scheme between first mortgagee and grandson to defraud second mortgagee. 208 Iowa 1100, 222NW428.
460-30 128Misc77, 217NYS764.
460-35 128Misc77, 217NYS764.
461-39 244NYS332; 292Pa464, 141A 298.
461-42 149SC513, 147SE635. See also 127Misc328, 215NYS770. [b] (2) Other instances. 292Pa464, 141A298.
462-45 See also 127Misc328, 215NYS 770.
462-49 22AlaA325, 115S385; 221MoA 868, 287SW819, 822 [quotCJ]. But see 217Ala216, 115S389.
462-57 176Ark1206, 3SW(2d)696.
463-65 121Kan6, 245P742; 117 Or107, 241P62; 128 Or218, 270P762, 763 [quot CJ].
463-66 121Kan6, 245P742.
464-67 Mass 171NE730.
464-69 221AppDiv838, 224NYS343; 128 Or218, 270P762, 763 [quotCJ].
464-75 121Kan159, 246P971, 972 [cit CJ]; 320Mo 1077, 9SW(2d)907.
465-77 121Kan159, 246P971, 972 [cit CJ].
465-78 121Kan159, 246P971.
465-79 167Minn275, 208NW1003.
467-90 42 Ida270, 245P98.
467-91 42 Ida270, 245P98; SD 227NW 466; TexCivA 10SW(2d)746.
467-92 42 Ida270, 245P98.
468-96½-New. Conveyance of realty must be fraudulent under law of situs. 16F(2d)187.
468-98 128Misc654, 219NYS676.
469-5½-New. Where a debtor transferred his bank account to his wife with the intent to hinder, delay, or defraud creditors and subsequently made withdrawals to pay the ordinary expenses of his business such expenditures are not in fraud of creditors and are not rendered so by the prior transfer. 201 Iowa308, 207NW329.
470-7 217Ala25, 114S408, 409 [quot CJ]; 181Ark96, 24SW(2d)976; 42 Ida 270, 245P98; 201 Iowa308, 207NW329; 203 Iowa1103, 212NW559; Iowa 231NW 309; 122Kan357, 252P249; 258Mass 402, 155NE429; 258Mass402, 155NE 429; 37Wyo 78, 259P185. See also LaA 128S903(2dcase). [e] **Transfer to obtain loan** conveyance to corporation to obtain loan by pledge of stock as collateral did not harm creditor as equity, and stock was as much subject to execution as equity in land. 83 IndA33, 147NE318. [f] **Hindrance** in collection of claims is sufficient injury. 220Ala82, 123S899.
470-7½-New. The creditor can avoid the act of the debtor for fraud only when the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer. 196 Cal 380, 238P81.
470-8 83 IndA33, 147NE318 (fraud never presumed).
470-9 217Ala25, 114S408, 409 [quot CJ].
470-10½-New. Where creditors of a lessee were in better condition after cancellation of a lease and the sale of premises to the lessee under option in the lease than prior thereto, the transaction is not in fraud of creditors. 233Mich 288, 206NW542.
470-11 217Ala25, 114S408, 409 [quot CJ]; 122Kan357, 252P249; 50Philippine636. [a] See also 122Kan357, 252 P249. [b] **Intent without prejudice** held insufficient. 217Ala25, 114S408.
470-14 180Ark1110, 25SW(2d)438; 38 GaA764, 145SE528; 86 IndA499, 157NE 11; 232Mich71, 205NW130; 316Mo 968, 293SW116; 132Misc723, 230NYS554. [l] **As between state and accused** in criminal prosecution punishable by fine plea of guilty does not create relation of debtor and creditor, and transfer of property by accused after such plea and before entry of judgment for fine is not necessarily fraudulent as to state. 202 Iowa307, 210NW121, 48ALR 603. [m] **Sheriff sued for taking property on void levy** cannot defend on ground that transfer by judgment debtor to third person in whose possession levy was made was in fraud of creditors. 55ND132, 212NW817. [n] **Court clerk to whom surplus proceeds foreclosure sale had been paid** is not creditor to whom defense of fraud is available when sued for surplus. SD 228 NW807.
471-16 217Ala25, 114S408, 409 [citCJ]; 83Colo 193, 265P682 (must have lien or superior right); 201 Iowa257, 207NW 230; 148Va610, 139SE273. See also 208 Iowa1326, 227NW110; Sask [1927] 3 DomLR565.
471-17 217Ala25, 114S408, 409 [citCJ]; 85Mont229, 278P143.
472-19 84Colo 362, 270P553; 166Ga 279, 142SE873; 241 IllA404; 218Ky589, 291SW1033; 153Wash116, 279P390. See also 9LaA245, 118S679.

472-20 103Conn624, 131A420. [k] **Landlord has been held subsequent creditor** within statute. SC 155SE622.

472-21 103Conn624, 131A420; 45 Ida 628, 264P231, 233 [citCJ], But see 31 OhA338, 166NE913. [c] **Executory contract for purchase of goods** renders purchaser under a debt or duty to seller within statute against fraudulent conveyances. 103Conn624, 131A420. [d] **Where summons served** before conveyance was executed, plaintiff has been held to be creditor at time of conveyance. 215Ala411, 110S903. [e] **Liability for injuries** from automobile accident arose at time of accident. CalA 287P 506.

473-25 44 Ida200, 256P99, 100 [citCJ]; 101NJEq51, 137A89. See also 202 Iowa 307, 210NW121, 48ALR603.

474-31 42 Ida560, 247P751, 752 [cit CJ].

474-36 245 IllA579; 205 Iowa460, 218 NW311; 115Tex342, 282SW558. [a] (2) On other hand, it is immaterial whether creditor's claim accrued previously or later in case of simulated deed. 163La442, 112S40.

474-38 TexCivA 10SW(2d)415; Tex CivA 24SW(2d)450. [a] **Where invalidity of gift depends only on fact of donor's insolvency regardless of intent,** it is voidable only on demand of creditors existing when it was made. 24F(2d) 661.

474-39 215Ky3, 284SW87.

475-43 [b] **Second creditor conveying property to family** is in same position as subsequent creditor. 172Ark234, 288 SW391.

475-44 Sask [1926] 4DomLR174, [1926] 2WestWkly671. [b] **In Idaho.**-42 Ida560, 247P751.

475-44½-New. Holder of second mortgage can attack subsequent fraudulent transfer of other property, although mortgage debt is adequately secured. 214Ala96, 106S504.

475-46 See also 155Tenn359, 293SW 541. [e] See also 84Mont384, 276P432.

476-48 See also 149Wash694, 270P 289.

476-52 101NJEq51, 137A89. [a] **"Creditor," within meaning of act concerning fraudulent conveyances,** is "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." DelCh 142A832.

476-56 18F(2d)722 (construing New York statute); DelCh 142A832; 164Ga 888, 139SE802, 804 [citCJ]; 150Md265, 132A633, 635 [citCJ]; 242Mich477, 219 NW651; 137Misc156, 241NYS626; 23 OhA481, 155NE699; 155Tenn359, 293 SW541. [a] 27F(2d)504.

477-57½-New. malicious prosecution, 155Tenn359, 293SW541.

477-57¼-New. alienation of affections, 27F(2d)504.

477-58 149Va39, 140SE277.

477-61 18F(2d)722; 92CalA749, 268P 962; 97CalA30, 275P448; CalA 287P 506; 110Conn314, 148A345; DelCh 142 A832; 137Misc156, 241NYS626.

478-80 11F(2d)984; Ala 114S408; 99 CalA594, 279P192; Mass 165NE388; 225AppDiv137, 232NYS94.

479-90 Sask [1928] 3DomLR179.

479-93 Ida 291P1069. [c] **Payee indorsing note to another** cannot sue to set aside maker's fraudulent conveyance where note remains unpaid. Ida 291P 1069.

480-96 33Ariz506, 266P16; TexCivA 296SW658, 660 [citCJ].

481-11 158La183, 103S733. [a] (4) Creditor's garnishment of selling price of land in hands of surety on release bond does not estop creditor from revoking sale and subjecting property to payment of debts. 158La183, 103S733.

481-12½-New. Creditor failing to object to allowance of claim at hearing before register is held not estopped from subsequently attacking allowance. 215 Ala307, 110S468.

481-15 101WVa310, 133SE360, 361 [cit CJ].

481-16 [f] **Exception.**-101WVa310, 133 SE360.

482-18 101WVa310, 133SE360, 361 [cit CJ].

483-23 [e] Kan 292P798 (acceptance of interest on purchase-money mortgage). [f] **Husband's creditor is not estopped to question validity of wife's title** by fact that as assignee of mortgage given by wife to secure purchase money creditor accepted from her payment of interest on such mortgage. 130Kan126, 285P597.

483-28 320Mo 754, 9SW(2d)880; 320 Mo 1077, 9SW(2d)907. [a] (4) Badges of fraud are suspicious circumstances that overhang transaction or appear on face of papers. 115 Okl 289, 243P147.

483-29 50ND371, 196NW104; 127 Okl 61, 259P858.

483-31 127 Okl 61, 259P858.

484-33 127 Okl 61, 259P858; 36Wyo 268, 254P130, 133 [citCJ].

484-34½-New. and may by their number and joint operation constitute conclusive proof of fraud. 17F(2d)492.

484-35 313Mo 27, 281SW445; 115 Okl 289, 243P147.

484-37 224Ky414, 6SW(2d)474.

484-40 16F(2d)187; 17F(2d)492; 202 Iowa817, 211NW396; 219Ky471, 293 SW959; 234Ky697, 27SW(2d)975; 320 Mo 1077, 9SW(2d)907; 80Mont40, 257P 1022; 81Mont393, 264P115; 118 Or685, 248P143; 51Philippine763; 145Va663, 134SE547.

484-41 174Ark184, 295SW353.

485-42 [a] (3) Conveyance of property worth sixty-seven thousand dollars to sister for one dollar, she giving power of attorney by which grantor had practically same control as before transfer, makes prima facie case of fraudulent conveyance. 73Mont429, 236P675.

485-43 202 Iowa817, 211NW396; 11Pa Dist&Co 760; SD 227NW466. See also 208 Iowa1326, 227NW110.

485-45 73Mont429, 236P675.

485-47 224Ky414, 6SW(2d)474; 36 Wyo 268, 254P130. [a] (3) Misstatement of consideration in bill of sale. 36 Wyo 268, 254P130.

486-49 36Wyo 268, 254P130.

486-51 36Wyo 268, 254P130, 133 [cit CJ].

486-52 36Wyo 268, 254P130, 133 [cit CJ].

488-67 Or 287P224.

488-68 160Ga763, 129SE65 (circumstance for consideration of jury); 164Ga 699, 139SE527.

488-69 73Mont429, 236P675.

489-84 320Mo 1077, 9SW(2d)907.

490-95 Iowa 222NW566.

490-97½-New. That an absolute conveyance was given with the intention that it should be security only is not alone sufficient to warrant setting aside the conveyance. Iowa 222NW566.

490-1 17F(2d)729; Iowa 222NW566; 219Ky471, 293SW959; 237Mich681, 213 NW194; TexCivA 275SW211.

491-2 17F(2d)729.

491-3 219MoA365, 271SW1008 (failure to record is fraudulent only when such action gives grantor fictitious credit on which creditor relies). [a] **"Credit"** means apparent possession of property by debtor out of which creditor can enforce payment and not such security as payment as creditor may hope to gain by debtor's inducing some one else to help him pay or secure it. 219MoA365, 271SW1008.

491-4 201 Iowa257, 207NW230; Iowa 222NW566.

491-7 81Mont393, 264P115, 120 [cit CJ]. [a] **Deed not recorded till some time after execution is not badge of fraud** where recorded before creditor brought original action. Wash 291P 1081.

491-8 5F(2d)921; 219MoA365, 271SW 1008.

491-10 170Ark322, 280SW1001; 127 Or 551, 272P914; Or 287P224.

491-11 127 Or551, 272P914; Or 287P 224.

492-24 16F(2d)187; 91CalA394, 267P 146; 160Ga763, 129SE65; 234Ky697, 27 SW(2d)975; 81Mont393, 264P115; Or 287P224.

493-25 Va 153SE651.

493-27½-New. Fact of debtor's insolvency alone does not give creditor any dominion over his property. WVa 153 SE502.

493-28 15F(2d)350; 17F(2d)492; 160 Ga763, 129SE65 (circumstance from which jury might infer fraud); 127 Or 551, 272P914; Or 287P224.

493-30 33Wyo 326, 239P531, 533 [cit CJ].

494-38 234Ky697, 27SW(2d)975; Nebr 231NW761, 762 [cit&quotCJ]; 143SC 516, 141SE705, 709 [citCJ]. But see Mo 29SW(2d)1090.

494-41 79CalA529, 250P405; 175Minn 157, 220NW560; 81Mont393, 264P115.

494-42 200 Iowa1371, 206NW295; 222 MoA128, 28W(2d)824.

495-58 202 Iowa795, 211NW381; 202 Iowa919, 211NW540; 203 Iowa1368, 214 NW542; Iowa 229NW813; 5LaA137; 73Mont429, 236P675; 75Mont99, 242P 425; 80Mont40, 257P1022; 83Mont49, 270P642; 52ND648, 204NW178; 54ND 35, 208NW847; 115 Okl 289, 243P147; 118 Okl 45, 246P638; 129 Okl 46, 263P 123; 117 Or107, 241P62; 116 Or650, 242P351; 146Va461, 131SE797; 148Va 479, 139SE295; 153Va392, 149SE624; Va 153SE651; 103WVa203, 136SE846; 103WVa545, 138SE107; 103WVa485, 138SW386; 106WVa265, 145SE384.

495-59 73Mont429, 236P675; 127 Or 551, 272P914; Or 287P224; 148Va479, 139SE295; 103WVa545, 138SE107; Sask [1930] 3DomLR955.

495-60 115 Okl 289, 243P147.

496-67 81Mont393, 264P115, 120 [cit CJ].

496-72½-New. failure of bankrupt or purchaser to notify creditors of the nature of proposed transfer; 17 F(2d)492.

496-72¼-New. the substitution of "quick" assets for "slow" assets. 17 F(2d)492.

497-82 [a] **Temporary reference** to vendors of necessary goods is not badge of fraud. 91CalA394, 267P146.

497-86 103WVa545, 138SE107.

497-87 [a] **Strong and clear evidence** will be required to repel conclusion of fraud. 115 Okl 289, 243P147.

497-90 233Ky583, 26SW(2d)493; NC 154SE736(2dcase).

497-94 28F(2d)7; 215Ala307, 110S 468; 97CalA508, 275P984; 160Ga763, 129SE65 (where grantee knows or has reasonable grounds to suspect fraudulent intent); TexCivA 32SW(2d)233.

497-96 But see 181Ark96, 24SW(2d) 976.

498-97 228Ky96, 14SW(2d)391. [b] **Voluntary conveyance by husband to wife** is not invalid where husband has enough property left to pay his existing debts. 115Tex342, 282SW558.

498-99 150Md265, 132A633.

498-4½-New. Subsequent insolvency of grantor, unforeseen by parties, does not render gift invalid although grantor is indebted at time of gift. 19 OhA207.

498-4¼-New. Business man's voluntary conveyances may be set aside as fraud on creditors when remaining property leaves unreasonably small capital. NJCh 151A873(1stcase).

498-5 81Mont560, 264P679.

498-14 42 Ida270, 245P98, 99 [citCJ].

498-15 42 Ida270, 245P98, 99 [citCJ].

499-16 Iowa 231NW387.

499-25 174Ark184, 295SW353; 149 Md103, 131A27, 28 [quotCJ].

499-26 163Ga604, 136SE914; 13LaA 498, 128S903(2dcase); 149Md103, 131A 27, 28 [quotCJ]; 168Minn168, 209NW 883, 886 [citCJ]; Wash 291P1081; Wis 232NW536. [b] (2) Mortgage, given at a time when mortgagor was indebted to banks in a large amount, and which had been pressing for payment, and mortgagor for at least a year prior to executing mortgage having been unable to pay its debts as they became due, is invalid as against mortgagee under subsequent mortgage given to him as trustee to secure money owed by mortgagor to banks. 266Mass437, 165NE 388.

499-27 174Ark184, 295SW353; 149Md 103, 131A27, 28 [quotCJ]; 168Minn 168, 209NW883, 886 [citCJ]; 48RI 271, 137A385, 386 [citCJ].

499-28 174Ark184, 295SW353; 177 Ark1194, 10SW(2d)500.

500-30 174Ark184, 295SW353.
500-32 28F(2d)740; 169Ark1, 272SW 864; 172Ark517, 289SW482; 71CalA 735, 236P325 (intent immaterial, under Civ. Code § 3442, if conveyance by insolvent grantor is without valuable consideration); 202 Iowa465, 210NW596; 205 Iowa662, 216NW700; 207 Iowa 1187, 224NW517; 316Mo 1213, 293SW 405; 75Mont99, 242P425; NJ 151A858; 54SD412, 223NW335; TexCivA 283SW 576; TexCivA 18SW(2d)762. See also 121Kan159, 246P971, 972 [citCJ]. [c] (5) Consideration of love and affection, though good consideraton, is not valuable one. 71CalA735, 236P325.
501-34 71CalA735, 236P325.
501-35 172Ark517, 289SW482; 37 Okl ACR423 [quotCJ].
501-36 37 OklACR423 [quotCJ].
501-40 173Minn104, 217NW139; 319 Mo 672, 4SW(2d)769; NC 154SE736 (2dcase); 54ND35, 208NW847, 849 [citCJ].
501-41 97CalA508, 275P984.
501-42 92CalA749, 268P962.
502-45 164Ga552, 139SE31; NC 154 SE736(2dcase); TexCivA 26SW(2d) 281. [e] **Every debt or claim that can be enforced in courts** may be considered in determining grantor's insolvency. TexCivA 26SW(2d)281.
502-47½-New. Market value of debtor's property may be proper basis for testing his solvency. 16F(2d)187.
502-49 167Ga783, 146SE736; 228Ky 96, 14SW(2d)391; NJCh 151A873 (1stcase).
502-51 CalA 286P741 (depreciation of assets after executing trust deed).
503-64 214Ala226, 107S57; 71CalA 735, 236P325 (necessary to prove intent to delay or defraud creditors to make out case under Civ. Code § 3439); 86Colo 595, 284P337; 164Ga421, 138 SE902; 164Ga552, 139SE31; 30Hawaii 948; 42 Ida270, 245P98; 203 Iowa 1368, 214NW542; Iowa 229NW816; 229Ky836, 18SW(2d)285; 233Ky583, 26SW(2d)493; 234Ky697, 27SW(2d) 975; 129 Okl 222, 264P164; TexCivA 32SW(2d)502; 149Va39, 140SE277. [b] (2) Proof of actual fraud is required when property has been transferred with intent to hinder, delay and defraud. 37F(2d)310. [e] **Fraud may be by actual intent to defraud creditors, or constructive,** by conveying property without retaining enough to pay creditors. CalA 286P741. [f] **Stock certificates delivered pursuant to prior trust** arrangement cannot have been delivered to defraud creditors. Wis 231NW 580.
503-68 28F(2d)740; 177Ark1023, 8 SW(2d)462; 44 Ida200, 256P99, 101 [citCJ]; 121Kan159, 246P971; Me 151 A559; 221MoA311, 273SW148; Tex CivA 15SW(2d)659; 37Wyo 78, 259P 185, 187 [citCJ]. [b] (1) 83Mont265, 271P612. [e] **An innocent and honest intention** is not enough to render contract enforceable, where its manifest object was one positively condemned by law. 39GaA344, 147SE180.
504-70 44 Ida200, 256P99, 101 [citCJ].
504-73 20F(2d)295; 177Ark1194, 10 SW(2d)500. [g] **Mortgage not fraudulent where delay caused** is natural consequence thereof. 260Mass151, 157NE 40.
505-74 20F(2d)295; 33Ariz506, 266P 16; Va 153SE651.
505-78 177Ark1023, 8SW(2d)462; 201 Iowa593, 207NW576.
506-80 201 Iowa593, 207NW576.
506-81 201 Iowa593, 207NW576.
506-86 214Ala558, 108S370; 42 Ida 270, 245P98; 99NJEq819, 134A619.
506-87 99NJEq819, 134A619.
506-91 196Cal 380, 238P81; Wash 292 P414; 37Wyo 78, 259P185.
506-95 82CalA691, 256P258; 86Colo 595, 284P337; 99Fla1221, 128S643; 160Ga763, 129SE65; 164Ga552, 139SE 31; 83 IndA33, 147NE318; 203 Iowa 271, 211NW217; 203 Iowa1368, 214 NW542; Iowa 232NW646; 214Ky849, 284SW77; 215Ky250, 284SW1050; 219 Ky468, 293SW950; 230Ky61, 18SW(2d) 884; 234Ky697, 27SW(2d)975; 262 Mass191, 159NE735; MoA 286SW133; NJ 151A858; 137Misc719, 244NYS369; 190NC411, 130SE45; NC 155SE611; 49 ND1, 177NW375; 121 Oh8, 166NE801; 117 Or107, 241P62; 116 Or650, 242P 351; 289Pa277, 137A272; 296Pa568, 146A153; 142SC78, 140SE238; 149Va 39, 140SE277; 153Va392, 149SE624; 106WVa265, 145SE384; 36Wyo 268, 254P130.
509-99 203 Iowa271, 211NW217; 202 Iowa1109, 211NW479.
509-1 190NC411, 130SE45.
509-3 28F(2d)7; 215Ala367, 110S809; 201Cal 689, 258P588; 202Cal 215, 259P 947; 167Ga205, 144SE778; 83Mont 265, 271P612; 190NC411, 130SE45; 26 OhNPNS552; 287Pa61, 135A210; 48 SD237, 208NW406; 33Wyo 326, 239P 531. [c] **Consideration must be fair equivalent of thing bought.** 234Ky697, 27SW(2d)975.
510-4 190NC411, 130SE45.
510-5 [b] **Mortgage given to secure genuine liabilities** is void only if mortgagee participated in mortgagor's fraudulent purpose. Mass 171NE730.
510-12 218Ala153, 117S641; 181Ark 96, 24SW(2d)976; 160Ga763, 129SE65; 166Ga279, 142SE873; 227Ky195, 12SW (2d)315; Mo 29SW(2d)56; 136Misc265, 239NYS639; 141Wash128, 250P944.
511-13 99Fla1221, 128S643; 227Ky195, 12SW(2d)315; 320Mo 754, 9SW(2d)880; Wash 292P414. See also 331 Ill 230, 162 NE829.
512-14 Ill 172NE164. [a] (2) Participation cannot be charged unless claimant is shown to be negligent in inquiring or participant in fraud. 30F(2d)372.
512-16 But see 150SC398, 148SE220.
512-26 See also 27F(2d)504.
513-40 220Ala629, 127S224 (infirmities and encumbrances appearing in chain of title); 177Ark1194, 10SW(2d)500; 234 Ky697, 27SW(2d)975; NJCh 147A509.
515-48 117 Or107, 241P62.
515-51 168Minn168, 209NW883.
516-52 320Mo 1077, 9SW(2d)907.
516-58 207 Iowa354, 223NW115.
517-67 13F(2d)413.
518-78 86Colo 595, 284P337; 297Pa 551, 147A657. [f] **Property deeded by tort-feasor to tort-feasee** after recovery of judgment but before certificate of judgment recorded. 220Ala629, 127S224. [g] **Recital in deed that conveyance from husband to wife** was in consideration of one dollar. 220Ala629, 127S224.
518-82½-New. [§ 193a] (1½). **Examination of Records.** A purchaser who has no knowledge or actual notice of a claim is not obliged to search the record beyond conveyance to intermediary. 101 NJEq173, 137A832.
519-93 208Ky382, 271SW69.
519-98 20F(2d)295; 28F(2d)7; DelCh 142A832; 99Fla1221, 128S643. [b] Mont 292P725 (consideration grantor's future support); 137Misc719, 244NYS 369.
520-99 20F(2d)295; 233Ky583, 26SW (2d)493.
521-5½-New. In order to invalidate a conveyance on the ground that it was made for the purpose of hindering, delaying, or defrauding creditors, it must appear that the debtor was insolvent at the time the conveyance was made. 122 Okl 37, 250P799.
521-7 81Mont393, 264P115; 117 Or107, 241P62; SC 155SE622.
521-8½-New. The rule is also applicable to a case where property is purchased by a debtor and title is taken in the name of another. 92Fla37, 109S 320.
521-9 201 Iowa257, 207NW230; 116 Nebr846, 219NW233; NJCh 148A754.
522-11 218Ky770, 292SW322. See also 121Kan180, 246P976.
522-12 5F(2d)921.
522-14 Contra 262Mass509, 160NE337. [b] **In Massachusetts.**-262Mass509, 160 NE337.
523-19 66Utah103, 240P165, 172 [quot CJ].
523-20 29Hawaii625.
524-23 201 Iowa257, 207NW230.
525-30 [b] (2) Actual possession under unrecorded deed has been held notice to subsequent creditors. 232Ky27, 22SW (2d)293.
526-32 229Ky836, 18SW(2d)285; 162 La698, 111S65; 222MoA339, 297SW91; 97NJEq52, 129A201; 153Wash116, 279 P390; Wis 232NW536. See also DelCh 142A832. But see 51SD603, 216NW346 ("fair consideration" held essential). [e] **Fair consideration** exists where fair equivalent goes to seller or to his creditors. Wis 232NW536.
526-33 51SD603, 216NW346 (consideration must be fairly adequate).
526-37 146Wash361, 263P188.
526-40 Iowa 232NW646; 146Wash361, 263P188.
526-41 39Wyo 266, 270P1072, 1074 [cit CJ].
527-43½-New. A fair consideration as used in the Minnesota statute is one which fairly represents the value of the property transferred or the obligation incurred. 168Minn168, 209NW883.
527-44 71CalA735, 236P325 (love and affection is good but not valuable consideration under statute); 92CalA749, 268P962; 319Mo 672, 4SW(2d)769; 75 Mont99, 242P425; 84Mont384, 276P432; 88PaSuper346, 348 [quotCyc].
527-45 75Mont99, 242P425; TexCivA 26SW(2d)281; TexCivA 32SW(2d)233.
527-48 Iowa 229NW813; 153Wash116, 279P390.
528-55 319Mo 672, 4SW(2d)769, 771 [citCJ].
528-56 [c] **Nominal consideration** has been held not to mean fair consideration. 128Misc901, 220NYS495. [d] **Quitclaim deed reciting consideration of one dollar and other valuable consideration** is not voluntary. 206 Iowa426, 218 NW303.
528-59 Iowa 232NW646; 168Minn168, 209NW883.
528-61 175Ark780, 1SW(2d)36.
528-62 Iowa 224NW530.
528-63 168Minn168, 209NW883; 316Mo 968, 293SW116 (transfer held voidable).
529-69 Iowa 222NW566; 168Minn168, 209NW883, 886 [citCJ].
530-78 149Va39, 140SE277.
530-79 85CalA51, 258P649; Me 151A 559; 166Minn435, 208NW184 [citCJ] (presumptively fraudulent where debtor insolvent); 38 OklACR357, 361 [citCJ& quotCyc]; 152Wash211, 277P843; Alta [1927] 3DomLR507.
530-84 38 OklACR357.
530-95 85CalA51, 258P649; 38 OklACR 357.
531-98 162Ga299, 133SE249 (one dollar and past and future support not voluntary as to subsequent purchaser).
531-1 38 OklACR357, 361 [citCJ&quot Cyc].
531-4 38 OklACR357, 361 [citCJ&quot Cyc].
531-9 260Mass151, 157NE40; MoA 281 SW98.
533-22 91CalA394, 267P146, 148 [quot CJ]; Wis 232NW536 (no fraud if no indebtedness in fact exists).
534-32 125Kan730, 266P53; 85PaSuper 103.
534-37 200 Iowa1020, 205NW974 (conveyance fraudulent for excess of value over encumbrance).
534-43½-New. By statute in Louisiana, debtor's transfer of property for antecedent debt is subject to revocation by creditor. 160La203, 106S784.
534-44 33F(2d)758; 163Ga604, 136SE 914; 249 IllA237; 149Md103, 131A27; 260Mass151, 157NE40; 244Mich525, 221 NW619; 221MoA152, 297SW727; 222 MoA339, 297SW91; 222MoA128, 2SW (2d)824; NJ 151A858; 137Misc719, 244 NYS369; 52ND648, 204NW178; 11Pa Dist&Co 760; 148Va616, 139SE291; 149 Va39, 140SE277 (relationship of debtor and creditor held to exist); Wash 291P 1081; 199Wis107, 225NW745; 39Wyo 238, 270P1082. See also 127Me286, 143 A101. But see 37 OklACR423.
535-45 202 Iowa1109, 211NW479; 165 Minn198, 206NW170, 43ALR41; 116 Or 650, 242P351; TexCivA 27SW(2d)250; 148Va616, 139SE291. [c] **Conveyance to daughters of debtor who was creditor's niece at his direction** is supported by extinguishment of debt and not alone by love and affection. 75Mont99, 242P425.
536-49 165Minn317, 206NW440.
536-50 31 OhA338, 166NE913.
536-57 250NY56, 164NE741.
537-63 331 Ill 240, 162NE869; TexCivA 297SW885. See also TexCivA 15SW(2d) 659.
537-68 103WVa545, 138SE107. [b] **Held not inadequate consideration.**-331 Ill 230, 162NE829.

539-84 51Philippine763.

539-86 [b] (1) 48 Ida471, 282P940(2d case).

539-96 See 26F(2d)937.

540-98 But see 30F(2d)372.

540-1 Mo 17SW(2d)271; 251NY1, 166 NE783.

542-15 Mo 17SW(2d)271.

543-29 Sask [1925] 3DomLR961.

543-30 See also 144Va1, 131SE344.

544-41 [a] (2) Wife's payment of money she owed to husband is not consideration for his conveyance to her. Iowa 216NW649.

544-43 Cal 292P636; 103WVa545, 138 SE107. [b] In Oklahoma.-38 OklACR 357.

544-45 200 Iowa970, 205NW788; 121 Kan159, 246P971, 972 [citCJ]; 137Misc 719, 244NYS369.

545-46 121Kan159, 246P971, 972 [cit CJ]; 51Philippine763.

545-46½-New. Conveyance not fraudulent in fact will not be set aside if consideration is adequate. 201 Iowa593, 207NW576.

545-51 51Philippine763. See also 170 La898, 129S522. [b] Inadequacy defined.-51Philippine781.

545-52 29Hawaii625, 637 [citCJ]; 203 Iowa512, 211NW538; 121Kan180, 246P 971, 972 [citCJ].

546-53 30F(2d)372; 251NY1, 166NE 783.

546-54 121Kan159, 246P971, 972 [cit CJ].

547-67½-New. However, a voluntary conveyance is not fraudulent as to the purchaser at judicial sale. 100NJEq 393, 135A791.

547-69 16F(2d)187; 215Ala411, 110S 903; MoA 4SW(2d)484; NJ 147A858; NJ 151A858; NJCh 147A509; 127 Okl 61, 259P858; 129 Okl 46, 263P123; 134 Okl 116, 272P383; 115Tex342, 282SW 558. But see NJCh 149A530. [e] 37 Okl ACR423 [quotCJ].

548-72 16F(2d)187; 18F(2d)722; 165 Ark57, 262SW988; 245Mich156, 222NW 74; Mo 1SW(2d)121; 320Mo 605, 8SW (2d)592; 221AppDiv838, 224NYS343. See also TexCivA 15SW(2d)1064.

548-73 172Ark31, 287SW769; 174Ark 184, 295SW353; 177Ark1060, 9SW(2d) 1062; 180Ark329, 21SW(2d)409; MoA 281SW98; 37 OklACR423. See also 225 Ky529, 9SW(2d)302. But see 166La626, 117S741.

550-74 42 Ida270, 245P98; 205 Iowa 662, 216NW700; 190NC411, 130SE45; 50Philippine636.

550-76 165Ark57, 262SW988; 85CalA 51, 258P649; 29Hawaii625; 167Minn 275, 208NW1003; MoA 281SW98; 319 Mo 672, 4SW(2d)769, 771 [citCJ]; 84 Mont384, 276P432; 190NC411, 130SE45; 22 OhA17, 153NE255; 51SD27, 211NW 972; Sask [1929] 2DomLR443; Sask [1928] 4DomLR188.

551-77 127Kan164, 272P167; 190NC 411, 130SE45.

551-78 83Mont265, 271P612; 190NC 411, 130SE45; Sask [1929] 2DomLR 443.

551-80 164Ga552, 139SE31.

552-92 225AppDiv290, 233NYS22.

552-97 16F(2d)187; 165Ga390, 142SE 277; 166Ga279, 142SE873; 241 IllA398; 202 Iowa465, 210NW596; 234Ky697, 27 SW(2d)975; 225AppDiv290, 233NYS22; TexCivA 276SW784.

553-1 71CalA735, 236P325.

553-5 136Misc265, 239NYS639.

553-7 12F(2d)652, 653 [citCJ]; 42 Ida 270, 245P98; 251 IllA392; 240Mich512, 215NW313; Mo 29SW(2d)1090; Tex CivA 276SW784; Wis 228NW494.

554-8 167Ga205, 144SE778. [b] (4) Other instances. Okl 292P833.

554-10 92CalA749, 268P962; 234Ky 697, 27SW(2d)975; 225AppDiv137, 232 NYS94.

554-13 83Mont265, 271P612.

554-14 122 Okl 37, 250P799, 801 [quot CJ].

554-15 209Ky698, 263SW485; 127 Okl 61, 259P858. See also 28F(2d)740.

555-16 127 Okl 61, 259P858.

555-17 122 Okl 37, 250P799, 801 [quot CJ].

555-17½-New. Under some statutes the foregoing rule applies irrespective of whether or not the maker was insolvent at the time of the conveyance, 122 Okl 37, 250P799.

555-17¼-New. and irrespective of whether or not the creditor has reduced his claim to judgment. 122 Okl 37, 250 P799.

555-18 42 Ida270, 245P98; 84Mont384, 276P432.

555-21 169Ark529, 276SW1; 172Ark31, 287SW769; 174Ark1180, 295SW390; 201 Iowa257, 207NW230; 216Ky682, 288SW 676; 319Mo 672, 4SW(2d)769; 115Tex 342, 282SW558. See also 225Ky529, 9 SW(2d)302. [a] (5) Conveyance to wife nine years before incurring debt does not show fraudulent intent. 216Ky682, 288 SW676. [c] Mere voluntary conveyance is not sufficient to warrant setting deed aside. 216Ky682, 288SW676.

557-23 201 Iowa257, 207NW230.

557-24 201 Iowa257, 207NW230.

557-27 [a] Husband assuming wife's obligation to support children is valuable consideration for deed to him. 219 Ky468, 293SW950.

558-29 164Ga552, 139SE31; 141Miss 370, 107S279 (conveyance valid, though not recorded till after suit was brought); 287Pa304, 135A260.

558-30 287Pa304, 135A260. [a] Consideration has been held not inadequate. -IndA 169NE869.

558-31 TexCommnA 15SW(2d)585.

558-33 121Kan180, 246P976.

558-36½-New. Where a wife procures an annulment of marriage, the sole consideration for her husband's transfer to her of realty and jewelry, because of the husband's false representations, fraud, and deceit, such transfers thereby become in effect voluntary transfers, without consideration, and in fraud of the husband's creditors. 225AppDiv137, 232 NYS94.

558-36¼-New. Transfer by wife to husband of note part of her separate estate, and of money received in satisfaction of a claim for personal injuries, deposited in a bank by the wife with the husband's knowledge and consent, constitutes a valuable consideration for the transfer to the wife of a one-half interest in the judgment of the husband against a third person. TexCommnA 15SW(2d)585.

558-37 Mo 23SW(2d)1004(2dcase) (doctrine of scrutiny of alleged consideration inapplicable).

558-38 43F(2d)497; 144Va1, 131SE344 (settlement on wife in consideration of release of her interest in other lands of husband).

558-40 144Va692, 130SE902 (postnuptial agreement not prima facie fraudulent). Contra 204 Iowa578, 213NW410.

559-50 TexCivA 293SW632.

559-51 But see 216Ala377, 113S243.

561-68 5F(2d)921.

561-72 TexCivA 290SW795.

562-74 143SC307, 141SE556; 153Va 190, 149SE537 (conveyance in consideration of assumption of deeds of trust thereon). [b] Where wife had no means to pay husband's debts conclusion of law that conveyance was made without consideration and in fraud of creditors is justified. SD 228NW392.

562-75 48 Ida471, 282P940(2dcase); 205 Iowa460, 218NW311; Iowa 229NW 816; 210Ky396, 275SW865; 13LaA607, 128S673 (holding advances from wife's paraphernal property showed bona fide debt); Okl 291P509; 153Va190, 149SE 537; Wis 228NW494. But see 132 Or 381, 285P1025. [a] 13LaA607, 128S 673. [d] (2) Husband's use of wife's funds in stock speculation with her authority does not make resulting loss basis of debt. 132 Or381, 285P1025. [f] Superiority over other creditors.-160Ga705, 129SE31.

562-81 [b] (2) Wife is not estopped by fact of husband's failure to inform bank of prior loan by her, when not aware of his representations. 214Ala96, 106S504.

563-82 204 Iowa580, 215NW652.

563-85 IndA 169NE869; Mo 30SW(2d) 44; 286Pa114, 133A31.

564-86 But see 48SD237, 208NW406.

564-95 [b] Transfer of property purchased by husband in part with wife's inheritance made without agreement or demand, cannot be sustained on theory husband was chargeable with interest. Mo 30SW(2d)44.

564-97 [b] Conveyance by husband to wife will not be set aside on sole ground that it was made to satisfy debt against which limitations had run. 205 Iowa 915, 218NW915.

565-98 Wis 228NW494.

565-3 [e] Where wife's property is mortgaged to secure husband's debt and is sold on foreclosure, conveyance of his property to wife to extent of debt is not fraudulent. 210Ky396, 275 SW865. [f] Dismissal of divorce suit.-18F(2d)894. [g] Wife's becoming surety for husband and executing mortgage on property conveyed to secure such debt constitutes consideration pro tanto. 207 Iowa1, 222NW362. [h] Wife's execution of quitclaim deed to husband and his promise to return her former interest by entirety. 249Mich215, 228 NW719.

565-4 [d] Payment by wife to husband of money borrowed on land conveyed by husband to wife is not valuable consideration where she acted as his agent. 71CalA735, 236P325. [e] Good motive will not supply want of consideration, as where money to be borrowed on land conveyed to wife was used to work husband's farm and pay creditors if successful. 71CalA735, 236P325. [f] Agreement to care for children is not valuable consideration. 224Ky414, 6SW (2d)474. [g] Promise of husband to wife to give child sum equal to wife's donations to him is without valuable consideration where she had given him sums at various times which he used for thier joint benefit. 81Mont560, 264 P679.

565-7 16F(2d)187; 172Ark234, 288SW 391; 172Ark517, 289SW482; 82Colo 98, 257P351; 164Ga421, 138SE902; 202 Iowa493, 210NW564; 204 Iowa378, 213 NW410; Iowa 216NW649; 205 Iowa 203, 217NW857; 242Mich477, 219NW 651; 26 OhA508, 160NE526; 287Pa304, 135A260; 88PaSuper346; TexCivA 295 SW640; TexCivA 32SW(2d)233; Alta [1927] 3DomLR507. [c] Vendor's lien note assigned to insolvent husband does not constitute consideration. TexCivA 295SW640. [d] Wife's assignment to insolvent husband of proceeds of judgment for injuries held not sufficient consideration. TexCivA 295SW640.

566-9 TexCivA 295SW640.

566-11 CalA 290P110; Mo 27SW(2d)6 (where husband has contracted to will property to others).

566-11½-New. In the absence of creditors, a conveyance is valid. 287Pa304, 135A260.

566-15 201Cal 689, 258P588.

567-20 201Cal 689, 258P588; 202 Iowa 493, 210NW564; Sask [1925] 3DomLR 961.

567-21 202 Iowa493, 210NW564.

567-23 172Ark517, 289SW482.

567-24 172Ark517, 289SW482.

567-24½-New. Transfer to wife, during insolvency, for consideration of love and affection, raises presumption of fraud. 71CalA735, 236P325.

567-25 201Cal 689, 258P588; 164Ga 421, 138SE902; 217Ky164, 289SW213; 224Ky414, 6SW(2d)474.

567-27 TexCivA 295SW640.

567-28 TexCivA 295SW640.

567-34 102CalA370, 283P94; 262Mass 509, 160NE337; TexCivA 31SW(2d) 519; 187Wis649, 205NW391.

568-40 172Ark234, 288SW391.

568-51 246 IllA296.

568-52 224Ky414, 6SW(2d)474; 287 Pa304, 135A260; TexCivA 32SW(2d) 233.

569-56 51SD27, 211NW972.

569-58 202Cal 215, 259P947; 149Va39, 140SE277.

569-59 Mo 293SW136, 138 [citCJ]; 49ND262, 191NW481; 53SD299, 220NW 500; Alta [1927] 3DomLR507.

569-62 16F(2d)187; 251Mich262, 231 NW575(1stcase) (holding sale of ten thousand dollars property to daughter for four thousand dollars inadequate consideration in fraud of creditors).

569-62½-New. A deed by a widow to her son's trustee in bankruptcy, as se-

curity for an extension, will not be set aside as fraudulent and void solely on the ground of lack of independent advice. **Ont** [1927] **2DomLR**389.

569-62½-New. That a comparatively small portion of the consideration for a conveyance to a parent in trust for a child was paid with funds of the beneficiary does not preclude a creditor from reaching the property if the conveyance was made with the intention on the part of the trustee to defraud his creditors. 156**Tenn**417, 1**SW(2d)** 1017.

570-64 208 **Iowa**776, 226**NW**133.

570-71 170**Ark**322, 280**SW**1001.

570-75 164**Minn**317, 204**NW**953; **NJ** 147**A**858.

570-76 248**Mich**215, 226**NW**855; 164 **Minn**317, 204**NW**953.

571-86 149**Va**39, 140**SE**277.

571-89 **Me** 151**A**559.

571-93 **MoA** 300**SW**1023; 150**SC**75, 147 **SE**752.

572-97 81**Colo** 195, 254**P**779; **Me** 151**A** 559; **Mo** 274**SW**741. See also **Iowa** 228 **NW**272.

572-98 296**Pa**568, 146**A**153.

572-1 **Iowa** 229**NW**813.

572-1½-New. Where lands were conveyed to a judgment debtor by her husband under an express oral agreement that she should hold them for their children, the moral obligation subsequently discharged by conveyance to a daughter for the benefit of the children is sufficient to protect the conveyance from attack of creditors. 83**Mont**265, 271**P**612.

572-1⅓-New. Where a judgment debtor acquired land in her own right without assistance from her husband, voluntary statements that she acquired the land for her children are not sufficient to protect a voluntary conveyance to her daughter from attack. 83**Mont** 265, 271**P**612.

572-4 208 **Iowa**776, 226**NW**133; 219**Ky** 471, 293**SW**959; 83**Mont**265, 271**P**612; **NJCh** 149**A**531; 26 **OhA**508, 160**NE**526; 134 **Okl** 116, 272**P**383; 153**Va**20, 149**SE** 497.

572-6 **Iowa** 224**NW**530; 225**Ky**529, 9 **SW(2d)**302.

573-13 167**Minn**275, 208**NW**1003; 81 **Mont**560, 264**P**679.

574-24 172**Ark**346, 289**SW**10; 205**Cal** 1, 269**P**610; 3**LaA**212; 175**Minn**157, 220**NW**560; **MoA** 22**SW(2d)**1055; 122 **Okl** 175, 253**P**51.

574-29 214**Ala**627, 108**S**573; 79**CalA** 529, 250**P**405; **Fla** 130**S**599; 170**La** 1044, 129**S**630; 175**Minn**157, 220**NW** 560; 176**Minn**433, 223**NW**683; 146**Va** 158, 135**SE**689; **Wash** 291**P**1081; 106 **WVa**265, 145**SE**384. But see 166**La**626, 117**S**741.

576-45 103**WVa**545, 138**SE**107.

577-57 83**CalA**551, 257**P**119. But see 201**Cal** 587, 258**P**382; **CalA** 286**P**1064; **CalA** 284**P**990; 81**Mont**482, 263**P**976. [c] **In North Dakota.**-51**ND**361, 199**NW** 858.

578-59 81**Mont**482, 263**P**976.

578-64 136**Misc**265, 239**NYS**639.

579-72 291**Pa**236, 139**A**847; 291**Pa**247, 139**A**873; 292**Pa**464, 141**A**298; 293**Pa** 412, 143**A**182; 88**PaSuper**106; 90**PaSuper**460.

579-74 172**Ark**346, 289**SW**10; 40 **Ida** 726, 236**P**538; 81**Mont**482, 263**P**976; 122 **Okl** 176, 253**P**51; 122 **Okl** 175, 253**P** 52; 293**Pa**412, 143**A**182; 291**Pa**247, 139 **A**873.

580-76½-New. Change of possession such as the circumstances and the character of the property permits is sufficient to satisfy a statute providing that an unrecorded bill of sale without transfer of possession is invalid against existing creditors and innocent purchasers. 143**Wash**4, 253**P**1081.

581-81 204 **Iowa**107, 214**NW**676; 9**LaA** 398, 121**S**783. [a] (1) 83**CalA**551, 257 **P**119.

581-82 143**Wash**4, 253**P**1081.

581-89 40 **Ida**726, 236**P**538, 542 [cit Cyc]; 81**Mont**482, 263**P**976; 50**ND**371, 196**NW**104, 106 [citCyc].

582-93 132 **Or**92, 284**P**832 (where creditor not misled).

583-95 97**CalA**442, 275**P**870.

584-2 81**Mont**482, 263**P**976; 88**PaSuper**106.

584-3 88**PaSuper**106.

584-6 **MoA** 22**SW(2d)**1055; **Alta** [1930] 3**DomLR**406.

585-10 254 **IllA**14 (sale of aeroplane to seller's aunt who could not operate it); 50**ND**371, 196**NW**104, 105 [citCyc].

585-11 293**Pa**412, 143**A**182.

585-15 293**Pa**412, 143**A**182.

586-17 81**Mont**482, 263**P**976.

586-25 87**CalA**399, 262**P**395; 125**Kan** 730, 733, 266**P**53 [quotCJ].

587-31 292**Pa**464, 141**A**298.

587-34 **MoA** 22**SW(2d)**1055.

588-35 **MoA** 22**SW(2d)**1055.

589-49 27**Hawaii**614, 619 [quotCJ].

589-50 27**Hawaii**614, 619 [quotCJ].

589-62½-New. Transfer by payee of note and mortgage held by bank for safe-keeping is not void where bank creditor of payee refuses to deliver them to payee or assignee. 130**Kan**182, 285**P** 637.

589-63 292**Pa**464, 141**A**298.

590-74 **Man** [1929] 4**DomLR**337.

590-80 See also 148**Miss**861, 114**S**752.

590-82 75**Mont**557, 244**P**506. [a] (6) Delivery five weeks after sale is not immediate delivery. **Alta** [1929] 2**DomLR** 779. [b] (2) Day after sale where delivery impossible on day of sale. 75 **Mont**557, 244**P**506.

591-83 [a] **Where written memorandum does not contain all necessary elements,** specific performance will be denied as they cannot be supplied by parol evidence. 92**Fla**689, 110**S**256.

591-84 97**CalA**442, 275**P**870.

591-89 254 **IllA**14 (advertisement of aeroplane for sale).

593-11 [a] **Purpose of registration law** is to protect creditors and innocent purchasers against secret and unrecorded liens. 154**Tenn**389, 285**SW**558.

593-12 219**MoA**365, 271**SW**1008.

593-13 219**MoA**365, 271**SW**1008.

593-16 83**CalA**551, 257**P**119. [b] **Instrument creating restrictive covenant** must be registered to constitute notice to creditors and purchasers. 189**NC**589, 127**SE**697. [c] **Statute not complied with.**-217**Ky**164, 289**SW**213.

593-18 **Ala** 130**S**680; 219**MoA**365, 271 **SW**1008.

593-20 214**Ala**226, 107**S**57; 219**MoA** 365, 271**SW**1008; **TexCivA** 286**SW**519; 142**Va**810, 128**SE**255. [b] **Credit.**-219 **MoA**365, 271**SW**1008.

594-24 220**Ky**365, 295**SW**140; 198**NC** 190, 151**SE**255; 131 **Or**71, 278**P**586; **Tex CivA** 286**SW**519; **Wis** 228**NW**494.

595-28 17**F(2d)**729; 56**ND**581, 218**NW** 644.

595-29 **Iowa** 222**NW**566.

596-34 208**Ky**382, 271**SW**69. [a] **In Idaho.**-290**P**200.

596-35 **TexCivA** 286**SW**519.

596-36 22**AlaA**213, 114**S**275. [e] **In Virginia.**-144**Va**692, 130**SE**902. [f] **In Manitoba.**-[1928] 2**DomLR**691. [g] **In Ontario.**-62 **OntL**203, [1928] 2**DomLR** 508.

596-36½-New. The Minnesota statute providing for the filing of assignment of debts has no application to a transfer of a claim to an attorney for collection. 168**Minn**168, 209**NW**883.

596-38 148**Va**616, 139**SE**291.

597-42½-New. A trust deed of lumber providing for payment of interest on bonds, creation of a sinking fund, and account to the trustee for timber cut, removed, and manufactured has been held not void because giving the grantor the right to remove and sell timber and lumber. 148**Va**528, 139**SE**317.

597-45½-New. Under statute, harvesting of crop within ten days is sufficient to transfer actual possession. 146**Wash** 361, 263**P**188.

597-47 102**Conn**425, 129**A**221.

598-55 19**F(2d)**764; **Ala** 130**S**680; 320 **Mo** 804, 9**SW(2d)**1066. See also **Tex CivA** 276**SW**444. [j] **Assignment or pledge of membership in live stock exchange** which is liable for indebtedness of member to other members is void as to creditors. **MoA** 16**SW(2d)**722.

599-58 15**F(2d)**743.

599-60½-New. In construing a deed of trust given to secure a creditor, a reservation to grantor of power of disposition must be read in connection with other provisions. 146**Va**158, 135**SE**689.

600-62 29**Hawaii**625, 636 [citCJ]; 241 **IllA**398; 172**Minn**83, 214**NW**771, 772 [citCJ]; 246**NY**133, 158**NE**48; 32 **OhA** 164, 166**NE**247. [a] (2) Under common law of North Dakota beneficiary's assignment of husband's life insurance policy, during his lifetime, in trust for herself and infant son is fraud on creditors and may be set aside. 216**AppDiv** 100, 214**NYS**528 (where both were insolvent at time of assignment). [c] **Community property,** conveyed to wife in trust for community estate, has been held subject to attachment for damages by breach of husband's contract of sale. **TexCivA** 298**SW**443.

600-64 172**Minn**83, 214**NW**771, 772 [cit CJ].

601-71 241 **IllA**398; **Mass** 171**NE**730.

601-74 **TexCivA** 298**SW**443.

601-77 [c] **Conveyance to grantor and wife as tenants by entirety** is not within statute. **Mo** 29**SW(2d)**1090.

602-79½-New. An assignment of a claim to an attorney for the purpose of collection is not fraudulent as a matter of law. 168**Minn**168, 209**NW**883.

604-7 115**Nebr**493, 213**NW**587, 590, 591 [quotCJ].

606-27 17**F(2d)**729; 331 **Ill** 240, 162 **NE**869; 258**Mass**402, 155**NE**429; 258 **Mass**402, 155**NE**429; 172**Minn**83, 214 **NW**771, 772 [citCJ]; 320**Mo** 1077, 9**SW (2d)**907; 50**RI** 283, 146**A**634, 68**ALR** 303; 144**Wash**609, 258**P**493.

607-28 172**Minn**83, 214**NW**771, 772 [cit CJ].

607-33-34 331 **Ill** 230, 162**NE**869.

607-37 71**CalA**735, 236**P**325.

608-40 [a] (6) **MoA** 277**SW**575.

609-47 115**Nebr**493, 213**NW**587, 591 [citCJ].

609-49 **Iowa** 222**NW**566; 115**Nebr**493, 213**NW**587, 591 [citCJ].

609-53 [c] (4) 331 **Ill** 230, 162**NE**829. (7) Debtor's deed, together with agreement to reconvey, if in fact mortgage, is evidence of fraudulent intent. 331 **Ill** 230, 162**NE**829.

611-60 331 **Ill** 230, 162**NE**829.

613-82 30**F(2d)**313; 34**Ariz**565, 273**P** 728; 85**CalA**468, 259**P**965, 967 [quot CJ]; 162**Ga**657, 134**SE**751; 163**Ga**796, 137**SE**64; 170**Ga**447, 153**SE**41; 239 **IllA** 515; 331 **Ill** 230, 162**NE**829; 331 **Ill** 240, 162**NE**869; 83 **IndA**33, 147**NE**318; 198 **Ind**190, 152**NE**520; 89 **IndA**269, 166**NE** 254; 203 **Iowa**271, 211**NW**217; 200 **Iowa** 300, 204**NW**275; 202 **Iowa**795, 211**NW** 381; 203 **Iowa**1368, 214**NW**542; 201 **Iowa**593, 207**NW**576; 204 **Iowa**188, 215 **NW**236; 127**Me**286, 143**A**101; **Me** 151**A** 559 (debt barred by limitations); 260 **Mass**151, 157**NE**40; **Mass** 167**NE**321; 240**Mich**18, 214**NW**944; 250**Mich**325, 230**NW**164; 165**Minn**317, 206**NW**440; **Mo** 275**SW**936, 939 [citCJ]; 222**MoA**128, 2**SW(2d)**824; **MoA** 283**SW**745; **MoA** 300**SW**1023; **MoA** 20**SW(2d)**912; 115 **Nebr**493, 213**NW**587; 98**NJEq**137, 129 **A**748; 32**NM**338, 255**P**785, 786 [citCJ]; 51**ND**148, 199**NW**444; 58**ND**704, 227 **NW**197; 131**Misc**175, 225**NYS**517; 55 **ND**616, 214**NW**913; **Okl** 291**P**509; 124 **Or**276, 261**P**432; 287**Pa**205, 134**A**422; 149**Va**39, 140**SE**277; 144**Wash**609, 258 **P**493; 103**WVa**545, 138**SE**107; 36**Wyo** 268, 254**P**130.

615-83 207 **Iowa**1187, 224**NW**517; 165 **Minn**317, 206**NW**440; 315**Mo** 966, 287 **SW**432; 115**Nebr**493, 213**NW**587; 144 **Wash**609, 258**P**493.

615-85 250**Mich**325, 230**NW**164.

616-88½-New. A creditor need not abate vigilance in obtaining security from debtor in order to give another creditor an equal or superior chance to secure his claim. 89 **IndA**269, 166**NE** 254.

616-89 315**Mo** 966, 287**SW**432. [d] **Transfer must be in good faith.**-162**Ga** 657, 134**SE**751. [e] **Time of transfer.**-162**Ga**657, 134**SE**751.

616-94 315**Mo** 966, 287**SW**432; **MoA** 300**SW**1023.

617-97 **MoA** 283**SW**745; 75**Mont**99, 242 **P**425.

617-1 144**Wash**609, 258**P**493.

617-5 32**NM**338, 255**P**785, 786 [citCJ].

617-8 75**Mont**99, 242**P**425 (applicable to insolvent debtor); 52**ND**648, 204**NW**

178; 55ND741, 214NW911; 53ND66, 204NW985; 115 Okl 80, 241P737; 129 Okl 222, 264P164; 124 Or276, 261P432.

617-12 [a] (1) 11LaA257, 123S463. [h] **In West Virginia.**–101WVa118, 132SE487.

618-14 204 Iowa188, 215NW236.

618-16 204 Iowa188, 215NW236.

619-21 204 Iowa188, 215NW236. [c] **Written agreement.**–98NJEq118, 130A 728.

620-24 [c] (1) 205 Iowa748, 218NW 280. [h] **Corporation,** insolvent debtor, has right to organize, transfer his property thereto, and transfer stock thereof to creditor as payment of debt. 83 IndA 33, 147NE318.

620-27½-New. Where preferences are forbidden agreement of insolvent debtor to move for dismissal of writ of error in consideration of cash payment by creditor is invalid. WVa 153SE502.

620-28 101WVa118, 132SE487. But see 11LaA251, 123S421.

621-44 214Ala446, 108S345. But see 101WVa118, 132SE487.

621-48 203 Iowa271, 211NW217; 204 Iowa188, 215NW236; 258Mass402, 155 NE429; 315Mo 966, 287SW432; 221MoA 152, 297SW727. [f] **Chattel mortgage to indorsers of notes given in payment for goods as part of one transaction** held not preference within statute. 189NC684, 128SE155. [g] **Though given for preference,** mortgage is not fraudulent as to creditors where it is not attacked under statute of 1856. 225Ky155, 7SW(2d) 1057.

624-68 115 Okl 80, 241P737.

624-72 MoA 283SW745.

624-75 But see 51Philippine763.

626-99 320Mo 754, 9SW(2d)880.

626-4½-New. Sale by debtor to secured creditor is preference, as it delays collection. 162Ga657, 134SE751.

626-6 37GaA280, 139SE910.

626-9 320Mo 1077, 9SW(2d)907; 115 Nebr493, 213NW587. See also 55ND 741, 214NW911.

627-15½-New. Conveyance of all assets to certain creditors which is fraudulent in fact is invalid as to all other creditors, regardless of nature or amount of consideration. Mass 170NE112.

627-18 83Colo 111, 262P1016; 202 Iowa817, 211NW396; 201 Iowa593, 207 NW576; 208 Iowa1326, 227NW110; 172 Minn149, 214NW787; 315Mo 966, 287 SW432.

627-19 See also 37F(2d)310.

627-20 202 Iowa795, 211NW381; 202 Iowa817, 211NW396; 315Mo 966, 287 SW432; 143SC516, 141SE705, 715 [quot CJperWatts,J].

627-21 315Mo 966, 287SW432; 66Utah 290, 241P1055.

628-24 83Colo 111, 262P1016; 315Mo 966, 287SW432.

629-26 223Ky339, 3SW(2d)644. [a] (2) Knowledge of fraud merely determines whether grantee shall lose advantage or shall lose also so much of consideration given insolvent as did not inure to benefit of creditors. 160La390, 107S390. [b] **In Kentucky.**–234Ky419, 28SW(2d)463(1stcase).

629-27 202 Iowa795, 211NW381; 202 Iowa817, 211NW396.

629-29 86Colo 595, 284P337; 202 Iowa 795, 211NW381; 201 Iowa593, 207NW 576; 202 Iowa817, 211NW396; 203 Iowa1103, 212NW559; 203 Iowa1368, 214NW542; 115Nebr493, 213NW587; 143SC516, 141SE705, 715 [quotCJper Watts,J]. See also 66Utah290, 241P 1055. Contra 163Ga796, 137SE64.

629-31 203 Iowa1368, 214NW542; 121 Oh8, 166NE801; 115 Okl 80, 241P737.

630-33 163Ga796, 137SE64.

630-34 201 Iowa593, 207NW576; 202 Iowa795, 211NW381; 202 Iowa817, 211 NW396; 202 Iowa1109, 211NW479; 203 Iowa1103, 212NW559; 204 Iowa11, 214 NW572; 207 Iowa1187, 224NW517; 258 Mass402, 155NE429; MoA 300SW1023; 222MoA128, 2SW(2d)824; 54ND35, 208 NW847; 115 Okl 80, 241P737; 36Wyo 268, 254P130, 133 [citCJ]. But see Mass 170NE112.

631-35 202 Iowa1109, 211NW479; 203 Iowa1103, 212NW559; 54ND35, 208NW 847; 58ND217, 225NW315; 36Wyo 268, 254P130, 133 [citCJ].

631-36 203 Iowa271, 211NW217; 202 Iowa817, 211NW396; 207 Iowa1187, 224 NW517; 115 Okl 80, 241P737; 143SC 516, 141SE705, 715 [quotCJperWatts,J].

631-37 Iowa 222NW566; 115 Okl 80, 241P737.

632-39 203 Iowa271, 211NW217; 115 Okl 80, 241P737.

633-51 308Mo 237, 252, 271SW508, 39 ALR1199 [citCJ]; 54ND35, 208NW847; 131Misc175, 225NYS517.

634-67 75Mont99, 242P425, 430 [quot CJ]; 131Misc175, 225NYS517.

634-68 75Mont99, 242P425, 430 [quot CJ].

634-69 75Mont99, 242P425, 430 [quot CJ].

638-11 214Ala96, 106S504; 163Ga796, 137SE64.

638-12 202 Iowa817, 211NW396; 203 Iowa1368, 214NW542; 209Ky698, 273 SW485; 131Misc175, 225NYS517; 103 WVa545, 138SE107; 36Wyo 268, 254P 130.

638-16 Mo 293SW136. [c] **Son-in-law and daughter.**–208Ky750, 271SW1051.

639-18 203 Iowa1368, 214NW542.

639-19 Mo 293SW136.

639-20 208Ky750, 271SW1051 (son charged with notice of fraudulent intent).

639-21 Sask [1930] 3DomLR955.

639-23 121Kan180, 246P976; 204 Iowa 11, 214NW572; Mo 275SW936; 32NM 338, 255P785, 786 [citCJ]; 51ND148, 199NW444; 58ND704, 227NW197; 187 Wis649, 205NW391.

640-24 204 Iowa11, 214NW572; 51ND 148, 199NW444.

640-25 204 Iowa11, 214NW572; Iowa 229NW816.

640-26 204 Iowa11, 214NW572.

641-31 Mo 308SW(2d)44.

641-35 171Minn284, 213NW911, 912 [citCJ]; 48 Ida471, 282P940(2dcase).

641-45 208 Iowa1315, 227NW141.

641-49 118 Okl 45, 246P638, 641 [quot Cyc].

641-50 220Ala82, 123S899; 331 Ill 240, 162NE869; 249 IllA576, 582 [citCyc]; 202 Iowa795, 211NW381; 207 Iowa1187, 224NW517; Kan 291P757; 245Mich185, 222NW148; 169Minn409, 211NW473; 85Mont229, 278P143; 118 Okl 45, 246P 638, 641 [quotCyc]; 129 Okl 46, 263P 123.

642-51 215Ala278, 110S465; 170Ark 445, 280SW380; 177Ark177, 6SW(2d) 10; 181Ark96, 24SW(2d)976; 180Ark 329, 21SW(2d)409; 88Colo 111, 262P 1016; 160Ga763, 129SE65; 202 Iowa 919, 211NW540; 200 Iowa300, 204NW 275; Iowa 229NW813; 229Ky836, 18 SW(2d)285; 84Mont384, 276P432; 52 ND648, 204NW178; 54ND35, 208NW 847; 58ND704, 227NW197; 118 Okl 45, 246P638, 641 [quotCyc]; 129 Okl 46, 263P123; 117 Or107, 241P62; 116 Or 650, 242P351; 118 Or317, 246P711 (mortgage to brother); 153Va110, 149 SE417; Wash 291P1081. [a] (2) Conveyance between brothers will be more closely scrutinized than would like transaction between strangers. 215Ala 278, 110S465.

642-53 118 Okl 45, 246P638, 641 [quot Cyc]; 129 Okl 46, 263P123; 33Wyo 326, 239P531, 533 [citCJ].

642-54 118 Okl 45, 246P638, 641 [quot Cyc].

642-56 118 Okl 45, 246P638, 641 [quot Cyc]. [a] (3) 176Ark1045, 5SW(2d) 297.

642-57 181Ark969, 28SW(2d)725 (holding check given to son-in-law to be for payment of debts); 52ND648, 204NW 178.

642-59 170Ark445, 280SW380; 118 Okl 45, 246P638, 641 [quotCyc].

642-60 73Mont429, 236P675 (prima facie fraudulent); 84Mont384, 276P432; 118 Okl 45, 246P638, 641 [quotCyc].

642-61 118 Okl 45, 246P638, 641 [quot Cyc].

642-62 73Mont429, 236P675 (transfer for one dollar, just before judgment rendered against grantor and execution back to him of power of attorney to control property, is prima facie fraudulent); 118 Okl 45, 246P638, 641 [quotCyc].

642-63 Okl 247P638, 641 [quotCyc].

642-67 118 Okl 45, 246P638, 641 [quot Cyc].

643-70 176Ark1082, 5SW(2d)318; 177 Ark177, 6SW(2d)10.

643-71 177Ark177, 6SW(2d)10.

643-73 81Colo 365, 255P460.

643-75 226Ky713, 11SW(2d)964.

643-76 42 Ida270, 245P98; 141Miss 370, 106S528 (conveyance acknowledged and filed for record as provided by statute); 115 Okl 289, 243P147; 118 Okl 45, 246P638; 127 Okl 61, 259P858; 129 Okl 46, 263P123; SD 230NW229 (except under statutes).

643-77 85Mont229, 278P143; 115 Okl 289, 243P147; 118 Okl 45, 246P638; 127 Okl 61, 259P858.

643-78 214Ala96, 106S504; 164Ga699, 139SE527; 218Ky770, 292SW322; 118 Okl 45, 246P638; NB [1925] 3DomLR 866.

643-79 176Ark1082, 5SW(2d)318; 181 Ark96, 24SW(2d)976; 97CalA30, 275P 448; CalA 292P996; 83Colo 111, 262P 1016; 164Ga699, 139SE527; 4Hawaii Fed547; 121Kan180, 246P976; 129Kan 743, 284P422; 220Ky687, 295SW991; 251Mich518, 232NW205; Mo 275SW936; 83Mont49, 270P642; 85Mont229, 278P 143; 51ND148, 199NW444; 115 Okl 289, 243P147; 118 Okl 45, 246P638; 127 Okl 61, 259P858; 129 Okl 46, 263P123; Okl 291P509; 128 Or242, 273P393; 132 Or381, 285P1025; 53SD388, 220NW863; 148Va779, 139SE495; 187Wis649, 205 NW391; Wis 228NW494; NB [1925] 3 DomLR866.

644-80 208Ky382, 271SW69.

644-80½-New. The fact that the creditor is put in no worse position by transfer does not affect the fraudulent character of conveyance. 71CalA735, 236P 325.

644-86 206 Iowa426, 218NW303.

644-88 216Ala503, 113S522, 523 [cit CJ].

645-91 [a] (4) Where property is conveyed by insolvent husband to wife through third person who bid it in at auction, and husband incidentally surrenders or assigns to her part of purchase money, held that to extent of such surrender rights of creditors would be protected. 134SC162, 132SE473. (5) Where land is sold at auction to creditor of owner, and bidder transfers bid to owner's wife, in consideration of mortgage covering amount of prior mortgage and debt, transaction is valid. 134 SC162, 132SE473.

645-96 130Kan126, 285P597; Kan 292 P798.

645-97 205 Iowa460, 218NW311; Tex CivA 290SW795.

645-5 209Ky355, 272SW899, 902 [cit CJ].

646-6 209Ky355, 272SW899.

646-7 204 Iowa580, 215NW652.

646-7½-New. or where land was subsequently sold and proceeds reinvested in property, title to which was taken in wife's name. 209Ky355, 272SW899.

646-11 249Mich215, 228NW719.

646-15 177Ark1194, 10SW(2d)500; 200 Iowa300, 204NW275; 202 Iowa603, 210NW919; 202 Iowa919, 211NW540; 207 Iowa1315, 224NW469; 234Ky130, 27SW(2d)668; 248Mich215, 226NW855; Mo 293SW136; 127 Or551, 272P914; 152Va395, 147SE211. [b] **Where transaction is duly proved,** privilege of enforcing repayment of loan will not be denied. 31F(2d)896.

647-17 255Mass92, 151NE77; 87PaSuper426. [b] (2) Where defendant's sons held his real estate for purpose of preventing his creditor from collecting his debt, it was held that sons participated in fraud to deprive such creditor from obtaining amount due him. 255 Mass92, 151NE77.

647-21½-New. As against existing indebtedness a voluntary conveyance by a parent to a child is invalid. 118 Or685, 248P143.

647-21½-New. Conveyance by mother financially embarrassed to son without consideration held void as to creditors. Iowa 232NW816.

647-22 200 Iowa300, 204NW275; 150 SC75, 147SE752. See also 222MoA128, 2SW(2d)824. [a] **Assignment of trust fund by son to mother** cannot be upheld as to amounts to be paid out by her after assignment for his benefit. MoA 20 SW(2d)912.

647-22½-New. A conveyance from a

child to its parent, after causing damages by negligence, in consideration of past board, was fraudulent as to the person injured. **DelCh 142A832.**

647-27 160Ga634, 128SE903. See also 320Mo 605, 8SW(2d)592.

643-28 146Va325, 131SE830, 832 [cit CJ].

648-29 41F(2d)501; 213Ala491, 105S 643; 196Cal 380, 238P81; 76CalA530, 245P451; 83CalA1, 256P294; 163Ga 291, 135SE922; 167Ga783, 146SE736; 47 Ida582, 277P565; 252 IllA449; IndA 167NE617(2dcase); 264Mass181, 162NE 356; 265Mass10, 163NE166; 316Mo 111S, 295SW763, 771, 772 [citCyc]; 128 Or218, 270P762; SC 155SE594; 152 Wash211, 277PS43; TexCivA 291SW 650; 146Va325, 131SE830, 832 [citCJ]; 195Wis258, 218NW593. But see Mo 29 SW(2d)56.

649-31 196Cal 380, 238P81.

650-43½-New. ; a sale in violation of Bulk Sales Law. 114Tex528, 272SW 772.

651-57 160Ga634, 128SE903; 168Ga 766, 149SE138; 213Ky138, 280SW928; 129 Okl 222, 264P164.

652-66 83CalA1, 256P294; Mo 23SW (2d)155.

653-69 83CalA1, 256P294; 318 Ill 500, 149NE495; 232Ky179, 22SW(2d)539.

653-70 83CalA1, 256P294; 318 Ill 500, 149NE495; 222AppDiv285, 226NYS124.

653-71 318 Ill 500, 149NE495.

653-74 318 Ill 500, 149NE495.

653-73½-New. In a proper case the court can ex mero motu raise the question as to the rights of one making a conveyance in fraud of creditors to relief. Mo 23SW(2d)155.

653-80 166Ga279, 142SE873; 47 Ida 478, 276P969; IndA 167NE617(2dcase); 207 Iowa1091, 224NW84; 121Kan873, 880, 250P341 [citCJ]; 230Ky351, 19SW (2d)988; 221AppDiv341, 223NYS424.

654-84 254 IllA372 (where parties use property jointly subsequent to bona fide transfer).

655-1 14F(2d)933; 83CalA1, 256P294; 100CalA177, 280P187; 15DelCh302, 137 A74; 121Kan873, 880, 250P341 [citCJ]; 213Ky73, 280SW473; 250Mich518, 230 NW924 (absence of consideration immaterial); Mo 23SW(2d)155; 101NJEq 51, 137A89; 11PaDist&Co 663. [h] **How fraudulent intent shown.**-15DelCh 302, 137A74.

656-2 213Ky73, 280SW473.

656-6 [a] (3) Equity will not allege trust created for inequitable purpose. 15DelCh302, 137A74.

656-11 14F(2d)933.

656-13 83CalA1, 256P294.

656-16 14F(2d)933.

657-19 15DelCh302, 137A74; 101NJ Eq51, 137A89.

657-24 Mass 166NES76.

657-27½-New. Husband's conveyance to wife to protect against what he believed to be unjust claims which were subsequently compromised held not to preclude recovery as against wife's heirs. 138Misc117, 244NYS713.

657-27¼-New. Property may be recovered where it is fraudulently conveyed to attorney or adviser of grantor. 222 AppDiv285, 226NYS124.

657-33 206 Iowa680, 218NW575, 579 [citCJ].

658-40 Ala 127SS44.

658-47 See also Wis 231NW580. [a] **Grantee's redelivery of stock for grantor's use as collateral security is not affected by fraud in original transfer.** Wis 231NW580.

659-51 317Mo 442, 297SW39.

660-65 165Ga135, 139SE873 (executed contract left in status quo by order to cancel instrument); 169Ga302, 150SE 166; 39GaA344, 147SE180; 101WVa 284, 132SE717. [e] **Recognition by party of others' right to bid is not sufficient to validate agreement.** 39GaA344, 147SE180. [f] **Absence of damage to creditors does not validate executory agreement.** 39GaA344, 147SE180.

660-68½-New. Parol trust in favor of a failing debtor cannot be ingrafted on a deed made to place property beyond the reach of creditors. TexCivA 296 SW658.

661-70 15DelCh302, 137A74. [a] (4) Where grantor conveyed his property fearing loss of pending suit, testimony that grantor was not indebted to plaintiff at time of conveyance held inadmissible in action to establish parol trust. TexCivA 282SW620.

661-73 121Kan873, 878, 250P341 [quot CJ].

661-74 105WVa385, 142SE845 (evidence held not to sustain burden).

661-76½-New. One transferring property to another conditioned on its retransfer to avoid a feared penalty for violation of the prohibition law is not guilty of unconscionable conduct to defeat the right to specific performance of reconveyance. 125Misc546, 211NYS557 (where no action affecting title to property could have been taken by federal government).

662-85 15DelCh302, 137A74; 262Mass 509, 160NE337; 250Mich659, 230NW 945; NJ 147A634. [h] **Fraudulent intent may be shown** by bill or proofs, though not set up in answer, and where thus shown, grantor is deprived of standing in equity. 15DelCh302, 137A 74.

662-87 318 Ill 500, 149NE495.

662-88 318 Ill 500, 149NE495.

664-20 320 Ill 308, 150NE913; 86 IndA499, 157NE11; Wis 231NW580. [a] (6) Assignee of contract for reconveyance of land, fraudulent as to assignor's wife, may not enforce right against wife on ground that her title was based on attempt to defraud husband's creditors. 320 Ill 308, 150NE 913.

665-28 77CalA535, 247P261.

665-32 41F(2d)501; 77CalA535, 247P 261; 101WVa118, 132SE487, 489 [quot CJ].

665-33 77CalA535, 247P261; 233 IllA 90; 166Ga279, 142SE873; 219Ky813, 294SW475.

666-34 Ill 173NE281; 233 IllA90; 219 Ky813, 294SW275; Mass 167NE276; 85 Mont229, 278P143; 128Misc901, 220 NYS495. [f] **Injunction.**-116 Okl 68, 243P497. [g] **If property transferred in fraud of creditors has been disposed of,** proceeds in hands of fraudulent grantee may not be recovered at law, but may in equity be impressed with trust. 207 Iowa711, 223NW541.

666-35 77CalA535, 247P261; 233 IllA 90.

666-36 77CalA535, 247P261; Va 154 SE514.

667-45½-New. The purchaser of exempt and nonexempt property cannot recover a proportion of the premises represented by the value of nonexempt property. TexCivA 296SW658.

667-45¼-New. Where a suit is based on the ground that property conveyed to a wife was purchased with money belonging to the debtor, plaintiff has no claim against the property in excess of the amount the debtor put into it. 37 Wyo 78, 259P185.

667-61 36GaA564, 137SE129. [a] **Son entitled to crops raised by his labor and supplies** (1) though mother's conveyance to him was in fraud of creditors. 36GaA564, 137SE129. (2) Son is not presumed in such case to donate services to mother. 36GaA564, 137SE129. (3) In such case fraud in mother's conveyance is irrelevant. 36GaA564, 137 SE129. (4) In such case title to crops is not, as matter of law, in mother. 36 GaA564, 137SE129. (5) Character of mother's renewed interest in conveyance held immaterial in such case. 36GaA 564, 137SE129.

668-72 214Ala558, 108S370; 201 Iowa 308, 207NW329; 48Nev373, 233P41, 47 [citCyceperSanders,J]; TexCivA 283SW 552; TexCivA 296SW658.

668-73 201 Iowa308, 207NW329.

668-76 46 Ida165, 267P232, 233 [cit CJ].

669-98 320Mo 754, 9SW(2d)880; 55ND 823, 215NW281; 57ND668, 223NW694.

669-1½-New. Where grantee takes the property outside of the jurisdiction where it cannot be reached by judicial process and retains it until it becomes valueless, he is liable for its value. 55 ND823, 215NW281.

670-7 207 Iowa1091, 224NW84.

670-13 [b]**Payment of rents to receiver should be required even though judgment** was not signed till after collection of rents. 225AppDiv217, 233NYS3.

672-38 32Ariz135, 256P507; 54SD28, 222NW485. [c] (1) 195NC741, 143SE 518. [d] (3) Grantee is not entitled to interest on loan to grantor. 32Ariz135, 256P507. [i] **Where sale is unlawfully preferential** to extent of antecedent indebtedness of buyer, he has lien for additional moneys paid thereunder after suit by other creditor. 234Ky419, 28 SW(2d)463(1stcase).

672-39 150SC60, 147SE627. [d] **Upon principles of subrogation** where vendee has paid money on purchase price of personal property, he is entitled to lien therefor and for that purpose to retain possession of property. 51ND361, 199 NW858.

673-41 Ill 173NE281; 121Kan159, 246 P971; 219Ky471, 293SW959; 169Minn 409, 211NW473.

675-56 20F(2d)295.

676-67 See also RI 131A554.

677-88 320Mo 754, 9SW(2d)880.

677-88½-New. , but it has also been held that in such case grantee should be reimbursed for interest on a loan, inuring to the benefit of the estate. RI 131A554.

677-96 See also RI 131A554.

678-11 171Minn197, 213NW892.

679-15 178Ark851, 12SW(2d)785; 162 Ga635, 134SE753; 128Misc901, 220NYS 495.

680-30 [b] **Where insolvent debtor's transfer of his half interest to owner of other half was set aside for inadequacy** of consideration, such other owner was entitled to be credited with lien for half of mortgage which both had assumed on conveyance of property to them. Iowa 227NW900.

685-79 [a] 219Ky813, 294SW475.

694-98 28F(2d)740; 164Ga21, 137SE 394; 146Va758, 132SE859; 39Wyo 266, 270P1072, 1075 [citCJ].

694-99 164Ga21, 137SE394.

695-12 177Ark1194, 10SW(2d)500; 193NC528, 137SE591; TexCivA 27SW (2d)833; 146Va758, 132SE859.

696-20 205 Iowa203, 217NW857.

696-26 203 Iowa995, 213NW609; 146 Va758, 132SE859.

696-27 Mass 171NE730.

696-31 28F(2d)740.

696-32 [d] See also 162Ga635, 134SE 753.

697-34 136Misc265, 239NYS639.

697-39 153Md598, 139A280.

698-44 203 Iowa995, 213NW609.

698-51½-New. Where a note for land purchased remains unpaid in the hands of the grantor, there is not payment such as to constitute a bona fide purchaser for value. 203 Iowa995, 213NW 609.

698-52 320Mo 754, 9SW(2d)880.

699-60 126Me443, 139A461.

699-63 177Ark1194, 10SW(2d)500; 39 Wyo 266, 275P127.

699-64 101NJEq173, 137A832.

701-95 164Ga888, 139SE802.

702-98 [d] **Action on judgment** may be maintained. 111Conn38, 149A393.

702-5 118 Okl 45, 246P638.

702-6 72CalA39, 236P154.

702-7 20F(2d)295; ,193NC528, 137SE 591.

703-12 163La442, 112S40; 166La626, 117S741.

703-13 161La971, 109S780; 170La898, 129S522; LaA 128S706. [a] 163La442, 112S40. [b] (1) 163La442, 112S40. (7) Attaching creditor is not precluded from setting aside as fraudulent sale of property after release by debtor giving bond. 158La183, 103S733. (8) Suit to declare sale simulated, and to include same in prior act of sale to plaintiff, is not revocatory action. 163La442, 112S40. [f] **As against third person,** rule does not apply. 10LaA404, 119S567. [g] **A giving in payment is real contract** vesting title in creditor taking possession. LaA 128S706.

704-16 TexCivA 296SW658.

704-17 92CalA749, 268P962; 92Fla706, 110S263; 163Ga291, 135SE922; 207 Iowa711, 223NW541; 218Ky589, 291SW 1033; Me 151A559; 242Mich477, 219NW 651; 116 Okl 68, 243P497; 13PaDist&

Co 446; 200Wis11, 227NW392. See also 28 OhA387, 162NE708. [l] **Effect of statute providing for proceedings supplementary to execution.**–170Minn290, 212NW455. [m] **In Alberta.**–[1929] 4 DomLR216. [n] **Seizure under fieri facias on constructively fraudulent judgment** has been held not to prevent seizure under fieri facias on judgment of injured creditor. 170LaS98, 129SS522.

705-18 116 Okl 68, 243P497.
705-23 128Me96, 145A896, 64ALR790.
706-37 300Pa250, 150A586.
707-43 200 Iowa935, 205NW745; 207 Iowa711, 223NW541; 134Misc275, 235 NYS239; 118 Okl 45, 246P638; TexCivA 296SW658.
707-50 Mont 292P725.
707-55 233Ky122, 25SW(2d)48; 129Me 282, 151A559.
708-67 207 Iowa711, 223NW541.
709-68 106WVa259, 145SE438.
711-92 161Ga58, 129SE526, 528 [cit CJ].
713-25 213Ky138, 280SW928.
714-31 SD 228NW807.
716-55 203 Iowa1385, 214NW576, 578 [citCJ]; 207 Iowa711, 223NW541; 156 Md65, 143A644; 170Minn290, 212NW 455; 101NJEq51, 137A89; 160Tenn453, 26SW(2d)131; Va 154SE514. [h] **Injunction granted creditors to prevent fraudulent surrender** by conditional purchaser of land contract to vendor for reconveyance to nonresident brothers of purchaser. 163Ga434, 136SE317. [i] **Sole limitation on right to avoid fraudulent conveyances** is that fraud complained of must obstruct enforcement by legal process of right to take property affected by transfer or obligation. 84 Mont384, 276P432 (statute).
717-60½-New. The remedy is largely in rem 130Misc618, 224NYS389.
717-60½-New. and will not be delayed because one of the parties entitled to defend claims privilege. 130Misc618, 224 NYS389.
717-62 167Ga648, 146SE482.
717-63 92Fla706, 110S263. See also 177 Ark1091, 9SW(2d)578.
717-64 286Pa449, 133A642.
718-73 203 Iowa1385, 214NW576.
718-75 34F(2d)396. See also 138Misc 76, 244NYS332. [a] (1) 286Pa449, 133 A642. [d] (1) 286Pa449, 133A642. (2) Act of 1921 gives additional remedy of proceeding by creditor's bill, but creditor must elect between remedies. 286 Pa449, 133A642.
719-81 207 Iowa1091, 224NW84; 170 Minn290, 212NW455; 137Misc420, 242 NYS308 (holding equitable action to be in rem or quasi in rem). [a] (3) Bill by judgment creditor of vendee of land to set aside as fraudulent assignment of land contract by judgment debtor and to redeem from foreclosure by vendors is in effect bill in aid of execution and is maintainable if facts support allegations under statutes in some jurisdictions. 234Mich252, 208NW60. (4) Issues involved in such suit are purely equitable, cognizable only by court of equity. 234 Mich252, 208NW60. (5) In such suit, where judgment creditor of vendee pays amount due on contract into court before right of redemption has expired, this protects right to redeem. 234Mich 252, 208NW60. (6) Where bill unequivocally tenders money which is paid into court tender is sufficient. 234Mich252, 208NW60.
720-91 [a] **In California.**–86CalA377, 260P937.
720-92 170Minn290, 212NW455; 289Pa 277, 137A272.
720-93 170Minn290, 212NW455.
720-96 [b] (1) 287Pa61, 135A210.
722-8 298Pa182, 148A94 (effect of Uniform Fraudulent Conveyance Act); 9Pa Dist&Co 155.
722-9 286Pa449, 133A642.
722-11 92Fla706, 110S263; 286Pa449, 133A642. [a] 286Pa449, 133A642.
723-20½-New. In an action to set aside a transfer from an insolvent debtor to his wife and children made for the purpose of cheating and hindering, it is not necessary to file the title papers with the petition, as where land of infants is involved, 213Ky720, 281SW816.
723-20½-New. or to execute a bond. 213Ky720, 281SW816.
723-20¼-New. Presentment of a claim to deceased grantor's estate is not a condition precedent to a creditor's bill against the grantee. 31F(2d)742.
723-21½-New. The lender of a debt due a secured creditor is not essential to secure cancellation of fraudulent transfer of security property. 164Ga421, 138SE 902.
723-23 [a] 83Mont49, 270P642.
723-24 251NY1, 166NE783; TexCivA 24SW(2d)450. [d] **Under statute plaintiff's right to challenge validity of assignment** did not depend upon lien. 99 Vt65, 130A749. [e] **In South Dakota.**–228NW392.
723-25 196Cal 380, 238P81; 70CalA372, 233P70; 207 Iowa711, 223NW541; NJ 146A328(2dcase); 49ND1, 177NW375; 150SC398, 148SE220; TexCivA 28SW(2d) 911. [f] **Manner of acquisition of lien.**–48Nev373, 233P41. [g] **Equitable lien is not created by stipulation** in ancillary suit that property sought to be reached, consisting of notes, should be held in safety deposit box where they then were till termination of litigation. 48Nev373, 233P41.
724-26 [a] **Lien need not exist at time of fraudulent conveyance.**–85Mont229, 278P143.
725-36 129 Okl 46, 263P123.
726-42 But see CalA 292P996.
726-49 13F(2d)321; 16F(2d)328; 252 IllA449; 127Misc529, 217NYS13; 129 Misc837, 223NYS455; 130Misc163, 223 NYS723.
727-53 13F(2d)321; 14F(2d)912, 915 [citCJ]; 16F(2d)328; 20F(2d)295; 20 F(2d)786; 33F(2d)667; 36F(2d)373; 34Ariz23, 267P415; 72CalA757, 238P 143; 42 Ida560, 247P751; Ida 291P 1069; 316Mo 1213, 293SW405; NJ 146 A328(2dcase); 129Misc837, 223NYS458; 129 Okl 222, 264P164; 33Wyo 326, 239 P531 (rule is one of procedure only and does not affect right).
729-55 129Misc837, 223NYS458.
729-68 NJCh 146A196(2dcase).
729-70½-New. **Rule in Louisiana.** 160 La516, 107S390.
730-78 16F(2d)328.
730-79 16F(2d)328.
730-82 14F(2d)912, 915 [citCJ]; 16F (2d)328; 20F(2d)786; 70CalA400, 233 P397, 400 [quotCyc]. [g] **Establishment of badges of fraud** excuses creditor's failure to exhaust legal remedies. 234 Ky697, 27SW(2d)975.
730-82½-New. Partner who has submitted himself to court's jurisdiction in partnership dissolution proceeding is not an absconding debtor in foreign jurisdiction excusing failure to obtain judgment and issue execution thereon. 235Mich282, 209NW179.
731-83 14F(2d)912, 915 [citCJ].
731-84 Mo 30SW(2d)44 (bankruptcy).
731-85 14F(2d)912, 915 [citCJ].
731-91 [a] **In Nevada.**–48Nev373, 233P 41.
731-94 14F(2d)912, 915 [citCJ].
732-95 14F(2d)912, 915 [citCJ].
732-96 14F(2d)912, 915 [citCJ].
733-5 252 IllA449.
733-10 48Nev373, 233P41, 43 [citCJ]; 33Wyo 326, 259P531, 533 [citCJ].
733-12 33Wyo 326, 239P531, 533 [cit CJ]. [a] (2) Failure to obtain attachment does not preclude relief to plaintiffs suing to set aside fraudulent conveyance. 224Ky414, 6SW(2d)474.
734-13 33Wyo326, 239P531, 533 [cit CJ]. But see 205Cal 491, 271P1059. [c] (1) 130Misc163, 223NYS723.
734-15 33Wyo 326, 239P531 (no decree can be entered till judgment has been obtained).
735-28 101NJEq51, 137A89; 251NY1, 166NE783; 226AppDiv766, 234NYS201; 137Misc420, 242NYS308; 33Wyo 326, 239P531, 533 [citCJ]. [g] **In New York.**–228AppDiv847, 240NYS636.
735-29 CalA 284P462; 157SC85, 153SE 640 (setting aside deed based on actual fraud).
736-38½-New. But in some jurisdictions the remedy is expressly extended to creditors whose claims are not matured, 101NJEq51, 137A89.
736-38½-New. and to claims, whether liquidated or unliquidated, absolute, fixed, or contingent. 101NJEq51, 137A 89.
737-46 42F(2d)886.
738-55½-New. Recital in judgment preserving attachment lien is not necessary to suit to set aside conveyance or to entry of decree. 33Wyo 326, 239P 531.
739-84 14F(2d)912, 915 [citCJ]; 127 Misc529, 217NYS13; 129 Okl 222, 264P 164. [d] **Excuse for failure to issue execution held insufficient.**–127Misc529, 217 NYS13.
739-85 129Misc337, 223NYS458.
741-12 226Ky347, 10SW(2d)1112.
741-15 14F(2d)912, 915 [citCJ]; 20 F(2d)295; 226Ky347, 10SW(2d)1112; 127Misc529, 217NYS13; 225AppDiv137, 232NYS94; 234NYS200; 129 Okl 222, 264P164; 131 Okl 190, 268P266; 150SC 75, 147SE752. [a] 131 Okl 190, 268P 266. [f] **Where all debtor's property subject to writ was conveyed,** return nulla bona is not necessary. 20F(2d) 295.
742-16 73Mont429, 236P675.
742-17 55ND475, 214NW461 (sufficient).
743-19 93Fla301, 112S569.
744-26 72CalA39, 236P154.
745-37 70CalA400, 233P397, 400 [cit Cyc].
746-47 73Mont429, 236P675. [c] **Return unsatisfied** establishes prima facie want of property out of which execution could be made. 73Mont429, 236P 675.
746-52 [b] But see 170La1044, 129S 630.
746-58 33Wyo 457, 240P449.
747-61 127Misc801, 217NYS467.
747-71 164Ga888, 139SE802.
747-72 164Ga888, 139SE802.
747-73 164Ga888, 139SE802.
748-81½-New. An equitable petition to set aside conveyances on the ground that they were made in fraud of creditors may be joined with a suit for fraud and deceit. 164Ga888, 139SE802.
749-9 165Ga890, 142SE277; 254 IllA 55. [b] **Defendant, execution creditor of plaintiff,** filing cross bill for relief against fraudulent transfer by plaintiff need not act in name of officer holding execution or other officer appointed by court. 101WVa728, 133SE628.
749-12½-New. A creditor may sue alone on his own behalf in the absence of a showing that there were other creditors. 126Misc23, 211NYS858.
749-13 205 Iowa203, 217NW857. [a] **Beneficiary under deed of trust,** where trustee is not party, is entitled in a creditor's suit to present his claim. 100WVa 707, 131SE545. [b] **Under statute remedy** is for benefit of all creditors and must be enforced in representative capacity. 224AppDiv527, 231NYS526.
750-18 164GaS69, 139SE799.
751-25 156Md65, 143A644.
751-26 86CalA259, 260P922, 924 [quot CJ]; 161Ga58, 129SE526; NJCh 146A 196(2dcase); SC 155SE622. See also 224Ky414, 6SW(2d)474.
751-28 102NJEq354, 140A573.
751-29 31F(2d)742; 164Ga888, 139SE 802.
752-33 Sask [1929] 3DomLR787.
752-37 14F(2d)912; 34F(2d)396.
753-38 Sask [1929] 3DomLR787 (where debtor is alleged to have interest in land conveyed and relief is claimed against him).
753-47 See also 164Ga772, 139SE537.
754-51 See also 287Pa61, 135A210.
754-58 See also TexCivA 275SW198.
754-59½-New. Commissioner of banking is a necessary party where the note issued by a garnishee and purchased by the bank from the judgment debtor had been transferred to the bank before maturity and he is in possession of the note as an asset of the bank. TexCivA 275SW198.
755-69 Iowa 216NW649; 198NC805, 153SE399; Va 154SE514.
756-78 Ala 130S630; 164Ga888, 139SE 802.
756-79 164Ga888, 139SE802, 804 [cit CJ].
756-81 216Ala106, 112S528.
757-91½-New. **Where a creditor has filed bill for exclusive benefit,** the cause

should proceed until estate of grantor has been brought into court as a fund for equal benefit of all creditors. 214 Ala96, 106S504.

757-91½-New. A subsequent grantee of the original grantor may file a petition praying for protection of his rights in the land. 107WVa280, 148SE114, 64 ALR1246.

757-97 320Mo754, 9SW(2d)880.

757-98 127Misc801, 217NYS467. [b] (2) Other instances where rule not applicable. 255Mass92, 151NE77.

757-3½-New. Existence of mortgage against property is no defense in an action to set aside a conveyance where the mortgagee is not a party. 224Ky414, 6SW(2d)474.

757-3⅓-New. That rescission of conveyance would prejudice third person is no defense in rescissory action. 34Porto Rico 830.

758-10½-New. Where a mortgage is executed to a mortgagee without consideration, and at a time when the mortgagee knows that the mortgagor is insolvent, the contention that the mortgagee might have filed a lien for the debt secured by the mortgage, and thus secured preference by varying the form of security, cannot avail to validate the mortgage. 225AppDiv290, 233NYS22.

759-39 176Minn120, 222NW646(2d case).

760-43 210Ky396, 275SW865 (petition must be filed within six months after transfer); 193NC836, 137SE135. [c] 103WVa485, 138SE386; 106WVa96, 144 SE874.

761-46 234Ky580, 28SW(2d)783.

761-56 210Ky396, 275SW865.

762-68 TexCivA 15SW(2d)1064. But see TexCivA 298SW443.

763-72 129Kan49, 281P868 (relief not barred by limitations).

764-73 129Kan49, 281P868.

764-81 24F(2d)776; 31F(2d)742; 153 Md598, 139A280; 101NJEq173, 137A 832.

764-86 57ND810, 224NW220.

765-88 Ariz 289P512; Wash 292P262. [a] 24F(2d)776. [b] 34F(2d)396; 129 Kan49, 281P868.

765-90 92CalA368, 268P488; 255Mass 92, 151NE77; 128 Or242, 273P393.

765-92 [a] (1) 217Ala399, 116S420; 220Ala695, 127S513; 160Ga309, 128SE 656; 164Ga837, 139SE676; 164Ga869, 139SE799; 224Ky414, 6SW(2d)474; 155Md139, 141A402; 320Mo 1077, 9SW (2d)907. (5) To state cause of action under Civ. Code either § 3439, or § 3442, 71CalA735, 236P325. [b] 30F(2d)313; 219Ala44, 121S45.

765-93 215Ala526, 112S111; CalA 285 P715 (cross complaint held sufficient as alleging execution and delivery of deed); 160Ga289, 127SE763 (petition failing to set out names of creditors at time of transfer held bad on special demurrer).

765-96½-New. The bill need not offer to return amount paid by the wife for property at tax sale. 216Ala503, 113S 522.

765-98 48Nev373, 233P41; 49ND1, 177 NW375.

765-99 49ND1, 177NW375.

765-1 49ND1, 177NW375.

765-2 48Nev373, 233P41; 49ND1, 177 NW375.

766-3 48Nev373, 233P41.

766-4 49ND1, 177NW375.

766-5 177Ark1091, 9SW(2d)578; 148 Va610, 139SE273.

766-6 83Mont49, 270P642.

766-8 92Fla706, 110S263; 156Md65, 143A644; 129Misc837, 223NYS458.

766-12 129Misc837, 223NYS458. [b] **Allegation of excuse for failure to issue held insufficient.**-127Misc529, 217NYS13.

766-16 129Misc837, 223NYS458; 157SC 85, 153SE640. [b] (2) Complaint alleging execution returned unsatisfied without alleging that execution was issued to sheriff of county where judgment debtor resided is insufficient. 215 AppDiv58, 213NYS105. [c] **Allegations held sufficient.**-97CalA30, 275P448.

766-16½-New. It is not necessary to recite that the statutory steps relating to the proceedings supplementary to execution have been taken. 86CalA377, 260P937.

768-32 Mo 274SW741; 115 Or633, 239 P810. [d] **Allegation that plaintiff had cause of action** is broad enough to admit proof under Gen. Code § 8618 giving creditor right of action. 23 OhA 481, 155NE699. [e] **Bill held sufficient** to describe claim of creditor. 220Ala 584, 127S151.

768-43 34F(2d)396; 222AppDiv561, 227NYS40. But see 163La442, 112S40. [b] (2) Other instances. 31F(2d)742.

769-57½-New. Time of the transfer must be alleged. 222AppDiv561, 227 NYS40.

770-64 251 IllA392; 213Ky658, 281SW 796; 32NM338, 255P785, 786 [citCJ]; 222AppDiv561, 227NYS40. See also 102 CalA370, 283P94. [b] (1) 75Mont99, 242P425. (2) Must also allege that debtor had no other property out of which creditor's claim could be satisfied or enforced with legal process. 75 Mont99, 242P425. [e] **In Oklahoma.**-122 Okl 37, 250P799.

770-65½-New. A judgment creditor failing to allege insolvency of both of two judgment creditors liable in solido has been held not entitled to have one judgment creditor's transaction annulled. 160La203, 106S784.

771-68 226AppDiv766, 234NYS201.

771-71 91CalA394, 267P146. See also 78Mont494, 254P869, 871 [citCJ]. But see Mo 274SW741.

772-83 214Ala226, 107S57; 71CalA339, 235P653; 156Md65, 143A644; 116 Okl 245, 244P191; 129 Okl 222, 264P164; 148Va616, 139SE291.

772-87 216Ala590, 114S2; 226Ky557, 11SW(2d)429; 156Md65, 143A644. [b] (3) 220Ala82, 123S899; 220Ala584, 127 S151; 70CalA400, 233P397; 222AppDiv 123, 225NYS561; 129Misc345, 221NYS 497; 198NC805, 153SE399.

773-96 121Kan873, 879, 250P341 [quot CJ].

773-97 121Kan873, 879, 250P341 [quot CJ].

774-98 92Fla706, 110S263; 50Nev191, 255P1010, 1012 [citCJ].

774-1 [a] **Bill held sufficient to show** fraud against creditors. 214Ala558, 108 S370.

774-2 213Ky658, 281SW796; 265Mass 199, 164NE69; 129 Okl 222, 264P164. [e] (2) Denial of fraud and assertion of good faith in answer does not warrant dismissal of nonsuit in suit to set aside simulated sale on ground that plaintiff's petition shows no counter letter, as written evidence is not necessary. 163La 442, 112S40.

774-6 [a] (4) Other instances. 225App Div770, 232NYS156.

775-10 49ND1, 177NW375.

775-12 215Ala367, 110S809; 241 IllA 404.

775-13 156Md65, 143A644.

779-76 [d] But see 128 Or242, 273P393.

779-78 33Wyo 457, 240P449, 454 [cit CJ].

779-85 [b] **Cross bill held sufficiently to allege fraudulent conveyance.**-216 Ala503, 113S522.

780-91½-New. An answer failing to allege that the amount sought to be recovered exceeded the value of goods received has been held demurrable. 86 IndA59, 155NE833.

780-93 146Va758, 132SE859.

780-94 216Ala106, 112S528. [b] (2) Answer alleging consideration is sufficient, though consideration stated in conveyance is nominal. 101WVa452, 132 SE877.

781-1 51SD157, 212NW872. But see 200 Iowa970, 205NW788; 224Ky414, 6 SW(2d)474.

782-21 [a] **Reply held general.**-226Ky 557, 11SW(2d)429.

782-31 [b] **Amendment to bill held to make case of constructive or actual fraud in alternative.**-214Ala558, 108S370.

783-46 201Cal 689, 258P588 (evidence admissible); 213Ky658, 281SW796; TexCivA 24SW(2d)450. [c] **Where there are different issues between plaintiff and several defendants, vendor, and vendee,** plaintiff is not required to go further in his proof against vendee than would be required against vendee alone. 234 Mich252, 208NW60. [d] **In auditor's bill** deed of trust cannot be adjudged fraudulent conveyance or preference without proper pleading and proof. 100 WVa707, 131SE545.

783-47 102CalA370, 283P94.

783-48 LaA 122S133. See also 144Va 692, 130SE902.

783-51 213Ky658, 281SW796; SD 227 NW380.

784-52 [b] **Validity of mortgage** given to secure another creditor is irrelevant and cannot be questioned in absence of allegation, direct proof, or offer to prove insolvency. 9LaA275, 120S120.

784-58½-New. Pleadings must be so framed as to put in issue notice to grantee. 146Va758, 132SE859.

784-58⅓-New. Under statutes extending to simple contract creditors without a lien a remedy in equity to avoid all transfers of property made by a debtor to hinder, delay, or defraud creditors, fraud is the basic fact that gives the court jurisdiction, and, in the absence of fraud, the creditors are left to their remedy at law. 219Ala140, 121S402.

784-58¼-New. Where a complaint is not framed on the theory that it is a creditor's action to avoid a fraudulent conveyance, but all facts necessary to support such an action are alleged and proved, the court is authorized to give plaintiff the equitable relief to which it was entitled. 225AppDiv137, 232NYS 94.

784-62 72CalA339, 236P154.

785-67 146Va758, 132SE859.

785-68½-New. Where a petition in an action to set aside a fraudulent conveyance alleges that grantees of a fraudulent grantee were not grantees in good faith, the defense of good faith may be proved although not pleaded. 39Wyo 266, 270P1072.

785-76 181Ark96, 24SW(2d)976 (which becomes conclusive in case of insolvency); Mass 170NE112; 35PortoRico 516.

785-83 226Ky403, 11SW(2d)103; 127 Okl 61, 259P858.

786-84 127 Okl 61, 259P858.

786-86 164Ga552, 139SE31; Iowa 232 NW666; 117 Or107, 241P62; 51SD157, 212NW872; 149Va39, 140SE277. [b] **Allegation of total want of consideration** does not cast burden on defendant of proving value of consideration which plaintiff's evidence shows was in fact paid. 205 Iowa841, 216NW634.

786-87 117 Or107, 241P62.

786-95 170Ark322, 280SW1001; 174 Ark184, 295SW353; 160Ga763, 129SE 65; 163Ga796, 137SE64; 100NJEq393, 135A791; 142Va125, 128SE508; 146Va 461, 131SE797; 146Va158, 135SE689; 148Va616, 139SE291; 149Va39, 140SE 277. [c] **It is presumed that conveyance is valid.**-220Ala629, 127S224.

787-98 42F(2d)886; 220Ala629, 127S 224; Fla 129S865; 331 Ill 230, 162NE 829; 331 Ill 240, 162NE869; 89 IndA 269, 166NE254; 202 Iowa795, 211NW 381; 203 Iowa512, 211NW538; 202 Iowa919, 211NW540; 203 Iowa1368, 214 NW542; 205 Iowa841, 216NW634; 213 Ky658, 281SW796; 216Ky682, 288SW 676; 262Mass191, 159NE735; 315Mo 966, 287SW432; 100NJEq393, 135A791; 116 Okl 245, 244P191; SD 227NW380; SD 230NW229; 146Va461, 131SE797; 144Wash609, 258P493; 103WVa485, 138 SE386; Ont [1925] 2DomLR897.

788-99 142Va125, 128SE508.

788-8 127Me286, 143A101; 222MoA128, 28W(2d)824.

788-17 79CalA529, 250P405; 229Ky 431, 17SW(2d)419; 234Ky697, 27SW (2d)975; 238Mich386, 212NW974; 248 Mich541, 227NW545; 80Mont40, 257P 1022, 1024 [quotCJ]; 37 OklACR423; Va 153SE651. [a] (2) Such showing makes out prima facie case entitling plaintiff to judgment in absence of testimony rebutting presumption. 80Mont 40, 257P1022.

789-18 214Ala558, 108S370; 331 Ill 240, 162NE869; 222MoA128, 28W(2d)824. But see 180Ark329, 21SW(2d)409.

789-19 181Ark444, 26SW(2d)115; 79 CalA529, 250P405; 176Minn433, 223NW 683.

789-27½-New. Where plaintiff made prima facie case by showing that grantor for years after execution of deed remained in possession and control of

property and then had deed recorded and returned to him; 75Mont294, 243P803.

790-29 228AppDiv840, 240NYS541 (to infant daughter).

790-32 137Misc719, 244NYS369; 34 PortoRico 830.

790-35 202 Iowa919, 211NW540; 202 Iowa1263, 211NW864; 164Minn317, 204 NW953; 80Mont40, 257P1022; Va 153 SE651; 103WVa203, 136SE846, 848 [quotCJ]; 103WVa485, 138SW386, 388 [citCJ]. [c] **Distinguished from duty of going forward.–Man** [1925] 3DomLR84.

790-37 202 Iowa795, 211NW381; 202 Iowa919, 211NW540; 208 Iowa1326, 227 NW110; 54ND35, 208NW847; 58ND 704, 227NW197; 129 Okl 46, 263P123; 146Va461, 131SE797; 103WVa203, 136 SE846, 848 [quotCJ].

790-38 103WVa203, 136SE846, 848 [quotCJ].

790-39 148SC500, 146SE414. [a] 78 Colo 1, 238P63 (transfer to sister-in-law of debtor); 82Colo 98, 257P351; 86 Colo 595, 284P337. [c] (1) 117 Or107, 241P62; 118 Or317, 246P711; 118 Or 685, 248P143 (dicta); 121 Or474, 256P 193. [f] **In Alabama.–215Ala278, 110S** 465.

791-43 DelCh 142A832; 208Ky750, 271 SW1051; 213Ky720, 281SW816; 237 Mich681, 213NW194; 146Va461, 131SE 797; **Man** [1925] 3DomLR84.

791-44 234Ky697, 27SW(2d)975; 146 Va461, 131SE797.

791-45 213Ky720, 281SW816; 237Mich 681, 213NW194; 33Wyo 326, 239P531, 533 [citCJ]; **Man** [1925] 3DomLR84.

791-46 172Ark517, 289SW482; 176Ark 1082, 5SW(2d)318; 213Ky720, 281SW 816; 320Mo 605, 8SW(2d)592.

791-47 200 Iowa970, 205NW788 (inadequacy of consideration held to cast upon defendants burden of rebutting presumption, by proof that remaining property of grantor was sufficient for payment of debts).

791-48½-New. In Manitoba, if absence of fraud is shown by independent corroborative evidence, the onus shifts back to plaintiff. **Man** [1925] 3DomLR 84.

791-49 170Ark445, 280SW380; Iowa 232NW816 (known to grantee); 208Ky 750, 271SW1051; 213Ky720, 281SW816.

792-55 237Mich681, 213NW194.

792-61 214Ala96, 106S504; 219Ala176, 121S535; 92Fla87, 109S320; 99Fla427, 126S773; 163Ga666, 136SE904; 121 Or 474, 256P193; 129 Or694, 277P826; 132 Or381, 285P1025; 300Pa250, 150A586; 51SD603, 216NW346; 144Val, 131SE 344 (and presumptions are in favor of creditors, in view of revival of statutory restrictions on right of husband and wife to testify in such cases); 145Va 663, 134SE547; 148Va779, 139SE495; 103WVa203, 136SE846; 37Wyo 78, 259 P185. See also 181Ark96, 24SW(2d) 976; TexCivA 11SW(2d)549. [d] **In Kentucky.–217Ky810, 290SW669.**

793-62 164Ga699, 139SE527; 145Va 663, 134SE547.

793-63 207 Iowa1, 222NW362; 262 Mass211, 159NE525 (no presumption where husband solvent); 153Va190, 149 SE537.

793-64 51SD603, 216NW346.

793-65 206 Iowa649, 221NW186.

793-67 145Va663, 134SE547.

794-75½-New. Rule as to presumptions of law has not been changed nor burden of proof shifted by a statute making testimony of either husband or wife competent in creditors' suits based on alleged fraudulent conveyances. 148Va 779, 139SE495.

794-75½-New. Wife had burden of proving that husband had no interest in land contract from wife to husband. 250Mich408, 230NW152.

795-91½-New. In an action to set aside a conveyance to insolvent debtor's wife on the ground that the property was purchased with money belonging to the debtor, the burden is on plaintiff to establish that the debtor owned the money. 37Wyo 78, 259P185.

795-93 70CalA614, 234P121; 217Ky 810, 290SW669; 187Wis649, 205NW391. [a] (2) Iowa 229NW816 (no presumption, but court will scrutinize transaction). (3) Settlement between husband and wife as to amount owing to wife, made when she was unaware of husband's debt, is presumptively fair. 205 Iowa460, 218NW311. [d] **In North Dakota.–51ND148, 199NW444.**

795-99 297Pa551, 147A657; 148Va779, 139SE495.

795-1 220Ky687, 295SW991.

796-2 220Ky687, 295SW991.

796-4 40 Ida726, 236P538, 542 [citCJ].

796-4½-New. But nonpayment of judgment in attachment suit will be presumed in suit in nature of creditor's bill to set aside conveyance. 33Wyo 326, 239P531.

796-12 But see 51SD157, 212NW872.

796-14 But see 58ND194, 225NW313.

796-14½-New. Return of property for taxation is not conclusive evidence of title in one making the return. 164Ga 552, 139SE31.

796-14½-New. There is no presumption that property constituting a homestead alleged to have been conveyed in fraud of creditors has a value in excess of the statutory amount. 51SD157, 212NW 872.

796-15 18F(2d)894; 43F(2d)497; 181 Ark96, 24SW(2d)976; 91CalA394, 267P 146; 84 IndA247, 147NE734; 213Ky 658, 281SW796; 9LaA245, 118S679; 83 Mont265, 271P612; 84Mont384, 276P 432; NJ 151A858; 122 Okl 37, 250P 799; 127 Okl 61, 259P858; TexCivA 294 SW295, 297 [citCJ]; Va 153SE651; [1925]CanSC683, [1925] 3DomLR1206. See also Sask [1928] 4DomLR18.

796-15½-New. and that the grantee had knowledge of such insolvency; [1925]CanSC683, [1925] 3DomLR1206.

797-17 234Ky697, 27SW(2d)975; 10 LaA404, 119S567; TexCivA 294SW295.

797-18 33Wyo 457, 240P449, 453 [cit CJ]; Sask [1929] 3DomLR191.

797-20 16F(2d)187; 181Ark268, 25SW (2d)770; 97CalA30, 275P448; 82Colo 98, 257P351; 99Fla1221, 128S643; 200 Iowa1020, 205NW974; Iowa 216NW 649; 207 Iowa1, 222NW362; 208 Iowa 179, 225NW361; Mo 1SW(2d)121.

798-21 16F(2d)187; 181Ark96, 24SW (2d)976; TexCivA 19SW(2d)762.

798-25 213Ky658, 281SW796; 127 Okl 61, 259P858.

798-27 127 Okl 61, 259P858.

798-29 220Ky687, 295SW991; 141Miss 370, 106S528; 84Mont384, 276P432. See also 91CalA394, 267P146; Wash 43 F(2d)497.

798-30½-New. Burden is upon defendants to prove a valuable consideration for a deed of conveyance by an insolvent grantor, reciting consideration of love and affection. 71CalA735, 236P326.

798-31 213Ala664, 106S133; 215Ala 307, 110S468; 220Ala695, 127S513; 85 IndA443, 154NE395; 225Ky529, 9SW (2d)302; 234Ky138, 27SW(2d)673; 128 Misc901, 220NYS495.

799-32 216Ala106, 112S528; 85 IndA 443, 154NE395; 287Pa304, 135A260. [b] **In Porto Rico.–34PortoRico** 830.

799-33 See also 80Mont40, 257P1022. [c] **Child has burden to show that parent's conveyance** was for valuable consideration. 148SC500, 146SE414.

799-33½-New. But the rule is particularly dependent upon showing of the existence of a creditor's claim prior to the transfer attacked. 80Mont40, 257 P1022.

799-34 118 Or317, 246P711.

799-35 166La626, 117S741; 287Pa304, 135A260. [a] (1) SD 230NW229 (nominal consideration for conveyance to wife). (5) 71CalA735, 236P325 (transfer to wife).

799-40½-New. Where a son admits that he parted with no consideration for a transfer to him by his father, the creditor is not required to show that no other person paid an adequate consideration for the grantee. 74Mont283, 240P374.

799-40½-New. In case of conveyance by father to son, when the grantor was indebted to the complaining creditor, the burden is on the grantee to show valuable consideration. 118 Or685, 248P 143.

799-40¼-New. It is not essential for the debtor to show that the consideration received was fair. SD 227NW380.

799-42 28F(2d)7; Cal 292P644 (where transfer is for consideration); 71CalA 735, 236P325; 89 IndA269, 166NE254; 202 Iowa1263, 211NW864; 203 Iowa 1368, 214NW542; Iowa 222NW566; Iowa 232NW813; 174Minn423, 219NW 550; 50ND949, 198NW673 (as to excess over homestead); 54ND35, 208NW 847; Okl 291P26; SD 227NW380; Tex CivA 24SW(2d)450.

800-43 [a] (1) 128Misc901, 220NYS495.

800-44 202 Iowa1263, 211NW864; 9La A245, 118S679; LaA 122S133; 250NY 56, 164NE741; 145Va422, 134SE690; 148 Va616, 139SE291.

800-45 89 IndA269, 166NE254; Iowa 222NW566; 174Minn423, 219NW550; 58 ND217, 225NW315; [1925] CanSC683, [1925] 3DomLR1206.

801-47 250NY56, 164NE741.

801-49½-New. It is presumed that the fraudulent intention of the grantor in a transfer to a relative is participated in by the grantee. 118 Or317, 246P711.

801-50 219Ky471, 293SW959; Mo 1SW (2d)121; 127 Or551, 272P914; 287Pa61, 135A210.

801-53 170Ark806, 281SW377; 111Conn 544, 150A700; 156Md65, 143A644; NJ Ch 148A754.

801-54 170Ark806, 281SW377; 121Kan 180, 246P976.

801-55 169Ark529, 276SW1; 170Ark 806, 281SW377.

801-56 169Ark529, 276SW1; 170Ark 806, 281SW377.

801-58 79CalA529, 250P405 (burden is on claimant).

803-72 215Ala9, 109S101.

803-76 203 Iowa995, 213NW609.

803-86 163Ga796, 137SE64; 320Mo 605, 8SW(2d)592.

803-88 163Ga796, 137SE64.

804-95 200 Iowa970, 205NW788 (defendants required to prove that property conveyed is exempt). [d] **In Ontario.–**[1929] 3DomLR82.

804-95½-New. There is a presumption that the grantor was not induced to make gratuitous conveyance to delay creditors by fiduciary relation or undue influence. 14F(2d)933.

804-95¼-New. One seeking the rescission of a transfer as fraudulent must furnish evidence to enable the court to do equity, where status quo cannot be restored. 54SD28, 222NW485.

804-97 163Ga796, 137SE64, 65 [citCJ]; 164Ga552, 139SE31; 115 Okl 289, 243P 147; 118 Okl 45, 246P633; 129 Okl 46, 263P123; 153Va392, 149SE624.

805-98 181Ark96, 24SW(2d)976; 48 Ida 783, 285P483; 34 OhA89, 170NE181 (intent); 118 Okl 45, 246P638. See also 166Ga713, 144SE262.

805-99 202Cal 215, 259P947; 262Mass 10, 159NE517.

805-7 102CalA370, 283P94; 250Mich 408, 230NW152.

806-11 163Ga796, 137SE64, 67 [citCJ]; TexCivA 32SW(2d)502.

806-15 164Ga552, 139SE31; 40 Ida726, 236P538, 542 [citCJ]; 85 IndA443, 154 NE395; 190NC411, 130SE45.

806-16 85 IndA443, 154NE395.

806-17 190NC411, 130SE45.

807-19 164Ga552, 139SE31.

807-25 177Minn84, 224NW457.

807-27 163Ga796, 137SE64; 203 Iowa 512, 211NW538; 260Mass151, 157NE40; 172Minn355, 215NW517; 313Mo 27, 281 SW445; Nebr 231NW761, 764 [citCJ].

808-29 203 Iowa512, 211NW538.

808-30 203 Iowa512, 211NW538.

809-35 260Mass151, 157NE40.

809-38 233Ky583, 26SW(2d)493; 131 Okl 190, 268P266.

810-48 [a] **Pleadings in attachment suit** are admissible to show that suit had been commenced. 33Wyo 326, 239P531.

811-57 80Mont40, 257P1022 (judgment roll); 33Wyo 326, 239P531.

811-66½-New. But attachment papers are admissible to show that plaintiff had a lien. 33Wyo 326, 239P531.

812-83 215Ala278, 110S465; 40 Ida726, 236P538, 542 [citCJ]; 262Mass10, 159 NE517; 33Wyo 326, 239P531 (declarations of grantor).

812-95 201Cal 689, 258P588; 190NC 411, 130SE45; 143Wash537, 255P942. [a] **Judgment rendered subsequent to conveyance attached,** based on prior indebtedness, is admissible. TexCivA 294 SW295.

812-96 73Mont429, 236P675.

813-99 TexCivA 294SW295, 296 [cit CJ].
813-15 [a] **Value of grantee's property subsequent to conveyance** is inadmissible. TexCivA 294SW295.
813-19 78Colo1, 238P63 [citCJ]; 101 WVa452, 132SE877.
813-21 33Wyo326, 239P531 (value of property).
814-33 33Wyo326, 239P531. But see 222McA128, 2SW(2d)824.
815-46 [a] (2) 9LaA245, 118S679; 101 WVa452, 132SE877. (7) Where deed recites consideration of one dollar and other valuable consideration, purchaser may show what he paid. 39Wyo266, 270P1072, 1074 [citCJ].
815-47 101WVa452, 132SE877.
815-48 156Tenn417, 1SW(2d)1017, 1018 [citCJ].
816-51 TexCivA 289SW146.
816-64½-New. It is error to refuse to allow the president of a bank, transferee of a note, to testify in an explanation of the cause of the delay of the bank in pressing the maker for payment brought out by plaintiff who contended that the issuance of such note by a garnishee and its purchase by the bank were without consideration and to defraud plaintiff. TexCivA 275SW198.
817-73 86Colo595, 284P337; 265Mass199, 164NE69. See also TexCivA 275SW198.
818-84 TexCivA 27SW(2d)833; 39Wyo266, 270P1072.
818-93 262Mass191, 159NE735.
819-97 39Wyo266, 270P1072, 1076 [cit CJ].
819-4½-New. Tax returns may be considered only as a circumstance in determining title to property. 164Ga552, 139SE31.
819-8 70CalA614, 234P121; 142Va125, 128SE508; 148Va616, 139SE291.
820-12 170Ark322, 280SW1001; 70CalA614, 234P121.
820-13 180Ark1110, 25SW(2d)438 (to show that transaction was honest).
820-16 148Va616, 139SE291.
820-17 170Ark322, 280SW1001; 203 Iowa271, 211NW217; 202 Iowa795, 211 NW381; 202 Iowa1263, 211NW864; Okl 291P26; 142SC78, 140SE238; 142Va125, 128SE508; 148Va616, 139SE291.
820-18 170Ark322, 280SW1001; 58ND704, 227NW197; 35PortoRico516; 38 Wyo469, 269P40; Sask [1929] 3DomLR474 (transaction between husband and wife).
820-19 178Ark851, 12SW(2d)785.
820-23 148Va616, 139SE291.
821-27 Iowa 231NW361; 127Me328, 143A169.
821-30 70CalA614, 234P121; 203 Iowa271, 211NW217; 202 Iowa795, 211NW381; 222MoA128, 2SW(2d)824; 142Va125, 128SE508.
821-31 149Va39, 140SE277.
821-39 79CalA529, 250P405; 91CalA400, 267P130; CalA 284P990; 164Ga699, 139SE527; 233 IllA90; 241 IllA404; 200 Iowa1371, 206NW295; 202 Iowa1263, 211NW864; 205 Iowa612, 218NW282; 208 Iowa1315, 227NW141; 123Kan612, 256P1010; 126Kan173, 267P1003; 127Kan164, 272P167; 213Ky720, 281SW816; 218Ky589, 291SW1033; 218Ky756, 292SW327; 218Ky770, 292SW322; 220Ky687, 295SW991; 163La442, 112S40; 11LaA201, 123S194; 168Minn497, 210NW634; 176Minn550, 224NW237; 179Minn7, 228NW177; 313Mo27, 281SW445; MoA 286SW133; Nebr231NW761; NJ 147A858; 33NM414, 269P56; 50ND319, 196NW101; 54ND35, 208NW847; 55ND323, 215NW281; 129 Okl46, 263P123; 127 Or551, 272P914; Tex CivA 27SW(2d)833; 146Va461, 131SE797; 144Wash609, 258P493.
821-40 248Mich541, 227NW545.
821-41 248Mich541, 227NW545.
821-42 177Ark1091, 9SW(2d)578; 241 IllA398; Mass 170NE112; 320Mo1077, 9SW(2d)907.
821-43 170Ark806, 281SW377; 172Ark821, 290SW603; 180Ark1110, 25SW(2d)438; 91CalA394, 267P146; Iowa 222NW566; 237Mich681, 213NW194; 164Minn350, 205NW218; 165Minn198, 206NW170, 43ALR41; 165Minn317, 206NW440; 115Nebr493, 213NW587; 98NJEq118, 130A728; 247NY262, 160NE364; Sask [1926] 4DomLR255, [1926] 2West Wkly667.
822-45 176Ark1082, 5SW(2d)318; NJ Ch 148A754.
822-47 Mo 293SW136.
822-48½-New. of evidence held sufficient to show that a lot conveyed was the debtor's homestead so that creditors were not prejudiced; 208 Iowa179, 225NW361.
822-49 169Ark529, 276SW1; 175Ark133, 298SW857; 181Ark169, 25SW(2d)11; 160Ga683, 128SE901; 253 IllA487 (chattel mortgage); 202 Iowa1109, 211NW479; 202 Iowa919, 211NW540; Iowa231NW361; 230Ky99, 18SW(2d)968; Miss 130S93; 54ND281, 209NW386; 127 Okl61, 259P858; 129 Or138, 276P1086; 143SC307, 141SE556; TexCivA 24SW(2d)450; 142Va125, 128SE508 (fraud not established by clear preponderance); 145Va149, 133SE664; 36Wyo268, 254P130; 38Wyo469, 269P40; [1925] CanSC683, [1925] 3DomLR1206; Man [1925] 3DomLR84.
822-50 205 Iowa841, 216NW634; [1925] CanSC683, [1925] 3DomLR1206.
822-54 202 Iowa1109, 211NW479; [1925] CanSC683, [1925] 3DomLR1206.
822-55½-New. of evidence insufficient to sustain value placed on bank stock by trial court; 55ND323, 215NW281.
822-55½-New. of evidence held insufficient to show notice to public of claim to livestock in possession of another; MoA 22SW(2d)1055.
822-56½-New. Evidence held sufficient to show that grantor was the equitable owner of the property transferred. 214 Ala558, 108S370.
822-57 170Ark322, 280SW1001; 163 Ga796, 137SE64, 65 [quotCJ]; 331 Ill240, 162NE869; 203 Iowa512, 211NW538; 202 Iowa919, 211NW540; 123Kan612, 256P1010; 234Ky130, 27SW(2d)668; 168Minn497, 210NW634; 169Minn409, 211NW473; 81Mont393, 264P115; 118 Okl45, 246P638; 37 OklACR423; 99 Vt65, 130A749; 142Va125, 128SE508; 146Va461, 131SE797; Va 153SE651.
823-58 163Ga796, 137SE64, 65 [quot CJ]; 203 Iowa512, 211NW538. See also 160Ga763, 129SE65.
823-66 33Wyo457, 240P449, 452 [cit CJ].
824-67 80Mont40, 257P1022; 22 OhA17, 153NE255.
824-71 33Wyo457, 240P449, 452 [cit CJ].
824-75 80Mont40, 257P1022; 152Wash211, 277P843; 33Wyo457, 240P449, 452 [citCJ].
824-76 80Mont40, 257P1022; 152Wash211, 277P843; 33Wyo457, 240P449, 452 [citCJ].
824-78 80Mont40, 257P1022; 33Wyo457, 240P449, 452 [citCJ].
824-79 33Wyo457, 240P449, 452 [cit CJ].
824-80 33Wyo457, 240P449, 452 [cit CJ].
824-81 33Wyo457, 240P449, 452 [cit CJ].
824-83 174Ark184, 295SW353; Ark 31SW(2d)289; Iowa 227NW112 (insufficient. [c] **Evidence sufficient to show** that execution of deed was fraudulent effort to help debtor conceal property. 230Ky609, 20SW(2d)474. [d] **Preference to creditors.**–11LaA251, 123S421.
825-86 79CalA529, 250P405; CalA 284P990; 51ND361, 199NW858. [d] 87 CalA399, 262P395; 143Wash4, 253P1081. [e] 127 Or551, 272P914. [f] 10LaA256, 120S711(2dcase). [h] 175Minn157, 220NW560.
826-88 54SD1, 222NW297. But see 88 CalA192, 263P325. [d] Mo 23SW(2d)1004(2dcase) (insufficient).
826-91 229Ky836, 18SW(2d)285.
826-97 [a] 213Ky138, 280SW928.
826-98 [h] **Evidence sufficient to show that tax sale amounted to voluntary transfer.**–11LaA257, 123S463.
826-98½-New. That a mortgage was signed on the day it was dated, and acknowledged on a later date, has been held not to cast suspicion on validity of the mortgage. 285Pa540, 132A718.
826-98½-New. That no bond was prepared in conjunction with a mortgage does not reflect on its validity where the mortgagee held judgment notes representing most of the indebtedness. 285Pa540, 132A718.
826-98¾-New. Evidence held sufficient to entitle defendants to notes given on subsequent sale of realty in fraud of creditors of payee. 115Nebr493, 213NW587.
826-98½-New. That judgment for fraud was obtained by collusion may justify setting it aside. TexCivA 14SW(2d)123. [a] **Evidence held sufficient.**–TexCivA 14SW(2d)123.
827-99 331 Ill230, 162NE829; 226Ky403, 11SW(2d)103; MoA 300SW1023; 80Mont40, 257P1022; 49ND262, 191NW481; 52ND648, 204NW178; 115 Okl289, 243P147; 148Va616, 139SE291; 103 WVa485, 138SW386. [c] (1) 32Ariz135, 256P507; 9LaA124, 118S779. (2) Finding that transaction was not fraudulent held justified. 181Ark969, 28SW(2d)725. [f] **Parent and child.**–200 Iowa300, 204NW275. [g] **Brother and sister.**–52ND648, 204NW178.
827-4 103WVa485, 138SW386. [c] 99 Fla427, 126S773. [e] Man [1925] 3DomLR84. [h] **Corroboration.**–Man [1925] 3DomLR84. [i] **Brother-in-law and sister-in-law.**–78Colo1, 238P63. [j] **Transferee held not entitled to allowance for debtor's maintenance** under evidence in creditor's suit to set aside debtor's transfer to son-in-law. 181Ark969, 28SW(2d)725.
827-6 [b] (1) 80Mont40, 257P1022 (prima facie case not shown).
828-9 234Ky130, 27SW(2d)668; 81Mont393, 264P115; Mont 292P725 (conveyance to mother-in-law); 115 Okl289, 243P147.
828-10 [a] 215Ala278, 110S465; 170Ark322, 280SW1001; 181Ark268, 25SW(2d)770; Ark 31SW(2d)289; 205Cal491, 271P1059; CalA 292P518; 83 IndA447, 149NE93; 202 Iowa603, 210NW919; Iowa229NW813; 213Ky138, 280SW928; 234Ky8, 27SW(2d)386; 234Ky130, 27SW(2d)668; 165La1019, 116S493; 170La1044, 129S630; 12LaA516, 126S537; 166Minn435, 208NW184; Mo 273SW723; 127 Or551, 272P914; 148SC500, 146SE414. [b] 91CalA88, 266P836; 81Colo195, 254P779; 338 Ill172, 170NE430; 200 Iowa300, 204NW275; 214Ky278, 283SW83; 226Ky403, 11SW(2d)103; 164Minn317, 204NW953; Minn 231NW397; MoA 300SW1023; 222MoA128, 2SW(2d)824; 49ND262, 191NW481; 57ND29, 220NW443; TexCivA 27SW(2d)250; Wash 291P1081. [d] **Creditor held entitled under evidence to decree setting aside deed from debtor to father.** Va153SE651.
828-11 92CalA691, 268P928; 160Ga763, 129SE65 (slight evidence of fraud may be sufficient); Iowa 232NW666; 161La971, 109S780; 244Mich174, 221NW285. [a] 215Ala278, 110S465; 153Va110, 149SE417. [b] **Evidence held insufficient to show fraud.**–148Va616, 139SE291.
828-11½-New. ; between brother and sister, 52ND648, 204NW178. [a] **Evidence held insufficient to show fraud.**–52ND648, 204NW178.
838-11½-New. between brother and sister, 205Cal491, 271P1059. [a] **Evidence held to show fraud.**–205Cal491, 271P1059.
828-12 [a] 97CalA398, 275P861; 164Ga699, 139SE527; 85 IndA443, 154NE395; 129Kan743, 284P422; 224Ky330, 6SW(2d)262; 251Mich518, 232NW205; 81Mont393, 264P115; 116Nebr33, 215NW559; 115 Okl289, 243P147; 132 Or381, 285P1025; Or 287P224; TexCivA 11SW(2d)549; TexCivA 15SW(2d)77; TexCivA 32SW(2d)233. [b] 250Mich408, 230NW152 (mortgage to husband or wife, or both, by third person). [c] 28F(2d)255; 214Ala96, 106S501; 171Ark24, 283SW41; 48 Ida471, 282P940 (2dcase); 48 Ida783, 285P483; 202 Iowa679, 210NW906; 204 Iowa11, 214NW572; 250Mich408, 230NW152; 173Minn468, 217NW593; 150SC60, 147SE627; 54SD625, 224NW190; 144Va1, 131SE344 (that wife furnished entire consideration for original purchase in husband's name). [f] 171Ark24, 283SW41; 121Kan180, 246P976; 51ND148, 199NW444. [i] 229Ky431, 17SW(2d)419. [j] 41GaA765, 154SE714; 48 Ida471, 282P940(2dcase); 323 Ill215, 153NE652; 204 Iowa532, 215NW501; 205 Iowa460,

218NW311; 121Kan180, 246P976; 246 Mich390, 224NW324(2dcase); 79Mont 100, 255P8; 220AppDiv258, 221NYS424; 51ND148, 199NW444; 58ND704, 227NW 197; Okl 291P509. [p] **Evidence held insufficient:** (1) To show that conveyance to wife was not fraudulent as to creditors. 121 Or474, 256P193. (2) To show deeds otherwise voluntary and without consideration were given to correct fraud or mistake in prior conveyance. 150Md265, 132A633. [q] **Evidence held sufficient to show property transferred to wife purchased with husband's own money.**–37Wyo 78, 259P185. [r] **Evidence held sufficient to show wife's conduct of business without fraud as to husband's creditors.**–226Ky713, 11 SW(2d)964. [s] **Evidence held sufficient to show husband's antenuptial agreement contemporaneous with contract to marry.**–Mo 17SW(2d)271. [t] **Landlord's payment of share of rent** for using furniture evidenced delivery of furniture from debtor to wife. 13LaA607, 128S673. [u] **Finding of fraud held sustained by evidence.**–CalA 290P110.

829–14 [a] (1) 16F(2d)187; 97CalA30, 275P448; 233 IllA90; 207 Iowa354, 223 NW115; 160La203, 106S784; 160La516, 107S390; 10LaA404, 119S567; 74Mont 283, 240P374; 83Mont265, 271P612; 127 Or551, 272P914. (2) 169Ark529, 276SW1; 172Ark517, 289SW482; 85 CalA468, 259P965; 121Kan180, 246P976 (insolvency two years after transfer); Mo 29SW(2d)1090; 127 Okl 61, 259P 858; [1925] CanSC683; [1925] 3DomLR 1206. [b] 172Ark31, 287SW769; 70CalA 614, 234P121; 91CalA394, 267P146; TexCivA 276SW784. [c] (2) Mo 1SW (2d)121. [e] (1) 200 Iowa970, 205NW 788; 208 Iowa179, 225NW361; 74Mont 283, 240P374; 127 Or551, 272P914. (2) Evidence held insufficient. NJ 151A858; SD 230NW229. [h] **Hindering and delaying creditors.**–118 Or685, 248P143.

830–15 See also Iowa 232NW666.

830–17 331 Ill 230, 162NE829; Iowa 232NW816. [a] 171Ark24, 283SW41; Cal 286P1001; 85CalA468, 259P965; CalA 285P715; 202 Iowa795, 211NW 381; 203 Iowa1103, 212NW559; 207 Iowa1187, 224NW517; 125Kan730, 266P 53; 262Mass191, 159NE735; 168Minn 168, 209NW883; MoA 300SW1023; 99 NJEq867, 133A292; 247NY262, 160NE 364; 131Misc175, 225NY8517; 117 Or 107, 241P62; 86PaSuper112; 150SC60, 147SE627; 151SC359, 149SE1; TexCivA 22SW(2d)1105. [b] 215Ala307, 110S 468; 91CalA394, 267P146; 207 Iowa1, 222NW362; 215Ky250, 284SW1050; 245Mich156, 222NW74; 320Mo 754, 9 SW(2d)880; 51SD603, 216NW346. [c] Ariz 289P512; 92CalA368, 268P488; 92 CalA749, 268P962; CalA 287P506; CalA 292P996; 200 Iowa970, 205NW788 (testimony offered by plaintiff held sufficient, over his objection, to establish amount of debt); 207 Iowa1315, 224NW 469; 208 Iowa179, 225NW361; 219Ky 813, 294SW475; 232Ky179, 22SW(2d) 589; 167Minn37, 208NW423; 171Minn 284, 213NW911; Mo 26SW(2d)609; 81 Mont393, 264P115; 83Mont49, 270P642; Nebr 231NW761; 55ND823, 215NW281; 53SD411, 220NW877; TexCivA 293SW 632; 152Va395, 147SE211; 33Wyo 326, 239P531; 33Wyo 457, 240P449. [d] 199 Iowa1352, 203NW685; 202 Iowa795, 211NW381; 226Ky357, 11SW(2d)429; 234Ky613, 28SW(2d)959; 7LaA694; 127 Okl 61, 259P858. [e] 201 Iowa593, 207NW576; 289Pa277, 137A272; 148Va 616, 139SE291; 103WVa545, 138SE107; 38Wyo 469, 269P40. [h] 205 Iowa915, 218NW915. [k] **Evidence held insufficient to show valuable consideration.**–71CalA735, 236P325. [l] **Evidence held insufficient to warrant setting aside conveyance from insolvent husband to wife in payment of her outlawed claim.** 205 Iowa915, 218NW915. [m] **Evidence held sufficient to show that consideration was inadequate.**–Iowa 227NW900. [n] **Evidence held to sustain finding of inadequacy of consideration.**–TexCivA 32 SW(2d)233.

830–18 [a] 171Ark24, 283SW41; 226 Ky403, 11SW(2d)103; 174Minn423, 219 NW550; Mo 275SW936; 98NJEq137, 129A748; 285Pa540, 132A718. [b] 124 Kan421, 260P654; 262Mass10, 159NE 517; 117Nebr276, 220NW274; 33Wyo 326, 239P531. [c] Me 151A559.

830–19 [a] 171Ark24, 283SW41; 204 Iowa11, 214NW572; Iowa 229NW816 (that indebtedness was in excess of equity received by her); 121Kan180, 246P976; Mo 275SW936; 53SD388, 220NW863. [b] 219Ala176, 121S535; 208Ky750, 271SW1051; 287Pa61, 135 A210; 48SD237, 208NW406; 51SD603, 216NW346; 148Va779, 139SE495. [e] 208 Iowa1256, 224NW574. [f] **Evidence held to show that value of household effects** conveyed did not exceed husband's bona fide indebtedness. 13 LaA607, 128S673. [g] **Whether bona fide indebtedness existed between husband and wife** and transfer was given and accepted as payment thereof must be determined from all facts and circumstances and all transactions between them. Iowa 226NW20; Iowa 229NW816.

831–20 [a] 37Wyo 78, 259P185. [d] 37Wyo 78, 259P185. [g] 99Fla427, 126 S773. [h] **Evidence held insufficient to** show that certain portion of husband's bank account was used in making purchase of property transferred to wife. 37Wyo 78, 259P185.

831–23 171Minn284, 213NW911.

831–27½–New. A judgment creditor, seeking to reach property held by the debtor under a deed conveying it to him as trustee for an infant child on the ground that the consideration was furnished by the debtor, need prove such fact only by a preponderance of evidence. 156Tenn417, 1SW(2d)1017.

831–27⅓–New. The fact that the state has liberal laws for the benefit of women does not bear on the question whether the evidence sustained a finding that property was purchased with the debtor's own money: 37Wyo 78, 259P185.

832–32 226Ky403, 11SW(2d)103.

832–38 [a] **Evidence held insufficient.**–149Md103, 131A27.

832–40 Cal 292P644. [a] (1) 62 OntL 12, [1928] 2DomLR343. (4) "Clearly and distinctly." 146Va461, 131SE797.

832–41 218Ky770, 292SW322. [d] **Tangible, substantial facts** must be proven. 180Ark1110, 25SW(2d)438.

833–42 Iowa 229NW813; 99Vt65, 130 A749.

833–46 170Ark445, 280SW380; 176 Ark1206, 3SW(2d)696; 181Ark444, 26 SW(2d)115; 202Cal 215, 259P947; 83 Colo 111, 262P1016; 160Ga763, 129SE 65; 165Ga414, 140SE872; 164Ga699, 139SE527; 207 Iowa1315, 224NW469; 208Ky750, 271SW1051; 232Ky179, 22 SW(2d)589; 219Ky813, 294SW475; 160La516, 107S390; 177Minn84, 224 NW457; Mo 26SW(2d)609; 85Mont 229, 278P143; 103NJEq407, 140A19; NJCh 144A114; 250NY56, 164NE741; 55ND823, 215NW281; 118 Or317, 246 P711; 118 Or685, 248P143; 127 Or551, 272P914; 99Vt65, 130A749; 146Va461, 131SE797. [a] **Evidence held to establish mortgages and deeds were executed pursuant to fraudulent scheme.** NJCh 151A121.

834–43 99CalA594, 279P192.

834–51 110Conn314, 148A345; 124Kan 421, 260P654; 153Va392, 149SE624; 33Wyo 326, 239P531.

834–52½–New. To sustain finding that conveyance was not made with intent to injure, delay, or defraud creditors, 70CalA614, 234P121.

834–53 172Ark31, 287SW769; 174 Minn423, 219NW550.

834–54 24F(2d)776; 169Ark529, 276 SW1; 172Ark31, 287SW769; Cal 286 P1001; 82CalA691, 256P258; 102CalA 582, 283P866; CalA 285P715; 46 Ida 55, 266P433; 199 Iowa1352, 203NW 685; 203 Iowa271, 211NW217; 203 Iowa1368, 214NW542; 207 Iowa1187, 224NW517; 129Kan140, 281P919; 209 Ky698, 273SW485; 167Minn275, 208 NW1003; 79Mont100, 255P8; 220 AppDiv258, 221NYS424; SD 227NW 466; TexCivA 32SW(2d)502; Wash 291P1081; 101WVa310, 133SE360; 36 Wyo 268, 254P130.

835–56 NJCh 148A754.

835–57 250Mich408, 230NW152; Mo 1SW(2d)121; 145Va663, 134SE547; 149Va39, 140SE277.

835–59 See 27F(2d)504.

835–63 [a] 163Ga430, 136SE280; 42 Ida560, 247P751; Ill 173NE281; 246 IllA296; 207 Iowa354, 223NW115; 209 Ky609, 273SW447; 234Ky138, 27SW (2d)673; 10LaA404, 119S567; 11LaA 251, 123S421; 262Mass191, 159NE735; 166Minn435, 208NW184; 172Minn355, 215NW517; 313Mo 27, 281SW445; 51 ND361, 199NW858 (grantor's insolvency); 118 Or317, 246P711; TexCivA 295 SW640. [b] 203 Iowa271, 211NW217; 215Ky250, 284SW1050; 223Ky339, 3 SW(2d)644; 55ND475, 214NW461; 233 Ky583, 26SW(2d)493; 117 Or107, 241 P62; 146Va758, 132SE859. [d] 214 Ala226, 107S57; 228Ky96, 14SW(2d) 391. [e] **Effect.**–10LaA404, 119S567.

835–64 [a] 177Ark1194, 10SW(2d)500; 227Ky195, 12SW(2d)315; 170La822, 129S215; 167Minn37, 208NW423; 313 Mo 27, 281SW445; 320Mo 754, 9SW (2d)880; Mo 29SW(2d)56; Mo 30 SW(2d)44; 221MoA868, 287SW819; 129 Or694, 277P826; 33Wyo 457, 240P 449. [b] 203 Iowa271, 211NW217; 202 Iowa817, 211NW396; 202 Iowa1109, 211NW479; 215Ky250, 284SW1050; Mass 171NE730; 117 Or107, 241P62. [c] 168Minn168, 209NW883; 174Minn 423, 219NW550; 117 Or107, 241P62; 285Pa540, 132A718; Wash 292P414. [d] **Finding that agreement of holder of vendor's lien and assignee to foreclose was not to defraud creditors** held against evidence. TexCivA 28SW(2d) 931.

836–68 [a] (2) 199 Iowa1352, 203NW 685; 320Mo 754, 9SW(2d)880; 39Wyo 266, 270P1072. (3) To show notice. TexCivA 27SW(2d)833. [b] (1) 172 Minn355, 215NW517. (2) 202 Iowa 817, 211NW396.

836–68 Iowa 229NW813; 145Va422, 134SE690. [a] (1) 83Colo 111, 262P 1016; 170Ga847, 154SE251; 209Ky609, 273SW447; 238Mich386, 212NW974. (4) 163Ga430, 136SE280. (5) That grantee had reasonable cause to suspect fraudulent intent of grantor. 160Ga763, 129 SE65. [b] (1) 203 Iowa271, 211NW 217; 209Ky698, 273SW485; 116 Or650, 242P351; 149Va39, 140SE277. (2) 215 Ky250, 284SW1050.

836–69 146Va758, 132SE859.

837–70 117 Or107, 241P62; 145Va422, 134SE690; 149Va39, 140SE277.

837–73½–New. The grantee's knowledge of the grantor's insolvency does not conclusively establish a right to have the conveyance annulled. 226Ky 403, 11SW(2d)103.

837–76 [b] **Nonsuit is properly granted** in absence of evidence from which jury can draw conclusion as to immediate delivery and continued change of possession. 40 Ida726, 236P538.

837–82 [a] **Reference properly ordered.**–151SC429, 149SE161.

837–88½–New. Whether a homestead, conveyance of which is attacked, is entirely exempt is a question of fact depending on value. 51SD157, 212NW 872.

837–88⅓–New. Whether defendant appropriated to his own use property of the judgment debtor attached by plaintiff is for the jury. MoA 18SW(2d) 552.

837–88¼–New. The right of assignee to foreclosure of a lien securing a purchase-money note, under an assignment for value from the assignor, as against a subsequent creditor of the assignor, claiming fraudulent conveyance, is a question of law for the court. TexCivA 10SW(2d)415.

838–90 176Ark1082, 5SW(2d)318; CalA 292P996; 160Ga348, 127SE757; 165Ga414, 140SE872; 331 Ill 240, 162 NE869; 86 IndA499, 157NE11; 89 IndA269, 166NE254; Me 151A559; 262 Mass211, 159NE525; 315Mo 966, 287SW 432; 221MoA311, 273SW148; 50ND371, 196NW104; TexCivA 278SW306; TexCivA 287SW666; TexCivA 32SW(2d) 233; TexCivA 32SW(2d)502. See also 51ND148, 199NW444. [a] TexCivA 278 SW306.

840–95 209Ky698, 273SW485 (finding of chancellor reversed as not supported by sufficient evidence).

840–97 254Mass584, 150NE866.

840-99 81Colo 195, 254P779; 169Ga 554, 150SE907(2dcase).
840-1 TexCivA 23SW(2d)816.
840-6 51ND148, 199NW444 (trial by court); 48RI 271, 137A385.
840-7 338 Ill 172, 170NE430.
840-10 Cal 292P644; 160Ga348, 127SE 757; 264Mass181, 162NE356; 79Mont 100, 255P8; 115Nebr493, 213NW587.
841-17 172Ark346, 289SW10; 40 Ida 726, 236P538; 50ND371, 196NW104.
841-17½-New. On undisputed evidence question whether delivery was immediate is for court. 40 Ida726, 236P538.
841-18 87CalA399, 262P395; 45 Ida 604, 264P384.
841-20 75Mont557, 244P506.
841-21 163Ga796, 137SE64; 154Miss 106, 121S850; 222MoA128, 2SW(2d) 824.
842-22 CalA 292P996.
842-31 81Mont560, 264P679; TexCivA 276SW784; TexCivA 278SW306.
842-32 195NC741, 143SE518.
842-33 [a] **Evidence held insufficient to warrant submission to jury.** TexCivA 11SW(2d)399.
842-35 TexCivA 278SW306; 222MoA 128, 2SW(2d)824.
842-40 165Ga414, 140SE872 (charge held proper); Ga 155SE473. [a] 164 Ga552, 139SE31. [b] 163Ga430, 136SE 280. [c] 164Ga552, 139SE31. [i] 164 Ga552, 139SE31.
843-41 162Ga657, 134SE751; 170Ga 659, 153SE740; Ga 155SE473. [a] 166 Ga877, 144SE652; 170Ga369, 153SE29 (1stcase); MoA 281SW98. [l] **"Badge of fraud,"** defined, raises no extraneous issue. 162Ga657, 134SE751. [m] **Applicability as to preference generally.**–162Ga657, 134SE751. [n] **Applicability as to good faith.**–162Ga657, 134SE751.
843-42 166Ga713, 144SE262; 167Ga 205, 144SE778; Ga 155SE473; MoA 18 SW(2d)552. [a] 163Ga430, 136SE280; 167Ga205, 144SE778; 170Ga369, 153SE 29(1stcase). [b] 222MoA128, 2SW(2d) 824. [f] 162Ga657, 134SE751; 164Ga 552, 139SE31. [j] **Title to property.**–164Ga552, 139SE31. [k] **Retention of possession.**–214Ala627, 108S573.
843-43 [a] 164Ga552, 139SE31.
844-56 162Ga657, 134SE751.
844-58 166Ga713, 144SE262. [b] 162 Ga657, 134SE751.
845-66 164Ga552, 139SE31.
845-70 170Ga659, 153SE740.
845-74 162Ga657, 134SE751.
846-81 260Mass151, 157NE40; 53SD 388, 220NW863. [a] **Finding not contrary to evidence.**–180Ark329, 21SW(2d) 409.
846-89½-New. In a proceeding to reach property conveyed to the debtor as trustee for his infant child on which the debtor is alleged to have paid large sums for improvements, the jury should find the amount so expended and the amount expended from funds of the infant. 156Tenn417, 1SW(2d)1017.
846-91 [c] **Testimony held to warrant chancellor's finding of fraud** in conveyance from husband to wife. 234Ky697, 27SW(2d)975.
846-94 But see 92CalA368, 268P488.
847-96 89 IndA269, 166NE254.
847-9½-New. Where proof establishes homestead character of property conveyed, the court should find such fact although there is no evidence that the value is less than the statutory exemption. 51SD157, 212NW872.
847-9½-New. Finding that value of land, when reconveyed to vendors, did not exceed indebtedness due them negatives bad faith. TexCivA 286SW519.
847-9¼-New. Finding that property conveyed to insolvent debtor's wife was purchased in part with funds of the debtor and that all the property was subject to judgment against him must be construed to mean that sufficient property was purchased with the debtor's funds to require full satisfaction of judgment. 37Wyo 78, 259P185.
848-13 169Ga309, 150SE203.
848-16 [a] NJCh 129A424.
848-22½-New. Enforcement of judgment should not be postponed until creditors are ascertained and brought into court. 226Ky713, 11SW(2d)964.
848-24 TexCivA 24SW(2d)450.
848-25 163La442, 112S840.
848-26 [a] (2) Other instances. 130 Kan133, 285P600. (3) Refusal to provide for lien proper where lien not adjudicated. SC 155SE594.
849-42½-New. Where it appears that all of bank stock and part of live stock conveyed by insolvent debtor to his wife were purchased by the debtor with his own money, both properties are subject to the debt, 37Wyo 78, 259P185.
849-42½-New. and that the bank stock should be first applied thereto and thereafter the live stock to the amount of money the debtor had put into live stock. 37Wyo 78, 259P185.
849-45 [c] 213Ky720, 281SW816; 163 La442, 112S40.
850-46 [a] (3) 48Nev373, 233P41.
850-50 CalA 292P996.
850-54 [a] **Wife assuming mortgage and note** in consideration of husband's conveyance of realty is entitled to no lien thereon to secure payment of note after cancellation of deed. 234Ky697, 27SW(2d)975.
851-61½-New. It is proper, under the statutes, to decree that the party, purchasing from an insolvent debtor without knowledge, retain title unless the creditor pay the purchaser, the amount of consideration paid for the property. SD 227NW380.
851-62½-New. Where a debtor's grantee joined with him in executing notes to one creditor and executed a deed of the land to secure them, and the proceeds of the land on a sale under a power of sale exceeded the debt secured, such excess cannot be subjected to the claim of another creditor in the absence of a decree setting the deed aside. 160 Ga683, 128SE901.
851-62½-New. Defendant creditor, who at no time had possession, control or title to any of said property could not be held liable even though he participated in transaction. Mass 170NE112.
851-63 See also 205 Iowa1333, 219NW 541. [a] (1) SC 155SE594.
853-82 Minn 231NW397.
853-83 [c] **Decree need not direct sale in inverse order of fraudulent conveyances.**–220Ala695, 127S513.
853-2½-New. Decree ordering sale of so much land as to satisfy complainant's lien held proper. 220Ala695, 127S513.
854-10½-New. A conveyance by a commissioner pursuant to a decree vests inchoate title in grantee until indorsement of the court's approval thereon, which may be made at any time. 8F(2d)813.
854-24½-New. Purchaser at a judicial sale is a necessary party in determining whether land was properly sold as a whole or not. 227Ky195, 12SW(2d) 315.
855-27½-New. Where a conveyance by a husband to his wife was made without adequate consideration but not to defraud creditors, the wife may void an attempted sale by the husband's creditor, made without repayment to her of the amount she paid for the property. 201 Iowa1175, 207NW233.
855-27½-New. In such case the creditor has the option of repaying the wife or abandoning his lien. 201 Iowa1175, 207NW233.
855-27¼-New. Since, upon the setting aside of a conveyance as fraudulent, title revests in the grantor the grantee cannot complain that the order is for the sale of more land than is necessary. 227Ky195, 12SW(2d)315.
855-28 46 Ida165, 267P232; 207 Iowa 711, 223NW541; 208 Iowa1315, 227NW 141; 55ND823, 215NW281, 283 [quot CJ].
855-28½-New. **Under some statutes a personal judgment against the debtor** may be rendered for the full amount of the creditor's claim, if the result of the suit proves unavailing to any creditor uniting therein. 144Val, 131SE344.
855-28½-New. This provision, being remedial, should be liberally construed. 144Val, 131SE344.
855-28¼-New. Personal judgment against heirs in proceeding to set aside transfer of note by decedent is error. 316Mo 968, 293SW116.
855-29 55ND823, 215NW281, 282 [quot CJ]; 37Wyo 78, 259P185, 187 [citCJ].
855-30 55ND823, 215NW281, 282 [quot CJ].
855-31 55ND823, 215NW281, 282 [quot CJ].
855-34 214Ala558, 108S370.
856-44 163Ga291, 135SE922.
857-45 129 Okl 204, 264P142.
857-47 SC 155SE594.
858-64 11LaA251, 123S421; Mass 170 NE112.
858-75 [a] **Where confessions of judgment to certain creditors are set aside,** proceeds of sale of property pass to attaching creditor under its judgment sustaining attachment to amount of its claim. 11LaA251, 123S421.
859-86½-New. Fraudulent conveyance passes title to the grantee which he retains subject to lien established in favor of creditors. 201 Iowa1175, 207NW233.
859-86½-New. Execution creditor has been held to have no preference lien over other creditors of the seller or transferor of property. TexCivA 283SW 552.
859-86¼-New. **Attorney taking conveyance from vendee** for services rendered vendor may have lien superior to that of judgment creditor. 126Kan246, 267P1105.
859-86½-New. No individual creditor can obtain any advantage or claim any superior rights over other creditors on property he may have been instrumental in uncovering from a simulated sale, the judgment therein inuring to the benefit of all creditors. 167La293, 119S54.
859-86½-New. A creditor cannot have all property of the debtor applied to payment of its debt, to the exclusion of other creditors, under statute. 224App Div527, 231NYS526.
859-87 [e] **In New York.**–126Misc23, 211NYS858.
859-88 101WVa728, 133SE628; 104 WVa561, 140SE537. [d] **No preference** over mortgagee. 12F(2d)981.
860-90 101WVa728, 133SE628.
860-95½-New. A creditor whose claim is decreed a lien on property voluntarily transferred by debtor for inadequate consideration, but subject to the amount actually paid by the transferee, does not by operation of law become obligated to pay such superior lien. 201 Iowa1175, 207NW233.
860-96 226Ky713, 11SW(2d)964.
860-98 [a] (2) Under West Virginia statute creditor instituting suit and all others who come in and agree to contribute to cost of suit are entitled to have their claims paid in full pro rata out of property in preference to any other creditors. 101WVa118, 132SE 487. (3) Under such statute creditor instituting suit is entitled to preference over all other creditors except creditor attempting to sustain preference where none come in and agree to contribute to cost of suit. 101WVa118, 132SE487. (4) In such case creditor instituting suit and creditor seeking to sustain preference are entitled to have their claims paid pro rata. 101WVa118, 132 SE487. [b] **In North Carolina.**–5F(2d) 316.
861-3 5F(2d)316; 200 Iowa935, 205 NW745.
861-10 227Ky195, 12SW(2d)315; 153 Va392, 149SE624.
861-12 154Md519, 141A355. [b] **Voluntary grantee held entitled to prior lien for expenditures.**–127 Or551, 272P 914.
861-13 [a] (5) Where parent, with intent to defraud creditors, causes title to be vested in infant child on payment of comparatively small part of consideration with funds of infant, and is given full right of possession and disposition, proceeds of property must be first applied to reimbursement of infant. 156 Tenn417, 1SW(2d)1017.
862-20 167Ga783, 146SE736.
862-22 See also 226Ky713, 11SW(2d) 964.
862-27½-New. Equity may refrain from penalizing defendant with costs in proper case. 99NJEq558, 134A119.
862-28 213Ala491, 105S643 (decree should direct payment of surplus to grantee); 47 Ida582, 277P565; 252 IllA

449. But see 152Wash211, 277P843. [a] 221AppDiv838, 224NYS343.

862-28½-New. The balance of the proceeds after payment of judgment is to be applied to paying damages against fraudulent grantee for filing claims for the purpose of delay only. 167Ga783, 146SE736.

863-29 228AppDiv847, 240NYS636.

863-35 155Tenn359, 293SW541.

863-36 163Ga70, 135SE406.

864-46 134 Okl 186, 272P840; 155Tenn 359, 293SW541. [d] **Transfer of property which is not subject of action,** may be enjoined. 134 Okl 186, 272P840.

865-50½-New. Statute forbidding injunction to creditors without lien. 170 GaS14, 154SE260.

865-52 165Ga890, 142SE277; 167Ga 783, 146SE736.

865-59½-New. A counterclaim pleading plaintiff's indebtedness and alleging that plaintiff's husband, one of the makers and indorser, prior to his death transferred the property to plaintiff in fraud of creditors, and seeking to enjoin plaintiff from disposing of the property and to declare the transfer void, does not state a cause of action. 224AppDiv527, 231NYS526.

866-70 TexCivA 14SW(2d)123.

866-71 155Md139, 141A402 (appointment of receiver properly refused); 103 NJEq407, 140A19.

866-72 167Ga783, 146SE736.

866-76 155Md139, 141A402.

867-83 198 Ind543, 154NE387.

867-84 198 Ind543, 154NE387. [c] **That maker of note transferred property with intent to avoid payment** has been held not to justify appointment of receiver. 198 Ind543, 154NE387.

868-94 122Kan357, 252P249 (good faith). [c] (1) 70CalA614, 234P121; 145Va422, 134SE690.

868-95 73Mont429, 236P675 (where, on defendant's motion at close of plaintiff's case for judgment, without official testimony that recited that consideration of one dollar for property worth sixty-seven thousand dollars was not true consideration, court granted motion, appellate court reversed judgment and directed entry of judgment for plaintiff); 118 Okl 264, 247P408.

872-82½-New. Statute making it an offense to make a conveyance with intent to defraud creditors has been held not to prohibit preference of one creditor. 59 OntL201, [1926] 4DomLR841.

872-84 181Ark1075, 29SW(2d)290.

873-13 [a] **In British Columbia.**-(4) BC [1929] 3DomLR931.

873-15 [a] (1) BC [1929] 3DomLR 931. [b] (2) To show facts of violation of law forbidding conveyances to defraud creditors. 86 IndA499, 157NE11. [c] **Defendant's refusal to pay note when due or on demand** is insufficient to show insolvency at previous time he transferred property. 181Ark1075, 29 SW(2d)290.

874-16 326 Ill 602, 158NE422; 254 IllA 372; 205 Iowa1111, 217NW449; 122 Kan630, 253P567; 125Kan425, 264P 1077; 128Misc105, 217NYS683; 149 Miss154, 114S871; 121 Or482, 256P190; 46RI 505, 129A503; 49SD27, 206NW 463; 188Wis115, 205NW804, 41ALR 1211. [b] **Purpose of statute stated.**-205 Iowa1111, 217NW449. [c] **Purpose** is to prevent purchase of stock of merchandise from various persons on credit and then selling it in bulk to defraud creditors. 243Mich417, 220NW724. [d] **Bulk sales act is not impliedly repealed** by Fraudulent Conveyance Act. 300Pa 192, 150A588.

874-16½-New. The statute is remedial. 243Mich417, 220NW724.

874-18 46RI 505, 129A503.

874-22 29F(2d)907; 300Pa192, 150A 588. [a] **Requirement of notice** by buyer to creditors of seller is not invalid. 300Pa192, 150A588.

874-23 29F(2d)907. [a] **Bulk Sales Act** which does not apply to all creditors is unconstitutional. 53ND195, 205 NW231, 41ALR968 (dictum).

874-24 LaA 130S879; 300Pa192, 150 A588.

875-25 LaA 130S879.

875-27 220MoA582, 287SW1057; 300 Pa192, 150A588.

875-34 46RI 505, 129A503.

875-35 188Wis115, 205NW804, 41ALR 1211.

875-36 204 Iowa644, 215NW746; 142 Miss768, 107S561; 148Miss861, 114S 752; 125Misc511, 211NYS375; 121 Or 482, 256P190; 188Wis115, 205NW804; 41ALR1211.

875-36½-New. and of the right to contract. 142Miss768, 107S561.

875-37 125Misc511, 211NYS375; 121 Or482, 256P190; 156Tenn314, 300SW 586.

875-38 200 Ind501, 165NE60; 200 Ind 540, 165NE318; 205 Iowa1111, 217NW 449; 148Miss861, 114S752; 125Misc511, 211NYS375; 132Misc723, 230NYS554; 121 Or482, 256P190; Pa 151A585; Tex CivA 4SW(2d)185, 188 [citCJ]; Tex CivA 29SW(2d)421; 188Wis115, 205 NW804, 41ALR1211. Contra 204 Iowa 644, 215NW746.

875-39 46RI 505, 129A503; TexCivA 275SW213. [a] **Where ambiguous,** Bulk Sales Act must be construed in light of general spirit and intent of law and object to be obtained. 29F(2d)907.

875-40 IndA 159NE434; 205 Iowa 1111, 217NW449; 241Mich690, 217NW 894; 243Mich417, 220NW724; 146Miss 291, 111S364; 46RI 505, 129A503. See also 122Kan630, 253P567; 128Misc105, 217NYS683.

875-42½-New. Statute does not apply to sale to creditor where there are no other creditors to be affected by transfer. 254 IllA372.

876-45 46RI 505, 129A503; TexCivA 283SW552.

876-46 207 Iowa343, 223NW102. [a] **Sale voidable or void.**-200 Iowa958, 205 NW774. [b] **Under Canadian Bankruptcy Act,** bulk sale is prima facie not in good faith and void where neither party made any attempt to carry out terms of statute. NS [1928] 2DomLR985.

876-47 IndA 159NE434; 146Miss291, 111S364; 152Miss590, 120S737; 35 Okl ACR492; 46RI 505, 129A503; 156Tenn 314, 300SW586; Can [1929] 3DomLR 300. [b] 146Miss291, 111S364. [d] **Good faith and payment of value held no defense.**-152Miss590, 120S737.

876-49 181Ark969, 28SW(2d)725; 169 Ark455, 275SW914; Conn 151A312; 205 Iowa1111, 217NW449; 127Kan539, 274 P200; 241Mich106, 216NW397; 242 Mich515, 219NW752; 223AppDiv576, 229NYS225; 126Misc357, 214NYS389 (void as to judgment creditors); Tex CivA 281SW344; TexCivA 19SW(2d) 156; Va 154SE514; 101WVa118, 132SE 487. See also 41F(2d)715.

877-54 200 Iowa760, 205NW350; 205 Iowa1111, 217NW449.

877-56 TexCivA 275SW213 (not liable to creditors omitted from list).

877-60 TexCivA 275SW213 (ten days' notice before payment sufficient compliance with statute).

878-61 200 Iowa760, 205NW350; 200 Iowa958, 205NW774; 207 Iowa343, 223 NW102; 128Misc105, 217NYS683; Tex CivA 3SW(2d)475. [a] (6) Creditor accepting debtor's note enlarging debtor's liability in full settlement of account with knowledge of sale in bulk made three months previously without notice to him waives illegality in sale. 200 Iowa760, 205NW350. [b] (1) See also 207 Iowa343, 223NW102. (3) Creditor waives no right against purchaser by taking debtor's note containing no release of purchaser. 36GaA 174, 136SE88. [d] **Creditor's right is individual,** of which he may or may not take advantage. 128Misc105, 217NYS 683.

878-62 16 OhA387.

878-64½-New. That a creditor of the seller learned of the sale as much as seven days before payment was made and took no action within that time does not preclude him from maintaining an appropriate action against the purchasers to subject the stock to the payment of his claim. 127Kan501, 274 P215.

878-66 LaA 130S879. [a] **Bulk Sales Act** does not apply to transfer of partnership assets to one partner on dissolution. 5F(2d)915.

878-67 242 IllA548.

878-68 2F(2d)774. Contra 171Ark129, 284SW26, 46ALR979.

878-69 TexCivA 12SW(2d)1087.

878-70 85CalA468, 259P965, 967 [cit CJ]; 13PaDist&Co 78.

878-70½-New. 188Wis115, 205NW804, 41ALR1211.

878-71 But see 34F(2d)528.

878-76 175Ark158, 298SW884; 142Miss 885, 108S141 (where no merchandise is sold in transfer of restaurant).

878-79 [c] **Plantation company** selling merchandise from company store to its tenants is engaged as merchant, not as planter. 169Ark455, 275SW914. [d] **Refining crude oil and selling refined products** has been held to be carrying on trade within meaning of statute. 171 Ark129, 284SW26, 46ALR979.

878-80 NJ 151A605; 188Wis115, 205 NW804, 41ALR1211.

878-81 189NC479, 127SE527.

878-84 See also 128Misc105, 217NYS 683.

879-87 169Ark455, 275SW914; 171Ark 129, 284SW26, 46ALR979; 220MoA582, 287SW1057. See also 330 Ill 11, 161NE 150.

879-88 169Ark455, 275SW914; 149Miss 154, 114S871; 220MoA582, 287SW1057; 53ND195, 205NW231, 233, 41ALR968 [citCJ]. [b] (1) 151Miss102, 117S545, 59ALR285. [c] **County is creditor,** under Bulk Sales Act, where sale of taxed goods was made after assessment of taxes, while they were unpaid. 53ND 195, 205NW231, 41ALR968. [d] **Term "creditors"** includes artificial persons, as bodies politic or corporate. 53ND 195, 205NW231, 41ALR968.

879-91 220MoA582, 287SW1057; 53ND 195, 205NW231, 233, 41ALR968 [cit CJ].

879-92 169Ark455, 275SW914; 220MoA 582, 287SW1057.

879-92½-New. Creditors for merchandise sold at a different store than one in which debtor was selling were his creditors with protection of statute. 220MoA582, 287SW1057.

879-93 148Miss861, 114S752, 754 [cit CJ]. [e] **One who had assigned note to another** before defendants, not then in default, had organized corporation involved is not a creditor under statute. Mass 172NE207. [f] **In Ontario.**-Ont [1930] 3DomLR617 [app dism [1930] 4 DomLR1010(2dcase)].

880-95 But see Ont [1927] 3DomLR 330.

880-98½-New. The statute does not ordinarily apply as between parties to the sale, but is enacted primarily to protect creditors. TexCivA 283SW303.

880-99 89Fla340, 103S615. [a] **Every chose in action is not "debt"** making owner creditor under Bulk Sales Act. 222AppDiv249, 225NYS549.

880-6 [a] (3) 243Mich417, 220NW724; 240Mich390, 215NW338, 54ALR1535. (5) Stock consisting of commodities purchased for resale in business as merchant. 220MoA582, 287SW1057. [b] (6) Merchandise of company store operated by plantation company for selling to its tenants. 169Ark455, 275SW 914. (7) Electric fixtures and materials used in wiring sold to any one who would engage seller to install them. 125Misc511, 211NYS375. (8) But not baking ingredients in bakery. TexCivA 4SW(2d)185, 188 [citCJ]. (9) Stock of merchandise used in dairy company's business. 243Mich417, 220NW724. [c] See also 204 Iowa644, 215NW746. [e] **In Mississippi.**-146Miss291, 111S364.

880-7 235Mich258, 209NW66.

880-8 235Mich258, 209NW66; 11Pa Dist&Co 353; TexCivA 4SW(2d)185. [a] (14) Towboat, barge, rock crusher, and piles of rock used in construction work. 89Fla340, 103S615. (15) Pool tables operated in connection with tobacco and candy store. 240Mich390, 215NW338, 54ALR1535. (16) Materials and ingredients used by manufacturer of article different from any of ingredients. TexCivA 19SW(2d)365. (17) Plumbing tools and supplies not selling

at retail. TexCivA 29SW(2d)421. [b] 160La516, 107S390.

880-8½-New. such as pack by pea cannery in operation for few days in year, 188Wis115, 205NW804, 41ALR1211.

881-10 [a] See also 154Md519, 141A 355. But see 12LaA471, 126S447.

881-12 29F(2d)907; 132Misc723, 230 NYS554. But see 200Ind540, 165NE 318. [a] (1) 240Mich390, 215NW338, 54ALR1535; 243Mich417, 220NW724. (3) Appliances for conduct of filling station held fixtures. 128Kan549, 278P 739. (4) Fixtures used by dairy company are within the act. 243Mich417, 220NW724. (5) Fact that appliances were attached to realty by owner instead of tenant does not remove them from provision of statute. 128Kan549, 278P739.

881-14 13PaDist&Co 78. [a] (7) Pool tables operated in connection with tobacco and candy store. 240Mich390, 215NW338, 54ALR1535. (8) Sale of manufacturing business. Pa 151A585. (9) Fleet of busses used for transportation of passengers. NJ 151A605.

881-16½-New. Damage by fire to grocery and meat market which could have been remedied does not render Bulk Sales Law inapplicable to sale of business while store is closed by reason thereof. 235Mich258, 209NW66.

882-17½-New. The statute has no application to, nor does it invalidate, a contract for exchange of going business for land, as between the parties, where the seller of the business agreed to pay all outstanding debts which he was ready, able and willing to do. TexCivA 283SW303.

882-18 130Kan147, 285P525; 152Miss 590, 120S737.

882-20 12PaDist&Co 507 (not applicable to sale of real estate and insurance business with office furniture and fixtures). [b] In Alberta.-[1925] 3DomLR693. [c] Transaction held within statute.-243 IllA195. [d] Operation of statute cannot be avoided by form of agreement of parties to sale.-242Mich 515, 219NW752.

882-22 [h] Release by husband to wife of his interest in stock of goods sold to both is within statute. 242Mich591, 219NW678. [i] Taking back store and merchandise on failure of payment is not sale within meaning of statute. 85 Colo 340, 275P935. [j] Transactions not within statute.-TexCivA 12SW(2d) 1087.

882-23 37F(2d)301. [d] (3) To corporation by individual. 149Miss154, 114S871. [e] (1) 241Mich690, 217NW 894. (2) 204Iowa644, 215NW746; 142 Miss768, 107S561. (3) 43F(2d)179; 241Mich690, 217NW894. (8) Sale of undivided half interest in partnership stock of merchandise by one partner to fellow partner is not within statute. 122Kan630, 253P567.

882-24 [b] Sales held in bulk.-125Misc 511, 211NYS375. [c] Sale of entire stock of retail business is sale in bulk. NJSup 151A597.

882-25 171Ark129, 284SW26, 46ALR 979.

882-26 39GaA383, 147SE183; 242Mich 591, 219NW678. [a] 123Kan319, 255P 30. [c] 213Ky187, 280SW923.

883-29 169Ark455, 275SW914; 49SD 27, 206NW463; Va 154SE514. [a] (2) Other illustrations of sales in usual course of business. 123Kan319, 255P 30. [b] (2) Other instances. 41F (2d)715. [d] (2) Sale of entire stock of merchandise, consisting of second-hand automobiles, furniture, and shop equipment constituted "sale out of ordinary course of business." 39GaA383, 147SE183. [e] Bankrupt's intention to discontinue business does not authorize sale in bulk. 41F(2d)715.

883-30¼-New. A sale of merchandise and fixtures of a corporation by the owner of its capital stock is within the statute although accompanied by an incidental transfer of the stock. TexCivA 281SW344.

883-31 121 Or482, 256P190.

883-33 233 IllA305.

883-34 323 Ill 232, 154NE139; 198 Ind 190, 152NE820; 46RI 505, 129A503. [a] Sale by pledgor of stock in trade in store is within statute, though pledgor is not in possession. 73CalA44, 238 P177.

883-35 319Mo 548, 4SW(2d)1068.

883-36 134Misc546, 236NYS1.

883-37 [a] Surrender of stock of goods and fixtures to mortgagee pursuant to provision of mortgage constitutes sale and disposal within statute. 127Kan 539, 274P200.

883-39 125Kan425, 264P1077.

884-42 319Mo 548, 4SW(2d)1068.

884-49½-New. Sale of interest to copartner is not within act. 204Iowa644, 215NW746.

884-50 200Ind540, 165NE318.

884-53 149Miss154, 114S871; 16OhA 387. See also 97CalA442, 275P870.

884-54 169Ark455, 275SW914. [a] (1) 223Ky640, 4SW(2d)412; 149Miss154, 114S871. See also 7LaA49. (2) Substantial compliance is sufficient. 205 Iowa1111, 217NW449, 451 [citCJ]. [b] (1) 205Iowa1111, 217NW449; TexCivA 13SW(2d)139. [e] (9) Statement that goods sold have been paid for and that there are no creditors existing at time of sale who could, by any process of law, obtain an interest in said goods is insufficient. 205Iowa1111, 217NW449. (10) Failure to include all creditors in list puts risk upon buyer. 149Miss154, 114S871. (11) List held not in compliance with statute. 128Kan333, 278P51. (12) Omission from statement of creditors of name of one who had prior personal notice of state will not void sale. 94PaSuper237. [h] Failure or refusal of seller to give list.-Buyer failing to receive written list of seller's creditors or written declaration that seller has no creditors proceeds at his peril, though seller failed or refused to give list. 49 SD27, 206NW463. [i] That seller's answers satisfied attorney who drew affidavit that there were no creditors does not satisfy Bulk Sales Law where statement was in fact insufficient. 205Iowa 1111. 217NW449.

885-56 169Ark455, 275SW914 (price, terms, and conditions); 146Miss291, 111 S364; 223AppDiv576, 229NYS225; 35 OklACR492. [b] (1) 128Kan333, 278P 51 (letter held insufficient). [d] (2) But see 147Miss453, 112S589. (6) As to creditor who received no notice, sale is void. 36GaA174, 136SE88.

885-57 169Ark455, 275SW914.

885-59 169Ark455, 275SW914.

885-61 169Ark455, 275SW914 (ten days); 126Misc857, 214NYS389. [d] Notice is sufficient irrespective of when purchaser takes possession.-TexCivA 275SW213 (construing amendment to statute).

885-62 146Miss291, 111S364.

885-67 147Miss453, 112S589; 149Miss 154, 114S871; TexCivA 13SW(2d)139; 193Wis77, 213NW643. [a] Need not be judgment creditor. 131Misc73, 226NYS 283.

885-68 46Ida780, 271P462; 48Ida600, 283P1038; 326 Ill 602, 158NE422; 127 Kan539, 274P200; 213Ky187, 280SW 923; 149Miss154, 114S871; 117Nebr224, 220NW236; 49SD27, 206NW463; 106 WVa259, 145SE438; 193Wis77, 213NW 643.

886-69 169Ark455, 275SW914; 5LaA 149.

886-70 TexCivA 32SW(2d)279. [a] Purchaser's liability is determined by ratio of value of goods acquired by vendee to vendor's total indebtedness. WVa 153SE252.

886-74 193Wis77, 213NW643.

886-75½-New. Where buyers not complying with the statute have paid part of the proceeds to certain creditors, they are liable to unpaid creditors only for the difference between such sum and the purchase price plus the statutory interest from the date of sale. 49SD27, 206 NW463.

886-75½-New. Conveyances in violation of the Bulk Sales Law are void only when attacked by creditors whose rights have been ignored. TexCivA 283SW 552.

886-75¼-New. Purchaser's failure to notify creditors does not render it liable to an unpaid creditor, whose claim was not listed by the seller, where claims of all listed creditors were paid. TexCivA 283SW574.

886-75½-New. Purchaser may rely on correctness of seller's list of creditors, unless he knows contrary, and, after paying price, is not liable for claim of which he had no notice until after statutory time. TexCivA 283SW574.

886-76 167La451, 119S423; LaA 130S 136; 300Pa192, 150A588.

886-78 46Ida780, 271P462; 48Ida600, 283P1038; 152Miss590, 120S737; TexCivA 4SW(2d)185; TexCivA 4SW(2d) 1029. [a] Where agreement of sale is on condition that title shall not pass till seller has paid debts buyer must act promptly to avoid liability on seller's breach of condition. 242Mich515, 219 NW752. [b] Liability is limited to value of goods.-46Ida780, 271P462. [c] Taking property in violation of bulk sales law has been held conversion as against creditors. Conn 151A312.

886-79 245IllA276 [citCJ]; 213Ky187, 280SW923; 193Wis77, 213NW643.

886-81 213Ky187, 280SW923; 142Miss 825, 108S142.

886-82 142Miss825, 108S142; TexCivA 32SW(2d)279; 193Wis77, 213NW643. See also Can [1929] 3DomLR300. [c] Effect of payment of certain creditors.-That buyer paid sum to buyer to discharge indebtedness and buyer made payment to certain creditor does not relieve buyer from liability. TexCivA 32 SW(2d)279.

886-84 169Ark455, 275SW914; 181Ark 969, 28SW(2d)725. [b] Interest is allowable on value of goods, in determining amount distributable to creditors for use of property received. 300Pa192, 150 A588.

886-87 300Pa192, 150A588 [citCJ].

887-94 136Okl 177, 276P747; SD 227 NW438; 156Tenn314, 300SW586, 587 [citCJ]; TexCivA 3SW(2d)475.

887-95 TexCivA 3SW(2d)475.

887-97½-New. Failure of the seller to comply with the bulk sales statute and to deliver property in accordance with executory contract is breach of contract entitling buyer to damages. 220MoA 582, 287SW1057.

887-97½-New. Such contract is binding, under statute, although not requiring compliance with the Bulk Sales Law. 220MoA582, 287SW1057.

887-98½-New. There is an implied agreement by the seller in an executory sales contract to comply with the Bulk Sales Law in the absence of any stipulation that he should be relieved from such compliance. 220MoA582, 287SW 1057.

887-99 149Miss128, 115S194.

887-2½-New. Where a contract is executory and title does not pass, the purchaser is not precluded from thereafter demanding compliance with the Bulk Sales Law. 220MoA582, 287SW1057.

887-2½-New. Where time is not of the essence of the contract, the buyer's right to demand compliance with the statute is not defeated by the fact that he failed to request compliance until several days before consummation of the deal, 220 MoA582, 287SW1057.

887-2¼-New. or, if so, was waived by the seller's failure to insist that the request was too late. 220MoA582, 287SW 1057.

887-4 177Ark1194, 10SW(2d)500.

887-5 [a] (4) Parties purchasing stock of merchandise, which was subject to debts of creditors, though demanding list of creditors, as provided by Bulk Sales Law, but not receiving name of certain creditor, are not liable to creditor whose name was not furnished, being innocent purchasers for value. 177Ark 1152. 9SW(2d)806.

888-6 TexCivA 281SW344.

888-6½-New. A seller of merchandise to a store owner, who afterward sold the store and all his stock in trade, without complying with the Bulk Sales Law, cannot sue the vendee in the contract for the price of such merchandise. 265Mass 10, 163NE166.

888-11 5PaDist&Co 216. But see 29F (2d)907.

888-11½-New. The principle allowing recovery in an action of contract, when defendant has money which in equity

and good conscience he should pay plaintiff, does not apply to a case arising under the Bulk Sales Law. 265Mass10, 163NE166.

888-11½-New. A bulk sale in fraud of creditors is voidable at the instance of a creditor supplying merchandise, if the debtor fails to pay the debt, but such creditor's remedies are the same as those of other creditors. 265Mass10, 163NE166.

888-13 167La451, 119S423; LaA 130S136.

888-15 5PaDist&Co 93.

888-21 46 Ida780, 271P462.

888-23 5PaDist&Co 93.

889-26 242Mich591, 219NW678; 5PaDist&Co 216.

889-30½-New. Under Pennsylvania statute attachment will be quashed if bond is not approved by judge. 13PaDist&Co 231.

889-30¾-New. Under such statute attachment will sometimes be dissolved but not quashed where defendant has been personally served. 13PaDist&Co 231.

889-32 36GaA174, 136SE88; 248 IllA 475; 241Mich690, 217NW894; 242Mich591, 219NW678; 117Nebr224, 220NW236; TexCivA 19SW(2d)156; 106WVa259, 145SE438.

889-34 241Mich690, 217NW894; 106WVa259, 145SE438.

889-35 241Mich690, 217NW894; 106WVa259, 145SE438.

889-37 106WVa259, 145SE438.

890-47 Conn 151A312; 242Mich591, 219NW678.

890-48 13PaDist&Co 231.

890-50 LaA 130S136.

890-51 126Misc857, 214NYS389 (receiver). [c] **Receivership cannot cover good will** but must be limited to merchandise and fixtures. 132Misc723, 230NYS554.

890-56½-New. Creditor not notified is held entitled to separate lien under statute, after pursuit of statutory remedy for sequestration. 149Miss154, 114S871.

890-57 242Mich591, 219NW678.

891-74 13PaDist&Co 231.

891-82 But see 207 Iowa343, 223NW102. [a] **In Nebraska.**–117Nebr224, 220NW236.

891-83 1LaA202; 292Pa464, 141A298; Ont [1930] 3DomLR617 [app dism [1930] 4DomLR1010(2dcase)]. [a] **Sale is "consummated"** under Kentucky statute of 1922, by notorious act of buyer in taking possession and when title passes, rather than at time buyer completes contract by payment. 225Ky190, 7SW(2d)1045.

891-90 200 Iowa958, 205NW774.

891-92 207 Iowa343, 223NW102.

891-92½-New. Creditor of seller is not precluded from bringing suit to have the purchaser declared the receiver of the business sold for the benefit of creditors because of recovery of a prior judgment by the creditor in a law action. 235Mich258, 209NW66.

891-92¾-New. Failure of creditor, upon filing claim with trustee, to include subsequent interest on account has been held not to preclude a claim therefor in an action against the debtor for balance unpaid. 21SaskL500, [1927] 3DomLR246.

891-95 142Miss768, 107S561 (must specifically set out facts showing failure to comply with statute); 131Misc73, 226NYS283;. 222AppDiv249, 225NYS549. [a] **Value of goods** must be pleaded in action to enforce personal liability. 46 Ida780, 271P462.

892-96 [a] **Plaintiff** need not allege that he is judgment creditor. 131Misc73, 226NYS283. [b] **Complaint** must be reasonably construed. 131Misc73, 226NYS283.

892-99½-New. In an action against a purchaser based on his failure to give notice to the seller's creditors, the declaration must allege the value of the goods alleged to have been illegally sold. 142Miss825, 108S142; 147Miss453, 112S589.

892-99¾-New. Value of goods at the time of sale must be alleged. Miss 111S843.

892-8 148Miss861, 114S752.

892-10 But see 198Wis492, 224NW475.

892-12½-New. Plaintiff must prove the fair market value of the goods alleged to have been illegally sold. 142Miss825, 108S142; 147Miss453, 112S589.

892-14 [b] (2) 1LaA244. (6) To show that creditor was estopped to attack validity of sale. TexCivA 281SW344. (7) To sustain finding that sale of electrical repair business was not sale of "mercantile business." 175Ark921, 300SW443. (8) To show value exempting property from execution. 152Miss590, 120S737. [e] **Evidence held insufficient.**–229Ky510, 17SW(2d)448. [f] **Evidence held inadmissible.**–TexCivA 19SW(2d)156.

892-15½-New. Value of stock sold must be proved by creditor. Miss 111S843.

892-19 [a](2) Evidence of buyer's title held insufficient for jury. NJSup 151A597. [f] **Value of goods sold** is for jury. Miss 111S843. [g] **Sale out of ordinary course of trade.**–85CalA468, 259P965. [h] **Waiver of compliance with statute.**–207 Iowa343, 223NW102.

892-21 [a] **Where goods were subject to mortgage** creditors who sold goods while mortgage was withheld from record and who sue to set it aside are entitled to lien on mortgaged property to extent of their claims. SD 228NW374. [b] **Only creditors who demanded part of fund for distribution** can be considered in determining total indebtedness of seller. 300Pa192, 150A588.

893-23 149Miss154, 114S871.

893-24½-New. The court may order the sale of any property, received by the purchaser without compliance with the law, which remains in the purchaser's possession. TexCivA 4SW(2d)185.

893-26½-New. **Attorney's fees** are properly allowed for services in producing fund for distribution at suit of one creditor for his benefit and all others who became parties. 300Pa192, 150A588.

FREE

894-58 112Ala1, 29, 21S214; 111Ala11, 15, 20S528.

894-74½-New. "free love," TexCivA 272SW536.

FREEHOLDER

896-39 25OhNPNS85.

896-40 25 OhNPNS85.

896-46 25 OhNPNS85.

896-48 25 OhNPNS85.

896-49 13PaDist&Co 198.

FREIGHT

903-18½-New. "freight booking," 34GaA14, 128SE774.

905-55 [a] (3) Train which carries freight alone, having caboose attached for use of crew. 29Ariz446, 242P870.

FREQUENCY

905-72½-New. In electrical nomeclature, depends on number of cycles per second. 39F(2d)684.

FREQUENT

906-78 [b] **"Frequently" is not synonymous** with "habitually." 93Fla261, 111S637.

FRIEND

906-11 But see 82NH281, 133A166, 45ALR1433.

907-12½-New. "Friend" is sometimes used in contradistinction to "enemy." 82NH281, 133A166, 45ALR1433.

FRIENDSHIP

907-17½-New. "Friendship" is a word of broad and varied application. 82NH281, 133A166, 45ALR1433.

FROM

908-33 236 IllA426.

908-42 85 Ind404, 154NE295.

908-52 But see 236 IllA426.

FRONT

910-5 107Conn400, 140A763.

FRONTAGE

911-31½-New. The line of demarcation between private property and that open to general use of the public. 319 Ill 51, 149NE538.

FRUIT

912-61 [b] **Word includes natural accession to live stock.**–TexCivA 278SW943.

FUEL

913-86 206 Iowa1251, 222NW31.

FUEL FLAT

913-86½-New. A barge of coal used to supply the engines of a boat. 229Ky685, 17SW(2d)753.

FUND

927-36 MoA 284SW164.

927-38 MoA 284SW164.

FUNDS

928-71 127Misc579, 217NYS323.

FUNDAMENTAL ERRORS

929-19¼-New. Unassigned errors in law apparent on face of record. Tex CivA 270SW1042.

FUNGIBLE

929-26 193NC780, 138SE131, 53ALR1404. [o] **Fungible goods** includes cotton. 193NC780, 138SE131, 53ALR1404.

FURNISH

931-63 117 Or338, 243P104.

931-66 117 Or338, 243P104.

931-85 128 Okl 201, 264P591. [b] 196 Ind137, 147NE323.

932-97 193NC751, 138SE121; 117 Or338, 243P104.

932-11 [a] 191NC313, 131SE754.

FURNITURE

935-24 131Misc21, 227NYS296, 300 [quotCJ].

935-42½-New. phonograph, 214Ala10, 106S188.

935-43 214Ala10, 106S188.

935-44½-New. pistol, 214Ala10, 106S188.

FURTHER

935-65 88CalA748, 264P289.

FUSEL OIL

937-33½-New. Fusel oil is a volatile, oily liquid obtained in the rectification of spiritous liquors made from fermentation of grain, potatoes, marc of grapes, and other material. 200 Iowa60, 204NW406, 41ALR363.

937-33½-New. The constituent of fusel oil is amyl alcohol, a direct nerve poison. 200 Iowa60, 204NW406, 41ALR363.

GAIN

938-86½-New. Declaration of stock dividend is not gain within the meaning of an income tax statute. 258Mass379, 155NE177.

GAME

941-1 [c] **Fish.**–Fish can and should be classed as game in act dealing with fish and game of country. 96Fla799, 119S376.

942-11 238Mich130, 213NW195; 315Mo1267, 288SW50; 74Mont587, 241P328; 191NC305, 131SE724; 192NC184, 133SE454; 146Wash17, 261P796; 197Wis394, 222NW300, 62ALR466.

942-12 [a] **Qualified ownership in wild fowl feeding on private land** is in owner of land under some statutes. 74Mont587, 241P328.

942-13 165Minn128, 206NW46; 74Mont587, 241P328; 191NC305, 131SE724.

942-16 163La579, 112S492.

943-19 74Mont587, 241P328, 332 [cit CJ]; TexCivA 21SW(2d)569. [a] 234Mich60, 207NW915, 917 [quotCJ]; 74Mont587, 241P328.

943-23 192NC184, 133SE454.

943-26 234Mich60, 207NW915; 74Mont587, 241P328, 332 [citCJ]; 51SD106, 212NW497. [c] **Grant of exclusive right of hunting** segregated from land is not against public policy. 234Mich60, 207NW915. [d] **Effect of possession under lease of hunting privileges** on rights

of subsequent lessee of land. Ala 128 S378.
943-27 51SD106, 212NW497.
943-32 [a] Where attached to other land grant of right to hunt creates easement rather than leasehold. 51SD106, 212NW497.
943-34 126Kan497, 502, 268P794 [cit CJ].
944-37 [b] One getting on private lake from highway without trespass to upland is not entitled to hunt thereon. 248Mich376, 227NW746.
944-39 74Mont587, 241P328; Wis 228 NW144.
944-40 170La281, 127S628 ("contract" to trap animals held not a permit).
944-42 See also 74Mont587, 241P328.
944-43 155Md688, 142A506; 74Mont 587, 241P328.
944-44 [a] NS [1929] 1DomLR307.
944-44½-New. That hunting value might be diminished does not prevent riparian owners from constructing drainage ditches, lowering lake level. 179Ark102, 14SW(2d)1101.
944-44¼-New. The game law does not permit taking a waterfowl from an artificial blind in public waters on an artificial embankment. 177Minn483, 225 NW430.
944-46 163La579, 112S492.
945-52 31F(2d)617.
945-53 30F(2d)111; 172Ark866, 291 SW89; Md 150A455; Mich 233NW205; 165Minn128, 206NW46; 315Mo 1267 288SW50, 53 [citCJ]; 191NC305, 131 SE724; 117 Oh78, 157NE792; 12PaDist &Co 795 (failure to report killing of deer); 143Wash117, 255P94; 146Wash 17, 261P796; 197Wis394, 222NW300, 62ALR466. [c] Deers.-11PaDist&Co 767.
945-54 96Fla799, 119S376; 165Minn 128, 206NW46; 177Minn483, 225NW 430; 197Wis394, 222NW300, 62ALR 466.
945-55 MoA 11SW(2d)1074. [b] Phrase "forever free" referring to "common highways," and protecting such highways from any tax, duty, or impost therefor, does not relate to game or fish. 197Wis394, 222NW300, 62ALR 466.
946-58½-New. Congress, establishing a refuge for migratory birds, may make reasonably necessary regulations concerning nonmigratory game. 31F(2d) 617.
946-60½-New. Construction of statutes. All provisions of Conservation law must be read together. 214AppDiv302, 212NYS206.
946-60½-New. Such reasonable interpretation must be given to the provision as to possession as will not nullify the provision as to transportation. 214App Div302, 212NYS206.
946-60¼-New. Permissive provisions as to transportation and those as to possession, being mentioned separately, must be read separately, being mutually exclusive. 214AppDiv302, 212NYS206.
946-60½-New. General prohibition in statutes must be interpreted in the light of specific exceptions. 214AppDiv302, 212NYS206.
946-61 NC 155SE724.
946-62 [c] Statutes held constitutional.-169Ga538, 150SE839; 200Wis271, 22NNW140.
946-63 165Minn128, 206NW46; 315Mo 1267, 288SW50; 191NC305, 131SE724.
946-67 191NC305, 131SE724.
946-67½-New. or prohibiting unreasonable searches and seizures, 315Mo 1267, 288SW50.
946-68 315Mo 1267, 288SW50; 146 Wash17, 261P796.
946-69 315Mo 1267, 288SW50.
946-70 Md 150A455.
946-71 Md 150A455; 191NC305, 131 SE724.
947-72 Md 150A455.
947-76½-New. or against temporary residents, 172Ark866, 291SW89.
947-80 192NC184, 133SE454.
947-80½-New. 172Ark866, 291SW89.
947-80½-New. A provision restricting resident licenses to persons having the qualifications of legal voters is invalid. 172Ark866, 291SW89.
947-81 [i] Deer without visible antlers. -14PaDist&Co 161.
947-82 [a] Statutory exception of owner of muskrat farm.-(1) 21 OhA168, 152 NE776.
948-86 7PaDist&Co 30.
948-90½-New. Some statutes make it unlawful to kill a doe at any time. 170 Ark917, 281SW680.
948-97 191NC305, 131SE724.
949-3 238Mich130, 213NW195. [e] Possession does not necessarily mean possession on person. 83Colo 289, 264P 720.
949-6 NC 155SE724.
950-19 146Wash17, 261P796.
951-24 [c] "Devices" for taking game illegally under statute do not include gun. 131Misc553, 228NYS231.
951-30 52ND500, 203NW497 (using spaniel to retrieve dead bird from area from which birds have already been flushed has been held not violation of statute); NS [1930] 4DomLR43.
952-35 165Minn128, 206NW46.
952-36 CalA 290P652.
952-37 [a] Shipment of furs in covered packages without statement of contents attached is prohibited by some statutes. 165Minn128, 206NW46.
952-50½-New. In New York provisions of law permitting transportation of venison are limited to the taker thereof, who may transport it in person, 214 AppDiv302, 212NYS206.
952-50½-New. or by carrier, 214App Div302, 212NYS206.
952-50¼-New. if evidence of sex is not removed from carcass. 214AppDiv302, 212NYS206.
952-50½-New. Transportation of portion of deer in a way prohibited by statute is a violation, even though the whole of the deer was not in the transporting car, in view of the statute providing that any person aiding in a prohibited act shall be deemed to have violated such section. 214AppDiv302, 212NYS206.
953-53 74Mont587, 241P328.
953-55½-New. Where a public domain is surrounded by privately owned land which is fenced, rendering it impossible for a hunter to reach the public domain without crossing such privately owned land, it is his duty to ask the owner to designate the way to be pursued, and he is guilty of trespass where, without doing so, he breaks a fence and crosses the land. 74Mont587, 241P328.
953-56 See also 112TexCr50, 13SW(2d) 861.
953-57 191NC305, 131SE724; NC 155 SE724. [f] Repugnant provisions.-172 Ark866, 291SW89. [g] Fox taken with dog and gun in open season, though without license, is lawful. Vt 147A697.
953-58 191NC305, 131SE724.
953-59 191NC305, 131SE724.
954-68½-New. A license to hunt game is a mere privilege subject to restrictions and limitations of statute. 315Mo 1267, 288SW50.
954-68½-New. A person accepting a license to hunt game and exercising its privileges subject to restrictions and limitations of statute relative to inspection of game in his possession waives his constitutional rights so far as they pertain to such inspection. 315Mo 1267, 288SW50.
954-71½-New. 192NC184, 133SE454.
954-74-75 [a] (4) 49ND890, 193NW 940. [e] Meetings of boards.-50ND478, 196NW554. [f] Appointment.-144Wash 56, 256P330.
955-78 50ND478, 196NW554.
955-79 [a] Evidence held sufficient to show deputy game warden acted under color of office in arresting and imprisoning plaintiff. Ala 128S447.
955-98 But see NJSup 147A639(2d case).
957-22 252NY86, 168NE838.
957-25 [b] Evidence held to sustain verdict of guilty for unlawfully possessing beaver hides. 154Wash409, 282P 907.
958-42 [b] (3) Furs shipped in covered packages without statement of contents attached are subject to seizure under some statutes. 165Minn128, 206 NW46.
958-49 172Minn469, 215NW837.
958-49½-New. Where a seizure of furs is lawful because they were shipped in violation of statute in closed packs, without a statement of contents attached, the fact that the game commissioner offered to and did release them on proof that they had been lawfully taken without the state does not give the owner any right of action for damages growing out of the seizure. 165Minn 128, 206NW46.
958-49½-New. Officers cannot search an automobile for evidence of violation of law unless they have reasonable cause to believe the automobile contains evidence. 131Misc521, 227NYS285.
958-57 MoA 11SW(2d)1074; 146Wash 17, 261P796. [a] (4) For transporting fur, pelt, and hides. 131SC511, 127SE 574.
959-59 315Mo 1267, 288SW50.
959-63 155Miss612, 125S99(2dcase).
959-72 146Wash17, 261P796.
960-73 8PaDist&Co 668. [a] (4) Okl Cr 282P690. (7) To show that farm or inclosure was used for breeding and raising of muskrats. 21 OhA168, 152 NE776.
960-78 TexCr 31SW(2d)1077(1stcase).
960-83 12PaDist&Co 795.

GAMING

963-4 68Utah251, 249P1016. [h] Racing, whether by men, horses, dogs, or other animals, or by animals of one kind against those of another, is "game." 178 Ark1189, 13SW(2d)808.
968-12 68Utah251, 249P1016, 1019 [quotCJ].
968-13 68Utah251, 249P1016, 1019 [quotCJ].
968-14 68Utah251, 249P1016, 1019 [quotCJ]; Utah 266P1037, 1038 [quot CJ]. [c] To constitute "lottery," "gift enterprise," or "game of chance," there must be combined three elements of present or prize, consideration, and uncertain or contingent event or chance. 151Wash297, 275P563.
969-15 68Utah251, 249P1016, 1019 [quotCJ]; Utah 266P1037.
969-20 [a] (14) "Tan tan" should be "fan tan." Man [1930] 1DomLR625. [b] (6) Utah 266P1037. (7) 76Mont166, 245P943, 45ALR993 (race run for reward offered by fair association); 68 Utah251, 249P1016. (16) Pari-mutuel system of betting on horse races. 68 Utah251, 249P1016.
969-21 Utah 266P1037.
969-22 68Utah251, 249P1016; Utah 266 P1037, 1038 [citCJ].
969-24 68Utah251, 249P1016.
972-61 [c] Other definitions.-RI 149A 863.
973-2 93Fla415, 111S801, 813 [citCJ], 52ALR51; 68Utah251, 249P1016, 1021 [citCJ].
974-10 86CalA362, 260P842, 844 [cit CJ].
974-15 115Tex125, 276SW645, 646 [quotCyc].
975-32 147Miss649, 112S579, 57ALR 421; 115Tex125, 276SW645, 646 [quot Cyc].
975-40 But see 82CalA28, 255P205.
975-47 8PaDist&Co 153.
976-60 [a] 86CalA362, 260P842, 844 [citCJ].
976-62 93Fla415, 111S801, 813 [citCJ], 52ALR51; 68Utah251, 249P1016. [b] Agreement to refund amount of bet to any dissatisfied patron held not to render receipt thereof lawful. 93Fla459, 111S816.
976-66 76Mont166, 245P943, 45ALR 993.
976-67 76Mont166, 245P943, 45ALR 993.
976-70 76Mont166, 245P943, 45ALR 993.
976-71 93Fla415, 111S801, 813 [citCJ], 52ALR51; 76Mont166, 245P943, 45ALR 993.
977-80 [a] (5) Agreement, between real estate broker having property listed with him for sale and purchaser, providing that broker will refund certain payments if purchaser fails to realize certain profit within stipulated time and will take over property. 39GaA243, 146 SE649.
977-88 [a] (2) Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount

from another is "gambling," though they always get something of trivial value as compared with sum risked. 294Pa498, 144A540. (3) Playing machine by dropping nickel to secure mints and varying number of slugs to play baseball game on machine constitutes gambling. Ark 32SW(2d)161.

977-95 93Fla462, 111S633.

978-97 93Fla462, 111S633.

978-7 93Fla415, 111S801, 813 [citCJ], 52ALR51.

982-99 [a] **Other definitions.**–181Ark 1147, 29SW(2d)673.

988-22 68Utah251, 249P1016, 1020 [quotCyc].

988-25 68Utah251, 249P1016, 1020 [quotCyc].

988-32 37 OklCr90, 256P939; 12PaDist &Co 188.

989-47 But see Utah 266P1037.

989-59½-New. money, 10PaDist&Co 315.

989-65 [a] **Use of vending machine is not unlawful** where it cannot be played for money, property, checks, credits, or any representative of value. OklCr 287 P796.

989-66 77Mont174, 250P443; 32NM80, 251P389; 114 Oh342, 151NE183, 185 [citCJ]; OklCr 279P523 (not per se gambling device); 9PaDist&Co 59; 12 PaDist&Co 188; 150SC277, 148SE66; 192Wis585, 213NW335.

989-67 US 41F(2d)855; 200 Iowa1228, 206NW105; 77Mont174, 250P443; 32 NM80, 251P389; 37 OklCr90, 256P939; 294Pa498, 144A540; 12PaDist&Co 188; 150SC277, 148SE66.

990-68 OklCr 287P796; 150SC277, 148 SE66.

990-69 133Misc508, 233NYS228.

990-69½-New. A slot machine, constructed so that the operator puts a nickel in the slot and takes out a mint, or something similar, and, if the winner, is paid by the person in whose place the machine is operated, and not by the machine itself, is a "gambling device." Mo 14SW(2d)574.

990-74 118Kan603, 236P663, 669 [cit CJ].

990-93 118Kan603, 236P663, 669 [quot CJ].

991-7 84 IndA522, 148NE205.

992-26 See also 190NC89, 129SE177.

992-27 53SD574, 221NW597, 598 [cit CJ].

993-30 190NC89, 129SE177.

993-31 See also 190NC89, 129SE177, 180 [quotCyc].

993-37 167Minn369, 209NW33, 36 [cit CJ].

994-42 167Minn369, 209NW33.

994-49 167Minn369, 209NW33.

996-3 1LaA629; 236Mich460, 210NW 492, 47ALR1128.

996-4 116 Oh205, 156NE124.

996-7 68Utah251, 249P1016.

996-8 [a] **Slot machines.**–(1) 37 OklCr 90, 256P939.

996-11 [b] **Permitting pool selling by pari-mutuel system** and prohibiting every other form of betting on horse races is within power of legislature. 68Utah 251, 249P1016.

997-18 132Misc343, 229NYS791.

997-19 162La543, 110S749.

997-19½-New. A statute prohibiting the publication of wagers and bets and the selling of pools before the event is a reasonable exercise of the police power. 236Mich460, 210NW492, 47ALR 1128.

997-19⅓-New. A prohibition of such publication after the event without distinction as to the harmful and the harmless, and without fixing a time limit after the event, is an unreasonable exercise of the police power and is unconstitutional. 236Mich460, 210NW492, 47ALR1128.

997-24 Md 150A735; 119 Oh49, 162NE 271.

997-28 151Wash297, 275P563.

998-30 156Md254, 144A239 (statute providing for liberal construction applies to all gambling statutes whether enacted before or subsequent to such provision).

998-35½-New. Penal statutes relating to gaming have no extraterritorial effect. 130Misc306, 223NYS765.

998-38 157Md332, 146A268.

998-44 134Misc529, 236NYS122 (common gambling is crime under statute).

999-50½-New. One wagering on boxing contest, permitted by law, is not guilty of misdemeanor. 151Misc80, 225 NYS346.

999-53 [a] **Guessing grains of wheat in jar.–Man** [1928] 4DomLR716.

999-55 Alta [1928] 4DomLR539.

999-57½-New. Private playing of poker is not forbidden by statute. 130Misc 306, 223NYS765.

1000-66 [a] **Horse racing for prize, premium, or purse** is within prohibition of statute forbidding all racing or trial of speed between horses for any bet, stake, or reward. 54ND330, 211NW597.

1000-67 93Fla462, 111S633.

1000-69½-New. Statute authorizing horse racing does not apply to dog racing. 339 Ill 220, 171NE140.

1000-69⅓-New. Pari-mutuel system of betting on horse races, when in actual operation, is a game of chance and unlawful. 118Nebr851, 226NW705.

1000-69¼-New. Dog races. Betting on dog races is gaming. 169Ga538, 150SE 825.

1000-69⅕-New. "Prizes" and "stakes," in statutes providing that persons engaged in horse racing may contribute purses or funds or prizes or stakes to be contested for, mean only such as may be lawfully won by contestants and horse owners at fairs and stock shows. 118Nebr851, 226NW705.

1000-74 93Fla462, 111S633; 320Mo 740, 8SW(2d)1 (dog races); Wash 291P 728.

1001-79 [a] **Pari-mutuel system of betting is not authorized** in connection with horse races by statutes creating state racing commission in some states. 118 Nebr851, 226NW705. [b] **State racing commission is without power** to permit betting or gambling at horse races. 118 Nebr851, 226NW705.

1001-79½-New. Some statutes, exempting from their operation regular organized race tracks and inclosures and wagers thereip, exempt from their operation only horse races. 213Ky648, 281SW826.

1001-79⅓-New. Some statutes denouncing betting and pool selling are not limited to acts committed at places other than race tracks, but apply as well to acts committed on a race track not within its exemptions. 213Ky648, 281SW826.

1001-79¼-New. Some statutes apply to persons conducting dog races within an inclosed track and conducting pools on the outcome of the races. 213Ky648, 281SW826.

1001-90 [a] **Grain Futures Act** does not forbid or make lawful any contract unless made on contract market. 318 Mo 225, 2SW(2d)621.

1001-91 165Ga265, 140SE847.

1001-94 165Ga265, 140SE847; 84 IndA 522, 148NE205; 190NC89, 129SE177 (misdemeanor). [a] (1) 165Ga265, 140 SE847. (3) Act held not to prohibit transactions covered by "U. S. Cotton Futures Act." 165Ga265, 140SE847.

1001-95 165Ga265, 140SE847; 54ND 651, 210NW169.

1001-96 84 IndA522, 148NE205.

1001-7 257Mass431, 154NE264. [a] (1) 257Mass431, 154NE264; 253NY83, 170NE501. (2) Candy slot machines indicating in advance of each operation number of premium checks to be received held gambling device. 257Mass431, 154NE264.

1001-8 Alta [1928] 4DomLR941.

1002-18 But see 147Miss649, 112S579, 57ALR421.

1002-19 121 Or545, 256P393.

1002-28½-New. prize fights 223App Div310, 228NYS192 (statute permitting prize fights held not to authorize betting thereon).

1002-39 251NY347, 167NE466(1stcase) (where result depends on selection of number, though not strictly game of policy, statute authorizes prosecution).

1002-42 147Miss649, 112S579, 57ALR 421. [b] **"Property" or "thing of value"** (1) within gaming statute includes right to play game by slugs received in varying amounts with mints from machine in which nickel is deposited. Ark 32SW(2d)161.

1004-56 147Miss649, 112S579, 57ALR 421.

1004-60 See also Alta [1928] 4DomLR 625.

1005-89 104TexCr81, 282SW589.

1005-91 [c] **Married woman separated from her husband** does not constitute family. 100TexCr406, 273SW597.

1006-97 36Wyo356, 255P786.

1007-5½-New. In Alberta a person who takes a rake-off for refreshments at a card game at a club is not the keeper of a gaming house where the money is used to purchase refreshments from a caterer who is a separate entity from the club. Alta [1929] 2DomLR317.

1007-6 169Ga538, 150SE825.

1008-18½-New. Actual participation in the game is not essential to constitute the offense of keeping a gaming house. 218MoA481, 279SW181.

1008-27 221Ky205, 298SW680 (allowing betting on pool games on premises held within statute declaring it offense to suffer gaming on premises).

1008-33 169Ga538, 150SE825 (betting on dog races).

1009-39 318Mo 225, 2SW(2d)621 (place held "bucket shop"); 190NC89, 129SE 177 (misdemeanor); 54ND651, 210NW 169.

1009-40½-New. Some statutes are directed principally at the professional gambler and the tools and implements of his calling, or his use thereof. 118 Kan603, 236P663.

1009-43 114 Oh342, 151NE183.

1010-49 Man [1929] 2DomLR795.

1010-50 218MoA481, 279SW181.

1011-59 RI 133A649; Man [1930] 1 DomLR625.

1011-61 [b] **Keeper of gambling device** is essential to offense of setting up or keeping such device or inducing persons to bet or play at game thereon. 118Kan 603, 236P663.

1011-63 But see 29Hawaii244. [a] **Ownership may be considered** with other circumstances in determining whether defendant had control over place. RI 133A649.

1011-67 28Hawaii514; RI 133A649.

1011-71 221Ky205, 298SW680.

1012-79 RI 133A649.

1012-83 But see 94Fla868, 114S665.

1012-85 37GaA594, 141SE84.

1012-87 94Fla868, 114S665.

1014-29 RI 149A863 (poker played without bank or banker held not within statute).

1014-36 223AppDiv310, 228NYS192 (money staked on prize fight). [b] **That depositary acts for another** is immaterial. 318Mo 958, 2SW(2d)618.

1014-39½-New. A statute prohibiting the possession of evidence of betting odds has been construed as prohibiting possession with intent to publish rather than mere possession. 236Mich460, 210 NW492, 47ALR1128.

1015-59 NJSup 152A206.

1015-66 Ga 140SE848.

1017-2 MoA 299SW125; NJSup 152A 206; 36Wyo 356, 255P786. [a] 165Ga 265, 140SE847.

1018-6 118Kan603, 236P663; 36Wyo 356, 255P786.

1019-15 158La203, 103S740; 218MoA 481, 279SW181.

1019-16 320Mo 171, 6SW(2d)842.

1019-17 118Kan603, 236P663.

1022-73 [a] 121 Or545, 256P393.

1023-79 [a] (1) DC 35F(2d)877. (2) Though word "by" was used instead of "upon," where statutory language was "money was betted, wagered and hazarded upon chance." 153Wash160, 279 P401. [c] Wash 291P728.

1024-91 32PortoRico 293. [b] **Lotto.**–32PortoRico 293.

1024-93½-New. In Porto Rico, the game of lotto not being among those games expressly prohibited by Pen. Code § 299, it is necessary to charge that someone conducted or directed the game and that he or another received some

profit. 32PortoRico 293.

1025-7 [a] **That contribution to fund was wager** need not be alleged under California statute. 86CalA362, 260P842.

1025-14 [a] **Name of person permitted** to set up gambling device on premises of accused should be set out. 118Kan 603, 236P663.

1025-15 [c] 36Wyo 356, 255P786.

1026-20 118Kan603, 236P663.

1027-46 [b] 320Mo 171, 6SW(2d)842; 115Nebr194, 212NW33; 137Misc267, 241 NYS745 (slot machine): **Wash** 287P 662. [c] **Mo** 11SW(2d)1031. [d] **Charge must show device of kind prohibited by statute.–Wash** 287P662.

1027-56 115Nebr194, 212NW33.

1028-59 320Mo 171, 6SW(2d)842.

1028-65 115Nebr194, 212NW33.

1028-76 [d] **MoA** 299SW125.

1030-8 [b] **Proof that checks, bank drafts and money orders were sent to** defendant support averments that defendant received money to be bet. **Wash** 291P728.

1030-10 [a] **Matter not necessary to be shown** to convict of setting up gaming device. **Mo** 273SW1069.

1033-39 253Mass65, 147NE833.

1033-40 **Fla** 130S459.

1033-41 149Wash60, 270P132.

1034-51 114 Oh342, 151NE183. [e] **In prosecution for knowingly permitting gambling games** to be carried on premises owned by defendant, prosecution must prove that he knowingly permitted it. 28Hawaii514. [f] **That race was actually run** need not be proved in prosecution under statute relative to bets on horse races. 82CalA28, 255P205.

1034-57 165Ga265, 140SE847.

1034-59 **Sask** [1929] 1DomLR166.

1034-61 **Man** [1929] 2DomLR795.

1035-63 [a] 82CalA28, 255P205; **DC** 32 F(2d)953; **Wash** 291P728.

1035-64 [a] 176Ark640, 3SW(2d)679.

1035-66 [a] 89PaSuper190. [c] (1) 218 MoA481, 279SW181; 85PaSuper316. [d] (1) 218MoA481, 279SW181; 85PaSuper 316. [i] **Reputation and events prior to time covered in indictment.–85PaSuper** 316.

1036-88 77CalA212, 246P95.

1037-99 127Misc791, 217NYS477.

1037-1 [a] 114 Oh342, 151NE183 (evidence insufficient to show intent); **OklCr** 287P796. [b] 77CalA212, 246P95; 93 Fla462, 111S633; 36GaA771, 138SE257; 253Mass65, 147NE833 (keeping bucket shop); **Mo** 273SW1069; **MoA** 299SW 125; **RI** 133A649. [c] 77CalA212, 246 P95; 225AppDiv299, 233NYS114 (possession of policy slips).

1037-2 28Hawaii514; 114 Oh342, 151 NE183.

1037-3 36GaA771, 138SE257.

1037-4 [a] 36GaA771, 138SE257.

1037-5 **OklCr** 283P583. [a] (1) **NJ** 149A61; 121 Or545, 256P393; 109TexCr 389, 4SW(2d)979. (5) To warrant finding that defendant was connected with premises and gambling. 152Wash686, 279P82. [b] 154Wash463, 282P908. [c] (2) **Wash** 291P728.

1038-7 28Hawaii514. [a] (1) 77CalA 212, 246P95; 29Hawaii244.

1038-9 [a] (1) **Fla** 130S459; **MoA** 299 SW125; 89PaSuper190. (2) 218MoA 481, 279SW181; **OklCr** 277P1037; 85 PaSuper316; **RI** 133A649. [b] 225App Div299, 233NYS114. [d] (3) Evidence of events occurring in house and its reputation prior to time covered by indictment, although not of itself sufficient, may be weighed with other circumstances in establishing character of place. 85PaSuper316.

1039-10 [a] 98Fla1225, 125S356. [b] 114 Oh342, 151NE183.

1039-11 [a] 153Wash160, 279P401. [b] 155Wash164, 283P680.

1039-15 77CalA212, 246P95.

1039-17 165Ga265, 140SE847; 28Hawaii514; **RI** 133A649.

1039-18 28Hawaii514. [a] (2) To show that defendant was part owner. **RI** 133 A649.

1039-19 28Hawaii514. [a] **RI** 133A 649.

1040-41 **Mo** 148W(2d)574.

1040-52 149Wash60, 270P132.

1041-56½–New. There was no error in leaving it to the jury to determine whether defendant could and should have produced witnesses to prove the actual purchase of stocks, or offered an explanation of incriminatory circumstances. 253Mass65, 147NE833.

1041-58 [f] 85CalA406, 259P481.

1041-59 [c] 253Mass65, 147NE833 (instruction on keeping bucket shop in prosecution for larceny and keeping bucket shop).

1041-62 [a] 239Mich60, 214NW165. [b] 221Ky205, 298SW680.

1041-63 [b] **Instruction held proper** as to control, knowledge of use, and mere ownership. **RI** 133A649.

1041-64 [a] (1) 165Ga265, 140SE847. (3) Instruction that assignor of lease would not be guilty because assignee conducted place as gambling resort. 145 Wash250, 259P711. [b] **Instructions properly refused.–109TexCr389, 4SW** (2d)979.

1042-74 239Mich60, 214NW165.

1042-75 82CalA28, 255P205; 239Mich 60, 214NW165.

1042-77 See also 232 IllA341.

1043-8 **Mass** 172NE84. [b] **Statute has been held not obsolete.–Mass** 172NE84. [c] **Validity of statute** has been held not impaired by defendant standing committed until compliance with order. **Mass** 172NE84.

1044-37 [b] **Petition held sufficient.–23 OhA**311, 155NE249.

1044-46 170Minn239, 212NW169 [cit CJ].

1045-50 [c] 10PaDist&Co 315.

1045-52 176Minn346, 223NW455; 150 SC277, 148SE66.

1045-54 40F(2d)535.

1045-56 170Minn239, 212NW169 [cit CJ].

1045-58 [a] 68CalA244, 228P865 (lottery tickets); 133Misc802, 233NYS570.

1045-59 [b] (2) Such action is civil action. 68CalA244, 228P865. (3) In action to recover slips of paper seized as lottery tickets and claimed by plaintiff to be portrayals of Chinese poems and literature, evidence beyond reasonable doubt that such slips are lottery tickets and intended for use as such is not required, but preponderance of evidence is sufficient. 68CalA244, 228P865. (4) Evidence held sufficient to support finding that slips of paper claimed by plaintiff to be portrayals of Chinese poems and literature were lottery tickets. 68 CalA244, 228P865.

1046-60 24 OhNPNS479.

1046-64 170Minn239, 212NW169 [cit CJ].

1046-70½–New. Under some statutes it is error to direct a sale of slot machines after they have been so destroyed that they cannot be used for gambling and to direct that the proceeds of sale be turned into the county treasury. 176Minn346, 223NW455.

1046-70¾–New. It is error to direct that money found in such machines be turned into the county treasury. 176Minn346, 223NW455.

1047-76 159La1049, 106S561.

1048-81 159La1049, 106S561.

1048-82 159La1049, 106S561.

1049-89 **TexCivA** 11SW(2d)203.

1049-2 252Mass306, 147NE740; **Tex CivA** 278SW899.

1050-3 3Del 591, 140A693; **TexCivA** 278SW899. [b] **Futures.–TexCivA** 278 SW899.

1050-6 But see 161La984, 109S785.

1050-8 6F(2d)109; 25F(2d)777; 35F (2d)328.

1050-9 132Misc56, 228NYS658.

1051-19 76Mont166, 245P943, 45ALR 993 [citCJ].

1051-20 93Fla415, 111S801, 813 [citCJ], 52ALR51; 76Mont166, 245P943, 45ALR 993.

1051-21 76Mont166, 245P943, 45ALR 993.

1052-22 76Mont166, 245P943, 45ALR 993 [quotCJ].

1052-28 [c] (4) Betting on primary election is illegal and void. 176Ark484, 3SW(2d)332.

1053-34 6LaA825.

1054-41 260Mass24, 156NE730; 315Mo 927, 288SW20; 48SD477, 205NW38; **NB** [1930] 1DomLR219; **NB** [1930] 4DomLR421. [c] (1) 220Ala568, 126S637. [g] **Sale at specified price for future delivery independent of market price is valid.** 142Va769, 128SE55. [h] **Stipulation for additional settlement based on market fluctuations is wagering contract where there is a definite price payable in any event.** 220Ala568, 126S637.

1055-44 168Ark504, 270SW946, 1119; 172Ark723, 290SW579; 225Ky440, 9SW (2d)110; 167Minn369, 209NW33.

1057-45 190NC89, 129SE177. [b] **In Massachusetts.–252Mass306, 147NE740.**

1057-46 **TexCivA** 278SW899.

1058-47 6F(2d)109; 25F(2d)777; 220 Ala568, 126S637; 68CalA139, 228P676.

1058-48 190NC89, 129SE177, 180 [cit Cyc].

1059-50 190NC89, 129SE177, 180 [cit Cyc].

1059-51 190NC89, 129SE177, 180 [cit Cyc].

1060-53 151Md43, 134A29, 31 [citCJ].

1060-58½–New. Under statutes in some jurisdictions every commission merchant is required to furnish to every customer for whom he executes an order for actual purchase or sale of grain for future delivery a written statement properly describing and confirming the transaction. 167Minn369, 209NW33.

1060-58¾–New. Such statutes also provide that failure to furnish such statement shall be prima facie evidence that such property was not sold or bought in a legitimate manner. 167Minn369, 209 NW33.

1061-62 151Md43, 134A29.

1061-64 167Minn369, 209NW33; **Tex CivA** 11SW(2d)203; **TexCivA** 15SW(2d) 711.

1061-65 [a] (1) 254 IllA177. (2) 3Del 591, 140A693. [h] **Where specific statute deals with dealings in futures, statutes dealing with contracts growing out of gambling generally have no application.** 141Miss453, 106S642.

1061-65½–New. Option in ordinary parlance is understood to mean a speculative contract, 167Minn369, 209NW33.

1061-65¾–New. and has no application to a hedge. 167Minn369, 209NW33.

1063-74 226Ky754, 11SW(2d)926; 14 PaDist&Co 167.

1063-75 172Ark723, 290SW579; 190NC 89, 129SE177 (under statute); **NC** 154 SE43.

1064-80 35F(2d)328; 21AlaA358, 108S 400.

1064-81 [b] **Subsequent change in relation or intention of parties does not render unlawful contract for future delivery valid in inception.** 6F(2d)109.

1064-83 162La698, 111S65.

1064-84 6F(2d)109.

1064-85 21AlaA358, 108S400; 322 Ill 133, 152NE572; 151Md43, 134A29; 14 PaDist&Co 167.

1064-87 [a] (2) Pledged note in renewal of notes given for stock to be held and resold by seller, at certain profit, no stock being delivered or promised, is held void. 144SC490, 142SE716.

1064-88-89 But see **TexCivA** 295SW 299.

1065-96 85 IndA418, 154NE692; 167 Minn369, 209NW33.

1065-1 254 IllA177.

1065-2 254 IllA177.

1065-3 254 IllA177.

1066-7 21AlaA358, 108S400; 254 IllA 177.

1066-10 254 IllA177.

1067-25 155Miss351, 121S817; 115Tex 125, 276SW645 (contract reserving right to take prevailing price at any time on any amount of cotton till certain date).

1069-60 Iowa 204NW252.

1069-62 19 OhA137. [c] **Sale of punch boards and candy prizes.–19 OhA137.**

1069-63 19 OhA137.

1069-68 **TexCivA** 15SW(2d)711.

1070-70 159La1049, 106S561; 132 Okl 214, 270P23.

1071-74 **TexCivA** 11SW(2d)203 (test of right to recover).

1071-79 195NC549, 142SE772.

1072-83 **MoA** 16SW(2d)104; 31NM344, 245P543, 545 [quotCJ], 46ALR952.

1073-88 263Mass37, 160NE324, 56ALR 1320.

1073-92 263Mass37, 160NE324, 56ALR 1320.

1074-98 213Ala398, 104S785 (mortgage of land).

1074-10 151Md43, 134A29; **MoA** 8SW

(2d)1079; 10PaDist&Co 288. [c] **Móney loaned to discharge** gambling debt already incurred may be recovered by lender. 20 OhA273, 153NE139.

1075-14½-New. Lender may recover from borrower money loaned to discharge a gambling debt already incurred. 20 OhA273, 153NE139.

1075-16 TexCivA 11SW(2d)203.

1075-18 TexCivA 11SW(2d)203.

1075-20 7LaA205; 141Miss453, 106S642, 644 [citCJ]; MoA 285SW1028; MoA 8SW(2d)1079.

1076-23 141Miss453, 106S642, 644 [cit CJ].

1076-24 141Miss453, 106S642, 644 [cit CJ]. [a] 141Miss453, 106S642.

1076-25 MoA 8SW(2d)1079.

1076-26 10LaA230, 120S664.

1077-40 226AppDiv352, 235NYS368.

1079-69 141Miss453, 106S642, 644 [cit CJ].

1079-71 See 132Misc750, 230NYS319.

1080-77 But see 130Misc306, 223NYS 765.

1080-78 226AppDiv352, 235NYS368. See also 209Ky173, 272SW415.

1081-81-83½-New. Common-law remedies have been declared supplanted by replevin. 168Ark700, 271SW710.

1081-85 168Ark700, 271SW710.

1081-86 168Ark700, 271SW710.

1081-87 168Ark700, 271SW710.

1081-88 168Ark700, 271SW710. [b] **Such statute not applicable** to stakeholder and does not affect his liability. 176Ark484, 3SW(2d)332.

1082-90 119 Oh49, 162NE271.

1082-97 76Mont166, 245P943, 45ALR 993.

1083-8 117 Okl 223, 246P217.

1083-24 26 OhA442, 160NE478.

1084-38 181Ark1147, 29SW(2d)673.

1084-42 176Ark484, 3SW(2d)332; 181 Ark1147, 29SW(2d)673.

1086-55 181Ark1147, 29SW(2d)673.

1088-76 See also 26 OhA442, 160NE 478.

1088-87 [a] **Contractual relation** between broker and customer cannot be changed by law without intention and consent of parties. 6F(2d)109.

1088-88 6F(2d)109; 165Ga265, 140SE 847, 848 [quotCJ]; 254 IllA177; Tex CivA 295SW299.

1088-89 165Ga265, 140SE847, 848 [quot CJ].

1088-91 84 IndA522, 148NE205.

1089-92 254 IllA177 (foreclosure of mortgage of land given to settle transaction not maintainable). [c] **Money lost in transaction in futures.**-162Ga839, 134 SE923.

1089-93 [a] (3) 256Mass147, 152NE 227. (11) To recover margins, customer must prove that he intended no actual purchase or sale. 256Mass147, 152NE 227.

1090-96 266Mass407, 165NE404.

1090-13 [a] **Contract violating statute against gambling on future market** is void as to broker or agent as well as to principal. 21AlaA358, 108S400.

1090-14 [a] **In cases of contracts made void by happening of contingencies,** in absence of such happenings, advances and commissions are recoverable. 21 AlaA358, 108S400.

1090-15 151Md43, 134A29; TexCivA 278SW899; TexCivA 295SW299. [c] **Right to contribution between broker and principal** is not recognized where transaction was illegal. TexCivA 278 SW899. [d] **Where broker makes later efforts to conform with statute,** he varies offer and cannot recover advances. Tex CivA 278SW899.

1092-24 TexCivA 278SW899.

1092-28 151Md43, 134A29, 31 [citCJ].

1093-33 213Ala398, 104S785 (foreclosure of mortgage based on gambling debt enjoined).

1093-41 168Ark700, 271SW710 (by replevin, pursuant to statute superseding prior remedy by detinues).

1094-45 168Ark700, 271SW710 (as included in enlarged remedy of replevin).

1094-45½-New. replevin, 168Ark700, 271SW710.

1094-61 190NC89, 129SE177 (contract for purchase of stock on margin); 10Pa Dist&Co 288.

1095-68½-New. In an action for grain sold, the defense of the statute of limitations was held not available as applying only to suits for money lost at gaming. 322 Ill 133, 152NE572.

1095-87 25 OhA297, 158NE498.

1097-27 [f] (1) 25 OhA297, 158NE498. [g] 162Ga826, 135SE78, 49ALR1076.

1097-33½-New. A petition in an action to recover the balance due from defendant for his share of losses in dealing in cotton and grain futures, not alleging that the actual delivery of cotton or grain was intended by the parties, but alleging their intention to buy and sell futures, was held subject to general demurrer as showing on its face the unlawfulness, under statute, of the contract sought to be enforced. TexCivA 15SW (2d)711.

1097-35 76Mont166, 245P943, 45ALR 993 (insufficient allegations).

1098-47 217AppDiv59, 216NYS437. [d] **Plea of want of consideration** is insufficient to raise issue. 217AppDiv59, 216 NYS437.

1098-49 217AppDiv59, 216NYS437.

1099-60 68CalA139, 228P676.

1099-67 68CalA139, 228P676.

1099-68 68CalA139, 228P676; MoA 8 SW(2d)1079; 54ND651, 210NW169. [c] **Burden of showing seller's knowledge that goods were purchased for gambling purposes** (1) is on purchaser defending action for price. Iowa 204NW252. (2) Purchaser of merchandise used for gambling transactions must show that seller knew that such was purpose of purchase in order to justify refusal to pay therefor. Iowa 204NW252.

1100-69 256Mass147, 152NE227.

1100-73 190NC89, 129SE177.

1100-74 6F(2d)109; 315Mo 927, 288SW 20.

1100-75 6F(2d)109; 25F(2d)777; Ala 127S673 (necessity of showing no delivery contemplated); 68CalA139, 228P 676; 225Ky440, 9SW(2d)110; 252Mass 306, 147NE740 (prima facie case); 266 Mass407, 165NE404. [c] **In Massachusetts.**-256Mass147, 152NE227.

1101-76 252Mass306, 147NE740. See also NC 154SE43.

1101-79 [e] (3) On issue of seller's knowledge that goods bought were to be used for gambling purposes he may testify that goods sold were not gambling devices and that he did not manufacture such devices. Iowa 204NW252.

1102-87 151Md43, 134A29.

1102-88½-New. On an issue whether a dealer knew that goods sold by him were gambling devices and that they were purchased for gambling purposes, he may testify that the goods were not gambling devices and that he did not manufacture such devices. Iowa 204 NW252.

1102-89 322 Ill 133, 152NE572.

1102-89½-New. Regulations of the board of trade are not admissible where both parties intended no delivery. 322 Ill 133, 152NE572.

1102-92 151Md43, 134A29; 256Mass 147, 152NE227.

1103-93½-New. In a suit for the purchase price of stock defended on the ground of illegality, where the pleadings and letters of both parties showed that defendant was to put up "margin," it was permissible for either party to define the meaning. 190NC89, 129SE 177.

1103-95 [a] (1) 25F(2d)247; 159La 1049, 106S561; 19 OhA137. (14) That parties to grain futures transaction did not intend to buy and sell grain. 151 Md43, 134A29. [b] (1) Iowa 204NW 252; 132Misc343, 229NYS791. (5) To show that seller of merchandise knew that it was to be used for gambling purposes. Iowa 204NW252. (6) To show illegal sale of gambling devices. Iowa 204NW252.

1103-96 TexCivA 278SW899. [c] (1) 254 IllA177 (broker's knowledge); Tex CivA 278SW899. (2) 256Mass147, 152 NE227. (8) To show that broker had no intention to deliver. TexCivA 278 SW899. [d] (1) 68CalA139, 228P676; 252Mass306, 147NE740; 260Mass24, 156NE730. [i] **Formal agreement** need not be proved to show intent to wager in futures. 21AlaA358, 108S400. [j] **Proof that contract was made under federal law** may overcome prima facie case of nondelivery. Ala 127S673.

1104-1½-New. Failure of grain commission merchant to furnish statutory confirmation of the order for actual purchase or sale of grain by customer is prima facie evidence of an illegal transaction. 167Minn369, 209NW33.

1104-7 35GaA226, 132SE775.

1104-8 TexCivA 278SW899.

1104-9 Ala 130S892; TexCivA 278SW 899.

1105-10 225Ky440, 9SW(2d)110.

1105-11½-New. , or whether certain particular trades were hedges or gambling transactions. 167Minn369, 209 NW33.

1105-15 MoA 8SW(2d)1079.

1106-24 [a] (2) Verdict on theory of breach of agreement is held not rejection of alternative wager theory, though not acceptance. 25F(2d)247. (3) Findings held conflicting. 30F(2d)521.

1106-24½-New. Finding that plaintiff intended that actual purchase and sale was to be made does not authorize recovery of margins. 260Mass24, 156NE 730.

GARAGE

1107-19 [a] 158La1014, 105S47, 49 [citCJ].

1107-20 See also 158La1014, 105S47. [b] **Storehouse** for automobiles. 126 Misc260, 213NYS18.

1107-20½-New. ; a place for housing automobiles. Webster D. [quot 158La 1014, 105S47].

1107-31 See also 121Kan62, 245P1056.

GARNISHMENT

28 C. J.—15-3 90Fla420, 106S427.

15-4 261Mass360, 158NE774; 100Vt 117, 135A197.

16-12 239 IllA589, 592 [citCJ].

17-35 84Colo 409, 270P875; 337 Ill 241, 169NE193; 128Mc238, 147A191 (2dcase) (trustee process); 241Mich34, 216NW390; 165Minn100, 205NW947; 51Nev114, 269P607; TexCivA 23SW (2d)482; 145Wash660, 261P388; 150 Wash267, 272P955.

17-40 14F(2d)688.

18-54 TexCivA 31SW(2d)508.

19-59 176Minn18, 222NW509.

19-60 80Mont258, 260P116.

19-61 80Mont258, 260P116.

19-64½-New. In some jurisdictions a garnishment proceeding under statutes is considered so effectually an attachment that it is included within that term. 126 Okl 138, 258P879.

19-65 235Mich1, 209NW65.

19-68 239 IllA578.

19-69 263Mass61, 160NE403.

20-75 173Ark48, 291SW989.

21-88 TexCivA 296SW970.

21-92 14F(2d)688; 37GaA535, 140SE 800; 239 IllA589, 592 [quotCyc]; 251 Mich276, 231NW572; 31NM593, 248P 885; ND 230NW596. [c] **Statute presupposes existence of suit in which definitive judgment on merits may be rendered.**-165La587, 115S789.

22-95 82Colo 482, 261P861, 864 [quot CJ].

22-96 115 Or633, 239P810.

22-99 31NM593, 248P885. But see 81 Colo 107, 253P1055.

22-3 239 IllA589, 592 [citCJ].

23-5 82Colo 482, 261P861, 864 [quot CJ]; 37GaA535, 140SE800; 41GaA748, 154SE466(1stcase); 239 IllA589, 592 [citCJ]; TexCommnA 281SW1045.

23-6 29 OhA233, 163NE502.

23-9 290Pa38, 137A815, 53ALR1020.

23-13 14F(2d)688; 215Ala175, 110S 149; 290Pa38, 137A815, 53ALR1020.

23-16 239 IllA589; 38Wyo 285, 267P 92.

25-56½-New. The garnishment statute must be construed in the light of other statutory provisions and the general principles of law and procedure. 31 NM593, 248P885.

25-57 [a] 126 Okl 138, 258P879.

26-65 90Fla420, 106S427; 36 OklACR 503; 50RI 452, 148A600; TexCommnA 273SW836, 838 [quotCJ]; TexCommnA 23SW(2d)312; TexCivA 272SW571. [a] **Extent of garnishee's liability** is measured and limited by express pro-

visions of statutes. **TexCivA** 2728SW 571.

26-72 240Mich129, 215NW377. See also 246Mich540, 224NW352, 64ALR427.

26-73 TexCivA 58SW(2d)553.

27-1 91La23, 1188790.

28-17 CalA 288P1104.

28-21 TexCivA 2838W1110, 1111 [quot CJ entire section].

28-26 178Minn381, 227NW430(1st case) (garnishment is not permitted in action to set aside assignment of note and mortgage).

28-27 242Mich486, 227NW794.

29-34 TexCivA 138W(2d)927.

30-46 157Miss810, 126S399.

30-49 TexCivA 2838W1110, 1111 [quot CJ].

30-51 TexCivA 2838W1110, 1111 [quot CJ].

30-52 TexCivA 2838W1110, 1111 [quot CJ].

30-56 242Mich23, 217NW913.

31-63 124 Okl 7, 253P66. See also Tex CommnA 158W(2d)585.

31-70 [c] 128Mo174, 146A257.

32-66 175Ark708, 18W(2d)43.

33-95 176Minn529, 223NW922.

33-1 33Ariz310, 264P687; 164La907, 1118832.

33-5 [a] **In Michigan.**–242Mich23, 217 NW913.

34-11 TexCommnA 273SW836; Tex CivA 138W(2d)953; TexCivA 308W (2d)112. [b] **Decree for alimony payable in installments** is not such final judgment or decree that action in garnishment may be maintained thereon. 242Mich23, 217NW913.

34-12 247 IllA51; TexCivA 38W(2d) 836.

34-14½-New. and unpaid in whole or part. CalA 285P362.

34-16 155Miss150, 124S267; TexCivA 272SW612, TexCivA 118W(2d)826.

35-21½-New. Judgment in partnership name without naming respective partners will support garnishment. TexCivA 128W(2d)608.

35-21½-New. Writ of garnishment cannot be issued on old judgment after seven years, although suit had been commenced on judgment within seven years. 155Miss150, 124S267.

35-22 240Mich199, 215NW372.

35-24½-New. Judgment on cross action without disposition of remainder of suit is not a final judgment sufficient for issuance of a writ of garnishment. TexCommnA 273SW836.

35-30 [a] **Wash** 292P1017.

36-61 165Ark254, 274SW703.

36-61½-New. Before funds due from improvement district to debtor are subject to garnishment, insolvency of debt or must be shown. 181Ark288, 25SW (2d)125.

37-65 168Ark754, 271SW703; **Can** [1925] 3DomLR1136.

37-67 101PaDist&Co 645.

37-69 35GaA29, 132SE238 (suit is pending, though judgment has issued where it may be reversed and defendant may ultimately prevail)

38-78 164La907, 1118832.

38-79 240 IllA46.

39-92 See also 82Colo472, 260P1017.

39-93½-New. Where a consent judgment has been stayed, plaintiff cannot obtain issuance of a garnishee order prior to expiration of stay. **Man** [1929] 1DomLR159.

39-92½-New. Where specific property is subject to mortgage equal to or in excess of its value actual levy on the property need not be made. 130Kan 153, 285P546.

39-95 **MoA** 208SW(2d)540 (return held sufficient)

39-96 127 Okl 20, 259P565. [a] (1) 127 Okl 20, 259P565.

39-96½-New. Where an execution has been returned nulla bona in good faith, the issuance of an alias execution does not deprive the execution creditor of his rights under the garnishment. 127 Okl 20, 259P565.

39-96½-New. In a garnishment proceeding in aid of execution, a sheriff's return has been held to be a return to execution, although it was attached to the execution and not written or stamped on the back thereof. **MoA** 20 SW(2d)540.

41-29 111Conn383, 150A313.

43-67 286Pa113, 132A918; 14PaDist& Co 1.

43-77 TexCivA 22SW(2d)1083; 145 Wash660, 261P388.

44-93 84Colo409, 270P875; **Cal** 290P 290; **DelSuper** 143A407; 229Ky674, 17 SW(2d)726; 241Mich255, 217NW29, 57 ALR692; **Mich** 233NW353; 157Miss 810, 126S399; 124 Or618, 265P786; 289 Pa341, 137A461, 463 [citCJ]; **TexCivA** 278W(2d)599; 106WVa259, 145SE438.

45-98 157Miss810, 126S399 (where indebtedness of garnishee to defendant is not of requisite nature).

45-2 239Mich401, 214NW132.

48-57 38GaA766, 145SE524.

50-51 150Md687, 133A847; 300Pa102, 150A157.

50-52 220MoA590, 287SW792, 793 [quotCJ]; 56ND81, 215NW918, 920 [quotCyc&CJ], 61ALR1454.

50-86 [a] (1) 220MoA590, 287SW792.

51-4 161La183, 108S408 (under code).

51-10 149Wash158, 270P425.

55-66 **Ariz** 288P1024; **Can** [1925] 3 **DomLR**1136. [a] **In Virginia.**–142Va 690, 128SE259.

55-68 See also **Can** [1925] 3DomLR 1136.

56-79 **Ark** 318W(2d)140.

58-12½-New. Prior to completion of improvement for which it was formed improvement district on governmental agency is not subject to garnishment. 181Ark288, 25SW(2d)425.

58-14 164Ga177, 137SE919; 51Nev114, 269P607, 609 [citCJ]; 34 OhA518, 171 NE369.

58-37 218Ala511, 119S236(1stcase).

59-39 **Ariz** 288P1024. [a] **City's admission of indebtedness** should be accepted as true as against intervening taxpayer's mere denial thereof. **Ariz** 288P1024.

59-44 206 Iowa1115, 221NW807.

60-55 171Minn280, 214NW26 (county treasurer).

60-60 34 OhA518, 171NE369.

60-62 175Ark542, 299SW1002.

64-46 8PaDist&Co 639 [citCJ].

64-47 230Ky27, 18SW(2d)308; 8Pa Dist&Co 639 [citCJ].

64-50½-New. A statute, providing for garnishment against the state, does not authorize the proceeding when the principal debtor is a legislator and the proceeding violates his exemption from process under state constitution. 234 Mich640, 208NW696.

65-54 109Conn316, 146A491.

65-70 20F(2d)791; 109Conn316, 146A 491; 208 Iowa1300, 227NW169; 20 OhA 356, 152NE193. See also 36F(2d)776.

67-80 33NM388, 268P566, 59ALR522.

67-84 33NM388, 268P566, 59ALR522.

68-97 171Minn280, 214NW26.

69-4 100Vt111, 134A595. [a] (6) 58ND 549, 226NW694. (7) Funds held on interpleader. 20 OhA356, 152NE193.

69-19½-New. Prior to judgment finding that claimant is entitled to funds deposited in interpleader, his creditor cannot garnishee such funds. 20 OhA 356, 152NE193.

70-40½-New. Garnishment of attorneys holding a check for a client for services has been held ineffective, where they were strangers thereto. 286Pa555, 134 A444.

74-11 **Erratum.**–"20 Ga. A. 148" should read "22 Ga. A. 148."

74-20 [c] **Construction of statute.**–136 Wash676, 241P290.

75-25 164Minn450, 205NW373 [citCJ] (redemption money after foreclosure sale).

76-37 **Miss** 119S503.

76-38 **OhA** 173NE258; 136Wash676, 241P290 [citCJ]. [c] **Chief of police within rule.**–OhA 173NE258; 143Wash 198, 253P596.

76-40 136Wash676, 241P290 [citCJ].

76-42 136Wash676, 241P290 [citCJ]; 143Wash198, 253P596.

76-44 136Wash676, 241P290 [citCJ].

77-56 208 Iowa1300, 227NW169; 121 Kan640, 249P590; 48Nev100, 227P1016, 232P783; 101Vt60, 141A174, 59ALR 766.

78-63½-New. A trust fund for alimony deposited in a bank by a special administrator is not subject to garnishment by the wife when his authority is terminated by appointment of an executor who then holds the remainder of the fund as assets of the estate and a special deposit belonging to it. 208 Iowa 1300, 227NW169.

82-37 161La183, 108S408.

82-44 But see **DelSuper** 143A410.

83-50 80Mont258, 260P116.

83-67 247 IllA23.

84-92 33GaA660, 127SE783.

87-41 170Ga332, 153SE4(2dcase); 41 GaA438, 153SE446. But see **CalA** 288P 884.

89-73 121 Okl 45, 247P369 (proceeds of sale of mortgaged property by mortgagor with consent of mortgagee bank, deposited in bank subject to mortgagor's check, after partial payment of debt, are subject to garnishment).

89-77 See also 198Wis154, 223NW446.

90-90 [b] (2) **Failure to pay debt secured prevents judgment against garnishee who sold his claim against defendant and its lien on collateral security.** 166Minn379, 208NW22.

92-46½-New. Debts to which the statutes refer are those which are admitted by the garnishee and not those which are disputed or denied. 27Hawaii651.

93-55 [a] **Though subject to levy** personal property in hands of debtor may be reached by garnishment. **Okl** 293P 195.

93-57 124 Or618, 265P786, 787 [quot CJ].

93-65 28Hawaii528. [a] (1) 28Hawaii 528. (2) Where action for money had and received would lie. 100Vt117, 135A 497.

95-80 164La998, 115S60. [g] **Garnishee's denial of indebtedness** to defendant cannot be impeached by evidence on trial where plaintiff waived oral examination of garnishee. 27Hawaii651. [h] **Money payable by husband to wife under divorce decree for support of children** is not subject to garnishment for wife's personal debt. 207 Iowa1008, 222NW534.

96-81 218Ala163, 118S153; 8PaDist& Co 161.

97-94 See also 39GaA417, 147SE418.

97-3 245 IllA602.

97-6½-New. Judgment creditor on attachment against all of original debtors is entitled to garnishment without an affidavit as to debt of one debtor occurring before the writ issued. 157Md 249, 145A779.

97-7 40GaA685, 151SE236; 236Mich 622, 211NW27, 28 [quotCJ]; 100Vt117, 135A497. [a] (3) Money due to husband and wife on contract for sale of land sold by them as tenants by entireties is not subject to garnishment for husband's debts. 236Mich622, 211NW27.

98-8 236Mich622, 211NW27, 28 [quot CJ].

98-13 152Wash382, 278P174.

98-15 236Mich622, 211NW27, 28 [quot CJ].

99-24 229Ky674, 17SW(2d)726; **Tex CivA** 291SW306.

99-25 125 Or307, 267P52.

99-27 **Ga** 139SE223; 37GaA718, 141SE 822.

99-32 **Ga** 139SE223.

100-41 **MoA** 23SW(2d)639.

101-74 253 IllA400.

102-78 82Mont574, 268P787.

102-81 See also 157Md36, 145A220.

102-89 **CalA** 288P884; **CalA** 288P1104; 200 Iowa1303, 206NW266, 267 [quot Cyc]. See also 244 IllA291. [a] (2) Disposition of money in trust generally takes priority over subsequent garnishment. **CalA** 288P1104.

103-90 **BC** [1930] 3DomLR203.

103-91 [a] **Unless duties of trustee have fully terminated** and amount due cestui que trust is definite and ascertained and nothing remains except duty of trustee to turn over and deliver definite sum to cestui, trustee cannot be made garnishee. 200 Iowa1303, 206NW 266. [b] **When income is payable to cestui que trust** only on his optional demand and is undeterminable at time of garnishment and has not been demanded by cestui, trustee cannot be made garnishee by creditor of cestui.

200 Iowa1303, 206NW266 (fund not debt till demanded).

103-10 [a] (2) Where trust provides for accumulation for three years and that fund shall not be assignable fund is not subject to garnishment during such period. 253 IllA400. (3) In such case interest of beneficiary is not subject to garnishment where it is not indebtedness that he can recover in his own right. 253 IllA400.

104-15 CalA 288P1104.

104-17 DelSuper 143A410; 99Fla1326, 1288846(2dcase); 208 Iowa1214, 227 NW151; 240Mich18, 214NW944; 128 Okl 299, 263P107; 289Pa341, 137A461; TexCivA 78W(2d)644.

105-24 84Colo 409, 270P875; 100Vt11, 134A595.

106-35 240Mich18, 214NW944. [a] **That creditor holds invalid chattel mortgage** is immaterial where he makes no claim thereunder. 240Mich18, 214NW 944.

107-48 [a] **In Saskatchewan.**–[1928] 2 DomLR543.

107-53 82Mont574, 268P787, 792 [cit CJ].

107-56 39GaA227, 146SE643; 289Pa 341, 137A461; TexCommnA 276SW664.

103-68 30Hawaii158.

110-94 289Pa341, 137A461; TexCivA 18SW(2d)784; 106WVa142, 145SE160, 164 [quotCJ].

111-97 106WVa142, 145SE160, 164 [quotCJ].

116-72 LaA 122S149.

116-73 TexCivA 24SW(2d)506 (no matter in whose name funds are deposited).

116-74 [a] **Deposit held subject to garnishment.**–40GaA150, 149SE172.

116-77½-New. Title to money owned by a foreign bank on deposit in a bank in the state passes by operation of law to the superintendent of banks in a foreign state upon his officially taking possession of the bank in such state. 170Minn120, 212NW3.

116-77½-New. and is not subject to garnishment in the state where deposited. 170Minn120, 212NW3.

116-77½-New. Nor does an allegation of fraud of a foreign bank while insolvent change the character of the original debt when not connected with the garnishee debt so as to aid the court's jurisdiction of deposit. 170Minn 120, 212NW3.

116-78 Okl 291P43.

117-83 136 Okl 158, 275P649; 289Pa 341, 137A461, 463 [citCJ].

117-88 3LaA197, 201 [quotCJ].

118-93 149Miss808, 115S888.

118-99 151Miss18, 117S329.

118-8 Mass 166NE705.

118-8½-New. Where claimant proves that she is the true owner, she is entitled to the amount in the bank in spite of trustee process as to the bank. Mass 166NE705.

119-15½-New. Where a draft was delivered to a bank with instructions to pay a portion of the proceeds to defendant, and before payment of the draft process was served on the bank, plaintiff was held entitled to judgment against the bank. TexCivA 286SW345.

119-15½-New. Money deposited in a bank to the credit of a building contractor without restrictions as to its use is subject to garnishment. 177Ark 79, 7SW(2d)776.

119-16 But see 151Miss18, 117S329.

119-28 77Colo 438, 237P149, 150 [cit CJ]; 51SD65, 212NW47. [a] TexCivA 27SW(2d)599.

120-30 [a] (2) Note taken by agent in own name for principal is not subject to garnishment. 77Colo 438, 237P149.

120-34 289Pa341, 137A461, 463 [cit CJ].

121-35 12PaDist&Co 103.

122-53 [e] **Proceeds of sale of mortgaged property,** under agreement between lienholder thereon, debtor, and third party, that latter shall collect proceeds and apply them on lien, is superior to garnishment of third party by creditors of debtor. 202 Iowa515, 210NW562.

125-5 See also 233 IllA305.

127-44 103WVa200, 136SE860. See also 90PaSuper327.

128-45 121Kan628, 249P587. See also 1LaA219.

128-50 [a] (1) 58ND934, 228NW435.

128-55 163La292, 111S710, 716 [quot CJ]; 152Miss266, 119S186.

128-59 [b] **Reserved percentage due highway contractor,** though not payable, not exempt from attachment as public fund. 142Va690, 128SE259.

129-68½-New. Where construction of part of an improvement for a drainage district covered by contract was at an end on account of breach thereof, whatever amount was due thereon became available and subject to equitable garnishment, as against the objection that the drainage district was not completed. 178Ark778, 13SW(2d)312.

129-83 See also 10LaA17, 120S401.

129-93 CalA 288P818; 157Miss810, 126 S399; 8PaDist&Co 161; 14PaDist&Co 287.

129-94 212Ala487, 103S455; 74CalA 247, 239P1095, 1097 [quotCJ]; 204 Iowa625, 215NW625, 55ALR356; 130 Kan153, 285P546; 241Mich255, 217NW 29, 57ALR692; 137 Okl 55, 280P416; 132 Or73, 282P230; TexCivA 23SW(2d) 482.

130-95 84CalA187, 257P882.

130-97 204 Iowa625, 215NW625, 55 ALR356 (alimony); 3LaA197, 201 [quot CJ].

130-1 [a] (1) 130Kan153, 285P546.

130-2 22F(2d)541, 543 [citCJ]; 95 CalA537, 272P1104; 27Hawaii297, 307 [quotCJ]; 246 IllA196; 208 Iowa1300, 227NW169; 10LaA651, 120S651; 12LaA 450, 124S845; 127Me423, 144A218; 175 Minn436, 221NW677; 157Miss810, 126S 399; 116Nebr317, 217NW94, 97 [citCJ], 56ALR594; TexCivA 3SW(2d)864; Tex CivA 23SW(2d)482; Utah 269P1032; Man [1930] 3DomLR509. [k] **Alimony installment due and payable on day garnishment served** and which was deposited in bank under order of court, directing payment of specified sum at end of each month if wife then living, is subject to garnishment. 208 Iowa 1300, 227NW169.

132-5 137 Okl 55, 280P416.

132-7 127Me423, 144A218.

133-20 3LaA197, 201 [quotCJ].

133-24 TexCommnA 276SW664. [a] **Stoppage of payment.**–TexCommnA 276 SW664.

134-31 95CalA537, 272P1104; 116Nebr 317, 217NW94, 97 [citCJ], 56ALR594; Utah 269P1032.

134-33 TexCivA 23SW(2d)482.

136-47 84CalA187, 257P882.

136-49 84CalA187, 257P882.

136-62 246 IllA196.

137-66 [b] **Compromise of claim** antedating attachment held acknowledgment of preëxisting debt and subject to garnishment. 162La774, 111S160.

137-73 TexCommnA 25SW(2d)601.

138-89 [a] **Money due under mortgage of land** is subject to garnishment before sale of land. Alta [1929] 4DomLR975.

142-39 [b] **In Minnesota.**–166Minn403, 208NW17.

143-42 DC 35F(2d)1010; 219MoA620, 282SW119.

145-68 221MoA868, 287SW819.

146-69 208 Iowa1300, 227NW169; 35 OhA59, 171NE613.

146-81½-New. Unauthorized payment by the special administrator of alimony out of a trust fund at time executor had been appointed may be ratified by the executor. 208 Iowa1300, 227NW 169 (facts constituting ratification).

147-84 TexCivA 14SW(2d)916(2dcase).

147-94 221MoA868, 287SW819, 823 [cit CJ].

148-5 221MoA868, 287SW819, 823 [cit CJ].

148-8 25 OhNPNS531. But see 110 Conn397, 148A374.

148-11 [a] See also 173Minn504, 218 NW99.

149-13 GaA 155SE799.

149-22½-New. An assignee's assent to assignment of a garnished fund by acceptance and cashing of check after garnishment would not defeat garnishment. TexCivA 14SW(2d)916(2dcase).

149-22½-New. Express company mailing money order for amount collected for C. O. D. shipment cannot be garnished as shipper's debtor until dishonor of order. Okl 292P560.

150-46 [f] See also 204 Iowa625, 215 NW625, 55ALR356 ("debt due or to become due" held not to include alimony). [i] **Money collected by local lodge for account of national lodge** and actually in hand of local lodge for that purpose is "debt or right and credit." NJSup 147A48.

151-51½-New. A restricted bank deposit is not subject to garnishment. 170 Ark1016, 282SW358.

151-51½-New. Payments of corporate funds made by a director to apply on his private debt, where accepted by a creditor with knowledge of the circumstances, are subject to garnishment in the creditor's hands in a suit by creditor of the corporation. 28F(2d)793.

152-64 [a] 218Ala163, 118S153.

153-93 See also 244 IllA291.

154-4½-New. A check on a garnishee bank in favor of defendant is not subject to garnishment in the hands of the bank. TexCivA 272SW571.

155-21 173Minn504, 216NW249.

156-42 236Mich37, 209NW929; 24 OhA 494, 156NE461.

157-45 24 OhA494, 156NE461.

159-64 TexCivA 14SW(2d)303.

159-66 24 OhA494, 156NE461 (dictum).

159-70 SD 232NW913.

160-87 Utah 269P1032, 1034 [citCJ].

161-95 136Wash261, 239P545.

161-98 TexCivA 26SW(2d)478(1stcase) (nonnegotiable note).

162-99½-New. , or a certificate of deposit in the hands of surety company as security for its risk. 136Wash261, 239P545.

162-14½-New. A note placed by defendant with a garnishee for special purpose could not be held by the garnishee and the proceeds applied on another indebtedness to the garnishee. 226Ky770, 11SW(2d)909.

163-22 BC [1930] 3DomLR203.

163-28 Alta [1930] 1DomLR302.

164-51 132 Or73, 282P230 (proceeds of policy are subject to garnishment, though action not yet maintainable thereon); TexCommnA 15SW(2d)1028 (2dcase).

164-52 246 IllA196.

164-55 22F(2d)541, 543 [citCJ]; 74 CalA247, 239P1095. [b] **Proceeds in hands of insurance company, claimed by assignment** after loss, may be garnisheed by creditors. 82Mont574, 268P 787.

164-56 22F(2d)541, 543 [citCJ]; 74 CalA247, 239P1095; 132 Or73, 282P230.

165-60 172Minn43, 214NW762, 53ALR 722.

165-62 172Minn43, 214NW762, 53ALR 722.

165-68 172Minn43, 214NW762, 53ALR 722. See also 74CalA247, 239P1095.

165-74 22F(2d)541, 543 [citCJ]; 74 CalA247, 239P1095. Contra 246 IllA196.

165-75½-New. An adjustment of loss under a nonwaiver clause is not such adjustment as to constitute a cause of action subject to garnishment where proof of loss had not been furnished and insurer still had the option to replace the property. 172Minn43, 214 NW762, 53ALR722.

166-31 254 IllA440.

166-84 But see 161Ga793, 131SE902, 903 [quotCJ], 44ALR1184.

166-85 161Ga793, 131SE902, 903 [quot CJ], 44ALR1184 (cash surrender value is not subject to garnishment till steps have been taken by insured to withdraw in cash accumulated surplus apportioned to policy). But see 241Mich255, 217NW29, 30 [citCJ], 57ALR692.

166-86 161Ga793, 131SE902, 903 [quot CJ], 44ALR1184.

166-88 161Ga793, 131SE902, 903 [quot CJ], 44ALR1184; TexCivA 23SW(2d) 482.

166-90 161Ga793, 131SE902, 903 [quot CJ], 44ALR1184.

166-90½-New. The cash loan value of a policy of insurance accruing at the end of a specified tontine period is not subject to garnishments by creditors of insured. 161Ga793, 131SE902, 44 ALR1184.

166-94 248Mich634, 227NW696(2d case); 221MoA868, 287SW819; MoA 3SW(2d)272; MoA 5SW(2d)648; 97 PaSuper13; 145Wash660, 261P388. But see TexCommnA 25SW(2d)601; TexCivA 27SW(2d)349.

166-97 221MoA868, 287SW819. See

also TexCivA 8SW(2d)354.
166-99 221MoA230, 1SW(2d)242.
167-6½-New. Security in the hands of indemnitor is liable to garnishment. 136Wash261, 239P545.
167-26 10PaDist&Co 133, 134 [citCJ].
168-39 [b] In Nova Scotia.-[1929] 3 DomLR156.
169-55 10PaDist&Co 133.
170-60 10PaDist&Co 133.
170-70 234 IllA605; 27 OhNPNS378.
171-76 234 IllA605.
171-79 [b] Before or after payment.-TexCivA 283SW277.
171-81 212Ala487, 103S455.
172-87 212Ala487, 103S455.
172-91 215Ala175, 110S149; 247 IllA 89; 116Nebr317, 217NW94, 97 [citCJ]. 66ALR594. [c] Fraud.-215Ala175, 110S 149.
173-93 212Ala487, 103S455; 215Ala 175, 110S149.
173-97 215Ala175, 110S149, 151 [cit CJ].
173-3 212Ala487, 103S455; 215Ala175, 110S149. [a] Garnishee must strictly conform to contract in paying wages in advance. 212Ala487, 103S455.
174-18 Ariz 289P515; 26 OhA313, 159 NE727.
174-19 170Ark54, 278SW625; 164Ga 177, 137SE919; 9LaA418, 121S237; 6 LaA147; 11LaA647, 124S628; 140Miss 615, 105S745 (while in hands of government disbursing agent). [a] Rule requiring firemen to pay creditors out of salaries in effect impounds salaries. 170Ark54, 278SW625.
174-22 163La292, 111S710, 718 [quot CJperOverton,J].
175-28 175Ark542, 299SW1002.
175-29 175Ark542, 299SW1002; 140 Miss615, 105S745, 746 [citCJ].
177-43 [b] Bank deposit.-TexCivA 285 SW941.
177-45 175Ark542, 299SW1002.
177-52 [c] Salary or fee.-220Ala478, 125S805.
178-66 140Miss615, 105S745.
179-67 170Ark54, 278SW625.
179-68 [a] (3) 6LaA147.
179-73 6LaA147. [a] One who performs functions prescribed by public authority for public purpose is officer within statute. 6LaA147.
179-76 [d] Elected offices and public offices.-163La292, 111S710.
179-81 [a] Expense account of public officer is not subject to garnishment. 163La292, 111S710.
181-2 218Ala511, 119S236(1stcase); 124 Or618, 265P786.
181-15 86CalA414, 260P930.
182-30 9LaA418, 121S237.
182-32 11LaA647, 124S628; Alta [1927] 3DomLR641.
183-42 81Colo 118, 253P1065, 1066 [citCJ].
183-44 81Colo 118, 253P1065, 1066 [citCJ]. [a] (1) 81Colo 118, 253P1065, 1066 [citCJ].
185-78 121Kan628, 249P587; TexCivA 3SW(2d)864, 871 [citCJ].
185-83 TexCivA 3SW(2d)864, 871 [cit CJ].
185-84 TexCivA 3SW(2d)864, 871 [cit CJ].
186-2 DelSuper 143A407; 121Kan 628, 249P587; 127Me423, 144A218; 53 SD499, 221NW257; TexCivA 3SW(2d) 864, 871 [citCJ]. [a] Effect of appeal.-TexCivA 3SW(2d)864.
187-6 TexCivA 3SW(2d)864, 871 [cit CJ].
187-8½-New. Liability of the administrator of a husband's estate on trustee process against a widow depended on the condition of things as they existed at the time of service. 127Me423, 144 A218.
187-11 DelSuper 143A407.
187-18 177Ark492, 6SW(2d)825 [quot CJ].
187-19 177Ark492, 6SW(2d)825 [quot CJ].
188-28 See also 5LaA329. [d] In South Dakota.-49SD215, 207NW85, 43 ALR186.
189-39 See also 204 Iowa625, 215NW 625, 55ALR356.
189-44 TexCivA 283SW576, 578 [cit CJ]. See also 176Minn18, 222NW509.
189-2 253Mass383, 149NE313; 235 Mich191, 209NW102; 240Mich129, 215 NW377; 241Mich34, 216NW390; 242 Mich23, 217NW913; 92PaSuper571; TexCivA 31SW(2d)508.
190-4½-New. Institution of proceedings and service of summons on garnishee constitute a suit. 39GaA614, 147 SE917.
191-21½-New. Illimitable jurisdiction is not given to district courts over garnishment proceedings after plaintiff controverts answer of garnishee who denies liability. TexCivA 5SW(2d)553.
192-37½-New. Garnishment action in aid of pending action must be instituted in court in which principal action is pending. ND 230NW596.
192-41 Nebr 232NW612.
192-43 165La587, 115S789; 116 Okl 284, 244P434.
192-50 169Minn188, 210NW874.
193-59 214Ala654, 108S765, 46ALR 928; 249 IllA161; 169Minn188, 210NW 874. [c] Jurisdiction over res cannot be waived or obtained by consent. 220 MoA676, 293SW512.
194-60 220MoA676, 293SW512; MoA 17SW(2d)685.
194-61 MoA 287SW874.
194-63 TexCivA 20SW(2d)413 (stock of foreign corporation cannot be impounded by garnishment).
194-66½-New. Court in which main action was tried is without jurisdiction to try issues arising under affidavit controverting answer of garnishee residing in another county. TexCivA 5 SW(2d)553.
194-68 7F(2d)499; 247Mich645, 226 NW672; 169Minn188, 210NW874; 49 ND312, 191NW620, 27ALR1392.
195-70 169Minn188, 210NW874.
196-72 111Conn383, 150A313; 169 Minn188, 210NW874.
197-77 [d] In Connecticut.-111Conn 383, 150A313.
199-95 180Ark638, 22SW(2d)165 (nonresident constructively served). See also TexCommnA 15SW(2d)1028 (2dcase).
200-15 247Mich645, 226NW672 (though cause of action did not accrue within state).
201-24 40GaA488, 150SE564(1stcase) (service on garnishee in county other than one in which sheriff has tenure of office confers no jurisdiction on court); 158Md186, 148A231 (service outside county of issuance of attachment).
201-25 7F(2d)499; 82Colo 472, 260P 1017; 143Miss299, 108S494.
202-44 MoA 17SW(2d)685.
203-49½-New. Garnishee residing in county other than that in which the main suit was tried is held not to waive jurisdiction by filing a motion to quash garnishment. TexCivA 5SW(2d)553.
203-59½-New. Under the West Virginia statute garnishment process against a resident domestic corporation must be sued out of the office of the clerk of the circuit court of the county in which such garnishee resides. 107WVa129, 147SE475.
203-59½-New. Under such statute garnishment process against a nonresident domestic corporation should be issued from the proper court of the county in which the judgment debtor could maintain suit against the corporation to assert the money or property claim involved in the garnishment. 107WVa 129, 147SE475.
204-68 169Ga136, 149SE908.
204-81 TexCivA 9SW(2d)474.
205-91 [a] In North Dakota.-ND 230 NW596.
205-95 49SD208, 206NW1005. [a] Rule not affected by stipulation between parties that jurisdiction of garnishment proceedings shall remain in court of county from which removal was had where garnishee is not party to stipulation. 49SD208, 206NW1005.
205-98½-New. Interpleaded defendant in garnishment action may be entitled to change of venue to county of his residence. ND 230NW596.
205-3 See also 90PaSuper58.
205-6 181Ark511, 27SW(2d)789.
206-14 TexCivA 13SW(2d)927.
207-30 10LaA404, 119S567; 1LaA347; 286Pa555, 134A444. [a] (3) Garnishment of shares of stock in hands of trustees, who were bound to deliver stock itself, not joining corporation, held ineffective. 286Pa555, 134A444. (4) And such garnishment is not validated by Uniform Stock Transfer Act. 286Pa555, 134A444.
207-43½-New. Where a creditor, seeking to subject assets of his debtor in a partnership, attacks, by equitable amendment, a transfer of partnership assets by the debtor pending garnishment proceedings, he may by such amendment add as parties defendant the transferor, transferee, and subsequent transferees. 37GaA718, 141SE 822.
207-44 246Mich540, 224NW352, 64ALR 427; TexCivA 13SW(2d)953. [c] Filing of summons and affidavit before service on garnishee is sufficient compliance with some statutes. 56ND531, 218NW223.
208-45 TexCivA 291SW266.
208-57 TexCivA 11SW(2d)826.
208-58 See also 123 Or534, 262P937.
209-79 248Mich167, 226NW874 (affidavit must conform to requirements of statute); 125 Or307, 267P52. [g] 329 Ill 82, 160NE193. [h] Allegation that indebtedness sought to be reached is not exempt is material. 52SD528, 219 NW206.
209-80 Alta [1929] 4DomLR975.
209-81 56ND531, 218NW223; Tex CivA 5SW(2d)235.
210-83½-New. Basic jurisdictional facts must be clearly pleaded. 107WVa 129, 147SE475.
210-90 [b] Where garnishee knows he is party intended, from conversations with plaintiff, misspelling of his name is immaterial. Sask [1925] 3DomLR513.
210-93 241Mich420, 217NW31.
210-94 241Mich420, 217NW31.
210-96 [e] Foreign corporation.-14Pa Dist&Co 1.
211-97 22AlaA269, 115S74.
211-2 TexCivA 16SW(2d)340.
211-3½-New. An affidavit by one not plaintiff need not recite that affiant is credible person. 329 Ill 82, 160NE193.
211-3¼-New. Where the garnishee is a domestic corporation, the suggestion must show whether it is a resident or nonresident corporation. 107WVa129, 147SE475.
211-3¼-New. In some jurisdictions principal action in tort will not support garnishment on affidavit that principal defendant has not sufficient property in state subject to execution. NM 289P803(1stcase).
211-6 [b] Where default judgment was vacated by agreement, garnishment affidavit not stating that judgment was entered has been held not defective. Tex CivA 283SW610. [c] Where original judgment is absent from record, presumption exists that judgment creditors recovered in their individual capacity as indicated by affidavit and amount due thereon is correctly stated. TexCivA 22 SW(2d)1083.
212-23 See also CalA 285P362.
212-24 [a] In Saskatchewan.-Sask [1925] 3DomLR513.
212-28 248Mich167, 226NW874. [c] In Saskatchewan.-[1930] 4DomLR123.
212-35½-New. Under some statutes affidavit of cause of action in foreign attachment sounding in tort must allege that tort was committed within commonwealth. 13PaDist&Co 265.
213-42 TexCivA 291SW266. [c] (2) Other affidavits. TexCivA 284SW227. [d] (1) TexCivA 281SW1113; Tex CivA 291SW266. (4) Where plaintiff released one of joint judgment debtors with reservation of rights against codebtor, affidavit need not show that released debtor had no property in his possession sufficient to satisfy judgment. TexCivA 281SW1113.
213-42½-New. Under some statutes affidavit of cause of action in foreign attachment must allege that defendant is owner of property in jurisdiction. 13 PaDist&Co 265.
213-43 [b] (4) Affidavit held insufficient which declares that garnishee is indebted to defendants or one of them. TexCivA 5SW(2d)553.

214-55½-New. An affidavit stating that garnishee had effects belonging to defendants, or one of them, is not too indefinite and uncertain. **TexCivA** 285SW933.

214-65 329 Ill 82, 160NE193.

214-67 **TexCivA** 31SW(2d)508.

214-70 **TexCivA** 13SW(2d)953.

214-71 56ND531, 218NW223. [d] **Failure to state corporate existence of** garnishee may be cured by amendment. 241Mich420, 217NW31.

214-72 [b] (2) Amendments striking words "for which judgment has been obtained" and inserting "for which suit is now pending" does not allege new cause of action. 35GaA89, 132SE238. (3) Under other sections of statute it is error to refuse amendment of affidavit to conform to pending suit after reversal of judgment by court of appeals. 35GaA89, 132SE238.

215-80½-New. In a proceeding to subject a debtor's interest in a partnership the creditor may by equitable amendment attack as void a transfer of the partnership assets by the debtor pending the garnishment proceedings. 37GaA718, 141SE822.

215-80⅓-New. When stay of proceedings has been granted on allowance of rule to dissolve attachment leave to file amended affidavit of cause of action is improvident. 14PaDist&Co 1.

215-82 **TexCivA** 31SW(2d)508.

215-86 See also 39GaA52, 145SE908.

215-88½-New. Plaintiff's right to issue a garnishment summons without an additional bond is terminated by trial and judgment in the pending suit. 39GaA52, 145SE908.

216-97 [a] (2) Bond reciting plaintiff would pay all damages defendant might sustain if garnishment order was wrongfully obtained held substantial compliance with statute. 143Okl131, 288P281.

216-99½-New. On motion to quash, a bond has been held sufficient where it identified the original cause of action by number and otherwise. **TexCivA** 283SW1110.

216-99⅓-New. Failure to designate the number of the original cause does not render bond insufficient. **TexCivA** 3SW(2d)503.

216-99¼-New. Bond not made payable to any person is void. **TexCivA** 31SW(2d)508.

217-21 35GaA89, 132SE238. [a] (2) Bond amendable by striking out words "or it should appear that amount sworn to be due on such judgment is not due," and inserting words "the plaintiff fails to recover in said suit pending." 35GaA89, 132SE238. [b] **After reversal of judgment** by court of appeals refusal to allow plaintiff to amend bond to conform to pending suit is error. 35GaA89, 132SE238.

217-23½-New. Under some statutes garnishment bond is not amendable. **TexCivA** 31SW(2d)508.

218-57 39GaA52, 145SE908.

219-84½-New. That the signature of the county clerk is followed by the name of a county other than that of which he is clerk does not invalidate a writ of garnishment. **TexCivA** 275SW725.

220-95 **Fla** 130S622 (writ directed to sheriff of any county is not void).

220-2 249 IllA372.

220-3 [f] **Description held defective.**-329 Ill 82, 160NE193.

221-8½-New. The fact that the writ embraces names other than the one stated in the affidavit is no ground for quashing it. **TexCivA** 283SW610.

221-8⅓-New. Where garnishment summons is issued in attachment suit rule of court in garnishment cases as to indorsement thereon of business and residence of defendants is not applicable. 255 IllA456.

221-10 22AlaA447, 116S708, 709 [cit CJ]; 249 IllA372.

221-17 **TexCivA** 5SW(2d)235.

221-21 [c] (1) **Ont** [1929] 3DomLR25. [d] **Trustees named in special precept for attachment.-Mass** 172NE884 (ruling of court as to capacity held not error).

223-38 **TexCivA** 283SW610.

223-42 [b] **Garnishment writ, not following affidavit, in that it omitted to require answer as to number of shares debtor held in garnishee corporations, held sufficient to support default judgment.** **TexCivA** 295SW950.

224-56½-New. Surety on a replevy bond may urge the same objections to the writ that the garnishee could have made. **TexCivA** 278SW456.

224-58 329 Ill 82, 160NE193.

224-65 248Mich319, 226NW817(1st case); **TexCivA** 275SW725; **BC** [1927] 3DomLR180.

224-66 **Fla** 130S622. [a] (8) Other instances. **Mass** 172NE884.

225-72 [a] (2) Amendment made at trial describing garnishee in representative capacity as administrator instead of in individual capacity cannot relate back to time of service so as to secure priority over another garnishing creditor. **Ont** [1929] 3DomLR25.

225-73½-New. Waiver of notice of hearing on motion to amend special precept for attachment. **Mass** 172NE884.

225-74 4LaA121; 246Mich540, 224NW352, 64ALR427; **TexCommnA** 23SW(2d)312. [b] (2) Evidence held to sustain finding that writ was never served. 178Ark1158, 13SW(2d)617. [d] **Omission of statement or imprint on copy of writ served** showing that original bore proper seal does not render service invalid. 123Or534, 262P937.

226-79 See also 155Miss242, 124S344.

226-80½-New. Letter of attorney appointing surrogate agent to receive process held not to include proceedings in which writ of attachment was issued. **NJ** 151A85.

226-85 248Mich167, 226NW874.

226-92½-New. Issuance of valid summons in main action is prerequisite to service of garnishee summons. 164Minn363, 205NW264.

226-92⅓-New. A motion to dismiss garnishment proceedings because substituted service made before return day was void because plaintiff had not availed himself of statutory permission, was properly denied as premature where plaintiff had time in which to perfect service. 248Mich167, 226NW874.

226-93 169Ga136, 149SE908 (words, "his county," as employed in statute authorizing sheriff to serve summons of garnishment on person found in his county, refer to county in which officer serving process has his tenure of office); 40GaA488, 150SE564(1stcase) (construction of words "his county"); 9LaA691, 120S239.

226-95 247Mich616, 226NW684.

227-98 178Ark1158, 13SW(2d)617; 237 IllA460.

227-4½-New. A writ, being a "summons," must be served as any other summons. 178Ark1158, 13SW(2d)617.

227-14 **MoA** 17SW(2d)685.

228-17 **TexCommnA** 23SW(2d)312. [d] **Service on debtor,** as president of garnishee does not affect validity of default judgment. **TexCivA** 295SW950.

229-35 **TexCommnA** 23SW(2d)312 (service on vice-president).

229-36 **TexCivA** 3SW(2d)503 (state bank).

229-38½-New. Under a statute providing for service on the president of a bank, service on the vice president is ineffectual. **TexCivA** 283SW265.

229-44 [a] **Service upon secretary of state as statutory agent of foreign corporation** of which he was not such agent has been held not to confer jurisdiction. **Wash** 286P666.

229-53 33GaA716, 127SE902 (agent in charge, and such agent may be partnership).

232-82 158Md186, 148A231.

233-83 **MoA** 17SW(2d)685.

233-99½-New. A provision of the statute relative to returning and filing summons in garnishment proceedings on the day it is issued is permissive and not mandatory. 248Mich167, 226NW874.

233-1 34GaA284, 129SE443 (sufficient to show pendency of proceedings); 246Mich540, 224NW352, 64ALR427; 220MoA676, 293SW512. [b] **Return held defective.**-329 Ill 82, 160NE193.

233-6 220MoA676, 293SW512.

234-11 175Ark1107, 1SW(2d)558.

234-12 220MoA676, 293SW512.

234-16 **MoA** 17SW(2d)685.

235-23 [a] **MoA** 17SW(2d)685. [d] **Evidence may show proper service,** though return is insufficient. **TexCommnA** 23SW(2d)312.

235-26½-New. Irregularity in stating the initial of garnishee's secretary on whom the writ was served is not fatal but curable by amendment before default. 239Mich337, 214NW63.

235-30 178Ark1158, 13SW(2d)617.

236-38½-New. A judgment based on a writ of garnishment actually served by the sheriff or a lawful deputy is not invalid, although the return was not properly made. 149Miss15, 115S114.

236-38⅓-New. Where a statute requires the return to be signed with the sheriff's name by the deputy sheriff if a deputy served the writ, a deputy who did not make the return may testify that he served the writ. 149Miss15, 115S114.

236-39 329 Ill 82, 160NE193; **TexCivA** 284SW227.

236-44 329 Ill 82, 160NE193; **MoA** 17SW(2d)685; 10PaDist&Co 533; **TexCivA** 283SW265; **TexCivA** 12SW(2d)676; **TexCivA** 13SW(2d)953.

236-45 **MoA** 17SW(2d)685; **TexCivA** 12SW(2d)676.

236-47 **MoA** 17SW(2d)685.

236-48 **TexCivA** 12SW(2d)676.

236-50½-New. Amendment may be allowed after removal of the case to the appellate court. **MoA** 17SW(2d)685.

236-51½-New. Correction of the return of a deputy sheriff may properly be made by the sheriff at any time before filing it with the clerk. 239Mich337, 214NW63 (irregularity in initial of corporation garnishee's secretary).

236-51⅓-New. Where a return is incorrect in any respect, it should be corrected before judgment is entered. **TexCivA** 135SW265.

237-54 220Ala448, 126S110; 36Okl ACR503.

237-55 180Minn119, 230NW476(2dcase) (judgment against garnishee without notice to defendant in original suit held not void).

237-57 **Okl** 293P195.

237-58 127 Okl 20, 259P565.

237-60 169Minn188, 210NW874.

238-63 [a] **Time of appearance.**-36 OklACR503. [b] **Garnishees served with notice and appearing by answer** were chargeable with notice of all subsequent proceedings. 181Ark444, 26SW(2d)115.

238-63½-New. Under some statutes, where an execution has been returned unsatisfied, no notice of garnishment proceedings after judgment or summons therein need be served on the judgment debtor unless the judge so orders. 127 Okl 20, 259P565.

238-83½-New. Where the appearance day stated in a notice to defendant was more than the statutory time, default or judgment will not be entered. 98 Fla23, 122S801.

238-87½-New. Defect in service waived by garnishee answers. **OhA** 173NE258.

240-3 **SD** 228NW807.

240-21 But see 201 Iowa1039, 203NW386.

241-25½-New. After judgment against the garnishee he cannot be requested by plaintiff to appear, upon service of written notice, to be examined orally under oath as to disclosure made by him prior to trial. 27Hawaii749.

241-25⅓-New. After judgment plaintiff cannot question garnishee's liability. 27Hawaii749.

241-25¼-New. Garnishee's appearance gives the court no jurisdiction over res. 220MoA676, 293SW512.

241-27 95CalA537, 272P1104; 201 Iowa1171, 208NW860; 205 Iowa491, 218NW276; 205 Iowa491, 218NW276; 219Ky590, 293SW1069; 148Md289, 129A660; 157Md36, 145A220; 241Mich255, 217NW29, 57ALR692; 220MoA668, 293SW73, 76 [citCJ]; 221MoA230, 1SW(2d)242; 51ND66, 199NW138; 51ND737, 200NW906; 136 Okl 158, 275P649; 121 Or407, 255P471; 289Pa341, 137A461; 51SD65, 212NW47; **TexCivA** 278SW299, 300 [quotCyc]; **TexCivA** 286SW345; **TexCivA** 286SW760; **TexCivA** 291SW306;

TexCivA 291SW944; **TexCivA** 22SW (2d)701; **TexCivA** 27SW(2d)599; **Utah** 269P1032.

242-28 219Ky590, 293SW1069; 221 MoA868, 287SW819; **TexCivA** 278SW 299, 300 [quotCyc].

242-29 218Ala163, 118S153; 84Colo 409, 270P875; **TexCivA** 272SW571; **TexCivA** 278SW299, 300 [quotCyc].

242-30 212Ala487, 103S455; 220MoA 668, 293SW73; 220MoA668, 293SW73, 76 [citCJ]; 51ND737, 200NW906; **Tex CivA** 1SW(2d)717. [a] **Deductions from proceeds of sale of property.**–52SD528, 219NW206.

243-31 81Colo 483, 256P660; 166Minn 481, 208NW413; 221MoA230, 1SW(2d) 242; **TexCivA** 278SW299; **TexCivA** 291 SW306.

243-32½-New. Garnishment does not prevent garnishee from delivering to defendant money or property due from third person. **TexCivA** 272SW571. [a] **Payment of check of third person by garnishee bank** to defendant does not render bank liable. **TexCivA** 272SW 571.

243-32⅓-New. Where all garnishee did was within its legal right it cannot be held liable on ground of collusion or fraud in surrendering check or making payment to defendant. **TexCivA** 272SW 571.

243-32¼-New. Garnishment against garnishees individually and as trustees of the estate of deceased has been held not to bind shares of stock held by them as trustees under a deed of trust of deceased. 286Pa555, 134A444.

243-32½-New. Description of garnishees as executors and trustees of the estate of deceased "and in any other capacity" has been held sufficient to bind stock held by garnishees as trustees under a deed of trust of deceased distinct from his estate. 286Pa555, 134A 444.

243-32⅙-New. Garnishment of trustee has been held not to bind a fund represented by a check delivered to attorneys for beneficiary of trust, where the check never came into the hands of the trustee. 286Pa555, 134A444.

243-33 84Colo 409, 270P875; 111Conn 383, 150A313; **Iowa** 224NW548.

243-34 111Conn383, 150A313; 151Miss 91, 117S363; 221MoA230, 1SW(2d)242; **ND** 232NW606.

243-41 53SD246, 220NW489.

243-42 28Hawaii528; **Iowa** 230NW349.

243-43 204 Iowa625, 215NW625, 55 **ALR**356; 173Minn504, 216NW249; 51 **ND**737, 200NW906; 53SD246, 220NW 489.

244-44 **CalA** 288P1104.

244-46 120Kan183; 165La587, 115S 789; 116Nebr317, 217NW94, 56**ALR** 594; 290Pa38, 137A815, 53**ALR**1020; **TexCivA** 18SW(2d)784; **Utah** 269P1032, 1034 [citCJ]; 150Wash267, 275P694(1st case). [e] **Moneys collected after service of writ on accounts theretofore assigned to garnishee for collection** are not subject to garnishment. **Utah** 269 P1032.

244-47 234 IllA605; 247 IllA23.

244-50 151Miss91, 117S363, return day of writ); **TexCivA** 298SW652.

245-52 150Wash267, 272P955.

245-53 290Pa38, 137A815, 53**ALR**1020.

245-56 121 Or407, 255P471; 289Pa341, 137A461.

246-57 [a] (2) Where mortgagor turns mortgaged grain over to mortgagee to sell and apply proceeds to debt, such proceeds, to that extent, are not subject to garnishment by mortgagor's general creditor. 51SD65, 212NW47.

247-63 5F(2d)529.

247-69 **TexCivA** 1SW(2d)356, 357 [quotCJ].

248-77 125Me465, 134A689.

248-81 198Wis11, 223NW83.

248-82 **TexCivA** 295SW640.

250-9 219Ky590, 293SW1069.

250-11 [b] **By garnishment of renter** judgment creditor acquires landlord's lien by constructive assignment. **Iowa** 230NW349.

253-27 168Ark754, 271SW703; 90Fla 420, 106S427, 429 [citCJ]; 200 Iowa 869, 205NW513 (garnishment of tenant gives no lien on share of crop belonging to landlord at maturity of crop); **Iowa** 232NW633; 150Md687, 133A847.

253-28 42 Ida224, 244P1102 (lien on property pledged with garnishee as security for debt).

253-29 95Fla99, 116S19, 21 [citCJ].

253-31 150Md687, 133A847.

253-32 34F(2d)832.

253-33 90Fla420, 106S427, 429 [citCJ]; 82Mont574, 268P787.

253-34 80Mont258, 260P116.

254-35 21AlaA580, 110S476.

254-42 106TexCr156, 291SW246.

254-45 Iowa 230NW349.

254-46 37GaA392, 140SE518.

255-51 135Wash389, 237P729 (bank deposit).

255-55½-New. After service of garnishment on tenant landlord's assignment of lease cannot convey landlord's garnished interest in growing crops. 49 SD616, 208NW160.

255-59 **TexCommnA** 276SW664.

256-61 128 Okl 299, 263P107.

256-66 83Colo 78, 262P919; **TexCivA** 298SW652.

256-67 **Okl** 293P195.

257-72 [a] **In Georgia.**–39GaA165, 146 SE495.

257-80½-New. Garnishment of those in possession of assets of a decedent's estate before the appointment of an administrator does not bind the interest of an heir as against garnishment of the administrator after final distribution has been ordered by the probate court. 121 Kan628, 249P587.

258-88 45 Ida746, 265P699, 700 [cit CJ].

259-92 52SD528, 219NW206, 207 [cit CJ].

259-96 42 Ida224, 244P1102, 1103 [cit CJ].

259-97 151Miss91, 117S363, 364 [cit CJ].

259-2 [a] **Executor,** charged with knowledge of law that money in his hands is due to assignee of claimant against estate, is not protected in payment to sheriff on service of writ of garnishment. 48Nev100, 227P1016, 232 P783.

260-5 [d] **Delivery to sheriff.**–45 Ida 595, 264P233.

260-6½-New. After the sheriff has filed a return he cannot lawfully release the property from the garnishment. 42 Ida 224, 244P1102.

261-15 85Colo 212, 274P924; 28Hawaii 528; 255 IllA456 (garnishee not misled by plaintiff); 31NM593, 248P885. See also 157Md36, 145A220. [k] **Garnishee not negligent in paying liability** on insurance policy without disclosing litigation to other claimants. 111Conn383, 150A313.

261-16 37GaA392, 140SE518. But see 171Ark1187, 287SW369.

263-22½-New. Treasurer of corporation is not personally liable. 219Ky 590, 293SW1069.

263-22⅓-New. The treasurer of a garnished corporation has been held not personally liable to plaintiff for transferring funds to an insolvent corporation. 219Ky590, 293SW1069.

265-60½-New. Where a bridge contract, requiring the principal contractor to pay for all material used in the construction of a bridge, was binding on the contractor and his surety as respects subcontractors' debts for labor and material, the principal contractor, after service on him of a writ of garnishment for a debt due from defendant subcontractors for labor or material and his admission of conditional liability by answer, had the right to pay such subcontractors therefor. 218Ala 163, 118S153.

265-61 131 **Okl** 209, 268P257.

266-75½-New. In some jurisdictions where garnishment proceedings are defective, garnishee cannot lawfully refuse to comply with debtor's demands. **TexCivA** 31SW(2d)508.

266-81½-New. Efficacy of an inchoate lien, created by service of attachment on garnishee, to whom defendant had assigned judgment, could not be impaired by garnishee's subsequent consent that the assignment be ignored. 157Md36, 145A220.

268-2 261Mass360, 158NE774.

270-24 [a] **Protection to garnishee in some manner against double liability** should be afforded, unless there is collusion to defeat local action. 261Mass 360, 158NE774.

270-25 261Mass360, 158NE774.

270-26 261Mass360, 158NE774.

270-28 158NE774. **Erratum.**–Phrase "by a garnishee" in text should be "against a garnishee."

270-29 **TexCivA** 297SW563, 567 [quot CJ].

271-34½-New. A subsequent trustee process in another jurisdiction is not ground for abating a writ. 261Mass360, 158NE774.

271-34⅓-New. Abatement is properly denied where recovery to some extent is not precluded because the claim is for a greater amount than that in foreign garnishee proceedings. 261Mass 360, 158NE774.

271-34¼-New. Abatement is properly denied where it would result in barring an action under limitation of time to sue. 261Mass360, 158NE774.

271-34⅕-New. Defendant seeking abatement because of a foreign trustee or garnishee process can have all benefits, entitled to by equity, if facts are set up in the answer. 261Mass360, 158 NE774.

271-34⅙-New. On plea for abatement, the court should ascertain whether both cases should go forward simultaneously, and, if not, what should be done. 261Mass360, 158NE774.

271-34⅐-New. The defense of foreign trustee process is available only while defendant is subject to possible double liability. 261Mass360, 158NE774.

271-39 253Mass383, 149NE313; 36 **Okl** ACR503.

272-51 31NM593, 248P885.

272-53 31NM593, 248P885, 886 [cit CJ].

272-54½-New. Upon dismissal of the main action by judgment and until supersedeas of the judgment there is nothing to prevent voluntary payment by or entry of judgment against the garnishee, notwithstanding the existence of a right to appeal. 31NM593, 248P 885.

274-89 [f] **Defendant cannot urge defect in proceeding** where in answer he disclaimed any interest in fund sought to be impounded. – **TexCivA** 31SW(2d) 856.

274-1 115 Or633, 239P810.

275-7 See also 10PaDist&Co 641.

275-7½-New. Pendency of garnishment prevents garnishee from asserting rights as mortgagee. 253Mass383, 149 NE313.

275-8½-New. Garnishee has the duty to protect interests of defendant. 296 Pa265, 145A846.

275-10 58ND934, 228NW435; 121 Or 407, 255P471; **TexCivA** 278SW299. [a] (8) 121 Or407, 255P471.

276-13 **TexCommnA** 273SW836, 838 [quotCJ].

276-14 **TexCommnA** 273SW836, 838 [quotCJ].

276-15 214Ala654, 108S765, 46**ALR** 928; **TexCommnA** 273SW836, 838 [quot CJ].

276-16 **TexCommnA** 273SW836, 838 [quotCJ].

276-17 **TexCommnA** 273SW836.

276-19 245 IllA602; **TexCivA** 3SW(2d) 503.

277-27 81Colo 107, 253P1055, 1056 [citCJ]; **TexCommnA** 281SW1045.

277-35 **TexCommnA** 281SW1045.

277-38 252 IllA612; 14PaDist&Co 1.

278-40 245 IllA602; 171Minn280, 214 NW26; 22 OhA67, 153NE293; **TexCivA** 21SW(2d)59.

279-71 45 Ida746, 265P699, 700 [cit CJ]; 240 IllA64; 151Miss91, 117S363; 121 Or407, 255P471; 52SD528, 219NW 206, 207 [citCJ]; **TexCivA** 278SW299.

280-72 **TexCivA** 278SW299.

281-93 But see 337 Ill 241, 169NE193. [d] **Applying deposit on demand notes** after service of process relieves bank of liability. 253Mass169, 148NE447.

282-6 See also 121 Or407, 255P471.

284-20½-New. Amount of recovery. Verdict held excessive. 126Me598, 138 A527.

285-39 249Mich22, 227NW710.
285-43 55ND741, 214NW911. [d] **Time within which exemption may be claimed** is prescribed by statute in some jurisdictions. 55ND741, 214NW911 (within thirty days after service of garnishee summons).
285-44 **TexCivA** 16SW(2d)926.
286-47 151Miss91, 117S363.
286-49 22 OhA67, 153NE293.
286-65 55ND741, 214NW911; **TexCivA** 29SW(2d)447.
287-67 6PaDist&Co 551.
287-77 192NC31, 133SE399, 402 [cit CJ].
287-81 11LaA610, 124S614.
288-97 [a] (4) Failure of garnishee to file answer in time subjects him to risk of having right to answer cut off by entry of judgment. 39GaA72, 146SE639.
288-97½-New. , or after filing of interrogatories. 233 IllA346.
288-99 161Ga62, 129SE787. [c] **In Arkansas.**-170Ark1016, 282SW358.
288-99½-New. , or before or at the time plaintiff moves to enter up judgment against him, 35GaA422, 133SE298.
289-1½-New. Permitting an answer to be filed by garnishees not answering until trial of the issues is within the trial court's discretion. 177Ark79, 7SW(2d)776.
289-2 177Ark79, 7SW(2d)776.
289-11 See also **TexCivA** 14SW(2d)1043
289-19½-New. Failure of the garnishee to interpose an answer until the time therefor has expired constitutes no ground for attack on the proceedings by defendant. 56ND531, 218NW223.
290-22 But see **TexCivA** 11SW(2d)826.
291-45 But see 39GaA614, 147SE917.
292-61 255Mass255, 151NE114.
292-74½-New. In some jurisdictions service is defective where there is no notice to the garnishee to answer within a stated time. 92PaSuper571.
292-78½-New. Answer is not essential until filing of interrogatories. 233 IllA346.
292-80 89PaSuper370.
293-3 255Mass255, 151NE114.
294-10 216Ala282, 113S261.
294-10½-New. Under some statutes the examination of a garnishee before a commissioner constitutes part of his disclosure. 236Mich208, 210NW292.
294-25 **TexCommnA** 285SW290; **TexCivA** 12SW(2d)1087.
295-26 91Fla593, 109S212, 48ALR957.
295-28 89PaSuper370.
295-29 121Kan640, 249P590; 90PaSuper327.
295-33½-New. A garnishee who does not know whether property held by him belongs to the attachment or execution debtor may deny ownership in such debtor and thereby force the garnishing creditor to prima facie proof of such ownership. 201 Iowa144, 206NW667 (property held as cash bail).
295-37½-New. Denial of having any property, money, or credit of defendant except as explained with respect to estate of which garnishee was executor sufficiently presents an issue. 121Kan640, 249P590.
296-48 91Fla593, 109S212, 48ALR957; 121Or407, 255P471 (allegation of conclusions is insufficient). [d] **Answer showing that mortgagee claims funds realized from auction sale** of debtor's property in hands of clerk of sale and making specific reference to mortgage which is attached sufficiently pleads mortgage. 83Colo78, 262P919.
297-65½-New. The garnishee must take notice of exceptions filed to his answer. **TexCivA** 276SW351.
297-65⅓-New. Notice to the garnishee of the court's action in sustaining exceptions to his answer is not necessary. **TexCivA** 276SW351.
297-70 236Mich208, 210NW292.
298-72 236Mich208, 210NW292.
298-73 236Mich208, 210NW292.
298-75 But see **TexCivA** 3SW(2d)864.
300-6 213Ala195, 104S334; 215Ala175, 110S149; 178Ark1079, 13SW(2d)816; 161Ga58, 129SE526; 39GaA462, 147SE720; 45 Ida579, 264P382; 240 IllA46; 201 Iowa144, 206NW667; 164La998, 115S60; **LaA** 122S149; 130 Okl11, 264P896; **TexCivA** 16SW(2d)926; **TexCivA** 22SW(2d)546. See also 198Wis154, 223NW446. But see 255 IllA456. [d] **In California.**-79CalA655, 250P700.
300-11½-New. A disclosure is analogous in its function to an answer in chancery. 236Mich208, 210NW292.
300-13 28Hawaii528.
301-18 246Mich540, 224NW352, 64ALR427.
301-20½-New. **As bar.** Admission of indebtedness to debtor has been held to bar intervention. **TexCivA** 284SW227.
301-21 20 OhA123, 153NE150.
301-25 21AlaA580, 110S476.
301-29½-New. The answer of garnishee as to consideration of mortgage was held not to preclude full examination of him relative to validity of the mortgage, where such was the primary question. 255Mass255, 151NE114.
301-29⅓-New. Whatever is admitted by a disclosure may be treated by plaintiff as established. 236Mich208, 210NW292.
301-29¼-New. The debt must be admitted to hold garnishee on answers. 204 Iowa625, 215NW625, 55ALR356.
302-33½-New. Garnishee who fails through accident, mistake, or inadvertence to answer one or more of statutory inquiries is not without remedy if timely interposed. **TexCommnA** 285SW290.
302-35½-New. Trustee is not liable for amount of judgment against debtor where deputy serving writ, paid trustee less than lawful fee required by statute. 50RI452, 148A600.
302-36 **TexCivA** 22SW(2d)1083. [d] (3) Pleadings should be sufficiently definite and certain as to make any judgment rendered res judicata. 230Ky82, 18SW(2d)883. [i] **Burden is on judgment-creditor** to see that statutory requirements have been complied with. 50RI452, 148A600.
302-43 See also 128 Or21, 271P738.
303-51 81CalA317, 253P757, 762 [quot CJ].
303-52 136 Okl237, 277P233. See also 192NC31, 133SE399, 402 [citCJ].
303-55 81CalA317, 253P757, 762 [quot CJ].
304-57 79CalA655, 250P700.
304-61 81CalA317, 253P757, 762 [quot CJ].
304-64½-New. In Manitoba where money paid into court under garnishee order is paid out by clerk without authority to debtor's assignee, judge may order repayment. Man [1930] 2DomLR45.
304-70 213Ala195, 104S334; **TexCivA** 295SW698.
305-76½-New. Controverting affidavit to garnishee's answer makes garnishment proceedings more than process in aid of execution. **TexCivA** 5SW(2d)553.
305-79 **TexCivA** 26SW314. [a] **Where answer does not indubitably deny indebtedness to defendant** controverting affidavit is not required under some statutes. **TexCivA** 25SW(2d)192 (answer stating that garnishee's books did not show indebtedness to defendant but showed indebtedness to his wife).
305-85 149Wash624, 272P58.
305-85½-New. By failure to traverse the answer, plaintiff did not admit a claim of interveners asserted in the garnishee's answer. 10LaA531, 120S637(1st case).
305-87 213Ala195, 104S334; 130 Okl11, 264P896; **TexCivA** 295SW698. [e] **In Texas.**-**CivA** 26SW(2d)314.
305-88 216Ala282, 113S261; **TexCivA** 295SW698.
305-88½-New. Filing a complete new answer preserves rights of plaintiff to contest the answer. 216Ala282, 113S261.
306-93 111Conn383, 150A313 (demurrer properly overruled).
306-97 213Ala195, 104S334.
306-99 [d] **Answer held sufficient.**-181 Ark726, 27SW(2d)514.
306-1 33GaA626, 127SE621.
307-4½-New. Where garnishees, by answer, asserted a mortgage of garnished chattels, plaintiff in garnishment may traverse the answer and in the alternative pray leave to pay the mortgage debt. 81Colo483, 256P660.
307-4⅓-New. Where garnishee voluntarily went to trial on issues formed by the court, an objection that one issue was not embraced in the affidavit controverting garnishee's answer comes too late after final judgment. **TexCivA** 295SW698.
307-4¼-New. Debtor cannot traverse the answer of a nonresident garnishee, admitting assets which the debtor had assigned to others joined in the suit. **TexCivA** 289SW149.
307-4⅕-New. Defendant to the main suit cannot traverse the answer of garnishee admitting indebtedness to be applied to pay defendant's debt. **TexCivA** 289SW149.
307-5 [b] (2) Where garnishee makes answer to garnishing officer, he is in court on return of such answer, though it unequivocally denies all indebtedness, and he is not entitled to notice of controverting of such answer by execution plaintiff. 201 Icwa1039, 203NW386.
307-7½-New. The principal defendant need not be given notice of plaintiff's election to take issue on the garnishee's return or answer. 50SD328, 210NW102.
307-14 **TexCivA** 295SW698. But see **TexCivA** 276SW351.
308-21 201 Iowa144, 206NW667; 205 Iowa491, 218NW276.
308-28 221MoA868, 287SW819. [a] **But where garnishee's answer raised issue** of insolvency, he has burden of proving it. **TexCivA** 26SW(2d)314.
308-29 246 IllA196; 247 IllA89; 201 Icwa144, 206NW667; 148Md628, 129A915; **TexCivA** 272SW571; **TexCivA** 27SW(2d)599 (that money in garnishee's hands represented indebtedness to defendant and was subject to garnishment).
308-34 **MoA** 287SW874; 10PaDist&Co470.
309-42 201 Iowa144, 206NW667.
309-44 247 IllA89.
310-50 255Mass255, 151NE114; **MoA** 20SW(2d)540; **MoA** 26SW(2d)843.
310-51 [a] (11) Where tenant-garnishee was liable as garnishee for value of crops which he willfully refused to harvest pursuant to his contract, witnesses may testify to value of crops if harvested. 202 Iowa141, 209NW408. (12) On issue of reasonable rental value of land admission of evidence that it was worth five dollars an acre is not error, though lease fixed it at six dollars where reasonable value was much less. 202 Icwa141, 209NW408. (13) Other evidence held admissible. **TexCivA** 8SW(2d)683. (14) Where garnishee answered in effect "no funds," it could prove that it charged off debtor's deposit against indebtedness owing from him. 337 Ill241, 169NE193. (15) Where fair value controls, reasonable market value is admissible. **TexCivA** 26SW(2d)314. [b] (5) In proceedings against garnishee tenant of debtor, testimony as to expenditures for improvements on farm is inadmissible where not within issues. 202 Iowa141, 209NW408.
311-59 202 Iowa141, 209NW408.
312-64 [d] **Where admission of fact in issue is made by garnishee,** plaintiff need not prove falsity of answers to interrogatories. 11LaA610, 124S614.
312-65 178Ark1079, 13SW(2d)816; **CalA** 288P818; 242 IllA60; 9LaA732, 120S256; **Mich** 233NW341; **MoA** 17SW(2d)685. [a] (1) 149Md86, 131A34; 121Or407, 255P471. (2) **MoA** 289SW345. (3) 196Wis324, 220NW183. (10) **That** check in hands of bank under garnishment was placed by payee with bank for collection only. **TexCommnA** 276SW664. (11) Other evidence held sufficient. **TexCivA** 283SW576. (12) To show that garnishee was not indebted to defendant. **ND** 228NW812. (13) To sustain jury's finding that plaintiff had relinquished funds to debtor. **TexCivA** 27SW(2d)290(2dcase). [e] **Evidence that garnishee compromised** claim of debtor antedating attachment is sufficient to prove that garnishee owed debt. 162La774,

111S160. [f] **Evidence held to warrant decision below** that garnishee's allegations of loss of profits for breach of contract by defendant were not sustained. 121 Or407, 255P471.

312–66 234 IllA605; 11LaA38, 123S416 (1stcase). [a] (1) 234 IllA605; 205 Iowa491, 218NW276; 205 Iowa491, 218 NW276; Iowa 228NW61; 163La325, 111S773; TexCivA 272SW571 (on check issued by garnishee bank); 143Va46, 129SE219 (mere suspicion of conspiracy). (2) 201 Iowa144, 206NW667. (6) To overcome evidence that property was no longer in possession of garnishee. 156Miss556, 126S191.

313–68 [b] **Judgment against garnishee held erroneous.**–TexCivA 21SW(2d)23.

313–71 213Ala195, 104S334.

314–88½–New. After examination is begun by the judge, an attaching creditor may not have the issues tried by jury. 255Mass255, 151NE114.

314–88⅓–New. Facts were held to show that the attaching creditor elected to waive a jury. 255Mass255, 151NE114.

314–88¼–New. The court is justified in dismissing the action upon an uncontradicted affidavit of a foreign statute affecting the rights of parties to the fund garnished, although by virtue of an unverified reply existence of the statute was an issue in the case. 170Minn120, 212NW3.

314–90 [a] **In Iowa.**–201 Iowa1039, 203 NW386.

314–92 [b] (6) Under Comp. L. (1915) § 13132, requiring demand for trial within ten days after filing disclosure, it is within discretion of court, upon application and showing, to extend time within which to file demand. 236Mich 208, 210NW292. (7) Discretion of court in denying garnishee's motion to extend time within which to file demand for trial is not abused where delay of two years is not excused. 236Mich208, 210 NW292.

315–95 150Wash267, 272P955.

315–2 28Hawaii528; 247Mich241, 225 NW536; TexCivA 291SW306.

315–3 [a] **Failure to try this issue** is ground for reversal. TexCivA 284SW 227.

315–4 [b] 158La183, 103S733.

315–6½–New. All questions as to interests of vendee's mortgagee when summoned properly are to be settled in vendor's lien. 253Mass383, 149NE313.

316–18 165Minn100, 205NW947.

316–26 35GaA155, 132SE143; 202 Iowa 141, 209NW408; Iowa 224NW548; MoA 289SW345; MoA 20SW(2d)540; 89Pa Super370; TexCivA 18SW(2d)775. [a] **Questions of fact in trial by court.**–Ariz 292P1025.

316–27 MoA 277SW575.

316–28 35GaA453, 133SE752.

316–29 202 Iowa141, 209NW408; 148 Md628, 129A915 (evidence sufficient to go to jury).

316–30½–New. Submitting issue of indebtedness, when evidence does not warrant it, is error. 171Ark1187, 287SW 869.

316–30½–New. It is error to dismiss the suit of an attaching creditor on the ground that the record shows no indebtedness by garnishee to him, 104 WVa122, 139SE755.

316–30⅓–New. especially where the record shows a strong probability of the existence of evidence to support a decree for plaintiff. 104WVa122, 139SE 755.

316–30⅙–New. On trial by the court without a jury where the right to recover depends on the construction of documentary evidence the giving of a peremptory declaration of law that the garnishee is indebted in a specified sum is not improper where plaintiff makes a prima facie case and garnishee offers no evidence. MoA 17SW(2d)685.

317–33 181Ark231, 26SW(2d)107.

317–36 TexCivA 26SW(2d)314 (definition held erroneous).

318–47 [b] (1) 292Pa556, 141A484. (3) Verdict against testamentary trustees, for full amount of judgment and interest to be levied on interest of judgment debtor in estate and paid as his interest becomes due and payable, is proper where amount in trustees' hands subject to attachment cannot be ascertained at time of verdict. 292Pa556, 141A484. [c] **In Georgia.**–33GaA626, 127SE21.

318–53½–New. Defendant's trustee in bankruptcy is not entitled to order directing garnishee to pay money into court for benefit of trustee where garnishment proceedings antedated bankruptcy. 118Kan637, 237P71.

318–56 38F(2d)212.

319–60 [a] 85Mont389, 278P836.

319–66½–New. Judgment should provide that writs shall issue and not leave the matter to the clerk's discretion. Tex CivA 295SW698 (judgment held sufficient).

319–66⅓–New. Final judgment held proper without scire facias. 233 IllA346.

319–66¼–New. Judgment for garnishee is proper where the principal defendants transferred to one not a party the garnishee's chattel mortgage. 244Mich373, 221NW155.

319–66⅙–New. Likewise, a judgment against the garnishee is improper where the garnishee's employee transferred his wages to a bank which paid money to his wife at his request so that neither the employee nor the wife could question the assignment. 84Colo 409, 270P 875.

319–68 215Ala449, 111S28, 29 [citCJ]; 168Ark754. 271SW703; 255 IllA456; MoA 287SW874; 55ND231, 212NW925; SD 232NW913; TexCommnA 281SW 1045; TexCivA 281SW326; TexCivA 281 SW328; TexCivA 283SW265; TexCivA 21SW(2d)59; TexCivA 31SW(2d)856; 104WVa122, 139SE755.

320–69 See also TexCivA 31SW(2d)856.

320–70½–New. Where judgment in rem could not be rendered against a nonresident defendant, served by nonresident notice, judgment cannot be rendered against the garnishee. TexCivA 20SW (2d)413.

320–71 TexCivA 281SW326; TexCivA 281SW328.

321–75 [a] **In Texas.**–CivA 20SW(2d) 413.

321–87½–New. Judgment against garnishee is unauthorized where nonresident principal defendant was not served and did not appear generally. 215Ala 449, 111S28.

321–92 45 Ida579, 264P382.

321–96½–New. Amendment of return. Since the validity of judgment depends on sheriff's return of writ, the writ should be corrected, if incorrect in any respect, before judgment is rendered. TexCivA 283SW265.

322–7½–New. Contention that conditional judgment and final judgment were against the same person is held not sustained by record. 329 Ill 82, 160 NE193.

323–17 222MoA1168, 11SW(2d)1068.

323–19½–New. Judgment is invalid against garnishee where there are no findings of fact or conclusions of law. 121 Or482, 256P190.

323–19⅓–New. Where judgment is in the alternative, conditional, or contingent, it is a nullity. TexCivA 13SW(2d) 146.

323–19¼–New. Part of a judgment contingent upon the outcome of a suit in another state was void. TexCivA 13SW (2d)146.

323–27 27 OhNPNS378 (amount fixed by statute in garnishment of personal earnings and court is without discretion).

326–67 239 IllA578.

326–70 236Mich208, 210NW292.

327–71 245 IllA602.

327–76 177Ark79, 7SW(2d)776; 236 Mich208, 210NW292; TexCivA 276SW 351; TexCivA 26SW(2d)478(1stcase). But see 12PaDist&Co 504.

327–78 212Ala487, 103S455; 164La 998, 115S60; LaA 122S149; 236Mich 208, 210NW292; 89PaSuper370; 90Pa Super327. [c] (4) Other instances. 89 PaSuper370; TexCivA 26SW(2d)478 (1stcase).

328–79 215Ala175, 110S149. [a] See also 89PaSuper370.

328–81 236Mich208, 210NW292.

328–82 Utah 269P1032.

329–85 213Ala195, 104S334; 164La 998, 115S60.

330–94 167La593, 120S18.

331–7 TexCivA 4SW(2d)98; TexCivA 14SW(2d)1043. [d] 12PaDist&Co 504. [e] **Answer held unjustified.**–155Wash 673, 286P57. [f] **Plaintiff's remedy** where answer denies indebtedness but is evasive or defective is motion to strike from files, or treatment as nullity and rendering of conditional judgment against garnishee or contesting of answer by statutory method, but no final judgment can be rendered against garnishee. 213Ala195, 104S334.

332–13 TexCommnA 285SW290. [b] TexCivA 276SW351.

332–17½–New. Garnishee, a foreign corporation, should not be penalized by having judgment rendered against it for failure to answer questions regarding shares of stock owned by defendant where its answer disclosed that the only property it could have held would be corporate stock of the garnishee owned by defendant. TexCivA 20SW(2d)413.

332–17⅓–New. Garnishee's failure to answer a question, which, if answered most favorably to plaintiff, would not give the court jurisdiction, does not warrant judgment against the garnishee and nonresident defendant. TexCivA 20 SW(2d)413.

332–25 [b] **Effect of denial of judgment on disclosure.**–Where motion for judgment on disclosure is denied without prejudice to what may be shown on statutory issue, whatever remedy plaintiff may have as to statutory issue is preserved without necessity of demand for further disclosure. 242Mich 515, 219NW752.

333–27½–New. A motion for judgment on the garnishee's answer before expiration of the time allowed by defendant to controvert such answer is premature where defendant has not controverted the answer. Ariz 283P285.

333–29 9LaA732, 120S256; Tex CommnA 285SW290; TexCivA 296SW 976; TexCivA 20SW(2d)413. [b] Tex CommnA 285SW290. [h] **Statute construed.**–TexCommnA 285SW290.

333–33 [b] **No judgment can be rendered** where answer denying indebtedness is before court. 13LaA30, 127S95(2d case).

333–35 But see 35GaA622, 134SE180.

334–36½–New. Statute does not require notice to be given a garnishee defendant that its default has been entered. 239 Mich337, 214NW63.

334–36⅓–New. Failure of the clerk of the court to indorse the garnishee's answer as filed and to enter it on the docket did not deprive the garnishee's answer of its power to prevent the issuing of a judgment pro confesso. 10LaA17, 120S401.

334–36¼–New. A defect in the service of a writ of garnishment, subsequently corrected by permitting an amendment to show that service was had upon the proper person, had no effect on judgment for money rendered by default. TexCivA 13SW(2d)953.

334–36⅙–New. A sheriff serving a garnishee a summons is not an agent of a judgment creditor in the sense that the judgment creditor is bound by the sheriff's statement that, if the garnishee did not owe anything, it need not answer the summons, and the garnishee relies on such representation at its peril. 199 Wis466, 226NW303.

334–40 13LaA30, 127S95(2dcase) (holding it error not to consider answer filed one day late, as failure to answer in specified time is not final, only motion in open court making it so).

334–42 39GaA72, 146SE639.

334–46½–New. Default judgment against garnishee will be presumed rendered when the garnishment case was reached on the docket and on a motion of plaintiff, if such motion is necessary. 39GaA72, 146SE639.

334–48 [g] 92PaSuper571.

336–72½–New. Return writ must show date of service. 329 Ill 82, 160NE193.

336–87 TexCommnA 285SW290.

336–91 9LaA732, 120S256.

336–94 TexCivA 295SW950. [a] **Constitutional judgment** held properly set aside where garnishee by leave of court

filed amended answer denying liability. 213Ala195, 104S334.

337-4 [c] **Application on April 28** to vacate order of March 6 held not laches. 166Minn481, 208NW413. [d] **Delay of four months** held to justify refusal of application. 180Minn119, 230NW476 (2dcase).

337-15½-New. Where judgment against garnishee defendant was set aside, garnishment served upon another garnishee defendant based on that judgment must fail. **Wash** 286P666.

337-18 178Ark1158, 13SW(2d)617; 39 GaA52, 145SE908.

337-19 70Utah163, 259P191; **Wash** 286P666.

338-27 **TexCivA** 295SW950.

338-36 49SD208, 206NW1005 (discretion abused).

338-38 49SD208, 206NW1005.

338-43 49SD208, 206NW1005.

338-44 329 Ill 82, 160NE193.

338-49½-New. Trustee, which was defaulted after removal of default, is not precluded from setting up in principal suit matters which would have defeated suit by principal debtor, if it does so before an order charging it is made. **Mass** 166NE705.

339-52 39GaA824, 148SE541(1stcase).

339-59 82Colo 472, 260P1017; **Tex CivA** 21SW(2d)59.

339-62 178Ark1158, 13SW(2d)617; 49 SD208, 206NW1005.

339-63 39GaA824, 148SE541(1stcase); **TexCivA** 21SW(2d)59.

339-65 [a] **If garnishee files his answer** at any time previous to motion for judgment pro confesso his default is set aside. 13LaA30, 127S95(2dcase).

339-67 49SD208, 206NW1005. [a] **If by any reasonable construction of his showing** garnishee's neglect to answer may be excused judgment should be vacated and garnishee permitted to answer. 49SD208, 206NW1005.

339-70 49SD208, 206NW1005.

340-71 144Miss674, 110S430; **TexCivA** 38SW(2d)847.

340-73½-New. Qualified denial in answer in action to set aside default judgment held sufficient to raise issue as to fraud in procuring judgment. **MoA** 19 SW(2d)776.

340-80 [b] **Excessive amount.**-49SD 208, 206NW1005 (default judgment).

342-14 221MoA230, 1SW(2d)242.

342-21½-New. Judgment cannot be used to substitute plaintiff in attachment for defendant as cestui que trust under deed of trust or will. 14PaDist& Co 287.

342-23 32 OhA379, 168NE216.

343-42 261Mass422, 158NE844.

344-47 128Me238, 147A191(2dcase).

345-81 32 OhA379, 168NE216.

345-84 131 Okl 209, 268P257.

347-11½-New. Garnishee's costs held limited to sum prayed for. **TexCivA** 283SW576.

349-27 **TexCivA** 289SW149.

349-36 [a] **Allowances held not excessive.**-**MoA** 287SW874.

349-38 **TexCivA** 29SW(2d)447.

350-43½-New. Costs are not matters subject to be controverted to deprive the court of jurisdiction over a fund held by a nonresident garnishee. **TexCivA** 289SW149.

350-45 See also **Colo** 259P712.

350-46 **TexCivA** 21SW(2d)23.

352-64 [a] **Allowance of motion for expenses, filed during same term** and after judgment, is not premature. **MoA** 287SW874.

352-66 23 Ind454; **MoA** 287SW874.

352-68 60Wis246, 19NW43.

353-87½-New. Where the garnishee files a disclosure stating that he hold as custodian for the sheriff the property which he understands belongs to the principal defendant, the trial judge should not quash the writ on motion of the principal defendant, the issue not being triable on affidavits. 231Mich604, 204NW704.

353-87⅓-New. A motion to quash is inappropriate where the writ is dissolved and the record discloses no collectable claim. 296Pa265, 145A846.

353-87¼-New. Whether the motion should have been both to dissolve and quash is immaterial where the stipulation asked the court to dispose of fundamental questions involved. 296Pa 265, 145A846.

353-91 **TexCommnA** 23SW(2d)312.

354-4 9LaA418, 121S237; 107WVa129, 147SE475.

354-14½-New. Defendant cannot move to set aside judgment against garnishee for the former's discharge in bankruptcy. 37GaA535, 140SE800.

355-40½-New. Grounds for vacating cannot be predicated on matters relating to rights and obligations of parties to suit as between themselves. **NJ** 151 A85.

356-46 See also 123Kan155, 254P345.

356-47 See also 149Wash158, 270P425.

356-51½-New. Where only a part of the fund is exempt, attachment should not be dissolved. 296Pa265, 145A846.

357-58 See also 208 Iowa1300, 227NW 169.

357-59 [a] (5) Failure to serve defendant in time required by statute. 36 OklACR503. (6) Want of timely service of statement of claim and garnishee summons not ground where facts justify extension of time permitted by rules of court. **Alta** [1930] 2DomLR821. (7) Other objections relating to service held not grounds for setting aside summons. **Alta** [1930] 2DomLR821.

358-80½-New. or affidavit. **Sask** [1925] 3DomLR513 (holding misspelling name of garnishee immaterial where he knew he was party intended).

358-81 **Alta** [1930] 2DomLR821.

358-82½-New. Writ of garnishment will not be quashed because of defective return, where the record shows proper service. **TexCivA** 289SW127.

359-95 31NM593, 248P885, 886 [citCJ]. See also 150Wash267, 272P955.

359-99 178Ark995, 13SW(2d)13.

359-7½-New. Failure of plaintiff to controvert the answer of the garnishee denying liability or possession of property belonging to defendant entitles the garnishee to discharge. **TexCivA** 22SW (2d)546.

359-9 [a] **Change in parties plaintiff.**-Dropping of one of two parties plaintiff on entry of judgment in favor of other in main action is not ground for dismissal of garnishment where cause of action was not changed. 240Mich129, 215NW377.

359-10 Contra 105Conn640, 136A681.

359-15 216Ala282, 113S261.

361-36 See also **Sask** [1928] 3DomLR 31.

362-63 300Pa102, 150A157 (petition to quash insufficient).

362-67½-New. The debtor, in a garnishment proceeding bringing separate suit by rule on seizing creditor and sheriff to show cause why money should not be released, could couple with the rule a prayer for an injunction, since that prayer did not preclude a decision on the point whether salary was exempt. 9LaA418, 121S237.

362-67⅓-New. A written and signed order discharging the garnishee is not essential to the validity of proceedings therefor. 207 Iowa944, 223NW868 (entry of ruling on motion held sufficient).

362-67¼-New. Failure to notify the garnishee of a motion to quash garnishment on the ground that the writ of suggestion was not sued out of the office of the clerk of the circuit court of the county in which the garnishee corporation had its principal office or in which its president or other chief officer resided is immaterial. 107WVa129, 147 SE475.

362-72 56ND329, 217NW523.

362-77 But see 157Md249, 145A779.

363-83 [a] **Categorical denial under oath** should be made by defendant wishing to try truthfulness of allegations contained in plaintiff's affidavit. 90Fla 420, 106S427.

363-89 157Md249, 145A779.

363-90½-New. The facts alleged in the petition to quash must be taken as admitted if plaintiff files no answer. 10 PaDist&Co 110.

363-90⅓-New. Sufficiency of evidence to show property in possession of mortgagor at time of attachment. **Mass** 172 NE884.

363-97½-New. **Effect of failure to appeal.** The garnishee is discharged from liability where the creditor fails to announce the purpose to appeal from an order of discharge when made and to perfect the appeal within the prescribed time thereafter. 207 Iowa944, 223NW 868 (failure to advise counsel is no excuse).

363-99 150Wash267, 275P694(1stcase). [a] **Attachment lien** has been held not to be discharged. **CalA** 288P1104.

363-4 150Wash267, 272P955.

363-6 But see 180Ark690, 22SW(2d) 368.

364-13 247Mich337, 225NW617; **Mich** 233NW431.

365-41 [a] **Bond given to dissolve attachment on judgment against credits** may be treated as common law bond although apparently one for dissolution of attachment on original process. **Md** 149A562.

365-41½-New. Where replevy bond is not double amount claimed in garnishment proceedings, garnishee is not relieved from liability to plaintiff, and clerk of court is without authority to accept such bond. **TexCivA** 18W(2d) 717.

365-43½-New. Motion to quash replevy bond in garnishment proceedings is motion in pending suit and filing and docketing thereof is constructive notice to garnishee. **TexCivA** 1SW(2d)717.

365-50 78CalA84, 248P286.

365-52 [a] **After approval of bond** it is error to order garnishee to pay over funds to receiver or furnish forthcoming bond. 100WVa359, 130SE439.

365-53 181Ark295, 25SW(2d)446; **Tex CivA** 283SW1110.

365-58 181Ark295, 25SW(2d)446; **Tex CivA** 283SW1110. But see 143Wash198, 253P596.

365-60 **TexCivA** 283SW1110, 1111 [quot CJ].

366-65½-New. Dissolution of garnishment by giving bond does not prevent the garnishee from showing that the fund in his hands was not subject to the debt. 35GaA155, 132SE143.

366-65⅓-New. Where defendant replevies funds from garnishee, plaintiff must thereafter look to replevy bond. **TexCivA** 1SW(2d)717.

366-74½-New. **Setting aside voluntary dismissal.** **TexCivA** 283SW205.

367-96½-New. Levy by a constable under writ and delivery of the property garnished to claimant have been held not essential to trial of the right of property under statute. **TexCivA** 296 SW970.

367-97 But see 40GaA685, 151SE236.

367-3 31NM336, 244P889.

370-39 48Nev100, 227P1016, 232P783 (assignee of claim against estate of deceased person held not required to take any steps in garnishment proceedings to preserve rights against executor making payment to sheriff on service of writ).

370-44 [g] **Rights of claimant** are not dependent on notice to garnishment creditor. **TexCivA** 291SW944.

371-45 **TexCivA** 291SW944. But see **TexCivA** 31SW(2d)856. [a] (1) 39GaA 227, 146SE643.

371-47 **TexCivA** 291SW944.

371-50½-New. Legal or equitable rights to fund may be set up by intervener. 31NM336, 244P889.

371-57 **TexCivA** 284SW227.

372-63½-New. One whose claim as owner is not sustained cannot question sale to garnishees. 164Minn446, 205NW 371.

372-66 82Colo 313, 260P105.

372-70 81CalA317, 253P757.

372-70½-New. or after the clerk has paid funds to the attorneys for creditor, 82Colo 313, 260P105.

373-77½-New. Where claimant is admitted as a party after default of others but before the trustee had been charged, claimant is not limited to scire facias proceedings against the trustee in order to establish a claim. **Mass** 166 NE705.

373-86 40GaA756, 151SE557.

373-88½-New. Claim by third person to funds impounded by garnishment is

invalid in absence of affidavit in forma pauperis or bond indemnifying plaintiff, whether such bond is given upon dissolution of garnishment or in ordinary bond required in claim cases. 34 GaA241, 129SE125.

373-88½-New. A bond or affidavit in forma pauperis is a condition precedent to the validity of a claim by a third person to funds impounded by garnishment, and to jurisdiction of court. 34GaA241, 129SE125.

373-90 3Del 422, 138A638.

373-92 [c] **In absence of objection** court may properly determine issues raised, though intervention was improper. 38 Wyo 28, 264P699.

374-15 [b] (4) Wife may be interpleaded as to husband's interest in joint bank deposit. 235Mich1, 209NW65.

377-43 164La998, 115860.

378-58 249Mich22, 227NW710.

378-67½-New. An oral motion of plaintiff in a garnishment proceeding to make an additional party a defendant is sufficient where the answer of the garnishee discloses that such person has or claims some interest in the money or property garnished. 136 Okl 202, 277P239.

379-76 192NC31, 133SE399. [b] **Style of notice.**-136 Okl 202, 277P239.

379-90 195Cal 759, 235P992 (referee in supplementary proceedings cannot order garnishee to pay over money to judgment creditor pending determination of claim of third party thereto).

380-92 [a] See also ND 232NW314.

380-96½-New. Where a garnishee bank, having on deposit a sum of money in the name of the wife of a party from whom collection of a debt was sought, paid over the deposit to such wife upon her giving a replevin bond as provided by statute, when in fact the money deposited was the property of her husband, judgment rendered against the garnishee has been held proper. Tex CivA 98SW(2d)474.

380-99 TexCivA 297SW563, 566 [quot CJ].

380-2 229Ky674, 178W(2d)726; Tex CivA 286SW760.

380-5 TexCivA 297SW563, 566 [quot CJ].

381-11 38Wyo 28, 264P699, 701 [quot CJ].

381-15 38Wyo 28, 264P699, 701 [quot CJ].

384-57 [c] **Voluntary dismissal of intervention petition without prejudice is properly denied** where intervener, in action by receiver of corporation to enforce statutory liability of stockholder, claimed prior lien on stock garnished. 38Wyo 28, 264P699.

386-97 238Mich126, 213NW127; MoA 288SW(2d)121; 193NC814, 138SE169; 194NC712, 140SE617.

387-98 238Mich126, 213NW127.

387-99 238Mich126, 213NW127.

387-3 32Ariz588, 261P45.

387-4 32Ariz588, 261P45.

387-8 Mass 166NE705. [h] (8) Judgment debtor's share of proceeds from land. 215Ala504, 112S216. [j] **Claimant who has signed replevy bond** stating that debt was owing to debtor by garnishee is precluded from asserting otherwise. TexCivA 284SW227.

388-9 32Ariz588, 261P45.

389-26 [a] (23) Proof that grain garnished belonged to judgment debtor is sufficient to sustain verdict for plaintiff. 54ND509, 209NW986. (24) That money garnisheed was not trust fund and that intervener had no superior rights therein. 174Minn504, 219NW765. (25) Right of plaintiff to recover against third person claiming garnisheed funds. 38GaA466, 144SE334. (26) Oral agreement for transfer of note in custody of garnishee as collateral security. 176 Minn18, 222NW509. (27) Assignee under instrument in writing executed before garnishment of debtor was properly awarded recovery. TexCivA 148W (2d)890. [b] (1) 38Wyo 28, 264P699. [c] **Proof as to precise terms of contract** under which third party claimed funds garnished is unnecessary as suit is not on contract. 158Md280, 148A236.

390-44 179Ark169, 148W(2d)546; 238 Mich126, 213NW127. [k] **Issue of ownership of property** between defendant and intervener held for jury under evidence. 238Mich126, 213NW127.

390-47 [b] **Instructions proper.**-238 Mich126, 213NW127.

391-43 215Ala676, 112S216.

391-60½-New. **Personal judgment against intervener** is erroneous. Tex CivA 286SW760.

391-60½-New. Where fund paid into court was to be paid to holders of loan deed, court properly awarded fund to trustees claiming under loan deed. 40 GaA756, 151SE557.

391-60½-New. Judgment against garnishee void where interpleader under statute not had to join garnishee in issues. ND 232NW314.

391-62 249Mich22, 227NW710.

392-86½-New. In Saskatchewan defendant's assignee obtaining payment of money paid into court by garnishee is not chargeable with plaintiff's costs because he proceeded by notice of motion, Sask [1930] 4DomLR436.

392-86½-New. nor because notice of motion was not addressed to persons on whom it was served. Sask [1930] 4 DomLR436.

393-83 176Ark1203, 38W(2d)5. [g] **Joinder of parties.**-38Wyo 28, 264P699.

394-1 [f] **Claimant giving bond** may traverse answer of garnishee admitting possession of effects at any time before judgment on bond. 35GaA234, 132SE647.

394-8 TexCivA 148W(2d)890. [a] **Collateral attack.**-TexCivA 258W(2d)192.

395-15½-New. Judgment against garnishee cannot be attacked on grounds not pleaded. TexCivA 289SW149.

395-15½-New. An order for payment which is void for want of jurisdiction is subject to collateral attack. 242Mich 23, 217NW913.

395-15½-New. Where the payee of a promissory note, after assigning the note to a third person, was sued by a creditor, who served garnishment on the maker of the note and the maker was notified of the assignment before filing an answer to the garnishment, the maker acted at his peril, in admitting in answer to the garnishment an indebtedness to the payee, and, when sued by the assignee on the note, the maker could not set up the defense of payment, which he was required to make to the payee's creditor. 38GaA764, 145SE528.

395-16 Okl 291P43.

395-19 84Colo 409, 270P875.

395-28 178Ark191, 108W(2d)8.

396-39 181Ark444, 26SW(2d)115.

396-40 181Ark726, 27SW(2d)514.

396-41 123Kan708, 710, 256P808 [cit CJ].

396-42 [c] **Claimant of real estate who interpleaded in attachment proceeding** is not bound by judgment in garnishment proceeding determining title to real estate levied upon under attachment though attachment and garnishment writs were issued in same action. 133 Okl 167, 271P152.

397-51 TexCivA 38W(2d)497, 498 [quot CJ].

397-53 TexCommnA 281SW1045.

397-55 39GaA72, 146SE639; 40GaA140, 148SE920(1st case).

398-66 81Colo 107, 253P1055, 1056 [cit CJ].

398-71 243 IllA55.

399-83½-New. Pending proceedings, a judgment debtor garnisheed may procure a stay of enforcement. 91Fla593, 109S212, 48ALR957.

399-85 252 IllA612.

399-89 249Mich22, 227NW710.

400-9 198NC471, 152SE408.

402-39 161Ga58, 129SE526 (judgment discharging garnishee on failure to contest his denial of indebtedness is one on merits); 46 Ida657, 270P621.

403-45½-New. Judgment founded on garnishee's answer did not estop plaintiffs from jointly suing defendants for amount of note where they incorrectly stated in answer indebtedness to one plaintiff only. 40GaA685, 151SE236.

403-47 91Fla593, 109S212, 48ALR957.

403-48 172Ark449, 289SW329.

403-49 91Fla593, 109S212, 48ALR957.

404-65½-New. Garnishee having paid judgment is subrogated to rights of judgment creditor. 143Miss492, 108S184.

404-68 91Fla593, 109S212, 48ALR957.

406-85 172Ark79, 287SW580.

406-89 But see 143Miss492, 108S184.

406-90 249Mich22, 227NW710.

406-93 111Conn383, 150A313.

407-99 See also 111Conn383, 150A313.

534-19½-New. Payment by the clerk of court of funds garnisheed to the attorney for the creditor was payment to the creditor, and an order that the creditor repay a part of the amount not belonging to the debtor was proper. 82 Colo 313, 260P105.

535-33 41GaA748, 154SE466(1st case); 143 Okl 131, 288P281. [a] **Suit seeking only to set up damages incurred in defending original suit** has been held properly dismissed. 41GaA748, 154SE466(1st case).

535-38 35GaA757, 134SE806. [b] **Damages awarded held not excessive.**-218Ala158, 117S668.

535-39½-New. But recovery for injured feeling is permissible if garnishment was sued out maliciously and without probable cause. 218Ala158, 117S668.

535-40 169Minn179, 210NW887; 135 Wash80, 237P8.

535-41 135Wash80, 237P8 (time expended in adjusting finances to meet outstanding checks).

535-42 135Wash80, 237P8.

535-42½-New. Under special circumstances there may be an additional recovery for loss of money garnished or loss of profits which might have been made. 135Wash80, 237P8.

536-47 218Ala158, 117S668.

536-48 218Ala158, 117S668.

536-50 143 Okl 131, 288P281; 38 Okl ACR72; 135Wash80, 237P8.

536-52 220Ala147, 124S387; 35GaA 757, 134SE806, 807 [citCJ].

536-57 218Ala158, 117S668.

536-61½-New. Under statute, demand on execution is a condition precedent to surety's liability, and failure to make such demand sixty days after judgment discharges surety's obligation. 104 Conn280, 132A454.

537-72 [b] (4) Allegations as to want of probable cause as basis of exemplary damages held sufficient. 218Ala158, 117S668.

537-85 218Ala158, 117S668 (loss of credit).

537-88 [a] **Requested charges denying recovery of any damages for injury to credit or business** from alleged malicious garnishment were properly denied, in view of evidence. 218Ala158, 117S668. [b] **Instructions held not erroneous.**-220Ala147, 124S387.

538-1½-New. Breach of bond given to dissolve attachment on judgment against credits in hands of garnishee entitles creditor to nominal damages. Md 149A562.

538-2 36GaA246, 136SE170; TexCivA 48W(2d)98.

538-3 34GaA62, 128SE208 (judgment against garnishee condition precedent). [c] (3) Md 149A562.

538-4 51ND221, 213NW17, 18 [citCJ].

538-6 36GaA246, 136SE170. [a] **Judgment must be against defendant alone** and not against him jointly with surety on bond. 36GaA246, 136SE170.

539-12½-New. Whatever destroys the attachment destroys the bond. 104Conn 280, 132A454.

539-14½-New. Where judgment discharging garnishment was not superseded, resulting in the discharge of the garnishees, sureties on bonds are also discharged. 180Ark690, 22SW(2d)368.

539-15 6PaDist&Co 149.

539-21 181Ark295, 25SW(2d)446; Tex CivA 48W(2d)98.

540-42 Minn 232NW631; 51ND221, 213 NW17, 18 [citCJ].

540-45 TexCivA 278SW456. [b] **Surety on replevy bond may urge defenses** of principal as to validity of service of writ. TexCivA 278SW456.

540-46½-New. A surety on a replevy bond takes the place of a garnishee and can urge any defenses that the garnishee could assert. TexCommnA 273 SW836.

541-58½-New. In an action against

principal and surety on bond to dissolve garnishment, verdict for plaintiff is properly directed. 34GaA284, 129SE443.

541-58½-New. Under a bond to dissolve garnishment principal and sureties are not obligated to pay expenses incurred in answering garnishment. 34GaA284, 129SE443.

541-58¼-New. Where surety pleaded non est factum burden of proving execution and delivery of bond rests on creditor. Md 149A562.

541-58½-New. Failure to produce judgment or certified copy as ground for setting aside judgment on bond see GaA 155SE773(1stcase).

542-79 143 Okl 131, 288P281.

542-92 [b] **Plea that defendant resorted only to ordinary legal action** held demurrable. 22AlaA269, 115S74.

542-96 22AlaA269, 115S74.

543-99 [b] **Instructions held proper.**-22AlaA269, 115S74.

543-99½-New. Evidence held admissible.-22AlaA269, 115S74.

543-99¾-New. Evidence held inadmissible.-217Ala10, 115S77; 22AlaA269, 115S74.

543-99¼-New. An instruction that if the fund was a special deposit, and the parties so understood it the fund was not subject to garnishment, was required to be given under the evidence. 178Ark997, 13SW(2d)21.

543-99½-New. Evidence held not to entitle debtor to recover damages for issuance of successive writs of garnishment. 154Wash51, 280P740, 65ALR1280.

543-8½-New. Some statutes providing for recovery of damages in main action are permissive and remedy is not exclusive. 143 Okl 131, 288P281.

543-13 22AlaA269, 115S74; 6LaA816; 135Wash80, 237P8 (must be natural result of garnishment).

543-15½-New. But damages for time expended by bank depositor to adjust finances to meet outstanding checks drawn against garnished deposit are not recoverable, being too speculative. 135Wash80, 237P8.

543-16 135Wash80, 237P8.

543-20 But see 135Wash80, 237P8.

544-23 135Wash80, 237P8.

544-25 22AlaA269, 115S74. See also 218Ala158, 117S668.

GAS

547-5 TexCivA 283SW281, 282 [citCJ] (dictum). [a] (2) It is mixture of number of different hydrocarbons, each one having definite chemical composition. 21F(2d)199.

547-6 TexCivA 283SW281, 282 [citCJ] (dictum).

547-10 [a] **Pennsylvania General Incorporation Act** authorizing borough to become owner of company's works after twenty years from introduction of water or gas provides condition precedent to right. 299Pa533, 149A713.

547-14 217AppDiv263, 216NYS677.

548-20 [d] **In Pennsylvania.**-299Pa533, 149A713.

549-35 169La300, 125S130 (certificate of public convenience not necessary).

549-38½-New. Franchise was held valid notwithstanding want of referendum. **TexCivA** 299SW705.

549-39 TexCivA 297SW904.

549-41 [a] **Acceptance by individuals, chosen as officers on organization of corporation,** of permission granted corporation under ordinance to operate pipe line, has been held sufficient as to competing pipe line company, in suit to enjoin construction of line where no objection was made by city, though newly organized corporation did not formally accept within time allowed by ordinance. 178Ark309, 10SW(2d)493.

550-48 [d] **Statute giving right to obtain lands and easements with "consent of city"** means consent in accordance with city's charter. **TexCivA** 297SW904.

551-57 173Ark174, 294SW52.

551-58½-New. Consent of a city within the statute means consent in accordance with the charter. TexCivA 13SW(2d)184.

551-62 173Ark174, 294SW52; **TexCivA** 283SW281; **TexCivA** 297SW904. [b] **Franchise held to have become** binding contract when grantee began work. **TexCivA** 297SW904. [c] **Gas company held to have acquired no rights** under franchise ordinance repealed before it became effective. **TexCivA** 297SW904, 911 [citCyc]. [d] **Acceptance of benefits** of franchise requires acceptance of conditions also. **TexCivA** 297SW904.

551-63 250Mich614, 231NW52; **TexCivA** 283SW281. [a] **Statute limiting franchises.**-250Mich614, 231NW52.

551-66 [a] **Gas company having rights in street** has been held not estopped to contest validity of ordinance granting exclusive franchise to another company. 173Ark174, 294SW52.

551-68½-New. Fraud vitiating a franchise is not shown by allegations as to the passage of a gas franchise ordinance and that plaintiff gas company employed the mayor's wife. **TexCivA** 13SW(2d)184.

551-68¼-New. No franchise having been legally granted to a gas company by the city, estoppel could not be predicated on preliminary proceedings to that end which never matured. **TexCivA** 13SW(2d)184.

551-68¼-New. Any expense incurred or work done by a gas company prior to ripening of negotiations into franchise is at its peril. **TexCivA** 13SW(2d)184.

552-75 231Ky813, 22SW(2d)909.

552-80 178Ark309, 10SW(2d)493. [a] **Right to furnish gas for heat and power** dates from amendment of charter where it originally had power to furnish gas light only. 36F(2d)816.

552-83 [b] **Stipulation in contract for use of city's pipe line permitting cancellation on notice** is binding on both parties. 38F(2d)444.

552-83½-New. Under a city franchise providing that, if natural gas, sufficient to supply city's demand, should be found in the city's vicinity and piped to the city, the company should have the right to distribute it at a rate to be agreed upon, the gas company, performing conditions, has the right to distribute natural gas. **TexCivA** 283SW281.

553-84 178Ark309, 10SW(2d)493; 253NY345, 171NE565. [d] **Rights in highway.**-121Kan119, 245P1059.

553-93½-New. Where a municipality has permitted a company without a franchise to expend a considerable sum in supplying its inhabitants with gas, the municipality may be estopped to prevent the company from maintaining its pipe line as established. 102WVa605, 135SE839.

553-93¼-New. Gas company could remove property from streets on expiration of its franchise, and might be compelled to do so. 231Ky813, 22SW(2d)909.

553-94 253NY345, 171NE565.

553-96 228AppDiv300, 239NYS443; 228AppDiv290, 239NYS543. [b] (3) Burden of relocating gas mains is upon entity owning and maintaining them. 228AppDiv300, 239NYS443.

553-97 253NY345, 171NE565; 228AppDiv300, 239NYS443.

553-99 But see 250Mich614, 231NW52.

554-7½-New. A gas company has no right to use streets for the purpose of extending its system without the consent of the municipality. 102WVa605, 135SE839.

554-9 175Ark289, 299SW355.

554-10 TexCivA 13SW(2d)184.

555-29½-New. A statute authorizing gas companies to maintain and operate plants and substations, and to own, hold, and use lands, rights of way, easements, and franchises necessary for their purposes and to condemn lands, rights of way, and easements to that end, has been held inapplicable to a contest between competing gas companies. **TexCivA** 13SW(2d)184.

556-30½-New. A company, having acquired a gas franchise from the city, has been held to have the right to maintain an injunction suit to contest the validity of a competitor's gas franchise rights in the same city. **TexCivA** 13SW(2d)184.

556-44 See also **TexCivA** 13SW(2d)184. [a] **Failure to perform conditions** as to commencement and completion of pipe lines held automatically to effect forfeiture. **TexCivA** 297SW904. [b] **Stopping grantee's assignee** from laying pipes, where grantee had forfeited rights by failure to comply with conditions is sufficient repudiation by city. **TexCivA** 297SW904.

557-43 TexCivA 299SW705. [a] **In contest over franchise rights** between competing companies, franchise on which defendant based rights held admissible, though forfeited. **TexCivA** 297SW904.

557-52½-New. Franchise rights are unimpaired where the city never enforced forfeiture for a gas company's failure to pay taxes. **TexCivA** 299SW705.

557-54 215Ky384, 285SW228, 230 [cit CJ].

557-55 215Ky384, 285SW228, 230 [cit CJ].

557-56 215Ky384, 285SW228.

557-57 215Ky384, 285SW228.

557-63½-New. That franchises expire in various cities does not make continuance of business illegal, enterprise being state, and not municipal, venture. 13F(2d)510.

557-63½-New. A statute requiring permission to withdraw service, where service was continued after expiration of franchise, has been held inapplicable where continuance was enforced by injunction. 17F(2d)143.

557-63¼-New. A gas company has no right to withdraw from business in particular cities merely because dissatisfied with the rate allowed. 13F(2d)510.

557-68½-New. Under a franchise providing that, on expiration of ten-year term, a gas company could withdraw from the city, a gas company was held entitled, on expiration and on giving of required notice, to withdraw, over objection of the city and inhabitants. 215Ky384, 285SW228.

557-68¼-New. Service continued by a gas company after expiration of franchise under court's mandatory orders held not constituting service without a new franchise, requiring the commission's permission to withdraw. 215Ky384, 285SW228.

558-84 [b] (2) Statute permitting classification held not inconsistent so as to repeal provision as to service charge. 23F(2d)719.

559-87 23F(2d)719 (prohibiting service charge).

559-95 [b] **Health board held without authority** to pass ordinance regarding gas holders. 217AppDiv263, 216NYS677.

559-96 [c] **Evidence to remove gas holder must be weightier than in cases for removal of garages,** as gas company supplies public necessity. 217AppDiv263, 216NYS677.

559-2 217AppDiv263, 216NYS677. [a] (4) Ordinance as to gas holders held discriminatory and unconstitutional. 217AppDiv263, 216NYS677.

560-12 [f] **In Oklahoma.**-120 Okl 206, 251P37. [g] **In Texas.**-117Tex291, 3SW(2d)794.

560-16 213Ala50, 104S538. [d] **Gas company** occupying limited territory has right to be heard upon issuance to another company by commission of certificate of convenience, and to appeal from arbitrary, unlawful, or unreasonable order. 122Kan462, 251P1097.

560-17 105WVa603, 144SE723. [a] **Commission has no jurisdiction** where order prayed for directly affects rights involved in cause pending in court. 112Oh717, 148NE685. [b] **Foreign corporation conveying gas by pipe line from neighboring state** into another state and furnishing it to domestic corporation whose stock it owns and holds is public utility, under statute, subject to jurisdiction of commission and required to furnish annual report of operations. 79Mont269, 256P373.

560-21 105WVa629, 143SE357.

560-23½-New. Where a patron is being amply served by one natural gas utility, it would be an unjust and unreasonable exercise of power of the commission to compel another utility to duplicate the service at great expense not called for by facts and circumstances of service. 103WVa306, 138SE388, 52ALR1104.

561-38 122Kan462, 251P1097. But see 114 Okl 258, 246P630. [a] **Where prima facie correctness of order of commission** is not overcome, such order will be affirmed. 114 Okl 258, 246P630.

561-38½-New. In some jurisdictions statutes are construed to be broad enough to permit bill for injunction to contest the validity of the commission's order refusing a gas company's petition for additional bond issue. 213Ala50, 104S538 (bill sufficient as against demurrer).

561-38¼-New. Resort to such remedy is proper in view of penalties imposed for violation of the commission's order. 213Ala50, 104S538.

561-38¼-New. In Canada a decision of the public utilities commission is not appealable on the ground that it arrived at its conclusion without such evidence as would be required by a court. [1929] 2DomLR4 (reduction of rates).

562-56 37F(2d)545 (contract by municipality held not within statute relating to franchises).

562-57½-New. Railroad commission has been held without jurisdiction to compel continuance of service on reasonable basis after expiration of charter of gas company. 231Ky813, 22SW(2d)909.

562-57¼-New. Reviewing court will continue injunction, prohibiting discontinuance, for a reasonable time, after holding gas company may withdraw service after expiration of franchise. 231Ky813, 22SW(2d)909.

562-57¼-New. Statute prohibiting abandonment of service without application to public utilities commission becomes part of contract between gas company and municipality and antagonistic provision is ineffective. 34 OhA97, 170 NE586.

562-59 269US244, 46SCt83, 70L ed255; 13F(2d)510. [d] 115 Okl 8, 241P164.

563-60 269US244, 46SCt83, 70L ed255.

563-61 [d] **In Oklahoma.**–115 Okl 8, 241P164.

564-76½-New. Public duty of a gas utility is determined by the service it professes to render which is a question of fact rather than of law. 105WVa603, 144SE723.

564-82 105WVa629, 143SE357.

564-88 [a] (8) Contract to furnish natural gas to landowner at specific rate in return for privilege of laying pipes on latter's land does not inure to grantees of part of such land where gas is furnished to original owner or his grantees at houses which were on land when contract was made. 121Kan116, 245P1058. (9) Other contracts construed. 20F(2d)1; 102WVa572, 135SE666. [d] **Joint and several contracts.**–36 OklACR462 (evidence held to show that all oil was taken from plaintiff's well).

565-93½-New. Jury's answer in special issues declared not conflicting. TexCivA 271SW145.

565-93½-New. Plaintiff's allegations and proof of willingness to perform essential only in determining amount of recovery. TexCivA 271SW145.

565-93¼-New. In an action for breach of contract plaintiff need not allege that a third party affected by such contract was willing to perform its part. TexCivA 271SW145.

565-93½-New. Act of third party would not relieve defendant from liability for breach of contract. TexCivA 271SW145.

565-93½-New. Contract price less cost of connection with pipe line, where no available market or intrinsic value was shown. TexCivA 271SW145.

565-94½-New. , and, after expiration of the franchise, as long as it continues in business. 278US300, 49SCt150, 73 L ed390.

565-6½-New. That a company by contract serves persons outside its territory will not generally require it to furnish like services to others outside of such territory. 105WVa603, 144SE723.

565-8½-New. The corporation commission has no authority to require a public utility to furnish natural gas to people living outside of the city limits where the utility has never professed or undertaken to serve people of that community generally, although it has a pipe line in close proximity to the property of such persons. 115 Okl 8, 241P164.

565-8½-New. The commission cannot, in specific instances, compel a gas corporation to make extensions of mains and furnish service to complaining individuals in violation of rules regulating rates and charges on file with it and have its approval express or implied and which are applicable to the public as a whole. 315Mo 312, 286SW84.

565-12½-New. Rules and regulations relating to extension of mains are integral parts of schedule of rates and charges. 315Mo 312, 286S84.

565-13 [c] **Power of public service commission.**–315Mo 312, 286SW84.

568-69 23F(2d)719.

569-76 [a] **Plaintiff not required to perform condition not in contract.**–115 Okl 27, 241P167.

569-88 [a] **Evidence held sufficient** to sustain finding that existing rate denied to prospective users right to purchase at reasonable rate and denied to company right to earn fair return. 23F(2d)719.

569-90½-New. Evidence held sufficient to sustain judgment for plaintiff. 227 AppDiv217, 237NYS198.

571-16 215Ky384, 285SW228; Okl 288 P316. [a] (4) In absence of rate-fixing ordinance, natural gas company has right to file with public utilities commission schedule of rates and charges. 113 OhSt689, 150NE48.

572-24½-New. The schedule of rates and charges filed and published by a gas corporation in accordance with provisions of the statute acquires the force and effect of law. 315Mo 312, 286SW84.

572-24¼-New. Such schedule may be modified or changed only by a new or supplementary schedule filed voluntarily or by order of the commission. 315Mo 312, 286SW84.

572-25 125Kan346, 264P68; 215Ky384, 285SW228.

572-30 See also 98PaSuper284.

572-33 14F(2d)209; 23F(2d)719; 206 Iowa261, 218NW563, 565 [citCJ].

572-40 Mo 274SW1067; 114 Okl 258, 246P630.

572-44 114 Okl 258, 246P630.

573-51 [b] **Charter should not be construed as surrender of state's power to regulate rates** if another construction is possible. 36F(2d)816.

573-53 31F(2d)339 (act fixing maximum rate held not impairment of contract); 32F(2d)338; 36F(2d)816 (power to regulate rates is inherent in every sovereignty); 120 Okl 206, 251P37. [b] **Power is inherent.**–120 Okl 206, 251P37. [c] **Every presumption is against surrender** by state of its power to regulate rates of public utilities. 36F(2d)816.

573-58½-New. Some constitutions expressly prohibit the surrender by the legislative branch of the state government of the power to regulate the charges for public services. 120 Okl 206, 251 P37.

573-64 36F(2d)816. [c] **Ordinance held not uncertain.**–17F(2d)630.

574-78½-New. Power to regulate charges for light and gas delegated to a city may be taken away by the legislature. 120 Okl 206, 251P37.

574-78¼-New. Utility companies' appeal to utilities commission involving rates under ordinance held waiver of rights under prior ordinance in view of reservation of rights. 42F(2d)379.

575-82 32F(2d)338. [a] **City has been held not authorized** to coerce gas company into making contract to furnish gas on reasonable terms. 231Ky813, 22 SW(2d)909.

575-95 90Fla721, 106S576, 584 [citCJ]; 120 Okl 206, 251P37.

576-11 Mo 274SW1067; 120 Okl 206, 251P37. [b] (1) 120 Okl 206, 251P37. (10) Commission is vested with authority to make all valid and lawful orders prescribing rates which state could prescribe or make. 120 Okl 206, 251P37. (11) Though franchise granted by city to gas company requires company to furnish free gas to city corporation, commission may make order increasing rates to be charged to consumers and require city to pay such rates. 120 Okl 206, 251P37. (12) Under reservation contained in Oklahoma constitution, state acting through corporation commission may revoke, enlarge, or set aside former acts of municipalities in regulation of rates. 120 Okl 206, 251P37. (13) It is duty of corporation commission to adjust rates on showing that company is furnishing natural gas to certain industrial consumers at cheaper rate than to others. Okl 288P316, 123Kan558, 256P114. [d] **Gas company, by expenditures in adjusting appliances** to commission's orders, cannot postpone regulation of rates. 7F(2d)628.

577-14 [a] **In New York.**–7F(2d)628.

577-17 130 Okl 34, 264P878.

577-21 7F(2d)628; 123Kan558, 256P 114. [b] **Continued jurisdiction of corporation commission** protects company as against their claim that rates will prove confiscatory. 38 OklACR121.

577-24½-New. But where contract to furnish gas to landowner at certain rate in return for privilege of laying pipes on his land is entered into and gas is furnished to his grantee at such rate, such rate is legal rate until changed by orders of public utility rate-regulating body. 121Kan116, 245P1058.

577-24¼-New. Rate at which gas is to be furnished landowner as specified in contract executed before passage of Public Utilities Law, in consideration of privilege of laying pipes on public highway abutting landowner's land, cannot be changed without order of the public service commission. 121Kan119, 245P 1059.

578-25 See also 125Kan346, 264P68.

578-25½-New. **Where operation of schedule increasing rates has been suspended** pending hearing by the commission and the company has filed a bond guaranteeing repayment of such portion of increased rates as the commission may determine to be unreasonable, the company cannot file a new schedule pending hearing. 115 Oh107, 152NE648.

578-25½-New. The burden of proof that rates fixed were wrong is on the gas company. 14F(2d)209.

578-25¼-New. A gas company selling gas at wholesale, free from regulation, has been held properly denied an increase of rates by the public service commission. 14F(2d)209.

578-25½-New. The amount of discount allowable to insure prompt payment of bills is within the discretion of a gas company and cannot be regulated by the commission. 13F(2d)510.

578-25¼-New. In a proceeding to abrogate uniform legal rates and to substitute therefor special rates in favor of some particular person, corporation, or locality, the burden rests on complainants to establish that such uniform rates are unjust and unreasonable. 126 Okl 280, 261P213.

578-29 13F(2d)510; 102WVa450, 135 SE397. But see 32F(2d)338. [a] **Rate and thermal unit standard** prescribed for gas companies are inseparable. 7F (2d)192.

578-30 16F(2d)615.

578-31 272US576, 47SCt198, 71L ed420; 272US579, 47SCt199, 71L ed421; 8F(2d) 632; 16F(2d)615; 23F(2d)719.

578-32 102WVa450, 135SE397.

578-40 123Kan558, 256P114.

578-41 272US576, 47SCt198, 71L ed420; 272US579, 47SCt199, 71L ed421; 278US 300, 49SCt150, 73L ed390; 13F(2d)510; 16F(2d)615; 31F(2d)339. [a] 6F(2d) 243; 7F(2d)192; 7F(2d)628; 8F(2d) 632; 16F(2d)615; 31F(2d)339. [b] 13 F(2d)510; 17F(2d)630; 101WVa63, 132 SE497. [f] **Fixing impracticable unsafe thermal unit standard** is unreasonable exercise of police power. 7F(2d) 192. [g] **Evidence held to show prescribed standard unreasonable.** 7F(2d) 192.

579-42 13F(2d)510.
579-50½-New. Apportionment of expenses and valuation between different localities in determining rate base. 13F(2d)510.
579-52 [b] **Unaccounted for gas,** due to leakage, should be allowed for on basis of company's experience and not at arbitrary figure. 7F(2d)628.
579-53 [c] **Special abnormal expenditures** are not considered as part of cost of manufacture. 7F(2d)628.
580-55 14F(2d)209. [b] **Gas company held chargeable with one half of net earnings** of its gasoline extraction department. 13F(2d)510.
580-58 14F(2d)209.
580-61½-New. Natural gas company is entitled to charge rates which will refund its entire capital investment within the life of the business. 13F(2d)510.
580-61¾-New. One half of the net earnings from gasoline extraction was properly included in the net earnings of a natural gas company for rate purposes. 278US300, 49SCt150, 73L ed390.
580-61¼-New. The net income of previous years must be considered. 35F(2d)743.
580-62 14F(2d)209.
580-65 14F(2d)209.
580-69 8F(2d)632. [a] (1) 6F(2d)243; 7F(2d)628; 16F(2d)615; 116 Oh596, 157NE72. (2) Held reasonable return for gas manufacturing company. 7F(2d)192. [b] (1) Mo 274SW1067. (2) Not confiscatory. 35F(2d)743. [d] 272US576, 47SCt198, 71L ed420; 272US579, 47SCt199, 71L ed421. [e] **Sixteen per cent return** to cover interest on investment, profits, depreciation, and depletion held not confiscatory. 13F(2d)510.
580-74½-New. , and the cost of relaying pavement in laying gas mains. 16F(2d)615.
581-83 8F(2d)632; 16F(2d)615; 35F(2d)743; 121 Oh507, 169NE575; 126 Okl 280, 261P213; 130 Okl 258, 267P235; 102WVa450, 135SE397. [a] (2) Including value of old gas main held proper where uncertainty of new field made abandonment of old main unwise. 116 Oh596, 157NE72. [n] **Burden of proving value of property** is on public utility company. 38 OklACR121. [o] **Value of leases of lands having wells** is not actual value, but should be determined by commission. 121 Oh507, 169NE575.
581-84 6F(2d)243; 8F(2d)632; 16F(2d)615; Mo 274SW1067; 108 Okl 215, 235P906; 38 OklACR121; 191Wis565, 211NW760. See also 102WVa450, 135SE397. [c] **Any method of fixing present** and near future value of property for rate purposes is proper. 191Wis565, 211NW760.
582-85 8F(2d)632. [d] **Original cost of gas company's** property, plus cost of additions since advance in war prices, held improper basis for rates. 191Wis565, 211NW760.
582-89 16F(2d)615. [a] (2) Public utilities commission could accept own engineer's valuation where he was unimpeached. 116 Oh596, 157NE72. [e] **Value of unproved gas lands** may not be included in valuation of plant. 14F(2d)209.
582-90 [a] **Items of organization, interest, engineering,** law expenditure, taxes, and general expenses during construction held properly included. 116 Oh596, 157NE72. But see 16F(2d)615.
582-90½-New. charge for interest on capital during construction; 13F(2d)510. [a] **Elements to be considered.**-13F(2d)510. [b] **Seven per cent interest** on capital during construction held proper charge. 13F(2d)510.
582-91 8F(2d)632; 13F(2d)510; 16F(2d)615; 38 OklACR121. [a] (2) Cost of cutting and replacing pavement is properly included. 17F(2d)630.
582-92 16F(2d)615 (land not yet used, but acquired for future use, should be added to value); 17F(2d)630; 38 Okl ACR121.
582-93 But see 13F(2d)510.
582-94 13F(2d)510; 16F(2d)615 (overhead).
582-95 7F(2d)192; 8F(2d)632; 13F(2d)510; 14F(2d)209; 17F(2d)630; 35F(2d)743; 116 Oh596, 157NE72.
582-96 16F(2d)615.
582-98 13F(2d)510. [b] **Reproduction cost, less depreciation,** is dominant element in determining rate base. 6F(2d)243; 8F(2d)632. [c] **"Undistributed structural costs"** held proper. 17F(2d)630.
583-1½-New. Extensions likely to be required should be considered. 17F(2d)630.
583-4½-New. A natural gas company has the right to hold reserve and undeveloped acreage which must be considered in determining rate base. 13F(2d)510.
583-4½-New. Indebtedness assumed when the system was purchased is not to be considered. 17F(2d)630.
583-4¾-New. The book value of gas fields has been held the value to be accepted in the absence of other evidence to establish the assumed value at a higher figure. 278US300, 49SCt150, 73 L ed390.
583-6 16F(2d)615.
583-7 7F(2d)628.
583-12 13F(2d)510; 16F(2d)615.
583-14 8F(2d)632; 16F(2d)615; 17F(2d)630; Mo 274SW1067; 38 OklACR121. [a] **Allowance of ten per cent** held reasonable. 17F(2d)630.
583-17. [a] **Specific sum should not be allowed** for going value especially where no losses suffered in establishing business. 38 OklACR121.
583-18½-New. A charge for the cost of financing is improper except as a part of the going concern value. 13F(2d)510.
583-19 8F(2d)632; 13F(2d)510; 16F(2d)615. [b] (1) 17F(2d)630. (16) Advertising. 17F(2d)630. [p] **Cost of operation** is based on cost at all of company's plants. 7F(2d)628. [q] **Paying higher rate for use of container** than rate charged for loan of money to build it held to present nothing for correction. 7F(2d)628. [r] **Six per cent held sufficient** to provide for depletion and depreciation. 13F(2d)510. [s] **Allowance of 7 per cent as sufficient** for general overheads, cost of financing and going concern value has been held not unreasonable. 121 Oh507, 169NE575.
584-28 101WVa63, 132SE497. [c] 130 Okl 258, 267P235.
584-29 101WVa63, 132SE497.
585-30 271US131, 46SCt445, 70L ed 870; 13F(2d)510; 16F(2d)615; Mo 274 SW1067.
585-31 Mo 274SW1067.
585-33 8F(2d)632; 34F(2d)297; 125 Kan346, 264P68. [c] **Gas company's bill and affidavits** held to show prima facie right to preliminary injunction against ordinance reducing rates. 36F(2d)318.
585-36 Mo 274SW1067.
585-38 Mo 274SW1067.
585-38½-New. City has been held within its rights in refusing to consent to an engineering conference. 17F(2d)630.
586-43 123Kan558, 256P114; 126 Okl 280, 261P213.
586-46 278US300, 49SCt150, 73L ed 390; 13F(2d)510; Mo 274SW1067; 126 Okl 280, 261P213; 130 Okl 258, 267P 235; 101WVa63, 132SE497. [a] **Admissibility of evidence.**-126Kan220, 268P 111. [b] **Gas company not required to prove exact apportionment of operating costs and capital values** between business in Queens County lying within city of New York, and Nassau County lying outside New York City limits, where all of gas was manufactured in single plant and distributed in unified system to customers in both counties, and where evidence indicated that allocation to Queens area would not produce substantial reduction in operating expenses. 31F(2d)339.
586-47 13F(2d)510; 101WVa63, 132 SE497. [b] 126Kan220, 268P111.
586-50½-New. An order will not be made allowing for recoupment or amortization where there is a wide range of judgment and justifiable controversy; 8F(2d)632.
586-50¼-New. and the court will allow injunction to stand until the commission has allowed and promulgated a schedule of rates responsive to the court's opinion in suit by the company to annul an order of the commission. 8F(2d)632.
586-50¼-New. Testimony of material and labor costs in another city held properly excluded. 17F(2d)630.
586-51 126Kan742, 271P392.
586-55½-New. One who has a contract for a supply of gas does not relieve himself of liability for the price by contracting with a corporation to take over the supply and carry out his contracts with his customers. 209Ky95, 272SW381.
588-85½-New. Where consumer fails to comply with his contract to install meter, he may be charged for amount reasonably estimated by other means. 209Ky95, 272SW381.
588-85¼-New. A consumer who contracted to lay pipes and install a meter, but who failed to install the meter, is liable not only for amounts conveyed to his customers, but also for gas wasted. 209Ky95, 272SW381.
589-3 125Kan574, 265P81 (real party in interest).
589-18 119 Oh9, 162NE41.
590-28½-New. Evidence held to show no liability of gas company for injuries to plaintiff. TexCommnA 24SW(2d)10.
590-31 TexCivA 15SW(2d)657.
590-34 34Wyo 272, 243P118.
590-36 178Ark522, 13SW(2d)9(2d case).
590-36½-New. Defendant's claim that it could not have foreseen an act of plaintiff in violating the law, whereby his automobile struck defendant's pipe line, causing burning of plaintiff from ignition of gas, cannot be set up where defendant itself was negligent in maintenance of the pipe line. 74CalA303, 240 P53.
590-36⅓-New. Gas companies cannot turn on meters connecting with uncapped pipes without incurring liability for injuries, although ordered to turn on gas. 206Cal 366, 274P544.
590-36¼-New. A city cannot, by passive acquiescence, waive a requirement that a map showing the location of gas pipes be filed. 96CalA250, 273P1111.
591-39 TexCivA 280SW234, 235 [cit CJ].
591-41 NJSup 145A238.
591-42 74CalA303, 240P53, 54 [cit CJ]; 34Wyo 272, 243P118.
591-45 NJSup 145A238.
591-47 TexCivA 280SW234, 235 [cit CJ].
591-48 36 OklACR432.
591-49 178Ark522, 13SW(2d)9(2d case); 179Ark481, 17SW(2d)309; 74 CalA303, 240P53, 54 [citCJ]; Mont 291 P1042; 36 OklACR432; 43 OklACR278, 281 [quotCJJ; 34Wyo 272, 243P118 (installation of hot water heater in bathroom).
591-51 74CalA303, 240P53, 54 [citCJ]; 36 OklACR432.
592-59 36 OklACR432.
592-62½-New. Failure of one excavating a trench for a city alongside of a street to notify the gas company that he had struck a service pipe would not relieve the gas company from the consequence of its continuing negligence in not filing a map showing the location of the service pipe as required by a city ordinance. 96CalA250, 273P1111.
592-63 See also NH 144A782.
592-64 11LaA228, 123S510 (city supplying gas for domestic uses must exercise care commensurate with danger).
593-68 [d] **Turning on meter** without first ascertaining whether pipes were in proper and safe condition is negligence. 227AppDiv200, 237NYS81.
593-69 130Kan853, 288P599.
593-72 178Ark522, 13SW(2d)9(2d case).
593-79 178Ark522, 13SW(2d)9(2d case); 102CalA703, 283P840(1stcase); 127Kan741, 275P164; NJSup 145A238.
594-80 [c] **Reasonable notice was given** where one picked gas company's telephone number from regular telephone book and called such number day and half before accident. 212NYS52.
594-83 38 OklACR493.
594-84 11LaA228, 123S510 (city, furnishing gas, is liable if, knowing there were uncapped openings, it turned on gas or failed to do anything on learning

such fact). [a] **Failure to attend after reasonable notice** may be found as fact to be negligence. 214AppDiv186, 212NYS 53.

594-85 38 OklACR493.

594-85½-New. Apartment owner's lack of knowledge of escaping gas in apartment held immaterial to liability for injuries to third person. 102CalA656, 283P823.

594-87 92CalA670, 268P930; 11LaA 430, 123S507 (city's inspector is not negligent in failing to search for uncapped openings, where city neither installed nor connected plumbing fixtures, and no inspection was requested before gas was turned on). [a] (2) 92CalA670, 268P930.

595-88 213Ala190, 104S248, 249 [cit CJ].

595-89 NJ 149A767.

595-90 [b] **Facts insufficient to impute notice.**-11LaA228, 123S510.

595-93 Kan 289P402.

595-94 Mont 291P1042.

595-94½-New. Where lack of proper means for the escape of fumes is the result of negligence in installing a gas water heater in a bathroom without windows, a company installing it is charged with knowledge of the danger of asphyxiation. 34Wyo 272, 243P118.

595-94½-New. Lighting match with knowledge of escaping gas in large quantities constitutes negligence. Mont 291P1042.

595-95 206Cal 366, 274P544.

596-98 See also 206Cal 366, 274P544.

596-8 179Ark481, 17SW(2d)309.

596-9 36 OklACR432.

596-13 Mont 291P1042 (lighting match with knowledge of escaping gas held proximate cause of explosion); 36 Okl ACR432.

596-14 36 OklACR432; 43 OklACR278.

596-15 79CalA395, 249P530; 83NH439, 144A57; 36 OklACR432; 43 OklACR 278.

597-16 96CalA250, 273P1111; 83NH 439, 144A57.

597-18 74CalA303, 240P53.

597-21 43 OklACR278.

597-23 74CalA303, 240P53.

597-24 79CalA395, 249P530; 43 Okl ACR278.

597-27 [a] **Customer creating condition.**-Mont 291P1042.

598-35½-New. A plaintiff, injured by gas fumes, was held not to have assumed the risk of injury by using a water heater. 257Mass441, 154NE74.

598-35½-New. Striking match to light cigar has been held not contributory negligence so as to preclude recovery. 102CalA656, 283P823.

598-42 83NH439, 144A57.

598-50 Kan 289P402; Mont 291P1042.

599-54½-New. The law imposed no duty on a gas company to firemen to avoid an occasion for the incurrence of danger in inspecting for escaping gas. 83NH439, 144A57.

599-61 [a] 79CalA395, 249P530; Tex CivA 271SW108. [b] 117 Oh252, 158NE 189.

599-70 101WVa499, 133SE116; 106 WVa155, 145SE165.

600-72 101WVa499, 133SE116. See also 206Cal 377, 274P548.

600-73½-New. Plaintiff suing for the death of a fireman by an explosion while inspecting for escaping gas has the burden to show that decedent did not assume the risk. 83NH439, 144A57.

600-79 36 OklACR432, 435 [quotCJ].

600-80 43 OklACR278.

600-82 101WVa499, 133SE116.

600-85 36 OklACR432, 435 [quotCJ]; 43 OklACR278.

600-86 89CalA81, 264P532; 36 Okl ACR432, 435 [quotCJ].

600-87 36 OklACR432, 435 [quotCJ].

600-88 36 OklACR432, 435 [quotCJ].

600-92 92CalA670, 268P930; NJSup 137A409; 36 OklACR432, 435 [quotCJ]; 101WVa499, 133SE116. [a] 102CalA 703, 283P840(1stcase). [b] **Doctrine of res ipsa loquitur held applicable** to explosion of gas in apartment, where owner thereof is defendant. 102CalA656, 283P823.

600-93 36 OklACR432, 435 [quotCJ].

601-95 206Cal 366, 274P544; Mo 30SW (2d)118; 83NH439, 144A57; NJSup 130 A522. [a] **Evidence held inadmissible.**-Mo 30SW(2d)118.

601-11 83NH439, 144A57.

602-18 [a] 101WVa499, 133SE116. [b] (1) 102CalA656, 283P823; TexCivA 275 SW735. (4) To show that explosion of gas after installation of range was due to negligence of gas company. 125Kan 206, 263P1079. (5) To show that defective meter was proximate cause of explosion. 126Kan33, 266P741. (6) To show that building occupant was liable for explosion of gas. Mo 30SW(2d)118.

602-19 [a] 202Cal 714, 262P313; 126 Kan775, 271P273; Kan 289P962; 257 Mass441, 154NE74; Mont 291P1042; 38 OklACR493; TexCivA 275SW735; Tex CivA 296SW619; TexCivA 11SW(2d) 207; TexCivA 21SW(2d)6; 34Wyo 272, 243P118. [b] NJSup 137A409; 101 WVa499, 133SE116. [c] 126Kan33, 266 P741; TexCivA 275SW735. [d] 106 WVa155, 145SE165. [f] **Plumbers and gas company** held equally liable for injury from gas explosion. TexCivA 297 SW244. [g] **Evidence held not to show notice** to city, which furnished gas for domestic use, that gas was escaping and request for inspection. 11LaA228, 123S 510. [h] **Evidence held sufficient to show meter reader acted within scope of authority.**-Mont 291P1042.

602-20 [a] Mont 291P1042.

602-21 [a] 257Mass441, 154NE74.

602-22 83NH439, 144A783.

602-26 101WVa499, 133SE116.

602-27 206Cal 366, 274P544. [a] 206 Cal 366, 274P544.

602-28 5F(2d)572; 39F(2d)7; 206Cal 366, 274P544; 74CalA303, 240P53; CalA 261P1023; 89CalA81, 264P532; 130Kan853, 288P599; 215Ky77, 284SW 405, 47ALR483; 261Mass77, 158NE263; 83NH439, 144A57; NJSup 130A522; NJSup 142A756; NJSup 145A238; 227 AppDiv200, 237NYS81; 36 OklACR 432; TexCivA 280SW234; TexCivA 297 SW244. [a] (8) Mont 291P1042. (14) To take question, of whether reasonable notice was given of danger, to jury. 214 AppDiv186, 212NYS53. (15) Whether person receiving notice was in employ of defendant. 214AppDiv186, 212NYS 53. (16) Whether duty to carry pipe in position other than through open air near floor of bridge. 74CalA303, 240P 53. [c] **Excessive pressure** negligence is question, for jury. TexCivA 271SW 108.

603-29 74CalA303, 240P53.

603-30 NJSup 137A409; 114 Oh423, 151NE323.

603-32 5F(2d)572; 215Ky77, 284SW 405, 47ALR483; Mo 30SW(2d)118; 36 OklACR432.

603-33 36 OklACR432.

603-36 Kan 289P402; 215Ky77, 284 SW405, 47ALR483; 125Misc167, 210 NYS477. [a] (1) 125Misc167, 210NYS 477. (4) Failure to cut off gas. 179Ark 481, 17SW(2d)309.

604-38 125Kan574, 265P81; 245Mich 277, 222NW123; NJSup 145A233.

604-40 83NH439, 144A57.

604-46 125Kan574, 265P81.

605-82 [b] **Defrauding gas company by interference with meter.**-311Mo 492, 278SW717. [c] **Instruction held properly refused as misleading.** 311Mo 492, 278SW717.

GASOLINE

606-10 [h] **Not synonymous with "casing-head gas."** TexCivA 289SW152.

GEARING

607-39 216Ala248, 112S737, 738 [quot CJ].

GELATIN

607-40½-New. Animal jelly. 14CustA 301.

GENERAL

609-94 96Vt462, 121A24.

609-99 Nebr 227NW325 (governmental, not corporate, expenses).

610-30 21F(2d)653.

611-45 TexCommnA 280SW557.

611-91 NJSup 129A819.

GENERAL ASTHENIA

611-98½-New. "Want or loss of strength, debility, diminution of the vital forces." Webster New Int. D. [quot Ala 115S12, 13].

GENERALIA SPECIALIBUS NON DEROGANT

612-10 [a] 12F(2d)922. [b] **Maxim does not apply** where "general" and "special" do not conflict. Can [1926]AC 81, [1925] 3DomLR880 (respecting statutes).

GET

615-21 31 OhA482, 166NE423.

615-23 [a] **As used in contract,** "to get" certain lands means each to have title in severalty. 171Ark168, 283SW360.

GIFTS

620-1 15F(2d)669; 33F(2d)286; 316 Mo 483, 291SW132; 23 OhA163, 154NE 799. [a] (7) Voluntary transfer of goods from one person to another made gratuitously, and not upon any consideration. 190NC586, 130SE500 [quot Blackstone]. (8) Other definitions. Tex CivA 25SW(2d)881. [b] (1) 202Cal 215, 259P947.

620-6 8F(2d)368; 41F(2d)501; 204 Iowa1367, 217NW456.

620-7 15F(2d)669, 671 [citCJ].

620-8 15F(2d)669, 671 [citCJ]; 83CalA 596, 257P157, 159 [quotCJ]; 297Pa26, 146A139; TexCommnA 276SW690. [a] 86Colo 458, 283P539.

621-11½-New. A gift of personal property is a unilateral act. 191NC493, 132 SE282.

621-11½-New. That a sum of money given was later used for another purpose than that intended does not change its character as a gift. 33F(2d)758.

621-20 [b] (5) Requisites and formalities of remuneratory donation in Canada. Can [1930] 1DomLR769.

621-22 CalA 283P949.

621-24½-New. Grant of land by widow to child held void as "donation" under statute. 13LaA48, 127S111.

621-28 316Mo 483, 291SW132.

621-30 176Ark585, 3SW(2d)316; 224 Ky493, 6SW(2d)499 [quotCJ]; 23 OhA 163, 154NE799; 123 Okl 142, 252P34, 36 [citCyc].

622-31 22AlaA430, 116S414 [citCJ]; 224Ky493, 6SW(2d)499 [quotCJ]; 52 ND182, 201NW861; 23 OhA163, 154NE 799; 123 Okl 142, 252P34, 36 [quotCJ]; TexCivA 293SW604. [a] (4) "In præsenti" as distinguished from "in futuro." 44Philippine668.

622-33 81CalA546, 254P306; 52ND182, 201NW861.

622-39 212NYS158, 159 [quotCJ].

623-40½-New. , or in apprehension of death. 214AppDiv331, 212NYS158.

623-43½-New. "Gift" and "onerous consideration" are exact antitheses. Tex CommnA 276SW690.

623-43½-New. A written instrument reciting that decedent desired to "give" defendant a note in recognition of services indicated an intended gift, not an intention to discharge an obligation. 142SC531, 141SE156.

623-43¼-New. A condition in an instrument containing a note to defendant that validity should depend on the maker's not recovering from an existing malady is inconsistent with an intention to create a definte obligation for services rendered. 142SC531, 141SE156.

623-43½-New. Where an insurance policy on defendant's life is payable to his mother if she survives him and otherwise to insured's estate, and some of the premiums were paid by the mother, such payments were not gifts. 197NC40, 147 SE680.

623-44 But see 83CalA596, 257P157.

623-58 TexCommnA 276SW690. [a] **Gift held not converted into sale.**-166La 57, 116S667.

623-59 176Ark946, 4SW(2d)933.

624-67 See also 230AppDiv160, 244NYS 228.

624-75 [c] **Transactions held to constitute gifts inter vivos.**-Nebr 228NW 619.

624-78 106Conn207, 137A727.

625-80 15F(2d)347, 349 [citCJ]; 202 Cal 215, 259P947.

625-86 168Ark981, 272SW869.

625-89 Mo 150A531. See also 6LaA401.

625-91 Me 150A531.
625-94 155Minn230, 141A531.
625-95 Me 150A531.
625-96 168Ark981, 272SW869 (living in state of concubinage).
625-97 [d] **Statute extending time to validate deeds of gift** held not retroactive. 193NC278, 136SE879.
625-98 166La57, 116S667; 169La412, 125S289. [a] 166La648, 117S750.
626-1 [c] **Con causa onerosa** contract declared valid. 44Philippine649.
626-2 See also 125 Or358, 267P521.
626-5 [a] **Gift of contents of deposit box** held not defeated by fact that certain contents were so marked as not to vest. 289Pa216, 137A247.
626-11 40F(2d)398 (stating essential elements); 41F(2d)501; 221Ky679, 299 SW576.
626-14 Me 150A531; 224AppDiv634, 232NYS147.
626-15 21F(2d)325, 332 [citCJ]. [a] (2) Mental capacity of donor at time of execution of gift is sufficient though incompetent before and after execution. 168Pa624, 122S886.
626-18 MoA 300SW1004; 100NJEq280, 134A681, 53ALR1115.
626-23 MoA 300SW1004.
627-24 MoA 300SW1004.
627-28 21F(2d)325.
627-29 21F(2d)325.
627-34 8F(2d)368; 13F(2d)805, 806 [citCJ]; 21F(2d)325, 332 [citCJ]; 176 Ark585, 3SW(2d)316; 177Ark860, 7SW (2d)985; 202Cal 215, 259P947, 951 [cit Cyc]; 207Cal 115, 277P313; 81CalA546, 254P306; 84CalA253, 257P911; 96CalA 568, 274P401(2dcase); CalA 290P668; 163Ga542, 136SE444; 254 IllA484; 202 Iowa1356, 212NW116; 205 Iowa1311, 217NW441; 151Md241, 134A210, 47ALR 730; Mass 172NE599; Miss 130S145; 81Mont560, 264P679; 82Mont73, 265P 15; 49Nev124, 240P435, 439 [quotCJ]; 83NH489, 144A848; 98NJEq728, 130A 628; 100NJEq400, 135A782; 101NJEq 203, 137A657; 102NJEq390, 140A792; 102NJEq371, 140A795; 102NJEq436, 141A175; NJCh 147A546; NJPrerog 146A471; 126Misc580, 214NYS73 (immediate); 128Misc718, 221NYS205; 130Misc865, 226NYS1; 133Misc795, 234 NYS366; 220AppDiv276, 221NYS409; 191NC493, 132SE282; 197NC274, 148SE 229; 130 Okl 154, 265P763, 764 [quot CJ]; 125 Or358, 267P521; 85PaSuper 470; 92PaSuper519; 7PaDist&Co 652; TexCommnA 283SW489; 145Va614, 134 SE568, 569 [quotCJ]; 150Va56, 142SE 378. [b] 81CalA546, 254P306.
628-35 49Nev124, 240P435, 439 [quot CJ]; 145Va614, 134SE568, 569 [quot CJ].
628-38 CalA 290P668; 251 IllA374.
628-40 253 IllA288.
628-42 [c] **Separate parts of instruments.**-205 Iowa1311, 217NW441.
628-43 79CalA762, 251P227.
628-44 79CalA762, 251P227; 133Misc 93, 231NYS251; TexCivA 25SW(2d)881.
629-46 8F(2d)368; 13F(2d)805, 806 [citCJ]; 319Mo 835, 5SW(2d)28, 31 [cit CJ]; 219MoA51, 266SW750; 100NJEq 400, 135A782; NJSup 150A50; NJPrerog 146A471; 221AppDiv211, 223NYS361; 125 Or358, 267P521; Utah 286P638 (title must pass).
629-50 214Ky785, 284SW83.
629-50½-New. Gift imperfect as such cannot be treated as an executed trust. 219MoA51, 266SW750.
629-50½-New. An intention of a corporation expressed by resolution of its board of directors as "a gratuitous appropriation," followed by a voluntary and absolute transfer of the thing or property, is conclusive of the character of the transfer. 8F(2d)368.
629-51 Ill 173NE100; 168Minn413, 210 NW147; 215AppDiv73, 213NYS277 (unexpressed intent); TexCivA 26SW(2d) 289; Can [1926] 3DomLR897.
629-52 13F(2d)805, 806 [citCJ]; 87 Colo 461, 288P620; 219MoA51, 266SW 750; 190NC586, 130SE500.
629-53 176Ark585, 3SW(2d)316; 198 Ind393, 153NE768, 771 [citCJ]; 128 Misc718, 221NYS205; 130Misc865, 226 NYS1.
630-55 128Misc718, 221NYS205.

630-66 8F(2d)368; 13F(2d)805, 806 [citCJ]; 34F(2d)899; 176Ark585, 3SW (2d)316; 207Cal 115, 277P313; 81CalA 546, 254P306; 96CalA568, 274P401(2d case); 104Conn17, 131A742; 163Ga542, 136SE444; 339 Ill 530, 171NE621; 251 IllA374; 254 IllA484; 202 Iowa927, 211 NW392; 202 Iowa1356, 212NW116; 130Kan453, 286P221; 209Ky212, 272 SW384; 221Ky679, 299SW576; 224Ky 493, 6SW(2d)499; 235Ky582, 31SW (2d)890; 151Md241, 134A210, 47ALR 730; 254Mass576, 151NE87; 168Minn 413, 210NW147; Miss 130S145; 316Mo 483, 291SW132; 219MoA51, 266SW750; MoA 8SW(2d)110; 81Mont560, 264P 679; 82Mont73, 265P15; Nev 283P913; 98NJEq728, 130A628; 100NJEq400, 135A782; 101NJEq203, 137A657; NJ Ch 147A546; NJPrerog 146A471; 248 NY76, 161NE425; 215AppDiv73, 213 NYS277 (gift consummated only on delivery of property); 126Misc580, 214 NYS73; 128Misc718, 221NYS205; 130 Misc865, 226NYS1; 133Misc795, 234 NYS366; 220AppDiv276, 221NYS409; 132Misc290, 230NYS271; 136Misc615, 241NYS648; 191NC493, 132SE282; 197 NC426, 149SE548; 52ND182, 201NW 861; 56ND152, 217NW150; 130 Okl 154, 265P763, 764 [quotCJ]; 142 Okl 233, 286P335, 69ALR681; 125 Or362, 267P520; 125 Or358, 267P521; 131 Or 481, 283P39; 85PaSuper470; 92PaSuper519; 7PaDist&Co 653; 12PaDist& Co 197; TexCommnA 283SW489; 145 Va614, 134SE568; 154Wash249, 282P 60; 99WVa498, 129SE472; 38Wyo 365, 267P426, 60ALR1046; Alta [1927] 2 DomLR429. [a] 81CalA546, 254P306; 44Philippine668.
632-68 202 Iowa1356, 212NW116; 82 Mont73, 265P15.
632-69 130Misc865, 226NYS1.
633-74 130Misc865, 226NYS1; Okl 291 P43.
633-75 248NY276, 161NE425.
633-76 133Misc758, 234NYS311.
633-80 [a] (1) 202Cal 215, 259P947. [b] 163Ga542, 136SE444.
634-82 13F(2d)805; 248NY276, 161 NE425; 133Misc758, 234NYS311; 289 Pa216, 137A247.
634-83 13F(2d)805, 806 [citCJ]; 35 GaA420, 133SE297; 202 Iowa1356, 212 NW116; 232Ky469, 23SW(2d)922; 136Misc250, 240NYS845; 5PaDist&Co 764.
634-84 123 Okl 142, 252P34, 36 [cit Cyc]; 85PaSuper470.
634-86 202 Iowa1356, 212NW116.
634-90 35GaA420, 133SE297.
634-92½-New. An essential element of delivery of a gift inter vivos is that title shall immediately vest in donee. 22 OhA295, 154NE163.
634-92½-New. Rule as to delivery is generally strict. 130Misc865, 226NYS1.
634-94 13F(2d)805, 806 [citCJ]; 212 Ala325, 104S808; 177Ark860, 7SW(2d) 985; 196Cal 497, 238P1034; 81CalA 546, 254P306; 202Cal 215, 259P947, 950 [quotCJ]; 104Conn17, 131A742; 55 AppDC341, 5F(2d)767; 163Ga542, 136 SE444; Ill 173NE100; 237 IllA190; 243 IllA386; 220Ky43, 294SW767; 151 Md241, 134A210, 47ALR730; 251Mich 483, 232NW192; 168Minn413, 210NW 147; Nev 283P913; 98NJEq728, 130A 628; 100NJEq280, 134A681, 53ALR 1115; NJ 144A10; 100NJEq400, 135A 782; 101NJEq203, 137A657; 102NJEq 436, 141A175; 248NY76, 161NE425; 128Misc718, 221NYS205; 130Misc865, 226NYS1; 133Misc795, 234NYS366; 197NC274, 148SE229; 22 OhA295, 154 NE163, 165 [citCJ]; 289Pa216, 137A 247; 85PaSuper470; 5PaDist&Co 764; 152Tenn500, 279SW801. [a] **Test of delivery** is not physical inability of donor to exercise control, but facts showing that donee has legal right to exercise dominion. Nev 290P1025.
635-95 41F(2d)501; 100NJEq280, 134 A681, 53ALR1115; 5PaDist&Co 764.
635-97 220Ky43, 294SW767; 260Mass 481, 157NE517; 100NJEq400, 135A782.
635-99 133Misc766, 234NYS246.
636-1 289Pa216, 137A247.
636-5 13F(2d)805; 106Conn276, 137A 767; 163Ga542, 136SE444. [a] **Delivery of possession of claim to donee** has been held not requisite to consummation of valid gift of donor's claim for unpaid purchase money, where claim had no corporeal existence. Tex CommnA 12SW(2d)114, 63ALR435.
636-6 46 Ida313, 268P31; 293Pa13, 141A629. See also 164La65, 113S766. [a] **Manual gift of money** may be complete without actual transfer from hand to hand. LaA 128S903(2dcase).
636-11 13F(2d)805, 806 [citCJ]; 202 Cal 215, 259P947; 207 Iowa95, 222NW 401; 209Ky212, 272SW384; 116Nebr 686, 218NW739, 741 [citCJ]; 99WVa 498, 129SE472.
637-12 103Conn88, 130A75; 237 IllA 190; TexCommnA 12SW(2d)114, 63ALR 435.
637-14 Utah 286P638.
637-16 289Pa216, 137A247.
637-19 202Cal 215, 259P947; 235 IllA 374; 84Mont424, 276P16, 63ALR528; 99NJEq560, 134A95; 215AppDiv73, 213 NYS277 (gift consummated only by execution and delivery of instrument); 134 Misc265, 234NYS497; 136Misc250; 240 NYS845 (assignment of bonds and mortgages); 229AppDiv286, 241NYS546; 100Vt51, 134A853; 140Wash472, 249P 992, 995 [quotCJ].
637-21 125Kan725, 266P649 (bill of sale for cattle); 98NJEq728, 130A628; 140Wash472, 249P992, 995 [quotCJ].
638-22 79CalA762, 251P227; 119Kan 568, 240P570 (gift may be made by transfer of certificate of sale from sheriff after foreclosure sale).
638-23½-New. Rules as to delivery are somewhat relaxed where the gift is evidenced by a written instrument. 130 Misc865, 226NYS1.
638-24 55AppDC344, 5F(2d)767 (written instrument, purporting to give personal property, held insufficient for gift inter vivos or donatio mortis causa in absence of delivery or possession); 123 Okl 142, 252P34, 36 [citCyc]; TexCivA 6SW(2d)136, 138 [quotCJ]; 194Wis625, 217NW305.
638-25 116Nebr686, 218NW739, 742 [citCJ].
638-27 142 Okl 233, 286P335, 69ALR 681. [d] **Mules** given by father to daughters who accepted and used mules as own. 181Ark454, 26SW(2d)109.
638-28 NJCh 151A48 [quotCJ]; 149Va 815, 141SE868.
638-29 [a] **Property received in exchange for gift** is not within operation of statute. 106WVa91, 144SE877.
638-30 81CalA176, 253P191, 194 [quot CJ]; 87 IndA462, 151NE735, 739 [cit CJ]; 261Mass381, 158NE794; 241Mich 216, 217NW71, 74 [quotCJ&Cyc]. [f] **Writing is not required** to complete gift of money which is in donee's possession. 261Mass381, 153NE794.
638-30½-New. Mere possession of an unindorsed negotiable instrument is not alone evidence of title either legal or equitable. 251 IllA374.
639-31 214Ky461, 283SW442, 443 [cit CJ].
639-38 See also 79CalA762, 251P227.
639-39 79CalA762, 251P227.
639-42 13F(2d)805; 104Conn17, 131A 742; 163Ga542, 136SE444; 99NJEq560, 134A95; 228AppDiv56, 239NYS5; Tex CivA 10SW(2d)136.
640-44 13F(2d)805.
640-45 13F(2d)805.
640-46 13F(2d)805.
640-47 13F(2d)805.
640-49 13F(2d)805; 56ND123, 216NW 335, 367 [quotCJ], 60ALR1040.
640-50 248NY76, 161NE425; 221App Div211, 223NYS361.
640-54 13F(2d)805; 104Conn17, 131A 742; 98Fla840, 124S734; 100NJEq400, 135A782 (dictum); 22AltaL270, [1926] 3DomLR765, [1926] 2WestWkly570. [g] **Trustee and not mere agent.**-201 Iowa834, 208NW508, 44ALR1516.
641-55 13F(2d)805; 132Misc910, 231 NYS16.
641-56 13F(2d)805; 104Conn17, 131A 742; 201 Iowa834, 208NW508, 44ALR 1516; 100NJEq400, 135A782 (dictum).
641-66 106Conn276, 137A767; 228App Div56, 239NYS5.
642-67 MoA 8SW(2d)1027; 100NJEq 400, 135A782. [a] (2) There is no gift

of bond contained in envelope of decedent with widow's name and description of bond where decedent retained possession and custody thereof during lifetime, and received dividends and interest. 130Misc421, 230NYS434.

642-68 120Kan286, 242P1018; 228App Div56, 239NYS5.

642-70 120Kan286, 242P1018; 228App Div56, 239NYS5.

642-71 120Kan286, 242P1018.

642-72 106Conn276, 137A767. [b] **Delivery seven years after making of gift** held sufficient. 106Conn276, 137A767.

642-76 260Mass481, 157NE517; 123 Okl 142, 252P34, 36 [quotCJ].

642-77 123 Okl 142, 252P34, 36 [quot Cyc].

642-78 114Nebr230, 206NW770, 773 [citCJ].

642-82½-New. Agreement to redeliver, in case of donor's recovery from illness, made subsequent to a gift consummated by delivery, will not defeat the gift. 79 CalA762, 251P227.

643-85 177Ark860, 7SW(2d)985; 96 CalA568, 274P401(2dcase); 163Ga542, 136SE444; Iowa 228NW93; 224Ky493, 6SW(2d)499; 235Ky582, 31SW(2d)890; 151Md241, 134A210, 47ALR730; Miss 130S145; 81Mont560, 264P679; 82Mont 73, 265P15; 126Misc580, 214NYS73; 128Misc718, 221NYS205; 133Misc795, 234NYS366; 220AppDiv276, 221NYS 409; 136Misc250, 240NYS845; 130 Okl 154, 265P763, 764 [quotCJ]; 142 Okl 233, 286P335, 69ALR681; 125 Or358, 267P521. [e] (1) 165La1019, 116S493. (2) 166La57, 116S667. (5) 166La57, 116S667. (10) Purchaser of property before acceptance acquires valid title. 170La663, 129S122. (11) Where widow buys property for self and minor children, title vests entirely in her, authorizing conveyance before their majority. 170La663, 129S122. [g] **Rights of creditors.–Iowa** 228NW93.. [h] **Benefits cannot be forced on person** against his will. 12LaA75, 125S300.

644-87 235Ky582, 31SW(2d)890 (cannot be accepted after death).

644-88 [a] 164Ga96, 137SE833.

644-88½-New. Where gift is highly beneficial to donee, it has been held that acceptance is not necessary, as it will be assumed. 104Conn17, 131A742.

644-90 See also 163Ga542, 136SE444.

644-95 [a] 11F(2d)948, 48ALR207.

644-4 127Misc647, 217NYS381.

644-6 162La880, 111S267 (adoption agreement purporting to vest child with qualities of forced heir held insufficient).

644-7 209Ky212, 272SW384 [quotCJ] (check where donor had no funds). But see 140Wash472, 249P992. [b] 162La 880, 111S267. [c] **Present right in future profits** is not subject of gift. 39F (2d)540.

645-10 56ND123, 216NW335, 336 [cit CJ], 60ALR1040.

645-12 11F(2d)948, 48ALR207; 213Ala 526, 105S666 [dictum]; 177Ark860, 7 SW(2d)985; 235 IllA374; 101NJEq90, 137A785; NC 154SE832.

645-13 177Ark860, 7SW(2d)985; 247 IllA358; TexCivA 299SW950.

645-15 Alta [1927] 2DomLR429.

645-19 215Ala179, 110S291; 101NJEq 90, 137A785.

645-20 NJCh 152A245.

645-22 See also 31F(2d)721.

645-23 See also 8LaA810.

645-27 22 OhA295, 154NE163; 134 Okl 38, 272P404.

646-31 40F(2d)398; 235 IllA374; Ind 169NE843 (solicitations forming basis of limitation of gifts). [d] **That gift is provisional** does not defeat gift. 126 Misc580, 214NYS73.

646-33 164La65, 113S766. [b] (3) **Donee cannot modify or change intended use.** Ind 169NE843.

646-34 [a] **Donor cannot contradict original purpose for use of gift.** Ind 169 NE843.

646-35 101NJEq203, 137A657, 659 [cit CJ].

647-37 [b] **Defeasance on death of donee before donor** does not defeat gift. 126Misc580, 214NYS73.

647-39 13F(2d)805; 40F(2d)398; 103 Conn88, 130A75; 235 IllA374.

647-40 235 IllA374; Mass 172NE599; Nebr 228NW619.

647-41 235 IllA374; 126Misc580, 214 NYS73. See also NJ 132A919.

647-42 31F(2d)574. [a] **Retention by deceased of coupons then due and becoming due in immediate future** is not inconsistent with present gift of bonds. Mass 172NE599.

647-43 13F(2d)805; 96CalA568, 274P 401(2dcase); 235 IllA374; 196Wis351, 220NW215, 59ALR1528.

647-43½-New. Reservation may be such as to exhaust the entire fund or property. 83NH489, 144A848.

647-46 40F(2d)398.

647-48 13F(2d)805; 22AlaA430, 116S 414; 168Ark981, 272SW869; Miss 130 S145; 316Mo 483, 291SW132; 134 Okl 38, 272P404; 125 Or358, 267P521; Tex CivA 293SW604.

648-49 Ill 173NE100; 228Ky259, 14 SW(2d)1096.

648-50 251NY257, 167NE434.

648-51½-New. In determining the date when a gift became effective, the intention of the donor, if ascertainable, should control. 241Mich216, 217NW71.

648-51½-New. Valid gift of savings deposit account requires intent that title thereto shall pass during donor's lifetime. Utah 286P638.

648-52 204Cal166, 267P104; 46 Ida 313, 268P31, 35 [quotCJ]; 220Ky43, 294SW767; 126Me84, 136A459; 100 NJEq400, 135A782; 140Wash452, 249P 980, 981 [quotCJ].

649-53 19F(2d)454; 126Me84, 136A459.

649-54 140Wash452, 249P980, 981 [quotCJ].

649-55 13F(2d)805; 83Colo 518, 266P 1110; 104Conn17, 131A742; 120Kan 286, 242P1018; 220Ky43, 294SW767; 140Wash452, 249P980, 981 [quotCJ]; 99WVa498, 129SE472. [a] (2) Gift must be complete and title must pass during lifetime of donor. 120Kan286, 242P1018.

649-55½-New. Delivery of stock by husband to wife to be held by her until his death when it was to become her property is not a present gift. 126Misc 580, 214NYS73.

649-61 22AlaA430, 116S414; 87Colo 461, 288P620; 164Ga96, 137SE833; 204 Iowa1367, 217NW456; 170La363, 127S 869 (where gift perfected by change of legal status); Md 152A111; 261Mass 130, 158NE502; 82Mont73, 265P15; 133Misc795, 234NYS366; 22 OhA295, 154NE163.

650-62 40F(2d)398; Mass 172NE74.

650-68 Iowa 231NW457; 136Misc250, 240NYS845.

650-73 [a] **Conveyance being intended and made and received and accepted as gift,** donor is not entitled to cancellation because recited nominal consideration was not paid. 95CalA487, 272P1079.

650-74 See also 151Md241, 134A210, 47 ALR730.

650-77 [a] (8) Defendant is entitled to recover on reconventional demand for return of engagement presents given plaintiff, under Rev. Civ. Code arts. 1740, 1897, where marriage did not take place, even if he was primarily responsible for breach of engagement, plaintiff's remedy being suit for breach of promise. 10LaA361, 120S880.

651-78 125 Or358, 267P521.

651-82 Ill 173NE100. [a] Ill 173NE 100.

651-84 5PaDist&Co 764.

651-85 [b] (1) See also 1LaA645. (5) Where property bought with parent's funds is taken in child's name, it is donation to child, revocable before child's majority. 170La663, 129S122. [d] **Prescription.–49Philippine**142.

651-89 1LaA186; 118Misc558, 194NYS 100; 119Misc39, 195NYS200; 98Pa Super535. But see 95PaSuper296. Contra 210AppDiv690, 206NYS353.

652-91½-New. Where a man purchases a motor vehicle intended for joint use of himself and his fiancée, it must be returned to his estate upon his death's terminating the engagement. Alta [1928] 3DomLR347.

652-92 202 Iowa927, 211NW392, 394 [quotCJ]; Man [1927] 1DomLR1057, [1927] 1WestWkly386.

652-92½-New. A donor is ordinarily entitled to a reformation of a conveyance by way of gift on account of his own mistake. 24 OhA57, 155NE815.

652-94 202 Iowa927, 211NW392, 394 [quotCJ].

652-95 125 Or358, 267P521.

652-96 DelCh 140A795; MoA 273SW 118; 100NJEq61, 135A79; Man [1928] 4DomLR806.

652-2½-New. Independent advice has been held not necessary to validity of a gift. 149Md526, 131A757.

652-3 42F(2d)699.

653-10 114Nebr752, 209NW737.

653-15 27F(2d)729; 100NJEq61, 135A 79; 298Pa1, 147A848.

653-16 100NJEq61, 135A79.

653-19 MoA 271SW1016.

654-22 [a] **Aged woman** making gift to grandson need not establish insanity or mental condition rendering her entirely incapable of executing valid gift to secure relief. 27F(2d)729.

654-24 11F(2d)841.

654-25 11F(2d)841.

654-27 202 Iowa927, 211NW392, 394 [quot entire section CJ]; MoA 271SW 1016.

654-28 120Kan13, 241P1087, 1089 [cit CJ]. [a] (1) Man [1929] 4DomLR128. (6) Can [1929] 1DomLR289. [b] (1) 101NJEq99, 136A730. But see NJCh 152A245. (6) Competent advice is not essential in absence of relation of trust and confidence. 100NJEq280, 134A681, 53ALR1115.

654-28½-New. In other jurisdictions, even where a confidential relation exists, independent advice of a third person is not necessary to the validity of a gift; 149Md526, 131A757.

654-28½-New. especially where it does not appear that donee was in a position of influence over donor, or that the latter was in an unequal or dependent position. 149Md526, 131A757.

654-29 Cal 289P613; 122Kan607, 253 P230.

654-31 202 Iowa927, 211NW392, 394 [quot entire section CJ]; 125Kan466, 473, 265P42 [quotCJ]; Alta [1930] 3 DomLR378.

654-31½-New. Where no fiduciary relation is shown, independent advice is not required. 119 Or277, 241P46.

654-32 213Ala526, 105S666 (cannot be recalled); 168Ark981, 272SW869; 106 Conn276, 137A767; Utah 286P638.

655-38 8LaA260.

655-45 164Ga279, 138SE218; 37GaA 301, 139SE912; 250Mich515, 231NW60; 124 Okl 188, 255P566; 124 Okl 193, 255 P577; 134 Okl 70, 272P857, 862 [quot CJ]; 130 Or577, 281P178.

656-47 219Ala44, 121S45.

656-48 134 Okl 70, 272P857, 862 [quot CJ].

656-48½-New. In the case of wild, unimproved land of little value, the law only required that it be described with reasonable certainty. 145Va731, 134SE 696.

656-49 37GaA301, 139SE912; 134 Okl 70, 272P857, 862 [quotCJ]; Tex CommnA 15SW(2d)232; TexCivA 300 SW203; 195Wis203, 217NW416; Alta [1926] 3DomLR448, [1926] 2WestWkly 463. [a] (4) Gift made prior to statute held not within statute of frauds as against subsequent grantee. 145Va731, 134SE696. (5) Verbal agreement by uncle that nephew should have farm in consideration of boarding uncle and his wife till uncle's death and rendering personal services is not within statute. 149Va815, 141SE868.

656-52 37GaA301, 139SE912.

657-53 134 Okl 70, 272P857, 862 [quot CJ].

657-57 37GaA301, 139SE912; 134 Okl 70, 272P857, 862 [quotCJ].

657-60 37GaA301, 139SE912; 134 Okl 70, 272P857. [a] TexCommnA 15 SW(2d)232.

657-61 37GaA301, 139SE912; 134 Okl 70, 272P857, 862 [quotCJ]; TexCivA 300SW203.

657-67 81Mont560, 264P679, 682 [cit CJ]; TexCivA 275SW96.

657-69 81Mich560, 264P679.

658-71 120Kan286, 242P1018 (delivery of liberty bonds); 248NY76, 161NE425.

[d] **Delivery of key to tin box containing choses in action is sufficient delivery** of box which was constructed for purpose of excluding its contents from all persons except one in possession of key. **TexCivA** 275**SW**96. [e] **Bonds.**–83**CalA** 604, 257**P**180.

658–71½–New. A promissory note, if intended as a gift to payee to take effect after the maker's death, is invalid. 217**Ky**258, 289**SW**275.

658–71¼–New. Vendor's lien notes not signed by the purchaser until after vendor's death may be transferred by gift, since the deed evidenced a contract of execution and delivery of notes. **Tex CivA** 299**SW**950.

658–71¼–New. Where a gift of land is valid, donor may make a contribution to cancel a mortgage thereon, since he has the right to pay a mortgage on his own land. 130**Misc**865, 226**NYS**1.

658–71⅓–New. Gift of royalty from literary property can be made only by deed. 39**F(2d)**540.

658–72 41**F(2d)**501. [b] **Assignment ineffectual.**–120**Kan**286, 242**P**1018. [c] **Indorsement without stamps or payment of transfer tax,** and not actually delivered, held insufficient. 221**AppDiv** 211, 223**NYS**361.

658–73 216**Ky**557, 288**SW**312; 100 **NJEq**400, 135**A**782; 136**Misc**615, 241 **NYS**648. [a] **Delivery to agent with proper instructions sufficient.**–36**Wyo** 210, 254**P**137. [b] **Account with stock brokers in son's name,** but used personally by decedent, held not to constitute gift. 135**Misc**686, 238**NYS**262.

658–74 237 **IllA**190.

658–75 237 **IllA**190, 196 [citCJ]; 247 **NY**447, 160**NE**910; 230**AppDiv**160, 244 **NYS**228.

659–83 15**F(2d)**347; 46 **Ida**313, 268 **P**31.

659–84 100**NJEq**400, 135**A**782.

659–85 237 **IllA**190, 196 [citCJ].

659–86 See also 230**AppDiv**160, 244 **NYS**228.

659–88 101**NJEq**90, 137**A**785.

659–90 [c] **Assignment reserving right of cancellation and conditioned that assignee shall survive insured** is ineffective, being merely attempted testamentary disposition. 81**CalA**546, 254**P**306.

659–91½–New. Where the policy provides for a written assignment and delivery of a copy to insurer, and insured retains the right to surrender the policy or change it for a paid-up policy, there is no gift by mere delivery. 90**CalA**362, 265**P**882.

659–92 35**GaA**420, 133**SE**297.

660–94½–New. Purchasing and taking assignment of notes and mortgages from the bank in the name of the donee is a valid gift inter vivos, although assignor retains possession during the life of the donor, such possession being as agent for donee. 13**F(2d)**805.

660–94¼–New. Where a father indorses a note to the effect that he gives it to his child and directs delivery to him on the father's death, and incloses it in an envelope addressed to such child with directions not to open it, and delivers the envelope to the child, there is a delivery sufficient to complete a gift. 207 **Iowa**95, 222**NW**401.

660–94¼–New. A like rule applies where the note so indorsed is delivered to a child other than the one named as donee. 207 **Iowa**95, 222**NW**401.

660–94½–New. Lender causing notes for money loaned to be made payable to his children for purpose of evading tax and retaining dominion over notes held not to have made gift. **Miss** 130**S** 145.

660–95 160**Tenn**229, 22**SW(2d)**1041.

660–99 244 **IllA**89, 102 [quotCJ]; 247 **NY**447, 160**NE**910.

660–99½–New. Delivery of bonds pledged to secure note is ineffectual as a gift without delivery of note. 38**F(2d)** 55.

660–2 **NJSup** 150**A**50; 138**Misc**330, 245 **NYS**626.

661–3 **Cal** 289**P**815 (notwithstanding execution, recordation and delivery of mortgage as security); 102**WVa**531, 135 **SE**654, 49**ALR**680.

661–10 102**WVa**531, 135**SE**654, 49**ALR** 680.

661–16½–New. A check delivered in blank, filled out by the bank, and the proceeds used for the purchase of a draft, is not a gift. 162**La**758, 1118 86.

662–22 102**WVa**531, 135**SE**654, 49**ALR** 680.

662–25½–New. Deposit in the name of a third person "as agent for" donee is sufficient. 164**La**65, 113**S**766.

662–25⅓–New. And a condition that deposit shall remain and draw interest until donee minor is eighteen is valid and will be enforced. 164**La**65, 113**S** 766.

662–26 27 **OhNPNS**375 (signature cards signed by husband for deposit in wife's name); **Okl** 291**P**43.

663–31 224**Ky**493, 6**SW(2d)**499. [a] (1) 293**Pa**85, 141**A**721.

663–33 228**Ky**32, 14**SW(2d)**189; 154 **Wash**249, 282**P**60. But see 201 **Iowa** 834, 208**NW**508, 44**ALR**1516.

663–35 224**Ky**493, 6**SW(2d)**499.

663–36½–New. A notation on a signature card authorizing payment to the depositor's wife of the balance of the money standing in the account on the depositor's death does not constitute a gift inter vivos. 92**PaSuper**480.

664–42 232 **IllA**20, 24 [quotCJ]; 205 **Iowa**237, 216**NW**12; 152**Md**654, 137**A** 378; 260**Mass**481, 157**NE**517; 99**NJEq** 119, 132**A**761. See also 179**Minn**430, 229 **SW**865. [b] **Where donee is given right to make withdrawals,** form is not important. 179**Minn**430, 229**NW**865.

664–43 163**Ga**542, 136**SE**444, 445 [cit CJ]; 36**GaA**377, 136**SE**825; 232 **IllA**20, 24 [quotCJ]; 260**Mass**481, 157**NE**517; 116**Nebr**686, 218**NW**739, 742 [citCJ]; 102**NJEq**436, 141**A**175; 223**AppDiv**186, 228**NYS**63.

664–44 83**Colo** 518, 266**P**1110.

664–45 232 **IllA**20, 24 [quotCJ]; 260 **Mass**481, 157**NE**517; **Mass** 171**NE**479 (holding failure of donee to sign deposit card not to affect right to deposit as gift, intent otherwise being clear); 99 **NJEq**119, 132**A**761.

664–46 82**CalA**696, 256**P**247; 163**Ga** 542, 136**SE**444, 445 [citCJ]; **NJ** 144**A** 10; 99**NJEq**119, 132**A**761; 154**Wash** 249, 282**P**60.

664–46½–New. Nor is mere circumstance that, as between the bank and the two joint depositors, bank would be justified in paying to the depositor conclusive as to question. 260**Mass**481, 157 **NE**517.

664–47 163**Ga**542, 136**SE**444, 445 [cit CJ].

664–48 260**Mass**481, 157**NE**517; 99**NJ Eq**119, 132**A**761. But see 83**Colo** 518, 266**P**1110(2dcase).

664–49 36**GaA**377, 136**SE**825. See also 163**Ga**542, 136**SE**444.

664–50 [a] **Deposit in name of decedent** is presumptively hers, although her daughter was authorized to draw against it. 158**La**61, 103**S**443.

664–52 232 **IllA**20, 24 [quotCJ].

665–53 232 **IllA**20, 24 [quotCJ]; 116 **Nebr**686, 218**NW**739; 223**AppDiv**186, 228**NYS**63. [a] **Where deposit is joint** but husband made it payable "to himself," it does not go to wife on his death. 232 **IllA**20.

665–53½–New. Where depositor merely deposits in own and donee's name, but nothing is done to give complete control to donee, there is no gift. 85**Pa Super**470.

665–53⅓–New. That funds of a deposit under an agreement for payment to the survivor are at all times subject to check of either party to the agreement does not make the transaction subject to the objection that the gift is incomplete. 293**Pa**13, 141**A**629.

665–53¼–New. Statute providing that deposits in name of two or more may be paid to survivor or his personal representatives raises presumption of ownership by survivor. 179**Minn**430, 229 **NW**865.

665–54 176**Ark**853, 4**SW(2d)**534; 36 **GaA**377, 136**SE**825; 99**NJEq**119, 132**A** 761; **Utah** 286**P**638.

665–56 36**GaA**377, 136**SE**825.

665–56½–New. ... but delivery to a third person for donee has been held sufficient even without notice to latter. 260 **Mass**481, 157**NE**517.

665–57 99**NJEq**119, 132**A**761; 223**App Div**186, 228**NYS**63. [a] **That deposit books are taken from sister's possession** and kept in deposit box of donor and herself does not affect prior gift. **Mass** 171**NE**479.

665–60 83**CalA**604, 257**P**180; 202 **Iowa** 1356, 212**NW**116; 224**AppDiv**699, 229 **NYS**75; 214**AppDiv**802, 210**NYS**588. [a] (1) 104**Conn**17, 131**A**742. [b] **NJ** 129**A**820 (delivery of pass book carries fund). [c] **Transfer of savings deposit by indorsing name of another on deposit book** without limitation as to right to draw upon fund was valid, notwithstanding donor retained right to draw upon fund at will, since transaction completely divested donor of title and did not take effect upon her death. 83**NH** 489, 144**A**848.

665–61 **NJ** 129**A**820 (power of attorney unnecessary); 23 **OhA**163, 154**NE**799. See also 83**CalA**604, 257**P**180.

665–62 [a] **Delivery to third person with instructions** to deliver to donee on donor's death is sufficient. 104**Conn**17, 131**A**742.

665–64 138**Misc**10, 245**NYS**305.

665–65 251**Mich**483, 232**NW**192.

666–67 104**Conn**17, 131**A**742.

666–68 104**Conn**17, 131**A**742.

666–68½–New. Where gift of savings bank book is highly beneficial to donee, acceptance of gift is unnecessary, since it is assumed. 104**Conn**17, 131**A**742.

666–69 254**Mass**576, 151**NE**87.

666–71 40**GaA**649, 150**SE**857 (1stcase) (failure to present for payment before death of donor is not revocation of gift); 114**Nebr**230, 206**NW**770; 100**NJEq**280, 134**A**681, 682 [citCJ], 53**ALR**1115. [b] **Where insured and wife, who was beneficiary under policy, joined in assignment of policy to insurer** to secure loan to insured, and check for loan was made payable to insured and wife, indorsement by wife of checks to husband did not constitute gifts by wife to husband, since wife never owned part of money loaned. 224**AppDiv**634, 232**NYS**147.

666–72 114**Nebr**230, 206**NW**770; 130 **Okl** 154, 265**P**763, 764 [quotCJ].

666–77½–New. But it has been held that the delivery of a depositor's checks on a savings bank without the delivery of the bank book to the donee is not a valid gift of the money in the bank. 132**Misc**290, 230**NYS**271.

666–78 114**Nebr**230, 206**NW**770.

666–79 213**Ala**526, 105**S**666, 668 [cit CJ]; 98**Fla**840, 124**S**734; 123 **Okl** 142, 252**P**34, 36 [quotCJ].

667–81 [b] **Mother's forbearance for seven years** after son's death, continuing to time of her own death, to collect loan son owed her from the son's estate, where agreement executed at time of making loan provided that obligation to repay should terminate on mother's death, indicates that she intended her death to satisfy loan. 150**Wash**391, 273**P**524.

667–83 231**Ky**454, 21**SW(2d)**825.

667–84 98**Fla**840, 124**S**734; 133**Misc**93, 231**NYS**251; 123 **Okl** 142, 252**P**34, 36 [quotCJ].

667–85 [a] (2) Delivery of note and mortgage to mortgagor is valid gift. 98**Fla**840, 124**S**734.

667–88 98**Fla**840, 124**S**734.

667–90 123 **Okl** 142, 252**P**34, 36 [quot Cyc].

668–91 123 **Okl** 142, 252**P**34, 36 [quot CJ].

668–99 221**AppDiv**697, 224**NYS**609.

668–2 221**AppDiv**697, 224**NYS**609.

669–13 See also 244**IllA**89.

669–25 [b] **Acceptance of arrangement** creating joint interest and survivorship may be presumed. 300**Pa**156, 150 **A**465.

669–26 205 **Iowa**302, 217**NW**851, 852, [citCJ]; 222**AppDiv**368, 226**NYS**325; 125**Misc**907, 212**NYS**265; 128**Misc**718, 221**NYS**205; 130**Misc**865, 226**NYS**1; 133 **Misc**795, 234**NYS**366; 150**Va**56, 142**SE** 378. But see 138**Misc**85, 245**NYS**636. [a] (5) 220**MoA**1165, 297**SW**415. (6) Decedent's bank account reciting that in case of her death it was payable to her daughters does not create presumption of intent to give it to daughters. 128**Misc**718, 221**NYS**205. [c] **Where gift of realty was never perfected,** court will not infer existence of gift thereof by donor. 130**Misc**865, 226**NYS**1.

669–30 254 **IllA**484 (gift is presumed where statute prevents presumption of advancement).
669–31 283**Pa**168, 129A53.
669–33 [a] **Where gift is to several persons,** presumption is that they share equally. **Tex** 293**SW**604.
669–33½–New. Ownership by testator of property up to within a short time of death is presumed to continue. 130 **Misc**865, 226**NYS1**.
669–33¼–New. Intent of donor is presumed to be natural legal effect of her acts. 136**Misc**250, 240**NYS**845.
670–35 86**Colo** 135, 278**P**614(1stcase); 202 **Iowa**927, 211**NW**392; 126**Me**84, 136 A459; **Me** 150A531; 116**Nebr**291, 216 **NW**831; 102**NJEq**436, 141A175; 98**Pa Super**535.
670–36 81**CalA**546, 254**P**306; 96**CalA** 568, 274**P**401(2dcase); 240 **IllA**40; 244 **IllA**89 [quotCJ]; 87 **IndA**462, 151**NE** 735; 221**Ky**679, 299**SW**576, 577 [citCJ]; 162**La**758, 111886; 319**Mo** 835, 5**SW(2d)** 28, 32 [citCJ]; 322**Mo** 842, 16**SW(2d)** 72; **MoA** 8**SW(2d)**110; **MoA** 13**SW(2d)** 1076; 101**NJEq**203, 137A657; **NJCh** 147A546; 128**Misc**422, 220**NYS**205; 130 **Misc**865, 226**NYS1**; 133**Misc**795, 234 **NYS**366; 229**AppDiv**368, 241**NYS**710; 136**Misc**893, 242**NYS**417; 136**Misc**798, 244**NYS**343; 145**Va**614, 134**SE**568; 150 **Va**56, 142**SE**378. See also 214**AppDiv** 331, 212**NYS**158 (holding burden is on donee, receiving gift when donor is expected to die, to establish that gift inter vivos was intended). [b] 251 **IllA** 374 (delivery with intent to pass title).
670–38 **Me** 150A531; 149**Md**526, 131A 757; **NJ** 151A58. [a] **As to gifts to take effect on death of donor** there is no presumption of undue influence. 148 **SC**369, 146**SE**220.
670–39 42**F(2d)**699; 149**Md**526, 131A 757.
670–41 42**F(2d)**699; **NJ** 132A919; 132**Misc**294, 230**NYS**226.
671–42 323 **Ill** 380, 154**NE**149; 100 **NJEq**280, 134A681, 53**ALR**1115; 130 **Misc**865, 226**NYS1**.
671–43 100**NJEq**280, 134A681, 53**ALR** 1115; 132**Misc**294, 230**NYS**226.
671–44 80**CalA**230, 251**P**692; 100**NJEq** 280, 134A681, 53**ALR**1115; **Can** [1930] 4**DomLR**915.
671–45 11**F(2d)**841; 27**F(2d)**729 (gift from older member of family is presumptively invalid); **Cal** 289**P**613; 201 **Iowa**1077, 203**NW**41; **Me** 150A531; 100 **NJEq**280, 134A681, 53**ALR**1115; 101 **NJEq**99, 136A730; 293**Pa**85, 141A721; 298**Pa**1, 147A848. [d] **Donee's mere living in close intimacy and harmony with donor** is insufficient to show confidential relationship. 149**Md**526, 131A 757. [e] **Relation of life tenant to remainderman** is not such confidential relation as matter of law. **Me** 150A531.
671–46 11**F(2d)**841; 157**Md**287, 145A 773.
671–50 157**Md**287, 145A773.
671–52 202 **Iowa**927, 211**NW**392, 394 [quotCJ entire paragraph].
671–53 [b] **Gift to brother-in-law** is not presumed void on ground of confidential relation between parties. Such relation must be shown actually to exist from facts of case. 157**Md**287, 145 A773.
672–55 149**Md**526, 131A757; 114**Nebr** 752, 209**NW**737; 92**PaSuper**519.
672–56 But see 102**NJEq**371, 140A795.
672–57 87 **IndA**462, 151**NE**735; 201 **Iowa**1077, 203**NW**41; 149**Md**526, 131A 757. [a] **Trust and confidence of child in parent and not vice versa** is assumed from such relationship so that gift from parent to child will not be assumed to be under influence of child. 149**Md** 526, 131A757.
672–58 293**Pa**85, 141A721.
672–60 293**Pa**85, 141A721.
672–61 293**Pa**85, 141A721.
672–64 220**Ala**360, 125**S**228; 172**Ark** 932, 290**SW**966; 163**Ga**542, 136**SE**444; 157**Md**287, 145A773; 81**Mont**330, 263**P** 421; 81**Mont**311, 263**P**683; 92**PaSuper** 519; 145**Wash**322, 260**P**532 (presumption held rebuttable). Contra 217**Ky** 50, 288**SW**1037. [c] **Presumption is rebuttable.**–172**Ark**932, 290**SW**966. [d] **Presumption after seven years' possession by child is not part of law of prescription.** 170**Ga**135, 152**SE**466. [e] **Conveyance of realty to one child** out of eight weakens presumption. 158**Md** 677, 149A462.
672–65½–New. The burden is on the donee to prove that the gift was voluntary. 157**Md**287, 145A773.
672–71 163**Ga**542, 136**SE**444.
672–71½–New. The confidential relation between the parties must be shown actually to exist from the facts of the case. 157**Md**287, 145A773.
672–71½–New. The rule extends to all relations in which confidence is reposed, and dominion and influence resulting therefrom may be exercised by one person over another. 157**Md**287, 145A773.
672–71¼–New. Relationship between blind donor and half brother's wife on whose family he was dependent for things necessary for his comfort creates no presumption of undue influence as to a gift to her. **Mo** 19**SW(2d)**1054 (burden is not on her to show gift valid).
672–72 104**Conn**17, 131A742; 106**Conn** 276, 137A767; **Iowa** 228**NW**93; 216 **AppDiv**100, 102, 214**NYS**528 [quotCJ]; 136**Misc**250, 240**NYS**845.
673–73 **Iowa** 228**NW**93; 216**AppDiv** 100, 102, 214**NYS**528 [quotCJ].
673–74 216**AppDiv**100, 102, 214**NYS** 528 [quotCJ].
673–76 106**Conn**276, 137A767.
673–79 240 **IllA**40; **MoA** 273**SW**118; 130**Misc**865, 226**NYS1**; 133**Misc**795, 234 **NYS**366.
673–80 138**Misc**330, 245**NYS**626.
673–82½–New. Transfer of savings account to depositor's administrator creates no presumption respecting gift. 138**Misc**10, 245**NYS**305.
673–84 142 **Okl** 233, 286**P**335, 69**ALR** 681.
673–86 262**Mass**595, 160**NE**405; 174 **Minn**61, 218**NW**163. [a] (5) Indorsement of notes by mother to daughters payable on death under notion that she retained control in her lifetime is held not to estop her from denying gift was intended. 202 **Iowa**927, 211**NW**392.
674–88½–New. In an action by a wife against her husband to recover money deposited by her in their joint bank account, she may testify that the deposit was made as a loan to her husband, and not intended by either as a gift. 8**PaDist&Co** 727.
674–88¼–New. Parol evidence is admissible to prove an intent to pass money, whether a deposit in savings bank or right to money in hands of another, as a present gift or trust. 83 **NH**489, 144A848.
674–96 237 **IllA**570; 114**Nebr**230, 206 **NW**770.
674–98 214**Ala**692, 108**S**752; 207**Cal** 115, 277**P**313; 237 **IllA**570; 202 **Iowa** 927, 211**NW**392; 114**Nebr**230, 206**NW** 770; **NJCh** 147A546; **TexCivA** 294**SW** 948, 951 [quotCJ].
674–2 **TexCivA** 294**SW**948, 951 [quot CJ].
674–7 **TexCivA** 294**SW**948, 951 [quot CJ].
675–11 164**Ga**96, 137**SE**833.
675–13 101**NJEq**203, 137A657.
675–14 237 **IllA**570; 114**Nebr**230, 206 **NW**770; 101**NJEq**203, 137A657, 659 [citCJ]; 130**Misc**865, 226**NYS1**; 289 **Pa**216, 137A247. [a] 207**Cal** 115, 277**P** 313.
675–16 101**NJEq**203, 137A657, 658 [citCJ].
675–20 214**Ala**692, 108**S**752; 168**Ark** 981, 272**SW**869; 82**Mont**73, 265**P**15.
676–22 81**CalA**176, 253**P**191, 196 [quot CJ].
676–23 81**CalA**176, 253**P**191, 196 [quot CJ]; **TexCivA** 288**SW(2d)**225 (to show plaintiff's understanding of transaction).
676–25 101**NJEq**203, 137A657.
676–31 114**Nebr**230, 206**NW**770.
676–33 13**F(2d)**805; 44**F(2d)**144; 81 **CalA**546, 254**P**306; 90**CalA**362, 265**P** 882; 96**CalA**568, 274**P**401(2dcase); 245 **IllA**227; 247 **IllA**429; 221**Ky**679, 299 **SW**576; 116**Nebr**291, 216**NW**831 [cit CJ]; 49**Nev**124, 240**P**435; 101**NJEq** 203, 137A657; 130**Misc**865, 226**NYS1**; 133**Misc**795, 234**NYS**366; 123 **Okl** 142, 252**P**34; **TexCivA** 275**SW**96 [quotCyc]; **TexCivA** 293**SW**604, 606 [quotCJ]; **Utah** 286**P**638. [a] (1) 44**F(2d)**144; 85**CalA**181, 259**P**112; 89**CalA**674, 265**P** 520; 89**CalA**682, 265**P**523; 106**Conn** 276, 137A767; 237 **IllA**190; **IndA** 169 **NE**362; 123**Kan**374, 255**P**50; **Md** 152A 111; 237**Mich**168, 211**NW**95; **MoA** 30 **SW(2d)**771; 98**NJEq**728, 130A628; 214 **AppDiv**493, 212**NYS**377; 138**Misc**10, 245**NYS**305; 138**Misc**330, 245**NYS**626; **Tex** 293**SW**604; 142**Wash**407, 253**P**462; 107**WVa**43, 147**SE**17. (2) 96**CalA**568, 274**P**401(2dcase); **CalA** 291**P**454; 104 **Conn**17, 131A742; 254 **IllA**484; 83 **IndA**98, 147**NE**732; 201 **Iowa**834, 208 **NW**508, 44**ALR**1516; 205 **Iowa**237, 216 **NW**12; **Mass** 171**NE**479; 23 **OhA**163, 154**NE**799. (3) 207**Cal** 115, 277**P**313; 237 **IllA**190; 133**Misc**758, 234**NYS**311; 228**AppDiv**56, 239**NYS5**; 289**Pa**216, 137 A247; **TexCommnA** 283**SW**489. (4) 13 **F(2d)**805; 116**Nebr**291, 216**NW**831; 220**AppDiv**276, 221**NYS**409. (5) **Ill** 173 **NE**100; 237 **IllA**190; 237 **IllA**500; 130 **Misc**332, 224**NYS**371; 144**Wash**657, 258 **P**465; 36**Wyo** 210, 254**P**137. (6) 201 **Iowa**834, 208**NW**508, 44**ALR**1516; 130 **Kan**14, 285**P**616; 133**Misc**251, 232**NYS** 320; 135**Misc**57, 237**NYS**526; 187**Wis** 71, 203**NW**927. (7) 13**F(2d)**805; **Ill** 173**NE**100; 316**Mo** 483, 291**SW**132; **MoA** 16**SW(2d)**630. (8) 151**Md**241, 134 A210, 47**ALR**730; **NJCh** 144A811. (12) Money deposited by deceased with co-defendant as property of defendant with whom deceased was living. 168**Ark**981, 272**SW**869. (13) Of contents of safe deposit boxes. 254**Mass**576, 151**NE**87. (14) Of land. 140**Wash**452, 249**P**980. (15) Of check drawn to cash and deposited to account of donee. 130**Misc** 865, 226**NYS1**. [b] (1) 97**CalA**628, 276 **P**122; 253 **IllA**288; 126**Me**84, 136A459; 219**MoA**365, 271**SW**1008; 114**Nebr**50, 205**NW**1000; 102**NJEq**436, 141A175; **NJCh** 147A546; **NJSup** 150A50; 252 **NY**366, 169**NE**612; 127**Misc**16, 215**NYS** 775; 129**Misc**840, 223**NYS**812; 229 **AppDiv**286, 241**NYS**546; 136**Misc**798, 244**NYS**343; 150**Va**56, 142**SE**378. (2) 106**Conn**207, 137A727; 127**Misc**16, 215 **NYS**775; 221**AppDiv**211, 223**NYS**361; 229**AppDiv**286, 241**NYS**546; 145**Va**614, 134**SE**568; 135**Wash**468, 238**P**5. (4) 162**La**758, 111886. (5) 130**Misc**865, 226 **NYS1**. (6) 244 **IllA**89; 120**Kan**286, 242**P**1018; 169**La**35, 124**S**137. (7) 195 **Wis**452, 218**NW**721. (9) **Nebr** 228**NW** 619. (12) Of check drawn to donee for deposit to special account. 130**Misc** 865, 226**NYS1**. (13) To show alleged donor's knowledge of transfer. 130 **Misc**865, 226**NYS1**. [h] **Fact that donor collected interest** on money in question during his life is not sufficient to overcome positive testimony that money was deposited with witness as money of alleged donee. 168**Ark**981, 272**SW**869. [i] **Testimony of relatives,** servant, or intended parties insufficient. 128**Misc**422, 220**NYS**204. [j] **Delivery of bank book of deceased wife by husband,** under belief that wife had made will to that effect is held not sufficient to establish gift. 127**Misc**16, 215**NYS** 775. [k] **Responsibility of determining whether evidence is clear and convincing** so as to establish gift is on trier of case. 130**Misc**865, 226**NYS1**. [l] **Evidence held sufficient:** (1) To support finding that there was no gift. 177 **Ark**860, 7**SW(2d)**985. (2) To support finding of no agreement of half interest to one furnishing part of purchase price. **TexCivA** 288**SW(2d)**225. (3) To establish sale and not gift. 102**CalA** 264, 282**P**995(2dcase).
678–37 **MoA** 8**SW(2d)**110.
678–41 128**Misc**422, 220**NYS**204; 130 **Misc**865, 226**NYS1**; 215**AppDiv**516, 213 **NYS**684.
678–42 136**Misc**798, 244**NYS**343.
678–46 But see 130**Misc**865, 226**NYS1**.
678–48 128**Misc**422, 220**NYS**204.
678–49 130**Misc**865, 226**NYS1**.
678–50 130**Misc**865, 226**NYS1**; 136 **Misc**798, 244**NYS**343. See also 168**Ark** 981, 272**SW**869.
678–52½–New. Evidence has been held sufficient to establish the date when a gift became effective. 241**Mich**216, 217 **NW**71.
678–53 But see 133**Misc**795, 234**NYS**366.

678–55 130Misc865, 226NYS1.

678–55½–New. Gifts to near relative require less proof than to strangers. 289Pa216, 137A247.

678–57 237 IIIA190, 196 [citCJ].

678–58 TexCivA 275SW96 [quotCyc].

678–59 202 Iowa927, 211NW392, 394 [quotCJ]; TexCivA 275SW96, 104 [quot Cyc]. [a] Mo 19SW(2d)1054; 100NJ Eq280, 134A681, 53ALR1115; 298Pa1, 147A848; Utah 286P638; 144Wash657, 258P465. [b] MoA 271SW1016. [c] MoA 271SW1016; MoA 300SW1004. [d] (2) 237 IIIA257; 168La624, 122S 886.

679–60 202 Iowa927, 211NW392, 394 [quotCJ].

679–61 202 Iowa927, 211NW392, 394 [quotCJ]; 160Tenn229, 22SW(2d)1041. [a] (1) 13F(2d)805; 220AppDiv276, 221NYS409; 226AppDiv291, 234NYS 680; 140Wash452, 249P980. (2) To sustain finding that gift inter vivos was intended. 214AppDiv331, 212NYS 158 (where donor was sick and expected to die). (3) To raise issue of intent. TexCivA 26SW(2d)289. [b] 251 IIIA 374; 201 Iowa1077, 203NW41; 221Ky 679, 299SW576; 102NJEq371, 140A795; Wash 289P36; Sask [1929] 2DomLR103.

679–62 207Cal 115, 277P313; 202 Iowa 927, 211NW392, 394 [quotCJ]; 125Misc 907, 212NYS265; 130Misc865, 226NYS 1; TexCivA 275SW96, 104 [quotCyc]. [a] (2) TexCommnA 283SW489. (3) 13F(2d)805. (4) 220AppDiv276, 221 NYS409. (7) Of mortgages. 13F(2d) 805. [b] (1) 240 IIIA40; 133Misc 795, 234NYS366. (2) Iowa 228NW66. (4) 176Ark585, 3SW(2d)316. (5) 251 IIIA374. [d] 106Conn276, 137A767. [e] **Where no delivery of any kind is shown,** facts should be carefully scrutinized in determining validity of gift. 130Misc865, 226NYS1.

679–63 202 Iowa927, 211NW392, 394 [quotCJ]; TexCivA 275SW96, 104 [quotCyc]. [b] 220AppDiv276, 221NYS 409. [c] **Evidence held insufficient to show acceptance.**–235Ky582, 31SW(2d) 890; Utah 286P631.

679–64 15F(2d)347; 202 Iowa927, 211 NW392, 394 [quotCJ]; 125Misc907, 212 NYS265; 289Pa216, 137A247; TexCivA 275SW96, 104 [quotCyc]. [b] (1) 202 Iowa927, 211NW392.

679–65 202 Iowa927, 211NW392, 394 [quotCJ].

679–66 202 Iowa927, 211NW392, 394 [citCJ].

679–67 168Ga359, 147SE882; 253 IIIA 288; 130Misc865, 226NYS1.

679–68 130Misc865, 226NYS1; 134 Okl 70, 272P857. [a] (2) **Exception to rule that possession plus written assignment of nonnegotiable instrument is evidence of ownership is especially applicable where possessor is executor or trustee.** 130Misc865, 226NYS1.

680–70 203 Iowa1124, 212NW147; 130 Kan834, 288P743; 49Nev124, 240P435; 130Misc865, 226NYS1; 134 Okl 70, 272 P857; 294Pa436, 144A413; TexCivA 275SW276. [a] 214Ala593, 108S536, 46ALR1201; 177Ark392, 7SW(2d)15; 164Ga96, 137SE833; 175Minn549, 221 NW908; 142Miss77, 107S273; 49Nev 124, 240P435. [b] 177Ark47, 5SW(2d) 739; 83CalA87, 256P479; 143Kan608, 256P995; 127Kan131, 272P147; 129 Kan317, 282P724; 130Kan524, 287P614; 130Kan834, 288P743; 322Mo 842, 16SW (2d)72; 49Nev124, 240P435 (of interest of cotenant); 130Misc865, 226NYS1; 134 Okl 70, 272P857; 134 Okl 86, 272P 865; TexCivA 270SW1059; TexCivA 275SW276; Utah 293P7.

680–71 127Kan131, 272P147.

680–73 164Ga96, 137SE833.

680–74 164Ga96, 137SE833.

680–82 49Nev124, 240P435. [a] **Payment of mortgage interest** by debtor negatives idea of gift of debt by creditor. 219MoA365, 271SW1008.

680–82½–New. That a religious society claiming as donee did not pay taxes on the land does not militate against its claim where the property was exempt by statute from taxation. 49Nev124, 240P435.

680–84 [a] (1) 27F(2d)729; 42F(2d) 699; 83NH236, 141A136; 101NJEq99, 136A730; 226AppDiv126, 234NYS414. (2) 99NJEq683, 133A538; 293Pa 85, 141A721; 144Wash657, 258P465. (3) To show aged donor had not benefit of independent advice. NJ 132A919. [b] (1) 42F(2d)699; 237 IIIA257; 87 IndA462, 151NE735; Me 150A531; 149 Md526, 131A757; Mo 19SW(2d)1054; 100NJEq280, 134A681, 53ALR1115. (3) 316Mo 483, 291SW132. (4) 132 Misc294, 230NYS226. [c] **Evidence held to warrant finding of no fraud.**–Me 150A531.

681–85 Mo 19SW(2d)1054.

681–87 136Misc798, 244NYS343.

681–88 27F(2d)729.

681–93 But see NJ 132A919. [a] **Evidence held sufficient to justify finding of absence of fraud.**–Md 152A111; 144 Wash657, 258P465.

681–93½–New. Mere fact that larger part of donor's property is given to one of three children is insufficient, of itself, to show undue influence. 149Md526, 131A757.

681–93⅓–New. Evidence has been held sufficient to show that the donor making division of property before death had competent advice. 128Kan383, 277 P1023.

681–94 81CalA546, 254P306; 101NJEq 203, 137A657.

681–95 13F(2d)805; 82CalA696, 256P 247; MoA 13SW(2d)1076; 116Nebr291, 216NW831 [citCJ]; 101NJEq203, 137A 657; 133Misc758, 234NYS311; 31 OhA 6, 165NE856; 289Pa216, 137A247; Tex CivA 275SW96, 104 [quotCyc] (gift of tin box and contents by delivery of key); TexCivA 275SW276. [a] 98NJEq728, 130A628; 130Misc865, 226NYS1; Tex CivA 275SW276; 150Va56, 142SE378; Alta [1930] 3DomLR378. [b] **Evidence held sufficient** to establish gift. 130 Misc332, 224NYS371.

681–96 13F(2d)805; 244 IIIA89, 102 [quotCJ]; TexCivA 275SW96, 104 [quot Cyc]; 187Wis71, 203NW927 (evidence sufficient).

681–97 TexCivA 275SW96, 104 [quot Cyc].

681–99 101NJEq203, 137A657, 659 [cit CJ]; TexCivA 275SW96, 104 [quotCyc].

681–99½–New. Where gift was made to take effect after donor's death, evidence has been held sufficient to show validity thereof. 104Conn17, 131A742.

681–1 133Misc795, 234NYS366; 142 Okl 233, 286P335, 69ALR681. [a] 130 Misc865, 226NYS1; 294Pa436, 144A413. [b] (1) 130Misc865, 226NYS1.

682–2 133Misc795, 234NYS366. [a] **No probative value.**–130Misc865, 226NYS1.

682–5 13F(2d)805; Mass 172NE599; 237Mich168, 211NW95; 252NY366, 169 NE612; 225AppDiv759, 232NYS371.

682–6 133Misc795, 234NYS366.

682–7 81CalA176, 253P191, 194 [quot CJ].

682–13 244 IIIA89, 102 [quotCJ].

682–15½–New. Assertion of the donee that she earned the money in question would not affect her title to money as a gift but would only go to her credibility as a witness. 168Ark981, 272SW869.

682–16½–New. In Louisiana oral gift of over five hundred dollars must be proved by one credible witness and corroborative circumstances. 162La758, 111S86.

682–17 But see 6PaDist&Co 636.

683–22½–New. Uncorroborated testimony of claimant daughter not sufficient. 128Misc422, 220NYS204.

683–24 130Misc865, 226NYS1.

683–25 130Misc865, 226NYS1.

683–29 [a] TexCivA 275SW276. [b] TexCivA 275SW276.

683–30 130Kan453, 286P221; 221Ky 679, 299SW576; 214AppDiv493, 212 NYS377 (in absence of proof to contradict proof of gift, donee is entitled to directed verdict); 134 Okl 70, 272P857; 134 Okl 86, 272P865.

683–31 247NY447, 160NE910; 229App Div368, 241NYS710; TexCivA 275SW 96; TexCivA 293SW604, 606 [citCJ]; TexCivA 25SW(2d)881; TexCivA 32SW (2d)513; 144Va330, 132SE320.

683–34 35GaA420, 133SE297; 191NC 493, 132SE282.

683–35 196Cal 497, 238P1034 (finding of court that insured did not intend to make absolute gift of policy but reserved right to change beneficiary held conclusive on appeal); 81CalA546, 254 P306; MoA 2SW(2d)207; Tex 293SW 604. [c] 110Conn461, 148A130. [d] **Whether transfer of savings deposit by donor's indorsing name of another on deposit book** with order to bank reciting that purpose was to make money payable to survivor of them as joint tenants constituted a present completed gift has been held for jury, in that, survivorship being real object evidently in view, it was not to be defeated because depositor or bank officials mistook technical meaning of term "joint tenancy." 83NH489, 144A848.

683–36 RI 147A751.

684–38½–New. Circumstances that would bring the case within the legal definition of "gift" is essentially a matter of evidence, not of law, and each case must depend on its own circumstances. 133Misc795, 234NYS366.

684–38⅓–New. Whether a gift of a life insurance policy was made is a mixed question of law and fact. 90CalA362, 265P882.

684–43 207Cal 115, 277P313.

684–44 [c] **Charge on nature and burden of proof held proper.**–131 Okl 263, 268P715.

684–47 212Ala325, 104S808.

684–52 [a] **Master's subsidiary findings** held to show gift inter vivos. Mass 172 NE599.

684–53 87Colo 461, 288P620. See also 120Kan145, 242P453. [a] **Findings warranted by evidence.**–Mass 171NE324.

684–58 100Vt51, 134A853.

684–60 140Miss562, 106S271, 272 [quot CJ].

684–61 15F(2d)347; 36F(2d)337; 122 Kan38, 251P194; 209Ky212, 272SW384, 385 [citCJ]; 140Miss562, 106S271, 272 [quotCJ]; 316Mo 483, 291SW132; 52 ND182, 201NW861; 58ND322, 226NW 510; 22 OhA295, 154NE163; 23 OhA 163, 154NE799.

685–62 140Miss562, 106S271, 272 [quot CJ].

685–63 140Miss562, 106S271, 272 [quot CJ].

685–64 140Miss562, 106S271, 272 [quot CJ].

685–65 140Miss562, 106S271, 272 [quot CJ].

686–69 140Miss562, 106S271, 272 [quot CJ].

686–70 140Miss562, 106S271, 272 [quot CJ].

686–71 122Kan38, 251P194; 140Miss 562, 106S271, 272 [quotCJ].

686–72 140Miss562, 106S271, 272 [quot CJ].

686–74 147Va493, 137SE365.

686–75 147Va493, 137SE365.

686–79 90CalA489, 265P995; 132Misc 910, 231NYS16; 107WVa43, 147SE17.

687–85½–New. A donee's offer to turn over to the administrator a pass book for the purpose of adjudication of a dispute does not affect the validity of a gift. 84CalA652, 258P423.

687–86 204Cal 166, 267P104 (no gift); 84CalA652, 268P423, 425 [quotCJ]; 245 IIIA227; 205 Iowa766, 218NW 308; 209Ky212, 272SW384, 385 [cit CJ]; 232Ky469, 23SW(2d)922 (conditional vesting of title); 81Mont560, 264 P679; 82Mont73, 265P15; 22 OhA295, 154NE163. [b] **In Louisiana.**–162La 880, 111S267.

687–88 84CalA652, 258P423, 425 [quot CJ].

687–89 221Ky679, 299SW576.

687–91 147Va493, 137SE365.

687–95 170La986, 129S552.

688–97 36F(2d)337; 232Ky469, 23SW (2d)922; NJCh 147A546; 22 OhA295, 154NE163; 147Va493, 137SE365; 145 Wash271, 259P722; 107WVa43, 147SE 17; 38Wyo 365, 267P426, 60ALR1046.

688–97½–New. and it must be given to take effect only in case the donor dies, 103Conn88, 130A75.

688–98 [1927] CanSC118, [1927] 1DomLR1009.

688–1 103Conn88, 130A75; 209Ky212, 272SW384; 228Ky259, 14SW(2d)1096; 254Mass576, 151NE87; 128Misc718, 221 NYS205; 138Misc10, 245NYS305; 22 OhA295, 154NE163; 38Wyo 365, 267P 426, 430 [citCJ], 60ALR1046. But see 90CalA489, 265P995. [f] **Bodily dis-**

order or illness imperiling life must be shown. 90CalA489. 265P995. [g] **In absence of evidence of decedent's disease or apprehension of death,** gift is not in causa mortis. 136Misc250. 240 NYS845.

688-4 TexCivA 275SW96. But see 103 Conn88. 130A75.

688-5 121Kan399. 247P866; 38Wyo 365. 267P426. 60ALR1046.

689-8 52ND182. 201NW861.

689-15 85 Ind487. 152NE181.

699-17 See also 145Wash271. 259P722.

699-19 15F(2d)347; 36F(2d)337; 103 Conn88. 130A75; 254 IllA55; 85 IndA 487. 152NE181; 130Kan14. 285P616; 209Ky222. 272SW384; 232Ky469. 23 SW(2d)922; 140Miss562. 106S271; 316 Mo 483. 291SW132; 81Mont560. 264P 679; NJCh 147A546; 220AppDiv511. 221NYS698. 699 [citCJ]; 132Misc290. 230NYS271; 22 OhA295. 154NE163; 125 Or362. 267P520; 131 Or481. 283P 3[illegible]; 12PaDist&Co 197; 52SD283. 217 NW221; 147Va493. 137SE365; 107WVa 43. 147SE17; 38Wyo 365. 267P426. 60 ALR1046. [b] **Delivery serves only purpose of evidence.**–38Wyo 365. 267P 426. 60ALR1046.

691-26 NJSup 140A25.

691-27 22 OhA295. 154NE163.

691-28 22 OhA295. 154NE163; 147Va 493. 137SE365.

691-30 85 IndA487. 152NE181.

691-31 85 IndA487. 152NE181.

691-32 147Va493. 137SE365.

691-33 NJSup 140A25.

691-34 107WVa43. 147SE17.

691-35 98PaSuper563.

691-36½-New. Essential element of delivery of gift causa mortis is that title shall vest immediately in donee. 22 OhA295. 154NE163.

692-39 140Miss562. 106S271; 147Va 493. 137SE365.

692-41 209Ky212. 272SW384; 22 OhA 295. 154NE163; 52SD283. 217NW221; TexCivA 275SW96.

692-46 56ND123. 216NW335. 60ALR 1040; TexCivA 275SW96.

693-47 85 IndA487. 152NE181.

694-66 205 Iowa766. 218NW308; 99NJ Eq560. 134A95; 56ND123. 216NW335. 60ALR1040; 22 OhA295. 154NE163; 52 SD283. 217NW221; 38Wyo 365. 267P 426. 60ALR1046. [f] **Gift of bank deposit.**–205 Iowa766. 218NW308.

694-67 228Ky371. 15SW(2d)296.

694-68 228Ky371. 15SW(2d)296.

694-73 Alta [1927] 2DomLR429.

694-76 205 Iowa766. 218NW308. 310 [citCJ]; 228Ky371. 15SW(2d)296; 200 Wis220. 228NW121; 38Wyo 365. 267P 426. 431 [citCJ]. 60ALR1046.

695-77 38Wyo 365. 267P426. 430 [cit CJ]. 60ALR1046.

695-80 85 IndA487. 152NE181.

695-81 107WVa43. 147SE17.

695-85 90CalA489. 265P995.

696-92½-New. There must be a thing in esse as the subject matter of the gift. 209Ky212. 272SW384.

696-93 103Conn88. 130A75 [citCJ]; 90 Fla162. 105S321; 209Ky212. 272SW384; 38Wyo 365. 267P426. 430 [citCJ]. 60 ALR1046.

696-98 [a] (2) 14PaDist&Co 298.

697-2 [a] **Condition that interest of notes and bonds shall go to donor during his lifetime** does not invalidate gift of them causa mortis where other necessary elements exist. 82Mont73. 265P 15.

697-8½-New. Condition may relate to substance of gifts or time of payment thereof. 98NJEq188. 130A811.

697-14 140Miss562. 106S271; 82Mont 73. 265P15.

697-15 36F(2d)337; 90CalA489. 265P 995; 207 Iowa95. 222NW401; 122Kan 38. 251P194; 22 OhA295. 154NE163; 52SD283. 217NW221; Can [1927] 3 DomLR609. [a] **Gift causa mortis need not be revoked in statutory manner of will,** but in other ways, therefore statute as to wills does not apply. 122Kan 38. 251P194.

698-18½-New. Revocation is a matter of intent. 90CalA489. 265P995.

698-19 36F(2d)337; 121Kan399. 247P 866; 316Mo 483. 291SW132; 214App Div331. 212NYS158 (per se revocation).

698-21½-New. Law relating to legal or conventional return as revocation of donations inter vivos is inapplicable to donations mortis causa. 170La449. 128 S273.

698-24 Contra 122Kan38. 251P194. 195 [quotCJ].

699-34 140Miss562. 106S271. 272 [cit CJ]. [a] (2) 56ND123. 216NW335. 60 ALR1040.

699-35 140Miss562. 106S271. 272 [cit CJ].

699-39 83CalA604. 257P180. 181 [cit CJ]; 228Ky371. 15SW(2d)296; 220 AppDiv511. 221NYS698 [citCJ].

699-46 [b] **Postal savings certificates** of donor have been held subject of valid gift causa mortis. 228Ky371. 15SW (2d)296.

700-47 81Mont560. 264P679. 682 [cit CJ&Cyc]. See also 220AppDiv511. 221 NYS698.

700-47½-New. Transfer to third party of packet containing postal savings certificates, with statement that the packet was to be given to the donee, constitutes a valid gift causa mortis. 228Ky 371. 15SW(2d)296.

700-50 140Miss562. 106S271 (delivery with indorsement).

701-58 209Ky212. 272SW384.

701-66 221Ky679. 299SW576; 245NY 516. 157NE840.

701-68 131Misc188. 226NYS415. 429 [citCJ].

701-68½-New. In case of contract between a husband and a bank, assented to by the wife, that on his death she was to be owner of the balance of the deposit, the balance on his death belonged to her as survivor, and her rights were not affected by statute of wills. 252Mass390. 147NE826.

701-69 56ND152. 217NW150.

702-70 [a] **Indorsement to pay in case of death** held not to constitute gift. 52 SD283. 217NW221.

702-71 56ND123. 216NW335. 60ALR 1040.

702-73 83CalA604. 257P180. 181 [cit CJ]; 84CalA652. 258P423; 90CalA489. 265P995; 220AppDiv511. 221NYS698. 699 [citCJ]; 219AppDiv178. 218NYS 513; 82Mont73. 265P15; 245NY516. 157NE840; 132Misc407. 229NYS247. [b] 82Mont73. 265P15.

702-75 90CalA489. 265P995.

702-77 220AppDiv511. 221NYS698. 701 [citCJ]; 36BC106. [1925] 3DomLR1028.

703-90 125Misc907. 212NYS265 (possession proves nothing).

703-92 131Misc188. 226NYS415.

703-93 221Ky679. 299SW576. 577 [cit CJ]; Mass 172NE74; 125Misc907. 212 NYS265; 132Misc910. 231NYS16; 10 PaDist&Co 721; TexCivA 275SW96. [b] **A heavier burden** of proof than for gift inter vivos is on donee of gift causa mortis. Mass 172NE74.

703-96 98NJEq621. 130A806.

703-97 [a] But see NB [1928] 4Dom LR630.

703-98 84CalA652. 258P423; 102WVa 454. 135SE390.

704-8 Miss 130S145.

704-10 82Mont73. 265P15.

704-12 82Mont73. 265P15. But see 157Cal 356. 107P1005.

704-14 14PaDist&Co 298.

704-17 36F(2d)337; 221Ky679. 299 SW576; Mass 172NE74; 132Misc910. 231NYS16; TexCivA 275SW96; 147Va 493. 137SE365; 102WVa454. 135SE390. [d] (1) 122Kan38. 251P194; 121Kan 399. 247P866; Mass 172NE74; 56ND 123. 216NW335. 60ALR1040; 102WVa 454. 135SE390. (2) 90CalA489. 265P 995; 219AppDiv178. 218NYS513. (5) 38Wyo 365. 267P426. 60ALR1046. (9) NB [1928] 4DomLR630. (12) To show intent. 38Wyo 365. 267P426. 60ALR 1046. (13) To show acceptance of funds as gift causa mortis. 84CalA652. 258 P423. (14) To sustain finding that gift was made in view of death. 90CalA 489. 265P995. (15) To sustain finding that gift had not been revoked. 90 CalA489. 265P995. [e] (1) 36F(2d)337; 14PaDist&Co 298; 147Va493. 137SE 365; 107WVa43. 147SE17; 195Wis452. 218NW721. (2) 84CalA652. 258P423; 131Misc188. 226NYS415; 132Misc910. 231NYS16. (3) 22 OhA295. 154NE163. [f] **Testimony of relatives, servants, or intended parties not sufficient.** 128Misc 422. 220NYS204.

705-20 147Va493. 137SE365.

705-21 125Misc907. 212NYS265 (clear and convincing); 128Misc422. 220NYS 204; 107WVa43. 147SE17.

705-28 Mass 172NE74.

705-29 125Misc907. 212NYS265 (no more proof required than is necessary to prove any claim).

705-34½-New. The evidence must be much stronger than in case of a gift inter vivos. 102WVa454. 135SE390.

705-34½-New. A gift causa mortis, shown for the first time in a proceeding in the superior court, fails for lack of establishment by means of a petition to a judge of probate in accordance with statute. 83NH489. 144A848.

706-37 130Kan14. 285P616; 125Misc 907. 212NYS265 (possession of personal property by members of family having access to decedent's papers proves nothing); 107WVa43. 147SE17.

706-41 147Va493. 137SE365.

706-43 But see 147Va493. 137SE365.

706-44 125Misc907. 212NYS265. See also 132Misc910. 231NYS16.

706-45 [a] **Corroboration by wife of donee** held insufficient to sustain gift. 125Misc907. 212NYS265 (even where wife is competent witness).

706-49 221Ky679. 299SW576.

706-51 90CalA489. 265P995; 122Kan 38. 251P194; 200Wis220. 228NW121. [a] (5) Whether delivery of key to tin box was a gift or in trust for other was for jury, and peremptory instruction was error. TexCivA 275SW96.

GINGER ALE

707-21 [a] **May be registered** under act relating to nonalcoholic drinks. 6 PaDist&Co 586.

GIVE

708-53 99NJEq333. 133A188.

708-71 [a] (2) Judgment is given when it becomes conclusive on rights of parties and not when pronounced. 76CalA 192. 244P94.

709-1 [a] **Essentials.**–Essentials of "giving in payment" are existing debt, just valuation, and delivery. 10LaA 256. 120S711(2dcase).

GOATSKINS

711-84½-New. As commonly understood, a term which includes the skins of young, as well as of old, goats. 15 CustA190.

GOING

712-9 203 Iowa913. 210NW553. 554 [citCJ].

712-10 203 Iowa913. 210NW553. 554 [citCJ].

GONORRHEA

713-40 [b] Clap is the vulgar name for gonorrhea. 220Ky576. 295SW890.

GOOD

715-6 44 Ida347. 257P30.

716-26 44 Ida347. 257P30; 254 IllA 505; 23 OhA71. 154NE357; TexCivA 294SW900. 904 [citCJ].

716-26½-New. without notice of rights of others; 254 IllA505.

716-28 TexCivA 294SW900. 904 [cit CJ].

716-31 TexCivA 294SW900. 904 [cit CJ].

718-82 173Minn153. 216NW787.

719-7 15F(2d)646; 241Mich600. 217 NW796.

GOODS

721-8 See also 250 IllA170 [citCJ].

726-87 127Misc820. 216NYS522. See also 87CalA636. 262P465. 466 [citCJ].

726-98 127Misc820. 216NYS522.

727-4 87CalA636. 262P465. 466 [cit CJ].

727-47 127Misc820. 216NYS522.

GOOD WILL

729-1 21F(2d)492; 242NY1. 150NE 581.

729-2 8F(2d)180. 182 [quotCJ]; 253 Mass451. 149NE156.

730-5 8F(2d)180. 182 [quotCJ].

730-7 8F(2d)180. 182 [quotCJ]; 236

IllA17; 253Mass451, 149NE156. [a] (1) 236 IllA17.

730-7½-New. Good will is privilege that gives reasonable expectancy of preference in race of competition. 242 NY1, 150NE581.

730-8 8F(2d)180; 15F(2d)626, 629 [citCJ]; 17F(2d)196; 76CalA19, 243P715; MoA 29SW(2d)165; 127Misc206, 216NYS523. [g] **Good will is intangible property.**-15F(2d)626; 127Misc206, 216NYS523.

731-10 236 IllA17, 32 [quotCJ].

731-11 NJPrerog 149A257; 151Va706, 144SE635.

731-15 15F(2d)626; 217Ala25, 114S408, 409 [quotCJ]; 236 IllA17, 32 [quotCJ]; 114Nebr496, 208NW615.

732-17 15F(2d)626.

732-18 236 IllA17, 32 [quotCJ]; Tex CivA 278SW466.

732-23 217Ala25, 114S408, 409 [citCJ]; 242NY1, 150NE581. [g] **"Two dollar" or "specialist" business.**-No good will attaches to "two dollar" or "specialist" business. 242NY1, 150NE581. [h] **"Odd lot business."**-No good will attaches to "odd lot business." 242NY1, 150NE581.

733-24 217Ala25, 114S408, 409 [citCJ].

733-25 Iowa 229NW257; 114Nebr496, 208NW615; TexCivA 278SW466.

734-36 Mass 168NE106.

734-41½-New. A clerk in a retail store, whose friends are so attached to him that their trade goes to him as a personal compliment, independently of the location of the store or the identity of its proprietor, may lawfully carry such patronage to a new employer. 151Va706, 144SE635.

735-46 76CalA19, 243P715, 717 [citCJ]; 127Misc206, 216NYS523.

735-48 236 IllA17, 40 [quotCJ]. [a] **To determine value of good will of a corporation** take annual net profits over period of years, deduct interest on average amount of capital invested, multiply result by suitable number of years' purchase. 136Misc593, 242NYS417.

735-49 [b] (4) 76CalA19, 243P715, 717 [citCJ]. (11) Elements as basis of good will. 249Mich489, 229NW462.

736-51 127Misc206, 216NYS523.

736-54 236 IllA17, 41 [quotCJ]. [a] 127Misc206, 216NYS523. [b] (5) Evidence held insufficient for use of multiple 3 in computation. 236 IllA17.

736-56 [b] 127Misc206, 216NYS523.

737-57½-New. Chief elements of value on sale of good will are: (1) Continuity of place. 242NY1, 150NE581.

737-57½-New. (2) Continuity of name. 242NY1, 150NE581.

737-57½-New. There may be at times value of continuity of organization. 242 NY1, 150NE581 (in business of complex order).

737-58 127Misc206, 216NYS523.

737-60 236 IllA187.

737-62 See also 236 IllA187.

737-62½-New. Evidence must be sufficient to enable jury to estimate damages from loss of good will with reasonable accuracy. 114Nebr496, 208NW 615.

737-64 15F(2d)626; 43F(2d)232; 76 CalA19, 243P715; TexCivA 278SW466.

738-72 Mass 168NE106.

738-73 30F(2d)614; 217Ala25, 114S 408; 153Md356, 138A242; Mass 168NE 106; 101NJEq383, 139A518; TexCivA 278SW466. But see TexCivA 6SW(2d) 400. [o] **Right to use name of "person"** on sale of good will. 42F(2d)421. [p] **Purchaser holding itself out as insolvent's successor.**-42F(2d)421.

738-74 Iowa 229NW257. [c] **Sale of stock** by officer and stockholder who contributed personal skill to corporate business, accompanied by agreement not to engage in similar business, may involve good will. 56ND1, 215NW868.

738-75 52ND137, 202NW132.

739-85 88CalA250, 263P277, 278 [cit CJ]; 242NY1, 150NE581.

740-86 88CalA250, 263P277.

740-93 130Misc428, 224NYS144.

741-2 242NY1, 150NE581; 21 OhA438, 153NE204. [a] 21 OhA438, 153NE204. [i] **Grocer, admitting that he solicited his old customers** after selling business and opening new store in same vicinity, and that his employees were actively doing so, with his knowledge, consent, and approval, after leaving service of purchaser's transferee, violated contract of sale and must answer for consequences, such employees' acts being his. 151 Va706, 144SE635.

742-6½-New. Three years is sufficient time for the purchaser to attach the good will to himself and make it his own. 21 OhA438, 153NE204.

742-6½-New. After such period of service to the customers they could no longer be called old customers of the seller. 21 OhA438, 153NE204.

742-6¼-New. and to hold otherwise would be unreasonable, in restraint of trade, and contrary to public policy. 21 OhA438, 153NE204.

742-10 242NY1, 150NE581.

742-12 242NY1, 150NE581; 132Misc 213, 229NYS210. See also 242NY1, 150 NE581. [c] **Where sellers have given sale aspect of voluntary one,** they may be bound as in case of voluntary sale. 242NY1, 150NE581.

743-13 132Misc213, 229NYS210. [a] (2) General assignment held not voluntary transfer. 132Misc213, 229NYS210.

743-14 But see 213Ky763, 281SW1026.

743-24½-New. Assisting another to establish a business is violation of such restricted covenant. 125Misc865, 212 NYS300.

744-28 219Ala346, 122S406.

744-32½-New. A purchaser in reselling a business, assuring vendees of enjoyment of good will, does not reserve ownership of good will and restrictive covenant. 219Ala346, 122S406.

744-35 246Mich695, 225NW546.

745-36 [a] **Evidence held sufficient** to show seller of business violated agreement not to engage in competing business. 217Ky180, 289SW300.

745-45 79CalA728, 250P1109; 96CalA 145, 273P825.

745-46 217Ky180, 289SW300, 301 [cit CJ]. [a] (1) 125Misc865, 212NYS300.

746-53 [a] (3) In action for breach of contract to sell bus line and good will, plaintiff is entitled to recover for loss of future profits. TexCivA 19SW(2d)134.

746-54 [a] (2) 217Ky180, 289SW300. [b] (1) But see 125Misc865, 212NYS300. (2) Evidence of decreased sales, if reasonably connected with competition, may be adduced. 125Misc865, 212NYS300. [f] **Value of property with good will impaired** by seller's competition may be considered. 217Ky180, 289SW300.

746-55 217Ky180, 289SW300, 301 [cit CJ].

746-56 [c] **Adequacy of damages.**-One thousand dollars held proper award of damages for breach of seller's agreement not to compete in business. 217Ky180, 289SW300.

746-57½-New. Price obtained on resale of business is not competent to show damages. 125Misc865, 212NYS 300.

746-57¼-New. The difference in value between business with competition and its value without, as a measure of damage. 125Misc865, 212NYS300.

746-57¼-New. must be shown by expert testimony. 125Misc865, 212NYS 300.

746-57½-New. A petition, alleging sale of a bus line together with good will, and that defendant agreed not to operate a competing line for two years, and that he breached the contract by failing to perform, states a cause of action for loss of future profits as damages. TexCivA 19SW(2d)134.

747-65 [b] **Evidence held insufficient** to show sale of good will. 52ND137, 202 NW132. [c] **Evidence held sufficient** to authorize injunction. 217Ky180, 289SW 300.

748-76 153Tenn1, 282SW199.

GOVERN

749-19 CalA 288P792.

GOVERNMENT

751-53½-New. A "government" is a political agency through which the "state" acts in international relations. 21F(2d)396.

GOVERNMENTAL

753-1 24 OhA268, 157NE309.

753-6 201 Iowa279, 207NW134; 174 Minn184, 218NW892, 60ALR96; 143SC 178, 141SE274.

GRADUATE

756-98 [f] **Similar definition.**-BC [1928] 4DomLR839.

GRAFT

756-9 118 Or568, 247P815.

756-12 77Mont74, 249P664; 118 Or568, 247P815, 822 [quotCJ].

757-13 118 Or568, 247P815, 822 [quot CJ].

757-14 118 Or568, 247P815, 822 [quot CJ].

757-15 118 Or568, 247P815, 822 [quot CJ].

757-18 118 Or568, 247P815, 823 [quot CJ].

757-19 118 Or568, 247P815, 823 [quot CJ].

757-20 77Mont74, 249P664; 118 Or568, 247P815, 822 [quotCJ].

757-21 118 Or568, 247P815, 822 [quot CJ].

757-22 77Mont74, 249P664; 118 Or568, 247P815, 822 [quotCJ].

757-23 118 Or568, 247P815, 822 [quot CJ].

757-24 118 Or568, 247P815, 822 [quot CJ].

757-25 77Mont74, 249P664; 118 Or568, 247P815, 822 [quotCJ].

GRAND JURIES

763-2 94Fla32, 113S630; Fla 129S827.

763-8 21AlaA330, 108S885; 198Cal 112, 243P667.

763-9 25 OhNPNS564.

764-12 26F(2d)487.

764-16 [d] **In Texas.**-100TexCr424, 274 SW137. [e] **Legislature has power to provide** that no grand jury shall be impaneled at term of court for transaction of civil business. 156Miss346, 126 S40.

764-17 156Tenn105, 299SW1052.

764-19 [b] **In Ohio.**-25 OhNPNS564.

765-21 TexCr 118SW(2d)172.

765-31 245 IllA334 [quotCJ].

765-31½-New. Statute authorizes issue of special venire for the grand jury, when the judge believes public justice requires it, and the court cannot impose further limitation. 333 Ill 429, 164NE 832.

765-31½-New. Issuing special venire for the grand jury, and impaneling such grand jury while the grand jury regularly impaneled was in existence, has been held authorized. 333 Ill 429, 164 NE832.

766-42 Fla 129S827; SC 155SE385. [c] **In North Carolina.**-198NC349, 151 SE733.

766-44 [b] **Statute applies only to** those qualifications generally applicable to all juries. Fla 129S827. [c] **Proof of ground for challenges** as applied to petit juries and as applied to grand jurors are defined and distinguished by statute. Fla 124S827.

766-47½-New. Persons summoned to serve as grand jurors at session of court in one division of a district may be impaneled as a grand jury for the entire district. 8F(2d)736.

767-64 SC 155SE385.

769-87 [a] **Maximum age limit is not disqualification** but privilege which may be claimed by prospective juror. Ill 150NE227.

769-90 But see 120 Oh62, 165NE566.

769-91 197 Ind625, 150NE917; 120 Oh 62, 165NE566. [c] **In Indiana.**-197 Ind 625, 150NE917.

769-91½-New. Where, by statute, grand jurors are to be selected from qualified electors, women possessing other requisite qualifications become eligible to serve as grand jurors when they become voters. Ind 167NE531.

769-93 [c] **In Florida.**-97Fla701, 122 S1.

770-2 164La597, 114S171. [b] **In Ohio.** -120 Oh62, 165NE566.

770-13 [a] **State of mind** as disqualification. NM 290P789.

770-14 [a] **Relationship to injured person** does not disqualify in some jurisdictions. 22AlaA368, 115S766.

770-15 See also 37GaA195, 139SE103.

770-18 15 OhA446.

770-19 15 OhA446.
771-20 175Ark1083, 3SW(2d)23.
771-24 But see CalA 265P310.
771-28 BC [1925] 2DomLR803 (grand jury improperly constituted cannot return true bill).
772-33½-New. Acts of a disqualified grand juror are void. CalA 265P310.
772-35 171Ark778, 286SW935.
773-46 200 Ind210, 162NE656.
773-47 328 Ill 367, 170NE227 (selection of grand jury held legal). [h] **Written notice of meeting of officers to draw grand jury is required under some statutes.** 49SD481, 207NW477.
773-48 57ND726, 224NW211; 102WVa 462, 135SE594.
774-49 122 Okl 64, 252P6.
774-50 142Miss468, 107S757; 122 Okl 64, 252P6.
774-53 23AlaA168, 123S237; 23AlaA 168, 123S237; Ind 169NE861; 142Miss 468, 107S757; 198NC349, 151SE733. [a] (4) Failure of board to act as such, and action of individual members in making out unsigned lists of names for jury boxes, constituting total departure from statute. 142Miss468, 107S757.
774-54 237 IlIA178; 122 Okl 64, 252P 6; OklCr 279P968; OklCr 287P1103; 102 WVa462, 135SE594. [a] (5) See also 102WVa462, 135SE594. (8) That order for drawing grand jury was directed to deputy court clerk and under sheriff instead of to court clerk and sheriff. OklCr 287P1103. (9) Selection of twelve grand jurors from twenty four summoned and qualified by district judge. OklCr 287P1103. [h] **Summoning defendant.**-34PortoRico 206 (return showing service).
775-57 57ND726, 224NW211.
775-57½-New. A motion to set aside an indictment does not justify a disregard of such provisions by the persons charged with the duty of selecting and certifying names for the jury list. 57ND726, 224NW211.
775-57½-New. Under some statutes the district courts are vested with express power to compel performance by public officers of all duties enjoined upon them as regards the selection of names for a jury list, the preparation of such list, and the drawing of the jury panel. 57 ND726, 224NW211.
775-57¼-New. Selection for term succeeding appointment of jury commissioners has been held proper. TexCr 328SW(2d)361.
775-58 200 Ind210, 162NE656.
776-63 200 Ind408, 164NE260; 142Miss 468, 107S757; 149SC121, 146SE676. [g] **Notice of meeting of drawing board.**-50 SD388, 210NW350. [h] **In Mississippi.**-142Miss468, 107S757.
776-64 105TexCr350, 288SW456; 108 TexCr142, 299SW437.
776-66 [a] **Participation in drawing by commissioner whose term had expired** does not render drawing illegal, where other commissioners constitute quorum. 194Wis410, 217NW283.
776-66½-New. Under a statute requiring the presence of witnesses, the chief deputy clerk may act as such in the absence of proof that he was acting as a member of the jury commission in the absence of the clerk. 165La215, 115S 464.
776-66¾-New. Defendant in a criminal prosecution is entitled to absolute impartiality of the commissioners charged with the duty of drawing. 149SC121, 146SE676.
776-67 194Wis410, 217NW283. See also 200 Ind210, 162NE656.
776-70½-New. The official capacity of a de facto jury commission is not subject to collateral attack. 168La1135, 123S 807(2dcase).
777-74 18F(2d)648.
777-76 167La1021, 120S633; 194Wis 410, 217NW283. See 200 Ind210, 162NE 656.
777-78 AlaA 130S527.
777-78½-New. Appointment of jury commissioners and drawing of grand jurors at special term following adjournment of regular term is sometimes authorized. TexCr 26SW(2d)227.
777-81 [a] 329 Ill 576, 161NE83. [b] 329 Ill 576, 161NE83.
777-82 But see 29Hawaii7.
778-88 19F(2d)897; 122 Okl 64, 252P 6; 194Wis410, 217NW283.
778-90½-New. Under statutory provision the grand jury should be drawn from the whole body of citizens selected and placed in the grand jury box indifferently and without discrimination. 167Ga147, 144SE782.
778-90¾-New. And the trial judge cannot eject jurors, drawn to fill places of disqualified jurors, because of information from others of their incompetency. 167Ga147, 144SE782.
778-93 [a] TexCr 78SW(2d)1078.
778-95½-New. Trial court informed before jury commissions report and list of jurors were opened of race discrimination in the drawing of grand jurors has power to set aside return and reconvene same commission or appoint a new one. TexCr 24SW(2d)396 (during same term).
778-97 158La129, 103S534. [a] (2) In absence of fraud, drawing of grand jury will not be held invalid because clerk's certificate to list of male voters was displaced in binding. 34NM84, 278P214 (1stcase).
778-99 204 Iowa837, 216NW43. [b] **Proceedings held proper.**-204 Iowa837, 216NW43.
779-1½-New. Statute providing that no name drawn from the grand jury box shall be destroyed except where the juror is dead, removed out of the county, or otherwise disqualified by law, words, "or otherwise disqualified by law," means disqualification which renders it improper to put a name in the grand jury box and not disqualification propter affectum. 167Ga147, 144SE782.
779-2 [a] **In Mississippi.**-142Miss468, 107S757.
779-9½-New. Where the sheriff is unable to serve certain persons selected for grand jury and serves others in their place without a proper order of the court, the grand jury is not properly constituted and cannot return a true bill. BC [1925] 2DomLR803.
779-16 307Mo 352, 270SW310.
779-17½-New. **In New Jersey** court of oyer and terminer has power to order special term and impanel grand jury. 103NJL246, 136A164.
780-22 4HawaiiFed577; 329 Ill 352, 160NE564, 569 [citCJ].
780-33½-New. Summons by post card is held sufficient. 237 IlIA178.
780-35 200 Ind210, 162NE656.
781-37 329 Ill 352, 160NE564, 569 [cit CJ].
781-41 200 Ind210, 162NE656.
781-43½-New. Summoning of grand jurors by a constable at special term is proper where the sheriff is dead and no provision for such exigency is made by statute. 103TexCr103, 280SW200.
781-44 103TexCr103, 280SW200.
781-45 160Ga292, 127SE842 (under statute service at proceeding term is valid).
781-52 19F(2d)897.
781-54 164La597, 114S171.
782-57 97Fla199, 120S330.
782-58 213Ala160, 104S336 (irregularity in filling jury box); 329 Ill 352, 160 NE564, 569 [citCJ].
782-65 158La129, 103S534 (ten grand jurors held sufficient).
783-73 32NM404, 258P209, 53ALR706.
783-74½-New. **Common practice** may warrant appointment by court. 194Wis 410, 217NW283.
784-78 167Minn25, 208NW177.
784-78½-New. and indictments properly indorsed by duly appointed acting foreman are not open to attack on that ground. 167Minn25, 208NW177.
784-79 158La129, 103S534 (whether foreman was present when members of grand jury were sent to their room is immaterial).
784-81 147Miss851, 112S790, 794 [cit CJ].
784-83 25 OhNPNS564.
784-91 25 OhNPNS564.
785-8 CalA 265P310.
785-10 89 IndA330, 166NE547(2dcase).
785-14 158La129, 103S534 (failure to give two absent members same charge as others does not affect competency of grand jury).
786-32 [1925]CanSC525, [1925] 3Dom LR887.
787-35 176Ark104, 28SW(2d)55 [citCJ].
787-37 107TexCr332, 296SW547. [a] 107TexCr332, 296SW547.
788-45½-New. Purging the grand jury of jurors does not reach back to jury commissioners also disqualified. 149SC 121, 146SE676.
788-45¾-New. In some jurisdictions where there has been a total departure from statute and no valid jury lists are in the boxes, grand jury for the term should be summoned from the body of the county. 142Miss468, 107S757.
788-56 329 Ill 576, 161NE83. [a] **Where organization of grand jury violates state or federal bill of rights,** courts will give relief, though there is no statutory authority. 105TexCr617, 290SW541.
788-57 109TexCr168, 3SW(2d)459.
788-57½-New. Challenge to array is not one where the guilt or innocence of accused is considered. 25 OhNPNS564.
789-60 50SD388, 210NW350. [a] (3) Lack of written notice of meeting of officers to draw grand jury. 49SD481, 207NW477. [b] (2) Fact that court struck certain names from list of grand jurors selected by jury commissioners is held not to warrant sustaining challenge to array. 105TexCr405, 289SW 73.
789-61 [d] **Matters not constituting ground for challenge.**-57ND726, 224NW 211. [e] **Where statute enumerates specific grounds of challenge,** specified grounds are exclusive. 57ND726, 224 NW211.
789-62 57ND726, 224NW211.
789-64 25 OhNPNS564.
790-76 34PortoRico 206 (mere unfriendliness not ground).
791-90 57ND726, 224NW211. [a] **Matters not constituting ground for challenge.**-(1) That at time grand jury was drawn jury list of county did not contain two hundred names. 57ND726, 224NW211. (2) Nonobservance by city officers of provisions of law relating to selection by lot of names for jury list of county, apportioned to city. 57ND 726, 224NW211.
792-4½-New. **Relationships held not ground of challenge.** 34PortoRico 206.
792-12 [a] (2) Accused after indictment cannot reopen in his own behalf hearing on challenge interposed by another before grand jury was impaneled in absence of showing that he was not charged with offense before grand jury was impaneled. 105TexCr617, 290SW 541.
792-12½-New. In Porto Rico accused is not entitled to be summoned for the drawing of a grand jury investigating his case in order that he may exercise the right of challenge where the grand jury investigates the crime without submission of any charge by the district attorney. 33PortoRico 825.
792-15 NJSup 150A249.
792-16 108TexCr142, 299SW437. [a] (2) Challenge to array cannot be made before any jurors are in attendance. 91 PaSuper229.
793-17 105TexCr617, 290SW541.
793-24½-New. Challenges nearly two months after jury had been in session may be properly overruled. NJSup 150 A249.
793-29 30F(2d)866; 106TexCr103, 290 SW1097.
793-29½-New. That the indictment alleges as the date of the offense a date subsequent to the impaneling after grand jury does not prove that defendant had not been arrested charged with the offense before the grand jury was impaneled. 106TexCr103, 290SW1097.
794-40 194Wis410, 217NW283.
794-41 See also 194Wis410, 217NW283.
795-59½-New. Revocation of order discharging grand jury see NJSup 152A 206.
795-59¾-New. Proof that names of three of jurors constituting venire did not appear on jury roll justifies court in discharging grand jury. AlaA 130S527.
795-65 158La129, 103S534 (indictment returned within seven months after jury was impaneled held sufficient); 147Miss 851, 112S790. [a] Wis 217NW283 [foll 87Wis340, 58NW386, 41AmSR45, 27 LRA776]. [f] **In Georgia.**-160Ga292, 127SE842. [g] **Determination when jury has "completed business" rests with**

court under statute requiring discharge on completion of business. NM 290P 789.

796-66 35F(2d)689. [d] **In Wisconsin** rule of common law that grand jurors could act only during term for which they were called does not prevail. 194 Wis410, 217NW283.

796-67 179Ark1123, 20SW(2d)622 (can function only during court term).

796-69 5F(2d)471 (court may adjourn to regular term at end of special term).

796-70½-New. Where the grand jury, after being duly discharged, reassembled on its own initiative or suggestion of the sheriff, or privately retained counsel, indictment found is invalid. 97Fla199, 120S330.

796-71 91Fla1085, 109S634.

796-73 179Ark1123, 20SW(2d)622; 127 Misc199, 215NYS433.

796-73½-New. That the judge, during temporary adjournment of the grand jury, held a session of court in another county does not operate to discharge the grand jury. 122 Okl 64, 252P6.

796-74 148Miss608, 114S392.

796-77 179Ark1123, 20SW(2d)622 (subject to orders of court).

797-79½-New. Trial judge has wide discretion on continuity or adjournment of grand jury. 179Ark1123, 20SW(2d) 622.

797-81 152Md616, 137A370.

797-83½-New. It is also the duty of the grand jury to protect persons from unfounded accusations. 27F(2d)137.

797-89½-New. It has authority to investigate places amounting to public nuisances in violating liquor laws, 125 Misc658, 211NYS705.

797-89½-New. to indict, 125Misc658, 211NYS705.

797-89½-New. and bring to trial persons responsible therefor. 125Misc658, 211NYS705.

797-89½-New. The grand jury is not authorized to determine guilt or innocence or impose costs. 7PaDist&Co 746.

797-89¼-New. It is not within the province of grand jurors to prosecute. CalA 265P310.

798-96 5F(2d)715.

798-97 21AlaA330, 108S85; 99Fla1132, 128S494 (perjury of witness before grand jury); 333 Ill 429, 164NE832; 152Md616, 137A370; 113 OhSt418, 149 NE395, 396 [citCJ].

798-4 [a] **Public profanity.**-155Tenn 11, 290SW7.

799-6 CalA 265P310.

799-6½-New. The court cannot limit the scope of an investigation of the grand jury. 333 Ill 429, 164NE832.

799-6½-New. Scope of inquiry by grand jury is not to be narrowly limited by forecast of probable result of investigation. 40F(2d)201.

799-14 See also 4HawaiiFed780.

799-16 152Md616, 137A370, 373 [quot CJ]. [b] **Presentment held unwarranted imputation** on integrity and good faith of authorities. 126Misc250, 213 NYS86. [c] **Motion to expunge from record** involves court's right to keep record clear of immaterial and improper matter, and not legal rights of individuals. 126Misc250, 213NYS86.

799-17½-New. Presentment should bear signatures of foreman and at least twelve jurors, and be attested by clerk, 126Misc250, 213NYS86.

799-17½-New. or bear statement that report is action of grand jury as a body. 126Misc250, 213NYS86.

799-17¼-New. The right to make presentment a report should be used with utmost caution and due respect for rights of individuals mentioned therein. 126Misc250, 213NYS86.

799-17½-New. The presentment or report should present facts obtained as result of inquiries authorized by statute. 126Misc250, 213NYS86.

800-20 133Misc620, 233NYS81.

800-20½-New. Grand jury may report on all matter as to which statute authorizes inquiry. 126Misc250, 213NYS 86.

800-20½-New. As respects presentment, the grand jury is part of the court, and can act only in the manner prescribed by law. 133Misc620, 233NYS 81.

800-20¼-New. The grand jury, under guise of a presentment, must not attack the good name of a citizen or a public official with misconduct without an opportunity to answer, and such individual or official is entitled to have the presentment expunged, regardless of the honesty of the motives of the grand jury. 133Misc620, 233NYS81.

800-20½-New. It is not within the powers of a grand jury to make adverse comments on the qualifications for the office of one holding office under a distinct department not within the court's jurisdiction, although he is under investigation. 4HawaiiFed780.

801-38 81CalA226, 253P735.

801-41 319 Ill 596, 150NE280.

801-48 [a] **Statute strictly construed.**-28F(2d)451.

801-49 156Miss487, 126S25.

802-55 106Conn701, 139A91; 103NJL 246, 136A164.

802-64 135Wash499, 240P676.

802-69 103TexCr318, 280SW202.

803-84½-New. A statute, empowering the governor to employ counsel to protect the rights or interests of the state and conduct proceedings before grand juries, is not unconstitutional. OklCr 279P921.

803-84½-New. Where an attorney is employed as counsel for the state under statute and appears before the grand jury without having taken an oath, the indictment is not rendered void. OklCr 279P921.

803-85 5F(2d)129; 25F(2d)430; 136 Wash499, 240P676. [a] **Fact that one of two deputy prosecuting attorneys took stenographic notes** is not ground of motion to quash indictment where he took no active part in questioning witnesses. 136Wash499, 240P676. [b] **Special commission authorizing appearance in certain federal district** is insufficient to establish qualification for appearance in another district. 28F(2d)451.

803-86 [a] **Failure of special prosecutor to take oath and furnish bond** does not disqualify him to appear before grand jury. CalA 265P310.

803-86½-New. Special counsel is not disqualified to appear before the grand jury because of having consulted with detectives regarding his employment, having discussed the matter with grand jurors, and having interviewed witnesses. CalA 265P310.

803-88 56ND357, 217NW531.

804-96 97Fla199, 120S330; 55ND437, 214NW39.

804-3 But see 205Cal 441, 271P478.

804-5 [b] (3) 28F(2d)424.

804-6 165La718, 115S914; 169La109, 124S188.

804-10 33PortoRico 179. [c] **Use of notes at trial** permitted for purposes of cross-examination by accused of adverse witness. 33PortoRico 179. [d] **Stenographer's notes transmitted** to the court become public document. 33PortoRico 179.

805-11 22AlaA143, 113S465; 81CalA 226, 253P735; 97Fla199, 120S330; 319 Ill 596, 150NE280.

805-12 55ND487, 214NW39.

805-14 110TexCr560, 9SW(2d)360.

806-20 But see 97Fla199, 120S330.

806-24 [b] **Keepers of records of trust organization** may be required to produce records for investigation. 5F(2d) 715.

806-26 5F(2d)715.

806-31½-New. Accused may not have his witnesses heard by grand jury as matter of right. 159La674, 106S28.

806-31½-New. Investigations of grand jury should be confined strictly to testimony of witnesses having knowledge of facts touching matters under inquiry. 156Miss487, 126S25.

807-44 12PaDist&Co 529; 12PaDist& Co 585. [b] **In PortoRico.**-33PortoRico 821.

807-47 12PaDist&Co 529; 12PaDist& Co 585.

808-59 [a] 177Minn200, 224NW838. [a] See also 33PortoRico 179.

808-60 40F(2d)201.

808-61 40F(2d)201 (form of presentment to court). [a] **Refusal to specify** particular questions and answers upon which witness was held in contempt has been held not prejudicial. 40F(2d)201.

803-62 [a] **Statute imposing on justice of peace** power to commit to jail witnesses refusing to be sworn or answer proper questions of grand jury. 110 Conn482, 148A551.

808-62½-New. Before a witness may be committed for contempt in refusing to answer incriminating questions, the record must show jurisdiction and facts affording immunity from prosecution. 208 Iowa472, 225NW954.

808-72 [k] **Examination of relatives of defendant.**-Complaint is without merit that defendant's children were subpoenaed and interrogated by grand jury. 310Mo 500, 276SW625.

809-74 22AlaA136, 114S791.

810-81½-New. There is no constitutional or statutory bar to the appearance of any person before a grand jury as a witness. 78CalA561, 248P990.

810-83 22AlaA143, 113S465.

810-84 22AlaA143, 113S465.

810-85 78CalA561, 248P990.

810-91½-New. There is no constitutional or statutory bar to the return of an indictment against a witness appearing before the grand jury if his testimony or other evidence shall so warrant. 78CalA561, 248P990.

811-96 40F(2d)931.

811-8½-New. Grand jurors are not restricted in inquiry to specific charges or accusations but are authorized to make inquiry concerning any offense they may have reason to apprehend has been committed. 110Conn482, 148A551.

811-11 33PortoRico 179.

811-12 Iowa 228NW1 (immaterial testimony may be omitted).

812-15 [c] But see 33PortoRico 179.

812-18 33PortoRico 179.

812-24 81CalA226, 253P735.

812-26 198Cal 112, 243P667; SC 155 SE385.

812-28 See also 33PortoRico 179.

813-31 NJSup 150A189.

813-32 119 Or312, 249P364. [a] **Grand juror in prosecution for arson** may testify that clothing from burned building brought before grand jury was damp and smelled of oil or gasoline. 104Tex Cr244, 283SW846.

813-37 119 Or312, 249P364.

814-51 But see 4HawaiiFed780.

814-57 33PortoRico 179. [a] **In Porto Rico.**-33PortoRico 179.

815-58 251NY156, 167NE204.

815-69 204 Iowa406, 215NW258.

815-71 93PaSuper365.

816-80½-New. Under statutes of some states it is not error for court to enter grand jury room and give secret instructions. 169Ark498, 276SW353.

816-83½-New. Minutes of proceedings held to show return of indictment by entire grand jury in open court. 159La 674, 106S28.

817-95 12PortoRicoFed490.

GRANT

821-23 [c] **A generic term** applicable to transfer of all classes of real property. 117 Or244, 243P767.

GRANTEE

822-72 329 Ill 30, 160NE179.

GRAZING COUNTRY

825-45½-New. "Grazing country" and "range country" are synonymous expressions. 76Mont201, 245P949.

GROCER

827-33½-New. "Grocery" is place for selling general supplies for table and household use. 214AppDiv628, 212NYS 430.

GROSS

828-76 24 OhA154, 157NE304.

829-94½-New. "gross annual receipts," 5LaA700; 7LaA557, 559.

GROUND RENTS

840-34 154Md438, 140A836.

842-82 154Md438, 140A836.

842-85 112 Oh306, 147NE513, 517, 39 ALR334 [quotCJ].

842-86 112 Oh306, 147NE513, 517, 39 ALR334 [quotCJ].

843-87 112 Oh306, 147NE513, 517, 39 ALR334 [quotCJ].
843-95 154Md438, 140A836.
846-47 112 Oh306, 147NE513, 517, 39 ALR334 [quotCJ].
846-48 112 Oh306, 147NE513, 517, 39 ALR334 [quotCJ].
846-49 112 Oh306, 147NE513, 517, 39 ALR334 [quotCJ].
843-81½-New. An assignment of a part interest in net rentals to accrue under a lease for a term of years, although made when there was as yet no tenant paying rent, is valid in equity and will be enforced. TexCivA 284SW253.
852-72 87PaSuper383.
853-85 148Md275, 129A289; 155Md 167, 141A558.
854-93 148Md275, 129A289.
855-27 151Md56, 133A830.
856-35 [a] (1) See also 157Md602, 146 A805. (2) 154Md438, 140A836. (8) Act (1900) c 207 is not unconstitutional. 154Md438, 140A836. (9) Lease for twenty-one years is not modified by agreement granting assignee interest in rent money so as to disentitle tenant to redeem under Act (1900) c 207. 154Md 438, 140A836. (10) Time for exercise of right. Md 152A258.
856-38 Md 152A258.
856-39 [a] (3) Statute giving tenant option to redeem where lease is for period greater than fifteen years held applicable to lease for less than such period, providing for successive renewal at different rentals. 157Md602, 146A805 (lease for term of six years with option to make successive renewals). (4) Lease term to begin in futuro can be redeemed, though portion of consideration for lease which is condition precedent to beginning future term has not been complied with by lessee. 157Md 602, 146A805. (5) Statute, declaring that statute giving tenant right to redeem shall not apply to leases for business purposes when they contain clause prohibiting assigning or sublease without landlord's written consent, did not apply to lease for business purposes not exceeding twenty-five years, containing no clause against assignment. 157Md602, 146A805.
857-41 154Md438, 140A836.
863-95½-New. Lien for rent may be waived by levying attachment on buildings of lessee and causing such attachment to be foreclosed. 111 Okl 253, 239 P449.
875-80 [a] **Evidence held sufficient** to justify decree fixing value of tract at one hundred ninety-two thousand dollars. Wash 287P898.

GROUP INSURANCE

879-2 124Kan584, 261P603. [c] **Workmen's compensation insurance compared and distinguished.**-124Kan584, 261P603.

GUARANTY

886-3 14F(2d)849; 41F(2d)793; Del 151A831; TexCivA 293SW613. [a] (3) 117Tex399, 5SW(2d)748. (5) Contract for direct payment of debt or of money. 88CalA111, 263P260.
886-4 14F(2d)849; TexCivA 300SW 129; Ont [1925] 3DomLR334.
886-6 77Mont539, 252P368; 75Mont 516, 244P494; 75Mont213, 245P956; 37 OklACR195; 43 OklACR291.
886-7 117Tex399, 5SW(2d)748.
886-8 116 Or217, 240P895, 896 [citCJ]; 116 Or250, 241P58 [citCJ]. See also MoA 292SW1079. [c] **That person calls himself "guarantor"** is not conclusive of relation. 117Tex399, 5SW(2d)748.
887-15 24F(2d)59; 202 Iowa117, 209 NW297; 153Md638, 139A446; 75Mont 167, 242P956; 126Misc690, 691, 214NYS 433 [citCJ].
887-16 88CalA111, 263P260, 263 [quot CJ]; 153Md638, 139A446; 36Wyo 12, 252P790.
887-17 Ont [1925] 3DomLR334.
887-19 243 IllA122; 50SD208, 208NW 985; TexCivA 258W(2d)222. [b] (1) See also 77Mont539, 252P368. (11) Written instrument signed by bank directing delivery of lumber to contractor. 76CalA438, 244P934.
888-22½-New. Liability of guarantor of contract is not necessarily inconsistent with liability of person primarily liable. Utah 291P303.
888-24 Fla 130S760.
888-25 Fla 130S760; 75Mont167, 242P 956; Ont [1925] 3DomLR334. [b] (1) 75Mont167, 242P956.
889-34 [c] 214Ky76, 282SW769. [d] **Contract held one of guaranty.**-SD 227 NW193.
889-36½-New. , or an original contract. 72CalA367, 237P550.
889-36½-New. Letter agreeing to pay another's note on delivery of collateral attached is held intended as guaranty. 163La933, 113S152.
889-36¼-New. A broker's agreement to reimburse a purchaser and take over land if the purchaser failed to profit has been held not a contract for future sale to the broker. 39GaA243, 146 SE649.
889-36½-New. An agreement to repurchase a note and mortgage is not a guaranty but a contract of sale, or of sale and resale or return. 208 Iowa573, 221NW486.
890-41 [a] 78Mont504, 255P1063.
890-44 176Ark401, 4SW(2d)912, 916 [citCJ]. [b] 78Mont504, 255P1063.
890-45 220MoA657, 291SW515, 518 [cit CJ]; 117 Oh290, 158NE543, 60ALR 199.
890-46 75Mont516, 244P494; 50Nev 346, 259P417, 418 [citCJ]; 117 Oh290, 158NE543, 60ALR199. See also 11Pa Dist&Co 288.
891-47 220Ala6, 123S271; 75Mont516, 244P494; 117 Oh290, 158NE543, 60 ALR199.
891-49 88CalA111, 263P260; 87 IndA 664, 158NE485; 50Nev346, 259P417, 418 [citCJ]. [a] (1) 85PaSuper480.
891-50 21F(2d)211, 213 [quotCJ].
891-51 21F(2d)211, 213 [quotCJ]; 50 Nev346, 259P417, 418 [citCJ].
891-53 75Mont167, 242P956; 117 Oh 290, 158NE543, 60ALR199.
892-57 220MoA657, 291SW515.
892-59 220MoA657, 291SW515.
892-62½-New. Under some statutes a guarantor is liable as surety where his agreement contains no words stating in substance that he does not intend the contract to be a suretyship. 91Pa Super413.
892-67 201 Iowa670, 207NW785, 788 [citCJ].
892-70 6F(2d)762; 215Ala398, 110S 822. [c] (5) Agreement in note and indorsement to protect plaintiff against loss he might suffer by reason of purchasing corporate stock if dividends thereon were not sufficient within three years to repay plaintiff's investment with interest. 77Mont539, 252P368. (6) Contract "guaranteeing title to lease" and agreeing to protect grantee from liens, encumbrances and defects "in order to indemnify" and hold him harmless. 215Ala398, 110S822.
893-71 201 Iowa670, 207NW785, 788 [citCJ].
893-76 TexCivA 30SW(2d)668.
893-77 TexCivA 300SW129.
893-79 TexCivA 300SW129.
894-82 [a] (2) 125 Or261, 264P852.
895-92 216Ala69, 112S426 ("absolute guarantee" one where signers "guarantee full payment of sum"); 44 Ida510, 258P527; MoA 278SW803, 804 [quot CJ]; 190NC512, 130SE323, 327 [quotCJ entire paragraph]; 51SD270, 213NW 505; TexCivA 300SW129; 143Va855, 129SE675, 677 [quotCJ].
895-93 170Ark555, 280SW659; 44 Ida 510, 258P527; 51SD270, 213NW505; TexCivA 300SW129; 143Va855, 129SE 675, 677 [quotCJ]. [b] (8) Other instances. Del 151A828; 229AppDiv453, 242NYS366; 132 Okl 40, 269P295.
896-96 170Ark555, 280SW659; 253 IllA51; 37 OklACR195; 141SC136, 139 SE217, 218 [quotCJ]; TexCivA 300SW 129; 143Va855, 129SE675, 677 [citCJ].
896-3 37Wyo130, 259P804, 810 [cit CJ]. [a] (9) Guaranty that assets of bank taken over by another bank will be sufficient to pay liabilities assumed held absolute guaranty. 253 IllA51.
896-4 37Wyo130, 259P804, 810 [cit CJ].
896-6 MoA 278SW803, 804 [quotCJ]; TexCivA 300SW129. See also 36Wyo 132, 253P658.
896-10 248NY28, 161NE319; 116 Or 217, 240P895; 116 Or250, 241P58; Tex CivA 300SW129.
897-12 Ill 172NE7; 51SD270, 213NW 505.
897-15 101CalA67, 281P400.
897-16 51SD270, 213NW505.
898-38 11F(2d)929; 213Ala631, 105S 886 (guaranty complete when minds of parties meet in mutual assent to same things in same sense); 252Mass383, 147 NE870; 174Minn484, 219NW766, 768 [citCJ]; 216AppDiv92, 214NYS705; 115 Okl 46, 241P770.
899-39 11F(2d)929; 43F(2d)985; 252Mass383, 147NE870 (telegram, containing no promise by defendant that payment would be made held insufficient); 174Minn484, 219NW766, 768 [citCJ]; MoA 25SW(2d)512 (offer can be accepted only by one to whom it is addressed). [b] **Letter held not offer of guaranty.**-MoA 25SW(2d)512.
899-41 20AlaA579, 104S286; 163La 933, 113S152, 154 [quotCJ]; 51SD270, 213NW505; 66Utah154, 239P949.
899-42 163La933, 113S152, 154 [quot CJ]; 51SD270, 213NW505.
899-43 51SD270, 213NW505.
899-44 66Utah154, 239P949.
899-44½-New. Mutual assent may appear from facts leading to, or connected with, signing and delivery of instrument. 213Ala631, 105S886.
899-44¼-New. Acceptance and mutual assent may appear from the instrument itself. 213Ala631, 105S886.
899-46 8PaDist&Co 45.
899-47 174Minn484, 219NW766, 768 [citCJ].
899-50 37Wyo130, 259P804.
899-51 37Wyo130, 259P804.
900-52 173Ark52, 291SW984; 50Philippine991.
900-55 43F(2d)985; 214Ala507, 108S 244; 174Minn484, 219NW766.
900-56 51SD270, 213NW505.
900-57 214Ala507, 108S244.
900-58 MoA 282SW414; 52ND607, 204 NW184; 36Wyo132, 253P658.
901-62 213Ala631, 105S886 (guaranty of line of future credit).
901-65 34F(2d)401; 213Ala631, 105S 886 [citCJ]; 45 Ida753, 265P664, 666 [citCJ]; 52ND607, 204NW184; 51SD 270, 213NW505.
901-67 52ND607, 204NW184.
902-71 115 Okl 46, 241P770. [b] **When "continuing offer of guaranty" has been accepted** and becomes contract it still remains an offer as to future loans and renewals. MoA 25SW (2d)512.
902-72 213Ala631, 105S886.
902-72½-New. or to a specified party to secure future credit for the person in whose favor it is drawn; 213Ala631, 105S886.
902-73 [a] (2) In construing contract for renewal of sales agency, with provision for future credit to be extended, held as to guaranty for future indebtedness, actual acceptance by party to whom offer of additional credit was made is required. 214Ala507, 108S244.
902-76 66Utah154, 239P949.
903-77 66Utah154, 239P949.
903-78 66Utah154, 239P949.
903-84 31F(2d)9; 213Ala631, 105S886 (notice of acceptance is unnecessary where mutual assent appears upon delivery of instrument); 118 Or373, 244P 84, 45ALR1382.
903-85 213Ala631, 105S886; 66Utah 154, 239P949.
903-86½-New. , or where guaranty is given pursuant to a prior or present agreement between the guarantor and guarantee. 213Ala631, 105S886.
903-90 213Ala631, 105S886 [citCJ]; 163La933, 113S152, 154 [quotCJ].
903-91 163La933, 113S152; 51SD270, 213NW505; SD 229NW293. [c] **Recital of actual consideration paid by guarantor to guarantee** goes to nature of contract as bilateral agreement, absolute and unconditional, binding upon parties, and not conditional offer or proposal. 213Ala631, 105S886.
904-92 118 Or373, 244P84, 45ALR1382. See also 213Ala631, 105S886.

904-93 213Ala631, 105S886 (failure to give notice of acceptance no defense to action on unconditional contract of guaranty of payment of indebtedness thereafter incurred, which receded nominal consideration); 51SD270, 213NW505.

904-95 But see 51SD270, 213NW505.

904-96 52ND607, 204NW184 (guaranty absolute in terms but in legal effect mere offer); 51SD270, 213NW505.

904-97 173Ark52, 291SW984; 176Ark958, 4SW(2d)923, 925 [quotCyc]; 45 Ida753, 265P664, 666 [quotCJ]; 266 Mass39, 165NE7; 167Minn40, 209NW533; 52ND607, 204NW184; 51SD270, 213NW505; SD 228NW809; 100WVa350, 130SE472. [b] (10) That certain form named "will guarantee that" named individual "will complete a certain building and other improvements" located in certain lot and block in accordance with certain contract of certain date between named parties. 37 OklACR195. (11) Guarantors financially interested in debtor bank who expressly guarantee note of bank unconditionally must keep themselves advised of transactions covered by guaranty. 51SD270, 213NW505.

905-98 52ND607, 204NW184; 37 Okl ACR195; 51SD270, 213NW505.

905-3 66Utah154, 239P949. See also 10LaA298, 121S359.

906-5 213Ala631, 105S886; 176Ark958, 4SW(2d)923, 925 [quotCyc]; 117 Okl256, 246P417. [a] (5) Where guarantor signs and sends to guarantee letter of guaranty prepared by guarantee and delivered to debtor stating that he will sell him goods on credit if proposed guarantor will sign it. 66Utah154, 239P949.

906-6 117 Okl256, 246P417.

906-9 266Mass39, 165NE7; 51SD270, 213NW505; 199Wis30, 225NW185. See also 31F(2d)9.

907-13 249 IllA562.

907-19 91PaSuper413.

908-23 51SD270, 213NW505.

908-27 37Wyo130, 259P804.

908-30 MoA 278SW803; SD 229NW293; 37Wyo104, 259P804.

908-31 51SD270, 213NW505.

909-45 215Ala528, 112S102; 187Wis55, 203NW910 [citCyc]; 38Wyo307, 267P77, 83 [citCJ]. [e] **Void and voidable.**–215Ala528, 112S102. [f] **Transactions held not within rule.**–38Wyo307, 267P77. [g] **Original agreements held not fraudulent or illegal.**–205 Iowa1233, 219NW266.

910-46 TexCivA 293SW613, 618 [cit CJ].

910-51 [b] **Contracts lacking in mutuality.**–Guarantor of payment for goods sold under contract by which buyer did not agree to buy any amount is obligated for goods actually sold. MoA 31SW(2d)544.

910-58½-New. or officer may exceed authority; TexCivA 293SW613.

910-59 154Wash559, 283P173.

911-63 Ariz 288P7; TexCivA 284SW298.

911-72 251 IllA177; 310Mo104, 274SW770; 31OhA537, 166NE595. [c] (9) Bank's telegram to correspondent bank held guaranty to pay broker's draft. 173Ark52, 291SW984. (10) Other instances. 177Minn592, 226NW203(2d case). (11) Letter stating "I will stand good for it." 32OhA544, 168NE479. [e] **Letter of credit** need not be couched in any particular words or specific form. MoA 292SW1079.

912-76 [b] **Written approval** by bank on order by its customer for shipment is held not guaranty. 258Mass182, 154NE545.

913-81 See also TexCivA 29SW(2d)845.

913-86 39GaA243, 146SE649; 88 IndA432, 164NE414.

913-94 131Misc697, 227NYS292.

914-99 176Ark958, 4SW(2d)923, 924 [quotCJ].

914-10½-New. Liability of guarantors is not affected because the bond is not signed by their principal. 193NC524, 137SE593.

914-11 51SD225, 213NW3; 36Wyo132, 253P658, 662 [citCJ]. [b] **Provision that failure of party to sign shall not affect liability of signers** does not impose liability where instrument was to become effective only if party signed. Iowa 230NW851.

915-15 52ND568, 204NW188 [citCJ]; 53ND328, 205NW732.

915-16 52ND568, 204NW188, 195 [quot CJ]; 36Wyo132, 253P658, 662 [citCJ].

915-17 52ND568, 204NW188, 195 [quot CJ].

915-18 52ND568, 204NW188, 195 [quot CJ]; 53ND328, 205NW732.

915-19 36Wyo132, 253P658, 662 [cit CJ]. [a] (2) Where guaranty is signed and delivered under agreement that blank shall be filled so as to limit liability to certain amount, there is no contract unless blank is filled in accordance with agreement. 252 IllA545.

915-22 MoA 31SW(2d)544; OhA 173NE16; 157SC371, 154SE641; SD 233NW285.

915-23 MoA 296SW225.

916-35 37 OklACR195 (under statute).

917-42 163La933, 113S152; LaA 129S450; 248NY28, 161NE319. [a] (7) Lease. NJSup 135A349. (8) Relinquishment of liability as indorser is held consideration for guaranty of renewal note. 173Minn325, 217NW381. (9) Interest of directors in keeping bank open is sufficient consideration for their guaranty against loss of doubtful assets of bank. 205 Iowa712, 218NW520. [b] **Sufficiency of consideration should be determined in light of circumstances** under which guaranty is accepted. 88CalA716, 264P265. [c] **Consideration held insufficient.**–35Ariz496, 281P202. [d] **That something actually pass** from seller to guarantors is not required. Iowa 231NW489.

917-43 TexCivA 283SW249.

917-49 82CalA240, 255P254; 39GaA243, 146SE649; 121Kan448, 247P1048, 1050 [citCJ]; Mass 166NE719; 80Mont308, 260P1039; NJSup 135A348; 220AppDiv649, 222NYS442; TexCivA 283SW249; 200Wis412, 228NW515, 67ALR875.

918-51 [b] **Generally consideration is that passing between maker and payee of note** guaranteed. 88CalA716, 264P265. [c] **That guaranty is executed** before maturity of note, renewal of which is given for guaranty, is no defense. 88CalA716, 264P265.

918-52 173Ark52, 291SW984; TexCivA 283SW249.

918-53 NJSup 135A348.

918-54 NJ 151A63; 50SD208, 208NW985. But see TexCivA 22SW(2d)343.

919-57 224Ky238, 5SW(2d)1070.

919-58 [a] (2) Rendering future legal services is good consideration for promise to pay for services rendered. 100WVa350, 130SE472.

919-61 82CalA240, 255P254; MoA 296SW225; MoA 31SW(2d)544; TexCivA 22SW(2d)343.

919-64 164La612, 114S354; 80Mont308, 260P1039; 117 Okl235, 245P825, 828 [quotCJ]; 117 Okl256, 246P417, 418 [citCJ]; TexCivA 283SW249; TexCivA 118SW(2d)808.

919-65 248NY28, 161NE319; 216App Div92, 214NYS705. [c] 145Wash525, 261P93.

920-68 TexCivA 283SW249.

920-68½-New. A contract of guaranty covering a past-due indebtedness was not wholly for the benefit of the seller, where the seller agreed to extend further credit to the buyer in consideration for execution of the guaranty contract. 87IndA337, 163NE538.

920-69 145Wash525, 261P93, 95 [cit CJ].

920-72 215Ala528, 112S102; TexCivA 283SW249.

921-73 215Ala528, 112S102; MoA 30SW(2d)1087; MoA 31SW(2d)544; 80Mont308, 260P1039. [b] Ill 172NE7; 115Nebr770, 215NW102. [c] (1) TexCivA 11SW(2d)808. [d] (2) Continuance in employment consideration for guaranty of payment of salary. Mass171NE454. [e] **Consideration for purchase price of goods** to be delivered to principal debtor at the time or subsequently is good consideration for guaranty. TexCivA 283SW249.

921-74 TexCivA 278SW243. [a] (8) Release of interests of inheritance by children to avoid confusion in settling of estate is held sufficient consideration for father's guaranty of daughter's notes. TexCivA 278SW243. (9) Such release is good consideration even if inoperative except as estoppel against daughter. TexCivA 278SW243. (10) Contract whereby bank officer guaranteed payment of doubtful note held supported by consideration. Iowa 230NW851. (11) Other instances. Iowa 233NW34.

921-79 Iowa 231NW489; 164La612, 114S354; 80Mont308, 260P1039; 222App Div651, 224NYS464; OhA 173NE16; Okl 293P214; 286Pa421, 133A554; 54SD291, 223NW193; TexCivA 288SW485; TexCivA 12SW(2d)247.

922-80 173Minn325, 217NW381.

922-87 MoA 296SW225.

922-88 MoA 31SW(2d)544.

923-94 MoA 296SW225; TexCivA 22SW(2d)343; 41Wyo286, 285P790. But see 88CalA716, 264P265.

923-96 [a] **Request to forbear need not be expressed** but may be inferred from surrounding circumstances. 41Wyo286, 285P790.

924-3 84 IndA280, 151NE105.

924-4 84 IndA280, 151NE105.

924-12 MoA 31SW(2d)544.

924-14 [a] **Provision of contract requiring director to pay stipend on default by corporation is binding.** 137Misc73, 241NYS474.

925-18 TexCivA 11SW(2d)808.

925-21 Sask [1929] 4DomLR220.

925-29 161La38, 108S117.

925-34 CalA 289P224; 206 Iowa90, 219NW44, 48 [citCJ]; 210Ky222, 275SW694; 161La38, 108S117; 169Minn199, 210NW880; 152Miss320, 120S188. But see 190NC397, 130SE40.

926-37 Can [1928] 3DomLR557.

926-40 169Minn199, 210NW880.

927-48 174Minn525, 219NW921; 141Miss30, 105S848; 143Miss895, 108S720; MoA 30SW(2d)1087; SD 229NW293; 153Va514, 150SE244. But see [1926]Can SC 551, [1926] 4DomLR141.

927-52 [a] (1) TexCivA 295SW274. (4) Fact that guarantor as president of corporation waived time of delivery does not carry with it waiver of the condition as to his individual responsibility as guarantor. 8PaDist&Co 45.

927-54 89 IndA337, 163NE538; 52ND568, 204NW188, 195 [citCJ]. [b] (1) TexCivA 295SW274; 21SaskL86, [1926] 4DomLR93, [1926] 2WestWkly800.

927-55 286Pa421, 133A554. But see 82CalA240, 255P254.

927-56 [b] **Failure to rescind for fraud within reasonable time** does not preclude assertion of fraud as defense. 206 Iowa90, 219NW44.

927-56½-New. One is not estopped to set up that he is only accommodation guarantor of plaintiff. SD 233NW285.

928-68½-New. Liability under continuing guaranty is terminated by proper notice by guarantors. 51SD270, 213NW505.

928-68½-New. Conduct of parties may show an abandonment of guaranty. 126Or309, 269P865.

928-70 134Misc321, 235NYS228; 21OhA385, 153NE162.

929-74 173Ark52, 291SW984; Mass 166NE719; 134Misc321, 235NYS228.

929-83 134Misc321, 235NYS228; 284Pa500, 131A381, 42ALR922. [a] 284Pa500, 131A381, 42ALR922. [c] But see 168La139, 121S602. [d] **Though guaranty provides for written revocation,** death of guarantor and notice terminates contract which is divisible and severable. 284Pa500, 131A381, 42ALR922.

929-85 284Pa500, 131A381, 42ALR922. [a] **Fact that consideration passed after notice of death** does not relieve guarantor's estate from liability for sums which became actually due on contract in force at time of death. 284Pa500, 131A381, 42ALR922.

929-86 See also 168La139, 121S602. [a] 284Pa500, 131A381, 42ALR922.

929-88½-New. **Where the contract of guaranty is entire and indivisible,** responsibility for advances made after death of guarantor continues until completion of all acts contemplated. 284Pa500, 131A381, 42ALR922.

930–94 134Misc321, 235NYS228.
930–97 284Pa500, 131A381, 42ALR922.
930–98 134Misc321, 235NYS228; 284Pa 500, 131A381, 42ALR922.
930–99 284Pa500, 131A381, 42ALR922. [a] **Notice to agent** of guaranty is sufficient. 284Pa500, 131A381, 42ALR922. [b] **Constructive notice.**–284Pa500, 131A 381, 42ALR922.
930–2 CalA 284P482; 253 IllA51; 251 IllA177 (construed as favorable to creditor as other written contracts); Iowa 232NW79; 150Miss738, 117S124, 126 [citCJ]; MoA 26SW(2d)1018; 136Misc 253, 242NYS682; TexCivA 289SW199, 201 [quotCJ]; TexCivA 23SW(2d)494.
931–3 173Ark52, 291SW934, 985 [cit CJ]; 94CalA473, 271P353; 205 Iowa 1233, 219NW266; 233Mich640, 207NW 814; 83NH516, 144A786; 248NY28, 161 NE319; 25 OhA360, 157NE908; 116 Or 217, 240P895, 896 [citCJ]; 116 Or250, 241P58 [citCJ]; 51SD374, 213NW943, 945 [quotCJ]; Tex 289SW199, 201 [quot CJ]; TexCivA 293SW613, 619 [citCJ]; TexCivA 295SW274; 66Utah154, 239P 949; 155Wash182, 283P695.
932–4 201 Iowa48, 206NW258; 258 Mass35, 154NE523; Tex 289SW199, 201 [quotCJ]; TexCivA 295SW274. [a] 25 OhA360, 157NE908.
932–5 201 Iowa48, 206NW258; 167 Minn40, 209NW533; Tex 289SW199, 201 [quotCJ]; 155Wash182, 283P695.
932–6 253 IllA51; 25 OhA360, 157NE 908.
932–7 258Mass35, 154NE523.
932–9 75Mont167, 242P956; 136Misc 253, 242NYS682; 136Misc253, 242NYS 682. [a] (2) Promisor held guarantor under special clause rather than surety under clause binding him generally as surety. 75Mont167, 242P956.
933–10½–New. that contract has prospective operation only; 114Nebr600, 209NW254.
933–11 MoA 17SW(2d)670.
933–11½–New. A contract guaranteeing payment of part and future indebtedness may be enforced as to payment of future indebtedness, although the clause as to past indebtedness has been altered so as to be unenforceable. 135 Wash488, 238P13.
933–11½–New. And a pertinent statute will be read into agreement, parties being presumed to have acted with reference thereto. TexCivA 293SW613.
933–11¼–New. Contract is construed independently of contract of principal debtor. MoA 278SW803.
933–11⅓–New. Statements of creditor's agent as to meaning of contract made before execution cannot defeat plain undertaking of contract. 37F(2d)648.
933–13 201 Iowa48, 206NW258, 259 [cit CJ]; 205 Iowa1233, 219NW266; TexCivA 289SW199, 201 [quotCJ].
933–14½–New. **Severable guaranties** are held created by instrument. TexCivA 4SW(2d)232.
933–15 21F(2d)56, 62 [citCJ]; 168Minn 50, 209NW533; Mo 282SW414; 136Misc 253, 242NYS682.
933–16 150Miss738, 117S124; 155Wash 182, 283P695.
933–17 286Pa421, 133A554.
933–18 155Wash182, 283P695.
933–19 243Mich362, 220NW704; 168 Minn308, 210NW84; 173Minn75, 216NW 545; 131Misc697, 227NYS292. See also 171Minn53, 213NW375, 376 [citCJ].
933–20½–New. But where the contract of guaranty was not made at time of original contract and did not arise out of same transaction, the stipulations in the latter cannot be read into the contract of guaranty unless set forth or identified by reference. 171Minn53, 213 NW375.
934–23 215Ala198, 110S277, 278 [cit CJ]; 201 Iowa48, 206NW258, 259 [cit CJ]; Okl 293P214; 43 OklACR127 [reh pending].
934–25 266Mass566, 165NE679; 25 OhA 360, 157NE908.
934–26 25 OhA360, 157NE908; 255 IllA 333; 33PortoRico 509; TexCivA 289SW 199; TexCivA 23SW(2d)494.
934–27 114Nebr600, 209NW254; 116 Or 217, 240P895.
935–31 116 Or217, 240P895, 896 [cit CJ]; 116 Or250, 241P58 [citCJ].
935–33 21F(2d)56, 62 [citCJ]; 215 Ala133, 110S299; CalA 284P482; 255 IllA333; Iowa 232NW79; Mass 166NE 719; MoA 256SW158; 218MoA645, 266 SW496; MoA 299SW1113, 1115 [cit Cyc]; MoA 13SW(2d)1092; MoA 31SW (2d)544; 134Misc321, 235NYS228; 229 AppDiv544, 242NYS111; 136Misc253, 242NYS682; 138Misc378, 245NYS629; 138Misc352, 245NYS699; 25 OhA360, 157NE908; 116 Or217, 240P895, 896 [citCJ]; 116 Or250, 241P58 [citCJ]; 118 Or373, 244P84, 87 [citCJ], 45ALR 1382; TexCivA 289SW199; TexCivA 293SW183; TexCivA 295SW274; Tex CivA 4SW(2d)232; TexCivA 29SW(2d) 513; 145Wash525, 261P93; 155Wash 182, 283P695.
936–34 25 OhA360, 157NE908.
936–35 255 IllA333; TexCivA 295SW 274.
936–37 118 Or373, 244P84, 45ALR 1382.
936–38 118 Or373, 244P84, 45ALR 1382.
936–40 120Kan504, 243P1042, 1044 [citCJ]; 176Minn234, 223NW98(2dcase); 83NH516, 144A786; 118 Or373, 244P 84, 87 [citCJ], 45ALR1382. But see 148Va651, 139SE325. [c] (1) 118 Or 373, 244P84, 45ALR1382.
937–41 120Kan504, 243P1042, 1044 [citCJ]; 143Miss895, 108S720.
937–42 120Kan504, 243P1042, 1044 [citCJ].
937–49 [b] **Place payable.**–215Ala538, 112S105.
937–51 202 Iowa1263, 211NW864.
937–53 [a] (2) Where contract of guaranty for future indebtedness was sent to Minnesota and there accepted, it was held it took effect as whole and was governed by laws of that state. 214 Ala507, 108S244.
938–57 [a] **Defendants not parties to contract of guaranty** covering notes sued on are not liable as guarantors. 170 La477, 128S282. [b] **Guaranty of payment to named bank "its successor, successors, or assign."**–TexCivA 23SW(2d) 494.
938–61½–New. Persons signing a contract as guarantors are bound by its provisions, although not named in the body of the contract. 134Misc321, 235 NYS228.
938–63 45Philippine107; 143SC156, 141SE267.
938–64 174Minn525, 219NW921; SD 227NW193.
938–65 205 Iowa1233, 219NW266.
939–70½–New. An instrument guaranteeing the payment of a corporation's indebtedness to a bank signed by the stockholders puts a common burden equally upon all of the guarantors. 238 Mich20, 213NW73.
940–83 172Minn508, 215NW855, 856 [citCJ]. [a] (3) Letter by president of corporation to attorney guaranteeing payment for services, past and future, to be rendered to the corporation by him and another attorney separately retained can be availed of by latter. 100WVa 350, 130SE472.
940–85 IndA 168NE44.
942–14 193NC524, 137SE593.
942–18 MoA 25SW(2d)512.
943–35 174Minn484, 219NW766; 221 MoA495, 281SW968, 972 [citCJ]; 53SD 335, 220NW865.
945–51 But see Mo 282SW414.
945–58 193Wis56, 213NW661.
946–66 38F(2d)452; 88CalA111, 263P 260; Del 151A831 (governed by rules of ordinary contract); 164La612, 114S 354; 266Mass39, 165NE7; 116 Or217, 240P895; 116 Or250, 241P58; 296Pa16, 145A584; TexCivA 16SW(2d)980; 155 Wash36, 283P476. See also 243Mich362, 220NW704. [d] **Trustee.**–132SC410, 129 SE629. [e] **General guaranty** of all contracts made by principal during its term covers changes made in such contracts. 6F(2d)990. [f] **Particular guaranties construed.**–160La963, 107S 711. [g] **Absolute guaranty** is where full sum is guaranteed. 216Ala69, 112 S426.
947–70 128Kan737, 280P753; 155Wash 182, 283P695. [a] (2) Other instances. 136Misc253, 242NYS682.
947–71 Iowa 232NW79.
947–73 [a] **Guaranty of fulfillment of vendor's obligation.**–40Wyo 226, 278P76.
947–73½–New. An agreement by guarantors to apportion among themselves their common liability to the guaranty in no way affects their common liability, to the guaranty. 238Mich20, 213NW73.
947–74 [a] **Guaranty of payment of dividends** binds guarantor to pay if corporation fails to do so although corporation's guaranty in certificate only makes dividends cumulative. Wash 286 P48.
947–82 174Minn484, 219NW766. [e] **Rule of strictissimi juris is inapplicable** to guaranty of corporation's debts to bank by stockholders and directors of corporation. TexCivA 23SW(2d)494.
948–83 337 Ill 173, 169NE1; 199Wis 440, 223NW559.
948–85 205 Iowa748, 218NW280; 196 NC103, 144SE545(1stcase).
948–91 167Minn369, 209NW33; 174 Minn383, 219NW454.
949–93 174Minn484, 219NW766; 50SD 219, 208NW824 (guaranty of accounts "now owing" does not cover subsequent indebtedness).
949–95 205 Iowa567, 218NW286. [a] (2) Bank's officers under agreement to pay all existing liability of bank are held liable on uncollectable notes rediscounted to plaintiff upon which indorsement without recourse was permitted in consideration of guaranty. TexCivA 289SW199.
949–96 24F(2d)816.
949–96½–New. Liability of mortgagee as guarantor of mortgage note transferred to innocent purchaser does not cease because purchaser has sufficient security. 190NC512, 130SE323.
949–97 TexCivA 21SW(2d)104; 148Va 651, 139SE325. [l] **Note payable to indorsee.**–47RI 237, 132A609. [m] **Guaranty of notes within fixed period** includes demand notes of which guarantor knew whether demand was made within period or not. 12PortoRicoFed 298.
949–99 25F(2d)576; 84Colo 207, 269P 9; 250 IllA258; Iowa 232NW79; 45 Philippine107; TexCivA 293SW183; TexCivA 293SW613. [c] **Writing purporting to renew oral guarantee of payment of drafts** does not support action on theory that defendant guaranteed payment of gasoline for which drafts were drawn. 215AppDiv385, 213NYS 630 (where no reference to gasoline is made).
950–2 [a] **Agreement to guarantee notes** included note transferred "without recourse." TexCivA 293SW613.
950–6½–New. Where a guaranty is to pay notes of a named concern, the legal status of the concern is immaterial. 170 Ark555, 280SW659.
950–8 115Nebr770, 215NW102.
950–10 174Minn383, 219NW454.
950–12 Ill 172NE7 (guarantors regarded as original promisors); Ill 172NE7; 202 Iowa117, 209NW297; 205 Iowa567, 218NW286; 233Ky457, 26SW(2d)15; 13LaA156, 127S433; NJ 151A86(1st case); 51SD270, 213NW505; TexCivA 288SW1100; TexCivA 300SW129; Tex CivA 21SW(2d)104; 37Wyo 130, 259P 804. [b] (10) Guaranty by payee of note of collection and payment, with consent to extension of time thereof or of renewals and waiver of demand and protest, is absolute. 203 Iowa382, 212 NW730.
951–13 199Wis350, 226NW313, 315 [cit CJ].
951–15 321 Ill 612, 152NE539, 47ALR 891; 199Wis350, 226NW313.
951–17 145Wash523, 260P1073, 1074 [citCJ].
951–25 45 Ida753, 265P664; 10LaA 298, 121S359; 25 OhA415, 158NE554; 145Wash525, 261P93. [a] (8) Under contract establishing importing agency in Ecuador, and providing that agent could not submit order without their guaranty, it was held that guaranty applied only to orders submitted by agents and not to those obtained by principal directly. 213AppDiv629, 210 NYS705. (9) If guarantor is not to become liable unless goods delivered in specified time, he is relieved from liability if not delivered within such time. 8PaDist&Co 45. (10) "Shortage" in bond means balance due after allowance

of credits for remittances to consignor. 176Ark958, 4SW(2d)923. (11) Other instances. 251Mich16, 231NW49; 40 Wyo488, 278P565. (12) Guaranty of payment of indebtedness incurred for materials to be delivered to particular job. 227AppDiv285, 237NYS583. (13) Contract whereby consignor retained title to all goods not sold, reserving right to reclaim unsold goods, held contract of agency, not contract of sale within guaranty. 155Wash182, 283P695. [b] (2) Letter saying "Therewith assume liability of said credit until further notice" is guaranty of both existing and future credits. 126Misc606, 214NYS381.

952-28 Mich 233NW320. [a] (4) Under contract of exclusive agency with guarantee clause, it was held that agent was not liable on guarantee for contracts not solicited by agent. 213App Div629, 210NYS705.

952-32½-New. Guaranty of payment of amount due does not include damages for breach of contract. 23 OhA399, 155 NE409.

952-33 173Minn462, 217NW369.

952-34 241Mich573, 217NW776.

953-45 But see 99Fla650, 126S913; 33 PortoRico 509.

954-52 251NY146, 167NE201.

954-58 30F(2d)790.

954-59 [b] **One guaranteeing payment of installments** of mortgage is liable for amount of deficiency judgment on foreclosure. 230AppDiv195, 243NYS406.

955-74 [b] **Provision for termination of guaranty** held condition subsequent rather than condition precedent. 229 AppDiv453, 242NYS366.

955-81 72CalA550, 237P808 (lessee assigning lease with consent of lessor and guaranteeing payment of rent and performance of other obligations by assignee assumes obligations of surety or guarantor); 254Mass331, 150NE177; 138Misc378, 245NYS629; 34 OhA397, 171NE117.

956-82 NJSup 143A719(1stcase); 197 Wis476, 222NW812.

956-87 250NY147, 164NE887; 223App Div454, 228NYS493.

957-94 196NC103, 144SE545(1stcase).

957-99½-New. Guaranty of debts of partnership extends to debts of corporation subsequently formed under same name with addition of "Inc" where guarantor participated in change without notifying creditor. 136Misc596, 240NYS367.

957-99¾-New. In such case guarantor is estopped to deny liability. 136Misc 596, 240NYS367.

957-5 [b] **Contract of guaranty takes effect** of day of delivery and acceptance, as facts warrant. 214Ala507, 108S244.

957-6 21F(2d)56; 227Ky594, 13SW (2d)759; 266Mass566, 165NE679; Mass 166NE719; 149Miss483, 115S773; 120 Oh13, 165NE353.

957-8 21 OhA385, 153NE162.

958-9½-New. Continuing a guaranty, guaranteeing payment of an indebtedness due and to become due to a bank by a partnership, does not obligate the guarantor to satisfy an indebtedness to be incurred and become owing to the bank by another later created partnership composed of a different membership, although the later created partnership succeeds to the ownership of the business and continues it under the same partnership name. 149Wash 118, 270P291.

958-11 163La933, 113S152; 51SD270, 213NW505. But see 101Vt220, 143A 288.

958-12½-New. Guarantors are liable under continuing guaranty until notice of termination is given. 51SD270, 213 NW505.

958-17 168La139, 121S602. [c] (3) Guaranty after seller's injury held to guarantee only sale referred to and not future sales. RI 137A145.

958-19 101CalA67, 281P400.

959-20 94CalA473, 271P353.

959-21 101CalA67, 281P400; 150Miss 322, 116S435.

959-22 150Miss322, 116S435.

959-24 94CalA473, 271P353; 101CalA 67, 281P400; 168Minn50, 209NW533.

960-26 163La933, 113S152.

960-27 51SD270, 213NW505; Mich 233NW320.

960-28 180Minn27, 230NW121.

960-29 94CalA473, 271P353; 101CalA 67, 281P400; 255 IllA333; 163La933, 113S152; 241Mich23, 216NW370; 173 Minn255, 217NW133, 134 [quotCJ]; 83 NH516, 144A786; NJSup 147A433.

961-31 37GaA728, 141SE916.

961-32 58ND345, 226NW523 (payment of note at maturity or any time thereafter or any renewal of same).

961-33 168Minn50, 209NW533. [a] (3) Other instances. Ill 172NE7.

962-35 241Mich23, 216NW370, 371 [quotCJ]; TexCivA 293SW613, 617 [citCJ].

962-36½-New. A bond executed by a bank and its sureties to secure a depositor from loss by reason of money deposited from time to time is a continuing guaranty. 241Mich23, 216NW 370.

962-52 130 Okl 231, 266P770; 143Va 855, 129SE675, 677 [citCJ].

963-56 104Conn404, 133A214; 143Va 855, 129SE675, 677 [citCJ] (in case of continuing guaranty, guarantor entitled to reasonable notice of principal's default unless waived).

963-57 131 Okl 295, 269P265; 51SD 270, 213NW505, 507 [citCJ].

963-61 25 OhA360, 157NE908; 145 Wash525, 261P93, 95 [quotCJ]. [d] **Guaranty of payment of all money deposited in bank** covers both individual and guardianship accounts of depositor. 176Minn234, 223NW98(2dcase).

963-63 25 OhA360, 157NE908; 145 Wash525, 261P93, 95 [quotCJ].

963-64 145Wash525, 261P93, 95 [quot CJ].

964-65 145Wash525, 261P93, 95 [quot CJ].

964-66 145Wash525, 261P93, 95 [quot CJ].

964-67 145Wash525, 261P93, 95 [quot CJ].

964-69 170Minn230, 212NW196; 131 Okl 295, 269P265, 268 [quotCyc].

964-71 155Miss266, 124S329; NJSup 147A627; 25 OhA360, 157NE908.

966-81 145Wash525, 261P93. [b] (4) Guarantor of payment of note in stated amount is not liable for interest. 13 LaA156, 127S433.

966-82 [b] **In Mississippi.**-155Miss 266, 124S329.

967-93 [b] **Guarantor bound by excessive rate agreed to by debtor and creditor.**-Man [1930] 1DomLR590.

967-96 13LaA156, 127S433; 134 Okl 111, 272P443.

967-1 74CalA68, 239P341.

967-3½-New. One guaranteeing performance of a contract covering the sale of a motor truck is liable for attorney's fees incurred by a pledgee of the seller in enforcing performance. 100CalA403, 280P218.

967-6 255 IllA479.

968-10 117 Oh290, 158NE543, 60ALR 199. See also 28 OhA309, 162NE701.

968-12 199Wis440, 223NW559.

968-14 See also 215Ala528, 112S102.

969-21 337 Ill 173, 169NE1.

970-25 104Conn404, 133A214, 215 [quotCJ]; 163La933, 113S152.

971-33 202Cal 565, 261P1015; 321 Ill 612, 152NE539, 47ALR891; 205 Iowa 567, 218NW286, 287 [quotCJ]; 116 Or 217, 240P895, 896 [citCJ]; 116 Or250, 241P58 [citCJ]; 145Wash523, 260P 1073, 1074 [citCJ].

972-44 213Ala631, 105S886 [citCJ]; 170Ark555, 280SW659; 37GaA554, 140 SE913; 321 Ill 612, 152NE539, 47ALR 891; 116 Or217, 240P895; 116 Or250, 241P58; TexCivA 290SW920, 923, 924 [citCJ]; 143Va855, 129SE675, 677 [cit CJ].

972-46 213Ala631, 105S886 [citCJ]; 44 Ida510, 258P527 [citCJ]; 337 Ill 173, 169NE1; 205 Iowa567, 218NW286, 287 [quotCJ]; LaA 129S168; 176Minn529, 224NW149; 126Misc606, 214NYS381; 91PaSuper413; TexCivA 290SW920, 923, 924 [citCJ]; TexCivA 300SW129; 142 Va738, 128SE61; 143Va855, 129SE675, 677 [citCJ]; 199Wis329, 226NW381.

973-48 5PaDist&Co 163.

973-49 132 Okl 40, 269P295.

973-50 205 Iowa567, 218NW286; 246 Mich365, 224NW332; NJ 151A86(1st case).

973-51 5PaDist&Co 163.

974-61 See also 179Ark409, 16SW(2d) 569(2dcase). [a] **In Arkansas.**-179Ark 409, 16SW(2d)569(2dcase).

974-62 126Misc606, 214NYS381 (no need to exhaust remedies against debtor).

977-97 104Conn404, 133A214. [c] **Proof of claim against insolvent debtor in bankruptcy court** is not necessary to fix liability of guarantor. 104Conn404, 133A214.

977-98 150Wash1, 272P29.

979-13 46 Ida355, 267P611, 617 [cit CJ]; TexCivA 290SW920, 923, 924 [cit CJ].

979-14 11LaA457, 123S493.

979-16 Del 151A831.

980-25 44 Ida510, 258P527; TexCivA 290SW920, 923 [quotCyc].

981-28 TexCivA 290SW920.

981-30 TexCivA 290SW920, 923 [quot Cyc].

981-31 TexCivA 290SW920, 923 [quot Cyc].

981-34 31F(2d)727; 40Wyo 226, 276P 452.

981-36 DelSuper 151A831.

982-43 Fla 130S760; 144SC64, 142SE 34; TexCivA 290SW920, 923, 924 [cit CJ]; TexCivA 300SW129.

982-44 MoA 278SW803.

983-45 Del 151A831; TexCivA 290SW 920; 142Va738, 128SE61.

983-49 43 OklACR291.

983-54 125 Or261, 266P624. [b] **Bank guaranteeing forged indorsement** of payee of draft cannot complain of failure to give notice promptly on discovery of forgery. 143Miss454, 109S274.

984-59 203 Iowa382, 212NW730; Tex CivA 290SW920.

984-61 227Ky594, 13SW(2d)759.

987-88 170Ark555, 280SW659.

989-6 45 Ida753, 265P664.

989-7 [a] (1) MoA 25SW(2d)512.

989-9 Ida 286P610.

989-15 203 Iowa382, 212NW730; Tex CivA 290SW920.

990-17 215Ala133, 110S299.

990-27 252NY230, 169NE287; 192Wis 141, 212NW278.

992-41 253 IllA51.

992-45 100CalA403, 280P218.

992-48½-New. A seller under a conditional sale contract assigning the contract with a guaranty of payment by the buyer is not released from liability on the guaranty by retaking the property on his own behalf. 142Wash31, 252P 539.

992-48¾-New. One who stands in the relation of a guarantor upon an obligation which is required by statute to stand as security until certain claims are paid is not released by a subsequent transaction between the principal debtor and the creditor which does not result in the release of the debtor or the payment of the claim. 54ND49, 208NW 949.

992-52 173Minn75, 216NW545.

992-53 [b] **Acceptance of subsequent guaranty** discharges former guaranty, though latter called for termination by written notice to make no more advances. 137Wash190, 242P13.

993-57 [b] **After breach of guaranty contract** by guarantor's refusal to pay for goods, shipper did not waive rights under guaranty by stopping shipment in transitu. 173Ark52, 291SW984. [c] **Shipper held not to waive rights** under guaranty by allowing shipment stopped in transitu to proceed after assurance of payment. 173Ark52, 291SW984.

993-58 120Kan504, 243P1042. [a] (2) Acceptance of new guaranty held to discharge liability under old. 137 Wash190, 242P13.

993-59 33Ariz56, 262P1, 2 [citCJ]; 136Misc376, 240NYS30.

993-64½-New. or where a finance trust employs a collection agency to collect accounts assigned by a customer, a contract requiring the customer to pay charges incurred by the trust. Mass 166 NE719.

993-65½-New. Absolute guaranty of payment of debts to be incurred by prin-

cipal for merchandise does not obligate guarantee to require principal to sell only for cash. 213Ala631, 104S886.

993–65½–New. Conversion of a national bank into a state bank does not operate to discharge liability of the guarantor of funds deposited in so far as fixed at the time of conversion. 193NC524, 137SE593.

993–65¼–New. Failure to advance all of a consideration at the time the contract was executed will not release the guarantor. 177Minn592, 226NW203(2d case).

993–66 But see TexCivA 270SW1109.

994–67 See also Man [1930] 1DomLR 590. [b] **Bankruptcy of corporation** does not release guarantors of its corporate mortgage bonds. 132 Okl 40, 269 P295.

994–71 TexCivA 23SW(2d)494 (sale of corporation's assets to another corporation).

994–73 241Mich23, 216NW370. [b] **Sale of interest of one partner to wife of another** does not release sureties on bond guaranteeing deposits in bank conducted by partnership where sale is void because of law prohibiting partnership between husband and wife. 241Mich23, 216NW370.

994–75 46 Ida355, 267P611.

994–81 254Mass331, 150NE177; Mass 166NE719; 173Minn75, 216NW545; Mo A 256SW158; 118 Or373, 244P84, 87 [citCJ], 45ALR1382; SD 226NW725 (4thcase) (guarantors held not released under facts); TexCivA 15SW(2d)100; TexCivA 29SW(2d)513. [c] (3) Increase not discharging guarantor. Tex CivA 29SW(2d)513. [d] **Obligation not changed** by agreement fixing amount due between principal and guarantee. Mass 171NE454.

995–82 118 Or373, 244P84, 45ALR1382.

995–85 218MoA645, 266SW496.

996–92 173Minn75, 216NW545.

996–93 TexCivA 293SW183.

996–1 254Mass331, 150NE177.

996–2 But see 200Wis412, 228NW515, 67ALR875.

996–9 241Mich23, 216NW370, 371 [quot CJ]; 50Philippine991. See also 118 Or 373, 244P84, 45ALR1382.

997–13 34F(2d)401.

997–16 138Misc352, 245NYS699.

997–17 MoA 278SW803. [a] (7) **Oral** agreement of lessor and lessee held to be immaterial change in lease. 254Mass 331, 150NE177. [c] (5) Goods bought by plaintiffs, who became sole distributors thereof, are held within meaning of contract the "products" of plaintiff. 215Ala133. 110S299.

998–20 155SC152, 152SE179 (not affecting rights and liabilities of prior indorsers as guarantors).

998–21 16F(2d)578, 581 [citCJ]. [a] (3) Other instances. Iowa 232NW79. [b] **Changes not within contract.**–118 Or373, 244P84, 45ALR1382.

999–22 Iowa 232NW79.

999–29 MoA 25SW(2d)512 (alteration of terms when loan renewed); 251NY 146, 167NE201; 131Misc697, 227NYS 292. [a] (2) Erasure of corporation name from letter of guaranty to make it appear personal obligation of officers signing invalidates writing. 216AppDiv 92, 214NYS705. [b] (3) Lease from which name of one lessee was stricken, executed simultaneously with guaranty, is held not altered because such name was not stricken from guaranty. 131 Misc697, 227NYS292. [c] **Filling blank to show amount of debt guaranteed.**–235Mich640, 209NW830, 48ALR 737.

999–30 TexCivA 295SW274.

999–32 214Ky76, 282SW769.

999–33 See also 174Minn525, 219NW 921.

999–34½–New. At common law any alteration was deemed material and released guarantors. 235Mich640, 209NW 830, 48ALR737.

999–34¼–New. Such common-law rule has been relaxed to some extent. 235 Mich640, 209NW830, 48ALR737.

1000–36 13LaA156, 127S433; Mass 171 NE454; 168Minn50, 209NW533; 174 Minn383, 219NW454; 144Miss91, 109S 606; 52ND607, 204NW184; TexCivA 4SW(2d)232, 238 [citCJ]; TexCivA 10 SW(2d)196; 146Wash332, 262P981. See also 54SD291, 223NW193. But see 100CalA403, 280P218; NJSup 147A433.

1000–37½–New. or except so far as he may be indemnified by the principal, 52ND607, 204NW184. [a] **There is no indemnity** by reason of fact that guarantor owned majority of stock in bank which sold land to principal debtor and on which such debtor still owed purchase price, so as to render guarantor liable for building material purchased to construct buildings thereon. 52ND 607, 204NW184.

1000–41½–New. However, extension of time of setting of price under contract does not discharge guarantor of note. 25F(2d)576.

1000–41¼–New. At most, guarantor of note is limited to loss suffered by maker by such postponement. 25F(2d)576.

1001–49 255 IllA549; 52ND607, 204NW 184.

1001–50 168Minn50, 209NW533.

1001–52 168Minn50, 209NW533.

1001–54 But see 144Miss91, 109S606.

1001–57 52ND607, 204NW184 (extension exonerates guarantor except so far as he may be indemnified by principal).

1001–58 210NW599, 202 Iowa478, 59 ALR983.

1001–59 168Minn50, 209NW533.

1001–60 224Ky238, 5SW(2d)1070; 156 Md167, 143A708.

1002–62 202 Iowa478, 210NW599, 59 ALR983; 52ND607, 204NW184.

1002–63 202 Iowa478, 210NW599, 59 ALR983. [a] (1) 202 Iowa478, 210 NW599, 59ALR983. [b] (2) Where no consideration for extension moved to holder. 146Wash332, 262P981. [d] **Statute presuming that signer to instrument is party for value** is held not to apply to agreement for extension. 146 Wash332, 262P981.

1002–67 163La933, 113S152, 154 [quot CJ].

1003–68 6F(2d)990; 163La933, 113S 152, 154 [quotCJ]; 118 Or373, 244P84, 45ALR1382.

1003–71 163La933, 113S152, 154 [quot CJ].

1003–74 249 IllA562, 567 [citCJ].

1003–74½–New. But if note is taken for debt as suggested by guarantor, date of note fixes maturity of debt and extension beyond that time without guarantor's consent releases him. 52ND607, 204NW184.

1003–75 180Minn27, 230NW121.

1003–79 134 Okl 111, 272P443; 149 Wash118, 270P291. [a] (3) When suit is brought against guarantor, payment of principal debt or obligation to attorney for plaintiff is payment to plaintiff. 134 Okl 111, 272P443.

1003–81 NH 146A165. But see 229 AppDiv544, 242NYS111.

1004–82 101CalA67, 281P400.

1004–85 38Wyo 307, 267P77.

1004–93 Ill 172NE7; 13PaDist&Co 732.

1004–94 56ND142, 216NW340. See also MoA 25SW(2d)512.

1005–95½–New. Valuation placed on security by creditor at time of filing a claim against the estate of a bankrupt principal does not constitute payment to such extent, and guarantor remains liable for full amount of debt. Alta [1925] 3DomLR744.

1005–95¼–New. If a creditor accepts goods in full payment of a debt owing him by his debtor and executes a written release of the debt to the debtor, one who guarantees the payment of the debt is also released from his obligation as guarantor of the debt, 119 Oh75, 162NE274.

1005–95¼–New. As does a transfer of the debtor's assets to the creditor executing release of the debt, of which the guarantor has knowledge. 119 Oh 75, 162NE274.

1005–95¼–New. Purchaser at foreclosure sale is not successor or assign of mortgagor under guaranty releasing guarantor if specified amount of certificates were paid mortgagor or successors or assigns. 229AppDiv544, 242 NYS111.

1005–95¼–New. **Request for payment** made by the creditor to the debtor will not relieve the guarantor. 251 IllA177.

1005–2 102NJEq415, 141A81, 82 [cit CJ].

1005–3 TexCivA 4SW(2d)232, 238 [cit CJ]. See also Mich 233NW320.

1005–6 TexCommnA 18SW(2d)609. See also TexCivA 4SW(2d)232.

1005–9½–New. Dividends from the estate of a debtor to whom credit was extended beyond the amount guaranteed should be prorated on second and unsecured debts. 117 Oh290, 158NE543, 60ALR199.

1005–9¼–New. Guarantors of note for loan are entitled to have applied on note guaranteed only collateral pledged for loan. Ariz 288P7.

1006–11 284Pa500, 131A381, 384 [cit CJ]; TexCivA 29SW(2d)513 (payment discharging continuing guaranty).

1006–14 [b] **Payment of notes reducing amount of guaranty.**–Ill 172NE7.

1006–19 171Minn53, 213NW375.

1007–29 But see 13F(2d)40.

1007–30 [e] **Voluntary dismissal of suit** for goods secured and release of property acquired thereunder were not negligence in failing to mitigate damages so as to release guarantor. MoA 287SW871.

1008–40½–New. Nor where the guarantor did not know of the deposit of security and deposit was not to secure any indebtedness of debtor to guarantee. 66Utah154, 239P949.

1008–43 205 Iowa567, 218NW286, 287 [quotCJ].

1008–43½–New. A mortgage executed by the principal debtor after guaranty was given, although it was an inducement for giving the guaranty, cannot affect the rights of the guarantee. 11 LaA457, 123S493.

1008–45 143SC156, 141SE267 (release not "compounding of debt" within statute).

1009–49½–New. Guarantors are not discharged by notice of withdrawal of the coguarantor, not consented to by obligee. 50Philippine991.

1009–50 13F(2d)40; 95CalA647, 273P 122; MoA 25SW(2d)512.

1009–61 153Md638, 139A446, 447 [cit CJ].

1009–63 153Md638, 139A446. [b] **In absence of objection.**–124Me384, 130A 209.

1010–64 153Md638, 139A446.

1010–67½–New. Finance company advancing money to automobile dealer on purchaser's notes under dealer's guaranty may replevy and sell cars and look to dealer for deficiency. 251Mich16, 231 NW49.

1010–76 [b] **Separate actions may be brought** on guaranty running to one person for benefit of himself and third person. 100WVa350, 130SE472.

1011–77 229Ky510, 17SW(2d)448.

1011–88 NJ 151A86(1stcase) (suit on original obligation not condition precedent).

1012–91 153Md638, 139A446.

1012–97 SD 227NW193.

1012–99 153Md638, 139A446, 448 [cit CJ]; 117 Oh290, 158NE543, 60ALR199. [a] (2) 117Tex399, 5SW(2d)748; Tex CivA 288SW1100. (3) TexCivA 288SW 1100. (4) TexCivA 284SW298. (5) Principal obligor's comaker of note issued to creditor is held not a necessary party where he was insolvent and his residence unknown. TexCivA 284SW 298. (6) Note executed and delivered simultaneously with absolute guaranty is held merely incidental to cause of action on guaranty, though both instruments are necessary part of cause of action, permitting nonjoinder of maker in suit against guarantors. TexCivA 288SW1100.

1012–2 219Ala203, 121S733; 153Md638, 139A446, 448 [citCJ]; 75Mont167, 242 P956; 143Va855, 129SE675, 677 [cit CJ]. [a] 75Mont167, 242P956.

1012–3 173Minn57, 214NW778; MoA 281SW450; MoA 98W(2d)251; 141 Okl 282, 285P17; 141SC136, 139SE217; 143 Va855, 129SE675, 677 [citCJ]; Wis 231 NW641.

1013–8 199Wis350, 226NW313, 315 [cit CJ] (guaranty of collection).

1013–13½–New. A guaranty may be absolute in the nature of suretyship upon which action may be brought without first proceeding against the principal, or showing diligence to make collection from him. 213**Ala**631, 105**S**886.

1013–13¾–New. Guarantee of mortgage note may sue guarantor at any time after default without resorting to security and selling under mortgage. 190**NC** 512, 130**SE**323.

1013–13¼–New. However, statutes providing for action against principal as condition precedent are held not to apply to guarantors of rent. 220**MoA**657, 291**SW**515.

1013–13½–New. Tender of note and mortgage is not a condition precedent to an action on a guaranty of payment of a note secured by mortgage. 192**Wis** 141, 212**NW**278.

1013–13¾–New. Where a syndicate note was secured by pledge and guaranteed by syndicate members individually, payee may sue on guaranty without first exhausting security. 258**Mass**573, 155 **NE**606.

1013–13½–New. A purchaser suing the vendor's guarantors must offer restoration of the property obtained before recovering the purchase price paid. 40 **Wyo** 226, 276**P**452.

1013–13⅞–New. A purchaser need not tender the purchase price unpaid before suing the guarantors for the portion paid where he has been evicted under paramount title. 40**Wyo** 226, 276**P**452.

1013–13½–New. Bank receiving assets and assuming liabilities of another held not required to tender remaining assets before suit on guaranty of sufficiency of assets to pay liabilities. 253 **Ill**A51.

1013–13 1/10–New. Where a contract of members of a certain association guaranteed plaintiff certain revenue from plaintiff's building to remodel which, for their use, they subscribed certain sums, an order of the building committee required, under contract, to turn subscriptions over to the owner was not necessary before the guarantors' liability accrued. **SD** 227**NW**193.

1013–13 1/11–New. Finance corporation taking buyer's note with seller's guarantee of payment held not required to tender property of which he had taken possession before suing seller. **LaA** 129 **S**168.

1014–27 [a] (7) Default of principal obligor in performance of contract with guarantor is no defense where such contract formed no part of guaranty. **Tex CivA** 284**SW**298. (8) Fact that offer was posted on Sunday, guarantee not knowing or concurring therein, is no defense in action against guarantors. 214**Ala**507, 108**S**244. (9) Other instances. **LaA** 129**S**450; 251**Mich**16, 231**NW** 49. (10) Guarantor cannot defend on ground that corporation of which he was director was guilty of fraud on plaintiff. 251**Mich**630, 232**NW**360. (11) Corporate director cannot defend suit on guaranty on ground that paper was hypothecated by corporation in violation of trust agreement. 251**Mich**630, 232**NW**360. [c] **Matters constituting good defenses.**–144**SC**125, 142**SE**245.

1014–28 98**CalA**457, 277**P**185; 126**Misc** 213, 212**NYS**129; 220**MoA**657, 291**SW** 515. [b] **That principal obligation absolutely void** is available to guarantor sued alone, but if only voidable it is unavailing unless principal actually asserts the invalidity. 215**Ala**528, 112**S** 102. [c] **Guarantor cannot set up defense,** not available to principal. 220 **MoA**657, 291**SW**515.

1014–30 170**La**477, 128**S**282 (advances represented by notes sued on not made).

1014–33 127**Me**298. 143**A**54.

1014–34 99**CalA**566, 278**P**905.

1014–35½–New. The relationship of persons interested in an agency employed by a trust to collect accounts and noncompliance with state laws are immaterial as to the guarantor's liability. **Mass** 166**NE**719.

1014–37 **MoA** 30**SW(2d)**1087.

1014–38 220**MoA**657, 291**SW**515.

1014–42 **MoA** 281**SW**450; 220**MoA**657, 291**SW**515, 518 [citCJ]; 130**Misc**904, 225**NYS**731; 199**Wis**111, 225**NW**731.

[f] **Defenses amounting to counterclaim** are held not available to guarantor. 220 **MoA**657, 291**SW**515.

1015–54 23**F(2d)**107; 38**F(2d)**452 (guarantor held entitled to day in court touching alleged defaults).

1015–55 220**AppDiv**649, 222**NYS**442. But see 38**F(2d)**452.

1016–68½–New. Holder of note under absolute guaranty is not obliged to resort to security but right of action accrues on default of maker. **Ida** 286**P** 610 (need not pursue rights under conditional sales contract).

1016–70 See also 176**Minn**529, 224**NW** 149 (limitation in contract construed as not intended to establish limitation).

1016–79 [a] (2) Where guaranty of payment of stock dividends was to run for twenty years, failure of stockholder to exhaust remedy immediately on first default did not constitute laches. **Wash** 286**P**48. (4) Other instances. **LaA** 129**S**450. [b] **Where guaranty is to pay note** at maturity or any time thereafter, bank not estopped by laches. 163**La**933, 113**S**152. [c] **No laches where guarantor** might have protected himself from loss by paying note at maturity. 163**La**933, 113**S**152.

1016–82 [a] (3) Complaint alleging facts constituting performance by plaintiff's assignor is not rendered insufficient by surplus allegation that assignor fully performed. 136**Misc**747, 240**NYS** 451.

1017–83 [a] (1) 215**Ala**528, 112**S**102; 164**Ga**33, 137**SE**381; 160**La**963, 107**S** 711; 170**La**477, 128**S**282; 176**Minn**529, 224**NW**149; 91**PaSuper**413; 199**Wis**440, 223**NW**559; 40**Wyo** 226, 276**P**452. (2) 51**SD**270, 213**NW**505. [b] (2) 200**Wis** 379, 228**NW**488. (4) On guaranty of conditional sales contract assigned by defendant to plaintiff. 33**Ariz**56, 262**P**1.

1017–85 215**Ala**528, 112**S**102. [a] (4) Items of account need not be set out. 215**Ala**528, 112**S**102.

1017–87 51**SD**270, 213**NW**505.

1017–88 215**Ala**528, 112**S**102; 51**SD**270, 213**NW**505.

1018–89 229**AppDiv**453, 242**NYS**366.

1018–96 51**SD**270, 213**NW**505.

1018–4 51**SD**270, 213**NW**505.

1018–5 51**SD**270, 213**NW**505.

1019–9 215**Ala**528, 112**S**102.

1019–11 215**Ala**528, 112**S**102; 164**Ga** 33, 137**SE**381.

1019–12 215**Ala**528, 112**S**102.

1019–14 176**Minn**529, 224**NW**149 (general allegation held sufficient).

1019–17 116 **Or**217, 240**P**895. See also 199**Wis**440, 223**NW**559.

1020–22 **Del** 151**A**828; 91**PaSuper**413.

1020–23 **Okl** 293**P**214; 91**PaSuper**413.

1020–25 12**PaDist&Co** 469.

1021–38 215**Ala**528, 112**S**102; 82**CalA** 240, 255**P**254. [b] (4) To set up defense of fraud. 233**Ky**457, 26**SW(2d)** 15. [h] **Illegality.**–215**Ala**528, 112**S**102.

1021–39 215**Ala**528, 112**S**102.

1022–43 [a] (2) Plea alleging that guarantors were induced to sign guaranty by false representations that principals owed nothing has been held sufficient. 152**Miss**320, 120**S**188.

1022–45 170**La**477, 128**S**282.

1022–48 8**LaA**620.

1022–53 215**Ala**133, 110**S**299.

1022–62½–New. Defense based on a different agreement than that on which plaintiff sued is nothing more or less than a general denial. 31 **OhA**525, 166 **NE**698.

1022–65 40**Wyo** 226, 276**P**452.

1023–66 **LaA** 129**S**168; 229**AppDiv**453, 242**NYS**366.

1023–72 **TexCivA** 288**SW**1100.

1024–94 150**Wash**1, 272**P**29.

1025–96 40**Wyo** 226, 276**P**452.

1025–97 115 **Okl** 46, 241**P**770.

1025–98 115 **Okl** 46, 241**P**770.

1025–99 116 **Or**217, 240**P**895.

1025–4½–New. Where plaintiff in an action on a contract of guaranty alleged that the contract specified the amount of past-due indebtedness of the principal, payment of which was guaranteed, and the guarantor introduces evidence negativing such allegation and the prima facie case presented by the writing, the burden rests on plaintiff to go forward and establish his claim by a preponderance of evidence. 235**Mich**640, 209**NW**830, 48**ALR**737.

1025–5 337 **Ill** 173, 169**NE**1 (plaintiff's breach of agreement); 300**Pa**175, 150**A** 463; 36**Wyo** 132, 253**P**658. See also **TexCivA** 12**SW(2d)**1247. [a] (3) Burden of proving invalidity of contract performance of which was guaranteed, as affirmative defense, rests on guarantor. 117 **Okl** 235, 245**P**825.

1025–6 **IndA** 173**NE**237 (agreement to release principal and consideration therefor). [a] (1) 168**Minn**50, 209**NW** 533.

1025–7 217**Ala**297, 116**S**149.

1026–23 233**Ky**457, 26**SW(2d)**15; **OhA** 173**NE**16.

1026–25 [a] (2) Where note guaranteed was delivered three months after delivery of merchandise for which note was given. 216**AppDiv**92, 214**NYS**705.

1026–27 **Iowa** 230**NW**851; **TexCivA** 22 **SW(2d)**343 (statutory presumption overcome). [a] **Written contract** whereby bank officers guaranteed payment of doubtful note imports consideration. **Iowa** 230**NW**851. [b] **Notes as against maker and guarantors are presumed** issued for valid and valuable consideration. 170**La**477, 128**S**282.

1026–28 **MoA** 17**SW(2d)**670.

1027–38 **MoA** 256**SW**158; **MoA** 299**SW** 1113. 137**Wash**190, 242**P**13; 40**Wyo** 226, 276**P**452. [a] (1) 215**Ala**133, 110**S** 299; 178**Minn**296, 226**NW**938; **SD** 227 **NW**193. (6) In action for breach of contract of guaranty defended on ground of forgery making sole question whether defendant signed contract of guaranty, evidence of forgery of the other guarantor's name is properly excluded. 233 **Mich**566, 207**NW**813. (7) Other instances. **Mo** 282**SW**414. [f] **Illegality.**–215**Ala**528, 112**S**102. [g] **Written contract of guaranty** amply found to have been executed by defendant is admissible. **TexCivA** 283**SW**249.

1028–42 [b] **If corporation name appeared above individual guarantor's** evidence that letter of guarantee was written solely on behalf of corporation is admissible. 216**AppDiv**92, 214**NYS**705.

1028–43 52**ND**568, 204**NW**188. [a] (2) 52**ND**307, 202**NW**642 (parol evidence admissible for this purpose, though writing provides that guaranty shall be binding on every party signing it, whether it is signed by any other person or not). [b] (2) Evidence that signer was man of large financial responsibility is inadmissible on issue whether instrument was delivered on condition that another signer be procured. **Iowa** 230**NW**851.

1028–46 143**Miss**895, 108**S**720; 152**Miss** 320, 120**S**188. [a] 169**Minn**199, 210**NW** 880.

1029–52½–New. Evidence held admissible on issue whether sales by plaintiff to debtor were illegal. 215**Ala**133, 110 **S**299.

1029–53 51**SD**270, 213**NW**505.

1029–55 **Iowa** 230**NW**851.

1029–56 170**Minn**230, 212**NW**196; 176 **Minn**234, 223**NW**98(2dcase); 251**NY**146, 167**NE**201; 51**SD**270, 213**NW**505. [c] **Agreement to fill blanks.**–252 **Ill**A545.

1029–56½–New. Where a contract provides for payment of the amount due as shown by the books of the creditor, such books are admissible in evidence for such purpose. 145**Wash**525, 261**P** 93.

1030–72 253 **Ill**A51. [a] (1) 3**LaA**182; 169**Minn**199, 210**NW**880; **MoA** 299**SW** 1113; 115 **Okl** 46, 241**P**770. (10) Evidence that bills of lading were for goods actually shipped is evidence that they were issued by proper agent of carrier. 213**Ala**631, 105**S**886. (11) To show defendant did not intend to protect purchaser against payment of taxes. 162 **La**35, 110**S**79. (12) To justify finding that defendant knew, at time of signing guaranty, that purpose was to enable son to secure further credit. **TexCivA** 11 **SW(2d)**808. (13) To show agreement to fill in blanks so as to limit liability to certain amount not performed. 252 **Ill**A545. (14) To support finding that provision was inserted for guarantor's benefit. 37**F(2d)**648. [b] (1) 217**Ala**297, 116**S**149; **Ky** 258**W(2d)**44. (7) To sustain defense of failure of consideration

by reason of failure and refusal to sell any more merchandise to principal debtor on credit. 11LaA457, 123S493. (8) Other instances. 300Pa175, 150A463. [f] **Admissions by principal debtor.**–215 Ala528, 112S102.

1030–73 [a] 203 Iowa257, 212NW555; 171Minn216, 213NW902; 141 Okl 282, 285P47; 51SD374, 213NW913; 66Utah 154, 239P949; 40Wyo 226, 276P452; BC [1929] 3DomLR638. [c] (2) To present prima facie case that principal was insolvent, making attempt to collect debt against debtor unnecessary. 150Wash 1, 272P29.

1030–74 [a] (1) 251 IllA177; 100WVa 350, 130SE472; 192Wis141, 212NW278. (4) To show that defendant executed guaranty. TexCivA 283SW249. [b] 170 Ark984, 282SW371; 164La72, 113S771; 258Mass182, 154NE515, 178Minn103, 226NW192; TexCivA 308SW(2d)668.

1030–74½–New. , the delivery of the guaranty, Iowa 230NW851 (evidence held sufficient).

1031–75 [a] (1) 88CalA716, 264P265; 222AppDiv651, 221NYS164. (4) To establish consideration for guaranty of payment of part of note. 233Ky457, 26 SW(2d)1. [b] (1) 82CalA240, 255P254, 178Minn103, 226NW192, 191 [illegible] (3) Other evidence held insufficient. 93 CalA509, 269P749; MoA 296SW225. (4) To show request for forbearance as consideration. 41Wyo 286, 285P790. [c] **That one dollar recited as consideration had not been paid** does not establish want of consideration for bank officers' guaranty of note. Iowa 230NW851.

1031–76 [b] **Evidence held insufficient** to support terms claimed by plaintiff. TexCivA 295SW274. [c] **Evidence held sufficient** to support finding that guaranty of note was unconditional in consideration of assumption of liability on bank deposits. 34Ariz472, 272P652.

1031–77 [a] (1) 178Minn296, 226NW938; 115 Okl 46, 241P770. (3) To show plaintiff's acceptance of bank president's written guaranty of note. 37Wyo 130, 259P804. [d] **Evidence held insufficient** to show that guarantee refused to accept contract of guaranty. 11LaA457, 123S493.

1031–79 [a] (4) Finding that credit was not extended to general contractor, but to plumbing contractor, held against weight of evidence. 227AppDiv285, 237NYS583.

1031–80 [a] **Evidence held sufficient** in action against guarantor of note conditioned upon holder's exercise of "every reasonable effort" to collect from maker. 127Kan852, 275P145. [b] **Evidence held insufficient** to show failure to use best efforts in collection of paper. 337 Ill 173, 169NE61.

1031–82 [c] **Evidence held insufficient** to warrant finding that plaintiff had notice that defendant signed guaranty on condition that note be indorsed by cashier. 37Wyo 130, 259P804.

1031–84 173Minn75, 216NW545. [a] (3) To show orders for goods by principal, their delivery to him, and that balance claimed was still due thereon. 213 Ala631, 105SS886. (4) To show that three hundred dollars was reasonable limit of credit beyond which guaranty, unlimited as to amount, did not create liability. 170Minn230, 212NW196. (5) To show amount of liability on guaranty of note. Iowa 230NW851. [b] **Evidence held insufficient** to sustain finding that guaranty was not continuing. 101CalA 67, 281P400.

1031–86 [a] 165Minn146, 205NW948. [b] (1) Iowa 230NW851; 260Mass189, 156NE878. (2) To show guarantee's agent knew of principal's fraud in obtaining guarantor's signature. 111Miss 30, 105SS848.

1031–89 [a] (1) Ida 286P610; 11LaA 457, 123S493; 132 Okl 40, 269P295. (3) To show usury as defense. 256Mass367, 152NE635. [c] **Evidence of substitution** of new guaranty for old held to sustain verdict for defendants. 137Wash190, 242P13. [d] **Discharge for failure of condition precedent** may be set up by facts and circumstances. 36Wyo 132, 253P658. [e] **Evidence held insufficient to warrant finding of defendant's estoppel to deny liability.** 200Cal 284, 253P 137.

1031–90 IndA 173NE237.

1032–92 [a] 168Minn50, 209NW533. [c] **Indorsement of interest on note in advance** is not conclusive, but only prima facie, evidence or presumption of binding agreement for extension of time of payment. 202 Iowa478, 210NW599, 59ALR983.

1032–97 [a] (1) 157SC371, 154SE641. (2) Evidence insufficient to go to jury on question of fraud by guarantee. 143 Miss895, 108S720. (3) On question of discharge from guaranty. TexCommnA 188SW(2d)609.

1032–98 20AlaA579, 104S286; 143Miss 895, 108S720.

1032–99 233Mich640, 207NW814 (direction of verdict for defendant); 130 Okl 231, 266P770.

1032–1 36Wyo 132, 253P658.

1032–2 38F(2d)452; 252 IllA545; 57 NDS16, 224NW909; TexCivA 293SW 613. [a] (5) Whether name of maker of notes was signed to letter guaranteeing payment of notes when mailed, or was subsequently erased. 216AppDiv92, 214 NYS705. (6) As to condition precedent. 36Wyo 132, 253P658. (7) Payment by debtor. 215Ala133, 110S299. (8) Whether plaintiffs sold liquor to debtor under circumstances from which they might deduce intent to use for illegal purpose. 215Ala133, 110S299. (9) Balance due upon account. 38F(2d)452.

1032–4 45 Idn753, 265P664 (nonsuit); 32 OhA544, 168NE479.

1033–5 206 Iowa90, 219NW44.

1033–6 142Va738, 128SE261 (whether presumption of receipt of letter revoking guaranty properly mailed was rebutted).

1033–6½–New. whether guarantor withdrew from guaranty; 218MoA645, 266 SW496.

1033–7 174Minn484, 219NW766.

1033–8 [a] **Whether offer to guarantee notes given for merchandise was accepted by seller.**–216AppDiv92, 214NYS 705.

1033–8½–New. , whether delivery of guaranty was conditional, Iowa 230NW 851.

1033–10½–New. In action on written guaranty nonsuit on ground of want of consideration is improper. CalA 285P 871 (dissense).

1033–13 11F(2d)929; TexCivA 128SW (2d)247; 41Wyo 286, 285P790 (request for forbearance claimed to be consideration for guaranty).

1033–13½–New. In an action on a guaranty contract, providing that "this is to be a continuing guaranty," to enforce obligations arising after expiration of the principal contract, evidence has been held sufficient to take to the jury the question whether the parties mutually intended to substitute a new guaranty contract for that sued on. 101Vt220, 143A288.

1033–14 174Minn484, 219NW766. [b] **Consent or ratification of acceptance** is for jury. 220Ala43, 124S86.

1033–19 241Mich573, 217NW776; 116 Or247, 240P895.

1033–20 176Ark958, 48SW(2d)923.

1033–21½–New. It has been held that whether a contract is one of guaranty or indemnity is a question of fact. Ont [1925] 3DomLR334.

1034–35 Iowa 232NW79; 318MoA645, 266SW496; MoA 13SW(2d)1092; 137 Wash190, 242P13.

1034–37 202 Iowa478, 210NW599, 59 ALR983.

1035–41 130 Okl 231, 266P770. [b] (1) 206 Iowa90, 219NW44.

1035–43 215Ala133, 110S299.

1035–46 21 OhA418, 152NE778.

1035–49 127Kan852, 275P145.

1036–54 174Minn383, 219NW154. [b] **Findings held to support conclusions of law and judgment.**–MoA 295SW806.

1036–56½–New. In an action on a guaranty of payment of a note, a judgment allowing recovery of the full face value of the note is not erroneous for failure to require assignment of the note and security to defendant. 192Wis141, 212 NW278.

1036–61½–New. Judgment against some, but not all, of guarantors held unwarranted under evidence where all denied execution. TexCivA 288SW 1100.

1036–67 115 Okl 46, 241P770.

1037–75 229AppDiv544, 242NYS111 (guarantor of mortgage indebtedness). 31F(2d)727.

1037–78½–New. A person guaranteeing payment of commercial paper to the extent of a named percentage of its face value becomes the owner of such paper to the extent that he subsequently discharges his guaranty. 201 Iowa353, 207 NW330.

1037–78¾–New. Guarantee could not prejudice rights and remedies of guarantors. 31F(2d)727.

1037–82 201Cal 715, 258P933; CalA 293P120; 118 Or373, 244P84, 45ALR 1382; TexCivA 285SW1115; TexCivA 293SW613. [f] **Guarantor of note paying judgment against him thereon** may acquire ownership of note and have confession of judgment against maker who was party to suit but not served. 255 IllA391.

1038–84 TexCivA 285SW1115.

1039–98 [b] (3) Maker of notes cannot set off amount on deposit in insolvent bank against bona fide guarantors without notice. 86Colo 429, 282P876.

1039–11½–New. Evidence held to show that notes given bank were purchased by another bank in good faith. 86Colo 429, 282P876.

1039–13 85CalA26, 258P700.

1039–19 82CalA174, 255P222; 120Kan 504, 243P1042; 246Mich365, 224NW 332; Alta [1926] 4DomLR951. [j] **Time of signing guaranty.**–195Wis304, 218NW590. [k] **That guarantor asked that others sign as guarantors** does not deprive him of right to contribution where they did not know that he made such request and he received no part of money secured and did not agree to indemnify coguarantors. 195Wis304, 218 NW590. [l] **Order of signatures.**–195 Wis304, 218NW590. [m] **As affected by false representations.**–195Wis304, 218 NW590.

1040–20 120Kan504, 243P1042 (accounting may be had on one making payment).

1040–22 120Kan504, 243P1042.

1040–25 See also 81Mont222, 262P1039.

1040–26 120Kan504, 243P1042.

1040–30 [a] **Particular agreements construed.**–238Mich20, 213NW73.

1040–34 116Nebr170, 216NW182.

GUARANTY INSURANCE

1041–1 220Ala6, 123S271.

1041–6 [d] (1) 202 Iowa1002, 210NW 129. (2) 202 Iowa1002, 210NW129. [g] (1) 217AppDiv102, 216NYS169. [n] **Indemnity against loss by fraud.**–16 F(2d)36. [o] **Indemnity against riot and civil commotion.**–130Misc450, 224 NYS136.

1043–19 40F(2d)626. [a] **Forgery insurance.**–217AppDiv102, 216NYS169.

1043–19½–New. Definite recitals in an application for a bond purporting to express the precise intention of the parties thereto must control conditions given only in general terms. MoA 9 SW(2d)661.

1043–20 40F(2d)626; 23AlaA246, 123S 265; 322 Ill 169, 152NE479; 224App Div573, 231NYS554; 288Pa211, 135A 746; Tex 12SW(2d)611; TexCivA 14 SW(2d)88; Utah 290P937.

1043–22 See also 28F(2d)511; MoA 9 SW(2d)661; 244NY166, 155NE87.

1043–22½–New. Loss from failure of salesman to observe check certification is within policy insuring against negligence of employee. 245NY111, 156NE 632.

1043–22¾–New. In construing a bond issued by a paid surety, more weight should be given to the general purpose of the bond as indicated by all of its provisions, the interests of the parties, and the subject matter, than to the precise form of words used in a particular clause. 149Wash378, 271P69.

1043–22¼–New. The rules of a coal exchange are not by implication a part of the conditions of a bond guaranteeing credits to members. 28F(2d)511.

1044-43½-New. Insurer when he has guaranteed the honesty of a municipal employee is not discharged by the acts or omissions of the municipality not concluding to defalcation of employee. [1927] CanSC165, [1927] 1DomLR1129.

1044-43¾-New. A mere soliciting agent is without authority to waive a provision requiring insured to check monthly wholesale obligations. 25F(2d)22.

1044-44 16F(2d)36; 25F(2d)22; 30 F(2d)445; 40F(2d)626; 333 Ill 318, 164 NE661; 84 Ind659, 149NE105; 161La 303, 108S545; 243NY34, 152NE456; 150Wash502, 273P745. [a] (6) Surety company is not liable under bond on discounted notes of corporation not named in bond, in absence of application or notice. 262Mass198, 159NE729. (7) Conversion by mortgagor. Utah 290P937. [b] **Policy against forgery.**-222MoA393, 5SW(2d)669. [c] **Period during which risk continues** has been held to be one year and thereafter as long as leases should be reviewed, or till proof of lessee's discharge. MoA 9 SW(2d)661. [d] **Embezzlement held not within terms of policy.**-12LaA107, 124S 682. [e] **Recovery of judgment against city for damages** does not fix liability of contractor to city within policy indemnifying contractor. Md 149A855 (2dcase).

1045-45 245Mich418, 222NW699; 199 Wis19, 225NW189. See also 28F(2d) 511.

1045-47½-New. Indemnity bond covering loss of securities "in transit" through negligence of employees does not cover loss resulting from employee's delivery of securities to buyer on worthless check bearing unsigned certification. 217AppDiv63, 216NYS109.

1045-48 [a] (2) Under surety bond mortgagee is entitled to complete construction of house after default of mortgagor and surety's refusal to do so, and to charge liens and claims paid against bond. 149Wash378, 271P69. [d] **Insurance against conversion.**-Policy held to cover value of goods at time of conversion. 161La303, 108S545. [e] **Evidence held not to show** that value of security at time of conversion equaled amount of defaulted indebtedness, so as to render insurer liable for whole amount sued for. 161La303, 108S545. [f] **Effect of other insurance.**-205 Iowa 1085, 217NW268, 56ALR463. [g] **Policy covering forgery of signature of any indorser** does not include forgery of maker's signature. 37F(2d)479. [h] **Losses resulting from conduct of manager** are not recoverable on bond covering losses resulting to company where losses were those of customers. Ind 169NE524. [i] **Losses resulting to investment company** from payment of dividend while insolvent and loans to irresponsible persons are recoverable on bond given to protect company from loss. Ind 169NE524. [j] **Indemnity for payment on forged note** does not cover loan on forged note. 33 OhA396, 169 NE707.

1045-51½-New. Policy against losses due to "riot attending strike" is held to cover entry in rowdy fashion of five men into insured's plant, who poured acid on merchandise. 25F(2d)635.

1045-52 [a] **Coinsurer paying more than its proportionate amount of loss** has no right of contribution where policy contains pro rata clause and limitation of liability of insurer to proportionate amount of loss. 205 Iowa1085, 217NW 268, 56ALR463.

1045-55½-New. Surety when paying indemnity after default of the mortgagor, is entitled to require the mortgagee to execute and deliver an assignment of any interest or right of action, legal or equitable, the mortgagee might have against the principal debtor, assigned rights to be inferior to rights under the mortgage and the note it secured. 149Wash378, 271P69.

GUARD

1046-5½-New. The term guard is of general significance and its application is to be determined from the character of the machine and the nature of the peril to be avoided. 219MoA234, 271 SW1023.

1046-57½-New. Actions. In an action on a policy to indemnify finance corporations for losses in financing automobile dealers in the purchase and sale resulting from fraud, evidence of insured's actual knowledge of dealer's fraud in issuing worthless obligations on which insured made loans is sufficient to take the case to jury. 16 F(2d)36.

GUARDIAN AND WARD

1059-26 215AppDiv581, 214NYS615, 618 [quotCJ].

1059-27 215AppDiv581, 214NYS615, 618 [quotCJ]. [d] 215AppDiv581, 214 NYS615 (Domestic Rel. L. § 80).

1059-31 See also 215AppDiv581, 214 NYS615. [a] **In New York.**-215AppDiv 581, 214NYS615. (2) It still exists with all its incidents except as modified by statute. 215AppDiv581, 214NYS 615.

1059-32 215AppDiv581, 214NYS615, 618 [quotCJ].

1060-35 110Conn463, 148A379; 215 AppDiv581, 214NYS615; TexCommnA 285SW285.

1060-39 TexCommnA 285SW285. [d] (1) 215AppDiv581, 214NYS615. (6) Statute is not exclusive. 215AppDiv 581, 214NYS615. (7) In so far as provision does not conflict with common law, it is declaratory thereof. 215 AppDiv581, 214NYS615.

1060-40 11F(2d)929.

1061-46 215AppDiv581, 214NYS615, 618 [quotCJ] (it might reside in mother irrespective of illegitimacy of ward).

1061-47 215AppDiv581, 214NYS615, 618 [quotCJ].

1061-48 215AppDiv581, 214NYS615, 618 [quotCJ].

1061-58 Can [1930] 4DomLR1030 (1stcase).

1064-21 [a] **Determination of propriety of encroachment on corpus of minor's estate** is, in absence of special statute, within exclusive jurisdiction of court of chancery. 158Tenn383, 13SW(2d)800, 62ALR904.

1065-27½-New. In Texas the district court has the general control over guardians and minors. CommnA 285SW 285.

1065-29 [f] **Appointment only to secure rebate of taxes** from federal government. 101NJEq215, 137A154. [g] **Right of action for damages** constitutes estate authorizing chancery court to appoint guardian. 149Miss603, 115S721.

1065-37 TexCommnA 285SW285; Tex CivA 275SW683; 154Wash400, 282P 486.

1066-40 TexCommnA 285SW285. But see TexCivA 275SW683.

1066-43 220AppDiv126, 220NYS645.

1066-45½-New. Rights of parent as natural guardian of minor child are subordinate to powers of the district court over guardians and minors. Tex CommnA 285SW285.

1066-46 101NJEq215, 137A154.

1066-50½-New. A probate court is not bound to appoint a guardian upon the infant's application while the infant is a ward of the juvenile court. 100CalA 743, 281P74.

1066-51 See also 11PaDist&Co 607.

1066-53 101NJEq215, 137A154; Tex CommnA 285SW285. [e] **In Texas.**-CommnA 285SW285.

1067-55 169La870, 126S221 (second district court has been held court of competent jurisdiction); 27 OhNPNS 129; 111 Okl 242, 238P956; 113 Okl 265, 242P185. [b] (2) Power of surrogate is same as that which chancellor formerly had. 126Misc96, 213NYS419.

1067-58 111 Okl 242, 238P956.

1067-59½-New. The court has broad discretion in the appointment of a guardian. 95CalA641, 273P69.

1068-70 35GaA40, 132SE108; 101NJEq 215, 137A154; 113 Okl 265, 242P185.

1068-71 35GaA40, 132SE108 (jurisdiction of court of infant's domicile not divested by removal of infant to another state, after filing of application, and judgment rendered in foreign jurisdiction as to guardianship of the infant void).

1068-74 240NY444, 148NE630.

1068-75 Nebr 229NW885 (on death of divorced mother).

1068-75½-New. The surrogate of deceased father's domicile is without jurisdiction to appoint guardian of child domiciled in another county, 240NY 444, 148NE630.

1068-75¾-New. especially without citing mother, domiciled in another county in view of statute. 240NY444, 148 NE630.

1068-75¼-New. This notwithstanding divorce decree awarding custody of child to father because of mother's unfitness. 240NY444, 148NE630.

1068-77 CalA 290P517; 166Ga670, 144 SE206.

1069-78 See also 40 OklACR591, 594 [reh pending, and citCJ]. Contra 144 Wash565, 258P333, 335 [citCJ].

1069-82¼-New. In some jurisdictions the minor must be an inhabitant or resident of the county in order to give the county court jurisdiction. 118 Okl 178, 246P848.

1069-85½-New. The United States court for the southern district of Indian Territory had authority to appoint a guardian or curator of the estate of a minor located in such district, although the domicile of the minor was in another district. 113 Okl 265, 242P 185.

1069-86 101NJEq215, 137A154.

1070-88 NJ 148A882. [a] **Only special and not general guardian** may be appointed. 101NJEq215, 137A154.

1070-93 113 Okl 265, 242P185.

1070-94 255Mass236, 151NE109.

1070-6 252NY218, 169NE282.

1071-7½-New. If parent waives right to be appointed and nominates suitable person, it is the duty of court to appoint such person. 114 Okl 116, 243P 938.

1071-7¾-New. A will giving property to the son of testatrix, and appointing a third person guardian of the property bequeathed and devised to the son until he attains twenty-one years, gave the third person power in trust over the property belonging to the son during the son's minority. 133Misc90, 231NYS 198.

1071-14 133Misc90, 231NYS198.

1071-15 133Misc90, 231NYS198.

1071-18 133Misc90, 231NYS198.

1073-39 Can [1930] 4DomLR1030(1st case).

1074-50 114 Okl 116, 243P938.

1074-51 86 IndA257, 157NE56; 38 Okl ACR684.

1074-52 220Ala369, 125S333; 114Conn 243, 149A664; 86 IndA257, 157NE56; 114 Okl 116, 243P938; 38 OklACR684. [f] **In Oklahoma.**-38 OklACR684.

1074-54 10PaDist&Co 624.

1074-55 7PaDist&Co 11.

1074-57 111Conn243, 149A664; 38 Okl ACR684. [a] **Authority of court after disapproving infant's selection.**-On disapproval by court of person selected by minor over fourteen, court has no authority to appoint another as guardian without allowing minor ten days to make another nomination. 114 Okl 116, 243P938.

1074-58 111Conn243, 149A664.

1075-84 48 Ida803, 285P1021; 255Mass 236, 151NE109; 126Misc96, 213NYS419.

1076-86 53ND603, 207NW444.

1076-88 137Misc496, 244NYS614.

1076-92 235 IllA63; TexCivA 283SW 599. [k] (4) Grandmother's claim of war risk insurance of son sued for by son's children held to conflict with children's financial interests disqualifying grandfather from acting as their guardian. TexCivA 283SW599. [l] **Partner of executor of mother's will** held competent as guardian where infant was illegitimate child and not mentioned in mother's will. 255Mass236, 151NE109.

1077-97 But see 93CalA404, 269P689.

1078-20 93CalA404, 269P689; 101NJEq 350, 139A812; 114 Okl 116, 243P938; 101 NJEq215, 137A154; 99Vt453, 134A606. Can [1930] 4DomLR1011(1st case). [b]

(3) Mother may qualify as tutrix. 13 LaA97, 126S715.

1079-23 48Nev352, 232P776, 37ALR527 (parent's fitness at time of hearing is determining factor).

1079-25 164La223, 113S825. [g] **Divorced mother** is entitled to appointment as guardian in conjunction with coguardian after death of father who had custody of child under divorce decree. 126Misc96, 212NYS419 (where mother had led honorable life preceding four years and was fit and competent).

1079-26 154Wash400, 282P486. [b] 48 Nev352, 232P776, 37ALR527. [c] **Father's misconduct**, standing alone, does not preclude appointment after divorce. 48Nev352, 232P776, 37ALR527.

1079-28 154Wash400, 282P486.

1079-29 99CalA57; 277P875(1stcase).

1079-31 101CalA669, 282P26. [b] **Failure to support** and denial of paternity held to justify refusal to appoint father. 48Nev352, 232P776, 37ALR527.

1080-36 TexCommnA 285SW285.

1080-37½-New. In Louisiana neither father nor mother could qualify as tutor to their children while both were alive. 159La231, 105S300.

1080-37½-New. even though they were divorced. 159La231, 105S300 (prior to passage of Acts [1924] Nos. 72, 196).

1080-46 TexCivA 283SW599. [a] (1) TexCivA 283SW599.

1080-51½-New. Guardian of property. Where infant's estate comes through paternal relatives, persons identified with such relatives should be appointed guardians of the property. 126Misc96, 212NYS419.

1081-51½-New. Maternal aunt held preferable to paternal uncle in best interests of infant. 137Misc496, 244NYS614.

1081-68 121Misc188, 226NYS415. But see 133Misc431, 232NYS653. [c] (2) Trust company cannot be appointed, under some statutes, when parent survives. 26 OhNPNS192.

1081-70 [a] 101NJEq350, 139A812.

1082-75 36GaA734, 137SE847.

1082-76 But see 93CalA404, 269P689.

1082-82 101CalA110, 281P435; 201 Iowa405, 205NW645 (not adversary proceeding but prosecuted and defended in interest of ward alone).

1083-95 [b] **In Minnesota.**-168Minn74, 209NW640.

1083-99 [a] **One who is neither idiot nor lunatic** but simply incapacitated to transact business by reason of advanced years and failing memory, has right to apply for appointment of guardian for himself under some statutes. 207 Iowa 738, 223NW495.

1083-5 168Minn74, 209NW640 (petition of incompetent person for appointment of guardian for himself); TexCivA 38W (2d)576.

1083-6 [c] **Waiver of notice.**-Notice required by statute of appointment of guardian for minor can be waived. 34 P(2d)948.

1083-8 40GaA431, 149SE799(2dcase) (though person appointed was guardian named in will of ward's father).

1083-9½-New. Object of notice is to give the interested party opportunity to be heard in defense. TexCommnA 285SW285.

1083-12 38 OklACR716 [quotCJ]. But see 39 OklACR191.

1083-13 38 OklACR716 [quotCJ].

1083-15 68CalA312, 229P60 (mandatory upon court to require notice to parents, or proof that their addresses were unknown, or that for other reasons notice could not be given); 117 Okl 223, 246P217; 118 Okl 178, 246P848; TexCommnA 285SW285; TexCivA 275SW683; 99Vt453, 134A606. [f] **Waiver.**-CalA 290P517.

1084-16 99Vt453, 134A606. But see 93 CalA404, 269P689.

1084-18½-New. Failure to give notice to parent is immaterial where he voluntarily appears. TexCivA 275SW683.

1084-19 37 OklACR469.

1084-22½-New. Where a parent voluntarily appears in proceedings to appoint a guardian of a minor child, he cannot contest the jurisdiction of the court for failure to receive notice of the proceedings. TexCommnA 285SW 285.

1084-35 273US195, 47SCt338, 71Led 602. See also 68CalA312, 229P60 (notice required which court deems reasonable).

1085-40 117 Okl 223, 246P217 (notice to resident parent by publication held insufficient).

1085-41 See also 143 Okl 147, 288P285.

1085-44½-New. If residence of parent is known and information of pendency of proceeding can be conveyed to him by mail so that he can appear within reasonable time, no notice is reasonable which prima facie must fail to afford him opportunity to appear. 68CalA 312, 229P60.

1085-44½-New. Notice is not reasonable, if time given by trial court would barely apprise a parent of pendency of proceeding, assuming that it would be received in due course of mail. 68CalA 312, 229P60.

1085-45 48Nev352, 232P776, 37ALR 527 (petition held sufficient).

1085-61½-New. Application for appointment of a temporary guardian alleging the father of a minor child to be unfit has been held broad enough to demand removal of the father as a natural guardian. TexCommnA 285 SW285.

1085-61½-New. Where a petition contained no allegation on the subject as to whether a minor's father as defendant is competent, no issue of competency is raised. 101CalA669, 282P26.

1086-71½-New. A judgment in divorce action which gave custody of child to father and declared wife unfit to take such custody is not conclusive that wife is unfit person to be appointed guardian after husband's death. 240NY 444, 148NE630.

1086-71½-New. although it might be evidence to justify such conclusion. 240NY444, 148NE630.

1086-89 101CalA110, 281P435.

1086-92 94CalA589, 271P523.

1087-1 128 Or94, 265P1087, 1089 [cit CJ].

1087-4½-New. In some states motion of petitioner to dismiss application may be properly overruled, since it is not the interest of the applicant, but that of the infant, which court is charged to protect. 35GaA40, 132SE108.

1087-5 102CalA445, 283P112.

1087-11½-New. Record of proceedings on petition, charging the father's abandonment of his child, held inadmissible on his petition for modification of an order appointing a guardian. 79Mont 198, 255P737.

1087-11½-New. Denial of nonsuit on petition for modification held not error regardless of merits. 79Mont198, 255 P737.

1087-11¼-New. Failure to comply with mere directory requirement does not invalidate order. TexCivA 38W(2d) 576 (failure to name appraisers or state conditions for making order permanent).

1087-11½-New. but it is otherwise where requirement is mandatory. TexCivA 38W(2d)576 (holding mandatory requirement as to entry of order sufficiently complied with as against collateral attack).

1187-11½-New. Lack of order making temporary appointment permanent does not impair acts of guardian. TexCivA 38W(2d)576.

1087-11½-New. Where the purpose of application to enter a nunc pro tunc order making a temporary guardian a permanent guardian was to enable applicant, as guardian, successfully to prosecute a suit against bondsmen of the former guardian, wherein a bond was a prerequisite to a valid sale of land belonging to the minor's estate, the purchaser would be a necessary party in a suit to set aside the order. TexCommnA 158W(2d)579.

1087-11½-New. Where an order making a permanent appointment of a guardian had been rendered, a notation to that effect made by the presiding judge on probate docket is sufficient evidence that the order of appointment had been made. TexCivA 78W(2d)613.

1087-11½-New. Mere absence of recitation of jurisdictional facts in the order did not render it void. TexCommnA 158W(2d)579.

1087-16 TexCommnA 158W(2d)579. But see TexCivA 78W(2d)613.

1087-17 TexCivA 78W(2d)613.

1087-17½-New. The probate court, having jurisdiction, is presumed to have determined that a citation had in fact been issued and served. TexCommnA 158W(2d)579.

1087-18½-New. The probate court, after adjournment of the term, has been held authorized to enter a nunc pro tunc order appointing a temporary guardian as a permanent guardian. TexCommnA 158W(2d)579.

1087-18½-New. [a] TexCivA 78W(2d) 613.

1087-18½-New. In a nunc pro tunc proceeding for the entry of an order appointing a permanent guardian, pleading sufficient to constitute a direct attack upon the order when presented in the form of an answer is nevertheless a distinct action, and its sufficiency as a cause of action is determined by what would be required of a pleader instituting an independent suit for the purpose of annulling the order. TexCivA 78W(2d)613.

1087-18½-New. The duty of inquiring into the validity of the order is no more imperative when a correction is sought by an interested party than it is when the court is acting on its own motion, and in either proceeding the record can only be corrected by evidence furnished by the record. TexCivA 78W(2d)613.

1087-18½-New. Where sureties of the guardian in answer affirmatively set up failure to give legal notice of appointment required by statute, but all parties who would be affected were not before the court, the order could not be annulled. TexCivA 78W(2d)613.

1088-21 TexCivA 78W(2d)613.

1088-22 213Ala33, 104S244.

1088-25½-New. Failure of record to show notice to parent immaterial when parent consents to adoption. 37 Okl ACR469.

1088-27 TexCivA 48W(2d)665.

1088-34 101CalA669, 282P26.

1089-40 [a] (3) Person who was not made party in lower court and who was appointed guardian by county court, acting without authority, had no right of appeal from decision of district court, reversing county court with directions to appoint another person guardian. 114 Okl 116, 243P938.

1089-42 220Ala369, 125S333 (appeal by next friend).

1089-55 101CalA110, 281P435. [b] **Appointment of guardian of child and making such guardian also guardian of estate** has been held not prejudicial error. 101CalA110, 281P435.

1089-57 TexCivA 48W(2d)665. [c] **Jury's verdict in appellate trial de novo** will not be disturbed where there was sufficient evidence to raise issue. TexCivA 48W(2d)665.

1089-62½-New. Where probate court declined to follow former decision of Supreme Court, minor appealing from decision has burden of appeal. 220 Ala369, 125S333.

1090-66 220Ala369, 125S333.

1090-67 See also 38GaA534, 144SE387.

1090-88 40GaA431, 149SE799(2dcase) (administration of funds which guardian is not qualified to administer is illegal); 101NJEq350, 139A812.

1091-93 See also 9PaDist&Co 520. Contra Alta [1928] 4DomLR821.

1095-92½-New. Appointment does not relieve parents and child of natural obligations to each other. 83NH576, 145 A782(2dcase).

1095-93 TexCivA 78W(2d)613. See also 150Wash355, 272P978.

1095-96 TexCommnA 158W(2d)579; 150Wash355, 272P978.

1091-97 [d] **In Georgia.**-40GaA431, 149SE799(2dcase) (proceeds of insurance policy on life of testator in which ward is beneficiary).

1092-10 27 OhNPNS812.

1092-16 216Ala396, 113S260.
1094-83 [a] **Letters prima facie evidence only.**–40GaA431, 149SE799(2d case).
1094-89 39 OklACR191.
1095-90 34F(2d)948; 39 OklACR191. [a] **Application, order of appointment, and letters of guardianship issued on same day,** apparent from records of court of ordinary, show lack of required citation and consequent nullity of judgment and letters. 40GaA431, 149SE799 (2dcase).
1095-91 51SD379, 216NW351, 56ALR 533; TexCivA 3SW(2d)576.
1095-92½-New. Mere illegality in appointment of tutor will not vitiate acts done under appointment. 169La870, 126S221.
1095-93 56ND60, 215NW913, 917 [cit CJ].
1095-95 [a] **Fraudulent purchaser of oil and gas lease** from guardian cannot deny legal capacity of his lessor in suit to cancel lease or establish trust in proceeds. 268US121, 45SCt451, 69L ed 876.
1095-96 169La870, 126S221; 168Minn 74, 209NW640; 111 Okl 242, 238P956; 39 OklACR191; Tex 3SW(2d)576.
1095-97 [a] See also 113 Okl 265, 242 P185. [b] **Failure to issue citation** renders appointment nullity, subject to collateral attack. 40GaA431, 149SE799 (2dcase).
1096-98 But see TexCivA 3SW(2d)576.
1096-1 127Misc821, 216NYS593; 130 Okl 133, 265P648.
1096-3½-New. Where guardian had not been discharged, judgment in proceeding to set aside compensation award would be binding on ward of more than twenty one years. TexCivA 27 SW(2d)838.
1096-12 203 Iowa1338, 214NW556; TexCivA 4SW(2d)566, 568 [citCJ].
1096-13 CalA 285P360 (jurisdiction of court after death of ward is limited to matter of settlement of guardian's account); TexCivA 4SW(2d)566, 568 [cit CJ]; TexCivA 15SW(2d)734. [a] **Guardian could impress lien** on deceased ward's estate for sums expended. Cal 286P1008.
1096-13½-New. On the death of the ward, property in the guardian's hands in which the ward had a life estate passes to the remaindermen. 169Minn 304, 211NW314.
1096-13¾-New. Court acquired jurisdiction in deceased ward's estate proceedings subject to guardian's liens imposed by another court. Cal 286P1008.
1096-13¾-New. Court has power to subject to charge and lien given for guardian's security only that property in the actual and constructive possession of guardian. CalA 285P360.
1096-14 203 Iowa1338, 214NW556, 558 [citCJ].
1097-19 114 Okl 234, 245P992.
1097-20 See also 215AppDiv581, 214 NYS615.
1097-21 215AppDiv581, 214NYS615, 619 [citCJ] (guardianship by nature). [b] **In New York.**–215AppDiv581, 214 NYS615.
1097-24 114 Okl 234, 245P992.
1097-29 [a] **In Spanish law,** under Civ. Code § 168, mother loses patria potestas upon remarriage. 29PortoRico 951.
1098-55½-New. Docket entry accepting resignation is as effective as entry on minutes. TexCivA 3SW(2d)576.
1098-46 9PaDist&Co 79.
1098-59 [a] **Before fiduciary relation ceases between guardian and ward,** probate court must discharge guardian. TexCivA 27SW(2d)838.
1098-68½-New. Court's refusal and later discharge of guardian held not to have abused discretion. 299Pa153, 149 A315(1stcase).
1099-73 38 OklACR461.
1099-81 10PaDist&Co 511. See also 49Philippine927.
1100-93 But see 10PaDist&Co 511.
1100-96½-New. A court of equity has no power to vacate an appointment made by a probate court. 8PaDist&Co 717.
1101-22 151Va136, 1448E432.
1101-30 [a] **Person aggrieved,** as used in the statute, does not include cousin and next friend. 256Mass203, 152NE 304.
1101-33 TexCommnA 285SW285.
1101-34 TexCommnA 285SW285.
1102-41 9PaDist&Co 79.
1104-7 164La463, 114S98.
1105-27½-New. A guardian is not subject to removal by a grand jury accusation, under a statute providing for the removal of public officers. 121 Okl 275, 249P924.
1105-40 121 Okl 275, 249P924.
1106-44 Contra 155Tenn565, 4SW(2d) 955.
1106-52 27Hawaii343.
1109-16 Wash 290P1003.
1109-16½-New. Where the appointment of a guardian is valid, a subsequent appointment of another made by the court, whose attention was not called to the prior appointment, is void. 85 IndA318, 154NE32.
1109-20 See also Wash 290P1003.
1109-26 228AppDiv854, 241NYS326.
1109-28 21AlaA650, 111S644; 57ND 381, 222NW256; 155Tenn565, 4SW(2d) 955, 956 [citCJ]. But see 161La978, 109 S783. [f] **Where minor is in lawful service of another,** his legal guardian cannot lawfully interfere nor direct discharge of duties to master. TexCivA 3 SW(2d)535.
1110-29 227Ky788, 14SW(2d)181; 151 Va136, 144SE432.
1110-34½-New. Under Texas constitution the right of a guardian to occupy his ward's homestead is an incident of guardianship. TexCivA 280SW254.
1110-34½-New. A statute giving a guardian full custody applies only to guardians appointed on petition of public authorities. 83NH576, 145A782(2d case).
1110-35 83NH576, 145A782(2dcase).
1110-36 83NH576, 145A782(2dcase).
1111-40 IndA 148NE163; 227Ky788, 14SW(2d)181.
1111-42 123Kan513, 255P978; Tex CommnA 285SW285; Can [1926] 4Dom LR897. [a] IndA 148NE163.
1111-43 TexCommnA 285SW285.
1111-50 221Ky808, 299SW979; Tex CommnA 285SW285.
1111-53 111 Okl 242, 236P956, 960 [quotCJ]. [a] **In Nebraska.**–230NW 251.
1112-81½-New. Crossing of jurisdictional lines by a custodian with his ward, in the absence of a restraining order, is not ordinarily regarded as an abuse of wardship. 83NH413, 143A471.
1112-86 [a] **Court has jurisdiction to grant permission.**–CalA 290P517. [b] **Order canceling permission** cannot be enforced where minor has been removed from state. CalA 290P517.
1113-96 204 Iowa449, 215NW498.
1113-99½-New. Trust as regards education may be exercised through the parents, if in the interest of the child, without a court order. 83NH576, 145A 782(2dcase).
1113-1 13ZSC367, 128SE840, 841 [cit CJ]; Wash 288P269.
1114-6 Wash 288P269.
1114-14 204 Iowa449, 215NW498; 100 WVa193, 130SE107. But see 151Wash 120, 275P82, 65ALR794.
1114-18 [g] (1) 101NJEq350, 139A812 (principal or income). (2) In extraordinary case court may advise guardian in advance as to expenditures from ward's estate. 101NJEq350, 139A812. (3) Suit by administratrix, as mother and natural guardian, for allowance from minor's estate for support, maintenance, and education should be by original bill. 101NJEq350, 139A812.
1115-19 181Ark933, 28SW(2d)1048. [f] **Construction of order.**–204 Iowa449, 215NW498.
1116-28 102NJEq393, 141A16; 225App Div702, 231NYS587; 51SD379, 216NW 351, 56ALR533. [d] **Surrogate's court may decree repayment** by ward of funds advanced out of guardian's own means for ward's support and education. 134 Misc374, 235NYS461.
1117-31½-New. Where a ward could have been maintained without expense by other relatives of the same degree as the guardian, a claim by the guardian for maintenance made only after it appeared that the purposes for which money had in fact been expended were not legal, allowance for maintenance was not sustained. 225AppDiv702, 231NYS 587.
1117-33 Contra 51SD379, 216NW351, 56ALR533.
1117-35 See also 178Ark911, 12SW(2d) 901.
1117-42 123Kan491, 255P1108; 51SD 379, 216NW351, 352 [citCJ], 56ALR533.
1117-43 But see 51SD379, 216NW351, 56ALR533.
1117-44½-New. In some jurisdictions a guardian who has received his ward into his house as one of his family is not entitled to reimbursement for support in the absence of a contract therefor. 123 Kan69, 254P351.
1118-48½-New. Gain to impecunious parents as guardians of wealthy minor children must be limited to advantage necessarily incident to maintenance of home for children. Wash 288P269.
1118-55 [b] **Allowance to father as guardian of five to seven hundred dollars monthly has been held unjustifiable.**–Wash 288P269.
1118-57 101NJEq350, 139A812.
1119-68 [a] **When acts, though approved by court have resulted in injustice to ward,** court must scrutinize account carefully and disallow expenditures. Wash 288P269.
1119-73 [c] (2) Expensive automobiles for wards and trips taken by family are not surcharageable to guardian where approved by court. Wash 288P269.
1120-79 151Wash120, 275P82, 65ALR 794.
1120-80½-New. A mother's unauthorized use of income prior to the time she was appointed guardian could not form the basis for a charge against the estate. 151Wash120, 275P82, 65ALR794.
1121-91 177Minn571, 225NW896.
1121-98 14DelCh389, 129A237.
1121-7 See also 227Ky788, 14SW(2d) 181.
1121-9½-New. The denial of an application by a mother earning fifty dollars a month for an allowance of ten dollars a month for the support of a child having an estate of fifteen hundred dollars has been held erroneous. 149 Miss254, 115S428.
1121-9½-New. Where maternal relatives of children placed them in a school after their mother's death, and a guardian was later appointed, the guardian should pay all reasonable and necessary expenses at such school, and also pay relatives for all reasonable and necessary expenses for clothing, etc., bought for the children. 227Ky788, 14SW(2d) 181.
1122-23 See also 29PortoRico 951.
1122-25 208 Iowa191, 225NW258, 64 ALR687.
1122-27 208 Iowa191, 225NW258, 64 ALR687.
1123-34½-New. A guardian's unexercised right to custody does not deprive the parents of the right to the child's services. 83NH576, 145A782(2dcase).
1123-44 99Ark344, 137SW926, AnnCas 1913B84; 28Hawaii81; 57ND381, 222 NW256. [a] **Ratification of acts of third persons.**–33F(2d)800. [b] **Court will generally heed guardian's suggestions** and views as to best course to pursue. Wash 288P269.
1123-45 213Ky625, 281SW789; Me 152 A84; 75Mont173, 243P569; TexCommnA 286SW167.
1123-45½-New. and not merely an agent, 75Mont173, 243P569.
1123-46½-New. Powers and duties of guardian are determined by laws of particular state. 41F(2d)858.
1123-47½-New. In Massachusetts the statute confers on a conservator, except as to custody of the person, the rights and duties of a guardian of an insane person. 258Mass417, 155NE457.
1124-50 204 Iowa20, 214NW712; Iowa 228NW661; 117 Okl 39, 245P833 [quot CJ]. [c] **Under statute,** minor on attaining majority has been held entitled to test right of guardian to make compromise settlement of claim under will. 110Conn150, 147A562.

1124-51½-New. Good faith compromise by a guardian with the approval of the court of the pending litigation to which the minor is a party is not a proceeding adverse to the minor. 204 **Iowa**20, 214**NW**712.

1124-52 But see 40**GaA**431, 149**SE**799 (2dcase).

1124-53 48**RI** 459, 137**A**381. [d] **Compromise binding on ward** when made for his best interest and in good faith. 117 **Okl** 39, 245**P**833. [e] **Time for exercise of power.**-149**Miss**603, 115**S**720. [f] **In vacation.**-District judge has jurisdiction, in vacation, to make order approving guardian's settlement for personal injuries of ward. 206 **Iowa** 1263, 222**NW**16.

1124-54 [b] (2) Other instances. **Mich** 233**NW**357.

1124-56 240**Mich**655, 216**NW**467. [a] **Evidence held insufficient to show fraud.**-206 **Iowa**1263, 222**NW**16.

1124-56½-New. An agreement by a guardian to compromise an indebtedness in favor of the ward without compliance with applicable statutory provisions is invalid. 36**GaA**356, 136**SE**806.

1124-56½-New. A contract of settlement by a guardian for his ward, submitted to the probate court and approved, is binding on a minor ward and on a third party. 206 **Iowa**1263, 222 **NW**16.

1124-56¼-New. An order approving settlement by a guardian for his ward, unless set aside, is binding on the guardian, the ward, and the third party. 206 **Iowa**1263, 222**NW**16.

1124-56½-New. Such order can be set aside only in the probate court, and cannot be overturned by the verdict of a jury in another proceeding. 206 **Iowa**1263, 222**NW**16.

1124-56⅛-New. Such order may be set aside on the ground of fraud of the third party. 206 **Iowa**1263, 222**NW**16.

1124-56⅛-New. Such order may be set aside on the ground of fraud or bad faith of the guardian. 206 **Iowa**1263, 222**NW**16.

1124-56⅛-New. Mere delay in causing the order of approval of settlement to be entered of record does not invalidate the proceedings. 206 **Iowa**1263, 222**NW** 16.

1124-56⅛-New. Such order when filed and recorded becomes effective as of the date of settlement. 206 **Iowa**1263, 222**NW**16.

1124-56⅒-New. An order approving a settlement cannot be challenged by the guardian on the ground that papers were signed before appointment was actually made, where all papers were signed on the same day in contemplation of the appointment. 206 **Iowa**1263, 222**NW**16.

1125-58 117 **Okl** 39, 245**P**833 [quotCJ].

1125-59 117 **Okl** 39, 245**P**833 [quotCJ].

1125-63 [a] (4) To consent to cancellation of trust of personal property. 222 **Ky**654, 18**SW(2d)**1071.

1125-65 15**F(2d)**940.

1125-67 15**F(2d)**940.

1125-70½-New. Partnership between guardian and ward involving property of both is unauthorized. 15**F(2d)**940.

1125-72 48 **Ida**85, 280**P**223 (acts not sanctioned by law held not binding on ward); 254**Mass**57, 149**NE**626; **Tex CommnA** 286**SW**167.

1125-73 **Ariz** 287**P**292.

1126-80 **Ariz** 287**P**292.

1126-88 150**Wash**355, 272**P**978.

1126-89 194**Wis**15, 215**NW**573, 54**ALR** 1271.

1126-90 But see 40**GaA**431, 149**SE**799 (2dcase). [d] **Interest in corporation.**-(1) Guardian is entitled to collect dividends on corporate stock owned by ward. **TexCivA** 280**SW**254. (2) Guardian cannot manage business of corporation, the majority of stock of which is controlled by ward. **TexCivA** 280**SW** 254.

1127-2 101**NJEq**350, 139**A**812; 215**App Div**581, 214**NYS**615; 225**AppDiv**489, 233 **NYS**407.

1128-3 [c] **In Tennessee.-Statute** authorizing courts to pay over funds of less than one hundred and fifty dollars therein to natural guardians of minor owners without regular or general guardians, does not authorize payment of balance in fund reduced below such sum by court's unlawful orders. 158**Tenn**383, 13**SW(2d)**800, 62**ALR**904.

1128-8 **Me** 152**A**84; 258**Mass**417, 155 **NE**457; 53**SD**129, 220**NW**474.

1128-9 134**Misc**374, 235**NYS**461.

1128-10 151**Va**773, 145**SE**317.

1128-12 **TexCivA** 18**SW(2d)**215.

1128-12½-New. Title to property devised by will is in the executor or trustee thereunder. 151**Va**773, 145**SE**317.

1129-16 **MoA** 5**SW(2d)**457; 195**NC**149, 141**SE**355; **TexCommnA** 286**SW**167. [a] **Court cannot authorize guardian** to deal with ward's property as adult may deal with his own. 67**Utah**60, 245 **P**966.

1129-17 254 **Ill**A96 (under statute).

1129-24 **Mass** 173**NE**530; 69**Utah**376, 255**P**430, 434 [citCJ]. [a] **Agreement by guardian affecting property rights of ward** will be carefully scrutinized by court. 50**RI** 147, 146**A**406.

1129-25 229**Ky**608, 17**SW(2d)**712; 69 **Utah**376, 255**P**430.

1130-26 **NJ** 152**A**243; 69**Utah**376, 255 **P**430.

1130-27 **NJ** 152**A**243; 69**Utah**376, 255 **P**430, 434 [citCJ].

1130-28 69**Utah**376, 255**P**430, 434 [cit CJ].

1130-30 [a] **Inventory by mother,** guardian of minor, as to land in which both were interested, held not conclusive against minor. **TexCivA** 297**SW** 482.

1130-42 **CalA** 284**P**222 (money wrongfully withheld on joint bank account of one with ward); 207 **Iowa**738, 223 **NW**495; 12**LaA**694, 127**S**74; **TexCivA** 275**SW**179; 194**Wis**15, 215**NW**573, 574 [citCJ], 54**ALR**1271. [b] (5) Guardian may, for valuable consideration, release guarantors on bond and mortgage and keep money invested therein rather than accept payment from guarantors and thus give up valuable investment. 143**SC**156, 141**SE**267.

1132-50 See also 203 **Iowa**1045, 213**NW** 781.

1133-61 139 **Okl** 152, 281**P**559.

1133-64 34**Ariz**245, 270**P**1044; **Ga** 155 **SE**183.

1135-83 116**Nebr**99, 216**NW**186, 56**ALR** 186.

1135-94 34**Ariz**245, 270**P**1044.

1136-99 118 **Okl** 135, 247**P**65.

1136-2 142 **Okl** 221, 286**P**867; 38 **Okl ACR**283; 54**SD**277, 223**NW**50; 67**Utah** 60, 245**P**966. See also 218**Ala**530, 119 **S**220; 204**Cal** 51, 266**P**532. [a] **Indirect violation of statute.**-38 **OklACR**283. [b] **Decree authorizing tutor to mortgage property** protected lender of money. 169**La**1030, 126**S**516.

1136-3 See also 116**Nebr**99, 216**NW**186, 56**ALR**186.

1136-5½-New. Indebtedness of estate arising from a mortgage given to secure a loan to pay a mortgage not authorized by the probate court may be disallowed as against the estate on settlement of the guardian's account. **MoA** 5**SW(2d)**457.

1136-5½-New. Where an original mortgage was unauthorized and illegal, a subsequent mortgage given to secure a loan for payment of the original mortgage is not authorized by a statute providing for taking up preexisting indebtedness. **MoA** 5**SW(2d)**457.

1136-5¼-New. A guardian has been held unauthorized to postpone a lien of a mortgage in favor of plaintiff's mortgage where no consideration passed to the guardian. 153**SC**94, 150**SE**612.

1136-10 204 **Iowa**449, 215**NW**498, 500 [citCJ].

1136-10½-New. that an order authorizing a guardian to borrow money does not warrant the hypothecation of securities for money borrowed, 204 **Iowa**449, 215**NW**498.

1137-27 **Okl** 268**P**706.

1137-29 **TexCivA** 274**SW**238 (oil and gas lease).

1137-29½-New. Estate is not liable for false representations of guardian inducing execution of lease of ward's property not made publicly or approved by clerk of superior court. 190**NC**838, 130 **SE**841.

1137-32 164**La**1090, 115**S**280.

1137-32½-New. An invalid lease of surface rights by the guardian of an incompetent Indian allottee which is a necessary incident of an oil and gas lease, may be binding on the allottee. 34**F(2d)**948.

1138-35 But see **TexCivA** 274**SW**238.

1138-43½-New. Form used in a sale of realty is not essential. 273**US**195, 47 **SCt**338, 71**L ed**602.

1138-44 13**F(2d)**356, 358 [citCJ].

1138-51½-New. Term beyond ward's minority is valid. 273**US**195, 47**SCt**338, 71**L ed**602.

1138-53 28**F(2d)**590.

1139-65½-New. [§ 231a] (3) **To Third Persons.** The fact that a guardian signed for his ward as lessor a mineral lease under which coal was wrongfully extracted from a mine on land belonging to another does not render him personally liable where he did nothing to encourage the wrongful extraction of coal. 170**Ark**426, 280**SW**383.

1139-67 208 **Iowa**191, 225**NW**258, 64 **ALR**687; 143**SC**156, 141**SE**267. **Erratum.**-S. C.—"30 S. C. L." should be "30 S. C. Eq."

1140-73 **GaA** 155**SE**55; 205 **Iowa**1248, 218**NW**24; 207 **Iowa**394, 223**NW**249. [a] **Exchange of minor's stock in corporation for stock of another corporation on consolidation** (1) without order or direction of probate court and without confirmation is not binding on minor. 34**Ariz**245, 270**P**1044. (2) Such exchange does not deprive minor of right to sue for value of stock. 34**Ariz** 245, 270**P**1044. [b] **Personal letter from probate judge** is insufficient where statute requires order. **MoA** 5**SW(2d)** 457.

1140-75 40**GaA**431, 149**SE**799(2dcase) (investment by testamentary guardian of funds received under policy on testator's life in which ward was beneficiary).

1140-82½-New. A statute authorizing a guardian to loan his ward's money under court orders does not prohibit the court from approving of an act which it might have authorized or directed. 204 **Iowa**98, 214**NW**696.

1140-83 195**NC**149, 141**SE**355. [a] (4) **TexCivA** 18**SW(2d)**215. [e] **Probate court need not approve of investments made by guardian, in considering annual report,** and guardian desiring protection must proceed in manner provided by statute. **TexCivA** 18**SW(2d)**215. [f] **Judgment setting aside approval by probate court of guardian's report** does not invalidate agreement of bank and guardian for loan of ward's funds, as between immediate parties, and guardian is liable for any losses. **TexCivA** 18**SW(2d)**215.

1140-85 218**Ala**530, 119**S**220.

1141-93 175**Ark**716, 300**SW**401; 27 **Hawaii**343; 195**NC**149, 141**SE**355; 143 **SC**156, 141**SE**267. [f] **Worthless note taken in exchange for grain bought for estate and sold** will not be allowed as credit. **MoA** 5**SW(2d)**457.

1141-94 175**Ark**716, 300**SW**401; 195 **NC**149, 141**SE**355.

1141-95 195**NC**149, 141**SE**355.

1142-17 [e] **Enforcement of security deed** to protect property of ward will not be restrained on ground that investment was unauthorized. 165**Ga**406, 141**SE**54.

1142-19 **SD** 226**NW**565.

1143-27 229**Ky**608, 17**SW(2d)**712.

1143-30 **TexCivA** 18**SW(2d)**215.

1143-33 [a] **Approval by probate judge** of loan without security does not protect guardian from liability for loss. 215**Ala**484, 111**S**208.

1143-37 [c] **Attempted purchase of real estate necessitating order of court.**-**Iowa** 232**NW**670.

1144-42 218**Ala**530, 119**S**220.

1144-43 [a] (3) Under code authorizing guardian to invest ward's funds in purchase of realty, guardian has no authority to incur debt in purchase of lands, and no power to give mortgage thereon. 218**Ala**530, 119**S**220. (4) If ward has neither funds on hand nor

property subject to sale for reinvestment, under statute, sufficient to acquire an unencumbered title, probate court should not authorize purchase of realty. 218Ala530, 119S220.

1144-43½-New. An order of a county court authorizing a guardian to purchase mortgaged lands in violation of such statute is without jurisdiction and is subject to collateral attack on the guardian's final accounting. 38 **Okl** ACR283.

1144-43¼-New. A statute forbidding a guardian to mortgage a ward's lands except as security for existing indebtedness deprives a guardian of power to purchase lands already subject to mortgage with the funds of his ward for the benefit of the ward's estate. 38 **Okl** ACR283.

1144-46 Iowa 232NW670.

1144-47 218Ala530, 119S220.

1144-49 But see **Iowa** 232NW670.

1144-50 Iowa 232NW670 (vendor held trustee).

1144-51 MoA 275SW970, 972 [citCJ]. [b] **Bank purchasing bonds** for customer as curator cannot recover from him individually. MoA 275SW970. [c] **Registration of bonds** in curator's name does not defeat estate's right thereto. MoA 275SW970.

1145-53 MoA 275SW970, 972 [citCJ].

1145-54 Ariz 287P292; 208 Iowa267, 225NW454; 75Mont173, 243P569; Tex CivA 18SW(2d)215. [a] But see 207 Iowa593, 223NW379. [b] **Bank examiner's reduction** of minor's deposit in insolvent bank is illegal without tutor's assent or court's authorization. 13LaA 41, 127S14.

1145-55 205 Iowa1248, 218NW24, 28 [quotCJ]; 75Mont173, 243P569; 197 NC348, 148SE438. But see 207 Iowa 394, 223NW249; 208 Iowa267, 225NW 454. [a] **Bank not maintaining legal reserve.**-SD 225NW717.

1145-56 204 Iowa98, 214NW696; TexCivA 18SW(2d)215. [a] **Subsequent approval.**-204 Iowa98, 214NW696.

1145-57½-New. A bank has right to rely on the general power of a guardian and need not inquire whether the guardian is specially authorized to deposit funds in an interest-bearing account. TexCivA 18SW(2d)215.

145-57⅓-New. Authorization to deposit funds in a bank may result from an order made after the date of the deposit. 208 Iowa267, 225NW454.

1145-57¼-New. Where income is insufficient to reimburse a curator, he should not be penalized for failure to deposit funds. 168La428, 122S280.

1145-57⅙-New. An ex parte order obtained by a guardian from a judge sitting in another county authorizing a deposit will not protect a guardian who had already deposited money in a savings deposit for a four-year period and suspected the bank's solvency. 208 Iowa 267, 225NW454.

1145-57⅛-New. In such case it will not be presumed that the judge had knowledge of a previous report on file showing money already on deposit in the bank in which the guardian asked authority to deposit. 208 Iowa267, 225 NW454.

1145-57½-New. A deposit which constitutes an unsecured loan is unauthorized. Ariz 287P292.

1145-57⅓-New. An order directing a guardian to deposit funds in a bank without notice of hearing to the wards is void. 208 Iowa392, 226NW73.

1145-62 TexCivA 18SW(2d)215.

1145-63½-New. A guardian's deposit of funds in a savings account for a four-year period is inferentially an investment at interest and as such unauthorized. 208 Iowa267, 225NW454.

1145-63⅓-New. The probate court has authority to direct guardians of minors and incompetent persons to require bonds to secure deposits of funds of their wards in banks. 176Minn541, 224 NW152.

1145-64 215Ky647, 286SW851.

1145-65 75Mont173, 243P569.

1145-66 195NC149, 141SE355.

1145-67 214Ala593, 108S536, 46ALR 1201; 195NC149, 141SE355.

1145-68 217Ala93, 114S692; 165La478, 115S662; TexCivA 48SW(2d)262.

1146-73 213Ala33, 104S244.

1146-74 213Ala33, 104S244; 208 Iowa 191, 225NW258, 64ALR687.

1146-81½-New. Sale of timber on ward's land held to establish prima facie right to interest. 214Ala593, 108S536, 46LRA1201.

1148-8 165La478, 115S662.

1148-12 175Ark716, 300SW401.

1148-17 See also 37Wyo 107, 259P815, 817 [citCJ], 55ALR941.

1148-25 [a] (2) 215Ala484, 111S208.

1149-32 131Misc800, 228NYS323.

1149-33 151Wash120, 275P82, 65ALR 794. But see 40GaA431, 149SE799(2d case); 27Hawaii439. [b] **Expense incurred by willful misconduct, bad faith, or gross mismanagement** precludes guardian from obtaining reimbursement. 229Ky608, 17SW(2d)712. [c] **Lien of guardian** for advances or expenditures attaches only against property actually or constructively in possession of guardian. CalA 284P222.

1149-34½-New. or for expenditures on realty in which the ward's funds were illegally invested, 40GaA431, 149SE799 (2dcase).

1150-41 40GaA431, 149SE799(2dcase).

1150-43 Contra 158Tenn383, 13SW(2d) 800, 62ALR904.

1150-46 40GaA431, 149SE799(2dcase).

1151-72 27Hawaii439 [quotCJ]. See also 132Misc560, 230NYS564.

1151-73 94CalA361, 271P503; 27 Hawaii439, 450 [quotCJ].

1152-74 27Hawaii439, 450 [quotCJ].

1152-78 But see 40GaA431, 149SE799 (2dcase).

1152-80 27Hawaii439.

1152-80½-New. Guardian not entitled to attorney's fees for services rendered to persons other than ward. 27Hawaii 439.

1152-80⅓-New. Where ward was entitled to services without cost. 27Hawaii 439.

1152-83½-New. Reasonable attorney's fees allowed guardian in proper case will not be disturbed on appeal. 27 Hawaii439.

1152-83⅓-New. Guardian who is also attorney cannot charge counsel fees for services re the widening of a street in front of ward's property. 27Hawaii343.

1152-83¼-New. Guardian not entitled to attorney's fees in an action against ward for commissions due guardian where employment of attorney was not shown to be necessary. 27Hawaii439.

1152-83½-New. Guardian may not even with authority from the probate court bind infant by contract for counsel fees after he reaches maturity. 13F(2d)356.

1152-83⅓-New. Although compensation of attorney is governed by an agreement between the guardian and the attorney, it is only valid and enforceable when it complies with the statute requiring that compensation must be fixed by the court. 132Misc560, 230NYS564.

1152-87 [a] **Approval of contract by court.**-134 Okl 172, 272P838.

1153-6 168La428, 122S280.

1154-23 268US121, 45SCt451, 69Led 876; 254Mass57, 149NE626. But see 38 GaA534, 144SE387. [h] **Satisfaction of lien.**-214Ala334, 107S818. [i] **Conveyance to guardian after termination of relation** but while influence lasts is presumed invalid and voidable. Or 286P 593.

1154-26½-New. Guardian cannot agree to a division of the proceeds of a life insurance policy between his ward and himself so as to bind the ward. TexCivA 276SW741.

1154-26⅓-New. A guardian who occupied the ward's farm land for six months' periods, covering the crop season of each year, is properly charged with a full year's rent for each of such periods. 151Wash120, 275P82, 65ALR 794.

1155-28 268US121, 45SCt451, 69Led 876.

1155-30 173Ark38, 291SW814.

1155-34 218Ky155, 291SW19; 132 Okl 204, 270P46, 50 [quotCJ]. [d] (4) Guardian buying lot with own money and erecting house thereon is not trustee for ward because ward's funds were used to pay obligations of father incurred while erecting house. 152Wash 336, 277P849. [e] **Transactions constituting purchase with ward's funds.**-132 Okl 204, 270P46.

1155-35 132 Okl 204, 270P46, 50 [quot CJ].

1155-37 132 Okl 204, 270P46, 50 [quot CJ].

1155-41 [a] **At common law** guardian could use funds of ward for his own purpose and make faithful accounting when due. 254 IllA96.

1156-46 [a] **Guardian loaning ward's money** to corporation which became bankrupt and in which he was officer and stockholder held liable for loss. 215 Ala484, 111S208.

1156-48 218Ala530, 119S220.

1156-50 207 Iowa668, 223NW500. [a] (12) Other acts not constituting conversion. 116Nebr591, 218NW380. [g] **Ward may follow property** fraudulently diverted until it reaches innocent purchaser and claim proceeds from persons fraudulently acquiring it from guardian. 268US121, 45SCt451, 69Led876.

1156-50½-New. A note made payable to a guardian, covering misappropriation of funds, becomes part of the estate notwithstanding delivery of the note to the surety on the guardian's bond. TexCivA 284SW977.

1156-53½-New. Duties of guardian as trustee are not terminated by conversion of funds during the period of guardianship. 203 Iowa1338, 214NW 556.

1156-53¼-New. A guardian is liable for any direct loss sustained by his ward through his negligence or mismanagement. TexCommnA 286SW167.

1157-60½-New. A deed from a guardian to a minor ward conveys title regardless of the ward's infancy and the fact that the deed was not recorded as required by order of the court. 178Ark 1011, 13SW(2d)314.

1158-75 99NJEq683, 133A538.

1158-76 99NJEq683, 133A538; Va 153 SE807. [b] **Burden is on guardian** to show lack of undue influence. 99NJEq 683, 133A538.

1158-81½-New. Deed to wife of grantor's committee is invalid when husband participates in transaction, if it would be voidable if made to husband. Va 153SE807.

1158-91 13F(2d)356; 40GaA431, 149 SE799(2dcase) (ward under no duty to perform acts of ratification); 154SC456, 151SE745. [a] (3) Minor cannot consent thereto while under age. GaA 155 SE55.

1159-92 154SC456, 151SE745.

1159-99 241 IllA96.

1159-4½-New. Where failure to restore what has been dissipated and is not in possession cannot be ratification. 40 GaA431, 149SE799(2dcase).

1159-5 34F(2d)948; 134 Okl 229, 273P 228.

1160-9 134 Okl 229, 273P228.

1161-26½-New. Guardian is estopped to complain of election by heirs to reject guardian's action in charging herself with value of ward's interest in realty and to approve her charging herself with value of their interests in personalty in decedent's estate. 146Wash 421, 263P741.

1161-40 116Nebr880, 219NW390, 391 [quotCJ].

1161-45½-New. Payments made to a guardian of an infant after the ward has attained majority and of which the ward had no notice are not binding on him. 118 Okl 12, 246P429.

1162-50 17F(2d)325.

1165-90 Iowa 211NW371; 41 OklACR 85; 192Wis571, 213NW300, 301 [citCJ]. [b] (5) Note signed as curator is not binding on him individually where there was no intention to so hold him. 222 MoA215, 297SW84. [d] (2) MoA 5SW (2d)457. (6) 204 Iowa449, 215NW498. (8) Where order authorizing borrowing money did not warrant hypothecation of securities, action of guardian in assigning mortgage and note as collateral security is voidable. 204 Iowa449, 215NW 498. [h] (2) Guardian has no authority to employ attorney unless authorized by county court. 41 OklACR85.

1167-1 Iowa 211NW371.
1167-4 13F(2d)356, 359 [citCJ].
1167-5 Cal 286P1008. [a] **Interest on money illegally borrowed.**–Guardian will not be allowed credit for interest on money illegally borrowed. MoA 5SW(2d)457. [b] **Excessive commissions paid for securing loan** will be disallowed. MoA 5SW(2d)457.
1167-7 12LaA451, 125S198.
1167-9½-New. Guardian may disaffirm and avoid contract of ward. 200 Iowa 613, 203NW809.
1167-9½-New. A father, permitting his son to leave home and obtain employment, is without the right thereafter to rescind a contract by the son for purchase of an automobile on the ground of minority. LaA 125S197.
1167-10 15F(2d)940.
1168-14 [e] (4) Duty of guardian to carry out order directing former guardian to pay claim. 132 Okl 1, 269P246. (5) Such order to pay claim not appealed from is sufficient to avert running of statute of limitations against claim. 132 Okl 1, 269P246. (6) Order for payment of claim is not open to collateral attack. 132 Okl 1, 269P246. [f] (4) Claim for funeral expenses of minor's indigent father will be disallowed where amount claimed is disproportionate to minor's estate and more than would be allowed for his own funeral. 8PaDist&Co 533. [h] **In Washington.**–151Wash525, 276P876.
1168-15½-New. Bill for removal of guardianship estate from the probate to the chancery court held to contain equity. 213Ala586, 106S140.
1169-37 103WVa227, 136SE857.
1169-42 112 Okl 13, 239P887.
1169-43 103WVa227, 136SE857, 859 [citCJ].
1170-53 112 Okl 13, 239P887; 133 Okl 242, 271P663.
1170-56 274US544, 47SCt706, 71L ed 1194.
1171-67 TexCivA 297SW482.
1171-68 124 Okl 123, 254P53. [a] **In Oklahoma.**–124 Okl 123, 254P53. [b] **County court has jurisdiction to order sale** of minor Creek Indian's undivided one-half interest in real estate. 133 Okl 109, 271P652.
1171-76½-New. Jurisdiction to order a sale of a minor's land is not destroyed or suspended by the fact that the title is in dispute, or that the land is in the occupancy of an adverse claimant. 124 Okl 123, 254P53.
1172-88 127 Okl 163, 260P58.
1172-89 127 Okl 163, 260P58.
1172-91 [a] (2) Sale of indivisible shares in land held void unless whole of land was sold. 218Ky666, 291SW1019.
1172-93 [b] **In Kentucky.**–213Ky614, 281SW807.
1173-9 151Wash120, 275P82, 65ALR794.
1173-10 218Ky666, 291SW1019.
1174-27½-New. A suit for the sale of an infant's property for reinvestment may be brought by the guardian appointed in the state where the real property is situated, notwithstanding the infant has been removed to another state and an attempt has been made there to appoint a guardian. 213Ky15, 280SW139.
1175-41½-New. The validity of a judicial sale through the county court sitting in probate does not depend on the accurate ascertainment of the interest of the minor or minors in the land sold, where it is alleged that the minors, whose estate is in probate, have an undivided interest in the property by inheritance from their deceased father. 122 Okl 12, 250P130.
1175-46 223Ky719, 48SW(2d)723; 103WVa227, 136SE857. [a] **In Virginia.**–152Va760, 148SE818 (decree void for want of necessary parties).
1176-53 [b] **Where guardian ad litem is appointed,** he remains so throughout action, not only for purposes of service of process. 215Ky270, 284SW1072.
1176-67 133 Okl 1, 270P846.
1177-75 215Ky270, 284SW1072.
1177-77 143 Okl 147, 288P285.
1177-81½-New. In a proceeding by a guardian for the sale of lands of an infant under fourteen years of age who has been absent from the state for more than four months, service is properly made on the father under some statutes, although no warning order is issued. 213Ky15, 280SW139.
1177-81½-New. In Philippines, where next of kin appear at hearing, fact that order authorizing sale is made before expiration of period of publication is immaterial. 51Philippine507.
1178-93 112 Okl 13, 239P887; 51Philippine507.
1178-94 112 Okl 13, 239P887.
1178-1 Ark 30SW(2d)837; 169Ga395, 150SE584; 119 Okl 28, 246P826.
1178-4½-New. The petition must contain at least a general description sufficiently definite to enable the court to identify the land by referring to competent extrinsic evidence. 119 Okl 28, 246P826.
1178-4½-New. A statement that minors whose estate is in probate have an undivided interest in the real property by inheritance from their deceased father is a sufficient description of their interest to give the county court sitting in probate jurisdiction to order a sale. 122 Okl 12, 250P130.
1178-5 227Ky466, 13SW(2d)494.
1178-16 223Ky719, 48SW(2d)723. [a] (2) 213Ky15, 280SW139. [c] (4) Petition sufficient. 141 Okl 24, 284P60.
1180-39 103WVa227, 136SE857, 859 [quotCJ].
1180-40 103WVa227, 136SE857, 859 [quotCJ]. [c] **Question of fact.**–152Va760, 148SE818.
1180-41 103WVa227, 136SE857, 859 [quotCJ].
1180-42 103WVa227, 136SE857, 859 [quotCJ].
1180-43 103WVa227, 136SE857, 859 [quotCJ].
1180-55 [c] **In Oklahoma.**–39 OklACR367.
1181-63½-New. A probate court has power to order a sale of all of the right, title, and interest of a minor in property sought to be sold. 122 Okl 12, 250P130.
1181-73½-New. An order authorizing the sale of all of the right, title, and interest of several minors in certain real estate, based on a petition stating that the minors have an undivided interest in the property, is not without the jurisdiction of the court, although it develops subsequently that some of the minors had no interest in the property and that the others had the entire interest. 122 Okl 12, 250P130.
1183-29 218Ky666, 291SW1019; TexCivA 98SW(2d)485.
1183-31½-New. Guardian's special bond filed on execution of fraudulent deed cannot be treated as taking place of purchase money never paid by grantee. Pa 151A676.
1184-47½-New. Failure of a bond to state a penal sum does not invalidate it when it otherwise complies with the statute. 213Ky15, 280SW139.
1185-58 222Ky504, 18SW(2d)955. But see 213Ky625, 281SW789.
1185-58½-New. Under some statutes the bond must be executed before the sale is ordered. 213Ky625, 281SW789.
1185-65 [b] **Sale of separate tracts belonging to different minors as one tract** is nullity where no separate designation of lands was made in petition, order of sale, notice, return, or order of confirmation. 135 Okl 269, 275P284.
1185-77 129 Okl 153, 263P1096. [a] 129 Okl 153, 263P1096.
1186-89 119 Okl 9, 247P379.
1186-95 See also 29PortoRico 951.
1187-3½-New. In Oklahoma a private sale is invalid where the bid is less than ninety per cent of the appraised value or where there has been no appraisement within a year prior to sale. 124 Okl 181, 254P972.
1187-3½-New. Under the Oklahoma statute, where the court is satisfied that the appraisement is too high or too low, it may cause a new appraisement to be made by new appraisers at any time before sale or confirmation thereof. 124 Okl 181, 254P972.
1187-3¼-New. The Oklahoma statute, prohibiting private sale of an infant's real estate unless the sum offered is at least ninety per cent of the appraised value thereof and unless such real estate has been appraised within one year of the time of sale, is mandatory and goes to the jurisdiction of the court to confirm a sale. 40 OklACR90.
1187-4 144 Okl 264, 291P124.
1187-13½-New. Some statutes do not authorize an exchange of a ward's property for other property. 118 Okl 135, 247P65.
1187-13½-New. It is fraud for a guardian to make an exchange of a ward's lands for other lands under guise of a sale. 118 Okl 135, 247P65.
1187-14 105Conn218, 134A792.
1187-17 But see 29PortoRico 951.
1187-24½-New. Occupants in adverse possession are not disqualified to become bidders and purchase the outstanding title of the minor to protect their possession, where such possession was acquired in good faith and not for the purpose of chilling bidding. 124 Okl 128, 254P53.
1187-28 213Ky625, 281SW789; TexCommnA 292SW862.
1188-29 [f] 98NJEq578, 131A611.
1188-33½-New. **Purchase by guardian from bona fide purchaser.** 98NJEq578, 131A611.
1188-35 213Ky625, 281SW789; 225Ky228, 7SW(2d)863.
1188-36 213Ky625, 281SW789.
1189-45½-New. An offer to purchase wards' lands will ripen into a contract of purchase and sale between the offerors and the court when the former file answers under oath confirming the offer in suit by guardian for sale of the land to which they are made parties. 152Va760, 148SE818.
1189-48 34Ariz245, 270P1044.
1189-51 But see 169Minn294, 211NW308.
1190-71½-New. Where a guardian and a ward are dead, the court on confirming an unauthorized sale need not appoint a guardian to execute confirmatory needs. 47RI 498, 134A1.
1190-73½-New. Where a decree of sale authorized the guardian of several wards to sell their lands in one tract or in separate tracts as was deemed beneficial, and the land of each ward was separately appraised, a return of sale describing the lands separately but reciting for which all land was sold as a lump sum does not preclude the court from ascertaining the amount received for the land of each ward. 113 Okl 206, 243P495.
1190-73½-New. Under the Oklahoma statute where the proceedings are otherwise in conformity to law, an order confirming a guardian's sale of real estate, pursuant to an order of sale made on the same date in the previous year, is a valid order and within the time prescribed by statute. 135 Okl 28, 273P224.
1190-74 47RI 498, 134A1.
1190-75½-New. Under Rhode Island statutes relating to confirmation of sales by a guardian, one who derived title through an unauthorized sale is entitled to apply for confirmation. 47RI 498, 134A1.
1191-92 120 Okl 261, 248P622. [c] **First purchaser may be liable for deficiency** on resale. 120 Okl 261, 248P622.
1191-94½-New. Where a bidder refuses to comply with an order of sale requiring the purchase price to be immediately deposited with a designated bank pending confirmation, there is no sale, and such bidder is without standing to object to confirmation of sale to another. 321 Ill 153, 151NE503.
1192-8½-New. Entry of order after the death of the ward is erroneous and subjects judgment to direct or collateral attack as void for want of jurisdiction, when the defect affirmatively appears on the face of the record. TexCivA 158SW(2d)734.
1192-13 [b] **Sale of land of several wards.**–113 Okl 206, 243P495.
1192-15 112 Okl 13, 239P887.

1192-17 124 **Okl** 181, 254P972; 141 **Okl** 24, 284P60.
1192-18 124 **Okl** 181, 254P972.
1192-19 227**Ky**466, 13**SW(2d)**494; 119 **Okl** 9, 247P379.
1192-23 [a] (2) Evidence held to show substantial conformity with court rules in sale. 129 **Okl** 153, 263P1096. [b] **Presumptions.**-37 **OklACR**469. [c] **Continuance of hearing.**-144 **Okl** 264, 291P 124. [d] **Authority to accept higher bid after continuance.**-144 **Okl** 264, 291 P124.
1193-25½-New. Validity of sale is question of fact and its effect one of law. 144**Okl** 264, 291P124.
1193-29½-New. A purchaser at a guardian's sale cannot maintain an action to quiet title against the minor during minority and thereby attempt indirectly to defeat the right of appeal of the minor, especially where the effect would be to subject the same parties to repeated litigation over the same subject matter. 112 **Okl** 180, 240P321.
1193-36½-New. Under the Oklahoma statute, where a sale is confirmed within one year from the time the order of sale was issued, a deed issued pursuant thereto passes title although not executed and delivered until after the expiration of such period. 135 **Okl** 28, 273 P224.
1193-40 But see 29**PortoRico** 951.
1194-54 **TexCommnA** 288**SW**143; **Tex CivA** 3**SW(2d)**576. [b] **Any description sufficient in voluntary deed of individual** is sufficient in deed of guardian. **Tex CivA** 282**SW**935. [c] **Where deed purported to convey "undivided interest"** in land conveyed to minor by metes and bounds, such words will be rejected as false and deed sustained where description otherwise sufficient to identify land. **TexCivA** 282**SW**935.
1194-55 See also **TexCivA** 282**SW**935.
1194-60 169**Ga**395, 150**SE**584.
1194-60½-New. **Deed to person other than purchaser.** Where a purchaser of an undivided interest of a royalty reserved to a ward in an oil and gas lease, after the making of the purchase and confirmation of the sale, agrees to convey such interest to another, and the guardian executes a deed to such subpurchaser and the original purchaser also executes a quitclaim deed to him and he pays the purchase price to the guardian, the conveyances are voted in the absence of fraud, collusion, or injury to the ward. 117 **Okl** 79, 245P866.
1194-61 130 **Okl** 197, 266P451.
1194-63 But see **Ga** 155**SE**183.
1194-65 **TexCivA** 297**SW**482, 485 [quot CJ].
1194-67½-New. Where a petition for the sale of land of several minors stated that each owned an undivided interest in the land inherited from their deceased father, and the court ordered a sale of all of the right, title, and interest of each of the minors, and it subsequently appeared that some of such minors had no interest in the property and that the others owned the entire interest, the purchaser acquires the full title as against those minors who owned it. 122 **Okl** 12, 250P130.
1195-77½-New. Void sale not validated by curative statute. **Ark** 30**SW(2d)**837.
1195-83 [a] (2) County court in Oklahoma has jurisdiction to hear and determine issues raised by guardian's motion to vacate order of confirmation for failure of purchaser to comply with terms of sale, made after confirmation of sale but before acknowledgment of deed, and to sustain or overrule same. 40 **Okl ACR**422, 250P793. (3) County courts are without jurisdiction after delivery of deed pursuant to confirmation of sale. 130 **Okl** 286, 267P268.
1195-86½-New. Action by a ward to vacate the sale of land after a deed is delivered must be brought in the county where the land involved or some part thereof is situated and not in the county where guardianship proceedings were had unless the land is situated in that county. 133 **Okl** 239, 271P660.
1195-86½-New. The county court has no jurisdiction in a proceeding by a ward to set aside a decree of sale of land where a deed therefor has been executed and delivered. 133 **Okl** 242, 271P663.
1195-86¼-New. Some statutes do not authorize county courts to vacate or set aside decrees of sale, orders of confirmation, or a guardian's deed after a guardian's deed, executed pursuant to order of court, has been delivered. 137 **Okl** 235, 278P1088.
1196-92 37 **OklACR**250; 38 **OklACR** 461. [b] (1) But see 38 **OklACR**461.
1196-93½-New. where the attorney conducting the sale was in the employ of the purchaser and the sale was made in the interest of the purchaser rather than the infant and for an inadequate consideration; 125 **Okl** 282, 257P793.
1196-96½-New. A sale may be set aside for gross inadequacy of consideration amounting to fraud. 240**Mich**387, 215 **NW**295.
1196-2½-New. or that the statements in the petition were false, 112 **Okl** 13, 239 P887.
1196-2⅓-New. or that the testimony on material questions was false and perjured, 112 **Okl** 13, 239P887.
1196-2¼-New. unless it concerned some extraneous fraud practiced on the court, 112 **Okl** 13, 239P887.
1196-3 227**Ky**466, 13**SW(2d)**494.
1196-4 12**LaA**18, 123**S**452 (collateral attack by heirs not maintainable); 138 **Okl** 208, 281P276; 33**PortoRico** 980, 984 [citCJ]. [b] **Want of service of notice of appointment on minor's mother and** grandmother does not render appointment of guardian void so as to defeat sale. 138 **Okl** 208, 281P276. [c] **Appointment of guardian for minor Creek freedman before removal of restrictions** on sale through act of congress did not affect validity of sale of ward's real estate after effective date of statute. 138 **Okl** 208, 281P276.
1196-6 8**F(2d)**236; 112 **Okl** 13, 239P 887. But see 240**Mich**387, 215**NW**295.
1197-9 223**Ky**719, 4**SW(2d)**723.
1197-12½-New. Where the ward's interest is regularly sold and all proceedings of the guardian and of the court are regular up to the confirmation of the sale, no irregularity on the part of the guardian in collecting the bid and closing the sale is material where the ward is not prejudiced thereby. 117 **Okl** 79, 245P866.
1197-12⅓-New. Where a decree of sale authorized the guardian of several wards to sell their lands in one tract or in separate tracts as was deemed beneficial and the land of each ward was separately appraised and the return of sale described the lands separately but recited the price for which all lands were sold as a lump sum, the proceedings do not necessarily result in a sale of the lands of the several wards or of any one of them for the benefit of another so as to require the sale to be set aside. 113 **Okl** 206, 243P495.
1197-12¼-New. A sale will not be annulled at the suit of the purchasers for a defect of the parties in the original proceeding, but the defect will be cured by further proceedings with all the proper parties impleaded. 152**Va** 760, 148**SE**818.
1197-14 **TexCivA** 297**SW**482.
1197-18 [a] **Right to sue to recover property within period fixed by statute** is material, subsisting, and valid right under statute. 137 **Okl** 235, 278P1088.
1197-25 130 **Okl** 83, 265P124; 137 **Okl** 235, 278P1088.
1197-27 105**Conn**218, 134**A**792 (delay of sixteen years, during which principal parties died, held laches).
1198-33 33**PortoRico** 359.
1198-39 135**Wash**214, 237P308.
1198-40 135**Wash**214, 237P308.
1198-45½-New. and, if it states grounds for equitable relief, is not subject to demurrer. 94**Fla**209, 113**S**712.
1198-53½-New. Evidence not responsive to pleadings is inadmissible. 12**LaA** 18, 123**S**452.
1199-70 138 **Okl** 208, 281P276 (finding as to minor's residence); 144 **Okl** 227, 291P542. [a] **Evidence held insufficient.** -8**F(2d)**236.
1199-71 See also 141 **Okl** 24, 284P60.
1199-85½-New. An order of the county court sustaining or overruling a guardian's motion to vacate the order of confirmation for the purchaser's failure to comply with the terms of sale, made before the acknowledgment of the deed, not appealed from, is final. 40 **OklACR** 422, 250P793.
1200-90 336 **Ill** 316, 168**NE**259; 169**La** 870, 126**S**221; 112 **Okl** 13, 239P887; 112 **Okl** 130, 240P321; 113 **Okl** 275, 240P 1060; 118 **Okl** 266, 248P567; 33**Porto Rico** 980, 984 [citCJ]. [a] (5) Judgment of confirmation of sale precludes inquiry as to adequacy or inadequacy of price in collateral proceeding in absence of fraud on part of party obtaining it. 112 **Okl** 13, 239P887. [b] (3) **TexCivA** 3**SW(2d)**576 (plea). (4) 113 **Okl** 265, 242P185. [d] (3) Where record of guardian's sale of real estate shows that sale was made and confirmed as one for cash and that deed was executed for cash, and that thereafter court authorized loan of cash or part of it to purchaser, and that such loan was made and was evidenced by bond and mortgage, presumption is that both transactions were valid and price fraud. 112 **Okl** 27, 239P465. [e] **Want of jurisdiction must appear on face of record.**-113 **Okl** 265, 242P185. [f] **Decree of sale from competent court is** protection to purchaser. 169**La**870, 126 **S**221.
1200-91 113 **Okl** 265, 242P185.
1201-92 336 **Ill** 316, 168**NE**259; 130 **Okl** 197, 266P451; 142 **Okl** 138, 285P845 (fraud extraneous to record). [b] **Evidence of fraud must be clear, cogent, and convincing.**-112 **Okl** 27, 239P465. [c] **Suit in equity to set aside order for sale and subsequent deeds** does not constitute collateral attack. 240**Mich**387, 215**NW**295.
1201-94 112 **Okl** 113, 239P887.
1201-94½-New. Orders for and confirming the sale of real estate are subject to collateral attack where the required bond is not ordered or given. **TexCivA** 9**SW(2d)**485.
1201-96 169**La**870, 126**S**221; 29**Porto Rico** 951; 33**PortoRico** 980, 985 [citCJ].
1201-97 113 **Okl** 275, 240P1060.
1201-3 223**Ky**719, 4**SW(2d)**723; 144 **Okl** 264, 291P124.
1201-4½-New. A statute relative to actions to quiet title cannot be used to abridge or destroy, by suit during minority, a ward's right to attack a guardian's sale of land for fraud. 137 **Okl** 235, 278P1088.
1201-4½-New. Where a ward, during minority, dismisses an action to quiet title and recover possession of land sold by his guardian, the purchaser cannot, over objection of the minor, maintain a cross petition to quiet title during the ward's minority. 137 **Okl** 235, 278P1088.
1201-6 177**Ark**101, 5**SW(2d)**723; 144 **Okl** 264, 291P124.
1201-9 120 **Okl** 261, 248P622. [b] **Good faith always presumed and** complaint in suit to annul sale must show lack thereof in parties participating. 29 **PortoRico** 951.
1202-11 120 **Okl** 261, 248P622.
1202-14 144 **Okl** 264, 291P124. See also 96**Fla**455, 118**S**216.
1202-19 132 **Okl** 141, 269P1067.
1203-33 37 **OklACR**250.
1203-34 37 **OklACR**250.
1204-39 132 **Okl** 141, 269P1067; 37 **Okl ACR**250.
1205-67 214**Ala**593, 108**S**536, 46**ALR** 1201.
1205-75 [a] (2) Sale is not invalidated by misapplication by guardian of part of purchase money to obtain lease from buyer unless done pursuant to agreement before sale. 127 **Okl** 163, 260P58. [d] **Minors cannot complain against one** acquiring title from vendee of tutor when tutor failed to account to them for price. 169**La**870, 126**S**221.
1206-85 82**Colo** 297, 259P517. But see 54**SD**277, 223**NW**50.
1206-99 38 **OklACR**283. [d] **Under statute authorizing mortgage** for "best interest of the estate" court may order mortgage for purposes other than maintenance and education or payment

of debts or expenses of guardianship, if for greatest advantage of estate. 67 Utah60, 245P966.

1206-1 38 OklACR283; 67Utah60, 245 P966 (court cannot authorize mortgage of minor's property to protect their interest in stock of failing corporation, which interest was subject to mother's life estate, such action not being for "best interests of the estate"). [a] **In Oklahoma.** 135 Okl 177, 274P867.

1206-5 [a] **Court cannot order mortgage of minor's property** to secure obligation of another. 67Utah60, 245P966.

1207-8 [a] **Jurisdiction of county court.**—TexCivA 308SW(2d)690.

1207-9 67Utah60, 245P966 (order authorizing mortgage should be made in formal application or petition).

1207-11 TexCivA 308SW(2d)690.

1207-11½-New. A guardian's petition reciting an overdue encumbrance and the necessity of making an improvement has been held to authorize mortgaging the land. 82Colo 297, 259P517.

1207-11½-New. The insufficiency of a guardian's petition does not make an order authorizing a mortgage on the ward's land void for want of jurisdiction. 82Colo 297, 259P517.

1207-12 See also TexCivA 308SW(2d) 690.

1207-14 [a] **Recital in order** that mortgage is for best interests of minor's estate is not conclusive where mortgage was authorized principally to secure obligations of others. 67Utah60, 245 P966.

1207-17½-New. A guardian's failure to expend money for improvements in accordance with a petition for authority to execute mortgage does not affect the validity of the order. 82Colo 297, 259 P517.

1207-17½-New. Failure of an order authorizing a guardian to mortgage real estate to fix the amount of the loan does not invalidate the order. 82Colo 297, 259P517.

1207-17½-New. An attempt to authorize mortgaging the ward's real estate for two years beyond minority has been held not to invalidate an order. 82 Colo 297, 259P517.

1207-29½-New. Foreclosure of a mortgage executed by a guardian precludes review of the contention that it was security for the guardian's personal indebtedness. 82Colo 297, 259P517.

1207-29½-New. A minor's suit after majority to vacate foreclosure constitutes a direct and not a collateral attack on the foreclosure decree. 82Colo 297, 259P517.

1207-29½-New. A court need not grant permission to foreclose a mortgage executed by a guardian on the ward's property. 82Colo 297, 259P517.

1207-29½-New. A finding in a foreclosure suit that the note on which judgment was rendered was identical to the note secured by the mortgage cannot be reviewed in a subsequent suit to vacate the foreclosure. 82Colo 297, 259 P517.

1207-29½-New. Contention that foreclosure should not be made because of misdescription of the note is without force in a subsequent suit to vacate foreclosure. 82Colo297, 259P517.

1207-29½-New. The contention that a guardian signed a note secured by mortgage on the ward's property in his individual capacity cannot be considered in a suit to vacate foreclosure. 82Colo 297, 259P517.

1207-29½-New. Failure to make the guardian a party to foreclosure under a mortgage on the ward's property does not make the decree void or voidable. 82Colo 297, 259P517.

1207-32 [b] 28F(2d)590; 112 Okl 13, 239P887.

1208-34 [a] 112 Okl 13, 239P887; 36 OklACR484. [c] **Lease of lands for agricultural purposes.**—113 Okl 153, 240P119.

1208-34½-New. Inadequacy of consideration for the extension of leases based solely on a disparity between the price paid for the extension and the purchase price paid for the assignment is not sufficient to authorize cancellation of the extension approved by the court. 27 F(2d)170.

1208-35 119 Okl 294, 249P386.

1208-36½-New. Validity of an oil and gas lease contract by the guardian of several minors, covering several tracts of land, some of which are owned by some of the minors severally and others of which are owned by all of the minors in common see 40 OklACR479 [reh pending].

1208-36½-New. In Philippines guardian, under power granted by court, can lease ward's lands for more than six years. 51Philippine862.

1208-36½-New. Court's approval of guardian's accounts including rents from leased land does not constitute approval of lease. 51Philippine862.

1208-42½-New. Where, in probate proceedings for the sale of an oil and gas lease, the land is described as a stated quartersection in a stated township, the sale cannot be treated as one of an oil and gas lease covering a different quartersection in such township on the ground of mistaken description where none of the sale proceedings refer to the latter description. 119 Okl 28, 246P826.

1208-42½-New. Substantial compliance with a rule of court providing for notice of application for sale of a mineral interest for sale to the highest and best responsible bidder, for approval by the court is sufficient in a proceeding for a sale of an oil and gas lease extending beyond the minority of the ward. 36 OklACR484.

1208-42½-New. A statutory provision, requiring notice to be given to a defaulting purchaser before the court may order a resale of real estate, does not apply to the resale of an oil and gas lease. 119 Okl 294, 249P386.

1208-42½-New. A guardian's sale of an oil and gas lease made without any attempt to comply with a supreme court rule that no sale be made until the petition has been filed five days is wholly void. 134 Okl 229, 273P228.

1208-42½-New. Extension of lease without public sale as required by a rule of court is void. 27F(2d)470.

1208-43 34F(2d)948.

1208-44½-New. Under some court rules no oil and gas or other mineral lease covering lands belonging to minors may be approved except on sale in open court to the highest and best responsible bidder and upon petition duly filed and after publication and posting of notice of sale. 43 OklACR91 [reh pending].

1208-45½-New. A judgment confirmation precluded inquiry in a collateral proceeding as to the question of adequacy of purchase price paid for an oil and gas lease sold under an order of a court. 112 Okl 13, 239P887.

1208-47½-New. Ratification. A ward who after attaining majority, accepts, with knowledge of the circumstances, the benefits of an oil and gas lease executed and delivered by his guardian during his minority through probate sale proceedings, thereby ratifies and adopts the conveyance provided he could have executed a valid conveyance at the time the benefits were accepted. 119 Okl 28, 246P826.

1208-47½-New. A party defending an action to quiet title against such lease on the ground that the ward's ratification and adoption thereof must plead the acts of the ward after attaining majority upon which he relies. 119 Okl 28, 246P826.

1208-50 168Ark763, 271SW714; 102NJ Eq393, 141A16.

1208-53 [f] **In Hawaii.**—27Hawaii343.

1209-55 [b] **Strict adherence** to method prescribed by law for settlement of estate by guardian should be had, protection of ward being chief concern of courts. 138SC86, 135SE643.

1209-68½-New. Guardian is not in default as to ward's funds until demand is made on him and he fails to comply with it. 254 IllA96.

1211-99 203 Iowa1338, 214NW556. But see 167Ga63, 144SE770.

1211-10 Wash 290P1003.

1211-18 81Mont161, 263P90.

1212-26½-New. In Pennsylvania the guardian of a minor must file his account in the office of the register of wills. 9PaDist&Co 79.

1213-47 227Ky114, 12SW(2d)298. [b] (3) Check payable to guardian himself, or to partnership in which he was interested, was not sufficient voucher. 227Ky 114, 12SW(2d)298. (4) Unindorsed check was not sufficient. 227Ky114, 12 SW(2d)298.

1213-48 151Wash525, 276P876.

1214-56 154Wash470, 282P845.

1214-56½-New. The court may, upon settlement of accounts of a guardian, determine whether fiduciary has been guilty of misconduct, although wrongdoing was not raised by the filing of formal objections. 243NY499, 154NE 538.

1214-56½-New. An action charging conspiracy to obtain land of plaintiff ward, participated in by a guardian, is in effect an action to compel the guardian to account and not one to recover the land itself. 16F(2d)45.

1214-57 125Kan403, 408, 265P66 [quot Cj].

1214-58 125Kan403, 408, 265P66 [quot Cj].

1214-59 [a] (1) 26F(2d)777.

1214-60 16F(2d)45, 48 [citCyc]; 247 IllA175; 125Kan403, 408, 265P66 [quot Cj].

1214-61 125Kan403, 408, 265P66 [quot Cj].

1214-62 125Kan403, 408, 265P66 [quot Cj].

1215-63 [a] (2) Order approving guardian's final account and discharging him and sureties six years after ward's death held within court's power. TexCivA 19 SW(2d)862.

1215-76½-New. In Washington the superior court has jurisdiction to render orders and judgments as necessity requires. 152Wash250, 277P846.

1216-79 114 Okl 72, 243P501.

1216-82 114 Okl 72, 243P501.

1216-84½-New. Where guardian dies before final settlement, former ward has right of action in superior or district courts against his personal representatives and sureties on his bond. 114 Okl 72, 243P501.

1216-88 See also 114 Okl 72, 243P501.

1216-94 155Tenn565, 48SW(2d)955.

1217-4 155Tenn565, 48SW(2d)955.

1217-9 Okl 291P33.

1217-15 138SC86, 135SE643.

1219-56½-New. Persons participating with guardian to defraud ward of lands are properly joined as parties defendant. 16F(2d)45.

1219-59 Cal 286P1008; 115 Okl 35, 241 P132.

1219-60 115 Okl 35, 241P132.

1219-61 115 Okl 35, 241P132.

1220-95 16F(2d)45.

1221-15 56ND60, 215NW913, 916 [cit Cj].

1221-16 56ND60, 215NW913, 916 [cit Cj].

1221-20 [a] **Want of good faith and** reasonable diligence in retaining ward's stock in corporation which became bankrupt held not presumed in view of evidence. 215Ala484, 111S208.

1222-27½-New. A son's expenditure in excess of his income will be presumed as prompted by a filial duty. 151Wash 525, 276P876.

1222-29 [a] (4) **As to understanding** between guardian and probate court that guardian would be reimbursed for expenses in caring for ward who was her grandchild. 123Kan491, 255P1108.

1222-39 [a] (10) To sustain order requiring account. 152Wash250, 277P846. (11) To sustain decree that guardian was indebted to estate in specified sum. 150Wash355, 272P978. (12) Other evidence held sufficient. 169Minn294, 211 NW308; SC 135SE643.

1223-57 41OklACR85.

1224-76 165La478, 115S662.

1224-92½-New. A personal judgment against a widow as administratrix has been held improper, where the widow's participation arose after funds were commingled and used for support of the family. 154Wash470, 282P845.

1224-92½-New. Compound interest has been held improperly allowed against an administratrix of a guardian's estate where the guardian was not required to

account during his life time and the administratrix was not a guilty party. 154 Wash470, 282P845.

1225-16½-New. Error cannot be predicated on a decree because the form precludes literal compliance. 152Wash250, 277P846.

1225-27 MoA 5SW(2d)457. [a] **Allowance of commissions to guardian may be reduced** where overcharge is shown. MoA 5SW(2d)457.

1226-30 [a] (4) Guardian's reports filed in county court may be admitted as evidence in trial of case on appeal, not only for purpose of establishing any fact therein set forth, but also for purpose of impeaching any fact set forth in substituted and amended final report. 132 Okl 181, 269P1074.

1226-34½-New. On appeal in the district court, the filing of an amended account in lieu of former reports filed in the county court is not a change of the issues, but is the filing of a new pleading pertaining to the same matters. 132 Okl 181, 269P1074.

1227-65 But see 229Ky608, 17SW(2d)712.

1227-69½-New. Where a statement of facts in a motion for writ of certiorari to bring up a transcript of the testimony to the probate court on final settlement of a guardianship account disclosed that no bill of exceptions had been reserved or certified, and that the time within which such bill may be signed was then long past, motion was held properly overruled. 214Ala163, 106S691.

1227-69¼-New. Where a bill of exceptions did not show error in determination of the guardian's account, the circuit court was held properly to have overruled a motion for new trial. 214 Ala163, 106S691.

1227-69¼-New. On appeal from judgment or decree of the probate court on a guardian's final accounting, evidence may be reviewed by the circuit court by a bill of exceptions. 214Ala163, 106S 691.

1228-77 97PaSuper502.

1228-87½-New. Where appellant has restricted issues on appeal to items of account specified in his notice, the judgment of the district court should affect the decision or decree appealed from only as to matters specified. 56ND60, 215NW913.

1228-88 41 OklACR85.

1228-91½-New. The court may examine any improvident expenditures of a guardian on appeal from final settlement. 229Ky608, 17SW(2d)712.

1228-91¼-New. In the absence of written exceptions, the court of appeals will not revise or reverse an order confirming the settlement of a guardian's account. 229Ky608, 17SW(2d)712.

1228-91¼-New. On appeal from the circuit court, the final settlement is reviewable on the law and the facts. MoA 5SW (2d)457.

1228-91½-New. Supreme Court may render judgment on appeal without remand where evidence is before it. 217 Ala93, 114S692.

1229-96½-New. The courts do not favor the practice of settlement of trust estates out of court. 138SC86, 135SE 643.

1229-97 Iowa 230NW397.

1229-99 16F(2d)746. [e] 16F(2d)746.

1229-4 Iowa 230NW397.

1230-15½-New. Release unsupported by consideration is void. 16F(2d)746.

1230-15½-New. However, settlement of controversy will support release. 16 F(2d)746.

1231-33 214Ala593, 108S536, 46ALR 1201; 169Minn294, 211NW308; Tex CommnA 286SW167. [a] (1) 168Ark763, 271SW714. (2) Guardian is liable for payments to him in nature of dividends made by corporation in which wards owned all but one share of stock. Tex CommnA 286SW167. [c] **Interest or income from reinvestment.**–214Ala593, 108 S536, 46ALR1201.

1231-34 168Ark763, 271SW714.

1231-37 38OklACR283 (money invested in mortgaged land).

1232-47 128 Or94, 265P1087.

1232-48 MoA 5SW(2d)457.

1232-56½-New. Where a ward living with a guardian earned his board and other necessities, the expense thereof cannot be set off against the ward's funds in the guardian's hands. 208 Iowa 191, 225NW258, 64ALR687.

1232-56½-New. Where infant did not disaffirm transaction within statutory period or restore consideration, guardian should be allowed credit therefor in his account. 56ND60, 215NW913.

1232-60 135Misc118, 236NYS685 (only where accounts properly rendered); Okl 291P33. [c] **Guardian is not confined to commission on funds handled,** but is also entitled to reasonable compensation for other services rendered ward. 229Ky 608, 17SW(2d)712. [d] **Veterans bureau's order is not limitation on probate court's power** to allow reasonable compensation to guardian of veteran. Mass 172NE111.

1232-61 NJ 130A733 (not entitled to commissions until allowed by court).

1233-75 229Ky608, 17SW(2d)712; 118 Or210, 246P713.

1233-76 116Nebr591, 218NW380; 128 Or94, 265P1087; 150Wash355, 272P978. [f] **Allowance of one thousand five hundred dollars** held not excessive. 229Ky 608, 17SW(2d)712.

1233-76½-New. Interest should not be paid on sum fixed as compensation of special guardian by order of court. 125 Misc354, 211NYS626.

1234-85 27Hawaii343.

1234-86 27Hawaii343; 229Ky608, 17 SW(2d)712.

1234-87 [g] **In Oklahoma.**–127 Okl 210, 260P452.

1235-11 213Ala33, 104S244; 215Ala 484, 111S208; 27Hawaii439; MoA 5SW (2d)457; 97PaSuper502; 152Wash250, 277P846. [c] MoA 5SW(2d)457. [e] **Where guardian expended all income received for benefit of ward,** and there was no present fund in guardian's possession from which payment could be made for commissions, guardian could recover commissions. 134Misc374, 235NYS461.

1235-17 208 Iowa191, 225NW258, 64 ALR687.

1235-20½-New. A guardian who knowingly and wrongfully fails to account to his ward for money in his hands belonging to the estate is not entitled to commissions thereon. TexCivA 280SW254.

1235-20½-New. Intimation by guardian of his intention to waive commissions in no way affects rights of parties on question whether he could recover them. 134Misc374, 235NYS461.

1235-21 178Ark911, 12SW(2d)901.

1235-22 217Ala93, 114S692; 27Hawaii 343; TexCivA 280SW254.

1236-40 208 Iowa191, 225NW258, 64 ALR687.

1237-43 214Ala10, 106S188.

1237-44 See also 152Wash250, 277P 846.

1237-52½-New. A general guardian is not entitled to attorney's fees for procuring the sale of land in a cross bill, where the petition for sale was embraced in the original petition. 214Ala10, 106 S188.

1237-58 165La478, 115S662; Tex CommnA 288SW148.

1238-59 Cal 286P1008; 179Minn523, 229NW785.

1238-63 227Ky114, 12SW(2d)298.

1239-73½-New. Where the probate court has directed a guardian to turn over to remaindermen property in his hands in which his deceased ward had a life estate, the remaindermen may maintain an action against the guardian to recover it. 169Minn304, 211NW314.

1239-73½-New. Report held not conclusive on matters of waiver of a ward's rights to an entire fund received in the sale of land. 214Ala593, 108S536, 46 ALR1201.

1239-74 41 OklACR85.

1239-77 41 OklACR85.

1239-78 215Ala484, 111S208; 41 Okl ACR85.

1239-80 [a] **Partial settlement** is not subject to review by appeal. 215Ala 484, 111S208.

1239-83 215Ala484, 111S208.

1240-88½-New. Allowance of a partial or periodical accounting by a guardian without notice to parties interested operates as an admission against interest by the guardian and is prima facie evidence against him. 41 OklACR85.

1240-90 241 IllA96.

1240-92 82Colo 251, 258P1114.

1240-95 129 Okl 300, 264P885.

1241-97 117 Okl 83, 245P50 (petition held sufficient).

1241-5 241 IllA96; 129 Okl 300, 264P 885.

1242-16½-New. That part of the property charged to the guardian did not belong to the ward is not ground for setting aside a judgment settling the guardian's accounts, where all parties interested turned the property over to the guardian and he treated it as in his hands as guardian and the judgment distributed it to those entitled. 169 Minn310, 211NW316.

1242-18 [a] **Ward has been held not a necessary party** in suit against surety. 129 Okl 300, 264P885.

1243-35½-New. In some jurisdictions the probate court may, at any time in furtherance of justice, reopen proceedings relating to the settlement of accounts of conservators which have been irregularly made and procured by fraud or mistake. 82Colo 251, 258P 1114.

1244-64 [b] 179Minn523, 229NW785; 116Nebr591, 218NW380.

1245-74½-New. Fact that on appeal from decree allowing application for rehearing after hearing on oral testimony presumption will favor judge's finding is no reason for permitting trial on depositions. 213Ala33, 104S244.

1246-97 SD 226NW565.

1246-99 [b] **Rule does not apply** where money was received by sister of soldier as allotment under War Risk Insurance Act for benefit of Soldier's infant child. 212Ala522, 103S561.

1246-12½-New. When the estate of a ward is threatened with loss by mismanagement, the remedy in equity is preventive as well as compensatory. 218Ala530, 119S220.

1246-12½-New. In a suit to protect the estate from mismanagement, equity must be done on both sides. 218Ala530, 119S220.

1247-21 204 Iowa20, 214NW712. [b] **Ordinary may sue under statute,** to recover money due minor from benefit insurances. 36GaA734, 137SE847. [c] **Infant may sue by natural guardian** where he has no legal guardian. 318 Mo 1206, 5SW(2d)46.

1247-24 [b] **In Alabama.**–129S23.

1248-46 [a] **Written approval of court or judge** not necessary to maintain or defend action for partition. 118 Okl 266, 248P567.

1248-67 318 Ill 570, 149NE469; 124 Or237, 264P459.

1249-77 But see 219Ala199, 121S718.

1249-79½-New. Where a tutor of minors alleged to own a vessel which is movable did not sell it within a month after inventory was closed, as required, but used the vessel as his own, and the vessel was thereafter seized under an attachment against the tutor, the tutor cannot recover damages alleged to have resulted from such seizure. 168La27, 121S180.

1249-79½-New. A guardian cannot, where his ward and another owned a bank account on which either could draw and which was to belong to survivor, maintain an action in tort to recover exclusive possession of the bank book. 258Mass417, 155NE457.

1251-36½-New. Where insurer brought suit to set aside compensation award, burden was on insurer to make ward over twenty-one party, if necessary. TexCivA 278SW(2d)838.

1253-70½-New. In a suit by a guardian to recover a ward's money invested in defendant's stock, the fact that the original investment was unlawful does not deprive defendant of the right to offset dividends paid to the guardian. TexCivA 281SW300.

1253-76 [a] (2) 77CalA599, 247P249.

1254-83 [e] **In Massachusetts.**–252Mass 111, 147NE562.

1254-84½-New. Court of equity may declare null and void a waiver by

guardian of provisions of will in favor of ward, if the waiver is in interest of guardian or persons other than ward. 254Mass57, 149NE626.

1254-84½-New. Controversy between a guardian and the maternal relatives of minor children is a matter that should be adjudicated by the courts of their domicile. 227Ky788, 148SW(2d)181.

1254-84½-New. Statute confers jurisdiction on court of common pleas to entertain action of guardian for direction and judgment of court in respect to ward's estate. 121 Oh401, 169NE450.

1254-89 [a] **In absence of statute of venue general law governs** in actions against guardians. 155Tenn565, 48W(2d)955.

1254-93 [a] **Guardian of nonresident minor,** though beneficiary in life insurance policy, may sue insurer within state on claim. 80Colo448, 252P888.

1255-6 140 Okl 292, 283P563(2dcase).

1256-15½-New. Recording of a deed by a guardian pursuant to sale on a court order sets the statute running against the ward. 140 Okl 292, 283P563(2dcase).

1256-28 57ND381, 222NW256.

1256-29 TexCivA 276SW750; TexCivA 30SW(2d)690.

1257-40½-New. That a guardian brought suit as next friend instead of guardian is not available to him in avoidance of guardianship proceedings after trial of the case. 206 Iowa1263, 222NW16.

1258-71 318 Ill 570, 149NE469.

1258-71½-New. Action for personal injuries to a ward may be brought in the guardian's name as well as in the ward's name. 318 Ill 570, 149NE469.

1260-4 47RI 359, 133A348.

1260-20½-New. In a bill to disaffirm the investment of funds of a minor by the guardian in purchasing realty, the realty company managing the property was a proper party respondent, where the company was shown to occupy a fiduciary relation to the parties, although the realty company was not guilty of any wrong. 218Ala530, 119S220.

1260-25 50SD269, 209NW544.

1261-29½-New. In an equity proceeding at the instance of a local guardian concerning disposition of the funds of foreign wards, it is error to dismiss intervention by the wards' foreign guardian. 169Ga36, 149SE567.

1261-38 9LaA467, 119S736.

1262-57 27 OhNPNS129 (statutory action for sale of entailed real estate).

1262-59 TexCivA 276SW750.

1262-62 [c] (6) Failure to obtain court's approval of contract to purchase in action by vendor against guardian. Iowa 232NW670.

1263-66 [a] **In Georgia.**-36GaA734, 137SE847.

1264-75 [c] (4) Other instances. 86 Mont33, 281P753.

1264-91 27 OhNPNS129.

1264-98 318 Ill 570, 149NE469.

1265-99½-New. Plea of not guilty in a guardian's suit for personal injuries to a minor admits plaintiff's representative capacity in the suit. 318 Ill 570, 149NE469.

1265-2 124 Or237, 264P459.

1265-4½-New. A plea in abatement by nonresident guardian alleging only nonresidence is insufficient to raise an objection of inability to sue as a guardian. TexCivA 296SW647.

1265-5 233Ky600, 26SW(2d)516 (court rule construed).

1265-19 [d] **Burden on defendant.**-40GaA431, 149SE799(2dcase).

1266-21 241 IllA96.

1266-27 [b] **Presumption of regularity does not apply** where guardian, in good faith, invested ward's funds without being qualified to administer them. 40GaA431, 149SE799(2dcase).

1267-28½-New. Resale by the purchaser to the tutor will not be presumed fraudulent after several years of silence by the minors. 167La1103, 120S872.

1267-39 [a] (1) 50SD269, 209NW544, 545 [citCJ].

1268-40 [a] (9) To sustain finding that ward received benefit of money borrowed to full amount thereof. 204 Iowa449, 215NW498. (10) To justify finding that bank loaning money of minor wards on second mortgage, which was valueless, obtained trust funds of wards through fraud. SD 226NW565. [b] (5) To justify finding that husband of guardian relied on bank and its officers in making loan of wards' funds on valueless second mortgage. SD 226NW565. [c] (7) Valid gift to guardian. 99NJEq688, 133A538. (8) What portion of expenditures noted in return was disbursed from ward's funds. 40GaA431, 149SE799(2dcase). (9) To support recovery for board, clothing, and other items furnished ward under oral agreement with guardian. Nebr 230NW251. (10) Deed to wife of grantor's committee was cloak for conferring benefit on husband. Va 153SE807.

1268-43 [a] **Questions for court.**-290 Pa65, 138A539.

1268-44 175Ark716, 300SW401.

1268-45 118 Okl 135, 247P65.

1269-46 [a] **Nonsuit held properly granted.**-69Utah376, 255P430.

1269-48½-New. A verdict failing to allow a guardian a proper credit is within the amount to which the ward is entitled where it fails to allow the ward interest to which he is entitled in a greater amount. 40GaA431, 149SE799 (2dcase).

1269-54 17F(2d)713.

1269-55 17F(2d)713.

1269-56 17F(2d)713.

1269-67½-New. Judgment against a guardian for moneys borrowed for the benefit of the estate and permitting the bank to retain security pledged without authority modified to direct the return of the security to the guardian. 204 Iowa449, 215NW498.

1269-67½-New. Even though such judgment was approval of the hypothecation, the court did not thereby surrender its jurisdiction over the hypothecated property. 204 Iowa449, 215NW498.

1270-83½-New. Guardian is only person who has authority to receive payment and enter satisfaction of judgment, and such receipt and satisfaction are binding on ward. 318 Ill 570, 149NE469.

1271-9½-New. Where ward becomes of age, guardian need only notify him of decision so that he may have opportunity to appeal. 290Pa65, 138A539. [a] **Appeal will be decreed individual appeal of ward,** though taken by guardian, where appellee is willing. 290Pa65, 138A539.

1271-21 318 Ill 570, 149NE469.

1271-26 86Mont33, 281P753.

1272-33 101NJEq350, 139A812.

1273-43 BC [1927] 3DomLR151.

1273-48 198NC790, 153SE401.

1274-50½-New. In the absence of statute or rule of comity a guardian is not entitled to exercise any right or authority of his office over the person or property of his ward in any other country or state. 48 Ida85, 280P223.

1275-65 48 Ida85, 280P223.

1278-33 101Vt496, 144A691.

1278-39 101Vt496, 144A691.

1279-57½-New. A ward cannot be deprived of the benefit of appeal by the county court, on appeal by a foreign guardian recognized by the probate court, from the allowance of a will. 101 Vt496, 144A691.

1281-99 [b] **Stepfather, cotutor with mother of minor,** can be held for negligence of minor. LaA 128S186.

1285-69 See also 23 OhA274, 155NE 511.

1285-77 207 Iowa668, 223NW500.

1285-80½-New. Surety becomes party to such orders as court may make in settling guardian's account. Ark 32SW (2d)321.

1285-82 217Ala93, 114S692; 200Wis 288, 227NW266.

1286-94 38GaA534, 144SE387.

1286-1 But see 208 Iowa267, 225NW 454.

1286-2½-New. Guardian entering into joint control agreement with his surety thereby becomes guardian of safety of assets, and his surety is chargeable with his liability for loss. 215Ky647, 286SW 851.

1287-25 235Ky109, 29SW(2d)595.

1288-38½-New. Acceptance of income from estate of ward and use of the same for maintenance of ward is not a breach of bond given for faithful discharge of trust reposed in person to whom custody was awarded. 132SC367, 128SE 840.

1288-49½-New. or during the life of the bond, 81Mont161, 263P90.

1289-66 [a] **In Oklahoma.**-120 Okl 294, 251P502.

1289-74 30F(2d)753.

1289-74½-New. Where a bond was given to guarantee the repayment of deposits of B, as guardian, and disputed items were deposits of the guardian, it was immaterial how they were carried on the books of the bank. 30F(2d)753.

1289-77 165La478, 115S662, 665 [cit CJ].

1290-78 165La478, 115S662; 37 Okl ACR613.

1290-80 207 Iowa668, 223NW500.

1290-86 TexCivA 138SW(2d)921.

1291-93½-New. Where additional general bond was given in proceedings to sell, amount recoverable is not fixed by sum realized from sale. 27 OhNPNS12.

1291-93½-New. Surety is not relieved by reinvestment of proceeds of sale under order of court unless fund is finally accounted for and paid to proper person. 27 OhNPNS12.

1292-11 [a] **Where second guardian did not attempt to cash check from first guardian,** good when given, for two years, first guardian's surety was released by laches. 220Ky128, 294SW 1093.

1292-19 169Minn304, 211NW314, 316 [quotCJ].

1292-24 Iowa 216NW88.

1292-26 146Wash421, 263P741.

1294-66½-New. Judgment has been held conclusive as to the amount which was due from the guardian. TexCivA 138SW(2d)921.

1294-66½-New. Judgment in favor of wards against a guardian is not subject to collateral attack, in an action against the surety. TexCivA 138SW(2d)921.

1294-70 169Minn304, 211NW314, 316 [quotCJ].

1294-71 213Ala33, 104S244; 216Ala 396, 113S260; 169Minn304, 211NW314, 316 [quotCJ]; 37 OklACR613.

1295-72 169Minn304, 211NW314, 316 [quotCJ]; 37 OklACR613.

1295-74 169Minn304, 211NW314, 316 [quotCJ].

1295-88 TexCivA 19SW(2d)862.

1297-27½-New. In a suit on a guardian's bond, where it appears that the guardianship began on a certain date, plaintiff's recovery should have included interest from the expiration of one year as to all items received by the guardian in the meantime. As to an item received by the guardian after one year, interest should have been charged from the date when it was received. 38GaA534, 144SE 387.

1297-33½-New. Statutory attorney's fees are recoverable in action on natural tutrix's bond in which plaintiff recovered amount sued for. 165La478, 115S 662.

1298-40 169Minn304, 211NW314, 316 [citCJ].

1299-62 [a] **Matters not affecting discharge.**-Ark 32SW(2d)321.

1299-67 203 Iowa1338, 214NW556, 558 [citCJ].

1299-73 Wash 290P1003.

1299-75½-New. Suit on behalf of a ward to charge a third person as trustee in invitum and impress a trust on the property does not release the sureties. 218Ala530, 119S220.

1300-89 Iowa 216NW88; 207 Iowa668, 223NW500.

1300-90 207 Iowa668, 223NW500.

1300-8 207 Iowa668, 223NW500.

1301-9 207 Iowa668, 223NW500.

1301-15 Iowa 216NW88.

1301-20 207 Iowa668, 223NW500.

1302-40 Iowa 216NW88.

1302-66 32NM99, 252P167, 169 [citCJ], 50ALR55.
1303-69 32NM99, 252P167, 50ALR55.
1303-70 See also 32NM99, 252P167, 50 ALR55.
1303-80½-New. Former guardian's surety is charged with knowledge that principal gave new guardian unpaid check, as shown by settlement. 235Ky 109, 29SW(2d)595.
1303-85 TexCivA 19SW(2d)862.
1304-96 TexCivA 19SW(2d)862.
1307-36 81Mont161, 263P90, 93 [cit CJ].
1308-68½-New. A surety's ignorance of the insolvency of a bank in which a guardian deposited funds is no defense where the guardian had knowledge that the bank was unsafe. 208 Iowa267, 225 NW454.
1308-74½-New. or the failure of the guardian to account, 203 Iowa1338, 214 NW556.
1308-76½-New. Conversion by guardian of guardianship funds does not state the running of the statute. 203 Iowa 1338, 214NW556.
1308-86 203 Iowa1338, 214NW556.
1309-89 134 Okl 118, 272P375; 146 Wash421, 263P741.
1309-9 203 Iowa1338, 214NW556.
1309-11 203 Iowa1338, 214NW556.
1309-12 203 Iowa1338, 214NW556.
1310-28 38GaA534, 144SE387. [a] **In Georgia.**-35GaA503, 134SE125.
1311-44½-New. A personal representative of the testatrix may be entitled to sue after the ward's death where there has been no assignment to the remainderman. 200Wis288, 227NW266.
1311-54 [b] TexCivA 275SW179, 181 [citCJ].
1311-55½-New. As a general rule all joint obligees in an instrument should join as plaintiffs, yet one or more may maintain an action thereon for their separate interests without joining the other where sufficient excuse is alleged. TexCivA 275SW179.
1311-57 162Ga143, 132SE755.
1312-68½-New. In some jurisdictions sureties may be sued without joining guardian in same action. 35GaA503, 134SE125.
1312-72 But see 205 Iowa1326, 219NW 485, 59ALR835.
1312-81 207 Iowa668, 223NW500.
1312-90 [a] 162Ga143, 132SE636; 35 GaA503, 134SE125 (in suit against sureties after maturity of ward where guardian not made party defendant). [a] 38 GaA534, 144SE387. [b] **Petition insufficient.-TexCivA** 275SW179.
1313-97½-New. Plaintiff need not allege that guardian had in his possession money belonging to ward during life of bond. 81Mont161, 263P90.
1313-98 [a] (4) Petition held sufficient. 162Ga143, 132SE636.
1313-99 [b] (5) Petition held sufficient as against objection that it was not shown therein how, when, or by whom demand to pay over ward's money where petition contained no other allegations giving information called for by demurrer. 162Ga143, 132SE636. (6) Demand unnecessary where court in settling guardian's account fixed amount due ward and directed payment. 81Mont 161, 263P90.
1313-99½-New. In suit against sureties, guardian not being joined, petition may be amended by alleging judgments rendered against guardian in his representative capacity and individual capacity. 162Ga143, 132SE755.
1313-5½-New. In a suit on a bond against guardian and surety on bond, complaint need not allege previous recovery of judgment against guardian in his representative capacity in order to show cause of action against surety in absence of averment as to why such a judgment has not been sought, 162Ga 143, 132SE636.
1313-5½-New. and in absence of such former averment, complaint is not subject to demurrer by surety. 162Ga143, 132SE636.
1314-33 [a] (6) Action against guardian and surety. 162Ga143, 132SE636.
1316-78 TexCivA 138W(2d)921.
1316-80 But see 81Mont161, 263P90.
1317-88 [b] **Where action against surety is defended on ground new bond was substitute bond,** relieving sureties for defalcation occurring prior to its execution, burden is on surety to show valid release of former sureties on former bond. 207 Iowa668, 223NW500.
1317-3½-New. Presumed that guardian performed duty of collecting vendor's lien notes given in part payment for land. TexCivA 275SW179.
1317-3½-New. It is presumed as against the surety that the guardian performed his duty and collected lien notes. TexCivA 275SW179.
1317-4 169Minn304, 211NW314.
1318-36½-New. Permitting the introduction of records of the probate court, to show that a sale of the real estate had been made and that the proceeds had come into the hands of the guardian, has been held proper. TexCivA 13 SW(2d)921.
1318-38 [a] (10) To support conclusions of master. 154SC456, 151SE745.
1318-46 [b] **Solvency of former guardian** giving unpaid check is for jury. 235 Ky109, 29SW(2d)595.
1319-61 See also 154SC456, 151SE745.
1319-66 See also TexCivA 275SW179.
1319-73½-New. Surety's plea for judgment over against share of wards in estate of deceased guardian, their father, is ineffectual where there is no sufficient basis for recovery against the children for any amount, TexCivA 275 SW179.
1319-73½-New. as where his plea fails to allege that there was property belonging to guardian's estate over and above any indebtedness chargeable against it, TexCivA 275SW179.
1319-73¼-New. or that the judgment recovered against him could not be established as a claim against guardian's estate. TexCivA 275SW179.
1319-73½-New. Where one ward released the guardian, amount to remaining wards should be increased. TexCivA 275SW179.

GYMNASIUM

1322-46½-New. Gymnasium is place or building where athletic exercises are performed. Mont 288P188.

GYRATION

1322-48½-New. Movement about a fixed point. 13F(2d)880.

HABEAS CORPUS

29 C. J.—6-1 NJCh 146A367. [b] (3) Writ of habeas corpus is writ of right, designed to protect individual against any character of illegal restraint by giving him prompt and speedy hearing. TexCommnA 9SW(2d)1029.
7-8 203 Iowa376, 212NW698; 146Miss 819, 112S170; 19 OhA309; 51SD540, 215NW697; 52SD524, 219NW118. See also 30Ariz591, 249P758.
7-9 93Fla5, 112S289; 193NC450, 137 SE305.
8-12 TexCivA 286SW629.
8-15 77Mont466, 251P163; TexCommnA 290SW155.
8-17 201Cal 122, 255P815, 52ALR869; 79Mont198, 255P737.
8-18 21AlaA241, 108S62; 79Mont198, 255P737; 126 Okl37, 258P879; Que [1929] 1DomLR223. [d] 77Mont466, 251P163.
9-22 21AlaA241, 108S62.
9-24 250 IllA601 [quotCJ].
9-25 19 OhA309.
11-42 246NY258, 158NE613.
11-43 243 IllA490; MoA 18SW(2d)562. [b] 246NY258, 158NE613.
11-46 246NY258, 158NE613.
12-47 203Cal 731, 265P947, 58ALR 1500; Cal 288P769 (statute that recovery of sanity is insufficient ground for release).
12-49½-New. Privilege of writ is not suspended by failure to provide for appeal in cases founded on recognized classification or distinction. 21AlaA241, 108S62.
12-51 201Cal 122, 255P815, 52ALR869; 79CalA659, 250P714; 95Fla736, 116S 858; 79Mont198, 255P737; 51SD540, 215NW697; TexCommnA 290SW155.
12-53 TexCommnA 290SW155, 157 [quotCJ].
12-54 130Misc224, 223NYS681; 51SD 540, 215NW697; TexCr 32SW(2d)187.
12-55 TexCommnA 290SW155, 157 [quotCJ]. [c] **Writ cannot be used to** test constitutionality of statute. 17F (2d)767.
12-63 TexCommnA 290SW155, 157 [cit CJ].
13-81 130 Or631, 280P660.
13-83 OklCr 287P802(2dcase); 103Tex Cr435, 281SW212. [a] (2) Where, at time of filing application for habeas corpus to be admitted to bail, petitioners had been admitted to bail, questions raised by application are moot, requiring dismissal of case. OklCr 273P380 (1stcase).
13-85 39 OklCr334, 265P147.
14-87½-New. where petitioner has completed term pending hearing; OklCr 288P371(1stcase).
14-89 93Fla5, 112S289; 93Fla963, 113 S103.
14-91 105NJL73, 143A825.
14-92 153Miss759, 121S493; NJCh 152 A188; 248NY126, 161NE444.
15-95 8F(2d)937; TexCivA 283SW244.
15-97 11F(2d)990; 30F(2d)106; 37F (2d)409; TexCivA 283SW244.
15-98 269US13, 46SCt1, 70Led138; 20 F(2d)912; 32F(2d)891; TexCivA 283 SW244.
15-99 TexCivA 283SW244. [b] 13PortoRicoFed447.
16-2½-New. Neither is it ground for the writ that the petitioner is about to go to trial in a criminal case in the federal court and his detention interferes with preparation therefor. 11 F(2d)990.
16-3 37F(2d)409.
17-15½-New. Federal court will not interfere to release federal official convicted by insular court unless commission of offense in necessary performance of petitioner's duty clearly appears. 13PortoRicoFed191.
17-19 8F(2d)937; 17F(2d)767; 229 AppDiv419, 242NYS105; 121 Oh628, 172 NE307(1stcase); OklCr 287P753; OklCr 287P755; 109TexCr231, 4SW(2d)67; 110TexCr452, 10SW(2d)86. [b] **Habeas corpus proceeding by father for custody of child** should be dismissed where action by wife for annulment of marriage is pending. 230AppDiv863, 245NYS119.
17-21 17F(2d)767; 43F(2d)290; 83 CalA742, 257P445; 4HawaiiFed372; NJCh 152A188; 100TexCr560, 272SW 130. See also 243 IllA367. [c] (1) 17 F(2d)767. (11) Motion to quash. 110 TexCr367, 8SW(2d)677. [f] **After information filed.-OklCr** 282P684.
17-21½-New. Nor will it lie after an indictment to prevent a trial on the merits. 110TexCr452, 10SW(2d)86.
18-22 [a] (5) Authority of insane asylum's superintendent to discharge inmate. 119 Oh166, 162NE740.
18-24 32F(2d)793.
18-25 25F(2d)65.
18-28 4HawaiiFed591; 163La1047, 113 S370; 129Misc701, 222NYS490.
18-32 26 OhA352, 160NE242.
19-37 31F(2d)966; 48RI 50, 135A322.
19-40½-New. Defendant, not objecting at the proper time during the same term of court to the manner in which information was signed and sworn to waives his right to do so by habeas corpus. 97Fla214, 121S468.
19-41 5F(2d)19; 5F(2d)280; 6F(2d) 828; 8F(2d)354; 8F(2d)937; 12F(2d) 704; 14F(2d)5; 16F(2d)118; 16F(2d) 119; 23F(2d)14; 25F(2d)74; 27F(2d) 313; 30F(2d)988; 40F(2d)502; 23AlaA 72, 121S692(1stcase); 84CalA295, 257P 876; 93CalA443, 269P719; 97CalA288, 275P495; 92Fla337, 110S533; 200 Ind 196, 158NE289, 291 [quotCJperMartin, J]; Ind 165NE906; 124Kan573, 261P 569; 258Mass289, 155NE12, 51ALR789; 171Minn36, 213NW56; 148Miss233, 114 S385; 153Miss759, 121S493; 320Mo 1140, 10SW(2d)953; Mo 19SW(2d)752; NJSup 131A620; 132Misc119, 228NYS 286; 229AppDiv419, 242NYS105; 54ND 732, 210NW652; 26 OhA352, 160NE242; OhA 172NE694; Okl 287P731; 118 Or 693, 247P809; 298Pa318, 148A307; 51 SD540, 215NW697; 116Tex39, 285SW 255, 256 [citCJ]; TexCivA 283SW244; 100TexCr558, 271SW924; 101TexCr576, 276SW428; 109TexCr52, 3SW(2d)84, 57 ALR82; 109TexCr231, 4SW(2d)67; 110

TexCr367, 88SW(2d)677; 111TexCr443, 18SW(2d)1027(1dcense). TexCr 228SW(2d)561, 99Va596, 131A847, 103WVa44, 130SE865. See also 200Ind196, 158NE229.

20-42 15F(2d)931; CalA 290P512; 200Ind196, 158NE289, 292 [cit CJ perMartin, J], 292P563, 140A533.

20-43 200Ind196, 158NE289, 292 [cit CJperMartin,J].

20-44 15F(2d)931, 200Ind196, 158NE289, 292 [cit CJperMartin,J]; 124Kan345, 259P793.

20-47 111(2d)518, 232Mo V708, 108W(2d)63. But see 13PortoRicoFed147.

20-48 32F(2d)108

20-49 218NY126, 161NE344. But see 10TexCr336, 27SSW126.

20-50 30F(2d)952, 29Pa252, 145A130, 160TexCr395, 27SSW924.

20-51 71CalA281, 235P158, CalA 290P512, 143Mo673, 1148395.

21-54 CalA 290P512.

21-54½-New. After an appeal from a conviction has been perfected, the trial court is without authority to discharge appellant on habeas corpus for any error, defect, or other infirmity in the proceedings appearing on the face of the record on appeal which was or might have been presented to the appellate court. 201Cal122, 255P815, 52ALR869. [a] Question of jurisdiction.-201Cal122, 255P815, 52ALR869.

21-54½-New. A writ of habeas corpus cannot be used to review the regularity of the proceedings of an inferior court. 110TexCr452, 108W(2d)36

21-54¼-New. That defendant did not learn of disqualification of juror in a murder case until after his appeal had been decided does not entitle him to have the question considered in a habeas corpus proceeding. 153Misc759, 1218493.

21-57 33Ariz41, 262P10, 81CalA269, 257P888; 85CalA484, 259P766; 47Ida207, 275P99; 116Tex69, 285SW255; 104TexCr275, 283SW795. [d] Restraint held insufficient. 116Tex39, 285SW255 [e] Actual confinement or threat, coupled with immediate ability to accomplish it, is necessary. NJCh 147A217.

21-58 7PaDist&Co 161, 36Wyo159, 253P667.

22-61 8C 155NE271.

22-62 48Philippine282, 283 [cit CJ].

22-66 23F(2d)993, 994 [cit CJ&Cyc]; 33Ariz41, 262P10, 85CalA131, 259P766; 156Misc323, 1280815. NJCh 146A307; Can [1930] 1DomLR393; Que [1929] 2DomLR900

23-70 84CalA269, 257P888; 126Mc330, 135A517; 11Philippine623

23-72 81CalA269, 257P888; 71CalA153, 234P877.

23-77 Or 289P372.

24-84 30Ariz591, 249P758, 760 [cit CJ]; 92Fla327, 1108533, 536 [cit CJ], 93Fla 5, 1128289, 95Fla736, 1168808, Fla 1298822. NJSup 131A620

24-85 40F(2d)643 (arrest and detention of alien without warrant or hearing); 30Ariz591, 249P758, 760 [cit CJ].

24-86 25F(2d)733, 30Ariz591, 249P758, 760 [cit CJ], 92Fla327, 1108533, 536 [cit CJ], 93Fla5, 1128289, 148Miss333, 1148714. See also 27F(2d)147.

24-87 30Ariz591, 249P758, 760 [cit CJ], 92Fla327, 1108533, 536 [cit CJ], 136Wash60, 235P913.

24-89 22AlaA60, 112896

24-93 148Miss335, 1148744; 48RI50, 135A322

24-95 203Iowa376, 212NW698; OklCr 268P328; 36Wyo159, 253P667.

25-99 But see 36Wyo159, 253P667

25-4 5F(2d)605, 6F(2d)167, 8F(2d)354; 8F(2d)937; 12F(2d)704; 16F(2d)119; 18F(2d)206; 18F(2d)955; 21F(2d)625; 21F(2d)934; 21F(2d)964; 24F(2d)392; 36F(2d)155; 36F(2d)882, 38F(2d)562, 34Ariz430, 272P967, 1Ind Cal49, 227P908, 71CalA190, 235P160, 97CalA288, 275P495; 3Del425, 138A631, 633 [cit CJ] 30Fla65, 1068115, 91Fla893, 109S620 1HawaiiFed.551, 27Hawaii237, 323Ill28, 153NE597, 19ALR190, 330Ill150, 161NE312, 203Iowa376, 212NW698; 205Iowa936, 218NW905, 1218Kan158, 260P975, 121Kan573, 261P569, 570 [cit CJ]; 126Me330, 138A547; 186Minn440, 208NW842; 171Minn36, 213NW56, 118Miss599, 1118395, 220Mo825, 278SW1047; 82Mont89, 265P21, 22 [cit CJ]; 114Nebr653, 209NW328, 115Nebr818, 215NW104; 117Nebr107, 219NW816; NJCh 152A188; 221AppDiv56, 222NY8319, 222AppDiv465, 226NY8449; 193NC450, 137SE305; 53ND573, 205NW314; 54ND178, 208NW677, 54ND193, 209NW231; 54ND295, 209NW552; 54ND732, 210NW652; 117Ok500, 159NE478; 82OkCr41, 239P944; 142Okl258, 286P765; 38OkCr207, 259P873; OklCr 274P485(1dcense); OklCr 287P1062(2dcense); OklCr 287P1091(1dcense); 118Or693, 247P809; 121Or234, 252P963, 235Pa289, 132A370; 202Pa63; 140A533; 48RI50, 135A322, 132SC199, 128SE282, 51SD540, 215NW697; 54SD382, 223NW323; TexCivA 283SW244; 100TexCr558, 271SW924, 109TexCr231, 18W(2d)67; 99Va596, 131A847, 103WVa44, 136SE865; 187Wis163, 204NW595; 192Wis132, 214NW396; Que [1926] 4DomLR973. [a] 51SD540, 215NW697. [1] Error in dismissing appeal not remediable on writ of habeas corpus. 91Fla893, 109S630. [m] Quo warranto.-51SD540, 215NW697.

27-6 21F(2d)625; 171Ark187, 284SW533; 71CalA281, 235P468; 79CalA64, 243P1014; 85CalA585, 261P731; CalA 290P589(2dcense); CalA 291P847; 90Fla625, 1068418; Fla 1298818; 199Ind501, 158NE572; 199Ind625, 159NE689; 203Iowa376, 212NW698, 124Kan455, 260P975, 124Kan573, 261P569, 126Me330, 135A547, 148Miss599, 1148395; 220MoA825, 278SW1047, 115Nebr299, 212NW612, 115Nebr818, 216NW104; 221AppDiv86, 222NY8319; 193NC450, 137SE305, 54ND732, 210NW652, OklCr 287P1062(2dcense); 118Or693, 247P809, 129Or652, 278P950, 51SD540, 215NW697; 100WVa70, 130SE86; 103WVa44, 136SE865, 867 [cit CJ]; 200Wis326, 228NW692; BC [1929] 4DomLR984.

29-7 5PaDist&Co97, 101 [quotCJ].

29-8 48RI50, 135A322

29-11 [a] (5) Failure personally to plead guilty 70CalA334, 233P390

30-15 6F(2d)573; 19F(2d)7; 19F(2d)193; 20F(2d)662; 30Ariz591, 249P758; 79CalA61, 243P1044; 81CalA105, 252P1063, 203Iowa376, 212NW698; 203Iowa352, 212NW701; 203Iowa1374, 214NW717, 124Kan345, 259P793 [cit CJ]; 124Kan455, 260P975; 166Minn440, 208NW612, 221AppDiv86, 222NY8319; 222AppDiv165, 226NY8449, 127Misc290, 216NY8465; 127Misc791, 217NY8477; 53ND518, 203NW898 [cit CJ]; 60SD48, 203NW224, 103WVa266, 137SE10.

30-16 14F(2d)953; 19F(2d)7; 19F(2d)193; 21F(2d)934; 22F(2d)823; 81CalA287, 253P948; CalA 284P509(2dcase), 3Del425, 138A631; Fla 1298818, 200Ind196, 158NE289, 291 [cit CJ per Martin, J]; 199Ind501, 158NE572; 203Iowa352, 212NW701; 124Kan345, 259P793 [cit CJ], Kan 292P790, 142Miss256, 107S200, 82Mont89, 265P21, 22 [cit CJ], NJCh 144A546, 131Misc50, 225NY8346; 227AppDiv57, 237NY8 85, 229AppDiv281, 242NY8348, 52ND518, 203NW898 [cit CJ]; 54ND732, 210NW652, 26OhNPNS325, 27OhNPNS167; OklCr 287P389, 51SD540, 215NW697; 109TexCr192, 38W(2d)810, 99Va390, 131A847; 36Wyo159, 253P667. But see NJSup 131A620.

31-17 79CalA61, 243P1044; 203Iowa352, 212NW701, 142Miss256, 107S200, 82Mont89, 265P21, 127Misc290, 216NY8468; 52ND518, 203NW898, 901 [cit CJ]; OklCr 278P671; 1328C199, 128SE382; Vt 148A489.

32-10 5PaDist&Co97, 101 [quotCJ].

32-25 20AlaA41, 104S561; 80Colo380, 252P353, 340Ill150, 161NE312, 148Miss599, 1118395, 83NH173, 139A580; 53ND573, 205NW314, 99Va306, 131A847.

32-28 80Colo380, 252P353.

32-29 105TexCr135, 285SW987.

33-31 79CalA64, 243P1044. But see 30F(2d)932.

33-32½-New. Writ does not lie for invalidity of prior sentence where release is sought for sentence after conviction of escape from former imprisonment. 203Iowa352, 212NW701.

33-33 [a] 80CalA61, 252P730.

33-35 124Kan345, 259P793; 35OhA191, 172NE623.

33-39 [c] (42) Confession of crime by another after conviction. 23F(2d)327. (43) Habeas corpus will not avail to discharge infant sentenced to penitentiary on guilty pleas, though not represented by counsel. Iowa 227NW139 (1dcase). [d] (5) Commitment under peace bond, where facts are insufficient to require commitment. 102TexCr336, 278SW426. (6) Girl held in custody under warrant, issued after juvenile court erroneously ruled that order vacating order committing her on day to which regular term was extended was authorized, was entitled to discharge from custody. 30F(2d)986.

34-40 24F(2d)392; 22AlaA443, 1168709; 89Fla293, 1038832; 93Fla5, 1128289; 94Fla1023, 1148760; 94Fla1071, 1148856; 95Fla736, 1168858; 99Fla362, 1268292; 127Misc290, 216NY8468.

35-41 8F(2d)354; OklCr 279P523; 65Utah609, 239P25, 26 [cit CJ] (not deciding question).

35-47 8F(2d)354.

35-48 13F(2d)1023; 38F(2d)226; 91Fla1044, 109S94; 99Fla933, 1278898; 307Mo67, 269NW383, 38ALR1032; 220MoA602, 287SW879; 229AppDiv419, 242NY8105; 38OklCr207, 259P873; 132SC199, 128SE882; Vt 148A489; Wash 289P51. [g] Claim that statute was void for embracing more than one subject does not entitle accused to release. Fla 1308621.

36-51 17F(2d)767; Wash 292P430.

37-56 143Okl8, 286P883.

37-62 89Fla477, 1048853; 166Ga137, 143SE147; 220MoA602, 287SW879; 118Or693, 247P809.

38-68 127Misc290, 216NY8468.

39-42 89Fla143, 1038419.

39-67 127Misc575, 217NY8631.

39-88½-New. Habeas corpus will not lie to procure the release of a prisoner from a federal penitentiary on parole where the recommendation of the board of parole was disapproved by the attorney-general. 18F(2d)572.

39-90 118Tex218, 138W(2d)57. [a] Where accused admits service of summons, habeas corpus will not be allowed. 59NS191, 1192?] 2DomLR849.

39-91 [c] (2) That person who had escaped after conviction of vagrancy was unlawfully arrested in another county on assumed charge and surrendered to sheriff of county in which he was convicted does not entitle him to release from custody. 70CalA170, 232P757.

39-92 Mo 298SW769; 106TexCr58, 290SW170.

39-99 248Mich512, 227NW754. [a] Pending motion.-86Colo184, 279P46(1dcase) (mandamus compelling ruling on motion and not habeas corpus held proper remedy of one committed for contempt in failing to pay alimony).

40-3 123Or1, 260P1004.

40-9 14F(2d)510.

40-9½-New. Defendant, pleading guilty at special term, cannot take advantage of irregularities in calling of the term. 33F(2d)68 (holding writ no substitute for appeal).

40-10 25OhA339, 158NE552.

41-13 148Miss599, 1148395.

41-16 148Miss599, 1148395, 148Miss335, 1148744. But see 26OhNPNS465.

41-20 33F(2d)68.

41-26 333Ill429, 164NE832.

41-29 99Fla1311, 1288853(2dcase); 49Nev110, 238P998.

41-30 203Iowa376, 212NW698, 699 [cit CJ]; NJCh 152A188

41-31 22F(2d)823, 24F(2d)392; 40F(2d)502, 199Cal590, 240P684, 93Fla5, 1128289, 93Fla993, 1128892; 97Fla260, 1208355; Fla 1298855; 203Iowa391, 210NW461; 203Iowa376, 212NW698, 699 [cit CJ]; 205Iowa936, 218NW905, 906 [cit CJ], Iowa 229NW191; OklCr 272P389, OklCr 287P786; 65Utah609, 239P25, 26 [cit CJ] (not deciding question). See also 5F(2d)19; 167Ga347, 145SE505. [b] 199Cal590, 240P684.

41-31½-New. But petitioner will not be discharged, although ordinance under which he was convicted was invalid if complaint, although purporting to state offense under void ordinance actually states offense under valid stat-

ute. 71CalA522, 235P1029.

41-31½-New. Petitioner will not be discharged where allegations bringing offense charged under void ordinance may be treated as surplusage and valid charge under valid statute remains. 71 CalA522, 235P1029.

41-32 8F(2d)488; 8F(2d)489; 24 F(2d)392; 102CalA97, 282P538; 203 Iowa376, 212NW698, 699 [citCJ]; 223 AppDiv310, 228NYS192.

42-33 5F(2d)19; 8F(2d)937; 16F(2d) 119; 17F(2d)187; 22F(2d)823; 24 F(2d)323; 24F(2d)392; 30F(2d)932; 31F(2d)980; 194Cal 49, 227P908; 196 Cal 515, 238P359; 199Cal 590, 250P684; 73CalA485, 238P1044; 84CalA153, 257 P586; 87CalA176, 261P727(2dcase); 97 CalA288, 275P495; 93Fla993, 112S892; 97Fla668, 122S5; 99Fla711, 127S317; 99Fla1311, 128S853(2dcase); 164Ga702, 139SE344; 45 Ida168, 260P1095 [cit CJ]; 202 Iowa391, 210NW461; 203 Iowa376, 212NW298; 203 Iowa1374, 214 NW717; 82Mont89, 265P21; 142 Okl 258, 286P765; OklCr 272P389; Okl Cr 287P1062(2dcase); OklCr 287P1091 (1stcase); 159Tenn473, 19SW(2d)227 (after trial on plea of not guilty, conviction, and entry of final judgment); 110TexCr367, 8SW(2d)677; 111TexCr 363, 12SW(2d)790(2dcase). [a] See also 86CalA362, 260P842. [d] (26) Failure of indictment to allege prisoner was fugitive from justice as avoidance of statute of limitations where answer alleges he was fugitive from justice. 308 Mo 538, 272SW922. (27) Information for murder held not so defective as to exclude jurisdiction. 202 Iowa391, 210 NW461. (28) Failure of justice to make docket entry showing that information was filed. 220MoA406, 286SW733. (29) Void counts in indictment containing good counts. 168Ga723, 149SE37. (30) Other matters. 85CalA161, 259P58; 110 TexCr367, 8SW(2d)677. [f] **Greatest liberality will be indulged in construction of complaint.**-199Cal 590, 250P684. [g] **Indictment or information charging offense in substantially statutory language** is not subject to attack on habeas corpus. 99Fla711, 127S317.

43-34 27Hawaii237.

43-36 Ind 165NE906.

43-38 97Fla260, 120S355; 97Fla668, 122S5; Fla 129S855; 49Nev110, 238P 998; OklCr 272P389. [e] (10) Information charging embezzlement of agent of grapes, where embezzlement, if any, was of proceeds of sale of grapes. 76CalA 142, 243P888.

43-39 222MoA798, 10SW(2d)63.

43-40 But see Mo 298SW769.

44-43 315Mo 695, 287SW463 [citCJ].

44-45 73CalA485, 238P1044.

44-47½-New. Defendants against whom a true bill was found on submission of guilt to the grand jury are not entitled to release on habeas corpus. 29F(2d) 573.

44-47¼-New. Unless irregularity appears on the face of the complaint or of commitment, no relief can be granted. 105NJL73, 143A825.

44-49 270US424, 46SCt333, 70Led662; 27Hawaii237; 112TexCr100, 13SW(2d) 869. [b] **Error in consolidating two indictments** for trial is not reviewable by habeas corpus. 13F(2d)827.

44-51 26 OhNPNS472.

44-51½-New. That prosecution in a state court was affected by mob spirit has been held insufficient on habeas corpus to show that the trial was a nullity. 21F(2d)964.

44-52 92Fla837, 110S533; 164Ga702, 139SE344; 27Hawaii237; 321Mo 268, 10 SW(2d)521.

45-58 16F(2d)119. See 27F(2d)137.

45-61 78CalA794, 248P1046.

45-61½-New. Where relator is restrained of liberty, previous adjudications are no bar to writ. 221AppDiv 418, 223NYS124.

45-63 30F(2d)687(2dcase); 94CalA 235, 270P996; 129Misc701, 222NYS490, 491 [citCJ]; OklCr 287P731; 131 Or 371, 283P751; 110TexCr452, 10SW(2d) 86; 113TexCr495, 23SW(2d)365. But see 137Misc314, 243NYS590. [a] (1) 15 F(2d)377 [citCJ].

46-66 115Nebr335, 212NW765; 131 Misc253, 227NYS360.

46-67½-New. Habeas corpus is the proper remedy where defendant has been convicted of an offense and stands charged in the same indictment with another offense relating to the same transaction, and facts and evidence to prove the same are identical. 80CalA647, 252 P730.

46-68 74CalA504, 241P399; 75CalA122, 241P934, 935 [quotCJ]; 88CalA59, 262 P780; 88CalA212, 263P295; 90CalA700, 266P585; 205 Iowa936, 218NW905; 148 Miss599, 114S395; 148Miss335, 114S744; 187Wis463, 204NW595.

47-71 NS [1929] 1DomLR349.

47-73 127Kan764, 275P159; 103WVa 266, 137SE10, 11 [citCJ]. See also 205 Iowa936, 218NW905.

48-75½-New. The question whether a statement by accused was an admission or confession is not open to inquiry on habeas corpus. 33PortoRico 237.

48-89 71CalA281, 235P458; 3Del 425, 138A631. [a] (5) 68CalA308, 229P63. [c] **Failure to show entry of judgment on plea of guilty** is not ground for grant of writ. 39F(2d)208.

50-10 But see 203Cal 731, 265P947, 58 ALR1500.

50-15 170Ga755, 154SE228; 57ND763, 224NW209.

51-19 86CalA585, 261P731.

51-20 86CalA585, 261P731.

51-22 19F(2d)193; 199 Ind501, 158NE 572; 248Mich512, 227NW754.

51-23 200 Ind196, 158NE289.

51-24 16F(2d)118; 199 Ind501, 158NE 572; 124Kan573, 261P569; 220MoA825, 278SW1047, 1049 [citCJ]; 115Nebr818, 215NW104; 53ND427, 206NW417; 132 SC199, 128SE882; 105TexCr52, 284SW 584.

51-25 270US424, 46SCt333, 70Led662; 6F(2d)573; 44F(2d)166; 165Ga103, 139 SE798; 200 Ind196, 158NE289; 199 Ind 501, 158NE572, 574 [citCJ]; 124Kan573, 261P569; 148Miss599, 114S395; 220 MoA825, 278SW1047, 1049 [citCJ]; 115 Nebr299, 212NW612; 115Nebr818, 215 NW104, 105 [citCJ]; 117Nebr107, 219 NW846; 221AppDiv86, 222NYS319; 143 Okl 8, 286P883; 105TexCr52, 284SW 584; 193Wis132, 214NW396. [a] **State's administration of criminal law** cannot be interrupted on collateral attack in habeas corpus except on definitely and narrowly limited grounds. 270US424, 46SCt333, 70Led662.

52-26 200 Ind196, 158NE289; 199 Ind 501, 158NE572; 115Nebr818, 215NW 104, 105 [citCJ]; 12PortoRicoFed411.

52-27 18F(2d)206; 19F(2d)193; 44F (2d)166; 219Ala7, 121S423; 23AlaA61, 121S424 [certiorari den 219Ala139, 121S427(1stcase)]; 198Cal 216, 244 P355; 205Cal 408, 271P201; 71CalA 744, 236P205; 3Del 425, 138A631; 4HawaiiFed730; 323 Ill 28, 153NE 597, 49ALR490; 334 Ill 241, 165NE 693; 200 Ind196, 158NE289; 199 Ind 501, 158NE572; 124Kan345, 259P793; 124Kan573, 261P569; 166Minn440, 208 NW642; 148Miss599, 114S395; 220MoA 825, 278SW1047; 220MoA406, 286SW 733; 86Mont147, 282P500(1stcase); 115 Nebr299, 212NW612; 115Nebr818, 215 NW104, 105 [citCJ]; 221AppDiv86, 222 NYS319; 129 Okl 73, 263P468; 38 Okl Cr207, 259P873; OklCr 274P485(1st case); 9PaDist&Co 395; 46Philippine 22; 132SC199, 128SE882; 54SD382, 223NW323; 105TexCr52, 284SW584; 105TexCr135, 286SW987; 112TexCr100, 13SW(2d)869; 136Wash60, 238P913; Wash 289P51; 103WVa44, 136SE865; Wis 233NW82; Que [1928] 4DomLR627. See also 30F(2d)187. [b] **Test for determining whether error is jurisdictional** is could court, under any circumstances of particular case have properly reached final result embodied in judgment or sentence. 132SC199, 128SE882.

52-27½-New. The court will not look beyond the judgment or order of any court or judge having competent jurisdiction as to mere irregularities of procedure or errors on questions over which the court or judge had jurisdiction. 130 Okl 106, 265P105.

53-28 219Ala7, 121S423; 23AlaA61, 121S424 [certiorari den 219Ala139, 121 S427(1stcase)]; 93Fla332, 111S518; 142 Miss256, 107S200; 115Nebr335, 212NW 765; 131Misc657, 228NYS361; 53ND 852, 208NW238; 285Pa289, 132A370; 103WVa44, 136SE865 (dictum).

53-32 [a] (1) 131Misc657, 228NYS361. (13) Trial court setting aside verdict of not guilty and remanding accused into custody to be again tried. 142Miss256, 107S200. (14) Sentence on several counts, in excess of punishment for one, but equal to all in aggregate, though not stated to run consecutively. 6F(2d)640. (15) Completion of sentence under record of judgment. 164Ga242, 138SE72, (16) Sentence of fine and imprisonment where statute provided for fine or imprisonment. 104WVa118, 139SE474. (17) Failure to pronounce sentence. 94 CalA639, 271P757. (18) Failure of record to show entry of judgment of conviction against particular defendants. 97Fla260, 120S355.

53-33 [a] (1) 39F(2d)208 (failure to show in direct words that judgment entered); 83CalA370, 257P92; 93CalA443, 269P719; 203 Iowa352, 212NW701; 220 MoA406, 286SW733; 105TexCr52, 284 SW584; 150Va33, 142SE402. (29) 68 CalA308, 229P63. (48) Other instances. 54SD382, 223NW323.

54-36 Utah 284P323.

55-45 35F(2d)934.

55-46 24 OhNPNS120; Wash 292P430.

55-49 105TexCr52, 284SW584.

55-52 162Ga210, 132SE911; 109TexCr 17, 28W(2d)445.

55-53 28F(2d)609.

55-53½-New. If sentence is authorized under any count of the indictment, it is sufficient and habeas corpus does not lie. 6F(2d)573.

55-54 200 Ind196, 158NE289.

55-55 200 Ind196, 158NE289, 291 [cit CJperMartin,J].

56-56 230AppDiv871, 245NYS41 (trial errors not jurisdictional are concluded by judgment). [a] **Judgment must be absolutely void** to authorize relief. 124 Or322, 263P903, 56ALR661.

56-58 124 Or322, 263P903, 56ALR661.

56-59 124 Or322, 263P903, 56ALR661.

56-62 15F(2d)931.

56-70 50SD48, 208NW224.

56-71 But see 35 OhA491, 172NE623.

57-73 15F(2d)931.

57-74 36F(2d)366; 136Wash60, 238P 913.

57-78 54ND178, 208NW977, 978 [quot CJ]; 54ND193, 209NW231, 233 [quot CJ].

57-79 54ND178, 208NW977, 978 [quot CJ]; 54ND193, 209NW231.

57-85 161Ga462, 131SE168.

57-87 113Nebr768, 205NW296, 297 [cit CJ].

57-92 52ND52, 203NW676. See also 295Pa379, 145A535; 52SD524, 219NW 118.

57-93 162Ga210, 132SE911 (defendant sentenced for twelve months with suspension of last six months on payment of fine before expiration of first six months is not entitled to release on parole on payment of fine before expiration of first six months).

58-94 But see 292Pa501, 141A287.

58-99½-New. Accused's discharge is properly ordered where sheriff held him in custody under his original sentence and on void order revoking parole. 161 Ga466, 131SE170.

58-99½-New. Failure of judge to file statement of circumstances and information, relating to defendant and crime of which he is convicted, is not a ground for discharge of prisoner on writ of habeas corpus. 52ND52, 203NW676.

58-99¼-New. Parole board's discretion in reincarcerating prisoner for violating parole cannot be reviewed by habeas corpus. 130Misc748, 226NYS98.

58-99⅛-New. Indeterminate sentence, fixing a minimum term under a statute not fixing the minimum sentence, is not a ground for habeas corpus, the proper remedy being by appeal. 51SD540, 215 NW697.

58-99⅛-New. A proceeding to compel commutation of sentence is premature if it is before the date when prisoner is entitled to discharge on full commutation. 134Misc46, 234NYS489.

58-2 3Del 425, 138A631; 199 Ind501, 158NE572; 124Kan573, 261P569; 115

Nebr299, 212NW612; 34PortoRico 84.
58-4 36F(2d)155; 92Fla185, 109S445; 285Pa289, 132A370. [a] (2) Where sentence for second offense was suspended, life sentence as fourth offender is unlawful, and habeas corpus is authorized. 134Misc786, 236NYS432.
59-5 285Pa289, 132A370.
59-6 3Del 425, 138A631; Ind 158NE574; 159La222, 105S297; 164Minn289, 204NW955.
59-7 3Del 425, 138A631; Ind 158NE574.
59-8 CalA 292P520.
59-9 19F(2d)478; 205Cal 534, 271P902; 70CalA770, 234P338; 87CalA36, 261P1048; 3Del 425, 138A631; 323 Ill 28, 153NE597, 49ALR490; Ind 158NE574; Iowa 229NW191; 164Minn289, 204NW955; 151Miss553, 118S621.
59-10 Ind 158NE574.
60-11 323 Ill 28, 153NE597, 49ALR490; 159La222, 105S297, 298 [citCJ]; 132SC199, 128SE882.
60-15 71CalA632, 235P1033.
60-17 Ind 158NE574.
60-24½-New. Question of unlawful imprisonment in penitentiary to enforce payment of fine may be considered in habeas corpus proceeding. 13F(2d)827.
60-24¾-New. Where sentence of fine and imprisonment on valid conviction is good as to imprisonment but bad as to fine, prisoner is not entitled to discharge. BC [1929] 4DomLR984.
60-25 32F(2d)240; Iowa 227NW139 (1stcase) (imprisonment aggregating eighty-two years); 114Nebr653, 209NW328.
61-28 89CalA530, 265P392.
61-30 108TexCr121, 299SW433.
61-31 89Fla143, 103S419; 164Ga242, 138SE72.
61-34 323 Ill 28, 153NE597, 49ALR490. See also 165Ga287, 140SE752.
61-36 89Fla143, 103S419. [c] Writ of error coram nobis.-Mo 30SW(2d)94 (application and judgment showing on face want of jurisdiction).
61-37 Mo 280SW1038.
61-37½-New. A defendant sentenced to imprisonment, who, after perfecting an appeal, obtained a stay of execution and was permitted to remain at liberty pending the appeal and acquiesced in the action of the trial court, is not entitled to discharge on habeas corpus because the trial court accepted an improper or insufficient bail bond and did not issue or enter a certificate of probable cause. 54ND178, 208NW977; 54ND193, 209NW231.
61-37⅓-New. Delay in issuing commitment for imprisonment does not warrant habeas corpus where delay was due to petitioner's applications for parole and postponement. 130Kan536, 287P257.
61-42 [c] Where grand jury is in session and commitment awaits its action, court may decline to entertain habeas corpus. 12PortoRicoFed86.
62-43 [a] (4) Arrest by sheriff in county other than county of justice of peace issuing warrant requires discharge of accused, in absence of waiver. 308Mo538, 272SW922. [e] Commitment of accused before lawful arrest entitles him to be discharged. 308Mo538, 272SW922.
62-44 295Pa252, 145A130; 12PortoRicoFed86.
62-46 87CalA60, 261P725; 167Ga284, 145SE509; 199Ind501, 158NE572; 126Me330, 138A547. See also 97Fla401, 121S462(1stcase).
62-47 OklCr 278P400(2dcase).
63-52 136Mich637, 241NYS225.
63-55 194Cal 1, 227P156; 95Fla736, 116S858, 860 [citCJ].
64-56 95Fla736, 116S858, 860 [citCJ]; 128Kan521, 278P761; MoA 18SW(2d)562; 53ND573, 207NW226.
67-78½-New. Habeas corpus court may go behind the commitment under which the prisoner is held and examine the record on which it issued in order to see if imprisonment is lawful. 29F(2d)979.
67-80 22F(2d)823.
67-82 223AppDiv168, 227NYS614.
67-84 33Ariz41, 262P10.
67-90 OklCr 287P786.
68-98 202Cal 341, 260P542; 136Wash60, 238P913; Can [1930] 1DomLR420.
68-99 46 Ida112, 268P8. But see MoA 286SW401; 134Misc468, 235NYS629. Contra 124 Okl 241, 255P154. [d] "Wayward minor," illegally committed to state reformatory for women at Bedford N. Y., will be discharged on habeas corpus. 132Misc119, 228NYS286.
68-2 136Wash60, 238P913.
68-3½-New. After affirmance on appeal from conviction, a new warrant is necessary, so that defendant must be released on habeas corpus if detained on original warrant. Ont [1925] 3DomLR1126.
68-3¾-New. Only question presented is whether record legally justifies detention. NJSup 131A620.
68-8 20F(2d)116.
69-23 217AppDiv514, 217NYS289.
69-33 91Fla197, 107S409; 258Mass289, 155NE12, 51ALR789; 217AppDiv514, 217NYS289; 160Tenn44, 22SW(2d)222. [c] Governor's findings based on erroneous application of law is reviewable. 126Misc591, 214NYS211.
70-36 258Mass289, 155NE12, 51ALR789; MoA 9SW(2d)544; TexCr 25SW(2d)334. [a] (2) It is not for federal court to inquire on what information demanding governor acted. 27F(2d)842.
71-38 258Mass289, 155NE12, 51ALR789; 318Mo928, 2SW(2d)612.
71-38½-New. Inquiry is limited to probable cause for believing guilt, and whether removal for trial is justified. 22F(2d)876.
71-39 220AppDiv212, 221NYS323.
71-39½-New. That extradition proceedings culminated from political controversy between governor and district attorney of demanding state is of no concern to the court. 126Misc591, 214NYS211.
71-40 But see 136Misc637, 241NYS225.
72-54 160Tenn44, 22SW(2d)222.
72-55 160Tenn44, 22SW(2d)222.
72-58 [a] 6F(2d)13.
72-62 160Tenn44, 22SW(2d)222.
73-63 258Mass289, 155NE12, 51ALR789.
73-67 6F(2d)13; 93Fla963, 113S103.
73-72 [a] (4) Affidavit before deputy clerk with appended warrant entitled in municipal court held sufficient. 172Minn401, 215NW863.
73-76 217AppDiv514, 217NYS289.
74-84 36F(2d)315; 265Mass101, 163NE870; 101NJEq75, 137A422. See also 225AppDiv156, 232NYS217.
75-85 102CalA97, 282P538; 247NY238, 160NE357. [a] (4) Indictment which follows language of statute is sufficient. 102CalA97, 282P538.
75-86 See also 226AppDiv589, 235NYS527.
75-87 247NY238, 160NE357.
75-88 22F(2d)876.
76-95 AlaA 129S681; 95CalA375, 272P1066; 93Fla963, 113S103; 160Tenn285, 23SW(2d)660.
76-96 93Fla963, 113S103; 258Mass289, 155NE12, 51ALR789.
76-97 258Mass289, 155NE12, 51ALR789; MoA 9SW(2d)544; 217AppDiv514, 217NYS289; 33PortoRico 561.
76-98 166Ga250, 142SE888; 258Mass289, 155NE12, 51ALR789; 321Mo268, 10SW(2d)521.
77-99 6F(2d)13; 93Fla963, 113S103; 172Minn401, 215NW863; Mo 9SW(2d)544; Mont 287P636; 137Misc905, 244NYS590.
77-2 196NC662, 146SE599(2dcase).
78-9 Ill 172NE168; 258Mass289, 155NE12, 51ALR789; 172Minn401, 215NW863; 310Mo355, 275SW923; 160Tenn285, 23SW(2d)660. [a] 217AppDiv514, 217NYS289. [b] (1) Ill 172NE168; 137Misc905, 244NYS590; 160Tenn285, 23SW(2d)660. (3) Evidence not disputed by state is not conclusive on court. AlaA 129S681. [c] Evidence regarded liberally in favor of demanding state.-137Misc905, 244NYS590.
78-11 265Mass101, 163NE870; MoA 9SW(2d)544; 137Misc905, 244NYS590. [a] Governor's warrant is conclusive where presence of accused in state when crime was committed rests on contradictory evidence. 6F(2d)13.
79-12½-New. The propriety of the revocation of the parole of one who came into the asylum state after conviction and parole in another state will not be inquired into. OklCr 273P286.
79-15 [b] Writ denied on sufficient requisition.-170Ga826, 154SE342.
79-21 25F(2d)929; 160Tenn44, 22SW(2d)222 (that duly certified copy of indictment accompanied requisition).
79-24 217AppDiv514, 217NYS289; 160Tenn44, 22SW(2d)222.
79-25 [a] But see 217AppDiv514, 217NYS289. [b] In Tennessee.-160Tenn44, 22SW(2d)222.
79-26 6F(2d)13; 23AlaA527, 128S591; 310Mo355, 275SW923; 104TexCr403, 284SW550; 106TexCr58, 290SW170; 113TexCr20, 18SW(2d)647.
80-29 104TexCr403, 284SW550.
80-33 157Tenn641, 12SW(2d)368.
80-36 22F(2d)876; 25F(2d)929.
80-37 22F(2d)876; 178Minn368, 227NW176; 318Mo928, 2SW(2d)612; MoA 9SW(2d)544; TexCr 25SW(2d)334.
81-41 93Fla963, 113S103; 172Minn401, 215NW863; 178Minn368, 227NW176; 318Mo928, 2SW(2d)612; 196NC662, 146SE599(2dcase); OklCr 273P1029(2dcase); 157Tenn641, 12SW(2d)368.
81-42 22F(2d)876.
81-47 172Minn401, 215NW863; BC [1929] 1DomLR692. [a] Contra 131Misc915, 229NYS268.
82-49 22F(2d)876. [a] (1) 22F(2d)876.
82-60 38F(2d)862.
83-75 38F(2d)862.
83-76 38F(2d)862.
83-78 38F(2d)862.
83-80 [e] Objection that complaint was not sworn to before judge cannot be urged in habeas corpus proceedings but should have been made at hearing. 36F(2d)565.
84-86½-New. Habeas corpus cannot be used as means for rehearing of what commissioner already decided. 38F(2d)862.
85-22 BC [1928] 1DomLR558.
87-67 5F(2d)494.
87-69 5F(2d)492 (writ discharged on showing at time of hearing that hearing on removal had been had before commissioners and petitioner was detained to await further hearing before court).
87-72 22F(2d)968.
87-74 11F(2d)847.
87-80 22F(2d)968.
87-81 6F(2d)828; 18F(2d)535.
88-85 6F(2d)209.
88-88 11F(2d)847. [b] No error to refuse evidence to overcome presumption of probable cause. 26F(2d)908. [c] Evidence held insufficient to overcome prima facie case made out by introduction of indictments. 26F(2d)908.
88-93 18F(2d)535; 26F(2d)908.
88-94 6F(2d)209.
88-95 22F(2d)968.
88-96 19F(2d)7; 22F(2d)968.
89-98 11F(2d)843; 11F(2d)847.
89-3 See also 26F(2d)908.
89-4 26F(2d)908.
93-60½-New. Conversely, in the absence of such declaration, detention is illegal by militia. 26F(2d)141.
93-66 4F(2d)823.
93-67 42F(2d)239; 174Minn82, 218NW542.
94-70 4F(2d)897.
94-72 [c] Intent of draft registrant to evade military service in failing to report is for military court. 4F(2d)823.
94-76 OklCr 269P785(2dcase); 12Pa Dist&Co 68.
94-78 96Fla237, 118S18; 101TexCr565, 276SW237.
95-89½-New. The question for decision on a petition for a writ admitting relator to bail pending determination of the right to appeal from a contempt judgment is the right to appeal. Ariz 281P944 (merits not inquired into).
95-92½-New. The appellate court will not interfere on conviction of felony and pending appeal except where circumstances of an extraordinary character have intervened since the conviction. 73CalA104, 237P801.
95-98 146Miss819, 112S170; 229AppDiv603, 243NYS15; 105TexCr484, 289SW43. [b] In determining amount, element of fine and imprisonment must be separated from amount. 146Miss819, 112S170.
96-12 29F(2d)399; 124Kan455, 260P

975; 33PortoRico 863; 48RI 50, 135A 322.

96-13 71CalA744, 236P205.

96-14 75CalA122, 241P934.

96-18 75CalA122, 241P934; 124Kan 455, 260P975; 125 Okl 1, 256P340; 33 PortoRico 863; 152Tenn416, 278SW54.

97-19 194Cal 49, 227P908.

97-20 20AlaA514, 104S561; 200Cal 403, 253P135; 292Pa63, 140A533; 110 TexCr362, 8SW(2d)674; 36Wyo 159, 253P667.

98-21 127Misc791, 217NYS477.

98-22 127Misc791, 217NYS477; 134 Okl 228, 273P211.

99-36 [b] **Where defendant is financially able to make alimony payments** required by court's order, he is not entitled to discharge. 100CalA477, 280P 181(1stcase).

99-37½-New. **In Texas** habeas corpus is the only way in which a contempt proceeding and the judgment thereon may be reviewed. CivA 284SW347.

99-37⅓-New. Where the petitioners purge themselves of contempt pending appeal by complying with the chancellor's order for refusal of which they were committed, they will be discharged by the appellate court. 99Vt306, 131 A847.

99-37¼-New. Whether a contempt proceeding was civil or criminal cannot be determined in habeas corpus proceedings. 33PortoRico 863.

100-48½-New. The allegations of the affidavit upon which the contempt proceeding was based must be taken as true. 75CalA122, 241P934.

100-50 129Kan597, 283P659.

101-66 109TexCr387, 4SW(2d)974.

102-77 17F(2d)737; 20F(2d)302.

102-77½-New. Conclusiveness of an order of deportation has been held not affected because a citizenship question was determined summarily. 20F(2d) 116.

102-79 110TexCr519, 9SW(2d)733, 62 ALR456.

102-82 127Misc290, 216NYS468.

102-88 21AlaA241, 108S62, 65 [citCJ].

102-94 21AlaA241, 108S62, 65 [citCJ].

103-6 89Fla143, 103S419.

103-11 130 Or631, 280P660.

103-16 **Immunity of bankrupt from arrest** see Bankruptcy § 617.

104-25 21AlaA241, 108S62, 65 [citCJ].

105-64 Contra TexCivA 5SW(2d)221.

105-66 Ariz 284P149.

105-70 80CalA27, 251P231.

106-74 193NC450, 137SE305.

106-79 119 Oh166, 162NE740.

106-80 [c] 80CalA27, 251P231.

106-82 See also NJCh 145A459(2d case).

106-83 [b] **Defects in petition for commitment.**-239Mich450, 214NW411.

107-95 See also NJCh 145A459(2d case).

107-97½-New. The fact that officials of a state hospital are willing to grant an applicant for habeas corpus leave of absence under safeguards is not sufficient reason for an order of discharge by way of writ of habeas corpus. 80 CalA27, 251P231.

107-97⅓-New. A person held by the sheriff before delivery to an insane hospital may not maintain habeas corpus under the statute applying to persons committed as insane. 199 Ind625, 159 NE689.

107-1 119 Oh166, 162NE740. [d] **Fact that court had previously ordered commitment and error had been prosecuted** from order constitutes no bar to subsequent application. 119 Oh166, 162NE 740.

108-7 213Ala259, 104S525; 21AlaA650, 111S644; 96CalA510, 274P396; 173 Minn177, 216NW937; 240NY429, 148NE 624, 40ALR937 (except when incident to divorce or separation); 19 OhA309; 39 OklACR241; 32PortoRico 20; Tex CivA 286SW629; Can [1926] 4DomLR 897. [d] **Two kinds of proceedings.**-Mont 292P582.

109-8 213Ala259, 104S525; 21AlaA650, 111S644; 81Colo 158, 253P1067; Fla 129S822; 163Ga272, 136SE60; 250 IllA 409; 250 IllA601; 197 Ind700, 151NE 826; 202 Iowa1, 209NW412; 119Kan 803, 241P115; 130Kan205, 285P606; 240Mich240, 215NW384; 240Mich376, 215NW367, 368 [quotCJ]; 241Mich567, 217NW780; 179Minn472, 229NW582; 102NJEq161, 139A906; 34NM587, 286 P828; 221AppDiv86, 222NYS319; 128 Or655, 275P661; 87PaSuper330; 90Pa Super350; 90PaSuper357; 90PaSuper 400; 94PaSuper86; 94PaSuper577; 8 PaDist&Co 117; TexCivA 286SW629. But see 48 Ida803, 285P1021.

109-10 81Colo 158, 253P1067; 202 Iowa1, 209NW412; 240Mich240, 215 NW384; 240Mich376, 215NW367; 169 Minn335, 211NW310; 77Mont466, 251 P163; 8PaDist&Co 117; TexCivA 280 SW294; TexCivA 22SW(2d)528. But see 322Mo 1155, 17SW(2d)941.

109-12 Fla 129S822 (physical restraint is given little consideration).

109-13 21AlaA241, 108S62, 65 [citCJ]; 90CalA307, 265P884. [a] **Not error to submit question to jury.**-TexCivA 273 SW974 (court not bound by findings of jury).

109-14 19 OhA309.

109-15 Mont 292P582; 38QueKB314, [1925] 3DomLR1189, 1192 [app dism [1925] CanSC532, [1925] 4DomLR530, and quotCJ].

109-17½-New. Habeas corpus proceedings involving custody of infants are of an equitable nature. 240Mich240, 215NW384.

109-17⅓-New. In such proceedings the court is vested with sound judicial discretion in ascertaining and determining the welfare of the child. 240Mich240, 215NW384.

109-17¼-New. The Michigan statute relative to the custody of minor children when parents separate is inapplicable when the infant is under twelve years of age. 240Mich240, 215NW384.

109-17⅕-New. Habeas corpus proceedings to modify or set aside judgment awarding custody of child is in effect a new suit. TexCivA 286SW629.

109-17⅙-New. Respondent without legal right to custody cannot, on habeas corpus by parent, set up parent's unfitness. Mont 292P582.

109-17⅐-New. Habeas corpus may issue if respondent harbors child and refuses to permit parents to exercise authority to enforce return. Mont 292 P582.

109-21 79Mont198, 255P737; 111 Okl 242, 238P956.

110-25½-New. Habeas corpus will not lie to secure the custody of a child held under an order which is voidable. 58 ND680, 227NW228.

110-26 [c] (3) 165Ga208, 140SE382. [g] (8) Where conditions remain unchanged, children's court decision, determining custody of child on notice to parents, is binding. 136Misc547, 242 NYS325.

110-28 93Fla383, 112S621; 130Kan 205, 285P606; 173Minn177, 216NW937; TexCivA 286SW629; 38QueKB314, [1925] 3DomLR1189, 1192 [app dism [1925] CanSC532, [1925] 4DomLR530, and quotCJ].

111-29 138 Okl 247, 280P813; TexCivA 278SW868; 68Utah74, 249P250, 48ALR 131; 38QueKB314, [1925] 3DomLR 1189, 1192 [app dism [1925] CanSC532, [1925] 4DomLR530, and quotCJ]. [b] **Presumptions,** in habeas corpus by parent for custody, favor natural parent. 68Utah74, 249P250, 48ALR131. [c] **County attorney held not proper party in such case.**-TexCivA 278SW868. [d] **Natural parents are not estopped to** bring habeas corpus to recover custody of child adopted, though mother signed instrument authorizing adoption. TexCivA 19SW(2d)159.

111-30 164Minn373, 205NW267; 38 QueKB314, [1925] 3DomLR1189, 1192 [app dism [1925] CanSC532, [1925] 4 DomLR530, and quotCJ].

111-31 46Philippine843 (holding paternity not in issue).

111-33 39 OklACR241.

111-37 164Ga69, 137SE760; Mont 292 P582. Contra 21AlaA650, 111S644.

111-38½-New. Where children are not under physical restraint, the court is bound to ascertain what custody is best for them and award their custody accordingly. 19 OhA309.

112-40 90CalA307, 265P884; 162Ga 148, 132SE895; 197 Ind700, 151NE826; TexCivA 22SW(2d)528.

112-46½-New. The court is not bound to respect mother's possession of child obtained by unlawful means. 215App Div38, 213NYS70.

112-46¼-New. Legal rights of parents are subordinate to the welfare of a child in determining its custody. 219Ala403, 122S615(2dcase).

112-46⅓-New. In absence of proof of proceedings establishing validity of decree appointing guardian, final judgment awarding custody to guardian against parents is improper. 111Conn 243, 149A664.

112-47 21AlaA241, 108S62, 65 [citCyc]; 90CalA307, 265P884; 100CalA796, 280 P1033(2dcase); CalA 284P944; 164Ga 7, 137SE567; 79Mont198, 255P737; TexCivA 286SW629. But see CalA 292 P285; Mont 292P582.

113-48 102NJEq161, 139A906; Tex CivA 286SW629.

113-52½-New. Inquiry is confined to merits, technicalities being overlooked unless absolutely controlling. 214Ala 1, 106S228.

113-56 82CalA580, 256P226; CalA 284 P944; 322 Ill 95, 152NE554; 173Minn 177, 216NW937; 79Mont198, 255P737; 221AppDiv86, 222NYS319; 111 Okl 242, 238P956, 960 [quotCJ].

113-57 Ill 173NE172; 250 IllA409. See also 208Cal 725, 284P916(2dcase).

113-58 221AppDiv86, 222NYS319.

113-59 79Mont198, 255P737; 221App Div86, 222NYS319. [a] **Irregularities acquiesced in.**-130 Okl 106, 265P105.

114-60 135 Okl 91, 274P469. [a] **Where parent has been adjudged insane,** order of adoption without his consent is valid under statute and cannot be collaterally attacked by habeas corpus even after parent has recovered sanity. 221 AppDiv86, 222NYS319.

114-61 79Mont198, 255P737; 111 Okl 242, 238P956, 960 [quotCJ].

114-62 79Mont198, 255P737; 111 Okl 242, 238P956, 960 [quotCJ].

114-64 111Conn243, 149A664; 79Mont 198, 255P737.

114-65½-New. Comity of courts may not be considered in habeas corpus proceedings for the custody of an infant where the future welfare of the child is the vital question. 240Mich240, 215 NW384.

114-63 202 Iowa1, 209NW412; 240 Mich240, 215NW384; 240Mich376, 215 NW367. [b] **Burden to show change of conditions is on party alleging it.** 32PortoRico 20.

114-70 See also 82CalA580, 256P226.

114-74 [d] **Parent is not bound by** adjudication committing child to reformatory or institution. Fla 129S822.

114-76 52ND518, 203NW898; 117 Oh 152, 157NE897 (procured by fraud).

115-80 [a] **District court** held to have jurisdiction of offenses charged, power to accept pleas of guilty and to pass judgments thereon. 54ND295, 209NW 552.

115-92 330 Ill 150, 161NE312; 100Tex Cr180, 272SW161 (petition dismissed for lack of jurisdiction).

115-94 195Wis545, 218NW829.

116-7 201Cal 122, 255P815, 52ALR869.

116-8 201Cal 122, 255P815, 818, 52ALR 869 [quotCJ]; 111 Okl 242, 238P956, 960 [quotCJ].

116-9 201Cal 122, 255P815, 818, 52ALR 869 [quotCJ]; 334 Ill 241, 165NE693; 200 Ind196, 158NE289; Ind 165NE906; 111 Okl 242, 238P956, 960 [quotCJ]; TexCivA 283SW244; TexCr 32SW(2d) 187. See also 10PaDist&Co 538.

116-10 201Cal 122, 255P815, 818, 52 ALR869 [quotCJ]; 82CalA280, 255P 541, [citCJ]; 84CalA24, 257P585.

116-11 22AlaA60, 112S96; 201Cal 122, 255P815, 818, 52ALR869 [quotCJ]; 200 Ind196, 158NE289.

116-12 201Cal 122, 255P815, 818, 52 ALR869 [quotCJ].

116-13 201Cal 122, 255P815, 818, 52 ALR869 [quotCJ]; 117Tex134, 299SW 393, 395 [quotCJ].

117-28½-New. Where custody award in divorce suit to father and mother forcibly took child to another state,

courts of latter state have jurisdiction to determine custody of child in proceedings by father against maternal grandparents. 202 **Iowa**l, 209**NW**412.

117-28½-New. A parent bringing habeas corpus, treated as equitable, for the custody of a child cannot question the jurisdiction of the court to proceed on equitable principles. 219**Ala**403, 122 S615(2dcase).

117-32 NJCh 152A188.

117-32½-New. The legislature is not prohibited by the constitution from authorizing the allowance of a writ by the judge of the court of common pleas. 105**NJL**73, 143A825.

117-33 285**Pa**289, 132A370.

117-34 201**Cal** 122, 255P815, 52**ALR** 869; 322**Mo** 1163, 17**SW(2d)**932; 220 **MoA**702, 293**SW**488; 117**Tex**134, 299 **SW**393. [a] **In Kentucky.**–214**Ky**684, 283**SW**1006.

118-36 41**F(2d)**38; 201**Cal** 122, 255**P** 815, 52**ALR**869; 124**Kan**3, 256**P**1015; **Mo** 280**SW**702; **OklCr** 290**P**357; 285 **Pa**289, 132A370; **TexCr** 27**SW(2d)**805; **TexCr** 29**SW(2d)**771.

118-37 [a] (2) In Montana supreme court will not exercise original jurisdiction in awarding custody of minors. **Mont** 292**P**582. [b] 220**MoA**702, 293 **SW**488. [d] (1) 116**Tex**515, 295**SW** 910. (10) Punishment for violation of injunction against sale of liquor is punishment in "civil case." 116**Tex**515, 295 **SW**910. [e] **In Oklahoma.–Cr** 290**P**357.

118-38 MoA 29**SW(2d)**725.

119-40 201**Cal** 122, 255**P**815, 52**ALR** 869.

119-42 See also 83**Colo** 321, 264**P**1090.

119-45½-New. Tendency of an appeal to it from a conviction does not deprive an appellate court of jurisdiction of a habeas corpus proceeding to secure release from imprisonment. 90**CalA**132, 265**P**561.

119-45½-New. Mere allegations of fact in a petition in the juvenile court, without a finding of fact thereon by the court, cannot prevail on habeas corpus in the appellate court as against admitted facts to the contrary. 99**CalA** 541, 278**P**910.

119-48 [a] (7) 23**AlaA**183, 123**S**87 [certiorari den 219**Ala**607, 123**S**88]. (10) Judge of Morgan County court has power to issue both statutory and common-law writs. 21**AlaA**650, 111**S**644 (limitation of power). [c] (4) Superior courts have concurrent jurisdiction with appellate courts in habeas corpus proceedings. 201**Cal** 122, 255**P**815, 52**ALR**869. (5) Superior courts not appellate have no power to interfere with appellate jurisdiction of either supreme or appellate courts in matters pending before such courts or to overrule or set aside judgment rendered therein. 201**Cal** 122, 255**P**815, 52**ALR**869. [d] (1) 83**Colo** 346, 265**P**690. [e] **Fla** 129**S**822. [h] (4) 323 **Ill** 28, 153**NE**597, 49**ALR**490. [aa] (6) County court has no general jurisdiction in habeas corpus proceedings. 97**PaSuper**380. [ii] But see 195 **Wis**545, 218**NW**829.

122-57 Del 145**A**9; 91**Fla**522, 107**S**689; 338 **Ill** 363, 170**NE**210.

122-60 315**Mo** 672, 286**SW**396.

123-61 CalA 292**P**545; **Mo** 25**SW(2d)** 472.

123-66 37**F(2d)**619. See also 332 **Ill** 295, 163**NE**668, 62**ALR**274.

123-67 91**Fla**522, 107**S**689.

124-68 91**Fla**522, 107**S**689.

124-70 91**Fla**522, 107**S**689, 691 [quot CJ].

124-73 91**Fla**522, 107**S**689, 691 [cit CJ].

124-85½-New. Federal courts will issue a writ of habeas corpus only when a federal question is involved. 11**F(2d)** 990.

125-87 36**F(2d)**882.

125-90½-New. Validity of a state statute under which sentence is imposed cannot be challenged on habeas corpus. 17**F(2d)**988.

125-90½-New. Federal courts may issue every species of writ of habeas corpus. 19**F(2d)**462.

126-22 14**F(2d)**609.

126-27 21**F(2d)**542. [a] (12) Where district director of naturalization was imprisoned for refusal to issue certificate of arrival against instruction of federal bureau. 17**F(2d)**133. (13) Where federal prohibition agent who, after arresting person for commission of felony in his presence under federal laws, shot such person on his attempt to escape. 21**F(2d)**542.

127-28 [c] **Prohibition officer seizing automobile** without warrant when facts would not lead reasonably prudent man to believe it was illegally transporting liquor is not acting in pursuance of law of United States so as to require his release on habeas corpus from custody on charge of aggravated assault. 5**F(2d)**280.

128-52 31**F(2d)**811; 37**F(2d)**407(2d case); 37**F(2d)**619. [a] **Federal courts will not attempt to control criminal prosecution** commenced in state courts, except under very exceptional circumstances. 41**F(2d)**38.

128-53 21**F(2d)**542; 37**F(2d)**409.

128-56 [a] **Financial inability of Indians,** imprisoned for contempt in state court, to proceed in state courts, does not entitle them to relief in federal courts. 269**US**13, 46**SCt**1, 70**L ed**138.

128-60 37**F(2d)**409; **TexCivA** 283**SW** 244. [b] **Power of federal court** is to be exerted in exercise of sound judicial discretion. 269**US**13, 46**SCt**1, 70**L ed** 138.

128-61 [b] **Federal court, in absence of exceptional circumstances or emergencies,** is without jurisdiction on habeas corpus to determine constitutionality of Iowa statutes. 41**F(2d)**38.

128-65 20**F(2d)**912. [c] **Court may look beyond form** and inquire into very substance of matter in deciding whether petitioner has been deprived of his liberty without due process. 37**F(2d)** 409. [d] **Court must consider entire course of proceedings in state court** in deciding whether petitioner has been deprived of his liberty without due process. 37**F(2d)**409. [e] **Where neither state or United States supreme court considered question** as to whether petitioner was confined in state prison without due process of law, court should discharge him. 37**F(2d)**409.

129-69 21**F(2d)**625; 36**F(2d)**882.

129-70 21**F(2d)**625.

130-95 74**CalA**247, 239**P**1095, 1097 [quot CJ].

132-27 33**F(2d)**360 (federal district court held without jurisdiction to issue writ to secure return of alien placed on vessel for deportation, where alien is in custody of ship master on high seas).

132-40 [d] (5) Legality of arrest in interstate extradition should be tested in state court. 21**F(2d)**74.

134-54½-New. The proper practice to secure the return by habeas corpus of a deportee bound from San Francisco to Honolulu is to apply at Honolulu for a writ directed to the ship's master having custody. 33**F(2d)**360.

135-76 [a] (1) **Can** [1929] 4**DomLR** 878. (3) **Can** [1929] 4**DomLR**878. (10) Judge of supreme court cannot issue writ where prisoner is detained for contempt of commissioner under Combines Investigation Acts. **Can** [1929] 4**DomLR**878.

136-86½-New. Intervenor in habeas corpus proceedings claiming custody of infant involved thereby submits to jurisdiction of court and waives right to plea of privilege. **TexCivA** 275**SW**606.

137-11½-New. Any question as to the sufficiency of the form of the relator's application is waived by the state by offering evidence on the hearing. 101 **TexCr**313, 276**SW**267.

137-11½-New. On application for writ of habeas corpus in which relator questioned stenographic accuracy of her plea, court is bound by record which is before it in moving papers. 135**Misc**475, 239**NYS**122.

137-11¼-New. Habeas corpus proceedings in original jurisdiction of supreme court should be instituted by application so as to avoid expense and hazard of bringing prisoner to court. **Wis** 229 **NW**643(2dcase).

137-17 51**SD**540, 215**NW**697 (recognizing rule).

138-30 52**SD**524, 219**NW**118 (defects held not fatal).

138-34 [a] 51**SD**540, 215**NW**697.

138-35 [a] **Habeas corpus to obtain child from stranger** may issue without child's request or even against his express wish. **Mont** 292**P**582.

138-36 51**SD**540, 215**NW**697, 698 [cit CJ].

139-46 TexCivA 278**SW**868. [a] **County attorney may not of own motion join parent** in habeas corpus for custody of child. **TexCivA** 278**SW**868.

141-66 322**Mo** 1163, 17**SW(2d)**932.

141-75 285**Pa**289, 132A370.

141-76 83**Colo** 321, 264**P**1090; 48 **Ida** 309, 282**P**380; 33**NM**324, 267**P**58; 285 **Pa**289, 132A370; 295**Pa**252, 145A130. [c] (5) Where application in effect requires review of sentence of nisi prius tribunal, supreme court will act if it, rather than superior court, is most convenient tribunal in session at time. 285 **Pa**289, 132A370. [e] **In Idaho.**–48 **Ida** 309, 282**P**380.

141-79½-New. In Canada the supreme court has no jurisdiction to issue a writ of habeas corpus where a conviction of crime was had under a provincial act. **Can** [1929] 1**DomLR**136.

142-83 But see 168**Ga**770, 149**SE**48.

142-90½-New. Answer to rule to show cause. The record below, and copies of the indictment, and verdict should be attached to the answer to the rule to show cause. 285**Pa**289, 132A370.

142-91 [a] **Where application is presented by one without assistance of counsel,** it will be ruled on by court, though defective in form. 83**CalA**742, 257**P**445.

142-93 [a] 29**Hawaii**830.

143-2 93**Fla**963, 113**S**103.

143-4 93**Fla**5, 112**S**289; 166**Ga**670, 144 **SE**206; 285**Pa**289, 132A370.

143-6 83**Colo** 321, 264**P**1090.

143-9 221**MoA**325, 273**SW**195.

143-11 221**MoA**325, 273**SW**195; 104 **TexCr**275, 283**SW**795.

143-12 196**Cal** 723, 239**P**708.

143-13 29**F(2d)**760; 95**CalA**571, 273**P** 143; 161**Ga**462, 131**SE**168 (petition insufficient); 322**Mo** 1163, 17**SW(2d)**932; 134**SC**147, 132**SE**39. [c] See also **Ariz** 282**P**276. [j] (10) 166**Ga**670, 144**SE** 206. (11) Mother seeking custody of infant must plead details as to time and place of birth upon intervention asserting intervenor's parentage. **Tex CivA** 275**SW**606. [k] **Expiration of term of prisoner.–CalA** 288**P**1109.

144-14 32**F(2d)**470; 93**CalA**88, 269**P** 183; 338 **Ill** 101, 170**NE**214; **Iowa** 229 **NW**189; 83**NH**173, 139A580; **OklCr** 288**P**351(2dcase).

144-15 [d] (3) Petition denied which fails to show that defendant should not be held on original warrant. 22**AlaA** 60, 112**S**96. [g] **If valid warrant and authority for detention appears** on examination of application for writ, it will be denied. 138 **Okl** 63, 280**P**427(1st case).

145-17 Ariz 282**P**276 (petition liberally construed).

145-18 Mo 25**SW(2d)**472. [a] **Especially where parentage of infant is involved** rules of pleading and practice applicable to civil actions generally should apply to proceedings in form of habeas corpus. **TexCivA** 275**SW**606.

145-19 5**F(2d)**608; 84**CalA**269, 257**P** 888.

145-22 4**HawaiiFed**274; 4**HawaiiFed** 342; 4**HawaiiFed**527.

145-24 89**Fla**143, 103**S**419 (certified or authenticated records not necessary); 97**Fla**668, 122**S**5; **Mo** 24**SW(2d)**111(3d case) (court is not deprived of jurisdiction by failure to attach governor's warrant in extradition proceeding); **Mo** 25 **SW(2d)**472 (other records not required). [c] **Requirement waived** by failure to move to quash writ. **Mo** 25**SW** (2d)472.

146-29½-New. Petition unaccompanied by briefs, or copy or proof of ordinance under which petitioner is held and which is alleged to be void, will be deemed abandoned. **OklCr** 290**P**568(2dcase).

146-31 [c] **Oath of applicant must be**

certified by officer authorized to administer oaths. 83CalA742, 257P445.
147-49 [b] **Petition held sufficient.**-27F(2d)230.
147-51 27F(2d)842.
147-54 Ind 167NE124.
147-55 33PortoRico 561.
147-57 13F(2d)347.
148-65 27F(2d)835.
148-66½-New. If a petition for habeas corpus to recover the custody of a minor child alleges facts which affirmatively show as matter of law that respondent is entitled to the custody of the child, a general demurrer will be treated as a motion to quash, and the petition may be dismissed. 166Ga670, 144SE206.
148-71 83Colo 321, 264P1090.
148-73 OklCr 287P726(2dcase).
149-75 23F(2d)326.
149-77 CalA 290P589(2dcase).
149-80 But see 111TexCr363, 12SW(2d)790(2dcase).
149-81½-New. Points of law raised by the pleadings are usually decided on the documentary evidence in the record. 285Pa289, 132A370.
149-81¼-New. In some jurisdictions, where matters set forth in a petition for a writ of habeas corpus to secure release after conviction and commitment cannot be proved without referring to the evidence received on the trial in the recorder's court, the application will be denied. 80CalA589, 252P752.
149-81½-New. It is a well-known practice of judges in granting writs to require counsel to state the contents of moving papers rather than to consume time in reading them. 103NJEq505, 143A836.
150-84 13F(2d)827
150-85 [b] **In Pennsylvania.**-285Pa289 132A370.
151-13 91Fla893, 109S630.
152-32 12F(2d)704.
152-36 [a] **That motion for dismissal was by one not entitled thereto** does not entitle petitioner to discharge where writ might have been dismissed on court's own motion. 25F(2d)74.
153-39 OklCr 289P359(1stcase); OklCr 289P359(2dcase).
153-52 4HawaiiFed258, 259 [citCyc]; Mo 24SW(2d)111(3dcase); 221MoA325, 273SW195.
153-53 4HawaiiFed529.
153-55 93Fla963, 113S103. [a] 89Fla 143, 103S419.
153-57 93Fla963, 113S103.
154-64½-New. Where an application for a writ of habeas corpus was directed to the court against a warden, the fact that the name of a former warden was used in the motion to dismiss, instead of the name of the present warden, has been held immaterial. 27F(2d)313.
154-64⅓-New. A writ is discharged where some of the essential facts on which it was based were misrepresented in the petition. 98CalA745, 277P740(2dcase).
154-66 TexCivA 4SW(2d)999, 1003 [cit CJ].
154-76½-New. A writ ad prosequendum to a warden is equivalent to a warrant for arrest, involving no question of conflicting or territorial jurisdiction. 322Mo 1163, 17SW(2d)932.
154-76⅓-New. Upon issuance of writ, petition becomes functus officio. CalA 290P589(2dcase).
154-77 37F(2d)409.
155-78 See also 37F(2d)409.
155-79 37F(2d)409.
155-81 37F(2d)409.
155-84 285Pa289, 132A370.
155-86 [a] **Review and not petition** as principal pleading. 310Mo 355, 275SW923.
155-87 310Mo 355, 275SW923 (case heard on allegations of petition by acquiescence of all parties); 139 Okl 31, 280P824 (petitioner entitled to discharge); OklCr 282P1114(1stcase) (prisoner discharged).
155-90 TexCr 25SW(2d)334.
155-97 [c] **In Oklahoma.**-39 OklACR 241.
156-16 80CalA647, 252P730.
156-20½-New. Allegations in a petition need not be denied. NJCh 144A546.
157-26 4HawaiiFed226; 4HawaiiFed 434.
157-27 165Ga103, 139SE798; Wis 233 NW82. [a] 4HawaiiFed531. [b] (2) But applicant may reply under same statutes and return is not conclusive. 315Mo 672, 286SW396.
158-28 NJCh 144A546. [a] (5) "I hereby relieve the within writ by producing prisoner" held insufficient. 310 Mo 355, 275SW923.
158-31 103WVa266, 137SE10, 11 [quot CJ].
158-34½-New. Infant in court under writ is in custody of the court and subject to its disposition uncontrolled by averments of return. 197 Ind700, 151 NE826.
159-48 118 Or693, 247P809.
159-54 118 Or693, 247P809; 119 Or 336, 249P639.
160-56 93Fla5, 112S289, 292 [citCJ].
160-59 118 Or693, 247P809.
160-62 199 Ind625, 159NE689.
160-65 220MoA825, 278SW1047.
160-68½-New. After amendment, the original return and rulings relating thereto go out of the case, and error cannot be predicated on the court's ruling thereon. 199 Ind643, 158NE594.
161-82 285Pa289, 132A370.
162-87 91Fla197, 107S409.
162-88 [a] **Officer arresting person pending hearing** on habeas corpus is not per se in contempt of court. 110TexCr 579, 9SW(2d)733, 62ALR456.
162-91 See also NS [1928] 1DomLR 624.
162-92 16F(2d)492; NJCh 144A546.
162-97 111Conn243, 149A664; 39 Okl ACR241.
163-19 310Mo 355, 275SW923.
163-20 161Ga466, 131SE170 (state of facts not alleged not before court for decision as to power of court on notice and hearing to revoke parole and require accused to serve original sentence in chain gang); 321Mo 268, 10SW(2d) 521; 308Mo 538, 272SW922 (without reference to petition). [c] **Inquiry into extrinsic facts is not authorized** upon record consisting of petition and exhibits, and return accompanied by copy of written authority under which petitioner is restrained. 81CalA105, 252P 1053.
164-79 See also 94CalA680, 271P784.
164-83-21½-New. Where no evidence is presented to an issue of the existence of an exception presenting running of statute of limitations for prosecution, other than letters tending to show absence from the state, supreme court will not try such issue, assuming its power to do so. 308Mo 538, 272SW922.
164-83-21⅓-New. Under such circumstances it is duty of supreme court to require trial of such issue in the usual and orderly course in the lower courts regardless of its power in the premises. 308Mo 538, 272SW922.
164-83-21¼-New. Defendant may not raise matters properly a defense to merits of charge in advance of hearing before magistrate. 30Ariz591, 249P758.
164-83-21⅕-New. The function of a writ is to determine the legality of detention by inquiry into the jurisdiction of the court and the validity of the process. 98CalA552, 277P201.
164-83-21⅙-New. Evidence controverting an indictment is matter of defense not considered on question of probable cause. 31F(2d)966.
164-83-21⅐-New. A petitioner, to secure release under an alleged warrant issued under the authority of a concurrent resolution of the senate and general assembly, is not restricted, in his presentation to the court, to the reasons set up in his petition and traverse. NJCh 144A546.
164-83-21⅛-New. Question whether registration as a physician and payment of narcotic tax is a defense is not available in habeas corpus. 31F(2d) 980.
164-83-21⅑-New. Relator may have inquiry on a writ of habeas corpus as to the power of the court convicting him to pronounce judgment, subject to the restriction that, when jurisdiction depends on the existence of fact, and the court has found the fact, such fact stands until reversed on direct review. 133Misc280, 232NYS9.
164-30 93Fla5, 112S289, 292 [citCJ].
165-31 6F(2d)640; Mo 25SW(2d)472.
165-32 But see 101TexCr432, 276SW 709.
165-33 82CalA172, 255P200; 308Mo 538, 272SW922 (where return states prisoner was fugitive from justice as avoidance of statute of limitation, court will not try this issue on habeas corpus); 50Philippine595.
165-38½-New. Where petitioner files a paper denominated a demurrer, which in reality goes to the merits of the issues joined by the return, the court may, in its discretion, refuse to permit an answer to be filed and may dismiss the writ after deciding issues raised by the demurrer. 119 Or336, 249P 639.
165-39 20F(2d)302; 93Fla5, 112S289; 339 Ill 356, 171NE548. But see MoA 9 SW(2d)544. [d] **Denial of leave to traverse return** where application is made seventeen days after return has been held not abuse of discretion. 13F(2d) 347; 136Misc637, 241NYS225. [e] **Petition treated as traverse to return.**-80 CalA647, 252P730.
166-41 See also Mo 31SW(2d)1.
166-48½-New. Magistrate's jurisdiction to issue commitment is presented by traversing return and presenting information or evidence on which he acted. 136Misc637, 241NYS225.
166-50 19F(2d)193; 31F(2d)966; 93 Fla963, 113S103; 95Fla37, 116S21 (extradition); 203 Iowa376, 212NW698; 229AppDiv687, 242NYS289; 129 Or652, 278P950; 32PortoRico 20; 104TexCr 403, 284SW550; 109TexCr17, 2SW(2d) 445(1stcase); 108TexCr533, 2SW(2d) 445(2dcase); 108TexCr619, 2SW(2d) 449. [a] (10) Burden on petition to show verdict void for uncertainty. 80 CalA647, 252P730. [g] **After decree of divorce** awarding custody of child to mother burden is on father to show conditions that existed when custody so awarded have changed. 32PortoRico 20. [h] **Burden is on one claiming that mother gave custody of her child** permanently. 134SC147, 132SE39.
166-51 136Misc637, 241NYS225.
167-52 93Fla963, 113S103; Ga 155SE 466; NJCh 146A423(2dcase); 136Misc 547, 242NYS325. [d] **Japanese seeking release on habeas corpus to reënter United States** has burden of proof on question of whether he was laborer at original surreptitious entry. 33F(2d) 926.
167-52½-New. In habeas corpus proceedings by surviving father for custody of his child, grandparents having custody have the burden of showing that father's prima facie right is overturned by testimony. TexCommnA 294 SW525.
167-52⅓-New. On application for a writ of habeas corpus to secure release from custody of the sheriff to whom the petitioners were committed by the police court, the appellate court cannot assume that the prosecution produced all of its evidence, and must assume that defendants had none to produce where they produced no evidence. 94 CalA680, 271P784.
167-55 32PortoRico 20 (conditions justifying award of child's custody to mother in divorce proceedings).
167-57 23AlaA61, 121S424 [certiorari den 219Ala139, 121S427(1stcase)]; 198 Cal 221, 244P359 (where defendant guilty in state court day after conviction and sentence in federal court, it must be presumed defendant was properly before state court); 69CalA784, 232P 725; 80CalA647, 252P730; 81CalA287, 253P948; 87CalA36, 261P1048; 95CalA 571, 273P143; 33PortoRico 863, 872 [quotCJ]; 132SC199, 128SE882; Utah

284P318. [c] (2) **Assumed that nunc pro tunc judgment correcting record was rendered on notice or in presence of petitioner. Utah** 284A318. (3) Presumed that evidence as recited in nunc pro tunc judgment showed that first judgment was not entered as rendered or imposed by court. **Utah** 284P318. [f] **Improper conduct of jury** returning indictment is not assumed. 22F(2d) 823.

167–58 81CalA287, 253P948; 112TexCr 495, 17SW(2d)1047.

167–60–69 107TexCr342, 296SW528.

167–60–69½–New. Where the person seeking to recover custody of a child is shown to be its adoptive parent, the presumption arises that the child's welfare would be best promoted by awarding custody to relator. **TexCivA** 289 SW745.

167–60–69⅛–New. It will be presumed that surrender of custody of a child by the parent to a stranger is intended to be temporary, unless the intention to surrender him permanently clearly appears. 91Fla300, 107S446.

167–60–69¼–New. Where a mother appeared in response to an order to show cause why the custody of her children should not be given to the father, and, without objection, the court referred the matter to a referee who requested one of her deputies to investigate the case, the court must presume that none of the witnesses interviewed by the deputy were sworn. 96CalA510, 274P 396.

167–60–69⅙–New. Where petitioner in proceeding to obtain custody of child shows parentage burden rests on maternal grandparents opposing petition to show forfeiture of petitioner's right. 48 Ida803, 285P1021.

167–60–69⅙–New. Burden of impeaching validity of process, valid on its face, rests on prisoner after proceeding for commitment by magistrate. 136 Misc637, 241NYS225.

167–71½–New. To support finding that conditions with reference to son of divorced parents had so changed as to warrant modification of decree in regard to custody. 240Mich240, 215NW 384.

167–72 30F(2d)650; 80CalA647, 252P 730; 95CalA375, 272P1066; CalA 293 P175(1stcase); Ga 155SE466; 104TexCr 403, 284SW550; 106TexCr58, 290SW 170; TexCivA 21SW(2d)365; TexCr 20SW(2d)1060(1stcase). [a] (3) **Where** applicant for writ is held under complaint, burden is on state to produce sufficient evidence to show probable cause for holding him. TexCr 32SW (2d)187. (4) Evidence held insufficient to establish probable cause to believe applicant committed offense. TexCr 32 SW(2d)187. [j] (9) On habeas corpus to secure discharge from custody under commitment for selling intoxicating liquor, evidence held sufficient to show probable cause for believing petitioner guilty of possessing intoxicating liquor unlawfully. 70CalA483, 233P805. (10) To show parents fit to have custody of child. 164Minn373, 205NW267. (11) To show that there was no fraud or misrepresentation in obtaining warrant for paroled convict. 49SD416, 207NW 213. (12) To warrant writ against person aiding in concealment of infant. 39 OklACR241. (13) To warrant holding defendant to answer to charge of embezzlement and deny writ. 78CalA550, 248P731. (14) To show sufficient evidence adduced at hearing to show defendant's knowledge of offense. 78CalA 550, 248P731. (15) To sustain award of custody of nine-year-old girl to great-grandmother rather than mother. 197 Ind700, 151NE826. (16) To show that prisoner was held under judgment of court of competent jurisdiction. 200 Ind196, 158NE289. (17) To show that mother was proper person to care for child. 173Minn177, 216NW937. (18) To show that authenticating certificate of governor of demanding state was before governor of asylum state when hearing was had and when requisition was honored and rendition warrant issued. MoA 98SW(2d)544. (19) To support decision of authorities that alien was not minor on arrival. 31F(2d)570. (20) To warrant finding that petitioner was in demanding state when crime was committed. 265Mass101, 163NE 870. (21) To establish that relator was not in demanding state at time of commission of crime. 227AppDiv436, 238NYS123. (22) To show deportation hearing unfair and discharge required. 34F(2d)223. (23) To show convict's discharge on habeas corpus improperly refused. TexCr 28SW(2d)147. (24) To warrant detention under application for extradition. 40F(2d)750. (25) Other evidence held sufficient. 20F(2d)116; 22F(2d)823; 171Ark475, 284SW726; 163Ga272, 136SE60; 171Minn140, 213 NW556; 102NJEq161, 139A906; 131Misc 915, 229NYS268; 130 Okl 106, 265P105; TexCivA 289SW104. [k] (9) Other evidence held insufficient. 37E(2d)36; 37F(2d)615(2dcase); 258Mass289, 155 NE12, 51ALR789; 102NJEq161, 139A 906; 134SC147, 132SE39; TexCivA 278 SW868; TexCivA 289SW745; 106TexCr 563, 293SW1117; 143Wash65, 254P466. [o] **Evidence held conclusively to establish abandonment of child by mother.** 215AppDiv38, 213NYS70. [p] **On collateral review, some evidence to support order held sufficient.**–273US103, 47 SCt302, 71L ed560. [q] **Where uncontradicted facts show defendant entitled to be released** as matter of law, writ may be granted. 248SNY126, 161NE444. [r] **Petitioner properly remanded** where absence from demanding state is not shown and demand was legally sufficient. 99CalA509, 278P911. [s] **Where evidence is merely contradictory,** prisoner will not be discharged under warrant of extradition. Ill 172NE168. [t] **Relator must conclusively establish** absence from demanding state at time of commission of offense where seeking release from custody under extradition warrant. 227AppDiv436, 238NYS123. [u] **Appellate court cannot hear evidence except on jurisdictional question** as regards application alleging insanity. TexCr 28SW(2d)133.

168–73–60 [a] (2) In review of deportation proceedings, hearsay evidence is admissible. 15F(2d)377. [e] (2) Statement of plaintiff's deceased wife shortly before death. TexCivA 273SW974. [f] **Evidence not confined** to general reputation. TexCivA 273SW974. [g] **Evidence admissible.**–15F(2d)377; TexCivA 273SW974 (cruelty to deceased wife).

168–73–60½–New. Where a writ of habeas corpus for the custody of a minor child has been issued, and in response thereto the child has been brought into court, the evidence necessary to a proper decision of the case should be inquired into, unless the petition alleges facts affirmatively showing as matter of law that respondent is entitled to the custody of the child. 166 Ga670, 144SE206.

168–61 279US597, 49SCt452, 73L ed 867; 19F(2d)64; 162Ga443, 133SE923; 199 Ind625, 159NE689; 265Mass101, 163 NE870. [d] **Proceedings to secure release after revocation of unauthorized suspension of sentence.**–162Ga443, 133 SE923.

168–62 [a] (1) 151Miss267, 117S596, 61ALR709. (3) 321Mo 268, 10SW(2d) 521. [a] (10) Other instances of evidence held admissible. 166Ga250, 142 SE888. (11) Court properly rejected evidence tending to show no valid basis for criminal charge, and complainant's motives. 27F(2d)842. (12) Evidence that alleged fugitive from justice was not in demanding state at time of commission of alleged crime is not admissible. 151Miss267, 117S596, 61ALR709. [b] (2) 256 IllA259; 240Mich376, 215 NW367. (3) 243 IllA367; 298Pa416, 148 A524. (6) 202 Iowal, 209NW412. (10) Divorce decree in another state awarding custody to father is admissible in proceeding by father to which maternal grandparents are parties having custody. 202 Iowal, 209NW412. (11) In such proceedings against maternal grandparents they may show that foreign divorce decree awarding custody to father was void or not final. 202 Iowa 1, 209NW412. [e] **Deposition.**–34Porto Rico514. [f] **On review of deportation proceedings,** opinion of medical examiner as expert, based on written report of physician who made examination, stating facts, is properly considered. 17 F(2d)378.

168–63 112TexCr495, 17SW(2d)1047. [b] **Testimony of stenographer** that certain statements offered in evidence were taken down and transcribed by him is admissible. 34PortoRico514.

169–64 171Ark1187, 284SW533; 153 Miss759, 121S493; 221MoA325, 273SW 195; 133Misc538, 232NYS603.

169–69–83½–New. Evidence held to show that welfare of child required it to remain in custody of grandparents. TexCivA 300SW146.

169–84 [a] **Affidavits are admissible** in habeas corpus by one under arrest for rendition to another state. 6F(2d) 13.

169–85½–New. In some jurisdictions ex parte affidavits are inadmissible of trial in habeas corpus proceedings except by consent or stipulation of counsel. 310 Mo 339, 275SW529.

169–90 But see Ga 155SE466.

169–92½–New. Habeas corpus will not be granted on mere affidavit alleging convicted defendant's insanity. TexCr 28SW(2d)133.

170–95 89Fla143, 103S419; 200 Ind 196, 158NE289; 168Minn374, 210NW14 (proceeding in probate court to discharge inmate of insane asylum); 115 Nebr818, 215NW104; 292Pa63, 140A 533.

171–98 106TexCr58, 290SW170.

171–99 92CalA384, 268P422; 103WVa 266, 137SE10, 11 [quotCJ].

171–2½–New. File mark of justice of peace on information showing filing on a certain day is prima facie evidence that it was filed that day. 220MoA406, 286 SW733.

171–3 [a] (2) Fact and date of filing of information before justice of peace may be shown by parol. 220MoA406, 286 SW733.

171–3½–New. In the absence of complaint, evidence, or judgment in the principal suit giving rise to proceedings for contempt, the court cannot determine in habeas corpus proceedings whether the order disobeyed was made without jurisdiction. 33PortoRico863.

171–6 [c] (3) Applicability of Indeterminate Sentence Law can be raised only by state or prisoner, and will not be considered when raised by daughter of prisoner applying for writ. 51SD540, 215NW697. [e] (2) Constitutionality of state statute denouncing offense will not be considered in habeas corpus proceeding to prevent removal of prisoner in extradition proceeding. 27F(2d)842. [f] (3) Rule in text applied where no issue of citizenship is involved. 15F(2d)377. (4) Finding of mental defectiveness of alien, antedating entry, is sufficiently supported by opinion of medical examiner as expert based on examination of other physician. 17F(2d)378. (5) The question to be determined is whether conclusions of immigration tribunals were so obviously unfounded as to be unreasonable and arbitrary. 37F(2d)615(2dcase). [i] (3) When infants are brought before haseas corpus court, court will exercise its discretion as to their custody, and, unless discretion has been flagrantly abused, reviewing court will not intefere. 166Ga670, 144SE206. (4) In proceedings by wife to recover custody of children under foreign divorce decree which is void as to question of custody of children, court may inquire into history and character of parents. 46 Ida512, 269P987. (5) On habeas corpus for release of infant from sheriff's custody, only proper subject of inquiry is illegality of restraint, not who should be awarded custody. Mont 292P582. (6) In Montana, when petition in supreme court presents case of unlawful restraint, nature of proceeding may not be transformed, by request in return, into equitable proceeding for custody. Mont 292P582. [j] (2) Where evidence taken in police court was not properly before district court of appeals on application for writ of habeas corpus to secure release from custody of sheriff,

appellate court cannot consult evidence, under Pen. Code § 1484. 94CalA680, 271 P784. [m] **The inquiry is limited** as to whether there is any substantial evidence of jurisdictional facts. 69CalA 598, 232P157. [n] **Court may inquire** into any matters affecting legality of detention and is not limited to those specifically set forth. 89Fla143, 103S 419. [o] **Production of petitioner in court.**–14F(2d)280. [p] **Where petitioner is detained under judgment of court,** question is whether court exceeded jurisdiction in giving judgment. 81 CalA287, 253P948. [q] **Ultimate questions** are jurisdiction and power. 320 Mo 1140, 10SW(2d)953. [r] **Whether petitioners are held without reasonable or probable causes** must be determined by court. 94CalA680, 271P784. [s] **Guilt or innocence of one accused of crime in state demanding his return** will not be tried in forum of the asylum state. 110TexCr454, 10SW(2d)94 (1stcase). [t] **Commitment which was functus officio when writ was issued** will not be considered. 86CalA585, 261P 731. [u] **Petitioner's guilt or innocence** cannot be considered on habeas corpus. MoA 27SW(2d)444. [v] **On review of commitment for inability to give peace bond,** court has right to hear and determine whether action of justice of peace committing relator was arbitrary and whether facts authorized judgment. 113 TexCr73, 19SW(2d)58. [w] **On sufficient complaint against fugitive from justice,** court should not discharge accused on habeas corpus unless law was clearly violated. Ill 172NE168. [x] **Existence of defendant's insanity is issuable fact** in habeas corpus proceeding. TexCr 28SW(2d)133. [y] **Precedence over respondent's adoption proceeding.**–256 IllA259.

172–7 [a] 20AlaA514, 104S561 (duty to inquire into cause of restraint unless petition shows restraint lawful beyond question). [b] (2) Traverse by answer or return of material allegations of fact in moving papers on which writ is granted requires a trial. 126Misc103, 213NYS476 (Civ. Pract. Act § 1251).

172–11 31F(2d)966; 114 Okl 143, 244P 787; TexCommnA 9SW(2d)1029. [b] **Jury trial is not matter of right** in proceedings to obtain release from hospital for insane. 114 Okl 143, 244P787.

172–12 94CalA680, 271P784; 215 AppDiv163, 213NYS220 (impaneling jury to aid judge decide whether prisoner had regained sanity held proper); 114 Okl 143, 244P787 (trial of issue of insanity); TexCivA 22SW(2d)528. [d] **Court not bound to accept findings of jury.** TexCivA 273SW974. [e] **In Texas.**–CivA 22SW(2d)528.

172–12½–New. Intervenor in habeas corpus asserting parentage of infant involved is entitled to jury trial as in other civil actions. TexCivA 275SW 606.

173–13 96CalA510, 274P396. [b] **Findings of referee** are merely advisory. 67 Utah371, 248P83. But see 15F(2d)576.

173–15 [b] **In Alabama.**–20AlaA514, 104S561.

173–19 37F(2d)36 (substantial fairness of proceedings); NJCh 146A423 (2dcase); 106TexCr58, 290SW170 (holding introduction of additional evidence after close of testimony not error). But see 8F(2d)42. [d] (2) Petitioner is entitled to appear as witness. 310Mo 339, 275SW529.

173–22½–New. When defendant is recovering concurrent terms under two indictments, and attack is made on habeas corpus on only one of the sentences, the question whether such sentence is void is immaterial. 12F(2d) 704.

173–22⅛–New. Question of fact as to credibility of witnesses and alibi has been held not triable on petition for habeas corpus. 258Mass289, 155NE12, 51ALR789.

173–22¼–New. To set aside a deportation order, the only question before the court is whether the petitioner had a fair hearing. 20F(2d)116.

173–22⅕–New. On alien's application, preliminary question for the court is whether the petitioner had a fair hearing before the immigration authorities, 23F(2d)326.

173–22⅙–New. and where a fair hearing was accorded, the court will refuse to hear the case on merits. 23F(2d)326.

173–22⅐–New. In proceedings involving the custody of an infant, the trial court may have a private interview with the child to ascertain his uninfluenced choice. 240Mich240, 215NW384.

173–22⅛–New. The court need not advise counsel of its intention to have such interview. 240Mich240, 215NW384.

173–22 1/10–New. A finding as to the child's physical condition cannot be based on information obtained by such interview. 240Mich240, 215NW384.

173–22 1/10–New. Discharge is denied when the evidence is conflicting. 31 F(2d)811.

173–22 1/11–New. A request for a ruling that the affidavit based on information and belief was not sworn evidence that the petitioner was a fugitive from justice, was properly refused. 265Mass 101, 163NE870.

173–22 1/12–New. The practice of determining a case on the pleadings, where material allegations in the pleading are not denied has been held inapplicable to habeas corpus proceedings. NJCh 144A 546.

173–22 1/13–New. Severity of sentence cannot be determined. 134Misc228, 235 NYS173.

173–22 1/14–New. On habeas corpus to procure release from imprisonment, only question raised is whether prisoner is illegally restrained by reason of lack of jurisdiction. 36F(2d)944.

173–22 1/15–New. Federal supreme court's affirmation of state court's judgment on ground that no federal question was involved precluded retrial questions of double punishment and conflict of jurisdiction. 37F(2d)407(2dcase).

173–22 1/16–New. Only question open to petitioner sentenced by state court is whether he was illegally deprived of rights under federal constitution. 37 F(2d)407(2dcase).

173–22 1/17–New. Whether petition to juvenile court alleges sufficient facts to support order depriving parents of custody and control of minor will not be inquired into. 208Cal 725, 284P916 (2dcase).

173–22 1/18–New. The court will inquire whether the complaint upon which a defendant is held, or has been convicted, charges a public offense. 99Fla362, 126 S292.

173–22 1/19–New. On habeas corpus court examines only power and authority of court to act, not correctness of conclusion. 136Misc637, 241NYS225.

173–22 1/20–New. Only thing to consider is whether there is probable cause for detention. 34PortoRico514.

173–26½–New. Request regarding the rights of one held as a fugitive from justice has been held properly refused, even though correct as an abstract principle of law, where there was no issue to which it was applicable. 265 Mass101, 163NE870.

173–26⅓–New. Request for a ruling that the governor was without authority to issue a warrant for the arrest and rendition of the petitioner, because the complaint annexed to the demand of the Governor of the demanding state was not accompanied by affidavits to facts constituting the crime charged by persons who had actual knowledge, has been held properly refused. 265Mass101, 163 NE870.

173–27 [g] **Expiration of time allowed for detention** necessitates discharge of prisoner arrested as fugitive from justice. 99Fla1219, 127S560.

173–28 Fla 129S818. [a] **In extradition cases** finding that prisoner is not fugitive from justice sustains order of discharge. 318Mo 928, 2SW(2d)612. [b] **Custody of person making affidavit which was basis of requisition.**–170Ga826, 154SE 342.

173–29 [c] (2) Judge of circuit court of appeals cannot grant bail pending an appeal to an alien whose writ of habeas corpus has been discharged. 29F(2d) 485.

174–31 20F(2d)302; 95Fla736, 116S 858; 217AppDiv514, 217NYS289; 196 NC662, 146SE599(2dcase); Utah 284P 318. [c] **Court improperly discharged prisoner** where prima facie case of lawful detention was not overcome. 23 AlaA527, 128S591.

174–32 97Fla617, 121S787.

174–33 6F(2d)13 (one held for rendition as fugitive from justice should not be discharged by federal court except when absolutely necessary to protect his legal rights); 87CalA60, 261P725; 315 Mo 672, 286SW396; 131Misc411, 227 NYS142. [d] **Defects in arrest** or commitment are not grounds for discharge. 6F(2d)828.

174–35 70CalA483, 233P805.

175–38 16F(2d)566; 82CalA73, 255P 244; 92Fla185, 109S445; 92Fla412, 109 S455; 93Fla332, 111S518; Fla 129S 818; 164La1051, 115S187; 285Pa289, 132A370; 292Pa501, 141A287; 293Pa 18, 141A723. But see 35 OhA491, 172 NE623. [b] (3) Where prisoner while on parole committed another crime and was sentenced therefor to minimum term and to maximum term under Habitual Offenders Act, and supreme court, after minimum term has been served, decides that maximum sentence was illegal, prisoner will be remanded to lower court for resentence, as he should have been sentenced at time of last conviction. 285Pa289, 132A370. (4) In such case, circumstance that confederate of prisoner was sentenced at time of last conviction to smaller period of imprisonment than minimum imposed on, and served by, relator, is matter for consideration of lower court on resentence and not for supreme court. 285Pa289, 132A370. (5) Remand for correction of judgment is proper. 98Fla181, 123S 571(1stcase). [c] **Where sentence was imposed on Saturday after twelve o'clock noon,** prisoner should be remanded for sentence. 87CalA36, 261P 1048. [d] **Discharge without prejudice to further proceedings.**–Utah 284P323. [e] **Clerical error** as to year in which sentence and judgment were pronounced will be corrected without discharge or remand. OklCr 281P597(2dcase).

175–39 16F(2d)566.

176–40 Fla 129S818.

176–41 But see Utah 284P318. [a] (2) Where one is properly sentenced to state prison, but erroneously resentenced to county jail, court on habeas corpus may direct commitment to custody of proper person. 196Cal 515, 238P359.

176–42 [a] **That deceased had been seen with drunkard prior to killing** is inadmissible in absence of statement that he was drunk or had been seen drinking. 104TexCr649, 285SW621.

176–42½–New. Release is not justified for failure to prove the crime charged in extradition proceedings. 93Fla963, 113S103.

176–42⅓–New. Where a juvenile court of competent jurisdiction made judgment as to the disposition of a child, which was unappealed from, the appellate court had no discretion except to remand the child to custody as ordered by the juvenile court. Mo 19SW(2d) 752.

176–42¼–New. Where, by the expiration of the term, a person is released before application on habeas corpus can be heard, motion to dismiss is proper. 129Kan597, 283P659.

176–42⅕–New. One erroneously convicted as a fourth offender, under a record showing sentence on the second offense to have been suspended, cannot be remanded for resentence and cannot be retried because of double jeopardy. 134 Misc786, 236NYS432.

176–43 BC [1930] 1DomLR575.

176–54 320Mo 1140, 10SW(2d)953.

177–59 53ND852, 208NW238.

177–63½–New. Where an aunt joins the mother to regain custody of the child, the court will require her to file a bond for support of the child. 134SC147, 132 SE39.

177–64½–New. The court cannot remove one guardian and appoint another. 151Va136, 144SE432.

177–72½–New. Upon return of writ, conviction and orders made are not collaterally before the court and there is no jurisdiction to quash such conviction

or orders. **NS** [1927] 2**DomLR**647.

177-72½-New. As against collateral attack, court must assume that order restoring person to competency was made on evidence deemed sufficient to prove sanity. **CalA** 284**P**987.

177-72¼-New. Issuance of execution upon judgment in habeas corpus proceedings is unauthorized. 111**Conn**243, 149**A**664.

177-72½-New. Judgment sentencing defendant to imprisonment in an unauthorized place cannot be annulled by the supreme court, nor can it direct rendition of a different judgment as on appeal or writ of review. **Utah** 284**P**318.

177-81 171**Ark**475, 284**SW**726; **Tex CivA** 286**SW**629.

177-91 21**AlaA**241, 108**S**62.

178-92½-New. Finding, on habeas corpus, that petitioners are entitled to bail should have no influence on determination of guilt or innocence at trial. 99 **Fla**1228, 128**S**846(1stcase).

178-93 Ariz 284**P**149. [a] **Judgment discharging relator from detention as insane person** is not res judicata as to illegality of original imprisonment where record does not show ground of discharge. **Ariz** 284**P**149.

178-96 [d] **Relator, by signing parole agreement accepting conditional discharge,** after previously having been granted absolute discharge in habeas corpus proceedings, did not waive right to absolute discharge. 221**AppDiv**418, 223**NYS**124.

178-8 18**F(2d)**503; 339 **Ill** 356, 171**NE** 548. [a] **Discharge without prejudice.**–13**F(2d)**827.

178-12½-New. On sentence under the wrong court, discharge under habeas corpus is primarily for resentence. 16 **F(2d)**566.

178-13 201**Cal** 122, 255**P**815, 52**ALR** 869.

179-15 18**F(2d)**503.

179-18 267**US**80, 45**SCt**209, 69**L ed**522 (discharge is not res judicata as to sufficiency of indictment or warrant on which subsequent arrest is made).

179-19 267**US**80, 45**SCt**209, 69**L ed**522 (discharge for insufficiency of evidence does not preclude second inquiry).

179-29 21**AlaA**241, 108**S**62, 65 [cit Cyc]; **Mont** 292**P**582; 33**NM**324, 267**P** 58, 59 [quotCJ]; **BC** [1928] 1**DomLR** 558.

179-30 Mont 292**P**582.

180-33 5**F(2d)**680; 166**Ga**185, 142**SE** 741. [b] **In Oklahoma.**–143 **Okl** 174, 288 **P**346(1stcase).

180-37½-New. An order in habeas corpus proceedings denying release on bail after refusal of the court ordering release on bail to approve the bail bond is not res adjudicata in a proceeding by mandamus to compel approval of the bond where the order in the habeas corpus proceeding was based on the ground that habeas corpus was not the proper remedy. 114 **Okl** 228, 245**P**999.

180-41 4**HawaiiFed**274; 103**WVa**264, 137**SE**219.

181-54½-New. In Kentucky a second application to the same court is expressly provided for by Crim. Code § 429. 214**Ky**684, 283**SW**1006.

181-55 89**Fla**143, 103**S**419.

181-57 160**Tenn**285, 24**SW(2d)**897.

181-59 160**Ga**853, 129**SE**94 (by statute). But see **NS** [1928] 3**DomLR**234.

182-87½-New. The prevailing party is taxed with appeal costs where he delayed appeal for a year. 36**Wyo** 159, 253**P**667.

182-87½-New. The sheriff is taxed with costs where he allowed petitioner to remain free for a year. 36**Wyo** 159, 253 **P**667.

182-4½-New. A statute authorizing award of "the costs of the proceedings" in habeas corpus embraces only charges fixed by statute and does not authorize award of attorney's fees of respondent. 160**Ga**853, 129**SE**94.

182-11 CalA 292**P**988.

183-12½-New. New trial. Error in denying a motion to reconsider finding and judgment denying release on habeas corpus is not cause for a new trial. 199 **Ind**625, 159**NE**689.

183-14 215**Ala**1, 109**S**607; 21**AlaA**241, 108**S**62; 201**Cal** 122, 255**P**815, 52**ALR** 869; 214**Ky**684, 283**SW**1006; 315**Mo** 672, 286**SW**396; 54**ND**164, 209**NW**211.

183-17 91**Fla**236, 107**S**267; 46 **Ida**142, 267**P**227, 228 [citCJ]. See also 36**Wyo** 159, 253**P**667.

184-19 91**Fla**236, 107**S**267; 97**Fla**668, 122**S**5.

184-20 21**AlaA**416, 109**S**124; 208**Ky** 632, 271**SW**679; 54**ND**164, 209**NW**211; 113**TexCr**187, 18**SW(2d)**1080(2dcase); **TexCr** 20**SW(2d)**1058(2dcase); **TexCr** 20**SW(2d)**1070(2dcase).

184-21 213**Ala**367, 104**S**806.

184-22 23**AlaA**301, 124**S**502(2dcase). But see 160**Tenn**285, 23**SW(2d)**660.

184-27 11**F(2d)**990; 120**Kan**692, 245**P** 105 (discharge on ground of lack of jurisdiction).

184-28 5**F(2d)**966; 125**Me**522, 134**A** 566; **NB** [1928] 3**DomLR**674.

185-38 215**Ala**509, 110**S**901.

185-48 But see 192**NC**672, 135**SE**773.

185-50 21**AlaA**241, 108**S**62; 163**La**1047, 113**S**370; **TexCivA**, 275**SW**606.

185-51 21**AlaA**241, 108**S**62, 65 [cit Cyc].

185-53 204**Cal** 169, 267**P**101, 102 [cit CJ].

185-56 See also 200 **Ind**270, 163**NE**97.

186-62 CalA 290**P**1076.

186-64 120**Kan**692, 245**P**105 (sheriff).

186-69½-New. Party who invites error is not entitled to allege error on appeal. 199 **Ind**625, 159**NE**689.

186-71 91**Fla**197, 107**S**409.

187-73 215**Ala**1, 209**S**607; 181**Ark**284, 25**SW(2d)**436; 315**Mo** 672, 286**SW**396.

187-80 215**Ala**1, 109**S**607.

187-87 7**F(2d)**515; 20**F(2d)**906.

187-91 7**F(2d)**515; 20**F(2d)**906.

188-94 113**TexCr**478, 22**SW(2d)**306.

188-95 [a] **Court of appeals has appellate jurisdiction.**–21**AlaA**650, 111**S**644.

188-2½-New. The right of a court on appeal to review a habeas corpus proceeding is not affected by the fact that it may later be called upon to review the trial. 11**F(2d)**847.

188-12 134**SC**147, 132**SE**39 (custody of child).

188-12½-New. In Canada the question of appeals in habeas corpus proceedings is a matter of provincial jurisdiction. **Que** [1929] 1**DomLR**223.

188-14 15**F(2d)**840; 219**Ala**403, 122**S** 615(2dcase); 80**CalA**647, 252**P**730; 93 **CalA**88, 269**P**183; 83**Colo** 346, 265**P**690; 172**Minn**401, 215**NW**863; 151**Miss**267, 117**S**596, 61**ALR**709; 100**TexCr**560, 272 **SW**130 (disqualification of juror).

189-21½-New. Habeas corpus pleading should be viewed with more indulgence if not timely assailed in trial court. **Mo** 24**SW(2d)**111(3dcase).

189-24 [a] **In Texas.**–106**TexCr**649, 294 **SW**213.

189-26 [c] **Certiorari.**–241**Mich**567, 217 **NW**780.

189-29 20**F(2d)**906; 24**F(2d)**706.

189-33 109**TexCr**73, 3**SW(2d)**86.

189-48 246**NY**258, 158**NE**613; 66**Utah** 282, 241**P**840, 43**ALR**136.

189-49 See also 246**NY**258, 158**NE**613.

189-50 246**NY**258, 158**NE**613; 66**Utah** 282, 241**P**840, 43**ALR**136.

190-53½-New. Where a person convicted of a bailable offense is discharged on habeas corpus, and notice of appeal is given while he is still in court, the judge should require the prisoner to enter into a recognizance for his appearance on review. 115**Nebr**818, 215**NW**104.

190-56 [b] **Constitutionality of statute** that would suspend effect of discharge by mere force of appeal has been challenged. 246**NY**258, 158**NE**613.

190-62 See also 44**F(2d)**166.

190-66 163**La**1047, 113**S**370.

190-73 [a] **Allegation of error in refusing to reconsider finding and judgment** held not proper assignment. 199 **Ind**625, 159**NE**689.

191-74½-New. In some jurisdictions appeal from order discharging petitioner will not be dismissed for failure to assign error. 23**AlaA**356, 127**S**797(2dcase).

191-76 80**CalA**647, 252**P**730; 93**Fla** 383, 112**S**621; 160**Ga**480, 128**SE**765 (whether court gave full faith and credit to foreign decree awarding minor children not considered where no authenticated record of decree introduced at trial); 165**Ga**103, 139**SE**798; 219 **AppDiv**691, 220**NYS**542; **OhA** 172**NE** 694; 122 **Or**680, 260**P**233; 104**TexCr** 403, 284**SW**550; 104**TexCr**563, 285**SW** 1090; 105**TexCr**146, 287**SW**246; 110 **TexCr**585, 10**SW(2d)**105. See also 166 **Ga**670, 144**SE**206.

191-77 30**F(2d)**523(1stcase); 104**TexCr** 563, 285**SW**1090; 105**TexCr**146, 287**SW** 246.

191-78 34**PortoRico** 688 (evidence).

191-78½-New. Transcript of testimony in the lower court is not part of the record subject to review. 318**Mo** 928, 2**SW(2d)**612.

191-85 113**TexCr**478, 22**SW(2d)**306.

191-94 29**F(2d)**541; 23**AlaA**404, 126**S** 179.

191-98½-New. Appeal in habeas corpus proceedings involving custody of an infant will not be dismissed as moot because child is no longer in jurisdiction where principal questions are parentage and inheritance. **TexCivA** 275**SW**606.

192-7½-New. It is ground for dismissal that the appeal does not cover an order sustaining the writ and refers only to an order denying a motion for reargument. 20**F(2d)**733.

192-14 126 **Or**466, 260**P**998.

192-15 126 **Or**466, 260**P**998.

192-18½-New. In California, rehearing is not allowed in habeas corpus proceedings. 200**Cal** 598, 254**P**951.

192-18½-New. Law does not provide for rehearing in District Court of Appeals for custody of minor. **CalA** 292**P** 285.

192-21 27**F(2d)**842; 104**TexCr**403, 284 **SW**550. [e] **Where trial court sustained demurrer to petition** appellate court will look to petition alone. **Iowa** 229**NW** 189.

192-22 246 **Ill**A394; 104**TexCr**403, 284 **SW**550. See also 200 **Ind**448, 163**NE** 269. [b] **Where court discharged writ after only partial hearing,** appeal will be considered on question of jurisdiction only. 24**F(2d)**632. [c] **Failure of brief to contain statement of return or exception thereto** is abandonment of assignment alleging error in overruling exceptions to return to writ. 197 **Ind**700, 151 **NE**826. [d] **Averments in application** for writ of habeas corpus cannot be treated as substitute for evidence on appeal. 113**TexCr**495, 23**SW(2d)**365.

193-24 [a] **In Mississippi** judgment will not be disturbed unless it is manifest that trial court tried cause on erroneous conception of law or that judgment was erroneous on facts. 150**Miss** 680, 116**S**531.

193-27 [b] **Sanity of accused.**–136**Wash** 133, 238**P**983.

193-28½-New. In deportation proceedings, where citizenship is not in issue, federal court will consider only whether proceedings or hearing were fair. 15 **F(2d)**377.

193-31½-New. Questions pertaining to the right to change of venue decided by a state court of last resort have been held not open on review by the circuit court of appeals. 20**F(2d)**906.

193-31½-New. When the trial court has jurisdiction of the subject matter and the parties, judgment of contempt, setting out facts constituting contempt, cannot be reviewed on habeas corpus, especially when there is no statement of facts. 110**TexCr**585, 10**SW(2d)**105.

193-35 26**F(2d)**588.

193-36 315**Mo** 672, 286**SW**396; **Mo** 25 **SW(2d)**472.

193-36½-New. and errors appearing on the face of the record. 315**Mo** 672, 286**SW**396.

193-37 240**Mich**240, 215**NW**384.

193-38 Mo 25**SW(2d)**472.

193-39 Mo 25**SW(2d)**472; 192**NC**787, 136**SE**116. [a] **Extent to which evidence considered.**–In habeas corpus proceedings involving custody of infants, court on certiorari will examine evidence only for purpose of determining whether there is any evidence to support findings. 240**Mich**240, 215**NW**384.

193-42½-New. The discharge of a prisoner, although erroneous, by the court having jurisdiction, will not be reviewed on the evidence on certiorari. 315**Mo** 672, 286**SW**396.

193-43 [a] **Suspension of sentence.**–136 **Wash**133, 238**P**983.

194-47 161**Ga**305, 130**SE**819 (refusal of bail); 163**Ga**272, 136**SE**60; 164**Ga**69, 137**SE**760; 128 **Or**655, 275**P**661; 103

TexCr229, 280SW580.
194-48 160Ga480, 128SE765 (where evidence conflicting); 162Ga148, 132SE895; 163Ga272, 136SE60; 164Ga69, 137SE760; 166Ga670, 144SE206; 240Mich240, 215NW384; 77Mont466, 251P163; 94PaSuper577.
194-51½-New. Where judgment of the trial court in a habeas corpus proceeding to recover the custody of a child is affirmed on controlling issues in the case, reversal will not be granted because of refusal of the judge to grant supersedeas preserving status until the case can be decided by the supreme court, regardless of whether refusal was a proper exercise of discretion by the trial judge. 166Ga670, 144SE206.
194-55 102TexCr336, 278SW426.
194-56 273US163, 47SCt302, 71Led560; 17F(2d)737; 81Colo158, 253P1067; 171Minn140, 213NW556; 111Okl254, 239P625.
194-57 [b] **Questions relating to peace bonds.**-113TexCr73, 19SW(2d)58.
194-60 91PaSuper213 (in proceedings involving custody of infant); 91PaSuper220.
194-62 35F(2d)559.
194-63 219AppDiv691, 220NYS542.
194-64 197Ind700, 151NE826; 90PaSuper350.
195-66 154Miss230, 122S470.
195-67 214Ala325, 107S840.
195-69 23AlaA339, 125S208(1stcase).
195-71 144Okl83, 289P740 (award of custody of infant following divorce decree of sister state). [a] **Finding of referee** on conflicting evidence will not be disturbed by appellate court. 67Utah371, 248P83.
195-72 138Okl247, 280P813 (custody of infant awarded to mother).
195-75 102TexCr336, 278SW426.
195-76½-New. Return to writ cannot be admitted as facts on review by certiorari where parties went to trial without denial of return and no motion for judgment was filed. Mo 25SW(2d)472.
195-76⅓-New. Findings not made in pursuance of statute cannot be used to impeach judgment on certiorari to quash judgment. Mo 25SW(2d)472.
195-76¼-New. Voluntary statement of judge of consideration of facts leading to decision cannot be substituted for evidence as test for correctness of judgment on certiorari to quash judgment. Mo 25SW(2d)472.
195-76½-New. Where the evidence before an ordinary in a habeas corpus proceeding to determine the custody of an infant did not demand the judgment rendered by him, the discretion of the court on certiorari in granting a first new trial will not be disturbed. 163Ga206, 135SE718.
195-79 Mo 25SW(2d)472; Mont 290P250; TexCommnA 9SW(2d)1029; 106TexCr651, 294SW592; 109TexCr17, 2SW(2d)445; TexCr 13SW(2d)842(1stcase). See also 90PaSuper350.
195-80 163Ga272, 136SE60; 318Mo928, 28SW(2d)612; 122Or680, 260P233.
195-82 318Mo928, 28SW(2d)612.
195-83 TexCivA 22SW(2d)528; 106TexCr651, 294SW592; 113TexCr18, 18SW(2d)637(1stcase). [a] **Fixing sentence.**-51SD540, 215NW697.
195-84 AlaA 129S681.
195-88 214Ala348, 108S68.
195-88½-New. On certiorari to quash judgment it will not be presumed that findings of fact in judgment were all of facts upon which judgment was based. Mo 25SW(2d)472.
195-88⅓-New. The supreme court will presume that no good mother will willingly give up her child. 134SC147, 132SE39.
195-89 163Ga272, 136SE60; Ga 155SE466; 151Miss267, 117S596, 61ALR709; 196NC662, 146SE599(2dcase); 34PortoRico514; 49SD416, 207NW213; 51SD540, 215NW697. [a] **Judgment denying application for bail** will not be reversed because of remark of court that argument was not necessary where court offered to vacate judgment and hear argument. 161Ga305, 130SE819.
195-92 NJ 145A618(2dcase); 89PaSuper301.
195-93 89PaSuper301.
195-94 89PaSuper301.
196-95 91PaSuper213; 91PaSuper220; TexCivA 19SW(2d)159 (evidence held not to warrant remand). [a] (1) 115Nebr818, 215NW104.
196-96 19F(2d)64; 29F(2d)527.
196-2½-New. If under the facts an order denying a writ is justified, it is immaterial whether it was upon a proper legal ground. 33Ariz41, 262P10.
196-3½-New. Supreme court will weigh evidence and pass on it as trial court on appeal from judgment denying bail. 196Ind184, 147NE764.
196-3⅓-New. In habeas corpus proceedings to determine the custody of infant, the appellate court cannot make a finding as to whose custody would be most beneficial to the infant and enter judgment of such finding where the trial court made no finding on the question. TexCommnA 294SW525.
196-3¼-New. The circuit court of appeals is justified in itself determining a jurisdictional question not considered by the district court. 14F(2d)953.
196-3⅕-New. Where a lower court refuses to discharge an alleged felon held by the examining court for want of bail, he is not entitled to relief on appeal in the absence of evidence of excessive bail, or appellant's pecuniary circumstances. 104TexCr563, 285SW1090.
196-3⅙-New. Where petitioners, committed for contempt in disobeying chancellor, purge themselves thereof pending appeal, the appellate court will discharge them although deciding that commitment was legal. 99Vt306, 131A847.
196-3⅐-New. The appellate court cannot, on appeal from judgment in a habeas corpus proceeding, order discharge of appellant on pending cases, on the theory that criminal acts charged in several indictments are one transaction and that the state therefore could not legally convict him on more than one indictment. 110TexCr452, 10SW(2d)86.
196-3⅛-New. The constitutional requirement as to modifying or setting aside a judgment does not apply in a habeas corpus proceeding. 98CalA552, 277P201.
196-14½-New. Where a judgment awarding custody of a minor to the mother against the grandmother is affirmed on appeal, the lower court is without power to make an order permitting the grandparents to file a petition to reopen proceedings on the ground that the mother had moved from the state. 164Ga7, 137SE567.
196-16 Mich 232NW748. [g] **Defective record.**-Mo 24SW(2d)111(3dcase). [h] **Jurisdictional facts and exhibits cannot be imported into certiorari** by voluntarily inserting them in abstract. Mo 24SW(2d)111(3dcase). [i] **On certiorari** court cannot go outside record to ascertain what information charged. Mich 232NW748.
197-18 But see Mich 232NW748.
197-19½-New. Proceedings in certiorari are not available for incorporating evidence into the record of a habeas corpus proceeding. 33PortoRico863.
197-21½-New. Supreme court cannot go outside record to determine correctness of decision of lower court. Mo 24SW(2d)111(3dcase).
197-26 125Okl1, 256P340. [a] **Statute forbidding inquiry by any court into judgment by contempt** is not violation of constitutional provision. 125Okl1, 256P340.

HABITANCY OR INHABITANCY

200-48 19OhA404.
200-55 19OhA404.

HABITUALLY

201-89 [a] But see 93Fla261, 111S637.
201-90 93Fla261, 111S637.

HAIL INSURANCE

205-2 53ND609, 207NW436. [a] **Taxability of land as test of insurance.**-55ND38, 212NW513.
205-3 50ND589, 197NW223; 55ND692, 215NW145; 48SD628, 205NW654; 52SD367, 217NW638. [a] (1) 55ND692, 215NW145. (2) There is no liability on part of state unless land has been properly listed before loss occurs. 52SD86, 216NW856. [c] **Requirement of affidavit.**-50ND589, 197NW223. [d] **Duty and liability of assessor.**-(1) 50ND589, 197NW223. [e] **The policy of insurance** consists of copy of filed affidavit required by statute of owner or tenant. 50ND589, 197NW223. [f] **Assessor's certificate** which he is required to make and file with county auditor where owner or tenant fails to file affidavit required by statute is binding on owner and tenant as to facts so certified. 50ND589, 197NW223. [g] **Listing of land cropped or to be cropped.**-Filing of crop-listing affidavit held timely under statute. 58ND604, 226NW629.
205-3½-New. Affidavit and application for reinstatement of insurance and for additional indemnity required to be filed prior to July 5 may be filed on that day. 51ND210, 199NW590.
205-3⅓-New. One who enters upon and occupies land adversely to the owner cannot, by listing the land under the provisions of the statute, effect insurance on the crops planted thereon by him. 55ND692, 215NW145.
205-3¼-New. Where failure of assessor to return land for hail insurance tax as required by statute was due solely to his negligence, he is liable for hail damage. 52SD86, 216NW856.
205-3⅕-New. County auditors are not agents of the state or of the commissioner of hail insurance to accept or receive notices of loss under the state hail insurance law, requiring notice of hail loss on property insured by the state to be addressed to the hail insurance commissioner. 54SD566, 223NW939.
205-3⅙-New. A lessee of farm land, who, on sustaining hail loss between June 1 and June 15 failed to give notice of loss to the commissioner of hail insurance, as required by statute, on account of a statement of the county auditor that the state was not liable, is not entitled to demand inspection and adjustment on filing notice of loss with the commissioner long after the loss occurred and after a decision holding unconstitutional attempting to limit hail coverage in certain counties to a period beginning June 15 instead of June 1. 54SD566, 223NW939.
205-3⅐-New. Interest is allowable on claims only in accordance with hail insurance law. ND 231NW722.
205-3⅛-New. Claimant pursuing remedy by mandamus to recover on claim can recover interest only for period warrant would have drawn interest. ND 231NW722.
206-8 54SD136, 222NW694. [c] **Compliance with statute prerequisite to recovery.**-54SD532, 223NW731 (reporting crop to officials). [d] **Duty of owner or tenant to comply with statute** regardless of failure of officers to do their duty. 54SD136, 222NW694.
206-8½-New. Hail insurance policies have been construed as excluding liability for loss of open cotton. TexCommnA 1SW(2d)263.
206-8⅓-New. A general provision exempting insurer from liability for damage to cotton, resulting from negligence or failure to harvest overripe crops, does not create ambiguity in a provision expressly exempting insurer from liability for damage to matured crops. TexCommnA 1SW(2d)263.
206-15½-New. Signing of application by local agent on behalf of insurer has been held waiver of omissions or defects as far as preliminary insurance is concerned. 130Kan438, 286P237.
206-24½-New. Penal provisions relating to fire insurance companies do not apply to hail companies, in absence of express provision therefor. 122Kan734, 253P562.
206-24⅓-New. and it cannot be contended by insured in an action against him on a premium note that the note is void because it exceeds the standard rate. 122Kan734, 253P562.
207-36½-New. Assessment may be valid, although the minutes of the board

of directors do not affirmatively show compliance with all the requirements of the articles and by-laws. 205 **Iowa**1099, 212**NW**473.

207-36½-New. The fact that the expense of the association is large and the amount collected more than needed does not invalidate the assessment. 205 **Iowa**1099, 212**NW**473.

207-36¼-New. Authority of association directors to levy and collect assessments cannot be delegated to the secretary or exercised by a lien alone. 205 **Iowa**1099, 212**NW**473.

207-36⅓-New. Failure to pay a valid assessment renders the policy void. 205 **Iowa**1099, 212**NW**473.

207-37 [a] **Good faith of insured.**—Where insured's statement in application that he owned one hundred per cent interest in land and crop constituted warranty, and where false, it was immaterial that it was made in good faith. 28**F(2d)**272. [b] **Determining vested interest in crops.**—Whether croppers had vested interest in growing crop of cotton, which insured stated in application for hail insurance he owned exclusively, depended on intention of parties to contract. 28**F(2d)**272.

207-38 [a] **Falsity as to extent of interest.**—Statement in application that insured owned one hundred per cent interest in land and crop was false where another had equitable title to undivided one-half interest. 28**F(2d)**272.

207-49 See also 28**F(2d)**272.

208-57½-New. Stipulation that notice of loss must be given within a stated period of time is waived by a company sending an authorized agent to inspect injured crop and adjust loss and by the agent's offering to make payment on loss. 123**Kan**692, 256**P**1002.

208-57⅓-New. Insurer is estopped from claiming insured's statement, in an application as regards the condition of wheat, false, despite policy provisions, where an agent inspected the wheat at the time of writing the policy. **TexCivA** 19**SW(2d)**916.

208-59½-New. Policy held to mean loss should be reduced in proportion matured cotton bears to unmatured cotton. **TexCivA** 293**SW**346.

208-61 See also 240**Mich**167, 215**NW** 401.

208-65½-New. In a suit to set aside an award of no loss by arbitrators and to determine the amount of loss under the policy, a decree of the court holding the award void is justified where the award was constructively fraudulent under the facts shown and was in violation of insurer's by-laws. 240**Mich** 167, 215**NW**401.

208-65⅓-New. A by-law of a mutual company, made a part of the policy and limiting liability, is void where not authorized by the statute under which insurer was organized, 240**Mich**167, 215 **NW**401.

208-65¼-New. and cannot affect the rights of insured who had not received the policy at the time of loss and had no notice of such provision therein. 240 **Mich**167, 215**NW**401.

208-66½-New. Ascertainment of loss. Where insured was to pay for investigating the loss if less than five per cent, judgment against him therefor would preclude recovery on the policy. 116 **Tex**418, 293**SW**802.

208-66⅓-New. A settlement by offer and its acceptance has been held binding on the parties in the absence of fraud or mistake. 204 **Iowa**991, 216**NW** 269.

208-66¼-New. Proof of loss held not ambiguous. 204 **Iowa**991, 216**NW**269.

208-66⅕-New. Under policy providing ratio of payment to amount of policy should not exceed proportion of actual loss to crop actual value of wheat damaged need not be proved. **TexCivA** 31 **SW(2d)**1095.

208-70½-New. Evidence held properly excluded. **TexCivA** 19**SW(2d)**916.

208-72 [a] **Evidence held sufficient** to sustain allegation of agreement to allow loss sustained after insurer sent inspector to adjust loss. 127**Kan**264, 273**P**416.

208-72½-New. Evidence of damage to open and unopen cotton held admissible in view of policy. **TexCivA** 293**SW**346.

208-72⅓-New. Oral testimony as to the manner in which the assessment was made is admissible when it bears on matters not revealed by the minutes of the board of directors or is explanatory thereof. 205 **Iowa**1099, 212**NW**473.

208-72¼-New. Burden of proof is on an association, sued on a policy, to show that the assessment, failure to pay which it claims invalidated the policy, was made in substantial conformity with rules. 205 **Iowa**1099, 212**NW**473.

208-72⅕-New. Sufficiency of evidence. Evidence held to require inference that directors of an association, making assessment, considered the total amount of insurance in force. 205 **Iowa**1099, 212 **NW**473.

208-72⅙-New. Where a policy provides that insurer will not be liable for hail damage where the crop was so poor that it would not pay the expenses of harvesting, threshing, and marketing and yield a profit in addition thereto, the burden does not rest on insured to prove the contrary. 127**Kan**783, 275**P** 131(2dcase).

208-72⅐-New. Evidence has been held sufficient to show that insurer's agent was authorized by wheat owner to sign his name to application for hail insurance. 130**Kan**438, 286**P**237.

208-72⅛-New. [§ 13] XI. **Trial.** Verdict is properly directed for defendant where the evidence clearly shows that plaintiff failed to pay an assessment properly made. 205 **Iowa**1099, 212**NW** 473.

208-72⅑-New. Plaintiff properly permitted to state amount of loss in money as calculated by percentage of face of policy. **TexCivA** 31**SW(2d)**1095.

HAIR

209-1½-New. a filament; 15**CustA**420.

HAMLET

210-43 195**Wis**602, 219**NW**346, 347 [quotCJ].

HARDPAN

214-78½-New. Any earth not popularly recognizable as rock through which it is hard to dig or to make excavation of any sort. Webster New Int. D. [quot 118 **Or**143, 246**P**352]. [a] **Hardpan may be:** (1) 118 **Or**143, 246**P**352, 355.

214-78⅓-New. Hardpan is a trade term known to road construction engineers and those familiar with road building and similar work. 118 **Or**143, 246**P**352.

HATCHWAY

215-8 171**Minn**408, 214**NW**269.

HAUL

215-24½-New. A car stopped on premises of carrier for repairs is being "hauled or used on its line" within Safety Appliance Act. 140**Miss**375, 105 S770.

HAVE, HAD, HAS, and HAVING

215-27 216**Ky**512, 287**SW**975, 976 [quot Cyc].

216-58½-New. In reference to property, it may mean ownership. 19 **OhA**191.

HAWKERS AND PEDDLERS

219-4 [a] (1) 6**LaA**594. (14) Person who solicits and makes sale and delivery of goods. **LaA** 129**S**224(2dcase). (15) Other definitions. 13**LaA**405, 127 S36(2dcase).

220-5 163**Ga**570, 136**SE**514.

221-12 13**LaA**405, 127**S**36(2dcase).

222-15 **NJ** 146**A**37(2dcase).

222-22 [a] **Defendants selling religious books and pamphlets are peddlers** though not engaged in such pursuit as trade or business. **Mass** 172**NE**114.

222-33 [d] (2) Books, pamphlets, worldly or religious are included within term. **Mass** 172**NE**114.

223-39½-New. One vending patent right is not required to procure license as peddler. 234**Ky**469, 28**SW(2d)**507.

223-40 But see **LaA** 124**S**851.

223-41 [a] **Terms judicially defined as used in ordinance defining "peddlers."**—118**Nebr**331, 224**NW**692 ("rolling store").

224-51 **LaA** 124**S**851.

224-56 180**Ark**546, 21**SW(2d)**966.

225-60 [c] **Corporation whose agent against instructions sold articles** while delivering other articles sold under prior orders is not required to pay peddler's license. **LaA** 129**S**224(2dcase).

225-69 [a] (5) Does not include wholesaler selling and distributing daily to customers by own motor trucks. **Nebr** 228**NW**256.

226-72 **Man** [1925] 3**DomLR**570.

226-79 [a] **Held not transient.**—9**Pa Dist&Co** 345.

226-87 **Mass** 172**NE**114.

227-3 38 **OklCr**207, 259**P**873.

227-4 48**Nev**420, 227**P**1020.

227-7 Contra **NS** [1930] 3**DomLR**830.

227-8 48**Nev**120, 227**P**1020.

228-26 163**Ga**570, 136**SE**514.

228-30 163**Ga**570, 136**SE**514.

229-42 180**Ark**546, 21**SW(2d)**966.

229-43 20**SaskL**481, [1926] 2**DomLR** 950, [1926] 2**WestWkly**230, 46**CanCrCas** 61.

229-50 20**SaskL**481, [1926] 2**DomLR** 950, [1926] 2**WestWkly**230, 46**CanCrCas** 61.

230-69½-New. One granted a permit to operate a rolling store is granted extraordinary use of the streets. 118 **Nebr**331, 224**NW**692.

230-71 [a] **Nev** 245**P**941.

232-99 [a] (14) Fifty dollars. **NS** [1930] 3**DomLR**830.

233-29 13**LaA**244, 126**S**587 (drugs). [c] **Power of city to provide penalty.**—118**Nebr**331, 224**NW**692.

234-38 [d] **Evidence sufficient to establish defendant was peddler.** 13**LaA** 405, 127**S**36(2dcase).

234-40 [a] 157**Miss**143, 127**S**279.

234-49 [b] (1) 89**CalA**390, 265**P**325.

235-66 [b] (4) That defendants indicted for selling books without license had good motive of disseminating religious beliefs cannot be shown. **Mass** 172**NE** 114.

HAZARDOUS

236-19 [a] 142**Wash**69, 252**P**152.

HEALTH

242-28½-New. : the devising and applying of measures for preserving and promoting public health; the removal or neutralization of elements injurious to health; the practical application of sanitary science. New Standard D. [quot 160**Ga**857, 129**SE**542, 544].

242-31 **Cal** 287**P**455; 204 **Iowa**30, 214 **NW**682; 319**Mo** 316, 48**W(2d)**467.

243-45 204 **Iowa**30, 214**NW**682; 291 **Pa**216, 139**A**860.

243-48 204 **Iowa**30, 214**NW**682, 684 [citCJ].

243-54 316**Mo** 1050, 294**SW**1012, 1014 [citCJ].

243-55 177**Ark**821, 9**SW(2d)**75. [c] **Act creating boards of health** held not invalid. 161**La**1, 108**S**104. [d] **Health department of Boston** held to be under control of health commissioner, exercising authority of board of health. 257**Mass**580, 154**NE**266.

243-57½-New. A constitutional provision ordaining that the legislature shall create state, county, and municipal boards of health has been held mandatory. 161**La**1, 108**S**104.

244-68 336 **Ill** 11, 167**NE**807.

244-75 **Ill** 172**NE**60; 204 **Iowa**30, 214 **NW**682; 34**NM**346, 282**P**1; 197**NC**85, 147**SE**736. [b] **Statutes held valid.**—195**NC**722, 143**SE**530. [c] **Benefit to health of people living in sanitary district** may be considered in determining validity of act authorizing district. 195 **NC**722, 143**SE**530. [d] **Creation of sanitary districts** is largely under control of state board of health. 195**NC**722, 143**SE**530.

244-81 [a] **Cities and villages as such, are not sanitary districts** contemplated by Sanitary District Act excluding territory already included in sanitary district. **Ill** 172**NE**60.

244-82 **Ill** 172**NE**60; 204 **Iowa**30, 214

NW682. [a] **Only land benefited can** be taken for sanitary district. 195NC 722, 143SE530.

244-84 204 Iowa30, 214NW682.

244-85 204 Iowa30, 214NW682.

244-87½-New. An act prohibiting the compelling of an owner of water and sewer system to become part of a district has been held to refer to a district system and not to the boundary lines of a district. 197NC85, 147SE736.

244-87⅓-New. Majority of voters in territory of sanitary district having voted for detachment, trustees must pass ordinance authorizing detachment. Ill 172NE60.

244-89 197Cal 448, 241P264 (publication of resolution of intention to create sanitary district held sufficient). [a] **In California.**-197Cal 448, 241P264.

244-97 197Cal 448, 241P264 (resolution calling election for bond issue must be published in newspaper designated). [a] 195NC722, 143SE530. [b] 195NC 722, 143SE530.

244-98 317 Ill 25, 147NE401 (special assessment); 316 Ill 452, 147NE494 (statute not repealed by implication); 321 Ill 39, 151NE601; 197NC85, 147SE 736. [a] **Owner of land assessed for** sanitary sewer after completion of improvement, in excess of value of land as improved is entitled to injunction without exhausting statutory remedies. 115 Oh288, 153NE266. [b] **Additional tax levy for sanitary district to be** certified in August, 1925 held authorized by election of Nov. 24, 1924. 324 Ill 85, 154NE438. [c] **Levy authorized by general act on all taxable property of district sufficient to meet all obligations of district** is general tax, as distinguished from special assessment, and is not limited by amount of benefits conferred. 195NC722, 143SE530. [d] **Extent of authority to impose taxes.**-328 Ill 440, 159 NE797. [e] **Property of municipality.**- 207Cal 697, 280P360.

245-4 317 Ill 25, 147NE401 (statute does not violate constitutional provision for drains, ditches and levees).

245-7½-New. A system involving necessary expense dispenses with the necessity of a vote of voters before contracting debt or assessing tax. 197NC 85, 147SE736.

245-9 See also 244 IllA112.

245-30 222MoA396, 5SW(2d)653. [d] **De facto officers.**-222MoA396, 5SW(2d) 653. [e] **Approval by county court** does not affect validity of appointment legally made by city council. 222MoA396, 5 SW(2d)653.

246-42 [a] **In Montana.**-75Mont207, 243P573.

246-43 **But see** 222MoA396, 5SW(2d) 653.

246-51 [a] **Member of school committee** held ineligible to appointment as medical inspector. 254Mass384, 150NE 159.

246-60½-New. A licensed osteopath is not a physician to qualify as a medical inspector. **NJSup** 145A730.

246-60⅓-New. One licensed to practice osteopathy and surgery is a legally qualified physician under statute providing for appointment of city health officer. 155Wash383, 284P756.

246-64 167La907, 120S593. [c] **Power of legislature to abolish or reduce term of office** of health officers has been held not affected by restriction upon authority of constitutional convention nor by constitution itself. 160La617, 107S 466.

247-66½-New. Since the act relating to the state board of health is valid, and has the effect of removing respondent from the office of president of the board of health, when it went into effect during the recess of the senate, his term of office "expired" at that time, and caused a "vacancy." 167La907, 120S 593.

247-69 167La907, 120S593.

247-78 142Miss146, 105S774 (board of supervisors has no power to pay expenses of attending conventions outside of county). [d] **Time of payment.**-Ill 173NE124.

247-80½-New. In the absence of an appropriation therefor by the county board, claims for services will be denied. 140 Okl 142, 282P299.

247-81 [b] **County superintendent of health.**-112 Okl 33, 239P567.

247-82 [c] **Certification of amount by state board.**-Ill 173NE124.

248-86 167La907, 120S593.

248-6 165Minn361, 206NW642 (rule applied to board of education's authority as to attendance of unhealthy children at school); 320Mo 1190, 9SW(2d) 635; 251NY343, 167NE464 (local authorities have wide latitude in adopting regulations directly affecting city's health); 133Misc145, 231NYS271.

249-10 99Vt360, 133A352.

249-13½-New. One cannot complain that business is injured by exercise of police power for the benefit of public health. Mass 166NE558.

249-18 320Mo 1190, 9SW(2d)635. See also 206Cal 497, 274P974.

249-19 95CalA762, 273P826.

249-21 150Wash203, 272P517.

249-22 99Vt360, 133A352. See also 224 AppDiv483, 231NYS368.

250-28 230AppDiv252, 243NYS644; 99 Vt360, 133A352.

251-58 215Ala655, 111S907.

251-62 [a] **Health regulations,** penal in character, must be officially adopted, reduced to writing, and recorded. 170 Minn6, 211NW673.

251-63½-New. One injuriously affected may claim that facts found by board as justification for order are not true. 196NC641, 146SE592.

251-63⅓-New. Determination of board is quasi judicial in the sense that it is not to be contested or revised except as provided. 265Mass520, 164NE390.

251-63¼-New. A report of an investigation is competent evidence in a hearing before the council, but the compilors are subject to cross-examination. 120 Oh426, 166NE370.

251-65 99Vt360, 133A352.

251-70 265Mass520, 164NE390.

251-71½-New. It could be shown by a member of the board in a suit by a town to enforce regulations that amended records were accurate. 265Mass520, 164NE390.

251-71⅓-New. Where original records were defective, it was within the power and duty of the clerk to amend them. 265Mass520, 164NE390.

251-72 133Misc145, 231NYS271.

251-73 NJ 147A226 (2dcase) (state board of health held justified in refusing permit to establish tuberculosis sanitarium near summer vacation center).

252-78½-New. Constitutional provisions forbidding the assembly from imposing taxes for municipal purposes do not inhibit it from creating tuberculosis districts and authorizing construction and maintenance of sanatoria by counties and cities in which located. 227Ky7, 12SW(2d)348.

252-95 235Mich163, 209NW163; 82NH 426, 135A159. [a] **Refusal of certificate of unfitness for vaccination** see NH 152 A279.

253-3 50Philippine595 (leprosy).

254-18 74CalA225, 239P1100.

254-20½-New. Where a state board of health has specified what classes of persons shall be exempt from quarantine regulations, a municipality may not provide for exemption of others. 144 Wash572, 258P520.

254-23 74CalA225, 239P1100.

256-5 118 OhSt147, 160NE456.

258-49 84 IndA260, 151NE31. [a] (2) Fixing date for stoppage of pollution held reasonable regulation. 47RI 431, 133A812. [b] **County health officer** has been held to have no power under statute to take steps for abatement of nuisances or removal of sources of filth and incur expenses in connection therewith without authorization from county board of health. 75Mont207, 243P573.

259-69 47RI 431, 133A812.

260-78 See also 101Vt99, 141A679.

260-80 257Mass580, 154NE266.

260-82½-New. The record of a commissioner of health has been held admissible as relating to a nuisance complained of. 257Mass580, 154NE266.

260-83 [c] **Notice held sufficient.**-257 Mass580, 154NE266. [d] **Notice to abate nuisance within twenty-four hours held not unreasonable.** 257Mass580, 154 NE266. [e] **Notice signed by clerk of health commissioner** held sufficient. 257 Mass580, 154NE266.

260-99½-New. Notice served by delivering a copy in the hand of defendant held sufficient. 257Mass580, 154NE266.

260-1 166La547, 117S586. [g] **Prohibiting revolving doors.**-114 Oh624, 151NE 775, 59ALR916. [h] **Lighting hallways.**-134Misc637, 236NYS299. [i] **Provision for artificial lighting of stairways.**-253NY440, 171NE699. [j] **Word "plumbing" used in regulation** includes pipe for sewage. Me 151A426.

261-3 265Mass233, 163NE898; 31 OhA 1, 166NE240.

261-4 216AppDiv474, 215NYS492; 133 Misc353, 232NYS33. [f] **Fireproof partition.**-244NY9, 154NE647. [g] **Laundries.**-223AppDiv478, 228NYS635. [h] **Lights.**-34 OhA259, 171NE39. [i] **Building has been held not factory.**-240 NYS181.

261-6 [b] **Combustible tiling.**-221App Div100, 222NYS667.

261-8 216AppDiv474, 215NYS492; 133 Misc353, 232NYS33.

261-9½-New. Requirement for adequate lighting by artificial light of all stairways and other means of exit requires the owner to exercise reasonable care in utilizing facilities for the lighting furnished when the structure was built and in maintaining adequate lights. 132 Misc485, 230NYS201.

261-15 [a] **Retroactive operation.**-253 NY440, 171NE699.

261-16½-New. A laundry operated by a manufacturer solely to launder new goods is a "public laundry" under a statute regulating laundries. 129Misc 747, 222NYS450.

261-20 168La714, 123S301. [a] **Fire marshal is mere prosecuting witness** in proceeding against owner of building alleged to constitute fire hazard. 84 Mont478, 276P958.

261-21 See also 166La817, 118S30. [a] 84Mont478, 276P958.

261-23½-New. In order to authorize condemnation of a building under some statutes it is not necessary that the danger or risk be immediate. 84Mont 478, 276P958.

261-23⅓-New. A judgment requiring the removal of a building as a fire hazard, based on a preponderance of substantial evidence, cannot be overthrown on appeal, although the court may suspect that the real purpose of the proceeding was to remove a local eyesore. 84Mont478, 276P958.

261-23¼-New. **In New York City** fire commissioner has no authority to order tenement house owner to provide devices to prevent spread of fire. 214App Div647, 212NYS451.

261-25 57ND768, 224NW680. [f] **Hotels and lodging houses.**-145Miss835, 111S370. [g] **Insufficient compliance with statute** (1) requiring safe and unobstructed exit to street from fire escape on rear of building. 130Misc667, 224 NYS694. [h] **"Apartment."**-Under Tenement House Law each room of apartment subrented to roomers constitutes apartment within statute. 223AppDiv 675, 229NYS47. [i] **Statute held mandatory.**-130Misc667, 224NYS694.

262-28 130Misc667, 224NYS694.

262-28½-New. , and under the statute is cause for dispossessing tenant by summary proceedings. 130Misc667, 224 NYS694.

262-28⅓-New. On failure to comply with the statute, a building may be deemed a public nuisance. 130Misc667, 224NYS694 (Labor Law requiring fire escapes on factories).

262-35 130Misc667, 224NYS694.

262-36 130Misc667, 224NYS694.

262-38½-New. The performance by lessor and lessee of a duty imposed by the Labor Law to provide safe egress from the foot of a fire escape not located on the front of a building may not be delayed until direction of the factory inspector. 130Misc667, 224NYS694.

262-38⅓-New. Under mandatory statutes relating to fire escapes and means of egress, no order is necessary to make a tenant liable for failure to comply with the statute. 130Misc667, 224NYS694.

262-40 177Ark821, 9SW(2d)75; 150

Wash203, 272**P**517 (legislation must be reasonably adapted to promote public health).

263–50 224**AppDiv**483, 231**NYS**368.

263–52½–New. A permit to maintain an X-ray laboratory was held improperly denied to one experienced, although without standing in the medical profession. 242**NY**66, 150**NE**603.

263–52⅓–New. The right of an individual to acquire property and utilize it, and the right to make contracts and do business freely, must yield to appropriate governmental regulation in the interest of public health. 224**AppDiv** 483, 231**NYS**368.

263–59 [a] **Previous employment.**–11**Pa Dist&Co** 503.

263–62½–New. Mortuaries are subject to reasonable police regulation as to location as well as the manner in which they are conducted. 34**Ariz**495, 272**P** 923.

263–66½–New. X-ray laboratories. In New York X-ray laboratory must be in charge of duly licensed physician, 242 **NY**66, 150**NE**603.

263–66⅓–New. or other person whose knowledge, experience, and qualifications to operate and use X-ray machine are satisfactory to health department. 242 **NY**66, 150**NE**603.

263–66¼–New. Mere reading and explanation of X-ray photograph is not diagnosis or treatment. 242**NY**66, 150 **NE**603.

263–66⅕–New. Because chiropractor has no standing in medical profession or qualifications for diagnosing and treating is no reason arbitrarily to refuse permit where he is otherwise qualified to operate and use X-ray machine. 242**NY**66, 150**NE**603.

264–68 150**Wash**289, 272**P**968. See also 244 **IllA**112. [c] **Certified copies of death certificate.**–Local registrar must furnish such copies. 220**Ala**393, 125**S** 643. [d] **Expense of additional copy of records for city's use** must be borne by it. **Ill** 173**NE**124. [e] **Refusal of county clerk to accept records from registrar** held justified where tender conditional. **Ill** 173**NE**124. [f] **Refusal of registrar to file records with county clerk** held not justified by mere statement of county clerk that county would not pay for records. **Ill** 173**NE**124. [g] **Duty of registrar** to receive original certificates and file first copy with county clerk. **Ill** 173**NE**124.

264–69 247**Mich**127, 225**NW**595.

264–70½–New. Vital statistics statutes should be given liberal construction. 150**Wash**289, 272**P**968.

264–75 See also 21**AlaA**5, 105**S**161.

264–77 See also 21**AlaA**5, 105**S**161.

265–5 [a] **Pollution** need not be dangerous to health. 5**PaDist&Co** 150.

265–9 207 **Iowa**1114, 224**NW**83.

265–12½–New. prohibiting exposure for sale in public place of foods to be eaten uncooked unless so covered as to be thoroughly protected from dust, dirt, flies and other vermin. 12**PaDist&Co** 487.

266–23½–New. Under the plumbing code enacted by the legislature of the state equity has jurisdiction to require removal of improper plumbing. 291**Pa** 216, 139**A**860.

266–23½–New. The city may enforce provisions of the plumbing code which fit the situation, although all provisions are not enforced. 291**Pa**216, 139**A**860.

266–23¼–New. A town may maintain a suit in equity to enforce regulations by the board of health. 265**Mass**520, 164 **NE**390.

267–56 Erratum.–"And see generally Criminal Law § 229 text and note 97," should read "And see generally Constitutional Law § 229 text and note 97."

267–58½–New. There is a fatal variance, where allegations of a complaint charge the sale of a hog and the proof showed merely the sale of forty pounds of dressed meat, which was less than half of the slaughtered animal. 111 **TexCr**294, 12**SW(2d)**575.

267–76 [c] (2) 222**AppDiv**172, 225**NYS** 556. [d] (1) 248**NY**200, 161**NE**470; 111 **TexCr**294, 12**SW(2d)**575.

267–80½–New. Defendant may be entitled to reduction of sentence though error does not warrant reversal. **OklCr** 292**P**1046(2dcase).

268–96 [c] **Evidence held sufficient** to sustain decision that school building was unfit for use as school. 84 **IndA** 260, 151**NE**31.

269–8 101**Vt**99, 141**A**679.

269–24½–New. In New York, an action may be brought under statute to test the reasonableness of rules of the department of labor. 216**AppDiv**474, 215**NYS**492.

269–28 84 **IndA**260, 151**NE**31.

269–29 84 **IndA**260, 151**NE**31. [b] **In Indiana,** statute provides that appeal may be taken from decisions of state board of health in any matter involving changing or condemnation of any school building. 84 **IndA**260, 151**NE** 31.

270–45 101**Vt**99, 141**A**679.

270–53 [a] **Causing commitment to pesthouse.**–317**Mo** 1061, 297**SW**968, 54 **ALR**644.

271–78 197**Cal** 448, 241**P**264 (character of type used in publishing notice of election for bond issue held sufficient).

272–95 261**Mass**358, 158**NE**791 (rabies).

273–18 261**Mass**358, 158**NE**791.

273–18½–New. , if they are able to pay. 261**Mass**358, 158**NE**791.

273–25 235**Mich**163, 209**NW**163 (expense of free vaccination).

273–27½–New. Liability on improvement contracts of levee and sanitary district. 320 **Ill** 396, 151**NE**260.

274–59 235**Mich**163, 209**NW**163.

274–61 [a] **This general legislative policy is within power of legislature to deviate** from and place burden of vaccination on cities, villages, and townships. 235**Mich**163, 209**NW**163.

275–77 [a] 75**Mont**207, 243**P**573.

277–32 265**Mass**520, 164**NE**390.

277–35½–New. Instructions. Refusal to charge on physician's duty to give notice of patient's contagious disease held error. 118 **Oh**147, 160**NE**456.

HEALTH INSURANCE

278–2½–New. Failure to give written notice of other insurance has been held to preclude right to claim penalty for delay. **LaA** 129**S**238.

278–2⅓–New. Insured's acceptance of policy has been held acceptance of clause relating to other insurance rendering insurer liable proratably in absence of notice of other insurance. **LaA** 129**S**238.

278–4 172**Minn**19, 214**NW**468; **MoA** 24 **SW(2d)**1058; 104**NJL**364, 140**A**307; 94 **PaSuper**303; 187**Wis**25, 203**NW**918.

278–4½–New. Duration of risk. 121 **Kan**674, 249**P**685.

278–5 [a] **Acts not constituting cancellation of policy.**–181**Ark**156, 25**SW(2d)** 23(2dcase).

279–10½–New. Under a statutory provision in a policy insuring against loss or disability resulting from illness contracted during the term of the policy, which authorizes cancellation by insurer without prejudice to any claim originating prior to cancellation, a claim originates not with the onset of the sickness, but with the beginning of the disability. 172**Minn**19, 214**NW**468.

279–11 [a] **General questions in application** as to former ailments do not require disclosure of ailments of trivial, temporary, or unimportant nature. 167 **Minn**53, 208**NW**410.

279–11½–New. In the absence of fraud, failure to state in the application that the applicant had stomach trouble has been held not to subject the policy to forfeiture. 161**La**229, 108**S**464, 45**ALR** 1521.

279–12 167**Minn**53, 208**NW**410; 104 **NJL**364, 140**A**307. [d] (2) Casual questioning and superficial examination of person by physician is not "medical attendance," within meaning of that term as used in question as to medical attendance. 57**ND**941, 224**NW**894. [f] **Misrepresentation increasing risk of loss** avoids policy, though made without intent to defraud. 167**Minn**53, 208**NW** 410. [g] **Insured is not responsible** where agent incorrectly wrote truthful answer in application. 167**Minn**53, 208 **NW**410. [h] **Effect of good faith.**–Negative answer to inquiry regarding existence of certain disease is not misrepresentation, when applicant honestly believes he does not have such disease and makes his answer with no intent to deceive. 57**ND**941, 224**NW**894.

279–13 [c] (4) Stipulation in application that policy becomes effective if delivered to insured while in good health is valid. **TexCommnA** 280**SW**551. (5) Statute regulating defenses based on false representations contained in application does not apply to defense based on such stipulation. **Tex CommnA** 280**SW**551.

279–15 But see 10**LaA**14, 120**S**424. [b] **Renewal premiums.**–52**Misc**353, 102**NYS** 157. [c] **Insured is liable for premium** which became due before insurer was notified of total permanent disability. 159**Tenn**541, 20**SW(2d)**1038.

279–17½–New. A statute relating to misrepresentations made in obtaining insurance on the life of a person does not apply to health insurance provisions of a policy for indemnity for disability resulting from sickness and for indemnity for disability or death resulting from accident. 123**Kan**282, 255 **P**65.

279–17⅓–New. Recovery of sick indemnity under an insurance policy could not be defeated on the ground that a nervous and mental breakdown was caused by overwork and hence was a voluntary act within the terms of the policy. **MoA** 9**SW(2d)**685.

279–17¼–New. Insured is entitled to sick benefits for sickness contracted during the term of the policy where there were no misrepresentations, although he was suffering from a disease when the policy issued. 107**WVa**574, 149**SE**668.

279–19½–New. Where an application provides that no agent or solicitor has authority to amend or waive any provision, insured has notice of such lack of authority. **TexCommnA** 280**SW**551.

280–31 187**Wis**25, 203**NW**918. [a] **By laws of association limiting payment** of sick benefit to insured personally does not prevent wife from collecting benefits due deceased husband. **Tex CivA** 32**SW(2d)**683.

280–32 132 **Okl** 165, 269**P**1065. [b] (2) Insurer held liable for sleeping sickness attributable to attack of flu antedating issuance of policy. 179**Ark** 65, 14**SW(2d)**229.

280–33 33 **OhA**401, 169**NE**712.

280–34 [b] **Stipulation restricting liability** for Bright's disease to one month's payment held binding on beneficiary. **TexCivA** 298**SW**443.

280–36 [a] 249 **IllA**302; **MoA** 4**SW(2d)** 497; 52**ND**688, 204**NW**344; **TexCivA** 297**SW**312; 141**Wash**213, 250**P**1084, 49 **ALR**960. But see 322**Mo** 38, 14**SW(2d)** 600. [h] **Provision for less benefit** for nonhouse confinement than for house confinement is valid. 187**Wis**25, 203**NW** 918. [i] **Test of insured's sanity** under permanent disability clause has been held to be whether he was able to carry on ordinary affairs of life. 174**Ark**783, 297**SW**847, 54**ALR**600. [j] **Where insured was taken to doctor daily,** he cannot recover under "confined to house" clause in policy. 124**Kan**685, 261**P**565. [k] **Test of confinement** has been held not ability to leave house by own efforts, but actual leaving. 124**Kan**685, 261**P**565. [l] **Requirement of continuous confinement** in house to recover for total disability held evidentiary. **Tex CivA** 297**SW**312. [m] **Temporary absence from house for consultation with physician in same town** does not prevent recovery of benefits. 207 **Iowa**977, 222**NW**25, 61**ALR**633. [n] **Confinement in hospitals for treatment** is confinement in house, though hospitals are located in other towns where insured went to them on physician's advice. 207 **Iowa**977, 222**NW**25, 61**ALR**633. [o] **Disability from illness marks time when** illness covered by disability begins, under policy. **Mass** 173**NE**425.

280–37 [a] (2) Substantial confinement sufficient. **TexCivA** 32**SW(2d)** 683.

281-38 [b] (2) Chiropractor is not legally qualified physician under provision. 187**Wis**25, 203**NW**918. [c] **Validity of provision** sustained. 187**Wis** 25, 203**NW**918. [d] **Going to doctor's office** is not equivalent to being visited by him. **MoA** 4**SW(2d)**497.

281-39 214**Ala**408, 108**S**837; 175**Ark** 359, 299**SW**366; 36**GaA**721, 138**SE**80; **MoA** 24**SW(2d)**1058; 119**Misc**467, 196 **NYS**337. See also 218**Ala**401, 118**S**753. [a] 84**CalA**689, 258**P**458; 155**Miss**515, 124**S**485(2dcase); 153**SC**401, 151**SE**67. See also 161**Tenn**335, 31**SW(2d)**689. [b] (1) 84**CalA**689, 258**P**458; 157 **Miss**571, 128**S**565; 153**SC**401, 151**SE**67; **TexCommnA** 25**SW(2d)**1093; **TexCivA** 9**SW(2d)**388; **TexCivA** 22**SW(2d)**1112; 108**WVa**22, 150**SE**385. (2) Disability to follow accustomed trade or business for which he was trained is sufficient. 153**SC**401, 151**SE**67. [c] (2) Disability, although total for years, is not permanent where it has terminated at time action is brought. 205 **Iowa**760, 218 **NW**313. [d] **Under total disability clause,** insured cannot recover where petition shows absence of essential total incapacitation for twelve months after proof of loss. 36**GaA**721, 138**SE**80. [e] **Disability clause providing for payment twelve months after proof of total incapacitation** has been held to raise presumption that twelve months of such condition after proof amounts to permanent total disability. 36**GaA**721, 138 **SE**80. [f] **Provision as to total disability** in effect from date of issuance. 214**Ala**408, 108**S**37. [g] **Insured is wholly disabled** when, as result of bodily injury, he has lost use of hand, arm, and leg and suffers from disease incapacitating him from his occupation as farmer or any other gainful occupation. 195**NC**332, 142**SE**1. [h] **Test of "total disability"** is whether insured can do sufficient work so that he may engage in some occupation for remuneration or profit. 129 **Or**485, 278**P**104. [i] **Initial total disability as prerequisite to partial indemnity for partial disability.–Tex CivA** 18**SW(2d)**723. [j] **Incapacity to do and perform one of several acts** necessary for prosecution of business constitutes "disability." 153**SC**401, 151 **SE**67. [k] **Insured afflicted with tuberculosis** is totally disabled though he is able to assist family in operation of country store. 155**Miss**515, 124**S**485(2d case). [l] **Provision indemnifies against loss of capacity to work** and not against loss of income. **TexCommnA** 25**SW(2d)**1093. [m] **Reasonable construction should be given to clause.–Tex CommnA** 25**SW(2d)**1093. [n] **Permanent total disability.–161Tenn**335, 31 **SW(2d)**689. [o] **Insured's attempt to discharge duties of employment before discovering inability to do so** does not prevent recovery of disability benefits. **GaA** 155**SE**221. [p] **Total disability for period of three months.–Wash** 290**P** 425. [q] **Disability insured against relating to insured's occupation.–TexCivA** 31**SW(2d)**1103. [r] **Disability insured against not confined to occupation named in application.–TexCivA** 31**SW(2d)** 1103. [s] **Group policy construed.–161 Tenn**335, 31**SW(2d)**689. [t] **Where insured was engaged in several occupations** all should be considered as unit. **GaA** 155**SE**221. [u] **Policy construed as to "total and permanent disability" insured against.–TexCivA** 31**SW(2d)** 1103. [v] **When total disability exists.–TexCivA** 31**SW(2d)**1103. [w] **"Loss of two feet" insured against** shown by proof of loss of use of feet if loss of use permanent. **TexCivA** 31 **SW(2d)**1103.

281-44 172**Minn**19, 214**NW**468.

281-44½-New. A claim for indemnity originates not with sickness, but with resulting disability, if any. 172**Minn**19, 214**NW**468.

281-44⅓-New. Each disability furnishes a new ground of claim. 172**Minn**19, 214**NW**468.

281-48 [c] **Torticollis.–52ND**688, 204 **NW**344.

282-61⅓-New. Plain terms of a policy control liability where the policy covers several classes of illness. 124**Kan**685, 261**P**565.

282-61¼-New. Indemnity should be under the provision most nearly applicable. 124**Kan**685, 261**P**565.

282-61⅕-New. Where a policy provides that it shall take effect fifteen days from date in case of disease, the beginning of disability is the time when the disease first becomes manifest. 153**Miss**53, 120 **S**180.

282-61⅙-New. An insurer, by furnishing forms on which to make proofs under a combination sick benefit and accident policy theretofore issued to insured, does not waive a stipulation in the policy that it shall not cover illness occurring within thirty days from its date so as to be estopped to take advantage thereof. 153**Miss**433, 121**S** 125.

282-61⅐-New. Disability benefits for part of year between anniversary of policy and insured's death held apportionable where paragraph under disability provision contained words "Life Income to Assured." 158**Md**51, 148**A** 273.

282-61⅛-New. Health policy allowing indemnity for confinement from certain diseases not including complications and consequences covers indemnity for period of recuperation. **MoA** 27**SW(2d)** 49.

282-61⅑-New. Certificate providing benefits for sickness and death does not relieve insurer from liability for sick benefits because insured dies from sickness. **TexCivA** 32**SW(2d)**683.

282-62 9**LaA**385, 120**S**431; 119 **Or**591, 250**P**227.

282-64 [a] (1) 175**Ark**359, 299**SW**366. [b] **Permanent insanity,** causing partial or complete permanent disability, has been held to excuse insured from giving notice of disability under life insurance policy. 174**Ark**783, 297**SW**847, 54**ALR** 600. [c] **Ignorance of insured** of provision entitling him to compensation is no excuse for failure to comply with terms of contract. 136**Misc**194, 240**NYS** 568.

282-65½-New. Provision not complying with statutory requirement as to place of notice is void, and notice to any authorized agent is sufficient. 187 **Wis**25, 203**NW**918.

282-67 236 **Ill**197.

282-69 119 **Or**591, 250**P**227.

282-71 175**Ark**359, 299**SW**366; 136 **Misc**194, 240**NYS**568; 159**Tenn**541, 20 **SW(2d)**1038; **TexCivA** 9**SW(2d)**290. [b] **Effect of delay.–SC** 155**SE**617. [c] **Inability by reason of insanity** excuses failure to file proofs. **NC** 154**SE**749; **NC** 154**SE**752.

282-72 [a] (3) See also **MoA** 24**SW(2d)** 1062.

283-73 195**NC**262, 141**SE**743; 119 **Or** 591; 250**P**227.

283-73½-New. Although a policy provides that statements of fact made in all proofs submitted shall be conclusive upon claimant the insured may introduce evidence to explain two contradictory proofs made by him during the time allowed by the policy. 119**Kan**399, 239 **P**972.

283-74½-New. Request by insurer that insured make but his proof of claim does not necessarily entitle him to recover under a provision determining liability where the renewal premium is paid after expiration of the policy. 52 **Misc**353, 102**NYS**157.

283-77 **MoA** 9**SW(2d)**685.

283-81½-New. Where a contract of insurance providing for monthly benefits in case of total disability contains stipulation that company may at any time, but not oftener than once a year, demand proof of continued disability, and that upon failure to furnish proof of continued disability or if it appears that insured is no longer disabled no further payments shall be made, a verdict and judgment awarding plaintiff monthly benefits until defendant shall show that plaintiff is no longer wholly disabled is erroneous. 38 **OklACR**58.

283-81⅓-New. In an action on such policy benefits accruing after filing of action are not recoverable in absence of amendment of petition to cover period between filing of original petition and time of trial. 38 **OklACR**58.

283-81¼-New. In such action recovery is limited to benefits accruing up to time of trial. 38 **OklACR**58.

283-81⅕-New. Successive actions may be maintained on such policy to recover benefits accruing. 38 **OklACR**58.

283-82 But see **TexCivA** 297**SW**312.

283-90 [a] **Under general averments of total disability** evidence thereof whether confined or non-confined is admissible in absence of request for further particulars. **WVa** 152**SE**859.

283-90½-New. In an action to recover sick indemnity under an insurance policy, want of notice must be affirmatively pleaded. **MoA** 9**SW(2d)**685.

283-90⅓-New. Where a policy, providing for permanent disability payments, entitles the insurer to proof of continuance of disability on demand therefor not more often than once a year, insured, suing for payments, on discontinuance thereof, need not allege continuance of disability. 158**Tenn**346, 13 **SW(2d)**330.

283-90¼-New. A petition, failing to allege furnishing proof of disability as required, warranting waiver of premiums or excuse for failure, is fatally defective. **TexCivA** 10**SW(2d)**267.

283-90⅕-New. Special defenses must be specially pleaded. 6**LaA**212 (that illness was not covered by policy and that notice and proof of loss were not timely given).

283-90⅙-New. Where insured does not plead failure of any policy requirement he cannot defeat sick benefit recovery for failure to give required notice. **TexCivA** 32**SW(2d)**683.

283-90⅐-New. Petitions to recover benefits for total disability have been held sufficient. **GaA** 155**SE**221.

283-93 See also 195**NC**262, 141**SE**743.

283-96 104**NJL**364, 140**A**307; **TexCivA** 31**SW(2d)**1103.

283-97½-New. In an action for permanent disability payments on discontinuance thereof, by insurer, under a policy, providing for payment thereof during insured's lifetime, and entitling insurer to proof of continuance of disability not more often than once a year on demand therefor, insurer has the burden of showing that demand was made and not complied with within a reasonable time. 158**Tenn**346, 13**SW** **(2d)**330.

284-7 [a] 52**ND**688, 204**NW**344.

284-8 256 **Ill**A197. [b] 127**Me**361, 143 **A**465. [c] 123**Kan**282, 255**P**65. [d] 170 **Minn**60, 212**NW**5. [f] **Insurer's knowledge of misrepresentations.–169Minn**106, 210**NW**846 (when it canceled policy).

284-8½-New. good health at the time when the contract was entered into, 142**Miss**735, 107**S**519.

284-9 223**Ky**571, 4**SW(2d)**364; **MoA** 9 **SW(2d)**685. [a] (1) 86 **IndA**82, 156**NE** 166; 168**La**271, 121**S**863. [b] 84**CalA** 689, 258**P**458; 41**GaA**644, 154**SE**198. [f] **Confinement to house.–218MoA**640, 266**SW**325. [g] **Evidence of plaintiff's physical condition** held to bring him within terms of policy. 237**Mich**294, 211**NW**991. [h] **Recovery for total disability** shown without dispute cannot be reversed for failure to establish confinement to house. **TexCivA** 297**SW**312. [i] **Evidence held sufficient** to support judgment for plaintiff. 208 **Iowa**348. 223 **NW**366. [j] **Disease originating more than thirty days after date of policy.–** 181**Ark**892, 28**SW(2d)**703. [k] **Total disability.–GaA** 155**SE**221. [l] **Prima facie case.–TexCivA** 31**SW(2d)**1103.

284-9½-New. concerning whether insured's illness was covered by the policy, 6**LaA**212.

284-10 [c] **Lapse of policy.–181Ark**156, 25**SW(2d)**23(2dcase).

284-11 [a] 10**LaA**14, 120**S**424; **NC** 154 **SE**752; 52**ND**688, 204**NW**344; 119 **Or** 591, 250**P**227.

284-11½-New. Matters considered in determining whether insured's disability is total and permanent. 161**Tenn**335, 31**SW(2d)**689.

284-12 167**Minn**53, 208**NW**410; 104 **NJL**364, 140**A**307. [a] **Whether matter misrepresented** increased risk of loss is for jury. 167**Minn**53, 208**NW**410. [b] **Whether misrepresentations** were made is for jury. 167**Minn**53, 208**NW**410.

284-13 MoA 9SW(2d)685; 195NC262, 141SE743; 52ND688, 204NW344; 129 Or485, 278P104 (permanent total disability); TexCivA 31SW(2d)1103; Tex CivA 32SW(2d)683.
284-15 161Tenn335, 31SW(2d)689 (whether permanent).
284-16 207 Iowa977, 222NW25, 61ALR 633; MoA 4SW(2d)497. [a] **Question is one of law** where uncontradicted evidence shows that insured spent most of his time out of doors pursuant to physician's directions. 207 Iowa977, 222NW 25, 61ALR633.
284-19 173Ark362, 292SW657.
284-19½-New. A demurrer to plaintiff's evidence should be sustained where it shows that the disability existed before issuance of the policy. 132 Okl 165, 269 P1065.
284-20 170Minn60, 212NW5; MoA 9 SW(2d)685; 198NC197, 151SE195 (instruction warranted); 52ND688, 204NW 344; TexCivA 31SW(2d)1103. [b] **Time of beginning of benefits.**-38 OklACR58. [c] **Instructions held not misleading.**-129 Or485, 278P104 (defining "permanent total disability").
284-20½-New. Recovery held not reducible by other policies not disclosed. 230AppDiv361, 244NYS576.

HEAR

284-2 [a] **In negative statement,** often expresses merely negation of conscious knowledge. 91Fla918, 109S193.

HEARING

285-15 Kan 289P64.
285-17 20F(2d)11; 24F(2d)390. [b] (1) 47RI 323, 133A1, 2 [citCJ]. (2) Includes introduction of evidence, argument of counsel, and pronouncement of decree. 100WVa531, 131SE7.
286-22 [a] **Preliminary hearing and preliminary examination synonymous.**-31NM485, 247P828.
286-25½-New. "due hearing," 15F(2d) 614.
286-34½-New. Hearing on merits of case is favored wherever possible. CalA 287P135.

HEARSAY

286-36 TexCivA 300SW191, 192 [citCJ].
286-36½-New. Hearsay is synonymous with rumor. 76Mont574, 248P179.

HEDGE

287-54½-New. Also, a term used in the milling business to indicate certain exchange market transactions. 104WVa 150, 139SE638, 55ALR636.

HEIR or HEIRS

287-66 153Md248, 138A5.
288-78 [a] **By statute** those who become such after contract is made. 60 OntL323, [1927] 2DomLR1161.
288-81 Or 290P1095.
288-83 122 Or387, 259P290.
288-89 Iowa 216NW753; 193NC294, 136SE733.
288-91 Mass 167NE274.
290-14 99NJEq514, 133A705.
290-15 98NJEq569, 131A210.
290-18 98NJEq569, 131A210; 99NJEq 514, 133A705.
290-19 194Cal 159, 228P428.
290-22 14DelCh465, 130A746; 116Nebr 785, 219NW138 [quotCJ]; Or 290P 1095; 49SD575, 207NW654, 44ALR 1462. [a] **Son predeceasing father** never became father's heir. Or 290P1095.
290-23 [a] Iowa 216NW753, 755 [cit CJ].
290-24 129 Or402, 275P915.
291-32 57ND63, 222NW464.
292-57 198NC503, 152SE388; 122 Or 387, 259P290.
293-71 122 Or387, 259P290.
293-79 126 Or193, 268P75.
295-1 146Miss748, 111S833.
295-2 122 Or387, 259P290.
295-5 146Miss748, 111S833; 122 Or 387, 259P290.
299-46 105Conn98, 134A530; 146Miss 748, 111S833, 834 [citCJ]; 122 Or387, 259P290.
300-47 146Miss748, 111S833, 834 [cit CJ].
301-49 193NC294, 136SE733.
301-52 163Ga204, 135SE747; 87 IndA 149, 165NE435; 127Me328, 143A169.
301-53 [a] 122 Or387, 259P290.
302-80 219Ala533, 122S625.
302-87 192NC614, 135SE632.
303-93½-New. Includes heir at law by designation under statute. 27 OhNPNS 193.
303-14 153Md248, 138A5.
303-16 153Md248, 138A5.
343-65 146Miss748, 111S833. [b] 146 Miss748, 111S833.
343-72 11PaDist&Co 709.
343-78 Iowa 216NW753.
344-19½-New. direct heirs, Iowa 228 NW629.
345-34 191NC453, 132SE278.
345-87 NJCh 150A187.

HEN

347-43½-New. "Pullet" has been held to be included in term. 197Cal 245, 239 P1086.

HEREIN

348-85 11PaDist&Co 734.

HEX

349-27½-New. Term means, literally, six. 41F(2d)295.

HIGH-JACKER

351-73½-New. High-jacker is one who holds up and steals booze from other vehicles. Iowa 229NW173.

HIGHWAYMAN

352-88 77CalA641, 247P507.

HIGHWAYS

363-1 164Ga872, 139SE671, 54ALR 1246; 80Mont228, 260P134.
363-2 164Ga872, 139SE671, 54ALR 1246.
363-4 164Ga872, 139SE671, 54ALR 1246.
363-5 164Ga872, 139SE671, 54ALR 1246.
364-8 77CalA641, 247P507, 514 [quot CJperCraig,J]; Mass 167NE311.
364-9 77CalA641, 247P507, 514 [quot CJperCraig,J].
364-10 77CalA641, 247P507 [quotCJ perCraig,J]; 219AppDiv114, 219NYS 497. [a] 219AppDiv114, 219NYS497.
364-12 [a] (9) 82NH278, 132A685. (21) A public way for use of public in general, for passage and traffic without distinction. 249Mich289, 228NW791. [d] **Purpose of highway** is for passage, travel, traffic, transportation, and communication. 124Kan414, 261P30.
365-13 80Mont228, 260P134. [a] **Highway is not necessarily a thoroughfare.**-138Misc607, 245NYS534.
365-20½-New. culverts, 117 Or566, 245 P308, 45ALR527.
365-25 147SC452, 145SE297 ("neighborhood roads" are public roads created by twenty years' prescriptive user).
366-32 23F(2d)211. [b] **Open ground** of railroad company behind station, used by public generally, has been held public highway. 23F(2d)211.
366-35 82NH278, 132A685.
366-70 80Mont228, 260P134.
366-71 80Mont228, 260P134; 109TexCr 403, 5SW(2d)141.
367-75 83Colo 536, 267P196, 197 [cit CJ].
367-77 83Colo 536, 267P196, 197 [cit CJ].
367-78 80Mont228, 260P134. [b] (5) Highway is one which public may use unconditionally. 23F(2d)211. [c] (3) The "public highways" of state include streets and alleys in municipalities as well as roads outside boundaries of any municipality. 337 Ill 200, 169NE22, 66 ALR834. [h] **"Public highway"** in accident policy is to be understood in its general sense. 23F(2d)211.
368-3½-New. Highway, being public easement, requires no dominant estate. 126Misc349, 214NYS123.
368-14 See also 249 IllA199.
368-18 [b] Contra Alta [1929] 1Dom LR344.
369-20 162Ga810, 134SE768; TexCivA 26SW(2d)405.
369-26 242Mich277, 218NW683.
369-39 162Ga810, 134SE768.
370-52½-New. **"Public highway"** means every public street, road, highway, or way in the state. 119 Or484, 250P213, 51ALR816.
370-54 [a] **In Oregon.**-117 Or566, 245 P308, 45ALR527 (statute applicable to bridge constructed either by county or state commission).
370-74 93Fla342, 112S75; 334 Ill 67, 165NE343; Iowa 230NW432; 216Ky 314, 287SW894; 128Misc525, 219NYS 545; TexCommnA 296SW877.
371-79½-New. The public right of passage over a strip along a river bank, in accordance with Civ. Code art 665, does not create a public road until the right is exercised by public authorities. 166La1069, 118S142.
371-82 334 Ill 67, 165NE343; 254 IllA 203.
371-84 216Ala656, 114S53; 93Fla342, 112S75.
371-85 93Fla342, 112S75.
371-86 216Ala656, 114S53; 93Fla342, 112S75; 320 Ill 467, 151NE253; 334 Ill 67, 165NE343; 254 IllA203; Iowa 230 NW432; 226Ky132, 10SW(2d)623; 128 Misc525, 219NYS545; TexCommnA 296 SW877; TexCivA 24SW(2d)773. But see 153Miss185, 120S814.
373-88 [e] **In Louisiana.**-166La1069, 118S142. [f] **In North Dakota** common-law rule is in force under statute. 57 ND305, 221NW270.
373-98 217Ala82, 114S686; 320 Ill 357, 151NE276; 323 Ill 486, 154NE207; 331 Ill 523, 163NE468; 334 Ill 67, 165NE 343; 203 Iowa134, 209NW731; Tex CommnA 296SW877; TexCivA 13SW (2d)412.
373-99 68CalA153, 228P726; 170Ga 324, 152SE831; 203 Iowa134, 209NW 731; 203 Iowa1114, 211NW986; 207 Iowa1173, 224NW834; 32NM342, 257P 998.
373-1 316 Ill 529, 147NE380; 320 Ill 467, 151NE253; 331 Ill 523, 163NE468; 203 Iowa134, 209NW731; 239Mich551, 214NW957; 82Mont115, 265P676.
374-3 218Ala19, 117S481; 334 Ill 67, 165NE343; IndA 171NE209 (road leading to cemetery); MoA 28SW(2d)389. **"The test,"** etc. 316 Ill 529, 147NE380. [a] (1) 320 Ill 357, 151NE276.
374-13 235Mich606, 209NW825; 221 MoA435, 282SW71; MoA 297SW424, 425 [citCJ]; 221AppDiv133, 223NYS 104.
375-15 331 Ill 523, 163NE468; Utah 285P646.
375-16 320 Ill 357, 151NE276.
375-19½-New. A change of location is not sufficient to defeat public's right, where such right was established through user before the change was made. 320 Ill 357, 151NE276.
375-19¾-New. A change of route by the owner for his own convenience does not affect or extinguish the right of the public therein. 320 Ill 357, 151NE 276.
375-20 316 Ill 529, 147NE380; 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 327 Ill 423, 158NE745; 203 Iowa134, 209 NW731; 203 Iowa1114, 211NW986; 32 NM342, 257P998; TexCivA 278SW341. See 166La1069, 118S142. [b] **In Texas.**-TexCivA 278SW341.
375-22 But see 247Mich435, 225NW884.
376-24 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 327 Ill 423, 158NE745; 203 Iowa1114, 211NW986; 32NM342, 257P998.
376-37 IndA 169NE873.
377-44 168Ark46, 269SW563; 323 Ill 486, 154NE207; 327 Ill 423, 158NE745; 239Mich551, 214NW957; 248Mich659, 227NW544; 32NM342, 257P998; Tex CivA 275SW173, 174 [quotCyc]; 192Wis 186, 212NW249. [b] (1) 32NM342, 257 P998.
377-45 168Ark46, 269SW563; 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 327 Ill 423, 158NE745; 334 Ill 67, 165 NE343; 203 Iowa1114, 211NW986; 239 Mich551, 214NW957; 32NM342, 257P 998; TexCivA 275SW173, 174 [quot Cyc]. [d] **In Wisconsin.**-192Wis186, 212NW249.
378-46 327 Ill 423, 158NE745; 207 Iowa1173, 224NW834; 154Md91, 140A 82; 235Mich606, 209NW825; 32NM342, 257P998; 127 Or356, 272P263; Tex CommnA 296SW877; TexCivA 275SW 173, 174 [quotCyc]; TexCivA 13SW(2d) 412.

379-47 TexCivA 275SW173, 174 [quot Cyc].
379-50 327 Ill 423, 158NE745; TexCivA 5SW(2d)213.
379-52 217Ala82, 114S686.
379-58 320 Ill 467, 151NE253; 327 Ill 423, 158NE745; TexCivA 275SW173, 174 [quotCyc].
379-61 220MoA1245, 290SW655; 32NM 342, 257P998.
379-62 252NY86, 168NE838.
380-64 239Mich551, 214NW957; 248 Mich659, 227NW544.
380-66 248Mich659, 227NW544.
380-69 93Fla342, 112S75.
381-74 [a] **In Ontario.**-61 OntL610, [1928] 2DomLR31.
382-87 [d] **Slight change in course** of public highway by public user does not defeat public nature of highway. Utah 290P954.
383-95 93Fla342, 112S75.
383-98½-New. One seeking to compel removal of fence from public road is not estopped from claiming it was public highway by prescription or user by fact of having petitioned for laying out of public along line in question without proceeding farther. 254 IllA203.
383-99 168Ark46, 269SW563; CalA 292 P981; 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 327 Ill 423, 158NE745; 203 Iowa134, 209NW731; 203 Iowa1114, 211NW986; TexCivA 275SW173, 174 [quotCyc]; TexCivA 289SW697, 700 [cit Cyc]. [a] **User varying from highway as laid** is insufficient to establish highway by prescription. 221MoA435, 282 SW71.
383-1 168Ark46, 269SW563; TexCivA 289SW697, 700 [citCyc].
383-2 168Ark46, 269SW563 (reparation or assuming control in some ostensible manner); 320 Ill 467, 151NE253.
384-4 But see 334 Ill 67, 165NE343.
384-5 [a] (7) Fifteen years. 320 Ill 357, 151NE276; 323 Ill 486, 154NE207.
384-12 23AlaA228, 124S912(2dcase); 89Fla253, 103S625; 95Fla976, 117S383; IndA 169NE873; 155Wash341, 284P92 (though portion of road not in controversy was not used for sufficient period).
384-13 168Ark46, 269SW563 (seven years); 203 Iowa134, 209NW731.
385-14 [a] (4) 254 IllA203.
385-15 89Fla253, 103S625; 327 Ill 423, 158NE745.
385-18 323 Ill 486, 154NE207; 203 Iowa1114, 211NW986.
385-19 203 Iowa1114, 211NW986.
386-21 [a] (1) 203 Iowa1114, 211NW 986.
386-22 57ND305, 221NW270.
386-24 323 Ill 486, 154NE207. See also 218Ala19, 117S481.
386-25 234 IllA219.
387-49 [b] **One obtaining patent** to public lands on which right of way by public use existed takes subject to public easements. Utah 290P954.
387-58 216Ala656, 114S53; 217Ala82, 114S686; 91Fla612, 108S689, 46ALR 870. But see 127Kan188, 272P189. [a] **Right of way granted by congress.**-Evidence must show unequivocal and clear act of competent authority to raise presumption in case of such right of way granted by congress. 216Ala656, 114 S53.
388-62 89Fla253, 103S625.
388-63 [a] 226Ky132, 10SW(2d)623.
388-68 TexCommnA 296SW877.
388-73½-New. , or by a party's payment of rent for the use of the road. 320 Ill 357, 151NE276.
388-78 MoA 296SW164.
388-79 323 Ill 486, 154NE207; MoA 256SW98.
389-84 MoA 256SW98.
389-90 323 Ill 486, 154NE207.
389-91 323 Ill 486, 154NE207.
389-92½-New. Landowner not having acquiesced in highway of greater width is not estopped to assert that highway is only of stated width. CalA 292P 981.
389-92½-New. County's mere assumption of width of highway is not controlling where proper legal action has not been taken to acquire land. CalA 292 P981.
389-96 TexCivA 291SW263.
390-3½-New. It is proper and necessary for court to determine width as reasonably called for under all facts and circumstances. Utah 285P646.
391-31 [b] **Petition sufficient.**-TexCivA 278W(2d)287. [c] **Counterclaim** held sufficiently particular. Utah 290P954. [d] **Highway must be described with reasonable certainty** by party claiming highway over another's land by public use. Utah 290P954.
391-35 [b] **Evidence of specific description** of highway is admissible although description is alleged generally. Utah 290P954.
391-38 [b] (3) Presumption is that use is not adverse. 174Ark428, 295SW52.
391-39 168Ark46, 269SW563.
391-40 168Ark46, 269SW563; 174Ark 428, 295SW52. [a] 203 Iowa1114, 211 NW986.
391-41 256Mass379, 152NE625.
391-42 168Ark46, 269SW563 (holding in absence thereof or of court order, it is prescribed that use is permissive, not adverse).
392-46 217Ala82, 114S686; 316 Ill 539, 147NE380; 323 Ill 486, 154NE207; MoA 27SW(2d)471.
392-48 316 Ill 529, 147NE380; 320 Ill 357, 151NE276; 331 Ill 523, 163NE468; MoA 27SW(2d)471; MoA 28SW(2d)389.
392-49 320 Ill 357, 151NE276; 254 IllA 203.
392-50 103WVa386, 137SE754 [citCJ].
392-51½-New. Where the original use of land by the public as a highway was permissive, there is no presumption that long continued use and possession was under a claim of adverse possession. 203 Iowa1114, 211NW986.
392-51¾-New. Use of land for a highway does not raise a presumption that the owner knew of it or of the claim of right thereto. 203 Iowa1114, 211NW 986.
392-51¾-New. Public use of vacant and unoccupied land is presumed permissive and not adverse. 320 Ill 467, 151NE 253.
392-57 217Ala82, 114S686; 167Minn 248, 208NW803.
393-64½-New. But it may be shown that a railroad maintained a crossing as required by law for nearly fifty years. TexCommnA 296SW877.
393-65 265Mass203, 163NE856. [a] (1) 68CalA153, 228P726; 320 Ill 357, 151NE 276; 167Minn248, 208NW803; TexCivA 9SW(2d)143; TexCivA 24SW(2d)773; Utah 285P646. (5) TexCivA 5SW(2d) 213. (6) To establish that no public road existed on plaintiff's property. 166 La1069, 118S142. (7) To support finding that public highway by public user existed on plaintiff's land. Utah 290P 954. [b] 216Ala656, 114S53; 168Ark 46, 269SW563; CalA 292P157; 320 Ill 467, 151NE253; 323 Ill 486, 154NE207; 331 Ill 523, 163NE468; 334 Ill 67, 165 NE343; 203 Iowa134, 209NW731; 154 Md91, 140A82; 256Mass379, 152NE625; 235Mich606, 209NW825; MoA 256SW 549; 252NY86, 168NE838; 95PaSuper 482; 192Wis186, 212NW249.
393-68 [a] **Evidence held insufficient** to show use of road by public was permissive only. MoA 27SW(2d)471.
393-69 316 Ill 529, 147NE380 (evidence insufficient to show permissive use); 203 Iowa1114, 211NW986.
393-71 TexCivA 27SW(2d)287.
393-76 323 Ill 486, 154NE207.
394-83½-New. Review in a court may be limited to an examination of the regularity of the proceedings and due execution of statutory powers. 241Mich161, 216NW426.
394-83½-New. Acts authorizing a township board to consider plats submitted for approval, and prohibiting the board from requiring parties to conform to a township, village, or city plan, which may conflict with any general plan adopted by the county or state for location and width of streets and highways, have been held not unconstitutional. 246Mich383, 224NW659.
395-95 [b] **In South Carolina.**-153SC7, 150SE315.
395-1 155Wash443, 284P744.
396-15 175Minn395, 221NW527.
396-24 164Ga434, 138SE847.
396-26 164Ga434, 138SE847.
396-27 164Ga434, 138SE847.
397-30 164Ga434, 138SE847; 14PaDist &Co 244.
397-38½-New. As between two proposed routes equally serviceable, the one offering fewer construction difficulties should be selected. 164Ga434, 138SE 847.
398-49 14PaDist&Co 244.
399-55 241Mich161, 216NW426; 80 Mont228, 260P134, 137 [citCJ].
399-56 171Ark328, 284SW24.
399-57 241Mich161, 216NW426; 80 Mont228, 260P134, 137 [citCJ]; 7Pa Dist&Co 227.
399-59 241Mich161, 216NW426. See also 163Ga707, 137SE626. [b] **In Georgia.**-163Ga707, 137SE626. [c] **Code provisions as to new roads or maintenance** held not to apply to power to classify roads. 163Ga707, 137SE626.
399-74 335 Ill 558, 167NE772 (department of public works can appropriate as part of proposed route portion of road previously paved by township).
400-86 [b] **Removal of dwelling house or any substantial, permanent, or valuable building** without consent of owner is forbidden by statute in some jurisdictions. 205 Iowa184, 217NW834 (small privy not within prohibition of statute).
400-92 205 Iowa184, 217NW834; 207 Iowa56, 222NW438. [a] (5) Other instances. 205 Iowa184, 217NW834, 836 [citCJ].
401-93 207 Iowa56, 222NW438.
401-1½-New. [§ 47a] (c) **Land Used for Educational or Charitable Purposes.** Under a statute providing that no public highway shall be laid out through or upon any yard or inclosure used for educational or charitable purposes, a town may not lay out a highway passing through the inclosure of a state tuberculosis camp. 192Wis186, 212NW249.
401-7 [b] **In Nebraska.**-Nebr 209NW 741. [c] **In Texas.**-CivA 290SW573.
401-8 TexCivA 291SW968. [a] **Provisions that properly designated roads** between county seats shall be parts of highway system and that decision of commission shall be final held to be strictly construed. 193NC36, 136SE612.
401-9 69CalA643, 232P475. [a] **Words "laid out" and "erected"** as applied to highways distinguished. 69CalA643, 232P475. [b] **Statute providing for appeal** does not violate due process clause because not providing for hearing before appraisers or county commissioners. 268US276, 45SCt491, 69Led953.
401-12 241Mich161, 216NW426. [c] **Procedure need not be in accord with common law.**-241Mich161, 216NW426.
401-12½-New. Term "layout" means taking necessary legal steps for establishment of and looking toward construction of highway, but does not include actual construction. Mont 288P 455.
402-16 CalA 292P981; 80Mont228, 260 P134; TexCivA 25SW(2d)625.
402-17 80Mont228, 260P134.
402-18 142Miss696, 107S753.
402-19 142Miss696, 107S753.
402-21½-New. Commissioners are not required to hear application for road on their regular court day. 34GaA292, 129SE567.
402-31 Ark 292SW672.
402-32 173Ark641, 296SW705.
403-39½-New. Statutes enacted after construction of a road through land have no retrospective effect. 102WVa 663, 136SE195.
403-41 152Tenn605, 279SW1041 (building, repairing, and maintaining roads county purpose).
403-43 Iowa 231NW461.
403-44 [a] **Legal proceedings, instituted pursuant to statute,** held not only mode of establishing public highway. 85 IndA227, 150NE374.
403-47 8PaDist&Co 89. [a] (1) 199 Ind467, 157NE721; 127Me42, 141A95; 142Miss696, 107S753. (2) Where county commissioners approve of township road as county road, latter becomes that of county, and county is thereafter liable for proper maintenance. 6PaDist&Co 565. [1] **Member of board cannot be challenged** on hearing of application for road for prejudice or expression of opinion where no statute disqualified

him from presiding thereon upon such ground. 34GaA292, 129SE567.

403–48 [a] 171Ark900, 286SW1035, 287SW404; 173Ark192, 292SW106. (1) 175Ark570, 299SW1014; MoA 296SW164; 123 Or103, 261P76; 131 Or168, 281P182(2dcase). (2) County court in laying out and establishing highway is court of special and limited jurisdiction. 123 Or103, 261P76. [e] **Commissioners' courts.–TexCivA** 290SW573.

404–51½–New. A court establishing a new road cannot ignore applicable provisions of the constitution as to taking property without compensation. 173 Ark641, 296SW705.

404–55 [a] (2) Jurisdiction of county board, by way of supervision over township board relative to platting streets and highways, is limited to cases where township board rejects proposed plat, with reasons, and court directs township board to give its approval thereto. 246Mich383, 224NW659.

405–67 [b] **Extension of road from one county into another.–67CalA**328, 227P664. [c] **Joint construction by adjoining counties.–67CalA**328, 227P664.

405–69 69CalA643, 232P475 (evidence held to sustain finding that highway existed as described in ordinance permitting adjoining county to use such highway and in acceptance of such ordinance by board of supervisors of such adjoining county). [e] **Statutes construed not to require existence of road** to enable supervisors of two adjoining counties to construct highway. 69CalA643, 232P475. [f] **Acceptance by supervisors** of adjoining county of strip of land granted for county road ipso facto establishes it as highway. 69CalA643, 232P475. [g] **Grant and acceptance of strip of land** by adjoining counties for county road is dedication of such strip to county road purposes. 69CalA643, 232P475.

406–91 [e] (3) A wife is "freeholder" within statute. TexCivA 291SW968.

406–93 [b] (2) Consent of holder of sheriff's certificate which subsequently ripened into sheriff's deed must be obtained. Iowa 228NW19.

407–98 [b] **In Texas.–CivA** 291SW968.

408–33 123 Or103, 261P76. [e] **Failure to give notice** to landowner's wife held not to vitiate commissioners' court proceedings. TexCivA 291SW968.

409–37 TexCivA 291SW968. [c] **Failure to give notice** to lessee of mineral rights of proposed road through land held available to any objecting landowner. TexCivA 291SW968. [d] **Necessity for publication of notice.–234Ky**115, 27SW(2d)665.

412–73 [d] **Length.–34GaA**292, 129SE567.

412–80 34GaA292, 129SE567 (signature by majority of petitioners sufficient); TexCivA 15SW(2d)178(2dcase).

413–86½–New. Where a petition is presented before notice, but the court did not act upon the petition until after notice, judgment opening the highway has been held not invalid. 171Ark900, 286SW1035, 287SW404.

413–86½–New. That a bond to protect a county is filed and viewers appointed before notice is given has been held not to affect jurisdiction. 171Ark900, 286SW1035, 287SW404.

413–94½–New. Under some statutes, where notice is published in a newspaper in accordance with the statute, failure to send notice by registered mail to the owners of the land over which the highway is proposed to be laid out does not vitiate the proceedings as against collateral attack. 40Wyo 378, 278P71.

416–40½–New. Persons duly served with notice as required by statute cannot complain that other persons of same class were not also served. 34GaA292, 129SE567.

416–41 142Miss696, 107S753; 80Mont 228, 260P134; TexCivA 25SW(2d)242. [b] **Freeholders in "precinct"** means those in commissioner's precinct. Tex CivA 294SW868. [c] **Commissioner's court cannot open road on its own motion.–TexCivA** 25SW(2d)242 (statute requiring commissioner to report what new roads should be opened held not to confer such authority).

416–44 [g] **In Oregon.–123 Or**103, 261P76.

417–49 175Minn395, 221NW527; 142 Miss696, 107S753; 82Mont115, 265P676; TexCivA 21SW(2d)571.

417–56 127Me42, 141A95.

418–67 82Mont115, 265P676, 680 [cit CJ].

418–68 82Mont115, 265P676, 680 [cit CJ].

419–78 TexCivA 21SW(2d)571.

419–91 [b] 208 Iowa552, 226NW171.

420–93 TexCivA 294SW868; TexCivA 21SW(2d)571. [b] TexCivA 294SW868.

421–96 88PaSuper51; 12PaDist&Co 251.

422–19 10PaDist&Co 785.

423–25 [a] See also 82Mont115, 265P676.

424–37 199 Ind467, 157NE721.

424–45 175Minn168, 220NW419.

424–53 [f] **In Georgia.–**(1) 34GaA292, 129SE567. (2) No abuse of discretion shown. 34GaA292, 129SE567.

428–7 13PaDist&Co 662 (court may fill vacancy).

428–26 See also 12PaDist&Co 660.

429–32 [a] (2) 34GaA292, 129SE567.

430–39 241Mich161, 216NW426, 427 [quotCJ].

432–88 175Minn168, 220NW419; Tex CivA 24SW(2d)1103.

432–91 199 Ind467, 157NE721.

433–99½–New. Signers of a petition do not become parties to proceedings of the board of supervisors in laying out a road and condemning the necessary rights of way. 146Miss613, 111S596.

434–6 176Ark903, 5SW(2d)327.

434–8 TexCivA 294SW868.

434–18 OhA 173NE252 (wrong year in published notice not invalidating proceeding).

435–34 [a] (2) Other notice held sufficient. OhA 173NE252.

440–11 324 Ill 113, 154NE707.

441–41½–New. That a landowner filed exceptions to the report of viewers laying out a road held not waiver of his right to notice. 176Ark903, 5SW(2d)327.

441–42 TexCivA 294SW868.

441–42½–New. The report of a committee appointed to suggest plans for finishing incomplete road projects may be considered as entering into a call for election. 161La675, 109S353.

442–55 117Nebr846, 223NW284.

443–58½–New. or expediency, 117Nebr 846, 223NW284.

444–66 [b] (2) Generally. TexCivA 294SW868.

444–70 12PaDist&Co 251 (error to designate intermediate point or points between proposed termini).

445–77 See also TexCivA 294SW868.

448–20½–New. Adoption by reviewers of map or plat attached to report and made part thereof containing all information and data necessary for definite location of road is sufficient compliance with law as to "marking out." 34GaA292, 129SE567.

452–93 144Wash124, 257P231.

452–95 144Wash124, 257P231.

453–6½–New. The rule in some jurisdictions, laid down as a matter of public policy and not of statutory origin, 34GaA292, 129SE567.

453–6½–New. is that reviewers in their investigation act in a capacity such as that of jurors, 34GaA292, 129SE567.

453–6¼–New. and the rule is applied that jurors cannot impeach their verdict. 34GaA292, 129SE567.

453–6½–New. Hence where the only testimony that they did not mark out the road as required by law is that of the reviewers themselves objection to adoption of report on that ground will not be sustained. 34GaA292, 129SE567.

453–10 13PaDist&Co 662.

455–37 10PaDist&Co 562.

456–63 See also 195NC783, 143SE871.

456–66 39GaA238, 146SE651. [f] **Department of public works** has power to determine routes between termini named, subject to approval of governor, under L. (1917) p 696. 324 Ill 113, 154NE707 (Bond Issue Act). [g] **North Carolina Road Act** has been held not to delegate to highway commission discretion in locating or relocating roads. 193NC36, 136SE612. [h] **State highway commission.–194NC**333, 139SE606.

456–68 164Ga434, 138SE847; 324 Ill 113, 154NE707; 130 Okl 38, 265P126. [a] **Rights of particular localities.–324 Ill** 113, 154NE707. [b] **State highway commission** having designated, mapped, accepted, and maintained road connecting county seats, such route held finally established. 193NC36, 136SE612. [c] **Sufficiently convenient connections.–335 Ill** 558, 167NE772.

456–68½–New. In locating a hard surfaced road, the primary interest to be considered is that of the state at large, and not that of a particular locality. 335 Ill 558, 167NE772.

456–69½–New. In Kansas road cannot be located longitudinally upon right of way of railroad. 121Kan26, 245P1029.

456–69¼–New. In locating routes for a state highway system, primary consideration is interest of the state. 324 Ill 113, 154NE707.

456–69¼–New. Location must be for primary interest of state at large. 338 Ill 222, 170NE283.

456–70 164Ga434, 138SE847; 234 IllA 111. [e] **Grade crossings of railroads** with hard road should be avoided where practicable. 324 Ill 113, 154NE707. [f] **Under statute requiring road to "run to" and "connect" county seats,** state highway cannot be terminated thirteen miles from one by junction with another route. 193NC36, 136SE612(2dcase).

457–82 TexCivA 24SW(2d)1103 [quot CJ].

457–83 241Mich325, 217NW57; 245 Mich135, 222NW89.

457–84 241Mich325, 217NW57. [c] TexCivA 24SW(2d)1103.

458–85 TexCivA 24SW(2d)1103 [quot CJ].

458–86 241Mich325, 217NW57.

458–93½–New. But location actually made by supervisors or persons authorized to build fixes the boundaries rather than the courses and distances designated in the viewers' report, and in either case the center line of a road so opened is the point from which the boundaries are determined. 286Pa351, 133A495.

458–94 176Ark99, 2SW(2d)1102; 194 NC333, 139SE606. [b] But see 176Ark 99, 2SW(2d)1102.

459–2 201 Iowa741, 205NW456 (designation as "territorial" highway conclusive that width is seventy feet); Tex CivA 294SW868; 108WVa287, 150SE 719. [a] (1) 108WVa287, 150SE719. [e] **Statutory width prevails** where no width is designated. 201 Iowa741, 205 NW456. [f] **Establishment of road thirty feet wide does not bar its subsequent classification** as second or third class road. 163Ga707, 137SE626.

459–3 163Ga707, 137SE626. [e] (3) Highway established in 1870 under code of 1851 was sixty-six feet in width. 208 Iowa552, 226NW171.

460–8 MoA 296SW164.

461–41 221MoA399, 278SW88. [b] **Construction of order.–127Me**42, 141A95. [c] **County court must order road** opened where requirements of statute have been complied with. 221MoA399, 278SW88.

461–41½–New. A board of supervisors has no power to give retroactive effect to an order attempting to ratify and validate its previous order laying out a road and reciting that necessary jurisdictional facts were found. 146Miss613, 111S596.

462–46 But see 325 Ill 603, 156NE811.

463–61 TexCivA 294SW868.

463–67 TexCivA 31SW(2d)686.

464–83 142Miss696, 107S753 (that ten of petitioners were freeholders or householders of county must be found by board); 146Miss613, 111S596; 82Mont 115, 265P676; 123 Or103, 261P76. [b] **Service on members of jury of view** must be shown. TexCivA 294SW868.

464–85 142Miss696, 107S753 (recital in petition insufficient).

465–23 [b] **In North Carolina.–193NC** 36, 136SE612.

465–28½–New. Judgment is not vitiated because rendered by commissioners several days prior to date until which com-

missioners had agreed with parties to withhold judgment. 34GaA292, 129SE567.

466-37 142Miss696, 107S753. [g] **Record held sufficient.**-208 Iowa552, 226NW171 (as to notice of construction and giving of security for expenses). [h] **Record held sufficient.**-208 Iowa552, 226NW171.

467-54 TexCivA 278SW928.

468-60 TexCivA 278SW928.

468-64 199 Ind467, 157NE721.

468-67½-New. In absence of anything to contrary presumption is that appointment of reviewers by county commissioners was properly made. 34GaA292, 129SE567.

470-89 10PaDist&Co 785.

470-93 NJ 141A577.

471-6 82Mont115, 265P676.

472-21 Minn 231NW924.

472-22 [a] (4) After road as laid out was improved and used continuously for over eleven years. 245Mich135, 222NW89.

472-24 48SD523, 205NW242.

473-33 48SD523, 205NW242; 187Wis611, 205NW426.

473-42 TexCivA 291SW968.

474-48 246Mich383, 224NW659.

475-53 Mo 30SW(2d)68. [c] **In Missouri.**-Mo 30SW(2d)68.

475-55 [h] **In North Carolina.**-195NC783, 143SE871.

476-61 MoA 294SW730.

476-66 85PaSuper119; TexCivA 21SW(2d)571.

476-67 85PaSuper119 (denying petition).

477-71 85PaSuper119 (held final order).

477-78 TexCivA 278SW928.

477-79 TexCivA 278SW928.

480-32 [e] (3) See also 85PaSuper119. (5) Erroneously taking exceptions to final order refusing petition does not suspend effect of order or running of time to appeal therefrom. 85PaSuper119. (6) And nunc pro tunc order dismissing such exceptions also does not suspend such time. 85PaSuper119. [h] **Discretion justified** when appeal is held up through fault of public official. 5PaDist&Co 112.

484-91½-New. A circuit court, on appeal, can exercise no greater power than a county court. 173Ark641, 296SW705.

485-96 199 Ind467, 157NE721. [c] **In North Carolina.**-195NC783, 143SE871.

485-98 34GaA292, 129SE567.

487-28 [d] **Upon affirmance of decision refusing to establish road** (1) code provision requiring court to certify its proceedings to board is not applicable. 146Va210, 135SE702. (2) Reference to necessity, just compensation, or lack of funds, being unnecessary, final judgment will not be reversed because of statement by court on subject. 146Va210, 135SE702.

487-33½-New. The circuit court's judgment, changing a route adopted, and making the location depend on contingencies, is erroneous. 173Ark641, 296SW705.

488-46 241Mich161, 216NW426; 146Miss613, 111S596.

488-47 241Mich161, 216NW426.

489-51 [c] **In Mississippi.**-146Miss613, 111S596.

489-56 241Mich161, 216NW426, 427 [quotCJ].

489-57 241Mich161, 216NW426, 427 [quotCJ].

492-98 146Miss613, 111S596.

493-5 146Miss613, 111S596. [a] **Proceedings of board of supervisors after issuance of writ** should not be made part of record. 146Miss613, 111S596.

493-7½-New. That the bond on certiorari is made payable to the state and the original petitioners for the road instead of to the county is not ground for dismissal of the writ. 146Miss613, 111S596.

493-8 175Ark570, 299SW1014.

494-21 [a] (5) That county court established road which district proposed to improve. 175Ark570, 299SW1014.

494-22½-New. To sustain an order denying a petition in a judicial road proceeding it is not necessary that the evidence be practically conclusive against the propriety of establishing the road. 176Minn94, 222NW578.

494-22⅓-New. Findings of fact will not be disturbed where there is evidence reasonably tending to support them. 176Minn94, 222NW578.

494-32 193Wis549, 214NW324.

494-34 CalA 292P981 [citCJ] (proceedings nullity); TexCivA 294SW868.

494-36 207 Iowa56, 222NW438; 123Kan626, 256P1011; 198Wis342, 224NW108. [a] **Routing state highway over boulevard.**-160Tenn571, 27SW(2d)1085.

494-39½-New. or where conditions of establishment, as by means of donations, had not been met. 123Kan626, 256P1011.

495-41 147SC97, 144SE926 (construction of substituted highway in place of one authorized by law).

495-43 TexCivA 278SW928.

495-47 TexCivA 278SW928. [b] **Jury of view presumed to have exercised discretion** in selecting course, which action cannot be enjoined. TexCivA 278SW928.

495-48 TexCivA 278SW928.

495-52 [c] 324 Ill 113, 154NE707.

495-53½-New. Use of injunction is not an effort to open a new road. TexCivA 294SW868.

495-53⅓-New. The court cannot lay out a new road in the decree. TexCivA 294SW868.

497-83 [b] **Sufficiency of bond to protect county** cannot be questioned by railroad over whose road highway was opened. 171Ark900, 286SW1035, 287SW404.

498-98 Mont 288P455.

498-3 325 Ill 603, 156NE811.

498-7½-New. A highway selected as part of a state system becomes a permanent link. 194NC159, 138SE601.

498-7⅓-New. Under some statutes highway becomes county road on being laid out whether erected or not. Mont 288P455.

498-9 [h] **Road made main market road** does not necessarily become state road. 35 OhA246, 172NE423.

499-10 325 Ill 603, 156NE811.

499-14 155Wash443, 284P744.

499-22 Mo 278SW387.

500-31 40Wyo 378, 278P71.

500-32 146Va246, 135SE809.

500-34 325 Ill 603, 156NE811; 245Mich135, 222NW89; 40 Wyo 378, 278P71.

500-35 325 Ill 603, 156NE811.

500-36½-New. Presumption is that highway was opened as legally directed in the absence of evidence to the contrary. 286Pa351, 133A495.

500-37 286Pa351, 133A495.

500-37½-New. The presumption is that sufficient width for public use was taken in the absence of showing a less amount appropriated, the extent being determined by a court order or act authorizing construction. 286Pa351, 133A495.

500-37⅓-New. Compensation to an abutting owner for damages is presumed after many years, especially where the owner fails to seek relief as provided by statute. 286Pa351, 133A495.

500-37¼-New. The presumption that occupation of the land was to the extent indicated, where the legislature directed a turnpike of certain width and authorized taking property therefor by eminent domain; however, such right may be limited and evidenced by a map site showing the taking of a less amount. 286Pa351, 133A495.

500-39 127 Or356, 272P263.

500-43 127 Or356, 272P263.

501-50 325 Ill 603, 156NE811.

502-66 [f] 138Misc607, 245NYS534. [h] 82Mont115, 265P676. [l] **Evidence held insufficient** to show petition not signed by required number of freeholders. 82Mont115, 265P676. [m] **Evidence insufficient to show abandonment** of county road by public. 127 Or356, 272P263. [n] Clear and satisfactory evidence is required to show intention to abandon. 127 Or356, 272P263. [o] **Evidence sufficient to support finding that road followed line laid out.**-MoA 296SW164.

503-82 177Ark296, 6SW(2d)312, 314 [citCJ]. [b] **Requirement of new beds.**-157Md521, 146A758.

503-83 See also MoA 274SW528.

503-87 [b] **Material alteration in location** of road is establishment of new road the width of which will be controlled by then existing statutes. 201 Iowa741, 205NW456.

504-91 205 Iowa523, 218NW258.

504-94½-New. The board of supervisors may acquire by contract the right for a change of road deemed necessary, and the contract will be held valid and unaffected by any irregularity of proceedings in changing the road. 148Miss148, 114S33.

504-95 [a] **No one has vested right in maintenance of highway in particular place.**-Ark 31SW(2d)300.

504-96 [a] **State highway commission** cannot change roads connecting county seats, established as part of highway system, to obtain "most practicable" road. 193NC36, 136SE612.

504-97 194NC159, 138SE601. [b] **In Ontario.**-62 OntL139, [1928] 2DomLR386(1stcase). [c] **Authority to change location within borough.**-13PaDist&Co416.

504-1 91Fla118, 107S146. [d] **County not bound by alleged oral agreement** of county judge and county commissioner separately with landowner that roadway was erroneously located and would be moved. TexCommnA 3SW(2d)75. [e] **Duty to provide access** to property as provided by part of road discontinued. 198NC293, 151SE625.

504-2 [a] (2) Under Iowa statute board of supervisors, on its own motion, has power to alter secondary roads. 205 Iowa523, 218NW258. (3) Jurisdiction under statute permitting action by supervisors on its own motion held concurrent with and independent of statute requiring petition. Iowa 230NW432. (4) "Statutory width" within meaning of statute is width established by supervisors. Iowa 230NW432. (5) Supervisors held to have jurisdiction to widen road from 40 to 56½ feet in proceeding without petition. Iowa 230NW432.

504-3 [a] **In Iowa,** under statute, state highway commission has power to alter primary roads. 205 Iowa523, 218NW258.

505-9 [a] (1) 131 Or168, 281P182 (2dcase) (county court acts as impartial public tribunal without private interest); 108WVa404, 151SE315 (burden of proof on one asserting authorization).

505-10½-New. A town with a population of one hundred has been held not the "principal town" within a statute authorizing change of location. 194NC180, 138SE717.

505-10⅓-New. Varying a tentative highway alignment from nothing to seven thousand or eight thousand feet held permissible. 194NC180, 138SE717.

505-10¼-New. A highway statute providing for protests by a street governing body of the "principal town" has been held inapplicable where the protesting town was not the principal town. 194NC180, 138SE717.

505-10⅕-New. The commission need not procure the consent of the street governing body of the town, not the county seat or the principal town, in changing the location of a tentative highway. 194NC180, 138SE717.

506-29½-New. Where a highway as actually laid out was used for sixty years, it cannot be altered to conform with lines as originally planned. 203 Iowa359, 212NW686.

506-29⅓-New. The county may move section line highway to true section line notwithstanding agreement between adjoining landowners as to location to which it was not a party. 52SD380, 217NW640.

506-34 129Kan66, 282P265 (elimination of dangerous railroad crossing not enjoined by landowner).

506-35½-New. The fact that a new road as altered will occupy part of the width of old road for part of its length does not bar right to relocate. 196 Ind635, 149NE345.

507-40 177Ark296, 6SW(2d)312; 121 Or323, 255P330.
507-43½-New. A statute, providing for the establishment and alteration of county roads and requiring viewers to report whether a road will run through an orchard or any part thereof, does not prohibit opening of the road through the orchard, being merely to aid in the estimate of damages. 229Ky713, 17SW (2d)1010.
507-45 229Ky713, 17SW(2d)1010.
507-46 121 Or323, 255P330.
508-58 229Ky713, 17SW(2d)1010.
508-59 [c] **Questions as to legal capacity of petitioners** are properly raised by exception to report of viewers. 229 Ky713, 17SW(2d)1010.
508-62½-New. Relocation may be made although the petition refers thereto as vacation of the old road and location of another. 196 Ind635, 149NE345.
509-67½-New. Signers of the petition are not parties to proceedings of the board of supervisors pursuant thereto. 146Miss613, 111S596.
509-71 [a] 175Ark1051, 1SW(2d)561.
509-72 [d] **No notice required** for discontinuance of short section of road. 198NC293, 151SE625.
509-73 [b] **Necessity for publication of notice.**-Ky 27SW(2d)665.
510-78 226Ky225, 10SW(2d)840.
510-84 [b] **Advertisement as required by statute immaterial** in view of written consent of owners. 208Ky625, 271 SW676.
510-92 MoA 277SW56; 147SC452, 145 SE297.
511-5 [d] (6) No answer is required to exceptions to report. 229Ky713, 17 SW(2d)1010.
513-26½-New. A board of supervisors has no power to give retroactive effect to an order attempting to ratify its previous order altering a road and reciting that necessary jurisdictional facts were found. 146Miss613, 111S596.
513-37 146Miss613, 111S596.
513-40 175Ark1051, 1SW(2d)561; 90 PaSuper109, 115 [citCJ].
514-49 [b] **Question of waiver of damages** is matter of defense on appeal and not to be heard on exceptions to report of viewers. 13PaDist&Co 484.
515-68 177Ark296, 6SW(2d)312.
515-71 [a] (4) Mississippi statute authorizing appeal does not exclude the right of review by certiorari. 146Miss 613, 111S596.
515-74 131 Or168, 281P182(2dcase) (writ of review will be dismissed where applicable statutes are fully complied with).
516-79½-New. The signers of the partition are not proper parties to review proceedings of the board of supervisors changing a road. 146Miss613, 111S596.
516-79¼-New. The proceedings of the board of supervisors after the issuance of the writ should not be made part of the record. 146Miss613, 111S596.
516-81½-New. That the bond on certiorari is made payable to the state and the original petitioners for alteration of a road instead of the county is not ground for dismissal of the writ. 146 Miss613, 111S596.
516-85 177Ark296, 6SW(2d)312, 314 [citCJ].
517-97 Contra 47RI 425, 133A806.
517-5½-New. Power to relocate a highway has been held under statute applicable to established roads as well as projected locations. Md 137A359.
517-5⅓-New. Power to abandon and relocate a road has been held administrative rather than essentially legislative. Md 137A359.
517-5¼-New. A highway department was authorized to relocate a road, which was officially designated and maintained as a state-aid road, provided there was no material change in the general direction and location of the designated road, other than such as was dictated by public interest. 167Ga859, 146SE 845.
517-5⅕-New. Relocation by the state highway department of four miles of state-aid road, extending for thirty miles in the county in which the change was located, and for a considerably larger distance in other counties, was not a material change as matter of law. 167Ga859, 146SE845.
517-5⅙-New. Valid governmental acts of the commission in relocating a highway cannot be assailed by a private citizen without pleading and proving that he has a personal interest in the subject matter. TexCommnA 12SW(2d) 150.
517-5⅐-New. The state highway department is "administrative tribunal," and any order made by it having for its purpose the location of a state highway is subject to revocation or change until something has been done giving a vested right to some one. TexCommnA 12SW(2d)150.
517-5⅛-New. Where the state highway commission in good faith, within the scope of its authority, relocated a state highway after a highway bond election, and no route was designated in order for the election, taxpayers cannot restrain the county commissioners' court from appropriating and expending the proceeds of the sale of the bonds toward construction of the highway. Tex CommnA 12SW(2d)150.
517-5⅑-New. Power to relocate a roadbed of an existing road does not include the power of establishing a new road and of entirely abandoning the existing road. 167Ga792, 146SE838.
517-5 1/10-New. Power to relocate implies preservation of identity of way without material change. 167Ga792, 146SE838.
517-5 1/11-New. That the designation of a road is on a map prior to the effective date of laws authorizing state highway department to relocate roads did not make the designation of the highway on such map illegal after the act became effective. 167Ga792, 146SE838.
517-5 1/12-New. Relocation of a state-aid road necessarily implies that it had been designated by the state highway board in accordance with the law. 167 Ga792, 146SE838.
517-5 1/13-New. The highway department is vested with power in its discretion to make such relocation of roads as will conform to the best engineering knowledge in road construction. 149SC79, 146SE685.
517-5 1/14-New. The highway department did not abuse its discretion by relocating a short section of a road in close proximity to the old road to eliminate a grade crossing. 149SC79, 146 SE685.
517-5 1/15-New. Where county supervisors, acting for the state in relocating a highway, obtain a deed to a strip of land in consideration of an agreement, to quitclaim the strip previously used as a public road, the state's right of way is limited to the strip granted notwithstanding its previous ownership of a wider strip. 34Ariz435, 272P639.
517-7 38F(2d)28; 288P434, 136PaA 669.
518-11½-New. Power granted highway commission to establish highways does not confer power to vacate them. Mont 288P181.
518-12 194NC159, 138SE601; 9PaDist &Co 571. See also 245Mich135, 222NW 89.
518-13 147SC452, 145SE297.
518-14 MoA 274SW528; 144Wash124, 257P231. [b] **Departure from original map route mentioned in statute** may be made by commissioners. 171Ark328, 284SW24.
518-16 91Fla118, 107S146; 157Md521, 146A758 (contract between county commissioners and power company for flooding roads in erection of dam ratified by special legislation); 156Miss 629, 126S405. [b] **County commissioners act judicially** in determining whether any legal objection to vacating road appears. 123Kan77, 254P321. [c] **State roads.**-251Mich256, 231NW621.
518-20 90PaSuper406.
518-21 [c] **Board member:** (1) Is not ipso facto disqualified because of interest. 167Minn187, 208NW757. (2) Is not elected as judge. 167Minn187, 208NW757. (3) Need not have unbiased attitude of juror. 167Minn187, 208NW 757.
518-22 173Ark192, 292SW106. [b] (1) 8PaDist&Co 89.
520-36½-New. Established "highways," under statutes relating to discontinuance, include any public highway, and not merely county roads. 67 Utah567, 248P811.
520-39 12PaDist&Co 660 (part cannot be left unvacated for use of private individual).
520-41 [a] (3) 12PaDist&Co 660.
520-43 [a] (3) County road vacated and made into township road. 5PaDist &Co 619. [d] **County roads.**-(1) 8Pa Dist&Co 89. [e] **In Ohio.**-25 OhNPNS 85.
521-50 5PaDist&Co 619.
521-51 Ind 169NE673. [f] **Neglect to keep in proper repair** is no excuse for discontinuing highway. 200Wis350, 228NW487.
522-53 Ind 169NE673.
522-55 [a] **Where discontinuance of highway would deprive owner of lands of access** to public highway, town board has no power to discontinue highway. 200Wis350, 228NW487.
522-56 177Ark296, 6SW(2d)312. [a] (3) In Ontario court will quash by-law authorizing stopping up and sale of road allowance where no other convenient access is provided for user. Ont [1929] 4DomLR1.
522-60½-New. In Ontario court, in determining validity of by-law providing for closing and selling road allowance will not consider whether proposed purchasers are entitled to purchase. Ont [1929] 4DomLR1.
522-67½-New. Subsequent opening is not prevented by fact that road laid out has not been opened where it was not vacated. NJCh 151A201.
523-68 175Ark1059, 1SW(2d)564; NC 154SE678; 67Utah567, 248P811, 814 [citCJ]. [b] **In Missouri.**-MoA 274SW 528. [c] **Proceedings dispensable.**-157 Md521, 146A758.
523-68½-New. Proceedings to vacate highway are governed by statute covering procedure to vacate, not by statute authorizing new roads and changes in old roads. 175Ark1059, 1SW(2d)564.
523-69 Miss 106S83, 87 [citCJperEthridge,J dis op].
523-74½-New. In vacating a road a board of county commissioners exercises legislative and administrative functions. 121Kan444, 247P1046.
523-74⅓-New. Improvement of a portion of a highway does not vacate the balance of the road. 30 OhA283, 165 NE53.
523-76 NC 154SE678; 8PaDist&Co 89. [a] **Failure to sign name of agent as such** to petition of corporation for closing of road till hearing is immaterial. 149Md461, 131A776.
523-77 [d] (1) 88PaSuper166. (6) Petition to vacate road partially laid out, not signed by majority of persons who petitioned for construction, will be dismissed where road was never constructed. 88PaSuper166. (7) Where road has been laid out but never constructed, proper procedure to vacate it is by petition signed by majority of persons asking for its construction. 88PaSuper 166. [f] (1) 121Kan444, 247P1046. (2) 121Kan444, 247P1046. [i] **Corporation is "citizen of county"** of its residence within meaning of statute authorizing citizen of any county to petition for closing of road. 149Md461, 131A776. [j] **In Ohio.**-25 OhNPNS85. [k] **In Washington.**-152Wash516, 278P412(2d case).
524-82 [a] But see 12PaDist&Co 660.
524-83 175Ark1059, 1SW(2d)564.
525-87 251Mich256, 231NW621.
525-88 See also TexCivA 30SW(2d) 936.
525-92 175Ark1059, 1SW(2d)564; NC 154SE678.
525-93 [b] (2) Publication of notice is jurisdictional. 234Ky115, 27SW(2d) 665.
525-94 [c] (5) Act of May 11, 1911, as amended by Act of May 11, 1921, requires written notice to supervisors of

township through which road passes. 8PaDist&Co 89.

526-4 See also NC 154SE678.

526-6 [a] (3) Ind 169NE673. (7) Held to justify vacation. 167Minn187, 208NW757. (8) Court cannot arbitrarily vacate road without finding based on evidence that it is useless. 175Ark1059, 1SW(2d)564. (9) Evidence held sufficient to show that road vacated by court was not useless. 175Ark1059, 1SW(2d) 564. [c] **Refusal of instruction held erroneous.**–Ind 169NE673.

527-9 147SC452, 145SE297.

527-12 [d] **That brother and sister of commissioner signed petition** does not disqualify commissioner. 255 IllA601.

530-37½-New. An agreement of county commissioners with an applicant to close a road is properly attached to an order closing the road as forming part of the record of the proceedings. 149 Md461, 131A776.

530-43 144Wash124, 257P231. [b] **Remedy of aggrieved persons** is by appeal. 173Ark192, 292SW106.

530-44 121Kan444, 247P1046; 147SC 452, 145SE297. [b] **Suit to enjoin erection of building** on vacated road held collateral attack on judgment of vacation. 173Ark192, 292SW106.

530-49 144Wash124, 257P231.

531-54 123Kan77, 254P321; 167Minn 187, 208NW757; 313Mo 672, 282SW694; MoA 274SW528.

531-56 [a] (3) In appeal from action of court of quarter sessions vacating road in response to report of viewers, findings of fact are entitled to weight of verdict of jury and will not be reversed where there is evidence to support them. 88PaSuper166.

531-56½-New. nor can order of local governing body be disturbed except where action was arbitrary, oppressive, fraudulent, or manifestly against best interest of community. 167Minn187, 208NW757.

531-59 [a] (1) 196 Ind635, 149NE345. (2) Rule applied as to issue as to number and qualifications of petitioners. 196 Ind635, 149NE345. [c] **Verdict held sufficient.**–196 Ind635, 140NE345.

531-60 [f] (3) In Arkansas. 175Ark 1059, 1SW(2d)564.

532-62½-New. Giving of an appeal bond may be waived by appellee by proceeding to trial in the circuit court on the merits. 175Ark1059, 1SW(2d)564.

532-65 NJSup 151A377(1stcase).

532-67 [b] **Record in prior and similar proceeding for certiorari** which had been dismissed cannot be considered by court. 255 IllA601.

532-68 255 IllA601; 315Mo 347, 286 SW82.

532-69 315Mo 347, 286SW82.

532-71 315Mo 347, 286SW82.

532-73½-New. , or go behind the records. 315Mo 347, 286SW82.

532-75 255 IllA601.

532-76 [a] **Petition properly denied.**– 255 IllA601.

533-80 255 IllA601 (record not disclosing such facts).

533-87½-New. Either dedication of public road and use by public or agreement between owners of fee is sufficient to justify enjoining of closing of public road. 120Kan515, 243P1004.

533-91½-New. Where proceedings to vacate a road were regular and the board was not guilty of fraud or bad faith, the enforcement of an order vacating the road will not be enjoined on the ground that the petitioners did not live in the vicinity of the road, 121Kan 444, 247P1046.

533-91¼-New. or that the interests of the public did not demand vacation of the road. 121Kan444, 247P1046.

533-91¼-New. Admissibility of evidence in suit to enjoin closing of highway. TexCivA 30SW(2d)936.

534-6½-New. On location of a permanent trunk highway by the highway commission, road along general location is not vacated, but reverts to control of the county or town board. 171Minn 369, 214NW653.

534-6½-New. Landowners signing petition to open new road and working on new road are not estopped from attacking validity of proceeding whereby old road was abandoned. 234Ky115, 27 SW(2d)665.

534-8 204 Iowa1021, 216NW739, 740 [citCJ].

534-9 204 Iowa1021, 216NW739. [a] **Relief may be had on ground of estoppel** to deny abandonment of highway. 204 Iowa1021, 216NW739. [b] **In New York.**–137Misc827, 245NYS65.

534-10 But see 147SC452, 145SE297.

534-12 204 Iowa1021, 216NW739.

534-13 See also 286Pa351, 133A495. [a] (1) 237Mich318, 211NW658; 137 Misc190, 242NYS78. [b] 204 Iowa1021, 216NW739.

534-14 141Miss72, 106S83 (recitals in minutes of board of supervisors of highways held to show abandonment).

534-14½-New. A person estopped from attacking the validity of a highway is not estopped from claiming its abandonment. 187Wis611, 205NW426.

534-14¼-New. The abandonment statute applies, although land in which the public claimed an easement lay adjacent to the highway and its use to widen such highway was once contemplated. 32F (2d)184.

534-15 204 Iowa1021. 216NW739; Mont 288P455; 88PaSuper419; 47RI 425, 133A806.

535-18 237Mich318, 211NW658.

535-21 93Fla342, 112S75.

535-22 237Mich318, 211NW658, 659 [citCJ].

535-23 [c] (3) Defendant, in suit to enjoin obstruction of road has burden to prove abandonment by nonuse. MoA 27SW(2d)471. [f] (3) Occasional use will not prevent abandonment. 137Misc 190, 242NYS78. (4) To prevent abandonment there must be use of road as highway along lines of existing street. 137 Misc190, 242NYS78. (5) Filing of instrument declaring abandonment. 137 Misc827, 245NYS65. (6) Necessity of recording certificate of discontinuance. 137Misc827, 245NYS65. [i] **Evidence held sufficient** to justify finding road had not been abandoned. MoA 27SW (2d)471. [j] **In Utah.**–287P622.

536-28 137Misc190, 242NYS78.

536-33 266Mass208. 165NE34; MoA 296SW164; NJ 141A577.

537-35 286Pa351, 133A495.

537-38 Mont 288P455.

537-39 204 Iowa1021, 216NW739. See also 30 OhA283, 165NE53.

537-40 187Wis611, 205NW426.

538-49½-New. A statute providing that all highways laid out by a town and recorded shall be deemed a legal highway when any portion thereof shall have been opened and worked for a term of three years does not operate to establish a highway once abandoned by failure to expend public funds thereon within the statutory period after the date of the order laying it out. 187Wis 611, 205NW426.

539-60 204 Iowa1021, 216NW739; NJ 141A577.

539-61 204 Iowa1021, 216NW739. But see 187Wis611, 205NW426.

539-66 203 Iowa359, 212NW686.

540-74 203 Iowa359, 212NW686.

540-74½-New. Parts of a road cut off in straightening do not continue to be public. 9LaA306, 119S475.

540-74¼-New. Where a roadway is abandoned as a county or public road and the owner is reinvested with the right of possession, the fiscal court has no jurisdiction over it and no authority to direct the removal of a fence erected by the owner. 230Ky138, 18SW(2d) 963.

540-76 97CalA296, 275P817; 204 Iowa 1021, 216NW739; 174Minn305, 219NW 172; 148Miss306, 114S625, 626 [citCJ]; 111 Okl 6, 241P164; 6PaDist&Co 493. See also 151Va801, 145SE257.

541-77 148Miss306, 114S625, 626 [cit CJ]; 112 OhSt385, 147NE907; 111 Okl 6, 241P164; 6PaDist&Co 493.

541-78 148Miss306, 114S625, 626 [cit CJ]; 111 Okl 6, 241P164; 6PaDist&Co 493; TexCivA 4SW(2d)136; 195Wis69, 217NW700.

541-79 317Mo 1235, 298SW363; 111 Okl 6, 241P164.

542-85 97CalA296, 275P817.

542-88½-New. The county may hold a fee to land over which a highway runs, while the public owns an easement for the highway. 97CalA296, 275P817.

542-89 17F(2d)953, 956 [citCJ]; 326 Ill 535, 158NE116, 54ALR777; 88Pa Super419. See also 99Vt265, 132A40.

542-91 IndA 173NE233 (easement terminated when highway changed by relocation); 149Md484, 132A64.

542-92 32F(2d)184; 9LaA306, 119S 475; 149Md484, 132A64; 317Mo 1235, 298SW363.

542-93 254NY366, 173NE224.

543-97 See also 149Md484, 132A64.

543-7 NH 146A90.

543-13 112 OhSt385, 147NE907 (property right in trees not to be interfered with, unless by consent of owner, or on compensation according to law). But see 94CalA667, 271P768.

544-14 94CalA667, 271P768.

544-24 TexCivA 19SW(2d)457 (prescriptive easement vests no title in county to minerals under highway).

544-30½-New. [§ 676a] E. **Forfeiture of Claim.** Where a creditor, believing that the debtor is a nonresident, and, in reliance upon the debtor's representation that certain wages are not exempt, garnishes such wages, the fact that such wages are exempt as current wages and that the creditor sought to garnish a greater amount than twenty-five per cent of his debt does not entitle the debtor to cancellation of the debt. 122 Okl 178, 252P1092.

545-41 50RI 53, 144A888; 66Utah550, 244P901.

545-42 112 OhSt385, 147NE907; 99Vt 265, 132A40. [b] **Public highway may be used** for carrying passengers and freight for hire by ordinary and usual means for transportation. 114Nebr483, 208NW123.

546-48 [d] **County commissioners are not authorized to grant franchise** or permit to maintain log bulkhead within county road right of way. 154Wash682, 283P198.

546-49 See also 93Fla342, 112S75.

547-62 167Ga124, 144SE796; 47RI 425, 133A806; 154Wash682, 283P198.

547-63 208Cal 29, 280P109; 100CalA 692, 280P1021; 47RI 425, 133A806; 154 Wash682, 283P198.

547-63½-New. An abutting owner does not acquire a prescriptive right of easement to have trees on the other side of highway remain as a wind break. 94 CalA667, 271P768.

547-64 Cal 273P833.

547-69½-New. Abutting landowners have the right to have the whole highway open. 47RI 425, 133A806.

547-71 167Ga124, 144SE796; NH 146A 159; NH 151A452; 147SC452, 145SE 297. [a] 167Ga124, 144SE796. [b] 167 Ga124, 144SE796. [f] **Particular statutes construed.**–TexCivA 23SW(2d)840.

548-72 167Ga124, 144SE796; 125Kan 482, 484, 264P1049 [citCJ].

548-73 88CalA545, 263P825, 826 [cit CJ].

548-75 167Ga124, 144SE796.

548-77 NH 146A159.

548-77½-New. A highway improvement which compels a property owner to travel slightly farther in going to and from his farm does not substantially interfere with his right of ingress and egress. 201 Iowa906, 208NW327.

548-77¼-New. An abandoned part of a highway may not be cleared without the consent of the abutting owners. 150SC 337, 148SE183.

548-79 174Minn305, 219NW172, 173 [citCJ]; 228AppDiv382, 239NYS140. [e] **Logging railroad across highway** is not incompatible with travel. 174Minn 305, 219NW172. [f] **Use of sidewalk is legal or illegal** according as it is reasonable or unreasonable. NH 151A452. [g] **Transportation of coal across and above highway** is right of owner of coal and mining rights with right to use surface of land adjoining highway. WVa 155SE174.

549-85 242 IllA28; 174Minn305, 219 NW172, 173 [citCJ]; NH 151A452. [b] **Use of sidewalk for driveway to filling station** presented no unusual hazard to pedestrians and was not unreasonable. NH 151A452.

549-88 TexCivA 9SW(2d)143.

549-92½-New. Owner of abutting urban land has no right to employ public

highways as conduit of water collected on his property. 13PaDist&Co 267.

550-8 154Wash682, 283P198. [a] (2) Without joining county. 154Wash682, 283P198. [d] **Evidence held to show:** (1) That bulkhead and garage erected in county road were specially injurious to abutting owners suing for abatement thereof as public nuisances. 154Wash 682, 283P198. (2) That unreasonable obstruction of county highway by log bulkhead and garage rendered them public nuisances. 154Wash682, 283P 198.

551-20½-New. Complaint held sufficient in a suit for closing an alley dedicated to public use. 197NC671, 150SE 200.

552-30 94CalA667, 271P768; 112 OhSt 385, 147NE907. [g] **Injunction only in favor of landowner.**-100CalA692, 280P 1021.

552-32 66Utah550, 244P901. But see 201 Iowa906, 208NW327.

553-41½-New. Whether plaintiff's exercise of right of ingress and egress would unreasonably endanger the public safety is a question of fact. 167Gal24, 144SE 796.

553-41½-New. Evidence has been held to justify a finding that the apprehended danger did not unreasonably endanger public safety. 167Gal24, 144SE796.

553-41¼-New. Under order restraining obstruction on ground roadway was public road plaintiff could not refuse defendant landowner right to use road. MoA 28SW(2d)389.

553-49 315Mo 56, 285SW57; 319Mo 1246, 6SW(2d)594; 6LaA643. [d] **In Idaho.**-42 Ida738, 248P456, 49ALR1057. [e] **Overlapping territory** forming part of two road districts is not distinct political subroad district. 160La230, 106S837.

553-58 169Ark603, 276SW355; 207Cal 722, 279P989 (to dispose of constitutional objection, such districts held to be public and quasi municipal corporations); 42 Ida738, 248P456, 49ALR 1057; TexCivA 278SW877.

553-59 317Mo 696, 296SW418.

553-60 See also 43 Ida233, 253P377. But see 315Mo 56, 285SW57.

554-63½-New. Actions against districts. A road improvement may, by voluntary appearance, confer jurisdiction on a court outside of the county of its residence. 170Ark522, 281SW5.

554-63½-New. On judgment in an action against a road improvement district for the recovery of money only brought in another county than that of its residence is not invalid although the judgment can be enforced only by taxes levied on land in the district. 170Ark 522, 281SW5.

554-63¼-New. A court is without jurisdiction of a suit against a highway district in a county other than that fixed by statute as its domicile. 179Ark875, 19SW(2d)1014.

554-67 17F(2d)329; 19F(2d)3; 178 Ark44, 9SW(2d)790; 315Mo 56, 285SW 57; 118Tex410, 16SW(2d)258; TexCivA 298SW462. [b] **Legislature may ratify and legalize previously organized district.**-17F(2d)329. [c] **Validity of road district created by statute** cannot be assailed except by showing statute void on its face. 171Ark8, 283SW39. [d] **Futile attempt** to create road districts has been held not to exhaust power of legislature over subject. TexCivA 298SW 462.

554-69 99Fla628, 127S486(2dcase); 315 Mo 56, 285SW57; TexCivA 298SW462. [a] **Under validation in 1926 of road districts** created by commissioners' courts, bonds issued by them have been held to relate back and include assessment for 1925. TexCivA 298SW462.

554-71 17F(2d)125.

554-72 22F(2d)681; 169Ark1198, 278 SW5; 170Ark366, 280SW641; 171Ark 710, 286SW829; 178Ark219, 10SW(2d) 856; 200Cal 170, 252P577; 99Fla628, 127S486(2dcase); 315Mo 56, 285SW57; 137SC288, 135SE153, 162 [citCJ]; 137 SC496, 135SE538; 152SC455, 150SE 269. [a] (1) 315Mo 56, 285SW57. (2) Statute creating incorporated road districts held not to violate constitutional provision declaring that corporate authorities of counties, townships, and school districts, cities, towns, and villages may be vested with power of taxation. 137SC288, 135SE153. [b] 200Cal 170, 252P577; 45 Ida112, 261P244; 319 Mo 1246, 6SW(2d)594; 120 Or408, 252 P562. [e] 45 Ida112, 261P244. [h] 200 Cal 170, 252P577; 315Mo 56, 285SW57. [u] 315Mo 56, 285SW57. [x] **Construction phrase** "affected thereby." TexCivA 271SW172. [y] **Power of commissioners to vary route** given by act creating improvement district does not invalidate creation of such district. 171Ark450, 284SW30. [z] **Act constituting complete law,** providing for assessment of benefits, bonds, and taxes within district is valid. 169Ark1198, 278SW5.

555-73 200Cal 170, 252P577; 45 Ida 112, 261P244.

555-73½-New. Constitutionality of a statute for a project to organize bridge and highway districts cannot be raised on the ground that a provision for equalization of assessments is omitted, in a proceeding for the sole purpose of testing validity of the provision of the act for incorporation and formation of such a district. 200Cal 170, 252P577.

555-77 35F(2d)365; 93Fla796, 112S 630; 152SC455, 150SE269.

555-78½-New. Statutes requiring assumption and payment by state highway commission of bonds for road improvement require payment of certificate of indebtedness. 175Ark652, 300SW377.

555-79 Mo 24SW(2d)133 (statute not repealed by statewide highway act); 283Pa126, 129A78 (repealing statute construed); 134Wash255, 235P33 (repealing act construed).

555-82 19F(2d)3.

555-83 17F(2d)329; 19F(2d)3. [a] **In Missouri.**-315Mo 56, 285SW57.

556-84 171Ark689, 285SW371; 319Mo 1246, 6SW(2d)594. [a] **County authorities cannot repeal their ordinance** declaring intent to join bridge and highway district pursuant to statute, where petition provided for by ordinance had been circulated, signed, certified, and presented to secretary of state under statute. 200Cal 170, 252P577.

556-86½-New. The organization of a road improvement district is not a matter of contract but a proceeding in invitum. 169Ark383, 275SW762.

556-86½-New. Police jury have authority to establish and define boundary of road district. 165La443, 115S650.

556-87 [c] **County court.**-TexCivA 271 SW172.

556-92½-New. Where order of county court dismissing proceeding was properly reviewed and power of court to make order held wanting, it did not by such dismissal lose jurisdiction. Mo 24 SW(2d)133.

556-6 200Cal 170, 252P577; 315Mo 56, 285SW57.

556-7 TexCivA 271SW172.

557-14 TexCivA 21SW(2d)580. [a] **Clerk's omission** of "one mile west" in boundary description in notice held not fatal. 319Mo 1246, 6SW(2d)594.

557-14½-New. Mere exercise of right of petition not a predicate for fraud. TexCivA 271SW172.

557-14½-New. Proceedings are not vitiated by failure of petition to allege desire that cost be taxed against land in district. Mo 24SW(2d)133.

557-16 [a] (3) Void assessment made in owner's excessive valuation of lots cannot be considered in determining whether petitioners constituted majority in value of owners. 181Ark450, 26 SW(2d)111.

557-20½-New. The right to withdraw names cannot be exercised so as to defeat jurisdiction after jurisdiction of a body authorized to act has been determined. 200Cal 170, 252P577.

557-21 119Kan824, 241P249.

557-22½-New. Arkansas statute has been construed as not authorizing a petitioner to withdraw his name. 171Ark 710, 286SW829.

557-23½-New. Recall of petition. When a petition to organize a road benefit district has served its purpose and the district is regularly organized and substantial and orderly progress in the improvement of the road petitioned for has been accomplished pursuant thereto, it is too late for a recall petition authorized by statute to be effective in nullifying the original petition under which the district was organized. 119 Kan824, 241P249.

557-23½-New. The Kansas statute providing for a recall petition has been repealed. 119Kan824, 241P249.

557-24 [a] TexCivA 271SW172.

557-24½-New. Refusal of amendment not abuse of discretion. TexCivA 271 SW172.

557-26½-New. Filing of petitions for organization of two districts at same time does not prevent legality of organization. 141Miss167, 106S625.

557-27 277US157, 48SCt438, 72L ed830.

557-29 178Ark44, 9SW(2d)790; 166La 711, 117S783. [c] **Description of improvement.**-207Cal 722, 279P989.

557-32½-New. Where notice and resolution to create a district omitted plaintiff's lands, yet when construed together plaintiff's lands were described so as to mislead neither plaintiff nor public, the notice and resolution are not vitiated. 159La733, 106S285.

558-39 TexCivA 271SW172 (no discretion to refuse hearing).

558-41 TexCivA 271SW172 (and such action, being in compliance with statutory requirements, cannot, standing alone, be held void for want of lawful authority or for fraud or for abuse of discretion).

558-43½-New. Excluding a letter attempting to withdraw petitioner's name is not error because a signature can be withdrawn only by leave of court. 171 Ark710, 286SW829.

558-45 Mo 24SW(2d)133 (order held not invalid).

558-47½-New. A landowner who objects to a notice on the ground that his lands were not included is barred when he instituted suit sixty days after formation of the district. 159La733, 106S 285.

558-47½-New. Judgment of the circuit court is not defective where recitals show that the court heard the cause de novo upon transcript of judgment of the county court and testimony and exhibits. 171Ark710, 286SW829.

558-47¼-New. Judgment of the circuit court, finding and reciting that a district is validly organized in all respects as provided by law, is sufficient. 171 Ark710, 286SW829.

558-47½-New. Police jury held not to have abused discretion in including marshland in road district. 165La443, 115S650.

558-56½-New. Contention that acreage included in assessment had been condemned for other purposes before assessment was filed should be established by strong and clear evidence. 8F(2d) 932.

559-65 170Ark366, 280SW641.

559-67 [a] **Venue of action against district** must be laid in county of domicile, any other court being without jurisdiction. 176Ark553, 3SW(2d)307.

559-70 [c] **In Washington** under statute commissioner may order whole county, outside of cities and towns, to constitute one road district. 134Wash255, 235 P33.

559-74 19F(2d)3; 169Ark1198, 278 SW5.

559-75 93Fla796, 112S630.

560-81½-New. Pipe line is real property included in a highway and bridge district. 19F(2d)3.

560-90 [c] (2) Commissioner of highways, notwithstanding general terms used in law on subject have no authority to lay out, open, maintain, or vacate land for highway purposes within corporate limits of city or village. 317 Ill 203, 148NE69.

560-94 [a] **Act creating road district** for certain counties has been held not unconstitutional for failure to follow constitutional amendment as to plan of assessment in two counties included in district. 137SC496, 135SE538.

560-94¼-New. Pipe-line is "real property" included in highway district. 19 F(2d)3.

561-2 [a] **Statute held not to apply to consolidation.**-166La711, 117S783.

561-4 [c] **Chancery court may wind up affairs of highway district**, though act creating district was repealed after commencement of proceedings. 174Ark553, 297SW833.

561-5 TexCivA 32SW(2d)695.

561-8½-New. Where a certificate of the commissioners, showing the indebtedness of the district, on repeal of the act creating the district, was not attacked until suit was brought to enforce payment of delinquent taxes, it was too late to litigate claims against the district. 178Ark289, 10SW(2d)876.

561-8¾-New. On repeal of the law creating a road district, the district has authority to collect interest on its indebtedness. 178Ark289, 10SW(2d)876.

561-20 126Me205, 137A67; 191NC141, 131SE385. See also 205 Iowa104, 215 NW611.

562-23 126Me205, 137A67.

562-25 But see 317Mo 696, 296SW418.

562-26½-New. A state highway commission is not a municipal corporation but a state agency for exercise of administrative and governmental functions. 190NC680, 130SE547.

562-28 Mass 167NE311.

562-37 Md 149A566; 191NC761, 133SE 395; 191NC761, 133SE395.

562-45½-New. A statute providing for a board of road overseers in counties having a population of seventy-five thousand to one hundred thousand inhabitants does not repeal a statute providing that judges of counties having a population of fifty thousand to two hundred thousand inhabitants shall constitute a board of road overseers. 319Mo 976, 5SW(2d)83.

563-71 141Miss72, 106S83 (minutes of board will be looked upon with indulgence, and fairly and reasonably construed).

563-82 91Fla118, 107S146.

564-86 156Miss273, 125S828; 147SC 433, 145SE186.

564-87 217Ala35, 114S415.

564-88 217Ala35, 114S415; 152Md566, 137A358.

564-89 217Ala35, 114S415.

564-90 174Ark1045, 298SW340.

564-3 Mass 170NE395.

564-4 125 Okl 197, 257P374.

564-5 35F(2d)365.

564-5½-New. **Duty is joint one of all** supervisors. 5PaDist&Co 39.

564-6 165Ga713, 141SE910; 156Miss 273, 125S828. [b] **Police jury have no discretion** to use moneys voted for particular road in construction of another. 163La1053, 113S372.

564-7 35F(2d)365.

564-8 See also 191NC68, 131SE372.

564-8½-New. Discretion of board of highway commissioners as to location and construction of road cannot be delegated to highway officials of another state. 191NC68, 131SE372.

564-8¾-New. The board cannot absolve itself from its duty or deprive itself of its right to exercise its discretion by its representations or agreements with respect to manner in which it will act. 192NC561, 135SE618.

565-20 Md 137A359. [b] **Settlement of claims for damages to highways.**–Power of town board to build and maintain highways includes power to settle claims for damages to highways. 188 Wis501, 205NW423. [c] **Agreement to loan state highway commission money** to be used in road construction is valid under some statutes. 192NC561, 135SE 618.

565-21 [e] **Appointment of secretary to board.**–170Ark1116, 282SW970.

565-24 192NC561, 135SE618.

565-25 17F(2d)63. [d] **Where contract is one which district has no right to make**, and no work is done under such contract, there is no liability for breach. 171Ark460, 284SW727.

565-27 35F(2d)365.

565-31 33NM664, 275P373. [b] (1) See also 168Ark204, 269SW583. (3) Amount of fees held not inadequate. 168Ark204, 269SW583 (twelve hundred and fifty dollars for services performed for two districts practically same as one). [d] **Bad faith as affecting compensation.**–168Ark 204, 269SW583. [e] **Statute imposing duty on attorney-general.**–216Ky567, 288SW323.

565-36 99Fla383, 126S491; 243 IllA 581.

565-37 See also 205 Iowa104, 215NW 611.

566-40 TexCivA 24SW(2d)728 (classification of bondholders).

566-40½-New. Some statutes impose mandatory duty on state highway commission to pay road indebtedness of road districts without destroying parity system of road construction. Ark 31SW (2d)427.

566-40¾-New. Statute requiring state highway commission to ascertain amount of valid road indebtedness of road districts requires commission to determine amount and validity of claims. Ark 31SW(2d)427.

566-48 128Kan453, 279P10; Kan 292 P921; 154Miss536, 121S826(2dcase); Mo 19SW(2d)1049 (insufficiently pleaded defenses of fraud and forgery in action on coupons); 191NC761, 133SE395; TexCivA 278SW877. [e] **Bonds of road district** are enforceable in hands of bona fide purchaser, though unlawfully sold and dishonestly acquired by original purchaser. 5F(2d)625. [f] **Denomination of bonds** may be fixed by later statute. 141Miss432, 106S644. [g] **Right to recover trustee's fees** and attorney's fees on foreclosure of mortgage given for security of bonds see 12F(2d) 718. [h] **Issuance of bonds held no violation of provision for uniformity of taxation.**–TexCivA 278SW877. [i] **Authority to levy taxes** to pay such bonds necessarily follows. 191NC761, 133SE 395. [j] **Discretion to fix terms.**–191NC 761, 133SE395. [k] **Remedy at law held adequate** where bondholders claim invalidity of issue. 17F(2d)329. [l] **Rescission for alleged invalidity of bonds** not allowed to purchasers where district met all payments at maturity. 17F(2d) 329. [m] **Bonds issued under Coastal Highway Act** have been held not to violate constitutional provision limiting bonded debt. 137SC496, 135SE538. [n] **Bonds, secured by pledge of funds**, sufficient to meet obligations without levying property tax, have been held not "bonded debt" within Const. art 10 § 5. 137SC496, 135SE538. [o] **Purchaser of bonds cannot sue to annul contract** and recover deposit sixty days after due approval of issuance of bonds. 166La711, 117S783. [p] **Action involving validity of bonds.**–All bondholders should be made parties defendant. 87Colo 1, 284P339. [q] **Statutory requirements held valid.**–99Fla383, 126 S491. [r] **Interest and payment.**–Kan 292P921.

566-49 178Ark44, 9SW(2d)790. [b] **Constitution does not forbid** issuance of county or district road bonds. 99Fla 226, 126S353.

566-49½-New. **Proceeds of bond issue** for state highway cannot be used for road not part of state system. 219Ky 410, 293SW965.

566-49¾-New. That second road district was created by statute, and was participating in the suit cannot affect the right of plaintiff to recover unpaid interest on bonds issued by the original corporation. 27F(2d)153.

566-49¼-New. **Sale of bonds.** Separate proposals to purchase bonds held required to be construed together as one contract. 132 Or297, 285P231 (agreements held void).

566-49½-New. Representations of state highway commissioner, with approval of county judge and county commissioners before bond election, that highway location would not be changed does not show fraud. TexCivA 26SW(2d) 470.

566-51 141Miss167, 106S625 (amount is not affected by amount of bonds issued for drainage district overlapping or within road district).

566-52 120 Or408, 252P562. [a] **Amount of reimbursement** under reimbursement agreement held to be offset in computing bonded debt. 137SC496, 135SE538.

566-56 1/10-New. Where one road district overlapped another, a bond issue which would cause proportion of overlapping area to be in excess of constitutional limit was not authorized. 160La230, 106S837.

566-56 1/11-New. Contracts by a district for the sale of refunding bonds, providing that fifteen per cent shall be deducted from the face of the bonds as discount and paid to the purchaser of the bonds which bore six per cent interest, are improvident and void. 177Ark1194, 9SW(2d)776.

566-57 99Fla383, 126S491; 156Miss 273, 125S828; Mo 19SW(2d)1049 (state auditor's certificate of compliance with statute and contract held prima facie valid in action on coupons).

566-59 [a] **In proceeding to validate bonds**, reasonableness in leaving certain land out of district cannot be inquired into. 141Miss432, 106S644. [b] **Validating statutes construed** not to validate bonds of new district not validated. TexCommnA 29SW(2d)321.

566-60 Mo 19SW(2d)1049; TexCivA 32SW(2d)695.

566-63½-New. Issuance of bonds is not complete until delivery. Mo 24SW (2d)133.

567-67 315Mo 56, 285SW57; 141Miss 167, 106S625 (election only, and not petition is necessary for second issuance of bonds under statutes); 118Tex265, 14SW(2d)57. [a] (2) Majority of electors held not shown to have voted against bond issue see 141Miss432, 106 S644. [d] **Notice of election held sufficient.**–TexCivA 32SW(2d)695.

567-68½-New. **Injunction against issuance of bonds**, to construct highway to become part of national highway will be granted at suit of railroad against which nearly entire cost would be assessed, in sparsely inhabited district, and there was no substantial local need for road. 8F(2d)676.

567-69½-New. **Under mortgage securing bonds of road district**, trustee may be entitled to recover, on foreclosure, for trustee's and attorney's fees. 275US117, 48SCt61, 72Led192.

567-70 37GaA812, 142SE214 (state highway board).

567-71 [b] **Remedy by statute for adjusting and litigating claims against state highway commission is exclusive** and may alone be pursued. 191NC141, 131SE385. [c] **Motion as of nonsuit is properly allowed** in action in tort against highway commission, where there is exclusive statutory remedy for litigating such claims. 191NC141, 131 SE385. [d] **Statute held valid** which provides no action shall be maintained against state highway commission to determine location of highway by any person, corporation, etc., other than road-governing body of county or county seat or principal town affected by change. 195NC783, 143SE871.

567-73 But see 317Mo 696, 296SW418. [a] **Chancery court has jurisdiction to wind up affairs of improvement district** (1) and adjust claims. 170Ark22, 278 SW627. (2) Decree winding up district may enforce penalty for nonpayment of special taxes, though road was neither improved nor constructed. 170Ark22, 278SW627. [b] **Decree allowing claim of engineer** (1) held conclusive. 170Ark 22, 278SW627. (2) Decree held free of fraud and collusion. 170Ark22, 278 SW627. [c] **Venue.**–317Mo 696, 296 SW418 (state may provide for place of suit and manner of service).

567-75 191NC141, 131SE385 (state highway commission not liable in trespass or tort for damages in building highway); 192NC156, 134SE401; 196 NC226, 145SE31; 103WVa37, 136SE 507.

567-88 261Mass407, 158NE800; 214App Div345, 212NYS410 (superintendent of highways).

567-92 261Mass407, 158NE800. [b] **Agents of state.**–137Misc555, 244NYS96 (county superintendent of highways).

568-93 261Mass407, 158NE800.

568-93½-New. Commissioners under Private Acts (1925) c 492 are county officers. 152Tenn605, 279SW1041.

568-96 Ga 155SE18.

568-1 [a] **Coastal Highway Act** held

not unconstitutional in requiring state officers to perform duties in connection with district. 137SC496, 135SE538.

568-2 152Tenn451, 278SW417 (county superintendent of roads abolished by implied repeal of statute).

568-4 152Tenn451, 278SW417.

569-11 152Tenn451, 278SW417.

569-13 [b] **Particular statutes construed.**-232Ky648, 24SW(2d)306.

569-16 Ky 9SW(2d)129; 232Ky648, 24SW(2d)306; 321Mo858, 12SW(2d)489. [h] **Attorney** may be employed by board of supervisors for road district commissioners. 142Miss146, 105S775.

569-20½-New. Evidence that an application for the appointment as a highway engineer and memorandum of acceptance thereof were properly entered on the docket of the commissioner's court has been held sufficiently to establish contract, notwithstanding the clerk in transcribing the orders of the commissioner's court omitted a material portion of the application. TexCivA 14SW(2d)958.

569-21 158Tenn133, 11SW(2d)688. [c] **Membership in board by chairman.**-Appointment as chairman of highway board, by governor, includes membership in the board. 160Ga433, 128SE181. [d] **One not paying taxes** is not qualified voter as required by law. Ga 155SE18. [e] **Appointment of commissioner by act of Legislature** does not prevent appointee from being ineligible for nonpayment of taxes. Ga 155SE18.

570-52 [b] **Statutes construed** to provide that chairman of highway board appointed by governor has fixed term of office. 160Ga433, 128SE181.

571-53 [b] **Nonpermanency.**-174Ark214, 295SW9. [c] **Coastal Highway Act** has been held not invalid for failure to specify terms of office of commissioners appointed therein. 137SC496, 135SE538.

571-57½-New. Where so provided in contract of employment between county and a road engineer, either the county or the employee could terminate contract with or without cause by giving specified notice. TexCivA 290SW804.

571-72 [b] **Failure of Senate** to confirm appointment. 232Ky648, 24SW(2d)306.

571-74 [b] **Incompentency** no ground for removal. 5PaDist&Co 39.

571-75 97CalA516, 275P974.

571-82 [a] **In South Dakota.**-49SD350, 207NW210.

571-83 49SD350, 207NW210.

571-84 TexCivA 14SW(2d)958.

571-86½-New. Acquiescence of the civil service commission in an action of the highway commission in an attempted lay-off of a general maintenance engineer by transfer of the engineer with a lower classification did not constitute a reclassification of such positions. 97CalA516, 275P974.

572-99½-New. **Petition for removal** required thirty-five signatures or else court had no jurisdiction. 5PaDist&Co 39.

572-99⅓-New. In a proceeding for the removal of a county commissioner for collecting illegal fees from the county for services in supervision of road construction, defendant should be permitted to show that the cost of the roads built under his supervision was less than they could have been constructed for under the supervision of the state highway commission or by contract. 84Mont61, 274P148.

572-7 233Mich619, 207NW863 (statutes construed).

572-9 161Ga366, 131SE88 (apparently conflicting statutes as to filling vacancies construed and harmonized).

572-14½-New. On death of town superintendent of highways after re-election and before expiration of first term appointment can be made only to fill vacancy for first term. 229AppDiv47, 241NYS244.

572-19 168Ark204, 269SW583 (not entitled to compensation for services other than attendance at board meetings); 142Miss146, 105S775. [f] **Warrant for compensation not due is unlawful.**-161Ga893, 131SE881. [g] **Members of board of overseers.**-319Mo976, 5SW(2d)83.

572-20 [b] **Attorney** may be paid out of funds of road district by board of supervisors of county for preparing necessary papers for bond issue. 142Miss146, 105S775.

572-21½-New. A statute providing that the salary of a road commissioner shall be paid monthly does not mean that where salary is not paid monthly the officer shall be barred of the right to collect it. 161Ga893, 131SE881.

572-21⅓-New. A statute providing that claims against counties must be presented within twelve months after they accrue or will be barred is inapplicable to allowances for salary of a road commissioner. 161Ga893, 131SE881.

572-21¼-New. Where salary is due to a road commissioner under a statute, it is unnecessary that it be audited or entered on the minutes of the board of roads and revenues. 161Ga893, 131SE881.

572-21⅕-New. **Reduction of salary** of road superintendent is held not to be acquiesced in by him when he did not know that the order of reduction also provided that he could be discharged at any time. TexCivA 284SW225.

572-21⅙-New. Complaints in actions to recover for labor and money advanced have been held demurrable. IndA 171NE224.

572-23 168Ark204, 269SW583 (denying recovery for services performed without authority and on own initiative); 178Ark606, 11SW(2d)478.

572-33 178Ark606, 11SW(2d)478.

573-35 261Mass407, 158NE800.

573-36 [a] **State highway commissioner** is not agent of town where road is located. 126Me287, 138A66.

573-37 150Wash20, 272P22.

573-38 150Wash20, 272P22. [a] (1) 53ND742, 208NW108. See also 175Minn583, 222NW285; 122 Okl241, 254P61. (2) Statute, enacted pursuant to constitutional provisions creating trunk highway system to be maintained by state, gives state highway commissioner power of regulation and general supervision of such highway in some jurisdictions. 166Minn416, 208NW132. (3) Such power to regulate and supervise extends within as well as without limits of cities and villages through which highway extends. 166Minn416, 208NW132. (4) Commission has no power to grant right of way for erection of an electric power transmission line over or upon state highways under its control and supervision. 53ND742, 208NW108. (5) State highway commission is executive department of government. 314Mo33, 282SW1007. (6) Statutes relative to public printing apply to printing and stationery for state highway commission, though Appropriation Act for highway commission mentions printing. 314Mo33, 282SW1007. (7) By statute of its creation in some jurisdictions commission is vested with powers and duties necessary fully to carry out all objects of act. 126 Okl114, 258P863. (8) But exercise of its powers and discretion and enforcement of its rules and regulations must not be inconsistent with statute of its creation nor with other laws of state. 126 Okl114, 258P863. (9) State highway committee may express its lawful orders and decisions through concurrence of majority of its members. 144Wash135, 257P396 (mode and effect of such expression). (10) State highway committee is not committee of legislature or of deliberative body, but is an administrative body. 144Wash135, 257P396. (11) Parliamentary custom of considering first named member of committee of legislative or deliberative body as chairman cannot be invoked, even though statute names governor as first member of state highway board and state highway committee. 144Wash135, 257P396. (12) Assent of state highway committee that governor act as its chairman is merely expression of choice and not practical construction of statute that governor was thereby intended so to act. 144Wash135, 257P396. (13) Statute requiring state highway commissioner to keep records of all proceedings and orders does not show intent that he should be secretary of state highway committee who records proceedings thereof. 144Wash135, 257P396. [c] **Special road district commissioners cannot designate depositary of funds** under statute authorizing them to appoint treasurer, prescribe his duties, and fix amount of his bond. Mo 20SW(2d)22, 66ALR1053.

573-47½-New. **There is no disqualification of county commissioner to act** in matter of improvement of highway merely because he has farm property which will be increased in value by the improvement. 20 OhA432, 152NE300.

573-49 126 Okl114, 258P863; 150Wash20, 272P22.

574-53 161Tenn222, 30SW(2d)234.

574-55 161Tenn222, 30SW(2d)234.

574-59 See also 161Tenn222, 30SW(2d)234.

574-63 [b] **Employment of assistants.**-23AlaA373, 125S784.

574-64 [b] **Statutes contemplate competitive bidding** where they require letting of contract to lowest bidder. 126 Okl114, 258P863.

575-66½-New. That road commissioner was incorporator of corporation from which material was purchased for use on highways does not avoid contract. 142Miss146, 105S775.

575-66⅓-New. Under some statutes a town road overseer has authority to employ aid in removing an obstruction or unsafe condition in a public highway where the same may be done speedily and with small expense. 168Minn245, 209NW910.

575-68 136SC15, 134SE209.

575-72 [a] **Audit of bill for purchase of supplies.**-137Misc555, 244NYS96. [b] **Officer empowered to purchase supplies for highway construction.**-137Misc555, 244NYS96.

575-72½-New. Lapse of prescriptive period for attacking a bond issue for maintenance of roads will not foreclose right of police jury to refuse to sell bonds in excess of constitutional limitations. 159La53, 105S97.

575-73½-New. The state highway commission has no authority to disburse funds appropriated to it under statutes in payment of premiums on guaranty insurance mentioned in the Workmen's Compensation Act. 139 Okl169, 281P801.

575-73⅓-New. Where balance on hand and income from other sources are sufficient for estimated needs, appropriation may be made without deduction of percentage. 142 Okl130, 285P836.

575-75 261Mass407, 158NE800.

575-78½-New. The state highway commission cannot be interfered with by suit or other legal proceedings when performing its official duties for the sovereignty, without fraud, illegality, or in derogation of statutory authority. 207Iowa56, 222NW438.

576-90 189NC633, 127SE625.

576-92 179Minn263, 228NW916(2d case).

577-99 42 Ida738, 248P456, 49ALR1057.

578-15 [a] **Treasurer permitting money to remain** on deposit instead of using it to pay warrants is liable personally on his bond for loss from failure of depository bank. 41 Ida54, 238P298.

578-16 [a] **Failure to call outstanding warrants** when they should have been called renders treasurer liable for interest accrued and unpaid since ten days after warrants should have been called. 41 Ida54, 238P298.

578-40 [a] **Commissioners of highway district** cannot waive duty of treasurer to call outstanding warrants when funds are available so as to relieve him from liability for loss of funds. 41 Ida54, 238P298.

579-46 261Mass407, 158NE800.

579-47 261Mass407, 158NE800.

579-56 12LaA382, 125S514 (liability not shown).

580-85½-New. In an action by taxpayers for the benefit of the district, recovery inures to its benefit. 170Ark1116, 282SW970.

580-85⅓-New. Money paid by bondholders to agent selling bonds for district, recovery on bonds should not be

reduced by amount of money so paid. 8 F(2d)932.

580–85¼–New. Two or three highway commissioners, having notice and present at trial, may confess judgment. 176Ark96, 3SW(2d)12.

581–92½–New. Although commission be nominal party to action, state, of which it is administrative arm, is actual party. 126Me205, 137A67.

581–95 [a] (1) 192NC156, 134SE401.

581–5½–New. Reference for accounting. Appointment of master for purpose of an accounting will not be made, where commissioners are required to make annual reports of receipts and expenditures and file same in office of clerk, and there is no allegation of fraud or suppression of accounts. 169Ark603, 276SW355.

581–13½–New. In an action by a taxpayer to recover excessive payments, the burden is on plaintiff. 170Ark1116, 282SW970.

582–20 [c] (2) To show funds in dispute were received by treasurer. 41 Ida 54, 238P298. [d] (3) To show excessive award to commissioner for damages to his own land, so as to warrant recovery in part. 170Ark1116, 282SW970. [f] **In suit by bondholders** to inforce bonds, pledge, mortgage, assessment for benefits, taxes levied, lien created, and to collect and pay amounts due purchasers of bonds, that acreage included in assessment had been condemned for other purposes before assessment filed requires strong and clear evidence. 8 F(2d)932.

582–24¼–New. Review. On appeal from judgment enforcing entire excessive bond issue for maintenance of roads reduction of issue to amount within constitutional and statutory limit is not permissible in absence of alternative allegations of petition or prayer for such relief. 159La53, 105S97.

583–55 98Fla436, 123S830(2dcase) (where organic law is not violated); 320 Ill 306, 150NE636; 221MoA67, 294 SW123; Nev 283P396 (held not amended); 155Tenn364, 293SW757; Ont [1927] 3DomLR764. [a] **Repeal.**–152 Tenn451, 278SW417. [b] **In Ohio.**–112 OhSt590, 148NE95. [c] **Statutory authority is essential** to permit state and city to combine to build road. 126Me 287, 138A66. [d] **Powers and duties of state highway commission.**–(1) Powers are specially conferred by statute, and it also had all powers necessary or proper for accomplishment of purposes. 315 Mo 707, 286SW1. (2) Commission is required in construction of "refund roads," to follow route located and designated by local municipal authorities. 315Mo 707, 286SW1.

583–57 176Ark796, 4SW(2d)19; 142 Miss146, 105S774 (later of two acts at same session amending same statute prevails); 118Tex359, 16SW(2d)513.

583–58 269US396, 46SCt141, 70L ed330; 15F(2d)996; 67CalA328, 227P664 (statutes relating to powers of supervisors to maintain roads and bridges held not incongruous); 75CalA247, 242P749; 175Minn103, 220NW408; Minn 232NW 718 (statute directing payment out of trunk highway fund of damages resulting from negligence of highway department held unconstitutional); NH 149A 321; 155Tenn364, 293SW757. [c] **Classification.**–155Tenn364, 293SW757. [d] **Act as to expenditure of funds** held not unconstitutional. 175Ark1078, 1SW (2d)814. [e] **Statute exempting single county from cost of state highway running through several** is unconstitutional. 160Tenn577, 28SW(2d)50. [f] **Constructing state highway is state, not county, purpose** as regards constitutionality of local act forbidding highway commission to impose expenses on county without its consent. 160Tenn 577, 28SW(2d)50.

583–59 269US396, 46SCt141, 70L ed330; 15F(2d)996; 178Ark44, 9SW(2d)790; 180Ark660, 22SW(2d)163; 67CalA328, 227P664 (statutes relating to powers of supervisors to maintain roads and bridges held not incongruous); 324 Ill 113, 154NE707; 315Mo 707, 286SW1; 286Pa137, 133A150; 196Wis76, 219NW 428. [c] (1) 190NC52, 128SE401. (2) County commissioners authorized to contract with state highway commission for loan of county funds to commission for construction of part of highway system in county. 190NC52, 128SE401. (3) It is sufficient consideration for such loan that commission agrees to repay county without interest, out of funds allocated to county from proceeds of bond issues thereafter to be authorized by legislature or out of other road construction funds to extent such funds may be sufficient therefor. 190NC52, 128SE401. [d] **Particular statutes construed.**–137SC288, 135SE153; 195NC26, 141SE539. [e] **Construction of particular statutes.**–143SC196, 141SE366.

583–61 But see 320 Ill 305, 150NE636. [a] **In Texas.**–269US396, 46SCt141, 70 L ed330.

583–61½–New. Constitution does not regulate construction or maintenance of roads. 99Fla226, 126S353.

583–62 161La803, 109S496; 165La443, 115S650; 126Me287, 138A66; 155Md 563, 142A723; 232Mich255, 205NW86; 286Pa137, 133A150; 193Wis457, 214 NW435.

583–64 126Me287, 138A66; 115Nebr 650, 214NW297; 115Or511, 239P109; 193Wis457, 214NW435. [b] **Power to declare county road state highway.**–67 CalA328, 227P664. [c] **Effect of construction by state** of part of road is to make only that part a state road. 35 OhA246, 172NE423.

583–65 [a] **Federal aid.**–(1) 120Kan 356, 243P539; 315Mo 747, 287SW39.

583–66 176Ark156, 2SW(2d)56; 292Pa 384, 141A259; 97PaSuper366 (after road taken over by state).

583–67 Kan 289P394; 126Me287, 138A 66; 283Pa126, 129A78 (county and township may join in improvement of state highway with approval of highway department). [a] **Where street is taken over as county road** city is not responsible for any part of pavement. 251Mich 582, 232NW363.

583–68 239Mich369, 214NW143; 239 Mich521, 215NW43; 292Pa384, 141A259; 10PaDist&Co 346. [b] **Where town takes no action** in compliance with order of county commissioners, it is duty of road commissioners to do work. Mass 167 NE311.

583–69 Ga 155SE317(2dcase) (county treasurer held required to pay warrant for expenses incurred by county for survey); Iowa 232NW682 (building culvert on street as part of county road system under agreement with town); 231 Mich681, 204NW756 (county adopting county road system held not relieved from duty to maintain county roads); 286Pa137, 133A150; 9PaDist&Co 571; TexCivA 10SW(2d)1057; 195Wis399, 216NW487. See also 163Ga707, 137SE 626; 165Ga316, 140SE880. [b] **Construction of part only of highway** and issuance of portion of notes authorized by statute held authorized. 132SC314, 128SE712. [c] **In Idaho.**–Mont 288P455.

584–71 109Conn336, 146A820(2dcase); 91Fla118, 107S146.

584–72 180Ark660, 22SW(2d)163; 126 Me287, 138A66; 128 Okl 232, 262P500. [b] **In Illinois.**–317 Ill 203, 148NE69.

584–73 35Ariz511, 281P207; 177Ark 157, 6SW(2d)23; 320 Ill 305, 150NE636; 86 IndA229, 156NE830; Kan 289P394; 126Me287, 138A66; 251Mich256, 231NW 621 (statute held not to repeal other statutes charging local authorities with maintenance); 125 Okl 197, 257P374; 131 Okl 29, 267P636; 139 Okl 292, 282 P467; 115 Or511, 239P109. [a] (4) Commissioner also possesses, in construction and maintenance of state highways, all rights and powers conferred by law on supervisors or commissioners in townships in construction and maintenance of township roads. 8PaDist&Co 305. [c] **In Kansas.**–243P539, 120Kan 356. [d] **In Minnesota** state highways are under control of commission of administration and finance. 175Minn583, 222NW285. [e] **Statutes applicable to amount of pavement to be constructed.**–Kan 292P921.

584–74 165Ga713, 141SE910. [e] **In New York.**–126Misc542, 214NYS129.

584–75 199 Ind467, 157NE721; Kan 289P394; Mass 167NE311; 150Miss416, 116S602; 35 OhA438, 172NE531; 24 Oh NPNS161; 5PaDist&Co 220; 147SC433, 145SE186; 134Wash626, 236P298. [i] **What roads required to be maintained.**–35 OhA438, 172NE531.

584–76 [i] **In Idaho.**–Ida 290P717(4th case).

585–77 167La83, 118S700, 68ALR336; 4LaA556. [a] **Highway funds.**–161La 675, 682, 109S353.

585–79 239Mich369, 214NW143; 188 Wis501, 205NW423. [b] **That small part of road coincides with line of state highway** does not deprive township board of jurisdiction to improve it. 116 Okl 104, 243P188. [c] **Order issued by town board in settlement** of contractor's claim is not subject to attack in suit on order. 239Mich369, 214NW143.

585–80 Ky 9SW(2d)129. [b] **In Arkansas.**–176Ark139, 2SW(2d)44; 177 Ark157, 6SW(2d)23. [c] **In Missouri.**–25SW(2d)456.

585–83½–New. The state need not procure a certificate of convenience from the railroad commission or any other body to secure permission to construct or maintain highways. 193Wis457, 214 NW435.

585–83⅓–New. A statute should not be construed as committing to a toll bridge company the function of maintaining a part of a public highway for all time, 193Wis457, 214NW435.

585–83¼–New. or until the state procures a certificate of convenience and necessity for another bridge. 193Wis 457, 214NW435.

585–84 [b] **Funds available to match federal aid highway system.**–82Mont63, 265P1.

585–87½–New. Statutory provision that applications for state aid be filed before March 1st is directory and application may be filed and acted upon at later date. 24 OhNPNS321.

585–2½–New. "Maximum of federal aid" in state statutes means the highest amount which will be awarded to a given district. 169Ark52, 272SW852.

585–2⅓–New. Statute, providing that districts which but for the statute could not obtain such maximum without issuing additional bonds or making additional assessments shall be entitled to its benefits, does not mean district cannot proceed under act unless awarded aid equal to highest percentage of construction cost awarded any other district. 169Ark52, 272SW852.

585–2¼–New. An appropriation bill authorizing state aid to townships has been construed as showing a legislative intention that one thousand dollars should be paid to each township applying. 113 OhSt434, 149NE392.

585–2⅙–New. Where such appropriation bill refers to a code provision fixing a minimum for each township and the appropriation bill does not fix a minimum, it will be presumed that the legislature deemed it unnecessary to provide that the minimum provided by such code provision should not be violated. 113 OhSt434, 149NE392.

585–2⅙–New. Under constitutional and statutory provisions authorizing county bonds for construction work, cost of acquiring rights of way cannot be paid therefrom, but must be paid from general fund. 223Ky636, 4SW(2d)414.

585–2⅙–New. General fund is presumed to consist of proceeds of general levy and surplus of funds appropriated for specific purposes. 223Ky636, 4SW(2d)414.

585–2⅕–New. Under some statutes the state highway commission may use money of the state highway fund for purchasing a right of way for state highways. 80Mont228, 260P134.

585–2⅛–New. County commissioners' agreement that money allocated to the county should be used in the construction of a road instead of applied toward retirement of bonds as originally contemplated is valid. 194NC380, 139SE 767.

585–2 1/10–New. Construction of a highway encircling a city held not an unwarranted expenditure of public funds. 142 SC196, 141SE366.

585–2 1/11–New. A change in a road for

which bonds had been issued will not affect the right of officials to apply the proceeds of the bonds to its construction. 157Tenn652, 16SW(2d)24.

585-2½2-New. A later legislature cannot pledge primary road funds derived from motor vehicle licenses and gasoline taxes for a future period, as such funds are controlled by the existing legislature. 207 Iowa923, 223NW737.

585-2½3-New. Road funds for a county created from a special tax must be expended as provided by statute. 219Ala 142, 121S504(2dcase).

585-2½4-New. Funds derived from the sale of bonds could be used for paving a portion of a route legally relocated. 167Ga859, 146SE845.

585-2½5-New. A county is not a corporation under a constitutional provision so as to prevent the state from using a primary road fund to pay road bonds of the county. 207 Iowa923, 223NW737.

585-2½6-New. A state highway fund is available for the purchase of machinery necessary in the construction and maintenance of roads. 178Ark652, 11SW (2d)444.

585-2½7-New. In some jurisdictions statutes authorize a general fund of a county to bear the expense of the construction and maintenance of roads. 86 CalA421, 260P961.

585-2½8-New. Promise by a city to issue road certificates in anticipation of levy of assessment for its share of the cost of a public highway, under statute, is not unconditional where the city could pay either from a general fund or by taxation and local assessment. Iowa 226NW718 (promise held not to support money judgment against city).

585-2½9-New. The county board of supervisors has been held justified in providing funds for acquiring a right of way for the construction of a hard-surface road. 336 Ill 233, 168NE364.

585-2½0-New. In some jurisdictions unexpended balance in road dragging fund cannot be set aside for use of separate supervisor districts. Nebr 231NW29.

585-2½1-New. Where money from various sources to the county highway fund is sufficient to meet the estimated needs for such fund, no ad valorem tax levy is necessary. 141 Okl 130, 284P27.

585-2½2-New. Contribution by county to state aid fund not county money. 137 Misc555, 244NYS96.

585-2½3-New. State highway commission required to pay from general fund for district highways taken over by it. Kan 292P921.

586-14 [a] (1) 100WVa667, 131SE462 (jointly and severally liable for personal injuries).

586-17 178Ark482, 10SW(2d)908; 324 Ill 113, 154NE707; 328 Ill 587, 160NE 201; 336 Ill 306, 168NE337; 336 Ill 233; 168NE364 (sufficiency of evidence); 336 Ill 513, 168NE372 (discretion is not unlimited); 167La83, 118S700, 68ALR336; NJSup 133A419; 191NC68, 131SE372 (location of road); 194NC159, 138SE 601; 112 OhSt356, 147NE501; 20 OhA 432, 152NE300 (location of more expensive route); 128 Okl 232, 262P500; 150SC337, 148SE183; 161Tenn222, 30 SW(2d)234; 196Wis76, 219NW428 (relocation). [b] **Trunk highway system** under constitutional provisions cannot be extended within limits of cities of first class. 175Minn103, 220NW408 (continuity of travel is not prevented by such provisions). [c] **Evidence held to show no abuse of discretion.**–336 Ill 306, 168NE337; 336 Ill 513, 168NE372. [d] **Discretion is not unlimited.**–338 Ill 222, 170NE283.

586-18 178Ark44, 9SW(2d)790; 167Ga 397, 145SE866; 328 Ill 587, 160NE201; 336 Ill 233, 168NE364; 336 Ill 513, 168 NE372; 338 Ill 222, 170NE283; 86 IndA 684, 158NE526; 146SC483, 144SE227; 161Tenn222, 30SW(2d)234. [h] (1) 35 Ariz511, 281P207. (2) 35Ariz511, 281P 207. (3) Deviation from existing highway held authorized in locating state hard surface highway in view of safety to traffic afforded. 326 Ill 589, 158NE 396. [j] **In Kansas.**–120Kan698, 244P 866. [k] **State road through city.**–324 Ill 113, 154NE707. [l] **Bridges.**–324 Ill 113, 154NE707. [m] **Act speaking through map** making certain connections with highway system will not be set aside. 192NC834, 134SE483. [n] **Road act creating system of highways** designed to serve general public. 192NC 834, 134SE483. [o] **Construction of ambiguous statute to give highway commission some discretion** in location of proposed highways is not in disregard of letter of law. 13LaA459, 128S56. [p] **Legislative location of highway** is binding on other departments of state government. 35Ariz511, 281P207.

587-20 167Ga859, 146SE845; 336 Ill 306, 168NE337 (arbitrary action); 13 LaA459, 128S56; Md 149A566; 192NC 561, 135SE618; 20 OhA432, 152NE300 (location of more expensive route); 128 Okl 232, 262P500; TexCommnA 12SW (2d)150. See also 112 OhSt356, 147NE 501. [d] **In emergency caused by ambiguity in statute,** state highway department may exercise its discretion in determining route, and courts will not interfere where such discretion is not abused. 134SC402, 132SE680.

587-21 Md 149A566 (discretion held not abused). See also 336 Ill 233, 168 NE364; 336 Ill 513, 168NE372. [b] **Where fund voted by county is insufficient to carry out entire road program,** it is duty of highway commission to designate roads to be improved and to proceed with improvements. 29 Ariz237, 240P465. [c] **That route has been main-traveled route between two points** for many years is evidence that it is most direct and feasible route. 336 Ill 513, 168NE372. [d]–**In Maryland.**–Md 149A566. [e] **Public roads.**–Md 149 A566. [f] **Presumption** is that state commission will be guided by considerations affecting entire system in selecting lateral roads for improvement from state funds. Md 149A566.

587-22 [c] **Plans not invalid** in that description shows improvement beginning at end of city street. 168Ark867, 271SW958. [d] **That proposed improvement extended to center of river** being state boundary line, not invalid where it there connected with similar improvement and formed complete bridge. 168Ark867, 271SW958.

587-23 150Miss416, 116S602; 194NC 159, 138SE601.

587-24 Contra 8PaDist&Co 305.

587-28 180Ark226, 21SW(2d)158; 332 Ill 416, 163NE795; 336 Ill 306, 168NE 337; 219Ky410, 293SW965; 312Mo 244, 279SW673; 194NC159, 138SE601; Tex CivA 26SW(2d)444 (where location called for north and south boundary line of county without naming point of control between such lines). See also 192 NC561, 135SE618; 98PaSuper488. But see 170La861, 129S372. [c] **Change or relocation of route.**–320 Ill 526, 151NE 546. [d] **In Missouri.**–321Mo 1047, 15 SW(2d)788, 63ALR512. [e] **Conclusiveness of determination.**–321Mo 1047, 15SW(2d)788, 63ALR512. [f] **Deviating from existing road.**–335 Ill 558, 167 NE772. [g] **Construction of statute setting out routes for proposed highways.**–13LaA459, 128S56.

587-29 180Ark226, 21SW(2d)158; 333 Ill 313, 164NE676.

587-30 163La1053, 113S372; 194NC 159, 138SE601. [c] **Change in location held not to disconnect town** from service of state highway system, as matter of law, where new route is near railroad station. 192NC561, 135SE618.

587-31 121Kan148, 245P1051; 163La 1053, 113S372; 194NC159, 138SE601; 194NC333, 139SE606. But see Tenn 11 SW(2d)863.

587-32 336 Ill 630, 168NE671.

587-32½-New. , nor may county commissioners abandon part of chosen route because federal aid cannot be obtained therefor. 121Kan148, 245P1051.

587-32½-New. Under statute plans and specifications should be kept on file in office of resident engineer. 112 OhSt356, 147NE501.

587-32¼-New. Where language of a statute is clear and certain as to routes to be followed, the road officers must conform to terms of the statute. 134 SC402, 132SE680.

587-32½-New. In such case neither the officers nor the courts have any authority to vary. 134SC402, 132SE680.

587-32½-New. Primary consideration in locating a hard surface road as part of the state wide system of highways is interest of the state at large. 326 Ill 589, 158NE396.

587-32½-New. In some jurisdictions the department of state highways may designate, locate, redesignate, relocate, alter, and change any portion of the state highway system without obtaining the consent of the board of commissioners of any county through which any portion of the highway is laid out. 58ND249, 225NW801.

587-32½-New. The primary interest to be considered in determining the location of a hard-surface road of a state highway system is the interest not of the particular locality, but of the state at large. 336 Ill 306, 168NE337.

587-32½-New. The primary interest to be considered in the construction of hard roads is that of the state at large and not the interest of the particular locality. 336 Ill 513, 168NE372.

587-32½0-New. Safety, economy, and convenience in the operation of traffic are factors to be considered in the selection of a route for a durable hard-surface state road. 336 Ill 306, 168NE 337.

587-32½1-New. Act providing for road construction to bring each county to parity requires all counties to be brought in same condition regarding aid in road building. Ark 318SW(2d) 427.

587-33 178Ark44, 9SW(2d)790. [b] **Provision in county court's order** that committee of citizens should act with court in selecting kind of material held to vest choice in committee. WVa 143 SE353. [c] **Highway department** has authority to buy on its own account any materials. 218Ala120, 117S757.

587-34 116 Okl 104, 243P188 (materials used for gravel road held within statutory requirements). See also 178 Ark44, 9SW(2d)790. [d] **Hard Surfaced Roads Act** held not to deprive cities of right to pave, by special assessment, streets over which state road passes. 326 Ill 82, 157NE28.

587-35 131 Okl 41, 267P860. See also Kan 292P921.

588-53 115Nebr650, 214NW297.

589-68½-New. Established road along right of way of railroad may be improved, although occupied only under long time lease at nominal rental subject to termination on notice. 121Kan 26, 245P1029.

589-76½-New. Under some statutes the highway commission has authority to reconstruct a paved road and is not confined to improvement of dirt roads. 115 Or511, 239P109.

589-76½-New. The statute relating to improvement of roads has been held to contemplate a project in part upon a line where no road was established. 124Kan511, 260P985.

589-76¼-New. Commissioners may relocate a highway after a bond election. TexCivA 300SW242.

589-76½-New. Designation and location of federal aided state highway may be made only by the state highway commission with the approval of the federal bureau of roads. TexCivA 300 SW242.

589-76½-New. Attempted designation of federal bureau of roads and state highway engineer held ineffective. Tex CivA 300SW242.

589-76½-New. Ownership, control, and location of state highway system is vested in state highway commission, subject to the approval of the federal bureau of roads. TexCivA 300SW242.

589-76½-New. Taxpayers residing near a state highway have been held not legally aggrieved by promises of members of commissioners' court during a campaign for a highway bond election. TexCivA 300SW242.

590-80 See also Miss 122S484.

590-84 327 Ill 180, 158NE389; 35 OhA 438, 172NE531.

590-85 198 Ind456, 152NE806; 246 Mich501, 224NW632. [a] (4) Agreement with municipalities for construc-

tion or improvement of highways within municipalities which are not on state highway plan. 12PaDist&Co 523.

590–86 [d] **In Wisconsin.**–195Wis399, 219NW98 (consent of state highway commission necessary).

590–86½–New. A contract of the state and county to improve a middle portion of a road in a village does not deprive the village of power to improve the remaining portion of the road. 318 Ill 360, 149NE258.

590–88 128Kan125, 276P62.

590–88½–New. Where proceeds of bonds voted by a county for a road building program are insufficient to complete the whole program, the failure of the county highway commission to object to the action of a city in improving a street which was included in the original county program is equivalent to a determination by the commission that the street was not one designated to be improved by it with available funds. 29Ariz237, 240P465.

590–88⅓–New. In such case the commission is not bound to stop the city from paving such street on the ground that it was originally included in the county program and a subsequent bond issue might be voted to complete such program. 29Ariz237, 240P465.

590–88¼–New. In such case the fact that a bond issue is subsequently voted to further carry out the program does not give a property owner assessed by the city for improvements the right to reimbursement from the county where such street was not included in the roads for the improvement of which the subsequent bond issue was voted. 29 Ariz237, 240P465.

590–88½–New. Some statute providing for coöperation between city authorities and a county highway commission in improving roads running through corporate limits are not mandatory. 29 Ariz237, 240P465.

590–88¾–New. Such statutes do not contemplate monetary coöperation by a county after work is completed by a city alone. 29Ariz237, 240P465.

590–88½–New. Under some statutes county commissioners may apply for state aid for the improvement of an intercounty highway although a petition signed by twenty-five per cent. of the abutting property owners has not been filed 19 OhA113.

590–88⅞–New. Where county commissioners make application for state aid for the improvement of that part of an intercounty highway within their county and file therewith a certified resolution that the public interest demands such improvement and the resolution is approved by the state highway commissioner, the county commissioners are not bound to proceed under one contract for the entire improvement of the highway named in the application. 19 OhA113.

590–88⅛–New. In some jurisdictions a county has the right to build a highway through a village without the consent of village authorities, 154Miss613, 122S753(2dcase).

590–88 1/10–New. and the route need not follow one of the established streets. 154Miss613, 122S753(2dcase).

590–88 1/11–New. Some statutes do not authorize county to aid city to improve streets. TexCivA 26SW(2d)405.

590–88 1/12–New. Portion of state road subsequently within city limits remains state road. 251Mich256, 231NW621.

590–88 1/13–New. Trunk highway under statute authorizing trunk highways from state boundaries through municipalities to certain city extends only to city limits. 251Mich256, 231NW621.

590–90 261Mass99, 158NE329; 115Tex 449, 283SW139.

590–91 261Mass99, 158NE329; 115Tex 449, 283SW139.

591–92 88CalA545, 263P825.

591–94 165Minn34, 205NW634 (town held to have adopted reasonably proper method of draining highway).

591–95 165Minn34, 205NW634 (failure to lay ditch to drain highway not coinciding with natural course of drainage held not to show town exceeded its legal rights).

591–99 88CalA545, 263P825; 167Ga 124, 144SE796.

591–2 226Ky703, 11SW(2d)712. But see 115Tex449, 283SW139.

591–3 [d] **Question for jury.**–134Wash 626, 236P298. [e] **Abutting landowner need not erect barriers** to keep water off his land in anticipation of flooding caused by reduction of areaway for passage of water. 134Wash626, 236P 298.

591–4 158La701, 104S623 (natural drainage need not be diverted for convenience of adjacent estate); 261Mass 99, 158NE329; 115Tex449, 283SW139. [e] **Abutting owner's interference with drainage.**–Property owner may not place obstruction within public highway and thereby interfere with drainage of surface waters across highway. 205 Iowa 137, 218NW60.

592–5 115Tex449, 283SW139.

592–6 115Tex449, 283SW139.

592–11 See 166La869, 118S65.

592–12½–New. Rights of a police jury in the matter of drainage of roads are no greater than those of the individual proprietor of an upper estate. 166La 869, 118S65.

592–12⅓–New. Failure of officials to keep open ditches and drains along a highway, causing water to concentrate on an owner's land, is an omission of duty and not the maintenance of a nuisance. 160Tenn216, 22SW(2d)353 (county not liable).

592–14 160Tenn216, 22SW(2d)353 (liability where duty ministerial).

592–18 261Mass99, 158NE329.

592–19½–New. County officials charged with the duty of supervising roads are not liable for mere acts of nonfeasance in the absence of willful misconduct. 160Tenn216, 22SW(2d)353.

593–25 205 Iowa137, 218NW60.

593–26 205 Iowa137, 218NW60; 158La 701, 104S623.

593–30 167Ga124, 144SE796; 204 Iowa 288, 213NW566.

593–32 208 Iowa1229, 227NW91.

593–33 See also 208 Iowa1229, 227NW 91.

593–35½–New. The injury must be of a substantial nature. 28 OhA449, 162 NE752.

593–36½–New. Police juries have plenary power over public roads and their natural drainage. 158La701, 104S623.

593–37 28 OhA449, 162NE752. [a] **Evidence held sufficient to sustain finding** that proposed drainage was different than original natural one and would materially increase natural flow of water. 166La869, 118S65.

593–42 [d] **County auditor's failure to file certificate** required by statute is fatal to proceedings. 28 OhA8, 162NE 430.

593–45 [d] **Petition construed.**–121Kan 148, 245P1051.

593–48 94Fla1238, 116S15. [a] (5) College trustees authorized to sign petition under will. Mo 24SW(2d)133.

594–49 Mo 24SW(2d)133 (resolution of college trustees authorizing petition for hard surfaced road held to show road was to be paved). But see 156Miss273, 125S828.

595–64½–New. Fraud in procuring judgment accepting highway improvement is not charged by allegations that the contractor concealed facts from the board of commissioners, as respects the right to have it set aside. 198 Ind516, 154NE284.

595–64⅓–New. The board of commissioners merely determines compliance by the contractor with the contract, and comes into effect as a result of its judgment. 198 Ind516, 154NE284.

595–64¼–New. Resolution and notice thereof must comply with statute. 28 OhA8, 162NE430.

595–64⅕–New. Taxpayers are entitled to notice of the county commissioners' passage of a resolution declaring the necessity for a road improvement. 28 OhA8, 162NE430.

595–64⅙–New. A resolution of a quarterly county court that the county cooperate with the state highway commission in the construction of a specified road and turn over the proceeds of bonds for the construction was a substantial acceptance of the proposal of the state commissioner for construction. Tenn 11SW(2d)863.

595–64 1/7–New. Under some statutes notice to county council to view road and make finding on public utility is sufficient when made by publication. Ind 170NE853.

595–64⅛–New. Irregularity in such notice does not invalidate action of county council where all members appeared and voted. Ind 170NE853.

595–65 232Ky439, 23SW(2d)276. [c] (3) Election need not be called upon overruling remonstrance against construction of road. 199 Ind467, 157NE 721. [d] (1) 169Ark179, 273SW1034. (3) Such statute is applicable to improvement authorized by statute authorizing improvement district to improve five laterals annexed to main road as new improvement after completion of original improvement. 169Ark179, 273 SW1034. (4) Such new improvement must be treated as new project and creation of new district and does not fall within exemption of general statute. 169Ark179, 273SW1034.

595–67 [a] **Provision in county court's order** submitting bond issue to voters, that committee of citizens should act with court in selecting kind of road improvement vests power of decision in committee as to which of three types shall be adopted. 105WVa589, 148SE 674(3dcase).

596–94½–New. **Election for issuance of bonds for road purposes** is not invalidated by mere irregularities. TexCivA 4SW(2d)249.

596–94⅓–New. Under statutes requiring voters to be citizens, the vote of a foreigner who took out his first papers many years previously was properly rejected. TexCivA 4SW(2d)249.

596–94¼–New. One living outside the district is not qualified as a voter. Tex CivA 4SW(2d)249.

596–95 123 Or301, 261P81.

597–12 320 Ill 526, 151NE546.

597–15½–New. Order of county court directing road improvement according to plans and specifications held not void for failure to state which of two sets on file was to be used. Mo 24SW (2d)133.

597–22 161Tenn222, 30SW(2d)234 (reasonable exercise of discretion).

597–23 196 Ind281, 148NE198; 199 Ind467, 157NE721. [e] **Slight change in road made after appeal** does not deprive court of jurisdiction. Ind 170NE 853. [f] **Notice of further appeal** need not be given to coparties by remonstrator who was sole party appealing. Ind 170NE853. [g] **Defects in transcript** because of absence of report of engineer and viewers which had been sent to state highway commission is not ground for dismissal of appeal. Ind 170NE853.

597–34 198 Ind516, 154NE284.

598–35 199 Ind467, 157NE721.

598–37 198 Ind516, 154NE284.

598–38 [b] (2) Rule that property owner who fails to review proceedings by statutory remedy of certiorari may not thereafter question their regularity is not applicable where constitutional rights have been invaded. 239Mich437, 214NW412. (3) Where notice in proper form is pasted as required by statute, defect in published notice in not fixing date of hearing does not invade constitutional rights of property owner so as to entitle him to assail validity of tax by reason of such defect, in proceeding to enforce payment of tax six years later where property owner did not review proceedings by certiorari. 239Mich437, 214NW412.

598–40½–New. **Estoppel.** A landowner joining in an improvement petition cannot avoid paying his share by setting up unconstitutionality of an act. 6PaDist&Co 32.

598–43 126Kan571, 268P837.

598–47½–New. After valid preliminary proceedings and final order for a proposed improvement, the board has the duty to proceed with the work with reasonable promptitude. 124Kan511, 260P985.

598–47⅓–New. It has been held not an

excuse that other roads are contemplated or in the course of construction, or that the board has decided that the proposed road is not practicable or desirable. 124Kan511, 260P985.

598–49 167Ga397, 145SE866; 168Ga 122, 147SE586; **Tenn** 11SW(2d)863. [a] But see 148Miss316, 114S609. [g] **It is question of law** whether change in location of road is authorized. 192NC 561, 135SE618. [h] **Commissioners' court will not be restrained** from expending proceeds of road bonds on route different from tentative route designated at time of selection, which was not approved by state and federal officers. 116Tex378, 292SW160.

599–54 169Ga725, 151SE509 (relocation of road saving four miles).

599–55½–New. Construction by state roads commission will not be enjoined at landowners' suit unless it affects some personal or property right belonging to them. **Md** 149A566.

599–58 312Mo 244, 279SW673. [c] **Necessity of special injury.**–(1) 115 Or511, 239P109. [d] **Failure to allege** that petitioner's taxes will be increased is immaterial where conclusion follows from facts pleaded. 312Mo 244, 279SW673.

599–59½–New. In proceeding to restrain highway commissioners from completing portion of proposed interstate highway a finding that highway authorities of adjoining state have suggested their willingness to connect with proposed highway is immaterial. 191 NC68, 131SE372.

599–59½–New. Injunctive relief will not be granted against highway officers acting within the scope of their authority in the maintenance and repair of highways in the absence of fraud, a manifest or gross injustice constituting abuse of discretion. 128 **Okl** 232, 262P500.

599–59¼–New. A taxpayer may have a right to enjoin the execution of illegal contracts involving payments from a public fund to which the taxpayer is a contributor. 97Fla28, 119S149.

599–69 9PaDist&Co 333.

600–70 5PaDist&Co 769.

600–92 But see 5PaDist&Co 769.

602–29 91Fla118, 107S146; 115Nebr 650, 214NW297.

603–30 91Fla118, 107S146; 327 **Ill** 180, 158NE389; **Kan** 292P921. [c] **Resolution of village council held** to require village to contribute to county one-fourth of gross expense without right to share in refund by United States and state to county. 166Minn354, 208NW9. [d] **Expenses of engineering and inspection** of certain roads are payable out of general motor license fund appropriation. 12PaDist&Co 523.

603–38½–New. Constitutional limitation on amount to be appropriated by state not applicable to appropriation for highway purpose, but confined to appropriation in connection with forests. 187Wis180, 204NW803.

604–53 [b] **Proceeds** of county highway bonds may be used to condemn land for highway, as well as for actual construction. **TexCivA** 272SW506.

605–59½–New. Bonds raised to finance repair of existing roads cannot be used for new roads or those virtually new by reason of material alterations. 165Ga 316, 140SE880.

605–59¼–New. Order of commissioners' court specifying that proceeds of bonds will be used for construction of designated highways refers to existing highways. **TexCivA** 26SW(2d)444.

605–59¼–New. Such order is of no binding effect on highway commission. **TexCivA** 26SW(2d)444.

605–69 **Mass** 167NE311.

605–70 200 **Ind**376, 163NE609.

605–70½–New. In Louisiana the police jury is invested with power to let contracts. 161La471, 109S34.

605–70¼–New. Power of the board of supervisors in respect of road contracts is to be exercised merely as an agent of a police jury. 161La471, 109S34.

605–71 [h] **In Oklahoma.**–139 **Okl** 292, 282P467. [i] **Power of county court.**–40F(2d)184 (under Tennessee statute).

605–72 **TexCivA** 4SW(2d)283. See also 336 **Ill** 630, 168NE671. [a] (6) Absence of one of these commissioners at time of signing does not render contract invalid. 286Pa137, 133A150. (7) Single member of board of county commissioners is without authority to contract on behalf of county for construction or repair of roads. 56ND571, 218 NW637. [d] 12PaDist&Co 250 (township commissioner of state highway department). [f] **Where state board has exclusive jurisdiction** in selecting and constructing highways, county court has no jurisdiction to make contract even when authorized by board. 312 Mo 73, 278SW730.

606–73 161La70, 108S128; **TexCivA** 4 SW(2d)283. [a] (1) 171Ark460, 284 SW727.

606–76 97Fla28, 119S149; 336 **Ill** 630, 168NE671 (contracts must be in writing). But see **TexCivA** 4SW(2d)283. [a] **Where statute limits county's share to one half of cost** of building highway, contract whereby county is to finance project and pay contractor sixty per cent of profits is illegal and unenforceable. 312Mo 73, 278SW730.

606–78 [a] (8) Even though county commissioner was beneficially interested, contract is not void, where work was done and accepted, its reasonable value worth or exceeding contract price, and results were highly beneficial to county. 152Wash519, 278P176.

606–79 [c] **Miss** 120S190(1stcase). [h] **Statute, that prior to advertisement for proposals,** requisite right of way and land should be acquired, is not mandatory and contract entered into before such requirement is not void. 240NY 348, 148NE546. [i] **Statute as to acquiring land for requisite right of way** prior to advertisement for proposals not mandatory and not rendering prior contract void. 240NY348, 148NE546. [j] **Where certificate of funds to support contract** is false, the contract may be repudiated in absence of equities acquired in performance thereof. 21 **OhA** 162, 152NE799.

606–80 158La294, 103S819 (statute construed to require acceptance of bid of lowest responsible bidder); 147Miss 57, 112S682; 312Mo 73, 278SW730; 125 **Okl** 197, 257P374; 283Pa582, 129A635; 286Pa137, 133A150. [s] But see 126 Misc542, 214NYS129. [t] **Time for completion of contract for road construction is essential element** in proposals or bids on work to be done, under some statutes. 126 **Okl** 114, 258P 863. [u] **Time of completion of contract** is essential element in proposals or bids upon work to be done. 125 **Okl** 197, 257P374. [v] **Source of funds.**–**TexCivA** 4SW(2d)283. [w] **Adjudication as to advertisement.**–153Miss459, 121S133. [x] **Where bid of petitioner is only bid for construction of road with brick,** it is not competitive bid within meaning of statute. 336 **Ill** 630, 168NE 671. [y] **Purpose of statute requiring letting of contract to lowest responsible bidder stated.**–139 **Okl** 292, 282P467.

607–81 161La471, 109S34; 147Miss57, 112S682. [c] (2) Under statute, when plans and specifications are materially altered, new advertisement for bidders is necessary. 147Miss57, 112S682. (3) Changes by which prospective bidder may be deceived will avoid contract. 286Pa137, 133A150. (4) Changes in plans held material requiring readvertising. 147Miss57, 112S682. [d] (4) Under Oregon statute highway commission in contracting for building road need not specify in advance kind of paving to be laid but may call for alternate bids if they embody standard specifications. 115 Or511, 239P109. (5) Board of commissioners has wide discretion as to materials to be used. 196 **Ind**485, 149NE64.

607–82 201**Cal** 629, 258P955; 161La70, 108S128. [c] **Contract of county with state board of directors of state institutions** for construction of highway under statute, providing state road tax fund apportionable to counties, is properly signed by and executed in the name of supervisors in official capacity. 30Ariz14, 243P611. [d] **Consideration.**–15F(2d)918.

607–84 **Mass** 167NE311.

608–85 [b] **For false certificate of availability of funds** contract is invalid, as between public officers and contractor who has made no expenditures under contract. 114 **Oh**323, 151NE177, 45ALR371. [c] **Subcontracts cannot be let by contractor** under statute without highway department's written approval therein for benefit of state which may waive condition. **Nev** 283P396.

608–85½–New. The fiscal court may cancel a contract, after notice to the contractor, at any time before or after the date for completion of work, if not presented with reasonable diligence. 217Ky343, 289SW316.

608–88 158La294, 103S819 (that lowest responsible bidder is small concern does not justify rejection of bid). [b] **Board of supervisors** held not justified in rejecting lowest bid because next lowest would furnish better grade of gravel where specifications stipulated kind and quality to be furnished. 158 La294, 103S819. [c] **Requirement by board of supervisors** in accepting bids that gravel shall come from pits of particular bidder held not justified as eliminating competition. 158La294, 103S 819.

608–88½–New. Where a dam constructed by a power company caused the flooding of a town road, an agreement between the power company and the town for construction of a new causeway above the highwater mark according to specifications furnished by the town and acceptable to it is valid. 188Wis501, 205NW423.

608–88¼–New. Where a contract for the construction of a project has been entered into in good faith, under a departmental construction of the law, and the contractor in good faith has performed a substantial part of the work contracted to be done, and has expended substantial sums of money for labor and materials, and there was no fraud or collusion in letting the contract, the contractor is entitled to complete the contract and receive the money thereunder. 125 **Okl** 197, 257P374.

608–88¼–New. , contracts for construction of state highways are under the control of the commission of administration and finance. 175Minn583, 222 NW285.

608–88½–New. The commission of administration and finance may disapprove of a contract made by the highway department on the ground that the proposal of another bidder was lower. 175Minn583, 222NW285; 175Minn590, 222NW287.

608–88½–New. A contract for the construction of a state highway made by persons styling themselves a "state highway board" is valid although such board has ceased to exist. 318Mo 387, 1SW(2d)787.

608–88¼–New. A contract between the state highway commission and selectmen of a town for repairs on a highway acquires no validity by being recited in an order of the county commissioners directing repairs. **Mass** 167NE311.

608–89 284Pa287, 131A281; **TexCivA** 4SW(2d)283. [a] **Ratification by subsequent election.**–284Pa287, 131A281.

608–96½–New. Under Contractors' Relief Act, where the board of commissioners refused relief, they were without authority to reverse the order. 83 **Ind**A598, 147NE287.

608–97 But see 126Misc542, 214NYS 129.

608–99 15F(2d)918. [a] **Provision requiring engineer's orders for changes to be in writing signed by him** may be waived or modified by parol. 39Wyo 84, 270P167.

608–99½–New. Boards of supervisors of counties and the board of directors of state institutions are authorized by statutes providing for highway system and establishing state road tax fund apportionable to counties to enter into contracts for highway construction work. 30Ariz14, 243P611.

608–99¼–New. Cancellation acquiesced in relieving other party terminates contract, relieving either party from liability. 126Misc542, 214NYS129.

608–99¼–New. That highway commissioner mistakenly based cancellation on inappropriate statute does not invalidate cancellation by mutual consent. 126**Misc**542, 214**NYS**129.

608–99½–New. Relation of employee rather than contractor is created where neither competitive bidding nor bond is required, and details are determined without regard to builders. **TexCivA** 4 **SW(2d)**283.

608–2 **IndA** 162**NE**55; 12**LaA**382, 125 **S**514 (construction with reference to statute under which it was written); 195**NC**799, 143**SE**851; 118**Tex**268, 12 **SW(2d)**127; **TexCivA** 300**SW**148. [a] 18**F(2d)**755; 70**CalA**326, 233**P**74; **IndA** 172**NE**201; 234**Ky**764, 29**SW(2d)**29; 166**Minn**7, 206**NW**934; 141**Miss**335, 105 **S**856; 283**Pa**582, 129**A**635; 288**Pa**577, 136**A**856; **TexCommnA** 276**SW**193; **TexCivA** 24**SW(2d)**99; 68**Utah**486, 251 **P**16; 148**Wash**367, 268**P**898. [q] **Highway construction contract** which required contractor to protect work done, where work was temporarily stopped, does not require contractor to protect subbase laid by previous contractor. 128**Misc**61, 217**NYS**868. [r] **Waiver of right to resort to courts.**–68**Utah**486, 251**P**16. [s] **Compensation for filling stump holes** is contemplated by contract providing for payment for earth placed in road embankment. 18**F(2d)** 755. [t] **Deduction for shrinkage** should not be made on remeasurement one year after materials were in place, where contract provides for making ninety per cent of earth in embankment equal to one hundred per cent in original position, and all shrinkage occurred within year. 18**F(2d)**755.

609–4½–New. Burden of proof, under a contract proving necessity of protecting a highway, is upon the state. 128 **Misc**61, 217**NYS**868.

609–4½–New. Where the original contract for the construction of a highway embankment contemplated payment for the overhaul of borrow hauled from other than free haul zones, and on default of the contractor free haul zones were enlarged in the contract of reletting the work, it was held that the work was relet under conditions materially different from conditions in the original contract. 167**La**301. 119**S**56.

609–5 180**Ark**226, 21**SW(2d)**158; 167 **La**301, 119**S**56; 138**Misc**341, 245**NYS** 565; 297**Pa**514, 147**A**611 (substantial compliance); 148**Wash**367, 268**P**898. [b] **Under extension agreement.**–139 **Okl** 292, 282**P**467. [c] **Approval procured by fraud** may be set aside. **TexCivA** 24**SW(2d)**99. [d] **Substantial compliance.**–138**Misc**341, 245**NYS**565.

609–6 [a] (4) Notorious use of road for public travel after surface of roadway is completed, for long time prior to final completion and official acceptance, is not acceptance under Ohio statute. 117 **Oh**28, 158**NE**1. [e] **On acceptance by board,** its functions are completed, and order cannot be revoked. 85 **IndA** 287, 149**NE**94.

609–7 196 **Ind**485, 149**NE**64; 117 **Oh** 28, 158**NE**1; **TexCommnA** 276**SW**193; 199**Wis**13, 225**NW**170. [b] (4) Where state engineer fails or refuses to sign final estimate, court will follow method indicated by contract in determining amount due. 114**Nebr**612, 209**NW**221. [c] (1) 119 **Or**565, 249**P**1100. (2) 18 **F(2d)**755; 195**NC**284, 141**SE**886; 118 **Or**143, 246**P**352. (3) 5**F(2d)**416; 18 **F(2d)**755; 118 **Or**143, 246**P**352 (as to computation and classification of excavated material including hardpan). (11) Contractor may maintain suit to set aside engineer's final estimate and to make proper allowance for work performed and not yet paid for with interest. 119 **Or**565, 249**P**1100. (12) Inexperience of engineer is not ground for disregarding provision of contract that his final estimate shall be conclusive. 18**F(2d)**755. (13) Road district cannot change engineers to secure fraudulent advantage under contract making engineer's final estimate conclusive. 18 **F(2d)**755. (14) Engineer's estimate, in order to be conclusive, as provided in contract, must be reached by methods of measurement provided by contract. 18 **F(2d)**755. (15) Engineer's estimate based on compromise of two alternative methods of measurement provided by contract cannot stand. 18**F(2d)**755. (16) Engineer's final estimate of material used in filling stump holes, made on resurvey by new engineer, based on theories without substantial basis of facts after fills had been covered, cannot supersede actual measurements made by former engineer. 18**F(2d)**755. (17) Contractor's signature to engineer's final estimate, reciting release of claims against state, held not receipt in full. 82**Mont**382, 267**P**499. (18) Highway commission held unauthorized under contract to revise decisions of engineer as umpire regarding final estimate of work performed. **Or** 292**P**309. [i] **Construction of contract provision relative to engineer's certificate** must be in accordance with intention of parties where meaning is plain. **TexCommnA** 276**SW**193. [j] **Provision in contract with county** requiring written order from engineer does not apply to contract of contractor with subcontractor. 70 **CalA**326, 233**P**74. [k] **Monthly estimates of engineer** are subject to correction on final estimate of new engineer. 18**F(2d)**755.

609–8 196 **Ind**485, 149**NE**64; 128**Misc** 227, 218**NYS**375. But see 207**Cal** 259, 277**P**723.

609–9 13**F(2d)**758; 117 **Or**482, 244**P** 528 (failure of discretion of roadmaster in directing order of work). See also 167**La**301, 119**S**56. But see 240**NY**348, 148**NE**546. [c] **Failure to acquire right of way before advertising for bids** does not of itself excuse nonperformance by contractor. 126**Misc**542, 214**NYS**129. [d] **Where work was not completed,** conclusion of law that state owed contractor seventy-five thousand dollars for work performed when he abandoned contract is erroneous, as amount could not be determined. 215**AppDiv**109, 213 **NYS**513 (in action to foreclose liens).

609–10 **TexCivA** 48**W(2d)**283.

609–11 [c] **No recovery** for loss of anticipated profits resulting from changing route to avoid swamp. 131**Misc**11, 225**NYS**665.

610–14 **IndA** 162**NE**55.

610–15 **IndA** 162**NE**55.

610–17 [d] **In absence of proof of actual completion of work and cost thereof** state cannot recover cost of completing work. 214**AppDiv**386, 212**NYS**222 (where evidence established work was near completion). [e] **"Cost," means state's expenditures.**–214**AppDiv**386, 212 **NYS**222 (within Highway L. § 132). [f] **Statute authorizing cancellation and reletting of contract where work** not being performed as per contract, original contractor to be liable for increased cost does not apply to contract canceled by mutual consent. 126**Misc**542, 214**NYS** 129.

610–17½–New. Where contract authorized highway commission to retain sufficient funds to pay claim against road contractor, contractor's assignment of portion of funds due was subject to commission's right to apply funds in payment of claims. 132**SC**171, 129**SE**81.

610–17⅓–New. Where proposal and contract of contractor recited personal inspection, knowledge of all conditions affecting the work, and waived right to plead any misunderstanding and to claim by reason of estimates, tests, or representations of state officers, contractor cannot complain of honest mistake in state's specifications. 214**App Div**386, 212**NYS**222 (as to location of sandstone ledge).

610–17¼–New. Contractor not entitled to abandon work for noncompliance with state in letting contract, unless it results in interference with work. 240 **NY**348, 148**NE**546.

610–17⅕–New. A contract giving a board of county commissioners the right, on the contractor's default, to take over the completion of the contract and to take over the equipment and material on the project and use it in completing the contract is valid. 123 **Kan**24, 254**P**386 (extent and enforcement of lien).

610–17⅙–New. A contractor's delay has been held not justified by the county's failure to build culverts. 217**Ky**343, 289**SW**316.

610–17½–New. Written assignments of money due and to become due from the state highway commission under a contract to build a road are valid. 191**NC** 672, 132**SE**806.

610–17⅓–New. After contractor's default, or on filing of claims for material and labor, the county has the right to appropriate for completion of work and payment of claims the entire fund withheld on the contract if necessary. 136 **SC**15, 134**SE**209.

610–17¼–New. A contractor cannot disregard an arbitration clause and present a claim to the auditor and treasurer as an ordinary creditor. 288**Pa**571, 136**A** 853.

610–17$\frac{1}{10}$–New. A county treasurer's refusal to pay drafts for work done on a highway construction contract was held to justify rescission by the contractor, where the state was obligated to pay, but did not offer to make the drafts good. 243**NY**140, 153**NE**28.

610–17$\frac{1}{11}$–New. In order that the county's failure to pay the amount due shall justify the contractor to rescind or abandon the contract, the county's breach must go to the substance of the contract. 13**F(2d)**758.

610–17$\frac{1}{12}$–New. Fraud is not established by failure to itemize claims. 174 **Ark**377, 295**SW**363.

610–17$\frac{1}{13}$–New. Legality of claims is determined by the circuit court. 174**Ark** 377, 295**SW**363.

610–17$\frac{1}{14}$–New. Evidence sufficient to justify a court ruling as to the amount due. 174**Ark**377, 295**SW**363.

610–17$\frac{1}{15}$–New. Statute held to contemplate payment by county warrants. 205 **Iowa**104, 215**NW**611.

610–17$\frac{1}{16}$–New. Assignee of contractor occupies the same position as assignor and claims of assignee are no higher or greater than contractor's. 205 **Iowa** 1119, 215**NW**803.

610–17$\frac{1}{17}$–New. If a county received payment on certificates, the city would be entitled to reimbursement for the amount it paid on paving. 167**Gal**181, 145**SE**47.

610–17$\frac{1}{18}$–New. A highway contractor's assignment of moneys due and to become due under contract, not having been filed within ten days after execution and date, was void. 225**AppDiv** 159, 232**NYS**410.

610–17$\frac{1}{19}$–New. The capacity of borrow pits should be determined by measuring the area not affected by flood waters in determining the shrinkage caused by the flood's carrying earth into the borrow pits, and not by the area affected by the flood waters and partially filled with dirt. 206**Cal** 617, 275**P**412.

610–17$\frac{1}{20}$–New. Engineers receiving excess commissions are estopped to question the validity of a contract in an action to recover excess. 118**Tex**359, 16 **SW(2d)**513.

610–17$\frac{1}{21}$–New. Funds appropriated for a highway do not constitute a trust fund for the benefit of a contractor. 199**Wis** 13, 225**NW**170.

610–17$\frac{1}{22}$–New. A contractor accepting a reduced rate is not entitled to rescind and recover on quantum meruit after settlement. 150**SC**167, 147**SE**848.

610–17$\frac{1}{23}$–New. A highway contractor required to follow a state engineer's direction is entitled to damages sustained because of mistakes of the engineer. **IndA** 162**NE**55.

610–17$\frac{1}{24}$–New. Parish held not liable to contractor's assignee for amounts certified due contractor by parish engineer on unauthorized certificates. 12 **LaA**382, 125**S**514.

610–17$\frac{1}{25}$–New. A highway construction contractor by permitting another, who was constructing a road in a neighboring state, to haul stones over the road under construction at a certain price per ton, violated the express terms of his contract and could not recover on his

agreement with such other. **Mass** 162 **NE**161.

610–17½6–New. Contract provision requiring state engineer's written consent to subcontract can be waived. **MoA** 28 **SW(2d)**674.

610–17½7–New. Complaint in action for constructing county road which county laid out but refused to construct held sufficient. **Mont** 288**P**455 (allegation held equivalent to "worked and maintained").

610–17½8–New. In action for labor and material in constructing county road, nonpresentment of claim is matter of defense. **Mont** 288**P**455.

610–17½9–New. A contractor is held entitled to recover damages from a subcontractor for failure to deliver all the material called for. **Nev** 283**P**396 (measure of damages).

610–17½30–New. The county cannot defeat claims of those furnishing labor and material in the construction of a road by arbitrarily refusing to sell a sufficient number of bonds. **TexCivA** 20**SW(2d)**822.

610–17½31–New. Assignee of contractor may waive rights as against labor and material claimants to fund retained by county. **IndA** 172**NE**201.

610–18 73**CalA**262, 238**P**752; 131**Misc** 11, 225**NYS**665; 148**Wash**367, 268**P**898. [c] **Recovery** allowed over regular amount where contract had to be performed to engineer's satisfaction. 131 **Misc**11, 225**NYS**665. [d] **Changing grade from erroneous grade fixed by contract.**–Road contractor is not required to remove material exceeding amount provided by contract at his own cost in order to change grade of slope erroneously fixed by contract to one that would permit embankment to stand. 147**Wash**678, 267**P**436.

610–19 18**F(2d)**755; 133**Misc**131, 231 **NYS**345.

610–20 222**Ky**598, 1**SW(2d)**1066; 133 **Misc**131, 231**NYS**345.

610–23 30**Ariz**245, 246**P**543. [b] **Removal of material falling into roadway.**–147**Wash**678, 267**P**436.

610–25½–New. Where the employer wrongfully compels work substantially performed to be done over, contractor may recover extra compensation. 128 **Misc**227, 218**NYS**375.

610–26 128**Misc**227, 218**NYS**375.

611–27½–New. Approval of contractor's estimates does not estop the county to deny the contractor's right to additional payment where the contract provides that acceptance of work or part payment shall not operate as waiver of contract or reserved powers. 13**F(2d)**758.

611–27⅓–New. A highway contractor could not acquiesce in the direction of a state's engineer, and, after performing the work with seeming willingness, recover therefor as extra, on the ground that the engineer's directions were erroneous, protest being a condition precedent to recovery. 133**Misc**131, 231**NYS** 345.

611–27¼–New. Where a contractor after completing an excavation on a line staked out by an engineer was directed by the engineer to go back and excavate further into the rock ledge, the contractor had the election either to refuse to proceed and recover on quantum meruit for work already done, or to continue under protest and recover the value of the extra work on a quantum meruit. 133**Misc**131, 231**NYS**345.

611–28 [a] **Contractor is not responsible to subcontractor for delay** caused by delay of engineer in setting grade stakes. 148**Wash**214, 268**P**876.

611–30 [a] **Materialman's right to recover** cannot be defeated by cancellation without his knowledge of contract to furnish material between original contractor and person contracting to furnish material. 162**La**836, 111**S**182. [b] **Persons furnishing material** may resort to unexpended funds in possession of public authorities. 162**La**836, 111**S**182.

611–31½–New. Amount due to subcontractor from contractor is determined by his contract, not contractor's contract with county. 70**CalA**326, 233**P**74.

611–31⅓–New. A judgment allowing the subcontractor the difference between the agreed price of hauling and spreading the quantity of gravel which he could have hauled and spread before quitting work if material had been furnished as agreed and the cost of doing so is proper. 52**SD**559, 219**NW**244; 68 **Utah**486, 251**P**16.

611–31¼–New. Consent of a road improvement district subletting a portion of work does not render it liable to the subcontractor, on ordinary cessation of work, for profits latter might have made by performance of subcontract. 171**Ark** 585, 286**SW**878, 48**ALR**456.

611–31⅕–New. Materialman under contractor's bond has an equitable lien on retained moneys and is entitled to payment therefrom on the contractor's default. 103**WVa**676, 138**SE**324.

611–31⅙–New. Subcontractor must file a claim with the county auditor. 205 **Iowa**104, 215**NW**611.

611–31⅐–New. The liability of the principal contractor to a subcontractor generally determines the right of the subcontractor's laborer to recover from the fund due the principal contractor. 132 **Misc**95, 228**NYS**289.

611–31⅛–New. Where a subcontractor completed work on a highway pursuant to a contract providing for measurement by yardage by the engineer, he is entitled to recover on showing the amount of work done by force account on the engineer's failure to measure yardage. 152**Miss**32, 118**S**370.

611–31⅕–New. A subcontractor is bound to take notice of the contractor's superior rights under the principal contract incorporated in the subcontract by reference. 148**Wash**214, 268**P**876.

611–31⅒–New. A provision of a highway contract requiring changes in plans to be by written order signed by the engineer to entitle a contractor to extra compensation is not available to a subcontractor against a contractor. 39 **Wyo** 84, 270**P**167.

611–31⅑–New. A subcontractor who failed to perform the subcontract cannot recover on quantum meruit. 148 **Wash**214, 268**P**876.

611–31⅓–New. A highway subcontractor continuing work after changes in the route and accepting compensation for the work and delay cannot recover from the principal contractor for loss of anticipated profits resulting from the changes. 39**Wyo** 84, 270**P**167.

611–31⅓–New. A contractor cannot recover excess of the cost of completing work on a subcontractor's default without written notice required by the subcontract. 148**Wash**214, 268**P**876.

611–31¼–New. A subcontractor may recover on quantum meruit for work done outside of his contract although he did not complete the subcontract. 148 **Wash**214, 268**P**876.

611–31⅕–New. A road district or county may file a claim for materials, apparatus, etc., furnished a public highway contractor. 118**Tex**268, 12**SW(2d)**127.

611–31⅙–New. Under a law providing for the withholding of sufficient money to pay claims in case established by judgment, a contractor is not precluded from having a claim adjudicated if dissatisfied with the procrastination of claimant. 118**Tex**268, 12**SW(2d)**127.

611–31⅐–New. A contractor is not liable personally from the balance due him for an automobile sold a subcontractor to transport laborers. 168**La**450, 122**S** 287.

611–31⅛–New. Where a highway contractor informed a subcontractor that he had taken charge of the work himself, and was going to charge the cost thereto to the subcontractor, who acquiesced therein, it was held that this constituted a new agreement, binding on both parties. 179**Ark**118, 14**SW(2d)**257.

611–31⅑–New. A statute relating to the right of priority of payment for material furnished to a contractor for a public improvement must be strictly construed. 206 **Iowa**1251, 222**NW**31.

611–31⅒–New. "Material," within the meaning of such statute, is confined to such goods, wares, and merchandise as may be furnished for and intended to enter into and become directly or indirectly a part of the completed improvement. 206 **Iowa**1251, 222**NW**31.

611–31½1–New. Under some statutes one furnishing kerosene for lighting and oils and greases for lubricating tractors, trucks, vehicles, and other machines used in constructing a road improvement is not entitled to allowance of claim from a fund consisting of ten per cent of the contract price retained. 206 **Iowa**1251, 222**NW**31.

611–31½2–New. Contractor not liable for dynamite, powder, fuses, and caps purchased and used by subcontractor in blasting rock. 27 **OhNPNS**158.

611–31½3–New. Where a subcontractor is the agent of the contractor, and not recognized by the state, the contractor is liable for materials furnished the subcontractor, even in absence of the statutory notice to the contractor. 154**Wash** 120, 281**P**14.

611–32 163**La**332, 111**S**776; 114 **Oh** 323, 151**NE**177, 45**ALR**371; **NJ** 147**A**639 (1stcase); **Wis** 233**NW**88.

611–33 326 **Ill** 418, 158**NE**151; **IndA** 169**NE**74; **LaA** 129**S**406; 26 **OhNPNS**1. See also 205 **Iowa**1119, 215**NW**803. [b] (2) What constitutes acceptance necessary to commence running of statute. **LaA** 129**S**406. (3) Other statutes. **LaA** 129**S**406. [c] (3) "Notice in writing," in law relating to liens, is notice showing charges arose in furnishing material, apparatus, fixtures, machinery, or labor. 118**Tex**268, 12**SW(2d)** 127. [f] 187**Wis**227, 201**NW**986. [g] 187**Wis**227, 201**NW**986. [h] **Claims not within statute.**–187**Wis**227, 201**NW**986. [i] **Discharge.**–126**Misc**873, 215**NYS**173. [j] **Lien lost** where foreclosure proceedings were not instituted within four months. 152**Wash**672, 278**P**694. [k] **Materials not within statute.**–**LaA** 129 **S**406. [l] **Statements sufficient to create lien.**–**LaA** 129**S**406. [m] **Scope of statute.**–**Wis** 233**NW**88. [n] **Choice of remedies under statute** of one furnishing materials. **IndA** 172**NE**569.

611–34½–New. The creditors of a contractor not within surety's bond were held entitled to a pro rata share of the fund retained by the state highway commission until the road was accepted. 84 **IndA**129, 150**NE**390.

611–35 **IndA** 169**NE**74; 12**LaA**382, 125 **S**514. See also 103**WVa**676, 138**SE**324. [a] **Person, lending money to contractor and taking assignment** which makes express reference to the contract, is chargeable with notice of its contents, and with knowledge of the requirement of a contractor's bond and of the rights of the sureties on the bond. 73**Mont** 502, 237**P**205.

611–35½–New. Duty of board of supervisors of county and state engineer contracting with board of directors of state institutions for construction of highway under statute providing state tax road fund apportionable to counties to see that work is done within estimate and according to plans and specifications. 30**Ariz**14, 243**P**611.

611–35⅓–New. An assignee of moneys due on a state public improvement contract is on parity with lienors in respect to remedies. 243**NY**140, 153**NE**28.

611–35¼–New. The enforceability of liens on funds due from the state to a contractor was held not affected because they exceed in aggregate moneys in state treasury appropriated to the contract. 243**NY**140, 153**NE**28.

611–35⅕–New. When a contract was not reduced to writing, nor bond executed, claimant was held entitled to a lien for labor. 161**La**70, 108**S**128.

611–36½–New. A provision against assignment without consent is binding and renders an assignment in violation thereof void. 26 **OhNPNS**1.

611–37 121**Kan**299, 246**P**503; 161**La**70, 108**S**128; 32**NM**68, 251**P**380, 49**ALR**525; 24 **OhA**237, 157**NE**418; 292**Pa**304, 141**A** 27; 35**Wyo** 15, 246**P**30, 34 [citCJ], 46 **ALR**496 (upholding power of legislature to require bond of tenor reasonably designed to protect public). [a] (2) Statute, requiring bond, is not unconstitutional because it imposes liability upon sureties for materials which do

not become part of permanent structure. 35Wyo 15, 246P30, 46ALR496. [b] 53 SD646, 222NW269. [c] **Premiums on bonds.**–175Minn14, 220NW543. [d] **Forfeiture of certified check deposited with bid** is authorized on failure of bidder to furnish required bond. 127Kan492, 274P253. [e] **Bond is in nature of insurance contract.**–118Nebr544, 225NW 673. [f] **Bond becomes part of contract.** –23F(2d)378. [g] **Purpose of statute,** requiring bond conditioned to pay claims for labor and materials, was to secure prompt payment of such claims and not to permit fraud or unfair dealing to prejudice of surety. 94Fla274, 114S 367. [h] **Statute held not applicable** to case involving materialman's right to sue on county highway contractor's bond. 292Pa304, 141A27. [i] **Rights of surety on bond** rest only in principle of subrogation, and surety is not beneficiary of statute with right to complain of injury from acts of obligee of bond. 147Wash277, 266P142. [j] **Approval of bond.**–127Kan492, 274P253.

611–38 12LaA382, 125S514 (construction therewith). [a] 24 OhA237, 157NE 418.

611–39 92Fla662, 109S644; 94Fla274, 114S367; 220MoA401, 286SW736; 24 OhA237, 157NE418. [a] (3) Bond naming state highway board instead of state highway commission as obligee. MoA 14SW(2d)677. [b] (2) Contractor must give bond equal to half estimated cost of work or at least half of contract price. 117 Oh512, 159NE559.

611–40 Ala 127S805; 92Fla662, 109S 644; Mo 32SW(2d)572; 193NC751, 138 SE121; NC 155SE731; TexCivA 276 SW203; 35Wyo 15, 246P30, 34 [citCJ], 46ALR496. [b] **Statute requiring bond conditioned on faithful performance of work** broad enough to cover condition for payment of labor and material. 142 Va435, 129SE263, 130SE235.

611–40½–New. Under such statutes, state highway commissions may require a contractor to furnish a bond indemnifying the state, 32NM68, 251P380, 49 ALR525.

611–40¾–New. and also containing provisions protecting materialmen and laborers. 32NM68, 251P380, 49ALR525.

611–40¼–New. A contract is not invalid because no bond is required where the statute does not apply. TexCivA 4SW (2d)283 (where fund not furnished by county).

611–41 See also 142Va435, 444, 129SE 263, 130SE235 [quotCJ entire section].

611–42 217Ala35, 114S415, 417 [citCJ]; 82 IndA377, 149NE377; 142Va435, 444, 129SE263, 130SE235 [quotCJ entire section]; 145Va138, 133SE793; 193Wis 218, 214NW613.

611–43 82 IndA377, 149NE377; 121Kan 299, 246P503.

611–45 [b] 17F(2d)63.

611–46 82 IndA377, 149NE377.

611–47½–New. Surety on bond has claim prior to assignee of contractor with notice to extent of payments due beneficiaries of bond, such as laborers and materialmen, and may have such amount set aside as trust fund by highway commission. 73Mont502, 237P205; 103WVa676, 138SE324.

611–47⅓–New. A road contractor's bond to pay for labor and materials is not void for duress because executed pursuant to a stipulation in the contract that the bond be given in compliance with an unconstitutional statute where the execution of the bond is required by a valid statute. TexCivA 276SW203.

611–47¼–New. A statutory bond treated by the parties as in force, after substitution of the contract by another, is sufficient without necessity of reëxecution. 15F(2d)918.

611–47⅕–New. After substantial performance by both parties, validity of a bond cannot be raised. 15F(2d)918.

611–47⅙–New. A provision in an act that it should not apply to pending suits on contractor's bonds has no application to a suit brought after the act went into effect on a cause of action accruing theretofore. 191NC703, 133SE 21.

611–47⅐–New. Surety performing his statutory contract at expense exceeding balance on hand and due is subrogated ipso facto to right of principal contractor to balance in preference to subcontractors holding claims not contemplated by statute. 205 Iowa1119, 215 NW803.

611–47⅛–New. The court must look to the statute for the meaning of a bond. Del 145A172.

611–47⅙–New. A contractor is not personally liable for an automobile sold a subcontractor because of his failure to exact a bond. 168La450, 122S287.

611–47 1/10–New. A contractor is not personally liable on a bond for the price of an automobile sold a subcontractor used to transport laborers. 168La450, 122S 287.

611–47 1/11–New. A statute requiring a public works contractor to give bond for the payment of persons supplying "him" with labor and material does not apply to a contract to supervise road construction work done directly by the county, which itself pays for labor and material. TexCommnA 11SW(2d)305.

611–47 1/12–New. In determining interest against surety, law of state where bond was executed and work was to be performed controls. Ala 127S204.

611–47 1/13–New. Obligations affecting cashier's check deposited in lieu of statutory bond are determined by statute. Ida 287P689.

611–47 1/14–New. A surety who has its attorney prepare the contract and approves it by furnishing a bond cannot claim that the principal had agreed to make a higher bid and that the contract was incorrectly prepared. 226AppDiv 450, 236NYS14.

611–47 1/15–New. Premiums, on construction bonds canceled by appointment of a receiver for a bonding company before sale of improvement bonds cannot be recovered for construction periods. IndA 168NE242.

611–47 1/16–New. A bond securing payment of claims for materials and labor should be most strongly construed in favor of indemnity. SD 228NW385(2d case).

611–47 1/17–New. Bond must be construed liberally. 234Ky764, 29SW(2d) 29.

611–47 1/18–New. Court having jurisdiction ratione personæ of highway contractors temporarily within state has jurisdiction ratione personæ of surety on bond. LaA 130S254.

612–48 35F(2d)265 (evidence of settlement between contractor and commonwealth necessary for recovery on bond); 163La332, 111S776; 79Mont111, 255P 722; 101NJL511, 130A564. [b] **In New Mexico.**–23F(2d)464.

612–49 11F(2d)910; 17F(2d)87 (New Mexico bond); 217Ala35, 114S415, 417 [citCJ]; 181Ark14, 24SW(2d)870; Del 145A172; 121Kan299, 246P503; 163La 332, 111S776; 145Miss599, 111S94; 220 MoA244, 284SW150; 73Mont502, 237P 205 (subcontractor furnishing labor and material protected by bond); 79Mont111, 255P722; 32NM68, 251P380, 49ALR525; 191NC313, 131SE754; 191NC672, 132 SE806; 198NC177, 151SE93; ND 215 NW682 [foll 55ND811, 215NW468]; 117 Oh28, 158NE1; 292Pa304, 141A27; 297 Pa514, 147A611; Pa 151A687; 142Va 435, 129SE263, 130SE235 (under code); 145Va138, 133SE793; 154Wash181, 281 P488 (claim of excessive amount due from contractor did not preclude recovery on bond). But see 17F(2d)242. [j] **Not within protection of bond.**–168 Ark400, 271SW24. [k] **Time to sue.**– 284Pa64, 130A261. [l] **Right of action is statutory** in some jurisdictions and definite procedure provided by statute must be observed in essential respects. 143Miss512, 108S501. [m] **Only one action may be brought** and any person entitled to sue may intervene to be made party upon application. 143Miss512, 108 S501. [n] **Notice of pendency of suit must be made by publication** in newspaper of general circulation published in county or town where contract being performed. 143Miss512, 108S501; 145 Miss599, 111S94. [o] **Purpose of statute.**–120 Or633, 253P520. [p] **Object of bond.**–145Va138, 133SE793. [q] **On default of contractor** making surety company liable on bond, it remained liable to subcontractors, materialmen, and laborers thereon, notwithstanding new contract with state of which bond was made part. IndA 162NE31. [r] **Actions within four months after filing of claims after completion of work** held in time though claims were previously filed. 148Wash214, 268P876. [s] **Notice to contractor by persons furnishing materials to subcontractor** held not required under statute under circumstances of particular case. 148Wash214, 268P876. [t] **Complaint not alleging filing of claim** with highway commissioners is fatal to action. Ind 168NE865. [u] **Failure to file verified duplicate statement** of claims by laborers and materialmen is fatal to maintenance of action against surety. IndA 169NE74. [v] **Burden of proof** as to waiver by contractor of materialman's notice is on materialman. 154 Wash181, 281P488. [w] **Notice of furnishing provision** must be given to contractor as required by statute; otherwise there can be no recovery on bond. 154Wash181, 281P488. [x] **Attorney's fees.**–154Wash181, 281P488.

612–49½–New. although bond is viewed as a common-law bond, 219MoA568, 282 SW164.

612–49⅓–New. subject to a prior right of the state or political subdivision in the same state, 117 Oh28, 158NE1 (Gen. Code §§ 2365—1, 2365—3 [107 Oh. L. p 642]).

612–50 121Kan299, 246P503; 198NC 177, 151SE93 (contract and bond must be construed together to determine materialman's right to sue) Contra 79 Mont111, 255P722. [b] **Bonds construed not to protect laborers or materialmen.**–234Ky764, 29SW(2d)29.

612–51 11F(2d)910; 121Kan299, 246P 503; 118Nebr544, 225NW673.

612–52 153Md308, 138A231. [a] (2) Statute was held not to authorize suit on bond given county by one contracting therewith. 292Pa304, 141A27. (3) Action on county highway contractor's bond to use of materialmen held not maintainable. 34F(2d)168. [b] **State highway board after ceasing to exist** has no capacity to sue. MoA 290SW 652.

612–53 169La914, 126S422 (effect of delay in filing sworn statement of amount due); 118Nebr544, 225NW673; 34 OhA 169, 170NE377; 147Wash277, 266P142. But see 148Wash214, 268P876.

612–54 163La332, 111S776; 165La83, 115S376; 125 Or13, 265P775; 125 Or 194, 265P782.

612–55½–New. In some jurisdictions, under statutes, a subcontractor cannot assign his account or demand against principal contractor so as to give assignee the right to sue on bond. 220 MoA401, 286SW736.

612–56 TexCivA 24SW(2d)99.

612–56½–New. Statute relative to venue of actions on contractor's bonds to counties and municipal corporations is not applicable to action on bond to state highway commission. 190NC680, 130 SE547.

612–56⅓–New. Statute, providing that actions on contractor's bonds given to state highway commission must be brought in county in which work was done, does not apply to action commenced prior to its ratification. 190NC 680, 130SE547.

612–56¼–New. Privity of contract or intended right of action must appear on the face of the bond to enable a materialman to sue the surety for breach thereof. IndA 156NE169.

612–56⅕–New. A surety sued at law by the state road commission on the bond of a state road contractor cannot plead as equitable set-off that the commission should hold a subsequent contractor liable for the first contractor's material taken over by him. 103WVa 432, 137SE878.

612–56⅙–New. Statutes requiring claims to be filed in fixed time and prescribed form are not applicable to claimants furnishing labor and material,

whose rights are contractual. 205 **Iowa** 1119, 215**NW**803.

612-56½-New. Subcontractor's remedy is on contractor's bond. **TexCivA** 5**SW** (**2d**)570.

612-56⅛-New. A petition by a state highway board in a suit on a bond for the benefit of materialmen alleging execution of the bond and breach of covenant and setting forth the damages suffered states a cause of action. 318 **Mo** 387, 1**SW**(**2d**)787.

612-56½-New. Where bond merely secures performance of contract, action by stranger cannot be maintained. 234 **Ky**764, 29**SW**(**2d**)29.

612-56½₀-New. Bond accepted by county for purpose other than authorized will not protect materialmen when different work is undertaken, in absence of estoppel. **Pa** 151A687.

612-57 13**F**(**2d**)758; 23**F**(**2d**)464; 35**F** (**2d**)265; 217**Ala**35, 114**S**415, 417 [cit CJ]; **Ala** 130**S**776; 217**Ky**343, 289**SW** 316; 234**Ky**764, 29**SW**(**2d**)29 (liability not dependent on absence of power to enforce lien on public property); 162 **La**562, 110**S**756; 165**La**94, 115**S**380; 167**La**301, 119**S**56; 221**MoA**67, 294**SW** 123; **MoA** 9**SW**(**2d**)92; 192**NC**391, 135 **SE**125; 193**NC**751, 138**SE**121; 297**Pa** 514, 147**A**611; **TexCivA** 300**SW**148; 35 **Wyo** 15, 246**P**30, 34 [citCJ], 46**ALR**496. [c] **Agent or servant doing work.**–189 **NC**748, 128**SE**337. [d] **Rights of materialman** are predicated upon conditions of bond read with contract, including specifications, etc. 145**Va**126, 133**SE**797. [e] **Subcontractor** may recover on contractor's bond. 92**Fla**662, 109**S**644. [f] **Voluntary payment, by state,** of claims under bond does not release surety. 23**F**(**2d**)464. [g] **Bond has been construed as contract of insurance on certain conditions. MoA** 9 **SW**(**2d**)92. [h] **Sureties held not released** by agreement of contractor to finance subcontractors. **IndA** 169**NE** 878. [i] **Surety completing work** is not entitled to money due contractor, if fund is insufficient to pay workmen and materialmen. 169**La**914, 126**S**422.

612-58 8**F**(**2d**)144; 23**F**(**2d**)378; 35**F** (**2d**)265; 82 **IndA**377, 149**NE**377; **IndA** 156**NE**169; 161**La**70, 108**S**128; 165**La** 83, 115**S**376; 165**La**94, 115**S**380; 10**LaA** 224, 120**S**654; 79**Mont**111, 255**P**722; 101**NJL**511, 130**A**564; 32**NM**68, 251**P** 380, 49**ALR**525; 195**NC**840, 143**SE**847; 297**Pa**514, 147**A**611 (principal contract); 299**Pa**143, 149**A**170; **TexCivA** 24**SW** (**2d**)99; 152**Wash**672, 278**P**694. [a] **Duty of surety taking over principal's contract** to pave road cannot be extended further than to complete work according to plans and pay lawful claims. 12**LaA**382, 125**S**514.

612-59½-New. Subletting of contract, without highway commission's written consent as required by contract, is not alteration discharging surety. 221**MoA** 67, 294**SW**123.

612-60 See also 167**La**301, 119**S**56. [a] **Surety held entitled to have amount contractor received** for empty sacks deducted from materialman's claim for cement consumed. 23**F**(**2d**)378.

612-63½-New. Where a bond was executed prior to enactment of a statute requiring presentation of claims, it was held inapplicable. 192**NC**391, 135**SE** 125.

612-63⅓-New. A contractor may recover from the subcontractor's surety interest on the amount used in completing the contract over the amounts the contractor received in current payments. 21**F**(**2d**)1002.

612-63¼-New. A surety may be discharged by practices between the creditor and the contractor resulting in fraud or unfair dealing toward the surety. 94**Fla**274, 114**S**367.

612-63½-New. Generally the surety is not liable to laborers and materialmen. 292**Pa**304, 141A27.

612-63⅙-New. A subcontractor was bound to establish his claim that there was a balance due him. 10**LaA**224, 120 **S**654.

612-63½-New. The surety was not bound by the books of the contractor admitting an indebtedness. 10**LaA**224, 120**S**654.

612-63⅛-New. A materialman's notice to the surety has been held sufficiently to specify the nature of his claim where it stated that it was for deliveries made to the project. 176**Minn**113, 222 **NW**573.

612-63⅛-New. Any deficiency in such notice is waived by the surety's retaining and acting on it without suggesting any defect. 176**Minn**113, 222**NW** 573.

612-63½₀-New. Sureties paying accounts for labor and material and promising to pay balance held estopped from contesting items sued on. **Ida** 287**P** 689.

612-63½₁-New. Under statutes sureties are liable for costs of suit and attorney's fees beyond the penalty fixed in the bond both in the lower court and on appeal. 131 **Or**275, 283**P**6.

612-63½₂-New. The assignee of labor claims, who elected to accept money retained by the highway commission under contract, cannot claim attorney's fees under the statutes. 131 **Or**275, 283 **P**6.

612-63½₃-New. Surety's promise to pay contractor's indebtedness to third person for money loaned held without consideration and unenforcible. **Ark** 32**SW** (**2d**)172.

612-63½₄-New. Highway contract and bond should be construed most strongly against surety. **Ark** 32**SW**(**2d**)172.

612-64 IndA 165**NE**444(2dcase); 205 **Iowa**1119, 215**NW**803 (obligation measured by statute); 163**La**332, 111**S**776; 165**La**565, 115**S**752; 7**LaA**215; **Mo** 32 **SW**(**2d**)572; 118**Tex**359, 16**SW**(**2d**)513; **TexCivA** 300**SW**148; 142**Va**435, 129**SE** 263, 130**SE**235 (bonds construed in connection with specific contracts); 145**Va** 138, 133**SE**793; 145**Va**126, 133**SE**797; 103**WVa**676, 138**SE**324. [c] **Strict construction.**–165**La**565, 115**S**752; 101**NJL** 511, 130**A**564; 292**Pa**304, 141A27. [d] **Provision for time of termination** has been held not prescriptive period in which to sue, but limit on period of suretyship. 162**La**562, 110**S**756. [e] **Matters covered by statute.**–165**La**83, 115**S**376. [f] **Liability on bond** for material and labor furnished is based on necessity of material and labor furnished. 193**NC**86, 136**SE**250. [g] **"Claims incurred in carrying out provisions of contract."–SD** 224**NW**925. [h] **Material used or consumed, and labor performed, in construction work** do not include time and material expended in keeping implements and machinery in repair. **MoA** 21**SW**(**2d**)494. [i] **Intention of parties governs.–SD** 228 **NW**385(2dcase).

612-64½-New. Under some statutes, at least, questions as to the labor and materials which are covered by the bond are not governed by whether such labor and materials would be lienable under mechanics' lien statutes. 35**Wyo** 15, 246**P**30, 46**ALR**496.

612-64⅓-New. Because of difference in object of mechanic's lien statutes and such surety bond, cases involving mechanics' liens do not afford an unfailing criterion. 145**Va**138, 133**SE**793.

612-65 217**Ala**35, 114**S**415, 417 [cit CJ]; 168**Ark**728, 271**SW**325; 178**Ark** 451, 13**SW**(**2d**)6; **Del** 145**A**172; 92**Fla** 662, 109**S**644; **Ida** 287**P**689; 165**La**83, 115**S**376; 169**La**914, 126**S**422; **MoA** 32 **SW**(**2d**)292; 32**NM**68, 251**P**380, 49**ALR** 525; 196**NC**494, 146**SE**135(2dcase); 117 **Okl** 252, 246**P**369; 52**SD**559, 219**NW** 244; **TexCivA** 276**SW**203 (bond construed as obligating makers to pay for all materials as well as labor necessary to complete work); 142**Va**435, 129 **SE**263, 130**SE**235 (proper though not required by statute); 35**Wyo** 15, 246**P** 30, 46**ALR**496. [a] (1) 217**Ala**35, 114 **S**415; 179**Ark**954, 18**SW**(**2d**)916; 55 **ND**154, 212**NW**836. (3) 35**Wyo** 15, 246 **P**30, 46**ALR**496. (4) 99**Fla**656, 127**S** 307; 191**NC**54, 131**SE**306; 145**Va**126, 133**SE**797, 799 [citCJ]. (5) 18**F**(**2d**) 582; 191**NC**54, 131**SE**306; **TexCivA** 276 **SW**203; 145**Va**126, 133**SE**797, 799 [cit CJ]; 35**Wyo** 15, 246**P**30, 46**ALR**496. (6) **Ida** 287**P**689. (9) 117 **Okl** 252, 246**P**369; 129 **Okl** 98, 263**P**666. (13) Crushed rock. 189**NC**714, 128**SE**334. (14) Lumber and supplies, though not put directly into highway, where used in performance of work. 189**NC**748, 128**SE** 337. (15) Necessary explosives used in performance of contract. 35**Wyo** 15, 246 **P**30, 46**ALR**496. (16) Repairs to trucks used in transporting material. 117 **Okl** 252, 246**P**369. (17) Coal oil necessarily used in contractor's camp for lighting, or other purpose aiding performance of the contract. 35**Wyo** 15, 246**P**30, 46 **ALR**496. (18) Haulage of materials used in and aiding performance of contract. 35**Wyo** 15, 246**P**30, 46**ALR**496. (19) Materials only consumable in work. 146**Miss**775, 112**S**164. (20) Labor performed with use of horses, derricks, tractors, and other mechanical equipment. 92**Fla**662, 109**S**644. (21) Salary of foreman. 165**La**83, 115**S**376. (22) Dishonored checks given by subcontractor for labor and groceries. 54**SD**164, 222**NW**657. (23) Charges for towing materials used in work. 152**Wash**672, 278**P**694. (24) Repairs to trucks used in transporting material. 106**WVa**109, 144**SE**887. (25) Towage company's charges for towing gravel. 154**Wash** 120, 281**P**14. (26) Payments for rental or use of equipment. **SD** 228**NW**385(2d case). (27) Repairs to plant and equipment. **SD** 228**NW**385(2dcase). (28) Repairs to tractor. **SD** 228**NW**385(2d case). [b] (1) 153**Md**308, 138**A**231. (4) 133**Miss**388, 103**S**224. (9) 219**MoA** 584, 282**SW**168. (12) Feed for horses and mules used by contractor. 219**MoA** 568, 282**SW**164. (13) Overshoes furnished to men engaged in work. 35 **Wyo** 15, 246**P**30, 46**ALR**496. (14) Coal furnished and used in running steam shovel to load shale on trucks. 172**Ark** 924, 290**SW**960. (15) Materials and equipment of contract necessary to perform work. 146**Miss**775, 112**S**164. (16) Provisions and commissary supplies furnished to contractor who maintained boarding camps. 170**Minn**298, 212**NW** 460. (17) Use of tractor engine in pulling grader in construction of road. 220**MoA**244, 284**SW**150. (18) Other claims held not to include labor or materials within bond. **IndA** 162**NE**31. (19) Traveling expenses of contractor's foreman. 165**La**83, 115**S**376. (20) Groceries furnished contractor for personal use or sale to workmen and others. 165**La**83, 115**S**376. (21) Material to be used merely for construction and repair of equipment. 55**ND**811, 215**NW**468. (22) Material furnished to caterer for meals for contractor's employees. 129 **Or**58, 276**P**260. (23) Money advanced by foreman to petty cash account of contractor, used in making repairs to machinery, purchasing materials, and paying freight thereon, claims for which were not assigned to foreman. 196**NC** 494, 146**SE**135(2dcase). (24) Gasoline, ray-o-lite, and oil used in operating shovels and explosives used in excavation. 299**Pa**143, 149**A**170. (25) Price of trucks sold contractor. **WVa** 152**SE** 860. (26) Purchase price of substantial items of plant and equipment. **SD** 228**NW**385(2dcase). (27) Other items. **MoA** 24**SW**(**2d**)1047; 196**NC**494, 146**SE** 135(2dcase). [c] **"Labor"** (1) includes electric power to run stone crusher and cable cars. 189**NC**714, 128**SE**334. (2) It includes work of man and team. **MoA** 300**SW**833. [d] **Whether bond is statutory or common-law bond is immaterial** on question whether bond conditioned for payment of claims for materials furnished or labor performed covers feed for horses and mules used by subcontractors. 219**MoA**568, 282**SW**164. [e] **"Performing labor" includes** renting of steam shovel and boiler. 193**NC** 751, 138**SE**121. [f] **"Materials, equipment, teams and labor"** include: (1) Dynamite. 145**Va**133, 133**SE**799. (2) Hardware necessarily and usually incident to road construction work. 145 **Va**133, 133**SE**799. [g] **"Labor, services or material" include:** (1) Hire of horses and machinery furnished to road builder. 55**ND**535, 215**NW**209. (2) Labor claims for work done. 55**ND**535, 215

NW209. [h] **"Labor, services or material" do not include:** (1) Gasoline for generating power in machinery furnished road builder. 55ND535, 215NW 209. (2) Oil for lubricating such machinery. 55ND535, 215NW209. [i] **As dependent upon whether items are lienable.**–129 Okl 98, 263P666. [j] **Fixed sum in addition to yardage provided by contract** constitutes part of contract price for which surety on bond is liable. 152Miss32, 118S370.

612-66 217Ala35, 114S415, 417 [cit CJ]; 220Ala292, 124S876; TexCivA 300SW148. [a] (2) 163La332, 111S 776. But see 169La914, 126S422. (4) 54SD164, 222NW657. (7) Hay and stock feed consumed by live stock. 5 F(2d)670. (8) "Supplies" held to include expense of repairs and veterinary treatment. 163La332, 111S776. (9) Materials and supplies to establish boarding camp for workmen's living quarters. 53SD170, 220NW461. (10) Groceries, cooking materials, soap, and cleansing compounds. 53SD170, 220 NW461 ("necessaries"). (11) Gasoline and lubricating outfit supplied to subcontractor. Ala 127S805. (12) Parts, tires, and grease for trucks. LaA 130 S254. [c] **Materials and supplies do not exclude.**–168Ark728, 271SW325. [d] **Materials and supplies do not include** snuff, pipes, candy, tobacco, cash, cigarettes, cider, ice cream, shoe polish, chocolate, cigars, marshmallows, and stationery. 53SD170, 220NW461 (not "necessaries").

612-67 [a] (1) 23F(2d)464; 193NC86, 136SE250. (2) 23F(2d)464; 146Miss 775, 112S164. (3) 217Ala35, 114S415; 146Miss775, 112S164. (5) Clothes, notions, and cash furnished laborers. 146Miss775, 112S164. (6) Furniture and effects of commissary's equipment. Miss 122S164. (7) Groceries and provisions have been held to be "materials furnished." 193NC86, 136 SE250. (8) Gas and oil. 193NC86, 136 SE250. (9) Candies, tobacco, and soft drinks have been held not "necessaries" covered by bond. 193NC86, 136SE250. [b] **"Supplies"** include: (1) Labor and materials used in repairing trucks hauling gravel for road at state price per yard. 118Nebr544, 225NW673. (2) Groceries furnished workmen on orders of contractor. 118Nebr544, 225NW673. (3) Gasoline and oil furnished drivers of own trucks on coupons furnished by contractor. 118Nebr544, 225NW673. [c] **Provisions or supplies** do not include claim for shoeing horses of subcontractor under state highway contract. 148Wash214, 268P876.

613-68 120 Or633, 253P520; 297Pa 514, 147A611 (reasonably necessary to complete work). [a] **"Material" includes** feed furnished subcontractor for teams used. 140 Okl 290, 284P34.

613-69 [b] **Attorney's fees** are recoverable in straight law action, under statute, on highway contractor's bond. 152Wash672, 279P1107(2dcase).

613-69½-New. Where labor or material is necessary, or even proper, for execution of particular work, and furnishing thereof may be fairly held within contemplation of parties, when executing contract and bond, and same is of nature to be necessarily wholly consumed in the particular work, then it is covered by the bond. 35Wyo 15, 246 P30, 46ALR496.

613-70 32Ariz399, 259P404; 168Ark 728, 271SW325; IndA 162NE64; 178 Minn283, 226NW940, 67ALR1227; 145 Miss378, 110S780; 79Mont111, 255P 722; 24 OhA237, 157NE418. [a] **"Materials furnished" include** claim for groceries consumed by workmen on job. 32Ariz399, 259P404.

613-71 28F(2d)489; 168Ark728, 271 SW325; 165La565, 115S752; 167La301, 119S56; 169La914, 126S422; 146Miss 775, 112S164; 24 OhA237, 157NE418; 27 OhNPNS158 (does not include dynamite, powder, fuses, or caps). But see 142 Okl 103, 285P949. [c] **Whether hay and stock feed** consumed by live stock employed on road contract are "materials" covered by bond depends on law of state. 5F(2d)670. [d] **In Iowa.**–201 Iowa614, 206NW37. [e] **Purchase price of machinery** held not included in bond. 146Miss775, 112S 164. [f] **Contractor's plant and camp equipment** are not included. 145Miss 378, 110S780. [g] **Though equipment is entirely worn out** during performance of contract, it is not covered by bond. 145Miss378, 110S780. [h] **In Louisiana.**–167La301, 119S56.

613-73 32Ariz399, 259P404; 169La 914, 126S422; 145Miss378, 110S780; 79Mont111, 255P722. See also Ida 287 P689. [a] **Permanent repairs to trucks** owned by drivers are not proper charges against surety. 118Nebr544, 225NW 673. [b] **Purchase price of new trucks** bought by drivers and guaranteed by contractor is not proper charge against surety. 118Nebr544, 225NW673.

613-73½-New. "Instrumentalities" or "tools" do not include electric power to run stone crusher and cable cars. 189 NC714, 128SE334.

613-73⅓-New. But "instrumentalities" include rock crusher and cable cars. 189NC714, 128SE334.

613-74 217Ala35, 114S415, 417 [cit CJ]; Ida 287P689 (labor and material not actually entering into permanent structure); 191NC313, 131SE754; 191 NC703, 133SE21; 117 Okl 252, 246P 369; TexCivA 276SW203; 35Wyo 15, 246P30, 46ALR496. [a] **Groceries supplied for laborers** are not within bond when not shown to be within rule of necessity. TexCivA 276SW203. [b] **In Missouri.**–219MoA568, 282SW164. [c] **"Furnishing materials" includes** renting of steam shovel and boiler. 193NC751, 138SE121. [d] **Tools and equipment.–SD** 224NW925. [e] **Assignment of accounts.**–33F(2d)494. [f] **Gasoline** furnished to foremen and employees of contractor for machinery used in road construction is covered by bond. IndA 171NE217.

613-74½-New. Under some statutes, sureties on a contractor's bond are liable for all material furnished to the contractor or a subcontractor which are used in, or consumed in the course of the construction of, the project. 117 Okl 53, 244P760. [a] **Material used in equipment.**–117 Okl 53, 244P760.

613-74⅓-New. There is no liability on the bond for items not shown to have been consumed in the course of the work. 117 Okl 252, 246P369.

613-74¼-New. A claim for materials furnished and removed after work is allowable against surety on contractor's bond only to the extent of materials actually consumed. 32Ariz399, 259P 404.

613-74½-New. The right of a grocery company to recover on a contractor's bond for supplies furnished is not affected by the failure of one of its officers to comply with a bid made at the sale under the foreclosure of a mortgage given to secure payment of the account. 33F(2d)494.

613-75 Ala 127S805; 204Cal 59, 266P 545; 92Fla662, 109S644; 165La83, 115 S376; 165La94, 115S380; 166Minn7, 206NW934 (surety is liable for "shoulder work" on sides of roadway); 145 Miss599, 111S94; NC 155SE731; 52SD 559, 219NW244. [a] **Effect of retirement of members of contracting firm.**–Bond covers labor and material furnished to contracting firm after retirement of all members but one. 145Miss 599, 111S94. [b] **Supplies** furnished foreman's wife operating cook shack on order of contractor are proper charges against surety, on contractor's bond. 118Nebr544, 225NW673. [c] **Taking additional security** in form of mortgage notes from subcontractor does not preclude one furnishing supplies to subcontractor from recovering on contractor's bond. 33F(2d)494.

613-76 79Mont111, 255P722.

613-78 [a] **Inferior workmanship.**–292 Pa304, 141A27. [b] **Negligence of third party to whom surety let contract** after taking over contract. Wash 291P1092.

613-79 31F(2d)65; Ark 32SW(2d)172 (surety held not liable under assignment of contract); 176Minn258, 223 NW298(2dcase); 142Miss490, 107S877; 196NC494, 146SE135(2dcase); 125 Or 13, 265P775; 125 Or194, 265P782; 147 Wash277, 266P142. [a] **Transactions held not loans or advancements.**–147 Wash277, 266P142.

613-79½-New. Bond secures furnishers of material and labor to same extent as if improvement was private one. WVa 152SE860.

613-79⅓-New. The assignment of a construction contract does not destroy the liability on the bond for materials furnished in course of the work. 117 Okl 252, 246P369.

613-79¼-New. It is not a condition of a contractor's bond that the contractor shall pay the full premium found to be due to the workmen's compensation fund where the agreement with the highway commission merely provides that the contractor will comply with the Workmen's Compensation Law and there is such compliance as fully protects his employees. 54ND211, 209 NW388.

613-79⅕-New. Labor furnished by a state prison to a contractor for construction of a road has been held within the road contractor's bond. 192NC 391, 135SE125.

613-79⅙-New. Under some statutes the contractor's sureties are not liable for labor and materials furnished to the contractor but not used in the prosecution of the work. 120 Or633, 253P520.

613-79⅐-New. The surety is liable for machinery furnished a contractor on a conditional sales contract and repossessed by the seller in a depreciated condition. 193Wis218, 214NW613.

613-79⅛-New. Where a conditional seller of machinery to a highway contractor repossessed and resold it, and credited the resale price, contractor's surety could not complain when sued for less than the contract price. 193 Wis218, 214NW613.

613-79⅑-New. Materialman suing contractor and surety held entitled to attorney's fees of ten per cent. LaA 130 S254.

613-80 200 Ind376, 163NE609; 9LaA 284, 120S114; 117 Oh28, 158NE1; Tex CivA 290SW196. [g] **Limitations.**–Tex CivA 275SW436. [h] **Actions against surety.**–117 Oh28, 158NE1. [i] **In North Carolina.**–193NC86, 136SE250. [j] **Remedy for breach of covenants in bond** is action on bond for penalty, not for wages or price of materials. 292 Pa304, 141A27.

613-81 9LaA284, 120S114; 221MoA67, 294SW123. [a] **Real parties in interest** should be made defendants in action by contractor for decree invalidating award by engineer and for judgment for balance due. Or 292P309.

613-82 172Ark924, 290SW960; IndA 173NE330(1stcase). [a] 181Ark761, 27 SW(2d)1023; Ida 287P689; 171Minn 305, 214NW47; 221MoA67, 294SW123; 191NC672, 132SE806; TexCivA 275SW 436; TexCivA 300SW148. [c] (2) Statute requiring presentation of claims against highway contractors, intended to affect only remedy, may be taken advantage of by answer. 192NC391, 135 SE125. [f] **Notice mailed to sureties** held sufficient. 171Minn305, 214NW47. [g] **Demurrer.**–192NC391, 135SE125. [h] **Action on bond.**–292Pa304, 141A27.

613-83 179Ark118, 14SW(2d)257; 130 Ark294, 21SW(2d)174; 9LaA490, 121S 248; TexCivA 275SW436; 38Wyo 165, 265P450. [b] (6) Estimates of chief of bureau of roads are admissible as to amount due contractors. 114Nebr612, 209NW221. (7) Other evidence held admissible. 87 IndA264, 159NE551. (8) Evidence of estoppel against sureties held admissible under pleadings. Ida 287P689. (9) Other instances. Tex CivA 24SW(2d)99. [c] (1) 219Ala100, 121S93; 121Kan422, 247P847. (12) To support verdict for plaintiff on issue of amount of dirt moved. 144Va138, 131SE129. (13) To justify finding that plaintiff subcontractor was employed to complete portion of county road for contractor on certain terms. 166Minn7, 206NW934. (14) To justify finding that subcontractor completed performance before certain date entitling him to

charge certain amount. 166Minn7, 206 NW934 (damages awarded therefor not excessive). (15) To sustain verdict for plaintiff as to amount of indebtedness. 179Ark118, 14SW(2d)257. (16) To sustain finding that gravel complied with specifications. 200 Ind616, 165NE911. (17) To sustain judgment, though high, for towing gravel used in construction. 154Wash120, 281P14. (18) To sustain finding that complainant is not entitled to any additional compensation. 180 Ark1168, 21SW(2d)612. (19) To support judgment for subcontractor on contractor's bond. 221MoA67, 294SW 123. (20) Other evidence held sufficient. 171Ark460, 284SW727; 173Ark1182, 295 SW725; 171Minn305, 214NW47; 221 MoA67, 294SW123; 192NC816, 135SE 120; TexCivA 290SW196; 147Wash678, 267P436. [d] (7) Other evidence held insufficient. 18F(2d)755; 172Ark924, 290SW960; 217Ky343, 289SW316; 161 La70, 108S128; 163La332, 111S776. [e] **Evidence held inadmissible as to** condition of subcontractor's terms. 166 Minn7, 206NW934. [f] **Assignment of contract held not established** to entitle plaintiff to sue on claim against state for value of materials, labor, and services furnished. 125Misc715, 211NYS 811. [g] **Presumption is that surety fixed its premiums to meet previous decisions,** especially a well-known opinion. 191NC54, 131SE306. [h] **Burden of proof.**–18F(2d)755; TexCivA 290SW196. [i] **Degree of proof.**–18F(2d)755. [j] **Sworn statement of amount due** for labor and materials not invalid because sworn to by contractor. 169La914, 126 S422.

613-84 30Ariz245, 246P543 (failure to file cause for reasonable value after verified account had been duly filed disregarded as technical error); MoA 9SW(2d)92. [a] **Verified statement of account** filed with board of supervisors held sufficient basis for action for reasonable value of services and material. 30Ariz245, 246P543. [b] **Particular defenses.**–(1) TexCivA 5SW(2d)570.

613-85 179Ark118, 14SW(2d)257; 180 Ark294, 21SW(2d)174. [a] 121Kan422, 247P847; 166Minn7, 206NW934. [b] TexCivA 276SW203. [c] 221MoA67, 294 SW123 (properly refused in action on contractor's bond for benefit of subcontractor). [d] **Instructions held authorized.**–318Mo 64, 298SW842. [e] **Instructions held erroneous or properly refused.**–318Mo 64, 298SW842.

613-86 206Cal 617, 275P412. [a] (6) Existence and terms of subcontractor's contract. 166Minn7, 206NW934. (7) Facts as to liability of surety for supplies furnished contractor. 191NC54, 131SE306. (8) Nonsuit properly refused in suit on contractor's bond for material furnished. 193NC86, 136SE 250. (9) Reasonable attorney's fees. TexCivA 300SW148. (10) Evidence as to materials furnished. TexCivA 300 SW148. (11) Gross and palpable mistake in measurement of work done. 318 Mo 64, 298SW842. (12) Other questions. TexCivA 24SW(2d)99. [b] **Demurrer to evidence properly overruled.**–121Kan422, 247P847.

613-87½-New. time to sue, 172Ark 924, 290SW960.

613-88 [b] **Acceptance by board of** work done under contract may be vacated by it by action in equity on ground of fraud, but such suit must be brought by taxpayers. 85 IndA287, 149NE94.

613-89 195NC799, 143SE851; 49SD284, 207NW104 (contractor need not appeal from order of commissioners rejecting claim before suing county). [c] **Appeal by objectors to circuit court from order of county commissioners** accepting road as completed according to plans and ordering settlement, it is error to submit cause to jury. 85 IndA399, 151 NE352. [d] **Delay in executing contract** caused by injunction restraining proceedings under contract which contractor agreed to abide by cannot be made basis of tort action by contractor. 241Mich478, 217NW565. [e] **Erroneous contention as to measure of recovery** does not preclude recovery of reasonable value of extra work. 147Wash678, 267P436 (pleading and proof held not to preclude recovery of reasonable value of work on theory that suit was on express contract).

613-89½-New. Complaint in action against surety held not demurrable. 82 IndA377, 149NE377.

613-89⅓-New. In an action against a surety, checks and other proofs of payment to principal are inadmissible in the absence of a showing of the use made thereof. 82 IndA377, 149NE377.

613-89¼-New. A statute providing that a lien against a state shall be enforced in the same manner as mechanics' liens generally means that there shall be cross remedies between defendants claiming derivative interests in fund by succession to contractor. 243NY140, 153NE28.

613-89½-New. In an action against a surety company for labor and materials, a contract between the surety company and a construction company, made after default of the original contractor, is admissible to disprove an allegation that the construction company was an agent. IndA 162NE31.

613-89⅙-New. A surety suing for balance due for completing a contract upon the contractor's default must show the work performed on the road by the surety and how much was due. 177 Minn408, 225NW291.

613-89⅐-New. Decree rejecting claims of workmen meant they could not share in distribution of balance due contractor. 169La914, 126S422.

613-89⅛-New. Right to recover attorney's fees requires literal compliance with statute. 169La914, 126S422.

613-89⅑-New. Where the contractor paid a sight draft for the invoice price of materials and took up the bill of lading, the materialman, in action on bond is estopped to contend that payment of the draft was not payment for materials shipped. SD 228NW400.

614-92 But see 2LaA21.

614-93 139SC163, 137SE444. [b] **In Texas.**–115Tex449, 283SW139; TexCivA 275SW845. [c] **In Michigan.**–242Mich 277, 218NW683. [d] **Effect of contract imposing liability on contractor.**–150 Wash578, 274P188.

614-94½-New. County is not liable for damages to health of persons on account of construction and maintenance of a public road. 115Tex449, 283SW 139.

614-94⅓-New. A county which constructs a road and parallel drainage ditch is not liable to an adjacent owner caused by unprecedented rain which could not have been reasonably anticipated. TexCivA 284SW691.

614-94¼-New. Where a landowner sells a right of way for a state highway without requiring replacement of a fence, he cannot recover the cost of such fence under a statute not requiring the highway commission or police jury to place fences on the side of the right of way. 7LaA345.

614-94⅕-New. Some statutes authorizing agents of state commission to enter on lands to make preliminary survey do not exempt them from responsibility for damage done. Md 149 A566.

614-97 115Nebr650, 214NW297; 118 Nebr465, 225NW235.

614-98 261Mass99, 158NE329.

614-1 12PaDist&Co 23; 13PaDist&Co 416 (statute construed). [a] (3) Where county directed relocation and repairs, but that work was to be done by town under direction of engineer of department of public works, county commissioner retaining right to determine location of guard rails, and whether work was satisfactory, county has been held not liable for wall and drain built on plaintiff's land, without authority. 261 Mass99, 158NE329 (Gen. L. c 82 § 8, as amended). [b] (3) Under Texas statute exempting road districts from liability for torts, county is liable to make compensation for injuries to private property caused by building of road. TexCivA 275SW845. [e] **Highway commission or police jury.**–7LaA319; 7LaA 331 (both cases holding that commission only liable). [f] **County or state.**–233 Ky152, 25SW(2d)31.

615-3 127Me332, 143A176.

615-4 See also 2LaA21.

615-7 4LaA231. [a] **Both highway contractors and state highway department are liable as joint tort-feasors for** trespass by contractors on private lands authorized by department. 156SC236, 153SE128.

615-8 19F(2d)32; 88 IndA93, 163NE 289; 227Ky138, 12SW(2d)303. [b] **Necessity of segregating damages caused by act of contractor.**–TexCivA 275SW 845. [c] **For negligent work outside of contract.**–100CalA173, 279P1057.

615-22½-New. A county may recover liquidated damages for each day of delay after the date for completion. 217 Ky343, 289SW316.

615-22⅓-New. A county may recover the cost of keeping engineers on the job longer than necessary for the contractor's failure to perform the contract within the time limited. 217Ky 343, 289SW316.

615-22¼-New. A city may not recover damages for a portion of water pipes, disconnected without other disturbance, by grading a public road. 115Nebr650, 214NW297.

615-22⅕-New. A city may recover reasonable value of water pipes destroyed by grading a public road as of the date of their destruction. 115Nebr650, 214 NW297.

616-39 TexCivA 4SW(2d)289.

616-41 But see TexCivA 4SW(2d)289.

616-42 TexCivA 275SW845 (petition alleging diversion of water of creek by reason of negligent construction of road held sufficient).

616-43½-New. In action against county, allegation that grading was done by order of commissioners' court was held unnecessary. TexCivA 4SW(2d) 289.

616-43⅓-New. Petition alleging alternately that county and officers contracting for it were liable was not insufficient for uncertainty. TexCivA 4SW(2d)289.

616-54½-New. An assignment of error as to a ground of recovery which was not asserted in the action is immaterial. TexCivA 4SW(2d)289.

616-3 93Fla342, 112S75; 220Ky693, 295SW989; 148Md432, 129A648; 158 Md229, 148A214; 82NH278, 132A685.

617-5 MoA 21SW(2d)229 (fence posts not preventing travel). [b] **Maintenance of barriers** is limited to such time as is reasonably required to restore road to safe condition. 200Wis350, 228NW487.

617-6 [f] **Transportation of coal above and across highway** continued for many years without danger to public is not nuisance per se. WVa 155SE174.

618-10 126Kan81, 266P927.

618-13 137Wis611, 205NW426.

619-29 126Kan81, 266P927 (sign); 82 NH278, 132A685. [a] **Gas arm** held not encumbrance. 82NH278, 132A685.

619-30 231Ky554, 21SW(2d)981; NC 154SE678.

619-32½-New. Constitutional provision forbidding a corporation operating a public utility to use highway for wires, poles, pipes, tracks, or conduit, without the consent of local authorities, applies to pipes of the city laid outside its boundaries for use in connection with operation of waterworks by the city. 235Mich455, 209NW579.

619-32⅓-New. Obstruction in highway, to be public nuisance, must imperil safety of public and be dangerous and hazardous in itself. 149Va536, 140SE 644. 56ALR209.

619-34 [d] 172Ark115, 287SW744.

620-39 226Ky132, 10SW(2d)623; 221 MoA435, 282SW71.

621-43 125Kan375, 378, 263P782 [quot CJ].

621-49 286Pa351, 133A495.

621-50 325 Ill 603, 156NE811.

621-64 [a] **Attorney's fees.**–152Miss32, 118S370.

622-81½-New. Use of highway outside boundaries of city for pipes for city's waterworks, without consent of local authorities, is not justified by provision in constitution that, subject to provisions of the constitution, the city may operate waterworks, 235Mich455, 209NW579.

622-81⅓-New. nor by a statute authorizing cities and villages to acquire property rights for the construction of

waterworks, 235Mich455, 209NW579.

622-81¼-New. nor by a statute giving the right to use highways for laying pipes for waterworks, the authority thus given being restricted, in view of provisions of constitution, to highways within the municipality. 235Mich455, 209NW579.

622-86 [a] **Proper crossing must be furnished and maintained** by person or corporation cutting through highway for his or its own benefit. 320 Ill 608, 151NE542.

623-91½-New. Where an ordinance is relied on as a defense in a suit to enjoin the obstruction of a highway, it may be shown to be void and therefore no defense. 188 Iowa861, 175NW1.

623-92 201 Iowa741, 205NW456; NJ 141A577; 286Pa351, 133A495.

623-96 5LaA633(2dcase); NJ 150A356. [a] **Necessity of showing occurrence of something** to authorize termination of right to use road. 180Ark1107, 24SW(2d)320.

623-7 253Mass116, 148NE377 (attorney-general or other officer representing commonwealth).

623-8 [a] **Validity of statutes.**-142 Okl 146, 285P1040 (not unconstitutional as taking of private property without compensation).

623-8½-New. An individual has no cause of action where he is not specially damaged other than by invasion of the common or public right. 253Mass116, 148NE377.

623-9 7PaDist&Co 389.

623-10 [b] (4) Legislature may require landowners or occupants to remove weeds, brush, or other obstructions from highway adjoining premises. 223Ky 427, 3SW(2d)1077. (5) Statutes requiring removal of obstructions are within police power. 223Ky427, 3SW(2d)1077. (6) Statutes requiring removal of obstructions from highway held to include those within highway's limits. 223Ky 427, 3SW(2d)1077.

624-14½-New. In Virginia, in a proceeding to remove an obstruction, the statute will be read in connection with, and treated as, a part of the pleadings. 146Va241, 135SE811.

624-17 [a] **Evidence held sufficient.**-142 Okl 146, 285P1040 (removal of signboard).

624-17½-New. No injury being shown, removal of gates will be denied. 146Va 241, 135SE811.

624-21½-New. In Virginia removal of gates is in discretion of supervisors and circuit court, subject to review. 146Va 241, 135SE811.

624-22½-New. County may try title to road in action to abate obstructions as public nuisance. Wash 287P15.

624-23 120Kan273, 243P311 (cutting of hedge fence).

624-27 208 Iowa552, 226NW171; 120 Kan273, 243P311.

625-34 120Kan273, 243P311 (by mail is sufficient when actually received). [b] **Mode of service.**-208 Iowa552, 226NW 171 (service by registered mail held insufficient).

625-36 [b] **Notice to trim hedges** held sufficiently to designate location. 120 Kan273, 243P311.

625-43 126Kan81, 266P927; 83NH176, 139A747; 286Pa351, 133A495; 92Pa Super336. [b] **Cutting hedge fences and weeds along public highway.**-120Kan 273, 243P311 (conditions caused by height and snow and rain affecting highway).

625-46 WVa 155SE174.

626-53 66Utah550, 244P901, 905 [quot CJ].

626-54 66Utah550, 244P901, 905 [quot CJ].

626-55 66Utah550, 244P901, 905 [quot CJ].

626-56 66Utah550, 244P901, 905 [quot CJ].

626-57 66Utah550, 244P901, 905 [quot CJ].

626-58 66Utah550, 244P901, 905 [quot CJ].

626-60 173Ark192, 292SW106; 300Pa 134, 150A300; 92PaSuper336. See also 218Ala19, 117S481.

627-72 But see 205 Iowa137, 218NW60.

627-74½-New. The county board cannot maintain an action in the name of the county to enjoin alleged improper use of a "state highway." 53ND742, 208 NW108.

627-75 92PaSuper336.

627-81 66Utah550, 244P901, 905 [quot CJ].

628-82 104Conn389, 133A35; 204 Iowa 530, 215NW497; 234Ky115, 27SW(2d) 665; 148Misc306, 114S625; 6PaDist& Co 47, 49 [quotCyc]; 11PaDist&Co 153; 66Utah550, 244P901, 905 [quotCJ]; 61 OntL679, [1928] 2DomLR268. [b] 66 Utah550, 244P901.

628-83 104Conn389, 133A34; 148Miss 306, 114S625; 66Utah550, 244P901, 905 [quotCJ].

629-86 MoA 256SW549.

629-96 11PaDist&Co 153.

630-12½-New. Injunction will not be granted where bill does not join all interested parties. 300Pa134, 150A300.

630-13 217MoA460, 268SW700.

630-17 [a] TexCivA 295SW296.

631-30 83Colo 536, 267P196.

631-31 TexCivA 318SW(2d)686.

631-32 95PaSuper482 (insufficient to show public highway). [a] (2) 66Utah 550, 244P901. (3) To sustain finding that ditch did not interfere with abutting landowners. 66Utah550, 244P901. (4) To sustain finding, in suit to enjoin building on vacated road, that order was made for road's vacation on which nunc pro tunc order was entered. 173Ark192, 292SW106. (5) To sustain finding that judgment in proceedings to condemn land for road was judgment intended. Mo 30SW(2d)15.

632-52 220Ky693, 295SW989; 148Md 432, 129A648; 66Utah550, 244P901.

632-53 180Ark1107, 24SW(2d)320; NC 154SE678.

633-66 86Md1, 38A33.

633-81 179Minn475, 229NW583.

634-84 Mo 285SW1005.

634-86 226Ky132, 10SW(2d)623.

634-94 217Ala82, 114S686; NC 154SE 678. [a] **Motion for nonsuit.**-NC 154SE 678.

634-97 228Ky134, 14SW(2d)379.

634-98 220Ky693, 295SW989.

634-8 [c] **Amount of profits** lost to coal operation by obstruction of road has been held not too conjectural, indefinite, uncertain, or remote. 220Ky693, 295SW 989. [d] **Loss of profits.**-220Ky693, 295 SW989. [e] **Special damages.**-40Wyo 378, 278P71. [f] **Damages held inadequate.**-11LaA191, 123S192.

634-12 [b] **Where coal operators** suing for obstruction could have avoided part of loss at reasonable expense, such expense is measure of damages for that part of loss. 220Ky693, 295SW989.

635-17 148Md432, 129A648 (special damages must be averred and proved).

635-21½-New. The existence of another road is an element to be considered in ascertaining the amount of damages resulting from the closing of one of the roads. 228Ky134, 14SW(2d)379.

637-61 104Conn389, 133A35.

637-74 104Conn389, 133A35.

637-80 187Wis611, 205NW426.

638-85 [b] (2) MoA 256SW98; 221MoA 435, 282SW71. [c] (2) MoA 256SW98. [d] (2) 187Wis611, 205NW426.

638-93 MoA 256SW98; 221MoA435, 282SW71.

638-96 221MoA435, 282SW71.

639-16 265Mass425, 164NE480. [c] 231 Ky554, 21SW(2d)981.

639-18 265Mass425, 164NE480.

640-28 [a] (3) "Willful" means committed with evil intent, legal malice, without reasonable ground for believing act lawful. 106TexCr255, 291SW914.

640-29 [b] **Injury to highway** must be done willfully as well as knowingly. 106 TexCr255, 291SW914.

640-31 See also 147SC452, 145SE297.

641-35 See also 125Kan375, 263P782.

642-57 231Ky554, 21SW(2d)981.

644-99 [a] (4) 231Ky554, 21SW(2d) 981.

644-1 [a] (4) 234 IllA219. (5) 234 IllA 219. [b] (1) 106TexCr255, 291SW914.

645-6 231Ky554, 21SW(2d)981.

645-9 [a] 125Kan375, 263P782.

645-19 231Ky554, 21SW(2d)981.

646-31 231Ky554, 21SW(2d)981.

646-39 326 Ill 535, 158NE116, 54ALR 777. [b] **State highway systems** are created by provisions of constitution in some jurisdictions. 166Minn416, 208NW 132.

646-40 274US135, 47SCt548, 71L ed 966; 276US13, 48SCt259, 72L ed446, 57 ALR1230; 17F(2d)953, 956 [citCJ]; 24 F(2d)226; 39F(2d)145; 180Ark96, 21 SW(2d)406 (streets in cities and towns as public highways); 108Conn371, 143A 240, 65ALR943; Fla 130S587 (use of highway for private profit); 170Ga873, 154SE439; 45 Ida427, 262P881, 56ALR 317; 326 Ill 535, 158NE116, 54ALR777; Ill 173NE361; 191 Ind475, 151NE390; Iowa 231NW461; Iowa 232NW477; 217 Ky119, 288SW1049; 153Md297, 138A29, 56ALR1042; 262Mass583, 160NE321; 174Minn305, 219NW172, 174 [citCJ]; 81 NH566, 129A117, 39ALR1023; 134Misc 253, 236NYS96 (power extends to use by nonresidents as well as residents); 227 AppDiv422, 237NYS436 (matter to be considered); 136Misc358, 239NYS659; 99Vt265, 132A40; 151Va801, 145SE257; 152Va992, 147SE262; 40Wyo 462, 278P 542. [a] (1) 209Ky40, 272SW18. (8) Use of highways for conduct of business of common carrier of passengers or freight may be prohibited. 42 Ida169, 244P149. [e] **Purpose of statute enacted pursuant to constitutional provision creating trunk highway system** was to vest in state highway commissioner power to regulate erection and maintenance of danger signals and warning devices and signs as well as general supervision and maintenance of such highway. 166 Minn416, 208NW132. [f] **Superintendent of national park** has no exclusive control over highways constructed therein by state or right to regulate vehicle traffic thereas to exclusion of state. 268 US228, 45SCt505, 69L ed927. [g] **Statutory regulation** held intended to protect all persons on road, including pedestrians. 234 IllA59. [h] **State may impose on nonresident user of road** condition that he assent to substituted service for causes arising out of local accidents. 274US352, 47SCt632, 71L ed1091. [i] **Statute making intoxication conclusive evidence of inability to control and operate vehicle** is within police power. 45 Ida427, 262P881, 56ALR317. [j] **Used highway may be prohibited.**-40 Wyo 462, 278P542. [k] **Use by private carriers** may be made subject to legislative regulation appropriate to that kind of carrier. 140Wyo 462, 278P542. [l] **Unnecessary and large vehicles.**-34F(2d) 780.

646-41 274US135, 47SCt548, 71L ed 966; 17F(2d)953, 956 [citCJ]; 337 Ill 200, 169NE22, 66ALR834; 82NH278, 132A685; NH 151A452; 40Wyo 462, 278 P542.

646-42 17F(2d)953, 956 [citCJ]; 337 Ill 200, 169NE22, 66ALR834; 294Pa451, 144A407(2dcase). [b] **Power delegated to state highway commission to make traffic regulations and rules** does not authorize commission to adopt rule as to side of highway on which pedestrian shall travel. 172Ark835, 290SW591.

646-43 17F(2d)953, 956 [citCJ]; 170Ga 873, 154SE439; 262Mass583, 160NE321; 174Minn305, 219NW172, 174 [citCJ]; 147SC452, 145SE297. [a] **Parkways.**-34 F(2d)780. [b] **In Tennessee.**-160Tenn 571, 27SW(2d)1085. [c] **Taking over street as county road** does not deprive city of reasonable control thereof. 251 Mich582, 232NW363.

646-44 17F(2d)953, 956 [citCJ]. [a] **Power of cities and villages to regulate traffic on trunk highways** by ordinance cannot be extended so as to encroach upon authority given state highway commissioner. 166Minn416, 208NW132.

646-46 216Ala127, 112S638. [a] **Power to prohibit horse-drawn vehicle** is not authorized by delegation of power to regulate. 17F(2d)953.

646-46½-New. The county board has no power to control or supervise or grant a right of way to a public service corporation over or upon any state highway within the county territorial limits. 53ND742, 208NW108.

646-47 17F(2d)953, 956 [citCJ].

646-48 Iowa 231NW461.

647-48½-New. Commonwealth is owner of either easement or fee in highway and may do with its own as general

court may direct within public interest and not in violation of constitution. 251 Mass569, 147NE681.

647-50 99Vt265, 132A40.

647-51 197Cal 82, 239P709, 41ALR 1027; 201Cal 57, 255P500.

647-52 Iowa 232NW477 (carries no right to use as place of business); 265 Mass425, 164NE480; 114Nebr483, 208 NW123; 82NH278, 132A685; 227App Div422, 237NYS436; 99Vt265, 132A40. [b] **Private citizen has no vested right to use highway for commercial purposes.** 99Vt265, 132A40.

647-53 17F(2d)953, 956 [citCJ]; Ill 173NE361; 265Mass444, 164NE448; 82 NH278, 132A685; NH 147A898(2dcase); 227AppDiv422, 237NYS436; 54SD552, 223NW943; Va 154SE579.

647-54 174Minn305, 219NW172, 173 [citCJ]; 82NH278, 132A685.

647-55 17F(2d)953, 956 [citCJ].

648-56 MoA 295SW524; 154Wash634, 283P467(2dcase).

648-57 17F(2d)953, 956 [citCJ].

648-57½-New. Legislature has power to extend liability for personal injuries caused by negligent operation of automobile used with owner's consent, express or implied, although not operated by himself, servant, or agent. 251Mass 569, 147NE681.

648-57¼-New. Under common law mere ownership of motor vehicles will not render the owner liable for negligent operation. 251Mass567, 147NE681.

648-60 CalA 290P1062.

648-62 [a] **Statutory regulation.**-122 Kan395, 252P245 (construction of statute).

648-63 174Minn305, 219NW172.

648-66 Ill 173NE361; 103NJEq307, 143A438; 196Wis410, 220NW390.

648-67 103NJEq307, 143A438.

648-71 191 Ind475, 151NE390. [a] **Statute construed to require lights irrespective of darkness or weather conditions.** 232Mich300, 205NW199.

648-72½-New. Public highways belong to the public, there being no such thing as rightful, private, permanent use. 219 Ala56, 121S62.

648-74 50RI 53, 144A888.

649-75 [b] (1) 71CalA221, 234P928. (2) Whether time employed in making repairs and manner of use of highway caused no unreasonable inconvenience and danger to public is generally question of fact. 71CalA221, 234P928.

649-79 225Ky123, 7SW(2d)833.

650-97 146Va789, 132SE844. But see 121 Or424, 254P1019.

650-14-16 **Erratum.**-Text should read "While in England[14] and Newfoundland[15] the law of the road requires vehicles on meeting to turn to the left, the universal rule in the United States and Canada is that in such case each shall turn to the right.[16]"

650-16 [c] **Time of turning to right.**-25 OhA89, 157NE402.

650-17 103Conn41, 130A86; 35GaA743, 134SE837; 203 Iowa661, 213NW428; 99Vt208, 130A679; 146Va789, 132SE 844. [e] **Rule applies where one car has stopped.**-35GaA743, 134SE837.

651-20 Iowa 207NW342; 203 Iowa661, 213NW428.

651-27½-New. An automobile driver who stopped his car opposite the traffic sign, forty feet back from the street line, has been held to have substantially complied with an ordinance requiring vehicles to come to a complete stop before entering or crossing such street. 239Mich390, 214NW172.

651-28 99Vt208, 130A679; 143Wash 308, 255P365, 367 [citCJ].

652-33 See also 218AppDiv198, 218NYS 120.

652-38 143Wash308, 255P365. [a] 99 Vt208, 130A679.

653-49 153Md194, 138A12; 246NY51, 158NE16.

653-50 237 IllA456; 251 IllA364 (higher degree of care required than at places less frequently traveled); 203 Iowa906, 210NW550; 203 Iowa884, 210NW778; 153Md194, 138A12; 246NY51, 158NE 16; Ont [1925] 3DomLR782 (rule as to right of way of vehicle on right gives no paramount right irrespective of relative position of vehicles). [a] **Negligence per se on entering cross roads** may be based on driver's failure to sound horn. 203 Iowa884, 210NW778.

653-51 153Md194, 138A12; 142Wash 348, 253P458. [b] **In turning corner of intersecting streets** driver must use "extreme caution" with vehicle under control. 246NY51, 158NE16.

653-52 [a] (4) Statute providing that vehicle approaching from right has right of way is mainly aimed to require drivers to use care commensurate with danger. 246NY51, 158NE16. (5) Driver should give right of way to one coming from right when position of both is such that reasonably careful man might doubt which should go first, or both are so near intersection that there is chance of collision if both go on at same speed. 246NY51, 158NE15 (Gen. Highway L. § 12). [c] **On meeting at street crossings or cross roads,** vehicle to right has right of way. 219AppDiv75, 219 NYS228. [d] **In Pennsylvania.**-285Pa 241, 132A185.

653-53 237 IllA456; NJSup 140A316; 192Wis197, 212NW257.

653-54 6LaA229.

653-56 122 Or162, 257P809; 85Pa Super233; Ont [1925] 3DomLR782 (right of way of vehicle approaching from right is not cloak for negligence of driver thereof).

653-56½-New. , and is only applicable where both vehicles are approaching intersection so nearly simultaneously as to make inevitable a collision if neither slows down. Ont [1925] 3DomLR782.

653-57 [a] **Approaching intersection at great speed** without sounding horn held contributory negligence. 153Md 194, 138A12.

653-57½-New. Vehicles approaching from the right have the right of way. 236 IllA300.

653-57¼-New. In the absence of statute giving motor vehicles moving over a paved road a preference in right of way at an intersection as against a vehicle moving on an unpaved road, no preference on that ground can be claimed. 123Kan277, 255P74.

653-57¼-New. A statute giving a driver approaching from the right the right of way at cross roads has been held inapplicable at an intersection of a highway and a private road. 151Md658, 135 A838, 50ALR280.

653-57⅛-New. One approaching a road crossing should sound the horn. 153Md 194, 138A12.

653-57⅛-New. A motorcycle policeman approaching a road intersection at great speed has been held required to give right of way to a truck coming from the left. 153Md194, 138A12.

653-57½-New. A vehicle approaching from the right has the right of way. 142Wash348, 253P458.

654-72 [a] **In Washington.**-96Wash 407, 165P106.

654-76 143Wash44, 254P452. [b] But see 194Wis36, 215NW591.

654-79 143Wash44, 254P452.

655-81 [a] **Auto attempting to pass another on hill,** with vision obstructed by rise of road, held negligent. 143 Wash44, 254P452.

655-82 146Va789, 132SE844.

655-85 26 OhA367, 159NE846.

655-92 194Wis36, 215NW591.

655-1½-New. Position of vehicles as their paths cross, not direction of highway, determines applicability of rule that driver on the left must yield. 82 Colo 150, 257P1079.

655-3 21AlaA449, 109S282; 172Ark 835, 290SW591; 260Mass110, 156NE 838; 249Mich147, 228NW723; 169Minn 55, 210NW630 [citCJ]; 48RI 101, 135A 853. [a] **Right of driver to use street** is restricted to facilities for travel which street affords. 49SD22, 205NW713.

655-4 21AlaA449, 109S282; 86CalA459, 261P315; 260Mass110, 156NE838; 169 Minn55, 210NW630 [citCJ]; 147Miss 843, 112S788; 121 Or424, 254P1019; 85 PaSuper233; 48RI 101, 135A853; 143 Wash308, 255P365. [c] **Doctrine of "drive within radius of headlights,"** as rule of care or law of road, repudiated. 141Wash399, 252P157, 58ALR1482. [d] **Concrete highway** is not in itself warning of danger, as is railroad crossing. MoA 295SW524. [e] **Police officer** is bound by standard of care required of all using highways. 108Conn180, 142A 749.

656-5 216Ala127, 112S638; 239Mich 390, 214NW172; 169Minn55, 210NW630 [citCJ]; 246NY51, 158NE16; 48RI 101, 135A853.

656-6 258Mass513, 155NE435.

656-8 216Ala52, 112S442; 85PaSuper 233.

656-9 144Wash513, 258P36.

656-14 121 Or424, 254P1019; 48RI 101, 135A853.

656-15 108Conn180, 142A749. [a] 203 Iowa1194, 212NW354; 147Miss843, 112 S788; 83NH39, 138A312; 121 Or424, 254P1019.

657-22 232Mich300, 205NW199 (negligence per se); 26 OhA194, 159NE858. But see Ark 30SW(2d)840(2dcase).

657-22½-New. In the absence of statute requiring drivers of horse-drawn vehicles to display lights failure to do so is not negligence per se. 203 Iowa 1194, 212NW354 (driving blind horse hitched to unlighted buggy is held not negligence per se).

657-35 71CalA221, 234P928 (act of defendant in leaving vehicle in highway at night, and not cloud of dust caused by passing automobile, held proximate cause of collision between plaintiff's vehicle and that of defendant).

657-42½-New. Failure to observe Headlight Law for automobiles is held negligence as a matter of law. 233 IllA 216.

657-42¼-New. Driving without lights is held negligence as a matter of law. 233 IllA216.

657-42¼-New. Leaving a truck in the road without room for a passing automobile is held negligence. 219Ky438, 293SW1082.

657-42⅛-New. Violation of law forbidding operator to have anything in motor vehicle interfering with operation constitutes evidence of negligence. 262 Mass312, 159NE622.

657-45 197Cal 82, 239P709, 41ALR 1027; 70CalA624, 234P113.

657-47 214Ala47, 106S175; 260Mass 110, 156NE838; NJSup 136A332; 289 Pa565, 137A797; RI 131A193.

658-48 70CalA624, 234P113; 169Minn 55, 210NW630 [citCJ].

658-49 149Md140, 131A82.

658-50 83CalA508, 257P114; 193Wis 69, 213NW652.

658-51 144Wash85, 256P1029; 101 WVa621, 134SE204, 47ALR800.

658-58 172Ark835, 290SW591; 197Cal 82, 239P709, 41ALR1027; 70CalA624, 234P113. [a] 172Ark835, 290SW591.

658-59 197Cal 82, 239P709, 41ALR 1027; 194NC747, 140SE806.

658-62 197Cal 82, 239P709, 41ALR 1027; 169Minn55, 210NW630 [citCJ].

659-69 RI 131A193.

659-70 149Md140, 131A82.

659-71 103Conn547, 131A415; 151Md 226, 134A326. See also 234 IllA59.

660-73 151Md226, 134A326. But see 103Conn547, 131A415.

660-74 103Conn547, 131A415.

660-75 103Conn547, 131A415. [a] **Pedestrian crossing diagonally between intersections** is required to exercise a higher degree of care than that at crosswalk. 103Conn547, 131A415.

660-76 103Conn547, 131A415. [a] 149 Md140, 131A82. [b] 103Conn547, 131A 415. [d] **Knowledge required of pedestrian.**-103Conn547, 131A415. [e] **Backing automobile causing injury from street car.**-149Md140, 131A82.

660-86½-New. Driver on traveled highway may assume that no adult will suddenly rush out at him from between two parked cars. 21AlaA449, 109S282.

660-86⅛-New. Pedestrian need not anticipate breach of rule of road by motorist. NJSup 137A792.

661-88 99Vt208, 130A679 (statutory rate twenty miles per hour). See also 233 IllA526.

661-89 48RI 101, 135A853.

661-95 216Ala52, 112S442; 48RI 101, 135A853.

661-97 5LaA105.

661-99½-New. Speed Law held inapplicable to cases of ineptitude by green driver. 234 IllA440.

663-35½-New. An owner is negligent in permitting his mule to run at large at

night near a highway if, by the exercise of reasonable care, he could have foreseen that some injury would result. 221MoA181, 299SW150.

664–55 260Mass110, 156NE838.

664–57 236 IllA300; 203 Iowa884, 210 NW778; 153Md194, 138A12; 258Mass 513, 155NE435; 102NJL377, 132A667, 44ALR1302; 219AppDiv75, 219NYS228; 136Wash663, 241P360. [a] 219AppDiv 75, 219NYS228. [c] **Negligence of person having right of way** does not absolve person not having right of way from consequences of his own contributory negligence. 77Colo 471, 238P21. [d] **Person driving on highway closed to traffic** while under construction or repair is guilty of negligence and cannot recover for injuries from careless operation of road contractor's truck where his driving on such highway contributed to injuries. 19 OhA510.

664–58 102NJL377, 132A667, 44ALR 1302.

664–64 136Wash663, 241P360.

665–65 232Mich300, 205NW199.

665–66 232Mich300, 205NW199; 222 MoA1098, 14SW(2d)31; 83NH39, 138A 312; 19 OhA510. [a] 19 OhA510. [c] **Whether driving automobile** too fast to stop within range of own lights is contributory negligence depends on circumstances. 174Ark130, 297SW856.

665–67 147Miss843, 112S788; 146Va 789, 132SE844.

665–68 [a] **Negligence in leaving property on highway** does not preclude recovery for damages caused by negligent operation of vehicle. 90CalA443, 265P 971.

665–69 174Ark130, 297SW856; 149 Md140, 131A82; 239Mich390, 214NW 172; 147Miss843, 112S788; NJSup 137 A792.

665–71 [a] **Conditions precedent.**–104 Conn487, 133A584.

665–72 216Ala495, 113S531.

665–73 216Ala495, 113S531. [b] (1) 215Ala216, 109S877; 216Ala495, 113S 531; 3Del 538, 140A646; 233 IllA353. (6) Allegation sufficient that injury occurred on public road. 216Ala52, 112S 442.

666–79 216Ala127, 112S638. [b] **Plea held insufficient** in not showing duty of plaintiff to look out for cars entering on highway traveled by plaintiff. 216Ala 127, 112S638.

666–82½–New. , and that plaintiff's deceased at all time while walking on highway exercised requisite degree and amount of care for his own safety. 197 Cal 82, 239P709, 41ALR1027.

666–83 252Mass47, 147NE564; Mass 168NE809 (collision); 289Pa565, 137A 797; 292Pa293, 141A41.

666–84 172Ark835, 290SW591; 153Md 194, 138A12; 218AppDiv220, 218NYS 155; 289Pa565, 137A797.

666–85 153Md194, 138A12; 218AppDiv 220, 218NYS155.

666–87 NJSup 137A849. See also 218 AppDiv749, 218NYS115.

666–87½–New. Violation of statutory rule of road must be proved by party alleging it. 71CalA604, 236P369.

666–88 82Colo 150, 257P1079; 86 IndA 270, 157NE60.

666–89 172Ark835, 290SW591; 81CalA 758, 254P681; 83NH39, 138A312; NJ CirCt 136A419; 142Wash419, 253P657. See also 153Md194, 138A12.

666–90½–New. Parking car on highway diagonally to curb with rear light out is prima facie evidence of negligence. 218AppDiv216, 218NYS1.

666–91 [a] (4) 212Ala588, 103S670 (condition of automobile after collision); 260Mass110, 156NE838; 171Minn321, 214NW52; 83NH39, 138A312. (5) Evidence of driver's violation of city regulation. 260Mass110, 156NE838. (6) As to speed of automobile. 233 IllA216. [b] (4) 174Ark130, 297SW856; 87 IndA 368, 158NE250 (other accidents after use of white flash lights). (6) That witness smelled alcohol on truck driver's breath as proof of intoxication to show careless driving. 289Pa381, 137A665.

667–4 See also 233 IllA278.

667–7 105Conn610, 136A467. [a] (1) NJSup 136A332; NJSup 138A509; NJ Cir 136A419; 26 OhA79, 159NE843. (3) To sustain recovery for collision. 219 Ky438, 293SW1082. [b] 220Ky451, 295 SW467.

667–8 233 IllA584; 145Wash221, 259P 393.

667–9 [a] 174Ark130, 297SW856; 71 CalA221, 234P928 (leaving disabled vehicle in highway at night); 81CalA758, 254P681; 90CalA443, 265P971; 106 Conn264, 137A753; 232 IllA193; 237 IllA279; NJ 130A468; NJSup 135A872; 122 Or162, 257P809; 144Wash513, 258 P36. [b] 234 IllA151; 236 IllA392; 171 Minn338, 214NW55; 136Wash663, 241 P360. [d] **Evidence held sufficient** to go to jury. 233 IllA353. [e] **Evidence held to show concurrent negligence.**–234 IllA 59.

668–10 [a] 234 IllA151; 171Minn338, 214NW55; 136Wash663, 241P360. [b] 197Cal 82, 239P709, 41ALR1027; 234 IllA157; NJCirCt 136A419; RI 136A 839; 143Wash44, 254P452.

668–11 [a] (1) 103Conn667, 131A392; 232 IllA193. [b] 219Ky438, 293SW 1082; 218AppDiv749, 218NYS115.

668–11½–New. , and as to who had right of way at intersection. 103Conn 667, 131A392 (evidence sufficient).

668–12 [a] 174Ark130, 297SW856; 262 Mass312, 159NE625. [b] **Contributory negligence.**–174Ark130, 297SW856.

668–13 18F(2d)279; 216Ala52, 112S 442; 216Ala495, 113S531; 103Conn675, 131A322; 87 IndA368, 158NE250; 212 Ky60, 278SW149; 219Ky201, 292SW 777; 149Md140, 131A82; 149Md281, 131A350; 221MoA181, 299SW150; NJ Sup 131A91; NJSup 137A646; NJSup 137A849; NJSup 139A238; NJSup 140 A578; 246NY51, 158NE16; 25 OhA89, 157NE402; 26 OhA79, 159NE843; 26 OhA426, 160NE110; 86PaSuper55; RI 131A193; RI 137A693; 142Wash419, 253P657; 144Wash27, 255P1031; 145 Wash221, 259P393. [a] 16F(2d)334; 215Ala688, 112S239; 168Ark836, 271SW 705; 78CalA378, 248P749; 80CalA667, 252P773; 105Conn610, 136A467; 33GaA 778, 127SE821; 36GaA815, 138SE286; 233 IllA278; 235 IllA362; 237 IllA488; 203 Iowa661, 213NW428; 220Ky708, 295SW1020; 220Ky758, 295SW1046; 151Md226, 134A326; 153Md221, 138A 25; 260Mass110, 156NE838; 260Mass 193, 156NE863; 260Mass206, 156NE 884; 140Miss764, 106S443; 147Miss843, 112S788; 83NH39, 138A312; 103NJL 416, 135A868; NJSup 137A403; NJSup 140A578; 218AppDiv198, 218NYS120; 218AppDiv199, 218NYS121; 218AppDiv 220, 218NYS155; 219AppDiv630, 221 NYS69; 26 OhA367, 159NE846; 26 OhA 426, 160NE110; 121 Or424, 254P1019; 289Pa560, 137A731; RI 136A845; 142 Wash419, 253P657; 143Wash308, 255P 365; 144Wash27, 255P1031; 144Wash 155, 257P236; 144Wash276, 257P846; 193Wis49, 213NW625. See also 71CalA 221, 234P928. [b] (1) 216Ala495, 113 S531; 172Ark835, 290SW591; 80CalA 667, 252P773 (collision of vehicles); 81 CalA758, 254P681; 82Colo 150, 257P 1079; 106Conn732, 138A433; 233 IllA 216; 233 IllA278; 203 Iowa906, 210NW 550; 203 Iowa1194, 212NW354; 203 Iowa661, 213NW428; 219Ky438, 293 SW1082; 149Md140, 131A82; 149Md 281, 131A350; 151Md226, 134A326; 153 Md221, 138A25; 260Mass193, 156NE 863; 260Mass206, 156NE884; 239Mich 390, 214NW172; 171Minn321, 214NW 52; 147Miss843, 112S788; MoA 295SW 524; 222MoA1098, 14SW(2d)31; 83NH 39, 138A312; NJ 130A468; 104NJL389, 140A325; NJSup 137A792; NJSup 140 A578; 219AppDiv630, 221NYS69; 26 OhA79, 159NE843; 26 OhA426, 160NE 110; 121 Or424, 254P1019; 122 Or162, 257P809; RI 136A839; RI 136A845; 99Vt208, 130A679; 146Va789, 132SE 844; 142Wash419, 253P657; 143Wash 308, 255P365; 144Wash27, 255P1031; 144Wash155, 257P236; 144Wash276, 257P846; 145Wash221, 259P393; 192 Wis197, 212NW257. See also 71CalA 221, 234P928. (2) Whether emergency justified plaintiff in turning automobile to left to avoid accident held for jury. 143Wash308, 255P365. (3) Whether plaintiff, on seeing defendant's automobile on left of highway, should have stopped is held for jury. 143Wash308, 255P365. [c] 215Ala688, 112S239; 233 IllA216; 234 IllA59; 212Ky60, 278SW 149; 260Mass206, 156NE884; 232Mich 300, 205NW199 (causal connection between plaintiff's injury and his failure to display lights as required by statute); 222MoA1098, 14SW(2d)31; 83NH 39, 138A312; 218AppDiv198, 218NYS 120; 218AppDiv216, 218NYS1; 26 OhA 194, 159NE858; 146Va789, 132SE844. [d] 171Minn321, 214NW52. [e] **Plaintiff cannot recover for damages to property of another** where he is not servant or bailee. 99Vt208, 130A679. [f] **Cause of collision** between automobiles. NJ 130A468. [g] **Time of collision.**–3Del 53, 130A267. [h] **Evidence held insufficient to go to jury.**–Md 134A326; Mass 156NE838; 260Mass193, 156NE863; 290 Pa1, 137A797(1stcase); 289Pa565, 137 A797(2dcase).

668–13½–New. A Michigan statute providing that, where both parties in a collision were violating the state highway law, the question as to who shall be held liable for the resulting damages shall be a question of fact is invasive of the judicial power and unconstitutional. 247Mich661, 226NW675.

668–15 35GaA743, 134SE837; 212Ky 60, 278SW149. [a] 16F(2d)334; 105 Conn410, 135A390; 212Ky60, 278SW 149; 149Md281, 131A350 ("unavoidable accident"); NJSup 140A578; 122 Or 162, 257P809; 150Wash459, 273P178. [b] 216Ala495, 113S531; 71CalA604, 236P369; 233 IllA216; 233 IllA526; 235 IllA440; 236 IllA392; 219Ky201, 292SW777; 260Mass110, 156NE838; 262Mass312, 159NE622. [c] **Instructions erroneously excluded.**–35GaA743, 134SE837 (as to rules of road on meeting). [d] **Use of language of opinion of courts** on rules of road on meeting is held not apt for charge. 35GaA743, 134SE837.

668–16 16F(2d)334.

668–17 212Ky60, 278SW149; NJSup 137A528. [a] 16F(2d)334; 235 IllA 362; 26 OhA194, 159NE858. [b] 216 Ala495, 113S531.

668–18 [a] (1) 16F(2d)334; 220Ky 708, 295SW1020; 171Minn321, 214NW 52. (2) 35GaA743, 134SE837. [b] 103 Conn547, 131A415; 219AppDiv332, 220 NYS466. [c] **Failure to instruct on statutory standards.**–106Conn383, 138A 130.

668–19 212Ky60, 278SW149. [a] 212 Ky60, 278SW149; 232Mich300, 205NW 199.

669–20 [a] 26 OhA79, 159NE843.

669–22 149Md281, 131A350; 260Mass 206, 156NE884. [b] 216Ala127, 112S 638; 71CalA604, 236P369; 233 IllA216; 146Va789, 132SE844.

669–23 203 Iowa1194, 212NW354.

669–24 215Ala688, 112S239; 233 IllA 216; 147Miss843, 112S788.

669–27 233 IllA216; 25 OhA89, 157NE 402.

669–27½–New. nor leave for their determination matters not in their province; 71CalA604, 236P369.

669–28 147Miss843, 112S788; 25 OhA 89, 157NE402.

669–30 216Ala127, 112S638; 233 IllA 584; 260Mass110, 156NE838. [a] 33 GaA778, 127SE821; 232Mich300, 205 NW199; 122 Or162, 257P809.

669–30½–New. or misleading, 106Conn 383, 138A130.

669–31 232Mich300, 205NW199.

669–32 216Ala495, 113S531; 122 Or 162, 257P809.

669–32½–New. Request for instructions as to effect of violation of statutory rule of road should include all provisions applicable to case. 71CalA 604, 236P369.

669–36 NJ 139A468. [b] **Finding held against weight of evidence.**–NJSup 138 A104.

669–37 106Conn264, 137A753.

669–39 215Ala216, 109S877.

669–40 216Ala52, 112S442.

670–45 [d] **Automobile dealer's employee held not guilty of using automobile with demonstration plates** for pleasure purposes in violation of Highway Law, because he took members of his family with him. 124Misc816, 210NYS 249. [e] **Any thoroughfare used for passage of public** is "public highway" within statute prohibiting driving while

intoxicated. 174Ark918, 298SW24.

670-47 [d] **Owner placing car in hands of reckless driver** is held liable as "principal." 16F(2d)342. [e] **Driving while intoxicated.**–128Misc31, 217NYS739.

670-48 227AppDiv422, 237NYS436.

670-48½-New. or driving upon a highway which has been closed, 19 OhA510.

670-49 227AppDiv422, 237NYS436 (willfulness).

670-52 16F(2d)342. [a] 16F(2d)342; 28Hawaii222; 125Me42, 130A737. [b] 234 IllA440; 159La886, 106S369. [c] (1) 28Hawaii222.

670-56 [a] 234 IllA440.

670-59 [a] (2) In prosecution for driving automobile while intoxicated, testimony that witness told defendant shortly before arrest not to continue "cutting up with his car" held admissible as showing intoxication. 174Ark918, 298SW24. (3) Other evidence held sufficient. 16F(2d)342; 76CalA525, 245P436; 36GaA84, 135SE765; 203 Iowa251, 212NW475. [e] **Driving automobile while intoxicated** on roadway within fair grounds held within statute prohibiting driving while intoxicated on "public highway." 174 Ark918, 298SW24. [f] **Violation of statute makes presumption of fault conclusive.**–227AppDiv422, 237NYS436.

670-59½-New. Evidence held sufficient for jury on issue of defendant's intoxication in prosecution for driving while intoxicated. 203 Iowa251, 212NW475.

670-59¾-New. Under statute making it misdemeanor to fail to give name and address after automobile collision, one is not liable unless either property or personal damage results from accident. 129Misc440, 222NYS337.

670-60 16F(2d)342.

671-63 137Misc840, 244NYS543.

671-64 110Conn68, 147A26(2dcase) (special statute inapplicable against state); 233Ky619, 26SW(2d)557, 69 ALR482. See also 137Misc768, 244NYS 547.

671-65 223AppDiv520, 228NYS593; 130Misc559, 224NYS354. [a] **In Connecticut.**–110Conn68, 147A26(2dcase).

671-66 133Misc326, 232NYS192. [b] **What law governs.**–155SC77, 151SE887. [c] **In New York.**–137Misc768, 244NYS 547.

671-68 110Conn68, 147A26(2dcase). But see 109Conn336, 146A820(2dcase).

671-70 133Misc331, 231NYS671; 226 AppDiv113, 234NYS476.

671-71 223AppDiv543, 228NYS718; 226AppDiv113, 234NYS476. [a] **Extent of liability** is for reasonable care in construction and maintenance. 126Misc 773, 214NYS783.

671-71½-New. State is not insurer of safety of highway under all conditions. 126Misc773, 214NYS783.

671-73 133Misc326, 232NYS192.

671-73½-New. A state is not an insurer of the safety of its highways, but it can only be held to reasonable care in their construction and maintenance. 133Misc331, 231NYS671.

671-75 142Va454, 129SE277 (duty is discharged by proper care to maintain reasonably safe road).

671-76 217Ala415, 116S119; 218Ala 114, 117S633; 38GaA514, 144SE348; 118Kan670, 236P811; 120Kan266, 243 P277; 121Kan269, 246P526; 233Ky 619, 26SW(2d)557, 69ALR482; 242 Mich277, 218NW683; 54ND540, 223NW 734; TexCommnA 288SW1067; 143 Wash127, 254P1086; 150Wash578, 274 P188.

672-77 118Kan670, 236P811; 195Wis 399, 219NW98.

672-79 LaA 130S660(2dcase) (parish policy jury); 195Wis399, 216NW487.

672-80 115Nebr506, 213NW826; 291 Pa240, 139A871; 195Wis399, 216NW 487. [c] **Town held liable for failure** to keep highway safe for automobile travel. 260Mass210, 157NE339. [d] **Agreement between state and county** pursuant to statute may impose on county duty to public to maintain and repair highways. 54SD540, 223NW734.

673-81 115Nebr506, 213NW826.

673-82 86 IndA229, 156NE830; 226 AppDiv294, 234NYS471; 195Wis399, 219NW98. [a] (1) 86 IndA229, 156NE 830; 19 OhA182 (village held not liable); 31 OhA224, 167NE404.

673-83½-New. , nor is it liable for collision at a highway crossing caused by a high hedge on abutting property obstructing the view. 118Kan670, 236P 811.

673-87 120Kan659, 245P162; 121Kan 269, 246P526; 52SD36, 216NW577 (under L. [1919] c 333 § 61). [a] (1) 242 Mich277, 218NW683.

673-88 [a] (5) Under Kansas statute county cannot be held liable for damages caused by defective highway located in another county. 121Kan269, 246P526. [e] 195Wis399, 219NW98.

673-89 121Kan269, 246P526; Kan 291 P762.

675-4½-New. A town is liable for damage caused by negligence of agents charged with the duty to maintain a highway. 214AppDiv142, 211NYS721.

675-6 [b] (4) Not liable. 35 OhA438, 172NE531. [f] (3) Other statutes. 35 OhA438, 172NE531.

676-7 241 IllA402.

676-11 42 Ida738, 248P456, 49ALR 1057 (not liable except for failure to secure suitable director or actual knowledge of negligence in performance of work).

677-17 77Mont80, 249P1041.

677-19½-New. In Maryland county road engineer is deemed the agent of the county. 151Md68, 134A33.

677-21 142Va454, 129SE277 (law forbids private person or corporation to maintain dangerous obstruction in public highway).

678-26 TexCivA 20SW(2d)236.

678-33 Contra TexCivA 278SW485.

678-35 194NC31, 138SE411.

678-36½-New. A grading contractor who has constructed a fill which is part of a state trunk highway is not liable, as for negligence, for failure to erect guard rails not called for by his contract. 167Minn290, 208NW995.

678-36¾-New. The rule applies although the work had not been formally accepted. 167Minn290, 208NW995.

678-37 TexCivA 278SW485.

678-38 84Colo 376, 270P656; 158Md 328, 148A439; 102NJL343, 132A749; 196NC160, 144SE693; TexCivA 278SW 485; TexCivA 138SW(2d)990; 142Va 690, 128SE259 (negligence in performance of ministerial duties for valuable consideration). But see 194NC31, 138 SE411. [b] **Contractor held independent,** and not servant of county, despite contract provisions for certain executive and inspection rights of county engineer. TexCivA 278SW485.

678-40 132 Or46, 284P567.

679-53½-New. It has been held that after completion and acceptance of work by county persons installing culverts are not liable to one using highway. TexCommnA 288SW1067.

679-53¾-New. Where contractor has opened highway, he cannot relieve himself from liability for negligence by posting signs that users travel at their own risk. LaA 130S234(4thcase).

679-55 104Conn508, 133A686; 36GaA 552, 137SE414; 10PaDist&Co 115.

679-56 104Conn508, 133A686; 36GaA 552, 137SE414.

679-57 118Kan670, 236P811 (high hedge obstructing view resulting in collision at crossing).

680-63 2LaA444; 115Nebr506, 213NW 826; 116Nebr718, 218NW751.

680-64 42 Ida738, 248P456, 49ALR 1057; 115Nebr506, 213NW826. See also 134Misc848, 236NYS505.

680-65 150Wash578, 274P188.

680-67 260Mass210, 157NE339; 115 Nebr506, 213NW826; 116Nebr718, 218 NW751; 219AppDiv124, 219NYS530; 137Misc768, 244NYS547; 291Pa240, 139 A871.

680-68 260Mass210, 157NE339.

680-72 110Conn68, 147A26(2dcase) (road is defective if not reasonably safe for reasonable travel); 115Nebr506, 213 NW826.

681-79 [c] **Duty is continuing one.**–NH 147A411.

681-82½-New. State not considered negligent because it did not employ enough men to repair all highways in few weeks or days after season opened. 128Misc156, 217NYS825.

683-19 130Misc776, 225NYS299.

685-34 42 Ida738, 248P456, 49ALR 1057.

685-39½-New. Failure of a contractor for road construction to post the statutory notice that the road is dangerous may justify a finding of negligence. 120 Kan393, 243P1049.

685-41 118Kan670, 236P811; 130Misc 559, 224NYS354; 195NC365, 142SE230. See also 253Mass119, 148NE376. [d] **Insufficient culvert.**–NH 147A411. [e] **Inadequate length of culvert** with reference to width of traveled way may constitute defect. NH 149A508. [f] **Omission to provide statutory safeguards as "defect."**–Kan 291P762.

685-43 120Kan659, 245P162.

685-44 166La472, 117S56.

686-58 223AppDiv543, 228NYS718.

686-59½-New. A highway curving under a bridge so that the top of an automobile collided with the curved ceiling when the wheels slightly left the concrete part thereof is "improperly" and "dangerously" constructed rendering the state liable within a special enabling act. 130Misc559, 224NYS354.

686-61 242Mich46, 217NW784.

686-68 [a] **Anticipating defect.**–NH 147 A411.

687-73½-New. Burning leaves, while wind blew smoke across highway and obstructed view of parked truck is held not negligence. 219AppDiv124, 219NYS 530.

687-73¾-New. Location and dimensions of culvert built by railroad cannot be made basis of charge of negligence where it was built in accordance with general plans of highway and has been adopted as part of highway. 116 Nebr413, 217NW944.

687-76 226AppDiv113, 234NYS476.

687-85 49SD220, 207NW87.

688-7 86 IndA180, 156NE566.

688-10 110Conn68, 147A26(2dcase) (where highway employees knew road was dangerous due to icy conditions, other accidents having happened there same afternoon, failure to warn travelers or place signs or lights was negligence); 121Kan211, 246P505 (sharp turn around bend of creek or gulch); 153Md221, 138 A25.

688-11 121Kan211, 246P505; 3LaA299, 301 [citCJ]; 291Pa240, 139A871; 200 Wis87, 227NW284.

689-12 [c] (3) Other instances. 131 Misc909, 228NYS579.

689-13 151Md68, 134A33; 114Nebr477, 208NW120.

689-14 83NH524, 145A265.

689-15 242Mich46, 217NW784; 83NH 524, 145A265.

689-17 49SD220, 207NW87. [b] (4) Well-travelled track within rural highway connecting with public highway with no barriers or warning signs justifies assumption that track is reasonably safe for public. 114Nebr477, 208NW120.

690-18 49SD220, 207NW87.

690-29 [c] **Railing held insufficient.**–110Conn68, 147A26(2dcase). [d] **Railing must be reasonably strong.**–110Conn 68, 147A26(2dcase).

690-35½-New. A road contractor is not liable for death caused by an unlighted obstruction placed in the highway by others. 86 IndA180, 156NE566.

690-35¾-New. It is the duty of a person creating a danger in a highway to give adequate warning against it. 62 OntL120, [1928] 2DomLR557.

690-37 253Mass119, 148NE376; NH 147A411 (defect caused by elements or by third person).

691-39 96PaSuper437.

691-52 Kan 291P762.
692-54 96PaSuper437.
692-55 120Kan266. 243P277 (statute requiring at least five days' actual notice).
693-64½-New. chairman of the board of county commissioners, 120Kan266, 243P277.
693-73½-New. Notice to county board chairman five days before injury is required to warrant recovery. Kan 291P762.
693-75 Kan 291P762; 210Ky666, 276SW493; 130Misc776, 225NYS299. [e] 223AppDiv543, 228NYS718. [f] 221App Div671, 224NYS675. [g] In Massachusetts.–252Mass397, 147NE883.
695-84 See also 142Va454, 129SE277.
695-85½-New. A passenger in an automobile cannot recover from the state where the driver's negligence is the sole cause of the accident to which the state's failure to repair the road was not a contributing cause, even though negligence of the driver cannot be imputed to the passenger. 221AppDiv671, 224NYS675.
697-19 116Nebr553, 218NW397, 58ALR527.
698-25 131Misc65, 226NYS271. [c] Special enabling act eliminating contributory negligence from consideration of court of claims given jurisdiction of particular injury claim is constitutional and must be obeyed. 130Misc559, 224NYS354.
699-30 Ala 128S145; CalA 273P155; 42 Ida738, 248P456, 462 [citCJ], 49ALR1057; NH 150A809; 102NJL708, 133A303, 304 [citCJ]; NJSup 135A62; 130Misc559, 224NYS354.
700-31 102NJL708, 133A303, 304 [cit CJ].
700-32 102NJL708, 133A303, 304 [cit CJ].
700-33 102NJL708, 133A303, 304 [cit CJ].
700-47 120Kan393, 243P1049; 30 OhA283, 165NE53.
701-50 151Md68, 134A33; NH 150A809; 291Pa240, 139A871. [a] Persons using township roads must assume risks inseparable therefrom. 49SD220, 207NW87.
701-51 But see 128Misc156, 217NYS825.
701-52 NJSup 135A62.
702-56 128Misc156, 217NYS825.
702-57 128Misc156, 217NYS825.
702-61 153Md221, 138A25; 96PaSuper437.
702-62 291Pa240, 139A871; 200Wis87, 227NW284.
703-64 153Md221, 138A25.
703-67 30 OhA283, 165NE53. [c] 130Misc559, 224NYS354.
704-77 131Misc65, 226NYS271.
705-3 But see 155SC219, 152SE429.
706-31 Ont [1929] 1DomLR181.
707-36 Ont [1929] 1DomLR181.
709-63 See also 116Nebr553, 218NW397, 58ALR527.
709-67 86Md1, 38A33.
710-82 [c] TexCivA 290SW210.
710-84½-New. that the place where the injury occurred was a public pass way; 210Ky666, 276SW493.
710-89 30 OhA249, 164NE791.
710-93 35 OhA438, 172NE531.
712-18 120Kan266, 243P277 (allegations not showing at least five days' notice as required by statute).
712-22½-New. Complaint in action against member of state highway commission must allege negligence in selection of subordinates or actual or constructive notice of condition of road. 132 Or265, 285P253.
712-23 155SC77, 151SE887.
712-37 [a] In suit against contractor, installing defective culvert, plaintiff must prove that he was required to use ordinary care to protect him from injury. TexCommnA 292SW187.
713-43 77Mont80, 249P1041.
713-49 But see Kan 291P762.
713-52½-New. , or that plaintiff did not come within the statute creating the right of action. 254Mass208, 150NE167.
713-61 Kan 291P762.
714-62 128Misc156, 217NYS825; 194NC31, 138SE411.
714-63 194NC31, 138SE411.
714-70 128Kan127, 276P74.
714-72 128Misc156, 217NYS825.
714-73½-New. Where accident occurs because of disrepair of highway, onus is on municipality to rebut negligence. Man [1925] 3DomLR523.
714-73½-New. In an action under a statute defining the extent of defendant's obligation, the burden of proof is on plaintiff to show that he comes within the terms of the statute. 254Mass208, 150NE167.
715-80 [b] TexCivA 278SW485.
718-51 [a] (1) 175Ark101, 298SW1023; 120Kan659, 245P162; NJSup 136A196; 223AppDiv543, 228NYS718; 133Misc239, 232NYS306. (6) NJSup 135A62. (7) 120Kan659, 245P162; 121Kan211, 246P505. (9) NJSup 135A62. (15) To warrant inference that defendant power company knew or should have known of location of pole in road and knowingly permitted it to remain where it was at time of accident. 142Va454, 129SE277. (16) To warrant finding that automobile was traveling thirty miles an hour when it collided with parked truck. 219App Div124, 219NYS530. (17) To warrant finding that negligence in driving automobile into cloud of smoke was proximate cause of collision with state's parked truck. 219AppDiv124, 219NYS530. [b] (1) TexCivA 32SW(2d)400. (3) 128Misc156, 217NYS825. (5) 128Misc156, 217NYS825. [c] In determining reasonable care as to giving warnings of excavations, jury should consider kind of travel and probable speed of vehicles. 42 Ida738, 248P456, 49ALR1057.
718-56 153Md221, 138A25; 260Mass210, 157NE339; NJSup 136A196; 196NC160, 144SE693; RI 139A301.
719-57 242Mich46, 217NW784; 291Pa240, 139A871.
719-58 254Mass208, 150NE167.
719-59 NH 149A508; 200Wis87, 227NW284. [a] 223AppDiv520, 228NYS593. [b] 42 Ida738, 248P456, 49ALR1057; 223AppDiv520, 228NYS593. [c] TexCivA 20SW(2d)236.
719-60 120Kan659, 245P162; 127Me554, 144A677; 153Md221, 138A25; 115Nebr295, 212NW613; 116Nebr553, 218NW397, 58ALR527; 223AppDiv543, 228NYS718; 96PaSuper437 (failing to place lantern or other warning signal); 142Va454, 129SE277 (evidence sufficient to go to jury).
720-61 239 IllA560.
720-62 239 IllA560.
720-63 239 IllA560. [b] Evidence of injuries supporting allegations of complaint held sufficient for jury. 31Ariz39, 250P356.
720-66 120Kan659, 245P162; 127Me554, 144A677; 153Md221, 138A25; 115Nebr295, 212NW613; 102NJL343, 132A749; 226AppDiv294, 234NYS471; 142Va454, 129SE277. [c] 116Nebr553, 218NW397, 58ALR527. [d] In Arizona.–31Ariz39, 250P356.
720-66½-New. Where injury was due to stumbling of mule, and it was as likely that it stumbled upon an obstruction for which defendant was not responsible as upon one for which he was responsible, the case was improperly submitted to the jury. 210Ky666, 276SW493.
722-69 [a] 260Mass210, 157NE339. [b] 116Nebr553, 218NW397, 58ALR527.
724-2 [a] (2) Failure to erect guard rail or warning sign on curve. 120Kan659, 245P162.
724-11 120Kan659, 245P162. [a] (12) Other items allowed. 218Ala661, 120S149.
725-27½-New. In Ontario, where a jury find as inadequate a warning which was adequate according to plaintiff's evidence, a verdict for plaintiff will be set aside as perverse. 62 OntL120, [1928] 2DomLR557.
725-30 269US396, 46SCt141, 70LEd330; 21 OhA292, 153NE167; 118Tex410, 16SW(2d)258.
725-33 21 OhA292, 153NE167.
725-34 317Mo41, 295SW78; 21 OhA292, 153NE167.
725-36 27F(2d)766; 116Tex299, 289SW381.
725-37 43 Ida233, 253P377; 165La443, 115S650; 315Mo56, 285SW57; 191NC761, 133SE395; 118Tex410, 16SW(2d)258. [d] Implied from power to issue bonds.–191NC761, 133SE395.
725-42 317Mo41, 295SW78. [c] Discretion to levy tax.–310Mo587, 275SW932.
725-43 274US188, 47SCt563, 71LEd992; 317Mo41, 295SW78. [b] 274US554, 47SCt702, 71LEd1199; 19F(2d)3; 136 Okl191, 276P769. [c] 98Fla436, 123S830(2dcase) (charging entire cost against abutting property other than government property, since burden was imposed regardless of benefit and took property without due process of law); 317Mo41, 295SW78; TexCivA 295SW271.
726-44 274US188, 47SCt563, 71LEd992. [b] 43 Ida233, 253P377.
726-46 [a] 138 Okl225, 280P568. [b] 128Kan437, 278P54.
726-47 But see 168La597, 122S862.
726-52 116Tex299, 289SW381.
726-58½-New. Property owners are held not unnecessarily burdened by pavement of street constituting part of state highway by special assessment deducting sum state agreed to pay. 326 Ill82, 157NE28.
726-59 228Ky699, 15SW(2d)468. [a] 178Ark632, 11SW(2d)447; 99Fla1, 126S308; 99Fla226, 126S353; Fla 126S367.
727-61 336 Ill330, 168NE275; 232Ky439, 23SW(2d)276.
727-63 176Ark1130, 5SW(2d)346.
727-69 149Miss139, 114S803; 146Va46, 135SE826. [a] Statute held repealed.–177Ark1009, 8SW(2d)469.
727-71½-New. And a town charter may be repealed by special act so far as in conflict therewith. 146Va46, 135SE826.
727-72 But see 146Va46, 135SE826.
727-74 32Ariz235, 257P648; 169Ark549, 275SW898; 321 Ill499, 152NE560; 149Miss139, 114S803; 81Mont86, 261P885; 198NC114, 150SE813; 146Va46, 135SE826. [a] Law authorizing county to construct sea wall does not impliedly repeal law requiring county to pay one half of ad valorem road taxes to municipality. 157Miss459, 128S331.
727-76 149Miss139, 114S803.
727-78 81Mont86, 261P885. See also NJSup 132A314.
727-80 [d] Fund raised for one purpose cannot be used for another. 77CalA404, 247P527.
727-81 149Miss139, 114S803. [a] (6) For pier at end of road, with recreation pavilion having rest rooms and refreshment stands. 165Ga713, 141SE910. (7) To satisfy bonded indebtedness for road improvements. 201Cal629, 258P955. [c] (3) Purpose of Tennessee statute is to divide cost of building state highways between state and county. 157Tenn652, 16SW(2d)24.
728-86½-New. Certificate of separate purpose tax levy has been held void, where it did not state separate purpose as required by statute. 316 Ill403, 147NE455; 316 Ill526, 147NE458; 317 Ill53, 147NE459.
728-86½-New. Failure of commissioner to certify different purposes of road and bridge tax as required by statute rendered tax void. 316 Ill452, 147NE494.
728-86¼-New. Amendment. Where testimony introduced to support amendment failed to show that the commissioner had separately stated purposes of tax as required by statute, allowance of amendment to show purpose may be declared error. 316 Ill403, 147NE455; 316 Ill526, 147NE458.
728-86½-New. Objections. Certificate of levy must be itemized in accordance with provisions of statute, the information being necessary to enable the county board to exercise its judgment advisedly, and where certificate is not so itemized, objection should be sustained. 316 Ill403, 147NE455; 316 Ill526, 147NE458.
728-87 232Mich255, 205NW86.
728-88 54ND75, 208NW768; 125 Okl161, 256P932; 141 Okl130, 284P27 (certain per cent for delinquencies). [c] 232Mich255, 205NW86. [e] Limita-

tion held applicable.–319Mo 302, 3SW (2d)378. [f] **County excise boards are authorized to levy tax** for county highway fund in addition to four mills authorized for current expenses so long as total amount allowed for county does not exceed eight mills. 133 Okl 90, 271 P245.

729–89 321 Ill 496, 152NE538.

729–90 232Mich255, 205NW86.

729–91 125 Okl 161, 256P932; 125 Okl 164, 256P935; 136 Okl 191, 276P769; 138 Okl 225, 280P568; 139 Okl 185, 281 P795; 142 Okl 19, 285P38. [b] (1) 326 Ill 354, 157NE472. (17) Statute held not retrospective. 316 Ill 410, 147 NE492. (18) Consent of town auditors must be given in their official capacity at an official meeting. 326 Ill 354, 157 NE472. (19) Town auditors' consent can be shown only by record of official meeting at which consent granted. 326 Ill 354, 157NE472. (20) Highway commissioner's certificate must show rate determined, but need not recite preliminary action by him or auditors. 326 Ill 354, 157NE472. (21) Recital of erroneous date of action of board of auditors in highway commissioner's certificate does not invalidate tax, official record controlling. 326 Ill 354, 157NE472. (22) Under present statute, condition precedent to extension of tax is written consent of majority members of board of town auditors. 321 Ill 39, 151NE601. (23) Such consent can only be obtained at regular meeting of board held first Tuesday in September. 321 Ill 39, 151 NE601. (24) It cannot be given at special meeting held prior to date of regular meeting. 321 Ill 39, 151NE601. (25) Statute requiring consent of auditors is not amended by amendment of Township Organization Act. 321 Ill 39, 151NE601. (26) Tax extended as shown by certificate held valid. 321 Ill 39, 151NE601. [c] (2) But county road tax, authorized by statute, is not special or additional levy within constitutional provision. 319Mo 302, 3SW (2d)378. [e] **In Oklahoma.**–125 Okl 183, 257P784.

730–93 TexCivA 295SW271.

730–95½–New. Failure of commissioner to certify amount of road and bridge tax separately rendered the tax void. 316 Ill 452, 147NE494.

730–95⅓–New. In some jurisdictions, where ad valorem tax levy is necessary to meet estimated needs, ten per cent must be included for delinquencies. 142 Okl 130, 285P836.

730–98 191NC761, 133SE395.

730–2 [a] **In Oklahoma.**–124 Okl 16, 253P483.

730–4 151Va672, 144SE870. [b] (3) Other statutes. 151Va672, 144SE870.

731–19½–New. An exemption under town charter from taxes for maintenance and improvement does not exempt property from another tax under later law. 146Va46, 135SE826.

731–22 228Ky699, 15SW(2d)468; 21 OhA292, 153NE167. [b] **Act held not violative of constitution** in not requiring levy to taxes by fiscal authorities of road district, "levy" referring to collection, not creation of tax. 137SC 496, 135SE538.

731–23 94Fla1238, 116S15; 38GaA703, 145SE668; 321 Ill 499, 152NE340; 322 Ill 623, 153NE697; 149Miss139, 114S 803; 191NC761, 133SE395; 21 OhA 292, 153NE167. [i] **Levy required to pay bonds.**–191NC761, 133SE395. [j] **In Oklahoma.**–124 Okl 16, 253P483. [k] **Financial statement and estimate** showing division of county highway needs among several districts is not for that reason void. 141 Okl 130, 284P27. [l] **Levy for county highway fund.**–141 Okl 130, 284P27 (must be made in same manner as for general fund).

732–24 140 Okl 240, 285P80. [a] **In Oklahoma.**–142 Okl 130, 285P836; 142 Okl 177, 286P343.

732–26 191NC761, 133SE395.

732–26½–New. Some statutes make it the mandatory duty of the county court to levy a road tax. 119 Or264, 240P 233.

732–26⅓–New. Such statutes make the levy of a tax county business. 119 Or 264, 240P233.

732–27 [d] **Publication of financial statement and estimate** is required under some statutes. 141 Okl 291, 285P 67; 142 Okl 1, 285P73.

732–28 319 Ill 415, 150NE247; 320 Ill 560, 151NE561; 321 Ill 499, 152NE560.

733–30 [a] 232Ky439, 23SW(2d)276.

733–32 319 Ill 415, 150NE247; 320 Ill 560, 151NE561; 332 Ill 53, 163NE 348. [a] (8) 256 IllA3. [d] 319 Ill 415, 150NE247. [e] **In Oklahoma.**–142 Okl 19, 285P38; 142 Okl 8, 285P48; 142 Okl 29, 285P59.

733–33 149Miss139, 114S803. [a] (7) In approving tax increase commissioner need not have before him evidence of consent of board of tax auditors. 324 Ill 510, 155NE358. (8) Highway commissioner need not certify to county board or club action taken by him before ascertaining rate. 324 Ill 510, 155NE358. (9) Extension of road and bridge tax at rate exceeding fifty cents on one hundred dollars requires consent of town auditors at regular meeting. 323 Ill 536, 154NE468. (10) Consent of town auditors to extension of road and bridge tax must be in writing signed by majority of board at official meeting. 323 Ill 536, 154NE468. (11) Excess of road and bridge tax not consented to in writing by majority of town auditors at meeting on first Tuesday in September is held invalid. 323 Ill 536, 154NE468.

733–34 321 Ill 566, 152NE507; 324 Ill 510, 155NE358.

734–36 [b] (15) Ordinance authorizing tax for improvement of roads signed by president and secretary of police jury is presumptively regularly adopted but presumption may be overcome by showing on minutes of jury. 157 La454, 102S522. (16) Adoption of ordinance not shown by minutes of police jury. 157La454, 102S522. (17) Evidence sufficient to show ordinance was not actually passed by police jury. 157La454, 102S522. (18) Amendment to record of town auditors showing consent to road and bridge tax held properly allowed. 323 Ill 536, 154NE 468.

735–40 319 Ill 415, 150NE247; 323 Ill 536, 154NE468; 320 Ill 560, 151NE561; 332 Ill 53, 163NE348.

735–42 See also 320 Ill 560, 151NE561.

735–43 323 Ill 536, 154NE468. [b] **Act curing irregularity in failing to itemize road and bridge taxes** is held to validate lump sum levy. 323 Ill 536, 154 NE468. [c] **Statute held to validate road and bridge tax, not itemized,** though certificate of itemized tax was not passed on by county court. 323 Ill 536, 154NE468.

735–44½–New. Single levy of two taxes covering different districts is not illegal in the absence of inequality of assessment as between citizens. 146Va 46, 135SE826.

736–48 232Ky439, 23SW(2d)276. [i] **Under Road and Bridge Act of 1927,** special election submitting question whether county road tax exceeding constitutional limitation should be levied is proper. 339 Ill 300, 171NE126.

737–50½–New. That a municipal subdivision must have the approval of taxpayers does not affect its governmental status. 27F(2d)766.

737–53 119 Or264, 240P233 (statutes held mandatory). [b] **Power of legislature.**–169Ark383, 275SW762. [c] **Penalty for failure to pay assessment** under invalid law must be paid where assessment was later validated and taxpayer had waived right to object to payment of tax. TexCivA 298SW462.

737–53½–New. Delinquent taxes recognized to be collected and state's obligation fixed. 174Ark315, 295SW48.

737–54 [b] **It is duty** of highway commissioners of district formed under Acts (1917) No. 473 to see that taxes delinquent from prior levies are collected. 170Ark1168, 282SW990. [c] **Taxes in abandoned highway district** have been held collected by county collector "by virtue of his office" under terms of fidelity bond. 174Ark553, 297 SW833. [d] **Sureties on county tax collector's bond** have been held liable for default in not accounting for taxes collected in abandoned highway district under chancery decree. 174Ark 553, 297SW833.

737–59 [b] **Road district's quitclaim deed of lands purchased by it at tax sale** carries only such title as district has at time of execution of deed. 176 Ark625, 3SW(2d)694. [c] **Redemption.**–Ark 32SW(2d)617. [d] **Title of purchaser.**–Ark 32SW(2d)617.

737–64 [a] **Receiver appointed to collect taxes** for road district holds title to land struck off to him as receiver for use and benefit of district. 181Ark 848, 28SW(2d)57.

737–67 [a] (2) Exemption from taxation. Ark 32SW(2d)617. [d] **Demurrer to plea** that delinquent taxes were not yet sued for sustained. 174Ark315, 295SW48. [c] **No defense** that bank taxes are not paid. 174Ark315, 295SW 48.

738–74½–New. A railroad not liable for road and bridge tax invalidly levied is under duty to pay tax on the passage of an validating act, although no hearing could be had on its objections to the tax because of the death of the county judge. 323 Ill 536, 154NE468.

738–75 169Ark383, 275SW762 (statute limiting time of redemption to two years held applicable to existing districts).

738–76 But see 176Ark625, 3SW(2d) 694.

738–80½–New. A person purchasing at a road improvement district tax sale is entitled to a writ of possession after the expiration of the period of redemption. 169Ark383, 275SW762.

738–80⅓–New. Assessor's general sureties are not relieved from liability for state and road capitation taxes collected by assessor because he failed to give statutory additional bond. WVa 155SE172.

738–82 232Mich255, 205NW86.

738–87 194Wis456, 216NW144.

739–98 [a] (2) Bill held to state reasonable grounds. 326 Ill 508, 158NE 112.

739–3 286Pa137, 133A150.

739–3½–New. Bill may be brought against others than state officers. 326 Ill 508, 158NE112.

739–3⅓–New. A property owner failing to review proceedings by certiorari, as authorized by statute, cannot assail the validity of a tax in a proceeding for enforcement of payment because of a defect in the published notice of proceedings, where notice in proper form was posted as required by statute. 239 Mich437, 214NW412.

739–4 103NJL160, 134A757. [c] **Statute requiring payment of stated percentage to city officers** is mandatory. 119 Or264, 240P233.

739–6 124 Okl 16, 253P483. [e] **Statute expressly providing for expenditures of funds on county roads and improvement of street within municipality** precludes contrary contention. 119 Or264, 240P233 (statute held reasonable). [f] **In Oklahoma.**–124 Okl 16, 253P483. [g] **In Kansas.**–130Kan456, 286P244.

739–8 219Ala142, 121S504(2dcase); 256 IllA3.

739–14 176Ark796, 4SW(2d)19; 250 Mich227, 229NW911(3dcase) (method of distribution of highway fund held proper); 118 Or546, 247P772. [c] **In California.**–88CalA131, 263P349; 88 CalA138, 263P352 (cannot be urged as set-off).

740–15 317Mo 41, 295SW78.

740–16 [a] **Share of gasoline tax given county** operating under county road system is subject to control of county road commissioners exclusively. 250 Mich695, 231NW56.

740–17 149Miss139, 114S803; 117 Or 140, 241P979 (L. § 4600 as to payment of certain proportion of taxes levied for road purposes by counties having population over twenty five thousand to cities and towns in county held directory only); 118 Or546, 247P772; 143 Wash95, 254P847. [d] (3) Share ap-

propriated to city in certain year is not subject to reduction by set-off for overpayments of previous years. **Ala** 129 S48. (4) Term "one half of money collected" refers to net amount after statutory deductions. **Ala** 129S48. [e] **In California.**–196**Cal** 161, 236P304. [f] **Levies of taxes for road purposes** for certain years is construed to have been made under statute which did not require payment of certain proportion to be made to cities and towns. 117 **Or** 140, 241P979. [g] **Resolution of municipality claiming share held insufficient.**–157**Miss**594, 128S757.

740–21 Contra 81**Mont**86, 261P885. [c] **Moneys may be expended by county commissioners** according to their discretion and not necessarily wholly in road district from which derived. 81 **Mont**86, 261P885.

741–23 157**Miss**594, 128S757 (must show funds had not been otherwise appropriated or expended); 118 **Or**546, 247P772. [b] **County is not liable to city,** where, though required by statute to make separate levy for road purposes and pay certain proportion of amount collected to cities, it did not do so but made a general levy for county purposes and amount levied for road purposes could not be segregated. 117 **Or**140, 241P979. [c] **Before county can be held liable,** revenue for which it is liable must have been received by it. 117 **Or**140, 241P979.

741–26½–New. Under statutes in some jurisdictions the right of municipality to receive a prescribed proportion of taxes arises only in the event that it elects to reserve for itself the benefit of the statute by resolution as provided therein. 149**Miss**139, 114S803.

741–31 127**Kan**227, 273P398. But see **Wash** 289P28.

741–31½–New. State road tax funds are provided by statutes in some jurisdictions. 30**Ariz**14, 243P611.

741–31⅓–New. The fundamental purpose of such statutes is to provide funds and revenues and to afford methods for the construction of a comprehensive highway system. 30**Ariz**14, 243P611.

741–31¼–New. Such statutes have been declared constitutional. 30**Ariz**14, 243 P611.

741–31⅙–New. They provide for apportionment of the fund to the several counties in the amount to each county of certain amount of the taxes collected under the statute by the county, 30 **Ariz**14, 243P611.

741–31⅙–New. and such amount is subject to be paid out for the construction, reconstruction, repair, improvement, and maintenance of highways in the manner provided and for the work provided in such statute within the county, 30**Ariz**14, 243P611.

741–31½–New. upon the authority and under the direction of the county board of supervisors and the state engineer as agreed upon. 30**Ariz**14, 243P611.

741–31⅛–New. The expenditure of the percentage fund is not confined to highways initiated prior to date the statute became effective, 30**Ariz**14, 243P611.

741–31⅙–New. but could be made upon any road project in the particular county whether authorized, commenced, or initiated subsequent or prior to such date. 30**Ariz**14, 243P611.

741–31 1/10–New. The percentage of the fund apportioned to a county under the statute becomes its property and may be expended by it under a provision in the statute which authorized the board of supervisors to enter into contracts with the board of directors of state institutions. 30**Ariz**14, 243P611.

741–31 1/11–New. That a special road tax was not properly distributed among the districts of a county as contemplated does not invalidate the assessment and levy. 152**Tenn**243, 276SW638.

741–31 1/12–New. The chancery court has jurisdiction of a suit to enjoin the transfer of a township road fund to one account for use throughout the county. 175**Ark**1078, 1SW(**2d**)814.

741–31 1/13–New. [§ 500a] 9½. **Rights and Remedies of Taxpayers.** 127**Kan** 863, 275P205; **SC** 155SE832.

741–31 1/14–New. Taxpayer in suit to enjoin an unauthorized road contract need only allege a state of facts necessarily leading to the conclusion that he or his property will be injuriously affected. 161**La**471, 109S34.

741–31 1/15–New. In a taxpayer's action to annul the county commissioner's contract, resolutions correcting the minutes of the board to make them speak the truth are admissible although not specifically pleaded. 194**NC**380, 139SE767.

741–31 1/16–New. In suit to enjoin county commissioners from expending proceeds of bond issue, charges of bad faith of member of state highway commission cannot be considered. **TexCivA** 26SW (**2d**)470.

741–31 1/17–New. Petition in such action held not to authorize relief on theory that bonds were void. **TexCivA** 26SW (**2d**)470.

741–31 1/18–New. Sufficiency of evidence in suit to cancel bonds and enjoin payment. **TexCivA** 24SW(**2d**)732.

741–33 269US396, 46SCt141, 70**L ed**330; 99**Fla**628, 127S486(2dcase); 137**SC**496, 135SE538. [b] **Tax levied under Coastal Highway Act** of North Carolina, for payment of bonds of highway district, issued to advance money to highway commission, held "special assessment," not general taxation. 137**SC**496, 135 SE538. [c] **General assembly held to have properly levied tax,** under general legislative power, for payment of bonds issued for advancements to state highway commission. 137**SC**496, 135SE538.

741–34 98**Fla**436, 123S830(2dcase) (properly apportionable between public and abutting owners).

741–36 190**NC**123, 129SE154 (authority to county to levy tax to keep up certain highway held not invalid and in disregard to rule of uniformity). But see 43 **Ida**233, 253P377. [e] **Tax, under Coastal Highway Act,** has been held levied by general assembly, duties of comptroller general in making annual levy being purely ministerial. 137**SC**496, 135SE 538.

741–36½–New. In proceeding to restrain town highway commissioners from completing portion of proposed interstate highway, finding that state highway commission has approved location of road suggested is immaterial. 191**NC**68, 131SE372.

741–37 19F(**2d**)3; 96**Fla**478, 118S212.

741–37½–New. Township highway commissioners cannot tie up taxpayers' money until road officials of another state have come to agreement relative to connecting with proposed interstate highway. 191**NC**68, 131SE372.

742–41 99**Fla**628, 127S486(2dcase).

742–43 126**Me**235, 137A398, 399 [citCJ]. [b] **In Ohio.**–153 **OhA**167.

742–45 123 **Or**345, 262P248 (statute valid).

742–47½–New. Under some statutes, where a street is constructed under arrangement between the city and the state, the portion of the cost to be furnished by the city may be paid by it in full from its general funds or may be imposed in full upon property owners or may be apportioned one third against the city and two thirds against property owners. 213**Ky**90, 280SW486.

742–47⅓–New. It has been held that ordinary taxation, not special assessments, must be resorted to meet charges of construction and maintenance of public roads. 161**La**803, 109S496.

742–47¼–New. Under some statutes the power and duty of the board of county commissioners to pay the cost of a paved road chargeable to adjacent landowners is optional and discretionary, and not subject to judicial control so long as it fairly appears that the road funds on hand are required to maintain the state road system and to meet expenditures and claims for other road projects. 127 **Kan**48, 272P176.

742–47⅙–New. Provision for payment by highway commission for cost chargeable to lands in districts not assessed does not violate constitutional provision for uniformity of assessment. 130**Kan** 456, 286P244.

742–49 [b] (1) 130**Kan**456, 286P244. (3) Assessing benefits to property owners where cost of improvement is to be borne by municipality as whole. 114 **Oh** 351, 151NE470. (4) Burden on land held to be special assessments rather than general taxes. 269US396, 46SCt141, 70 **L ed**330.

742–50 320**Mo** 489, 8SW(**2d**)1003.

742–57 170**Ark**522, 281SW5.

743–62 96**Fla**478, 118S212; 24 **OhNP** NS321 (constitutional provisions for interest and sinking fund complied with).

743–64 But see 27F(**2d**)766.

743–67½–New. That road funds avoidable proved insufficient to complete improvement, or that anticipated benefits were not realized, is not ground for setting aside assessments on which taxes were levied to pay outstanding bonds. 168**Ark**266, 270SW961.

743–67⅓–New. Express authority to issue bonds for an improvement does not constitute a limitation on authority as to the cost. 170**Ark**522, 281SW5.

743–67¼–New. Road improvement proceedings contemplate a specific improvement, which cannot be changed by the court or commissioners in a contract for the construction of an improvement. 320**Mo** 489, 8SW(**2d**)1003.

743–67⅕–New. Where a highway was originally constructed of water-bound macadam, rebuilding it with bituminous macadam and construction of new culverts did not change the type of road, within the meaning of the statute authorizing an assessment of the cost of repair against nearby property when the type of road is changed. 29 **OhA**1, 163 **NE**34.

743–67⅙–New. And such improvement is not a "new construction," for which an assessment may be made. 29 **OhA**1, 163**NE**34.

743–67½–New. An assessment equal to the market value of the property is valid. 207**Cal** 1, 276P570.

743–70 [a] But see 173**Ark**372, 293SW 1031. [c] **Coal in place owned separately** with right of way on and under land for mining held realty subject to road improvement assessment. 117 **Ob**599, 159**NE**583.

743–77½–New. Pipe line is held subject to assessment as real property. 173**Ark** 372, 293SW1031.

743–78 119 **Oh**54, 162**NE**268; 21 **OhA** 292, 153**NE**167. [b] (4) Benefits from road improvement are not determinable by owner's use of land or use to which it may be devoted, but are matter of forecast and estimate. 153 **OhA**167. (5) Benefit need not be direct. 173**Ark** 372, 293SW1031. [e] **Assessing entire cost against abutting property** may be authorized if improvement benefits property primarily and public benefits are only incidental, provided cost is reasonable and benefits are properly apportioned and at least equal assessment. 98**Fla**436, 123S830(2dcase).

744–81 153 **OhA**167. [a] (1) 19F(**2d**)3.

744–87½–New. Under some statutes it is not necessary, in order to authorize an assessment of nonabutting property within one half of a mile of an intercounty highway for the improvement thereof, that an amount be assessed greater than ten per cent of the cost of the improvement. 19 **OhA**113.

744–89 169**Ark**1198, 278SW5; 153 **OhA** 167. [d] **Mode of assessment of property of railroad company** in benefit district for cost of constructing hard-surfaced road should be same as is followed with reference to other property liable for its proportionate part of such cost. 120**Kan**240, 243P282.

744–90 173**Ark**372, 293SW1031; 99**Fla** 628, 127S486(2dcase); 238**Mich**381, 212 **NW**950; 119 **Oh**54, 162**NE**268. [a] (2) Assessments against benefited property must be fairly apportioned and lawfully made. 98**Fla**436, 123S830(2dcase). [c] **Principle of apportionment according to benefits** has no application to road district tax. 165**La**443, 115S650. [d] **Cost of improvements essentially for benefit**

of public may not be entirely assessed against abutting property. **Fla** 126S367.

744-92 173**Ark**372, 293**SW**1031; **Mo** 19 **SW(2d)**891.

744-95 **Mo** 198**W(2d)**891.

745-96 **Mo** 198**W(2d)**891.

745-98 238**Mich**381, 212**NW**950. [a] **Front-foot rule may be unconstitutional.**–Legislature cannot constitutionally apply rule as sole basis for special highway assessments through rural lands outside municipality because of diversity of lands and of discrepancies in benefits conferred. 98**Fla**436, 123S830(2dcase).

745-99 277**US**160, 48**SCt**441, 72**L ed** 831, 58**ALR**126; **Fla** 126S367; 238**Mich** 381, 212**NW**950.

745-1 **Fla** 126S367.

745-2 169**Ark**1198, 278**SW**5; 153 **OhA** 167. [b] **Assessment may be validly limited** to region benefitted, no benefits being assessed to region not benefited. 169**Ark**1198, 278**SW**5.

745-3 171**Ark**423, 284**SW**733.

745-3½-New. Zoning of rural lands for road assessments does not invalidate them unless arbitrary, confiscatory, or discriminatory. 171**Ark**423, 284**SW**733 (Acts [1925], § 2).

745-8 19**F(2d)**3; 96**Fla**478, 118S212. [a] **That court directed collection of assessment to pay judgment** does not affect validity of levy made in accordance with statute. 170**Ark**522, 281**SW**5.

745-9 128 **Or**339, 273**P**716.

745-14 [a] **Membership of board of town auditors held not raised from three to four** when assessor acted instead of absent member and certificate of levy of taxes signed by two was therefore signed by majority. 323 **Ill** 347, 154**NE** 126.

745-15 See also 98**PaSuper**488.

746-17 269**US**396, 46**SCt**141 70**L ed**330; 180**Ark**606, 22**SW(2d)**904; **Fla** 126S367; 123 **Or**345, 262**P**248. [d] **Sufficiency of description of property to be assessed.**–Published notice of proposed assessment for improvement of section of intercounty road is sufficiently definite to apprise property owners where it refers to section of road to be improved and designates area of assessment though it does not give names of property owners or description of particular tracts of land. 19 **OhA**113. [e] **Owners of lands** have no right to be heard on question of benefits where assessment is legislative. 269**US**396, 46**SCt**141, 70**L ed**330.

746-18½-New. County court's order levying road assessment is not void because entered in separate book kept for such matters. 173**Ark**468, 292**SW**675.

746-18¼-New. Where highway commissioner delivered certificate of levy of taxes to town clerk with instruction to withhold filing until board of town auditors consented to levy, it was held that commissioner did not file certificate before consent, and irregularity did not vitiate tax. 323 **Ill** 347, 154**NE**126.

746-19 21 **OhA**292, 153**NE**167. [b] **Petition not alleging assessment void on face** limited to attack prescribed in statute. 169**Ark**1198, 278**SW**5.

746-21 204 **Iowa**1114, 216**NW**736.

746-22 194**Wis**456, 216**NW**144.

746-24 207**Cal** 1, 276**P**570. [b] 204 **Iowa**1114, 216**NW**736. [g] **In suit by taxpayers** to restrain bond issue for road work election of grounds not necessary. 160**La**326, 107S126. [h] **Parties.**–147 **Wash**57, 265**P**473 (necessary parties in suit to enjoin collection).

746-26 150**SC**538, 148**SE**548.

747-28 170 **Ark**522, 281**SW**5; 171**Ark** 8, 283**SW**39.

747-29 238**Mich**381, 212**NW**950; 153 **Oh A**167.

747-30 201 **Iowa**418, 205**NW**529 (reduction of highway drainage assessment on agricultural land justified).

747-31 [b] **In Louisiana.**–27**F(2d)**766. [c] **Petition held sufficient.**–27**F(2d)**766; 28 **OhA**492, 162**NE**814. [d] **Railroad company was entitled to assert its own case** to restrain collection of tax, even if company was not entitled to sue as regards claim asserted in behalf of another corporation. 27**F(2d)**766.

747-34 171**Ark**8, 283**SW**39; 201**Cal** 629, 258**P**955. [e] **Court on petition to enjoin assessment** as unconstitutional cannot substitute its judgment as to amount of benefits for that of commissioners acting within statute. 153 **OhA**167.

747-36½-New. Assessment will not be declared void on collateral attack unless it is shown on its face to be arbitrary. 171**Ark**8, 283**SW**39.

747-36¼-New. Defense in proceedings to enforce a tax lien challenging correctness of assessment constitutes collateral attack. 171**Ark**8, 283**SW**39.

747-36¼-New. Where one claims to have paid an illegal assessment, he cannot recover the amount so paid unless the payment was an involuntary one. 119 **Oh**504, 164**NE**755.

747-36½-New. Petitioning landowner not objecting to issuance of bonds, making of improvement or levying of assessment held barred by laches from suing to cancel assessment. **Nebr** 231 **NW**783.

747-37½-New. Where a street which was made part of the primary system of highways by statute was jointly constructed by the city, state, and federal road department, a landowner cannot complain that the procedure was not authorized by the city charter where the procedure resulted in his paying a lower assessment. 213**Ky**90, 280**SW**486.

747-37¼-New. A taxpayer's remedy after paying under protest is an action to recover it back. 119 **Oh**504, 164**NE**755.

747-38 173**Ark**372, 293**SW**1031. [b] 173**Ark**372, 293**SW**1031.

747-45 274**US**188, 47**SCt**563, 71**L ed**992; **Fla** 126S367.

747-48 **Mo** 24**SW(2d)**133.

747-49 [c] 168**Ark**266, 270**SW**961.

747-51 169**Ark**1198, 278**SW**5. [b] **Additional assessment valid** and indicative of legislative object to remove thirty per cent limit of statute. 169**Ark**1198, 278 **SW**5.

748-60 **Order levying tax under reassessment** held not necessary. 180**Ark** 606, 22**SW(2d)**904.

748-64½-New. On reduction of taxes it is proper for attorney of district to give notice of reduction to county clerk. 180 **Ark**606, 22**SW(2d)**904.

748-65 169**Ark**603, 276**SW**355 (upholding increase in annual installments); 178 **Ark**289, 10**SW(2d)**876; 96**Fla**478, 118S212; 320**Mo** 489, 8**SW(2d)**1003. [b] **Notice of fixing amount of installments.**–169**Ark**603, 276**SW**355.

748-66 180**Ark**606, 22**SW(2d)**904. [b] **Rate of interest on deferred payments** is limited by some statutes to six per cent. 19 **OhA**113.

748-67 **Mo** 19**SW(2d)**891 (enforceable by action only). [a] **Actions to enforce liens and collect taxes.**–County court's determination that street is public highway, and that signatures to petition for improvement are sufficient, does not preclude property owner, when sued on tax bill, from asserting nonexistence of such facts. **Mo** 19**SW(2d)**891.

748-68 173**Ark**295, 292**SW**130.

748-71½-New. Bondholders do not have separate liens upon independent units of land within district, but indebtedness for improvements is obligation of whole district to be paid out of revenues raised by uniform levies of taxation on assessed benefits. 169**Ark**603, 276**SW** 355.

748-72 178**Ark**289, 10**SW(2d)**876.

748-73 178**Ark**289, 10**SW(2d)**876.

748-77 176**Ark**1130, 5**SW(2d)**346.

749-81½-New. Before a resale, district is not entitled to be credited in any amount on outstanding bonds. 169**Ark** 603, 276**SW**355.

749-81½-New. Uniformity of taxation is not violated by purchase of delinquent lands by district. 169**Ark**603, 276**SW** 355.

749-81¼-New. A receiver for district bondholders is empowered, under a previous resolution of district commissioners, to collect assessments to pay defaulted bonds even if he would not have power to levy assessments as original cost. 15**F(2d)**996.

749-81½-New. Where assessment for payment of road bonds, with amount contributed by state, exceeded liabilities maturing that year, a property owner, paying an assessed rate under protest, may recover excess. 15**F(2d)**996.

749-81⅛-New. Where property owners failed to avail themselves of a statutory opportunity to challenge correctness of assessment, they cannot do so in the district's suit to enforce a tax lien. 171 **Ark**8, 283**SW**39.

749-81½-New. Tax bills, issued after the admitted abandonment of an improvement are invalid. 320**Mo** 489, 8**SW (2d)**1003.

749-81⅛-New. Where the proceedings in voting an additional tax were void for want of indorsement of the county court's approval on the petition, the court properly enjoined collection of the tax. 128 **Or**339, 273**P**716.

749-81½-New. Tender and offer to redeem after sale is sufficient although made to the clerk as commissioner. 179 **Ark**305, 15**SW(2d)**990.

749-81½-New. A statute providing that the owner of property sold may redeem includes any person having interest that would be foreclosed. 179**Ark** 305, 15**SW(2d)**990.

749-81½-New. The state highway commission is required to make reimbursement for assessments, under some statutes establishing a state highway system, where highways have been built under a benefit district plan. 129**Kan** 192, 281**P**855 (not authorized to pay interest on assessments made or on bonds issued for deferred payments).

749-81½-New. Plaintiff seeking to rejoin an improvement and cancel tax bills has the burden to show noncompliance with the statute under which the improvement was made. **Mo** 19**SW(2d)**891.

749-82 122**Kan**514, 252**P**466; 320**Mo** 489, 8**SW(2d)**1003.

749-82 But see 169**Ark**97, 273**SW**355, 41**ALR**629. [c] **Apportionment.**–45 **Ida** 406, 262**P**1048. [d] **Right to reimbursement** under statute when assessment paid in full. 126**Kan**591.

749-82½-New. A direction by the legislature to local authorities to use funds raised by local assessments for certain work which could have been, but was not, included in the original plan for improvement does not constitute an unlawful diversion of such funds. 169**Ark** 97, 273**SW**355, 41**ALR**629.

749-82½-New. **Constitutional provision** providing the use of a tax levied for one purpose for any other purpose does not apply to local assessments for highways. 169**Ark**97, 273**SW**355, 41**ALR**629.

753-83 21**AlaA**170, 106S207.

754-93 [b] 21**AlaA**170, 106S207. [e] **Complaint must set out substantially** ordinance alleged to have been violated. 21**AlaA**76, 105S424 (conviction cannot stand in absence thereof). [f] **Demurrers to complaint held properly overruled.**–21**AlaA**170, 106S207.

754-95 [a] (2) 103**TexCr**224, 280**SW** 786.

754-96½-New. , and it must affirmatively appear that the supervisor's district, in which prosecution originated, has been placed under provisions of statute. 140**Miss**147, 105S501.

754-1 [c] **Admission of evidence held error.**–Admission of county ordinance on which prosecution was not based. 21**Ala A**76, 105S424.

754-1½-New. The burden of proving that accused was liable for road service rests on the state. 103**TexCr**224, 280**SW** 786.

754-3½-New. Report of overseer, filed with justice of peace, containing name of delinquent, is necessary to conviction. 140**Miss**147, 105S501.

754-3½-New. To sustain a conviction for failing to work the public road, the state must show that accused was liable to road duty and failed or refused to work the road after a legal warning. 23**AlaA**266, 123S283(1stcase).

754-4 21**AlaA**170, 106S207.

754-6½-New. Indebtedness by a county, due to one liable to the county for road duty, has been held not to exempt him from performance of such duty. 21**AlaA**170, 106S207.

754-14½-New. **Rights and remedies of taxpayers.** A taxpayer cannot prevent the removal of a bridge from an old road which was destroyed as he has nothing to protect and preserve. 222**MoA**1216, 4 **SW(2d)**480.

HIRE

756–59 CalA 287P368.
756–61 [c] **Has ordinary meaning of** word "employed." TexCommnA 271SW 890.

HOG

758–34 10 Iowa115.

HOLDER

760–27 31NM667, 250P18.

HOLIDAYS

762–8 [c] **Proclamation by governor on occasion of funeral of Woodrow Wilson** ordering government departments and offices closed and work therein suspended held equivalent to declaration of legal holiday within rule of Political Code § 388, as to exclusion of last day when holiday. 32PortoRico 790.
762–15½–New. In Porto Rico a proclamation of the governor declaring a day of mourning on account of the death of a former president of the United States and ordering the closing of public offices and suspension of business has no greater scope than a recommendation. 33 PortoRico 478.
762–16 Contra 35PortoRico 577.
762–20 ND 231NW892.
762–21 131 Okl 232, 268P722, 724 [quot CJ].
763–27 169La831, 126S207.
763–27½–New. That appeal bond was dated and signed on legal holiday does not affect its validity. 165La478, 115S 662.
763–29 GaA 155SE786(1stcase); 33 PortoRico 478, 480 [citCJ]; Sask [1928] 3DomLR562(2dcase). See also 1LaA25.
764–33 90CalA700, 266P585.
765–52 See also 57ND17, 220NW130.
766–55 144 Okl 284, 290P1106.
766–59 160La168, 106S734. See also 79 CalA64, 248P1044.
766–60½–New. In Porto Rico the impaneling of a jury is not unlawful because done on a day declared by the governor to be a day of mourning because of the death of a former president of the United States. 33PortoRico 478.
766–71 198Cal 216, 244P355; 205Cal 408, 271P201. [b] **In California.**–198Cal 216, 244P355.
767–72 ND 231NW892; 131 Okl 232, 268P722, 724 [quotCJ].
767–76 169La831, 126S207.

HOLUA

767–7½–New. A slope. 29Hawaii130.

HOME

768–21 [a] **Hotel is temporary home in eyes of law,** but locus is not confined to room which one occupies, as guest has use of whole building, lobbies, etc. 218 AppDiv302, 218NYS193.

HOMESTEADS

781–1 115Nebr643, 214NW73. [a] (5) 191Wis580, 211NW798. [i] **In Oklahoma.**–37 OklACR496.
782–3 138 Okl 133, 280P581.
782–4 118 Okl 277, 248P594; 138 Okl 133, 280P581.
782–6 126 Okl 83, 258P748.
782–7 203 Iowa372, 212NW678.
782–10 6LaA457; 313Mo 476, 285SW92.
782–12 90Fla407, 106S127, 43ALR1409; 123Kan441, 256P133; 218Ky557, 291 SW757; 313Mo 476, 285SW92.
783–14 55ND301, 213NW850; 139SC66, 137SE331; TexCivA 275SW187.
783–15 139SC66, 137SE331.
783–16½–New. In some jurisdictions exemption laws and laws pertaining to homestead rights of a surviving spouse constitute distinct policies of the state and should not be confused in determining the rights under either policy. 37 OklACR496.
783–16½–New. In such jurisdictions the exemption laws are intended as a protection to the head of the family against creditors only, while the homestead right given to a surviving spouse, to occupy and live on the homestead, is intended to protect such survivor against all persons except holders of expressly enforcible liens during the lifetime of the survivor or until waived. 37 OklACR 496.
783–18 218Ky557, 291SW757; OhA 172 NE683; 121 Okl 14, 247P55; 139SC66, 137SE331, 334 [quotCJ]. [a] **In Georgia.**–5F(2d)326.
783–19 139SC66, 137SE331, 334 [quot CJ].
783–20 139SC66, 137SE331, 334 [quot CJ].
783–20½–New. The legislature cannot confer on either spouse exclusive possession of the homestead. 115Tex16, 273SW798.
783–20½–New. Homestead right not an estate in realty, nevertheless partakes of the nature of an estate for life or term of years, in that use, fruits, and occupancy of the property inhere in the holder during the homestead period. TexCivA 13 SW(2d)233.
783–22 TexCivA 275SW187 (mere community growing out of exercise of certain conditions).
784–23 139SC66, 137SE331. See also 8 LaA773.
784–24 218Ky557, 291SW757.
784–25 [b] **Right of homestead** includes only right of occupancy and use of surface of land. 218Ky557, 291SW757.
784–31 164Ga302, 138SE223; 234Ky 369, 28SW(2d)32; 129 Or128, 276P680; TexCivA 275SW187; TexCivA 19SW (2d)382.
784–33 315Mo 872, 288SW54.
784–37 158Tenn437, 14SW(2d)745.
785–42 234Ky369, 28SW(2d)32; TexCivA 286SW315. [c] (1) 116 Okl 159, 243P950. (2) Administrator of wife has no right to collect rents when wife dies before husband. 116 Okl 159, 243P950.
785–44 115Tex16, 273SW798 (legislature cannot confer on either spouse power to dispose of homestead).
785–46 116 Okl 159, 243P950.
785–48 234Ky369, 28SW(2d)32.
785–50 TexCivA 293SW350.
785–51 TexCivA 286SW315.
785–52 Nebr 228NW369.
786–55 76Mont239, 245P953. [a] **Constitutionality of law requiring selection before judgment.**–154Wash191, 281P 482.
786–58 115Tex16, 273SW798.
786–60½–New. But in some jurisdictions the legislature may by express constitutional provision, modify the state constitutional provisions relating to homestead. 115 Okl 44, 241P480.
786–71 See also TexCivA 78W(2d)620.
787–72½–New. Homestead acquired during marital relations cannot be subject to payment of community debts. TexCivA 24SW(2d)69.
787–74 115Tex16, 273SW798 (legislature cannot confer on either spouse power to dispose of homestead).
787–81 36Wyo 290, 254P691, 693 [cit CJ].
787–82 28F(2d)353; 28F(2d)396; 34 F(2d)970; 92CalA337, 268P428; 90Fla 407, 106S127, 43ALR1409; 337 Ill 427, 169NE201 (protection of surviving spouse); 200 Iowa1109, 206NW22; 205 Iowa701, 216NW288; 206 Iowa961, 221 NW550; Iowa 228NW295; 230Ky66, 18SW(2d)870; 165Minn295, 206NW 461; MoA 31SW(2d)103; Mont 285P 172; Mont 289P559; 118 Okl 277, 248 P594; 122 Okl 255, 254P95; 39 Okl ACR238; 121 Or102, 254P201; 122 Or 493, 259P778; 140SC114, 138SE626; 115Tex400, 282SW788; 118Tex586, 19 SW(2d)35; TexCivA 28W(2d)992; 146 Wash273, 263P184; 154Wash191, 281P 482; 191Wis580, 211NW798; 39Wyo 414, 273P173.
788–85 Iowa 227NW587; 154Wash191, 281P482.
788–89 90Fla407, 106S127, 43ALR 1409; 140SC114, 138SE626.
788–93 208Cal 528, 282P793.
789–7 173Minn576, 218NW108.
789–9 220Ky464, 295SW442, 444 [cit CJ].
789–11 219Ala537, 122S668; 220Ala 72, 124S113; Ala 127S503; 198Cal 440, 245P422; 98CalA633, 277P372.
789–12 33F(2d)157(2dcase); 220Ky 464, 295SW442, 444 [citCJ].
789–12½–New. Rights of parties to partition proceeding involving a homestead right are determined by statutes in force at the time the right arose. Mo 20SW(2d)26.
790–23 316Mo 1188, 295SW123; 127 Okl 203, 260P481, 485 [quotCJ]; Tex CivA 13SW(2d)971.
790–24 127 Okl 203, 260P481, 485 [quotCJ]; TexCivA 272SW510; Tex CivA 28W(2d)987; TexCivA 13SW(2d) 176. [a] **That lands are adjacent** does not affect rule. 127 Okl 203, 260P481.
790–25 TexCivA 294SW618.
791–39 Mo 26SW(2d)603.
791–43 TexCivA 13SW(2d)176.
791–45 TexCivA 13SW(2d)176.
791–47 217Ky465, 290SW349; 55ND 301, 213NW850, 852 [citCJ].
791–48 55ND301, 213NW850, 852 [cit CJ]; 126 Okl 83, 258P748. [a] **Effect of divorce.**–126 Okl 83, 258P748.
791–49 245Mich246, 222NW111; 139 SC66, 137SE331.
792–58 139SC66, 137SE331.
792–80 5F(2d)326.
793–85 [b] **In Oklahoma.**–140 Okl 86, 282P677.
793–98 205 Iowa701, 216NW288. [a] 206 Iowa961, 221NW550.
793–6 126 Okl 83, 258P748.
794–20½–New. a father and his crippled adult son; 206 Iowa961, 221NW 550.
794–26 TexCivA 19SW(2d)442.
794–31 TexCivA 272SW830.
794–44 TexCivA 274SW292.
795–70 TexCivA 275SW187.
795–70½–New. There is no homestead exemption where there is no family. TexCivA 275SW187.
795–70½–New. A family is not necessarily a parent and its children but may be constituted by an adult and a dependent minor living with him, whom he has a moral permanent obligation to support. TexCivA 272SW830.
795–72 140Wash525, 250P36.
795–73 TexCivA 275SW187 (no homestead exemption where there is no family).
795–74 143Miss498, 108S498; 126 Okl 83, 258P748. [a] 126 Okl 83, 258P748.
795–76 139SC66, 137SE331.
795–77 99Fla1282, 128S817.
795–79 5F(2d)326, 327 [citCyc].
795–5 Utah 270P1089.
796–7 Tex 27SW(2d)1093 (homestead exists on property occupied by husband where separation for less than ten years and husband supports wife).
796–15 TexCivA 281SW598. [a] (2) Where wife obtained custody of minor child, husband, being liable for necessities of life for child, held head of family and entitled to homestead exemption. 98Fla339, 123S780. [b] **Minor children living with divorced father** constitute family. TexCivA 275SW187.
796–21 164La1015, 115S129.
796–25 [a] 316 Ill 605, 147NE427.
797–32 316 Ill 605, 147NE427.
797–38 168La909, 123S616.
797–46 168La909, 123S616; 143Miss 498, 108S498 (widow over sixty years of age); 317Mo 1336, 298SW34. [c] **In Iowa** widow or widower, although without children, is deemed family while continuing to occupy homestead. Iowa 232NW813.
797–49 TexCivA 275SW187. [a] (4) Unmarried brother living with niece and sister on latter's premises adjoining his own unimproved land. TexCivA 290 SW791.
798–50 TexCivA 275SW187.
798–56 Tex 287SW666. [a] Tex 287 SW666. [c] **Supporting unmarried brother** who was unable to work regularly. 101CalA162, 281P442.
798–67 [a] (2) Natural children of homestead claimant are dependent, within meaning of law authorizing homestead exemption, regardless of fact that children had not been acknowledged or legitimated. 33F(2d) 335. [b] (11) Life devisee not obligated to support son, but dependent on son. 231Ky682, 22SW(2d)111. (12) Widow supporting child given to her by mere verbal gift without legal adoption. TexCivA 19SW(2d)442.
799–68 TexCivA 32SW(2d)259 (dependence need not be absolute).
799–71 But see 168La909, 123S616.

799–74½–New. In determining whether a person is the head of a family entitled to homestead exemption, the extent to which contributions are made to dependents need not be considered. 168La909, 123S616.

799–76 231Ky682, 28SW(2d)111; 168La909, 125S588; TexCivA 32SW(2d)259. [a] See also Mont 285P172.

800–80 But see TexCivA 32SW(2d)259.

800–92 OhA 172NE683; TexCivA 30SW(2d)522. [c] **In Louisiana.**–169La1185, 126S916.

800–93½–New. A woman may not claim homestead exemption in her own property merely because she is a widow. 139SC66, 137SE331.

800–96 See also TexCivA 272SW830.

801–6½–New. Land to which head of family acquires title and makes home becomes homestead without further legislative action or other act on his part. Fla 130S623.

801–7 34F(2d)970; 95Fla522; 116S867; 112Okl82, 240P101; 39OklACR238; 53SD399, 220NW862; 146Wash273, 263P184.

801–8 146Wash273, 263P184.

801–11 140Okl86, 282P677; 142Wash335, 253P124; 146Wash273, 263P184.

801–14 200Iowa1109, 206NW22; 230Ky696, 20SW(2d)734; 124Okl300, 256P46; 140Okl86, 282P677; 39OklACR238; TexCivA 296SW658; TexCivA 300SW235; TexCivA 1SW(2d)695; TexCivA 13SW(2d)176.

802–15 TexCivA 19SW(2d)442.

802–17 142Wash335, 253P124.

802–24 215Ala644, 112S204; 200Iowa1109, 206NW22; 205Iowa701, 216NW288; 206Iowa1382, 222NW370; 119Kan760, 241P259; 121Kan617, 249P593; 230Ky66, 18SW(2d)870; 143Miss498, 108S498; 123Okl81, 252P48; TexCivA 287SW144; TexCivA 296SW658; 142Wash335, 253P124; 153Wash218, 279P579. [c] (2) Mere removal from old house into new house on same tract has no effect on right of owner to claim and have set off to him homestead not exceeding forty acres in extent. 206Iowa1382, 222NW370. (3) Where debtor owning quarter section of land moves from old dwelling house into new dwelling house on same tract, and sells three fourths of quarter section including old dwelling house, his acts amount to nothing more than exercise of homestead rights on basis of different location. 206Iowa1382, 222NW370. (4) In such case there is no abandonment of homestead rights. 206Iowa1382, 222NW370. [e] **Failure to occupy premises purchased** held not excused by litigation not preventing appropriation of property. TexCivA 296SW658. [f] **Property not taken into possession.**–240Mich454, 215NW389. [g] **Wife need not join husband** in occupancy of land since that may be done by husband alone. TexCivA 24SW(2d)69.

804–41 220Ala446, 125S611; 123Okl81, 252P48; 124Okl300, 256P46; 133Okl204, 271P665; 39OklACR238; TexCivA 281SW893; TexCivA 284SW612; TexCivA 297SW271; TexCivA 15SW(2d)112; TexCivA 15SW(2d)707.

805–42 123Okl81, 252P48.

805–43 123Okl81, 252P48; 124Okl300, 256P46; 39OklACR238; 199Wis1, 225NW134.

805–45 124Okl300, 256P46; 138Okl133, 280P581; TexCivA 30SW(2d)582.

805–50 241Mich528, 217NW911.

805–50½–New. A family can have only one residence homestead at the same time. TexCivA 300SW235.

805–52 112Okl82, 240P101; 53SD399, 220NW862; TexCivA 30SW(2d)582.

806–58 Man [1930] 1DomLR58.

806–65 161La657, 109S347; 56ND613, 218NW864; TexCivA 1SW(2d)695; TexCivA 24SW(2d)454.

806–67 TexCivA 13SW(2d)176.

806–68 TexCivA 290SW813.

807–71½–New. It is not mere declarations that constitute a homestead but the use to which it is put. TexCivA 2SW(2d)317.

807–74 34F(2d)970 (that smaller buildings on homestead lot were rented held immaterial).

807–76 Fla 129S847.

807–78 172Minn200, 214NW793.

808–84 TexCivA 297SW609.

808–91 TexCivA 290SW813.

809–95 127Okl203, 260P481; TexCivA 290SW813. [e] **Temporary renting not defeating homestead.**–TexCivA 30SW(2d)582 (whether renting temporary question for jury).

809–99 TexCommnA 6SW(2d)350.

809–3½–New. That tenant cultivates land does not preclude owner from selecting it as homestead where he resides in dwelling house thereon. Mont 289P559.

810–10 14F(2d)974, 975 [citCJ] (applying Texas statute).

810–11½–New. The property must be used for claimant's business. TexCivA 294SW618.

810–11⅓–New. Mortgaged apartments do not constitute the business homestead of the mortgagor where there is no office room in the building and he only occupies a storeroom at the will of a tenant. TexCivA 294SW618.

810–15 14F(2d)974 [citCJ] (applying Texas rule).

810–18 TexCivA 294SW618.

810–28 TexCivA 2SW(2d)307.

811–39 200Iowa1109, 206NW22.

811–41½–New. Under some statutes it is immaterial whether occupancy is for short or long period, even if for express purpose of preventing levy. 24F(2d)482.

811–43 TexCivA 275SW84.

811–45 203Iowa1368, 214NW542; TexCivA 275SW84.

811–46 TexCivA 275SW84.

812–49½–New. Designation of a homestead in papers executed to procure a loan estops the parties from asserting that other land on which security was taken constitutes the homestead. TexCivA 275SW84.

812–49⅓–New. A homestead, as designated in an Indian allotment of land, creates no presumption that the same constitutes a homestead under state law. 140Okl86, 282P677.

812–53 203Iowa1368, 214NW542; 56ND613, 218NW864, 867 [citCJ]; TexCivA 27SW(2d)1093 (in spite of contrary declarations); Wis 230NW132.

812–54 56ND613, 218NW864, 867 [cit CJ].

812–61 56ND613, 218NW864, 867 [cit CJ].

812–66½–New. Public instrument and record in registry not required. 35PortoRico726.

813–70 146Wash128, 262P144; 147Wash574, 266P731; 154Wash191, 281P482 (judgment debtor may declare). See also 142Wash335, 253P124.

813–72 147Wash574, 266P731.

813–75 56ND613, 218NW864, 867 [cit CJ]. [a] **Failure to make and record plat** is immaterial where claimant moved into house on portion of his quarter section not exceeding statutory limit in area and sold balance of quarter section. 206Iowa1382, 222NW370.

813–82 92CalA337, 268P428; TexCivA 281SW277.

813–86 [a] Mont 285P172.

814–5 202Cal695, 262P331. [a] **In Oklahoma.**–140Okl86, 282P677.

814–8½–New. Where a wife does not join with her husband in a homestead declaration on property owned by them as tenants in common, the exemption does not extend to her interest. 78Mont395, 255P1049.

815–15 92CalA337, 268P428. [a] (3) Homestead does not come into existence and become vested right till declaration is filed. 147Wash574, 266P731. (4) Mortgagor failing to file declaration before entry of foreclosure judgment is not entitled to possession during period of redemption. 147Wash574, 266P731.

815–19 146Wash273, 263P184.

815–20 29Ariz325, 241P515.

815–21 See also 204Cal452, 268P629.

815–25½–New. That homestead declaration on statutory maximum of land includes property not owned by claimant does not invalidate homestead on remainder. Mont 289P559.

815–28 TexCivA 15SW(2d)155.

815–31 202Iowa493, 210NW564; TexCivA 27SW(2d)1093; TexCommnA 13SW(2d)685; TexCommnA 15SW(2d)1017; TexCivA 281SW277; TexCivA 286SW680 (applying by analogy rule where there is excess over exemption); TexCivA 23SW(2d)850.

816–36 TexCivA 281SW277.

816–43½–New. Appraiser's return need not be registered in the county where the homestead is located if filed in the judgment roll. 193NC541, 137SE658.

816–43⅓–New. Allotment for eight hundred dollars instead of one thousand dollars, although irregular, is not invalid. 193NC541, 137SE658.

816–52 But see 166Ga519, 143SE770.

816–53 213Ala46, 104S330. [a] **Where administration is pending,** petition for allotment need not show jurisdictional facts. 213Ala46, 104S330.

816–57 166Ga519, 143SE770. [a] **Facts necessary to validity of exemption** need not affirmatively appear on face of schedule. 166Ga176, 142SE667.

816–61 165Ga812, 142SE142.

817–77 213Ala46, 104S330 (want of qualifications of commissioners does not render homestead exemption void).

817–83 166Ga176, 142SE667.

818–1½–New. **Appeal** to superior court from judgment of ordinary setting apart or refusing to set apart homestead is an unavailable remedy where the creditor has filed one of the objections enumerated in the statute. 35GaA614, 134SE343.

818–4 Tex 27SW(2d)1093.

818–5 140Wash525, 250P36.

818–6 140Wash525, 250P36.

818–7 154Wash544, 283P169 (under statute since repealed).

818–8½–New. Date from which right to exemption of a tract as an entirety accrued is not brought forward by payments on the price of property, Iowa 228NW295.

818–8⅓–New. or by payment of liens thereon. Iowa 228NW295.

818–10 206Iowa1382, 222NW370.

818–14 [b] **Land exchanged for homestead,** with intention of making it new homestead, which intention is carried out by moving thereon, becomes homestead from date of exchange. TexCivA 21SW(2d)1090.

818–18 170La768, 129S158.

819–20 316Mo1188, 295SW123. [a] **Exemption does not attach till deed** is filed for record, and then only when actually occupied as homestead. 313Mo448, 285SW459.

819–27 Iowa 228NW295. [e] 138Okl133, 280P581 (where abandoned homestead is occupied by tenant).

819–35½–New. Abandonment of an existing homestead is a condition precedent to the acquisition of another. TexCivA 281SW592.

819–39 TexCivA 30SW(2d)582 (intention to unite houses on one lot as homestead).

819–41½–New. Evidence showing the entire transaction relative to the purchase is admissible. TexCivA 284SW612.

819–43 98CalA615, 277P513; 166Ga176, 142SE667, 167La1024, 120S634, 63ALR1283; Minn 232NW740; TexCivA 23SW(2d)850; 199Wis1, 225NW134.

820–44 215Ala644, 112S204; 92CalA337, 268P428.

820–46 [a] **Where premises occupied as homestead do not exceed legal extent and value,** it will be presumed that premises are family homestead and exempt as such. 56ND613, 218NW864.

820–48 TexCivA 30SW(2d)582.

820–54½–New. Proof must be by preponderance of the evidence. TexCivA 14SW(2d)881.

820–56 53SD399, 220NW862; 146Wash273, 263P184.

820–56½–New. Nor is testimony of homesteader conclusive as to interest. 198Cal177, 244P330.

820–61½–New. The intention of a purchaser of unimproved land to create a homestead thereon may be shown by circumstances. TexCivA 284SW612.

820–63 TexCivA 1SW(2d)695; TexCivA 15SW(2d)112.

821–64 202Cal695, 262P331; 99Fla1282, 128S817; Mo 30SW(2d)1073; 191NC376, 131SE742; 51SD157, 212NW872; 53SD399, 220NW862; 53SD533, 221NW255; TexCivA 284SW612; TexCivA 296SW658; TexCivA 12SW(2d)269; TexCivA 20SW(2d)238; TexCivA 24SW(2d)69; TexCivA 28SW(2d)247;

TexCivA 29SW(2d)431; TexCivA 29SW (2d)447.

821-65 168Ark1168, 273SW18; 39 OklACR238; 39OklACR265; TexCivA 28W (2d)307; TexCivA 23SW(2d)791; TexCivA 23SW(2d)850.

821-66 213Ala46, 104S330; TexCommnA 13SW(2d)685; TexCivA 281 SW893.

821-68 See also 150SC244, 147SE874.

821-69½-New. to show that the place where claimant lived was a town or village at the time of levy of attachment. TexCivA 280SW854.

821-71 198Cal177, 244P330 (insufficient to show residence); 98CalA615, 277P513; Minn 232NW740; 138 Okl 133, 280P581; TexCommnA 29SW(2d) 982 (as matter of law); TexCivA 281 SW281; TexCivA 13SW(2d)176; TexCivA 23SW(2d)871. See also 146Wash 273, 263P184. [a] **Evidence held not to show fraud** in appraisal of homestead value. 213Ala46, 104S330.

821-71½-New. to warrant setting apart of rural homestead, TexCivA 280 SW854.

821-71⅓-New. to show that wife acted in bad faith in making selection, 146 Wash128, 262P144.

821-72½-New. Evidence held insufficient to support a finding that defendant legally or equitably owned adjoining land, which plaintiff claimed was included in the homestead designated, instead of that conveyed. TexCivA 15 SW(2d)116.

821-76 Alta [1930] 3DomLR200.

821-84½-New. Coal underlying homestead is protected same as homestead is protected. 176Ark126, 28SW(2d)63.

822-90 TexCivA 293SW632. [c] (4) Use made of land in close proximity is material. TexCommnA 288SW802. (5) Fact that there was vacant space of two hundred yards between corporate limits and lot is not conclusive on issue. TexCommnA 288SW802.

822-97 TexCivA 293SW632.

823-1 [a] 207 Iowa702, 223NW527.

823-2 207 Iowa702, 223NW527. [b] (1) 207 Iowa702, 223NW527.

823-9 140 Okl 86, 282P677; 38 OklACR 187 (urban homestead); TexCivA 294 SW294. But see TexCivA 28SW(2d)992. [a] **Renting city lots is not homestead use,** though revenue is used to support family. TexCivA 294SW294. [b] **Small houses used for renting, located on homestead property,** cannot bar valid homestead declared on whole tract where such smaller houses are only incidental and main house is primarily family residence. 34F(2d)970.

824-27 38 OklACR187.

824-28 143Miss498, 108S498; 38Okl ACR187 (urban homestead limited to one acre); 115Tex400, 282SW788; TexCivA 38SW(2d)941.

824-29 117Nebr488, 221NW101.

824-31 [a] **Head of family with four minor children** held to have homestead right in forty acre tract. 203 Iowa1368, 214NW542.

825-39½-New. In some jurisdictions a minimum urban homestead site or unit is one quarter of an acre. 37 OklACR 496.

825-41 [c] **In Florida.**-90Fla47, 105S 143.

825-42 TexCivA 293SW632; TexCivA 28W(2d)307. [b] **Extension of corporate limits** so as to include part of homestead does not affect right to add to homestead up to limit fixed therefor. 7 F(2d)218.

825-46 TexCivA 293SW632.

826-58 143Miss498, 108S498.

826-60 143Miss498, 108S498; 50ND 949, 198NW673; 115Tex400, 282SW 788.

826-64½-New. Although interest in acreage homestead is worth less than statutory limit of value, debtor is not entitled to exemption in remainder of estate. 143Miss498, 108S498.

826-66 51SD157, 212NW872.

826-67 221MoA877, 288SW84; 51SD 157, 212NW872; 115Tex400, 282SW788; TexCivA 286SW350; TexCivA 3SW(2d) 941; TexCivA 20SW(2d)238. [a] 51SD 253, 213NW364. [c] **Improvements.**-TexCivA 286SW350.

827-70 [a] **In Missouri.**-221MoA877, 288SW84.

827-72½-New. In case of partition of excess value of urban homestead on petition of surviving children of deceased wife, their interest should be accounted for by awarding them other property of estate. TexCivA 286SW350.

827-72⅓-New. If there is not sufficient other property surviving parent should be allowed to portion of excess and retain his homestead right in whole property. TexCivA 286SW350.

827-84 TexCommnA 6SW(2d)350.

827-84½-New. Improvements on new homestead cannot be considered in determining value of old homestead. Iowa 228NW295.

827-84⅓-New. Where improvements made to a homestead by the surviving husband were made for his use after his wife's death, the improvements are not to be considered in the valuation of the homestead. 230Ky143, 18SW(2d) 961.

827-86½-New. "Value of homestead" is value of tract and not the value of the debtor's interest therein. Iowa 228NW 295.

827-86⅓-New. Payments on purchase price made after acquisition of a homestead cannot be deducted from the value of the homestead tract, though made after the debt to which it is sought to subject the homestead was contracted. Iowa 228NW295.

828-87 Iowa 228NW295; 50ND949, 198NW673. [b] **In North Dakota.**-50 ND949, 198NW673.

828-88 320Mo754, 9SW(2d)880. [b] **In Wisconsin** mortgagor's equity must be considered in determining whether homestead rights in proceeds of sale exceed statutory limitations as to value. 191Wis580, 211NW798.

829-15½-New. A mere parol license or privilege to use land for a particular purpose, which is gratuitous and revocable, is not such an interest in, or title to, such land as to make it capable of being contiguous to real property or affording the legal contact necessary between two otherwise disconnected tracts for homestead purposes. 128Kan87, 276 P57.

829-16 128Kan87, 276P57.

829-17 Mont 289P559.

830-19 91CalA78, 266P617.

830-32 38F(2d)228 (under Texas Constitution); Ala 127S816; Mo 30SW(2d) 1073; 118 Okl 277, 248P594; 136 Okl 174, 276P707; TexCommnA 13SW(2d) 348.

830-33 But see 230Ky66, 18SW(2d) 870.

830-34 179Ark712, 17SW(2d)888; 224 Ky289, 6SW(2d)253.

831-35 TexCivA 1SW(2d)695.

831-36 [a] (2) Lots held homestead within application of rule. 130Kan552, 287P621. [b] (4) In Florida conveyance of pieces of land, thereby separating main body does not destroy homestead character of parts not conveyed. 7 F(2d)218.

831-37½-New. In some jurisdictions only the residence tract may be claimed as an urban homestead. 38 OklACR 187.

831-38 [a] **Character as homestead not affected,** even though excess was produced in excess of family's actual and necessary support and maintenance. TexCivA 2SW(2d)992.

831-39 29F(2d)230. [a] (8) Noncontiguous tract used for hay, pasturage, grain, growing, etc., held homestead. 49SD130, 206NW691. (9) Other instances. TexCivA 23SW(2d)818. [c] TexCivA 290SW813; TexCivA 1SW(2d) 695.

832-48 [a] (2) In Kansas. 12Kan257; 47Kan690, 28P696; 48Kan374, 29P693. **Erratum.**-Strike out Kansas cases.

832-58 See also Ala 129S12.

832-59 206 Iowa1382, 222NW370. [a] **Building restriction running against lot,** to effect that any residence constructed thereon should be faced to south street, does not relate to question of reducing area of lot claimed as homestead, so as to exempt reserved area of lot from forced sale for debt. 115 Okl 44, 241P480. [b] **Form.**-In platting homestead out of larger tract, government's subdivisions may be ignored and area platted in any shape or form and from any part of whole tract. 206 Iowa1382, 222NW370.

832-60½-New. A suite in an apartment block is not a "homestead." Man [1929] 2DomLR935.

833-61 34F(2d)970; 161La719, 109S 400; TexCivA 297SW609.

833-62 [a] (8) House attached to realty cannot be seized and sold separate from land. TexCivA 297SW609.

833-70½-New. irrigation canal; 161La 719, 109S400.

833-70⅓-New. pumping plant; 161La 719, 109S400.

834-84 TexCommnA 6SW(2d)350. [b] **Right to exemption as to improvements** dates from acquisition and occupancy of homestead. Iowa 228NW295.

834-93½-New. Where a homestead was complete before an adjoining vacant lot, which did not add materially to the enjoyment of the homestead except as a driveway, was purchased, the fact that both properties were inclosed with a fence and used together will not render the vacant lot exempt as a homestead. 241Mich528, 217NW911.

834-94 22AltaL329, [1927] 1DomLR 286, [1926] 3WestWkly778. [a] **Homestead owner is not entitled** to oil produced from land, nor to proceeds thereof, nor to operate wells. 218Ky557, 291 SW757. [b] **Landlord's share of proceeds of sale of crop** is not exempt. Tex CivA 298SW652.

834-95 Ga 155SE678; 123Kan441, 444, 256P133 [quotCJ]; TexCivA 294SW 250, 251 [quotCJ].

834-96 123Kan441, 444, 256P133 [quot CJ]; TexCivA 19SW(2d)382.

834-96½-New. Head of family renting land exempt from sale does so for use and benefit of family. Ga 155SE678.

834-96⅓-New. Tenant procured by husband for homestead exemption of which wife was sole beneficiary was tenant of wife. Ga 155SE678.

835-2 123Kan441, 444, 256P133 [quot CJ]; TexCivA 20SW(2d)241.

835-3 123Kan441, 444, 256P133 [quot CJ].

835-4 123Kan441, 444, 256P133 [quot CJ]; TexCivA 12SW(2d)271. See also Sask [1930] 1DomLR927.

835-5 123Kan441, 444, 256P133 [quot CJ].

835-7 49SD582, 207NW657, 46ALR 811; Alta [1930] 2DomLR796.

835-9 [c] (4) 229Ky728, 17SW(2d) 1022. [e] **Automobile** purchased with proceeds of sale of homestead is not exempt. 29Ariz116, 239P794.

835-10 TexCivA 29SW(2d)447. [b] **Loss or waiver of exemption.**-TexCivA 29SW(2d)447.

836-18 200 Iowa1109, 206NW22; 120 Okl 210, 251P73; 122 Or493, 259P778; 197Wis56, 221NW417. See also 24F(2d) 422; 126Kan503, 268P799 (proceeds of sale held exempt). [a] 200 Iowa1109, 206NW22.

836-19 49SD582, 207NW657, 46ALR 811.

836-23 122 Or493, 259P778.

836-24 200 Iowa1109, 206NW22.

836-26 [c] **Contrary rule** obtains in some jurisdictions where proceeds of sale are not protected beyond exemption as to personal property. 169Ark1, 272 SW864.

837-31 200 Iowa1109, 206NW22.

838-42 OhA 172NE683.

838-46 167La1024, 120S634, 63ALR 1283; 117 Okl 179, 245P881; TexCommnA 14SW(2d)816.

838-50 210Ky777, 276SW848.

838-51 See also 210Ky777, 276SW848.

839-60½-New. Timely claim of debtor to surplus of proceeds of sale is good as against an attachment creditor whose judgment was not accompanied by order applying attachment proceeds to payment of the debt. 210Ky777, 276SW 848.

839-60⅓-New. In Manitoba proceeds of sale of lunatic's homestead under order of court are exempt from execution. Man [1930] 2DomLR683.

840-64 164Ga742, 139SE540. [d] (1) Iowa 228NW295. [e] (2) Use of exact proceeds from sale of homestead to purchase new homestead, is not essential to exemption of new homestead. 206 Iowa920, 221NW582. (3) Where new

homestead is acquired with proceeds of old and additional means of debtor, exemption dates back from acquisition and occupancy of old homestead as home. **Iowa** 228NW295.

840–65 **Iowa** 228NW295.

840–70½–New. The general rule does not operate against the rights of one who, bona fide and for value, acquired a lien on the land without actual or constructive knowledge of its homestead character. 164Ga742, 139SE540.

841–76 206 **Iowa**761, 221NW467.

841–79 206 **Iowa**761, 221NW467; 206 **Iowa**920, 221NW582.

842–97 [a] **Immaterial which spouse owns title to land.**–133 **Okl** 204, 271P 665.

842–98 220**Ala**367, 125S212(2dcase); 244**Mich**638, 222NW180.

842–99 90**Fla**47, 105S143 (not necessary that entire estate be vested); **Tex CivA** 16SW(2d)844.

842–4 But see 230**Ky**66, 18SW(2d)870.

842–7½–New. A wife may acquire homestead rights by continuous residence with her husband and children on lands to which the husband and other have title and homestead rights. **Tex CivA** 275SW617.

842–8 But see 150SC244, 147SE874.

842–10½–New. As regards a claim of homestead exemption, it is immaterial in whom the bare legal title is vested so long as it is the actual home of the family. 39**Wyo** 414, 273P173.

842–10⅓–New. In some jurisdictions a homestead may be acquired in land in which claimant has neither a legal nor equitable interest. 142**Wash**187, 252P 692.

842–10¼–New. Homestead rights do not accrue until title to land has been acquired or until party is in position to demand title. **TexCivA** 24SW(2d)509.

843–16 145**Miss**728, 110S847.

843–18 145**Miss**728, 110S847.

844–24 176**Ark**1065, 5SW(2d)299; 90 **Fla**47, 105S143 (homestead exemption under constitution applies to beneficial interest); 27 **OhA**86, 160NE875; 129 **Or**128, 276P680; **TexCivA** 300SW123.

844–27 119**Kan**760, 241P259.

844–28 [a] **Creditor cannot reduce extent of homestead interest by paying encumbrance.**–**Iowa** 228NW295.

844–31 13F(2d)76; **TexCivA** 4SW(2d) 180; 142**Wash**187, 252P692 [citCJ]. See also **TexCivA** 272SW510.

845–43½–New. An entryman living with his family under a certificate of entry on government land for the purpose of ultimately obtaining from the federal government a patent thereto under the United States homestead statutes may, before proof is made or patent issued, acquire a homestead right in the premises under the state laws. 50 **ND**423, 196NW507.

845–47 **Iowa** 228NW295.

846–54 205 **Iowa**701, 216NW288, 290 [citCJ]; 125**Kan**290, 295, 264P47 [quot CJ].

847–68 28F(2d)396; 137 **Okl** 183, 279 P351 (leasehold estate in school lands not exceeding one hundred and sixty acres); **TexCivA** 16SW(2d)844.

847–69 **TexCivA** 300SW235.

847–76 **TexCivA** 16SW(2d)844.

848–85 7**Alaska**13; 201 **Iowa**484, 207 NW578; 119**Kan**760, 241P259; 245 **Mich**246, 222NW111; 76**Mont**239, 245P 953, 954 [citCJ]; 129 **Or**128, 276P680; **TexCivA** 280SW295; **TexCivA** 294SW 294; **TexCivA** 16SW(2d)844; **TexCivA** 21SW(2d)382; **TexCivA** 29SW(2d)431; **Alta** [1930] 3**DomLR**200.

848–86 76**Mont**239, 245P953, 954 [cit CJ]; 121 **Oh**446, 169NE442 (allowance in lieu of homestead cannot be claimed out of proceeds of sale of husband's moiety).

849–91 129 **Or**128, 276P680.

849–93 **TexCivA** 275SW617 (cannot prevent partition).

849–94 **TexCivA** 280SW295; **TexCivA** 16SW(2d)844. [b] **Exemption will be applied to land ultimately set apart.** **TexCivA** 29SW(2d)431.

849–95½–New. Homestead right of surviving spouse continues as against children's right to have land partitioned. **TexCivA** 28SW(2d)1100.

850–3 [b] **Property held half in full ownership and half in usufruct** held not within rule. 165**La**458, 115S655.

850–7½–New. Surviving spouse owning half of property in full ownership and other half in usufruct is held entitled to homestead in own right. 165**La**458, 115 S655.

851–21 172**Minn**200, 214NW793, 794 [citCJ].

852–37 14F(2d)974 [citCJ] (applying Texas rule).

852–47 [b] **In Louisiana** husband is not entitled to homestead exemption in land owned separately by wife not separated from him in property and which is mortgaged. 169**La**1185, 126S916.

852–49 39**Wyo** 414, 273P173. [a] **Court had no authority to order wife to sign deed or transfer** without joinder of husband. 115**Tex**16, 273SW 798.

852–52 [e] **Wife's consent to selection of homestead from her separate property** may be evidenced by acts as well as words. 56**ND**613, 218NW864 (occupation by family held to establish consent).

853–53 [c] (1) 112 **Okl** 82, 240P101.

853–59 [b] (4) Where wife of able-bodied farmer is not separated in property from husband and is not administering separate property she is not entitled to homestead exemption. 169 **La**1185, 126S916.

854–72 [a] (3) Where husband and surviving children move on community property after wife's death, he can establish homestead on his undivided one-half interest. **TexCivA** 281SW580. [c] **House built with community funds** on land of another held exempt as homestead. **TexCivA** 275SW617. [d] **Property purchased with community funds,** though taken as joint tenants, without intent to vest separate property in wife, is held community property, and husband can declare valid homestead thereon. 34F(2d)970.

855–90 But see **TexCivA** 23SW(2d)791 (homestead interest cannot be claimed under parol gift, unless facts vest title in donee).

855–4 115**Tex**400, 282SW788.

855–5 201 **Iowa**59, 206NW301 (debts contracted during life of homesteader after acquisition of homestead are not enforceable against it).

855–7 See also 169**Minn**209, 210NW 889, 48**ALR**1266.

855–8 69**CalA**404, 231P371; 244**Mich** 179, 221NW289; 115**Tex**400, 282SW 788; **TexCivA** 280SW247; **TexCivA** 289 SW709. [b] **Violation of promise to give mortgage on homestead** to secure money loaned for purchase thereof does not require or authorize imposition of lien to enforce trust ex maleficio. 171 **Minn**431, 214NW467.

855–11½–New. Homestead exemption authorized under state law will defeat enforcement of lien existing on property of bankrupt more than four months prior to filing of petition in bankruptcy. 35**GaA**790, 134SE806.

855–11½–New. The only homestead exemptions are those provided by law. 115**Tex**400, 282SW788.

858–42 252 **IllA**115 (property purchased subject to trust deed); 315**Mo** 872, 288SW54; **MoA** 31SW(2d)93; **TexCivA** 24SW(2d)509; 155**Wash**239, 283P1089. But see 318**Mo** 948, 2SW(2d) 771; **TexCivA** 16SW(2d)844. [a] (3) Double liability of stockholder under statute. **Iowa** 227NW587. [g] **Person may claim exemption upon property occupied when acquiring title** to prejudice of judgment previously recorded. 170**La**768, 129S158.

858–44 [a] **Lien for loan to be used in consummating transaction** as result of which grantees acquired property is superior to homestead exemption though no part of loan was actually used in purchase of property. **TexCivA** 19SW (2d)919.

859–53 222**Ky**361, 300SW913; 231**Ky** 682, 22SW(2d)111 (statute denying homestead applies to purchasers, and not to donees or devisees); **TexCivA** 16 SW(2d)844. [c] 230**Ky**696, 20SW(2d) 734.

859–54 35**GaA**790, 134SE806.

859–55 230**Ky**696, 20SW(2d)734 (right lost for failure to act for over five years, which was not reasonable time).

859–58 **TexCivA** 286SW593; **TexCivA** 287SW77.

860–61 **TexCivA** 281SW592; **TexCivA** 15SW(2d)155.

860–66 **TexCivA** 281SW592.

860–70 30F(2d)100; **Tex** 12SW(2d) 618.

862–93 76**Mont**239, 245P953, 954 [cit CJ].

862–94 76**Mont**239, 245P953. [a] **Declaration filed after levy of attachment** exempts property from sale on execution under judgment rendered after filing of declaration. 76**Mont**239, 245P 953.

862–95 76**Mont**239, 245P953.

862–95½–New. Judgment creditor is charged with knowledge that debtor might acquire status of householder before sale on execution and thereby acquire right to claim homestead. 140 **Wash**525, 250P36.

863–8 **TexCivA** 286SW593. [a] (2) Renewal note for greater amount executed after establishment of homestead held valid, though raising equities subject to adjustment. **TexCivA** 287SW77. (3) Release of part of land and renewing mortgage on remainder including homestead does not release remainder. **TexCivA** 287SW77.

864–24 [e] **In North Dakota.**–51**ND** 384, 199NW760.

864–25 203 **Iowa**1270, 212NW134; 118 **Tex**526, 18SW(2d)1049; **TexCommnA** 12SW(2d)146; **TexCivA** 285SW935; **Tex CivA** 292SW913; **TexCivA** 300SW123; **TexCivA** 24SW(2d)509.

864–26 220**Ala**367, 125S212(2dcase); 50**Nev**74, 250P991, 992 [citCJ]; **Tex CommnA** 278SW180; **TexCivA** 30SW (2d)812. [b] **Where mortgage covering homestead lands** and other land was released and new mortgage given for increased amount of homestead, homestead will be relieved from such additional amount unless it is shown that additional amount was borrowed to pay for part of land. **TexCivA** 287SW77.

865–27 51**SD**253, 213NW364.

866–45 51**SD**253, 213NW364, 365 [cit CJ].

866–49 171**Minn**431, 214NW467.

866–50 **TexCivA** 289SW709; **TexCivA** 295SW266. [b] **Mortgagee releasing mortgage on property given in exchange for homestead** and taking lien on land received in exchange has lien valid against homestead claim. **TexCivA** 31 SW(2d)662.

867–51 **TexCivA** 289SW709. See also **TexCivA** 295SW266.

867–51½–New. Bona fide purchaser of purchase-money notes is not entitled to lien on homestead for money received by vendor on cancellation of deed for forgery. **TexCommnA** 285SW268.

867–54 **TexCommnA** 278SW180; **Tex CivA** 287SW70. [a] **Renewal of vendor's lien barred by statute of limitations** renders homestead liable on trust deed executed to secure renewal. **Tex CommnA** 278SW180.

868–68 90**Fla**407, 106S127, 43**ALR**1409; 121**Kan**229, 246P521; 163**La**679, 112S 647.

868–73 167**Minn**243, 208NW960. But see 163**La**679, 112S647.

868–74 167**Minn**243, 208NW960.

869–80½–New. **No exemption for money loaned to make improvements.** **Tex CivA** 295SW266.

869–90 90**Fla**407, 106S127, 43**ALR** 1409; 165**Minn**177, 206NW164; 172 **Minn**198, 215NW197; 316**Mo** 1118, 295 SW763, 766 [citCJ]; 51**ND**384, 199NW 760. [d] **Homestead is not liable for** debt incurred to laborer by virtue of collateral agreement with employer not owner of homestead. 175**Minn**389, 221 NW534.

870–98 See also 49SD341, 207NW155.

870–6 90**Fla**407, 106S127, 43**ALR**1409.

871–14 51**ND**384, 199NW760.

871–26 **Iowa** 228NW295.

871–27 173**Ark**38, 291SW814. But see **TexCivA** 3SW(2d)941.

872–28 90**Fla**407, 106S127, 43**ALR**1409; 130**Kan**308, 286P400; 175**Minn**161, 220

NW421; TexCivA 19SW(2d)426 (either before or after death of homesteader); TexCivA 21SW(2d)586. [e] See also 207 Iowa702, 223NW527. [g] **Date when judgment became lien rather than date of execution** determines question of priority between judgment creditor and lien claimant. 125Kan290, 264P47.

873–29 29Ariz325, 241P515; Iowa 226 NW52.

873–30½–New. Where judgment against a father and son is filed against the father's homestead, a lien attaches against the son's interest upon his inheriting from his mother. TexCivA 19SW(2d) 426.

873–30½–New. Where a judgment lien does not attach as against a judgment debtor because the land is his homestead, it will not, upon his death, attach as to his heirs. TexCivA 21SW (2d)586.

873–31 221MoA877, 288SW84; 115Tex 342, 282SW558.

874–51 140Wash525, 250P36.

874–52 See also 242Mich477, 219NW 651.

874–53 31NM366, 246P910, 916 [citCJ].

875–57 [c] (2) Homestead held not exempt from execution under judgment for costs entered prior to purchase of homestead. 225Ky648, 9SW(2d)988.

875–70½–New. Charges for a physician's services to a family are not a lien on the homestead. Iowa 226NW52.

875–71 See also 169Minn209, 210NW 889, 48ALR1266.

877–91½–New. A simulated mechanic's lien contract on homestead may be enforced by bona fide purchaser. TexCivA 23SW(2d)436.

877–92 208Cal 528, 282P793. See also 166Ga39, 142SE150 (surety paying homestead waiver note and judgment entitled to subject property in equity set aside as homestead in bankruptcy).

878–8 29Ariz567, 243P415, 44ALR754; 172Minn529, 215NW850; TexCivA 275 SW152; 191Wis602, 211NW795. [c] (1) 29Ariz567, 243P415, 44ALR754. (6) Holder of second mortgage on homestead and cattle who foreclosed third mortgage on same cattle may not foreclose second mortgage against homestead where proceeds of cattle would have been sufficient to satisfy second mortgage if so applied. 29Ariz567, 243 P415, 44ALR754. (7) Foregoing rule applies though homestead declaration was filed after execution of mortgages. 29Ariz567, 243P415, 44ALR754.

878–9 29Ariz567, 243P415, 44ALR754; Iowa 228NW295; 54ND686, 210NW657, 659 [citCJ].

878–10 54ND686, 210NW657, 659 [citCJ].

879–23 TexCivA 275SW152 (waiver depends on circumstances of particular case); TexCivA 287SW77. [a] (1) TexCivA 275SW152. [c] **Failure to demand that mortgaged nonhomestead property be sold first** does not deprive homestead claimant of right to have assets marshalled where purchaser was not prejudiced. SD 230NW243.

879–23½–New. Failure to assert homestead exemption and resulting right amounted to waiver and the mortgagor is not entitled to special application of proceeds of foreclosure. TexCivA 275 SW152.

879–23⅓–New. What will constitute waiver of right to have non-exempt property first applied to satisfaction of primary lien as against junior lienor depends on circumstances of particular case. TexCivA 275SW152.

879–24½–New. Where proceeds of sale were insufficient without sale of homestead to satisfy both a vendor's lien and a mortgage held and foreclosed by same person in separate suits, mortgagors suffered no actual injury by refusal of their demand for a separate and prior sale of mortgaged tract under order of sale on judgment foreclosing vendor's lien. TexCivA 275SW152.

879–32½–New. A creditor appealing to a court of equity for a specific lien on a tract of land in which the debtor has a homestead must show a substantial right and substantial benefit to be obtained. Iowa 228NW295 (relief denied where debtor was bankrupt and homestead and prior liens exceeded value of property).

880–52 201Cal 194, 256P202.

881–55 [d] **Notice to assignee of note** of homestead rights. TexCivA 28SW (2d)247. [e] **To show wife was sole surviving constituent.**–TexCivA 29SW (2d)447.

881–58 See also TexCommnA 1SW(2d) 1090.

881–66½–New. Under some statutes a judgment creditor having a lien on excess in defendant's homestead is entitled to a sale thereof by the sheriff and application of the proceeds in excess of defendant's exemption to satisfaction of his claim. 221MoA877, 288SW84.

881–66⅓–New. Where property to the extent of part of its value is a homestead, a judgment creditor has no right to a judicial sale of the land including the homestead. Iowa 228NW295.

881–76 [b] **Homestead rights on surplus proceeds** of mortgage foreclosure sale remained undetermined, where court failed to ascertain whether mortgaged property was homestead. 191Wis 580, 211NW798. [c] **Mortgagor's petition** to determine homestead rights in surplus proceeds of foreclosure sale held improperly denied. 191Wis580, 211NW 798.

882–86½–New. Execution purchaser must pay amount of homestead exemption immediately on sale of property. 36Wyo 290, 254P691.

882–86⅓–New. Court cannot determine claim to proceeds of homestead after expiration of term at which sale was confirmed. 36Wyo 290, 254P691.

882–86¼–New. Transfer of certificate of purchase of homestead property goes only to question as to proper or necessary party to motion by owner for share of proceeds. 36Wyo 290, 254P691.

883–98 164Ga302, 138SE223; 56ND613, 218NW864; TexCivA 19SW(2d)454 (business homestead). [e] **Validity of deed of trust** covering unpaid purchase price of property. TexCivA 21SW(2d) 17.

884–5 TexCivA 275SW196.

884–7½–New. A court has no authority to impose upon a homestead a greater burden than has been placed thereon by the parties or by law. 52SD53, 216NW 589.

884–14 226Ky665, 11SW(2d)725; TexCivA 13SW(2d)469; TexCivA 13SW(2d) 971; TexCivA 15SW(2d)155.

884–16 TexCommnA 281SW196; TexCivA 299SW456; TexCivA 300SW123; TexCivA 28SW(2d)317; TexCivA 13SW (2d)739. [a] (2) Wife is without power to fix lien on her homestead for payment of attorney's fees. TexCivA 290SW784.

884–21½–New. The issue of homestead must be decided by the conditions existing at the time the lien was given. TexCivA 13SW(2d)971.

884–21⅓–New. Liens on homestead do not operate in favor of creditors generally and are not extended beyond the charge for which they are granted. Iowa 228NW295.

884–21¼–New. Where a homestead exists in a tract of land to the extent of part of its value, the owner may impose on the entire tract the liens of mortgages. Iowa 228NW295.

884–23 [a] **Simulated conveyance to create lien** securing grantor's indebtedness is held void, and creditors took no title under grantee's deed. TexCivA 295 SW953.

885–32 90Fla407, 106S127, 43ALR1409; TexCivA 299SW655; 36Wyo 290, 254P 691.

885–34 172Minn504, 215NW857.

885–35 172Minn504, 215NW857.

885–36 172Ark454, 289SW485. [b] **Statutes held not repealed.**–172Ark454, 289SW485. [c] **That grantor in deed of trust died and widow's dower became vested before enactment of curative act** does not prevent operation of statute. 172Ark454, 289SW485. [d] **Where wife refused to sign trust deed executed by husband** defect is not cured by curative act. Ark 31SW(2d)533.

885–39 121 Okl 14, 247P55.

885–48 121 Okl 14, 247P55; TexCivA 21SW(2d)17.

885–49 214Ala382, 107S841; 170Ark 1192, 282SW678; 171Ark791, 286SW 1022; 172Ark129, 287SW745; 175Ark 641, 1SW(2d)59; 204 Iowa328, 213NW 417; 172Minn200, 214NW793; 114Nebr 621, 208NW964; 57ND57, 220NW647; 121 Okl 14, 247P55; 41 OklACR53; 49 SD130, 206NW691; 49SD524, 207NW 543; 158Tenn437, 14SW(2d)745; TexCommnA 13SW(2d)683; TexCivA 287 SW668; TexCivA 291SW948; TexCivA 293SW350; Alta [1929] 1DomLR147; Sask [1929] 2DomLR401.

887–51 222Ky749, 2SW(2d)366; TexCivA 291SW641.

889–94 See also 172Ark381, 288SW890.

889–95 TexCivA 2SW(2d)307.

889–96 TexCivA 2SW(2d)307.

889–3 176Ark1065, 5SW(2d)299; 179 Minn42, 228NW339.

890–4 197Wis257, 221NW749.

890–15 187Wis55, 203NW910. [d] **Subsequent offer by wife to join.**–187 Wis55, 203NW910.

892–54 156Tenn529, 3SW(2d)167, 168 [quotCJ]; Sask [1929] 4DomLR1068 (1stcase). But see 155Miss428, 124S 490(2dcase).

893–66 98Fla185, 122S565(1stcase); 54 ND548, 210NW21, 24 [citCJ]; TexCivA 276SW480. [a] (1) TexCivA 276SW 480. [b] But compare 116Tex273, 280 SW531. [c] **Where husband has secured administration** of communal estate, wife being insane, he may convey validly whether there are debts or not. 115Tex162, 278SW1101. [d] **Where wife is guardian of insane husband,** she is not authorized to convey homestead. 97Fla1057, 122S566(1stcase).

893–66½–New. In case of insanity of wife at time she joins in conveyance of homestead, her signature and acknowledgment do not show that consent and sale of homestead is not in accordance with provisions of the law. TexCivA 276SW480.

893–66⅓–New. Constitutional provision, forbidding sale of homestead without consent of wife, is mandatory, TexCivA 276SW480.

893–66¼–New. and is not dependent upon continuance of mental capacity of the wife. TexCivA 276SW480.

893–68½–New. Some statutes authorize the spouse of an insane ward to convey or mortgage a homestead with approval of the guardian. 172Minn504; 215NW 857.

893–68⅓–New. Under such statutes the fact that the guardian joins as comaker instead of expressing consent by indorsement is a mere irregularity. 172 Minn504, 215NW857.

894–83½–New. vendor's lien created by a husband pursuant to an agreement for sale and reconveyance in a partition suit to the prejudice of homestead rights of a wife who is not a party; TexCivA 275SW617.

894–89 TexCivA 30SW(2d)812. [a] TexCivA 275SW196.

894–92 145Miss728, 110S847; 50ND 423, 196NW507. [a] (2) Loan by third person to purchaser of relinquishment from entryman on government lands with intent and understanding that purchaser will establish home on premises is debt created for purchase price of homestead. 50ND423, 196NW507.

895–93 TexCivA 15SW(2d)139.

895–10 222Ky504, 1SW(2d)955.

896–20 TexCivA 286SW550, 551 [quot Cyc&citCJ]. [e] **Conveyance to wife and children without joinder of wife** is valid, and divests husband of title and vests in wife and children interest and possession of homestead which is not disturbed by such conveyance. TexCivA 286SW550.

896–21 TexCivA 286SW550, 551 [quot Cyc&citCJ] (dictum).

897–28½–New. A wife may convey interest in a homestead to her husband and stipulate that the property conveyed shall be liable for mortgage. 206 Iowa 432, 220NW20.

897–29 90Fla563, 107S255.

897–40 175Ark874, 1SW(2d)66.

898–52 But see 49SD524, 207NW543. [b] **Trust deed of wife covering portion of lot not used for homestead purposes** has been held valid. TexCommnA 24 SW(2d)351.

899–56 See also 49SD442, 207NW449, 450 [citCJ].

899–63½–New. when spouse who is not joined is proved insane; **TexCivA** 287 SW668; **TexCommnA** 293SW560.

899–77 143Miss498, 108S498 (veto power not property right).

900–79 201 Iowa120, 206NW812. [a] 201 Iowa120, 206NW812; 57ND117, 220 NW645 (transaction whereby husband secures renewal of existing indebtedness).

900–84 TexCivA 291SW641.

901–16 117Nebr488, 221NW101.

902–17 [b] (5) Mortgage is invalid under statute where husband's signature was made while he was intoxicated, being in effect no signature, unless ratified. 201 Iowa722, 207NW745 (voidable and not void).

902–18 204 Iowa328, 213NW417; Tex CivA 28SW(2d)307.

902–23 214Ala382, 107S841.

903–26 [a] **In securing signature of wife as surety** to mortgage of husband on homestead, creditor must act in utmost good faith. 201.Iowa120, 206NW 812.

903–34 89Fla185, 104S852.

904–42 216Ala265, 113S238; 220Ala 402, 125S642; 156Tenn529, 3SW(2d) 167. But see 115Tex273, 280SW531.

904–64 TexCivA 280SW885; TexCivA 287SW70; TexCivA 15SW(2d)707.

905–66 TexCivA 287SW70.

905–68 TexCivA 280SW885.

905–69 TexCivA 280SW303.

905–70 Kan 292P918; TexCommnA 288SW817; TexCivA 280SW303; Tex CivA 280SW918; TexCivA 6SW(2d) 158. [a] (1) TexCivA 280SW303. (4) Condition of defeasance need not appear in instrument to render it invalid as mortgage, parol being sufficient. TexCivA 6SW(2d)158.

905–73 TexCivA 6SW(2d)158.

905–77 [a] **In Texas.**–TexCivA 25SW (2d)196.

906–95 181Ark644, 27SW(2d)510 (deed of trust).

906–96 See also TexCivA 4SW(2d)180.

907–3 171Minn431, 214NW467.

907–23 TexCivA 30SW(2d)812.

908–25 214Ala382, 107S841; 218Ala 637, 119S844(2dcase); 170Ark1192, 282 SW678; 115Nebr643, 214NW73; 117 Nebr488, 221NW101; 57ND57, 220NW 647; TexCivA 278SW286; TexCivA 30 SW(2d)812. But see 204 Iowa328, 213 NW417(2dcase). [e] **Wife's acknowledgment must be separate to be valid.**–TexCivA 278SW286. [f] **Conveyance of minerals** on homestead is void, unless acknowledged. TexCivA 292SW281. [g] **Where homestead title is in wife,** no acknowledgment is required. 218Ala 637, 119S844(2dcase).

908–32 204 Iowa328, 213NW417.

908–36 Ala 130S378.

908–37 57ND57, 220NW647; TexCivA 4SW(2d)195.

909–41 Can [1930] 1DomLR997(2d case) (certificate antedating examination not fatal).

909–44 [b] **Effect of delay of officer in signing certificate.**–Sask [1930] 4DomLR 314.

909–58 But see 117Nebr488, 221NW101 (instrument falsely certified to that wife acknowledged it held void).

910–66 32F(2d)322; 98CalA615, 277P 513; 126Kan503, 268P799; 115Nebr 643, 214NW73 (in priority over prior invalid mortgage); 118 Okl 142, 247P85.

910–74 170Ark1192, 282SW678; Ark 31SW(2d)136; 337 Ill 617, 169NE743; 150Miss476, 116S879; 114Nebr621, 208 NW964; 49SD524, 207NW543; Tex CivA 28SW(2d)317.

911–81 Sask [1929] 2DomLR401. [c] (6) TexCommnA 280SW571. [d] **In Saskatchewan.**–[1929] 2DomLR401.

912–89 34F(2d)112 (mortgagors held estopped to assert falsity of notarial certificate); 170Ark895, 282SW9; TexCivA 295SW953; TexCivA 300SW123; Tex CivA 13SW(2d)195; TexCivA 13SW(2d) 739.

912–93 53ND736, 208NW101. See also TexCommnA 13SW(2d)69.

912–96½–New. It is fraud or misconduct only at inception of mortgage that estops assertion of homestead right. TexCivA 28SW(2d)317.

912–98½–New. Husband's fraudulent disclaimer of ownership of homestead does not estop him from asserting ownership. TexCommnA 295SW584.

913–19 TexCivA 13SW(2d)195. [a] **Grantees, who in consideration of canceling grantor's notes,** transferred to secure his grantor's indebtedness, cannot urge latter's estoppel to assert invalidity of their deed. TexCivA 295SW 953.

913–19½–New. if they join in deed of trust after conveying homestead and taking reconveyance; TexCivA 25SW (2d)931.

913–22½–New. Lender cannot predicate estoppel on declarations in trust deed as to abandonment of homestead openly, visibly, and apparently occupied by husband and small child while wife and older children lived elsewhere. Tex CivA 5SW(2d)208.

913–28 201 Iowa722, 207NW745; Tex CivA 3SW(2d)573; TexCivA 6SW(2d) 158. See also TexCivA 291SW641. [a] **Active fraud not shown.**–TexCivA 291 SW641.

913–28½–New. The donee under a parol gift is charged with notice of constitutional and statutory requirements. Tex CivA 291SW641.

913–28¼–New. If donee is misled as to character of title under parol gift, because of own folly or carelessness, it will be presumed as matter of law that he intended to incur consequences of own acts. TexCivA 291SW641.

913–31 TexCommnA 13SW(2d)69.

913–35 But see Alta [1930] 4DomLR 750.

914–37 156Tenn529, 3SW(2d)167.

914–39 156Tenn529, 3SW(2d)167.

914–45 206 Iowa432, 220NW20; 53ND 736, 208NW101.

915–53 TexCivA 286SW680. [c] **Reason for rule stated.**–TexCivA 286SW680.

915–55 TexCivA 286SW680; TexCivA 298SW308; TexCivA 300SW123; Tex CivA 28SW(2d)317. See also TexCivA 13 SW(2d)971. [a] TexCivA 286SW680.

915–56 TexCivA 286SW680; TexCivA 21SW(2d)1094. [b] **Deed void.**–Tex CivA 21SW(2d)1094.

915–57 150Miss476, 116S879.

915–58½–New. Where owners occupy two residences under such circumstances that either may be a homestead according to their intention, designation and representations as to the homestead character of one will estop assertion of such character as to other. TexCivA 286SW680.

915–59 Ark 31SW(2d)136.

915–67 Man [1927] 3DomLR168.

916–73½–New. Invalid signature of husband to mortgage made while he was intoxicated is not ratified by delay of eight months in repudiating signature where there was no intent to ratify and the delay caused by continued inebriety and investigation by his attorney. 201 Iowa722, 207NW745.

916–73½–New. Wife cannot ratify void deed which she failed separately to acknowledge. TexCivA 278SW286.

916–77 TexCommnA 13SW(2d)69; Tex CivA 8SW(2d)327.

916–78 TexCivA 280SW303; TexCivA 280SW885.

916–85 130Kan533, 287P271.

917–94 See also 156Tenn529, 3SW(2d) 167.

917–10 217Ala375, 115S864; Tex CommnA 24SW(2d)354; TexCivA 275 SW196.

918–11 TexCommnA 13SW(2d)69; Tex CivA 300SW123.

918–19 [b] TexCivA 13SW(2d)195.

918–22½–New. Note not given for purchase money holder of note not entitled to foreclosure. TexCivA 300SW123.

918–23 TexCommnA 13SW(2d)69. But see TexCivA 25SW(2d)931.

918–24 TexCommnA 13SW(2d)69.

918–25 TexCivA 278SW286.

919–27½–New. Due registration of title concurring with occupancy constitutes notice of husband's inability to bind wife respecting homestead. Tex CommnA 295SW584.

919–27½–New. One charged with notice cannot rely on husband's statement. TexCommnA 295SW584.

919–29 TexCommnA 295SW584; Tex CivA 286SW680; TexCivA 300SW123.

919–30 SD 230NW243; TexCivA 4SW (2d)189.

919–32 TexCivA 286SW680.

919–35 TexCivA 286SW680. See also TexCivA 13SW(2d)195.

919–42 [a] (4) Subsequent mortgagee was chargeable with notice of character of prior recorded mortgage which, being for improvements, was not subject to exemption. 163La679, 112S647.

920–43 44 Ida293, 256P371, 372 [quot CJ].

920–44 29Ariz325, 241P515; 164Ga302, 138SE223; 44 Ida293, 256P371, 372 [quotCJ]; 130Kan308, 286P400; 56 ND613, 218NW864, 868 [citCJ]; 56ND 729, 219NW225. [a] **Purchaser after levy of execution** takes grantor's homestead exemption to which levy was subject. 240Mich468, 215NW360.

920–48 44 Ida293, 256P371, 372 [quot CJ].

920–49 44 Ida293, 256P371, 372 [quot CJ].

921–53 TexCivA 21SW(2d)382.

921–60 208Cal 528, 282P793 (husband as grantee of wife).

921–81½–New. Wife cannot restrain sale under power of deed of trust as against transferees of note and mortgage who had no notice of alleged fraud of original mortgagee inducing execution of notes and liens. TexCivA 275SW196.

922–93½–New. Appointment of receiver is proper where sale of remaining property on execution under mortgage foreclosure does not satisfy judgment. 203 Iowa1380, 214NW546.

922–93½–New. The statute prohibiting the sale of a homestead unless more than one thousand dollars is offered does not apply to a mortgage foreclosure sale. 225Ky521, 9SW(2d)528.

922–93¼–New. One executing a homestead mortgage, joined in by his wife after recovery of judgment against him, which constituted a lien on his land, has been held not entitled to the present worth or cash value of the amount realized in excess of the mortgage debt on foreclosure sale. 196NC439, 146SE 77.

922–93½–New. Foreclosure sale of partnership land divested deceased partner's heirs of interest in the land in excess of the acres constituting the family home. TexCommnA 13SW(2d) 685.

922–93¼–New. Constitutional inhibition against forced sale of homestead does not prevent sale thereof on foreclosure to satisfy valid mortgage. 143 Okl 162, 288P476.

922–93½–New. Where constitution does not provide procedure for foreclosure of mortgage on homestead, legislature may do so. 143 Okl 162, 288P476.

922–99½–New. One not waiving homestead in land sold on foreclosure for more than the amount of the debt was entitled to a homestead in the equity. 196NC439, 146SE77.

923–15 33Ariz128, 262P995. [a] **Contract to convey made before declaration of homestead** is held specifically enforceable. 33Ariz128, 262P995.

923–16 TexCivA 9SW(2d)756.

924–22 165Minn38, 205NW607; Tex CivA 9SW(2d)756.

925–44½–New. Burden of proving wife's insanity at time husband alone conveyed is on claimant under husband's deed. TexCommnA 293SW560.

925–47 TexCivA 271SW119.

925–49½–New. Grantors under a warranty deed, who claimed a homestead at the time of execution of a prior trust deed to secure a loan, payment of which was assumed by their grantee, may not oppose foreclosure of the trust deed on the ground that the property constituted a homestead. TexCivA 280SW885.

925–49¼–New. Owner of homestead may be estopped to assert invalidity of mechanic's lien. TexCivA 23SW(2d) 436.

925–59½–New. Lessee of homestead may quit where the lease thereof was void for nonjoinder of wife despite subsequent offer of wife to sign. 187Wis 55, 203NW910.

925–59¼–New. Tenant in possession under lease void because of lack of wife's signature may quit premises although

the wife is willing to sign. 187Wis55, 203NW910.

925–59¼–New. A purchaser of a homestead from a mortgagor with knowledge of a void mortgage is not bound thereby in the absence of a contract to assume it or of estoppel and may plead its invalidity in direct or collateral attack. TexCommnA 281SW196.

926–73 See also Sask [1928] 4DomLR 167.

927–2 TexCommnA 281SW196.

927–4½–New. Petition to cancel deed void as mortgage held sufficiently to show continuance of original indebtedness. TexCivA 6SW(2d)158.

927–7½–New. Wife alleging that she did not sign trust deed sought to be foreclosed has burden of proof. 169Ark1211, 276SW859.

927–10½–New. , but where the transaction grows out of a preëxisting debt, the burden is on creditor to show it did not represent mere change in security void as a mortgage. TexCivA 6SW(2d)158.

927–22½–New. Exclusion of testimony that at the time the deed was executed plaintiffs were living on the land as a homestead and that the deed was executed for the purpose of attempting to fix a lien on their homestead in favor of defendant who had knowledge of a prior unrecorded deed to plaintiffs has been held error. TexCivA 13SW(2d)388.

927–29½–New. that wife's signature to trust deed was not forged; 169Ark1211, 276SW859.

927–30½–New. that wife did not sign mortgage; 175Ark641, 1SW(2d)59.

927–31 [a] **Evidence held to establish** that homesteaders were estopped to deny invalidity of lien. TexCivA 23SW(2d)436.

927–31½–New. to sustain a finding that plaintiff made representations to defendant that the property had been sold; TexCivA 13SW(2d)195.

927–31⅓–New. that deed of homestead absolute on its face was not intended as mortgage; TexCivA 31SW(2d)485.

927–32 But see 57ND57, 220NW647.

927–32½–New. that land was not impressed with homestead character subsequent to the adoption of a constitutional provision requiring the wife's consent to a conveyance of the homestead; 121 Okl 14, 247P55.

927–33½–New. Finding that the mortgage was signed by the wife has been held against the weight of evidence. 197 Wis257, 221NW749.

927–33½–New. Evidence sufficient, in action to cancel mechanic's lien, to sustain finding that assignee was an innocent purchaser. TexCivA 23SW(2d)436.

927–33¼–New. Questions for jury. Whether deed covering homestead was intended as mortgage and therefore void held question for jury. TexCivA 31SW(2d)485.

928–44 See also TexCivA 18SW(2d)687.

929–55½–New. In a suit by a debtor to cancel a deed and lease a contract alleged void as a mortgage, the indebtedness due need not be tendered as a condition precedent. TexCivA 6SW(2d)158.

929–58 Iowa 229NW693 (subjecting personalty only to debts).

929–63 Iowa 229NW693.

930–71 [j] **In California.**–198Cal 440, 245P422.

930–72 219Ala234, 121S528; 76CalA315, 244P629; 98Fla276, 123S768; TexCivA 281SW580. [b] (10) Head of family with wife or children may not devise homestead. 95Fla922, 117S703. (11) Heirs of deceased husband accepting certain legacies do not give validity to attempted testamentary disposition of homestead property nor estop themselves from claiming their rights therein. 98Fla344, 123S777. (12) Homesteader leaving widow or child surviving cannot lawfully make testamentary disposition of his homestead, and attempt to do so is ineffectual. 90Fla47, 105S143. (13) Gen. St. (1920) § 3592 permitting devises and bequests does not apply to homesteads. 93Fla311, 112S80.

931–77 122 Okl 255, 254P95; TexCivA 281SW893; TexCivA 300SW235. [a] **Judgment against head of family** does not become lien on homestead when title passes. Fla 130S623.

931–78 122 Or493, 259P778.

931–79 89Fla356, 104S589; 203 Iowa 372, 212NW678; 122 Or493, 259P778. [a] **Homestead not abandoned** is not subject to attachment or execution for owner's debts. 91Fla991, 108S886.

931–80½–New. Execution defendant's ignorance of execution, and consequent nonacceptance of deed to him from his father's other heirs, is held not to deprive him of his homestead. 214Ky499, 283SW434.

931–81 90Fla563, 107S255; 205 Iowa 701, 216NW288.

932–82 90Fla563, 107S255 [citCJ].

932–86 177Ark371, 6SW(2d)301; 231 Ky682, 22SW(2d)111; 118Tex586, 19 SW(2d)35; TexCivA 22SW(2d)1091. [a] 177Ark371, 6SW(2d)301. [d] **In North Dakota.**–55ND301, 213NW850.

932–87 55ND301, 213NW850.

932–88½–New. Permanent separation of a husband and wife terminated the family status as effectively as a formal divorce decree, and hence precluded a claim by the husband's vendor that land was a family homestead. TexCivA 14 SW(2d)881.

932–88⅓–New. Homestead right of brother in land formerly occupied with sister held not terminated by brother's subsequent marriage. TexCivA 32SW (2d)259.

933–91 TexCommnA 6SW(2d)350. See also TexCommnA 15SW(2d)1017.

933–98 See also TexCivA 12SW(2d)269.

934–5 177Ark371, 6SW(2d)301; Tex CivA 24SW(2d)69.

934–8 TexCivA 275SW187.

934–9 118Tex586, 19SW(2d)35 (children continuing to live with husband though awarded to wife).

934–11 123 Okl 81, 252P48; TexCivA 275SW187; TexCivA 283SW923. Contra 177Ark371, 6SW(2d)301.

934–13½–New. No change of value will effect the exemption of the lot of land from sale for the payment of debts. 316 Ill 605, 147NE427.

934–13⅓–New. In such case the rights of the person entitled to the estate of homestead are fixed. 316 Ill 605, 147NE 427.

934–13¼–New. The purpose of assignment is to fix boundaries, and where premises occupied are worth less than one thousand dollars, their boundaries determined the boundaries of the homestead. 316 Ill 605, 147NE427.

934–13⅙–New. Where a wife obtained a divorce after abandonment by husband, and succeeded to the homestead as the head of the family, no assignment was necessary since the value of the property at the time of divorce did not exceed one thousand dollars. 316 Ill 605, 147NE427.

934–13⅛–New. It is held that constitutional and statutory provisions for protection of homestead rights in survivor on death of either spouse do not apply where marital relation is severed by divorce. TexCivA 275SW187.

934–13⅐–New. Constitutional provision protecting survivor's use of homestead is not applicable to divorce. TexCivA 275SW187.

934–19 [a] **On divorce of childless couple** remarriage of husband gives no right of homestead in community property as against rights of his former spouse therein. TexCivA 283SW923.

934–21 126 Okl 83, 258P748. [c] **In Arkansas.**–170Ark758, 281SW17.

935–28½–New. An interlocutory decree of divorce does not impair the homestead nor destroy the right of survivorship created thereby. 99CalA594, 279P192.

935–35 337 Ill 617, 169NE743 (living apart of husband and wife).

935–38 218Ala424, 118S636; 181Ark 719, 27SW(2d)512; 89Fla356, 104S589 (no intent and no other homestead acquired); 337 Ill 427, 169NE201; 165 Minn492, 206NW929; 315Mo 872, 288 SW54; 122 Okl 255, 254P95; 122 Or493, 259P778; TexCivA 293SW350.

935–39 179Ark1113, 20SW(2d)177(2d case); 95Fla522, 116S867; 126Kan503, 268P799; 164La297, 113S853; 165La98, 115S381; 115 Okl 207, 242P264; 122 Okl 255, 254P95; 122 Or493, 259P778; Tex CommnA 300SW33; TexCivA 30SW(2d) 582 (abandonment of portion of lot).

936–40 89Fla356, 104S589; 121Kan617, 249P593; 122 Okl 255, 254P95. [a] **Abandonment and waiver distinguished.** –27F(2d)146.

936–41½–New. An unexecuted intent to abandon is insufficient. TexCivA 281SW 592.

936–41⅓–New. Abandoning use for home of portion of tract constituting homestead deprives such portion of homestead character, although the family continues to use the remainder as a home. TexCommnA 300SW33.

936–43 TexCivA 1SW(2d)684. But see 315Mo 872, 288SW54.

936–45 119Kan760, 241P259.

936–47 89Fla356, 104S589.

936–48 316 Ill 605, 147NE427; 165Minn 492, 206NW929; TexCivA 293SW621.

936–51 168Ark637, 271SW32; 174Ark 26, 295SW392; 176Ark126, 2SW(2d)63; 315Mo 872, 288SW54(2dcase); 122 Okl 255, 254P95; 50SD269, 209NW544; Tex CivA 272SW510; TexCivA 293SW621; TexCivA 300SW235; TexCivA 5SW(2d) 208; TexCivA 13SW(2d)971; TexCivA 20SW(2d)238.

936–52 200 Iowa1109, 206NW22; 206 Iowa761, 221NW467; 168Minn336, 210 NW87; NH 149A864; TexCivA 20SW (2d)238.

937–54 See also TexCommnA 15SW(2d) 1017. [a] **Reacquisition as homestead does not relate back** to time of filing of deed thereto so as to defeat rights of creditors accruing during period of abandonment. 316Mo 1188, 295SW123.

938–61 176Ark126, 2SW(2d)63; 179 Ark1113, 20SW(2d)177(2dcase); 95Fla 522, 116S867; 200 Iowa1109, 206NW22; 119Kan760, 241P259, 261 [citCJ]; 121 Kan617, 249P593; 221Ky763, 299SW 957; 160La548, 107S403, 404 [quotCJ]; 165Minn492, 206NW929; 168Minn336, 210NW87; 315Mo 872, 288SW54; 54 ND548, 210NW21; 57ND57, 220NW647, 649 [citCJ]; 122 Or493, 259P778; 54SD 1, 222NW297; TexCivA 293SW621; Tex CivA 20SW(2d)238.

939–62 315Mo 872, 288SW54.

939–65 122 Or493, 259P778, 780 [cit CJ].

939–66 160La548, 107S403, 404 [quot CJ].

939–67 165La98, 115S381, 383 [citCJ]; 122 Or493, 259P778, 780 [citCJ].

939–71 200 Iowa1217, 206NW110, 42 ALR1158; 54ND548, 210NW21; 55ND 301, 213NW850; 122 Or493, 259P778, 780 [citCJ].

939–72 164La297, 113S853; 55ND301, 213NW850.

939–73 54ND548, 210NW21, 24 [quot CJ].

939–75 160La548, 107S403, 404 [quot CJ].

940–78 160La551, 107S403.

940–81 50ND432, 196NW502.

940–85½–New. A wife's involuntary absence from the property in compliance with a court order which practically evicted her pending divorce proceedings does not constitute an abandonment. 200 Iowa1217, 206NW110, 42ALR1158.

940–86½–New. A homestead is not abandoned where a husband, after his wife's death, is taken to the home of a son-in-law on account of his infirmities and is cared for there for more than a year. 55ND301, 213NW850.

940–88 176Ark126, 2SW(2d)63.

941–96 38F(2d)228; 54ND548, 210NW 21, 24 [quotCJ].

941–3 89Fla356, 104S589; 122 Or493, 259P778, 780 [citCJ]. [a] **No abandonment where husband occupies premises,** though family away. 163La209, 111S 679.

941–7 [a] (11) 220Ala657, 127S227.

942–12 TexCivA 292SW648.

943–16 206 Iowa761, 221NW467; 122 Okl 255, 254P95.

943–18 54ND548, 210NW21, 24 [cit CJ].

943–23 173Minn576, 218NW108. See also TexCivA 13SW(2d)971.

944–33 122 Okl 255, 254P95; 122 Or 493, 259P778.

944–37½–New. A desire to sell one homestead for the purpose of acquiring another is not indicative of an intention to abandon the first. 200 Iowa 1109, 206NW22.

944-40 316Mo 1188, 295SW123; 138 Okl 133, 280P581; TexCivA 290SW813; TexCivA 15SW(2d)112. See also Tex CivA 13SW(2d)176. But see 176Ark 126, 2SW(2d)63.
945-47 28F(2d)353.
945-47½ 220Ala446, 125S611 (mortgage without joinder of wife held valid).
945-54 44 Ida293, 256SW371; 140 Wash525, 250P36.
945-55 44 Ida293, 256P371, 372 [cit CJ]; 140Wash525, 250P36. [a] 44 Ida 293, 256P371, 372 [citCJ].
945-68 TexCivA 294SW317. See also Ark 31SW(2d)136.
946-70 [a] But see 91Fla991, 108S886.
946-73½-New. Wife succeeded to homestead estate on divorce as head of family and may convey by deed, and estate did not differ from an ordinary estate for life. 316 Ill 605, 147NE427.
946-74 TexCivA 18SW(2d)724.
946-83½-New. , or by conveyance by a father to his daughter under an agreement whereby he has a life estate occupancy and remains in possession as head of family. TexCivA 272SW830.
946-82½-New. Owner may sell and convey homestead and remove therefrom without affecting exemption if he does not thereby abandon homestead as his place of abode. 168Minn336, 210 NW87.
946-82½-New. Sale of, and removal from, homestead, worth not over one thousand dollars after judgment against vendor, is held not to make land subject to payment. 214Ky499, 283SW 434.
946-88 99CalA594, 279P192; 39Wyo 414, 273P173.
947-89 7F(2d)218.
947-5 7F(2d)218.
947-8 316 Ill 605, 147NE427; 122 Okl 255, 254P95; Tex 27SW(2d)1093; Tex CivA 294SW250.
948-12 TexCivA 292SW648.
948-14 215Ala644, 112S204.
948-16 38F(2d)228; 212Ala474, 103S 457; 207 Iowa702, 223NW527.
949-20 TexCivA 292SW648.
949-29½-New. Execution of mortgages is not abandonment of homestead. 181Ark719, 27SW(2d)512.
949-33½-New. The fact that homestead claimant paid a poll tax in another county did not constitute abandonment of the homestead claim. TexCivA 20SW(2d)238.
949-34 TexCivA 19SW(2d)454 (abandonment established).
950-50 7F(2d)218 (Florida homestead); 171Ark791, 286SW1022; 172 Ark381, 288SW890; TexCommnA 300 SW33; TexCivA 23SW(2d)850. [c] **Husband's renewal of vendor's lien notes,** barred by limitation, is held not in fraud of wife's homestead rights. TexCivA 297SW491.
951-52 171Ark791, 286SW1022.
951-57 TexCivA 23SW(2d)850.
951-63 200 Iowa1217, 206NW110, 42 ALR1158; 173Minn576, 218NW108; 114 Okl 190, 245P589.
951-63½-New. Under Alberta statute wife cannot be deprived of life estate in new homestead because she did not consent in writing to change of residence. Alta [1929] 4DomLR659.
951-67 49SD341, 207NW155; TexCivA 8SW(2d)566.
952-77 50ND432, 196NW502, 503 [cit Cyc].
952-80½-New. Widow is not estopped by claiming legacy in husband's will. 216Ala286, 113S42.
952-83 162La703, 111S66; 49SD341, 207NW155, 158 [citCJ]; SD 226NW 343.
952-84 216Ala286, 113S42.
952-85 197NC572, 150SE32(2dcase).
953-86 159La1087, 106S574.
953-87½-New. Antenuptial contract whereby husband waived all claim to any right or interest in wife's property is not waiver by husband of homestead right. Iowa 229NW736.
953-1 139SC206, 137SE601.
954-3 122Kan109, 251P199.
954-7 [d] **In South Carolina.**-140SC 114, 138SE626.
954-13 TexCivA 8SW(2d)566.
955-15½-New. Right of homestead is not impliedly waived by owners creating mortgage on it. 35PortoRico 726.
955-18 TexCivA 287SW77.
955-22 See also 35PortoRico 726. [b] **In foreclosure of mortgage** court could determine existence of homestead rights in favor of owners who did not appear. 191Wis602, 211NW795.
955-30 123 Okl 81, 252P48.
955-31 220Ala657, 127S227; 171Ark 791, 286SW1022; 123 Okl 81, 252P48; Tex 12SW(2d)618.
955-35 123 Okl 81, 252P48.
955-36 See also TexCivA 24SW(2d) 440.
955-41½-New. Waiver of homestead by wife is no waiver of "matrimonial, dotal, paraphernal, or other rights." 159 La1087, 106S574.
955-41½-New. A waiver in a promissory note of the maker's homestead right does not constitute authority for the court in an action on the note to decree a lien on the maker's homestead for the amount of the note. 203 Iowa 372, 212NW678.
956-54½-New. However, waiver of homestead in note upon which judgment is rendered held not to give homestead title to judgment creditor. 164 Ga302, 138SE223.
956-63 167Ga892, 147SE51.
956-65 52SD53, 216NW589; 191Wis 602, 211NW795.
956-67 [a] **But his priority extends only to exempt property;** otherwise his mortgage does not take priority over prior mortgages containing no such waiver. 161La657, 109S347.
956-67½-New. but does not take precedence over a prior mortgage which was also free of homestead exemption, 163La679, 112S647.
957-70½-New. Judgment prior to debtor's deed of trust is held to have priority on foreclosure sale of debtor's property as against mortgagee asserting debtor's homestead exemption. 195 NC445, 142SE481.
957-78 See also TexCommnA 17SW (2d)803.
958-93 165La374, 115S625; TexCivA 286SW680.
958-95 142 Okl 160, 286P4; TexCivA 286SW680. [a] TexCivA 286SW680. [b] (2) Filing with land office application for homestead in land other than that actually occupied as home, making some improvements and residing there temporarily and making declaration in deed of trust that designated, not occupied, property is in fact homestead, is insufficient to constitute estoppel. TexCivA 286SW680.
958-96 TexCommnA 300SW33; Tex CivA 2SW(2d)987.
959-4 TexCivA 286SW680 (reason for rule); TexCivA 16SW(2d)433.
959-16 TexCommnA 17SW(2d)803.
959-4½-New. Where two residences are occupied under such circumstances that either may be homestead according to intention of owners, designation and representations of homestead character of one estops them from asserting such character as to other. Tex CivA 286SW680.
959-5 TexCivA 286SW680.
960-25½-New. nor by failure to demand that nonhomestead property be sold before homestead property on foreclosure of mortgage covering both; SD 230NW243.
960-26½-New. Where a wife joined in her husband's mortgage, she waived her homestead rights in favor of the mortgagee but not as against the children. 218Ala109, 117S623.
960-26½-New. Husband is not estopped to assert homestead character of property against wife's mortgagee by statement that tenant was in possession where mortgagee knew of homestead claim. Iowa 229NW736.
960-26¼-New. Husband held not estopped to assert homestead character of property against wife's mortgagee by his statement relative to antenuptial agreement relinquishing his dower right. Iowa 229NW736.
960-31½-New. Children are not estopped to claim a right in a homestead by failure to object to probate proceedings in which the land was sold. Tex CivA 7SW(2d)620.
960-32 TexCivA 289SW442.
960-33 54ND548, 210NW21, 24 [cit CJ]; TexCivA 289SW442.
960-34 TexCivA 293SW350.
960-37 TexCivA 287SW1107.
961-50½-New. A husband cannot forfeit the homestead rights of his wife. 50ND432, 196NW502.
961-53 168Minn336, 210NW87; 122 Or 493, 259P778, 780 [citCJ]; TexCivA 20 SW(2d)238.
961-54 122 Or493, 259P778, 780 [cit CJ].
961-55 164La297, 113S853; 165La98, 115S381; 122 Okl 255, 254P95; 124 Okl 300, 256P46; 122 Or493, 259P778, 780 [citCJ]; TexCommnA 6SW(2d)350; TexCivA 293SW350; TexCivA 297SW 609; TexCivA 22SW(2d)969.
961-56 200 Iowa1109, 206NW22; 202 Iowa493, 210NW564; Iowa 227NW521 (prima facie proof).
961-57 202 Iowa493, 210NW564.
962-59 200 Iowa1109, 206NW22; 206 Iowa761, 221NW467; TexCivA 272SW 510.
962-62 TexCivA 1SW(2d)684.
962-68 TexCommnA 6SW(2d)350.
962-69 212Ala474, 103S457. Contra 215Ala644, 112S204.
962-70 212Ala474, 103S457. [b] **Testimony of claimant** as to whether he had any other home during an eighteen years' absence is admissible. 212Ala 474, 103S457.
962-72 212Ala474, 103S457. (evidence that possession of caretaker left in charge was temporary is admissible).
962-76 212Ala474, 103S457 (refusal of wife to go to new home with fact of leaving part of furniture in their home is admissible).
962-78 But see TexCivA 8SW(2d)569.
962-80½-New. Evidence as to an attempted sale of the homestead while occupied as such is inadmissible except that which relates to the intention of the parties. 125Kan308, 263P1045.
962-82 125Kan308, 311, 263P1045 [quotCJ]; TexCivA 272SW510.
962-83 125Kan308, 311, 263P1045 [quotCJ]; TexCivA 272SW510.
963-84 [a] **In action by devisee under wife's will** to recover possession, proof that husband mistreated wife, causing her to abandon premises owned by her and occupied as homestead, held admissible to prove husband's forfeiture of right to homestead exemption. Tex CivA 297SW609.
963-87½-New. Designation of another homestead, although not sufficient as statutory designation, is admissible as evidence of abandonment of former homestead. TexCivA 272SW510.
963-87½-New. Letter of defendant offering to waive homestead rights for purpose of adjusting estate is held inadmissible as evidence of abandonment. TexCivA 286SW350.
963-90 [a] **Evidence** held not conclusive. TexCivA 285SW650.
963-91 125Kan286, 289, 264P75 [cit CJ].
963-92 168Minn336, 210NW87; 122 Or493, 259P778.
963-94 TexCivA 297SW271.
963-4½-New. Abandonment of a homestead may be proved by conduct, circumstances, and actions, as well as by direct testimony. 179Ark1113, 20SW (2d)177(2dcase).
963-6 54ND548, 210NW21, 24 [citCJ].
963-7 168Minn336, 210NW87.
963-7½-New. His conduct must also be considered. 168Minn336, 210NW87.
963-9 [a] **Evidence held sufficient** to support claim of homestead under temporary absence clause. 129 Or520, 275 P689.
963-10 171Minn176, 213NW537.
964-13 [a] **Failure to file notice of homestead claim** within six months from beginning of absence is not conclusive proof of abandonment but merely a circumstance to be considered. 171Minn 176, 213NW537.
964-18½-New. Lease of premises because of necessity, and removal to cheaper quarters, does not of itself show abandonment. 171Minn176, 213NW537.

964-19 168Minn336, 210NW87.
964-22 179Ark1113, 20SW(2d)177(2d case).
965-38½-New. Abandonment may be proved by conduct, circumstances, and actions. 178Ark324, 11SW(2d)765.
965-39 30F(2d)100; 171Ark791, 286SW1022; 179Ark1113, 20SW(2d)177; 202 Iowa493, 210NW564; 205 Iowa701, 216NW288; Iowa 227NW521; Iowa 229NW736; 167Minn489, 209NW636; 124 Okl 300, 256P46; Tex 12SW(2d)618; TexCivA 290SW813; TexCivA 23SW(2d)840; TexCivA 24SW(2d)440 (before levy of attachment); TexCivA 28SW(2d)247.
965-44 87Colo 153, 285P939; 172Minn 200, 214NW793; 122 Or493, 259P778; SD 230NW243; TexCivA 5SW(2d)208; TexCivA 20SW(2d)238.
965-45 200 Iowa1109, 206NW22.
965-45½-New. to show intention of owner of homestead at the time he exchanged it for other property to use such property in acquiring a new homestead; 200 Iowa1109, 206NW22.
965-45⅓-New. to show that homestead claimant did not intend to abandon homestead when he moved therefrom; 125Kan308, 263P1045.
965-53 54ND548, 210NW21.
965-54 7F(2d)218; 163La209, 111S679; 164La297, 113S853; 165La98, 115S381; 165Minn492, 206NW929; 171Minn176, 213NW537; 50ND432, 196NW502; 57ND57, 220NW647; 58ND317, 226NW481; 122 Okl 255, 254P95; TexCivA 286SW350; TexCivA 297SW271; TexCivA 297SW609; TexCivA 22SW(2d)969; TexCivA 30SW(2d)582. See also TexCivA 29SW(2d)447.
965-56 50ND432, 196NW502.
965-57½-New. To show waiver by wife joining in deed of fraud on part of grantee. TexCivA 287SW1107.
965-60 54ND548, 210NW21, 24 [cit CJ]; TexCommnA 6SW(2d)350; TexCommnA 15SW(2d)1017; TexCivA 275SW473; TexCivA 285SW650; TexCivA 293SW350; TexCivA 297SW609; TexCivA 24SW(2d)454. [b] **Evidence held insufficient to present issue.**–TexCommnA 6SW(2d)350.
966-62 119Kan760, 241P259; 221Ky763, 299SW957; 115 Okl 207, 242P264; TexCivA 20SW(2d)238.
966-63 119Kan760, 241P259.
966-64 TexCivA 286SW680; TexCivA 24SW(2d)454.
966-64½-New. Where facts are uncontroverted, it may be determined as matter of law as to whether there has been an abandonment of homestead. 89Fla 356, 104S589.
966-64⅓-New. Legal definition of "abandoned" should be given if requested. TexCivA 275SW473.
966-64¼-New. Good faith of husband in designating other land as homestead is held for jury. TexCivA 293SW350.
966-71 51ND148, 199NW444; 126 Okl 83, 258P748; TexCivA 24SW(2d)440. See also 130Kan641, 287P245.
966-72 221Ky640, 299SW541; Mont 289P559; 121 Or102, 254P201, 203 [cit CJ]. [a] 130Kan308, 286P400.
966-74 [a] **Procedure.**–167Minn243, 208NW960.
966-77 121 Or102, 254P201.
967-79½-New. A levy is necessary and sufficient to subject the excess property to satisfy a judgment and create a lien therefor. 208Cal 528, 282P793.
967-87 316 Ill 605, 147NE427.
967-92 130Kan308, 286P400 (invalidity of sale not cured by confirmation); 121 Or102, 254P201; 36Wyo 290, 254P691, 693 [citCJ]. [c] **Judgment creditor seeking to execute judgment against debtor's homestead** assumes risk property will sell under execution for more than two thousand dollars. 170La403, 127S883.
967-95½-New. An execution sale of defendants' undivided interests as tenants in common of real estate cannot be confirmed where such interests are affected by homestead exemption properly asserted. 129 Or128, 276P680.
968-5½-New. But wife is entitled to set up homestead rights in suit to foreclose vendor's lien created pursuant to agreement and partition suit to which she was not a party. TexCivA 275SW617.
968-12 234Ky369, 28SW(2d)32.
969-42 Wis 230NW132 (where purchasers are presumed to know of debtor's rights).
969-49 [a] Wis 230NW132.
970-52½-New. A homestead right is waived by failure to assert it in an ejectment action resulting in a judgment involving issue of title. 139 Okl 110, 281P243.
970-54 [a] **Tenant in action on rental contract** may not claim homestead in right of third persons on property in his possession. SC 155SE622.
970-58 TexCivA 28SW(2d)317.
970-61 224Ky289, 6SW(2d)253.
970-67 See also 118 Okl 277, 248P594 (at any time prior to levy).
971-75 7Alaska601; 222Ky361, 300SW913; Wis 230NW132.
971-78½-New. Under a bill in aid of execution, the court has the power and duty to protect a homestead right, even if not presented until the decree is being reduced to form. 245Mich246, 222NW111.
971-87 [b] **Claims held sufficient.**–Ala 127S816.
971-95½-New. , nor that the sheriff had levied on the property. 129 Or520, 275P689.
972-3½-New. Notice to sheriff of widow's exemption claim is notice to execution creditor. Or 289P495.
972-14½-New. Judgment creditor may contest claim of judgment debtor. 146Wash273, 263P184.
973-32 201Cal 194, 256P202.
973-40½-New. Claimant need file no pleadings. 201Cal 194, 256P202.
973-40⅓-New. Where a judgment valid on its face is shown and execution has been levied on the homestead which appears to be of a greater value than the statutory amount, appraisers should be appointed. 99CalA594, 279P192.
973-40¼-New. Although claimant is entitled to a hearing on a petition in a proceeding for the appraisement of a homestead, no formal trial of the issues nor any findings are contemplated by statute. 99CalA594, 279P192.
973-46 94Fla540, 113S769.
973-47 50ND949, 198NW673.
973-48½-New. In an action on a note and to foreclose a deed of trust on a tract of land from which a stated acreage was exempted as the mortgagor's homestead, the court, on failure or refusal of the mortgagor to make selection of boundaries, should make the designation and allow foreclosure on the remainder of the tract. TexCivA 281SW277.
973-53 331 Ill 483, 163NE401.
974-66 141SC407, 139SE842.
974-75 [a] **Allotment for eight hundred dollars,** instead of one thousand dollars, held not invalid. 193NC541, 137SE658.
974-83½-New. The value of a life estate and whether the homestead was susceptible of division are questions for the determination of commissioners in the first instance. 331 Ill 483, 163NE401.
975-2 But see 331 Ill 483, 163NE401.
975-6 193NC541, 137SE658.
976-44½-New. Statute contemplates hearing on petition. 201Cal 194, 256P202.
979-92 206 Iowa961, 221NW550.
979-4 201 Iowa327, 207NW372 (purchaser with actual or constructive notice); 36Wyo 290, 254P691, 693 [citCJ].
980-8 36Wyo 290, 254P691, 693 [cit CJ].
980-22 331 Ill 483, 163NE401; 244Mich 179, 221NW289.
981-23 [b] (2) 331 Ill 483, 163NE401.
981-29 163Ga146, 135SE497.
981-35 [a] **Relief against express limitation of law,** as to alienation of homestead, will not be granted in equity. TexCivA 276SW480.
982-42 TexCommnA 276SW197.
982-58 160Ga565, 128SE668 (pending application by wife for homestead out of husband's lands where husband refused to apply therefor); TexCivA 21SW(2d)382; TexCivA 27SW(2d)567. [b] **Wife, though not party to attachment suit** against husband, can enjoin foreclosure on establishing her right to homestead. TexCivA 291SW948.
982-60 163Ga146, 135SE497.
983-74 See also MoA 282SW755.
983-80 146Wash273, 263P184.
983-81 174Ark26, 295SW392.
983-85 190NC772, 130SE611.
983-85½-New. A widow's unassigned dower right will not prevent the statute of limitation from running against heirs in favor of adverse claimants to abandoned homestead right. 174Ark26, 295SW392.
983-85⅓-New. An application for homestead exemption before confirmation of execution sale has been held timely. 220Ky464, 295SW442.
983-91 [a] **Beneficiaries of property set aside as homestead** may institute proceeding to enjoin any interference with right of possession. Ga 155SE678.
984-94 125Kan206, 210, 263P1079 [quot CJ].
984-97 TexCivA 289SW442.
984-97½-New. But a collusive arrangement between husband and wife cannot be countenanced. 216Ala349, 113S291.
984-99 216Ala349, 113S291; 160Ga565, 128SE668.
984-4 See also 337 Ill 617, 169NE743.
984-5 But see TexCommnA 295SW584.
984-6 TexCivA 4SW(2d)274; TexCivA 15SW(2d)112. [c] **In partition suit,** wife is necessary party where she has defense growing out of her homestead rights. TexCivA 275SW617.
985-16 TexCivA 4SW(2d)102. But see 166Ga519, 143SE770; 245Mich246, 222NW111.
985-17 TexCivA 2SW(2d)992.
985-19 [a] (3) 50SD12, 208NW402. [c] **Answer and cross complaint in action to recover possession held sufficient.**–87Colo 153, 285P939.
986-27 [b] See also 129 Or520, 275P689.
986-29 50SD12, 208NW402 (averments held sufficient).
986-30 TexCivA 20SW(2d)238.
986-32 [a] (3) Allegation that plaintiff is owner of quarter section creates no presumption that land exceeds one-hundred sixty acres. 50SD12, 208NW402. (4) Allegation of contiguity of premises is not material where premises are alleged to be homestead. 50SD12, 208NW402.
986-39 But see 94Fla540, 113S769.
987-53 [a] (2) Amendment, by alleging that plaintiff was head of family, consisting of wife and children, held properly allowed. 160La551, 107S403.
988-66 [a] **Under plea of not guilty,** in suit to recover possession, evidence of defendant's homestead rights is admissible. TexCivA 297SW609.
988-68½-New. Evidence of defendant's homestead rights in property sought to be recovered is admissible under plea of not guilty where no affirmative relief is prayed. TexCommnA 6SW(2d)350.
988-74 217Ala375, 115S864; Ala 129S12; 166Ga176, 142SE667; 206 Iowa920, 221NW582; TexCivA 288SW235. [a] (4) That present homestead was procured with proceeds of prior homestead. 206 Iowa761, 221NW467.
988-78 TexCivA 275SW617.
989-85½-New. Under bill conceding homestead right in part of land complainant does not have burden of proving value thereof. Ala 129S12.
989-89 165La98, 115S381.
989-90 166Ga176, 142SE667; TexCivA 10SW(2d)140.
989-91 118 Okl 277, 248P594.
989-3½-New. Articles of adoption of a minor member of family are admissible to establish right to homestead of defendant in action by judgment creditor for recovery of possession and title claimed by virtue of execution sale. TexCivA 272SW830.
990-9½-New. Evidence that defendant paid taxes on a homestead in the name of the record owner while holding an unrecorded deed is immaterial in a suit by the purchaser on execution sale. TexCommnA 295SW584.
990-18 [a] **Evidence held insufficient** to show notice to mortgagee of unrecorded instrument under which homestead

claimed. 217Ala375, 115S864.

990–19 170La612, 128S652; 112 Okl 82, 240P101; 49SD130, 206NW691; Tex CivA 297SW271.

990–24½–New. that when the mortgage was executed there was due on the contract of sale by plaintiff a sum in excess of the mortgage; 51SD253, 213NW364.

990–24½–New. or to sustain a finding that the mortgagor of a homestead authorized the foreclosure purchaser to convey it to his son, 177Ark1193, 7SW (2d)763.

990–25 TexCivA 286SW292; TexCivA 288SW235; TexCivA 16SW(2d)433.

990–27½–New. Evidence held insufficient to show that mortgagee practiced fraud on wife in procuring her execution to husband's mortgage. 216Ala349, 113 S291.

990–27½–New. , to show that homestead was urban, rather than rural. Tex CivA 293SW632.

990–31½–New. Evidence has been held sufficient to show the value of the old homestead which was exchanged for a new homestead. Iowa 228NW295.

990–36 166Ga176, 142SE667; TexCivA 4SW(2d)189; TexCivA 13SW(2d)469; TexCivA 16SW(2d)844.

991–37 39 OklACR238; 136 Okl 174, 276 P707.

991–38 TexCivA 32SW(2d)259.

991–40½–New. whether city limits had extended to include land claimed as a homestead; TexCommnA 288SW802.

991–48 [a] **Instructions held erroneous.**–136 Okl 174, 276P707.

991–49 TexCivA 2SW(2d)987.

992–62½–New. The general rules as to instruction apply to instructions on abandonment of homestead. TexCivA 272SW510 (instruction held proper).

992–62½–New. Where designation of homestead is introduced merely as evidence of abandonment of other homestead, refusal of instruction that it was not legally binding as statutory designation is not error. TexCivA 272SW 510.

992–66 125Kan286, 264P75. [b] **In divorce suit,** court should make conclusion of law adjudging homestead free of claim of husband's judgment creditor who was made party defendant. Utah 269P485. [c] **Findings held not to show abandonment before sale.**–TexCivA 29 SW(2d)447.

992–70½–New. Findings that defendants did not intend to return to property as homestead, and that they had not abandoned such intention, have been held not conflicting. TexCivA 289SW 146.

992–78 TexCivA 15SW(2d)155.

992–80½–New. Injunction held too broad that restrained judgment creditor from selling homestead under any execution thereafter issued. TexCivA 22 SW(2d)1091.

992–81 202 Iowa401, 210NW428.

993–89½–New. Decree directing payment to administrator of proceeds of sale of deceased cotenant's interest in common estate in excess homestead is proper. 143Miss498, 108S498.

993–91½–New. In a suit to foreclose a lien on homestead property, judgment against the husband is binding on the wife as to her homestead interest. Tex CivA 4SW(2d)274.

993–2 39 OklACR238; 122 Okl 255, 254 P95; TexCivA 16SW(2d)433.

993–13½–New. Where the proceeds of the sale of a homestead were impounded by garnishment, the measure of damages was six per cent interest on the sum of money impounded. TexCivA 10 SW(2d)140.

994–14 139SC66, 137SE331. [a] (4) 170La403, 127S883. (6) Homestead is not continued indefinitely in favor of surviving spouse regardless of changed conditions. 165La458, 115S655. (7) Proportion of costs of administration cannot be deducted from surviving widow's homestead exemption right. 170La 403, 127S883. (8) Only where widow seeks to claim homestead exemption against her own debts is she required to do so as head of family. 170La403, 127S883. (9) On sale of homestead by administratrix, exemption can only be applied to proceeds of homestead. 170 La403, 127S883. (10) Benefit of homestead exemption cannot be claimed by widow unless she is head of family or has person dependent upon her for support. 168La909, 125S588 (surviving widow with two major daughters without means of support held head of family).

994–18 176Ark442, 3SW(2d)6; 171 Minn182, 213NW736; 315Mo 442, 286 SW385; 315Mo 872, 288SW54; 51ND 384, 199NW760; 55ND301, 213NW850; 131 Okl 144, 268P245; 139SC66, 137SE 331; TexCivA 293SW621; TexCivA 28 SW(2d)1100. [b] **Absence of means or property** is not condition precedent to assertion of claim to homestead. 168La 909, 123S616.

995–23 234Ky369, 28SW(2d)32.

995–24 317Mo 544, 297SW54.

995–25½–New. In some jurisdictions the widow is entitled to receive rents under an oil and gas lease. 168Ark682, 272SW367.

995–25½–New. In North Carolina the constitution is construed to mean that a widow is not entitled to homestead in lands of her husband if he dies leaving children, minor or adult. 190NC772, 130 SE611.

995–25¼–New. A widow is not entitled to a homestead in premises of which she was a joint owner in fee. 26 OhNPNS 221.

995–32 [a] **Land not owned by or in possession of husband at time of death** cannot be claimed by widow as homestead. 181Ark463, 26SW(2d)587.

996–46 76CalA315, 244P629.

996–47 76CalA315, 244P629.

997–58½–New. Right to rents under lease executed during coverture. Widow is entitled to rents and profits under lease executed jointly by her and her husband during coverture on homestead property by virtue of her homestead rights thereon. 168Ark682, 272SW367 (oil and gas lease).

997–76 TexCivA 293SW621.

997–77 TexCivA 293SW621.

998–80 98CalA633, 277P372.

998–83 [b] **Wife living separate from husband** on own property is held entitled to widow's homestead in husband's property claimed immediately after his death. 176Ark442, 3SW(2d)6.

998–84 227Ky473, 13SW(2d)506.

998–85½–New. Surviving widow need not show, as condition precedent to claim of homestead, that she has no other property. 168La909, 125S588.

998–87 See also TexCivA 29SW(2d)447. [a] **Fraud, duress, and undue influence** will invalidate contract relinquishing right. 131 Okl 144, 268P245.

998–87½–New. Widow as administratrix paying subordinate claims before preferred claims leaving latter unpaid is not entitled to homestead exemption as against preferred creditors. Wyo 292 P246.

999–4½–New. An antenuptial contract under which a wife agrees to accept a named fractional part of the husband's property in case she survives does not deprive her of her homestead right until her share is actually set off to her or otherwise disposed of. 201 Iowa1311, 207NW772.

999–4½–New. Under such contract the wife is not liable for rent of the homestead until her share is actually set off to her or otherwise disposed of. 201 Iowa1311, 207NW772.

999–23 202 Iowa401, 210NW428.

1001–55 168Ark682, 272SW367 (sale of interest in oil, gas, and mineral in homestead property). See also 232Ky602, 24 SW(2d)301.

1001–58 219Ala537, 122S668 (right of ejectment is in children).

1003–92½–New. A widow living apart from her husband whether for her fault or his is held not to have abandoned a homestead to which she could return. 176Ark442, 3SW(2d)6.

1003–92½–New. Widow who killed her husband can take no interest in homestead. Iowa 229NW850.

1003–92¼–New. Under Alberta statute a widow is not deprived of her life estate in a homestead to which her husband removed because she did not consent in writing to his change of residence. Alta [1929] 3DomLR640.

1003–94 69CalA404, 231P371; 191NC 376, 131SE742; 55ND301, 213NW850; 139SC66, 137SE331; TexCivA 24SW (2d)440; TexCivA 29SW(2d)452 (heir does not inherit homestead right).

1003–3 [a] (7) Children of deceased wife, as against surviving husband, can subject urban homestead to forced sale for purpose of partitioning excess value. TexCivA 286SW350. (8) Children are not entitled, as against surviving spouse, to part of rental value of homestead since death of deceased spouse. TexCivA 286SW350. (9) Title vested absolutely upon death of father who survived mother. TexCivA 7SW(2d)620.

1004–10 [a] **Exemption does not extend** to adult unmarried daughter after death of both parents. TexCivA 28SW(2d) 257. [b] **Stepdaughter** is not entitled to homestead claim in stepfather's estate. TexCivA 29SW(2d)452.

1004–10½–New. Children of widow by second marriage have no share in the homestead. Mo 20SW(2d)26.

1004–11 69CalA404, 231P371. [b] (1) 121Kan333, 246P688. (4) Shares of adult children are not exempt from sale for their own debts. 121Kan333, 246P 688.

1004–17 TexCivA 297SW891.

1005–47 [d] (5) Children are entitled to partition of excess value of property on which homestead of father and deceased mother was situated. 115Tex400, 282 SW788.

1006–48 Mo 20SW(2d)26; MoA 286SW 353.

1006–52 Mo 20SW(2d)26; MoA 286SW 353.

1006–53 315Mo 872, 288SW54(2dcase).

1007–82 169Ark210, 275SW524 (order of probate court held absolutely void).

1008–86 98Fla276, 123S768; 161Tenn 172, 29SW(2d)254.

1008–89 [a] (2) 168Ark682, 272SW 367. [c] **Accounting after abandonment by widow.**–Where wife abandons her right by selling her interest in oil, gas and minerals in homestead property, heir of husband is entitled to accounting for royalties collected by widow since date of conveyance. 168Ark 682, 272SW367.

1008–91 [a] **Accounting after abandonment by widow.**–168Ark682, 272SW367.

1008–92½–New. Heirs of a widower, to whom the court set aside homestead on the wife's death, in violation of statute, are liable to the wife's heirs for rent, not from the beginning of the widower's occupancy, but only for the period of their possession. 128 Or455, 275P21.

1008–93 171Ark162, 283SW19.

1008–95 171Ark162, 283SW19.

1009–11 171Ark162, 283SW19.

1009–20 322Mo 697, 16SW(2d)49.

1009–22 230Ky143, 18SW(2d)961; 115 Okl 44, 241P480; TexCivA 278SW937; TexCivA 10SW(2d)140; TexCivA 21SW (2d)586 (in wife's half interest in community property). [e] **Where title to lot was in deceased wife,** lot descended to her child subject to homestead right in surviving husband. 230Ky143, 18 SW(2d)961.

1009–27 But see 205 Iowa701, 216NW 288.

1009–29 TexCivA 287SW141.

1009–34 118Tex343, 15SW(2d)589; TexCivA 19SW(2d)382.

1010–35 See also 118Tex343, 15SW(2d) 589.

1010–37 118Tex343, 15SW(2d)589.

1010–37½–New. Surviving husband may rent out his share in cotenancy which he holds as a homestead, but not more. TexCivA 278SW937.

1010–38 See also 118Tex343, 15SW(2d) 589.

1010–38½–New. Surviving husband, holding a homestead right as a tenant in common, is not liable to account for rents and profits. TexCivA 278SW937.

1010–48 TexCivA 21SW(2d)586.

1011–61½–New. A statute, authorizing the probate court to set apart all exempt property for deceased's surviving spouse or minor children, does not prevail over a statute providing for descent and devise of homesteads, because of its reenactment with addition of a mere cur-

ative clause. 128 Or455, 275P21.

1011-67 69CalA404, 231P371; 315Mo 872, 288SW54(2dcase).

1011-72 [a] **In Oklahoma.**-37 OklACR 496, 498.

1012-82 121Kan229, 246P521. See also TexCivA 24SW(2d)440.

1012-85½-New. but only if such debts were charged thereon during decedent's lifetime. 315Mo 872, 288SW54.

1012-90 TexCivA 285SW935.

1014-31 TexCivA 7SW(2d)620.

1014-35½-New. Since the enactment of Cal. Civ. Code § 1265, dissolution of family by death of wife and passing of children into age of majority does not limit homestead to one thousand dollars. 69CalA404, 231P371.

1015-52 [a] **In Colorado.**-78Colo 346, 242P54.

1015-54 [c] (9) See also 91CalA388, 267P148.

1016-63 171Minn182, 213NW736; 315 Mo 442, 286SW385; 118Tex343, 15SW (2d)589. See also TexCivA 11SW(2d) 631. [j] **In Oklahoma.**-37 OklACR496.

1017-66 [b] (1) 313Mo 476, 285SW92; 315Mo 872, 288SW54; MoA 286SW353. (2) 313Mo 476, 285SW92; 315Mo 872, 288SW54. (3) 317Mo 544, 297SW54. (4) Under former statutes giving widow fee, widow purchasing under trust deed sale acquires fee as purchaser subject to trust for children who might contribute share of purchase money. 317Mo 544, 297SW54 (children held to have abandoned equities by failure to offer contribution for thirty years after majority). (5) Under statute of 1868 widow took absolute title in fee. Mo 30SW(2d)1073.

1017-69½-New. In some jurisdictions the homestead right is the right to occupy and live upon the land itself and not the buildings thereon. 37 OklACR 496.

1017-71 TexCivA 286SW298.

1017-72 TexCivA 286SW298.

1017-75 TexCivA 286SW298.

1018-81½-New. **In California** heirs at law who succeed to general homestead have all the rights and benefits conferred by law on persons whose rights they acquire. 69CalA404, 231P371.

1018-96 200 Iowa926, 205NW755; 201 Iowa484, 207NW578; 205 Iowa349, 218 NW29. [a] 201 Iowa484, 207NW578.

1018-6 201 Iowa59, 206NW301.

1018-9½-New. Homestead property passing by will to a testator's children by way of remainder after the termination of a life estate in the surviving spouse is not exempt from the antecedent debts of such children. 201 Iowa 484, 207NW578.

1019-20½-New. **In South Carolina,** a niece of the testatrix is not entitled to homestead exemption in lands devised as against debts of the testatrix. 139SC 66, 137SE331.

1019-22 117Tex474, 8SW(2d)633, 66 ALR916; 117Tex580, 8SW(2d)640.

1019-38 MoA 286SW353.

1020-47½-New. A widow may have a homestead in real estate devised to her, but never in personal property. 330 Ill 624, 162NE164.

1020-47½-New. A homestead exemption extends to an undivided interest of the surviving spouse. 33F(2d)335.

1021-80 199Cal 103, 247P1082.

1021-83 216Ala49, 112S330.

1022-97 216Ala49, 112S330.

1022-13 153Wash218, 279P579. [a] **In Washington.**-Wash 289P1015.

1023-24 TexCivA 293SW342.

1023-30 78Colo346, 242P54, 55 [quot CJ].

1023-36 [a] **Where all children had attained majority** before widow brought proceedings, she was entitled to have homestead set apart and to her proportional interest in reversion. 220Ala72, 124S113.

1024-45 [a] **In Oklahoma.**-37 OklACR 496.

1024-46 [d] **Margin must be allowed** for good faith differences as to value. 214Ala587, 108S529. [e] **Fluctuating values in different years** held considered in determining question. 214Ala 587, 108S529. [f] **As to homestead exemption itself,** creditor, though he may be interested when value exceeds exemption allowance, is in fact not creditor at all. 78Colo 346, 242P54. [g] **In Louisiana.**-170La590, 128S525.

1025-57 TexCivA 19SW(2d)382. But see 218Ala436, 118S651. [c] 319Mo 930, 5SW(2d)636.

1025-58 MoA 286SW353.

1025-60 TexCivA 21SW(2d)586.

1025-61 Wyo 292P246. But see Tex CivA 7SW(2d)620.

1026-73 168Ark682, 272SW367.

1026-77 337 Ill 427, 169NE201.

1026-82 231Ky522, 21SW(2d)833 (mere removal).

1027-84 231Ky522, 21SW(2d)833.

1027-85½-New. Where a widow and children, after expiration of minority, conveyed a homestead, to which they did not have absolute title, they abandoned it. 219Ala537, 122S668.

1027-90 168Ark682, 272SW367 (on sale of interest in oil and gas lease, heir is entitled to accounting of rents subsequently collected).

1027-94 [a] (2) Evidence held insufficient to authorize finding that surviving husband had abandoned his homestead interest. TexCivA 10SW(2d)140.

1027-1 219Ala537, 122S668; 220Ala72, 124S113 (insolvency of father's estate undiscovered during minority); 98CalA 633, 277P372; 313Mo 476, 285SW92; 317Mo 544, 297SW54 (under law of 1875); MoA 286SW353. But see 169 Ark210, 275SW524; 117Tex566, 8SW (2d)641. [c] **In Alabama.**-220Ala72, 124S113.

1028-10½-New. When a homestead has been selected from community property, and upon death of one spouse has vested in the survivor, it ceases to exist on death of the survivor. 69CalA404, 231 P371.

1028-10½-New. Where spouse on death of husband took life estate in homestead, such life estate becomes extinct upon her death. Nebr 230NW443 (rights of her common creditors also extinguished).

1028-15 124 Okl 170, 254P1. [a] **Proceeds of sale** in so far as interest of heir is concerned are exempt from execution levy. 205 Iowa349, 218NW29.

1028-24½-New. Proceedings may be instituted within twenty years of decedent's death, provided only children who are minors when the proceedings are instituted take an interest therein. 220Ala72, 124S113.

1028-24½-New. That decedent's surviving husband, as administrator, has not properly accounted with reference to the estate cannot be considered or remedied in a proceeding by him for an award to him of property in lieu of the homestead. 153Wash218, 279P579.

1029-31 227Ky473, 13SW(2d)506; 51 ND384, 199NW760 (unnecessary where wife is sole heir and sole devisee). [c] (1) TexCivA 286SW298. (4) Absence of order setting apart homestead for use of heirs does not affect rights of heirs or exemption of homestead from simple debts. TexCivA 7SW(2d)620. (5) Order setting apart homestead for use operates merely upon possession of land as between heirs, and is not essential to vesting of title in them. Tex CivA 7SW(2d)620. [d] **In Oklahoma.**-124 Okl 170, 254P1. [e] **In California.**-202Cal 695, 262P331.

1029-34 76CalA315, 244P629. [b] **Court has no discretion** except in selection of fit and proper place to be set apart as homestead. 76CalA315, 244P 629.

1029-35 76CalA315, 244P629.

1029-39 [b] (1) 220Ala72, 124S113 (rule still applicable where only heirs are minors). (3) 213Ala561, 105S561. (4) And under Code [1907] § 4204 same is true as to estate of deceased mother vesting in minor children as against other heirs. 213Ala561, 105S561.

1030-47 213Ala561, 105S561 (holding probate court has jurisdiction either when estate is undergoing administration or when property does not exceed exemptions and no administration is granted within sixty days); 76CalA315, 244P629. [c] **In Oregon.**-(1) 129 Or307, 275P17.

1030-48 [a] (1) 213Ala561, 105S561. (2) 213Ala561, 105S561. (4) Jurisdiction is dependent on fact that more than sixty days have elapsed since death and there has been no administration. 213Ala561, 105S561. (5) Jurisdiction to set apart homestead is dependent on lapse of sixty days without administration. 213Ala561, 105S561. (6) Proceedings to set aside homestead which failed to show lapse of sixty days from death of decedent and no administration are void and must be so declared on collateral attack. 213Ala561, 105S561.

1030-49 [a] 213Ala265, 104S515.

1030-55 213Ala265, 104S515; 220Ala72, 124S113 (though no application during minority of children). [a] **In Tennessee.**-153Tenn150, 281SW929.

1031-69 [a] **Determination of homestead and dower interests.**-313Mo 476, 285SW92.

1031-71½-New. In partition of land in which a widow claimed the land under a lease from decedent's children, the court could not set aside a homestead. 320Mo 617, 8SW(2d)900.

1032-89 117Tex474, 8SW(2d)633, 66 ALR916.

1032-92½-New. Minor children of deceased may appear and resist a claim of his alleged widow. 35Wyo 300, 249 P81.

1032-97 213Ala265, 104S515 (that no administration on estate had been granted); 213Ala561, 105S561; 214Ala 587, 108S529. [e] (3) Petition sufficiently showed deceased resided within state at time of death. Ala 128S606. [i] **Lapse of time since death.**-213Ala561, 105S561. [j] **Administration not granted.**-213Ala561, 105S561. [k] **Bill in equity showing conditions under which widow is entitled to estate in fee** in hands of her deceased husband, and that statutory remedy to ascertain facts upon which her estate depends is not available, shows special equity and is not subject to demurrer for want of equity. 213Ala265, 104S515. [l] **Jurisdictional averments.**-214Ala587, 108S 529.

1033-2 212Ala635, 103S692 (settlement of homestead held void where heirs and widow had agreed that she should have use of all of husband's lands for life and that at her death they should come to heirs).

1033-2½-New. Whether surviving spouse had abandoned the premises is an issue of fact. TexCivA 293SW621.

1033-9½-New. Where objections were made at the time of sale of property for less than the value of the homestead, such sale was ineffectual to pass title. 216Ky345, 287SW941.

1033-10 [a] (4) Burden is upon persons claiming forfeiture of homestead by surviving wife by her abandonment of husband. TexCivA 293SW621. (5) One claiming that widow lost right to homestead because she killed husband has burden of proving her guilt. Iowa 229NW850.

1033-11 [a] (3) Till proof of abandonment, right of surviving spouse to homestead is presumed to continue. Tex CivA 293SW621.

1033-12 [a] (4) In contesting homestead exemptions allotted to widow, location and value of deceased's lands in relation to neighboring lands is competent. Ala 128S606.

1033-13 227Ky473, 13SW(2d)506; 165 Minn492, 206NW929 (evidence sufficient to sustain order setting apart homestead to surviving widow). [a] (3) Other evidence held insufficient. 214Ala 422, 108S253; TexCivA 293SW621. (4) To show lands set apart to widow were in excess of homestead exemptions of two thousand dollars. Ala 128S606. [b] **Evidence held sufficient** to show that property sought to be set apart as homestead was community property. 76 CalA315, 244P629.

1033-22 Fla 129S847.

1034-24½-New. A decree failing to provide that there should be no sale for less than the value of the homestead, as limited by statute, has been held erroneous. 216Ky345, 287SW941.

1034-29 [a] (3) Setting apart of home-

stead for widow has been held not abuse of discretion where objecting creditor was not injured and widow had used her own property to pay debts exceeding value of homestead, and property set apart could not be partitioned without materially impairing value. 76CalA618, 245P454. [c] (1) 91CalA388, 267P148.

1034-41 130 Okl 148, 265P1056.

1034-43 147Wash463, 266P723.

1035-48½-New. Assignment of homestead in fee, where the estate is insolvent, operates as an assignment to the widow as well as minor children, and mortgage of her interest can only be made effectual after the youngest child arrives at full age. 214Ala422, 108S253.

1035-65 214Ala587, 108S529.

1035-66 214Ala587, 108S529.

1036-71 213Ala561, 105S561 (lack of necessary averments in petition).

1036-71½-New. Absence of fraud preventing a hearing will not invalidate a decree despite the purpose to claim in excess of exemption. 214Ala587, 108S529.

1036-71¾-New. Disparity between claimed and actual values may be sufficient to warrant conclusion of bad faith. 214Ala587, 108S529.

1036-71¼-New. Knowledge of excess of demand over statutory value allowed has been held to negative bona fides of claimed error in judgment as to value. 214Ala587, 108S529.

1036-72 But see 220Ala72, 124S113.

1036-84 [a] **Who can appeal.**-Ala 128S606.

1036-94 53ND376, 206NW414.

1037-9 221Ky685, 299SW571. [e] **Homestead right may not be subject to lease for more than twelve months,** nor subject to any other incumbrance or conveyance, under statute. 219Ala537, 122S[illegible].

1037-12 219Ala434, 122S649; 193Wis 389, 214NW363.

1038-14 MoA 286SW353.

1038-20½-New. Widow selling interest in oil and gas lease by virtue of homestead right abandons interest therein as much as if she sold part of the land. 168Ark682, 272SW367.

1038-22 228Ky589, 15SW(2d)426.

1038-25 [a] (10) Holder of trust deed may foreclose after husband's death. TexCivA 28SW(2d)257 (enforceable during lifetime of husband).

1039-26½-New. The fact that the surviving husband had exchanged his interest in a portion of the homestead for land against which there was a lien has been held not to estop him from asserting his homestead rights. TexCivA 10 SW(2d)140.

1039-46½-New. A homestead is subject to partition among those entitled thereto on the death of the head of family. 71Fla644, 72S178.

1039-46½-New. The right of partition or sale for division is not defeated because the widow of deceased tenant in common has a homestead right in his moiety. 216Ala49, 112S330.

1039-46¾-New. The statute relating to sale or partition of a homestead is for the protection of the widow as against heirs and personal representatives of the estate and also children. 216Ala49, 112S330.

1039-46⅞-New. A suit by a husband against his wife, for the sale of land owned by them jointly, for division, cannot be maintained over the wife's objection when the land constitutes the homestead. 207Ala57, 91S886.

1039-49 207MoA646, 229SW1094; 16SD489, 94NW394, 102AmSR713. But see 211Ala136, 99S905.

1040-50 TexCivA 106SW755.

1040-53 20CalA84, 128P349; 195 Ill 409, 63NE271; 252Mo 568, 161SW251; 300Mo 144, 253SW1053; TexCivA 212 SW[illegible]72; TexCivA 236SW806.

1040-54 181Ala219, 61S264; 203 Ill 167, 67NE762; 94Ky421, 22SW646, 15 KyL197, 42AmSR365; 145Ky205, 140 SW150; 148Ky642, 147SW369; 78 Okl 277, 190P681; 98Tex332, 83SW680, 84 SW643; TexCivA 80SW1050.

1040-55 182Cal765, 190P181; 153Ga 212, 112SE278; 193 Iowa1262, 188NW 787; 115SC91, 104SE318; 61TexCivA 41, 129SW162; 62TexCivA387, 131SW 641; TexCivA 199SW341; TexCivA 209SW770. [a] (3) Result of petition may be but exchange of portion of homestead partitioned. TexCivA 10 SW(2d)140. (4) Constitutional provision prohibiting partition under certain circumstances. TexCivA 13SW(2d)233.

1040-56 61Kan861, 60P1049; 313Mo 476, 285SW92; 223Mo 568, 123SW454; 313Mo 476, 285SW92; 98Tenn33, 39SW 1051.

1040-57 [c] **Bill must be proceeding directly for that purpose,** in order that issue may be made in respect of right or advisability of selling such homestead. 98Tenn33, 39SW1051.

1040-58 313Mo 476, 285SW92.

1040-60½-New. , and although the widow has remarried or died. 313Mo 476, 285SW92.

1040-64 108Ark248, 156SW1018; 132 Ark357, 200SW1025; 20CalA84, 128P 349; 195 Ill 409, 63NE271; 102Kan766, 173P2, LRA1918F394; 211Ky204, 277 SW242; 108Miss84, 66S328; 111Miss 129, 71S300; 113Miss776, 74S660; 270 Mo 287, 193SW546; 16SD489, 94NW 394, 102AmSR713; 115Tex400, 282SW 788; TexCivA 71SW670; TexCivA 85 SW46; TexCivA 278SW937. But see 183Ala544, 62S776; 216Ky154, 287SW 532.

1040-67½-New. But in some jurisdictions, excess above the homestead amount and value is not a homestead, and is subject to the laws applicable to nonexempt property, 115Tex400, 282SW 788.

1040-67¾-New. although if, when offered for sale on partition, the property fails to bring more than the value of the improvements and amount of homestead exemption, no sale should be declared. 115Tex400, 282SW788.

1040-67¼-New. and thereafter the homestead claimant should be quieted in his homestead claim to the property and no further or subsequent sale be ordered. 115Tex400, 282SW788.

1041-71 But see 137Miss699, 102S774.

1041-78 [c] **Widow and children in possession of homestead inherited from deceased** are not tenants in common, but joint tenants, whose estate is subject to survivorship, and none of the parties are entitled to partition. 195 Ill 409, 63 NE271.

1041-79 [a] (3) 110Kan210, 203P712. (6) Devisees of part of testator's homestead, who are not members of testator's family, cannot demand partition so long as testator's widow, who claimed her rights under law rather than under will, chooses to occupy premises as homestead and does nothing to terminate her right to such occupancy. 110Kan30, 202P841.

1041-80 49Mich176, 13NW504.

1041-81 [e] **Tenant in common will not be allowed his homestead** as against claims of his cotenants, so as to defeat their right to partition. 117SC409, 109 SE649.

1041-83 But see 313Mo 476, 285SW92.

1041-88 [a] (2) Widow takes homestead free from decedent's debts contracted after acquisition of homestead by him. 201 Iowa59, 206NW301. (3) Homestead devised to wife of owner, who accepts it in lieu of distributive share, descends, upon death of wife intestate, to her heirs at law, free from debts of original owner contracted subsequent to his acquisition of such homestead. 201 Iowa59, 206NW301. [b] (2) Homestead of decedent is not subject to administration proceedings. 124 Okl 170, 254P1. [c] (7) Community homestead passes to surviving spouse free from debts of community, and on death of survivor descends to her or his collateral heirs free from liability for such debts. TexCivA 19SW(2d)382.

1042-6 [e] (1) MoA 282SW755.

1043-15 [c] **In Ipwa.**-205 Iowa349, 218 NW29.

1043-16 117 Okl 209, 245P622.

1043-19 315Mo 872, 288SW54 (statute of descent). [b] **Right of survivor to occupy and live on homestead** is superior to rights of coheirs of property interest in estate. 37 OklACR496.

HOMICIDE

1049-2 85Mont544, 281P352; 128Misc 333, 219NYS293. See also 122 Or444, 252P975.

1049-4 111TexCr116, 12SW(2d)218.

1049-5 126Me223, 137A244, 53ALR241.

1049-6 128Misc333, 219NYS293.

1049-11 156Md149, 143A872; Mo 27 SW(2d)16; 122 Or444, 259P893.

1050-47 44Philippine204. [a] **Rule should be applied with caution.**-NJ 148 A764.

1051-48 See also 90Fla255, 105S829.

1051-49 206Cal 35, 273P767; 14Pa Dist&Co 191.

1051-51 209Ky70, 272SW26 (that defendant had been adjudged insane prior to crime and had never been adjudged restored is not conclusive).

1051-52 44Philippine204 (contemporaneous insanity held established by evidence).

1051-59 105TexCr353, 288SW465.

1052-62 213Ala358, 104S656; 205 Iowa 1028, 219NW17; 208 Iowa127, 224NW 537; 209Ky70, 272SW26; 220Ky348, 295SW142; 105TexCr353, 288SW465.

1052-64 195Cal 623, 234P890; 92Fla 878, 110S547.

1053-65 5PaDist&Co 559.

1053-69 23AlaA529, 128S461; 220Ky 348, 295SW142; 5PaDist&Co 559.

1054-70 126 Or560, 270P404; 161Tenn 23, 28SW(2d)993.

1054-74 92Fla878, 110S547.

1055-76 92Fla878, 110S547.

1055-79 161Tenn23, 28SW(2d)993.

1056-84 23AlaA232, 123S288; 224Ky 224, 5SW(2d)1056; 5PaDist&Co 559.

1056-87 213Ala358, 104S656; 177Ark 708, 7SW(2d)980, 59ALR356.

1056-92 213Ala358, 104S656; 168Ark 1087, 273SW374; NJ 146A313; 244NY 147, 155NE79; 190NC674, 130SE627, 629, 42ALR1114 [citCJ]; 119 Ohl89, 162NE802.

1057-93 207Cal 131, 277P316.

1058-94 155Miss659, 124S802; NM 292 P225(2dcase).

1058-96 168Ark1087, 273SW374.

1059-5 244NY147, 155NE79; 283Pa 468, 129A453.

1059-7 NM 292P225(2dcase).

1059-11 31NM436, 246P897; 284Pa 255, 131A184.

1060-15 284Pa255, 131A184.

1060-16 31NM436, 246P897; 12PaDist &Co 735.

1061-20 197NC445, 149SE590(2dcase) (murder in first degree).

1061-23 49Nev217, 242P590, 598 [cit CJ].

1062-34 168Ark1087, 273SW374.

1062-35 168Ark1087, 273SW374; 119 Ohl89, 162NE802.

1063-50 TexCr 28SW(2d)822(2dcase).

1063-57 32PortoRico 355.

1063-58 22AlaA144, 113S474; 169Ark 421, 275SW758; 79CalA101, 248P1078; 201 Iowa940, 208NW351; 203 Iowa90, 212NW312; 229Ky305, 17SW(2d)238; 309Mo 397, 274SW423; 248NY118, 161 NE441; 8PaDist&Co 210; 32PortoRico 355.

1064-61½-New. Persons charged with aiding, abetting, and assisting another in the commission of homicide would be guilty of no greater offense than that of which the principal was convicted. 313Mo 436, 282SW22.

1064-61¾-New. In a prosecution for murder, a witness who was employed in a public restaurant conducted by defendant and deceased, which occupation was varied occasionally by hauling wood and sweeping and dusting rooms not shown to be occupied by any members of the family, was not a "domestic servant," within Texas statute and therefore not precluded from being an accessory. 111TexCr500, 148SW(2d) 853.

1064-64 143Va489, 129SE252. See also 46PhilippineS38. [b] **It is immaterial which of two principals struck last mortal blow.**-143Va489, 129SE252.

1064-67½-New. Where one of the parties in a conspiracy to manufacture intoxicating liquor kills an officer, the offense is murder to every one in the conspiracy. 21AlaA537, 109S615.

1064-69 313Mo 71, 281SW35; 152SC

17, 149SE348; 107TexCr504, 296SW 513.

1065-70 231Ky152, 21SW(2d)231; 104 TexCr46, 282SW242.

1065-72 Mo 279SW696.

1067-91 311Mo 581, 278SW995; 47RI 292, 132A436, 438, 44ALR572 [quot CJ].

1067-93 313Mo 71, 281SW35.

1067-5 327 Ill 312, 158NE732.

1068-6 327 Ill 312, 158NE732; 115 Nebr335, 212NW765, 768 [citCJ].

1068-7 214Ala172, 106S692; 110Conn 55, 147A118; 115Nebr335, 212NW765, 768 [citCJ].

1068-8 115Nebr335, 212NW765, 768 [citCJ]; 298Pa370, 148A501.

1068-9 314Mo 662, 285SW62; 115Nebr 335, 212NW765, 768 [citCJ].

1068-10 327 Ill 312, 158NE732; 115 Nebr335, 212NW765, 768 [citCJ].

1069-11 115Nebr335, 212NW765, 768 [citCJ].

1069-12 314Mo 662, 285SW62; 115 Nebr335, 212NW765, 768 [citCJ].

1069-13½-New. Defendant may, by separate acts, be both an accessory before the fact and a principal in the second degree to the same murder. 32NM 319, 255P396.

1069-14 See also 318Mo 647, 300SW 511.

1069-22 212Ky791, 280SW111; 221Ky 258, 298SW696; 227Ky100, 12SW(2d) 329(2dcase).

1070-28 151Va556, 145SE336.

1070-29 201 Iowa940, 208NW351.

1070-32 221Ky490, 298SW1101; 44 Philippine38; 134SC485, 133SE457.

1071-33 222Ky460, 18SW(2d)774.

1072-45 313Mo 436, 282SW22; 152SC 17, 149SE348.

1072-47 86CalA542, 261P756, 758 [quotCJ].

1072-52 Cal 286P998; 228Ky19, 14 SW(2d)194; 311Mo 581, 278SW995; 316Mo 904, 292SW714; Mo 30SW(2d) 132; 155Tenn397, 293SW755; TexCr 22SW(2d)670.

1073-59 20AlaA426, 103S707; 23AlaA 10, 119S243(2dcase); 195Cal 272, 232P 710; 87Colo 507, 289P1081; 162Ga267, 134SE36; 124Kan208, 210, 257P739 [quotCJ]; 150Miss206, 116S746; 311 Mo 581, 278SW995; Mo 30SW(2d)750; 115Nebr335, 212NW765, 768 [citCJ]; 287Pa539, 135A310; 287Pa547, 135A 313; 287Pa553, 135A316; 65Utah362, 237P476.

1074-60 195Cal 623, 234P890; 311Mo 581, 278SW995.

1074-66 Ark 30SW(2d)865; 195Cal 623, 234P898; 68CalA95, 228P417; 162 Ga267, 134SE36; 166Ga758, 144SE301; 168Ga598, 148SE511; 149Miss280, 115 S213 (must include agreement to kill); Mo 30SW(2d)750; 287Pa547, 135A313; 8PaDist&Co 210. [a] **Although killing was unnecessary** fellow conspirator can be convicted. Mo 30SW(2d)750.

1075-71 20AlaA426, 103S707; 311Mo 581, 278SW995.

1076-75 124Kan208, 210, 257P739 [quotCJ].

1076-76 124Kan208, 210, 257P739 [quotCJ].

1076-76½-New. One who is apprehended in flight after abandoning stolen property may be found guilty of murder in the first degree for homicide committed by his confederates who, continuing their flight, thereafter kill a pursuing officer in an effort to effect their own escape to avoid arrest. 8Pa Dist&Co 210.

1076-76¾-New. That a participant in an attempted robbery, during which homicide occurred, was under the control of a confederate and did not personally do the killing, is no defense to a charge of first degree murder. 294Pa 339, 144A534.

1077-90 332 Ill 207, 163NE430.

1077-91 [a] **In Georgia.**-160Ga678, 128 SE913.

1078-1 210Ky385, 275SW819; 198NC 682, 153SE155 (proximate cause).

1078-2 152SC17, 149SE348.

1078-4 156Tenn68, 299SW1049, 1051 [quotCJ], 55ALR915.

1079-7 110Conn55, 147A118.

1079-8 156Tenn68, 299SW1049, 1051 [quotCJ], 55ALR915.

1080-9 TexCr 29SW(2d)399.

1080-10½-New. If any life at all is left in a human body, extinguishment of it is as much homicide as the killing of the most vital being. 152SC17, 149 SE348.

1080-16 199 Ind592, 159NE420, 426 [citCJ]; 194NC442, 140SE22, 23 [cit CJ]; 5PaDist&Co 287; 49SD456, 207 NW456 (pneumonia).

1081-17 199 Ind592, 159NE421; 5Pa Dist&Co 287.

1081-20 199 Ind592, 159NE420.

1081-23 22AlaA185, 113S830; 23AlaA 122, 122S461; 199 Ind592, 159NE420, 426 [citCJ]; OklCr 292P82; 5PaDist& Co 287.

1082-28 92Fla1094, 111S245.

1083-34 152SC17, 149SE348.

1083-36 See also 5PaDist&Co 105.

1083-37 54ND779, 211NW336.

1083-39 CalA 286P514; 93Fla207, 111 S628; 164Ga298, 138SE229; 221Ky202, 298SW675; 82Mont530, 268P507; 85 Mont544, 281P352; 5PaDist&Co 287; 29PortoRico 961 (Pen. Code § 199); 133 SC167, 130SE747 (statutory definition either express or implied); 106TexCr 373, 292SW889; 110TexCr605, 10SW (2d)116(2dcase). [e] **Motive** is not element. 187Wis122, 203NW749. [g] **Elements included.**-SC 155SE385. [f] **Intent to kill,** actual or implied, is essential to murder. 311Mo 581, 278SW995.

1084-43 169Ark289, 273SW11; 170 Ark1061, 282SW684; 172Ark1176, 288 SW925; 195Cal 272, 232P710; 166Ga1, 141SE903; 161Tenn23, 28SW(2d)993 (malice is essential ingredient); 150Va 588, 142SE369; 153Va863, 149SE419.

1084-44 110TexCr605, 10SW(2d)116 (2dcase).

1084-45 5PaDist&Co 287.

1084-46 164Ga298, 138SE229; 255 Mass304, 151NE297, 47ALR962; 5Pa Dist&Co 287; 5PaDist&Co 559.

1085-47 5PaDist&Co 287; 5PaDist& Co 559.

1085-48 117Nebr304, 220NW292, 294 [citCJ]; 5PaDist&Co 287.

1086-49 164Ga298, 138SE229; 255 Mass304, 151NE297, 47ALR962.

1087-59 163Ga684, 137SE31; 53ND 931, 208NW566.

1087-60 231Ky82, 21SW(2d)115. [a] (5) 210Ky796, 276SW841. (7) 108Tex Cr72, 299SW403. (9) "Malice aforethought" means predetermination to kill without lawful reason previous to act of killing, "but it is immaterial at what time previously the predetermination was formed, if it existed at the time of the killing." 215Ky162, 167, 284SW1035.

1088-64 210Ky796, 276SW841; 106 TexCr446, 292SW901.

1089-71 143Va510, 129SE360.

1089-76 170Ark1061, 282SW684; 172 Ark1176, 288SW925; 29PortoRico 961 (Pen. Code § 200).

1089-77 "One difference between express malice and implied malice is the manner by which they may be shown to exist." 324 Ill131, 154NE715.

1089-79 CalA 286P514.

1090-82 29PortoRico 961 (Pen. Code § 200).

1090-83 324 Ill 131, 154NE715.

1091-6 29PortoRico 961 (Pen. Code § 200); 324 Ill 131, 154NE715.

1091-7½-New. In some jurisdictions malice is never implied where the circumstances of the killing are testified to by eye-witnesses. 116Nebr191, 216 NW656.

1091-8 CalA 290P493; 110Conn549, 148A664; 170Ga895, 154SE368; NJ 151A781.

1092-9 112TexCr517, 17SW(2d)807.

1092-13 44Philippine333.

1092-14 93Fla1076, 113S121.

1092-16 321 Ill 397, 152NE149; 29 PortoRico 961, 964 (to "cut the throat" [Spanish "degollar"] of person is equivalent in language of "killing person").

1092-20½-New. General malice sufficient without specific intent to kill. Ill 173NE112.

1092-21 23AlaA547, 129S99(1stcase) (guilt depends on facts concerning other person); 29Ariz460, 242P864, 865 [quotCJ]; CalA 290P102; 121Kan576, 581, 249P617 [quotCJ]; 223Ky65, 2SW (2d)1055; 309Mo 397, 274SW423; 126 Or560, 270P404; 283Pa327, 129A86; SD 232NW51.

1093-22 29Ariz460, 242P864, 865 [quot CJ].

1093-23 22AlaA338, 115S695; 23AlaA 502, 127S909; 29Ariz460, 242P864, 865 [quotCJ]; Ark 32SW(2d)169; Ga 154 SE906; 159La435, 105S440 (deliberately shooting at one in way apt to kill).

1093-24 29Ariz460, 242P864, 865 [quot CJ].

1093-25 29Ariz460, 242P864, 865 [quot CJ].

1093-26 29Ariz460, 242P864, 865 [quot CJ]; 159La435, 105S440.

1093-27 Ark 32SW(2d)169; 29Ariz 460, 242P864, 865 [quotCJ]; 309Mo 397, 274SW423; NJ 146A313; 283Pa 327, 129A86.

1093-28 124Kan208, 210, 257P739 [quotCJ]; 102NJL134, 130A642; 115 Oh542, 155NE189.

1094-29 151Miss225, 117S523. But see Ont [1929] 3DomLR688.

1095-45 29PortoRico 961, 963 ("if a man inflicts a blow on another with malice aforethought and causes death, this may be murder, depending upon the circumstances as developed in the information itself or at the trial"); Tex Cr 29SW(2d)399.

1095-46 214Ala273, 107S737; 169La 55, 124S143(2dcase).

1095-47 [c] **Sufficient that act done was malicious,** deliberate, and premeditated, and caused death. 29PortoRico 961.

1096-48 287Pa512, 135A301.

1096-49 [a] (6) 108WVa148, 150SE 519. (10) Homicide committed in course of attack on another, is murder though homicide may not originally have been contemplated. 153Va828, 149 SE445.

1097-59 199Cal 471, 250P168; 204Cal 109, 266P807 (guilty of murder, though felony involved was not completed); 93Fla207, 111S628; 318 Ill 332, 149NE 266; 255Mass304, 151NE297, 47ALR 962; 239Mich123, 214NW231; Mo 279 SW696, 698, 700 [quotCJ]; NJ 151A 781; 246NY100, 158NE35; 152Wash 68, 277P394. [c] **Criminal accidentally committing homicide while attempting to escape with plunder** is guilty of murder at common law. Mo 279SW696. [d] **Accidental killing while perpetrator is engaged in furtherance of illegal manufacture of liquor** is murder. Mo 279SW696 (moving mash from one place to another). [e] **Where several persons went to home of deceased to take him out and whip him,** and one was carrying pistol unlawfully, any assault with pistol so unlawfully carried was felony under statute, and if death resulted parties would be guilty of murder. 111TexCr182, 11SW(2d)519.

1097-60 93Fla207, 111S628.

1097-61 152Wash68, 277P394.

1097-63 CalA 290P655.

1098-67 165La842, 116S206.

1098-68 Cal 290P881; 110Conn549, 148A664 (possession of revolver immaterial); 110Conn303, 147A801 (malice aforethought will be implied); 3Del 236, 134A693; 199 Ind247, 155NE544; 255 Mass304, 151NE297, 47ALR962; Mo 22 SW(2d)639 (attempt to rob); NJ 151A 756; 292Pa506, 141A476; 8PaDist&Co 210. [a] **Person killed need not be person robbed.** Mo 30SW(2d)750. [b] **Shooting policeman while escaping** near scene is committed "in perpetration" of robbery within robbery statute. Mo 30SW(2d)750.

1098-70½-New. Unless precedent felony was an independent crime, homicide cannot be first degree murder merely because effected while defendant was engaged in felonious assault on deceased. 245NY143, 156NE644.

1098-72 [a] (5) Defendant is guilty of murder where he and his companions banded together to chastise deceased who was killed in pursuance of such purpose. 20AlaA426, 103S707.

1098-73 [b] **Homicide in course of misdemeanor or trespass** may warrant man-

slaughter conviction. 244NY147, 155 NE79.

1098–73½–New. 290Pa195, 138A686.

1098–74 110Conn303, 147A801; 324 Ill 131, 154NE715; 49Nev184, 242P316; 5 PaDist&Co 287; 143Va510, 129SE360. [b] **Where defendant pleads self-defense** his admission of killing raises presumption of malice. NC 153SE395.

1099–77 219Ala674, 123S55.

1099–78 38F(2d)862; 170Ark1061, 282 SW634; 172Ark244, 288SW904; 174 Ark1035, 298SW333; 110Conn549, 148 A664; 110Conn303, 147A801; Ind 167 NE133; Ind 171NE192; 224Ky151, 5 SW(2d)897, 899 [citCJ]; 245NY143, 156NE644; 190NC506, 130SE308; 193 NC489, 137SE429; 197NC445, 149SE 590(2dcase); 5PaDist&Co 559; 108Tex Cr72, 299SW403.

1101–79 170Ark1061, 282SW684; 5Pa Dist&Co 559.

1101–80 170Ark1061, 282SW684.

1101–81 170Ark1061, 282SW684.

1102–93 235Ky449, 31SW(2d)697. (d) **Automobile** held not deadly weapon within criminal law. 326 Ill 104, 157 NE76.

1102–2 172Ark244, 288SW904; 163Ga 176, 135SE735.

1102–6 193NC489, 137SE429.

1102–15 112TexCr125, 13SW(2d)865; 112TexCr55, 14SW(2d)69.

1103–30 SC 155SE409.

1103–31 198NC629, 152SE890; 122 Or 444, 252P975; 150Va588, 142SE369.

1103–32 Mo 30SW(2d)132.

1104–33 [a] **Statutes defining degrees of murder** leave prosecution to follow course of common law. 235Mich433, 209NW663.

1104–35 AlaA 129S785(2dcase).

1104–37½–New. Bad character of deceased cannot be considered in determining degree of murder. 22AlaA62, 112S184.

1104–39 Ariz 283P711; 115Nebr148, 211NW994; 49Nev184, 242P316; 197 NC445, 149SE590(2dcase); 24 OhNPNS 413; 284Pa255, 131A184; 5PaDist&Co 287; 29PortoRico 961 (Pen. Code § 201). See also 190NC506, 130SE308. [a] 76Mont509, 248P201.

1105–40 5PaDist&Co 559. [a] 246NY 100, 158NE35; 121 Or141, 253P367. [c] 90Fla255, 105S829 (premeditation is essential element under statute).

1105–41 49Nev241, 242P697, 698 [quot CJ].

1105–41½–New. In the Philippines the shooting of a person who came to the rescue of a victim of an assault by accused while the rescuer was attempting to raise the victim from the ground constitutes murder with treachery. 50 Philippine660.

1106–44 5PaDist&Co 287; 29PortoRico 961 (Pen. Code § 201). [b] **Constitutionality of statute.**–203 Iowa918, 210 NW961.

1106–45 315Mo 7, 285SW489; 298Pa 370, 148A501; 5PaDist&Co 287; 29 PortoRico 961 (Pen. Code § 201).

1106–47 93Fla207, 111S628; 118Nebr 591, 225NW766; 246NY100, 158NE35; 219AppDiv334, 220NYS249. [a] (6) 24 OhNPNS413. (7) Killing of warden and keeper of prison in attempt to escape. 248NY118, 161NE441.

1106–48 93Fla207, 111S628; Mo 279 SW696; 5PaDist&Co 287; 29PortoRico 961.

1106–49 93Fla207, 111S628; 5PaDist &Co 287; 44Philippine333; 29Porto Rico 961. [a] **In Iowa.**–Statute declaring murder to be in first degree when committed in perpetration or attempt to perpetrate burglary refers solely to burglary of dwelling house. 201 Iowa 940, 208NW351. [b] **In Philippines.**–44 Philippine333. [c] **Fact that two homicides are committed** in perpetration of complex offense does not destroy its identity. 44Philippine333. [d] **What constitutes.**–208 Iowa818, 222NW394.

1106–51 93Fla207, 111S628; 5PaDist &Co 287; 29PortoRico 961.

1106–52 169Ark717, 276SW849 (statute held constitutional); Cal 290P881; 93Fla207, 111S628; 98Fla1184, 125S 345(3dcase); Mo 278SW987; 24 Oh NPNS413; 5PaDist&Co 287; 44Philippine333; 29PortoRico 961; 50RI 356, 147A878 (by one of several accomplices). [a] **Constitutionality of statutes.**–169Ark289, 273SW11. [b] **Robbery with homicide** is distinct offense. 44Philippine333.

1106–52½–New. Kidnapping resulting in death is first degree murder. 5Pa Dist&Co 287.

1107–57 120Kan226, 243P291, 293 [quotCJ]; 245NY143, 156NE644. [a] (2) Must be felony that is independent of homicide and of assault merged therein. 246NY100, 158NE35.

1107–59 [a] (5) Where defendant broke lock and opened door of schoolhouse, and directed accomplice to go in and steal oil stove, while defendant stood on guard, and defendant shot school district subdirector, resisting burglary, defendant, at time of killing, was engaged in "perpetration of burglary." 208 Iowa818, 222NW394. [b] (4) Killing prior to robbery does not destroy character of offense as complex crime under Pen. Code subs 1 art 503. 44Philippine333.

1107–60 Cal 290P881.

1108–61 300Pa375, 150A649.

1108–69 29PortoRico 961.

1108–70 191NC387, 132SE6.

1108–73 CalA 286P514; Ind 171NE 192; NJ 148A764; 244NY147, 155NE 79; 121 Or141, 253P367; 284Pa255, 131 A184; 5PaDist&Co 287; 5PaDist&Co 559.

1109–74 51Philippine967 (discharging fire arm with intent to kill).

1109–77 Mo 30SW(2d)132.

1109–79 121Kan576, 249P617.

1109–83 CalA 286P514; 316Mo 904, 292SW714.

1110–91 254NY255, 172NE489.

1110–92 169Ark717, 276SW849.

1111–94 106TexCr373, 292SW889.

1111–6 110Conn549, 148A664 (willfulness); 202 Iowa173, 209NW458, 47ALR 407; 121Kan576, 249P617; 27 OhA59, 160NE718; 121 Or141, 253P367.

1112–9 117Nebr759, 222NW956 (purposely and with deliberate and premeditated malice). [a] **"Purposely" means "intentionally."**–117Nebr759, 222 NW956.

1112–14 50ND270, 195NW567, 569 [citCJ].

1112–15½–New. Willfulness embodies malicious intention to kill. 5PaDist&Co 559.

1112–16 210Ky796, 276SW741; 232Ky 211, 22SW(2d)627.

1112–19 198NC82, 150SE678. [a] (6) Premeditation means thought beforehand for some length of time, however short. 190NC506, 130SE308. (7) "Premeditation" involves prior intention to do action in question. 90Fla255, 105 S829. (8) "Premeditation" means intent before act, not necessarily existing any time before act. 93Fla756, 112S608. (9) Conceived beforehand. 117Nebr759, 222NW956.

1112–20 [a] (5) "Deliberate" means "maturely reflected." 117Nebr759, 222 NW956.

1113–22 190NC506, 130SE308 (intention to kill in furtherance of fixed design for revenge or other unlawful purpose); 198NC82, 150SE678; 5PaDist &Co 559.

1113–28 OklCr 287P761.

1113–34 90Fla255, 105S829; 203 Iowa 929, 210NW465; 206 Iowa859, 220NW 95; NJ 148A764; 190NC506, 130SE 308; 50ND270, 195NW567, 569 [cit CJ]; 121 Or141, 253P367; 5PaDist&Co 287.

1114–36 203 Iowa929, 210NW465; 140 Miss889, 105S742; 143Va609, 130SE 777 (only necessary that intention exist for first time at time of killing or any time previously).

1114–37 117Nebr304, 220NW292, 294 [citCJ].

1114–38 110Conn549, 148A664; 198 NC82, 150SE678.

1114–40 90Fla255, 105S829; 140Miss 889, 105S742; 190NC506, 130SE308; 121 Or141, 253P367.

1114–41 OklCr 287P761.

1115–44 41 Ida616, 243P359.

1115–45 121 Or141, 253P367.

1115–46 198NC82, 150SE678 (no premeditation where formation of intent is simultaneous with killing); 5PaDist &Co 559. [c] (1) 93Fla756, 112S608, 615 [citCJperBrown,J]. (2) 93Fla756, 112S608.

1116–62 90Fla255, 105S829.

1116–64 155Tenn325, 292SW849, 852 [quotCJ]. See also 44Philippine224.

1117–65 155Tenn325, 292SW849, 852 [quotCJ].

1117–66 [a] (1) 218Ky734, 292SW329.

1117–68 181Ark1011, 28SW(2d)1055; Ark 30SW(2d)830; 118Nebr591, 225NW 766. See also 145Wash672, 261P639.

1117–72 [a] **"Malice"** means "willful or corrupt intention of mind" as used in law relating to first degree murder. 117Nebr759, 222NW956.

1118–76 298Pa370, 148A501.

1118–79 50ND270, 195NW567, 569 [cit CJ].

1118–84 35Ariz432, 280P672; 29Porto Rico 961 (Pen. Code § 201); 156Tenn 105, 299SW1052.

1118–85 50ND270, 195NW567, 569 [cit CJ].

1118–86 152Wash68, 277P394 (statute strictly construed).

1119–87 92Fla1094, 111S245; 93Fla 207, 111S628.

1119–88 195Wis540, 218NW714.

1119–90 Mo 279SW696.

1119–90½–New. killing of another purposely and maliciously, but without deliberation and premeditation; 115Nebr 143, 212NW35.

1119–92½–New. There is not second degree murder while engaged in an attempt to commit a felony without design to effect death. 219AppDiv334, 220 NYS249.

1119–92¾–New. Leading characteristic of murder in second degree is absence of premeditation and deliberation and presence of malice. Ark 32SW(2d)169.

1119–93 284Pa255, 131A184.

1119–97 284Pa255, 131A184; 195Wis 540, 218NW714. [b] **If incapable of specific intent** by reason of insanity, offense is murder of second degree. NJ 148A764.

1120–98 NM 292P225(2dcase).

1120–99 116Nebr191, 216NW656. [a] (1) 320Mo 319, 68W(2d)857. [b] (1) 244NY147, 155NE79. [c] **In Alabama.**–21AlaA646, 111S318.

1120–1 Ind 171NE192.

1120–2 115Nebr143, 212NW35.

1120–4 21AlaA646, 111S318; Mont 289 P1037; 115Nebr143, 212NW35; 116Nebr 191, 216NW656; 190NC674, 130SE627, 42ALR1114.

1120–5 190NC674, 130SE627, 42ALR 1114; 50ND270, 195NW567. [a] (2) Malice may be implied where no considerable provocation appears or when circumstances show abandoned and malignant heart. Mont 289P1037. (3) Malice is implied unless nature of provocation reduces homicide to voluntary manslaughter. NM 292P225(2dcase).

1120–7 85Mont544, 281P352.

1121–13 197NC445, 149SE590(2dcase); Kan 291P945; 50ND270, 195NW567; 34 PortoRico 626.

1121–18 214Ala273, 107S737; 35Porto Rico 828.

1122–30 171Minn414, 214NW280.

1122–32 93Fla207, 111S628.

1122–39 214Ala273, 107S737; 21AlaA 234, 109S189; 76CalA648, 245P461; 164 Ga59, 137SE762; 163La484, 112S373; 125Me453, 134A572; 156Md149, 143A 872; 85Mont544, 281P352; 122 Or444, 252P975; 36Wyo 111, 253P14.

1123–40 170Ark1061, 282SW684; 174 Ark1180, 298SW3.

1123–41 164Ga677, 139SE349; Wash 290P824.

1123–42 156Md149, 143A872; 47RI 292, 132A436, 438, 44ALR572 [citCJ].

1123–43 156Md149, 143A872.

1123–45 228Ky19, 14SW(2d)194 (cannot be committed in pursuance of conspiracy to kill). But see 47RI 292, 132 A436, 44ALR572.

1124–47 29Hawaii7 (statutes held constitutional and not void); 122 Or444, 252P975. [b] **In Alabama.**–21AlaA633, 111S191.

1124–49 141Miss841, 105S784 (killing not in self-defense in course of altercation held manslaughter).

1124–51 Fla 129S576.

1125–72½–New. A saving clause first going into effect is not repealed by a statute abolishing manslaughter, previously passed, but going into effect subsequently. 109**TexCr**261, 4**SW(2d)**43.
1125–73 122 **Or**444, 252**P**975.
1125–74 122 **Or**444, 252**P**975. See also 36**Wyo** 111, 253**P**14.
1125–75 76**CalA**648, 245**P**461; 164**Ga** 59, 137**SE**762; 5**PaDist&Co** 287; 33**Porto Rico** 179; 161**Tenn**23, 28**SW(2d)**993. [a] (5) Where death ensues on sudden provocation, or sudden quarrel, without malice prepense, killing is manslaughter. 143**Va**609, 130**SE**777.
1126–77½–New. Voluntary manslaughter has been abolished by statute in some jurisdictions. 141**Wash**542, 251**P** 887.
1126–80 214**Ala**273, 107**S**737; 231**Ky**82, 21**SW(2d)**115; 103**TexCr**352, 281**SW** 202; 108**TexCr**643, 2**SW(2d)**254; 153 **Va**863, 149**SE**419. [c] (2) Malice aforethought and heat and passion are contradictory and cannot exist simultaneously in connection with same act. 231 **Ky**82, 21**SW(2d)**115.
1127–86 5**PaDist&Co** 287.
1127–87 5**PaDist&Co** 287.
1127–88 5**PaDist&Co** 287.
1127–90 231**Ky**82, 21**SW(2d)**115.
1128–94 5**PaDist&Co** 287.
1128–96 161**Tenn**23, 28**SW(2d)**993. [a] 179**Ark**1066, 20**SW(2d)**189.
1128–3 5**PaDist&Co** 287.
1128–6 121**Kan**576, 249**P**617. See also 5**PaDist&Co** 287.
1128–12 164**Ga**298, 138**SE**229; **Fla** 129 **S**576; **Iowa** 228**NW**80; 244**NY**147, 155 **NE**79.
1128–14 23**AlaA**401, 126**S**177; 160**Ga** 769, 129**SE**102; 36**GaA**639, 138**SE**83; 213**Ky**356, 281**SW**164; 234**Ky**27, 27**SW (2d)**394; 161**La**863, 109**S**519. [d] **Manslaughter in first degree** is committed where automobile is so intentionally or recklessly driven as to be manifestly dangerous. 21**AlaA**633, 111**S**191 [citCJ].
1129–15 36**GaA**639, 138**SE**83.
1129–17 213**Ky**356, 281**SW**164; 226**Ky** 173, 10**SW(2d)**643; 235**Ky**735, 32**SW (2d)**51.
1129–18 213**Ky**356, 281**SW**164.
1129–19 [a] **Operation of automobile.**– 213**Ky**356, 281**SW**164.
1129–25½–New. The words "gross negligence" as used in a statute defining "voluntary manslaughter" mean "reckless and wanton." 213**Ky**356, 281**SW** 164.
1129–26 22**AlaA**392, 115**S**860; 105**TexCr** 299, 288**SW**223.
1130–29 213**Ky**356, 281**SW**164.
1130–30 29**Hawaii**7.
1131–39 **Mo** 292**SW**728.
1131–47 160**Ga**565, 128**SE**679.
1131–48 160**Ga**565, 128**SE**679.
1131–49 231**Ky**82, 21**SW(2d)**115 (suddenness, heat of passion, and provocation must concur); 235**Ky**735, 32**SW (2d)**51; 104**TexCr**26, 282**SW**245. [a] (1) 104**TexCr**26, 282**SW**245.
1132–56 231**Ky**82, 21**SW(2d)**115.
1134–63½–New. Provocation is a necessary element in the crime of voluntary manslaughter. 169**Ark**353, 275**SW** 662.
1134–64 214**Ala**273, 107**S**737; 21**AlaA** 152, 106**S**341; 172**Ark**244, 288**SW**904; 160**Ga**509, 128**SE**791; 121**Kan**576, 581, 249**P**617 [quotCJ]. [c] (2) Deceased's addressing defendant, saying he would not shake hands with him because he was not his friend, is insufficient to reduce homicide to manslaughter. 172**Ark** 244, 288**SW**904.
1134–65 172**Ark**244, 288**SW**904; 160**Ga** 565, 128**SE**679.
1134–66 103**TexCr**334, 280**SW**792.
1135–73 160**Ga**565, 128**SE**679; 160**Ga** 509, 128**SE**791.
1135–77 164**Ga**677, 139**SE**349.
1135–78 105**TexCr**308, 288**SW**444. [a] **Insulting words or conduct** toward female relative may be proof of malice rather than adequate cause for state of mind. 105**TexCr**308, 288**SW**444.
1135–79 [b] (4) Must be "first meeting" to come within statute. 105**TexCr** 327, 288**SW**458.
1136–88 103**TexCr**348, 281**SW**204.
1137–4 219**Ala**407, 122**S**633; 161**La**518, 109**S**51; 108**TexCr**643, 2**SW(2d)**254.
1138–9 [a] **Where slayer acted in self-defense,** but was not free from blame, crime may be manslaughter. 174**Ark** 1035, 298**SW**333.
1138–15 [a] (4) Blow with fist. 105 **TexCr**600, 289**SW**689.
1138–16 160**Ga**565, 128**SE**679.
1138–17 160**Ga**565, 128**SE**679.
1138–19 164**Ga**298, 138**SE**229.
1140–29 40**GaA**360, 149**SE**429.
1140–36 172**Ark**244, 288**SW**904; 40**Wyo** 184, 276**P**458.
1141–46 **Mo** 6**SW(2d)**898(2dcase).
1141–50 But see 113**TexCr**112, 18**SW (2d)**643.
1142–56 104**TexCr**649, 285**SW**621.
1142–57½–New. Assault and battery upon grown son is not adequate cause to reduce murder to manslaughter. 104 **TexCr**649, 285**SW**621.
1142–60 153**Va**863, 149**SE**419.
1142–61 40**Wyo** 184, 276**P**458.
1143–67 103**TexCr**348, 281**SW**204. [b] **Slaying must have taken place at first meeting** after receipt of information of deceased's conduct. 103**TexCr**348, 281 **SW**204. [c] **Killing must have resulted from uncontrollable passion.**–103**TexCr** 348, 281**SW**204.
1144–84 162**Ga**208, 132**SE**911; 324 **Ill** 131, 154**NE**715; 333 **Ill** 512, 165**NE**168.
1144–85 324 **Ill** 131, 154**NE**715.
1145–93 162**Ga**208, 132**SE**911.
1145–1 121**Kan**576, 581, 249**P**617 [quot CJ].
1146–15½–New. State of mind of defendant depends on what he believes to be true, and not upon actual facts. 105 **TexCr**479, 289**SW**46.
1147–21 169**Ark**594, 276**SW**358; **Mo** 23 **SW(2d)**87; **Mo** 6**SW(2d)**903.
1148–36 169**Ark**225, 273**SW**13, 14 [cit CJ]; 195**Cal** 325, 233**P**97; 76**CalA**648, 245**P**461; 219**Ky**406, 293**SW**975; 235**Ky** 735, 32**SW(2d)**51; 318**Mo** 647, 300**SW** 511; 116**Nebr**125, 216**NW**294; 194**NC** 121, 138**SE**518; 38 **OklCr**338, 261**P**378; 122 **Or**444, 259**P**893, 896 [quotCJ]; 290 **Pa**195, 138**A**686, 688 [quotCJ]; 93**Pa Super**339; 47**RI** 292, 132**A**436, 44**ALR** 572; 154**Tenn**7, 285**SW**565, 566 [citCJ], 49**ALR**605. [a] (1) 229**Ky**63, 16**SW(2d)** 496. (7) Killing of one accidentally, contrary to intention of parties, in prosecution of some unlawful, but not felonious, act, or in improper performance of lawful act. 144**Va**609, 131**SE**242. (8) Other instances. 234**Ky**142, 27**SW (2d)**705. [b] (3) 70**CalA**519, 234**P**110.
1149–37 169**Ark**225, 273**SW**13, 14 [cit CJ]; 122 **Or**444, 259**P**893, 896 [quotCJ].
1149–38 21**AlaA**234, 109**S**189; 36**GaA** 639, 138**SE**83; 338 **Ill** 353, 170**NE**265; 213**Ky**356, 281**SW**164; 141**Wash**542, 251 **P**887.
1149–41 36**GaA**639, 138**SE**83; 38 **OklCr** 338, 261**P**378.
1149–43 38 **OklCr**338, 261**P**378.
1149–47 143**Miss**324, 108**S**711, 714, 46 **ALR**895, [dis op,quotCJ].
1149–48 143**Miss**324, 108**S**711, 714, 46 **ALR**895, [dis op,quotCJ].
1149–49 21**AlaA**449, 109**S**282, 284 [cit CJ]; 76**CalA**648, 245**P**461; 164**Ga**467, 139**SE**77; 198 **Ind**444, 154**NE**16; 124 **Kan**556, 261**P**846; 213**Ky**356, 281**SW** 164; 143**Miss**324, 108**S**711, 714, 46**ALR** 895 [dis op,quotCJ]; **Mo** 279**SW**696; 116 **Nebr**125, 216**NW**294; **NJSup** 137**A**829; 191**NC**387, 132**SE**6; 38 **OklCr**338, 261**P** 378; 47**RI** 292, 132**A**436, 44**ALR**572; 156 **Tenn**68, 299**SW**1049, 55**ALR**915; 147 **Wash**198, 265**P**481, 59**ALR**688. [h] **Violation of statute** punishing one who by driving automobile while intoxicated causing death may be prosecuted as distinct crime of felony or made basis of prosecution for manslaughter and finding of either intoxication or driving on wrong side of road supports a verdict of conviction. 195**Cal** 325, 233**P**97.
1150–50 143**Miss**324, 108**S**711, 714, 46 **ALR**895 [dis op,quotCJ].
1150–51 143**Miss**324, 108**S**711, 714, 46 **ALR**895 [dis op,quotCJ].
1150–52 143**Miss**324, 108**S**711, 46**ALR** 895. See also 155**Tenn**633, 299**SW**803, 59**ALR**685.
1150–53 129**Kan**381, 282**P**1071, 67**ALR** 909; 143**Miss**324, 108**S**711, 714, 46**ALR** 895 [dis op,quotCJ].
1150–54 143**Miss**324, 108**S**711, 714, 46 **ALR**895 [dis op,quotCJ].
1150–55 154**Tenn**7, 285**SW**565, 566 [cit CJ], 49**ALR**605.
1150–56 198 **Ind**444, 154**NE**16; 154 **Tenn**7, 285**SW**565, 566 [citCJ], 49**ALR** 605. But see 155**Tenn**633, 299**SW**803, 59**ALR**685.
1150–57 86**CalA**542, 261**P**756, 758 [quot CJ]; 318 **Ill** 332, 149**NE**266; 198 **Ind** 444, 154**NE**16; 34**NM**639, 288**P**407; **Okl Cr** 275**P**657; 154**Tenn**7, 285**SW**565, 566 [citCJ], 49**ALR**605. [a] 198 **Ind**444, 154**NE**16. (2) Unlawful carrying of revolver. 34**NM**639, 288**P**407. [b] (2) Shooting firearm at boy in boat, primary proximate cause of death by drowning. 156**Tenn**68, 299**SW**1049, 55**ALR** 915.
1150–57½–New. More than mere coincidence of time and place between act and death must be shown. 318 **Ill** 332, 149**NE**266.
1151–63 20**F(2d)**269; 311**Mo** 581, 278 **SW**995.
1151–65 [a] **Deputy sheriff,** killing occupant of automobile in unlawfully attempting to stop it, has been held criminally liable. 192**NC**692, 135**SE**866.
1151–67 [a] 157**Tenn**421, 7**SW(2d)**50.
1152–75 143**Miss**324, 108**S**711, 715, 46 **ALR**895 [dis op,quotCJ].
1152–76 21**AlaA**449, 109**S**282, 284 [cit CJ]; 195**Cal** 325, 233**P**97 (code punishing killing of one by person driving automobile while intoxicated does not render prosecution under manslaughter section improper); 70**CalA**519, 234**P**110 (excessive speed); 143**Miss**324, 108**S**711, 715, 46**ALR**895 [dis op,quotCJ]. 198**NC** 682, 153**SE**155; 119 **Or**409, 243**P**72 (contributory negligence of deceased is no defense); 122 **Or**444, 259**P**893, 896 [quot CJ].
1152–77 143**Miss**324, 108**S**711, 715, 46 **ALR**895 [dis op,quotCJ]; 113**Nebr**790, 205**NW**252. [c] **Pistol unlawfully carried** must have been so handled as to make killing natural or probable result. 152**Tenn**390, 277**SW**900.
1152–79 338 **Ill** 56, 170**NE**14; 234**Mich** 569, 208**NW**685. [e] **In Connecticut.**– Person attempting abortion wherein death resulted may be prosecuted for manslaughter. 107**Conn**148, 139**A**632, 634 [citCJ].
1153–84 124**Kan**556, 261**P**846; 126**Mo** 223, 137**A**244, 53**ALR**241. [d] See also 155**Tenn**633, 299**SW**803, 59**ALR**685.
1153–86 164**Ga**467, 139**SE**77; 38 **OklCr** 338, 261**P**378.
1153–87 164**Ga**467, 139**SE**77; 38 **OklCr** 338, 261**P**378, 122 **Or**444, 259**P**893. [a] 38 **OklCr**338, 261**P**378.
1153–88 104**NJL**325, 140**A**566, 567 [cit CJ].
1153–90 164**Ga**467, 139**SE**77; 38 **OklCr** 338, 261**P**378, [a] 38 **OklCr**338, 261**P** 378.
1154–94 21**AlaA**234, 109**S**189; 21**AlaA** 449, 109**S**282, 284 [citCJ]; 194**NC**121, 138**SE**518; 33 **Okl** 100, 242**P**270; 38 **Okl Cr**338, 261**P**378; 47**RI** 292, 132**A**436, 438, 44**ALR**572 [citCJ]. See also 48 **Philippine**204. [b] (2) At common law, when death resulted from negligent conduct in doing lawful act, it was necessary, in order to constitute manslaughter, that conduct should be reckless. 129**Kan**381, 282**P**1071, 67**ALR**909. [c] **In Wyoming.**–33**Wyo** 346, 239**P**526, 41 **ALR**717. [d] **It is duty of prohibition agents,** in pursuing criminals, as it is duty of other officers, having regard to existing ordinances and circumstances, to exercise reasonable care and caution for safety of public, and, if they fail to do so, and such failure results in death, they are guilty of manslaughter. 29**F(2d)**61 (pursuit of criminal by prohibition agent).
1154–95 21**AlaA**449, 109**S**282, 284 [cit CJ].
1154–96 21**AlaA**449, 109**S**282, 284 [cit CJ]; 91**Fla**214, 107**S**360, 363 [citCJ]; 213**Ky**356, 281**SW**164; 154**Tenn**7, 285 **SW**565, 566 [quotCJ], 49**ALR**605; 47 **RI** 292, 132**A**436, 438, 44**ALR**572 [cit CJ]. [a] (2) 237**Mich**424, 212**NW**97. [b] (2) Something more than ordinary negligence, consisting of aggravated facts and circumstances which demand criminal punishment rather than mere civil liability. 219**AppDiv**646, 221**NYS** 47. [c] 104**NJL**325, 140**A**566, 567 [cit CJ]. [f] 87**CalA**5, 261**P**531. [h] (1)

153Miss770, 121S492; 33 OklCr100, 242 P270; 38 OklCr338, 261P378; OklCr 281P310. See also 149Miss171, 115S217. (2) Criminal and culpable negligence differ only in degree. 33 OklCr100, 242P 270. (3) Blameworthiness alone is insufficient to meet test of criminal culpability or to constitute culpable negligence. 220AppDiv495, 221NYS778. (4) Other statements. Mo 27SW(2d)16. [j] **Carelessness of low degree** in performance of lawful act not amounting to criminality held possible basis for homicide. 21AlaA449, 109S282. [k] **Negligence complained of must be of "a gross and flagrant character,** evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects." 91Fla214, 107S360, 361. [l] **It is only negligence in doing such acts as will probably endanger life or limb** which constitutes negligence amounting to an unlawful act within definition of "manslaughter." 198 Ind 444, 154NE16. [m] **All negligent acts that are torts** are not crimes. 219App Div646, 221NYS47. [n] **Momentary failure of hoistman at mining shaft to arrest machinery as skip neared bottom** does not constitute criminal negligence where it appears that his attention was involuntarily attracted elsewhere by distracting noises. Can [1929] 2DomLR 282. [o] **Elements of willfulness or wantonness and recklessness supporting manslaughter.**–243Mich300, 220NW777. [p] **Reckless.**–129Kan381, 282P1071, 67 ALR909.

1154–97 21AlaA449, 109S282, 284 [cit CJ]; 91Fla214, 107S360, 363 [citCJ]; NJSup 140A438; 220AppDiv495, 221 NYS778; 194NC121, 138SE518; 154 Tenn7, 285SW565, 566 [quotCJ], 49ALR 605; 33Wyo 346, 239P526, 529 [citCJ], 41ALR717. See also 318Mo 553, 300SW 694, 697 [quotCJ].

1155–98 21AlaA449, 109S282, 284 [cit CJ]; 154Tenn7, 285SW565, 566 [quot CJ], 49ALR605.

1155–99 213Ky356, 281SW164. [b] **In Michigan.**–237Mich424, 212NW97.

1155–1 See also 190NC674, 130SE627, 42ALR1114.

1155–2 194NC121, 138SE518; 154Tenn 7, 285SW565, 49ALR605; 153Va943, 151 SE168. [c] 129 Or564, 278P568, 63ALR 1225. [e] 154Tenn7, 285SW565, 49ALR 605.

1155–4 21AlaA323, 108S80; 129Kan 381, 282P1071, 67ALR909; 237Mich424, 212NW97; 249Mich147, 228NW723; 168Minn263, 209NW881; 154Tenn7, 285 SW565, 49ALR605; 155Tenn633, 299 SW803, 59ALR685. [b] **Contributory negligence may be considered** in determining whether negligence of defendant in operation of automobile was proximate cause of death. 154Tenn7, 285SW565, 49ALR605.

1155–6 21AlaA449, 109S282.

1155–7 237Mich424, 212NW97.

1155–7½–New. Accused cannot be convicted of criminal negligence on facts showing only a momentary lapse from duty not amounting to such disregard of life and safety as to constitute a crime against the state and conduct deserving punishment. Ont [1929] 1 DomLR785.

1155–17½–New. Where death of a human being results from playing or skylarking with, or the reckless handling of, firearms, the killing is involuntary manslaughter. 76CalA648, 245P461.

1156–18 91Fla214, 107S360; 237Mich 424, 212NW97; 249Mich147, 228NW723 (statute construed); 116Nebr125, 216 NW294; 195NC242, 141SE736; 29Porto Rico 856 (judgment of conviction reversed because of prejudicial errors in admission of evidence); 38OklCr338, 261P378; 136Wash495, 240P674. [h] **Driving automobile while intoxicated** raises presumption of negligence. 168 Minn263, 209NW881. [i] **Violation of speed law.**–233Mich222, 206NW562. [j] **Driver not exceeding speed limit** cannot be convicted of involuntary manslaughter unless conduct was so reckless and negligent as to evidence disregard of human life. 154Tenn7, 285SW 565, 49ALR605. [k] **Unreasonable speed** or speed that is likely to endanger life or limb is not necessarily criminal negligence within some statutes. 33 Wyo 346, 239P526, 41ALR717. [l] **Effort to avert injury** after discovery of peril is no defense where death was caused by culpable negligence. 33 Okl Cr100, 242P270. [m] **Automobile driver who loses control of himself** due to deceased's sudden rush into street ahead of him held liable for manslaughter. 21AlaA449, 109S282.

1156–19 153Miss770, 121S492; 122 Or 444, 252P975.

1157–20 204 Iowa1360, 217NW236.

1157–24 33PortoRico 188. [a] **No obligation to slow down** at stop in nonurbanized district. 33PortoRico 188.

1157–25 47RI 292, 132A436, 44ALR572.

1159–49½–New. , or by failure of owner of automobile to curb chauffeur from exceeding speed laws. 164Ga467, 139SE 77.

1160–62 [a] **Statute held not repealed** by statute authorizing action for wrongful death. 109TexCr157, 3SW(2d)449.

1160–63 109TexCr157, 3SW(2d)449.

1160–64 109TexCr157, 3SW(2d)449.

1160–65 109TexCr380, 5SW(2d)139, 61 ALR318.

1160–70 109TexCr157, 3SW(2d)449.

1161–76½–New. In some jurisdictions manslaughter is not divided into degrees. 122 Or444, 252P975.

1161–79 But see 244NY147, 155NE70.

1161–80 21AlaA528, 109S560.

1161–82 [a] **Deputy sheriff without warrant shooting into auto** refusing to stop and killing driver, with no element of self-defense, and not making self known, is guilty of not less than first degree manslaughter. 22AlaA 133, 114S68.

1161–83 121Kan167, 246P685. [c] (2) Where defendant is charged with manslaughter in second degree in connection with abortion under Rev. St. 21–410, he cannot be convicted of first degree manslaughter under Rev. St. 21–407 upon theory that death followed commission of misdemeanor under Rev. St. 21–437. 121Kan167, 246P685.

1161–89 219Ala674, 123S55.

1162–96 [b] **In Alabama.**–20AlaA553, 103S717; 22AlaA136, 114S791.

1162–97 [b] 22AlaA567, 117S906.

1162–1 21AlaA234, 109S189. [a] **In Alabama.**–21AlaA633, 111S191.

1162–2 33 OklCr100, 242P270; 38 Okl Cr338, 261P378; 49SD192, 206NW927. [a] (1) 38 OklCr338, 261P378. See also 49SD192, 206NW927. (2) Reckless driving of automobile may amount to manslaughter in second degree. 33 OklCr 100, 242P270. [d] **That negligent act is made misdemeanor** which may render accused guilty of manslaughter in first degree if death ensues, does not prevent its being made basis of second degree manslaughter. 49SD192, 206NW927.

1162–4 125Kan496, 264P1060.

1163–6½–New. Offense consists of unintentional homicide in the course of committing misdemeanor or civil tort. 215Ala2, 109S287.

1163–6⅓–New. Intent to kill is not necessary to constitute offense. 244NY147, 155NE79.

1163–7 121Kan167, 246P685; 199Wis 68, 225NW167.

1163–8 120Kan430, 243P1006.

1163–12 120Kan430, 243P1006.

1164–16 [c] **Act must have constituted manslaughter at common law.**–129Kan 381, 282P1071, 67ALR909.

30 C. J.—12–4 70CalA498, 233P816.

13–6 70CalA498, 233P816.

13–7 [a] (3) Wife, arranging for another to kill her husband, is not guilty of attempt to commit murder in absence of intent on part of either herself or agent to kill. Mo 12SW(2d)43.

13–12 70CalA498, 233P816. [a] (4) Actual firing of gun may not be necessary to complete offense of attempt to commit murder. 144Va594, 131SE212.

13–13 See also 70CalA498, 233P816.

13–15 70CalA498, 233P816.

14–21 45Philippine207; 48Philippine 190; 48Philippine747. [d] **Evidence insufficient** to sustain either frustrated murder or frustrated homicide. 45Philippine207.

14–24 [a] 51Philippine488.

14–25 51Philippine99.

14–28 319Mo 1222, 6SW(2d)609.

15–31 [e] **Threats to act to protect one's self or to prevent commission of unlawful act** by another are expressly withdrawn from operation of statute in some jurisdictions. 101TexCr593, 276SW712.

16–51 Ill 172NE740; Mo 278SW1009. [a] (2) With deadly or other dangerous weapon. 113TexCr155, 18SW(2d)650.

16–54 148Miss685, 114S747, 748 [cit CJ].

16–56 148Miss685, 114S747.

16–58 40GaA118, 149SE153(2dcase).

17–68 32NM48, 250P842.

17–74 168Ga690, 148SE731; 40GaA118, 149SE153(2dcase); TexCr 26SW(2d) 206.

17–75 [b] **In Illinois.**–337 Ill 131, 169 NE18.

18–83½–New. Under statutes deadly weapons necessarily include dangerous weapons. 55ND761, 215NW277.

18–83⅓–New. Under a statute providing punishment for assault with intent to murder by use of a weapon likely to produce death, the words "deadly weapon" include all means or instrumentalities by which assault with intent to murder may be made. 40GaA118, 149SE153 (2dcase).

18–91 21AlaA500, 109S558.

19–93 21AlaA500, 109S558.

19–1 317Mo 284, 295SW550.

20–3 106Conn345, 138A132; Iowa 230 NW394; 219Ky446, 293SW961; 146Miss 510, 112S673. But see TexCr 26SW(2d) 638. [a] **Existence of malice is not negatived** by fact that defendant desisted. 106Conn345, 138A132.

20–8 146Miss510, 112S673.

20–8½–New. New malice may not be inferred from mere use of deadly weapon. 146Miss510, 112S673.

20–8⅓–New. To carry such inference the use of such weapon must have been deliberate. 146Miss510, 112S673.

20–15 106Conn345, 138A132.

20–18 168Ark710, 271SW326; 71CalA 213, 234P877; 37GaA154, 139SE159; 40 GaA118, 149SE153(2dcase); 40GaA503, 150SE451(2dcase); Ill 172NE740; Iowa 230NW394; 143Miss 96, 108S443; 116 Nebr8, 215NW465; 31NM485, 247P828, 835 [quotCJ]; 108TexCr413, 18SW(2d) 315; TexCr 22SW(2d)309; TexCr 29 SW(2d)384 (subsequent abandonment of intent). See also OhA 173NE296. [a] **Reckless disregard of human life** may be equivalent of specific intent to kill. 41 GaA495, 153SE372.

21–21 284Pa159, 130A317.

22–29 71CalA213, 234P877; 106Conn 345, 138A132.

22–30 CalA 286P476; TexCr 29SW(2d) 384 (axe and screwdriver held not necessarily deadly); 196Wis104, 219NW349. But see 71CalA213, 234P877. [a] (4) Mere leveling of gun is insufficient to justify inference of intent to kill. 143 Miss96, 108S443. (5) Fact that no attempt to shoot was made, though gun was leveled and there was nothing to prevent shooting tends to negative existence of intent to kill. 143Miss96, 108 S443.

23–37½–New. Reckless disregard of human life may be the equivalent of a specific intent to kill. 37GaA124, 139 SE80.

23–41 175Ark232, 298SW1028; 71CalA 213, 234P877; 321 Ill 559, 152NE552; 133SC167, 130SE747.

24–44 71CalA213, 234P877, 880 [citCJ].

25–49 31NM485, 247P828, 836 [citCJ]; 111TexCr636, 13SW(2d)696.

25–51 331 Ill 434, 163NE437; Iowa 206 NW620.

25–58 180Ark1131, 24SW(2d)334 [quot CJ].

27–73 98Fla370, 123S735.

28–74 169Ark1192, 278SW10. [a] **Premeditation and deliberation are not necessary elements of crime.**–169Ark1192, 278SW10.

28–76 [a] (2) Intent must be proved. 106Conn345, 138A132.

28–80½–New. or a dangerous weapon. 158La799, 104S720.

28–85½–New. That deceased had received a mortal blow before defendant struck him does not constitute a defense where he lived a short time after the blow struck by defendant. 36GaA212, 136SE99.

29–88 But see CalA 286P476.

29-89 CalA 286P476.
29-92 CalA 286P476.
29-95 21AlaA152, 106S341.
30-3 200Cal730, 254P893.
30-7 215Ala106, 109S846.
30-9 [c] **Necessity of apprehension of loss of life or serious bodily injury** as element of self-defense not confined to cases of homicide but must be established in case of assault and battery with intent to kill and murder. 133SC167, 130SE747.
30-10 179Ark776, 18SW(2d)343.
31-14 172Ark156, 287SW1026; 36GaA288, 136SE324.
31-16 151Miss617, 118S447.
31-17 172Ark156, 287SW1026; 36GaA288, 136SE324.
31-18 133SC167, 130SE747 (where it appears that accused used more force than reasonably necessary, plea of self-defense fails and he becomes aggressor from beginning of his attack).
31-20 187Wis448, 204NW486, 490, 40ALR945 [citCJ].
32-22 111TexCr636, 13SW(2d)696.
33-31 143Miss324, 108S711, 715, 46ALR895 [dis op quotCJ].
33-32 143Miss324, 108S711, 715, 46ALR895 [dis op quotCJ].
33-33 143Miss324, 108S711, 715, 46ALR895 [dis op quotCJ].
33-34 143Miss324, 108S711, 715, 46ALR895 [dis op quotCJ].
33-39 Iowa 206NW620.
34-41 See also 203 Iowa155, 212NW382.
34-42 See also 203 Iowa155, 212NW382.
35-63 177Ark1056, 9SW(2d)314.
35-67 169Ark1192, 278SW10; 327 Ill 312, 158NE732.
35-68 327 Ill 312, 158NE732.
35-71 337 Ill 131, 161NE18 (accessary after fact).
36-84½-New. Any killing is criminal homicide unless justifiable or excusable. 246NY451, 159NE394.
36-94½-New. Justifiable homicide and homicide amounting to voluntary manslaughter because of mitigating facts are distinct matters. 164Ga677, 139SE349.
36-3 128Misc333, 219NYS293.
36-4 199Wis615, 227NW258 (statute not in derogation of common law).
36-5 [b] **Statutes construed.**-113TexCr621, 24SW(2d)52.
37-13 164Ga728, 139SE352.
37-15 312Mo635, 281SW29; Mo 281SW32.
37-17 312Mo635, 281SW29; Mo 281SW32.
37-20½-New. indecent proposals by deceased to wife of accused; 169Ark594, 276SW358.
37-25½-New. , or fact that unlawful arrest has been made. 162Ga208, 132SE911.
37-25⅓-New. Passion arising after a formed intent to kill is held not justifiable of homicide. 78CalA442, 248P1061.
37-31 212Ala571, 103S664; OklCr 268P732; 40Wyo184, 276P458. [b] (1) 116Nebr493, 218NW137, 139 [citCJ]. (3) Not recognized in Pennsylvania. 5PaDist&Co 287; 5PaDist&Co559.
37-32 170Ga895, 154SE368; 224Ky224, 5SW(2d)1056; 107TexCr137, 294SW1109.
38-34½-New. or has a general reputation for violence and quarrelsomeness, 327 Ill 50, 158NE457.
38-40 110Conn55, 147A118; 168La861, 123S600.
38-51½-New. A customs officer guarding an international border is justified in using necessary force to meet new methods of smuggling. 14F(2d)609.
38-52 TexCivA 286SW766.
38-56 235Ky351, 31SW(2d)608.
38-57 128Misc333, 219NYS293.
39-60 Iowa 206NW620.
39-72 Iowa 206NW620.
39-73 Iowa 206NW620.
39-74 Iowa 206NW620.
39-75 Iowa 206NW620.
40-80 197NC445, 149SE590(2dcase).
40-81 38F(2d)862; 23AlaA188, 122S306; 46Philippine738; 49Philippine75.
40-82 TexCr 22SW(2d)670.
40-85 161Ga166, 129SE772.
40-86½-New. Before an officer is justified in using firearms to stop a smuggling car, he should satisfy himself that goods are being smuggled and that the driver knows the officer's character and sees his signal to stop. 14F(2d)609.
40-90 See also 22AlaA133, 114S68; 166Ga296, 143SE371.
40-92 21F(2d)542; 38F(2d)862; CalA 290P513; 212Ky50, 278SW163, 165 [cit CJ]; 234Ky37, 27SW(2d)397.
40-93 210Ky385, 275SW819.
40-94 210Ky385, 275SW819.
41-84 47 Ida328, 274P805, 62ALR195.
41-85 See also 212Ky50, 278SW163.
41-86 212Ky50, 278SW163.
41-90 161Ga166, 129SE772; 41 Ida616, 243P359; 232Ky159, 22SW(2d)599; 156Miss535, 126S194; 308Mo560, 274SW70, 72[citCJ].
41-96 199 Ind567, 159NE145, 147 [cit CJ]; 232Ky10, 22SW(2d)298; 118Nebr31, 223NW464.
42-97 [b] **Officer arresting person for misdemeanor** had no right to kill such person because of resisting attempted arrest, unless resistance was made with armed force. 226Ky460, 11SW(2d)125.
42-4 159Tenn241, 18SW(2d)381.
42-10 But see 22AlaA329, 115S420(2d case) (request to assist in keeping quiet held not to justify killing).
42-14 See also 214Ala2, 106S617.
43-27 5PaDist&Co 287.
43-28 49Philippine187; 49Philippine201.
43-30 143Wash313, 255P382.
43-32 194NC121, 138SE518.
43-35 235Ky351, 31SW(2d)608.
43-36 128Misc333, 219NYS293.
43-37 235Ky351, 31SW(2d)608.
43-38 114 Oh299, 151NE182. [b] **Law of self-defense** is that if it appeared to defendant, acting as reasonable person under circumstances that he was in danger of losing life or receiving great bodily harm then he was warranted in using such force as seemed to him necessary or apparently necessary to defend himself against attack of deceased. 316 Ill 591, 147NE484.
44-43 See also 21AlaA204, 107S797.
44-48 [a] **Not admission** of killing. 161La620, 108S143.
44-49 300Pa125, 150A290(2dcase).
44-54 23AlaA359, 125S688.
44-55 53ND916, 208NW388.
44-56 228Ky432, 15SW(2d)273.
44-61 53ND916, 208NW388.
44-62 21AlaA508, 109S566; 228Ky432, 15SW(2d)273; 53ND916, 208NW388.
45-63 242Mich16, 217NW758.
45-64 332 Ill 410, 163NE784; 53ND916, 208NW388; 143Va510, 129SE360 (necessity must not arise out of prisoner's misconduct).
45-65 73CalA580, 239P82; 53ND916, 208NW388.
45-70 171Ark1188, 287SW172; 327 Ill162, 158NE462.
45-78 Ala 130S175; 21AlaA508, 109S566; 22AlaA329, 115S420; CalA 290P493; 94Fla1138, 115S43; 198 Ind590, 154NE372; 202 Iowa722, 210NW904; 213Ky501, 281SW507; 166La859, 118S46; 143Miss324, 108S711, 715, 46ALR895 [disop,quotCJ]; 194NC121, 138SE518; OklCr268P996; OklCr 276P518; OklCr 283P689; OklCr 283P266; 118 Or397, 247P146, 150 [quotCJ]; 149SC367, 147SE310.
46-79 143Miss324, 108S711, 715, 46ALR895 [disop,quotCJ]; 118 Or397, 247P146, 150 [quotCJ].
46-80 23AlaA428, 126S420(3dcase); 143Miss324, 108S711, 715, 46ALR895 [disopquotCJ]; 118 Or397, 247P146, 150 [quotCJ].
46-81 166La859, 118S46; 143Miss324, 108S711, 715, 46ALR895 [disopquot CJ]; 118 Or397, 247P146, 150 (convict killing keeper while attempting to escape); 143Va510, 129SE360.
46-84 166La859, 118S46.
47-92 Contra 192NC533, 135SE345.
47-96 215Ky815, 287SW8.
47-97 220Ala544, 126S848. See also 215Ky815, 287SW8.
47-99 224Ky203, 5SW(2d)1067, 1068 [quotCJ].
47-1 143Va510, 129SE360.
48-3 175Ark1083, 3SW(2d)23.
48-7 224Ky203, 5SW(2d)1067, 1068 [quotCJ].
48-16 [a] (7) Entering house with drawn weapon and demanding person of owner. 21AlaA588, 109S566.
48-17½-New. It is not necessary that defendant's provocative acts be sufficient to create the right of self-defense on the part of deceased in order that defendant be deprived of defense. 224Ky203, 5SW(2d)1067.
48-18 78CalA442, 248P1061; Iowa 228NW37.
49-31 208 Iowa818, 222NW394.
49-34 36 OklCr44, 253P1027.
49-39 Iowa 206NW620.
50-40½-New. Trespasser cannot justify on grounds that others committed a like trespass or that a series of trespasses justifies a continuance of such habit. 36 OklCr44, 253P1027.
50-49 30Ariz448, 247P1103.
50-50 30Ariz448, 247P1103.
51-69 147SC514, 145SE404.
51-72 168Ga731, 149SE23; 143Va510, 129SE360.
52-75 307Mo365, 270SW291.
52-77 33Ariz336, 264P685, 687 [citCJ].
52-81 103TexCr423, 281SW213; 40Wyo184, 276P458.
53-91 79CalA101, 248P1078; La 129S730.
53-93 171Ark1188, 287SW172; 172Ark61, 287SW747; CalA 290P493; 167La967, 120S614; 194NC121, 138SE518; 118 Or397, 247P146.
54-94 167La967, 120S614; 194NC121, 138SE518.
54-5 21AlaA32, 104S884; 21AlaA375, 108S639; 23AlaA447, 126S856; OklCr268P996; OklCr 283P266; 51Philippine701; 51Philippine815.
55-21 101TexCr164, 274SW146.
56-43 21AlaA204, 107S797; 324 Ill 294, 155NE301; 198NC629, 152SE890; 109TexCr361, 4SW(2d)966.
57-55 214Ala273, 107S737.
57-56 308Mo560, 274SW70, 72 [citCJ].
57-58 214Ala273, 107S737.
57-59 214Ala273, 107S737.
57-61 166Ga189, 142SE674; 308Mo560, 274SW70, 72 [citCJ].
57-66 20AlaA660, 104S771; 21AlaA508, 109S566; 22AlaA329, 115S420; 22AlaA376, 115S852; 32Ariz111, 256P111; 94Fla1138, 115S43; 324 Ill 294, 155NE301; 118 Or397, 247P146, 150 [quotCJ]; 104TexCr178, 283SW517; 104WVa1, 138SE732.
58-67 118 Or397, 247P146, 150 [quot CJ]; 150Va588, 142SE369.
58-68 118 Or397, 247P146, 150 [quot CJ] (rigor of imprisonment held not to justify killing keeper); 104TexCr178, 283SW517; 104WVa1, 138SE732. [a] 242Mich16, 217NW758 (homicide three hours after abandonment of assault).
58-72 198NC79, 150SE663.
58-74 114 Oh299, 151NE182.
58-75 30Ariz448, 247P1103; 172Ark244, 288SW904; 324 Ill 294, 155NE301; 5PaDist&Co 287; 33PortoRico179 (rule stated to correct misapprehension of trial court, but not applied); TexCr 30SW(2d)331.
59-76 141Wash104, 250P645 [citCJ].
60-78 198 Ind590, 154NE372. [a] 101TexCr514, 276SW233.
60-79 172Ark244, 288SW904; 73CalA580, 239P82; 42 Ida319, 245P685; 324 Ill 294, 155NE301; 223Ky211, 3SW(2d)631 (as situation appears to defendant, not another); 228Ky432, 15SW(2d)273; 234Ky268, 27SW(2d)946; NM 292P225(2dcase); 109TexCr361, 4SW(2d)966; TexCr 28SW(2d)164 (question not one of jury's belief).
60-84 169Ark594, 276SW358.
61-93 220Ala544, 126S848.
61-96 NM 292P225(2dcase).
61-99 163La563, 112S486.
61-2 CalA 288P106.
61-3 30Ariz448, 247P1103; 78CalA442, 248P1061; 86CalA768, 261P512; 41 Ida616, 243P359; Kan 291P945. [c] **Where circumstances did not warrant** killer's belief of self-danger, crime may be murder or manslaughter, though not committed in fit of passion. 174Ark1035, 298SW333. [d] **Defense fails** where wound was inflicted through fear and not because of reasonable ground to apprehend immediate bodily injury. 96Fla243, 118S22.
61-4 22AlaA531, 117S505; 32Ariz111, 256P111; 73CalA580, 239P82; 324 Ill294, 155NE301; 198 Ind590, 154NE372; 230Ky250, 19SW(2d)218; 230Ky761, 20SW(2d)742; 149Miss262, 115S208; Mo

292SW728; 85Mont585, 281P551; 198 NC79, 150SE663; 157SC278, 154SE161; 109TexCr361, 4SW(2d)966; 101Vt5, 139 A769; 143Wash313, 255P382.

62-12 194NC121, 138SE518.

62-14 219Ala407, 122S633; 172Ark244, 288SW904; 78CalA442, 248P1061; 41 Ida616, 243P359; 327 Ill 162, 158NE 462; 143Wash313, 255P382.

63-16 92Fla1062, 111S725.

63-17 94Fla1138, 115S43.

63-31 171Ark768, 286SW939; 224Ky 502, 6SW(2d)502; 230Ky761, 20SW(2d) 742; 242Mich16, 217NW758, 760 [quot CJ]; 198NC79, 150SE663; 105TexCr 451, 288SW1082; 104WVa1, 138SE732. [c] **What codefndant believed and did is immaterial.** 224Ky446, 6SW(2d)464.

64-38 171Ark203, 284SW28.

64-41 198NC79, 150SE663.

64-43 TexCr 26SW(2d)644(2dcase).

65-55 163La563, 112S486.

65-57 152SC17, 149SE348.

66-73 172Ark156, 287SW1026; 40Wyo 184, 276P458.

67-93 174Ark1180, 297SW830.

67-96 214Ala273, 107S737; 217Ala519, 116S913 ("reasonable mode of escape" defined); 219Ala407, 122S633; 21AlaA 508, 109S566; 23AlaA447, 126S856; 22 AlaA472, 116S896; 94Fla1138, 115S43; Iowa 228NW37; Mass 167NE354; 194 NC121, 138SE518; 5PaDist&Co 287; 40 Wyo 184, 276P458. [d] **Where there is no way of escape,** there is no legal obligation to retreat. 198NC79, 150SE663.

67-97 213Ala576, 105S583; 20AlaA660, 104S771.

68-98 21AlaA46, 104S889 (duty to retreat only if reasonably safe mode of escape without apparently increasing peril).

68-3 Iowa 228NW37; 113TexCr621, 24SW(2d)52.

68-7½-New. Defendant is not required to retreat merely because he saw deceased in the neighborhood. 214Ala 273, 107S737.

68-14 20AlaA660, 104S771.

68-17 202 Iowa173, 209NW458, 460, 47 ALR407 [citCJ].

69-24 291Pa319, 139A836.

69-28 22AlaA472, 116S896; 93CalA133, 269P204; 337 Ill 371, 169NE190; 198 NC79, 150SE663.

70-32 213Ala576, 105S583.

70-33 213Ala576, 105S583.

70-34 213Ala576, 105S583.

70-37 194NC121, 138SE518.

70-40 104TexCr178, 283SW517.

71-47 Ariz 283P711; 337 Ill 371, 169 NE190.

71-51 Ariz 283P711.

71-57 214Ala675, 108S612; 215Ala619, 112S157; 22AlaA39, 111S767; 23AlaA 474, 127S253; 202 Iowa173, 209NW458, 460, 47ALR407 [citCJ]; 5PaDist&Co 287; 101TexCr454, 276SW715. [e] **Rule as to retreat,** applicable to domicils, does not apply where accused is in automobile. 216Ala7, 111S227.

72-58 110Conn303, 147A801 (employee assaulted with deadly weapon in employer's place of business); 202 Iowa 173, 209NW458, 460, 47ALR407 [cit CJ].

72-59 138SC147, 135SE800; 148SC86, 145SE628.

72-60 22AlaA39, 111S767.

72-65 22AlaA95, 112S811, 812 [citCJ].

72-66 22AlaA95, 112S811, 812 [citCJ]; 144SC452, 142SE725, 728 [citCJ].

72-67 23AlaA426, 126S417.

72-70 21AlaA372, 108S633.

73-72 215Ala643, 112S234.

73-74 22AlaA126, 113S466; 22AlaA 329, 115S420; 22AlaA549, 117S605.

73-75 23AlaA109, 121S455; 22AlaA 126, 113S466; 22AlaA549, 117S605.

73-76 But see 128Kan317, 277P1019.

73-77 224Ky443, 6SW(2d)488; 234Ky 142, 27SW(2d)705; 194NC121, 138SE 518; 198NC79, 150SE663; 143Wash 313, 255P382. [b] **Right of self-defense held under facts not to accrue to person assaulted** till he avails himself of means to decline combat. 257Mass 473, 154NE260.

73-78 22AlaA531, 117S505; 198 Ind 590, 154NE372; 192NC1, 133SE176.

73-80 22AlaA366, 115S763; 194NC121, 138SE518; 198NC79, 150SE663.

73-81 198NC79, 150SE663 (jury need not measure force with nicety).

73-85 Mo 6SW(2d)857; 192NC1, 133 SE176; 48Philippine153; 105TexCr57, 284SW952.

73-87 22AlaA366, 115S763; 48Philippine268.

74-91 320Mo 319, 6SW(2d)857.

74-95 104TexCr178, 283SW517.

74-4 101TexCr587, 276SW699. [a] **Defendant, owner of farm cultivated by deceased as sharecropper,** had right to go on farm whenever he saw fit, and he was entitled to stand his ground thereon when attacked, but he had no right to pursue deceased into house on such farm, which was deceased's home, or on the porch, which was part of house. 148SC86, 145SE628.

74-5 104TexCr178, 283SW517.

75-6 104TexCr178, 283SW517.

75-7 104TexCr178, 283SW517.

75-13 103TexCr148, 280SW787.

76-17 90Fla337, 106S406; 106WVa216, 145SE275, 277 [citCJ] (misdemeanor).

76-22 90Fla337, 106S406.

76-24 159Tenn422, 19SW(2d)231.

76-33 [c] **Unlawful arrest may be resisted with force** proportionate to attack by officer, but felonious assault on officer may justify killing. 166Ga296, 143SE371.

76-37 90Fla337, 106S406.

77-42 170Ark1073, 282SW680; 179 Ark384, 16SW(2d)1; 197NC445, 149SE 590(2dcase); 112TexCr107, 14SW(2d) 838. [d] **Unconstitutionality of statute defining offense for which arrest is attempted** does not justify resistance of arrest and killing of officer. 49Nev184, 242P316.

77-43 22AlaA57, 112S181; 162Ga208, 132SE911; 41 Ida616, 243P359, 362 [cit CJ]; 143Miss324, 108S711, 713, 46ALR 895 [citCJ]. [b] 232Ky159, 22SW(2d) 599. [c] (2) Where deceased officer was investigating recent breach of peace of which accused was suspected, presumably with view to arrest, instruction that it was duty of accused peaceably to give officer any information he had on subject was held reversible error. 209Ky817, 273SW503.

78-51 143Miss324, 108S711, 713, 46 ALR895 [citCJ].

78-53 29Ariz247, 240P863; 162Ga208, 132SE911; 324 Ill 131, 154NE715; 143 Miss324, 108S711, 713, 46ALR895 [cit CJ]. [e] **Overt act by officer** is prerequisite to right to resist arrest. 152SC 17, 149SE348.

78-54 [a] **Statements of officer** that he has warrant or that person may consider himself under arrest do not justify making of physical attack upon officer. 152SC17, 149SE348.

78-56 217Ala219, 115S308.

78-57 49Nev184, 242P316.

78-59 115 Oh542, 155NE189.

79-65 But see 112TexCr574, 17SW(2d) 823.

79-67½-New. Use of necessary force by peace officer to drive intoxicated person off street does not justify killing of officer, where it is misdemeanor to be intoxicated on the street. 50ND270, 195NW567.

79-70½-New. However, where an officer acts in performance of his duty, although not making an arrest, resistance and an attempt to kill is not justifiable. Mo 278SW1009.

79-74 21AlaA204, 107S797; 79CalA 101, 248P1078, 1084 [quotCJ]; 217Ky 556, 290SW330, 332 [citCJ]; 223Ky 826, 4SW(2d)1109; 235Ky351, 31SW (2d)608; 164La420, 114S82; 152SC17, 149SE348; 103TexCr148, 280SW787; 104TexCr228, 283SW507; 105TexCr37, 285SW327. See also 235Ky322, 31SW (2d)391.

79-76 234Ky135, 27SW(2d)683; 164 La420, 114S82.

80-78 144SC452, 142SE725.

80-80 218Ala527, 119S215.

80-81 198NC79, 150SE663; 152SC17, 149SE348. [a] (1) 198NC79, 150SE 663. [d] **Danger need not be apparent to person defended** to justify killing where it was so to accused. 224Ky502, 6SW(2d)502.

81-84½-New. , although in some jurisdictions a defender may use only such force as would appear necessary to an ordinary man so situated. 164La420, 114S82.

81-89½-New. Rule which applies where a man kills another for insulting conduct toward female relative should be applied where woman kills another woman who sought to win her husband. 104TexCr15. 282SW580.

81-91 23AlaA89, 121S444; 21AlaA204, 107S797; 198NC79, 150SE663.

81-92 51Philippine802; 112TexCr107, 14SW(2d)838.

81-93 Mo 6SW(2d)898(2dcase); 51 Philippine802.

81-98 128Kan317, 277P1019 (fiancée); 164La420, 114S82 (paramour attacked). [b] **Since "any one may do for another what another may do for himself,"** defense of paramour not provoking attack is permissible. 164La 420, 114S82.

82-4 212Ala571, 103S664.

82-11 Miss 118S708.

82-12 23AlaA516, 128S124.

82-14½-New. Under some statutes an act or attempt to commit an act of sexual perversion with a daughter does not constitute defilement making homicide by a parent justifiable. Utah 283 P738.

82-15 103TexCr163, 280SW829; 199 Wis615, 227NW258 (instruction justifying shooting to prevent adultery properly refused). [a] **In Philippines.**–45 Philippine84.

82-25 100TexCr402, 273SW580.

83-29 79CalA101, 248P1078; 221Ky 557, 299SW183; 234Ky56, 27SW(2d) 405; 234Ky673, 28SW(2d)978; 245NY 401, 157NE509; 32PortoRico 668; 144 SC452, 142SE725, 728 [citCJ].

83-29½-New. One has a right to use all necessary force to prevent an officer from entering his house, until the authority of the officer is made known. 134SC485, 133SE457.

83-32 232Ky691, 24SW(2d)564.

83-36½-New. If, in resisting expulsion, an intruder places the owner in real or apparent danger, the owner may in self-defense take the life of the intruder without seeking other ways of averting danger. 214Ky211, 282SW1109.

83-37 225Ky590, 9SW(2d)723(2dcase).

83-40½-New. Roadhouse in which keeper lives. 245NY401, 157NE509.

84-53 234Ky142, 27SW(2d)705.

84-56 Ky 13SW(2d)267.

84-58 22AlaA508, 117S492.

84-66 227Ky500, 13SW(2d)511.

85-77 [a] **Reasonable time to depart** should be given to person entering another's premises to settle dispute. 144 SC452, 142SE725.

85-83 203 Iowa155, 212NW382. [b] **Degree of force which he may so use** must not exceed what, to reasonable person, would seem reasonably necessary under existing circumstances as they reasonably or in good faith appear to injured party. 203 Iowa155, 212NW 382. [c] **If force used takes effect on unintended person,** defendant who employs such force is not criminally liable if force employed is used in justifiable degree to prevent thieves from carrying away his property. 203 Iowa155, 212 NW382 (discharge of gun).

85-84 100TexCr67, 272SW154.

85-85 23AlaA321, 124S744; 34NM112, 278P210; 151SC379, 149SE108. [a] 209 Ky10, 272SW1.

85-87 219Ala567, 122S683. But see 113 TexCr230, 18SW(2d)635.

86-90 110Conn303, 147A801 (employee assaulted with deadly weapon on employer's premises).

86-95 219Ala567, 122S683.

87-9 122 Or444, 259P893.

87-10 164Ga728, 139SE352; 198 Ind 614, 154NE370.

87-11 164Ga728, 139SE352. [a] **It is unnecessary to find that defendant was not doing unlawful act,** to make this defense available. 126Me223, 137A244, 53 ALR241.

87-22 [e] **Shooting by customs officer.**–14F(2d)609.

87-23 122 Or444, 259P893.

88-26 22AlaA108, 113S88.

88-29 [a] **If malum in se or malum prohibitum,** misadventure does not excuse. 126Me223, 137A244, 53ALR241.

88-30 122 Or444, 259P893.

88-32 But see 126Me 223, 137A244, 53 ALR241.

88-47 23AlaA502, 127S909; 29Ariz460, 242P864; 105TexCr299, 288SW223.
89-48 29Ariz460, 242P864.
89-53 See also 217Ala60, 114S798.
89-55 Miss 130S502.
89-58 166Ga1, 141SE903; 36GaA286, 136SE331; 114Nebr404, 207NW928 (information for murder in first degree held sufficient).
90-72 155Miss348, 124S432(1stcase).
90-77 122Kan552, 253P221; OklCr 292 P82. [a] 315Mo 1259, 289SW865; Mo 8 SW(2d)49; Mo 26SW(2d)793; 191NC 378, 131SE743; SC 155SE409; 113 TexCr314, 21SW(2d)728.
91-89 205Cal 596, 271P1074; 118 Or 397, 247P146; 110TexCr420, 10SW(2d) 119; 33Wyo 346, 239P526, 41ALR717.
91-97 SC 155SE385. [a] But see 160 La47, 106S670.
91-99 30Ariz159, 245P356 (allegation held sufficient).
92-6½-New. The misstatement of exact date of murder is immaterial. 284Pa 105, 130A403.
92-8 104WVa1, 138SE732.
93-35 32NM319, 255P396. [a] (2) "Then" in indictment of accessary before fact in murder, alleging that parties "then" procured and induced person to commit murder, means at any time within statute of limitations. 32NM319, 255 P396.
93-38 SC 155SE385. But see 160La47, 106S670.
93-40 30Ariz159, 245P356.
93-41 30Ariz159, 245P356.
93-43 154SC1, 151SE206.
93-43½-New. "then" meaning within statute of limitations, 32NM319, 255P 396.
94-63 220Ky640, 295SW983.
95-71 89Fla261, 103S630.
95-83½-New. Omission of word "him" after word "murder" in indictment renders it fatally defective. 21AlaA620, 111 S48.
95-87 339 Ill 328, 171NE261.
97-19 But see 314Mo 612, 286SW29.
97-23 [a] 171Minn414, 214NW280.
97-27 200 Iowa1244, 206NW100; OklCr 276P701; 109TexCr157, 3SW(2d)449. See also 29PortoRico 856.
97-28 [a] (1) 318Mo 553, 300SW694.
98-37 [a] **Commission of murder pursuant to conspiracy** need not be alleged. Mo 23SW(2d)22.
98-39 98Fla1184, 125S345(3dcase); Mo 30SW(2d)750; 34Wyo 175, 242P411. [e] **Conspiracy** need not be charged under statute providing that homicide in perpetration of robbery is first degree murder. Mo 30SW(2d)750.
98-42 [b] (2) Murder in attempt to rob. 196 Ind534, 149NE59.
98-43 22 OhA185, 153NE907. [b] (1) 181Ark1011, 28SW(2d)1055. (2) In indictment for murder while perpetrating robbery, it is not necessary to set out facts which constitute attempt to perpetrate robbery, but indictment is sufficient if it charges that defendant, while attempting to perpetrate robbery, did unlawfully kill and murder deceased. 22 OhA185, 153NE907. (3) Other instances. Ark 30SW(2d)865.
99-47 198 Ind444, 154NE16; 119 Or 409, 243P72 (indictment following language of statute sufficient).
101-72 156Md149, 143A872; 33Wyo 346, 239P526, 41ALR717.
101-77 76Mont509, 248P201.
102-78 22AlaA136, 114S791; 11TexCr 101, 10SW(2d)87; 112TexCr233, 16SW (2d)123(2dcase).
102-85 112TexCr233, 16SW(2d)123(2d case).
102-87 235Ky449, 31SW(2d)697. [a] (4) 164Ga128, 138SE67.
103-96½-New. In indictment for malicious cutting, stabbing, and wounding with intent to maim, disable, and kill, weapon with which assault is made need not be named. 99WVa689, 129SE 705.
103-13 [a] (1) 203 Iowa1305, 214NW 735; 171Minn414, 214NW280; 314Mo 612, 286SW29. (9) 309Mo 155, 274SW 734.
104-19 [a] 117Nebr692, 222NW47.
104-29 166Ga182, 142SE676.
104-31 But see TexCr 25SW(2d)614.
104-35 [a] 166Ga182, 142SE676.
105-51 Mo 22SW(2d)784 (allegations not invalidating indictment).
105-53 34PortoRico 127.
105-54 122Kan552, 253P221.
106-61 339 Ill 328, 171NE261.
106-62 177Ark534, 7SW(2d)5.
106-76 [a] 166Ga266, 142SE891. [b] (11) Other instances. 34PortoRico 447; 34PortoRico 519.
107-80 SC 155SE385.
107-87 118 Or397, 247P146.
108-89 177Ark534, 7SW(2d)5.
108-1 SC 155SE385. Contra 160La47, 106S670.
109-2 96Fla243, 118S22; 33PortoRico 284.
109-3 SC 155SE385.
109-6 TexCr 25SW(2d)1098; TexCr 25 SW(2d)1105; TexCr 26SW(2d)643; TexCr 26SW(2d)644(2dcase); TexCr 26 SW(2d)915; TexCr 26SW(2d)919(1st case); TexCr 26SW(2d)919(2dcase); TexCr 26SW(2d)920(1stcase).
109-7 96CalA430, 274P433.
110-20 166Ga1, 141SE903.
110-26 TexCr 25SW(2d)1098.
110-28 166Ga1, 141SE903.
110-29 107TexCr221, 296SW563.
111-45 Ind 171NE192.
111-46 29PortoRico 961.
111-47 29PortoRico 961.
112-49 170Ark1073, 282SW680.
112-56 [a] (5) Other instances. 166 Ga1, 141SE903.
112-58 116Nebr90, 215NW785.
112-61 110TexCr420, 10SW(2d)119.
113-69 See also 170Ark1073, 282SW 680.
113-73 But see 29PortoRico 961.
113-74 OklCr 287P761.
113-75 [a] OklCr 287P761.
114-85 TexCivA 289SW159.
114-88 30Ariz159, 245P356. [a] (5) Other allegations held sufficient. 150 Wash82, 272P80.
114-89 198Cal 776, 247P884.
114-91 30Ariz159, 245P356.
114-96 170Ark1073, 282SW680.
115-22 OklCr 291P989.
115-25 [b] **Information held sufficient.** -316Mo 185, 289SW619.
116-27 169Ark717, 276SW849; 202Cal 165, 259P943; Mo 256SW753.
116-28 20AlaA581, 104S341.
116-38½-New. In some jurisdictions murder in the first degree may be charged as having been committed in any of the methods specified in the statute. 201 Iowa940, 208NW351.
116-40 219AppDiv334, 220NYS249.
116-43 [c] (1) 315Mo 695, 287SW463.
116-49 29PortoRico 961.
117-54 204 Iowa1360, 217NW236; 116 Nebr125, 216NW294. [a] **Affidavit held sufficient.**-Ind 171NE1.
117-55 [b] (5) Involuntary manslaughter. 166Ga266, 142SE891; 204 Iowa1360, 217NW236.
117-62 [c] **Indictments held sufficient** for involuntary manslaughter in commission of unlawful act. 119 Or409, 243 P72 (driving auto at dangerous and unreasonable rate of speed).
117-63 82Mont530, 268P507.
117-64 49SD192, 206NW927.
117-66 315Mo 695, 287SW463, 464 [cit CJ]. [a] 315Mo695, 287SW463.
118-76 315Mo 695, 287SW463; 318Mo 611, 300SW691; Mo 300SW820.
118-83½-New. Under some statutes a formal conclusion is not a necessary part of an information charging murder. 303Mo 246, 259SW798.
118-87 [a] (1) 30Ariz366, 247P129; 147Miss79, 112S866; Miss 113S353; 152 Miss114, 118S710; Mo 284SW(2d)799 (1stcase); 317Mo 284, 295SW550; MoA 256SW523; OklCr 287P1073.
119-88 [a] **Indictment under statute** for malicious shooting with intent to kill is not demurrable because not expressly stating that prosecuting witness was not wounded. 227Ky249, 12SW (2d)289.
119-94½-New. The words "in the peace of the people" mean that deceased had done nothing to forfeit his right to live. 337 Ill 131, 169NE18.
120-10½-New. If the name given is that by which he is commonly and generally known, although different from his true name, conviction will be sustained. 149Miss212, 115S399.
120-21 Mo 23SW(2d)7 (sufficient).
121-33 170La207, 127S603(1stcase); TexCr 22SW(2d)309.
121-35 168Ga690, 148SE731 (allegation that weapon was likely to produce death held unnecessary).
121-36 170La207, 127S603(1stcase).
122-50 216Ky541, 287SW972. [a] (6) Allegation that defendant "did cut, thrust and stab with dangerous weapon, to wit, an axe" is sufficient to support verdict of "cutting with an axe." 158La 799, 104S720.
122-54 40GaA118, 149SE153(2dcase); OklCr 287P1073.
123-61 TexCr 22SW(2d)309.
123-72 168Ga690, 148SE731, 733 [quot CJ]; 40GaA118, 149SE153(2dcase); 147Miss79, 112S866.
123-75 [a] 147Miss79, 112S866.
123-76 Miss 118S375.
125-15 235Ky683, 32SW(2d)34.
127-42 148Miss685, 114S747.
127-43 147Va648, 136SE598.
127-44 147Va648, 136SE598.
128-60 [c] **Plea of guilty** may justify admission of evidence as to whether defendant fired fatal shots, even though he depends for acquittal on plea of insanity. 219Ala282, 122S45. [d] **Evidence admitted under insanity plea.**-23AlaA232, 123S288.
128-61 [a] (5) In prosecution for negligent homicide by operation of automobile intoxication of defendant may be proved though not alleged. 233Mich 222, 206NW562. [b] (4) It has been held proper to admit testimony that deceased usually carried considerable money. 166Ga512, 143SE896.
128-63 44Philippine271.
128-65 316Mo 157, 289SW948.
129-78 Mo 30SW(2d)132; 246NY262, 158NE615; OklCr 288P374. [a] (3) Felonious assault upon third party. 112TexCr223, 15SW(2d)1046.
129-79 117Nebr601, 221NW683.
130-85 [c] **In Philippines.**-45Philippine137.
130-91 83Colo 107, 262P918. [b] (6) That murder was committed on March 1, 1924, while indictment named April 19, 19—— as date. 284Pa105, 130A403.
130-92½-New. Exact time may be proved at the trial. 284Pa105, 130A 403.
130-94½-New. Time of assault and time of death must be proved. SC 155 SE385.
130-95 [a] **Place of assault and place of death must be proved.**-SC 155SE 385.
131-99 154SC1, 151SE206.
131-2 105TexCr516, 289SW54; 111TexCr547, 15SW(2d)18(2dcase).
131-5 105TexCr516, 289SW54.
131-11 21AlaA206, 106S621; 33GaA 677, 127SE617.
131-12 20AlaA599, 104S555.
131-15 21AlaA206, 106S621.
131-16 21AlaA206, 106S621. [b] 112 TexCr305, 16SW(2d)539(2dcase).
131-17 21AlaA206, 106S621.
132-19 109TexCr414, 5SW(2d)503.
132-20 34NM112, 278P210.
133-43 255Mass304, 151NE297, 47ALR 962.
133-44 169Ark421, 275SW758; 212Ky 50, 278SW163; 227Ky100, 12SW(2d) 329(2dcase); 234Ky192, 27SW(2d)971; 32PortoRico 355.
133-47 Mo 30SW(2d)132; 32Porto Rico 355.
133-50 104TexCr46, 282SW242.
133-54½-New. Where the indictment did not charge defendant with actually firing the fatal shot, the state does not have the burden of proving that he did, and that he actually inflicted the fatal wound. Iowa 227NW601.
133-55 332 Ill 207, 163NE430.
134-57 201 Iowa940, 208NW351; Tex Cr 25SW(2d)614.
134-58 170Ark1073, 282SW680.
135-66 190NC177, 129SE417.
136-74 Ark 30SW(2d)213(1stcase).
136-77 226Ky169, 10SW(2d)626.
137-93 190NC177, 129SE417.
137-5 [b] (2) Proof that defendant shot at and missed prosecuting witness held not at variance with indictment alleging shooting of witness. 105TexCr 403, 289SW48.

138-14 190NC177, 129SE417.
139-26 192NC225, 133SE458; 193NC 489, 137SE429; 116 Oh495, 156NE600; 45Philippine78; 103TexCr636, 282SW 251.
139-27 21AlaA646, 111S318; 204 Iowa 1360, 217NW236; 235Ky351, 31SW(2d) 608; 54ND779, 211NW336. [e] **Aiding and abetting.-Man** [1925] 3DomLR 447. [f] **Motive,** to be essential, need not be proved. 232Mich310, 205NW188. [g] **Burden was on prosecution** to connect defendant with coat and empty shell found in deceased's room. 147Va692, 137SE603. [h] **Admission of killing by defendant** does not relieve state from proving guilt beyond reasonable doubt. 179Ark1055, 20SW(2d)120.
139-29 23AlaA313, 124S670; 155Miss 398, 124S493; 111TexCr570, 13SW(2d) 874. [g] **Manslaughter in committing abortion.**-116 Or615, 241P843.
139-32 212Ky791, 280SW111.
140-47 108TexCr302, 300SW71.
140-50 36GaA639, 138SE83; 321 Ill 397, 152NE149; 199 Ind247, 155NE544; 201 Iowa940, 208NW351; 206 Iowa859, 220NW95; 317Mo 372, 295SW734; 317 Mo 348, 295SW754, 756 [citCJ]; 53ND 931, 208NW566; 116 Or509, 241P983; 284Pa159, 130A317; 294Pa573, 144A 743; 108TexCr302, 300SW71; 110Tex Cr109, 7SW(2d)566.
141-51 [c] 108TexCr159, 300SW51; 112TexCr55, 14SW(2d)69.
141-52 151Va510, 144SE361.
141-53 198 Ind590, 154NE372.
141-56 205Cal 594, 271P1049(1stcase); Ind 167NE133.
141-57 298Pa370, 148A501.
141-58 317Mo 348, 295SW754, 756 [cit CJ].
141-63 198 Ind590, 154NE372.
141-65 116Nebr8, 215NW465; 196NC 393, 145SE772.
142-66 95CalA659, 273P110.
142-67 Mass 171NE16.
142-71 116Nebr191, 216NW656; Tex Cr 25SW(2d)1098.
142-72 228Ky432, 15SW(2d)273.
142-72½-New. But the intentional use of deadly weapon imposes upon accused burden of showing circumstances in mitigation or excuse. 190NC674, 130 SE627, 42ALR1114.
142-73 321 Ill 397, 152NE149; 216Ky 665, 288SW295.
142-74 214Ala273, 107S737; 21AlaA 116, 105S435; 172Ark244, 288SW904; 174Ark1180, 298SW3; 164Ga509, 139 SE37 (dictum); 221Ky175, 298SW376; 235Ky391, 31SW(2d)622; 235Ky845, 32 SW(2d)405; 247Mich260, 225NW540; 152Miss728, 120S837; 321Mo 662, 12SW (2d)34; 284Pa159, 130A317. See also 151Miss702, 118S431. [a] 100TexCr54, 271SW902. [c] **Knife wounds.**-143Va 510, 129SE360. [d] **Where state's evidence of malice discloses mitigating facts,** presumption is rebutted. 164Ga 509, 139SE37.
142-74½-New. Rule applies in case of killing with deadly weapon. 143Miss 352, 108S727.
142-74½-New. Where evidence shows killing was perpetrated without malice, presumption does not arise. 21AlaA 116, 105S435.
142-74¼-New. In a prosecution for murder the use of a deadly weapon may justify an inference of malice. 140Miss 889, 105S742.
142-74⅕-New. Malice is implied from any intentional killing which the law does not make justifiable or excusable. 147Miss171, 113S177.
142-76½-New. Malice is presumed where killing results from attempt to commit a felony. 169Ark289, 273SW 11.
142-76⅓-New. Where circumstances point to killing of one human being by another, malice is presumed. 34Porto Rico 626.
142-76¼-New. The presumption of malice does not obtain when the provocation for homicide appears to be gross and when the act is impelled by it and done in the heat of passion. 153 Va863, 149SE419.
142-78 85Mont553, 281P757.
142-81 197NC445, 149SE590(2dcase).
142-82 121 Or141, 253P367, 370 [cit CJ]; 144Wash446, 258P508, 516 [cit CJ].
142-82½-New. Law presumes that homicide occurred on an old grudge, unless new and sufficient provocation is shown, in which case the killing is presumed to have occurred on the new provocation. 155Tenn325, 292SW849.
142-83 164Ga509, 139SE37; Ga 155SE 329; 42 Ida319, 245P685; 331 Ill 608, 163NE453; 209Ky395, 272SW909; 215 Ky837, 287SW32; 219Ky697, 294SW 153; 224Ky151, 5SW(2d)897, 899 [cit CJ]; 235Ky462, 31SW(2d)712; 317Mo 348, 295SW754, 756 [citCJ]; 116 Oh 495, 156NE600; OklCr 292P385; 143 Va510, 129SE360. See also 87Colo 507, 289P1081.
143-84 220Ala544, 126S848; 81CalA 199, 253P169; 164Ga509, 139SE37.
143-86 317Mo 348, 295SW754, 756 [cit CJ].
143-88 101TexCr96, 274SW628 (burden of accused to prove duress).
143-90 206Cal 64, 273P779; 167Ga341, 145SE647; 208 Iowa127, 224NW537; 76Mont574, 248P179; 191NC753, 133SE 81; 193NC489, 137SE429; 5PaDist&Co 559; 106TexCr222, 291SW558; 106 TexCr558, 293SW1104.
144-91 167Ga341, 145SE647.
144-93 109TexCr440, 5SW(2d)157.
144-95½-New. But evidence of previous insanity, although accompanied by such presumption of continuance, does not affect the rule as to the burden of proof of insanity. 191NC753, 133SE81.
144-3 87CalA724, 262P795; 192NC1, 133SE176; 119 OhSt39, 162NE106; 291 Pa319, 139A836; 294Pa544, 144A542; 51Philippine840; Wash 290P824; 99 WVa711, 129SE715. But see AlaA 130 S903. [b] **Question who was aggressor** is to be ascertained as fact, and not by presumption. 216Ala7, 111S227.
144-5 93CalA133, 269P204; 161La863, 109S519; 55ND761, 215NW277.
144-6 22AlaA434, 116S504; 208 Iowa 818, 222NW394; 161La863, 109S519.
144-6½-New. There is no presumption that defendant is at fault solely because he was the aggressor. 199 Ind 196, 156NE403.
145-12½-New. Notwithstanding failure to establish plea of self-defense burden is still on state to establish guilt of higher offense of assault with intent to kill and murder beyond reasonable doubt. 133SC167, 130SE747.
145-15 21AlaA508, 109S566; 196NC 457, 146SE1; 104WVa1, 138SE732.
145-16 21AlaA508, 109S566.
145-17 22AlaA549, 117S605.
145-18 23AlaA426, 126S417.
145-19 219Ala407, 122S633; 21AlaA 285, 107S722; 21AlaA508, 109S566; 23 AlaA428, 126S420(3dcase).
145-24 101TexCr454, 276SW715; 105 TexCr451, 288SW1082; 109TexCr154, 3SW(2d)814.
145-27 112TexCr659, 18SW(2d)181.
146-35½-New. The burden is not on state to show that pursuit by deceased was peaceable. 21AlaA35, 104S876 (instruction properly refused).
146-36 126Me223, 137A244, 53ALR 241.
146-38 169Ark353, 275SW662.
146-41½-New. In a prosecution for manslaughter by negligently killing a person while driving an automobile while intoxicated, the burden does not rest on the prosecution to show that death was not due to unavoidable accident. 168Minn263, 209NW881.
146-59 85CalA258, 258P1111; 317Mo 348, 295SW754; 193NC489, 137SE429; 5PaDist&Co 559; 35PortoRico 828; 143 Va510, 129SE360.
146-60 116 Oh495, 156NE600; 10Pa Dist&Co 56; 143Va510, 129SE360.
147-65 168Ark534, 270SW968; 144 Wash446, 258P508.
147-66 168Ark534, 270SW968.
147-70 313Mo 615, 285SW392; 85Mont 544, 281P352; 5PaDist&Co 287; 5Pa Dist&Co 559; 143Va489, 129SE252; 143 Va479, 129SE348; 144Va609, 131SE242. [b] (1) 322Mo 1239, 18SW(2d)71.
148-71 313Mo 615, 285SW392; 5Pa Dist&Co 287; 12PaDist&Co 735; 143Va 489, 129SE252; 153Va863, 149SE419; 153Va909, 150SE407.
148-72 143Va489, 129SE252; 144Va 609, 131SE242; 150Va588, 142SE369; 153Va909, 150SE407. [a] **Evidence sufficient to raise reasonable doubt as to malice** must be adduced under statute in order to reduce degree of homicide to manslaughter. 85Mont544, 281P352.
148-74 203Cal 153, 263P524.
148-77½-New. Killing of officers of law in performance of their duties is presumed to be murder in the second degree in the absence of contrary evidence. 3Del 123, 131A566.
148-87 Sask [1930] 3DomLR345.
148-90 21AlaA116, 105S435 (any relevant testimony may affect verdict); DC 41F(2d)979; 324 Ill 404, 155NE360; 229Ky207, 16SW(2d)1016; 118 Or397, 247P146; 5PaDist&Co 559. [b] **Knowledge of official character of deceased** by accused was held admissible. 284Pa 159, 130A317. [c] **Statute abolishing manslaughter** and permitting state or defendant to offer testimony of relevant facts surrounding killing and previous relationship between accused and deceased and condition of mind of accused, does not extend or broaden rules of evidence in homicide cases, but merely secures to accused benefit of rules of evidence available under repealed law of manslaughter. 111TexCr657, 13SW(2d) 689.
149-91 23AlaA348, 128S359(2dcase); Ala 130S69; 21AlaA528, 109S560; 22 AlaA472, 116S896; 23AlaA547, 129S99 (1stcase); 170Ga234, 152SE482; 332 Ill 207, 163NE430; 203 Iowa1305, 214 NW735; 235Ky78, 29SW(2d)629; 155 Md474, 142A497; Mass 171NE16; 101 TexCr86, 273SW598; 107TexCr614, 298 SW426.
150-96 103TexCr636, 282SW251.
150-3½-New. Corpus delicti must be proved without the aid of any admission by defendant. 70CalA531, 233P980.
150-7 70CalA531, 233P980.
150-8 196Cal 191, 237P25 (proof of defendant's connection with crime is not to be excluded in proving corpus delicti, where circumstances are such that proof of crime involves proof of defendant's guilt); 90Fla844, 107S530.
150-8½-New. The order of proof of corpus delicti is discretionary with court. 70CalA531, 233P980.
150-12 196Cal 191, 237P25.
150-13 103TexCr636, 282SW251.
150-16 Ala 130S70.
151-17 [a] **Questions as to testimony witness had given** was not irrelevant or prejudicial where effect was merely to show that witness had communicated what he knew of deceased's identity. 166La924, 118S85.
151-19½-New. Where state's witness, a married woman of a different name than deceased, testified she was deceased's mother, court erred in refusing to allow defendant to ask if she had ever married a man of deceased's name. 20 AlaA599, 104S555.
151-20 TexCr 27SW(2d)233.
151-33 172Ark244, 288SW904; 327 Ill 393, 158NE712; 257Mass473, 154NE 260; 79Mont343, 256P380; 121 Or141, 253P367. [d] **Fact that evidence of unlawfulness offered in manslaughter case may show murder** does not render it inadmissible. 152Miss625, 120S751.
151-34 40GaA123, 149SE51; 327 Ill 393, 158NE712; 161La863, 109S519.
152-36 172Ark244, 288SW904.
152-40 168Ark710, 271SW326 (declarations two months after shooting).
152-41 Mo 18SW(2d)8; 49ND228, 191 NW345. [d] **That defendant was expert shot** and could have killed prosecutor had he so intended is inadmissible to show intent with which he shot. 180 Ark197, 20SW872.
152-43 Iowa 230NW394; 105TexCr 291, 288SW226.
153-47 230Ky411, 19SW(2d)1091, 66 ALR360; 318Mo 766, 300SW1073.
153-48 198NC82, 150SE678; 145Wash 4, 258P845.
153-49 Mo 22SW(2d)784.
153-50 121 Or141, 253P367. [a] 121 Or141, 253P367.
153-51 228Ky254, 14SW(2d)773.
153-52 228Ky254, 14SW(2d)773. [a] **Question preliminary to evidence of**

planned, premeditated, and conspired homicide is relevant and admissible. 166 La924, 118S85.

153–52½–New. Flight is not evidence of premeditation. 190NC506, 130SE308.

153–53 228Ky254, 148SW(2d)773.

153–54 228Ky254, 148SW(2d)773.

154–63 164Ga509, 139SE37.

154–64 164Ga509, 139SE37.

154–68 215Ala635, 112S212; 21AlaA 182, 106S392; 21AlaA455, 109S295; 21 AlaA601, 110S913; 175Ark786, 300SW 426; 178Ark1121, 13SW(2d)606; 40 GaA123, 149SE51; 327 Ill 393, 158NE 712; Ind 167NE531; 215Ky717, 286SW 1053; 221Ky648, 299SW553; 235Ky 340, 31SW(2d)383; 159La972, 106S461; 160La661, 107S481; 164La813, 114S 696; 169La1025, 126S514; 318Mo 766, 300SW1073; Mo 7SW(2d)264; 191NC 122, 131SE370 (previous threat made by accused directly to deceased); 99TexCr 627, 271SW87; 103TexCr340, 280SW 796; 107TexCr293, 296SW516. [f] **Presence of deceased.**–Testimony of threats made by accused or by codefendant in presence of accused, prior to killing, is always relevant to show malice. 90Fla844, 107S530.

155–69 160La661, 107S481; 164La813, 114S696; 99TexCr627, 271SW87.

155–70 99TexCr627, 271SW87.

155–74 But see 161La863, 109S519.

155–75 327 Ill 393, 158NE712; 152 MissI14, 118S710; 193NC487, 137SE 417.

155–78 [a] **Boastful and menacing remarks.**–227Ky129, 12SW(2d)297.

155–80 40GaA123, 149SE51.

155–87 145Miss252, 110S515.

155–88 143Va489, 129SE252.

156–89 99TexCr627, 271SW87; 143Va 489, 129SE252. [a] (3) Burden is on commonwealth to show connection. 143 Va489, 129SE252. (4) Connection may be shown by circumstances or subsequent declarations of accused. 143Va 489, 129SE252.

156–90 99TexCr627, 271SW87.

156–91 327 Ill 162, 158NE462; 99Tex Cr627, 271SW87.

156–92 Ind 167NE531; 143Va489, 129 SE252 (subsequent declarations of accused after attacking deceased with ax rendered general threat admissible).

156–92½–New. It is immaterial that the threat was not directed against deceased individually. 90Fla844, 107S530.

156–94 171Ark184, 284SW38.

156–97 163Ga186, 136SE72; Ind 167 NE531; 34NM65, 277P22. [a] 295Pa 190, 145A85.

156–99 167Ga271, 145SE517, 63ALR 179.

156–1 90Fla844, 107S530; 160La661, 107S481; 169La1025, 126S514; 198NC 762, 153SE395; TexCr 8SW(2d)176, TexCr 20SW(2d)794. [a] (1) See also 194NC459, 140SE26. (5) 159La972, 106 S461. (6) Fourteen months to within several months before. 90Fla844, 107 S530. (7) Three months. TexCr 8SW (2d)176. [c] **Presence of deceased.**–90 Fla844, 107S530. [d] **Where reconciliation is not shown,** it is not error to admit evidence of threats because of mere lapse of time. TexCr 20SW(2d) 794.

157–7 215Ky717, 286SW1053.

157–8 AlaA 129S797.

157–16 21AlaA649, 111S645; 86CalA 148, 260P591; 199 Ind10, 154NE870; 224Ky334, 6SW(2d)269; 159La972, 106 S461; 161La518, 109S51; 121 Or141, 253P367; 126 Or560, 270P404. [e] **Declarations of deceased.**–150Wash66, 272P89.

157–16½–New. Details of former difficulties held properly excluded. 21AlaA 649, 111S645.

158–22 235Ky670, 32SW(2d)29. [b] **Evidence held not too remote.**–159La 972, 106S461; Mo 292SW728. [c] **Evidence of fight ten months previous** held admissible. 105TexCr351, 288SW464.

158–24 34Wyo 247, 242P812.

159–26 Mont 289P1037.

159–30 AlaA 129S706; 332 Ill 167, 163 NE399; 198 Ind141, 152NE830.

159–31 162Ga573, 134SE169. [b] But see 216Ky724, 288SW680.

159–36½–New. Evidence that earlier in the evening defendant had fired at others is admissible to show intent and motive. Ariz 283P711.

159–37 216Ky724, 288SW68. [a] **Similarly,** in assault with intent to kill case testimony concerning difficulty of person assaulted with absent witness held properly excluded as irrelevant. 180 Ark363, 21SW(2d)850.

159–38½–New. Evidence of difficulty between deceased and a member of defendant's family has been held admissible where at least part of the facts was communicated to accused prior to the killing. 104TexCr583, 286SW231.

159–41 218Ala442, 118S654.

159–43 221Ky433, 298SW1078.

160–45 213Ala358, 104S656. But see 235Ky710, 32SW(2d)43.

160–46 193NC796, 138SE166.

160–51 216Ala475, 113S393; CalA 292 P693; 214Ky280, 283SW84; Mo 6SW (2d)903; 100TexCr67, 272SW154; 105 TexCr152, 287SW265; 108TexCr576, 2 SW(2d)245. [c] (5) Purchasing cartridges and arming himself. 113TexCr 9, 18SW(2d)615.

160–52 100TexCr67, 272SW154.

160–54 [a] **Proof that defendant carried pistol** because threatened by other persons is not competent where such threats did not justify him in carrying pistol at time and place of homicide. 20AlaA412, 103S694.

161–58 332 Ill 207, 163NE430; 29 PortoRico 961. [a] (4) Response of police as to knowledge whether defendant had killed deceased. 166La759, 117 S820.

161–61 172Minn106, 214NW782.

161–68 Nev 285P503.

161–69 34PortoRico 626.

162–72 199Cal 471, 250P168; Ill 172 NE740; Ill 172NE743.

162–73 201Cal 341, 257P64; 94CalA 628, 271P765; 137SC75, 134SE514.

162–76 22AlaA583, 118S242; 94CalA 628, 271P765; 94Fla318, 113S689; 166 Ga15, 142SE105.

162–77 83CalA463, 256P876; 144Miss 447, 110S124.

162–82 [c] **Evidence inadmissible.**–231 Ky337, 21SW(2d)441.

162–86 287Pa1, 134A465.

163–91 198NC649, 152SE895; TexCr 7SW(2d)1078.

163–95 [a] (2) Where it is not shown whether tracks were those of man or beast, evidence is inadmissible. 21AlaA 565, 110S55.

163–99 See also 101Vt124, 141A686.

163–2 168Ga344, 148SE91. But see Mo 256SW787.

163–5 227Ky439, 13SW(2d)244.

163–19 22AlaA583, 118S242; 201Cal 341, 257P64; 35PortoRico 533; 137SC 75, 134SE514.

163–20 199 Ind592, 159NE420, 428 [cit CJ].

164–28 22AlaA583, 118S242.

164–47½–New. Where the district attorney's theory was that P, in defendant's behalf, had rented the automobile claimed to have been used in the homicide, evidence of an agreement on the part of P as to how long he was to use the automobile was admissible, subject to its being eventually proved that he acted as defendant's agent. 167La484, 119S523.

164–52 199Cal 471, 250P168; 287Pa1, 134A465. See 166Ga512, 143SE896.

165–56½–New. Evidence by defendant that one he was accused of having employed to burn a building was a burglar and not a fire bug held properly excluded. 110Conn55, 147A118.

165–57 115Nebr737, 214NW643; 191 NC698, 132SE785.

165–60 115Nebr737, 214NW643. [a] (3) In prosecution for murder of defendant's wife, exclusion of testimony by defendant that wife was sensitive about age and size and talked of it, and to show that wife's health was bad, and that she had threatened to commit suicide, is error. 227Ky404, 13SW(2d) 247.

165–61 191NC698, 132SE785.

165–63 82Colo 205, 258P226.

165–70 198Cal 426, 245P426.

166–79 TexCr 26SW(2d)204(2dcase).

166–80 191NC698, 132SE785.

166–82 294Pa353, 144A292.

166–89 See also 143Va579, 130SE389.

166–95 140Miss881, 105S520; 289Pa 284, 137A261; 34Wyo 247, 242P812.

167–98½–New. Testimony of witness as to statement by deceased that "four negroes assaulted him" held properly excluded. 140Miss881, 105S520.

167–6 154Tenn26, 285SW554.

167–9 [b] (5) On trial for poisoning by arsenic, it is not error to exclude question put to sister of deceased who lived in same house as to whether arsenic had not at one time formed part of medicine taken by husband of witness. 252Mass450, 148NE113. (6) Where defendant charged with killing his wife testified that wife left him with another man whom he described, evidence as to apparent age and appearance of man seen near where body was found, who immediately disappeared, is properly excluded. 215Ky613, 286SW696.

168–14 But see 151Miss85, 117S361.

168–16 [a] **Evidence admissible.**–111 TexCr570, 13SW(2d)874.

168–17 See also Mo 292SW728.

168–21 166La924, 118S85; 145Wash4, 258P845.

168–23½–New. Account in newspaper not brought to attention of those referred to therein cannot be said to furnish motive. 161La532, 109S56.

168–24 22AlaA583, 118S242; Nev 285 P503.

169–34 215Ala27, 109S161; 216Ala247, 113S33; 22AlaA39, 111S767; 217Ky 608, 290SW498. But see 100TexCr261, 272SW492.

170–39 289Pa284, 137A261.

170–40 See also 22AlaA48, 112S93. [a] (10) Other instances. Mo 19SW(2d) 671.

170–42 217Ky608, 290SW498.

170–44½–New. Defense may show habit of accused to carry pistol to rebut theory of premeditation. 164Ga509, 139SE37.

170–45 169Ark1188, 278SW3; 216Ky 98, 287SW235, 238 [quotCJ]; 254NY 192, 172NE466; 137SC145, 134SE885; 156SC375, 153SE344; 53SD182, 220NW 615; 107TexCr585, 298SW587; 111Tex Cr182, 11SW(2d)519. [b] (9) Question as to time of arrest and period required to make bond under different indictment. 110TexCr254, 8SW(2d)171. (10) That defendant was bootlegger. 230Ky199, 18SW(2d)1005.

171–47 169Ga142, 149SE887; NJSup 142A643.

171–56 51ND445, 200NW20; 99TexCr 589, 271SW385.

171–58½–New. Where accused introduces evidence of emotional insanity caused by former wife's moral delinquencies, his own moral delinquencies may be shown. OkiCr 285P142.

171–60 172Ark61, 287SW747; 106Tex Cr90, 291SW238.

171–62 Mo 6SW(2d)903. But see 22 AlaA39, 111S767.

171–63 La 129S730; 103TexCr665, 281 SW1063.

171–66 172Ark61, 287SW747; 106Tex Cr90, 291SW238; 111TexCr116, 12SW (2d)218.

171–68½–New. Evidence that accused was expelled from a fraternal organization after the homicide is inadmissible. 315Mo 1259, 289SW865.

172–69 212Ala484, 103S458.

172–70 Miss 130S697.

172–72 143Miss324, 108S711, 46ALR 895.

172–74 143Miss324, 108S711, 46ALR 895.

172–77½–New. Where defendant offers no evidence of good character, it is error to introduce such in rebuttal. 219Ky 446, 293SW961.

172–79½–New. Nor may such evidence be brought out on cross-examination of accused's witnesses. 143Miss324, 108S 711, 46ALR895.

172–83 23AlaA456, 126S890(1stcase); 23AlaA475, 127S788; 195Cal 295, 232P 974; 215Ky613, 286SW696; 105TexCr 451, 288SW1082; 108TexCr516, 1SW (2d)883; 112TexCr524, 17SW(2d)1069; TexCr 29SW(2d)381(2dcase).

172–83½–New. Whether testimony of deceased's reputation is connected in point of time with the killing is within

the discretion of the trial judge. 134 SC329, 133SE31.

172-33½-New. The trial court has been held not to have abused its discretion in excluding testimony of deceased because it was not connected in point of time. 134SC329, 133SE31.

173-85 34Ariz129, 268P611; 169Ark 335, 275SW671; 195Cal 295, 232P974; OklCr 291P152; 105TexCr451, 288SW 1082.

173-88 165Ga210, 140SE625; 104Tex Cr608, 286SW228.

173-90 121Kan436, 247P437, 440 [quot CJ]; 107TexCr649, 298SW604; 112 TexCr245, 16SW(2d)127. [a] **In assault with intent to murder** rule applies, though statute refers to "deceased." 110TexCr116, 7SW(2d)958.

173-91 195Cal 295, 232P974 (state cannot show decedent's reputation for peace and quiet was good, though defendant had testified he used violent and profane language).

173-92 107TexCr453, 296SW602.

173-94 107TexCr649, 298SW604.

173-99½-New. Where deceased was shown to have been robbed, testimony as to the habit and custom of deceased, on closing store, of putting money into shot bags, and placing bags of money in grip or hand bag, is admissible. 137 SC145, 134SE885.

174-2 215Ky613, 286SW696; Mo 11 SW(2d)103; 107TexCr315, 296SW895; 108TexCr285, 300SW75.

174-3 161La796, 109S494; 50Nev271, 257P619. See also 110TexCr298, 8SW (2d)129.

174-7 But see 106Conn454, 138A456.

174-14 168Ark1145, 273SW19.

174-15 161La796, 109S494. [a] (6) 73 CalA580, 239P82. (10) That deceased's character and habits were those of a drug addict. 50Nev271, 257P619. (11) Other instances. 220Ala419, 125S682.

175-16 22AlaA39, 111S767.

175-18 21AlaA577, 110S171; 22AlaA 472, 116S896; 161La796, 109S494; 170 La507, 128S293; 107TexCr453, 296SW 602. [a] (9) Specific acts as to reputation, which was in issue. 108TexCr 516, 1SW(2d)883.

175-21½-New. But his reputation in a county other than that in which he lived may be shown. 100TexCr261, 272 SW492.

175-26 324 Ill 131, 154NE715; 108Tex Cr516, 1SW(2d)883. [a] **State may not prove that another had committed assault** with which deceased had been charged. 108TexCr516, 1SW(2d)883.

175-31 214Ala273, 107S737; 20AlaA 412, 103S694.

176-32 210Ky413, 276SW112; 109Tex Cr345, 4SW(2d)542.

176-33 214Ala675, 108S612. But see 21AlaA649, 111S645.

176-34 214Ala675, 108S612.

176-35 214Ala675, 108S612.

176-38 210Ky385, 275SW819 (sobriety of deceased).

176-39 22AlaA133, 114S68. But see 225Ky590, 9SW(2d)723(2dcase).

176-40 22AlaA133, 114S68 (liquor in car).

176-41 156SC509, 153SE480.

176-45 20AlaA412, 103S694.

176-49 [b] **Refusal to permit defendant to testify to his age** held not reversible error. 21AlaA611, 110S694.

177-60 23AlaA544, 129S303(2dcase); 158La1045, 105S59; Mo 27SW(2d)16.

177-61 23AlaA544, 129S303(2dcase); Mo 27SW(2d)16.

177-62 158La1045, 105S59.

177-70 87Colo 44, 285P162; 213Ky501, 281SW507; 214Ky620, 283SW958; 232 Ky590, 24SW(2d)280; 252Mass450, 148 NE113; 79Mont343, 256P380; 144SC 452, 142SE725. [a] (15) That war existed between two tongs of which defendants and decedent respectively were members. 33Ariz383, 265P609.

177-71 243NY320, 153NE433. [a] (7) That deceased had made second will without wife's knowledge reducing amount of property left to her. 243NY 320, 153NE433. (8) Defendant's acquaintance and relation with deceased held irrelevant to show opportunity. CalA 281P443.

178-78 41GaA618, 154SE201.

178-80 CalA 281P443 (objection erroneously sustained).

178-83½-New. Where defense seeks to show friendly relations, evidence that accused had been ordered from premises of father of prosecuting witness some years before and had not been there again until time of alleged attempt to commit murder is admissible to refute claim of friendship. 144Va594, 131SE 212.

178-84 113TexCr247, 20SW(2d)431.

178-85 235Ky469, 31SW(2d)728.

178-85½-New. Testimony by deceased's wife as to the reason for separating from deceased several days before the murder is inadmissible. 154Miss 862, 123S892.

178-87 22AlaA36, 111S763; 102TexCr 441, 278SW201. [c] **Quarrel of accused with wife over another woman immaterial** in prosecution for killing of man allegedly for familiarity with defendant's wife. 102TexCr441, 278SW 201.

178-96 But see 99TexCr656, 271SW 606.

179-6 169Ga455, 150SE587; 215Ky 613, 286SW696.

179-7 215Ky613, 286SW696 (previous assault); 29PortoRico 961 (evidence offered in rebuttal).

179-8 156Miss499, 126S29(3dcase).

179-18 See also 29PortoRico 961.

179-27 99TexCr627, 271SW87.

179-31 79Mont343, 256P380; 144Wash 446, 258P508.

179-35½-New. Evidence of defendant's motive in a case of assault with intent to murder is always relevant. 39GaA 21, 145SE904.

179-36 22AlaA583, 118S242; 156Md 240, 144A252; Vt 145A413; 151Va533, 145SE307.

179-37 213Ala541, 105S677; 20AlaA 550, 104S50; 22AlaA120, 113S494; 29 Ariz247, 240P863; 171Ark768, 286SW 939, 942 [citCJ]; 70CalA465, 233P812; 162Ga777, 135SE187; 327 Ill 393, 158 NE712; Ill 172NE728; 203 Iowa90, 212 NW312; 224Ky334, 6SW(2d)269; 224 Ky370, 6SW(2d)483; 230Ky411, 19SW (2d)1091, 66ALR360; 232Mich310, 205 NW188 (if intent appears); 238Mich 332, 213NW104; 79Mont343, 256P380; 115Nebr737, 214NW643; NJ 151A737 (2dcase); 32NM500, 258P1009; 289Pa 284, 137A261; 100TexCr433, 273SW 586; 103TexCr636, 282SW251; 105 TexCr152, 287SW265; TexCr 26SW(2d) 225; TexCr 31SW(2d)815. But see CalA 286P476. [a] (1) See also 230Ky 411, 19SW(2d)1091, 66ALR360. (2) Evidence of motive is admissible to give jury opportunity to increase or diminish punishment accordingly. 230Ky 411, 19SW(2d)1091, 66ALR360. [c] **Particular evidence admissible.**–213Ala 541, 105S677.

180-38 Cal 285P704; 313Mo 615, 285 SW392.

180-39 22AlaA120, 113S494; 71CalA 453, 236P163; 327 Ill 393, 158NE712; 216Ky832, 288SW768; 168La584, 122 S858.

180-40 219Ala282, 122S45; 22AlaA338, 115S695; 40GaA123, 149SE51; 327 Ill 393, 158NE712; 310Mo 500, 276SW625; Vt 145A413.

180-42 218Ala442, 118S654; 162Ga777, 135SE187; 216Ky832, 288SW768. See also Ga 154SE700.

180-43 171Ark768, 286SW939; 166Ga 15, 142SE105; 39GaA836, 148SE610; 315Mo 7, 285SW489; OklCr 278P404; 144Wash446, 258P508; 103WVa427, 137 SE649. [b] (1) 161La863, 109S519. (4) Letter written by accused to wife of deceased is admissible. 228Ky830, 16 SW(2d)478. [f] **Evidence of insolvency of company** of which defendant was manager and large owner of common stock held admissible to show motive in killing alleged to have been for purpose of obtaining from deceased large block of preferred stock. 121Kan383, 247P 843. [g] **Evidence of improper intimacy** between defendant and his stepdaughter and of defendant's having induced her to accuse deceased has been held admissible. 110TexCr206, 7SW(2d)1086.

181-44 33PortoRico 48.

181-45 315Mo 7, 285SW489; Mo 23SW (2d)22; 103WVa427, 137SE649.

181-47 238Mich332, 213NW104.

181-50½-New. Defendant's admission of homicide does not prevent state's introducing proof of motive. 79Mont343, 256P380.

181-51 107TexCr58, 294SW852; 109 TexCr518, 6SW(2d)119; TexCr 31SW (2d)655.

181-53 25F(2d)546; 22AlaA88, 112S 542; 205Cal 462, 271P497; 71CalA453, 236P163; 170Ga859, 154SE344; Ga 154 SE799; 218Ky703, 292SW336; 229Ky 617, 17SW(2d)757; 252Mass450, 148NE 113; 79Mont343, 256P380; 103TexCr 636, 282SW251; 106TexCr222, 291SW 558; Vt 145A413; Va 152SE366. [a] 29Ariz247, 240P863; 199Cal 357, 249P 177; 209Ky59, 272SW29. [c] **In prosecution for murder resulting from jail delivery,** state may show reason for defendant's detention in jail. 203 Iowa90, 212NW312.

181-56 20AlaA412, 103S694.

182-59 20AlaA412, 103S694.

182-63 331 Ill 608, 163NE453; 117Nebr 304, 220NW292.

182-64½-New. When involuntary manslaughter is charged, absence of motive raises no presumption of innocence and is wholly irrelevant. 143Va579, 130SE 389.

182-66 21AlaA256, 107S222; 171Ark 768, 286SW939; 327 Ill 393, 158NE712; 224Ky160, 5SW(2d)899; 229Ky312, 17 SW(2d)241; 164La423, 114S83; 104Tex Cr127, 283SW512; 107TexCr444, 296SW 897. [a] 111TexCr116, 12SW(2d)218.

182-67 49ND228, 191NW345. [a] **Trouble between defendant and decedent's mother-in-law.**–228Ky151, 14SW (2d)387.

182-69 148Miss680, 114S750.

182-70 174Ark899, 298SW349; 198Cal 426, 245P426 (holding up and robbing patrons of deceased's store and shooting two of her friends); 224Ky334, 6 SW(2d)269; Mo 23SW(2d)22; 33Porto Rico 48; 104TexCr127, 283SW512; 105 TexCr327, 288SW458; Vt 145A413. [a] (1) 104TexCr127, 283SW512; 111TexCr 116, 12SW(2d)218.

183-72 220AlaA412, 103S694; 180Ark 197, 20SW(2d)872; 84CalA58, 257P592; 225Ky286, 8SW(2d)411; 229Ky708, 17 SW(2d)999; 232Ky613, 24SW(2d)269; 169La135, 124S670(2dcase); 316Mo 904, 292SW714; 49ND228, 191NW345; 105 TexCr 152, 287SW265. But see TexCr 26SW(2d)915. [d] **That party assaulted was county attorney** who had occasion to perform official duties against defendant. 112TexCr305, 16SW(2d)539 (2dcase).

183-74 Ala 130S175; 49ND228, 191NW 345; 33PortoRico 48. [b] **Defendant's statements of close association with deceased held inadmissible** to show motive. CalA 281P443.

183-75 105TexCr272, 288SW207.

183-76 Ala 122S34; 162Ga307, 134SE 41 [citCJ] (Beck, P. J. and Gilbert, J.); 112TexCr659, 18SW(2d)181.

183-77 229Ky708, 17SW(2d)999.

184-79 162Ga307, 134SE41 [citCJ] (Beck, P. J. and Gilbert, J.).

184-79½-New. Judgment in civil proceedings between defendant deceased showing final termination thereof for accused permitting jury to infer that accused's feelings would have been kinder toward deceased than those of latter toward him is improperly excluded. 162 Ga307, 134SE41.

184-80 [c] **Conversation of defendant** with another on way to place of homicide about an uninterested party is inadmissible. 20AlaA412, 103S694.

184-81 215Ala229, 110S21; 164Ga509, 139SE37.

184-84 174Ark1180, 298SW3; 162Ga 573, 134SE169; 112TexCr194, 15SW (2d)1043.

184-85 109TexCr283, 4SW(2d)47. But see 100TexCr241, 272SW788.

184-87 115Nebr737, 214NW643.

184-88½-New. **In prosecution for murder of former wife,** in which defense was insanity, and defendant's evidence indicated great affection of defendant for his wife, the commonwealth was entitled to disprove the existence of such affection and to show previous threats of homicide. 227Ky528, 13SW(2d)521.

184-89 216Ala336, 113S64; 167Ga325, 145SE449; 232Ky453, 23SW(2d)930;

82NH518, 136A358.

184-90 201Cal 341, 257P64; 49ND228, 191NW345 (assault with intent to kill).

184-96 219Ala83, 121S72, 63ALR560.

185-99 22AlaA93, 112S806; 227Ky404, 13SW(2d)247; 115Nebr737, 214NW643.

185-4 166Ga182, 142SE676; 224Ky370, 6SW(2d)483; 156Miss499, 126S29(3d case).

185-5 7F(2d)313; 145Miss227, 110S 500; 9PaDist&Co 161.

186-12 30Ariz448, 247P1103; 1105 [cit CJ]; 70CalA531, 233P980; 93Fla504, 112S83; 320 Ill 495, 151NE280; 166La 924, 118S85; 5PaDist&Co 559.

186-17 But see 70CalA531, 233P980.

186-23 TexCr 27SW(2d)198(2dcase).

186-24 68CalA545, 229P987 (written declaration of accused); 41GaA574, 153 SE613; 107TexCr293, 296SW516. [b] (3) Accused's letters written to deceased on day preceding homicide held admissible. 68CalA545, 229P987.

187-34½-New. Admission of testimony that defendant's wife was jealous of deceased has been held error. 110TexCr 254, 8SW(2d)171.

187-38 70CalA465, 233P812.

187-40½-New. Admission of testimony as to the production of a letter at a court of inquiry, showing a pecuniary motive, held error where defendant was not present at the inquiry. 222Ky546, 1SW(2d)961.

187-41 220Ala501, 126S127(2dcase); 166Ga758, 144SE301; 230Ky725, 20SW (2d)745; 230Ky315, 20SW(2d)998; 150 Miss206, 116S746; 300Pa125, 150A290 (2dcase); 104TexCr661, 285SW617; 145 Wash4, 258P845. [f] **Evidence of defendant's concealment** of money in hat is admissible. 215Ala497, 111S212. [g] **Defendant's possession of money of same denomination** as that left in safe where watchman was murdered is admissible, though money not exactly identified. 230Ky725, 20SW(2d)745.

187-43 104TexCr661, 285SW617.

187-44 166Ga512, 143SE896.

187-45 166Ga758, 144SE301; Nev 285 P503; 104TexCr661, 285SW617; 111 TexCr205, 13SW(2d)80. [d] NH 130A 742.

187-48 111TexCr320, 12SW(2d)1788. Contra 106TexCr593, 294SW573.

188-52½-New. In a prosecution for murder of one killed by an intruder who had entered his house, testimony of a police officer detailing the conversation with defendant after arrest, in which defendant stated that he was a housebreaker, was admissible to show motive for entering deceased's house. 105NJL352, 144A612.

188-57½-New. Evidence that defendant was seen with a third party in an automobile the day before the homicide is of no probative force as rebutting the theory that defendant killed deceased to get his car; 104TexCr567, 285SW1094.

188-57½-New. so, statements of defendant before the homicide as to a different automobile are inadmissible in the absence of a showing of its connection with such car. 104TexCr567, 285SW1094.

188-58 100TexCr24, 271SW81.

188-60 252Mass450, 148NE113. [a] **Wealth of others.**-252Mass450, 148NE 113.

188-62 252Mass450, 148NE113.

188-64 243NY320, 153NE433.

188-65 81CalA226, 253P735; 243NY 320, 153NE433.

188-67½-New. but not that his inquiries before the act as to the financial means of deceased; a relative did not appear, to another relative, as strange and unnatural. 252Mass450, 148NE113.

188-67½-New. Taking out administration. No error in permitting a sister of deceased to testify that she did not know why accused, a nephew of deceased had sought administration after she had applied for it. 252Mass450, 148NE113.

188-67¼-New. Statement of defendant that he deeded his property to his wife and wanted to get it back, but she would not agree to it, was admissible as tending to show motive. 219Ala282, 122S45.

188-67½-New. In a prosecution of a husband for the murder of his wife, on the theory that the motive inducing the offense was that defendant might become possessed of property of both his wife and her foster mother, any act of defendant which could logically be claimed to be part of the execution of this plan was material, regardless of whether it was prior or subsequent to the commission of the crime. 244Mich 622, 222NW185.

188-70 Ga 154SE332; 100TexCr24, 271 SW81; 113TexCr188, 19SW(2d)319.

189-81½-New. A defendant, charged with conspiracy with another to procure insurance on life of deceased for purpose of dividing proceeds after commission of murder, has right to introduce evidence that she and deceased were getting other insurance of which the other alleged conspirator knew nothing. 307Mo 393, 270SW286.

189-83 213Ala358, 104S656; 21AlaA 227, 107S37; Ark 32SW(2d)619; 167 Ga271, 145SE517, 63ALR179; 327 Ill 393, 158NE712; 209Ky157, 272SW397 (admissible as substantive evidence of offense, not merely as proof of malice); 143Miss352, 108S727; 310Mo 500, 276 SW625; 101TexCr333, 275SW831.

189-84 But see 221Ky648, 299SW553.

189-89 53ND879, 207NW1000. [c] **In prosecution for homicide committed in latter part of August,** evidence of threats made during May, June, July, and August of same year, was not so remote as to be incompetent. 178Ark1121, 13 SW(2d)606.

190-90 [a] **Threats not too remote.**-209 Ky263, 272SW721.

190-91 265Mass382, 163NE251(2dcase).

190-98½-New. Evidence of a witness in a prosecution for murder of defendant's wife that he had heard a woman screaming ten days previous to the date of the alleged offense and begging some one to stop and not do it, and a man tell her to shut up or he would cut her throat, without identification of the parties making the statements, is inadmissible. 111TexCr116, 12SW(2d)218.

190-99 213Aja358, 104S656; 99TexCr 627, 271SW87.

190-1 161La532, 109S56; 99TexCr627, 271SW87; TexCr 26SW(2d)227. [a] (3) Threats against man who had broken gun "for some of his folks." 209Ky 263, 272SW721.

190-3 221Ky648, 299SW553.

190-4 161La863, 109S519; 100TexCr67, 272SW154. [a] (8) That defendant would guard his liquor and nobody would get it. 213Ala541, 105S677 (on being told officers were coming).

191-5 213Ala358, 104S656; 100TexCr 67, 272SW154.

191-8 100TexCr67, 272SW154.

191-10 22AlaA274, 114S786; 162Ga208, 132SE911; 161La532, 109S56, 71 [cit CJ]; 295Pa190, 145A85; 107TexCr151, 295SW1098. [b] **Statement of defendant to wife's roommate** that he was going to "make it hot for the whole damn bunch" was admissible in homicide prosecution, though introduced by preliminary attempt to impeach defendant on that issue. 227Ky528, 13SW(2d)521.

191-11 107TexCr151, 295SW1098.

191-16 21AlaA464, 109S375.

191-18 214Ala273, 107S737. [a] **Statement not part of threat proved held** properly excluded. 21AlaA455, 109S295.

191-20 235Ky845, 32SW(2d)405. [a] **Admission of fact of communication of threats** and exclusion of reply of defendant has been held not error. 234Ky 45, 27SW(2d)410.

191-21 209Ky566, 273SW30, 31 [citCJ].

191-25½-New. Where the defense is self-defense, the only purpose for which uncommunicated threats may be admitted is to determine who was the agressor. 106TexCr338, 294SW584.

192-30 140Miss238, 105S497.

192-32 Ky 12SW(2d)326.

192-34 23AlaA539, 128S589; 230Ky 569, 20SW(2d)447.

192-35 Ark 31SW(2d)288.

192-36½ New. Threats made by a third person, not against any particular person, nor containing any particular threat against any one specifically, are not admissible in evidence in favor of defendant. 151Miss752, 118S726.

192-39 326 Ill 518, 158NE142.

192-41 22AlaA274, 114S786; 22AlaA 583, 118S242; 214Ky280, 283SW84; 108 TexCr19, 298SW601. [c] (2) 194NC459, 140SE26.

192-42 [a] **Evidence that unknown and unidentified men asked to buy shells** is admissible. 316Mo 576, 292SW411.

193-46 312Mo 673, 280SW1026, 44ALR 848.

193-52 See also 283Pa327, 129A86.

193-53 213Ala301, 104S668; 214Ala2, 106S617; 22AlaA57, 112S181; 21AlaA 565, 110S55; 22AlaA583, 118S242; 23 AlaA359, 125S688; 201Cal 474, 259P47; 81CalA226, 253P735; 166Ga15, 142SE 105; 331 Ill 581, 163NE373; 210Ky385, 275SW819; 213Ky501, 281SW507; 232 Ky453, 23SW(2d)930; 232Ky500, 23SW (2d)940; Mo 281SW960; 316Mo 995, 292SW70; 32NM500, 258P1009; 195NC 242, 141SE736; 51ND445, 200NW20; 116 Or509, 241P983; 118 Or397, 247P 146. See also 214Ala76, 106S618. [b] (3) Evidence of anger and resentment toward third person, to whom deceased transferred note of defendant, held admissible. 105TexCr508, 289SW398. [f] **In prosecution for negligent homicide by automobile,** testimony as to defendant's use of whisky prior to homicide is admissible, where part of case was that crime was committed while defendant was intoxicated or transporting liquor. 105TexCr468, 288SW1081. [g] **Evidence of distribution of communist newspaper** before murder is competent, where murder arose out of alleged conspiracy, to show purpose. NC 154SE604.

193-54 214Ala2, 106S617; 215Ala27, 109S161; 216Ala475, 113S393; 219Ala 46, 121S38; 21AlaA313, 108S77; 21AlaA 577, 110S171; 22AlaA255, 114S475; 22 AlaA338, 115S695; 23AlaA539, 128S589 (defendant's drinking whisky before homicide); 171Ark672, 285SW377; 180 Ark197, 20SW(2d)872 (in prosecution for assault with intent to kill); 181Ark 331, 25SW(2d)769; Ark 32SW(2d)619; 72CalA318, 237P53; Ga 155SE11; 318 Ill 332, 149NE266; 324 Ill 131, 154NE 715; 216Ky724, 288SW680; 226Ky318, 10SW(2d)1099; 227Ky404, 13SW(2d) 247; 161La796, 109S494; 169La109, 124 S183; 32NM319, 255P396; 102TexCr 441, 278SW201; 104TexCr619, 286SW 214; 105TexCr451, 288SW1082; 107 TexCr32, 294SW541; 106TexCr642, 294 SW557; 107TexCr307, 296SW582; 113 TexCr112, 18SW(2d)643; 153Va909, 150 SE407. [b] (2) That assaulted party had fallen and cut his head at time prior to difficulty is wholly immaterial. 21AlaA348, 108S262. [f] 22AlaA583, 118S242. [g] **Exclusion of evidence held not error.**-21AlaA111, 105S427 (where it shed no light on acts complained of). [h] **Telephone conversations.**-21AlaA348, 108S262.

194-55 246NY437, 159NE390; 101TexCr 454, 276SW715.

194-56 101TexCr454, 276SW715. See also 104TexCr583, 286SW231.

194-57 209Ky59, 272SW29. [b] **Details of rape of defendant's wife.**-40Wyo 184, 276P458.

194-58 218Ala442, 118S654.

195-61 164La813, 114S696; Mo 30SW (2d)132; 51ND445, 200NW20; 287Pa1, 134A465.

195-64 219Ala282, 122S45; 149Miss 171, 115S217; Mo 278SW1009.

195-66 164La813, 114S696; NC 154SE 604; 105TexCr291, 288SW226. [f] **Evidence showing drinking party** and fight. 143Va479, 129SE348.

196-67 164La813, 114S696; 137SC145, 134SE885. [b] **That deceased returned to house** to get coat. 143Va479, 129SE 348.

196-69 147SC514, 145SE404.

196-73 227Ky439, 13SW(2d)244.

196-78½-New. Excluding testimony that state's witness, armed with revolver, visited home of deceased held not error. 32NM319, 255P396.

196-78½-New. A question as to when defendant left witness' home is admissible to rebut defendant's statement that deceased was then at his home. 164La 813, 114S696.

196-78¼-New. Where accused and two others took deceased for a ride during

which the latter was shot, evidence that accused's companions were members of a union is admissible. Mo 23SW(2d)22.

196-80 181Ark331, 25SW(2d)769; Cal A 292P693; 126Kan282, 267P1109; 215 Ky613, 286SW696; 225Ky671, 9SW(2d) 1018; 164La423, 114S83; 143Miss352, 108S727; 144Miss447, 110S124; 133SC 491, 131SE603.

196-81 169Ga142, 149SE887; 126 Or 560, 270P404.

196-82 23AlaA253, 123S277(1stcase); 126 Or560, 270P404.

196-83 209Ky203, 272SW423; 224Ky 443, 6SW(2d)488; 143Miss352, 108S 727; Miss 113S219; 143SC318, 141SE 559. See also 21AlaA33, 104S878. [a] (3) Why defendant's sister, wife of deceased, did not report her differences with deceased held properly excluded. 153SC25, 150SE321.

197-84½-New. Defendant has the right to show the general nature and gravity of alleged former difficulty admitted in evidence on behalf of prosecution. 21 AlaA33, 104S878.

197-85 23AlaA456, 126S890(1stcase).

197-86 23AlaA26, 119S863(1stcase); 23 AlaA185, 122S296; 220Ala419, 125S682; 161La796, 109S494.

197-87 219Ala670, 123S50; 161La796, 109S494. [a] **Evidence of difficulty between deceased and others than defendant** is admissible when connected with fatal shooting. 112TexCr194, 15SW(2d) 1043.

197-88 23AlaA329, 125S64(2dcase); 161La796, 109S494.

197-90 170Ga843, 154SE232; 105Tex Cr369, 288SW227.

197-91 126Kan282, 267P1109.

197-93 21AlaA464, 109S375; 318 Ill 316, 149NE236; 110TexCr220, 7SW(2d) 543.

197-4 220Ala419, 125S682; 21AlaA455, 109S295; 21AlaA577, 110S171; 23AlaA 456, 126S890(1stcase); 339 Ill 78, 170 NE690; Iowa 206NW620 (in prosecution for assault with intent to murder); 222Ky546, 1SW(2d)961. [b] **Testimony as to trouble occurring between defendant and deceased twenty years before** killing, wherein deceased hit and shot defendant, is properly excluded as remote, since evidence showed that deceased and defendant were on good terms at time of killing. 179Ark94, 14 SW(2d)261.

198-5 93CalA81, 269P177; CalA 292P 693; 232Ky613, 24SW(2d)269; 34Wyo 247, 242P812.

198-6 23AlaA416, 125S398; Ill 172NE 740; 210Ky421, 276SW119; 225Ky590, 9SW(2d)723(2dcase); 235Ky471, 31SW (2d)721; 142Miss872, 108S143; 133SC 491, 131SE603; 101TexCr587, 276SW 699 (tending to show defendant aggressor); 104TexCr371, 283SW816; 107Tex Cr444, 296SW897.

198-7 210Ky421, 276SW119; 142Miss 872, 108S143; Mo 29SW(2d)60; 102 NJL134, 130A642.

198-9 133SC491, 131SE603.

198-13 21AlaA573, 110S169.

198-19 23AlaA26, 119S863(1stcase).

198-20 [a] (2) Statement by defendant two hours before shooting that he had had trouble with man, not deceased, is inadmissible. 214Ky280, 238SW84.

198-21½-New. Previous declarations of intention to resist arrest admissible to show motive for murder in resisting arrest by prohibition officer when properly limited. 143Va592, 130SE398.

198-22 174Ark1180, 297SW830. [a] **Proof that defendant** on way to decedent's house made no threats is incompetent. 20AlaA412, 103S694.

199-23 102TexCr579, 278SW1105.

199-25 218Ala442, 118S654; 171Ark 768, 286SW939; 331 Ill 581, 163NE373; 161La532, 109S56; 316Mo995, 292SW 70; Nev 285P503; 287Pa512, 135A301. [e] (3) In prosecution for murder, based on abortion claimed to have been practiced by defendant, refusal to admit testimony as to statements made by alleged victim, at time she came to defendant for treatment, was erroneous. 96 CalA430, 274P433.

199-27 82Colo 205, 258P226; 28Hawaii350.

199-28 287Pa512, 135A301.

199-29 166Ga15, 142SE105; 218Ky721, 292SW307; 32NM500, 258P1009; 133 SC491, 131SE603; 101TexCr454, 276SW 715; 103TexCr372, 280SW802; TexCr 28SW(2d)164.

199-30 92Fla1094, 111S245.

199-30½-New. Testimony as to statements of prosecuting witness in proceeding for maliciously shooting and wounding another with intent to kill is irrelevant and properly rejected. 214Ky125, 282SW775.

200-32 335 Ill 217, 167NE1; 101TexCr 454, 276SW715; 104TexCr619, 286SW 214.

200-34 102TexCr579, 278SW1105.

200-35 105TexCr508, 289SW398.

200-36 229Ky312, 17SW(2d)241.

200-38 21AlaA405, 108S641; 22AlaA 36, 111S763; 22AlaA491, 118S248; Ill 173NE112 (where no eyewitnesses); 225Ky590, 9SW(2d)723(2dcase); 233Ky 820, 27SW(2d)80; 234Ky45, 27SW(2d) 410; 126Me239, 137A400; NJ 140A452; 195NC242, 141SE736; 133SC491, 131SE 603; 100TexCr438, 273SW586; 104Tex Cr649, 285SW621; 109TexCr345, 4SW (2d)542. [j] **Evidence of incriminating** acts of deceased defendant is admissible. 199Cal 471, 250P168. [k] **Testimony of wounds found on bodies of relatives of deceased alleged to have been murdered at same time** held admissible. 133SC 491, 131SE603. [l] **Where two persons are killed at same time and place,** as part of same event, evidence as to circumstances of killing of one is admissible on trial of defendant for killing of other. 78Mont560, 254P858. [m] **Statute making all relevant facts and circumstances admissible** does not extend rules of evidence. TexCr 27SW(2d)236. [n] **Inflammatory evidence.**—In prosecution for murder, evidence is not rendered inadmissible by sheer force of fact that it might prove inflammatory. 111TexCr 205, 13SW(2d)80.

200-39 214Ala2, 106S617; 21AlaA573, 110S169; 72CalA318, 237P53; 166Ga15, 142SE105; 327 Ill 162, 158NE462; 155 Md474, 142A497; 110TexCr220, 7SW (2d)543. [d] **Where state's witness in homicide prosecution had stated** on cross-examination that he had attempted to strike defendant by throwing stick at him after defendant had knocked deceased down, sustaining of objection to question on recross-examination as to where witness got stick was not error, it being wholly immaterial. 167La1085, 120S865. [e] **Refusal to permit witness,** who had testified that defendant and deceased were drunk, to answer question whether any one else in crowd was drunk, is proper, since fact that other people who were not called as witnesses were drunk was immaterial. 167La 1085, 120S865. [f] **Question as to who went after doctor** for deceased, purpose of which was to show that defendant's mother sent for him was properly excluded as immaterial. 167La1085, 120 S865.

201-41 198NC704, 153SE259(3dcase). [i] **Evidence of acts of third persons.**—(1) 100TexCr235, 272SW777.

201-45 25F(2d)546; 78Mont560, 254P 858.

201-53 219Ala282, 122S45; 21AlaA405, 108S641; 21AlaA551, 109S897; 133SC 491, 131SE603.

201-54 219Ala282, 122S45.

202-56 21AlaA528, 109S560; 233Ky9, 24SW(2d)946; 133SC491, 131SE603; 150Va588, 142SE369.

202-60 22AlaA36, 111S763.

202-62 22AlaA36, 111S763; 33Porto Rico 48.

203-65 [b] In Porto Rico.—33Porto Rico 48.

203-66 33PortoRico 48.

203-68 See also 33PortoRico 48.

203-68½-New. Measurements of distances, in and about place of homicide, by speedometer is admissible as part of locus in quo. 21AlaA15, 105S714.

203-69 172Ark244, 288SW904; 5Pa Dist&Co 559.

203-73 164Ga250, 138SE153; 133SC 491, 131SE603.

203-74 133SC491, 131SE603.

203-75 164Ga250, 138SE153; 126Me 239, 137A400; OklCr 287P782.

203-77 113TexCr291, 21SW(2d)524.

203-82 AlaA 129S785(2dcase); 201 Cal 474, 259P47; 163Ga186, 136SE72; 163Ga561, 136SE530; 199 Ind592, 159 NE420, 428 [citCJ]; 165La842, 116S 206; 291Pa291, 139A850; 107TexCr 332, 296SW547.

204-84 214Ala2, 106S617; 22AlaA567, 117S906; Ala 130S175; 22AlaA120, 113S494; 22AlaA561, 117S614; 73CalA 580, 239P82; 216Ky724, 288SW680; 252Mass450, 148NE113; Mont 289P 1037; 198NC545, 152SE630; 54SD552, 223NW943; 102TexCr579, 278SW1105. [a] (12) That accused some half hour after killing of special policeman, being himself wounded, cursed another special policeman. 209Ky817, 273SW503. (13) Details of telephone conversation between accused and assaulted party after assault. 21AlaA348, 108S262. (14) That codefendant was lynched in another county after acquittal. 150Miss206, 116S746.

204-85 79CalA506, 250P208; 166Ga 512, 143SE896; 233Ky545, 26SW(2d) 489; 168Minn263, 209NW881; Mo 18 SW(2d)8.

205-87 78CalA476, 248P981; 79CalA 506, 250P208; 166Ga10, 142SE160; SD 229NW373 (acts showing preconceived plan and continued execution); 66Utah 223, 241P314. [a] Iowa 227NW601; 196NC562, 146SE395. [c] **Evidence that defendant offered to pay officers** one hundred dollars for his release was admitted. 219Ala282, 122S45.

205-89 23AlaA217, 123S107(2dcase); 190NC506, 130SE308.

205-4 But see 51ND445, 200NW20.

205-4½-New. Testimony of the sheriff that defendant did not tell him of shooting by deceased before the homicide is admissible. 177Ark186, 6SW(2d)34.

205-4⅓-New. In trial for malicious shooting with intent to kill, testimony as to defendant's conduct at a hotel, to which he took the prosecuting witness after the shooting, and following their departure therefrom until she was rescued from the room to which he took her, is admissible to prove defendant's motive and frame of mind, being part of one continuous transaction engaged in for the execution of one purpose. 227 Ky249, 12SW(2d)289.

205-6 22AlaA57, 112S181; 20AlaA570, 104S140 (testimony, that fifty minutes after shooting, and after persons other than witness had been on scene of alleged crime, witness did not find knife, held properly admitted over defendant's objection); AlaA 129S797; 177Ark534, 7SW(2d)5; 179Ark1055, 20SW(2d)120; 154Miss671, 122S766(2dcase). [d] (3) Evidence that nine months after fire parts of furniture were found in ruins held properly excluded. 110Conn55, 147A118.

206-7 214Ala91, 106S503. [b] (1) 227 Ky83, 11SW(2d)996. (2) Testimony as to condition of defendant's automobile on day after homicide is not admissible where condition is not shown to be same as it was immediately after homicide. 151Miss752, 118S726.

206-8 86CalA148, 260P591; 229Ky348, 17SW(2d)345. [f] **Finding under direction of accused's co-conspirator.**—Fact that articles were found after talking with defendant's co-conspirator does not render evidence of finding inadmissible where witnesses did not testify to any part of conversation. 99TexCr305, 268 SW941, 269SW1056.

206-11 119 Or409, 243P72 (skidmarks on pavement after involuntary manslaughter by auto driven at dangerous speed). [a] **Witness, who had measured distance** between parties and objects involved, after shooting, was allowed to testify thereto in murder prosecution. 23AlaA51, 121S698.

206-12 99TexCr589, 271SW385.

206-13 TexCr 25SW(2d)870.

206-14 21AlaA573, 110S169.

206-17 See also 159La674, 106S28.

207-30½-New. In a prosecution for murder, testimony of a physician as to wounds and bruises on the body of the widow of deceased is competent to corroborate her testimony that she and her husband were assaulted by defendant. 105TexCr590, 289SW691.

207-31 214Ala91, 106S503. [d] **Ab-**

sence of proof that body was in same condition as at time of homicide, or that no attention or treatment of body had been made after infliction of wounds, does not render testimony inadmissible, but goes merely to its weight. 105**Tex Cr**494, 288**SW**1074.

207–33 107**TexCr**444, 296**SW**897.

207–34 105**TexCr**494, 288**SW**1074. [a] **Layman** may testify as to whether he saw wounds on examination of body. 168**La**976, 123**S**645.

207–35 22**AlaA**36, 111**S**763; 105**TexCr** 494, 288**SW**1074.

208–46 [a] (4) Undertaker who prepared body is qualified to testify as to location of wound. 23**AlaA**92, 121**S**447 (1stcase).

208–47 23**AlaA**92, 121**S**447(1stcase).

208–51 22**AlaA**561, 117**S**614.

208–54 [a] (3) Undertaker may testify to location and depth of wounds. 213 **Ala**358, 104**S**656.

209–62 232**Ky**52, 22**SW(2d)**418 (eccentric actions, though not part of res gestæ); 99**TexCr**98, 272**SW**134; 104 **TexCr**15, 282**SW**580; 107**TexCr**444, 296 **SW**897. [a] 199**Cal** 471, 250**P**168. [c] **Objection as too remote** overruled, as going to weight and not admissibility of evidence. 99**TexCr**589, 271**SW**385.

209–65 217**Ala**225, 115**S**297; 22**AlaA** 583, 118**S**242; **Ill** 173**NE**155.

209–66 179**Ark**625, 17**SW(2d)**317.

209–67 214**Ala**2, 106**S**617.

209–68 219**Ala**670, 123**S**50; 107**TexCr** 332, 296**SW**547. [b] **Similarity to weapon previously repaired for deceased.**–(1) Testimony of firearms repairman that revolver taken from defendant answered description of revolver previously repaired for deceased is admissible. 255 **Mass**369, 151**NE**839. (2) Testimony of firearms salesman that such revolver had not been sold as uncalled for goods. 255**Mass**369, 151**NE**839.

209–70 103**TexCr**665, 281**SW**1063; 104 **TexCr**456, 284**SW**578.

209–72 But see 201**Cal** 474, 259**P**47.

209–74 23**AlaA**83, 121**S**2(2dcase).

209–75 224**Ky**370, 6**SW(2d)**483, 486 [citCJ]; 102**NJL**569, 134**A**110; 34**Wyo** 247, 242**P**812.

210–78½–New. Testimony whether pistol with which killing was done was concealed is relevant. 21**AlaA**116, 105**S** 435.

210–78½–New. Testimony as to the position of deceased's gun is admissible where it is shown that the surroundings had not changed. 105**TexCr**272, 288**SW** 207.

210–85 But see 325 **Ill** 337, 156**NE**378 (testimony that accomplice had money after holdup is inadmissible).

210–86 But see **CalA** 290**P**655.

210–93 199**Cal** 451, 249**P**859; 227**Ky** 439, 13**SW(2d)**244; 150**Miss**787, 117**S** 119; 190**NC**506, 130**SE**308; **NC** 154**SE** 604. [d] (3) 194**NC**459, 140**SE**26. (6) In prosecution for murder, evidence that defendant, while at large after fleeing from scene of crime, went under assumed name and grew mustache, is admissible. 295**Pa**190, 145**A**85.

211–94 219**Ala**282, 122**S**45; 34**Ariz**129, 268**P**611. [e] **Possession by defendant of box of cartridges** and sawed-off rifle held admissible as circumstance attendant on flight. 199**Cal** 451, 249**P**859.

211–95 163**Ga**561, 136**SE**530; 191**NC** 526, 132**SE**281, 282 [quotCyc].

211–99 113**TexCr**291, 21**SW(2d)**524.

211–5 See also 238**Mich**332, 213**NW**104.

211–7 149**Miss**280, 115**S**213.

211–11 156**Miss**731, 126**S**824(2dcase); 196**NC**351, 145**SE**677(2dcase).

211–12 107**TexCr**151, 295**SW**1098.

211–15 [d] **Evidence held irrelevant and immaterial.**–Question as to distance of place from killing to place where defendant went afterward. 159**La**674, 106 **S**28. [e] **Evidence properly excluded.**–Defendant's testimony that he left state because mother and brother advised it as deceased's people might kill him. 225**Ky**275, 8**SW(2d)**415.

212–24 21**AlaA**211, 106**S**891; 143**Miss** 438, 108**S**810; 104**TexCr**15, 282**SW**580; 106**TexCr**500, 293**SW**1112; 110**TexCr** 460, 9**SW(2d)**259. [c] **Statements part of res gestæ.**–100**TexCr**241, 272**SW**788. [d] **Fact that defendant, after arrest, gave false name and made untrue statements to district attorney and officer** may be shown. 255**Mass**304, 151**NE**297, 47**ALR**962. [e] **Statement as to previous threat.**–In murder prosecution, admission of testimony as to defendant's remark few minutes after homicide that he had told certain person that he would kill "him" is not error, in view of evidence showing that defendant, by use of word "him," referred to deceased. 228**Ky**432, 15**SW(2d)**273.

212–26 98**Fla**881, 124**S**445.

212–27 [a] **Evidence that defendant, when arrested after flight, was asked whether gun shown him** was gun he had on night of killing, to which he answered he had a different gun which he subsequently sold, is not inadmissible on ground that question was not directed at homicide charged. 295**Pa**190, 145**A** 85. [b] **Admission of evidence erroneous.**–**CalA** 290**P**655.

212–29 230**Ky**250, 19**SW(2d)**218.

212–33 175**Ark**1083, 3**SW(2d)**23; 106 **TexCr**482, 293**SW**173. [b] 218**Ala**442, 118**S**654.

213–34 112**TexCr**305, 16**SW(2d)**539(2d case).

213–35 213**Ala**358, 104**S**656; 105**TexCr** 152, 287**SW**265; 112**TexCr**305, 16**SW** **(2d)**539(2dcase).

213–42 148**Miss**680, 114**S**750. See also 83**CalA**463, 256**P**876.

213–43 218**Ala**40, 117**S**457.

213–44 See also 327 **Ill** 162, 158**NE**462.

213–48 168**Ark**1005, 272**SW**671.

213–54 176**Minn**562, 223**NW**917.

213–55 93**Fla**504, 112**S**83; 164**Ga**250, 138**SE**153; **OklCr** 287**P**826; 105**TexCr** 531, 289**SW**395; 111**TexCr**172, 11**SW** **(2d)**798.

214–56 164**Ga**250, 138**SE**153.

214–61 140**Miss**881, 105**S**520.

214–61½–New. Statements of deceased to an officer, where accused was not present, are inadmissible. 107**Conn**148, 139**A**632.

214–68½–New. Decedent's statements, in defendant's presence, that shooting was accidental are not binding on state. 235**Ky**670, 32**SW(2d)**29.

214–69 But see 232**Ky**691, 24**SW(2d)** 564.

214–70 But see 110**TexCr**220, 7**SW(2d)** 543.

214–71 170**Ga**843, 154**SE**232.

215–73 321 **Ill** 559, 152**NE**552. But see 210**Ky**385, 275**SW**819.

215–80 See also 294**Pa**144, 143**A**904.

215–81 215**Ala**27, 109**S**161.

215–84 168**Ga**136, 147**SE**97.

215–85 See also 100**TexCr**438, 273**SW** 586.

215–89 97**Fla**650, 122**S**110.

216–2½–New. Presence of jug of liquor near defendant is admissible to explain defendant's presence armed, in prosecution for assault with intent to murder officers. 213**Ala**541, 105**S**677.

216–2½–New. Evidence that deceased was an officer is admissible. 108**TexCr** 270, 18**W(2d)**287.

216–5 91**Fla**214, 107**S**360; 213**Ky**356, 281**SW**164; **NJSup** 137**A**829. [c] (1) 91**Fla**214, 107**S**360.

216–6 213**Ky**356, 281**SW**164. [a] 237 **Mich**424, 212**NW**97. [c] **Habit of carelessness.**–87**CalA**5, 261**P**531. [d] **Custom of others.**–87**CalA**5, 261**P**531.

216–12 229**Ky**580, 17**SW(2d)**706(2d case). [a] **Evidence that injured party was carried to hospital** and testimony as to result of examination of his injury, though transpiring out of presence of defendant, was admissible. 112**TexCr** 305, 16**SW(2d)**539(2dcase).

216–13½–New. Commission of unlawful act by accused in involuntary manslaughter. Where the unlawful act charged was the driving of an automobile in a careless, imprudent, and unlawful manner, testimony as to whether witness heard the sound of any siren, whistle, or horn, is proper. 119 **Or**409, 243**P**72.

216–15 180**Ark**197, 20**SW(2d)**872 (that one bullet could not have inflicted injuries).

217–16 [a] (2) Such testimony is admissible as part of res gestæ. 21**AlaA** 348, 108**S**262.

217–17½–New. In a prosecution of accessary after the fact of an assault with intent to murder, it is not error to admit evidence that the victim died. 337 **Ill** 131, 169**NE**18.

217–19 [d] **Knife wounds.**–100**TexCr** 114, 272**SW**149.

217–20 Mo 22**SW(2d)**802; 108**TexCr** 19, 298**SW**601.

217–31½–New. Evidence of examination of pistol on July 4, alleged to have been delivered to defendant July 3, after homicide at a different place on June 28, is too remote and inadmissible in behalf of defendant. 21**AlaA**38, 104**S**881.

217–32 [a] **Evidence that there were many** shot guns in community similar to defendant's held improperly excluded. 219**Ky**664, 294**SW**160.

217–36½–New. Testimony of physician as to his opinion of kind of instrument used to make bruises and wounds found on deceased's body is competent. 192 **NC**80, 133**SE**404.

217–45 100**TexCr**114, 272**SW**149.

218–47 160**La**47, 106**S**670; 106**TexCr** 570, 294**SW**205. [c] **Testimony of toxicologist,** in prosecution of husband for murder of wife by arsenic poisoning, that embalming fluid contained no arsenic was admitted, when shown that fluid analyzed came from same container as that used in deceased. 244**Mich**622, 222 **NW**185.

218–48 111**TexCr**205, 13**SW(2d)**80. [a] (4) Testimony of physician as to location of wounds is admissible though X-ray pictures had been taken. 179**Ark**1055, 20**SW(2d)**120.

218–65½–New. In a prosecution for murder by poison, evidence tending to show that deceased was in a diseased condition five or more years before the alleged homicide is properly excluded where there is no offer to show that such condition existed at the time of death. 203 **Iowa**918, 210**NW**961.

219–67½–New. Evidence that deceased was in the habit of taking medicines recommended by neighbors is inadmissible in a prosecution for murder by poison where it is not shown that such medicines were poisonous. 53**ND**931, 208**NW**566.

219–67½–New. In such prosecution evidence that deceased took medicine to prevent her from having children is properly excluded when not supplemented by other evidence. 53**ND**931, 208**NW**566.

219–69 22**AlaA**185, 113**S**830.

219–73½–New. In a prosecution for murder by poison, uncontradicted evidence as to the amount of embalming fluid injected into the body of deceased renders immaterial evidence as to the amount of such poisons contained in other such fluids of the same manufacturers. 203 **Iowa**918, 210**NW**961.

219–73½–New. That accused, claiming accidental discharge of pistol, had drawn it in self-defense, held not material. 90 **Fla**779, 107**S**242.

219–74 21**AlaA**565, 110**S**55; 22**AlaA**120, 113**S**494; 22**AlaA**583, 118**S**242; 192**NC** 80, 133**SE**404; 34**PortoRico** 519. [d] **Physician who treated deceased** can testify to cause of death. 21**AlaA**214, 107 **S**29.

219–80½–New. Exclusion of expert testimony concerning treatment to prevent lockjaw held proper, in the absence of testimony tending to show neglect of wound. 105**TexCr**621, 289**SW**1007.

219–83 [a] (2) Undertaker of nineteen years' experience is properly qualified to testify that wounds crushed deceased's skull and, in his opinion, caused death. 104**TexCr**567, 285**SW**1094.

220–86½–New. Physician may testify as expert in regard to cause of death, basing opinion upon special knowledge from professional study, although he may have had no practical experience in cases of the kind in question. 69**CalA** 257, 231**P**593.

220–87 113**TexCr**9, 18**SW(2d)**615.

220–2 See also 116**Nebr**90, 215**NW**785.

220–6 14**PaDist&Co** 191.

220–7 Md 151**A**409; 32**NM**319, 255**P** 396.

221–8 CalA 291**P**434.

221–13 [a] **Under plea of not guilty.**–In prosecution for murder in which de-

fendant entered pleas of not guilty and not guilty by reason of insanity, court committed no error on trial of issue as to guilt in excluding all evidence tending to show mental condition at time of commission of offense, under statute. 206Cal 35, 273P767; 206Cal 64, 273P 779.

221-16 110TexCr639, 10SW(2d)566.

221-18 213Ala358, 104S656.

221-19 68CalA545, 229P987.

221-20 87Colo 11, 285P157; 3Del 388, 138A597.

221-21 213Ala358, 104S656 (there being no other real issue refusal to limit to insanity vel non is not error); 174 Ark1180, 298SW3.

221-24½-New. Where there is no evidence of delusional insanity, refusal to permit a physician to say whether defendant accused of killing his wife was disturbed by the fact that he thought his wife was untrue is not error. 163 Ga43, 135S6410.

221-25 [d] **Suicide of defendant's blood relatives** cannot be shown in absence of proof of other facts tending to show insanity of such relatives. 317Mo 843, 297 SW397.

222-32 219Ala282, 122S45; 22AlaA331, 115S417.

222-33 68CalA545, 229P987; 143Miss 438, 108S810. [a] 213Ala358, 104S656.

222-38 227Ky528, 13SW(2d)521.

222-41 317Mo 843, 297SW397. [d] (2) In prosecution for homicide under plea of not guilty by reason of insanity, defendant could prove illicit relations between deceased and defendant's wife coming to his knowledge, how long these relations had continued, and that defendant remonstrated with deceased regarding such relations. 23AlaA26, 119S 863(1stcase).

222-47 22AlaA331, 115S417.

222-52 220Ala501, 126S127(2dcase); 201Cal 290, 257P46; 68CalA545, 229P 987 (written declaration of defendant shortly prior to killing, showing mental attitude toward deceased). [c] 219Ala 282, 122S45.

223-55 143Miss318, 108S722.

223-56½-New. , or that accused sold liquor prior to homicide. 143Miss318, 108S722.

223-59 215Ala27, 109S161; 21AlaA200, 106S697; 21AlaA391, 108S641; 217Ky 403, 289SW371; 230Ky630, 20SW(2d) 461; 236Mich226, 210NW219; 119 Oh 189, 162NE802 (showing that no crime was committed); 113TexCr207, 19SW (2d)322. [a] (6) In prosecution for manslaughter in causing death by driving automobile while intoxicated, evidence of defendant's condition both before and after accident is relevant, if tending to show his condition at time. 195Cal 325, 233P97.

223-60 193NC25, 136SE193; 119 Oh 189, 162NE802.

223-62 119 Oh189, 162NE802.

223-63 CalA 289P918 (testimony is relevant only as to state at time of crime).

223-64 119 Oh189, 162NE802.

223-65 193NC25, 136SE193.

224-69 221Ky175, 298SW376.

224-73 [a] 205Cal 29, 269P628(2dcase).

224-83½-New. Refusal to permit testimony as to where defendant and deceased got liquor preceding the homicide held not prejudicial error. 144SC452, 142SE725.

224-83½-New. Where defendant contradicted testimony that he was drunk at the time of the shooting, the state was allowed to rebut the contradiction by showing that defendant appeared to be drunk not more than twenty minutes prior to the shooting and at a place not more than one-half mile away. 23AlaA 51, 121S698.

224-85 214Ala273, 107S737; AlaA 129 S797; 161La518, 109S51.

224-87 [c] **Testimony properly rejected** where accused's mind was apparently not inflamed by passion. 104TexCr15, 282SW580.

225-93 214Ala273, 107SW737.

225-94 103TexCr372, 280SW802.

225-99 314Mo 612, 286SW29.

225-3 105TexCr281, 288SW213.

225-10 110TexCr254, 8SW(2d)171.

225-14½-New. Where the killing was not at the first meeting after knowledge of deceased's improper conduct, and there was no fresh insult, testimony as to previous specific acts is inadmissible. 105TexCr327, 288SW458.

226-15 162Ga777, 135SE187; 5PaDist &Co 287.

226-18 162Ga777, 135SE187.

226-21 162Ga777, 135SE187.

226-23 104TexCr583, 286SW231.

226-25 104TexCr15, 282SW580.

226-27 105TexCr308, 288SW444.

226-28 215Ala428, 110S908.

226-29 104TexCr127, 283SW512. But see 22AlaA133, 114S68.

226-34 197NC626, 150SE125(1stcase).

227-40 [c] **Where defendant, in murder prosecution, had killed deceased while assisting officer** pursuant to his request, testimony relative to instructions given to him by officer, and relative to fact that he had never had any trouble with deceased, and only went with officer because requested, was admissible. 227Ky83, 11SW(2d)996.

227-51 22AlaA231, 115S80, 87 [cit Cyc].

227-53 40GaA123, 149SE51.

228-66 23AlaA253, 123S277(1stcase); 23AlaA547, 129S99(1stcase); 335 Ill 217, 167NE1; Ind 171NE192.

228-67 22AlaA304, 115S146; 335 Ill 217, 167NE1; 34NM112, 278P210.

228-70 22AlaA304, 115S146.

228-72½-New. Circumstances of subjective, objective, and social character may be taken into consideration in determining who started the provocation. 50Philippine660.

228-77 217Ala212, 115S223; 161La 863, 109S519; 101TexCr587, 276SW699; 106TexCr586, 294SW221.

229-78 161La863, 109S519.

229-80 168La584, 122S858.

229-80½-New. Cross-examination of accused putting upon him burden of retreat to avoid necessity of killing defendant is erroneous. 101TexCr454, 276SW715.

229-81 21AlaA577, 110S171; 29Ariz 247, 240P863; 80CalA31, 251P343; 41 Ida616, 243P359, 362 [citCJ]; 198 Ind 590, 154NE372; 210Ky385, 275SW819; 225Ky275, 8SW(2d)415; 233Mich185, 206NW568; 242Mich16, 217NW758; 109 TexCr530, 5SW(2d)987; 106WVa262, 145SE389. See also TexCr 298SW(2d) 381(2dcase) (to show who probably began difficulty). [d] In Texas.-109TexCr 530, 5SW(2d)987. [e] **Evidence of general reputation for violence** under particular circumstances is admissible under plea of self-defense. 166La859, 118S46.

229-81½-New. It must be shown that witness is qualified to testify as to reputation of deceased as being peaceable or quarrelsome. 201 Iowa10, 206NW 635.

229-82 [b] 23AlaA107, 121S453. [c] **Dangerous character when intoxicated cannot be shown,** absent proof of intoxication at the time. 170La507, 128 S293.

229-83 233Mich185, 206NW568.

229-85 113TexCr58, 18SW(2d)641; TexCr 29SW(2d)381(2dcase).

230-89 [a] (12) Temper of assaulted party. 21AlaA227, 107S37. (13) That deceased had reputation of carrying pistol. 176Ark249, 3SW(2d)15. (14) Deceased's reputation as a peaceable, law-abiding citizen. 113TexCr58, 18 SW(2d)641.

230-91 195Cal 295, 232P974.

230-3 195Cal 295, 232P974; 106Conn 454, 138A456; 85Mont585, 281P551; 106TexCr78, 290SW1105.

230-4 198 Ind590, 154NE372.

230-10 218Ala527, 119S215; 106Conn 454, 138A456; 161La796, 109S494; 163 La609, 112S503; 105TexCr291, 288SW 226. [d] 166Ga296, 143SE371.

231-14 219Ala567, 122S683 (must be hostile demonstration either by defendant or one of his codefendants); 158 La842, 104S736; 161La796, 109S494.

231-16 219Ala567, 122S683.

231-17 161La796, 109S494.

231-18 219Ala567, 122S683; 158La 842, 104S736. [a] **Bare possession of a pistol by defendant** was not sufficient to make him aggressor. 219Ala567, 122 S683.

231-28 78CalA488, 248P986. [d] **That deceased was unarmed** may be shown by state. 108TexCr516, 1SW(2d)883.

232-29 22AlaA635, 118S814.

232-38½-New. Admitting evidence that no arms were found on deceased after killing and that he left weapons at another place held not error. 108 TexCr302, 300SW71.

232-40 34Ariz129, 268P611.

232-42 [b] (3) Evidence of specific acts of cruelty and violence of deceased to wife, son, and domestic animals does not authorize admission of general peaceable reputation. 56ND 642, 219NW132.

233-45 Contra OklCr 291P152.

233-51 21AlaA649, 111S645; 176Ark 756, 4SW(2d)12; 106Conn454, 138A 456; 41 Ida616, 243P359, 362 [citCJ]; 161La796, 109S494; 170La69, 127S368; 113TexCr58, 18SW(2d)641; 106WVa 262, 145SE389. Contra 198 Ind590, 154 NE372. [h] **That deceased was dangerously insane** may be shown by expert testimony. 56ND642, 219NW132.

234-53 106Conn454, 138A456.

234-55 112TexCr550, 17SW(2d)1051.

234-58 But see 81CalA456, 254P281.

234-59½-New. , or without being acquainted with some one who knew deceased. 81CalA456, 254P281.

234-60 21AlaA649, 111S645.

234-70 23AlaA475, 127S788; 209Ky 787, 273SW515; 103TexCr420, 281SW 210.

234-71 112TexCr479, 17SW(2d)1064.

234-73 170La69, 127S368.

235-79 169Ark594, 276SW358.

235-88 171Ark799, 286SW981.

235-95 110TexCr353, 7SW(2d)569.

235-96 32Ariz111, 256P111.

235-97 32Ariz111, 256P111; 312Mo 673, 280SW1026, 1029, 44ALR848 [quot CJ].

235-98 32Ariz111, 256P111; 81CalA 456, 254P281; 229Ky708, 17SW(2d) 999.

235-99 21AlaA46, 104S889; 32Ariz 111, 256P111; 228Ky696, 15SW(2d) 450; 230Ky207, 18SW(2d)995.

235-1 22AlaA39, 111S767.

236-4 33Ariz336, 264P685; 312Mo 673, 280SW1026, 1029, 44ALR848 [quotCJ]; 105TexCr369, 288SW227. [a] **Acts of deceased not amounting to hostility,** such as mere presence at foot of defendant's steps, are inadmissible. 215 Ala576, 105S583.

236-5 312Mo 673, 280SW1026, 1029, 44ALR848 [quotCJ].

236-9 219Ala407, 122S633.

236-10 242Mich16, 217NW758. But see 21AlaA46, 104S889.

236-11 22AlaA39, 111S767; 81CalA 456, 254P281.

236-13½-New. Evidence of illicit relations between defendant and the wife of deceased is not admissible to show who was the aggressor where the evidence is undisputed that deceased was the aggressor. 30Ariz448, 247P1103.

236-14 32Ariz111, 256P111.

236-15 220Ala419, 125S682; 32Ariz 111, 256P111; 33Ariz336, 264P685.

236-16 32Ariz111, 256P111.

236-20 169Ark225, 273SW13.

236-21½-New. Evidence of previous quarrels with third persons not connected with the homicide is not admissible. 100TexCr241, 272SW788.

236-21¼-New. Evidence of peace overtures by defendant prior to homicide is inadmissible. 215Ala229, 110S21.

236-23 220Ala419, 125S682. [c] **Nature of trouble** between witness and deceased cannot be inquired into, under rule. 166La859, 118S46.

237-26 175Ark1166, 2SW(2d)66.

237-29 164La423, 114S83.

237-31½ 23AlaA592, 129S482(2dcase); 21AlaA46, 104S889 (after admission of evidence of self-defense); 32Ariz111, 256P111; 80CalA31, 251P343; 81CalA 456, 254P281; 229Ky708, 17SW(2d) 999; 164La423, 114S83; 233Mich185, 206NW568; 242Mich16, 217NW758; 138SC491, 131SE603; 113TexCr58, 18 SW(2d)641; 113TexCr555, 23SW(2d) 721.

237-32 81CalA456, 254P281; 144Miss

789, 110S443. [a] **Evidence is admissible to prove aggressor** only where it is doubtful under evidence as to who made attack. 166La924, 118S85.

237–33 81CalA456, 254P281.

238–34 Mo 274SW50.

238–40 321Mo 870, 12SW(2d)469.

238–43 81CalA456, 254P281.

238–49½–New. Where defendant is shown to be aggressor and no overt act or hostile demonstration was made by deceased at time of killing, evidence of threat prior to killing is properly excluded. 159La674, 106S28.

238–50 [b] (3) Remark in connection with conduct of defendant with respect to third person that if it were him there would be trouble. 21AlaA528, 109S560.

239–52 168Ark1145, 273SW19 (statement of deceased that another ought to whip defendant properly excluded); 100TexCr516, 271SW906.

239–53 169Ark594, 276SW358.

239–56 AlaA 129S708.

239–58 AlaA 129S708; 169Ark594, 276 SW358.

239–60 150Miss787, 117S119; 100Tex Cr516, 271SW906.

239–66 AlaA 129S708; 100TexCr516, 271SW906.

239–71 324 Ill 404, 155NE360; 126Me 239, 137A400; 156Miss535, 126S194; TexCr 29SW(2d)381(2dcase); 41Wyo 308, 285P803.

240–72 22AlaA146, 113S625(1stcase); 22AlaA125, 113S625(2dcase).

240–73 167La967, 120S614. [a] 151 Miss539, 118S610.

240–75 OklCr 288P500.

240–83 166La924, 118S85 (evidence must satisfy trial judge).

240–84 166La924, 118S85.

241–89 41GaA366, 153SE203(1stcase); 126Me239, 137A400; 154Miss862, 123S 892; 321Mo 870, 12SW(2d)469; Mo 27 SW(2d)16.

241–90 23AlaA592, 129S482(2dcase); 22AlaA39, 111S767; 169Ark594, 276SW 358; 179Ark94, 14SW(2d)261; 80CalA 31, 251P343; 87CalA724, 262P795; Miss 130S693; 33NM259, 263P754; 101TexCr 192, 274SW974, 977 [citCJ]; 104TexCr 583, 286SW231; 106TexCr318, 291SW 1108; Wash 287P887.

242–94 296Pa332, 145A855.

242–95 TexCr 26SW(2d)915.

242–2 [b] **To determine who was agressor,** threats of third party are admissible to explain why defendant carried gun. 169Ark1188, 278SW3.

242–12 106Conn454, 138A456; 214Ky 620, 283SW958; 229Ky708, 17SW(2d) 999.

243–13 242Mich16, 217NW758. [b] **Evidence of conduct of deceased** is admissible. 242Mich16, 217NW758.

243–15 [a] (2) In prosecution for murder of ranger, evidence that persons from whom officers received compensation instructed them to shoot is inadmissible. 112TexCr107, 14SW(2d)838.

243–27 111TexCr657, 13SW(2d)689.

243–27½–New. Advice or warning given defendant by person communicating threats of deceased against him held properly excluded. 216Ala475, 113S393.

243–33 257Mass473, 154NE260.

244–36 21AlaA227, 107S37; 225Ky340, 8SW(2d)422; 105TexCr327, 288SW458.

244–37 242Mich16, 217NW758.

244–38 104TexCr398, 284SW549.

244–38½–New. After admission of evidence of self-defense accused should be allowed to prove physical condition and pregnancy of which deceased had knowledge. 21AlaA46, 104S889.

244–43 But see 230Ky250, 19SW(2d) 218.

244–45 TexCr 24SW(2d)840; TexCr 32SW(2d)202.

244–51 23AlaA139, 122S300; Miss 130 S693.

244–51½–New. Circumstantial evidence tending to show character of weapon is admissible. 93Fla504, 112S83.

244–53 161La518, 109S51.

244–56 107TexCr58, 294SW852.

244–57 93Fla504, 112S83.

245–66 But see 213Ala301, 104S668.

245–67 107TexCr58, 294SW852.

245–69 216Ala475, 113S393; 23AlaA 382, 125S899; 23AlaA475, 127S788; 195 Cal 295, 232P974; 210Ky385, 275SW 819; 103TexCr242, 280SW319; TexCr 32SW(2d)657. [b] (1) 22AlaA176, 113S 644.

245–71 215Ky837, 287SW32. [b] (4) Testimony of witness that he saw officer take cartridges from deceased's pistol and that there was dust in barrel held competent. 216Ala7, 111S227.

245–72 230Ky569, 20SW(2d)447; 150 Miss787, 117S119.

245–75½–New. Evidence of innocent intention of deceased in obtaining a weapon is inadmissible without showing of knowledge of accused of such intention. 104TexCr398, 284SW549.

246–82 21AlaA116, 105S435 (evidence of intoxication improperly excluded); 23AlaA475, 127S788.

246–88 162Ga777, 135SE187; 106TexCr 78, 290SW1105. But see TexCr 23SW (2d)375. [a] **Where defendant did not know of facts,** statements of deceased that he had made away with defendant's money held not error. 162Ga777, 135 SE187.

246–89 101TexCr377, 276SW291. [a] **Evidence held not inadmissible** as disclosing unknown or undisclosed motive of adversary. 111TexCr657, 13SW(2d) 689.

246–90 101TexCr377, 276SW291; 113 TexCr650, 21SW(2d)724.

246–9 [a] (4) That defendant was rightfully in field where he killed deceased. 324 Ill 404, 155NE360. (5) Other evidence. Mo 29SW(2d)148.

247–11½–New. That daughter told father that deceased was father of her child. 21AlaA445, 109S183.

247–17 [a] **Evidence held inadmissible.** –215Ala635, 112S212.

247–22½–New. evidence of condition of deceased's pistol on the morning following the homicide, indicating that it had not been fired; 214Ky475, 283SW431.

247–23 229Ky617, 17SW(2d)757.

247–25 [a] (8) That deceased had not purchased knife on day of killing, as claimed. 107TexCr609, 298SW429. (9) That defendant, who was officer, could have had deceased throw up his hands. 111TexCr70, 11SW(2d)513. (10) Other instances. 23AlaA475, 127S788. [d] **Who was aggressor** may be shown. 164 La423, 114S83.

248–28 [d] **Defendant's witness may be asked** on cross-examination whether deceased was in position to be shot in back. 216Ala7, 111S227.

248–30 Nebr 232NW575. [a] See also 27OhA272, 161NE37.

248–37½–New. Evidence as to physical defects of the person defended is admissible. 103TexCr148, 280SW787.

249–59 [a] **Evidence of specific acts** is not admissible to corroborate defendant as to deceased's attempt to break into defendant's house. 170La 69, 127S368.

249–64½–New. In a prosecution for assault to murder, resulting in a conviction of assault and battery on an officer and his companions when they attempted to enter defendant's house, the affidavit and search warrant under which they purported to act were inadmissible, where the officer did not attempt to use the warrant or to make a search of defendant's home under its authority. 22 AlaA508, 117S492.

249–67 98TexCr298, 265SW560.

250–75 But see 206Cal 35, 273P767 (only evidence admissible is evidence concerning circumstances connected with offense).

250–85 93Fla172, 111S351; 334 Ill 526, 166NE74; 198 Ind590, 154NE372, 376 [citCyc]; 203 Iowa1305, 214NW735.

250–86 111TexCr172, 11SW(2d)798; 112TexCr422, 16SW(2d)1068.

251–95 21AlaA378, 108S646; AlaA 130 S525; 29Ariz247, 240P863; 170Ark 1193, 283SW29; 173Ark890, 293SW 1012; 93Fla172, 111S351; Fla 130S582; 168Ga598, 148SE511; 41 Ida616, 243P 359; 203 Iowa1305, 214NW735, 739 [cit CJ]; 204 Iowa1306, 214NW743; 209 Ky263, 272SW721; 210Ky413, 276SW 112; 221Ky170, 298SW379; 226Ky144, 10SW(2d)639; 227Ky439, 13SW(2d) 244; 229Ky159, 16SW(2d)775; 191NC 297, 131SE735; 193NC313, 136SE868, 869 [citCJ]; 5PaDist&Co 559; 45Philippine9; 35PortoRico 533; 133SC491, 131 SE603; 149SC439, 147SE441; 157Tenn 403, 8SW(2d)371; TexCr 27SW(2d) 1102.

252–97 203 Iowa1305, 214NW735.

252–98 203 Iowa1305, 214NW735; 224 Ky502, 6SW(2d)502; 48Nev358, 232P 778, 235P645.

252–99 77Colo546, 238P25; Fla 130S 582; 169Ga814, 152SE76; 230Ky630, 20SW(2d)461.

252–2 22AlaA493, 117S397; 156Miss 499, 126S29(3dcase); 76Mont565, 248P 176.

252–3 76Mont565, 248P176.

252–4 76Mont565, 248P176.

252–7 But see Mo 285SW706.

252–8 76Mont565, 248P176; 113Nebr 698, 204NW780; 101Vt5, 139A769.

253–11 203 Iowa1305, 214NW735.

253–12 77Colo 546, 238P25.

253–14 133SC491, 131SE603, 607 [cit CJ].

254–19 21AlaA474, 109S385; 170Ark 1193, 283SW29; 93Fla172, 111S351; 93 Fla1076, 113S121; 198 Ind590, 154NE 372, 376 [citCyc]; 203 Iowa1305, 214 NW735, 739 [citCJ]; 76Mont565, 248P 176; 76Mont574, 248P179; 218AppDiv 204, 218NYS148; 134SC361, 133SE24; 138SC532, 137SE139.

254–20 164Ga95, 137SE824; 166Ga645, 144SE193; 198 Ind590, 154NE372, 376 [citCyc]; 225Ky177, 7SW(2d)1052; 162 La641, 110S888, 889 [quotCJ]; 165La 163, 115S445; Nebr 227NW314; 291 Pa319, 139A836; 157Tenn403, 8SW(2d) 371. [a] (9) Mo 285SW706. (20) Sixteen hours. 238Mich351, 213NW63. (21) Thirty-three days. 134SC361, 133 SE24.

255–21 164Ga95, 137SE824; 27Hawaii 28, 54 [quotCyc]; 203 Iowa1305, 214 NW735; 134SC361, 133SE24, 26 [quot CJ].

255–24 219Ala83, 121S72, 63ALR560; 20AlaA686, 104S922 (when declarant has realization and solemn sense of impending death); 21AlaA530, 109S611; 22AlaA493, 117S397; 23AlaA125, 121S 904; 168Ark634, 271SW3; 170Ark1193, 283SW29; 173Ark890, 293SW1012; 86 CalA298, 260P901; 93CalA81, 269P177; 89Fla439, 105S137; 92Fla241, 109S334; 93Fla172, 111S351; 93Fla1076, 113S 121; 164Ga95, 137SE824; 34GaA222, 129SE7; 203 Iowa1305, 214NW735, 739 [citCJ]; 209Ky208, 272SW389; 220Ky 191, 294SW1042; 222Ky248, 300SW 625; 225Ky660, 9SW(2d)992; 235Ky 670, 32SW(2d)29; 158La927, 105S16 (declaration of one who stated he had been fatally shot is admissible); 165 La163, 115S445; 239Mich123, 214NW 231; 143Miss324, 108S711, 46ALR895; 144Miss793, 110S517; 147Miss479, 112 S677; 156Miss499, 126S29(3dcase); 76 Mont574, 248P176, 177 [quotCJ]; 76 Mont574, 248P179; 34NM65, 277P22; 218AppDiv204, 218NYS148; 53ND879, 207NW1000; OklCr 287P826; 291Pa 319, 139A836; 44Philippine267; 134SC 361, 133SE24; 138SC532, 137SE139; 107TexCr293, 296SW516; 112TexCr 422, 16SW(2d)1068; 101Vt5, 139A769; Wis 232NW866.

256–25 164Ga95, 137SE824.

256–26 77Colo 546, 238P25; 121Kan 436, 247P437, 440 [quotCJ].

256–27 168Ark634, 271SW3; 298Pa370, 148A501.

256–29 121Kan436, 247P437, 440 [quot CJ]; 225Ky655, 9SW(2d)990; 291Pa 319, 139A836.

256–30 68CalA259, 228P868; 169Ga 814, 152SE76.

256–30½–New. Statute using term "sense of impending death" construed. 76Mont565, 248P176.

257–32 93Fla172, 111S351; 164Ga95, 137SE824.

257–33 195Cal 295, 232P974. Compare 225Ky177, 7SW(2d)1052.

257–35 22AlaA185, 113S830; 173Ark 890, 293SW1012; 165La163, 115S445; 149Miss758, 116S90; 74Mont269, 240P 365.

257–36 195Cal 295, 232P974.

257–36½–New. That predicate had been laid to another witness several days prior to the declaration offered in evidence is not sufficient. 23AlaA125, 121 S904.

257–39 157Tenn403, 8SW(2d)371.

257-42 157Tenn403, 8SW(2d)371.
257-42½-New. It is state of mind of declarant and not belief of trial court or attending physician which determines whether declarant was in extremis. 76 Mont565, 248P176.
257-43 229Ky153, 16SW(2d)509(2d case); 230Ky840, 20SW(2d)1005; [1926]CanSC492, [1926] 4DomLR722.
257-46 203 Iowa1305, 214NW735, 739 [citCJ].
258-48 162La641, 110S888, 889 [quot CJ]; 291Pa319, 139A836.
258-49 195Cal 295, 232P974; 162La 641, 110S888, 889 [quotCJ]; 163La481, 112S372. See also 209Ky208, 272SW 389.
258-51½-New. Nor is a request that a doctor be sent for sufficient alone to show that the dying person had hopes of living at the time he made the statement. 147Miss479, 112S677.
258-52 158La927, 105S16; 113Nebr 698, 204NW780; Nebr 227NW314; 44 Philippine267.
258-53 203 Iowa1305, 214NW735; 44 Philippine267.
258-54 10PaDist&Co 56.
258-56 203 Iowa1305, 214NW735.
258-57 203 Iowa1305, 214NW735.
258-58 Fla 130S582; 158La927, 105S 16; TexCr 31SW(2d)812; 101Vt5, 139 A769.
258-61 TexCr 31SW(2d)812.
258-62 106TexCr321, 292SW231.
259-66 229Ky348, 17SW(2d)245; 10 PaDist&Co 56, 58 [citCJ].
259-72 45Philippine9; 107TexCr293, 296SW516.
259-73 107TexCr293, 296SW516.
259-77 45Philippine9. [b] **Signature held genuine.**-45Philippine9. [c] **Fact that characters of signature well formed,** as if written with steady hand except at end, held insufficient to establish alleged forgery. 45Philippine9.
259-78 44Philippine267 [citCyc].
260-98 203 Iowa1305, 214NW735; Wis 229NW549.
260-99 180Ark241, 22SW(2d)47; 339 Ill 328, 171NE261; Ill 172NE64.
261-3½-New. Admission of a dying declaration is primarily a question to be determined by the nature of each case. Nebr 227NW314.
261-6 107Conn148, 139A632; 113Nebr 698, 204NW780.
261-9 20AlaA570, 104S140; 168Ark 1087, 273SW374; 198 Ind590, 154NE 372; Mo 285SW706; 218AppDiv204, 218NYS148; 107WVa324, 148SE208. [a] (4) Evidence held to show declarant was dying at time of declaration. 79 Mont574, 248P179. [c] **Prima facie case held sufficient.** 169Ga814, 152SE 76.
261-10 169Ark421, 275SW758; 76Mont 565, 248P176.
262-11 [a] **What constitutes sufficient foundation for admission of dying declaration** is mixed question of law and fact for trial judge. 92Fla241, 109S 334.
262-12 See also 225Ky177, 7SW(2d) 1052.
262-13 93Fla172, 111S351; 74Mont269, 240P365.
262-15 But see 230Ky761, 20SW(2d) 742.
262-16½-New. Deceased's declaration that he was nearly half dead is admissible for the court's consideration in determining the admissibility of dying declarations. 101Vt5, 139A769.
262-16¾-New. Evidence of deceased's mental state when making dying declarations is admissible to determine the weight of the declarations. 101Vt5, 139A769.
262-19 35PortoRico 533. [a] **Production of all witnesses present** is proper practice. 292Pa579, 141A624.
262-24 168La1099, 123S781.
262-28 179Ark998, 18SW(2d)1021 (exclusion of testimony of physician held error); OklCr 276P503.
262-32½-New. Evidence that deceased was unconscious when witness arrived on scene shortly after fatal injury held erroneously excluded. Miss 130S693.
262-33 168Ark1087, 273SW374.
263-36 23AlaA125, 121S904; 173Ark 890, 293SW1012; 89Fla439, 105S137; 198 Ind590, 154NE372, 376 [citCyc]; 225Ky177, 7SW(2d)1052; 143Miss324, 108S711, 46ALR895; 48Nev358, 232P 778, 235P645; 218AppDiv204, 218NYS 148; 53ND879, 207NW1000; 138SC 532, 137SE319. [a] 76Mont565, 248P 176. [d] 113TexCr235. 20SW(2d)202.
263-37 169Ark421, 275SW758; 195Cal 295, 232P974; 68CalA259, 228P868; 334 Ill 526, 166NE74; 198 Ind590, 154 NE372, 376 [citCyc]; 210Ky413, 276SW 112; 222Ky248, 300SW625; Mo 279SW 705; 76Mont565, 248P176; 192NC723, 135SE859; OklCr 276P503; 104TexCr 442, 284SW554; 101Vt5, 139A769. [d] 216Ala342, 113S391; 219Ala83, 121S72, 63ALR560; 23AlaA592, 129S482(2d case); 21AlaA474, 109S385; 22AlaA434, 116S504; 29Ariz247, 240P863; 173Ark 890, 293SW1012; 195Cal 295, 232P974; 97Fla61, 119S791; Fla 130S582; 204 Iowa1306, 214NW743; 210Ky747, 276 SW834; 214Ky620, 283SW958; 216Ky 832, 238SW768; 230Ky327, 19SW(2d) 964; 168La1115, 123S800; Mo 285SW 706; 315Mo 1259, 289SW865; 298Pa 370, 148A501; 300Pa125, 150A290(2d case); 143SC175, 141SE364; 107TexCr 649, 298SW604; 110TexCr298, 8SW(2d) 129; 113TexCr235, 20SW(2d)202. [e] 198 Ind590, 154NE372; 76Mont565, 248 P176; 138SC532, 137SE319.
264-38 93Fla172, 111S351; 198 Ind590, 154NE372.
264-40 169Ark421, 275SW758; 177Ark 1193, 9SW(2d)235(2dcase); 93Fla172, 111S351; 168Ga598, 148SE511; 198 Ind 590, 154NE372, 376 [citCyc]; 239Mich 123, 214NW231; 53ND879, 207NW1000; 107TexCr293, 296SW516; 113TexCr 235, 20SW(2d)202. [a] OklCr 276P503.
264-41 93Fla172, 111S351; Fla 130SE 582; 210Ky747, 276SW834; 53ND879, 207NW1000.
264-42 89Fla439, 105S137; 93Fla172, 111S351; 168Ga575, 148SE500; 34GaA 222, 129SE7; 198 Ind590, 154NE372, 376 [citCyc]; 210Ky747, 276SW834; 225Ky177, 7SW(2d)1052; 239Mich123, 214NW231; 76Mont565, 248P176; Nebr 227NW314; 53ND879, 207NW1000; OklCr 287P826; 50Philippine182. [a] 22AlaA418, 116S910; 23AlaA484, 127S 262; 169Ark421, 275SW758; 121Kan 436, 247P437; 238Mich351, 213NW63; 144Miss793, 110S517; Miss 130S693; Nev 290P732; 53ND879, 207NW1000; OklCr 287P826; 45Philippine9; 108 TexCr489, 1SW(2d)639. [b] 76Mont 565, 248P176; 218AppDiv204, 218NYS 148.
265-43 163Ga12, 135SE421; 210Ky747, 276SW834; 225Ky177, 7SW(2d)1052; 239Mich123, 214NW231; 76Mont574, 248P179; 192NC723, 135SE859; NC 154 SE604; 298Pa370, 148A501.
266-44 147Miss479, 112S677, 679 [cit CJperAnderson,J].
266-46 168Ga598, 148SE511.
266-52 198 Ind590, 154NE372, 376 [cit Cyc]; 76Mont565, 248P176.
266-53 76Mont565, 248P176.
266-55 Mich 233NW430; 76Mont565, 248P176; 53ND879, 207NW1000.
266-56 176Ark217, 2SW(2d)11; 168 Ga575, 148SE500; 169Ga814, 152SE76; 38GaA648, 145SE106; 239Mich123, 214 NW231; 76Mont565, 248P176; 76Mont 574, 248P179; 53ND879, 207NW1000; 291Pa319, 139A836; 298Pa370, 148A 501; Wis 232NW866.
267-58 53ND879, 207NW1000.
267-59 210Ky413, 276SW112.
267-60 198 Ind590, 154NE372 [citCyc].
267-60½-New. Neither belief of attending physician, 76Mont565, 248P176.
267-60¾-New. nor belief of trial court that declarant was in extremis, determines admissibility. 76Mont565, 248P 176.
267-65 147Miss479, 112S677, 678 [cit CJ].
267-68 74Mont269, 240P365; 76Mont 574, 248P179.
268-70 74Mont269, 240P365, 569 [cit CJ].
268-71 225Ky177, 7SW(2d)1052; 76 Mont574, 248P179.
268-76 74Mont269, 240P365.
268-77½-New. Where predicate is laid in jury's absence, other witnesses may testify as to what the dying statement was. 145Miss227, 110S500.
268-78 219Ala83, 121S72, 63ALR560; AlaA 130S525; 179Ark1055, 20SW(2d) 120; 89Fla439, 105S137; 93Fla172, 111 S351; Fla 130S582 (mixed question of law and fact); 168Ga575, 148SE500; 198 Ind590, 154NE372; 74Mont269, 240 P365; 76Mont574, 248P179; Nebr 227 NW314; OklCr 276P503; OklCr 287P 826; 291Pa319, 139A836; 107WVa324, 148SE208.
269-79 169Ark421, 275SW758; 179 Ark998, 18SW(2d)1021; 41GaA574, 153 SE613; 104TexCr442, 284SW554. See also OklCr 276P503. [e] 104TexCr442, 284SW554. [f] (4) Instruction held not erroneous as failing to permit jury to pass on whether declaration was made in belief of impending death. Mo 279 SW705.
269-79½-New. Admitting dying declarations is a tacit finding that foundation for their admission had been laid. 101Vt5, 139A769.
270-84 AlaA 130S525; 176Ark217, 2 SW(2d)11; 179Ark1055, 20SW(2d)120; 168Ga575, 148SE500; 147Miss694, 112 S785; 74Mont269, 240P365; 76Mont 574, 248P179; 113Nebr698, 204NW780; Nebr 227NW314; Nev 290P732; 192 NC723, 135SE859; 291Pa319, 139A836; 113TexCr235, 20SW(2d)202 (where deceased has been adjudged insane); 101 Vt5, 139A769.
270-88 76Mont574, 248P179 (instruction not erroneous).
270-91 35PortoRico 533. [a] **Oral testimony in corroboration of written declaration.**-45Philippine9. [b] **Testimony of attending physician,** independently admissible. 45Philippine9.
270-94 92Fla241, 109S334.
271-98 10PaDist&Co 56, 58 [citCJ].
271-6 179Ark1055, 20SW(2d)120.
271-11 44Philippine267.
271-16½-New. Oral testimony as to dying declarations of deceased are admissible where his written signed statement was produced but not read, as defendant might have introduced it if he had desired. 210Ky796, 276SW841.
271-18½-New. Where a declaration is reduced to writing by a magistrate, oral testimony as to the declaration is admissible where the writing is not produced. 214Ky280, 283SW84.
272-24 168Minn341, 210NW45; TexCr 292SW609; 107TexCr649, 298SW604. But see 113Nebr698, 204NW780. [c] (2) In prosecution for murder from abortion, in which letter from doctor performing abortion was admitted, testimony that she registered at hotel under fictitious name held inadmissible. 203 Iowa1305, 214NW735. [e] **Nature of each case** determines question of admissibility of dying declarations. 113 Nebr698, 204NW780.
272-25 21AlaA378, 108S646; 22AlaA 418, 116S910; 167Ga452, 145SE879(2d case); 203 Iowa1305, 214NW735; 210 Ky413, 276SW112; 220Ky191, 294SW 1042; 230Ky250, 19SW(2d)218; 230 Ky761, 20SW(2d)742; Mo 285SW706; 315Mo 1259, 289SW865; 113Nebr698, 204NW780; 45Philippine9; 48Philippine971; 49Philippine601; 134SC361, 133SE24; 138SC532, 137SE139; TexCr 26SW(2d)220. See also 75CalA642, 243 P461. [a] **Statements tending to show conspiracy between declarant and others to perform abortion upon declarant** are admissible in prosecution for homicide resulting from abortion. 113Nebr 698, 204NW780.
272-26 21AlaA33, 104S878; 203 Iowa 1305, 214NW735; 235Ky670, 32SW (2d)29; 156Miss499, 126S29(3dcase). [b] (4) In prosecution for murder from abortion, dying declarations as to intercourse, pregnancy, and operation held admissible. 203 Iowa1305, 214NW 735.
272-27 68CalA259, 228P868; 203 Iowa 1305, 214NW735; 315Mo 1259, 289SW 865.
272-29 76Mont565, 248P176.
272-29½-New. or cause of injury from which declarant was then dying, 76 Mont574, 248P179.
272-29¼-New. the manner in which declarant received the injury from which he was dying, 76Mont574, 248P 179.
272-29¾-New. the motive of accused,

21AlaA378, 108S646.

272-30 68CalA259, 228P868; 315Mo 1259, 289SW865.

272-31 21AlaA33, 104S878 (facts coincident with commission of homicide and tending to establish essential elements of crime); 178Ark928, 12SW(2d)909; 179Ark1055, 20SW(2d)120; 89Fla439, 105S137 (actors, what was said, instruments used, who used them, and how); 315Mo 1259, 289SW865; 10PaDist&Co 56.

272-32 21AlaA33, 104S878; 89Fla439, 105S137; Fla 130S582; 203 Iowa1305, 214NW735, 739 [citCJ]; 218Ky435, 291 SW734; 221Ky222, 298SW678; 235Ky 670, 32SW(2d)29; 156Miss499, 126S29 (3dcase); Mo 285SW706 (statement held inadmissible); 111TexCr116, 12 SW(2d)218; TexCr 26SW(2d)269. [e] **Statement that declarant did not have chance to run,** and was surrounded by accused and another, is not part of res gestæ. 21AlaA33, 104S878. [f] **Statement that declarant wanted witness** to stay with his children as long as he lived, has been held inadmissible. 21 AlaA33, 104S878. [g] **Declarations held not to violate this rule.**–203 Iowa1305, 214NW735.

273-33 298Pa370, 148A501.

273-38 200 Ind557, 159NE545; 203 Iowa1305, 214NW735; 109TexCr157, 3 SW(2d)449; 111TexCr116, 12SW(2d) 218.

273-39 203 Iowa1305, 214NW735; 220 Ky191, 294SW1042; 168Minn341, 210 NW45; Mo 285SW706; 315Mo 1259, 289SW865. [d] **Contents inadmissible in so far as relating to past events,** but this does not make declaration inadmissible as to immediate act of homicide. 45Philippine9.

274-40 218Ky435, 291SW734.

274-43 45Philippine9.

274-48 21AlaA33, 104S878; 203 Iowa 1305, 214NW735; 215Ky731, 286SW 1044; 220Ky191, 294SW1042; 215Ky 786, 287SW12; 221Ky222, 298SW678; 235Ky670, 32SW(2d)29; Mo 285SW 706; 221AppDiv150, 223NYS133; 107 TexCr649, 298SW604.

275-55 215Ky731, 286SW1044.

275-57 [a] (1) 230Ky250, 19SW(2d) 218. (15) Statement of deceased that when he was shot he was not doing anything. 221Ky170, 298SW379.

275-58 219Ala83, 121S72, 63ALR560.

275-68 216Ky98, 287SW235.

275-69 220Ky191, 294SW1042; NC 154SE604.

276-70 41 Ida616, 243P359; 200 Ind 557, 159NE545; 74Mont269, 240P365.

277-81½-New. A dying declaration not identifying defendant may be admissible in connection with other testimony identifying defendant. 219Ala674, 123 S55.

277-82 89Fla439, 105S137 (state of hostility or bad blood by accused toward deceased); 109TexCr157, 3SW(2d)449. [a] **Statements negativing state of bad blood** by accused toward deceased does not offend against rule and is merely irrelevant and immaterial. 89Fla439, 105S137.

277-83 See 225Ky177, 7SW(2d)1052.

277-87 203 Iowa1305, 214NW735; 215 Ky786, 287SW12, 15 [quotCJ]; NC 154 SE604; 107WVa324, 148SE208 (statements disconnected and irrational). [b] **If declaration leaves identity of assailants doubtful,** doubt affects only weight, not competency. NC 154SE604. [c] **Declaration "they" shot him is admissible** as evidently referring to defendants. NC 154SE604.

277-88½-New. A written dying declaration that one of two officers who were pursuing deceased shot him is admissible where the state shows which officer fired the shot. 167Ga452, 145SE 879(2dcase).

277-91 101Vt5, 139A769.

277-94 101Vt5, 139A769.

278-99 Fla 130S582; 203 Iowa1305, 214NW735; NC 154SE604.

278-1 [b] (1) See also TexCr 25SW(2d) 833. [c] **Religious unbelief** that would exclude testimony of living witness will exclude his dying declarations. 219Ala 83, 121S72, 63ALR560.

278-2 [a] **That deceased was infidel** is insufficient to render his dying declaration inadmissible in absence of showing that he did not believe in Supreme Being rewarding truth and punishing falsehood here or hereafter. 219Ala83, 121S 72, 63ALR560.

278-8½-New. Declaration of one in delirium or so nearly dead that he cannot appreciate his condition is inadmissible. 76Mont565, 248P176.

278-10½-New. If sanity of the person making a dying declaration is not questioned, he is presumed sane, but if raised, sanity must be proved. 101Vt5, 139A769.

279-13 [a] **Competency shown.**–TexCr 26SW(2d)269.

279-17 [a] 76Mont565, 248P176.

279-19 76Mont565, 248P176.

279-21½-New. In determining whether declarant was in such mental state as to make the declaration admissible, resort may be had to all circumstances of the case. 92Fla241, 109S334.

279-21¼-New. Where the dying declaration of one adjudged insane was admitted in evidence, the state, in discharging its burden, was not required to prove annulment of the judgment of insanity. 113TexCr235, 20SW(2d)202.

279-21¼-New. The presumption of continued insanity of deceased, whose dying declaration was admitted, and who had been adjudged insane, was a rebuttable one. 113TexCr235, 20SW(2d)202.

279-22½-New. Any person present may testify as to the consciousness or sanity of one making a dying declaration. 107TexCr649, 298SW604.

279-23 206 Iowa859, 220NW95; 134SC 361, 133SE24.

279-25 48Philippine268.

279-26 157Tenn403, 8SW(2d)371.

279-31 169Ark421, 275SW758; 216Ky 832, 288SW768; 113Nebr698, 204NW 780; Nev 290P732. [a] 169Ark421, 275 SW758; 44Philippine267.

279-32 [a] **Dying declarations entitled to same weight** as if deceased had given testimony under oath. 157Tenn403, 8 SW(2d)371.

279-37 76Mont574, 248P179; 221App Div150, 223NYS133.

280-39 169Ark421, 275SW758; 221App Div150, 223NYS133; 155Tenn371, 293 SW539. [a] (1) 155Tenn371, 293SW539 [citCJ].

280-47 200 Ind557, 159NE545.

281-49 219Ala83, 121S72, 63ALR560; 169Ga814, 152SE76 (introduced by defendant); 168Minn341, 210NW45; 74 Mont269, 240P365, 370 [citCJ]; Nev 290 P732; 245NY401, 157NE509. [a] (2) Evidence of declarant's mental condition, and physical exhaustion, is admissible in impeachment. 245NY401, 157NE509.

281-50 44Philippine224.

281-51 101TexCr19, 274SW616; 112 TexCr31, 13SW(2d)845. [a] **Such statements affect credibility,** not admissibility, of dying declaration. 134SC361, 133 SE24.

281-55 41GaA268, 152SE619.

282-66 179Ark998, 18SW(2d)1021.

282-75½-New. Failure of defendant to offer testimony in contradiction of a witness deposing to a dying declaration at the time when its admissibility was under consideration and before its admission does not deprive him of the right to offer it in his case in chief. 74 Mont269, 240P365.

282-75⅓-New. Exclusion of testimony as to the effect of the habitual use of morphine creating liars is not error when no evidence had yet been introduced that deceased was so addicted. 21 AlaA378, 108S646.

282-77 [c] **Testimony as to shooting** held circumstantial evidence corroborating dying declarations. 200 Ind557, 159 NE545.

282-82 222Ky510, 1SW(2d)976. But see 164Ga250, 138SE153.

282-87 [a] (2) Admitting evidence of justice of peace that he authorized removal of body and was requested to hold inquest in absence of coroner held not erroneous. 169La109, 124S188.

282-88 199 Ind55, 155NE203.

283-89 [b] **Introduction of all evidence given** by accused at inquest is not necessary. 199 Ind55, 155NE203.

283-90 205Cal 596, 271P1074.

283-1 233Mich222, 206NW562. [a] 233 Mich222, 206NW562.

283-6 233Mich222, 206NW562.

283-10 See also 33PortoRico 179.

284-19 161La518, 109S51; 162La500, 110S733.

284-35 202Cal 154, 259P442.

284-36 21AlaA211, 106S891; 22AlaA 277, 114S789; 85CalA258, 258P1111; CalA 286P1061; 96Fla59, 117S699; 228 Ky830, 16SW(2d)478; 155Miss398, 124S 493; 315Mo 7, 285SW489, 495 [citCJ]; 292Pa26, 140A611; 104WVa617, 141SE 7.

285-37 Contra 315Mo 7, 285SW489, 495 [citCJ].

285-38 23AlaA484, 127S262; 96Fla59, 117S699; 28Hawaii350; 225Ky667, 9 SW(2d)1000; 155Miss398, 124S493; 191 NC698, 132SE785; 44Philippine192; TexCr 24SW(2d)1097; 103WVa743, 138 SE393. [a] 45Philippine9. [b] 21AlaA 211, 106S891; 202Cal 154, 259P442; 68 CalA259, 228P868; 199Cal 610, 250P 659; 85CalA258, 258P1111; CalA 286P 1061; 168Ga457, 148SE157; Ga 154SE 799; 199 Ind1, 154NE801; 224Ky502, 6SW(2d)502; 229Ky159, 16SW(2d)775; 140Miss238, 105S497; 151Miss161, 117S 528; 152Miss43, 118SE369; 309Mo 155, 274SW734; 313Mo 615, 285SW392; 44 Philippine271; 100TexCr98, 272SW134. [c] 155Miss398, 124S493; 116 Or615, 241P843; 44Philippine192; 45Philippine67; 45Philippine78; 112TexCr254, 16SW(2d)248.

285-42 21AlaA211, 106S891; CalA 286 P1061; 28Hawaii350; 203 Iowa954, 210 NW448; Nev 285P503; 103WVa743, 138 SE393. But see 80Mont181, 260P138. [a] **Character of proof.**–96Fla59, 117S 699; 228Ky830, 16SW(2d)478.

285-43½-New. Corpus delicti may be proved by testimony of defendant voluntarily becoming a witness and testifying to facts which tend to prove it. 70CalA 519, 234P110.

285-44 70CalA531, 233P980.

285-45 21AlaA211, 106S891; 23AlaA 484, 127S262; 202Cal 154, 259P442; 28 Hawaii350; 104WVa617, 141SE7. [a] 199Cal 610, 250P659; 70CalA531, 233P 980 (incriminating evidence sufficient to establish corpus delicti in absence of body independent of any confession or admission by defendant). [b] **Evidence held insufficient.**–23AlaA484, 127S262; 155Miss398, 124S493.

286-47 110TexCr159, 8SW(2d)947.

286-48 202Cal 154, 259P442; 70CalA 531, 233P980 (by circumstances convincing mind to moral certainty); 28 Hawaii350.

286-51 220Ala461, 125S802.

287-59 194NC442, 140SE22; 35 OhA 463, 172NE555; 110TexCr159, 8SW(2d) 947. [a] 21AlaA211, 106S891; 171Ark 184, 284SW38; 195Cal 325, 233P97 (voluntary intoxication while driving automobile or driving on wrong side of road); CalA 290P655; 199 Ind592, 159 NE420; 203 Iowa954, 210NW448; 252 Mass450, 148NE113 (death by poison); Mo 278SW676; 129 Or564, 278P568, 63ALR1225; 292Pa26, 140A611; 111 TexCr570, 13SW(2d)874; TexCr 29SW (2d)399; 135Wash333, 237P706; 145 Wash227, 259P395. [b] 210Ky494, 276 SW158; 221AppDiv150, 223NYS133; 194NC442, 140SE22; 49Philippine177; 51Philippine842; 112TexCr593, 17SW (2d)1072(2dcase).

287-60 [a] 53ND931, 208NW566. [b] (2) Evidence held insufficient to show reasonable probability that deceased committed suicide by poison. 53ND931, 208NW566.

287-63 215Ky613, 286SW696, 702 [quotCJ]; 112TexCr233, 16SW(2d)123 (2dcase); 145Wash227, 259P395; 108 WVa330, 150SE754.

287-64 215Ky613, 286SW696, 702 [quotCJ]; 103WVa743, 138SE393, 396 [citCJ].

287-64½-New. , or that a human being has come to his death by criminal agency. 116 Or615, 241P843.

287-64¼-New. Means by which death resulted are sufficiently proved by some

evidence to justify conclusion that criminal agency was the direct cause, 70CalA 531, 233P980.

287-64½-New. and need not be established beyond a reasonable doubt. 70 CalA531, 233P980.

287-65 [a] 135Wash333, 237P706. [c] **Evidence held insufficient** to go to jury on question of death from cause other than gunshot wound inflicted by accused. 108TexCr489, 18SW(2d)639.

287-66 215Ky613, 286SW696, 702 [quotCJ]; 103WVa743, 138SE393. [a] **In British Columbia.**-[1928] 2DomLR 694.

288-68 21AlaA211, 106S891; 244Mich 622, 222NW185; 103WVa743, 138SE 393, 396 [citCJ]; 104WVa617, 141SE7; 34Wyo 247, 242P812 (evidence held to show death caused by explosion of nitroglycerin or dynamite).

288-76 [a] 219Ky406, 293SW975; 232 Mich310, 205NW188 (sufficient to show death was caused by strychnine); 244 Mich622, 222NW185; 220AppDiv528, 221NYS760.

288-76½-New. In a prosecution for the murder of a wife by her husband, alleged to have been accomplished by arsenic poisoning, in order to obtain the wife's property, the fact that there was no direct testimony that the husband possessed arsenic, or that he administered arsenic to his wife, has been held not to preclude a conviction based on circumstantial evidence. 244Mich622, 222NW185.

288-88 96Fla59, 117S699.

288-90 [b] 198Cal776, 247P884; 199 Cal610, 250P659; CalA 289P212; 327 Ill 162, 158NE462; Ill 173NE383.

289-91 111TexCr205, 13SW(2d)80. [a] 111TexCr205, 13SW(2d)80. [b] 105TexCr624, 289SW1009.

289-99 See also 105TexCr624, 289SW 1009.

289-5 22AlaA277, 114S789; 78CalA151, 248P542; 105TexCr624, 289SW1009. See also 70CalA519, 234P110.

289-7 78CalA151, 248P542; TexCr 25 SW(2d)325. [a] 177Ark534, 7SW(2d)5; 78CalA151, 248P542.

290-12 [b] (1) 100TexCr39, 272SW130.

290-13 [b] 100TexCr39, 272SW130.

290-14 100TexCr39, 272SW130.

290-17 198Cal776, 247P884.

290-26 Ill 172NE740; 115Nebr143, 212 NW35; 116Nebr191, 216NW656; Nebr 232NW575.

290-29 TexCr 29SW(2d)384. [a] **Specific proof of intent is not essential.**-Ill 172NE740.

290-30 172Ark244, 288SW904; CalA 292P654. [a] 69CalA257, 231P593; 95 CalA659, 273P110; 326 Ill 145, 157NE 225; Mo 256SW787; 284Pa311, 131A 229; 50Philippine548. [b] 162Gal, 132 SE418.

291-31 327 Ill 393, 158NE712; 337 Ill 131, 169NE18. [a] 196Wis104, 219NW 349.

291-32 172Ark244, 288SW904; 41GaA 346, 152SE911(2dcase); Ind 171NE 192; 5PaDist&Co 559.

291-32½-New. the fact that the several bullets found in deceased's body were fired from a rifle requiring reloading, 284Pa311, 131A229 (held of itself sufficient).

291-33 172Ark244, 288SW904.

291-37 172Ark244, 288SW904.

291-38 172Ark244, 288SW904.

291-39 327 Ill 393, 158NE712.

292-58 CalA 292P654; 115Nebr143, 212NW35 (second degree); 116Nebr191, 216NW656; Nebr 232NW575; 50ND 270, 195NW567 (murder in second degree).

292-60 172Ark244, 288SW904; 172Ark 1176, 288SW925; 215Ky162, 284SW 1035; 292Pa210, 140A898; 103TexCr 145, 280SW771. [a] Ariz 283P711; 208 Cal 243, 280P944; CalA 290P493; 323 Ill 617, 154NE435; 215Ky162, 284SW 1035; 228Ky432, 15SW(2d)273; TexCr 27SW(2d)233; TexCr 31SW(2d)437; 143Va510, 129SE360; 100WVa57, 130 SE91 (murder in second degree). [b] 315Mo 7, 285SW489. [e] **Proof of conspiracy in prosecution of several defendants** for murder is but a means of establishing malice, and proof of existence of conspiracy is conclusive proof of premeditation necessary to establish malice aforethought. Ky 12SW(2d)326.

292-61 21AlaA348, 108S262.

292-62 Iowa 230NW394; 151Va533, 145SE307.

292-64 172Ark1176, 288SW925.

292-65½-New. Use of deadly weapon is prima facie evidence of malice and fact of its intentional use imposes upon accused the burden of showing circumstances in mitigation or excuse. 190NC 674, 130SE627, 42ALR1114.

293-69 215Ky162, 284SW1035.

293-77 215Ky162, 284SW1035.

293-82 95Fla139, 116S7; 121 Or141, 253P367; 12PaDist&Co 735. [a] **Premeditation is proved** if jury may reasonably conclude that accused's mind had become conscious of its design. 93Fla 756, 112S608.

293-83 195Cal 272, 232P710; 203 Iowa 929, 210NW465, 473 [citCJ]; 206 Iowa 859, 220NW95; 121 Or141, 253P367.

293-85 90Fla255, 105S829, 832 [citCJ]; 121 Or141, 253P367.

293-86 90Fla255, 105S829, 832 [citCJ].

293-87 90Fla255, 105S829, 832 [citCJ].

293-89 CalA 290P610; 90Fla255, 105S 829, 832 [citCJ]; 121 Or141, 253P367.

293-90 90Fla255, 105S829, 832 [citCJ].

293-91 90Fla255, 105S829, 832 [citCJ]; 203 Iowa929, 210NW465, 473 [citCJ]; 121 Or141, 253P367; 284Pa311, 131A 229; 10PaDist&Co 56.

293-92 90Fla255, 105S829, 832 [citCJ]; 121 Or141, 253P367; 284Pa311, 131A 229.

293-93 90Fla255, 105S829, 832 [citCJ] (locality of wounds).

293-94 90Fla255, 105S829, 832 [citCJ]; 44Philippine224.

294-95 90Fla255, 105S829, 832 [citCJ]. [a] **Evidence held sufficient.**-49Nev241, 242P697.

294-96 205 Iowa929, 210NW465, 467 [citCJ]; 121 Or141, 253P367. [a] Ariz 283P711; 42 Ida319, 245P685; 323 Ill 617, 154NE435; 203 Iowa929, 210NW 465; 190NC506, 130SE308; 121 Or141, 253P367; 284Pa159, 130A317 (brief conversation with officer, fear of arrest, and selection of instrument of death are sufficient to support findings that accused formed conscious purpose of taking life); 284Pa311, 131A229; 34Porto Rico 619; 104TexCr26, 282SW245; 142 Wash673, 253P1074; 145Wash4, 258P 845. [b] 95Fla391, 116S78; 246NY 437, 159NE390; 41Wyo 128, 283P406. [c] 44Philippine224.

295-7 198NC82, 150SE678.

295-9 22AlaA120, 113S494; 23AlaA 521, 128S126(2dcase); 208Cal 387, 281 P609 (if homicide can be otherwise established); Cal 289P634; 327 Ill 393, 158NE712; 200 Ind557, 159NE545; 203 Iowa954, 210NW448; 203 Iowa929, 210 NW465; 203 Iowa90, 212NW312; 228 Ky432, 15SW(2d)273; 230Ky411, 19SW (2d)1091, 66ALR360; 238Mich332, 213 NW104; 140Miss889, 105S742; 117 Nebr304, 220NW292; 217AppDiv527, 217NYS244; 223AppDiv248, 228NYS24; 197NC684, 150SE337; 53ND931, 208 NW566; 50Philippine545; 100TexCr39, 272SW130; 187Wis122, 203NW749.

295-10 95CalA659, 273P110; 203 Iowa 954, 210NW448.

295-10½-New. Proof of motive alone is insufficient to establish guilt of accused. 228Ky830, 16SW(2d)478.

295-11 315Mo 7, 285SW489; 50Philippine545.

295-12 315Mo 7, 285SW489.

295-13 Mo 29SW(2d)60.

295-13½-New. In such case motive becomes immaterial. 187Wis122, 203NW 749.

295-15 228Ky432, 15SW(2d)273. [a] 197Cal 200, 239P1080 (robbery); Cal 289P634; 310Mo 500, 276SW625; 316 Mo 104, 289SW789; 53ND931, 208NW 566; 155Tenn266, 292SW451; 145Wash 4, 258P845. [b] (1) 315Mo 7, 285SW 489; 100TexCr39, 272SW130; 40Wyo 128, 274P1074(2dcase). (2) 116Nebr 141, 216NW173.

296-19 212Ala410, 102S621(2dcase); 21 AlaA646, 111S318; 70CalA531, 233P 980; 94CalA628, 271P765; 212Ky212, 278SW611; 228Ky830, 16SW(2d)478; 315Mo 7, 285SW489; 116 Or615, 241P 843; 297Pa160, 146A553; 160Tenn221, 22SW(2d)225; 101TexCr169, 274SW 585. [a] (1) 170Ark1193, 283SW29; 198Cal 776, 247P884; 69CalA257, 231P 593; 109Conn124, 145A761; 213Ky675, 281SW819; 214Ky572, 283SW1032; 221 Ky689, 299SW570; 230Ky725, 20SW (2d)745; 235Ky78, 29SW(2d)629; Mo 286SW20; 316Mo 104, 289SW789; Mo 30SW(2d)132; Mo 256SW753; 49Nev 194, 242P582; 105NJL352, 144A612; 220AppDiv528, 221NYS760; 287Pa1, 134A465; 288Pa74, 135A538; 48Philippine439; 49Philippine146; 49Philippine482; 51Philippine201; 137SC75, 134SE514; 100TexCr334, 273SW589. (3) To show that accused was guilty of breach of criminal law, in connection with homicide. 190NC674, 130SE627, 42ALR1114. [b] 214Ala2, 106S617; 210Ky494, 276SW158; 212Ky212, 278 SW611; 212Ky791, 280SW111; 232Ky 645, 24SW(2d)285; 232Mich310, 205NW 188 (poisoning); 315Mo 7, 285SW489; 318Mo 1149, 2SW(2d)758; 48Philippine 925; 101TexCr169, 274SW585. [e] **Purchase of poison by accused,** where murder was committed by that means, need not be proved to sustain conviction, though law requires record of such purchases to be kept. 232Mich310, 205 NW188.

296-20 [b] TexCr 28SW(2d)546(2d case). [c] **Evidence held insufficient to raise inference that others might be guilty.** 109Conn124, 145A761.

297-27 21AlaA646, 111S318; 326 Ill 145, 157NE225; 230Ky725, 20SW(2d) 745 [a] 32Ariz470, 260P188; 170Ark 1193, 283SW29; 195Cal 623, 234P890 (three persons acting in concert in bank robbery resulting in killing of police officer); 83Colo 4, 262P892; 45Philippine137 (dying declaration); 109TexCr 394, 5SW(2d)135. [b] 21AlaA646, 111S 318; 241NY481, 150NE523 (to sustain conviction).

297-32 179Ark625, 17SW(2d)317; 167 Ga452, 145SE379(2dcase); 212Ky212, 278SW611; 212Ky791, 280SW111; 51 ND445, 200NW20. [c] **Purchase of automobile in which murderers rode four days before crime** held not sufficient to connect purchaser with crime. 241NY 481, 150NE523.

297-40½-New. , or constitute mere speculation. 116 Or615, 241P843.

297-41 96Fla808, 119S137(1stcase); 101TexCr169, 274SW585.

297-42 170Ga343, 153S2; 170Ga810, 154SE229; 203 Iowa954, 210NW448; 212Ky212, 278SW611; 116 Or615, 241P 843; 113TexCr22, 18SW(2d)1087.

298-47 CalA 289P212; 168Ga344, 148 SE91; Ill 173NE112; 316Mo 104, 289 SW789; NJ 140A452; 53ND931, 208 NW566.

298-48 153Va928, 150SE242.

298-50 208Cal 387, 281P609; 331 Ill 608, 163NE453; 217AppDiv527, 217NYS 244.

299-52 310Mo 500, 276SW625.

299-53 **Erratum.**-Cross reference should be "§ 539."

299-54 327 Ill 393, 158NE712. [a] 147 Miss171, 113S177; 147Miss180, 113S179. [b] 101TexCr169, 274SW585.

299-55 217AppDiv527, 217NYS244.

299-56 101TexCr169, 274SW585.

299-57 315Mo 7, 285SW489.

299-59 [a] Ark 30SW(2d)213(1stcase). [b] 101TexCr169, 274SW585.

300-66 179Ark244, 15SW(2d)323; CalA 290P655; 167Ga282, 145SE458; 39GaA 135, 146SE336(1stcase); 199 Ind55, 155 NE203; 245NY401, 157NE509; 285Pa 49, 131A657; 107TexCr504, 296SW513; 110TexCr159, 8SW(2d)947; 111TexCr 299, 12SW(2d)578(1stcase); 112TexCr 254, 16SW(2d)248; TexCr 25SW(2d) 325.

300-67 167Ga532, 146SE120; 111TexCr 570, 13SW(2d)874.

300-68 93CalA711, 270P237.

300-69 45Philippine78; 108TexCr1, 298SW422.

300-71 330 Ill 532, 162NE196.

300-75 79Mont614, 257P1010; 285Pa 49, 131A657.

300-82½-New. fact that defendant was in need of money, 285Pa49, 131A657.

301-86 79Mont614, 257P1010; 297Pa 326, 146A905.

301-86½-New. has given false explanation of the absence of deceased, 79 Mont614, 257P1010.

301-86½-New. has directly charged an

innocent third party with the crime, 285Pa49, 131A657.

301-93½-New. and the fact that accused gave conflicting accounts of the transaction. 285Pa49, 131A657.

301-97 285Pa49, 131A657.

301-97½-New. That the pistol used in commission of the murder charged and subsequent holdups by defendants was taken from the possession of one who was with one defendant on the night of the latter's arrest was of no controlling significance, where there was ample evidence that the weapon passed from such defendant to his companion on that evening. 294Pa144, 143A904.

301-98 79Mont614, 257P1010.

301-1½-New. Evidence that accused purchased automobile four days before crime is insufficient to connect purchaser with murder. 241NY481, 150NE523.

301-1¾-New. Testimony as to bloodhounds' action while trailing is of no value where they made no demonstration on encountering accused. 223Ky645, 4SW(2d)675.

301-8 149Miss239, 115S433, 435 [cit CJ]; 101WVa356, 132SE728; 103WVa380, 137SE536. [a] (5) Evidence of general affray held insufficient to sustain second degree murder conviction. 103WVa380, 137SE536. [c] **In absence of evidence of conspiracy,** evidence that one of several fired shot cannot support conviction. 103WVa380, 137SE536.

301-9 149Miss239, 115S433, 435 [cit CJ]; 101WVa356, 132SE728.

302-10 [a] (1) 151Va556, 145SE336. (4) 169Ark1192, 278SW10.

302-11 166Ga758, 144SE301; 314Mo662, 285SW62. [a] (1) 163Ga186, 136SE72; 122Kan552, 253P221; 224Ky806, 7SW(2d)237; Mo 286SW20; 254NY255, 172NE489; 287Pa547, 135A313; TexCr 21SW(2d)679 (justifying conviction for murder). (4) 122Kan552, 253P221. (11) To show conspiracy. 310Mo500, 276SW625. (12) To show conspiracy to kill. Mo 30SW(2d)750. [b] (1) 158Tenn531, 14SW(2d)735. [e] **Prima facie case of conspiracy held established.-NC** 154SE604.

302-12 218Ala40, 117S457; 314Mo662, 285SW62.

302-13 218Ala442, 118S654; 324Ill375, 155NE363.

302-14 224Ky806, 7SW(2d)237; 44Philippine38. [b] **Evidence held to permit inference** of conspiracy to resist officers, even to death. NC 154SE604.

302-15 113TexCr50, 19SW(2d)60.

302-16 169Ark1192, 278SW10; 205Cal470, 271P500 (manslaughter); 68CalA95, 228P417; 329Ill352, 160NE564; 337Ill131, 169NE18; 203Iowa90, 212NW312; 228Ky19, 14SW(2d)794; 231Ky152, 21SW(2d)231 (manslaughter); 235Ky454, 31SW(2d)703; 176Minn562, 223NW917; 311Mo581, 278SW995; Mo 278SW1009; 314Mo662, 285SW62; 254NY255, 172NE489; 103TexCr636, 282SW251; 104TexCr65, 282SW600.

303-17 332Ill207, 163NE430; 227Ky100, 12SW(2d)329(2dcase); 227Ky831, 14SW(2d)146; 235Ky351, 31SW(2d)608; 235Ky469, 31SW(2d)728; 158Tenn531, 14SW(2d)735; 101WVa356, 132SE728.

303-18 79Mont614, 257P1010; 151Va556, 145SE336.

303-21 See also 44Philippine38.

303-24½-New. Conviction of one whom the state contends to be the principal in the second degree cannot stand against an objection that the finding is contrary to law, unless the guilt of the principal in the first degree appears. 163Ga406, 136SE448.

303-24¾-New. Evidence that defendant was guilty as an accomplice or accessory to a murder actually committed by another will not permit conviction as a principal in the absence of evidence of presence and participation. 113TexCr16, 18SW(2d)1078.

303-25 [a] (1) 169Ark289, 273SW11; 176Ark1003, 5SW(2d)322; Cal 290P881; Mo 279SW696; 287Pa547, 135A313. (2) 54ND779, 211NW336. (3) 338Ill237, 170NE303. (9) 104WVa617, 141SE7. (10) 239Mich123, 214NW231. (11) 169Ark717, 276SW849; Ark 30SW(2d)865; 195Cal584, 234P374; 162Ga267, 134SE36; 168Ga575, 148SE500 (conspiracy to commit robbery); 168Ga598, 148SE511; Mo 30SW(2d)132; 246NY262, 158NE615; 22OhA185, 153NE907; 30OhA379, 165NE98. (12) Homicide. Ark 32SW(2d)169. [b] 203Cal587, 265P230 (arson).

304-35 206Cal35, 273P767; 87CalA68, 261P1059; CalA 291P434; 106TexCr222, 291SW558.

304-36 191NC753, 133SE81; 193NC489, 137SE429.

304-38 5PaDist&Co559.

304-39 5PaDist&Co559.

304-40 193NC489, 137SE429.

304-50 205Iowa1028, 219NW17.

304-54 21AlaA534, 109S613; 170Ark1193, 283SW29; 198Cal238, 244P362; 206Cal35, 273P767; Cal 292P459; 87CalA68, 261P1059; CalA 290P896; CalA 291P434; 167Ga341, 145SE647; 169Ga569, 150SE843(1stcase); 336Ill251, 168NE292; 209Ky70, 272SW26; 220Ky348, 295SW142; 224Ky13, 5SW(2d)275; 227Ky528, 13SW(2d)521; 163La701, 112S655 (insanity at time of trial); 143Miss318, 108S722; 76Mont574, 248P179; 115Nebr277, 212NW606; Nebr 233NW461; 49ND348, 191NW628; 49Philippine887; TexCr 28SW(2d)822(2dcase); Utah 290P727.

305-55 102NJL659, 133A274.

305-60 284Pa255, 131A184.

305-69 [a] **Evidence held insufficient** to show that intoxication rendered defendant incapable of forming intent. 337Ill310, 169NE243.

305-72 200Cal730, 254P893; 336Ill251, 168NE292.

305-73½-New. Other cases have expressly held the evidence sufficient against the defense of drunkenness. 284Pa255, 131A184.

305-75 214Ala273, 107S737. [a] 231Ky82, 21SW(2d)115 (conviction for murder not supported). [c] 95CalA711, 273P99; CalA 288P106; 323Ill617, 154NE435. [d] 103TexCr352, 281SW202. [h] **Evidence held sufficient** to show that deceased and accused were much same type as to character and temper. 216Ky216, 287SW722.

306-77 Sask [1930] 3DomLR345.

306-80 [a] **Transaction held not pledge.-**158La777, 104S712.

306-82 331Ill608, 163NE453.

306-83 42Ida319, 245P685; 210Ky494, 276SW158; 5PaDist&Co287. [a] 285Pa77, 131A655.

306-84 285Pa77, 131A655; 5PaDist&Co559. [a] 294Pa544, 144A542.

306-85 216Ala564, 114S135.

307-87 42F(2d)623; 220Ala544, 126S848; 20AlaA604, 104S280; 23AlaA77, 121S1; 42Ida319, 245P685; Mo 6SW(2d)898(2dcase).

307-89 213Ala121, 104S282.

307-92 331Ill608, 163NE453.

308-99 226Ky144, 10SW(2d)639.

308-8 Miss 106S270.

308-9 CalA 288P106; 144Miss778, 110S225.

308-17 [b] 166Ga296, 143SE371; 47Ida328, 274P805, 62ALR195; 233Ky9, 24SW(2d)946.

308-19 Ind 167NE531; 227Ky190, 12SW(2d)285; 227Ky520, 13SW(2d)533. [a] Ark 30SW(2d)852; 96CalA102, 273P843; 84CalA168, 257P903; 87CalA724, 262P795; CalA 288P106; CalA 290P610; 90Fla844, 107S530; 92Fla241, 109S334; 96Fla307, 118S13 (gesture toward back pocket); 166Ga645, 144SE193; 324Ill170, 155NE39; Ind 167NE133; 120Kan221, 243P280; 209Ky566, 273SW30; 215Ky585, 286SW689; 219Ky505, 293SW1085; 221Ky420, 298SW1083; 223Ky211, 3SW(2d)631 (manslaughter); 233Ky319, 25SW(2d)723; 231Ky1, 21SW(2d)120 (manslaughter); 235Ky340, 31SW(2d)383; 170La69, 127S368; 257Mass473, 154NE260; Miss 109S29; 144Miss778, 110S225; Mo 256SW787; 49Philippine482; 51Philippine840; 100TexCr352, 273SW588; 104TexCr356, 284SW548; 105TexCr637, 289SW1010; 106TexCr500, 293SW1112; TexCr 26SW(2d)231; TexCr 27SW(2d)1102; 41Wyo308, 285P803. [b] 224Ky446, 6SW(2d)464; Miss 109S741; Miss 130S150. [h] **Knowledge that deceased was officer.-**49Nev184, 242P316. [i] **Evidence held sufficient** to show that defendant, in using force, exceeded bounds of defense. 257Mass473, 154NE260.

309-20 225Ky608, 9SW(2d)726. [b] (3) To show impending peril. 21AlaA204, 107S797.

309-21 149SC464, 147SE606. [c] **Evidence insufficient to take case to jury** where decedent when he was shot was attempting to enter defendant's bedroom. 22AlaA257, 114S478.

309-22 [a] 96CalA102, 273P843; 122Or444, 259P893; TexCr 28SW(2d)825. [b] 111TexCr172, 11SW(2d)798.

310-24 [a] CalA 290P655.

310-24½-New. Where the burden is on the state to prove that the killing was not done in self-defense, it is not required to make such proof by direct evidence. 208Iowa818, 222NW394.

310-25 23Ala122, 122S461; 172Ark244, 288SW904; 177Ark534, 7SW(2d)5; 179Ark94, 14SW(2d)261; 179Ark1123, 20SW(2d)622; Ark 30SW(2d)819; 199Cal610, 250P659; 201Cal341, 257P64; Cal 285P704; 73CalA74, 238P142; 86CalA148, 260P591; 92CalA405, 268P439; 93CalA497, 269P702; 95CalA659, 273P110; 97Fla1059, 122S704; 160Ga769, 129SE102; 161Ga640, 131SE682; 162Ga13, 132SE388; 162Ga1, 132SE418; 162Ga7, 132SE624; 162Ga208, 132SE911; 163Ga206, 135SE748; 163Ga186, 136SE72; 163Ga561, 136SE530; 164Ga47, 137SE553; 164Ga59, 137SE762; 164Ga151, 138SE52; 164Ga128, 138SE67; 164Ga250, 138SE153; 164Ga490, 139SE5; 164Ga500, 139SE23; 164Ga728, 139SE352; 164Ga656, 139SE427; 166Ga115, 142SE681; 166Ga251, 142SE866; 166Ga213, 142SE895; 166Ga200, 143SE369; 167Ga277, 145SE452; 167Ga280, 145SE453; 167Ga261, 145SE512; 167Ga326, 145SE654; 167Ga549, 146SE185; 167Ga536, 146SE191(1stcase); 168Ga375, 148SE33; 168Ga731, 149SE23; 169Ga373, 150SE427; 169Ga384, 150SE558; 169Ga455, 150SE587; 169Ga414, 150SE642; 169Ga583, 151SE15; 169Ga613, 151SE17; 170Ga570, 153SE363; 170Ga843, 154SE232; Ga 154SE332; Ga 154SE337; 170Ga859, 154SE344; 170Ga886, 154SE363; 170Ga895, 154SE368; Ga 154SE799; Ga 155SE11; Ga 155SE478; 319Ill606, 150NE347; 321Ill397, 152NE149; 323Ill617, 154NE435; 324Ill170, 155NE39; 324Ill375, 155NE363; 324Ill428, 155NE337; 326Ill640, 158NE403; 334Ill526, 166NE74; 336Ill412, 168NE380; 337Ill84, 169NE12; Ill 172NE728; Ill 172NE743; 215Ky613, 286SW696; 216Ky787, 288SW742; 216Ky832, 288SW768; 218Ky314, 291SW383; 221Ky222, 298SW678; 222Ky99, 300SW357; 222Ky630, 18SW(2d)1045; 223Ky224, 3SW(2d)618; 225Ky177, 7SW(2d)1052; 225Ky286, 8SW(2d)411; 225Ky572, 9SW(2d)707; 225Ky713, 9SW(2d)1080; 226Ky437, 11SW(2d)111; 227Ky212, 12SW(2d)305; Ky 12SW(2d)326; 227Ky500, 13SW(2d)511; 228Ky432, 15SW(2d)273; 229Ky168, 16SW(2d)766; 229Ky249, 16SW(2d)1058; 231Ky527, 21SW(2d)840 (prosecution for murder, aiding and abetting, and conspiracy to murder); 232Ky453, 23SW(2d)930; 235Ky735, 32SW(2d)51; 235Ky845, 32SW(2d)405; 262Mass408, 160NE271; 236Mich672, 211NW39; 140Miss238, 105S497; 140Miss889, 105S742; 141Miss115, 106S264; 142Miss335, 107S373; 142Miss787, 107S663; 143Miss318, 108S722; 145Miss252, 110S515; 147Miss479, 112S677; 147Miss694, 112S785; 147Miss171, 113S177; Miss 113S352; 150Miss785, 116S885; 151Miss539, 118S610; 154Miss671, 122S766(2dcase); 154Miss862, 123S892; 156Miss612, 126S390(2dcase); Miss 130S502; 319Mo28, 3SW(2d)230; 76Mont574, 248P179; 53ND931, 208NW566; 58ND82, 224NW878; OklCr 282P903; OklCr 284P651; OklCr 286P815; OklCr 287P429; OklCr 287P818; OklCr 287P822; OklCr 287P826; 116Or509, 241P983; 46Philippine266; 50Philippine200; 50Philippine203; 50Philippine207; 50Philippine780; RI 135A152; 152SC17, 149SE348; 53SD60, 220NW139; 155Tenn266, 292SW451; 103TexCr334, 280SW792; 103TexCr496, 281SW559; 103TexCr593, 281SW865; 104TexCr263,

283SW522; 104TexCr423, 284SW571; 104TexCr408, 284SW588; TexCr 287SW 245; TexCr 288SW441; 106TexCr68, 291SW226; 106TexCr482, 293SW173; 107TexCr376, 296SW537; 107TexCr221, 296SW563; 107TexCr530, 298SW287; 108TexCr270, 1SW(2d)287; 109TexCr 265, 4SW(2d)42; 110TexCr128, 7SW (2d)579; TexCr 7SW(2d)1117(3dcase); 111TexCr559, 15SW(2d)619(1stcase); 112TexCr227, 16SW(2d)122(2dcase); 111TexCr237, 16SW(2d)251; 112TexCr 517, 17SW(2d)807; TexCr, 17SW(2d) 1060; 113TexCr108, 18SW(2d)637(2d case); 113TexCr555, 23SW(2d)721; TexCr 24SW(2d)48; TexCr 25SW(2d) 338; TexCr 26SW(2d)631; TexCr 26 SW(2d)920(2dcase); TexCr 26SW(2d) 1064; TexCr 27SW(2d)196(2dcase); TexCr 29SW(2d)779; TexCr 31SW(2d) 437; TexCr 31SW(2d)812; 153Va909, 150SE407. [d] 163Ga312, 136SE134; 230Ky327, 19SW(2d)964. [e] OklCr 270 P344; OklCr 281P988.

311-26 164Ga92, 137SE768; 339 Ill 78, 170NE690; 223Ky645, 4SW(2d)675; 228Ky591, 15SW(2d)429; 154Miss742, 123S867; 155Miss404, 124S480; 243 NY320, 153NE433; 51Philippine825; 50Philippine545; 105TexCr308, 28SSW 444; 113TexCr50, 19SW(2d)60.

311-29 [a] 49Philippine103.

311-32 [a] 223Ky374, 3SW(2d)757.

312-37 153Va846, 149SE414.

312-38 But see 116 Oh495, 156NE600.

312-42 216Ala336, 113S64; 216Ala356, 113S67; 219Ala670, 123S50; 32Ariz111, 256P111; 32Ariz175, 256P359; 32Ariz 153, 256P1117; 33Ariz354, 264P1083; Ariz 283P711; 169Ark627, 276SW361; 169Ark717, 276SW849; 170Ark560, 280 SW9; 171Ark1188, 287SW172; 172Ark 244, 288SW904; 173Ark713, 293SW19; 176Ark1205, 4SW(2d)948; 177Ark1193, 7SW(2d)10; 178Ark928, 12SW(2d)909; 178Ark1121, 13SW(2d)606; 179Ark1199, 20SW(2d)128; 180Ark241, 22SW(2d)47; 181Ark185, 25SW(2d)766; 181Ark1011, 28SW(2d)1055; 181Ark1145, 29SW(2d) 670; 196Cal 191, 237P25; 198Cal 454, 245P821; 198Cal 776, 247P884; 199Cal 361, 249P186; 201Cal 290, 257P46; 201 Cal 474, 259P47; 202Cal 154, 259P442; 203Cal 139, 263P522; 203Cal 153, 263P 524; 207Cal 131, 277P316; 207Cal 172, 277P320; Cal 286P998; Cal 289P634; Cal 292P459; 69CalA257, 231P593 (evidence sufficient to show murder by poison); 71CalA453, 236P163; 79CalA101, 248P1078; 94CalA164, 270P747; CalA 286P514; CalA 284P485; CalA 289P918; CalA 292P693; 82Colo 205, 258P226; 86Colo 141, 278P792; 87Colo 44, 285P 162; 87Colo 360, 287P643; Colo 293P 335; 110Conn549, 148A664; 92Fla987, 111S127; 93Fla1076, 113S121; 94Fla 318, 113S689; 95Fla775, 116S618; 95 Fla997, 117S381; 162Ga573, 134SE169; 163Ga12, 135SE421; 163Ga121, 135SE 917; 169Ga468, 151SE34; 316 Ill 288, 147NE246; 316 Ill 591, 147NE484; 326 Ill 145, 157NE225; 337 Ill 493, 169NE 321; 198 Ind141, 152NE830; 198 Ind 156, 152NE803; Ind 166NE654; 200 Iowa644, 204NW213; 203 Iowa929, 210 NW465; 204 Iowa1306, 214NW743; 206 Iowa859, 220NW95; 208 Iowa863, 226 NW19 (wife murder); 120Kan221, 243 P280; 121Kan576, 249P617; 122Kan 552, 253P221; 124Kan208, 257P739; 214Ky137, 282SW1082; 221Ky175, 298 SW376; 222Ky727, 2SW(2d)373; 265 Mass382, 163NE251(2dcase); 247Mich 260, 225NW540; 170Minn197, 212NW 203; Mo 256SW753; Mo 274SW62; 310 Mo 500, 276SW625; Mo 278SW694; 314 Mo 699, 285SW440; 316Mo 195, 289SW 604; 316Mo 904, 292SW714; Mo 8SW (2d)49; 321Mo 870, 12SW(2d)469; 114 Nebr404, 207NW928; 115Nebr148, 211 NW994; 115Nebr320, 212NW614; 116 Nebr90, 215NW785; 116Nebr73, 215NW 789; 118Nebr591, 225NW766; 49Nev 184, 242P316; 49Nev217, 242P590; 50 Nev271, 257P619; Nev 285P503; Nev 290P732; 102NJL134, 130A642; 102 NJL94, 131A292; NJ 134A611; 103NJL 64, 134A760; 103NJL383, 135A895; NJ 146A313; 102NJ569, 134A110; 31NM 620, 249P1003; 245NY577, 157NE864; 245NY591, 157NE870; 245NY613, 157 NE879; 245NY617, 157NE881(1stcase); 245NY617, 157NE881(2dcase); 246NY 262, 158NE615; 246NY409, 159NE379; 189NC616, 127SE675; 191NC122, 131SE 370; 197NC478, 149SE735; 198NC82, 150SE678; 198NC629, 152SE890; 115 Oh283, 152NE667; 23 OhA237, 155NE 569; 30 OhA379, 165NE98; 33 OhA445, 169NE833; OhA 173NE26; 121 Or141, 253P367; 126 Or560, 270P404; 285Pa 49, 131A657; 289Pa284, 137A261; 289 Pa452, 137A606; 292Pa16, 140A537; 292Pa26, 140A611; 295Pa50, 144A761; 296Pa164, 145A692; Pa 146A553; 297 Pa382, 147A79; 298Pa165, 148A65; 298 Pa363, 148A508; 300Pa375, 150A649; 50RI 171, 146A415(2dcase); 155Tenn 325, 292SW849; 99TexCr572, 271SW99; 100TexCr54, 271SW902; 100TexCr114, 272SW149; 104TexCr661, 285SW617; 107TexCr541, 298SW293; 107TexCr666, 298SW591; 108TexCr623, 2SW(2d)249; 143Va609, 130SE777 (verdict not contrary to law and evidence); 147Va692, 137SE603; 150Va571, 142SE397; 142 Wash673, 253P1074; 144Wash446, 258 P508; Wash 287P57; 104WVa617, 141 SE7; 108WVa148, 150SE519; 193Wis 482, 214NW356; 196Wis571, 219NW 278; 198Wis176, 223NW416; 34Wyo 247, 242P812. [a] (6) Poisoning. 203 Iowa918, 210NW961. (7) Shooting. 180Minn221, 230NW639. [c] 197NC 445, 149SE590(2dcase). [f] 115Nebr 320, 212NW614; 117Nebr304, 220NW 292; 107TexCr666, 298SW591. [g] In attempt to commit another crime.–Mo 22 SW(2d)639. [h] Homicide in course of premeditated robbery.–50RI 356, 147A 878.

314-43 89Fla280, 103S618; 316 Ill 575, 147NE443; 208Ky707, 271SW1055; 85 Mont553, 281P757; Mo 32SW(2d)596; 114Nebr543, 208NW619; 100TexCr39, 272SW130; 100TexCr269, 272SW799 (not to warrant death penalty); 106 TexCr366, 292SW217; 153Va857, 149 SE471; 108WVa208, 150SE602; 41Wyo 128, 283P406.

314-44 110TexCr639, 10SW(2d)559(2d case). [a] 263Mass356, 161NE245; 265 Mass382, 163NE251(2dcase); 121 Or141, 253P367.

314-45 225Ky492, 9SW(2d)132.

314-49 203Cal 153, 263P524; 82Colo 205, 258P226; Mo 22SW(2d)802; 285 Pa49, 131A657; 292Pa210, 140A898.

314-50 243NY320, 153NE433; 295Pa 50, 144A761.

314-54 22AlaA101, 112S806; 23AlaA 516, 128S124; 169Ark1211, 276SW863; 170Ark1194, 282SW676; 170Ark1061, 282SW684; 170Ark1192, 283SW12; 171 Ark799, 286SW981; 171Ark1188, 287 SW178; 171Ark1136, 287SW590; 172 Ark61, 287SW747; 172Ark1176, 288SW 925; 174Ark1180, 298SW3; 176Ark 1203, 3SW(2d)292; 176Ark756, 4SW (2d)12; 180Ark711, 22SW(2d)1012; Ark 29SW(2d)1079(2dcase); 195Cal 295, 232P974; 198Cal 717, 247P576; 199Cal 155, 248P504; 85CalA258, 258P1111; 91CalA290, 266P1000; 95CalA259, 272P 816; 102CalA688, 283P388; CalA 286 P1061; CalA 290P493; 77Colo 350, 237 P159; 91Fla1026, 109S804; 92Fla878, 110S547; 92Fla1094, 111S245; 94Fla 149, 113S726; 94Fla1189, 116S501; 95 Fla775, 116S618; 99Fla732, 127S342; 28Hawaii350; 197 Ind583, 151NE 403; 198 Ind614, 154NE370; 199 Ind489, 158NE480; Ind 171NE192; 200 Iowa1248, 206NW246; 203 Iowa90, 212NW312; 205 Iowa858, 216NW759; 208 Iowa818, 222NW394; 121Kan687, 247P427; 121Kan377, 247P1050; 128 Kan475, 278P767; Kan 291P945; 233 Mich185, 206NW568; 239Mich123, 214 NW231; Mo 281SW32; 313Mo 615, 285 SW392; 316Mo 995, 292SW70; Mo 292 SW728; 317Mo 372, 295SW734; Mo 295 SW791; Mo 300SW320; Mo 6SW(2d) 903; Mo 7SW(2d)264; Mo 11SW(2d) 1037; 321Mo 662, 12SW(2d)34; 322Mo 1239, 18SW(2d)71; Mo 24SW(2d)1039; Mo 29SW(2d)60; 79Mont343, 256P380; 79Mont614, 257P1010; 85Mont544, 281 P352; Mont 289P1037; 118Nebr862, 226NW784; Nev 233P49; NJ 148A776; NJ 150A361; 33NM187, 262P929; 33 NM365, 266P920; 33NM377, 267P63; 190NC674, 130SE627, 42ALR1114; 287 Pa512, 135A301; 296Pa332, 145A855; 29PortoRico961; 156Tenn105, 299SW 1052; 157Tenn403, 8SW(2d)371; 143 Va489, 129SE252; 143Va479, 129SE348; 143Va510, 129SE360; 151Va533, 145SE 307; 153Va828, 149SE445; Va 154SE 508; 150Wash66, 272P89; 99WVa694, 129SE748; 104WVa1, 138SE732; 106 WVa289, 145SE634; 107WVa418, 148SE 131; 107WVa490, 148SE843; 108WVa 330, 150SE754; WVa 153SE496; 195 Wis540, 218NW714; 199Wis615, 227 NW258. [a] 93CalA174, 269P176.

315-55 20AlaA565, 104S45; 21AlaA 180, 106S390; 21AlaA646, 111S318; 98Fla1228, 125S352; 99Fla387, 126S 366; 315Mo 7, 285SW489; 316Mo 995, 292SW70; 317Mo 372, 295SW734; 117 Nebr759, 222NW956; Nebr 232NW575; 195NC20, 141SE285; 144Va669, 131SE 227; 150Va571, 142SE397; 152Wash68, 277P394; 103WVa380, 137SE536.

315-56 [a] 171Minn414, 214NW280.

315-57 175Ark1170, 299SW755.

316-60 Mo 25SW(2d)109.

316-61 149Wash440, 271P64.

316-64 89Fla475, 104S782.

316-65 93CalA81, 269P177. [a] Negligence.–21AlaA449, 109S282.

316-68 20F(2d)269; Ala 104S782 (culpable negligence); 171Ark255, 283SW 981; 171Ark297, 284SW734; 174Ark 950, 298SW323; 198Cal 534, 246P62; 72 CalA318, 237P53; 79CalA506, 250P208; 80CalA31, 251P343; 84CalA58, 257P 592; 86CalA768, 261P512; 93CalA81, 269P177; 93CalA334, 269P726; 98CalA 423, 276P1030; CalA 285P866; CalA 290P102; CalA 292P654; 89Fla212, 103 S636; 89Fla336, 103S642; 93Fla372, 112S73; 93Fla1057, 113S98; 94Fla163, 113S699; 99Fla1216, 128S486; Fla 130 S718; 36GaA660, 137SE787; 36GaA659, 137SE913; 36GaA771, 138SE275; 36 GaA769, 138SE288; 37GaA379, 140SE 395; 37GaA376, 140SE527; 40GaA360, 149SE429; 337 Ill 161, 169NE9; 202 Iowa722, 210NW904; 205 Iowa1028, 219 NW17; 208Ky538, 271SW566; 209Ky 59, 272SW29; 210Ky566, 276SW522; 213Ky190, 280SW1086; 213Ky675, 281 SW819; 214Ky111, 282SW766; 214Ky 280, 283SW84; 215Ky585, 286SW689; 215Ky809, 287SW4; 215Ky837, 287SW 32; 216Ky317, 287SW898; 216Ky724, 288SW680; 219Ky205, 292SW835; 219 Ky592, 293SW1057; 219Ky505, 293SW 1085; 221Ky433, 298SW1078; 221Ky 487, 298SW1086; 221Ky603, 299SW183; 223Ky25, 2SW(2d)1035; 223Ky402, 3SW (2d)775; 223Ky484, 3SW(2d)1105; 223 Ky831, 4SW(2d)728; 224Ky229, 5SW (2d)1047; 224Ky334, 6SW(2d)269; 224 Ky381, 6SW(2d)457; 224Ky370, 6SW (2d)483; 225Ky160, 7SW(2d)1064; 225 Ky282, 8SW(2d)406; 225Ky275, 8SW (2d)415; 225Ky340, 8SW(2d)422; 225 Ky655, 9SW(2d)990; 225Ky660, 9SW (2d)992; 225Ky802, 10SW(2d)286; 227 Ky129, 12SW(2d)297; 227Ky100, 12SW (2d)329(2dcase); 228Ky106, 14SW(2d) 390; 228Ky722, 15SW(2d)435; 228Ky 674, 15SW(2d)463; 229Ky305, 17SW (2d)238; 229Ky348, 17SW(2d)245; 231 Ky463, 21SW(2d)800 (in murder prosecution); 233Ky820, 27SW(2d)80; 234 Ky56, 27SW(2d)405; 234Ky192, 27SW (2d)971; 234Ky441, 28SW(2d)505; 234 Ky734, 29SW(2d)13; 235Ky325, 31SW (2d)390(2dcase); 127Me551, 143A687; 247Mich308, 225NW752(2dcase); 143 Miss421, 108S899; 150Miss552, 117S 529; 152Miss43, 118S369; 151Miss702, 118S431; 152Miss143, 118S716; 152 Miss728, 120S837; Mo 278SW676; 317 Mo 272, 295SW96; Mo 22SW(2d)797; 85Mont585, 281P551; 113Nebr790, 205 NW252; 116Nebr125, 216NW294; 117 Nebr601, 221NW683; 118Nebr31, 223 NW464; Nebr 229NW271; NJ 143A 811; NJ 148A776; 221AppDiv26, 222 NYS497; 192NC80, 133SE404; 192NC 692, 135SE866; OklCr 275P361; OklCr 283P260; OklCr 288P987(2dcase); 134 SC76, 131SE784; 103TexCr279, 280SW 594; 104TexCr356, 284SW548; 105Tex Cr281, 288SW213; 105TexCr600, 289SW 689; 106TexCr46, 290SW163; 106TexCr 500, 293SW1112; 109TexCr564, 5SW (2d)982; TexCr 26SW(2d)256. [d] 152 Miss133, 118S906; 104NJL226, 139A833. [e] 70CalA519, 234P110; 195NC242, 141SE736.

317-69 174Ark950, 298SW323; 174 Ark1035, 298SW333; 176Ark771, 4SW (2d)9; 179Ark1158, 16SW(2d)468; Ark 30SW(2d)840(1stcase); Ark 30SW(2d) 852; 35GaA241, 132SE650; 36GaA213, 136SE182; 36GaA652, 137SE790; 36

GaA648, 137SE863; 36GaA639, 138SE 83; 36GaA741, 138SE258; 37GaA19, 138SE671; 38GaA661, 145SE105; 38 GaA648, 145SE106; 41GaA255, 152SE 595; 41GaA333, 153SE79(2dcase); 41 GaA618, 154SE201; 333 Ill 451, 164NE 840; 209Ky10, 272SW1; 210Ky71, 275 SW22; 210Ky217, 275SW689; 210Ky 594, 276SW545; 210Ky747, 276SW834; 212Ky791, 280SW111; 213Ky253, 280 SW953; 216Ky98, 287SW235; 217Ky 403, 289SW371; 217Ky518, 289SW1102; 218Ky153, 291SW4; 218Ky189, 291SW 1; 219Ky505, 293SW1085; 221Ky158, 298SW374; 223Ky762, 4SW(2d)419; 225Ky596, 9SW(2d)720; 226Ky186, 10 SW(2d)646; 226Ky296, 10SW(2d)1094; 228Ky765, 15SW(2d)525; 229Ky153, 16 SW(2d)509(2dcase); 229Ky312, 17SW (2d)241; 230Ky624, 20SW(2d)442; 230 Ky718, 20SW(2d)738; 230Ky840, 20SW (2d)1005; 231Ky76, 21SW(2d)113 (defendant drunk); 231Ky412, 21SW(2d) 651(2dcase) (verdict held not flagrantly against evidence); 32NM500, 258P1009; 297Pa326, 146A905; 159Tenn422, 19SW (2d)231. [a] 39GaA836, 148SE610.

317-71. 175Ark1083, 3SW(2d)23; 176 Ark1203, 4SW(2d)4; 76CalA648, 245P 461; 164Ga467, 139SE77; 125Me453, 134A572; 290Pa195, 138A686; 93Pa Super339; 157Tenn421, 7SW(2d)50. [a] (1) 78CalA598, 248P969; 37GaA180, 139 SE361 (owner of car driven by chauffeur); 96PaSuper547. (2) Evidence held sufficient to show that defendant at time of accident was intoxicated and was on wrong side of road. 195Cal 325, 233P97. [c] **Shooting man riding horse mistaken for deer.**–129 Or564, 278P568, 63ALR1225.

317-72 21AlaA111, 105S427; 22AlaA 368, 115S766; 22AlaA508, 117S506(2d case); 167Minn164, 208NW760; 37 Okl Cr282, 257P1114; 38 OklCr34, 259P173; OklCr 268P732; OklCr 272P491; Okl Cr 273P1029(1stcase); OklCr 280P639; OklCr 280P859; OklCr 280P1105; Okl Cr 281P157(1stcase) (shooting); OklCr 286P808; OklCr 287P813; OklCr 287P 826; OklCr 287P1067; OklCr 287P1090; OklCr 288P396(2dcase); OklCr 288P 500; OklCr 288P1075; OklCr 290P927 (2dcase); OklCr 291P989; OklCr 292P 82; OklCr 292P376; 43 OklACR321 [reh pending].

317-73 95CalA259, 272P816; Minn 231 NW721; 245NY220, 156NE672; 220 AppDiv528, 221NYS760; 38 OklCr338, 261P378. [a] 168Minn263, 209NW881 (driving automobile while intoxicated); 33 OklCr100, 242P270. [b] **Reckless driving of automobile.**–OklCr 281P160 (2dcase) (causing death of occupants); OklCr 281P163 (running down person in highway).

317-75½-New. or to show that defendant was not intoxicated while driving automobile; 33Wyo 346, 239P526, 41 ALR717.

317-76 22AlaA126, 113S466; 90Fla816, 107S245; 95Fla821, 116S642; 209Ky 51, 272SW11; 210Ky494, 276SW158; 213Ky701, 281SW806; 219Ky664, 294 SW160; 221Ky648, 299SW553; 225Ky 234, 8SW(2d)403; 230Ky199, 18SW(2d) 1005; 235Ky351, 31SW(2d)608; 235Ky 751, 32SW(2d)331; Miss 110S691; 245 NY220, 156NE672; 27 OhA272, 161NE 37; 116 Or615, 241P843; 144SC53, 142 SE31; 40Wyo 128, 274P1074(2dcase). [b] **Driving automobile.**–321 Ill 11, 151 NE676.

317-77 [a] 23AlaA336, 125S204(1st case) (absence of evidence); 223AppDiv 248, 228NYS24.

317-78 216Ky216, 287SW722; 236Ky 23, 32SW(2d)532; 33PortoRico 823; 106WVa216, 145SE275.

317-79 144Va609, 131SE242. [a] 33 PortoRico 188; 154Tenn7, 285SW565, 49 ALR605. [b] See also 36GaA286, 136 SE331. [f] **Placing poison in beverage.**–204 Iowa1360, 217NW236.

318-80 93Fla1057, 113S98.

318-81 171Ark1187, 285SW359; Ill 172 NE740.

318-82 237 IllA467; 311Mo 683, 279 SW695.

318-83 23AlaA149, 122S308; OklCr 283 P266; 109TexCr108, 3SW(2d)91. [b] **Evidence held sufficient to show intent.** 171Ark1187, 285SW359.

318-84 219Ky177, 292SW799.

318-85 171Ark1187, 285SW359.

318-87 175Ark232, 298SW1028.

318-94 [b] **Evidence insufficient to show deadly character of weapon.**–113TexCr 155, 18SW(2d)650.

318-96 21AlaA313, 108S77; 169Ark 1192, 278SW10; 170Ark1194, 282SW 676; 171Ark672, 285SW377; 172Ark 156, 287SW1026; 172Ark1176, 288SW 705; 180Ark197, 20SW(2d)872; Ark 31SW(2d)760; 89CalA18, 264P324; 106 Conn345, 138A132; 94Fla268, 113S707; 36GaA17, 135SE443; 36GaA119, 135SE 515; 36GaA288, 136SE324; 36GaA676, 137SE791; 37GaA486, 140SE924; 37 GaA124, 139SE80; 37GaA79, 139SE82; 39GaA21, 145SE904; 41GaA346, 152SE 911(2dcase); 318 Ill 316, 149NE236; 321 Ill 559, 152NE552; 327 Ill 312, 158NE 732; 339 Ill 263, 171NE143; 337 Ill 131, 169NE18 (accessory after fact); Ill 172 NE740; 237 IllA467; 197 Ind491, 151 NE382; Iowa 206NW620; 126Kan414, 268P842; 213Ky559, 281SW529; 214 Ky223, 282SW1111; 221Ky219, 298SW 707; 223Ky692, 4SW(2d)711; 224Ky 269, 6SW(2d)248; 224Ky443, 6SW(2d) 488; 227Ky463, 13SW(2d)486(2dcase); 227Ky792, 13SW(2d)1053; 229Ky646, 17SW(2d)751; 232Ky211, 22SW(2d) 627; 234Ky729, 29SW(2d)11; 234Ky 799, 29SW(2d)560; 314Mo673, 285SW 726; Mo 274SW19; Mo 278SW669; Mo 289SW616; Mo 23SW(2d)7; 49ND228, 191NW345; OklCr 271P430; OklCr 287 P815; OklCr 292P373; OklCr 292P1050; 154Tenn95, 290SW25; 161Tenn310, 30 SW(2d)231; 101TexCr553, 276SW279; 104TexCr100, 283SW511; TexCr 290 SW162; 107TexCr40, 294SW545; 107 TexCr614, 298SW426; 110TexCr318, 7 SW(2d)564; TexCr 15SW(2d)635(1st case); TexCr 24SW(2d)423; TexCr 26 SW(2d)206; TexCr 27SW(2d)797; Tex Cr 28SW(2d)149. [e] (4) That person assaulted was deputy sheriff. 100TexCr 438, 273SW586. (5) That knife used was deadly weapon. 36GaA288, 136SE 324. (6) Intent to kill. 36GaA288, 136 SE324; 37GaA823, 142SE195. [g] **Conviction of shooting another with intent to kill sustained.**–OklCr 287P807.

319-97 23AlaA149, 122S308; 37GaA95, 138SE923; 327 Ill 312, 158NE732; 237 IllA467; 197 Ind622, 151NE691; 143 Miss96, 108S443; 311Mo 683, 278SW 695; 318Mo596, 300SW702; 113TexCr 155, 18SW(2d)650; 113TexCr280, 22 SW(2d)456(1stcase); TexCr 28SW(2d) 142; TexCr 28SW(2d)146(3dcase).

319-99½-New. To show accused's intent all circumstances tending to show his state of mind should be taken into consideration by the jury. 171Ark1187, 285SW359.

319-1 [a] 214Ky130, 282SW1070; Tex Cr 290SW1114; 144Va594, 131SE212; 147Va648, 136SE598. [e] **Conviction of frustrated homicide not sustained.**–45 Philippine207. [f] **Evidence insufficient.**–319Mo 1222, 6SW(2d)609; Mo 12 SW(2d)43.

320-12 See also 22AlaA376, 115S852.

320-13½-New. Where, after juries' views of premises requested by accused, he insisted that conditions had been changed, it was not error for the court to refuse to order restoration of conditions as at the time of homicide. 76 Mont509, 248P201.

320-13½-New. Granting of motion for jury to view scene of homicide rests in sound discretion 161La532, 109S56.

320-13¼-New. and is properly derived where it was thirty miles distant and fully described by oral testimony and maps and measurements. 161La532, 109S56.

320-17 [a] **Partial and unsatisfactory autopsy** previously made does not affect court's authority. 127Me197, 142A 728.

320-17½-New. Refusal of petition for exhumation of body is proper where deceased's near relatives are given no notice. 287Pa512, 135A301.

320-18 127Me197, 142A728; 26 OhNP NS406.

320-19 127Me197, 142A728.

321-44½-New. In a prosecution for murder, committed in the course of a bank robbery, the fact that automobile, used by defendant in committing the robbery and murder, stood outside of the bank when the jury viewed the scene was held not prejudicial where it was removed before jury's attention was drawn to it. 255Mass304, 151NE297, 47ALR962.

321-46 22AlaA583, 118S242; 106Tex Cr482, 293SW173.

321-48 But see 169Ga142, 149SE887.

322-60 31NM436, 246P897.

322-62 18F(2d)850; 32Ariz111, 256P 111; 195Cal 272, 232P710 (whether defendants jointly charged with murder were jointly concurred in commissions of crime is for jury); 78CalA442, 248P 1061 (whether defendant was engaged in unlawful act at time of killing); 90 Fla255, 105S829; Ill 172NE740; 198 Ind590, 154NE372; 203 Iowa918, 210 NW961; 260Mass303, 157NE354; Mo 256SW753; 241NY481, 150NE523; 195 NC242, 141SE736; 109TexCr108, 3SW (2d)91. [e] 210Ky385, 275SW819. [g] **Genuineness of defendant's reason** for refusal to tell what he knew about deceased and inferences therefrom are for the jury. 198Cal 776, 247P884. [h] **Peremptory instruction** properly refused. 216Ky753, 288SW693. [i] **In prosecution for assault with intent to kill,** question whether force used was such as likely would produce death is for jury. OklCr 287P1073.

322-63 [a] **Whether special officer was acting in unlawful manner** and without due caution in shooting and killing deceased while attempting to arrest him is for jury. 157Tenn421, 7SW(2d)50.

322-65 217Ala212, 115S223; 218Ala40, 117S457; 218Ala442, 118S654; 23AlaA 182, 122S298; 20AlaA570, 104S140; 21 AlaA285, 107S722; 21AlaA313, 108S77; 21AlaA573, 110S169; 22AlaA88, 112S 542; 22AlaA120, 113S494; 22AlaA136, 114S791; 22AlaA392, 115S860; 23AlaA 488, 128S358(2dcase); 23AlaA416, 125 S398; 23AlaA428, 126S420(3dcase); Ariz 282P481; 169Ark1211, 276SW863; 176Ark771, 4SW(2d)9; 177Ark1193, 7 SW(2d)10; 181Ark185, 25SW(2d)766; 180Ark79, 20SW(2d)618; 78CalA442, 248P1061; 86CalA148, 260P591; 90Fla 255, 105S829 (jury are judge of credibility and weight of evidence); 169Ga 455, 150SE587; 337 Ill 84, 169NE12; Ill 173NE383; 198 Ind590, 154NE372; 204 Iowa1306, 214NW743; 120Kan430, 243P1006; 209Ky263, 272SW721; 215 Ky843, 287SW34; 216Ky753, 288SW 693; 218Ky721, 292SW307; 219Ky406, 293SW975; 219Ky664, 294SW160; 220 Ky640, 295SW983; 221Ky49, 297SW 929; 221Ky222, 298SW678; 222Ky546, 1SW(2d)961; 223Ky93, 2SW(2d)1026; 223Ky305, 3SW(2d)647; 223Ky393, 3 SW(2d)764; 224Ky334, 6SW(2d)269; 225Ky590, 9SW(2d)723(2dcase); 226 Ky255, 10SW(2d)820; 226Ky660, 11 SW(2d)726; 227Ky65, 11SW(2d)1000 (2dcase); 227Ky129, 12SW(2d)297; 228Ky765, 15SW(2d)525; 228Ky830, 16 SW(2d)478; 229Ky534, 17SW(2d)432 (2dcase); 230Ky707, 20SW(2d)721; 231Ky527, 21SW(2d)840 (evidence held sufficient in prosecution for murder, conspiracy to murder, and aiding and abetting); 234Ky441, 28SW(2d)505; 235 Ky78, 29SW(2d)629; 235Ky336, 31SW (2d)381; 235Ky391, 31SW(2d)622; 260 Mass303, 157NE354; 265Mass382, 163 NE251(2dcase); Mass 171NE16; 232 Mich310, 205NW188 (cause of death); 233Mich185, 206NW568; 236Mich226, 210NW219; 239Mich123, 214NW231; 244Mich622, 222NW185; 150Miss228, 116S435; 151Miss85, 117S361; 153Miss 654, 121S284; 154Miss671, 122S766(2d case); 154Miss862, 123S892; 156Miss 612, 126S390(2dcase); Miss 128S891; Miss 130S908; 312Mo 411, 278SW1036; 313Mo 436, 282SW22; 313Mo 615, 285 SW392; Mo 278SW681; Mo 279SW 696; 316Mo 104, 289SW789; 316Mo 904, 292SW714; 317Mo 284, 295SW550; 318Mo 766, 300SW1073; Mo 11SW(2d) 1011; 116Nebr73, 215NW789; Nev 290 P732; 105NJL352, 144A612; 243NY 134, 152NE700; 193NC487, 137SE417; 196NC129, 144SE698(2dcase); 196NC 351, 145SE677(2dcase); 196NC562, 146 SE395; 196NC542, 146SE409; 198NC 649, 152SE895; 197NC684, 150SE337; 126 Or560, 270P404; 152SC17, 149SE 348; 155Tenn397, 293SW755; 104Tex Cr408, 284SW588; 105TexCr166, 287

SW260; 106TexCr300, 292SW220; 107 TexCr40, 294SW545; 107TexCr600, 298 SW438; 107TexCr676, 298SW594; Tex Cr 21SW(2d)299(1stcase); 144Wash 446, 258P508; 149Wash92, 270P123. [a] (1) 154Miss60, 119S507. (4) 21 AlaA611, 110S694. [c] 217Ala164, 115 S101. [d] **Evidence held sufficient to go to jury.**–316Mo 104, 289SW789; NC 154 SE604; 152SC17, 149SE348; 107TexCr 332, 296SW547.

323–66 312Mo 411, 278SW1036; Mo 256SW740.

323–67 219Ala83, 121S72, 63ALR560; 21AlaA38, 104S881 (general charge properly refused where evidence is in conflict); 21AlaA43, 105S696 (to refuse general affirmative charge); 21AlaA313, 108S77; 21AlaA551, 109S897; 21AlaA 577, 110S171; 22AlaA120, 113S494; Ga 154SE332; 209Ky263, 272SW721; 210Ky 385, 275SW819; 215Ky837, 287SW32; 227Ky439, 13SW(2d)244; 260Mass303, 157NE354; 233Mich185, 206NW568; 141 Miss841, 105S784; 142Miss787, 107S 663; 149Miss741, 115S889; Miss 128S 891; Mo 256SW744; 192NC150, 134SE 413; 193NC487, 137SE417; 195NC242, 141SE736; 196NC50, 144SE518; 197NC 576, 150SE25(2dcase); 107TexCr676, 298SW594.

324–69 212Ky212, 278SW611; 212Ky 791, 280SW111; 218Ky314, 291SW383; Miss 106S270; 153Miss357, 120S918(3d case); 246NY451, 159NE394; 194NC 442, 140SE22. [a] **Evidence held insufficient to go to jury.**–217Ky155, 289SW 208; 219Ky446, 293SW961; 225Ky83, 7SW(2d)823. [b] **In homicide witnessed by no other person** defendant's testimony is controlling in absence of circumstances proving guilt. 144Miss778, 110S225.

324–70 220Ky585, 295SW888.

324–71 196NC129, 144SE698(2dcase).

324–73 210Ky359, 275SW872 (aider and abettor); 212Ky212, 278SW611; 212Ky791, 280SW111; 219Ky621, 294 SW189; Miss 106S270; 157Miss33, 127 S684(2dcase).

324–74 213Ala143, 104S220; 28Hawaii 350; 203 Iowa918, 210NW961. [b] **Where there is no proof of death or of criminal agency of another,** question is for court. 22AlaA277, 114S789.

324–75 213Ala333, 104S830; 214Ala 273, 107S737; 22AlaA567, 117S906; 23 AlaA348, 128S359(2dcase); 93Fla756, 112S608; Ind 171NE192; 229Ky580, 17 SW(2d)706(2dcase); 242Mich16, 217 NW758; Mo 11SW(2d)1037; 246NY100, 158NE35; 126 Or560, 270P404; 287Pa 547, 135A313; 5PaDist&Co 287; 5PaDist &Co 559; 104TexCr608, 286SW228; 106 TexCr528, 293SW827; 108TexCr302, 300 SW71.

324–76 71CalA213, 234P877; 77CalA 472, 246P1085; CalA 286P476; 41GaA 495, 153SE372; 235Ky683, 32SW(2d) 34; OklCr 287P1073; 117 Or515, 243 P766; 126 Or560, 270P404; 105TexCr 8, 284SW961; 196Wis104, 219NW349.

325–77 195Cal 272, 232P710; 90Fla255, 105S829 (premeditation); 203 Iowa929, 210NW465; 121 Or141, 253P367; 108 WVa148, 150SE519.

325–77½–New. Intent to kill may or may not be an issue to be submitted to the jury, depending on the facts in each case. 113TexCr160, 19SW(2d)47.

325–80 214Ala273, 107S737.

325–81 172Ark156, 287SW1026; 226 Ky255, 10SW(2d)820; 196NC393, 145 SE772.

325–81½–New. Absence of deadly weapon has been held not to rebut presumption of intent. 298Pa370, 148A 501.

325–82 22AlaA120, 113S494; 203 Iowa 929, 210NW465; 232Mich310, 205NW 188; 238Mich332, 213NW104; 313Mo 615, 285SW392; 217AppDiv527, 217 NYS244.

325–82½–New. It is not necessary for jury to find a motive in order to convict of murder. 238Mich332, 213NW104.

325–83 232Mich46, 204NW763 (whether speed at which automobile is driven is negligent made question of fact for jury by Michigan negligent homicide statute); 149Miss171, 115S217; Mo 2 SW(2d)753; 219AppDiv646, 221NYS 47; 141Wash542, 251P887.

326–84 37GaA124, 139SE80; 119 Or409, 243P72; 141Wash542, 251P887. [a] (2) Whether defendant was driving automobile at immoderate rate of speed is question for jury under some statutes regardless of whether defendant was violating speed law. 233Mich222, 206 NW562. (3)Whether defendant charged with involuntary manslaughter while driving auto at dangerous speed actually gave warning of his approach. 119 Or409, 243P72.

326–88 23AlaA434, 126S604(2dcase); 170Ark1061, 282SW684; 172Ark244, 288 SW904; 203Cal 153, 263P524; CalA 290P493; Ind 171NE192; 224Ky151, 5 SW(2d)897; 49Nev184, 242P316; 112 TexCr517, 17SW(2d)807; TexCr 25SW (2d)1098; 113TexCr53, 19SW(2d)44; TexCr 31SW(2d)630(3dcase).

326–90 3Del 236, 134A693.

326–92 113TexCr53, 19SW(2d)44.

326–94 110TexCr109, 7SW(2d)566. [a] (12) 117 Or515, 243P766.

327–95 218Ky217, 291SW47; 235Ky 449, 31SW(2d)697; 108TexCr159, 300 SW51; TexCr 32SW(2d)202.

327–96 218Ky217, 291SW47. [b] (3) Where defendant admits striking deceased with pistol and that death resulted, fact that such use was that of deadly weapon was proved. 225Ky275, 8SW(2d)415.

328–98 109TexCr624, 6SW(2d)369.

328–98½–New. A sawed-off billiard cue. 106Conn345, 138A132.

328–1½–New. Whether presumption of guilt from deliberate use of deadly weapon has been overcome by other evidence is for jury. 143Miss352, 108S 727.

328–2 23AlaA584, 129S492; 168Ark 534, 270SW968; 195Cal 584, 234P374; 213Ky675, 281SW819; 231Ky487, 21 SW(2d)797; 313Mo 615, 285SW392; 223 AppDiv248, 228NYS24; 298Pa63, 148A 45 (defendant as participant).

328–3 [a] (3) Whether "Vinson" stated in indictment as deceased was "Benson" proof showed to have been killed was for jury. 174Ark1180, 298SW3.

328–4 218Ala442, 118S654; 90Fla844, 107S530.

328–5 218Ala442, 118S654; 21AlaA 227, 107S37; 22AlaA274, 114S786; 169 La1025, 126S514. [a] (2) If language used might reasonably be construed to refer to deceased, evidence of general threat should be admitted, and question left to jury. 143Va489, 129SE252.

329–9 18F(2d)850; 22AlaA28, 111S757; 223Ky402, 3SW(2d)775; 225Ky660, 9 SW(2d)992; 235Ky710, 32SW(2d)43; Miss 111S864; TexCr 292SW609; 111 TexCr308, 12SW(2d)801.

329–13 22AlaA67, 111S587; 199 Ind 567, 159NE145; 219Ky60, 292SW471.

329–14½–New. , whether deceased committed felony justifying constable in shooting him to prevent escape, 235 Ky403, 31SW(2d)628.

329–14½–New. , whether deceased was arrested for intoxication or unlawfully possessing intoxicating liquor, 235Ky 403, 31SW(2d)628.

329–15 See also 217Ala219, 115S308.

329–15½–New. Evidence held sufficient for jury on question whether homicide by private person was justifiably committed in attempt to arrest deceased. 251Mich443, 232NW365.

329–16 21AlaA111, 105S427 (justification in killing); 235Ky403, 31SW(2d) 628; 118Nebr31, 223NW464.

329–18 21AlaA508, 109S566; 22AlaA 126, 113S466; Mass 167NE354; 143 Miss519, 108S502.

329–19 23AlaA109, 121S455; 22AlaA 126, 113S466; 234Ky33, 27SW(2d)387; 143Miss519, 108S502; Miss 109S741; 153Miss709, 122S189(1stcase).

329–20 41F(2d)162; 213Ala691, 106S 134; 214Ala273, 107S737; 217Ala519, 116S910; 23AlaA533, 128S465; 20AlaA 426, 103S707; 22AlaA255, 114S475; 22AlaA376, 115S852; 23AlaA29, 120S 299; 23AlaA428, 126S420(3dcase); AlaA 130S525; 30Ariz448, 247P1103; 32Ariz111, 256P111; 169Ark1188, 278 SW3; 171Ark1188, 287SW178; 172 Ark61, 287SW747; 172Ark244, 288SW 904; CalA 288P106; CalA 290P610; 90 Fla337, 106S406; 94Fla1138, 115S43; 321 Ill 559, 152NE552; Ind 171NE192; 202 Iowa722, 210NW904; 208 Iowa 818, 222NW394; 120Kan221, 243P280; 209Ky157, 272SW397; 214Ky111, 282 SW766; 214Ky475, 283SW431; 215Ky 162, 284SW1035; 216Ky698, 288SW 688; 218Ky189, 291SW1; 219Ky697, 294SW153; 221Ky433, 298SW1078; 223Ky826, 4SW(2d)1109; 224Ky158, 5SW(2d)902; 227Ky500, 13SW(2d) 511; 227Ky520, 13SW(2d)533; 229Ky 580, 17SW(2d)706; 230Ky738, 20SW (2d)748; 234Ky37, 27SW(2d)397; 235 Ky478, 31SW(2d)719; 234Mich590, 208 NW675; 144Miss778, 110S225; 147Miss 133, 113S187; 150Miss552, 117S529; 53ND916, 208NW388; 117 Or515, 243 P766; 35PortoRico 620; 100TexCr241, 272SW788; 101TexCr33, 274SW568; 113TexCr108, 18SW(2d)637(2dcase); Wash 287P887; Wash 290P824; 99 WVa694, 129SE748; 104WVa1, 138SE 732; 41Wyo 308, 285P803. See also 143Va609, 130SE777.

330–21 214Ala273, 107S737; 22AlaA 366, 115S763; 32Ariz111, 256P111; 171Ark297, 284SW734; 92Fla1062, 111 S725; 96Fla307, 118S13; Kan 291P945; 223Ky402, 3SW(2d)775; 242Mich16, 217NW758; 149Miss262, 115S208; 320 Mo 319, 6SW(2d)857; 85Mont585, 281 P551; 194NC121, 138SE518; 159Tenn 422, 19SW(2d)231; 109TexCr361, 4 SW(2d)966.

330–22 234Ky676, 28SW(2d)971(2d case).

330–23 22AlaA366, 115S763.

330–24 53ND916, 208NW388.

330–25 220Ala544, 126S848; 22AlaA 366, 115S763; 172Ark244, 288SW904; 175Ark1170, 299SW755; 90Fla844, 107 S530; 215Ky162, 284SW1035; 234 Mich419, 208NW458; 53ND916, 208 NW388; 111TexCr70, 11SW(2d)513.

330–25½–New. whether deceased had abandoned a declared purpose to kill defendant; 242Mich16, 217NW758.

331–27 322 Ill 473, 153NE710; 209Ky 395, 272SW909; 217Ky556, 290SW 330; 218Ky189, 290SW1; 149Miss412, 115S552.

331–30 23AlaA43, 121S432(2dcase) [certiorari den 219Ala116, 121S435 (1stcase)]; 22AlaA39, 111S767.

331–36 221Ky557, 299SW183. See also 203 Iowa155, 212NW382.

331–37 231Ky82, 21SW(2d)115.

331–38 172Ark244, 288SW904; 103 TexCr163, 280SW829; 105TexCr308, 288SW444.

332–39 104TexCr408, 284SW588. See also 90Fla255, 105S829.

332–42 40Wyo 184, 276P458.

332–43 219Ala282, 122S45; 198Cal 238, 244P362; 87CalA68, 261P1059; 87Colo 11, 285P157; 336 Ill 251, 168NE292; 205 Iowa1028, 219NW17; 208 Iowa127, 224 NW537; 220Ky348, 295SW142; 222 Ky248, 300SW625; 227Ky528, 13 SW(2d)521; 143Miss318, 108S722; 249 NY179, 163NE553; 193NC489, 137SE 429; 197NC547, 149SE845; OklCr 267 P864; OklCr 292P1053; 106TexCr558, 293SW1104; 106TexCr558, 293SW1104; 105TexCr308, 288SW444; 107TexCr444, 296SW897; 193Wis482, 214NW356. [b] **Evidence of insanity held insufficient to go to jury.**–208Cal 123, 280P526.

333–44 336 Ill 251, 168NE292; 221Ky 175, 298SW376; 222Ky614, 1SW(2d) 1060; 126Me223, 137A244, 53ALR241; 49Nev217, 242P590; 31NM436, 246P 897; Utah 290P727.

333–45 219Ala557, 123S34; AlaA 129 S706; AlaA 130S374; 222Ky248, 300 SW625; 145Miss328, 110S666. [b] **Whether unlawful act,** malum prohibitum, proximately caused homicide, is for jury. 126Me223, 137A244, 53ALR 241.

333–46 Ky 12SW(2d)326; 311Mo 581, 278SW995; 221AppDiv139, 222NYS683 (acted in concert). [b] 149Miss280, 115 S213.

333–47 313Mo 71, 281SW35; 313Mo 436, 282SW22.

333–48 105TexCr246, 287SW1095; 101 Vt124, 141A686.

333–49 214Ky572, 283SW1032; 221Ky 207, 298SW702; 228Ky19, 14SW(2d) 194; 262Mass408, 160NE271; 149Miss 239, 115S433; 196NC457, 146SE1; 101 Vt124, 141A686; 150Wash82, 272P80. [c] **Facts held insufficient to make jury question.**–219Ky446, 293SW961. [d]

Evidence held insufficient for jury.–150 Wash82, 272P80.

333–49½–New. , or as an accessary before the fact. 313Mo 71, 281SW35.

333–49⅓–New. Whether witness jointly indicted with defendant acted of his own volition or under compulsion of fear of injury from defendant is question for jury. 79Mont614, 257P1010.

333–49¼–New. Whether defendant was present, aiding, abetting and assisting his son to fire fatal shot. 171Ark1188, 284SW721.

333–50 287Pa547, 135A313.

333–52 213Ala143, 104S220; 214Ala476, 108S349; 22AlaA567, 117S906; 219Ala670, 123S50; 219Ala674, 123S55; 23AlaA348, 128S359(2dcase); 22AlaA136, 114S791; 168Ark534, 270SW968; 169Ark353, 275SW662; 169Ark1211, 276SW863; 176Ark916, 5SW(2d)946; 84CalA58, 257P592; 93CalA81, 269P177; 106Conn701, 139A91; 3Del 236, 134A693; 38Ga661, 145SE105; 168Ga611, 148SE531; Ga 154SE906; 322 Ill 473, 153NE710; 205 Iowa858, 216NW759; 120Kan430, 243P1006; 209Ky157, 272SW397; 223Ky393, 3SW(2d)764; 224Ky158, 5SW(2d)902; 234Ky142, 27SW(2d)705; 235Ky471, 31SW(2d)721; 256Mass387, 152NE380; 263Mass356, 161NE245; 265Mass382, 163NE251(2dcase); 316Mo 185, 289SW619; 316Mo157, 289SW948; 318Mo 647, 300SW511; 318Mo 553, 300SW694; Mo 25SW(2d)109; 117Nebr601, 221NW683; 243NY134, 152NE700; 246NY100, 158NE35; 194NC459, 140SE26; 198NC483, 152SE407; 198NC655, 153SE255; OklCr 287P822; 283Pa468, 129A453; PaDist&Co 287; 35PortoRico 395; RI 136A8; 100TexCr241, 272SW788; 103TexCr566, 281SW1080; 106TexCr141, 291SW244; 109TexCr414, 5SW(2d)503; 99WVa711, 129SE715; 193Wis482, 214NW356. [a] (2) Effect of insulting conduct and words toward defendant's wife by deceased prior to killing is for jury in determining degree of homicide. 110TexCr254, 8SW(2d)171. [b] 105TexCr531, 289SW395.

334–53 153Miss770, 121S492.

334–54 122Kan552, 253P221. See also 246NY100, 158NE35.

335–58 108TexCr317, 300SW79.

335–62 See also 117Nebr692, 222NW47.

335–63½–New. Waiver of capital verdict by prosecuting officer is not binding upon jury. 162La1075, 111S461.

335–66 76CalA648, 245P461; 165Ga290, 140SE754; Ga 154SE906; 318 Ill 332, 149NE266; 120Kan430, 243P1006; 31NM436, 246P897; 103TexCr148, 280SW786. [a] (1) 164Ga128, 138SE67. [b] (1) OklCr 287P822; [d] **Additional instructions.**–29PortoRico 961.

335–67 43 Ida459, 252P673; 31NM436, 246P897; 100TexCr402, 273SW580.

335–67½–New. Giving of erroneous modification of requested instruction is error. 318 Ill 332, 149NE266.

336–70 22AlaA95, 112S811; 22AlaA144, 113S474; 22AlaA368, 115S766; 70CalA465, 233P812; 76CalA645, 245P450; 164Ga298, 138SE229; 170Ga859, 154SE344; Ga 155SE329; 41 Ida616, 243P359; 198 Ind141, 152NE830; 142Miss787, 107S663; 149Miss406, 115S215; 309Mo 498, 274SW734; 32NM500, 258P1009; 122 Or444, 252P975; 104TexCr619, 286SW214; 106TexCr338, 294SW584; 107TexCr609, 298SW429.

336–76 162Gal, 132SE418; 31NM436, 246P897; 104TexCr442, 284SW554.

336–77 99TexCr618, 271SW92 (words "wrongful act" not ambiguous).

336–78 172Ark983, 291SW85; 175Ark1170, 299SW755.

336–79 213Ala358, 104S656; 20AlaA550, 104S50; 164Ga509, 139SE37; 318 Ill 332, 149NE266; 322 Ill 473, 153NE710; 167La967, 120S614 (duty to retreat); 119 Or409, 243P72. [a] (1) 160Ga769, 129SE102; 162Ga7, 132SE624; 162Ga777, 135SE187; 41 Ida616, 243P359; 42 Ida319, 245P685; Mo 30SW(2d)132; 49Nev217, 242P590; 116Or509, 241P983; 155Tenn397, 293SW755; 105TexCr590, 289SW691. (4) 232Mich46, 204NW763.

336–80 234Mich419, 208NW458.

337–81 119 Or409, 243P72 (instruction sufficient in involuntary homicide driving auto at dangerous speed); 106TexCr338, 294SW584.

337–82 22AlaA95, 112S811.

337–85 101WVa356, 132SE728. [a] (2) Instruction charging that defendants entered an "agreement or conspiracy" to kill is sufficient, though information did not charge conspiracy. 150Wash82, 272P80. [b] **Instruction that accused should be acquitted, unless state proved every material allegation in indictment** for first degree murder, was properly refused as crime charged embraces all lower degrees of homicide. 21AlaA35, 104S876.

337–86 78CalA442, 248P1061; 160Ga769, 129SE102 (instruction authorized by evidence); 37GaA79, 139SE82; 164Ga656, 139SE427; 165Ga326, 140SE889; 41GaA268, 152SE619; 327 Ill 312, 158NE732; 333 Ill 512, 165NE168; 338 Ill353, 170NE265; 204 Iowa1306, 214NW743; 121Kan576, 249P617; 101WVa356, 132SE728. [d] **Evidence held sufficient to warrant submission to jury** of issue of intimate relations between accused and wife of deceased, as showing motive. 190NC506, 130SE308. [e] **Instruction on right of officer to destroy still** held authorized by evidence. 163Ga186, 136SE72. [f] **Instructions held sufficient.**–168Ga530, 148SE386(2dcase).

337–87 20AlaA550, 104S50; 22AlaA28, 111S757; 177Ark534, 7SW(2d)5; 78CalA442, 248P1061; 76CalA645, 245P450; 93CalA711, 270P237; 318 Ill 332, 149NE266; 322 Ill 473, 153NE710; 327 Ill 162, 158NE462; 327 Ill 312, 158NE732; 337 Ill 161, 169NE9; 203 Iowa918, 210NW961; 206 Iowa859, 220NW95; 121Kan576, 249P617; 171Minn414, 214NW280; 149Miss239, 115S433; 157Miss669, 128S885(2dcase); Miss 130S729; 316Mo 185, 289SW619; 31NM436, 246P897; 39 OklCr264, 264P643; OklCr 292P82; 154Tenn26, 285SW554; 104TexCr127, 283SW512; 104TexCr338, 283SW840; 106TexCr570, 294SW205; 108TexCr364, 18W(2d)303; TexCr 28SW(2d)810(2dcase); TexCr 22SW(2d)670; TexCr 32SW(2d)657; 147Va692, 137SE603; 144Wash446, 258P508; 101WVa356, 132SE728.

338–89 215Ala276, 110S407; 22AlaA472, 116S896; 327 Ill 50, 158NE457; 203 Iowa1305, 214NW735; 149Miss678, 115S777; 120 Or134, 249P1045; 105TexCr308, 288SW444; 110TexCr298, 8SW(2d)129.

338–90 213Ala691, 106S134; 113Nebr790, 205NW252; 99TexCr618, 271SW92; 101WVa356, 132SE728.

338–91 75CalA222, 242P506.

339–99 143Miss1, 108S287; 110TexCr420, 10SW(2d)119. [a] (2) Mo 256SW740. [b] **Failure to define deadly weapon** held error. 108TexCr302, 300SW71.

339–2 Ariz 283P711; 212Ky791, 280SW111.

339–7½–New. The use of the word "feloniously" in an instruction authorizing the jury to convict in a homicide case is unnecessary. 221Ky202, 298SW675.

340–16 [c] **Instruction properly refused.**–220Ala461, 125S802.

340–20 222Ky460, 1SW(2d)774; 113TexCr621, 24SW(2d)52; 100WVa57, 130SE91 (where criminal act is admitted and excuse is not sufficient in law, refusal of request that jury might consider character evidence in determining guilt properly refused). [a] (1) 41GaA495, 153SE372; 317Mo 348, 295SW754; 284Pa255, 131A184; 297Pa382, 147A79; TexCr 29SW(2d)399. [b] 23AlaA468, 126S896(2dcase); Ind 171NE192; 202 Iowa173, 209NW458, 47ALR407.

340–21 107TexCr307, 296SW582.

341–22 But see 109TexCr278, 4SW(2d)52.

341–24 316 Ill 591, 147NE484 (ambiguous).

341–26 106TexCr446, 292SW901.

341–28½–New. Instruction that it was unnecessary to determine the time when the purpose was formed has been held not error. 256Mass387, 152NE380.

341–32 210Ky796, 276SW841; 226Ky173, 10SW(2d)643. See also Mo 23SW(2d)22.

341–42 198 Ind590, 154NE372; 291Pa291, 139A851.

342–45 22AlaA556, 117S761.

342–47 294Pa573, 144A743; 104TexCr26, 282SW245; 108TexCr72, 299SW403; 108TexCr159, 300SW51. [a] (4) Infliction of wounds with deadly weapon directed to vital part of body of deceased is evidence of intent to kill. 297Pa382, 147A79. [b] **Requested instructions held erroneous.**–104TexCr26, 282SW245.

342–51 But see 110TexCr605, 10SW(2d)116.

342–52 108TexCr72, 299SW403.

343–59½–New. An instruction based on the presumption that a man intends the natural and probable consequences of his acts is held prejudicial error where eyewitnesses had testified to the shooting and the attending circumstances. 116Nebr8, 215NW465.

343–62 156SC63, 152SE825(2dcase); 153Va863, 149SE419. [b] (1) 168Ark1087, 273SW374; 317Mo 348, 295SW754; 149SC439, 147SE441. [c] (1) 113TexCr53, 19SW(2d)44. [e] **Evidence held to warrant instruction.**–95CalA659, 273P110.

344–67 151Va510, 144SE361; 105WVa520, 143SE230.

344–68 [b] **Instruction held not to intimate** that defendant had malice at time of killing. 163Ga176, 135SE735.

344–69 110TexCr420, 10SW(2d)119.

344–70 102WVa462, 135SE594. [a] 169Ga613, 151SE17.

345–73 [a] (1) 164Ga298, 138SE229; 41 Ida616, 243P359; 255Mass304, 151NE297, 47ALR962. [c] **Instructions held erroneous.**–117Nebr759, 222NW956.

345–78 [b] (5) Omitting word "unlawfully" from definition of express malice may be cured by definition of "malice aforethought" immediately preceding, which supplies omission. 169Ga414, 150SE642.

345–84 202 Iowa173, 209NW458, 47ALR407.

346–85 162Ga777, 135SE187; 168Ga731, 149SE23 (threats by defendant few days before homicide); 169Ga367, 150SE100(1stcase); 204 Iowa1306, 214NW743. [a] (2) Threats by defendant, if any, are admissible to show malice. 168Ga731, 149SE23. [b] **Instruction held properly refused.**–In prosecution for assault to murder, charge that if no deadly weapon was used malice could not be presumed. 21AlaA348, 108S262.

346–86 162Gal, 132SE418; 162Ga777, 135SE187; 163Ga561, 136SE530; 292Pa16, 140A537.

346–87 162Gal, 132SE418.

346–88 168Ark1087, 273SW374; 162Ga777, 135SE187; 168Ga731, 149SE23; 40GaA360, 149SE429; 204 Iowa1306, 214NW743. [d] **Instruction held erroneous.**–143Miss352, 108S727; 100TexCr54, 271SW902.

346–89 167Ga282, 145SE458.

346–91 164Ga509, 139SE37.

347–93 115Nebr143, 212NW35.

347–93½–New. In a murder prosecution, a charge that a presumption of malice from the use of a deadly weapon may be rebutted by the fact proving the killing was held properly refused. 214Ala273, 107S737.

347–94 [b] 235Ky845, 32SW(2d)405; 82NH518, 136A358; 110TexCr420, 10SW(2d)119. (1) 109TexCr345, 48SW(2d)542; 110TexCr420, 10SW(2d)119; 113TexCr570, 24SW(2d)56; TexCr 25SW(2d)870; TexCr 26SW(2d)915; TexCr 28SW(2d)822(2dcase). [c] (1) 202 Iowa173, 209NW458, 47ALR407. (6) Instruction that malice aforethought includes every unlawful or unjustifiable motive is erroneous. 43 Ida459, 252P673. (7) Other erroneous instructions. 41Wyo 128, 283P406.

347–99½–New. Failure of instructions in a murder prosecution, requiring conviction in case defendant killed deceased with malice aforethought, to set forth that defendant would not be guilty if he killed deceased in the heat of passion, or to prevent deceased from raping his daughter, or while he was insane does not render instruction erroneous. Miss 118S708.

348–2 216Ala336, 113S64; OklCr 283P796. [a] (1) 95CalA659, 273P110; 160Ga605, 128SE747 (in definition of voluntary manslaughter). [b] (1) 198Cal

776, 247P884; 68CalA95, 228P417; 49 Nev184, 242P316. [c] AlaA 130S374; 41 Ida616, 243P359. [d] (1) 117Nebr 759, 222NW956. (3) 219Ala670, 123S 50; 202 Iowa173, 209NW458, 47ALR407. [i] **Killing preceded by concurrence of will.**–Ariz 283P711 (instruction not erroneous).

348–4 [a] 103NJL383, 135A895.

349–8 197Cal 200, 239P1080. [a] (1) 181Ark185, 25SW(2d)766; 86CalA768, 261P512; 110Conn55, 147A118; 169Ga 613, 151SE17; 199 Ind55, 155NE203; 256Mass387, 152NE380; 244Mich622, 222NW185; Mo 278SW676. [b] (6) As being argumentative and misleading. 218Ala527, 119S215.

349–9 SC 155SE409.

349–10 But see 143Va579, 130SE389.

349–11 But see 35Ariz432, 280P672; 86CalA148, 260P591.

349–12 Nebr 227NW443.

349–14 34NM494, 285P497.

350–15 316Mo 195, 289SW604.

350–16 199 Ind55, 155NE203; 151Va 533, 145SE307.

350–17 143Va579, 130SE389 (where involuntary manslaughter charged).

350–18½–New. Where identity of the slayer is the sole issue, an instruction that, as there were eye-witnesses, absence of motive could not be considered on such issue is reversible error. 217 AppDiv527, 217NYS244.

350–19 33PortoRico 195. [a] (8) Other instances. 195NC242, 141SE736.

351–25½–New. It is improper to refer to the indictment as to the manner and form of the killing. 145Miss227, 110S 500.

351–29 78CalA442, 248P1061; 255Mass 304, 151NE297, 47ALR962; 244NY147, 155NE79; 245NY143, 156NE644; 156 SC63, 152SE825(2dcase). [c] **Instructions held erroneous.**–86CalA542, 261P 756.

351–30 244NY147, 155NE79; 112TexCr 223, 15SW(2d)1046. [a] (4) Other instructions held not erroneous. 176Ark 1003, 5SW(2d)322. (5) Instruction that, though jury believe defendant killed father of deceased, conviction could not be had unless they believed defendant killed deceased acting either alone or with other persons. 112TexCr194, 15 SW(2d)1043.

352–36 [c] **Instructions held not erroneous.**–Use of words "blunt instrument" where defendant confessed he banged decedent's head on corner of landing. 208 Iowa863, 226NW19; Mo 30SW(2d) 750.

352–38 109TexCr624, 6SW(2d)369. [a] (1) 228Ky765, 15SW(2d)525; 234Ky 135, 27SW(2d)683. [b] (2) Instruction that knife, as matter of law, is not deadly weapon, but proof must show character of knife. 168Ga731, 149SE23. [e] **Instruction held proper.**–41GaA311, 152 SE907(2dcase).

352–41 168Ga731, 149SE23.

352–42½–New. In a prosecution for striking and wounding with a cane, under a statute making wounding with a deadly weapon with intent to kill a felony, an instruction assuming that a cane is a deadly weapon is erroneous. 218Ky217, 291SW47.

352–43 168Ga731, 149SE23; 235Ky449, 31SW(2d)697; 107TexCr460, 296SW883.

352–44 309Mo 50, 273SW730.

353–47 109TexCr624, 6SW(2d)369; 112 TexCr125, 13SW(2d)865. [b] (1) 93 CalA174, 269P176; 287Pa512, 135A301; 292Pa26, 140A611. [c] (3) 197NC554, 149SE857. [g] **Refusal of instructions held erroneous.**–338 Ill 56, 170NE14.

353–48 22AlaA136, 114S791.

354–56 199 Ind567, 159NE145.

353–52½–New. Refusal of instruction on question of suicide of deceased is error when question is presented by evidence. SC 155SE409.

354–56 [a] (1) Iowa 206NW620; 229 Ky646, 17SW(2d)751. [b] (1) 21AlaA 348, 108S262.

354–65 [b] 197 Ind491, 151NE382.

354–69 229Ky646, 17SW(2d)751; 108 TexCr413, 18SW(2d)315. [b] (1) 71CalA 213, 234P877; 31NM485, 247P828. (3) 71CalA213, 234P877.

355–70 [a] (1) 37GaA79, 139SE82. [b] (1) 233Mich185, 206NW568. [d] **Instructions held erroneous.**–146Miss510, 112S673. [e] **It is error to give instruction as to inference of malice from deliberate use of deadly weapon,** where all facts and circumstances attending shooting were developed by evidence. 146 Miss510, 112S673.

355–73 37GaA823, 142SE195.

355–80 31NM485, 247P828.

356–87 31NM485, 247P828.

356–90 37GaA486, 140SE924; 50Nev 256, 256P793, 52ALR1015.

356–92 168Ga530, 148SE386(2dcase).

357–95 [a] 322 Ill 473, 153NE710. [b] **Instructions held properly refused.**–Refusal to charge on aggravated assault held proper where accused might have been guilty of assault with intent to kill. 104TexCr616, 286SW223.

357–97 179Ark1066, 20SW(2d)189; 78 CalA442, 248P1061; Ga 154SE906; 212 Ky50, 278SW163; OklCr 268P312; 107 TexCr297, 296SW570. [a] (1) 291Pa 319, 139A836. [d] **Instructions on various branches of justifiable homicide** must not be confusing. 164Ga509, 139 SE37.

357–1 212Ky50, 278SW163; 107TexCr 297, 296SW570.

357–3 140Miss265, 105S514.

357–4 122 Or444, 259P893; 100TexCr 399, 273SW593; 107TexCr307, 296SW 582. [b] **Where undisputed evidence** shows death wound was in back of deceased, general affirmative charge was properly refused. 21AlaA111, 105S427.

358–5 34NM530, 284P1018.

358–13 321 Ill 157, 151NE584; 116 Or 509, 241P983. [a] **Evidence held insufficient to require charge.**–56ND642, 219 NW132.

358–14 321 Ill 157, 151NE584.

358–17 TexCr 8SW(2d)176.

359–20 [a] **Instructions held proper.**–195Cal 623, 234P890 (where evidence for defense furnishes basis for contention that defendant was irresponsible by reason of mental unsoundness, though defendant insists no claim of insanity was made).

359–21 224Ky224, 5SW(2d)1056; 225 Ky492, 9SW(2d)132; 227Ky792, 13SW (2d)1053; 235Ky735, 32SW(2d)51; 262 Mass185, 159NE518; 126 Or560, 270P 404; 105TexCr8, 284SW961. [d] 163 Ga43, 135SE410.

359–22½–New. Refusal to charge that, if killing was at a time when defendant's faculties were beyond his control, defendant was not accountable, has been held not error. 105TexCr470, 289SW 57.

359–23 [a] (1) 177Ark708, 7SW(2d) 980, 59ALR356; 167Ga341, 145SE647; 205 Iowa1028, 219NW17; 115Nebr277, 212NW606; 292Pa26, 140A611. (4) Instruction in language of statute that all persons are of sound mind who are neither idiots nor lunatics nor affected with insanity. 195Cal 623, 234P890. [b] (1) 171Ark255, 283SW981; 87CalA 724, 262P795. (2) DC 36F(2d)548.

360–24 Wash 286P69.

360–30 Sask [1929] 2DomLR279.

360–34 20AlaA529, 104S339.

360–35 213Ala301, 104S668.

361–36 213Ala301, 104S668.

361–37 213Ala301, 104S668.

361–40 244NY147, 155NE79. [a] (1) 31NM436, 246P897; 283Pa468, 129A 453 (on burden of proof). (6) 168 Ark1087, 273SW374. [b] 49Nev217, 242 P590; 31NM436, 246P897; 196NC714, 146SE858; 116 Oh495, 156NE600; 284 Pa255, 131A184. [c] (1) 170Ga870, 154 SE351; 262Mass185, 159NE518; 263 Mass356, 161NE245. (5) Charge relative to want of intention because of mental status caused by drink. 215 Ala106, 109S846. [e] **In prosecution for willful murder,** jury should not be instructed that drunkenness mitigates the offense. 221Ky175, 298SW376.

361–41 94Fla149, 113S726.

361–42 31NM436, 246P897; 244NY147, 155NE79; 284Pa255, 131A184. [a] **Instructions held insufficient.**–31NM436, 246P897.

362–44 207Cal 131, 277P316; 244NY 147, 155NE79; 283Pa468, 129A453.

362–45 327 Ill 162, 158NE462. See also OklCr 280P851(2dcase). [a] 283Pa 468, 129A453.

362–51 But see 49Nev217, 242P590.

362–54 [a] (1) 168Ark1087, 273SW 374; 230Ky718, 20SW(2d)738. [c] **Instruction held properly refused.**–168Ark 1087, 273SW374.

362–59½–New. An instruction that temporary insanity is not a defense, if error, was harmless where defendant testified that he knew what he was doing. 137SC371, 135SE364.

362–61 162Ga178, 132SE899; 217Ky 556, 290SW330; 105TexCr308, 288SW 444; 107TexCr609, 298SW429; 109Tex Cr113, 3SW(2d)101. [a] (1) 162Ga1, 132SE418; 169Ga613, 151SE17; 116 Oh495, 156NE600; 105TexCr508, 289 SW398; 105TexCr590, 289SW691; 108 TexCr326, 300SW67. [b] (1) 100TexCr 83, 271SW897; 101TexCr33, 274SW568. (6) Instruction that legal provocation must amount to assault on defendant "or something of that kind" is not sufficiently comprehensive. 137SC371, 135 SE364. (7) As failing to instruct that deceased's conduct toward defendant's sister was immaterial if defendant believed reports of insults. 105TexCr479, 289SW46. [g] **Failure to define "sudden affray"** held not error where evidence was simple and instruction was easily understood. 235Ky322, 31SW (2d)391.

362–62 162Ga178, 132SE899.

363–67 [b] (1) 103TexCr508, 281SW 1054. (4) Instruction defining "manslaughter" as "unlawful killing of human being, usually in sudden heat and passion upon sufficient legal provocation," is not erroneous because of word "usually." 137SC371, 135SE364, 365. (5) Instruction defining "legal provocation" is not erroneous for omitting conditions not established by evidence, defense being accidental shooting. 137SC371, 135SE364. (6) Instruction that employee's grievances because of employer's failure to pay wages would not justify taking of life. 201 Cal 290, 257P46. [c] (4) In excluding consideration of conduct of persons acting with deceased. 106TexCr636, 294 SW582. [e] **Instruction that killing, to be reduced from murder to manslaughter,** must have been in sudden heat of passion, instantly, suddenly raised, is not erroneous. 137SC371, 135 SE364.

363–68 113TexCr650, 21SW(2d)724.

364–74 22AlaA86, 112S538.

364–75 105TexCr479, 289SW46.

364–77 104TexCr447, 284SW568; 109 TexCr414, 5SW(2d)503.

364–78 21AlaA152, 106S341; 235Ky 735, 32SW(2d)51; 154Tenn26, 285SW 554; 103TexCr508, 281SW1054; 105 TexCr396, 288SW1087; 113TexCr247, 20SW(2d)431.

364–79 104TexCr447, 284SW568; 106 TexCr636, 294SW582.

364–80 235Ky454, 31SW(2d)703; 104 TexCr583, 286SW231.

364–83 78CalA442, 248P1061; 162Ga 178, 132SE899; 163Ga313, 136SE154; 164Ga677, 139SE349; 167Ga318, 145SE 456; 43 Ida766, 254P520; 122 Or444, 259P893; TexCr 25SW(2d)836. [a] (2) Where defendant struck deceased, when reprimanded, causing his head to strike sidewalk. 96CalA157, 273P 854. [b] (1) 162Ga277, 133SE255; 162 Ga777, 135SE187; Ga 155SE38; 39GaA 836, 148SE610; 99TexCr600, 271SW 610; 143Wash313, 255P382. [c] 214 Ala273, 107S737; 43 Ida766, 254P520; 100TexCr402, 273SW580. [d] **Instructions held not erroneous.**–103WVa605, 138SE202.

365–85 164Ga677, 139SE349; 42 Ida 319, 245P685; 225Ky590, 9SW(2d)723 (2dcase); Mo 273SW733; Mo 292SW 728; Mo 25SW(2d)109; 101TexCr96, 274SW628 (charge on duress properly refused); 104TexCr338, 283SW840; 195Wis540, 218NW714; 40Wyo 184, 276 P458.

365–91 226Ky173, 10SW(2d)643. [c] (1) Mo 273SW733.

366–94½–New. In South Dakota an instruction that burden is on defendant conceding that he shot deceased to show justifiable homicide is erroneous because broader than statute. SD 229NW373.

366–94½–New. South Dakota statute imposing burden of proving justifiable

homicide on defendant under certain circumstances should not be embodied in instruction. SD 229NW373.

366–96 CalA 290P513; 212Ky50, 278SW163; 215Ky710, 286SW1069. [a] (2) Deputy sheriff, on trial for murder, was entitled to instruction relative to authority to kill person arrested for a misdemeanor and offering armed resistance. 226Ky460, 11SW(2d)125. [b] AlaA 130S374; 234Ky37, 27SW(2d)397; 83Mont556, 274P840; 150Va588, 142SE369. [c] (1) 212Ky50, 278SW163; 143Miss324, 108S711, 46ALR895; TexCr 22SW(2d)670.

366–97 216Ky665, 288SW295; 219Ky60, 292SW471; 224Ky229, 5SW(2d)1047; 229Ky832, 18SW(2d)314; 314Mo612, 286SW29 (sufficient).

366–98 229Ky87, 16SW(2d)769; Mo 25SW(2d)109.

366–99 199 Ind567, 159NE145; 210Ky385, 275SW819; 232Ky10, 22SW(2d)298; 215Ky819, 287SW6.

366–2 215Ky819, 287SW6.

366–2½–New. On request, defendant is entitled to proper instruction on the theory that he shot to prevent the escape of a fleeing felon. 326 Ill 104, 157NE76.

366–4 29Ariz247, 240P863. [a] 195Cal584, 234P374; 162Ga208, 132SE911; 168Ga136, 147SE97; 112TexCr574, 17SW(2d)823. [b] (1) 324 Ill 131, 154NE715; 232Ky159, 22SW(2d)599; 307Mo291, 270SW298; 110TexCr474, 9SW(2d)355.

366–5 173Ark713, 293SW19; 324 Ill131, 154NE715; 199 Ind567, 159NE145; 321Mo870, 12SW(2d)469. [a] (1) 163Ga206, 135SE748; 47 Ida328, 274P805, 62ALR195; 49Nev184, 242P316. [b] (1) 47 Ida328, 274P805, 62ALR195; 150Wash82, 272P80. (6) Entering home without warrant to arrest for misdemeanor. 179Ark384, 16SW(2d)1. (7) Officer's right to arrest without warrant for offense not committed in his presence. 168Ga136, 147SE97.

366–6 173Ark713, 293SW19; 324 Ill131, 154NE715; 308Mo560, 274SW70. [b] 163Ga206, 135SE748. [c] **Instructions on right to resist excessive force in making arrest held sufficient.**–143Va592, 130SE398. [d] **Requested instructions held properly refused.**–163Ga206, 135SE748.

366–6½–New. as to the distinction between murder and manslaughter, where the question of legality of arrest is in issue. 324 Ill 131, 154NE715.

367–8 166Ga645, 144SE193; 198NC483, 152SE407; 100TexCr438, 273SW586.

367–9½–New. Refusal to instruct as if accused had been waylaid by strangers on highway is proper where warrant had been issued and deceased was recognized as officer. 143Va592, 130SE398.

367–9⅓–New. Instruction as to right of officer to make arrest without warrant held proper under evidence. OklCr 287P1067.

367–11 216Ala336, 113S64; 77CalA472, 246P1085; 91CalA599, 267P161; 164Ga677, 139SE349; 166Ga115, 142SE681; Ga 154SE906; Ga 154SE337; 326 Ill104, 157NE76; 198 Ind614, 154NE370; 210Ky410, 276SW127; 215Ky613, 286SW696; 224Ky116, 5SW(2d)884; 164La420, 114S82; 309Mo 50, 273SW730; Mo 23SW(2d)87; 192NC1, 133SE176; 53ND916, 208NW388; 294Pa544, 144A542; 154Tenn26, 285SW554; 100TexCr67, 272SW154; 101TexCr587, 276SW699; 105TexCr451, 288SW1082; 107TexCr376, 296SW537; 107TexCr208, 296SW593; 108TexCr326, 300SW67; TexCr 25SW(2d)858 (regardless of conflicts or trial court's belief as to truth); 143Wash313, 255P382. [b] (1) 209Ky263, 272SW721. [f] **Instructions to acquit defendant** if deceased took money, and that "immediately" deceased made attempt to draw pistol, have been held not erroneous in using quoted word. 107TexCr208, 296SW593. [g] **Omission to charge held justified.**–119 Oh189, 162NE802.

368–12 77CalA472, 246P1085. But see 37GaA379, 140SE395.

68–13 91CalA599, 267P161. [a] **Where accused denied killing, and there was doubt whether he fired fatal shots,** instruction on self-defense which assumes that it was defendant that fired them constitutes reversible error. 209Ky817, 273SW503. [b] **Where evidence is purely circumstantial,** unless there are facts negativing combat, it is proper to instruct on all phases of law including self-defense. 209Ky263, 272SW721.

368–14 221Ky689, 299SW570. But see 333 Ill 451, 164NE840.

368–15 73CalA580, 239P82; 309Mo 50, 273SW730; 112TexCr536, 17SW(2d)830; TexCr 25SW(2d)858.

368–16 22AlaA366, 115S763; 29Ariz247, 240P863; Ariz 283P711; 177Ark708, 7SW(2d)980, 59ALR356; 73CalA580, 239P82; 78CalA442, 248P1061; 166Ga189, 142SE674; 163La563, 112S486; 120Kan221, 243P280; 233Mich185, 206NW568; 140Miss265, 105S514; 149Miss678, 115S777; 33PortoRico 825; 100TexCr424, 274SW137; 103TexCr242, 280SW819; 104TexCr178, 283SW517.

368–19 37GaA379, 140SE395; 49Nev184, 242P316; 137SC75, 134SE514.

368–21 198 Ind614, 154NE370; 154Tenn26, 285SW554.

368–23 151Va510, 144SE361. [a] (5) Other illustrations. 220Ala544, 126S848. [b] 164Ga298, 138SE229. [c] **Instruction held properly refused.**–21AlaA15, 105S714.

369–24 143Miss324, 108S711, 46ALR895; TexCr 26SW(2d)651. [a] 111TexCr70, 11SW(2d)513.

369–25 216Ala7, 111S227; Ala 130S175; 41 Ida616, 243P359.

369–26 22AlaA366, 115S763; 38GaA737, 145SE485(2dcase).

369–27 22AlaA350, 115S701; 143Miss324, 108S711, 46ALR895. [a] 327 Ill50, 158NE457.

369–27½–New. "Self-defense."–20AlaA630, 104S677.

370–29 Ariz 283P711; 163Ga176, 135SE735; 41 Ida616, 243P359; 140Miss265, 105S514; 194NC121, 138SE518; OklCr 287P815; 104TexCr178, 283SW517.

370–30 22AlaA62, 112S184; 20AlaA412, 103S694; 20AlaA630, 104S677; 22AlaA508, 117S492; 198Cal534, 246P62; 337Ill 371, 169NE190; 316 Ill 591, 147NE484; Iowa 228NW37; 214Ky211, 282SW1109; 228Ky322, 14SW(2d)1077; 198NC79, 150SE663. [a] 162Ga777, 135SE187; 164Ga298, 138SE229; 41 Ida616, 243P359; 327 Ill 162, 158NE462; 225Ky590, 9SW(2d)723(2dcase); 230Ky704, 20SW(2d)711; 247Mich260, 225NW540; 104TexCr302, 283SW836. [c] **Instructions held confused or misleading.**–23AlaA428, 126S420(3dcase); 234Ky142, 27SW(2d)705.

371–33 213Ala301, 104S668.

371–34 161Ga166, 129SE772; 236Ky15, 32SW(2d)530; 315Mo242, 286SW69; Mo 284SW785; 109TexCr85, 3SW(2d)97; TexCr 32SW(2d)459; TexCr 32SW(2d)462. [a] (1) 318Mo611, 300SW691; 107TexCr46, 294SW595. (2) Defendant is entitled to affirmative instruction upon law of self-defense, negative and inconclusive instructions being insufficient. 169Ark594, 276SW358. [b] But see 21AlaA32, 104S884. [e] **Instructions held proper.**–30Ariz366, 247P129; 164Ga298, 138SE229; 165Ga210, 140SE625; 116 Or509, 241P983.

371–36 20AlaA630, 104S677. [a] (1) 21AlaA372, 108S633; 22AlaA556, 117S761; 176Ark916, 5SW(2d)946; Ind 173NE453; 229Ky207, 16SW(2d)1016; 234Ky676, 28SW(2d)971(2dcase). [b] (1) 23AlaA89, 121S444; 202 Iowa173, 209NW458, 47ALR407.

372–37 327 Ill 162, 158NE462; 111TexCr130, 12SW(2d)211. [a] (6) Instructions that defendant, using excessive force in self-defense, would be guilty of manslaughter. 194NC121, 138SE518. (7) Instruction on self-defense without qualification presenting defense of defendant's right to use force apparently necessary to protect himself has been held sufficient. 227Ky212, 12SW(2d)305. (8) Instructions on self-defense in homicide case have been held not prejudicially erroneous, in using words "greater force," instead of words "unnecessary force," in informing jury of defendant's right to repel attack. OklCr 271P959. [b] 202 Iowa173, 209NW458, 47ALR407 (requiring defendant to act as ordinarily prudent and "courageous" man instead of "prudent and cautious"); 164La418, 114S82.

372–40 121Kan436, 247P437.

372–41 121Kan436, 247P437.

372–42 121Kan436, 247P437.

372–44 Ark 31SW(2d)760; 121Kan436, 247P437; 210Ky796, 276SW841; 227Ky520, 13SW(2d)533; NJ 151A737(2dcase).

373–45½–New. Where a charge is given which places a limitation on accused's right of self-defense, every issue raised by the testimony which, if found in accused's favor, would restore that right unimpaired should be submitted. 100TexCr424, 274SW137.

373–47 Ala 130S175.

373–48 Ala 130S175; 162Ga378, 134SE91; 120Kan221, 243P280; Mo 29SW(2d)148. [a] (1) 104TexCr178, 282SW517. (4) 100TexCr424, 274SW137. (5) 100TexCr424, 274SW137. (13) Assuming disputed facts. 209Ky817, 273SW503. (14) Not giving defendant, accused of aiding or abetting homicide, benefit of actual perpetrator's right of self-defense. 219Ky456, 293SW951. (15) Using word "reasonable" instead of "safe" in describing means of warding off danger. 234Ky676, 28SW(2d)971(2dcase).

374–49 162Ga378, 134SE91; 210Ky542, 276SW507 (instruction, limiting right of accused in defending himself to shooting and wounding, and not advising jury that in defending himself he had right to kill); 105TexCr531, 289SW395; 112TexCr164, 15SW(2d)626(2dcase). [b] (1) Ga 155SE670.

374–49½–New. or where it is too abstract. 21AlaA116, 105S435.

374–51½–New. Instruction implying that jury must find that defendant acted in self-defense in order to acquit him is erroneous. Iowa 228NW37.

374–52 126Kan710, 271P316.

374–54 327 Ill 162, 158NE462; TexCr 29SW(2d)787.

374–56 174Ark899, 298SW349; 213Ky501, 281SW507; 234Ky56, 27SW(2d)405; 224Ky203, 5SW(2d)1067; 147SC514, 145SE404. [b] 105TexCr179, 287SW257. [d] (1) 21AlaA372, 108S633; Ariz 283P711; 179Ark94, 14SW(2d)261; 79CalA101, 248P1078; 327 Ill 162, 158NE462; 214Ky458, 283SW427; 228Ky19, 14SW(2d)194; 234Ky56, 27SW(2d)405; 229Ky168, 16SW(2d)766; Mont 289P1037; 194NC121, 138SE518; OklCr 267P494; OklCr 277P670; 294Pa573, 144A743; 99TexCr618, 271SW92; 103TexCr572, 281SW1082; 100TexCr114, 272SW149. [e] (1) 20AlaA660, 104S771 (failure to consider absence of necessity to protect self and opportunity of retreat); Iowa 228NW37. (6) For using words "brought on the difficulty" without explaining how it was brought on. 230Ky738, 20SW(2d)748. [f] (2) In removing defendant's father's water meter where the trespass was completed, and defendant invited combat, self-defense is unavailing. 208Ky500, 271SW586 (that removal of water meter was error on part of employee does not operate to relieve defendant). [g] **Instruction erroneously refused.**–111TexCr137, 12SW(2d)221.

375–57 [a] (1) 181Ark331, 25SW(2d)769; 218Ky521, 291SW765; 100TexCr424, 274SW137; TexCr 29SW(2d)787. [b] 172Ark1176, 290SW54; 73CalA580, 239P82; 223Ky305, 3SW(2d)647; 230Ky738, 20SW(2d)748. [d] **Instruction on question whether deceased was aggressor is not necessary** where it makes no difference why defendant was in danger. 214Ky137, 282SW1082. (1) 224Ky443, 6SW(2d)488.

375–58 106TexCr446, 292SW901.

376–59 [c] (3) As omitting to tell jury that they must believe that difficulty or attack was caused by words or conduct of defendant. 104TexCr550, 286SW224. [e] **Instruction not erroneous.**–171Ark768, 286SW939; 215Ky815, 287SW8; 143Va510, 129SE360.

376–60 100TexCr157, 272SW454; 100TexCr424, 274SW137. See also 104TexCr550, 286SW224. [a] **Instruction held insufficient.**–104TexCr550, 286SW224.

376–60½–New. In charge on converse of issue, matters stated on the affirmative of issue should be referred to. 104TexCr550, 286SW224.

376–66 216Ala336, 113S64; 78CalA442,

248P1061; 316 Ill 591, 147NE484; 226 Ky186, 10SW(2d)646; Ky 13SW(2d) 263(2dcase); 154Tenn26, 285SW554. [a] (1) 23AlaA426, 126S417; 23AlaA 428, 126S420(3dcase); 172Ark156, 287 SW1026; 172Ark244, 288SW904; 71 CalA628, 235P737; 73CalA580, 239P82; 95CalA659, 273P110; 164Ga298, 138SE 229; Ga 155SE38; 36GaA288, 136SE 324; 16SGaA282, 147SE519; 41 Ida616, 243P359; 42 Ida319, 245P685; 327 Ill 50, 158NE457; 221Ky187, 298SW373; 222Ky248, 300SW625; 234Ky734, 29SW (2d)13; 235Ky391, 31SW(2d)622; 161 La518, 109S51; 140Miss889, 105S742; 151Miss617, 118S447; Mo 274SW50; Mo 281SW32; 50ND270, 195NW567; 104TexCr178, 283SW517; 105TexCr161, 287SW247; TexCr 287SW1116; 106Tex Cr583, 294SW220; TexCr 25SW(2d)849. (2) 171Ark768, 286SW939. (8) Fear of attack. 171Ark297, 284SW734. (9) Instruction that "before one not reasonably free from blame in the inception of the difficulty can justify a homicide under the plea of self-defense, he must have honestly and bona fide declined the combat" is not error in view of whole charge. 94Fla163, 113 S699, 700. [b] (1) 218Ala660, 120S 148; 220Ala544, 126SS48; 78CalA442, 24SP1061; 87CalA724, 262P795; 322 Ill 434, 153NE639; 337 Ill 371, 169NE 190; 199 Ind196, 156NE103; 120Kan 221, 243P280; 227Ky83, 41SW(2d)996; 145Miss227, 110S500; 115 Oh308, 152 NE664; 113TexCr621, 24SW(2d)52; 113TexCr570, 24SW(2d)56. [d] (3) Where evidence authorized finding that fears of defendant that his life was in danger were fears of reasonable man, it is error to restrict defense of justification for shooting to prevention of like or similar assault on defendant by person shot. 35GaA589, 134SE197. [e] **Assault with intent to kill and murder.**–133SC167, 130SE747.

377–67 78CalA442, 24SP1061; 107Tex Cr307, 296SW582.

377–71 Mo 273SW733; 157SC278, 154 SE161; 108TexCr159, 300SW51; 143 Wash313, 255P382.

373–72 78CalA442, 24SP1061; 163La 563, 112S486; 315Mo242, 286SW69; 143Wash313, 255P382. [c] (2) **Other instances.** 151Miss617, 118S447.

378–72½–New. Instruction, basing right of self-defense upon defendant's belief that "there was a reasonably apparent necessity to kill to save himself," may be refused. 169Ark594, 276 SW358.

378–74 171Ark297, 284SW734; 171Ark 768, 286SW939; 172Ark244, 288SW 904; 161Ga166, 129SE772; 41 Ida616, 243P359; 321 Ill 157, 151NE584; 219 Ky505, 293SW1085; 219Ky546, 293SW 1095; 225Ky160, 7SW(2d)1064; 115 Oh308, 152NE664; 101TexCr514, 276 SW233; 101TexCr587, 276SW699; 104 TexCr649, 285SW621; 105TexCr451, 288SW1082; 105TexCr600, 289SW689; 109TexCr85, 38SW(2d)97; 109TexCr154, 38SW(2d)814; 111TexCr320, 12SW(2d) 788; 112TexCr550, 17SW(2d)1051. [a] (1) 219Ky505, 293SW1085. [b] (1) 171Ark297, 284SW734; 172Ark244, 288 SW904; 73CalA580, 239P82; 230Ky207, 18SW(2d)995; 105TexCr451, 288SW 1082; 100TexCr352, 273SW588; 101 TexCr535, 276SW275. (5) Other instances. TexCr 30SW(2d)331. [c] (1) 337 Ill 371, 169NE190; 112TexCr550, 17 SW(2d)1051; TexCr 26SW(2d)644(2d case). [d] **Reference to relative size and strength of parties** is proper under issue that defendant was attacked by stronger man. TexCr 32SW(2d)202.

379–77 168Ark1005, 272SW671; 321 Ill 157, 151NE584; 101TexCr514, 276SW 233; 111TexCr320, 12SW(2d)788; 112 TexCr554, 18SW(2d)163.

379–82 101TexCr464, 276SW715; 105 TexCr451, 288SW1082. [b] (1) 106 TexCr482, 293SW173; 112TexCr659, 18 SW(2d)181. [c] (1) 113TexCr62, 18 SW(2d)172.

379–83 105TexCr451, 288SW(2d)1082.

379–85 102TexCr435, 278SW201; 106 TexCr528, 293SW827. [a] (3) Requested instruction held erroneous. 106 TexCr338, 294SW584.

379–86 102TexCr435, 278SW201.

380–89 113TexCr247, 20SW(2d)431; TexCr 29SW(2d)787.

380–89½–New. , or where defendant testifies that he armed himself before deceased came to his place of business, and there is no evidence of former difficulty or threats against defendant. 21 AlaA116, 105S435 (abstract).

380–91 164Ga57, 137SE765; 164Ga677, 139SE349; 166Ga645, 144SE193; 334 Ill 526, 166NE74; 54SD552, 223NW 943; 104TexCr178, 283SW517; 107 TexCr307, 296SW582; 107TexCr357, 296SW596; 113TexCr112, 18SW(2d) 643; 40Wyo 184, 276P458. [e] **Evidence held to require instruction on imperfect self-defense.**–307Mo 365, 270SW 291. [f] **Instructions on self-defense held proper.**–104TexCr178, 283SW517; 144SC452, 142SE725. [c] **Instruction not erroneous.**–335 Ill 217, 167NE1.

380–92 213Ala576, 105S583 (holding instruction that, if deceased made murderous attack on defendant, it was not defendant's duty to retreat properly refused where evidence showed mere hostile demonstrations by deceased's throwing hand in pocket); 213Ala691, 106S134; Ala 130S175; 20AlaA630, 104 S677; 23AlaA336, 125S206; 78CalA442, 24SP1061; 160Ga605, 128SE747 (doctrine of reasonable fears has no connection with offense of voluntary manslaughter); 164Ga57, 137SE765; 166 Ga645, 144SE193; 168Ga530, 148SE386 (2dcase); 324 Ill 294, 155NE301; 210 Ky524, 276SW550; 210Ky747, 276SW 834; 218Ky236, 291SW40; 227Ky418, 13SW(2d)250; 228Ky432, 15SW(2d) 273; 229Ky139, 16SW(2d)793; 229Ky 249, 16SW(2d)1058; 230Ky815, 20SW (2d)998; 232Ky613, 24SW(2d)269; 257 Mass173, 154NE260; 312Mo411, 278 SW1036; Mo 284SW785; 50Nev256, 256 P793, 52ALR1015; NM 292P225(2d case); 189NC639, 127SE689; 148SC86, 145SE628; 154Tenn26, 285SW554; 101 TexCr19, 274SW616; 103TexCr334, 280 SW792; 105TexCr590, 289SW691; 107 TexCr58, 294SW852; 107TexCr307, 296 SW582; 108TexCr364, 18SW(2d)303; 109TexCr85, 38SW(2d)97; 109TexCr213, 38SW(2d)808; 109TexCr564, 5SW(2d) 982; 112TexCr406, 16SW(2d)1086; 113 TexCr439, 22SW(2d)674; 113TexCr621, 24SW(2d)52; 113TexCr570, 24SW(2d) 56; TexCr 27SW(2d)820; 143Va510, 129SE360. [a] **Instructions held warranted by evidence.**–20AlaA425, 104S443 (inference of communication of threat to defendant); 218Ky189, 291SW1.

381–93 195Cal 295, 232P974; 195Cal 584, 234P374; 164Ga57, 137SE765; 48 Ida636, 284P201; 333 Ill 451, 164NE 840; 210Ky449, 276SW160; 218Ky236, 291SW40; 218Ky703, 292SW336; 231 Ky150, 21SW(2d)236; 312Mo411, 278 SW1036; Mo 284SW785; 50Nev256, 256P793, 52ALR1015; 107TexCr58, 294SW852. [a] (4) Where deceased was killed while repelling burglary, fact that deceased fired first shot does not warrant instruction on self-defense. 90CalA366, 265P978.

382–94 316 Ill 591, 147NE484; 121Kan 576, 249P617; 257Mass473, 154NE260; OklCr 268P312; OklCr 292P867; 107 TexCr357, 296SW596; 143Va609, 130SE 777 (refusal of instruction extending self defense to second altercation proper where deceased had abandoned fight after first altercation).

382–95 40Wyo 184, 276P458.

382–96 22SKy710, 15SW(2d)458.

382–97 220Ala544, 126SS48; 195Cal 295, 232P974; 78CalA442, 24SP1061. [a] **Instructions held not erroneous as abstract.**–104TexCr178, 283SW517.

383–98 100TexCr424, 274SW137 (when encounter was with deadly weapons).

383–3 220Ala544, 126SS48; 332 Ill 167, 163NE399; 225Ky572, 9SW(2d)707; 321Mo598, 12SW(2d)426; 192NC1, 133 SE176; 194NC28, 138SE337; 112TexCr 61, 13SW(2d)872. [a] (1) 142Miss787, 107S663; 49Nev184, 242P316; 149SC367, 147SE310.

383–4 213Ala691, 106S134; 215Ala276, 110S407; 22AlaA62, 112S184; 22AlaA 95, 112S811; 22AlaA366, 115S763; 161 Ga166, 129SE772; 162Ga378, 134SE91; 163Ga425, 150SE579 (held error for removing state's evidence of mitigation from jury); 232Ky52, 22SW(2d)418; Mo 273SW733; 106TexCr188, 291SW 552; 109TexCr113, 8SW(2d)101; 111 TexCr320, 12SW(2d)788. [a] 227Ky710, 13SW(2d)1046.

383–5 214Ala273, 107S737; 22AlaA350, 115S701; 20AlaA630, 104S677; 228Ky 322, 14SW(2d)1077; 232Ky52, 22SW (2d)418; 161La518, 109S51; 103Tex Cr518, 281SW859; TexCr 8SW(2d)122. [a] (1) 161Ga298, 138SE229; 219Ky 505, 293SW1085; 223Ky184, 38SW(2d) 1105; 230Ky738, 20SW(2d)748; 142 Miss787, 107S663; 107TexCr46, 294SW 596.

384–9½–New. An instruction that defendant has the burden of justifying killing unless evidence shows justification is erroneous where statement of defendant shows justification. 163Ga388, 136SE144.

384–10 213Ala301, 104S668; 214Ala91, 106S503; 21AlaA256, 107S222; 21AlaA 348, 108S262; 22AlaA95, 112S811; 22 AlaA366, 115S763; 22AlaA368, 115S 766; AlaA 129S705(1stcase); 199 Ind 196, 156NE403; Ind 167NE531; 101 TexCr587, 276SW699; 40Wyo 184, 276 P458.

384–11 22AlaA338, 115S695; La 129S 730; 105TexCr179, 287SW257.

385–12 106TexCr446, 292SW901.

385–14½–New. Court should omit to charge on provocation of difficulty by deceased. TexCr 32SW(2d)202.

385–15 214Ala273, 107S737; 216Ala7, 111S297; 215Ala643, 112S234; CalA 286P1061; 161Ga166, 129SE772; Iowa 228NW37; 163La563, 112S486; 114 Oh 299, 151NE182; 157SC278, 154SE161. [b] 36GaA288, 136SE324; 223Ky826, 4 SW(2d)1109; 233Ky785, 26SW(2d)46; 109TexCr361, 48W(2d)966.

385–16 213Ala301, 104S668; 214Ala 273, 107S737; 215Ala276, 110S407; 166 Ga189, 142SE674; 101Vt5, 139A769. [a] (7) As limiting right of self defense only on reasonable belief that defendant was about to be killed. 193NC12, 135SE165.

385–17 20AlaA412, 103S694; 192NC1, 133SE176; 103TexCr518, 281SW859; 110TexCr353, 7SW(2d)569; 110TexCr 262, 8SW(2d)122. [a] (8) As excluding apprehension of harm from men acting in concert with deceased at time of homicide. 211Ky23, 276SW969. (9) Failing to hypothesize that deceased attacked, or was about to attack, accused. 213Ala691, 106S134. (10) As instructing that deceased must shoot at defendant before he would be warranted in defending himself. 150Va588, 142SE369.

386–18 33NM187, 262P929. But see 114 Oh299, 151NE182.

386–21 215Ala576, 105S583; 214Ala91, 106S503; 215Ala276, 110S407; 215Ala 453, 111S34; 22AlaA62, 112S184; 216 Ala643, 112S234; 20AlaA630, 104S677; 20AlaA660, 104S771; 21AlaA415, 109S 122; 21AlaA436, 109S171; 23AlaA434, 126S604(2dcase); AlaA 129S705(2d case); 170Ark1193, 282SW983; 234Ky 142, 27SW(2d)705; 189NC639, 127SE 689; 148SC86, 145SE628; 101Vt5, 139 A769; 40Wyo 184, 276P458. See also 21AlaA35, 104S876. [a] 215Ala643, 112 S234; 171Ark297, 284SW734; 177Ark 1108, 9SW(2d)800; 73CalA580, 239P82; 199 Iowa432, 200NW732 (in own dwelling); 216Ky787, 288SW742; Ky 13SW (2d)263(2dcase). See also 22AlaA519, 117S605. [c] **It is erroneous to instruct that defendant was bound to retreat** before homicide would be justified, where he was feloniously attacked on his own premises. 202 Iowa173, 209NW 458, 47ALR407. [d] **Requested instruction that person attacked may pursue his adversary till he has secured himself from danger** held properly modified to give right to stand his ground and repel force with force. 171Ark297, 284 SW734.

386–22 [a] (1) 147SC514, 145SE404. (2) As placing too great burden on accused as to necessity for retreat. 21 AlaA46, 104S889.

386–23 196NC157, 144SE1.

386–23½–New. A charge that there is no duty resting on a party to retreat from his own home or residence, although he could do so with safety, is erroneous as incomplete. 22AlaA95, 112 S811.

386-23¼-New. An instruction failing to eliminate the duty to retreat where the killing occurred in a fight in the house of defendant's father, occupied by defendant and deceased as a home, is erroneous. 22AlaA95, 112S811.

386-23¼-New. The court should instruct fully as to the right of one on own premises to stand his ground. 138SC147, 135SE800.

386-23⅓-New. In a prosecution for shooting or wounding with intent to kill it is not error to charge that, if the parties entered into combat intending to shoot, kill, or do great bodily harm, defendant cannot be acquitted on the ground of self-defense. 221Ky219, 298SW707.

386-23⅓-New. In such prosecution it is not necessary to charge that the law of self-defense did not require defendant to flee to avoid difficulty when he was on his own premises. 221Ky219, 298SW707.

386-24 [a] (1) Mass 167NE354. [c] **Unless qualified self-defense instruction given.**-219Ky505, 293SW1085.

386-25 210Ky566, 276SW522.

386-27 100TexCr424, 274SW137; 105TexCr508, 289SW398.

387-31 111TexCr657, 13SW(2d)689.

387-33 112TexCr550, 17SW(2d)1051. [a] (1) 20AlaA425, 104S443; 121Kan436, 247P437; Mo 279SW705; 100TexCr424, 274SW137. [b] (1) 169Ark594, 276SW358 (instruction that threats of deceased could be considered only in determining who was aggressor).

387-34 110TexCr109, 7SW(2d)566.

388-37 103TexCr334, 280SW792.

388-38 103TexCr334, 280SW792.

388-39 103TexCr334, 280SW792.

388-40 107TexCr530, 298SW287.

388-42 103TexCr334, 280SW792; 109TexCr564, 5SW(2d)982; 112TexCr536, 17SW(2d)830.

388-45 312Mo635, 281SW29; 106TexCr318, 291SW1108. [a] TexCr 29SW(2d)782.

388-47 312Mo635, 281SW29.

389-48 100TexCr424, 274SW137.

389-50 177Ark1108, 9SW(2d)800.

389-51 162Ga378, 134SE91; 164Ga298, 138SE229; 36GaA94, 135SE757; 36GaA660, 137SE787; 120Or134, 249P1045. [a] (1) 21AlaA375, 108S639; 36GaA94, 135SE757; 120Or134, 249P1045 (improperly refused). (4) 162Ga378, 134SE91; 164Ga298, 138SE229. [d] **Testimony of defendant held sufficient to authorize instruction.** 120Or134, 249P1045. [d] **Instruction referring to "altercation" held not erroneous.** Va 154SE508.

389-52 162Ga378, 134SE91; 36GaA660, 137SE787.

389-53 163Ga176, 135SE735; 101TexCr164, 274SW146.

389-58 210Ky410, 276SW127. See also 143Va609, 130SE777. [a] (1) 41Ida616, 243P359. [b] **Instructions held erroneous.**-55ND761, 215NW277.

390-59 171Ark307, 284SW751; 75CalA642, 243P461. [b] (2) 171Ark307, 284SW751.

390-60 171Ark307, 284SW751.

390-62 213Ala121, 104S282; 210Ky494, 276SW158.

390-67 218Ky189, 291SW1; 223Ky374, 3SW(2d)757; 230Ky569, 20SW(2d)447; 103TexCr148, 280SW787; TexCr 23SW(2d)369. [a] (1) Kan 291P945 ("unwritten law"); 225Ky160, 7SW(2d)1064; 110TexCr298, 8SW(2d)129; TexCr 27SW(2d)214. (2) 231Ky82, 21SW(2d)115. (3) That self-defense does not include defense of others. 215Ky717, 286SW1053. (4) Limiting right of defendant to kill to prevent commission of felony on his wife by force and against her will. 199Wis615, 227NW258. [b] (1) 21AlaA264, 107S323; Miss 118S708; 115Oh308, 152NE664; 103TexCr423, 281SW213; 103TexCr462, 281SW868; 110TexCr298, 8SW(2d)129; TexCr 26SW(2d)269. [d] (2) Instruction that, for son to plead defense of mother, it must be shown that father was at fault and aggressor in trouble, has been held erroneous where there was no evidence on which to base it. 210Ky355, 275SW876. [e] **Unlawful assault or lawful defense.**-In prosecution of husband and wife for murder, where defendant husband contended that he shot deceased in self-defense, and wife contended that she was engaged in defending her husband, whether she aided him in unlawful assault, or only in his lawful defense, was required to have been explained and submitted to jury. 196NC457, 146SE1. [f] **Instructions held properly refused.**-TexCr 26SW(2d)269.

391-69 223Ky369, 3SW(2d)754; 225Ky384, 9SW(2d)107. But see 33NM449, 269P331.

391-70½-New. Where there is no evidence as to defense of another, instructions confining accused's right to kill deceased to self-defense are proper. 214Ky475, 283SW431.

391-71 103TexCr462, 281SW868.

391-72 [a] **Refusal to charge held erroneous.**-23AlaA89, 121S444.

391-76½-New. or where it gives too great a right to the defender as to the force necessary to repel an attack; 164La420, 114S82.

391-77 172Ark156, 287SW1026; 210Ky747, 276SW834; 222Ky630, 1SW(2d)1045; 224Ky158, 5SW(2d)902; 226Ky144, 10SW(2d)639; 228Ky151, 14SW(2d)387; 228Ky722, 15SW(2d)435; 229Ky534, 17SW(2d)432(2dcase); 234Ky676, 28SW(2d)971(2dcase); 235Ky78, 29SW(2d)629; 140Miss265, 105S514.

391-80 22AlaA508, 117S492; 97Fla650, 122S110; Ky 13SW(2d)267; 227Ky578, 13SW(2d)763; 32PortoRico668; 100TexCr641, 274SW611. [a] 144SC452, 142SE725. [b] (1) Ala 130S175; 32PortoRico668. (4) Instruction excluding right of defendants to protect their house from search, if they did not know parties making search were officers, is erroneous. 134SC485, 133SE457. [d] **Refusal to so instruct held error,** notwithstanding instruction on self-defense, 227Ky578, 13SW(2d)763. [e] **Refusal of instructions held erroneous.**-232Ky691, 24SW(2d)564.

392-81 22AlaA508, 117S492; 221Ky557, 299SW183. [b] **Illegal search warrant.**-134SC268, 131SE419.

392-82 219Ala567, 122S683.

392-82½-New. It is proper also to instruct as to general right of self-defense, either separately or in the same instruction. 214Ky211, 282SW1109.

392-83 210Ky378, 275SW881; 210Ky747, 276SW834; 210Ky685, 276SW575; 225Ky596, 9SW(2d)720; 225Ky590, 9SW(2d)723; 227Ky500, 13SW(2d)511; 229Ky534, 17SW(2d)432(2dcase); 234Ky56, 27SW(2d)405; 234Ky673, 28SW(2d)978; 140Miss265, 105S514; 144Miss793, 110S517; 151SC379, 149SE108; 101Vt5, 139A769. [a] (2) 227Ky142, 12SW(2d)324. (5) Where evidence does not show commission of felony in or upon dwelling house. 140Miss265, 105S514.

392-88 166Ga115, 142SE681; 113TexCr230, 18SW(2d)635. [a] (1) 100TexCr67, 272SW154. See also 110TexCr298, 8SW(2d)129. [b] (1) 219Ala567, 122S683; 203Iowa155, 212NW382; 163La563, 112S486. [d] **Robbery.**-208Ky628, 271SW681.

393-90 195Cal295, 232P974 (request for instruction as to conspiracy to commit larceny properly refused); 209Ky10, 272SW1; 229Ky505, 17SW(2d)421; ND 229NW7; 98TexCr298, 265SW560; 103TexCr496, 281SW559; TexCr 27SW(2d)214.

393-95 75CalA642, 243P461; 231Ky487, 21SW(2d)797; 56ND642, 219NW132; 113TexCr160, 19SW(2d)47. [a] (1) Ga 155SE478; 29Ariz460, 242P864; 162Ga7, 132SE624; 169Ga142, 149SE887; 204Iowa414, 214NW596; 213Ky356, 281SW164; 227Ky418, 13SW(2d)250; 227Ky520, 13SW(2d)533; 56ND642, 219NW132; 122Or444, 259P893. (3) 160Ga605, 128SE747 (charging section of code in entirety); 169Ga455, 150SE587. [b] (1) 23AlaA348, 128S359 (2dcase); 75CalA642, 243P461; 169Ga142, 149SE887; 101TexCr33, 274SW568.

393-97 195CalA584, 234P374; 199Cal361, 249P186; 162Ga277, 133SE255; 212Ky50, 278SW163; 221Ky158, 298SW374; 151Miss702, 118S431.

394-98 212Ky50, 278SW163.

394-1 22AlaA93, 112S806; 86CalA542, 261P756.

394-2 199Cal361, 249P186.

394-5 169Ark1192, 278SW10; 104TexCr46, 282SW242; 107TexCr315, 296SW895. [a] (1) 169Ark421, 275SW758; 169Ark1192, 278SW10; 171Ark1188, 284SW721; 79CalA101, 248P1078; 124Kan208, 257P739; 229Ky207, 16SW(2d)1016; 229Ky305, 17SW(2d)238; 311Mo581, 278SW995; 313Mo71, 281SW35; 197NC576, 150SE25(2dcase); 284Pa99, 130A302; 137SC75, 134SE514; TexCr 26SW(2d)1064. (4) Aider and abettor held entitled to instruction authorizing acquittal, if principal attests in self-defense. 220Ky807, 295SW1075. [b] (1) 218Ala442, 118S654; 171Ark1188, 284SW721; 215Ky786, 287SW12; 149Miss239, 115S433; 311Mo581, 278SW995; 104TexCr46, 282SW242; TexCr 26SW(2d)1064; 110TexCr183, 8SW(2d)162. (4) 171Ark1188, 284SW721. (5) 171Ark1188, 284SW721.

394-6 104TexCr616, 286SW223; 110TexCr81, 8SW(2d)152.

394-6½-New. Where one is charged with striking the fatal blow and that defendants were aiding, abetting, and assisting him, the court correctly charges to acquit defendants if other than the one charged struck the fatal blow. 313Mo436, 282SW22.

394-7 43Ida459, 252P673; Mo 30SW(2d)132; 104TexCr46, 282SW242; 107TexCr208, 296SW593. [a] (1) Mo 279SW696; 104TexCr46, 282SW242; 110TexCr183, 8SW(2d)162; TexCr 29SW(2d)391(1stcase); Wash 286P69. (8) That if defendant, with criminal intent, gave poison to others, who administered it, he was accomplice and could not be convicted as principal. 104TexCr46, 282SW242. (9) Other instances. 337Ill333, 169NE169. [b] (3) 333Ill512, 165NE168. (8) On aiding and abetting. 219Ky664, 294SW160.

395-8 43Ida459, 252P673; 311Mo581, 278SW995; 104TexCr46, 282SW242.

395-9 166Ga512, 143SE896; 166Ga758, 144SE301. See also Mo 22SW(2d)639.

395-11 166Ga758, 144SE301; 106TexCr251, 291SW908.

395-13 235Ky356, 31SW(2d)602; 316Mo185, 289SW619.

395-14 198Cal454, 245P821 (duty of court to instruct); 68CalA259, 228P868; 163Ga186, 136SE72; 164Ga128, 138SE67; 40GaA123, 149SE51; 210Ky796, 276SW841; 221Ky207, 298SW702; 223Ky369, 3SW(2d)754; 231Ky527, 21SW(2d)840; Mo 30SW(2d)132. [b] 198Cal454, 245P821; 164Ga128, 138SE67; 168Ga575, 148SE500; 168Ga598, 148SE511; 210Ky796, 276SW841; 231Ky527, 21SW(2d)840; 150Miss206, 116S746.

396-15 45Colo1, 99P1009; 321Ill397, 152NE149; 228Ky19, 14SW(2d)194.

396-18 219Ky88, 292SW756; 223Ky305, 3SW(2d)647; 230Ky738, 20SW(2d)748; 312Mo411, 278SW1036.

396-20½-New. Charge on specific intent of accused to murder is not required where there was common intent to rob. 162Ga267, 134SE36.

396-20⅓-New. Instruction, permitting conviction of defendant as principal under evidence, held not erroneous, although indictment charged defendant and others with having jointly murdered. 153Va909, 150SE407.

396-21½-New. If the principal was entitled to manslaughter instructions, those charged with aiding, abetting, and assisting him are entitled to the same. 313Mo436, 282SW22.

396-23 29Ariz247, 240P863 (evidence held to require instruction on degrees of both murder and manslaughter); 170Ark1073, 282SW680; 179Ark1066, 20SW(2d)189; 163Ga313, 136SE154; 164Ga509, 139SE37; 39GaA13, 145SE918; 205Iowa1028, 219NW17; 121Kan576, 249P617; 218Ky798, 292SW467; 228Ky710, 15SW(2d)458; 164La420, 114S82; 313Mo615, 285SW392; Mo 27SW(2d)16; Mont 289P1037; 114Nebr28, 206NW16; 117Nebr601, 221NW683; 49Nev241, 242P697 (instruction as to distinction between first and second degree murder held sufficient); 31NM436, 246P897; 244NY147, 155NE79; 246NY

100, 158NE35; 198NC629, 152SE890; 50ND270, 195NW567; 284Pa255, 131A184; 49SD456, 207NW456; 104TexCr456, 284SW578; 143Va609, 130SE777 (in view of evidence, no error in instructing on law of murder of first or second degree). See also 227Ky65, 11SW(2d)1000(2dcase). [d] **Charge on murder** held properly given. 105TexCr508, 289SW398. [e] **Charge on aggravated assault required.**–110TexCr81, 8SW(2d)152.

397–24 164Ga509, 139SE37. But see 147Miss171, 113S177; Mo 6SW(2d)898 (2dcase); OklCr 289P788.

397–26 104TexCr456, 284SW578.

397–28 120Kan430, 243P1006; 121Kan576, 249P617.

397–29 221Ky49, 297SW929; 49Nev194, 242P582, 586 [quotCJ].

397–30 198Cal776, 247P884; 49Nev194, 242P582, 586 [quotCJ].

397–31 Ky 12SW(2d)326.

398–39 30Ariz366, 247P129; 168Ark1087, 273SW374; 198Cal776, 247P884; Cal 289P634; 98Fla1184, 125S345(3d case); 163Ga467, 136SE459; 203Iowa918, 210NW961; 121Kan576, 249P617; 225Ky667, 9SW(2d)1000; 146Miss505, 112S685; Mo 278SW987; 50RI356, 147A878; Wash 287P57. [a] (2) 34Porto Rico 443. (6) As to offenses below murder in first degree. 169Ark717, 276SW849; 203Iowa918, 210NW961. (7) As to assault with intent to kill or to inflict great bodily injury. 202Iowa663, 210NW916. (8) As to offenses lower than manslaughter. 205Iowa1028, 219NW17. [b] (1) 251Mich443, 232NW365; Mont 289P1037; 41Ida616, 243P359; 205Iowa1028, 219NW17; 114Nebr28, 206NW16; 103TexCr334, 280SW792. (2) Instructions on murder. 111TexCr199, 12SW(2d)223(2dcase).

398–40 168Ark1087, 273SW374; 76Cal A648, 245P461; 234Mich569, 208NW685; 116Nebr191, 216NW656, 658 [cit CJ].

398–43 203Iowa918, 210NW961.

399–44 76CalA648, 245P461; 234Mich569, 208NW685; 115Nebr143, 212NW35, 36 [citCJ]; 116Nebr191, 216NW656, 658 [citCJ]; 119Oh250, 163NE202. [a] (2) 213Ky356, 281SW164. (3) On killing in duel. 100TexCr641, 274SW611.

399–47 214Ala273, 107S737; 217Ala219, 115S308; 39GaA694, 148SE284(2d case); 164La420, 114S82; 153Miss770, 121S492; 154Miss489, 122S533; 246NY100, 158NE35; OklCr 283P796. [a] 30Ariz366, 247P129 (instruction held not erroneous as taking from jury issue of assault with deadly weapon, when instructions are considered as whole, and in absence of special request on that issue); 32Ill410, 163NE784.

399–49½–New. A requested instruction that defendant can be guilty only of involuntary manslaughter if the knife with which he stabbed deceased was not a deadly weapon likely to produce death is properly refused. 168Ga731, 149SE23.

399–51 214Ala273, 107S737; 162Ga777, 135SE187; 216Ky698, 288SW688; 284Pa255, 131A184. [a] (5) Defining murder in third degree. 171Minn414, 214NW280. (6) Other instructions held proper. Ga 155SE670. (7) Other instances. 235Ky845, 32SW(2d)405. [b] (7) Other instances. 217Ala219, 115S308; 117Nebr759, 222NW956. [c] (1) 22AlaA62, 112S184; 219Ky88, 292SW756. [d] 30Ariz366, 247P129. [e] **Instructions held not assumption of fact nor expression of opinion** where fact of killing was admitted. 162Ga777, 135SE187. [f] **Instructions held not confusing.**–41GaA248, 152SE637.

400–53 221Ky229, 298SW708; 234Ky842, 29SW(2d)561 (held not best practice). But see 210Ky449, 276SW160.

400–61½–New. Instruction on first degree murder supported by evidence is not an invasion of the province of the jury to pass on a plea of self-defense or the question of manslaughter. 143Va609, 130SE777.

400–61¾–New. Where evidence did not warrant charge on death from blow struck in heat of passion in mutual combat, omitting such element from charge defining second degree murder was not error. 101Vt5, 139A769.

400–65 [c] (1) 103WVa427, 137SE649.

402–77 Ark 30SW(2d)830; 198Cal776, 247P884; 199Ind247, 155NE544; 326Ill640, 158NE403; 121Kan383, 247P843; 116Nebr90, 215NW785; OklCr 285P142; 104TexCr338, 283SW840. But see 42F(2d)623.

402–78 202Iowa173, 209NW458, 47ALR407; 224Ky116, 5SW(2d)884; 318Mo568, 300SW732; 116Nebr90, 215NW785; 105TexCr254, 288SW196. [b] (1) 163Ga206, 135SE748; 43Ida459, 252P673; 49Nev184, 242P316; 49Nev217, 242P590; 283Pa564, 129A582. [d] **If accused is guilty of first degree murder or not guilty at all,** jury should be so instructed. 169Ark717, 276SW849.

403–82½–New. An instruction that the essentials of first degree murder were shown if defendant decided between first and second shots to kill deceased is not erroneous. 291Pa291, 139A851.

403–84 116Nebr90, 215NW785. [a] (1) 244Mich622, 222NW185.

403–85 203Iowa918, 210NW961.

403–87 169Ark717, 276SW849; 181Ark1011, 28SW(2d)1055; 195Cal623, 234P890; 90CalA366, 265P978; 199Ind247, 155NE544; Mo 30SW(2d)750; NJ 150A367; NJ 151A756; 116Nebr90, 215NW785; 246NY100, 158NE35; 246NY262, 158NE615; 116Oh265, 155NE800. [a] (3) Instruction that if, before he had been placed in lawful custody of officer, defendant shot another officer in effort to escape, he had committed homicide while engaged in another felony, is held error. 246NY100, 158NE35. [b] (1) 181Ark1011, 28SW(2d)1055.

404–89 246NY262, 158NE615. See also Mo 22SW(2d)639.

404–91 106TexCr300, 292SW220.

404–93 35Ariz432, 280P672; 85CalA258, 258P1111; 205Iowa1028, 219NW17; 251Mich443, 232NW365; 313Mo615, 285SW392; Mo 274SW50; 318Mo568, 300SW732; 321Mo662, 12SW(2d)34; 31NM436, 246P897; 34NM65, 277P22; 284Pa255, 131A184; 142Wash653, 254P445.

404–1 110Conn303, 147A801; Mo 30SW(2d)132; 115Nebr143, 212NW35.

405–2 Iowa 227NW601; 315Mo7, 285SW489; Mo 278SW987; Mo 12SW(2d)30; Mo 19SW(2d)671; Mo 30SW(2d)132.

405–3 50RI356, 147A878.

405–4 [a] (1) 30Ariz159, 245P356; 314Mo612, 286SW29; 284Pa255, 131A184; 29PortoRico961; 34PortoRico443; 156Tenn105, 299SW1052. (3) 95CalA659, 273P110. [b] (1) 150Va588, 142SE369.

406–14 [a] But see Mo 24SW(2d)1039.

406–17 176Ark217, 2SW(2d)11; 161Ga640, 131SE682; 164Ga677, 139SE349; 35GaA399, 133SE266; 36GaA94, 135SE757; 36GaA652, 137SE790; 37GaA19, 138SE671; 37GaA118, 139SE120; 37GaA379, 140SE395; 37GaA503, 141SE56; 168Ga843, 149SE145(2dcase); 38GaA648, 145SE106; 40GaA360, 149SE429; 41GaA248, 152SE637; 322Ill434, 153NE639; Ill 173NE383; 215Ky613, 286SW696; 221Ky689, 299SW570; 232Ky159, 22SW(2d)599; 234Ky142, 27SW(2d)705; 235Ky735, 32SW(2d)51; 164La420, 114S82; Miss 107S768; 152Miss133, 118S906; 311Mo581, 278SW995; 313Mo436, 282SW22; 314Mo612, 286SW29; Mo 274SW50; Mo 284SW785; 31NM436, 246P897; 244NY147, 155NE79; 220AppDiv528, 221NYS760; 192NC533, 135SE345; 119Oh250, 163NE202; OklCr 283P796; 103TexCr163, 280SW829; 103TexCr518, 281SW859; 103TexCr585, 281SW553; 106TexCr141, 291SW244; 106TexCr245, 291SW906; 109TexCr113, 3SW(2d)101. [b] (1) 208Ky569, 271SW661; 116Nebr141, 216NW173. (4) Where evidence is purely circumstantial, unless there are facts negativing combat, it is proper to instruct on all phases of law including manslaughter. 209Ky263, 272SW721. [e] **Charge on voluntary manslaughter by operation of automobile approved.**–213Ky356, 281SW164. [f] **Charge held erroneous** when not pertinently applied to facts. 108TexCr159, 300SW51. [g] **Evidence held not to raise issue.**–Mo 292SW728.

407–19 34GaA133, 128SE687 (charge authorized by statement); 36GaA94, 135SE757; 36GaA652, 137SE790; 37GaA118, 139SE120. But see 160Ga509, 128SE791.

407–20 106TexCr141, 291SW244.

407–21 164Ga677, 139SE349; 215Ky484, 285SW203; 215Ky800, 287SW17; 164La420, 114S82; 311Mo581, 278SW995; 116Nebr141, 216NW173; 103TexCr163, 280SW829; 106TexCr141, 291SW244; 106TexCr245, 291SW906.

408–22 35GaA399, 133SE266; 36GaA652, 137SE790; 37GaA118, 139SE120; 106TexCr141, 291SW244.

408–23½–New. 33Wyo346, 239P526, 41ALR717 (giving of instruction based on repealed statute is erroneous).

408–23¾–New. Refusal to charge in manslaughter case that slight negligence was not culpable is error. 246NY451, 159NE394.

408–26 164Ga728, 139SE352.

408–30 CalA 285P866 (instruction held sufficient); 37GaA379, 140SE395; 212Ky50, 278SW163; 215Ky484, 285SW203; 226Ky173, 10SW(2d)643; 154Tenn7, 285SW565, 49ALR605; 193NC321, 136SE877; 108TexCr302, 300SW71. [d] (1) 214Ala273, 107S737; 213Ky356, 281SW164; 219AppDiv646, 221NYS47; OklCr 273P1027; 126Or118, 268P1016; SC 155SE409. [g] 212Ky50, 278SW163. [h] (8) Instruction failing to define words "gross negligence," "reckless," and "wanton" is erroneous. 213Ky356, 281SW164. (9) Not error to refuse instruction as to degree of negligence of which defendant must have been found guilty in order to convict him. 136Wash495, 240P674. (10) In prosecution for second degree manslaughter by reckless driver, instruction defining "culpable negligence" as culpable, or blameworthy, or criminal, etc., is erroneous as likely to lead jury to believe that blameworthiness alone is sufficient. 220AppDiv495, 221NYS778. (11) Other correct instructions. 149Miss171, 115S217. [j] 162Ga1, 132SE418; 164Ga298, 138SE229; 121Kan670, 249P623; 104TexCr423, 284SW571. [k] **Instructions held correct.**–210Ky796, 276SW841. [l] **Instructions held not erroneous.**–318Mo611, 300SW691. [m] **Instructions held sufficient.**–151Miss702, 118S431. [n] **Instructions held sufficient.**–CalA 286P493. [o] **Instruction held not erroneous.**–40GaA360, 149SE429. [p] **Instructions held proper.**–40GaA123, 149SE51.

409–31 36GaA83, 135SE513; Mo 258SW(2d)109. [b] (2) Instruction held ambiguous. 97CalA664, 275P1010(2dcase).

409–34 97CalA664, 275P1010(2dcase); 126Me223, 137A244, 53ALR241; Mo 24SW(2d)993; 220AppDiv495, 221NYS778; 219AppDiv646, 221NYS47; 193NC321, 136SE877; 33Wyo346, 239P526, 41ALR717. [a] 162Ga777, 135SE187; 333Ill451, 164NE840; 317Mo348, 295SW754; 320Mo319, 6SW(2d)857 (homicide); 114Nebr28, 206NW16; 100TexCr424, 274SW137. [b] **Instructions held misleading.**–324Ill294, 155NE301.

409–35 318Mo553, 300SW694; 108TexCr302, 300SW71. [a] (5) That death must have been natural and probable result of reckless or culpably negligent act in order to convict of involuntary manslaughter by lawful act committed in unlawful manner. 154Tenn7, 285SW565, 49ALR605. (6) That in involuntary manslaughter killing must be natural and probable result of unlawful act. 152Tenn390, 277SW900.

409–36 70CalA519, 234P110 (causal connection between unlawful act in driving automobile with excessive speed and injury to deceased); 105TexCr479, 289SW46; 110TexCr81, 8SW(2d)152.

409–36½–New. or which assumes the existence of a fact not in evidence, 220AppDiv495, 221NYS778.

410–38 215Ky484, 285SW203; 163La484, 112S373. [a] (4) Instruction defining manslaughter and placing burden of showing circumstances to reduce charge from murder to manslaughter on defendant held proper in view of evidence. 192NC533, 135SE345.

410–47 21AlaA449, 109S282; 164Ga509, 139SE37; 36GaA213, 136SE182; 326Ill104, 157NE76; 120Kan430, 243P1006; 121Kan514, 247P429 (sufficient); 118Nebr31, 223NW464; 244NY147, 155NE79; 220AppDiv528, 221NYS

760. [e] **Instruction on negligent homicide** should be given where evidence raises such issue. 105TexCr410, 288 SW1084.

411-50 76CalA648, 245P461.

411-52 164Ga677, 139SE349; 215Ky 484, 285SW203; 164La420, 114S82; 313 Mo 436, 282SW22; 318Mo 611, 300SW 691. [d] 241Mich1, 216NW372. [e] **Evidence held to warrant instruction** on manslaughter on theory of sudden heat of passion. 209Ky263, 272SW721.

411-55 162Ga178, 132SE399; 35Porto Rico 395.

412-58 95CalA659, 273P110; 104TexCr 408, 284SW588. [b] (1) 164Ga298, 138 SE229; 192NC35, 133SE161; 104TexCr 408, 284SW588; 108TexCr489, 1SW (2d)639. (2) 164Ga298, 138SE229; 104 TexCr649, 285SW621. [c] (4) Instruction that if accused believed or was informed of husband's relation with deceased it would constitute adequate cause held properly refused where such information was antecedent to previous meeting of accused and deceased. 104 TexCr15, 282SW580.

412-60 [a] (1) 107TexCr70, 294SW857. (4) Need not be accompanied by bodily pain. 104TexCr649, 285SW621.

413-63 104TexCr649, 285SW621.

413-66½-New. Confession that defendant and accomplice were robbing accused at time of killing did not raise issue of manslaughter. 107TexCr504, 296SW513.

413-72 194NC459, 140SE26.

414-79 179Ark1066, 20SW(2d)189; 203 Cal 139, 263P522; 95CalA711, 273P99; CalA 286P476; 77Colo 350, 237P159; 160Ga565, 128S679; 160Ga593, 128SE 796; 163Ga43, 135SE410; 163Ga312, 136SE134; 163Ga467, 136SE459; 166 Ga251, 142SE866; 167Ga544, 146SE121; 168Ga530, 148SE386(2dcase); 168Ga 671, 148SE583; 169Ga384, 150SE558; 170Ga461, 153SE31; Ga 155SE670; 41 GaA300, 152SE604(1stcase); 41GaA248, 152SE637; 120Kan430, 243P1006; 121 Kan576, 249P617; 214Ky787, 283SW 1063; 226Ky437, 11SW(2d)111; 235Ky 356, 31SW(2d)602; 140Miss238, 105S 497; 143Miss689, 109S728; 153Miss 654, 121S284; Mo 281SW960; Mo 284 SW785; 313Mo 615, 285SW392; 315Mo 242, 286SW69; 318Mo 568, 300SW732; 321Mo 870, 12SW(2d)469; Mo 23SW (2d)87; 76Mont574, 248P179; 244NY 147, 155NE79; 194NC28, 138SE337; OklCr 289P790; 284Pa255, 131A184; 285Pa49, 131A657; 10PaDist&Co 56; 99TexCr627, 271SW87; 104TexCr26, 282SW245; 105TexCr246, 287SW1095; 105TexCr254, 288SW196; 106TexCr300, 292SW220; 108TexCr326, 300SW67; BC [192S] 2DomLR694.

416-84 214Ky787, 283SW1063; 228Ky 19, 14SW(2d)194; Mo 256SW744; Mo 279SW696; Mo 12SW(2d)30; 285Pa49, 131A657; 297Pa382, 147A79; 104TexCr 26, 282SW245; TexCr 8SW(2d)176.

416-85 307Mo 291, 270SW298; Mo 29 SW(2d)60.

417-88 169Ark225, 273SW13; 171Ark 307, 284SW751; 160Ga605, 128SE747; 160Ga509, 128SE791; 160Ga593, 128 SE796; 162Ga7, 132SE624; 163Ga176, 135SE735; 168Ga731, 149SE23; 169Ga 455, 150SE587; Ga 155SE478; 37GaA 376, 140SE527; GaA 155SE382; 215 Ky589, 286SW785; 215Ky734, 286SW 1049; 222Ky630, 1SW(2d)1045; 225Ky 275, 8SW(2d)415; 227Ky520, 13SW(2d) 533; 229Ky87, 16SW(2d)769; 106Tex Cr300, 292SW220. See also 335 Ill 217, 167NE1. [a] (5) 171Ark307, 284SW 751. (6) Where defendant contended killing was accidental, without culpability on her part. 229Ky63, 16SW(2d) 496. (7) In prosecution for voluntary manslaughter, in which defendant admitted, at time he shot deceased, he shot at, and intended to shoot, another, he was not entitled to instruction on involuntary manslaughter. 227Ky418, 13 SW(2d)250. (8) Where guilt of defendant is predicated on use of deadly weapon. 228Ky765, 15SW(2d)525.

417-89 162Ga7, 132SE624; 169Ga455, 150SE587. See also OklCr 275P657.

417-90 160Ga605, 128SE747; Ga 155 SE670.

417-91 76CalA648, 245P461; 166Ga1, 141SE903; 169Ga425, 150SE579; 337 Ill 371, 169NE190; 215Ky484, 285SW 203; 226Ky173, 10SW(2d)643; 235Ky 356, 31SW(2d)602; 35PortoRico 828; 109TexCr157, 3SW(2d)449. [a] 121 Kan670, 249P623; 213Ky356, 281SW 164; 237Mich424, 212NW97; 152Miss 133, 118S906; 109TexCr380, 5SW(2d) 139, 61ALR318. [b] (1) See also NJSup 140A438. (2) Instruction defining culpable negligence held erroneous. Mo 27SW(2d)16. [c] **Abstract instruction** not prejudicial in view of evidence and verdict. 168Ark634, 271SW3. [d] **Instruction that deceased, walking in roadway,** was not guilty of contributory negligence held erroneous on evidence. 237 Mich424, 212NW97. [e] **Where there is even slightest doubt,** from evidence, of intention to kill, instruction should be given. 39GaA128, 146SE340.

418-99 36GaA83, 135SE513; 39GaA 836, 148SE610; 215Ky613, 286SW696; 33NM449, 269P331; 192NC35, 133SE 161.

418-1 164Ga677, 139SE349; 224Ky116, 5SW(2d)884; 109TexCr78, 3SW(2d) 437.

418-3 36GaA83, 135SE513. [a] **Instructions held not objectionable.**–41GaA 248, 152SE637.

418-5 36GaA83, 135SE513. [a] (1) 34 GaA222, 129SE7. (4) Even though charge given on voluntary manslaughter was erroneous, it was not prejudicial where the evidence did not authorize any manslaughter charge. 169Ga384, 150 SE558.

418-6½-New. Where instruction defining self-defense has been correctly given, it need not be negatived in separate instructions defining murder and manslaughter. 210Ky378, 275SW881. [a] **Instruction held sufficient.**–210Ky 378, 275SW881.

418-8 39GaA407, 147SE718; 41GaA 495, 153SE372; Mo 278SW1009; Mo 23SW(2d)7 (evidence sufficient). [a] (4) Other illustrations. 155SC407, 152 SE667. [b] 21AlaA351, 108S271; 123 Kan586, 256P959. [c] **Instruction held properly refused.**–105TexCr403, 289SW 48.

419-9 218Ky217, 291SW47; Mo 23SW (2d)7 (assault to kill without malice).

419-10 39GaA407, 147SE718; 133SC 167, 130SE747 (accused failing to establish self-defense still entitled to instruction on simple assault if justified by evidence).

419-11 223Ky692, 4SW(2d)711.

419-12 133SC167, 130SE747 (accused failing to establish self-defense still entitled to instruction on aggravated assault if justified by evidence).

419-14 76CalA188, 244P114; 82CalA 618, 256P270; 133SC167, 130SE747 (instruction that wounding with deadly weapon is aggravated assault held proper where shot gun was used).

420-16 [c] **Under Rev. St. (1919) § 3692** jury is authorized under proper instruction to find accused guilty of any degree of offense inferior to that charged. 309Mo 50, 273SW730.

420-19 163La750, 112S708.

420-20 See also Mo 23SW(2d)7.

420-23 172Ark1176, 288SW705; 98Fla 609, 123S912; 116Nebr90, 215NW785; 133SC167, 130SE747 (charge of simple assault properly withdrawn where accused had become aggressor); 105 TexCr8, 284SW961.

420-25 223Ky692, 4SW(2d)711; 163La 750, 112S708.

421-23½-New. In a prosecution for wounding by striking with a stick with intent to kill, it is error to give an instruction permitting a conviction of a misdemeanor not included in the charge. 218Ky217, 291SW47.

421-29 22AlaA86, 112S538; 116Nebr90, 215NW785; 116 Oh265, 155NE800; 161 Tenn310, 30SW(2d)231 (degree of guilt); 105TexCr531, 289SW395. [a] (4) Where death followed from use of deadly weapon, refusal to charge on assault in prosecution for murder is not error. 23 OhA237, 155NE569.

421-30 217Ky556, 290SW330.

421-34 110TexCr81, 8SW(2d)152. [a] (2) 108TexCr72, 299SW403.

422-37½-New. Refusal to withdraw counts as to assault with dangerous weapon is not error, although defendant is acquitted of manslaughter. 26 F(2d)168.

422-37½-New. Under some statutes court, in prosecution for homicide should instruct on shooting and wounding with intent to kill and wounding in sudden passion without previous malice, where authorized by evidence. 235Ky351, 31SW(2d)608.

422-39 210Ky449, 276SW160; 230Ky 630, 20SW(2d)461; SC 155SE409; 105 TexCr8, 284SW961; 105TexCr590, 289 SW691; Sask [1930] 3DomLR345.

423-53 [a] (3) Instruction defining simple assault and battery as being with weapons nature has provided takes question of simple assault and battery from jury by conveying impressions that, if weapons are used, it cannot be simple assault and battery. 133SC230, 130SE 752.

423-54 246NY100, 158NE35.

424-65 229Ky646, 17SW(2d)751; 148 Miss1, 113S627; 110TexCr420, 10SW (2d)119; 111TexCr657, 13SW(2d)689; TexCr 27SW(2d)236.

424-65½-New. In Indiana a jury may not fix punishment for second degree murder. 199 Ind196, 156NE403.

424-69½-New. Evidence held insufficient to justify charge in mitigation of punishment. 108TexCr285, 300SW75.

424-69¾-New. An instruction, in a prosecution for murder, referring only to punishment for the crime of murder in the usual form, has been held not erroneous as depriving the jury of the right, if they saw fit to do so, to convict of manslaughter. 153Miss654, 121 S284.

424-70 199 Ind196, 156NE403; 101Vt 124, 141A686.

424-71 144SC452, 142SE725; 100WVa 57, 130SE91.

425-73½-New. Failure of court in prosecution for murder in first degree to charge jury that it must not consider punishment has been held not error. OhA 173NE26.

425-78 196Cal 191, 237P25; 291Pa270, 139A875.

425-79 178Ark1121, 13SW(2d)606; 179 Ark244, 15SW(2d)323; 196Cal 191, 237 P25; 291Pa270, 139A875.

425-80 166Ga10, 142SE160; NJ 150A 367.

425-81 [b] **Instructions held proper.**– 168Ga575, 148SE500.

425-82 196Cal 191, 237P25.

425-82½-New. Instruction to assess life imprisonment in case of reasonable doubt as to punishment has been held properly refused. 299Pa547, 149A696.

425-86 196Cal 19, 235P721; 199Cal 471, 250P168; 287Pa553, 135A316.

425-87 199Cal 471, 250P168. [a] (1) 196Cal 191, 237P25; 198Cal 454, 245P 821.

426-90 30Hawaii697.

426-93 [e] **Implied findings.**–317Mo 348, 295SW754.

426-94 Mo 27SW(2d)16.

426-97 See also 207Cal 507, 279P145; 153Va857, 149SE471.

427-99 192NC225, 133SE458; 110 TexCr605, 10SW(2d)116(2dcase).

427-2 Mo 256SW462. [b] **Manslaughter.**–Mo 285SW419.

427-5 See also 94Fla32, 113S630.

427-6 170Ark1194, 282SW676.

427-7 125Kan111, 263P1051.

427-8 See also OklCr 280P857.

427-10 214Ky209, 283SW1077.

428-18 94Fla32, 113S630; 121Kan167, 246P685; 163La495, 112S377. [a] (6) Words "with dangerous weapon" need not be in verdict when it identifies offense with that charged in indictment with reasonable certainty. 158La799, 104S720. (7) Other instances. NJ 148 A776. [b] (1) 121Kan167, 246P685. (4) If information charges manslaughter, defendant cannot be convicted of second degree murder. 315Mo 695, 287 SW463. [d] **Where indictment alleges unlawful killing,** verdict of guilty of "homicide" is not responsive. 111 TexCr116, 12SW(2d)218.

428-19 163La495, 112S377.

428-19½-New. Where the information charges "cutting" with a dangerous weapon, verdict that defendant is guilty of "using" such weapon is irresponsive. 163La495, 112S377.

428-20 [b] **Verdict held warranted by instructions and evidence.**–169Ga468, 151SE34.

428-20½-New. One indicted for first degree murder while attempting to commit larceny may be convicted of voluntary manslaughter. 170Ark1073, 282 SW680.

429-34 116Nebr141, 216NW173.

429-37 170Ark1194, 282SW676. [b] **Verdict held sufficient.**–Ala 129S282.

429-38 316Mo 157, 289SW948.

429-39 [a] **Where evidence justifies submission on every grade of homicide,** specific finding of degree of any grade is sufficient. Mo 27SW(2d)16.

429-40 170Ark1194, 282SW676 (verdict sufficient).

430-44½-New. In a prosecution for murder of two defendants, the fact that one was found guilty of second degree murder and the other of manslaughter only did not authorize setting aside the verdict of second degree murder rendered against one defendant where the evidence was sufficient to sustain a verdict against both defendants for the higher degree of crime had such verdict been rendered. 95CalA259, 272P816.

431-61 22AlaA379, 115S851; 216Ky 216, 287SW722.

431-66 201Cal 290, 257P46; 68CalA 545, 229P987; 104TexCr263, 283SW 522. [a] (1) Ala 130S175. (4) Verdict fixing punishment "at death." 323 Ill 617, 154NE435. [e] **Facts to be considered.**–TexCr 29SW(2d)395.

431-68 TexCr 25SW(2d)868; TexCr 28SW(2d)146(2dcase); TexCr 28SW (2d)810(2dcase).

431-70½-New. But under instructions that, if jury should think defendant should suffer death, they should merely find him guilty in first degree, such verdict is equivalent to finding that he should suffer death. 196Cal 191, 237P 25.

432-72 196Cal 191, 237P25. See also 148Miss702, 114S883.

432-72½-New. Verdict of guilty of manslaughter stating that jury cannot agree on punishment is in proper form and authorizes judge to fix punishment. Mo 24SW(2d)980.

432-77 [a] (2) 98Fla1184, 125S345 (3dcase).

432-78 170La507, 128S293; 285Pa49, 131A657.

432-81 224Ky806, 7SW(2d)237; TexCr 27SW(2d)1100.

433-86 265Mass382, 163NE251(2dcase) (that defendant killed deceased).

433-91 37GaA94, 139SE95.

433-95 70CalA519, 234P110 (conviction for manslaughter); 162La1075, 111S461.

433-96 261Mass299, 159NE51.

433-98 30Hawaii697. [i] **That district attorney solicited ambiguous answer to question** affecting identity of pistol from which mortal bullet was fired is held insufficient ground for new trial in court's discretion. 255Mass369, 151 NE839.

434-2 164Ga92, 137SE768; 85Mont 553, 281P757 (previous objection to instructions is not necessary); 147SC329, 145SE192; 103TexCr233, 280SW832. [b] (2) In conviction for capital punishment where evidence as to identity of accused is not satisfactory, new trial should be granted. 90Fla75, 105S140.

434-3 87Colo 11, 285P157; 36GaA643, 137SE794; 285Pa49, 131A657.

434-4 144Va553, 131SE196 (accused cannot complain of such error in own favor).

434-9 [a] (3) Omitting to charge law of voluntary manslaughter. 168Ga843, 149SE145(2dcase). [b] (4) Where defendant was convicted of unlawfully shooting at another, failure of court to instruct jury on law of voluntary manslaughter was not ground for new trial. 39GaA475, 147SE400(1stcase). [d] 34 GaA175, 128SE585.

434-15 GaA 155SE382.

435-18 199 Ind235, 157NE1; 144Va 553, 131SE196; 151Va510, 144SE361.

435-19 322 Ill 473, 153NE710; 199 Ind 235, 157NE1; 199 Ind489, 158NE480; 221Ky638, 299SW542; 235Ky478, 31 SW(2d)719; 165La215, 115S464; 318 Mo 766, 300SW1073; 230AppDiv487, 245 NYS245; 104TexCr338, 283SW840; 112 TexCr517, 17SW(2d)807; 151Va510, 144 SE361.

435-20 199 Ind247, 155NE544; 199 Ind 235, 157NE1; 327 Ill 393, 158NE712; 105TexCr637, 289SW1010; 111TexCr 320, 12SW(2d)788.

435-21 227Ky520, 13SW(2d)533; 160 La47, 106S670; 33NM259, 263P754.

435-22 GaA 155SE531; 327 Ill 393, 158 NE712; 199 Ind235, 157NE1; 199 Ind 489, 158NE480; 235Ky462, 31SW(2d) 712; 165La657, 115S814; 49Nev241, 242 P697; 292Pa16, 140A537; 112TexCr 517, 17SW(2d)807; 144Va553, 131SE 196.

435-23 CalA 288P106; GaA 155SE531; 199 Ind235, 157NE1; 110TexCr536, 9 SW(2d)356.

436-24 327 Ill 393, 158NE712; 199 Ind 489, 158NE480; 221Ky219, 298SW707; 131Misc647, 228NYS571. [a] (1) 108 TexCr669, 2SW(2d)268. (6) 223Ky224, 3SW(2d)613. (8) As to uncommunicated threats by deceased. 168Ga672, 148 SE586. (9) As to threats by deceased's paramour. 113TexCr22, 18SW(2d)1087. (10) Other instances. 230Ky830, 20 SW(2d)981. [b] (7) 199 Ind489, 158NE 480. (10) As to insanity. 199 Ind247, 155NE544. (11) As to ownership of revolver used in killing deceased. 255Mass 369, 151NE839. (12) As to ill will of deceased, without showing intent to do bodily harm. 150Wash66, 272P89. (13) As to self-defense. 96Fla307, 118S13.

436-25 255Mass369, 151NE839.

436-26 199 Ind489, 158NE480; 230Ky 327, 19SW(2d)964; 255Mass369, 151NE 839; 285Pa49, 131A657.

436-29½-New. **Newly discovered evidence.** Affidavit on information and belief should have been considered where it showed disturbance within the hearing of the jury during its deliberation and the placing of dead bodies within view of its windows, such excitement tending to impair the jury's ability impartially to consider defendant's case. 100TexCr1, 271SW613.

436-32 NJ 146A313.

437-34 214Ky572, 283SW1032.

437-35 170Ark1193, 282SW983; 124 Kan556, 261P846; 215Ky539, 286SW 785; 225Ky671, 9SW(2d)1018.

437-36 177Ark1193, 9SW(2d)235(2d case). [a] (1) 48Nev358, 232P778, 235 P645; 157Tenn403, 8SW(2d)371. (4) 157Tenn403, 8SW(2d)371. (5) Objection to dying declaration as whole does not justify reversal, though statement therein be incompetent. 225Ky177, 7 SW(2d)1052.

437-37 327 Ill 223, 158NE436.

437-38 337 Ill 84, 169NE12.

438-40 43 Ida766, 254P520.

438-44 229Ky305, 17SW(2d)238.

438-45 [a] **Consideration of records in another case** to revise wrong conviction of homicide. 45Philippine67.

438-51 21AlaA474, 109S385; 23AlaA 329, 125S64(2dcase); 143Va479, 129SE 348 (verdict in second degree not disturbed where no substantial right denied).

439-55½-New. In a prosecution for murder in the first degree, where the prisoner tendered a plea of murder in the second degree which was refused, the only question on appeal is whether evidence of premeditation and deliberation was sufficient to warrant a verdict in the first degree. 197NC445, 149SE 590(2dcase).

439-59 92Fla241, 109S334; 166La924, 118S85.

439-60 166La924, 118S85.

439-61 219Ala83, 121S72, 63ALR560.

439-62 107Conn148, 139A632; 93Fla 172, 111S351; 149SC439, 147SE441; Wis 232NW866.

439-63 93Fla172, 111S351.

439-64 101Vt5, 139A769.

439-66 227Ky831, 14SW(2d)146; 228 Ky254, 14SW(2d)773; 228Ky519, 15SW (2d)414.

439-67 [a] **Though based partly on circumstantial evidence,** conviction will not be set aside merely because of possibility that deceased died otherwise than as charged. 244Mich622, 222NW 185.

439-69½-New. The supreme court will inquire into the evidence only to ascertain if the ingredients necessary to constitute murder in the first degree were proved as required by statute. 290Pa 271, 138A836.

439-73 284Pa159, 130A317; 291Pa319, 139A836.

439-75 89Fla261, 103S630; 144Wash 446, 258P508; 104WVa617, 141SE7.

439-75½-New. , nor because of the strangeness of the story of the state's principal witness who claimed to have been present when the crime was committed. 236Mich226, 210NW219.

439-76 91Fla370, 107S922; 95Fla139, 116S7; 115 Ob542, 155NE189. See also 90Fla75, 105S140.

439-77½-New. Court of appeals reviewing conviction for murder in first degree may weigh evidence. 246NY437, 159 NE390.

439-78 171Ark1136, 287SW590; 177 Ark1108, 9SW(2d)800; 87Colo 11, 285P 157; 106Conn701, 139A91; Fla 129S 576; 210Ky71, 275SW22; 236Ky74, 32 SW(2d)552; Mo 274SW62; 115Nebr148, 211NW994; 44Philippine271; RI 133A 808. [a] **Conviction of first degree murder will be reversed** when evidence fails to establish elements in that degree. Fla 130S419(1stcase).

439-78½-New. or unless palpably against the evidence, 222Ky614, 1SW (2d)1060.

439-78½-New. or merely because credibility of witnesses is attacked, 222Ky 614, 1SW(2d)1060.

440-79½-New. Strong evidence of defense contradictory to testimony for people will be considered in reviewing conviction where the state's testimony was weak. 241NY481, 150NE523.

440-79½-New. Where the state's testimony is weak, the appellate court will consider the stronger evidence of the defense in reviewing a conviction. 241 NY481, 150NE523.

440-80 165La163, 115S445.

440-80½-New. Where the evidence showing that declarant was aware of his dying condition, the appellate court will not interfere with the trial court's ruling admitting such declaration in evidence. 76Mont574, 248P179.

440-85 29 OhA467, 163NE715.

440-86 199Cal 361, 249P186; 215Ky 244, 286SW790; 104TexCr263, 283SW 522; 110TexCr196, 9SW(2d)267.

440-87 [a] **Verdict held not so excessive** under evidence as to evidence passion or prejudice. TexCr 24SW(2d)840.

440-88 141Wash542, 251P887.

440-92 92Fla241, 109S334; Fla 130S 582.

440-94 322 Ill 434, 153NE639.

440-98½-New. Accused cannot complain that certain statements of deceased's dying declaration were not put in by the prosecution introducing such declaration, where accused failed to bring such matter out by cross-examination. 76Mont574, 248P179.

440-99 226Ky186, 10SW(2d)646; 229 Ky207, 16SW(2d)1016; 229Ky312, 17 SW(2d)241; 142Miss484, 107S755; Okl Cr 288P1075; 33PortoRico 48. [b] **Modern tendency** is to overlook errors that do not affect substantial rights of parties. 33PortoRico 48.

440-1 289Pa284, 137A261.

440-2 230Ky411, 19SW(2d)1091, 66 ALR360.

440-3 171Ark799, 286SW981.

440-5 See also 21AlaA204, 107S797.

440-8 226Ky186, 10SW(2d)646.

440-8½-New. Erroneous exclusion is not prejudicial where witness later testified to facts. 213Ala301, 104S668.

441-9 [b] **Remarks as to necessity of interpreters** for witnesses held not prejudicial. 102NJL569, 134A110.

441-16½-New. Holding of revival meeting in courthouse yard during trial is not reversible error where nothing prejudicial to defendant occurred. 142Miss 484, 107S755.

441-16½-New. Absence of defendant at view of evidence by jury held no cause for reversal. 31Ariz427, 254P467.

441-28 21AlaA577, 110S171; 22AlaA 583, 118S242; 170Ga843, 154SE232; 228 Ky254, 14SW(2d)773; 156Md149, 142 A872; 33PortoRico 195; 111TexCr93

10SW(2d)101; 112TexCr554, 18SW(2d) 163.

441-29 225Ky655, 9SW(2d)990; 225 Ky713, 9SW(2d)1080; 229Ky153, 16 SW(2d)509(2dcase); NJ 151A737(2d case).

441-30 167Ga261, 145SE512; 334 Ill 200, 165NE611; 156Md149, 143A872; 33PortoRico 195; 112TexCr216, 15SW (2d)1052; TexCr 26SW(2d)1064.

441-31 225Ky413, 9SW(2d)53; 110Tex Cr460, 9SW(2d)259.

441-34 334 Ill 200, 165NE611; 126 Or 560, 270P404.

442-36 221Ky433, 298SW1078; 227Ky 129, 12SW(2d)297.

442-36½-New. motive, 22AlaA136, 114 S791.

442-38½-New. Admission of unpremeditated statement of deceased, immediately accompanying injury, is not prejudicial. 326 Ill 104, 157NE76.

442-39 198NC762, 153SE395.

442-41 49Nev75, 236P1100.

442-42 23AlaA533, 128S465; 21AlaA 200, 106S682; 332 Ill 207, 163NE430; 221Ky648, 299SW553; 229Ky348, 17 SW(2d)245; 243NY320, 153NE433.

442-43 112TexCr524, 17SW(2d)1069.

442-48 23AlaA359, 125S688.

442-48½-New. No prejudicial error in compelling defendant to revisit scene of crime. 198Cal 454, 245P821.

442-48½-New. nor in receiving evidence of his appearance and conduct there and reluctance to enter. 198Cal 454, 245P821.

442-51 Mo 295SW791.

442-52 326 Ill 104, 157NE76.

443-56 198Cal 426, 245P426.

443-59 196NC397, 145SE773; 40Wyo 184, 276P458.

443-70 154Miss858, 123S891; 103Tex Cr252, 280SW808.

443-76 22AlaA493, 117S397; 86CalA 298, 260P901; 221Ky222, 298SW678; 225Ky177, 7SW(2d)1052; Mo 285SW 706. [a] **Statements or declarations held not prejudicial.**-Mo 24SW(2d)1039 (laying foundation for introduction of dying declaration).

443-77 201Cal 474, 259P47; 210Ky747, 276SW834; 225Ky655, 9SW(2d)990; 44 Philippine267 (testimony by justice of peace who was present at time of declaration); 157Tenn403, 8SW(2d)371.

443-80 227Ky439, 13SW(2d)244.

443-81 168Ark634, 271SW3; 218Ky 435, 291SW734; 227Ky439, 13SW(2d) 244; OklCr 280P633.

444-82 86CalA298, 260P901; 228Ky 722, 15SW(2d)435. Contra 106TexCr 321, 292SW231.

444-89 216Ky98, 287SW235.

444-92 22AlaA493, 117S397.

444-97 175Ark1083, 3SW(2d)23; 228 Ky623, 15SW(2d)516; 107TexCr453, 296SW602; 110TexCr460, 9SW(2d)259.

444-98 171Ark1188, 287SW172; 205Cal 29, 269P628(2dcase); 226Ky186, 10SW (2d)646.

444-99 94CalA192, 270P715.

444-2 107TexS83, 2SW(2d)242; 111 TexCr137, 12SW(2d)221.

444-4½-New. Error in excluding evidence relied on to reduce offense to manslaughter is harmless where verdict is for manslaughter. 101TexCr192, 274 SW974.

444-4½-New. Where self-defense cannot be pleaded, exclusion of the evidence as to deceased's reputation for violence was not prejudicial. 166La 859, 118S46.

444-5 45Philippine84.

444-10 39GaA100, 146SE333; 332 Ill 207, 163NE430; 227Ky418, 13SW(2d) 250; 198NC762, 153SE395.

444-11 Ark 31SW(2d)760; 235Ky454, 31SW(2d)703. See also 29PortoRico 961.

444-17 169Ark1188, 278SW3; 176Ark 88, 2SW(2d)50; 179Ark1066, 20SW(2d) 189; 214Ky662, 283SW999; 141Miss 841, 105S784; 144Miss420, 110S208; 147Miss570, 113S186; 321Mo 870, 12SW (2d)469; 283Pa468, 129A453; 29Porto Rico 961.

445-19 170Ark1073, 282SW680; 53ND 916, 208NW388; 106TexCr167, 291SW 249.

445-21 106TexCr167, 291SW249.

445-24½-New. An instruction defining "voluntary manslaughter" is not prejudicial because accidentally omitting the word "voluntary" before "manslaughter." 216Ky216, 287SW722.

445-26 198NC629, 152SE890; 143Va 489, 129SE252 (conviction of murder in second degree, where presumption of murder in second degree arising from intentional homicide was not rebutted); 103WVa191, 136SE861.

445-27 169Ark1188, 278SW3.

445-29 151Va533, 145SE307.

445-31 147Miss570, 113S186; 153Miss 381, 120S920; 321Mo 598, 12SW(2d) 426; 321Mo 553, 12SW(2d)428; OklCr 27SP1117(2dcase).

445-32 Contra 146Miss893, 112S586; 148Miss713, 114S823; 153Miss381, 120 S920.

446-34 214Ala172, 106S692; 21AlaA 261, 107S226; Ark 31SW(2d)288; 41 GaA313, 152SE907(1stcase); 121Kan 514, 247P429; 221Ky207, 298SW702; 226Ky186, 10SW(2d)646; Mo 281SW 960; 79Mont343, 256P380; 114Nebr28, 206NW16; 192NC80, 133SE404; 53ND 879, 207NW1000; 101TexCr462, 276SW 256; 104WVa1, 138SE732.

446-35 214Ala172, 106S692; 215Ala 106, 109S846; 79Mont343, 256P380; 104WVa1, 138SE732.

446-36 213Ala576, 105S583; 214Ala 172, 106S692; 20AlaA412, 103S694; 22 AlaA304, 115S146; Ark 32SW(2d)169; Ind 171NE192; Iowa 228NW37; 314Mo 612, 286SW29; Mo 11SW(2d)1037; 79 Mont343, 256P380; 150Wash66, 272P 89; 150Wash656, 274P716; 104WVa1, 138SE732; 107WVa418, 148SE131.

446-38 169Ark225, 273SW13; 70CalA 519, 234P110; CalA 290P102; 225Ky 160, 7SW(2d)1064; 152Miss133, 118S 906; Miss 124S766(1stcase); Mo 27 SW(2d)16; 34NM22, 276P291; 192NC 80, 133SE404; 195NC242, 141SE736; OklCr 275P657; OklCr 292P376; 153 Tenn397, 293SW755; 101TexCr535, 276 SW275. But see 116Nebr191, 216NW 656.

446-39 AlaA 130S531; 228Ky765, 15 SW(2d)525. Contra 290Pa195, 138A686. [b] **Verdict of voluntary manslaughter** is not prejudicial where instruction is to find on smallest offense of murder, voluntary or involuntary manslaughter. 214Ky662, 283SW999.

447-40 39Ga100, 146SE333.

447-41 OklCr 280P633.

447-46½-New. , or of aggravated assault. 106TexCr338, 294SW584.

447-50 121Kan514, 247P429.

447-52 34GaA146, 128SE686.

447-53 21AlaA261, 107S226; 21AlaA 573, 110S169.

447-54 106TexCr338, 294SW584.

447-56 90Fla178, 105S401 (omitting charge of murder in third degree).

447-56½-New. a misdemeanor under a statute relative to shooting or stabbing in sudden affray, 218Ky217, 291SW47.

447-57½-New. , or endangering the life of another under circumstances which would have constituted murder or manslaughter if death had ensued. 125Kan111, 263P1051.

447-59 39GaA550, 147SE784; 145Miss 675, 110S367; 102NJL388, 132A93. See also 223Ky762, 48SW(2d)419.

447-60 164Ga59, 137SE762; 168GaA 296, 147SE504; 142Miss872, 108S143; 145Miss675, 110S367.

447-61 Ariz 283P711; 206 Iowa859, 220NW95.

447-62 Kan 291P945; 33PortoRico 856.

447-63½-New. Rule applies also where instruction relates to aggravated assault and accused is convicted of assault with intent to kill. 172Ark156, 287SW1026.

447-64 310Mo 500, 276SW625; 102NJL 94, 131A292; 102NJL388, 132A93; 102 NJL659, 133A274.

447-65 102NJL94, 131A292.

448-68 102NJL388, 132A93.

448-70 169Ga384, 150SE558; 215Ky 589, 286SW785; 145Miss675, 110S367; 33PortoRico 856.

448-71½-New. Where evidence warrants giving of instruction on voluntary manslaughter, such instruction cannot be complained of where conviction was for murder. 162Ga1, 132SE418.

448-72 145Miss675, 110S367.

448-74 230Ky738, 20SW(2d)748.

448-75 103TexCr540, 281SW857. [e] **Failure to charge on manslaughter** is harmless where jury would have acquitted, under instructions, if homicide was manslaughter. 95CalA711, 273 P99.

448-76 221Ky229, 298SW708.

449-79 164Ga677, 139SE349; 333 Ill 512, 165NE168; 120Kan430, 243P1006; 219Ky446, 293SW961; 313Mo 436, 282 SW22; 318Mo 647, 300SW511.

449-87 TexCr 27SW(2d)211(1stcase).

449-88 81CalA199, 253P169; 110Conn 303, 147A801; 321 Ill 397, 152NE149; 337 Ill 333, 169NE169; 292Pa16, 140A 537; 108TexCr72, 299SW403.

449-96 84CalA168, 257P903; 326 Ill 104, 157NE76.

449-99 34GaA146, 128SE686.

449-1 197 Ind491, 151NE382.

450-7 313Mo 615, 285SW392.

450-8 313Mo 615, 285SW392.

450-11 215Ky819, 287SW6.

450-12 233Ky785, 26SW(2d)46; 169La 55, 124S143(2dcase); Mo 279SW705; 294Pa353, 144A292.

450-14 105TexCr60, 285SW321.

450-16 320Mo 319, 6SW(2d)857. [a] **Instructions on accidental shooting held prejudicial.**-NS [1929] 1DomLR892.

450-16½-New. An instruction that to acquit the jury must find that defendant was not engaged in an unlawful act, has been held reversible error, although the appellate court believes the evidence justified conviction. 126Me223, 137A244, 53ALR241.

450-17 171Ark307, 284SW751; 97CalA 291, 275P474; 97Fla1059, 122S704; 210 Ky71, 275SW22; 223Ky211, 3SW(2d) 631; 321Mo 870, 12SW(2d)469; 198NC 762, 153SE395; 299Pa547, 149A696; 104TexCr178, 283SW517; 110TexCr243, 8SW(2d)153.

450-18 215Ky809, 287SW4; 103NJL 275, 136A345; OklCr 288P396(2dcase); 122 Or444, 259P893, 896 [quotCJ]; 105 TexCr60, 285SW321.

451-19 93CalA133, 269P204; 332 Ill 167, 163NE399; 199 Ind567, 159NE145; Iowa 228NW37; 211Ky23, 276SW969; 223Ky305, 3SW(2d)647; 225Ky572, 9 SW(2d)707; 234Ky33, 27SW(2d)387; 234Ky676, 28SW(2d)971(2dcase); 109 TexCr154, 3SW(2d)814. But see 111 TexCr333, 12SW(2d)1029.

451-20 164Ga677, 139SE349; 225Ky 608, 9SW(2d)726; 102TexCr435, 278SW 201.

451-21 49Nev184, 242P316; OklCr 279 P515.

451-21½-New. Where there is evidence warranting the inference that accused shot deceased in protection of a relative who shot in self-defense, failure to submit issue of self-defense is prejudicial error. 209Ky263, 272SW 721.

451-21½-New. Error in failing to give an instruction as to justification on excuses for the act are harmless when cured by other instructions and the verdict indicates that the jury amply considered the omitted part of the instruction. 171Ark307, 284SW751.

451-21¼-New. An instruction which fully states the law as warranted by evidence is not cause for reversal. 326 Ill 104, 157NE76.

451-25 169Ga468, 151SE34; TexCr 25 SW(2d)870. [a] **Error in failing to instruct may be cured** by reducing punishment. 178Ark1121, 13SW(2d)606; 179Ark244, 15SW(2d)323.

451-33 [a] (2) Instruction to fix punishment at some "definite" rather than "maximum" period of time held favorable to accused. 156Tenn68, 299SW 1049, 55ALR915. [b] (2) Other instances. 196Wis571, 219NW278.

452-38 169Ark353, 275SW662; 169Ark 421, 275SW758; 175Ark1083, 3SW(2d) 23; 95Fla269, 116S7; 37GaA519, 141 SE64; 142Miss484, 107S755; 313Mo 615, 285SW392; 49Nev194, 242P582; OklCr 278P1117(2dcase); 155Tenn397, 293SW755; 106TexCr500, 293SW1112; 199Wis615, 227NW258.

452-39 169Ark421, 275SW758; 94Fla 149, 113S726; 313Mo 615, 285SW392; Mo 23SW(2d)22; 195Wis540, 218NW 714.

452-40 CalA 274P988; 322 Ill 434, 153 NE639; 49Nev194, 242P582; OklCr

288P357(2dcase); 106TexCr500, 293SW 1112.

452-43½-New. Where the jury could have found defendant guilty of manslaughter only on the ground of his violation of an ordinance improperly admitted in evidence, the conviction cannot be sustained on the theory that he violated a statute where such theory was not submitted to the jury. 141 Wash542, 251P887.

452-43½-New. A conviction of murder on an erroneous theory cannot be sustained on the conjecture that conviction would also have resulted if the correct theory had been applied. 246 NY100, 158NE35.

452-46 44Philippine224 (punishment increased); 45Philippine84 (instance of exercise of power to reverse conviction and change punishment from "cadena perpetua" to "destierro"). See also 45Philippine137.

452-54 169Ark717, 276SW849; 68CalA 545, 229P987 (where verdict of jury fixes punishment in accordance with law, judge can impose no other); 332 Ill 207, 163NE430; 191NC378, 131SE 743; 106WVa26, 144SE571, 575 [cit CJ].

453-55 169Ark717, 276SW849; 32NM 48, 250P842; 191NC378, 131SE743; 104 TexCr619, 286SW214; 110TexCr605, 10SW(2d)116; 136Wash132, 238P922 (minimum sentence of nineteen years and eleven months for manslaughter erroneous under Washington statutes). [e] **Minimum terms.**–136Wash132, 238P 922. [f] **Statutes not void for uncertainty.**–32NM48, 250P842. [g] **Increased punishment may be imposed** upon conviction for manslaughter where defendant was armed. 249NY302, 164NE 106. [h] **Where there is no allegation that murder was with malice aforethought,** punishment cannot exceed five years in some jurisdictions. TexCr 27 SW(2d)162; TexCr 27SW(2d)187; Tex Cr 27SW(2d)189(1stcase); TexCr 27SW (2d)197(1stcase); TexCr 27SW(2d)211 (2dcase); TexCr 27SW(2d)214. [i] **Sentences held not in conformity with statute.**–TexCr 25SW(2d)1106; TexCr 25 SW(2d)1107(1stcase).

453-57 44Philippine333. [b] (3) In cases of robbery with homicide it is immaterial that killing was accomplished before perpetration of robbery. 44 Philippine333. (4) Double homicide with robbery does not destroy essential unity of complex offense under Pen. Code art 503 subds 1. 44Philippine333.

453-58 191NC378, 131SE743; 285Pa49, 131A657.

453-59 285Pa49, 131A657; 49Philippine759. [a] (1) Mo 278SW987; 118 Nebr84, 223NW645; OklCr 286P815; 103TexCr145, 280SW771. [b] (1) 118 Nebr591, 225NW766; OklCr 273P366 (2dcase). [c] (4) Other instances. 113 TexCr555, 23SW(2d)721.

453-61 86Colo 141, 278P792. [a] **Verdict held not to rest on circumstancial evidence alone.**–Colo 293P335.

453-62 191NC378, 131SE743. [b] (1) 200 Iowa1248, 206NW246 (murder of brother). (5) 115Nebr277, 212NW606. (9) Ninety to ninety-nine years. 30 NM309, 233P49. [e] **In Philippines.**–45 Philippine137 (thirty-four years imposed). [f] **Second degree murder.**–28 Hawaii268. [g] **Travesty of justice.**–304 Ill 131, 154NE715.

454-63 191NC378, 131SE743. [c] (4) Where statute relating to manslaughter does not fix minimum, court must fix minimum under general statute providing therefor. 135Wash333, 237P706 (minimum of fifteen years erroneous). [d] (12) Indeterminate sentence of five to twenty years. 141Wash342, 251P 887. (13) Twenty-one years. 223Ky 484, 3SW(2d)1105; 227Ky418, 13SW (2d)250. (14) Two years. Mo 279SW 702. [e] (4) Forty years for manslaughter in first degree reduced to twenty years. 38 OklCr34, 259P173. (5) Twelve years' imprisonment on conviction of manslaughter in first degree reduced to seven. OklCr 268P312. (6) Three years reduced to one year. 118 Nebr31, 223NW464. (7) Ten years reduced to five years. Nebr 229NW271. (8) Sentence of two years' imprisonment and five hundred dollars fine held excessive to extent of fine. OklCr 279P 976(2dcase). [f] **Under several counts for involuntary manslaughter** each charging killing of different person by same act there is but one injury to commonwealth permitting sentence for single act only. 93PaSuper339.

454-64 [a] (6) TexCr 290SW162. (9) Seven to ten years for assault with intent to murder. 32NM48, 250P842. [d] (12) Minimum sentence of not over two thirds of maximum sentence under statute. 167La1085, 120S865. [e] **Held excessive.**–OklCr 280P857 (four years reduced to two years).

454-67½-New. Accessary before the fact in murder should have been sentenced to imprisonment for not less than three months and not sentenced to death. 32NM319, 255P396.

454-67½-New. Fifteen years' imprisonment held not excessive punishment for murder. 326 Ill 266, 157NE218.

454-67¼-New. A statute giving the jury discretion as to death penalty in cases of first degree murder does not abolish the death penalty. 287Pa539, 135A310.

454-67⅓-New. Lesser punishment than death can be imposed only after conviction of murder in the first degree carrying the death penalty. 287Pa539, 135A310; 287Pa553, 135A316.

454-69 36Wyo 111, 253P14.

454-70 285Pa49, 131A657.

455-74 Miss 107S768; Miss 107S769; 144Miss104, 109S727; 143Miss689, 109 S728; 116Nebr73, 215NW789.

455-77 195Cal 623, 234P890 (not required to declare intent to impose death penalty where repeatedly told that if it returned simple verdict of first degree murder such verdict would carry death penalty); 199Cal 610, 250P659; 202Cal 165, 259P943; 84CalA58, 257P 592; 285Pa49, 131A657. [c] **In California.**–199Cal 451, 249P859 (statute construed); Cal 292P459. [d] **Failure of jury to exercise its discretion by fixing life penalty** on verdict of first degree murder leaves court no discretion other than to fix death penalty prescribed by law. 199Cal 361, 249P 186. [e] **Failure of jury to exercise discretion by fixing life penalty** on verdict of first degree murder leaves court no discretion other than to fix death penalty. 203Cal 153, 263P524; 106WVa 32, 144SE574. [f] **Issue of defendant's mental capacity to make confessions** gives jury right to exercise discretion in fixing penalty on conviction of first degree murder. Cal 292P459.

455-78 223Ky826, 4SW(2d)1109.

455-79 199Cal 610, 250P659; 105TexCr 621, 289SW1007; 113TexCr247, 20SW (2d)431; 113TexCr297, 21SW(2d)507 (whether finding of guilt be with or without malice).

455-81 68CalA545, 229P987; 114Nebr 404, 207NW928.

455-84½-New. On second trial, the court may submit the question of punishment to the jury although they may return the death verdict, despite recommendation for life imprisonment at the first trial. 203 Iowa929, 210NW465.

455-88 191NC378, 131SE743, 746 [cit CJ].

455-89 [b] **In Pennsylvania.**–285Pa49, 131A657.

455-90 195Cal 272, 232P710 (where there is evidence of deliberate intent to kill, verdict of guilty without recommendation of mercy will not be disturbed on appeal).

455-94 50Philippine535.

455-95 49Philippine160.

455-95½-New. Compulsion which could have been avoided is not a mitigating circumstance. 217Ala60, 114S798.

455-95⅓-New. In the Philippines the customs of the tribes may be taken into consideration. 48Philippine79.

455-96 13PaDist&Co 285. [a] **Court need not state reasons.**–13PaDist&Co 285.

456-1 44Philippine333. [a] **Held to include murder** under statute providing for complex offense of robbery with homicide. 44Philippine333.

456-4½-New. Discretion of court. On conviction for murder in the first degree, the court has discretion only as to the date to be set for execution. 191NC378, 131SE743.

456-4⅓-New. On conviction of murder in the second degree, the court has no discretion as to the kind of punishment, 191NC378, 131SE743.

456-4¼-New. but only as to the length of imprisonment. 191NC378, 131SE743.

456-4⅕-New. On conviction of manslaughter, the court has no discretion as to the kind of punishment, 191NC 378, 131SE743.

456-4⅙-New. but only as to the length of imprisonment. 191NC378, 131SE743.

456-4⅐-New. Discretion conferred on court under some statutes in determining penalty for first degree murder is to be exercised on some reasonable basis and not arbitrarily. 13PaDist&Co 285.

456-4⅛-New. Under such statutes elements to be taken into consideration are restraint and deterrence. 13PaDist &Co 285.

HOOTCH

458-74½-New. "Hootch" includes "corn whisky," but is a broader term and is a name applied to other liquors as well. 312Mo 99, 279SW144.

HORNSWOGGLE

458-94½-New. To triumph over; overcome; beat; bedevil. TexCivA 281SW 306.

HORSE

458-99 10PaDist&Co 466; 1HeadTenn 154.

459-10 1HeadTenn154.

459-11 1HeadTenn154.

HOSPITALS

462-2 47 Ida66, 272P696, 62ALR323. [a] (6) Establishment or institution for care of sick or wounded or such as require medical or surgical treatment. 14 DelCh392, 129A512.

462-4 123 Or144, 261P694, 698 [quot CJ].

462-6 331 Ill 182, 162NE888; 123 Or 144, 261P694; TexCivA 18SW(2d)700.

463-16 [a] **Construction of particular statutes.**–230AppDiv228, 243NYS686.

463-17 199Cal 64, 248P225, 48ALR50.

463-23½-New. The law authorizing a tuberculosis hospital has been held not invalid because providing for appointment of members of advisory board who were elective county officers, 289Pa437, 137A635.

463-23⅓-New. nor does such law require public authorities to complete proceedings had under a previous unconstitutional law. 289Pa437, 137A635.

463-24 179Ark788, 18SW(2d)364; 180 Ark387, 21SW(2d)867 (statute not repealed); 333 Ill 577, 165NE348; 227Ky 7, 12SW(2d)348; 148SC229, 146SE12. [b] **Statute requiring cities previously exempted to join in maintenance of hospital district** held constitutional. 254 Mass232, 150NE234. [c] **In Oklahoma.**–143 Okl 160, 288P306; 143 Okl 145, 288 P307.

463-29½-New. An act appropriating money for a sanitarium may constitute the approval of a site selected by the trustees. 179Ark788, 18SW(2d)364.

463-31½-New. In the absence of abuse of discretion on the part of a local health officer in enforcing an application for a license to operate a maternity home, the licensee, to enjoy the privilege, need only conduct the home according to law. TexCivA 282SW329.

463-31⅓-New. A law, authorizing maternity homes, has been held to give adequate remedy at law for a violation of any of its provisions, TexCivA 282SW329.

463-31¼-New. to which resort should be had before seeking equitable relief. TexCivA 282SW329.

463-32 [a] **Rules and regulations cannot contravene or conflict with state laws.**–157Tenn477, 9SW(2d)697, 60ALR 652. [b] **That physician solicits practice from other physicians and offers to divide fees** is insufficient ground for his exclusion from practice in public hospital. 157Tenn477, 9SW(2d)697, 60 ALR652. [c] **Right of physicians to**

practice.–157Tenn477, 9SW(2d)697, 60 ALR652.
464–39 [a] (2) Resolution barring osteopathic physicians from practicing in county hospitals. 86Colo 446, 282P 1068.
464–41 See also 244 IllA370.
464–42½–New. County commissioner's resolution rescinding standardization resolution may have effect of removing restrictions as to other than so-called regular practitioners. 45 Ida468, 263 P992.
464–42½–New. Under statutes sole authority to control county hospitals is in county commissioners. 45 Ida468, 263P992 (orders of commissioners allowing practice of all licensed practitioners in county hospital are held not illegal or abuse of discretion).
464–42¼–New. A statute providing for the treatment of indigent insane should be reasonably construed to prevent the state from becoming a dumping ground of nonresident pauper insane. 250NY 489, 166NE177.
464–42½–New. A physician has no constitutional or statutory right to practice his profession in a county hospital. 86Colo 446, 282P1068.
464–55½–New. Removals to another state may prevent an incompetent from being a resident "who is entitled to hospital treatment. 225AppDiv687, 231 NYS326 [rev on other grounds 250NY 489, 166NE177].
464–57½–New. Superintendent of county hospital is not obligated or authorized to receive a person for observation as to her competency without an order directing her admission made on application. 125Misc62, 210NYS253.
464–59½–New. County hospitals should not receive person as pay patient. The purpose of such an institution is charitable and to accept case does not raise a presumption of repayment. 125Misc 62, 210NYS253.
464–59½–New. From confinement in an almshouse dependency and charity are inferred. 125Misc62, 210NYS253.
464–59¼–New. A county is held not entitled to recover from a testatrix's estate for her support in the county hospital, where the superintendent of the hospital knew that the testatrix was not a poor person and who refused to recognize any obligation to county. 125Misc62, 210NYS253.
465–71 [a] Proximate cause.–TexCivA 272SW497.
465–76 66CalA693, 227P243, 246 [cit CJ]; 216Ky339, 287SW945 (disposal of unclaimed body).
465–77 214Ky132, 282SW1071.
465–78 66CalA693, 227P243, 246 [cit CJ].
465–79½–New. Public hospital does not contract to heal patient. 222AppDiv402, 226NYS317.
465–79½–New. An incompetent, living in a state less than eight months, is entitled to treatment pending acceptance by the state of legal residence. 250NY 489, 166NE177.
465–79¼–New. An incompetent living in a state for fourteen months, although not continuously, is entitled to treatment as a citizen. 250NY489, 166NE 177.
465–82 218Ala464, 118S741; 233Ky 171, 25SW(2d)33 (leased property); 229AppDiv58, 240NYS720; 196NC610, 146SE573; 137 Okl 133, 278P334; SC 131SE42; 100WVa290, 130SE481.
466–91½–New. A hospital is not liable for suicide of a patient admitted for observation and medical treatment alone. 103NJL458, 135A817.
466–91½–New. Private nurse engaged in work in hospital in employ of patient was an invitee of hospital when injured. CalA 285P369.
466–91¼–New. Entry into sanitorium by a person for treatment by its physicians and surgeons creates relation of patient and physician between him and sanitorium. MoA 24SW(2d)249.
466–93½–New. A charitable hospital is not liable for an employee's wrongful delivery of a patient's property to an imposter. 115 Oh539, 155NE126.
466–96 132Misc466, 230NYS519; 196 NC610, 146SE573.
467–8 196NC610, 146SE573; NC 154 SE406.
467–9½–New. Physician acts independently and cannot be interfered with by hospital. 222AppDiv402, 226NYS317.
467–11 6LaA230; LaA 123S726; 222 AppDiv402, 226NYS317.
467–13 43 Ida661, 254P528; 137 Okl 133, 278P334. See also NS [1928] 1 DomLR1129. But see 6LaA230; Tex CivA 21SW(2d)125.
467–13½–New. Regular nurses are employees in the absence of a showing that they controlled the means and the manner of performing duties. 219Ala 445, 122S411(2dcase).
467–14 221Ky655, 299SW590.
467–15 [a] Proof that patient was insane is not necessary to entitle husband to recover for negligence enabling her to commit suicide. 221MoA550, 288SW69.
467–16 218Ala464, 118S741; 43 Ida661, 254P528; 221Ky655, 299SW590; 231 Ky60, 21SW(2d)125; 233Ky171, 25SW (2d)33; 190NC833, 131SE42 (and will exercise best judgment).
467–17 223Ky497, 4SW(2d)407; 221 MoA550, 288SW69; 190NC833, 131SE 42; TexCivA 272SW497 (preventing escape).
467–19 221Ky655, 299SW590.
467–19½–New. It is the duty of a hospital doctor to retain patient and continue to treat him until he feels that the patient should be discharged. 253 IllA 458.
468–25½–New. Patient's wife was not guilty of contributory negligence in not permitting him to be kept on the second floor where he could be watched more closely, where she was not warned that he was in a dangerous condition. Tex CivA 272SW497.
468–55½–New. Superintendent of county sanatorium is not "subordinate officer" subject to removal by county supervisor. NJSup 150A218.
469–70½–New. The trustees of a public hospital may refuse an osteopathic practitioner permission to treat in the hospital a part-pay patient or a private-room patient. 8PaDist&Co 273.
469–71 [b] Employee of state hospital cannot maintain action against executive officer on naked allegation that such officer has deprived him of his annual vacation. 202 Iowa484, 210NW532. [c] Executive officer of state hospital is not liable to employee for value of use of latter's automobile in behalf of state on allegation that such officer refused him use of automobile belonging to state. 202 Iowa484, 210NW532.
469–78 See also 11PaDist&Co 577.
470–85½–New. Under statutes providing for assessment upon municipalities for district tuberculosis hospital, the county may be given a right of action to recover assessments. 252Mass407, 147 NE901.
470–89 [a] 216Ala210, 112S831; 216 Ala326, 113S79; 218Ala464, 118S741. [b] 2LaA448; 196NC752, 147SE288.
470–93½–New. Allegations in a bill to enjoin operation of a maternity home have been held insufficient to show violation of law regulating the manner in which the home shall be conducted. Tex CivA 282SW329.
470–93½–New. Allegations in a bill to enjoin operation of a maternity home, based on general aspect surrounding the home, and plaintiff's anticipation of what would be the result of the operation, have been held not to be allegations of positive fact, and can furnish no grounds for relief. TexCivA 282SW 329.
470–93¼–New. Allegations to the effect that a maternity home will be operated in violation of law have been held insufficient grounds for equitable relief. Tex CivA 282SW329.
470–94 219Ala445, 122S411(2dcase). [a] Nurse is not presumed to have had authority to contract for hospital. 6 LaA230.
470–95 75CalA161, 241P941; 156Miss 676, 126S465; 101WVa103, 132SE194 (employee of corporation contracting for hospital service for fees for service at another hospital has burden of proving that defendant did not furnish treatment contemplated in contract, and ordinarily furnished in similar hospital in same community under like circumstances, and that such failure was not result of plaintiff's act).
470–96 [a] 214Ala314, 107S858; 216 Ala210, 112S831; 218Ala464, 118S741; 219Ala298, 122S41; 219Ala445, 122S 411(2dcase). [b] 214Ala314, 107S858; 216Ala210, 112S831; 75CalA161, 241P 941. [c] Proof of burns received in child birth case is not required to be by expert testimony exclusively. 126Me244, 137A689.
470–97 225AppDiv574, 232NYS618; TexCivA 15SW(2d)148. [a] (1) 233Ky 171, 25SW(2d)33. (2) TexCivA 272SW 497 (permitting escape of patient). (7) To support judgment for hospital. Tex CivA 15SW(2d)148. (8) To show that patient would probably have recovered if he had not been permitted to escape and been killed. TexCivA 272SW497. (9) That nurse was negligent. 216Ala 326, 113S79. (10) To show competency of nurse. 11LaA423, 123S466. (11) To sustain verdict for defendant. 231Ky 60, 21SW(2d)125. [b] (1) NC 154SE 406. (2) 221Ky538, 299SW159. (5) To sustain finding that injury was result of improper douche and verdict for plaintiff. 125Me12, 130A353. (6) To establish contract between city and hospital for care of tubercular patients. 254Mass232, 150NE234. (7) To support finding of negligence of hospital nurse in injecting pituitrin in patient's thigh. 257Mass525, 154NE253. (8) To show negligence. 221Ky655, 299SW590. (9) To show negligence in maintaining quarantine in hospital. 172Minn408, 216NW 221. [c] That negligence of defendant was proximate cause of burns from hot water bottle must be proved by preponderance of evidence. 129 Or242, 276P255.
470–98 233Ky171, 25SW(2d)33. [a] Res ipsa loquitur inapplicable.–129 Or 242, 276P255 (hot water bottle burn).
470–2 218Ala464, 118S741; 219Ala445, 122S411(2dcase); 225AppDiv574, 232 NYS618. [a] 216Ala326, 113S79; 231 Ky60, 21SW(2d)125; MoA 24SW(2d) 249; 137 Okl 133, 278P334. [b] Evidence held not to present question for jury. 221Ky655, 299SW590. [c] Evidence insufficient to raise jury question. TexCivA 10SW(2d)396.
470–3 221Ky655, 299SW590; 129 Or 242, 276P255. But see NC 154SE406. [a] (2) Whether douche was administered negligently is question for jury. 126Me244, 137A689.
470–4 218Ala464, 118S741; 221Ky655, 299SW590; 221MoA550, 288SW69.
470–5 221Ky655, 299SW590.
470–6 219Ala445, 122S411(2dcase).
470–7 75CalA161, 241P941; 223Ky497, 4SW(2d)407.
470–8 75CalA161, 241P941; 221Ky538, 299SW159; 231Ky60, 21SW(2d)125.
471–9 219Ala298, 122S41.

HOUSE

472–38 NJSup 137A317 [quotCJ].
472–39 288Pa428, 135A862.
472–43 7Alaska103; 288Pa428, 135A 862.
472–46 288Pa428, 135A862, 863 [cit CJ]; Sask [1929] 3DomLR64 (outbuilding included).
472–47 288Pa428, 135A862, 863 [citCJ].

HOUSEHOLD

474–34½–New. "household decorations." 214Ala10, 106S188.

HOUSEHOLDER

475–49 160La155, 106S728, 729 [quot CJ entire paragraph perLand,J].
475–49½–New. master or head of a family; 160La155, 106S728.
475–49½–New. one who occupies a house or separate tenement with his family or alone. 160La155, 106S728.

HOUSEKEEPER

475–59 316Mo 1118, 295SW763, 765 [cit CJ].

HUSBAND AND WIFE

507-54 90Fla372, 106S79; 124Kan216, 257P944; 19OhA302; 122 Or620, 260P 206, 59ALR707.
507-56 90Fla372, 106S79.
507-57 90Fla372, 106S79.
507-59 See also 222MoA941, 300SW540.
508-63 87Colo 607, 290P285; 124Kan 216, 257P944.
508-65 19OhA302.
508-75½-New. Civil law, in provinces transferred to the United States, relating to the property rights of married women, was validated by the federal statutes. 97Fla551, 121S886(2dcase).
509-83 235Ky658, 32SW(2d)8.
509-84 124Kan216, 218, 257P944 [cit CJ].
510-98 94Fla547, 114S249.
510-16 214Ala412, 108S233; 36GaA766, 138SE274; 170Minn517, 212NE4, 5 [cit CJ]. [b] **As head of family,** husband presumptively has title to all household goods. 36GaA766, 138SE274.
510-17 199 Ind653, 160NE41, 42 [cit Cyc]; 170Minn517, 212NW4, 5 [citCJ]; 138Misc335, 245NYS439; SC 155SE838.
511-32 256Mass30, 152NE35, 47ALR 1100; 265Mass601, 164NE444; 125Misc 433, 210NYS141 (charging goods to Mrs. John Doe does not prove that credit was given to husband rather than wife as use of separate name by married women is not rule).
511-36 220Ala57, 124S107; 23AlaA1, 121S9(2dcase); 160Ga618, 128SE902; 234Ky314, 28SW(2d)1; 109TexCr241, 3 SW(2d)1111; 153Va342, 149SE493.
511-37 89CalA485, 265P340; 160Ga 618, 128SE902.
511-38 158Md80, 148A259; NJ 148A 615. [a] **Effect of lack of means.**–160 Ga618, 128SE902.
511-39 33PortoRico 768, 770 [citCyc].
511-40 162La277, 110S421.
512-44 [a] **Home of husband's parents** held not domicile contemplated by law in view of antagonism between wife and mother-in-law. 162La277, 110S421.
512-50½-New. Where parties enter into a separation agreement providing that the wife could reside where she chose, she could select her own domicile for any reason desired. 131Misc13, 226NYS 115.
512-50¼-New. The law entitles a wife to a home over which she alone may preside and when there is no serious obstacle in the way of the husband providing such a home, she is not required to live in the home of his parents under their domination. 106WVa634, 146SE 614(2dcase).
512-52 254Mass509, 150NE405.
512-54 Ala 129S1 (courts do not justify separation except for compelling reasons).
516-38½-New. After marriage conjugal duties must be held paramount when they conflict with former ties. 213Ala 545, 105S867.
516-46 29Ariz538, 243P402, 404 [cit CJ]; 80CalA363, 252P656; 166Ga519, 143SE770; 316 Ill 569, 147NE440; 323 Ill 323, 154NE146; 208Ky605, 271SW 659; 211Ky799, 278SW121; 154Miss 621, 122S769; Mo 15SW(2d)912; 129 Misc207, 221NYS594; 129Misc263, 221 NYS249; 134Misc590, 236NYS132; 132 Okl 252, 270P57; 117 Or691, 245P504 (duty to provide home); 289Pa542, 137 A802, 52ALR1251; 8PaDist&Co 316; 192Wis507, 213NW301, 57ALR346. [b] **Wife's mother's agreement** to care for sick wife does not relieve husband from obligation to support. 163Ga18, 135SE 402. [c] **Wife's right to support depends on marital relation.–SD** 228NW 464. [d] **Support due wife while parties are living together is not alimony.–SD** 228NW464.
517-47 Iowa 229NW855; 289Pa542, 137 A802, 52ALR1251. [a] **In absence of any evidence to contrary,** there is presumption that moral and legal obligation on part of husband to support wife and family is being carried out. 133 Misc556, 232NYS299. [b] **Wife included** in "family." Conn 151A333.
517-48 8PaDist&Co 316, 317 [quotCJ].
517-49 316 Ill 569, 147NE440; 208Ky 845, 272SW36; 211Ky799, 278SW121; 289Pa542, 137A802, 52ALR1251; 8Pa Dist&Co 316, 317 [quotCJ].
517-50 99NJEq376, 132A603; NC 154 SE731; 8PaDist&Co 316, 317 [quotCJ].
517-51 55ND471, 214NW460; 132 Okl 252, 270P57; 8PaDist&Co 316, 317 [quotCJ].
517-52 155Miss316, 124S365; 8PaDist &Co 316, 317 [citCJ].
517-53 8PaDist&Co 316, 317 [citCJ]. [a] 9PaDist&Co 301 [citCJ]; 8PaDist &Co 316, 317 [quotCJ].
517-54 254 IllA552; 222MoA1138, 14 SW(2d)660; 289Pa542, 137A802, 806 [quotCJ], 52ALR1251. But see 80CalA 363, 252P656.
517-55 155Miss316, 124S365; 289Pa 542, 137A802, 52ALR1251; 13PaDist &Co 673.
517-56 216Ala377, 113S243; 29Ariz 538, 243P402, 404 [citCJ]; 323 Ill 323, 154NE146; 129Misc263, 221NYS249.
517-56½-New. A contract before a marriage whereby a wife waives her right to support by her husband during coverture is contrary to public policy. 29 Ariz538, 243P402.
517-60 215Ky154, 284SW1042, 1043 [citCJ].
517-62 222MoA1138, 14SW(2d)660.
518-65½-New. A husband cannot be made to support his wife except during his lifetime. 125Misc475, 211NYS450.
518-73 132Misc61, 229NYS567.
518-77 211Ky799, 278SW121; 96Pa Super553. [d] **Marriage gives woman marital rights,** which are basis for claims for maintenance, support, and alimony. 211Ky799, 278SW121.
518-78 83Mont152, 269P403.
518-79 80CalA363, 252P656.
518-80 80CalA363, 252P656; 167La 208, 118S890.
518-85 288Pa52, 135A617.
519-87 21AlaA627, 111S195.
519-91 152Miss454, 120S179; 135SC 412, 138SE824.
519-1 107Conn101, 139A685; RI 150A 754.
519-3 82Mont239, 266P410.
519-8 82CalA515, 255P880; 316 Ill 569 147NE440 (husband may not by contract relieve himself of obligation to support his wife imposed by law); 222 MoA1138, 14SW(2d)660; NJ 146A189; 230AppDiv483, 245NYS253; 288Pa52, 135A617.
519-9 203Cal 441, 264P761.
519-12 50RI 129, 145A445.
519-17 336 Ill 395, 168NE271.
519-18 336 Ill 395, 168NE271. Contra 129Misc263, 221NYS249.
520-23 129Misc263, 221NYS249. See also 50RI 278, 146A626. [a] (5) **Reasonably suitable home** where wife may live in peace and safety from violence or threats thereof must be provided. 211Ky7, 276SW967. (6) Where wife has reasonable apprehension for her personal safety by continuing to live in home provided, husband is required to remove cause of complaint or move residence where financially able to do so. 211Ky7, 276SW967. [b] 123Kan 62, 254P317; 239Mich590, 214NW950.
520-24 CalA 290P468.
520-26 99CalA163, 277P1065.
520-31 132 Okl 252, 270P57. [a] **What are necessaries** under such statute. 132 Okl 252, 270P57.
520-31½-New. A wife must adjust herself to her husband's financial condition and ability to provide for her. 211 Ky7, 276SW967.
520-33 77Mont554, 252P377; 230App Div389, 244NYS663.
520-34 230AppDiv389, 244NYS663.
521-40 77Mont554, 252P377.
521-49 286Pa114, 133P31.
522-53½-New. Wife is not entitled to services of husband. 192Wis507, 213 NW301, 57ALR346.
522-53¼-New. Right of deceased wife's child in realty purchased by husband with funds acquired during coverture. Okl 293P266.
522-53¼-New. Property procured with money earned after marriage is separate property. 87Colo 607, 290P 285.
522-54 124Kan216, 257P944; Nebr 228 NW619.
522-55 [c] **Wife's savings out of husband's earnings** must be accounted for. NJCh 143A830.
522-63 152Md654, 137A378; Nebr 228 NW619; 294Pa482, 144A401.
522-67 TexCivA 6SW(2d)396. See also 214Ala382, 107S841. But see 147NC 644, 150SE178.
523-69½-New. Land held by entireties cannot be so conveyed. 237Mich 371, 211NW738.
523-78 237Mich371, 211NW738.
523-79 48 Ida722, 285P678; 122Kan 244, 252P205; 161La282, 108S483; 22 OhA58, 153NE269; 299Pa51, 149A87.
523-82 152Md654, 137A378; 22 OhA 58, 153NE269 [quotCJ]. [b] **"Good faith," required of husband in making gift** of his personal property during his lifetime, does not refer to purpose to affect his wife, but to intent to divest himself of ownership of property. 294Pa482, 144A401.
524-85 294Pa482, 144A401.
524-89 161La282, 108S483. [a] **Evidence held not to show fraud.–Nebr** 228 NW619.
524-93 [b] **Neither party to a contract of marriage** can give away his or her property without consent of other. 197 NC197, 148SE171(2dcase).
524-96 122Kan244, 252P205. [c] **Conveyance to brothers and sisters** not void where grantor obligated to one of brothers in large amount. 246Mich 324, 224NW611.
525-6 See also 197NC197, 148SE171 (2dcase).
525-14 [a] **Sufficiency of evidence.**–122 Kan244, 252P205.
526-24½-New. In an action by a wife to set aside a prenuptial conveyance by her husband to his mother as in fraud of her rights, in which the court has rendered judgment against plaintiff on a finding, based on sufficient evidence, that there was no fraud, evidence of a vague understanding that the mother would leave the property to the son on her death does not justify the court in modifying the judgment so as to adjudicate that plaintiff has an inchoate statutory right of inheritance in the property. 122Kan244, 252P205.
526-35 97Fla551, 121S886(2dcase); 145Va149, 133SE664.
528-66 97Fla551, 121S886(2dcase). [a] 215Ky154, 284SW1042, 1043 [citCJ].
528-72 215Ky154, 284SW1042, 1043 [citCJ].
528-74 97Fla551, 121S886(2dcase).
530-17 124Kan216, 257P944.
531-31 TexCivA 278SW885.
534-84 97Fla551, 121S886(2dcase).
548-4 287Pa115, 134A463.
548-4½-New. Wife may be declared a sole trader, under statute, even though she may have a separate estate sufficient for her support. 287Pa115, 134A 463.
548-4¼-New. Wife leaving voluntarily and refusing reconciliation held not entitled to decree under statute. 287Pa 115, 134A463.
548-4¼-New. Conduct compelling a wife to leave her husband does not warrant a femme sole trader decree, under statute, in the absence of nonsupport for a year. 287Pa115, 134A463.
555-36 8F(2d)911, 43ALR1079; 28F (2d)887; 177Ark250, 6SW(2d)21; 84 IndA555, 151NE740; 238Mich373, 213 NW106; 240Mich512, 215NW313; 99 NJEq176, 132A100; 128Misc881, 220 NYS487; 130Misc701, 225NYS426; 134 Misc607, 235NYS661; NC 155SE611; 121 Or116, 254P203, 205 [citCJ]; 121 Or86, 254P207; 122 Or620, 260P206, 59ALR707; Or 290P751(2dcase); Or 291P1015; 6PaDist&Co 799; 48RI 106, 135A850, 852 [citCJ]; 161Tenn165, 29 SW(2d)261.
556-37 8F(2d)911, 43ALR1079; 128 Misc881, 220NYS487; 122 Or620, 260P 206, 59ALR707; 13PaDist&Co 302; 48 RI 106, 135A850, 852.
557-46 89Fla303, 103S833; 121 Or116, 254P203; 48RI 106, 135A850.
557-47 48RI 106, 135A850, 852 [cit CJ].
557-48 48RI 106, 135A850 (dictum).
557-53 8F(2d)911, 43ALR1079; 128 Misc881, 220NYS487; 221AppDiv679, 225NYS87; 121 Or86, 254P207; 13Pa Dist&Co 302; 48RI 106, 135A850. [f] **In New York.**–128Misc881, 220NYS487.
557-55½-New. Under some statutes

property owned by husband and wife is held by them as tenants in common, each owning an undivided one-half interest therein. 78Mont395, 255P1049.

557-56 89Fla303, 103S833.

558-60 259Mass486, 156NE685, 52ALR 886; 221AppDiv679, 225NYS87; 121 Or116, 254P203, 205 [citCJ]; 286Pa 529, 134A494; 13PaDist&Co 302.

558-62 126Me84, 136A459; 48RI 106, 135A850, 852 [citCJ]; 197Wis56, 221 NW417.

558-63 126Me84, 136A459; 48RI 106, 135A850.

558-64 Ont [1928] 4DomLR723.

559-69 221AppDiv679, 225NYS87, 90 [citCJ]; 132Misc764, 230NYS605; 10 PaDist&Co 747, 748 [quotCJ]; 13Pa Dist&Co 41.

559-70 133Misc69, 231NYS165. [a] **Where plaintiff and defendant lived together as husband and wife,** though they were never legally married, because defendant had former wife living, from whom he never obtained divorce, it has been held that, as respects realty conveyed to plaintiff and defendant as husband and wife, parties must be treated up to time of their separation as sustaining relation of husband and wife. 132Misc764, 230NYS605.

559-72 128Misc881, 220NYS487. [a] **Omission of words "his wife"** in conveyance to husband and wife held immaterial. 128Misc881, 220NYS487.

559-73 219MoA365, 271SW1008.

559-73½-New. Interlineation of the wife's name in a deed to her husband after its execution and delivery does not make her a tenant by entirety, Md 140A834(1stcase).

559-73¼-New. and the husband is not estopped to deny the creation of tenancy by entirety thereby although interlineation is made at his request, where the wife did not rely on the deed as altered to her prejudice. Md 140A834(1stcase).

559-74 161Tenn165, 29SW(2d)261 (intent of grantor).

559-75 161Tenn165, 29SW(2d)261.

559-76 121 Or86, 254P207.

559-77 325 Ill 253, 156NE352; 251 Mich557, 232NW211; 312Mo 609, 280 SW424; 218AppDiv278, 218NYS131. [c] (2) Shares in name of husband and wife held owned in common in absence of evidence of intention to create joint tenancy. 218AppDiv278, 218NYS131.

560-79 8F(2d)911, 43ALR1079.

560-80 48RI 106, 135A850, 852 [citCJ].

560-81 312Mo 609, 280SW424; 48RI 106, 135A850.

560-83 141SC265, 139SE625, 54ALR 964 (apt words held essential).

560-87½-New. Evidence may be sufficient to overcome presumption of wife's joint ownership of property covered by contract with husband and wife. 325 Ill 229, 156NE306.

560-88 47RI 215, 132A439.

561-89 [a] **In Virginia,** statute is construed to convert tenancy by entirety into tenancy in common, destroying survivorship, except where intent is manifestly shown in instrument. 149SE 615.

562-6 81CalA535, 254P310.

562-12 10PaDist&Co 747 [quotCJ].

563-19 239Mich139, 214NW81; 240 Mich512, 215NW313; 122 Or620, 260P 206, 59ALR707.

563-23 121 Or86, 254P207; 47RI 215, 132A439.

563-24 99NJEq176, 132A100; 121 Or 86, 254P207.

563-25 192NC211, 133SE461.

563-28 [a] **Where property is deeded jointly** to husband and wife it is immaterial that property was acquired through the earnings of both after marriage. CalA 290P110.

563-29½-New. When a statute permits a husband and wife to hold property as joint tenants, tenants in common, or as community property, the fact that before marriage the husband bought land, taking title in the wife who paid part of the price, does not create either expressly or impliedly a joint tenancy. 199Cal 344, 249P180.

563-29¼-New. an arrangement whereby a husband and wife deeded their respective properties to a third party, who deeded the combined properties to them as tenants by entireties, amounts to a contract giving a right of survivorship in the other's property. 247Mich 468, 226NW234.

563-31 192NC422, 135SE127.

563-32 192NC211, 133SE461; 192NC 422, 135SE127.

563-33 192NC211, 133SE461; 192NC 422, 135SE127.

563-41½-New. Where, however, the husband makes an absolute conveyance and takes back a contract for repurchase, which is not recorded, and subsequently surrenders such contract and causes the grantee to convey the land to himself and his wife, and they give a mortgage for the balance owing on the contract, the contract merges on the deed and husband and wife take an estate by the entireties. 232Mich227, 205NW 55.

563-41¼-New. In such case the fact that there was no change of possession is immaterial. 232Mich227, 205NW55.

563-43 Ida 207NW369.

563-44 126Misc590, 214NYS793 (where deed states that tenancy by entirety is intended); 254NY355, 173NE220(1st case).

563-45½-New. Statute authorizing owner to convey to himself and another person jointly has been held to include conveyance to self and wife. 48RI 134, 136A241.

563-45¼-New. A husband, turning money over to his wife for household expenses, the surplus to be saved for a joint benefit, creates joint possession. 262Mass509, 160NE337.

564-47 Mich 233NW394.

564-53 30F(2d)898; CalA 290P110; CalA 291P663; 157Md112, 145A363; 167Minn489, 209NW636 (husband improving property with wife's consent is not entitled to reimbursement in action of partition); 115Nebr781, 215NW117. [a] **Equities of wife may be allowed** in husband's action for expenditures on common property. 110Conn651, 149A 394. [b] **Redeposit by husband in own name of joint savings account** of husband and wife did not show intention to create joint tenancy. 227AppDiv392, 237NYS484. [c] **Husband may sue wife for half of moneys expended** on property held in common. 110Conn651, 149 A394 (laches held to bar recovery). [d] **Decree wife had no interest in property** husband conveyed in joint tenancy to himself and wife held not supported by finding. 339 Ill 400, 171NE504.

564-54 339 Ill 400, 171NE504 (holding husband's intention in placing title in self and wife as joint tenants cannot control legal effect). [a] **Where conveyance is held to have created joint tenancy between husband and wife,** wife, predeceasing husband, leaves no estate of inheritance in this property. 48RI 134, 136A241.

564-55 326 Ill 633, 158NE428. [a] **Deed by husband of entire interest to wife** destroys joint tenancy. CalA 290 P110.

564-56 327 Ill 448, 158NE706; 334 Ill 183, 165NE629 (independently of claims of children of such parties); 115Nebr 781, 215NW117.

564-58 See also 265Mass428, 164NE616.

564-59 See also 312Mo 609, 280SW424.

564-60 256 IllA386.

564-64 212Ala664, 103S863; 265Mass 428, 164NE616; NJCh 145A329; 226 AppDiv621, 236NYS593. See also 134 Misc724, 236NYS630.

564-65½-New. Wife's interest in tenancy in common with husband does not subject her interest to levy for his embezzlement of funds. 169Minn209, 210 NW889, 48ALR1266.

564-65⅓-New. Employment of husband and wife as farm manager and housewife did not make them joint tenants in wages. 126Me84, 136A459.

564-65¼-New. Husband's reservation of absolute control of a bank deposit and withdrawals for his own uses contravene a joint tenancy. 126Me84, 136 A459.

564-65⅕-New. Joint deposit payable to the husband or wife or survivor held not to create joint interest with right of survivorship. 126Me84, 136A459.

564-65⅙-New. Whether an account is joint is to be determined under the law existing at the date of the depositor's death. 131Misc188, 226NYS415.

564-65⅐-New. The intent of a depositor in opening an account is a question of fact. 131Misc188, 226NYS415.

564-65⅛-New. The depositor's intention may be found in a statement made to the bank's agent at the time of deposit. 131Misc188, 226NYS415.

564-65⅑-New. Oral declarations of deceased husband testified to after lapse of time have little probative value as to the intent of the depositor. 131Misc 188, 226NYS415.

564-65/10-New. The intention of the husband as to a deposit determines whether it is a joint deposit. 131Misc 188, 226NYS415.

564-65/11-New. Evidence of a statement by the husband at the time of depositing the account of a desire to give the wife access to funds held not to raise the presumption of a joint account. 131 Misc188, 226NYS415.

564-65/12-New. An account belonging equally to husband and wife held to be in common. 131Misc188, 226NYS415.

564-65/13-New. Debts owed by the husband, taken in the name of husband and wife, omitting the word "jointly," held evidence of intention to create right of survivorship. 131Misc188, 226NYS415.

564-65/14-New. A deposit in a commercial bank owned by the husband and taken in the name of husband and wife held evidence of intention to create right of survivorship. 131Misc188, 226NYS 415.

564-65/15-New. Deceased husband's possession of a pass book for a checking account standing in the name of husband or wife held consistent with mere agency of the wife rather than joint tenancy. 131Misc188, 226NYS415.

564-65/16-New. Depositors of an account standing in the name of husband or wife may be shown by evidence not to have intended to create joint tenancy. 131Misc188, 226NYS415.

564-65/17-New. Prior to the Banking Law no presumption exists evidencing an intent of deceased husband to create a joint account. 131Misc188, 226 NYS415.

564-65/18-New. Evidence held to show that the addition of the wife's name to a checking account created only an agency to draw checks. 131Misc188, 226 NYS415.

564-65/19-New. Bonds and mortgages not containing the word "jointly," but running to the husband and wife, create a joint estate with the right of survivorship. 131Misc188, 226NYS415.

564-65/20-New. Whether bonds were intended to create a joint tenancy depends on whether the husband was the sole owner of the money invested. 131Misc 188, 226NYS415.

564-65/21-New. A prior will creating an estate for life or until remarriage in the wife has been held not to conflict with the husband's intention to create a joint tenancy. 131Misc188, 226NYS415.

564-65/22-New. Bonds and mortgages in the name of the husband and wife purchased with joint funds are held as tenants in common. 131Misc188, 226 NYS415.

564-66 89Fla303, 103S833; 242Mich 477, 219NW651; 250Mich469, 231NW 109 (holding only husband and wife are only ones who can be tenants by entirety); 219MoA365, 271SW1008; 221 AppDiv679, 225NYS87; 137Misc358, 242 NYS6 (holding grantees must be husband and wife in fact); 122 Or620, 260 P206, 209 [quotCJ], 59ALR707; 6Pa Dist&Co 799. [a] **In Idaho.**-207NW369. [b] **In Oregon.**-121 Or76, 252P708.

564-67 89Fla303, 103S833; 122 Or620, 260P206, 209 [quotCJ], 59ALR707.

564-68 89Fla303, 103S833; 122 Or620, 260P206, 209 [quotCJ], 59ALR707.

565-69 122 Or620, 260P206, 209 [quot CJ], 59ALR707; 47RI 215, 132A439, 441 [citCJ].

565-70 281US497, 50SCt356(2dcase), 74Led991; 8F(2d)911, 43ALR1079; 89 Fla303, 103S833, 834 [citCJ]; 158Md

372, 148A444; 252Mass582, 147NE887; 259Mass486, 156NE685, 52ALR886; 265Mass403, 164NE613; NC 155SE611; 121Or76, 252P708, 709 [citCJ]; 122Or620, 260P206, 209 [quotCJ], 59ALR707; 286Pa529, 134A494; 6PaDist&Co 799; 48RI 106, 135A850. [b] **Evidence held to establish estate by entirety.**–MoA 11SW(2d)63. [c] **Husband's deposit of oil and gas lease on property held by entireties in escrow** has been held binding on both husband and wife or neither. 249Mich190, 228NW782. [d] **Legal fiction of complete ownership yields to paramount equitable principles.**–MoA 27SW(2d)757.

565–71 252Mass582, 147NE887; 122Or620, 260P206, 209 [quotCJ], 59ALR707.

565–72 259Mass37, 155NE787; 116Or661, 242P626; 122Or620, 260P206, 209 [quotCJ], 59ALR707; 286Pa529, 134A494, 495 [quotCJ].

565–74 122Or620, 260P206, 209 [quot&CitCJ], 59ALR707.

565–75 122Or620, 260P206, 209 [quot CJ], 59ALR707.

565–75½–New. Usual method of creating the estate by entireties is by a deed from the grantor naming the grantees as husband and wife. 116Or661, 242P626.

565–75⅓–New. Where the spouses themselves desire to create such an estate of property held by both or either of them, the usual way is for both to join in deed to third party who conveys back to them describing them as husband and wife. 116Or661, 242P626.

565–75¼–New. Tenancies in entirety are not recognized in Maine. 126Me84, 136A459.

565–75⅓–New. An estate by the entireties depends for its creation and for its continuance on the marital relation of the cotenants. 122Or620, 260P206, 59ALR707.

565–75½–New. The execution of a mortgage and notes to a husband and wife as tenants by the entireties is held to constitute a completed gift to the wife. 156Md115, 143A712.

565–75½–New. In Florida estates by entireties are recognized as they existed at common law, except as modified by statute or constitution. 98Fla171, 123S697.

565–75⅛–New. Quality of estate by entirety is not affected by wife's dissent from her husband's will. 198NC219, 151SE269.

565–76 8F(2d)911, 43ALR1079; 259Mass486, 156NE685, 52ALR886.

565–78 252Mass582, 147NE887; 48RI106, 135A850.

566–85 265Mass428, 164NE616; 48RI106, 135A850.

566–88 133Misc69, 231NYS165. [a] **Statute abolishing survivorship** in joint tenancies held not to affect estates by entirety. 89Fla303, 103S833.

566–91 137Misc358, 242NYS6.

566–93½–New. Tenancy by entirety is not subject to partition. 48RI106, 135A850.

566–94 252Mass582, 147NE887.

566–5 121Or116, 254P203, 207 [citCJ].

567–7 48RI106, 135A850.

567–8 89Fla303, 103S833; 252Mass582, 147NE887; 259Mass37, 155NE787; 259Mass486, 156NE685, 52ALR886; 250Mich469, 231NW109; 96PaSuper310; 47RI215, 132A439, 441 [citCJ]; 48RI106, 135A850.

567–10 NJ 129A408 (after sale husband and wife are tenants in common on the proceeds).

567–11 158Md372, 148A444; 252Mass582, 147NE887 (survivor seized as sole owner); 122Or620, 260P206, 209 [quot CJ], 59ALR707.

567–12 122Or620, 260P206, 209 [quot CJ], 59ALR707. But see 83IndA58, 147NE634.

567–12½–New. A divorce decree changes tenancy by the entirety to tenancy in common only from the date of the decree. 130Misc701, 225NYS426.

567–20 252Mass582, 147NE887; 259Mass37, 155NE787; 267Mass375, 166NE712; 236Mich84, 210NW299; 121Or116, 254P203, 207 [citCJ]; 286Pa529, 134A494; 12PaDist&Co 805.

567–22 259Mass37, 155NE787; 259Mass486, 156NE685, 52ALR886; 265Mass403, 164NE613.

567–23 252Mass582, 147NE887; Mass171NE485.

567–24 121Or116, 254P203.

568–25 250Mich469, 231NW109; 286Pa529, 134A494; 6PaDist&Co 799.

568–27 99NJEq176, 132A100.

568–28 156Md115, 143A712.

568–29 286Pa529, 134A494.

568–30 13PaDist&Co 608.

568–31½–New. Husband erecting building on common property and borrowing part of necessary money therefor from his wife need not make an express gift thereof to the wife, the law supplying such promise. 102NJEq367, 140A681.

568–32 Fla 130S12; 238Mich373, 213NW106; 237Mich548, 213NW137; 242Mich37, 217NW905; 136Misc493, 241NYS22; NC 154SE52; 286Pa529, 134A494; 300Pa397, 150A663. [c] **One leasing from wife** property owned by husband and wife as tenants by entirety gained no rights as tenant. 267Mass375, 166NE712. [d] **Where land was owned by husband and wife as tenants by entireties,** wife's act in signing application for mortgage loan would not bind husband who did not sign it. 156Md302, 144A254. [e] **Lease of real estate owned by husband and wife by entireties is not effective** until delivered by both. 249Mich190, 228NW782. [f] **That conveyance is to wife** does not affect rule, wife's acceptance of deed not being equivalent to joinder. 13PaDist&Co 302.

568–33 89Fla303, 103S833. [a] **Wife cannot by will defeat husband's right of survivorship.** 89Fla303, 103S833.

568–34 281US497, 50SCt356(2dcase), 74Led991; 259Mass486, 156NE685, 52ALR886; 265Mass403, 164NE613; 237Mich548, 213NW137; 219MoA365, 271SW1008; 130Misc861, 225NYS91; 133Misc69, 231NYS165; 121Or116, 254P203; 96PaSuper255. [c] **Husband's consent to wife's disposition** of certain funds preclude recovery from her executor. MoA 11SW(2d)63. [d] **Release of claim** by husband for negligent destruction of house is ineffectual. 300Pa397, 150A663.

569–36 121Or116, 254P203. See also 136Misc493, 241NYS22.

569–38 286Pa529, 134A494.

569–40 193NC320, 136SE876.

569–42 121Or116, 254P203. But see 286Pa529, 134A494.

569–43 121Or116, 254P203.

570–50½–New. Where a husband and wife sell on contract land held by them as tenants by the entireties, they have a nonseverable interest in the contract with full rights in the survivor, unless it is otherwise expressly provided in the contract. 236Mich622, 211NW27.

570–51 [a] **Validity of purchase money mortgage** on real estate is not dependent on execution by purchaser's wife. 99Fla1169, 128S420. [b] **Wife is jointly liable for misrepresentation** of husband and his agent in sale of property of which they were tenants by entirety. 250Mich469, 231NW109.

570–54¼–New. Where a husband and wife join in a mortgage to secure a stated sum according to the terms of a note executed by the husband, the extent of the mortgage lien is confined to the amount named in the mortgage although the note is given to secure such sum and any further sums that may be due on open account. 241Mich338, 216NW913.

570–56 NC 154SE52.

570–59 But see 11PaDist&Co685.

570–68½–New. Equity has jurisdiction in a case where one spouse seeks to recover his just proportion of rent where spouse, sued, has received more than his just share, 125Misc849, 211NYS507.

570–68⅓–New. but this jurisdiction is not exclusive, law also having concurrent jurisdiction. 125Misc849, 211NYS507.

570–69 30F(2d)395; 177Ark250, 6SW(2d)21; 89Fla303, 103S833; 232Mich227, 205NW55; 248Mich650, 227NW541 (1stcase); 99NJEq176, 132A100; 216Misc590, 214NYS793; 240NYS772; 138Misc247, 245NYS298; 117Or691, 245P504; 121Or76, 252P708; 122Or620, 260P206, 210 [citCyc], 59ALR707; 6PaDist&Co 464; 6PaDist&Co 799; 9PaDist&Co 436; 10PaDist&Co 71; 10PaDist&Co 563; 10PaDist&Co 663. [f] (2) **In New Jersey.**–NJPrerog 141A453. [g] **Where wife alone paid purchase price,** husband could not retain entire estate. 193NC478, 137SE424. [h] **Effect of executory contract to sell to another.**–247Mich468, 226NW234. [i] **Where husband murders wife** rules of construction regulating estates by entirety do not permit acquisition of entire estate by survivorship. MoA 27SW(2d)757. [j] **Spouse must be survivor in legal contemplation** in order to acquire whole estate by entirety. MoA 27SW(2d)757. [k] **Entire award of damages are payable to wife,** for land held by entirety, which was condemned. 137Misc358, 242NYS6.

571–70 30F(2d)395; 265Mass403, 164NE613; NJ 144A619; NC 155SE611; 122Or620, 260P206, 59ALR707.

572–80 99NJEq176, 132A100.

572–84 259Mass37, 155NE787; Mich233NW353; 121Or76, 252P708; 121Or116, 254P203.

572–85 259Mass37, 155NE787; 121Or116, 254P203. [b] **Writ of entry** may be maintained by purchaser at sale on execution against husband for possession and title, and against wife for possession but not for her title. 259Mass37, 155NE787.

572–87 242Mich477, 219NW651; Mich233NW353; 219MoA365, 271SW1008; 100Vt90, 135A10. [b] 219MoA365, 271SW1008. [c] (3) Husband's interest cannot be subjected to mechanic's lien. MoA 14SW(2d)9. [d] **Conduct of husband and wife,** as tenants by entirety, held not to make husband agent of wife to create lien on land superior to prior lien given by them to another. 219MoA365, 271SW1008.

573–88 97NJEq52, 129A201.

573–89 96Fla667, 119S116; 97Fla858, 122S217(2dcase); NC 155SE611; 12PaDist&Co 673.

573–90 265Mass403, 164NE613; Mo 18SW(2d)388; 221MoA703, 285SW178; 8PaDist&Co 724; 10PaDist&Co 156.

573–96 12PaDist&Co 673.

573–97 12PaDist&Co 673.

573–97½–New. Erratum.–In 1926 Annotations "207 App. Div. 315" should be "122 Misc. 599."

573–97⅓–New. Creditor of joint and several obligation of husband and wife may sue the estate of the husband without joining the surviving wife, although the proceeds of the loan were used in the purchase of realty conveyed to them by the entirety which vested in her upon his death. 117Or691, 245P504 (executor without right to complain).

573–97¼–New. A joint promise by a husband and wife to pay a mortgage debt is just as valid and binding, although found only in the mortgage itself, as it would have been had it been expressed in the notes secured by the mortgage. 89IndA94, 163NE119.

573–97⅕–New. Partial release, as to properties owned solely by the husband in consideration of a substantial payment, did not work such a wrong as to the wife that would entitle her to relief in equity. 156Md208, 144A226.

573–98 89IndA94, 163NE119 (even if wife merely was surety for husband); 13PaDist&Co 41 (where no question is raised under Pennsylvania statute of June 8, 1893 P. L. 344).

573–99 250Mich34, 229NW519; Mo 18SW(2d)388; MoA 15SW(2d)860 (property of entity or that of each spouse may be sold).

574–3 [a] **Origin of funds used in purchase.**–241Mich528, 217NW911. [b] **Exchange of entirety property for other entirety property** is not fraudulent. 250Mich67, 229NW451.

574–14 MoA 25SW(2d)130.

574–18 239Mich452, 214NW418; 10PaDist&Co 747.

575–21 Minn 231NW794 (evidence held to sustain finding that bonds payable to bearer were held in joint tenancy); Mo 31SW(2d)28; 125Misc668, 212NYS116; 127Misc773, 216NYS620. [a] **Deposits in bank by husband and wife in**

joint names are held by them as joint tenants and husband's interest is severable as to demands of creditors. 235 **Mich1**, 209**NW**65.

575-22 125**Misc**668, 212**NYS**116 (Banking L. § 249 subd 3). [a] **Husband as murderer of wife** is not permitted to retain title as survivor to joint deposit in bank, proceeds going to wife's administrator. 125**Misc**668, 212**NYS**116.

575-23 111**Conn**165, 149**A**790; 127**Misc** 773, 216**NYS**620; **Or** 290**P**751(2dcase). [b] **Bank deposit.**–190**NC**764, 130**SE**614. [c] **Husband became entitled to full possession of bonds** on death of wife. 111 **Conn**165, 149**A**790. [d] **On deposit of bonds in name of both spouses** husband cannot take possession of bonds in wife's possession unless circumstances justified equitable interference. 111**Conn**165, 149 **A**790.

575-24 89**Fla**303, 103**S**833; 238**Mich** 373, 213**NW**106; 290**Pa**43, 138**A**217; 11 **PaDist&Co** 713; 12**PaDist&Co** 116. [c] (3) Other instances. 96**PaSuper**255. (4) Ownership by entirety may exist. **Mo** 31**SW(2d)**28.

575-25 [a] (1) 219**MoA**51, 266**SW**750. (4) Delivery is not necessary to create estate. 219**MoA**51, 266**SW**750. (5) Evidence of husband's direction changing indorsement on notes held by him has been held to establish estates in entirety in proceeds of note. 219**MoA**51, 266 **SW**750. [b] (1) 96**PaSuper**310; 10 **PaDist&Co** 94. (5) Mere fact that bank accounts are carried jointly in names of husband and wife does not prove ownership in both. 132 **Or**381, 285**P** 1025.

575-26 100**Vt**90, 135**A**10.

575-27 100**Vt**90, 135**A**10.

575-28 238**Mich**373, 213**NW**106; 96 **PaSuper**255.

575-29 238**Mich**679, 214**NW**320; 125 **Misc**150, 210**NYS**424 (estates in entirety do not exist in personalty except in analogy); 194**NC**698, 140**SE**622; 121 **Or** 86, 254**P**207. [a] **Right of survivorship** existing between husband and wife as to lands held by entirety does not apply to personal property so held. 190**NC** 764, 130**SE**614.

576-32 196**NC**12, 144**SE**368.

576-35 But see 197**Wis**56, 221**NW**417.

576-37 239**Mich**452, 214**NW**418. **Erratum.**–"214 Mich." should read "215 Mich."

576-37½-New. Where a vendor conveys standing timber to husband and wife, retaining the fee in the land, a conveyance by either without the other is void. 238**Mich**373, 213**NW**106.

576-37¼-New. A right of survivorship in personal property may be created by an express act of the parties. 238**Mich** 679, 214**NW**320. [a] **Where note payable to husband and wife is secured by mortgage silent as to survivorship,** the husband is the owner of both on the wife's death. 242**Mich**639, 219**NW**641.

576-37¼-New. Where a note and mortgage are made payable to husband and wife "by entireties," they should be construed to give effect to the clear intent of the parties that title pass to the survivor. 238**Mich**679, 214**NW**320.

576-38 246**NY**498, 159**NE**410.

576-39 246**NY**498, 159**NE**410.

576-42 See also 130 **Or**577, 281**P**178 (court of equity will not change ownership where personal property purchased with funds of husband and wife is so intermingled as to make segregation impossible).

577-51 215**Ky**364, 285**SW**235. [e] (3) In conveyance of land to husband and wife bill of sale of timber given at same time to grantor is a reservation and need not be signed by the wife. 232 **Mich**458, 205**NW**225.

578-52 215**Ky**364, 285**SW**235.

578-62½-New. Husband cannot by will dispose of land belonging to him and wife by entireties. 143**NC**334, 132**SE**17.

578-65 36**GaA**766, 138**SE**274.

578-67 100**Vt**259, 136**A**835.

579-75½-New. Where, under a separation agreement, the wife accepted certain real property in full satisfaction of her rights and her husband granted her permission to use the household furniture owned by him until he should want it, the transaction so far as it concerns the furniture is a bailment for the benefit of the wife for an indefinite period. 76**Mont**38, 245**P**257.

580-4 92**Fla**718, 111**S**278.

581-19 191**NC**521, 132**SE**275.

581-34 See also 157**Tenn**332, 8**SW(2d)** 481.

583-53 **TexCivA** 273**SW**934.

583-60 19 **OhA**16.

583-64 [a] (1) 19 **OhA**16; **Ont** [1930] 3**DomLR**448. (4) Husband not liable for coat sold to wife, separated from him, on her personal credit. 126**Misc** 567, 214**NYS**83.

584-86 [a] **Wife executing contract for sale of realty** is bound upon delivery thereof. 249**Mich**603, 229**NW**417.

584-92 [a] (11) Duebill expressing on face individual liability, but signed by two who are husband and wife, is joint liability of signers. 7**PaDist&Co** 668.

586-22 **TexCivA** 299**SW**322, 323 [cit CJ].

586-25 [b] **In Ohio.**–20 **OhA**248, 152 **NE**31.

587-31½-New. In Ontario the repeal of the provision of Married Women's Property Act of 1914, limiting liability for antenuptial debts to the amount received by the husband from the wife, did not revive the husband's common-law liability. **Ont** [1929] 2**DomLR**473.

589-76 **MoA** 27**SW(2d)**1059; **NJComPl** 149**A**830; **Nev** 292**P**616; **TexCivA** 294 **SW**988; **Ont** [1930] 3**DomLR**174.

589-77 40**GaA**553, 150**SE**435(3dcase); 86**Mont**535, 284**P**532; 27 **OhA**107, 160 **NE**865; 105**WVa**126, 141**SE**629.

589-78 **CalA** 290**P**468; 165**La**315, 115 **S**575; 234**Mich**347, 208**NW**453; 86**Mont** 535, 284**P**532; 102**NJL**166, 130**A**555, 556 [citCJ]; 127 **Okl** 27, 259**P**556; 105 **WVa**126, 141**SE**629.

590-82 **Conn** 151**A**333; 86**Mont**535, 284 **P**532; **NJComPl** 149**A**830.

590-83 [a] **Contractual intention** determines liability of husband or wife. 41**GaA**31, 151**SE**676.

590-84 **DC** 36**F(2d)**537.

590-85 165**La**315, 115**S**575, 576 [quot CJ]; 12**LaA**116, 124**S**620; 222**AppDiv** 837, 226**NYS**688; 49**Philippine**849; 105 **WVa**126, 141**SE**629; **Ont** [1930] 3 **DomLR**174.

591-95 **MoA** 27**SW(2d)**1059.

591-1 **IndA** 165**NE**338; 10**LaA**317, 120 **S**544; 86**Mont**535, 284**P**532; 102**NJL** 166, 130**A**555; 128**Misc**17, 217**NYS**181; **Sask** [1927] 3**DomLR**156.

591-7 33**NM**93, 262**P**173.

591-9 232 **IllA**566, 569 [quotCJ].

591-10 232 **IllA**566, 569 [quotCJ]; **Sask** [1927] 3**DomLR**156.

591-11 232 **IllA**566, 569 [quotCJ].

591-14 34**GaA**111, 128**SE**699; 234**Mich** 347, 208**NW**453; 12**PaDist&Co** 788; **Sask** [1927] 3**DomLR**156.

592-15½-New. , or that the goods were supplied under such circumstances that he is not bound to pay for them. 34 **GaA**111, 128**SE**699.

592-17 **IndA** 165**NE**338; 10**LaA**317, 120**S**544.

592-22 234**Mich**347, 208**NW**453; 249 **Mich**63, 227**NW**789 (wife obtaining money from her parents); **Sask** [1927] 3**DomLR**156. [a] **Purchase of diamond ring or expensive fur coat** by wife raises no presumption that it was done with husband's assent. 234**Mich**347, 208 **NW**453.

592-22½-New. , although in such case the question of prior dealings between the parties in which the husband paid similar bills charged to him would affect the matter in presumption. 234 **Mich**347, 208**NW**453.

593-23 41**GaA**31, 151**SE**676.

593-25 41**GaA**31, 151**SE**676.

593-26 41**GaA**31, 151**SE**676.

593-29 165**La**315, 115**S**575.

593-30 149**Miss**56, 115**S**117.

593-36 168**Minn**502, 210**NW**395.

593-37 168**Minn**502, 210**NW**395.

593-41½-New. Daughter paying doctors and hospital bills for mother after remarriage cannot recover from stepfather. 13**PaDist&Co** 161.

593-42 [a] **No presumption that necessaries were furnished gratuitously.**–132 **Misc**582, 230**NYS**311.

593-43 127**Misc**801, 217**NYS**467 (dictum); 132**Misc**582, 230**NYS**311 (dictum).

594-51 244 **IllA**533 (under statute).

594-62 **TexCivA** 294**SW**988.

594-66 234**Misc**347, 208**NW**453.

595-71 128**Misc**17, 217**NYS**181.

595-72 222**MoA**516, 281**SW**69; 128 **Misc**17, 217**NYS**181.

595-73 128**Misc**17, 217**NYS**181.

595-80 222**MoA**516, 281**SW**69; 46**SD** 532, 194**NW**840, 30**ALR**501.

595-85 **IndA** 165**NE**338; 128**Misc**17, 217**NYS**181.

596-86 128**Misc**17, 217**NYS**181.

596-94 **IndA** 165**NE**338; 86**Mont**535, 284**P**532; 223**AppDiv**342, 227**NYS**743; **TexCivA** 294**SW**988. [c] **Presumption that wife who because husband deserted her** moved to city where her mother lived was husband's agent for purpose of contracting for necessaries would continue until happening of some event which would have effect of changing legal situation. 10**LaA**317, 120**S**544.

597-98 99**Vt**199, 130**A**685.

598-4½-New. Where a husband has left his wife without reasonable cause, he is liable for support and maintenance of the wife and children. 6**PaDist&Co** 680.

598-10 **IndA** 165**NE**338.

598-21 **IndA** 165**NE**338; 125**Misc**123, 210**NYS**257.

598-22 7**LaA**696.

599-28 **IndA** 165**NE**338; 8**LaA**729; 222**MoA**516, 281**SW**69, 71 [citCJ]; 148 **Wash**649, 269**P**797. But see **Conn** 151 **A**333.

599-30 222**MoA**516, 281**SW**69.

599-31 175**Minn**39, 220**NW**156.

599-38 127 **Okl** 27, 259**P**556.

599-39 127 **Okl** 27, 259**P**556.

600-52 21**AlaA**257, 107**S**224; 34**GaA** 111, 128**SE**699; 41**GaA**31, 151**SE**676; 33**NM**93, 262**P**173, 174 [citCJ]; 19 **OhA** 16; **TexCivA** 22**SW(2d)**747.

600-59 92**PaSuper**61.

601-60 105**WVa**126, 141**SE**629, 630 [citCJ].

601-80 102**NJEq**393, 141**A**16, 19 [cit CJ].

602-82 102**NJL**166, 130**A**555, 556 [cit CJ].

602-82 102**NJEq**393, 141**A**16, 19 [cit CJ].

602-83 19 **OhA**16.

602-84 **TexCivA** 22**SW(2d)**747.

602-91 9**LaA**732, 120**S**256; 99**Vt**199, 130**A**685 (that defendant had given his wife money did not relieve him from liability).

602-92 9**LaA**732, 120**S**256; 151**Miss**56, 117**S**354. [b] **Relation of parent and child** between plaintiff and defendant's wife does not preclude recovery. 99**Vt** 199, 130**A**685.

603-95 99**Vt**199, 130**A**685.

603-95½-New. Evidence sufficient to submit to jury question of implied contract. 99**Vt**199, 130**A**685.

603-95½-New. Evidence sufficient to sustain finding of value. 99**Vt**199, 130 **A**685.

603-6½-New. The husband is not liable for furniture purchased by his wife for use in keeping rooming house. 188**Wis**205, 205**NW**819.

603-8 [a] (3) Fur coat. **IndA** 165**NE** 338.

603-10 68**CalA**367, 229**P**873 (husband liable for expenses of last illness of wife); 10**LaA**317, 120**S**544; 13**LaA**191, 127**S**423; 138**Misc**101, 244**NYS**764 (expenses of last illness); 198**NC**395, 151**S** 868.

603-14 68**CalA**367, 229**P**873.

603-17 **CalA** 290**P**468.

603-19 But see **BC** [1928] 1**DomLR** 638.

604-30 [d] **Employment of detective.**–Husband, sued for separation, is not liable for services of detective employed by wife, unless necessary to obtain decree. 240**NY**274, 148**NE**520.

604-31 240**NY**274, 148**NE**520.

604-38 9**PaDist&Co** 606.

605-54 But see 125**Misc**123, 210**NYS** 257.

606-56 125**Misc**123, 210**NYS**257.

606-71 217**AppDiv**473, 217**NYS**221.

606-71½-New. Liability of husband for fees of lawyers and detectives depends upon circumstances of each case, and whether or not such services were actually necessary to afford her protection. 240**NY**274, 148**NE**520 (evidence

insufficient to show necessity of employing detective).

606-71⅓-New. To obtain decree of separation; employment of detective by wife to obtain evidence of husband's infidelity has been held not necessary. 240NY274, 148NE520.

606-75½-New. Compensation for legal services rendered to a wife in proceedings for nonsupport is not a subject for a separation action as for necessaries, the statute providing the proper relief to the wife. **Mass** 168NE183(1st case).

606-77 68CalA367, 229P873; 232 IllA566, 569 [citCJ]; **MoA** 27SW(2d)1059; **NC** 154SE731; 35 **OhA**402, 172NE421; 197Wis336, 222NW218. See also 169 **La**701, 125S860.

607-78 232 IllA566, 569 [quotCJ].

607-79 232 IllA566.

607-79½-New. A husband is liable although children of his wife by a former marriage contracted for expenses of funeral. 232 IllA566.

607-80 232 IllA566, 569 [quotCJ].

607-81 232 IllA566, 569 [quotCJ].

607-82 232 IllA566.

607-85 232 IllA566.

607-86 68CalA367, 229P873; 34**GaA** 73, 128SE207; 232 IllA566, 569 [citCJ].

607-88½-New. Where a creditor actually extends credit to third person for funeral expenses of wife, without any relationship with husband, liability is governed by the contract and remains against third persons. 34**GaA**73, 128SE207.

607-88⅓-New. A third person's guarantee of payment of funeral expenses of wife does not relieve the husband of liability. 34**GaA**73, 128SE207.

607-89 34**GaA**73, 128SE207 (husband primarily liable, not estate of deceased).

607-90 **MoA** 27SW(2d)1059.

607-91 **MoA** 27SW(2d)1059.

607-95 104**Conn**519, 133A746.

607-96 232 IllA566 (dictum).

607-97 **MoA** 27SW(2d)1059.

608-99 34**GaA**73, 128SE207; 247 IllA 404; **NC** 154SE731. But see 35 **OhA** 402, 172NE421.

608-1 See also 10**PaDist&Co** 271 (election to take against will).

608-5 92**PaSuper**348. [b] (2) Especially where husband offered to provide necessaries for wife. 10**LaA**352, 119S 576.

608-7 **CalA** 290P468.

608-8 163**La**660, 112S521.

609-18 8**LaA**221; 6**PaDist&Co** 435.

609-22 34**GaA**111, 128SE699; 41**GaA** 31, 151SE676; 27 **OhA**107, 160NE865. [b] (1) 92**PaSuper**61.

609-23 **GaA** 155SE532; 6**PaDist&Co** 435; 12**PaDist&Co** 788.

609-29 **GaA** 155SE532 (claim of daughter for services to insane mother not recoverable against latter's estate).

609-35 144SC84, 141SE893, 895 [cit CJ].

610-37 255 IllA8.

610-43 111**Conn**306, 149A768.

610-56 [a] **Under California statute** divorced wife may be sued directly for services rendered by physician during coverture regardless of whether property received by her on marital settlement is subject to seizure for satisfaction of judgment. 186**CalA**631, 261 P311.

611-63 168**Minn**502, 210NW395.

611-66 168**Minn**502, 210NW395.

611-82 111**Conn**306, 149A768.

612-88½-New. dental services for husband, 255 IllA8.

612-98 111**Conn**306, 149A768.

613-13 205**Cal** 345, 270P948; 40**GaA** 553, 150SE435(3dcase).

613-21½-New. A creditor could sue a husband as an undisclosed principal, although he may not have known of the existence of the principal at the time the debt was incurred by the wife as agent. 205**Cal** 345, 270P948.

613-21⅓-New. Contract of purchase imposes reciprocal rights and obligations on a married woman and seller which are unaffected by her agency for her husband under evidence not requiring a finding of agency as a matter of law. **Mass** 167NE308.

613-22 149**Md**548, 131A810.

614-26 32**Ariz**381, 259P397; 254**Mass** 501, 150NE326; **Mass** 167NE308.

614-32 245 IllA330.

614-33 324 Ill 549, 155NE477.

616-50 But see **MoA** 280SW62.

616-52 **Mass** 173NE425.

616-53 236**Ky**42, 32**SW(2d)**536.

616-54 149**Md**548, 131A810.

616-55 7**LaA**31.

616-58 [c] **Power of attorney held to include power to lease with option of purchase.**-149**Md**548, 131A810.

616-59½-New. Although a wife acts as her husband's agent a finding as a matter of law of no contractual relation between wife and seller is not required. **Mass** 167NE308.

616-59⅓-New. In Alberta a married woman is liable for goods bought by her, although she acted as agent for her husband, where she did not disclose such fact. **Alta** [1928] 2**DomLR** 608.

616-60 115 **Okl** 92, 241P765. [a] (6) Where husband suggested that wife sell drug store owned by both jointly and use proceeds for reinvestment, disposal of store by wife to her sister for one dollar and other considerations does not impair husband's title in equity. 204 **Iowa**950, 216NW77.

616-63½-New. A husband cannot accept the benefits and reject the detriments of his wife's alleged unlawful acts, 82**Colo** 373, 260P112.

616-63⅓-New. and hence cannot claim the benefits of deposits of her money in his bank account and at the same time reject her unauthorized drafts on such account. 82**Colo** 373, 260P112.

617-66 10**LaA**11, 119S904; 222**MoA** 1098, 14**SW(2d)**31; **Tex** 286SW611. [a] 205**Cal** 345, 270P948. [c] 10**LaA**11, 119S904. [d] **Husband refusing to ratify purchase by wife** may recover value of machine given in part payment. **Tex CivA** 14**SW(2d)**311.

617-69 **Tex** 286SW611.

617-71 249**Mich**63, 227NW789.

617-72 217**Ala**441, 116S528; **Tex** 286 SW611.

618-73 **Tex** 286SW611.

618-76 165**La**315, 115S575.

618-86 10**LaA**11, 119S904; 249**Mich** 63, 227NW789. But see 10**LaA**317, 120 S544.

618-87 205**Cal** 345, 270P948.

619-90 205**Cal** 345, 270P948. [a] 217 **Ala**441, 116S528; 111**Conn**162, 149A405 (2dcase); 10**LaA**317, 120S544; 197**NC** 274, 148SE229. [b] (1) 37**GaA**239, 139 SE590; **TexCivA** 19**SW(2d)**173. (2) To warrant finding of agency. **Mass** 167NE308.

619-91 100**CalA**606, 281P655.

619-92 214**Ala**8, 106S49 (finding that wife had authority to bind husband by contract held supported by evidence).

619-92½-New. Source of money used by a wife is but one of the facts in determining an agency. **Mass** 167NE308.

619-92⅓-New. Specific authority to contract for any other purpose than necessities must be established. 249 **Mich**63, 227NW789.

619-98 205**Cal** 345, 270P948; 161**Ga** 978, 133SE512; 40**GaA**746, 151SE657; 238**Mich**189, 213NW163.

620-99 161**Ga**978, 133SE512.

620-1 [c] **Transfer requiring order of court.**-Where statute prohibits purchase by husband of wife's property without order of court, husband, though he has power of attorney in writing given by wife, cannot transfer her property to himself without order of court. 161 **Ga**978, 133SE512.

620-2 See also 104**Conn**169, 132A902.

620-3 249**Mich**190, 228NW782.

620-5 [b] **Power of attorney** "to sell any kind of property" belonging to wife without specifying community property does not cover wife's interest in latter. 32**PortoRico** 534.

620-7½-New. But a wife is not estopped to repudiate an unauthorized contract by stating the reason for so doing other than lack of agency. 253**Mass**460, 149NE123.

620-8 144**Miss**709, 111S107; **BC** [1928] 2**DomLR**367.

620-10 161**Ga**978, 133SE512.

620-10½-New. A wife's rights, where the husband's contract is repudiated, are not affected by her failure to file a married woman's certificate under statute. 253**Mass**460, 149NE123.

620-11 144**Miss**709, 111S107; **MoA** 277 SW969.

620-11½-New. On disaffirmance, a wife need not give reasons therefor. 253 **Mass**460, 149NE123.

620-12 92**PaSuper**210.

621-26 22**AlaA**426, 116S412; 249**Mich** 190, 228NW782; 112 **Okl** 23, 239P659.

621-28 **BC** [1928] 2**DomLR**367.

621-34 41**GaA**707, 154SE463.

621-35 205**Cal** 345, 270P948; 84 **IndA** 253, 151NE13; 238**Mich**189, 213NW163.

622-38 **MoA** 11**SW(2d)**61.

622-44 213**AppDiv**504, 210NYS663. [c] **"There is no presumption in law** that a husband is his wife's agent." 103 **NJL**449, 135A880, 882. [d] **Evidence held sufficient** to prove husband agent of wife. 84 **IndA**253, 151NE13.

622-48 100**CalA**606, 281P655.

622-51 See also 238**Mich**189, 213NW 163.

623-56 [a] 238**Mich**189, 213NW163; 140**Miss**474, 106S6. [b] 95**CalA**456, 273 P50; 34**GaA**347, 129SE301 (no evidence of authority or ratification under seal of act of husband in signing note under seal as agent); 213**AppDiv**504, 210**NYS** 663. [d] **Iowa** 232NW116; 92**PaSuper** 210. [e] 253**Mass**460, 149NE123. [f] **Evidence held sufficient** to support finding that wife had authority to bind husband. 214**Ala**8, 106S49.

624-72 286**Pa**529, 134A494, 496 [cit CJ].

624-73 232**Ky**809, 24**SW(2d)**592.

624-77 49**Philippine**574.

624-81 286**Pa**529, 134A494, 496 [cit CJ].

626-11 **Ala** 130S550.

626-13 32**Ariz**381, 259P397; 35**GaA** 122, 132SE393; 295**Pa**62, 144A824.

626-22 **Nebr** 228NW537; 216**AppDiv** 362, 215NYS184; 284**Pa**414, 131A236.

627-24 121**Kan**520, 247P433, 49**ALR** 433; 130**Misc**605, 224NYS130; 284**Pa** 414, 131A236.

627-31½-New. Invalid provision of an antenuptial contract, providing for a forfeiture of the wife's rights in her husband's property if she should file a petition for divorce and that alimony should not be allowed to her, does not affect valid provisions of the contract. 207 **Iowa**994, 222NW3.

627-33 50**ND**677, 197NW778, 781 [cit CJ]; 86 **IndA**206, 156NE524.

627-33½-New. A valid antenuptial contract must be made with the intention that the marriage shall subsist until death intervenes. 177**Ark**613, 7**SW(2d)** 783.

627-33⅓-New. If either party to an antenuptial contract intends that the contract be used only in case of divorce, the contract is void. 177**Ark**613, 7**SW (2d)**783.

627-40 **TexCivA** 20**SW(2d)**1073 (prenuptial oral agreement is not binding or enforceable while executory). [a] **TexCivA** 32**SW(2d)**233.

629-66 5**PaDist&Co** 727.

631-28 215**Ala**179, 110S291; 207 **Iowa** 994, 222NW3. [b] (5) 177**Ark**613, 7 **SW(2d)**783.

634-60 [a] (2) Mutual advantages of marital relation and advantage to child constitute sufficient consideration for antenuptial contract before remarriage. 177**Ark**613, 7**SW(2d)**783.

635-77 177**Ark**613, 7**SW(2d)**783.

635-84 50**ND**677, 197NW778, 781 [cit CJ].

635-91 121**Kan**520, 247P433, 49**ALR** 433; 296**Pa**458, 146A109.

637-37½-New. In Virginia, relinquishment by the wife of inchoate right of dower in her husband's realty constitutes a valuable consideration for postnuptial settlement in favor of the wife. 146**Va**417, 131SE800.

638-44½-New. The dismissal of a wife's suit for divorce and resumption of marital relations is a legal consideration for her husband's agreement to pay money to, or settle property on, her or to do some other thing for her material benefit. 235**Mich**598, 209NW821.

638-65 50**ND**677, 197NW778, 781 [cit CJ].

639-69 50ND677, 197NW778, 781 [cit CJ].
639-80 121Kan520, 247P433, 49ALR 433.
639-83½-New. Antenuptial agreement may settle property rights of parties during life or after death. 216AppDiv 362, 215NYS184.
639-83½-New. Provision giving wife possession of residence during widowhood is valid and will be enforced. 216 AppDiv362, 215NYS184.
640-93 323 Ill 323, 154NE146; 121Kan 520, 247P433, 49ALR433. [c] (3) By antenuptial contract property may be changed from community to separate, or from separate to community. CalA 288 P870.
640-95 115Nebr882, 215NW131.
641-99 177Ark613, 7SW(2d)783; 129 Kan558, 283P483; 115Nebr882, 215NW 131.
641-1 234Ky769, 29SW(2d)15; 95 PaSuper449.
641-2 129Kan558, 283P483.
641-3 129Kan558, 283P483.
642-19 [b] **Where wife's release of all claims against husband from whom she was separated** and another instrument purporting to make property settlement between parties related to different subject-matters, invalidity of one of such instruments did not affect validity of other, though they were executed at same time and as part of same transaction. 95CalA690, 273P86.
642-20 Contra 121Kan520, 247P433, 49 ALR433 (contract mutually relinquishing right of inheritance from each other).
642-26 115Nebr882, 215NW131, 134 [citCyc]; 116Nebr352, 217NW588; 96 PaSuper527.
642-27 129Kan558, 283P483; 115Nebr 882, 215NW131, 134 [citCyc]; 50ND677, 197NW778, 781 [citCJ].
642-31 [a] 50ND677, 197NW778.
642-32 50ND677, 197NW778.
643-37 [a] (4) 116Nebr352, 217NW588.
643-38 317 Ill 468, 148NE323.
643-42 115Nebr882, 215NW131, 134 [citCyc]; 50ND677, 197NW778, 781 [citCJ].
643-43 115Nebr882, 215NW131, 134 [citCyc]; Nebr 228NW537; 50ND677, 197NW778.
643-44 115Nebr882, 215NW131, 134 [citCyc].
643-45 328 Ill 420, 159NE790; 329 Ill 198, 160NE149.
644-46 329 Ill 198, 160NE149. (1) 115 Nebr882, 215NW131.
644-51 328 Ill 420, 159NE790; 329 Ill 198, 160NE149; 115Nebr882, 215NW 131; 50ND677, 197NW778, 781 [cit CJ]; 95PaSuper449.
644-52 50ND677, 197NW778, 781 [cit CJ].
644-53 329 Ill198, 160NE149.
644-55 317 Ill 468, 148NE323 (holding that recitals in settlement itself of mutual disclosure of recources was not sufficient to prove wife's knowledge of husband's wealth).
645-56 329 Ill 198, 160NE149.
645-62 [a] (3) Proof that wife had been servant in house for five years prior to marriage does not establish knowledge on her part of extent of holdings actually worth seven hundred thousand to one million dollars. 317 Ill 468, 148NE323. (4) Evidence held not to show knowledge by wife entering into antenuptial contract of extent of husband's propery. 328 Ill420, 159NE790. (5) Admission prior to execution of antenuptial contract of existence of engagement to marry between parties sufficiently proves such engagement. 328 Ill 420, 159NE 790. [b] **Evidence held sufficient** to show wife's knowledge of facts. 329 Ill 198, 160NE149.
646-79½-New. **"Laws of Moses and Israel,"** referred to in an antenuptial agreement as the law to govern property rights of parties settled therein, are not "foreign laws" within rules relating to laws governing such contracts. 216 AppDiv362, 215NYS184.
646-85 127Kan31, 272P166; 128 Or 635, 275P663. [b] **Particular agreements construed.**-170La467, 128S279.
648-97 177Ark613, 7SW(2d)783; 73 Mont560, 238P599. [a] **Particular postnuptial contracts construed.**-235Mich 598, 209NW821.
648-99 5PaDist&Co 727.
648-8 Nebr 228NW537.
648-13 124Kan818, 262P589.
649-14 See also 128 Or635, 275P663.
649-15 124Kan818, 262P589.
650-29½-New. "income" held to mean "legal interest." 5PaDist&Co 727.
651-53 124Kan818, 262P589.
652-54 128Kan394, 278P36.
652-56 237Mich336, 211NW637. [c] **Contract need not be in express terms.**-297Pa290, 147A54.
654-8 207 Iowa994, 222NW3.
656-45 [a] **By parol.**-Antenuptial contract may be abrogated by parol agreement after marriage. 129Kan558, 283 P483. [b] **Surviving husband is entitled to statutory rights in property of wife.**-233Ky27, 24SW(2d)917.
656-50½-New. Gift of property to wife as right of survivorship is not irrevocable. Can [1927] 3DomLR609.
657-60 201Cal 36, 255P800.
657-68½-New. Wife's institution of a suit for divorce and alimony, the acceptance of land in settlement thereof, and the institution of a suit for damages for mistreatment do not constitute the repudiation of an antenuptial settlement so as to estop her heirs from claiming that the husband is bound thereby. 322Mo 802, 16SW(2d)92.
658-71 201Cal 36, 255P800.
659-87 215Ky278, 284SW1071.
660-12½-New. Election against will will be sustained where agreement is unfair to wife and will follows agreement. 96PaSuper527.
660-18 317 Ill 468, 148NE323 (proof of engagement to marry sufficient to establish confidential relation); 115Nebr 882, 215NW131.
660-20 115Nebr882, 215NW131. [a] **Agreements held not unconscionable.**-207 Iowa994, 222NW3.
660-23 115Nebr882, 215NW131.
661-24 177Ark613, 7SW(2d)783; 317 Ill 468, 148NE323; 129Kan558, 283P 483; 115Nebr882, 215NW131. [b] **Equity will not relieve** where contract is acted upon after fraud becomes known. 250Mich53, 229NW456.
661-27½-New. Antenuptial contract not avoided by surviving husband by proof of concealment of fact not affecting his interest. OhA 172NE626.
662-38 172Minn91, 214NW791 [quot CJ].
663-71½-New. Estoppel cannot be based upon acquiescence in probate proceedings concerning husband's estate when plaintiff had no knowledge of her rights and duties. 50ND677, 197NW 778.
664-81 54ND930, 212NW214.
664-87 242Mich608, 219NW675.
665-88 242Mich608, 219NW675.
665-90 233Ky27, 24SW(2d)917.
665-91½-New. A provision of settlement for the delivery of merchandise to the husband does not prevent the operation of judgment establishing a trust for the wife's mother in property claimed by the husband under the wife's will. 207Cal 534, 279P444(2dcase).
665-91½-New. A husband's rights under a settlement agreement to money placed in escrow for him by his wife are not prejudiced by judgment establishing a trust for the wife's mother as her sole heir in property claimed by the husband under the wife's will. 207Cal 534, 279P444(2dcase).
666-10 322Mo 697, 16SW(2d)49.
666-13½-New. **Although rights are to be governed by foreign laws,** courts will enforce an antenuptial agreement according to the intention of the parties, in so far as not contrary to law of forum. 216AppDiv362, 215NYS184.
666-13½-New. Prenuptial agreements, although made in foreign countries, are valid and enforceable in this country. 226AppDiv159, 235NYS273.
667-34 [a] **Estoppel to assert defenses.**-322Mo 802, 16SW(2d)92.
668-59 [a] Iowa 224NW38 (that antenuptial contract was executed by widow).
668-65 234Ky769, 29SW(2d)15; 115 Nebr882, 215NW131; 116Nebr352, 217 NW588, 590 [citCyc]; Nebr 228NW537. See also 294Pa442, 144A426. [b] **Party assailing antenuptial agreement which is apparently unjust** is not required to produce proof necessary to overthrow ordinary written instrument. 234Ky 769, 29SW(2d)15.
668-65½-New. Postnuptial agreements and circumstances surrounding their making are closely scrutinized, and, if grossly disadvantageous to the wife, are presumptively fraudulent. 294Pa442, 144A426.
669-69 322Mo 802, 16SW(2d)92.
669-71 [a] (2) 115Nebr882, 215NW131. (3) Evidence held sufficient to show that widow agreed not to claim any interest before marriage. 86 IndA206, 156NE 524. (4) Evidence held to sustain finding that copy of antenuptial contract was identical with original. 128Kan394, 278P36. (5) Evidence held sufficient to support finding that testatrix acted in reliance on defendant's promise not to claim property on her death. 207Cal 534, 279P444(2dcase). (6) Evidence held sufficient to support finding that husband promised not to claim property received under wife's will. 207Cal 534, 279P444(2dcase). [d] **Evidence held sufficient** to establish antenuptial contract by copy, original being lost. 201 Iowa1311, 207NW772. [e] **Evidence held to sustain judgment.**-234Ky769, 29 SW(2d)15.
669-72 [a] (1) Nebr 228NW537. (2) Fraudulent concealment. 50ND677, 197 NW778. [b] 294Pa442, 144A426.
669-75 28F(2d)789; 256Mass351, 152 NE707. [g] **Wife can enforce contract** for conveyance of real estate entered into with her husband as agent for defendant. 233Mich92, 206NW488.
671-97 161Ga978, 133SE512 (contract constituting settlement between husband and wife held valid); 48 Ida600, 283P 1038; 215Ky154, 284SW1042, 1043 [quotCJ]; 235Mich598, 209NW821; 116 Nebr180, 216NW297, 56ALR327 (dictum).
672-98 215Ky154, 284SW1042, 1043 [quotCJ].
672-3 264Mass166, 162NE300.
672-11 215Ky154, 284SW1042, 1043 [quotCJ].
672-12 215Ky154, 284SW1042, 1043 [quotCJ].
673-25 202 Iowa976, 208NW343.
673-29 217Ala230, 115S256 [citCJ]; 217Ala235, 115S258, 259 [citCJ]; 50ND 677, 197NW778. [b] 201Cal 518, 258P 55. [c] (2) Proof of independent advice to wife is not indispensable in rebutting presumption by proof of full disclosure. 201Cal 518, 258P55. (3) Evidence held sufficient to overcome presumption. 20 Cal 518, 258P55.
674-34 NJDistCt 149A637.
675-48 51ND148, 199NW444 (promise implied to pay amount agreed upon).
675-50 [a] (4) Other instances. 128Me 495, 148A796.
675-52 106WVa634, 146SE614(2dcase).
675-53 Alta [1929] 3DomLR16. [a] **Mechanic's lien filed by husband against wife's property before marriage** in respect of antenuptial debt of wife to him is ineffective after marriage. Alta [1929] 3DomLR16.
677-91 226Ky750, 11SW(2d)933. See also Mo 275SW936.
677-94 226Ky750, 11SW(2d)933.
678-14½-New. In North Carolina, contract of wife to convey realty is invalid unless executed in compliance with statute. 192NC422, 135SE127.
678-18½-New. Wife's return to husband from whom she had been separated held not consideration. Tex 293SW604.
678-20 [b] **Nor can she recover from his estate** after death or from partnership. 266Mass180, 165NE14. [c] **Money loaned to partnership.**-Wife cannot maintain proceedings either at law or in equity against husband, his estate or partnership for repayment of money loaned by wife to partnership. 266Mass 180, 165NE14.
678-22 30Hawaii392, 402 [citCJ].
680-43½-New. A wife's loan to her husband to be used in making payments on land purchased by him before marriage creates the relation of debtor and creditor only and does not give her an interest in the land. 48Nev175, 228P306.
680-44 [d] (3) SD 230NW29(2dcase).
680-49 81CalA678, 254P644.

681–67 238**Mich**189, 213**NW**163; 241 **Mich**23, 216**NW**370. [a] 165**La**1027, 116 **S**546.
681–80 238**Mich**189, 213**NW**163.
682–92½–New. Where husband and wife pool moneys for joint benefit and pay joint expenses, they are joint adventurers, 107**Conn**342, 140**A**745.
682–92¼–New. even as to a portion of funds saved by the wife and kept in her possession. 107**Conn**342, 140**A**745.
682–92¼–New. Rights of parties in such case are governed by legal principles applicable to unmarried persons. 107 **Conn**342, 140**A**745.
682–92½–New. Disagreement and separation of husband and wife warrants dissolution of such joint adventure and division of the fund acquired. 107**Conn** 342, 140**A**745.
682–94 See also 103**Conn**431, 130**A**705, 44**ALR**693.
682–4½–New. A woman, living with a man as his wife under a mistaken belief of relationship due to his fraud, may recover from his estate for services. 79 **CalA**560, 250**P**411.
683–9 33**F(2d)**987.
684–24 85 **IndA**384, 150**NE**103. [a] (5) Sale of personal property by husband to wife. 85 **IndA**384, 150**NE**103. [d] **Corporation charged with notice** that stock transfer to husband needs joint signature. **TexCommnA** 294**SW**843. [e] **Evidence held sufficient to show delivery of bill of sale.**–84**Mont**424, 276**P**16, 63**ALR** 528.
684–30½–New. The presumption of fraud arising from a transaction between husband and wife by which the husband benefits is only evidence. 70 **CalA**180, 232**P**755.
684–34½–New. Where a bank was not the creditor of the husband, it was in no position to question the validity of his transfers. 101**CalA**532, 281**P**1104.
684–36 See also 245 **IllA**570.
686–61 See also 265**Mass**428, 164**NE**616.
686–66½–New. A conveyance by a husband, directly to his wife and minor children, of land title to which is in both husband and wife, accepted and filed for record by the wife, who takes charge of the property for the joint benefit of herself and children, is valid although the wife does not join in the deed. 170**Ark**1194, 281**SW**657.
686–67 264**Mass**166, 162**NE**300. See also 94**Fla**129, 113**S**675. [a] (3) Husband seized in fee of real property may deed property to himself and wife without intervention of trustee or third person, and thereby create estate by entirety. 133**Misc**236, 232**NYS**360.
687–78 173**Ark**33, 291**SW**799; **TexCivA** 14**SW(2d)**865. [c] **Wife's death, before husband's death,** terminated his trusteeship under conveyance made to her during his lifetime. 173**Ark**33, 291**SW** 799.
688–79 204 **Iowa**532, 215**NW**501. [b] **Conveyance held void where consideration not shown.**–10**LaA**569, 121**S**630.
688–85 16 **Or**661, 242**P**626.
688–85½–New. Husband may under such statute convey to his wife a fee simple estate or an estate contingent upon his death, or any other interest he has. 16 **Or**661, 242**P**626.
689–10 239**Mich**139, 214**NW**81; 307**Mo** 682, 271**SW**489; **TexCivA** 278**SW**306.
689–12 **CalA** 286**P**439; 239**Mich**139, 214 **NW**81.
689–13 **TexCivA** 272**SW**225; **TexCivA** 278**SW**306.
689–14 168**Ga**766, 149**SE**138.
689–20 80**CalA**185, 251**P**666; 287**Pa**304, 135**A**260.
689–20½–New. If the conveyance is without condition expressed therein, the wife's failure to execute the will in accordance with an oral agreement not expressed in the deed will not prevent title passing to grantee, nor furnish a basis for rescission. 80**CalA**185, 251**P**666.
690–27 55**ND**184, 212**NW**848.
690–44 **TexCivA** 278**SW**306.
691–56½–New. If deed to husband is ineffective wife is not a bona fide purchaser under subsequent deed from husband and may be individually liable for proceeds of a sale. **TexCivA** 24**SW(2d)** 742.
691–63 265**Mass**428, 164**NE**616; 50**RI** 429, 148**A**321.
692–72½–New. Where a husband purchases real estate and conveys it to his wife under the express understanding that she will reconvey to him on his request, he is the equitable owner although the record title stands in her name at the time of her death. 108**Conn** 37, 142**A**407.
692–75 307**Mo** 682, 271**SW**489; 55**ND** 184, 212**NW**848.
692–76 307**Mo** 682, 271**SW**489.
692–77 199**Cal** 344, 249**P**180.
692–78½–New. , or intend to divest himself of title. 199**Cal** 344, 249**P**180.
692–81½–New. In the absence of statute, acknowledgment of husband's deed to wife is not essential to its validity. 199**Cal** 344, 249**P**180.
693–1 122 **Okl** 301, 254**P**979.
693–3 163**Ga**666, 136**SE**904.
694–22 [a] (1) 167**Ga**498, 146**SE**187; **Ga** 155**SE**8.
694–23½–New. Under some statutes a sale and conveyance by a married woman to her husband without allowance by order of court is void and not merely voidable. 165**Ga**513, 141**SE**211.
694–28 **TexCivA** 278**SW**306, 308 [cit CJ].
695–47 264**Mass**166, 162**NE**300.
695–47½–New. , or to husband and wife jointly. 201**Cal** 518, 258**P**55 (transfer of wife's interest in joint tenancy to trustee is not revocable).
695–47⅓–New. Rights of a husband as joint beneficiary will not be affected by refusal of the wife to accept a conveyance from the trustee. 201**Cal** 518, 258 **P**55.
695–58 See also 245**Mich**205, 222**NW** 176.
695–62 [a] (3) Deed gives color of title though void. 191**NC**539, 132**SE**290. (4) Acknowledgment statute applies also to conveyance by wife to another in trust for husband. 191**NC**539, 132**SE** 290.
696–63 215**Ky**57, 284**SW**410, 412 [cit CJ].
696–64 215**Ky**57, 284**SW**410, 412 [cit CJ].
696–70 128 **Okl** 172, 261**P**944.
696–71 128 **Okl** 172, 261**P**944.
696–73 201**Cal** 518, 258**P**55. [a] **Evidence insufficient to overcome presumption.**–128 **Okl** 172, 261**P**944.
696–76 128 **Okl** 172, 261**P**944.
697–83 239**Mich**139, 214**NW**81.
697–84 239**Mich**139, 214**NW**81.
697–85 239**Mich**139, 214**NW**81; 99 **NJEq**873, 131**A**904.
697–86 12**PaDist&Co** 639.
697–91 101**NJEq**485, 138**A**707, 708 [quot CJ].
697–7 159**La**228, 105**S**299 (after dissolution of marriage by divorce).
698–25 102**CalA**582, 283**P**866; 237 **IllA** 190; 208**Ky**441, 271**SW**600 (gift ratified); 126**Me**84, 136**A**459. [a] **Property received in exchange for property claimed by gift.**–106**WVa**91, 144**SE**877.
699–51 [c] **Husband cannot recover property** because wife lost her affection for him. 95**CalA**487, 272**P**1079.
699–54 297**Pa**551, 147**A**657 (if husband is solvent he may make valid gift of property to wife); 97**PaSuper**250.
700–69 35**GaA**420, 133**SE**297; **MoA** 13 **SW(2d)**1076. [a] **Failure of husband to create joint estate in personalty** does not make transaction outright gift. **CalA** 290**P**668.
700–71 100**Vt**51, 134**A**853.
700–74 35**GaA**420, 133**SE**297; 84**Mont** 424, 276**P**16, 63**ALR**528.
700–78 35**GaA**420, 133**SE**297.
700–79 35**GaA**420, 133**SE**297.
700–82 100**Vt**51, 134**A**853.
700–83 See also **Mo** 289**SW**579.
700–83½–New. When a husband retains the management and use of property during his life, a trust in his favor may be implied extending only to a life interest. **Mo** 289**SW**579.
701–83 100**Vt**51, 134**A**853.
701–89½–New. That husband handed wife all his earnings from week to week from which to pay family expenses does not constitute a gift to her of surplus over expenses. 126**Misc**1, 213**NYS**162, 167 [quotCyc].
701–89⅓–New. A gift by a husband to a wife may be made in accordance with an understanding that the excess of money turned over to the wife for household expenses during the current month should become her separate property. **Nev** 283**P**913.
701–2½–New. Vesting by husband, of estate by entirety in himself and wife, deposit of proceeds of sale thereof, and investment of such proceeds in realty as tenants by entirety, constituted valid gift to wife. 125**Misc**851, 213 **NYS**4.
701–4 237 **IllA**190.
701–14 202 **Iowa**1356, 212**NW**116; 131 **Misc**188, 226**NYS**415.
701–16 202 **Iowa**1356, 212**NW**116; 131 **Misc**188, 226**NYS**415.
701–17 202 **Iowa**1356, 212**NW**116; 127 **Me**480, 144**A**399.
701–18 202 **Iowa**1356, 212**NW**116; 131 **Misc**188, 226**NYS**415.
702–19 33**GaA**615, 127**SE**658. But see 134**Misc**607, 235**NYS**661.
702–19½–New. or in the names of husband and wife jointly for convenience, **Ont** [1929] 3**DomLR**651.
702–20 See also 307**Mo** 682, 271**SW**489.
702–21 252**Mass**390, 147**NE**826.
702–24 But see 197**NC**274, 148**SE**229.
702–26 [a] **Certificates of deposit placed in safe deposit box.**–Where husband makes deposits on time certificates payable to himself or wife, and places certificate in safe deposit box to which wife has key, there is completed gift, though wife has not signed card for admission to vault. 116**Nebr** 686, 218**NW**739.
702–27½–New. Wife's withdrawal, with husband's permission, of money from joint checking account is effectual delivery as gift to wife. **Nev** 290**P**1025.
702–29 172**Ark**932, 290**SW**966; 107 **Conn**342, 140**A**745; 325 **Ill** 253, 156**NE** 352; 213**Ky**575, 281**SW**530, 531 [quot CJ]; 158**Md**372, 148**A**444 (payment on joint mortgage); 99**NJEq**176, 132**A**100; 193**NC**478, 137**SE**424; 286**Pa**575, 134**A** 451; 97**PaSuper**250; 135**Wash**468, 238 **P**5, 9 [quotCJ].
702–30 323 **Ill** 170, 153**NE**658; 85 **IndA** 443, 154**NE**395; 213**Ky**575, 281**SW**530, 531 [quotCJ]; 135**Wash**468, 238**P**5, 9 [quotCJ]; 105**WVa**39, 141**SE**433. See also **NJCh** 151**A**487.
702–31 213**Ky**575, 281**SW**530, 531 [quot CJ]; 135**Wash**468, 238**P**5, 9 [quotCJ].
702–32 213**Ky**575, 281**SW**530, 531 [quot CJ].
702–33 81**CalA**535, 254**P**310; 84**Colo** 64, 268**P**526; 325 **Ill** 553, 156**NE**828; 213 **Ky**575, 281**SW**530, 531 [quotCJ]; 194 **NC**312, 139**SE**601; 130 **Or**577, 281**P**178; 151**Va**603, 144**SE**613; 135**Wash**468, 238 **P**5, 9 [quotCJ]; **Ont** [1925] 2**DomLR** 849.
702–34 **Ala** 128**S**593; 325 **Ill** 553, 156 **NE**828; 334 **Ill** 211, 165**NE**641; 337 **Ill** 267, 169**NE**168; 213**Ky**575, 281**SW**530, 531 [quotCJ]; **Mo** 289**SW**579; 217**MoA** 587, 272**SW**1056; 99**NJEq**176, 132**A**100; 194**NC**312, 139**SE**601; 198**NC**219, 151 **SE**269; 6**PaDist&Co** 235; **TexCivA** 299 **SW**310; 135**Wash**468, 238**P**5, 9 [quot CJ].
702–34½–New. A husband paying premiums on an insurance policy taken by his wife before marriage in favor of parents is presumed to have intended the policy as a gift. 17**F(2d)**112.
703–35 213**Ky**575, 281**SW**530, 531 [quot CJ]. [a] **Payments presumed advancements.**–**Ala** 130**S**378.
703–36 213**Ky**575, 281**SW**530, 531 [quot CJ].
703–40 194**NC**312, 139**SE**601.
703–41 172**Ark**932, 290**SW**966; 176**Ark** 12, 2**SW(2d)**41; 330 **Ill** 74, 161**NE**97; 337 **Ill** 267, 169**NE**168; 213**Ky**575, 281 **SW**530; **Mo** 32**SW(2d)**605; 194**NC**312, 139**SE**601; 286**Pa**575, 134**A**451; 151**Va** 603, 144**SE**613. But see **Ont** [1925] 2 **DomLR**849 (where presumption is not rebuttable).
703–42 213**Ky**575, 281**SW**530; 194**NC** 312, 139**SE**601.
703–48 199**Cal** 344, 249**P**180; **TexCivA** 28**SW(2d)**205. [c] **If husband's contribution exceeds wife's,** the presumption is he intended gift. 339 **Ill** 400, 171**NE** 504.
703–51 108**WVa**285, 150**SE**744 (presumption prevails that husband intended gift to extent that half of purchase money exceeded her contribution and

that she be vested with undivided half interest).

703-52 See also 116Nebr686, 218NW739.

703-54 But see 197NC274, 148SE229.

703-56½-New. Property taken in the joint names of husband and wife, and paid for by the husband, is presumed to be intended as a gift to the wife on the husband's death. 327 Ill 448, 158 NE706.

704-58 191NC493, 132SE282. But see 330 Ill 548, 162NE191.

704-59 191NC493, 132SE282.

704-60 191NC493, 132SE282.

704-66 337 Ill 267, 169NE168; 6PaDist&Co 235.

704-67 30Hawaii565, 569 [quotCJ]; 217MoA587, 272SW1056.

704-67½-New. Where husband handed wife all his earnings from week to week from which to pay family expenses, the inference is that any surplus still belongs to husband. 126Misc1, 213NYS162.

704-74 34F(2d)970; 102CalA643, 283P860; Ont [1928] 2DomLR311. [a] 202Iowa1356, 212NW116; NJ 129A408. [c] 202Cal 215, 259P947; 81CalA535, 254P310; 83CalA684, 257P171; 202Iowa1356, 212NW116; 252Mass390, 147NE826; Nev 290P1025; 254NY139, 172NE269; TexCivA 20SW(2d)1073 (gift of one-half interest in land); TexCivA 27SW(2d)610; 100Vt51, 134A853. [d] 173Ark1182, 293SW719; 175Ark1, 298SW999; CalA 290P668; 107Conn342, 140A745; 213Ky575, 281SW530; 252Mass390, 147NE826 (gift of deposits in savings bank not established as matter of law); Mo 32SW(2d)605; 51Nev242, 274P2; 102NJL268, 132A247; TexCivA 283SW562; 101WVa739, 133SE621. [e] **Evidence held to show** that husband did not buy property wholly for himself or for speculation. Mo 289SW579. [f] **Prima facie case of advancement** is made where husband purchases land in wife's name and pays consideration. Ala 128S593. [g] **Absolute certitude is not required** to establish donation by husband to wife. 254NY139, 172NE269.

705-75 [b] **Husband's intention** should be determined from his acts, declarations, and conduct at time of alleged gift rather than from his subsequent declarations. 81CalA535, 254P310.

705-75½-New. That husband had access to deposit box containing bonds does not furnish basis for inference that there was not prior delivery of bonds to wife as gift. Nev 290P1025.

705-77 [a] 252Mass390, 147NE826. [b] **Deposit in wife's name** and later arranging so both could make withdrawals justify finding that after death of both fund belonged to estate of wife. 33GaA615, 127SE658.

705-80 51Nev242, 274P2. [c] **Possession of keys to safety deposit box** and payment of rental showed constructive delivery of bonds. 231Ky202, 21SW(2d)254(2dcase).

705-84 330 Ill 548, 162NE191; Mo 289SW579; MoA 30SW(2d)870; NJCh 151A487; 130 Or577, 281P178; 97PaSuper250; 6PaDist&Co 235. [a] 322Mo 1219, 18SW(2d)77. [b] 199Cal 344, 249P180; NJCh 151A487.

705-84½-New. The presumption is not overcome by relatively slight acts, 199Cal 344, 249P180.

705-84½-New. such as payment of taxes, expenses for repairs, and occupancy by family. 199Cal 344, 249P180.

706-86 [a] (1) 223AppDiv186, 228NYS63.

706-91 194NC331, 139SE604.

706-92 35GaA420, 133SE297; MoA 13SW(2d)1076; 194NC312, 139SE601; TexCommnA 12SW(2d)114, 63ALR435; 148Wash31, 267P777.

706-94 194NC312, 139SE601.

706-98 28F(2d)789; 102CalA582, 283P866; 165Ga513, 141SE211; 214Ky461, 283SW442, 443 [citCJ]; 220Ky181, 294SW1052; 307Mo 98, 270SW662; MoA 21SW(2d)200 (may transfer title to note to husband by parol).

706-99 237 IllA190.

706-1 Md 150A286.

707-2 Md 150A286.

707-3 214Ky461, 283SW442, 443 [quot CJ].

707-14 Contra 307Mo 98, 270SW662 (by later statute).

707-15½-New. Parol transfer to a husband of furniture installed in the residence is effective as a parol gift where possession was given to him. 130 Or577, 281P178.

707-15¼-New. A parol gift of real estate is ineffectual, under statute, to pass title. 130 Or577, 281P178.

707-18 243 IllA386.

707-19 12F(2d)652. [b] **Words uttered by husband** held not to constitute gift to wife. Tex 293SW604.

707-22 [a] **Gift is not implied** from management by husband of wife's funds. BC [1930] 4DomLR201.

707-23 169Ga264, 149SE879.

703-31½-New. A deposit made by a wife of her money in a joint bank account may be shown to be a loan to the husband. 8PaDist&Co 727.

708-33 220Ky181, 294SW1052, 1053 [quotCJ]; 12PaDist&Co 639, (presumption of loan). But see 9PaDist&Co 761. [e] **Transfer of checks by wife presumed to be a loan.**-196NC681, 146SE711.

708-34 39GaA310, 147SE147; 81Mont393, 264P115; 81Mont560, 264P679; 148Va779, 139SE495. [b] See also Alta [1928] 3DomLR471.

708-34½-New. Expenditure by wife of husband's property is presumed to be a gift. 100NJEq437, 135A516.

708-35 165Ga513, 141SE211; NJ 129A408.

708-37 180Ark596, 22SW(2d)32. But see 110Conn314, 148A345.

703-41½-New. A deed from a wife to her husband reciting a valuable consideration is prima facie a contract of sale. 165Ga513, 141SE211.

709-54 30Hawaii392, 403 [quotCJ].

710-62 6PaDist&Co 464; 12PaDist&Co639.

710-70 217Ala235, 115S258.

710-73½-New. The burden is on the widow to prove a gift inter vivos to her by husband. 126Me84, 136A459.

710-79½-New. Check book and ledger entries are not admissible as against the wife where she never saw, knew of, or authorized them. 12F(2d)652.

710-81 165Ga513, 141SE211. [b] 12F(2d)652; 169Ga264, 149SE879; 214Ky461, 283SW442; 150Md265, 132A633; 226AppDiv10, 221NYS309. [c] 243 IllA386; 220Ky181, 294SW1052; 126Me84, 136A459; 156Md115, 143A712; NJ 129A408.

711-83 [d] Md 150A286.

711-85 [b] **Circumstances.**-98NJEq274, 130A816.

711-92 220Ky181, 294SW1052.

711-94½-New. Entries in a bank book are insufficient to prove a gift inter vivos by a husband to the wife. 126Me84, 136A459.

711-94¼-New. A husband's reservation of absolute control of bank deposit and withdrawals for his own uses contravene a gift inter vivos to the wife. 126Me84, 136A459.

712-98 MoA 21SW(2d)200.

712-98½-New. The question whether a conveyance by a wife to her husband was a sale or a gift is one of fact for the jury. 165Ga513, 141SE211.

712-7 121Kan520, 247P433, 49ALR433.

712-9 220AppDiv555, 222NYS56.

712-12½-New. Acquittance by wife of husband from further payment for support, executed with full knowledge of the husband's financial condition, is presumably not induced by fraud or coercion. 287Pa24, 134A418.

712-14 42 Ida338, 245P389; Md 150A286; 99NJEq873, 131A904; 135 Okl211, 275P348. [b] 238Mich497, 213NW699. [d] **Evidence held sufficient** to establish grounds for setting aside gift of savings bank book. 99NJEq873, 131A904. [e] **Divorce for wife's adultery** forfeits her interest in realty in their joint names, bought by husband, the adultery being constructive fraud. DC 40F(2d)800.

713-18 83NH547, 145A269. [f] **In Kentucky.**-214Ky633, 283SW952.

714-34½-New. Notice to a wife's assignee of a land contract that it had been assigned to her by her husband pursuant to a property settlement is not notice of infirmity where both assignment and property settlement were regular and valid on their faces. 241Mich416, 217NW42.

714-34½-New. Equity will not set aside valid gift from wife to husband who cannot be compelled to return money or property given. Md 150A286.

714-36 97PaSuper250.

714-38 162Ga413, 134SE76; 167Ga655, 146SE475. [a] 162Ga413, 134SE76.

714-40 167Ga655, 146SE475.

714-41 162Ga413, 134SE76.

714-53 11F(2d)871; 127Misc304, 215NYS767; 129Misc578, 222NYS115.

715-67 Miss 105S640; 116Nebr131, 216NW299; 127Misc304, 215NYS767 (dictum); 9PaDist&Co 723, 724 [citCJ]; 153Tenn250, 283SW71. [b] (2) Danger of disrupting serenity of marital relations held cause for rule. 116Nebr180, 216NW297, 56ALR327. [c] **Wife cannot sue husband's employer** for tort by husband where husband is liable over to employer. 116Nebr180, 216NW297, 56ALR327.

715-74 124Kan216, 217, 257P944 [cit CJ].

716-85½-New. Those who deal with married women do so subject to controlling laws. 97Fla609, 123S694.

716-88 107Conn342, 140A745; 165La169, 115S447. [b] **In Florida.**-89Fla303, 103S833.

716-89 212Ala511, 103S477 (statute forbidding wife to become surety for husband does not violate Fourteenth Amendment); TexCivA 273SW934 (legislature has inherent power to change common-law rule).

716-90 TexCivA 273SW934 (married woman accepting law entitling her to remove disability of coverture is bound on contracts to extent such law prescribed).

718-17 TexCivA 18SW(2d)932.

718-29 But see TexCivA 299SW917.

720-64 298Pa33, 148A37.

721-75 40GaA746, 151SE657.

723-13 92Fla929, 111S252; 250 IllA577; 238Mich189, 213NW163; TexCivA 275SW134; TexCivA 276SW752; TexCivA 28SW(2d)467.

723-19 97Fla551, 121S886(2dcase); 97Fla609, 123S694; 117Nebr342, 220NW587; TexCivA 275SW134; TexCivA 1SW(2d)932.

724-28 [a] **Statutes must be construed as grants** rather than restrictions. Ida 290P404.

724-29 241Mich19, 216NW430.

724-30 163Ga666, 136SE904; 163Ga807, 137SE45; 226Ky750, 11SW(2d)933; 232Ky844, 24SW(2d)912; 84Mont384, 276P432; Nebr 231NW141; 191NC609, 132SE560; NC 153SE597; 20OhA248, 152NE31; 135Wash139, 237P17. See also 2LaA768.

724-31 [a] **In Michigan.**-241Mich338, 216NW913.

725-32 [c] TexCivA 275SW134 (contracts voidable, but not void); TexCivA 28SW(2d)467.

725-33 247Mich267, 225NW511; NJCPl 149A830 (statute of frauds not impliedly repealed).

725-40 43F(2d)985.

725-41 27 OhA107, 160NE865. [c] **In NewYork.**-126Misc567, 214NYS83.

725-43 40F(2d)604.

725-44 165Ga123, 139SE861.

725-45 TexCivA 25SW(2d)689.

725-50 43F(2d)985; 97Fla551, 121S886(2dcase); 42 Ida78, 244P145; 238Mich189, 213NW163.

726-51 97Fla609, 123S694.

726-52 [a] 238Mich189, 213NW163.

726-55 250 IllA577.

727-58 157Miss229, 127S777.

727-59 [a] (3) Notes of married woman, not for necessaries or connected with her separate estate, will not be enforced, though valid where made. TexCivA 28SW(2d)995.

727-61 TexCivA 275SW134.

727-62 TexCivA 275SW134.

729-80 [e] **Contract made in California** to sell lands in Texas. TexCivA 275SW134.

729-81 NJCPl 149A830.

730-22 But see 11LaA629, 124S564(1st case).

731-26½-New. Under Illinois statute neither husband nor wife can recover compensation for labor or services rendered for other. 44F(2d)236.

732-56 242Mich668, 219NW743, 745 [citCJ].

733-70 CalA 291P269; 34GaA111, 128 SE699; 132Misc61, 229NYS567; Tex CivA 276SW752.

733-85 232Ky844, 24SW(2d)912.

733-88 97Fla551, 121S886(2dcase); 250 IllA587; Tenn 3Humphr80; Tex CivA 283SW193; TexCivA 19SW(2d) 127.

734-94 [b] **Note for purchase price.**-10LaA788, 123S795.

734-11 160La433, 107S295. [c] **That deed for which note was given puts title in separate estate is immaterial,** and note does not make married woman executing it personally liable on her separate estate subject to its payment. TexCivA 283SW193.

735-14½-New. Authorization of a court to the execution of a note is unnecessary where the wife is separate in property and was authorized by her husband to contract. 10LaA788, 123S795.

735-24 TexCivA 299SW917.

735-30 CalA 288P819 (holding that wife indorsing note payable to husband is liable as indorser).

736-43 170Ga296, 152SE834; 84Mont 384, 276P432; NC 153SE597; 51SD507, 215NW490.

736-47 198NC219, 151SE269 (makers are jointly and severally liable).

736-59 202 Iowa802, 211NW429.

736-62 262Mass422, 160NE251.

736-65 212Ala614, 103S682 (requested charge that wife not liable if husband received any part of proceeds properly refused); 101CalA719, 282P 427; 232Ky809, 24SW(2d)592.

737-70½-New. A wife signing a note and mortgage with her husband has been held not relieved from personal responsibility because she thought she was signing merely to release dower in mortgaged land where there was no mutual mistake. 171Ark675, 286SW 865.

737-76 98Fla1155, 125S350.

737-79 **Erratum.**-Strike out citation "Bedford v. Burton, 106 U. S. 338, 1 SCt 98, 27 L. ed. 112."

737-89 188Wis205, 205NW819.

738-91 188Wis205, 205NW819.

739-13 MoA 27SW(2d)1036; 188Wis 205, 205NW819.

740-37 163Ga807, 137SE45; 226Ky 381, 11SW(2d)144.

740-38 170La163, 127S587.

740-43 163Ga807, 137SE45; 241Mich 338, 216NW913. But see NJCh 146A 194(2dcase). [c] **Repeal by one statute of section of code forbidding married woman to contract as** surety at date subsequent to time of transaction did not divest married woman of her defense thereunder. 31F(2d)222.

740-45 43F(2d)985; Wis 231NW641 (statutory provision).

741-51 117Nebr34, 219NW798.

741-55 226Ky381, 11SW(2d)144; 247 Mich551, 226NW250 (statement that no undue influence or restraint has been exercised).

741-62 51SD507, 215NW490.

741-66 163Ga807, 137SE45; 38GaA 440, 144SE143(1stcase); 220Ky71, 294 SW800.

741-70 212Ala511, 103S477 (release of wife's debt to husband and another as consideration for becoming surety does not avoid statutory inhibition); 163Ga 807, 137SE45; 170Ga296, 152SE834; 39GaA402, 147SE405; 220Ky71, 294SW 800; 285Pa286, 131A859.

742-71 22AlaA426, 116S412; 165Ga513, 141SE211; 285Pa286, 131A859. But see 22AlaA7, 112S99. [b] **Wife's executing note payable to corporation** of which husband was stockholder does not render note invalid. 40F(2d)604.

742-72 285Pa286, 131A859.

742-80 94CalA473, 271P353; 98CalA 457, 277P185; 203 Iowa372, 212NW 678.

742-83 202 Iowa1085, 209NW293.

742-84 203 Iowa372, 212NW678.

742-85 203 Iowa372, 212NW678; 206 Iowa49, 219NW931; 207 Iowa1060, 224 NW62.

742-85½-New. A wife's agreement to pay for goods furnished her husband is void where without consideration. TexCivA 295SW625.

742-86 [a] **Extension of time on husband's debt** is sufficient consideration for wife's joining in note for its payment. Nebr 231NW141.

742-86½-New. Consideration for a wife signing a note collaterally with her husband must be within express or implied contemplation of the parties. 202 Iowa 1085, 209NW293.

742-86¼-New. Where a wife knows there is an arrangement or agreement pursuant to which the note is given, and that she is signing collaterally, she is held to have intended to sign collaterally with her husband, 202 Iowa1085, 209 NW293.

742-86¼-New. and her knowledge of the terms of the agreement are not necessary to its validity. 202 Iowa1085, 209NW293.

743-89 Alta [1926] 4DomLR844 [1926] 3WestWkly486; NS [1930] 4DomLR 605.

743-95 See also 90PaSuper285.

743-96 39GaA785, 148SE542.

743-98 213Ala237, 104S663.

744-1 39GaA785, 148SE542. [a] 213 Ala237, 104S663.

744-2 214Ala211, 106S851; 219Ala159, 121S534; 38GaA440, 144SE143(1st case).

744-3 [h] **Evidence sufficient to show money borrowed** by wife was applied by lender in part payment of husband's debt. 213Ala237, 104S663. [i] **Where wife purchased goods with others, previously bargained for by husband,** and became actual part owner thereof and having possession, she will be bound by contract. 39GaA785, 148SE542.

744-4 [a] (5) Wife obtaining loan on note and mortgage on her home, for express purpose of aiding husband in his business, held liable thereon as principal. 214Ala211, 106S851.

745-9 [d] **Trust deed signed by married woman** held void as really contract of suretyship. 31F(2d)222.

745-12 [a] 213Ala237, 104S663.

745-13 [a] (1) 213Ala237, 104S663.

745-16½-New. Whether transaction is bona fide loan to wife is a question of fact. 213Ala237, 104S663.

746-21 TexCr 28SW(2d)144.

746-30 41GaA1, 151SE823.

746-31 12PaDist&Co 421.

747-47 TexCr 292SW609.

749-94 [c] **Injunction bond.**-228Ky 615, 15SW(2d)517, 70ALR56.

749-6 87PaSuper605.

749-11 235Ky784, 32SW(2d)340; 156 Tenn463, 2SW(2d)409.

752-54 TexCivA 21SW(2d)341 (title revests in seller).

752-55½-New. , and the proper time for the exercise of her option is usually when legal enforcement is sought. Tex CivA 275SW134.

752-59 97Fla679, 122S107(2dcase); 97Fla904, 122S512.

752-59½-New. Married woman purchaser of stock on which she completed all payments with full knowledge of all facts pursuant to agreement entered into voluntarily and in good faith by the parties cannot recover such payments merely because she was married, although contract voidable and unenforceable in first instance. TexCivA 272 SW1114.

753-72 97Fla551, 121S886(2dcase).

754-77 [a] **In Spanish law** in force in Porto Rico till amended in 1902 by Civ. Code §§ 160, 161 wife could not, "without the permission or power of her husband acquire property for a good or valuable consideration, alienate her property or bind herself, except in the cases and with the limitations established by law." 29PortoRico 909.

754-80 97Fla904, 122S512; 226Ky750, 11SW(2d)933; 29PortoRico 909 (Civ. Code §§ 160, 161); 114Tex535, 273SW 799.

754-82 100CalA49, 279P679.

755-96 See also TexCivA 278SW885.

756-42 But see TexCivA 15SW(2d)672.

757-54 193NC560, 137SE578, 579 [quot CJ].

757-57 TexCivA 283SW903; TexCivA 283SW908.

759-87 TexCivA 283SW908. [a] **Though deed reciting that married woman is living apart from husband** because of his desertion, could be shown to be otherwise than it purports on its face to be, such fact does not affect strangers to deed. TexCivA 283SW903.

761-44 208Cal463, 281P1026, 65ALR 1059.

762-92 7LaA420.

762-97 48 Ida600, 283P1038; 238Mich 189, 213NW163; TexCivA 283SW296.

763-99 [a] **Compliance not necessary when trading with separate property.**-TexCivA 283SW296.

763-18 288Pa52, 135A617.

763-19 288Pa52, 135A617.

763-20 [a] **Decree denied** where petitioner refused to accompany husband ordered to leave home of her mother. 14PaDist&Co 120.

763-23 288Pa52, 135A617.

764-24 10PaDist&Co 62.

764-39 238Mich189, 213NW163.

764-47 [b] **On death of husband** necessity for certificate ceases. Mass 171 NE651.

765-67 [b] **Personal property of wife** employed in business is not liable for husband's debts unless attached or levied upon. Mass 171NE651.

765-69 [a] **Real estate of married woman** is not subject to husband's debts, though neither filed certificate. Mass 171NE651.

765-76 See also TexCivA 283SW296.

766-84½-New. Under statute service of the petition may be had by publication. 90PaSuper410.

767-8 [a] **Husband's petition to set aside decree** is properly dismissed when unsupported by evidence. 90PaSuper 410.

767-23 [b] **In Louisiana.**-12LaA471, 126S447.

768-40 [a] (3) Such contract is not broken by husband's engaging in such business, even if wife aids by voluntary services. Can [1930] 4DomLR1014(2d case).

769-55 238Mich189, 213NW163.

769-56 238Mich189, 213NW163.

769-57 238Mich189, 213NW163.

769-57½-New. Although business is conducted by the husband and creditors are led to believe he alone is liable, his wife is liable for debts where the business is really hers. 238Mich189, 213 NW163.

769-72 [e] **In Nova Scotia.**-NS [1930] 3DomLR350.

770-79 TexCivA 7SW(2d)883.

772-14 224Ky238, 5SW(2d)1070.

773-37 44 Ida643, 258P929.

773-39½-New. A wife is not estopped to deny liability for goods delivered to her husband by the husband's statement that she would make payment. TexCivA 295SW625.

773-46 [a] (1) TexCommnA 290SW 1086. (2) Married woman's deed, void because not acknowledged as required by statute, does not estop her from claiming title. TexCommnA 290SW 1086.

776-87 91Fla89, 107S350; 238Mich 189, 213NW163.

776-89 238Mich189, 213NW163.

776-93½-New. Where a wife consented that her money be used to pay a lien on notes against the homestead, she cannot recover money from the payee. TexCivA 285SW335.

776-94 30F(2d)885; 91Fla89, 107S350.

777-95 10LaA332, 120S659; 238Mich 189, 213NW163.

777-8 TexCommnA 13SW(2d)69; TexCivA 283SW903; TexCivA 283SW908; TexCivA 286SW315.

778-12 239Mich354, 214NW87.

778-14 TexCr 28SW(2d)144.

779-23 [a] **Where evidence discloses no false statement,** or authority to make it, female surety is not estopped. Tex Cr 28SW(2d)144.

779-37 32Ariz370, 259P282, 56ALR903.

784-25 29GaA585, 116SE339; Ill 233A 475 (dictum); 316Mo 31, 292SW434

(dictum); 8PaDist&Co 768; 38BC56, [1927] 1DomLR865. [b] In Saskatchewan.–[1929] 4DomLR677.
785–37 316Mo 31, 292SW434 (dictum); 8PaDist&Co 768.
785–38 8PaDist&Co 768.
786–50 211Ky786, 278SW129; 97Pa Super240.
786–56 TexCommnA 292SW185. But see 165Ga782, 142SE111 [citCJ]. [a] In New Jersey.–Sup 130A207.
787–64 TexCommnA 292SW185, 187 [citCyc]. [c] Forging by wife of husband's name to notes and deed of land is actionable fact without regard to constructional liability. TexCommnA 292 SW185.
787–67 1LaA364.
787–71 29GaA585, 116SE339.
787–74 168Ark836, 271SW705; Ill 233 A475; 216MoA663, 272SW101; 8Pa Dist&Co 768; TexCommnA 290SW526; TexCivA 286SW661. [b] 165Ga782, 142 SE111. [e] In Georgia.–165Ga782, 142 SE111 (operation of automobile not owned by husband).
788–75 38GaA781, 145SE501; 41GaA 120, 152SE278 (joinder of husband as defendant unnecessary); 8PaDist&Co 768.
788–77 NJSup 130A207.
788–85½–New. In some jurisdictions a husband is not liable for his wife's torts except as to his interest in community property. TexCommnA 281SW 1043.
788–88 NJSup 130A207, 208 [citCJ]. [c] (2) Statute provides that husband's separate property cannot be reached for torts of wife, he may be sued alone and their common property may be subjected to judgment recovered. TexCivA 284SW261.
789–1 Vt 130A759.
790–3 TexCivA 286SW661.
790–4 [a] (2) Injury by dog owned by husband but controlled by both. 31 OhA14, 165NE97.
790–6 47 Ida542, 277P554(2dcase); TexCivA 286SW661.
790–11 TexCivA 286SW661.
790–14 311Mo 664, 279SW395; 316Mo 31, 292SW434; TexCr 24SW(2d)830 (claim of husband's guilt does not exonerate wife).
790–15 18F(2d)685 (violation of federal statute); 311Mo 664, 279SW395.
791–21 32Ariz200, 256P1054, 1055 [cit CJ].
791–28 18F(2d)685 (defense of marital coercion abrogated by statute in New York); 316Mo 31, 292SW434; 133 SC238, 130SE641.
791–30 163La952, 113S159.
792–32 163La952, 113S159.
792–33 197 Ind169, 150NE56; 163La 952, 113S159.
792–34 [a] Evidence held insufficient to require submission of question of coercion. 224Ky116, 5SW(2d)884.
792–37 197 Ind169, 150NE56; 200 Ind 496, 163NE596; 89 IndA192, 166NE 25; IndA 173NE235; 163La952, 113S 159; 258Mass410, 155NE448; 311Mo 664, 279SW395; 316Mo 31, 292SW434; OklCr 289P798; 13PaDist&Co 681; 133 SC238, 130SE641; 144SC121, 142SE 236.
792–38 197 Ind169, 150NE56.
792–39 197 Ind169, 150NE56.
792–42 199 Ind653, 160NE41; 206 Iowa622, 220NW118; 311Mo 664, 279 SW395, 400 [quotCJ].
792–43 IndA 173NE235; 311Mo 664, 279SW395, 400 [quotCJ].
792–44 311Mo 664, 279SW395, 400 [quotCJ].
792–44½–New. A wife's property is subject to penalties for maintaining a liquor nuisance by the husband as against presumption of coercion of the husband where, having knowledge, she did nothing to prevent the nuisance. 202 Iowa1217, 211NW721.
792–47 316Mo.31, 292SW434.
792–50 200 Ind496, 163NE596.
792–51 143Va479, 129SE348.
793–58 39QueKB1, [1925] 3DomLR 1055, 44CanCrCas114.
793–59 Iowa 230NW316.
793–60 224Ky116, 5SW(2d)884.
793–65 197 Ind169, 150NE56; 200 Ind 496, 163NE596; 89 IndA192, 166NE25; 163La952, 113S159; 316Mo 31, 292SW 434; NM 292P225(1stcase); 133SC238, 130SE641 (question of wife's guilt being for jury); 144SC121, 142SE236. [b] 197 Ind169, 150NE56. [c] 197 Ind 169, 150NE56. [f] Question whether presumption was rebutted held for jury. 144SC121, 142SE236. [g] Evidence sufficient to rebut presumption.–Ind 166 NE439.
794–66 200 Ind496, 163NE596.
794–67 [b] Sufficiency of evidence.–316 Mo 31, 292SW434.
794–72 163La952, 113S159.
794–73 But see 206 Iowa622, 220NW 118.
794–77 206 Iowa622, 220NW118.
794–82 [b] Evidence held sufficient to show absence of coercion.–89 IndA192, 166NE25.
795–97 95Fla765, 116S726, 117S852; 163La952, 113S159; 144SC121, 142SE 236, 238 [citCJ].
795–99 166Ga758, 144SE301.
795–1 163La952, 113S159.
795–5 160La936, 107S702.
795–8 97Fla551, 121S886(2dcase); 144 Va375, 132SE347, 45ALR738. [c] Protection.–329 Ill 235, 160NE605.
796–10 144Va375, 132SE347, 45ALR 738.
796–21 329 Ill 235, 160NE605.
797–25 329 Ill 235, 160NE605.
800–61 [b] In Illinois.–329 Ill 235, 160 NE605.
801–71 [a] Constitutional protection of married woman's property from husband's debt does not change nature of estate which she may take and hold in real and personal property. 89Fla303, 103S833.
801–72 [a] 154Tenn167, 289SW513.
801–73 114Tex535, 273SW799 (legislature is prohibited from saying that property acquired after marriage in some mode other than prescribed by constitution becomes separate property of wife).
801–75 165Ga123, 139SE861; 124Kan 216, 257P944; 152Tenn648, 280SW408. [b] In Tennessee.–152Tenn648, 280SW 408.
803–93½–New. The legislature may make any laws deemed best to protect a married woman's property. TexCivA 299SW917.
803–93¼–New. In Canada provincial acts affecting the status arising from marriage are ultra vires. Alta [1929] 1 DomLR423.
803–93¼–New. A statute providing that property used by a married woman in a business conducted on her separate account shall be liable to be attached or taken on execution as property of her husband, if she fails to file a prescribed certificate, is constitutional. 30Hawaii 51.
803–93½–New. The Married Women's Property Act is intra vires the province of Manitoba. Man [1929] 3DomLR390.
803–95 TexCivA 295SW625.
803–98 114Tex535, 273SW799 (constitutional specification).
805–22 30Hawaii51.
805–46 But see Fla 130S12.
806–54 114Tex535, 273SW799 (limited by constitution).
806–65 198NC14, 150SE668.
807–71 TexCommnA 276SW643.
807–72 TexCommnA 276SW643.
807–85 79Mont10, 254P875.
808–99 114Tex535, 273SW799.
809–14 [a] Wedding presents from husband to wife can be recovered by her from husband. NJCh 150A764.
810–18 TexCivA 293SW632.
810–25 169La588, 125S627.
810–26 114Tex535, 273SW799.
811–28 286Pa520, 134A402.
811–33½–New. Legacies received by wife and deposited in wife's name in account containing community fund is community fund. 126Miscl, 213NYS162.
813–79 152Tenn648, 280SW408.
814–91 199Cal 344, 249P180.
814–92 199Cal 344, 249P180.
814–94½–New. The fact that a husband expected to occupy property as a domicile in conjugal happiness with his wife to the end of his days is not sufficient ground to avoid the deed. 199Cal 344, 249P180.
814–94¼–New. In such case the evidence is insufficient to sustain a finding that the husband is a tenant in common in ownership of property conveyed to the wife before marriage. 199Cal 344, 249P180.
814–96½–New. Earnings of husband deposited in wife's name is community fund where entire earnings were turned over to wife who stated money in account was to be used to purchase home for both. 126Miscl, 213NYS162 (in absence of evidence that husband intended money to be wife's absolutely).
815–11 208 Iowa336, 223NW381.
815–20 125 Okl 294, 258P262.
817–45 125 Okl 294, 258P262; BC [1925] 3DomLR223.
817–46 125 Okl 294, 258P262; BC [1925] 3DomLR223.
817–47 125 Okl 294, 258P262; BC [1925] 3DomLR223.
818–81 101CalA638, 281P1077.
819–93½–New. In Ontario, where a husband makes a practice of giving his wages to his wife and she purchases furniture out of the money so received, the furniture is the property of the husband unless conveyed to the wife by bill of sale. 62 OntL12, [1928] 2DomLR343.
819–98 TexCivA 30SW(2d)522.
821–31 But see 114Tex535, 273SW799.
821–41 [a] Partnership with husband.–BC [1925] 3DomLR223.
823–54 226Ky713, 11SW(2d)964.
823–56 226Ky713, 11SW(2d)964.
824–70 Alta [1930] 4DomLR506. But see Sask [1930] 1DomLR927.
824–72 5LaA497; Man [1926] 4DomLR 1089.
825–88 37GaA237, 139SE580.
825–89 220MoA102, 278SW806; 98 NJEq274, 130A816; TexCivA 283SW601.
825–90 MoA 283SW461; 77Mont554, 252P377; 134Misc902, 236NYS720; BC [1925] 3DomLR223 (partnership with husband). [d] Statute to be strictly construed.–126Me84, 136A459.
826–91 [a] Where contract for services made before marriage is renewed thereafter and after removal of disability by statute, wife is entitled to recover for whole term of service. 242Mich668, 219NW743.
826–92 126Me84, 136A459.
826–93 126Me84, 136A459, 467 [citCJ].
826–95 77Mont554, 252P377.
827–3 37GaA237, 139SE580 (dictum).
827–4½–New. Wife's earnings deposited in bank in her name constituted community fund. 126Miscl, 213NYS162 (where husband turned over entire earnings to wife who said all money in such account was to be used to purchase home for both).
827–5 126Me84, 136A459, 467 [citCJ].
827–9 133Misc397, 232NYS663.
827–16 See also 220MoA102, 278SW806.
827–17 126Me566, 140A380, 381 [citCJ]; 286Pa114, 133A31.
828–22 Mich 233NW343. [a] Notice of husband's consent need not be given to person for whom services were performed in order to entitle wife to recover therefor where services were not rendered as member of husband's family. 242Mich668, 219NW743.
828–23 242Mich668, 219NW743.
829–32 TexCivA 295SW640.
829–47 TexCivA 25SW(2d)887 (joinder in mortgage).
830–60 See also 238Mich189, 213NW 163.
830–64 221MoA577, 284SW156.
830–66 203 Iowa485, 210NW767; NJ 131A86; 296Pa26, 145A682.
830–68 Mo 275SW936.
830–71 TexCommnA 294SW843.
830–74 43F(2d)497; 99Fla427, 126S 773; 163Ga4, 135SE67; 165Ga194, 140 SE368; 166Ga69, 142SE536; 166Ga887, 144SE655; 169Ga226, 150SE89; 169Ga 465, 150SE591; Ga 155SE473; 204 Iowa 580, 215NW652; Kan 292P798; 171Minn 276, 214NW45; 98NJEq274, 130A816; 100NJEq104, 134A846; 49ND1047, 194 NW702; 55ND184, 212NW848. But see 83CalA18, 256P298. [a] (3) Averring in previous suit that her indorsement on note was for accommodation only and not for loan used in repairing her separate estate estops wife from claiming property as her own. 98NJEq74, 130A 367. (4) Permitting property to remain

in husband's name, though she paid purchase price, and stating that it was husband's property to bolster his credit, estops wife from claiming ownership of property. 98NJEq74, 130A367. [f] **Judgment against husband is lien on husband's apparent interest** in land recorded as joint property, though in fact wife's separate property. CalA 290P 110.

832–85½–New. As to creditors, husband is the owner where he keeps as such and they have no notice. 216Ala170, 113 S15.

832–86 Contra 238Mich189, 213NW163.

832–91 83CalA18, 256P298; Mich 213 NW211; 171Minn276, 214NW45; 105 WVa270, 142SE65. But see Kan 292P 798.

833–1 43F(2d)497; NJ 131A86. [a] **Acceptance by wife of certificate to her stock in joint names of herself and husband,** without her attention being called to insertion of husband's name or its appearing that she entered into compromise, does not estop her or her personal representatives from claiming entire ownership thereto. NJ 131A86.

833–4½–New. Nonfraudulent act of a wife in withholding from the record a deed from the husband of land bought with her money and taken in his name will not estop her from asserting her ownership where she did not know anyone would extend credit to him in reliance on his supposed ownership. 203 Iowa585, 213NW211, 52ALR182.

833–9 330 Ill 548, 162NE191.

835–43 TexCivA 283SW601.

835–44 287Pa304, 135A260; TexCivA 283SW601.

835–46½–New. The burden is on party asserting it to prove estoppel against the wife. 320 Ill 308, 150NE913.

835–51 100WVa671, 131SE469.

835–52 100WVa671, 131SE469.

835–53½–New. It has been held that in an action for materials furnished, the burden is on materialman to show what materials, if any, were purchased in behalf of wife's separate estate, although such estate was commingled with husband's property. 238Mich189, 213NW 163.

835–55 98Vt466, 129A306 (presumption of ownership as between husband and wife in joint possession of personalty is in favor of husband).

835–60 [b] (3) Where from joint earnings portion is placed to wife's credit in bank, it will be presumed to represent her portion of such earnings and be her separate estate. 208Ky702, 271SW1064.

836–63 38GaA422, 144SE125.

837–78½–New. An upholsterer, who did not know the husband and wife until the latter called him to make an estimate for refinishing and repairing furniture, is not chargeable with knowledge of antecedent facts bearing on the actual title to the property, such as separation of husband and wife before he took it. MoA 14SW(2d)658.

837–30 88CalA769, 264P294.

837–36 See also 100WVa671, 131SE469.

838–1 287Pa304, 135A260.

838–7½–New. In California, under statute, property bid in by a wife at a foreclosure sale is presumed to be her separate estate. 101CalA638, 281P1077.

839–15 126Me84, 136A459; 133Misc 397, 232NYS663.

840–42½–New. Parol evidence is admissible to show that chattel bought in name of husband and wife was really bought with wife's money and belonged to wife, although it varies terms of a written sales agreement. BC [1925] 3 DomLR223.

841–67 40GaA782, 151SE535(2dcase); 149Wash99, 270P137. [a] (1) 35F(2d) 943; 181Ark1147, 24SW(2d)862; 74 CalA560, 241P281; CalA 286P439; 320 Ill 308, 150NE913; 100NJEq104, 134A 846; 125 Okl 294, 258P262; TexCivA 274SW281. (6) 81CalA535, 254P310. (11) Chattel purchased in name of husband and wife. BC [1925] 3DomLR223. (12) Stocks and bonds. 92CalA697, 268 P946.

841–76 But see MoA 13SW(2d)555.

841–79 [a] 330 Ill 548, 162NE191. [b] 126Me84, 136A459; TexCivA 283SW601.

842–90½–New. Clear and convincing proof is required to establish husband's claim to an automobile purchased by his wife and operated under a license in her name, in a contest between the husband and the wife's creditors. 100WVa671, 131SE469.

842–99½–New. Where it is shown that property was the wife's separate estate held in trust for her by her husband, the fact that his deed to her recites a consideration of love and affection is of no weight. TexCivA 274SW281.

843–11 Ala 124S284(2dcase); Ala 125S 284(3dcase); MoA 14SW(2d)658; 218 AppDiv411, 218NYS457.

844–20 TexCivA 6SW(2d)430.

845–35 320Mo 341, 7SW(2d)1013. [b] **Effect of deeds from holders of tax deeds.**–Deeds to husband from holders of tax deeds of wife's lands merely effect redemption of land from tax sale and do not render it subject to sale on execution against him. 127Kan321, 273 P439. [c] **Husband cannot hold title against drainage district** having lien for assessments where such title was acquired without wife's consent or in collusion with her. 320Mo 341, 7SW(2d) 1013.

845–44 91Fla565, 108S165.

845–47 98NJEq274, 130A816.

845–52 125 Okl 294, 258P262.

846–72 166La784, 117S829.

846–75 [a] **Wife separating from husband** is entitled to possession as against him under contract giving him management of property in consideration of support for family. 318Mo 935, 2SW (2d)585.

846–82 11F(2d)931.

846–83 48 Ida600, 283P1038.

847–86 329 Ill 235, 160NE605.

847–5 TexCivA 273SW969; TexCommnA 296 SW868. [a] TexCivA 273SW969.

848–23 22AlaA426, 116S412; 117 Okl 92, 244P774; 296Pa26, 145A682.

849–25 238Mich189, 213NW163.

849–30 238Mich189, 213NW163.

850–31 238Mich189, 213NW163.

850–32 238Mich189, 213NW163.

850–32½–New. Power of attorney, authorizing the husband to mortgage his wife's real property, need not be acknowledged and recorded to be effective. 262Mass555, 160NE532.

850–36 117 Okl 92, 244P774.

850–38 170La163, 127S587.

850–43 See also 249Mich190, 228NW 782.

850–49 [a] (3) Telephone conversation in which wife agreed to deed house as security for lumber bill, ordered by husband, though not constituting enforceable contract, may be offered to show wife's knowledge and approval of husband's acts on her behalf. 238Mich189, 213NW163. [b] 206 Iowa469, 220NW49.

851–50 [a] (2) That he signed her name to promissory notes with her express or implied consent through many years. 201 Iowa1094, 206NW143.

851–52 37GaA239, 139SE590.

851–53 37GaA239, 139SE590.

851–59 37GaA239, 139SE590. [a] (1) 100CalA606, 280P711; CalA 292P148; 254Mass486, 150NE326; NJSup 129A 390; 39Wyo 331, 271P217, 69ALR840. (3) 41GaA748, 154SE723(2dcase); 238 Mich189, 213NW163. (5) To purchase furs. 10LaA166, 119S553. (6) To deliver wife's deed. 320Mo 474, 7SW(2d) 691. [b] (1) 201 Iowa561, 207NW610 (contract for exchange of lands); 170La 163, 127S587.

851–61 37GaA239, 139SE590.

851–62 37GaA239, 139SE590; 41GaA 748, 154SE723(2dcase).

852–72½–New. The general rules as to sufficiency apply as to sufficiency of evidence to show change of circumstances relieving a wife of liability. 218Ky391, 291SW367 (evidence held insufficient).

852–73 249Mich190, 228NW782. [a] **Wife can appoint husband agent to receive payments** under land contract. 181Ark979, 28SW(2d)1064.

852–74 206 Iowa469, 220NW49.

852–76 262Mass555, 160NE532; TexCivA 28SW(2d)584; 149Va500, 140SE 674.

852–77 249Mich190, 228NW782 (acquiescence of wife necessary).

853–86 But see 226AppDiv190, 234NYS 432.

853–92 [a] (3) Husband indorsing wife's name on small checks for deposit in her separate account does not authorize indorsing her name to checks for deposit in his account. 296Pa26, 145 A682.

853–96 262Mass555, 160NE532.

853–6½–New. The fact that the wife owned no registered land on executing power of attorney to her husband held not controlling in the wife's suit to cancel mortgages given on registered land subsequently acquired. 262Mass555, 160NE532.

853–6½–New. A husband, acting under power of attorney to mortgage his wife's real estate, may appoint an attorney to obtain a certificate of registration. 262Mass555, 160NE532.

853–10 TexCivA 298SW177.

854–19 170Ga296, 152SE834; 169La 156, 124S677; 170La163, 127S587; 13 LaA620, 127S435.

854–21 330 Ill 548, 162NE191. [b] (2) Where husband purchasing furniture and furnishings for home causes bill of sale to be made to third person without wife's knowledge or consent, wife's title is not impaired. 85CalA204, 259P71.

854–22 170La163, 127S587. [b] **Husband's belief as to his authority** held not to affect mortgagees in wife's cancellation suit. 262Mass555, 160NE532.

855–23 144Miss841, 110S793.

855–24 262Mass555, 160NE532. [a] **Existence of wife's recorded but unregistered power of attorney authorizing husband to mortgage property** held to protect mortgagees of registered land, though second power of attorney, given another, authorizing foreclosure, was registered. 262Mass555, 160NE532.

855–25 39GaA271, 146SE655(2dcase); Alta [1930] 2DomLR57. [b] (2) Wife is liable as undisclosed principal for contract entered into by husband. 267Mass 312, 166NE629.

855–26 218Ky391, 291SW367; 267Mass 312, 166NE629. [a] 114Tex548, 273SW 808. [c] **Changes in management** would not change personal liability of wife as principal, once attached. 218Ky391, 291SW367.

855–27 See also 267Mass312, 166NE 629.

855–29½–New. The purchaser of a wife's property, which she stated belonged to her husband, is not entitled to specific performance on the theory that the husband signed the contract individually and as her agent. 223AppDiv 494, 228NYS609.

855–29½–New. One who knows, or is given reason to believe, in dealing with a husband, that the latter will resort to misrepresentation or concealment in order to procure from his wife the assignment of a mortgage, cannot claim from the assignment alone an ostensible authority in the husband to apply the mortgage to the satisfaction of his own contract, to which the wife is not a party. 177Minn87, 224NW458(2dcase).

856–43 149Miss188, 115S211.

856–44 51ND788, 200NW1016.

856–52 128Kan65, 275P1084. But see 295Pa62, 144A824.

863–61 [b] In Pennsylvania.–14Pa Dist&Co 245.

857–66 95CalA456, 273P50; 41 Ida547, 240P593; 262Mass555, 160NE532; Vt 145A258(2dcase).

857–71 [d] **After revocation of agency** to receive payments, one who paid agent cannot invoke estoppel against wife because she did not answer his letter protesting against revocation. 181Ark979, 28SW(2d)1064.

858–74 215Ala209, 110S306; 95CalA 456, 273P50; 153Miss576, 121S131. [a] 170La163, 127S587.

858–81 41 Ida547, 240P593.

858–86 81CalA659, 254P618.

859–2 181Ark979, 28SW(2d)1064 (holding purchaser paying husband after notice of revocation of agency does so at peril).

859-5 307Mo 462, 271SW370.
860-20 81CalA535, 254P310.
860-23 104Conn169, 132A902; 208 Iowa336, 223NW381; 98NJEq274, 130A 816; 135Misc512, 239NYS49.
862-58 104Conn169, 132A902.
863-69½-New. Where a wife had no connection with her husband's receipt of money for the use and benefit of plaintiff, and the husband did not act as her agent, or have authority to transact business for her, she was not jointly liable with her husband in an action for money had and received. 129 Or32, 275 P913(2dcase).
863-70 238Mich189, 213NW163.
865-9 115Nebr236, 212NW536.
865-11 See also 93Fla258, 112S62.
867-45 83CalA551, 257P119; 42 Ida 240, 245P75; 329 Ill 235, 160NE605; Mass 169NE662 (right to contest legality of attachment sale); 238Mich189, 213 NW163; TexCommnA 2SW(2d)834; TexCivA 283SW601; Wash 290P822. [e] **Validity of statutes.**–TexCivA 283 SW601. [f] **Creditor acquires no title against wife,** regardless of whether she consents, when he knows it is her separate estate. 170Ga296, 152SE834.
868-47½-New. or of failure to comply with statutory provisions relative to the filing of a certificate of doing business on a separate account, 30Hawaii51 (owner of three trucks, using them for profit, held to be doing business within statute).
869-71½-New. Although husband caused lots, of which he was contract vendee, to be deeded to his wife to defraud creditors, their remedy is not to sue wife for debt of husband. 238Mich189, 213NW163.
869-73 127Kan321, 273P439.
870-97½-New. A wife may charge her separate estate for fuel oil purchased for an oil rig constituting her personal earnings and acquired by her efforts alone where the law gives her separate control and management of her earnings. 115Tex1, 274SW120.
870-97½-New. Common-law disabilities not removed by statute are limitations on right of married women to bind their separate estates. Ida 290P404.
871-5 97Fla601, 121S900; 40GaA746, 151SE657.
873-24 114Tex548, 273SW806; Tex CivA 273SW925. [d] **Contract binding land held by entireties.**–Married woman having no separate estate may make no valid contract during coverture to bind or affect land held by her husband by entireties as after acquired estate. 232 Mich579, 206NW508.
874-26 42 Ida78, 244P145.
874-27 97Fla609, 123S694.
874-28½-New. Constitutional provision authorizing a charge on a married woman's separate estate in stated cases does not apply where such property may otherwise be subjected for her debts. 97Fla609, 123S694.
874-28½-New. Such provision does not authorize a married woman to charge as she might do if she were not married. 97Fla609, 123S694.
875-44 21AlaA325, 109S170.
875-49 98Fla238, 123S761; 40GaA746, 151SE657; 10LaA393, 119S894; 238 Mich189, 213NW163; 115Nebr236, 212 NW536; 114Tex548, 273SW806 (through husband as agent); TexCivA 299SW505; TexClvA 3SW(2d)461.
875-51 Ida 290P404; 232Mich486, 205 NW596; 238Mich189, 213NW163; Tex CivA 23SW(2d)865. See also TexCivA 273SW925.
876-54 238Mich189, 213NW163.
876-58 238Mich189, 213NW163; 115 Tex1, 274SW120 (oil for oil rig and machinery).
877-66 115Nebr236, 212NW536; NJCh 146A178.
877-80 48Ida600, 283P1038. [c] **Assumption of preëxisting debts of business purchased** is contract in relation to separate property. 48 Ida600, 283P 1038.
878-85 151Miss163, 117S259.
879-96 TexCivA 295SW625.
880-12 27 OhA107, 160NE865.
881-24 222Ky542, 1SW(2d)966.
882-38 165Ga123, 139SE861; 40GaA 746, 151SE657. [b] **Renewal of void note** does not waive defense. 170Ga185, 152SE215. [c] **Where contract is for benefit of wife's separate estate,** she cannot defend on this ground. 40GaA 746, 151SE657.
882-39 [a] **Wife cannot avoid** liability for husband's debts which she assumed unless she shows that such liability was assumed by her through undue influence of husband. Alta [1927] 2DomLR530.
882-41 165Ga123, 139SE861.
882-44 38GaA389, 144SE41.
883-51 Mass 170NE621.
884-64 170Ga185, 152SE215.
884-66 TexCivA 9SW(2d)470. [b] **Contract to procure purchaser** for separate estate. 21AlaA325, 109S170.
884-72 TexCivA 299SW505.
886-4 165Ga123, 139SE861; 250Mich 34, 229NW519.
886-8 209Ky661, 273SW501.
887-17 36GaA466, 137SE285.
887-19 [b] (1) 34GaA115, 128SE213 (dictum).
888-28 But see 97Fla601, 121S900.
888-38½-New. Vendor's lien notes hypothecated by wife to secure husband's debt did not pass wife's interest in land. TexCivA 271SW272.
888-38½-New. In Texas note executed by married woman as part of purchase money for land does not make her liable personally or subject her separate estate to its payment, even though deed conveying land on its face puts title in her as her separate estate. CivA 283SW 193.
888-40 [c] **Joint note to protect loan made on property held by entireties** is binding on wife. 94PaSuper306.
889-41½-New. Where a joint note is executed by a husband and wife for fertilizers to be used on described lands, part of which is shown to belong to her and part to the husband, the wife is bound only to the extent of the consideration actually received by her in the absence of showing of partnership. 37 GaA73, 138SE916.
889-41½-New. In such case the wife is not bound for any part of the consideration appropriated by her husband. 37GaA73, 138SE916.
889-42 TexCivA 270SW1066.
889-44 42 Ida636, 248P19.
889-46 TexCivA 273SW925.
890-54 164La417, 114S81.
891-69 [d] **Contemporaneous loan to husband** is consideration for wife's signing note secured by husband's mortgage where mortgagor would not have made loan without signature. Iowa 231NW1.
892-88 232Mich486, 205NW596.
892-90 [c] **Intent to bind separate estate by note executed as husband's surety** must appear where note does not relate to separate estate, trade, or business. 117Nebr34, 219NW798.
892-91 [b] **In Idaho.**–Ida 290P404.
892-96 165Ga123, 139SE861; 170Ga 296, 152SE834; 34GaA115, 128SE213 (and no superficial appearance will be permitted to lead court away from inwardness of transaction); 36GaA465, 137SE102; 36GaA466, 137SE285; 40 GaA746, 151SE657; TexCivA 270SW 1066. [c] **Mere fact that wife knows at time of transaction that promise as surety is not binding** will not change rule or render her liable. 34GaA115, 128SE213.
893-98 165Ga123, 139SE861.
893-99 TexCivA 271SW272.
893-3 170La163, 127S587. [c] **In Alabama.**–216Ala428, 113S293.
894-14 See also 36GaA465, 137SE102.
895-25 51SD507, 215NW490.
895-31 232Mich486, 205NW596; 295Pa 88, 146A98(1stcase). [f] (6) Statute is inapplicable to guaranty by partnership of which wife is member, and wife is liable on guaranty to extent of interest in firm. 224Ky238, 5SW(2d)1070.
895-32 Ala 128S790 (holding transaction not intended as security for debt).
896-34 218Ala382, 118S752.
896-35 DC 32F(2d)965.
896-38 [a] (2) Where husband and wife signed jointly note for purchase price of both real and personal property and wife admits that as to personalty she was in partnership with her husband, she cannot be heard to say that as to realty she was surety and not bound because of coverture. 209Ky661, 273SW 501.
897-45 218Ala382, 118S752; 219Ala 159, 121S534.
897-50 87PaSuper605.
897-59 [a] **Burden of proving extension without her consent** rests on wife asserting it. Iowa 231NW1.
897-63½-New. Wife signing as surety notes secured by husband's mortgage is liable to mortgagee notwithstanding assumption of mortgage debt by subsequent grantee. Iowa 231NW1.
897-63½-New. In such case wife is surety for husband not assuming grantee, as regards discharge by requesting creditor to sue. Iowa 231NW1.
898-65 169Ga784, 151SE501; 205 Iowa 203, 217NW857; 10LaA393, 119S894; Wis 230NW705.
898-69 97Fla609, 123S694; NJCh 134 A519; 97PaSuper528; TexCivA 16SW (2d)296. [e] **Constitutional authority to charge separate estate in equity in stated cases** does not take away or add to statutory authority to mortgage it or displace remedy by foreclosure, but affords different remedies where debt is not secured by mortgage. 97Fla609, 123S694 (statute construed as not inconsistent with constitutional provision).
898-70 But see TexCivA 16SW(2d)981.
899-76 TexCivA 270SW1066.
899-77 TexCivA 271SW272.
899-80 28F(2d)740 [certiorari den 278 US655, 49SCt179(11th case), 73L ed565].
899-92½-New. A mortgage of a mere contingent interest of a widow under her first husband's will is not binding. 220Ala319, 125S828.
899-95 219Ky468, 293SW950; 235Ky 831, 32SW(2d)415; NJCh 146A178; NJ Ch 146A358; NJCh 148A733; 192NC45, 133SE195. [a] 215Ky543, 286SW783.
900-98 [a] **Effect of nonjoinder.**–192NC 45, 133SE195.
900-5 NJCh 146A358; NJCh 148A733.
901-27 TexCivA 280SW879.
902-32 97Fla551, 121S886(2dcase).
903-61 97Fla858, 122S217(2dcase).
903-61½-New. Under some statutes a mortgage lien on a separate estate may be enforced without charging the property in equity. 97Fla609, 123S694.
903-67½-New. Statute making a wife's separate estate liable for her debts does not provide for attorney's fees. 97Fla 577, 121S896; 97Fla582, 121S898.
903-67½-New. Where husband conveyed land to wife and himself and they executed deed of trust secured by three notes, two of which were paid, husband's executor and wife were each liable for one half. 198NC219, 151SE269.
904-75½-New. One whose rights arise under a contract with a married woman is without interest to champion the rights of community in attempting to cancel the wife's mortgage to another, since, if she could not validly contract with the mortgagee, neither could she validly contract with plaintiff. 10LaA 393, 119S894.
904-77 28F(2d)740 [certiorari den 278 US655, 49SCt179(11thcase), 73L ed565]; 219Ala159, 121S534; 95Fla889, 116S 863; 101NJEq392, 138A107; 97PaSuper 528; 157SC334, 154SE305; TexCivA 288SW525; Wis 230NW705. [d] **Under New Jersey Uniform Fraudulent Conveyance Act,** wife's mortgage is void as to creditors, but not as to others. 28 F(2d)740 [certiorari den 278US655, 49 SCt179(11thcase), 73L ed565].
904-78 235Mich571, 209NW921; Tex CivA 288SW525.
905-79 31F(2d)222; 212Ala664, 103S 863; 219Ala258, 121S910; Ala 128S790; 161Ga837, 132SE79; 164La417, 114S81; 10LaA332, 120S659; TexCivA 270SW 1066. [c] (6) But see Acts (1923) c 63 p 190, abolishing legal disabilities of women to make contracts, except as therein provided. [e] **Wife taking over husband's business.**–164La417, 114S81. [f] **Mortgagor's wife executing mortgage is not liable on bond** secured by mortgage and executed by husband alone. NJ 150 A335.
906-80 220Ala344, 125S217 (assign-

ment of husband's life policy); **TexCivA** 270SW1066. [b] **Charging fraud by way of inference or conclusion** is not sufficient. 216Ala602, 114S220. [c] **Married woman waiting sixteen years to bring suit** to cancel instruments for husband's fraud held negligent. 216Ala 602, 114S220.

906–81 164La417, 114S81. [c] **Void only in so far** as it secures husband's sole debt. 216Ala632, 114S211. [d] **Burden is on wife** to show that it secures husband's sole debt. 216Ala632, 114S211. [e] **Evidence held not to show** that wife took over husband's business, so as to validate note and mortgage given for his debt. 164La417, 114 S81.

906–83 [a] 164La417, 114S81.

906–84 164La417, 114S81.

906–84½–New. ; and where the mortgagee knows that the mortgage covered the wife's separate estate and secured the debt of the husband, he is not an innocent holder, and the mortgage is void as against him. 164La417, 114S81.

906–89 169Ga784, 151SE501.

906–95½–New. Wife denying interest in debt secured has burden of proving debt is that of husband. 216Ala206, 113S15.

907–2 97Fla41, 119S520. [d] **Statute of frauds.**–Telephone conversation in which wife agreed to deed her equity in house as security for lumber ordered by husband is unenforceable. 238Mich 189, 213NW163.

907–5 [a] (1) 316Mo 674, 291SW109. [c] **Wife joining with husband in mortgage without consideration,** and thereafter paying mortgage is entitled to reimbursement. NJCh 150A783.

907–6 95Fla889, 116S863; **TexCivA** 10 SW(2d)746.

908–15 216Ala632, 114S211; 175Ark1, 298SW999. [b] **Facts held to show** that advances were for joint benefit. 216Ala632, 114S211. [c] **Presumption** is that husband and wife are equally responsible on mortgages executed by them on property owned in entirety. 158Md372, 148A444.

908–16 216Ala632, 114S211. [a] 91 PaSuper127.

908–17 170Ga296, 152SE834.

909–33 [a] **Bank acquiring mortgage** after due date is not innocent purchaser. 213Ala395, 104S791.

909–36 See also 118 Oh564, 162NE35. [a] **Pleading.**–Ala 128S790.

909–39 214Ala681, 108S742, 46ALR 1084; 218Ala382, 118S752; 219Ala258, 121S910; 164La417, 114S81. [b] **Direction of verdict for plaintiff.**–161Ga 837, 132SE79 (not erroneous). [c] **Presumption** is that spouses' deed to husband's creditor and his lease to them recite true nature of agreement, in absence of contrary averment. Ala 128S 790. [d] **Bill held insufficient.**–Ala 128 S790.

909–42 165Ga193, 140SE383; 164La 417, 114S81. [a] **Petition held to state cause of action** in suit to enjoin foreclosure. 170La747, 129S151. [b] **Petition to enjoin foreclosure** held not to present on face case where injunction could issue without bond. 170La747, 129S151.

909–43½–New. Equity requires that to recover land conveyed by wife and husband, wife must return amount of vendor's lien note. **TexCivA** 288SW525.

909–43½–New. Whether note is barred by statute of limitations is immaterial. **TexCivA** 288SW525.

909–43¼–New. Evidence has been held insufficient to warrant cancellation of mortgage for fraudulent representations. 177Ark1171, 9SW(2d)560.

909–44 [a] **Holder of mortgage** invalid because given to secure husband's debts is entitled on cancellation to just charges paid for taxes and redemption from tax sales. 213Ala395, 104S791. [b] **Husband's debts arising from individual transaction** with mortgagee are not proper allowances on mortgage given by wife on separate property to secure amount due under prior mortgage. 213Ala395, 104S791.

909–51 **TexCivA** 288SW525.

909–54 **TexCommnA** 24SW(2d)351.

910–57 **TexCommnA** 24SW(2d)351; **TexCivA** 294SW238, 240 [citCyc].

910–58 [a] **Refusal of wife's tender of debt** discharges lien on her property pledged for husband's debt. **TexCivA** 294SW238.

911–79 235Mich571, 209NW921.

912–89½–New. Under some statutes the deed of a married woman given pursuant to a scheme to pledge her individual property as security for another's debt is void in toto. 162Ga560, 134SE166.

912–91 [b] **Judgment bond securing indebtedness of husband and advancements for benefit of wife's separate estate,** accompanying mortgage upon wife's separate estate, will be sustained to extent of advancements for benefit of separate estate. 91PaSuper127.

912–93 91PaSuper127.

912–3 232Mich486, 205NW596.

913–6 97Fla601, 121S900; 10LaA140, 119S572(2dcase).

913–10 97Fla577, 121S896; 97Fla601, 121S900. See also 97Fla551, 121S886(2dcase); 97Fla609, 123S694.

913–12 97Fla582, 121S898; 97Fla601, 121S900; 98Fla1155, 125S350.

914–28 Mich 233NW341.

914–34 97Fla530, 121S800.

915–50 238Mich189, 213NW163. [a] **Extent of liability.**–238Mich189, 213NW 163.

916–51 238Mich189, 213NW163.

917–73½–New. Joint liability cannot be predicated on fact that wife permitted her separate property, which materials were furnished, to be commingled with husband's property. 238Mich189, 213 NW163.

918–91 But see 238Mich189, 213NW163.

918–97 **TexCivA** 295SW625.

920–6 [d] **Effect of divorce.**–116Nebr 205, 216NW667.

920–18 **TexCivA** 294SW625.

921–28 [a] (5) Where husband operates, in his own name, with wife's means, her plantation and mercantile business as well as his own logging business, wife is liable for supplies furnished to him on faith that such businesses are his. 151Miss163, 117S259.

921–31 151Miss163, 117S259.

923–89 197Wis336, 222NW218.

923–90 Mass 168NE169 (treatment for own personal injuries).

923–97 169Ga762, 151SE377; 34GaA 73, 128SE207.

924–1 34GaA73, 128SE207.

925–28 97Fla551, 121S886(2dcase); 99 Fla1082, 128S425. [e] **If case comes within one of specified cases** in which separate property of married woman may be charged with debts, remedy that is appropriate to such class should be invoked. 97Fla601, 121S900.

925–29 97Fla551, 121S886(2dcase).

925–31 97Fla551, 121S886(2dcase).

926–36 [a] (2) Purchase contract executed by married woman alone may be used as evidence to support decree charging wife's separate estate. 99Fla 1082, 128S425. (3) Married woman's equitable estate in land may be subjected to lien for balance of purchase price by foreclosure. 99Fla1082, 128S425.

928–76½–New. A married woman, abandoned by her husband, can, under certain conditions, convey separate property and bind community estate. **Tex CivA** 299SW917.

929–89 91Fla89, 107S350; 97Fla609, 123S694; **TexCivA** 9SW(2d)470.

930–6 91Fla89, 107S350.

931–11 41F(2d)634; 216Ala564, 114S 135; 21AlaA325, 109S170; 91Fla89, 107 S350; 28Hawaii385; 215Ky364, 285SW 235; 217Ky258, 289SW275; 221Ky7, 297SW702; 222Ky504, 18W(2d)955; 232 Ky602, 24SW(2d)301; 103NJEq167, 142 A645; 152Tenn648, 280SW408 (under statute of 1919); **TexCivA** 278SW885; **TexCivA** 278SW893. [a] (2) **TexCivA** 5SW(2d)831. [b] (1) 91Fla89, 107S 350. (2) 91Fla89, 107S350. [e] **Provision in statute that stated conveyances under powers shall be presumed regular and correct** is held not to modify requirement that husband must join in conveyance. 91Fla89, 107S350. [f] **Wife cannot foreclose purchase-money lien,** where husband did not join conveyance, and she, though living apart at time of deed, failed to go through necessary procedure to secure right to convey separately. **TexCivA** 278SW893.

931–12 99NJEq254, 132A224 (such a conveyance passes only the interest of the wife subject to husband's interest in property); 195NC422, 142SE329. [f] **Statute held remedial, and not as providing changes in prior statute.**–**TexCivA** 278SW893.

931–12½–New. Where wife was suing husband for divorce, nonjoinder of husband held not to establish contract's invalidity. 82NH449, 136A257.

932–16 **TexCivA** 30SW(2d)337.

932–17 215Ky364, 285SW235.

932–30 160La1089, 108S100; 115 Okl 277, 242P1047. [a] (1) 323 Ill 73, 153 NE735. [e] (2) Mo 26SW(2d)598.

932–33 [b] (2) 152Tenn648, 280SW 408.

933–34½–New. A husband's joinder in his wife's deed does not render the deed void although he had previously conveyed the property to her. 168Ga766, 149SE138.

933–36 **TexCivA** 278SW885.

933–37 104Conn97, 132A411.

933–45 28Hawaii385.

933–48 221Ky7, 297SW702.

933–53 221Ky7, 297SW702.

934–56 217Ky192, 289SW262.

934–58 100NJEq528, 135A809; 103 NJL486, 135A811. [a] **Title of grantee is equitable** where husband's name is not mentioned in deed as grantor. 100NJEq528, 135A809; 103NJL486, 135 A811.

934–59½–New. Under some statutes, the consent of the husband is sufficiently shown by the joinder of husband and wife as grantors in conveyance of land owned by them as tenants by the entirety. 28Hawaii385.

934–68 [d] **Conveyance to husband for valuable consideration.**–169Ga264, 149 SE879. [e] **In Philippines.**–50Philippine647.

934–75 Ala 128S790.

935–76 But see 115Tex425, 282SW789.

935–81 40GaA746, 151SE657. [a] (2) Wife may recover back realty conveyed as part of purchase price of land purchased by husband. 168Ga106, 147SE 57. [b] **Invalidity is not dependent upon possession of wife.**–170Ga1, 152SE65. [c] **Sale of property in partial consideration of extinguishment of husband's debt** is void unless property transferred is separable. 41GaA98, 152SE485(2dcase) (relinquishment of right of action held void).

935–88 NJCir 139A435.

936–2 NJCir 139A435.

936–3 NJCir 139A435.

936–8½–New. A wife living separate and without issue may, without joining her husband, convey a ninety-nine year lease irrespective of whether her interest constitutes a fee. NJCir 139A435.

936–16½–New. Performance of contract to convey acknowledged on Sunday cannot be had as against married woman. 100NJEq319, 134A665.

936–18 216Ala431, 113S277; 216Ala 564, 114S135; 213Ky473, 281SW467.

936–19 100NJEq298, 134A742.

936–21 93Fla143, 112S378.

936–23 99NJEq254, 132A224.

937–37 99NJEq254, 132A224.

937–39 TexCivA 19SW(2d)457.

937–40 164Ga96, 137SE833.

938–51 TexCommnA 290SW1086; **Tex CivA** 30SW(2d)812; **TexCivA** 13SW(2d) 386. [j] **In Tennessee.**–152Tenn648, 280 SW408. [k] **Validity of unacknowledged deed** cannot be challenged by strangers to title. 118Tex551, 18SW(2d)1057.

938–52 [c] (3) Under Acts (1919) c 48 and c 126 § 1, husband is not required to join wife in conveyance nor is privy examination required. 152Tenn648, 280 SW408.

938–52½–New. Contract between married woman and another as heirs to divide equally property inherited from ancestor has been held present conveyance of future expectancy and valid. **TexCommnA** 29SW(2d)949.

939–57 209Ky24, 272SW38 (deed void under statute construed contract to convey).

939–65½–New. Joinder by a husband to convey his rights by courtesy does not create title to fee by estoppel against

the husband. Mass 168NE78.
939-71 229Ky726, 17SW(2d)1007.
939-79 100NJEq528, 135A809. [a] **Act held constitutional.**–100NJEq528, 135A 809.
940-85 TexCivA 295SW679.
940-96 TexCivA 19SW(2d)457 (conveyance by husband in which wife did not join).
940-99 164Ga96, 137SE833; Tex CommnA 290SW1086.
940-1 91Fla89, 107S350; TexCommnA 290SW1086; TexCivA 19SW(2d)457. [c] 100NJEq298, 134A742.
941-3 99NJEq254, 132A224. But see 100NJEq298, 134A742.
941-8 See also 90Fla197, 105S814. [a] (3) Where wife and children partitioned land of man believed to be dead by deeds reciting that wife was feme sole, and purchaser of lien notes contracted in reliance thereon, it was held that they were estopped to deny such recitals. Tex CivA 286SW315.
941-10½-New. Where woman conveys undivided real estate in maiden name after securing absolute divorce, she is estopped in action of ejectment brought by her to assert that the decree of divorce is void and the subsequent conveyance did not carry her title in absence of fraud. 90Fla197, 105S814.
942-35½-New. A wife's execution, joined by her husband, of a lease on land which the wife owned separately, shows that she had not relinquished her claim to the land which the husband conveyed without joinder by the wife. TexCivA 19SW(2d)457.
942-35½-New. A husband and a wife, executing a paper incorporating a defective lease in full, ratified it. 230Ky 769, 20SW(2d)1002.
942-37 TexCommnA 290SW1086. [a] 211Ky662, 278SW131. [d] **Where wife elects to avoid for nonjoinder of husband,** she must return consideration. 211Ky662, 278SW131.
942-42 [a] (2) In action to cancel deed by wife to husband as contract by wife to sell separate estate without court order, deed held properly admitted over objection that it recited valuable consideration, that evidence showed there was no order of court, or that it did not show gift. 169Ga264, 149SE879.
943-45½-New. Where a wife is induced by her husband to give him personal property to pay his debt, with connivance of creditor, transfer by the husband to the creditor will be set aside. 156GaA18, 131SE918.
943-52½-New. Strangers to the wife's title cannot question the validity of her deed because not acknowledged as required by statute. TexCommnA 290SW 1086.
943-52½-New. The right to set up the invalidity of a mortgage is personal with the wife. TexCivA 16SW(2d)296.
943-68 [a] **Notice.**–TexCivA 19SW(2d) 457.
944-81 115Tex425, 282SW789; Tex CivA 278SW885. [a] **Assignee of vendor's lien notes** held put on inquiry by form of wife's acknowledgment. Tex CivA 278SW885.
944-92 90Fla711, 106S876; 211Ky662, 278SW131.
945-93 211Ky662, 278SW131.
945-94 211Ky662, 278SW131.
945-95 211Ky662, 278SW131.
945-96 90Fla711, 106S876.
945-5 TexCivA 281SW326.
946-12 See also 98Fla576, 124S24.
947-19 [d] **Husband may sue as wife's next friend** in suit against third persons. 97Fla679, 122S107(2dcase).
947-20 219Ky537, 293SW1070; Tex CivA 283SW296. See also 4LaA669.
947-22½-New. A statute authorizing a married woman to sue "in the same manner" as if she were sole refers both to the extent of rights to be established and to the mode of ascertaining and declaring those rights. Mass 168NE169.
948-32 197NC550, 149SE855; TexCivA 18SW(2d)719.
949-52 96Fla358, 118S215.
950-63 [d] **In Maine.**–124Me391, 130A 233.
950-64½-New. A married woman arrested on an original writ for tort or contract may waive her right of action which the violation of her exemption completes. 124Me391, 130A233.
950-64½-New. Once arrested, right of action for interfering with her liberty is accrued. 124Me391, 130A233.
950-64¼-New. Married woman arrested on mesne process, from which she was exempt, has a right of action for damages. 124Me391, 130A233.
951-72 30Ariz501, 249P70, 71 [citCJ].
951-75 90Fla372, 106S79; 215Ky154, 284SW1042; 239Mich142, 214NW305; NJCir 151A847 (action on judgment of foreign state); 19 OhA302.
951-77 239Mich142, 214NW305.
951-81 TexCivA 28SW(2d)316.
951-82 96Fla358, 118S215; 30 OhA298, 163NE507. But see 244Mich78, 221NW 285.
952-90 124Kan216, 257P944; 152Miss 201, 119S299; TexCivA 48W(2d)296.
953-2 [b] **Wife has no cause of action against husband** for breach of marriage contract in absence of divorce or prayer therefor. TexCommnA 292SW211.
954-14 124Kan216, 257P944; Mass 167 NE638; 99NJEq25, 133A179.
954-15 TexCivA 272SW501.
954-16 215Ky154, 284SW1042. [f] **Petition to cancel deed** of land to husband must allege offer to return consideration. 160Ga309, 127SE655.
954-17 215Ky154, 284SW1042.
954-18 215Ky154, 284SW1042.
954-19 [b] **Assumpsit** will lie. 215Ky 154, 284SW1042.
954-20 215Ky154, 284SW1042.
954-21 215Ky154, 284SW1042. [c] **In Kentucky.**–215Ky154, 284SW1042. [d] **Garnishment proceedings.**–215Ky154, 284SW1042. [e] **No action of ejectment** by married woman against husband. NJCir 133A860.
954-22 215Ky154, 284SW1042.
954-26½-New. Where ejectment is barred, equity will protect her property rights in her separate estate. NJCir 133 A860.
954-31½-New. A deserted wife cannot maintain an action against her husband to recover amounts expended for support from her separate estate. 117Tex 183, 300SW20.
954-32 89 IndA529, 167NE146; 203 Iowa231, 212NW553; 239Mich142, 214 NW305; NJSup 130A207; 99NJEq25, 133A179; 249NY534, 164NE42; 19 OhA 302.
955-35 40F(2d)792; 239Mich142, 214 NW305.
955-36 11F(2d)871.
955-37 203 Iowa231, 212NW553. [b] (2) 203 Iowa231, 212NW553.
955-39 246NY571, 159NE656.
955-40 239Mich142, 214NW305; 240 Mich402, 215NW290; 99NJEq25, 133A 179; 223AppDiv502, 228NYS604; 21 OhA110, 153NE93 [citCJ]. But see 198 NC411, 151SE884. Contra 103Conn583, 131A432, 44ALR785. [b] **Married Woman's Act** does not empower wife to maintain action against husband for personal injuries. 99NJEq25, 133A179.
955-41 19 OhA302.
955-42 40F(2d)792 (where action was begun but not brought to judgment before marriage).
955-47 19 OhA302.
955-48½-New. A wife's action against her husband for negligent operation of an automobile is not constructively fraudulent or otherwise illegitimate. 107Conn86, 139A635.
955-48½-New. Community of interest in a wife's action against her husband for negligence is a consideration affecting their credibility only. 107Conn86, 139A635.
956-51 87Colo 607, 290P285.
956-56½-New. The Alberta Married Woman's Act did not give a married woman a right to sue her husband in tort. Alta [1929] 2DomLR735.
956-56½-New. Under Ontario statute a wife cannot sue her husband for tort except for the protection of her separate estate even if the tort arises out of contract. 61 OntL657, [1928] 2DomLR152.
957-72 246Mich434, 224NW399.
957-74 97Fla679, 122S107(2dcase).
958-78 133Misc556, 232NYS299.
958-83 221MoA715, 285SW524.
959-85 CalA 258P125; 126Me566, 140 A380.
959-86 [a] (1) See also 214Ala412, 108 S233.
960-88 160Ga472, 128SE674 (wife may sue for rents from husband's property where he gave her such rents on leaving her).
960-94 241Mich39, 216NW384.
960-94½-New. Wife held entitled to sue for breach of joint contract. WVa 153 SE248.
961-10½-New. Under some statutes the right of a married woman to sue for torts without joining her husband is not affected by distinction between negligent and willful wrong. 194NC25, 138SE405.
961-10½-New. Joint action cannot be maintained where injury not joint. 12 PaDist&Co 743.
961-12 12PaDist&Co 743. (cannot be permitted to join).
962-19 NJSup 132A500; 284Pa267, 131 A260.
962-20 284Pa267, 131A260.
962-33 [b] (1) TexCivA 26SW(2d)340. (4) Husband can sue for injuries to himself and wife. TexCivA 14SW(2d) 290. (5) Wife is neither necessary nor proper party to action for personal injuries to her. TexCivA 27SW(2d)830.
963-36 284Pa267, 131A260; TexCivA 6SW(2d)180; TexCivA 10SW(2d)426.
963-39 33GaA696, 127SE671; Mich 232 NW744; 114Nebr745, 209NW617; NJ 130A448. [i] **Where wife purchased buns from defendant conducting bakery, and was injured by tack in bun,** wife was entitled to recover for injuries, since contract of sale was made with wife, and warranty ran to her as in case of any purchaser. 133Misc330, 232NYS 300.
965-48 128Me77, 145A740.
966-62 [a] (1) 284Pa267, 131A260.
966-77 180Minn433, 230NW888.
967-81 149Miss56, 115S117, 120 [cit CJ]; 217MoA645, 274SW923.
967-84 Ala 128S143(1stcase); NJSup 135A55; NJSup 135A81; NJSup 149A 39. [e] (5) Wife's services in nursing children may be more valuable than those of ordinary nurse. 41GaA193, 152 SE306. [j] But see TexCivA 299SW301. [k] See also NJSup 132A500. [o] **Damages held not excessive.**–NJ 135A93; NJ Sup 135A81. [p] **Value of housewife's services,** being not ascertainable under ordinary rules, must be assessed in light of sound discretion and common experience of jury. TexCivA 27SW(2d) 830.
968-87 NJSup 135A81; NJSup 142A 435.
968-88 233Ky321, 25SW(2d)722; NJ Sup 135A55; NJSup 135A81; NJSup 149A39. [d] **Doctor's bill rendered to wife** recoverable by husband. 40GaA 553, 150SE435(3dcase). [e] **Award held excessive.**–12LaA562, 126S274.
969-89 But see 249Mich27, 227NW727.
969-91½-New. **Where husband has deserted wife,** he forfeits his right to recover for an injury inflicted upon her, under some statutes. 284Pa267, 131A 260.
969-92 [a] (2) One thousand dollars. NJSup 136A715. (3) Seven thousand dollars. NJSup 136A337.
969-96 155Tenn639, 299SW785, 55ALR 932.
969-99 Mass 168NE169.
969-1 6LaA165.
969-5 NJSup 135A55; NJSup 135A81; NJSup 145A226. [a] **Damages held not excessive.**–MoA 23SW(2d)1087 ($2,000).
970-6 Minn 232NW344 (verdict held not excessive); NJSup 135A81.
970-10 [a] **Conversely,** that wife has right of recovery does not necessarily entitle husband to recover for loss of services. 49RI 146, 141A331.
970-10½-New. **In Ontario** damages recoverable by a husband for injury to wife will be affected by her contributory negligence. Ont [1930] 3DomLR633.
972-44 TexCivA 27SW(2d)263.
973-57 [a] 197NC342, 148SE440. [b] **Money expended by wife out of her personal estate** as proximate result of injury to husband can be recovered by her. 197NC342, 148SE440.
973-58 [d] **In Washington.**–6F(2d)329.

973-62 149Miss823, 116S100, 59ALR 676.
973-64 197NC342, 148SE440.
976-2 CalA 258P125; 90Fla372, 106S79 (Gen. Rev. St. [1920] § 3951); 97Fla551, 121S886(2dcase); 32PortoRico 80 (foreclosure of mortgage).
978-10 47 Ida542, 277P554(2dcase).
978-17½-New. Joint injury to wife's and husband's property. Where as a result of same tort real property of wife and personal property of husband and wife are injured, both may join in one suit. 85PaSuper357.
979-22 12LaA516, 126S537.
980-37½-New. Under married woman's acts where husband and wife are tenants in common husband cannot recover for injury to wife's share. 154Tenn167, 289 SW513.
980-37½-New. A statute giving the wife sole control of separate property is held not to repeal statute permitting husband to sue, alone or jointly, with wife for recovery of wife's separate property. TexCivA 283SW562.
981-40 [b] (3) Wife may bring replevin to recover her separate chattel sold by husband to defendant. 90Fla372, 106S 79.
982-63 219Ky537, 293SW1070.
983-69 TexCivA 294SW699.
983-70 TexCivA 294SW699.
984-78 But see 222MoA38, 282SW81.
985-91 20 OhA248, 152NE31.
985-96 97Fla551, 121S886(2dcase).
985-1 [g] (3) In action on note executed by wife, husband must be joined. TexCivA 19SW(2d)127.
986-9 32Ariz381, 259P397. [d] 10Pa Dist&Co 71.
986-10 248 IllA438 [citCJ].
987-19 53Hun82, 6NYSt62 [aff 111NY 401, 18NE617].
988-28 82CalA356, 255P537; 90PaSuper305.
988-29 See also 38GaA781, 145SE501.
988-33 Ont [1930] 1DomLR758.
988-35 NJSup 130A207.
989-62½-New. In a wife's action for assault and battery, self-defense and threats are no defense where the wife was justifiably provoked by the conduct of defendant. TexCivA 6SW(2d)180.
990-74 TexCivA 273SW934.
990-75 161NJEq392, 138A107.
991-91 221Ky685, 299SW571.
991-3½-New. A statute exempting husband and wife from the bar of the statute does not apply to a cause of action by a wife against her husband which was barred before marriage. 172Ark 647, 291SW90.
991-4 266Mass578, 165NE653.
992-14½-New. A wife is held not guilty of laches in contesting an assignment as void as collateral for her husband's debts. 220Ala344, 125S217.
992-19 222MoA38, 282SW81.
992-22 97Fla551, 121S886(2dcase).
993-34 116Ky474, 76SW329, 25KyL 707.
993-40 178Minn452, 227NW501.
993-52 [b] **Wife is not necessary party plaintiff** in suit by husband for sale of land and accounting, he being owner of interest therein. 215Ky226, 284SW1052.
994-65½-New. Wife is not necessary party in suit against husband for sale of land and accounting brought by owner of interest therein. 215Ky226, 284 SW1052.
994-65½-New. That defendant was the wife of another defendant is insufficient to warrant making her a party in an action for a partnership accounting. 78 CalA284, 248P268.
994-65¼-New. Where a grantor's wife joined in a deed, she was a proper party to a suit for its reformation. 217Ala81, 114S688.
994-71 215Ky181, 284SW1034. [a] **Where part of consideration for land was paid from wife's separate estate** wife is not necessary party defendant in order effectually to foreclose lien. Tex CivA 280SW228.
994-77 [c] **Where wife joined.**-215Ky 292, 284SW1084.
994-82 12LaA269, 125S754.
995-96½-New. In some jurisdictions, defendant may enter a rule on husband to join in wife's suit for injuries, although no objection to nonjoinder of husband is made until after verdict. 284 Pa267, 131A260.
997-36 284Pa267, 131A260.
997-36½-New. But under some statutes defendant may obtain a rule on husband to join in wife's suit for injuries, even after verdict. 284Pa267, 131 A260.
998-42 6LaA392.
998-48½-New. Service of executory process on wife alone is not sufficient in an action based upon a note and mortgage, if the husband is sole party liable on the note, and, legally, the sole mortgagor. 158La361, 104S115.
999-82 263Mass248, 160NE799.
999-82½-New. Husband's bill is held to give equity jurisdiction where wife obtained money from husband by deception and false representations. 150 Md271, 132A627.
999-82½-New. Husband's petition for award of joint household furnishings, showing suit for separation and cross bill had been dismissed, is held not to authorize equitable relief. 15F(2d)731.
1004-68½-New. Petition to vacate judgment is held to show action brought against married woman as if she were single. 93Fla319, 111S630.
1004-68½-New. Where an action brought against a woman as if unmarried, it is not necessary to allege removal of coverture. 93Fla319, 111S630.
1004-71 TexCivA 2SW(2d)467. [e] (2) Petition held not subject to general demurrer because joint maker was married woman. TexCivA 19SW(2d)800.
1004-73 44 Ida283, 256P368.
1005-79½-New. In the absence of a contract that the wife had paid for support, she could not claim reimbursement from her husband. TexCivA 296SW643.
1005-84 TexCivA 23SW(2d)865; Tex CivA 24SW(2d)794.
1006-93 42 Ida78, 244P145.
1007-15 TexCivA 276SW752.
1007-15½-New. Allegation of husband's insolvency is unnecessary in order to bind wife. TexCivA 276SW752.
1007-18 127 Okl 27, 259P556; 92Pa Super348.
1008-25½-New. A declaration, in an action against a husband for legal services rendered his wife, alleging that money was expended for the wife's benefit in connection with her real estate arising from breach of faith on defendant's part, does not state a cause of action. Mass 168NE183(1stcase).
1008-36 TexCivA 299SW520.
1010-65 [c] **Fraud.**-165Ga123, 139SE 861.
1010-71 220Ky71, 294SW800.
1010-72 41GaA1, 151SE823; 220Ky71, 294SW800.
1011-79½-New. In an action for funeral bills, plea by husband that daughter had promised to pay all the bills is held demurrable. 104Conn519, 133A746.
1011-79½-New. Answer alleging note sued on by married woman belonged to community and could be sued for only by husband is insufficient defense. 170 La712, 129S139(1stcase).
1013-33 TexCivA 276SW752.
1014-34 TexCivA 276SW752.
1014-35 TexCivA 276SW752.
1014-45 [c] **Particular plea** held sufficient, and erroneously dismissed. 165Ga 123, 139SE861.
1017-6½-New. Use of title "Mrs." is no part of name but when used with initials of husband raises presumption she is negotiating in own behalf. CalA 290P 146.
1017-6½-New. Check by wife to husband's creditor is presumed paid from her separate account. 170Ga296, 152SE 834.
1017-8 2LaA138; 232Mich486, 205NW 596; 117Nebr342, 220NW587.
1018-12 232Ky809, 24SW(2d)592. [d] **Burden is on wife to prove matters of** release where she signed note as maker with husband. NC 153SE597.
1018-13 NS [1930] 1DomLR1003(2d case).
1019-31 [a] **In action against husband and wife on note signed by latter,** burden was on her to prove amounts of payments made by her in reduction of note. 10LaA11, 119S904.
1019-44 GaA 137SE102; 36GaA466, 137SE285. [c] (7) See also 220Ala75, 124S110. (9) Presumption of hypothecation of policy being shown, burden shifted on bank to show that wife was not surety for debts of insured husband. 220Ala344, 125S217.
1020-46 36GaA466, 137SE285. [a] (3) 36GaA465, 137SE102.
1020-48 36GaA465, 137SE102; 36GaA 466, 137SE285.
1020-49 But see 117Nebr34, 219NW798.
1020-49½-New. In Manitoba the burden of proving undue influence rests on a married woman disputing liability on a guaranty signed by her at her husband's request. Man [1929] 3Dom LR390.
1020-53 [a] **Plaintiff in such case is suing in wife's right** and his position is no stronger than hers. 234Mich347, 208NW453 (suing for fur coat bought by wife in summer time).
1020-54 128Misc17, 217NYS181.
1020-56 232 IllA566 (dictum); 234Mich 347, 208NW453 (suitable wearing apparel).
1020-56½-New. that an article sold was one of the necessaries, 234Mich347, 208NW453.
1020-56½-New. that plaintiff sold it on defendant's credit, 234Mich347, 208NW 453.
1020-59 232 IllA566 (dictum); 128Misc 17, 217NYS181. [a] IndA 165NE338. [b] **Funeral expenses.**-232 IllA566.
1021-62 234Mich347, 208NW453.
1021-63½-New. , and that the articles he furnished were necessaries. 234Mich 347, 208NW453 (fur coat sold to wife in summer time).
1021-65 Contra 127 Okl 27, 259P556.
1021-66½-New. In the absence of anything to the contrary the presumption is that the husband and wife were living together. 34GaA111, 128SE699.
1021-67 34GaA111, 128SE699.
1021-68 34GaA111, 128SE699.
1021-71½-New. Burden of proving that articles supplied are suitable necessaries lies, as a general rule, on one who seeks to hold husband. Sask [1927] 3DomLR156.
1021-77½-New. Undertaker must show expenses of funeral were suitable to husband's station in life in action for funeral expenses of wife. 232 IllA566.
1021-88½-New. Burden is on widow seeking to establish joint tenancy in joint bank account to sustain allegations. 126Me84, 136A459.
1022-98½-New. In an action by a wife to recover damages for unwholesome milk sold by defendant, the fact that the wife paid for the milk did not overcome the presumption of liability on the part of the husband to support the wife as respects the wife's right to recover damages. 133Misc556, 232NYS299.
1022-1 170Ga185, 152SE215. [a] (12) In action by husband's assignee for breach of contract between husband and wife on separation wherein husband agreed to satisfy mortgage given by him on wife's property in consideration of her paying him certain portion of value, evidence that such property was wife's separate property is admissible. 42 Ida338, 245P389.
1022-2 104Conn519, 133A746. [a] (12) In action by wife for injuries from tack in bun purchased by wife, evidence whether husband supplied money with which to purchase buns or whether money belonged to wife is immaterial. 133Misc330, 232NYS300.
1024-30½-New. or that he was not neglecting his duty in the matter of providing necessaries, 234Mich347, 208 NW453.
1024-39 [a] (4) That husband paid some bills charged to wife may be shown. 27 OhA107, 160NE865.
1024-43 TexCivA 22SW(2d)747.
1026-71 85 IndA629, 155NE265.
1026-71½-New. that the injuries suffered caused the wife to miscarry, 117 Okl 60, 245P52.
1026-77½-New. Evidence of sums spent for labor to take his wife's place may be introduced by a plaintiff suing for personal injuries and the loss of his wife's services, where such evidence is not for the purpose of establishing

additional elements of recovery. **40GaA** 138, 149SE85.

1027-6 [a] **In wife's action against husband** to recover on joint note paid by her, where defense was that suit was vindictive, letter regarding husband and his conduct held admissible. 138SC318, 136SE297.

1027-23½-New. Evidence to establish joint tenancy between husband and wife must be by unequivocal and compelling language. 126Me84, 136A459.

1028-28 [a] 216Ala293, 112S903; 220Ala344, 125S217; 34GaA115, 128SE213 (verdict against wife contrary to evidence); 163Ga807, 137SE45; 36GaA466, 137SE285; **TexCivA** 270SW1066. [b] 220Ala75, 124S110; 36GaA465, 137SE102; 158Md372, 148A444.

1028-29 [a] 163Ga807, 137SE45.

1028-30 [a] 212Ala614, 103S682.

1028-31 [a] (2) To show mortgages on wife's separate estate were to secure husband's debts. 213Ala395, 104S791. [b] (1) 232Ky809, 24SW(2d)592. (2) Evidence insufficient to show that mortgages on wife's separate estate were to secure husband's debts. 213Ala395, 104S791.

1028-32½-New. That husband did not have express contract with wife for five thousand dollars a year for legal services rendered her. 72CalA757, 238P143.

1028-36 [a] **NS** [1930] **1DomLR**1003.

1028-38 [b] 42 **Ida**338, 245P389.

1028-38½-New. that wife's contract relative to a disposition of property was procured by her husband's fraud; 42 **Ida**338, 245P389.

1028-40½-New. that wife was induced to give her personal property to husband to pay his debt by scheme of husband and creditor, 35GaA18, 131SE918.

1028-47 [b] **Evidence held insufficient.**-170La163, 127S87.

1028-50 [a] 84Mont384, 276P432; **Tex CivA** 9SW(2d)470.

1028-52 [a] 34Wyo119, 241P1068.

1028-54 [a] 11F(2d)931.

1029-59 [b] **Evidence held sufficient** to justify finding that defendant was liable for services rendered. 126Me566, 140A380.

1029-65½-New. that plaintiff's husband and not she was real party in interest in action for accounting and to have defendant declared trustee of resulting trust; 75Mont66, 241P623.

1029-81 [a] 246Mich324, 224NW611; 90CalA525, 265P1024; **Ky** 13SW(2d)266; 208 **Iowa**336, 223NW381.

1030-13½-New. that wife knew of and ratified transfer of stock to her by her husband; 19F(2d)920. [a] **Evidence sufficient.**-19F(2d)920.

1030-17 [a] 9**LaA**732, 120S256.

1030-21 Conn 151A333. [a] **TexCivA** 276SW752; **TexCivA** 294SW988. [b] **Evidence insufficient.**-234Mich347, 208NW453.

1030-21½-New. Husband's ability to provide for wife. **CalA** 290P468.

1030-29 [a] 124Misc433, 210NYS141; 27 **OhA**107, 160NE865.

1030-33 [a] 21AlaA257, 107S224; 125Misc433, 210NYS141; 27 **OhA**107, 160NE865; 92PaSuper61.

1030-38 [a] 41GaA31, 151SE676.

1031-47 [a] **Ala** 130S378; 88CalA10, 263P269.

1031-57½-New. joint liability of husband and wife on a contract; 327 **Ill** 219, 158NE426.

1031-61½-New. that settlement was made between husband and wife in respect of business in which husband acted as wife's agent; 161Ga978, 133SE512.

1031-61½-New. that a wife held furniture of her husband as bailee under a separation agreement; 76Mont38, 245P257.

1031-61¼-New. that none of wife's money was used in purchase of lots, in suit to foreclose vendor's lien; 173 **Ark**1182, 293SW719.

1031-62½-New. That wife did not own corporate stock standing in husband's name. **Mo** 31SW(2d)28.

1031-72½-New. Wife's testimony that she loaned money to husband and allowed him to retain writing evidencing loan has been held not inherently improbable. 72CalA757, 238P143.

1031-74½-New. The fact that an account for alleged necessities was kept on the tradesman's books in the name of the wife and bills sent her does not establish as matter of law that credit was extended to her rather than her husband, but is strong evidence thereof. 125Misc433, 210NYS141.

1031-74⅓-New. Evidence of price of casket, in action for wife's funeral expenses is held insufficient. 232 **Ill**A566.

1031-74¼-New. Evidence held to show wife's removal from husband was due to his fault in an action against a husband for merchandise bought by his wife. **TexCivA** 294SW988.

1031-74⅕-New. Evidence held sufficient to support finding that mortgagee was guilty of fraud or misrepresentation in having wife sign note and mortgage with husband. 171Ark675, 286SW865.

1031-74⅙-New. Evidence is held insufficient to show deceased's estate is insufficient to pay funeral expenses and thus to charge husband with statutory liability. 104Conn519, 133A746.

1031-74⅐-New. Evidence held to show that purchases from plaintiff by husband and plantation overseer were kept secret from defendant, and that plaintiff knew this was done, and knew they had no authority to make purchases. 9**LaA** 250, 119S459.

1031-74⅛-New. Defendant wife's failure to produce receipts for more than sixty-seven dollars and fifty cents, paid by her on a two hundred and fifty-three dollar note sued on, and plaintiff's positive testimony that no more was paid, has been held to require judgment against her for one hundred and eighty-five dollars and fifty cents, with stipulated interest and attorney's fees. 10 **LaA**11, 119S904.

1031-74⅑-New. Finding of the trial court that the wife had sufficient mental capacity to make a deed or contract at the time of the execution of mortgages by herself and husband on property has been held sustained by the evidence. 156Md208, 144A226.

1031-74 1/10-New. Performance of valuable services on separate property of a married woman is evidence of employment by her, from which obligation to pay may be inferred. 267Mass312, 166NE629.

1031-74 1/11-New. Evidence was sufficient to show "fifty-fifty" agreement as to investment of husband's earnings. **NJ Ch** 143A830.

1031-74 1/12-New. In a suit by a wife against her husband on notes executed five or six years before the suit, defendant, who merely showed that plaintiff had wrongfully taken their minor child outside the state and refused to permit defendant to have it over the end of each week as provided in the agreement, failed to sustain the burden by showing the extent of failure of consideration, where the time of the alleged refusal was not shown and no showing was made of damages. 29 **OhA** 272, 162NE711.

1031-74 1/13-New. Evidence held not to show that the husband supported the wife in a manner consistent with his circumstances. 12**LaA**116, 124S620.

1031-74 1/14-New. That a guaranty signed by a married woman was read over to her and its effect explained by an independent solicitor negatives undue influence by her husband. **Man** [1929] 3**DomLR**390.

1032-93½-New. Where, in a suit against a husband and wife, no evidence warrants a decree against the wife, the action is properly dismissed as to her. 204 **Iowa**771, 212NW733.

1032-94½-New. Where, in an action by a wife to annul a lease of her separate property on the ground that it is a prohibited hypothecation for husband's debt, the pleadings entitle her some other relief a judgment of nonsuit, rather than on the merits for defendant, should be awarded. 158**La**777, 104S712.

1032-1 214Ala561, 108S367. [c] **Ratification for jury.-Ala** 130S391.

1032-2 173Ark1181, 292SW373; **Mass** 167NE308; **MoA** 299SW55.

1033-8 165Ga513, 141SE211; 38GaA 440, 144SE143(1stcase); 12**PaDist&Co** 295.

1033-12 234Mich347, 208NW453; 105 **WVa**126, 141SE629.

1034-21 170Ga296, 152SE834; 192NC 422, 135SE127.

1034-23 232Mich486, 205NW596.

1034-26 See also **TexCivA** 10SW(2d) 746.

1034-28 232Mich486 205NW596.

1034-29 170Ga185, 152SE215; 40GaA 802, 151SE562.

1034-33 See also 126Me566, 140A380.

1034-42½-New. Where defendant's wife testified that they were jointly interested in the transaction in question, the trial court does not err in refusing direction of verdict for her. 247**Mich** 624, 226NW656.

1035-44 [a] (1) 40GaA633, 151SE42. [b] (2) 170Ga296, 152SE834. [c] **CalA** 291P269. [d] (1) 102**NJL**166, 130A555. [e] (1) 163Ga807, 137SE45; 232**Mich** 486, 205NW596.

1035-45 163Ga807, 137SE45.

1035-47 [g] (4) Suit on notes executed by married woman may be defended on ground that notes were given for debt of husband and were without consideration. 39GaA271, 146SE655(2d case). [j] **Action by wife** against creditor of husband. 170Ga296, 152SE834.

1036-49 MoA 27SW(2d)1036.

1036-50 MoA 14SW(2d)658.

1036-51 234Mich347, 208NW453 (on whether defendant had been guilty of neglect of duty in refusing to supply wife with suitable wearing apparel).

1036-52 [e] **Wife's action for services.**-126Me566, 140A380.

1036-62½-New. In an action where a husband was plaintiff and wife defendant, and plaintiff denied payment, even though wife produced receipt, instruction to consider likelihood of defendant's giving it before receipt of money is held proper. 104Conn121, 132A399.

1037-84 Mass 167NE308.

1037-93 [b] **Findings by court construed.**-101Vt147, 141A682.

1038-5 [f] **Husband being sole owner of property** mortgaged to secure bond on which judgment was confessed, wife is not liable thereon. **NJSup** 148A15(2d case).

1039-22 TexCivA 2SW(2d)467.

1039-23 But see **TexCivA** 271SW638.

1040-42 See also **TexCommnA** 286SW 193.

1040-44 [c] **Suit for divorce.**-Decreeing equitable lien on defendant's automobile to secure payment of judgment on note held error. **TexCivA** 20SW(2d) 813.

1041-45½-New. In an action by a husband to set aside a transfer by the wife of property owned jointly, a judgment giving the husband the right of immediate possession should distinctly preserve the right of joint possession of the wife and her transferee as their interests appear. 204 **Iowa**950, 216NW 77.

1041-45⅓-New. Judgment for wife only in action by both spouses for injuries to wife is final as husband's interest is disposed of by necessary implication. **TexCivA** 27SW(2d)830.

1041-45¼-New. Judgment for personal injuries to wife in suit wherein husband joins should dispose of his interest, unless law otherwise provides. **Tex CivA** 27SW(2d)830.

1041-53 Utah 273P319. [b] **Court must incorporate statutory recitals** in some cases. 250Mich34, 229NW519.

1041-53½-New. On the other hand, where there can be no joint liability, a joint judgment is improper, although the wife's separate property is commingled with that of husband. 238 **Mich**189, 213NW163.

1041-55 TexCivA 9SW(2d)70. [d] (2) Judgment held nullity where husband was not made party. 222**MoA**38, 282 SW81.

1041-55½-New. In suit on a note against a husband and wife, an inter-

locutory order dismissing the husband before entry of judgment, under statute, refers only to plaintiff's rights for personal judgment against the husband. TexCivA 19SW(2d)800.

1042-56 TexCivA 299SW952; TexCivA 28SW(2d)199.

1043-62 Ont [1930] 1DomLR758.

1043-64 225Ky746, 9SW(2d)1090 (where wife did not sign notes executed by husband, or was not personally obligated, personal judgment was erroneous).

1043-66 Ida 286P364. [g] **Personal judgment against married woman on** contract which she was not authorized to make, entered as result of connivance between spouses and plaintiff, is void and a nullity wherever it comes in question by person whose rights are violated by it. 33PortoRico 832.

1044-67 83Mont68, 271P695. [c] **Construction.**-115Nebr236, 212NW536.

1044-70 44Ida283, 256P368; TexCivA 3SW(2d)461. [f] **Where married woman purchased furniture without her husband's consent,** giving purchase-money note and chattel mortgage to secure payment, seller was entitled to judgment establishing debt and to foreclosure of chattel mortgage lien, without personal judgment against husband or wife, where furniture was not necessary for family use. TexCivA 13SW(2d)735(1stcase). [g] **Wife, not party to agreement** to reimburse one with whom spouses contracted is not liable for money advanced. CalA 289P242. [h] **Petition must show wife's assumption of notes** for benefit of her separate property or other fact to authorize personal judgment against her. TexCivA 28SW(2d)199.

1045-71 TexCivA 23SW(2d)436. [d] **In Nebraska.**-115Nebr236, 212NW536.

1046-92½-New. A judgment in an action to subject a wife's personal property to judgment for a debt created by the husband for necessaries for the wife and family to which the husband was not a party is subject to attack by motion in arrest of judgment. 222MoA38, 282SW81.

1048-6½-New. In Nova Scotia judgment against wife carrying on business in her own name without filing certificate is not bar to action against husband. NS [1930] 3DomLR350.

1048-12 29F(2d)638.

1050-37½-New. Husband's creditor has no lien against property of wife whom he did not join as party in suit against husband. 103WVa132, 136SE697.

1051-47 Iowa 216NW649.

1051-55 TexCivA 3SW(2d)461. See also 115Nebr236, 212NW536. [c] **After-acquired property.**-115Nebr236, 212NW536.

1054-98 See also 102NJEq239, 140A393.

1055-8 [b] **In Alabama.**-217Ala208, 115S301.

1056-32 [b] **Reversible error.**-77Mont554, 252P377.

1056-37½-New. Whether a business belonged to her and was carried on by her in good faith as her own enterprise. 76CalA511, 245P221.

1059-86 Mass 169NE891.

1059-88 Mass 169NE891; 130Misc59, 223NYS603.

1059-88½-New. A separation agreement not the voluntary act of the wife will be set aside. 130Misc59, 223NYS603.

1059-88½-New. as will a separation agreement providing an inadequate amount for the wife in view of the extent of the husband's property. 130Misc59, 223NYS603.

1059-89 100CalA584, 280P693.

1059-90 Ont [1927] 3DomLR321.

1059-90½-New. Some statutes prohibiting agreements changing the law of descent apply only to antenuptial agreements and not to postseparation agreements. 29Ariz398, 242P337.

1059-90½-New. Provision that a husband will pay his wife a certain sum each month for support is held not void as against public policy. 323Ill323, 154NE146.

1059-90¼-New. An agreement between husband and wife, material provision of which is that wife release all rights to support, is held void as against public policy. 323Ill323, 154NE146.

1059-90½-New. Validity cannot be determined on affidavits but only on careful inquiry and competent proof. 127Misc157, 215NYS325.

1059-90¼-New. In some jurisdictions agreements for alimony are void only if made before or pending divorce proceedings as inducement to procure divorce or not to contest. 8F(2d)490.

1059-90½-New. An agreement made after separation is valid if reasonable and fair to wife. Mo 158SW(2d)912 (not void as against public policy where there is possibility of reconciliation).

1059-90½-New. If separation was merely temporary when agreement was made, agreement is void as tending to prevent reconciliation. Mo 158SW(2d)912.

1059-90½-New. Parties may not bind the court as to payments for accrued alimony. 89CalA86, 264P497.

1059-90½-New. Separation agreement releasing right to statutory allowances including right to year's support is valid. 27OhNPNS865.

1059-94 MoA 268SW(2d)836 (note payable to daughter); 113OhSt228, 148NE585.

1059-97 See also 316Ill569, 147NE440.

1059-98 89CalA86, 264P497.

1059-5½-New. Separation agreement held valid as agreed equivalent of future maintenance of wife, 151Md196, 134A136.

1059-5½-New. and invalid as contract for relinquishment of right and duty of cohabitation. 151Md196, 134A136.

1059-6½-New. A provision in a separation agreement whereby the parties agree not to molest each other or to compel cohabitation does not affect the validity of the contract as being contrary to public policy. 29Ariz398, 242P337.

1059-7 78CalA326, 248P686; 323Ill323, 154NE146; 215Ky299, 284SW1073; 215Ky598, 284SW1113; Mass 169NE891; MoA 274SW530; NJCh 146A592; 137Misc59, 243NYS141; 197NC197, 148SE171(2dcase); 284Pa384, 131A378; 284Pa414, 131A236; 9PaDist&Co681. [a] (7) **Concealment of prior existing marriage.** 165Ga198, 140SE501. [b] 217Ky786, 290SW686; 235Mich330, 209NW140.

1060-8 155Wash52, 283P704.

1060-12 129Misc263, 221NYS249.

1060-13 113OhSt228, 148NE585.

1060-14 215Ky598, 284SW1113; 155Wash52, 283P704. But see 69CalA447, 231P604.

1060-15 59OntL661, [1927] 1DomLR653.

1060-17 215Ky598, 284SW1113.

1060-20 See also 134Misc614, 235NYS617.

1060-21 129Misc263, 221NYS249; 69CalA447, 231P604. [b] (1) 215Ky598, 284SW1113. (3) Agreement giving two thousand six hundred dollars in monthly installments where reference had recommended alimony of one hundred dollars a month for life. 129Misc263, 221NYS249. [c] (6) One dollar paid to wife. 125Misc475, 211NYS450.

1061-22 215Ky598, 284SW1113. [c] **One dollar paid to wife under separation** agreement is sufficient under certain circumstances. 125Misc475, 211NYS450.

1061-23 137Misc59, 243NYS141 (provision held inadequate).

1061-30 See also 224AppDiv168, 230NYS851 (dictum).

1061-32½-New. An agreement whereby wife releases husband's estate from all claims is not within such statute. 125Misc475, 211NYS450.

1061-34 135Okl211, 275P348.

1061-35 99CalA60, 277P898.

1061-41 [a] **Letter from husband to wife's attorney** does not constitute valid agreement as it is not signed by both parties. CalA 288P74. [b] **Promise of husband in letter** could be revoked at any time, and could not be varied by parol. CalA 288P74. [c] **Statutory requirements** as to execution of agreement must be complied with. CalA 288P74.

1061-46½-New. **Offer and acceptance.** An offer of separation agreement is validly accepted so as to be binding where, although she gives no formal notification thereof, she fulfills terms thereof by refraining from instituting threatened suit. 284Pa384, 131A378.

1061-46½-New. Separation under certain circumstances is valid when signed in conformity to statute. 197NC197, 148SE171(2dcase).

1061-47 146Va417, 131SE800. [d] **Evidence held to sustain finding** contract for maintenance was on valuable consideration. CalA 288P1111.

1062-60 83CalA74, 256P595. [a] **Agreement held based on consideration of agreement of wife** to relinquish all rights in husband's property. 146Va417, 131SE800. [b] **Wife's release of rights held valuable consideration for postnuptial agreement** where divorce decree did not extinguish her dower rights. 146Va417, 131SE800.

1062-64 284Pa384, 131A378; 146Va417, 131SE800; 141Wash281, 251P580. [a] **Agreement held not based on consideration that it was in lieu of alimony.**-146Va417, 131SE800.

1062-64½-New. Wife's relinquishment of support held consideration for note by husband to daughter. MoA 268SW(2d)836.

1062-66 83CalA74, 256P595. [b] **Mutual consent to immediate separation** is sufficient consideration. 53ND631, 207NW424.

1063-74½-New. A husband's note to his wife given as part of a property settlement agreement made in contemplation of immediate separation is supported by sufficient consideration. 200Iowa695, 205NW339.

1063-81 134Misc250, 234NYS705.

1063-85 171Ark799, 286SW981; 76Mont38, 245P257; 106TexCr300, 292SW220.

1063-86 [a] **"Further"** construed to require monthly payments in addition to cash settlement. 88CalA748, 264P289.

1064-92½-New. Rule that mere expectancy or change of heirship is not subject to release at common law does not apply to husband or wife's release of their respective claims to dower and distributive share in the property of each other. 113OhSt228, 148NE585.

1064-92½-New. Agreement during divorce suit for distribution of property held by entireties is held not to authorize payment of subsequent default judgment against husband. 153Md44, 137A501.

1064-92½-New. A recital that property rights had been satisfactorily settled held not an agreement that the contract had been performed. 220MoA1266, 290SW85.

1064-96 220Ala372, 125S335 (provision has been held not to include insurance policy); CalA 288P74 (holding agreements almost always provide not only for maintenance, but also settle property rights). But see 316Ill569, 147NE440. [e] **Agreement to forego and quitclaim moneys** heretofore "paid" by wife to husband includes loans made by her to him. 77Colo322, 236P1017. [f] **Husband's agreement to hold wife harmless** from obligations entered into by her on his behalf in reference to notes then outstanding has been held not to apply to note given him to pay his debts, where note not paid prior to agreement. 77Colo322, 236P1017. [f] **It is not necessary to validity of** agreement that property rights or inheritance rights are disposed of. CalA 288P74.

1064-98½-New. Contract of separation, illegal and against public policy in that it relieved husband from duty to support wife, could not be ratified. 316Ill569, 147NE440.

1064-98½-New. Transfer of title to wife's property to husband is not effected by provision in agreement that it constitutes full discharge of all claims of wife. 218AppDiv411, 218NYS457.

1064-98¼-New. Nor is wife deprived of title if husband arbitrarily refuses consent under her agreement not to remove personality claimed by her with certain exceptions without husband's written consent. 218**AppDiv**411, 218 **NYS**457.

1064-98½-New. Wife's covenant not to remove such personalty without his prior written consent implied his reciprocal obligation not arbitrarily to withhold consent. 218**AppDiv**411, 218 **NYS**457.

1064-99½-New. Agreement of wife to release husband's estate from any claims does not relieve husband from liability for support, 125**Misc**475, 211 **NYS**450.

1064-99½-New. nor does it dissolve the marriage. 125**Misc**475, 211**NYS**450.

1064-99¼-New. Motion for alimony and counsel fee cannot be granted during continued existence of separation agreement not breached by husband. 229**AppDiv**728, 241**NYS**440.

1064-3½-New. An agreement as modified has been held to require the wife to furnish support to those children only who might be with her from time to time. 130**Misc**541, 224**NYS**59.

1064-3½-New. Agreement construed as not rendering a wife liable to her husband for the amount the husband was compelled to pay the state for the maintenance of a feeble-minded child. **Mass** 168**NE**163.

1064-11 [a] **Husband is not relieved from payments** because of financial reverses. 137**Misc**8, 244**NYS**265.

1064-14½-New. Annuity payable to wife does not constitute lien on husband's property until reduced to judgment. 146**Va**417, 131**SE**800.

1064-14½-New. A husband may not, under pretext, deprive his wife of that which is provided for her support under an agreement. 134**Misc**590, 236 **NYS**132.

1064-14¼-New. An agreement providing for payments up to a certain amount is not performed by procurement of judgment for that amount. 102 **CalA**166, 282**P**977.

1064-15 **NJCh** 151**A**473.

1064-16 See also **Sask** [1928] 1**DomLR** 1090.

1064-18 130**Misc**541, 224**NYS**59; 133 **Misc**510, 232**NYS**184.

1064-19 83**CalA**74, 256**P**595; 135**Misc** 530, 238**NYS**44.

1064-20 176**Ark**1204, 3**SW(2d)**680; **MoA** 284**SW**186; 95**PaSuper**273. [a] **Intent of parties.**-81**Mont**587, 264**P**667.

1065-22 135**Misc**530, 238**NYS**44.

1065-28 [a] **Where wife, on discontinuance of payments by husband** did not attempt to recover on agreement either before or after divorce, the agreement terminated on last payment. **CalA** 288 **P**74.

1065-35½-New. Breach of covenant against molestation is no defense to an action to enforce payment under agreement. **NJCh** 146**A**592.

1065-41 **NJ** 146**A**431; **NJCh** 146**A**592; **Va** 153**SE**879 (court will not insert such condition in contract); **Alta** [1927] 2**DomLR**248.

1065-43 **Alta** [1928] 1**DomLR**546.

1065-44 94**CalA**647, 271**P**760; **MoA** 15 **SW(2d)**912; 81**Mont**587, 264**P**667; 27 **OhNPNS**65; 38 **OklACR**663. But see 128**Kan**421, 277**P**1015; 144**Va**692, 130 **SE**902.

1066-57 152**Md**53, 136**A**34, 36 [quot CJ].

1066-60 [c] **Whether wife and children forfeited rights under agreement approved by divorce decree** depends not only upon terms of agreement, but upon situation and conduct of parties as indicating their intention. 144**Va**692, 130**SE**902.

1066-60½-New. Question whether postnuptial agreement has been abrogated by reconciliation cannot be raised by subsequent attaching creditor of husband. 144**Va**692, 130**SE**902.

1066-61 95**PaSuper**273.

1067-71 83**CalA**345, 256**P**826; 127 **Misc**157, 215**NYS**325; **NJ** 146**A**431; 134 **Misc**479, 235**NYS**451; 230**AppDiv**99, 243**NYS**414; 284**Pa**414, 131**A**236, 238 [citCJ].

1067-75 130**Misc**712, 225**NYS**55; 131 **Misc**851, 228**NYS**313; 230**AppDiv**791, 244**NYS**652.

1067-80 213**AppDiv**183, 210**NYS**55 (but suit on agreement is election not to rescind for husband's breach and precludes wife, prior to new breach, from applying for alimony pendente lite in divorce suit).

1067-82 141**Wash**281, 251**P**580.

1067-85 **NJSup** 134**A**883.

1067-88 129**Kan**824, 284**P**379.

1068-96 83**CalA**74, 256**P**595.

1068-97½-New. Where no mention is made as to term during which payments are to be made, separation agreement is operative only during husband's lifetime in accordance with apparent understanding of the parties. 125**Misc** 707, 212**NYS**119 (in absence of specific provisions that payments be made during life of wife).

1068-2 220**MoA**1266, 290**SW**85; **NJCh** 145**A**639.

1068-3 **Can** [1925] 3**DomLR**281 (nonperformance by wife).

1068-10½-New. Conditions precedent. Performance by wife is a condition precedent to her right to recover, and, where she has not performed, she cannot plead conduct of husband in which she has acquiesced by knowingly accepting benefits, as excuse for nonperformance. **Can** [1925] 3**DomLR**281.

1069-26 48 **Ida**203, 281**P**377.

1069-27 225**AppDiv**309, 232**NYS**599. [c] **Answers held sufficient.**-**Can** [1925] 3**DomLR**281. [d] **Subsequent oral modification of separation agreement is sufficient defense** to action by wife for expenditures under agreement. 226 **AppDiv**322, 235**NYS**101.

1069-28½-New. Construction of written separation agreement is for court, with aid of circumstances out of which it grew, and subject to jury's finding on conflicting facts. 218**AppDiv**411, 218**NYS**457.

1069-28½-New. Finding amount of property settlement fair is justified. 99 **CalA**60, 277**P**898.

1069-28¼-New. Complaints held sufficient. 136**Misc**13, 242**NYS**65.

1069-28½-New. The court's findings construed as showing that an agreement was not annulled by reconciliation. 100**CalA**584, 280**P**693.

1069-28½-New. It is not necessary for the court to make a finding as to the fairness of a separation agreement, in an action by a wife to recover funds given in trust by her husband for her. 48 **Ida**203, 281**P**377.

1069-28½-New. In husband's action to be declared owner of land cross-petition seeking partition held to entitle defendant to affirmative relief. **Mo** 30 **SW(2d)**49.

1069-37½-New. Offset or counterclaim may be allowed husband for wife's failure to support minor child pursuant to agreement, **TexCivA** 6**SW(2d)**175.

1069-37½-New. and the reasonable cost of such support may be deducted by the husband from installments due the wife where he educates and maintains the child at his wife's consent. **TexCivA** 6**SW(2d)**175.

1069-37¼-New. Husband is not entitled to recover allowance for support of child. **TexCommnA** 14**SW(2d)**805.

1069-37½-New. Money due under a separation agreement, necessary for the wife's support, cannot be diminished by any recovery by the husband on the wife's note purchased by the husband. 134**Misc**590, 236**NYS**132.

1069-39 But see **NJCh** 145**A**639 (attorney's fees allowed).

1069-41 [a] **In suit by divorced husband** to cancel instruments given as property settlements, husband has no concern with payee attorney's lien on instruments for services rendered wife. 141**Wash**281, 251**P**580.

1069-44 [a] **Estoppel of husband to complain of fraud shown by bill.**-**Va** 153**SE**879.

1069-51 146**Va**417, 131**SE**800.

1070-55 **Va** 153**SE**879.

1070-59½-New. In absence of evidence of incompetency of wife a property settlement will not be set aside on that ground. 235**Mich**330, 209**NW**140.

1070-68 323 **Ill** 323, 154**NE**146.

1070-69 323 **Ill** 323, 154**NE**146. [a] **Tender held sufficient** where wife alleged readiness and willingness to repay money received. 323 **Ill** 323, 154 **NE**146.

1070-70 69**CalA**447, 231**P**604 (wife not required to offer to restore street assessments which under contract husband was required to pay where accounting was necessary to ascertain amount).

1070-71 69**CalA**447, 231**P**604 (husband wrongfully depriving wife of power to restore street assessments paid by him under separation contract cannot be heard to object that she has not done so).

1070-73 129**Misc**263, 221**NYS**249.

1070-77 130**Misc**541, 224**NYS**59.

1071-86½-New. In Texas wife cannot maintain suit to compel husband to support her when no divorce proceeding is pending. **TexCommnA** 17**SW (2d)**789.

1071-91 211**Ky**799, 278**SW**121.

1071-93 28**Hawaii**581; 165**Ga**198, 140 **SE**501. [e] **Right flows from marital rights,** acquired by wife on marriage. 211**Ky**799, 278**SW**121.

1071-96 **NJCh** 151**A**606; **Ont** [1930] 1**DomLR**53 (court has no power to order wife to leave husband's roof).

1071-98 **Mo** 29**SW(2d)**99.

1072-5½-New. In an action for separate maintenance and support and not for divorce, the right of the wife does not rest on statute. 207 **Iowa**121, 222 **NW**351.

1072-6 **Md** 150**A**451; **Mo** 29**SW(2d)**99 (mere apprehension as to failure to support).

1072-8 205 **Iowa**1081, 216**NW**619.

1072-9 232 **IllA**517; 174**Minn**159, 218 **NW**559, 561 [citCJ].

1072-12 152**Md**632, 137**A**354; 237**Mich** 112, 211**NW**74.

1072-13 206 **Iowa**1203, 219**NW**416; 154**Md**11, 139**A**573; 150**Md**119, 132**A** 585.

1072-14 217**Ala**96, 114**S**906; 165**Ga** 305, 140**SE**872; **Mass** 170**NE**384(1st case).

1072-16 217**Ala**96, 114**S**906; 166**Ga** 519, 143**SE**770; **Ind** 172**NE**124; 237 **Mich**112, 211**NW**74; **Mo** 28**SW(2d)**98; **MoA** 148**W(2d)**486; **NJCh** 145**A**639; 193**NC**492, 137**SE**426; 145**Wash**542, 260 **P**1076; **Alta** [1929] 4**DomLR**997.

1073-18 **NJCh** 150**A**832 (separation to go to paramour).

1073-20½-New. There must exist both abandonment and failure or refusal to support. **MoA** 297**SW**978.

1073-24 152**Md**632, 137**A**354.

1073-24½-New. Mere failure of husband to support wife is not abandonment within the statute. **NJCh** 145**A** 639.

1073-30 [a] **In Ontario** wife's action cannot succeed unless under law of England she would be entitled to restoration of conjugal rights, and written demand therefor is condition precedent to right to alimony. [1930] 1**DomLR** 53.

1073-31 **NJCh** 145**A**639. [a] (7) Coolness and indifference. 152**Md**632, 137 **A**354. (8) Wife is entitled to recover, though husband claimed that he left because of constant quarreling and nagging. **NJCh** 145**A**733(2dcase). (9) By single act of extreme cruelty where provoked by behavior of other party. **NJ** 144**A**583.

1074-39 163**Ga**18, 135**SE**402; 333 **Ill** 478, 165**NE**231; 231**Ky**80, 21**SW(2d)** 122; 145**Wash**542, 260**P**1076.

1074-40 216**Ala**569, 114**S**185; **MoA** 297**SW**978.

1074-41 191**NC**740, 133**SE**9. See also 103**NJEq**214, 142**A**898.

1074-49 191**NC**740, 133**SE**9.

1074-50 191**NC**740, 133**SE**9.

1074-54 255**Mass**19, 150**NE**879.

1074-55 **MoA** 297**SW**978.

1074-56½-New. Failure to comply with promises made to wife before or after marriage with respect to property rights does not justify wife in leaving so as to

constitute constructive abandonment by husband. 191NC740, 133SE9.

1074-56½-New. Court should not, through medium of allowing alimony, encourage wife's abandonment of husband. 103NJEq214, 142A898.

1074-57 SC 155SE838.

1074-60½-New. Husband's duty to maintain wife is not limited to home he has provided, where she is forced to leave it because of his misconduct. 215 Ala259, 110S140.

1075-62 333 Ill 478, 165NE231; NJCh 145A639.

1075-63 215Ala259, 110S140; 216Ala 569, 114S185.

1075-66 193NC492, 137SE426.

1075-69 201 Iowa810, 208NW324.

1075-70 215Ala259, 110S140.

1075-71 201 Iowa810, 208NW324; 255 Mass19, 150NE879; NJCh 150A832; Man [1928] 2DomLR776. [a] (4) Husband's domineering, arbitrary, unsympathetic, unkind, stubborn, uncommunicative, and parsimonious conduct endangering wife's life is sufficient. 201 Iowa810, 208NW324. [b] (4) Unreasonable attitude of husband toward wife for seven years before separation. 255 Mass19, 150NE879.

1075-77 240NY274, 148NE520 (not cruelty and inhuman treatment).

1075-77½-New. Husband's adultery after separation is held immaterial on issue. 236 IllA505.

1075-77½-New. That husband is financially embarrassed is not ground for separate maintenance. 206 Iowa1203, 219NW416.

1075-79 47 Ida135, 273P1.

1075-80 162Ga734, 134SE767.

1076-82 40 Ida751, 236P863.

1076-92 205 Iowa1081, 216NW619.

1076-93 6PaDist&Co 523.

1076-95 But see 200 Iowa1193, 206NW 262.

1076-96 40 Ida751, 236P863; 230App Div494, 245NYS287.

1076-98½-New. Award of separate maintenance in a divorce action is not erroneous merely because conditions do not authorize divorce. 47 Ida135, 273P1.

1076-99 [a] **Mental capacity of wife** held pertinent on issue of husband's liability. 232 IllA517.

1076-1 232 IllA517. [c] 152Miss201, 119S299; MoA 297SW978.

1077-2 333 Ill 478, 165NE231.

1077-5 NJCh 146A592.

1077-9 MoA 31SW(2d)277 (hiring detective to discover cause of abandonment).

1077-10½-New. Where a wife's cruelty, while unpleasant, is not sufficient to render further cohabitation impossible, the wife is entitled to support. Alta [1928] 1DomLR249.

1077-14½-New. In a bill by a wife for maintenance, in which the husband filed a counterclaim for divorce based on the ground of desertion, it was incumbent on the wife to have manifested repentance for her unjustified abandonment of her husband and her malicious and outrageous charges of moral depravity against him, where her prior petition for divorce, based on alleged cruelty, was dismissed, showing exoneration of the husband. 103NJEq214, 142A898.

1077-14½-New. Where the court adjudicated, in complainant's former suit for divorce from bed and board on the ground of cruelty, that the wife had failed to substantiate allegations of the petition, it was the duty of the wife to return to live with the husband, since she must live with the husband, unless she can show reasons valid in law relieving her from her duty to him. 103 NJEq214, 142A898.

1077-15½-New. Where a wife, after dismissal of a petition for divorce on the ground of cruelty, did not attempt reconciliation, and did not avail herself of her husband's offer to take her back as a wife, but instituted suit for maintenance, based on the same charges of cruelty, grievously slandering her husband, the presumption that a spouse who commences a suit for divorce does not want to resume cohabitation was not overcome, but showed that the wife was not ready, willing, and desirous of living with her husband. 103NJEq214, 142A898.

1077-16 162Ga734, 134SE767; 240 IllA 193; NJCh 151A606; Ont [1928] 4 DomLR793.

1077-17 [a] **Condonation not shown.**–Mass 170NE384(1stcase).

1077-22 See also 103NJEq214, 142A 898.

1077-22½-New. The court may consider the conduct of a wife toward her husband since her abandonment, for the purpose of determining the bona fides of her professed readiness and willingness to resume cohabitation with him. 103NJEq214, 142A898.

1077-22½-New. The court, in estimating the sincerity of a wife's alleged endeavor to effect reconciliation with her husband, may consider intent, design, and purpose of the wife's activity. 103 NJEq214, 142A898.

1077-23 232 IllA517; 333 Ill 478, 165 NE231. See also NJ 146A189.

1077-24 NJ 148A615.

1078-31 6PaDist&Co 359. See also BC [1925] 3DomLR872.

1078-32 99NJEq106, 132A674.

1078-33 99NJEq106, 132A674.

1078-35 99NJEq106, 132A674.

1078-37½-New. Agreements have been construed as referring only to temporary alimony and attorney's fees. 161 Ga867, 132SE85.

1078-37½-New. The receipt of money under such agreements does not constitute as representation on the part of plaintiff that the suit for permanent alimony would be abandoned. 161Ga867, 132SE85.

1078-41 80CalA363, 252P656; 163Ga 377, 136SE149; 231Ky80, 21SW(2d) 122.

1078-42 163Ga377, 136SE149.

1078-43 See also 33Ariz367, 265P87, 61 ALR1264.

1078-45½-New. 99NJEq106, 132A674.

1078-46 NJCh 151A606.

1079-47 216Ala569, 114S185; 217Ala 96, 114S906; 28Hawaii581; 205 Iowa 1081, 216NW619; Iowa 229NW855; 150Md119, 132A585; 152Miss201, 119S 299; 114 Okl 279, 246P599; 145Wash 542, 260P1076.

1079-48 28Hawaii581.

1080-58 Mo 29SW(2d)99; NJCh 145 A639.

1080-59 163Ga377, 136SE149; 123Kan 142, 254P334; NJCh 145A639.

1081-73½-New. **It is not a bar to suit for alimony or separate maintenance** that a judgment in her prior suit refusing divorce carried with it a refusal of the alimony therein sought, 163Ga377, 136SE149.

1081-73½-New. where wife is living apart from husband and has custody of child of the marriage. 163Ga377, 136 SE149.

1081-74 Ind 172NE124.

1081-84 Ida 289P86; Ind 172NE 124; 99NJEq106, 132A674.

1081-85 220Ala482, 125S612; Ida 289 P86; 99NJEq106, 132A674.

1081-89 220Ala482, 125S612. [a] Wife's action for support is against property, and court in which complaint is filed has jurisdiction throughout state. Ind 172NE124.

1081-91 [a] **If property of husband is subjected to jurisdiction** support may be compelled in state where neither party resides. 111Conn124, 149A246.

1081-93 220Ala482, 125S612.

1081-94 220Ala482, 125S612.

1081-96 220Ala482, 125S612.

1081-97 [a] **Property must be brought within control of court.**–26 OhA222, 159 NE856.

1081-98 But see 131 Okl 95, 267P621.

1081-1½-New. A court has jurisdiction to award alimony, although neither husband nor wife is domiciled in state and there was no actual service on husband where husband's property was attached. 214Ky389, 283SW397.

1082-5 131 Okl 95, 267P621, 622 [quot CJ].

1082-7 214Ala321, 107S827.

1082-9 99NJEq106, 132A674.

1082-10 [a] (4) Husband's domicile is that of wife in suit for alimony and attorney's fees. 212Ala496, 103S558.

1082-12 131 Okl 95, 267P621, 622 [quot CJ].

1082-16 80CalA363, 252P656.

1082-19½-New. Where a cause of action for divorce is the basis of an action for separate maintenance, the action is not barred unless a divorce on the ground alleged would be denied under the statute. 80CalA363, 252P656.

1082-23 48 Ida722, 285P678 (fraudulent grantee).

1082-25½-New. Where parties other than husband claimed property sought to be set apart to wife, they may be made parties defendant for purpose of settling ownership of the property. 123 Kan142, 254P334.

1083-40 212Ala496, 103S558; Ga 155 SE521; 191NC740, 133SE9; 193NC492, 137SE426; 197NC197, 148SE171(2d case).

1083-41 212Ala496, 103S558; 220Ala 482, 125S612; 160Ga200, 127SE860; Ga 155SE521; 197NC197, 148SE171(2d case). [a] **Allowance for services in attempting to enforce alimony decree** is proper. NJCh 151A740.

1083-45 160Ga200, 127SE860.

1084-47 212Ala496, 103S558 (holding that circuit court's allowance pendente lite was in lieu of temporary allowance by probate judge in prosecution for abandonment); 170Ga340, 153SE9.

1084-48 217Ala258, 115S300; 160Ga 200, 127SE860.

1084-52 217Ala258, 115S300; NJCh 151A606 (application denied in view of settlement agreement after prior decree); 191NC740, 133SE9.

1084-54 193NC492, 137SE426.

1084-55 193NC492, 137SE426.

1084-58 Ga 155SE521 (temporary alimony awarded to afford wife means of defending plea to jurisdiction as one of the issues). [a] **In North Caroline.**–191NC740, 133SE9.

1084-59 But see 170Ga905, 154SE352 (2d case).

1084-62 217Ala258, 115S300.

1084-64 103NJEq174, 142A644.

1085-84½-New. Separation agreement involving question of fact is not considered by court. 160Ga200, 127SE860.

1085-99 160Ga200, 127SE860.

1085-3 148Md682, 130A325.

1085-4 220Ala482, 125S612; 160Ga200, 127SE860. [c] 163Ga18, 135SE402. [1] **$100 per year.**–215Ala259, 110S140.

1086-5 [c] **$1,500.**–214Ky389, 283SW 397; 235Ky498, 31SW(2d)889 (excessive by $500).

1086-10 See also 160Ga200, 127SE860.

1086-11 [a] 214Ala65, 106S397; 217 Ala96, 114S906; 164Ga115, 137SE827; 165Ga305, 140SE872; 166Ga519, 143SE 770; 170Ga329, 152SE828; 145Wash 542, 260P1076. [b] **Plaintiff's pleading held insufficient.**–191NC740, 133SE9.

1086-13 164Ga115, 137SE827. [a] See also 164Ga115, 137SE827.

1086-14 28Hawaii581. [b] **To sustain general allegation of marriage according to Chinese custom and rites** further appropriate allegations of what such rites and customs consisted of and also that they included mutual assent must be made. 28Hawaii581. [c] **Allegations held not inconsistent.**–166Ga153, 142SE 684.

1086-15 [a] 214Ala65, 106S397; 145 Wash542, 260P1076.

1086-16 214Ala321, 323, 107S827 [cit CJ]; 145Wash542, 260P1076.

1086-17 [a] 214Ala321, 107S827; 152 Md632, 137A354. [c] (i) 152Md632, 137 A354. (4) Although allegations of bill for absolute divorce were sufficient to support decree for divorce, with incidental alimony, they are insufficient to support decree for separate maintenance without divorce. 214Ala321, 107S827.

1086-20½-New. Allegation under which wife, living apart from husband, seeks custody of child, constitutes different cause of action than in suit for separate maintenance, and should be separately pleaded. 99NJEq106, 132A 674.

1086-20½-New. Facts showing good cause for divorce need not be alleged. 165Ga305, 140SE872.

1086-23 [a] **Bill held sufficient to show** parties were residents of county. 214 Ala65, 106S397.

1087-30½-New. A petition for permanent alimony based on a separation of the parties without any suit for divorce and for temporary alimony and attorney's fees, alleging in general terms the existence of the marital relation and the husband's ability to support, may be amended so as to allege a common-law marriage and specifically to describe the social and financial standing of the parties. 161Ga867, 132SE85.

1087-30¾-New. An amendment to such petition, alleging that the marital relation existed by reason of a common-law marriage by agreement made after the husband had repudiated a prior ceremonial marriage entered into while he was under disability and while a suit by him to annul such ceremonial marriage was pending in another state, does not allege a different cause of action from that set up in the original petition, 161Ga867, 132SE85.

1087-30¼-New. An amendment to such petition so as specifically to describe the social and financial standing of the parties and to pray for alimony in a lump sum does not state a different cause of action from that set up in the original petition. 161Ga867, 132SE85.

1087-30⅕-New. Bill may be amended before final decree so as to aver jurisdictional fact of residence. 241 IllA166.

1087-32½-New. An answer setting up that in a husband's action for divorce the wife made personal appearance, and not setting forth recitations of pleadings, is insufficient to plead estoppel. 32 OhA202, 167NE690.

1087-33 [a] **Allowance of alimony** in divorce action is bar to subsequent suit by wife for maintenance. 74CalA101, 239P383.

1087-38 104WVa254, 139SE754. [a] **Wife may thereupon file amended pleading** asking for similar relief. 104WVa 254, 139SE754.

1087-43 [b] (3) Evidence of inability to support not in issue is inadmissible. 172Minn250, 215NW181.

1087-46½-New. Proof sufficient for granting separate maintenance, without allegations in bill, does not warrant relief. 214Ala321, 107S827.

1087-48 262Mass209, 159NE495; 100NJEq68, 135A73. See also 103NJEq 214, 142A898.

1087-49 236 IllA505.

1087-52½-New. Wife has burden of proving husband's net profits. 74CalA 646, 241P581.

1087-53 [a] **Evidence held inadmissible.**-172Minn250, 215NW181.

1087-55 See also 160Ga497, 128SE66.

1088-63 236 IllA505; 201 Iowa864, 208 NW377; 51Nev62, 268P771. [a] (1) 163 Ga23, 135SE427; 165Ga314, 140SE868; 201 Iowa810, 208NW324; 123Kan142, 254P334; Md 150A271; MoA 31SW(2d) 277; 140 Okl 1, 282P361; 125 Or53, 263 P911. (3) 123Kan142, 254P334; 229Ky 351, 17SW(2d)248; Alta [1929] 4Dom LR997. (11) 154Md11, 139A573. (13) 123Kan142, 254P334. (20) In suit for alimony, evidence held sufficient to justify divorce. 148Md682, 130A325. (21) That wife was not living apart from husband for justifiable cause. 262Mass 209, 159NE495. (22) To justify wife's refusal to return on request. NJ 146A 189. (23) Sustain decree ordering conveyance of property to wife in lieu of uncollectable alimony. 335 Ill 517, 167 NE792. (24) To show refusal to support without justification. NJ 146A189. [b] (1) DC 33F(2d)369; 232 IllA517; 236 IllA505; 174Minn159, 218NW559; Mo 29SW(2d)99. (3) MoA 297SW978. (6) 236 IllA505. (9) 206 Iowa1203, 219NW 416; Iowa 228NW30; 154Md11, 139A573; 237Mich112, 211NW74; 100NJEq68, 135 A73. (10) 75CalA614, 243P24; Iowa 228NW30. (16) That wife deserted husband. 148Md682, 130A325. (17) Other evidence insufficient. 215Ala259, 110S 140; 99NJEq899, 133A406. (18) To justify adjudication of adultery by wife. NJCh 146A57. (19) To establish wife's refusal to permit exercise of marital rights or that husband made effort to secure wife's return. NJCh 145A733(2d case).

1088-63½-New. In some jurisdictions evidence must be clear and convincing and must be corroborated. 100NJEq 68, 135A73.

1088-65 231Ky80, 21SW(2d)122 (evidence, not sufficient to justify divorce, does not prevent recovery of alimony for support); Md 152A230." [a] In Iowa.-201 Iowa810, 208NW324. [b] **Standard and degree of proof required is same as** if divorce were asked when separate maintenance is asked on ground of cruelty. Iowa 228NW30. [c] **But evidence that would entitle wife to divorce** a mensa et thoro adequately supports alimony suit. Md 150A451.

1088-67 But see 148Md682, 130A325; NJ 144A583. [a] **Corroboration required by statute need be slight** where nature of proceeding is such as to exclude idea of collusion. Md 150A271.

1088-69½-New. Party charging adultery must establish charge by satisfactory evidence leaving no doubt. 99NJ Eq899, 133A406.

1089-75 160Ga231, 127SE743 (whether wife has forfeited right to alimony by misconduct is for jury).

1089-77 160Ga497, 128SE66 (sufficient).

1089-78 165Ga314, 140SE868.

1089-79 160Ga497, 128SE66 (instruction not misleading); 163Ga23, 135SE 427.

1089-80 161Ga350, 130SE685.

1089-82 206Cal 706, 276P100.

1089-84½-New. Court need only state conclusions with reasons in determining issues of fact. 148Md682, 130A325.

1089-85½-New. Sufficient and adequate support for the wife is a question of fact. 145Wash542, 260P1076.

1089-85¼-New. Whether the parties were living separate and apart is an issue of fact under a complaint alleging removal of the husband after service of summons. 145Wash542, 260P 1076.

1089-85¼-New. Court may examine sufficiency of support without considering provision made for maintenance. Mo 29SW(2d)99.

1089-86 165Ga305, 140SE872; Ida 289 P86.

1089-97 140 Okl 1, 282P361.

1089-98 But see 161Ga867, 132SE85.

1089-99 Ida 289P86.

1089-6½-New. The complaint in an action for separate maintenance without an allegation of necessity has been held sufficient to sustain an award in view of defendant's pleadings. 80CalA363, 252P 656.

1089-6¼-New. The trial court, by denying divorce to defendant on his cross-complaint in his wife's action for separate maintenance, was thereby relieved of the necessity or duty of determining whether the personal property was community or the separate estate of the husband, even if such issue was presented by application for general relief in the cross complaint. 206Cal 706, 276P100.

1089-6¼-New. A provision of a judgment following the language of a stipulation is not void for uncertainty. 89 CalA86, 264P497.

1090-10 See also 97CalA99, 274P1012.

1090-16 74CalA646, 241P581; NJ 146 A330; 140 Okl 1, 282P361; Alta [1929] 4DomLR997.

1090-21 152Md632, 137A354.

1090-28 215Ala259, 110S140; 165Ga 305, 140SE872.

1090-29 74CalA646, 241P581; 214Ky 633, 283SW952.

1090-30 Md 150A451.

1090-31 NJ 146A330.

1090-34 216Ala569, 114S185.

1090-35 93PaSuper21.

1090-41 165Ga305, 140SE872.

1091-50 [l] (2) Where husband's income is $115 per month. 97PaSuper 193. [mm] **$425 per month.**-235Ky498, 31SW(2d)889 (excessive by $125).

1091-51 [f] 47 Ida135, 273P1; 140 Okl 1, 282P361. [g] 74CalA646, 241P581; 201 Iowa810, 208NW324. [n] 229Ky351, 17SW(2d)248. [w] 97PaSuper576 (husband earning $600 per month). [ss] **$1,050 per annum.**-152Md632, 137A354. [tt] **$35.00 per month.**-192NC825, 135 SE350. [uu] **$20 per week** where husband's income is over $5,000 and he has resources of $30,000. 154Md11, 139A 573; 102NJEq337, 141A585. [vv] **$35 per month.**-231Ky80, 21SW(2d)122 (wife and child).

1091-53 40 Ida751, 236P863.

1091-53½-New. Personal judgment cannot be procured against a husband as the proceeding is in rem. IndA 168 NE492(1stcase).

1091-54 69CalA784, 232P725 (provision as to advancing funds to jailor for maintenance as required in commitments on execution in civil cases does not apply to contempt proceedings); 85Colo 364, 276P674; 91Fla82, 107S251; 194NC673, 140SE440.

1092-56 69CalA784, 232P725 (absence of testimony at time order of commitment was issued as to ability to pay immaterial, where no request made and no denial of allegations of affidavit). [b] **Provision as to discharge of debtors** committed under judgment in civil action does not apply to contempt proceedings. 69CalA784, 232P725.

1092-81 238Mich555, 213NW719.

1092-82 238Mich555, 213NW719.

1092-82½-New. In action against wife for divorce court is without power to grant her divorce against her desire on her cross petition for separate maintenance. Iowa 229NW855.

1092-83 217Ala96, 114S906.

1092-84 137 Okl 12, 277P943. [b] (2) Award of child to wife residing outside state as against resident husband held not precluded by statutes. 99NJEq106, 132A674.

1093-86 217Ala96, 114S906.

1093-91½-New. An allowance may be made for the support of an adopted child, custody of which is awarded to the wife. 125 Or53, 263P911.

1093-91⅕-New. Probate court has jurisdiction to enter decree restraining removal of child regardless of validity of divorce in another state. Mass 171NE 464.

1093-91¼-New. Probate court's exercise of prohibition of removal of child was properly incident to duty of securing care, maintenance and education. Mass 171NE464.

1093-92 But see 137 Okl 12, 277P943. [a] **Court may not terminate husband's inchoate interest in wife's land** on evidence not justifying divorce, though misconduct justifies wife in living apart from him. 174Minn159, 218NW559.

1093-96 102CalA775, 283P842.

1093-3 MoA 318W(2d)277.

1093-9 80CalA363, 252P656; 89CalA 86, 264P497; Ida 289P86. [a] **In California.**-80CalA363, 252P656.

1093-13 123Kan142, 254P334. [a] **Amount set apart not excessive.**-123Kan 142, 254P334.

1093-15½-New. Inquiry and determination of ownership of land alleged by wife to be owned by husband and claimed by other parties as devisees under a will is a mere incident of action for alimony and not a contest of the will. 123Kan142, 254P334.

1093-22 33Ariz279, 264P100; 111Conn 124, 149A246; 178Minn531, 227NW895. See also 116Nebr820, 219NW239. [a] **Motions to subject community property to lien do not ipso facto constitute sequestration.** CalA 289P169.

1094-30½-New. Husband should be given opportunity to pay without sale and to file bond assuring future payments. 111Conn124, 149A246.

1094-33 166Ga519, 143SE770; 34 OhA 89, 170NE181. [b] (2) Georgia Civ. Code (1910) § 2955 is operative only on conveyances by husband made during pendency of libel for divorce and does not apply in independent action for alimony. 161Ga350, 130SE685. [c] **Where wife had returned to husband,** condoning offenses, husband's deed conveying property to defeat alimony cannot be canceled after his death. 162Ga 734, 134SE767.

1094-39½-New. In a proper case the court may order a fraudulent transferee to make periodical payments for maintenance of the wife and her child. 292 Pa564, 141A493.

1094-39½-New. Under some circumstances a wife may attack as fraudulent a mortgage on her husband's property. 299Pa51, 149A87.

1095-49 166Ga519, 143SE770; 131 Okl

95, 267P621; TexCivA 9SW(2d)378. See also 206Cal706, 276P100. But see TexCivA 22SW(2d)549. [a] **Order appointing receiver** does not ipso facto constitute sequestration, independent of actual or attempted possession. CalA 289P169.

1095-56 215Ala259, 110S140.

1095-59 206Iowa1075, 221NW837.

1095-61 But see 220Ala177, 124S214; 206Iowa1075, 221NW837.

1095-63 218Ala519, 119S210; 220Ala482, 125S612; 47Ida135, 273P1; NJCh 151A606. [a] **Decree for alimony unexcepted to** cannot be revised within judge's discretion. 170Ga457, 153SE182(2dcase). [b] **Approval of settlement agreement made after decree** does not prevent court from requiring husband to make additional payment. NJCh 151A606.

1095-64 218Ala519, 119S210; 33Ariz279, 264P100; 74CalA646, 241P581; 200Iowa1193, 206NW262 (refusal of increase held proper where wife inherited large property after original decree); 97PaSuper424 (order to maintain common home).

1095-68 240IllA193.

1095-72 40Ida751, 236P863; 292Pa564, 141A493; 94PaSuper545.

1095-73 94PaSuper545.

1095-74 94PaSuper545.

1095-77 10PaDist&Co373.

1095-77½-New. , or generally, to meet changed condition of the parties. 217Ky723, 290SW708.

1096-80 170Ga457, 153SE182(2dcase).

1096-81 94PaSuper386 (petition properly refused).

1096-88½-New. A husband's motion to vacate a verdict and judgment for permanent alimony in a lump sum is properly deemed dismissed where he filed no demurrer or answer and failed to appear at the trial. 161Ga867, 132SE85.

1096-88⅓-New. A decree will not be revoked for false testimony or for want of proper presentation of the case, 256Mass99, 152NE75.

1096-88¼-New. nor on the ground that the husband had no opportunity to show that wife was not living apart on justifiable grounds. 256Mass99, 152NE75.

1096-88½-New. Reduction of a certain amount per month is proper where there has been a corresponding diminution of the petitioner's income. 89PaSuper216.

1096-88¼-New. Upon such application the court need not review the merits of the original order. 89PaSuper216.

1096-88½-New. Evidence of the husband's financial inability to comply with the decree held insufficient to warrant relief therefrom. 220Ala177, 124S214.

1096-94 Ida289P86; 150Md119, 132A585; 99NJEq486, 133A529.

1096-99 150Md119, 132A585; 137Okl148, 278P388. See also, 99NJEq486, 133A529.

1096-1½-New. 150Md119, 132A585.

1096-4½-New. A wife may devise property set apart for her in fee by a separation decree. 124Kan642, 261P838.

1096-4¼-New. In an action for separate maintenance, it was unnecessary to make specific objection to the jurisdiction of the court to make an order directing the husband's employer to pay the wife certain sum, since such order was beyond the court's jurisdiction and could be collaterally attacked. 97CalA99, 274P1012.

1096-4½-New. A decree rendered against a wife living apart from her husband in a previous suit for separate maintenance is res judicata of her right to alimony pendente lite in the husband's suit for divorce, where no change in the situation of the parties appears. 152Miss454, 120S179.

1096-4⅙-New. Date of entry of order fixes time from which payments are to accrue. 97PaSuper453.

1097-16½-New. Special allowance to master for services in proceedings to reduce alimony held authorized. NJCh 151A740.

1097-20 220Ala482, 125S612; 160Ga586, 128SE788 (counsel fees allowable by judge as expense of litigation); 154Md11, 139A573; 102NJEq337, 141A585; 125Or53, 263P911; 8PaDist&Co316, 317 [citCJ]; 9PaDist&Co301. [b] (5) 102NJEq337, 141A585.

1097-27½-New. In suit for permanent alimony in which divorce is not sought, court may hear and grant application for counsel fees, made after verdict. 160Ga586, 128SE788.

1097-27⅓-New. Where counsel fees have been allowed in a previous trial of the case, it is not error to refuse application for continuance made upon the ground that defendant was entitled to three days' notice of application for attorney's fees. 160Ga586, 128SE788.

1097-28 [a] **Stay of appeal** by husband from judgment for alimony and costs will not ordinarily be granted pending payment by him of amounts awarded. Sask [1930] 2DomLR792.

1097-31 80CalA363, 252P656; 165Ga305, 140SE872; 136Wash696, 240P1119. [b] (1) 165Ga305, 140SE872. [c] Unless clearly against weight of evidence findings will not be disturbed. 114Okl279, 246P599.

1097-32 74CalA646, 241P581; 165Ga305, 140SE872; 140Okl1, 282P361; Alta [1929] 4DomLR997.

1097-34 89PaSuper216.

1097-35 255Mass19, 150NE879.

1097-38 220Ala482, 125S612.

1097-42½-New. Intermediate orders have been held not reviewable on appeal from a judgment of separation. 227AppDiv1, 236NYS544.

1097-43 136Wash696, 240P1119.

1098-54 148Md682, 130A325. [a] **Temporary alimony and attorney's fees** are judgment independent of final judgment in action for separate maintenance and are enforceable. CalA 289P169.

1098-55 148Md682, 130A325.

1098-70 [a] **Construction of statute** authorizing attachment against property of absent husband. 14PaDist&Co122.

1099-72 99Fla1275, 128S814.

1099-73 171Ark620, 286SW871, 48ALR1189.

1099-74 [a] **Purpose of statute** is to secure proper support for wife rather than to punish husband. 156Tenn599, 4SW(2d)351.

1099-75 [b] **Not class legislation.-Or** 292P98.

1099-76 171Ark620, 286SW871, 48ALR1189; 150SC452, 148SE474; 106WVa1, 144SE570.

1099-79 [c] (3) Proceeding under statute is of quasi-criminal nature only—a fortiori it is quasi-civil. 92PaSuper94.

1099-80 99Fla1275, 128S814.

1099-82 [a] **Statute held not to violate constitutional provision against retroactive laws.**-105TexCr1, 285SW323.

1099-84 [a] (5) Law repealing statute held to repeal amendment thereto. MoA 274SW89.

1099-86 171Ark620, 286SW871, 48ALR1189. [b] (1) 125Misc637, 210NYS598 (proceeding held special proceeding of criminal nature).

1099-86½-New. However, notice or demand are not essential as basis for prosecution for offense. 236IllA14.

1100-90 173Ark4, 291SW808; 194NC378, 139SE697; 103TexCr221, 280SW789; 109TexCr241, 3SW(2d)1111. [a] (4) Under statute "willful" means "without just cause, excuse, or justification." 194NC378, 139SE697. [b] **Failure of husband to comply with conditions imposed by wife for her maintenance** does not render husband guilty of willful failure to provide. 22AlaA115, 113S321.

1100-92 173Ark4, 291SW808.

1101-93 173Ark4, 291SW808.

1101-98½-New. Man cannot designate parent's home as his, and, under circumstances showing treatment unendurable to wife, compel her to live there with him. 105TexCr1, 285SW323.

1101-2 99Fla1275, 128S814.

1101-5 22AlaA115, 113S321.

1101-6 [a] See also Iowa228NW353. [b] **Fact not constituting good cause.**-Iowa228NW353.

1101-7 173Ark4, 291SW808; 194NC378, 139SE697; 95PaSuper510.

1101-9 95PaSuper510 (only reasonable cause).

1101-10 135SC412, 133SE824, 825 [cit Cyc].

1102-13½-New. acts of sexual intercourse with other men before marriage, 154Miss621, 122S769.

1102-21 194NC378, 139SE697. [d] **In North Carolina.**-194NC378, 139SE697. [e] **Time of nonsupport.**-156Tenn599, 4SW(2d)351.

1102-22 22AlaA115, 113S321; 109TexCr237, 4SW(2d)62. [b] **Law does not require husband to contribute to wife's** support beyond his ability. 22AlaA115, 113S321. [c] **Support includes food, shelter, fuel, clothes,** and medical and dental services, if necessary. 239Mich590, 214NW950.

1102-23½-New. Failure to support must be willful. 103TexCr221, 280SW789.

1102-29 100CalA435, 280P151.

1102-34 103TexCr135, 280SW584; 109TexCr81, 3SW(2d)98.

1103-35 109TexCr241, 3SW(2d)1111.

1103-38 Iowa228NW353.

1103-40 125Misc637, 210NYS598.

1103-41½-New. A wife is not destitute where she has an estate of her own. 200Iowa772, 205NW325.

1103-44 99Fla1275, 128S814; MoA299SW829; 112TexCr325, 16SW(2d)826.

1103-45 109TexCr237, 4SW(2d)62.

1104-56½-New. Misconduct of wife before marriage does not constitute a defense. 159Tenn6, 15SW(2d)744.

1104-56⅓-New. That parties are living in the same house does not deprive the court of power to make an order for support. 91PaSuper586.

1104-56¼-New. , or that minor differences existed between them. 236IllA14.

1104-68 124Kan529, 261P559, 561 [quot CJ].

1105-75 124Kan529, 261P559.

1105-79 125Misc637, 210NYS598. [a] **Separation agreement tending to facilitate divorce** is no bar to proceedings. 92PaSuper94.

1105-81 125Misc637, 210NYS598.

1105-84 But see 88PaSuper37.

1105-86 See also 266Mass80, 165NE29.

1105-88 22AlaA115, 113S321.

1106-6½-New. Decree of dismissal of municipal court of one county is bar to similar proceedings in another county where status of parties has not changed. 12PaDist&Co307.

1106-8 93PaSuper282; 10PaDist&Co263.

1106-9 266Mass80, 165NE29.

1106-11 156Tenn599, 4SW(2d)351. [b] **Temporary residence sufficient.**-156Tenn599, 4SW(2d)351.

1106-13 [b] **Arraignment in juvenile court** (1) is jurisdictional in some jurisdictions, and without it husband cannot be prosecuted in criminal court. 156Tenn599, 4SW(2d)351. (2) Where defendant has been once arraigned and indictment has failed, it is not necessary that he be again arraigned before juvenile court in order to issue second indictment at same term of criminal court. 156Tenn599, 4SW(2d)351.

1106-14 125Misc637, 210NYS598; 12PaDist&Co578 (exclusive).

1106-18 [a] **Statutory provision** that offense is committed in any county where wife makes complaint is valid. 21AlaA627, 111S195.

1106-19 TexCr23SW(2d)729.

1107-22 [a] **In Alabama.**-21AlaA129, 106S872.

1107-24 21AlaA627, 111S195.

1107-28 236IllA14; 10PaDist&Co263.

1107-39 236IllA14. [a] (1) MoA274SW89.

1108-49 197NC668, 150SE197 (willful abandonment); 104TexCr389, 283SW804. But see 112TexCr325, 16SW(2d)826.

1108-55 197NE668, 150SE197.

1108-64½-New. An information must charge that the offense was willfully

committed. 103TexCr221, 280SW789.
1108–73 22AlaA115, 113S321.
1108–74 201 Iowa4, 206NW584.
1109–76 201 Iowa4, 206NW584.
1109–78 22AlaA115, 113S321; 103TexCr135, 280SW584.
1109–79 80CalA410, 251P940; 97Fla332, 120S762.
1109–81 MoA 274SW89; MoA 299SW829.
1109–83 109TexCr237, 4SW(2d)62.
1109–85 [b] **In South Carolina.**–150SC452, 148SE474.
1109–90 107TexCr233, 296SW540. [a] (4) 100CalA435, 280P151 (after information was filed against him); 96PaSuper288 (statements made by husband to wife). (25) Other evidence held admissible. 123Kan62, 254P317; 239Mich590, 214NW950; 105TexCr1, 285SW323.
1110–92 123Kan62, 254P317. [a] (24) Other evidence held admissible. 22AlaA115, 113S321; 123Kan62, 254P317; 106TexCr121, 290SW1099. (25) Evidence of acts of sexual intercourse of wife with other men before marriage. 154Miss621, 122S769.
1110–94 23AlaA211, 123S99(1stcase); 112TexCr179, 15SW(2d)641.
1110–97 [a] 171Ark620, 286SW871, 48ALR1189; 172Ark398, 288SW926; 100CalA435, 280P151 (willful neglect to provide necessaries); 110Conn348, 148A385; 236IllA14; 123Kan62, 254P317; OklCr 287P1064(1stcase); OklCr 280P1111(1stcase); 156Tenn599, 4SW(2d)351; 103TexCr121, 280SW579; 104TexCr389, 283SW804; 148Wash627, 269P798. [b] (1) 22AlaA115, 113S321; MoA 274SW521; 99TexCr582, 271SW618; 109TexCr81, 3SW(2d)98; 109TexCr241, 3SW(2d)1111; 109TexCr237, 4SW(2d)62; 112TexCr179, 15SW(2d)641; 112TexCr325, 16SW(2d)826.
1111–98 [a] (1) 172Ark398, 288SW926; MoA 285SW547. [d] Iowa 228NW353.
1111–1 [a] 100CalA435, 280P151. [b] **Conviction unauthorized** with no evidence of husband's ability to support. 99Fla1275, 128S814.
1111–3 [b] 80CalA410, 251P940; 101TexCr121, 274SW573. [d] 125Misc637, 210NYS598 (holding evidence must be "clear and positive").
1111–5 [a] 125Misc637, 210NYS598.
1111–9½–New. The question for determination is whether the wife was in necessitous circumstances and did the husband neglect to provide support and maintain her without just cause. 123Kan62, 254P317.
1111–13 23AlaA211, 123S99(1stcase).
1111–15 **Evidence of desertion sufficient** to go to jury. 169Ark257, 275SW325. [a] **Weight of conflicting evidence** is for jury. 172Ark398, 288SW926.
1111–16 Iowa 228NW353. [a] **What constitutes "just cause or excuse" for failure to support** is for jury. 150SC452, 148SE474.
1111–17 22AlaA115, 113S321.
1111–18 22AlaA115, 113S321.
1111–19 239Mich590, 214NW950.
1111–20 197NC668, 150SE197.
1111–22 172Ark398, 288SW926; 201Iowa4, 206NW584 (holding that it was error, under record, to instruct that, as matter of law, defendant had failed to show conduct of wife, justifying him in refusing to live with her or support her); 123Kan62, 254P317; MoA 285SW547; 109TexCr81, 3SW(2d)98. [e] (2) Instruction that husband may be criminally liable for failure to support wife, though "she has an estate of her own" is confusing where not coupled with explanation as to what would constitute destitute condition within meaning of statute. 200 Iowa772, 205NW325. [g] **Instructions held erroneous.**–108TexCr154, 300SW49.
1112–23 22AlaA115, 113S321; (2) 135SC412, 133SE824.
1112–24 200 Iowa772, 205NW325.
1112–24½–New. and are properly refused. 105TexCr1, 285SW323. [a] **Refusal of charge submitting issue of agreement as to temporary separation** is held proper. 105TexCr1, 285SW323.
1112–35½–New. The order cannot be made retroactive. 88PaSuper37.
1112–39 196NC239, 145SE175; 197NC62, 147SE673.
1113–43 93PaSuper307; 95PaSuper510 (not exceeding one-third of net amount of earnings). [c] **Awards held excessive.**–Twenty-five dollars per week out of salary of two hundred dollars per month is excessive where husband paid for rent, light, and heat. 85PaSuper147. [d] **In Pennsylvania.**–91PaSuper533. [e] **Award excessive.**–96PaSuper138 ($100 a month reduced to $50 a month). [f] **Award restricted to monthly allowance by statute.**–96PaSuper288 (lump sum in addition disallowed). [g] **Additional amount granted.** NJJuv 150A824.
1113–46 [c] (2) Order reducing amount to be paid must be supported by competent evidence received in open court. 91PaSuper563. (3) Such order cannot be based on report of investigator who was not sworn and subjected to cross-examination. 91PaSuper563. [d] **Judgment should provide for retention of jurisdiction** for purpose of modification. 156Tenn599, 4SW(2d)351.
1113–49 But see NJSup 149A355.
1113–53 196NC239, 145SE175.
1114–92½–New. Where court not only reduces amount of weekly allowance but changes method of compliance with order, surety is released where all arrearages paid. 96PaSuper606.
1115–11 [b] **Sentence not within year's time** as provided by statute is invalid. 170La677, 129S127.
1115–17 13PaDist&Co 673 (payments under Workmen's Compensation Act).
1115–24 124Kan529, 261P559.
1116–29 See also 124Kan529, 261P559 (alternative order held not to render husband subject to punishment on mere showing of later nonpayment).
1116–32 124Kan529, 261P559, 561 [quot CJ].
1116–33½–New. An order compelling a husband to support his wife is not affected by a voluntary agreement to pay alimony pending divorce proceedings. 88PaSuper37.
1116–33⅓–New. Order of support is properly vacated where husband obtains divorce on ground of desertion. 96PaSuper553.
1116–42½–New. In a hearing for violation of an alternative order to live with wife or pay alimony, the wife's fault for a later separation held material. 124Kan529, 261P559.
1116–43 22AlaA592, 118S145; 218Ala113, 118S147.
1116–44 [d] **In Alabama.**–22AlaA592, 118S145.
1116–45 [b] **Appeal by wife.**–92PaSuper94.
1116–48½–New. Power to make orders for temporary support of wife, pending appeal in the circuit court for trial de novo in prosecution of husband for desertion and nonsupport, remains in the juvenile court. 218Ala113, 118S147.
1116–48⅓–New. In Pennsylvania an appeal taken more than three months after final order was made will be quashed on motion. 91PaSuper586.
1116–48¼–New. In some jurisdictions a wife who is aggrieved by an order may appeal, although the proceeding is in the name of the commonwealth. 92PaSuper94.
1116–51½–New. After perfection of an appeal and giving of an appeal bond by a defendant, required by judgment to pay certain sums to his wife periodically for her support, a judge of the appellate court cannot issue another warrant of arrest and require appellant to pay such installments pendente lite. 105WVa18, 141SE395.
1116–54 But see 88PaSuper37.
1117–56 [b] **Modification of award.**–Where amount awarded by lower court is excessive, court will reduce it according to circumstances. 85PaSuper147.
1117–60 [a] **Attorney's fees in reasonable amount** may be taxed as costs where wife employs private counsel to institute proceedings to compel support by husband. 8PaDist&Co 316.
1117–66 102TexCr573, 278SW845. [b] **Stage to which prosecution had progressed** is immaterial. OklCr 287P1076. [c] **Place where charge was filed** is immaterial. OklCr 287P1076.
1117–68 [e] **Seduction and marriage necessary.**–102TexCr573, 278SW845.
1117–71 102TexCr573, 278SW845.
1117–75 See also 98PaSuper87.
1118–88 [a] (3) Other evidence held sufficient. OklCr 287P1076. [b] **Evidence insufficient.**–102TexCr573, 278SW845.
1118–96½–New. Prosecutor must prove seduction, marriage, and abandonment to sustain conviction. 102TexCr573, 278SW845.
1119–6 89CalA336, 265P281; 47RI186, 131A643, 645 [citCJ]; 147Wash251, 265P727.
1119–11 215Ala90, 109S754, 755 [citCJ]; 47RI186, 131A643.
1119–12 [a] (1) 254Mass509, 150NE405; 258Mass420, 155NE441; 47RI186, 131A643. (2) 254Mass509, 150NE405.
1119–13½–New. Husband's right of action is for an injury to himself and not for injury to his wife. 118Or111, 244P71.
1119–13⅓–New. In Louisiana, action for damages for alienation of wife's affections does not lie. 165La169, 115S447.
1119–13¼–New. Husband's participation in illegal abortion performed on wife, where not necessary to prove case, does not prevent recovery for alienation of affections. Nebr 230NW669.
1120–19 126Me291, 138A70, 71 [citCJ] (dictum); TexCivA 271SW209 (wife may sue alone for injunction against defendant's communication or association with her husband).
1120–25 [b] (1) 254Mass509, 150NE405.
1121–29 127Misc801, 217NYS467 (dictum).
1122–33 89CalA336, 265P281.
1122–34 85Mont492, 279P374, 66ALR587.
1122–36 192NC556, 135SE348; 99Vt91, 130A759, 768 [citCJ]; 62OntL209, [1928] 3DomLR15. [b] **Where persons act jointly** acts of one are binding on other. Minn 231NW718.
1122–37 197NC550, 149SE855.
1122–37½–New. or against other near relatives, 197NC550, 149SE855.
1122–38 CalA 285P412; 85Mont492, 279P374, 66ALR587; 99Vt91, 130A759; 135Wash675, 238P626 [quotCJ]; 147Wash497, 266P688. [b] **Malice** does not necessarily mean that which must proceed from spiteful, malignant, or revengeful disposition. Ark 31SW(2d)304.
1122–39 192NC556, 135SE348; 99Vt91, 130A759, 768 [citCJ]. See also 85Mont492, 279P374, 66ALR587.
1122–40 170Ark650, 280SW667; 124Kan443, 260P647.
1122–41 145Miss191, 110S504; 85Mont492, 279P374, 66ALR587.
1122–43 99Vt91, 130A759, 768 [citCJ].
1122–44½–New. A parent may advise his son or daughter in good faith to leave spouse if in reasonable grounds of belief. 213Ala545, 105S867.
1123–50½–New. Wrongful acts before marriage cannot be basis for cause of action for alienating wife's affection. 137Misc292, 241NYS691.
1123–51 [a] (4) Unwarranted interference by parent accompanied by threats to disinherit plaintiff's husband. 85Mont492, 279P374, 66ALR587.
1123–54½–New. Prevention or obstruction of a possible reconciliation between husband and wife is equivalent to alienation. 82Colo133, 257P359.
1123–54⅓–New. The law requires nothing from parents except to refrain from meddling with the domestic felicity and affections of a husband and wife. 85Mont492, 279P374, 66ALR587.
1123–55 128Me201, 146A692; 114Nebr353, 207NW669, 672 [quotCJ]; NJSup129A204; 214AppDiv398, 212NYS213 ("the gist of the action is the invasion of the plaintiff's right of consortium—the right to conjugal fellowship . . . coöperation, and aid in every conjugal relation"); 137Misc292, 241NYS691; 192NC556, 135SE348; 121 Okl I, 246P1095; 47RI186, 131A643.
1123–56 206 Iowa70, 220NW17; 114Nebr353, 207NW669, 672 [quotCJ]; 51Nev16, 266P913, 915 [citCJ]; 85Mont

492, 279P374, 66ALR587; 224AppDiv 706, 229NYS481; 99Vt91, 130A759.

1123-58 NJSup 129A204; 99Vt91, 130A 759.

1123-61 99Vt91, 130A759.

1124-62 9PaDist&Co 263.

1124-63 30NM557, 240P303, 304 [cit CJ]; 11PaDist&Co 114.

1124-67 214AppDiv398, 212NYS213 (allegation of adultery is merely incidental).

1124-68 47RI 186, 131A643. [b] 111 Okl 267, 239P596.

1124-69 [a] 118 Or111, 244P71, 73 [cit CJ]. [b] **Both causes of action may be maintained.**-215AppDiv833, 213NYS475.

1124-70 118 Or111, 244P71.

1124-71 118Or111, 244P71; 47RI 186, 131A643.

1124-72 206 Iowa70, 220NW17; 85 Mont492, 279P374, 66ALR587.

1125-73 TexCivA 289SW159; 105NJL 13, 143A742; 118 Or111, 244P71.

1125-74 CalA 285P412; Nebr 230NW 669; 111 Okl 267, 239P596, 598 [citCJ]; 118 Or111, 244P71.

1125-75 221Ky202, 298SW675.

1126-86 TexCivA 289SW159.

1126-88 111 Okl 267, 239P596; 118 Or 111, 244P71, 73 [quotCJ].

1126-88½-New. Husband may maintain action for alienation notwithstanding his own ill treatment of wife where defendant's misconduct was controlling cause of estrangement. Nebr 230NW 669.

1126-89 118 Or111, 244P71, 73 [quot CJ].

1126-91 Mich 233NW215.

1126-92 111 Okl 267, 239P596, 598 [cit CJ]; 128 Okl 213, 262P196.

1126-93 [a] 130Misc650, 224NYS461.

1126-93½-New. Fundamental inquiry in suit for alienating wife's affections is her affection for husband and defendant. TexCivA 289SW159.

1127-5 178Ark513, 11SW(2d)1; NJSup 135A63; 128 Okl 213, 262P196; 118 Or 111, 244P71. [c] (2) Since divorce decree is res judicata as against world only to extent of establishing prior existence of marriage, its dissolution, and status of parties, it cannot affect cause of action against third person springing from relation. 128 Okl 213, 262P 196.

1128-19 99Vt91, 130A759.

1128-22 121 Okl 1, 246P1095, 1097 [cit CJ].

1128-23 121 Okl 1, 246P1095, 1097 [quotCJ]; 118 Or111, 244P71.

1128-24 121 Okl 1, 246P1095.

1129-26½-New. But statute of limitations as a bar to action for criminal conversation cannot be set up against complaint constituting action for alienation of affections. 214AppDiv398, 212 NYS213.

1129-36 206 Iowa70, 220NW17.

1129-37½-New. Where a complaint alleges conspiracy between a mother and other relatives of plaintiff's wife, the existence of anything which justified the mother in bringing about the separation will excuse the other defendants. 89 CalA336, 265P281.

1129-37⅓-New. Damage is gist of action against several persons forming conspiracy to alienate affections of plaintiff's wife and causing separation pursuant thereto. Nebr 230NW669.

1129-40 126Me318, 138A472, 473 [cit CJ]; NJ 143A512.

1129-41 78Colo 310, 241P539; 241 IllA 11; 124Kan443, 260P647, 649 [citCJ]; 126Kan531, 268P807; 126Me291, 138A 70; 126Me318, 138A472, 473 [citCJ]; 145Miss191, 110S504; 85Mont492, 279P 374, 66ALR587; 115Nebr795, 215NW 122; TexCivA 228SW(2d)514; 135Wash 675, 238P626. [b] (3) Malice means deliberate intention. 78Colo 310, 241P539. (4) Malice has been defined as reckless disregard of rights of others. 78Colo 310, 241P539. [c] **There is no inference of malice** (1) from mere fact of parental interferences. 99Vt91, 130A759. (2) Malice must be proved. 99Vt91, 130A 759. [d] **Not necessary that defendant's conduct be sole cause to confer right of action for alienation.** 99Vt91, 130A759. [e] **Malicious disinheritance for purpose of alienating son's affections is actionable wrong.** 99Vt91, 130A759. [f] **Legal acts maliciously done.**-Parents are liable. 99Vt91, 130A759. [g] **Hostile, wicked, or malicious intent** must be shown. 126Me291, 138A70.

1130-42 89CalA336, 265P281, 283 [cit CJ]; 206 Iowa70, 220NW17; 124Kan 443, 260P647, 649 [citCJ]; 126Kan531, 268P807; 126Me291, 138A70; 85Mont 492, 279P374, 66ALR587 (difference in religion is not sufficient cause for interference); 99Vt91, 130A759; 152Va 910, 143SE720; 195Wis650, 219NW275.

1131-45 195Wis650, 219NW275.

1131-46 [a] **Parents have no right to use threat of disinheritance** to accomplish wrongful purpose. 99Vt91, 130A 759.

1131-48½-New. Parents may not meddle unjustifiably with domestic felicity and affection of son and his wife. 99 Vt91, 130A759.

1131-50 89CalA336, 265P281, 283 [cit CJ].

1132-67 151Wash641, 276P882.

1132-77 9PaDist&Co 263. [b] (1) 202 Iowa314, 208NW288. [g] **Husband's cause of action** for loss of services, comfort, and society of wife is common-law action of trespass on case. 218MoA 534, 280SW441. [h] **Complaint held to state cause for alienation of affections** and not for criminal conversation. 214 AppDiv398, 212NYS213. [i] **Allegations of acts of defendant before plaintiff's marriage** are irrelevant. 137Misc292, 241NYS691.

1133-79 51Nev16, 266P913.

1133-82 [b] 202 Iowa314, 208NW288.

1134-85½-New. Alleging criminal conversation or complaint in aggravation of damages makes it none the less an action for alienation of affection. 215 AppDiv833, 213NYS475.

1134-85⅓-New. Adultery may be pleaded by way of aggravation of damages. 214AppDiv398, 212NYS213.

1134-85¼-New. Denial of lawful marriage denies only fact of marriage, and not its legality. 22F(2d)878.

1134-94 MoA 5SW(2d)689; Nebr 230 NW669.

1134-94½-New. In order to recover damages, plaintiff must prove that defendant's intent was willful and wrongful. 224 IllA425.

1134-94⅓-New. In an action for alienating a wife's affections, proof that plaintiff specifically ordered defendant not to allow her to remain in defendant's house has been held not required to warrant judgment for plaintiff, such allegation in the declaration not being a controlling consideration. 265Mass 189, 163NE906.

1134-1 128 Okl 213, 262P196. [b] **Under allegation of "intimate" relations,** evidence tending to show adulterous relation is admissible. 128 Okl 213, 262P 196.

1135-7½-New. Wife's testimony in trial for alienating affections that defendant told her he had wronged her is held inadmissible as departure from pleadings. TexCivA 289SW159.

1135-7⅓-New. Under denial of lawful marriage in pleading, invalidity of marriage due to nonfinality of divorce decree is not admissible. 22F(2d)878.

1135-10 See also 175Minn414, 221NW 639.

1135-17 115Nebr795, 215NW122.

1135-18 213Ala545, 105S867.

1135-23 208 Iowa914, 224NW568; 222 Ky409, 300SW853; 126Me291, 138A70; 175Minn414, 221NW639; 177Minn270, 224NW839; 130Misc650, 224NYS461; 197NC550, 149SE855.

1135-25 99Vt91, 130A759 (it is not essential to recovery that evidence support all of allegations as to means employed to accomplish alienation).

1135-26 126Me318, 138A472; 145Miss 191, 110S504; MoA 5SW(2d)689; 115 Nebr795, 215NW122.

1135-27 126Kan531, 268P807; 126Me 291, 138A70; 126Me318, 138A472; Nebr 231NW506; 99Vt91, 130A759; 195Wis650, 219NW275.

1136-32 Ark 31SW(2d)304.

1136-34 [a] (2) That spouse's affections, continued up to time of separation will be presumed. 121 Okl 1, 246P 1095.

1136-38 213Ala545, 105S867; 126Kan 531, 268P807; 145Miss191, 110S504; Nebr 231NW506; 30NM557, 240P303; 147Wash497, 266P688; 195Wis650, 219 NW275. [d] **Presumption is not evidence in favor of parent,** such presumption being locative, not probative. 99 Vt91, 130A759. [e] **Presumption rebuttable.**-225AppDiv391, 233NYS252.

1136-39 126Me291, 138A70; Nebr 231 NW145; 30NM557, 240P303. [a] 135 Wash675, 238P626.

1136-40 243Mich638, 220NW737. [b] **Malice presumed from alienation by adultery.**-Ark 31SW(2d)304.

1136-45 265Mass189, 163NE906; MoA 5SW(2d)689; 194NC760, 140SE807. [a] 99Vt91, 130A759. See also Wash 253P452. [b] **Evidence admissible.**-99 Vt91, 130A759.

1136-46 241 IllA242; 208 Iowa215, 225 NW251; 129 Or11, 276P248; 99Vt91, 130A759; 142Wash391, 253P452. [a] 145Miss191, 110S504; 129 Or11, 276P 248.

1137-47 MoA 288SW100.

1137-49 [a] (1) 241 IllA11; Nebr 230 NW669; 99Vt91, 130A759.

1137-50 [a] (1) 241 IllA242; MoA 288 SW100; 99Vt91, 130A759.

1137-51 152Wash633, 278P692 (absence of affection admissible only in mitigation of damages). [a] (1) Iowa 226NW922(2dcase); MoA 288SW100; 99Vt91, 130A759.

1138-55 [a] See also Iowa 226NW922 (2dcase). [c] (1) 128 Okl 213, 262P 196 (decree held inadmissible). [f] **Cross petition filed by wife in husband's divorce action,** charging husband with inhuman treatment, is admissible in action against husband's parents. Iowa 226NW922(2dcase). [g] **Judgment for temporary alimony in divorce action** held inadmissible in wife's action against husband's parents. Iowa 226NW922(2dcase).

1138-57 [a] **Wife's ill health following abortion procured by advice and with aid of husband's mother** is admissible as characterizing defendant's treatment of plaintiff. 78Colo 310, 241P539.

1138-57½-New. Although causal connection between defendant's act and alienation must be shown, admissibility of evidence is not dependent on defendant's knowledge or connection therewith. 99Vt91, 130A759.

1138-57⅓-New. In a husband's action for alienation proof of wife's state of mind subsequent to institution of divorce suit by her is inadmissible. 258 Mass420, 155NE441.

1138-61½-New. Letter from plaintiff to his wife written after difficulties arose is admissible. 258Mass420, 155 NE441.

1138-61⅓-New. Plaintiff's answer in divorce action by wife inadmissible to contradict his testimony and to show his state of mind. 258Mass420, 155NE 441.

1138-61¼-New. Declarations of plaintiff husband previous to marriage are admissible to show whether he abducted his wife under fraudulent pretense before marriage. 89CalA336, 265P281.

1138-62 258Mass420, 155NE441.

1138-63 241 IllA242; MoA 5SW(2d) 689.

1139-67½-New. Statements of defendant that he had disinherited his son because of his escapade with plaintiff and that he hoped son might be reinstated in family are admissible against objection of materiality. 99Vt91, 130 A759.

1139-67⅓-New. Conversations of defendant to show she was attempting to persuade the husband to return to his wife are admissible only under the usual rules of evidence. 224 IllA425.

1139-68 85Mont492, 279P374, 66ALR 587; NJSup 144A186; 30NM557, 240P 303; 102WVa595, 136SE47, 48 [citCJ]. See also 129 Or11, 276P248. [a] (2) 208 Iowa215, 225NW251.

1139-69 241 IllA242; 194NC760, 140 SE807. [a] **Dependent on circumstances.**-85Mont492, 279P374, 66ALR587.

1139-69½-New. Declarations of an

alienated spouse in plaintiff's presence are admissible. 89CalA336, 265P281.

1139-70 208 Iowa215, 225NW251; 258 Mass420, 155NE441; 142Wash391, 253 P452.

1139-71 TexCivA 289SW159, 162 [cit CJ].

1139-72 92CalA464, 268P453; 241 IllA 242, 262 [citCJ]; Mo 278SW412; 85 Mont492, 279P374, 66ALR587; 115Nebr 601, 213NW971; 30NM557, 240P303; 118 Or111, 244P71, 72 [citCJ]; Tex CivA 289SW159, 162 [citCJ]; 152Va 910, 143SE720; 142Wash391, 253P452, 453 [quotCJ]. [b] (10) Statement of plaintiff's wife that she was wife of defendant. 118 Or111, 244P71.

1140-73 30NM557, 240P303; 142Wash 391, 253P452.

1140-74 30NM557, 240P303; 118 Or 111, 244P71, 72 [citCJ].

1140-75 30NM557, 240P303; 118 Or 111, 244P71, 72 [citCJ].

1140-76 85Mont492, 279P374, 66ALR 587 (statements by defendant shortly before marriage of her son and plaintiff).

1140-77 30NM557, 240P303.

1140-79½-New. Excluding wife's testimony that she did not believe plaintiff was where he said he was on a certain occasion before separation was not error. 258Mass420, 155NE441.

1140-82 129 Or11, 276P248.

1140-84 MoA 29SW(2d)243.

1140-85 Ill 241 IllA242, 262 [citCJ]; Mo 278SW412. [a] **Particular statements held admissible.**–TexCivA 289SW 159.

1141-94 [a] (3) Statement by son of defendant to son's own wife, who was daughter of plaintiff's wife, that if plaintiff's wife stayed at defendant's home, he, the son, would leave. 215 Ala90, 109S754. (4) Conversation of third person with plaintiff's wife. 254 IllA192.

1141-95 [a] (3) In husband's action for alienation, testimony of wife's sister that their mother did not want wife to get divorce is hearsay. 242Mich422, 218NW667.

1141-97 See also 258Mass420, 155NE 441.

1141-1 NJSup 136A707.

1141-2 [a] (4) Evidence that beneficiary in husband's life insurance policy was changed from wife to that of husband's family is admissible. 152Va910, 143SE720.

1141-6 Iowa 226NW922(2dcase).

1142-8 265Mass189, 163NE906.

1142-8½-New. In a wife's action for alienation of her husband's affections, evidence that the husband registered at a hotel with another woman is inadmissible where such woman is not shown to have been defendant. 170Ark 650, 280SW667.

1142-11 213Ala545, 105S867 (acts of mother sued for alienation are admissible to show motive); Minn 231NW718; MoA 5SW(2d)689; 221AppDiv376, 222 NYS737; 128 Okl 213, 262P196. [b] (2) 128 Okl 213, 262P196. [j] (1) 128 Okl 213, 262P196. [m] **Assistance in procuring abortion.**–In action by wife against husband's parents, evidence that husband's mother advised and aided wife in procuring abortion is admissible. 78Colo 310, 241P539. [n] **Visits to plaintiff's home.**–215Ala90, 109 S754. [o] **Defendant's efforts with plaintiff's wife** to reconcile husband and wife. 254 IllA192.

1143-13 MoA 29SW(2d)243.

1143-17 147Wash251, 265P727.

1143-18 129 Or11, 276P248.

1143-21 118 Or111, 244P71, 72 [citCJ].

1143-22 Minn 231NW718 (where alienated husband testified for defendant); 30NM557, 240P303; 118 Or111, 244P71, 72 [citCJ]. See also NJSup 151A375. [a] (2) 30NM557, 240P303.

1143-24 145Miss191, 110S504.

1143-26 129Kan766, 284P427; Mo 279 SW415, 424 [citCJ].

1143-28 MoA 5SW(2d)689, 695 [citCJ]. But see 192NC556, 135SE348, 349 [quot Cyc].

1143-29 9PaDist&Co 397.

1144-31½-New. Letters between strangers and found in possession of husband are incompetent as evidence in action by wife, where no connection of defendant therewith is shown. 115 Oh 468, 154NE727.

1144-36 224 IllA425.

1144-41 200 Iowa864, 205NW515. [b] **Less evidence is necessary** than is required when a parent is defendant. CalA 285P412.

1144-42 CalA 285P412; 85Mont492, 279P374, 66ALR587. [a] (3) Wife's divorce indicates her loss of affection for husband plaintiff. 118 Or111, 244P71. [b] **To prove malice.**–85Mont492, 279P 374, 66ALR587.

1144-43 178Ark513, 11SW(2d)1. [a] (1) 129Kan766, 284P427; 126Me291, 138A70; 85Mont492, 279P374, 66ALR 587; 126 Or8, 268P765. [b] CalA 285P 412; 118 Or111, 244P71; 47RI 186, 131A643; TexCivA 278SW229.

1144-44 152Wash633, 278P692. [a] 124 Or189, 264P355. [b] 222Ky409, 300SW853; 177Minn577, 226NW195.

1144-45 205Cal 188, 270P364.

1144-46 [a] 200 Iowa864, 205NW515; 118 Or111, 244P71; 47RI 186, 131A643. [b] 124 Or189, 264P355. [c] 111 Okl 267, 239P596, 598 [citCyc].

1144-47 [a] 254Mass509, 150NE405; 47RI 186, 131A643.

1145-50½-New. , enticement or inducement by defendant, Ark 31SW(2d)304.

1145-52 [b] **Evidence held sufficient.**–254Mass509, 150NE405; 85Mont492, 279 P374, 66ALR587 (to show malice).

1145-53 [a] 200 Iowa864, 205NW515; 254Mass509, 150NE405; 243Mich638, 220NW737; 221MoA748, 286SW412.

1145-56 89CalA336, 265P281; 124Kan 443, 260P647, 649 [citCJ]; 125Kan234, 263P1062; 126Kan531, 268P807; 85 Mont492, 279P374, 66ALR587; 115Nebr 795, 215NW122.

1145-58 195Wis650, 219NW275.

1145-59 Minn 231NW718. [a] (1) Nebr 231NW145; 103NJL645, 137A419; NJSup 136A707; 30NM557, 240P303. (5) Evidence held insufficient to connect one of husband's brothers with other defendants, but sufficient as to one of his sisters. 152Va910, 143SE720. [b] 116Nebr208, 216NW659; Nebr 230 NW669. [c] 208 Iowa914, 224NW568; MoA 288SW100; NJ 148A761; 99Vt 91, 130A759.

1145-60 [a] 124Kan443, 260P647; 125Kan234, 263P1062; Nebr 231NW 506; 197NC550, 149SE855; 195Wis650, 219NW275. [b] 126Kan531, 268P807; 126Me318, 138A472. [c] **Verdict for defendant held sustained** by evidence. 124Kan443, 260P647.

1145-62 [a] 152Va910, 143SE720. [c] 135Wash675, 238P626.

1145-64½-New. **Evidence sufficient** to sustain finding that defendant's acts were controlling causes of plaintiff's loss of consortium. 99Vt91, 130A759.

1145-65 [b] (3) Where malice of parent defendants could be inferred from conduct, nonsuit at close of plaintiff's case was improper. 135Wash675, 238P 626.

1145-68 127Me377, 143A466; Mich 233 NW215; NJSup 129A204 (nature of defendant's gifts).

1145-69 254Mass509, 150NE405.

1146-75 205Cal 188, 270P364; 124 Or 189, 264P355.

1146-76 99Vt91, 130A759. [a] (1) NJSup 136A707; 111 Okl 267, 239P596. (2) MoA 5SW(2d)689. (5) 177Minn 270, 224NW839. (16) Whether defendant prevented or obstructed possible reconciliation between plaintiff and her husband. 82Colo 133, 257P359. (17) Whether criminal conversation caused alienation of affections. 47RI 186, 131 A643. (18) Cause of loss of wife's affections. 147Wash251, 265P727. (19) Motive of defendant's father, mother, and brother. 206 Iowa70, 220NW17.

1146-77 [a] (1) 129Kan766, 284P427. [b] (1) 128 Okl 213, 262P196; 118 Or 111, 244P71.

1146-79 265Mass189, 163NE906.

1146-80 115Nebr795, 215NW122; 147 Wash497, 266P688.

1146-81 115Nebr795, 215NW122.

1146-82 [a] (4) Refusal of instruction on proximate cause of damages held not erroneous. 149Miss5, 115S36.

1146-83 178Ark513, 11SW(2d)1.

1146-84 242Mich422, 218NW667; 115 Nebr795, 215NW122. [b] **Instructions on theories as to means of alienation** held proper and supported by evidence. 121 Okl 1, 246P1095.

1147-85 102WVa595, 136SE47.

1147-86 149Miss5, 115S36.

1147-87 170Ark650, 280SW667; 222 Ky409, 300SW853; Mich 233NW215; 145Miss191, 110S504. [b] (2) Instruction on damages and authorizing punitive damages on finding of actual malice has been held proper. 20 OhA349, 152 NE208.

1147-89 149Miss5, 115S36. [b] (6) Relating to parent's right and duty to counsel and advise child even after marriage. 145Miss191, 110S504.

1147-89½-New. , or conflicting. 145 Miss191, 110S504; 149Miss5, 115S36.

1148-93 149Miss5, 115S36; 115Nebr 795, 215NW122.

1148-95 49ND723, 193NW316.

1148-96 224 IllA425; 145Miss191, 110 S504; 115Nebr601, 213NW971; 115 Nebr795, 215NW122; 105NJL13, 143A 742. [a] **Instruction held prejudicial.**–224 IllA425.

1148-97 178Ark513, 11SW(2d)1; 82 Colo 133, 257P359; Ind 164NE496; 208 Iowa914, 224NW568; 125Me44, 130A 737; 243Mich638, 220NW737; MoA 288 SW100; MoA 5SW(2d)689; 115Nebr 795, 215NW122; NJSup 143A142; 49 ND723, 193NW316. [a] (5) Instruction to consider decree only in wife's divorce from plaintiff granted by default, and advising jury not to read other papers and documents connected with it. 118 Or111, 244P71.

1148-7½-New. Refusal to set aside verdict declared not error. 99Vt91, 130A 759.

1148-13 114Nebr353, 207NW669. [d] **Verdict for $20,000** held grossly excessive. 111Conn575, 150A692.

1148-17½-New. Enticing wife away without debauching entitles husband to compensatory damages. 47RI 186, 131 A643.

1149-21 85Mont492, 279P374, 66ALR 587; 114Nebr353, 207NW669; 115Nebr 795, 215NW122; TexCivA 22SW(2d)514. [e] **Recovery limited to consortium.**–115Nebr601, 213NW971. [f] **Damages for loss of consortium were properly refused** to wife whose husband was confirmed criminal confined in state prison for substantial term. 132Misc250, 230 NYS197.

1149-25 85Mont492, 279P374, 66ALR 587. See also 99Vt91, 130A759.

1149-30 [c] (1) 128Me201, 146A692.

1149-31 [e] 254 IllA192; 128Me201, 146A692. [j] **Venereal disease.**–254 Ill A192. [k] **Association with undesirable people.**–254 IllA192.

1150-35 111 Okl 267, 239P596.

1150-37½-New. The value of performance of the duty to support a wife may lessen the amount of compensable injury. 128Me201, 146A692.

1151-42 118 Or111, 244P71.

1151-46½-New. Items received by the wife on divorce should be considered. NJCh 145A727(1stcase).

1151-48 99Vt91, 130A759 (injurious effect on health through inability to find husband).

1151-54 82Colo 133, 257P359; 125Me 44, 130A737; 85Mont492, 279P374, 66 ALR587 (in case against parent).

1152-66 47RI 186, 131A643. [c] Wash 291P323. [d] **In Nebraska.**–114 Nebr353, 207NW669. [e] **Attorney's fees may be included** as part of punitive damages to be awarded. 20 OhA349, 152 NE208.

1152-67 NJSup 129A204; 47RI 186, 131A643.

1152-68 206 Iowa70, 220NW17; NJSup 136A707; 20 OhA349, 152NE208; 99Vt 91, 130A759 (allowance not improper on theory that punitive principle was not involved).

1152-69 149Miss5, 115S36. But see 151Wash641, 276P882.

1152-71 20 OhA349, 152NE208; 47RI 186, 131A643; 99Vt91, 130A759. [d] (4) Will of defendant's deceased husband showing defendant was beneficiary is not improperly admitted. 121 Okl 1,

246P1095. [e] **Evidence as to defendant's property.**–47RI 186, 131A643.

1152–73½–New. In action based on joint liability, evidence is admissible to show that wealth of one defendant is greater than a codefendant as a basis for recovery of exemplary damages against him alone. 99Vt91, 130A759.

1152–77 99Vt91, 130A759 (size of verdict alone does not establish it result of passion and prejudice).

1152–78 Ind 164NE496; MoA 288SW 100; 85Mont492, 279P374, 66ALR587; NJCh 145A727(1stcase); NJSup 129A 204; 47RI 186, 131A643, 647 [citCJ]; 99Vt91, 130A759 (exemplary damages discretionary with jury).

1152–78½–New. , subject to revisory power of court. 47RI 186, 131A643.

1153–80 [d] NJSup 135A63. [j] **$7,500.**–47RI 186, 131A643 (reduced to $6,000, compensatory and punitive). [k] **$20,000.**–147Wash251, 265P727. [l] **$90,000.**–254 IllA192 (excessive after remittitur to $45,000). [m] **$12,500.**–Wash 291P323.

1153–81 [g] Ark 31SW(2d)304; Ind 164NE496; 116Nebr208, 216NW659. [h] 177Minn270, 224NW839. [n] 47 RI 186, 131A643. [p] **$25,000.**–NJSup 129A204. [q] **$1,916.66.**–126Me603, 138 A867. [r] **$7,500.**–MoA 5SW(2d)689. [s] **$6,000.**–92CalA464, 268P453.

1153–82 NJCh 145A727(1stcase) ($90,000). [l] **$150,000.**–121 Okl 1, 246P 1095 (remittitur in sum of $90,000). [m] **$100,000.**–20 OhA349, 152NE208 (as to one of several defendants reduced to $75,000 where proof of actual malice as to her was slight). [n] **Court's order requiring wife to remit** $3,000 of $9,000 held not error under evidence. Nebr 231 NW145.

1153–83 [a] NJSup 136A707. [n] 20 OhA349, 152NE208. [p] **$400,000 actual** and $65,000 exemplary. 99Vt91, 130A 759. [q] **$2,000.**–235Mich111, 209NW 94; Minn 231NW718. [r] **$23,000.**–82 Colo 133, 257P359. [s] **$12,000.**–194NC 760, 140SE807. [t] **$13,500.**–152Va910, 143SE720. [u] **$20,000.**–85Mont492, 279 P374, 66ALR587.

1153–83½–New. That exemplary damages allowed are in excess of wealth of least wealthy defendant is insufficient alone to show that verdict was result of bias or passion. 99Vt91, 130A759.

1153–86 47RI 186, 131A643.

1153–88 23 OhA104, 154NE747; 47RI 186. 131A643.

1153–89 128Me201, 146A692. See also 295Pa208, 145A94.

1153–91½–New. The gist of the wrong to the husband is the shame and dishonor brought upon him, 214AppDiv398, 212NYS213.

1153–91⅓–New. and the hazard of having to maintain spurious issue; 214App Div398, 212NYS213.

1153–91¼–New. to a wife the same shame and dishonor 214AppDiv398, 212 NYS213.

1153–91½–New. and the hazard to her right of having a clean man 214AppDiv 398, 212NYS213.

1153–91¾–New. and healthy children. 214AppDiv398, 212NYS213.

1153–93 4HawaiiFed625, 632 [citCyc].

1154–97 230Ky165, 18SW(2d)981. [b] **Husband's illicit relations with woman other than defendant** does not preclude recovery. 206 Iowa1134, 221NW802.

1154–4 214AppDiv398, 212NYS213 (adultery is all important in action for criminal conversation); 23 OhA104, 154 NE747; 118 Orl11, 244P71.

1154–7 149Miss5, 115S36, 38 [quotCJ].

1154–9 130Misc650, 224NYS461, 464 [citCJ]; 214AppDiv398, 212NYS213 (incidental); 23 OhA104, 154NE747; 47 RI 186, 131A643. See also 215Ala90, 109 S754, 755 [citCJ].

1154–10 23 OhA104. 154NE747.

1155–12 23 OhA104, 154NE747.

1155–13 23 OhA104, 154NE747.

1155–15 Mo 287SW634.

1155–18 Mo 287SW634, 639 [citCJ].

1155–29 MoA 25SW(2d)499.

1156–36 GaA 155SE379. See also 23 OhA104, 154NE747.

1156–39 295Pa208, 145A94.

1156–42 149Miss5, 115S36, 38 [citCJ]. See also 9PaDist&Co 458.

1156–43 149Miss5, 115S36, 38 [citCJ].

1157–56 130Misc650, 224NYS461, 464 [citCJ]. See also Sask [1926] 4DomLR 470, [1926] 2WestWkly726.

1157–58 130Misc650, 224NYS461, 464 [citCJ]. See also 23 OhA104, 154NE 747.

1157–64 [b] **In New York.**–218AppDiv 743, 218NYS21.

1158–75 [a] 82Colo 133, 257P359.

1158–78 [a] 214AppDiv398, 212NYS 213.

1159–92 82Colo 133, 257P359; 149Miss 5, 115S36, 39 [citCJ].

1159–99 295Pa208, 145A94.

1160–24½–New. Alienation of affections is not conclusively presumed to have been caused by criminal conversation. 47RI 186, 131A643.

1160–24⅓–New. Evidence held sufficient to warrant finding of final and complete alienation resulting from criminal conversation with plaintiff's wife with knowledge that she was married woman. 47RI 186, 131A643.

1160–24¼–New. The character of both plaintiff and spouse is presumed to be good. 295Pa208, 145A94.

1160–24½–New. Evidence to attack the case by showing the bad character of plaintiff and spouse may be either actual or reputed character, or both. 295Pa 208, 145A94.

1160–24¾–New. Evidence held insufficient to sustain recovery. Man [1929] 4 DomLR20.

1160–27 Mo 287SW634, 638 [citCJ]. See also Ont [1927] 3DomLR488.

1160–37 Sask [1927] 3DomLR669.

1161–41 149Miss5, 115S36. [a] 200 Iowa864, 205NW515.

1161–42 177Minn577, 226NW195.

1161–43 200 Iowa864, 205NW515.

1161–45 47RI 186, 131A643.

1161–48 47RI 186, 131A643.

1161–49 MoA 25SW(2d)499.

1162–60 295Pa208, 145A94.

1162–61½–New. Evidence held sufficient to show that defendant was guilty of criminal conversation with knowledge that his paramour was married woman. 47RI186, 131A643.

1162–69 Mo 287SW634. [a] (2) Instructions held not misleading. MoA 25 SW(2d)499. [b] (2) Other instructions properly refused. MoA 25SW(2d)499. [e] **Charge submitting form of verdict for plaintiff only** is proper as against defendant filing plea of general issue and admitting guilt. GaA 155SE379.

1162–70 82Colo 133, 257P359; 23 OhA 104, 154NE747.

1162–71 Mo 287SW634, 638 [citCJ].

1162–74 200 Iowa864, 205NW515; 230 Ky165, 18SW(2d)981; Mo 287SW634.

1162–75 Mo 287SW634.

1162–76½–New. Whether criminal conversation caused alienation of affections is question of fact for jury. 47RI 186, 131A643.

1163–85 23 OhA104, 154NE747.

1163–88 GaA 155SE379.

1163–90 GaA 155SE379.

1163–92 GaA 155SE379.

1163–94 47RI 186, 131A643.

1163–99 47RI 186, 131A643.

1163–3 230Ky165, 18SW(2d)981; 128 Me201, 146A692; 47RI 186, 131A643; Sask [1926] 4DomLR470, [1926] 2 WestWkly726. [b] (1) 47RI 186, 131A 643. (2) Loss of wife's companionship. Mo 287SW634.

1163–6 GaA 155SE379; Mo 287SW634.

1163–8 230Ky165, 18SW(2d)981; 128 Me201, 146A692; Sask [1926] 4DomLR 473, [1926] 2WestWkly726.

1164–14 295Pa208, 145A94.

1164–15 295Pa208, 145A94.

1164–15½–New. The value of performance of the duty to support a wife may lessen the amount of compensable injury. 128Me201, 146A692.

1164–21 130Misc650, 224NYS461, 464 [citCJ].

1165–24 See also 295Pa208, 145A94.

1165–25 128Me201, 146A692.

1165–28 128Me201, 146A692; 130Misc 650, 224NYS461.

1165–29 130Misc650, 224NYS461.

1165–33 130Misc650, 224NYS461, 464 [citCJ]. See also 295Pa208, 145A94.

1165–39 See also 295Pa208, 145A94.

1166–43 130Misc650, 224NYS461.

1166–46½–New. Alienation of affections. Damages may be awarded for alienation of affections, if found, as aggravation of damages for criminal conversation. 47RI 186, 131A643.

1166–54 GaA 155SE379; 125Me518, 134 A193; 128Me201, 146A692; 47RI 186, 131A643.

1166–54½–New. , especially where aggravated by alienation of affections. 47 RI 186, 131A643.

1166–55 Mo 287SW634, 649 [citCJ].

1166–57 47RI 186, 131A643.

1166–58 47RI 186, 131A643. [a] **Absence of evidence of definite value of defendant's property** does not require award of nominal punitive damages only, since every defendant will have prospects if not property. 47RI 186, 131A643. [b] **Evidence as to defendant's property.** 47RI 186, 131A643.

1166–65 [e] **$7,500.**–47RI 186, 131A643 (reduced to $6,000, compensatory and punitive). [f] **$6,474.17.**–128Me201, 146 A692.

1166–66 [c] 47RI 186, 131A643. [n] **$22,542.**–125Me518, 134A193 (defendant worth $125,000). [o] **$1,916.66.**–126Me 603, 138A867. [p] **$10,000.**–230Ky165, 18SW(2d)981.

1167–67 Mo 287SW634.

1167–67½–New. Fixing of damages is function of jury under proper instructions, subject to court's revisory power. 47RI 186, 131A643.

31 C. J.—8–1 20F(2d)95; TexCivA 285 SW900.

9–6 107Conn342, 140A745, 748 [quot CJ]. [b] **Connubial partnership** is founded in exact equality and justice as to property rights of spouses. Tex CivA 292SW290.

9–10 169La973, 126S442; 145Wash 165, 259P10.

9–11 155Wash585, 285P425, 67ALR 1152.

9–17 32PortoRico 274. [d] **In Porto Rico.**–32PortoRico 274.

11–41 [f] (2) Common law never in force with respect to marital rights. TexCommnA 6SW(2d)348.

12–44 8F(2d)797; TexCivA 292SW290.

12–45 29PortoRico 909.

12–50½–New. , and Germany. 8F(2d) 797.

12–54 TexCivA 5SW(2d)612.

12–55½–New. A statute authorizing service on the surviving spouse in the community has been held not unconstitutional under the due process clause. 67La1032, 120S767(1stcase); 167La 1042, 120S770(2dcase).

12–56 204Cal 546, 269P439; 204Cal 557, 269P519. [a] **Statute authorizing service on surviving spouse** in community, being remedial in nature, has been held retroactive. 167La1032, 120S767 (1stcase); 167La1042, 120S770(2dcase).

13–57 95CalA754, 273P109.

13–59 Cal 285P318. See also Cal 263P 1013.

13–60 199Cal 369, 249P515.

14–74 Ariz 284P158; TexCivA 24SW (2d)542.

14–76 Ariz 284P158; 146Wash1, 261P 647.

17–34 199Cal 369, 249P515.

17–37 TexCivA 22SW(2d)961.

19–69 34PortoRico 796. See also 29 Hawaii770.

20–93 27F(2d)582 [certiorari den 278 US636, 49SCt33(1stcase), 73Led552]; 159La5, 105S80; 167La861, 120S479; 3 LaA591. [a] (2) 164La193, 113S814. [c] (4) Woman of fifty seven who married first cousin after being advised that it was against the law did not act in good faith to give null marriage its civil effect as to property. 159La5, 105 S80. [d] **Law presumes that marriage was contracted in good faith though it is null.**–159La5, 105S80. [e] **Good faith necessary to cause null marriage to produce civil effects of valid marriage** may arise from error of law. 159La5, 105 S80.

20–97½–New. The character of the property becomes fixed at the time it is acquired. 35Ariz378, 278P370.

20–99 160La936, 107S702; TexCivA 293SW695.

21–6 [d] **Strictly speaking,** term "separate property" applies only to property owned by married person in his or her own right during marriage. 203 Cal 569, 265P241.

21–8 31F(2d)795.

21-9 31F(2d)795.
21-11½-New. Husband can claim no interest in alimony or maintenance allowed wife in divorce action against him. 74CalA359, 240P293.
22-20 But see TexCommnA 17SW(2d)786(2dcase).
22-21 82CalA449, 255P892; 142Wash372, 253P113.
22-22 74CalA359, 240P293; 80CalA222, 251P640; 94CalA453, 271P542; TexCivA 283SW923; TexCivA 287SW77; TexCivA 288SW494; 151Wash35, 274P719. [j] **Conveyance to woman before her marriage to grantor** becomes her separate estate and not community property. TexCivA 283SW310.
22-22½-New. Where property is conveyed to husband by two deeds, equally effective to convey legal title, one before and one after marriage, first deed will have preference in determining status of title. TexCivA 287SW70.
22-24 Cal 290P576; 158La822, 104S728; 170La839, 129S364; 48Philippine144; TexCivA 275SW190; TexCivA 278SW236; TexCivA 286SW593. [d] **Time of payment of consideration.**-TexCivA 286SW593.
23-25 155Wash517, 285P442. [a] **Test of character of property is as of date of acquisition.** 136Wash196, 239P391.
23-26 142Wash372, 253P113; 155Wash510, 285P449.
23-27 Cal 290P576; 82CalA449, 255P892.
23-27½-New. Where property left community for sufficient consideration, it can be brought back only by being repurchased with community funds or by donation. LaA 128S903(2dcase).
23-28 165La334, 115S582; TexCivA 286SW593.
24-38 TexCivA 15SW(2d)1102; 152Wash336, 277P849; 152Wash448, 277P988; 155Wash517, 285P442.
24-41 See also 203Cal414, 264P743 (husband).
24-50 See also 76CalA511, 245P221.
24-53 94CalA453, 271P542.
25-69 35PortoRico59; TexCivA 8SW(2d)288.
25-84 29Ariz554, 243P405; 83CalA358, 257P109; Ida 291P1049; TexCommnA 15SW(2d)585; TexCivA 5SW(2d)824; TexCivA 26SW(2d)340; TexCivA 27SW(2d)830. [d] **Proceeds of judgment recovered by wife for personal injuries** when received constituted part of community estate of husband and wife, but husband having by conduct, in allowing wife to deposit money in bank, clearly evidenced intention to make gift to wife, such action on his part had effect of making fund part of wife's separate estate. TexCommnA 15SW(2d)585.
26-89 LaA 130S229.
26-97 94CalA453, 271P542; CalA 286P439; TexCivA 286SW593; 149Wash600, 271P886.
27-2 22F(2d)932; CalA 288P102; 8LaA402; 49Nev299, 245P292 (board and lodging of guest); 32PortoRico274; TexCivA 1SW(2d)911; TexCivA 18SW(2d)762. [a] **Constitutionality of statute.**-Statute, so far as provides that wife's personal earnings shall constitute her separate property, is violative of state constitution. 33F(2d)987.
27-3 32PortoRico274 (Civ. Code § 1310). [b] **Where one spouse owns business before marriage,** continuing it thereafter, portion attributable to personal activity is community property. CalA 288P102.
27-4 32PortoRico274 (Civ. Code § 1310); TexCivA 283SW601; 150Wash192, 272P722. [b] 151Wash698, 275P72(1stcase).
27-5 TexCivA 283SW601.
27-6 48Ida163, 280P220.
28-7 But see TexCommnA 25SW(2d)606 (abandonment does not divest husband of community share).
28-9 131Okl33, 267P620, 621 [quot CJ]; 34PortoRico594. [c] **Payment by negotiable instrument** instead of cash is purchase, not exchange. 158La154, 103S723. [d] **Real estate received in exchange** for separate property becomes separate property. 158La154, 103S723. [e] **Conversion of partnership** into corporation and issuance of stock for partner's interest, which was separate property, does not make stock community property. 158La154, 103S723.
28-10 32Ariz286, 257P639; 98CalA180, 276P634; CalA 286P439; 160La936, 107S702; TexCivA 286SW593; TexCivA 15SW(2d)1102.
29-25 32Ariz286, 257P639.
29-27½-New. Husband may legally give his entire time, skill, and industry to his wife in aiding to carry on a business owned by her, 76CalA511, 245P221 (rights of husband's creditors).
29-29 See also TexCommnA 276SW690.
29-30 32F(2d)222.
29-39 29PortoRico909.
29-40 TexCivA 283SW296.
29-41 168La493, 122S593; 29PortoRico909.
30-45 85CalA683, 259P984; 95CalA490, 273P103; 152Wash448, 277P988. But see CalA 289P887.
32-76 34PortoRico496.
32-85 164La841, 114S706. [a] (1) But see 113Tex535, 273SW799. (5) Rents and revenues from husband's separate estate in land go to community fund. TexCivA 278SW236. (6) Husband's leasing of land and receipt of proceeds of part of oil produced did not convert his separate estate into community property. TexCivA 292SW290. (7) Share of oil paid husband by lessees before statute making rents and revenues from his separate estate separate property held not "rents" belonging to community estate. TexCivA 292SW290. (8) Oil in place is part of corpus of husband's separate estate in land. TexCivA 292SW290. (9) Proceeds of lease of wife's separate realty constitute community. TexCivA 6SW(2d)425.
32-36 114Tex548, 273SW808.
32-90 [b] **Crops are community property** where raised with seed and labor furnished by husband on land leased by wife. 81CalA204, 253P351.
33-94 [a] (2) Cotton grown on wife's separate estate is community property subject to lien of chattel mortgage executed by husband on all crops to be grown during year where land was cultivated by wife and children of previous marriage with teams and tools of community estate. TexCommnA 5SW(2d)753.
33-8 TexCivA 278SW236.
33-9 32PortoRico80 (foreclosure proceedings cannot be held to involve community property where not shown that accrued interest was received during wedlock); TexCivA 278SW236.
34-17 76CalA511, 245P221.
34-19 152Wash146, 277P376.
34-27 161La664, 109S349.
34-34 85CalA683, 259P984; 102CalA775, 283P842. [a] (4) Fact that separate property was improved by community funds is held not to affect its ownership, owner being accountable for enhanced value. 161La664, 109S349. [e] **In Arizona.**-Ariz 291P995.
35-35 85CalA683, 259P984; TexCivA 283SW531.
35-39 68CalA732, 230P188.
35-39½-New. When a policy of insurance on a husband's life payable to his estate is taken out during coverture and the premiums are paid out of community funds, the policy is community property. 68CalA732, 230P188.
35-40 [b] **Where wife predeceases husband** (1) proceeds of policy go to personal representatives of wife as her separate property. 68CalA732, 230P188.
35-45 68CalA732, 230P188.
35-47 But see 198Cal91, 243P431.
35-49 [b] 198Cal91, 243P431.
36-60 74CalA363, 240P796; 158La154, 103S723; 158La361, 104S115; 165La151, 115S441; 9LaA269, 120S124; 9LaA414, 121S236; TexCommnA 276SW690; TexCivA 8SW(2d)334; TexCivA 15SW(2d)1102. [d] **Declaration in deed that husband purchased property out of his separate funds** and that title should vest in his separate funds is necessary to make it so vest. 161La1022, 109S824. [e] **Where recital of consideration was cash,** though really separate property. 163La142, 111S655. [f] **Repurchase of realty after marriage** sold by husband before marriage is held to put it in community of acquêts and gains. 161La222, 108S422.
37-65½-New. Time of acquisition tests character of property. 136Wash196, 239P391.
37-67 20F(2d)95.
37-68 32F(2d)222.
37-72 196Cal547, 238P353; 86CalA764, 261P509; Ida 291P1049; 160La936, 107A702; TexCivA 5SW(2d)612; 151Wash698, 275P72(1stcase).
37-74 TexCivA 285SW837; TexCivA 1SW(2d)911; TexCivA 16SW(2d)136.
37-76 TexCivA 1SW(2d)911.
37-78 35Ariz378, 278P370; 86CalA764, 261P509; 102CalA582, 283P866; CalA 289P887; 160La936, 107S702; 34PortoRico198; TexCivA 22SW(2d)327; TexCivA 22SW(2d)961 (laws of foreign jurisdiction); 142Wash372, 253P113; 145Wash19, 258P851; Wash 291P1077. [a] TexCivA 3SW(2d)830. See also 155Wash517, 285P442 (inadvertence of scrivener).
38-30 165La151, 115S441.
38-84 1LaA558.
38-87 [e] **Realty purchased in name of wife alone** is only presumed her real property. 99CalA172, 277P1089.
39-89 145Wash19, 258P851.
39-90 [a] **Unless deed states purchase was with separate funds,** property belongs to community. 161La664, 109S349.
40-3 35Ariz378, 278P370. [a] **Husband's labor in erection of building on lot** does not make property so purchased community property. 35Ariz378, 278P370.
40-16 35Ariz378, 278P370; TexCivA 15SW(2d)155; 136Wash196, 239P391; 153Wash392, 279P599; 155Wash631, 285P649. [a] **Rule applied, unless action is taken** destroying mixed character of property. 136Wash196, 239P391. [b] **In determining extent of community and separate property** on husband's death, their interests are measurable by their respective contributions. CalA 288P102. [c] **If initial payment is with wife's money,** her rights to the homestead as community property are different than by making deferred payments. TexCivA 28SW(2d)173.
41-19 TexCivA 20SW(2d)229.
41-27 165La458, 115S655.
43-30 TexCivA 283SW531.
43-37 33NM55, 263P758.
43-39½-New. Property interest of a husband and wife as beneficiaries of a trust is community property. CalA 266P843.
44-41 TexCivA 288SW494.
44-49½-New. Wife's expectancy of inheritance is part of her separate estate. TexCivA 8SW(2d)236.
44-53 48Nev175, 228P306.
44-55 80CalA222, 251P640.
45-63 82CalA313, 255P767.
45-64 162La793, 111S166.
47-72 158La822, 104S728. [a] **In Porto Rico.**-32PortoRico849.
47-74 158La822, 104S728 (construing acquisition "in any other similar way").
47-79 196Cal547, 238P353, 356 [quot CJ].
47-80 196Cal547, 238P353, 356 [quot CJ].
47-81 196Cal547, 238P353, 356 [quot CJ]; 74CalA363, 240P796; CalA 289P887; 6LaA177; 13LaA143, 127S417; 48Nev166, 228P307; 33PortoRico413; TexCivA 288SW614; TexCivA 1SW(2d)911. But see 71CalA389, 235P653; 92CalA270, 267P911.
48-82 196Cal547, 238P353; 74CalA363, 240P796.
48-84 32Ariz286, 257P639, 640 [citCJ]. [a] **Where parties have signed document** admitting certain movables to have been possessed at time of marriage and also at time of death, property belongs to separate estate of decedent. 10LaA109, 119S768.
48-85 196Cal547, 238P353, 356 [quot CJ]; CalA 289P887; 13LaA143, 127S417; TexCivA 291SW273; TexCivA 293SW638.

48-86 [b] **TexCivA** 287**SW**77.
48-86½-New. The record title in a wife raises the presumption that the property is her separate estate. 203**Cal** 409, 264**P**747(1stcase).
48-90 196**Cal** 547, 238**P**353 (after death of husband).
48-91 87**CalA**359, 262**P**339.
48-93 48**Nev**166, 228**P**307.
48-94 152**Wash**448, 277**P**988.
48-95 48**Nev**166, 228**P**307.
48-97 **TexCivA** 24**SW(2d)**506.
48-98 **TexCivA** 9**SW(2d)**474; **TexCivA** 25**SW(2d)**192.
49-3 32**Ariz**286, 257**P**639; 35**Ariz**378, 278**P**370; 196**Cal** 547, 238**P**353; **Cal** 265 **P**929; **Cal** 285**P**318; **Cal** 290**P**576; 89 **CalA**485, 265**P**340; 93**CalA**27, 268**P** 1093; 102**CalA**643, 283**P**860; **CalA** 288 **P**102; 47 **Ida**568, 277**P**425; 158**La**822, 104**S**728 (prescriptive right completed during marriage); 7**LaA**29; 7**LaA**131; 8**LaA**562; 8**LaA**794; 48**Nev**166, 228**P** 307; 49**Nev**299, 245**P**292; 31**NM**543, 249**P**100, 47**ALR**1016; 29**PortoRico** 829; 29**PortoRico** 909; 32**PortoRico** 146; 32 **PortoRico** 274; **TexCommnA** 17**SW(2d)** 786(2dcase); **TexCivA** 287**SW**141; **Tex CivA** 287**SW**687; **TexCivA** 288**SW**494; **TexCivA** 288**SW**603; **TexCivA** 295**SW** 264; **TexCivA** 298**SW**154; **TexCivA** 300 **SW**215; **TexCivA** 1**SW(2d)**911; **Tex CivA** 4**SW(2d)**1046; **TexCivA** 20**SW (2d)**229; **TexCivA** 24**SW(2d)**542. [c] **In California.**–70**CalA**607, 233**P**988. [d] **Registration of possessory title in husband** is equivalent to notice that property belongs to community. 32**Porto Rico** 849. [e] **Failure to include community property in partition** does not change its legal character so as to make it separate property of spouse who acquired it. 32**PortoRico** 274. [f] **There is no presumption of separate property** in some cases, 155**Wash**510, 285**P**449. [g] **All property so commingled** that it is impossible to identify separate and community property will be deemed community property. **CalA** 289**P**887. [h] **Note acquired by wife during coverture from husband** will be presumed community property rather than separate property of wife. **Ida** 291**P**1049.
50-4 32**PortoRico**274; **TexCommnA** 276**SW**211; **TexCivA** 3**SW(2d)**830. [b] **TexCommnA** 276**SW**211.
50-10 32**Ariz**286, 257**P**639; **Cal** 283**P** 813; **Cal** 290**P**576; **LaA** 128**S**903(2d case) (holding presumption continues until destroyed by conclusive proof of separate ownership); **TexCivA** 292**SW** 290. [b] **In Porto Rico.**–32**PortoRico** 849.
50-11 196**Cal** 547, 238**P**353; 93**CalA**27, 268**P**1093; 102**CalA**643, 283**P**860; **CalA** 288**P**102; 49**Nev**299, 245**P**292; 146**Wash** 1, 261**P**647. [e] 48 **Ida**163, 280**P**220. [g] **Degree of proof.**–**TexCivA** 287**SW** 687. [h] **Evidence held insufficient** to overcome presumption, **TexCivA** 287**SW** 687.
51-12½-New. Presumption that property conveyed to wife as separate property constitutes her separate estate is not conclusive. **TexCivA** 5**SW(2d)**612.
51-22 [g] **Deed from surviving husband to wife** is admissible to prove separate character of wife's title. **Wash** 289**P**1015.
52-27 32**Ariz**286, 257**P**639.
52-28 80**CalA**222, 251**P**640.
52-23½-New. A husband's application for an automobile license is admissible on the issue whether the automobile was community property. 142**Wash**98, 252 **P**533.
52-42 [a] (1) 196**Cal** 547, 238**P**353. (4) **TexCivA** 1**SW(2d)**911. (7) **TexCivA** 24 **SW(2d)**542. (8) 89**CalA**485, 265**P**340. (13) "Proof to a reasonable certainty." 205**Cal** 252, 270**P**672, 675. (14) Cannot be shown by inferences from conclusion of witnesses. **TexCivA** 300 **SW**215. (15) Convincing. **Wash** 288**P** 664. [b] **Presumption of community property of title by deed** may be rebutted by parole showing that purchase was made with separate funds. **TexCivA** 28 **SW(2d)**205.
53-43 **TexCommnA** 17**SW(2d)**786(2d case).
53-46 205**Cal** 252, 270**P**672. [c] **Contemporaneous conduct** by husband indicating intention that wife should have it is generally conclusive that it is not community property. 32**Ariz**286, 257**P** 639.
53-47 196**Cal** 547, 238**P**353. [a] (1) 32 **Ariz**286, 257**P**639; 74**CalA**359, 240**P**293; 102**CalA**620, 283**P**344; **CalA** 286**P**439; 160**La**936, 107**S**702; 11**LaA**199, 123**S** 178; **NM** 290**P**801; **TexCivA** 275**SW** 473; **TexCivA** 280**SW**315; **TexCivA** 288 **SW**494; **TexCivA** 9**SW(2d)**474; **TexCivA** 22**SW(2d)**327; 149**Wash**600, 271**P**886; 153**Wash**392, 279**P**599. (2) **LaA** 128 **S**903(2dcase). (4) 203**Cal** 613, 265**P**214; **Cal** 283**P**813; **Cal** 285**P**318; **Cal** 290**P** 576; 80**CalA**222, 251**P**640; 82**CalA**449, 255**P**892; **CalA** 289**P**887; 48 **Ida**147, 279 **P**1090; 6**LaA**177; **LaA** 130**S**628; 49 **Nev**299, 245**P**292; **TexCivA** 28**SW(2d)** 240; (4) 142**Wash**98, 252**P**533. (6) To support inference of fact that deceased wife's estate was accumulated during coverture. 196**Cal** 547, 238**P**353. (7) To support findings that property purchased on execution sale against husband was community property. 44 **Ida** 129, 255**P**409. (8) To show properties exchanged were purchased with community funds. **TexCivA** 18**SW(2d)**762. (9) To support finding of separate property. 203**Cal** 414, 264**P**743; 205**Cal** 252, 270**P**672. (10) That parties kept account of increase of live stock and separate accounts in wife's name is sufficient evidence of implied agreement to consider increase as wife's separate property. **TexCivA** 20**SW(2d)**229. (11) To support finding that wife purchased business from husband for her separate estate, assuming payment of preëxisting debts as part of purchase price. 48 **Ida** 600, 283**P**1038. (12) To support finding that property was purchased with funds from wife's separate estate. **TexCivA** 22**SW(2d)**961. (13) To sustain court's finding of separate property. **TexCivA** 28**SW(2d)**205. (14) To support finding that land transferred in exchange for land involved was not wife's separate property. **TexCivA** 3**SW(2d)**935. [b] 196**Cal** 547, 238**P**353; **Cal** 265**P**929; 89 **CalA**485, 265**P**340; 102**CalA**643, 283**P** 860; **CalA** 288**P**102; 46 **Ida**286, 269**P** 84; **Ida** 291**P**1049; 170**La**839, 129**S**364; 8**LaA**82; 13**LaA**143, 127**S**417; 33**Porto Rico** 413; **TexCommnA** 276**SW**690; **Tex CivA** 291**SW**273; **TexCivA** 295**SW**264; **TexCivA** 300**SW**215; **TexCivA** 3**SW(2d)** 830; **TexCivA** 8**SW(2d)**334; **TexCivA** 24**SW(2d)**542; 155**Wash**510, 285**P**449. [c] 74**CalA**646, 241**P**581; **CalA** 264**P**772; **TexCivA** 293**SW**638; 146**Wash**1, 261**P** 647; 155**Wash**517, 285**P**442. [e] **Evidence held insufficient** to warrant finding that deceased wife's estate was not community property. 196**Cal** 547, 238**P**353. [f] **Parole purchase of land,** possession and improvements during first marriage held to warrant finding of community property of that marriage. **TexCivA** 28 **SW(2d)**240. [e] **Wife's testimony that she purchased note with separate funds and was owner** is mere conclusion insufficient to overcome presumption of community ownership. **Ida** 291**P**1049.
54-48½-New. Proof of facts from which conclusion may be reached that property was not community is necessary and mere testimony that property or consideration paid therefor was a gift is insufficient. 48**Nev**166, 228**P**307.
54-48¼-New. Only slight evidence is required to show property purchased by husband immediately after marriage is his separate estate. **TexCivA** 275**SW** 473.
54-48¼-New. Only slight evidence is required to show that property purchased by a husband immediately after marriage was his separate and not community property. **TexCivA** 280**SW**315.
54-55 48**Nev**166, 228**P**307; **TexCivA** 300**SW**215.
55-59 Ida 286**P**615; **TexCivA** 300**SW** 215.
55-65½-New. Where a wife had separate money, it will be presumed that, in purchasing an annuity bond, in which her sister's nephew and niece were named beneficiaries, the wife was using her separate money. 152**Wash**448, 277 **P**988.
55-71 29**PortoRico** 909; **TexCivA** 283 **SW**296; **TexCivA** 20**SW(2d)**229.
55-72 Contra **TexCivA** 287**SW**70. [c] **As to difficulty of proof.**–29**PortoRico** 909.
56-80 **TexCivA** 283**SW**296.
56-86 **TexCivA** 283**SW**296.
56-88 **TexCivA** 283**SW**296.
56-92½-New. In such jurisdictions, where the profits from wife's separate estate, becoming community property, are mixed with separate estate, the burden is on the wife to show how much remained of the separate estate or to trace and identify any part which has undergone mutations. **TexCivA** 283**SW** 296.
57-5 See also 51**Nev**242, 274**P**2.
57-7 29**PortoRico** 909. [a] 85**CalA**683, 259**P**984. See also 29**PortoRico** 909. [c] 149**Wash**600, 271**P**886.
58-31 158**La**361, 104**S**115; 35**PortoRico** 785; **TexCivA** 275**SW**190.
59-40 32**Ariz**286, 257**P**639; 199**Cal** 305, 249**P**10; 82**CalA**449, 255**P**892.
60-41 32**Ariz**286, 257**P**639.
60-45 82**CalA**449, 255**P**892.
61-60 82**CalA**449, 255**P**892. See also **CalA** 286**P**439.
61-61 9**LaA**30, 118**S**775.
61-62 **TexCivA** 288**SW**845.
62-69 **CalA** 286**P**439.
63-89 **TexCivA** 283**SW**310.
63-90 **TexCivA** 283**SW**310.
63-91 **TexCivA** 283**SW**310.
63-92 **TexCivA** 283**SW**310.
64-5 **TexCivA** 275**SW**190.
64-12 158**La**154, 103**S**723; **TexCivA** 15 **SW(2d)**1102.
65-17½-New. Mere declaration in will of surviving husband that property is part of community estate would not give it that status in face of facts giving it character of separate estate. **TexCivA** 287**SW**77.
65-21 [a] **Where wife is empowered by deed to do acts inconsistent with disability of coverture,** separate estate will be created in her. **TexCivA** 15**SW(2d)** 1102.
66-40 **TexCivA** 18**SW(2d)**762.
66-42 158**La**154, 103**S**723.
66-43 160**La**936, 107**S**702.
66-48 **TexCivA** 3**SW(2d)**935.
66-50 **TexCivA** 3**SW(2d)**935.
66-54 29**PortoRico** 909.
66-56 [a] **In Porto Rico.**–29**PortoRico** 909.
67-72 161**La**940, 109**S**770. [c] **Deed fraudulently procured.**–Husband held estopped to deny recital of intention that property should be separate property of wife although she procured deed by fraud. **TexCivA** 31**SW(2d)**828.
67-84½-New. Wife may be estopped from asserting her rights in husband's life insurance policy, based on fact that premiums were paid from community estate, where, with knowledge of facts, she acquiesces in payment to named beneficiary. 198**Cal** 91, 243**P**431.
67-84½-New. Wife's ignorance of law will not prevent her from being estopped to claim proceeds of husband's life insurance policy by acquiescence in payment of proceeds of policy to a designated beneficiary, although premiums were paid from community property. 198**Cal** 91, 243**P**431.
68-88 152**Wash**336, 277**P**849.
68-97 130**Kan**126, 285**P**597 (where wife without knowledge of husband's need of credit or that he had procured it).
70-29 86**CalA**193, 260**P**605; 104**Conn** 285, 132**A**459; 149**Wash**99, 270**P**137.
70-30 104**Conn**285, 132**A**459. See also 102**CalA**643, 283**P**860.
71-51 161**La**940, 109**S**770.
71-53 But see 161**La**940, 109**S**770.
71-76½-New. Where a wife purchases a business from her husband, notifies creditors of the fact, and assumes the indebtedness, and the creditors allow her to continue the business and obtain further credits, both husband and wife are estopped to contend as against the creditors that the wife was not the sole owner of the business. 48 **Ida**600, 283 **P**1038.
72-88 102**CalA**775, 283**P**842.
72-90 [c] **Character of property, partly separate and partly community,** not affected by use of income to pay community debt. 136**Wash**196, 239**P**391.

72-91½-New. Payment of mortgage on wife's separate property with husband's separate funds does not change status of property to community property. **Ariz** 291P995.

72-95½-New. That mechanics' liens for improvements on wife's separate property were discharged by community funds gives community at most only equitable lien, not title. **TexCivA** 31SW(2d)828.

72-96 **TexCivA** 292SW290.

72-98 **TexCivA** 24SW(2d)542.

72-2 152**Wash**448, 277P988. [d] **Proceeds of lessor's share of oil** from his separate land held his separate property, change from realty to personalty by removal being definitely traceable. **Tex CivA** 292SW290.

72-3 32F(2d)222; 152**Wash**146, 277P376.

73-7 155**Wash**517, 285P442 (improvements intended as gift).

73-11 155**Wash**517, 285P442.

73-11½-New. That husband contributed labor in improving wife's separate property does not transform it into community property. **Ariz** 291P995.

73-13 **TexCivA** 292SW290.

73-19 76**CalA**511, 245P221.

73-22 **TexCommnA** 1SW(2d)1090, 1091 [citCJ].

74-29 80**CalA**222, 251P640; **TexCivA** 283SW310.

74-30 80**CalA**222, 251P640.

74-32 [a] **TexCivA** 283SW310.

74-40 80**CalA**222, 251P640. But see 152**Wash**448, 277P988.

74-43 76**CalA**511, 245P221.

75-44 76**CalA**511, 245P221.

75-44 80**CalA**222, 251P640.

75-56 205**Cal** 26, 269P626; **TexCivA** 283SW310.

75-57 115**Tex**1, 274SW120.

75-59 115**Tex**1, 274SW120; **TexCivA** 283SW310; **TexCivA** 3SW(2d)935.

77-95½-New. Fact that husband contributed time and skill in conduct of business gave him no interest therein, nor in proceeds derived therefrom, 76 **CalA**511, 245P221.

77-95⅓-New. nor did it have the effect of transmitting status of ownership of business from separate to community property. 76**CalA**511, 245P221.

77-95¼-New. Nor is it of legal consequence that husband allowed wife to use in her business articles of personal property of small value belonging to him, 76**CalA**511, 245P221.

77-95⅙-New. where profits derived from such business were not product of such property. 76**CalA**511, 245P221.

78-7 10**LaA**82, 120S408(2dcase).

79-21 32**PortoRico** 274.

79-23 48**Nev**166, 228P307, 308 [citCJ].

79-24 32F(2d)222; **TexCivA** 8SW(2d)327.

79-28 198**Cal** 91, 243P431; 199**Cal** 318, 249P197; 75**CalA**698, 243P889.

79-29 269**US**315, 46**SCt**148, 70**L ed**285; 198**Cal** 91, 243P431; 199**Cal** 318, 249P197; **Cal** 263P1013; 204**Cal** 546, 269P439; **Cal** 283P813; 74**CalA**363, 240P796; 75**CalA**698, 243P889. [a] 208**Cal** 323, 281P67.

80-30 199**Cal** 318, 249P197; 204**Cal** 557, 269P519.

80-30½-New. but, in those jurisdictions, while wife's interest has not reached status of a vested interest, it is and has always been a more definite and present interest than that of ordinary heir, 199**Cal** 318, 249P197.

80-30⅓-New. although in the nature of an expectancy the wife's interest is nevertheless tangible and enforceable. 74**CalA**363, 240P796.

80-37 27F(2d)140; 160**La**813, 107S584.

81-44 **TexCivA** 16SW(2d)136.

81-47 **TexCivA** 286SW315; **TexCivA** 16SW(2d)136.

81-52½-New. The interest of husband and wife in community property in respect to their interests being vested or not vested must be determined by the state law at date of acquisition of the property. 199**Cal** 318, 249P197.

81-53 **Cal** 283P813.

82-62 43 **Ida**433, 251P957; 2**LaA**613; 30**NM**541, 240P803.

82-63 282**US**101, 51**SCt**58; 200**Cal** 389, 253P143; 41 **Ida**538, 240P600; 43 **Ida** 433, 251P957; **Ida** 291P1049; 49**Nev** 299, 245P292; 30**NM**541, 240P803; 29 **PortoRico** 909; **TexCivA** 274SW217; **TexCivA** 275SW190; **TexCivA** 293SW 695. [d] 30**NM**541, 240P803.

83-65 200**Cal** 389, 253P143; **NM** 289P 803(2dcase).

83-68 **TexCivA** 275SW190 (sole authority).

83-84½-New. One of rights of community is to assist a child of the spouses, and when husband uses community personal property for that purpose, he will be held to be acting as agent of community. 136**Wash**137, 238P918.

83-84½-New. Wife has no control over property in home during absence of husband. 163**La**752, 112S709.

83-86 43 **Ida**433, 251P957.

83-92 150**Wash**436, 273P530.

83-96 **TexCivA** 274SW217.

83-97 **TexCivA** 5SW(2d)824.

86-48½-New. In the Philippines, where a husband and a wife live apart, the wife is entitled to retain the net income of her paraphernal property instead of the support which her husband does not give her. 50**Philippine**779.

87-72 44**Philippine**76. [b] **Where debt paid by rents from property** inherited by husband, expense of obtaining it satisfied. 163**La**142, 111S655.

89-90 44**Philippine**76 (amount spent for repurchase of land sold with "pacto de retro" or agreement for reconveyance).

89-92 12**Cal** 216, 73**AmD**533; 102**CalA** 775, 283P842; 44**Philippine**76.

89-93 But see 85**CalA**683, 259P984; 86 **CalA**764, 261P509.

89-99 161**La**664, 109S349.

89-2 163**La**142, 111S655.

92-43 31F(2d)795 (claim held to be for paraphernal funds).

93-80 **NM** 290P1015.

97-58 31F(2d)795.

97-63 [b] **Contract by wife in absence of and without consent of husband** to purchase property is void as against community whose funds were expended in purchase, and where other contracting parties knew of husband's absence, though wife had temporary possession. 141**Wash**250, 251P282.

98-31½-New. Pleading defense that claim for workmen's compensation was not filed within statutory time may not be enjoined, as filing of such claims is jurisdictional fact. 100**NJEq**444, 136**A** 342.

98-68 136**Wash**137, 238P918.

99-88 [b] **Transaction is presumed to have been without consideration** where one spouse obtains advantage over other. 87**CalA**359, 262P339.

99-92 [a] **Contract not amounting to release by wife.**-97**CalA**603, 275P996. [b] **Agreement between husband and wife that land was placed in name of wife,** in order to reimburse wife for her paraphernal property, administered by her husband, did not make land separate property of wife. 9**LaA**269, 120S 124. [c] **Any form of express words** that property should be considered community, is sufficient where there is meeting of minds. **CalA** 288P870.

99-93 **CalA** 288P102. [d] (2) Deed to realty and bill of sale to business without consideration and without wife's knowledge of contents is ineffective. **CalA** 288P102.

99-93½-New. At common law a contract between husband and wife for community to pay wife a salary is invalid. 33F(2d)987.

100-95 30**Ariz**501, 249P70; 87**CalA**359, 262P339; **La** 129S801; **TexCivA** 282SW 925; **TexCivA** 3SW(2d)112. See also 142**Wash**372, 253P113.

101-17 205**Cal** 26, 269P626; **Tex CommnA** 286SW193.

101-18 87**CalA**359, 262P339; 48 **Ida** 600, 283P1038. Contra 51**Nev**242, 274 P2.

101-19 32**Ariz**286, 257P639.

101-20 [a] **Insolvent husband** cannot convey community property to his wife as against his creditors. **TexCivA** 3 SW(2d)935.

101-21 87**CalA**359, 262P339. [a] **Nev** 283P913. [e] (5) Oral transfer of personalty held valid. 155**Wash**517, 285P 442. [f] **Only creditor** when gift is made can complain of husband's giving wife separate estate of his interest in community estate. **TexCivA** 3SW (2d)112. [g] **Where deed is made to wife,** funds being from community property it may be proved husband intended gift. **TexCivA** 28SW(2d)205.

101-21½-New. Taking title by insolvent debtor to himself and wife is fraud on creditors. 256**Mass**250, 152NE335.

102-26 [d] **Donation becomes irrevocable** at death of donor. **La** 129A801.

102-36 24F(2d)916; 144**Wash**494, 258 P335.

102-39 163**La**752, 112S709; **TexCivA** 275SW190.

103-49½-New. After the separation of a husband and wife and during the pendency of divorce proceedings, the husband may not state an account with a creditor, growing out of community business and covering a period before and after the separation so as to give the creditor a right to a personal judgment against the wife. 90**CalA**525, 265 P1024.

103-56 163**La**752, 112S709; 164**La**397, 113S889.

105-87 13**LaA**191, 127S423 (medical services). [c] **That wife is living away from husband** does not relieve conjugal partnership from obligation for her support. 51**Philippine**719. [d] **In Philippines** support of family is chargeable to conjugal partnership. 51**Philippine** 719.

107-12 142**Wash**385, 253P642. [a] (2) Statute protecting holder in due course from maker's defense that he signed as accommodation held not to apply to community. 142**Wash**385, 253P642.

107-14 136**Wash**137, 238P918; 142 **Wash**385, 253P642; **Wash** 291P1079.

107-15 136**Wash**137, 238P918; 142 **Wash**385, 253P642. [a] **Presumption held rebutted.**-136**Wash**137, 238P918. [b] **Husband's affidavit that debt contracted in Illinois is not community property** is insufficient to overcome contrary presumption. **Wash** 291P1079.

108-29 158**La**361, 104S115.

109-54 144**Wash**494, 258P335.

110-69 But see **TexCivA** 275SW310. [a] **In Texas.**-**TexCivA** 275SW310.

111-80 147**Wash**153, 265P178; 151 **Wash**199, 275P699; 155**Wash**585, 285P 425, 67**ALR**1152.

111-82 82**CalA**342, 255P523.

111-83 144**Wash**520, 258P35. [c] **That husband was appointed to office** and not elected does not affect rule. 144**Wash** 520, 258P35. [d] **Surety on sheriff's bond** cannot recover against community property for loss sustained on bond because of sheriff's tort. 144**Wash**520, 258P35.

111-85½-New. The harboring of a vicious dog by a husband and wife is an act of the community, and, where, as a result of such act, injury is suffered by another, under circumstances which render the harborers of the dog liable, liability is a community one, and the husband must be made defendant and not the wife. 9**LaA**375, 119S445(2d case).

111-89 164**La**397, 113S889.

111-96½-New. Attorney's fees for representing wife in a limited divorce suit must be fixed as against the husband upon quantum meruit and under the court's supervision, regardless of the wife's contract. 164**La**397, 113S889.

111-96⅓-New. Attorney for wife in a suit for separation ended by reconciliation can recover from the husband the reasonable value of services notwithstanding a note given by the wife for fees. 164**La**397, 113S889.

111-96¼-New. One thousand dollars is reasonable compensation to an attorney for the wife in a suit for separation, ended by reconciliation, where the net value of the community property was sixty-two thousand dollars. 164**La**397, 113S889.

111-98 10**LaA**550, 120S237; 170**La**521, 128S297; **LaA** 126S246.

112-4 **TexCivA** 6SW(2d)425.

112-6 4**LaA**87; 8**LaA**341; 12**LaA**471, 126S447; 149**Wash**257, 270P829.

112-7 149**Wash**257, 270P829.

112-8½-New. Wife's separate estate is not liable for goods furnished to husband for benefit of community prop-

erty, although furnished on husband's statement that wife would make payment. **TexCivA** 295SW625.

113-28½-New. Earnings of a wife, paid or converted into other property, do not come within exemptions granted by statutes. 48 **Ida**163, 280P220.

113-31 160**La**813, 107S584; **TexCivA** 283SW923; **TexCivA** 298SW443; 148 **Wash**689, 270P93. [c] 141**Wash**422, 251P868. [d] **Community property may always be subjected to community debts, though standing in wife's name,** notwithstanding statute providing that community property, standing in name of wife, cannot be sold or mortgaged without wife's consent. 9**LaA**269, 120 S124.

114-33 6**LaA**329; 6**LaA**476.

114-35½-New. Creditors cannot follow community personalty on which there is no lien, into hands of spouse, unless transfer was made to defraud creditor. 142**Wash**372, 253P113.

114-37 142**Wash**385, 253P642; 151 **Wash**35, 274P719; **Wash** 290P822.

114-40 41 **Ida**538, 240P600; **TexCivA** 283SW296. [c] **Where land purchased, including that taken in name of wife, was acquisition of legal community of acquets and gains** existing between her and husband, amount due as part of purchase price of entire tract was community debt as regards right of husband's judgment creditors to seize and sell property as his property. 9**LaA** 30, 118S775. [d] **Judgment against husband** is presumptively community obligation. 155**Wash**517, 285P442.

115-44 205**Cal** 345, 270P948; 10**LaA** 140, 119S572(2dcase); 10**LaA**352, 119 S576. See also 95**CalA**628, 273P36. [b] **Wife's contracts during coverture** are alone exempted under Texas statute. **TexCommnA** 6SW(2d)348.

115-47 **TexCivA** 9SW(2d)70.

115-49 141**Wash**250, 251P282.

115-50 Contra **TexCommnA** 6SW(2d) 348.

115-51 83**CalA**551, 257P119.

115-52 **TexCommnA** 6SW(2d)348; **Tex CivA** 299SW322.

115-54 34**Ariz**380, 271P865.

115-57 See also 151**Wash**221, 275P700 (property received in exchange for separate property).

115-63 **TexCivA** 290SW872. [d] **Community crop produced on wife's separate** estate is subject to wife's debts. **TexCivA** 3SW(2d)461.

116-64 **TexCivA** 299SW322.

116-66 **TexCivA** 300SW215; 142**Wash** 372, 253P113. But see 169**La**1069, 126 S556. [c] **False representations in sale of community property.**–Wife's separate property is not liable for false representations of husband as agent of community in sale of community property. 141**Wash**422, 251P868.

116-67 76**CalA**511, 245P221; 102**CalA** 582, 233P866. [j] **Community crop produced on wife's separate estate** is not subject to husband's debts. **Tex CivA** 3SW(2d)461.

117-72½-New. A stock in trade which was originally the separate property of the wife may become so indistinguishably mixed with the community estate as to be subject to sale on execution under a judgment against the husband for his individual debt. **Tex CivA** 291SW273.

117-77 153**Wash**163, 279P583.

117-78½-New. In Texas wife may bind herself or her separate estate for necessaries furnished her and her children or for benefit of her separate estate. **TexCivA** 276SW752.

118-10 **TexCommnA** 12SW(2d)146.

119-13 [f] **Married woman** falsely representing that she was divorced, and that property mortgaged was her separate property, has been held estopped to claim that property was community property. **TexCivA** 297SW277.

120-27½-New. Where abandoned wife as feme sole purchased property and deeded it to son and participated in effort to secure erection of house for her benefit, she and husband are both estopped to dispute validity of lien for money advanced to build house or to claim any right in lot as distinguished from house. **TexCivA** 286SW593.

120-37½-New. Wife permitting husband to commingle her separate property with community, could not maintain property was hers against bona fide creditors. **Wash** 288P664.

120-37½ Wife is not estopped from claiming goods were her separate property where the other party had notice of her ownership. **CalA** 290P146.

120-40 196**Cal** 497, 238P1034 (designation for valid consideration of third party as beneficiary in policy which was community property held valid transfer); 200**Cal** 389, 253P143; **Cal** 283P 813; **TexCivA** 275SW190; **TexCivA** 290 SW548. [c] (2) Under Spanish civil code formerly in force in Porto Rico consent was not required. 32**PortoRico** 534.

122-46 168**La**493, 122S593.

122-47 **TexCommnA** 25SW(2d)606; **TexCivA** 286SW593.

123-48 **TexCivA** 286SW593. [c] **Consent or joinder of husband is unnecessary** where he abandons her and she must sell and encumber community property to provide necessities for self and family. **TexCivA** 286SW593.

124-68 73**CalA**655, 239P56; 74**CalA** 363, 240P796; 45 **Ida**15, 260P433; 32 **PortoRico** 534; 135**Wash**195, 237P295.

124-69 135**Wash**195, 237P295. [b] (2) Though statute in force at time marriage contracted did not require consent, latter is necessary, it being required by law in force at time of conveyance. 32**PortoRico** 534. [c] **Consent as derived from power of attorney.**–32**PortoRico** 534. [d] **"Deed" in statute requiring wife to join in deed** is held to mean written instrument duly acknowledged by competent party, conveying title to land. 31**Ariz**456, 254P223. [e] **Lease.**–Under some statutes, husband's lease of community property not signed nor acknowledged by wife is not valid. 47 **Ida**687, 278P 221.

124-71 [a] (1) 79**CalA**428, 249P878. (2) 205**Cal** 642, 272P573; **CalA** 264P772. (3) 84**CalA**142, 257P606.

124-75 91**CalA**640, 267P384.

124-75½-New. or assignment contract to convey, 74**CalA**363, 240P796.

124-77 89**CalA**485, 265P340.

124-83½-New. or to a supplemental contract extending the time of payment. 48 **Ida**580, 283P613.

124-83½-New. or to lease by husband for three year period with option of renewal for five years additional, **NM** 289P803(2dcase).

125-88 73**CalA**655, 239P56. [a] **Tenant cannot escape** payment of rent because community property was not signed by wife. 43 **Ida**306, 251P630. [b] **Deed of husband without wife joining** vested one-half interest of community property. 207**Cal** 131, 277P316.

125-89 73**CalA**655, 239P56; 96**CalA** 682, 274P755. [a] **A wife could recover only one half of property** conveyed by husband. 97**CalA**628, 276P122.

125-91 32**Ariz**370, 259P282, 56**ALR** 903; 73**CalA**655, 239P56. [a] **Matters not constituting estoppel.**–135**Wash**195, 237P295. [b] **Matters not raising estoppel.**–Wife is not estopped to prevent exchange of community property by husband by following husband in moving out. 89**CalA**485, 265P340.

125-92 84**CalA**142, 257P606.

125-92½-New. Public policy does not forbid wife from waiving her right to avoid transfer of community real property executed solely by her husband. 73**CalA**655, 239P56.

125-94 115**Tex**162, 278SW1101; 115 **Tex**273, 280SW531.

125-95½-New. Words "transfer" and "convey" as used in New Mexico statute restricting transfer of community realty refer to deeds and mortgages only. **NM** 289P803(2dcase).

125-97 200**Cal** 389, 253P143; **TexCivA** 298SW154; **TexCivA** 298SW443; **Tex CivA** 3SW(2d)596. [a] (1) 41 **Ida**538, 240P600. (2) Rule applies though property is exempt from execution. 41 **Ida** 538, 240P600. (3) Sale in payment of indebtedness is authorized. 41 **Ida**538, 240P600.

125-1 **TexCivA** 298SW154.

125-3½-New. , or that, because he did not sign original contract of sale, and that property, although in wife's name, was community property, he should not be bound to convey. 72**CalA**748, 238P 127.

125-7 **NM** 291P489.

125-7½-New. but the rule is otherwise under statutes in some jurisdictions; 45 **Ida**15, 260P433. [a] **Subsequent tender of deed** duly signed by wife and acknowledged by her does not validate contract. 45 **Ida**15, 260P433.

126-13½-New. Husband's knowledge that deed was signed as such is held immaterial as to community property unless wife also understood nature and contents of paper. 43 **Ida**675, 256P529.

126-16 [d] **Innocent third parties dealing on faith of public records** are excepted from general rule protecting them where property was acquired by married woman during marriage. 10 **LaA**297, 120S408(1stcase).

126-17 **TexCommnA** 293SW563.

126-20 [a] **Where grantee was not informed** that property transferred to him was community property of wife and husband, who had disappeared, deed from wife vested in him both legal and equitable title. **TexCivA** 16SW(2d)136.

126-27 See also 73**CalA**655, 239P56. [c] **In California.**–73**CalA**655, 239P56; 89**CalA**535, 265P292.

126-30 74**CalA**363, 240P796.

127-43½-New. Purchaser from husband, under a contract void because of the wife's failure to join therein, may recover from the husband the value of a building placed on the property. 45 **Ida**15, 260P433.

127-44 **TexCivA** 3SW(2d)596.

127-45 141**Wash**672, 252P105. [c] **Chattel mortgage by husband on automobile** held valid lien against husband, though not placed of record, and was not invalid as against wife and children of deceased husband. **TexCivA** 11 SW(2d)325.

127-55 **TexCivA** 280SW879. [b] **Mortgages executed by both spouses on** community real estate are indebtedness against both jointly and each severally. 150**Wash**482, 273P735.

128-57½-New. Pledge of community property for debt of child of the spouses is within authority of husband as statutory agent of the community. 136 **Wash**137, 238P918.

128-58 41 **Ida**690, 241P1023. [b] 32 **PortoRico** 702. [e] **Express consent of wife is indispensable** in order that husband may encumber growing crops or properties belonging to conjugal partnership. 32**PortoRico** 702. [f] **To record agricultural loan** secured by growing crops of community property, express consent of wife is necessary, and it is insufficient for wife to appear before notary and state that she accepts and ratifies contract. 32**PortoRico** 702. [g] **Mortgage to secure specified sum** due at time certain cannot be shown intended to secure future advances under agreement between husband and mortgagee unknown to wife. 41 **Ida** 172, 238P515.

128-59 But see 31**Ariz**456, 254P223. [f] **Husband can make valid assignment of lease** without joinder and consent of wife. 146**Wash**520, 264P8 (assignment of rentals effective).

128-60 42 **Ida**338, 245P389.

128-61 81**CalA**204, 253P351.

128-63 [a] 29**Ariz**276, 240P1029.

128-63½-New. Judgment of foreclosure on mortgage by husband, wife not joining, is proper as against his administratrix where deceased, if alive, would have been estopped to claim that absence of wife's signature invalidated mortgage, and widow is not a party to the action. 29**Ariz**276, 240P1029.

128-63½-New. Husband purchasing real property as community agent and taking deed in his own name may as part of same transaction give purchase-money mortgage to vendor. 31**NM**543, 249P100, 47**ALR**1016.

128-69 41 **Ida**538, 240P600.

129-70 41 **Ida**538, 240P600; **TexCivA**

28SW(2d)173; 136Wash137, 238P918, 920 [citCJ].
129-82 198Cal 91, 243P431; 205Cal 26, 269P626. [c] **Deposit by husband** of community property with warehousekeeper is not gift or a conveyance without valuable consideration. 74CalA87, 239P422.
129-83 198Cal 91, 243P431; 208Cal 323, 281P67 (wife surviving husband dying intestate).
129-84 198Cal 91, 243P431; 208Cal 323, 281P67; 97CalA628, 276P122; 169 La1127, 126S681.
130-86 198Cal 91, 243P431.
130-87 198Cal 91, 243P431. [a] **Gift initiated during husband's life but not completed till his death** vests property in donee subject to wife's right of revocation. 198Cal 91, 243P431. [b] **Proceeds of insurance policy** premiums of which were paid out of community funds are within rule that husband's gift of community property is valid till avoided by wife. 198Cal 91, 243P431.
130-89 198Cal 91, 243P431.
130-89 198Cal 91, 243P431.
130-90 See also 208Cal 323, 281P67.
130-91 198Cal 91, 243P431.
130-91½-New. Delivery to sister of deed of community property, naming wife and sister as grantees more than a year after its execution is valid, although the wife was unaware thereof prior to the husband's death. 208Cal 323, 281P67.
130-99 [a] **In Porto Rico.**-32Porto Rico 534.
130-10½-New. Statute giving spouses right to execute power of attorney to each other for disposition of community property held to apply only to realty conveyance. 142Wash372, 253P113.
132-24 TexCivA 8SW(2d)236.
132-25 But see TexCivA 8SW(2d)236.
132-26 TexCivA 8SW(2d)236.
133-43 TexCivA 286SW593.
133-47 TexCivA 286SW593.
136-5 See also 142Wash372, 253P113.
139-61 48Philippine523.
142-52 See also TexCivA 8SW(2d)236.
142-73 Mo 280SW702.
145-11 136Wash196, 239P391.
145-23 74CalA87, 239P422.
145-24 47 Ida542, 277P554(2dcase).
146-30 [b] (9) Wife holding property in trust for community has been held proper party to suit, aided by attachment, for breach of husband's contract to sell land. TexCivA 298SW443.
146-36 7LaA194.
146-45 1LaA255.
146-51 2LaA123. But see 11LaA190, 123S191.
147-65 Mo 280SW702.
148-86½-New. Under some statutes the husband is deemed the sole owner of the community property for the purpose of defending an action involving it. 49Nev299, 245P292.
148-87 Ida 291P1049; 49Nev299, 245P 292; 191NC412, 131SE750. [a] (5) Other instances. TexCivA 30SW(2d) 697.
148-88 But see 98CalA180, 276P634. [d] **Wife, as husband's administratrix,** may sue to recover community property without making herself individually party plaintiff. 43 Ida255, 251P623.
148-89 99CalA583, 278P912; CalA 286 P1089.
148-90 99CalA583, 278P912.
149-13½-New. Action by a wife to quiet title by removal of deed valid on its face is not an action to quiet title as against adverse claims under code. 73CalA312, 238P798.
149-13⅓-New. In an action by a wife to set aside a husband's deed to a third party the husband is the necessary party. 73CalA312, 238P798.
149-14 [a] **Wife's assignee** may sue without consent of husband where wife had right to sue alone. 84CalA430, 258 P407.
149-25 But see TexCivA 5SW(2d)824.
149-26 35PortoRico 59; TexCivA 5SW (2d)824.
150-28 9LaA264, 119S268. [b] **Medical expenses paid by husband for wife's injuries** may be recovered by him. 9 LaA380, 120S504.
151-66 TexCivA 25SW(2d)283.
151-80 [a] **Under statute providing that, when wife's paraphernal property is administered by husband or by him** and wife indifferently, fruits and profits belong to community of acquets and gains, wife could have no personal action against husband for account of rents or revenues on quantum meruit of her separate property while under husband's administration, either before or after demand for return of administration.. 167La595, 120S19.
151-89 71CalA50, 234P329 (complaint held sufficient in action for wrongful disposition by wife of proceeds of sale of community property and refusal to join in sale of community property contrary to agreement).
152-2 LaA 130S628.
152-9 9LaA429, 119S886; 49Nev299, 245P292.
152-10 49Nev299, 245P292.
152-11 LaA 126S246 (where wife did not sign contract).
153-38½-New. The court is not required to order that a wife be made a party to an action against her husband on a note made by him, although it is shown that an amount owed by the payee to the maker's wife for board and lodging in a house owned by her and occupied as a residence by her and her husband was applied as payment on the note: 49Nev299, 245P292.
153-45½-New. In some jurisdictions an action to avoid instrument of husband holding record title to community property cannot be brought after expiration of one year from filing for record of such instrument. 73CalA655, 239P 56.
153-45⅓-New. The filing of a complaint and lis pendens cannot take the place of recording of a husband's contract for exchange of community property so as to start the period of limitations running against the wife's right to prevent enforcement of the contract. 89CalA485, 265P340.
153-45¼-New. A wife's defense to an action for specific performance of her husband's contract for exchange of community property pleaded by way of answer relates back to filing of the complaint in determining whether defense is barred. 89CalA485, 265P340.
153-50½-New. Wife, joined as defendant in suit to foreclose mortgage on community property, is entitled to defend her own right, and, on husband's neglect, to defend his right also. 41 Ida 690, 241P1023.
153-50⅓-New. On death of wife, husband may assert any defense, not based on his own wrongful acts, which wife could have asserted for protection of rights in community property, 41 Ida 690, 241P1023.
153-50¼-New. but he may not assert defense, available to wife, which arose from unlawful acts in which he participated. 41 Ida690, 241P1023.
153-50⅕-New. Either husband or wife, when sued jointly, may set up any defense either may have. 153Wash163, 279P583.
153-57 99CalA583, 278P912.
155-95½-New. In a wife's statutory action to remove cloud on husband's deed to which she did not consent from community status of land in the absence of an allegation of fraud want of consideration for the deed must be alleged in order to state cause of action, 73CalA 312, 238P798.
155-95⅓-New. or the facts must be alleged showing that the consideration was so inadequate as to support the conclusion that the transfer was made fraudulently to deprive wife of her rights. 73CalA312, 238P798.
155-96 TexCivA 298SW443; TexCivA 300SW215. [c] (2) Complaint in action to recover commissions setting up contract for commissions for sale of community property signed only by husband does not state cause of action against wife. 42 Ida240, 245P75.
155-17 [b] **Objection that cause of action is community property on which husband alone can sue** is not available in action by wife unless specially pleaded. 87CalA165, 261P739.
156-27 TexCivA 293SW638.
156-35 TexCivA 15SW(2d)1102.
156-36 [a] (3) Consent of wife may be presumed to use of community property to assist child of spouses. 136 Wash137, 238P918. [h] **Loan to husband** after marriage is presumed to be loan to community. 49Nev299, 245P 292. [i] **Presumption that note executed by husband is for benefit of community** is rebuttable. 142Wash385, 253 P642. [j] **Transactions presumed for benefit of community.**-146Wash569, 264 P2. [k] **Presumption of gift as her separate property** arises where father conveys chattels to married daughter, unless deed shows contrary. TexCivA 15SW(2d)1102. [l] **Property acquired during marriage** is presumed to be community property. 32F(2d)222; CalA 276P122; 168La510, 122S599; 9LaA429, 119S886; 9LaA269, 120S124; 10LaA 550, 120S237; LaA 122S92; TexCivA 11 SW(2d)350; TexCivA 15SW(2d)1102; 151Wash698, 275P72(1stcase). [m] **Debts incurred by husband during marriage** are presumed to be community debts. 32F(2d)222. [n] **Where wife purchases immovable property in her own name,** declaring that she buys with her separate funds for her separate benefit, and husband's consent and authority is not shown in writing, and he does not take part in act, there is no presumption that purchase is for benefit of community so as to bind husband. 9LaA242, 119S 267. [o] **Community interest of husband and wife** in all property of whatever kind, whether standing in name of husband, or that of wife, or in their joint names, is presumed to exist till contrary is shown. 9LaA429, 119S886. [p] **Rebuttable presumption** that property possessed at dissolution of marriage is community property. 9LaA102, 119 S85; TexCivA 15SW(2d)1102; TexCivA 16SW(2d)366.
156-37 [b] (5) Burden was on wife to show that note signed only by husband was not community debt. 148Wash689, 270P93. [e] (2) 41 Ida538, 240P600. (7) In case of purchase in name of wife with community funds, burden is on husband to show that conveyance was not intended as gift to wife. 70CalA 607, 233P988. [f] **Burden of proof on wife** to show character of property taken in her name as separate. LaA 122S 92. [g] **Person claiming character of property acquired during marriage as separate** has burden of proof. 32F(2d) 222; 97CalA628, 276P122; 9LaA269, 120S124; 151Wash698, 275P72(1stcase). [h] **In order for husband to charge community** with money alleged to have been brought in by him, he must show he brought in money and that it enhanced community. 168La417, 122S276.
157-38 [a] (4) 73CalA655, 239P56. (7) Husband's assent may be shown by actions, inaction, and silence. 10LaA550, 120S237. (8) Other instances. Tex CivA 24SW(2d)524.
157-39 12LaA178, 125S475(1stcase). [b] (3) That broker's services benefited wife's separate estate. TexCivA 300SW 215. [e] (10) Support finding that husband had no interest in property conveyed to wife. 70CalA607, 233P988. (11) Support finding in action by husband against wife for wrongful disposition of proceeds of sale of community property that no complete account was kept after specified date. 71CalA50, 234 P329. (12) Support finding that assets of business were separate property of wife. 76CalA511, 245P221. (13) Show debt of husband to community repaid. 163La142, 111S655. (14) Show that wife agreed that husband should control her separate estate as community property. 203Cal 96, 263P213. (15) Show that obligation was contracted for benefit of conjugal partnership. 33 PortoRico 506. (16) Support finding that property in wife's name was community property. 206Cal 657, 275P801. (17) Show husband authorized wife to buy. 10LaA550, 120S237. (18) Overcome presumption that property was community property. 9LaA537, 119S 740. (19) Sustain finding that wife had separate title to automobile seized under fieri facias issued by virtue of judgment against husband. 9LaA102, 119S 85. (20) Support finding that property

wife exchanged for other property was community property. **TexCivA** 16SW(2d)136. [f] (3) Warrant judgment against community for loan to husband. 141Wash603, 251P890. (4) Show that partnership real estate was community property of one partner. 205Cal642, 272P573. (5) Sustain burden of showing that property was purchased by wife with her separate funds. 10LaA82, 120S408(2dcase). (6) Sustain burden of proof on plaintiff to rebut presumption that land was community property. 9LaA269, 120S124. (7) Show that property constituted wife's separate and paraphernal estate. 168La510, 122S599. (8) Overcome presumption that note was community obligation. 148Wash689, 270P93. [g] **Presumption that lands purchased during marriage relationship were community property** can be overthrown only by evidence of clear, certain, and convincing character establishing contrary. 97CalA628, 276P122. [h] **One asserting community interest** has burden to establish claim by preponderance of evidence. CalA 286P439.

157-48 TexCivA 28SSW845 (question whether property bought with community funds was separate property); **Tex CivA** 11SW(2d)350.

157-49 TexCivA 8SW(2d)792. [a] **Evidence held sufficient to require submission to jury** whether lots were separate estate of husband. **TexCivA** 22SW(2d)327.

157-49½-New. It is a question of fact whether evidence is sufficient to overthrow presumption. 70CalA607, 233P988.

157-49⅓-New. In trespass to try title question whether land was purchased by husband with community funds and deed taken in name of plaintiff to defraud wife is for jury. **TexCivA** 285SW837.

157-50 [c] **Instruction on skill of wife** as nurse to children held not unauthorized, where value was inferable from evidence. 41GaA193, 152SE306.

158-55½-New. Discontinuance. Where wife has sued on a community claim, she has the capacity to discontinue. 159La209, 105S292 (pretermitting any question as to right of wife to sue for community debt).

158-55⅓-New. Proportion of profits from use of separate property and increased values is for court to determine. CalA 289P887.

158-59 73CalA655, 239P56; 93CalA27, 268P1093.

158-59½-New. In an action to quiet title to community property where the complaint alleged that the deed given by the husband was not authorized by the wife, a finding that the wife had present vested interest is erroneous and insufficient to support judgment, as her interest is only a contingent ultimate interest. 73CalA312, 238P798.

158-59⅓-New. In such an action where the complaint did not allege want of consideration or fraud, finding that husband's grantee had no interest is erroneous and insufficient to support judgment. 73CalA312, 238P798.

158-59¾-New. Wife is entitled to the verdict on the defense made by her in an action wherein the judgment would bind community and her separate estate. 32Ariz381, 259P397.

158-72 [a] **Wife entitled to modification of ambiguous judgment against community,** preventing judgment from being personal against her. **Wash** 291P1079.

158-82½-New. In an action on a note executed by deceased husband, secured by a mortgage lien on an automobile which passed to the wife and minor children, judgment should have provided for the establishment of the debt, foreclosure of the mortgage lien, and sale to satisfy the debt, and for payment to the wife and minor children of any excess after payment of the debt and court costs. **TexCivA** 11SW(2d)325.

158-83½-New. Judgment on community debt in a suit against both spouses is properly rendered against the surviving husband where the wife dies pending the suit. **TexCivA** 3SW(2d)596.

160-21 206Cal254, 274P326.

160-23 49Nev342, 246P688.

160-34 176Ark714, 3SW(2d)993, 995 [quotCJ].

160-34½-New. Where conveyance by husband of community property was set aside as to wife's interest, it was inoperative as to community creditors. **TexCommnA** 293SW563.

160-34⅓-New. Judgment against husband as to community property is not subject to collateral attack in an action by the wife to quiet title. 136Wash196, 239P391.

160-41½-New. In an action by wife to quiet title, based on separate claim, judgment against husband and community cannot be attacked collaterally. 136Wash196, 239P391.

161-60 See also 155Wash517, 285P442. [b] (2) Sale of husband's interest in community on judgment against him alone for community debt after wife's death conveys interest of both husband and wife. **TexCivA** 3SW(2d)596.

161-69½-New. In an action on a note executed by deceased husband, secured by a chattel mortgage on an automobile passing from husband's insolvent estate to wife and minor children, it was error to award execution against the wife and minor children. **TexCivA** 11SW(2d)325.

162-87 76CalA511, 245P221.

162-97 1LaA413.

162-99 29PortoRico909.

163-22 115Tex273, 280SW531.

163-25 9LaA732, 120S256.

163-26 [b] **Wife may resume administration of her paraphernal property whenever she chooses to do so,** and she is not required to sue for dissolution of community. 167La595, 120S19.

164-53 TexCivA 274SW217.

164-60 TexCivA 274SW217 (wife's petition not alleging waste or fraud on part of husband held insufficient).

164-70½-New. [§ 1280a] (5½). **Trial.** Instructions defining "community property" and "separate property" are held sufficient. 160La936, 107S702.

165-72 [a] **Husband's claim for balance due him** for difference between amount turned over to him by wife and expended by him in improvements placed on wife's separate property is properly postponed to dissolution of community. 167La595, 120S19.

166-12 8LaA552.

169-81 170La312, 127S735(1stcase); 29PortoRico909 (Civ. Code § 173); 32PortoRico274; **TexCivA** 27SW(2d)871. [b] **Presumption** is that wife renounces community unless accepting it within statutory time. 159La652, 106S20; 29PortoRico909.

169-82 32PortoRico274.

169-94 [a] (3) Where husband agrees to buy property before death of first wife and receives title after second marriage, property falls into second community. 161La1022, 109S824.

170-4½-New. Where a decree of divorce does not provide for a division of community property, it is held by the parties as tenants in common, under some statutes. 29Ariz538, 243P402.

170-12 162La660, 111S51.

170-13 75CalA698, 243P889; 41Ida690, 241P1023 (incidental right to assert defenses to mortgage).

171-19 TexCivA 287SW687.

171-20 TexCivA 6SW(2d)430; **TexCivA** 11SW(2d)197.

171-27 [b] **Nature of statutes.**-203Cal106, 263P1017.

171-28 Cal 263P1013; 204Cal557, 269P519.

172-34½-New. The surviving spouse succeeds to community property as his or her property without it being characterized as either separate or community property. 203Cal569, 265P241.

172-35 TexCivA 275SW156.

172-36 TexCivA 275SW156.

172-49 [a] **Devolution of realty acquired as community prior to statute relating to property of husband and wife** is governed by it so long as in force. NM 291P287.

173-63 203Cal569, 265P241.

173-72½-New. Although father, directing that certain tract be left to son at death of mother, leaves remaining property to other heirs, son is entitled to share in mother's portion of community property as her heir. **TexCivA** 291SW631.

173-72¾-New. Under some statutes heirs of married woman who predeceased her husband had no claim on property acquired by him before or during marriage. **NM** 291P287.

173-86½-New. In the absence of administration or guardianship with partition, the surviving husband and children become tenants in common of community property. **TexCommnA** 28W(2d)422.

173-86¾-New. Where the surviving husband wrongfully disposes of community property, the children can recover the value thereof or property into which they can trace the proceeds. **TexCommnA** 28W(2d)422.

173-86¼-New. That father's purchases partly with community property, after his wife's death, were chiefly on credit is not conclusive on respective rights of children and father. **TexCommnA** 28W(2d)422.

173-86⅓-New. Land acquired by father would become joint property of himself and children if he intended to make deferred payments thereon out of common property. **TexCommnA** 28W(2d)422.

174-92 TexCivA 290SW244.

174-93 35Ariz274, 276P850; 161La728, 109S403.

174-94 145Wash172, 259P32.

174-95 161La940, 109S770; 167La383, 119S399(6thcase).

174-98 204Cal557, 269P519. [b] **Under amendment to California statute,** surviving husband is entitled to one half of community property where wife leaves will disposing of other half. 203Cal613, 265P214.

174-1 198Cal91, 243P431. [a] **Under California statute as amended,** where husband died intestate while statute as amended was in force, entire community property descended to surviving wife to exclusion of children or other descendants. 203Cal106, 263P1017.

174-2 115Okl99, 243P146.

175-3 198Cal91, 243P431.

175-7 158La822, 104S728 (one claiming under father cannot deny ownership); 159La848, 106S327; 161La728, 109S403; **La** 129S664; **TexCommnA** 287SW243; **TexCivA** 293SW695; **TexCivA** 48W(2d)257.

175-10 161La728, 109S403.

175-10½-New. As respects the rights of heirs, property does not lose its character as community property by a change in form or identity. 205Cal252, 270P672.

175-17½-New. In Philippines, where it does not appear that advances to children were made from conjugal partnership funds, children are not required to bring them into collation. 51Philippine719.

176-52 TexCivA 158SW(2d)159.

176-53 TexCivA 28SW(2d)173.

177-58 [a] **Reconveyance after dissolution of community** of property originally conveyed under invalid oral sale does not constitute separate property. **Tex CommnA** 27SW(2d)137.

179-94 160La813, 107S584. See also **La** 126S528. [a] **Statute giving wife separated from husband same rights to accept or renounce community as widow** is held to abrogate statute raising presumption of renunciation of community, if not accepted by wife within statutory period after separation. 160La813, 107S584. [b] **Wife separated from husband held not presumed to renounce community by failure formally to accept within statutory period after decree of separation,** but husband may sue to compel her to accept or renounce community. 160La813, 107S584.

180-20½-New. Acceptance by wife of marital community is merely expression of consent to receive residue of community without incurring any obligation. 160La813, 107S584.

180-26½-New. Effect of remarriage where parol purchase made during prior marriage. **TexCivA** 28SW(2d)240.

181-35½-New. Where father invested his own and children's interest in de-

ceased mother's interest in land and also borrowed money, the children after father's death are entitled to half the proceeds of the land after payment of debts incurred in its purchase and management. 30Ariz552, 249P745.

181–35½–New. Widow's right to annul donation by husband is personal, as is right of children to sue. 169La1127, 126 S681.

181–40½–New. Right of husband in wife's separate property. TexCivA 283 SW310.

181–42 13LaA289, 127S767.

182–59 La 129S651; 13LaA289, 127S 767.

182–63 La 129S651.

183–89 La 129S651.

183–93 But see 13LaA289, 127S767.

183–93½–New. On expiration of usufruct, it is duty of usufruct to restore goods to owner. 13LaA289, 127S767.

183–9½–New. Widow may pledge deposit certificate issued in renewal of husband's deposit, although liable as usufructuary on accounting. 162La660, 111 S51.

184–22 See also 149Wash29, 270P110.

184–25 168La139, 121S602.

184–36 La 129S664.

185–54½–New. After the death of a married woman, a receipt, executed by her mother's attorney, acknowledging delivery by the husband of all personal property and estate payable and receivable by the mother, and releasing and discharging the husband from all further claim, liability, or demand, did not transfer the mother's interest in community property, where the husband paid nothing in connection with the transaction. 167La383, 119S399(6th case).

186–80 See also TexCivA 24SW(2d)542.

187–87 168La139, 121S602.

187–1 9LaA732, 120S256.

188–8 44 Ida461, 259P3; TexCivA 281 SW580. But see TexCivA 27SW(2d) 250.

188–10 TexCivA 275SW156.

188–11 167La1032, 120S767(1stcase); TexCommnA 12SW(2d)955; TexCivA 275SW156.

188–24 44 Ida461, 259P3. [a] **In Texas.–CivA** 286SW350. [b] **Loan made to husband by brother-in-law during community** enhanced community, and is chargeable against community. 168La 417, 122S276. [c] **Attorney's fees of husband and costs of proceedings** to settle community held properly allowed as charged against community. 168La417, 122S276. [d] **Paving lien** on property sold to wife to partition community may be included as charge against community. 167La208, 118S890. [e] **Paving bill on property sold to husband in partition of community** held not chargeable against community, where paving had not commenced. 167La208, 118S890.

188–25 TexCivA 283SW923.

189–34 TexCivA 293SW342.

189–35 13LaA191, 127S423.

189–40 13LaA191, 127S423; TexCivA 5SW(2d)224. [a] **Creditor held not required to provoke administration of wife's succession** before making demand on husband for payment of community debt. 13LaA191, 127S423.

189–43 But see 13LaA37, 127S104.

190–48 46 Ida165, 267P232; TexCivA 11SW(2d)325. But see TexCivA 275SW 156.

190–53½–New. A married woman, after the death of her husband, was at liberty to pay his debts or those of the community, and had a right to request another to pay the husband's account and bind herself for repayment of the amount thereof. 10LaA452, 121S334.

190–53½–New. Where a claim for family expenses is a several liability against both spouses, neither the death of one spouse nor administration of his estate bars action against the surviving spouse. 153Wash163, 279P583.

190–53¼–New. Where spouses are jointly liable for family expenses, payment from deceased spouse's estate operates as satisfaction pro tanto. 153 Wash163, 279P583.

190–54 But see 118Tex343, 15SW(2d) 589.

190–58 158La822, 104S728.

190–59 TexCivA 275SW156.

190–61½–New. Heirs may avoid responsibility for community debts by accepting under benefit of inventory. 13 LaA191, 127S423.

190–67½–New. After action for divorce is brought, debt contracted by one party without consent of court is not a charge against community property even though action is dismissed. 34PortoRico 209.

191–1 But see TexCivA 21SW(2d)586.

191–17½–New. Community creditors may sue cobeneficiary to recover amount recovered by him from debtor's heirs. TexCivA 288SW609 (rights of community creditors).

192–42 167La1032, 120S767 (1stcase).

192–45 116Tex180, 288SW181.

192–50½–New. Where, in a proceeding by executory process on community debt, the debt was in fact a community debt, and the property was in fact community property, sale will not be set aside in whole or in part for failure to attach to the petition for executory process authentic evidence showing that the debt was a community debt and that the land was community property. 167La1032, 120S767(1stcase).

193–63 44 Ida461, 259P3 [citCJ]; TexCommnA 283SW153; 145Wash165, 259P 10.

193–64 44 Ida461, 259P3 [citCJ]; 145 Wash165, 259P10. [a] 145Wash165, 259 P10.

193–84½–New. A petition and order for sale in administering a husband's succession must describe the property as community property in order to authorize sale of the deceased wife's interest. LaA 124S535.

193–88 44 Ida461, 259P3; TexCommnA 283SW153; TexCivA 293SW342.

193–93 161La222, 108S422.

194–27½–New. In Porto Rico, where the husband dies first and his estate is still undivided on his wife's death, the community property belongs wholly to the heirs and is subject to administration. 33PortoRico 221.

196–71 203Cal613, 265P214.

197–77 [a] 170La839, 129S364.

197–80 TexCivA 293SW695.

197–85 [a] **Survivor may incumber community estate** with trust deeds. TexCivA 293SW695.

198–90 TexCivA 293SW342.

198–93 TexCivA 293SW695.

199–15 [a] **Mere defects in proceedings to qualify** do not render administration void. TexCivA 24SW(2d)450.

199–27½–New. It has been held that the appointment of a community survivor is not subject to collateral attack. TexCivA 24SW(2d)450.

199–35 TexCivA 275SW156.

199–39 TexCivA 275SW156.

200–44 TexCivA 27SW(2d)554.

200–47 TexCivA 27SW(2d)554 (mortgage of community property).

201–88 170La521, 128S297; TexCivA 5 SW(2d)224.

202–2½–New. That agent signed a note describing the principal as acting in a representative capacity was not decisive of whether the note was executed in a representative capacity. TexCivA 1SW (2d)915.

202–4 TexCivA 292SW574. [a] (2) Surviving wife may sue on note payable to husband. TexCivA 31SW(2d)871. (3) Defendant in action on such note contesting wife's right to sue must prove that there was closed or existing administration on husband's estate. TexCivA 31SW(2d)871. (4) Allegation in complaint in such action that wife was sole owner of such note is sufficient as against special demurrer. TexCivA 31 SW(2d)871.

202–6 TexCivA 292SW574.

205–54 TexCivA 275SW156.

205–73 [b] Petition on note signed by H, administratrix, by agent, held not demurrable where authority was determinable only under evidence. TexCivA 1SW(2d)915.

205–74 10LaA452, 121S334.

205–74½–New. Under statutes in some jurisdictions, in actions by lien creditor against heirs of deceased to establish his debt and foreclose his lien on property in their hands which belonged to deceased, creditor must allege that there is no administration on estate of deceased and no necessity therefor. TexCivA 275SW156.

205–74½–New. But where the surviving spouse is sued as such, as well as the heirs of the deceased, and judgment had against widow as survivor, it has been held that sale of land on foreclosure of vendor's lien is not invalid for failure to allege that there was no necessity for administration of purchaser's estate. TexCivA 275SW156.

205–74¼–New. Where the wife is sued as survivor and children as heirs at law, sale on foreclosure is not invalid for failure to allege there is no administration on such estate nor necessity therefor. TexCivA 275SW156.

205–74½–New. Peremptory instruction for materialman suing surviving husband and children on note held proper. TexCivA 27SW(2d)554.

205–74½–New. Administratrix is properly permitted to explain seeming discrepancy in accounts of estate. CalA 289P887.

206–78½–New. Judgment on merits as to grantee's title can be rendered on rule in succession of grantor's wife to show cause why one purchasing from grantee should not accept title. 161La 1022, 109S824.

206–99 But see TexCivA 27SW(2d)554.

207–17 TexCivA 293SW695.

207–34 170La521, 128S297; TexCivA 5SW(2d)224; TexCivA 28SW(2d)584.

208–36 TexCivA 16SW(2d)886.

208–41 TexCivA 5SW(2d)224.

209–58 TexCivA 16SW(2d)886.

209–61 TexCivA 286SW350.

209–66 TexCommnA 12SW(2d)955.

210–79 TexCommnA 12SW(2d)955; TexCivA 288SW609; TexCivA 16SW (2d)886.

210–87 49Philippine230.

210–91½–New. All parties deriving titles through one who was an innocent purchaser for value from surviving husband are entitled to protection against claims of minor children. TexCivA 16 SW(2d)886.

210–93 TexCivA 5SW(2d)224.

211–4½–New. Evidence held not to show that execution of trust deed of community property was under duress. TexCivA 293SW695.

212–25 TexCivA 5SW(2d)224, 228 [quotCJ]; TexCivA 16SW(2d)886. [b] La 129S651.

212–53 TexCivA 27SW(2d)554.

212–63 161La493, 109S42.

213–80 [a] **Judgment for minor children on father's bond** is held proper. TexCivA 293SW695.

213–90 145Wash165, 259P10.

213–91 Cal 290P576.

213–92 TexCommnA 283SW153.

213–93 8LaA86.

214–95 145Wash165, 259P10.

214–99 145Wash165, 259P10.

214–4 [b] **Administration of part voidable.–TexCommnA** 283SW153.

214–14 35Ariz166, 275P2(2dcase). [b] **Where husband's estate has vested in remaindermen under his will,** his administrator de bonis non is not entitled to possession of his moiety where there are no debts. 35Ariz166, 275P2(2d case).

215–41 TexCommnA 280SW742.

215–42 [e] **Sale to pay separate debt of husband** is illegal and may be set aside and interest of heirs therein awarded to them. 158La822, 104S728.

216–64 170La1019, 129S622.

216–69 TexCommnA 283SW153. [a] **Sale of part only of community property.–TexCommnA** 283SW153 (collateral attack).

219–56 159La1065, 106S567.

219–60 [a] **Husband, administering community estate, cannot be required to account as other trustees.–TexCivA** 293SW695.

220–86½–New. The surviving husband handles the estate as trustee for the heir, who is entitled to all the advan-

tages of increase of investment. **Tex CivA 48SW(2d)257.**
221-98 159La1065, 1068567.
221-99 Contra 159La1065, 1068567.
221-1 159La1065, 1068567.
221-15½-New. A husband, separated from his wife, could not charge the wife, on partition of community property, with the rental of a common dwelling for two years' occupancy by the wife, where the husband consented to an arrangement during such period in lieu of payment to the wife of alimony. **167La208, 1138890.**
221-20 159La1065, 1068567.
222-22 **TexCivA 198W(2d)382.**
222-28 159La1065, 1068567.
222-30 But see 159La1065, 1068567.
222-40 [a] **Memorial.-44Philippine76.** [b] **Funeral expenses are chargeable** to decedent's share of community and to his separate estate. **10LaA109, 1198 768.**
222-42 See also **44Philippine76.**
222-52 159La1065, 1068567; **44Philippine76** (amount expended to repurchase wife's separate property sold with "pacto de retro").
222-53 **44Philippine76** (irrigation system improving separate property of wife).
223-54 159La1065, 1068567.
223-55 159La1065, 1068567; **167La 595, 120819.**
223-56 **44Philippine76.**
223-58 159La1065, 1068567.
223-68 167La595, 120819.
224-94½-New. Testator, having mingled his property with personalty in his hands at his first wife's death, his executor and children by her must clearly trace his separate property. **TexCivA 168SW(2d)366.**
224-94¼-New. On remarrying, only the income and profits of personalty in the husband's hands can become community property. **TexCivA 168SW(2d) 366** (not personalty itself).
224-94¼-New. A life tenant remarrying has been held conclusively presumed to have preserved the corpus of personalty for remaindermen. **Tex CivA 168SW(2d)366.**
224-98 But see **La 120819.**
225-20 [b] **Evidence held to raise issue of fraud.-TexCivA 288SW(2d)584.**
225-31 **TexCivA 286SW647** (settlement approved by court).
226-50½-New. Clause in property settlement that agreement is made on each party's own responsibility, not on other's representation, should be read in light of all attending circumstances. **TexCivA 286SW647.**
226-59 **101CalA195, 281P533.** But see **170La1019, 129S622.**
227-69½-New. A wife could not maintain a suit to partition her husband's earnings as community before they were earned and when no divorce suit was pending. **TexCommnA 178W(2d) 789.**
227-69¾-New. Where decedent died leaving a legal wife and a legal granddaughter, putative wife and daughter of putative wife, and the estate was accumulated during the existence of the second or putative community, the net estate left by decedent should be divided into two equal parts, one part for each wife to be divided respectively with the granddaughter and daughter of the putative wife. **10LaA52, 1208538.**
227-91½-New. Where one of several children converted community property of deceased parents, discovery and accounting can be required. **TexCivA 291SW340.**
227-91¾-New. In Louisiana the act providing for proceedings via executiva contradictorily with the surviving widow in the community applies where the widow has renounced marital community. **167La1042, 1208770(2dcase).**
229-25½-New. Heirs suing to establish a trust are not bound to resort to recovery of the father's interest in community exchanged by the mother for other property. **TexCivA 168W(2d) 136.**
229-54 **TexCivA 48W(2d)257.**
230-63½-New. In action by insured's widow to recover proceeds of life policy of husband, where premium paid from community property and another is named as beneficiary, she may sue in own name without joining estate of deceased husband. **198Cal91, 243P 431.**
230-63¾-New. Wife and son of deceased are necessary parties to suit for cancellation of instruments relating to community. **TexCivA 248W(2d)786.**
230-65 **180Misc605, 224NYS130.**
230-66½-New. Pleadings may be amended as in other actions. **TexCivA 48W(2d)257.**
230-67 [b] **Variance held not fatal.-CalA 288P870.**
230-68 [a] (2) In suit by husband against minor child for partition of land as community, defendant need not allege that property was wife's separate estate, but may prove such fact under allegations in cross action of trespass to try title. **TexCivA 283SW 310.**
230-70 See also **TexCommnA 258W (2d)606.** [a] **Evidence held insufficient** to establish that father acquired property with community funds with understanding to transfer property to son's second wife. **170La839, 129S364.**
230-70½-New. Wife has burden of proving allegation that gifts of husband were intended to defeat her interest in community property. **TexCivA 288W (2d)173.**
230-77½-New. Deed of share of property by defendants to heir is admissible. **TexCivA 48W(2d)257.**
230-78 **TexCommnA 148W(2d)797.**
230-79½-New. A petition need not allege that administration was unnecessary where such fact is inferable from the allegations made. **TexCivA 291SW 340.**
231-84½-New. In widow's suit as community survivor, judgment was construed to be for single sum held in escrow, and not for that sum together with personal judgment for like amount. **TexCivA 282SW351.**
231-84¾-New. Attorney's fees held improperly allowed. **101CalA195, 281P 533.**
231-90½-New. Library and household furniture belonging to community estate should be partitioned upon death of wife. **TexCivA 286SW350.**
231-94½-New. In Louisiana a wife, as coöwner and purchaser of property at auction sale, ordered to effect partition of community property, was entitled to receive the property purchased free from all encumbrances, and hence the property passed to the wife free from a lien for pavement which had been laid for several years, and which was a debt of community. **167La208, 1138 890.**
231-94¾-New. Satisfying a mortgage out of the proceeds of sale of part of community property before dividing the proceeds has been held proper. **101 CalA195, 281P533.**
232-26 [b] **Contention of husband that possession and control of community property** vested in him by separation agreement was taken away by decree held without merit. **101CalA 195, 281P533.**

HYPOTHETICAL

235-67 **Erratum.**-"See Evidence § 195" should read "§ 795."

ID CERTUM EST QUOD CERTUM REDDI POTEST

235-89 **93Fla849, 1128846; 123 Or 370, 261P69.** [a] **165La385, 1158629; 119 Or297, 247P761; 123 Or370, 261P 69; 50SD261, 209NW341; Ont [1925] 3DomLR875.**

IF

238-56 [a] **98NJEq514, 131A159.**
238-58 **98NJEq514, 131A159.**
238-64 **98NJEq514, 131A159.**
239-6 **198 HlA604, 607.**

IGNORANTIA JURIS (OR LEGIS) NEMINEM EXCUSAT

241-70 [g] **13CustA562; 31Ariz347, 253P626; 221MoA814, 288SW95.**

IGNORANTIA JURIS NON (OR HAUD) EXCUSAT

242-71 **317Mo181, 296SW755, 762** [cit Cyc]. [a] **246 HlA496.**

ILLEGALITY

243-15 [a] **Contains some element of moral turpitude.-95CalA690, 273P86.**
243-18 **217AppDiv123, 216NYS458.** [a] **In statute permitting certiorari in tax assessments,** "illegality" means irregular proceedings to assess and not total want of power in assessors. **217 AppDiv123, 216NYS458.**

ILLICIT

244-38 **14F(2d)228.**

ILLNESS

244-47 [f] **As used in application for insurance.-15F(2d)646.**

IMMEDIATE

245-2 **83CalA74, 256P595, 599** [citCJ].
246-7 **NJ 129A466** (reasonable dispatch).
246-9½-New. In popular acceptation importing swifter action than terms "reasonable time" or "reasonable dispatch." **33GaA705, 127SE878.**
246-19½-New. Construed equivalent to "reasonable promptitude" or "within a reasonable time." **33GaA705, 127SE 878.**
246-47 **TexCivA 291SW674** [citCJ].

IMMEDIATELY

249-38 **72CalA339, 237P408.**
251-87½-New. **Immediately recorded,** that is, as soon as may be by reasonable dispatch under the circumstances of the case. **98NJEq38, 129A710.**

IMMINENT

251-4 **67Utah242, 247P476.**
251-4½-New. perilous; **67Utah242, 247P476.**
251-6½-New. The meaning of the word "imminent" is substantially different from "reasonably apprehended." **67Utah242, 247P476.**

IMMORAL

251-36 [a] **"Immoral conduct"** of officer synonymous with "improper conduct." **29PortoRico 754.**

IMPARTIAL

253-89 **19F(2d)202.**
253-91 **19F(2d)202.**

IMPEACH

253-98½-New. To bring or throw discredit on; to call in question. **213Ky 291, 280SW1081.**
253-3½-New. As applied to a legislative act, to bring or throw discredit on; to call in question. **213Ky291, 280SW 1081.**

IMPENDING

254-26½-New. Impending means imminent; **76Mont565, 248P176.**
254-26¾-New. threatening to occur immediately; **76Mont565, 248P176.**
254-26¼-New. near at hand. **76Mont 565, 248P176.**

IMPORT

257-20 **12CustA266.**

IMPORTATION

258-98 See also **12CustA266; 12CustA 338.**

IMPOSSIBILIUM NULLA OBLIGATIO EST

258-46 **146Miss449, 1118600, 605** [cit Cyc].

IMPOTENCY or IMPOTENCE

259-56 **Alta [1927] 2DomLR1137, 1139, [1927] 2WestWkly12** [quotCJ].
259-56½-New. Inability to copulate. **118 Or178, 246P1082.**
259-57 **Alta [1927] 2DomLR1137, 1139, [1927] 2WestWkly12** [quotCJ].

IMPRACTICABLE

259–72 TexCivA 6SW(2d)380.

IMPROPER

260–10 214Ala542, 108S362, 364 [cit CJ]. [a] As compared with "infamous" or "disgraceful" see Ont [1925] 3DomLR543.

IMPROPERLY

261–23 214Ala542, 108S362, 364 [quot CJ].

IMPROVEMENT

262–83 234 IllA141.
262–87 234 IllA141.
262–88 234 IllA141; 52SD551, 219NW256.
264–52 169Ark610, 276SW367; 319 Ill 411, 150NE241. [c] A "local improvement" is public improvement made primarily for accommodation and convenience of inhabitants of particular locality, and conferring special benefit on real property, adjoining or near locality of improvement, though incidentally beneficial to public at large. 169Ark610, 276SW367.
264–53½–New. "A public improvement by which realty adjoining or near such improvement is specially benefited, and not necessarily an actual physical improvement of the land." 93Wash472, 161P381, 383.

IMPROVEMENTS

308–6 [a] 217MoA554, 272SW1006.
309–21 221MoA657, 284SW204.
309–23 251Mich578, 232NW200.
309–25 221MoA657, 284SW204.
309–25½–New. barn, summer house, granary, and iron tanks; 221MoA657, 284SW204.
309–25⅓–New. rebuilding a roof; 221MoA657, 284SW204.
309–26 221MoA657, 284SW204.
309–32 NJ 146A184. See also 39GaA295, 147SE189.
310–34 MoA 1SW(2d)241.
310–38 51Philippine862.
310–45 Mo 31SW(2d)993.
311–49 208 Iowa1379, 227NW414.
311–52 190NC14, 128SE494, 499, 40ALR273 [citCJ].
312–64 But see 2LaA198.
312–75 Mo 31SW(2d)993.
313–89 128 Okl 134, 261P950.
313–91½–New. A person is not liable for improvements on the ground that he has had the full benefit thereof where he has received exactly what he contracted for with a third person. 205 Iowa483, 218NW325.
314–2 25 OhNPNS574.
314–5 128 Okl 134, 261P950. See also 83CalA161, 256P464, 468 [citCJ].
315–9 83CalA161, 256P464, 468 [quot CJ].
315–9½–New. Where the owner of land permitted another to erect valuable improvements thereon without claim of right, and a restoration of the land would not only necessitate the removal of a building but would bottle up a business establishment so as to require a large expenditure of money, the court of equity will adjust the controversy by requiring payment of the reasonable market value of the land taken together with damages for detention. 228Ky206, 14SW(2d)753.
315–14 See also 10LaA779, 123S153.
315–20 218Ala334, 118S559; 165Ga422, 141SE188; 128Okl 134, 261P950; 38 OklACR443; Sask [1927] 3DomLR751. See also 83CalA161, 256P464, 468 [cit CJ]. [b] Statutes are in derogation of common law.–128 Okl 134, 261P950.
316–24 [c] 307Mo 576, 271SW365.
316–26 51Philippine279.
317–30 128 Okl 134, 261P950.
317–34 165Ga422, 141SE188.
317–47 206 Iowa884, 221NW661.
317–49 165Ga422, 141SE188.
318–76 220Ky413, 295SW408.
319–82½–New. Where a husband, for valuable consideration, conveyed land to wife, he is not entitled to reimbursement for improvements, in the absence of a special agreement, in a motion against the wife's heirs. 307Mo 462, 271SW370.
319–98 335 Ill 184, 166NE538; 220Ky413, 295SW408; 190NC14, 128SE494, 499, 40ALR473 [quotCJ].
320–7 220Ky413, 295SW408; 234Ky296, 28SW(2d)22; 170La573, 128S520 (tenant in possession); 135SC446, 134SE1; TexCivA 24SW(2d)742; Wyo 291P812. But see 228AppDiv19, 238NYS443.
321–8 7LaA56; 264Mass199, 162NE364; TexCivA 2SW(2d)907. [d] Where plaintiff attempts to acquire land with hope of perfecting title under statute of limitations, he had not such good faith as to entitle him to reimbursement for improvements. TexCivA 273SW938.
321–9 See also 3LaA568.
321–11 8LaA409.
322–23 222Ky584, 1SW(2d)1079.
322–24 88 IndA469, 150NE384.
322–28 165Ga422, 141SE188; 171Minn318, 214NW59 [quotCJ].
323–29 171Minn318, 214NW59.
323–36 Sask [1927] 3DomLR751. But see 165Ga422, 141SE188.
323–38 335 Ill 184, 166NE538; 307Mo576, 271SW365; Mo 293SW371.
324–46 307Mo 576, 271SW365.
325–51 88CalA441, 263P870.
325–54 158Md457, 148A592.
325–57 335 Ill 184, 166NE538; 169La809, 126S69; TexCivA 287SW81.
325–60 165Ga422, 141SE188.
326–64 165Ga422, 141SE188.
326–68 132 Okl 159, 269P1091, 1095 [citCyc].
328–94 218Ala334, 118S559.
328–95 307Mo 576, 271SW365 (life tenant).
328–2 181Ark914, 28SW(2d)697; 129Kan317, 282P724; 143Va133, 129SE341.
329–3 165Ga422, 141SE188.
332–61½–New. One in possession under an unregistered deed is not entitled to improvements as against a subsequent purchaser for value from the common grantor. 190NC14, 128SE494, 40ALR273.
334–7 317 Ill 625, 148NE384; 236Mich374, 210NW212; 307Mo 576, 271SW365, 369 [citCJ]; 114Nebr858, 211NW184; 51Philippine279; TexCivA 273SW938; 147Va921, 133SE614; 153Wash99, 279P102.
335–10 307Mo 576, 271SW365, 368 [cit CJ]; 147Va921, 133SE614.
335–11 307Mo 576, 271SW365, 368 [cit CJ].
335–12 307Mo 576, 271SW365, 368 [cit CJ]; 147Va921, 133SE614.
336–13 307Mo 576, 271SW365, 368 [cit CJ].
336–17 88CalA441, 263P870.
336–24 246Mich659, 225NW620.
337–40 144SC89, 142SE39.
337–47½–New. Bona fide purchaser may claim compensation for increased value due to improvements made after date of sale contract. 158Md457, 148A592.
338–56 308Mo 406, 275SW32.
339–69 308Mo 406, 275SW32.
339–72 But see 316Mo 1058, 293SW770, 772 [citCJ].
339–76 316Mo 1058, 293SW770, 772 [quotCJ].
340–82 [b] (2) Owner must elect between buying building and selling land. 33PortoRico 722. (3) Such election must be categorical and unconditional in order to bind possessor. 33PortoRico 722. (4) Till such election, possessor is not bound to act, and his possession is not in bad faith because action of revendication is brought. 33PortoRico 722.
341–4 [a] In South Carolina.–144SC89, 142SE39.
341–14 222Ky504, 1SW(2d)955; 225Ky579, 9SW(2d)723(1stcase).
342–15 90Fla407, 106S127, 43ALR1409; 97Fla1077, 116S644; 236Mich374, 210NW212; 134Misc143, 235NYS428. [d] In NewYork.–134Misc143, 235NYS428.
342–16 30Hawaii446.
343–41 [b] In Oklahoma.–128 Okl 134, 261P950.
343–42 [a] (2) Act of December 26, 1885, providing for claim for improvements in action for recovery of land supplemented, did not supersede act of 1870 allowing defendant in such action to file complaint for amount of betterments after judgment in action for recovery of land. 144SC89, 142SE39.
343–43 128 Okl 134, 261P950; 144SC89, 142SE39.
344–66 128 Okl 134, 261P950.
344–67 206 Iowa884, 221NW661; 128 Okl 134, 261P950.
345–71 128 Okl 134, 261P950.
346–4 [b] Allegations of estoppel against owners of land are unnecessary. –251Mich578, 232NW200.
346–13 131Misc207, 226NYS333.
347–14 88CalA441, 263P870.
348–53 317 Ill 625, 148NE384.
349–80 307Mo 576, 271SW365 (evidence of dimensions and condition and present worth of improvement is admissible as showing enhanced value of land); Wash 290P232.
349–84 Wash 290P232.
349–86 [a] (1) 88CalA441, 263P870. (3) To show plaintiff entitled to reasonable value of improvements. 336 Ill 530, 168NE676.
349–89 165Ga422, 141SE188; 149Wash227, 270P825.
350–93 TexCivA 24SW(2d)742.
350–94 114Nebr858, 211NW184; 131Misc207, 226NYS333.
350–95 131Misc207, 226NYS333.
350–99 165Ga422, 141SE188.
350–3 165Ga422, 141SE188.
350–7 307Mo 576, 271SW365 (finding for value of improvements including improvements made after notice of adverse claim, amount being in excess of enhanced value of land, was held excessive).
352–33½–New. A lot owner who through mistake constructs a building on land of an adjoining owner who did not cause the mistake is not entitled to judgment that the adjoining owner pay for the improvement or, in the alternative, that the land be sold to pay therefor. 246 IllA184.
352–33⅓–New. In such case the court may sometimes decree an exchange of conveyance between the adjoining owners. 246 IllA184.

IN

354–53 [a] 221AppDiv100, 222NYS667.
357–60 [a] 83PaSuper550.
358–84 75CalA247, 242P749, 753 [cit CJ]; 314Mo 373, 284SW464.
358–85 75CalA247, 242P749, 753 [cit CJ]; 314Mo 373, 284SW464.
361–26 221AppDiv180, 222NYS671.
361–27 221AppDiv180, 222NYS671.
361–49 TexCivA 27SW(2d)897.
362–60 [e] Merchandise temporarily held on piers for convenience of shipper, pending reshipment, delivery, or sale, is still "in transit." 227AppDiv560, 238NYS424.
364–48 [a] 51SD540, 215NW697.
364–55 [b] 15DelCh84, 131A529.
365–88 1LaA129.

INADEQUACY

369–60 [a] Distinguished from "illegality" and "invalidity."–95CalA690, 273P86.

INADVERTENCE or INADVERTENCY

370–74 21AlaA51, 105S716.
370–75 21AlaA51, 105S716.
370–76 21AlaA51, 105S716.
370–77 21AlaA51, 105S716.
370–78 21AlaA51, 105S716.
370–79 21AlaA51, 105S716; MoA 274SW876.
370–80 21AlaA51, 105S716.
370–81 21AlaA51, 105S716; MoA 274SW876.
370–82 21AlaA51, 105S716.

INAPPROPRIATE

371–19½–New. Term means "unfit" or "improper" as distinguished from "unequal." MoA 274SW1103.

INCEPTION

372–72 44 Ida599, 258P522.

INCEST

374–2 6PaDist&Co 669.
374–3 6PaDist&Co 669; 8PaDist&Co534. [a] (4) 190NC810, 130SE848. [b] Incestuous cohabitation.–115Nebr158, 211NW942. [e] 8PaDist&Co 534.
375–7 190NC810, 130SE848.
375–8 190NC810, 130SE848.
375–10 190NC810, 130SE848.
376–21 Utah 291P307. [a] (2) Penetration, however slight, is sufficient, and

hymen need not be broken. **Utah** 291**P** 307.
376–26 243**NY**595, 154**NE**620.
376–31 121**Kan**284, 246**P**1003.
377–46 **Iowa** 227**NW**830 (daughter of half sister).
377–51 225**Ky**663, 9**SW(2d)**1001.
377–64 225**Ky**663, 9**SW(2d)**1001.
377–65 115**Nebr**158, 211**NW**942, 944 [citCJ].
378–71 121**Kan**284, 246**P**1003.
378–72 121**Kan**284, 246**P**1003.
379–98 117**Nebr**377, 220**NW**599; 101 **TexCr**26, 273**SW**851.
380–6 190**NC**810, 130**SE**848 ("feloniously and incestuously did have intercourse").
381–32 **Iowa** 231**NW**375.
381–34 [b] **Daughter of half brother.**–101**TexCr**26, 273**SW**851.
382–40 **Md** 150**A**278.
382–52½–New. In some jurisdictions incest and rape may be charged in separate counts of the same indictment although the offenses did not arise out of the same transaction. 121**Kan**284, 246**P**1003.
382–56 142**Miss**602, 107**S**667.
383–66 [a] (2) Testimony that defendant's divorced wife, who was mother of prosecutrix, was afflicted with gonorrhea is inadmissible to show origin of disease which accused may have communicated to prosecutrix. 82**CalA** 389, 255**P**839. (3) Testimony as to attitude of prosecuting witness, who was defendant's daughter, toward her stepmother has been excluded as not germane to issue. 82**CalA**389, 255**P**839. (4) Testimony as to carrying notes between prosecuting witness and boys is inadmissible in absence of showing as to knowledge of contents. 82**CalA**389, 255**P**839. (5) Other instances. **Mo** 24 **SW(2d)**1046. [b] **Motive of third person in causing prosecution** against defendant is immaterial if there was sufficient ground for prosecution. **Mo** 24 **SW(2d)**1046.
384–79 159**La**589, 105**S**631.
384–81 204 **Iowa**1355, 217**NW**233.
384–87 117**Nebr**377, 220**NW**599, 600 [citCJ].
385–6 159**La**589, 105**S**631 (examination nearly year after alleged offense held admissible).
385–6½–New. , and it has been held that even where he examined her nearly a year after the alleged offense, his testimony is not thereby rendered inadmissible, although such fact may affect its weight. 159**La**589, 105**S**631.
385–11 84**CalA**99, 257**P**583.
385–12 [a] **Circumstances attending childbirth inadmissible.**–100**TexCr**30, 271**SW**920.
386–13½–New. An offer by defendant of evidence for the purpose of showing the possibility of a boy acquaintance having been the father of a child is properly rejected. 79**CalA**709, 250**P** 879.
387–35 [a] (1) 70**CalA**92, 232**P**724; 72**CalA**322, 237**P**63; 87**CalA**33, 261**P** 530; 231**Ky**372, 21**SW(2d)**476; 142 **Miss**602, 107**S**667 (accessary before fact); 115**Nebr**158, 211**NW**942.
387–36 159**La**589, 105**S**631 (weight to be given testimony of physician who examined prosecutrix nearly year after alleged offense is for jury).
387–45 21**AlaA**371, 108**S**625; **CalA** 289 **P**176; 109**TexCr**596, 6**SW(2d)**367.
388–47 21**AlaA**371, 108**S**625; 179**Ark** 714, 17**SW(2d)**868.
388–52 [a] (1) 21**AlaA**371, 108**S**625. (4) In general. **CalA** 289**P**176. [b] **Evidence held insufficient corroboration** that about period of gestation, following date that defendant was alone at house with niece, child was born. **Tex Cr** 20**SW(2d)**780.
388–56 109**TexCr**596, 6**SW(2d)**367.
389–66 149**Miss**817, 115**S**887; 117**Nebr** 377, 220**NW**599. [b] **Improbability of testimony of prosecutrix** does not necessarily justify court in ruling that testimony is per se insufficient to support verdict. 204 **Iowa**1355, 217**NW**233.
389–72 [a] (1) 114**Nebr**238, 206**NW** 735. (3) Other illustrations of correct instructions. 87**CalA**33, 261**P**530. [b] (3) It is error to give instruction from which jury may infer that facts and circumstances necessary to corroborate testimony of prosecuting witness need not be proved by other witnesses. 114 **Nebr**238, 206**NW**735. [d] **Outcry.**–70 **CalA**92, 232**P**724. [e] **As to conviction on different counts.**–82**CalA**389, 255**P** 839.

INCHOATE

391–14½–New. Inchoate means a beginning. 23 **OhA**484, 156**NE**146.

INCIDENTAL

392–36 20**F(2d)**924.

INCLUDE

395–34 15**F(2d)**626.
395–35 15**F(2d)**626.
395–36 15**F(2d)**626. [a] (1) 15**F(2d)** 626. (2) 15**F(2d)**626.
395–38 15**F(2d)**626. [a] 15**F(2d)**626.
395–40 15**F(2d)**626.
395–41 15**F(2d)**626; 251 **IllA**119 [cit CJ].
395–42 15**F(2d)**626.
395–46 15**F(2d)**626.
395–47 15**F(2d)**626.
395–61 212**Ala**47, 101**S**670.

INCLUSIO UNIUS EST EXCLUSIO ALTERIUS

396–95 [b] 41 **Ida**14, 236**P**862; 315**Mo** 798, 287**SW**450.

INCOME

397–10 19**F(2d)**121.
397–28 25**F(2d)**997.
397–31 136**Misc**704, 242**NYS**192; 122 **Or**547, 259**P**902.
397–42 **Miss** 108**S**158, 161 [quotCJ].
397–43 **Miss** 108**S**158, 161 [quotCJ].
397–44 **Miss** 108**S**158, 161 [quotCJ].
397–45 **Miss** 108**S**158, 161 [quotCJ].
397–46 **Miss** 108**S**158, 161 [quotCJ].
397–47 **Miss** 108**S**158, 161 [quotCJ].
398–52 **Miss** 108**S**158, 161 [quotCJ].
398–53 19**F(2d)**148; **Miss** 108**S**158, 161 [quotCJ]; 215**AppDiv**576, 214**NYS** 484; 187**Wis**539, 204**NW**481.
398–54 19**F(2d)**148; **Miss** 108**S**158, 161 [quotCJ]; 187**Wis**539, 204**NW**481.
398–55 **Miss** 108**S**158, 161 [quotCJ].
398–56 19**F(2d)**148; **Miss** 108**S**158, 161 [quotCJ]; 187**Wis**539, 204**NW**481.
398–57 **Miss** 108**S**158, 161 [quotCJ].
398–58 **Miss** 108**S**158, 161 [quotCJ].
398–59 **Miss** 108**S**158, 161 [quotCJ]; 187**Wis**539, 204**NW**481.
398–60 **Miss** 108**S**158, 161 [quotCJ]; 187**Wis**539, 204**NW**481.
398–61 **Miss** 108**S**158, 161 [quotCJ].
398–62 **Miss** 108**S**158, 161 [quotCJ].
399–63 19**F(2d)**148; **Miss** 108**S**158, 161 [quotCJ].
399–64 19**F(2d)**148; **Miss** 108**S**158, 161 [quotCJ].
399–65 **Miss** 108**S**158, 161 [quotCJ]; 98**PaSuper**22.
399–66 **Miss** 108**S**158, 161 [quotCJ].
399–67 **Miss** 108**S**158, 161 [quotCJ].
399–68 **Miss** 108**S**158, 161 [quotCJ].
399–69 **Miss** 108**S**158, 161 [quotCJ].
399–70½–New. "Income" is gain from labor, business, or property, and includes a return from capital stock. 290**Pa**457, 139**A**200, 56**ALR**1303.
399–74 215**AppDiv**576, 214**NYS**484.
399–75 215**AppDiv**576, 214**NYS**484; 187**Wis**539, 204**NW**481.
399–77 215**AppDiv**576, 214**NYS**484; 187**Wis**539, 204**NW**481.
400–8 187**Wis**539, 204**NW**481.
400–9 187**Wis**539, 204**NW**481.
401–21 [b] 122 **Or**547, 259**P**902.
401–27 [c] **"Income" declared synonymous** with "increase." 283**Pa**185, 129**A** 74.
401–38 [a] 149**Va**701, 141**SE**770.
402–39 But see **Mass** 172**NE**605.
402–62 127**Misc**579, 217**NYS**323.

INCOMPETENCE or INCOMPETENCY

404–38 214**Ala**47, 106**S**175.

INCOMPETENT

404–49 [c] (1) 198**Cal** 145, 243**P**675.

INCONSISTENT

405–79 See also 7**Alaska**103.

INCONTESTIBLE

405–90 28**Hawaii**99, 102 [citCJ]; 119 **Kan**314, 239**P**959.
405–91 28**Hawaii**99, 102 [citCJ]; 119 **Kan**314, 239**P**959.
405–91½–New. unassailable; Standard D. [quot 28**Hawaii**99, and citCJ].
405–92 28**Hawaii**99, 102 [citCJ]; 119 **Kan**314, 239**P**959.
405–93 28**Hawaii**99, 102 [citCJ]; 119 **Kan**314, 239**P**959.
405–93½–New. not admitting of debate or controversy; Standard D. [quot 28 **Hawaii**99, 102, and citCJ].
405–93½–New. not admitting of dispute or debate. Century D. [quot 28 **Hawaii**99, and citCJ].
406–94 28**Hawaii**99, 102 [quotCJ]; 119 **Kan**314, 239**P**959.

INCONVENIENCE

406–8½–New. to disturb; to discomfort. 213**Ala**209, 104**S**429.

INCREASE

409–88 283**Pa**185, 129**A**74 ("increase" declared synonymous with "income").

INCUR

410–19 [a] (1) 73**CalA**769, 239**P**358. (2) 73**CalA**769, 239**P**358.
410–20 73**CalA**769, 239**P**358.
410–21 73**CalA**769, 239**P**358.
410–24 73**CalA**769, 239**P**358.

INCURABLE

410–52 311**Mo** 262, 278**SW**398 (diseases included in term "enumerated").
410–52½–New. "Incurable" is not synonymous with "chronic." 256**Mass**568, 153**NE**13.

INDEBTEDNESS

411–98 81**Mont**560, 264**P**679, 682 [cit CJ].
413–49 167**Minn**286, 209**NW**9 (includes tax certificates).

INDEMNIFY

416–42 148**Md**289, 129**A**660 [quotCJ]; 220**MoA**462, 274**SW**930.
416–43 148**Md**289, 129**A**660 [quotCJ].
416–44 102**Conn**488, 129**A**384; 148**Md** 289, 129**A**660 [quotCJ].
416–45 102**Conn**488, 129**A**384; 148**Md** 289, 129**A**660 [quotCJ].
416–46 148**Md**289, 129**A**660 [quotCJ].
416–47 102**Conn**488, 129**A**384; 148**Md** 289, 129**A**660 [quotCJ]; 220**MoA**462, 274**SW**930.
416–48 148**Md**289, 129**A**660 [quotCJ].
416–49 148**Md**289, 129**A**660 [quotCJ].
416–50 148**Md**289, 129**A**660 [quotCJ]; 220**MoA**462, 274**SW**930.
416–51 148**Md**289, 129**A**660 [quotCJ].
416–52 148**Md**289, 129**A**660 [quotCJ].
416–53 148**Md**289, 129**A**660 [quotCJ].
416–54 148**Md**289, 129**A**660 [quotCJ].
416–55 148**Md**289, 129**A**660 [quotCJ].
416–56 148**Md**289, 129**A**660 [quotCJ].

INDEMNITY

419–6 131**Misc**891, 228**NYS**508.
419–8 [a] See also 77**Mont**539, 252**P** 368.
419–14 88**CalA**111, 263**P**260, 263 [cit Cyc]; 165**Ga**283, 140**SE**866, 867 [cit CJ].
419–16 165**Ga**283, 140**SE**866, 867 [cit CJ].
419–17 165**Ga**283, 140**SE**866, 867 [cit CJ]; 201 **Iowa**670, 207**NW**785, 788 [cit CJ].
419–20 165**Ga**283, 140**SE**866, 867 [cit CJ].
419–24 27**F(2d)**859; **MoA** 272**SW**1032, 1036 [citCJ].
419–25 **Iowa** 230**NW**319.
420–26 [a] **Held contract of indemnity.**–**Del** 143**A**34.
420–26½–New. A contract indemnifying insured against loss and containing a condition that insured shall notify the company of accident, and not voluntarily assume any liability, constituted a policy of indemnity against liability for damages. 27**F(2d)**859.
420–39 88**CalA**111, 263**P**260; 126**Kan** 255, 267**P**974; 216**AppDiv**35, 214**NYS** 621 (application of indemnity is to indemnitor's principal, while that of sure-

tyship is to third person for default of principal). [b] **Surety not indemnity.**–216**AppDiv**35, 214**NYS**621 (surety being liable for damages to obligee).

420–45 220**Ala**69, 124**S**108; 46**Philippine**167, 170 [quotCJ].

421–51 But see **IndA** 164**NE**281.

421–57 **Wash** 290**P**228.

421–65 33**F(2d)**89 (in absence of request, obligee need not disclose fact not changing or increasing risk of surety).

421–67½–New. A bond to indemnify against loss for amounts it might have to pay the seller's creditors was not tainted with fraud and unenforceable because the sale came within the Bulk Sales Law and was fraudulent. 157 **Tenn**662, 11**SW(2d)**877.

421–69 215**Ala**398, 110**S**822, 824 [cit CJ]; 201 **Iowa**670, 207**NW**785, 788; 29 **OhA**425, 163**NE**628. [a] 201 **Iowa**670, 207**NW**785; 162**La**1073, 111**S**425. [b] **Contract held too vague and indefinite.**–220**Ala**69, 124**S**108.

421–70 128**Me**495, 148**A**796.

422–72 **TexCommnA** 284**SW**933, 935 [quotCJ]. [a] (6) Agreement for advance money for payment of insurance premiums to be repaid from proceeds of policy when collected. **TexCommnA** 284**SW**933. (7) Agreement by seller of stock in respect of corporation's obligation to repurchase fixtures sold subless-see held agreement of indemnity. 253 **NY**598, 171**NE**760.

422–73 **TexCommnA** 284**SW**933, 935 [citCJ].

422–74 215**Ala**398, 110**S**822, 824 [cit CJ].

422–79 147**Wash**133, 265**P**457 [citCJ]. [a] Consideration is unnecessary to support agreement by bank stockholders with state superintendent of banking that they will indemnify bank which is third party against loss on certain bills receivable. 201 **Iowa**670, 207 **NW**785.

422–82 [c] **Consideration held sufficient.**–**MoA** 30**SW(2d)**186.

422–83 36**GaA**169, 136**SE**94. [a] (2) Interest of bank stockholders in keeping bank going and preventing impairment of its capital is sufficient consideration for their agreement with banking superintendent to indemnify bank against loss on bills receivable. 201 **Iowa**670, 207**NW**785.

422–84 36**GaA**169, 136**SE**94.

423–91 45 **Ida**159, 261**P**239; 213**Ky**551, 281**SW**487; 158**Tenn**7, 12**SW(2d)**364; 147**Wash**133, 265**P**457; 37**Wyo** 412, 263 **P**605.

423–98 **Iowa** 227**NW**833.

424–6 147**Wash**133, 265**P**457.

424–9 147**Wash**133, 265**P**457.

424–14 17**F(2d)**913, 916 [citCJ]. [f] **Indemnitors to surety on contractors' bond** are not entitled to question validity of bond as including private work. **Wis** 232**NW**525.

425–19 213**Ky**551, 281**SW**487.

425–24 But see **BC** [1929] 4**DomLR** 918.

425–26 253**NY**313, 171**SE**75. [a] **Covenant in lease for manufacturing purposes to indemnify against loss if manufacturing is illegal** is enforcible, although manufacturing is forbidden by zoning laws. 253**NY**313, 171**NE**75.

426–30 133 **Okl** 23, 270**P**854, 855 [cit CJ]. [a] **Bond to indemnify bank** from loss in certain litigation and sale of bonds is held not totally invalid because of void provision containing power of attorney to confess judgment. 218 **Ky**813, 292**SW**489.

426–39 218**Ala**433, 118**S**633; 132**Misc** 844, 230**NYS**617. [a] Particular contracts construed. **TexCivA** 29**SW(2d)** 507.

426–40 16**F(2d)**309; 215**Ala**398, 110**S** 822; 120**Kan**504, 243**P**1042, 1044 [cit CJ]; 83**Mont**334, 272**P**250; 39 **OklACR**8.

427–41 201 **Iowa**670, 207**NW**785; 120 **Kan**504, 243**P**1042, 1044 [citCJ]; 118 **Oh**414, 161**NE**280; **TexCivA** 29**SW(2d)** 507.

427–43 16**F(2d)**309; 41**F(2d)**319; **MoA** 7**SW(2d)**309, 312 [citCJ]; 289**Pa**252, 137**A**257, 259 [quotCJ]; 300**Pa**405, 150 **A**665. [d] **Where location of employee** was incorrectly stated in bond and location was not material factor, it was held that employer could show what was intended to be covered by undertaking. 215**Ala**198, 110**S**277.

427–44 See also 132**Misc**844, 230**NYS** 617. [a] **Bond executed days later than agreement** held immaterial. 230**Ky**235, 18**SW(2d)**1001.

427–47 232 **Ill**411 (rule approved, but not applied); 118 **Oh**414, 161**NE**280.

427–48 215**Ala**198, 110**S**277, 278 [quot CJ]; 219**Ala**286, 122**S**169.

427–49 120**Kan**504, 243**P**1042, 1044 [cit CJ].

427–49½–New. The contract must be construed according to its unequivocal terms taken in connection with the subject matter. 6**LaA**104.

427–53 16**F(2d)**309; **Ala** 130**S**73; 126 **Kan**255, 260, 267**P**974 [quotCJ]; 6**LaA** 104; 300**Pa**405, 150**A**665; **TexCivA** 274**SW**655.

427–54 [a] **This rule held not to apply,** where bank examiner, not indemnitee bank, wrote agreement. 289**Pa**252, 137 **A**257.

427–55 16**F(2d)**309; 6**LaA**104.

427–56 120**Kan**504, 243**P**1042, 1044 [citCJ].

427–57 120**Kan**504, 243**P**1042, 1044 [citCJ]. See also 4**LaA**184.

428–65 203 **Iowa**179, 210**NW**775.

428–66 27**F(2d)**681; 261**Mass**224, 158 **NE**661; 178**Minn**103, 226**NW**192; 118 **Oh**414, 161**NE**280.

428–68 [c] **Director general of railroads** may recover under indemnity contract of oil company with railroad taken over by government during war. 6 **F(2d)**729.

429–82½–New. Where performance bond is to cover insurer and reinsurer, on losses, it covers only a single liability. 203 **Iowa**179, 210**NW**775.

429–83 [b] **Provision of bond has been held not suspended** by appointment of receiver after termination of bond. 42 **F(2d)**953.

429–84 45 **Ida**159, 261**P**239, 241 [cit CJ]; 221**AppDiv**740, 225**NYS**270.

429–87 15**F(2d)**756; 24**F(2d)**347; 25 **F(2d)**339; 215**Ala**398, 110**S**822, 824 [citCJ]; 219**Ala**286, 122**S**169; 204 **Iowa** 1325, 217**NW**262; **MoA** 28**SW(2d)**448; 253**NY**496, 171**NE**756(1stcase); 132**Misc** 138, 229**NYS**615; 132**Misc**371, 229**NYS** 93; 289**Pa**252, 137**A**257, 259 [quotCJ]; 295**Pa**357, 145**A**434. See also 149**Wash** 343, 270**P**799. [a] (8) Agreement by principal to hold assured under indemnity bond harmless against all liability for payment of lost travelers' checks precludes principal from asserting defense that he is not liable to assured for sums paid on forged checks and bars suit against assured, in the absence of fraud or bad faith. **TexCivA** 274**SW** 1002. (9) Bond furnished by member of coal exchange conditioned to indemnify exchange against any loss, damage, costs, and expenses which it might suffer by reason of any credits in money or property extended to principal included demurrage assigned or apportioned against principal. **Del** 143**A**34. (10) Dynamite caps temporarily stored in basement in connection with work of excavation for sewer are "in use" within meaning of bond to pay damages caused by use of explosives. 322**Mo** 1050, 17 **SW(2d)**977. (11) Other instances. 178 **Minn**219, 226**NW**572. [c] **Bank official's indemnity bond** covers amount of notes taken up by bank in accordance with agreement by bank official, without previous adjudication of bank's liability on notes personally sold by official under agreement to take back notes when requested. 27**F(2d)**496.

430–88 16**F(2d)**309; 24**F(2d)**347; 215 **Ala**398, 110**S**822, 824 [citCJ]; 126**Kan** 255, 267**P**974; 33 **OhA**358, 169**NE**584; 300**Pa**405, 150**A**665; **TexCivA** 273**SW** 676. See also 245**Mich**14, 222**NW**134; 149**Wash**343, 270**P**799. [a] (7) Obligation to indemnify for expenses of voyage held not promise to pay judgment for such charges and disbursements. 27 **F(2d)**681.

430–89 **MoA** 294**SW**930, 932 [quotCJ].

430–90½–New. Act of indemnitee in "charging off" certain bills receivable against loss of which it was indemnified does not affect its right to proceed against the indemnitor thereon. 201 **Iowa**670, 207**NW**785 (charging off shows loss).

430–90¼–New. Note executed for loan with which borrower deposited forged notes and securities is not within policy against forgery. 222**MoA**393, 5**SW(2d)** 669.

430–90¼–New. In determining the extent of protection given by bond, it is proper to take into consideration the business in connection with which the bond was given, the method of conducting it, and all acts of parties to the transaction. **Del** 143**A**34.

431–93 6**F(2d)**729; 16**F(2d)**199; 16 **F(2d)**309; 24**F(2d)**347 (held included); 198**Wis**527, 224**NW**743.

431–94 16**F(2d)**199; 16**F(2d)**309; 25 **F(2d)**339.

431–95 213**Ky**551, 281**SW**487.

431–3 **TexCivA** 23**SW(2d)**765. [a] **Collections made by employee after execution of bond** could not, as against surety company, be credited to cover defalcations occurring before bond was executed. **TexCivA** 23**SW(2d)**765.

431–4 38 **OklACR**372; 46**Philippine**167, 170 [citCJ].

432–6 45 **Ida**159, 261**P**239; **IndA** 164 **NE**281.

432–10 87 **IndA**520, 156**NE**433.

432–11 215**Ala**398, 110**S**822.

432–19 31**F(2d)**708. [a] (5) Collapse of scaffold erected by defendants to enable plaintiff to complete painting job. 310**Mo** 419, 276**SW**614. [b] (6) If encroachment due to railroad's negligence it cannot recover from contractor under indemnity contract. 260**Mass**242, 157 **NE**540. [e] **Encroachments and trespass on adjoining property.**–260**Mass** 242, 157**NE**540. [f] **Owner voluntarily paying claims** not lienable or enforceable against building cannot recover on bond contemplating only that work would be completed within cost set in contract. 152**Wash**604, 278**P**679, 63 **ALR**1246.

434–32 46**Philippine**167, 170 [citCJ]. [a] (2) "Not exceeding $100" signed by several held not joint obligation and each liable up to one hundred dollars. **TexCivA** 285**SW**662.

434–34 133 **Okl** 23, 270**P**854, 855 [quot CJ].

435–44 46**Philippine**167, 170 [citCJ].

435–48 **Iowa** 227**NW**833 (implied agreement as to reasonable rate of interest).

435–55 **TexCommnA** 284**SW**933, 935 [quotCJ].

436–57 85 **IndA**169, 151**NE**396, 399 [quotCJ]; 126 **Okl** 270, 259**P**528; **Tex CommnA** 12**SW(2d)**189; **TexCivA** 15**SW (2d)**100; **Wash** 290**P**228. Contra **Tex CivA** 294**SW**268.

436–58 85 **IndA**169, 151**NE**396, 399 [quotCJ]; 126 **Okl** 270, 259**P**528. But see **Wash** 290**P**228.

436–59 85 **IndA**169, 151**NE**396, 399 [quotCJ]; 159**La**36, 105**S**91; **TexCivA** 299**SW**676, 678 [citCJ]; **TexCivA** 15**SW (2d)**100.

436–60 **IndA** 158**NE**910, 913 [citCJ]; 159**La**36, 104**S**91; **TexCommnA** 284**SW** 933, 935 [quotCJ].

436–62 216**AppDiv**418, 215**NYS**468. [b] (2) Indemnitor is liable only for reasonable value of attorney's services. 156**SC**132, 152**SE**772. [d] **Where surety on mortgage** filed appearance in foreclosure suit requiring notice of all proceedings, failure to notify him of release of purchaser's bid relieves him of liability for expenses of suit. 216**AppDiv** 418, 215**NYS**468.

437–63 156**SC**132, 152**SE**772.

437–63½–New. A bond indemnifying party against "expense" incurred in a suit covers attorney's fee paid by the party to the suit, **TexCivA** 299**SW**676.

437–63½–New. and covers attorney's fees in a suit to recover attorney's fees in a suit mentioned in the bond. **Tex CivA** 299**SW**676.

437–63¼–New. Employment by principal on bond of attorney to represent all defendants does not preclude a party indemnified from employing his own attorney and recovering expense thereof. **TexCivA** 299**SW**676.

437–63½–New. Where indemnitor denied liability after notice of indemnitee's possible liability, he is not entitled to

further notice as condition precedent to liability for attorney's fees. 156SC132, 152SE772.

437-68 TexCommnA 12SW(2d)189; Wis 232NW531.

437-70½-New. Where surety was not liable on bond because of misrepresentations in guaranteed contract, he is not entitled to attorney's fees from warrantor for defending action on bond. La 130S344(1stcase).

438-75 289Pa252, 137A257.

438-76½-New. If defendant bound himself to indemnify plaintiff who became surety on a note for money borrowed, defendant was obligated from the time the loan was made. Iowa 227 NW833.

438-77 17F(2d)38; Ala 130S799; Del 143A34; 150Miss864, 117S245, 248 [cit CJ]; 221MoA868, 287SW819, 822 [quot CJ]; 133 Okl 23, 270P854, 855 [quot CJ].

439-78 168La241, 121S757.

439-79 221MoA868, 287SW819, 822 [quotCJ]. [a] **Protection against judgment by certain person** is held to cover judgment recovered by that person's agent. 289Pa252, 137A257.

439-86 19F(2d)95; 20F(2d)14; 33F (2d)289 (cause of action on bond for failure to erect buildings did not accrue till after deficiency on sale or foreclosure); Ala 130S799; Del 143A34; 243 IllA83; Iowa 230NW319; 132Misc 844, 230NYS617. [f] **Indemnity against loss from paramount title.**–Iowa 230NW 319. [g] **Loss not within terms of bond.** –Wis 232NW531.

440-95 40F(2d)606; 232 IllA441. [a] (3) Where government officer made payments for overtime work to employee contrary to law, he cannot recover under latter's indemnity bond for his refusal to return such money, as his act was cause of loss. 232 IllA411.

440-97 133 Okl 23, 270P854, 855 [quot CJ]; 40 OklACR122, 124 [citCyc]. [a] **Indemnitee is not deprived of right to compromise suit** where indemnitor merely gives notice to indemnitee to defend suit but fails to deposit collateral as required. 24F(2d)268. [b] **Provision authorizing indemnitor to compromise claim** and that itemized statement be prima facie evidence of extent of indemnitee's liability thereon is valid. 24 F(2d)268.

440-98 40 OklACR122.

441-2 [b] **Redemption after execution sale.**–83Mont334, 272P250.

441-8 83Mont334, 272P250; 253NY508, 171NE760.

441-13 24F(2d)268; 131Misc505, 227 NYS233; 40 OklACR122, 123 [quotCJ& citCyc].

442-29 42F(2d)953 (discovery of loss within time limited); 126 Or404, 270P 479, 483 [citCJ]. [b] **Indemnity bond did not make liability dependent** on diligence in discovering losses. 42F(2d) 953.

443-35 See also 219Ala286, 122S169.

443-40 149Va168, 140SE272. [c] **Liability on bond indemnifying grantee against loss from paramount title** is released by reconveyance to grantor by warranty deed. Iowa 230NW319.

443-40½-New. But a new contract of indemnity does not release indemnitor unless the parties so intend. 120Kan 504, 243P1042.

443-41 MoA 7SW(2d)732.

443-43 [a] (3) Settlement of indebtedness of notes by acceptance of property in payment thereof discharges obligors under contract of indemnity in absence of fraud. 169Ga40, 149SE573.

444-44 Ala 130S73; 45 Ida159, 261P 239; TexCivA 15SW(2d)100.

444-45 203 Iowa179, 210NW775.

444-46 13F(2d)464; 130Kan583, 287P 579.

444-47 [a] **Acceptance of property not worth amount of indebtedness** by bank directors in settlement of indebtedness does not discharge directors indemnifying bank against loss where such acceptance amounts to fraud on bank. 169Ga40, 149SE573.

444-48½-New. An indemnitee may abandon security furnished by indemnitors without impairing his right under the indemnity contract where he is not guilty of any omission or commission in violation of any obligation resting on him in reference to such security. 142 Wash230, 252P703.

444-48⅓-New. Indemnitors cannot summarily relieve themselves from an obligation by notice that they do not choose to be further bound. 45 Ida159, 261P239.

444-48¼-New. The fact that indemnitors ceased to be stockholders of a bank bonded by a surety company did not relieve them of liability to the surety company where an agreement imposed on them the duty first to relieve the surety from its liability on the bond already assumed. 45 Ida159, 261P239.

444-48½-New. Liability of bank held not extinguished so as to relieve depositor's insurer from liability. 130 Kan583, 287P579.

444-48¼-New. Liability on bond is extinguished by suit on note tendered and accepted for that purpose. 41GaA809, 154SE711.

444-56 150Miss386, 116S605, 608 [cit CJ].

445-60½-New. Failure of creditors holding collateral to present their claims to the liquidator of an insolvent debtor bank does not relieve indemnitors of such creditors from liability, 144 Wash494, 258P335.

445-60⅓-New. especially where the indemnitors agreed that an action taken for the enforcement of claims against the bank should release them. 144 Wash494, 258P335.

445-61 137Wash368, 242P379, 43ALR 1365.

445-65½-New. That building contractor used money received from performing the contract in performing another contract does not relieve the surety on the statutory bond given under the first contract. 150Miss864, 117S245.

446-73 219Ala286, 122S169. [b] **Directors are not estopped from setting up settlement as release of liability** under contract of indemnity where bank received full value, though directors were parties to settlement. 169Ga40, 149SE 573.

446-74 24F(2d)268.

446-75 201 Iowa670, 207NW785.

446-77½-New. Indemnitor requesting sureties to make certain payments is estopped from afterward asserting that contract of indemnity did not aver payments made. 15F(2d)756.

446-77⅓-New. Indemnitors of creditors under an agreement that the holders of certain notes or the debtor should agree to forbear from suit for a stipulated time cannot assert that no agreement to forbear was made where the holders actually did forbear. 144Wash494, 258 P335.

446-79 26 OhNPNS513.

446-84 110Conn221, 147A705, 66ALR 1428; 162Ga659, 134SE921; 223Ky640, 4SW(2d)412; 174Minn281, 219NW96; 129Misc212, 221NYS117. [a] (2) Maker of note can recover from payee who transferred note to avoid defense, where maker paid judgment to transferee. 162Ga659, 134SE921.

446-85 [a] (1) 16F(2d)926.

447-87½-New. In suit to settle conflicting claims, contractor may recover judgment against subcontractor for amount of judgment rendered in favor of subcontractor's creditors against contractor. 161La789, 109S492.

447-88 23F(2d)201; 25F(2d)602; 29 F(2d)193; 32F(2d)182; 85 IndA169, 151NE396, 399 [citCJ]; 310Mo 419, 276 SW614; 224AppDiv553, 231NYS494; 87PaSuper6; Man [1930] 3DomLR320; Ont [1928] 2DomLR958. See also 224 AppDiv500, 231NYS169. But see 36F (2d)399; Wis 231NW597.

447-90 [a] **Refusal to make one authorizing trespass party defendant** to action would not preclude reimbursement. 156SC286, 153SE128.

447-93½-New. That a landlord who satisfied a judgment against him for the death of a tenant denied his ownership of the building in the action in which the judgment was rendered does not affect his right to indemnity against a company which negligently caused such death where he was in fact the owner of the building. 34Wyo 272, 243 P118.

447-93⅓-New. Contract protecting owner from negligent use of workmen causing injury is not extended to cover acts of owner. 16F(2d)309.

447-95 256 IllA442; 85 IndA169, 151 NE396; Wis 229NW81.

448-99 122Kan369, 252P268; 217Ky 186, 289SW378; 49ND562, 192NW313 (statute held not to enlarge liability of third person who has given bond of indemnity against negligence on his part or unfaithful or inadequate work done by him); 54ND449, 209NW990; 94PaSuper25.

448-1 [b] (5) Other instances. 13Pa Dist&Co 751.

449-5 122Kan369, 252P268.

449-8½-New. A statute providing for an estimate of damage done by dogs to sheep by a selectman of the town with a person to be named by the owner of the sheep and for the town's payment of damages and recovery over from the owner of the dogs gives the town a right of action where the damage has been agreed upon by the selectman with the person so named. 108Conn152, 142A 805.

449-8⅓-New. In Manitoba charter of Winnipeg entitling municipality to indemnity for damages from nuisance created by another is inapplicable where city is jointly responsible for nuisance. Man [1929] 4DomLR683.

450-12 21F(2d)313.

450-14 21F(2d)313; Iowa 232NW682; TexCivA 1SW(2d)688.

451-21 213Ky518, 281SW503.

451-23 213Ky518, 281SW503.

451-24½-New. The liability of a ship owner for medical expenses for one of seamen being contractual, the owner cannot maintain action to recover the expense incurred in the cure of a seaman injured through the negligence of another. 14F(2d)530.

451-29 162Ga659, 134SE921.

452-33 34Wyo 272, 243P118, 122 [cit CJ].

452-36½-New. Failure of the indemnitee to request the indemnitor to defend an action defended by indemnitee with the full knowledge and consent and on the advice of the indemnitor does not bar recovery of attorney's fees in such action from the indemnitor. 34Wyo 272, 243P118.

452-37½-New. An action for coal delivered by mistake by carrier, not being in tort, rules governing measure of damage ex delicto are not controlling, 85 IndA557, 155NE50.

452-37¼-New. but plaintiff is limited in his recovery to contract price and not market value of coal. 85 IndA557, 155NE50.

452-38 131Misc891, 228NYS508.

452-40½-New. As between active and passive joint tortfeasors, prior payment by a coöbligor of more than his proportionate part of the common debt is not a condition precedent to an action for indemnity. TexCommnA 276SW 177.

452-40⅓-New. The rule applies whether relief is sought in an original action or by cross actions in suits by injured parties. TexCommnA 276SW177.

452-40¼-New. Where one person alone signs a note for a common debt, prior payment of the note is not a condition precedent to a cross action by him against his codebtors for indemnity in an action against him on the note. Tex CommnA 276SW177.

453-42 159La36, 105S91; 131Misc891, 228NYS508. But see Iowa 232NW682.

453-43 159La36, 105S91 (may make reasonable settlement); 131Misc891, 228NYS508.

453-44 159La36, 105S91 (and his refusal to defend).

453-47½-New. That indemnitee abandoned proceeding in error to review a judgment against him and settled the judgment without the indemnitor's consent does not preclude the recovery of indemnity. 34Wyo 272, 243P118.

453-50 34Wyo 272, 243P118, 122 [cit CJ].

453-54½-New. Motion to set aside

third party notice will be granted where it is clear that no case for indemnity is shown. **Man** [1929] 4**DomLR**683.

453-55 295**Pa**183, 145**A**65. See also 87 **PaSuper**6.

454-63 214**Ky**822, 284**SW**104; 190**NC** 611, 130**SE**502; 195**NC**30, 141**SE**492; **TexCivA** 278**SW**501; **Man** [1929] 4**Dom LR**683. But see 98**PaSuper**84. [b] (3) Perpetrator of fraud has no indemnity from joint tort-feasor. **TexCivA** 278**SW** 501.

455-65 87**PaSuper**6.

455-66 140**SC**123, 138**SE**675.

455-66½-New. The rule applies only to an intentional wrong. 219**Ala**286, 122**S**169.

455-69 310**Mo** 419, 276**SW**614; 140**SC** 123, 138**SE**675, 704 [quotCJperCothran, J]; 34**Wyo** 272, 243**P**118. See also 203 **Iowa**152, 211**NW**423. [a] (3) Executor, knowing but not participating in wasteful investment by life tenant, is not barred from reimbursing himself from life tenant's estate. 151**Md**59, 133 **A**851.

455-70 [a] **Parties are not in pari delicto** where plaintiff relied on defendant's expert knowledge to furnish scaffold sufficient to enable plaintiff's employees to complete painting job. 310 **Mo** 419, 276**SW**614. [b] **Plaintiff held not precluded from recovery** for injuries to his employees through collapse of scaffold erected by defendant, erected according to plans calling for nails and not bolts, unless it understood what drawings meant or quality of thing represented thereby. 310**Mo** 419, 276**SW** 614.

455-71 31**F(2d)**51; 256 **IllA**442; 214 **Ky**822, 284**SW**104; 131**Misc**891, 228 **NYS**508; 190**NC**611, 130**SE**502; 140**SC** 123, 138**SE**675, 704 [quotCJperCothran, J]; 34**Wyo** 272, 243**P**118.

455-72 215**AppDiv**35, 212**NYS**746; 190 **NC**611, 130**SE**502; 140**SC**123, 138**SE** 675, 704 [quotCJperCothran,J]; **Tex CivA** 278**SW(2d)**917.

456-73 213**Ky**518, 281**SW**503; 145 **Wash**157, 259**P**35. See also 190**NC**611, 130**SE**502.

456-77 **TexCivA** 284**SW**617; **TexCivA** 27**SW(2d)**917.

456-82 213**Ky**551, 281**SW**487; 158**La** 885, 104**S**914 (suit against surety on bond given for payment of damages arising ex delicto is itself action ex contractu).

456-83 295**Pa**183, 145**A**65; 297**Pa**564, 147**A**826; 10**PaDist&Co** 295.

457-93 [c] **In Manitoba.**–[1930] 3**Dom LR**320.

457-98 16**F(2d)**83; 310**Mo** 419, 276**SW** 614. [b] **Patentee** can be subrogated in equity to rights of contractors using patented pavement under indemnity agreement of highway commission. 43 **F(2d)**582.

458-1 16**F(2d)**83; 86 **IndA**429, 158**NE** 488. Contra 193**NC**780, 138**SE**131, 53 **ALR**1404.

458-2 7**F(2d)**822; 16**F(2d)**83; 191**NC** 253, 131**SE**659. [a] (2) Bank can also enforce such agreement because money paid thereon would become property of bank whatever stockholder's intention. 201 **Iowa**670, 207**NW**785. (3) Instrument signed by bank stockholders to avoid impairment of capital stock of bank wherein they "guarantee the said bank against loss" in certain amount on bills receivable is contract of indemnity to bank upon which it can maintain actions. 201 **Iowa**670, 207**NW** 785.

458-3 322**Mo** 1050, 17**SW(2d)**977; **MoA** 28**SW(2d)**448.

458-3½-New. Where jitney bus indemnity bond to city provided for suit in city's name for use of persons injured, the court has jurisdiction of such a suit. 35**GaA**681, 134**SE**632.

459-20½-New. In an action on an agreement to indemnify for failure of payment of stock dividend within a certain time, where the agreement contained an option to the purchaser of stock either to retain it or sue for the dividend, failure to return stock is condition precedent to commencement of action. 77**Mont**539, 252**P**368.

459-20⅓-New. Provision that itemized statement of compromise payment should be prima facie evidence of fact and extent of indemnitor's liability does not require filing affidavit before suit. 24**F(2d)**268.

459-20¼-New. A statute permitting recovery against a town for damages done to sheep by dogs and the town's recovery over from the owner of the dogs must be literally followed by the owner of the sheep and by the town in order to permit recovery. 108**Conn**152, 142**A**805 (damages must be estimated in manner provided otherwise town may not recover).

459-20½-New. Guarantor need not seek recovery against coguarantors before resorting to liability of indemnitor. **Wash** 290**P**228.

459-24 110**Conn**255, 147**A**841(2dcase); 126 **Or**404, 270**P**479, 484 [citCJ]; **Tex CivA** 15**SW(2d)**100. [b] (1) 81**Colo** 241, 254**P**999; 123**Kan**502, 255**P**975; **Mass** 173**NE**517; **Wis** 232**NW**525.

459-24½-New. Conversely any matter may be set up as defense which is germane to cause of action pleaded and presents legal reason why indemnitee cannot recover. 108**WVa**589, 152**SE**3(2d case).

459-25 126 **Or**404, 270**P**479, 484 [cit CJ].

460-31 126 **Or**404, 270**P**479, 484 [cit CJ].

460-33 181**Ark**671, 27**SW(2d)**507(2d case).

460-36 148**Md**289, 129**A**660 [quotCJ].

460-37 29**F(2d)**193; 129**Kan**262, 282**P** 703; 159**La**36, 105**S**91; 7**LaA**249, 252 [quotCyc]; 148**Md**289, 129**A**660 [quot CJ]; 260**Mass**242, 157**NE**540; 322**Mo** 502, 15**SW(2d)**766, 64**ALR**936; 131**Misc** 505, 227**NYS**233; 49**ND**562, 192**NW**313; 56**ND**110, 216**NW**203; 129 **Okl** 300, 264 **P**885; 126 **Or**404, 270**P**479, 484 [quot CJ]; 289**Pa**252, 137**A**257, 259 [citCJ]; 295**Pa**183, 145**A**65; 87**PaSuper**6; 94**Pa Super**25; 10**PaDist&Co** 295; 145**Wash** 157, 259**P**35; **Wash** 290**P**228.

461-38 148**Md**289, 129**A**660 [quotCJ].

461-39 148**Md**289, 129**A**660 [quotCJ].

461-40 121**Kan**369, 252**P**268; 49**ND** 562, 192**NW**313.

461-41 49**ND**562, 192**NW**313.

461-42½-New. Judgment of an employee against a railroad director is not conclusive as to the cause of accident as against a roadbed contractor. 164 **La**546, 114**S**153.

461-44 122**Kan**369, 252**P**268; 214**Ky** 822, 284**SW**104; 295**Pa**183, 145**A**65; 142**SC**125, 140**SE**443. But see 260**Mass** 242, 157**NE**540.

462-46 88**CalA**100, 262**P**790, 792 [cit CJ].

462-47½-New. Where indemnitors of a surety company were made parties to an action against the surety company by order of court, notified of the pendency of the action by service of a cross complaint, and suffered the case to go by default, they cannot thereafter have judgment set aside on the ground that the cross complaint by the surety company was defective. 96**CalA**615, 274**P** 617.

462-48 260**Mass**242, 157**NE**540; 86 **Mont**584, 284**P**1011.

462-49 [c] **Effect of consent decree.**– 260**Mass**242, 157**NE**540.

463-50 25**F(2d)**339.

463-51 260**Mass**242, 157**NE**540; 49**ND** 562, 192**NW**313.

463-52 87**PaSuper**6. But see 33**F(2d)** 89.

463-55 **Ala** 130**S**799; 126 **Okl** 270, 259 **P**528; 40 **OklACR**122; **TexCivA** 15**SW** **(2d)**100.

463-56 35**GaA**681, 134**SE**632; 131**Misc** 505, 227**NYS**233; **Okl** 259**P**528; 40 **Okl ACR**122; **TexCivA** 15**SW(2d)**100. See also 105**Conn**11, 134**A**252.

463-58 34**Wyo** 272, 243**P**118, 122 [cit CJ].

464-59 40 **OklACR**122.

464-60 35**GaA**681, 134**SE**632; **Tex CivA** 15**SW(2d)**100.

464-64 **TexCivA** 15**SW(2d)**100.

464-72 131**Misc**891, 228**NYS**508. But see 220**AppDiv**520, 221**NYS**680. [a] **Nonsuit granted one of two defendants** in personal injury action is conclusive evidence in action over by other defendant if other's negligence was found. 131**Misc**891, 228**NYS**508.

465-76 [a] (4) Three-year limitation. 123**Kan**502, 255**P**975 (action not barred). (5) Five-year limitation. 123 **Kan**502, 255**P**975 (action not barred).

465-80½-New. Mere delay short of period of limitations will not estop purchaser of corporate stock from seeking recovery on indemnity agreement or constitute bar to action on ground of laches. 77**Mont**539, 252**P**368.

465-84 [a] (2) All material papers such as bond should be attached. 13**Pa Dist&Co** 390.

465-85 27**F(2d)**681. [a] (1) 29**F(2d)** 193; 219**Ala**286, 122**S**169; **Del** 143**A**34; **MoA** 282**SW**457; 77**Mont**539, 252**P**368; 83**Mont**334, 272**P**250; 131**Misc**505, 227 **NYS**233; 53**SD**417, 220**NW**874; **Wis** 229 **NW**28; **Wis** 232**NW**535(2dcase). (7) Allegation as to ownership of land and lien held sufficient in action on contract to hold premises harmless from judgment lien. 83**Mont**334, 272**P**250. (8) To support judgment. 32**F(2d)**182. (9) To show relation of indemnitor and indemnitee rather than bank and depositor, debtor and creditor. 320**Mo** 57, 6**SW(2d)**576, 67**ALR**489. [b] 216**Ala**78, 112**S**356; 35**GaA**454, 133**SE**308; 220**Ky** 71, 294**SW**800; 267**Mass**442, 166**NE**765 (1stcase); **TexCivA** 274**SW**655; **Tex CivA** 299**SW**676; **Utah** 263**P**928. [d] **Allegation in alternative** of encumbrance indemnified against is defective. 215**Ala** 398, 110**S**822.

466-91 See also **Del** 143**A**34.

466-95 310**Mo** 419, 276**SW**614.

466-97 But see 32**F(2d)**182.

466-97½-New. Inadvertent prayer for specific performance doesn't matter where the petition otherwise states a cause for a money judgment and prayed general relief. 168**La**241, 121**S**757.

466-98 [a] **Allegations held sufficient.**– **Iowa** 230**NW**319.

466-2 215**Ala**398, 110**S**822; 220**Ky**71, 294**SW**800.

467-3 **Iowa** 230**NW**319 (allegations held insufficient); 83**Mont**334, 272**P**250 (sufficient). [e] **Cause of loss.**–215**Ala**398, 110**S**822.

467-4 [b] **Plaintiff must give detailed statement of sums spent** as result of liability and items of credit allowed in making up claim. 13**PaDist&Co** 390.

467-5½-New. Allegations of remote, consequential damages not covered by contract of indemnity are demurrable. 215**Ala**398, 110**S**822.

467-5⅓-New. and allegations of fraud inducing acceptance of contract cannot enlarge recoverable damages to include such items of damage. 215**Ala**398, 110**S** 822.

467-6 [d] **Injury to indemnitor** by renewal of note protected is matter of defense. 137**Wash**368, 242**P**379, 43**ALR** 1365.

467-9 98**CalA**748, 277**P**1075.

468-23½-New. Indemnitee's prayer for judgment over if city recovered judgment in action to foreclose assessment lien warrants recovery where city recovers judgment in rem. **TexCommnA** 26**SW(2d)**173.

468-25 131**Misc**891, 228**NYS**508.

468-28 [c] **Pleadings held to authorize consideration of indemnitor's estoppel** to assert liability under special indemnity agreement. 41**F(2d)**319.

469-34 [a] **Acceptance of instrument containing contract of indemnity for benefit of third person is presumed.**–201 **Iowa**670, 207**NW**785.

469-35 **Mass** 173**NE**517.

469-36 40**GaA**573, 150**SE**596; 227**App Div**580, 238**NYS**422.

469-36 **TexCivA** 15**SW(2d)**100. [a] (2) In action by father to recover part of payments from mother for maintenance of feeble-minded son, burden is on father to show that mother is able to pay. **Mass** 168**NE**163.

469-37 219**Ala**286, 122**S**169.

469-38 105**Conn**11, 134**A**252.

469-39 260**Mass**242, 157**NE**540.

469-40 33**F(2d)**89.

469-44½-New. In an action by an indemnitee based on a judgment rendered against him he makes a prima facie case by proof of the judgment, and satisfac-

tion thereof. 119 **Okl** 280, 249P422.

469-44½-New. In such case the burden of proof is on the indemnitor to establish his defense. 119 **Okl** 280, 249P422.

469-46 [a] (1) **Mass** 173NE517; 51**ND** 673, 200NW780. (6) Opinion and interlocutory decree in suit against indemnitee settled by him is evidence in his suit against indemnitor as to reasonableness of settlement. 260**Mass**242, 157NE540. [b] (1) 256**Mass**329, 152NE363. (3) Indemnitor's statements before execution of cost bond. 41F(2d)319.

470-47 256 **Ill**A442; 265**Mass**433, 164 NE376.

470-56 [a] (1) 123**Kan**502, 255P975. (5) To sustain finding that indemnitor had notice and knowledge of pendency of action against city. 122**Kan**369, 252 P268. (6) To support finding that counsel was legally employed by indemnitee and received valuable benefits for his services, reasonable value of which was fixed. 122**Kan**369, 252P268. (7) To show defects in workmanship and materials and necessity and value of repairs on which liability of subcontractor was based. 241**Mich**285, 217NW38. [b] (1) 105**Conn**11, 134A252. (3) To show waiver of requirements in contract. 256 **Mass**329, 152NE363.

470-57 43F(2d)668; 164**La**546, 114S 153; 149**Wash**343, 270P799. [a] **Evidence held not to sustain charge** that judgment for injured brakeman against indemnitee railroad was rendered through collusion between railroad and brakeman illegally to compensate brakeman at expense of indemnitor. 159**La** 36, 105S91.

470-58 [b] (2) To show mutuality of assent to agreement rendering owner of automobile stored in garage liable to indemnify garage keeper for liability incurred in delivering and calling for car. 146**Va**442, 131SE846, 44**ALR**1175. (3) To establish promise to pay any judgments. 27F(2d)681. (4) To show defendant had been induced to execute bond because of fictitious name of applicant. 33F(2d)89.

470-59 [a] (1) 51**ND**673, 200NW780. (3) 94**PaSuper**25. (8) To show that collapse of scaffold was due to use of nails instead of bolts. 310**Mo** 419, 276 SW614. [b] (2) To support cross action of railroad company against wharf company. **TexCivA** 138SW(2d)983.

471-63 See also 45 **Ida**159, 261P239.

471-65 43F(2d)668.

471-66 157**Md**437, 146A275; 196**NC** 550, 146SE229(2dcase). [a] 196**NC**675, 146SE716.

471-67 **Iowa** 227NW833; **Iowa** 227NW 833; 227**AppDiv**580, 238NYS422. [a] (3) Whether proximate cause of injuries to one who recovered against city was negligence of contractor or otherwise. 51**ND**673, 200NW780. (4) Whether defendant's signature to indemnity contract was obtained by fraud. 58**ND** 937, 228NW432. (5) Other instances. 41F(2d)319.

472-69 **Mass** 173NE517; 221**AppDiv** 740, 225NYS270.

472-73 [b] (3) Charge that it was indemnitee's duty to defend suit against indemnitor held error. 260**Mass**242, 157 NE540.

472-74½-New. Instructions precluding payee's recovery on note covering loss on cotton consigned to him if he induced maker to continue with contract by denying receipt of letter sent directing sale are proper when supported by evidence. 215**Ala**693, 112S305.

472-74½-New. Instruction following stipulation in note sued on is proper. 215**Ala**693, 112S305.

472-79 161**La**789, 109S492.

472-86 See also 260**Mass**242, 157NE540.

473-89 101**WVa**186, 132SE369.

473-90½-New. Indemnitor of joint tortfeasor satisfying judgment against indemnitee and another cannot enforce payment of any part against codefendant of indemnitee. **Oh** 173NE194.

INDEPENDENT

473-19 20F(2d)103.

473-24 **Ala** 130S545; 29**Ariz**452, 242P 866; 215**Ky**461, 285SW191; 254**Mass** 280, 150NE157; 255**Mass**285, 151NE 302; 169**Minn**183, 210NW1004; 219**App Div**541, 220NYS625; 221**AppDiv**167, 222NYS644; 143 **Okl** 120, 287P379; 128 **Okl** 188, 261P941; 290**Pa**315, 138A863, 866 [citCJ]; **TexCivA** 272SW807, 809 [citCJ].

473-25 219**AppDiv**541, 220NYS625.

473-26 [b] (8) 45 **Ida**143, 260P1035; **TexCivA** 32SW(2d)220. (10) 189**NC**748, 128SE337. (11) Person who is employed to do piece of work without restriction as to means to be employed, and who employs his own labor and undertakes to do work according to his own ideas or in accordance with plans furnished by person for whom work is done, to whom owner looks only for results. 142**Va**690, 128SE259.

474-27 **TexCivA** 278SW485, 486 [quot CJ].

474-28 29**Ariz**452, 242P866; **TexCivA** 278SW485, 486 [quotCJ].

474-29 29**Ariz**452, 242P866; **TexCivA** 278SW485, 486 [quotCJ].

474-30 29**Ariz**452, 242P866; **TexCivA** 278SW485, 486 [quotCJ].

474-31 317**Mo** 64, 296SW1008, 1011 [quotCJ]; 318**Mo** 421, 18SW(2d)791, 796 [quotCJ]; **TexCivA** 278SW485, 486 [quotCJ].

474-32 29**Ariz**452, 242P866; 189**NC**748, 128SE337; **TexCivA** 278SW485, 486 [quotCJ].

475-33 219**AppDiv**541, 220NYS625; 290 **Pa**315, 138A863; **TexCivA** 278SW485, 486 [quotCJ].

475-34 29**Ariz**452, 242P866; **TexCivA** 278SW485, 486 [quotCJ].

475-35 **TexCivA** 278SW485, 486 [quot CJ].

475-36 290**Pa**315, 138A863; **TexCivA** 278SW485, 486 [quotCJ].

475-37 219**AppDiv**541, 220NYS625; 290 **Pa**315, 138A863; 156**Tenn**202, 299SW 1045, 1046 [quotCJ]; **TexCivA** 278SW 485, 486 [quotCJ].

475-38 120**Kan**13, 241P1087.

INDIANS

480-6 [c] (1) 55**AppDC**391, 6F(2d)694. (2) 55**AppDC**391, 6F(2d)694.

482-36 55**AppDC**391, 6F(2d)694.

482-40½-New. Citizenship is not incompatible with tribal relation. 8F(2d) 433.

482-43 28F(2d)398.

482-43½-New. They are also citizens of the United States. 28F(2d)398.

482-49 [a] (1) 55**AppDC**391, 6F(2d) 694. (7) Adoption of citizenship of United States does not affect rights of member of Indian tribe in tribal property. 55**AppDC**391, 6F(2d)694. [c] **Effect of citizenship.**-22F(2d)851.

482-50 14F(2d)784; 26F(2d)434.

483-59½-New. Indians residing on a reservation, made subject to laws of the United States and their own customs, and exempt from criminal laws of the state, are within a constitutional provision excluding persons under guardianship from the right to vote. 34**Ariz**308, 271P411.

483-59½-New. Members of an Indian tribe residing on an Indian reservation within a state and subject to control of the commissioner of Indian affairs are residents of the state as regards qualifications to vote. 34**Ariz**308, 271P411.

483-64 [a] **In Oklahoma.**-34**Ariz**144, 268P617.

483-66 27F(2d)751. [c] **Statute requiring approval by secretary of interior** of contracts by members of Osage Tribe is not limited to contracts affecting property coming to them by reason of membership in tribe. 137 **Okl** 171, 278P621. [f] **Congress may prescribe conditions** under which member of Osage Tribe not having certificate of competency may become indebted. 137 **Okl** 171, 278P621. [g] **Notes executed by Indian of nine-sixty-fourths' Indian blood** is properly canceled where no certificate of competency has been issued to him. 33F(2d) 21. [h] **Statute requiring approval of secretary of interior of contracts for debt of Indians** not having certificate of competency is not unconstitutional. 33F (2d)21.

483-69 129 **Or**620, 278P572.

483-74 129 **Or**620, 278P572. [b] **Presumptions.**-129 **Or**620, 278P572. [c] **Replevin.**-129 **Or**620, 278P572.

484-83½-New. , and such an Indian may sue in the federal courts. 22F(2d) 851.

484-84½-New. The act of congress of March 3, 1921 authorizing the secretary of the interior to pay certain taxes of members of the Osage Tribe, did not authorize the superintendent of the Osage agency to sue as the real party in interest or as trustee of the Indians to recover taxes paid under protest. 38 **Okl ACR**310.

484-84½-New. A claim of Indians that a deed had been secured by fraud could be settled and waived by attorneys for the government authoritatively representing the Indians in the litigation. 28F(2d)596.

484-84½-New. A state court in which an Indian citizen may sue has jurisdiction to award relief for or against him in a suit brought by him to replevy cattle wherein he filed an undertaking to return them and pay damages if unsuccessful. 129 **Or**620, 278P572.

484-84½-New. Grantee of heir of Indian cannot maintain suit to cancel conveyances unless heirship of Indian has been determined by secretary of interior. 36F(2d)351.

484-86 117 **Okl** 285, 246P441 (application of Arkansas statute to action of ejectment by Cherokee freedman).

484-87 28F(2d)596.

484-92½-New. The act of congress, April 12, 1926, providing that the statute of limitations of Oklahoma shall be applicable to all restricted Indians, does not apply to land upon which restrictions have expired. 126 **Okl** 165, 258P 1041.

484-92½-New. Doctrine of laches has no application to rights of minor Quapaw Indian under invalid lease of allotted lands. 22F(2d)81.

484-94 28F(2d)596 (evidence held insufficient to establish fraud in securing deed from Indians, who inherited allotment, with approval by county court).

485-5½-New. General acts of congress do not apply to Indians, unless clearly so intended. 25F(2d)71.

485-6 [g] (1) 245**NY**433, 157NE734. [m] **Yakima Indians** are held mere occupants of land with possessory rights and not nation. 143**Wash**117, 255P94. [n] **Chippewa Indians.**-281**US**206, 50**SCt** 320, 74**LEd**809.

486-28 121 **Okl** 277, 249P914.

487-30 [b] (1) 133 **Okl** 40, 270P1096; 136 **Okl** 206, 277P213; 38 **OklACR**684. (4) Divorce and marriage according to laws of Creek Nation are recognized, notwithstanding their marriage and divorce statute of 1881, which they ignored. 38 **OklACR**684. (5) Whether in any particular case under tribal customs there was valid marriage or divorce is question of fact for jury whose finding, unless against clear weight of evidence, will not be disturbed on appeal. 38 **Okl** 684. (6) Creek ordinance providing for divorce by district court is held not mandatory so as to render divorce according to previous custom invalid. 19F(2d) 504.

487-38½-New. Polygamy was never recognized as an established custom of the Chickasaw and Choctaw Nations. 123 **Okl** 133, 252P61.

487-39 But see 117 **Okl** 87, 246P868.

490-80 30F(2d)989. [c] **Duties of commission of Five Civilized Tribes,** in making roll of citizens of Creek Nation, were to place persons appearing on tribal rolls on final roll for allotting of land unless found to have died prior to April 1, 1899 or to be on tribal rolls fraudulently. 129 **Okl** 48, 262P682. [f] **Question as to person under consideration** at time judgment of enrollment was entered is one of fact when raised long after enrollment. 129 **Okl** 48, 262P682.

490-81 118 **Okl** 291, 248P651.

490-83½-New. Mandamus will lie to require one, whose father was an enrolled member of the Seneca Nation and whose mother was white, to be enrolled as a member of the nation. 128**Misc**392, 219NYS587.

490-83½-New. A judgment roll does not disclose the degree of Indian blood

of one claiming to be the heir of a deceased allottee where the only reference thereto is contained in his pleadings which do not exhibit a certified copy of the enrollment record. 123 **Okl** 218, 253 **P**99.

490–83½–New. Secretary of interior can revoke ruling of predecessor as to persons entitled to interest annuities as Chippewa Indians. 281**US**206, 50**SCt** 320, 74**L ed**809.

490–83½–New. Same member of Creek Tribe cannot be enrolled twice nor allotted distinct allotments of land of average value. 38**F(2d)**665.

490–83¼–New. Secretary of interior cannot arbitrarily strike from approved rolls member of tribe enrolled according to authority granted to Dawes commission. 38**F(2d)**665.

490–83½–New. Where patents have been issued and title passed to duly enrolled member of tribe, secretary of interior cannot cancel enrollment as allottee without hearing after notice. 38 **F(2d)**665.

490–84 22**F(2d)**786; 28**F(2d)**118.

490–85 112 **Okl** 289, 241**P**147; 128 **Okl** 48, 261**P**150. [c] (1) 128 **Okl** 48, 261**P** 150. [f] **Enrollment records are only competent evidence of age** in action by Indian heir to recover share in deceased mother's allotment where statute of limitations is interposed as defense and date of majority becomes material. 112 **Okl** 289, 241**P**147.

490–86 [a] **Dawes commission decisions and recitals and reports therein** as to matters not indispensable, such as sex of child or enrollment names or numbers of child's parents, are not of conclusive effect. 141 **Okl** 86, 284**P**8.

490–86½–New. Descriptive part of rolls does not have force and effect of judicial determination of the matter shown thereon. 38 **OklACR**514.

490–86⅓–New. Descriptive part relating to parentage is prima facie evidence of matter shown therein. 38 **OklACR** 514 (evidence held insufficient to overcome enrollment record).

490–86¼–New. Where upon enrollment of a minor Creek child under act of congress of April 26, 1906, the commission made an erroneous notation on the census card as to the name of the child's father not supported by the record but subsequently corrected such notation by one naming another person as father, the first notation is not sufficient evidence to sustain a finding that the person last named was not the father. 130 **Okl** 56, 264**P**831.

490–86½–New. An enrollment record is the best evidence of the right of a Creek citizen to inherit. 130 **Okl** 56, 264**P**831.

490–86⅓–New. Production of such record may be waived. 130 **Okl** 56, 264**P** 831.

490–86½–New. Descriptive part relating to parentage is prima facie evidence of matter shown therein. 135 **Okl** 218, 275 **P**317.

490–86⅓–New. Such record cannot be overthrown except by clear, cogent, and convincing proof. 135 **Okl** 218, 275**P**317.

491–3 55**AppDC**391, 6**F(2d)**694. [a] **Right to annuities.**–18**F(2d)**820.

492–11 8**F(2d)**564; 14**F(2d)**784; 37**F (2d)**272; 34**Ariz**308, 271**P**411; 75**Mont** 219, 243**P**1067. [b] 271**US**432, 46**SCt**561, 70**L ed**1023. [c] **Guardianship of United States** over Osage Indians has not been abandoned. 271**US**467, 46**SCt**559, 70**L ed** 1039. [d] **Quapaw Indians** are under guardianship of United States. 271**US** 609, 46**SCt**592, 70**L ed**1112.

492–12 14**F(2d)**784; 17**F(2d)**36; 25**F (2d)**71.

492–13 34**Ariz**308, 271**P**411.

492–14 34**Ariz**308, 271**P**411.

492–15 14**F(2d)**784; 28**F(2d)**200; 34 **Ariz**308, 271**P**411.

492–16 34**Ariz**308, 271**P**411.

492–17 14**F(2d)**784; 75**Mont**219, 243**P** 1067.

492–19 34**Ariz**308, 271**P**411.

492–20 75**Mont**219, 243**P**1067; 129 **Or** 620, 278**P**572. [a] **Emancipation cannot be set aside** without consent of Indian and that of state in which he resides. 129 **Or**620, 278**P**572.

493–24 28**F(2d)**200.

493–25½–New. The secretary of the interior, holding property in trust for an incompetent full-blood Creek Indian, has power to distribute part thereof to the wife of the Indian and to create a trust fund, in accordance with a request therefor. 33**F(2d)**340.

493–25⅓–New. Distribution of trust funds belonging to an Indian by the secretary of the interior must, in the absence of fraud, be approved as done under full power and authority conferred on the secretary. 33**F(2d)**340.

493–32 26**F(2d)**434; 28**F(2d)**76; 113 **Okl** 265, 242**P**185.

493–41 8**F(2d)**564; 27**F(2d)**274; 31**F (2d)**624; 32**F(2d)**581; 170**Minn**110, 212 **NW**23.

494–43 170**Minn**110, 212**NW**23. See also 32**F(2d)**581.

494–44½–New. Decrees of the federal courts in such actions must be given effect in state courts, 170**Minn**110, 212 **NW**23.

494–44⅓–New. even though based upon mistake of fact as to status of the Indian as one of full blood instead of mixed blood. 170**Minn**110, 212**NW**23.

495–71 [b] **Jay Treaty of 1794**, authorizing passage of Indians over Canadian boundary, held not abrogated by War of 1812. 25**F(2d)**71.

495–76 122 **Okl** 105, 251**P**81.

495–80 270**US**181, 46**SCt**298, 70**L ed**539.

495–81 27**F(2d)**909; **Mich** 233**NW**205. [a] **Treaty of 1855 with Quinaielt Indians** is construed to give them exclusive fishing right in reservation. 5**F(2d)**255.

496–82 276**US**58, 48**SCt**248, 72**L ed**467.

496–83 20**F(2d)**873; **Mich** 233**NW**205.

496–84 270**US**181, 46**SCt**298, 70**L ed**539.

496–85 20**F(2d)**873. [a] **Value of land set aside for Indians**, but erroneously patented to state, should be determined on basis of prices which would have been controlling had the lands been dealt with as they should have been. 270**US**181, 46 **SCt**298, 70**L ed**539.

496–87 20**F(2d)**873.

496–89 See also **Mich** 233**NW**205.

497–18 12**PortoRicoFed**252. [c] (4) History of land ownership in Porto Rico under Spanish rule shows intention of individual ownership of land. 12**Porto RicoFed**252.

498–24 See also 7**Alaska**643.

499–28 See also 3**F(2d)**90.

499–40 91**CalA**792, 267**P**576, 577 [cit CJ]. [a] 91**CalA**792, 267**P**576, 577 [quot CJ].

500–53 [b] **Reservation lands ceded by Mississippi Chippewas** under Nelson Act were ceded in trust only and remained subject to rights thereby reserved to Indians. 179**Minn**180, 228**NW**611.

500–57 [b] (2) Federal government cannot divest title out of Chickasaw Tribe and vest same in Chickasaw freedman without consent of tribe or its constituted authorities. 38 **OklACR**443.

500–61 See also 7**Alaska**568.

501–73 28**F(2d)**76; 32**F(2d)**371.

501–77 28**F(2d)**472.

501–78 28**F(2d)**200.

502–83½–New. That plaintiff was part Indian did not exempt him from the legal effect of his own conduct or neglect regarding an oil and gas lease. 28**F(2d)** 590.

502–86 28**F(2d)**76; 32**F(2d)**371; 86 **Colo** 59, 278**P**804.

502–90½–New. Under an act declaring Quapaw Indian allottees of mineral lands to be incompetent and providing that the land may be leased for mining purposes under such conditions only as may be prescribed by the secretary of the interior, leases executed on direction of the secretary of the interior on refusal of the Quapaw Indians is proper. 28**F (2d)**200.

503–95½–New. Where the United States has not specifically granted to a state any right in waters of streams within Indian reservation created by treaty before the state was admitted, it has the exclusive right to use such waters for the benefit of the Indians. 18**F(2d)**642.

503–95⅓–New. An owner of land in an Indian reservation and under government reclamation project who has received water and refused to make payments on back charges is liable for such charges for each year, although, on his refusal, the water was turned off from his land. 18**F(2d)**643.

503–95¼–New. The acts of congress authorizing such projects create a direct liability for charges which will sustain an action therefor by the United States. 18**F(2d)**643.

503–95½–New. Failure of Indians to reside on their lands and use water granted them will not cause abandonment or forfeiture of their rights. 27 **F(2d)**909.

503–2 119 **Okl** 282, 249**P**712. [a] **Time for removal.**–119 **Okl** 282, 249**P**712.

504–20½–New. Act of congress requiring railroad, seeking additional right of way in lands of Indian nation or tribe, to deposit compensation before taking possession and using such lands is mandatory. 38 **OklACR**595.

504–20⅓–New. Deposit more than ten years after filing of plat is ineffectual to confer any rights upon railroad company as against vendee of allottee who has been in actual possession and occupancy, claiming title. 38 **OklACR**595.

504–20¼–New. Under provisions of the act of congress of May 27, 1908 original allotments of minor Creek Indians, citizens of quarter blood, may be taken and condemned for public purposes under state laws. 139 **Okl** 76, 281**P**280.

506–48 272**US**351, 47**SCt**142, 71**L ed**294; 55**AppDC**391, 6**F(2d)**694.

506–49½–New. Cession to United States by Mexico. Indian's rights in land, in Klamath national forest in state of California, are lost by failure to claim under act of congress of March 3, 1851. 3**F (2d)**90.

506–53 See also 272**US**351, 47**SCt**142, 71 **L ed**294.

507–57½–New. Right of occupancy reserved in cession of land by an Indian tribe to the United States until terminated by government order is terminated by an executive order of removal. 193 **Wis**462, 214**NW**454.

507–67 12**F(2d)**938. [b] (3) Court must make effective intention of parties as expressed in entirety of agreement. 20**F(2d)**873. [g] 179**Minn**180, 228**NW**611.

508–69 [b] **Statute giving Indian right to take hold and convey real property** is not determinative of rights in allotment in reservation. 227**AppDiv**107, 237**NYS** 134.

508–72½–New. The provision of the act of Congress of April 26, 1906 granting Choctaw and Chickasaw freedmen the right to purchase certain unallotted lands is valid, although not ratified and approved by the Indian nations. 132 **Okl** 141, 269**P**1067.

508–72⅓–New. Under Original Creek Agreement, allottee's acceptance of share of tribal land in manner provided precludes allottee or heirs from asserting title to other tribal lands. 38**F(2d)** 665.

508–72¼–New. Character of estate of Indian is controlled by federal law. 43**F(2d)**513.

508–73 [f] **Tribal Indian residing off reservation** is not entitled to allotment. 15**F(2d)**518. [g] **Allotments in Quinaielt reservation.**–38**F(2d)**799. [h] **Tribal Indian not actually located on reservation** is not entitled to allotment under act of Feb. 8, 1887. 38**F(2d)**795.

508–76 See also 22**F(2d)**771. [a] **Tribal approval of Indian's application for adoption by Quinaielt Tribe** is ineffectual when disapproved by secretary of interior. 38**F(2d)**799. [b] **Recognition of Indian blood of children of part Indian woman and white man** is not equivalent to adoption. 38**F(2d)**806.

508–79½–New. Where nonexistent person was enrolled as member of Creek Tribe, allottee accepting allotment and not claiming lands allotted to nonexistent person cannot, through his heirs, assert title thereto. 38**F(2d)**665.

508–79⅓–New. Children of part Indian woman adopted into tribe and white husband are not within statute governing rights of children of marriages between white men and Indian women. 38**F(2d)**805.

508–79¼–New. Grandchildren of In-

dian woman and her white husband held not within statute governing rights of children of marriages between white men and Indian women. 38F(2d) 806.

508-79⅙-New. Statute authorizing children of half blood to participate in tribal lands of Indian mother applies only to children of Indian woman of blood of tribe whose lands are claimed. 38F(2d)805.

508-79⅙-New. Daughter of full-blood Indian woman, who was recognized as member of tribe before death, and of her white husband is within statute governing rights of children of mixed marriages. 38F(2d)806.

509-84 227AppDiv107, 237NYS134.

509-87 12F(2d)938.

509-93½-New. During the trust or restrictive period, congress has power to control lands within the state of Oklahoma which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. 119 Okl 300, 249P726.

509-99 15F(2d)518.

509-99½-New. A duly enrolled Chickasaw freedman entitled to purchase additional unallotted land under act of Congress of April 26, 1906 acquires an equitable title which he can convey, in the absence of restrictions, when he has complied with the regulations of the secretary of the interior, has made selection, and applied for same. 132 Okl 141, 269P1067.

510-1½-New. Where Indian's right of property is vested, it is not subject to impairment by legislative action even while he is subject to guardianship of United States as to his political and personal status. 12F(2d)938.

510-1½-New. Water rights passing. Patents issued to Indians have been held to include water and ditch rights appurtenant to land, although not expressly mentioned therein. 12F(2d) 938.

510-9½-New. Indian woman does not lose right in tribal property by marriage with white man. 19F(2d)219.

510-9¼-New. Children of Indian woman married to white man and having abandoned tribe are held not entitled to right in tribal property. 19F(2d) 219.

510-9¼-New. An Indian woman does not lose rights in tribal property by marriage with a white man. 19F(2d) 219.

510-9⅓-New. Children of an Indian woman married to a white man are not entitled to rights in tribal property. 19F(2d)219.

510-21½-New. An allotment of lands is notice to the world of the title of the allottee or title in his heirs at law and their grantees. 118 Okl 1, 246P879.

511-25 276US431, 48SCt366, 72L ed 640.

511-31 130 Okl 223, 267P243.

511-40 289Fed396.

511-42 36 OklACR578.

511-43 36 OklACR578.

512-49½-New. Approval of allotment by secretary is not ministerial but essential to give vested right. 15F(2d) 518.

512-53 5F(2d)994.

512-54 [a] **Original allotment** procured by fraud is valid in hands of bona fide purchaser. 5F(2d)994.

512-55 [a] But see 5F(2d)994. [b] **Validity of cancellation** of patent held properly litigated in action to determine adverse claims. 5F(2d)994.

512-58½-New. Where patent has been issued, approved and delivered to allottee or recorded, secretary of interior cannot correct mistake resulting in distinct allotments to same member of tribe. 38F(2d)665.

512-58⅔-New. Where patent was issued through mistake and without authority, secretary of interior, with consent of allottee, may cancel patent and reallot land to member entitled. 38 F(2d)665.

512-64 [f] **Complaint** in suit for allotment must state with particularity facts on which action of court is sought. 38 F(2d)799. [g] **Variance between pleading and proof in suit for allotment as to what tribe Indian belonged has been** held not fatal. 38F(2d)799.

513-65 [a] **Where secretary of interior denied claim based on membership of Quinaielt Indians,** court is not required to determine whether Cowlitz Indians were entitled to allotment. 38F(2d) 799.

513-69½-New. Suit by Indian to recover allotment held barred by laches. 15F(2d)518.

513-69½-New. Before court can act in suit by Indian for allotment, it must appear that claim was previously presented to secretary of interior and denied by him. 38F(2d)799.

513-71 43F(2d)322. [e] **Deed by heirs of deceased allottee.**-134 Okl 124, 272P463.

513-72 23F(2d)81.

513-74½-New. "Competent" Osage Indian is one having certificate of competency giving him certain rights as to disposal of his property. 38F(2d)662.

513-82 273US315, 47SCt361, 71L ed 658. [c] **Public Indians** are within the law limiting alienation of lands. 271 US432, 46SCt561, 70L ed1023. [d] **Secretary of interior may prescribe restrictions.**-17F(2d)894.

513-83 273US315, 47SCt361, 71L ed 658; 8F(2d)564; 21F(2d)165; 118 Okl 188, 247P392 (statute construed to apply to written stipulation fixing lien on lands of minor Indian ward); 38 Okl ACR443. [d] (7) Act of congress of May 27, 1908 protects Indian minors against voluntary or involuntary alienation or encumbrance of their lands both allotted and inherited, unless same is affected in the course of probate proceedings. 118 Okl 188, 247P392. (8) Under act of congress of May 27, 1908, where member of Five Civilized Tribes of one half or more of Indian blood dies leaving issue surviving born since March 4, 1906, homestead of such deceased allottee remains inalienable for use and support of such issue during their life or lives until Apr. 1, 1931 unless restrictions are removed by secretary of interior. 122 Okl 169, 250P82 (rule applied in case of death of deceased allottee of Choctaw Nation). (9) Such act of congress applies to allottees who died prior to its enactment. 122 Okl 169, 250P82. [e] **Restricted Indians** cannot transfer property prior to termination of their restrictions. 36 F(2d)91.

514-84 8F(2d)564; 112 Okl 289, 241P 147; 38 OklACR443.

514-85 112 Okl 289, 241P147.

514-89 32F(2d)745. See also 280US 183, 50SCt143, 74L ed361.

514-90 32F(2d)745; 116 Okl 111, 243 P526.

514-93 273US195, 47SCt338, 71L ed 602; 41F(2d)257 (relief from restrictions); 122 Okl 169, 250P82; 122 Okl 105, 251P81.

514-96 15F(2d)184; 122 Okl 105, 251 P81. [a] (2) Deeds of lands of Indian allottee validated by statute prevented recovery thereof by allottee's heir when no fraud was shown. 143 Okl 23, 289P 339. [c] (1) 39 OklACR141 (status as freedman of Creek Nation). (8) 132 Okl 141, 269P1067. (15) 37F(2d)493 (test of quantum of Indian blood is record embodied in approved rolls); 123 Okl 106, 251P981; 124 Okl 300, 256P46; 136 Okl 24, 275P1064(2dcase); 138 Okl 208, 281P276 (no vested right destroyed by act of congress in requiring sale to be made through probate court). (19) 118 Okl 18, 246P397; 136 Okl 56, 276P218(1stcase). (20) 137 Okl 175, 278P635; 142 Okl 168, 285P968 (purpose of requirement is for Indian's protection. (22) 132 Okl 48, 269P302. (38) Act of congress of April 26, 1906 made land inherited by full-blood citizens of Creek Nation inalienable except as therein provided as to approval. 114 Okl 217, 246P603. (39) Under such act decree in partition of such land between such heirs made by federal court is void for want of jurisdiction of subject matter. 114 Okl 217, 246P603. (40) Act of May 27, 1908 removed restrictions from allotted lands of certain classes of minors, members of Five Civilized Tribes, subject to condition that allotted land be sold through county court in regular guardianship proceeding. 112 Okl 110, 243P516. (41) Sale of minor freedman's allottment through county court in regular guardianship proceeding satisfies conditions and requirements of such act. 112 Okl 110, 243P516. (42) After act of May 27, 1908 took effect secretary of interior only had power to remove restriction against alienation from allotment of restricted allottees. 118 Okl 18, 246P397. (43) After such act took effect secretary of interior could not relieve full-blood Indian heir of necessity of having deed conveying inherited lands approved by county court having jurisdiction of estate of decedent. 118 Okl 18, 246P397. (44) The act of May 27, 1908 (35 US St. at L. 313) § 3 providing that rolls of citizens and of freedmen of Five Civilized Tribes approved by secretary of interior should be conclusive evidence as to age of such citizen or freedman because effective May 27, 1908. 114 Okl 64, 243P222. (45) Deed of Chickasaw Indian minor of allotted lands, not made by guardian under order of county court, is void. 128 Okl 48, 261P150. (46) Such deed is not validated by subsequent decree of district court quieting title. 128 Okl 48, 261P150. (47) Under act of May 27, 1908 mortgage executed by full-blood Choctaw Indian upon his interest in inherited lands approved by county court having jurisdiction of settlement of estate of deceased allottee is valid and may be foreclosed. 129 Okl 78, 262P1071. (48) Under act of congress of April 26, 1906 there are no restrictions on alienation of unallotted land purchased by Chickasaw freedman. 132 Okl 141, 269P1067. (49) Under act of May 27, 1908, enrollment as of twenty-one thirty-seconds Indian blood is conclusive against contention that allottee is full-blooded Indian. 39F(2d) 594. (50) Widow of deceased allottee leaving child or children cannot convey her interest during life of any child till April 26, 1931, without removal of restrictions by secretary of interior. 139 Okl 115, 281P576. (51) Validity of conveyance by full-blooded Choctaw heirs is not affected by approval by court of county other than one having jurisdiction of state. 138 Okl 288, 281 P141. (52) Other Acts of congress. 143 Okl 23, 289P339. [d] 112 Okl 110, 243P516.

516-97 170Minn110, 212NW23.

516-98 136 Okl 24, 275P1064(2dcase). But see 137 Okl 249, 278P1080.

516-99 170Minn110, 212NW23; 122 Okl 169, 250P82; 143 Okl 23, 289P339.

516-1 170Minn110, 212NW23; 130 Okl 217, 266P760. [b] **Void judgment quieting title to allotted lands of minor Creek freedman in his grantee under deed executed during minority** cannot be validated by same court by order denying motion to vacate same after grantor has attained majority. 130 Okl 133, 265P648.

516-6 [a] **Issuance of fee simple patent to Indian allottee** terminates trust and restrictions against alienation, giving court where land situated jurisdiction of questions pertaining to title. 276US431, 48SCt366, 72L ed640.

516-11½-New. Statute of limitations does not begin to run against action concerning restricted Indian land until restrictions against alienation have been removed. 33 OklCr250, 242P539.

516-11⅓-New. An Indian's trust deed of property, with the purported approval of the probate court, and the trustees' reconveyance without restriction, did not operate to remove restrictions on the Indian's right of alienation. 27 F(2d)274.

516-11¼-New. Osage Indian of less than half blood with certificate of competency, or with restrictions removed, cannot dispose of his trust fund or his trust estate. 38F(2d)662.

516-11⅙-New. Indians selling land and taking back a mortgage with a provision that, on foreclosure the grantors shall take subject to restrictions, take land on default by the grantees subject to restrictions, although the land is redeeded to them, and not by foreclosure. 34F(2d)755.

516-12½-New. After sale of a minor freedman's allottment through the county court in Oklahoma in a regular guardianship proceeding, the management, control, and disposition of the funds from the sale of the allotted lands are matters governed by the state law. 112 **Okl** 110, 243P516.

516-13 [a] **Written declaration of heirship** by three-fourths blood Choctaw Indian vests no interest in land subsequently allotted. 4F(2d)838.

516-15 39F(2d)188; 114 **Okl** 217, 246 P603.

517-21 273US315, 47SCt361, 71L ed 658.

517-22 [d] **Invalidity of deeds by heir** as to surplus portion of allotment. 115 **Okl** 117, 245P988.

517-23 Okl 291P43. [a] (1) 115 **Okl** 117, 245P988. (2) Fact that unrestricted homestead portion was included in same deed with restricted surplus portion of allotment for definite money consideration which grantor received and retained will not permit him to recover homestead portion on ground that entire contract was void because it was unlawful to convey such surplus portion of allotment. 115 **Okl** 117, 245P988. [b] **Allotments made on behalf of deceased persons** under authority, Second Seminole agreement § 2, are not within restriction against alienation by citizens of Seminole Nation made by original Seminole agreement. 114 **Okl** 267, 246P455. [c] **Where Osage Indian holds certificate of competency,** he can convey interest inherited in son's land 39F(2d)188.

517-29 [b] **Transfer of leases.**-53SD 341, 220NW852 (no recovery for rent paid to date of contract).

517-30 21F(2d)165; 28F(2d)590; 135 **Okl** 293, 275P625. [c] 270US456, 46S Ct338, 70L ed682 (lease of longer than maximum period is wholly void); 40F (2d)479 (sufficiency of evidence to show fraud); 120 **Okl** 98, 250P911; 40 **Okl ACR**218 [reh pending]. [d] **Agricultural leases of homestead and surplus allotments.**-**Okl** 268P706. [e] **Agricultural lease by full-blood Choctaw.**-135 **Okl** 293, 275P625. [f] **Agricultural lease of surplus allotment by full-blood Choctaw allottee on day preceding twenty-first anniversary of birth** for period of five years is void and incapable of ratification. 137 **Okl** 249, 278P1080.

518-31½-New. Where a departmental lease provides the manner in which it may be released, such method must be followed by the lessee, and an attempted release in any other manner will be ineffective and will not relieve the lessee from liability for the rents and royalties provided for. 112 **Okl** 94, 240P81.

518-31½-New. Doctrine of estoppel respecting payment of royalty will not operate against a restricted full-blooded Indian. 15F(2d)565.

518-31¼-New. An occupant of restricted Quapaw Indian land holding as sublessee under a mining lease, void because executed in violation of the laws of the United States regulating the leasing of such land for mining purposes, can acquire no rights by reason of the unlawful relationship thus existing based on estoppel of the sublessee to deny the title of the original lessee or of the original lessee to deny his title. 120 **Okl** 98, 250P911.

518-31½-New. Superintendent of the Five Civilized Tribes has no power to lease restricted lands of Indian heirs and allottees but has only power to approve leases executed by them. 15F(2d) 565.

518-31½-New. Superintendent is without power to continue in force lease which has expired. 15F(2d)565.

518-31¼-New. Secretary of interior is without power to determine whether terms of lease have been complied with. 15F(2d)565.

518-31½-New. A lease executed by a mixed-blood Creek Indian, after enactment of an act providing that lands of mixed-blood Indians should be free from restrictions, could not be treated as an extension of a prior lease. 28F(2d)590.

518-31½-New. A white man is entitled to protection under state laws against trespass on lands leased from an Indian allottee. 129 **Or**620, 278P572.

518-31 1/10-New. Construction of agreement by church organization to conduct school on Indian land. 37F(2d)272.

518-34½-New. Purchaser of lease in reliance on records is entitled on cancellation to reimbursement for expenditures. 15F(2d) 565.

518-37½-New. Where permit to cut and remove hay from Indian allotment is later revoked because secured by misrepresentation, the permittee does not take title to hay already cut and stacked by him as employee of a third person, 50 SD255, 209NW339.

518-37½-New. and his sale to another conveys no title. 50SD255, 209NW339.

518-43 21F(2d)165 (statement quoted). See also 119 **Okl** 74, 247P982.

518-49 21F(2d)165 (rule stated); 28 F(2d)472; 119 **Okl** 74, 247P982; 120 **Okl** 98, 250P911; 122 **Okl** 60, 252P33.

519-50 122 **Okl** 60, 252P33; 129 **Okl** 255, 264P610 (lease held invalid). See also 39 **OklACR**235. [a] **Leases of homestead allotments.**-**Okl** 268P706.

519-51½-New. The act of congress of May 27, 1908 was not intended to restrict the leasing of surplus allotments for agricultural purposes to a person who is actually cultivating the lands. 122 **Okl** 60, 252P33.

519-51½-New. But under a statute permitting the lease of homestead allotment for more than one year, with the approval of the secretary of the interior or superintendent of the Five Civilized Tribes, Choctaw allottee's lease for five years with such approval held valid although made before expiration of the prior commercial lease. 21F(2d)165.

519-58½-New. Subsequent purchasers under void deeds take no title, and such conveyances are not susceptible of ratification, and no rule of estoppel prevents the assertion of their invalidity. 115 **Okl** 117, 245P988.

519-60½-New. The purchaser acquires the same water rights as the Indians had with equal priority for actual acreage under irrigation, and any increased acreage placed under irrigation with reasonable diligence. 27F(2d)909.

519-61 8F(2d)564; 17F(2d)116; 27F (2d)274; 170Minn110, 212NW23; 116 **Okl** 111, 243P526; 115 **Okl** 117, 245P 988; 135 **Okl** 276, 276P191; 38 **OklACR** 497 (deed pursuant to void agreement with grantor while minor); 40 **OklACR** 104, 250P82. [f] **United States may sue to enforce restrictions** upon alienation of Indian lands transgressing restrictions. 40F(2d)247. [g] **Attorney-general has authority** to initiate, control, and dismiss suit upon discovering suit to enforce restrictions to be groundless. 40 F(2d)247.

519-62 128 **Okl** 48, 261P150; 42 **Okl ACR**100.

520-63 But see 130 **Okl** 297, 267P466.

520-66 115 **Okl** 117, 245P988.

520-70 170Minn110, 212NW23; 134 **Okl** 274, 275P1050.

520-72 [a] **Evidence held insufficient** to establish Indians knew they were signing deed at time of its execution. 43 **Ida**675, 256P529.

520-72½-New. Where the guardian of full-blood Creek Indians' minor heirs born after March 4, 1906 sells both homestead and surplus portion of their mother's allotment inherited by them and the sale is approved by the county court and the lands are conveyed in one deed for a lump sum consideration without reference to any portion of the lands being the homestead allotment, the deed, although void as to the homestead portion, will be sustained as to the surplus portion. 117 **Okl** 288, 246P388.

520-72½-New. A mortgage on an allotment, a portion of which is restricted, is void as to only the restricted portion. 119 **Okl** 44, 247P1003.

520-72¼-New. Where deed to one purchasing land from Indian prohibits alienation without consent of secretary of interior, the conveyance without such consent is void as against public policy, 8F(2d)564.

520-72½-New. and the good faith, motives, or considerations of the purported grantee are immaterial. 8F(2d)564.

520-72½-New. Where restricted land of a mentally incompetent Indian is sold through departmental proceedings in conformity with regulations in force at the time, and under authority of an order of the secretary of the interior removing restrictions and providing that it shall be effective only and simultaneously with the sale, the deed when delivered by the department to the purchaser is merely voidable and not void, in the absence of fraud inducing its execution. 123 **Okl** 199, 252P829.

520-72¼-New. The infirmity of such deed is cured by the act of congress of August 24, 1922, validating all conveyances of allotted lands theretofore approved by the secretary of the interior. 123 **Okl** 199, 252P829.

520-72½-New. The secretary of the interior is without authority to provide in rules of department other grounds of forfeiture of rights of purchasers of unallotted lands in Choctaw, and Chickasaw Nations than are expressly provided for by statute. 134 **Okl** 274, 275P 1050.

520-72½-New. A valid conveyance gives fee title exempt from liability of debts of an allottee and a patentee created before issuance of the patent, but not debts of a subsequent grantee. **Nebr** 228NW 541.

520-72 1/10-New. Title of the grantee is not exempt under federal law from debts incurred prior to the approval and delivery of the deed. **Nebr** 228NW541.

520-74 273US315, 47SCt361, 71L ed653; 8F(2d)564; 27F(2d)751; 31F(2d)624; 39F(2d)188 (approval of partition of restricted lands); **Nebr** 228NW541; 124 **Okl** 260, 256P727. [g] **In Oklahoma.**-124 **Okl** 260, 256P727. [h] **Sufficiency of approval of conveyance through departmental proceedings.**-123 **Okl** 199, 252 P829. [i] **Partition not approved by secretary of interior** does not divest minor Indian of her title to interest in lands. 39F(2d)188. [j] **Exercise of power by secretary of interior is not subject to review by courts** in absence of fraud or want of jurisdiction. 39F(2d) 293. [k] **Purpose of requiring county court's approval of conveyance of inherited land.**-142 **Okl** 202, 286P329. [l] **County court's approval of conveyance of inherited land is ministerial act.**-142 **Okl** 202, 286P329. [m] **County judge's approval of heir's conveyance occurs** when judge instructs clerk to enter order of approval and not when he states, without county, that he will approve. 142 **Okl** 202, 286P329.

520-75 But see 136 **Okl** 274, 277P579. [c] **Reconveyance to Quapaw Indian,** on payment of debt secured by mortgage approved by secretary of interior does not enable him to hold land free from restrictions on right to alienate. 270US 456, 46SCt338, 70L ed682.

521-78 But see 34F(2d)755.

521-88½-New. Where full-blood Creek Indian heirs executed a deed to an inherited allotment at a time when the approval of the deed was within the exclusive jurisdiction of the secretary of the interior and it was disapproved and returned by him, the same deed subsequently approved by the county court at a time when it had exclusive jurisdiction to approve the same is valid and effective as a movement to pass title. 114 **Okl** 153, 244P744.

521-88½-New. Married minor member of one of Five Civilized Tribes, of less than one-half Indian blood, may convey lands acquired, after marriage, with proceeds from sale of his allotted lands free and clear of supervision of county court. 116 **Okl** 218, 244P31.

521-89 31F(2d)624.

521-92 28F(2d)200. [a] (1) 33F(2d) 688. [d] 21F(2d)165. [e] 38 **OklACR**2 [foll 67 **Okl** 106, 169P483]. [h] **Contract held not assignment of lease.**-33 F(2d)248. [i] **Superintendent of Quapaw Indian agency** can act in behalf of secretary of interior in executing mining leases on behalf of Indians. 40F (2d)479. [j] **County courts** authorized to approve leases of Indian lands act as federal agencies. 40F(2d)479.

521-93 126 **Okl** 3, 258P906. [a] (2) Person securing leases from minor Qua-

paw Indian must have approval of secretary of interior and rights of lessees are not preserved by appointment of guardian and submitting leases to probate court. Such approval may be retroactive as of the date of deed, and carries presumption that Indian lessor was not imposed upon, but does not constitute settlement of all rights and liabilities. The secretary of interior ordinarily may only approve or disapprove such leases. 22F(2d)81.

522-94 Okl 268P706. [a] **Statute giving guardian control over estate of ward** does not authorize guardian of Indian minor to make agricultural lease of ward's allotment without approval and authorization of county court. Okl 268 P706.

522-96½-New. , or an assignment thereof, 126 Okl 3, 258P906. [a] **Act of congress of April 26, 1906,** dispensing with necessity of approval of secretary of interior does not prevent county court and interested parties from inserting in lease provision making such approval condition precedent to assignment. 126 Okl 3, 258P906 (provision construed as condition precedent).

522-97½-New. Investment of royalties from oil leases. Secretary of state has authority to withhold consent to proposed investment of royalties from oil lease of Indian's restricted lands. 8F (2d)564.

522-97½-New. and such authority includes authority to allow investment on condition that property into which proceeds are converted shall be impressed with like restriction. 8F(2d)564.

522-2 See 17F(2d)116.

522-6½-New. On canceling deed by Indian wards when receiving three thousand dollars for which they intended to execute mortgage, grantee will be given equitable lien therefor. 43 Ida675, 256 P529.

522-11 39 OklACR213. [a] **Estate of purchaser from next of kin** of deceased allottee is subject to administration and payment of debts. 39 OklACR213.

523-14½-New. Heirs of deceased Choctaw Indian allottee have equitable interest in land before patent is issued. 23F(2d)81.

523-14½-New. Heirs of a Winnebago Indian are entitled to an unrestricted deed in fee after expiration of twenty-five years from the allotment. 31F(2d) 520.

523-20 19F(2d)35.

523-21 128Misc392, 219NYS587.

523-28 [b] **All provisions published in Mansfield Ark. Dig. c 53** were placed in effect whether or not they were in force in Arkansas. 114 Okl 217, 246P603. [c] **Widow is given child's part** on compliance with provisions of statute. 114 Okl 217, 246P603. [d] **Evidence sufficient** to show plaintiff was not husband of Creek Indian woman at her death, precluding claim to undivided interest in tribal lands. 40F(2d)264.

523-30 114 Okl 66, 243P522; 37 Okl ACR460. See also 142 Okl 79, 285P946. [c] **Devolution of allotment.**–37 OklACR 460.

523-33 37 OklACR469 (inheritance by nearest relative).

523-34 23F(2d)277.

523-36 122 Okl 12, 250P130. [d] (1) 122 Okl 12, 250P130. (2) Children of deceased duly enrolled and allotted Indian citizens of Creek tribe who are enrolled as Seminole citizens may not inherit interest in decedent's allotted lands along with his children who are enrolled as Creek citizens. 122 Okl 12, 250P130. [e] **Supplemental Creek agreement** is not applicable merely to first succession but applies to future successions. 267US352, 45SCt317, 69L ed 652. [f] **Proviso as to devolution where property would descend to parents** modifies applicable provisions of Arkansas statutes to extent that, where there is mother in esse, she takes entire land and, if there is no mother, but there are brothers and sisters or descendants of such, they take entire land. 131 Okl 153, 268P721. [g] **Maternal grandmother and aunts take to exclusion of father** where deceased daughter inherited allotment from mother. 23F(2d)277.

523-38 19F(2d)35; 114 Okl 89, 243P 957. [b] **Rights in and to land** are adjudged to be same as if citizen allottee was living on date of selection, and title had actually vested in him. 114 Okl 89, 243P957.

524-39 37 OklACR469.

524-40 [a] (1) 129 Okl 38, 262P678 (act of 1921); 141 Okl 212, 285P120; 39 Okl ACR365. (4) Wife and children of Seminole allottee, who died in 1904 after receiving allotment, inherited land allotted to him as a Seminole citizen, though they were enrolled citizens by blood of Creek Tribe. 39 OklACR365. (5) Widow's right of election to take child's part terminated on advent of statehood. 132 Okl 10, 268P1113.

524-41 [a] **Mansfield Dig. c 49 §§ 2522-2545** controls descent and not Arkansas law of curtesy as it appears in c 20 §§ 566, 567, 276US69, 48SCt218, 72L ed 471.

524-44 19F(2d)504; 112 Okl 116, 240P 87 (statute construed); 124 Okl 63, 253 P1014; 137 Okl 265, 278P648; 139 Okl 171, 281P787; 38 OklACR342. [a] (1) 43F(2d)513; 114 Okl 66, 243P522; 37 OklACR216 (kindred of half blood who are not of blood of ancestor from whom deceased inherited cannot inherit). [d] (2) 120 Okl 260, 250P792. (4) Maternal half sister and half brother inherit allotment of deceased Creek maternal half brother to exclusion of paternal half brothers of allottee. 120 Okl 260, 250P 792. [f] **Estate of deceased allottee** is not subject to administration or payment of debts. 39 OklACR213. [g] **Allottee leaving as his only heirs maternal grandmother** and paternal half-brother, allotment will go to them in equal shares. 114 Okl 66, 243P522. [h] **Whether lands pass under federal or state law.**–119 Okl 300, 249P726. [i] **Ancestral estates.**–134 Okl 127, 272P471. [j] **Allotment of unmarried Creek Indian dying without issue** passes in equal shares to surviving father and mother. 134 Okl 124, 272P463. [k] **Inheritance by father from minor son** dying intestate and unmarried. 39F(2d)188. [l] **Father of full-blood Choctaw minor succeeds to lands** inherited by minor from his mother. 139 Okl 9, 280P828 (to exclusion of uncles and aunts of deceased minor).

524-45 124 Okl 63, 253P1014; 38 Okl ACR342.

524-45½-New. Inheritance from illegitimate Cherokee allottee is governed by laws of inheritance of Arkansas if they were in full force at the date of the death of allottee. 117 Okl 87, 246P868.

524-45½-New. Contract by attorney for interest in full-blood Choctaw's inherited allotment is valid and binding, in absence of fraud, when approved by county court. 37 OklACR527.

524-45¼-New. Judgment giving lien on inherited land of full-blooded Choctaw is improper in absence of approval by county court. 37 OklACR527.

524-45½-New. Indians' allotted lands become subject to state laws. 19F(2d) 35.

524-45¼-New. In determining the scope of authority vested in the secretary of the interior over restricted estates, the intent of congress and rules of the department are to be considered. 24 F(2d)613.

524-45½-New. A liberal rule of interpretation should be adopted for the administration of such estates. 24F(2d) 613.

524-45⅛-New. Laws of descent and distribution in force in state at time of death of Indian subsequent to admission of Oklahoma into Union controls devolution of his estate. 43F(2d)513.

524-45⅙-New. Congress in making Oklahoma statute control devolution of estates of Indians did not adopt Oklahoma statute as state law. 43F(2d)513.

524-46 [b] **Effect of recognition of illegitimate by father.**–117 Okl 87, 246P 868.

524-51 117 Okl 151, 245P874 (mode of obtaining service of process); 129 Okl 155, 265P1064; 132 Okl 48, 269P302. [b] 142 Okl 82, 285P5. See also 141 Okl 300, 285P13. [l] **Judgment** in action to determine heirs of deceased allottee is competent and conclusive as against all contesting Indian citizen claimants in later action. 113 Okl 278, 241P768. [m] **Effect of determination.**–135 Okl 218, 275 P317. [n] **Sufficiency of evidence.**–135 Okl 218, 275P317. [o] **Affidavits incompetent** to show heirs of deceased Creek allottee. 142 Okl 157, 286P14. [p] **Appeal from determination.**–142 Okl 82, 285 P5 (matter not constituting reversible error). [q] **Service by publication on unknown heirs.**–141 Okl 300, 285P13 (federal statute mandatory).

525-53 36F(2d)351 (applicable to past and future allotments). [e] **Act giving secretary of interior exclusive power** to determine Indian heirship is held not repealed by act giving district courts jurisdiction of action involving rights to allotments of land under law or treaty. 270US243, 46SCt246, 70L ed565.

525-60½-New. County court's determination of heirship of Creek Indians is held not conclusive as to inheritance under Supplemental Creek Agreement. 23F(2d)481.

525-64 But see 276US58, 48SCt248, 72 L ed467.

525-64½-New. However, it has been held that no curtesy attaches to land held by Choctaw woman on its descent to her heirs. 276US69, 48SCt218, 72L ed 471.

526-75 135 Okl 276, 276P191.

526-82½-New. Possession of Indian land by church organization held permissive as against United States. 37F (2d)272.

526-82¼-New. Adverse possession. Necessity of paying taxes by adverse claimant in suit by government to quiet title in Indians. 40F(2d)882.

527-1 27F(2d)751; 132 Okl 262, 270P 319.

527-3 [a] (4) Attempt of female member of Five Civilized Tribes to convey homestead is ineffective where consent of husband is obtained by fraud and such property passes under her will. 37 OklACR176 [reh pending].

529-33 8F(2d)433.

530-37 [a] 121 Okl 277, 249P914. [c] **Sisseton and Wahpeton Bands of Indians.**–277US424, 48SCt536, 72L ed939. [d] **Control of government over affairs of Creek Indian** includes not only his allotment, but income therefrom. 37F (2d)860. [e] **Same general principles apply** to personalty and realty. 41F(2d) 257.

530-47 [f] **Indian trader without permit** may be enjoined from trading at mouth of Quillehute River. 33F(2d)608.

530-51 [b] **Power to remove.**–135Misc 132, 237NYS697.

531-58 [a] **Secretary of interior** has no authority to distribute part of trust property to wife of incompetent Indian and decree trust fund. 37F(2d)860.

531-59½-New. Defendant holding funds under an alleged transfer from an Indian holds them in trust for the owner. 21F(2d)325.

531-59⅓-New. Approval of the secretary of the interior does not make a gift by a mentally incompetent Indian valid. 21F(2d)325.

531-59¼-New. Such defendant must account for property to the secretary of the interior. 21F(2d)325.

531-60 [g] **Penalty can be collected by criminal proceedings.**–38F(2d)431.

531-64 34Ariz308, 271P411; 129 Or620, 278P572. [b] **State of Oregon did not cede jurisdiction over Umatilla Indian reservation** to United States under act of congress organizing territory of Oregon, and acts admitting state to Union contained no such reservation of jurisdiction. 129 Or620, 278P572.

532-66 27F(2d)274; Mich 233NW205.

532-68 133Misc286, 232NYS415.

532-69½-New. State laws extended to Indians carry settled constructions of courts of state. 274US544, 47SCt706, 71 L ed1194.

532-70 [b] (3) Statutes of limitation appearing in Mansfield Digest, statutes of Arkansas, control commencement of all actions, real or personal, where cause of action accrued prior to Nov. 16, 1907, in that part of Oklahoma for-

merly comprising Indian Territory. 130 **Okl** 223, 267P243.

532-72 86**Colo** 59, 278P804. [p] **Indian agent** is not immune from prosecution for false imprisonment. 117 **Or** 492, 244P543.

533-91 37F(2d)318.

534-93 But see 37F(2d)318.

534-95 37F(2d)318.

534-99 75**Mont**219, 243P1067.

535-12 8F(2d)433 (act repealed by National Prohibition Act); 16F(2d)754.

535-23 5F(2d)231 (nonqualification for allotment is no defense).

535-27 8F(2d)433.

536-32 15F(2d)496; 25F(2d)581. [a] (1) 16F(2d)876; 19F(2d)131. [b] (3) Statutes prohibiting introduction of liquor into Indian country is held not repealed by National Prohibition Act. 7 F(2d)887. (4) National Prohibition Act does not repeal statutes prohibiting possession of intoxicating liquor in Indian country. 6F(2d)801. [c] (8) Statute including Oklahoma county in "Indian country" held valid. 7F(2d)887. (9) Term "Indian country" has constantly changing application. 6F(2d)801. (10) Streets and large part of town site held to have ceased to be Indian country within statute. 6F(2d)801. (11) Statute declaring Osage County, Okl., to be Indian country held valid, though portions had previously lost such status. 6 F(2d)801. [d] (2) 5F(2d)17; 15F(2d) 32. [k] **Courts construe statutes prohibiting intoxicating liquor in Indian country** as showing intention that Indian country should diminish as necessity therefor disappears. 6F(2d)801. [l] **Regulation of commission of internal revenue** approved by secretary of treasury permitting possession and sale of jamaica ginger is held ineffectual in Indian Territory. 13F(2d)651.

536-32½-New. Possession of tincture of ginger or imitation apricot extract within limits of Indian country is unlawful under statute prohibiting possession of intoxicating liquors. 16F(2d)876.

537-33 15F(2d)496; 15F(2d)991; 18 F(2d)477; 34F(2d)398 (statute held valid); 36F(2d)356 (act held not unconstitutional). [b] **Place need not be shown to be Indian country** in prosecution for possessing liquor in Indian Territory, though Indian country is unnecessarily alleged. 15F(2d)991.

537-33½-New. or was prohibited by treaty or statute, 15F(2d)991 (holding constitutional act of June 30, 1919).

537-42 [c] (2) 41F(2d)782.

537-49 179**Minn**180, 228NW611. [b] (4) Chippewa reservation. 179**Minn**180, 228NW611.

538-56 179**Minn**180, 228NW611 (Indian living on allotment held in trust by United States violating state law as to taking muskrats); 75**Mont**219, 243P 1067 (Indian not allottee and still maintaining tribal relation). [a] **Crime committed on highway.**–83**Mont**556, 274P 840.

538-60 271**US**467, 46SCt559, 70**L ed** 1039; 5F(2d)608; 32F(2d)860.

538-61 75**Mont**219, 243P1067.

538-62 179**Minn**180, 228NW611; 83 **Mont**556, 274P840.

538-64½-New. Where a member of the Blackfeet Tribe of Indians has received a patent in fee to allotment of land, and is therefore a citizen, he is subject to prosecution under state law for manslaughter, notwithstanding he has been subsequently granted an additional allotment which is held in trust for him as a homestead. 83**Mont**556, 274P840.

539-67½-New. Where a white man commits manslaughter within the boundaries of an Indian reservation and on tribal lands, and deceased was a white man, the state court has jurisdiction notwithstanding federal courts ordinarily have jurisdiction as to crimes within Indian reservations. 83**Mont**556, 274P840.

539-68 143**Wash**117, 255P94. [b] **Indian allottee citizen** who has received patent in fee is subject to civil and criminal laws of state. 75**Mont**219, 243 P1067. [c] **Where misdemeanor is committed on land to which United States has relinquished title** by Indian who is ward of the federal government state has jurisdiction to punish him. 75**Mont** 219, 243P1067.

539-69 271**US**467, 46SCt559, 70**L ed** 1039. [a] **Indian allottee who has not obtained patent** is still ward of federal government, though citizen and as such ward is subject to exclusive jurisdiction of United States. 75**Mont**219, 243P 1067.

539-70½-New. State courts have jurisdiction of the crime of murder of an Indian committed on territory within the original boundaries of a reservation but afterward excluded therefrom by act of congress. 48**SD**409, 205NW25.

540-88 75**Mont**219, 243P1067.

540-93 [a] 15F(2d)32; 19F(2d)131; 25F(2d)581; 26F(2d)245; 33F(2d)263.

540-96 [b] (6) Possessing intoxicants in former Indian Territory and transportation of liquor. 27F(2d)94.

540-99 [a] **Allegations as to place held sufficient** in indictment for possession of intoxicants in former Indian Territory. 27F(2d)94.

541-19 27F(2d)94. [a] (2) 32F(2d) 1002. [c] **Evidence held sufficient** to warrant conviction for possessing intoxicating liquors in Indian country. 6F(2d)809. [d] **Evidence held insufficient** to sustain conviction for possessing whisky in Indian country. 15F(2d) 929. [e] **Evidence as to possession of intoxicating liquors in Indian country** is held sufficient. 18F(2d)522.

541-21 35F(2d)594.

542-27 5F(2d)17.

542-37 32F(2d)581. [a] **Evidence held to show incompetency of Indian** to make gift. 21F(2d)325.

542-42 32F(2d)550.

542-43 [a] **Federal courts have jurisdiction** in proper civil actions or cases involving title to restricted Indian lands. 28F(2d)398.

543-45½-New. Delegates appointed to press claims for tribe may collect for services on quantum meruit. 272**US**728, 47**SCt**275, 71**L ed**494.

543-45¾-New. Court of claims must determine value of such services. 272**US** 728, 47**SCt**275, 71**L ed**494.

543-45¼-New. United States may invoke equitable jurisdiction of federal courts to determine whether restrictions on alienation of Indian allottees have been violated. 23F(2d)81.

543-52 [a] **Action in state court is properly dismissed** where United States is proper party to maintain and has brought action in behalf of Indian for destruction of growing timber by fire negligently set by defendant where land is held by such Indian under restricted patent prohibiting the patentee from selling, leasing, or in any manner alienating the land without consent of president. 166**Minn**14, 206NW939.

543-53 [a] **State courts have jurisdiction** to try suits involving title to lands of Pueblo Indians. 271**US**432, 46**SCt**561, 70**L ed**1023.

543-55 [a] **State courts in proper civil actions** have jurisdiction of cases involving title to restricted Indian lands, though they may be required to construe acts of congress, treaties with Indian tribes, department leases, and conveyances of Indians. 28F(2d)398.

543-59 245**NY**433, 157NE734.

543-60 245**NY**433, 157NE734.

543-61 [a] (5) Onondago tribe does not have peacemaker's court. 214**App Div**678, 213**NYS**576. [b] **Supreme court** has jurisdiction of actions by Onondago Indian. 214**AppDiv**678, 213**NYS**576.

543-61½-New. A finding on the issue as to the age of the grantor made in an action against a Creek Indian citizen to quiet title to certain lands claimed under a deed executed by him cannot be collaterally attacked in the absence of a showing of fraud or collusion. 134 **Okl** 301, 273P220.

543-64 [a] **District courts of Oklahoma have jurisdiction** to partition real estate of full-blood Indians. 125 **Okl** 147, 256P908. [b] **Where unknown heirs are made parties** to partition proceeding under Act Congr. June 14, 1918, it is not necessary to appoint guardian ad litem for possible unknown heirs. 125 **Okl** 147, 256P908.

544-74 14F(2d)430. [a] **Limitation of time to attack administrator's sale.**–123 **Okl** 106, 251P981. [b] **General jurisdiction** under which decisions are reviewable on appeal is exercised under these provisions. 25F(2d)85. [c] **Estates of nonresidents.**–181**Ark**433, 26SW(2d)74.

544-76 [a] **Payment of debts of incompetent.**–122 **Okl** 174, 252P827.

544-77 [a] (12) Where guardian of nonallotted full-blood Osage orphan minors who inherited lands from deceased parents who were Osage allottees of full-blood files in county court application for approval of contract between guardian and attorneys to enforce payment of money in hands of secretary of interior to guardian for use of minors, court does not acquire jurisdiction until all papers filed in matter are served on superintendent of Osage agency as required by act of congress approved April 18, 1912. 115 **Okl** 116, 242P1036.

544-83 280**US**363, 50**SCt**121, 74**L ed**478; 35F(2d)78.

545-85 26F(2d)434.

545-86 26F(2d)434.

545-88½-New. Where personal property not held in trust by the federal government is left by a deceased, incompetent, full-blood Osage Indian as part of his estate descendable under the statutes of Oklahoma, the same, less allowances and exemptions, is subject to an inheritance tax under the laws of the state. 119 **Okl** 300, 249P726.

545-88½-New. Rule is not changed by state's admission of Indian to citizenship. 26F(2d)434.

545-91 [c] (5) 112 **Okl** 289, 241P147. [g] (11) 112 **Okl** 289, 241P147. (20) Under act May 27, 1908 surplus and homestead allotments of one-sixteenth Cherokee Indian are subject to sale under execution on judgment obtained on debt arising after restrictions were removed. 124 **Okl** 300, 256P46. [h] See also 140 **Okl** 178, 282P611.

546-94½-New. Creditors of Osage Indians, when they deal with them, deal with full knowledge of limitations which congress has placed on alienation of their lands. 38F(2d)662.

INDICATE

546-2 See also 13**CustA**652.

INDICTMENTS AND INFORMATIONS

559-1 220**MoA**883, 295SW529.

559-2 **AlaA** 130S905; 318 **Ill** 293, 149 **NE**241; **Mo** 18SW(2d)841; 72**Mont**270, 233P615; 23 **OhA**109, 155NE393.

559-4 **Utah** 273P969.

559-5 318 **Ill** 293, 149NE241.

559-6 318 **Ill** 293, 149NE241. [b] **Accused has right to clear and intelligible written statement** of nature and cause of accusation. 233 **IllA**13.

559-8 26F(2d)272.

559-10½-New. Where it is clear that an attempt has been made to charge an offense of a kind over which the court has jurisdiction, the accusation is sufficient to invoke the court's jurisdiction. **Utah** 273P969.

559-11 21**AlaA**188, 106S510; 131**Misc** 411, 227**NYS**142; 25 **OhNPNS**564. See also 321**Mo** 786, 12SW(2d)466(2dcase). [b] **In Oklahoma.**–111 **Okl** 240, 239P566. [c] **In Kentucky.**–217**Ky**316, 289SW225. [d] **Statute should be construed to speed up administration** of criminal law. **CalA** 277P1069. [e] **Presumptions in aid of construction.**–**CalA** 292P684.

560-16 131**Misc**411, 227**NYS**142.

560-17 125**Me**319, 133A738.

560-18 [a] **Statutes held constitutional.**–17F(2d)771.

560-19 96**CalA**430, 274P433; 156**Md** 149, 143A872. [a] **Statute held constitutional.**–**CalA** 290P470.

561-29 249**NY**314, 164NE111; 131**Misc** 411, 227**NYS**142.

561-33 [a] But see 249**NY**314, 164NE 111.

561-39 [a] **Search warrant** merely authorizing search of premises for liquor cannot form basis for conviction. **Mo** 1SW(2d)841.

561-46 198**Cal** 112, 243P667; 152**Md** 616, 137A370; 243**NY**162, 153NE35; 254**NY**16, 171NE890.

563-50 29F(2d)573.

563-54 233 **IllA**13; 243**NY**162, 153NE 35.

563-55 233 IIIA13; 243NY162, 153NE 35.
563-56 233 IIIA13; 243NY162, 153NE 35.
563-59 152Md616, 137A370.
563-61 133Misc620, 233NYS81.
564-66½-New. Since the adoption of the Code of Criminal Procedure, abolishing all forms of pleadings prior to indictment, which under § 274 is the first pleading, the terms "presentment" and "indictment" are used interchangeably; both contemplating an accusation of crime and an opportunity on the part of accused to be heard in his own defense before a jury of his peers, and presentment as a means of requiring one to answer for a crime is unknown to the law of this state. 133Misc620, 233NYS 81.
564-70½-New. In Iowa the offense of transporting intoxicating liquors not properly labeled, punishable by fine not exceeding one hundred dollars, cannot be prosecuted by indictment. 207 Iowa 319, 222NW866.
564-75 204 Iowa186, 214NW675.
565-81 152Md616, 137A370; 12Porto RicoFed369.
565-89 234Ky776, 29SW(2d)32.
565-90 220MoA883, 295SW529.
565-6½-New. Prosecution for violations of liquor laws by indictment is required only in cases clearly and specifically set out by statute. 128Me293, 147A212.
565-8 131Misc411, 227NYS142. [f] **Statutes requiring life imprisonment on fourth conviction of a felony** are not unconstitutional on ground of making defendants answerable for infamous crime without indictment or presentment. 219 AppDiv19, 219NYS373. [g] **Statute providing that, where defendant has been held to answer to criminal charge,** court may, on defendant's written application, direct information to be filed against him for offense of which he stands charged, held not violative of constitution. 224AppDiv243, 229NYS644. [h] **Accused may assert constitutional right to discharge** at any time at least before conviction, where not indicted for charge for which he is held. 254NY16, 171NE 890 (state must meet challenge).
566-11 79CalA605, 250P578; 94Fla60, 113S736, 743 [citCJ]; 159La674, 106S 28.
566-15 79CalA605, 250P578; 94Fla60, 113S736, 743 [citCJ]; Iowa 210NW934, 212NW550; 159La674, 106S28.
567-20 97Fla199, 120S330; 152Md616, 137A370.
567-21 [a] **In Florida.**-94Fla60, 113S 736.
567-23 104NJL268, 140A21; 131Misc 411, 227NYS142.
567-24 NJSup 133A536. [b] **Statute providing for trial before justice of peace of husband for violation of Nonsupport Act** is not violative of constitutional requirement of grand jury presentment or indictment in crimes not cognizable by justice of peace. 106WVa 1, 144SE570.
567-28 218Ala250, 118S265.
567-32 230Ky71, 18SW(2d)881.
568-38 [a] (4) Sabbath breaking. 156 Md459, 144A350. (5) Participating in obscene drama. 134Misc127, 234NYS 211.
568-44½-New. The offense of distributing circulars containing obscene selections need not be prosecuted by indictment. 133Misc693, 234NYS213.
568-47 131Misc411, 227NYS142.
568-49 164La199, 113S816, 817 [citCJ].
569-62 131Misc411, 227NYS142.
569-66½-New. A sentence for contempt of court to confinement in an institution which does not of itself denote infamy and without requirement of hard labor does not impose infamous punishment. US 18F(2d)374.
569-68 198Cal 112, 243P667; 220MoA 883, 295SW529; 58ND832, 227NW560; 32PortoRico 5 (Code Cr. Proc. § 68); 52 SD273, 217NW205. [f] **In Porto Rico.**-32PortoRico 5, 7.
570-73 233 IIIA13.
570-73½-New. , and to plead judgment in bar on further prosecution for same offense. 233 IIIA13.
570-79 47RI 88, 129A825 (failing to prove special damage set forth in bill, defendant was not required to meet different claim, though plaintiff might have been entitled to rely upon general damages).
570-80 76CalA734, 245P1109; 12Porto RicoFed369.
570-87 8F(2d)732; 79CalA605, 250P 578.
571-91 21F(2d)513; 12PortoRicoFed 108.
571-92 21F(2d)513.
571-93 But see 96Fla551, 119S396.
571-99 17F(2d)771.
571-3 234Ky776, 29SW(2d)32.
572-5½-New. Under some statutes, the rules of law and procedure on indictments are applicable to prosecutions on information so far as relative thereto. 52SD273, 217NW205.
572-5½-New. In some jurisdictions nothing less than an indictable offense can be presented by the county attorney's information. 207 Iowa322, 222 NW867.
572-7 TexCr 26SW(2d)634(2dcase).
572-9 210Ky764, 276SW809.
572-10 111 Okl 240, 239P566.
572-15 [c] **Prosecution for nonsupport of child** must be by information, affidavit being insufficient. OhA 172NE 694.
572-17 140Miss165, 105S461; 111 Okl 240, 239P566.
573-42 91Fla1026, 109S804.
574-53½-New. Search warrant may be used as basis of prosecution for misdemeanor for which accused was arrested without warrant following discovery of liquor in his house, and no indictment, information, or further warrant is necessary in such case. 210Ky764, 276SW 809.
574-53⅓-New. Dismissal of an information does not require dismissal of a subsequent indictment for the same offense although the indictment was found before the information was dismissed and without any order of court. 88 CalA222, 263P306.
574-56 273US392, 47SCt377, 71L ed700, 50ALR989; 156Miss346, 126S40.
574-57 273US392, 47SCt377, 71L ed 700, 50ALR989; 261Mass294, 158NE 894. [a] **Indictment charging offense committed in another county** may be demurrable. Oh 170NE653.
574-60 8F(2d)736; 20F(2d)42; 23F (2d)55. Contra 6F(2d)942.
574-64½-New. Jurisdiction is a question for the court and not for the grand jury. 162Ga442, 134SE68.
574-66 See also 161Tenn248, 30SW(2d) 255.
574-67 SC 155SE385; 50SD388, 210 NW350; 100TexCr424, 274SW137.
575-70 [a] (1) 109TexCr168, 38SW(2d) 459, 461 [citCyc].
576-72 149Miss223, 115S429.
576-73½-New. Grand jury summoned and impaneled in one division of the federal district is deemed impaneled for the whole district and may indict for offense committed in another division of district under Judicial Code, § 269, as amended. 15F(2d)14.
576-82 310Mo 500, 276SW625; 318Mo 687, 1SW(2d)96.
577-84 175Minn607, 222NW280.
577-88 [a] (6) 89PaSuper82. (13) Where defendant enters into recognizance to answer charge, indictment is not defective for lack of complaint. 86 PaSuper382.
577-97 92PaSuper530.
578-9 [a] **Statute held void** to extent that it authorized assistant county solicitors to sign, swear to, and file informations in criminal courts of record. 94Fla1128, 115S537.
578-17 [a] (10) Either magistrate's transcript or sanction of court is sufficient basis for indictment. 91PaSuper 110. (11) That both such bases exist does not require abandonment of either. 91PaSuper110. (12) District attorney need not file verified petition in order to obtain sanction for indictment. 91 PaSuper110.
579-21 148Miss608, 114S392.
579-24 179Ark1123, 20SW(2d)622. [b] **Indictment by grand jury impaneled at former term,** when another term has intervened, is held void. 147Miss851, 112 S790. [c] **Indictment during period of adjournment.**-149Miss223, 115S429.
579-28 148Miss608, 114S392; 156Miss 346, 126S40. [b] **Indictment returned at special term by grand jury impaneled at last regular term** should be quashed. 149Miss394, 115S437.
579-30 9PaDist&Co 81.
579-36½-New. **Indictments found in extraordinary term** which are still pending and open for trial do not constitute unfinished business pending before extraordinary term but are pending before supreme court, 241NY389, 150NE 303.
579-36⅓-New. and may be moved for trial in any term thereof. 241NY389, 150NE303.
579-36¼-New. An indictment found in an extraordinary term of court does not constitute unfinished business pending before extraordinary term. 241NY389, 150NE303.
580-43 32PortoRico 764; 32PortoRico 816 (sixty days from date of arrest). [a] **Indictment for other crime.**-32Porto Rico 816.
580-44 32PortoRico 764.
580-49 13PaDist&Co 252. But see 9 PaDist&Co 380.
580-62 156Tenn451, 2SW(2d)705.
581-68 See also 12PaDist&Co 529.
582-82 213Ala555, 105S664 (before return by grand jury).
583-15½-New. Any person has a right to go before grand jury and prefer a charge against another. 159La589, 105 S631.
583-20 [a] **Found means voted or concurred** in by grand jury. 52SD273, 217 NW205, 208 [citCJ].
583-21 89 IndA330, 166NE547(2dcase).
583-26 34NM465, 284P113 (applicable to crime committed prior to effective date of constitutional provision).
584-27 165La842, 116S206.
585-46 15F(2d)965; 20F(2d)376; 20F (2d)113. [a] 15F(2d)965. But see 207 Cal 172, 277P320. [b] **Evidence held incompetent.**-20F(2d)376. [c] **Evidence held sufficient** to warrant finding of grand jury. 20F(2d)113. [d] **Indictment is invalid** where grand jury considered detailed evidence of bar association report charging acts of extortion. 156Miss487, 126S25.
585-47 15F(2d)965; 22AlaA136, 114S 791; Fla 130S718; 255Mass317, 151NE 300; 152Miss625, 120S751; 108TexCr92, 299SW249.
585-48 15F(2d)965; Ala 114S794 [foll 53Ala481]. See also 108TexCr92, 299SW 249. [b] **Indictment for defrauding by false pretenses** may be found, though person victimized was not witness before grand jury. 168Minn13, 209NW 633.
585-49 15F(2d)965.
585-51 15F(2d)965; 22AlaA136, 114S 791.
585-54 [b] **Proof need only establish** reasonable ground for belief of guilt. 7F(2d)756.
585-61 [a] **Examination of accused in John Doe proceeding** held not to vitiate indictment on ground of self-incrimination. SD 228NW240.
586-64 152Miss13, 118S356.
586-71 26F(2d)487.
587-85 6PaDist&Co 215 [quotCJ].
587-86 6PaDist&Co 215 [quotCJ].
587-89 6PaDist&Co 215 [quotCJ].
587-93 33PortoRico 290, 295 [quotCJ].
587-96 [b] **Motion for resubmission must state grounds.**-33PortoRico 290.
587-3 162Ga504, 134SE326; 35GaA658, 134SE327.
587-5 20F(2d)42; 152Miss114, 118S 710; 309Mo 498, 274SW734. [e] **Indictment** may be returned in another division of district if transferred for trial to division where offense was committed. 20F(2d)42.
588-8 52SD273, 217NW205.
588-18½-New. Statute as to presentment of indictment by grand jury has been construed to be directory and not to require strict compliance. 217Ky8, 288SW1059.
588-22 But see 94Fla268, 113S707.
588-29 217Ky8, 288SW1059.

588-30 217Ky8, 288SW1059.
589-33 217Ky8, 288SW1059.
589-34 217Ky8, 288SW1059; Mo 12SW(2d)53; 105TexCr531, 289SW395.
589-36 35GaA391, 133SE650; 100TexCr220, 272SW480 (misplacing of comma, making date of finding indictment appear year later).
589-39 Mo 12SW(2d)53; 105TexCr531, 289SW395; 110TexCr566, 9SW(2d)742.
589-43 217Ky247, 289SW246.
590-48 309Mo 498, 274SW734.
591-72 But see 23AlaA104, 121S451(1st case).
591-78 [a] (1) Fla 130S718; TexCr 27SW(2d)205.
592-79½-New. Recitation in order of court is sufficient to show return as required by code. 217Ky8, 288SW1059.
592-87 See also 94Fla268, 113S707.
592-93 309Mo 498, 274SW734 (secrecy not violated by giving indictment number).
593-96 [b] (5) Identification by number sufficient where accused already under bond. 104TexCr257, 282SW807. (6) Indictment signed by foreman of grand jury and stated by clerk to be indictment returned by grand jury and receipted as original held original indictment. TexCr 31SW(2d)648. [c] **Name of defendant need not appear in** minutes of court in order to identify indictment. 101TexCr267, 275SW837.
593-3 See also 217Ky8, 288SW1059.
593-4 [b] **Showing held sufficient.**–TexCr 27SW(2d)205.
593-16 See also 109TexCr218, 3SW(2d)816.
594-26 [b] **Sufficient compliance** with statute. 213Ala358, 104S656.
595-55 106TexCr593, 294SW573.
595-56 106TexCr593, 294SW573.
596-72 202 Iowa146, 209NW403. [a] (6) Morphine not inadmissible on trial of offense because not preserved and identified as required by law. 202 Iowa 146, 209NW403.
596-84 AlaA 114S281; 29Ariz523, 243P601; 156SC324, 153SE269; 111TexCr517, 14SW(2d)1039.
596-85 TexCr 27SW(2d)178.
596-87 29Ariz523, 243P601.
597-97 22AlaA220, 114S280; 29Ariz523, 243P601 (nunc pro tunc order entered before sentence sufficient).
598-13 74CalA178, 240P502, 505 [quot CJ]; 84CalA403, 258P134, 137 [quot CJ]; 167Minn25, 208NW177 (order of resubmission not required in absence of statute); 11PaDist&Co 619.
598-15 169La447, 125S444.
598-19 121Kan139, 245P1018, 1019 [cit Cyc].
598-24 See also 91Fla1026, 109S804.
599-36 181Ark94, 24SW(2d)969.
599-42 58ND82, 224NW878. [a] **Where time to obtain another change of venue is allowed,** defendant is not prejudiced. 58ND82, 224NW878.
599-46 [b] **Grand jury may find second indictment** for different offense without its resubmission by court after first indictment. 181Ark94, 24SW(2d)969.
599-55 See also 133Misc658, 233NYS656.
599-57 84CalA403, 258P134.
600-59½-New. The state cannot be estopped by the unauthorized dismissal of a prior indictment on the merits before trial on motion of the prosecuting attorney. 166Minn302, 207NW646.
600-62 74CalA178, 240P502.
600-62½-New. Resubmission is not for purpose of amendment. 76CalA734, 245P1109.
600-62½-New. and accused is not entitled to an order of dismissal because an indictment was not promptly amended upon the sustaining of a demurrer and direction for resubmission. 76 CalA734, 245P1109.
600-63 But see 41F(2d)366.
600-64½-New. Order permitting resubmission to grand jury of charge for which indictment was dismissed will be denied as unnecessary and a nullity. 128Misc550, 220NYS167.
600-65 226Ky220, 10SW(2d)812.
600-67 225Ky264, 8SW(2d)390.
601-69 74CalA178, 240P502; 167Minn25, 208NW177.
601-72½-New. An indictment is returned under oath by grand jury and may be superseded only by an indictment of equal solemnity. 16F(2d)62.
602-97½-New. Omission of date of filing from copy of indictment served on accused is not fatal. 169Ark717, 276SW849.
602-97⅓-New. An indictment in one county for an offense committed in another county need not state that the investigation was transferred pursuant to statute where such was the fact. 35GaA658, 134SE203.
602-97¼-New. A common-law offense must be charged according to common-law forms. 167La986, 120S620.
602-97½-New. An indictment under some statutes need not follow any particular form. 127 Or565, 273P338.
602-97⅗-New. Accused cannot complain of infringement of constitutional rights by form of indictment if form does not prevent him from asserting constitutional rights. 254NY16, 171NE890.
602-99 23AlaA37, 121S435(2dcase) [certiorari den 219Ala155, 121S436 (1stcase)]; 220Ala30, 123S231, 68ALR712; 220Ala112, 124S284(1stcase); 23AlaA584, 129S492; 20AlaA613, 104S554; 21AlaA177, 106S218 (robbery); 21AlaA289, 107S791; 23AlaA264, 124S282; 23AlaA504, 127S911; AlaA 129S717; CalA 286P434; CalA 289P215; 168La1135, 123S807(2dcase). But see 23AlaA168, 123S237. [a] **Indictment held good** against demurrer where following form of statute. 21AlaA94, 105S703.
602-1½-New. But statutory forms of declaration in slander and libel are not applicable to indictments for libel. 254 Mass424, 150NE190.
602-3 AlaA 130S902.
602-11 18F(2d)531.
602-12 18F(2d)531.
603-25 214Ky797, 284SW80; 107TexCr221, 296SW563.
603-27 AlaA 130S902.
604-42 100TexCr451, 273SW578.
605-72 94Fla268, 113S707.
606-81 [a] TexCr 28SW(2d)541.
606-82 See also TexCr 28SW(2d)541.
610-40 18F(2d)531.
610-41 18F(2d)531.
610-42 18F(2d)531.
610-43 18F(2d)531.
610-49 320Mo 280, 6SW(2d)849.
611-58 243 IllA244. [c] **Indictment held not defective.**–TexCr 28SW(2d)155.
612-86½-New. Failure of an indictment to designate on its face in which of two district courts in the county it was presented is not fatal, where an order of the other district court having the right to impanel juries appeared in the transcript. 112TexCr546, 17SW(2d)1066(2dcase).
613-1 18F(2d)531.
613-3 18F(2d)531.
613-4 [a] (1) 18F(2d)531.
613-10 [a] **Indictment ending against peace and dignity of state** may be sufficient without each count so ending. 23AlaA460, 126S890(2dcase).
614-21 171Ark568, 285SW13. [b] (8) Omission of words "in the manner and form aforesaid." 171Ark568, 285SW13.
614-27 AlaA 130S168.
615-44 87PaSuper61.
618-85 113TexCr462, 22SW(2d)922.
619-4 169Ark589, 276SW577. [a] **Indorsement** is sufficient compliance with statute. 169Ark589, 276SW577.
619-5 152Miss114, 118S710.
619-7 23AlaA297, 124S406(1stcase); 89Fla494, 104S783; 210Ky332, 275SW810; 230Ky387, 19SW(2d)1086.
619-8 [e] 169Ark717, 276SW849.
619-9 175Ark453, 299SW739; 144Miss452, 110S239.
619-12 312Mo 373, 278SW1016. [a] **Foreman who signs indictment without adding word "foreman"** acts officially and not in his private capacity. 312Mo 373, 278SW1016.
619-17 22AlaA369, 115S769; 166La21, 116S579; 152Miss114, 118S710; 34PortoRico 447 (need not verify). See also 34PortoRico 127.
620-19 177Ark534, 7SW(2d)5.
620-20 177Ark534, 7SW(2d)5.
620-22 89Fla494, 104S783.
620-24½-New. Lack of direction to sign is immaterial where the indictment with signature was accepted without objection. MoA 288SW792.
620-27½-New. Solicitor is not a proper party to sign a complaint for violation of a liquor ordinance. 21AlaA253, 107S41.
620-35 Ind 167NE531 (omission of judicial circuit).
620-36 200 Ind403, 163NE91.
621-42 See also 44Philippine267 (information).
621-52 23AlaA297, 124S406(1stcase).
621-54 163La51, 111S492.
621-61 22AlaA651, 119S595(2dcase); 21AlaA464, 109S371; 89Fla494, 104S783; 230Ky387, 19SW(2d)1086; 167Minn25, 208NW177. [b] **Unnecessary to make indorsement of true bill** where presentment signed by thirteen members of grand jury without showing that it was not based on knowledge of members of grand jury. 160Tenn305, 23SW(2d)658.
622-68½-New. The word "indorsed" in a statute is held to mean writing the words "a true bill" on the indictment found and having this indorsement signed by the foreman. 52SD273, 217NW205.
622-69 23AlaA104, 121S451(1stcase); 22AlaA369, 115S769.
622-70 167Minn25, 208NW177.
622-74 [a] (2) Where words "a true bill" followed signature and preceded words "Foreman of Grand Jury," it was sufficient. 89Fla494, 104S783.
622-79 167Minn25, 208NW177.
623-86½-New. or because it does not immediately follow the signature. 89Fla494, 104S783.
623-87 89Fla494, 104S783; 312Mo 373, 278SW1016, 1020 [citCJ]; 143Va554, 130SE416.
623-89 [b] **Entry in order book makes it immaterial** whether words "a true bill" are in fact indorsed on indictment. 143Va554, 130SE416.
623-7 See also 52SD619, 219NW817.
624-17½-New. Failure to indorse indictment as presented to court by grand jury and filed in open court has been held not to render it invalid. 217Ky8, 288SW1059.
624-23 100WVa213, 130SE451; 103WVa148, 136SE842. See also 128 Or515, 273P323.
624-24 143Va554, 130SE416.
624-27 143Va554, 130SE416 (by returning indictment grand jury makes prosecuting attorney's act theirs).
625-51 [a] **In California.**–198Cal 112, 243P667.
625-52 102CalA237, 283P136. See also 94Fla60, 113S736, 740 [citCJ].
625-54 273US1, 47SCt250, 71L ed505. [b] **In Illinois.**–317 Ill 521, 148NE303. [c] **In Iowa.**–206 Iowa1247, 220NW100.
625-57 71CalA709, 236P217; 75Mont274, 243P566. See also 97Fla214, 121S468. [a] 318Mo 813, 18SW(2d)143.
625-58 [a] **Information filed by assistant prosecuting attorney cannot be impeached** by showing what duties prosecuting attorney was performing while absent. 318Mo 813, 18SW(2d)143.
626-60 94Fla60, 113S736; OklCr 273P369.
626-65 94Fla60, 113S736, 743 [citCJ].
626-69 But see Mo 11SW(2d)1044.
626-74 311Mo 664, 279SW395 (information may be filed without prosecutor's knowledge, subject to preliminary examination of accused).
626-76 28F(2d)509; 52SD273, 217NW205, 209 [citCJ].
626-77 273US1, 47SCt250, 71L ed505; 32F(2d)742; 161La331, 108S661; 161La332, 108S661; 161La335, 108S663. [b] **In Louisiana.**–165La822, 116S199.
627-81 74Mont269, 240P365. [a] **Sufficient compliance with requirement of written request.**–74Mont269, 240P365.
627-81½-New. A motion by the county attorney need not be accompanied by an affidavit, the statements made therein being made under his official oath. 74Mont269, 240P365.
627-84 273US1, 47SCt250, 71L ed505.
627-90 165La822, 116S199.
627-94 [a] **Order granting leave to file**

information by judge of district court in exercise of lawful discretion cannot be reviewed in district court on motion to vacate order. 30**F(2d)**939.

627-96 See also 32**PortoRico** 5.

627-96½-New. The district attorney must file his information in the court in which the law requires accused to be held to answer the charge. 49**SD**438, 207**NW**222.

628-19 49**SD**485, 207**NW**466. [b] **In New York.**-223**AppDiv**168, 227**NYS**614.

628-20 321**Mo** 786, 12**SW(2d)**466(2d case).

629-22 239**Mich**695, 214**NW**965; **OklCr** 272**P**485(2dcase); 49**SD**485, 207**NW**466.

629-27½-New. or where an information is substituted for a quashed indictment. 318**Mo** 687, 18**SW(2d)**96.

629-28 318**Mo** 687, 18**SW(2d)**96.

629-29 **Mo** 24**SW(2d)**1003.

629-30½-New. Information filed before magistrate's transcript is filed is not void in absence of showing that preliminary examination was not in fact held. 34**NM**486, 285**P**490.

629-35 194**Cal** 1, 227**P**156.

630-48 73**CalA**372, 238**P**758; 102**CalA** 549, 283**P**378; 240**Mich**75, 215**NW**5.

630-49 But see 39**OklCr**119, 263**P**473.

630-50 120**Kan**187, 243**P**318; 233**Mich** 98, 206**NW**516 (must be so based).

630-51 198**Cal** 112, 243**P**667.

630-53 194**Cal** 1, 227**P**156.

630-54 194**Cal** 1, 227**P**156; 120**Kan**187, 243**P**318.

631-61 233**Mich**98, 206**NW**516; 240 **Mich**53, 214**NW**962; **OklCr** 272**P**485(2d case).

631-64 128**Kan**299, 278**P**1. [a] **(9)** Commitment for offense charged in complaint warrants information charging such offense in greater detail. 194**Cal**1, 227**P**156. [m] **Information charging offense for which defendant was committed** is sufficient in respect to conformity with preliminary proceedings. 194 **Cal** 1, 227**P**156. [n] **In Wyoming.**-34 **Wyo** 84, 241**P**707.

631-65 39 **OklCr**119, 263**P**473.

632-67½-New. An information based on a valid commitment stating the offense is sufficient where showing and timely objection is not made that preliminary examination had not been had on that charge. 47 **Ida**760, 278**P**773.

632-71 5**F(2d)**667 (holding where warrant was issued after arrest information need not be submitted to court for approval with evidence of probable cause); 86**Colo** 406, 282**P**257; 105**TexCr** 117, 286**SW**1107; 107**TexCr**593, 298**SW** 590; 112**TexCr**136, 13**SW(2d)**854; **Tex Cr** 23**SW(2d)**728(1stcase); **TexCr** 27**SW (2d)**161.

632-78½-New. Where the statute does not require a county attorney to attach copies of the sworn minutes of evidence to an information, the information is not defective because the minutes of the testimony of the witnesses do not show that the witnesses were sworn. 208 **Iowa**867, 226**NW**81.

632-79 [b] (2) **Utah** 263**P**86. [c] (2) Complaint omitting phrase, "does believe," required by statute, is defective. **TexCr** 21**SW(2d)**297(1stcase).

632-82 329 **Ill** 173, 160**NE**186.

633-2 86**Colo** 406, 282**P**257.

633-8 But see 314**Mo** 612, 286**SW**29.

633-12 107**TexCr**593, 298**SW**590.

634-15½-New. A county attorney is not required to attach copies of sworn evidence to the information under a statute requiring filing with information of minutes of evidence of witnesses to be used at trial. 205 **Iowa**132, 215**NW**643.

635-43 **TexCr** 23**SW(2d)**728(1stcase). See also 22**AlaA**346, 115**S**700. But see 99**CalA**409, 278**P**885. [e] (6) Variance between complaint and information as to date on which larceny was committed is immaterial, time not being of essence of offense. **OklCr** 287**P**1110.

635-45 52**SD**121, 216**NW**870, 871[cit CJ]; 105**TexCr**119, 286**SW**1104; **TexCr** 23**SW(2d)**370(1stcase); 67**Utah**1, 245**P** 332. [c] (7) Allegation in information that offense was second offense not fatal. 55**ND**511, 214**NW**800. [k] **Name of injured party** spelled "Lular Watson" in complaint and "Lula Watson" in information is immaterial. **TexCr** 26**SW (2d)**217(1stcase).

636-56 52**SD**273, 217**NW**205.

636-57 308**Mo** 390, 272**SW**940; **Mo** 12 **SW(2d)**46; 108**TexCr**647, 28**W(2d)**271. [a] **Filing dates** from receipt by clerk and lodgment in his office. 308**Mo** 390, 272**SW**940.

636-61 **MoA** 256**SW**572; 108**TexCr**647, 28**W(2d)**271. [a] (2) Other illustrations of sufficient records. 308**Mo** 390, 272**SW** 940.

637-65 108**TexCr**647, 28**W(2d)**271.

637-67½-New. In Missouri the circuit court's jurisdiction of a murder case is not impaired by the fact that the information was filed with the circuit clerk in a criminal division. 308**Mo** 390, 272 **SW**940.

637-67½-New. Absence of indorsement of prosecutor held not fatal. 162**La**980, 111**S**350.

637-69 28**F(2d)**548.

637-72 [a] **Filing held timely.**-During regular term of court. 52**SD**273, 217 **NW**205. [b] **In Missouri.**-18**SW(2d)** 1041.

637-74 But see 90**CalA**654, 266**P**555. [a] **In California.**-89**CalA**687, 265**P**360.

637-79½-New. Information filed shortly before its approval may have same effect as if approved and then filed. 204 **Iowa**1135, 216**NW**642.

637-82 108**TexCr**647, 28**W(2d)**271.

637-83 308**Mo** 390, 272**SW**940; 116 **Nebr**45, 215**NW**564, 566 [quotCJ].

637-84 [e] **In North Dakota.**-58**ND**27, 224**NW**898.

638-90 114**Nebr**142, 206**NW**756, 757 [quotCJ].

638-7 121**Kan**139, 245**P**1018, 1019 [cit Cyc].

639-12 121**Kan**139, 245**P**1018, 1019 [cit Cyc].

639-21½-New. Filing of a new information by permission of court destroys all functions of the old information the same as if dismissed by a formal motion. 16**F(2d)**62.

639-22½-New. Where additional defendants are included in an altered information, it must be refiled in addition to being resigned and resworn. 95**Fla** 42, 115**S**519.

639-22½-New. Filing a new information is not necessary because one of two defendants in the information filed pleads guilty, especially where the other defendant makes no request therefor. 100**CalA**509, 280**P**379(2dcase).

639-27½-New. Where, however, complaint is so defective as not to support first information, new information based on such complaint must fail. **Utah** 263 **P**86.

640-46 **Cal** 291**P**582; 95**CalA**259, 272 **P**816; 99**CalA**515, 278**P**1056(2dcase). [a] **In Florida.**-94**Fla**60, 113**S**736 (Rev. Gen. St. § 6064).

640-46½-New. The legislature may simplify the form of an indictment or information, but cannot dispense with the necessity of alleging all essential elements. 156**Md**149, 143**A**872.

640-47 See also 127**Me**440, 144**A**206.

640-50 202 **Iowa**450, 209**NW**468.

640-52 202 **Iowa**450, 209**NW**468.

640-56 [c] **In Porto Rico.**-33**PortoRico** 949.

641-76 14**F(2d)**846.

642-93 199 **Ind**540, 156**NE**555.

643-98 31**NM**485, 247**P**828, 833[citCJ]; 33**NM**365, 266**P**920.

643-99 [a] 31**NM**485, 247**P**828, 833 [cit CJ]; 33**NM**365, 266**P**920.

643-2 111**TexCr**605, 13**SW(2d)**366.

643-3 12**PortoRicoFed**108.

643-8 8**F(2d)**593, 594 [quotCJ]; 67 **Utah**325, 247**P**497, 498 [quotCJ]. [b] 108**TexCr**474, 18**W(2d)**635.

643-9 8**F(2d)**593, 594 [quotCJ]; 67 **Utah**325, 247**P**497, 498 [quotCJ].

643-11 [a] **MoA** 21**SW(2d)**229 (typewritten signature held valid).

643-12 67**Utah**325, 247**P**497, 498 [quot CJ].

644-18 **MoA** 278**SW**1073; 75**Mont**274, 243**P**566 (where deputy has authority to present information in own name); 67 **Utah**325, 247**P**497; 151**Wash**323, 275**P** 940. [d] **Erroneous designation of official character as district attorney instead of deputy** is mere irregularity not invalidating information. 67**Utah**325, 247**P**497.

644-20 44**Philippine**267 (designation of officer presumed legal).

644-32 [a] **Failure to indorse plea of not guilty** on information is not ground for reversal where no injury results. 34 **Wyo**90, 241**P**705.

644-34 See also 162**La**980, 111**S**350.

644-35 [a] **Inadvertent error in indorsement** in failing to strike out printed words in parenthesis expressing disapproval is insufficient to invalidate information. 206 **Iowa**635, 220**NW**41.

644-37 **Mo** 11**SW(2d)**1044.

644-37½-New. Affidavit charging burglary not approved by prosecuting attorney held invalid under Indiana statute. 199 **Ind**203, 156**NE**515.

644-39 273**US**1, 47**SCt**250, 71**L ed**505; 6**F(2d)**120; 8**F(2d)**732; 26**F(2d)**847.

645-44½-New. Where the court's error in overruling a demurrer to a complaint was cured by permission to strike therefrom an objectionable feature, reverification was unnecessary. 21**AlaA**550, 109**S**900.

645-45 255 **IllA**554.

645-46 14**F(2d)**366. [a] 5**F(2d)**667.

645-49 337 **Ill** 636, 169**NE**737; 243 **IllA** 427; 251 **IllA**425. [a] **Verification held insufficient.**-251 **IllA**425.

645-53 116**Nebr**45, 215**NW**564.

645-55 24**F(2d)**690; 116**Nebr**45, 215 **NW**564; 34**NM**232, 280**P**248 (on information and belief).

646-56 **Mo** 18**SW(2d)**53.

646-56½-New. Amendment is sufficient in Missouri where oath of state's attorney is attached without affidavit. 311 **Mo** 461, 278**SW**719.

646-65½-New. An allegation that affiant has good reason to believe that accused committed the offense charged is insufficient without the further allegation required by statute that he does believe so. 103**TexCr**228, 280**SW**581.

646-68 34**NM**486, 285**P**490. [b] **Notary acting outside of his county.**-Notary appointed in one county may administer oath for verification of felony information in another county. 34**NM**486, 285 **P**490. [b] (2) But see 255 **IllA**554.

646-75 202 **Iowa**450, 209**NW**468; **34** **NM**486, 285**P**490.

647-78 318 **Ill** 305, 149**NE**277.

647-82 251 **IllA**425; **OklCr** 274**P**901. See also 13**PaDist&Co** 658.

647-83 34**NM**477, 284**P**119(1stcase).

647-84 34**NM**533, 285**P**486.

647-88 273**US**1, 47**SCt**250, 71**L ed**505.

647-91 **Wash** 292**P**107(2dcase).

648-99 337 **Ill** 636, 169**NE**737.

648-2 [a] **Motion in arrest of judgment** may be sufficient to preserve objection. 255 **IllA**554.

648-4 **Mo** 18**SW(2d)**53.

648-4½-New. or during the trial, **Mo** 18**SW(2d)**153.

648-7½-New. Verification of an information on information and belief is sufficient to give the court jurisdiction where no objection is made until after plea, trial and sentence. 34**NM**112, 278 **P**210.

648-7½-New. Failure to verify not fatal where warrant not issued. 42**F(2d)** 793.

649-51 **Me** 149**A**389 (where prosecutions originate under statute); 117 **Or** 466, 242**P**440 (verification sufficient).

650-56 200 **Ind**512, 165**NE**57; 200 **Ind** 548, 165**NE**319.

650-57 200 **Ind**548, 165**NE**319.

650-60½-New. Use of affidavit for warrant held not to vitiate information. 273**US**1, 47**SCt**250, 71**L ed**505.

650-64 158**La**129, 103**S**534.

650-65 **Ind** 171**NE**1; 148**Miss**718, 114 **S**815; 51**Nev**402, 279**P**759(2dcase); 191 **NC**751, 133**SE**14; 26 **OhNPN**546; 121 **Or**451, 255**P**897; 123 **Or**165, 261**P**426; 126 **Or**651, 269**P**869.

650-67 148**Miss**718, 114**S**815.

650-68 121 **Or**451, 255**P**897.

650-69 124**Kan**20, 257**P**925; 309**Mo** 155, 274**SW**734; 121 **Or**451, 255**P**897; 122 **Or**377, 257**P**699.

651-70 125**Me**319, 133**A**738; **Mo** 295 **SW**535.

651-73½-New. Offense named in accusatory part must correspond with offense in descriptive part of indictment. 233**Ky**471, 26**SW(2d)**3.

651-74 220 **Ala**268, 125**S**606; 254**NY** 16, 171**NE**890; 160**Tenn**664, 28**SW(2d)** 635; 187**Wis**463, 204**NW**595. [b] **Stat-**

utory forms held sufficient.–100WVa150, 130SE124.

651–75 123 Or165, 261P426.

651–76 220Ala268, 125S606.

652–83 Contra 125Me319, 133A738.

652–87½–New. or providing that an indictment or information may charge two or more offenses in separate counts, SD 228NW382.

652–97½–New. A statute authorizing indictment describing defendant by a fictitious name has been held not a denial of due process. 259Mass453, 156 NE890.

652–99 123 Or165, 261P426.

653–1 22 OhA185, 153NE907.

653–3 226Ky220, 10SW(2d)812; 22 OhA185, 153NE907; 91PaSuper559.

653–5 22 OhA185, 153NE907.

653–12 220Ala268, 125S606; Ala 128 S210; 23AlaA365, 125S690.

653–14 125Me319, 133A738; Me 149A 389.

654–19 AlaA 114S281; 118Kan603, 236P663; 119Kan467, 239P749; 116 Nebr90, 215NW785; OklCr 289P1115; 156Tenn509, 3SW(2d)159. [a] 123 Or 165, 261P426.

654–20 87CalA236, 261P1103; 44 Ida 173, 258P551; 46 Ida775, 271P325; 221 Ky232, 298SW681; 230Ky677, 20 SW(2d)741; 50Nev1, 248P900; 55ND 194, 212NW857; OklCr 292P573; 43 OklACR318; 123 Or165, 261P426; 131 Or314, 282P105 (such precision that person determined to be misled will have no basis to support mistaken conclusion is not required); 142Wash530, 253P801.

654–21 87PaSuper61.

654–22 36F(2d)743; 235Ky320, 31 SW(2d)393; 142Wash530, 253P801.

655–26½–New. The purpose of pleadings is to show jurisdiction, aver the commission of a crime, state the nature thereof, and to bring accused to bar, to plea, and to trial. 246Mich459, 224NW 605.

656–57 [a] (6) Use of word "charged" in place of "charge" held harmless in view of statute. 21AlaA573, 110S169.

656–58 99Fla1242, 128S820. [a] (8) Word "atorethough" instead of "afterthought." 23AlaA182, 122S298.

657–59 23AlaA182, 122S298; 197 Ind 193, 150NE99; 109TexCr524, 5SW(2d) 988. [a] (55) "Sells" instead of "sell." TexCr 27SW(2d)217(2dcase).

657–60 23AlaA182, 122S298; 39GaA 697, 148SE423; 256 IllA415; 197 Ind 193, 150NE99; 104NJL268, 140A21; 290Pa195, 138A686, 688 [citCyc].

658–62 197 Ind193, 150NE99; 309Mo 155, 274SW734; 131 Or314, 282P105. [a] **Failure to put comma.**–197 Ind193, 150NE99.

658–65 168Ark580, 271SW330; 196 Ind 213, 147NE766; 212Ky47, 278SW160. [a] (11) Word "sell" in indictment for sale of liquor. 212Ky47, 278SW160.

658–66 204 Iowa186, 214NW675; 308 Mo 664, 274SW21.

658–69 168Ark580, 271SW330.

659–71 19F(2d)46; 19F(2d)316, 317 [citCJ]; 19F(2d)842; 3Del 102, 131A 313; 126Mei77, 136A817; 103WVa392, 137SE538, 539 [citCJ].

659–72 273US77, 47SCt300, 71L ed545; 19F(2d)46; 19F(2d)316, 317 [citCJ]; 19F(2d)891; 39F(2d)325; 77CalA301, 246P557; 77CalA483, 247P221; 3Del 102, 131A313; 98Fla523, 124S12(2d case); 198 Ind444, 154NE16; 200 Ind 430, 164NE263; 154Miss21, 122S98; 316Mo 591, 292SW63; MoA 281SW142; 116Nebr287, 216NW807; NJ 146A335; 129Misc777, 223NYS584; 191NC700, 132 SE795; 55ND194, 212NW857; 155Tenn 55, 290SW380; 103WVa392, 137SE538, 539 [citCJ]. [c] **Allegations held sufficient.**–32F(2d)742. [d] **Allegation must not be negatively pregnant.** Ind 170NE 325.

659–73 13F(2d)620; 19F(2d)316, 317 [citCJ]; 168Ark498, 270SW959; 77CalA 301, 246P557; 4HawaiiFed479, 484 [citCyc]; Ind 170NE325; 204 Iowa186, 214 NW675; 208Ky655, 271SW701; Mo 274 SW24; Mo 278SW992, 994 [citCyc]; 317 Mo 398, 295SW739; MoA 287SW809; 155Tenn55, 290SW380; TexCr 25SW (2d)614; 103WVa392, 137SE538, 539 [citCJ].

659–74 13F(2d)620; 3Del 102, 131A 313.

659–77 77CalA301, 246P557.

660–78 168Ark498, 270SW959; NJ 141 A24.

660–78½–New. An indictment has been held not objectionable in that in the body thereof the grand jury "avers" certain facts. 22AlaA220, 114S280.

660–79 103WVa392, 137SE538.

660–80 20F(2d)328; 20F(2d)359.

660–89 155Tenn55, 290SW380. See also 160La579, 107S433.

660–90 19F(2d)891; 19F(2d)897; 19F (2d)901; Mo 274SW24.

660–91 199 Ind550, 159NE149; 115 Oh 127, 152NE186; OklCr 267P1040.

660–92 273US77, 47SCt300, 71L ed545; 83CalA321, 256P611.

660–93 15F(2d)686; 15F(2d)977; 22F (2d)1; 26F(2d)487; 3Del 102, 131A313; 166Ga182, 142SE676; 197 Ind697, 151 NE730; 124Kan556, 261P846; Me 151A 427; NJ 146A335; 127Misc300, 216NYS 116; 101TexCr26, 273SW851; 145Va 865, 134SE699.

661–94 273US77, 47SCt300, 71L ed545; 6F(2d)530; 7F(2d)271; 13F(2d)620; 15 F(2d)977; 19F(2d)46; 20F(2d)359; 23 F(2d)472; 24F(2d)397; 25F(2d)294; 97CalA185, 275P462; 3Del 102, 131A 313; 196 Ind213, 147NE766; 219Ky789, 294SW491; 252Mass126, 147NE582; MoA 285SW794; NH 146A870; 127Misc300, 216NYS116; 135Misc564, 238NYS712; OklCr 281P154(1stcase) (sufficient); OklCr 281P157(2dcase) (sufficient); Utah 286P960; Utah 286P962. See also 251NY94, 167NE183. [c] See also 317 Ill 551, 148NE265.

661–95 273US77, 47SCt300, 71L ed545; 4F(2d)889; 6F(2d)530; 15F(2d)965; 15F(2d)977; 19F(2d)46; 19F(2d)842; 19F(2d)891; 19F(2d)897; 20F(2d)129; 24F(2d)397; 24F(2d)399; 26F(2d)487; 29F(2d)239 [certiorari den 279US849, 49SCt346(5thcase), 73L ed993]; 169Ark 717, 276SW849; 77CalA301, 246P557; 77CalA483, 247P221; 80CalA159, 251P 315; 81CalA668, 254P640; 82CalA465, 255P777; 89CalA390, 265P325; 3Del 102, 131A313; 97Fla988, 122S567; 37 GaA113, 138SE922; 332 Ill 436, 163NE 804; 196 Ind213, 147NE766; 196 Ind258, 148NE143; 196 Ind699, 149NE438; 199 Ind146, 155NE819; 119Kan467, 239P 749; 121Kan1, 245P101; 124Kan20, 257 P925; 219Ky834, 294SW790; 220Ky 343, 295SW167; 222Ky742, 2SW(2d) 370 (indictment held not defective as uncertain); 223Ky25, 2SW(2d)1035; 230 Ky656, 20SW(2d)484, 66ALR1297; 231 Ky554, 21SW(2d)981 (indictment held sufficient); 169La468, 125S451; Me 149 A389; 252Mass126, 147NE582; 237Mich 156, 211NW346; Mo 278SW992; 311 Mo 630, 279SW135; 318Mo 712, 300SW 738; 220MoA883, 295SW529; 117Nebr 440, 220NW826; 118Nebr828, 226NW 449; NH 146A870; 105NJL73, 143A 825; 127Misc300, 216NYS116; 129Misc 650, 222NYS432; 129Misc777, 223NYS 584; 218AppDiv488, 218NYS41; 115 Oh 127, 152NE186; OklCr 280P1112; OklCr 282P683; OklCr 290P193; OklCr 292P 1046(2dcase); 123 Or165, 261P426; SC 155SE849; 158Tenn212, 12SW(2d)375; 161Tenn320, 30SW(2d)247(2dcase); 108 TexCr626, 2SW(2d)265; 136Wash495, 240P674; Wyo 267P89. See also 251NY 94, 167NE183; 191NC668, 132SE664. [a] (7) Indictment charging "confederation." 220Ky343, 295SW167. (8) 29F (2d)926. (9) Other instances. 34NM 419, 283P51; 40Wyo 404, 278P563. [b] 197 Ind374, 151NE98. [c] **Charge held sufficiently definite.**–38GaA392, 144SE36; 229Ky776, 18SW(2d)290; 232Ky561, 24 SW(2d)298. [d] **Allegations held sufficiently certain.**–100CalA295, 279P1054; 230Ky656, 20SW(2d)484, 66ALR1297;

661–96 273US77, 47SCt300, 71L ed545; 5F(2d)712; 6F(2d)530; 15F(2d)977; 16F(2d)44; 19F(2d)891; 20F(2d)129; 24F(2d)397; 24F(2d)399; 169Ark717, 276SW849; CalA 277P1069; 3Del 102, 131A313; 37GaA113, 138SE922; 338 Ill 353, 170NE265; Ill 172NE64; 124Kan 556, 261P846; 124Kan627, 261P844; 311Mo 630, 279SW135; 243NY162, 153 NE35; 133Misc658, 233NYS656; 127 Or 565, 273P338; Wyo 292P2.

661–97 273US77, 47SCt300, 71L ed545; 4F(2d)889; 5F(2d)712; 6F(2d)530; 15 F(2d)965; 15F(2d)977; 19F(2d)421; 19F(2d)891; 20F(2d)129; 26F(2d)487; 36F(2d)855; 37F(2d)503; 42F(2d)374; 199 Ind550, 159NE149; 121Kan1, 245P 101; Mo 25SW(2d)101(2dcase); NH 146A870; 243NY162, 153NE35; 244NY 413, 155NE724; OklCr 275P1073; OklCr 281P160(2dcase); OklCr 291P 143; 123 Or165, 261P426; 156Tenn509, 3SW(2d)159.

662–98 15F(2d)965; 15F(2d)977; 196 Ind699, 149NE438; 127Misc862, 217NYS 696; 115 Oh127, 152NE186; 123 Or165, 261P426. [a] **If all material allegations, taken as true,** disclose that defendant committed offense charged, information must be held sufficient. MoA 287SW 809.

662–99 19F(2d)891; 331 Ill 268, 162 NE839; 115 Oh127, 152NE186.

662–2 80CalA159, 251P315; 124Kan 556, 261P846; 220Ky343, 295SW167; 222Ky742, 2SW(2d)370; 232Ky432, 23 SW(2d)555; 127Misc862, 217NYS696.

662–2½–New. or that the facts charged are sufficient to support a conviction; 15F(2d)977.

662–4 20F(2d)129; Ind 170NE325.

662–4½–New. What need not be proved need not be alleged. 123 Or165, 261P 426.

662–5 6F(2d)530; 6F(2d)579; 15F (2d)977; 19F(2d)46; 35F(2d)791; 220 AlaA112, 124S284(1stcase); 170Ark1119, 282SW992; 173Ark674, 293SW714; 69 CalA475, 231P572 (allegations as to false pretenses held not uncertain); 73 CalA649, 238P1075; 96CalA669, 274P 607(1stcase); CalA 289P215; 98Fla464, 124S27; 317 Ill 551, 148NE265; 331 Ill 268, 162NE839; 336 Ill 257, 168NE289; Ill 173NE357; 196 Ind699, 149NE438; 198 Ind444, 154NE16; 89 IndA151, 165 NE917(1stcase); 216Ky541, 287SW972; 169Minn364, 211NW319; 169Minn298, 211NW334; 307Mo 411, 270SW282; Mo 289SW575; 322Mo 1, 16SW(2d)96; 243 NY162, 153NE35; 254NY16, 171NE890; 115 Oh127, 152NE186; 22 OhA185, 153 NE907; 115 Oh340, 154NE244; OklCr 268P312; OklCr 277P254(2dcase); OklCr 277P598; OklCr 287P747; OklCr 287P809; OklCr 287P1047; OklCr 287 P1053; OklCr 287P1103; OklCr 293P 275; 156SC509, 153SE480; SC 155SE 849; 54SD178, 222NW677; 111TexCr 441, 14SW(2d)1035; 101Vt53, 140A492. See also 97Fla988, 122S567.

662–6 23AlaA578, 129S480(2dcase); 83 CalA321, 256P611; 121Kan762, 250P 296; 124Kan20, 257P925; 124Kan556, 261P846; 127Kan481, 274P223; 126Me 136, 136A808; 169Minn364, 211NW319; 169Minn298, 211NW334; 243NY162, 153 NE35; 191NC700, 132SE795; 115 Oh 340, 154NE244; OklCr 276P507; OklCr 280P1112; 91PaSuper559.

663–7 216Ky541, 287SW972; 243NY 162, 153NE35; 127Misc862, 217NYS 696.

663–8 87CalA236, 261P1103; 204 Iowa 1360, 217NW236; 154Miss451, 122S731 (2dcase).

663–10 180Ark397, 21SW(2d)606; 231 Ky327, 21SW(2d)471; 243NY162, 153 NE35; 127Misc862, 217NYS696.

663–10½–New. Indictment held not ambiguous, duplicitous, or contradictory. 103NJL246, 136A164.

663–10½–New. Any doubt as to certainty of indictment may be removed by a motion for bill of particulars and hence not fatal to indictment. 243NY 162, 153NE35.

663–11½–New. But in some jurisdictions want of certainty in the accusatory part cannot be supplied by allegations in the descriptive part. 225Ky202, 7SW(2d)1039.

663–18 309Mo 534, 275SW41.

663–20 309Mo 534, 275SW41; MoA 278 SW1073; 12PortoRicoFed369 (as to time and place).

663–27 Mo 285SW432; MoA 285SW 794; 112TexCr414, 16SW(2d)1089 (indictment in alternative). [a] (10) Possessed intoxicating liquor with intent to "sell, barter, exchange or otherwise handle." Ind 166NE881(1stcase). [c]

Indictment held sufficient.–156SC509, 153SE480.
664–28 Mo 285SW432.
664–29 154Miss14, 122S101; MoA 285 SW794; MoA 17SW(2d)577. [a] (2) Information charging bank director with receiving or assenting to reception of deposits after he knew that bank was in failing circumstances states no offense. MoA 17SW(2d)577.
664–30 23AlaA521, 128S126(2dcase); 68CalA457, 229P974; MoA 285SW794. See also 329 Ill 223, 160NE582.
664–33 [e] **In prosecution for arson, allegation of ownership of property in alternative** held not defective. 214Ky422, 283SW420.
665–39 22AlaA369, 115S769; 23AlaA 162, 122S309(2dcase); 23AlaA168, 123S 237; 23AlaA351, 125S604(2dcase); 41 Wyo 438, 286P390.
665–45 19F(2d)202; 135Wash346, 237 P994.
665–46 16F(2d)872; 19F(2d)202; 178 Minn437, 227NW497; TexCr 29SW(2d) 367; 144Wash334, 258P15. [a] (17) Other instances. TexCr 26SW(2d)251 (2dcase).
666–54 310Mo 500, 276SW625.
666–59 [a] **Technical name of offense** in indictment is not important. 97Pa Super181.
666–70 MoA 15SW(2d)931.
666–73 OklCr 267P1040.
667–82 NH 146A870.
667–83 23AlaA520, 128S777; TexCr 22 SW(2d)309.
667–84 216Ky541, 287SW972; 230Ky 656, 20SW(2d)484, 66ALR1297.
667–85 43F(2d)135.
667–88 169Minn364, 211NW319; 131 Or455, 282P560. [a] **Exhibits.**–OklCr 288P489.
667–90 43F(2d)135.
667–91 318Mo 1068, 2SW(2d)589; Tex Cr 30SW(2d)316.
667–91½–New. An accusation implies commission of a crime. 169Ark589, 276 SW577.
667–91½–New. Sufficiency of pleading is to be decided from its language, and not proceedings thereunder. Utah 263 P86.
667–91¼–New. Indictment must be read in light of circumstances under which it was found. 254NY16, 171NE 890.
667–95 MoA 291SW151, 152 [citCJ].
667–97 23AlaA520, 128S777; 199 Ind 550, 159NE149.
668–10 22 OhA185, 153NE907.
668–16½–New. Where a judge of the superior court of the county where a crime was committed transferred the investigation to another county as authorized by statute, and the grand jury of such county returned an indictment, failure of the indictment to state that the investigation had been transferred does not render it void. 162Ga442, 134 SE68.
668–17 [a] **Word "exclusive" must be set forth** in indictment for common-law crime. 12PortoRicoFed479.
669–19 94CalA738, 271P920.
669–20 168Ark1012, 272SW359; Ida 290P387. [a] (1) 35GaA392, 133SE285; 35PortoRico 161. [d] (1) 232Ky686, 24 SW(2d)568. [e] **Offenses interchangeable.**–168Ark1012, 272SW359.
669–22 226Ky617, 118SW(2d)432.
669–23 220Ky343, 295SW167. See also 251NY94, 167NE183.
669–23½–New. **Offense named** in "accusatory" part. 220Ky343, 295SW167.
669–23½–New. Statement of acts in "descriptive" part. 220Ky343, 295SW 167.
669–26½–New. In charging offense under National Prohibition Act some fact or circumstance identifying offense must be alleged. 38F(2d)633 (naming purchaser sufficient).
670–29 37GaA149, 139SE131; Mo 280 SW48; 147Misc352, 244NYS557. [a] **Information held to charge misdemeanor and not felony.**–Mo 289SW560.
670–30½–New. If the facts alleged show a felony, the mere allegation that defendant is charged with a misdemeanor is immaterial. 37GaA149, 139SE131.
670–33 78CalA380, 248P975; 75CalA 434, 243P31.
670–34½–New. A county attorney may charge in the indictment the highest possible offense constituted by any act committed. OklCr 280P630.
670–35 233 IllA53; Mo 300SW767; 82 Mont456, 268P493; 100Vt140, 135A705. [b] (3) 233 IllA53.
671–37 30F(2d)394(2dcase); 36F(2d) 944; 21AlaA253, 107S41; 77CalA301, 246P557; 316 Ill 547, 147NE428; 321 Ill 484, 152NE500; 338 Ill 128, 170NE 240; 199 Ind217, 156NE513; 200 Iowa 1244, 206NW100; 232Ky686, 24SW(2d) 568; 133Misc658, 233NYS656 (conclusion of law alone insufficient); 155Tenn 55, 290SW380; 156Tenn509, 3SW(2d) 159; 67Utah1, 245P332. [b] (1) 23F (2d)244; 67Utah1, 245P332. (8) That arrest without warrant was lawful is conclusion. 113TexCr169, 18SW(2d) 628. [g] (9) That assault was made with fists and hands on head and face and result was fractured jaw and other grievous injuries. 194Cal 1, 227P156. (10) Transportation of liquor. 156Tenn 509, 3SW(2d)159. (11) Indictment in prosecution for carnal knowledge of girl. 22AlaA517, 117S608. (12) False entry in book of state bank explained by innuendo. 113TexCr130, 19SW(2d) 52. [h] **Words "contrary to the form and provisions"** of specified statute held not to cure defects in complaint. 115 Nebr119, 211NW619. [i] **In Manitoba.**–36Man386, [1927] 2DomLR982, 47CanCr Cas345, [1927] 1WestWkly734.
671–38 77CalA301, 246P557; 162La 781, 111S162; 312Mo 510, 279SW411.
672–44 19F(2d)813; 29F(2d)239 [certiorari den 279US849, 49SCt346(5thcase), 73L ed993]; 329 Ill 352, 160NE564; 197 Ind16, 148NE420; 199 Ind217, 156 NE513; 197 Ind16, 164NE93; 244NY 413, 155NE724; 218AppDiv488, 218NYS 41; 123 Or165, 261P426; 101TexCr606, 276SW713; 112TexCr223, 15SW(2d) 1046. [b] **Allegations held not matters of evidence.**–That assault was made with fists and hands on head and face and result was fractured jaw and other grievous injuries. 194Cal 1, 227P156. [c] **Where crime consists of series of continuous acts, as fictitious sales of securities,** general description reasonably including such series is sufficient. 218App Div488, 218NYS41.
672–47 29F(2d)239 [certiorari den 279 US849, 49SCt346(5thcase), 73L ed993]; 164Ga702, 139SE344; 309Mo 520, 275 SW36; 52ND81, 202NW131; 116 Or416, 241P390.
673–51 316Mo 591, 292SW63.
673–53 32PortoRico 70.
673–54 Mo 278SW685.
673–55 [a] (4) Allegation that offense had never been brought to attention of "public officer" instead of statutory words "public officer having power to direct the investigation or prosecution" is sufficient since former expression includes latter. 159La589, 105S631. (5) Use of expression "brought to attention of" public officer, instead of statutory expression "made known to" is sufficient since one is equivalent of other. 159La589, 105S631.
673–64 20F(2d)574.
674–66 21F(2d)285; 25F(2d)581; 42 F(2d)721. [c] **Not essential to validity** in indictment for stealing "sundry drugs." 173Ark674, 293SW714.
674–70 See also TexCr 21SW(2d)301.
674–71 123 Or595, 263P60; TexCr 21 SW(2d)301.
674–72 20F(2d)127; Me 151A426; 144 Miss1, 108S725; 113Nebr767, 205NW 252. See also 32PortoRico 295. [e] **Charge of vagrancy.**–140Miss175, 105S 457.
674–73 21AlaA286, 107S786; 318Mo 592, 300SW685. [c] **In Oklahoma.**–Cr 281P310.
675–76½–New. **Failure** to allege the place where the act unnecessarily alleged occurred does not invalidate the information. 142Wash19, 251P859.
675–77 7F(2d)309; 14F(2d)835; 17 F(2d)723; 20F(2d)127; 20F(2d)574; 43F(2d)135; 197 Ind16, 164NE93; 34 OklCr52, 244P451 (sufficient allegation of venue). [a] (2) "At Oklahoma City" is insufficient for failure to specify place where offense was committed. 37F(2d) 503. (3) Indictment defective without alleging residence in state of abandoned children. 232Ky432, 23SW(2d)555. [b] **Place sufficiently charged.**–38F(2d)630 (2dcase); 38F(2d)633; 42F(2d)721. [c] **Allegation held sufficient.**–44F(2d) 48.
675–80 273US593, 47SCt531, 71L ed793; 126Me509, 140A188; 156Md149, 143A 872. [b] (2) Acts described as committed within certain judicial district held sufficient. 34PortoRico 606.
675–81 279US63, 49SCt257, 73L ed615; 158La203, 103S740; Mo 24SW(2d)1023. [c] (5) Assault and battery committed "on the premises of P. R. in the municipal judicial district of M." 32Porto Rico 207. [d] (2) Allegation that defendant unlawfully sold alcohol in Kansas City, Jackson County, Missouri, is sufficiently definite as to venue for western division of western district of Missouri. 34F(2d)406. [f] **Indictment for conspiracy** to violate statute as to misuse of mails held not indefinite as to allegation of place of offense. 7F(2d)785.
675–82 17F(2d)723; 233 IllA53; Mo 31 SW(2d)39. [a] 233 IllA53 (that Chicago is in Cook County, Illinois).
675–83 23F(2d)235.
675–87 231Ky487, 21SW(2d)797.
675–87½–New. Right to a bill of particulars may bar the right to complain of what would otherwise be an insufficient specification of place. 18F(2d)208.
676–91 80CalA583, 251P222. See also 32PortoRico 207.
676–98 14F(2d)881; 124Kan482, 260P 655. [c] **Indictment charging formation and existence of conspiracy in Missouri,** having as object transportation of whisky into and through Indiana, held sufficiently to charge existence of conspiracy in Indiana. 14F(2d)881.
676–1 20F(2d)127; 117 Or466, 242P 440. [b] (8) Other illustrations of sufficient allegations. MoA 279SW221.
677–3 105TexCr566, 289SW404.
677–5 128Me431, 148A406(1stcase).
677–6 7F(2d)309.
677–18 197 Ind16, 148NE420; IndA 167NE634.
677–19 144Miss1, 108S725.
678–21 157Tenn535, 11SW(2d)860.
678–23 [d] (3) Description by street number of building held to cover vacant space in rear thereof on same parcel of land. 145Wash677, 261P384. (4) Is sufficiently described as "point in the seven hundred block on North Third street, in the city of Muskogee, Muskogee county, state of Oklahoma." 34F(2d) 398, 399.
679–45 324 Ill 190, 154NE900; 201 Iowa159, 205NW534 (indictment may be laid wholly in one county without stating it was partly committed in that county and partly in another county).
679–46 See also 39GaA674, 148SE300.
679–47 86CalA160, 260P330.
679–55 197 Ind193, 150NE99.
680–62 Mo 23SW(2d)179.
680–64 94Fla268, 113S707; 126Me136, 136A808; 104WVa1, 138SE732. See also 222MoA798, 108SW(2d)63.
680–67 177Ark91, 5SW(2d)716; 169La 251, 125S67; 193NC747, 138SE138; 104 WVa1, 138SE732.
680–68 22AlaA317, 116S110; 104WVa1, 138SE732.
681–69 144Miss872, 110S690; 77Mont 297, 250P612; OklCr 272P487(3dcase); 127 Or294, 271P742; 52SD619, 219NW 817.
681–70 19F(2d)46; 177Ark91, 5SW(2d) 716; 216Ky430, 287SW949; 140Miss 224, 105S498; 77Mont297, 250P612. [d] 126Kan17, 266P937.
681–72 104WVa1, 138SE732.
681–78 124Kan20, 257P925; 154Md655, 141A346, 347 [citCyc].
681–80 19F(2d)46; 43F(2d)135. [a] (2) Charge charging sale of alcohol on or about particular dates is held insufficient. 19F(2d)901. [c] **Time sufficiently charged.**–42F(2d)721.
682–84½–New. In an indictment for conspiracy, an allegation referring to the time of the overt act is sufficient. 19F(2d)506.
682–87 14F(2d)835. See also OhA 173 NE253. [a] See also MoA 21SW(2d) 229.
682–88 [a] (3) Other illustrations. Mo 29SW(2d)58. [f] **Time of day.**–34F(2d) 398.

682-91 [a] **In certain year prior to named date.**–Statement that offense occurred in 1924 before November 24th of that year is sufficient especially where record showed accused knew of time and circumstances and suffered no prejudice. 6F(2d)498.

682-93 [a] **Right to bill of particulars** may bar right to complain of what would otherwise be insufficient specification of place. 18F(2d)208.

683-2 7F(2d)309; 77CalA29, 245P769; 154Md655, 141A346, 348 [quotCJ]; 171 Minn513, 213NW46; 312Mo 212, 278SW 1030.

683-7 OklCr 267P1038; 104WVa1, 138 SE732.

683-9 IndA 172NE504.

683-10 104WVa1, 138SE732, 735 [cit Cyc].

683-14 16F(2d)44; 196 Ind579, 149NE 53; 103TexCr117, 280SW220; TexCr 23 SW(2d)728(1stcase); TexCr 26SW(2d) 276(2dcase); 100WVa647, 131SE466 [citCJ]. [a] **Informations** are also within application of rule. 251 IllA425.

683-16 169Ark589, 276SW577; 181Ark 603, 27SW(2d)99; Mo 296SW155.

684-18 29F(2d)279.

684-20 94Fla268, 113S707.

684-24 37GaA195, 139SE103; 199 Ind 550, 159NE149; 159La589, 105S631; 222MoA798, 10SW(2d)63; TexCr 27SW (2d)821 (offense, as stated, barred by statute of limitations). [e] **Where indictment is not found nor information filed within period of limitation,** state must allege and prove exceptions which prevent running of statute. 308Mo 538, 272SW922. [f] **Under statute prescribing prosecution** unless brought within twelve months after offense is "made known" to a public officer the expression "brought to the attention of" held equivalent to the statutory language. 159La 589, 105S631.

684-26 104WVa1, 138SE732.

684-27 165La47, 115S363; 103WVa 361, 137SE749.

685-29 222MoA798, 10SW(2d)63.

685-30 199 Ind550, 159NE149.

685-37 7Alaska23, 25 [quotCyc]; 124 Kan245, 259P691, 693; 228Ky477, 15 SW(2d)261; 244NY243, 155NE113; 218 AppDiv488, 218NYS41.

686-47 124Me359, 129A226.

686-47½-New. Where the time of a continuing offense is stated as between two named dates inclusive, acts committed on first and last dates are included. ND 229NW363.

686-49 [b] **Indictment not alleging whether law was violated** before or after statute took effect has been held not demurrable. 23AlaA518, 128S122. But see 23AlaA514, 128S123.

686-57 210Ky324, 275SW795. Contra 84 IndA559, 151NE705.

687-73 155Tenn15, 290SW28, 29 [quot CJ].

687-74 155Tenn15, 290SW28, 29 [quot CJ].

688-86 131 Or314, 282P105.

688-3 199 Ind550, 159NE149.

689-19 7F(2d)309; 16F(2d)828; 327 Ill 312, 158NE732; 199 Ind481, 157NE 100; 219Ky834, 294SW790; 161La328, 108S660; 140Miss235, 105S506; Utah 280P1046 (sufficient).

689-20 327 Ill 312, 158NE732; SD 228 NW240.

689-21 327 Ill 312, 158NE732.

689-23½-New. Intention of grand jury as to person indicted is ascertained from words used, considered in light of attending circumstances. 22F(2d)264.

690-34½-New. If plea of misnomer in statutory form is proved, the prosecution cannot proceed on the indictment. 21AlaA406, 108S642.

690-42 20F(2d)42; 4HawaiiFed57; 327 Ill 312, 158NE732.

690-44 20F(2d)42.

690-45 20F(2d)42.

690-52 AlaA 114S281; 147Miss446, 111 S148, 149 [citCJ].

690-53 123 Or490, 262P950.

690-54 [b] **And if, in fact, grand jury did knew his true name,** indictment cannot be sustained. 21Ala517, 110S168.

691-64½-New. Where the testimony for both prosecution and defense shows that there is some uncertainty as to defendant's real name, it is not error for the court to refuse to strike from the information all names by which it is alleged that defendant was known other than the name which he claims is his own. 233Mich185, 206NW568.

691-64½-New. Naming of defendant by her right name and as "alias" under which her husband masqueraded but which she never used is not fatally defective. 322Mo 1239, 18SW(2d)71.

691-66 254Mass556, 150NE869.

691-67 254Mass556, 150NE869.

691-69 259Mass453, 156NE890.

691-70 259Mass453, 156NE890.

691-74 21AlaA597, 110S562; 22AlaA 344, 115S697.

691-75 254Mass556, 150NE869. [c] Okl Cr 279P710. [d] "**Fred Doe**" indictment alleging that true name is unknown is not bad. 254Mass556, 150NE869.

692-97 74CalA109, 239P413, 414 [cit CJ].

692-6 101TexCr573, 276SW711.

692-9 22AlaA220, 114S280; 219Ky490, 293SW982.

693-16 273US77, 47SCt300, 71Led545; 6F(2d)530; 6F(2d)579; 15F(2d)965; 16F(2d)816; 20F(2d)127; 29F(2d)694; 77CalA301, 246P557; 91Fla938, 109S91; 331 Ill 268, 162NE839; 199 Ind217, 156 NE513; 200 Iowa1244, 206NW100; 232 Ky686, 24SW(2d)568; 144Miss1, 108S 725; Mo 297SW388; 49Nev110, 238P 998; 127Misc300, 216NYS116; 218App Div488, 218NYS41; 135Misc41, 237NYS 511; 135Misc564, 238NYS712; 55ND 194, 212NW857; 115 Oh127, 152NE186; 26 OHNPN8546; OklCr 292P79(2d case); 121 Or451, 255P897; 126 Or651, 269P869; 155Tenn55, 290SW380; 108 TexCr626, 28W(2d)265; Utah 280P1046 (ordinary and concise language required); 151Wash512, 276P539. See also 222MoA798, 10SW(2d)63. [f] **Reference** to court record as to facts constituting offense is insufficient. 196 Ind 654, 149NE161.

693-17 196 Ind654, 149NE161; Ind 166 NE430; 133Misc658, 233NYS656.

693-18 97PaSuper181.

693-19 15F(2d)965; 43F(2d)353; CalA 277P1069; NH 146A870; 127Misc 300, 216NYS116; 121 Or451, 255P897. See also 218AppDiv488, 218NYS41.

694-21 6F(2d)530. See also 77CalA301, 246P557.

694-22 20F(2d)127.

694-30 67Utah1, 245P332.

694-36 156Md149, 143A872; 244NY 413, 155NE724; TexCr 29SW(2d)377.

694-37 127Misc300, 216NYS16.

694-41 Utah 286P960.

695-42 4HawaiiFed422, 423 [citCyc].

695-48 210Ky439, 276SW126; 126Me 136, 136A808.

695-49 157Md407, 146A238.

696-56 17F(2d)339.

696-57 17F(2d)339; Mo 25SW(2d)101 (2dcase); 38Wyo 352, 267P89, 90 [quot CJ].

696-59 38Wyo 352, 267P89, 90 [quot CJ].

696-65 167La986, 120S620.

696-67 28Hawaii546; 146Miss682, 111 S749.

696-68 148Va725, 138SE483.

697-70 33 OklCr436, 244P206.

697-75 CalA 277P1069; 28Hawaii546.

697-82 318Mo 592, 300SW685. [c] **Where statute provides that person willfully committing assault on another shall be guilty of assault,** omission of word "willfully" renders indictment insufficient. 101TexCr217, 275SW714.

697-85 146Miss682, 111S749.

698-90 158La129, 103S534 (placing word "willfully" before instead of after "feloniously" is sufficient compliance with statute).

698-91 112TexCr414, 16SW(2d)1089.

698-93 215Ky360, 285SW193. [a] (9) "Unlawfully" includes "willfully." 121 Kan329, 246P507, 48ALR81. (10) "Feloniously, falsely, or corruptly" includes "willfully." 215Ky360, 285SW193.

699-7 215Ky360, 285SW193. [a] **Other definitions.**–Wickedly and wrongfully, and against admonition of law. 313Mo 71, 281SW35.

699-9 191NC702, 132SE796. [a] (3) Seduction. 191NC702, 132SE796.

699-13 196 Ind499, 149NE50; 197 Ind 179, 150NE50.

699-14 226Ky318, 10SW(2d)1099; 34 NM499, 285P501.

700-15 121 Or451, 255P897, 898 [cit CJ].

700-16 Ark 295SW29; 196 Ind499, 149 NE50.

700-17 123 Or490, 262P950.

700-22½-New. If the information or indictment alleges acts to have been done which constitute a felony, it is not necessary to allege that the acts were done feloniously. Mo 22SW(2d)1049 (sale of intoxicating liquor).

700-26 121 Or451, 255P897, 898 [cit CJ].

700-27 197 Ind448, 151NE329.

700-29 198 Ind487, 154NE280. [a] 198 Ind487, 154NE280.

701-34 74CalA666, 241P598. See also 229Ky305, 17SW(2d)238. But see Ind 166NE430. [a] 74CalA666, 241P598.

701-41 28F(2d)871.

701-44 92Fla711, 109S807.

701-45 TexCr 26SW(2d)271.

701-46 Ark 30SW(2d)855; 116 Or459, 241P383.

701-48 37F(2d)673; 40GaA543, 150SE 469; 199 Ind146, 155NE819; 35Porto Rico 533; TexCr 27SW(2d)821 (holding "unlawfully and willingly" defective). But see 92Fla711, 109S807.

701-49 229Ky305, 17SW(2d)238. But see 23AlaA168, 123S237. [a] (3) Mo 296SW155. (4) "Maliciously and mischievously." 199 Ind146, 155NE819.

702-52 See also ND 229NW7.

702-56½-New. In some jurisdictions statutes provide that it shall be sufficient to state that act complained of was then and there prohibited and unlawful. 309Mo 534, 275SW41.

702-57 25 OhNPN869.

702-58 15F(2d)977; 16F(2d)816; 196 Ind654, 149NE161; 129Misc650, 222 NYS432; 6PaDist&Co 293.

702-59 6F(2d)327. But see 202 Iowa 954, 211NW252.

702-60 6F(2d)327. [a] 6F(2d)327.

702-62 106TexCr240, 291SW904.

702-64½-New. Prosecution should be under the more recent of statutes covering the same subject matter. 32Ariz 607, 261P337.

702-65 271US620, 46SCt603, 70Led 1118; 18F(2d)208; 20F(2d)589; 24 F(2d)527; 245Mich530, 222NW765.

702-66 18F(2d)208.

703-69½-New. Including in charge all acts denounced by statute, where it is known the evidence will have no tendency to prove some of them, is not approved. 20F(2d)752.

703-77½-New. To describe an offense by statute section is insufficient where more than one offense is created by the section. NJ 146A42(2dcase).

703-78 14F(2d)561.

703-79 13F(2d)591; 27F(2d)77; 4HawaiiFed422, 425 [citCyc].

703-85 16F(2d)816; 332 Ill 617, 164 NE167; 160La579, 107S433; 190NC 322, 130SE10.

703-86 15F(2d)977; 21F(2d)285; 23 AlaA411, 128S209; 7Alaska290; 169 Ark717, 276SW849; 75CalA84, 241P 935; 92Fla648, 109S805; 164Ga638, 139SE355; 197 Ind189, 150NE49; 217 Ky675, 290SW511; 154Miss14, 122S 101; 313Mo 66, 280SW1033; 316Mo 1, 289SW945; 318Mo 657, 300SW746; MoA 15SW(2d)349; 115Nebr119, 211 NW619; 115Nebr194, 212NW33; 129 Misc650, 222NYS432; 191NC700, 132 SE795; OhA 173NE253 (affidavit in prosecution for being engaged in business without having filed certificate and bond held insufficient).

704-87 Fla 129S112.

704-88 308Mo 664, 274SW21; 190NC 322, 130SE10.

704-91 129Misc650, 222NYS432.

704-92 15F(2d)977; 311Mo 630, 279 SW135.

704-93 19F(2d)891.

704-95 129Misc650, 222NYS432.

704-96 15F(2d)977; 16F(2d)816; 39 F(2d)870; 91Fla214, 107S360; 199 Ind 217, 156NE513; Ind 172NE902; 203 Iowa86, 210NW571; 230Ky677, 20SW (2d)741; Md 150A278.

705-97 16F(2d)816.

705-98 16F(2d)816; 160La579, 107S 433.

705–99 16F(2d)816.
705–1 15F(2d)977; 68CalA588, 229P983; 48 Ida760, 285P467; 158La1014, 105S47 (identical words of statute not necessary, but in case of departure therefrom words of equivalent import or which unequivocally convey meaning should be used); 163La34, 111S486; 154Miss451, 122S731(2dcase); 115Nebr194, 212NW33; 31NM485, 247P828, 833 [citCJ]; Okl 282P1109; 158Tenn212, 12SW(2d)375; 152Va1002, 147SE231; 143Wash288, 255P141. [a] (15) "Intoxicated" and "drunk." OklCr 274P687. [b] (10) "Under influence of intoxicating liquor" and "while intoxicated." 91Fla214, 107S360.
706–6 15F(2d)977; 21F(2d)285; 169Ark717, 276SW849; Fla 129S832; 322Ill70, 152NE567; 334Ill524, 166NE96; 335Ill61, 166NE462; Ind 169NE40; 118Kan603, 236P663; 119Kan467, 239P749; 161La827, 109S505; 190NC810, 130SE848; 142Va609, 128SE555.
707–8 15F(2d)977; 22AlaA590, 118S594; 195NC537, 143SE3; 127Or565, 273P338.
707–9 195NC537, 143SE3. But see 111TexCr441, 14SW(2d)1035.
707–10 31NM485, 247P828, 833 [citCJ].
707–13 137Wash414, 242P389.
707–17 124Kan482, 260P655, 657 [citCJ]; 246NY106, 158NE38; 101TexCr217, 275SW714; 39Wyo309, 270P1064 [citCJ], 64ALR289.
707–19 124Kan482, 260P655, 657 [citCJ]; 39Wyo309, 270P1064 [citCJ], 64ALR289.
708–25 32PortoRico143; 108TexCr477, 18SW(2d)644. [a] (2) Charging driving of automobile "with such unskillfulness, negligence and carelessness as to collide, etc.," under statute making it an offense "through gross negligence or carelessness to suffer or cause" vehicle to collide, etc. 32PortoRico143.
708–28 29F(2d)798; 21AlaA177, 106S218; 36GaA266, 136SE333; 196Ind258, 148NE143; Mo 273SW1057.
708–29 6F(2d)530; 7F(2d)104; 14F(2d)827; 15F(2d)977; 34F(2d)92; 39F(2d)440; 20AlaA454, 103S912; 30Ariz113, 244P1020; 174Ark357, 295SW368; 179Ark3, 13SW(2d)828; 181Ark336, 25SW(2d)752; 80CalA583, 251P222; 80CalA159, 251P315; 90Fla844, 107S530; 37GaA41, 138SE590; 44Ida173, 258P551; 196Ind316, 148NE197; 196Ind665, 149NE348; 196Ind699, 149NE438; 197Ind8, 149NE442; 197Ind173, 150NE58; 197Ind705, 151NE829; 198Ind45, 152NE161; 203Iowa86, 210NW571; 122Kan552, 253P221; 210Ky362, 275SW871; 210Ky573, 276SW512; 158La203, 103S740; 160La559, 107S433; 162La357, 110S557; 162La781, 111S162; 150Md278, 132A624; 141Miss289, 105S523; 311Mo683, 278SW695; Mo 278SW733; 316Mo157, 289SW948; 317Mo268, 295SW741; 318Mo1185, 2SW(2d)731; MoA 273SW141; 217MoA156, 273SW1098; MoA 278SW1073; 218MoA481, 279SW181; MoA 289SW664; MoA 290SW1026; 73Mont376, 237P486; 115Nebr194, 212NW33; 51Nev402, 279P759(2dcase); NJSup 140A21; 53ND222, 205NW234; 118Or5, 244P512; 119Or15, 244P516; 117Or430, 244P538; 126Or118, 268P1016; 126Or651, 269P869; 50SD564, 210NW988; 154Tenn105, 289SW363, 53ALR821; 100TexCr93, 271SW901; 104TexCr432, 284SW574; 104TexCr473, 284SW950; 108TexCr177, 299SW420; 109TexCr320, 48SW(2d)971; 111TexCr384, 12SW(2d)792; 100WVa213, 130SE451; 101WVa160, 132SE366; 106WVa46, 144SE718; 106WVa299, 145SE604.
709–30 15F(2d)977; 19F(2d)322, 22F(2d)393; 31F(2d)88; 180Ark397, 21SW(2d)606; 195CalA774, 235P735; 88CalA575, 263P862; 88CalA575, 265P322; 90Fla719, 107S246; 93Fla1082, 113S90; 48Ida760, 285P467; Ida 288P894; 336Ill257, 168NE289; 338Ill631, 170NE678; Ill 173NE357; 233IllA504; 197Ind685, 150NE409; 197Ind374, 151NE98; 198Ind198, 152NE814; 198Ind502, 154NE273; Ind 166NE651; 200Iowa1244, 206NW100; 118Kan771, 236P652; 218Ky233, 291SW45; 230Ky677, 20SW(2d)741; 158La799, 104S720; 254Mass454, 150NE197; 309Mo520, 275SW36; Mo 279SW133; 322Mo1, 16SW(2d)96; Mo 25SW(2d)101(2dcase); MoA 279SW733; 51Nev402, 279P759(2dcase); 103NJL663, 138A575; 54ND871, 211NW813; 54ND878, 211NW816; OklCr 277P254(2dcase); OklCr 281P321; OklCr 288P999(2dcase); OklCr 289P363; 91PaSuper559; 106TexCr158, 291SW892; 108TexCr626, 2SW(2d)265; Utah 290P962; 141Wash668, 252P104 (dictum); Wash 288P236. Contra 336Ill257, 168NE289.
709–31 15F(2d)977; 25F(2d)294; 213Ala170, 104S440; 21AlaA177, 106S218; 90Fla133, 105S314 (information substantially language of statute held sufficient where it acquaints accused with nature and cause of accusation); 98Fla464, 124S27; 164Ga638, 139SE355; 196Ind379, 148NE411; 210Ky439, 276SW126; 218Ky233, 291SW45; 236Ky68, 32SW(2d)550; 157Md407, 146A238; 311Mo473, 278SW970; 311Mo531, 279SW134; 316Mo1, 289SW945; 244NY413, 155NE724; 123Or231, 261P431; 123Or595, 263P60; Or 285P1105; 156Tenn509, 3SW(2d)159; 141Wash668, 252P104 (dictum); 142Wash465, 253P655; 99WVa702, 129SE757; 108WVa525, 151SE852.
710–32 13F(2d)620; 19F(2d)891; 316Mo1, 289SW945; Utah 263P86. [b] **Statutory language held insufficient to apprise** accused of nature of charge of threat to expose and impute disgrace. 141Wash668, 252P104.
710–34 210Ky439, 276SW126.
710–35 23AlaA168, 123S237, 243 [citCJ]; 168Ark498, 270SW959; 80CalA159, 251P315; 156Tenn509, 3SW(2d)159.
710–43 165Ga44, 139SE812.
710–43½–New. Some statutes set forth the precise words that shall be deemed and held a sufficient description of the offense; 160La559, 107S433.
710–43¾–New. and in such case, a common-law requirement, that the crime be charged with such particularity that accused is notified with reasonable certainty of all elements of the offense charged, is not applicable. 160La579, 107S433.
711–45 [a] **If statutory language is deemed insufficient** defendant should apply for bill of particulars. 73Mont376, 237P486.
711–47 326Ill481, 158NE134; 126Or651, 269P869; 108TexCr214, 299SW899; 99WVa702, 129SE757.
712–52 [b] **An indictment for pandering in language of statute which sets out no facts showing how offense was committed** is insufficient. 100TexCr237, 272SW791.
712–53 142Wash465, 253P655.
712–59 15F(2d)977, 987 [quotCJper Booth,CJ].
712–61½–New. Where an offense, created by act of congress, describes the manner of doing the act as "forcibly," the omission of such word from the indictment is fatal. 12PortoRicoFed488.
712–66 105WVa549, 143SE307.
712–67 105WVa549, 143SE307.
712–69½–New. Where analogous offenses at common law require more particular allegations, or where the statutory language would not fairly inform defendant of the nature of the charge, the act charged must be defined with greater particularity. 244NY413, 155NE724.
712–69¾–New. In applying this test the court will construe the indictment liberally. 244NY413, 155NE724.
712–70 142Wash465, 253P655.
712–71 37GaA113, 138SE922.
713–72 99WVa702, 129SE757.
713–73 142Wash465, 253P655.
713–79 326Ill481, 158NE134.
713–80 23AlaA168, 123S237.
713–86 124Kan345, 259P793 [citCJ].
714–93 197Ind685, 150NE409. [a] (1) 254Mass454, 150NE197. (2) Failure of indictment to name owner of property held not fatal where offense was charged in language of statute. 197Ind685, 150NE409.
714–96 [a] 314Mo673, 285SW726.
714–97 [b] **Language of statute sufficient.**–47 Ida760, 278P773.
714–98 [a] 324Ill224, 154NE909.
714–3 [b] **Description of officer.**–15F(2d)191.
714–4 47Ida336, 276P528. [a] (1) 167La986, 120S620; 123Or231, 261P431.
714–6 29F(2d)103. [a] 42F(2d)812.
715–11 [a] (3) Indictment for illegally voting. NJ 143A802.
715–12 [a] (1) 81CalA668, 254P640; 228Ky477, 15SW(2d)261; 141Miss289, 105S523; Mo 278SW971. (7) Information for embezzlement by agent in language of statute sufficiently charges agency. Nebr 232NW781.
715–13 [a] (2) Charge in language of statute insufficient. 30OhA195, 164NE649.
716–14 20AlaA631, 104S676.
716–14½–New. attempt to rescue; 190NC319, 129SE802.
716–15 32PortoRico349 (charging harboring and protecting felon, under Pen. Code § 37). [b] **Statement of facts and circumstances.**–Indictment for harboring and protecting felon held insufficient, it failing to specify acts of defendant. 32PortoRico349.
716–17 [b] **Words of statute sufficient.**–MoA 288SW792.
716–20 [a] (4) Confidence game indictment, following words declared by statute to be sufficient. 160La579, 107S433.
716–21 [a] (4) Information for dynamiting fish sufficient. 314Mo567, 284SW806.
716–23 [a] (1) 32NM191, 252P1003.
716–24 [g] **Devising scheme to defraud.**–Charge in language of statute is insufficient and particulars of alleged scheme should be set forth. 99WVa702, 129SE757.
717–25 [a] (2) 115Nebr194, 212NW33. (12) 162La543, 110S749.
717–27 245Mich455, 223NW70. [a] (1) CalA 290P102; 196Wis571, 219NW278. (4) 122Kan552, 253P221. (6) Indictment for involuntary manslaughter in driving auto at dangerous speed and unreasonable rate of speed. 119Or409, 243P72. [b] NJ 148A776. [e] **Manslaughter caused by negligent driving.**–29PortoRico856.
717–30 97CalA185, 275P462. [a] (1) 15F(2d)977; 198Ind61, 152NE274; 89IndA136, 165NE918; 89IndA222, 166NE17; Mo 278SW1028; 311Mo531, 279SW134; 320Mo173, 7SW(2d)340; Mo 14SW(2d)441; MoA 284SW520. (7) MoA 278SW825. (8) 89IndA617, 167NE631; 129Kan719, 284P357; 163La487, 112S374; MoA 278SW1073; 221MoA146, 297SW711; MoA 15SW(2d)865(2dcase); 144Va630, 131SE204. (10) 108TexCr626, 2SW(2d)265. (13) 23AlaA121, 123S895(1stcase); MoA 293SW87; MoA 294SW422. (22) MoA 16SW(2d)648; MoA 16SW(2d)653. (27) Indictment charging unlawful transportation of liquor. 73Mont376, 237P486. (28) Unlawful transportation. 196Ind258, 148NE143; 309Mo534, 275SW41. (29) Owning and operating moonshine still. 103WVa361, 137SE749. (30) Charge for selling intoxicating liquor in language of statute sufficient, though it did not specify kind of liquor. 161La948, 109S772. (31) Charging transportation. 316Mo179, 289SW954. (32) Indictment for transportation not describing points between which liquor was transported. 156Tenn509, 3SW(2d)159. (33) Transporting moonshine. 320Mo271, 8SW(2d)57. (34) Transportation. 23AlaA53, 122S460(1stcase). (35) Charge of possessing still. 98CalA28, 276P155. (36) Maintaining nuisance. 129Kan719, 284P357. (37) Other matters. MoA 2SW(2d)146. [b] (15) In alleging transportation of liquor it is not necessary to specify place from which nor place to which transportation takes place. 196Ind258, 148NE143. (16) In alleging transportation of liquor it is not necessary to state in the affidavit name of carrier from whom liquor was received. 196Ind258, 148NE143. (17) Other instances. OklCr 281P982(2dcase). [c] (5) Indictment charging maintenance of liquor nuisance in violation of National Prohibition Act must add averments of facts showing violation. 13F(2d)620. [d] **Being drunk in a public place.**–Statutory language sufficient. 100TexCr76, 271SW922. [e] **Statutory language sufficiently**

followed.–Mo 296SW152.

718–32. [a] (1) 95CalA242, 272P794; 97CalA253, 275P518.

718–33 [a] (1) 53ND222, 205NW234.

719–37 244NY413, 155NE724 (manipulating price of securities).

719–41 336 Ill 257, 168NE289 (indictment held insufficient).

719–44 [a] Mo 285SW469; 105WVa 549, 143SE307.

719–46 Ind 169NE40.

719–47 [a] (3) Other instances. 42F (2d)812.

719–48 [a] (1) 21AlaA177, 106S218; 68CalA308, 229P63; Mo 285SW400; Mo 285SW445; 143Wash288, 255P141.

720–55 [a] (37) Blackmail. 36GaA226, 136SE333. (38) For receiving deposit with knowledge of bank's insolvency. 161La827, 109S505. [b] (5) Charge of selling choléra infected hogs. 210Ky439, 276SW126. [c] (3) Resultant crimes predicated on negligence. 200 Iowa1244, 206NW100 (involuntary manslaughter). (4) Charge of imputing disgrace with intent to extort money. 141Wash668, 252 P104.

720–57 13F(2d)427; 16F(2d)816; 181 Ark316, 25SW(2d)424; 199Cal 773, 250 P714; 91Fla893, 109S630, 631 [citCJ]; 125Me319, 133A738; 126Me177, 136A 817; 254Mass454, 150NE197; Mo 278 SW670; 115Nebr194, 212NW33; NJSup 131A675; 116 Or459, 241P383; 116 Or 416, 241P390; 105TexCr114, 286SW 1089; 111TexCr318, 138SW(2d)91(1st case); 103WVa555, 138SE120. [b] (3) Violation of Lobbyist Act. 229Ky264, 17SW(2d)227, 63ALR932.

720–58 5F(2d)503; 15F(2d)977; 16F (2d)816; 199Cal 773, 250P714; 71CalA 374, 235P81; 75CalA471, 242P1078; 81 Colo 66, 255P452; 233 IllA608; 196 Ind 316, 148NE197; 196 Ind654, 149NE161; 197 Ind173, 150NE58; 166Minn116, 207 NW19; Mo 296SW155; 75Mont240, 243 P1073; 76Mont278, 246P257 (prosecution for unlawful possession of opium); 116Nebr363, 217NW591; NJSup 131A 675; 49ND648, 192NW974; 49ND677, 193NW148; 52ND81, 202NW131; 54 ND878, 211NW816; 116 Or459, 241P 383; 116 Or416, 241P390; 130 Or480, 280P653; 91PaSuper559; Utah 286P 645; 187Wis463, 204NW595; 36Wyo 532, 257P2.

721–59 254Mass208, 150NE167.

722–60 21AlaA353, 108S272; 322 Ill 390, 153NE688; 322 Ill 416, 153NE693; 328 Ill 494, 160NE86; 198 Ind198, 152 NE814; 200 Ind380, 165NE522; 162La 242, 110S336; 254Mass208, 150NE167; 143Miss787, 109S799; 155Miss612, 125 S99(2dcase); NJSup 131A675. [a] (1) 328 Ill 494, 160NE86. (8) In prosecution for uttering bad check, indictment need not negative payment within five days after notice which is exception in detached clause of statute. NJSup 131 A675.

722–61 196 Ind654, 149NE161; 157Md 332, 146A268; 143Miss787, 109S799.

722–62 16F(2d)816.

722–64 16F(2d)816; 121Kan339, 246 P989; 75Mont240, 243P1073; 116 Or 416, 241P390.

723–71½–New. The general rule in federal criminal practice is that negative defensive matters need not be alleged in an information or an indictment. 35 F(2d)96.

724–77 181Ark316, 25SW(2d)424.

725–88 233 IllA608; 202 Iowa146, 209 NW403; 202 Iowa450, 209NW468; 82 Mont456, 268P493; 187Wis463, 204NW 595. [a] (4) See also 202 Iowa146, 209 NW403. (5) Indictment charging possession of narcotics is sufficient without alleging drugs were not obtained from licensed practitioner on prescription. 202 Iowa146, 209NW403.

725–90 126Me177, 136A817; 143Miss 787, 109S799; 115Nebr194, 212NW33, 35 [quotCJ]. [d] (9) Indictment charging use of instrument to procure abortion, "it not being necessary for preservation of life" of mother, sufficiently negatived exception in statute. 126Me 177, 136A817.

726–91 115Nebr194, 212NW33, 35 [quotCJ].

727–8 124Kan627, 261P844; OklCr 292 P573.

727–10 168Ark498, 270SW959; 118 Kan603, 236P663.

727–11 [a] (1) 100TexCr448, 273SW 563 (indictment for receiving stolen property).

728–16½–New. Defect, if any, in indictment for larceny in failing to set out name of owner is cured when supplied in answer requested by accused. 170La51, 127S361.

728–23 100TexCr448, 273SW563.

728–24 22AlaA220, 114S280.

728–28 Ill 172NE743.

728–33 101TexCr31, 274SW135.

729–54 43 OklACR318. [b] In California.–198Cal 112, 243P667.

730–60 [a] **Name in abbreviated or shortened form** is sufficient where it is so clearly identified as not to prejudice defendant as to double jeopardy. 326 Ill 481, 158NE732.

730–65 43 OklACR318.

730–69 202 Iowa739, 210NW901.

731–75 98PaSuper570. [b] **Sufficient allegation** as to description of land. TexCr 26SW(2d)251(2dcase).

731–82 118Nebr828, 226NW449.

731–87 21F(2d)285.

731–89 21F(2d)285; 314Mo 599, 285SW 733.

731–90 21F(2d)285.

731–91 21F(2d)285.

731–93½–New. Where property or its ownership is merely incidental and not an essential element of the crime charged, particularity of description is not required. 314Mo 599, 285SW733.

731–95 331 Ill 268, 162NE839.

732–6 MoA 272SW710 [quotCJ].

732–8 197 Ind685, 150NE409.

732–15 Ind 168NE458.

732–17½–New. The fact that the owner is unknown must be stated in such case. 143Wash370, 255P122.

732–17½–New. Where an allegation of ownership is necessary it must be alleged in a person, corporation, or other entity that may be the owner of property. 334 Ill 38, 165NE190.

732–25 [c] **Forged instrument** need not be set out unless prosecution is for forgery, counterfeiting, or misuse of mails. 5F(2d)45.

734–58 165La341, 115S613, 616 [citCJ]; 112TexCr433, 17SW(2d)818(2dcase).

734–61 24F(2d)890; 206Cal 307, 274P 523; 78CalA503, 248P946; 110Conn298, 147A825 (allegations relating to penalty should be incorporated in original information); 168Ga699, 148SE593(2d case); 40GaA228, 149SE153(1stcase); 44 Ida636, 258P553; Ida 290P387; 207 Iowa334, 221NW556; Iowa 231NW318; 157La235, 102S319; 163La552, 112S414; 165La341, 115S613, 616 [citCJ]; 258 Mass98, 155NE8; 233Mich98, 206NW 516; MoA 298SW1044; 76Mont526, 248 P215; 102NJL318, 133A403; 193NC290, 136SE709; 23 OhA299, 155NE498; 45 Philippine167; 49SD398, 207NW161 [citCJ]; 53SD521, 221NW250; 109 TexCr450, 58W(2d)514; 69Utah444, 256 P109; 152Wash284, 277P856; 154Wash 304, 282P48; 154Wash663, 283P182. See also Mo 287SW775; 114Nebr257, 207 NW207. [c] (3) Statute making second offense felony and providing that indictment need not charge former conviction does not violate constitutional right to demand nature and cause of accusation. 160Tenn664, 28SW(2d)635. [d] 114 Nebr257, 207NW207. [e] 8F(2d)113; 39F(2d)432. [f] **Words "second offender."**–32PortoRico 737. [g] **Objections to court raised for first time on appeal** come too late. 32PortoRico 737. [h] **Provision of Illinois Prohibition Act.**–316 Ill 547, 147NE428. [i] **Insufficient allegation of former conviction.**–49SD 398, 207NW161. [j] **In Kentucky.**–221 Ky166, 298SW389. [k] **Grand jury** not deprived of power to allege prior convictions in indictment by statute purporting to render such allegations unnecessary. 130Misc821, 226NYS397. [l] **Identification of defendant** held sufficient. 230Ky732, 20SW(2d)731. [m] **Allegation of former conviction does not constitute separate charge** but merely authorizes additional punishment. Mo 22SW(2d)809. [n] **It is within legislature's province** to require allegation of prior conviction in information charging violation of prohibition law. 154Wash 304, 282P48.

734–62 22AlaA300, 115S149; 44 Ida636, 258P553; 258Mass98, 155NE8; 233Mich 98, 206NW516 (where second conviction changes grade of offense or authorizes higher penalty than could otherwise be imposed); 76Mont526, 248P215; OklCr 287P1068; 45Philippine167.

734–64 140Wash385, 249P784. [a] **In New York.**–244NY451, 155NE737.

734–66½–New. An indictment after a previous conviction has been held to charge both felony and misdemeanor. 147Va678, 137SE478.

734–66⅓–New. And in Florida, where the second offense for illegal possession of alcoholic liquor is felony, and the first only misdemeanor, an indictment reciting the first conviction for the offense of possessing alcoholic liquors invalid for failure to allege such possession was illegal. 92Fla711, 109S807.

735–68 315Mo 1279, 289SW792; 45 Philippine167.

735–69 169La215, 124S832; 128 Or515, 273P323.

735–70 315Mo 1279, 289SW792; 136 Wash453, 240P562.

735–70½–New. Although sentence is not affected, it is duty of prosecuting attorneys to allege prior convictions. Wash 286P102.

735–75 210Ky571, 276SW533; 216Ky 608, 288SW320; Mo 298W(2d)698; 26 OhA329, 157NE421; 285Pa289, 132A 370; Va 153SE821. [d] (1) Mo 23SW (2d)1; TexCr 28SW(2d)818. (4) 36F (2d)472. (5) 6F(2d)145; 88CalA 245, 262P1115; 92CalA775, 263P 1082; 221Ky166, 298SW389; 222Ky 385, 300SW902; 168Minn329, 210NW 65; Utah 286P645; 150Wash121, 272P 72. (10) Violation of National Prohibition Act. 8F(2d)113. (11) Bootlegging as second offense. 53ND429, 206NW786. (12) Possession of intoxicating liquor. 204 Iowa670, 215NW752. (13) Allegation of former conviction in police court of city of Los Angeles has been held sufficient though conviction was in municipal court which supplanted police court. 88CalA212, 263P295. (14) Allegation that accused is habitual delinquent according to terms of statute is sufficient in Philippines. 50Philippine 582. (15) Violation of prohibition statute. 235Ky10, 29SW(2d)580. (16) Two prior convictions of unlawful possession of intoxicating liquor. MoA 32SW (2d)129. [e] (1) 316 Ill 547, 147NE428. (4) 165Minn220, 206NW389. (8) Unlawful transportation of liquor. 89Fla202, 103S633. (9) Allegation of former conviction which does not show that prior offense was not committed before statute, increasing penalty for second conviction became operative, is insufficient, when the statute, by its terms, is inapplicable in case of offense committed prior to that date. 210Ky571, 276SW 533; 216Ky405, 287SW937; 221Ky239, 298SW704. (11) Allegation that accused "has heretofore been twice convicted of theft . . ." without reference to act authorizing additional punishment on habitual delinquency. 45Philippine167. (12) Indictment for third violation of liquor statute which failed to show that former offenses were committed subsequent to passage of statute held insufficient. 217Ky255, 289SW299. (13) Charge of failing to send child to school, "this being second offense of this nature within said county." 26 OhA329, 157 NE421. (14) Burglary. 223AppDiv123, 227NYS417. (15) Manufacture of liquor. 226Ky683, 11SW(2d)696(1stcase). (16) Information charging felony of transporting whisky is defective in charging former conviction of misdemeanor of possession. Mo 29SW(2d)159. (17) Other instances. Mo 29SW(2d)159. [f] **Specific allegation that subsequent offense was violation of same law,** and consequently felony, is unnecessary where former conviction and sentence are set out and essential facts of second offense are alleged. 108WVa273, 151SE186.

735–76 231Ky327, 21SW(2d)471; 26 OhA329, 157NE421; 45Philippine167 (but formal or technical allegation is not

required); Wash 292P107(2dcase). [d] (1) 37 OklACR602. 244P461.

735-77 41F(2d)215 (allegation held immaterial where second offense was committed before prior conviction).

735-79 [a] **In Philippines.**-45Philippine167.

735-80 26 OhA329, 157NE421.

735-81 204 Iowa670, 215NW752 (sufficient with additional allegation of record and page where conviction may be found).

735-82 [a] **Where greater penalty is not imposed,** it is unnecessary to allege that former conviction has become final. 158 La755, 104S705. [b] **Where it appears in brief of defendant's counsel,** that former conviction had become final, failure to allege such fact is immaterial. 158La755, 104S705.

735-82½-New. , and that it was had under same section of the statute as is the present prosecution. 165Minn220, 206NW389.

735-83 8F(2d)937; 70CalA489, 233P 413, 415 [quotCJ]; 231Ky327, 218SW (2d)471; 54ND768, 210NW971; 108W Va692, 152SE749. But see 26 OhA329, 157NE421. [a] **Indictment sufficiently alleges crime** of being persistent violater though not stating particular violation for which defendant was convicted. Utah 290P962.

735-84 79CalA605, 250P578; 54ND768, 210NW971.

735-85 8F(2d)937, 938 [citCJ]; 79CalA 605, 250P578; 54ND768, 210NW971; 108WVa692, 152SE749.

735-88 237 IllA211.

736-89½-New. Where a statute provides for increased punishment where defendant has twice before been convicted, sentenced and imprisoned in a penitentiary for a term of not less than one year, an indictment, changing a conviction and imprisonment in a reformatory for more than one year from whence he was removed to a state prison where he was held for more than another year and then paroled, is insufficient. 285Pa289, 132A370.

736-89½-New. An allegation that defendant had been previously convicted sufficiently alleges a prior conviction without further showing of a final enforceable judgment. 144Wash598, 258P 484.

736-91 OklCr 283P1023(2dcase).

736-98 146Wash221, 262P622.

736-4½-New. An indictment charging that defendant had been twice convicted under the Prohibition Act is not insufficient as an indictment for a third offense because of failure to show that the affidavit on the second violation charged a second offense. 27 OhA297, 161NE284.

736-8 8F(2d)113; 114Nebr257, 207NW 207.

736-10 208 Iowa1205, 227NW165 (indictment held sufficient). But see 45 Philippine167.

736-13 [a] **In Florida.**-92Fla711, 109S 807.

736-14 [a] 204 Iowa670, 215NW752.

737-19 208 Iowa811, 225NW852; 165 Minn220, 206NW389; 45Philippine167 (principle applied; and punishment reduced on appeal).

737-19½-New. , the defective allegations as to previous conviction being regarded as surplusage. 165Minn220, 206 NW389.

737-20 151Miss56, 117S354.

737-21 165La341, 115S613, 616 [citCJ].

737-23½-New. Without an allegation in the information that first degree robbery was committed by means of a deadly weapon, the increased penalty prescribed when such weapon is used could not be imposed. Mo 18SW(2d)474.

737-24 151Miss56, 117S354.

738-35½-New. An indictment charging each defendant with aiding and abetting the other in homicide by shooting is not demurrable, as both are principals in the first degree. 214Ky147, 282SW1066.

738-42 169La468, 125S451.

733-44 17F(2d)339; 198 Ind718, 153 NE765; 200 Ind7, 159NE755; 229Ky 168, 16SW(2d)766. See also 82CalA465, 255P777.

738-46 41F(2d)193; 43F(2d)135.

738-47 17F(2d)339; 43F(2d)135; 98 Fla687, 124S177 (indictment held insufficient); 200 Ind7, 159NE755. [a] (2) Indictment for murder charging defendant and codefendant each as principal and other as aider and abettor held sufficient on demurrer. 214Ky572, 283SW 1032.

738-49 See also 227Ky100, 12SW(2d) 329(2dcase).

738-51 200 Ind7, 159NE755.

738-52 169Ark421, 275SW758, 761 [quotCyc]; 34GaA198, 128SE920; 115 Nebr335, 212NW765; 158Tenn531, 14 SW(2d)735.

738-56 214Ky578, 293SW1034. See also 245Mich229, 222NW149.

738-57½-New. A charge of aiding and abetting, without setting out the act by which it was consummated, is sufficient. 25F(2d)430.

738-57½-New. An indictment for aiding and abetting in embezzling public funds by receiving a loan of the embezzled money with knowledge is sufficient without alleging defendant's presence at the time of the embezzlement. 158Tenn212, 12SW(2d)375.

739-65 See also 227Ky100, 12SW(2d) 329(2dcase).

739-69 98Fla687, 124S177. [b] **Abrogation of distinction** between principal and accessory does not deny defendant right to demand nature and cause of accusation. 115Nebr109, 211NW613. [c] **Where accessory charged jointly with principals,** charge has been held dependent offense as at common law and not substantive offense under statute. 98Fla687, 124S177.

739-71 96Fla723, 119S118. But see 171 Ark568, 285SW13.

739-73 See also 90Fla299, 105S834; 10 PaDist&Co 428.

739-74 90Fla299, 105S834 (if indicted after principal's conviction must allege either principal's guilt or that he has been convicted).

740-89 169Ark421, 275SW758; 200 Ind 7, 159NE755; 234Mich95, 207NW867; 310Mo 500, 276SW625; Mo 285SW737; 115Nebr109, 211NW613; 115Nebr335, 212NW765; 115Nebr833, 215NW125; OklCr 279P976(2dcase); 118 Or5, 244P 512; 67Utah1, 245P332; 142Wash19, 251P859.

740-90 115Nebr335, 212NW765; 115 Nebr833, 215NW125; OklCr 279P980(2d case); 118 Or5, 244P512; 142Wash19, 251P859.

740-91 115Nebr335, 212NW765; 115 Nebr833, 215NW125; 118 Or5, 244P512.

740-92 169Ark421, 275SW758; 142 Wash19, 251P859. [a] 115Nebr833, 215 NW125.

740-96 310Mo 500, 276SW625; 115 Nebr335, 212NW765; 118 Or5, 244P512; 67Utah1, 245P332.

740-97 La 129S736. [a] **Allegation of commission of crime involving charge of guilt.**-La 129S736.

740-1 67Utah1, 245P332 (it is insufficient to charge that defendant in same way aided another in committing felony). [a] **Information charging defendant as accessory to rape** is fatally defective where it does not charge knowledge that principal intended to have carnal knowledge of prosecutrix or that defendant intended to aid him in commission of rape. 67Utah1, 245P332.

741-3 [a] **Indictment charging that defendant aided and abetted** in abstracting money from federal reserve member bank held not to negative participation as principal. 20F(2d)604.

742-28 Fla 130S617.

742-29 6F(2d)579; Fla 130S617; 145 Miss821, 111S300. [a] (3) Indictment need not allege that overt act is adapted to effectuate purpose where it is intrinsically so adapted. 145Miss821, 111S 300. [b] **Merely charging "attempt" to commit crime** without setting forth act or acts constituting same is insufficient. 6F(2d)579.

742-35 50Nev1, 248P900.

742-37 But see Ill 173NE357.

742-39 [a] Vt 151A562.

742-47 43F(2d)353; 46 Ida124, 266P 415, 417 [citCJ].

743-55½-New. In determining intention and effect of any one count, court must look at all words contained therein. SC 155SE385.

743-65 [b] **Every paragraph of indictment held to have been properly treated as separate count,** though not numbered. 214Ala273, 107S737.

743-66½-New. Want of numbering is not fatally defective to separate counts. 77CalA212, 246P95.

743-69 SC 155SE385.

744-81 43F(2d)353.

745-90 16F(2d)451; 312Mo 373, 278SW 1016.

745-92 41GaA653, 154SE194(1stcase).

745-96 5F(2d)712; 16F(2d)816; 17 F(2d)723; 41F(2d)144; 21AlaA168, 106 S203; 21AlaA554, 110S58; AlaA 114S 281; 71CalA522, 235P1029; CalA 288P 19; 91Fla214, 107S360; 93Fla1082, 113 S90; 321 Ill484, 152NE500; 328 Ill 494, 160NE86; 256 IllA415; 197 Ind123, 150 NE24; 89 IndA500, 167NE147; 212Ky 811, 280SW103; 214Ky422, 283SW420; 163La34, 111S486; Mass 169NE542; 146 Miss540, 112S681; 317Mo 840, 297SW 34; 80Mont181, 260P138; 244NY413, 155NE724; 25 OhNPNS69; OklCr 273P 1016; 121 Or451, 255P897; 47RI 341, 133A236; 108TexCr631, 28W(2d)256; 141Wash638, 251P875; 103WVa641, 138 SE321. See also 273US593, 47SCt531, 71 L ed793.

745-97 17F(2d)723; 121 Or451, 255P 897.

745-98 71CalA522, 235P1029; 324 Ill 26, 154NE467; 146Miss540, 112S681; 315Mo 1314, 290SW130, 51ALR564; Mo 24SW(2d)981; 121 Or451, 255P897; 123 Or165, 261P426.

745-99 214Ky422, 283SW420; 285Pa 49, 131A657.

746-5 285Pa49, 131A657.

746-10 244NY413, 155NE724.

746-12 151Miss56, 117S354.

746-12½-New. Unnecessary averments which tend to confuse and embarrass the jury may not be regarded as surplusage. 12PortoRicoFed482.

746-13 24F(2d)397, 399 [citCJ].

747-23 273US593, 47SCt531, 71L ed 793; 15F(2d)139; 24F(2d)397, 399 [quotCJ]; 124Me357, 129A226, 227 [cit CJ]; 69Utah53, 252P280, 289 [quotCJ perStraup,J].

747-24 273US593, 47SCt531, 71L ed793; 15F(2d)372; 24F(2d)397, 399 [quotCJ]; Ind 165NE61; Ind 167NE125; 227Ky 100, 12SW(2d)329(2dcase); 124Me357, 129A226, 227 [citCJ]; 80Mont181, 260 P138; 50SD564, 210NW988; 113TexCr 130, 19SW(2d)52; 69Utah53, 252P280, 289 [quotCJperStraup,J]; 142Wash19, 251P859; 41Wyo 365, 285P992. [a] (11) Where second paragraph charged no crime. 21AlaA234, 109S189. (12) Averments in indictment for treating or offering to treat diseases of human beings without certificate of qualification that treatment was by a system known as chiropractic for a reward held not necessary to valid indictment. 21AlaA 168, 106S203. (13) Allegation relative to depositing letter in post office in indictment for using mails to defraud. 24 F(2d)397. (14) Indictment charging maintenance of liquor nuisance through sale is not objectionable for alleging further means whereby same nuisance was maintained. 41F(2d)144. [d] (2) Statement in second count that it was statement of same offense charged in first count may be disregarded as surplusage where obvious meaning was that it was statement of same transaction. 199Cal 78, 248P250. [g] **Unnecessary work as surplusage** on motion to quash. 197 Ind123, 150NE24.

748-30 17F(2d)89; 233Mich222, 206 NW562.

748-31 312Mo 510, 279SW411.

748-33 Mo 26SW(2d)937. See also 273 US593, 47SCt531, 71L ed793.

748-36 16F(2d)816.

748-37 16F(2d)816. [a] (3) Acts constituting alleged culpable negligence. Miss 127S277.

748-39 16F(2d)816; 107TexCr511, 298 SW286.

748-41 23AlaA123, 122S465; Ind 166 NE649.

748-44 119Kan757, 241P119.

749-45 23F(2d)235; 199Cal 78, 248P 250; 89CalA18, 264P324; 91Fla214, 107 S360; 202 Iowa739, 210NW901; Iowa 228NW307; 162La357, 110S557; 312 Mo 510, 279SW411; 315Mo 1279, 289 SW792; Mo 297SW388; 322Mo 1, 16

SW(2d)96; 80Mont181, 260P138; 50SD 564, 210NW988; 52SD121, 216NW870; 113TexCr450, 21SW(2d)499; 145Va880, 134SE567; 142Wash19, 251P859; 141 Wash638, 251P875. [d] (20) "For beverage purposes" in indictment charging unlawful possession of cider. 5F(2d) 586. (21) Other instances. NM 290P 792.

749-46 24F(2d)104.

750-48 [a] Allegations held surplusage. -15F(2d)139.

750-50 171Ark778, 286SW935; 141Miss 289, 105S523 (not required); 220MoA 883, 295SW529; 55ND194, 212NW857. [b] In Ohio.-114 Oh397, 151NE468.

750-51 145Va901, 134SE542.

750-52 93Fla238, 112S70; 218Ky72, 290 SW1075; 32PortoRico 207 (when defendant desires fuller information as to locality of offense, his remedy is to ask for bill of particulars).

750-53 15F(2d)977; 218Ky72, 290SW 1075.

750-54 6F(2d)530; 14F(2d)659; 15F (2d)686; 15F(2d)977; 16F(2d)754, 756 [citCJ]; 19F(2d)322; 19F(2d)842; 20 F(2d)785; 23F(2d)472; 29F(2d)239 [certiorari den 279US849, 49SCt346(5th case), 73Led993]; 31F(2d)805; 41F (2d)193 (liability to surprise by evidence); 4HawaiiFed69, 71 [quotCyc]; 233 IllA13 (after dismissal of motion to quash); 222Ky310, 300SW866; 158La 203, 103S740; Me 149A389; 156Md149, 143A872; NJ 143A802; 130Misc679, 225NYS444; 194NC336, 139SE608; 101 WVa477, 133SE79. [a] But see 197 Ind 705, 151NE829. [d] Rule applies without distinction to all classes of cases. 15F(2d)977.

750-54½-New. Bill of particulars may be ordered where further details are necessary to protect him against subsequent prosecution. 15F(2d)977.

751-55 16F(2d)754; 95Fla42, 115S 519; 73Mont201, 239P1002; 145Va865, 134SE699; 145Va901, 134SE542.

751-58 15F(2d)586; 19F(2d)813; 93 Fla238, 112S70; 329 Ill 352, 160NE564; 331 Ill 268, 162NE839; Ill 172NE64; 164La543, 114S151; 194NC336, 139SE 608. But see 231Ky527, 21SW(2d)840. [a] (1) 19F(2d)322; 19F(2d)813; 19 F(2d)891. (10) Illegally taking clams from prescribed area. 261Mass510, 159 NE599. (11) Procuring miscarriage. Mass 170NE813. [b] Under indictment for selling intoxicating liquors for beverage purposes defendant is entitled to be informed as to kind of liquor he is charged with selling. 158La498, 104S 304. [c] Defendant charged with unlawful sale of liquor is entitled to know day of alleged sale so as to be able to make defense of alibi. 158La498, 104 S304.

751-59 19F(2d)322; 164La543, 114S 151; 105WVa165, 141SE637.

751-62 145Va901, 134SE542.

751-63 163La525, 112S404.

751-64 329 Ill 352, 160NE564.

751-65 19F(2d)322; 158La535, 104S 317 (allegations in bill of particulars that date of offense was that "charged in bill of information" held sufficient); 161La214, 108S419.

751-66 [a] Motion will be denied in prosecution for violating Anti-Narcotic act. 19F(2d)813.

751-67½-New. Where the courts were inconsistent, defendant was held entitled to a bill of particulars stating particularly date of possession of morphine. 15F(2d)686.

751-67½-New. A bill is not granted for disclosure of state's evidence. NJ Sup 137A893.

751-67¼-New. An objection that an indictment did not sufficiently set forth facts and circumstances of the statutory offense charged in the language of the statute is met by defendant's failure to demand a bill of particulars. 6 F(2d)530.

751-67⅓-New. Defendants, indicted for killing two men in the same place on the same day, are entitled to a bill of particulars setting forth the time and place of the killing, 130Misc679, 225 NYS444.

751-67⅙-New. but are not entitled to a bill of particulars stating the manner in which each participated in the crime. 130Misc679, 225NYS444.

751-68 14F(2d)659; 15F(2d)168; 16 F(2d)754; 16F(2d)830; 19F(2d)322; 19F(2d)842; 21F(2d)285; 22F(2d)766; 35F(2d)483 (refusal of demand for bill of particulars held not abuse of discretion); 86Colo 456, 283P47; DC 35F(2d) 877 (denial of bill of particulars held not abuse of discretion); 93Fla238, 112 S70; 98Fla152, 123S567(2dcase); 329 Ill 352, 160NE564; 331 Ill 268, 162NE 839; Ill 172NE64; 237 IllA178; 210 Ky564, 276SW521; 218Ky72, 290SW 1075; 156Md149, 143A872; 82Mont530, 268P507; 189NC516, 127SE590; 194NC 336, 139SE608; 7PaDist&Co 65; 33 PortoRico 217; 47RI 341, 133A236; 100 WVa213, 130SE451. [a] (12) Defendant is not entitled to be informed of quantity of liquor he is alleged to have sold. 158La498, 104S304. (13) Under indictment charging sale of liquors "on or about" a certain date defendant is not entitled to further particulars as to time. 158La498, 104S304. (14) Defendant is not entitled to statement as to time of day liquor was sold. 158 La498, 104S304. (15) Defendant is not entitled to be informed to whom sale of liquor was made. 158La498, 104S304. (16) Defendant is not entitled to know place where liquor is alleged to have been sold. 158La498, 104S304. (17) Defendant is not entitled to know exact hour and place of sale of ginger. 162 La471, 110S723. (18) Indictment for conspiracy to obtain entry of decree by false and fraudulent deposition. 47RI 341, 133A236. (19) Refusal, in prosecution for conspiracy, to violate prohibition law, to require bill of particulars setting up numerous details. 19 F(2d)842.

752-69 218Ky72, 290SW1075. [a] Bill of particulars as to time of offense.-210 Ky564, 276SW521.

752-70 16F(2d)754; 331 Ill 268, 162NE 839; 194NC336, 139SE608; 29Porto Rico 856.

752-71 16F(2d)754; 16F(2d)830; 21 F(2d)285; 33F(2d)238 (where indictment is reasonably definite and certain); 95Fla42, 115S519; 218Ky72, 290SW 1075; 228Ky477, 15SW(2d)261; 82 Mont530, 268P507.

752-73 16F(2d)754; 16F(2d)830.

752-75 36F(2d)859; 210Ky629, 276SW 531; 142Va628, 128SE565 (should fairly give accused notice of cause and nature of accusations). [b] (1) 26F(2d)903. (3) 163La502, 112S396. (4) Charging liquor was possessed in field near defendant's home and on his premises. 158La535, 104S317. (5) Prosecution for manufacturing liquor. 160La904, 107S 616. (6) Indictment for embezzlement. 93Fla238, 112S70. (7) Prosecution for carnal abuse, state's answer stating place and fixing time as summer of 1928 between hours of 6 A. M. and 10 P. M. NJSup 147A496.

752-76½-New. and should be directed to charges as to which prosecution expects to introduce supporting testimony, 142Va628, 128SE565.

752-77 5F(2d)471.

752-78 Ill 172NE64; 158La300, 103S 821.

752-79 222Ky310, 300SW866; 260 Mass303, 157NE354; 101WVa477, 133 SE79.

752-80 19F(2d)891; 93Fla238, 112S70.

752-81½-New. Defendant has been held not entitled to information as to the particular hour the offense was committed or whether it was committed during the day or at night, where the date of the sale was made certain by a bill of particulars. 167La279, 119S48.

752-82 93Fla238, 112S70; 194NC336, 139SE608; NC 154SE604.

752-83 194NC336, 139SE608; 35Porto Rico 109.

752-84 13F(2d)427; 15F(2d)977; 19 F(2d)472; 93Fla238, 112S70; 194NC 336, 139SE608, 609 [citCJ]; 33Porto Rico 217. See also 246Mich459, 224NW 605.

753-85 194NC336, 139SE608; NC 154 SE604.

753-85½-New. It is the function of a bill of particulars rather than of an indictment to indicate particular transactions, where the indictment charges the crime as a series of acts. 244NY413, 155 NE724.

753-87 21F(2d)285; 194NC336, 139SE 608.

753-88 194NC336, 139SE608.

753-89 18F(2d)208; 19F(2d)891; 21 F(2d)285; 194NC336, 139SE608.

753-90 42F(2d)812; Fla 112S70; 266 Mass391, 165NE413; 194NC336, 139SE 608.

753-91 But see 194NC336, 139SE608 (bill is part of record).

753-92 194NC336, 139SE608; NC 154 SE604.

753-96 93Fla238, 112S70(2dcase); 74 Mont201, 239P1002; 194NC336, 139SE 608. But see 252Mass465, 148NE123.

753-98 158La300, 103S821.

753-1½-New. A bill of particulars under the statutory form of indictment takes the place of added counts. 103 NJL246, 136A164.

753-2 6F(2d)530; 15F(2d)977; 20F (2d)785.

753-4 14F(2d)596; 16F(2d)451, 453 [citCJ]; 161La214, 108S419; 29Porto Rico 856.

753-4½-New. or promptly. NJSup 137 A893.

753-6 98Fla152, 123S567(2dcase).

754-11½-New. Charges made in bill of particulars under mistaken belief that they could be proved should be withdrawn where it appears that there is no evidence to support them. 142Va628, 128SE565.

754-12 See also NJSup 137A893.

754-12½-New. Motion for bill of particulars must be timely made. 14F(2d) 659.

754-12¼-New. Motion made year after indictment held not timely. 14F(2d) 659.

754-16 4HawaiiFed582, 591 [citCyc].

754-19 165Ga44, 139SE812.

754-25 34GaA198, 128SE920.

754-32 317 Ill 551, 148NE265; 156Md 149, 143A872; 245Mich530, 222NW765; Mo 300SW767; 133Misc658, 233NYS656. [d] Fact that one defendant is charged with prior convictions which would render offense charged felony does not deprive other defendant not charged with such convictions of fair trial. 135Wash 609, 238P638.

755-36 7F(2d)244.

755-38 43F(2d)135.

755-39 [a]. (8) Rape. 317 Ill 551, 148 NE265, 268 [citCJ].

755-41 38F(2d)450. [a] (2) That prosecutrix was raped three times by different men not acting in concert or even with knowledge of what others had done cannot be blended into single offense and charged jointly. 317 Ill 551, 148NE265.

756-43 315Mo 232, 285SW712.

756-55 20F(2d)454; 230Ky656, 20SW (2d)484, 66ALR1297; 266Mass391, 165 NE413.

756-56 315Mo 232, 285SW712; 322Mo 234, 14SW(2d)628; 321Mo 1171, 14SW (2d)638; 115Nebr833, 215NW125. [a] (3) Indictment charging city commissioner and his deputy with violation of statute denouncing offense of knowingly keeping false account of public money is not objectionable where trust of two officers so far as crime was concerned was on trust imposed in defendant commissioner and only trust reposed in deputy was reason of his deputyship. 68 CalA457, 229P974.

756-59 34GaA198, 128SE920.

756-64½-New. An indictment for murder under statute on the theory of conspiracy is not defective because of failure to name any other person than defendant. Iowa 227NW601.

756-64⅓-New. Under statutes all persons concerned in the commission of the same offense, whether directly or as aiding and abetting, may be jointly or severally indicted as principals. Iowa 227NW601.

757-67 45 Ida720, 264P875, 876 [cit CJ].

757-77 45 Ida168, 260P1095.

757-79 219Ky789, 294SW491; 46Philippine463. [a] (2) Indictment for being accessory to felonious burning of insured dwelling house occupied by accused has been held to charge single

offense. 219Ky789, 294SW491.

757-80 [b] **In Philippine Islands.**–50 Philippine1001.

758-81 5F(2d)712; 13F(2d)11; 19F (2d)202; 324 Ill 261, 155NE34.

758-83½-New. A misjoinder is the charging in separate counts of separate and distinct offenses, arising out of wholly different transactions, having no connection or relation with each other. 13F(2d)11.

758-87 146Miss66, 111S850.

758-88 29F(2d)76 [certiorari den 279 US836, 49SCt250(9thcase), 73L ed983].

758-89 150Wash82, 272P80.

758-89½-New. An indictment may be duplicitous and yet not reveal such fact on the face of the indictment. 202 Iowa 168, 209NW419.

758-89¼-New. Indictment for maintaining liquor nuisance before, during, and after period covered by former indictment therefor is duplicitous, 202 Iowa168, 209NW419.

758-89¼-New. if it assumes to charge complete offense after date of first indictment. 202 Iowa168, 209NW419.

759-90 7F(2d)244; 17F(2d)723; 25 OhNPNS69.

759-91 OklCr 293P268.

759-92 17F(2d)723; 19F(2d)472; 251 Mich359, 232NW358; NJ 146A335; 25 OhNPNS69; 101TexCrl, 274SW596; 107TexCr67, 294SW856. [b] (31) Distinct offenses in violation of Medical Practice Act. 107TexCr67, 294SW856. (32) Unlawful possession of liquor in count for maintaining nuisance cannot stand. 7F(2d)881. (33) Illegal "selling" and "furnishing" of liquor are distinct offenses. 21F(2d)690. (34) Other instances. 38F(2d)450.

759-94 16F(2d)535.

759-96 157Miss675, 128S875.

759-97 118Kan603, 236P663.

759-98 17F(2d)771; 106WVa46, 144SE 718.

759-1 See also 222MoA597, 292SW1061.

759-2½-New. Burglary and larceny may be charged in single count, if criminal acts alleged constitute parts of same transaction. 114Nebr292, 207NW168.

759-4 [a] (11) Indictment charging that defendant did "ravish and have carnal knowledge of" girl under eighteen held not duplicitous. 106TexCr310, 292 SW240.

760-6 32 OklCr379, 240P753.

760-10 22F(2d)393. [a] (5) Affidavit charging burglary of four railroad cars "then and there" held not bad for duplicity. 199 Ind203, 156NE515.

761-16½-New. Acts prohibited in same section of statute may be joined in same count. 119Kan674, 240P407.

761-17 227Ky748, 14SW(2d)205.

761-18 [b] **In New Mexico.**–34NM486, 285P490.

761-19 [b] **Indictment not demurrable.**–145Va901, 134SE542.

761-20 311Mo 452, 278SW740 (larceny and burglary); MoA 27SW(2d)444.

761-21 17F(2d)771.

761-22 220Ala268, 125S606; 23AlaA 518, 128S122.

761-25 14F(2d)12; 14F(2d)75; 14F (2d)109; 16F(2d)535; 17F(2d)723;19F (2d)202; 19F(2d)322; 19F(2d)801; 19 F(2d)813; 35F(2d)665; 35F(2d)794; CalA 289P653; 199 Ind217, 156NE513; 215Ky172, 284SW1039; 225Ky202, 7SW (2d)1039; 164La940, 114S844; 175Minn 222, 220NW611; NJ 141A165; 98Pa Super117; 132SC236, 128SE722; 100 TexCr50, 271SW628; 101TexCr471, 276 SW236; 100WVa213, 130SE451. [a] (41) Other illustrations. 6F(2d)902; 42F(2d)354; 47 Ida315, 274P628; 162 La543, 110S749; 155SC495, 152SE738; 105TexCr497, 288SW1072. [b] **Refusal to quash or compel election** held proper where information, seemingly faulty, is shown by bill of particulars to charge single offense. 114Nebr1, 205NW565.

762-26 19F(2d)801. [a] (5) Possession of still and operation thereof constitute offense of operation of still. 208Cal 142, 280P681. [d] 197 Ind16, 148NE420.

763-27 OklCr 277P259.

763-28 99Fla1275, 128S814; 199 Ind 203, 156NE515; Mo 3SW(2d)235; 54SD 178, 222NW677.

763-29 8F(2d)478; 19F(2d)801; 39F (2d)52.

763-30 199 Ind203, 156NE515.

763-31 6F(2d)148 (under Harrison Anti-Narcotic Act); 16F(2d)535; 19F (2d)202; 179Ark94, 14SW(2d)261; 89 Fla309, 103S628; 204 Iowa1360, 217NW 236; 120Kan763, 245P102, 104 [citCyc]; 178Minn437, 227NW497; Mo 296SW155; Mo 300SW767; MoA 27SW(2d)444; 114Nebr1, 205NW565; 103NJL246, 136 A164; OhA 172NE838; OklCr 279P968; OklCr 279P982(2dcase); OklCr 281P 160(2dcase); OklCr 292P573; 103Tex Cr580, 281SW1071; 104TexCr189, 283 SW791; TexCr 286SW1090; 105TexCr 640, 289SW1011; 108TexCr317, 300SW 79; 111TexCr116, 12SW(2d)218; 113 TexCr679, 22SW(2d)943(2dcase); 141 Wash638, 251P875; 154Wash667, 283P 195. [a] (11) Charging keeping and being interested in keeping premises for purpose of selling, transporting, receiving, and giving away intoxicating liquor held not duplicitous. 104TexCr189, 283 SW791. (12) Charging accused ravished and carnally knew female under eighteen. TexCr 283SW820. (13) Other instances. OklCr 286P912 (assault).

764-33 [a] (3) Single count may charge that defendant did "raise, alter, forge and counterfeit" check. 170Ark1119, 282SW992, 993.

764-34 16F(2d)535 [quotCJ]; 19F(2d) 813; 7Alaska320, 322 [citCJ]; 195Cal 445, 234P91; 46 Ida765, 271P322; Ida 288P894; 197 Ind193, 150NE99; Minn 231NW804; 317Mo 354, 296SW397; Mo 23SW(2d)183; 120 Or508, 252P951; 152 Wash155, 277P377. [a] (13) Count charging defendant with selling and disposing of liquor does not charge two offenses. 161La771, 109S485. [b] (2) Where statute denounces receiving or concealing stolen property, indictment alleging both modes is not duplicitous. 113TexCr124, 18SW(2d)1070.

765-35 16F(2d)535 [quotCJ]; 19F(2d) 322; 19F(2d)813; 20F(2d)42; 21AlaA 539, 110S157; 170Ark1119, 282SW992; 93CalA42, 269P198; 89Fla309, 103S628; Fla 110S476; 197 Ind193, 150NE99; 205 Iowa30, 215NW758; 163La34, 111S 486; 165La497, 115S728; 320Mo 280, 6 SW(2d)849; 114Nebr661, 209NW330; OklCr 275P355; OklCr 281P321; OklCr 282P694(2dcase); 120 Or508, 252P951; 124 Or525, 265P422; 34PortoRico 136; 35PortoRico 672; 108TexCr626, 2SW (2d)265; 146Wash180, 262P129; 154 Wash667, 283P195; 43Wyo 72, 283P151. [a] (1) 197 Ind193, 150NE99; OklCr 281 P321. (25) Charging rape with force and arms upon female under age of fifteen years is not duplicative as to offense charged and amendment striking out allegations as to force and arms does not change issue. 222Mich433, 205NW151. (26) Violation of Anti-Narcotic Act. 19F (2d)322. [a] (27) Charge that defendant gave and furnished liquor to minor. 46 Ida765, 271P322. [b] 35PortoRico 580.

766-36 16F(2d)535; 20F(2d)574; 197 Ind16, 164NE93.

767-44 [b] (2) Charge that defendant gave and furnished liquor to minor. 46 Ida765, 271P322.

768-51 24F(2d)325.

768-53 16F(2d)816; 20F(2d)604; 24F (2d)527. [d] **Conspiracy to commit several offenses** may be charged in one count. 16F(2d)816. [e] **Information charging persuading female to go from place to place for purpose of prostitution and concubinage** is not bad for duplicity where no issue is involved as to which of immoralities is involved. 125Kan791, 266P37 (limiting rule, announced in 33 Kan538, 6P899, to cases where protection of rights of accused requires distinction between concubinage and prostitution to be preserved).

769-55 173Ark1071, 294SW66; 40GaA 235, 149SE169; 47 Ida281, 274P108; 161Tenn177, 29SW(2d)255. [a] (4) Sale of intoxicating liquor to two persons at same time may be charged in single count without rendering it duplicitous. 32 OklCr379, 240P753. (5) Information charging failure to furnish necessaries to minor children. 33Ariz170, 263P1.

769-57 85Colo 479, 277P1(2dcase).

769-64 179Ark3, 13SW(2d)828; NJ 141A165, 166 [citCJ].

769-72 But see 167La967, 120S614.

769-77 See also Mo 289SW575.

770-81 51Philippine923.

770-85 307Mo 411, 270SW282; Mo 300 SW719.

770-87 85Colo 479, 277P1(2dcase); Mo 24SW(2d)1020; OklCr 288P499; 131 Or314, 282P105 (indictment held to charge theft of animals as single crime).

770-91 Mo 285SW416.

770-91½-New. or sale of different kinds of whisky in violation of the liquor law, Mo 22SW(2d)787.

770-98 153Miss585, 121S282.

770-4 8F(2d)478; 19F(2d)801; 124 Kan245, 259P691, 693 [citCJ]; 210Ky 588, 276SW498; NJCh 133A519; 244 NY243, 155NE113.

771-7 207 Iowa1114, 224NW83; 124 Me359, 129A226; 107TexCr67, 294SW 856. [a] (5) Other instances. 38F(2d) 450.

771-8 124Me359, 129A226.

771-9 31F(2d)752. See also 197 Ind 709, 151NE721.

771-14 124Kan245, 259P691, 693 [cit CJ].

771-16 273US593, 47SCt531, 71L ed 793; 19F(2d)813; 124Kan505, 260P 629, 630 [citCJ]; 124Kan556, 261P846; 210Ky588, 276SW498; 245Mich530, 222 NW765; 316Mo 150, 289SW822; 116 Or509, 241P983; 122 Or377, 257P699; 157Tenn446, 9SW(2d)702; 69Utah53, 252P280, 288 [citCJperThurman, JJ]. [a] (4) 49SD192, 206NW927. (8) Indictment charging cashier with embezzling, abstracting, and misapplying bank's funds held to charge only single offense, embezzlement. 114Nebr1, 205 NW565.

772-19 69Utah53, 252P280.

772-21 316Mo 150, 289SW822.

772-22 228Ky234, 14SW(2d)759; 162 La1067, 111S423; 316Mo 150, 289SW 822; MoA 31SW(2d)559. But see 206 Iowa981, 221NW445.

772-30 273US593, 47SCt531, 71L ed 793; 19F(2d)202; 38F(2d)450; CalA 284P1096. [a] (1) 34F(2d)630.

773-31 5F(2d)712; 14F(2d)561; 19F (2d)801. [a] **Conspiracy to commit several offenses** may be charged in one count. 5F(2d)437.

773-33 La 125S451.

773-35 115Nebr109, 211NW613.

773-47 17F(2d)723, 724 [quotCJ]; 26 F(2d)791; 212Ky811, 286SW103; 149 Miss223, 115S429; Mo 29SW(2d)71; 135Wash346, 237P994.

774-48 17F(2d)723, 724 [quotCJ]; 212 Ky811, 280SW103; 233Mich222, 206 NW562; 88PaSuper451.

775-49 21F(2d)690, 691 [quotCJ].

775-50 100TexCr626, 272SW167.

775-54 100TexCr626, 272SW167; 106 WVa601, 146SE628.

775-55 24F(2d)527; OklCr 275P385; OklCr 287P842; 100TexCr626, 272SW 167.

775-61 AlaA 115S149, 150 [citCJ]; OklCr 293P278.

775-63 22AlaA300, 115S149, 150 [cit CJ]; 109TexCr450, 5SW(2d)514.

776-64 [a] **Indictment held not duplicitous** because charging keeping of "disorderly house" and keeping "bawdyhouse" in same count. OklCr 293P 275.

776-72 Mo 29SW(2d)71.

776-81 44F(2d)134.

776-82½-New. Counts of an indictment containing more than one count are not interdependent. 120 Oh62, 165 NE566.

776-83 21AlaA300, 107S731; 180Ark 1131, 24SW(2d)334 (same offense against different persons); 83CalA370, 257P92; 88CalA502, 263P836; 328 Ill 332, 159NE360; 146Miss66, 111S850; 315Mo 192, 286SW12; 317Mo 361, 296 SW125; 116Nebr45, 215NW564; 243 NY162, 153NE35; 127Misc862, 217NYS 696; 122 Or377, 257P699; 102TexCr 444, 278SW446; Utah 280P1046 (whether joinder proper determined by consideration of proof admissible). [b] (14) Keeping disorderly house and keeping house of prostitution. 243NY 162, 153NE35.

777-84 317Mo 408, 297SW368.

777-87 207Cal 605, 279P646; 100Tex Cr442, 273SW845.

778-95 70CalA567, 234P129.

778-6 230Ky656, 20SW(2d)484, 66 ALR1297; La 129S736; 310Mo 500, 276 SW625.
778-7 217Ky485, 290SW339.
778-8 102TexCr444, 278SW446. [a] **Counts charging burglary, being accomplice, and receiving stolen goods,** not bad for duplicity. 102TexCr444, 278SW446.
778-10 100WVa213, 130SE451.
779-11 227Ky100, 12SW(2d)329(2d case).
779-23 AlaA 103S104(2dcase).
779-30 127Misc862, 217NYS696.
780-35 127Misc862, 217NYS696.
780-39 243NY162, 153NE35.
780-40 7F(2d)598; 14F(2d)659; 15F (2d)916; 20F(2d)454; 26F(2d)168; 36 F(2d)871; 42F(2d)354; 75CalA109, 241P913; 75CalA365, 242P906; 82CalA 73, 255P244; DC 35F(2d)877; 98Fla 1225, 125S356; 324 Ill 261, 155NE34; 126Me230, 137A396; 234Mich574, 208 NW682; Mich 233NW227; 315Mo 192, 286SW12; 320Mo 196, 6SW(2d)853; Mo 29SW(2d)71; 116Nebr45, 215NW 564; 27 OhA391, 161NE344; 13PaDist &Co 361; TexCr 27SW(2d)808; TexCr 29SW(2d)339; 143Wash99, 254P454; 143Wash262, 255P109; 145Wash672, 261P639; 59NS55, [1927] 1DomLR911. [b] 36F(2d)155. [c] (15) Attempt to commit murder and malicious use of explosives. CalA 274P595. (16) Murder and murder while attempting to commit burglary. Nebr 227NW314. (17) Larceny and knowingly receiving stolen property. 235Ky349, 31SW(2d) 380. (18) Other offenses properly joined. 13F(2d)295, 14F(2d)659; 23 AlaA318, 127S497; 75CalA365, 242P 906; 324 Ill 261, 155NE34; 121Kan844, 250P233; 145Wash672, 261P639. [e] 143Wash262, 255P109. [f] **Legal test** is whether offenses arose in same transaction and whether judgment on one would bar trial for other. Mo 12SW (2d)28.
781-41 207Cal 605, 279P646; 324 Ill 261, 155NE34; 34NM276, 280P406 (statute not retroactive).
781-42 207Cal 605, 279P646 (not necessary to allege fact where it clearly appears from context); Mo 12SW(2d) 28.
781-43 234Mich574, 208NW682; 249 Mich543, 229NW442; 315Mo 192, 286 SW12; 130 Or480, 280P653; 147SC480, 145SE285; 101TexCr336, 275SW829; 145Wash672, 261P639. [a] (5) Smuggling whisky and illegal transportation of liquor. 15F(2d)916; 3DelGenSess 140, 132A219. (6) Murder and murder while attempting to perpetrate burglary. Nebr 227NW314.
781-45 39GaA826, 148SE608(2dcase); 124Misc813, 210NYS250. [a] **Indictment charging theft of automobile** and receiving stolen automobile held defective, in not stating that automobile referred to in each count was same. 124 Misc813, 210NYS250.
782-55 26F(2d)168.
782-65 253Mass549, 149NE417.
782-66 18F(2d)477; 20F(2d)454.
783-76 5F(2d)712; 16F(2d)62; 42 F(2d)68; 202Cal 409, 261P303; 203 Cal 128, 263P226; 70CalA567, 234P129 (assault, with intent to murder, and rape held properly joined as offenses of same class); 91CalA150, 266P860; 96 CalA664, 274P621; OhA 173NE253; Utah 263P86; 99Vt275, 131A798; 146 Wash509, 263P951; 146Wash626, 264 P15. [b] **In Wyoming.**-34Wyo 84, 241 P707.
783-77 5F(2d)712; 7F(2d)244; 8 F(2d)841; 220AlaI12, 124S284(1stcase); 22AlaA590, 118S594; 38GaA358, 144 SE15; 41GaA635, 154SE209; 213 AppDiv571, 211NYS244 (reversed on ground that separate count did not sufficiently identify house where crime was committed); 99Vt275, 131A798. [a] (3) 217Ky539, 290SW314.
783-78 91CalA150, 266P860; 333 Ill 150, 164NE154; 111TexCr482, 14SW (2d)278; 143Wash99, 254P454; 143 Wash281, 255P91; 150Wash136, 272P 48.
783-80 320Mo 202, 7SW(2d)262; 51 SD496, 215NW531; Utah 280P1046.
783-81 51SD496, 215NW531. [a] **In Idaho.**-47 Ida416, 275P1112.
783-83 315Mo 192, 286SW12; 317Mo 361, 296SW125; 101TexCr544, 276SW 261. [a] (2) Receipt of separate and distinct deposits by separate and distinct depositors may not be joined in prosecution for receiving bank deposits with knowledge of bank's insolvency. 202 Iowa162, 209NW288.
783-84 315Mo 192, 286SW12.
783-86 91CalA150, 266P860.
784-88½-New. Separate and distinct offenses cannot be joined in indictment by means of special count. 103NJL246, 136A164.
784-88⅓-New. The offenses of manufacture and distillation of intoxicating liquor and possession of a still may be charged in separate counts of one indictment. 155Miss662, 124S785.
784-89 See also Mo 291SW1078(1st case).
784-90 Mo 292SW27 [citCJ].
784-94 23F(2d)472; 177Ark1, 5SW (2d)355; 75CalA439, 242P876; 121 Kan284, 246P1003; 320Mo 202, 7SW (2d)262; 145Wash435, 260P990. [b] (9) 121Kan284, 246P1003. (12) Burglary and larceny. 318Mo 548, 300SW 678. (13) Several murders committed at different times on same night. 203 Cal 128, 263P226. (14) Manufacture of liquor and keeping and storage of liquor and possession of mash. SD 228 NW382.
784-3 317Mo 380, 295SW747.
785-9 75CalA439, 242P876.
786-19 34Wyo 90, 241P705.
786-28 317Mo 380, 295SW747; Mo 11 SW(2d)1024. [b] **Allegations of prior convictions,** which would render offense charged felony, do not constitute charge of second offense. 135Wash609, 238P638.
786-37 148Wash468, 269P844.
786-38 7F(2d)244; 14F(2d)564; 142 Va609, 128SE555 (manufacture of ardent spirits and felonious carrying of pistol); 150Wash664, 274P797.
787-40 12F(2d)727. [d] (1) 75CalA 439, 242P876. (3) Where indictment charges two or more offenses of same class of crimes under separate counts, prosecution is not required to elect and defendant may be convicted of any number of offenses charged. 75CalA 439, 242P876. (4) Under such statute, where two defendants are indicted for two crimes of rape against the same person on the same day in different counts and there is evidence tending to support each charge, the prosecution cannot be required to elect. 75CalA439, 242P876. [e] **In Washington** offenses not of same class cannot be joined unless connected. Wash 289P41 (challenge allowable altho reversal not sought).
787-41 [a] (11) Separate instances of arson. 146Wash391, 263P180.
787-51 12F(2d)727; 14F(2d)505. See also 44F(2d)49. [a] (10) Making false income tax returns by partners and perjury in making false oath on return. 12F(2d)727. (11) Conspiracy to possess and to manufacture intoxicating liquor, possession of intoxicating liquor, and manufacturing intoxicating liquor. 18F(2d)477.
788-58 31F(2d)544.
788-61 12F(2d)727.
789-63 NJSup 150A253.
789-70½-New. Where information charged two offenses so connected as to show one transaction, where the jury brings in a verdict of guilty on one count only, conviction will be secured. 105TexCr117, 286SW1107.
789-77 Ark 30SW(2d)865; 69Utah53, 252P280, 285 [citCJperStraup,J].
789-78 200 Iowa627, 204NW441; 201 Iowa16, 206NW292 (on defendant's motion); Mo 292SW27; 69Utah53, 252P 280, 285 [citCJperStraup,J].
789-82 52ND478, 203NW679.
789-86 106TexCr496, 293SW817.
789-90½-New. Election to try on one of charges in indictment sufficiently puts accused on notice as to criminal charge he has to meet. 144Va630, 131 SE204.
789-90⅓-New. Under statute permitting joinder of offenses refusal to require election between offenses charged in bill of particulars at conclusion of evidence may not be reversible error in view of right to instruction protecting rights of accused. 142Va628, 128 SE565.
789-91 122Kan840, 253P572; 212Ky 311, 280SW103; 213Ky323, 280SW 1094; 204Ky480, 264SW1067; 215Ky 172, 284SW1039; Mass 170NE813; 124 Or525, 265P422; 129 Or577, 278P974; 132SC236, 128SE722; 41Wyo 72, 283P 151. [a] Mo 23SW(2d)183; 100WVa 213, 130SE451.
789-92 218Ky651, 291SW1041. See also 216Ky405, 287SW937; 69Utah53, 252P280, 285 [citCJperStraup,J].
790-3 180Ark1131, 24SW(2d)334; Mich 233NW227; 100TexCr553, 271SW 631; TexCr 31SW(2d)1075(2dcase).
790-4 15F(2d)916; 16F(2d)59; 22 AlaA306, 115S149; 80CalA167, 251P 327; 3Del 140, 132A219; 335 Ill 432, 167NE10; 127Kan481, 274P223; 241 Mich111, 216NW434; 251Mich542, 232 NW384; MoA 293SW87; 195NC868, 142SE486; 154SC97, 151SE233; 101 TexCr336, 275SW829; 110TexCr217, 8 SW(2d)139; 111TexCr482, 14SW(2d) 278; 104TexCr533, 286SW204.
790-4½-New. Where, according to stipulated facts, defendant's conduct constitutes a single criminal delinquency and not two distinct crimes, constituting carrying separate and successive punishments, the county court should require a county attorney to elect between the count charging being drunk in a public place or the count charging driving an automobile in a public street while in a drunken condition. 121Kan 693, 249P612.
790-6 316Mo 144, 290SW142.
790-7 4Hawaii620; 315Mo 192, 286SW 12; 317Mo 361, 296SW125, 127 [citCJ]; 147SC480, 145SE285; 101TexCr615, 276 SW924.
790-8 4HawaiiFed69; 241Mich111, 216 NW434; 108TexCr444, 1SW(2d)617; 112TexCr307, 17SW(2d)56(2dcase).
790-15 320Mo 219, 6SW(2d)877.
790-15½-New. Rule, that in felony case defendant can be convicted on one count only, does not require election, but court may submit two or more counts to jury with proper instructions. 101TexCr531, 276SW429.
790-20 7F(2d)244.
790-21 317Mo 361, 296SW125, 127 [cit CJ].
790-23½-New. That defendant was tried on two counts until after the argument, when the state dismissed as to one count, cannot be complained of as depriving defendant of a fair trial. 149 Wash675, 272P26.
790-24 7F(2d)867; DC 35F(2d)877 (denial of election between counts held not abuse of discretion); MoA 279SW 199; Nebr 232NW781; 27 OhA391, 161 NE344; 143SC63, 141SE165; 99Vt275, 131A798; 100Vt373, 137A465; 143Wash 99, 254P454. [b] (2) Other instances. Mass 172NE343.
791-25 142SC17, 140SE256.
791-26 100TexCr11, 271SW380; 112 TexCr233, 16SW(2d)123(2dcase); 100 Vt373, 137A465.
791-27 100TexCr11, 271SW380.
791-28 107TexCr620, 298SW424; 111 TexCr325, 13SW(2d)86; 111TexCr388, 13SW(2d)106.
791-29 334 Ill 385, 166NE38.
791-32 334 Ill 385, 166NE38; 52SD619, 219NW817; 143Wash99, 254P454.
792-43 102TexCr444, 278SW446; Tex Cr 27SW(2d)808; TexCr 32SW(2d)191 (2dcase). [b] **Motion to quash properly refused where only one count is submitted.**-102TexCr444, 278SW446.
792-44 214Ky578, 283SW1034; 317Mo 293, 295SW743. But see 156Tenn331, 1 SW(2d)784.
792-46 69Utah53, 252P280, 285 [citCJ].
792-47 69Utah53, 252P280, 285 [citCJ].
792-53½-New. Where a duplicitous charge is expressly reserved, proceeding to trial on another charge is no abandonment of the former. 69Utah53, 252P 280.
792-67 121Kan139, 245P1018, 1019 [cit Cyc].
793-70 6F(2d)530; 12F(2d)765; 19 F(2d)202; 21F(2d)283; 23F(2d)788;

165La120, 115S407; 203Iowa333, 210NW934, 212NW550; OklCr 291P142. [c] But see 317Mo 361, 296SW125.

793-72 30F(2d)866.

793-73 94Fla60, 113S736; 197Ind680, 151NE827; 199Ind630, 158NE593; Ind 168NE481; 163La701, 112S655; NJCh 152A188; 36Wyo 356, 255P786. [d] **Objection to want of filing mark on complaint** must be by motion to quash. 108TexCr647, 2SW(2d)271.

793-74 21F(2d)283; 95CalA92, 272P 786; 94Fla60, 113S736; 203Iowa333, 210NW934, 212NW550; 143Miss787, 109S799.

793-77 3Del102, 131A313; 92Fla262, 109S463; 197Ind680, 151NE827.

793-77½-New. , or by motion to modify judgment by reducing punishment. 197Ind680, 151NE827 (age of raped girl indefinitely stated).

793-78 317Mo 361, 296SW125, 127 [cit CJ].

794-79 317Mo 361, 296SW125, 127 [cit CJ].

794-86 196NC280, 145SE399.

794-89½-New. Motion to set aside judgment after conviction is not the proper remedy where the indictment is absolutely void. 36GaA301, 136SE829.

794-89⅓-New. In a prosecution for selling obscene literature, a motion to require the state to indicate the matter alleged to be obscene raises no question. 197Ind705, 151NE829.

794-89¼-New. In a prosecution for mailing alleged obscene letter, unless the statute was violated by mailing the letter in question, the case should be disposed of by raising legal questions by preliminary motions at the threshold of the case. 29F(2d)248.

794-89⅕-New. Motion to dismiss indictment should be preceded by first permitting withdrawal of defendants' pleas. CalA 290P595.

794-92 26F(2d)487.

794-93 But see 28F(2d)424.

794-74½-New. Attack for a misnomer should be made by a plea. 97Fla988, 122S567.

794-98 OklCr 276P507.

795-8 [e] **Duty to object before jury sworn does not apply** when demurrer will not lie because objection does not appear on face of indictment and is revealed only by testimony at trial. 202Iowa168, 209NW419 (former acquittal).

795-12 198Ind693, 154NE671; 152Miss 13, 118S356.

796-15 49ND1127, 194NW745.

796-19 SD 225NW60.

796-21 SD 225NW60.

796-30 167Minn25, 208NW177.

796-34 196Ind512, 149NE77.

796-36 [a] **Distinguished from plea in abatement.**-43F(2d)135.

796-37 233IllA13. [a] (3) Motion to quash, which fails to specify grounds, amounts to demurrer. 233IllA13.

797-50 Ind 170NE325.

797-57½-New. The statute for setting aside an indictment is procedural only. 128Misc550, 220NYS167.

797-57⅓-New. A motion to quash is mere pleading, requiring proof on appeal. 107TexCr95, 295SW614.

797-57¼-New. A motion cannot raise the issue of the validity of the arrest. 273US1, 47SCt250, 71Led505.

797-57⅕-New. Motion presents a preliminary question of law, not the actual guilt or innocence of accused. 109TexCr148, 4SW(2d)79.

797-58 15F(2d)965; 20F(2d)376; 23F(2d)788; 35F(2d)584; 229Ky87, 16SW(2d)769; 167La190, 118S884; Me 149A389; NJ 130A446; NJSup 132A235; 103NJL246, 136A164; 103NJL663, 138A575; 104NJL10, 139A417; OklCr 279P925(2dcase); 149Va457, 141SE115. [d] **Motion made at close of prosecution's case** held properly overruled in court's discretion. 15F(2d)965.

797-59 149Va457, 141SE115.

797-61 NC 154SE604.

798-74 200Iowa1234, 206NW119; 98PaSuper201.

798-81 200Iowa1234, 206NW119.

798-81½-New. , although first called to the court's attention by an unauthorized and nugatory motion filed on behalf of defendant. 200Iowa1234, 206NW119.

798-87 34PortoRico 477.

798-89 102CalA608, 283P389; 329Ill 576, 161NE83; 254IllA199. [b] **After plea of not guilty** motion to quash is too late. Mass 170NE813.

798-90 16F(2d)451, 453 [citCJ]; 91CalA298, 266P1020; 326Ill 379, 158NE 103; 125Kan365, 263P1081; 160La757, 107S564; MoA 272SW1061; 89PaSuper 244; 12PaDist&Co 423; 108TexCr77, 299SW259.

798-91 16F(2d)451, 453 [citCJ].

798-92 But see 34PortoRico 416.

799-95 MoA 274SW1097.

799-98 134Wash30, 235P6.

799-99 36GaA268, 136SE821; 36GaA 301, 136SE829.

799-6½-New. In some jurisdictions a motion on the ground of the insufficiency of the evidence before the examining magistrate is timely if made before the jury is sworn. 231Mich607, 204NW 742.

799-11 318Ill 114, 149NE3; 254IllA 199; 117Nebr597, 221NW706; 142Wash 388, 253P637.

799-18 198NC349, 151SE733 (on arraignment and before plea, held timely).

799-20 203Iowa333, 210NW934, 212 NW550; NJSup 132A235; 34PortoRico 127 (lack of verification of indictment).

799-21 OklCr 270P862.

800-30 97Fla988, 122S567; 89IndA 590, 166NE300; 119Kan467, 239P749; 150Md687, 133A847; 35OhA311, 172NE 401.

800-41 See also 108TexCr77, 299SW 259.

800-43 OklCr 286P21 (including verification).

800-45½-New. A motion need not be framed with greater certainty than is necessary in stating the offense in the indictment. 197Ind697, 151NE730.

800-47 23AlaA43, 121S432(2dcase) [certiorari den 219Ala116, 121S435(1st case)]; 164La597, 114S171. [b] (2) Indictment not quashable for mistake in spelling juror's name. 22AlaA133, 114 S68.

801-49 [a] (1) 150Md687, 133A847. (2) Motion to quash affidavit on ground of variance between charge and proof cannot be sustained. 199Ind73, 155NE 196.

801-50 [a] (2) Defect in venire of trial jurors. 22AlaA133, 114S68.

801-58½-New. Refusal to quash because minutes of court fail to give name of defendant, where they give the style of case, except the name of defendant, is not error. 100TexCr161, 272SW466.

801-58⅓-New. A motion on the ground that the state elected to proceed on one of the counts has been held properly overruled. 113TexCr142, 18SW(2d) 663.

801-60½-New. The granting of leave to the prosecutor not to file an information and the discharge of defendant without prejudice before an information is filed is not ground for quashing an information based on a subsequent preliminary examination. 41Ida616, 243 P359.

801-60⅓-New. **Tolling of limitations.** 13F(2d)923.

801-61 35Ariz321, 278P63; 199Ind 540, 156NE555; 57ND726, 224NW211.

802-65½-New. Statutory grounds for setting aside indictments which cannot apply to informations are not grounds for setting aside an information. 52SD 273, 217NW205.

802-66 98Fla1231, 125S353; 4Hawaii Fed210; 196Ind512, 149NE77; 199Ind 540, 156NE555; 165La120, 115S407; 150 Md687, 133A847. [c] 97Fla988, 122S 567.

802-67 See also 28F(2d)424.

802-68 196Ind512, 149NE77.

802-70½-New. , or face of indictment. 143Miss312, 108S723.

802-74 165La120, 115S407. See also 199Ind73, 155NE196.

802-75 214AppDiv804, 210NYS562 (so also of demurrer); 8PaDist&Co 798.

802-81 But see Mo 18SW(2d)827.

803-88 See also 91Fla1026, 109S804.

803-91 52SD273, 217NW205. But see 29F(2d)573; 30F(2d)866.

803-92 Contra 273US1, 47SCt250, 71Led505.

803-1 29F(2d)573.

803-4 [a] **Irregularities in search warrant and affidavit** held not grounds for quashing indictment. TexCr 29SW(2d) 774.

803-4½-New. Commonwealth attorney's statement of law relative to indictments laid before grand jury in open court without reference to indictment against accused, not violation of rights of accused or statute making appearance of commonwealth attorney before grand jury during deliberations unlawful. 143Va554, 130SE416.

803-4⅓-New. Where, in an examination by the grand jury, accused was not informed of his constitutional rights, but was not compelled to testify, there is no basis for quashing the indictment. 160La199, 106S782.

803-4¼-New. The mere fact that an illegal search warrant was issued prior to the indictment is not ground for quashing it. 103NJL534, 138A203.

803-5 97CalA288, 275P495; 232Mich 443, 205NW154; Mo 12SW(2d)46. [a] (9) That information on which bill was founded was procured by unlawful means is no ground for quashing bill or dismissing prosecution. 161La988, 109 S787. [b] 33PaSuper348. [c] **Motion to set aside information may be based** on ground that it was not signed by county attorney or that defendant has not been legally committed. Ariz 282P930.

804-14⅕-New. Failure of committing magistrate to inform defendant, ignorant of the English language, of any of his constitutional rights is a ground for setting aside an information where he was not at any time represented by counsel. 80CalA318, 250P526.

804-15 194Cal1, 227P156 (complaint not questioned before magistrate); 46 Ida561, 270P417.

804-21 91CalA298, 266P1020; CalA 285P870. [a] **Motion to quash information** because no sufficient evidence of venue was presented to committing magistrate to give him jurisdiction held not sustained by evidence. 232Mich 433, 205NW151.

804-21½-New. In some jurisdictions it is ground for quashing an information that the evidence before the magistrate was insufficient to prove the corpus delicti. 231Mich607, 204NW742.

804-24 204Iowa837, 216NW43; 316 Mo 213, 292SW721. [a] **Collateral attack on commissioners** cannot establish invalidity. AlaA 130SE527.

804-25 71CalA176, 235P51; 204Iowa 837, 216NW43; 164La813, 114S696; 169 La55, 124S143(2dcase); 316Mo 213, 292 SW721; 122Okl 64, 252P6; 194Wis410, 217NW283. [a] (13) That court ordered larger number to be drawn than prescribed by statute. 122Okl 64, 252P6. (14) Motion to quash indictment eight months after issuance on ground that judge made order for drawing when outside his district. 14F(2d)12. (15) Indictment not quashed because clerk of jury board did not advertise time and place of drawing. 12PaDist&Co 585.

805-26 102TexCr426, 278SW220; 105 TexCr350, 288SW456. [a] (5) Motion to quash is not proper method for attacking, as irregular, appointment of jury commission which selected grand jurors. 109TexCr218, 3SW(2d)816.

805-31½-New. But the interest of members of the jury commission in civil suits pending in courts of county is not a ground for quashing indictment. 101 TexCr114, 274SW981.

805-35 329Ill 576, 161NE83.

805-38½-New. An indictment may be set aside in the absence of waiver where two members of the grand jury which returned it were drawn from the same civil township in violation of statute. 200Iowa1234, 206NW119.

805-38⅓-New. It is immaterial that an oral order duly made for summoning of grand jurors was not entered until after indictment was found. 307Mo 352, 270SW310.

805-38¼-New. That the appointment of the clerk administering the oath to the grand jury had not been certified to the governor is not ground for quashing the indictment since incumbent was a de facto clerk. 106TexCr402, 292SW 893.

805-38½-New. The court's striking names from the list of grand jurors selected by the commissioners held not

ground for a motion to quash the indictment. 105TexCr405, 289SW73.

805-38½-New. In the absence of anything of record, setting up by plea or otherwise allegations specifying an objection to constitution of a grand jury or disqualification of any individual juror, a motion to quash the indictment on such ground will be denied. 30F(2d) 866.

805-39 22AlaA93, 112S806; 199 Ind 540, 156NE555; 108TexCr142, 299SW 437. [a] **Matters not constituting ground for quashing.**-57ND726, 224NW 211.

805-41 49SD481, 207NW477.

806-43 109TexCr168, 3SW(2d)459.

806-44½-New. Where a defendant was not held to answer before the indictment, he is entitled, under some statutes, to raise by motion to quash the objection that notice of the meeting of the drawing board was not given in accordance with the statute. 50SD388, 210NW350.

806-51 [a] **Exception to rule.**-Where there is arbitrary disregard of procedure to select grand jury, motion is well made after impaneling jury. 102 TexCr426, 278SW220.

806-58½-New. Motion to quash made long after arraignment and after procuring a continuance is too late. 215 Ky589, 286SW785.

806-61 20F(2d)376; 105TexCr297, 288 SW224; 106TexCr478, 293SW573; Tex Cr 24SW(2d)396 (where judge testifies to Mexicans on jury).

806-65 CalA 265P310; NJSup 150A249 (motion properly overruled); 198NC349, 151SE733; 55ND437, 214NW39; SC 155SE385.

807-69 223Ky677, 4SW(2d)683. [a] 168La1099, 123S781.

807-70 210Ky410, 276SW127.

807-73½-New. Expression of opinion of defendant's guilt in a grand jury report does not constitute ground for quashing the indictment where defendant failed to object to the qualification of the grand jurors before the indictment was returned. 170Ark602, 280SW 636.

807-76 167La190, 118S884. [b] **Burden of showing race discrimination in selection** of grand jury is on defendant. 106TexCr478, 293SW573.

807-80 43F(2d)135; 171Ark620, 286 SW871, 48ALR1189; 12PaDist&Co 529 (swearing of witnesses by foreman); 12 PaDist&Co 585 (swearing of witness by foreman of grand jury).

807-81 22AlaA360, 115S761, 762 [quot CJ]; 81CalA226, 253P735; 152Miss625, 120S751; 55ND437, 214NW39.

808-83 CalA 265P310.

808-85 159La674, 106S28.

808-86½-New. Nor because the grand jury sat in a building a few feet away from the temporary courthouse while a new courthouse was in the process of construction. 141Miss788, 106S96.

808-86¾-New. That the grand jury, after being empaneled and working for a few days, adjourned for several days and that the judge left the county and held session of court in another county during such period is not ground for quashing an indictment found by the grand jury after reconvention. 122 Okl 64, 252P6.

808-89½-New. It is not ground for quashing indictment that a committee of ladies requested the grand jury during recess to investigate a charge and to take action if justified. 159La589, 105S 631.

808-89⅔-New. The presence of the district attorney, who is not a licensed attorney, before the grand jury is sufficient to render the indictment void. 319 Ill 596, 150NE280.

808-89¼-New. Presence of deputy sheriff while accused was before grand jury held to render bill invalid. 22AlaA 143, 113S465.

808-89⅓-New. A district attorney's expression of opinion before the grand jury as to the effect or sufficiency of the evidence does not invalidate the indictment although acted upon by the grand jury. CalA 265P310.

808-91 15F(2d)965; 171Ark620, 286SW 871, 48ALR1189. See also 28F(2d)424 (dictum).

808-93 15F(2d)965; Iowa 228NW1; 152Miss625, 120S751. [a] (4) Motion to quash information on ground that evidence was procured in unlawful search under void search warrant held properly denied. 44 Ida43, 254P788, 52ALR 463.

808-96 10PaDist&Co 432.

808-97½-New. An indictment may not be quashed on the ground that it was found and returned on testimony improperly obtained. 200 Iowa333, 202 NW77.

808-99 217Ala68, 114S794 [foll 53Ala 481]; 21AlaA554, 110S58; 21AlaA638, 111S315; 91PaSuper571, 575 [citCJ]. [b] **Where corroboration of prosecutrix is essential** to indictment, only fact thereof considered, and not weight of such testimony. 21AlaA638, 111S315.

809-2 22AlaA136, 114S791; 35Ariz321, 278P63.

809-3 24F(2d)405, 407 [quotCJ]; 22 AlaA136, 114S791.

809-4 15F(2d)965; 24F(2d)405, 407 [quotCJ].

809-5 24F(2d)405, 407 [quotCJ]. See also 21AlaA638, 111S315.

810-10 15F(2d)965.

810-11 22AlaA143, 113S465; 136Misc 17, 241NYS733. [c] **Motion to quash is proper remedy** to take advantage of statutory immunity. 22AlaA360, 115S761.

810-24 199 Ind630, 158NE593.

810-29 Fla 129S832; 12PortoRicoFed 482.

810-33 97PaSuper495.

810-34 243 IllA427; OklCr 270P862; OklCr 274P901. See also 251 IllA425.

810-38 124Kan20, 257P925; 94PaSuper419. [a] (5) Indictment for transporting liquor, charging offense in language of statute, is not subject to motion to quash. 198 Ind45, 152NE161.

811-39 7F(2d)271; 90Fla133, 105S314; 90Fla844, 107S530; 94Fla490, 114S 317; 97Fla988, 122S567; 99Fla1132, 128S494. [a] **Information sufficiently acquainting accused with nature and cause** of accusation will not be quashed as motion. 90Fla133, 105S314 (substantially in language of statute).

811-40 14F(2d)12; 197 Ind193, 150NE 99; 13PaDist&Co 66 (averring ownership of stolen goods in unincorporated association instead of in members).

811-42 134Wash30, 235P6.

811-43 See also 3Del 102, 131A313.

811-44 196 Ind332, 147NE624.

811-51 TexCr 25SW(2d)862.

811-52 But see 41Wyo365, 285P992.

811-53½-New. Under statutes a motion to quash, when confined to its proper office, does not raise a question that facts do not constitute a punishable offense. 40Wyo 404, 278P563.

811-53⅓-New. By statute in some jurisdictions indictment may be quashed for defects in form of indictment or in manner in which offense is charged. Nebr 232NW781.

811-58 97PaSuper495.

811-61 199 Ind540, 156NE555; Iowa 228NW1.

811-61½-New. Failure to indorse names of witnesses as ground for setting aside information under statute held different from ground for setting aside indictment. 52SD273, 217NW205.

812-65 9PaDist&Co 768.

812-66 [a] **Setting forth christian name by initial only** is not ground for quashing indictment. 14F(2d)659.

812-67 But see 109TexCr218, 3SW(2d) 816.

812-69 109TexCr443, 5SW(2d)510.

812-70 See also 213Ala169, 104S438.

812-72 201 Iowa16, 206NW292; 118 Kan603, 236P663; 317Mo 361, 296SW 125, 127 [citCJ]; NC 154SE604; 41 Wyo 365, 285P992. [a] **Allegations held not duplicitous.**-105TexCr55, 285SW 322.

812-73 324 Ill 261, 155NE34. But see NJSup 152A206. Contra 101WVa123, 132SE368.

812-78 But see 89PaSuper339.

812-79 5F(2d)437.

812-80 91Fla79, 107S416; 98Fla1231, 125S353; 318 Ill 188, 149NE269; Ind 166NE439; NJ 146A335; Va 153SE 821.

812-89 159La589, 105S631 (motion to quash held properly tried at defendant's request by court without jury).

812-89½-New. Trial by court without jury of motion to quash because indictment was prescribed is proper where defendant so requested. 159La589, 105S 631.

812-89¾-New. The inquiry the motion involves is not triable by a jury. 22Ala 136, 114S791.

812-89¼-New. Motion on day set for trial to quash indictment held properly denied where no diligence was shown to have grand jurors present to testify in support thereof. 175Ark1083, 3 SW(2d)23.

812-89⅓-New. Accused has a right to be heard on a motion to set aside an indictment on the ground of the insufficiency of the evidence before the grand jury. OklCr 277P256.

812-92 Mo 296SW152.

813-99½-New. The court will inquire into matters which affect the integrity of a grand jury or irregularities, but may not inquire into a grand jury's deliberations. 29F(2d)573.

813-99¼-New. The question whether defendant, accused of statutory rape, voluntarily and knowingly waived preliminary examination, is a question of fact for the trial court's determination, under evidence. 322Mo 194, 14SW(2d) 611.

813-3 8F(2d)561; 194Cal 1, 227P156; Mo 12SW(2d)51; Mo 18SW(2d)53 (as to variance). See also 335 Ill 412, 167NE29. [b] (12) Defendant must show injury or prejudice resulting from irregularity in excluding names of women from box from which grand jury was drawn. 8 F(2d)561. [c] 106TexCr478, 293SW573. [e] (4) To show untrue statements in indictment as to grand jury's lack of knowledge of exact place of crime. 25 F(2d)581. (5) Other instances. 232Ky 453, 23SW(2d)930; 152Miss625, 120S 751. [g] **Evidence held sufficient** to show waiver of preliminary examination. 322Mo 194, 14SW(2d)611. [h] **"Taking of evidence" under statute.**-Taking of evidence to identify transcript of evidence taken at preliminary hearing held not "taking of evidence" under statute. OklCr 281P166.

814-4 CalA 265P310; OklCr 277P 256.

814-5 22AlaA136, 114S791; 152Miss 625, 120S751; 109TexCr218, 3SW(2d) 816; TexCr 12SW(2d)578(1stcase).

814-6 [a] (4) Other instances. Iowa 228NW1.

814-11½-New. It is not error for the court to refuse to send for witnesses to testify in support of a motion where the ground alleged is insufficient. 170 Ark602, 280SW636.

814-11⅓-New. Defendant may not prove that all or part of the testimony before the grand jury was hearsay, to show that after eliminating such, what remains is insufficient to make out a prima facie case. 6PaDist&Co 15.

814-11¼-New. Records of another court are inadmissible in the absence of proof of the identity of the offense. 5 PaDist&Co 19.

814-11⅙-New. Inclusion of certain grounds in a motion to quash the information excludes consideration of others. 44 Ida43, 254P788, 52ALR463.

814-11⅙-New. Witnesses testifying before grand jury may be examined. 22 AlaA136, 114S791.

814-11½-New. Notes and testimony of solicitor's stenographer. The transcribed notes of such stenographer taken at a meeting of the grand jury are not admissible to show that no legal evidence was introduced to support the indictment. 22AlaA136, 114S791.

814-11⅓-New. And it is not reversible error to refuse to allow the stenographer to refer to the notes in testifying as to what witnesses testified before the grand jury. 217Ala68, 114S794.

814-11⅙-New. Defendant may not examine witnesses who testified before the grand jury to prove that their testimony before that body was insufficient to warrant a return of a true bill. 91 PaSuper571.

814-12 22AlaA136, 114S791; OklCr 277P256. But see 12PaDist&Co 203.

814-17½-New. In the absence of proof

that defendant had not been legally committed by a magistrate, a motion to dismiss an information on such ground is properly denied. 194**Cal** 1, 227**P**156.

814-18½-New. Allegations of place as unknown to the grand jury are presumed true, in the absence of contrary showing. 25**F(2d)**581.

814-20 See also 4**HawaiiFed**210.

815-21 147**SC**325, 145**SE**194.

815-27 23**F(2d)**156.

815-28 197 **Ind**680, 151**NE**827.

815-30 197 **Ind**680, 151**NE**827; 32**Porto Rico** 92.

815-33 34**PortoRico** 106.

815-38 **Ariz** 282**P**930 (order held proper order under statute).

815-40½-New. Granting of a motion to quash is in effect a ruling that the pleading ought to be amended. 40**Wyo** 404, 278**P**563.

815-40¾-New. On motion to quash information for duplicity court should order severance or strike out count as surplusage. 251**Mich**359, 232**NW**358.

815-41 5**F(2d)**437 (unprovable allegations may be rejected as surplusage); 219**Ky**834, 294**SW**790.

815-44 202**Cal** 165, 259**P**943.

815-46 219**Ky**834, 294**SW**790.

816-49 298**Pa**63, 148**A**45.

816-51 21**F(2d)**283; 3**Del** 102, 131**A** 313; 190**NC**322, 130**SE**10.

816-54 190 **NC**322, 130**SE**10.

816-55 232**Ky**686, 24**SW(2d)**568; 190 **NC**322, 130**SE**10.

816-59 100**Vt**140, 135**A**705, 711 [cit CJ].

816-59½-New. A special demurrer on the ground that the offense was committed in a county other than alleged is properly overruled. 215**Ky**847, 287 **SW**21.

816-61 102**CalA**608, 283**P**389.

816-64 203 **Iowa**333, 210**NW**934, 212 **NW**550.

816-66 29**PortoRico** 856. See also 142 **Wash**388, 253**P**637. [b] **Plea not withdrawn.**-213**AppDiv**571, 211**NYS**244.

817-74½-New. Denying the filing of a demurrer after an amendment of the information not affecting a substantial right and after the jury is impaneled is proper. 88**CalA**591, 264**P**263.

817-87 71**CalA**709, 236**P**217; 38**GaA** 449, 144**SE**138; 202 **Iowa**537, 210**NW** 555. [b] (1) 43 **Ida**564, 253**P**842, 845 [citCJ].

817-89 169**Ga**552, 150**SE**839.

818-95½-New. Demurrer must not aver new facts not alleged in the indictment. 122 **Or**257, 257**P**806.

818-96 70**CalA**567, 234**P**129 (only face of pleading considered); 164**Ga**128, 138 **SE**67; 227**Ky**710, 13**SW(2d)**1046; 231 **Ky**554, 21**SW(2d)**981; 150**Miss**542, 117 **S**374; 244**NY**243, 155**NE**113; 55**ND** 194, 212**NW**857; 122 **Or**257, 257**P**806; 100**Vt**140, 135**A**705. [a] (6) Variance between indictment and proof, although fatal, cannot be raised by demurrer. 235**Ky**5, 29**SW(2d)**646. [f] **By demurrer and not otherwise** must advantage be taken of defect in indictment appearing on face thereof under statutes in some jurisdictions. 143**Miss**787, 109**S** 799.

818-97 100**Vt**140, 135**A**705.

818-97½-New. If indictment is to be sustained upon ground that counts are statements of "two or more different offenses connected together in their commission," it must show such fact on its face. 70**CalA**567, 234**P**129.

818-1 22**AlaA**107, 114**S**71 ("bu" for "by" is mere clerical error, self-correcting); 233 **Ill**A13 (defects of substance only are attacked by demurrer).

818-3½-New. Indictment is not subject to demurrer, merely because it does not properly allege a previous conviction which would make defendant liable to increased penalty. 210**Ky**571, 276**SW** 533.

818-8¼-New. If an indictment contains allegations which constitute an offense for which no penalty is provided by statute or common law, demurrer is the proper remedy. 151**Md**438, 135**A**161.

818-9 71**CalA**709, 236**P**217; 99**CalA**37, 277**P**1082. [d] **Defects in preliminary complaint.**-71**CalA**709, 236**P**217. [e] **District attorney complaining witness.**-71**CalA**709, 236**P**217.

819-10 88**CalA**609, 264**P**318; 119 **Or** 409, 243**P**72.

819-14 210**Ky**332, 275**SW**810 (indictment not signed by foreman).

819-15½-New. That the grand jury report was written by the prosecuting attorney and recited that the jurors believed defendant guilty is not ground for demurrer. 170**Ark**602, 280**SW**636.

819-19 21**F(2d)**283; 22**AlaA**369, 115**S** 769; 77**CalA**301, 246**P**557; 37**GaA**113, 138**SE**922. [d] **Averments held sufficient.**-232**Ky**214, 22**SW(2d)**629.

819-26 215**Ala**148, 109**S**849.

819-28 7**F(2d)**271; 31**F(2d)**805. But see 29**F(2d)**239 [certiorari den 279**US** 849, 49**SCt**346(5thcase), 73**L ed**993].

819-30 77**CalA**301, 246**P**557; 3**Del** 102, 131**A**313; 133**Misc**658, 233**NYS**656; 12 **PortoRicoFed**482.

820-40 35**GaA**578, 134**SE**183.

820-42 See also 215**Ky**498, 285**SW**232.

820-48½-New. It cannot be maintained that there is a variance between complaint and information, where the information alleges same facts as the complaint, but states them with more detail. 71**CalA**709, 236**P**217.

820-48¾-New. An indictment is not demurrable which alleges a former conviction and that the charge for which he was indicted was committed after that conviction. 219**Ky**482, 293**SW**984.

820-49¼-New. Insufficiency of notice that record proof of prior conviction will be introduced may be taken advantage of by demurrer. 147**Va**678, 137**SE** 478.

820-49½-New. Demurrer is properly overruled where allegations are sufficient to charge any offense whatever. 155**SC** 495, 152**SE**738.

820-49 17**F(2d)**723; 21**F(2d)**690; 47 **Ida**416, 275**P**1112; **OklCr** 293**P**268; 69 **Utah**53, 252**P**280.

820-50 **NC** 154**SE**604; 101**WVa**123, 132**SE**368. [a] 8**F(2d)**841.

820-53 89**PaSuper**339.

820-54 214**Ky**578, 283**SW**1034; 317**Mo** 361, 296**SW**125, 127 [citCJ].

820-55 214**Ky**680, 283**SW**1002.

820-56 69**Utah**53, 252**P**280; **Wash** 289 **P**41.

821-63 126**Me**230, 137**A**396; 157**Md**185, 145**A**492; 143**Va**540, 129**SE**257 (general demurrer).

821-63½-New. but a demurrer to a separate count should be either entirely sustained or entirely overruled. 17 **F(2d)**479.

821-64 76**CalA**419, 245**P**212, 216 [quot CJ].

821-65 220**Ala**30, 123**S**231, 68**ALR**712; 76**CalA**419, 245**P**212, 216 [quotCJ]; 145 **Miss**207, 110**S**447; 100**Vt**140, 135**A**705; 104**WVa**480, 140**SE**324.

821-66 76**CalA**419, 245**P**212, 216 [quot CJ].

821-67 76**CalA**419, 245**P**212, 216 [quot CJ].

821-79½-New. Overruling a demurrer to a complaint not subject to any defects urged is not error. 21**AlaA**548, 109 **S**896.

821-79½-New. On demurrer to an indictment for embezzlement while employed as assistant postmaster of a named post office, it cannot be assumed that the post office was of a class in which an assistant postmaster was not authorized. 18**F(2d)**648.

821-79¼-New. The court need not rule on a demurrer, although filed, where it is not actually presented in open court by defendant or his counsel. 85**CalA** 192, 259**P**67.

821-80 [b] (2) Where no valid objection to information is presented and court attempts to nullify proceedings by sustaining demurrer which merely alleges defects in an extinct pleading, its action is void. 71**CalA**709, 236**P**217.

821-82 76**Cal** 419, 245**P**212, 217 [quot CJ].

821-86 76**CalA**419, 245**P**212.

822-87 76**CalA**419, 245**P**212, 217 [quot CJ].

822-91 76**CalA**419, 245**P**212, 217 [quot CJ].

822-5 51**Philippine**34 (where defect amendable).

822-6½-New. Discretionary power in the court to order resubmission to the grand jury because the charge is defective does not include power simply to authorize a resubmission. 202 **Iowa**537, 210**NW**555.

822-8 See also 202 **Iowa**537, 210**NW** 555. [a] **Where district attorney was not authorized to amend** after demurrer was sustained as to count in information, judgment is not sustainable as to such count in amended information. 100**CalA**113, 279**P**1070.

822-17½-New. Demurrer sustained to a count of an indictment does not destroy it's effect for reference purposes. 33**F(2d)**238.

822-18 78**CalA**426, 248**P**1021; 81**CalA** 668, 254**P**640; 203 **Iowa**333, 210**NW**934, 212**NW**550; 203 **Iowa**1305, 214**NW**735; 209**Ky**15, 272**SW**24; **OklCr** 268**P**1115; 69**Utah**53, 252**P**280.

823-19 78**CalA**426, 248**P**1021; 84**CalA** 663, 258**P**457; 203 **Iowa**333, 210**NW**934, 212**NW**550; 209**Ky**15, 272**SW**24; 69 **Utah**53, 252**P**280.

823-20 **Ala** 128**S**129(2dcase); 3**Del** 102, 131**A**313; 54**ND**878, 211**NW**816.

823-24 209**Ky**15, 272**SW**24.

823-25 201 **Iowa**159, 205**NW**534; 203 **Iowa**333, 210**NW**934, 212**NW**550.

823-27 54**ND**878, 211**NW**816; 54**SD** 267, 223**NW**55; 69**Utah**53, 252**P**280.

823-28 97**CalA**288, 275**P**495; 235**Ky** 683, 32**SW(2d)**34.

823-29 76**CalA**114, 243**P**898; 3**Del** 102, 131**A**313; 231**Ky**505, 21**SW(2d)**828; **OklCr** 268**P**1115.

823-36 122 **Or**377, 257**P**699; 34**Porto Rico** 290 (surname of deceased in murder case).

823-41 281**US**619, 50**SCt**424, 74**L ed** 1076; 17**F(2d)**479; 94**Fla**268, 113**S**707; **Mass** 169**NE**542.

824-44 [a] **Failure to connect all defendants** was not amendment. 36**F(2d)** 859.

824-44½-New. Unauthorized amendment of indictment by the court does not destroy its validity as originally returned by the grand jury. 16**F(2d)**863.

824-46 94**Fla**268, 113**S**707.

824-47 259**Mass**453, 156**NE**890.

824-51 21**AlaA**284, 107**S**725; 76**CalA** 734, 245**P**1109; 77**CalA**745, 247**P**580; 79**CalA**605, 250**P**578; 101**CalA**84, 281**P** 404; 202 **Iowa**1377, 212**NW**63; **Iowa** 231**NW**318; 148**Miss**62, 114**S**123; **Miss** 119**S**355; 150**Miss**797, 117**S**116; 155 **Miss**298, 124**S**353(2dcase); 34**PortoRico** 290; 105**TexCr**572, 289**SW**1012; 150**Va** 580, 142**SE**354; 200**Wis**145, 227**NW**306. [a] (1) 76**CalA**734, 245**P**1109; 79**CalA** 160, 248**P**1042 (prosecution for pimping). (2) Power to determine whether change in accusation is of such nature as to affect substantial rights of defendant is for trial court and not for prosecuting attorney). 76**CalA**734, 245 **P**1109. (3) Indictment sufficiently but imperfectly stating matter indicating commission of crime may be amended on motion of district attorney. **Cal** 286**P**697. [b] **Purpose.**-160**La**503, 107 **S**386. [c] **Amendment of indictment** during trial so as to render previous ineffective indictment good is not authorized by such statute. 264**Mass**378, 162 **NE**733.

824-52 29**F(2d)**103.

825-53 **NJ** 148**A**776.

825-54 208 **Iowa**802, 226**NW**57.

825-56½-New. **In Oklahoma** amendment can be made only in open court. 213**Ala**555, 105**S**664.

825-56¾-New. Signing of indictment by solicitor after filing thereof is not amendment. 213**Ala**555, 105**S**664.

825-56¼-New. Defendant is not entitled to continuance by reason of an amendment as to a formal matter. 105 **TexCr**572, 289**SW**1012.

825-60 **Mass** 169**NE**542.

825-65 213**Ala**555, 105**S**664; 23**AlaA** 351, 125**S**604(2dcase).

826-76 85**CalA**732, 260**P**378.

826-76½-New. A change in an essential part of the charge cannot be made after evidence has been introduced. 119**Kan** 757, 241**P**119.

826-76¾-New. Filing of an order allowing amendment is not necessary provided it is actually entered on the minutes before the trial of the case. 146 **Miss**322, 111**S**564.

826-76¼-New. A clerical mistake of the clerk in marking such order as being filed after the trial of the case is immaterial. 146Miss322, 111S564.

826-78 106La503, 107S386, 387 [quot CJ]; 148Miss62, 114S123; 153Miss290, 120S445 (variance must be material to necessitate amendment).

826-79 See also 208 Iowa802, 226NW57. [a] Amendment must be entered on minutes of court or the indictment remains as it originally stood. 157Miss548, 128 S579.

826-80 [b] **Indictment held not void, but defective.**-17F(2d)479.

826-81 17F(2d)479.

826-82 204 Iowa977, 216NW271.

826-84 See also 205 Iowa30, 215NW 758.

826-86 16F(2d)62; Kan 291P742; 168 La364, 122S67; Nebr 233NW461; 48 Philippine877. [a] **Leave of court unnecessary** where amendment made in open court before plea. 129Kan175, 281 P872.

826-90 OklCr 288P362; OklCr 288P 365(2dcase).

826-92½-New. Unless limited by statute right to amend information is generally as broad as right to amend pleadings in civil actions. MoA 31SW(2d) 559.

827-96 70CalA489, 233P413; 79Mont 46, 254P872; 45Philippine173.

827-97 250Mich573, 231NW126; MoA 281SW142; Mo 12SW(2d)46; OklCr 268P1116 (after plea). [c] **In Iowa.**-202 Iowa450, 209NW468. [d] **After change of venue has been awarded,** information may be amended. 317Mo 319, 296SW132. [e] **Where court is given discretion,** it is immaterial whether amendment is in form or substance. 317 Mo 319, 296SW132.

827-97½-New. , or after trial has begun. OklCr 282P899.

827-97¼-New. In Missouri amended information may be filed after original has been quashed where no material change is made. 311Mo 461, 278SW719.

827-98 198Cal 112, 243P667; 77CalA 427, 245P998; 82CalA489, 255P781; Fla 130S912; 202 Iowa450, 209NW468; 312Mo 425, 279SW102; Mo 23SW(2d) 179; Mo 23SW(2d)183; Mo 300SW820; Mo 1SW(2d)153; Mo 18SW(2d)53; 77 Mont297, 250P612; 74Mont201, 239P 1002; 34NM112, 278P210; OklCr 287P 1080; OklCr 284P903; OklCr 292P76. But see 70CalA489, 233P413. [a] (2) Permissible under statute. 82CalA422, 255P552 (prosecution for rape).

827-99 Mo 23SW(2d)179; Mo 23SW (2d)183; 79Mont46, 254P872; 69Utah 266, 254P141. Contra Utah 287P909. [a] **After change of venue and after jury is sworn** information cannot be amended. MoA 272SW710.

827-4½-New. In a prosecution for unlawful possession of liquors the amendment during the trial of a count charging a prior conviction so as to charge a different offense is prejudicial error. 70CalA489, 233P413.

827-8 77Mont297, 250P612.

827-9½-New. The procedure by indictment is so different from that by information as to justify a distinction made by a statute prohibiting the amendment of an indictment so as to change the offense charged, but permitting the amendment of an information so long as the crime stated by the amendment is supported by the evidence taken at the preliminary examination. 198Cal 112, 243P667.

827-9⅓-New. Such statute does not deprive a person prosecuted by information of due process of law. 198Cal 112, 243P667.

827-9¼-New. The legislature has power to provide that an information may be amended so long as the crime stated is supported by the evidence taken at the preliminary examination. 198Cal 112, 243P667.

827-10 7F(2d)309; Mo 296SW423; 69 Utah266, 254P141.

828-17 311Mo 461, 278SW719.

828-18½-New. or by a special prosecutor appointed by the court in place of a disqualified prosecuting attorney, OklCr 272P493.

828-21 Iowa 231NW451.

828-26 16F(2d)62; Mo 278SW665.

828-27 34PortoRico 80.

828-32 23AlaA90, 121S443(2dcase); 23 AlaA33, 120S304(2dcase); 23AlaA457, 126S895; 197 Ind603, 151NE609. See also 164La167, 113S805. [a] (2) Inclusion of all offenses relative to same act. 89 IndA617, 167NE631.

828-34 22AlaA56, 112S98.

828-37 22AlaA56, 112S98.

828-37½-New. An amended affidavit may state charges not included in the original. 198 Ind253, 151NE697.

828-37⅓-New. and need not be signed by the same person who signed the original. 198 Ind253, 151NE697.

828-37¼-New. An amended affidavit supersedes the original affidavit on file, therefore not requiring a count in the amended affidavit to be stricken because it is the same as in the original affidavit. 89 IndA617, 167NE631.

828-38 45Philippine173.

829-43 77CalA745, 247P580; 96CalA 358, 274P592(2dcase); 94Fla268, 113S 707; 202 Iowa1377, 212NW63; NJ 148 A776; 160La79, 106S701; 107TexCr95, 295SW614; 147Va678, 137SE478. See also 77CalA427, 245P998; 246 IllA376. [a] (2) Clerical misprision in date in caption, where other date correct, is not fatal. 94Fla268, 113S707.

829-46 79CalA605, 250P578.

829-47 79CalA605, 250P578.

829-48 But see MoA 299SW821.

829-49 79CalA605, 250P578; 169La699, 125S859; Mass 169NE542 (test of materiality). See also Mo 296SW423. [b] (2) Amended information charging misdemeanor of possessing intoxicating liquor as well as felony of transportation, which alone was charged in original information, does not create new case which special judge, called in before amendment, could not try. 312Mo 425, 279SW102. [e] **Amendment eliminating reference to prior conviction** does not change identity of offense charged. 79 CalA605, 250P578.

829-50 69Utah266, 254P141.

829-50½-New. or to charge a felony by an additional charge of a prior conviction, 79Mont46, 254P872.

829-50⅓-New. even though defendant is rearraigned and pleads over. 79Mont 46, 254P872.

829-52½-New. Amendment will not be made to change charge of misdemeanor to a charge of felony. 79Mont46, 254P 872.

830-53 Mo 22SW(2d)809.

830-57½-New. An information for felonious assault may be amended by describing the same offense with more detail as to means employed and force used than is alleged in the complaint. 194Cal 1, 227P156.

830-57⅓-New. Amendment of indictment after conviction to conform to proof, so as to come within Penal L. §§ 480, 481, is abortive. 216AppDiv771, 215NYS95.

830-57¼-New. Under some statutes, where preliminary examination was waived, the information may be amended so long as the amended information charges substantially the same offense as that charged in the original complaint. OklCr 272P485(2dcase).

830-58 169La377, 125S277.

830-59 150Miss797, 117S116. [d] **Amending indictment to change spelling of defendant's surname** is proper under statute if his identity is not thereby changed. 166La924, 118S85.

830-61 TexCr 27SW(2d)217(2dcase).

830-68 259Mass453, 156NE890. [a] **Entering defendant's real name** held not amendment of indictment describing defendant only by fictitious name. 259 Mass453, 156NE890.

830-68½-New. The court must allow a motion to enter the true name of defendant indicted under fictitious name. 259 Mass453, 156NE890.

830-68⅓-New. Under some statutes, mistake in an information as to defendant's given name can be corrected by amendment even after an appeal has been taken. MoA 299SW821.

830-68¼-New. Under statutes, where defendant is arraigned under a John Doe warrant, the court should ascertain his true name, and thereafter the prosecution should be conducted in his true name. OklCr 279P710.

830-69 198Cal 112, 243P667; Kan 291 P950; 154Miss446, 122S538; 13PaDist &Co 66. [a] (6) Substitution in information of name of person actually injured by robbery in place of person who was not injured so far as property loss was concerned but who was present and held in fear. 198Cal 112, 243P667. [a] (7) Changing "company" to "corporation" in corporate owner's name. OklCr 282P899.

831-73 152Va1002, 147SE231.

831-76 82CalA489, 255P781.

831-77½-New. or solicitation for prostitution. 203 Iowa329, 210NW911.

831-78 34NM112, 278P210; OklCr 292 P76.

831-79½-New. , or assault by means and force likely to produce great bodily injury, 194Cal 1, 227P156.

831-81 Me 149A389.

831-82 [e] **Substituting name of person** for corporation just before trial is not abuse of discretion. 88CalA591, 264P 263.

831-83 Mass 169NE542. [a] (4) 105 NJL529, 147A325.

831-86 200 Iowa1394, 206NW607; 165 La650, 115S812; 235Mich620, 209NW 915; 152Miss154, 118S719; Mo 29SW (2d)58; 77Mont297, 250P612; NJSup 135A339; 14PaDist&Co 174; 134SC329, 133SE31. [h] **Amendment by alleging date under videlicet** is permissible. 235 Mich620, 209NW915.

832-89 105NJL270, 144A872.

832-91 [a] (2) 103NJL519, 138A370.

832-8 154SC1, 151SE206. [a] (1) See also NJSup 135A339.

832-8½-New. Under some statutes amendment of statement as to venue is permitted. 144Miss1, 108S725.

832-8⅓-New. Under statute permitting amendment as to venue a ruling and order entered on minutes are necessary. 144Miss1, 108S725.

833-9 But see NJSup 135A339 [dist 72 NJL4, 60A41].

833-10 NJSup 135A339. [a] (6) Indictment for illegal sale or possession of liquor in one township amended to correct error as shown on trial, held no error as substituting different offense. NJSup 135A339 [dist 72NJL4, 60A41].

833-14 147Va678, 137SE478.

833-15 77CalA745, 247P580; 160La79, 106S701.

833-16 89 IndA617, 167NE631.

833-18 CalA 290P629; 202 Iowa1377, 212NW63.

833-19 205 Iowa1321, 217NW814; 169 La626, 125S737; MoA 31SW(2d)559.

834-24 77CalA745, 247P580.

834-31 NJ 146A335.

834-33 NJ 146A335.

834-34½-New. to amend failure to indorse "filed" on information, Mo 12SW (2d)46.

834-34⅓-New. to charge a former conviction under an habitual criminal statute; Mo 22SW(2d)809.

834-43½-New. In a prosecution under the nuisance clause of the prohibition law an amendment of the information after the beginning of the trial so as to describe entirely different premises from those defendant was originally charged with keeping is not one of form and is not permissible. 119Kan757, 241P119.

834-43⅓-New. Defective alternative averments in an affidavit may be amended. 23AlaA269, 123S294(1stcase).

834-43¼-New. Information for robbery may be amended at the trial by adding the phrase "against the peace and dignity of the state." Mo 23SW(2d)179.

834-44 206Cal 480, 275P219; MoA 296 SW440.

834-48 89PaSuper454.

835-51 162La531, 110S744; 194NC336, 139SE608; NC 154SE604.

835-53 21F(2d)889; 22AlaA278, 114S 788; Ga 155SE11; 327 Ill 312, 158NE 732; 112TexCr544, 17SW(2d)820(2d case). [a] **Immaterial allegation** need not be proved unless its form renders it material. 327 Ill 312, 158NE732.

835-54 191NC668, 132SE664.

835-62 CalA 279P175.

835-67½-New. Proof of substance of issue is sufficient. Ind 167NE125.

835–67½–New. Issue of fact arises only from allegation of ultimate fact and denial thereof. **CalA** 292P500.

835–69 32F(2d)130; 22AlaA316, 115S291; 117Or466, 242P440.

835–72 219Ky139, 292SW771.

835–74 174Ark357, 295SW368; 312Mo212, 278SW1030.

835–75 335Ill412, 167NE29.

835–77 176Ark1203, 3SW(2d)1002; 104TexCr189, 283SW791.

836–86 106La503, 107S386, 387 [quot CJ].

836–90 See also 202Iowa739, 210NW901.

836–4 22AlaA344, 115S697; 174Ark950, 298SW323; 100TexCr496, 272SW181. But see Ind 169NE40. [b] (1) 331Ill581, 163NE373; 111TexCr101, 10SW(2d)87.

837–11 327Ill194, 158NE431.

837–15 20F(2d)570; 30F(2d)485; 39GaA35, 145SE902; 39GaA674, 148SE300; 40GaA514, 150SE457(2dcase); 74Mont201, 239P1002; NM 290P792; 107TexCr511, 298SW286.

837–18 23F(2d)235; 29F(2d)798; 327Ill312, 158NE732; Ind 166NE649; Ind 167NE125; 202Iowa739, 210NW901; 31NM485, 247P828. [a] (5) Lot and block number of house where liquor was sold. 32F(2d)742. [f] **Unless form of surplus allegation renders it material,** it need not be proved. 327Ill312, 158NE732.

838–20 Contra MoA 15SW(2d)931.

838–25 22F(2d)594; 195Cal445, 234P91; 246IllA376; MoA 27SW(2d)444.

838–27 41F(2d)144; 195Cal445, 234P91; 120Or508, 252P951.

838–28 99Fla1187, 128S628; Fla 129S112.

839–34 78CalA503, 248P946; 207Iowa334, 221NW556; 221Ky166, 298SW389; 233Mich98, 206NW516; 115Nebr65, 211NW179.

839–35 78CalA503, 248P946. See also 40F(2d)609.

839–41 210Ky571, 276SW533; 221Ky239, 298SW704; 318Mo581, 300SW765; 49RI386, 143A413; 141Wash542, 251P887; 103WVa427, 137SE649. [b] **Evidence should be confined to issues involved.** 23AlaA452, 126S887.

839–44 233Mich98, 206NW516.

839–44½–New. Admitting exhibits not referred to in a bill of particulars is not prejudicial where the bill contained general statements which might have included the subject matter of the exhibits. 47Ida750, 278P776.

839–50 OklCr 267P1040.

839–51½–New. Admission in evidence of statements made by defendant's alleged coconspirators in defendant's absence was not error because the information did not charge conspiracy. 245Mich229, 222NW149.

839–51½–New. An indictment need not allege conspiracy in order to make evidence thereof competent at trial. Iowa 227NW601 (in prosecution of sole defendant).

840–59 110Conn403, 148A350.

840–60 Fla 110S476; 143SC63, 141SE165.

840–66 221Ky239, 298SW704.

840–67½–New. Under indictment for possessing described bonds and "other bonds" known to have been stolen from mails, evidence of sale by defendant of bonds not described is admissible. 15F(2d)965.

840–68 111TexCr367, 12SW(2d)1027 (2dcase).

840–72 15F(2d)139; 36F(2d)855. [a] **Proof held to correspond to allegations.** –109TexCr448, 5SW(2d)154. [b] **Variance not shown.–NH** 146A870.

840–73 22AlaA278, 114S788; 326Ill216, 157NE211; 254Mass454, 150NE197; 72Mont270, 233P615; NJSup 151A285(1stcase); 191NC751, 133SE14; OklCr 289P787; 144Wash629, 258P501; 145Wash647, 261P397. See also 93Fla238, 112S70. See also 191NC668, 132SE664.

840–75 41GaA651, 154SE211; Ind 167NE125.

840–76 15F(2d)139; 20F(2d)328; 36F(2d)766; 92CalA245, 267P942; 327Ill194, 158NE431; 118Kan771, 236P652; 234Ky224, 27SW(2d)957(2dcase); 141Miss289, 105S523; 79Mont385, 256P1071; 116Nebr45, 215NW564, 568 [quotCJ]. [b] **If allegation varied from is surplusage the variance is immaterial.** NM 290P792.

841–82½–New. Proof under embezzlement statute concerning an individual's funds held not variance under indictment under statute concerning a corporation's funds. 217Ky388, 289SW244.

841–82½–New. Question whether variance is material and prejudicial rests primarily in discretion of trial court. Mo 24SW(2d)1027.

841–88 5F(2d)887; 28F(2d)586; 29F(2d)225; 91Fla214, 107S360; 161La332, 108S661; 126Me509, 140A188; 130Or132, 279P283; 100TexCr489, 272SW141; 144Wash311, 258P12 [citCJ].

841–89 5F(2d)887.

841–90 7F(2d)28.

841–96 144Wash311, 258P12 [citCJ]. [a] (2) Where words used are synonymous. 106TexCr524, 293SW821.

841–97 107TexCr511, 298SW286 [cit CJ].

841–98 41F(2d)449.

841–4 7F(2d)531; 7F(2d)553; 16F(2d)595; 20F(2d)113; 23F(2d)235; 23F(2d)472; 25F(2d)49; 26F(2d)993; 34F(2d)318; 35F(2d)552; 40F(2d)315; 215Ala318, 111S204; 22AlaA317, 116S110; 171Ark658, 285SW367; 73CalA649, 238P1075; 76CalA144, 244P101; 77CalA384, 246P811; 79CalA27, 248P924; 35GaA381, 133SE302; 39GaA673, 148SE309(2dcase); 48Ida567, 283P44 (rape); 333Ill200, 164NE150; 335Ill61, 166NE462; 339Ill415, 171NE554; 199Ind697, 160NE293; IndA172NE504; 200Iowa636, 204NW307; 124Kan20, 257P925; 124Kan219, 257P719; 235Ky182, 30SW(2d)484; 165La270, 115S484; 125Me358, 133A912; 126Me136, 136A808; 253Mass65, 147NE833; Mass 172NE97; 235Mich620, 209NW915; 246Mich429, 224NW387; 141Miss289, 105S523; 144Miss872, 110S690; 148Miss53, 113S445; Mo 296SW423; 318Mo1233, 3SW(2d)365; Mo 30SW(2d)59; 117Nebr556, 221NW689; NJSup 147A496; NM 290P739(1stcase); 193NC747, 138SE138; OklCr 272P487 (3dcase); 134SC329, 133SE31 (manslaughter); 100TexCr604, 272SW180; 101TexCr1, 274SW596; 101TexCr576, 276SW428; 105TexCr348, 287SW1100; 105TexCr501, 289SW1008; 106TexCr661, 294SW215; 108TexCr90, 299SW246; 113TexCr263, 20SW(2d)200; 113TexCr642, 21SW(2d)727; TexCr 27SW(2d)200; TexCr 24SW(2d)1101(1st case); TexCr 31SW(2d)632; 151Va545, 145SE377; 142Wash483, 253P793; 39Wyo309, 270P1064 [citCJ], 64ALR289. [a] (1) Mo 300SW712; MoA 274SW88. [f] (1) 238Mich15, 213NW135. [g] (1) 89IndA463, 166NE883; 226Ky300, 10SW(2d)1109(1stcase); 153Wash173, 279P566(1stcase). (2) Same rule applied to information charging abandonment of minors. 32PortoRico558.

842–6 [a] **In prosecution for third offense of possessing intoxicating liquors** variance as to date on which plea of guilty to first offense was filed held not fatal. OhA 173NE267.

842–8 79CalA27, 248P924; 119Kan743, 241P110 (state should be required to prove that offense was committed on specific date alleged).

843–10 82Colo589, 263P19. But see OklCr 291P988.

843–11 16F(2d)595; 70Utah586, 262P113.

843–13 7F(2d)553.

843–14 [a] **Held no variance** between proof and bill of particulars. 161La214, 108S419.

843–23 113Nebr517, 204NW74, 206NW153; 107TexCr322, 296SW569. [a] **In Mississippi.–141Miss667,** 107S280. [c] **Where date is not laid** in indictment evidence of more than one offense. 156Miss659, 126S477.

843–23½–New. Where the state introduces more than one offense and fails to show the commission of each prior to the statutory period, judgment of conviction will be reversed. 148Miss53, 113S445.

843–26 113Nebr517, 204NW74, 206NW153.

843–28 47RI269, 132A734.

843–29 47RI269, 132A734.

843–30 69CalA501, 231P358. See also 123Or595, 263P60.

843–32 21AlaA206, 106S621.

843–33 327Ill312, 158NE732.

844–38 Ill 173NE55.

844–40 21AlaA206, 106S621; 21AlaA231, 106S874; 21AlaA318, 108S82.

844–40½–New. Where name alleged and name proved are entirely different and not idem sonans, variance is material. 21AlaA231, 106S874.

844–45½–New. Under an allegation of a christian and surname, proof of either one alone is a fatal variance. 327Ill312, 158NE732.

844–46 23AlaA518, 128S122; 23AlaA518, 128S122.

844–51½–New. Where evidence shows that offense charged against defendant was committed by partnership of which he is a managing partner proof is required that he is the only managing partner and committed the offense. 34PortoRico327.

844–52 20F(2d)574; Iowa 227NW601; 220Ky334, 295SW154.

844–53 34GaA198, 128SE920.

845–62 219Ky319, 292SW806.

845–67 113TexCr16, 18SW(2d)1078.

845–69 112TexCr546, 17SW(2d)1066 (2dcase).

845–70½–New. Conviction as accessary before the fact under information charging aiding and abetting is not error where trial proceeded on such theory. 193Wis595, 214NW335.

845–70½–New. Allegations in an indictment that defendant conspired with all of alleged burglars held not to require proof of conspiracy with more than one. 107TexCr247, 296SW558.

846–72 22AlaA628, 118S768; 23AlaA518, 128S122; 34Ariz9, 267P206; 90CalA132, 265P561; 216Ky63, 287SW211; Mass 168NE208; 132Misc18, 229NYS467; 196NC357, 145SE691; 27OhA59, 160NE718; SD 225NW61; 150Va611, 143SE641. [g] **Indictment charging conspiracy** to prevent manufacturers in states other than Illinois from selling and shipping building material to Chicago not sustained by proof of agreement to prevent shipment of nonunion millwork into Illinois. 6F(2d)98.

846–73 321Ill552, 152NE495; 135Misc564, 238NYS712. [a] **Conspiracy to commit** any crime may be proved under charge directly of its commission. CalA 284P1096.

846–74 39F(2d)325.

846–80 Iowa 227NW616 (evidence held sufficient under disjunctive statute); 148Miss718, 114S815.

847–90 104NJL10, 139A417; 120Or508, 252P951.

847–92 21AlaA177, 106S218; 327Ill312, 158NE732. [d] **Variance in name of prosecuting witness is not material** unless it appears some substantial injury results to accused. Ind 171NE197.

847–96 118Kan771, 236P652; 217Ky801, 290SW702; TexCr 27SW(2d)653 (2dcase).

847–97 94Fla286, 115S143, 144 [citCJ].

847–98 21AlaA177, 106S218.

847–4 118Kan771, 236P652.

848–24 21AlaA177, 106S218; 94Fla286, 115S143 [citCJperBuford,J]. [a] **There is no presumption of identity where christian names vary.–21AlaA177,** 106S218.

849–36 Mass 169NE542; 34PortoRico785.

849–38 103TexCr580, 281SW1071.

849–42 94Fla286, 115S143.

850–51 327Ill312, 158NE732.

850–54 108TexCr499, 18SW(2d)896.

850–67 77CalA438, 246P1072.

850–68 21F(2d)285.

852–11 77CalA438, 246P1072.

853–28 [a] **Rule is otherwise where description of property given in indictment is sufficient,** in which case allegation may be treated as surplusage and need not be proved. 327Ill194, 158NE431.

853–30 20F(2d)113; 21F(2d)285. [d] **Excluding evidence of immaterial variance held proper.** 255Mass510, 152NE377.

854–31 But see TexCr 21SW(2d)301. [b] **Evidence held sufficient within rule.** 111TexCr101, 10SW(2d)87.

854–38 23AlaA433, 126S606; 30Ariz366, 247P129; 172Ark240, 288SW384;

169La441, 125S442; 221MoA592, 283 SW468, 470 [citCJ]; 50ND715, 197NW 881; 20 OhA284, 152NE194; Wash 288 P236.

854-42 50ND715, 197NW881.

855-44½-New. Assault and battery with sharp or dangerous weapon, with intent to injure another is included in offense of assault and battery by means of deadly weapon, with intent to kill. 50ND715, 197NW881.

855-52 234Ky531, 28SW(2d)774. [b] Test.-94CalA520, 271P549.

855-53 49Nev194, 242P582; 55ND846, 215NW552; 69Utah53, 252P280.

855-54½-New. Such statutes apply to misdemeanors as well as felonies. 118 Kan618, 236P826.

856-56 322Mo 1199, 18SW(2d)492.

856-61 36GaA103, 135SE758; NJ 150A 394; Wash 288P236.

857-71 83CalA34, 256P455.

857-72 22AlaA74, 112S177; 21AlaA261, 107S226; 36GaA103, 135SE758; 246 IllA376; 167La635, 120S33; 221MoA 592, 283SW468; 153Tenn316, 283SW 986 (offense against liquor laws); 135 Wash240, 237P502.

857-73 36GaA103, 135SE758; 69Utah 53, 252P280.

857-76 172Ark240, 288SW384; 221 MoA592, 283SW468; MoA 293SW796; 147Wash194, 265P460.

857-81 167La635, 120S33.

857-86 202Cal 165, 259P943; 94Fla143, 114S237; 117Nebr601, 221NW683; Mo 24SW(2d)980; 122 Or444, 252P975, 977 [quotCJ]; 49Nev194, 242P582. [a] **Indictment specifically charging manslaughter in first degree,** by operation of law charged every lesser offense included in that charged. 23AlaA578, 129S 480(2dcase).

857-87 179Ark1066, 20SW(2d)189; 94 Fla143, 114S237; 122 Or444, 252P975, 977 [quotCJ]; 105TexCr410, 288SW 1084; TexCr 25SW(2d)868.

858-88 Ind 173NE324; 225Ky153, 7 SW(2d)1059; 320Mo 319, 6SW(2d)857; Mo 24SW(2d)980; 122 Or444, 252P975, 977 [quotCJ]; 285Pa49, 131A657. [a] 338 Ill 56, 170NE14.

858-91 122 Or444, 252P975, 977 [quot CJ]; 105TexCr410, 288SW1084.

858-92 122 Or444, 252P975, 977 [quot CJ]; 285Pa49, 131A657.

858-93 36GaA784, 138SE280; 82Mont 530, 268P507; 49Nev194, 242P582; 122 Or444, 252P975, 977 [quotCJ].

858-94 290Pa195, 138A686. [a] **Where evidence established involuntary manslaughter only,** court erred in receiving verdict other than not guilty. 290Pa 195, 138A686.

858-95 315Mo 1259, 289SW865; Mo 26 SW(2d)793; 27 OhA59, 160NE718; 285 Pa49, 131A657; 144Va594, 131SE212 (dictum).

858-95½-New. Under some statutes upon an indictment charging attempt to commit murder accused may be found guilty of attempt to commit murder in second degree. 144Va594, 131SE212.

858-1 20AlaA604, 104S280. [b] **Election by state to proceed** on lesser crime than charged is bar to subsequent trial for higher degree of offense. 20AlaA 604, 104S280.

858-2 122 Or444, 252P975, 977 [quot CJ].

858-3 122 Or444, 252P975, 977 [quot CJ].

859-6½-New. On indictment assault with intent to kill and murder conviction of assault with intent to kill is proper. 158La799, 104S720.

859-12 Ind 173NE191. [a] **Indictment** charging rape upon female under sixteen has been held to embrace charge of carnal abuse. 175Ark64, 297SW828.

859-12½-New. Adultery is not crime necessarily included in crime of rape. 69Utah53, 252P280.

859-12¾-New. Under a rape indictment, defendant may be convicted of assault and battery. 36GaA103, 135SE 758.

859-12¼-New. Offense of rape in second degree is included in information for rape in the first degree. OklCr 283 P805.

859-14 103TexCr393, 281SW571.

859-14½-New. Larceny is a degree of the offense of robbery. 217Ky94, 288 SW1051.

859-14¾-New. Assault and battery is a degree of robbery, and conviction may be had therefor if felonious intent is lacking. 217Ky94, 288SW1051.

859-15 22AlaA74, 112S177; 199Cal 461, 249P867; 115Nebr335, 212NW765; 55 ND846, 215NW552.

859-17 22AlaA74, 112S177.

859-20 22AlaA74, 112S177; 118Kan 618, 236P826.

859-24 80CalA789, 252P1068; 119 Or 512, 249P172.

859-24½-New. Conviction of attempt to commit a crime cannot be attacked on the ground that the information also charges assault with intent to commit a felony. 55ND846, 215NW552.

860-31 172Ark240, 288SW384.

860-39½-New. It has been said that under statute authorizing conviction of attempt to commit a felony under an indictment for the felony, upon an indicment for murder in first degree there may be a conviction of attempt to commit murder in first or second degree or manslaughter. 144Va594, 131SE212.

860-43 176Ark1206, 2SW(2d)87; Ind 171NE5 (notwithstanding evidence showing rape committed); Ind 171NE 197.

860-44 52SD582, 219NW263.

860-47 108WVa98, 150SE369.

860-49 207 Iowa744, 223NW548; Iowa 223NW554.

860-49½-New. A conviction of an attempt to commit rape cannot be attacked on the ground that information also charges an assault with intent to commit rape. 55ND846, 215NW552.

861-54½-New. extortion, Utah 284P 108.

861-58 118Kan618, 236P826; OklCr 282P178(2dcase).

861-59 199Cal 461, 249P867.

861-60½-New. In an indictment for robbery, conviction for attempt held proper under statute. 172Ark240, 288 SW384.

861-63 22AlaA74, 112S177; 87CalA510, 262P442; 254Mass390, 150NE181; 50 Philippine641.

861-65 21AlaA209, 106S895; 200 Ind 287, 163NE93; 206 Iowa373, 220NW 106; Utah 289P92. [a] **Crime of knowingly possessing liquor** is necessarily included in charge of being "persistent violator" of state prohibition act. Utah 290P962.

861-71 Ind 173NE191.

861-71½-New. Conviction may be had for separate and distinct offense involved in one general criminal undertaking. 6PaDist&Co 15.

861-71¾-New. Offenses of entering building with intent to commit felony; committing assault with intent to kill; and robbery. 6PaDist&Co 15.

861-71¼-New. The provision of the Alberta criminal code permitting conviction of an offense included in one charged, although the whole offense charged is not proved, does not refer to a minor or less serious offense but to one which is part of the offense charged. Alta [1929] 2DomLR452.

861-78 104NJL291, 140A287.

862-85 Contra 100CalA82, 279P826.

862-88 CalA 287P362.

862-94 Contra Nebr 230NW684.

862-99 22AlaA39, 111S767; 40GaA118, 149SE153(2dcase); Mo 278SW1009.

862-1 Mo 278SW1009 (with malice aforethought); SD 232NW909.

863-5½-New. or shooting at another not in self defense, 35GaA375, 133SE105.

863-6 37GaA338, 140SE396.

863-8 34Ariz370, 272P99; 55ND761, 215NW277. Contra 33NM35, 261P808.

863-17 90Fla178, 105S401.

863-18 90Fla178, 105S401.

864-28 23AlaA433, 126S606; 34Ariz 430, 272P97. See also OklCr 289P357. But see 36GaA309, 136SE330. [a] **Where information charging assault with intent to commit rape on child does not allege age of defendant,** simple assault is included in charge. 34Ariz430, 272P97.

864-29 34Ariz430, 272P97.

864-30 23AlaA433, 126S606; IndA 168 NE611.

864-31 41GaA466, 153SE436(2dcase); 207 Iowa744, 223NW548.

865-74 41GaA368, 153SE199.

865-75 162La1067, 111S423.

866-79 167La986, 120S620.

866-84 254Mass390, 150NE181.

866-94 146Miss588, 111S586; 148Va 725, 138SE483.

866-95 112TexCr182, 15SW(2d)1039.

866-96 Contra 149Miss745, 115S896.

866-99 218Ky798, 292SW467.

866-6 200 Ind287, 163NE93.

866-10 218Ky798, 292SW467.

867-24 206 Iowa373, 220NW106, 107 [citCJ].

868-44 36Wyo 241, 254P120.

868-47 148Va725, 138SE483.

868-48 32PortoRico 816.

868-49 32PortoRico 816.

868-54 207 Iowa744, 223NW548; 161 Ga492, 131SE503. Contra 52SD582, 219 NW263.

868-57 207 Iowa744, 223NW548; Iowa 223NW554; 161Ga492, 131SE503; Ind 173NE229. Contra 21AlaA209, 106S895; 52SD582, 219NW263.

868-61½-New. Conviction of assault with intent to rape may be had in prosecution for statutory rape. 161Ga492, 131SE503.

868-70 161Ga492, 131SE503.

868-71½-New. On a charge of attempt to commit rape on a female under eighteen years of age, not alleging assault or assault to commit rape, charges of simple assault or assault with intent to commit rape are not included. 129Kan739, 284P365.

868-76 41GaA368, 153SE199.

869-80 148Va725, 138SE483.

869-81 85CalA269, 259P123.

869-82 148Va725, 138SE483.

869-84 148Va725, 138SE483.

869-95 CalA 288P50. See also 100Tex Cr11, 271SW380. But see Wash 288P 236.

869-98½-New. in a prosecution for kidnapping, there may be a conviction for false imprisonment; 220Ala30, 123S231, 235, 243 [citCJ], 68ALR712.

869-5 [d] (6) Possessing still is not lesser degree of charge of manufacturing corn whisky. MoA 293SW484.

870-9 Ida 290P387.

870-14½-New. One indicted as principal cannot be legally convicted as accessary before the fact. 160La925, 107 S698.

870-18 85PaSuper424. [a] (6) 85Pa Super424. (7) **In Pennsylvania.**-85Pa Super424. (8) There may be conviction of assault and battery under indictment charging rape, though proof shows that rape was committed. 200 Ind400, 163 NE334.

870-20 Fla 129S112; 41GaA368, 153SE 199; 41GaA368, 153SE199.

871-25 245Mich229, 222NW149.

871-29 221Ky236, 298SW682; 231Ky 505, 21SW(2d)828; 235Ky683, 32SW (2d)34; 50Philippine641.

871-31 5F(2d)673; 6F(2d)530; 14F (2d)659; 22AlaA415, 116S903; CalA 288P880; 3Del 102, 131A313; 36GaA 268, 136SE821; 36GaA301, 136SE829; 40GaA617, 150SE917(2dcase); 45 Ida 168, 260P1095; 116Nebr635, 218NW 432; 137Misc267, 241NYS745; 229App Div385, 242NYS625; 54ND878, 211NW 816; 56ND678, 218NW871. But see Cal A 290P595. [a] **Objection that indictment does not sufficiently describe property** alleged to have been obtained by defendant by false pretenses is not timely after verdict. 159La840, 106S324.

871-32 98Fla181, 123S571(1stcase); OklCr 276P494.

871-33 117Nebr597, 221NW706; 58 ND282, 225NW789.

871-34 206 Iowa1247, 220NW100.

872-35 24F(2d)690.

872-37½-New. **Fundamental allegations** essential to support conviction are not waived by failure to demur or by plea of not guilty. 3Del 102, 131A313.

872-39 See also 167Ga549, 146SE185.

872-43 73CalA402, 238P794; 329 Ill 576, 161NE83; 149SC121, 146SE676.

872-44 176Ark104, 2SW(2d)55.

872-48 329 Ill 576, 161NE83; Mo 12SW (2d)53.

872-49 23AlaA387, 126S498. [a] (4) 217Ky8, 288SW1059. (13) Information

filed by assistant county solicitor instead of county solicitor. 94Fla60, 113 8736, 742 [citCJ]. (14) Failure to make entry on indictment as having been presented to court. 217Ky8, 288SW1059. [c] **Giving bond for appearance** after arrest held waiver of right to object that information was verified on information and belief. 122Kan524, 252P 551.

873-55½-New. By entering bail for the present term defendant waives any right to object to being indicted at that term. 9PaDist&Co 81.

873-55½-New. Failure to attach or file minutes of evidence with an information is waived where defendant pleaded guilty and judgment was entered on plea. 208 Iowa867, 226NW81.

873-57 201 Iowa16, 206NW292; 163La 51, 111S492. See also 200 Iowa406, 204 NW401.

873-59 8F(2d)593, 594 [citCJ]; 201 Iowa16, 206NW292; 156Tenn451, 28SW (2d)705.

873-60 201 Iowa16, 206NW292.

873-62 337 Ill 636, 169NE737 (verification of amended information).

873-66 34Wyo 90, 241P705.

873-67 200 Iowa406, 204NW401; Mo 18SW(2d)53.

873-67½-New. or by failing to move to quash before the jury are sworn, Mo 18SW(2d)153.

873-75½-New. That information was not approved by district judge is waived by failure to move to set aside information before plea. 200 Iowa406, 204 NW401.

873-75½-New. Failure to indorse indictment as having been presented to court and filed in open court is waived by waiver of arraignment and plea of not guilty. 217Ky8, 288SW1059.

873-75¼-New. Waiving of a preliminary hearing and giving of a bond for appearance in the district court is a waiver of any defects in the verification of the complaint. 127Kan832, 275P166 (1stcase).

874-77 14F(2d)659; 199 Ind38, 154NE 872.

874-78 101TexCr434, 276SW289.

874-78½-New. Where fact of misdescription could have been shown before argument, objection cannot be raised for first time by general affirmative charge. 213Ala555, 105S664.

874-80 TexCr 8SW(2d)176. [c] **Value of stolen goods.**-87CalA236, 261P1103.

874-81 329 Ill 576, 161NE83; 134Wash 30, 235P6.

874-82 251Mich89, 231NW130.

874-84 16F(2d)44; 3Del 102, 131A313; 197 Ind680, 151NE827; 39Wyo 309, 270 P1064, 64ALR289.

874-85 16F(2d)44; 3Del 102, 131A313. [b] **Failure to allege character of certain instruments or manner of using them** is waived by failure to demur. 203 Iowa1305, 214NW735.

874-86 23AlaA162, 122S309(2dcase); Ill 173NE355; 206 Iowa1247, 220NW 100; 54ND878, 211NW816.

874-87 6F(2d)530; 16F(2d)44; 77CalA 366, 246P815; 3Del 102, 131A313; 197 Ind680, 151NE827; 200 Iowa313, 202 NW212; 201 Iowa159, 205NW534 (after jury sworn); 35 OhA311, 172NE401; 119 Or409, 243P72; 151Wash312, 275P 706. [d] **Specific waiver by attorney before trial** precludes objection to defect. 159La199, 105S288.

874-88 [b] (1) 197 Ind680, 151NE827. See also 35GaA578, 134SE183.

874-90 See also 158La1014, 105S47. But see 5F(2d)586.

874-91 235Ky683, 32SW(2d)34; 30 OhA195, 164NE649. [b] **Iowa statute** as to waivers of pleas in abatement does not apply where indictment or information is a nullity. 202 Iowa391, 210NW 461.

874-92 204Cal 39, 266P518. [a] **Plea to jurisdiction** because indictment or information is so totally defective as to be a nullity is allowable. 202 Iowa391, 210NW461.

875-94 26 OhNPNS546.

875-96½-New. Where information charging resistance of an officer, informed defendant of the nature of the charge against him, if defendant desired a bill of particulars, he should have asked for it. 246Mich459, 224NW605.

875-97 167La703, 120S57(2dcase); 169 La251, 125S67.

875-98 See also TexCr 30SW(2d)316.

875-98½-New. Where indictment for forgery bad for failure to allege extrinsic circumstances showing validity of instrument, accused entitled to affirmative charge without demurrer. 21AlaA 41, 104S882.

875-98½-New. In a criminal case, facts may be conceded or variances waived. 250NY358, 165NE810.

875-1 320Mo 196, 6SW(2d)853; TexCr 28SW(2d)537(2dcase).

875-2 201 Iowa16, 206NW292; 206 Iowa981, 221NW445; 175Minn222, 220 NW611; 320Mo 189, 6SW(2d)883; 50 Philippine771; 150SC452, 148SE474; 69Utah53, 252P280.

875-4 54ND878, 211NW816.

875-5 69Utah53, 252P280.

875-7 See also 69Utah53, 252P280. But see TexCr 28SW(2d)537(2dcase).

875-11 [a] **Waiver by preliminary hearing and giving bond for appearance.** -Kan 291P782.

875-13 87CalA181, 261P1045.

875-19 But see 208 Iowa802, 226NW 57.

876-24 OklCr 273P279; OklCr 273P 376.

876-30½-New. A duplicitous indictment, charging burglary and larceny, is not cured by dismissing one count after overruling demurrer. 208 Iowa 851, 226NW61 (defendant is entitled to resubmission to grand jury under statute if court so orders).

876-33 12F(2d)742; 15F(2d)977.

876-34 22AlaA422, 116S411; Mo 292 SW415; 13PortoRicoFed117; Utah 290 P962.

876-36 16F(2d)44.

877-47 95Fla42, 115S519.

877-52 Mo 256SW753.

877-59 19F(2d)46.

877-61 14F(2d)659.

877-64½-New. Information charging an offense by a male not of statutory age to commit offense is not cured after verdict although there was uncontradicted evidence that he was over the prescribed age. 318Mo 657, 300SW746.

877-66 15F(2d)977; 37F(2d)673; 42F (2d)374; 23AlaA589, 129S480(1stcase); 40GaA543, 150SE469; Mo 278SW706; Mo 285SW87; 318Mo 596, 300SW702; 318Mo 712, 300SW738; 318Mo772, 300 SW807; 320Mo 260, 7SW(2d)250; Mo 25SW(2d)101(2dcase); 32NM319, 255P 396, 399 [citCJ]; 144Wash337, 258P22. [d] (7) Failure of allegation of second offense to state it was second offense for manufacturing liquor is cured by introduction in evidence, without objection of indictment and records of former trial showing it to be such crime. 158 La755, 104S705. (8) Indictment for falsifying entry in book of county officer held sufficiently definite after verdict. 316Mo 591, 292SW63. (9) Alternative description of intoxicating liquors as hootch, moonshine, or corn liquor. Mo 285SW432. (10) Omission of word "feloniously" before word "steal" in indictment for grand larceny. 46 Ida775, 271P325. (11) Omission of word "liquor" after words "did unlawfully possess intoxicating." 159Tenn 451, 19SW(2d)276. [e] **Even as against special demurrer,** indictment or information charging essentials of offense is good after verdict unless prejudice resulted. 15F(2d)977.

878-63 15F(2d)977; 32NM319, 255P 396, 399 [citCJ].

878-69 But see 159Tenn451, 19SW(2d) 276.

878-70 135Wash621, 238P635. But see 21AlaA76, 105S424.

878-75½-New. Indictment will not be held bad after verdict unless it fails in some essential averment necessary in description of offense. Mo 25SW(2d) 101(2dcase).

878-76 [c] **In indictment for unlawful sale of liquors** failure to name persons to whom sales were made is cured by verdict. 4F(2d)884.

878-77 118Kan629, 236P816 (value of stolen property received by another); 34NM447, 283P904. See also Mo 285 SW432, 433 [citCJ].

878-77½-New. In a prosecution for feloniously leaving the scene of injury to property by a colliding automobile, information in the language of the statute is good after verdict, although not particularly describing the property injured. 314Mo 599, 285SW733.

878-78 4F(2d)884; 318Mo 712, 300SW 738; NC 154SE604; 101TexCr483, 276 SW277.

879-30 320Mo 228, 7SW(2d)259.

879-35 21F(2d)690, 691 [citCJ].

879-88 149Miss223, 115S429.

879-90 39F(2d)440; Ill 173NE357; 197 Ind16, 148NE420; 108WVa681, 152SE 633.

879-95 197 Ind16, 148NE420.

879-96 157Md185, 145A492.

880-5 197 Ind16, 148NE420.

880-19 Nebr 232NW781.

880-21 16F(2d)44; 169Minn214, 210 NW1001.

882-48 19F(2d)46.

882-51 317Mo 865, 297SW73.

883-61 161La948, 109S772.

883-74 See also 320Mo 228, 7SW(2d) 259, 261 [citCJ].

INDIVIDUAL

885-58½-New. "Individuals using engines, locomotives, or cars" means owners as distinct from employees operating them under a Mississippi statute as to presumption of negligence of a railroad. 21F(2d)185.

INDUCE

887-30 82Colo 133, 257P359.

887-31 82Colo 133, 257P359.

887-32 82Colo 133, 257P359.

887-33 82Colo 133, 257P359.

887-35 82Colo 133, 257P359.

887-39½-New. , brought on as by inducement, 82Colo 133, 257P359.

887-39½-New. caused by indirect influence, 82Colo 133, 257P359.

INDUSTRIAL CO-OPERATIVE SOCIETIES

961-9 229Ky432, 17SW(2d)432(1st case).

962-17½-New. Members of a cotton association, organized under statute and in accordance with an agreement authorizing organization on a certain date, failing to withdraw before that date, were in no position to complain of irregularities in organization a few days before the date specified in the agreement. TexCivA 16SW(2d)413.

962-17½-New. It was immaterial that all the members of the committee to organize the association were not present at the time it was determined to incorporate, where there was more than a quorum present, and no evidence that any of the absentees dissented or objected to what was done. TexCivA 16 SW(2d)413.

962-26 98CalA230, 276P636. [a] **Attempted amendment adopted by voting board and majority of members,** and not two thirds as required, has been held ineffective. 98CalA230, 276P636.

963-42½-New. Authorizing establishment of a coöperative cotton gin is in violation of the Fourteenth Amendment, as a denial of equal protection to those operating gins for which adjudication of necessity is required. 278US515, 49 SCt235, 73Led483.

963-54½-New. Judgment of an association in classifying and selling cotton is conclusive, except in cases of fraud or gross mistake amounting to fraud. 179Ark338, 16SW(2d)177.

963-54½-New. An agreement of arbitration and award made thereunder between a tobacco growers' coöperative association and a warehousing corporation has been held legal and binding on all the parties. 229Ky696, 17SW(2d) 1002.

963-54¼-New. Where members of an association borrowed money from the bank for use in making advances and in purchasing cotton from their tenants, and transferred negotiable warehouse receipts to the bank as the cotton was

purchased and stored, the cotton so purchased and held was not within the marketing contract, so as to authorize suit for specific performance by the association. **TexCivA** 16**SW(2d)**413.

963–54½–New. A provision of an association for distribution of any surplus in a fund for credits and commercial purposes did not preclude the use of the fund as provided in the contract as long as the use was necessary. 229**Ky** 696, 17**SW(2d)**1002.

963–54¼–New. Deduction for credits and commercial purposes may be used for any costs of operation which may be classified under the head of "credits" or "commercial purposes." 229**Ky**696, 17**SW(2d)**1002.

963–54½–New. Deduction for credits and commercial purposes may be used to settle an indebtedness arising out of violation of contract with warehousing corporations. 229**Ky**696, 17**SW(2d)** 1002.

963–54½–New. To hold that deductions by an association for credits and commercial purposes were a trust fund and, when invested in bonds of warehousing corporations, remained a trust fund, which could not be used for payment of obligations of the association not arising directly in connection with the fund, is too narrow a construction of the contract. 229**Ky**696, 17**SW(2d)** 1002.

963–54½–New. Charges against subsidiaries for funds may constitute valid obligations of subsidiaries, which association cannot cancel. 227**Ky**297, 11**SW (2d)**119.

963–57 [a] (3) One soliciting members or who is director is not authorized to release party from marketing agreement. 91**CalA**654, 267**P**572. (4) Authority of agent to defeat purpose of legislation as respects marketing agreement must be expressly conferred by association. 91**CalA**654, 267**P**572.

963–57½–New. Whether inactive tobacco growers' coöperative marketing association should be held intact, in readiness awaiting future developments, has been held a question for the directors' sound discretion. 227**Ky**297, 11**SW(2d)** 119.

964–65½–New. If members of a coöperative marketing association are entitled to withdraw from the association, they may set up such withdrawal as a defense to any action brought by the association to enforce its contract rights. 98**CalA**230, 276**P**636.

964–72 227**Ky**297, 11**SW(2d)**119. [c] **Jurisdiction of equity** of action for accounting. 230**AppDiv**571, 245**NYS**432.

964–78 2**LaA**620. [a] **Action to enforce agreement to deliver produce to association.**–126**Kan**694, 271**P**284 (procedure).

964–79 [a] **Necessity for assessment of stockholders is sufficiently shown** where it appears that corporation had no assets from which to pay existing claims against it. 177**Minn**211, 225**NW**22(2d case).

965–83½–New. Where an association by mistake made excess advances to a member, under a contract providing for advances, it may recover such excess from the member. 179**Ark**338, 16**SW (2d)**177.

965–83½–New. Evidence has been held sufficient to support findings in plaintiff's favor in an action by a coöperative milk producers' association against a member thereof for breach of agreement to deliver milk to the association. 97**CalA**650, 275**P**1001.

965–83¼–New. If an association made a demand on a member that he install expensive apparatus for cooling milk, the member might be relieved of obligation to deliver the milk. 199**Wis**379, 225**NW**209.

965–83½–New. Although members of an association mortgaged cotton, that would be no defense in an action by the association for breach of contract. **Tex CivA** 16**SW(2d)**413.

965–83¼–New. Provision of a contract between an association and a member that the membership should cease in case of failure of the member to comply with the terms of the sale agreement did not prevent the association from recovering liquidated damages under the agreement, for failure of the member to deliver milk provided by contract. 97 **CalA**650, 275**P**1001.

965–83 1/17–New. A statute requiring the filing of a contract of a coöperative association with its members in the office of the register of deeds, to operate as notice, must be substantially complied with. 199**Wis**379, 225**NW**209.

965–83⅓–New. Marketing agreements are entitled to extraordinary protection. 91**CalA**654, 267**P**572.

965–83 1/10–New. Evidence was held insufficient to show the agency of a director to relieve a member of an agreement by anticipatory breach. 91**CalA** 654, 267**P**572.

965–83 1/10–New. A contract between society and a member may be specifically enforced, and injunctive relief given. 91**CalA**103, 267**P**172.

965–83 1/11–New. A statute, authorizing liquidated damages in contracts between society and members and providing for specific performance, is not unconstitutional. 91**CalA**103, 267**P**172.

965–83 1/12–New. Contract for sale of products to association partakes of trust or fiduciary character. 230**App Div**571, 245**NYS**432.

970–91 35 **OhA**261, 172**NE**418.

965–98½–New. A member of an association, in an action by the association to restrain defendant from inducing breach of members' contracts and to restrain defendant from accepting milk from members, was entitled to be made a party defendant, and to assert the defense that association had prevented his performance of contract. 199**Wis** 379, 225**NW**209.

966–1 144 **Okl** 166, 289**P**734.

970–1½–New. Person holding policy and premium book cannot enforce payment where he does not come within class named in facility of payment clause. 35 **OhA**261, 172**NE**418.

970–1⅓–New. That person claiming to be beneficiary has possession of policy and has paid premiums does not entitle him to recover on policy. 35 **OhA**261, 172**NE**418.

INDUSTRIAL INSURANCE

966–3 TexCommnA 276**SW**643.

966–4 MoA 285**SW**168.

967–11½–New. The group policy is called the "master" policy. 145**Miss** 266, 110**S**660.

967–17½–New. and construction making policy a nullity will not be adopted, 120**Kan**406, 243**P**1035.

967–19 [a] **In Georgia** statutes construed not to subject industrial insurance agents to occupational tax. 162 **Ga**208, 132**SE**764.

967–29½–New. Provisions of the master policy release insurer from liability for death or disability of a former employee after termination of active employment and the discontinuance of the insurance, 145**Miss**266, 110**S**660.

967–29⅓–New. but do not affect the liability of insurer for total and permanent disability occurring while insured is actively employed and the policy contract is in full force and effect. 145**Miss**266, 110**S**660.

967–29¼–New. Betterment of employee's condition is a consideration to support the beneficiary's action. 141 **SC**303, 139**SE**619, 55**ALR**1237.

967–29½–New. Surrender of a policy and substitution of a new plan has been held not to entitle the original beneficiary as such under the new plan. 141 **SC**303, 139**SE**619, 55**ALR**1237.

967–29⅙–New. Employer's failure to notify the beneficiary of surrender of the policy has been held not to create liability under the old on the theory that the employee might have paid the premiums himself. 141**SC**303, 139**SE** 619, 55**ALR**1237.

967–29½–New. Where, by its terms, a new policy does not replace the old, employee beneficiary under the latter cannot recover on such theory. 141**SC**303, 139**SE**619, 55**ALR**1237.

967–29⅓–New. The contract terminates when the employee leaves service. **MoA** 297**SW**87.

967–29⅙–New. No recovery can be had for death of a day laborer who died after he had been laid off and the work on which he was employed had been discontinued. 13**PaDist&Co** 119.

967–31 216**Ky**401, 287**SW**928, 929 [quotCJ].

967–32 216**Ky**401, 287**SW**928, 929 [quotCJ].

967–33 216**Ky**401, 287**SW**928.

969–84 TexCommnA 276**SW**643.

969–85 TexCommnA 276**SW**643.

969–89 TexCommnA 276**SW**643.

970–92 MoA 294**SW**453, 454 [quotCJ]; **TexCommnA** 276**SW**643. See also 224 **AppDiv**350, 231**NYS**124.

970–93 MoA 285**SW**168.

970–2 135**Misc**747, 239**NYS**582.

970–4 TexCommnA 276**SW**643.

970–7 120**Kan**406, 243**P**1035.

970–9 120**Kan**406, 243**P**1035.

971–27 MoA 285**SW**168, 170 [citCJ].

971–28 MoA 285**SW**168, 170 [citCJ].

971–40 See also 133**Misc**34, 231**NYS**95.

972–57 [a] **Promise to pay widow** upon production of policy and receipt book is without consideration and does not bind company. **MoA** 294**SW**453.

972–65 27 **OhA**466, 161**NE**561.

973–67 TexCommnA 276**SW**643.

973–68 MoA 294**SW**453.

973–69 See also **MoA** 3**SW(2d)**397.

973–72 MoA 294**SW**453.

973–80½–New. Facility of payment clause designating wife as beneficiary is not invalid as permitting separate property of widow to be taken for payment of debts of deceased husband. **TexCommnA** 276**SW**643.

973–80⅓–New. Payment in good faith to one living with insured as wife and who paid all premiums and incurred other expenses for insured discharges insurer regardless of whether she was lawful wife. 144 **Okl** 166, 289**P**734.

973–94½–New. Payment by insurer under "facility of payment" clause, if invalid, would not constitute a waiver of insurer's right to proof of death as a condition precedent to recovery, but, if pro tanto discharging insurer's responsibility under policy, would constitute a waiver of presentation of proof of death. 224**AppDiv**350, 231**NYS**124.

974–98½–New. Arbitration is not necessary, although policy provides that extent of insurer's liability shall be based on allowances for industrial accidents and deaths under Workmen's Compensation Act, and that provisions of such act shall govern as far as practicable. 120**Kan**406, 243**P**1035.

974–98⅓–New. The amount of a note from an employee to an employer, in no way connected with the employment, has been held not deductible from the policy. 39**GaA**768, 148**SE**418.

974–1½–New. Proof of death is a condition precedent to the beneficiary's right to recover, but may be waived by insurer. 224**AppDiv**350, 231**NYS**124.

974–3½–New. Liability of insurer under group policy becomes fixed at time of injury to employee while in active employment, and may be enforced after termination of employment. 145**Miss** 266, 110**S**660.

974–3⅓–New. Where replication to a special plea averring insured's failure to furnish special proofs of disability pleads waiver of proofs thereof, demurrer thereto is properly overruled. 145 **Miss**266, 110**S**660.

974–5 120**Kan**406, 243**P**1035.

974–5½–New. Evidence sufficient to maintain action on policy. 120**Kan**406, 243**P**1035.

974–5⅓–New. Pleadings in action on group insurance policy held sufficient. 120**Kan**406, 243**P**1035.

974–5¼–New. Parol evidence is admissible to show intention of parties and their operative interpretation of terms of policy not according with usual use of such nomenclature. 120**Kan**406, 243 **P**1035.

974–5⅙–New. Instructions in an action on a policy held without material error. 120**Kan**406, 243**P**1035.

974–5⅙–New. Whether insured was

suffering from total disability was for the jury. **MoA** 7**SW(2d)**746.

974–5⅞–New. The beneficiary of an employee who went on strike and died before termination thereof cannot recover under a group policy. 251 **IllA** 434.

974–5⅛–New. Where an employee terminates his employment by going on strike, notice to him of the termination of his membership in an association of employees and the consequent loss of rights under a group policy is not necessary to relieve insurer of liability. 251 **IllA**434.

INDUSTRY

974–7 See also 12**CustA**110.

INEFFECTUAL

975–21 [a] **MoA** 282**SW**739.

INELIGIBLE

975–31 197 **Ind**161, 150**NE**53.

INFANTS

986–18 147**Miss**141, 113**S**327. [f] **Not synonymous with "orphan."–Tex CommnA** 285**SW**285.

986–19 [b] Contra 147**Miss**141, 113**S** 327.

986–22 212**Ala**600, 103**S**887.

986–25 77**Mont**290, 250**P**973, 49**ALR** 398.

986–26 [a] 310**Mo** 227, 274**SW**1025.

987–27 221**MoA**290, 3**SW(2d)**281. [b] **Stating raising age of majority to twenty-one unconstitutional** in so far as it divests femes coverts of right to convey title vested before date of act. 24 **OhNPNS**499.

987–28 77**Mont**290, 250**P**973, 49**ALR** 398; 48**Nev**319, 232**P**206.

987–31 125 **Okl** 224, 257**P**322.

987–34 21**AlaA**650, 111**S**644; 53**ND** 852, 208**NW**238.

987–39 **Fla** 129**S**822.

988–45½–New. Equal Guardianship Act has no application to illegitimate children, the right of the mother being paramount. **BC** [1927] 2**DomLR**91.

988–48 220**Ala**654, 127**S**221; 21**AlaA** 650, 111**S**644.

988–50 215**Ala**1, 109**S**607; 228**Ky**390, 15**SW(2d)**251; 156**SC**496, 153**SE**468; **TexCivA** 299**SW**289. [c] **Extent of jurisdiction.–218Ala**548, 119**S**675.

988–53 21**AlaA**650, 111**S**644.

988–55 **TexCivA** 286**SW**629; **TexCivA** 8**SW(2d)**524.

988–56 21**AlaA**650, 111**S**644; 333 **Ill** 284, 164**NE**678.

988–58 [a] **City Court has no jurisdiction** of prosecution for contributing to child's delinquency. 230**AppDiv**249, 243**NYS**613.

988–61½–New. In New York supreme court has plenary jurisdiction over custody of destitute and dependent child committed to custody of authorized agency. 126**Misc**135, 212**NYS**741.

988–63 [a] **TexCivA** 285**SW**909. [b] **Courts of general civil jurisdiction** are exclusive tribunals to decide custody. 170**La**255, 127**S**619.

988–66 62 **OntL**145, [1928] 2**DomLR** 981.

989–70 121**Kan**886, 250**P**316. [a] **In North Dakota.–53ND**852, 208**NW**238. [b] **Affidavit of neglect sufficient** to give juvenile court jurisdiction under statute. 170**La**255, 127**S**619.

989–71 23 **OhA**348, 155**NE**499.

989–72 99**CalA**645, 279**P**157 (offenses by others than wards of court excepted).

989–73 48**Philippine**25, 29 [citCJ].

989–75 121**Kan**886, 250**P**316. See also 193**Wis**635, 215**NW**583.

989–78 321**Mo** 1090, 13**SW(2d)**1061(2d case).

989–79 208**Cal** 725, 284**P**916(2dcase) (deprivation of control by parents). [a] (2) Juvenile court has exclusive original jurisdiction by statute over all male offenders. 216**Ky**573, 288**SW**330. [b] **Statute relating to jurisdiction of juvenile court** does not relate to custody of child involved in civil action brought by one parent against other, where child has committed no wrong and is in no danger physically or morally. **Del** 145 **A**9.

989–80 **CalA** 285**P**871(2dcase); 193**Wis** 635, 215**NW**583. [a] See also **Iowa** 227 **NW**136. [h] **In Missouri.–A** 294**SW**423.

989–81 151**Miss**398, 118**S**184, 188 [quot CJ], 60**ALR**1325.

989–83 **Del** 145**A**9; 170**La**255, 127**S** 619; 318**Mo** 998, 2**SW(2d)**747; 53**ND** 852, 208**NW**238; 193**Wis**635, 215**NW** 583. [c] **Court has no general equity jurisdiction.–193Wis**635, 215**NW**583.

990–84 208**Cal** 725, 284**P**916(2dcase).

990–84½–New. Where the mother and the reputed father of a child were beyond the state, and custody was in an orphan asylum, publication of citation under the statute in the proceedings, to declare the child dependent, was held sufficient, although no affidavit for service was filed. 22 **OhA**528, 154**NE**55.

990–84⅓–New. Summons against a widow and her two children identifying them as such is not rendered defective when the clerk inserted the names of children. 144**Va**676, 132**SE**332.

990–84¼–New. In proceedings for contempt issued by the juvenile court judge, a widow may not raise regularity of summons for the first time on appeal. 144**Va**676, 132**SE**332.

990–84½–New. Infants produced in the juvenile court become subject to jurisdiction of the court, although released to the mother. 144**Va**676, 132**SE**332.

990–86½–New. The fact that defendant was over sixteen years of age when put on trial rendered inoperative a requirement that the case be transferred to the juvenile court, if he was under such age when the offense was committed. 23 **AlaA**43, 120**S**307.

990–87 170**La**255, 127**S**619 (jurisdiction of father of neglected children).

990–89 99**CalA**541, 278**P**910.

990–89½–New. Where the juvenile court obtains jurisdiction of a proceeding against a neglected child, removal of the child beyond the state by the parent cannot defeat jurisdiction. 221**MoA**847, 285**SW**786.

990–89¾–New. Review of judgment. The only ground on which the appellate court is authorized to reverse judgment of the juvenile court is insufficiency of finding of facts or evidence to sustain it. 88 **IndA**445, 164**NE**508.

990–93 21**AlaA**650, 111**S**644; 151**Miss** 398, 118**S**184, 60**ALR**1325.

990–98 53**ND**852, 208**NW**238. [a] **Omission from statute** of declaration that destitute and dependent children are wards of state is no evidence of abandonment of doctrine. 126**Misc**135, 212**NYS**741.

990–99 220**Ala**654, 127**S**221 (directing guardian as to proper pleading); 99**NJ Eq**461, 133**A**768.

990–1 218**Ala**530, 119**S**220; 77**CalA**109, 246**P**89.

990–2 77**CalA**109, 246**P**89; 53**ND**852, 208**NW**238; **TexCivA** 286**SW**629.

990–3 77**CalA**109, 246**P**89; 197 **Ind**700, 151**NE**826; 259**Mass**148, 156**NE**21. [a] **Evidence held sufficient to support finding** that child was living in unfit place, and adjudging child ward of court. 99 **CalA**134, 277**P**1049.

990–6 67**Utah**316, 247**P**301.

990–7 214**Ala**325, 107**S**840; 21**AlaA**650, 111**S**644; 240 **IllA**508; 197 **Ind**700, 151 **NE**826; 119**Kan**803, 241**P**115; 161**La** 978, 109**S**783; 259**Mass**148, 156**NE**21; 221**AppDiv**86, 222**NYS**319; 126**Misc**135, 212**NYS**741; 22 **OhA**528, 154**NE**55; 127 **Okl** 253, 260**P**775, 776 [quotCJ]; 144 **Okl** 65, 289**P**704; **TexCommnA** 285**SW** 285; **TexCommnA** 285**SW**606; **TexCivA** 286**SW**629, 632 [citCJ]; **NB** [1928] 1 **DomLR**403; 59 **OntL**40, [1926] 3**Dom LR**349. [i] **Affection between child and persons given custody** is not controlling. 126**Misc**135, 212**NYS**741. [j] **All circumstances that may affect life of child must be considered.–126Misc**135, 212 **NYS**741.

991–8 218**Ala**548, 119**S**675; 77**CalA**109, 246**P**89; **TexCivA** 286**SW**629, 632 [cit CJ]. [c] **Change of custody from parents to juvenile home** for conduct not involving criminal charge held not to require trial or hearing. 77**CalA**109, 246**P**89.

992–11 213**Ala**328, 104**S**804 [citCJ].

992–14½–New. Where authorized agency has placed destitute and dependent child, the child will be ordered returned, in absence of adoption or guardianship, where persons with whom child was placed are unfit to train the child, 126 **Misc**125, 212**NYS**741.

992–14⅓–New. and the society is able to give it approved care, 126**Misc**135, 212**NYS**741.

992–14¼–New. or where both are proper guardians and the agency has superior right. 126**Misc**135, 212**NYS**741.

992–14⅙–New. The return of the child will be denied where agency is unfit and person with whom child was placed is competent to care for it. 126**Misc**135, 212**NYS**741.

992–14⅙–New. Custody of the child will be given to others than authorized agency or persons with whom child was placed by the agency when the welfare of the child requires. 126**Misc**135, 212 **NYS**741.

992–17½–New. Rights of parties growing out of their relations to, affection for, or interest in, child should be considered and determined. **TexCivA** 286 **SW**629.

993–27 36**Man**221, [1927] 1**DomLR**781, [1927] 1**WestWkly**355.

993–28 [a] (2) Application by aunt for custody of orphan children placed in orphan asylum dismissed upon ground that welfare of child controlled rule that child should be brought up in religion of father. **Ont** [1927] 3**DomLR**136.

993–30 125**Kan**594, 596, 264**P**1069 [quotCJ].

993–31½–New. The proceedings are civil in nature. 99**CalA**541, 278**P**910.

993–33 125**Kan**594, 596, 264**P**1069 [quotCJ].

993–34 125**Kan**594, 596, 264**P**1069 [quotCJ]. [a] **Allegations held insufficient to support order.–208Cal** 725, 284 **P**916(2dcase).

993–35 21**AlaA**650, 111**S**644; 243 **IllA** 367, 373 [citCJ].

993–36 21**AlaA**650, 111**S**644; **TexCivA** 286**SW**629, 632 [citCJ]. [a] **Evidence held not to show right of stranger to have custody as against parents.** 79 **CalA**525, 250**P**201.

993–37 117 **Oh**152, 157**NE**897; **TexCivA** 286**SW**629, 632 [citCJ].

993–37½–New. In Missouri finding by juvenile court that child was neglected by custodian thereof does authorize judgment changing custody under statute authorizing such order where child is found destitute or homeless or abandoned. 220**MoA**29, 285**SW**167.

993–37⅓–New. Formal party has the right to have the trial court's judgment reviewed. **TexCommnA** 285**SW**606.

993–37¼–New. Removal of child from state may be wrongful as an irreparable injury to the child. **TexCommnA** 285 **SW**606.

993–37⅕–New. Until the child is returned to the state, the supreme court will not review on a writ of error of the party removing the child. **TexCommnA** 285**SW**606.

993–37⅙–New. In a proceeding to determine the custody of the child, a request that discretion as to the return of child to its parents be based on comparison of the homes is proper. 259 **Mass**148, 156**NE**21.

993–37⅐–New. Suit to determine the custody of child is a civil suit. **TexCivA** 286**SW**629.

993–37⅛–New. Proceedings to modify or set aside a judgment awarding the custody of the child is in effect a new suit. **TexCivA** 286**SW**629.

993–37⅛–New. Juvenile court has been held without jurisdiction in an action to regain custody of a child over sixteen. 193**Wis**635, 215**NW**583.

993–37 1/10–New. Appeal by father from order affecting child's custody, failing to show that proceeding was taken on behalf of infant, will be dismissed. 221 **MoA**366, 273**SW**155.

993–37 1/11–New. Proceedings to take custody of children from parents for neglect is quasi-criminal. 170**La**255, 127**S**619.

993–38 208**Cal** 725, 284**P**916(2dcase) (parents are entitled to custody pending hearing).

993–45 See also **Sask** [1928] 4**DomLR** 127. [a] **Proceedings under Saskatchewan statute to compel maintenance by**

municipality.–Man [1930] 2**DomLR**255. [b] **Who are dependent children.–230 AppDiv**276, 243**NYS**640.

993–46 230**AppDiv**276, 243**NYS**640. [a] **In Pennsylvania.–91PaSuper**261. [b] **Statute requiring payment by municipality is mandatory.–230AppDiv**276, 243 **NYS**640.

993–47 [b] 49**ND**205, 190**NW**811.

993–49½–New. Such statutes are not poor relief statutes but the pension provided for is more in the nature of compensation by the state for services rendered in rearing future citizens in proper surroundings. 49**ND**682, 193**NW**250.

993–50½–New. Fatherless minor children in charge of grandmother do not come within provisions of statute, requiring that children for whose benefit allowance is to be made must be living with their mother. 48**SD**428, 204 **NW**946.

994–51 202 **Iowa**1327, 212**NW**152. [a] 12**PaDist&Co** 246.

994–55 [b] **Informal ex parte application** is authorized under some statutes. 152**Tenn**217, 276**SW**867.

994–62½–New. Arbitrary termination of a pension by the tribunal which administers it is not permissible. 106**WVa** 317, 145**SE**641.

994–62⅓–New. A mother's pension should not be revoked because of a report disparaging her character, without giving her notice and the opportunity to be heard. 106**WVa**317, 145**SE**641.

994–70 77**CalA**587, 247**P**245; 79**CalA** 268, 249**P**209; 93**CalA**141, 269**P**194; 82 **Colo** 589, 263**P**19; 197 **Ind**412, 151**NE** 131. [d] **Punishment.–202 Iowa**189, 209 **NW**287. [e] **Defenses.–202 Iowa**189, 209 **NW**287. [f] **That acts charged lead up to commission of sodomy** does not prevent conviction under statute denouncing offense of committing lascivious acts upon children. 68**CalA**575, 229**P**990. [g] **Effect of intent to effect sexual intercourse and accomplishment thereof.–** 69**CalA**83, 230**P**213. [h] **Elements of crime.–69CalA**83, 230**P**213.

994–78 42 **Ida**381, 246**P**531. [a] **Conviction for sale of cigarettes** not set aside because minor purchased by direction of sheriff. 42 **Ida**381, 246**P**531. [b] **Purchase by minor** by direction of sheriff does not prevent act from being criminal. 42 **Ida**381, 246**P**531. [c] **Minor purchasing by direction of sheriff** held within class contemplated by statute. 42 **Ida**381, 246**P**531.

994–79 74**CalA**540, 241**P**401; 197 **Ind** 412, 151**NE**131; 176**Minn**234, 223**NW** 98(1stcase); **ND** 228**NW**847 (term "child" in statute means any human being under eighteen); **Wis** 229**NW**35 (2dcase) (statute construed). [b] **Neither assault with intent to commit rape nor** intent to have carnal knowledge is element of this crime. 320 **Ill** 233, 150 **NE**631. [c] **Acts constituting this crime may undoubtedly be** committed in seclusion of sedan. 320 **Ill** 233, 150**NE** 631 (parked in string of cars along street with child of tender years offering no resistance). [d] **Conviction warranted** under statute punishing lewd and lascivious conduct with child. 74**CalA** 540, 241**P**401. [e] **Questions of law and fact.–**Exclusive province of jury to determine weight to be given testimony of complaining witness in prosecution for lewd and lascivious conduct with child. 74**CalA**540, 241**P**401. [f] **Statutes construed.–ND** 228**NW**847. [g] **Consent no defense.–ND** 228**NW**847.

995–84 114**Nebr**142, 206**NW**752. [b] **Exception in statute forbidding appearance of children in public entertainments** in favor of nonremunerated appearance on behalf of churches and charities does not make statute unconstitutional under denial of due process or equal protection clauses. 113 **Oh**111, 148**NE**367.

995–86 27**F(2d)**197. [a] **Statute construed.–9PaDist&Co** 779 (opinion of attorney-general).

995–89 See also 79**Mont**52, 255**P**337.

995–91 279**US**587, 49**SCt**442, 73**Led** 861; 261**Mass**226, 158**NE**759, 55**ALR** 640; 221**MoA**345, 273**SW**176; 79**Mont** 52, 255**P**337; 13**PaDist&Co** 385. [a] (2) Sending stepson under fourteen on occasional errand, without hiring, pay, or promise of pay, is not unlawful employment of child under Labor Law. 220**AppDiv**743, 221**NYS**637.

995–92 337 **Ill** 70, 168**NE**895; 79**Mont** 52, 255**P**337. [d] (2) Nor can mayor issue permit authorizing theatrical exhibition, including speaking parts by child under sixteen, and his written consent is void under Pen. Code (1884) § 292, as amended. 132**Misc**283, 230**NYS**206. [g] (2) Sale of daily newspapers to boys under fourteen years of age for resale on streets in cities of first, second or third class constitutes violation of such statutes. 213**Ky**618, 281**SW**805. [j] **Employment certificate** issued by secretary of school board falsely stating that minor could read and write English language intelligently does not render secretary criminally liable. 38**PaCo** 24. [k] **The term "colliery,"** as used in statute regulating employment of minors in anthracite coal mines, is construed to mean entire operation. 37**PaCo** 256. [l] **Application of rule of ejusdem generis.–** 79**Mont**52, 255**P**337. [m] **Phrase "occupation known to be dangerous"** means calling, trade, business, or profession commonly reputed to be considered dangerous by public. 79**Mont**52, 255**P**337. [n] **Dangerous employment.–329 Ill** 308, 160**NE**588. [o] **Singing and dancing constitutes "work"** within meaning of statute. 261**Mass**226, 158**NE**759, 55**ALR**640. [p] **Restriction to establishment or occupations operated by parents.–Iowa** 232 **NW**279.

995–94 **Iowa** 232**NW**279.

996–96 221**MoA**345, 273**SW**176. [b] **Issuance of employment certificate is sole evidence** of child's qualifications to work. 221**MoA**345, 273**SW**176. [c] **Certificate sole evidence of infant's qualifications to work.–221MoA**345, 273**SW**176.

996–98 [a] **Factory owner held not liable.–230AppDiv**502, 245**NYS**270.

996–8 [a] **In Ohio.–113 Oh**111, 148**NE** 367.

996–11 88**CalA**221, 262**P**1105; 117 **Or** 466, 242**P**440.

996–19 But see 191**NC**668, 132**SE**664.

996–21 105**WVa**165, 141**SE**637. [a] **Defenses.–99CalA**778, 279**P**488.

996–22 74**CalA**666, 241**P**598; 168**La**87, 121**S**583.

997–25½–New. In Illinois it is held, construing the statute, not necessary for a child to leave the home for immoral purposes to be delinquent, 321 **Ill** 552, 152**NE**495.

997–25⅓–New. but, to constitute the crime of contributing to the delinquency of a child, more than mere temporary leaving with intention to return is necessary. 321 **Ill** 552, 152**NE**495.

997–25¼–New. Criminal intent is not a necessary element of the offense of contributing to the delinquency of a child. 105**WVa**165, 141**SE**637.

997–25½–New. In a prosecution for contributing to delinquency, it is not necessary to show that the child knew that its act induced by defendant was wrongful and in violation of law. 92**CalA**683, 268**P**915.

997–27 26 **OhNPNS**343.

997–31 [d] See also 37**GaA**32, 138**SE** 528.

997–45 [b] But see 89**PaSuper**195.

998–61 101**WVa**178, 132**SE**504.

998–65 [b] (5) Reliance in good faith on forged consent constitutes defense. 213**Ky**617, 281**SW**803.

998–70 **TexCr** 20**SW(2d)**790 (statute should be liberally construed). [d] 338 **Ill** 373, 170**NE**305. [e] 68**CalA**588, 229**P** 983. [f] 69**CalA**174, 230**P**972; 168**La** 87, 121**S**583.

999–72½–New. Infant committed to Children's Aid Society without due formalities of law will be released on habeas corpus. **NS** [1927] 2**DomLR**529.

999–72⅓–New. A female under the age of eighteen at the time of trial and married is a "delinquent child" under the statute. **TexCr** 20**SW(2d)**790.

999–74 [e] **Superior court has jurisdiction of charge** against adult for contributing to delinquency of female child. 144**Wash**334, 258**P**15.

999–75 **CalA** 285**P**871(2dcase); 191**NC** 668, 132**SE**664; 230**AppDiv**249, 243**NYS** 613. [b] **Duty is on juvenile court judge** to transfer case to superior court after entry of plea of not guilty. **CalA** 285 **P**871(2dcase). [c] **If defendant pleads guilty,** then juvenile court has jurisdiction; otherwise superior court has jurisdiction. **CalA** 285**P**871(2dcase). [d] **In California.–99CalA**645, 279**P**157.

999–79½–New. Defenses. In a prosecution against a restaurant keeper permitting the employment of minor girls at prohibited times, it is no defense that they were employed by an independent contractor. 261**Mass**226, 158**NE**759, 55 **ALR**640.

999–80 [c] **Preliminary hearing before some magistrate** is sufficient for filing information in superior court. **CalA** 285 **P**871(2dcase).

999–81 23**AlaA**333, 125**S**204(2dcase). [a] (1) **TexCr** 20**SW(2d)**790. (4) 68**CalA** 588, 229**P**983; 93**CalA**141, 269**P**194. (5) To charge adult with contributing to delinquency of female child. 144**Wash** 334, 258**P**15. [b] (1) 23**AlaA**333, 125**S** 204(2dcase); 99**CalA**123, 278**P**466. [c] **Information held not to charge aggravated assault** by one under twenty-one, but merely simple assault. 113**TexCr** 429, 21**SW(2d)**1068.

999–82 [a] (4) In some jurisdictions both delinquency and defendant's contribution thereto must be alleged. **Ariz** 286**P**824. [d] 74**CalA**666, 241**P**598; 88 **CalA**609, 264**P**318; 99**CalA**778, 279**P**488; 168**La**87, 121**S**583; 117 **Or**466, 242**P**440 (complaint sufficient). [e] **Ariz** 286**P** 824; 70**CalA**195, 232**P**993; 191**NC**668, 132**SE**664; 30 **OhA**195, 164**NE**649.

999–82½–New. Variance. Allegation that defendant placed his hand upon the clothes and privates of the prosecuting witness and proof that defendant placed hands on but not under her clothes does not constitute variance. 69**CalA**174, 230 **P**972.

999–83 251**Mich**364, 232**NW**349(2d case). [c] (1) 195**Wis**181, 217**NW**697. (2) Conviction may be had on uncorroborated testimony of prosecuting witness. **CalA** 289**P**667. [e] (1) 74**CalA**666, 241 **P**598; 80**CalA**182, 251**P**692; 92**CalA**683, 268**P**915; 102**CalA**608, 283**P**389. [f] (1) 79**CalA**20, 248**P**1027; 80**CalA**243, 251**P**699; 338 **Ill** 373, 170**NE**305. [h] **Intercourse between prosecutrix and third party** prior to her examination by physician may be shown to rebut inferences unfavorable to defendant in prosecution for using female under eighteen years for immoral purposes. 3**Del** 127, 131**A**567. [i] **Evidence held immaterial.–** 3**Del** 432, 138**A**633. [j] **Variance.–113 TexCr**429, 21**SW(2d)**1068.

1000–84 **Ariz** 286**P**824 (delinquency of child and defendant's contribution thereto); 94**CalA**25, 270**P**457; 94**CalA**696, 271**P**751. [a] (7) To sustain conviction of having taken immoral, improper, and indecent liberties with female child under the age of fifteen years. 320 **Ill** 233, 150**NE**631. [c] (1) 99**CalA**409, 278**P** 885; **IndA** 169**NE**883(1stcase). (2) 92 **CalA**683, 268**P**515. (3) 68**CalA**588, 229 **P**983; 69**CalA**83, 230**P**213; (3) 79**CalA** 268, 249**P**209; 80**CalA**182, 251**P**692; 80 **CalA**243, 251**P**699; 323 **Ill** 540, 153**NE** 727. (6) 74**CalA**666, 241**P**598. (7) To sustain conviction of contributing to delinquency of child. 99**CalA**778, 279**P**488 (contributing). (8) To sustain conviction for delinquency. 113**TexCr**429, 21 **SW(2d)**1068. [d] (1) 339 **Ill** 267, 171**NE** 144. (3) 99**CalA**123, 278**P**466. (4) 195 **Wis**181, 217**NW**697. (5) To sustain conviction of doctor. **CalA** 288**P**113.

1000–84½–New. To sustain a conviction of permitting minor girls to work at prohibited times. 261**Mass**226, 158**NE** 759, 55**ALR**640 (dancing and singing).

1000–86 [a] (1) 69**CalA**83, 230**P**213; 69**CalA**174, 230**P**972. (3) Whether defendant intended by his acts to arouse sexual passion of himself and of child. 69**CalA**174, 230**P**213. (4) Whether child of unquestioned character may be subject of criminal act of contributing to her delinquency. 74**CalA**666, 241**P**598. [b] (3) Tending to induce infant to become delinquent. 74**CalA**666, 241**P**598. (4) Prosecution for lewdness. **NJ** 143 **A**810. [c] **Testimony of prosecuting witness held not as matter of law unbelievable.–CalA** 289**P**667.

1000–86½–New. Judgment. A sentence of not "less" than four years instead of not "more" than four years has been held erroneous. **TexCr** 20**SW(2d)**790.
1000–90 Mo 283**SW**700.
1000–91 314**Mo** 144, 282**SW**700.
1000–13 [a] **In Missouri.**–314**Mo** 144, 282**SW**700.
1001–19 [a] **In New York.**–126**Misc**135, 212**NYS**741.
1001–20 [a] **In New Jersey.**–**Ch** 148A10.
1001–26½–New. But an instrument executed and acknowledged by child's mother surrendering child to such home cured any infirmity in instrument previously executed by maternal grandmother. 126**Misc**135, 212**NYS**741.
1001–26⅓–New. An instrument executed by child's maternal grandmother surrendering child to authorized infants' home vested no right to the child's custody. 126**Misc**135, 212**NYS**741.
1001–26¼–New. An authorized agency, which placed child with persons on express condition that custody was not to be permanent without the agency's consent, is entitled to return of child because of superior right. 126**Misc**135, 212 **NYS**741.
1001–30 **MoA** 274**SW**510.
1001–33½–New. Minority of itself shows incompetency. 22**F(2d)**81.
1001–35 145**Miss**51, 111**S**96.
1001–36 145**Miss**51, 111**S**96.
1001–40 146**Va**91, 135**SE**S90, 46**ALR** 1427.
1002–55 112 **Okl** 110, 243**P**516.
1003–75 50**RI** 321, 147**A**617.
1003–82 237**NYS**305, 311, 142**NE**671, 31 **ALR**995 [mod 206**AppDiv**793, 200**NYS** 790 (aff 119**Misc**116, 195**NYS**848) and disappr 3**NY**506, 508; 17**WendNY**119, 131] ("Notwithstanding numerous general statements in the books, sound principles compel the conclusion that no satisfactory distinction can be drawn between a sale and delivery by the infant and a sale and delivery by an agent for him. The sale of the stock . . . was voidable only and not void. Dicta and general statements to the contrary are no longer respectable authority"); 119 **Or**691, 250**P**1101.
1004–17 **TexCivA** 281**SW**580.
1004–18 **TexCivA** 281**SW**580.
1005–20 175**Ark**50, 297**SW**1022, 1026 [quotCJ]; 163**Ga**551, 136**SE**528; **MoA** 274**SW**510; 124 **Or**443, 264**P**432, 436 [citCJ]; 132**SC**72, 128**SE**34 (not ordinarily available against infants).
1005–22 [a] **MoA** 274**SW**510.
1005–23 124 **Or**443, 264**P**432, 436 [quot CJ]. [a] 132**SC**72, 128**SE**34 (dictum).
1005–24 113 **Okl** 265, 242**P**185.
1005–26 163**Ga**551, 136**SE**528.
1005–30 **MoA** 274**SW**510.
1006–36 273**US**18, 47**SCt**277, 71**L** ed515, 50**ALR**1181; 206 **Iowa**964, 221**NW**506.
1006–45 273**US**18, 47**SCt**277, 71**L** ed 515, 50**ALR**1181; 217**AppDiv**324, 216 **NYS**571.
1006–46 273**US**18, 47**SCt**277, 71**L** ed515, 50**ALR**1181; 219**Ala**211, 121**S**713; 177 **Ark**121, 6**SW(2d)**829; 98**CalA**282, 276**P** 1065; 20 **OhA**229, 153**NE**153; 132**SC** 72, 128**SE**34. But see 39**GaA**275, 146**SE** 773.
1007–47 But see 51**Philippine**417.
1007–48 159**Tenn**192, 17**SW(2d)**8.
1007–51 231**Ky**626, 21**SW(2d)**1001; 159**Tenn**192, 17**SW(2d)**8.
1007–53 136**Wash**565, 240**P**921.
1003–71 225**Ky**753, 9**SW(2d)**1100.
1008–82 13**PaDist&Co** 8.
1003–83 9**LaA**467, 119**S**736.
1009–94½–New. Where an infant husband sued his infant wife for divorce, appearing by his next friend, and the court ordered him to pay certain sums for temporary alimony and other expenses and adjudged him in contempt for failure to make such payments and committed him to jail, he will not be discharged on habeas corpus on the ground that he was an infant at the time of the proceedings and of the confinement. 114 **Okl** 234, 245**P**992.
1009–97 77**Mont**290, 250**P**973, 974 [cit CJ], 49**ALR**398.
1009–98 77**Mont**290, 250**P**973, 974 [cit CJ], 49**ALR**398. [h] **Special guardian may be appointed** to give or refuse consent in cases specified by law. 34**Porto Rico** 157.
1009–8½–New. Minor emancipated by marriage may sell his property without authorization of court. 34**PortoRico** 157.
1009–10 148**Miss**75, 114**S**128.
1009–11 147**Miss**141, 113**S**327; 148**Miss** 75, 114**S**128. [b] **Chancery court held within jurisdiction to remove disabilities** of illegitimate minor. 147**Miss**141, 113 **S**327.
1009–13 148**Miss**75, 114**S**128.
1009–14 [b] **Order removing disabilities of female minor** is in "coram non judice" and deeds executed thereunder are held voidable at minor's instance. 173**Ark**223, 292**SW**122.
1009–15½–New. Statutes held to create right in illegitimate minor to pursue remedy. 147**Miss**141, 113**S**327.
1009–17 **TexCivA** 292**SW**947.
1010–24 112 **Okl** 110, 243**P**516 (under Texas laws).
1010–25 181**Ark**391, 26**SW(2d)**92 (minor over eighteen to join in gas and oil lease); 147**Miss**141, 113**S**327. [a] **Petition to emancipate** held not case in equity. 147**Miss**141, 113**S**327.
1010–27 [b] 153**Miss**91, 120**S**437. [c] **In Louisiana.**–**LaA** 127**S**663.
1010–28 153**Miss**91, 120**S**437.
1010–31 141**Miss**96, 106**S**106 (petition held sufficiently signed by required parties).
1010–40½–New. Mother alone held necessary defendant to proceedings. 147 **Miss**141, 113**S**327.
1010–45½–New. Where petition is not made returnable in vacation, ordinary service of process is necessary. 147**Miss** 141, 113**S**327.
1010–45⅓–New. Next of kin may waive issuance of summons. 148**Miss**75, 114 **S**128.
1010–48½–New. Allegation in petition of illegitimate child that father is dead held not to raise a presumption of fraud. 147**Miss**141, 113**S**327.
1010–50 148**Miss**75, 114**S**128.
1010–52½–New. Decree may be made in vacation where the only living parent appeared to answer the petition. 147 **Miss**141, 113**S**327.
1010–52⅓–New. The facts giving jurisdiction to the court to remove disabilities of a minor must plainly appear in the judgment. 178**Ark**297, 10**SW(2d)** 517.
1010–53 Contra **TexCivA** 292**SW**947.
1011–56½–New. Order cannot be set aside by evidence outside record. **Tex CivA** 292**SW**947.
1011–56⅓–New. Recitals in order removing disabilities of union import absolute verity to order. **TexCivA** 292**SW** 947.
1011–58 7**LaA**169. See also 178**Ark**297, 10**SW(2d)**517.
1011–59 153**Miss**91, 120**S**437.
1011–65 112 **Okl** 110, 243**P**516.
1011–70½–New. By legal fiction or indulgence legal personality is imputed to an unborn child as a rule of propriety for all purposes beneficial to the infant after birth, but not for purposes working to its detriment. 214**Ala**611, 108**S** 566.
1011–75 148**Miss**75, 114**S**128.
1012–77 148**Miss**75, 114**S**128.
1012–96 [a] **Statute relieving against disability** of minor depositor does not extend to validating release to bank executed by minor. 175**Ark**143, 298**SW** 872.
1013–17 141**SC**265, 139**SE**625, 54**ALR** 964.
1013–18 141**SC**265, 139**SE**625, 54**ALR** 964.
1013–19 141**SC**265, 139**SE**625, 54**ALR** 964.
1013–32 116 **Okl** 65, 243**P**516.
1014–35 32**PortoRico** 84 (principle applied to conveyance under deed of partition).
1014–36 32**PortoRico** 84 (rule applied to conveyance under partition proceedings in settlement of decedent's estate).
1014–46 169**Ark**1115, 278**SW**41, 43**ALR** 114; **NJCh** 151**A**766; 217**AppDiv**224, 216**NYS**571; 141**SC**265, 139**SE**625, 54 **ALR**964. [b] **Ratification on reaching majority after suit** held ineffective for purposes of that suit. 169**Ark**1115, 278 **SW**41, 43**ALR**114.
1015–56 **NJCh** 151**A**766; 141**SC**265, 139**SE**625, 54**ALR**964.
1015–65 [a] 196**NC**674, 146**SE**707.
1015–74 209**Ky**806, 273**SW**476; 227**Ky** 623, 13**SW(2d)**780; 141**SC**265, 139**SE** 625, 54**ALR**964; 106**WVa**348, 145**SE** 581. [d] **Mere fact that grantor did not know that law required her to move within reasonable time** to disaffirm deed would not alone excuse delay in moving to disaffirm. 168**Ga**245, 147**SE**526.
1016–76 227**Ky**623, 13**SW(2d)**780.
1016–78 168**Ga**245, 147**SE**526; 141**SC** 265, 139**SE**625, 54**ALR**964; 106**WVa**348, 145**SE**581. [a] (13) Nine months. 106 **WVa**348, 145**SE**581. [b] (2) 30**Hawaii** 184. (17) Thirty years after infant wife could have disaffirmed release of dower. 209**Ky**806, 273**SW**476. (18) Twenty-eight years. **TexCivA** 15**SW(2d)**672. (19) Other periods held unreasonable. 106**WVa**348, 145**SE**581.
1016–81 227**Ky**623, 13**SW(2d)**780.
1017–85 209**Ky**806, 273**SW**476; 227**Ky** 623. 13**SW(2d)**780.
1017–90 28**F(2d)**590; 135**Misc**598, 238 **NYS**301.
1017–93 137 **Okl** 204, 279**P**310.
1018–3 But see 169**Ark**1115, 278**SW**41, 43**ALR**114.
1018–13 86 **IndA**632, 155**NE**712.
1018–17 56**ND**60, 215**NW**913, 915 [cit CJ].
1019–30 141**SC**265, 139**SE**625, 54**ALR** 964. [a] (1) **Iowa** 228**NW**655.
1019–42 165**Ga**514, 141**SE**408. [b] **Married woman cannot disaffirm deed,** executed during minority, after ten years from time of majority, regardless of her continuing disability of coverture. 225**Ky**288, 8**SW(2d)**404.
1020–46 165**Ga**514, 141**SE**408.
1020–54½–New. A minor is not bound by act in executing deed nor by a void decree to remove disability of minority, but could disaffirm the deed while under disability of minority and recover property. 153**Miss**91, 120**S**437.
1020–56 56**ND**60, 215**NW**913, 915 [cit CJ].
1020–62 [a] 265**Mass**163, 163**NE**885.
1021–72½–New. Adult must return consideration which infant paid for land before the infant is required to return land. 217**AppDiv**224, 216**NYS**571.
1021–82 159**Tenn**192, 17**SW(2d)**8. [g] **Offer to return** made in open court held sufficient. 33**GaA**784, 127**SE**793.
1021–83 173**Ark**223, 292**SW**122; 108 **Conn**528, 143**A**896; 159**Tenn**192, 17**SW** (2d)8.
1022–85 [a] **Misrepresentation as to age.**–**TexCivA** 286**SW**593.
1022–86 See also 153**Miss**91, 120**S**437.
1022–89½–New. Under some statutes restoration of the consideration is a condition of rescission of a conveyance made by an infant over eighteen years of age. 112 **Okl** 110, 243**P**516.
1022–89⅓–New. Where an infant rescinding the purchase of a ranch offers to return the entire consideration upon like return by the seller, who refused the condition but accepted the return of all property including a brand, and the infant repeated the offer in pleading and at trial which was again refused, the seller cannot complain on appeal. 78 **CalA**536, 248**P**779.
1022–92 79**CalA**787, 251**P**319; 92**Pa Super**245. [d] **Statutory provision.**–78 **CalA**536, 248**P**779.
1022–92½–New. , or he must pay its equivalent. 79**CalA**787, 251**P**319.
1022–94½–New. In an action to rescind a contract for the purchase of an automobile equity requires the accounting of charges and countercharges as to each party, where the infant offered to restore after use and damage and defendant received from him another car applied on purchase price. 79**CalA**787, 251**P**319.
1022–94⅓–New. In such case the rule regarding tender or restoration is not so strict in view of the necessity for hearing evidence to fix the amount and do equity. 79**CalA**787, 251**P**319.
1022–94¼–New. In such action plaintiff should be charged with the use and depreciation of an automobile he agreed to purchase from defendant, 79**CalA**787, 251**P**319.
1022–94⅕–New. and defendant is

chargeable with the use and depreciation if there is any on the car traded in by plaintiff. 79CalA787, 251P319.

1022-94½-New. If such traded-in car has been sold defendant would be liable on that item with its reasonable value at the time he received it from plaintiff less the sum paid to the former owner to obtain a bill of sale. 79 CalA787, 251P319.

1022-96 [a] **On infant's disaffirmance of chattel mortgage by sale of chattel** mortgage becomes void as against purchaser with or without notice. 144 Okl 174, 289P698.

1023-17½-New. Infant's lien on a house and lot to secure repayment of a sum paid the vendor cannot be enforced against insurance in the hands of the purchaser from the vendor. 217Ky354, 289SW283.

1024-53 119Kan568, 240P570. [e] **Infant innocently receiving gift** through fraud of third party, after majority, stands in no different position than any other defendant receiving gift procured by fraud. 69CalA447, 231P604.

1025-87 20 OhA229, 153NE153.

1025-88 20 OhA229, 153NE153.

1025-92 119 Or691, 250P1101.

1025-96 92PaSuper245, 247 [citCJ].

1026-8 240Mich408, 215NW305; 51 Philippine417.

1026-12 240Mich408, 215NW305.

1026-12½-New. If not ratified by the infant after attaining majority, it cannot be specifically enforced. 240Mich 408, 215NW305.

1026-18 165Ga514, 141SE408.

1027-20 46Philippine551.

1027-25½-New. Where the court would have ordered sale of the land in which infants are interested, in the application, it will sanction the sale when voluntarily made. 134SC54, 131SE319.

1028-38 134Misc82, 234NYS514.

1028-40 144 Okl 174, 289P698.

1028-57 See also 32PortoRico 84.

1029-86½-New. The duty to disaffirm, if minor elects to do so, is a positive duty enjoined by law. 225Ky288, 8SW (2d)404.

1029-88 225Ky288, 8SW(2d)404.

1029-96 144 Okl 174, 289P698 (infant mortgagor's sale of mortgaged chattel).

1031-23 173Ark223, 292SW122. [b] **Purchaser on cancellation** is entitled to allowance for repairs. 173Ark223, 292 SW122.

1031-24 173Ark223, 292SW122.

1031-33 93Fla143, 112S378.

1033-79 37GaA301, 139SE912.

1033-85 See also 37GaA301, 139SE912.

1033-90 141SC265, 139SE625, 54ALR 964.

1033-93 See also 28F(2d)590.

1033-94½-New. Adoption of a lease by an Indian minor after reaching majority created a new lease commencing with his majority, and did not estop him from asserting that it was null and void prior to that time. 28F(2d)590.

1035-35 22AlaA252, 114S422.

1035-36 22AlaA252, 114S422.

1035-37 22AlaA252, 114S422.

1035-44 102NJEq393, 141A16; Sask [1925] 3DomLR141. [a] **Erratum.-** "147 N. Y. 460" should be "147 N. Y. 560."

1035-46 158Md13, 148A116.

1035-48 220Ala654, 127S221; 334 Ill 315, 166NE50; 233Mich58, 206NW310.

1036-55 [a] (2) It has jurisdiction to construe will, determine interest of parties, and make proper disposition, though infants are devisees. TexCivA 16SW(2d)839.

1036-60 178Ark583, 12SW(2d)875; 144 Okl 264, 291P124.

1036-64 TexCivA 291SW615.

1037-72 222Ky649, 1SW(2d)1040.

1037-72½-New. Sale made in conformity to infancy proceeding is judicial sale. 215AppDiv841, 213NYS680.

1037-83 Va 153SE705. But see 228App Div629, 238NYS6.

1038-94 149Va867, 141SE856.

1038-1 233Ky109, 25SW(2d)56.

1039-10 142Va173, 128SE541.

1039-11 196NC4, 144SE372; 135SC183, 133SE556; 153Tenn150, 281SW929.

1039-18 135SC183, 133SE556.

1040-45 135SC183, 133SE556. [a] **Reasonable necessity** is sufficient. 135 SC183, 133SE556.

1040-46 233Mich58, 206NW310; 135 SC183, 133SE556.

1041-50½-New. Minors have the right to have their interest in lands sold to raise funds to redeem land from tax sale. 145Miss456, 110S865.

1041-53 145Miss456, 110S865.

1041-55 142Va173, 128SE541.

1041-57 149SC545, 147SE648.

1041-63 233Mich58, 206NW310.

1042-83 96Fla455, 118S216.

1042-86 35PortoRico 564; 142Va173, 128SE541 (stating requirements of statute).

1042-87½-New. A proceeding to sell land of infants inherited from father to pay father's debts is prematurely instituted before settlement of the estate, unless for good cause shown. 142Va 173, 128SE541.

1042-87⅓-New. Compliance must appear from an inspection of the proceedings had. 142Va173, 128SE541.

1043-98 142Va173, 128SE541.

1043-7 [a] **Failure to join infant plaintiff as defendant in proceedings for sale of land** did not invalidate judgment as to purchaser. 233Ky600, 26SW(2d) 516.

1043-11 96Fla455, 118S216.

1043-14½-New. Under some statutes guardian ad litem of infant over fourteen must file answer in his own proper person for such infant. 142Va173, 128SE541.

1043-20 [b] **Petition making no reference to will** providing for division of property, is not res judicata in subsequent proceeding. 228AppDiv629, 238 NYS6.

1044-29 142Va173, 128SE541 (bill to sell infant's land inherited from father to pay debts defective in failing properly to specify heirs of infants).

1044-37 142Va173, 128SE541 (bill to sell land of infants inherited from father to pay father's debts defective in failing to state tract mentioned was all of real estate).

1044-38 142Va173, 128SE541 (bill to sell infant's land inherited from father to pay father's debts defective for lack of allegations concerning personal estate).

1045-55 But see 230AppDiv764, 244 NYS216.

1045-72 96Fla455, 118S216.

1047-18 142Va173, 128SE541.

1049-44½-New. to require deposit of security, 135SC183, 133SE556.

1049-46½-New. Statute providing a saving of rights of infants in sale or conveyance of real estate is substitute for ancient chancery rule to insert such saving in decree itself. 143Miss56, 108 S274.

1049-46⅓-New. and has the effect of reserving such rights in the decree itself. 143Miss56, 108S274.

1050-69 TexCommnA 25SW(2d)309.

1050-80 32PortoRico 858 (Spec. Legal Proceeding Act, § 82 and Code Civ. Proc. § 251 applicable).

1050-87 32PortoRico 858 (twenty days). [b] **Notice sufficient** where required time intervenes between date of first publication and date of sale, though shorter time elapsed between first and last publications. 32PortoRico 858.

1052-28 117 Okl 151, 245P874.

1052-32 [c] **In Texas.-CivA** 286SW 642.

1052-55 Va 153SE705.

1053-63 [a] **Presumption arises that guardian filed sufficient bond** if sale is confirmed. TexCommnA 25SW(2d)309.

1053-90 [b] **Order affirming sale** will be set aside where no contract of sale was made, conditional on guardian's returning payment received by him with interest. 233Mich58, 206NW310.

1054-17 143Miss56, 108S274.

1054-18 143Miss56, 108S274.

1054-18½-New. Decree may approve sale or conveyance as directed by statute but infant has right to show good cause for setting it aside after coming of age, 143Miss56, 108S274.

1054-18⅓-New. unless he has previously attacked such decree or conveyance. 143Miss56, 108S274.

1054-18¼-New. All who deal with the property are bound to take notice of infant's rights in that regard. 143Miss 56, 108S274.

1054-18⅕-New. "Good cause" under statute giving right of infant to set aside sale after coming of age may consist of fraud between next friend of minor in partition suit for sale of real estate and commissioner appointed to make sale and purchaser at sale. 143 Miss56, 108S274.

1054-18⅙-New. Also anything that would cause court to set aside decree after it is made by one of the parties over objection of the other during term amounts to good cause, 143Miss56, 108 S274.

1054-18⅐-New. and any cause that would move supreme court on appeal to reverse decree of lower court amounts to good cause. 143Miss56, 108S274.

1054-18⅛-New. Proceedings not rendered nullity by fact guardian of minor held his office illegally. 27 OhNPNS 525.

1054-21 54SD267, 223NW50.

1055-27 See also 27 OhNPNS525.

1055-28 149SC545, 147SE648.

1055-30 336 Ill 316, 168NE259.

1055-32 194NC633, 140SE436.

1055-34 143Miss56, 108S274.

1055-44½-New. In New York court may relieve purchaser if title is defective or unmarketable. 215AppDiv841, 213NYS680 (where sale was conducted on theory that infant possessed absolute fee title where in fact he did not).

1055-44⅓-New. Under statutes in some jurisdictions absolute title cannot be acquired under the decree until the expiration of period therein fixed. 143 Miss56, 108S274.

1055-44¼-New. While the court had jurisdiction to sell property, of which the infant was one of several joint owners in a partition suit, it could not validate a previous invalid contract for sale thereof to one not a party to such suit against his protest, nor require him to accept the deed, tendered by special commissioners as directed by judgment therein. 152Va587, 147SE206.

1056-76 127 Okl 163, 260P58.

1057-88 Sask [1925] 3DomLR141 (where court disallowed items of cost unnecessarily incurred).

1058-32½-New. Foreclosure of vendor's lien not invalid because one heir was a minor and no guardian ad litem had been appointed where such minor appeared by brother as next friend. TexCivA 275SW156.

1058-56 21AlaA515, 109S576; LaA 125S197.

1058-57 16F(2d)1010; 22AlaA252, 114 S422; 160Ga516, 128SE659; 165Ga514, 141SE408; 2LaA525; 152Miss860, 119 S913, 64ALR968; 102NJEq393, 141A 16; 56ND60, 215NW913; 119 Oh575, 165NE93; 159Tenn192, 17SW(2d)8; 197Wis342, 222NW233. See also 136 Wash565, 240P921, 923 [citCJperFullerton,J]. But see Nev 290P1023(2dcase).

1059-62 256 IllA322.

1060-70 273US18, 47SCt277, 71Led 515, 50ALR1181; 20 OhA229, 153NE 163.

1060-71 126Me70, 136A290.

1060-76 21AlaA515, 109S576; 22AlaA 252, 114S422; 33GaA784, 127SE793; Iowa 230NW330; 155Miss227, 124S331; MoA 274SW510; 217AppDiv224, 216 NYS571; 129Misc190, 220NYS689; 134 SC54, 131SE319; 159Tenn192, 17SW (2d)8; TexCivA 2SW(2d)873.

1061-77 22AlaA252, 114S422; 217 AppDiv224, 216NYS571; 129Misc190, 220NYS689.

1061-78 [b] (1) 160Ga516, 128SE659. (2) Other exceptions under statute are marriage contracts and settlements made by infants of lawful age to marry which are binding as if made by adults. 160Ga516, 128SE659. (3) The marriage contracts and settlements referred to are prenuptial contracts and settlements. 160Ga516, 128SE659. (4) Contract made by infant wife with her husband in settlement of alimony is not binding on her as being within such

exceptions. 160Ga516, 128SE659.
1061-89 87Colo 301, 287P284.
1061-92 22AlaA252, 114S422.
1061-96 216Ky637, 287SW994.
1062-2 216Ky637, 287SW994.
1062-3 OhA 173NE211.
1062-7 87Colo 301, 287P284; 216Ky 637, 287SW994.
1062-23 126Me70, 136A290.
1063-27 132SC72, 128SE34. **Erratum.**–Case under "Mass." should appear under "Ky."
1063-33 7LaA594.
1064-48 219Ala211, 121S713. [b] **Participating in litigation held ratification.**–228Ky615, 158SW(2d)517, 70ALR 56.
1064-50 [a] **Voluntary execution** involves renunciation of exceptions which might have been opposed to act. 166 La671, 117S768, 59ALR276.
1064-51 [a] **Inclusion of creditor's name on bankruptcy schedule,** filed after reaching majority, held no proof of ratification, as it evinces no intent to pay. 126Me70, 136A290. [b] **Intention** must be clearly and unequivocally shown, whether validation be by formal instrument or voluntary execution. 166La671, 117S768, 59ALR276. [c] **In case of doubt as to intent,** intent to ratify will not be inferred if otherwise explainable; benefit of doubt is for party against whom ratification is claimed. 166La671, 117S768, 59ALR 276.
1064-53 [b] **Formal instrument** is not indispensable where act was not binding on party. 166La671, 117S768, 59 ALR276. [c] **Facts not showing ratification.**–166La671, 117S768, 59ALR276.
1064-55 168Minn479, 210NW632.
1065-75 169Ark1115, 278SW41, 43 ALR114; 165Ga514, 141SE408; 230 AppDiv266, 243NYS467.
1065-79½-New. Minor who abandons contract after majority cannot thereafter enforce it. 5PaDist&Co 129.
1065-80 165Ga514, 141SE408; 259 Mass162, 156NE7.
1066-85 Alta [1926] 4DomLR1080.
1066-91 165Ga514, 141SE408.
1066-93 130Misc412, 224NYS400. [b] 168Minn479, 210NW632.
1066-96 [b] **Evidence held inadmissible.**–126Me70, 136A290.
1066-1 216Ky637, 287SW994.
1066-9 214AppDiv490, 212NYS459 (infant may rescind contract without stating infancy is ground).
1066-11½-New. Infants may avoid any contract to surrender their rights for which they are entitled to an equivalent since they are presumed not to have sufficient discretion to place just value on their property or rights. 125 Me438, 134A567.
1066-11½-New. An infant's right to avoid a contract because of his infancy is not affected by the fact that the rights of third parties have supervened. 152Miss312, 119S913, 64ALR968.
1066-13 216Ky637, 287SW994.
1066-13½-New. Where statute requires satisfaction in writing all elements of estoppel must concur, to raise estoppel by conduct after attaining full age. 132SC72, 128SE34.
1066-13½-New. Infant is not estopped to avoid purchase contract by filing answer and replevying property prior to appointment of guardian. 198NC 664, 153SE152.
1066-15 169Ark1115, 278SW41, 43ALR 114; 33GaA784, 127SE793; 206 Iowa 539, 218NW907, 58ALR1359(2dcase); Me 151A423(2dcase); 129Misc190, 220 NYS689; 141SC265, 139SE625, 54ALR 964; TexCivA 288SW255. [a] **Where infant fails to void contract, it is construed** like that of adult, as long as infant asserts contractual rights. 169 Ark1115, 278SW41, 43ALR114.
1067-16 169Ark1115, 278SW41, 43ALR 114; 129Misc190, 220NYS689; 56ND 60, 215NW913, 915 [citCJ]; 141SC265, 139SE625, 54ALR964.
1067-17 See also 125Kan305, 307, 264 P37 [citCJ].
1067-20 129Misc190, 220NYS689; 134 SC54, 131SE319.
1067-24 33GaA784, 127SE793; 252 IllA348; 253 IllA368; 197NC659, 150 SE177; 159Tenn192, 17SW(2d)8.
1067-25 219Ala197, 121S714; 252 IllA 348; 217AppDiv224, 216NYS571; 230 AppDiv266, 243NYS467; 198NC664, 153SE152; 159Tenn192, 17SW(2d)8.
1068-28 252 IllA348; 217AppDiv224, 216NYS571.
1068-29 [a] 56ND60, 215NW913.
1068-33 33GaA784, 127SE793; OhA 173NE307(2dcase); 141SC265, 139SE 625, 54ALR964; TexCivA 2SW(2d)873.
1068-34 Iowa 228NW655.
1068-35 TexCivA 2SW(2d)873. [b] (1) 26 OhNPNS232.
1068-41 84CalA526, 258P429; 265 Mass163, 163NE885; 33 OhA113, 168 NE754 (infant retiring from employment). [a] (5) Where minor, purchasing automobile, had paid portion of note taken in part payment therefor, and seller thereafter sequestrated automobile under mortgage lien, minor tendering automobile to seller was entitled to cancellation of note and to recovery of amount paid thereon. Tex CivA 11SW(2d)259. [c] **Expressing clear intention to rescind** is sufficient. 214AppDiv490, 212NYS459.
1068-41½-New. There is no need to state that infancy is the ground for rescinding. 214AppDiv490, 212NYS 459.
1068-42 84CalA526, 258P429; 214 AppDiv490, 212NYS459 (recovery by infant of payments made); 217AppDiv 224, 216NYS571.
1069-44 217AppDiv224, 216NYS571; 230AppDiv266, 243NYS467.
1069-51 16F(2d)1010; CalA 285P720; 160Ga516, 128SE659; 256Mass5, 152NE 236; 217AppDiv224, 216NYS571; 33 OhA113, 168NE754 (where impossible to do so).
1069-52 TexCivA 1SW(2d)332, 333 [citCJ].
1069-56 273US18, 47SCt277, 71Led 515, 50ALR1181; 219Ala211, 121S713; 79CalA787, 251P319; 84CalA526, 258P 429.
1069-57 273US18, 47SCt277, 71Led 515, 50ALR1181; 155Miss227, 124S331; 230AppDiv266, 243NYS467; 197NC659, 150SE177; 198NC664, 153SE152; 95 PaSuper296 (rule applicable only in suit by infant); TexCommnA 26SW (2d)168; TexCivA 2SW(2d)873; Tex CivA 17SW(2d)116 (obiter). [a] (2) MoA 274SW510.
1070-58 206 Iowa539, 218NW907, 58 ALR1359(2dcase). See also 224AppDiv 487, 231NYS435.
1070-60 273US18, 47SCt277, 71Led515, 50ALR1181.
1070-62 105WVa232, 142SE428, 430 [citCJ].
1070-63 108Conn528, 143A896; 165Ga 514, 141SE408; 197NC659, 150SE177; 198NC664, 153SE152; 159Tenn192, 17 SW(2d)8; TexCivA 1SW(2d)332; Tex CivA 4SW(2d)155. [e] **Infant retiring partner,** signer of partnership note, may set up infancy. 197Wis342, 222NW233. [f] **Depreciation by wear and tear or total loss of consideration** does not prevent rescission of contract by infant. TexCommnA 26SW(2d)168.
1071-71 78CalA536, 248P779; 79CalA 787, 251P319; CalA 285P720; Iowa 228 NW655.
1071-72 87CalA151, 262P51; 144 Okl 174, 289P698; 56ND60, 215NW913.
1072-76 152Miss860, 119S913, 64ALR 968; 155Miss227, 124S331; OhA 173NE 307(2dcase).
1072-82 273US18, 47SCt277, 71Led515, 50ALR1181; Iowa 229NW767; 256Mass 5, 152NE236; 20 OhA229, 153NE153; TexCivA 4SW(2d)155. [a] **Consideration advanced by another for minor's benefit** cannot be recovered by infant. 219Ala211, 121S713. [b] **Value of property as of date of contract** may be recovered on disaffirmance. 197NC659, 150SE177.
1072-83 155Miss227, 124S331 (seller is entitled to return of automobile on condition that he first return to infant one traded in or its value).
1072-86 217AppDiv224, 216NYS571; 197NC659, 150SE177. See also 95Pa Super406.
1072-87½-New. The recourse of the infant is against the party with whom he contracted. 206 Iowa539, 218NW907, 58ALR1359(2dcase).
1072-87½-New. A minor seeking to pursue property into the hands of a third party must show the fraud of such party. 206 Iowa539, 218NW907, 58 ALR1359(2dcase).
1072-90 273US18, 47SCt277, 71Led515, 50ALR1181; 16F(2d)1010.
1073-94 214AppDiv490, 212NYS459.
1073-99 But see 273US18, 47SCt277, 71 Led515, 50ALR1181.
1073-1 See also 256Mass5, 152NE236.
1074-13½-New. The infant must make a demand before bringing the action. 214AppDiv490, 212NYS459.
1074-19 [b] **Inability to return consideration** must be alleged and proved by infant to be entitled to defense of infancy. TexCivA 2SW(2d)873.
1074-20 84CalA526, 258P429, 431 [quot CJ].
1074-23 [a] **Vendor may counterclaim** as damages fair value of property not in excess of purchase price if not restored, or, if restored, then deterioration in value by use and abuse. 119 Oh 575, 165NE93.
1074-24½-New. Innocent purchasers are entitled to protection as such. 206 Iowa539, 218NW907, 58ALR1359(2d case).
1075-32 78CalA536, 248P779.
1075-33½-New. Plea of recoupment for use of automobile bought by a minor including the period during the buyer's minority, has been held insufficient. 219 Ala211, 121S713.
1075-36½-New. Rescission by minor of transfer of old automobile does not convert credit slip given into cash obligation to entitle minor's father to claim same as credit on father's indebtedness. 41GaA389, 153SE88.
1075-38 220Ala590, 127S190, 68ALR 1182 [citCJ].
1075-41 220MoA284, 286SW140; 197 NC692, 150SE339; 161Tenn217, 30SW (2d)239, 70ALR569.
1076-45 145Miss87, 110S218, 49ALR 565.
1076-51 MoA 27SW(2d)752.
1076-52½-New. Plaintiff must prove that medical services were necessaries and that infant's father was unable or refused to furnish them. 130Miss713, 225NYS139.
1076-63 220MoA284, 286SW140. [a] **Fact that infant's note was given in part for necessaries** does not entitle holder thereof to recover without showing value of necessaries. 220MoA284, 286SW140.
1077-77 161Tenn217, 30SW(2d)239, 70 ALR569.
1077-79 267Mass378, 166NE724; 161 Tenn217, 30SW(2d)239, 70ALR569. But see 72CalA57, 236P319.
1077-80 267Mass378, 166NE724. [a] **Father's inability to pay for medical** services has been held not indifferent failure or refusal to provide necessaries so as to make child liable. 161Tenn217, 30SW(2d)239, 70ALR569.
1077-83½-New. Minor is not prohibited from making contract for necessary medical treatment while under care of parent or guardian by fact of existence of statute prohibiting minor from disaffirming contract for necessaries when not living under care of parent or guardian. 72CalA57, 236P319.
1078-2 126Me70, 136A290; 144Miss459, 110S224.
1078-15½-New. deceased parent's burial expenses; 13PaDist&Co 742.
1078-21½-New. House is necessary for married infant occupying it with family making him liable for rent. 220Ala 590, 127S190, 68ALR1182.
1078-26 [a] **Automobile accessaries** held not necessaries. 144Miss459, 110S 224.
1078-33½-New. hay and corn; 220 MoA284, 286SW140.
1078-39 220MoA284, 286SW140.
1078-40 183Mich157, 149NW985 (automobile not suited to infant's station in life).
1079-43½-New. Motor truck purchased by minor for use of his brother is not necessary. 181Ark403, 26SW(2d)85.
1079-52 72CalA57, 236P319; 237Mich 76, 211NW75; 197NC692, 150SE339; 161Tenn217, 30SW(2d)239, 70ALR569.

[b] **Surgical operation.**–237Mich76, 211 NW75.
1079–53 256 IllA322; **NJSup** 137A555 [citCJ].
1079–54 [c] **Electrical instruction not necessary.**–256 IllA322.
1079–57 [a] **Mass** 171NE477.
1079–59 **Mass** 171NE477.
1080–75 152SC199, 149SE593, 65ALR 1334 (precautions are unnecessary where minor has reached age of discretion); [a] **That money was spent for other purposes** is not defense where minor had reached age of discretion and was of apparently sound mind. 152SC199, 149 SE593, 65ALR1334.
1081–88 256 IllA322; 144Miss459, 110 S224.
1081–5 253 IllA368 (mother of infant); 118 Okl 219, 247P60.
1082–19 168Minn479, 210NW632, 633 [citCJ].
1082–33 21AlaA515, 109S576; 48Nev 319, 232P206.
1083–39 201 Iowa430, 205NW977, 43 ALR535.
1084–62 13LaA41, 127S14 (bank examiner's reduction of minor's deposit account in bank without legal authority).
1084–62½–New. Compromise involving infant's rights should not be approved by the court, unless on independent consideration it is found to be for the infant's best interest. **RI** 138A184.
1084–62⅔–New. and such cannot be approved if to the disadvantage of the infant. **RI** 138A184.
1084–71 188Wis205, 205NW819, 820 [citCJ].
1084–73 13PaDist&Co 701.
1084–76 188Wis205, 205NW819, 820 [citCJ].
1084–76½–New. Where three minors make joint adventure prospecting agreement, defendants after locating claims cannot avoid obligations to plaintiff who performed. **Nev** 287P274 (defense of infancy unavailable).
1084–77 [c] (2) **Miss** 107S385. [e] **Construction of statute.–Miss** 107S385.
1084–83½–New. In Porto Rico when mother continues deceased father's business for minor children they may be sued for debts therein contracted though they did not participate. 34**PortoRico** 366.
1084–86 **MoA** 274SW510. [b] **Evidence held not to show partnership.** **MoA** 274 SW510.
1085–88 206 **Iowa**539, 218NW907, 58 **ALR**1359(2dcase); 48Nev319, 232P206.
1085–3 197Wis342, 222NW233.
1085–7 But see 206 **Iowa**539, 218NW 907, 58**ALR**1359(2dcase).
1085–10½–New. Minors depositing money in a partnership account, under an oral partnership agreement, are not entitled to recover money drawn by partnership checks where neither the bank nor the payee knew of the minors' interest. 206 **Iowa**539, 218NW907, 58 **ALR**1359(2dcase).
1086–19½–New. Upon dissolution of partnership owning realty in which minors have interest, and organization of new firm to which realty is contributed as capital, parents with patria postestas must have judicial authorization to effect transaction. 35**PortoRico** 953.
1086–35 [b] **Contract to repay money borrowed to pay insurance premium** is not within statute. 134**Misc**91, 234**NYS** 592.
1087–44 50**RI** 158, 146A401.
1087–61 175**Ark**143, 298SW872; **Sask** [1925] 3**DomLR**251 (limitation of employer's liability for negligence).
1088–75 21**AlaA**161, 106S58, 59 [citCJ].
1088–77 21**AlaA**161, 106S58, 59 [citCJ].
1088–78½–New. , or sue for damages for breach of contract. 21**AlaA**161, 106 S58.
1089–91 148Va409, 139SE246.
1090–26 180**Ark**1152, 24SW(**2d**)867; **MoA** 274SW510.
1090–27 **Wis** 228NW484.
1091–32½–New. Minor is liable for damages resulting from his illegal acts, offenses or quasi offenses. 13**LaA**194, 127S133(2dcase).
1091–44 **Utah** 272P207.
1092–46 197NC659, 150SE177.
1092–55 **BC** [1926] 4**DomLR707**, [1926] 3**WestWkly**428.
1093–65 **Wis** 228NW484.
1093–66 **Wis** 228NW484.
1093–69 180**Ark**41, 20SW(**2d**)310.
1094–70 37**GaA**242, 139SE577.
1094–75 **Wis** 228NW484. [a] **Punitive damages.**–180**Ark**1152, 24SW(**2d**)867.
1094–75½–New. A minor of sufficient age to be criminally responsible may be liable for punitive damages. 180**Ark**41, 20SW(**2d**)310.
1094–77 319**Mo** 440, 4SW(**2d**)424.
1094–84 316**Mo** 157, 289SW948; 22 **OhA**357, 153NE902; 144**Wash**687, 258 P859. [a] (3) Boy of seventeen years, who, while committing burglary, intentionally kills another, may be indicted for murder. 22 **OhA**357, 153NE902. [f] **Murder.**–22 **OhA**357, 153NE902. [g] **Fact that juvenile court is authorized to take charge of minor who has committed felony as delinquent** does not relieve him of criminal responsibility. 22 **OhA**357, 153NE902.
1094–87 144**Wash**687, 258P859. [a] **In California.**–(1) 199**Cal** 78, 248P250.
1095–12 318 **Ill** 142, 149NE23.
1095–13 **Mass** 167NE354; 144**Wash** 687, 258P859.
1095–15 **Mass** 167NE354 (criminal responsibility does not depend on age of defendant).
1096–20 [a] **In prosecution of minor for murder** (1) district court's jurisdiction, based on fact that crime charged was capital, held not divested by prosecutor's waiver of capital verdict. 162 **La**1075, 111S461. (2) Conviction of manslaughter, acquitting fifteen-year-old infant of capital crime, ousted jurisdiction of district court. 162**La**1075, 111S461. [b] **Crime of manslaughter** committed by juvenile is mere delinquency, triable and punishable as provided by special law. 162**La**1075, 111 S461.
1096–21 24**F**(**2d**)619; 144**Wash**687, 258P859. [a] **Statutory provision** held only to embrace legal machinery and not character of offense or offender. 319**Mo** 440, 4SW(**2d**)424. [b] **Preliminary hearing** held not required. 319 **Mo** 440, 4SW(**2d**)424. [c] **Forms.**–230 **AppDiv**370, 245**NYS**141.
1096–22 [a] **Indictment by grand jury.**–113 **Oh**418, 149NE395.
1096–23 But see 319**Mo** 440, 4SW(**2d**) 424.
1096–24½–New. In Oklahoma there is no difference in mode of procedure in criminal case against defendant, eighteen years of age, and one who has reached his majority. 32 **OklCr**41, 239 P944.
1096–24¼–New. Under Gen. Code §§ 1639, 1647, 1681, transfer by the common pleas court to the domestic relations court of a case against a minor merely gives the latter court information against which it may act. 23 **OhA** 348, 155NE499.
1096–24¼–New. And the court of domestic relations may either hear and dispose of the case or may transfer it back to the common pleas court for indictment. 23 **OhA**348, 155NE499.
1096–24⅓–New. An infant is not precluded from waiving the right to be brought before the court when arrested. 261**Mass**255, 158NE771.
1096–24⅓–New. Notice to a parent or guardian of a minor of proceedings against the minor before the county judge on a charge of bastardy is not essential, under the Florida statute, requiring notice to a parent or guardian prior to the trial of any minor, since the hearing in question is merely a preliminary investigation to determine whether defendant shall be held for trial in the circuit court. 96**Fla**873, 119 S866.
1096–24½–New. The circuit court has jurisdiction to determine any fact necessary to confer jurisdiction on it. 231 **Ky**132, 21SW(**2d**)150.
1096–24⅔–New. Surrender of jurisdiction by the county court has been held to vest the circuit court with jurisdiction. 231**Ky**473, 21SW(**2d**)799.
1096–26 32 **OklCr**41, 239P944 (defendant eighteen years of age may waive right to counsel). [a] **Acceptance of plea of guilty to first degree murder on numerous charges** and sentence to life imprisonment on each charge is error where defendant is seventeen-year-old boy without counsel. 127**Kan**412, 273 P490.
1096–27 326 **Ill** 266, 157NE218.
1096–29 [a] (1) 92**Fla**990, 111S277. (2) In Florida. 90**Fla**136, 105S316. (3) But failure to give notice may constitute material error or irregularity for which judgment may be reversed. 90 **Fla**136, 105S316 (if minor is in class referred to by statute). (4) Such omission is properly evidenced to supreme court. 90**Fla**136, 105S316. (5) Where father was in court when date set for trial and appeared on day of trial failure to serve summons was not fatal. 169**La**441, 125S442.
1096–32 32 **OklCr**41, 239P944.
1096–33½–New. When infant of age of eighteen, charged with felony appears without counsel, parent or friend, it would seem appropriate for court to exercise duties of guardian or attorney. 32 **OklCr**41, 239P944.
1096–36 113 **Oh**418, 149NE395, 396 [citCJ]; 32 **OklCr**41, 239P944.
1096–36½–New. An objection to the jurisdiction of a court of common pleas on the ground of defendant's minority should be raised by plea in abatement. 113 **Oh**418, 149NE395.
1096–36⅓–New. and is waived if not so raised. 113 **Oh**418, 149NE395.
1096–39 But see 216**Ky**573, 288SW330.
1096–39½–New. Where no question as to defendant's age is raised, testimony that he was "around" eighteen indicates that he is not a juvenile offender. 216**Ky**573, 288SW330.
1096–40 206**Cal** 353, 274P353; 195**Cal** 643, 234P898. See also 229**Ky**499, 17 SW(**2d**)403.
1096–42½–New. The state has the burden of rebutting a presumption as to a child's age raised on plea of jurisdiction. 160**La**920, 107S696.
1096–42⅔–New. unless the child appears over the statutory age to the presiding judge. 160**La**920, 107S696. [a] **Statute should be liberally construed in favor of child** alleged to be under age. 160**La**920, 107S696.
1096–42¼–New. Serious and substantial doubt whether a child is of age should be resolved in favor of the child. 160**La**920, 107S696.
1096–44 32 **OklCr**41, 239P944; 284**Pa** 311, 131A229.
1097–46 **Mass** 167NE354 (refers only to his physical, and not his mental, age); 284**Pa**311, 131A229.
1097–47 284**Pa**311, 131A229.
1097–49 199 **Ind**247, 155NE544, 549 [citCJ]; 284**Pa**311, 131A229, 234 [cit CJ].
1097–52 [a] 32 **OklCr**41, 239P944.
1098–58 [a] 107**TexCr**585, 298SW587.
1098–60 32 **OklCr**41, 239P944.
1098–69 [a] (1) 206**Cal** 353, 274P353 (age of defendant); 22 **OhA**357, 153NE 902. (2) To show that defendants were under seventeen years of age. 160**La** 920, 107S696.
1099–74½–New. Appearance of child should not be permitted to outweigh positive testimony showing that child is of age. 160**La**920, 107S696.
1099–77 332 **Ill** 222, 163NE694.
1099–85½–New. Defendant's juvenility vel non is for court. 170**La**111, 127S 382.
1099–87 [a] 78**CalA**277, 248P304; 231 **Ky**473, 21SW(**2d**)799.
1100–7½–New. Infant defendant, eighteen years of age, may waive statutory time to pronounce judgment. 32 **OklCr** 41, 239P944.
1100–7⅓–New. The court must ascertain the age of defendant before sentence. 22**AlaA**135, 113S471.
1100–7¼–New. Irregularities in printed form of certificate of conviction of infant committed to state training school have been held harmless. 230 **AppDiv**370, 245**NYS**141.
1100–18 54**ND**295, 209NW552. [a] **Finding by trial court** that accused's age was sufficient to give jurisdiction held justified by record. 235**Mich**412, 209NW112.
1100–18½–New. Sentence of one described in the record as "about 16 years

of age" is erroneous in the absence of transfer of the cause to the juvenile court. 22AlaA135, 113S471.

1100-18½-New. Finding below as to age is held not subject to review. 316 Mo 213, 292SW721.

1100-25 321 Ill 390, 152NE212; 221Ky 700, 299SW568.

1101-45 121Kan886, 250P316; 81Mont 132, 262P168; 49RI 336, 142A542. [a] 121Kan886, 250P316. [c] **Statutes held not repealed.**-321Mo 1090, 13SW(2d) 1061(2dcase).

1101-46 151Miss398, 118S184, 60ALR 1325. [c] **Equal protection of laws** is not denied by statute applicable only to counties having fifty thousand inhabitants or more. Mo 32SW(2d)69.

1102-51 110TexCr145, 8SW(2d)140.

1102-52 18F(2d)1008.

1102-54 18F(2d)1008; 110TexCr145, 8SW(2d)140.

1102-55 AlaA 129S795; 77CalA301, 246P557; MoA 13SW(2d)566; 110Tex Cr145, 8SW(2d)140.

1102-56 77CalA301, 246P557.

1102-58 83Colo 300, 264P718; 109Tex Cr463, 5SW(2d)153.

1103-60 [d] **What constitutes abandonment.**-208Cal 725, 284P916(2dcase).

1103-61 Mo 19SW(2d)752 (defining "dependent child").

1103-62 29Hawaii830. [a] (4) Insufficient proof. 111TexCr461, 14SW(2d) 1041. [f] **Roaming streets at night.**-101TexCr415, 276SW262.

1103-63 [a] (6) Taking of only one automobile does not constitute incorrigibility. 83Colo 300, 264P718.

1103-64½-New. "Wayward minor" as defined by statute is not criminal. 230 AppDiv397, 244NYS727.

1103-65 58ND365, 226NW540 (statute fixing limit of minority at twenty-one years regardless of sex held to apply to order committing delinquent child to state training school).

1103-66 [a] **In North Dakota.**-53ND 852, 208NW238.

1103-67 [a] **In District of Columbia.**-18F(2d)1008.

1103-69 See also 29Hawaii830.

1103-73 Contra 77Mont290, 250P973, 49ALR398.

1103-74½-New. A female infant married under the age of consent, without the consent of her parents, where such marriage is void, is a delinquent. 26 OhNPNS343.

1103-74½-New. Statute relating to delinquent children includes a child wife. 250Mich210, 229NW623.

1103-75 321Mo 1090, 13SW(2d)1061 (2dcase); 129 Or652, 278P950.

1103-77 [c] **Juvenile court law** leaves common-law rule as to criminal irresponsibility and incapacity in full favor except as to procedure against offenders under fifteen at time of charge of felony. 235Mich433, 209NW663.

1104-78 94CalA402, 271P360; 121Kan 886, 250P316; TexCr 25SW(2d)842. [b] **Where no suggestion of age is made,** superior court is not deprived of jurisdiction to proceed with prosecution of minor under eighteen years of age. 81CalA287, 253P948.

1104-82 See also Utah 279P497.

1104-83 [c] **Felony.**-Utah 282P784.

1104-84½-New. Under conflicting statutes in some jurisdictions it is held that the juvenile court does not have exclusive jurisdiction of a juvenile charged with crime. 207 Iowa557, 218NW609.

1104-84½-New. A criminal case against a minor may be transferred from the juvenile court to the circuit court or vice versa, where the circumstances warrant it. 129 Or652, 278P 950.

1104-86 81CalA287, 253P948; 81CalA 294, 253P951.

1104-90 [c] **Notice.**-78CalA23, 247P 591. [d] **Right of parents.**-78CalA23, 247P591.

1104-91 78CalA23, 247P591; 104Tex Cr9, 282SW804. [a] **Investigation by probation officer before formal appointment** does not deprive juvenile court of jurisdiction. Iowa 229NW205.

1104-91½-New. Court will not ignore rules protecting substantial rights. 78 CalA23, 247P591.

1104-91⅓-New. Under some statutes, where the question of age is first raised in the superior court, it is the court's first duty to hear and determine question in what court defendant is entitled to be tried. 81CalA287, 253P948.

1104-91¼-New. Under such statutes, where the infant is of an age entitling him to trial in the juvenile court, the proceedings should be suspended and the minor certified to the juvenile court. 81CalA287, 253P948. [a] **In California** statute prescribing such procedure applies to superior court. 81CalA287, 253 P948.

1104-91⅗-New. And it is improper for the superior court, after the age of such infant has been made known to it, to proceed to conviction as if he was an adult. 81CalA287, 253P948.

1104-91⅙-New. Court should permit testimony on motion of accused to have himself adjudged juvenile. 170La111, 127S382.

1104-92 121Kan886, 250P316; 214Ky 88, 282SW781; OkiCr 278P671; 154 Tenn83, 289SW498. [c] **Juvenile court does not lose its jurisdiction** (1) by delay in obtaining personal jurisdiction over delinquent. 121Kan886, 250P316. (2) This rule applies whether delay was occasioned by failure to discover delinquency, or neglect or inability to institute delinquency proceedings, or deliberate postponement of such proceedings with view of invoking criminal law. 121Kan886, 250P316. [d] **In other jurisdictions** rule is otherwise, and decision of court first having occasion to determine preliminary question is final. 321Mo 1090, 13SW(2d)1061(2dcase).

1105-93 But see 85CalA435, 259P488.

1105-94 214Ky88, 282SW781; 154 Tenn83, 289SW498. [c] **In Michigan.**-235Mich433, 209NW663. [d] **One is not charged with felony** under juvenile court act until charge is made in court having criminal jurisdiction. 235Mich 433, 209NW663. [e] **Juvenile court cannot retransfer case to circuit court** until it is convinced delinquent cannot be disciplined. AlaA 129S795.

1105-95½-New. The determination of the juvenile court that an infant is incorrigible under statute is conclusive. 154Tenn83, 289SW498.

1105-95⅓-New. The finding of the juvenile court that an infant is incorrigible is reviewable only by petition for certiorari to the circuit court. 154Tenn83, 289SW498.

1105-95¼-New. Order declaring a child to be incorrigible will not be disturbed on appeal where not so defective as to be void. 154Tenn83, 289SW498.

1105-96½-New. An order of the juvenile court holding a juvenile offender in custody, referring the case to the grand jury, and recommending that he be proceeded against under the criminal laws cannot be attacked collaterally in such proceedings where the court had jurisdiction of the juvenile and his parents and the jailer who had him in custody were before the court. 210Ky449, 276SW160.

1105-97½-New. No appeal lies from the juvenile court's adjudication that a child is wayward. 49RI 336, 142A542.

1105-98 208Ky707, 271SW1055; 319 Mo 440, 4SW(2d)424; 77Mont290, 250P 973, 49ALR398. [a] **Officer making arrest** of defendant under eighteen years of age must give him into custody of juvenile officer. 54ND295, 209NW552.

1105-99 121Kan886, 250P316; 212Ky 178, 278SW595.

1105-1 21AlaA649, 111S645. [c] **In Michigan.**-235Mich433, 209NW663.

1105-2 [a] **In Kentucky.**-212Ky178, 278SW595.

1105-3 104TexCr9, 282SW804.

1105-4 212Ky178, 278SW595.

1105-5 NB [1929] 1DomLR716. [b] **Uncontradicted evidence** that infant is within statutory age is controlling, and judge may not decide otherwise merely from appearance of infant. 210Ky849, 276SW970.

1105-7 81Mont132, 262P168.

1105-8 83Colo 300, 264P718; 253Mass 244, 148NE449 (appeal by delinquent child); 151Miss398, 118S184, 60ALR 1325; 81Mont132, 262P168; 51Nev105, 269P600, 602 [citCJ].

1105-11 But see 151Miss398, 118S184, 60ALR1325.

1105-12 81Mont132, 262P168.

1105-13 151Miss398, 118S184, 60ALR 1325; 81Mont132, 262P168.

1105-19 208Cal 725, 284P916(2dcase); 51Nev105, 269P600, 602 [citCJ]; 244NY 307, 154NE584.

1106-20 Iowa 227NW136 (investigation and testimony by probation officer are not so irregular as to deprive court of jurisdiction because investigation was made by officer before his appointment); 117 Oh152, 157NE897.

1106-21 Mo 32SW(2d)69. See also 132 Misc741, 230NYS767.

1106-23 132Misc741, 230NYS767.

1106-26 [a] **Where proceeding is based upon criminal offense,** offense must be proved by competent evidence. 244NY 307, 154NE584.

1106-32 121Kan886, 250P316.

1106-35 18F(2d)1008; 121Kan886, 250 P316; 124Kan345, 259P793; 170La111, 127S382; 321Mo 1090, 13SW(2d)1061(2d case).

1106-35½-New. of which in some jurisdictions the probate judge is the judge. 121Kan886, 250P316.

1106-37 [c] **In Missouri.**-Mo 32SW(2d) 69.

1106-47½-New. Whether the trial, conviction, sentence, and commitment is had in the juvenile or in the district court, the juvenile court is still charged with the responsibility for the welfare of the child. 121Kan886, 250P316.

1106-47⅓-New. Where the juvenile court transfers the case to the district court, it merely refers the issue of delinquency to the district court for trial, 121Kan886, 250P316.

1106-47¼-New. and upon return of verdict the district court's jurisdiction ceases and it has no authority to pronounce sentence. 121Kan886, 250P316.

1106-47⅕-New. In such case the juvenile court necessarily takes cognizance of the result of the verdict of guilty and may proceed as if it had determined for itself the question of delinquency. 121Kan886, 250P316.

1106-50½-New. or his parents may reside in another county, 142 Okl 243, 286 P347.

1107-61 117 Oh152, 157NE897.

1107-63 326 Ill 266, 157NE218.

1107-66 Mo 32SW(2d)69.

1107-67 83Colo 300, 264P718. [a] (3) Under North Dakota statute withholding petition from files after judgment sending child to institution is unauthorized. ND 230NW9.

1107-69 51Nev105, 269P600. [c] 124 Kan345, 259P793; 250Mich210, 229NW 623; 142 Okl 243, 286P347. [d] 250 Mich210, 229NW623; 81Mont132, 262P 168; 67Utah371, 248P83. [e] **Petition held insufficient** to give jurisdiction to order minor committed. 51Nev105, 269P 600.

1107-74 102TexCr530, 278SW846. [b] MoA 13SW(2d)566; 110TexCr145, 8SW (2d)140. [c] 102TexCr530, 278SW846; 109TexCr463, 5SW(2d)153; 111TexCr 461, 14SW(2d)1041. [e] **Complaints held sufficient.**-101TexCr415, 276SW262.

1107-78 [c] **Constructive notice.**-117 Oh 152, 157NE897.

1108-80 52ND518, 203NW898; 115 Oh 394, 154NE914; 117 Oh152, 157NE897; 27 OhA306, 160NE733; 111TexCr461, 14 SW(2d)1041.

1108-82 [b] **Words "person having custody" of child** in statute held to mean custody created by operation of law or awarded by judicial order. 115 Oh394, 154NE914.

1108-87 52ND518, 203NW898; 117 Oh 152, 157NE897; 109TexCr192, 3SW(2d) 810.

1108-87½-New. And if the notice is constructive only and based on fraud, it is of no effect. 117 Oh152, 157NE897.

1108-88 115 Oh394, 154NE914.

1108-92 142 Okl 243, 286P347.

1108-93 128Me316, 146A904.

1108-94½-New. Under a statute requiring notice to parents, failure to notify parents does not deprive a court, proceeding according to common law, of jurisdiction of a criminal offense. 128 Me316, 146A904.

1108-96 52ND518, 203NW898 (that

child delinquent and parents unfit, unwilling, or unable to care for child, and that its interest and that of state requires it be taken from parent's custody). [a] 151Miss398, 118S184, 60ALR 1325. [b] (3) 83Colo 300, 264P718; 110 TexCr145, 8SW(2d)140. [c] (1) 81Mont 132, 262P168. (2) 101TexCr415, 276SW 262; 111TexCr461, 14SW(2d)1041. (5) 129Kan818, 284P388; 244NY307, 155 NE584. (7) 51ND698, 200NW786. (8) To show moral depravity of female infant. 230AppDiv397, 244NYS727. [e] **Right to cross-examine** should be afforded parents on issue of their fitness to care for delinquent. 81Mont132, 262P 168. [f] **Evidence held inadmissible.**–81 Mont132, 262P168 (reports of probation officer as to parents' fitness). [g] **Discretion of court.**–Admission of evidence after both sides had closed is for discretion of court. 110TexCr145, 8SW (2d)140.

1109-97¼-New. In a proceeding against a father on the ground of his immoral conduct, testimony of children as to his delinquencies based on hearsay is incompetent, 82Colo 395, 260P 114.

1109-97½-New. as is also a statement by the children of their preference to live with their maternal grandmother. 82Colo 395, 260P114.

1109-98 151Miss398, 118S184, 60ALR 1325; 81Mont132, 262P168; ND 230NW 9. [c] **Hearing before juvenile commissioner** without order of court is not hearing contemplated by statute. ND 230NW9. [d] **Hearing without evidence taken before court** and without permitting introduction of evidence to refute petition does not satisfy statute. ND 230NW9.

1109-98½-New. Unless on the return day the parties signify that they are ready for a hearing, the court must not proceed with the matter but should fix a time certain for hearing. 81Mont 132, 262P168.

1109-98⅓-New. A plea of guilty by the delinquent to the charge of an offense will not warrant his commitment where the parents had not signified readiness for hearing. 81Mont132, 262P168.

1109-6½-New. After a plea of guilty, the fact that pleader testified that some of the acts charged were not committed by him did not require withdrawal from the jury. 106TexCr136, 291SW545.

1109-6⅓-New. Under such plea, sufficiency of evidence to sustain it was not in issue, unless evidence affirmatively showed pleader not guilty. 106TexCr 136, 291SW545.

1109-6¼-New. Charge of being wayward minor cannot be established by plea of guilty but only on competent evidence and after hearing. 230AppDiv 397, 244NYS727.

1109-7 51Nev105, 269P600, 602 [cit CJ].

1109-8½-New. Joint trial of an infant defendant charged with being wayward with other women charged with vagrancy and prostitution is reversible error, although arrests grew out of the same transaction. 132Misc741, 230NYS767.

1109-10 81Mont132, 262P168. [b] **Denial of motion for new trial** is error where, without evidence of fitness or unfitness to care for delinquent, court adjudged them unfit. 81Mont132, 262P 168.

1109-11 [d] **Where proceedings are resisted** findings based on evidence must be made. ND 230NW9. [e] **Conclusions instead of findings of fact** required by statute do not support judgment of delinquency and commitment. Utah 279P 497.

1109-12 81Mont132, 262P168; 52ND 518, 203NW898.

1109-13 176Ark660, 3SW(2d)974.

1109-14 [a] 176Ark688, 3SW(2d)976. [b] **Judgment held sufficient.**–TexCr 25 SW(2d)842.

1109-20 See also 175Ark217, 299SW5.

1109-21 [a] **Judicial notice** is taken that State Juvenile Training School is at Gatesville, Coryell County. 110TexCr 145, 8SW(2d)140.

1109-23 81CalA562, 254P588.

1109-25 178Minn394, 227NW356(2d case); 319Mo 440, 4SW(2d)424.

1109-27 121Kan886, 250P316; Mo 19 SW(2d)752. See also 132Misc741, 230 NYS767. [a] (4) Appeal lies to district court where hearing and disposition of case is to be had and made in spirit and with discretion exercised by juvenile court. 121Kan886, 250P316. (5) Appeal from county court which affirmed conviction in children's court held properly taken to court of appeals where justice of appellate division certified that question of law ought to be reviewed. 244NY307, 155NE584. (6) In Kansas district court on appeal from juvenile court has no broader jurisdiction than juvenile court and must try case de novo subject to limitations as to jurisdiction and issues applicable to juvenile court. 129Kan818, 284P388. [c] (2) Delinquent child may appeal to superior court whether or not he has been notified of his right of appeal. 253Mass244, 148NE 449. (3) Parents of alleged delinquent may appeal from order finding them unable to control son and adjudging and committing him as delinquent. 46 Ida 47, 266P421. (4) Appeal must be on behalf of child. 221McA366, 273SW155. (5) Child may appeal from any final judgment of dependency. Mo 19SW(2d) 752. [e] (2) On hearing of special appeal in proceedings under Missouri Juvenile Act supreme court cannot consider errors presented by bill filed subsequent to taking of appeal. Mo 32SW(2d)69. [l] **Waiver of appeal.**–253Mass244, 148 NE449. [m] **Judgment,** not designating proper place of confinement, may be corrected or reformed on appeal. 110 TexCr145, 8SW(2d)140. [n] **Denial of continuance** for absence of witnesses who would have testified to facts substantially in evidence of state's witnesses held not erroneous. 110TexCr 145, 8SW(2d)140. [o] **Appeal acts as supersedeas** where taken from any final judgment of delinquency or dependency entered by juvenile court, or final order of commitment with or without bond. Mo 19SW(2d)752.

1110-29½-New. Where the juvenile court rendered final judgment determining the status of a child and judgment was not appealed from, error in disallowing appeal did not nullify judgment ousting the court of all jurisdiction. Mo 19SW(2d)752.

1110-34½-New. In certiorari only questions reviewable are alleged illegal acts or want of jurisdiction. Iowa 229NW 205.

1110-35 [a] **Judgment of juvenile court conclusive where evidence sufficient.**–86 CalA226, 260P566.

1110-38 86CalA226, 260P566.

1110-38½-New. Harmless error. Error in failing to instruct as to the limit of the penalty may be cured by the verdict. 106TexCr136, 291SW545.

1110-42 121Kan886, 250P316.

1110-43 81Mont132, 262P168; 87PaSuper223.

1110-44 121Kan886, 250P316. But see 132Misc741, 230NYS767.

1110-46 121Kan886, 250P316.

1110-48 AlaA 129S795; 121Kan886, 250P316.

1110-49 121Kan886, 250P316.

1110-51½-New. Where the case was not finally disposed of because the term had not expired, the juvenile court had complete authority to dispose of the custody of the child under statute. Mo 19 SW(2d)752.

1110-52 121Kan886, 250P316. [a] **Authority of court over delinquent child on probation** is not lost by subsequent marriage. 250Mich210, 229NW623.

1110-53½-New. Provisions relating to suspended sentence which has been repealed prior to trial do not control. 106 TexCr136, 291SW545.

1110-57 86CalA226, 260P566. [a] **Recalling commitment and pronouncing sentence.**–81CalA562, 254P588. [b] **Its future orders regarding delinquent** must be based on facts arising after commitment. AlaA 129S795.

1111-61 163La172, 111S666.

1111-67 34NM557, 287P288.

1111-68 [a] **In North Dakota.**–53ND 852, 208NW238.

1111-69 77Mont290, 250P973, 49ALR 398. [a] **Controlling element is age in juvenile laws.** 77Mont290, 250P973, 49 ALR398.

1111-73 77Mont290, 250P973, 49ALR 398. [a] **On recommendation of commissioners,** court must order discharge. 163La172, 111S666.

1111-74 77Mont290, 250P973, 49ALR 398. But see 94CalA402, 271P360.

1111-75 86CalA226, 260P566.

1111-76 87PaSuper223.

1111-80 155Wash147, 283P691 (husband presumed to act as agent of community); 61 OntL651, [1928] 2DomLR 49.

1111-84 [d] **Commitment to Wayside Home for Girls** held proper. 217AppDiv 763, 216NYS388. [e] **State reformatory at Bedford, New York.**–"Wayward minor" cannot be committed to state reformatory for women at Bedford, New York. 132Misc119, 228NYS286. [f] **Girls' Welfare Board.**–34NM557, 287P 288.

1111-86 121Kan886, 250P316.

1112-91 113TexCr18, 18SW(2d)637(1st case).

1112-92½-New. Neglected and dependent children. In some jurisdictions neglected and dependent children not delinquent may be committed to the care of some suitable state institution as wards of the state. 202 Iowa1077, 209NW282.

1112-92⅓-New. Thereafter, as provided by statute, such children may be taken from such institution under either one of two methods. 202 Iowa1077, 209NW 282.

1112-92¼-New. One is by the execution of proper articles of adoption. 202 Iowa 1077, 209NW282.

1112-92⅕-New. and the other is by what is called a "placement" contract. 202 Iowa1077, 209NW282.

1112-92⅙-New. The board of control of state institutions is empowered to take the child from any person or persons with whom it is placed in event the articles of commitment are not carried out. 202 Iowa1077, 209NW282.

1112-1 [a] 117 Oh152, 157NE897.

1112-6½-New. The effect of adjudication that a child is neglected and dependent is to make the state parens patriæ of the child. 202 Iowa1077, 209 NW282.

1112-6⅓-New. A judgment of a juvenile court committing a child under the age of sixteen to a training school is an adjudication only that the child is a delinquent and not a conviction of an offense. 37GaA670, 141SE416.

1112-7 [b] **Commitment of neglected child** occurs after judgment determining child to be neglected. Mo 19SW(2d)752.

1112-9 109TexCr463, 5SW(2d)153.

1112-12 109TexCr463, 5SW(2d)153.

1112-18½-New. Judgment of the court committing a girl to a school for girls on adjudication of her delinquency is in accordance with the law. 111TexCr 66, 11SW(2d)319(2dcase).

1113-34 Me 151A423(2dcase).

1113-24 [a] **Suit to disaffirm minor's contract** for purchase of automobile is triable at law. 181Ark755, 27SW(2d) 1020.

1113-26 9PaDist&Co 62.

1113-34 169Ark1115, 278SW41, 43ALR 114; 146Va91, 135SE890, 49ALR1427. [a] **Other party cannot resist specific performance** after infant reaches majority because of no mutuality of remedy at inception of agreement, where such party retained benefits. 169Ark 1115, 278SW41, 43ALR114.

1113-35 21AlaA161, 106S58. [a] **Infant may repudiate contract** and sue on quantum meruit. 146Va91, 135SE890, 46ALR1427.

1113-35½-New. Where time is of essence, infant cannot have specific performance after reaching majority. 169 Ark1115, 278SW41, 43ALR114.

1113-43½-New. Right of infant under statute to disaffirm and rescind a contract by restoring consideration prevents the other party from enforcement or recovery of damages for breach. 78 CalA536, 248P779.

1113-43⅓-New. The infant in such case is entitled to recoup for expenses incurred and services rendered in caring for property. 78CalA536, 248P779.

1113–44 336 Ill 316, 168NE259.

1114–67 84Mont397, 276P437. [a] **Action by minor, by his next friend, is maintainable under Federal Employers' Liability Act,** though form of suit or procedure as administered by state controls. 128Me6, 145A388.

1115–69 217Ky781, 290SW662; 217 MoA312, 269SW688 (instruction allowing recovery for loss of earning capacity held erroneous); 194NC696, 140 SE730; TexCivA 289SW1040. But see 225Ky542, 9SW(2d)517.

1115–70 217Ky781, 290SW662; 83NH 576, 145A782(2dcase).

1115–71 82CalA215, 255P755; TexCivA 289SW1040. But see 128Me6, 145A388 (under federal statute). [a] **Recovery on theory of waiver and emancipation** is not authorized in action by infant not under guardianship where defense of contributory negligence of parent has been eliminated on demurrer. 82CalA 215, 255P755.

1115–72 [a] 192NC475, 135SE339.

1115–73 242Mich9, 217NW792.

1115–75 217Ky781, 290SW662.

1115–76 240Mich306, 215NW422; 112 Okl 97, 240P317.

1115–77 214Ala611, 108S566.

1115–84 174Ark1127, 298SW507; 126 Me17, 135A524; 237Mich470, 212NW92; NJCh 151A766; 137SC337, 135SE357; 149SC545, 147SE648; TexCommnA 288 SW132; 152Va760, 148SE818. [a] (3) Taxation of unnecessary costs. Sask [1925] 3DomLR141.

1115–85 331 Ill 420, 163NE393.

1115–86 84CalA526, 258P429.

1116–96 325 Ill 165, 156NE334.

1116–97½–New. It is the court's duty to protect the rights of the next friend, 237Mich470, 212NW92.

1116–97½–New. and also those of the attorney acting for him. 237Mich470, 212NW92.

1116–97¼–New. A statute authorizing the court to bring unknown and unborn parties before it by appointment of a guardian for the protection of their interests has been held not unconstitutional. 227AppDiv160, 237NYS162.

1116–7½–New. Where infant, within statutory time after reaching maturity, institutes suit as soon as he learns of facts and circumstances entitling him to sue is not guilty of laches. 92Fla360, 109S458.

1116–11 215Ala328, 110S566; 103NJL 502, 135A884.

1116–14½–New. Where personal representative under will sues, infant is not a party, although interest as heir is affected. 126Me17, 135A524.

1117–21 233Ky600, 26SW(2d)516.

1118–36 22AlaA199, 114S15.

1118–38 47RI 359, 133A348.

1118–41 22AlaA199, 114S15.

1118–54 215AppDiv581, 214NYS615. [a] (2) Is one who has already performed service for infant in matter on hand, not one who might perform in future if called upon to do so. 215 AppDiv581, 214NYS615.

1118–60 215AppDiv581, 214NYS615.

1119–65 [a] **Authority limited** to proceeding in which appointed. 215App Div581, 214NYS615.

1119–69 21F(2d)56; 91Fla1064, 109S 225; 326 Ill 327, 157NE247; 223Ky289, 3SW(2d)620; 5LaA245; NJSup 137A 555; 135Misc25, 237NYS701; 189NC 465, 127SE529; 50RI 321, 147A617 (cannot conduct his own defense); 51SD505, 215NW531; TexCommnA 288SW132. [h] **Curator ad hoc.**–158La745, 104S701. [i] **Presence of undertutor** does not prevent appointment of curator ad hoc when tutrix and minor are both absentees. 158La745, 104S701. [j] **Where tutor forfeits tutorship by leaving jurisdiction** (1) curator ad hoc to represent minors should be appointed. 164 La463, 114S98. (2) Appointment of curator ad hoc to represent such forfeiting tutor is ineffectual for such purpose. 164La463, 114S98.

1119–70 256 IllA291; 133 Okl 300, 272 P412.

1119–71 NJSup 137A555.

1120–73½–New. A special guardian will be appointed in an annulment action in which the legitimacy of the infant is questioned. 134Misc88, 234NYS44.

1120–75½–New. In bastardy proceedings against an infant, a guardian must be appointed before the trial of the case. 124 Okl 278, 255P697.

1120–76 116Nebr670, 218NW746, 747 [quotCJ]. [c] **Executor's conveyance** without appointment of guardian for infant minor devisee was valid where will authorized sale without license from court. 261Mass489, 159NE437.

1120–80½–New. In foreclosure proceedings. Where only relief sought against infant was foreclosure of lien, and he appeared in motion to set aside sale by brother as next friend who was party to cross action to obtain affirmative relief in foreclosure suit, sale of land on foreclosure is not invalid in absence of allegation that infant was not represented by brother in cross action or some other proper party as next friend. TexCivA 275SW156.

1120–80½–New. In bastardy proceedings, appointment of guardian ad litem is necessary when defendant is an infant. 124 Okl 278, 255P697; 125 Okl 1, 256P31.

1120–81 See also 109Conn563, 145A161.

1120–81½–New. Where it is not shown that court knew of existence of unknown infants, it is no objection in partition proceedings that no guardian was appointed for them. 126Misc826, 215NYS1.

1121–93 But see 226Ky665, 11SW(2d) 725 (under statute).

1121–95 164La463, 114S98; Va 152SE 328.

1121–98 82NH221, 131A688; NJSup 137A555; 133Misc53, 231NYS130. See also 198Wis457, 224NW735.

1122–99 NJSup 137A555; TexCommnA 288SW132.

1122–1 82NH221, 131A088.

1122–2 [a] Contra 9PaDist&Co 62.

1122–3 221MoA290, 3SW(2d)281; Tex CivA 275SW156.

1122–4 250Mich105, 229NW622; 33 PortoRico 446; 50RI 321, 147A617; Tex CivA 275SW156.

1122–5 [a] **Refusal to vacate for lack of appointment** held not abuse of discretion. 250Mich105, 229NW622.

1122–6 127Misc114, 215NYS328.

1122–7 91Fla770, 108S820, 835 [citCJ], 51ALR731; 250Mich105, 229NW622; 82 NH221, 131A688; 139 Okl 76, 281P280.

1122–8 82NH221, 131A688; 139 Okl 76, 281P280.

1123–14 But see 10LaA499, 119S731.

1123–26 219MoA234, 271SW1023.

1123–27 219MoA234, 271SW1023.

1123–29½–New. Relief from a judgment, recovered against an infant for whom no guardian ad litem was appointed, must be made to the court in which the judgment was entered. NJCh 145A231(1stcase).

1124–44 9PaDist&Co 62.

1124–53 But see 198Wis457, 224NW 735.

1124–55 Sask [1929] 3DomLR193.

1125–71 13LaA432, 127S8(2dcase) (father); TexCivA 283SW611.

1127–9 29PortoRico 975. [b] In Porto Rico.–29PortoRico 975.

1127–11½–New. Where infant is not named in petition nor served with process, court cannot appoint a guardian ad litem. 219AppDiv471, 220NYS44.

1127–11½–New. Where the court has no jurisdiction over infants to appoint guardians ad litem for them, amending of petition inserting infant's name is without effect. 219AppDiv471, 220NYS 44.

1128–46 CalA 286P1091.

1128–48 255 IllA189 (no appointment of guardian ad litem).

1129–63 221MoA290, 3SW(2d)281; Tex CivA 296SW613. [c] **Justification for appointment.**–158La745, 104S701. [d] **Court did not err in failing to appoint guardian ad litem** where probate guardian appeared for infants, whose interest did not conflict with theirs. TexCivA 17SW(2d)1077. [e] **Order appointing guardian ad litem, nunc pro tunc,** for minor after decree in divorce suit, was a nullity. 250Mich105, 229NW622.

1129–64 [e] (4) In Missouri clerk may appoint next friend on filing of petition and consent to act. 219MoA234, 271SW 1023. [f] In British Columbia.–38BC 328, [1927] 2DomLR747, [1927] 1West Wkly737.

1129–65 237Mich470, 212NW92.

1130–76 222Ky325, 300SW880. [d] (4) In some jurisdictions court has no jurisdiction to appoint guardian ad litem for nonresident infant defendant proceeded against by warning order. 217 Ky806, 290SW665.

1131–82 33PortoRico 446.

1131–87 [a] In Porto Rico.–33Porto Rico 446.

1132–96 93Fla611, 112S768, 782 [cit CJ]. [b] **Appointment under summons in partition suit where mother is defendant** has been held voidable. 211Ky817, 278SW152.

1132–97 213Ala46, 104S330 (appointment made on filing of crossbill); 152 Miss572, 120S568.

1132–8 50RI 321, 147A617 (as soon as fact of infancy is called to court's attention). [c] (2) Appointment before service of notice of probate petition on minors is premature. 219Ala199, 121S 718. [e] In New York.–136Misc234, 242 NYS171.

1133–10 But see 89 IndA632, 166NE773.

1134–34 164La463, 114S98.

1134–40½–New. In Maine, trustees of juvenile institutions can act as next friend for minor complainant. 125Me 438, 134A567.

1135–61 Sask [1928] 1DomLR970.

1135–75 [a] **Natural mother's capacity to sue as tutrix** cannot be attacked collaterally by exception challenging her appointment and qualification. 13LaA 696, 129S171.

1135–80 225AppDiv343, 233NYS90.

1136–92 See also 334 Ill 315, 166NE50.

1136–3 See also 96Fla873, 119S866.

1136–4 223Ky713, 4SW(2d)721.

1137–24 225AppDiv343, 233NYS90.

1137–27 213Ky720, 281SW816.

1138–40½–New. In British Columbia order appointing guardian ad litem for infant defendant will not be reversed for defects in form of affidavit which are cured by statute. BC [1929] 4DomLR 1067(1stcase).

1133–42 [a] (1) 219MoA234, 271SW1023.

1138–43 [b] (2) Acknowledgment before notary, ratified by court held sufficient. 219MoA234, 271SW1023.

1138–43½–New. In other jurisdictions, where an attorney is appointed, he is not required to accept his appointment in writing. 158La745, 104S701.

1139–54 [b] **Presumption of regularity.**–29PortoRico 975.

1139–57 [a] **Omission cured by naming** infants in guardian's report. 223Ky713, 4SW(2d)721.

1139–61½–New. A deputy clerk's appointment of "attorney" instead of "guardian ad litem" for infant defendants has been held not ground for reversal of judgment against them, being a mere clerical misprision. 215Ky440, 285SW250.

1139–61½–New. Entry on writ by judge that infant's father was to maintain suit as next friend is a sufficient order of court and becomes part of the record of trial. 82NH221, 131A688.

1139–61¼–New. and failure of the clerk to note such order on the docket and of counsel to file formal amendment of the writ in accordance therewith does not render the judgment voidable. 82NH 221, 131A688.

1139–68 237Mich470, 212NW92.

1140–84 [c] **Attorney appointed curator ad hoc** is not required to take any special oath. 158La745, 104S701.

1141–91 TexCivA 286SW642.

1141–92 TexCivA 286SW642.

1141–96 237Mich470, 212NW92; 50RI 321, 147A617; TexCivA 286SW642.

1141–98 27Hawaii132.

1141–4½–New. A guardian ad litem for minors interested may be heard on a claim against decedent's estate, but cannot control the trial. 193Wis392, 214 NW344.

1141–7 TexCivA 286SW642. [a] **May not receive, dispose of, possess, or control property** or funds of infant. Tex CivA 286SW642.

1141–8½–New. Next friend of infant is an officer of the circuit court, subject to its lawful orders in the suit and ac-

countable in such court, 237Mich470, 212NW92.

1141-8½-New. while a general guardian is appointee of probate court bonded there, subject to its lawful orders and accountable in such court. 237Mich470, 212NW92.

1141-10 TexCivA 286SW642.

1141-12 [a] **Guardian ad litem has not only power but it is his duty** in proper case to seek review of decree adverse to his ward, where it is shown appeal is necessary for protection of interests of his ward. 27Hawaii132.

1141-14 334 Ill 315, 166NE50.

1141-15 TexCivA 286SW642.

1141-16 TexCivA 296SW929.

1142-27½-New. Next friend may institute and prosecute a suit in behalf of an infant if, and to the extent that, he is recognized by the court as a proper person to act in such capacity. TexCivA 286SW642.

1142-41 49RI 87, 140A356; Man [1928] 3DomLR484.

1142-43 179Ark478, 16SW(2d)590.

1142-46 237Mich470, 212NW92.

1142-48 234Mich547, 208NW677 (settlement held not for best interests of infant); 237Mich470, 212NW92; 49RI 87, 140A356; TexCivA 297SW264. [c] **Collateral attack.**-237Mich470, 212NW 92. [d] **Application to compromise action for personal injuries denied.**-137 Misc403, 243NYS114.

1142-49 237Mich470, 212NW92. [a] **Separate powers of probate and trial courts.**-(1) In action by next friend for personal injuries to infant, circuit court alone has jurisdiction of case. 237Mich 470, 212NW92. (2) Order of probate court authorizing its general guardian to settle claim while action is pending is void. 237Mich470, 212NW92.

1142-49½-New. Presiding judge must exercise discretion, and not allow judgment, whether for or against infant, to pass as matter of course. 234Mich547, 208NW677.

1142-50½-New. On the other hand, it is held that, either subject to the approval of the circuit court or by its direction, next friend of infant has authority to negotiate and conclude a settlement, 237Mich470, 212NW92.

1142-50¾-New. and to receive the money. 237Mich470, 212NW92.

1142-50¼-New. Where money is paid by defendant to a general guardian under a void order of settlement of the probate court pending action by next friend in circuit court for injuries to infant, such money may be recovered as paid without consideration. 237Mich470, 212 NW92.

1142-50½-New. Next friend is not required to tender back the money paid under the void settlement before proceeding with the action against defendant. 237Mich470, 212NW92.

1143-54 35 OklACR575 [quotCJ].

1143-55 86Colo 389, 282P251; 93Fla 611, 112S768, 782 [citCJ]; 158La745, 104S701 (alleged admissions because of default); 102NJEq393, 141A16; NJCh 151A766; 35 OklACR575 [quotCJ]; 37 OklACR660.

1143-56 158La745, 104S701; 35 Okl ACR575 [quotCJ]; 48RI 99, 135A606, 607 [citCJ].

1143-57 Ark 31SW(2d)738; 120 Okl 261, 248P622, 626 [citCJ]; 35 OklACR 575 [quotCJ]; 48RI 99, 135A606, 607 [citCJ].

1143-58 37 OklACR660.

1143-59 101NJEq350, 139A812; 103 NJEq487, 143A771; 35 OklACR575 [quotCJ]; 48RI 99, 135A606; Tex CommnA 293SW560, 562 [citCJ]. [a] **Infant** is not accountable for action of curator ad hoc to same extent as those of an attorney employed to represent him. 158La745, 104S701.

1143-60 102NJEq393, 141A16; 35 Okl ACR575 [quotCJ].

1143-61 NJCh 151A766.

1143-65 82NH221, 131A688.

1144-76 TexCommnA 292SW862, 863 [citCJ].

1144-76½-New. A subsequent purchaser from the next friend who purchased minor's property at judicial sale is charged with notice that the sale is voidable. TexCommnA 292SW862.

1144-77 TexCivA 286SW642. But see TexCommnA 292SW862.

1144-84 248NY193, 161NE468; Tex CivA 7SW(2d)913; TexCivA 30SW(2d) 385.

1144-86 TexCivA 7SW(2d)913. [a] **Guardian ad litem of infant defendants adjudged not entitled to property** held entitled to compensation. 138Misc117, 244NYS713.

1144-87 27Hawaii132; 198Wis128, 223 NW434.

1144-89 [a] 27Hawaii132.

1146-18 Contra 248NY193, 161NE468.

1146-25 [b] 221Ky248, 298SW714; 131 Misc800, 228NYS323. [c] 228Ky390, 15SW(2d)251. [d] **Allowance held not abuse of discretion.**-38F(2d)605.

1146-26 [a] **Court need not receive expert evidence** in order to determine amount where it is fully familiar with situation. TexCivA 7SW(2d)913. [b] **Allowance of attorney's fees of three thousand five hundred dollars** held not abuse of court's discretion. TexCivA 30SW(2d)385.

1146-27 38F(2d)605.

1146-28 TexCivA 7SW(2d)913.

1146-29 TexCivA 7SW(2d)913.

1146-30 TexCivA 7SW(2d)913.

1146-31 TexCivA 7SW(2d)913.

1146-32 TexCivA 30SW(2d)385.

1146-37 163La112, 111S617. [d] **Party attacking judgment allowing fee against ward** must show failure to tax fee as costs was without sufficient reason. Tex CivA 30SW(2d)385. [e] **Failure of judgment to set out reason for not taxing fee as costs** does not render judgment allowing fee against ward void. TexCivA 30SW(2d)385.

1147-40 248NY193, 161NE468; 131 Misc800, 228NYS323.

1147-42 See also 248NY193, 161NE468.

1147-46 [b] **Determination of power to create lien.**-TexCivA 30SW(2d)385.

1147-57 See also 256 IllA291.

1147-59 [c] **Evidence held insufficient** to warrant removal. 149Va597, 140SE 810.

1148-63 TexCivA 296SW929.

1148-68 334 Ill315, 166NE50 (court should compel performance of duty or appoint new guardian).

1148-81 225AppDiv323, 232NYS543.

1149-86 200Cal 654, 254P567.

1149-93 150Miss849, 117S249.

1149-93½-New. An infant appearing by attorney after being fully emancipated has been held to have ratified prior proceedings. 161La265, 108S477.

1149-93¼-New. Appearance by attorney after emancipation has been held to constitute sufficient ratification of proceedings. 161La265, 108S477.

1149-94 44 Ida633, 258P1085.

1149-99 [a] But see 133Misc361, 231 NYS666.

1150-10 NJCh 151A766.

1150-13 NJCh 151A766.

1150-16 222Ky325, 300SW880.

1150-23½-New. Amendment. Court may approve an amendment to a writ either by insertion of the name of next friend or substitution of another, and amendment, when allowed, relates back to commencement of suit. 82NH221, 131 A688.

1150-24 333 Ill 267, 164NE685; 150 Miss849, 117S249.

1150-27 [e] **In Florida.**-92Fla360, 109 S458.

1150-28 150Miss849, 117S249.

1151-36 48Philippine884.

1151-37 328 Ill 462, 159NE799.

1151-40 173Ark66, 291SW996. See also 96Fla455, 118S216. But see 225Ky228, 7SW(2d)863.

1152-43 92Fla360, 109S458; 216Ky260, 287SW705.

1152-45 194NC633, 140SE436.

1152-53 [e] **Reading summons to infant without delivering copy** is insufficient. 150Miss849, 117S249.

1152-55½-New. Under Nova Scotia Judicature Act an application to declare personal service on an infant already made to be good service may be made ex parte. NS [1928] 2DomLR989.

1152-57 96Fla327, 118S60.

1153-59 [d] **Defects in service on nonresident infant defendants** cannot be complained of by complainants where they are represented by guardian ad litem. 213Ala46, 104S330.

1153-60 91Fla824, 108S679, 688 [cit CJ]. [e] **In Florida.**-92Fla360, 109S458.

1153-61 91Fla770, 108S820, 51ALR731.

1153-66 92Fla360, 109S458.

1153-70 211Ky817, 278SW152. [a] (3) 211Ky817, 278SW152. [g] **Failure to complete service does not require dismissal of action,** but necessitates additional service on parent. 136Misc234, 242NYS171.

1153-71 150Miss849, 117S249.

1154-74 See also 225AppDiv323, 232 NYS543.

1154-76 223AppDiv440, 228NYS371; 136Misc234, 242NYS171.

1154-77 TexCivA 299SW458.

1154-78 223AppDiv440, 228NYS371. [c] **Appointment nunc pro tunc of guardian ad litem** for infant defendant does not cure jurisdictional defect of failure to serve parent. 136Misc234, 242NYS 171.

1154-81 But see 231Ky273, 218SW(2d) 284.

1154-82 171Ark1188, 286SW1029.

1155-84 See also 333 Ill 267, 164NE685.

1155-85½-New. Summons for a minor defendant cannot be left with a person who, although not a nominal complainant, is a party interested and benefited by a decree. 333 Ill 267, 164NE685.

1155-87 [b] **Service on guardian ad litem, invalidly appointed, does not bring infants before court,** though he answers. 211Ky817, 278SW152.

1155-88 180Ark41, 20SW(2d)310.

1155-90 See also 2LaA781.

1155-92 180Ark41, 20SW(2d)310; 93 Fla611, 112S768; 150Miss849, 117S249.

1155-94 180Ark41, 20SW(2d)310; 93 Fla611, 112S768.

1155-3 333 Ill 267, 164NE685.

1156-23 252 IllA348; 1LaA665.

1156-26½-New. Prosecution of an action by a minor after attaining majority cures lack of authority, if any, of the mother who brought suit. 161La461, 109S31.

1157-57 [a] **Bill held to present ground for equitable relief.**-215Ala328, 110S566.

1157-61½-New. Where an authorization to sue a minor is based on a statutory proceeding to relieve the minor of the disability of nonage, such a proceeding should be specifically pleaded, either by a statement in the bill or by a copy attached as an exhibit thereto, 218 Ala143, 117S665.

1157-61¼-New. and averments on information and belief of such proceeding are not permissible. 218Ala143, 117 S665.

1158-66 [a] **Complaint alleging due appointment** not demurrable for want of capacity to sue. 29PortoRico 975.

1159-94 331 Ill 420, 163NE393.

1159-96 170Ark568, 280SW654.

1159-97 331 Ill 420, 163NE393.

1159-98 170Ark568, 280SW654.

1159-10 But see 220Ala654, 127S221.

1160-17 113 Oh418, 149NE395, 396 [cit CJ].

1160-19 51SD505, 215NW531.

1160-21 [b] **Legality of appointment may be raised** either by demurrer or answer. 219MoA234, 271SW1023.

1160-24½-New. Where a complaint alleges the infancy of plaintiff, a defense of release is insufficient in the absence of an allegation denying infancy. 227 AppDiv805, 237NYS229.

1160-27½-New. A minor's suit to cancel a deed is not without equity because in the original pleadings the minor alleged that she had never received any of the purchase money, and after finding that the purchaser was able to show that she had received the purchase money, the minor thereupon amended and tendered the purchase price received by her to the purchaser. 153Miss91, 120S437.

1161-40 Mass 171NE477. [d] **Infancy sufficiently pleaded.**-181Ark403, 26SW (2d)85.

1161-41 48Nev319, 232P206; 156SC 496, 153SE468. [a] **Failure to plead infancy** in suit on note is implied ratification of codefendant's act in making note. 48Nev319, 232P206.

1161-46 [a] **Right to plead infancy** is not lost because infant is sued jointly with others. 48Nev319, 232P206.

1161-47½-New. Defense of infancy is

sufficient without alleging disaffirmance of contract or that defendant had not ratified it after reaching majority. 130 Misc412, 224NYS400.

1162-61 123 Okl 106, 251P981.

1162-63 [a] (3) In minor's action, after disaffirmance, to recover money paid into partnership, evidence of contribution by third party is inadmissible under general denial. 256Mass5, 152NE236.

1162-73½-New. Where persons sue in their own right as heirs of a deceased Indian, and there is no allegation or suggestion of the minority of any of the parties in the pleadings, the question of minority is not in issue and is not material, and no evidence on such question is necessary. 123 Okl 106, 251 P981.

1162-76 Mass 171NE477 (that college education is necessary). [c] **Plaintiff has burden of showing infant was destitute** and had no way of getting articles except by contract. 267Mass378, 166 NE724. [d] **Ratification or voluntary execution.**—Plaintiff, suing on contract by infant, has burden of proving ratification or voluntary execution thereof after minor reaches majority. 166La 671, 117S768, 59ALR276.

1162-77 [c] (3) Market value and initial cost of home purchased by married minor as necessary. TexCivA 274SW 667. [d] (2) In general. 181Ark755, 27 SW(2d)1020.

1162-78 [a] (1) 168Ga245, 147SE526. (2) 206 Iowa964, 221NW506. (10) 78 CalA536, 248P779. (13) To show misrepresentations by infant and engagement in business as adult preventing disaffirmance of contract. 147Wash54, 265 P161. (14) To justify verdict for defendant in suit to disaffirm infant's purchase contract. 181Ark755, 27SW(2d) 1020. (15) That parent was liable for medical services. 161Tenn217, 30SW (2d)239, 70ALR569. [b] (1) 230AppDiv 266, 243NYS467. (9) To support finding that household goods and furnishings were actually necessary. 141Miss556, 106S825. (10) To show ownership in partition proceedings where only evidence theory was statement by counsel for plaintiff as to effect of public records. 158La745, 104S701.

1163-87 331 Ill 420, 163NE393.

1163-99 231Ky626, 21SW(2d)1001.

1164-4 [a] (1) 252 IllA348; 253 IllA 368. (6) To show female infant was fourteen years old at time deeds sought to be canceled were executed. 173Ark 223, 292SW122. (7) To sustain finding that plaintiff did not misrepresent his age at time of purchase. 231Ky626, 21 SW(2d)1001.

1164-7 230AppDiv266, 243NYS467. See also 221AppDiv492, 224NYS660.

1164-8½-New. Where the defense of infancy is interposed, plaintiff has the burden of proving the additional facts under which defendant as an infant would be liable. 130Misc412, 224NYS 400.

1164-19 160Ga865, 129SE528 (omission to charge on delivery and acceptance of deed by minor and effect of nondelivery not erroneous). [d] **Instructions held not erroneous.**—TexCivA 274SW667 (defining term "necessary" as applied to home purchased by minor). [e] **Sufficiency of evidence to require charge** on effect of minority on release. 156SC496, 153SE468.

1165-21½-New. Instructions. Charge that the jury, in determining whether the deed was disaffirmed within a reasonable time after the infant attained majority, could consider the circumstances surrounding the transaction, conduct of the party respecting property since reaching majority, and the disposition of the funds received when the deed was executed, was not erroneous. 168Ga245, 147SE526.

1165-24 50RI 321, 147A617.

1165-30 [a] (3) Whether automobile when returned by infant was in as good condition as when received by him. 92 PaSuper110. (4) Reasonable value of services rendered. 197NC692, 150SE339.

1165-31 217Ky781, 290SW662.

1165-32 256Mass5, 152NE236; 141Miss 556, 106S825 (direction for infant in absence of evidence that articles furnished were actually needed by him); 136Wash 565, 240P921.

1165-33 126Me70, 136A290.

1165-34 [a] **Whether plaintiff misrepresented his age** is for jury. 231Ky626, 21SW(2d)1001.

1165-36 168Ga245, 147SE526.

1166-49½-New. In execution against property a directed verdict against a claimant, who had, during infancy, conveyed his share without consideration to defendant, and had attempted disaffirmance after majority, may be proper. 169Ga78, 149SE907.

1166-51 [c] **Judgment held proper.**—84 CalA526, 258P429. [c] **Judgment held inconsistent.**—181Ark403, 26SW(2d)85.

1166-54 TexCivA 18SW(2d)332.

1166-55½-New. Personal judgment cannot be taken against minor children on notes not executed by them. TexCivA 276SW750.

1166-55½-New. But judgment may be taken foreclosing vendor's lien notes on land for which notes given. TexCivA 276SW750.

1166-58 208 Iowa1226, 227NW116; 208 Iowa1241, 227NW118; 82NH221, 131A 688; TexCivA 275SW156; TexCivA 283 SW611; TexCivA 286SW642; TexCivA 296SW929; 152Va684, 148SE680. See also 164La463, 114S98.

1167-59 82NH221, 131A688; TexCivA 286SW642.

1167-61 TexCivA 291SW615.

1167-62 TexCivA 275SW156.

1167-63 82NH221, 131A688.

1167-64 211Ky817, 278SW152; 82NH 221, 131A688; TexCivA 283SW611.

1167-65 [b] **Absence of showing in record of service of process on minor** will require reversal of judgment, though guardian is appointed and maintains thorough defense. 180Ark41, 20 SW(2d)310.

1168-71 IndA 158NE299.

1168-72 IndA 158NE299.

1168-73 17F(2d)710; 180Ark41, 20SW (2d)310 (no judgment till after real defense by guardian); 211Ky817, 278SW 152; 101NJEq350, 139A812. [d] **Judgment should be reversed** where only evidence of ownership consisted of statement of counsel for plaintiff as to effect of public records. 158La745, 104S701. [e] **Judgment granted without defense by statutory guardian or guardian ad litem** is erroneous but not open to collateral attack. 211Ky817, 278SW152.

1168-75 211Ky817, 278SW152.

1168-79 IndA 158NE299; NC 154SE 674(2dcase); TexCivA 16SW(2d)839. See also TexCivA 30SW(2d)690.

1168-80 195Cal 132, 231P987 (judgment is suit against minor where both sides were controlled by some attorney and true facts concealed from court held fraudulent and void as to minors); TexCivA 16SW(2d)839.

1168-85 TexCivA 291SW615.

1170-2 12PaDist&Co 419 (properly refused). [a] **Default judgment held properly set aside.**—17F(2d)710.

1171-16 37 OklACR660.

1171-22 37 OklACR660.

1171-23 333 Ill 267, 164NE685; 142 Okl 221, 286P867; 37 OklACR660. [a] (2) Judgment of foreclosure of mortgage on land. 142 Okl 221, 286P867.

1172-27 120Kan209, 243P306.

1172-28 120Kan209, 243P306.

1172-31½-New. Failure of next friend properly to prosecute suit cannot avoid decree on collateral attack. 215Ala328, 110S566.

1172-32 120Kan209, 243P306. [b] **Flagrant neglect of duty by next friend** may be fraud furnishing ground for equitable relief. 215Ala328, 110S566.

1172-35 37 OklACR660 (premature sale under foreclosure of mortgage containing waiver of appraisement).

1173-50 174Ark1127, 298SW507.

1173-67 82NH221, 131A688; Va 152 SE328.

1173-70 [b] **Injunction** is proper remedy where judgment was rendered against infant not represented by guardian ad litem. 221MoA290, 3SW (2d)281.

1173-71½-New. When record does not disclose invalidity of the appointment of a curator ad hoc, **remedy is not by** appeal but by direct action to annul the judgment. 158La745, 104S701.

1174-74 333 Ill 267, 164NE685; NJCh 151A766.

1174-76 177Ark1186, 9SW(2d)803; NJ Ch 151A766; TexCivA 30SW(2d)690. [d] **When action timely.**—203 Iowa645, 212NW564.

1174-82 226Ky665, 11SW(2d)725. [a] **Acceptance of benefits.**—Mo 32SW(2d) 91.

1174-84 198Wis457, 224NW735.

1174-86 But see 226Ky665, 11SW(2d) 725.

1175-5 TexCivA 18SW(2d)1091.

1176-28 333 Ill 267, 164NE685; 149 Miss512, 115S591.

1176-30 216Ky260, 287SW705.

1176-30½-New. but by direct action to annul the judgment, 158La745, 104S701 (invalid appointment of curator ad hoc).

1176-31½-New. Where no guardian was appointed, an infant must proceed by writ of error to avoid judgment, and not by bill of exceptions. 50RI 321, 147 A617.

1176-38 149Va39, 140SE277.

1177-69 325 Ill 43, 155NE757; 333 Ill 267, 164NE685.

1177-70 216Ky260, 287SW705.

1177-73½-New. Minor, although giving timely notice of appeal, cannot proceed after the expiration of the time for filing the transcript. TexCivA 15SW (2d)1114.

1178-80 255 IllA189 (failure of lower court to appoint guardian ad litem).

1178-83 But see 126Me17, 135A524.

1178-84 Ill 172NE770. [a] **Court's discretion in fixing guardian ad litem's fees** cannot be set aside without abuse of discretion. TexCivA 30SW(2d)385. [b] **Presumption is in favor of court below** having appointed guardian for minor litigant. CalA 286P1091.

1178-90½-New. An action may be dismissed on appeal where it appears that it was not for the benefit of the minors that the action be prosecuted to final judgment. 125Kan403, 265P66.

1178-90½-New. Proceedings involving appointment of guardian ad litem not appearing on record cannot be considered on appeal. CalA 286P1091.

1178-90¼-New. Where decree fully protects minor litigant it is no concern of opposite party whether guardian ad litem is appointed. Ill 172NE770.

1178-90½-New. Appellant cannot complain of failure to show order of appointment of guardian ad litem where abstract showed appearance and decree recited appointment. Ill 172NE770.

1179-6 339 Ill 230, 171NE178 (fee of guardian ad litem as costs).

1180-11½-New. By statute next friend becomes liable for costs before and after an infant becomes of age unless an application is made for relief from liability. 31 OhA25, 166NE206.

1180-19 218Ky497, 291SW737.

INFECTION

1180-10 [a] **Infection is caused by any** noxious substance inserted into flesh whether substance be germ or poison. 218MoA253, 267SW431.

INFERENCE

1181-17 24 OhA29, 155NE806; 34Wyo 1, 242P1107.

1181-19 116 OhA451, 157NE21, 53ALR 1486.

1181-22 [a] (1) 24 OhA29, 155NE806.

INFIDELITY

1182-41½-New. By common usage and acceptation, the term may be said to be synonymous with "adultery." 129 Okl 244, 264P162.

INFIRMARY

1182-50 44F(2d)172.

INFLUENCE

1183-66 TexCivA 275SW124.

1184-93 115Nebr761, 215NW99, 101 [citCJ].

1185-8 115Nebr761, 215NW99, 101 [cit CJ].
1185-11 115Nebr761, 215NW99, 101 [citCJ].
1185-12 115Nebr761, 215NW99, 101 [citCJ].

INHABIT

1194-48 [d] **"Inhabited building."**–49 Philippine620.

INHABITANT

1194-65 199 Ind262, 157NE275, 53ALR 1386.
1194-67 194Wis353, 216NW499.
1196-95 205 Iowa108, 215NW661.
1196-8 194Wis353, 216NW499.
1196-10 205 Iowa108, 215NW661.

INHERE

1197-49½-New. ;existing in and inseparable from something else; sticking fast; 211Ky92, 275SW16.

INHERENTLY

1198-62 [a] 211Ky92, 275SW16.

INHERENT

1198-83½-New. The word inherit used in its technical senses relates only to real estate. 112 OhSt269, 147NE602.

INHERITANCE

1199-94 TexCivA 277SW197.
1199-95 TexCivA 277SW197.
1199-1½-New. in its technical meaning does not include personal property, 112 OhSt269, 147NE602.
1199-2 TexCivA 277SW197.
1199-3½-New. ,to heir at law. Tex CivA 277SW197.
1199-4 TexCivA 277SW197, 198 [cit CJ].
1199-6 112 OhSt269, 147NE602.
1199-9½-New. At common law when one spoke of inheritance or inheriting he referred to real property, and it means real property now exclusively, when used in its legal technical meaning. 112 OhSt269, 147NE602.
1199-9¾-New. In legal sense term is used in contradistinction to property acquired by will. TexCivA 277SW197.
1199-9¼-New. Popular use of word includes property obtained by devise or descent. TexCivA 277SW197.

INJUNCTIONS

32 C. J.—19-1 30F(2d)842. See also Utah 278P816. [a] (1) 298Pa487, 148A 699, 68ALR1172. (8) Other instances. SD 232NW20. [b] (1) 80Mont293, 260P727. [c] See also OhA 173NE449. [d] 114 Oh 702, 152NE656. [h] **Synonymous with "restraining order."** 50Nev191, 255P 1010. [i] **Rules of equity jurisprudence are not applicable** where plaintiff is entitled to relief against prejudicial act. TexCivA 6SW(2d)400.
20-2½-New. Principles applicable to enjoining breach of contract and decreeing its specific performance are the same. 17F(2d)739.
20-3½-New. Injunction cannot be maintained merely as a method of prosecuting an appeal from a judgment or order made without jurisdiction and which was not appealable. TexCivA 282SW879.
20-4 16F(2d)279; 218Ala544, 119S 660; 197Cal 649, 242P725; 201Cal 204, 256P207; 77CalA297, 246P342; 163Ga 293, 135SE911; 255 IllA199; Ind 171 NE871; 236Mich480, 210NW332; 83 Mont21, 269P162, 167 [citCJ]; 83NH 426, 143A687; 217AppDiv541, 217NYS 256; 137Misc139, 244NYS484; 142 Okl 121, 285P957; 6PaDist&Co 93, 95 [cit CJ]; RI 150A76; 134SC21, 131SE324; TexCommnA 12SW(2d)959; TexCivA 288SW281; TexCivA 294SW694; Tex CivA 8SW(2d)730; TexCivA 21SW(2d) 582. [d] **Injunction will not be granted** where it would suppress nuisance pendente lite and prevent lawful use of property. 6PaDist&Co 93. [e] **Under New York Civil Practice Act plaintiff** in action for damages for fraud in procurement of notes has been held not entitled to order enjoining their negotiation. 230AppDiv866, 245NYS118.
21-8 16F(2d)279; Ala 130S178; 166 Ga173, 142SE887; 170Ga829, 154SE452; Ga 155SE317(1stcase); 134SC21, 131SE 324. See also 165Ga472, 141SE207.
21-9 13PaDist&Co 409.
21-10 256 IllA357; 6PaDist&Co 93, 95 (quotCJentiresection); 50RI 409, 148A 803. [c] **Full measure of relief** which complainant may be entitled to on final hearing is ordinarily not granted in preliminary injunction. NJCh 150A347.
21-10½-New. Even where an injunction has not been issued, if the suit is one for injunction, defendant will act at his peril in doing the thing sought to be enjoined. 82Colo 239, 259P6.
21-10¾-New. In some jurisdictions injunction pendente lite can be issued by district court only in pending action or special proceeding or to enjoin foreclosure by advertisement. ND 229NW921.
21-13 TexCivA 20SW(2d)338.
21-17 206Cal 118, 273P555; 89Fla253, 103S625.
22-18 TexCivA 26SW(2d)353 [quot CJ].
22-21 89Fla253, 103S625.
22-23 42 OklACR26 [reh pending].
22-24 [b] (1) 163Ga365, 136SE160. (3) 163Ga365, 136SE160. (11) Injunction dispossessing one party and admitting another to possession is equivalent to mandatory injunction. 163Ga365, 136SE160. [c] **In Oklahoma.**–42 Okl ACR26 [reh pending].
23-26 23F(2d)208; 206Cal 118, 273P 555; Ga 155SE23; 235Ky810, 32SW (2d)401; 168La342, 122S59; 261Mass 314, 158NE761; 152Miss694, 120S830; 25 OhA278, 158NE94; TexCivA 32SW (2d)480. [d] (2) Where action was brought in same court mandamus might have been brought and same parties were before court, and no special objection to form of remedy is made, mandatory injunction may be issued to compel performance of mandatory duty by board of elections. 25 OhA278, 158NE94. [g] **Action to obtain mandatory injunction against city council is civil suit** and is controlled and limited by rules of procedure applicable to other civil suits. TexCivA 8SW(2d)730.
23-29 276US475, 48SCt361, 72L ed661; 32F(2d)124; 149Md163, 130A46.
23-30 89Fla253, 103S625; 47 Ida267, 275P99.
23-31 168La342, 122S59.
23-32 47 Ida267, 275P99; 48RI 234, 136A878. [a] **City council will not be compelled to confirm invalid assessment.**–172Ark544, 289SW478.
23-33 125Kan214, 217, 264P25 [citCJ].
24-35 125Kan214, 217, 264P25 [citCJ]; 21 OhA165, 152NE775. Contra 196Wis 635, 220NW209.
24-35½-New. and there is no evidence that there will be a recurrence of the injury, 291Pa258, 139A914.
24-36½-New. Mandatory injunction is the proper remedy where one bank was unlawfully charging another check remittance fees. 194NC720, 140SE705.
24-37 87Colo 339, 287P644.
24-40 87Colo 339, 287P644.
24-42 [a] **Immediate delivery of chattels.**–NJCh 147A202.
24-45 144Miss343, 109S854; 101NJEq 192, 137A650; 50RI 409, 148A803; Tex CivA 8SW(2d)730; 104WVa198, 139SE 713 [citCJ].
25-47 5F(2d)500.
25-50 Sask [1926] 4DomLR1169, 1171 [1926] 3WestWkly657 [citCJ].
25-51 89Fla253, 103S625; 144Miss343, 109S854; NJCh 147A202; TexCivA 20 SW(2d)338.
25-54 144Miss343, 109S854.
26-55 5F(2d)500; 50RI 409, 148A803; TexCivA 20SW(2d)355; 104WVa198, 139SE713.
26-56 NJCh 147A202; TexCivA 8SW (2d)730; TexCivA 30SW(2d)354.
26-57 [c] **Only where property has been forcibly or fraudulently obtained** and equities require possession be restored is court authorized to do so by mandatory injunction. TexCivA 275SW 454. [d] **Mandatory injunction issued without notice** where property was obtained by trespass and fraud. TexCivA 275SW454.
26-58 6F(2d)1016; 162Ga336, 133SE 857; NJCh 147A202; TexCivA 275SW 177. [b] **Granting mandatory injunction erroneous** where petition did not show property obtained forcibly or fraudulently. TexCivA 275SW454.
27-82 80Mont293, 260P727; 136 Okl 201, 277P230; TexCivA 286SW572, 573 [citCJ]; TexCivA 20SW(2d)855. [a] (2) Injunction, purpose of which is to keep waters in status quo till, upon trial of merits, rights of parties may be determined. 80Mont293, 260P727. (3) Temporary restraining order is an injunction. Mont 285P190.
28-83 TexCivA 286SW572, 573 [citCJ].
28-84 TexCivA 286SW572, 573 [citCJ].
28-85 TexCivA 286SW572, 573 [citCJ].
28-87 See also La 129S731.
28-89 NJCh 147A338.
28-91 Nebr 227NW145.
28-96 TexCivA 286SW572, 573 [citCJ].
29-2 TexCivA 286SW572, 573 [citCJ].
29-3 81Colo 254, 254P990; 120Kan316, 243P329.
29-5 TexCivA 286SW572.
29-10 80Mont293, 260P727.
29-10½-New. In some jurisdictions a motion to dissolve a temporary restraining order is irregular practice, 80Mont 293, 260P727.
29-10¾-New. and the proper practice is a motion to shorten the time, where the order to show cause is set for a too distant date. 80Mont293, 260P727.
29-10¼-New. Where defendant was restrained by a temporary restraining order from interfering with a threatened sale of crops to be held on the following day, a motion to dissolve is proper. 80 Mont293, 260P727.
29-10½-New. Restraining order was void ab initio if court lacked jurisdiction. TexCivA 26SW(2d)659.
29-13 273US284, 47SCt406, 71L ed646; 278US509, 49SCt220, 73L ed480; 279US 229, 49SCt266, 73L ed675; 14F(2d)297; 14F(2d)569; 14F(2d)1022; 16F(2d) 279; 22F(2d)374; 29F(2d)932; 30F (2d)385; 41F(2d)28; 41F(2d)58(2d case); 195Cal569, 234P371; 84CalA485, 258P630; CalA 261P1026; CalA 289P 229; Fla 106S73 (temporary injunction); 99Fla1296, 128S821; 165Ga366, 140SE761; 165Ga449, 141SE200; 43 Ida 371, 252P489; 317 Ill 356, 148NE64; 332 Ill 136, 163NE440 (mandatory); 242 IllA343; Ind 171NE871; 201 Iowa625, 207NW755; 207 Iowa515, 221NW205; 119Kan824, 241P249; 124Kan713, 261P 572; 126Kan690, 271P304; 130Kan685, 288P560; 156Md254, 144A239; 257 Mass399, 153NE884, 48ALR1431; 240 Mich279, 215NW325; 167Minn330, 209 NW5; 172Minn179, 215NW215; 175 Minn253, 221NW5; 311Mo 349, 278SW 74; 220MoA218, 283SW717; MoA 30 SW(2d)791; 83Mont21, 269P162; 83 Mont244, 271P455; 86Mont218, 283P 219; 83NH91, 138A428; 100NJEq185, 135A284; 244NY22, 154NE652; 246NY 140, 158NE51; 216AppDiv6, 214NYS 507; 223AppDiv356, 228NYS156; 214 AppDiv371, 212NYS236; 225AppDiv 401, 233NYS360; 228AppDiv585, 240 NYS647; 136Misc406, 241NYS5; NC 155SE734; 56ND1, 215NW868; 58ND 244, 225NW805; 58ND295, 225NW806; 133 Okl 125, 271P666; 298Pa487, 148A 699, 68ALR1172; 91PaSuper201, 204 [citCJ]; 32PortoRico313; 32PortoRico 829; 50RI 409, 148A803; 146SC225, 143SE796; 146SC279, 143SE878; 158 Tenn554, 14SW(2d)961; TexCivA 275 SW177; TexCivA 282SW834; TexCivA 286SW647; TexCivA 294SW624; Tex CivA 298SW456; TexCivA 26SW(2d) 662; 151Va1, 144SE492; 194Wis634, 217NW282. [g] **Discretion not abused.**–14F(2d)1022.
31-15 TexCivA 282SW627.
31-16 16F(2d)279; 58ND244, 225NW 805; 32PortoRico 829.
31-17 278US509, 49SCt220, 73L ed480; 25F(2d)485; 161Ga823, 131SE896; 162 Ga84, 132SE902; 165Ga516, 141SE410; 165Ga491, 141SE432; 167Ga637, 146SE 319; 169Ga33, 149SE636; 170Ga829, 154SE452; Ind 172NE353; 124Kan 713, 261P572; 167Minn330, 209NW5; 172Minn179, 215NW215; 100NJEq185, 135A284; 50ND365, 195NW660; Tex CivA 286SW647; TexCivA 5SW(2d) 1007; TexCivA 32SW(2d)246.
32-18 240Mich279, 215NW325; Tex CivA 275SW177; Sask [1926] 4DomLR

1169, [1926] 3WestWkly657.

32-19 TexCivA 282SW627; Sask [1926] 4DomLR1169, [1926] 3WestWkly657.

32-21 240Mich279, 215NW325.

32-22 195Cal569, 234P371; MoA 285SW175; Sask [1926] 4DomLR1169, [1926] 3WestWkly657.

33-23 [a] **In view of evidence that club was gambling house and concession that** police were properly motivated, held abuse of discretion to grant temporary injunction against police restraining forcible entry, etc. 216AppDiv6, 214NYS507.

33-28 220MoA218, 283SW717. [a] **Injunction will be withheld as oppressive** when injury is not substantial and restraint would cause great inconvenience and loss. 244NY22, 154NE652.

33-29 244NY22, 154NE652.

33-32 50RI409, 148A803.

33-34 13F(2d)123; 15F(2d)16; 163Ga70, 135SE406; 157Md576, 146A797; 220MoA218, 283SW717, 719 [quotCJ]; MoA285SW175; 101NJEq185, 137A572; 61ND188, 199NW523 (drastic remedy); 123Or28, 260P1100; 13PortoRicoFed56; TexCivA 2SW(2d)1012, 1014 [citCJ]. [d] **Injunction is extraordinary remedy.**–123Or28, 260P1100. [e] **In cases involving right to earn livelihood,** injunction should be granted only when justice can be accomplished by no other means. TexCivA 18SW(2d)1096.

33-35 42F(2d)1; 256IllA357; 101NJEq185, 137A572.

34-36 149Md163, 130A46; 101NJEq185, 137A572.

34-39 245NY260, 157NE130.

34-45 115Tex77, 273SW795.

34-46 274US488, 47SCt661, 71Led1164; 250NY382, 165NE819.

34-47 30Ariz7, 243P606; 103NJEq96, 142A309; 34PortoRico588; 116Tex187, 288SW129; BC [1929] 2DomLR651.

35-50½-New. , or depending on an unsettled question of law. 98NJEq373, 129A616.

35-51 274US488, 47SCt661, 71Led1164; 235Mich481, 209NW576. [a] (4) Injunction to restrain foreclosure of land contract because vendor may default in making mortgage payments on property will be denied. 235Mich481, 209NW576.

35-52 150SC538, 148SE548.

35-53½-New. In some jurisdictions courts may interpose their mandates between contesting parties only where it is attempted to effectuate an unlawful purpose or to effectuate a lawful purpose by unlawful means. 247NY65, 159NE863.

35-55 29Hawaii804, 813 [quotCJ]; 333Ill535, 165NE181; 165Minn415, 206NW654; 126Misc21, 211NYS856; 32PortoRico559; TexCivA 2SW(2d)1012, 1014 [citCJ]; 40Wyo106, 275P115(2dcase).

36-57 Cal291P204.

36-59 16F(2d)279; 165Minn415, 206NW654; 131Misc136, 226NYS172; TexCommnA 12SW(2d)203. [a] (3) Doubt as to reasonableness of covenant of restraint in contract of employment. 125Misc805, 212NYS72.

36-60 16F(2d)279; 256IllA357; 216AppDiv6, 214NYS507 (where truth through witnesses may be ascertained at trial); 292Pa547, 141A483; TexCivA 298SW461.

36-61 29F(2d)113; 7Alaska314; 134Misc129, 234NYS147; 292Pa547, 141A483.

36-62 256IllA357.

36-63 98NJEq18, 130A834; TexCivA 20SW(2d)338.

36-64 131Misc136, 226NYS172.

36-65 99NJEq847, 132A657; NJCh147A787(2dcase); 137Misc305, 242NYS509; TexCivA 289SW131. [c] (2) Irreparable injury from failure to be given possession of certain machines, which could be replaced, though after long delay, was not shown where bond, many times cost of building machines, was posted. NJCh147A202.

37-67 98NJEq18, 130A834 (urgent necessity for injunction must appear).

37-68 130Misc396, 223NYS559.

37-70 217Ala241, 115S165; 96NJEq83, 90, 124A615; 99NJEq224, 129A404; 32PortoRico559; 32PortoRico661; TexCivA 300SW220.

38-72 279US813, 49SCt256, 73Led972; 126Misc23, 211NYS858; 136Misc312, 242NYS283.

38-74½-New. The chancery court can maintain status quo during pendency of any suit properly before it. 99NJEq788, 134A363.

38-74½-New. A party to a suit asking a temporary injunction must assume the risk of obtaining a favorable final decree. 30F(2d)385.

38-76 22F(2d)374; 41F(2d)28; TexCivA 14SW(2d)931.

39-78 162Ga236, 133SE263.

39-82 135Misc282, 238NYS62.

39-83 29F(2d)679; 163Ga467, 136SE409; 168Ga81, 146SE897(1stcase); 165Minn415, 206NW654; 98NJEq194, 129A739; 98NJEq18, 130A834; 102NJEq467, 141A564; 126Misc21, 211NYS856. [a] (3) Temporary injunction to restrain sale of stock will not be granted where ownership is in dispute. 126Misc21, 211NYS856.

39-85 197NC6, 147SE617; TexCivA 289SW131.

40-86 99NJEq847, 132A657; NJ144A879; NJ150A415. [b] **Rule held not applicable.**–99NJEq770, 134A309.

40-87 98NJEq123, 130A843. [a] (3) Preliminary injunction denied where right to ultimate relief not clear, question being whether defendant could use for business purposes a driveway in residential zone. 128Misc441, 218NYS359.

40-89 98NJEq123, 130A843.

40-90 98NJEq123, 130A843.

41-92 170Ga505, 153SE42.

41-93 274US488, 47SCt661, 71Led1164.

41-98 269US328, 46SCt122, 70Led289; LaA124S684.

42-5 272US525, 47SCt189, 71Led387; 276US311, 48SCt311, 72Led587; 4F(2d)840; 41F(2d)305; 42F(2d)490; 168La172, 121S613; 263Mass235, 160NE801; TexCivA 4SW(2d)586; TexCivA 10SW(2d)736. [j] **Temporary injunction** contemplates relief where final injunction would be of no avail. 19F(2d)295. [k] **Injunction pendente lite** will be granted only when absence of restraining order will cause irreparable injury. 19F(2d)295.

42-6 87CalA127, 261P1029.

43-8 168La868, 123S602; Mo2SW(2d)743 [quotCJ]; 37OklACR557, 561 [quotCJ]; TexCommnA 14SW(2d)825. See also 229Ky339, 17SW(2d)194.

43-9 269US328, 46SCt122, 70Led289; 274US488, 47SCt661, 71Led1164; 25F(2d)485; 169Ga791, 151SE489; 198Ind95, 151NE411; 235Ky842, 32SW(2d)413; 2LaA53, 56 [citCyc]; 5LaA692; 172Minn179, 215NW215; 316Mo457, 290SW443; 220MoA218, 283SW717; MoA296SW442; 99NJEq738, 133A758; 31NM384, 247P310; 196NC226, 145SE31; 20OhA261, 151NE798, 799 [citCJ]; 37OklACR557; 37OklACR628; 9PaDist&Co158; 32PortoRico570; TexCommnA 288SW809; TexCommnA 1SW(2d)587; TexCivA 276SW471; TexCivA 297SW518; TexCivA 8SW(2d)189; TexCivA 22SW(2d)1073(1stcase). [e] **Injunction warranted** by probability of injury to plaintiff's property by continuation of operation of quarry by blasting. 20OhA261, 151NE798. [f] **Mortgagee's belief** that deficiency judgment will be entered does not warrant injunction against mortgagor's disposal of other property, in absence of showing warranting attachment. 138SC106, 136SE132. [g] **Injunction cannot be founded on supposition.**–158Md496, 148A826.

44-13 248Mich34, 226NW680.

44-14 [a] (9) See also 156Tenn474, 2SW(2d)414. (15) Announced intention of superintendent of insurance to make void rate reduction is not ground for injunctive relief to insurance companies, where statute does not provide for enforcement which would preclude adequate remedy at law. 316Mo457, 290SW443. (16) To enjoin threatened criminal prosecution for violating municipal ordinance. TexCivA 2SW(2d)1001.

44-26 32PortoRico570 (possibility of passage of ordinance confiscating plaintiff's property as result of acts of defendant in narrowing street).

45-38 6F(2d)1016; 213Ala289, 104S671; 141Miss279, 106S514, 516 [quotCyc]; MoA297SW184, 186 [citCJ]; TexCivA 278SW925; TexCivA 27SW(2d)849.

45-40 42F(2d)88; 213Ala289, 104S671; 119Kan824, 241P249; 141Miss279, 106S514, 516 [quotCyc]; Mo2SW(2d)743 [quotCJ]; MoA297SW184; 112Okl252, 240P1042; 136Okl201, 277P230; 140Okl252, 282P1099(2dcase); Okl292P66(1stcase); 9PaDist&Co158; TexCivA 278SW925; TexCivA 20SW(2d)356; TexCivA 22SW(2d)718. [a] (1) 125Misc83, 210NYS548, 551 [quotCyc]. (15) Action by taxpayers to enjoin board of county commissioners from proceeding with construction of improved road in duly organized road benefit district cannot be maintained where construction of road pursuant to regular authorization of county board has progressed almost to completion. 119Kan874, 241P249.

46-42 141Miss279, 106S514, 516 [quotCyc]; TexCivA 278SW925, 926 [citCJ].

46-43 141Miss279, 106S514, 516 [quotCyc]; TexCivA 278SW925.

46-44 181Ark216, 26SW(2d)57.

47-51 98CalA585, 277P500; Ind166NE281; 157Md576, 146A797; 126Misc869, 215NYS679; 118Tex38, 9SW(2d)731; TexCivA 22SW(2d)482; 103WVa81, 137SE349; 36Man67, [1926] 4DomLR230, [1926] 3WestWkly16.

48-56 See also 126Misc869, 215NYS679.

48-57 126Misc869, 215NYS679.

49-63 67Utah567, 248P811.

49-67 137Misc470, 244NYS427; 123Or28, 260P1100; TexCivA 282SW329.

50-69 244NY22, 154NE652.

50-70 14F(2d)957; Mass170NE385; 245NY516, 157NE840.

50-71 200Cal396, 253P134; 220MoA218, 283SW717.

50-72 220MoA218, 283SW717.

50-73 227Ky566, 13SW(2d)767, 63ALR404; 250NY382, 165NE819.

50-75 123Or28, 260P1100; TexCivA 282SW329.

51-82 See also 32PortoRico570.

51-90 83NH91, 138A428.

51-91 225AppDiv379, 233NYS364; 32PortoRico570 (amount of damages has no effect on right to injunction, but damages must exist and be irreparable).

51-95 32PortoRico570; Va154SE579; 101WVa256, 132SE721.

51-96 272US525, 47SCt189, 71Led387; 19F(2d)295; 42F(2d)463; 83CalA41, 256P476; 240Mich279, 215NW325; 31NM384, 247P310; 31NM641, 249P1074, 58ALR573; 28OhA449, 162NE752; 37OklACR557; TexCommnA 298SW540; TexCivA 8SW(2d)955. [b] **Injunction to prevent solvent corporation from distributing assets** to stockholders denied at suit of claimant against corporation where not shown assets would be so impaired as to leave them insufficient to pay claim. 101WVa256, 132SE721. [c] **Diminution in value** of property without irreparable mischief is not sufficient. 28OhA449, 162NE752.

52-99 19F(2d)295; 172Minn179, 215NW215; 103NJEq190, 142A553; 98NJEq123, 130A843; NJCh147A202; NJCh151A95; NJCh151A388; 222AppDiv631, 227NYS311; 223AppDiv75, 227NYS510; 146SC225, 143SE796.

52-2½-New. Temporary injunction will not be granted where defendant would suffer irreparable injury, 125Misc756, 211NYS838.

52-2½-New. and where it would be of no benefit to plaintiff. 125Misc756, 211NYS838.

53-3 240Mich279, 215NW325; 152Miss694, 120S830; 32PortoRico829. [a] **Erratum.**–"Irrevocable" injury should read "irreparable" injury. 101WVa256, 132SE721. [d] **By "irreparable injury" not meant** that injury is beyond possibility of repair, or beyond possibility of compensation in damages, but must be of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law. 32PortoRico829.

53-4 152Md190, 136A631, 60ALR207; 152Miss694, 120S830; 32PortoRico829.

54-6 161Ga629, 131SE505.

54-10 152Miss694, 120S830.

54-12 34PortoRico90.

54-13½-New. Whether an irreparable

injury is about to be committed is a question for the court. 198 Ind95, 151 NE411.

54-15 89CalA435, 264P782.

55-19 89CalA435, 264P782; 160Ga424, 128SE194; 162Ga336, 133SE857; 163 Ga455, 136SE429.

55-20 160Ga424, 128SE194.

55-24½-New. A court of equity should not interfere to prevent multiplicity of suits against plaintiff on causes of action arising out of the same facts and legal principles, unless clearly necessary to protect plaintiff from a continued and vexatious litigation. 40Wyo 106, 275P 115(2dcase).

55-27 223Ky582, 4SW(2d)395, 398 [cit CJ].

57-34 19F(2d)295; 21F(2d)333; 200 Cal 396, 253P134; Cal 290P11; Conn 152A297; 90Fla525, 107S269; 99Fla 496, 126S117; 160Ga556, 128SE766 (dictum); 163Ga465, 136SE432; 163Ga 760, 136SE895; 164Ga878, 139SE799; 27Hawaii292; 325 Ill 70, 155NE761; 83 IndA53, 147NE629; 86 IndA322, 157NE 472; 224Ky25, 3SW(2d)766; 158La 979, 105S35 (remedy of parties alleging error in mandamus judgment is by direct suit to annul, or appeal); 148Md 354, 129A366; 149Md163, 130A46 (mandatory injunction); 241Mich266, 217 NW43; 141Miss156, 106S440; 222MoA 1216, 4SW(2d)480; 117Nebr511, 221 NW438; Nebr 230NW490; 101NJEq 185, 137A572; 31NM641, 249P1074, 58 ALR573; 245NY260, 157NE130; 126 Misc869, 215NYS679; 20 OhA162, 153 NE129; 37 OklACR281; 37 OklACR 557; 39 OklACR267; 10PaDist&Co 440; 157Tenn343, 8SW(2d)498; TexCivA 275SW177; TexCivA 278SW305; Tex CivA 282SW627; TexCivA 284SW 347; TexCivA 286SW590; TexCivA 289SW1064; TexCivA 297SW1067; TexCivA 1SW(2d)380; TexCivA 9 SW(2d)461; TexCivA 20SW (2d)1087; 100WVa64, 130SE151. See also 134SC 106, 131SE678. [d] (7) Defendant's remedy by injunction to enjoin garnishment based on dormant judgment is not exclusive. TexCivA 13SW(2d)927. [e] Equity will not enjoin collection of money by one voluntary association from another. 71CalA159, 233P823.

59-35 90Fla525, 107S269.

59-36 137Misc637, 244NYS231.

59-39½-New. Intervention of equity is not justified by the mere fact that the parties regard such proceedings as more expeditious. Mass 167NE417.

59-39⅓-New. Although a party is entitled to remedy by injunction in absence of legal remedy, he is not entitled to relief in absence of equitable showing. Kan 292P783.

59-41 21F(2d)333; 21F(2d)355.

60-42 TexCivA 23SW(2d)535.

60-43 21F(2d)355; 232 IllA596; 234 IllA222.

60-45 21F(2d)333; 21F(2d)355; 141 Miss156, 106S440; 132Misc82, 229 NYS32.

60-46 TexCivA 24SW(2d)778.

60-47 27 OhNPNS215; TexCivA 282 SW627; TexCivA 289SW1064; Tex CivA 1SW(2d)426.

61-48 17F(2d)143; 12PortoRicoFed 570.

61-49½-New. trespass to try title, Tex CivA 286SW669.

61-50 10PaDist&Co 627.

61-52 TexCivA 275SW177.

61-54½-New. taxpayers' actions to enjoin payment by public officers. 86 IndA322, 157NE472.

61-55 163Ga760, 136SE895; 163Ga760, 137SE236; 99NJEq847, 132A657. [a] 99NJEq847, 132A657.

61-58 200Cal 396, 253P134; 218Ky 356, 291SW752; 149Md163, 130A46 (mandatory injunction); 241Mich266, 217NW43; 220AppDiv182, 221NYS194; TexCivA 275SW177; TexCivA 284SW 347; TexCivA 286SW590; TexCivA 5 SW(2d)557.

62-59 245NY260, 157NE130.

62-61 234 IllA222; 236 IllA613; 113 Nebr731, 204NW798; 100NJEq78, 135 A83. [h] Continuing trespass in driving across lot to and from garage causes injury not susceptible of complete pecuniary compensation and is not estimable in money. 83Mont244, 271P 455.

62-61½-New. and where in addition to the inadequacy of the remedy at law for damages, the injury is so serious or material that restoration to former condition is the only adequate relief a mandatory injunction will be awarded. 149 Md163, 130A46.

62-62 21F(2d)333; 236 IllA613; 83 Mont244, 271P455.

63-63 236 IllA613.

63-64 22[illegible]AppDiv677, 225NYS164.

63-66 21F(2d)333.

63-70 [c] Injunctive relief against employees using property intrusted to them and revenues therefrom. TexCivA 275SW454.

63-74 39F(2d)5.

63-75 161Ga629, 131SE505 (pendency of prior suit for damages not precluding injunction as ancillary proceeding).

64-82 166Ga173, 142SE887.

64-88 127 Okl 260, 260P758.

65-89 Cal 290P11; 163Ga760, 136SE 895; 86 IndA322, 157NE472; 322Mo 419, 17SW(2d)535; 25OhNPNS118; 299Pa496, 149A710; 7PaDist&Co 327. [j] Remedy to discharge property from illegal attachment by intervention in action is adequate and person who knowingly neglects to avail himself of remedy until after judgment and order of sale will be denied injunctive relief against order of sale. 37 OklACR281.

65-92 32PortoRico 343.

66-94 32PortoRico 343 [quotCyc].

66-95 32PortoRico 343 [quotCyc].

66-97 235 IllA532.

66-7½-New. An injunction restraining interference with an unlicensed dance hall will not be granted where there is adequate remedy by mandamus to compel the issuance of a license. 252 IllA1.

67-13 220MoA218, 283SW717. [a] That plaintiff is member of laundry organization does not prevent maintenance of suit to enjoin former employee from soliciting customers. Mass 172 NE104.

67-14 13PaDist&Co 389 (mandatory injunction).

67-18 99Fla1296, 128S821; 164Ga777, 139SE549; MoA 20SW(2d)567 (suit to enjoin picketing not barred by conduct of plaintiff); 126Misc777, 215NYS549; 224AppDiv768, 230NYS463; Tex CommnA 286SW176. See also 165Ga 334, 140SE879. [a] (5) Organization, which by stamps falsely pictured acts of United States forces in Nicaragua as unlawful is not entitled to relief in suit to enjoin exclusion of envelopes bearing such stamps from mails. 27F(2d) 889. (6) Enforcement of judgment by defendants against plaintiffs will not be enjoined where it was obtained because of plaintiffs' fraudulent acts. 224 AppDiv768, 230NYS463. [f] Sharp practice.-33F(2d)638.

68-19 164Ga777, 139SE549; 215Ky 189, 284SW1031; 9PaDist&Co 59; 200 Wis153, 228NW123, 66ALR1085. [b] Violation of contract between two banks to enable one to carry loan to its customer in violation of banking law will not be enjoined. 100WVa342, 130SE 476.

68-21 320 Ill 586, 151NE491.

68-22 320 Ill 586, 151NE491.

68-25 120Kan749, 244P1054; TexCivA 293SW850; TexCivA 4SW(2d)293.

69-32 205Cal 639, 271P1050.

70-33 IndA 165NE84; 155Md30, 141A 440; 135Misc282, 238NYS62.

70-35 Ida 286P353; 155Md30, 141A 440.

70-37 259Mass86, 156NE4; Tex CommnA 286SW176.

70-47 [a] (5) 99Fla914, 127S859. [b] (6) 5F(2d)559; 216Ala504, 113S609, 54ALR1413; 105Conn464, 136A71; 110 Conn130, 147A513; 56AppDC320, 13 F(2d)292; 164Ga592, 139SE1; 317 Ill 264, 148NE7; 256Mass101, 152NE225; MoA 27SW(2d)462. [c] Accrual of cause of action to enjoin trespass arises when trespass is threatened or committed. 23F(2d)109. [d] Time from which laches is considered is date of trespass sought to be enjoined. 23 F(2d)109.

71-48 247Mich394, 225NW500; 99NJ Eq602, 133A754. [b] (6) 240Mich1, 215NW24.

71-49 218AppDiv377, 218NYS339; Tex CivA 287SW693.

71-51 32PortoRico 559; TexCommnA 286SW176. [a] (5) Where lot owners knew of repairs being done on neighbor's property (defendant) and applied for injunction after such repairs were nearly completed. 32 PortoRico 559.

72-55 See also TexCommnA 286SW 176. [a] (2) Acquiescence by owner in second cutting over of land, making results of rightful and wrongful cutting difficult to distinguish, prevents recovery of damages prior to filing of suit to restrain second cutting. 5F(2d)559.

72-59 32PortoRico 559; TexCivA 287 SW693. [c] Rule not applied.-33 OhA 287, 168NE757.

73-60 120Kan749, 244P1054; 117 Or 220, 243P93, 45ALR521.

74-70 TexCivA 278SW858, 862 [quot CJ].

74-71 TexCivA 278SW858, 862 [quot CJ].

74-72 TexCivA 278SW858, 862 [quot CJ].

74-73 TexCivA 278SW858, 862 [quot CJ].

74-74 TexCivA 278SW858, 862 [quot CJ].

74-76 223AppDiv10, 227NYS363.

75-79½-New. Injunction will not issue against one in possession of land so long as the original injunction granting him possession, concededly proper, remains in force. 134SC21, 131SE324.

75-79⅓-New. Where plaintiff first tenant is in possession under an injunction against defendant second tenant, the landlord, on becoming a party defendant on application of defendant tenant, may not move for injunction against plaintiff so long as the original injunction remains in force. 134SC21, 131SE 324.

75-82 201Cal 643, 258P945; 100NJEq 185, 135A284; 112 Okl 252, 240P1042.

75-83 100NJEq185, 135A284. [a] (3) To restrain use of municipal radio broadcasting station for political propaganda or purposes. 125Misc489, 211 NYS397.

75-84 [c] Defense that injunction to restrain city council from acting ultra vires was premature held properly overruled. 162La823, 111S177.

76-85 245IllA367; 136 Okl 144, 276P 740; Ont [1928] 4DomLR483.

76-86 157Tenn429, 7SW(2d)40; Utah 269P1026.

76-88 15DelCh356, 138A603.

76-95 125Misc83, 210NYS548; 32PortoRico 313.

77-1 [b] Cessation of illegal picketing is no ground for refusal of permanent injunction. 218MoA516, 279SW232.

77-5 149Md163, 130A46 (mandatory injunction); Mass 173NE534; 240Mich 279, 215NW325; 251Mich488, 232NW 395; 103NJEq96, 142A309; 129Misc 668, 223NYS506; 50ND741, 197NW885, 31ALR1296; TexCommnA 286SW176; TexCivA 30SW(2d)412. See also 82NH 193, 132A12.

77-6 232 IllA596; 98NJEq194, 129A 739.

77-7 18F(2d)736; 181Ark216, 26SW (2d)57; 200Cal 396, 253P134; 240Mich 279, 215NW325; 223AppDiv768, 227 NYS600, 601 [citCJ]; 285Pa102, 131A 728; Utah 278P816; 151Va1, 144SE 492; Can [1926] 4DomLR593. [b] (1) 200Cal 396, 253P134; 333 Ill 535, 165 NE181. (3) 50ND741, 197NW885, 31 ALR1296.

78-8 TexCivA 26SW(2d)925.

78-9 200Cal 396, 253P134; 218Ky557, 291SW757; 240Mich279, 215NW325; 151Va1, 144SE492.

78-13 232 IllA596; Mass 170NE416; 285Pa102, 131A728; TexCommnA 286 SW176, 181 [citCJ]; 195Wis139, 217 NW730. See also 216Ala367, 113S592. [b] (6) Removal of building encroachment. NJCh 151A467.

79-14 285Pa102, 131A728.

79-15 232 IllA596.

80-18 215Ala429, 110S911; 217Ala241, 115S165; 172Minn179, 215NW215; 315 Mo 568, 287SW445; 102NJEq213, 140A 261; TexCivA 5SW(2d)796; TexCivA 7SW(2d)1102.

80-19 315Mo 568, 287SW445, 449 [quot CJ]; 83Mont244, 271P455; 98NJEq123, 130A843; 195NC305, 141SE882; 13 PortoRicoFed24.

80-20 98NJEq18, 130A834; 102NJEq 213, 140A261; Que [1929] 1DomLR301.

81-25 240Mich279, 215NW325.

81-27 240Mich279, 215NW325; 116 Nebr648, 218NW429, 431 [citCyc]; 98 NJEq18, 130A834; 120 Or202, 250P722, 727 [citCJ]; 194Wis634, 217NW282.

82-29 120 Or202, 250P722, 727 [citCJ].

82-30 [a] (3) Rule applied where municipality by resorting to condemnation proceedings could have avoided condition complained of by plaintiff. 103NJ Eq176, 142A648.

82-44 120 Or202, 250P722, 727 [quot CJ].

83-45 TexCivA 298SW461.

83-45½-New. Benefit to third persons accruing from favorable decree is no ground for refusing protection against irreparable injury. 24F(2d)169.

83-46 BC [1929] 2DomLR651; BC [1928] 4DomLR724.

83-51 CalA 289P169; 221MoA1033, 295 SW515; 143 Okl 258, 288P605; 193Wis 108, 213NW657, 658 [citCJ].

83-52 193Wis108, 213NW657, 658 [cit CJ].

84-58 But see 32PortoRico 570.

84-61 129 Okl 236, 264P176.

84-62 148Wash15, 267P767.

84-62½-New. Temporary injunction to prevent change in status of parties claiming interest in subject of controversy is proper. 216Ala60, 112S347.

84-62½-New. In a suit against a city to enjoin diversion, from gross revenues of a street railway system purchased by a city, plaintiff was held not entitled to enjoin a private citizen from suing in a state court to enforce a claim on such revenues. 291 (2d)254.

84-63 156Tenn430, 1SW(2d)526; 116 Tex1, 285SW1063, 1072 [citCJ].

84-65 116Tex1, 285SW1063, 1072 [cit CJ].

84-67 But see TexCivA 21SW(2d)70.

85-69. 157Tenn553, 12SW(2d)370.

85-78 20F(2d)707.

85-80 127Misc470, 216NYS481.

85-85 234 IllA430; 100NJEq78, 135A 83.

85-86 234 IllA430; 144Miss560, 108S 907, 910 [citCJ]; 129 Okl 236, 264P176.

86-89 307Mo 137, 270SW339. Contra 100NJEq78, 135A83.

86-94 Mass 169NE504; 100NJEq238, 134A866; TexCivA 289SW1064.

86-97 40F(2d)269.

87-98 129 Okl 236, 264P176. [a] **That creditor receiving judgment** will have priority over other creditors is no ground for injunction by debtor. 145 Va568, 134SE570. [b] **Person suing railroad company for personal injury in district court of county through which its road passes,** as authorized by statute, will not be enjoined on ground that plaintiff is nonresident, that injury occurred in another county, that view by jury is necessary, and that witnesses cannot attend. 129 Okl 236, 264P176.

87-99 216Ala504, 113S609, 54ALR1413; 127Misc84, 215NYS257. But see 41 F(2d)316.

87-6 249Mich558, 229NW481; 228App Div379, 239NYS1.

87-7 164Ga592, 139SE1; 239 IllA38; 102NJEq33, 139A712; 116Tex1, 285SW 1063; TexCivA 288SW1103; 99Vt306, 131A847.

88-8 116Tex1, 285SW1063.

88-9 99Vt306, 131A847.

88-18 43F(2d)163; 31Ariz378, 253P 897; TexCivA 288SW1103.

90-37 107WVa512, 149SE166.

90-39 TexCivA 1SW(2d)515.

91-40 [n] (2) Action involving same subject matter enjoined though there are parties not common to both actions and different cause of action is also involved. TexCivA 288SW1103.

92-44 But see TexCivA 288SW1103.

92-54 35F(2d)403.

93-67½-New. Where the cause of action asserted in the suits is not expressly denied, the bill should be dismissed. TexCivA 9SW(2d)1055(2dcase).

93-69 148Miss536, 114S397.

93-71 TexCivA 9SW(2d)1055(2dcase).

93-74 247Mich180, 225NW583.

94-86 TexCivA 282SW608; TexCivA 9 SW(2d)461; 148Wash15, 267P767, 769 [quotCJ].

95-96½-New. Complainant asking an accounting and an injunction involving the construction of a will may be restrained from prosecuting a subsequent ejectment suit involving the same matter. 101NJEq449, 139A428.

96-4 307Mo 137, 270SW339.

97-11 307Mo 137, 270SW339.

98-28 229AppDiv273, 241NYS584.

98-37 20F(2d)799; 100NJEq78, 135A 83. See also 76PaSuper250.

99-41 166Ga800, 144SE261.

99-51 164Ga54, 137SE770; 164Ga878, 139SE799; 166Ga800, 144SE261; 267 Mass375, 166NE712; Mass 171NE281; Mass 171NE713; 236Mich480, 210NW 332; 166Minn507, 208NW408; 144Miss 560, 108S907; 307Mo 137, 270SW339; 103NJEq323, 143A327; 100NJEq78, 135 A83; TexCivA 297SW307; 101WVa147, 132SE202.

100-52 100NJEq78, 135A83.

100-54 100NJEq78, 135A83.

101-57 TexCivA 31SW(2d)478.

101-58 240 IllA136, 144 [quotCyc]; 100 NJEq78, 135A83.

101-59½-New. More cogent state of facts is required to warrant preliminary injunction restraining suit than would be required as defense thereto. TexCivA 31SW(2d)478.

101-69½-New. Equitable jurisdiction is not lost because legal remedy becomes subsequently available. 14F(2d)877.

101-71 165Ga447, 141SE306.

102-77 167Ga395, 145SE865.

103-86½-New. Waiver. Although equitable defense of waiver is available at law, equity will enjoin an action at law where it is summary and no right to appeal therefrom exists. 100NJEq78, 135 A83.

103-94 101WVa147, 132SE202.

105-23 245Mich514, 222NW727.

106-25 15F(2d)303.

106-32 215Ala349, 110S571; 148Miss 536, 114S397; 101WVa147, 132SE202.

107-34 148Miss536, 114S397, 403 [cit CJ].

107-36 160Ga307, 127SE852.

103-49 [a] 7F(2d)143.

108-52 165Ga447, 141SE306; 116 Or 310, 241P50.

108-56 NJCh 145A622. But see 17 F(2d)906.

108-57 [f] **Trespass to try title.-Tex** CivA 271SW213.

103-58 168Minn22, 209NW485.

109-61 NJCh 149A630.

109-64 Mass 171NE281 (writ of entry after foreclosure).

103-66½-New. Equity will enjoin summary proceedings against assignor of a lease without the landlord's consent, at the instance of an assignee claiming waiver, where the assignee is not a party to the proceedings and there is no right to appeal on the merits. 100NJEq 78, 135A83.

109-66⅓-New. Equity will restrain an improper use of a written lease in an ejectment action. NJ 146A207.

109-67 But see 100NJEq78, 135A83.

109-68 22F(2d)574; 199 Ind467, 157 NE721; 294Pa139, 143A776; 32Porto Rico 343; 134SC373, 133SE35; TexCivA 290SW831; TexCivA 16SW(2d)395; 100WVa64, 130SE151. [g] **Remedy of parties alleging error in judgment in mandamus is by appeal** therefrom or direct suit to annul it. 158La979, 105 S35.

110-69 32PortoRico 343 [quotCyc].

110-69½-New. But it is otherwise where proceedings are summary and no right to appeal on the merits exists. 100NJEq78, 135A83.

110-70½-New. But where remedy by appeal is inadequate, injunction lies without first resorting thereto. TexCivA 286SW497.

110-71 102NJEq169, 139A911; 32PortoRico 343 [quotCyc].

110-72 100NJEq78, 135A83; 32Porto Rico 343.

110-73 181Ark235, 25SW(2d)431; 32 PortoRico 343. See also 32PortoRico 343.

110-76 20F(2d)707; 85Mont439, 279P 234.

111-79 41F(2d)316.

111-82 201Cal 204, 256P207.

111-86 TexCivA 288SW1103.

111-88 170Ga91, 152SE110.

111-90½-New. In an action for appointment of a receiver to take over proceeds of a sale of certain properties and distribute them, similar suits in another court by sixty or seventy other claimants will be enjoined where there were seventeen hundred or eighteen hundred remaining claimants and the same subject matter is involved. TexCivA 288SW 1103.

111-91½-New. Equity will restrain the improper use of a written lease in action of ejectment. NJCh 150A10.

111-96 144Miss560, 108S907. [b] (2) Intention of attorney-general in appeal from tax assessment to secure hundred per cent assessment as against sixty per cent as to other property does not present grounds for enjoining appeal. 144 Miss560, 108S907. [c] **Fact that defense to appeal** from tax assessment will entail expense is no ground for injunctive relief. 144Miss560, 108S907. [d] **Chancery court** cannot enjoin prosecution by state, county, or municipality of appeal from tax assessment. 144Miss560, 108S 907.

112-5 132 Okl 242, 269P297, 298 [cit Cyc].

112-7 36F(2d)712; 36F(2d)813; 116 Tex1, 285SW1063; TexCivA 21SW(2d) 72; TexCivA 30SW(2d)407; 99Vt306, 131A847.

114-23 217Ky160, 289SW219.

114-32 115Tex509, 283SW1071.

114-33½-New. Judges in same circuit. Statutes prohibit one judge from staying proceedings on orders or decrees of another judge of the same circuit. 236 Mich480, 210NW332 (statute construed).

114-34 308Mo 230, 271SW469 (where suit is not incident to main suit or ancillary to it); NJSup 147A460(2dcase); 44Philippine182; 116Tex1, 285SW1063; 118Tex227, 11SW(2d)298; TexCivA 294 SW305. [a] **Power to interfere with judgment or decree denied.-44Philippine182.** [b] **Where suit has abated** by pendency of prior action in another court, court has no jurisdiction to exercise or protect, and it may not enjoin such pending action. 116Tex1, 285SW 1063. [c] **Equity will not interfere with law court** having jurisdiction though no appeal lies from latter's decision. Tex CivA 294SW305.

114-35 167Ga630, 146SE441.

114-35½ 181Ark444, 26SW(2d)115; CalA 288P723; 321Mo 624, 12SW(2d) 91; 116Tex1, 285SW1063; TexCivA 25 SW(2d)164. [a] **Circumstances held not to warrant injunction.-TexCivA** 21SW (2d)72.

114-36 101NJEq449, 139A428.

114-37½-New. Application for injunction in a federal district court to prevent numerous suits in another district may be denied where relief against oppression may be obtained through the court in such other district. 34F(2d)50.

114-39 158La889, 105S2, 3 [citCJ]; 103NJEq487, 143A771; 218AppDiv104, 218NYS87, 94 [citCyc]. [b] **Court may enjoin resident in its jurisdiction** from submitting himself to foreign jurisdiction to obtain divorce on grounds not recognized in domiciliary state. 218App Div104, 218NYS87.

114-41 218AppDiv104, 218NYS87, 94 [citCyc].

115-54 Ala 128S438; 104Conn28, 132A 390; IndA 170NE328; 210Ky718, 276 SW815; 158La889, 105S2, 4 [citCJ]; 103NJEq487, 143A771; 300Pa291, 150A 475; 13PaDist&Co 29; 99Vt306, 131A 847.

116-56 13PaDist&Co 29.

116-58 104Conn206, 132A390.

116-59 158La889, 105S2, 4 [citCJ].

116-61 210Ky718, 276SW815.

116-63 [c] **Unprofessional conduct of counsel.-199Wis278, 226NW297.**

116-65 126Kan745, 271P313; 158La 889, 105S2.

116-66 210Ky718, 276SW815.

116-68 210Ky718, 276SW815. [a] (4) Prosecution of claim against estate in courts of another state where will of decedent had been probated and estate was in process of settlement will not be enjoined. 210Ky718, 276SW815.

116-71 13PaDist&Co 29.
117-73 13PaDist&Co 29.
117-77 13PaDist&Co 29.
117-81 Miss 128S871; 218AppDiv104, 218NYS87, 94 [citCyc]. [c] **Evasion not shown.**–300Pa291, 150A475.
118-86 218AppDiv104, 218NYS87, 94 [citCyc].
118-93 DelCh 142A368.
118-95 308Mo 201, 271SW481. [a] 308 Mo 201, 271SW481.
118-96½-New. , or where injunction would be wholly superfluous and add nothing to relief granted in suit in state. 308Mo 201, 271SW481.
118-97 122Kan831, 253P431.
119-97½ DelCh 142A368; 158La889, 105S2.
119-98 126Kan745, 271P313; 158La 889, 105S2.
119-1 126Kan745, 271P313.
119-11½-New. Equity does not require that suit in another state be enjoined merely to enable a nonresident defendant to remove the suit to a federal court by reason of diversity of citizenship. 158La889, 105S2.
119-14 278US515, 49SCt235, 73Led 483; 209Ky299, 272SW748; 169La77, 124S151 (right to use city streets is not "property right"); 6LaA128; 250Mich 96, 229NW598; 101NJEq192, 137A650; 245NY260, 157NE130; 247NY65, 159NE 863; 34PortoRico 343; TexCivA 23SW (2d)840; 107WVa409, 148SE376. But see 255 IllA314. [c] **Rights to make unobjectionable speech for hire** is property right within rule. 209Ky299, 272SW 748.
119-15½-New. Injunction will be granted restraining defendants from using a private sewer without obtaining consent of all the owners. 170Ark982, 282SW363.
119-16 13PortoRicoFed103; 196Wis 635, 220NW209.
120-17 216Ala618, 114S10, 11 [citCyc].
120-20 212Ky715, 280SW99; 220Ky 154, 294SW1063; 224Ky1, 5SW(2d)278. [c] **Complaint held to be one based upon ownership** of property to try title rather than prevent trespass. 136SC525, 134 SE497.
120-21 174Ark287, 294SW996; 212Ky 715, 280SW99.
120-21½-New. Construction of a two-story garage on a lot adjoining that of plaintiff, with the second story on a level with that of plaintiff's residence, will not be enjoined merely because of the inconvenience that will result to plaintiff. TexCommnA 14SW(2d)825.
120-24 Ala 130S559; 169Ga395, 150SE 584; 6LaA128; 18OhA506; 5PaDist&Co 119, 122 [quotCyc]; TexCivA 282SW 826; TexCivA 16SW(2d)328. [b] **Persons in possession of levee under lease from city** have color of title authorizing injunction against use of portion thereof by another. 127Kan216, 273P448. [c] **Possession necessary to sustain possessory proceeding.**–41F(2d)32.
120-31 [a] **Mortgagee** may enjoin trespass affecting his security. Alta [1924] 2DomLR942.
121-35 235 IllA387, 394 [citCyj].
121-36 235 IllA387, 394 [citCyj].
121-37 235 IllA387, 394 [citCyj].
121-40 143Wash172, 254P857.
121-49½-New. Lessor not entitled to enjoin lessee from obstructing alley where lessee had purchased leave of adjoining property and the use of reserved alley was permissive only. 114Tex452, 270SW1014.
122-53 40F(2d)679; 324 Ill 569, 155NE 280; 235 IllA387; 99NJEq356, 131A 889; NJCh 137A96; 101NJEq192, 137A 650; 32PortoRico 559; 32PortoRico 661.
122-54 32PortoRico 559.
122-55 TexCivA 282SW627.
122-56 15DelCh168, 132A891; TexCivA 14SW(2d)86.
123-57 NJCh 137A96.
123-62½-New. **Retention of jurisdiction.** Where defendant fails to make motion to dismiss for lack of equity, the court should retain jurisdiction until complainant has reasonable opportunity to establish right at law. 99NJEq356, 131A889.
123-67 32PortoRico 661.
124-72 48RI 401, 137A699.
124-83 164Ga805, 139SE678; 3LaA 188; NJCh 137A96; 101NJEq192, 137A 650; 229AppDiv422, 243NYS244; 34 PortoRico 393; TexCivA 27SW177; TexCivA 20SW(2d)104; 143Wash172, 254P857.
124-84 143Wash172, 254P857.
124-86½-New. The court is without authority to divest a party of property rights without a trial. TexCommnA 12 SW(2d)959.
124-88 163Ga894, 137SE251; 235 IllA 387, 394 [quotCJ]. [a] **That same relief might be obtained in another forum** does not prevent granting of injunction. Tex CivA 1SW(2d)358.
124-89 235 IllA387; 191NC217, 131SE 575. [a] **Injunction retaining transfer on books of company** will be granted pending legal adjudication of ownership. 216Ala504, 113S609, 54ALR1413.
125-90 235 IllA387, 394 [quotCJ]. [g] **Order should be interlocutory,** where there was issue as to liability of defendant to account. 218AppDiv149, 218NYS 31. [h] **In action for annulment of marriage** on ground of wife's mental incapacity, injunction restraining husband from asserting possession or right to possession of her property is properly granted. TexCivA 1SW(2d)358.
125-91 161Ga629, 131SE505; 232 IllA 419; 235 IllA387, 394 [quotCJ]; 315Mo 568, 287SW445; NJCh 137A96; 101NJ Eq192, 137A650; TexCivA 20SW(2d) 104; Va 154SE518. But see 208AppDiv 854, 204NYS934.
125-93 235 IllA387, 394 [quotCJ].
125-94 235 IllA387, 394 [quotCJ].
125-95 235 IllA387.
125-96 235 IllA387, 394 [quotCJ]; Tex CivA 26SW(2d)925.
126-98 101NJEq192, 137A650.
126-99 98Fla410, 123S814(2dcase).
126-2 157Md229, 145A546; 86Mont218, 283P219.
126-3 315Mo 568, 287SW445.
126-6 157Md229, 145A546.
127-10 220AppDiv340, 221NYS414. [a] **In suit to foreclose mechanic's lien against insured's property destroyed by fire** lienor is entitled to temporary injunction restraining payment of insurance money to insolvent insured. 223 AppDiv356, 228NYS156.
127-14 [a] (3) Other instances. NJCh 149A50.
127-15 315Mo 568, 287SW445, 449 [quotCJ]. [c] (3) And where cancellation of deed is decreed, temporary injunction against transfer is properly made permanent. 317 Ill 356, 148NE64. [h] **Pending suit for recovery back of subscriptions to syndicate,** temporary injunction will be granted to preserve assets in hands of trustees of syndicate. 27F(2d)48.
128-16 315Mo 568, 287SW445.
128-17 315Mo 568, 287SW445, 449 [quotCJ].
129-23 214Ala432, 108S589, 590 [cit Cyc]; 232 IllA419.
129-32 13F(2d)988; 82 Colo 333, 259P 514 [citCJ]; 164Ga858, 139SE666; 232 IllA30, 42 [citCyc]; 237 IllA129; 232Ky 791, 24SW(2d)619 (equity has inherent power to permit inspection of cave owner's premises where party shows reasonable grounds suspicion that his lands are trespassed); 6LaA312; 251Mich488, 232NW395; 217AppDiv541, 217NYS256; 7PaDist&Co 565; TexCivA 276SW471.
130-34 166Ga630, 144SE27.
130-36 83CalA41, 256P476; Colo 225 P987; 164Ga858, 139SE666; 233 IllA 30; 222MoA1216, 4SW(2d)480.
130-38 17F(2d)17. [d] **Owner of hunting privileges** is entitled to injunction for continued trespass. Ala 128S378.
130-40 7F(2d)42; 107WVa624, 150SE 223.
130-41 [a] (1) 217AppDiv541, 217NYS 256. [f] **Lessee of hunting privileges** on land posted by subsequent lessee who was threatening to interfere with them is entitled to injunction. Ala 128S378.
130-42 18 OhA506.
131-45 35PortoRico 561.
131-47 TexCivA 20SW(2d)104.
131-47½-New. A court of equity will not protect a scrambling possession as where lessor has dispossessed by force. 37Wyo 357, 261P908.
131-50 32PortoRico 566. [b] (4) One in possession, though without title, may enjoin trespass. 5F(2d)770. [c] **In Michigan.**–235Mich174, 209NW152. [d] **In Porto Rico.**–32PortoRico 254.
131-51 164Ga805, 139SE678; 130 Okl 14, 264P895.
132-53 TexCivA 278SW952.
132-53½-New. , or where defendant is not a lessee, but a mere employee of plaintiff. 164Ga805, 139SE678.
132-55 13F(2d)375.
132-59 90Fla62, 105S141 (complainant's title must be admitted or legally established). [a] **Title sufficiently established.**–NJCh 148A202.
132-65 15DelCh379, 138A630; 90Fla 62, 105S141; 164Ga858, 139SE666; 27 Hawaii292; 233 IllA30; 86Mont218, 283 P219; 223AppDiv193, 227NYS616; 20 OhA162, 153NE129; 120 Okl 211, 251 P84.
133-66 41F(2d)305; 164Ga858, 139SE 666; 237 IllA129; Mass 170NE385 (flying of airplane over land covered with brush and woods); 102NJEq213, 140A 261; TexCivA 7SW(2d)1102. [b] (3) Few instances of flights at less than five hundred feet over land adjoining airport have been held insufficient to warrant injunctive relief. Mass 170NE 385 (failure to show damages to property).
134-70 TexCivA 275SW177.
134-72 Nebr 230NW490; TexCivA 275 SW177.
134-73 32PortoRico 521. [a] (1) 32 PortoRico 254; 32PortoRico 566. (4) Remedy available against municipal officers and agents. 32PortoRico 521. (5) Statute amended in 1917 so as to cover disturbance of possession by acts showing intention to disturb or deprive of possession. 32PortoRico 521. (6) Property is not sufficiently described by merely stating number of meters. 33 PortoRico 98.
134-74 166Ga187, 142SE558; 169Ga313, 150SE158(2dcase); 223AppDiv198, 227 NYS616, 617 [citCJ]; TexCivA 275SW 177; TexCivA 14SW(2d)86; TexCivA 20SW(2d)104; TexCivA 20SW(2d)1087; 37Wyo 357, 261P908. [d] **Where defendant is mere employee of plaintiff and not technical lessee** rule does not apply. 166Ga187, 142SE558.
135-77 6LaA128. See also TexCivA 278 SW952. [a] In PortoRico.–35PortoRico 561.
135-78 TexCivA 278SW952.
135-82 Fla 129S334.
135-83 40Wyo 106, 275P115(2dcase).
135-84 135Misc216, 237NYS339; 13 PortoRicoFed103; TexCivA 297SW1067; TexCivA 20SW(2d)356; TexCivA 20SW (2d)1087.
136-85 81Colo 393, 255P987; 15DelCh 379, 138A630; 164Ga858, 139SE666; 164 Ga805, 139SE678; 168Ga164, 147SE38; 324 Ill 569, 155NE280; 233 IllA30; 128 Kan235, 276P821; 209Ky299, 272SW748 (proposed interference by police in property right to make unobjectionable speech for hire); 251Mich488, 232NW 395; 5PaDist&Co 119; TexCivA 278SW 952. [c] (3) Where defendant is in possession, but remedy at law inadequate, mandatory injunction to dispossess is proper. TexCivA 278SW952.
136-86 15DelCh379, 138A630; 90Fla 62, 105S141; 164Ga858, 139SE666; 324 Ill 569, 155NE280; 237 IllA129.
137-87 166Ga630, 144SE27; 237 IllA 129.
137-87½-New. The right to recover damage furnishes an adequate remedy only where the injured party can by one action at law recover damages which constitute complete and certain relief for the whole wrong. 86Mont218, 283P 219.
138-96 164Ga858, 139SE666. But see 40Wyo 106, 275P115(2dcase).
138-99 164Ga858, 139SE666; 324 Ill 569, 155NE280.
139-10 18F(2d)839; 214Ala58, 106S 185, 187 [citCJ]; 217Ala516, 116S704; Ala 130S559; 72CalA151, 236P373; 162 Ga336, 133SE857; 164Ga858, 139SE

666; 166Ga689, 144SE313; 169Ga313, 150SE158(2dcase) (interlocutory injunction); 324 Ill 569, 155NE280; 237 IllA129; 265Mass559, 164NE470; Mass 170NE416 (irreparable damage is not essential to sustain mandatory injunction); Mass 173NE534; 235Mich 174, 209NW152; 99NJEq627, 134A553; 20 OhA162, 153NE129; 123 Or103, 261 P76; 7PaDist&Co 8; 7PaDist&Co 33; WVa 153SE146. But see 259Mass86, 156NE4. [d] **Lessee authorized to use garage when moved to stated location** is trespasser in driving across lessor's land to garage before removal and may be enjoined. 83Mont244, 271P455.

140-12 214Ala58, 106S185, 187 [quot CJ].

140-13 214Ala58, 106S185, 187 [quot CJ].

140-14 214Ala58, 106S185, 187 [quot CJ]; SD 232NW907. [a] **Equity looks chiefly to nature of injury** and its constant repetition or continuation, rather than to magnitude of damages. SD 232 NW907.

140-15 214Ala58, 106S185, 187 [quot CJ].

140-16 214Ala58, 106S185, 187 [quot CJ].

140-16½-New. Where damages in such cases are substantial, injunction to persons substantially injured is a matter of right. 126Misc126, 212NYS633.

140-23 214Ala58, 106S185, 187 [cit CJ]; 178Ark1146, 13SW(2d)610; 72 CalA151, 236P373; 237 IllA129; 259 Mass86, 156NE4; NJCh 148A202.

141-31 214Ala58, 106S185, 187 [cit CJ]; 216Ala153, 112S739, 740 [citCJ].

141-32 178Ark1146, 13SW(2d)610; 72 CalA151, 236P373; 83Mont244, 271P 455; 126Misc126, 212NYS633.

142-36 17F(2d)17; 214Ala58, 106S 185, 187 [citCJ]; 237 IllA129. [a] (8) Casting of rocks by blasting operations. 214Ala58, 106S182.

142-41 39F(2d)5; 216Ala445, 113S 411; 219Ala447, 122S426; 72CalA151, 236P373; 164Ga23, 137SE390; 165Ga 115, 139SE810; 119 Okl 282, 249P712, 714 [citCJ]. [d] **That grantee of land knew of purported sale of standing timber by grantor** will not deprive him of right to enjoin cutting and removal by purchasers under void conveyance. 238Mich373, 213NW106.

143-42 119 Okl 282, 249P712, 714 [cit CJ].

143-48 39F(2d)5.

144-54 See also 32PortoRico 313.

144-54½-New. The court will not deny relief on the ground that it will have to superintend the cutting of timber. 214 Ala230, 107S67.

144-55 214Ala230, 107S67.

144-57 72CalA151, 236P373. [a] 72 CalA151, 236P373.

145-66 161Ga629, 131SE505.

145-71 256Mass299, 152NE90; 33 PortoRico 973. [g] (4) Valid contract by tenant to permit purchaser from lessor to build on part of land is defense to tenant's suit to enjoin erection of building. MoA 5SW(2d)699.

146-77 200Cal 396, 253P134. See also 32PortoRico 559.

146-78 200 Cal 396, 253P134.

146-81 327 Ill 423, 158NE745; Mass 170NE416 (revocation of telephone company's license and removal of poles and wires); Mass 172NE342; 99NJEq 627, 134A553; NJCh 151A467; 5Pa Dist&Co 475. [o] **Fire escape.**–327 Ill 423, 158NE745. [p] **Awning.**–327 Ill 423, 158NE745.

147-83 87CalA127, 261P1029.

147-84 Mass 172NE342.

147-86 87CalA127, 261P1029; Mass 172NE342.

147-90 191NC217, 131SE575.

147-91 200Cal 396, 253P134; 125Kan 214, 264P25.

147-93 107Conn109, 139A508, 510 [cit CJ], 57ALR331.

147-94 191NC217, 131SE575.

147-96 Del 150A20.

148-3 Va 154SE518. [a] **Granting temporary injunction against dismantling filling station** held not erroneous, where contract did not clearly justify it. 170Ga74, 152SE47(1stcase).

148-9 But see 250Mich96, 229NW598.

148-10 [a] **Defendant's erection of fence upon complainant's land** is disturbance of possession entitling complainant to maintain injunction proceedings. 41F(2d)32.

151-88 39 OklACR346; TexCivA 276 SW471.

151-90½-New. the enforcement of a void judgment, 23F(2d)109.

151-93¾-New. Trespass to inland lake entirely surrounded by plaintiffs' land. 248Mich410, 227NW741.

151-94½-New. Agent of commission company dealing in live stock on stockyards company's premises, as a tenant, is not a trespasser in going on premises as such agent. 153Tenn225, 280 SW1015.

151-94¼-New. The owner of a theater with a fire exit opening on an alley used by plaintiff and defendant with equal right will not be compelled by an injunction to rehang a gate so as to swing inward, where plaintiff's property rights are not interfered with. 93 PaSuper296.

151-94¼-New. A pipe line owner may restrain an assignee of an oil and gas leasehold from interfering with its possession, under a contract with the previous owner for sale of all gas produced, of which the assignee had notice. 33F(2d)248.

151-96 161Ga732, 132SE62. See also 163Ga434, 136SE317.

152-1 160Ga556, 128SE766 (dictum). But see 155Md139, 141A402. [a] **Temporary injunction pending suit.**–Tex CivA 283SW332.

152-3½-New. One having the right to specific performance of a contract to carry real estate cannot omit a demand therefor and sue merely for injunction to prohibit sale to another. 162La49, 110884.

152-3⅓-New. A mortgagor of chattels which have come into possession of a mortgagee in replevin against a third party is entitled to a preliminary injunction against selling the property where the statute recognizes the right only of possession of specific personal property. 100CalA491, 280P380.

152-11 [a] (4) Transfer on corporate books enjoined till rights of parties are adjudicated. 216Ala504, 113S609, 54ALR1413.

153-17 Mass 169NE504.

154-43 160Ga556, 128SE766 (equitable assignee of school funds entitled to injunction against tax collector to prevent continuing acts of dissipation and conversion of fund); 247 IllA170.

155-45 151Miss170, 117S540.

155-54 41F(2d)385; Ala 130S64; 206 Cal 697, 275P944; 81Colo 431, 256P319, 322 [citCJ]; 48RI 332, 138A47, 54ALR 343.

155-55 16F(2d)401; 36F(2d)827 (preliminary injunction can be issued pending infringement suit); 216Ala206, 112S823; Ala 130S64; 81Colo 431, 256 P319, 322 [citCJ]; MoA 29SW(2d)165; 100NJEq224, 135A275; 245NY260, 157 NE130; 135Misc426, 237NYS601; 48 RI 332, 138A47, 54ALR343; 36BC286, [1926] 1DomLR130, [1926] 1WestWkly 25. See also 219Ala689, 123S222. But see Mont 288P612. [c] **Acts not authorizing injunction.**–158Md496, 148A 826.

156-60 158Md229, 148A214.

156-64½-New. In the absence of bad faith, the discretion of a person in managing his own business will not be interfered with. 218AppDiv377, 218NYS 339.

156-64⅓-New. Lawful interference with business by competition cannot be enjoined. 81Colo 420, 256P325.

156-64¼-New. Injunction should not be granted unless need for future protection from interference with business appears. 245NY260, 157NE130.

156-65 239Mich70, 214NW152.

156-65½-New. The term "trade secret" does not denote the mere privacy with which an ordinary commercial business is carried on. 239Mich70, 214NW152

156-66 31F(2d)293; CalA 290P534; 104 Conn472, 133A582; 239Mich70, 214NW 152; 100NJEq224, 135A275; 48RI 332, 138A47, 54ALR343. [e] (2) Evidence held not to show confidential relationship imposing duty on machine shop making special unpatented machine not to use such knowledge. 261Mass94, 158 NE346, 54ALR1215. [f] **Good will of business** held protected in equity. 48 RI 332, 138A47, 54ALR343. [g] **Qualified secrecy** of formula and process held sufficient to justify relief. 173Minn342, 217NW339.

157-67 104Conn472, 133A582; 100NJEq 224, 135A275.

157-70 104Conn472, 133A582; 100NJEq 224, 135A275.

157-73 130Kan443, 286P225.

157-75 But see 20F(2d)386.

157-77 104Conn472, 133A582. [a] **Secret formulæ discovered and used by manufacturer for making paste** constitute trade secrets which will be protected. 239Mich70, 214NW152.

157-77½-New. The fact that an owner of a secret process had granted exclusive right subsequent to the filing of a bill to enjoin the use thereof by another, did not affect the right to maintain a suit. 31F(2d)293.

157-81 [b] (2) Manufacturer using formula disclosed to him by originator without grant of exclusive right or agreement against further disclosure or use cannot enjoin disclosure or use by originator. 130Kan443, 286P225.

158-84 135Misc537, 238NYS78.

158-87 31F(2d)293; 104Conn472, 133A 582; 100NJEq224, 135A275.

158-88 300Pa542, 151A15.

158-88½-New. Competitor will be enjoined from employing spies in complainant's factories. 99NJEq456, 137A 149.

158-90 239Mich70, 214NW152; 100 NJEq224, 135A275; TexCivA 297SW 573.

158-91 239Mich70, 214NW152; 173 Minn342, 217NW339; 100NJEq224, 135 A275; 48RI 332, 138A47, 54ALR343.

159-92 213AppDiv769, 210NYS506; 222 AppDiv653, 225NYS75.

159-3½-New. A former employee may be enjoined from using trade secret by means of a corporation under his active control, his knowledge and means of obtaining it being chargeable to the corporation. 173Minn342, 217NW339.

159-4 135Misc537, 238NYS78.

160-13 87CalA282, 262P43; 92CalA575, 268P939; 221AppDiv747, 225NYS260; 48RI 332, 138A47, 54ALR343.

160-15 48RI 332, 138A47, 54ALR343.

160-16 48RI 332, 138A47, 54ALR343.

160-17 48RI 332, 138A47, 54ALR343.

160-18 48RI 332, 138A47, 54ALR343.

161-20 21 OhA177, 152NE675. See also 31F(2d)157.

161-20½-New. and where, although there is no written list of customers, the reason for the rule is just as pertinent to the circumstances, injunctive relief will be granted by forbidding the employment of former employees for the purpose of soliciting former customers. 21 OhA177, 152NE675.

161-21 174Ark104, 294SW393; 252 IllA 122; 6LaA35; 267Mass256, 166NE640; 101NJEq74, 137A541; 32NM169, 252P 991; 140Wash381, 249P782. But see 206Cal 697, 275P944. [b] (5) Information acquired by employee as to ice wagon customers through previous deliveries made by employee and another is not trade secret or similar confidential information, use of which will be enjoined. 140Wash381, 249P782.

161-23 101NJEq74, 137A541.

162-28 15F(2d)16; 71CalA159, 233P 823.

162-29 222AppDiv631, 227NYS311.

162-30 71CalA159, 233P823; 99NJEq 230, 133A202; 126Misc781, 216NYS79 [rev on other grounds 216AppDiv407, 215NYS323]; 131Misc813, 227NYS459; 131Misc816, 227NYS462; 135Misc426, 237NYS601.

162-34 [a] **Motive** actuating strike is immaterial. 71CalA159, 233P823.

162-37½-New. Interposition of courts of equity in industrial disposition is to be determined substantially by the same tests applicable to any other case. 126 Misc781, 216NYS79 [rev on other grounds 216AppDiv407, 215NYS323].

163-43 12F(2d)945; 27F(2d)560.

163-49 [a] **Local trade union cannot enjoin** local building trades council, which refused to admit former to its membership, from collecting per capita tax from members or from calling out on strike members of other crafts in same industry. 71CalA159, 233P823.
163-50 131Misc813, 227NYS459.
163-52 131Misc816, 227NYS462.
164-56½-New. That employees may strike of their own volition does not justify a labor union, to which such employees do not belong, in instigating a strike. 99NJEq770, 134A309.
164-57 17F(2d)806; 18F(2d)371.
164-60 158Md496, 148A826.
165-66 287Pa171, 134A430, 47ALR745.
165-69½-New. The court will act only when the situation encroaches on safety and peace of the public, or test nerve, courage, and strength of those desiring to work. 287Pa171, 134A430, 47ALR 745.
165-71 158Md496, 148A826; 99NJEq 230, 133A202; 287Pa171, 134A430, 47 ALR745. But see 35F(2d)203.
165-76 287Pa171, 181, 134A430, 47ALR 745 [citCJ].
165-77 26 OhNPNS439.
166-86 158Md496, 148A826; 127Misc 53, 216NYS68; 135Misc426, 237NYS601; 287Pa171, 134A430, 47ALR745.
167-16 [d] **Acts held not to create secondary boycott.**-35F(2d)723.
167-19 35F(2d)34; 135Misc426, 237 NYS601.
168-22½-New. A boycott of an employer of colored labor, who are refused a union charter solely on account of race will be enjoined. 26 OhNPNS435.
168-23 326 Ill 405, 158NE162; 127Misc 152, 215NYS401.
168-23½-New. In some jurisdictions secondary boycott is not illegal per se, and is condemned only when inspired by malicious intent and purpose to destroy the good will or business of those against whom it is directed. 27F(2d) 560.
171-53 [a] **Injunction granted** where acts did not grow out of dispute concerning terms or conditions of employment. 36F(2d)78.
172-57½-New. , or by showing that ultimate object of defendants was to regain their position in union rather than force plaintiffs to accede to union demands. 131Misc506, 227NYS185.
172-62 127Misc229, 215NYS537; 129 Misc343, 221NYS446; 138Misc512, 240 NYS797.
174-83 129Misc343, 221NYS446.
174-89 See also 13F(2d)673.
175-99 127Misc152, 215NYS401; 127 Misc335, 215NYS397.
177-33 Mass 164NE393.
178-39 17F(2d)807.
179-42 12F(2d)945.
179-52 136Misc490, 240NYS145. [a] (3) Systematic interference with relations between employer and employees. 127Misc229, 215NYS537.
179-54 158Md496, 148A826; 218MoA 516, 279SW232; MoA 20SW(2d)567; 99NJEq230, 133A202; 247NY65, 159 NE863; 216AppDiv407, 215NYS323; 127Misc53, 216NYS68; 136Misc490, 240 NYS145; 25 OhNPNS485; 100WVa627, 131SE357. [c] **Acts of intimidation** by other than defendants, unless ratified, are not ground for injunction restraining defendants. 218MoA516, 279SW232. [d] **Relief by injunction** against picketing presupposes creating of nuisance and working of irreparable injury. 218MoA 516, 279SW232. [e] **In absence of strike,** where unfair methods are employed in connection with picketing, injunction will usually issue. 127Misc229, 215NYS537.
180-60 15F(2d)652; 99NJEq770, 134A 309.
180-61 99NJEq770, 134A309; 127Misc 335, 215NYS397.
181-62 218MoA516, 279SW232 (profane language in presence of ladies two blocks from plaintiff's premises held not ground for injunction as creating nuisance).
181-63 127Misc335, 215NYS397. **Erratum.**-"Hitchman Coal, etc., Co. v. Mitchell, 254 U. S. 229" should be "245 U. S. 229."
181-66½-New. Picketing in itself may be legal or illegal according to the manner in which it is carried on. 99NJEq 230, 133A202.
181-66½-New. Picketing to compel employment of union workers only accompanied by threats and violence will be enjoined. 99NJEq770, 134A309.
181-69 103NJEq332, 143A331. Contra 247 IllA248.
182-76 158Md496, 148A826; 218MoA 516, 279SW232; MoA 20SW(2d)567; 99 NJEq230, 133A202; 126Misc781, 215NYS 79 [rev on other grounds 216AppDiv 407, 215NYS323]; 127Misc271, 215NYS 157; 127Misc337, 215NYS399; 223App Div701, 226NYS747; 134Misc841, 237 NYS76; 136Misc490, 240NYS145. See also 127Misc229, 215NYS537; 127Misc53, 216NYS68. [b] **Former employees may peaceably persuade plaintiff's employees** to leave or not to enter his employ, though effect is breaking of contract. 218MoA516, 279SW232. [c] **Pickets carrying signs that theater does not employ operator affiliated with American Federation of Labor,** though not connected with strike, will not be enjoined in absence of intimidation. 127Misc271, 215 NYS157.
182-76½-New. If there is no strike, and the union is acting merely for its own purposes, it has no right, by picketing or similar means, to interfere with employer's business. 127Misc337, 215NYS 399.
182-76½-New. Employer's breach of oral agreement to employ union laborers and pay a certain wage scale does not constitute a strike so as to authorize the labor union to picket. 127Misc337, 215NYS399.
182-76¼-New. Picketing having an unlawful object may be restrained irrespective of whether peaceable, militant, or intimidating in character. 99NJEq 770, 134A309.
182-80½-New. Where there is no strike or dispute between employer and employees, peaceful picketing may be enjoined without violating terms of the Clayton Act. 6F(2d)568.
182-80½-New. A statute forbidding injunction against peaceful picketing held not applicable where no strike in fact existed and defendant's acts furthered an illegal object. 99NJEq770, 134A309.
182-82 127Misc53, 216NYS68.
182-85 126Misc781, 215NYS79 [rev 216 AppDiv407, 215NYS323]; 127Misc53, 216NYS68.
183-87 216AppDiv663, 215NYS753. [b] (1) 216AppDiv663, 215NYS753. [c] **Picketing enjoined where there was no strike or none should have been called,** as employer has right to run nonunion shops. 216AppDiv663, 215NYS753. [d] **In absence of strike,** picketing to compel employer to employ only union labor is unlawful and will be enjoined. 218 AppDiv80, 217NYS817.
183-94 24 OhNPNS60. But see 127 Misc271, 215NYS157.
183-95 22 OhA265, 154NE362.
183-96 119Kan713, 241P459 (holding that statute forbidding injunctions in labor disputes applies only to controversies between employers and employees, between employees and persons employed and persons seeking employment, and not to controversies between employer and parties not employed or seeking employment); 134Misc841, 237NYS 76. [a] (5) Where signs and circulars distributed did not honestly state dispute, but gave false and misleading information with intent to coerce employer, injunction was properly granted. 243NY544, 154NE598.
184-12 127Misc335, 215NYS397; 127 Misc337, 215NYS399.
185-25 267US203, 45SCt307, 69L ed574 (conspiracy to avoid compliance with judgment and principles of labor board).
186-45½-New. An unofficial organization, although actuated by a sincere desire to benefit the public, may be enjoined from threatening distributors of books with prosecution. 13F(2d)224.
186-45½-New. Plaintiff in patent infringement suit will be enjoined, at instance of defendant, from sending out threatening and intimidating letters to the trade. 24F(2d)255.
186-45¼-New. Injunction will lie to protect from invasion the right granted to employees by Federal Railway Labor Act to select their own representatives in labor disputes without interference by enjoining railroad from violating the law. 25F(2d)873.
186-45½-New. The Clayton Act does not prevent injunction in such case. 25 F(2d)873.
186-45¾-New. A union will be restrained from depriving a member of a subordinate union of the right to vote for particular officers. 31F(2d)689.
186-45½-New. Unlawful combination interfering with right of nonunion men to engage in interstate commerce will be restrained. 40F(2d)189.
186-46 148Md354, 129A366.
186-48 13F(2d)6; 17F(2d)739; 26 F(2d)576; 99Fla1296, 128S821; 257 Mass12, 153NE99; 82NH193, 132A12.
187-50 17F(2d)739; 26 OhNPNS117, 135 [quotCyc]. See also 50RI 409, 148 A803.
187-52 93CalA411, 269P672; 318Mo 292, 300SW1108; ND 229NW915.
187-56 TexCivA 1SW(2d)380.
187-56½-New. It is proper to deny an injunction restraining a person for all time from conducting a business or having employment in public stockyards. 175Minn294, 221NW20.
187-57 37F(2d)105; 37F(2d)545; 216 Ala367, 113S592; 93CalA411, 269P672; CalA 286P1074; 106Conn243, 137A769; 164Ga805, 139SE678; 166Ga187, 142SE 558; 86 IndA354, 156NE408; 81NH535, 129A374; 222AppDiv631, 227NYS311; 197NC6, 147SE617; TexCivA 1SW(2d) 421; TexCivA 32SW(2d)388; 36BC286, [1926] 1DomLR130, [1926] 1WestWkly 25.
188-65½-New. Power and duty of a court of equity to grant an injunction against the breach of a contract is broader than its power and duty to grant a decree of specific performance. 37F(2d)545.
189-66 106Conn243, 137A769; 56App DC4, 6F(2d)702; 99Fla1296, 128S821; 257Mass12, 153NE99; 251Mich224, 231 NW577(2dcase); NJCh 149A587; 136 Misc406, 241NYS5; 197NC6, 147SE617; 26 OhNPNS117; 142Wash118, 252P680. [b] Covenants will not be enforced, if change in circumstances makes enforcement inequitable. 136Misc406, 241NYS 5.
189-67 257Mass12, 153NE99.
189-68½-New. That covenant is valid is not necessarily inconsistent with refusal to enforce it because change of situation has made it inequitable to do so. Kan 292P783.
189-77 [b] **Contract held not to authorize injunction.**-170Ga237, 152SE254(2d case).
189-79 26F(2d)576. See also 164Minn 152, 204NW925.
190-83 37F(2d)105.
190-90 148Md354, 129A366.
190-92 15DelCh356, 138A603; 148Md 354, 129A366.
191-94 15DelCh356, 138A603.
191-97 Mass 172NE510; 218AppDiv 377, 218NYS339; 21 OhA165, 152NE 775.
191-98 257Mass12, 153NE99.
191-2 20F(2d)966; 37F(2d)105; 40 F(2d)844; 86Colo 441, 282P874; 27 Hawaii292, 296 [citCyc]; 256 IllA279; 148Md354, 129A366; 251Mich224, 231 NW577(2dcase); 136Misc307, 240NYS 784; 21 OhA165, 152NE775; 37 OklaCR 417; TexCivA 1SW(2d)380; TexCivA 28SW(2d)202; TexCivA 7SW(2d)597; TexCivA 10SW(2d)736. [d] **Legal remedy inadequate.**-IndA 172NE801; 136 Misc406, 241NYS5.
192-3 86 IndA354, 156NE408.
192-7 [a] **Violation of grantee's covenant to keep open drainage ditches** across land conveyed will be restrained, grantor having no adequate remedy at law. 130 Or148, 279P546.
192-9 168Ark240, 269SW582, 583 [quot CJ] (insurance contract); 165Ga334, 140SE879; 204 Iowa1208, 212NW726; TexCivA 26SW(2d)1085.
194-29 17F(2d)739; 20F(2d)966, 967 [citCJ]; 26F(2d)576; 216Ala367, 113 S592; 169La893, 126S228; 82NH193, 132A12. [b] (4) To enforce contract licensing manufacture under numerous patents having several years to run. 20 F(2d)966.

194-30 82NH193, 132A12.
194-33 26F(2d)576; 197Cal 577, 241P 861.
195-37 116 Or562, 241P1011.
195-44 241 IllA208.
196-54 56AppDC4, 6F(2d)702; 41 Ida 783, 242P793.
197-60 251Mich224, 231NW577(2d case).
197-62 251Mich224, 231NW577(2d case); 113Nebr731, 204NW798.
197-65 See also 318Mo 292, 300SW 1108.
197-68 But see 82NH193, 132A12.
197-69 See also 169La893, 126S228.
198-73½-New. That subsequent events will make performance onerous may be ground for refusal of equity to interfere. 136Misc406, 241NYS5.
198-75 107Conn459, 140A808. [a] But see 21 OhA165, 152NE775.
198-76 21 OhA165, 152NE775.
198-77 See also 236Mich565, 211NW 99.
198-77½-New. Relief in nature of mandatory injunction to compel transfer of stock for fraud will be denied where false representation created no legal liability in defendant and there was not consideration for transfer. 13F(2d) 932.
198-80 See also 31F(2d)205.
198-81 24F(2d)924.
199-84½-New. Lessor is not entitled to injunction against lessee for violation of lease provision by lessee's assignee. 229AppDiv681, 243NYS255.
199-86 Man [1928] 2DomLR880. [a] **Subcontractor cannot enjoin contractor** from unlawfully employing third party. 6F(2d)1016. [b] **Injury to subcontractor's trade reputation** will not warrant injunction against contractor's giving work to third person. 6F(2d)1016.
199-87 214Ala265, 107S745, 46ALR 1441.
199-92 But see 135Misc616, 238NYS 132.
199-93 24 OhA294, 156NE243.
199-94 26F(2d)576.
200-97 227AppDiv212, 237NYS205.
200-93 [b] **Injunction pendente lite against general manager of chain store** will not issue to prevent him from working for competitor of employer in another town where employer also has store, where there were no trade secrets, services were not unique, and where acts constituting unfair competition were not shown. 126Misc229, 214NYS 3 (under contract not to divulge business methods or trade secrets).
201-6 214Ala265, 107S745, 46ALR1441 [citCJ]; TexCivA 18SW(2d)1096; Tex CivA 28SW(2d)202. [a] 81NH535, 129 A374.
201-14 214Ala265, 107S745, 46ALR 1441 [citCJ]; NJCh 129A399 (where there is express covenant, it is immaterial that service does not require unique skill and ability).
201-16 225AppDiv34, 232NYS1.
202-22 214Ala265, 107S745, 46ALR 1441 [citCJ].
203-40 31F(2d)205; 106Conn243, 137 A769; 56AppDC4, 6F(2d)702; 98NJEq 289, 130A824 (intention to lease to colored people not ground for injunction); 102NJEq430, 141A172.
204-44 31F(2d)205; 213Ala66, 104S5 (remedy for breach of covenant not running with land is action at law, where adequate, by injunction, where action at law is inadequate); 197Cal 733, 242P 718; 90CalA606, 266P570; 106Conn243, 137A769; 164Ga77, 137SE831, 833 [cit CJ]; 249 IllA263; 261Mass314, 158NE 761; 260Mass180, 156NE867; NJ 147 A390 (existence of property is essential); 254NY161, 172NE455; 128 Or 229, 274P306; TexCivA 278SW513; Tex CivA 283SW615; 102WVa374, 135SE 399. [a] (2) MoA 27SW(2d)462 (use of residence as cat and dog hospital).
204-48 164Ga77, 137SE831, 833 [cit CJ].
204-48½-New. Landowner's heirs may sue to enjoin enforcement of restrictions against land. 106Conn66, 136A865.
204-48¼-New. If building restrictions imposed on the sale of lots by plaintiff are regarded as covenants, plaintiff retaining the ownership of a part of the lands had no cause of action in equity to enjoin the violation of the covenants as against trespassers or adverse possessors of his own land. 206Cal 392, 274P527.
204-50 40F(2d)161; 99NJEq663, 134A 548; 250NY228, 165NE273; 253NY111, 170NE512. [d] TexCivA 271SW435.
205-52 246 IllA18; 241Mich186, 216 NW388.
205-54 154Md302, 140A363.
205-56½-New. Before equity will restrain revocation of license of uncertain duration, the evidence must clearly establish that refusal to do so will result in perpetration of fraud. 118 Or55, 245 P727.
205-58 93CalA411, 269P672; 338 Ill 412, 170NE425; 255Mass186, 150NE 885; 34NM35, 275P922; 224AppDiv 435, 231NYS315; TexCivA 278SW513; 102WVa374, 135SE399.
205-61 205Cal 46, 269P660; 154Md302, 140A363; 34NM35, 275P922.
206-63 166Ga149, 142SE690; 154Md 302, 140A363.
206-68½-New. Restriction not contained in deeds of parties from common grantor cannot be enforced by one against the other, TexCivA 6SW(2d) 170.
206-68¼-New. even though such restrictions were contained in a deed to a common grantor and such deed was recorded. TexCivA 6SW(2d)170.
206-70 197Cal 733, 242P718; CalA 281 P93 (appropriation for dedication as street of land restricted to residence purposes); 103Conn177, 129A228; 286 Pa33, 132A809; TexCivA 8SW(2d)352; TexCivA 8SW(2d)750.
207-71 197Cal 733, 242P718.
207-73 315Mo 1239, 288SW38, 44 [quot CJ].
207-74½-New. Where deeds restricting property involved were from different grantors, and that one of the lots was not effectively subjected to restrictions, general plan of development is not shown. 101NJEq532, 138A197.
207-78 197Cal 733, 242P718.
207-79 197Cal733, 242P718.
207-82 244NY22, 154NE652.
207-83 135Misc514, 239NYS52.
207-87 101NJEq532, 138A197.
207-89 See also 226Ky747, 11SW(2d) 910, 61ALR453.
207-91 See also Ala 128S796.
207-91½-New. One warned against violation of restrictive covenant can obtain no immunity from injunctive relief by proceeding with construction of building. 216AppDiv135, 215NYS65.
207-91¾-New. Equity will restrain violation of restrictions where substantial benefits inure to residents of restricted district. 311Mo 262, 278SW398.
207-91¼-New. Injunctive relief may be appropriated, although it might incidentally require defendant to remove an obstruction. 165Ga159, 140SE360.
207-92 NJ 147A390.
207-95 97NJEq393, 129A433; 244NY 22, 154NE652; 283Pa517, 129A558. [c] **Subdivision of lots.**-242Mich331, 218 NW692.
203-97 83CalA391, 257P124; Kan 292P 783; 34NM35, 275P922; 254NY161, 172 NE455; TexCivA 8SW(2d)750. See also 244NY722, 154NE652.
208-2 251 IllA333.
209-4 255Mass186, 150NE885; 246 Mich369, 224NW389; 6PaDist&Co 796.
209-11 165Ga83, 140SE67; NJ 144A 877. [b] (1) See also 165Ga83, 140SE 67; 97NJEq425, 129A442; NJCh 129A 256.
210-12 246Mich369, 224NW389. [c] (4) Abandonment of covenant not shown. NJ 148A621.
210-13 332 Ill 136, 163NE440; 333 Ill 535, 165NE181. [c] **Practical interpretation by original grantor and abandonment** in many instances of restriction concerning material used for roof of buildings is sufficient to prevent further enforcement thereof. 99NJEq425, 131A579. [d] **Where other violations are not acquiesced in by complainant,** injunction will issue. 99NJEq636, 134 A359.
210-15 [b] 97NJEq425, 129A442.
210-16 245Mich188, 222NW171.
210-17 244Mich473, 221NW632.
211-20 251 IllA333.
211-21 99NJEq602, 133A754.
211-24 128 Or229, 274P306; 6PaDist&Co 796.
211-26 293Pa39, 141A732, 734 [quot CJ].
212-31 200Cal 743, 254P1101; Cal 288 P1080; 90CalA535, 266P329; 338 Ill 412, 170NE425; Kan 292P783; 237 Mich642, 212NW959; NJ 147A390; 194 NC74, 138SE408, 54ALR806. [a] (1) 200Cal 743, 254P1101. [c] **Covenant against sale of property to negroes.**-Kan 292P783.
212-35 245Mich344, 222NW721.
212-36 56AppDC320, 13F(2d)292.
212-38 311Mo 262, 278SW398.
213-39 338 Ill 412, 170NE425 (need not apply to zoning board of appeals as condition precedent); 311Mo 262, 278 SW398; TexCivA 278SW513. See also 251 IllA333.
213-40½-New. A property owner is entitled to enjoin the erection of a public garage, on a particular street, in violation of a deed restriction, although the changed conditions precluded the enforcement of restrictions as to the other parts of the area involved. 257Mass 399, 153NE884, 48ALR1431.
213-41 See also 128 Or229, 274P306.
213-42 251 IllA333; NJCh 129A256; Tex 8SW(2d)750.
213-43 194NC74, 138SE408, 54ALR 806.
213-44 244NY22, 154NE652; 194NC 74, 138SE408, 54ALR806. [b] **That large number of lots were sold without restrictions** disproved general plan, preventing injunctive relief. Wash 289P 530.
213-46 244NY22, 154NE652.
213-47 244NY22, 154NE652.
213-47½-New. , or where property has no special advantages for residential purposes. 244NY22, 154NE652.
213-52 TexCivA 278SW513. See also 261Mass314, 158NE761.
214-53 83CalA391, 257P124; 245Mich 65, 222NW325, 67ALR373; 6PaDist&Co 261; TexCivA 278SW513; 149Va 251, 141SE141. [a] **Owner who violated restrictions** may be estopped to enjoin like violations, but not other beneficial restrictions. 250Mich167, 229NW 600. [b] **Some deviations allowed by owners,** is not ground for refusal of injunction to enforce remaining beneficial restrictions. 250Mich167, 229NW600.
214-54 245Mich344, 222NW721.
214-56 337 Ill 589, 169NE760; 101NJ Eq761, 139A174. But see 241Mich591, 217NW794.
214-59½-New. In determining whether plaintiff's house was in a residential neighborhood so that erection of a garage next door should be restrained, only the immediate neighborhood may be considered. 287Pa14, 134A394.
214-59¼-New. In an action to restrain violation of a building restriction, proof of special damages is unnecessary. 105 Conn464, 136A71.
214-59¼-New. In a suit to restrain erection of store buildings on a street restricted to use for residence purposes, defense of waiver and laches held without merit. 239Mich242, 214NW123.
214-60 311Mo 262, 278SW398; 252NY 7, 168NE444 (injunction denied where breach not found); 14PaDist&Co 256; TexCivA 278SW513; TexCivA 8SW(2d) 352. [a] (3) That building contains five bedrooms is no ground for injunction on ground that rooms will be rented. 92CalA156, 267P716.
214-70 82CalA180, 255P269; 106WVa 201, 145SE267. But see TexCivA 19 SW(2d)784. [a] (2) Construction of house partly on one lot and partly on another does not violate covenant restricting lots to one house each. Tex CivA 6SW(2d)170.
215-91 107Conn109, 139A508, 57ALR 331; 236Mich116, 210NW323; 261Mass 314, 158NE761; 125 Or150, 262P853, 57 ALR311. But see 248Mich625, 227NW 772.
216-97 107Conn109, 139A508, 57ALR 331.
216-98 107Conn109, 139A508, 57ALR 331.
217-9 24F(2d)924; 37F(2d)904; 15

DelCh329, 138A78; 93Fla214, 111S722; 86IndA354, 156NE408; Iowa 229NW257; NC 155SE734; 97PaSuper164.
217-12 113Nebr731, 204NW798.
218-23 93Fla214, 111S722; TexCivA 284SW615.
218-24 TexCivA 284SW615.
218-26 Mass 170NE67(2dcase).
218-27 158Md193, 148A223; 265Mass 374, 164NE238; NJCh 147A111(2d case); 221AppDiv307, 223NYS484; 21 OhA177, 152NE675; 6PaDist&Co 759; TexCivA 32SW(2d)246. See also 135 Misc534, 238NYS49. [f] **Undertaking business.**–6PaDist&Co 759. [g] **Garage business.**–137Misc139, 244NYS484.
218-28 Mass 170NE67(2dcase).
218-31 221AppDiv583, 224NYS494.
219-52 85Colo 232, 274P932.
219-59 NJCh 148A174; 52ND604, 204 NW672 (seller of business enjoined regardless of whether other members of firm are bound).
220-64½-New. or with seller's former employees, 21 OhA177, 152NE675 (milk business).
220-65 85Colo 232, 274P932.
220-65½-New. , or employment of former employees of seller. 21 OhA177, 152NE675 (milk business).
220-66 85Colo 232, 274P932; NJCh 148A174.
220-70 NJ 151A617; 133Misc591, 233 NYS30; 155Tenn110, 293SW993, 52 ALR1350; TexCivA 276SW726; Tex CivA 299SW440.
220-71 155Md280, 141A542, 67ALR 993; 263Mass223, 160NE801; 263Mass 223, 160NE804; MoA 16SW(2d)735; 213AppDiv769, 210NYS506; 125Misc 805, 212NYS72; 197NC223, 148SE315; NC 155SE154; TexCivA 299SW440; TexCivA 18SW(2d)1099 (temporary injunction held properly granted). [b] TexCivA 276SW726. (2) Agreement of former employee of laundry not to solicit. for himself or another laundry within four miles of employer's plant is enforceable. Mass 172NE104. [e] **Reasonableness of restraint held doubtful.**–125Misc805, 212NYS72 (restraint for five years). [f] **Interests of employer, employee, and public at large must be considered.** 155Md280, 141A542, 67 ALR993.
221-76 But see 155Tenn110, 293SW 993, 52ALR1350. [b] **Injunction held not warranted.**–TexCivA 18SW(2d)1096.
221-76½-New. Other decisions hold that irreparable injury may be presumed. NJ 151A617.
221-77 263Mass223, 160NE804.
221-78 267Mass256, 166NE640.
221-83 NC 155SE154.
221-84 But see 125Misc805, 212NYS 72. But see TexCivA 21SW(2d)372(2d case).
222-89½-New. Agreement by purchaser of sanitarium and practice not to practice within certain distance is also enforceable. 114Nebr496, 208NW615.
222-92½-New. Purchaser of sanitarium will be enjoined from violating agreement not to practice within certain limits thereof, even though he defaults in payment and loses property purchased. 114Nebr496, 208NW615.
222-93 205 Iowa542, 218NW255, 58 ALR153; 114Nebr496, 208NW615.
222-94 205 Iowa542, 218NW255, 58 ALR153.
222-99½-New. a barber business, 98 NJEq194, 129A739.
222-3 37F(2d)451.
222-7½-New. business of optometrist. 132Misc406, 229NYS209.
222-15 229AppDiv236, 241NYS556 (corporate name).
222-19 165Ga449, 141SE205.
223-24 101NJEq383, 139A518.
223-28½-New. Covenant not to engage in certain business within named territory is held violated by soliciting orders within such territory or delivering orders therein. 165Ga449, 141SE205.
224-35 15DelCh329, 138A78; 166Ga 173, 142SE887; 99NJEq622, 133A526. [a] (3) Temporary injunction issued to restrain town from interfering with exclusive franchise to operate ferry. 6 F(2d)19. [h] **Removal of garbage.**–222 MoA331, 297SW141.
224-40 DelCh 140A803. See also 318 Mo 292, 300SW1108.
225-48 103WVa539, 138SE104.
225-53½-New. It has been held that a company contracting with an operator of a municipal light plant to furnish current is not entitled to sue for an injunction against a violation of the contract by the town. 84 IndA115, 150NE 116.
225-54 157SC320, 154SE217.
226-74½-New. A contract to appoint a coöperative marketing association agent to dispose of products for the benefit of a member. 33NM136, 262P185.
226-58 [d] **Coöperative marketing association agreement** will be enforced by enjoining member from improper disposition of crop for single season. 213 Ala264, 104S264.
227-76½-New. , to furnish heat with provision that landlord be not liable for damages for failure so to furnish. 216 AppDiv218, 214NYS653.
227-78½-New. A breach of an agreement to offer to plaintiff for production, before offering to others, a certain class of motion pictures may be enjoined. TexCivA 8SW(2d)189.
227-79 [c] **Contract to buy** from complainant for five years is held not to require defendant to continue business so that injunction against its sale was not authorized. 23F(2d)515. [d] **Where there was no claim that defendants were insolvent** there was no ground for injunction. 166Ga635, 144SE103.
227-81 [b] **Covenant amounting to forfeiture not enforcible.** 256 IllA540.
227-82 204 Iowa1195, 213NW264; Tex CivA 25SW(2d)174 (temporary injunction).
228-91½-New. Where a lease provides for surrender on sale of premises, lessees are not entitled to enjoin purchaser's interference with possession on the basis of an alleged oral agreement, known to the purchaser, not to sell during the term, in the absence of allegations of fraud or that the oral agreement antedated the written lease. Tex CivA 286SW669.
228-95½-New. A labor union may attempt to recruit its membership from employees prohibited by their employer from joining such union if such prohibition is not part of employment contract for definite term. 247NY65, 159 NE863.
228-95¼-New. Where employees have freedom of choice, members of labor union are not guilty of malicious interference as ground for injunction in urging them to join union, although involving termination of their employment. 247NY65, 159NE863.
228-95¼-New. Members of a labor union need not inform or urge new members to inform the latter's employer that they are joining the union. 247NY65, 159NE863.
228-98 5F(2d)389; 19F(2d)963; 38F (2d)444; 194Wis311, 216NW833.
229-8 5F(2d)389; 36F(2d)81.
229-14 202 Iowa1304, 211NW839; 218 MoA516, 279SW232; 247NY65, 159NE 863.
229-18 18F(2d)339. See also 125Misc 689, 212NYS113. [d] **Probability of threatened and unjustified interference** with electric railway company's rights must be shown to justify injunction against inducing employees to leave. 247NY65, 159NE863.
230-28 18F(2d)839. [a] **Clayton Act,** prohibiting injunction against peaceful persuasion, is inapplicable in case between employers and persons not exemployees or seeking employment. 18F (2d)839.
230-30 [b] **In determining whether injunction shall issue court is not primarily concerned** with such conflicting considerations of economic policy as that condition of employment lessens employees' power to compel employer to meet their demands. 247NY65, 159NE 863. **Erratum.**–In 1929 Annos "249NY 65, 159NE863" should be "247NY65, 159 NE863"
230-31½-New. Preliminary injunction against inducing employees to break contract not to join any other than company union will be denied where misconduct is not shown and contract is inequitable. 131Misc682, 227NYS258.
231-36½-New. Inducing, or attempting to induce, members of a coöperative marketing association to break their contracts with the association may be enjoined. 81Colo 420, 256P325.
231-42 [b] **Injunction against distribution of assets** denied at suit of claimant where dangerous impairment thereof is not shown. 101WVa256, 132SE721.
231-45 See also 32PortoRico 661.
232-47 14F(2d)877; 18F(2d)918, 922 [citCJ]; 253Mass178, 148NE590.
232-48 14F(2d)877; 18F(2d)918, 922 [citCJ].
232-49 [e] (4) In general. 40F(2d) 679.
233-50 18F(2d)918, 922 [citCJ].
233-53 37F(2d)826 (suit by trustee of bondholders).
233-54 TexCivA 297SW904.
234-61 91Fla612, 108S689, 46ALR870.
236-97 180Ark492, 22SW(2d)21.
237-5 108Conn567, 144A39.
238-15½-New. A representative stockholder is entitled to a temporary injunction against the transfer of stock alleged as wrongfully transferred, but not against voting such stock. 133Misc 340, 232NYS112.
239-24 157Tenn131, 7SW(2d)43. [b] **Corporation may be enjoined from entering transfer of stock on its books,** pending determination as to rights in stock as against one wrongfully in possession thereof. 216Ala504, 113S609, 54ALR 1413.
239-26 157Tenn131, 7SW(2d)43.
239-27 [a] **Injunction will be granted** to preserve bank ownership till adjudication of right between two stockholders to determine ownership of stock. 216Ala504, 113S609, 54ALR1413.
239-28½-New. Corporation cannot be compelled to transfer stock subject to inheritance tax in another state, regardless of payment thereof. 152Md94, 136A 66, 60ALR558.
239-35 49Philippine609.
240-40 235 IllA532.
240-46 But see 131Misc380, 226NYS 621.
240-48 272US525, 47SCt189, 71L ed 387; 21F(2d)355; 130Misc505, 224NYS 289; 85Mont439, 279P234; 49ND27, 186 NW381. See also 216Ala618, 114S10.
240-50 116 Or62, 240P244, 249 [citCJ& quotCycperCoshow,J].
240-51 164Ga235, 138SE234; 336 Ill 513, 168NE372; 145Miss747, 110S775; 245NY580, 157NE865; 130Misc505, 224 NYS289 (dictum); 116 Or62, 240P244, 249 [citCJ&quotCycperCoshow,J]; Tex CivA 10SW(2d)208.
241-52 116 Or62, 240P244, 249 [citCJ& quotCycperCoshow,J]; 175Ark289, 299 SW355.
241-53 28 OhA107, 162NE466.
241-55 NJ 146A34(2dcase). [f] **Necessity for showing special injuries.**–Fla 129S913.
241-56 278US105, 49SCt57, 73L ed204.
241-58 25F(2d)485.
241-59 [a] **Legislative bodies** should not be enjoined, unless applicant shows clear legal right to injunctive relief. 126Misc194, 213NYS583.
241-61 261Mass269, 159NE41.
241-63 32PortoRico 24.
241-63½-New. In determining whether acts of officers should be enjoined, private business must be protected from unwarranted invasion, and public health and safety must also be preserved. 216 Ala206, 112S823.
241-67 21F(2d)355.
242-70 82Colo 534, 261P859, 57ALR 203; 235 IllA9, 20 [quotCJ]; 204 Iowa 376, 213NW532; 159La471, 105S556 (drainage district); 261Mass269, 159NE 41; 113 Okl 234, 241P346, 348 [citCJ]; 125 Okl 217, 257P307; 36 OklACR544; 130 Okl 38, 265P126; TexCivA 8SW(2d) 258. See also 218AppDiv82, 217NYS 861. [f] **Revocation of physician's license.**–316Mo 770, 293SW362.
242-71 21F(2d)355; DC 41F(2d)430; 164Ga434, 138SE847; 204 Iowa376, 213 NW532; 113 Okl 234, 241P346, 348 [cit CJ]; 36 OklACR544; 125 Okl 217, 257P 307. [b] **Action is not arbitrary** where matter, thing, or practice calling for exercise of authority is one involving controversy about which reasonable and experienced men differ. 36 OklACR544.

243-74 235 IllA9, 20 [quotCJ].
243-76 235 IllA9, 20 [quotCJ]. See also Conn 152A297.
243-77 97Fla28, 119S149; 235 IllA9, 20 [quotCJ].
243-78 113 Okl 234, 241P346, 348 [citCJ]; 130 Okl 38, 265P126.
243-79 324 Ill 113, 154NE707; 235 IllA 9, 20 [quotCJ]; 113 OhSt641, 150NE78; 113 Okl 234, 241P346, 348 [citCJ]; 130 Okl 38, 265P126.
243-80 235 IllA9, 20 [quotCJ]; 113 Okl 234, 241P346, 348 [citCJ].
243-81 278US1, 49SCt1, 73L ed147; 278US235, 49SCt115, 73L ed287, 60ALR 596; 18F(2d)918; 23F(2d)968; 33NM 504, 270P897; 128 Okl 3, 261P366; 116 Or62, 240P244, 249 [citCJperCoshow,J]; 13PortoRicoFed465; 149SC52, 146SE 686; Va 154SE579. [i] **Court does not enjoin execution of statute** but enjoins acts of officials notwithstanding statute. 23F(2d)997.
244-89 42F(2d)490.
244-91 130Misc505, 224NYS289.
244-92 154Miss765, 122S776; ND 231 NW851. But see 41F(2d)241.
244-94 118Nebr729, 226NW452.
244-97 18F(2d)918; 118Nebr729, 226 NW452.
245-98 41F(2d)241 (where provision is not sought to be applied against plaintiff).
245-6 49ND27, 186NW381; Okl 292P 54; 143SC283, 141SE454.
245-7 272US525, 47SCt189, 71L ed387; 281US431, 50SCt397, 74L ed945; 32F (2d)415; ND 231NW851; TexCivA 287 SW693.
245-8 272US525, 47SCt189, 71L ed387; ND 231NW851.
245-9 ND 231NW851; Va 154SE579.
246-12 127 Okl 260, 260P758.
246-14½-New. or by intervention in another pending suit, 145Miss747, 110 S775.
246-16 DC 41F(2d)430. [b] **Courts cannot in effect nullify treaty** by enjoining possession of sealed liquor on foreign ship. 7F(2d)397.
246-17 27F(2d)262; 30F(2d)737 [certiorari den 279US855, 49SCt351(3dcase), 73L ed997].
246-18 269US250, 46SCt92, 70L ed259; 16F(2d)981. [a] **Suit to restrain secretary of interior** from putting into effect order requiring state to establish nonmineral character of land granted as swamp land held not suit to establish title to land or adjudicate its character. 269US250, 46SCt92, 70L ed259. [b] **Injunction restraining secretary of interior** from disposing of swamp lands or taking any steps other than necessary to recognition of state's rights held erroneous. 269US250, 46SCt92, 70L ed259. (2) Secretary of war has been enjoined from interference with or taking or causing to be taken proceedings against a railroad company for failure to alter bridge over nonnavigable stream. 26F(2d)930.
246-19 268US228, 45SCt505, 69L ed 927; 23F(2d)750.
247-22 7F(2d)397.
247-24 15F(2d)823; 22F(2d)518. See also 21F(2d)696.
247-24½-New. Injunction will not lie to restrain assessment and collection of taxes or penalties under the National Prohibition Act where such acts have not been threatened but merely notice of proposed assessment and hearing has been given. 6F(2d)658.
247-24¾-New. Observance of condition of radio license has been held enforceable by injunction. 14F(2d)166.
247-24½-New. An official of the executive department will not be enjoined, except under extraordinary circumstances, necessitating such a course to conserve the rights of person or property. 27F(2d)930.
247-40 320Mo 1093, 9SW(2d)612.
247-41 32PortoRico 24.
247-42 155Md86, 141A518.
248-44 280US500, 50SCt186, 74L ed578 (remedy at law adequate); 29F(2d)535 (where state officers attempt to enforce unconstitutional law, or exceed authority in attempt to enforce valid law, where property rights destroyed or seriously impaired); 33F(2d)318 (enforcement of act); 329 Ill 432, 160NE 769; 207 Iowa56, 222NW438; 207 Iowa 639, 223NW386; 28 OhA107, 162NE 466; 122 Or337, 255P603; 285Pa153, 131A707; 142Va382, 128SE558. [a] **Owner of agricultural land** and Japanese subject may maintain action to enjoin attorney-general and district attorney, who threaten prosecutions under escheat and forfeiture sections of alien land laws if they shall enter into certain cropping contract, purpose being to test validity of act. 195Cal 71, 231P554.
248-49 But see 83NH426, 143A687.
248-52 TexCivA 238SW(2d)534.
248-54½-New. Workmen's compensation commission. 32PortoRico 343.
248-54¾-New. , and other boards. 285 Pa153, 131A707.
248-55 Nebr 231NW840. See also TexCivA 108SW(2d)1057.
249-57 32PortoRico 24.
249-57½-New. **Mandatory injunction** will not be granted to compel act requiring exercise of discretion by board. 285Pa153, 131A707.
249-57¾-New. An injunction will not be granted where to do so would interfere with the ordinary functions of an executive department of the state government. 321Mo 1047, 15SW(2d)788, 63 ALR512.
249-57¼-New. The Workmen's Relief Commission of Porto Rico has been enjoined on ground that legislature lacked power to create commission. 12PortoRicoFed465.
249-63 [b] **Regulations relating to importation of hatching eggs and poultry** could not sustain injunction against governor and others to refrain from enforcing them. 32F(2d)714.
249-74 See also 119 Or484, 250P213, 51 ALR816.
250-76½-New. Injunction will not lie to restrain commission from preventing complainant's operation of motor vehicles in violation of law. 149Md30, 129 A884.
250-76¾-New. Federal court will enjoin enforcement of legislative orders of commission violating constitution when enforcement by civil or criminal process is threatened. 17F(2d)143.
250-79 117Nebr66, 219NW851; 58ND 249, 225NW801.
250-89 28 OhA107, 162NE466. [d] 162Ga185, 132SE753.
251-90 144 Okl 41, 289P273.
251-92 161La471, 109S34.
251-3 202Cal 299, 260P789; 168Ga353, 148SE96; 202 Iowa701, 210NW947, 49 ALR705; 19 OhA18. [a] (3) 203 Iowa 1016, 213NW593; 120Kan316, 243P329 (enjoining board of trustees of community high school from using school's money to purchase busses for transportation of pupils to school or to pay cost of such transportation). (11) To prevent interference by board of trustees in conduct and management of school by superintendent and teacher who is acting under valid contract made with former board of trustees. 142Miss510, 107S657.
251-4 Ga 154SE788; IndA 172NE 545; TexCivA 275SW265 (injunction is error where state superintendent had jurisdiction to control subordinate school trustees).
251-5 73Mont442, 236P670. [b] **Appeal to county board.**-TexCivA 31 SW(2d)468.
252-6 124 Okl 117, 254P101; 134SC46, 131SE772.
252-8½-New. An injunction will not be granted against a new school district unless the facilities in the old district are completely adequate, although county trustees refused to obey an order rescinding the new district. TexCivA 284 SW306.
252-8¾-New. The duty of the county of residence to pay high school tuition in another county may be enforced by mandatory injunction. 213Ky343, 280 SW1098.
252-8¼-New. Board of education has right to bring action to enjoin county superintendent from erecting new school district. Nebr 231NW689.
252-9 203 Iowa1016, 213NW593; 125 Okl 217, 257P307.
252-10 125 Okl 217, 257P307.
252-13 202 Iowa701, 210NW947, 49 ALR705.
252-23 153Tenn408, 284SW382.
252-24½-New. , designation of separate schools for white and colored children. 125 Okl 217, 257P307.
253-27 116 Okl 104, 243P188; TexCivA 272SW526 (receiving funds and expending them in maintenance of state highway).
253-30 102WVa663, 136SE195.
253-32 [a] **State highway commission will be enjoined from entering into contract** for construction of highway where bidder was authorized and required to name his own time for completion of work under statute making time essential element of proposal on bid for work. 126 Okl 114, 258P863.
253-34 102WVa663, 136SE195.
253-36 322Mo 419, 17SW(2d)535; 196 NC226, 145SE31.
253-43 164Ga434, 138SE847.
253-44 164Ga434, 138SE847; 58ND 249, 225NW801; 128 Okl 232, 262P500; 147SC100, 144SE926; TexCivA 10 SW(2d)1057. [a] (3) Whether condition of road is such as to require reconstruction is matter within discretion of highway commission exercise of which will not be interfered with by court. 115 Or511, 239P109. (4) Statute requiring contract for building road to be let to lowest responsible bidder involves exercise of discretion by officials which will not be interfered with by court, although contract is not let to lowest bidder. 115 Or511, 239P109.
254-46½-New. An injunction to restrain from interfering with the removal of a bridge by road district officers may be the proper remedy. 222MoA1216, 4 SW(2d)480.
254-48 123Kan393, 254P366. [b] 123 Kan393, 254P366.
254-49 123Kan393, 254P366.
254-50 240Mich146, 215NW387.
254-52 123Kan393, 254P366.
255-65 Ala 128S362(2dcase); 195Cal 676, 235P445; 125 Or72, 265P1092. Contra 136Wash467, 241P21.
255-66 136Wash467, 241P21. [a] **Recall elections.**-136Wash467, 241P21.
255-67 Ala 128S362(2dcase).
256-75 195Cal 676, 235P445; 125 Or72, 265P1092. See 146SC372, 144SE78.
256-76½-New. In some jurisdictions it is held that the court, in a proper case, has power to enjoin the holding of elections. 136Wash467, 241P21.
256-78 167Ga252, 145SE76; 49ND11, 186NW284 (canvass of returns of recall election).
257-86 TexCommnA 18SW(2d)587.
257-90 See also 125 Okl 197, 256P929.
257-94 TexCivA 238SW(2d)535.
258-97 TexCivA 297SW496.
258-99 33PortoRico 720. But see 136 Wash467, 241P21.
258-1 But see 235Ky692, 32SW(2d)26.
258-3 218MoA131, 262SW455 (contention that defendant as fire chief and assistant fire chief were appointive officers holding under color of title and removable only by quo warranto has been held untenable).
258-5½-New. A court of equity will not interfere by injunction to determine questions concerning the appointment of public officials or their title to office. 57ND708, 223NW931.
259-9 29F(2d)113; 164Ga235, 138SE 234; 334 Ill 46, 165NE143; 244 IllA 185; 246 IllA152; 199 Ind708, 160NE 347; 118Kan767, 236P638 (threatened prosecution for moving building held ground for injunction); 165La665, 115 S817; 32PortoRico 521. [f] **Even though municipality could not itself be mulcted** in damages, injunction will lie in proper case to restrain its officers and agents. 32PortoRico 521. [g] **Injunction is proper remedy** to prevent creation of nuisance by municipal corporation. TexCivA 290SW833.
259-10½-New. In an action by the taxpayers of a town to have declared void proceedings to raise the town to a city of the second class and to enjoin council from exercising the powers of such a city it was held that the chancery court had the power to grant the relief prayed.

178Ark507, 108W(2d)906.

259-11 122Kan603, 252P903; 215Ky 319, 285SW212; 177Minn44, 224NW 261.

260-16 163Ga502, 136SE446; 83 IndA 53, 147NE629; 98NJEq18, 130A834. See also 157Md576, 146A797. [a] (2) Injunction does not lie as of right, under statute, on mere allegations of bill. 162La262, 110S415.

260-18 241 IllA21; 18 IndA53; 147NE 629; 150Wash421, 273P188.

260-22½-New. An injunction will not issue unless acts sought to be restrained are capable of precise definition, 125 Misc489, 211NYS397.

260-22⅓-New. and unless the court is able to enforce its mandate 125Misc489, 211NYS397.

260-22¼-New. or punish its violation. 125Misc489. 211NYS397.

260-23 125Kan341, 344, 263P1069 [cit CJ]; 221MoA292, 3SW(2d)266; 220 AppDiv695, 222NYS484; 119 Oh136, 162NE389; TexCivA 28SW(2d)190; 147Va736, 133SE586. See also 32 OhA 248, 167NE894. [a] (3) Injunction should not issue to protect encroachment on street, though encroachment continued more than year. 162La262, 110S415.

260-24 98NJEq18, 130A834; 119 Oh 136, 162NE389.

261-30 98NJEq18, 130A834.

261-33 202 Iowa1162, 211NW694, 695 [citCJ]; 209Ky299, 272SW748, 750 [quotCyc] (dictum); 156Md254, 144A 239; 216AppDiv6, 214NYS507; 126 Misc698, 214NYS99; 127Misc84, 215 NYS257; 128 Okl 3, 261P366, 367 [quot CJ]. [g] Measures for identification of prisoners.-NJCh 152A17.

261-34 209Ky299, 272SW748, 750 [quot Cyc] (dictum); 221MoA292, 3SW(2d) 266, 269 [citCJ] (making arrests of customers whom police have probable cause to believe guilty of crimes); 128 Okl 3, 261P366, 367 [quotCJ]. But see 126Misc 698, 214NYS99. [a] Application of rule restricted to cases where officers are engaged in "performing their proper duties in the exercise of the general police power," as distinguished from occasions where they have no duty on premises. 209Ky299, 272SW748. [b] Execution of search warrant will be enjoined where warrant is void. 202 Iowa1162, 211NW 694.

261-35 221MoA292, 3SW(2d)266, 269 [citCJ]; 128 Okl 3, 261P366, 367 [quot CJ].

261-36 221MoA292, 3SW(2d)266, 269 [citCJ]; 128 Okl 3, 261P366, 367 [quot CJ].

261-36½-New. Unlawful forcible entry, 126Misc698, 214NYS99.

261-36⅓-New. and stationing of police officers and detectives in house or club will be enjoined. 126Misc698, 214NYS 99.

261-37 244 IllA540; 209Ky299, 272SW 748, 750 [quotCyc] (especially where remedy at law is inadequate); 156Md 254, 144A239; 127Misc84, 215NYS257 (dictum); 221MoA292, 3SW(2d)266, 269 [citCJ]. [c] Rule applied to threatened interference by police officers with proposed unobjectionable speech in vacant lot to be delivered for pay, on showing that unlawful assembly would not necessarily result. 209Ky299, 272SW748.

261-38 221MoA292, 3SW(2d)266, 269 [citCJ]; 127Misc84, 215NYS257 (dictum).

262-42 221MoA292, 3SW(2d)266.

262-45 195Cal676, 235P445; 58MoA 86; 122 Or485, 259P908; Vt 144A680.

263-46 156Md605, 144A836(1stcase).

263-47 195Cal676, 235P445; 116 Or 62, 240P244, 249 [citCJperCoshow,J]; TexCivA 30SW(2d)431; Vt 144A680.

263-48 See also 146SC372, 144SE78.

263-49 162La823, 111S177.

263-49½-New. A general order of the council to investigate newspaper charges of corruption in appointments and promotions on the police force, and assuring impunity to witnesses confessing crime, was enjoined, as ultra vires and unauthorized. 18QueSuper30.

264-58 13F(2d)852; 19F(2d)681; 24 F(2d)541; 31F(2d)308; Ark 31SW(2d) 944; CalA 271P518; 325 Ill 511, 156NE 778; 327 Ill 387, 158NE703, 55ALR303; 339 Ill 595, 171NE742; 161La1066, 109S840; 152Md1, 136A41, 50ALR620; 239Mich286, 214NW148; 218MoA1, 274 SW1095; 101NJEq778, 136A707; 224 AppDiv483, 231NYS368; 191NC305, 131 SE724; 189NC737, 128SE149 (and in conflict with organic law); 128 Okl 3, 261P366; 122 Or485, 259P908; 116 Or 62, 240P244, 249 [citCJ&quotCycperCoshow,J]; 6PaDist&Co 667; 32PortoRico 338 (Municipal L. § 65 gives insular courts jurisdiction "to stay by injunction the execution of any ordinance, act, resolution, or order which infringes rights guaranteed by the constitution or insular laws); TexCivA 297SW479; TexCommnA 12SW(2d)976. See also TexCommnA 24SW(2d)816. But see 116 Or141, 240P536. [a] (3) Plaintiffs operating oil wells and incurring penalties up to five hundred dollars per day are entitled to invoke injunction. 24F(2d) 541. [b] (4) Ordinance imposing property already taxed by central government. 32PortoRico 338. [n] Ordinance prohibiting operation of oil wells.-196 Cal 211, 237P538, 40ALR782. [o] Performance of conditions of ordinance held not prerequisite to suit. 272US365, 47 SCt114, 71L ed303, 54ALR1016. [p] Ordinance contravening federal constitution.-13F(2d)853. [q] Injunction may be sought against ordinance prohibiting sale of fresh meats and fish within defined area, except in municipal market. 193NC207, 136SE489. [r] Person entitled to sign petition for referendum on ordinance has sufficient interest to enjoin action under ordinance. 53SD191, 220 NW613.

265-59 163Ga455, 136SE429; 218MoA 1, 274SW1095.

265-61 325 Ill 511, 156NE778; 339 Ill 595, 171NE742; 189NC737, 128SE149; 191NC305, 131SE724; 19 OhA396; Tex CommnA 298SW540; Va 154SE579.

265-62 32F(2d)134; 189NC737, 128SE 149.

265-63 163Ga465, 136SE432; 307Mo 206, 270SW680 (ordinance providing for killing of impounded dogs).

265-63⅓-New. where replevin or trover would furnish an adequate remedy, 307 Mo 206, 270SW680.

265-64 325 Ill 511, 156NE778; Tex CommnA 298SW540; TexCivA 48W(2d) 586.

265-65 TexCivA 2SW(2d)1001.

265-66½-New. Injunction may be refused in cases of irregular proceedings, which had been cured by subsequent legislative action. 34BarbNY494.

265-66⅓-New. Where appeal from the board's refusal to issue a building permit is pending, aid of equity to restrain the city from interfering with the work of construction will not be admitted. 100NJEq240, 135A333.

265-69 But see 323 Ill 368, 154NE131.

265-72 42F(2d)88; 163Ga282, 136SE 65; 151Wash665, 276P886. But see 169 La77, 124S151.

266-73 19 OhA396.

266-74 19 OhA396.

266-76 163Ga570, 136SE514; 234 IllA 614. See also 272US365, 47SCt114, 71 L ed303, 54ALR1016. [a] 15 OhA305.

266-77 234 IllA614; 167Ga83, 144SE 767.

266-79 234 IllA614.

266-80 234 IllA614. [a] 330 Ill 97, 161 NE133.

266-81½-New. An arbitrary or unreasonable attempt to enforce a valid ordinance without warrant of law or facts may be enjoined. 216Ala206, 112S823.

266-81⅓-New. Where property rights are involved, and unlawful enforcement of ordinance would cause irreparable loss, injunction may be granted. 216 Ala206, 112S823.

266-81¼-New. The power of a transit corporation is determined as of the time of the trial in a suit to enjoin enforcement of an ordinance. 98CalA165, 276 P629.

266-82 272US365, 47SCt114, 71L ed303, 54ALR1016; 91Fla223, 107S146; 36App Div558, 55NYS718; 134NC363, 47SE793, 65LRA902; 191NC305, 131SE724; Tex CivA 275SW282.

267-83 19 OhA396; 26 OhA87, 159NE 492.

267-85 116 Or62, 240P244 [citCJ&quot CycperCoshow,J]. [f] In Massachusetts. -(1) 252Mass258, 147NE878.

267-86 116 Or62, 240P244, 249 [citCJ& quotCycperCoshow,J].

267-87 116 Or62, 240P244, 249 [citCJ& quotCycperCoshow,J].

267-96 116 Or62, 240P244, 249 [citCJ& quotCycperCoshow,J].

269-22 169Ark436, 276SW2; 326 Ill 240, 157NE235. [a] (11) Suit by existing school district to enjoin county superintendent of schools from appropriating money for assumed new school district which was nullity. 80Mont363, 260P 1042.

269-23 23F(2d)371; 171Ark576, 286 SW873; 161Ga893, 131SE881; 112 Oh 559, 148NE342; TexCivA 286SW497. [b] (2) Other instances. 165Ga899, 142 SE280.

269-25 144 Okl 41, 289P273.

269-27 132 IllA135.

270-30 29F(2d)254.

270-31 161La675, 109S353.

270-32½-New. The state treasurer will not be enjoined from depositing state funds in a bank in which he is required by statute to deposit them. 49ND27, 186 NW381.

270-32⅓-New. Injunction will not lie to restrain payment of a claim allowed by a board of county commissioners in the absence of fraud or corruption or unless the claim is of a kind not authorized by law. 66Utah184, 240P454.

270-32¼-New. An injunction will not lie to require spending proceeds of a bond issue in a particular way, when disposition was left to the discretion of commissioners, 219Ky410, 293SW965.

270-32½-New. nor will injunction lie to restrain commissioners from spending money on any other road. 219Ky410, 293SW965.

270-35 245 IllA165; 19 OhA107 (expenditures arising out of submission of referendum where proceedings were vitally defective).

270-45½-New. Injunction will not lie against the state commission and its members to restrain payment by them of moneys due a contractor with the state pending efforts of contractor's creditor to procure judgment so as to summon state officials as garnishees. 31NM 557, 249P112, 50ALR1404.

271-47 273US284, 47SCt406, 71L ed646; 31F(2d)448; 117Nebr588, 221NW712. [a] (5) Unlawful taking of fresh food fish for use in reduction plant for manufacture of fish meal and fish oil. 195 Cal 548, 234P398, 38ALR1186. [f] Sale of securities resulting in cheating of public will be enjoined regardless of seller's ignorance of falsity of representations. 216AppDiv250, 214NYS670 (Gen. Bus. L. §§ 352, 353). [g] Violation of Zoning Law cannot be restrained by individual unless damage to person or property exists or is threatened. 222 AppDiv308, 226NYS335. [h] Illegal sale of securities.-NJCh 152A20.

271-47½-New. Courts may grant injunctions for the public good, within the judicial power. 21F(2d)144.

271-48 [a] Unlawful taking of fresh food fish for use in reduction plant.-195Cal 548, 234P398, 38ALR1186.

271-49 [d] Packing house.-78Colo 246, 242P47.

271-53 [a] Exercise of franchises requiring special qualifications would not be enjoined at common law, quo warranto being appropriate remedy. 152 Miss54, 118S360.

272-57 95Fla224, 116S54.

272-61 218Ala403, 118S572.

272-66 331 Ill 514, 163NE418, 60ALR 763; 339 Ill 463, 171NE550.

272-67 [c] Carriers' employees' right to select representative to confer with employer is a property interest. 281US 548, 50SCt427, 74L ed1034. [d] "Property right," under statute, includes right to make contracts for personal services. 33F(2d)13.

272-68 258Mass434, 155NE462.

272-69 [c] Holding self out as common-law wife.-Suit will lie to enjoin defendant from holding herself out as

plaintiff's common-law wife where there was no present agreement between parties to take each other for husband and wife though they lived together and cohabited for several years. 236Mich443, 210NW482.

272–70½–New. Enjoining the prosecutor from requiring submission of bank accounts of members of the police department is proper. NJ 146A34(2d case).

272–70½–New. Under federal statute a railroad will be enjoined from coercing, intimidating, or influencing employees in organizing. 33F(2d)13 (Clayton Act not violated).

272–73 13F(2d)673; 19F(2d)963.

272–74 13F(2d)673; 19F(2d)963; 194 Cal 49, 227P908 [citCJ]; 133Misc213, 232NYS245; TexCivA 22SW(2d)718.

273–78 But see 13F(2d)673.

273–79 13F(2d)673.

273–82½–New. It has been held that, where a proposed publication threatens irreparable injury to rights of property and other grounds of equitable jurisdiction exist, a court of equity will restrain such publication regardless of its character as libelous. 194Cal 49, 227P908.

273–84 19F(2d)963.

273–85 19F(2d)963.

273–89 36F(2d)105(2dcase).

274–93 TexCivA 294SW264.

275–9 See also 77Mont361, 251P137, 139 [citCJ], 49ALR627.

275–11 77Mont361, 251P137, 139 [quot CJ], 49ALR627. [f] In Montana it is held that, generally, legislature may empower court of equity to prevent commission of crime which is not nuisance. 77Mont361, 251P137, 49ALR627. [g] In Iowa.–228NW288 (sale of drugs).

276–12 23F(2d)871; 214Ala236, 107S86; 194Cal 49, 227P908; 206Cal 669, 275P787; CalA 284P725; 93Fla415, 111S801, 809 [citCJ], 52ALR51; 163Ga725, 137SE60; 213Ky382, 281SW188; 149Md621, 132A48; 157Md576, 146A797 (in performing valid public contract); 157Md576, 146A797 (except as property rights are concerned); 254Mass240, 150NE206; 238Mich216, 213NW107, 52ALR77; 77Mont361, 251P137, 139 [quotCJ], 49ALR627; 85Mont11, 277P437; 115Nebr435, 213NW578; 126Misc869, 215NYS679; 225AppDiv179, 232NYS506; 191NC305, 131SE724; 198NC585, 152SE681(2dcase); 114Oh582, 151NE709; 154Tenn458, 285SW705; 159Tenn465, 19SW(2d)238 (misdemeanor); TexCommnA 14SW(2d)825; TexCivA 10SW(2d)124; TexCivA 16SW(2d)860; 144Va339, 132SE355.

276–13 77Mont361, 251P137, 49ALR627; 137Misc524, 244NYS63; 191NC305, 131SE724.

276–14 253Mass178, 148NE590.

276–15 77Mont361, 251P137, 49ALR627.

276–16 159Tenn465, 19SW(2d)238.

277–24 Ark 31SW(2d)396; 225AppDiv179, 232NYS506; 34Wis450, 17AmR446. But see 196Wis635, 220NW209.

277–26 245IllA202. [b] In Montana.–77Mont361, 251P137, 49ALR627.

277–29 14PaDist&Co 4 (unless acts are such as to become nuisance).

277–39 7F(2d)397; 31F(2d)441; Conn 152A297; 128Kan772, 280P906, 66ALR1072 (usury); 214Ala236, 107S86; 194Cal 49, 227P908; 93Fla415, 111S801, 52ALR51; 162Ga228, 133SE345; 163Ga725, 137SE60; 253Mass178, 148NE590; Mass 172NE867; 238Mich216, 213NW107, 52ALR77; 125Misc70, 210NYS658; 126Misc869, 215NYS679; 225AppDiv179, 232NYS506; 228AppDiv270, 239NYS438; 33OhA287, 168NE757; 119Or484, 250P213, 51ALR816; TexCommnA 14SW(2d)825; TexCivA 10SW(2d)124; TexCivA 10SW(2d)151; TexCivA 22SW(2d)320; 144Va339, 132SE355. [a] 194Cal 49, 227P908; 77Mont361, 251P137, 49ALR627. [b] Matters not constituting defense in suit to restrain violation of ordinance regulating erection of buildings. 33OhA287, 168NE757.

278–40 125Misc70, 210NYS658.

278–41 77Mont361, 251P137, 139 [quot CJ], 49ALR361.

278–43 [a] Injunction forbidding acts denounced as crimes by Criminal Syndicalism Act does not supersede act, but is supplementary thereto. 194Cal 49, 227P908.

278–47½–New. to prevent acts denounced as crimes by Criminal Syndicalism Act; 194Cal 49, 227P908 (being member and delegate of Industrial Workers of World).

278–53½–New. to restrain the operation of a lottery; 238Mich216, 213NW107, 52ALR77.

278–53½–New. to prevent competitive carrier operating without license from conducting same business over same route: 81Mont472, 263P982.

278–53¼–New. the violation of a zoning ordinance; Nebr 230NW592.

279–54½–New. to restrain the infringement by competitors of a hack stand granted by the city; 144Va339, 132SE355.

279–54¼–New. ; to restrain a divorced husband from coming to the home of a former wife and molesting and injuring the wife and children there. TexCivA 294SW694.

279–55 31F(2d)448; 194Cal 49, 227P908; 195Cal 548, 234P398, 38ALR1186; (taking of fish for use in reduction plant); Ind 171NE199; 213Ky382, 281SW188; 115Nebr435, 213NW578, 580 [quotCJ]; 118Nebr851, 226NW705; 129Misc94, 221NYS20. See also 126Misc869, 215NYS679. [a] (5) Commission of acts denounced as crimes by Criminal Syndicalism Act. 194Cal 49, 227P908 (prosecution under act held not adequate remedy). (6) Violation of quarantine order. 129Misc94, 221NYS20. [d] Where property rights of many citizens are involved, it is proper for government to sue to enjoin injury to such rights by criminal acts. 194Cal 49, 227P908. [e] Acts violative of public policy may be enjoined, though they are specific crimes and punishable as such. 194Cal 49, 227P908.

279–56 274US445, 47SCt681, 71Led 1146 (dictum); 7F(2d)715; 78Colo 246, 242P47; 163Ga282, 136SE65; 164Ga755, 139SE559, 55ALR230; 169Ga530, 150SE837; 170Ga505, 153SE42; 202Iowa1162, 211NW694, 695 [citCJ]; 225Ky212, 7SW(2d)1048; 169La284, 125S125; 220MoA614, 288SW966; 77Mont361, 251P137, 49ALR627; 85Mont439, 279P234; 130Misc357, 223NYS830; 137Misc472, 242NYS316; 194NC802, 139SE773; 54ND637, 210NW501, 505 [citCJ]; ND 231NW851; 116Or310, 241P50; 13PaDist&Co 145; 143SC347, 141SE610; 150SC277, 148SE66; 156Tenn278, 300SW565; 156Tenn430, 1SW(2d)526; 160Tenn649, 28SW(2d)343; Tex 281SW217; TexCivA 278SW305; TexCommnA 12SW(2d)976. [c] Execution of search warrant will be enjoined where warrant is void. 202Iowa1162, 211NW694. [d] Pending review of conviction.–NJ 141A563.

280–58 85Mont439, 279P234.

280–58½–New. An injunction to prohibit the enforcement of an invalid statute is an appropriate remedy. 315Mo823, 290SW416.

280–59 272US525, 47SCt189, 71Led 387; 274US445, 47SCt681, 71Led1146; 164Ga755, 139SE559, 55ALR230; 170Ga624, 154SE145; 130Misc357, 223NYS830; 137Misc472, 242NYS316; 194NC802, 139SE773; 116Or310, 241P50; 143SC347, 141SE610. [a] Property must be legal and not used as medium of fraud with petitioner's knowledge.–US 41F(2d)855.

280–60 116Or310, 241P50.

280–61 271US240, 46SCt492, 70Led927.

280–66 TexCivA 278SW305; TexCivA 283SW870.

280–67 TexCivA 278SW305.

281–72 130Misc357, 223NYS830.

281–82 7Alaska201, 206 [quotCJ]. Contra 163Ga282, 136SE65.

281–83 202Iowa1162, 211NW694, 695 [citCJ].

281–84 [a] To enjoin performance of act alleged to be malum prohibitum legality of prohibition must be established. 131Misc752, 228NYS204.

281–85 130Misc357, 223NYS830; 85Mont439, 279P234. [a] Equity court may enjoin criminal prosecution where necessary to protect property rights. 23F(2d)189.

282–98 202Iowa1162, 211NW694.

282–5 160Tenn649, 28SW(2d)343.

282–14 274US445, 47SCt681, 71Led 1146; 7F(2d)715; 22F(2d)993; 29F(2d)897; 32F(2d)904; 40F(2d)532; 42F(2d)88; 42F(2d)765; 163Ga282, 136SE65; 164Ga755, 139SE559, 55ALR230; 170Ga624, 154SE145; 169La284, 125S125; 220MoA614, 288SW966; 85Mont439, 279P234; 143SC347, 141SE610, 619 [quotCJ]; 160Tenn649, 28SW(2d)343; TexCommnA 12SW(2d)976; TexCivA 2SW(2d)1001.

283–17 163Ga282, 136SE65; TexCivA 17SW(2d)157.

283–18½–New. Where the justice of peace before whom defendant is to be tried is pecuniarily interested in conviction, and objection is made before trial, the question of disqualification may be raised in an injunction proceeding to prevent the enforcement of a fine. 222Ky306, 300SW918.

283–19 ND 231NW851.

283–20 194NC802, 139SE773.

283–21 [b] Beneficiaries under will may sue to restrain unauthorized transfer of electric company's stock to another similar company. 125Misc70, 210NYS658.

284–22½–New. punishing obstruction of sidewalks; 163Ga282, 136SE65.

284–26½–New. prohibiting auction sales without license; TexCivA 4SW(2d)586 (temporary injunction granted).

284–28½–New. Moving of buildings upon or into fire limits. 118Kan767, 236P638.

284–30½–New. prohibiting operation of taxicabs without a city license; 252IllA156.

284–34 42F(2d)765.

284–35 156Tenn430, 1SW(2d)526.

284–36 143SC347, 141SE610.

284–37 [c] Injunction held proper.–156Tenn430, 1SW(2d)526.

284–39 24F(2d)455. See also TexCivA 18SW(2d)768.

284–40 164Ga755, 139SE559, 55ALR230.

285–45 42F(2d)765; 164Ga755, 139SE559, 55ALR230; TexCivA 2SW(2d)1001.

285–47½–New. Where police officers have on sundry occasions arrested large numbers of drivers of a taxicab company for operating cabs without a city license which has been unreasonably refused, injunction will lie to enjoin prosecutions to avoid a multiplicity of suits. 252IllA156.

285–49 TexCivA 281SW217.

285–51 [a] Unlawful arrest will not be enjoined. 126Misc698, 214NYS99 (since it cannot be anticipated).

285–55 252IllA156 (arrests of taxicab drivers where licenses for cabs were unreasonably refused to owner).

285–56 [c] 164Ga219, 138SE213. But see 213Ky499, 281SW512.

286–65 80Mont293, 260P727.

286–66½–New. Where statutory provisions have been satisfied and the trial court has acquired jurisdiction to hear and determine application for preliminary injunction on the first day appointed for a hearing or to continue to a later date, the court does not by virtue of statute or other authority lose its jurisdiction over the subject matter of the hearing by reason of matters urged by adverse parties applying for a writ of prohibition. 196Cal 445, 238P670.

286–66⅓–New. Equity has jurisdiction to restrain city police department from interference with manufacture and sale of malt extracts for medicinal purposes under federal and state permits. 12PaDist&Co 280.

286–66¼–New. Jurisdiction is determined as of the time the suit is commenced. 14F(2d)877.

286–66⅓–New. [§ 454a] 1½. Conditions Precedent. In a suit to enjoin unlawful maintenance of a health department by the city board of education, appeal to the state superintendent and the state board of education is not necessary before suing. TexCivA 286SW497.

286–71 See 243Mich703, 221NW19.

287–76 39F(2d)800; 160Ga546, 128SE793.

287–78 [a] Creditor of nonresident debtor who is distributee of estate can maintain suit for injunction and receiver in county of administration against absconded administrator and nonresident purchaser of land belonging to estate,

where purchaser submits to jurisdiction. 160Ga536, 128SE753.

287–87 [d] **In California.**–194Cal 146, 228P19. [e] **In Pennsylvania.**–96Pa Super146.

287–88 157Miss559, 128S734; 77Mont 361, 251P137, 49ALR627.

287–89 77Mont361, 251P137, 49ALR 627; TexCivA 23SW(2d)535.

288–93½–New. Power of the district court, sitting in exercise of its criminal jurisdiction, to exercise powers known only to court of equity is impliedly denied by letter and spirit of constitutional provisions. 77Mont361, 251P137, 49 ALR627.

288–94½–New. The circuit court is without jurisdiction to enter an order restraining the clerk of the probate court from removing a will to a foreign state. 224 IllA363.

288–14 [i] (3) District courts may, in exercise of their discretion, issue injunctions where they have jurisdiction over subject matter and parties. TexCivA 282SW627. (4) District judge may issue injunction though he does so erroneously. TexCivA 282SW627.

289–17 217MoA460, 268SW700 (jurisdiction of county court to grant temporary injunction, when petition had been filed in circuit court, held to depend on question whether facts alleged in petition showed jurisdiction in circuit court to grant permanent injunction).

289–19½–New. Application for temporary injunction to restrain assessment and collection of taxes and penalties under National Prohibition Act is premature and will not be granted where such acts have not been threatened but merely notice of proposed assessment and hearing has been given. 6F(2d)658.

289–19⅓–New. In some jurisdictions the district courts are without jurisdiction to grant any sort of restraining order until the action has been commenced by the filing of the complaint, 80Mont 293, 260P727.

289–19¼–New. and a temporary restraining order granted on a reading of a complaint not filed until two days thereafter is void. 80Mont293, 260P727.

289–19½–New. Such order is not rendered valid by a modification thereof, after filing of the complaint, on the hearing of defendant's motion to dissolve the injunctive order. 80Mont293, 260P727.

290–31 [a] **Suits not within statute.**–26 F(2d)799.

290–32 See also Courts § 360. [a] **Unless constitutionality of state statute is directly involved,** case is not within section. 27F(2d)945.

290–34 [b] **In absence of jurisdiction,** statutory court will be dissolved and resident judge alone will determine questions involved. 26F(2d)799. [c] **Hearing before three judges** on application for interlocutory injunction does not require trial before them unless application is pressed to determination. 27F(2d)425.

290–36½–New. The statute is not applicable to motions incidental to the progress of a suit. 34F(2d)295.

290–38–39½–New. In a suit to enjoin drainage commissioners from issuing bonds, three judges are not required even though the constitutionality of the statute is considered. 27F(2d)377.

290–38–39⅓–New. A district judge is without authority to convene a three-judge court to review and vacate his dismissal of a suit, no suit being then pending. 34F(2d)295.

290–45 160Ga556, 128SE766 (judge cannot make final disposition and award funds on hearing in vacation); MoA 27 SW(2d)456.

291–62 160Ga307, 127SE852; 164Ga 625, 139SE147; 233Ky588, 26SW(2d) 481; NJCh 149A369. But see TexCivA 285SW909.

291–62½–New. A mother attempting to kidnap children, in lawful custody of the father in a certain county, thereby attempts to violate the law of the child's domicile, and loses the right to be sued in another county. TexCivA 285SW909.

291–63 [b] **Chancery rule for purpose of acquiring jurisdiction** cannot be disregarded. NJCh 149A369.

292–68½–New. , or in the circuit court of the county where the act sought to be restrained is about to be committed or is threatened. 102WVa663, 136SE 195.

292–69 165Ga703, 141SE907. See also 165Ga292, 140SE876.

292–70 TexCivA 297SW276.

292–70½–New. Where the primary purpose of a suit is to restrain unlawful interference with plaintiff's business of coal mining, a chancery court obtaining jurisdiction of the person of defendant acquires jurisdiction of the subject matter. 170Ark863, 281SW663.

292–72 160Ga307, 127SE852.

292–74 160Ga307, 127SE852.

292–80 43F(2d)198 (suit not prematurely brought). But see TexCivA 294 SW305.

293–85½–New. The state has a right to commence, at any time, action to enjoin acts of an officer, as such, on the ground that he is acting illegally. 120Kan321, 243P262.

293–85⅓–New. The legality of such acts is not involved in determining whether such an action was begun prematurely. 120Kan321, 243P262.

293–85¼–New. Unexcused laches infringing suit have been held to bar relief. 235 IllA387.

293–85⅕–New. Under a statute, it has been held that a suit to enjoin a recall election was begun in time when commenced within ten days after filing of charges containing the requisite number of signatures. 136Wash467, 241P21.

293–85⅙–New. Temporary injunction will not be granted where application therefor is premature. 6F(2d)658.

293–85⅐–New. In determining whether the owner of stock was guilty of laches in asking an injunction restraining transfer, time is computed from holder's demand for transfer. 216Ala504, 113S 609, 54ALR1413.

293–85⅛–New. Suit to prevent public officers from paying out funds held not premature. 326 Ill 240, 157NE235.

293–85⅛–New. Taxpayers' suit to enjoin the establishment of a separate high school for colored children is premature until some act or order denying such children equal opportunities or facilities is made. 198 Ind95, 151NE 411.

293–85 1/10–New. An injunction suit attacking the validity of a statute is not prematurely brought where danger of injury is imminent. 28F(2d)441.

293–85 1/11–New. Where a prohibition administrator has issued notices to apply for new permits, a suit to enjoin interference with the permits is not premature. 34F(2d)642.

293–85 1/12–New. In equitable action for removal of abandoned street railway tracks, fact that time for repair had not expired when action brought is immaterial. 229AppDiv41, 241NYS569.

293–87 165Ga292, 140SE876; Tex CommnA 12SW(2d)541. But see 23 F(2d)750.

293–90 165Ga292, 140SE876; 232 IllA 596.

293–92 [b] **Where plaintiff vendee has assigned land contract,** foreclosure of which is sought to be enjoined, but still claims beneficial interest in contract, assignee is necessarily interested party without whom complete adjudication cannot be had. 235Mich481, 209NW576.

294–1 317 Ill 264, 148NE7 (fact that one who has made himself coplaintiff has no right of action will not prevent decree in favor of other plaintiffs).

294–4 40F(2d)787; 82Colo 534, 261P 859, 57ALR203; 137Misc470, 244NYS 427; TexCivA 278SW925; TexCivA 15 SW(2d)99; 103WVa81, 137SE349. [a] (3) Purchaser of denatured alcohol is not proper party to enjoin interference with sales to him. 5F(2d)987. [b] (7) Purchaser of property after enactment of ordinance prohibiting erection of gasoline filling station thereon may maintain action to enjoin enforcement of ordinance. Ida 286P353. [d] **Decedent's mother and sister not showing injury to themselves,** injunction cannot be granted against publication of articles allegedly libeling deceased. 137Misc575, 244NYS 430.

294–6½–New. A landlord may maintain a bill for injunctive relief for protection of undisturbed possession of a tenant. 214Ala58, 106S182.

294–6⅓–New. A father may bring action in his name to compel a county to pay his child's tuition in a high school of another county where such high school is more convenient. 213Ky343, 280SW1098.

294–6¼–New. Incorporated local post of the American Legion is entitled to maintain an injunction to enjoin the state department from revoking the charter. 258Mass434, 155NE462.

294–6⅕–New. A taxpayer whose interest is sufficient to confer jurisdiction may maintain a bill to enjoin the unlawful expenditure of public funds. 240 Mich515, 215NW333.

295–7 224Ky356, 6SW(2d)497.

295–9 [a] **Pledgee of stock** cannot restrain corporation from disposing of assets pending receivership in Louisiana. 158La672, 104S612.

295–14 252 IllA41.

295–15 219Ala346, 122S406; 158Md193, 148A223.

295–17 120Kan316, 243P329 (state on relation of county attorney of proper county in suit to enjoin board of trustees of community high school from unlawful expenditure of school money); 213Ky382, 281SW188; 126 Or641, 270P 513; 9PaDist&Co 543. [e] **State board of dental examiners** may maintain suit to enjoin practice of dentistry without license. 213Ky382, 281SW188. [f] **Right of individual defendant on damage to his person or property.**–230App Div245, 244NYS295.

295–23 But see Mass 172NE867.

295–23½–New. Attorney-general has been held a proper party. 19F(2d)681.

295–25 338 Ill 508, 170NE669.

295–25½–New. Beneficiaries under will may sue to restrain unauthorized transfer of corporation stock. 125Misc70, 210 NYS658.

295–26 89CalA505, 264P1115; 218App Div367, 218NYS483. See also 175Ark 979, 1SW(2d)1000.

296–31 37F(2d)904; 198Cal 373, 245P 814 (irrigation district acquiring canal during pendency of suit for relief from seepage and for part damages); Tex CommnA 12SW(2d)541; 196Wis76, 219 NW428.

296–32 216Ala586, 114S3; TexCommnA 12SW(2d)541. [a] **In proceeding to enjoin enforcement of statute abolishing county and giving its territory to other counties,** objection that new county sought to be created is not and cannot be represented or impleaded is not well taken where officers of county to which territory is to be added become officers of new county on its creation. 33NM 504, 270P897.

296–33 55AppDC372, 6F(2d)675. [a] **In United States.**–55AppDC372, 6F(2d) 675.

296–36 160Ga565, 128SE668; 154Md 302, 140A363.

297–37 41F(2d)326; Del 149A303; Tex CivA 10SW(2d)151.

297–38 [b] **Wife.**–217AppDiv191, 217 NYS482.

297–39 [a] **United States** is not indispensable party to suit to restrain secretary of interior from putting into effect order respecting public lands. 269 US250, 46SCt92, 70L ed259. [b] **Homestead entrymen** are not indispensable parties to suit to restrain secretary of interior from putting into effect order respecting public lands. 269US250, 46 SCt92, 70L ed259.

298–42 29F(2d)897; 125Misc692, 211 NYS822 [citCJ]; 157Tenn295, 8SW(2d) 366. [b] **Suit to enjoin national park superintendent** from infringing state's rights may be pursued without joining his superior officer in the United States. 268US228, 45SCt505, 69L ed927.

298–43 26F(2d)244; 125Misc692, 694, 211NYS822 [citCJ]. [g] **District attorney not necessary party.**–12PaDist&Co 280.

298–43½–New. Notary public before whom depositions were to be taken is not a necessary party in a suit to enjoin

execution of court's order requiring production of documents before notary for purposes of deposition. **TexCivA** 282 SW879.

298-43½-New. Commissioner of internal revenue and prohibition commissioner have been held not necessary parties to an injunction suit against the collecter of internal revenue. 14**F(2d)**976.

298-43¼-New. Governor and attorney-general are indispensable parties in application for interlocutory injunction against enforcement of state laws. 25 **F(2d)**993.

298-45 **TexCivA** 282**SW**879.

299-51 116 **Or**62, 240**P**244, 246 [quot CJ] (suit to enjoin award of contract for printing).

299-52 116 **Or**62, 240**P**244, 246 [quot CJ]. [a] (2) School district is not necessary party in suit to restrain members of board of directors from carrying out provisions of invalid act. 157 **Tenn**295, 8**SW(2d)**366.

299-58 155**Md**30, 141**A**440.

299-70 198**NC**306, 151**SE**634.

300-79 **TexCivA** 289**SW**1067; 100**WVa** 478, 130**SE**673.

300-80 **TexCommnA** 23**SW(2d)**713.

300-81 194**Wis**311, 216**NW**833.

301-90 [c] **Basis for exceptions** as to attorneys, agents, and servants, or successor in office of party enjoined, is theory that they are represented by such party, or one under his control. 217**App Div**191, 217**NYS**482. [d] **In action to enjoin business agent of local union** from committing unlawful acts to plaintiff's injury, local unions are, in effect, parties to action by representation. 135 **Misc**426, 237**NYS**601.

301-93 **TexCivA** 289**SW**1067.

301-95 143**Va**460, 130**SE**408.

302-96 89**CalA**505, 264**P**1115.

302-97 [a] **What constitutes "installment sale."**-44**F(2d)**268.

303-18 165**Ga**703, 141**SE**907; **TexCivA** 23**SW(2d)**534. [c] 100**WVa**478, 130**SE** 673, 676 [quotCJ].

304-31½-New. Where the sheriff fails to defend an action against him to restrain him from collecting acreage taxes levied against lands in a proposed drainage district which was never organized, certificate holders may be permitted to intervene on giving bond to indemnify the sheriff against liabilities in the suit. 142**Miss**298, 107**S**524.

304-34 203 **Iowa**317, 211**NW**417.

304-35 101**WVa**73, 131**SE**713.

305-40 158**Md**193, 148**A**223.

305-50 25**F(2d)**993; 81**Colo** 431, 256**P** 319; **Ida** 290**P**400; 235 **IllA**449; 12**LaA** 516, 126**S**537; 99**NJEq**696, 133**A**774; 7 **PaDist&Co** 648; 138**SC**106, 136**SE**132. [d] (2) Issuance ex parte of temporary injunction restraining city employees from issuing warrants and forbidding payments under contract held error. **Ida** 290**P**400. [i] **Validity of fiat issued without notice.**-152**Miss**694, 120**S**830.

306-55½-New. In British Columbia plaintiff applying for ex parte injunction should notify court of defendant's appearance. **BC** [1929] 4**DomLR**658 (1stcase).

306-56 **TexCivA** 294**SW**694.

306-63 [b] **In North Dakota.**-50**ND**788, 198**NW**116, 32**ALR**82.

307-66 15**F(2d)**797, 799 [citCJ]; 235 **IllA**449; **TexCivA** 294**SW**694.

307-70½-New. Service of subpœna or other process is not prerequisite to granting of preliminary injunctions under Equity Rules, rule 73 and Comp. St. § 1243a. 15**F(2d)**797.

307-71 18**F(2d)**645; 81**Colo** 431, 256**P** 319; 235 **IllA**449; 247 **IllA**170. [a] (2) Preliminary injunction will not issue ex parte to undo that which has already been done. 18**F(2d)**645.

307-72 81**Colo** 431, 256**P**319.

307-73 81**Colo** 431, 256**P**319.

307-74 246 **IllA**18.

308-75 81**Colo** 254, 254**P**990; 81**Colo** 431, 256**P**319; **Ind** 171**NE**871; **TexCivA** 286**SW**572, 573 [citCyc].

308-76 81**Colo** 431, 256**P**319. [a] **Compliance with statute requiring filing of certain affidavits** is necessary to granting of order. 81**Colo** 254, 254**P**990.

308-78 [a] (5) Where petition by marketing association alleged that defendants were attempting to induce exchange members to break cabbage marketing contracts and to discredit plaintiff's officers during marketing period. 81**Colo** 431, 256**P**319.

308-81 81**Colo** 431, 256**P**319.

308-81½-New. Where the original petition and affidavits justify the issuance of a temporary restraining order without notice, objection to the sufficiency of the showing of emergency should be treated as a motion to dismiss the action, and the burden is on defendant to show that the emergency did not exist. 81**Colo** 431, 256**P**319.

308-82 99**NJEq**696, 133**A**774.

309-84 15**F(2d)**797, 799 [citCJ]. [e] **Notice held sufficient.**-240 **IllA**411. [f] **Notice not stating details** as to law, enforcement of which is sought to be enjoined, is insufficient as to state officers. 25**F(2d)**993.

309-84½-New. Service of copy of ancillary bill and notice of time and place of applying for temporary injunctions is sufficient notice. 15**F(2d)**797 (service on attorneys held sufficient).

309-84½-New. Service on one of two defendants gives court jurisdiction to deny restraining order. **Fla** 130**S**11.

309-86 **TexCivA** 2**SW(2d)**471.

309-88 38 **OklACR**51.

309-92 99**NJEq**696, 133**A**774. [b] **Service on nonresident defendant without state** is insufficient to confer jurisdiction. 143 **Okl** 258, 288**P**605.

309-94 99**NJEq**696, 133**A**774.

310-2 24 **OhNPNS**265.

310-5 17**F(2d)**772.

310-6 17**F(2d)**772; 126**Kan**76, 267**P**29; 214**AppDiv**371, 212**NYS**236 (customary to give bond); 142 **Okl** 121, 285**P**957.

310-8 24 **OhNPNS**265. But see 30**Ariz** 72, 245**P**366. [b] **In Texas.-CivA** 1**SW (2d)**355.

310-9 32**Ariz**33, 255**P**488; 172**Ark**189, 288**SW**10; 45 **Ida**51, 261**P**665; 236**Mich** 480, 210**NW**332; 169**Minn**15, 208**NW**952; 144**Miss**343, 109**S**854; 191**NC**105, 131**SE** 375 (requirement of undertaking mandatory); 50**ND**788, 198**NW**116, 32**ALR**82; 24 **OhNPNS**265; 90**PaSuper**545; **Tex CivA** 278**SW**466.

311-14 [c] (2) Under 3 Comp. L. (1915) § 12664 court on granting stay of proceedings on default judgment in action at law, should require giving of bond unless there is actual fraud. 242**Mich** 656, 219**NW**620.

312-16 144**SC**188, 142**SE**343.

312-18 126**Kan**76, 267**P**29.

312-20 240 **IllA**36.

312-22 222**Ky**173, 300**SW**346; 227**Ky** 768, 14**SW(2d)**160.

312-26 246 **IllA**18. [b] (7) Issuance by federal court of protective injunction against suit in state court. 43**F(2d)** 130.

313-31 **TexCivA** 1**SW(2d)**355, 356 [cit CJ].

313-35½-New. To require bond for benefit of one not enjoined, courts must be satisfied that injustice will follow in the absence of such bond, 214**AppDiv** 371, 212**NYS**236.

313-35½-New. and that application for bond was not interceded only to harass plaintiff. 214**AppDiv**371, 212**NYS**236.

313-35¼-New. Defendant, not enjoined, not claiming great misfortune would follow pending trial, if injunction is granted, has been held not to have proved great damage would be suffered. 214 **AppDiv**371, 212**NYS**236.

313-35½-New. Conclusions, not supported by sufficient facts, are not enough on which to grant motion for deposit of bond for benefit of one not enjoined by plaintiff. 214**AppDiv**371, 212**NYS**236.

313-39 216**Ala**367, 113**S**592.

314-50 **CalA** 291**P**647. [a] **Bond held sufficient.**-**MoA** 27**SW(2d)**1046.

314-51 228**Ky**615, 15**SW(2d)**517, 70 **ALR**56.

314-62 191**NC**105, 131**SE**375 (amount to be fixed by judge). [b] **Statutory provision that bond secure payment of damages** caused by injunction refers to amount of bond, not contents thereof. **MoA** 27**SW(2d)**1046.

315-64 163**La**125, 111**S**622; 169**Minn** 15, 208**NW**952.

315-65 163**La**125, 111**S**623.

315-66 169**Minn**15, 208**NW**952. [c] (2) $25,000, where work of construction of state project was enjoined. 163**La**125, 111**S**623.

315-67½-New. If undertaking is not sufficient, upon good cause shown it may be increased. 191**NC**105, 131**SE**375.

315-68 221**Ky**442, 298**SW**1091, 1092 [citCJ].

316-94 30**F(2d)**842.

317-2½-New. Filing of bond in wrong case by clerk and giving wrong case number does not invalidate bond, where record shows injunction was issued against obligee in bond. 142 **Okl** 121, 285**P**957.

317-4 [a] **Defendant's landlord not named as obligee in bond** to enjoin tenant's trespass cannot sue thereon. 212 **Ky**118, 278**SW**557.

318-12 [f] **Amendment showing signers were sureties** and making condition accord with statutory requirement is not prejudicial. **Miss** 128**S**871.

318-15 144**SC**188, 142**SE**343. [f] **In West Virginia.**-107**WVa**632, 149**SE**819.

319-18 30**F(2d)**842.

319-28 42**F(2d)**9; **NJCh** 146**A**366(2d case).

319-31 [a] (1) 14**F(2d)**877; 43**F(2d)** 225; 216**Ala**206, 112**S**823; 180**Ark**492, 22**SW(2d)**21; 82**Colo** 534, 261**P**859, 57 **ALR**203; 85**Colo** 232, 274**P**932; 161**Ga** 893, 131**SE**881; 161**Ga**734, 132**SE**386 (injunction against executors proceeding with administration of estate as temporary administrators pending will contest); 164**Ga**625, 139**SE**147; 165**Ga** 437, 141**SE**201 (trespass); 165**Ga**479, 141**SE**291; 166**Ga**186, 142**SE**680; 166 **Ga**757, 144**SE**241(1stcase); 168**Ga**353, 148**SE**96; 169**Ga**400, 150**SE**647; 170**Ga** 680, 154**SE**141; **Ga** 155**SE**194; 236 **IllA** 613; 237 **IllA**129; **IndA** 169**NE**880; 126 **Kan**690, 271**P**304; 127**Kan**704, 274**P** 1113(2dcase); 217**Ky**269, 289**SW**295; 158**La**889, 105**S**2; 163**La**860, 113**S**126; 155**Md**86, 141**A**518; 131**Misc**506, 227 **NYS**185; 134 **Okl** 186, 272**P**840; 130 **Or** 644, 281**P**169; 35**PortoRico** 179; **Tex CommnA** 14**SW(2d)**825; **TexCivA** 32 **SW(2d)**480. (2) 213**Ala**50, 104**S**538; 194**Cal** 171, 228**P**4; 164**Ga**592, 139**SE**1; 166**Ga**149, 142**SE**690; 169**Ga**33, 149**SE** 636; 169**Ga**349, 150**SE**92; 170**Ga**779, 154**SE**240. (5) 122 **Okl** 275, 254**P**716; 297**Pa**247, 146**A**889; **TexCivA** 8**SW(2d)** 352. (9) **TexCivA** 278**SW**466. (13) To prevent sale of franchise to operate auto stages. 194**Cal** 171, 228**P**4. (14) To prevent use of private driveway in residential zone for business purposes. 128**Misc**441, 218**NYS**359. (15) To enjoin fraudulent practice in the sale of securities. 221**AppDiv**443, 223**NYS**566. (16) To enjoin actions at law and for accounting against attorney holding lien on collection. 216**Ala**586, 114**S**3. (17) To enjoin continuing trespass for unlawfully selling foods in depot. 178 **Ark**1146, 13**SW(2d)**610. (18) To suppress systematic exaction of usury from wage earners. 128**Kan**772, 280**P**906, 66 **ALR**1072. [c] **Complaints held insufficient.**-19**F(2d)**963; **TexCivA** 12**SW** (2d)839.

319-32 29**F(2d)**113; 219**Ala**346, 122**S** 406; 97**Fla**321, 120**S**849; 165**Ga**703, 141**SE**907; 165**Ga**765, 142**SE**139; **Ga** 155**SE**469(2dcase); **IndA** 169**NE**873; 123**Kan**645, 256**P**806; 156**Md**699, 145**A** 338; 137**Misc**524, 244**NYS**63 (demand on municipal authorities in suit for violation of zoning ordinance); **Tex CommnA** 29**SW(2d)**1041; **TexCivA** 1 **SW(2d)**380; **TexCivA** 31**SW(2d)**468. [e] **Allegations held unnecessary.**-**IndA** 172**NE**801.

320-35 170**Ga**46, 152**SE**41; **Okl** 292**P** 54; 36 **OklACR**544; 107**WVa**512, 149 **SE**166.

320-37 121**Kan**444, 247**P**1046 (petition held insufficient); **TexCivA** 9**SW(2d)** 747.

321-40 **Tex** 285**SW**691. See also 160 **Ga**460, 128**SE**580.

321-52 19**F(2d)**963; 164**Ga**167, 138**SE** 50; 256 **IllA**357.

321-54 216**Ala**586, 114**S**3; 135**Md**30, 141**A**440; 129**Misc**343, 221**NYS**446. [a] (6) Petition to enjoin trespasses to realty held demurrable for failure to identify damaged property. 218**Ky**805, 292**SW**508. (7) Allegation that defendant deprived plaintiff of piece of land, stating number of meters, is not sufficiently specific description of property. 33**PortoRico** 98.

322-55 35**PortoRico** 179 (allegations held not objectionable).
322-57 **NJCh** 147A195.
322-59 See also 218**Ala**67, 117S622.
322-64 256 **IllA**357; **TexCivA** 8**SW (2d)**730. But see **TexCivA** 28**SW(2d)** 270.
323-67 19**F(2d)**963; 27**F(2d)**144; 88 **CalA**545, 263P825; 164**Ga**167, 138**SE** 50; 165**Ga**765, 142**SE**139; 239 **IllA**82; 256 **IllA**357; 235**Ky**842, 32**SW(2d)**413; 116 **Or**62, 240P244; 153**Tenn**225, 280 **SW**1015 (averment that presence of commission company's agent on premises of stockyard company was objectionable and hurtful held not sufficient for injunction relief in view of Federal Packers & Stockyards Act of 1923); 153 **Tenn**408, 284**SW**382 (corruption or fraud of school authorities in selecting location for school building); **TexCivA** 287**SW**693; **TexCivA** 13**SW(2d)**401.
323-70 [e] **In suit to enjoin publication of libel,** facts must be set out. 19 **F(2d)**963. [f] **Fraud.**–164**Ga**167, 138**SE** 50. [g] **Mere allegation of abuse of power by municipal corporation** is only statement of conclusion. **MoA** 5**SW(2d)** 677. [h] **Allegations held not mere conclusions.**–130 **Or**644, 281P169 (in suit to enjoin breach of trust agreement).
323-72 7**F(2d)**397; 174**Ark**486, 295**SW** 708; 70**CalA**720, 234P336; 223**Ky**242, 3**SW(2d)**639.
324-73 165**Ga**889, 142**SE**152.
324-81 244**NY**33, 154**NE**655.
324-83 49**ND**27, 186**NW**381.
325-96 156**Md**510, 144A495.
325-97 157**Md**229, 145A546.
325-98 See also 81**Colo** 25, 253P386, 50 **ALR**1263.
325-99½-New. The allegation that plaintiff was in the business of general storage and repair of automobiles did not necessarily establish that plaintiff was a common carrier within the meaning of license laws so as to render the complaint insufficient. 26**F(2d)**855.
325-2 13**F(2d)**898; 43**F(2d)**198; 206 **Cal** 392, 274P527; 90**CalA**606, 266P570; 223**Ky**389, 3**SW(2d)**762; **TexCivA** 274 **SW**648 (contractual relation between parties as principal and broker and legal authority to act as broker not shown in suit to enjoin insurer from paying part of premiums received to local agents); **TexCivA** 278**SW**466; **TexCivA** 28**SW(2d)**178 (petition sufficient); **TexCivA** 28**SW(2d)**270. [f] **Interference with use of property by ordinance.**–13**F(2d)**898. [g] **Highway obstructions.**–93**Fla**342, 112S75.
326-3 13**F(2d)**898; 213**Ala**601, 105S 694 (demurrer properly sustained where right appeared only by doubtful reference); 165**Ga**812, 142**SE**142.
326-5 [a] (2) In general. **TexCivA** 28 **SW(2d)**178.
326-6 165**Ga**703, 141**SE**907.
327-10 13**F(2d)**898.
327-11 165**Ga**703, 141**SE**907; 86**Mont** 218, 283P219 (allegation held sufficient); 103**WVa**481, 138**SE**120. See also 32**PortoRico** 566. [a] **Bill to enjoin interference with business** must show complainant's possession of premises under superior right to that of respondent. 213**Ala**601, 105S694. [b] **Possession of tenants** under leases from complainants is sufficient allegation. 327 **Ill** 423, 158**NE**745.
327-13 [a] **In injunction proceeding for restoration of possession of realty,** allegation of ownership and former possession and ouster by defendant now holding possession is sufficient. 34 **PortoRico** 406.
327-14 23**F(2d)**189; 31**Ariz**378, 253P 897; 204**Cal** 687, 269P537; 72**CalA**151, 236P373 (complaint sufficient in case of trespass and carrying away plaintiff's property); 94**Fla**313, 114S455; 96**Fla** 519, 113S476(2dcase); 315**Mo** 781, 287 **SW**337; **TexCivA** 278**SW**466; **TexCivA** 278**SW**925, 926 [citCJ]; **TexCivA** 31 **SW(2d)**478. But see 249**NY**530, 164**NE** 571(5thcase). [a] 259**Mass**86, 156**NE**4. [b] (5) Petition alleging no threat to cloud title held insufficient. **TexCivA** 278**SW**925. [d] 256**Mass**76, 152**NE**341. [f]**Petition failing to allege defendant in possession** held insufficient. **TexCivA** 278**SW**925.
328-15 **TexCivA** 278**SW**925.
328-16 31**Ariz**378, 253P897; 170**Ga** 419, 153**SE**29(2dcase); **TexCivA** 296**SW** 917.
328-19 214**Ala**230, 107S67; 220**Ky**610, 295**SW**903; 222**AppDiv**308, 226**NYS** 335; **TexCivA** 8**SW(2d)**329.
328-22 14**F(2d)**957; 163**Ga**725, 137**SE** 60.
328-22½-New. Invasion of property rights.–The complaint in an action to restrain criminal prosecutions is demurrable where it fails to show an invasion of property rights. 116 **Or**310, 241P50.
328-23 37 **OklACR**557, 561 [quotCJ].
328-24 35**F(2d)**199; 216**Ala**618, 114S 10; 165**Ga**479, 141**SE**291; 251**Mich**224, 231**NW**577(2dcase); 148**Miss**278, 114S 482; 37 **OklACR**557, 561 [quotCJ]; 32 **PortoRico** 559; **TexCivA** 274**SW**648; **TexCivA** 278**SW**466. [d] (3) 180**Ark** 46, 20**SW(2d)**317; 169**Ga**166, 149**SE** 905; **Mass** 171**NE**281; 318**Mo** 292, 300 **SW**1108; **TexCivA** 275**SW**454; **Tex CivA** 278**SW**466.
329-25 80**Mont**374, 260P734; 37 **Okl ACR**557, 561 [quotCJ]; **TexCivA** 284 **SW**347, 350 [quotCJ]; **TexCivA** 20**SW** (2d)842.
329-26 92**Fla**1021, 111S250; 37 **OklA CR**557, 561 [quotCJ]; 32**PortoRico** 829; **TexCivA** 3**SW(2d)**894 [citCJ].
329-26½-New. An injunction may sometimes be granted in a law action without averring an adequate remedy at law. 207 **Iowa**515, 221**NW**205.
329-27 16**F(2d)**981; 97**Fla**321, 120S 849; 164**Ga**858, 139**SE**666; 165**Ga**479, 141**SE**291; 233 **IllA**30; 233 **IllA**579; 315**Mo** 781, 287**SW**337; 130**Misc**505, 224 **NYS**289; **ND** 231**NW**851; 134**SC**402, 132**SE**680; **TexCivA** 30**SW(2d)**431. But see **IndA** 169**NE**71; 207 **Iowa**515, 221 **NW**205. [c] **Allegations held sufficient.**–**MoA** 296**SW**164. [d] **Irreparable injury need not be alleged** under statute in some jurisdictions where it is shown that action for damages will not afford adequate remedy. 318**Mo** 292, 300**SW** 1108.
330-29 16**F(2d)**981; 31**F(2d)**969; 214 **Ala**230, 107S67; 72**CalA**151, 236P373; 99**Fla**496, 126S117; 29**Hawaii**804; 233 **IllA**579; 118**Nebr**729, 226**NW**452; 32 **PortoRico** 559; 34**PortoRico** 588; **Tex CivA** 284**SW**347, 350 [citCJ]; **TexCivA** 10**SW(2d)**736; 101**WVa**256, 132**SE**721. [a] **Allegations held insufficient.**–233 **IllA**579.
331-30 233 **IllA**579; 32**PortoRico** 559.
331-32 94**Fla**313, 114S455; **TexCivA** 3**SW(2d)**894 [citCJ]; **TexCivA** 24**SW** (2d)778.
331-35 32**PortoRico** 559 (objectionable construction on adjoining lot).
331-40 216**Ala**618, 114S10; 130**Misc** 505, 224**NYS**289.
331-42 72**CalA**151, 236P373. [a] (1) 72**CalA**151, 236P373; 233 **IllA**30. (2) General allegation of trespass held not to show cause cognizable in equity. 15 **DelCh**379, 138A630. [b] **Petition held sufficient.**–166**Ga**630, 144**SE**27.
332-44 **Mass** 171**NE**281; **TexCivA** 24 **SW(2d)**1112 (denial of temporary injunction). But see 207 **Iowa**515, 221 **NW**205.
332-49 214**Ala**230, 107S67. [b] (1) 195 **NC**305, 141**SE**882.
332-51½-New. A complaint in an action to restrain continuous trespasses and avoid a multiplicity of suits need not allege defendant's iniolvency. 86 **Mont**218, 283P219.
333-62 **Erratum.**–In text substitute "solvency" for "insolvency."
333-65 [a] **Averments held sufficient.**–244**NY**33, 154**NE**655 (fraud).
333-66 **Ga** 154**SE**877(2dcase); 156**Md** 699, 145A338; 155**Tenn**359, 293**SW**541.
333-73 31**Ariz**378, 253P897; 256 **IllA** 540; **TexCivA** 291**SW**582, 583 [citCJ].
334-74 **TexCivA** 291**SW**582, 583 [cit CJ].
334-75 [a] **Where attorney seeks injunction against action at law,** asserting lien on money collected, he should pay money into court, in view of code provision. 216**Ala**586, 114S3.
334-81 32**F(2d)**904; **TexCivA** 20**SW** (2d)855. Contra 50**Nev**191, 255P1010.
335-83 **TexCivA** 286**SW**572; **TexCivA** 286**SW**573; **TexCivA** 294**SW**694; **Tex CivA** 20**SW(2d)**338; **TexCivA** 27**SW(2d)** 885 (holding judge in vacation has no authority to issue temporary writ without special prayer).
335-84 130 **Or**148, 279P546 (complaint praying both special and general relief held sufficient against contention that mandatory injunction should not issue).
335-95 But see 97**Fla**749, 125S704(3d case).
335-1 **NJ** 144A879 (fact that bill is not properly verified will not prevent award of injunction on final hearing).
336-4 23**F(2d)**159; 196**Cal** 445, 238P 670; 102**NJEq**64, 139A881.
336-16 101**NJEq**805, 138A886.
337-21 149**Md**39, 129A887; **TexCivA** 8 **SW(2d)**730.
337-22 149**Md**39, 129A887.
337-23 146**SC**225, 143**SE**796. [b] (2) Verification stating that facts alleged in certain paragraphs of petition "are known to affiant of his own personal knowledge," without expressly declaring that they are true, is equivalent to affirmation of truth. 32**PortoRico** 829. [d] **For meaning and use of Spanish verb "constar"** see 32**PortoRico** 829. [e] **Verification held sufficient.**–242 **IllA** 343.
337-24 13**F(2d)**642; 149**Md**39, 129A 887; 101**NJEq**805, 138A886; **TexCivA** 270**SW**1094.
337-27 22**F(2d)**975; 23**F(2d)**159. [a] **Stating that facts are known to affiant of his own knowledge** held equivalent to affirming their truth. 32**PortoRico** 829.
338-31 See also 32**PortoRico** 829.
338-37 127**Kan**704, 274P1113(2dcase).
338-41½-New. Objection that complaint was insufficiently verified is no longer available where restraining was supplanted by preliminary injunction based on a verified complaint. 196**Cal** 445, 238P670.
338-42 166**Ga**804, 144**SE**256(1stcase); **TexCivA** 271**SW**253.
338-45½-New. Allegations of claimant's answer and plaintiff's reply thereto sufficiently charge fraud. 99**Vt**65, 130A749.
339-55 155**Md**30, 141A440; **TexCivA** 278**SW**312. But see 155**Md**654, 142A508.
339-59 155**Md**654, 142A508.
339-60 [b] **Where copartnership incorporated,** sold good will, agreeing not to enter similar business, partner signing as corporation's president, could not be restrained from engaging in similar business. **CalA** 287P980(2dcase).
339-63 216**Ala**679, 114S63; 107**Conn** 459, 140A808; 27 **OhNPNS**215 (that plaintiff has an adequate remedy at law). [a] (2) In suit by city to enjoin trespass on land claimed as public park dedicated to city, claim that defendant was innocent purchaser for value without notice must be pleaded to be available. 216**Ala**679, 114S63. [b] (5) In suit to restrain defendant from proceeding with action at law, defendant must plead defense that plaintiff can fully protect his rights in such action. 267**Mass**375, 166**NE**712.
339-64 [b] (1) 216**Ala**445, 113S411; 58**ND**820, 227**NW**556. (5) Showing that deed was in fact mortgage. 231**Ky** 215, 21**SW(2d)**252. [c] **Answers held insufficient.**–155**Tenn**342, 293**SW**996. [d] **Answer held unnecessary.**–238**Mich** 151, 213**NW**110, 51**ALR**1303.
340-71 14**F(2d)**907. See also 32**Porto Rico** 464.
340-72 See also 32 **PortoRico** 464. [a] **Affirmative matter held insufficient** to warrant denial of injunction. 14**F(2d)** 907.
340-77½-New. The making of answer a part of affidavit is not a filing thereof and does not preclude the right to file a plea in abatement. 145**Va**317, 133**SE**812.
340-80 163**La**976, 113S167; **TexCivA** 30**SW(2d)**532; **TexCivA** 30**SW(2d)**403; **Alta** [1929] 4**DomLR**1025.
340-81½-New. Where answer admits facts in petition alleged to show petitioner's want of adequate remedy at law, defendant does not invoke application of principle that resort to equity cannot be had where there is such remedy. 161**Ga**732, 132**SE**62.
340-86½-New. Verified answer may be insufficient against plaintiff's sworn de-

nial to take from trial court right to choose between them. **TexCivA** 300**SW** 220.

340-89½-New. In a suit by owners of a building to enjoin the lessee from interfering with their possession defendant, by cross bill, may set up that plaintiff's possession was obtained by forcible entry and detainer and seek damages therefor. 241**Mich**209, 217**NW**36, 60 **ALR**276.

340-89⅓-New. Defendant may maintain cross action to recover for wrongful issuance of injunction and damages. **TexCivA** 6**SW(2d)**414 (held to state good cause of action).

341-93 175**Ark**979, 1**SW(2d)**1000; 163 **Ga**33, 135**SE**503. [b] **Pleadings held not demurrable.-NC** 153**SE**632.

341-95½-New. Where a case was specially set down for hearing on application of complainant for a temporary injunction, action of the court at the hearing, when respondents appeared and filed demurrers without a submission on the demurrer and without complainant's consent in sustaining the demurrer and dismissing the bill, has been held reversible error. 219**Ala**134, 121**S** 397.

341-99½-New. Irrelevant and surplus matter incident to cause of action and not interfering therewith may be allowed to remain in complaint, on motions to dismiss and to separate causes. 128**Misc**441, 218**NYS**359.

341-1 [a] **Matters not ground for demurrer.-Va** 153**SE**879.

341-3 219**Ala**346, 122**S**406 (failure to describe territory involved in covenant against engaging in business); 170**Ga** 545, 153**SE**364; **RI** 151**A4**; **TexCivA** 12 **SW(2d)**806. [b] (3) But see 165**Ga** 889, 142**SE**152. [c] 27 **OhNPNS**215; 124 **Okl** 117, 254**P**101. [d] **General demurrer cannot lie for alleged defects** not on face of bill. 164**Ga**592, 139**SE**1. [e] **Petition held not demurrable.-170Ga**527, 153**SE**357.

342-12½-New. The sufficiency of a petition may be attacked by demurrer without controverting facts by verified answer. **TexCivA** 18**SW(2d)**844.

342-14 318 **Ill** 198, 149**NE**294; 237 **IllA** 129; 344**Mich**480, 221**NW**622; 121 **Or** 227, 252**P**954.

342-18½-New. A motion to dissolve a temporary injunction and to dismiss the bill operates as a demurrer and admits the material allegations of the bill. 252 **IllA**178.

342-20 [a] (4) Trial court is not required to hear demurrer upon interlocutory hearing, and may postpone hearing until it may be reached in due course. 165**Ga**397, 141**SE**48.

342-22 [a] **Only specific facts** are considered; general allegations must be ignored. **TexCivA** 26**SW(2d)**470.

342-26 [a] **Where temporary restraining order had terminated,** order sustaining general demurrer and dissolving temporary injunction merely sustained general demurrer. **TexCivA** 27**SW(2d)** 644.

342-28 **TexCivA** 299**SW**499.

342-30 20**F(2d)**386; 165**Ga**437, 141**SE** 201; **TexCivA** 299**SW**499. [b] **After order sustaining demurrer,** petitioners could amend and court could render judgment inconsistent with order. **Tex CivA** 27**SW(2d)**644.

342-31 50**RI** 332, 147**A**666; 101**WVa** 73, 131**SE**713.

343-37 17**F(2d)**167; 166**Ga**186, 142**SE** 680.

343-38 **CalA** 287**P**980(2dcase) (holding facts to show complaint could not be amended).

343-39 [a] **After dismissal** court does not abuse discretion in disallowing plaintiff's amendment which is not consonant with original bill. 41**F(2d)**484.

343-41 215**Ala**550, 112**S**115. [a] **Amendments giving bill inconsistent aspects.-215Ala**550, 112**S**115.

343-44 [a] 335 **Ill** 106, 166**NE**488.

343-49 See also 215**Ala**550, 112**S**115.

343-57 32**PortoRico** 566.

343-60 **TexCivA** 12**SW(2d)** 1098. See also 32**PortoRico** 566. [d] **General demurrer,** sustained as to original bill, is held directed to amended bill filed after answer. **TexCivA** 297**SW**518.

344-61 216**Ala**445, 113**S**411.

344-61½-New. or at close of evidence, 81**Colo** 254, 254**P**990.

344-66½-New. A stipulation of the parties and order of court to amend pleadings may be treated as an amendment as respects the court's jurisdiction of the subject matter. 25**F(2d)**851.

344-72 See also 32**PortoRico** 566.

344-75 95**Fla**952, 116**S**857, 858 [citCJ].

345-81 32**PortoRico** 566.

346-2 **TexCivA** 275**SW**282; 149**Va**772, 141**SE**844.

346-3 **TexCivA** 275**SW**282. [a] (2) Refusal of city to grant permits for oil wells not presented, where bill did not allege request. 24**F(2d)**541. (3) City's right to deny permit on account of improvements or suitability for civic purposes not presented in suit contesting constitutionality of ordinance where denial of permit because of location not alleged. 24**F(2d)**541. (4) In suit to test constitutionality of ordinance, abuse of power denying property owner's right to recover oil thereunder not involved. 24**F(2d)**541.

346-4 166**Ga**786, 144**SE**284 (in absence of proof, nonsuit is proper); 156**Md**254, 144**A**239; 103**NJEq**475, 143**A**623; 246 **NY**203, 158**NE**74; **TexCivA** 31**SW(2d)** 468. [a] **Issues in injunction suit** are those as to right to relief at time of trial, where no claim for damages and no bond. 246**NY**203, 158**NE**74.

346-8½-New. Petition seeking to restrain interference with plaintiff's possession and title held not to show suit to be one in trespass to try title, and hence plaintiffs were not confined to title pleaded under partition decree. **Tex CivA** 283**SW**591.

346-8⅓-New. In suit to enjoin interference with quiet possession of land, awarded to plaintiffs in prior partition suit, defendant's acts cannot be defended on ground that partition decree was invalid, where he failed to plead or prove any title or prior possession. **Tex CivA** 283**SW**591.

346-11 24**F(2d)**541. But see 99**NJEq** 602, 133**A**754.

346-12 **TexCivA** 12**SW(2d)**839.

347-16 146**Va**426, 131**SE**689.

347-18½-New. Complainants showing possession under deeds purporting to convey fee are presumed owners in fee. 327 **Ill** 423, 158**NE**745.

347-18⅓-New. Issuance of a patent to plaintiff cannot be presumed where there was no adverse possession, the land was never in actual possession of anyone, and there was no sufficient cutting of timber to constitute peaceable possession. 152 **Va**533, 147**SE**196.

347-20 15**F(2d)**16; 29**F(2d)**679; 42 **F(2d)**107; 42**F(2d)**904; 216**Ala**206, 112 **S**823; 216**Ala**367, 113**S**592; 165**Ga**437, 141**SE**201; 339 **Ill** 595, 171**NE**742; 198 **Ind**456, 152**NE**806; **IndA** 172**NE**545; 219 **Ky**522, 293**SW**1074; 218**MoA**516, 279 **SW**232 (plaintiff alleging acts of intimidation by specific individuals must prove charge against such individuals and no others); 101**NJEq**761, 139**A**174; 217**AppDiv**247, 216**NYS**637; 22 **OhA**265, 154**NE**362; 124 **Or**677, 265**P**790, 59**ALR** 512; **TexCivA** 10**SW(2d)**1057; **TexCivA** 18**SW(2d)**1096; **TexCivA** 26**SW(2d)**670; **TexCivA** 28**SW(2d)**202.

347-21 **TexCivA** 2**SW(2d)**1012, 1014 [citCJ]; **TexCivA** 14**SW(2d)**931.

347-22 [a] (2) Burden is on plaintiff to establish both necessity for and reasonableness of covenant not to engage in competing ice business within certain territory breached by defendant. **Tex CivA** 275**SW**87. [j] **To restrain employee's breach of negative covenant** employer must show that covenant is reasonable and necessary. **TexCivA** 275**SW** 87. [k] **Trespass or threatened trespass** must be shown. 219**Ky**522, 293**SW**1074. [l] **Grantor has burden of proving that acts of grantee were in violation of restrictions in deeds.** **Vt** 146**A**417. [m] **Restrictive covenant** must be shown by plaintiff to be reasonably necessary. **TexCivA** 21**SW(2d)**372(2dcase).

347-23 14**F(2d)**957.

347-26 165**Ga**437, 141**SE**201; 234**Ky**18, 27**SW(2d)**399. [b] (2) Defendant's claim of title under lease executed by plaintiff is admission of plaintiff's title which with further admission of intention to cut and remove timber admits prima facie case. 161**Ga**636, 131**SE**361.

348-28 103**WVa**481, 138**SE**120. [a] 103 **WVa**481, 138**SE**120.

348-29 [a] (3) Burden rests on remote grantee of part of tract of land seeking to enforce restrictive covenant against remote grantee of another part to establish that covenant was imposed on defendant's land for benefit of land owned by plaintiff. 315**Mo** 1239, 288**SW**38.

348-30 214**Ala**230, 107**S**67; 85**Colo** 232, 274**P**932; 15**DelCh**391, 138**A**607; 170**La** 861, 129**S**372; 262**Mass**247, 159**NE**909; **TexCivA** 3**SW(2d)**857; 143**Va**57, 129**SE** 251 (to show defense of permission in suit to enjoin trespass). [e] **In Porto Rico.-33PortoRico** 973. [f] **In suit to restrain confiscation of vending machine,** officers claiming right under statute must satisfy court their authority is sufficient. 40**F(2d)**535.

348-30½-New. The burden of proving unlawful conduct by defendant is on plaintiff. 22 **OhA**265, 154**NE**362.

348-31 223**AppDiv**83, 227**NYS**22. [e] **In suit to restrain building of oil station** in violation of alleged building restrictions, admissions by defendant grantor as to existence of restrictions may not be considered as evidence against other defendants who were purchasers of lots. 237**Mich**333, 211**NW**746. [f] **Evidence held admissible.-DelCh** 151**A**261.

348-35 165**Ga**703, 141**SE**907; 169**Ga** 395, 150**SE**584; 87**PaSuper**265.

348-37 **IndA** 169**NE**880 (record of proceedings before board of commissioners); 156**Md**254, 144**A**239.

348-38 169**Ga**665, 151**SE**343; **Mass** 162 **NE**773; **Mass** 172**NE**867.

348-39 **MoA** 287**SW**781; **TexCivA** 24 **SW(2d)**728. [a] (3) In suit to restrain violation of building line restriction, written instrument signed on condition not fulfilled by one of plaintiffs is nullity and not properly admitted. 56**App DC**320, 13**F(2d)**292. (4) In suit to restrain violation of building line restriction, evidence of effect of enforcement of restriction on values of properties is inadmissible. 56**AppDC**320, 13**F(2d)** 292.

349-40 260**Mass**117, 156**NE**840; 311**Mo** 262, 278**SW**398 (comparative value of property in restricted district with and without restrictions removed). [a] **In suit against husband by wife and son-in-law,** to whom wife owing property with husband by entirety leased portion of it, to enjoin husband from prosecuting action of ejectment, evidence that amount husband was ordered to pay her for support was fixed by alleged oral agreement that wife was to receive rent of portion of property she leased held properly excluded. 267**Mass**375, 166**NE**712.

349-41 175**Minn**431, 221**NW**642.

349-42 **Ida** 286**P**353; 27 **OhA**141, 160 **NE**868. [a] **Testimony explaining circumstances surrounding execution of deeds,** revealing general residential scheme is admissible in suit to enjoin violation of restrictive covenant. **Tex CivA** 28**SW(2d)**270.

349-44 137**Misc**637, 244**NYS**231.

349-48½-New. On issue of fraudulent and collusive assignment, plaintiff may show claimant's familiarity with defendant's business affairs and readiness to assist defendant. 99**Vt**65, 130**A**749.

349-52 See also 13**F(2d)**850.

349-55 [a] **Evidence held insufficient** to show that suit against carrier in another state was brought for purpose of perpetrating fraud, evading jurisdiction, or to harrass or put carrier to extra expense. 158**La**889, 105**S**2. [b] **Nonsuit properly granted** where evidence is insufficient to establish exclusive possession in injunction proceedings. 136**SC** 525, 134**SE**497.

349-57 **Cal** 291**P**204; 99**NJEq**602, 133**A** 754; 102**NJEq**33, 139**A**712.

350-59 **TexCivA** 299**SW**440.

350-62 **TexCivA** 12**SW(2d)**239; 193 **Wis**334, 214**NW**338.

350-63 123 **Or**28, 260**P**1100.

350-64½-New. "satisfactory," 28 **OhA** 203, 162**NE**459.

350-66 24 **OhA**294, 156**NE**243, 247 [quotCJ].

350-66½-New. that the right must be

"clear," 28 OhA203, 162NE459.

350–69 123 Or28, 260P1100.

350–69½–New. Indisputably proven facts must sustain allegations. 42F(2d) 904.

350–76 14F(2d)321; 30Ariz45, 243P 916; 175Ark979, 1SW(2d)1000; 105 Conn464, 136A71; 165Ga449, 141SE205; 167Ga144, 145SE87; 170Ga37, 151SE 923; IndA 169NE880; 217Ky180, 289 SW300; MoA 15SW(2d)957; 100NJEq 224, 135A275; 137Misc208, 244NYS487; 226AppDiv125, 234NYS439; 136Misc 449, 240NYS807; 230AppDiv268, 243 NYS446; 20 OhA261, 151NE798; 21 OhA 165, 152NE775; 300Pa542, 151A15; TexCivA 278SW513; TexCivA 284SW615. [a] (1) MoA 20SW(2d)567. (3) Purloining quotations distributed by defendant. 270US593, 46SCt367, 70L ed750, 45ALR 1370. (4) Trade secrets. 100NJEq224, 135A275. (5) Proposed abandonment of railroad. 32F(2d)819. [b] 149Md271, 131A446.

350–77 32F(2d)904; CalA 261P1026; 166Ga689, 144SE313; 158Md193, 148A 223; Or 289P500; Or 289P503; TexCivA 8SW(2d)750; TexCivA 11SW(2d) 199; TexCivA 24SW(2d)778. [a] (4) 100NJEq110, 135A673. (8) That grantees took lots with notice that restrictions were intended to benefit estate. 197Cal 733, 242P718. (9) Other illustrations. 239Mich70, 214NW152; 145Miss 585, 111S99; 125Misc689, 212NYS113; TexCivA 284SW615; TexCivA 290SW 235; TexCivA 3SW(2d)937. (10) That plaintiff was engaged in furniture business at time it was sought to enjoin defendant from engaging therein. Iowa 229NW257. (11) That contract for transfer of electric distribution system was not for security purposes and was not rescinded. ND 229NW915. [h] (1) TexCivA 278SW513. (6) That difference between building plans and neighboring structures was sufficient to justify grantor in rejecting plans. 149Md 271, 131A446. (7) That dwelling was used as apartment house. TexCivA 278 SW513. (8) Street on which business building was to be erected was still residential in character. 234Ky318, 28SW (2d)18. [i] (3) That formula and process were trade secret. 173Minn342, 217 NW339. (4) That formula and process were known to defendant. 173Minn342, 217NW339. (5) That defendant used same formula and process as plaintiff and obtained knowledge while employed by plaintiff. 173Minn342, 217NW339. [j] **Existence of agreement.–Mo** 15SW (2d)957 (as to building restriction). [k] **Breach of restriction covenant.–MoA** 27 SW(2d)462 (use as cat and dog hospital).

351–78 169Ga511, 150SE905; 204 Iowa 1208, 212NW726; 237Mich642, 212NW 959; 250Mich182, 229NW599; 221MoA 85, 290SW96; 58ND244, 225NW805; 148Wash15, 267P767. [a] (10) Finding that complainant's right of possession of premises and goods was of serious doubt has been held supported by evidence. 213Ala601, 105S694 (in suit to enjoin interference with business where injunction was denied). (11) Other illustrations. 237Mich642, 212Mo 959; 239Mich216, 214NW245. (12) Such change in character of locality is to warrant refusal of injunction. 200Cal 743, 254P1101. (13) Plaintiff's failure to perform exclusive sales contract in not providing funds for dies and not devoting best efforts to promote sales. 204 Iowa1208, 212NW726 (suit to enjoin cancellation of contract). (14) Restrictive covenant was unnecessary for plaintiff's protection. TexCivA 21SW(2d) 372(2dcase). (15) Defendants proposed in good faith to construct larger residence to comply with restrictive covenant. TexCivA 21SW(2d)1091. (16) Plaintiff pursued deliberate course of conduct naturally leading to controversy with defendants. 200Wis153, 228NW 123, 66ALR1085. (17) To justify censors in refusing permit to exhibit talking pictures dealing with murder. 339 Ill 595, 171NE742.

351–79 274US588, 47SCt720, 71L ed 1219; Cal 291P208; Del 150A20; 123 Kan659, 256P983; 126Kan745, 271P 313; 236Mich480, 210NW332; 240Mich 146, 215NW387; MoA 16SW(2d)735; NJ 151A848; 22 OhA265, 154NE362; 123 Or28, 260P1100; Utah 265P745; 39 Wyo 1, 269P31. [a] 237Mich642, 212 NW959; 242Mich331, 218NW692; 101 NJEq532; 138A197. [c] **For interference with plaintiff's business.**–22 OhA 265, 154NE362. [d] **Restraining power company from refusal to furnish electrical energy.–Iowa** 225NW861.

351–80 274US588, 47SCt720, 71L ed 1219; 123Kan659, 256P983 (title); 167 La791, 120S369(3dcase). [a] (2) 40Wyo 106, 275P115(2dcase). (3) 165Ga703, 141SE907. (4) Evidence held insufficient to show that certain insurance companies and their representatives entered into conspiracy or combination to oust plaintiffs from mixed agencies and to monopolize insurance business of mixed agencies in territory where plaintiffs and defendants operated. 119Kan 452, 239P974. (5) Residence in county essential to court's jurisdiction. 160Ga 546, 128SE793. (6) Other illustrations. 216Ala367, 113S592; 127Misc337, 215 NYS399; 22 OhA265, 154NE362; 103 WVa481, 138SE120. (7) Fraud of tri-county drainage board in proceedings for construction of supplemental tri-county drain. 240Mich146, 215NW387. (8) Insolvency of defendant. 40Wyo 106, 275P115(2dcase). (9) Unreasonableness and arbitrariness of ordinance, enforcement of which was sought to be enjoined. 35F(2d)808. (10) That building and loan association was complying with law. TexCivA 31SW(2d) 478. (11) That banking commissioner was interfering with building and loan association's compliance with law. TexCivA 31SW(2d)478. [b] (2) 101NJEq 532, 138A197. (3) Change in character of property in locality justifying refusal to enforce restriction. 241Mich591, 217NW794. (4) As to extent of depreciation in value from enforcement or failure to enforce. Kan 292P783. [c] (1) See also 165Ga703, 141SE907. (2) Evidence sufficiently established ownership. 234Ky18, 27SW(2d)399. [d] (2) Evidence held not to show secret method in making product. 20F(2d) 801.

351–81 177Ark27, 5SW(2d)914; 15Del Ch391, 138A607; 338 Ill 508, 170NE669 (change in environment of property); 311Mo262, 278SW398 (insufficient change of neighborhood to prevent injunction against violation of restrictive covenant); TexCivA 16SW(2d)328; 143 Va57, 129SE251 (evidence insufficient to support defense of permission in suit to enjoin trespass).

351–82 126Kan690, 271P304. [a] (2) To authorize preliminary injunction to restrain prosecution by citizen of state of action in another state to evade state laws. Miss 128S871.

351–83 41F(2d)305; 166Ga301, 143SE 400; 126Kan690, 693, 271P304 [citCJ]; 157Md229, 145A546; NJ 151A617; 130 Okl 14, 264P895; TexCivA 24SW(2d) 778. [a] (4) To enjoin board of trustees of community high school from using school's money to purchase busses for transportation of pupils to school or to pay cost of such transportation. 120Kan316, 243P329. (5) To warrant issuance of preliminary injunction against local garment workers' union. 218AppDiv367, 218NYS483. (6) To show, under pleadings, legal remedy inadequate and that equity had jurisdiction to enjoin withdrawal of funds by defendant pending final hearing. 169 Ga6, 149SE557(1stcase). (7) To authorize temporary injunction restraining continuous trespasses. 86Mont218, 283 P219. (8) To sustain finding of violation of covenant to justify preliminary injunction. 97PaSuper164.

351–84 165Ga304, 140SE859; 167Ga 478, 146SE123; Ind 169NE530; 124 Kan713, 261P572; 157Md229, 145A546; 98NJEq18, 130A834; 102NJEq218, 140 A261; 127Misc84, 215NYS257; TexCivA 20SW(2d)338. See also 274US588, 47 SCt720, 71L ed1219. [b] (2) 221AppDiv 533, 224NYS486. (6) Lessee in possession from interfering with lessor's occupancy of farm, in absence of rescission of lease. 163Ga365, 136SE160. (7) Refusal to carry out advertising contract. 128Misc673, 219NYS705. (8) Disposal of property in stockholder's suit to establish constructive trust against manager in property claimed to have been misappropriated. TexCivA 298SW170. (9) Proceedings under Stock Law. 195NC71, 141SE481. (10) Labor unions from interfering indirectly with contracts and business of plaintiff. 27F(2d)560. (11) Erection of building which would obstruct public road. 196NC807, 144SE925. (12) Other instances. 136Misc83, 240NYS267.

352–85 124Kan713, 261P572.

352–87 163Ga467, 136SE409; 103NJEq 190, 142A553. See also 160Ga824, 129 SE94.

352–88 94Fla890, 114S509; 103NJEq 190, 142A553; 127Misc84, 215NYS257.

352–88½–New. Discharge by magistrate of members of club, arrested in raid, for insufficiency of evidence, is of no probative value in suit for injunction to restrain police interference with club. 216AppDiv6, 214NYS507.

352–83½–New. The court may issue a temporary injunction on testimony elicited from defendants on the hearing of an application therefor. 81Colo 431, 256P319.

352–91 124Kan713, 261P572; 127Misc 271, 215NYS157.

352–94 166Ga57, 142SE537; 243 IllA 31; 125Misc70, 210NYS658; TexCivA 21SW(2d)72. [d] **Petition held sufficient.–120Kan316, 243P329.** [e] **Affidavit is not necessary** where facts warranting relief are admitted by pleadings. 50ND788, 198NW116, 32ALR82. [f] **In Montana.–80Mont293, 260P727.**

353–98 13F(2d)850. [c] **Unnecessary examination** of product manufactured by permittee to use denatured alcohol will not be assumed in hearing on affidavits alone. 5F(2d)987.

353–4½–New. Whether advertising company was justified in terminating plaintiff's advertising display can be determined only at trial, and not by affidavits for preliminary injunction. 221 AppDiv579, 224NYS514.

353–5½–New. Statute requires plaintiff applying upon notice for preliminary injunction after receiving restraining order to serve his affidavits two days prior to date first set for hearing. 196Cal 445, 238P670.

353–5⅓–New. Such statute has reference only to such hearing, 196Cal 445, 238P670.

353–5¼–New. and does not apply to an affidavit filed at date of continuance of hearing. 196Cal 445, 238P670.

353–13 247NY65, 159NE863.

353–14 [b] **Affidavits held sufficient** prima facie to establish agreement between publisher's local agent and dealers not to sell to plaintiffs. 132Misc726, 230NYS538.

354–17 TexCivA 26SW(2d)661.

354–17½–New. In some jurisdictions affidavits alone unaccompanied with the complaint are insufficient upon which to predicate a right to preliminary injunction. 127Misc271, 215NYS157.

354–29 13F(2d)850.

355–39 98NJEq702, 130A528.

355–46 260Mass559, 157NE705.

355–47 30F(2d)539; 102NJEq259, 140 A398; 103NJEq190, 142A553; NJCh 147A161; TexCivA 20SW(2d)355.

356–51 216Ala367, 113S592.

357–66 219Ala689, 123S222, 223 [cit CJ].

357–73 207Cal 648, 279P771 (dismissal denied where defendant asked affirmative relief).

358–86 29F(2d)113; TexCivA 26SW (2d)659.

358–90½–New. A property owner's suit against the secretary of the navy not a resident of the district, nor served, nor voluntarily appearing, was properly dismissed. 27F(2d)262.

358–92 27F(2d)262; 164Ga167, 138SE 50; 99NJEq356, 131A889; 245NY637, 157NE889; 107WVa512, 149SE166 (court should dismiss bill ex mero motu).

358–93 325 Ill 70, 155NE761; 13Porto RicoFed103 (dismissal without prejudice); TexCivA 7SW(2d)1102.

358–94½–New. On motion to dismiss bill to enjoin enforcement of ordinance

as void, court may inquire into proper reasons for ordinance. 24F(2d)541.

358-97 13PaDist&Co 497.

359-98½-New. A bill to enjoin the enforcement of a statute should be dismissed as to defendants joined who are not charged with the enforcement of the act. 29F(2d)762, 49SCt342(8theuse).

359-1 [a] **Dismissal not warranted.**-Absence of plaintiff's counsel at hearing of motion to dissolve temporary injunction does not warrant dismissal for failure to prosecute. 12F(2d)867.

359-2 16F(2d)782; 165Ga364, 141SE 54. [c] **When lapse of time left nothing to be tried,** temporary injunction is properly vacated and suit dismissed. Iowa 231NW487.

359-3 12F(2d)867; 91PaSuper259. [c] See also 81Colo 254, 254P990.

359-5 12F(2d)867.

360-11½-New. Absence of plaintiff's counsel on the date set for argument of motion does not warrant dismissal of the bill, but the motion should be disposed of nevertheless. 12F(2d)862.

360-14 155Tenn342, 293SW996.

360-16 164Ga167, 138SE50.

361-25 147Miss556, 113S180, 53ALR 288.

361-30½-New. Dismissal may be for failure of plaintiff to comply with the conditions of the grantor of the injunction. 256Mass85, 152NE88.

361-30½-New. Dismissal cannot be sustained because plender sought more relief than entitled to upon facts stated in bill. 40F(2d)620.

361-32 31F(2d)308 (exact nature of interest justifying injunctive relief need not be determined on motion to dismiss). [a] (2) Motion to dismiss bill of complaint admits allegations thereof. 20F (2d)948. [b] **Necessity for motion.**-99 NJEq356, 131A889.

361-34½-New. Facts well pleaded in bill are admitted by motion to dismiss. 24F(2d)541 (that plaintiff employed all available safeguards and exercised proper care).

361-34½-New. Mere conclusions of fact are not admitted. 24F(2d)541 (that drilling of oil well is not unsafe, or detrimental to comfort of residents).

361-35 20F(2d)966.

362-42 132SC380, 129SE207. But see TexCivA 268SW(2d)659.

362-44 168Ark262, 271SW30; 43 Ida 371, 252P489.

362-47 116Tex43, 285SW807.

362-51½-New. Dismissal of suit to enjoin enforcement of judgment upon general demurrer is held final disposition of case and court is authorized to enter judgment upon bond. 165Ga173, 140 SE354.

362-52 See also 236Mich480, 210NW 332. [b] **Voluntary dismissal** without prejudice of suit to enjoin removal of gravel does not adjudicate right to remove. 115Nebr104, 211NW617.

362-54½-New. Dismissal may be without prejudice to suit at law. 256Mass 299, 152NE90.

362-61 TexCivA 268SW(2d)670.

362-64 83Colo 547, 267P200, 202 [cit CJ]; 165Ga159, 140SE360; 163La378, 111S792.

362-66 29F(2d)789; 132SC380, 129SE 207.

363-67 99Fla1296, 128S821. [d] **Restraining order requiring appearance on certain day** was merely temporary restraining order expiring on date set for hearing, though no judge was designated to try case till thereafter. Tex CivA 278SW(2d)644.

363-68½-New. A decree ordering a mandatory injunction in vacation without the consent of the parties can be only an interlocutory decree. 144Miss 343, 109S854.

363-70 [c] (2) Defendant is entitled as of course to continuance for reasonable period. 196Cal 445, 238P670. [f] (2) Continuance of hearing from time provided in restraining order is not sufficient of itself to convert restraining order into temporary injunction. Nebr 227NW145 (order contemplating hearing as to whether temporary injunction shall be allowed is not temporary injunction).

363-72 Del 141A619. See also 13F(2d) 850.

363-76½-New. Ground alleged why injunction should not issue appearing on face of papers does not call for introduction of evidence. 162La49, 110884.

363-80 5F(2d)987 (refusal of plaintiff, having permit to use denatured alcohol to manufacture insecticide, to permit prohibition agents to take samples of product for analysis justifies refusal of injunction against interference with purchases of alcohol pending hearing on citation to revoke his permit for such refusal); 16F(2d)279; 77CalA297, 246 P342.

363-81 13F(2d)850. But see 12PortoRicoFed105.

363-82 13F(2d)850; 90Fla398, 106S873 (merits of bill considered); TexCivA 278SW312. But see TexCivA 308SW(2d) 403. [b] **Temporary injunction would be based on same facts and for same reasons** which would determine question on final hearing, subject to interim changes. 218Ala544, 119S660.

363-84 13F(2d)850; 90Fla398, 106S873; 161Ga629, 131SE505 (prerogative of judge to determine credibility of witnesses). [a] **Appellate court will not dissolve preliminary injunction** where lower court did not abuse its discretion. TexCivA 288SW498.

363-85 127Misc84, 215NYS257.

363-86 15DelCh329, 138A78; 255 IllA 199; 101NJEq94, 136A731; 127Misc84, 215NYS257.

363-90 219AppDiv219, 220NYS308.

363-91 177Minn318, 225NW150; 83 Mont244, 271P455; 86Mont218, 283P 219; 127Misc84, 215NYS257; 128Misc 863, 220NYS349; TexCommnA 128SW (2d)969. [a] (1) 128Misc863, 220NYS 349; TexCivA 288SW498. [b] **Stipulation that hearing on preliminary injunction shall be considered final hearing on merits** must be disregarded. 91PaSuper 259. [1] **Fact that defendant does not contemplate taking further testimony** does not change preliminary hearing into final one. 97PaSuper164.

365-92 [b] See also 161Ga832, 132SE 206. [c] **Ad interim injunction** should be granted to remain in force only till final trial. 162Ga336, 133SE857.

365-94 132SC380, 129SE207.

365-95½-New. Where wisdom of the decree is doubtful, preliminary injunction should be denied. 16F(2d)279.

365-95½-New. Where defendant bank and its management may be absorbed or embarrassed by a competing institution or speculators as the result of a temporary injunction, to restrain the trustees of a voting trust agreement from voting stock, validity of the agreement will not be determined on motion for such injunction. 217AppDiv691, 217 NYS67.

365-95¼-New. What should be a part of the judgment may not be inferred to make the foundation for a decree ordering an injunction which is not permanent but subject to a possible contingency set forth therein. Ind 166NE 659.

365-95½-New. The trial judge is not required to pass on defendant's exceptions to the petition. TexCivA 118SW (2d)404.

365-95¼-New. Only grounds of equitable relief alleged in petition can be considered. TexCivA 318SW(2d)364.

365-96 102NJEq218, 140A261; Tex CivA 148SW(2d)86.

365-97 42F(2d)490; 217AppDiv691, 217 NYS67. See also TexCommnA 289SW 999.

365-99 153Va730, 151SE139 (rights of person not party). [g] **Future complications and conflicts of jurisdiction** that are reasonably expectable must be considered by court. 43F(2d)130.

365-2 [d] **Question whether building declared unsafe by building inspector can be made safe by repairs** may be determined by court in lessee's suit to enjoin interference with use of building against city and lessor. TexCivA 18SW (2d)421.

365-2½-New. **Objection that judge other than one granting temporary injunction** was without jurisdiction to make it permanent held without merit where the order granting temporary injunction was a nullity. 236Mich480, 240 NW332.

365-2½-New. Whether a legal wrong exists or is threatened, and whether a legal right requires protection by injunction, is a question of law, in the absence of disputed questions of fact. 250 NY382, 165NE819.

365-2¼-New. Whether a building is a private garage, where the facts are undisputed, is a matter of law. Tex CommnA 148W(2d)825.

365-2½-New. The reasonableness of a restrictive covenant held a question for the jury. TexCivA 218SW(2d)372(2d case).

365-4½-New. **Performance pending hearing of act complained of** does not deprive court of jurisdiction to render verdict or original issue, and defendant performs the act complained of at his own risk. 27Hawaii150.

365-4½-New. The fact that a temporary injunction was not secured by complainant upon filing of the bill does not render the above rule inapplicable. 27 Hawaii150.

366-6 [b] (2) In action to enjoin waster of fish fit for human consumption by using same in reduction plant for manufacture of fish meal and fish oil, finding that large quantities of sardines received by defendant were unfit for human consumption is immaterial where it is proved by uncontradicted testimony and admitted that defendant was engaged in receiving and using in reduction large quantities of fish fit for human consumption. 195Cal 548, 234P398, 38 ALR1186.

366-7 IndA 169NE873; 259Mass319, 156NE693; 83NH91, 138A428. [a] (8) Other findings construed. Mass 167NE 305; Mass 167NE323.

366-11 [a] **Particular findings** held proper. 193Wis334, 214NW338.

366-11½-New. General finding for plaintiff does not carry by implication finding that plaintiff had no adequate remedy at law. 83NH91, 139A366.

366-11½-New. In a suit for injunction it is for the trial judge to determine whether finding that remedy at law was inadequate should be drawn from general finding for plaintiff. 83NH91, 139A 366.

367-26 220Ala90, 124882 (remedy of evil complained of by improved appliances).

367-43 82CalA202, 255P275.

367-44 274US588, 47SCt720, 71L ed 1219; 274US597, 47SCt724, 71L ed1224; 97CalA713, 276P363(2dcase).

368-47 [a] **In Kansas.**-120Kan316, 243 P329 (order sufficient).

368-48 274US588, 47SCt720, 71L ed 1219. But see 274US597, 47SCt724, 71 L ed1224.

368-52 191F(2d)963; 247IllA248; 220 MoA614, 288SW966. [c] (4) Writ enjoining party from trespassing on land and from constructing buildings thereon on injuring fences or interfering with peaceful possession and occupancy. 202 Iowa 345, 209NW285. (5) Interlocutory injunction restraining debtor who had waived homestead from receiving from trustee in bankruptcy any property claimed as exempt, with certain exceptions, held not void for uncertainty. 163 Ga355, 136SE71. [d] (3) Order held too broad. 222AppDiv631, 227NYS311. [e] **Injunction in labor dispute** has been held too broad and indefinite. 158Md 496, 148A826.

368-53 97CalA713, 276P363(2dcase).

369-54 82CalA202, 255P275; 97CalA 713, 276P363(2dcase); MoA 188SW(2d) 142.

369-63 [a] **Full relief to which complainant may be entitled on final hearing** will not ordinarily be granted by preliminary injunction. NJCh 151A95.

369-66 97CalA713, 276P363(2dcase); 167Ga735, 146SE455(2dcase); 130Misc 505, 224NYS289.

369-68 35F(2d)317; 220AppDiv413, 221NYS593; 130Misc505, 224NYS289.

370-73½-New. Order restraining defendant from engaging in similar business is not enlarged or rendered erro-

neous by judge's threat to jail defendant if he should violate order. **TexCivA** 32SW(2d)246.

370-76 261Mass314, 158NE761.

370-79 82CalA564, 256P239. [b] **Particular injunctions construed.**–Injunction in labor dispute. 15F(2d)652.

370-86 7F(2d)362; 177Minn318, 225NW150. [a] (4) Defendants enjoined from prosecuting numerous suits may be protected from bar of statute of limitations. **TexCivA** 1SW(2d)515. [e] 7F(2d)362.

371-88 168Ga164, 147SE38.

371-90 165Ga364, 141SE54; 168Ga164, 147SE38.

371-91½-New. Court has authority to impose reasonable terms and conditions on persons seeking injunction, to the end that parties whether enjoined or not may be protected from loss or unwarranted interference with their rights. 214AppDiv371, 212NYS236.

371-96 137Misc305, 242NYS509.

372-5 195NC360, 142SE491, 492 [quot CJ].

373-28 But see **TexCivA** 1SW(2d)426.

373-38 CalA 284P514; 195NC360, 142SE491, 492 [citCJ]. [c] **Where restraining order terminated as matter of law,** belief of parties or judge would not change it. **TexCivA** 27SW(2d)644.

373-39½-New. Temporary injunction does not annul or cancel contract by restraining payments due under contract. **TexCivA** 25SW(2d)174.

373-39⅓-New. Particular orders construed. 161Tenn222, 30SW(2d)234.

373-40 91Fla241, 107S364.

374-41 97CalA474, 275P886.

374-46½-New. An injunction order purporting inferentially to authorize action cannot aid a complaint therein which would not otherwise be good. 8D 229NW380.

375-57 217AppDiv191, 217NYS482.

375-58 [b] 217AppDiv191, 217NYS482.

375-65 221MoA1033, 295SW515; **MoA** 298W(2d)165; 193Wis108, 213NW657.

376-67 [c] **Purchaser at foreclosure sale** who did not erect encroaching building cannot be compelled to undergo expense of removing encroachment. **NJCh** 151A467.

376-71½-New. Mandatory decree to vacate must be against tenant in possession. **TexCivA** 278SW925.

376-73 [a] **Final decree cannot be entered** at hearing on temporary injunction. 160Ga216, 127SE652.

376-74 100NJEq33, 134A860; **Alta** [1929] 4DomLR1025.

376-78 See also 165Ga449, 141SE205.

376-78½-New. Final decree may be entered without hearing on merits where defendant stands by overruled demurrer. 233 IllA579.

376-78⅓-New. Upon adjudication of the merits, temporary injunction will be made permanent. **TexCivA** 282SW627.

376-81 **TexCommnA** 12SW(2d)959.

376-82 But see 223AppDiv770, 227NYS630.

376-85 107Conn32, 139A348; **Ida** 285P1023; **Mo** 2SW(2d)743; 83NH426, 143A687; **TexCivA** 26SW(2d)311.

377-87 6F(2d)182.

377-91½-New. Where the court completely litigated all the matters involved in the other suits, injunction should be made permanent. 218Ala637, 119S844 (2dcase).

377-93 19F(2d)963; 82Colo333, 259P514; 158Md496, 148A826. See also 274US597, 47SCt724, 71Ledl224. [c] (3) Directing removal of dam where finding gave height. 86IndA411, 157NE446.

377-94½-New. Decree reserving right to modify injunction has been held not defective, as failing to protect existing rights. 38F(2d)466.

378-99 72CalA433, 237P758.

378-3 72CalA433, 237P758; 85Colo232, 274P932; 159La723, 106S252; 264Mass511, 163NE193; **MoA** 29SW(2d)165; 221AppDiv307, 223NYS484; **TexCivA** 278SW466. [b] (5) Injunction against former fire chief and assistant fire chief from interfering with equipment and employees of fire department and from loitering around the property construed to restrain their right to be there as fire chief and assistant fire chief. 218MoA131, 262SW455. [f] (3) Injunction restraining breach of contract not to engage in stated business in certain town properly extends restraint to adjacent trade territory. **Iowa** 229NW257. [j] (2) Decree held too broad where restraining peaceful and lawful picketing. **MoA** 20SW(2d)567. [l] **Breach of agreement so to complete** after cessation of employment. **TexCivA** 278SW466. [m] **Decree held reasonable.**–**Wash** 283P1081.

379-4 72CalA433, 237P758; **TexCivA** 278SW466. See also 85Mont11, 277P437. [a] (6) Other instances. **Utah** 278P816.

379-5 **TexCivA** 32SW(2d)271. [b] **Decree restraining police from interference at any time** with audience assembled to hear plaintiff's address is too broad, as prohibiting possibility of interference after assembly becomes unlawful. 209Ky299, 272SW748.

379-7 85Mont11, 277P437.

380-12 166Minn507, 208NW448 (where order restraining prosecution of replevin suit pending suit for reformation of conditional sales contract was granted on condition that cause be placed on calendar for trial as soon as at issue, plaintiff's motion to strike from calendar has been held properly refused). [a] **Where multiplicity of suits enjoined.**–**TexCivA** 1SW(2d)515.

380-13 37F(2d)105.

380-18 162Ga376, 134SE84.

380-22 23F(2d)371; 27F(2d)478; 39F(2d)162; **TexCivA** 11SW(2d)199. [a] (4) Accounting denied where allegations are not specific. 15DelCh379, 138A630.

381-36 [b] **Injunction on other grounds.**–128Kan646, 278P1067.

382-44 259Mass478, 156NE727; 264Mass447, 162NE895; 114Nebr397, 207NW680. [o] **Breach of exclusive sales contract.**–**DelCh** 140A803. [p] **Seller is not liable for losses from price cuts** it was not responsible for. **DelCh** 140A803. [q] **Punitive damages may be awarded.**–13PaDist&Co 529.

383-50 23F(2d)426.

384-52 [a] **Statute** authorizing treble damages for violation of Anti-Trust Law does not authorize treble damages as incidental relief to injunction restraining its violation. 23F(2d)426.

384-54 213AppDiv355, 210NYS621. [a] (1) 145Miss352, 111S142. [e] (2) Assessment of damages is not proceeding in injunction suit (126Misc675, 214NYS290). (3) though for motion practice regularity it may properly be made in same court (126Misc675, 214NYS290).

384-55 **BC** [1930] 2DomLR843 (for encroachment on land).

384-56 [d] **In Arkansas.**–168Ark262, 271SW30.

385-62 See also 196Wis635, 220NW209.

385-67 179Ark857, 18SW(2d)356.

386-71 200Cal396, 253P134. [b] (2) **BC** [1930] 1DomLR226.

386-74 158La557, 104S367 (reimbursement for taxes paid in action enjoining cutting and removal of timber).

386-75 165Ga582, 141SE647 (injunction properly refused); 32PortoRico464.

386-76 172Ark681, 290SW577; 165Ga582, 141SE647; **TexCivA** 6SW(2d)414.

387-86 **Mass** 168NE919. [b] **Judgment on cross action for license fees** held proper in suit to enjoin enforcement of valid ordinance licensing auctions. **TexCivA** 31SW(2d)882.

387-87 But see 152Md126, 136A618, 56ALR1103.

387-92 206Cal118, 273P555; 167La791, 120S369(3dcase). [b] (6) Injunction prohibiting defendant from further prosecuting his business does not prohibit him from prosecuting or defending suit for breach of lease. 254Mass331, 150NE177. (7) Injunction against removing logs from bayous held not to prevent other operations therein. 164La301, 113S855.

388-94 172Ark681, 290SW577 (as against collateral attack); 80Colo516, 252P813, 814 [citCJ]; 37Wyo389, 262P22. [a] (7) Decree restraining erection of closed porch in violation of building restrictions binds parties and successors in title and remains in force till change in conditions making it inequitable further to require obedience to restraint. 236Mich251, 210NW226. [e] **Decree operates till modified, vacated, or dissolved.**–298Pa487, 148A699, 68ALR1172.

388-95 **TexCivA** 271SW178 (decree continuing injunction not erroneous).

388-95½-New. Where equity had jurisdiction, an injunction was not wholly void because it contained some prohibitions that should not have been made. 29F(2d)565 [certiorari den 279US843, 49SCt264(6thcase), 73Ledl989].

388-97 197Cal649, 242P725, 732 [quot Cyc].

388-99 197Cal649, 242P725, 732 [citCJ &quotCyc].

388-1 197Cal649, 242P725, 732 [citCJ &quotCyc]. [b] But see 75CalA292, 242P741.

389-11 298Pa487, 148A699, 68ALR1172; **TexCivA** 22SW(2d)1091.

389-14½-New. A default and resulting perpetual injunction may be vacated on motion supported by answer stating complete defense and sufficient showing of excusable neglect. **Nebr** 229NW13.

389-14⅓-New. Evidence has been held sufficient to show abuse of discretion in refusing to set aside default on resulting perpetual injunction. **Nebr** 229NW13.

389-25½-New. Rights of parties obtaining decree allowing three months to conform building to dwelling against purchasers, where not attempting to execute decree till after sale. **Wis** 231NW172.

389-27 32PortoRico559; 32PortoRico644 (attorney's fee).

389-28 32PortoRico644.

389-29 [a] **In Porto Rico.**–32PortoRico644.

389-29½-New. In suit to enjoin trespass, defendant may escape costs by showing lack of title in plaintiff. 41F(2d)305.

389-32½-New. Where plaintiff is in the main successful on motion for temporary injunction in labor dispute, defendant will be ordered to pay for referee's and stenographer's fees. 127Misc53, 216NYS68.

389-33 83IndA737, 149NE647 (in case of several defendants, successful defendants entitled to costs); 32PortoRico559; 32PortoRico644 (attorney's fees allowed as costs).

390-40 See also 226AppDiv168, 234NYS544.

390-46 9LaA624, 121S657.

390-48½-New. Complainant cannot defeat the allowance of attorney's fees by saying that the attorney-general might have been compelled to act. 224 IllA533.

390-48⅓-New. Attorney's fees are not recoverable by defendant in cross action seeking affirmative relief. **TexCivA** 6SW(2d)414.

390-50 215Ala429, 110S911; **Ala** 129S279; 207Iowa162, 222NW372; **LaA** 129S688; 223AppDiv356, 228NYS156; 128Okl3, 261P366; **TexCivA** 275SW177; **TexCivA** 4SW(2d)293; **TexCivA** 5SW(2d)1007; **TexCivA** 8SW(2d)329; 104WVa296, 140SE15.

391-55½-New. Injunctive orders granted without notice, not being appealable, are vulnerable to motion to vacate, dissolve, or modify. 80Mont293, 260P727.

391-56 164La140, 113S795. [b] (3) Dissolution or order restraining defendant from trespassing during pendency of suit to try title held not abuse of discretion. **TexCivA** 289SW198. (4) Dissolution of injunction against disposal of notes and sale of property under deed of trust is not abuse of discretion where averments of bill are vague and indefinite. 104WVa296, 140SE15. (5) Discretion is not abused by refusal to dissolve temporary injunction restraining city from erecting fire station on lots which it owned. **TexCivA** 8SW(2d)329. (6) Other instances. **LaA** 129S688.

391-65 128Okl3, 261P366; **TexCivA** 273SW665.

392-69 **TexCivA** 5SW(2d)796, 798 [quotCJ].

392-70 193NC832, 136SE721; **TexCivA** 5SW(2d)796, 798 [quotCJ].

392-71 202Iowa85, 209NW511; 193NC832, 136SE721.

392-72 225AppDiv401, 233NYS360.

393-81 82CalA202, 255P275.

393-87½-New. In New York an order

may be suspended, modified, or dissolved on motion as justice requires, either at special term or on appeal. 214 AppDiv371, 212NYS236.

394-4 98CalA108, 276P403. But see TexCivA 22SW(2d)718.

394-10 TexCivA 297SW241.

395-16 214AppDiv371, 212NYS236 (order may be vacated or continued on terms such as giving of undertaking to protect moving party).

395-18½-New. On motion to suspend, 214AppDiv371, 212NYS236.

395-18½-New. dissolve, 214AppDiv 371, 212NYS236.

395-18¼-New. or modify injunction, court may allow it to stand on new term and conditions imposed on plaintiff. 214AppDiv371, 212NYS236.

395-20 197NC223, 148SE315.

395-21 TexCivA 2SW(2d)474.

395-22 [a] **Requiring increase of security as condition for continuing injunction.**-Where undertaking on temporary injunction is insufficient, court must require increase thereof as condition of allowing plaintiff to continue injunction. 78CalA790, 248P1077.

395-26 152Miss792, 119S194; 103NJEq 101, 142A360; 193NC832, 136SE721; 194NC819, 140SE724. [a] (2) Wage contract in force through failure to take steps required for its termination. 24 OhNPNS193.

395-28 202 Iowa85, 209NW511 (constitutional questions); 193NC32, 135SE 480.

395-29 TexCivA 5SW(2d)263.

395-29½-New. **Injunction will not be continued** where defendants are not insolvent or unable to respond in judgment, and continuance would be detrimental to defendant without benefiting plaintiff. 131Misc136, 226NYS172.

396-30 98NJEq123, 130A843; 190NC 851, 129SE145; TexCivA 296SW954; 101WVa73, 131SE713. See also 198NC 337, 151SE646.

396-31 101WVa73, 131SE713.

396-32 190NC851, 129SE145. See also 198NC337, 151SE646.

396-35 197NC223, 148SE315.

396-37 196NC559, 146SE203. [a] **Parties to segregation agreement** need not be joined in action by one, not party thereto, to enjoin segregation ordinance passed pursuant to agreement, as rights of parties to agreement were not affected. TexCivA 19SW(2d)845.

397-40 193NC32, 135SE480; 101WVa 73, 131SE713.

398-57½-New. Perpetuating injunction where defendant had filed answer, but, taken it from courthouse without calling court's attention to it or requesting hearing, is proper. TexCivA 2SW(2d)471.

398-59 167Ga199, 144SE761.

398-60 Miss 128S871.

398-65½-New. Temporary injunction restraining members of coöperative cotton marketing association from violating a contract pending suit will not be dissolved on the ground that such contract was intended to bind members as cotenants and not as partners. TexCivA 283SW619.

399-72 12F(2d)945; 164Ga251, 138 SE156; MoA 5SW(2d)677; 39 OklCr 402, 266P495. [a] (3) It was error to refuse dissolution pending final hearing where defendant, sought to be enjoined from conducting business contrary to alleged agreement, was not shown to be insolvent, as necessity for equity relief was not shown. TexCivA 20SW(2d)338.

400-81 101WVa73, 131SE713, 715 [cit CJ&Cyc].

400-82 101WVa73, 131SE713, 715 [cit CJ&Cyc].

400-86½-New. A restraining order based on a petition verified on belief will not be set aside where, a few days after the order was issued, the verification was called to the attention of the court, and was then made positive. 127 Kan704, 274P1113(2dcase).

401-2 [e] **Penalty for failure to serve subpœna** is dissolution of injunction, not dismissal of bill. 98NJEq354, 129 A137.

401-3 99NJEq696, 133A774.

401-9 [d] **Permanent injunction need** have no bond. 336 Ill 522, 168NE640.

401-10 248Mich557, 228NW775.

402-19 189NC494, 127SE545.

404-40 30F(2d)842.

404-42 See also 32PortoRico 313.

404-44 TexCivA 12SW(2d)252.

404-45 256Mass547, 152NE888. See also 220MoA218, 283SW717; NJ 144A 879.

404-50½-New. Where plaintiff, in a suit for an injunction against a minor, took no action looking to his proper representation, the court will dissolve the injunction granted. 11LaA72, 122 S911.

405-55½-New. Irregularity for failure to issue a rule to show cause, where another injunction would be granted in its place. 161La1066, 109S840.

405-60 220MoA218, 283SW717.

405-61 30Ariz14, 243P611 (compliance with statute, noncompliance with which was basis of restraining order).

406-65 99NJEq696, 133A774.

406-67 [c] **Issuance of process before hearing of motion to dismiss suit and dissolve injunction** requires dismissal of motion based on failure to issue process where proper case for injunction has been made and motion is not accompanied by affidavit or answer. 104WVa102, 139SE476.

406-75 104WVa102, 139SE476.

406-76 101WVa73, 131SE713 (refusal to amend so as to bring in necessary parties).

407-86 95Fla952, 116S857.

407-96½-New. It is not prejudicial error to dismiss a bill for an injunction where the statute involved has been declared constitutional. 143Va741, 129 SE739.

408-97 Iowa 231NW487.

408-99½-New. Temporary injunction does not remain in force pending an appeal from dismissal of suit, in the absence of an order to that effect. 252 Mass542, 147NE853.

408-99⅓-New. Dissolution of temporary injunction after trial on merits does not amount to finding that it was not properly issued. 45 Ida51, 261P 665.

408-2 43 Ida371, 252P489; 252Mass 542, 147NE853.

408-2½-New. Where injunction was granted pending appeal from denial of writ of mandamus, it is properly dissolved on affirmance of judgment denying writ of mandamus. 214Ala432, 108 S589.

409-15 But see 158La1003, 105S843.

409-17½-New. **In New York** a party may move to vacate an injunction where his interests are affected, although he is not enjoined. 214AppDiv371, 212 NYS236.

409-32 251Mich268, 231NW557(2d case); MoA 5SW(2d)677; 189NC494, 127SE545.

410-38 MoA 5SW(2d)677.

412-76 216Ala486, 113S516.

412-77 TexCivA 4SW(2d)586. See also TexCivA 18SW(2d)844.

412-78 216Ala486, 113S516.

412-79½-New. Only matters of substance may be considered. 216Ala486, 113S516.

413-83 [a] (1) 216Ala206, 112S823.

413-84 TexCivA 20SW(2d)338; 104 WVa296, 140SE15.

415-87½-New. where there is no replication to the answer and it is buttressed by affidavits, 104WVa296, 140 SE15.

415-91 8F(2d)781.

415-92 TexCivA 4SW(2d)586. See also TexCivA 18SW(2d)844.

415-97 216Ala486, 113S516; Ala 130 S189; TexCivA 4SW(2d)204, 205 [cit CJ]; TexCivA 8SW(2d)329. [b] **Court balances relative injuries and benefits** in considering motion. 216Ala486, 113 S516.

416-4 Ala 130S189; 158La512, 104S 309.

417-16 TexCivA 2SW(2d)474; TexCivA 4SW(2d)293; 100WVa478, 130SE 673 (plaintiff's title not sufficiently denied).

417-17 TexCivA 275SW454.

418-28 TexCivA 275SW454.

422-59 8F(2d)781.

425-27 TexCivA 256SW634.

425-28 152Miss792, 119S194.

426-44 151Miss170, 117S540.

426-45 TexCivA 294SW284. [a] **Only facts alleged as basis of relief** can be considered. TexCivA 31SW(2d)364.

426-49 236Mich480, 210NW332. [a] (3) On motion to continue injunction restraining voting trustees from voting bank stock, validity of trust agreement may be determined. 126Misc753, 214 NYS643. (4) Court on order dissolving temporary injunction pending trial of main action will not pass on constitutionality of statute under attack. 202 Iowa85, 209NW511.

426-49½-New. Although plaintiff's counsel is absent on hearing court should dispose of motion. 12F(2d)862.

426-49⅓-New. Matters occurring after filing of a petition for an injunction and before trial on merits may be heard by the court in its discretion. 220MoA 218, 283SW717.

426-49¼-New. In a suit to restrain deputy constable from entering quasi public park in which he was commissioned by owner as park officer, the evidence of revocation of commission by the owner during the trial may be considered. 220MoA218, 283SW717.

426-49⅕-New. A motion to dissolve a temporary injunction, supported by testimony, must be accorded the same effect as if the same facts had been pleaded in an answer. 207 Iowa162, 222NW372.

426-51 12F(2d)862; 152Miss792, 119 S194.

426-53 216Ala206, 112S823; 174Ark 807, 298SW1; 207 Iowa162, 222NW372; Miss 114S147; 195NC56, 141SE535; 131 Okl 186, 268P254; TexCivA 27SW (2d)885. [b] **Refusal to dissolve temporary injunction** held proper. Ala 129 S279; 251Mich268, 231NW557(2dcase).

427-57 8F(2d)781; 197NC493, 149SE 682(1stcase) (continuing injunction held justified).

427-59½-New. Neither party can rely on pleadings as evidence on hearing to dissolve injunction, where answer was waived in bill and cause submitted on pleadings. Miss 128S871.

427-60 [a] **Motion to dissolve injunction cannot be treated as general demurrer** where on hearing, court had before it as evidence, agreed statement of facts. TexCivA 30SW(2d)431.

427-62 [e] **Order dissolving restraining order** is unnecessary after right to injunction is determined. 136 Okl 201, 277P230.

427-63½-New. In case a general demurrer to petition is one of grounds of motion to dissolve temporary writ, and challenges sufficiency of petition to entitle plaintiff to injunctive relief, sustaining of demurrer dissolves the injunction. TexCivA 276SW471.

427-63⅓-New. Where the court, in a decree dissolving an injunction, reserved the question of damages, on account of the issuance of a wrongful injunction, it had no power to render a decree for such damages after it rendered a final decree in the original action, since the matter thereafter became res judicata. 178Ark778, 13SW(2d)312.

427-64 147Miss885, 113S552.

427-73 37Wyo 169, 260P174.

427-74½-New. An injunction may be modified to preclude erroneous construction. 15F(2d)652.

427-75 [a] **Continuing till specified day** serves to render restraining order inoperative at time fixed where no further action was taken. TexCivA 20 SW(2d)221.

427-75½-New. A judgment dissolving a temporary restraining order, dismissing petition, and restoring property must be regarded as showing that the court found against plaintiff on the issue as to whether he acquired possession before issuance of the restraining order or by virtue thereof. 37Wyo 169, 260P174.

427-76 165Ga361, 140SE874.

428-82 164Ga23, 137SE390.

428-83 164Ga23, 137SE390; 165Ga 361, 140SE874 (dictum).

429-93 160La563, 107S427. [a] **Con-**

stitutionality of statute.–321 **Ill** 324, 151 **NE**915. [b] **Where defendants are partners,** damages may be awarded to both on dissolution of injunction, though attorneys were employed by one. 321 **Ill** 324, 151**NE**915.

429–98 169**La**642, 125**S**743.

429–1 321 **Ill** 324, 151**NE**915.

429–3 159**La**498, 105**S**598 (attorney's fees not allowed in absence of proof of value of services or amount agreed on).

429–4 321 **Ill** 324, 151**NE**915.

429–6½–New. Counsel fees necessarily incurred in procuring dissolution of an injunction may be allowed as damages, but except where the injunction is ancillary and its dissolution merely incidental to the defense on merits. 325 **Ill** 16, 155**NE**773.

429–6½–New. Attorney's fees. Where injunction is merely ancillary to principal relief sought, and its dissolution only incidental to defense made, counsel fees cannot be assessed as damages; 321 **Ill** 324, 151**NE**915.

429–6¼–New. but where counsel fees are necessarily incurred in procuring dissolution of injunction, they may be allowed as damages, 321 **Ill** 324, 151**NE** 915.

429–6½–New. even though services rendered in procuring dissolution also simplified preparation for defense on merits. 321 **Ill** 324, 151**NE**915.

429–6½–New. A bill rendered defendants by their attorneys is not evidence either of services rendered or their value. 321 **Ill** 324, 151**NE**915.

429–8½–New. Allowance of one hundred dollars attorney's fees may be reasonable. 158**La**672, 104**S**612.

429–10 217**MoA**179, 274**SW**875 (decree res judicata in action for damages on injunction bond); **MoA** 279**SW**1059.

429–12 83**NH**426, 143**A**687. [d] **Legality of acts of city officers after dissolution of temporary injunction.**–126 **Okl** 153, 259**P**133.

430–17 217**MoA**179, 274**SW**875.

430–21 216**Ala**445, 113**S**411, 412 [cit CJ]; 219**Ala**447, 122**S**426.

430–22 [a] 216**Ala**445, 113**S**411.

430–30 [a] **In Alabama.**–216**Ala**586, 114**S**3.

431–38 22**F(2d)**374; 35**F(2d)**555; 82 **CalA**202, 255**P**275; 222**AppDiv**631, 227 **NYS**311; 214**AppDiv**371, 212**NYS**236, 238 [cit CJ].

432–44 80**Colo** 452, 252**P**343.

432–45 217**AppDiv**191, 217**NYS**482.

432–47½–New. Invalidity of the original injunction order renders a modifying order void. 31**F(2d)**556.

432–48 106**WVa**26, 144**SE**571.

433–59 **TexCivA** 275**SW**454.

433–60 89**CalA**505, 264**P**1115.

433–61½–New. Where an injunction has been vacated, a motion for an extension of its operation is without force, 208**AppDiv**854, 204**NYS**934.

433–61¼–New. especially as to a corporation which was not made party to the action, 208**AppDiv**854, 204**NYS**934.

433–62 169**Ga**313, 150**SE**158(2dcase).

433–70 298**Pa**487, 148**A**699, 68**ALR** 1172.

433–73 214**AppDiv**371, 212**NYS**236, 238 [cit CJ]; **TexCivA** 228**SW(2d)**320 (suspension held improper).

433–74 [a] (2) Court has power to suspend injunction where power is reserved in decree. 82**CalA**202, 255**P**275.

434–77½–New. A separate order made by the court staying an injunction after entry of the decree is in effect a part of the decree and operates concurrently therewith. 197**Cal** 649, 242**P**725.

434–79 216**Ala**445, 113**S**411.

434–81 148**Miss**7, 113**S**908; 228**App Div**529, 240**NYS**550.

434–82 [a] 3**LaA**487.

434–84 17**F(2d)**772; 216**AppDiv**634, 215**NYS**735; 192**NC**175, 134**SE**417, 418 [quotCyc]. See also 36**F(2d)**972.

434–86 216**AppDiv**634, 215**NYS**735.

435–88 221**Ky**442, 298**SW**1091, 1093 [quotCJ].

435–92 **MoA** 9**SW(2d)**670.

435–96½–New. Damages may be assessed on the dissolution of a temporary injunction without disposing of the merits of the case. 224 **IllA**533.

435–97 156**Miss**775, 125**S**826; 217**MoA** 179, 274**SW**875 (no recovery even under statute where defendant at fault at issuance of injunction); 246**NY**203, 158 **NE**74.

435–99 169**La**642, 125**S**743; 217**MoA** 179, 274**SW**875; 246**NY**203, 158**NE**74.

436–13 156**Miss**269, 125**S**837; 107**WVa** 210, 148**SE**6.

437–19 235 **IllA**449.

437–19½–New. Where the petition was filed and a restraining order was made in term time, the order entered of record controls in determining the persons restrained and entitled to damages rather than that signed by the judge and filed in the cause. 218**MoA**468, 279**SW** 249.

437–20½–New. Generally, order of judge fixing conditions for granting injunction and not the suing out thereof is spring of liability. 36**F(2d)**972.

437–24 142 **Okl** 121, 285**P**957 (sureties liable); **TexCivA** 271**SW**261, 263 [cit CJ].

437–30 221**Ky**442, 298**SW**1091; 143 **Miss**585, 108**S**807; 84**Mont**585, 277**P** 419; 98**PaSuper**77. [a] (4) Sureties held not liable to one not obligee, upon whom copy of injunction was served after sureties had signed bond. 230**Ky** 119, 18**SW(2d)**960. (5) Fees and costs in hearing or injunction are held not recoverable under bond covering restraining order only. 136**Wash**148, 238 **P**996.

438–31 136**Wash**148, 238**P**996.

438–32 169**Minn**15, 208**NW**952. [e] **Though subsequent events, not provider for in bond,** constitute ground for holding legal acts enjoined, obligors are not necessarily relieved from liability for damages for period prior to such events. 169**Minn**15, 208**NW**952. [f] **Bank wrongfully suing out injunction against improvement district** is charged with knowledge of district's recorded contract to pay contractors for delay and is liable for amount paid contractors. **TexCivA** 28**SW(2d)**305.

438–32½–New. The liability of the sureties commences with the giving of the undertaking. 104**WVa**324, 140**SE** 49, 55**ALR**452.

438–42 169**Minn**15, 208**NW**952; 83 **Mont**170, 271**P**609.

438–45 104**WVa**324, 140**SE**49, 55**ALR** 452.

438–46 104**WVa**324, 140**SE**49, 55**ALR** 452.

438–46½–New. The bond should not be construed retrospectively unless such seems to be the legislative intent. 104 **WVa**324, 140**SE**49, 55**ALR**452.

439–50 25**F(2d)**95.

439–52 207**Cal** 395, 279**P**136.

439–55 233 **IllA**591; 253 **IllA**546. [a] But see 160**La**563, 107**S**427. [b] **Damages so assessed are punitive and statute needs strict construction.**–159**La** 1035, 106**S**556.

439–57 159**La**498, 105**S**598; 159**La** 1035, 106**S**556.

440–60 159**La**1035, 106**S**556.

440–62 **Mass** 170**NE**385.

440–66½–New. A proceeding on motion to assess damages is in nature of independent action on injunction bond ingrafted on injunction suit for sake of expedition. 218**MoA**468, 279**SW**249.

440–69 83**Mont**170, 271**P**609.

440–76 236**AppDiv**168, 234**NYS**544. [d] **No damages allowable on dissolution of temporary injunction.**–137**Misc** 446, 244**NYS**281.

441–77 226**AppDiv**168, 234**NYS**544.

441–90½–New. In a proceeding by motion the same issues may be made and tried as in a suit on the bond. 218**MoA** 468, 279**SW**249.

441–90¼–New. Motions for assessment of damages have been held to state facts sufficient to constitute cause of action as against attacks made for first time on appeal. 218**MoA**468, 279**SW**249.

442–93½–New. Where order continuing ex parte injunction did not recite appearance of certain defendant to oppose motion, motion for reference to ascertain damages sustained by such defendant by reason of injunction must be denied. 228**AppDiv**524, 240**NYS**446.

442–5 **Vt** 151**A**642.

443–18 325 **Ill** 16, 155**NE**773.

443–20½–New. Finding as to transfer of stock held by defendant in enjoined law action held immaterial where stock was returned. **Vt** 151**A**642.

443–26 159**La**498, 105**S**598 (holding that where value of, or amount agreed to be paid for, attorney's fees is not sufficiently proved, damages therefor will not be allowed). [a] 291**Ky**554, 291**SW** 767. [b] (2) Disallowing claim for attorney's fees is proper where there is no proof of value. 168**La**714, 123**S**301. [d] (3) Burden is on enjoined defendant to establish damages by proper evidence. **Vt** 151**A**642. [g] **Sufficiency of evidence.**–**Vt** 151**A**642.

444–28½–New. The style of the case appearing in the caption of the record entries in the injunction suit and in the caption of the restraining order may conclusively establish that defendant moving for assessment of damages was a party to temporary restraining order. 218**MoA**468, 279**SW**249.

445–53 17**F(2d)**772; 36**F(2d)**485; 148 **Miss**7, 113**S**908.

445–62 [f] (7) On dissolution trial court should assess damages on value of property which was less than debt instead of basing assessment on amount of debt. 146**Miss**496, 112**S**686. [g] (4) Proceeding by motion to assess damages may culminate in final judgment on bond against one or more obligors for amount of damages assessed with costs. 218**MoA**468, 279**SW**249. [i] 48 **Philippine**851. [l] (5) Under § 6264 summary judgment is allowable only on dissolution of injunction to stay proceedings on money judgment. 152 **Tenn**682, 280**SW**694. (6) Judgment cannot exceed penalty of bond except on proof of malice and want of probable cause. 152**Tenn**682, 280**SW**694. (7) In all cases other than under § 6264, defendant can under § 6259 maintain independent suit or have reference to ascertain damages. 152**Tenn**682, 280 **SW**694. (8) Unless bond so conditioned as to justify summary judgment by motion, court read such condition into bond. 152**Tenn**682, 280**SW**694. (9) Decree silent as to nature, condition, and penalty of bond is void for failure to recite jurisdictional facts necessary to rendition of summary judgment. 152**Tenn**682, 280**SW**694. [m] (1) **Tex CivA** 28**SW(2d)**305. (5) Statute, providing for damages on dissolution of injunction "where collection of money was enjoined," has no application to temporary injunction restraining partition sale. **TexCivA** 283**SW**211. [n] **In Colorado.**–81**Colo** 254, 254**P**990.

446–64 221**Ky**442, 298**SW**1091.

447–72 220**Ky**356, 295**SW**169.

448–76 84**Mont**585, 277**P**419; 142 **Okl** 121, 285**P**957.

449–77 [a] (3) 48 **Ida**200, 280**P**1038 (2dcase).

449–78 220**Ky**356, 295**SW**169, 172 [cit CJ].

449–79 143**Miss**585, 108**S**807; **MoA** 27 **SW(2d)**1046.

449–80½–New. and except where injunction was properly issued, but thereafter properly dissolved because continuance was not necessary in view of matters occurring after issuance. 217 **MoA**179, 274**SW**875.

449–81 142 **Okl** 121, 285**P**957.

449–84½–New. Defendant in an injunction suit is not entitled to action on a bond until the mandate from the United States supreme court was filed in the state district court of appeal. 97**CalA** 474, 275**P**886.

449–85 100**CalA**658, 280**P**1008.

450–87 115**Nebr**104, 211**NW**617.

451–97 132**SC**179, 128**SE**853.

451–98 See also 84**Mont**585, 277**P**419.

451–3½–New. The appellate court's order for dissolution of an injunction is conclusive that it was wrongfully sued out. 84**Mont**585, 277**P**419.

451–6 **La** 129**S**731; 126**Misc**675, 214 **NYS**290 [cit CJ]. [c] (2) **Assessment** by referee of damages arising out of injunction may be made in action on injunction bond on a reference. 126

Misc675, 214NYS290. (3) Order of reference to assess damages is at most irregularity which may be disregarded under Civ. Pract. Act § 105 where defendant did not oppose or move to vacate it. 126Misc675, 214NYS290.

452-10½-New. Failure to file a memorandum of the costs and disbursements in the injunction suit does not preclude recovery of damages in an action on a bond. 83Mont170, 271P609.

452-18 126Misc675, 214NYS290 [cit CJ].

452-18½-New. In New York. Leave of court mentioned in Civ. Pract. Act § 896 is formal matter, 126Misc675, 214NYS290.

452-18⅓-New. which may be supplied nunc pro tunc, 126Misc675, 214NYS 290.

452-18¼-New. or assumed as given until withdrawn, 126Misc675, 214NYS 290.

452-18⅕-New. as by motion to dismiss action. 126Misc675, 214NYS290.

452-20 See also 1LaA784.

452-22 Erratum.-In text strike out "So far as actual damages sustained by reason of the injunction are concerned, the better opinion is that if the injunction suit was brought in good faith, and believed that he had reasonable grounds for injunction;[22]" and substitute therefor "According to some decisions it is no defense to an action on an injunction bond given to cover any damages sustained by the wrongful suing out of the writ that the injunction suit was brought in good faith;[22]" [a] **Change of issues in suit,** by amendment of pleadings or supplemental pleadings, is not defense, since bond is given with understanding that there may be such change. 169Minn15, 208NW952.

453-27 169Minn15, 208NW952.

453-30 129Kan556, 283P663; 31NM 479, 247P840, 842 [citCJ]; 123 Okl 43, 251P985, 988 [quotCJ].

453-31 [a] (6) Paving contractor's agreement with city to use patented material precluded recovery on patentee's injunction bond. 32F(2d)487.

456-75 See also 125Kan680, 265P743.

456-78½-New. Defenses to action on preliminary injunction bond are such only as ordinarily are available in actions on contracts. 169Minn15, 208NW 952.

456-78⅓-New. An offhand opinion on a legal question, given by an attorney at the invitation of the court during the trial in which preliminary injunction was granted will not constitute an estoppel in an action on the bond. 169 Minn15, 208NW952.

456-78¼-New. Surety not liable if property converted in violation of injunction had been abandoned by plaintiff. 220Ky356, 295SW169.

456-87½-New. Bond given to obtain temporary restraining order in equity suit against public officer is canceled automatically on abatement of suit by his resignation. 13PortoRicoFed378.

457-15 But see 212Ky118, 278SW557. But see 230Ky119, 18SW(2d)960.

457-16 But see 230Ky119, 18SW(2d) 960.

458-36 96PaSuper273 (interest of obligees held not joint so as to require joinder).

458-46 But see 83Mont170, 271P609.

458-51 TexCivA 2SW(2d)305.

459-62 But see 84Mont585, 277P419.

459-64 84Mont585, 277P419.

460-68 [b] (2) Allegations from which nonpayment may be implied are sufficient as against general demurrer. 131 Okl 134, 268P224.

460-81 TexCivA 2SW(2d)305.

460-81½-New. , and have not been paid. 142 Okl 121, 285P957 (express allegation unnecessary).

462-13 Iowa 230NW550; TexCivA 299 SW664.

462-14 Iowa 230NW550; La 129S731; 84Mont585, 277P419.

462-15½-New. It is incumbent upon defendant to plead and prove equitable defenses by way of estoppel or otherwise, unless the record in the injunction suit plainly discloses such defenses. 169Minn15, 208NW952.

462-20½-New. In an action on a bond for damages sustained by reason of an injunction in suit to enjoin a street improvement, the burden is on defendant to show that the recording of the assessment had been made before the issuance of a restraining order. 97CalA 474, 275P886.

462-25 Iowa 230NW550. [d] **Introduction of record entries of case not required.**-MoA 27SW(2d)1046.

462-32 [b] **Expert testimony** as to reasonable value of counsel's services held unnecessary, since record showed it. 100CalA658, 280P1008.

463-38 But see 228Ky615, 15SW(2d) 517, 70ALR56.

463-33½-New. In such an action on an injunction bond given in a suit to restrain the mining of coal, evidence of preparation work before restraining order is admissible, but the cost thereof is immaterial. 221Ky442, 298SW1091.

463-33⅓-New. In such an action evidence as to the price plaintiff obtained for the coal before the restraining order is inadmissible. 221Ky442, 298SW 1091.

463-33¼-New. Plaintiff's statement that he was not making any profit is admissible on the part of defendant, but plaintiff may show that he was making a profit. 221Ky442, 298SW 1091.

463-33⅕-New. Evidence by plaintiff of the price paid for certain coal is improper in the absence of a showing that plaintiff had coal to sell then. 221Ky 442, 298SW1091.

463-39 224Ky188, 5SW(2d)1054.

463-46 [a] (1) 39F(2d)285; 125Kan 680, 265P743. (5) 125Kan680, 265P 743. (6) To establish market value of goods claimed as damages. 100CalA658, 280P1008. (7) To sustain findings as to value of grapes converted. 100CalA 658, 280P1008. (8) Other evidence held sufficient. 97CalA474, 275P886. [b] (3) To establish loss from deprivation of right to rent vacant lots during injunctive period. 224Ky188, 5SW(2d) 1054. (4) To go to jury on question of loss of profits. TexCivA 299SW664. (5) To sustain judgment for plaintiff. 134 Okl 47, 272P852. [c] **Recital in order dissolving injunction that injunction should not have been granted** is sufficient to show breach of bond. 83 Mont170, 271P609.

463-49 214Ky451, 283SW399; 224Ky 188, 5SW(2d)1054; 96PaSuper273.

463-51 214Ky451, 283SW399.

463-51½-New. It is question for court to determine whether extraordinary costs are permissible. 214Ky451, 283 SW399.

463-51⅓-New. Instruction to allow damages under injunction bond as otherwise defined, if injunction was granted and dissolved held proper. MoA 27 SW(2d)1046.

463-51¼-New. Amount on motion confined to items in bill of particulars filed after non-suit. NC 154SE318.

464-72½-New. Recovery cannot be had for loss in the absence of bond or other security. NH 146A159.

464-72⅓-New. The court having determined, on hearing, that the right to possession of land was in the owners, an injunction requiring the tenants to surrender possession of the premises to the owners could not form the basis for damages. TexCivA 12SW(2d)238.

464-80 177Minn103, 224NW700; 132 Misc887, 230NYS731; 131 Okl 134, 268 P224, 226 [citCJ]. [a] **Damages held not excessive.**-233Ky430, 25SW(2d) 1019.

464-82 LaA 125S144(2dcase); 7LaA 728; 96PaSuper273 (all damages sustained by reason of injunction).

464-86½-New. An action to maintain status quo of tenancy so that lessor might have lien for accruing rent is held to have for its sole object injunctive relief as regards claim of damages against injunction bond. 32Ariz33, 255 P488.

464-87 216Ala465, 113S489; 22AlaA12, 113S486; 32Ariz33, 255P488; 100CalA 658, 280P1008; Iowa 228NW568; 28 Hawaii399; 214Ky451, 283SW399; 221 Ky718, 299SW734; 224Ky188, 5SW(2d) 1054; NM 288P1044; TexCivA 21SW (2d)372(2dcase) limited to damages arising prior to trial court's judgment perpetuating temporary injunction); 104WVa324, 140SE49, 55ALR452.

465-88 100CalA658, 280P1008; Iowa 228NW568; 128Kan492, 278P755; 131 Okl 134, 268P224, 226 [citCJ]; Vt 151 A642.

465-90 100CalA658, 280P1008.

465-91 32Ariz33, 255P488; 28Hawaii 399.

465-92 221Ky442, 298SW1091; 238 Mich227, 213NW190; 143Miss585, 108S 807; 83NH342, 142A685. [f] **In Kansas.**-127Kan811, 275P216.

466-95 [b] **In Vermont.**-Vt 151A642.

466-96 100CalA658, 280P1008; 228Ky 615, 15SW(2d)517, 70ALR56; 238Mich 227, 213NW190; 191NC105, 131SE375.

466-97 See also 191NC105, 131SE375.

466-99 221Ky718, 299SW734, 736 [cit Cyc].

467-12 150SC438, 148SE361.

467-14 141Miss617, 106S881 (for injunction obtained in good faith against removal of buildings by lessee, latter is not entitled to recover value of buildings).

467-15 [a] (3) Where portion of grape crop was converted by complainant's receiver under temporary injunction, owner was entitled to recover value of portion converted. 100CalA658, 280P 1008.

467-16 141Miss617, 106S881. [h] **Restraining forcible entry and detainer.**-127 Or393, 272P265.

468-19 224Ky188, 5SW(2d)1054.

468-20½-New. Where defendant failed to pray in answer for damages for loss of rent, he will not be awarded same on dissolution of injunction. 160La563, 107S427.

468-24 214Ky451, 283SW399; 131 Okl 134, 268P224. [d] **Damages denied** where alleged losses were not proximately caused by injunction. 22AlaA 12, 113S486.

468-26 113 Okl 271, 242P260.

469-28½-New. Damages for being enjoined from mining coal are reasonable profits plaintiff would have made limited by the amount of the bond. 221Ky 442, 298SW1091.

469-28⅓-New. A reasonable profit is the difference between the fair market price and the necessary expense in mining and marketing. 221Ky442, 298SW 1091.

469-29 216Ala465, 113S489; NC 154SE 318; 131 Okl 134, 268P224; 134 Okl 47, 272P852.

469-30 Iowa 228NW568; 214Ky451, 283SW399. See also 141Miss617, 106S 881. [b] **Difference in market value held not recoverable** in absence of proof of contract of sale performance of which was prevented by injunction. 214Ky451, 283SW399. [c] **Depreciation in property caused by neglect** is not recoverable against surety where party enjoined was not entitled to possession. NM 288P1044.

470-31 NC 154SE318. [a] **Creditor entitled to same security at date of dissolution** that he had at date of issuance of injunction. NC 154SE318.

470-33 219Ky51, 292SW476; 135 Okl 285, 275P1032. [a] **There must have been bona fide offer** to buy property which would have been accepted but for injunction. 135 Okl 285, 275P1032.

470-33½-New. Damages for wrongful injunction against coal mining are the difference between the market price and the cost of getting coal to market. 221 Ky442, 298SW1091.

470-35 113 Okl 271, 242P260 (time of officer of corporation).

470-38½-New. Where defendant failed to pray in his answer for damages for loss of time, he may not recover therefor on dissolution of injunction. 160 La563, 107S427.

470-40 22AlaA12, 113A486; 32Ariz33, 255P488; Iowa 228NW568; Iowa 230 NW550; 128Kan218, 276P799(2dcase); 129Kan220, 282P728; 158La889, 105 S2; 141Miss617, 106S881; MoA 27SW

(2d)1046; 137Misc446, 244NYS281; NC 154SE318.

470-41 104WVa324, 140SE49, 55ALR 452.

470-43 131 Okl 134, 268P224.

470-44 131 Okl 134, 268P224.

471-43 30Ariz7, 243P606; 32Ariz33, 255 P488; 141Miss617, 106S881. [f] **Costs held recoverable.**–(1) 32Ariz33, 255P488.

471-48½-New. In some jurisdictions plaintiff must show that injunction was the sole relief to which the suit pertained or that the expenses were paid out solely to procure dissolution of the injunction. 104WVa324, 140SE49, 55ALR452.

471-49 32Ariz33, 255P488.

471-50 100CalA658, 280P1008.

471-53 But see 48 Ida200, 280P1038(2d case).

471-58 32Ariz33, 255P488; 214Ky451, 283SW399; 224Ky188, 5SW(2d)1054.

471-58½-New. Court costs may be recovered if court finally decided plaintiff was not entitled to injunction. Mont 285 P190.

471-60 26F(2d)102; 307Mo 417, 270SW 691. [b] (2) 307Mo 417, 270SW691; 222 MoA383, 5SW(2d)671.

471-62 26F(2d)102.

472-63 [a] (2) 131 Okl 134, 268P224 (attorney's fee held recoverable).

472-64 22AlaA12, 113S486; 30Ariz7, 243P606; 100CalA658, 280P1008; Iowa 228NW568; 128Kan218, 276P799(2d case); 129Kan220, 282P728; 129Kan 556, 283P663; La 129S731; Ky 299SW 734; 170La805, 129S209(2dcase); 169 Minn15, 208NW952; 141Miss617, 106 S881; 218MoA468, 279SW249; MoA 279 SW1059; MoA 296SW181; 31NM479, 247P840; 135Misc569, 239NYS89; 132 SC179, 128SE853; 41Wyo 419, 286P383. But see 159La1035, 106S556; LaA 124 S703; 222MoA383, 5SW(2d)671.

473-65 169Minn15, 208NW952.

473-66½-New. Counsel fees were properly allowed in an injunction suit, even though defendant was not designated as the county collector, when the intendment of the decree was clear. 224 IllA 533.

473-67 325 Ill 16, 155NE773.

473-73 169La642, 125S743.

473-74 [b] **Necessity of motion.**–8LaA 761.

473-75½-New. As affected by failure to demand. Where defendant, who moves to dissolve injunction, failed to pray for attorney's fees in his answer, he will not be awarded same on dissolution. 160La563, 107S427.

474-88 235 IllA449; 147Miss556, 113S 180, 53ALR288.

474-92 28Hawaii399; 228Ky615, 15SW (2d)517, 70ALR567; 11LaA72, 122S911; 84Mont585, 277P419; 115Nebr104, 211 NW617; 31NM479, 247P840; 104WVa 324, 140SE49, 55ALR452.

475-93 28Hawaii399.

475-94 [a] (1) 104WVa324, 140SE49, 55 ALR452.

475-95 31NM479, 247P840 (services in bringing suit on injunction bond).

475-98 224Ky188, 5SW(2d)1054; 115 Nebr104, 211NW617. See also 83NH342, 142A685.

476-2 159La1035, 106S556. Contra 24 F(2d)879.

476-6 Iowa 228NW568; Iowa 230NW 550; Mont 285P190; 113 Okl 271, 242P 260; 134 Okl 55, 272P855.

476-7 224Ky188, 5SW(2d)1054.

476-9 45 Ida51, 261P665; Iowa 230 NW550; 140Miss769, 106S513; 141Miss 279, 106S514; 151Miss207, 117S528; 104 WVa324, 140SE49, 55ALR452. [c] **Though hearing was on motion to dissolve made in vacation** attorney's fees should not be allowed where injunction was mere incident of action and court adjudicated all rights of parties without objection. 145Miss585, 111S99.

477-10 325 Ill 16, 155NE773.

477-10½-New. To determine whether prayer for temporary injunction is auxiliary to main issues, court will disregard prayer and ascertain whether cause of action remains. Iowa 230NW 550.

477-10⅓-New. Where only relief asked is restraining order, temporary injunction, and permanent injunction on final hearing temporary injunction is not auxiliary to another cause of action. Iowa 230NW550.

477-12 218MoA468, 279SW249.

477-19 Contra 84Mont585, 277P419.

477-21 41Wyo 419, 286P383. [b] **Evidence held not to make separation.**–41 Wyo 419, 286P383.

477-24 134 Okl 47, 272P852. See also 151Miss207, 117S528 (presumed liability was incurred for services of counsel).

478-25 170La805, 129S209(2dcase); 113 Okl 271, 242P260; 134 Okl 47, 272 P852; 135 Okl 285, 275P1032.

478-33 154Miss765, 122S776. [a] **Opinion evidence of value is not indispensable.**–154Miss765, 122S776.

478-35 La 129S731; 8LaA48.

478-36 235 IllA449; 134 Okl 47, 272P 852; 135 Okl 285, 275P1032. [a] (1) 158La889, 105S2; 8LaA443. [b] (1) 203 Iowa1253, 213NW218; La 129S731. [d] **In Missouri.**–296SW181.

478-40 235 IllA449; 154Miss765, 122S 776.

478-41 154Miss765, 122S776.

478-42 113 Okl 271, 242P260, 263 [quot CJ]. [a] **Where only evidence of reasonableness was stricken from record,** there is nothing for jury to base verdict on in this particular in action on injunction bond. 48 Ida200, 280P1038 (2dcase).

479-43 113 Okl 271, 242P260, 263 [quot CJ].

479-44 113 Okl 271, 242P260, 263 [quot CJ].

479-51½-New. Interest on notes issued to defendant properly refused. NC 154 SE318.

479-54 See also 22AlaA12, 113S486.

480-72 TexCivA 297SW872.

480-73 See also 219Ala447, 122S426.

481-83 [e] 30Ariz7, 243P606. [o] **Reasonable expenses of investigator.**–30Ariz 7, 243P606. [p] **Loss resulting from injunction against carrying on competing business.**–TexCivA 21SW(2d)372(2d case).

481-96½-New. Recovery may not be had for overhead where defendant was not engaged in production. 132Misc 887, 230NYS731.

481-96⅓-New. Nor may recovery be had for business expenses for which defendant was not liable. 132Misc887, 230NYS731.

482-4 [a] **In action on bond for injunction** against removal of sand and gravel defendant may counterclaim damages caused by wrongful removal. 115Nebr104, 211NW617.

482-5½-New. Merits of cause are held to affect at least quantum of damages. 235 IllA449.

482-9 194Cal 49, 227P908.

482-10 194Cal 49, 227P908.

482-11½-New. Continuance of erection of ice plant is held not contempt where builders were merely ordered to show cause why preliminary injunction should not issue. 159La698, 106S118.

482-11⅓-New. In a contempt proceeding, temporary restraining orders, issued to prevent enforcement of a city ordinance, have been held superseded by an order of another judge granting a temporary injunction in connection with an order refusing a motion to dissolve the restraining orders. 245Mich 635, 223NW217.

482-12 19F(2d)463; 318 Ill 307, 149NE 262; 86Mont387, 284P128; 116Texl, 285SW1063.

482-13 24F(2d)426; 194Cal 49, 227P 908; 86CalA259, 260P922 (defective complaint); 202 Iowa345, 209NW285.

484-15 202 Iowa345, 209NW285. See also 245Mich635, 223NW217.

484-16 131Misc758, 228NYS218.

485-30½-New. Pending appeal from order denying injunction to restrain certain acts defendant performs such acts at his peril. 249Mich347, 228NW 761.

485-37 125Kan202, 263P789.

486-49 But see 30F(2d)99.

486-53 See also 131Misc758, 228NYS 218.

486-53½-New. [§ 840a] 7½. **Actions for Damages for Violation of Injunction.** A claim that a court of law cannot take cognizance of violation of an injunction in another action, unless such injunction is shown to have been perpetuated by final decree, has been held overruled. 95CalA757, 273P609.

488-53½-New. Complaint held sufficient as against general demurrer. 95 CalA757, 273P609.

488-55 33F(2d)489; TexCivA 284SW 347. [c] **Recitals in writ served sufficient** to apprise party of what he is enjoined from doing. 202 Iowa345, 209 NW285.

486-56 318 Ill 230, 149NE297; MoA 297SW187; TexCivA 21SW(2d)1072.

487-61 MoA 297SW187, 189 [citCJ].

487-65 33F(2d)489; 247 IllA248; 202 Iowa762, 211NW403; 127Misc907, 217 NYS645. But see CalA 289P169. [c] **Defendant personally served with temporary order** is held punishable in contempt for violation of permanent order served on her attorney. 127Misc907, 217NYS645. [d] **Defendant having actual notice of injunction** from its inception must inquire if it still is in force before violating it. 127Misc907, 217NYS 645.

488-66 127Misc907, 217NYS645.

488-77 95CalA757, 273P609.

483-79½-New. Only those defendants who violate the decree of injunction are guilty of contempt where there are several defendants. 336 Ill 100, 167NE782.

488-80 124 Or656, 265P784.

490-94 [a] **Merely being with person** violating order does not render one liable. 15DelCh282, 136A887.

490-96 99NJEq839, 133A299.

490-98 35F(2d)823.

490-99 107WVa210, 148SE6.

491-11 129Kan114, 281P924.

492-32 107Conn252, 140A108.

492-33 Ind 173NE456.

492-37 107WVa210, 148SE6; 200Wis 454, 229NW31.

492-39 242Mich34, 217NW896.

493-41½-New. Discharge of water pumped from mine in disobedience of injunction is indirect contempt. 196 Ind 501, 149NE54.

494-54 [g] **Settlement of suit** would be violation of court order restraining further proceedings. NJCh 151A121.

494-54½-New. Effect of violation. Violation of injunction against prosecuting suit in another state does not invalidate decree therein for all purposes, if at all. Ala 128S438.

494-55 [n] **Warrant for attachment of witness** is held not to violate injunction against interference with bank records. 273US135, 47SCt319, 71Led580, 50 ALR1.

495-70½-New. Where county commissioners were enjoined from proceeding with contract for construction of court house, and thereafter readvertised for bids and relet new contract for such construction which remedied defects in first advertising, there is no violation of restraining order. 164Ga117, 137SE776.

495-70⅓-New. An injunction against the erection of a building for a residence not complying with building restrictions is not violated by moving into and occupying a building already erected. 125 Kan202, 263P789.

495-70¼-New. Building constructed constituted private dwelling as regards restrictive decree. Wis 231NW172.

495-74 29F(2d)565 [certiorari den 279 US843, 49SCt264(6thcase); 73Led989].

497-88½-New. It is a criminal contempt to violate order restraining defendants from interfering with restaurant patrons. 15DelCh282, 136A887.

497-92 86CalA259, 260P922; 166Ga43, 142SE153; 39Ga716, 148SE407(2dcase). [e] (2) Use of rear room of store as storage room and stairway in connection therewith violates injunction against maintaining in residential area any building as business house or conducting any business therein. 149Md182, 131A148. (3) Injunction restraining maintenance of cottages on restricted lots and ordering removal is violated by failure to remove buildings, though they have been rearranged. 194Wis509, 217 NW691. [j] **Soliciting.**–154Md349, 140 A361. [k] **Defendant's selling newspaper to brother,** transferring properties to third party, and publishing newspaper in near-by town which was printed in place transferred to third party and

published by him, was violation of injunction to refrain from publishing in violation of contract with plaintiff. 219 **Ala**508, 122**S**819. [l] **Repealing old gasoline tax ordinance by police jurors** and substituting new one, while old was still in litigation. 170**La**644, 128**S** 663.

498–93 95**PaSuper**328 (use of garage not as public garage within injunction); 200**Wis**454, 229**NW**31. [c] (2) Injunction restraining interference with business of coöperative marketing association prohibits interference with contracts of association only and not general and indefinite interference with members. 81**Colo** 420, 256**P**325. [h] **Discussion of matters of public interest.**–81**Colo** 420, 256**P**325. [i] **Acts of superintendent of insurance.**–316**Mo** 457, 290**SW**443. [j] **Acts of person not party.**–132**Misc**803, 231**NYS**1. [k] **Where business agent of labor union** talked with contractors concerning work which they were doing in violation of rules of union, it was held that he was not guilty of violating provisions of ad interim restraint in order. 103**NJEq**195, 142**A**822. [l] **Agreement that suit should be dismissed** and bonds paid as called for in contract. **TexCivA** 25**SW(2d)**174.

498–99 318 **Ill** 307, 149**NE**262.

498–1 202 **Iowa**345, 209**NW**285.

498–4½–New. Where former partner was enjoined from soliciting former customers, customers' statements not to worry, "we will buy from you" held not orders as to justify his stopping at their homes. 154**Md**349, 140**A**361.

498–4½–New. Violation of a water right decree is not excused by failure of the court to appoint a water commissioner to make proper distribution, or by the fact of plaintiff's taking full control of the water and refusing to consent to the appointment of a commissioner as provided by the decree. **Utah** 280**P**715.

498–4¼–New. Acts of servants if party obtaining injunction may warrant dismissal of complaint. 200**Wis**454, 229 **NW**31.

499–23 **Utah** 280**P**715.

500–27 318 **Ill** 230, 149**NE**297.

500–28½–New. ; but the contrary has been held where the party sought and acted upon the advice of the trial judge. **TexCivA** 299**SW**539.

500–30 See also 130**Kan**614, 287**P**228.

501–49 318 **Ill** 230, 149**NE**297.

501–51 [f] **Rule nisi and restraining order passed by judge of circuit in one county returnable before judge of circuit in another county.**–164**Ga**28, 137**SE** 546. [g] **Where case is regularly assigned,** chancellor is held to have jurisdiction. 326 **Ill** 405, 158**NE**162.

501–52 227**AppDiv**57, 237**NYS**85.

502–64 See also **Ind** 173**NE**456.

502–65 **NJCh** 147**A**338.

502–73 196 **Ind**501, 149**NE**54.

503–54 **TexCivA** 276**SW**728, 730 [cit CJ].

503–79 260**Mass**344, 157**NE**684, 54**ALR** 1422.

503–89 260**Mass**344, 157**NE**684, 54**ALR** 1422.

504–95 **TexCivA** 282**SW**627.

504–1 **MoA** 18**SW(2d)**142.

504–3 326 **Ill** 405, 158**NE**162.

504–3½–New. Citation may issue although a motion for new trial is pending. **MoA** 297**SW**187.

504–4 115 **Oh**64, 152**NE**29; 40**Wyo** 498, 280**P**98.

504–8 139 **Okl** 157, 281**P**144; 124 **Or** 656, 265**P**784.

504–9 81**Colo** 431, 256**P**319.

504–13½–New. Effect of denial of charges under oath see **Ind** 173**NE**456.

504–16 18**F(2d)**371. [a] **Amendment to citation** may be within discretionary power of court. **MoA** 297**SW**187, 189 [citCJ].

504–17 [a] 81**Colo** 431, 256**P**319; **Ind** 173**NE**456 (to show indirect contempt).

505–18 97**CalA**713, 276**P**363(2dcase); 124 **Or**656, 265**P**784.

505–19 But see 97**CalA**713, 276**P**363. [b] **Allegations held sufficient.**–194**Cal** 49, 227**P**908.

505–20 97**CalA**713, 276**P**363(2dcase); 139 **Okl** 157, 281**P**144 (accusation is fatally defective unless it sets forth facts constituting contempt with sufficient particularity to inform accused of nature of proceedings); **Utah** 280**P**715 (sufficient).

505–20½–New. and time and place must be stated. 196 **Ind**501, 149**NE**54.

505–22 [a] 194**Cal** 49, 227**P**908 (affidavit). [c] 81**Colo** 431, 256**P**319. [d] **Complaint held insufficient.**–**NJCh** 147**A** 338.

505–22½–New. Where the petition and affidavit show that a contempt was committed in violation of an injunction granted by the court, the court has jurisdiction to proceed. 81**Colo** 431, 256**P** 319.

505–25 97**CalA**713, 276**P**363.

505–29½–New. A punitive judgment directing payment of a fine to the United States is not authorized under a petition in contempt proceedings based on violation of an injunction where the petition only asks that attachment issue. 18**F** **(2d)**578.

506–40 See also 156**Md**183, 143**A**799.

506–43 200**Wis**454, 229**NW**31.

506–49 **MoA** 18**SW(2d)**142.

506–51 260**Mass**344, 157**NE**684, 54**ALR** 1422.

506–55 29**F(2d)**565 [certiorari den 279 **US**843, 49**SCt**264(6thcase), 73**L ed**989]; 260**Mass**344, 157**NE**684, 54**ALR**1422; **Utah** 275**P**9.

507–61 [b] **Evidence held sufficient.**–326 **Ill** 405, 158**NE**162.

507–66 18**F(2d)**371; 24**F(2d)**426.

507–67 See also 133**SC**112, 129**SE**210.

507–68 29**F(2d)**565 [certiorari den 279 **US**843, 49**SCt**264(6thcase), 73**L ed**989].

507–6½–New. to show only technical violation of restraining order; 170**Ark** 863, 281**SW**663.

507–71 **Utah** 280**P**715.

507–72 213**AppDiv**57, 211**NYS**284; 2 **OntWR**1032, 1102, 3 **OntWR**53, 630.

507–73½–New. to show that defendant had sold his business at the time the acts complained of were committed; **Utah** 275**P**9.

507–76 139 **Okl** 157, 281**P**144 (facts constituting contempt). [d] **Orders held insufficient.**–139 **Okl** 157, 281**P**144.

508–77½–New. Order directing mortgagee to account for proceeds of sale is held not erroneous as determining other questions involved in such. 99**NJEq**839, 133**A**299.

508–78½–New. Order requiring removal of stairway for violation of injunction against business use will be modified to permit alteration in use thereof so as to comply with injunction. 149**Md**182, 131**A**148.

508–82 99**NJEq**839, 133**A**299.

508–84 **MoA** 297**SW**187. See also 139 **Okl** 157, 281**P**144.

508–84½–New. Punishment is of two distinct kinds, one to enforce obedience to order, and the other to vindicate the dignity of the court. 139 **Okl** 157, 281**P** 144.

508–86 **MoA** 297**SW**187.

508–88 170**Ark**863, 281**SW**663.

508–94 Compare **Mass** 157**NE**684 (petition held broad enough to warrant punitive treatment).

509–99 [a] **In Oklahoma.**–139 **Okl** 157, 281**P**144.

509–1 166**Ga**43, 142**SE**153.

509–10 260**Mass**344, 157**NE**684, 54**ALR** 1422.

510–16 260**Mass**344, 157**NE**684, 54**ALR** 1422. [e] (1) 260**Mass**344, 157**NE**684, 54**ALR**1422. [g] (1) 260**Mass**344, 157 **NE**684, 54**ALR**1422.

510–18 30**F(2d)**454(2dcase). Contra **TexCivA** 299**SW**539.

511–24½–New. An order requiring a railroad to disestablish an employers' association which it had promoted and not to recognize it and directing restoration of employees discharged because of activities in connection with the employees' association does not go farther than an injunction restraining violation of the Federal Railway Labor Act. 25**F** **(2d)**876.

511–24½–New. A contempt order made on violation of an injunction restraining violation of the Federal Railway Labor Act should not go further than the injunction. 25**F(2d)**876.

INJURY

515–2½–New. Heat stroke held no injury under Workmen's Compensation Act. **TexCivA** 296**SW**688.

515–17½–New. Used synonymously with "accident." 125**Me**374, 134**A**163.

516–32 125**Me**524, 134**A**626.

516–48 [h] **Wound is included.**–312**Mo** 15, 278**SW**743.

517–55 [a] **Strangulation of hernia caused by lifting** is held compensable injury. 85 **IndA**347, 154**NE**35.

520–2 119 **Oh**101, 162**NE**382, **61ALR** 1343.

INNKEEPERS

527–1 288**Pa**428, 135**A**862 [quotCJ].

523–7 [g] **"Hotel" within meaning of particular statutes.**–General Business Law. 246**NY**169, 158**NE**63 (lodging house not furnishing food or maintaining public rooms and keeping no register is not "a hotel").

529–22 8**PaDist&Co** 6.

529–25 Contra 8**PaDist&Co** 6.

530–33 224**AppDiv**232, 230**NYS**44.

530–40 205 **Iowa**736, 218**NW**510, 511 [citCJ], 56**ALR**1098.

531–47 136**Wash**681, 241**P**298, 299 [quotCJ].

531–49 136**Wash**681, 241**P**298, 299 [quotCJ].

531–50 136**Wash**681, 241**P**298, 299 [quotCJ].

531–51 136**Wash**681, 241**P**298, 299 [quotCJ].

533–90 237 **IllA**77, 80 [quotCJ]; 145 **Wash**344, 259**P**1085.

533–94 197**Cal** 126, 239**P**1069 [citCJ] (one residing in hotel at owner's invitation before employment began); 237 **IllA**77, 80 [citCyc]; 133**Misc**611, 233 **NYS**113.

534–3 224**AppDiv**232, 230**NYS**44.

534–4½–New. Occupancy of rooms in hotel by others than proprietor's family and friends arises from contract. 284 **Pa**545, 131**A**537, 42**ALR**1081.

534–4½–New. Service of food to restaurant patron is held not "sale" at common law. 103**NJL**464, 135**A**805, 50 **ALR**227.

535–14 237 **IllA**77, 80 [quotCJ].

535–17 237 **IllA**77, 80 [quotCJ].

536–32 237 **IllA**77.

536–40 237 **IllA**77.

536–46 125 **Okl** 295, 244**P**1104.

537–64 Contra 8**PaDist&Co** 6 [disappr 12**PhilaPa**500].

537–65 145**Wash**344, 259**P**1085, 1086 [citCJ]. But see **TexCivA** 19**SW(2d)** 216.

537–66 See also **Ont** [1930] 3**DomLR** 722.

538–72 145**Wash**344, 259**P**1085. [c] **Persons held lodgers and not guests.**–145**Wash**344, 259**P**1085.

538–73 145**Wash**344, 259**P**1085.

538–74 145**Wash**344, 259**P**1085.

538–78 [a] **Held guest and not tenant.**–243 **IllA**118.

538–79 205 **Iowa**736, 218**NW**510, 56 **ALR**1098.

538–79½–New. Boarding house keeper may dispossess boarder without resort to summary proceedings. 125**Misc**649, 212**NYS**62.

538–80 79**Mont**25, 255**P**11, 54**ALR**1091.

538–81 79**Mont**25, 255**P**11, 54**ALR**1091.

538–82 [a] (2) Municipal corporation unauthorized under statute. 180**Ark**582, 21**SW(2d)**950.

539–86 79**Mont**25, 255**P**11, 54**ALR**1091.

539–88½–New. rooming houses, 79 **Mont**25, 255**P**11, 54**ALR**1091.

539–2 79**Mont**25, 255**P**11, 54**ALR**1091.

539–3 79**Mont**25, 255**P**11, 54**ALR**1091.

539–7 [a] (4) 79**Mont**25, 255**P**11, 54 **ALR**1091.

539–8 [c] **Written consent** of one owner and verbal consent of other owner is held insufficient. **NJSup** 134**A**187. [d] **One partner cannot bind other partner** respecting realty owned by both by filing written consent for license. **NJSup** 134**A**187.

540–10 79**Mont**25, 255**P**11, 54**ALR**1091. [a] **Ordinance need not prescribe all conditions** (1) on which license shall be granted or refused by city officials. 79 **Mont**25, 255**P**11, 54**ALR**1091. (2) Ordinance not prescribing all such conditions is not invalid as contemplating ex-

ercise of arbitrary power by city council. 79Mont25, 255P11, 54ALR1091.

541-39½-New. Statute imposing license tax on apartment houses renting rooms to transients does not relieve from tax owner occupying apartment as residence. Fla 130S716.

541-48 145Miss835, 111S370. [c] **Statute fixes minimum,** below which negligence per se arises. 34 OhA259, 117NE39.

541-51½-New. Presence of basement under three story hotel held not to make structure one of four stories required to be provided with life lines and nets. 34 OhA259, 171NE39.

541-53 See 224AppDiv232, 230NYS44.

541-54 145Miss835, 111S370.

541-60 214Ala396, 108S26.

541-61 214Ala396, 108S26.

541-62 214Ala396, 108S26.

542-70½-New. Hotel clerk acting within employment binds proprietor. 262 Mass41, 159NE456, 56ALR313.

542-71 136Wash681, 241P298, 299 [quotCJ].

542-79 214Ala396, 108S26.

542-80 214Ala396, 108S26.

543-90 214Ala396, 108S26; 91PaSuper195.

543-91 214Ala396, 108S26.

543-94 214Ala396, 108S26; 284Pa545, 131A537, 42ALR1081.

543-94½-New. , or law of the land. 284Pa545, 131A537, 42ALR1081.

544-34 197Wis382, 222NW320.

544-42 214Ala396, 108S26.

544-44 [a] (3) To authorize recovery against hotel keeper and hotel detective. 197Wis382, 222NW320. [b] **Evidence held insufficient** to warrant recovery for ejection. 197Wis382, 222NW320.

545-60½-New. A man who is not registered as a guest and whose presence is not known to the hotel management cannot recover damages for discourtesy of the innkeeper's employees in requesting him to register. 91PaSuper195.

545-60¾-New. A husband occupying with his wife a room reserved by her for herself alone but who has not registered nor been received as a guest has no standing to maintain an action for damages for discourtesy of the innkeeper's employees in requesting him to register or leave the hotel. 91Pa Super195.

545-62 106Conn551, 138A479, 480 [cit CJ], 53ALR1042; 254 IllA415; 87 IndA 333, 158NE294; 217AppDiv570, 216 NYS158; 8PaDist&Co 6.

545-66 106Conn551, 138A479, 53ALR 1042.

545-67 106Conn551, 138A479, 53ALR 1042.

546-68 106Conn551, 138A479, 53ALR 1042; 87 IndA333, 158NE294; 129Misc 329, 221NYS363; 125 Okl 239, 257P314. [a] (1) 125 Okl 239, 257P314. (2) And same construction upon these words was adopted by Oklahoma court. 125 Okl 239, 257P314.

546-69 106Conn551, 138A479, 53ALR 1042; 129Misc329, 221NYS363; 125 Okl 239, 257P314.

546-70 87 IndA333, 158NE294.

546-72 106Conn551, 138A479, 53ALR 1042; 251NY290, 167NE447; 125 Okl 239, 257P314.

546-75 237 IllA77.

547-79 237 IllA77.

547-85½-New. Failure to secrete valuables in hotel room does not constitute contributory negligence. 136Wash615, 241P14.

547-85¾-New. It is not negligence for guest to fail to secrete his valuables within his room. 136Wash615, 241P14.

547-2 125 Okl 239, 257P314.

548-7 159Tenn498, 19SW(2d)245 (if contract is treated as ordinary one of bailment, it is bailment for hire).

548-12 106Conn551, 138A479, 53ALR 1042; 251NY290, 167NE447; 217App Div570, 216NYS158; 129Misc329, 221 NYS363; 125 Okl 239, 257P314.

549-16 106Conn551, 138A479, 53ALR 1042.

549-17 [a] 125 Okl 239, 257P314.

550-23 106Conn551, 138A479, 482 [cit CJ], 53ALR1042; 217AppDiv570, 216 NYS158; 125 Okl 239, 257P314.

550-30 125 Okl 239, 257P314. [a] **As embracing samples of traveling salesmen.**–125 Okl 239, 257P314.

550-35 [a] (4) Automobile in garage operated in connection with hotel. 205 Iowa736, 218NW510, 511 [citCJ], 56 ALR1098.

550-37 106Conn551, 138A479, 53ALR 1042.

551-43 262Mass41, 159NE456, 56ALR 313. [b] **Hotel clerk** held not authorized to waive regulations regarding disposition of baggage as to guest familiar with regulation. 262Mass41, 159NE456, 56ALR313.

551-52 262Mass41, 159NE456, 56ALR 313.

551-60½-New. Limitation on check for trunk deposited at hotel to effect that baggage is left at owner's risk because no charge made for checking will not relieve hotel of its own negligence or that of its servants and agents. Tex CivA 276SW765.

551-66 106Conn551, 138A479, 481 [cit CJ], 53ALR1042.

551-67 106Conn551, 138A479, 53ALR 1042; 136Wash615, 241P14. [b] **In Texas.**–CommnA 23SW(2d)708.

552-69 136Wash615, 241P14.

552-70 106Conn551, 138A479, 480 [cit CJ], 53ALR1042; 126Misc247, 213NYS 333.

552-72 [a] **What constitutes delivery.**–129Misc329, 221NYS363.

552-76 82CalA155, 255P213, 214 [quot CJ]; TexCommnA 23SW(2d)708 (locks on guests' doors); 136Wash615, 241P 14.

552-78 251NY290, 167NE447; 136 Wash615, 241P14; Ont [1929] 2Dom LR612.

552-80 136Wash615, 241P14.

552-84 Contra Ont [1929] 2DomLR 612.

552-92 237 IllA77; 217AppDiv570, 216 NYS158 (restaurant).

552-93 236 IllA386; 237 IllA77; 217 AppDiv570, 216NYS158; 129Misc329, 221NYS363; 224AppDiv594, 231NYS 549; TexCivA 12SW(2d)633.

553-94 237 IllA77; 217AppDiv570, 216 NYS158.

553-96½-New. A hotel keeper is liable for full value of guest's wearing apparel delivered to it, even though guest failed to state value as required by statute. 126Misc247, 213NYS333.

553-96¾-New. Innkeeper receiving package without notice of value or request for special agreement may assume it was to be bound by statutory liability. 129Misc855, 223NYS733.

553-96¼-New. Innkeeper's liability for articles deposited is limited to articles specially exposed to theft, but usually in owner's custody. 129Misc855, 223 NYS733.

553-99 82CalA155, 255P213. [b] **In New York.**–126Misc247, 213NYS333.

553-13 82CalA155, 255P213; 8LaA479; 251NY290, 167NE447 (statute applicable where property is stolen by hotel employee); 129Misc329, 221NYS363; 136 Wash615, 241P14. [a] (1) See also 244 NY105, 155NE65. (7) **One thousand dollars.** 136Wash615, 241P14. (8) Five hundred dollars for money when amount not disclosed and there is no special written agreement. 129Misc329, 221NYS363. [b] **Exception where receipt is given.**–84CalA272, 258P155.

553-14 236 IllA386. But see 8Pa Dist&Co 6. See also 244NY105, 155NE 65.

553-14½-New. Hotel clerk's statement that key to box constituted receipt for guest's money is held not special agreement in writing within statute so as to extend hotel keeper's liability beyond statutory amount. 129Misc329, 221 NYS363.

554-22 TexCivA 276SW765.

555-24 BC [1925] 3DomLR433.

555-26 9LaA748, 120S269; BC [1925] 3DomLR433.

555-27 La 129S725; 125 Okl 295, 244 P1104.

555-28½-New. So, also, where one purchases a hotel he becomes a gratuitous bailee of baggage left there previous to his purchase. BC [1925] 3DomLR433.

555-29 87 IndA333, 158NE294 (in case of loss through negligence, whether owner was guest or roomer, is immaterial); La 129S725; TexCivA 276SW 765.

555-30 BC [1925] 3DomLR433.

555-37 IndA 158NE295.

555-37½-New. It has been held that such a gratuitous bailee is bound to exercise the care necessary under the circumstances. BC [1925] 3DomLR433.

555-38 Contra 87 IndA333, 158NE294.

556-51 [a] **Not essential** to notify innkeeper of contents of locked case. 106 Conn551, 138A479, 53ALR1042. [b] **Innkeeper must be notified** of intent to deposit goods with him. 106Conn551, 138A479, 53ALR1042.

556-52 TexCivA 276SW765.

557-64 TexCivA 276SW765.

558-97 244NY105, 155NE65.

558-4 [a] **In New York.**–244NY105, 155NE65.

558-4½-New. Statute limiting liability of restaurant proprietor to definite amount where value is not stated does not apply to cases of negligence. 126 Misc320, 213NYS380.

558-4¾-New. Statute limiting liability, being incapable of interpretation, does not change restaurant proprietor's common-law liability for negligence. 126 Misc320, 213NYS380.

559-14½-New. An action to enforce an innkeeper's liability for loss of a guest's baggage by fire is transitory and may be enforced wherever jurisdiction of the person can be acquired. 170Ark440, 280 SW20.

559-15 8PaDist&Co 6.

559-16 See also 159Tenn498, 19SW(2d) 245.

559-19½-New. In California, in the absence of a special contract of storage, the action is barred under the ninety-day statute. 88CalA597, 264P268.

559-21 159Tenn498, 19SW(2d)245 (sufficient without alleging cause of loss).

559-25 159Tenn498, 19SW(2d)245 (duty to plead sufficient excuse for failure to return property).

559-25½-New. The question whether a contract sued on was an ordinary one of bailment or a contract between an innkeeper and a guest is a conclusion of law for the court on demurrer to a declaration. 159Tenn498, 19SW(2d)245 (demurrer held insufficient).

560-29 237 IllA77; 126Misc247, 213 NYS333; 136Wash615, 241P14.

560-30 126Misc247, 213NYS333; 136 Wash615, 241P14.

560-34 129Misc329, 221NYS363.

560-35½-New. Burden of proof in an action for loss of baggage is on the guest. 126Misc247, 213NYS333.

560-38 159Tenn498, 19SW(2d)245.

560-47 [b] (7) That defendant had been guilty of other acts of negligence disconnected with present case. Tex CivA 276SW765.

561-48 [b] (2) 237 IllA77; 130Misc 656, 224NYS273; TexCivA 12SW(2d) 633. (5) 217AppDiv570, 216NYS158. [c] (6) To warrant finding that statutory notice had been kept posted in rooms. 136Wash615, 241P14. (7) To show guest was guilty of contributory negligence. 136Wash615, 241P14.

561-50 [b] 106Conn551, 138A479, 53 ALR1042; 8PaDist&Co 6. [c] **Instruction that plaintiff has burden of proving negligence** without reference to presumption arising from failure to return guest's coat, after which jury found for plaintiff, gives no cause for complaint to defendant. 126Misc320, 213NYS380.

561-51 [a] (4) Liability for wrecking of guest's automobile by bell boy who took it from garage designated by doorman as hotel garage. TexCivA 300SW 651.

561-52 TexCommnA 23SW(2d)708.

561-53 TexCivA 19SW(2d)216.

561-56 215AppDiv294, 214NYS66; 224 AppDiv232, 230NYS44.

562-57 91CalA715, 267P741, 744 [cit CJ]; 215AppDiv294, 214NYS66; 296 Pa249, 145A822.

562-58 224AppDiv232, 230NYS44.

562-59 143 Okl 196, 288P309.

562-59½-New. Placing cuspidors in public room of hotel is not negligence as to guest whose ankle was cut thereby. 131Misc525, 227NYS281.

562-61 NJ 130A4 (cafeteria); 224App Div232, 230NYS44.
562-62 247 IllA239.
562-63 143 Okl 196, 288P309.
562-67 147Wash257, 265P472, 473 [quotCJ].
562-68½-New. For negligence of physician having office in hotel in treating guest, the hotel is not liable in the absence of allegations that he was incompetent and was employed by, or represented, the hotel. 215AppDiv294, 214 NYS66.
562-68½-New. or that the hotel was negligent in recommending the physician. 215AppDiv294, 214NYS66.
562-68¼-New. There is no relation of respondeat superior between a hotel and a physician having an office in the hotel. 215AppDiv294, 214NYS66.
562-69 284Pa545, 131A537, 42ALR 1081.
562-69½-New. -, nor would innkeeper be responsible for consequences of guest's willful acts in throwing articles to street unless he could prevent it. 284Pa545, 131A537, 42ALR1081.
562-72½-New. Liability as to injury from food served is based on reasonable case. 103NJL464, 135A805, 50ALR227.
562-73 24F(2d)280; 220AppDiv613, 222NYS273.
563-74 111Conn726, 150A702 (hotel clerk as agent of hotel). [b] Falling into open ditch in pathway.-136Wash 681, 241P298.
563-77 128Kan609, 278P722.
563-78 22AltaL237, [1926] 4DomLR 87, [1926] 2WestWkly557.
563-84½-New. Hotel keeper is held not negligent for injury received from floor lamps falling on guest because of another guest's tilting chair against it merely because it is unfastened to floor. 220AppDiv613, 222NYS273.
563-87 32 OhA26, 167NE589 (highest degree of care); Utah 267P186.
563-90 223AppDiv237, 227NYS671.
563-96 84CalA465, 258P394.
563-97 206Cal 494, 274P955.
563-98 But see 206Cal 494, 274P955.
564-12 294Pa291, 144A71.
564-22½-New. A guest who leaves a bunkhouse by one door has been held to have the right to return by way of another door without being guilty of contributory negligence. 136Wash 681, 241P298.
564-24 145Miss835, 111S370; 224App Div232, 230NYS44.
564-25 145Miss835, 111S370. [b] See also 145Miss835, 111S370.
565-27 10PaDist&Co 632.
565-28 But see 34 OhA259, 171NE39.
565-29½-New. Owner of hotel building providing fire escapes as provided by law is absolved from negligence in not providing other means of escape. TexCivA 292SW950.
565-32½-New. A statute regulating hotels and stating the duties of a hotel inspector has no bearing on a cause of action for injuries to a guest nor on defenses which defendant may interpose. 128Kan609, 278P722.
565-36 128Kan609, 278P722.
565-40 130Misc667, 224NYS722.
565-44 220AppDiv613, 222NYS273; 284Pa545, 131A537, 42ALR1081; Tex CivA 292SW950. See also 224AppDiv 232, 230NYS44. [a] Res ipsa loquitur held inapplicable.-284Pa545, 131A537, 42ALR1081. [b] Doctrine of res ipsa loquitur held inapplicable.-34 OhA259, 171NE39; 300Pa1, 149A644.
565-45 [a] Fact that fire breaks out in hotel raises no presumption of negligence. 296Pa249, 145A822.
565-50½-New. Negligence of a guest killed by a fall into a shaft cannot be presumed. 91CalA715, 267P741.
565-50½-New. The burden of proving that a guest waived the hotel's violation of the Fire Escape Law is on defendant proprietor. 224AppDiv232, 230 NYS44 (if such defenses are available).
565-52 [a] (6) Contradictory statements. 236 IllA386.
566-53 [b] (1) 296Pa249, 145A822 (inaccessible fire escape). (8) To sustain verdict for defendant. 130Misc667, 224NYS722. (9) Establish that violation of statute as to protection from fire was proximate cause of injury. 224 AppDiv232, 230NYS44. (10) Sustain finding that building was hotel. 224 AppDiv232, 230NYS44. (11) Support findings. 91CalA715, 267P741. (12) Raise presumption that guest reached window near fire escape and was unable to open it because of its defective condition. 296Pa249, 145A822. [c] (6) To warrant finding that floor lamp was so top-heavy as to be easily toppled over. 220AppDiv613, 222NYS273. (7) To warrant inference restaurant owner knew of dangerous substance in vestibule on which customer slipped. 255 Mass121, 150NE878. (8) Show that falling bottle fell from window sill and not from some other building across street. 284Pa545, 131A537, 42ALR1081. [d] Proof of compliance with law relating to exits held not to acquit of charge of common-law negligence. 34 OhA259, 171NE39.
566-54 [b] Refusal to direct verdict held improper.-255Mass121, 150NE878; 284Pa545, 131A537, 42ALR1081.
566-55 Ind 156NE414. [a] Ind 156NE 414. [b] Instructions held improper.-143 Okl 196, 288P309.
566-56 102CalA697, 283P837; 128Kan 609, 278P722; 224AppDiv232, 230NYS 44; 34 OhA259, 171NE39.
566-57 24F(2d)280; 128Kan609, 278P 722; 223AppDiv237, 227NYS671; 32 OhA26, 167NE589; Utah 267P186; 136 Wash681, 241P298.
566-58 223AppDiv237, 227NYS671.
566-60 223AppDiv237, 227NYS671; 130Misc667, 224NYS722.
566-60½-New. of appliances, 220App Div613, 222NYS273.
566-63 34 OhA259, 171NE39.
566-68 214Ala396, 108S26; 284Pa545, 131A537, 42ALR1081.
566-69 214Ala396, 108S26; 284Pa545, 131A537, 42ALR1081.
566-70 214Ala396, 108S26.
566-71 214Ala396, 108S26.
566-73 214Ala396, 108S26; 284Pa545, 131A537, 42ALR1081.
566-74 214Ala396, 108S26; 284Pa545, 131A537, 42ALR1081.
567-77 214Ala396, 108S26.
567-79 214Ala396, 108S26.
567-80 214Ala396, 108S26.
567-81 86PaSuper359.
567-84 [a] Punitive damages.-86PaSuper359.
567-89 91PaSuper195.
567-89½-New. Innkeeper's suspicion of improprieties on part of guests will not authorize violation of right of guests. 214Ala396, 108S26.
567-89½-New. Subsequent apology of hotel manager does not relieve hotel from liability for wrongful conduct of servants. 214Ala396, 108S26.
567-92 [a] (2) In action for humiliation, insults, and disturbance by hotel servants, testimony that voice and manner of house officer of hotel was insulting is held admissible. 214Ala396, 108S26. (3) Evidence that conduct of servants arose through mistake as to persons occupying rooms is held admissible in mitigation of damages on question of wanton misconduct. 214Ala396, 108S26. [b] (1) 86PaSuper359. (2) Other questions. 86PaSuper359. (3) Whether servants of innkeeper acted properly in discharge of their duties in supervising conduct of persons in room engaged by wife or were abusive to her when she permitted husband who had not registered to occupy room with her. 91Pa Super195. [c] Instructions held improperly refused.-214Ala396, 108S26. [d] Instructions held proper.-214Ala396, 108S26. [e] Remarks of counsel.-86Pa Super359.
567-97½-New. Liability of innkeeper for act of guest. If the flooding of a lower floor leased to plaintiff was caused by a guest in a hotel room above leaving the faucet turned, defendant hotel keeper was not liable for damages caused. TexCivA 14SW(2d) 367 (burden of proof).
568-25 247Mich226, 225NW549.
569-26 254 IllA415 (statute not unconstitutional as denying due process); 125 Okl 239, 257P314.
569-31 205 Iowa736, 218NW510, 511 [citCJ], 56ALR1098.
569-37½-New. A hotel keeper has been held not to have a lien for storage charges incurred in caring for deceased tenant's property. 133Misc715, 233NYS 676.
569-38 133Misc715, 233NYS676.
570-59 [b] Automobile under control of guest in garage operated in connection with hotel is not baggage subject to lien. 205 Iowa736, 218NW510, 511 [citCJ], 56 ALR1098.
570-68 See also 243 IllA118.
571-73 254 IllA415 (samples of traveling salesman).
571-86 10LaA6, 119S444(1stcase).
571-97 125 Okl 239, 257P314.
572-13 [a] (5) Apartment house is not rooming house within statute. 205 Iowa 736, 218NW510, 56ALR1098.
573-42½-New. Innkeeper cannot use hotel as place for committing crime himself, nor knowingly permit it to be so used by others. Wash 287P667.
573-43 169Ark527, 275SW902; 35GaA 499, 133SE880.
574-46 39GaA540, 147SE777(2dcase).
574-47 [a] (4) The statute applies only to persons obtaining accommodations for themselves. 169Ark527, 275SW902.
574-49 35GaA499, 133SE880.

INNUENDO

576-31 254Mass424, 150NE190. [a] Other definitions.-80Mont70, 258P242.

IN PARI DELICTO MELIOR EST CONDITIO POSSIDENTIS

576-63 [a] 152Tenn339, 279SW257. [b] 152Tenn339, 279SW257.

INSANE PERSONS

593-16 320 Ill 577, 151NE526.
593-19 312Mo 62, 278SW735.
593-27 34Ariz308, 271P411; Wis 232 NW866. [f] One unconscious of physical nature and consequences of act is, in contemplation of law, insane. 312 Mo 62, 278SW735.
594-28 199Cal 759, 251P778, 780 [quot CJ].
594-30 TexCr 28SW(2d)133.
594-31 199Cal 759, 251P778, 780 [quot CJ].
594-34 199Cal 759, 251P778, 780 [quot CJ].
594-44 See also 121Kan797, 250P308.
596-85 144SC252, 142SE498.
600-55 121Kan797, 250P308.
600-56 121Kan797, 250P308.
602-7 See also 115 OhSt326, 154NE317.
603-22 [b] One so disturbed by delirium as to be unconscious of physical nature and consequences of acts is, in contemplation of law, insane. 312Mo 62, 278SW735.
604-66 TexCivA 295SW326, 331 [quot CJ].
606-78 210Ky731, 276SW820.
606-81 210Ky731, 276SW820. [a] 210 Ky731, 276SW820.
609-30 See also 12PaDist&Co 25.
609-45 48Philippine772.
610-59 98NJEq1, 131A101.
610-60½-New. Epilepsy is a disease of the nervous system. 98NJEq1, 131A101.
611-67 98NJEq1, 131A101.
615-98 [b] Term means derangement of mind; madness; insanity. 316Mo 665, 291SW481.
618-77 34Ariz308, 271P411.
619-15 [b] (2) "Sane or insane" in exemption clause in accident policy includes entire range of mental condition. 218MoA374, 271SW867. (3) Expression "sane or insane" covers entire range of mental condition; whatever is not included in one term is included in other. 312Mo 62, 278SW735. [c] (2) In accident policy, term "suicide, sane or insane" includes entire range of mental condition. 312Mo 62, 278SW735. [f] "Sane" and "insane" are antipodes of each other. 218MoA374, 271SW867.
620-35 116 Or467, 241P996, 997 [cit CJ].
621-51 206Cal 592, 275P794.
621-55 116 Or467, 241P996, 997 [quot CJ].
621-56½-New. , every mental deficiency or derangement. 115 OhSt326, 154NE 317.

621-57 116 Or467, 241P996, 997 [quot CJ].
621-58 320 Ill 577, 151NE526; 233Ky 636, 26SW(2d)506.
621-59 See also 115 OhSt326, 154NE 317.
622-63 72CalA773, 238P171.
622-67 72CalA773, 238P171.
623-6 TexCivA 271SW217 (such being is not person in ordinary and general acceptation of term); TexCivA 290SW 829, 830 [citCJ].
624-15 TexCivA 290SW829, 830 [cit CJ].
624-31 TexCivA 290SW829, 830 [cit CJ].
625-50 CalA 268P688.
626-87 198Cal 183, 244P343.
627-94 [a] **Reservation to circuit court of general control over guardians** is within power of general assembly. 317 Mo 828, 297SW382.
627-97 Contra 274US200, 47SCt584, 71 L ed1000.
627-98 Contra 274US200, 47SCt584, 71 L ed1000. [a] **Statutes held not unconstitutional.**–Utah 276P921.
627-99 236Mich478, 210NW498. Contra 274US200, 47SCt584, 71L ed1000.
627-6 233Ky636, 26SW(2d)506; 100 NJEq370, 136A408, 409 [citCJ]; 33 PortoRico602.
627-6½-New. But a lunacy proceeding is not a civil action and procedure provisions of the code of civil procedure are not applicable. 77Colo 310, 236P 995.
627-7 77Colo 310, 236P995. [b] **Incompetency can be determined** only in proceeding brought for that purpose. NJ Ch 151A274.
627-11 100NJEq370, 136A408, 409 [cit CJ].
627-12 100NJEq370, 136A408, 409 [cit CJ].
627-13 Ala 129S51.
628-16 MoA 298SW1055(2dcase).
628-17 Ala 129S51.
628-18 98Fla627, 125S2.
628-21 198Cal 183, 244P343.
628-23 198Cal 183, 244P343.
628-28 Fla 130S596; 100NJEq370, 136 A408.
628-32 83Colo 282, 264P662; 327 Ill 381, 158NE720; Ind 166NE657. See also Ont [1930] 4DomLR597. [a] **Jurisdiction to appoint conservator** is not affected by subsequent adjudication of lunacy. 83Colo 282, 264P662.
629-34 228Ky32, 14SW(2d)189.
629-35 82Colo 550, 262P89, 96 [citCJ]; TexCivA 7SW(2d)940. [a] (2) TexCivA 7SW(2d)940. [b] **County judge, though not lawyer,** is qualified to preside at inquest. 233Ky636, 26SW(2d)506.
629-37 198Cal 183, 244P343; 327 Ill 381, 158NE720; 248Mich512, 227NW 754; 218MoA440, 277SW607.
629-41 27 OhNPNS16 (jurisdiction of one acquitted of crime on sole ground of insanity).
629-42½-New. Court of domestic relations has original and exclusive jurisdiction to make an order committing persons of the full age of eighteen years to an institution for the feebleminded, 119 Or550, 249P1097.
629-42½-New. and a girl of seventeen may be so committed, although by reason of being married statutes declare her to have arrived at majority. 119 Or550, 249P1097.
629-42¼-New. The record must show on its face every fact necessary to jurisdiction. 219Ala457, 122S444.
629-42½-New. Jurisdiction does not depend on applicant's ability to prove the averments of the application. Tex CivA 7SW(2d)940.
629-43 [b] **Entire income from trust fund is "estate"** within statute permitting appointment of conservator for incompetent having estate real or personal. 327 Ill 381, 158NE720.
629-49 218MoA440, 277SW607.
629-50 218MoA440, 277SW607.
629-52 MoA 18SW(2d)147; 86PaSuper 38; TexCivA 31SW(2d)835. [a] **Rule applies though husband of insane person has his domicile elsewhere.**–160La 953, 107S708.
630-54 126Kan268, 267P1112.
630-57 But see 244Mich148, 221NW165.
630-63 161La490, 109S41; 254Mass325, 150NE228. But see 24 OhNPNS46.
630-67½-New. A court, having general probate jurisdiction to which application is made, should decide the question as to the residence of the non compos mentis. TexCivA 7SW(2d)940.
630-67⅓-New. As regards jurisdiction to appoint guardian, situs of portion of ward's estate consisting of future monthly allowances by government follows legal residence of ward. TexCivA 31SW (2d)835.
630-67¼-New. For such purpose situs of portion of estate consisting of money misapplied by guardian is constructively within county wherein guardian was appointed. TexCivA 31SW(2d) 835.
630-80 27 OhNPNS 16 (statute requiring certificate of two medical witnesses is inapplicable to one acquitted of crime on sole ground of insanity).
631-86 164La1026, 115S133; 311Mo 551, 279SW122.
631-91 198Cal 183, 244P343; 28Hawaii 469. [b] 198Cal 148, 243P674; 198Cal 183, 244P343; 200 Iowa1258, 206NW90; 208 Iowa582, 226NW33; La 130S866. [c] 165Minn103, 205NW886; 114Nebr 704, 209NW492; 26 OhNPNS533; 6Pa Dist&Co 604; TexCivA 291SW950.
632-92 200 Iowa1258, 206NW90.
632-94½-New. It is not necessary that the person shall be violent or dangerous to safety of community to authorize appointment of guardian. 28Hawaii469.
632-96 La 130S866.
632-10 24 OhNPNS46 (peaceful enjoyment of person and estate not interfered with unless interests require it).
632-15 9PaDist&Co 278. [c] 86PaSuper194.
634-47 101NJEq1, 137A93.
634-53½-New. Commitment of a person without the appointment of a guardian is void. 151Wash321, 275P724(1st case).
634-58 219Ala457, 122S444; 317Mo 228, 295SW794, 798 [quotCJ]; Or 289 P511; TexCivA 5SW(2d)221. But see 158Md654, 149A446.
634-62 100NJEq370, 136A408.
634-68 158La148, 103S721 (corporation defendant may institute proceedings against plaintiff who has become insane).
634-72½-New. Creditors may institute lunacy proceedings. 100NJEq370, 136 A408.
634-72⅓-New. Commission may issue on petition of strangers on information by attorney-general. 100NJEq370, 136 A408.
635-79 [b] 316Mo 665, 291SW481; 218 MoA440, 277SW607 (sufficient to give probate court jurisdiction to hear evidence and determine its jurisdiction). [c] 317Mo 228, 295SW794.
635-97 CalA 285P330; 77Colo 310, 236 P995; 82Colo 550, 262P89; Mo 26SW (2d)768; 217MoA333, 272SW1089 (appointment of attorney does not dispense with necessity of notice); 125Misc92, 210NYS594.
636-5 206Cal 346, 274P337; 77Colo 310, 236P995; 98Fla627, 125S2; 166 Ga631, 144SE24; 217MoA333, 272SW 1089.
636-6 219Ala457, 122S444; 317Mo 228, 295SW794; 217MoA333, 272SW1089.
636-7 166Ga631, 144SE24; 217MoA333, 272SW1089.
636-22 151Wash321, 275P724(1stcase). [a] (1) 166Ga631, 144SE24. (2) In determing meaning of word "nearest" in Civ. Code (1910) § 3092, resort may be had to Civ. Code § 3931 pars 4, 5. 166 Ga631, 144SE24. (3) As between sister of imbecile and adult child of deceased child of imbecile, adult child is nearest related. 166Ga631, 144SE24.
637-23 MoA 274SW482; 218MoA440, 277SW607 (reasonable notice is all that is required). [b] 317Mo 228, 295SW794.
637-24 Mo 26SW(2d)768 (person given written notice is charged with knowledge of insufficiency of notice or validity of judgment).
637-26 77Colo 310, 236P995.
637-27 218MoA440, 277SW607 (held sufficient). [b] **In Missouri.**–217MoA 333, 272SW1089.
637-36 77Colo 310, 236P995. [a] (1) 165Ga873, 142SE273.
637-37 218MoA440, 277SW607 (service three days prior to hearing held sufficient).
637-46 77Colo 310, 236P995 (two days' notice required by Comp. L. § 552 cannot be waived by guardian ad litem).
637-47 [c] **Permission of court** to guardian ad litem is necessary to make waiver of five days' notice valid unless in aggravated case. 77Colo 310, 236P 995.
637-48 82Colo 550, 262P89. [a] 316Mo 665, 291SW481.
638-50 206Cal 346, 274P337. [a] **Appearance by attorney appointed by court without request or approval of subject of inquiry** does not constitute waiver of insufficiency of notice. 317Mo 228, 295 SW794.
638-56 248Mich512, 227NW754.
639-79 TexCivA 5SW(2d)221. See also 32F(2d)839.
639-80 82Colo 550, 262P89, 95 [citCJ].
639-88 TexCivA 291SW950; TexCivA 5SW(2d)221. [d] **Appointment of counsel.**–164La1026, 115S133.
639-89 TexCivA 291SW950.
640-99 See also 82Colo 550, 262P89.
640-10½-New. Motives of person applying for appointment of guardian inquired into. 24 OhNPNS46.
640-10⅓-New. Motive of plaintiff is of little or no value in determining capacity of alleged incompetent. La 130S866.
640-20 [b] 100NJEq370, 136A408.
641-28 243Mich309, 220NW710.
641-29 TexCivA 291SW950. [b] **Instructions held sufficient.**–233Ky636, 26 SW(2d)506.
641-45 82Colo 550, 262P89. [b] **Time and place** of examination may be determined by commission where not specified by statute. 82Colo 550, 262P89.
642-63½-New. The record showing the alleged incompetent living happily and his property well managed did not authorize the appointment of a committee. 226AppDiv811, 234NYS438.
642-63⅓-New. Issuance of a commission is justified only when it presumptively appears that the person is incompetent. 226AppDiv811, 234NYS438.
642-81 [c] 316Mo 665, 291SW481.
643-86½-New. Proceedings are void where the decree does not affirmatively show the execution of a writ by taking the alleged lunatic into custody. 219 Ala453, 122S440.
643-92 82Colo 550, 262P89.
643-93½-New. The motion should allege that the insane person was not a resident and that the court assumed jurisdiction without finding his residence. MoA 18SW(2d)147.
643-93⅓-New. Proceeding to trial in a proceeding to set aside an adjudication of insanity waived failure of a motion to state sufficient facts. MoA 18SW(2d) 147.
643-96 77Colo 310, 236P995 (county courts).
643-97 77Colo 310, 236P995 (court's jurisdiction is continuing one till lunatic's death or discharge).
643-7½-New. Memorandum on a lunacy judgment, showing defendant's release upon the doctor's recommendation, did not prove the judgment's annulment. 109TexCr440, 5SW(2d)157.
643-7⅓-New. Proof of a custom to enter judgments against drug addicts for the purpose of treating them held inadmissible to impeach judgments of lunacy. 109TexCr440, 5SW(2d)157.
643-7¼-New. Bill held sufficient to show fraud in procurement of the decree and want of jurisdiction. 219Ala453, 122S440.
643-7½-New. A guardian and the surety are properly joined in a bill to set aside a proceeding and for an accounting. 219Ala453, 122S440.
643-7⅓-New. Adjudication may be set aside for want of jurisdiction where there was no finding that the insane person was a resident of the county and there was an affirmative showing of nonresidence. MoA 18SW(2d)147.
643-8 CalA 285P330.
644-26 100NJEq370, 136A408.
644-30 100NJEq370, 136A408.
644-31 100NJEq370, 136A408.
644-32 100NJEq370, 136A408.
645-34 100NJEq370, 136A408.

645–36½–New. Where a petitioner wishes to drop a case, the prosecution will be directed to proceed if the person appears insane. 100**NJEq**370, 136**A** 408.

645–50 6**PaDist&Co** 778.

645–53 6**PaDist&Co** 778.

646–70 100**CalA**325, 279**P**1048.

646–71–76 92**CalA**411, 268**P**434. But see 317**Mo** 228, 295**SW**794.

646–77½–New. Refusal of the court to expunge alleged libelous statements in incompetency proceedings is conclusive in the absence of appeal or resettlement of the order. 223**AppDiv**849, 228 **NYS**544.

646–81 144**SC**252, 142**SE**498.

646–90 206**Cal** 592, 275**P**794; **CalA** 268 **P**688; 83**Colo** 282, 264**P**662; **Kan** 289**P** 446; 127**Misc**505, 217**NYS**280.

646–91 109**TexCr**251, 48**W(2d)**74, 77 [quotCJ].

646–92 46 **Ida**313, 268**P**31; **Iowa** 225 **NW**948; 106**TexCr**558, 293**SW**1104.

646–95½–New. Unconstitutionality of the law authorizing a trial of one accused of lunacy by a doctor renders lunacy judgments of the doctor's commissions invalid. 109**TexCr**440, 5**SW (2d)**157.

647–99 163**Ga**18, 135**SE**402.

647–1 102**TexCr**517, 278**SW**840.

647–3 98**Fla**266, 123**S**732; 104**NJL**519, 140**A**408; 127**Misc**505, 217**NYS**280.

647–4 87**CalA**68, 261**P**1059; 330**Ill** 106, 161**NE**99; 224**AppDiv**262, 229**NYS**761; **TexCivA** 21**SW(2d)**1094; **TexCivA** 27 **SW(2d)**263.

647–10 206**Cal** 592, 275**P**794; 201 **Iowa** 586, 207**NW**598; **Kan** 289**P**446; 228**Ky** 32, 14**SW(2d)**189.

647–11 217**Ala**506, 116**S**686; **CalA** 291 **P**887; 214**Ky**716, 283**SW**1044; 127**Misc** 505, 217**NYS**280; **TexCivA** 27**SW(2d)** 263. [a] **Testamentary incapacity** is not conclusively established by adjudication of insanity. 300**Pa**116, 150**A**159.

647–13 163**Ga**18, 135**SE**402; 214**Ky**716, 283**SW**1044; 29**PortoRico** 874; 106**Tex Cr**558, 293**SW**1104. See also 109**TexCr** 251, 48**W(2d)**74(2dcase).

647–15 **Kan** 289**P**446; 214**Ky**716, 283 **SW**1044; 102**TexCr**517, 278**SW**840; 109 **TexCr**251, 48**W(2d)**74. See also 48**Philippine**772, 811 [citCJ]. [a] **In Porto Rico.**–29**PortoRico** 874. [b] **Burden of proof is on one asserting sanity.**–163**Ga** 18, 135**SE**402. [c] **No proof of discharge from asylum is necessary,** mere proof of present normalcy being sufficient. 102**TexCr**517, 278**SW**840.

647–17 127**Misc**505, 217**NYS**280.

648–22 201 **Iowa**586, 207**NW**598.

648–23 See also 109**TexCr**251, 48**W(2d)** 74.

648–24 214**Ky**716, 283**SW**1044.

648–26 29**PortoRico** 874. [a] (3) Where several years after person was adjudged incompetent his actual competency is shown by proof of present ability to protect interests by consulting counsel, by estoppel of plaintiff who treated him as competent, and otherwise, effect of adjudication vanishes. 127**Misc**505, 217 **NYS**280.

648–28 122**Kan**762, 253**P**424, 425 [quot CJ].

648–30 122**Kan**762, 253**P**424, 425 [quot CJ].

648–34 218**MoA**440, 277**SW**607; **MoA** 291**SW**156; 136**Wash**265, 239**P**385. [e] **Proceeding to set aside verdict of jury and order of court** is collateral attack on judgment. 32**F(2d)**839. [f] **Erroneous determination by court as to jurisdiction of subject matter or of persons** does not show lack of jurisdiction. **CalA** 285**P**330.

648–35 136**Wash**265, 239**P**385.

648–36 317**Mo** 228, 295**SW**794.

648–38 32**F(2d)**839; **CalA** 285**P**330; **MoA** 291**SW**156; 114 **Okl** 143, 244**P** 787.

649–42 [a] **In Missouri.**–**A** 2**SW(2d)**189.

649–48 **TexCivA** 292**SW**249.

649–49 **MoA** 2**SW(2d)**189.

649–50 327 **Ill** 381, 158**NE**720.

649–52 **TexCivA** 291**SW**950.

649–54½–New. In Porto Rico an appeal from a judgment of dangerous insanity is governed by the ordinary procedure of appeals in criminal cases in district courts. 33**PortoRico** 602.

649–64½–New. In some jurisdictions any reputable citizen of the county may appeal. **MoA** 2**SW(2d)**189.

650–65 [i] **Alteration in affidavit of service of notice is assumed** to have been properly accounted for to court appointing guardian. **CalA** 285**P**330. [j] **Harmless error.**–233**Ky**636, 26**SW(2d)** 506.

650–66 [a] **In Ohio.**–24 **OhNPNS**46.

650–68 [b] **Evidence held to show** that defendant did not have fair hearing owing to failure of guardian ad litem to guard defendant's rights. 77**Colo** 310, 236**P**995. [c] **Time.**–77**Colo** 310, 236**P** 995. [d] **Procedure.**–243**Mich**309, 220 **NW**710.

650–69 206**Cal** 346, 274**P**337; **TexCivA** 291**SW**950. [a] **Petition for certiorari** to revise judgment, declaring petitioner insane, lies without first proceeding by bill of review in county court. **TexCivA** 291**SW**950. [b] **Lunacy proceedings** should be tried de novo on certiorari to district court to revise judgment. **TexCivA** 291**SW**950. [c] **Petition for certiorari** authorizes writ where it shows petitioner's lack of knowledge of proceeding and alleges she was not of unsound mind. **TexCivA** 291**SW**950. [d] **In motion to dismiss certiorari,** petition must be taken as true. **TexCivA** 291**SW**950. [e] **Certiorari will issue** where petition shows injustice may have been done without petitioner's fault. **TexCivA** 291**SW**950.

650–71 [b] **Statute providing that person applying for committal shall not be liable for costs** refers to court costs. **Ind** 173**NE**321.

651–85 **NJCh** 149**A**64(1stcase).

652–9 206 **Iowa**303, 220**NW**85; **NJCh** 151**A**274.

652–11 5**PaDist&Co** 472.

652–13 327 **Ill** 381, 158**NE**720.

652–21 170**La**859, 129**S**371. [a] **Rules governing tutorship have no application** in appointment of curator. 170**La**859, 129**S**371.

652–22½–New. **State may act** to have a guardian appointed. 5**PaDist&Co** 472.

652–22½–New. A court of proper jurisdiction may appoint a guardian for an insane person if the first appointment was void. **MoA** 18**SW(2d)**147.

652–24 101**NJEq**1, 137**A**93.

653–27 101**NJEq**1, 137**A**93.

653–44 [a] **Upon jury's finding** that party is of unsound mind, court must immediately appoint guardian of both person and estate. **TexCivA** 291**SW** 950.

653–49 [a] **Implied conclusion of court that alleged incompetent was unable to attend** may be supported by evidence of sworn statement of physician. **CalA** 279**P**1004 (truth of affidavit not reviewable on certiorari).

653–51½–New. A guardianship proceeding is not adversary. 201 **Iowa**405, 205 **NW**645.

653–51½–New. It is both prosecuted and defended in the interest of the ward alone. 201 **Iowa**405, 205**NW**645.

653–51¼–New. Statutes in some jurisdictions provide that the proceedings shall be commenced in the county where the person of unsound mind resides. **TexCivA** 290**SW**852.

653–51½–New. Such statutes are mandatory and jurisdictional, **TexCivA** 290 **SW**852.

653–51½–New. and appointment of a guardian by the court of any other county is void. **TexCivA** 290**SW**852.

653–51½–New. Court is not required to appoint guardian for war veteran because director of veterans' bureau required appointment before payment of benefits. 158**Md**654, 149**A**446.

653–53 317**Mo** 228, 295**SW**794, 800 [cit CJ]; **TexCivA** 291**SW**950.

653–56½–New. In a proceeding for the appointment of a guardian for an incompetent, it is not necessary to wait until actual loss or damage has been suffered, but it is sufficient if mental weakness exists which makes such person easy prey for designing persons. 95**CalA**641, 273**P**69.

653–56½–New. Statute relating to appointment of guardian for veteran when required by director of veterans' bureau has been held not open to objection of denial of due process. 158**Md**654, 149**A** 446.

653–57 170**La**859, 129**S**371.

654–72 [a] 93**CalA**320, 269**P**758. [b] 95**CalA**641, 273**P**69.

655–90 **Or** 289**P**511.

655–91 But see **Va** 150**SE**413.

655–93 40 **OklACR**591 [reh pending].

655–1 But see 206**Cal** 346, 274**P**337.

656–13 201 **Iowa**525, 207**NW**613.

656–14 201 **Iowa**525, 207**NW**613.

656–14½–New. The appointment of a temporary guardian on proper and sufficient notice is valid, although the statute authorizing such appointment is silent as to notice. 201 **Iowa**525, 207**NW** 613.

656–25½–New. An order approving the final report of one guardian and appointing another without notice to the incompetent is not invalid. **Iowa** 228 **NW**661.

656–28 [a] 201 **Iowa**525, 207**NW**613; 142 **Okl** 165, 286**P**319. [b] **In Oklahoma.**–40 **OklACR**591 [reh pending] (sufficiency of citation).

657–29 [d] **Service in same manner as summons in civil action** is required in some jurisdictions. 40 **OklACR**591 [reh pending]. [e] **By whom served.**–40 **Okl ACR**591 [reh pending]. [f] **Failure of court orders to name incompetent,** served with citation, as one who should be, and was, notified, did not invalidate proceedings. **Cal** 287**P**474.

657–30 40 **OklACR**591 [reh pending].

657–35 206**Cal** 346, 274**P**337. [b] **In Oklahoma.**–122 **Okl** 202, 253**P**300.

657–35½–New. Some statutes do not require the notice of hearing on application for the appointment of a special guardian to be fixed by the court or judge. 201 **Iowa**525, 207**NW**613.

657–38 206**Cal** 346, 274**P**337.

657–40 **Or** 289**P**511.

657–41 [a] **Citation, not addressed to incompetent person,** though irregular, is not void. **CalA** 287**P**534.

657–42 **CalA** 287**P**534.

657–43 83**Colo** 282, 264**P**662.

657–43½–New. A husband may waive the posting of statutory notice of application of appointment of a guardian for his wife so far as it affects him. **Tex CivA** 290**SW**852.

657–45 40 **OklACR**591 [reh pending].

657–47 34**F(2d)**948; 206**Cal** 346, 274**P** 337.

658–64 198**Cal** 183, 244**P**343; 23 **OhA** 390, 155**NE**654.

658–65 **Cal** 287**P**474 (holding certificate of hospital superintendent alleging that patient, not a patient therein, could not attend hearing, was not pertinent). [c] (3) To show lunatic's brother, rather than daughter, is entitled to appointment of guardian. 216**Ala**385, 113**S**248. (4) To support finding that guardian should be appointed. 95**CalA**641, 273 **P**69.

658–65½–New. The absence of the alleged incompetent from the hearing is excused where his presence is prevented by persons who have removed him from the jurisdiction for the purpose of getting a deed from him. 125 **Okl** 236, 257 **P**309.

658–65½–New. The court should be satisfied that the alleged incompetent is unable to protect his property from persons inclined to take advantage of him by taking his property without giving proper consideration therefor. 23 **OhA** 390, 155**NE**654.

658–67 [b] 200 **Iowa**1258, 206**NW**90.

658–66½–New. A nunc pro tunc order to record an appointment order as of a date prior to the guardian's sale of his ward's property does not validate such order. 98**Fla**103, 122**S**222.

659–89 98**Fla**103, 122**S**222. [a] **Failure to record may be cured** by order nunc pro tunc. 98**Fla**627, 125**S**2. [b] **Where order was not recorded before conveyance by guardian,** conveyance was ineffective. 98**Fla**627, 125**S**2.

659–91 77**Colo** 310, 236**P**995 (**lack of** notice to alleged insane person).

659–92 **Or** 289**P**511.

659–15½–New. Legal effect of improvident appointment of a guardian for property of a person mentally competent but suffering physical disabilities

is to constitute such guardian a trustee or agent as to such person's property and property rights under statutes in some jurisdictions. **Iowa** 212NW371.

659-15⅓-New. An incompetent for whom a guardian was appointed, who conferred with the guardian and was relieved from guardianship on his own application on the ground that he had regained his mental competency, is not entitled to attack the validity of the guardian's appointment and settlement agreement entered into by the guardian. 244Mich148, 221NW165.

660-20 320Mo 1122, 9SW(2d)600; 125 Okl 236, 257P309.

660-21 125 Okl 236, 257P309.

660-26 Ill 173NE52 (cannot be questioned collaterally).

660-34 125Me430, 134A544; TexCivA 292SW249.

660-35 327 Ill 381, 158NE720; 116 Nebr873, 219NW387.

661-46 But see 93CalA320, 269P758.

661-47 198Cal 183, 244P343.

661-48 198Cal 183, 244P343.

661-54 254Mass325, 150NE228. [d] (1) 254Mass325, 150NE228. (2) Conservator of incompetent's estate within state is not "person aggrieved." 254 Mass325, 150NE228.

661-56 [b] **It is presumed, on certiorari, that evidence not before supreme court** clearly demonstrates incompetent's inability to attend hearing. Cal 287P474.

662-58 [a] (3) Where probate court had no jurisdiction to appoint guardian, appellate court should not direct verdict for defendant but should dismiss case. 327 Ill 381, 158NE720. [f] **Scrutiny of verdict.**-201 Iowa405, 205NW 645.

662-59 216Ala385, 113S248.

662-59½-New. where the conclusion reached and judgment entered are not manifestly against the weight of evidence, 23 OhA390, 155NE654.

662-61 CalA 279P1004.

662-62 198Cal 148, 243P674.

662-64½-New. and may notice, of its own motion, an error in appointing a former guardian on security of an improper bond, 216Ala385, 113S248.

662-75 [a] **Attorneys employed by temporary guardian to prosecute main action** on issue whether permanent guardian should be appointed may not be paid for services out of ward's estate when action for appointment of permanent guardian fails. 201 Iowa525, 207NW613.

662-77 95CalA641, 273P69. [b] **Applicant for guardianship,** disqualified because of debt to estate, on removal of disqualification, may be appointed. Tex CivA 292SW629.

663-83 216Ala385, 113S248.

663-84 216Ala385, 113S248.

663-85 95CalA641, 273P69.

663-89½-New. A daughter, rather than a brother, is the proper guardian of a lunatic's person. 216Ala385, 113S248.

663-89⅓-New. Home relations should not be disturbed without good cause. 216Ala385, 113S248.

663-89¼-New. A brother may be the guardian of the estate, and a daughter the guardian of the person, without joint guardianship. 216Ala385, 113S 248.

663-89⅙-New. That an estate is owned jointly by a lunatic and her daughter is reason for appointing the daughter guardian. 216Ala385, 113S248.

663-99 95CalA641, 273P69. But see 198Cal 183, 244P343.

663-1 [c] (5) Minor son, not having waived appointment, on becoming of age, held properly appointed to replace former guardian. Tex 292SW629.

664-10 [a] (2) Only legal curatorship is that of husband to demented wife. 170La859, 129S371.

664-19 229AppDiv19, 241NYS35.

664-25 See also 135Wash625, 238P610.

664-33½-New. Vacating appointment by agreement does not cure impropriety of defective bond. 216Ala385, 113S248.

664-33⅓-New. It is improper to appoint a guardian on security of a former bond. 216Ala385, 113S248.

665-38 43 Ida255, 251P623, 625 [cit CJ]; 316Mo 308, 289SW586; TexCivA 4SW(2d)556.

665-43½-New. A large discretion in the refusal to terminate guardianship is recognized, 201 Iowa405, 205NW645.

665-43⅓-New. for the reason that such refusal does not prevent a later consideration of the same question in the light of intervening events. 201 Iowa405, 205 NW645.

665-43¼-New. On the other hand the court will not continue a guardianship simply on the unsupported apprehension that the ward who has attained a great age may be despoiled of the property by her husband when it appears that she is otherwise competent to direct her business affairs. 201 Iowa 405, 205NW645.

665-43⅕-New. Vacation of appointment of guardian operates as removal. 216Ala385, 113S248.

665-43⅙-New. The discharge of a guardian does not operate as the resignation of the guardian. 320Mo 1122, 9SW(2d)600.

665-45 [b] **Order accepting resignation is void** where account of guardian has not been presented and allowed as required by statute. 178Minn495, 228NW 326, 66ALR1136(2dcase).

665-49 320Mo 1122, 9SW(2d)600.

665-53 135Wash625, 238P610.

665-54 But see Ind 166NE657. [a] **Change of venue or of judge** is not authorized, at least where application was not made upon first appearance. 135 Wash625, 238P610.

665-56 [a] **In Missouri.**-317Mo 828, 297 SW382.

665-57½-New. Power of probate court to remove guardian of estate carries with it power to appoint another guardian as to estate constructively within county. TexCivA 31SW(2d)835.

665-60 [b] **Making illegal election for insane widow** renouncing will of deceased husband is ground for removal of guardian by circuit court though his conduct did not justify removal by probate court. 317Mo 828, 297SW382.

665-62 [c] (2) Failure is not ground for removal, where inadvertent and no loss results. 214Ala185, 106S848. [d] **Fact that prosecuting attorney filed a petition asking that balance on hand** belonging to insane ward be paid to county treasurer, together with order for payment of such sum, did not constitute evidence of mismanagement on part of guardian. 320Mo 1122, 9SW(2d) 600.

665-65 135Wash625, 238P610.

666-83 But see Or 289P511.

666-98½-New. [§ 291a] (e) **Order of Removal.** Order should contain reason for removal. 135Wash625, 238P610.

666-98⅓-New. But the omission of such reason is a mere irregularity. 135Wash 625, 238P610.

667-3 Ind 166NE657.

667-8 135Wash625, 238P610 (abuse not shown).

667-16 82Colo 251, 253P1114; 254Mass 57, 149NE626; 246Mich405, 224NW381.

667-17 246Mich405, 224NW381; 138 Misc238, 245NYS234.

667-18 254Mass57, 149NE626 (waiver of provisions of will in favor of ward).

667-19½-New. One subsequently appointed guardian may not interfere with the first appointee, but may proceed without further appointment upon establishing that the first appointment was void. MoA 18SW(2d)147.

667-19⅓-New. A committee of an incompetent World War veteran cannot waive the incompetent's right to have government allowances exempt from claims of creditors. 134Misc683, 236 NYS343.

667-19¼-New. Proceedings by committee of incompetent for accounting. 138 Misc238, 245NYS234 (right of attorneys to costs and disbursements).

667-26 316Mo 308, 289SW586.

668-40 [c] **Temporary guardian** is entitled to compensation, though no permanent guardian is appointed. 201 Iowa525, 207NW613.

668-48 243NY499, 154NE538; 7PaDist &Co 682. [b] 168Ark763, 271SW714. [d] **Failure to file annual accounts, or negligence** which works no injury, and that is no mala fides, will not prevent compensation. 214Ala185, 106S848.

668-49 254 IllA96.

669-60 246Mich405, 224NW381. [c] **Compensation held excessive.**-223App Div1, 227NYS318.

669-62 MoA 298SW1055(2dcase). [b] **Where funds left in committee's estate are insufficient** to pay what is due to incompetent's estate, no commissions or allowances can be granted. 226AppDiv 285, 235NYS96.

669-65 Wash 286P646 (amount not exceeding five per cent of funds received).

669-66 [a] **As regards compensation of soldier's guardian,** money from government is not considered in same light as ordinary assets. Wash 286P646.

669-74½-New. Allowance to a special guardian of an incompetent for services in connection with an appeal from a decision in proceedings in which wrongdoing of the committee had been established has been held properly granted. 243NY499, 154NE538.

670-85 See also 226AppDiv285, 235NYS 96.

670-86 [a] (1) 135Misc118, 236NYS 685. (2) Where committee deducted commissions under invalid court order, account should not be surcharged therewith. 135Misc118, 236NYS685. (3) No account rendered to beneficiary as to right of committee to deduct commissions. 135Misc118, 236NYS685.

670-15 But see 176Minn541, 224NW 152.

671-28 [c] **Unauthorized deposit in state bank** by guardian (1) renders bondsmen liable, failure to follow court direction not being ordinary care (Tex CivA 3SW(2d)486), (2) notwithstanding funds were deposited year at time bond was executed (TexCivA 3SW(2d)486).

671-32 241 IllA384.

671-37 [a] **Under some statutes it is implied condition of bond** that guardian shall, at expiration of his trust, settle his accounts with county court or with ward. 123 Okl 1, 251P734.

671-37½-New. Surety is liable for interest on annual balances of funds misappropriated by guardian. 254 IllA96.

671-40 But see 254 IllA96; 178Minn 495, 228NW326, 66ALR1136.

671-43 216Ala385, 113S248.

671-46 241 IllA384.

671-53 241 IllA384; 178Minn495, 228 NW326, 66ALR1136(2dcase).

671-57 [a] **In Illinois.**-254 IllA96.

672-76 See also 86 IndA388, 158NE252.

672-82½-New. In an action by a substituted guardian against a former guardian, the latter cannot offset against the amount due the substituted guardian a dividend paid him by the receiver of an insolvent bank on a checking account. 208 Iowa1342, 227NW344 (2dcase).

672-89 But see 208 Iowa1342, 227NW 344(2dcase).

673-98½-New. A ward as the real party in interest may sue on a bond. 176 Minn541, 224NW152.

673-6 86 IndA388, 158NE252.

673-6½-New. To recover on a bond, not only the guardian's duty and breach thereof must be shown, but also resulting loss. 208 Iowa1342, 227NW344 (2dcase).

673-13 146Wash202, 262P970. [a] **Application attacking adjudication of insanity** and action thereon is not bar to proceeding to determine restoration to sanity. 132 Okl 52, 270P87.

673-16½-New. Some statutes relating to proceedings to determine restoration to capacity apply to any person for whom a guardian has been appointed under certain statutes. 134 Okl 202, 272 P480.

673-16⅓-New. If the court finds that the petitioner is of sound mind and mentally capable of taking care of himself and his property, the court is without authority to order that judgment thereon shall not become effective until the debts of the petitioner or his estate, personally assumed by his guardian, are paid and discharged. 134 Okl 202, 272P480.

673-16¼-New. Under some statutes the denial of an application attacking an

order under which applicant was adjudged an incompetent and asking for relief from the orders of the court and for restoration of property is not a bar to a later action and proceeding by the same party to determine his restoration to capacity. 134 **Okl** 202, 272**P**480.

673-16½-New. Person adjudged insane and subsequently filing statutory allegation of restoration to sanity cannot attack validity of original judgment of insanity. **Mo** 26**SW(2d)**768.

673-19 82**Colo** 550, 262**P**89.

674-29 102**CalA**592, 283**P**103; 206 **Iowa** 303, 220**NW**85; 29 **OhA**449, 163**NE**724.

674-33 29 **OhA**449, 163**NE**724. [b] (1) 29 **OhA**449, 163**NE**724. [c] (1) 102**CalA** 592, 283**P**103; 206 **Iowa**303, 220**NW**85. (2) 29 **OhA**449, 163**NE**724.

674-35 206 **Iowa**303, 220**NW**85.

674-37½-New. Inquiry assumes valid prior judgment of insanity. **Mo** 26**SW (2d)**768.

674-40 [a] **Ultimate goal of proceeding** is conservation of incompetent's estate for his protection, care, and well-being. 206 **Iowa**303, 220**NW**85.

674-41 169**Minn**264, 211**NW**12.

675-73 131**Misc**187, 227**NYS**43.

675-74 169**Minn**264, 211**NW**12.

675-74½-New. But statements of judge at hearing which resulted in appointment of guardian are properly excluded as immaterial. 198**Cal** 145, 243**P**675.

675-75 171**Minn**227, 213**NW**898. [a] **Evidence sufficient** to show petitioner still incompetent. 198**Cal** 145, 243**P**675.

676-93 169**Minn**264, 211**NW**12.

676-1 See also 171**Minn**227, 213**NW**898. But see 206 **Iowa**303, 220**NW**85.

676-2½-New. Where evidence is conflicting, the reviewing court will not disturb the finding that the mental faculties of an incompetent are still impaired. 198**Cal** 145, 243**P**675.

677-18 123 **Okl** 1, 251**P**734.

677-25 [a] **Suspension of judgment of restoration to sanity** till debts assumed personally by guardian have been paid. 132 **Okl** 52, 270**P**87.

677-25½-New. A final decree in a proceeding to terminate a guardianship adjudicating that the ward is mentally incompetent and incompetent to transact business, subjecting the ward to guardianship and vacating a previous order discharging the guardian made at the same term, is not necessarily binding on strangers who accepted a mortgage from the ward's grantee under a deed made while the prior order was in force. 114**Nebr**314, 207**NW**506.

677-25¼-New. Under some statutes the county court, after judgment of restoration, has no jurisdiction to make additional orders as to the guardianship of the former incompetent, 123 **Okl** 1, 251**P**734.

677-25¼-New. but, under its plenary powers to require and enforce settlements of final accounts of guardians, it retains jurisdiction to require the settlement of a claim which it has previously disallowed where an appeal from its order disallowing such claim is pending. 123 **Okl** 1, 251**P**734.

677-38 100**NJEq**370, 136**A**408.

677-39 220**Ala**654, 127**S**221.

678-55 [a] **In North Carolina.**-195**NC** 143, 141**SE**471.

678-63 **Ariz** 284**P**149.

678-71 See also 93**CalA**575, 270**P**247.

679-89 80**CalA**27, 251**P**231.

679-95 125**Misc**92, 210**NYS**594.

679-3½-New. The county court of a county in which an insane person is arrested on process from another county may order him held temporarily in a hospital or other convenient place without bringing him into court. 80**Colo** 380, 252**P**353.

679-8 [b] **Under guardianship proceedings** confinement of incompetent is unauthorized. 198**Cal** 183, 244**P**343.

680-11 [b] 80**Colo** 380, 252**P**353. [e] **County superintendent of the poor** has no authority to commit defective inmate of penal institution. 125**Misc**92, 210**NYS** 594. [f] **Court of ordinary.**-160**Ga**487, 128**SE**770. [g] **County lunacy board** is special board created by law for special purpose. 124 **Okl** 300, 256**P**46.

680-12 222**Ky**517, 18**SW(2d)**952.

680-14½-New. That an insane person has removed from the county of his residence while insane does not deprive the county court of such county of jurisdiction to order him into custody. 80**Colo** 380, 252**P**353.

680-23 [b] **Petition stating conclusion and not facts upon which allegation of insanity is based** is insufficient to confer jurisdiction. 239**Mich**450, 214**NW** 411.

682-80½-New. **Habeas corpus** may be employed where a prisoner in a penal institution has been unlawfully committed by a county superintendent of the poor, but where successful, the order will be for return to the penal institution and not for complete freedom. 125 **Misc**92, 210**NYS**594.

682-86 124 **Okl** 300, 256**P**46; 106**Tex Cr**558, 293**SW**1104.

682-87 80**CalA**789, 252**P**1068; 124 **Okl** 300, 256**P**46.

682-89 80**CalA**789, 252**P**1068; 124 **Okl** 300, 256**P**46.

682-95 [a] **Rule held not applicable** where asylum does not require adjudication. 106**TexCr**558, 293**SW**1104.

683-6 [a] **One directly committed to institution as mental defective delinquent** is committed for indefinite term till paroled by superintendent. 229**AppDiv** 687, 242**NYS**289.

683-7½-New. The state is under the duty to arrange for the commitment of an incompetent in a foreign state of his legal residence pending which he should have care and treatment in the state hospital. 225**AppDiv**687, 231**NYS**326.

683-17 See also 229**AppDiv**687, 242**NYS** 289.

684-22 [a] 80**CalA**27, 251**P**231.

684-24 [d] (3) But see 207**Cal** 561, 279 **P**658.

684-25 143**Wash**65, 254**P**466. [a] **Evidence of sanity,** to warrant discharge, must be clear. 143**Wash**65, 254**P**466.

684-27 [l] **Statute providing for filing of state hospital superintendent's written certificate** does not mean that his signature be affixed by him in all cases, but may be affixed by another person under his direction. 207**Cal** 561, 279**P** 658. [m] **There should be expert opinion evidence** to sustain release of mental defective delinquent. 229**AppDiv**687, 242**NYS**289.

684-30½-New. It is a question of fact whether an alleged insane person is or is not suffering from a disordered mental condition such as requires commitment under statute, 80**CalA**27, 251**P**231.

684-30¼-New. and not what causes have primarily superinduced his condition. 80**CalA**27, 251**P**231.

685-44 103**Conn**1, 130**A**126 (statute requiring support of paupers).

685-45 **Iowa** 231**NW**298; 121**Kan**346, 246**P**516.

685-48 121**Kan**346, 246**P**516.

685-50 **Iowa** 231**NW**298.

685-52 **Ind** 173**NE**321; 121**Kan**346, 246 **P**516. [c] (2) Averment as to parent's financial ability held sufficient. **Ind** 173 **NE**321. [d] (2) Other instances. **Ind** 173**NE**321.

686-58 But see 11**PaDist&Co** 79. [a] **In Kansas.**-121**Kan**346, 246**P**516.

686-73½-New. **Estate liable** after death. 5**PaDist&Co** 472.

686-75 5**PaDist&Co** 472.

686-80 121**Kan**346, 246**P**516.

687-84 130**Kan**428, 286**P**250; 14**PaDist &Co** 225. [b] **Cost of maintenance of persons committed while out on bail awaiting trial for crime** is borne by counties. 14**PaDist&Co** 225. [c] **Cost of maintenance ends** when term of sentence expires and thereafter cost continues as person committed while free from charge of crime. 14**PaDist&Co** 225.

687-85 **Iowa** 231**NW**298. [e] (2) Iowa statute does not impose entire burden on county where settlement of ward was at time of commitment, providing legal settlement has been established in another county since that time. 207 **Iowa** 1117, 224**NW**232. (3) In proceedings to determine liability for expenses of commitment and support of insane person under such statute, fact that place of legal settlement was in particular county at time of commitment is not determinative that such county was place of legal settlement at time of commencement of action and entry of judgment. 207 **Iowa**1117, 224**NW**232. (4) Where legal settlement of insane person was in county in which he was committed, residence at such time and for one year thereafter in another county makes such other county place of legal settlement. 207 **Iowa**1117, 224**NW**232. (5) That insane person is in asylum in another county does not change his residence during period of commitment in county other than place of continuous residence, as regards liability of county for support. 207 **Iowa**1117, 224**NW**232. (6) Continuous residence for one year without notice of warning to depart makes place of residence in county place of legal settlement, as regards liability of county for support. 207 **Iowa**1117, 224 **NW**232. (7) Person moving from one county and taking up his residence in another county while sane acquires legal settlement in latter county after expiration of one year, as regards such county's liability for his support, though during major portion of year he has been committed to hospital for insane. 207 **Iowa**1117, 224**NW**232. (8) County of residence is liable for expenses of commitment to insane hospital in another county, under some statutes, for period after year of residence. 207 **Iowa** 1117, 224**NW**232. [g] (2) Statute imposing expenses of maintaining public patients in state hospitals for insane on county of commitment or residence is violative of Oklahoma constitution imposing such liability on state. 122 **Okl** 268, 254**P**710. [k] (2) Part of contribution of state not used for maintenance of insane patient may be recovered from poor board. 298**Pa**358, 148**A**479. [l] **In Oklahoma.**-122 **Okl** 268, 254**P**710.

688-96 114**Nebr**797, 210**NW**275, 277 [quotCJ], 48**ALR**728.

688-97 81**Colo** 306, 255**P**622; 141**Miss** 421, 106**S**630; **Nebr** 210**NW**275, 277 [quotCJ] [overr 37**Nebr**283, 55**NW**875, 20**LRA**850]; 298**Pa**358, 148**A**479; 5**Pa Dist&Co** 472; 11**PaDist&Co** 18; **Tex CivA** 291**SW**966. [x] **Previous inquiry by authorities** and ascertainment of existence of estate is not necessary to recovery. 141**Miss**421, 106**S**630. [y] **State can sue estate of public patient** in asylum for support though statute provided remedy to citation from county judge to guardian. **TexCivA** 291**SW**966.

689-98 12**PaDist&Co** 183 (assumpsit against husband for maintenance of wife in state asylum). But see 10**PaDist&Co** 745.

689-5 81**Colo** 306, 255**P**622.

689-6 But see 81**Colo** 306, 255**P**622.

689-8½-New. Under World War Veterans' Act and New York Civil Practice Act, state of New York can recover no compensation out of veteran's government allowance for care of deranged state veteran in one of its hospitals, in the absence of contract made in advance with the committee. 134**Misc**683, 236 **NYS**343.

689-12 11**PaDist&Co** 20.

689-17½-New. Order required by statute to be made on application of attorney-general should be made when guardian files his account after death of ward without waiting for settlement of estate. 12**PaDist&Co** 309.

690-31 [b] **Committee of incompetent World War veteran** may lawfully contract for his future support and maintenance while he is not in hospital but cannot legally pay claims without his previous approval. 134**Misc**683, 236**NYS** 343.

690-36 254**Mass**57, 149**NE**626; 101**NJ Eq**232, 137**A**524.

690-43 But see 98**Fla**627, 125**S**2.

690-44 **Ind** 166**NE**657.

691-46 130**Misc**554, 224**NYS**27.

691-61 [c] **Circuit court of appeals** will protect estates of incompetents whose interests are not being safeguarded. 22 **F(2d)**142.

691-65 333 **Ill** 284, 164**NE**678.

691-66 [b] **TexCivA** 290**SW**829. [c] 172**Minn**504, 215**NW**857.

692-70½-New. In some jurisdictions the district court's jurisdiction over appointment of receiver and guardian to

prevent waste of incompetent's property is appellate and not original. Tex CivA 290SW829.

692-74 214Ala185, 106S848.

692-79 101NJEq1, 137A93; 53SD129, 220NW474; Wyo 291P812.

692-82 53SD129, 220NW474.

692-83 Wyo 291P812.

692-84 101NJEq1, 137A93.

692-88 [a] In Louisiana.-170La859, 129S371.

692-89 [a] In Nova Scotia.-[1930] 3 DomLR287.

693-91 Wyo 291P812.

693-99 333Ill284, 164NE678; Wyo 291P812.

693-2½-New. Summary proceedings. The court has no authority to order a bank to pay over moneys to the committee of an incompetent in a summary proceeding. 222AppDiv317, 226NYS159.

693-4 316Mo308, 289SW586; TexCivA 4SW(2d)566.

693-6 245Mich167, 222NW197; 316Mo308, 289SW586. [b] Executrix.-263Mass70, 160NE283.

693-9 169Ga5, 149SE579(1stcase).

693-14½-New. After the death of his ward the guardian is not entitled to possession of lands of his ward sold by the public administrator. 316Mo308, 289SW586.

693-14¼-New. Sisters possessed of beneficial interests in the estate of a deceased ward, selling such interest to the guardian for much less than its real value, because the guardian unfairly took advantage of them, by not informing them as to the true value of the estate, are entitled to have the settlement set aside. 245Mich167, 222NW197.

693-14¼-New. Conservator of estate of deceased has no authority to dispose of property in any manner than authorized by court. Mass 169NE778.

694-19 316Mo308, 289SW586.

694-20 316Mo308, 289SW586.

694-31 See also 142Wash60, 252P151.

694-31½-New. A guardian has no power to bind the estate by a contract with third persons whereby they are to enter on the ward's lands, pay taxes and interest on a mortgage thereon, and care for the ward and be reimbursed and paid for their services out of the ward's estate on his death. 316Mo308, 289SW586.

694-44 Md150A37.

695-54 256Mass351, 152NE707.

695-60 5PaDist&Co472.

695-62 134Misc123, 234NYS626.

695-64½-New. Settlement of an insurance policy by insured incompetent and his guardian without leave of court is void where the company knew of the incompetency. 224Ky405, 6SW(2d)447.

695-66 151Va495, 145SE419.

695-69 [b] Appointment of special guardian is not necessary on motion for order approving past expenditures by committee of incompetent. 130Misc892, 224NYS679. [c] Effect of ratification on liability of guardian.-38F(2d)791.

695-72½-New. A committee's transcending its authority in making payment to a state hospital does not render the hospital liable therefor. 151Va495, 145SE419.

695-77 TexCivA 16SW(2d)844. [b] Payment by insurance company to de facto guardian of money due under policy for disability does not prevent beneficiary after death of insured from recovering on policy. 217MoA333, 272SW1089.

696-82 82Colo251, 258P1114.

696-83 82Colo251, 258P1114; 256Mass351, 152NE707.

696-85 214Ala185, 106S848; SD226NW278 (statutes held inapplicable in fixing amount lost as measure of damages for guardian's failure to follow statute in selling real estate). [b] Relief from liability.-SD 226NW278.

696-87 214Ala185, 106S848. But see 243NY499, 154NE538.

696-89½-New. Self-interest must not dictate actions of committee for incompetents. 243NY499, 154NE538.

696-3 [a] In Pennsylvania.-6PaDist&Co813.

696-9 127Kan275, 273P420; 57ND344, 221NW780; 6PaDist&Co813.

696-10 [a] Deposits.-SD 228NW379.

697-14 6PaDist&Co813. [c] Deposit in savings bank without court's authority is wrongful where it could be withdrawn only on sixty days' notice except at bank's option. 208Iowa1342, 227NW344(2dcase).

698-38 135Misc118, 236NYS685 (statute imposes on committees duties of guardians under Surrogate's Court Act as to accounting).

698-42 176Minn234, 223NW98(2dcase). [a] Administrator may sue to enforce securities held by guardian for ward's funds deposited in bank. 176Minn234, 223NW98(2dcase).

698-56 [a] Extra account may be required within statutory period if account filed is not satisfactorily detailed and specific. 9PaDist&Co111. [b] Court has no power to waive accounting required by statute. 9PaDist&Co15.

699-71 316Mo308, 289SW586.

699-73 83Colo282, 264P662.

699-75 168Ark763, 271SW714.

699-80½-New. Agent should not be charged for automobile worn out in principal's service. 168Ark763, 271SW714.

699-80¼-New. Committee of incompetent held liable for expenses incurred in establishing alleged wrongdoing of committee. 243NY499, 154NE538 (extent of liability).

700-97 168Ark763, 271SW714.

700-9 TexCivA 295SW646.

700-14 83Colo282, 264P662; MoA274SW482.

700-16 MoA 298SW1055(2dcase). [e] Payment in goods, according to ward's instructions, allowed. 214Ala185, 106S848.

700-18 Wash286P646.

701-21½-New. Chancery had power to permit suit against one receiving property from incompetent under power of attorney. 168Ark763, 271SW714.

701-21¼-New. That court in permitting suit did not disturb status of appointee claimed illegal did not affect its decree. 168Ark763, 271SW714.

701-26 [d] Traveling expenses and board.-MoA 298SW1055(2dcase). [e] Visiting expenses of parents.-Wash286P646.

701-28 217MoA333, 272SW1089 (de facto guardian in expending money for insured and his family, received under insurance policy, holds trust relation to insured).

701-35 214Ala185, 106S848.

702-46 246Mich405, 224NW381.

702-47 214Ala185, 106S848. [c] 201Iowa525, 207NW613.

702-50 See also MoA 298SW1055(2dcase).

702-52 201Iowa525, 207NW613.

703-74 129Misc82, 220NYS696. [a] 57ND344, 221NW780. [e] In New York.-County courts of Kings, Bronx, Queens, and Richmond Counties have no jurisdiction. 129Misc82, 220NYS696.

703-78 83Colo282, 264P662.

703-83½-New. The United States veterans' bureau has a right to institute proceedings for an accounting by the guardian of insane veteran. 9PaDist&Co111.

703-5½-New. The legal advisor and guardianship officer of the regional office of the United States veterans' bureau is a proper person to swear to a petition for an accounting by the guardian of an insane veteran. 9PaDist&Co111.

703-9 [a] Sufficiency of evidence.-SD 228NW379.

704-10 SD 226NW278 (findings held not to show that terms of sale were to best interests of incompetent's estate).

704-11½-New. A contract between attorneys employed to recover a ward's estate was admissible in evidence as an explanation of disbursements of attorney's fees made by the guardian. Tex CivA 14SW(2d)300.

704-13 MoA 298SW1055(2dcase); 116Nebr873, 219NW387. [e] Motion to dismiss appeal should be overruled except when made on proper ground. 116Nebr873, 219NW387. [f] Reviewing court will presume order correct allowing expenditure of ward's money for parent's visit where record fails to show financial condition of parents. Wash286P646.

704-15 116Nebr873, 219NW387.

704-16 83Colo282, 264P662.

704-27 82Colo251, 258P1114.

704-36 220Mo1122, 9SW(2d)600; 153SC78, 150SE473.

704-37 TexCivA 14SW(2d)300.

704-38 82Colo251, 258P1114; 83Colo282, 264P662.

704-39 82Colo251, 258P1114; 83Colo282, 264P662.

705-46 MoA 298SW1055(2dcase).

705-59½-New. , and the substituted committee cannot file an account for the predecessor. 245NY546, 157NE851.

706-85 174Ark262, 295SW20.

706-91 TexCivA 31SW(2d)835. [a] Monthly allowances received by guardian of disabled soldier from government constitute corpus and not income of estate. TexCivA 31SW(2d)835.

707-93 215Ala91, 109S746.

707-6 [a] 115Tex583, 285SW815.

707-8 6PaDist&Co789. [b] Each application for allowance is separate and distinct proceeding. 131Misc430, 226NYS38.

708-30 223AppDiv1, 227NYS318, 321[quotCJ]; 131Misc430, 226NYS38. [a] (1) But see 130Misc554, 224NYS27. (2) Public policy against hoarding of large sums does not authorize court to distribute incompetent's property to relatives unless incompetent would have done so if sane. 131Misc430, 226NYS38. [d] Court cannot deny aid to those whom it believes incompetent would have assisted for reason that similar applications may be made by others. 130Misc375, 224NYS30. [e] It is not sufficient, to warrant allowance, that petitioner is second cousin of incompetent, worthy, respectable, far from wealthy, and that addition to petitioner's income would be helpful. 131Misc430, 226NYS38. [f] Circumstances to be considered on application by second cousin for allowance.-131Misc430, 226NYS38. [g] Evidence, degree of proof.-131Misc430, 226NYS38. [h] Evidence held insufficient to show that incompetent would have contributed annual allowance to second cousin, if sane. 131Misc430, 226NYS38.

708-31 223AppDiv1, 227NYS318, 321[quotCJ].

708-32 131Misc430, 226NYS38. [d] Second cousin.-131Misc430, 226NYS38(under no legal or equitable obligation to support).

708-33 38F(2d)791; 248NY415, 162NE471; 131Misc430, 226NYS38. [a] Applicant's stress and relationship alone are not sufficient to warrant granting of allowance. 126Misc764, 214NYS631; 131Misc430, 226NYS38.

708-34 223AppDiv1, 227NYS318, 321[quotCJ]; 130Misc375, 224NYS30; 131Misc430, 226NYS38. [c] 248NY415, 162NE471; 126Misc764, 214NYS631(second cousin); 130Misc554, 224NYS27. [f] Attorney of successful applicant is entitled to allowance commensurate with his efforts and disbursements out of surplus income. 126Misc764, 214NYS631.

708-35 131Misc430, 226NYS38(actual necessity must be shown).

708-36 126Misc764, 214NYS631(courts reluctant to grant such allowances). [a] (1) Reason for rule.-126Misc764, 214NYS631(even where there is abundant surplus).

708-38 248NY415, 162NE471; 130Misc375, 224NYS30, 31[citCJ]; 130Misc554, 224NYS27. [a] Supreme test in applications is incompetent's probable course of conduct, if sane, to be gathered from collateral circumstances. 126Misc764, 214NYS631; 130Misc375, 224NYS30; 131Misc430, 226NYS38. [b] Circumstances held to authorize allowance to aged second cousin of wealthy incompetent as probably in accord with latter's sound wish, if she could express it. 126Misc764, 214NYS631.

708-38½-New. The court will presume that incompetent would act, if sane, as any ordinary person would under the circumstances of the case. 130Misc554, 224NYS27.

708–39½–New. It is not the province of the court to deal benevolently with incompetent's property in passing on an application for allowance therefrom. 223**AppDiv**1, 227**NYS**318.

708–39⅓–New. The attorney of a relative unsuccessfully applying for an allowance from the incompetent's surplus income is not entitled to an allowance from the estate for services or disbursements. 223**AppDiv**1, 227 **NYS**318.

708–39¼–New. Attorneys for incompetent and incompetent's next of kin held properly allowed expenses in successfully opposing an application for allowance out of the incompetent's surplus income. 223**AppDiv**1, 227**NYS**318.

708–39⅕–New. Each application for allowance is a separate and distinct proceeding. 131**Misc**430, 226**NYS**38.

709–64 222**Ky**517, 18**SW(2d)**952.

709–66 214**Ky**726, 283**SW**1042, 1043 [quotCJ]; 227**AppDiv**839, 237**NYS**448.

710–68 214**Ky**726, 283**SW**1042, 1043 [quotCJ].

710–85½–New. Payment on equitable principles cannot be made to persons who cared for the ward under a contract with the guardian for payment out of the ward's estate after his death, where the claim has been barred by statute and there has been an adjudication against it. 316**Mo** 308, 289**SW**586.

710–96 6**PaDist&Co** 789.

711–4½–New. If represented plaintiff is restored to sanity before termination of action, he may dismiss action and neither guardian nor next friend has authority to proceed over objection of former incompetent. 114 **Okl** 151, 152, 244**P**447, 448.

711–11 300**Pa**26, 150**A**152.

711–13 [b] 30 **OhA**30, 164**NE**67.

711–20 9**PaDist&Co** 124.

712–26 [b] **In Manitoba.**–[1930] 2**Dom LR**683.

712–32 8**PaDist&Co** 796.

712–33 8**PaDist&Co** 796.

712–34 [b] **Where defendant was adjudged insane after commencement of action by writ of attachment,** claim need not be filed against estate. 49**RI** 302, 142**A**371.

712–39½–New. In some jurisdictions there is no specific statutory provision for the ultimate settlement of a disputed claim against the estate of an incompetent person in the event that it is finally established. 123 **Okl** 1, 251 **P**734 (payment into court pending determination of claim).

712–41 But see 142**Wash**60, 252**P**151.

713–47 214**Ky**726, 283**SW**1042.

713–58½–New. An allowance by a probate court, after a ward's death, of a claim against the guardian on contract between the guardian and claimant, whereby claimant was to care for the ward and was to be paid therefor out of the ward's estate after his death, is a nullity so far as the estate is concerned. 316**Mo** 308, 289**SW**586.

713–68½–New. The law applicable to the sale of a minor's property applies to the sale of an insane person's property. 98**Fla**103, 122**S**222.

714–78½–New. A chattel mortgage executed by the guardian of an insane person without the court's authorization does not create a valid lien on the ward's property. 53**SD**129, 220**NW**474.

714–80 222**Ky**517, 18**SW(2d)**952; 101 **NJEq**232, 137**A**524.

714–90 [a] **Jurisdiction of county judge is not wholly statutory.**–98**Fla** 627, 125**S**2.

715–95 143 **Okl** 23, 289**P**339.

715–96 [a] (5) Original petition must be presented in county where committee was appointed. 10**PaDist&Co** 246.

715–99 See also 165**Ga**873, 142**SE**273.

715–4 [a] **Rule applies** to conveyance of real estate in another state. 28 **OhA** 361, 162**NE**722.

716–10 See also 199 **Ind**687, 156**NE**552. [b] **Avoidance of mortgage given without compliance.**–159**Tenn**36, 18**SW(2d)** 747.

716–15 199 **Ind**687, 156**NE**552.

716–16½–New. The court of a sister state is not empowered to make valid an order affecting the real property of an insane person in the state. 199 **Ind** 687, 156**NE**552.

716–16⅓–New. A bank loaning money to pay a mortgage on an insane ward's property is charged with want of authority of a foreign guardian to execute the mortgage. 199 **Ind**687, 156**NE** 552.

716–16¼–New. In the absence of ratification such mortgage is unenforceable. 199 **Ind**687, 156**NE**552.

717–33 222**Ky**517, 18**SW(2d)**952.

717–40 215**Ala**91, 109**S**746.

718–83½–New. Petition to deliver jewelry must be joined in by the guardian. 5**PaDist&Co** 675.

718–84 98**Fla**627, 125**S**2. [b] **Rules as to sales of property of infant** applicable to sales of property of insane persons. 98**Fla**627, 125**S**2.

718–85 See also 226**AppDiv**373, 235**NYS** 357(2dcase).

718–86 **Wyo** 291**P**812.

718–90 98**Fla**627, 125**S**2.

718–91 98**Fla**627, 125**S**2; **Nebr** 228**NW** 369.

719–13 215**Ala**91, 109**S**746. But see **Ill** 173**NE**52.

719–20 98**Fla**627, 125**S**2; **Nebr** 228**NW** 369. [a] **Validity of statute not requiring notice.**–**Nebr** 228**NW**369 (not violative of due process).

720–21 **Wyo** 291**P**812.

720–22 98**Fla**627, 125**S**2.

720–33½–New. Evidence has been held insufficient to sustain contention that sale was mala fide. **Ill** 173**NE**52.

720–34 [a] **Advisability of sale is** concluded by order. **Ill** 173**NE**52.

721–60 101**NJEq**232, 137**A**524.

721–88 See also **MoA** 298**SW**1055(2d case).

721–90½–New. Confirmation between the report and the death of an incompetent is not void where death is not shown by the record. **TexCivA** 15**SW** (2d)734.

722–98 See also 206**Cal** 346, 274**P**337.

722–2 172**Minn**504, 215**NW**857.

723–42 98**Fla**627, 125**S**2; **TexCivA** 15 **SW(2d)**734.

723–44 [b] **When collaterally attacked,** jurisdiction of county court must affirmatively appear. 98**Fla**627, 125**S**2.

723–54½–New. Mortgagee of insane ward's property who obtained title illegally from ward's guardian held not bona fide purchaser against ward. **Wyo** 291**P**812.

724–74½–New. In Manitoba proceeds of sale of lunatic's homestead are exempt from execution. **Man** [1930] 2 **DomLR**683.

725–95 But see **TexCommnA** 25**SW(2d)** 299.

725–97½–New. Insane person retains control of property after commitment, until the appointment of a committee. 245**NY**300, 157**NE**146.

725–97⅓–New. Provisions for commitment of an insane person are protective, not relating to property except as to maintenance, as distinguished from statutes providing for a committee. 245 **NY**300, 157**NE**146.

726–34 **CalA** 268**P**688; 197 **Ind**236, 150 **NE**361, 363 [citCyc]; **Iowa** 212**NW**371; 255**Mass**175, 151**NE**119; 151**Miss**56, 117 **S**354; 130**Misc**900, 226**NYS**152; 51**SD** 502, 215**NW**529. [b] **Payment of insurance premiums** for insane person held gratuitous. 255**Mass**175, 151**NE** 119.

727–35½–New. One dealing with an insane person, knowing his mental condition, is deemed to have perpetrated fraud. 193**NC**413, 137**SE**314.

727–36 198**Cal** 46, 243**P**657; 92**CalA** 411, 268**P**434; 147**Va**478, 137**SE**511. [b] **"Testamentary capacity" and "contracting capacity" compared.**–198**Cal** 46, 243**P**657.

727–36½–New. Principles controlling contracts of insane persons apply to negotiable instruments. 193**NC**413, 137 **SE**314.

727–37 **Iowa** 228**NW**562; **TexCivA** 284 **SW**636, 641 [citCJ]; **TexCivA** 290**SW** 270, 273 [quotCJ].

727–38½–New. Capacity to make a deed or contract is not identical with testamentary capacity. 163**Ga**553, 136**SE** 526.

728–44 244**Mich**129, 221**NW**127; 29 **PortoRico** 874; 147**Va**478, 137**SE**511.

728–47 29**PortoRico** 874 (circular insanity).

728–50 **CalA** 268**P**688.

728–52 **CalA** 268**P**688.

730–68 163**Ga**204, 135**SE**747; 247 **IllA** 233; 250 **IllA**499; **Iowa** 212**NW**371; 193**NC**413, 137**SE**314; 29**PortoRico** 874.

730–69 178**Ark**862, 12**SW(2d)**772, 68 **ALR**1303; 163**Ga**204, 135**SE**747; 170**Ga** 239, 152**SE**237; **Ga** 155**SE**8; **Iowa** 212 **NW**371; 127**Kan**301, 273**P**432; 172**Minn** 420, 216**NW**224; 173**Minn**141, 216**NW** 793; 193**NC**413, 137**SE**314; 29**Porto Rico** 874; **TexCivA** 17**SW(2d)**116; **Tex CivA** 25**SW(2d)**989.

731–71 74**Mont**245, 240**P**376. [a] 74 **Mont**245, 240**P**376. [b] **Entire lack of understanding** requisite to make contract void does not require proof that mind was absolute void, but incapacity to understand transaction of nature involved is sufficient. 74**Mont**245, 240**P** 376. [c] **Testimony of lay witnesses** that maker of contract was of unsound mind is insufficient to prove that he was "entirely without understanding" so as to make his contract absolutely void. 74**Mont**245, 240**P**376.

731–72 74**Mont**245, 240**P**376; 130 **Okl** 71, 265**P**117.

731–75 **Iowa** 212**NW**371; 29**PortoRico** 874.

731–75½–New. Guardianship of property of a normal minded ward, solely because of physical infirmities, does not incapacitate the ward from contracting for necessaries although the contract is not approved by the court. **Iowa** 212**NW** 371.

731–78 29**PortoRico** 874.

731–79 [a] **In Porto Rico.**–29**PortoRico** 874.

731–82 7**Alaska**80; **CalA** 268**P**688; 100 **CalA**325, 279**P**1048; 170**Ga**239, 152**SE** 237; 40 **Ida**782, 238**P**291; **MoA** 291**SW** 156; 193**NC**413, 137**SE**314. See also 206 **Cal** 592, 275**P**794; 220**AppDiv**722, 221 **NYS**495. [b] **Rule applied, though appeal from adjudication pending.**–**CalA** 268**P**688.

732–89 **TexCivA** 12**SW(2d)**625.

732–99 [b] (2) Transfer by indorsement of cashier's check by one adjudicated incompetent is not valid and binding on estate of indorser because at time of transfer appeal from adjudication of incompetency was pending. 206**Cal** 592, 275**P**794.

732–9 [a] **In Porto Rico.**–29**PortoRico** 874.

732–10 **MoA** 291**SW**156.

732–17 21**F(2d)**325. [b] **Setting aside of guardianship order** held not adjudication of restoration to sanity. 21**F(2d)** 325.

733–19 40 **Ida**782, 238**P**291.

733–25½–New. Parole raises presumption of capacity to contract. 5**PaDist &Co** 34.

733–33 197 **Ind**236, 150**NE**361.

733–40 **CalA** 268**P**688.

733–42 [a] **Action to recover price paid by insane buyer for goods not delivered** may be maintained by guardian of insane person without resort to equity. 204 **Iowa**881, 216**NW**258 (action held one at law).

733–43½–New. Where an indorser, under adjudication for incompetency, transferred a cashier's check to the indorsee, who deposited it in the bank and secured funds, rescission is not the only remedy. 206**Cal** 592, 275**P**794.

733–44 **TexCivA** 284**SW**636, 641 [cit CJ].

733–45 197 **Ind**236, 150**NE**361; **Tex CivA** 284**SW**636, 641 [citCJ].

734–56 217**Ala**307, 116**S**151, 154 [cit CJ]; 231**Ky**202, 21**SW(2d)**254(2dcase); 172**Minn**420, 216**NW**224; 193**NC**413, 137 **SE**314; 49**RI** 302, 142**A**371; **TexCivA** 284**SW**636, 734 [citCJ]. [c] (3) Holder in due course could enforce note received from insane person for good consideration, without notice of mental condition, where contract was fully executed and consideration could not be restored. 193 **NC**413, 137**SE**314.

735–57 156**Tenn**529, 3**SW(2d)**167, 168 [citCJ].

735–64 [a] (2) Attorney unsuccessfully prosecuting suit attacking validity of judgment of interdiction held not enti-

tled to fees on quantum meruit. 164La 1026, 115S133.

735-69 149Md662, 132A148, 151 [quot CJ].

736-78 193NC413, 137SE314.

736-93 149Md662, 132A148.

736-98 200 Iowa613, 203NW809. See also 127Kan301, 273P432.

736-2 163Ga204, 135SE747; 149Md662, 132A148, 151 [citCJ].

736-3 163Ga204, 135SE747; 149Md662, 132A148, 151 [citCJ].

736-3½-New. The widow of an insane person who has not elected to take child's share in his estate may not avoid a contract of her deceased husband on the ground of insanity. 163Ga204, 135 SE747.

736-4½-New. State selling land, reserving mineral rights, had right to avoid leases on ground of grantee's insanity. TexCivA 25SW(2d)989.

736-7 244NY424, 155NE728; 228NYS 711.

737-18 204 Iowa881, 216NW258.

737-20 248Mich160, 226NW830.

37-31 250 IllA499; 197 Ind236, 150NE 361; 172Minn420, 216NW224; TexCivA 17SW(2d)116. See also 29 OhA322, 163 NE511. But see 170Ga239, 152SE237; 204 Iowa881, 216NW258.

737-22 206Cal 592, 275P794.

737-25 CalA 268P688.

737-27 170Ga239, 152SE237; 200 Iowa 613, 203NW809 (need tender back only what remains).

737-29 200 Iowa613, 203NW809 (only what remains need be tendered).

738-39 155Miss227, 124S331 (seller is entitled to return of automobile on condition that he first return to buyer one traded in or its value).

738-48 RI 133A3, 4 [citCJ].

738-55½-New. A guardian, who is the wife of an incompetent, may, after her appointment, ratify an agreement with an attorney previously made by the husband and wife. 142Wash60, 252P151.

739-69 255Mass175, 151NE119.

739-73 29PortoRico 874.

740-96 228Ky32, 14SW(2d)189 (nursing, board, and care); 255Mass175, 151 NE119; 49RI 302, 142A371, 372 [citCJ].

741-4 133 Okl 3, 270P321, 322 [quot CJ].

741-8 133 Okl 3, 270P321, 322 [quot CJ].

741-9 133 Okl 3, 270P321, 322 [quot CJ].

741-11 101NJEq232, 137A524, 525 [cit CJ].

741-15 101NJEq232, 137A524.

742-24 [b] **Reduction of contingent liability as consideration.**-193NC413, 137 SE314.

742-30 Mass 172NE87; 144Miss392, 109S905; 251NY28, 166NE793; 126Misc 469, 214NYS85; 123 Okl 199, 252P829.

742-31 204 Iowa1394, 213NW225, 227 [citCJ]; 144Miss392, 109S905; 123 Okl 199, 252P829.

742-31½-New. **In New York** purchaser who agrees to take deed of lunatic in state hospital if signed by only heirs of the lunatic does not waive requirement that deed be executed in compliance with rules of hospital commission. 126Misc469, 214NYS85.

742-31⅓-New. A deed executed by lunatic in state hospital without complying with rules of hospital commission is absolutely void, 126Misc469, 214NYS85.

742-31¼-New. and is no consideration for purchase-money bond and mortgage. 126Misc469, 214NYS85.

743-39 232Ky363, 23SW(2d)548; Tex CommnA 291SW1095.

744-47 40 Ida782, 238P291.

744-49 [a] **Rules in Virginia.**-153SE 807.

744-49½-New. "Office found" and "judicially declared incompetent" as referred to in the Practice Act in relation to the validity of deeds of an insane person, refer to proceedings resulting in the appointment of a committee. 246 NY300, 157NE146.

744-67 245NY300, 157NE146.

745-78 [a] Mass 172NE87.

745-80 144SC252, 142SE498.

745-85 126Misc469, 214NYS85. [b] **Bringing of bill to set aside conveyance** is election to avoid conveyance. Mass 172NE87. [c] **Laches no bar to disaffirmance.**-Mass 172NE87.

745-87 255Mass607, 152NE363.

745-92 255Mass607, 152NE363.

745-97 30Ariz238, 246P541, 46ALR413; 294Pa295, 144A72.

745-99 287Pa21, 134A385.

746-1 287Pa21, 134A385. [a] **Consideration held not inadequate.**-287Pa21, 134A385.

746-16 214Ky716, 283SW1044; 251NY 28, 166NE793.

747-23 126Misc469, 214NYS85.

747-24 287Pa21, 134A385.

747-39 [a] **Deed executed before office found** cannot be avoided by purchaser. 126Misc469, 214NYS85.

747-42 207Cal 347, 278P233 (sale of property to satisfy requirement of reimbursement).

748-44 Mass 172NE87.

748-50 Ill 172NE25.

748-59 30Ariz238, 246P541, 46ALR413.

748-68 144Miss392, 109S905.

749-78 See also 144Miss392, 109S905.

749-86½-New. Where a husband conveys property to his insane wife during construction of a building thereon and gives a deed of trust which the wife disaffirms, the court will order restitution of the amount the building enhances the value of the property, apportioned to the value that the deed of trust bears to the value of improvements at the time of disaffirmance. 151Miss56, 117S354.

749-86½-New. The holder of a trust deed on an insane person's property paying taxes or redeeming from tax sale may recover, on disaffirmance of the trust deed, such expenditures with interest from payment to redemption. 151 Miss56, 117S354.

749-86¼-New. The mortgagee, on disaffirmance of a mortgage, cannot charge property with insurance premiums. 151 Miss56, 117S354.

749-94 218Ala209, 118S396; 123Kan 88, 254P348, 349 [citCJ]. [c] 123Kan 88, 254P348, 349 [citCJ]. [f] Contra 218Ala209, 118S396.

750-95 130Misc900, 226NYS152. [a] **Malicious prosecutions.**-4LaA344.

750-98½-New. An insane person is not capable of fraud in connection with a contract. 224AppDiv529, 231NYS338.

751-24 218Ala209, 118S396.

752-57 97CalA321, 275P815.

752-58 CalA 291P845; 169La520, 125S 580 (insane at time of commission of offense but presently sane).

752-59 [a] **Proceedings for asexulization.**-Utah 276P921.

752-61½-New. An insane person committed to hospital for insane, before trial, with instructions that he be returned for trial on recovery, on finding that insanity was cured but that he remained mentally defective within Mental Deficiency Law, is properly transferred to state institution for defective delinquents, rather than returned for trial. 214AppDiv359, 212NYS627 (by statute).

753-64 85PaSuper47.

753-72 Cal 288P769.

754-94 [c] **Statutes changing tribunal for hearing and determining application** from board of administration to district court and back again to board provide mere changes of procedure. 129Kan126, 281P863. [d] **Statute requiring full hearing** requires that reasonable opportunity to be present be afforded by notice or otherwise to those known to be interested. 129Kan126, 281P863.

755-99 [b] **In California.**-288P769.

755-1 Cal 288P769.

755-1½-New. Release on parole of defendant acquitted because of insanity is within the discretion of the trial judge. 85PaSuper47.

756-12 214Ky716, 283SW1044.

756-13 214Ky716, 283SW1044; Tex CivA 287SW668; TexCivA 290SW270.

756-20 146Wash202, 262P970, 971 [quotCJ].

756-21½-New. Where adjudication of insanity was had in proceedings under an unconstitutional statute, presumption of sanity still attaches. TexCivA 287 SW668.

756-21⅓-New. It will be presumed that adjudication of insanity was under the only statute then in effect, and thereafter held unconstitutional. TexCivA 287SW668.

757-34½-New. **Persons acquitted of crime.** Certificate of criminal court clerk of acquittal of person on sole ground of insanity, and verdict, make prima facie case of insanity throwing burden on such person to prove sanity at time of hearing. 27 OhNPNS16.

757-36 124Kan790, 262P554.

757-37 124 Or480, 264P842, 843 [cit CJ]; TexCommnA 293SW560; TexCivA 287SW668.

758-39 191NC753, 133SE81.

758-44 178Ark862, 12SW(2d)772, 68 ALR1303; 124Kan790, 262P554, 555 [citCJ].

758-47 [d] **Fact that person was released from asylum for short time** has been held insufficient rebuttal. Tex CommnA 293SW560.

759-50 [a] **Evidence held irrelevant.**-TexCivA 25SW(2d)989.

759-51 See also 221MoA380, 283SW 741.

759-52 TexCivA 25SW(2d)989.

759-56 [a] **Criminal offenses.**-205 Iowa 1130, 217NW225.

759-59½-New. Judgments establishing sanity of person in other proceedings are admissible. TexCivA 25SW(2d)989.

760-66 165Ga228, 140SE497, 499 [cit CJ].

761-80 [a] 100CalA325, 279P1048; 151Miss56, 117S354. [b] 34F(2d) 470; 39GaA509, 147SE400(2dcase); 114 Nebr704, 209NW492.

761-91½-New. There is a substantial distinction between adjudication that a person is insane and requires care and treatment, and one that he is mentally incompetent to manage his property and requires a guardian. 201 Iowa586, 207NW598.

761-91⅓-New. Insanity or unsoundness of mind may be shown by mere appearances and proof of acts out of the ordinary which to a person of ordinary intelligence would indicate abnormal state or unsoundness of mind or insanity. TexCivA 273SW866.

761-91¼-New. To prove that one is of sound mind it is necessary to show only that he is not known to be guilty of any act or conduct which would indicate to a man of ordinary intelligence that his mind is unsound. Tex CivA 273SW866.

762-15½-New. The finding of jury approved by court that prisoner had regained sanity does not overcome expert testimony that he was still insane supported by prisoner's "case book" kept under law. 215AppDiv163, 213NYS220.

763-25 122 Okl 160, 252P410, 412 [quot CJ entire section].

763-31 13F(2d)653.

763-37 122 Okl 160, 252P410. [a] **Where object of suit is to determine legality of adjudication of incompetency,** suit may be prosecuted by alleged incompetent in his own person. 122 Okl 160, 252P410.

763-37½-New. In some jurisdictions by force of statutes a person who has been declared insane may be sued. 121Kan 212, 246P506.

764-43 21F(2d)325; 122Kan1, 251P 438.

764-44 86Colo 391, 282P255; 122Kan 1, 251P438.

764-49 See also 122Kan1, 251P438.

765-60 204 Iowa1394, 213NW225. [1] **Guardian could defend cross complaint,** even if he was unauthorized to sue without court order. IndA 171NE385.

766-89½-New. Where a guardian has taken possession of property of a value of over one thousand dollars, which the husband of the insane person claims as community property, he may sue the guardian therefor. TexCivA 290SW 852 (defenses available to guardian).

767-26 222Ky517, 1SW(2d)952.

768-29½-New. , and do not affect the jurisdiction of the district court over the sale of property and the distribution of the proceeds thereof pursuant to a judgment entered before one of the parties in interest was adjudicated insane and a guardian was appointed for him by the probate. TexCommnA 280SW185.

768-38 But see IndA 170NE341.

768-40 But see IndA 170NE341.

768-45 241NY354, 150NE141; 135Misc

481, 238NYS336, [c] **Where person is declared insane in another state,** and committee of his property is appointed within state, suit affecting property cannot be brought against incompetent in state without consent of court. 241NY354, 150NE141.

768–51½–New. In an action brought without the court's consent against an insane person, the court has power to substitute his committee as defendant, and this amounts to a permission to sue the committee. 241NY354, 150NE141.

768–56½–New. The substitution of a committee for insane person is tantamount to permission to begin action against committee. 241NY354, 150NE141.

769–63 13F(2d)653, 654 [citCJ].

770–79 163Ga18, 135SE402.

770–80 163Ga18, 135SE402; 255Mass607, 152NE363.

770–81 163Ga18, 135SE402.

770–85 TexCivA 300SW193.

770–90 121Kan212, 246P506.

770–91 326Ill327, 157NE247. [b] **In Iowa.**–204Iowa1394, 213NW225.

770–94 221Ky616, 299SW559.

771–4½–New. Where defendant is discharged from hospital sane, appointment of guardian ad litem is unauthorized. NC154SE311(2dcase).

771–9 114Okl151, 152, 244P447, 448.

771–10 TexCivA 14SW(2d)286.

772–23 21F(2d)325.

772–27 122Kan1, 251P438; TexCivA 12SW(2d)625 (district court is not deprived of jurisdiction in suit by next friend to cancel note and deed of trust given, by virtue of fact that maker of note had never been adjudged incompetent and no guardian had been appointed). [c] **Inability to care for interests** is sufficient ground for appointment. TexCivA 295SW347.

772–34 137SC450, 135SE558.

772–43 255Mass607, 152NE363; Mass171NE490 (statute construed); 127Misc505, 217NYS280. [a] **Statute providing for appointment of guardian ad litem is applicable to justice court.**–TexCivA 274SW292.

773–45 127Misc505, 217NYS280. [a] **Appointment not required** where no appearance or answer is made and insanity does not appear. TexCivA 29SW(2d)849 (tax suit).

773–65 219Ala453, 122S440.

774–86 334Ill315, 166NE50.

774–90 See also TexCivA 14SW(2d)286.

775–30 [a] **Court is not obliged to tolerate action by incompetent;** but court is not obliged to dismiss action because not commenced in due form. 122Kan1, 251P438.

777–66 [b] **Settlement of litigation by guardian not prevented** by fact that guardian ad litem had been appointed and had filed answer. Iowa 228NW661.

777–73½–New. A settlement agreement entered into among beneficiaries under a will, in which one of beneficiaries was represented by a general guardian duly appointed, was binding on all of the parties, and the ward who urged the consummation of the agreement could not thereafter repudiate it. 244Mich148, 221NW165.

777–75 TexCommnA 293SW560.

777–79 229AppDiv19, 241NYS35.

777–91 TexCommnA 293SW560, 562 [citCJ].

778–4 34F(2d)916 (allowance to attorneys and next friend).

778–16 NJCh151A611.

779–62 100CalA37, 279P837.

780–1 [a] **Erroneous order substituting guardian as plaintiff** does not have effect of dismissal when not intended as such. 100CalA37, 279P837.

780–3 [a] **Court has power to substitute** committee of property in state for insane person declared insane out of state. 241NY354, 150NE141.

780–11 100CalA37, 279P837.

781–22½–New. Plaintiff may not raise the question that the court lacks jurisdiction because service on defendant alone, adjudged incompetent, was ineffective; 127Misc505, 217NYS280.

781–22⅓–New. He may only raise the question to apprise the court of facts so that it may of its own motion appoint a special guardian. 127Misc505, 217NYS280.

781–22¼–New. In such case defendant, not plaintiff, is entitled to raise such question of jurisdiction. 127Misc505, 217NYS280.

781–22⅙–New. In an action against an incompetent who alone was served, the burden is on the party challenging the court's jurisdiction to show that there is a committee of incompetent's person. 127Misc505, 217NYS280.

781–50 43Ida255, 251P623.

782–70 127Misc505, 217NYS280. [a] 214Ky716, 283SW1044.

782–72 214Ky716, 283SW1044; 233Ky507, 26SW(2d)37.

782–73 127Misc505, 217NYS280.

782–75 [a] **Where no committee appears to have been appointed,** service on judicially declared incompetent defendant alone is sufficient. 127Misc505, 217NYS280.

782–76 [a] **Failure to serve guardian with crosspetition** affected ward's substantial right, though trustee was appointed by court before submission of case. 29OhA76, 163NE36.

782–77 122Kan762, 253P424; 214Ky716, 283SW1044; 127Misc505, 217NYS280. See also 86PaSuper43.

783–83 [a] **Waiver of personal service.**–Or289P511.

783–84 Vt148A286.

783–89 94Fla104, 113S892; Vt148A286.

783–90 94Fla104, 113S892; 96Fla327, 118S60.

783–92 91Fla770, 108S820, 834 [citCJ], 51ALR731. See also 91Fla824, 108S679, 688 [citCJ].

783–97 121Kan212, 246P506 (service on guardian required); 86PaSuper43. [a] 121Kan212, 246P506.

783–3 74Mont558, 241P636.

784–10 But see 156Tenn529, 3SW(2d)167.

784–11 [a] (3) To charge estate with liability for accessories furnished by guardian. 214Ky726, 283SW1042. [b] 204Cal384, 268P643; 170Ga239, 152SE237.

784–14½–New. A petition in an action to avoid a voidable contract must allege prior disaffirmance. 127Kan301, 273P432.

784–14⅓–New. Fraud need not be alleged in suit to cancel deed of insane person. 170Ga239, 152SE237.

784–22 TexCivA 290SW829.

785–39½–New. The guardian of an insane person may by sworn answer put in issue the genuineness of the purported signature of his ward as indorser of a nonnegotiable certificate of deposit and thereby cast on plaintiff the burden of showing genuineness. 201Iowa73, 204NW404.

785–39⅓–New. Chancery court will decree for incompetent widow interest under will which guardian's answer and proof showed them entitled to. 220Ala654, 127S221.

786–78 See also TexCivA 270SW1043.

786–79 43Ida255, 251P623; 46Philippine957.

786–80½–New. In an action on a contract by a committee of adjudicated incompetent, defendant may show that alleged incompetent is no longer such. 220AppDiv722, 221NYS495.

787–90 See also TexCivA 12SW(2d)625.

787–97 [a] (1) 262Mass595, 160NE405. (4) 200Iowa613, 203NW809; 231Ky202, 21SW(2d)254(2dcase). (5) 204Iowa1394, 213NW225 (mortgage). (9) To show fraud inducing execution of note by incompetent. 200Iowa613, 203NW809. (10) Grantee entitled to return of consideration. TexCivA 270SW1043. (11) To show no imbecility or unsoundness of mind. 214Ky716, 283SW1044; RI133A3. [b] (1) 72CalA773, 238P171; 262Mass595, 160NE405. (3) 92CalA411, 268P434. (7) That assignment of interest of insane person in partnership was procured by fraud or duress when he was mentally incompetent. 223Ky365, 3SW(2d)761.

787–98 [b] **Finding** held properly refused. 262Mass595, 160NE405.

787–1½–New. Where the court found that cashier's clerk was indorsed while the indorser was laboring under an adjudication of incompetency, the effect was tantamount to a determination that the transaction was void for incapacity. 206Cal592, 275P794.

787–1⅓–New. Ordinarily a finding that one is unable unassisted properly to care for himself or property, by reasons of old age or weakness of mind, will not warrant a conclusion that a specific contract is therefore void for lack of mental capacity. 206Cal592, 275P794.

788–6 But see 98Fla627, 125S2.

788–7 MoA299SW80. [a] 104NJL519, 140A408; 49RI302, 142A371.

788–8 [b] **Directed verdict based on admissions by guardian ad litem** held improper. TexCommnA 293SW560.

788–10 49RI302, 142A371.

788–10½–New. , as is the question of the reasonable value thereof. 228Ky32, 14SW(2d)189.

788–16 167Ga537, 146SE170.

788–22 88CalA369, 263P823.

788–26½–New. Where no regular guardian has been appointed for an incompetent defendant, judgment may properly direct that execution issue. TexCivA 274SW292.

789–27 121Kan212, 246P506 [citCJ].

789–28 204Iowa1394, 213NW225; 124Okl128, 254P38; TexCivA 294SW618.

789–29 204Iowa1394, 213NW225; 124Okl128, 254P38.

789–31 204Iowa1394, 213NW225; 244Mich148, 221NW165; 137SC450, 135SE558.

789–36 [a] **Failure to serve summons on committee does not render judgment invalid** where made party to action in which answer and defense is made. 214Ky716, 283SW1044.

789–39 Fla109S312, 314 [citCJ].

789–49 204Iowa1394, 213NW225; TexCivA 29SW(2d)849 (default judgment in tax suit).

789–50 204Iowa1394, 213NW225.

790–59 204Iowa1394, 213NW225; 124Okl128, 254P38.

790–60 [b] (2) Proceedings by guardian to set aside judgment entered seventeen months previously is timely where ward is still alive and incompetent. 204Iowa1394, 213NW225.

790–62 TexCivA 29SW(2d)849.

790–63 Fla109S312, 314 [citCJ].

790–66 204Iowa1394, 213NW225.

791–75 91Fla858, 109S315; 204Iowa1394, 213NW225. [c] **Restoration to statu quo is not necessary in suit by guardian to set aside foreclosure judgments** and decrees where no consideration passed. 204Iowa1394, 213NW225.

791–80 204Iowa1394, 213NW225.

791–81 204Iowa1394, 213NW225.

791–82 204Iowa1394, 213NW225.

791–84 124Okl128, 254P38; TexCivA 294SW618.

791–93 9PaDist&Co718.

792–97 40GaA305, 149SE293. [a] **Where insane person has no regularly appointed guardian** judgment against him can be collected only by execution against his property. TexCivA 274SW292.

792–98 [a] **Purchaser at execution sale** on judgment against insane person would be protected. 170Ga239, 152SE237.

792–99 [a] **Adjudication by lunacy board.**–124Okl300, 256P46.

792–4 TexCivA 274SW292 (where insane person appeared by permanent guardian).

792–5 TexCivA 274SW292 (where insane person appeared by permanent guardian appointed by county court).

793–53 229AppDiv19, 241NYS35 (nunc pro tunc appointment is ineffective). See also 226AppDiv373, 235NYS357(2d case).

793–54 226AppDiv373, 235NYS357(2d case); 22OhA1, 153NE914. [a] But see 230AppDiv707, 243NYS220.

794–56½–New. Proceeding to incompetents committed in another state to obtain possession of securities is ancillary to that in state by which committee was appointed. 126Misc1, 213NYS162.

794–56⅓–New. Order directing a trus-

tee to pay the income of a trust to a foreign conservator of a beneficiary adjudged incompetent by a foreign court has been held unwarranted. 223AppDiv 89, 227NYS421.
794-63 22 OhA1, 153NE914.
794-64 22 OhA1, 153NE914.
794-65 22 OhA1, 153NE914.
794-63½-New. The power of a foreign guardian has been held to be limited to similar powers possessed by a guardian appointed by the state courts. 22 OhA1, 153NE914.

INSECURE

794-10½-New. ; unsafe and dangerous. 313Mo 527, 282SW425.

INSOLVENCY

805-2 33 OklCr125, 243P251 [citCJ].
805-8 [a] 105NJL616, 147A483. [c] **Mere failure to pay claim because of dispute** as to amount or validity and not because of inability is not "insolvency." DelCh 140A801.
808-12 15DelCh321, 137A79; 202 Iowa 1377, 212NW63; 311Mo 551, 279SW122, 126 [citCJ]; 130 Okl 27, 264P904; 33 OklCr125, 243P251 [citCJ]; TexCivA 218SW(2d)711.
808-13 26F(2d)40.
803-25 286Pa213, 133A229.
803-26½-New. Insolvency is unaffected by the intention or hopes of persons affected. 19F(2d)40.
809-34 202 Iowa1377, 212NW63.
809-49 220MoA973, 272SW1021, 1025 [citCJ].
814-98 [b] (3) Generally, creditors have preferential right in their own state as against trustees and receivers appointed in foreign jurisdiction. 253 IllA361.
815-23 [a] **Sovereign is not bound by** provisions of insolvency law unless especially mentioned. 18F(2d)409.
815-24½-New. **Canadian Bankruptcy Act**, making the act binding on the crown, applies to the crown in the right of a province as well as in the right of the Dominion. BC [1928] 3DomLR 255.
816-36 BC [1929] 4DomLR536.
820-31 [c] **Court of equity** may administer assets of insolvent debtor. 146 Va197, 135SE882.
820-37 [a] In Ontario.-62 OntL271, [1928] 2DomLR520.
820-39½-New. The bankruptcy court cannot adjudicate a dispute between a trustee and a stranger to the estate as to any matter not provided for in the Bankruptcy Act. 62 OntL360, [1928] 3DomLR562(1stcase).
821-58 [e] **Persons confined in jail in default of payment of fines and costs.**-27 OhNPNS31.
822-63 [b] (2) Under Canadian Bankruptcy Act, insolvent married woman not carrying on trade or business may make authorized assignment. Ont [1930] 2DomLR40.
827-25 [a] **Election of trustee.**-NB [1930] 1DomLR733 (held invalid where secured by disqualified votes).
829-49½-New. **Philippine Islands.** A limited partnership has a personality distinct from its members and may be declared insolvent, although its members may not be insolvent. 44Philippine916.
829-50 [h] In Philippines.-45Philippine142.
831-78 [c] Philippine Islands.-44Philippine916.
832-95 But see Man [1930] 2DomLR 643.
835-41 [f] **Carrying on business of debtor.**-Ont [1930] 4DomLR805.
835-42½-New. In Ontario registrar in bankruptcy, in absence of express direction by judge, has no jurisdiction to adjudicate upon issue as to amount of damages sustained by debtor from appointment of interim receiver. Ont [1930] 2DomLR689.
836-43 See also 46Philippine59.
837-63 [e] **Person having adverse interest** is disqualified. 88PaSuper275.
838-78 196Cal 380, 238P81.
839-82 196Cal 380, 238P81; 49Philippine657. [i] (2) Where person domiciled in England at time of adjudication in bankruptcy under English Bankruptcy Act owns property situated in province of Canada such property will be vested in English trustee by order of provincial bankruptcy court. Sask [1929] 3DomLR353.
840-93 Can [1930] 1DomLR689.
841-7 [d] In Ontario.-62 OntL263, [1928] 2DomLR602.
843-19 44Philippine216.
843-25 [a] (1) 62 OntL291, [1928] 3 DomLR73.
845-42 [a] (2) Alta [1928] 3DomLR 147; 62 OntL281, [1928] 3DomLR139.
847-45 Ont [1928] 2DomLR96.
848-53 Ont [1928] 1DomLR699. [j] In Ontario.-[1928] 2DomLR96.
848-54 Ont [1928] 2DomLR331.
850-66½-New. In Canada provision of fire insurance policy making loss payable to bank inserted to secure advances made or to be made is not unlawful preferences. Can [1929] 4DomLR1028.
851-69 44Philippine216 (assignment to creditor within thirty days before filing of insolvency petition held void).
851-70 [c] In Ontario.-Ont [1930] 4 DomLR113.
852-83 48Philippine931.
852-84 44Philippine243.
854-1 48Philippine931.
856-12 175Ark599, 299SW997.
857-22 44Philippine243. [a] (2) Court acquiring jurisdiction of subject matters and of person of defendant prior to adjudication of insolvency, upon notice to assignee to appear in foreclosure suit and defend, may hear and determine cause. 44Philippine243.
858-27½-New. A chancery court as a court of general jurisdiction has jurisdiction to administer insolvent estates. 154Miss846, 123S887.
859-41 [a] (1) 48Philippine499.
860-45 [a] In Philippines.-50Philippine654.
860-47 [a] (3) Carrying on business for conservatory purposes. Alta [1930] 4DomLR841 (direction regarding shares of stock refused). [c] **Leasing property.**-BC [1929] 4DomLR536.
863-83½-New. A promise by a person disqualified by adverse interest to act as receiver and personally pay the debts of the insolvent is void and unenforceable. 88PaSuper275.
863-83⅓-New. Under the Canadian Bankruptcy Act a trustee is prima facie personally liable for goods supplied to him in carrying on the debtor's business. Ont [1928] 2DomLR986(2dcase).
863-83¼-New. Expense of abating nuisance created by abandonment of railroad tracks is not on trustee of insolvent railroad, but on trust property. 229AppDiv41, 241NYS569.
864-91 [a] (2) Trustee appointed to collect assets has right to be heard in state other than that where involuntary assignment was made. 253 IllA361.
877-73½-New. An estate is administered on equitable principles, without preference as to the priority of matured debts. 118Tex91, 11SW(2d)496.
877-74 [a] (2) Claimant cannot rank on estate of bankrupt for alleged loan consisting of financial juggling whereby claimant refunded to bankrupt as loan money received from bankrupt. Ont [1928] 2DomLR686.
878-85 [j] **Holder of shares of stock received for services** cannot claim to be creditor to extent of value of shares. BC [1930] 1DomLR642. [k] **Holder of shares for services** cannot claim to be creditor. NB [1930] 1DomLR733.
879-91 [f] In Philippines.-51Philippine992.
879-92 But see 239Mich670, 214NW 971.
883-7 17F(2d)913, 915 [citCJ]; 17F (2d)918.
884-8 13F(2d)887.
889-72 Sask [1930] 2DomLR88.
889-72½-New. In Saskatchewan unreasonable delay by trustee in disallowing claim will be held to constitute admission of proof. Sask [1930] 2DomLR88.
889-73 [g] **Philippine Civil Code article 1924** refers to credits in insolvency proceedings. 51Philippine992.
890-78 MoA 282SW757, 759 [citCJ].
890-81½-New. Preferences can only be created by contract or statute. 118Tex 91, 11SW(2d)496.
890-83 34Wyo 134, 241P1063, 42ALR 1290.
890-84 18F(2d)231.
891-85 18F(2d)231.
891-5 [d] **Canadian Bankruptcy Act**, giving crown preference for taxes, rates, and assessments, does not include "rates" as used in the Crown Timber Act. BC [1928] 3DomLR255. [e] In Canada.-Ont [1929] 2DomLR558. [f] **Effect of repeal of Canadian Special War Revenue Act** was to abolish liens of crown for sales tax held at date of repeal and substitute therefor right to preferential payment subject to prior charges or liens of creditors. Ont [1928] 2DomLR396. [g] In Ontario.-[1928] 2DomLR529.
893-15 26 OhNPNS24.
894-29½-New. In Ontario, where a fire insurance policy is made payable to a creditor of insured and insured's trustee sues for and recovers the proceeds, the trustee becomes the trustee for the creditor to the extent of the latter's interest. Ont [1928] 2DomLR396.
894-31 50Philippine654 (attachment). [c] **That attaching creditor participated unlawfully in election of assignee** does not deprive him of lien. 50Philippine654.
895-38 48Philippine499. See also BC [1930] 1DomLR57.
900-3 [b] In Ontario.-Ont [1930] 2 DomLR471.
900-6 [d] In Ontario.-Ont [1930] 2 DomLR657.
901-19 Sask [1930] 2DomLR777.
905-64 [a] (1) 48Philippine971.
905-65 49Philippine657; Man [1929] 4 DomLR1067(2dcase).
908-11 NS [1929] 4DomLR321.
909-23 50Philippine95.
912-61½-New. Bankrupt may be required to consent to judgment for 50% of debts provable and not satisfied as condition to granting of application for discharge. Sask [1930] 1DomLR218.
923-19 BC [1930] 1DomLR642.
925-56 49Philippine820.
925-59 [e] In Canada.-[1928] 2DomLR136.
926-69½-New. In Canada an order of discharge imposing conditions will not be disturbed unless the conditions appear onerous. Man [1929] 1DomLR986.

INSPECTION

930-3 26F(2d)458.
930-13 270US402, 46SCt320, 70Led 654.
931-18 156Md244, 144A357.
934-84 167Ga594, 146SE467.
934-96½-New. A special oath, required by the state inspector of fertilizers, must be filed with the commissioner of agriculture. 167Ga594, 146SE467.
934-96⅓-New. The appointment by the commissioner of agriculture of six persons to act until further notice from him, and the designation of one of such appointees to act in the territory served by the relator sought to be ousted by the commissioner, and seeking to compel payment of his salary, did not amount to a specific appointment of another to a position held by the relator, so as to preclude recovery of salary. 167Ga594, 146SE467.
934-93 167Ga594, 146SE467.
935-12 84Colo 576, 272P629.
936-14 [b] In Missouri.-313Mo 334, 281SW946.

INSTALL

939-10 77CalA66, 246P113, 116 [quot CJ].

INSTALLATION

939-13 77CalA66, 246P113, 116 [quot CJ].

INSTALLMENT

940-25 241NY312, 150NE127.

INSTANCE

940-37½-New. At his "instance" may mean at his "solicitation," 214Ala62, 106S396.

940–37½–New. or "suggestion." 214 Ala62, 106S396.

INSTITUTE

941–82 120Kan350, 243P288.

INSTRUMENT

945–67 32Ariz182, 256P1048, 1050 [cit CJ].
945–69 TexCivA 275SW730, 732 [cit Cyc].
945–70 32Ariz182, 256P1048, 1050 [cit CJ].
945–74 TexCivA 275SW730, 732 [cit Cyc].
945–80 TexCivA 275SW730, 732 [cit Cyc].
945–82 TexCivA 275SW730, 732 [cit Cyc].
945–84 TexCivA 275SW730, 732 [cit Cyc].
945–85 [a] TexCivA 275SW730, 732 [citCyc].
946–3 51ND246, 199NW930.
946–8 TexCivA 275SW730, 732 [cit Cyc].
946–19 TexCivA 275SW730, 732 [cit Cyc].

INSUBORDINATION

948–92 [a] **Insubordination can rightfully be predicated** only upon refusal to obey some order which superior officer is entitled to give and entitled to have obeyed. 197Cal 70, 239P844.

INSULATOR

949–11 See also 29F(2d)784.

INSURANCE

975–2 6F(2d)533, 43ALR496; 41GaA 639, 154SE194(2dcase).
975–3 193Wis179, 214NW616. [a] **Other definitions.**–234Ky714, 29SW(2d) 19.
975–6 41F(2d)793; 6F(2d)533, 43ALR 496; 194Cal 114, 228P11; 166Minn285, 207NW724; 128Misc870, 220NYS386; 49ND534, 191NW839; 132 Okl 165, 269 P1065; 193Wis179, 214NW616. [a] **Statutory definitions** exist in some jurisdictions. 166Minn167, 207NW317.
975–6½–New. It is indemnity for loss in respect of a specified subject. 166 Minn167, 207NW317.
976–12 25F(2d)31.
976–36 [a] **Contract of fire insurance company in foreign state** to insure automobiles, when sold to retail purchaser, may be construed as contract made in foreign state for benefit of third party. 13F(2d)500.
977–43½–New. Statute authorizing creation of surety and trust companies and prescribing their powers has been held not to define "insurance policies." TexCivA 299SW676.
977–43⅓–New. Laws of state of domicile of corporation issuing policy govern where premiums and benefits are payable at home office and it does not appear where policy was issued and delivered. 43F(2d)517.
977–44 22F(2d)952 (dictum).
977–46 22F(2d)952; 31F(2d)571; 83 IndA209, 147NE816, 817 [quotCyc]; 203 Iowa198, 212NW562, 563 [citCJ]; Iowa 229NW702; 232Ky834, 24SW(2d) 906; 231Ky5, 20SW(2d)1029 (laws of insurer's home office state held not controlling); 218MoA374, 271SW867; 219 MoA121, 272SW79; 221MoA1007, 300 SW550; 75Mont460, 243P1061; 82NH 543, 136A400, 50ALR1276; 135 Okl 40, 273P1007; 122 Or615, 260P229; 128 Or9, 270P764; 47RI 416, 133A799; 48 RI 152, 136A305, 54ALR512; TexCivA 13SW(2d)720; TexCivA 20SW(2d)142. [a] **That premium notices were sent to address in state** and were to be paid to agent within state has been held not to work change in place of contract consummated outside state. MoA 27SW (2d)452.
978–51 219MoA121, 272SW79.
978–53 219MoA121, 272SW79.
979–57 217Ky846, 290SW690; MoA 24 SW(2d)653.
979–59 217Ky846, 290SW690.
979–60 MoA 24SW(2d)653.
980–66 31F(2d)862; 83 IndA209, 147 NE816; 217MoA429, 266SW1001.
980–67½–New. , if entered into with an authorized agent of the insurer within the state, 65Utah581, 238P648.
980–72 TexCivA 293SW271.
980–75½–New. , law of the place where policy is delivered and first premium paid. 83 IndA209, 147NE816.
980–75¼–New. Law of place of performance governs validity and construction of an insurance contract. 217Ky 846, 290SW690.
980–76 MoA 27SW(2d)452.
981–81 [a] 263Mass341, 161NE589.
981–87 300Pa327, 150A645.
981–90 267US126, 45SCt320, 69Led538; 13F(2d)500; 251Mass569, 147NE681; 252Mass432, 147NE904; 175Minn73, 220NW425; Minn 233NW310; 315Mo 681, 286SW363; 115Nebr357, 213NW 349; 115 OhSt607, 155NE138, 50ALR 473; 25 OhNPNS331; 37 OklACR205; 193Wis179, 212NW289; 196Wis451, 220 NW534. [a] **State has right** to question right to exercise franchise originally granted by it. TexCivA 297SW1049. [b] **Nonuser of corporate rights** for forty five years held to cause loss of powers. TexCivA 297SW1049. [c] **Filing charter amendment** by secretary of state and receipt by insurance commissioner of application for permit to write life insurance held not to estop state to forfeit franchise for nonuser. Tex CivA 297SW1049.
982–91 But see 117Nebr98, 219NW847.
982–92 TexCommnA 29SW(2d)316.
982–93 34F(2d)185; 97Fla916, 123S668 (2dcase); Mass 169NE657.
982–93½–New. **Insurance of public property.** In some jurisdictions there are statutes establishing a state fire and tornado fund for furnishing insurance on property of the state and its governmental agencies and divisions. 53ND 683, 208NW968, 45ALR1337 (constitutionality).
982–99 289Pa307, 137A601.
982–5 34F(2d)185 (elimination from expenses of federal tax); 34F(2d)185 (excess commission); 34F(2d)185 (basis for rate reduction); 34F(2d)185 (insurance rate reduction order is effective till designation of classes of insurance is made); 34F(2d)185; 154Wash269, 282 P44. [a] **Determination of rates by state officer.**–121Kan302, 249P908.
983–7½–New. , and it may protect its citizens against other unjust discriminations in relation to contracts of insurance. 37 OklACR205.
983–9 135Misc352, 238NYS313; 37 Okl ACR205.
983–10 **Erratum.**–"21 Ida. 285, 131 P 81" should read "21 Ida. 285, 121 P 81."
983–12½–New. The state will not attempt to make contracts for the parties to an insurance contract and will leave them to agree to the terms. 37 OklACR 205.
983–12⅓–New. But the court has power to say what contracts are enforceable. 37 OklACR205.
983–12¼–New. and in what courts they may be enforced. 37 OklACR205.
983–25½–New. A statute providing for transfer of funds of defunct insurance companies to the state comptroller is not invalid as taking property without due process of law, 133Misc464, 232NYS 489.
983–25⅓–New. or as legislative divesting of title of substituted trustee, 133 Misc464, 232NYS489.
983–25¼–New. and is valid as in the nature of a statute of limitations. 133 Misc464, 232NYS489.
983–26½–New. Statute prohibiting more than one agent of a fire insurance company in each town violates due process and special privileges and immunities clauses of constitution. 32NM88, 251P390.
983–26⅓–New. Statute providing that judgment received against insured should be paid by insurer held valid. 25 OhNPNS331.
984–32 315Mo 681, 286SW363.
984–50 118 OhSt56, 160NE464. [a] **Exchange of stock** by stockholders of domestic and foreign companies, not affected by Blue Sky Law, may not be impeded or interfered with by insurance commissioner or railroad commission. 187Wis528, 205NW492. [b] **Consent of parties** cannot confer jurisdiction on commissioner. 187Wis528, 205NW492.
984–51 315Mo 681, 286SW363.
984–53 See 196Wis472, 220NW929.
984–57 34F(2d)185 (where parties understood that stipulation relative to proceeding for rate reduction order settled matter of designation of class, they are estopped to deny that order was not in effect from effective date provided therein); 130Kan2, 285P522; Mass 169 NE657; 118 OhSt56, 160NE464. [a] **Determination of rate under Missouri statute.**–315Mo 113, 285SW65. [b] **What constitute reasonable rates.**–124 Kan350, 259P1068. [c] **How profits determined for purpose of fixing rates.**–124Kan350, 259P1068. [d] **Stipulating not to make further reduction in rates.**–Superintendent of insurance, in stipulating that insurance companies may continue under old rates on giving refunding bond till validity of rate reduction is determined, cannot bind himself not to make further reduction during pendency of suit to determine validity. 316Mo 457, 290SW443. [e] **Rating bureau.**–(1) 196Wis472, 220NW929. [f] **Suit to enjoin enforcement of order of superintendent of insurance reducing rates to be charged.**–281US331, 50SCt 288, 74Led881.
984–57½–New. The legislature may vest in the commissioner power to determine whether rates are unreasonable and discriminatory, and to establish a reasonable rate. 196Wis472, 220NW929.
985–64 [a] **Rates.**–196Wis472, 220NW 929.
985–65 Mass 169NE657. [a] **Jurisdiction of insurance** commissioner is always open for review, though not raised in trial court or in briefs or arguments on appeal. 187Wis528, 205NW492. [b] **Effect of amendment of statute after decision.**–315Mo 113, 285SW65. [c] **Scope of review.**–315Mo 113, 285SW65. [d] **Findings of insurance commissioner** must be accepted as true by Supreme Judicial Court. Mass 169NE657. [e] **Automobile owners affected by higher premium rates** have been held persons aggrieved, entitling them to bring petition for review. Mass 169NE657.
985–67 34F(2d)185 (temporary injunction issued where failure of proof as to confiscation resulted from mistake as to basis of evidence); 34F(2d)185 (federal court has jurisdiction, and injunction suit is proper proceeding to determine validity of reduction rate order).
985–68⅓–New. An order of the superintendent of insurance, fixing rates, is presumed to be reasonable. 124Kan350, 259P1068.
985–71½–New. The hail indemnity fund for any year consists of the proceeds of a levy based upon losses previously reported to the insurance commissioner. 54ND820, 211NW592.
985–71⅓–New. The duty of presenting claims for losses payable out of such fund rests upon those sustaining losses. 54ND820, 211NW592.
985–71¼–New. The surplus fund, consisting of any surplus in the indemnity fund above the amount necessary to pay losses for a given year, plus the proceeds of a flat acreage tax, is not an indemnity fund but a revolving fund. 54ND820, 211NW592.
985–73 10PaDist&Co 30. [a] **Corporation chartered prior to regulating statutes** has been held subject thereto. Tex CivA 297SW1049.
985–75 [a] **Statutes exempting mutual fire companies from general statutes** do not exempt them from general rules of substantive law. 222MoA1010, 7SW(2d) 463.
985–82 135 Okl 151, 274P642, 63ALR 704.
986–99 315Mo 681, 286SW363.
986–1½–New. The general object of such code is to make certain that a citizen secures indemnity for which he contracts, and that rates and charges be reasonable and nondiscriminatory. 315Mo 681, 286SW363.
986–2 38 OklACR268; 200Wis585, 229

NW26 (remedial statutes).

986-9 13PaDist&Co 306 (statute held applicable to domestic mutual fire insurance company). [a] (2) But see 13 PaDist&Co 306.

986-12 [a] **Increase of rates,** without filing copy of agreement for increase before taking effect thereof, held invalid. 14F(2d)690. [b] **Compensation inspection rating board** is competent to fix rates for compensation insurance with approval of state superintendent. 243NY261, 153NE68. [c] **Validity and construction of statutes.**–14F(2d)690.

987-24½-New. In Oklahoma statute applies to contracts with residents on property outside state. 38 OklACR268.

987-24⅓-New. Insurance commissioner, finding that insurance companies are not properly doing business, may inform them as to what they must do to continue in business. 221Ky750, 299SW989.

987-24¼-New. Record of mutual association should be kept complete enough to give all necessary information to members. 205 Iowa1099, 212NW473.

987-24⅕-New. A claim arising before the statute became effective did not come under its provisions, where the statute related to reference proceedings. 267Mass430, 166NE758.

987-27 243Mich561, 220NW743.

987-27½-New. The certificate of a reciprocal insurance association authorizes its attorney in fact to represent it. 243 Mich561, 220NW743.

987-28 [a] **License may be withheld** pending correction of statutory violation, on company's neglecting or refusing to make correction. 115 OhSt607, 155NE138, 50ALR473.

987-29 [c] **Notice of suspension or revocation** as required by statute is necessary where authority to suspend depends on another statute, and ten-day notice does not deny due process as giving inadequate time for hearing. 154 Wash269, 282P44.

987-30½-New. The suspension of a company's license for charging inadequate rates does not prevent the company from issuing policies at reasonable rates under a previously approved schedule. 154Wash269, 282P44.

988-56½-New. A policy including a death benefit and a health or accident disability benefit constitutes a life insurance policy within a statute imposing a privilege tax on insurance companies with different rates as between life insurance companies and other companies. 155Miss358, 121S849.

988-59 150Md557, 133A472. [a] **Companies engaged in writing surety bonds** are required to make deposit under some statutes. 167Minn198, 208NW659.

988-60 [a] **Sureties on bond** to secure payment of assessments to parties entitled thereto are not liable for insurer's repudiation of liability. 173Ark9, 292SW396.

988-61 See 150 Md557, 133A472.

989-76½-New. Assets of an insurance company no matter where located are liable to foreign policy holders. 125 Misc417, 211NYS270.

989-76⅓-New. Under amendments to the Insurance Law, it was held that the legislature intended that securities deposited with the superintendent of insurance should be security for domestic business only. 242NY148, 151NE159, 45ALR622.

989-76¼-New. That a casualty company deposited securities with the state insurance commissioner as a guaranty for payment of insurance policies issued by it, at a time when no statute required such deposit, under the mistaken belief that a deposit was required, does not cause such fund to lose its character as a trust fund for the purposes for which it was deposited. 206 Iowa 988, 221NW585.

989-82 [a] **Attorney-general** has authority to sue to forfeit franchise for nonuser. TexCivA 297SW1049.

989-88½-New. Contracts of an unincorporated association doing insurance business as an assessment company in violation of statute may be enforced against it. MoA 286SW842.

989-89 275US274, 48SCt124, 72Led277; 13F(2d)500; 30F(2d)539; 227Ky804, 14SW(2d)150; 126 Or588, 269P236, 60 ALR1165; 128 Or9, 270P764; 49RI 132, 141A76. See also 272US295, 47SCt88, 71Led243.

989-89½-New. Requirement that foreign companies comply with laws under penalty of refusal of license does not discriminate between foreign and domestic companies. 116 OhSt127, 156 NE114.

989-89⅓-New. Superintendent of insurance may refuse or revoke the license of a foreign insurance company where expense of management is not in due proportion to income, subject to review by the court. 116 OhSt127, 156NE114.

989-89¼-New. The state may refuse the aid of its courts in enforcing a contract involving violation of its laws. 275US274, 48SCt124, 72Led277.

990-90½-New. The state may prescribe conditions under which foreign insurance corporations may do business, although the conditions differ from those prescribed for other foreign corporations engaged in other business. 196Wis451, 220NW534.

990-91 But see 272US295, 47SCt88, 71 Led243.

990-91½-New. Still, insurance contracts illegally solicited in another state are not enforceable there, although made outside the state. 275US274, 48SCt124, 72Led277.

990-94 48SD629, 205NW714 (mortgage to foreign insurance company on realty within state held valid).

990-95 272US295, 47SCt88, 71Led243.

990-95½-New. However, the constitutional right to make a contract in another state does not entitle the insurance company to solicit insurance there by an agent present within the state. 275US274, 48SCt124, 72Led277.

991-96 MoA 24SW(2d)653. [a] **In South Dakota.**–48SD629, 205NW714.

991-98 272US295, 47SCt88, 71Led243.

991-99 8PaDist&Co 93.

991-8 Ill 172NE17.

991-10½-New. Superintendent of insurance liquidating a foreign insurance company must remit funds to persons entitled after paying domestic creditors. 244NY606, 155NE916.

991-10⅓-New. A foreign corporation, qualifying to do business within the state, may refrain from doing such business. 330 Ill 608, 162NE178.

991-10¼-New. Foreign company held not authorized by charter to write disability insurance. Mass 171NE656.

991-10⅕-New. Liquidation of foreign reinsurer. Claim held not "domestic claim." 230AppDiv110, 243NYS480.

992-18 [a] **Municipal taxes paid by foreign insurance** are to be considered as part of aggregate taxes paid within state. 233Ky350, 25SW(2d)748.

992-20 [a] **Conversely,** they may enjoy permissive features of statute as to loans and investments. 154Wash 297, 282P63.

992-25½-New. Foreign fire insurance company, authorized to do business in New York, held not to have violated New York laws as to impairment of capital and surplus. 13F(2d)500.

992-25⅓-New. Foreign fire insurance company held not to have written policies of insurance against theft without charter authority therefor. 13F(2d)500.

992-25¼-New. A statute, requiring that foreign insurance companies' investments be of the same "general character" as those of domestic companies, to entitle them to do business in the state, authorizes the state superintendent of insurance to insist on the same proportion between foreign and domestic companies' holdings of stock in other such companies, and safer investments. 30F(2d)539.

992-27 48SD629, 205NW714 (statutory requirement held repealed).

993-34½-New. Foreign companies are required in some jurisdictions to have policies countersigned by a resident agent. 82Colo 72, 257P246; Tex CommnA 288SW801; TexCivA 280SW 297 (transaction held violative of statute).

993-34⅓-New. Bad faith, within the meaning of a statute, has been held not shown by insuring automobiles on which another company having the same stockholders has loaned money. BC [1927] 3 DomLR245.

993-35 [a] **Proof that foreign surety corporation had procured certificate of doing business** could be dispensed with where contract and performance was pleaded. TexCivA 23SW(2d)484. [b] **Inapplicable to domestic corporations.**–Wis 227NW952. [c] **Foreign companies submit themselves to interpretation of statutes** by state courts on securing license. 41F(2d)316.

994-50 13F(2d)500.

994-54 154Wash297, 282P63 (failure to comply with order to dispose of certain investments).

994-63½-New. The license may be revoked for violation of a statute although the statute is unconstitutional. TexCivA 280SW297.

994-65 [a] **In Washington.**–154Wash 269, 282P44.

994-67 13F(2d)500. [a] **Cause not shown.**–13F(2d)500. [b] **In New Mexico.**–270US426, 46SCt331, 70Led664. [c] **Insolvency.**–9PaDist&Co 693.

994-75½-New. State held without authority to revoke a foreign fire insurance company's certificate because of business with residents of an objecting state, written in another state, in a manner consistent with the latter state's laws. 13F(2d)500.

994-76 330 Ill 608, 162NE178.

994-76½-New. Rate and amount of tax. Notwithstanding a statutory provision that the amount of net annual receipt of an agency "shall be entered on the tax lists . . . and subject to the same rate of taxation . . . that other personal property is subject to," where the tax on personal property is at fifty per cent of "full value," such receipts may be taxed without being scaled down to fifty per cent thereof. 317 Ill 366, 148NE23.

994-78 280US111, 50SCt49, 74Led217, 64ALR1430 (Oregon statute requiring fee for additional agent); 317 Ill 366, 148NE23 (uniformity clause).

995-85½-New. Tax on net receipts. 317 Ill 366, 148NE23.

995-86 317 Ill 366, 148NE23 (holding that possession of certificate from state insurance commission showing payment of tax on net agency premium receipts is condition precedent to lawful doing of business in state).

995-94 114 OhSt504, 151NE755 (superintendent of insurance).

995-96 [a] **Withdrawal of deposit.**–117 OhSt412, 160NE239.

995-97 114 OhSt504, 151NE755.

995-99 [a] 242NY148, 151NE159.

996-4 114 OhSt504, 151NE755. [a] **Claim on insolvent foreign insurer** (1) could be asserted only against securities deposited, if contract of insurance was American obligation. 130Misc97, 222NYS562. [b] **Extent of rights of policyholders and creditors.**–253NY365, 171NE572. [c] **Disposition of surplus assets after liquidation.**–229AppDiv637, 243NYS35.

996-5 [b] **Creditors of insolvent foreign insurance company,** dealing with American branch, but not those creditors not dealing with branch, are entitled to interest on their claims, even though remaining creditors will receive less than forty per cent of claims. 249 NY139, 163NE129.

996-8 251 IllA549 (not collateral security but part of company's assets).

996-9½-New. In New York the statute does not classify in different degrees of preference those who are entitled to its protection. 242NY148, 151NE159.

996-9⅓-New. All claimants are entitled to equal protection or none at all. 242 NY148, 151NE159.

996-9¼-New. Rights of foreign insurance company depositing securities are governed by statute in force at time of deposit. 242NY148, 151NE159 (sub-

sequent amendments do not affect such rights).

996-9⅛-New. It is fair presumption that the legislature intended to adjust the amount of this capital to domestic business and to risks incurred in issuing policies in the state. 242**NY**148, 151**NE** 159 (not to those incurred by issuing policies abroad even to residents of this country).

996-9⅛-New. Thus such funds are available on insolvency of the corporation only to claimants under policies issued in this country to residents. 242 **NY**148, 151**NE**159.

996-9⅙-New. Under statutes in some jurisdictions suit by the attorney-general is authorized to determine rights of persons claiming interest in deposit by foreign company and to make proper distribution of fund where such company fails to pay its liabilities or becomes insolvent or ceases to do business in state, leaving any such liability unpaid. 114 **OhSt**504, 151**NE**755.

996-9⅙-New. Judicial comity does not require the courts to recognize the alien liquidator of the foreign company appointed in a foreign country applying under the statute for distribution of the deposit for benefit and security of policyholders of such company doing business in state, when certain policies issued by such company reinsuring resident risks have not matured and liabilities of the company cannot presently be determined in liquidation proceeding. 114 **OhSt**517, 151**NE**759.

996-9⅙-New. The receiver of the foreign company appointed in a foreign country applying under the statute for distribution of the deposit has no standing in courts of state for that purpose where no policy holder or creditor of the company has applied to the attorney-general to bring action for distribution. 114 **OhSt**504, 151**NE**755.

996-9⅒-New. Until all valid claims of domestic policyholders and creditors have been settled under statute, the receiver appointed in a foreign country is not "any person entitled to participate in such deposit or the proceeds arising therefrom" within the purview of the statute. 114 **OhSt**504, 151**NE**755.

996-9 1/11-New. Under some statutes the deposit required of fidelity, guaranty, and surety companies is made a trust fund only for obligations of a fidelity, guaranty, and surety business. **Tex CivA** 294**SW**599.

996-9½-New. Under such statutes a foreign fidelity, guaranty, and surety company, which has deposited the amount required to do such business, is not required to make further deposit in order to entitle it to do other insurance business not of the character done by fire, marine, and life insurance companys. **TexCivA** 294**SW**599.

996-9 1/13-New. Assets of a foreign insurance company should, after all claims have been paid on a domestic obligation, be transmitted to the domicile of the company. Foreign creditors and policy holders may not sue on this fund in this country. 219**AppDiv**46, 219**NYS** 366.

996-16 13**F(2d)**500. See also 27**F(2d)** 329.

996-18 40**F(2d)**357; 175**Minn**284, 221 **NW**21. [b] **Reinsurance contracts.**-making of reinsurance contracts in foreign state as to property located outside state does not constitute doing business in latter state. 279**US**405, 49 **SCt**360, 73**L ed**762.

996-20 49**RI** 132, 141**A**76.

997-37½-New. Acquiescence by purchasers of automobiles in a sales contract, which gave them insurance under an agreement made in a foreign state, held not procuring of insurance in New York. 13**F(2d)**500.

997-41 170**Ark**1039, 282**SW**975.

998-49 [a] 166**Minn**285, 207**NW**724.

998-53 38 **OklACR**268; 48**RI** 274, 137 **A**470.

999-55 157**Tenn**241, 7**SW(2d)**803.

999-57 87**CalA**584, 262**P**792. [b] **Statute limiting commissions** to agents on fire insurance policies to reasonable amount is held within police power of state. 105**NJL**642, 146**A**370.

999-64 87**CalA**584, 262**P**792; 315**Mo** 681, 286**SW**363; 222**MoA**1057, 7**SW(2d)** 479; **TexCivA** 274**SW**648. [a] **Repeal of statutes.**-87**CalA**584, 262**P**792. [b] **Statutory requirement must be construed** to protect policyholders, and not to defeat their rights. 243**Mich**395, 220 **NW**758. [c] **Classification.**-87**CalA**584, 262**P**792 (statutes held not discriminatory). [d] **Regardless of license requirements,** agent may receive commissions from agent of another company. **Cal** 290**P**574.

999-65 87**CalA**584, 262**P**792; 315**Mo** 681, 286**SW**363.

999-69 [c] **Reciprocal exchange** defined. 23**AlaA**542, 129**S**291(2dcase).

999-73 But see 209**Ky**137, 272**SW**408.

999-73½-New. Trust company, otherwise eligible, not debarred from receiving license by voting arrangement associating it with bank not qualified. 209**Ky**137, 272**SW**408.

1000-78 209**Ky**134, 272**SW**379 (person of good character acting as secretary of bankers' association on salary, and obtaining much of insurance business from members, eligible to license). See also 243**Mich**561, 220**NW**743.

1000-80 315**Mo**681, 286**SW**363. [a] (3) Refusal of applicant to answer questions in form prepared by insurance department is sufficient reason for refusing license. 315**Mo** 681, 286**SW**363.

1000-82½-New. Some statutes forbid any licensed broker to pay any commission, brokerage, or other consideration on account of policies covering property within the state to a nonresident of the state or to anyone not licensed by the state as an insurance agent. **TexCivA** 280**SW**297 (transaction held to violate statute).

1000-83 [a] **Phrase "or other bad practices"** in statute is too indefinite and uncertain upon which to predicate revocation of insurance license. 139 **Okl** 92, 281**P**300. [b] **Ruling of insurance commissioner revoking license of agent** will not be controlled by certiorari unless arbitrary. **WVa** 153**SE**911. [c] **Evidence held sufficient** to show violation of insurance law by agent in making incomplete comparison of policies. **WVa** 153**SE**911.

1000-91 87**CalA**584, 262**P**792.

1000-2 243**Mich**395, 220**NW**758; 218 **MoA**84, 262**SW**686; 198**Wis**561, 225**NW** 174.

1001-11 38 **OklACR**268; 107**WVa**331, 148**SE**197; **Wis** 229**NW**77.

1001-15 **Wis** 229**NW**77.

1001-21 [b] **In West Virginia.**-107 **WVa**331, 148**SE**197.

1001-25 139 **Okl** 277, 281**P**955.

1001-26½-New. Action against agent must be begun within time prescribed by policy. 38 **OklACR**268.

1001-27½-New. One who receives and transmits applications, receives and delivers policies, collects premiums, and has general authority to adjust small losses and make transfers on policies is an agent of the company within the statute. 107**WVa**331, 148**SE**197.

1001-27½-New. [§ 38a] 5. **Reciprocal Insurance.** The terms of a reciprocal insurance policy have been held to preclude recovery by an employee suing for compensation under the Employers' Liability Act against insurers individually or as members of a partnership, where they stipulated against such liability. **TexCivA** 10**SW(2d)**129.

1001-27¼-New. Where subscribers to reciprocal insurance by contract agreed to exchange their insurance to provide workmen's compensation for an injured employee, one entering the employ of a subscriber becomes a party to the insurance contract both in law and in fact. **TexCivA** 10**SW(2d)**129.

1001-27½-New. [§ 38b] F½. **Reciprocal and Interinsurance Associations.** Interinsurance corporation trustees may, under the by-laws thereof, appoint an agent to transact the corporate business. 150**Wash**49, 272**P**67.

1001-27⅙-New. On insolvency of an interinsurance association, a member thereof is properly assessed on the basis of premiums earned monthly, 150 **Wash**49, 272**P**67.

1001-27⅓-New. rather than on liabilities assumed under by-laws or otherwise, 150**Wash**49, 272**P**67.

1001-27⅓-New. although such assessment includes losses under policies issued before acceptance by the member, 150**Wash**49, 272**P**67.

1001-27½-New. or losses in a given month before the date of the policy issued in such month. 150**Wash**49, 272 **P**67.

1001-27 1/10-New. A corporation, on joining such association, is liable to a ratable assessment on liquidation thereof, 150**Wash**49, 272**P**67.

1001-27 1/11-New. although not authorized to insure others. 150**Wash**49, 272 **P**67.

1001-27½-New. A provision may properly be made that, on levy of assessment against a member of an insolvent association, judgment shall be without prejudice to further levy. 150 **Wash**49, 272**P**67.

1001-27 1/13-New. The power of attorney under which an agreement is made becomes a part of the contract and of every policy issued thereunder. **Tex CivA** 10**SW(2d)**129.

1002-35 214**Ala**628, 108**S**756.

1003-63 **Ala** 129**S**291(1stcase) (whether exempt is defensive matter, though special plea is not required); 23**AlaA** 542, 129**S**291(2dcase) (whether exempt is defensive matter); 166**Minn**167, 207 **NW**317; **TexCivA** 274**SW**648.

1003-69 166**Minn**167, 207**NW**317.

1004-78½-New. Proceedings charging agent with "twisting" held judicial. 217 **AppDiv**644, 216**NYS**178.

1004-88½-New. In a proceeding for violation of a statute forbidding "twisting," it was held that letters between third persons in which the agent had no part were not binding on him. 217 **AppDiv**644, 216**NYS**178.

1004-94½-New. That one charged with burning insured property was living with his wife, who owned and attended to all matters relating to the property, is insufficient to support a finding that he knew that it was insured, as against direct evidence to the contrary. 95**CalA**96, 272**P**304.

1005-99 35**F(2d)**360.

1006-27 [a] **Companies may be organized** to transact only health and accident insurance. **Ill** 172**NE**17.

1006-29 [a] **State Constitution and general laws** are parts of charter. **Tex CommnA** 29**SW(2d)**316.

1006-34½-New. Articles of association filed by incorporators do not alone constitute charter of life insurance company but statute and certificate of incorporation are part thereof. **Mo** 25**SW (2d)**101(2dcase).

1006-45 [a] **In Ohio.**-29 **OhA**428, 163 **NE**631.

1006-55 [b] **Statute allowing time as to investments** held not to exempt from requirements as to amount of capital. **TexCommnA** 29**SW(2d)**316.

1007-66 [b] **Kansas statute providing for sale of stock to policyholders construed.**-129**Kan**663, 284**P**397.

1009-25½-New. Where a contract provides that an officer shall receive a commission on profits for the succeeding twelve months, profits and losses are to be figured on the fiscal year, and losses suffered thereafter on policies written during the year cannot be considered. **Nev** 283**P**404.

1009-25⅓-New. Under such contract expense of reinsurance is deductible from gross income in ascertaining net profits. **Nev** 283**P**404.

1009-25¼-New. In an election contest on the ground that the stockholders were not permitted to vote their shares, the evidence establishes that stock transfers were made merely for voting purposes. 12**LaA**42, 125**S**135.

1009-29 [b] **Waiver of lien by president to obtain mortgage** is waiver by corporation. 156**Miss**820, 127**S**288.

1009-36½-New. There is no presumption of law that the secretary has power to contract for the company, or to bind it by any statement made to general counsel concerning a change in

a by-law relating to the term of employment of general officers. 85Colo 255, 274P926.

1010-48 [a] **Articles of incorporation and by-laws** of life insurance company construed to require special stockholders' meeting to elect directors where stockholders neglected to elect requisite number at regular meeting. 6F(2d) 922.

1010-50½-New. Effect of nationalization. On nationalization of Russian insurance corporation's business by Soviet government, powers of directors will be assumed to continue to protect the corporation's assets. 220AppDiv404, 221NYS739.

1011-85½-New. But the president of an insurance company is not personally liable on a surety bond signed by him in his capacity as president because signing of the bond was ultra vires. 145Miss330, 110S795.

1013-24½-New. Effect of change from a stipulated premium insurance company to an old-line legal reserve insurance company. 222MoA1044, 9SW(2d) 676.

1013-25 MoA 278SW780, 781 [citCyc]; Wis 227NW952.

1015-43 156Miss820, 127S288.

1015-49 [b] **Investment in corporate securities.**-31NM94, 240P988.

1015-51 175Ark1143, 2SW(2d)22.

1017-36 25 OhNPNS409.

1017-3 [b] **Construction of statute.**-10 PaDist&Co 87 (opinion of attorney-general).

1018-26 [a] **Surplus funds** mean what is left after deducting capital, liabilities, and unearned premiums. 30F(2d)539.

1018-41 12F(2d)998; 239Mich642, 214 NW962; 120 Or411, 252P75, 78 [cit CJ].

1019-42 120 Or411, 252P75, 78 [cit CJ]; 56ND319, 217NW273.

1019-43 120 Or411, 252P75, 78 [cit CJ].

1019-46 239Mich642, 214NW962.

1019-48 167Minn198, 208NW659; 120 Or411, 252P75, 78 [citCJ].

1020-61 35F(2d)360.

1020-66½-New. The fundamental essential of mutual insurance will not permit a mutual company to write surety bonds for public officers. 167Minn198, 208NW659.

1020-67 173Ark9, 292SW396.

1020-69 [a] **Constitutional and statutory provisions part of charter.**-208 Iowa1053, 223NW257 (provisions authorizing changes in laws relating to organization).

1021-99 337 Ill 431, 169NE254 (general provision for such membership held not ultra vires).

1021-2 255 IllA170.

1021-3 337 Ill 431, 169NE254 (death benefit association reincorporated under statute).

1021-5 115Nebr801, 215NW167.

1022-10 115Nebr801, 215NW167.

1022-13½-New. Transformation to stock basis is not rendered invalid by the fact that the price of stock is fixed at one hundred and twenty-five dollars a share, although such proceeding is irregular. 115Nebr801, 215NW167.

1022-14½-New. The change may be made without consent of all members, where the right so to amend articles of incorporation was therein reserved. 115Nebr801, 215NW167.

1022-14¾-New. Change is not invalidated by failure of the department of trade and commerce to make order for distribution of existing and future surplus. 115Nebr801, 215NW167.

1022-18 127Kan768, 275P214; 239Mich 410, 215NW401. [a] **By-law as to quorum for business held valid** and not contrary to statutory provision. 166Ga620, 144SE111.

1022-20 239Mich410, 215NW401, 407 [citCJ].

1022-21 239Mich410, 215NW401, 407 [citCJ].

1022-23 127Kan768, 275P214.

1022-24 But see MoA 286SW842.

1022-28½-New. Contract entered into by mutual insurance company, shifting powers of agents, is a by-law. 115 OhSt 607, 155NE138, 50ALR473.

1022-28¾-New. A new by-law or one amending an existing by-law is illegal if not filed and approved. 115 OhSt607, 155NE138, 50ALR473.

1022-28¼-New. By-laws adopted under Acts (1925) p 405, requiring payment of maximum amounts specified in certificate, do not affect rights vested under certificates already in existence. 171 Ark952, 287SW199.

1022-28½-New. The right reserved to amend by-laws will not be construed prejudicially to affect the contract rights of holders of policies already issued prior to adoption of amendment. 128Kan323, 278P48.

1023-42 239Mich642, 214NW962.

1024-44½-New. Membership in a mutual fire insurance company may not be obtained by estoppel. 241Mich637, 217 NW755.

1024-62 [a] **Effect of charter provisions.**-241Mich637, 217NW755.

1024-63 [a] **Only one membership fee may be collected** under Texas statute, and collection of that fee is optional. TexCivA 20SW(2d)1093.

1025-64 See also 163Ga718, 137SE53.

1025-67 208 Iowa1053, 223NW257. [a] **Relative rights and liabilities of old and new members on change of assessment company to legal reserve company.**-208 Iowa1053, 223NW257.

1026-90 [a] **Salaries of officers.**-115 Oh St607, 155NE138, 50ALR473.

1026-5 But see 208 Iowa1053, 223NW 257.

1026-12 [b] **Laches of insurance commission,** in failing sooner to file bill for receiver, does not relieve officer of company from liability for securities deposited by him and which became impressed with trust. 150Md557, 133A472. [c] **Joinder.**-245Mich493, 222NW754.

1026-13½-New. Liability for representations as to securities and surplus. 150 Md557, 133A472.

1027-23½-New. Where an association had funds with which to pay a claim of a totally disabled certificate holder, but used funds in payment of other claims filed later, directors thereby became personally liable. TexCivA 289 SW93.

1027-23¾-New. Member's reliance on statement of surplus bill to impress a trust on securities deposited by officers of a mutual fire insurance company to enable it to do business in another state is demurrable if it fails to show that the claims accrued in such state after the deposit was made, or other claimants became such knowing of, and relying on, such representation of the company as to surplus. 150Md557, 133A 472.

1028-47 [b] **Word "other"** in statute authorizing writing of insurance of certain kinds and against loss or liability arising from "any other casualty" has been held not to refer only to same kinds of losses as those specified. 252 IllA413.

1028-47½-New. Where a town mutual company expressly adopts a standard policy, it is bound by the law governing such policies. 200Wis118, 227NW 255.

1029-68 128 Or9, 270P764.

1029-72 But see 208 Iowa1053, 223NW 257.

1029-73 208 Iowa1053, 223NW257.

1029-78 150Md557, 133A472.

1030-80 128 Or9, 273P386. [a]**Nonassessable policy of foreign company is not voided** by subsequent depletion of assets and surplus. 128 Or9, 273P386.

1030-82½-New. A statute passed after deposit of securities to meet surplus requirement to enable the company to do business in Massachusetts has been held not to affect the status of the deposit, although the deposit is not immediately withdrawn, the depositor having no right to withdraw it. 150Md557, 133A 472.

1030-89 177Minn165, 224NW851.

1030-2 See also 150Md557, 133A472.

1030-3 See also 150Md557, 133A472.

1030-4 208 Iowa1053, 223NW257.

1031-20½-New. An agreement for operation of companies under common management but as separate companies under exchange of stock held not merger or consolidation under statute. 187 Wis528, 205NW492.

1034-87 See also 178Ark205, 10SW(2d) 17.

1034-91½-New. A new company is held not liable upon policy expired and without proper renewal, before merger. 125 Kan10, 262P552.

1034-91¾-New. A fraternal benefit society taking over and merging another cannot, without the consent of a policyholder of such other company, cancel a policy and issue another in its stead, containing different provisions. 135 Okl 93, 274P475(2dcase).

1037-56½-New. Where a fire company assigned its assets for the benefit of creditors, including a claim against a reinsurer, the trustee, and not the creditors alone, must sue the trustee of reinsurer. 227AppDiv59, 237NYS89.

1038-88 134Misc533, 236NYS292.

1038-91 See also Man [1930] 4DomLR 572 (statutory authority to write off paid up capital becoming impaired).

1038-94 309Mo 381, 274SW722.

1038-7 309Mo 381, 274SW722.

1039-19 287Pa6, 134A435.

1040-41 206 Iowa988, 221NW585; 224 Ky643, 6SW(2d)1091, 1093 [quotCJ]. But see 205 Iowa1085, 217NW268, 56 ALR463. [a] **As to rights accrued at time of appointment** of receiver, policyholder continues to be such. 206 Iowa 988, 221NW585.

1040-42 224Ky643, 6SW(2d)1091, 1093 [quotCJ].

1040-55½-New. Contract of insurance, valid when issued, does not become invalid because the company subsequently becomes insolvent. 128 Or9, 273P386.

1040-56 224Ky643, 6SW(2d)1091, 1093 [quotCJ].

1040-58 309Mo 381, 274SW722. [a] **Rights in deposit.**-206 Iowa988, 221NW 585.

1041-59 224Ky643, 6SW(2d)1091, 1093 [quotCJ].

1041-67 206 Iowa206, 214NW718.

1041-73½-New. Where the superintendent required a company to obtain more funds as a condition of delay in liquidation proceedings, securities obtained for the purpose need not be such as the company could legally buy as an investment. 8F(2d)65.

1041-75 130Misc235, 223NYS726.

1042-86 130Misc235, 223NYS726.

1043-26 130Misc235, 223NYS726.

1043-26½-New. In New York notice of assessment within a year after the end of the policy period is sufficient. 130 Misc235, 223NYS726.

1043-26¾-New. A policy cannot prevail over a statute making a provision as to giving notice of assessment. 130 Misc235, 223NYS726.

1043-26¼-New. Notice that assessment is required, but not stating that assessment has been levied, is insufficient. 130Misc235, 223NYS726.

1044-48½-New. The members are liable for pro rata assessments covering losses in their class of risks, although the company subsequently created another class of insurance where no increase in the amount of liability of members of the original class resulted from the change. 243Mich500, 220NW 721.

1044-48¾-New. In New York, prior to 1922, assessments in mutual company, on liquidation on basis of earned premiums, was not permitted. 130Misc 235, 223NYS726.

1045-74½-New. Petition by foreign insurance commissioner against former member of mutual insurance company to enforce assessment decreed by foreign court has been held to state cause of action. MoA 32SW(2d)147.

1047-98 217AppDiv494, 217NYS92. [a] **Where voluntary dissolution is not duly proceeding,** exclusive remedy is to petition superintendent of insurance to take possession of assets, and liquidation through formal receivership is improper. 217AppDiv494, 217NYS92.

1047-99 287Pa6, 134A435.

1047-4 19F(2d)709; 19F(2d)300.

1047-5½-New. Appointment of receivers pendente lite is in the discretion of the court. 19F(2d)709.

1047-14 [a] **Substituted trustee** is in fact coliquidator with superintendent

of insurance. 232NYS489.

1047-14½-New. Court of equity could appoint a receiver for an insurance reciprocal, whose affairs were involved, where an attorney in fact confessed inability to complete duties. 19F(2d)300.

1047-16 [a] **In New York.**-223AppDiv 378, 228NYS106.

1048-26½-New. An unsecured creditor has a standing in equity, where defendants either joined in a request for relief or admitted facts. 19F(2d)300.

1048-26½-New. Resigned underwriters, not attempting to bring their action for dissolution of a group of underwriters to trial for over three years, are not entitled to appointment of a receiver. 217AppDiv494, 217NYS92.

1048-26¼-New. Illinois law, authorizing procedure in winding up affairs of insurance reciprocal, held not exclusive. 19F(2d)300.

1048-26½-New. The attorney in fact of a reciprocal association, who acquiesces in a receiver's appointment, cannot challenge the appointment for the first time on the filing of his final report. IndA 169NE54(2dcase).

1048-28 130Misc235, 223NYS726.

1048-31 But see 248NY408, 162NE298.

[a] **Insurance company having no title to moneys** paid by subscribers of stock, superintendent of insurance on dissolution of company likewise has no title. 136Misc133, 239NYS55.

1048-32 287Pa12, 134A437.

1048-37 129Misc337, 221NYS500.

1048-47 309Mo381, 274SW722.

1048-48 But see 309Mo381, 274SW722.

1048-48½-New. The superintendent of insurance is nothing more than a receiver for a court of equity, and his conduct is governed by equitable rules, having due regard for the statutes, 309Mo381, 274SW722.

1048-48½-New. and the fact that the court is required by the statute to appoint superintendent to take charge of the assets does not make him any the less a receiver of the court and under its control. 309Mo381, 274SW722.

1048-48¼-New. The superintendent of insurance takes no better title to proceeds of stolen bonds than did the company which, prior to an order of the court placing assets in charge of the superintendent, had notice that they were stolen. 8F(2d)65.

1048-48½-New. Acts of the superintendent may be such as to charge him with notice of defective title to assets. 8F(2d)65.

1048-48⅓-New. Superintendent of insurance is not clothed with authority of arbitrator to fix finally compensation of assistants and counsel. 244NY443, 155NE735.

1048-48½-New. He may fix their compensation as may a trustee or receiver but subject to approval of the court. 244NY443, 155NE735.

1048-48⅛-New. Insurance superintendent's primary duty as liquidator of a foreign company is to secure payment of American creditors. 223AppDiv870, 229NYS285.

1048-48⅛-New. The attorney in fact of a reciprocal association has not such an interest in the association's funds in a receiver's hands as will authorize it to except, in its own name, to the receiver's final report. IndA 169NE54 (2dcase).

1048-49 See also 11PaDist&Co 51.

1048-54 224AppDiv105, 229NYS554.

1048-54½-New. A petition to the court, praying that an account of the liquidator of a dissolved insurance company be referred back to him with direction to proceed further with certain litigation, held properly dismissed. 287Pa12, 134A437.

1048-54½-New. Validity of foreign insurance company's assignment of moneys due under reinsurance contract and conflict of title involving superintendent of insurance as liquidator cannot be determined in an action in which the superintendent is not a party. 223AppDiv870, 229NYS285.

1048-54¼-New. If the superintendent of insurance as liquidator of a foreign company has sufficient funds to pay American creditors, he need not participate in the litigation of such company involving its assignment of moneys due under a reinsurance contract and conflict of title in respect thereto. 223AppDiv870, 229NYS285.

1048-54⅛-New. The superintendent of insurance as liquidator of a foreign insurance company is not a necessary or proper party to foreign creditors' actions. 224AppDiv105, 229NYS554.

1049-65½-New. Under a statute empowering the superintendent of insurance to employ counsel in liquidating and conserving assets of an insolvent company, compensation of such counsel, fixed by the superintendent, is final, subject only to disapproval of the court if excessive. 217AppDiv681, 216NYS256.

1049-77½-New. The superintendent of insurance must transmit the surplus of assets of an insolvent foreign corporation, after paying domestic policy holders and creditors, to the primary receiver. 242NY148, 151NE159, 45ALR622.

1049-77½-New. The domestic assets of an insolvent foreign corporation will not be transmitted by the superintendent of insurance to the foreign receiver if there is any danger of unfair distribution. 242NY148, 151NE159, 45ALR622.

1049-77¼-New. The courts should provide the manner of proving small claims by domestic creditors of obligations incurred elsewhere as against distribution of assets by foreign receiver as condition to transmission of surplus funds of insolvent foreign corporation in hands of superintendent of insurance. 242NY148, 151NE159, 45ALR622.

1049-77½-New. Directors of an insolvent company may petition the court for payment of foreign creditors from funds held by the state superintendent of banks. 250NY449, 166NE163(1stcase).

1049-77½3-New. Part of directors of an insurance company are not entitled to possession of funds held by a liquidator. 225AppDiv92, 232NYS282.

1049-79 309Mo381, 274SW722.

1049-84½-New. Under the statute the distribution of assets is under the direction of the court and not at the will of the superintendent. 309Mo381, 274SW722.

1049-84½-New. The statutes contemplate court proceedings and the superintendent takes title to the assets and right to distribute only through a court action. 309Mo381, 274SW722.

1049-84¼-New. The securities are under the control of the court and not in the hands of the superintendent as a mere trustee for all contract holders. 309Mo381, 274SW722.

1049-84½-New. Where time set for proving claims has expired and the fund deposited with the superintendent is the only asset remaining of the insolvent company, 309Mo381, 274SW722.

1049-84½-New. the court may direct the superintendent to sell the securities for the benefit of contract holders whose claims have been approved and allowed. 309Mo381, 274SW722.

1049-84½-New. although there are contracts outstanding upon which claims might accrue in future. 309Mo381, 274SW722.

1050-88½-New. Courts of state where fund is deposited are not required to recognize foreign receiver or liquidator applying for distribution of fund for benefit of policy holders of the state. 114OhSt504, 151NE755.

1050-88½-New. Writ of mandamus will not issue to compel attorney-general to bring action under Gen. Code § 641, until application is made by person entitled to participate in the fund. 114OhSt504, 151NE755.

1050-88¼-New. Until all valid claims of policyholders and creditors have been settled under the statute, a liquidator or receiver is not a person entitled to participate in the fund within the purview of § 641. 114OhSt504, 151NE755.

1050-88½-New. Insolvency of company is prerequisite to action for distribution of the fund. 114OhSt504, 151NE755.

1050-88½-New. The rights of a foreign company depositing securities with the superintendent of insurance are determined by the laws then in effect. 242NY148, 151NE159, 45ALR622.

1050-88½-New. Under statutes the fund of a defunct insurance company, deposited with the state comptroller, is vested in the supreme court and its trustee for distribution. 223AppDiv319, 228NYS680.

1050-90 131Misc220, 226NYS585.

1050-98½-New. Premiums paid but unearned at date of decree of insolvency are valid claims against the insolvent estate. 309Mo381, 274SW722.

1050-98½-New. Unsecured creditor has standing in equity where defendants either joined in request or admitted facts. 19F(2d)300.

1050-98¼-New. The creditors of an insolvent foreign insurance company, except those dealing directly with the American branch, may only share in the distribution of assets of foreign liquidators. 249NY139, 163NE129.

1050-3½-New. Agent refunding unearned premiums may file claim against receiver without deducting commissions paid on new policies. 224Ky643, 6SW(2d)1091.

1050-4 309Mo381, 274SW722; 287Pa6, 134A435.

1051-7 309Mo381, 274SW722; 287Pa6, 134A435.

1051-10 242NY148, 151NE159, 45ALR622.

1051-11 131Misc220, 226NYS585 (American policyholders of foreign company denied interest on claims where other classes of creditors received only thirty-six per cent of claims).

1051-20½-New. Creditors of a foreign insurance company, who have been paid dividends out of a special fund in their own state, cannot share in the general fund in the state of the company's domicile until the other creditors shall have shared an amount equal to that distributed from such special fund. 251IllA549.

1051-21 See also Man [1927] 3DomLR289.

1051-24 15OhA457.

1051-29½-New. Under New York Insurance Law, securities deposited by a foreign corporation are available on its insolvency only to claimants under policies issued in the United States to residents thereof. 242NY148, 151NE159, 45ALR622.

1051-29½-New. The holder of a judgment against a foreign company on an obligation, arising from its surety business is entitled to priority in payment out of the amount deposited to enable it to do such business over holders of judgments arising from other business. TexCivA 294SW599.

1052-45 [a] **Foreign corporation may act as attorney in fact** for exchange. 86PaSuper312. [b] **Insolvent exchange is subject to liquidation.**-86PaSuper307; 86PaSuper312.

1052-46 [a] **Central bureau created for clearing earned premiums** is held "rating organization." 221AppDiv8, 222NYS87. [b] **Rating organizations may not indirectly affect insurance rates** by imposing obligations or penalties. 221AppDiv8, 222NYS87.

1052-52½-New. Statutes have been construed to prohibit rating associations from refusing to do business with brokers for any reason, except for refusal to adhere to reasonable rules. 221AppDiv8, 222NYS87.

1052-52½-New. Where exchange is merely place where subscribers exchange contracts, it is not a legal entity. 86IndA565, 155NE222.

1052-52¼-New. A contract between underwriters and employees of subscribers has been construed to obligate the underwriters to pay compensation to an employee or his dependents, measured by the Workmen's Compensation Law. 129Kan808, 284P594.

1053-56 120Kan415, 243P1023, 1024 [citCJ].

1053-62 133Misc440, 232NYS351; 141Okl90, 284P624.

1054-69 109Conn609, 145A44.
1054-76 41F(2d)696; 120Kan415, 243P1023; MoA 279SW246; MoA 288SW965.
1054-77 120Kan415, 243P1023 (as to facts pertaining to risk necessary or proper to be stated in applying for insurance); 245Mich378, 222NW731.
1054-78 MoA 279SW246. [a] **As dependent on facts.**–Whether broker soliciting insurance is agent of insured or insurer depends on facts of particular case. MoA 279SW246.
1055-81 But see 41F(2d)696.
1055-84 [b] **Evidence sufficient** to show broker was agent of insured. 120Kan415, 243P1023.
1055-91 199 Iowa1358, 203NW826, 830 [citCJ]; 202 Iowa1270, 211NW860, 862 [citCJ]; 120Kan415, 243P1023; 229AppDiv349, 243NYS249.
1055-92 43 Ida441, 252P870, 871 [cit CJ].
1055-93 199 Iowa1358, 203NW826, 830 [citCJ]; 320Mo 146, 6SW(2d)920, 928 [quotCJ]; TexCommnA 276SW887.
1055-94 13F(2d)375; 202 Iowa1270, 211NW860.
1055-95 229AppDiv349, 243NYS249. [a] (2) **Agent issuing policy in another company he represents on cancellation of old policies which he also wrote is held not agent of both parties.** 220Ky173, 294SW1035. [b] **Policy left with agent by insured** is in possession of insured, not company. Mich 233NW417. [c] **Where agent held policy for insured** he must deliver them to insured on request. Mich 233NW417.
1055-96 252Mass336, 147NE851; 33OhA253, 169NE311.
1056-97 CalA 287P535; 220Ky173, 294SW1035, 1037 [citCJ]; 150Wash626, 274P704; 198Wis561, 225NW174.
1056-98 [b] 223AppDiv169, 227NYS619. [c] 109Conn609, 145A44.
1056-1 199 Iowa1358, 203NW826, 830 [citCJ].
1056-2½-New. or by the fact that the president of a bank which is agent of company acts as agent for insured in individual capacity. 15F(2d)957.
1057-8 126Misc874, 215NYS225. [b] **Broker procuring insurance for agent of insured** cannot be held to be agent of company where policy provides that party procuring insurance for another is to be deemed agent for insured in absence of evidence showing contrary inference. 126Misc874, 215NYS225.
1057-9 51ND917, 201NW514 [citCJ].
1057-10 277US311, 48SCt512, 72L ed895; 51ND917, 201NW514 [citCJ].
1057-10½-New. ,to all intents and purposes. 51ND917, 201NW514.
1057-11 51ND917, 201NW514 [citCJ]; 53ND391, 206NW225; 120 Okl 108, 250P892.
1057-13 [a] **Foreign insurance company may have agents within state under some statutes with authority only to solicit applications for insurance.** 221MoA727, 285SW772.
1057-15½-New. Under some statutes authorized agents through whom only insurance companies may do business in the state must be residents of, and have their office or place of business in, the state. 51ND917, 201NW514.
1057-17 21F(2d)263. [b] **Group insurances.**–Employer as insurer's agent. 82NH543, 136A400, 50ALR1276. [c] **Employer under group insurance policy** is not agent of company. 124Kan584, 261P603.
1058-22 MoA 20SW(2d)299; TexCivA 13SW(2d)148. [a] **Alleged agent's interest in property** sought to be insured gives him no authority to bind insurer by contract of insurance. 199 Iowa1358, 203NW826.
1058-23 24 OhA29, 155NE806.
1058-26 219Ala332, 122S346; 243Mich395, 220NW758; 98PaSuper353.
1058-27 TexCommnA 15SW(2d)223.
1058-27½-New. Presumption that agent issuing policy may waive provisions by words or conduct does not apply to mere soliciting agents. 220Ky167, 294SW1048.
1058-28 219Ala332, 122S346; 48RI274, 137A470; NJ 151A869; TexCivA 274SW299; TexCivA 288SW271; TexCivA 24SW(2d)501. [a] (4) Statements of mere conclusion. 247 IllA283. [c] **Evidence of usage and custom.**–Exclusion of testimony that in locality clerks and assistants signed policies in name of agent is error. 85Mont419, 279P243.
1058-30 180Ark877, 23SW(2d)268. [a] (1) 25F(2d)415; 88CalA88, 262P820 (adjuster); 96CalA295, 273P1093; GaA 155SE105(2dcase); 323 Ill 143, 153NE744; 251 IllA150 (broker); Miss 115S346; MoA 20SW(2d)950; 228AppDiv837, 239NYS12; 148SC238, 146SE15; TexCommnA 15SW(2d)223; TexCivA 24SW(2d)501. (2) 222Ky608, 18SW(2d)1063; 81Mont281, 264P132; 51ND917, 201NW514 (agent "to all intents and purposes" under statute); TexCivA 31SW(2d)362. (7) To show that insurers subsequently had authority verbally to bind it as to date of application. 13F(2d)779. (8) To show that agent had no authority to make oral contract of insurance. 222MoA1057, 7SW(2d)479. (9) To show solicitor for agency. 33NM661, 274P169. (10) To show that agent was acting within apparent scope of authority. 88 IndA564, 165NE77. (11) To show that local agent of compensation insurer was authorized to waive technical defenses in suit to determine whether injury was compensable. 159Tenn202, 17SW(2d)904. [b] (1) 39GaA429, 147SE768; Iowa 215NW244; 120Kan415, 243P1023; 250Mich38, 229NW626; MoA 23SW(2d)198; 32 OhA138, 167NE695. (3) To establish soliciting agent had authority to extend credit for first premium on policy. Wis 230NW612.
1059-36½-New. One dealing with the insurance agent of principal in loan and insurance business could presume the agent's authority to be general in the absence of notice. 175Ark806, 300SW420.
1059-38 169Ark136, 273SW378.
1059-39 247 IllA283.
1059-44 219Ala332, 122S346; 178Ark611, 12SW(2d)21; 202 Iowa1291, 211NW716; 221MoA727, 285SW772; 130Misc52, 223NYS563; 50SD418, 210NW509; TexCommnA 276SW887 (estoppel not shown where previous acts of agent showing authority were not known to plaintiff); 193Wis16, 213NW649.
1060-46 35F(2d)253.
1060-49 33Ariz206, 263P584; 202 Iowa1291, 211NW716.
1060-50 165Ga193, 140SE496; 37GaA756, 142SE183; 222Ky157, 300SW347. [c] **Evidence held insufficient** to show knowledge of agents unauthorized agreement. MoA 23SW(2d)198.
1060-51 129Misc493, 221NYS610.
1060-52 129Misc493, 221NYS610.
1062-71 180Ark877, 23SW(2d)268 (date for termination must be fixed in notice).
1062-72 247 IllA562; 218Ky163, 291SW6. But see TexCivA 18SW(2d)712.
1062-73 219Ky629, 294SW173.
1062-82 38F(2d)393; 226Ky328, 10SW(2d)1079.
1062-85 161Ga568, 131SE490; 226Ky534, 11SW(2d)148; 239Mich92, 214NW308.
1062-86 50SD418, 210NW509; TexCommnA 283SW161.
1062-87 Wis 233NW85. [a] **Insured's ignorance of identity of company** for whom agent is acting does not affect liability of company. 13F(2d)779.
1062-88 205 Iowa119, 217NW258.
1063-93 236Ky166, 32SW(2d)529.
1063-94 [a] **Only if terms of doubtful import.**–215Ala481, 110S909.
1063-97 82NH177, 131A352, 353 [quot CJ].
1063-98 169Ark136, 273SW378; 178Ark1090, 13SW(2d)621; 33GaA642, 127SE892; 35GaA723, 134SE804; 160La381, 107S232; 239Mich92, 214NW308; 243Mich395, 220NW758; 171Minn118, 213NW539; MoA 23SW(2d)198; 82NH177, 131A352, 353 [quotCJ]; 229AppDiv349, 243NYS249 (issuing new policies after accepting cancellation); 120 Or411, 252P75; 157SC469, 154SE855; TexCivA 278SW476; 198Wis561, 225NW174.
1063-99 217Ala114, 115S8; 178Ark611, 12SW(2d)21; 96CalA295, 273P1093; 35GaA723, 134SE804; 220Ky167, 294SW1048; 222Ky608, 18SW(2d)1063; 239Mich92, 214NW308; 51ND917, 201NW514; TexCivA 293SW256.
1063-99½-New. Where agent's verbal consent to modify contract and make needed entries on policy is sufficient to bind company, agent is not personally liable to insured for failure to make entries. 171Minn118, 213NW539.
1064-1 157SC469, 154SE855.
1064-7 178Ark319, 11SW(2d)772; 161Ga568, 131SE490; Iowa 215NW244; 120Kan53, 242P455 (method of payment of premium outside scope of authority inot binding on company, such as crediting amount of premium on debt owed by agent to insured); 222Ky157, 300SW347; 226Ky534, 11SW(2d)148; NC154SE21; 50SD418, 210NW509; TexCivA 3SW(2d)505.
1065-8 161Ga568, 131SE490; 226Ky534, 11SW(2d)148; 229AppDiv670, 243NYS579; 98PaSuper353; TexCivA 289SW450.
1065-10 TexCivA 289SW450, 451 [quot CJ].
1065-11 35GaA723, 134SE804.
1065-13 29F(2d)357; TexCivA 289SW450.
1065-13½-New. Any notice of limitations upon an agent's power which a prudent man is bound to regard is the equivalent of knowledge to insured. 161Ga568, 131SE490.
1065-16 96CalA295, 273P1093 (newspaper, and not its circulation manager, was general agent); 103WVa574, 138SE381, 383 [citCJ]. [d] **Appointment as general agent is not shown** by requisition for agent's license required by statute. 222MoA1057, 7SW(2d)479. [e] **Held general agent of surety company.**–249NY1, 162NE565.
1066-18 103WVa574, 138SE381.
1066-23 TexCivA 288SW271.
1066-24 33GaA642, 127SE892.
1066-27 172Ark98, 287SW758; 33GaA642, 127SE892. See 249NY1, 162NE565.
1067-31 [a] **Contracts held valid** as within power of company to make. 122Kan382, 251P1102. [b] **Power to indorse checks.**–205 Iowa801, 218NW529.
1067-32 219Ky629, 294SW173.
1067-33 50SD418, 210NW509.
1067-39 Iowa 215NW244; TexCivA 291SW257.
1067-40 222MoA763, 9SW(2d)673; 33NM661, 274P169.
1068-41 33Ariz206, 263P584; Iowa 215NW244; 50SD418, 210NW509. [a] **After sending application to insurer** soliciting agent cannot bind insurer by his statements. 242Mich394, 218NW776.
1068-42 Wis 233NW85 (no authority to modify provisions of application). [d] **Authority to waive explicit provisions of application** held not conferred by statute. Wis 230NW612.
1068-47 [b] **Directors of company, by failing to take action on subagency contract,** after discussion thereof at meeting, ratified contract. 89 IndA446, 166NE664.
1068-48 21F(2d)263; 177Ark927, 9SW(2d)26; 243Mich395, 220NW758; 295Pa286, 145A286; 193Wis16, 213NW649. [a] (3) Where automobile dealer is agent of automobile insurance company, the latter is bound by the action of a salesman of the dealer in selling insurance to a purchaser of an automobile. 236Mich393, 210NW247.
1069-50 104WVa580, 140SE552.
1069-58 172Ark958, 291SW82; 110Conn319, 148A353; 35GaA723, 134SE804; 38GaA328, 144SE29; 43 Ida222, 253P379, 382 [citCJ]; 224 IllA606; 201Iowa363, 207NW334; 202 Iowa1291, 211NW716; 208 Iowa450, 224NW524; 220Ky167, 294SW1048; 160La381, 107S232; 239Mich10, 214NW216; 242Mich394, 218NW776; MoA 25SW(2d)1075; 133 Okl 256, 271P1037; 127Misc751, 217NYS504; 192NC8, 133SE337, 47ALR645; 120 Okl 108, 250P892; 120 Or353, 252P556; 135SC89, 133SE215, 45ALR1172. [c] **Knowledge of insured's age** by agent authorized to solicit life insurance is knowledge of insurer. 218Ky825, 292SW511.
1070-59 43 Ida222, 253P379, 382 [cit CJ]; 160La381, 107S232.
1070-61 33Ariz206, 263P584, 588 [cit

CJ]; 165Ga193, 140SE496; **Iowa** 215 NW244.

1070-62 See also 27F(2d)552.

1070-63 MoA 272SW698. [a] (2) Knowledge of insurance brokers, not agents of insurer, of misstatements in policy which they procured, through insurer's agent is not knowledge of insurer. 239Mich10, 214NW216.

1070-65 [a] **Duty to disclose all material facts connected with matters in their charge.**–216AppDiv78, 214NYS697. [b] **Duty to furnish information.**–88PaSuper 133.

1070-66 103WVa574, 138SE381, 383 [citCJ].

1070-67 103WVa574, 138SE381, 383 [citCJ].

1071-74 43 Ida441, 252P870.

1071-74½-New. But it is no defense to an action on a policy that agent might have been put into a position, by the transaction, whereby he could defraud the company. 220Ky173, 294SW1035.

1071-75 51SD40, 211NW973.

1071-76 43 Ida441, 252P870, 871 [cit CJ]; 247Mich188, 225NW527; 58ND13, 224NW891; **WVa** 153SE512. See also 16F(2d)251. But see 142 **Okl** 272, 286P 792. [d] **Permission to write insurance** on property in which agent is interested does not excuse concealment of facts as to risk. 51SD40, 211NW973. [e] **Insurer's request for all of agent's business** does not show acceptance of risk under policy issued by agent on his own property. 43 Ida441, 252P870.

1071-82 320Mo146, 6SW(2d)920, 928 [quotCJ].

1071-84 [a] 213Ala534, 105S901 [cit CJ].

1072-86 216AppDiv78, 214NYS697 (relation being fiduciary one, on demand); 146SC175, 143SE544.

1072-87 [d] **Evidence held to show that** agent of foreign insurance company misappropriated five per cent of recoveries through legal proceedings by misrepresenting amount of contingent fee paid attorney. 216AppDiv78, 214NYS697. [e] **Facts held to entitle insurance company to accounting.**–216AppDiv78, 214 NYS697. [f] **Contributory negligence** in reposing confidence is no defense to action for accounting because of fraudulent concealment of misappropriations. 216AppDiv78, 214NYS697. [g] **Possession of data from which insurance company could have learned of misappropriation of agent before giving release** to him is no defense to accounting for such misappropriation. 216AppDiv78, 214NYS697. [h] **Account current** is statement of policies written and return premiums canceled, bringing down net premiums less commission, and other charges or balances due company, regardless of whether premiums are paid. TexCivA 290SW251.

1072-91 216AppDiv78, 214NYS697 (general release on termination of agency does not preclude accounting for funds misappropriated and concealed).

1072-93 [b] **Agent receives premiums in a fiduciary capacity.**–251Mich163, 231 NW38.

1072-94 TexCivA 290SW251.

1072-95 [a] (1) **IndA** 153NE779. [d] **Insurer's solicitation of renewals after termination of agency** does not furnish basis of counterclaim on theory that agent sustained loss of business. 88 PaSuper133.

1073-8 103WVa574, 138SE381, 383 [cit CJ]; 194Wis135, 215NW820.

1073-9 103WVa574, 138SE381, 383 [cit CJ].

1073-14½-New. An insurance broker, not authorized to accept risks or issue policies, is without authority to nullify cancellation of a policy by the company, 245NY279, 157NE138.

1073-14½-New. and after cancellation of the policy by the company payment of the premium to such broker does not restore the policy. 245NY279, 157NE 138.

1074-21 [c] **Burden of proof.**–200 **Iowa** 1206, 206NW123. [f] **Overvaluation of items in proofs of loss.**–250NY157, 164 NE890(1stcase).

1074-23 39F(2d)416.

1074-27½-New. Lack of proof of damages to fire insurer from overvaluation in proof of loss requires reversal of judgment against the adjuster. 223 AppDiv32, 227NYS250.

1075-32 215Ala112, 110S27; **Ark** 31 SW(2d)142; 120 **Okl** 226, 253P273. [a] (4) Bond construed to require agent to return commission on portions of premiums returned on canceled policies. 217MoA630, 274SW503. [d] **Agent not being indebted to company** to whom surety paid claimed defalcation, surety is entitled to recover money paid. TexCivA 24SW(2d)474.

1075-33 [a] **Under bond to indemnify company for losses by lapse of policies** for which agent should be responsible, company need not establish that lapses were caused by agent's fault. **DC** 32 F(2d)937.

1075-33½-New. Principal cannot be compelled to reimburse surety for any sum except what the surety was legally required to pay. 155Miss21, 119S357.

1076-50 155Miss21, 119S357. [b] **Evidence held inadmissible.**–177Ark1178, 9 SW(2d)561.

1076-50½-New. Sufficiency of evidence as to release of surety. 42F(2d)807.

1076-58 176Ark809, 4SW(2d)11. [g] **After termination of agency.**–Contract held to protect agent's right to commissions on outstanding premiums. **Tex CivA** 290SW251. [h] **Commissions not due till premiums were paid cannot be recovered.**–223AppDiv92, 227NYS201. [i] **Bonus.**–247Mich315, 225NW485(1st case). [j] **That separate insurance companies were affiliated,** and had common agent, did not render each of companies jointly and severally liable to broker for loss of commissions though cancellation by companies of insurance policies placed with them by broker. 34F(2d) 805.

1076-60½-New. An agent selling insurance without procuring a license as required by statute has been held not entitled to recover commissions for policies issued after the effective date of the statute. 98Fla151, 123S570.

1077-63 149Miss123, 115S199; **Tex CivA** 297SW612. [a] **Insurance company need not disclose** to agent reason for rejection application where rule so provides. TexCivA 297SW612.

1077-74½-New. Where agent is to return premium if policy is canceled, he is not entitled to premium on policies held by him and not delivered, or not issued. TexCommnA 4SW(2d)35.

1077-77 89 IndA446, 166NE664.

1077-77½-New. Commissions on assessment. An agency is not entitled, under contract with a mutual insurance company, to commissions on assessments voluntarily paid to the company, before necessity to employ a collector, although the agency would be entitled to reasonable compensation for services performed. 245Mich493, 222NW754.

1077-79 215Ala112, 110S27; **Tex CommnA** 4SW(2d)35.

1078-82 180Ark401, 21SW(2d)180; 231 Ky264, 21SW(2d)281 (where contract reserved to company absolute right to cancel); 232Ky111, 22SW(2d)426 (upon cancellation of agency contract); 217 MoA630, 274SW503 (in suit to recover commission on canceled policies reasons for cancellation need not be alleged or proved unless policies make it necessary). [a] **In suit to recover commissions** on canceled policies question of arbitrary cancellation can be raised only by special plea in answer. 217MoA630, 274 SW503. [b] **When on cancellation** unearned portion of premium is returned to insured agent can retain commission only on premium retained by insurer. 217MoA630, 274SW503. [c] **Unearned commission** held not to include commissions on policies canceled by insurer. GaA 155SE105(2dcase). [d] **Construction of particular contracts.**–GaA 155SE 105(2dcase).

1078-87 154Md171, 140A64; 230App Div588, 245NYS423 (construction of contract); ND 232NW10; 25 OhNPNS424; 123 Or539, 259P419, 262P938.

1078-88 262Mass238, 159NE608; 25 OhNPNS424.

1078-93½-New. An agent's right to his commission for securing a renewal cannot be affected by any subsequent arrangement between insurer and insured relative to the policy or renewal thereof. 19 OhA149.

1078-93½-New. , or without clear showing that right was surrendered by virtue of agreed consideration. 143 Okl 168, 287P997(2dcase).

1078-94 25 OhNPNS424. [e] **Forfeiture of right.**–123 Or539, 259P419, 262P938.

1079-95 Mass 170NE382; 25 OhNPNS 424.

1079-96 262Mass238, 159NE608; 165 Minn327, 206NW452; 25 OhNPNS424.

1079-1½-New. Where agency terminated without cause assigned therefor, the agent is entitled to commissions effected by him during his agency. [1927] CanSC242, 59 OntL628, [1927] 1DomLR 99.

1079-2 123 Or539, 259P419, 262P938.

1079-2½-New. Under a provision that an agent should not be entitled to premiums on renewals if he sold insurance in specified territory, he did not forfeit the right by a sale outside the territory to a person residing therein. 154Md 171, 140A64.

1079-2⅓-New. Where the agent has not defaulted and the company terminates the contract without cause, it is not within the contemplation of the parties that the agent forfeit commission on renewals merely because he has entered the employ of another company, 123 Or 539, 259P419, 262P938.

1079-2¼-New. notwithstanding provision for cessation of such commissions from the date of such employment. 123 Or539, 259P419, 262P938.

1079-11 245Mich493, 222NW754.

1080-13 See also 123 Or539, 259P419, 262P938 (waiver of strict enforcement of requirement to remit promptly premiums collected);

1080-14 123 Or539, 259P419, 262P938.

1080-18 95PaSuper74 (contract sufficiently definite).

1080-23 231Ky264, 21SW(2d)281 (in absence of exclusive agency contract).

1081-34 220MoA607, 289SW26.

1081-46 231Ky264, 21SW(2d)281 (withdrawing from territory and canceling all policies).

1081-48 140SC31, 138SE522. [a] (2) Failure of one contracting to work for insurance company to procure license does not preclude action for breach of such contract. 140SC31, 138SE522.

1082-60½-New. Right of agent for company's breach of contract with customer. A broker has no cause of action against insurer for a breach of the policy of insurance, beyond recovery of commissions. 240NY511, 148NE661.

1082-63 [b] **Recovery on quantum meruit.**–245Mich493, 222NW754 (invalid contract).

1082-65 34F(2d)805 (statement of claim averring that broker's compensation was measured by percentage of total premiums paid and amount of aggregate commission earned has been held not defective for insufficient particularity); 34F(2d)805 (alleged cause of action for cancellation of policies). [a] (1) 217Ala301, 116S154. [c] **Complaint alleging arbitrary rejection** of applications, without alleging bad faith, is held demurrable. TexCivA 297SW612.

1083-66 [d] **Plea held sufficient.**–215 Ala183, 110S133.

1083-69 [a] (1) 266Mass270, 165NE 386. (3) To show that contract was ratified by quorum of disinterested directors with full knowledge of its character and purport. 245Mich493, 222NW 754.

1083-71 [a] (4) 123 Or539, 259P419, 262 P938. [b] (6) To show ratification by insurance corporation of contract with agency, by which agency was given a perpetual right to renewals on insurance business contributed. 245Mich493, 222 NW754. (7) To sustain finding that recovery of bonus was not dependent on agent's completing his service for fiscal year. 89 IndA446, 166NE664.

1083-73 154Md171, 140A64. [a] (2) Whether unambiguous contract provided for general cancellation of policies procured through agent is for court. 231 Ky264, 21SW(2d)281.

1084-86 [b] **Where principal undisclosed.**–247NY392, 160NE651.

1084-87 [c] **Evidence held to show mis-**

representation by broker.–225AppDiv 115, 232NYS168.
1084–88 194NC775, 140SE709; 188Wis 140, 205NW800. [e] **Evidence held sufficient** to show that brokers negligently failed to insert in fire policy, covering building, clause showing that insured leased land. 194NC775, 140SE709.
1085–2 22F(2d)454; 50RI 405, 148A 324. See also 127Me182, 142A481. [a] (1) 86Colo 293, 281P366, 66ALR1166; 199 Iowa1358, 203NW826; 133Misc440, 232NYS351. (3) Failure of automobile dealer's efforts to insure car as requested by mortgagee paying balance due on car purchased by another held not to estop dealer from recovering on draft given by mortgagee where car was burned while uninsured. TexCivA 21 SW(2d)1102.
1085–3 TexCivA 21SW(2d)1102.
1085–4 217Ala153, 115S94, 55ALR1231; 286Pa119, 133A217. But see TexCivA 295SW242.
1085–4½–New. It has been held that, where a corporation under contract with an agent to secure insurance on goods of his principal, in turn contracts with an insurance broker to effect such insurance, the broker is agent for the corporation and clearly not an independent contractor. 217AppDiv352, 217NYS459.
1085–4⅓–New. Defendant company, having no relation with an insurance solicitor or broker placing risks with its agent, is not bound by neglicence or mistakes of the solicitor. 131Misc 215, 225NYS470.
1085–4¼–New. An insurance broker, who is the agent of insured, cannot be converted into agent for insurer without evidence from which authority to represent insurer might be inferred. 131Misc 215, 225NYS470.
1085–5 [a] **Evidence held insufficient.**–CalA 287P535.
1085–7½–New. Weight and sufficiency.–Evidence held to show that one was insured's agent. 33 OhA253, 169NE311.
1085–9 98CalA33, 276P368.
1086–19 [c] **Question of authority** must be determined from facts and circumstances. CalA 287P535.
1086–21 127Me182, 142A481; TexCivA 4SW(2d)88; TexCivA 27SW(2d)581; Vt 147A267(2dcase) (fraudulent acts of insured's agent in procuring policy would, in law, be act of insured). [a] **Insurance agent who, by course of dealing or agreement with insured,** undertakes to rewrite or renew coverage as policies expire, has authority to cancel policies and rewrite them in other companies represented by him. TexCommnA 15 SW(2d)223. [b] **False swearing by agent** authorized to make proofs of loss will ordinarily defeat rights of insured despite his innocence. 35F(2d)147.
1086–22 153Md179, 138A16, 53ALR487.
1086–23 109Conn673, 145A38; 120Kan 415, 243P1023; 170La775, 129S161; TexCivA 10SW(2d)799.
1087–26½–New. The holder of a deed of trust entitled to select the companies in which the property shall be kept insured and entitled to the benefit of policies taken out by the mortgagor by committing to the mortgagor the matter of maintaining insurance consents to be governed by the usage of insurance companies at the places where he deals whether or not such customs are known. TexCivA 274SW299.
1087–29 8F(2d)389.
1087–34 226Ky424, 11SW(2d)87.
1087–35 TexCivA 274SW299. [a] (1) 95CalA500, 272P1111; 286Pa119, 133 A217. [b] Vt 147A267(2dcase). [d] **If insured persists in taking benefit of agent's act,** insured is answerable to fullest extent for what her agent did or represented in obtaining policy. Vt 147 A267(2dcase).
1087–39 CalA 289P865; TexCivA 274 SW299.
1087–43 [a] (1) 336 Ill 542, 168NE637. [b] **Broker not actuated by malice** is not liable for making report of loss. 228 AppDiv415, 239NYS419.
1087–45 216Ala383, 113S246. [c] 150 Wash676, 274P698.
1088–48 216Ala383, 113S246; 219 AppDiv610, 220NYS251. [b] 88PaSuper 187. [c] **Pleading.**–217AppDiv352, 217 NYS459. [d] **Plea held demurrable.**–217Ala153, 115S94, 55ALR1231. [e] **Company is not liable to insured** for mistake in description made by agent for insured. 50RI 405, 148A324.
1088–50½–New. To recover for failure to insure, the mortgagor must prove that the agreement to insure was omitted from the mortgage by fraud or mistake. 220Ky499, 295SW429.
1088–50⅓–New. Where insurer is not guilty of deception and the agent does something in violation of a prohibition contained in the instrument, which declares that it constitutes the entire contract, the agent acts for himself and is alone answerable to insured for any false pretense. 164La741, 114S637.
1088–51 225AppDiv115, 232NYS168; 50RI 405, 148A324; 54SD81, 222NW 598; TexCivA 14SW(2d)295. [a] 54SD 81, 222NW598. See also MoA 25SW(2d) 484(2dcase). [b] **Actions.**–232 IllA333. [c] **Burden of proof.**–Defendant has burden of proving that loss occurred under conditions which would have prevented plaintiff from recovering under policy for loss if policy had been issued. TexCivA 14SW(2d)295. [d] **Contention that oral agreement was merged in policy is untenable** where plaintiff does not seek to recover on policy. 50RI 405, 148 A324. [e] **Evidence has been held sufficient** to warrant recovery by insured from insurance agent. 50RI 405, 148A 324. [f] **Pleading has been held insufficient.**–40GaA652, 151SE114(1stcase).
1089–56 228AppDiv298, 239NYS419.
1089–56½–New. Where seller of automobile after receiving payment for insurance on car cancels the insurance, he is liable for any loss; evidence of cancellation improperly excluded. 219App Div610, 220NYS251.
1089–56⅓–New. Evidence improperly excluded which showed that insured recovered the stolen car. 219AppDiv610, 220NYS251.
1089–57 54SD81, 222NW598. [a] **Special promise to notify.**–TexCommnA 276 SW887.
1089–63 MoA 25SW(2d)484(2dcase).
1089–69 MoA 25SW(2d)484(2dcase).
1090–76½–New. Broker placing insurance with company not admitted to do business in state is difference in cost between litigation in foreign jurisdiction and similar litigation in state. 228 AppDiv415, 239NYS419.
1090–84 266Mass121, 165NE25.
1090–87½–New. Time is essence of a contract between an insured and a broker in so far as it affects payment of premiums when due. 18F(2d)948.
1090–87⅓–New. An insurance broker's waiver of prompt payment of an installment of premium creates no obligation to grant like extension of credit on subsequent installments. 18F(2d)948.
1090–87¼–New. That British underwriters extended credit to British brokers and such brokers extended credit to American brokers, although policies pursuant to British statute acknowledge receipt in full of premium, does not imply an agreement by an American broker to extend credit to insured. 18F(2d) 948.
1090–88 [b] (3) Other instances. 131 Misc742, 228NYS154. [c] **Broker's refusal to make change in sprinkler system recommended by insurance inspector** held not to preclude recovery. 229 AppDiv469, 242NYS381. [d] **Contract to carry minimum amount** held not illegal because it might require over insurance. 229AppDiv469, 242NYS381.
1091–16 See also 36GaA325, 136SE535.
1091–20 206Cal 273, 274P57; CalA 266 P307; 49SD319, 207NW49.
1091–22 8F(2d)202; 221MoA519, 290 SW109; 243NY261, 153NE68.
1092–23 8F(2d)202; CalA 266P307; 221MoA1193, 300SW556; 187Wis25, 203 NW918.
1092–24 206Cal 273, 274P57; 328 Ill 571, 160NE145, 146 [quotCJ]; 209Ky 626, 273SW536; 218Ky327, 291SW705; 126Me7, 135A357; 130 Or50, 278P87.
1092–27 MoA 25SW(2d)554; 241NY 318, 150NE129; TexCivA 3SW(2d)505.
1092–41 6F(2d)533, 43ALR496.
1092–43 6F(2d)533, 43ALR496.
1092–49 131SC498, 127SE570; Tex CommnA 12SW(2d)189.
1093–58 6F(2d)533, 43ALR496; 4LaA 474; LaA 122S909(2dcase); 241Mich 255, 217NW29, 57ALR692; 21 OhA70, 152NE794. [b] **Policy is contract governed by same rules as other contracts** except so far as modified by statute. 57ND941, 224NW894.
1093–60 241Mich255, 217NW29, 57ALR 692.
1093–62 198Cal 91, 243P431; Mass 168 NE737 (life insurance policy is nonnegotiable chose in action).
1094–78 [a] (3) Insurance contract issued by fraternal beneficiary association is not "old-line policy," though there is stipulated premium, payable in monthly installments, and fixed indemnity. MoA 289SW672.
1095–97 234Ky714, 29SW(2d)19.
1095–1 222Ky157, 300SW347. See also 31Ariz340, 253P440.
1095–2 252NY69, 168NE832.
1095–8 19F(2d)177; 41F(2d)696; 216Ala605, 114S6; 220Ala270, 124S889; 206Cal 273, 274P57; CalA 266P307; 166 Minn207, 207NW307; MoA 8SW(2d) 1090; 190NC549, 130SE186; 118 Okl 55, 246P383; TexCivA 270SW1032; 104 WVa580, 140SE552; 40Wyo 1, 273P667.
1095–9 19F(2d)177; 118Nebr116, 223 NW655; TexCivA 270SW1032; 104WVa 580, 140SE552.
1096–10 32 OhA316, 168NE61.
1096–12 1LaA338; 118 Okl 55, 246P 383.
1096–26½–New. To determine whether a written instrument embodies a contract of insurance the courts will look behind the terminology to ascertain what the parties intended to accomplish. 166Minn167, 207NW317.
1096–26⅓–New. Where an instrument evidenced an agreement on the part of each member of an association to contribute to a fund from which those sustaining losses should be indemnified, mere fact that contributions depended on the promptings of conscience does not affect the legal status of the instrument as a contract of insurance. 166 Minn167, 207NW317.
1096–26¼–New. Insurance may be taken out for whom it may concern. 13 F(2d)500.
1096–28 104Conn539, 133A666, 667 [citCJ]; 239 IllA510; TexCivA 296SW 693.
1097–30 218MoA84, 262SW686.
1097–31 See also IndA 171NE14.
1097–36 122Kan352, 252P213.
1097–40 TexCivA 288SW487.
1097–43 13F(2d)779; 135Wash547, 238 P565. [c] **Kind of policy** issued and delivered to plaintiff must be shown. Tex CivA 283SW886.
1098–44 135Wash547, 238P565.
1098–48 13F(2d)779.
1098–53 13F(2d)779. [a] **Fact that insured did not know identity of company** at time he made agreement with agent does not affect company's liability. 13 F(2d)779.
1098–56 [b] Preliminary receipt providing for return of premium if within sixty days company fails to issue policy or applicant refuses to take policy has no application in suit for damages for unreasonable delay in issuing policy. 117 Okl 7, 245P59.
1099–72 19F(2d)177.
1099–73 243NY266, 153NE70.
1099–83 135Wash547, 238P565.
1099–85 178Ark1090, 13SW(2d)621. See also 145Va694, 134SE728.
1100–2 [a] (2) Where not forbidden by statute, duly authorized agent may make binding contracts for insurance by parol, binding books, binding slips, binding receipts, or binding memoranda. 214Ala387, 107S846.
1100–3 247NY392, 160NE651. [a] (5) Binder is present contract of insurance issued to protect insured temporarily while insurer investigates risk. 247NY 392, 160NE651.
1101–14 37F(2d)461; 243NY266, 153 NE70. [a] **Insurer's liability** is determined by policy, and not by receipt for premium paid. 193NC166, 136SE291.
1101–18½–New. Recital in certificate that it represents and takes place of policy has been held not to show intention to substitute certificate for policy in view of other provisions of policy. 37F (2d)461.

1101-19 25F(2d)555, 558 [citCJ]; 218 MoA84, 262SW686.
1101-20 [a] **Company's right to reject** is absolute. 35F(2d)612.
1101-21 35F(2d)612.
1101-26 TexCivA 28SW(2d)895.
1101-29 218MoA84, 262SW686 (delay in reducing temporary agreement to writing, where due to fault of insured's agent does not relieve from liability).
1101-35 243NY266, 153NE70. [b] **Broker's retention of policy for six days pending examination and return for correction** is held not so unreasonable as to defeat binder issued pending delivery of final policy. 243NY266, 153NE70.
1101-35½-New. In New York, a binder, insuring property, is binding until issuance of "corrected policy" which is one issued after investigation of risk. 243NY266, 153NE70.
1102-39 137SC396, 135SE367.
1102-49 217MoA302, 261SW340.
1102-51 NJCh 149A633; 300Pa327, 150A645.
1102-52 203 Iowa1165, 211NW858.
1102-53 21F(2d)39; 85CalA542, 259P 1108; 172Minn511, 216NW225, 226 [citCJ]; NJCh 149A633; 300Pa327, 150 A645 (application held to charge applicant with knowledge it must be accepted); TexCivA 24SW(2d)774; Tex CivA 28SW895 (application held not ambiguous as to necessity of acceptance); TexCivA 285SW889; Tex CivA 288SW271; TexCivA 11SW(2d) 231; TexCivA 30SW(2d)1114.
1102-54 154Miss89, 121S487.
1103-56 41F(2d)696.
1103-58 13F(2d)779; 7PaDist&Co 767; 54SD125, 222NW676.
1103-59 13F(2d)779; 241NY318, 150 NE129, 43ALR522.
1103-60 13F(2d)779. But see 220Ala 270, 124S889.
1103-61 13F(2d)779.
1103-67½-New. Acceptance by insured of a material benefit certificate returned for correction is a condition precedent to recovery thereon. TexCivA 285SW 889.
1103-67½-New. Provision making payment of premiums condition precedent to liability on policy may be waived. TexCivA 285SW889.
1103-68½-New. Failure to pass on application within a reasonable time gives a cause of action in some jurisdictions. 124 Okl 155, 254P7. [a] **Whether delay was negligent or unreasonable is question for jury.**-124 Okl 155, 254P7. [b] **Admissibility of evidence in action for damages.**-124Okl 155, 254P7.
1103-74 118Nebr116, 223NW655.
1104-4½-New. That insured did not sign the application is immaterial where an application bearing his typewritten signature accompanies the policy. 85 CalA419, 259P496.
1104-4½-New. An applicant for insurance may reject a policy which does not conform to his oral request to insurer's agent, although he made a written application for insurance. 118Nebr 116, 223NW655.
1105-9 NJ 151A627.
1105-13 96CalA295, 273P1093; Tex CommnA 276SW887; TexCivA 285SW 889; 40Wyo 1, 273P667. But see 223 Ky533, 4SW(2d)372. [b] **District agent's approval** of application is not an acceptance by the company. TexCivA 288SW271.
1105-14 40Wyo 1, 273P667.
1105-15 TexCivA 24SW(2d)774. [b] **Execution of policy has been held not an acceptance** of application. 300Pa327, 150A645.
1105-18 172Minn511, 216NW225; 193 NC481, 137SE422.
1105-28 300Pa327, 150A645.
1105-29 40Wyo 1, 273P667.
1106-32 255 IllA586; IndA 171NE14; TexCivA 24SW(2d)774; 40Wyo 1, 273P 667.
1106-42 41F(2d)696; 81Colo 518, 256P 317; 115Nebr357, 213NW349.
1106-45 40Wyo 1, 273P667. [a] **Burden of proof.**-41F(2d)696. [b] **Sufficiency of evidence to show damages.**-41F(2d)696.
1106-45½-New. which is the proximate cause of damages; 115Nebr357, 213NW 349.
1106-47 [a] **Company not guilty of negligence as matter of law** in rejecting application by wiring broker. 41F(2d) 696.
1106-51½-New. Beneficiary cannot recover in assumpsit where nonacceptance is specifically pleaded. 255 IllA586.
1106-53 [c] **Failure to prove tender of premium** estops insurer from claiming policy was never in force. 217MoA302, 261SW340.
1107-55 TexCivA 28SW(2d)895.
1107-57 TexCivA 28SW(2d)895 (where beneficiary repaid agent who lent money for payment of premium).
1107-63 NJ 151A627.
1107-70½-New. A life insurance company's liability for insurance rejected by it before the application was finally approved is unaffected by failure to return the premium with the application, where the premium was returned to the company advancing the same, and applicant's note was canceled in accordance with an arrangement made by applicant and insurer's soliciting agent. 40Wyo 1, 273P667.
1107-76 174Ark409, 295SW376; 187 Wis25, 203NW918.
1107-77 187Wis25, 203NW918. [b] **Policy held not to contravene public policy.**-36F(2d)226.
1108-96½-New. Provision in contract of mutual insurance is enforceable which makes member liable for ratable proportion of all liabilities of company which may accrue during time policy is void or suspended and until it is legally canceled. 232Mich210, 205NW165.
1108-96⅓-New. A contract by insurance company with insured to furnish workmen's compensation insurance at fixed rate, notwithstanding later revision by state rating board, is illegal and unenforceable in view of statute requiring approval of rates by such board. 240NY511, 148NE661.
1108-96¼-New. Insurance policy covering adventure for illicit trade in foreign country is not illegal. 40F(2d)659.
1108-99 33Ariz206, 263P584. See also 145Va694, 134SE728.
1108-7 240NY511, 148NE661.
1109-13 MoA 14SW(2d)23.
1109-27 134Misc741, 236NYS395 (life insurance).
1109-32 8F(2d)706; 19F(2d)280; Wash 287P894.
1109-40 145Wash375, 260P257.
1110-44 TexCivA 30SW(2d)539.
1110-45 124Kan677, 261P573; 218MoA 673, 267SW51.
1110-46 124Kan677, 261P573.
1110-49 39F(2d)528; 218MoA673, 267 SW51.
1110-50 Alta [1930] 3DomLR456.
1111-62 Ala 128S225; 43 Ida222, 253P 379, 383 [citCJ].
1111-63 220Ala491, 125S676 (automobile liability insurance); 43 Ida222, 253 P379, 383 [citCJ]; 131Misc305, 226NYS 630, 634 [quotCJ].
1111-65 126Kan27, 267P23.
1111-73 216Ala553, 114S187. See also 20F(2d)951.
1111-75 229Ky392, 17SW(2d)206 (equitable title sufficient to comply with requirement of "unconditional ownership").
1111-81 TexCommnA 12SW(2d)971; TexCivA 18SW(2d)348.
1111-87 158Md169, 148A252.
1111-88 158Md169, 148A252.
1111-91 20F(2d)951. [a] **Bailed property may be insured for full value by bailee.**-216AppDiv252, 214NYS693.
1111-92 20F(2d)951.
1111-99 TexCivA 282SW957.
1111-2 [a] **Seller of automobile on conditional sale contract, assigning contract and guaranteeing payment,** had by reason of such guaranty insurable interest. 150Wash502, 273P745.
1112-11 Contra 35Ariz115, 274P784.
1112-19 167Ga237, 145SE78, 60ALR 969; 318Mo 969, 2SW(2d)733.
1112-23 Ala 128S225.
1112-24 127Kan271, 273P408; 218MoA 673, 267SW51.
1112-29 166Minn273, 207NW625, 627 [citCJ].
1112-32½-New. Public policy is opposed to contracts for overinsurance. 131 Or302, 282P764.
1112-34 31Ariz161, 251P458; 37 Okl ACR205; 10PaDist&Co 610. [b] (4) Distinction between options allowed insurants under life policies giving insured who had no loan against cash surrender value right of election of one of three options but if there was such indebtedness insured had no option renders policy void. 37 OklACR205. [c] (2) Taking note without interest where statute, policy, or application does not require payment of interest. 31Ariz161, 251P458. (3) Granting through medium of promissory note for premium an extension of time to pay accrued annual premium on condition that nonpayment of note shall ipso facto void policy does not violate statute against discriminations. 204 Iowa706, 213NW 753, 53ALR1528.
1113-35 217Ky826, 290SW673.
1113-39½-New. , although a discriminatory clause in violation of a valid statute is void and unenforceable. 37 OklACR205.
1113-53 19F(2d)177; 41F(2d)696; Ariz 286P183; 87CalA28, 261P499; 252 IllA460; 234Ky95, 27SW(2d)675; 249 NY217, 164NE29; 229AppDiv50, 240 NYS537; 24 OhA357, 157NE311; OhA 148NE61; Utah 290P979.
1114-58 Ariz 286P183.
1114-60 [a] **Agreement that insurance should remain in effect** till application was rejected and insured notified is sufficient on which to base claim for oral insurance. 221MoA727, 285SW772.
1114-61 252 IllA460; 234Ky95, 27SW (2d)675; 300Pa327, 150A645.
1114-64 234Ky95, 27SW(2d)675.
1115-69 Wis 231NW252.
1115-72 24 OhA357, 157NE311.
1115-73 36GaA325, 136SE535.
1115-77 300Pa327, 150A645.
1115-79 204 Iowa706, 213NW753, 53 ALR1528. [a] **In Arizona.**-33Ariz206, 263P584.
1115-87 221MoA727, 285SW772.
1116-93 [a] **Local agent of foreign insurance company** may bind his company by oral contract of fire insurance. MoA 22SW(2d)364.
1116-95 252 IllA460; 129Kan506, 283 P503; 229AppDiv50, 240NYS537; 288 Pa325, 135A614; TexCivA 28SW(2d) 895.
1116-4 TexCivA 28SW(2d)895.
1116-7 [b] **Statute held not applicable** to temporary binders. 104NJL218, 141 A92.
1116-8 TexCivA 272SW346 (insurance contract presumed to be in contemplation of statute).
1116-11½-New. Parties may limit or qualify terms of contract in any manner not inconsistent with statutory form. 187Wis25, 203NW918.
1117-25 193NC166, 136SE291. [a] **Commissioner's approval is persuasive** as to compliance with statute. 248Mich 645, 227NW692.
1117-33 187Wis25, 203NW918. [a] (2) Exceptions in light face type following benefits in bold face type all of same size and in one sentence held sufficient compliance with statute. 248Mich645, 227NW692. (3) "Exceptions" defined as used in Michigan statute. 35F(2d)126. [c] **Michigan statute held inapplicable** where, by direct statement, liability is incurred only for specified risks. 35F (2d)126.
1117-34 208Cal 151, 280P687; Cal 280 P690(1stcase); 208Cal 157, 280P690(2d case) (all three cases construing workmen's compensation policy).
1117-35 237Mich294, 211NW991; 187 Wis25, 203NW918.
1117-41 248 IllA232.
1117-45 122Kan800, 253P405; 102NJL 85, 132A106.
1118-47 122Kan800, 253P405.
1118-52 AlaA 130S520.
1118-53 204 Iowa706, 213NW753, 53 ALR1528; TexCivA 275SW313.
1118-54 214Ala387, 107S846. [b] **Such a statute does not prevent reformation of policies** for mutual mistakes. 220Ky 142, 294SW1059.
1118-56 TexCivA 275SW313 (applicable only to life policies).
1118-58 204 Iowa706, 213NW753, 53 ALR1528.

1118–62 Ala 106S45.
1118–67 145Va694, 134SE728. [b] **Contents of oral contract.**–221MoA727, 285SW772.
1119–75 263Mass341, 161NE589.
1119–75½–New. Statute as to contents of policy dealing solely with one form of insurance is not applicable to another form of insurance. TexCivA 6 SW(2d)195 (life policy provisions inapplicable to health and accident policy).
1119–82 LaA 130S561; 219AppDiv246, 219NYS152; TexCivA 282SW829; 105 WVa215, 141SE880.
1119–84 TexCivA 31SW(2d)854.
1119–85 41F(2d)351; 254NY333, 173 NE4 (rule applicable to life insurance policies); TexCivA 282SW829; TexCivA 292SW569; TexCivA 31SW(2d)465.
1119–87 133Misc335, 232NYS37; Tex CivA 282SW829.
1119–89 203 Iowa198, 212NW562; 8 LaA126; 239Mich150, 214NW117; 154 Miss196, 122S382; 219AppDiv246, 219 NYS152; TexCivA 292SW569. [b] 219 AppDiv246, 219NYS152. [c] **Failure to attach application** precludes insurer from proving fraudulent representations as basis to cancel policy. 203 Iowa198, 212NW562. [d] **Rule applied to effort to avoid policy for statements** knowingly false. 203 Iowa198, 212NW562.
1120–95 219AppDiv246, 219NYS152.
1120–97 35GaA1, 132SE120.
1120–3 TexCivA 31SW(2d)854.
1120–9 TexCivA 293SW271.
1121–23 TexCivA 275SW313.
1121–25 227AppDiv79, 236NYS659.
1121–31½–New. The statute applies to an application for reinstatement of a lapsed policy as well as one for an original policy. 139 Okl 130, 281P561.
1122–46 230AppDiv477, 245NYS240.
1122–52 13F(2d)779.
1122–55 220Ala314, 124S886.
1122–58 [a] **Indorsement by secretary.**–94PaSuper457.
1123–88 135Wash547, 238P565.
1123–93 300Pa327, 150A645.
1123–95½–New. A contract to insure to be obligatory in advance of the issuance of the policy must be in itself complete and unconditional so as to leave nothing to be done but the formal issuance of the policy. 135Wash547, 238P565.
1123–95½–New. A contract to insure to be obligatory in advance of the issuance of the policy must be in itself complete and unconditional so as to leave nothing to be done but the formal issuance of the policy. 135Wash547, 238P565.
1123–96 221MoA764, 285SW761.
1123–99 13F(2d)779; 35GaA360, 133 SE289; 220Ky173, 294SW1035; MoA 27 SW(2d)452.
1124–1 179Ark842, 19SW(2d)1013; 35 GaA360, 133SE289; 203 Iowa1165, 211 NW858; 153Md179, 138A16, 53ALR487; 131Misc794, 228NYS615; 193NC481, 137 SE422; TexCivA 13SW(2d)720. [a] (1) 193NC481, 137SE422. [b] **Question of delivery as condition precedent** is held one of intention. 153Md179, 138A 16, 53ALR487.
1124–2 237 IllA95.
1125–11 204 Iowa528, 215NW598 (policy in mutual company held binding).
1125–22½–New. Insured cannot accept a portion of a policy on which an indorsement has been made and reject the remainder which is consistent with the application and the policy. 85CalA542, 259P1108.
1125–25 Wash 288P262 (stipulation held not to prevent constructive delivery).
1125–26 153Md179, 138A16, 53ALR 487.
1125–28 33Ariz303, 264P474; 153Md 179, 138A16, 53ALR487.
1126–29 31F(2d)715; 85CalA419, 259 P496.
1126–30 153Md179, 138A16, 18 [citCJ], 53ALR487; 166Minn207, 207NW307 (no contract where there is intentional nondelivery).
1126–32 Wash 288P262.
1126–44 153Md179, 138A16, 53ALR487.
1126–45 See also 42F(2d)399.
1126–48 153Md179, 138A16, 18 [citCJ], 53ALR487; 252Mass336, 147NE851; MoA 274SW520.
1126–49 252Mass336, 147NE851; 33 OhA253, 169NE311 (even where agent was to be responsible for premium).
1127–52 33F(2d)434; 153Md179, 138A 16, 53ALR487; Vt 148A869(2dcase).
1127–53 [a] **Agent's agreement to hold policy** after payment of premium has been held constructive delivery. 42 F(2d)399.
1127–54 [a] **General instructions to agent to keep property insured** authorized him to accept policy for insured, when written, to waive cancellation change of old policy and accept new policy in lieu thereof. 173Ark1016, 294 SW19.
1127–55 203 Iowa1165, 211NW858, 859 [citCJ].
1127–56 153Md179, 138A16, 53ALR 487. [a] **Policy written by agent,** and turned over to clerk of insured, is enforceable where insured had instructed agent to keep property insured without designating name of company. 173Ark 1016, 294SW19.
1127–58 153Md179, 138A16, 53ALR 487.
1127–59 203 Iowa1165, 211NW858, 859 [citCJ]; 170La775, 129S161. [b] 196 Cal 179, 237P33.
1127–63 33F(2d)434 (applicant is not bound by insurance company's instruction to agent not entering into application); 33F(2d)434.
1128–64 33Ariz303, 264P474.
1128–66 85CalA419, 259P496; Wash 288P262.
1128–67 7F(2d)31, 32 [quotCJ].
1128–73 170La775, 129S161 (right to partial recovery).
1128–78 [a] **Insured need not signify** acceptance of policy. 217MoA302, 261 SW340.
1128–84 175Ark1155, 2SW(2d)20; 178 Ark230, 10SW(2d)873; 241NY318, 150 NE129, 43ALR522.
1129–85 241NY318, 150NE129, 43ALR 522.
1129–90 241NY318, 150NE129, 43ALR 522. [b] **In California.**–85CalA419, 259 P496.
1129–91 16F(2d)928; 252 IllA232; 242 Mich394, 218NW776.
1129–94 33F(2d)434; 241NY318, 150 NE129.
1129–94½–New. If insurer has right to assume that insured would read terms of contract, 241NY318, 150NE129.
1129–94½–New. or insured assented to terms without reading by acceptance of policy, 241NY318, 150NE129.
1129–94¼–New. negligent failure to read policy does not change its binding character. 241NY318, 150NE129.
1129–95 242Mich394, 218NW776.
1129–99 234Ky95, 27SW(2d)675; 190 NC867, 129SE727.
1129–1 218Ky473, 291SW760; 229 AppDiv670, 243NYS579.
1130–4½–New. That partners received and retained a policy does not estop one of the partners from setting up an oral contract of insurer's agent that the policy would cover him where he had no reason to believe that the policy was not of the kind promised. 33Ariz206, 263P 584.
1130–21 252Mass336, 147NE851; Wis 231NW252.
1130–24 221MoA727, 285SW772. [a] **Company may withhold authority** of agent to give credit or grant it on conditions, such as taking of notes. 35F(2d) 673. [b] **Company's authorization to local agent** to extend credit on note does not authorize his taking oral promise. 35F(2d)673.
1131–27 252Mass336, 147NE851; 165 Minn186, 206NW162.
1131–32 33GaA642, 127SE892; 239 Mich92, 214NW308; 193NC481, 137SE 422.
1131–33 219Ky103, 292SW742; 239 Mich92, 214NW308; 193NC481, 137SE 422.
1131–34 239Mich92, 214NW308; 193 NC481, 137SE422.
1131–35 33GaA642, 127SE892; 165 Minn186, 206NW162; 193NC481, 137SE 422; Wash 288P262.
1131–36 33GaA642, 127SE892.
1131–37 33GaA642, 127SE892; 165 Minn186, 206NW162.
1132–55 219Ky103, 292SW742.
1132–56 131Misc794, 228NYS615.
1132–61 85CalA633, 260P367, 369 [citCyc]; 52SD264, 217NW184.
1132–62 But see 23 OhA535, 156NE231.
1132–65 239 IllA532. [a] 91PaSuper 422.
1133–66 91PaSuper422.
1133–71 But see 91PaSuper422.
1133–82 25F(2d)555. See also Ariz 264 P474.
1134–87 See also 42F(2d)399. [a] **Application by agent of returned premium** in satisfaction of premium charged on policy in controversy does not invalidate policy. TexCivA 26SW(2d)295.
1134–90 41F(2d)351; 33Ariz303, 264P 474, 475 [quotCJ]; 12PaDist&Co 126, 127 [quotCJ].
1135–97 288Pa325, 135A614.
1135–99 33GaA642, 127SE892.
1135–1 33GaA642, 127SE892.
1135–12 220MoA1112, 296SW257.
1135–13 220MoA1112, 296SW257.
1135–15 220MoA1112, 296SW257.
1135–17 42F(2d)399; 177Ark927, 9SW (2d)26; 220Ky142, 294SW1059; 120 Or353, 252P556, 558 [citCJ].
1135–19 120 Or353, 252P556, 558 [cit CJ].
1135–22 42F(2d)399; MoA 31SW(2d) 108.
1135–23 288Pa325, 135A614. But see 35F(2d)612 (delay in refunding premium, after due notice of rejection, held not to create insurance by estoppel).
1135–29 TexCivA 31SW(2d)362.
1135–29½–New. the authority of an officer of a corporation to sign on its behalf for reciprocal insurance, 239Mich 362, 214NW212.
1135–32 235Mich4, 209NW104 (neglect of agent of insurer to insert provision).
1136–33 235Mich4, 209NW104 (neglect of insurer's agent to insert provision estops insurer from insisting on its omission as legal defense to action on policy); 300Pa206, 150A468. See also 119Kan502, 240P411.
1136–36 119Kan502, 240P411; MoA 24 SW(2d)211; TexCivA 11SW(2d)231; Wis 233NW85. [a] **Facts sufficient to constitute estoppel.**–200Wis8, 227NW 292.
1136–39½–New. Where insurer intends and does insure drivers of teams in repairing town highway, he is estopped from contesting that employment was hazardous. 214AppDiv345, 212NYS410.
1136–39½–New. or that it was carried on for pecuniary gain, 214AppDiv345, 212NYS410.
1136–39¼–New. or from denying that policy covered claim of injured laborer. 214AppDiv345, 212NYS410.
1136–39½–New. An indemnity company whose agent executed a builders' bond cannot deny the authority of its agent to execute it where the bond, bearing the corporation's seal, was issued and delivered and was acted upon. 157Tenn 440, 9SW(2d)704.
1136–39½–New. That a builders' bond was signed by one person alone whose signature was followed by the words "attorney in fact" is not sufficient to charge a purchaser of the bond with notice that it was improperly executed or that other signatures were necessary. 157Tenn440, 9SW(2d)704.
1136–39½–New. Conditions may be waived as well as representations and warranties. 6LaA95.
1136–42 42F(2d)399; IndA 171NE14; 165Minn186, 206NW162 (waiver of payment in cash); 120 Or353, 252P556, 558 [citCJ]; 145Wash489, 261P106.
1137–46 31F(2d)715.
1137–47 25F(2d)555.
1137–48 145Wash489, 261P106.
1137–49 120 Or353, 252P556, 558 [cit CJ]; 145Wash489, 261P106.
1138–59 120 Or353, 252P556, 558 [cit CJ].
1138–63 [a] (2) Wash 288P262. (4) Soliciting agent has no authority to waive payment of first premium. 38 F(2d)393; 38F(2d)557.
1138–65 [a] **That local agent accepted oral promises** in other cases does not authorize recovery on policy without showing knowledge or approval by insurer. 35F(2d)673.

1138-66 165Minn186, 206NW162; Wis 233NW85.

1138-69 [a] (3) 91PaSuper422. (5) Other instances. Wash 28SP262.

1138-71 [a] 38F(2d)393.

1139-73 120 Or353, 252P556, 558 [cit CJ].

1139-75 221MoA1151, 298SW103.

1139-76½-New. After making fortnightly payments under a policy, it cannot deny issuance of a policy. TexCivA 272SW601.

1139-77 MoA 23SW(2d)209.

1139-87 12F(2d)986.

1139-89½-New. Nonconformance of policy with representations made by agent are not waived by insured by paying note given to bank to secure money with which to pay first premium. 120 Kan86, 242P133.

1140-91½-New. Insured may waive condition precedent to delivery of policy which is solely for his benefit. SC 155 SE577.

1140-93 83NH474, 144A261.

1140-95 35F(2d)675; 121Kan674, 249P685; 122Kan800, 253P405; 223Ky533, 4SW(2d)372; 234Ky95, 27SW(2d)675; 4LaA711; 236Mich393, 210NW247; 244Mich668, 222NW116; 223AppDiv603, 229NYS121; 127Misc751, 217NYS504; 51SD293, 213NW726; TexCivA 298SW178. [a] (7) Where insurance agent was notified of transfer of auto to new corporation, is was held that company was entitled to reformation of theft policy of original owner. 127Misc751, 217NYS504.

1140-96 35F(2d)309; 220Ky173, 294SW1035; 236Mich393, 210NW247; 137Misc263, 241NYS727 (right of assignee).

1140-97 19F(2d)277; 188Wis140, 205NW800.

1141-1 160La439, 107S298. [b] **Where minds never met on agreement,** policy cannot be reformed. 160La439, 107S298. [c] **Insurer's approval of application and issuance of policy** held sufficient antecedent agreement, though policy issued was, through error, different from that applied for. 35F(2d)571.

1141-3 122Kan800, 253P405; 249NY217, 164NE29.

1141-4 19F(2d)277; 35F(2d)309; 39F(2d)50; 99Fla851, 127S894; 220Ky173, 294SW1035; 232Ky469, 23SW(2d)922; 234Ky788, 29SW(2d)557; 168La422, 122S278; 151Md383, 135A163; 83NH474, 144A261 (mistake held not unilateral); 100NJEq332, 134A774; 54SD125, 222NW676. See also 244Mich668, 222NW116. But see TexCivA 27SW(2d)581. [b] (6) 100NJEq332, 134A774. [e] **Statute prohibiting insurance contract not plainly expressed in policy** is held not to prevent reformation for mutual mistake. 220Ky142, 294SW1059.

1141-5 177Ark927, 9SW(2d)26; 236Mich393, 210NW247.

1141-6 35F(2d)571 (company's failure to detect error in use of part of indowment form on reverse of life policy held not to bar reformation); 160La439, 107S298; 236Mich393, 210NW247; 166Minn295, 207NW634.

1141-7 99Fla851, 127S894; 160La439, 107S298; 236Mich393, 210NW247. [c] **Where part of endowment form was erroneously used,** insurer could reform when claim was made for fraud at maturity. 35F(2d)571.

1142-9 246Mich251, 224NW337(2d case).

1142-10 188Wis140, 205NW800 (mistake as to coverage in liability policy on auto truck held one of fact and not of law).

1142-13 35F(2d)675. [a] **Where contract provided for illegal preferential premium on contractor's bond,** surety company, not seeking relief on ground of mistake, cannot have contract reformed and enforced so as to recover higher customary rate. 222Ky198, 300SW592.

1142-13½-New. Where a compensation insurance policy by mutual mistake covers insured's entire pay roll instead of the part thereof intended to be covered and the rate agreed upon is not warranted by statute, the court, on reformation of the policy so as to cover the pay roll intended, may apply the legal rate to the reformed policy. 166Minn295, 207NW634.

1142-13¾-New. even after the policy has expired by lapse of time. 166Minn295, 207NW634.

1142-13¾-New. As respects grounds for reformation, fire policy permitting unoccupancy for nine months and ten days is not harsh. 131Misc215, 225NYS470.

1142-14 188Wis140, 205NW800 (reformation held not necessary). [a] **Suit held proper without reformation.** 24OhA357, 157NE311.

1142-16 128Kan265, 276P800.

1142-18 81Mont99, 261P880.

1142-21 131Misc215, 225NYS470. But see 167Minn494, 210NW66.

1142-22 But see 223AppDiv603, 229NYS121.

1142-27 [a] **Company not barred after twenty years,** where error in using part of endowment form for ordinary life policy was called to insured's attention and company accepted only ordinary life premiums. 35F(2d)571.

1142-29 188Wis140, 205NW800, 803 [quotCJ].

1142-30 188Wis140, 205NW800, 803 [quotCJ]. [b] **Insured not entitled to reformation** on ground of solicitor's misrepresentations. 248Mich645, 227NW692.

1142-31 39F(2d)50; 166Minn295, 207NW634; 83NH474, 144A261; 249NY217, 164NE29; 188Wis140, 205NW800, 803 [quotCJ].

1142-31½-New. especially where insurer assured insured that policy contained desired coverage. 188Wis140, 205NW800.

1142-34½-New. Reformation will not be decreed where it would be ineffectual to bring plaintiff within protection of policy. 107Conn446, 140A816.

1142-36 171Minn118, 213NW539. [c] **Provision in policy that no condition or statement therein should be altered except by indorsement** by officer of insurer has been held void. TexCivA 11SW(2d)340. [d] **Statute prescribing standard form of policy** does not prevent change of written contract provided amendment is not in contravention of statutes. Ariz 286P183.

1143-37 [b] 122Kan800, 253P405; Wis 231NW252.

1143-39 Md 136A893.

1143-45 Ariz 286P183; 171Minn118, 213NW539.

1143-49 TexCivA 286SW508; TexCivA 11SW(2d)340. [a] (2) Agent of several companies. 171Minn118, 213NW539. [c] (5) Agency director. 229AppDiv670, 248NYS579.

1143-50 8F(2d)134.

1143-50½-New. A provision, that no erasure or change upon the face of the policy shall be valid unless indorsed and signed by proper officer, precludes alteration except in the manner stated. TexCivA 272SW539.

1143-50¾-New. A provision that no condition in a policy shall be altered except by indorsement thereon of an officer is void as depriving insurer of right to contract. TexCivA 11SW(2d)340.

1143-50¾-New. Strict indemnity contract may become modified by subsequent acts. Pa 152A104.

1143-56 [a] **Where extension certificate shows intention not to make new contract but to continue original contract** rule that renewal constitutes distinct contract is inapplicable. Mo 25SW(2d)783 (fidelity insurance bond).

1144-57 319 Ill 311, 150NE256.

1144-62 249NY217, 164NE29.

1144-72½-New. Privilege of continuance of group insurance after employment terminated, to be exercised within thirty-one days, did not mean that original insurance continued without insured's action. 82NH543, 136A400, 50ALR1276.

1145-73 198Wis202, 223NW444.

1145-75 51ND917, 201NW514.

1145-79 Ark 30SW(2d)217.

1145-83 217Ala114, 115S8; 51ND917, 201NW514.

1145-83½-New. An authorized agent's oral agreement for renewal is binding on company although made after the expiration of the policy. 51ND917, 201NW514.

1146-2½-New. TexCivA 290SW212.

1147-14 8F(2d)202; 8F(2d)224; 39F(2d)528; 69CalA730, 232P728; 318 Ill 350, 149NE247; 241 IllA283; 262 Mass469, 160NE306; 252NY75, 163NE834; 229AppDiv670, 243NYS579; 120 Okl 108, 250P892; 37 OklACR115; 37 OklACR137; 37 OklACR584; 38 Okl ACR58; TexCivA 289SW114; TexCivA 295SW242; Wash 28SP906. [c] **Insured is not held to same degree of care in respect of examination of printed policy** as in case of ordinary contract. 39F(2d)50. [d] **Contract must be enforced in accordance with its meaning** in absence of waiver or prevention of performance by one party through acts of other. SC 155SE617.

1147-15 8F(2d)224; 33F(2d)7; 178 Ark24, 9SW(2d)773; 27Hawaii326; 219 MoA322, 271SW1011 (plain and unambiguous terms cannot be changed by construction); 85PaSuper63; TexCivA 295SW242.

1147-24 47RI 416, 133A799.

1148-27½-New. Every insurance contract is presumed to be made with knowledge of customs and practices of insurance business. 14F(2d)196.

1148-27¾-New. Custom and usage may not control or overrule established law nor contradict express or implied agreement between parties. 126Misc874, 215NYS225.

1148-27¾-New. Where insurer protects itself with a coinsurance clause, its contract is not affected by contract of another insurer. 31F(2d)817.

1148-30 221MoA930, 288SW788.

1148-33 124Kan685, 261P565; 222MoA393, 58SW(2d)669; NC 154SE400.

1148-39 8F(2d)202, 203 [citCJ]; 98Fla1044, 124S817 (accident risk included in indemnity contract and not specifically excepted); 318 Ill 350, 149NE247; 124Kan685, 261P565; 230Ky354, 19SW(2d)955; 75Mont460, 243P1061; NJ 148A610; 127Misc751, 217NYS504; 226AppDiv408, 235NYS501; TexCommnA 27SW(2d)111.

1148-40 8F(2d)202, 203 [citCJ]; 39F(2d)956; 70CalA650, 234P116; 318 Ill 350, 149NE247; IndA 169NE473; 221Ky450, 298SW1080; 230Ky354, 19SW(2d)955; MoA 8SW(2d)1090; 127Misc751, 217NYS504; 38 OklACR58; 146Va312, 131SE806.

1148-41 8F(2d)202, 203 [citCJ]; 105Conn402, 135A388, 54ALR463; Md 150A732; 127Misc751, 217NYS504.

1148-42 190NC549, 130SE186; 38 Okl ACR58.

1148-43 70CalA650, 234P116; 322Mo38, 14SW(2d)600; 127Misc751, 217NYS504; TexCivA 24SW(2d)512. [a] **Courts have no authority to create ambiguity.**-35F(2d)126.

1148-44 TexCivA 24SW(2d)512.

1148-46½-New. Purpose of court is to give language used by parties its usual and ordinary meaning. 241NY252, 149NE849.

1148-46¾-New. in light of all circumstances and conditions having in mind nature of the transaction. 241NY252, 149NE849.

1148-47 6F(2d)294; 31F(2d)149; 220Ala162, 124S239, 65ALR921; Ala 129S470; 178Ark1090, 13SW(2d)621; Cal 287P468; 82CalA131, 255P220; 85CalA263, 259P121; CalA 266P853; 43 Ida222, 253P379, 382 [citCJ]; 318 Ill 350, 149NE247; IndA 152NE844; 124Kan584, 261P603; Md 136A893; Md 150A732; 75Mont460, 243P1061; 127Misc751, 217NYS504; 226AppDiv839, 234NYS513; 227AppDiv39, 237NYS36; 190NC549, 130SE186; 24 OhA21, 155NE649; 114 Okl 237, 246P238; 120 Okl 108, 250P892; 120 Or381, 250P717; 300Pa555, 151A285(2dcase); Pa 152A104; TexCommnA 276SW227; TexCommnA 280SW762. [f] **Intention of insurer to cover laborer injured as driver of team on highway** in repairing town highway shown under evidence. 214AppDiv345, 212NYS410. [g] **Where meaning is clearly expressed,** there is no place for rule of construction to ascertain parties' intention. 39F(2d)528.

1149-48 30F(2d)794; 124Kan584, 261P603; 219MoA322, 271SW1011; 55ND647, 215NW93, 54ALR289; 129 Okl 114, 263P652; TexCommnA 280SW762.

1149-49 124Kan584, 261P603; 125Me 255, 132A745; 158Md51, 148A273; 75 Mont460, 243P1061; 83NH200, 140A 169; 37 OklACR584; 47RI416, 133A 799.

1149-50 219Ala106, 120S912; IndA 152 NE844; 21 OhA129, 152NE796; 114 Okl 237, 246P238; 120 Or381, 250P717; 192 Wis319, 212NW523.

1149-51 20F(2d)951; CalA 291P698; 98Fla1044, 124S817; 50RI118, 145A 448; TexCivA 32SW(2d)683.

1149-52 114 Okl 237, 246P238; 120 Or 381, 250P717.

1149-55 120 Or381, 250P717.

1150-59 18F(2d)375; MoA 25SW(2d) 554; 120 Or381, 250P717; 192Wis315, 212NW779.

1150-60 32F(2d)61 (notwithstanding apparent hardship); 127Misc751, 217 NYS504; 120 Okl 108, 250P892; 299Pa 125, 149A96; 192Wis315, 212NW779.

1150-66 25F(2d)635; 49ND534, 191 NW839.

1150-67 49ND534, 191NW839.

1150-67½-New. Contract should be construed so that dominant purpose is not frustrated by technical rules of construction. Pa 152A104.

1150-68 52ND688, 204NW344; 120 Or 381, 250P717. [a] (7) Policy permitting payment of annual premium in installments construed to apply to first premium in view of delivery of policy on payment of one quarter of first annual premium. 6F(2d)294.

1150-69 52ND688, 204NW344.

1150-70 52ND688, 204NW344; 120 Or 381, 250P717.

1151-73 281US34, 50SCt165, 74Led683; 18F(2d)375; 18F(2d)879; 24F(2d)694; 31F(2d)547; 33F(2d)785; 35F(2d)126; 39F(2d)477; 42F(2d)997; 77CalA343, 246P1055; CalA 291P698; 27Hawaii 326; 28Hawaii99; 205 Iowa760, 218NW 313; 124Kan685, 261P565; Md 150A 732; 255Mass528, 152NE345; 258Mass 353, 155NE10; 318Mo 363, 1SW(2d)99, 57ALR615; 241NY252, 149NE849; 216 AppDiv453, 215NYS366; 218AppDiv455, 218NYS332; 136Misc47, 239NYS203; 24 OhA21, 155NE649; 50RI 203, 146A763 (names of beneficiaries); TexCivA 289 SW114; TexCivA 289SW1020; TexCivA 291SW301; TexCivA 5SW(2d)252, 254 [quotCJ]; 135Wash524, 238P568; Wash 288P906; Wis 232NW848. [b] Interpretation which will not render liability indefinite and uncertain should be preferred.-157Tenn301, 8SW(2d)473.

1151-75 7F(2d)522; 42F(2d)997; MoA 16SW(2d)663.

1151-77 Mass 173NE425; TexCivA 23 SW(2d)832.

1151-78 18F(2d)879; MoA 22SW(2d) 206 (in construing standard policy).

1151-79 18F(2d)879; 123Kan731, 733, 256P981 [quotCJ]; 93PaSuper28.

1151-79½-New. Provision of policy will be construed from layman's standpoint rather than from medical standpoint provided layman's understanding favors insured. MoA 27SW(2d)49.

1151-80 43 Ida222, 253P379, 382 [cit CJ]; 123Kan731, 733, 256P981 [citCJ]; 81Mont99, 261P880; 218AppDiv455, 218 NYS332.

1151-81 Ark 32SW(2d)310; CalA 287P 107; 43 Ida222, 253P379, 382 [citCJ]; 123Kan731, 733, 256P981 [citCJ]; 124 Kan584, 261P603; 261Mass245, 158NE 764; 156Miss865, 127S298; 157Miss97, 127S699(2dcase); 318Mo 363, 1SW(2d) 99, 57ALR615; 81Mont99, 261P880; 82 NH543, 136A400, 50ALR1276; 245NY 111, 156NE632; 218AppDiv455, 218NYS 332; 87PaSuper483; TexCivA 289SW 1020 [citCJ]; TexCivA 31SW(2d)1095; Wash 288P262; 107WVa555, 149SE605.

1151-82 43 Ida222, 253P379, 382 [cit CJ].

1151-83 123Kan731, 733, 256P981 [cit CJ]; 81Mont99, 261P880.

1151-84 43 Ida222, 253P379, 382 [cit CJ]; 123Kan731, 733, 256P981 [citCJ].

1151-85 123Kan731, 733, 256P981 [cit CJ]; Mich 233NW367.

1152-86 CalA 288P444.

1152-87 261Mass245, 158NE764.

1152-88 43 Ida222, 253P379, 382 [cit CJ]; 123Kan731, 733, 256P981 [citCJ]; 240Mich199, 215NW372; 81Mont99, 261 P880; TexCivA 289SW1020 [citCJ].

1152-90 TexCivA 5SW(2d)252, 254 [quotCJ].

1152-91 13F(2d)474; CalA 291P698; 35GaA606, 134SE336, 339 [citCJ]; IndA 168NE468; 127Misc344, 216NYS97.

1152-91½-New. Expiration limit group insurance policy insuring employees while employed did not amount to forfeiture requiring strict construction. 82NH543, 136A400, 50ALR1276.

1152-92 105Conn402, 135A388, 54ALR 463; 105Conn402, 135A388, 54ALR463.

1152-93½-New. Policies of insurance should receive a liberal and reasonable construction in favor of the beneficiaries. 177Ark875, 8SW(2d)452.

1152-94 277US311, 48SCt512, 72Led 895; 14F(2d)197; 15F(2d)976; 33F(2d) 231; 36F(2d)9; 41F(2d)351; 41F(2d) 586; 41F(2d)693; 43F(2d)885; 214Ala 166, 106S689; 214Ala373, 108S5; 214 Ala408, 108S37; 214Ala585, 108S524; 30Ariz599, 249P761, 762 [citCJ]; 170 Ark474, 280SW3; 172Ark1098, 292SW 389; 180Ark140, 20SW(2d)611 (in favor of beneficiaries instead of insurer); 85 CalA633, 260P367; CalA 291P698; 82 Colo 86, 257P265; 105Conn402, 135A 388, 54ALR463; 164Ga392, 138SE787; 35GaA606, 134SE336; 36GaA703, 137 SE848; 27Hawaii326; Ida 291P1072; 243 IllA181; 244 IllA241; 251 IllA197; 256 IllA8; 200 Ind472, 164NE628, 61 ALR840; 201 Iowa266, 207NW243, 44 ALR863; 207 Iowa977, 222NW25; 207 Iowa1101, 224NW67, 63ALR292; 217 Ky590, 290SW500; 226Ky534, 11SW (2d)148; 227Ky804, 14SW(2d)150; 168 La271, 121S863; 261Mass245, 158NE 764; 237Mich182, 211NW749; 148Miss 173, 114S262, 56ALR681; 151Miss189, 117S524; 157Miss97, 127S699(2dcase); 316Mo 278, 290SW429; Mo 30SW(2d) 100; 220MoA753, 275SW973; 222MoA 393, 5SW(2d)669; 221MoA868, 287SW 819; 222MoA393, 5SW(2d)669; MoA 24SW(2d)686; 79Mont166, 255P340, 60 ALR1; 85Mont248, 278P509; 33NM64, 260P849; 127Misc342, 216NYS151; 127 Misc344, 216NYS97; 127Misc674, 216 NYS643; 128Misc893, 220NYS289; 127 Misc9, 214NYS548 (marine insurance policy is construed strongly against insurer); 128Misc223, 218NYS221; 133 Misc193, 231NYS67; 190NC867, 129SE 727; NC 154SE400; 25 OhNPNS187; 114 Okl 237, 246P238; 133SC472, 131SE 22; 159Tenn531, 19SW(2d)229; 160 Tenn551, 26SW(2d)135, 68ALR1380; TexCivA 272SW346; TexCivA 272SW 539; TexCivA 280SW336; TexCivA 286 SW545; TexCivA 293SW346; TexCivA 294SW675; TexCivA 5SW(2d)252; Tex CivA 14SW(2d)372; TexCivA 31SW(2d) 850; TexCivA 31SW(2d)1095; TexCivA 32SW(2d)708; 66Utah307, 242P403; 145Va694, 134SE728; 152Va38, 146SE 353; 104WVa353, 140SE61; 107WVa 574, 149SE668; 107WVa608, 149SE830; Wis 232NW848; BC [1927] 2DomLR 126. [a] 230Ky354, 19SW(2d)955. [b] Surety companies being paid for assuming risks should not be easily relieved from their obligations. 135Misc 359, 238NYS209.

1152-95 281US34, 50SCt165, 74Led683; 8F(2d)202; 8F(2d)224; 14F(2d)197; 17F(2d)450; 26F(2d)501; 31F(2d)919; 214Ala166, 106S689; 214Ala408, 108S 37; 214Ala585, 108S524; 215Ala142, 110 S275; 215Ala13, 112S225; 220Ala162, 124S239, 65ALR921; AlaA 130S520; 172Ark1098, 292SW389; 178Ark24, 9 SW(2d)773; Ark 32SW(2d)310; 85CalA 263, 259P121; CalA 287P107; CalA 287 P377; 82Colo 86, 257P265; 108Conn707, 145A33 62ALR926; 98Fla1044, 124S 817; 164Ga392, 138SE787; 36GaA703, 137SE848; 37GaA203, 139SE362; 41 GaA644, 154SE198; 245 IllA295; IndA 171NE219; 123Kan731, 256P981; 124 Kan685, 261P565 (dictum); 221Ky450, 298SW1080; 158La601, 104S383; 2LaA 505; 262Mass469, 160NE306; 240Mich 199, 215NW372; 144Miss541, 110S432; 148Miss173, 114S262, 56ALR681; 156 Miss865, 127S298; 316Mo 278, 290SW 429; 318Mo 363, 1SW(2d)99, 57ALR615; 219MoA322, 271SW1011; MoA 4SW(2d) 497; MoA 27SW(2d)49; 81Mont99, 261 P880. 883 [citCJ]; 104NJL30, 139A725; 250NY264, 165NE286; 249NY21, 162NE 571; 216AppDiv202, 214NYS637; 127 Misc342, 216NYS151; 127Misc344, 216 NYS97; 127Misc674, 216NYS643; 132 Misc679, 230NYS340; 190NC549, 130SE 186; 55ND647, 215NW93, 54ALR289; 21 OhA129, 152NE796; 24 OhA21, 155 NE649; 25 OhNPNS187; 114 Okl 223, 245P837; 117 Okl 35, 245P582; 114 Okl 223, 245P837; 114 Okl 237, 246P238; Okl 292P349; 37 OklACR115; 37 Okl ACR137; 37 OklACR205; 38 OklACR 58; 129 Okl 114, 263P652; 134 Okl 303, 272P1023; 120 Or381, 250P717; 289Pa 13, 136A856; 299Pa11, 148A855; 87 PaSuper483; SC 155SE617; 157Tenn 301, 8SW(2d)473; TexCommnA 276SW 227; TexCommnA 285SW265; TexCivA 274SW307; TexCivA 286SW545; Tex CivA 293SW346; TexCivA 293SW869; TexCivA 294SW675; TexCivA 295SW 944; TexCivA 1SW(2d)490; TexCivA 8SW(2d)679; TexCivA 12SW(2d)1068; TexCivA 14SW(2d)372; TexCivA 23 SW(2d)799; TexCivA 23SW(2d)832; 146Va312, 131SE806; Wis 230NW704. See also 23F(2d)665. [c] "Builder's risk" policy, covering "all risks of loss or damage through collapse of supports or way from any cause whatever," is held to cover damage to ways built, specially to launch barge, which ways collapsed at launching of barge. 127 Misc342, 216NYS151. [d] Provision for forfeiture will not be read into policy where parties have not unmistakenly inserted it. MoA 26SW(2d)843.

1155-96 26F(2d)666; 207Cal 50, 276P 1004; 82Colo 86, 257P265; IndA 169 NE57; IndA 169NE65; MoA 21SW(2d) 926; NJ 147A196; 127Misc344, 216NYS 97; 127Misc674, 216NYS643; 221App Div184, 223NYS373; TexCivA 20SW(2d) 1093; 66Utah307, 242P403; 149Wash 70, 270P96.

1155-97 18F(2d)879 (provision of accident policy limiting liability to injuries received while riding in carrier's public passenger conveyance is held not misleading); 66Utah307, 242P403.

1155-98 15F(2d)976; 24F(2d)714; 180 Ark140, 20SW(2d)611. [a] (2) Benefit of doubt is given to insured. TexCivA 21SW(2d)36. [b] Every proper presumption should favor insured. 152Va 715, 148SE811.

1155-1 82Colo 86, 257P265; 134Misc 553, 236NYS171.

1155-2 24F(2d)714; 214Ala585, 108S 524; 202 Iowa43, 209NW406 (construction working forfeiture avoided); 125 Misc422, 210NYS720; 221AppDiv184, 223NYS373; 49ND534, 191NW839; Tex CivA 293SW346.

1155-3 135Misc883, 238NYS613.

1155-5 17F(2d)450; 30Ariz599, 249P 761; 170Ark478, 280SW15; 85CalA633, 260P367; 82Colo 86, 257P265; 36GaA 703, 137SE848; 202 Iowa43, 209NW406; 204 Iowa706, 213NW753, 53ALR1528; 207 Iowa167, 216NW62, 62ALR31; 217 Ky590, 290SW500; 158La601, 104S383; 240Mich199, 215NW372; 148Miss173, 114S262, 56ALR681; 220MoA753, 275 SW973; 251NY51, 167NE169; 135Misc 883, 238NYS613; Or 291P349; Or 291 P495; 47RI416, 133A799; 50RI 203, 146A763; TexCommnA 285SW265.

1156-6 30Ariz599, 249P761.

1156-7 30Ariz599, 249P761; Mich 215 NW373; 66Utah307, 242P403.

1156-8 82Colo 86, 257P265.

1157-10 [a] Clause in rain insurance policy making rain gauge at weather bureau conclusive as to proof of rain is held inapplicable where policy expressly insured against loss from rain causing abandonment of baseball game at grounds. 82Colo 86, 257P265.

1157-12 220Ala104, 124S229; 127Misc 674, 216NYS643.

1157-13 IndA 169NE473; 148Miss173, 114S262, 56ALR681; 127Misc344, 216 NYS97.

1157-14 29F(2d)977 [certiorari den 279 US851, 49SCt347(6thcase), 73Led994]; 31F(2d)149; 170Ark478, 280SW15; 82 Colo 86, 257P265; 200 Ind472, 164NE 628, 61ALR840; 216Ky329, 287SW896; 217Ky590, 290SW500; 262Mass469, 160 NE306; 237Mich182, 211NW749; 148 Miss173, 114S262, 56ALR681; 318Mo 363, 1SW(2d)99, 57ALR615; 127Misc 344, 216NYS97; 127Misc674, 216NYS 643; 114 Okl 223, 245P837; TexCivA 12 SW(2d)1068; TexCivA 16SW(2d)360; Ont [1929] 2DomLR70.

1157-15 24F(2d)714; 179Ark398, 16 SW(2d)6; 33NM64, 260P849.
1157-23 129Kan332, 282P757.
1157-24 266Mass230, 165NE429; 195 Wis494, 218NW845.
1157-26 Mich 233NW367; 195Wis494, 218NW845.
1158-29 8F(2d)202; 18F(2d)375; 22F (2d)136; 207Cal 50, 276P1004; CalA 266P853; CalA 269P728; 77Colo 130, 235P343; 107Conn446, 140A816; 164Ga 392, 138SE787; 252 IllA232; IndA 159 NE21; 197NC122, 147SE740; 113 Okl 184, 240P630; 38 OklAC58; 85PaSuper63; TexCommnA 298SW535 [cltCJ]; TexCommnA 18SW(2d)263; TexCivA 289 SW1020; TexCivA 291SW301; 146Va 312, 131SE806; 135Wash524, 237P568; 187Wis25, 203NW918; 192Wis315, 212 NW779.
1158-30 164Ga392, 138SE787. [a] **Where numerous courts have construed language in conflicting manner,** question whether language is ambiguous is not open. 118 OhSt421, 161NE276.
1158-34 Ala 129S470; 207Cal 355, 278 P861; 204 Iowa706, 213NW753, 53ALR 1528; 219MoA322, 271SW1011; Tex CivA 272SW539; TexCivA 291SW301, 304 [quotCJ].
1158-35 18F(2d)375; 77Colo 130, 235 P343; 222MoA393, 5SW(2d)669; Tex CommnA 29SW(2d)980; 135Wash524, 238P568. See also 24OhA21, 155NE649.
1158-36 4LaA184; 113 Okl 184, 240P 630; TexCivA 291SW301, 304 [quotCJ]. [a] **Rule of strict construction in favor of insured** does not affect rule that contracts of insurance are to be construed as other contracts to give effect to intention of parties. TexCommnA 280SW 762.
1158-36½-New. or give it an unreasonable interpretation, 261Mass245, 158NE 764.
1158-36⅓-New. or an interpretation that results unjustly, 261Mass245, 158 NE764.
1158-38 7F(2d)522; 8F(2d)202; 35F (2d)122; 36F(2d)186; 168Ark80, 269 SW62; CalA 269P728; 240 IllA502; 124Kan191, 257P933; 124Kan584, 261 P603; 125Mc255, 132A745; Miss 115S 400; 120 Okl 108, 250P892; 47RI 416, 133A799; TexCommnA 276SW227; Tex CommnA 280SW762; TexCommnA 285 SW265; TexCivA 291SW674; TexCivA 295SW944; TexCivA 24SW(2d)512.
1158-39 168Ark80, 269SW62; 164Ga 392, 138SE787; TexCommnA 276SW227.
1158-40 25F(2d)555; 168Ark80, 269 SW62; 124Kan191, 257P933; 138Misc 9, 245NY145; 120 Okl 108, 250P892; TexCommnA 285SW265; TexCommnA 15SW(2d)544; TexCivA 16SW(2d)834.
1158-44 Ark 32SW(2d)310; 240 IllA 502; 318Mo 969, 2SW(2d)733.
1158-46 128Misc510, 219NYS84.
1158-47 168Ark80, 269SW62 (clauses held not repugnant); 192Wis315, 212 NW779.
1158-49 193Wis179, 214NW616.
1159-51½-New. An inapplicable proviso cannot be resorted to, to render doubtful an otherwise unambiguous clause. 24F(2d)784.
1159-53 222AppDiv608, 226NYS676; 192Wis315, 212NW779.
1159-54 162La1090, 111S466; 128Misc 510, 219NYS84.
1159-56 32F(2d)310; 35GaA723, 134 SE804; 124Kan584, 261P603; 191NC32, 131SE395, 45ALR1360; Utah 290P937. [b] **Rate manual not made part of policy** has been held not available as defense. TexCivA 27SW(2d)921.
1159-60 85CalA542, 259P1108; Tex CivA 28SW(2d)196.
1159-62 [b] **Heading construed as part of clause following** when it must be read in connection therewith to make complete contract. 237Mich294, 211NW991.
1159-64 43F(2d)673.
1159-69 32F(2d)490.
1159-70 15SLa601, 104S383.
1159-71 17F(2d)658; 85CalA542, 259P 1108; CalA 287P107; 241NY318, 150 NE129, 43ALR522. See also 191NC32, 131SE395, 45ALR1360. [b] **Liability on rider** depends on validity of contract. 241NY318, 150NE129.
1160-72 170Ark1039, 282SW975.
1160-73 [a] **Incontestable provision of policy** is not applicable to loss under rider occurring before date of such rider. TexCivA 7SW(2d)946 (company is not estopped from denying liability under rider).
1160-74 17F(2d)658.
1160-75 17F(2d)658; 24F(2d)600; 36 F(2d)186; Cal 287P468; 158La601, 104 S383; 133Misc193, 231NYS67; 85PaSuper224; 193Wis179, 214NW616.
1160-76½-New. Controlling effect of rider may be made contingent upon certain conditions agreed upon orally. 285 Pa91, 131A701.
1160-76⅓-New. Failure to attach riders to policies before the time of fire does not preclude their consideration as part of the policies, where delay in delivering the riders is due to the fault of insurers. 103NJEq521, 143A815.
1160-80 216Ky19, 287SW16.
1160-94 153Md179, 138A16, 53ALR487. But see 193NC166, 136SE291. [a] **Agent cannot limit principal's right** to vary terms in receipt. 153Md179, 138A16, 53 ALR487.
1160-95 153Md179, 138A16, 53ALR487.
1160-96½-New. Fact that note for deferred part of premium is payable in yearly installments does not render policy for term of years a separable and divisible contract. 142Miss558, 107S754.
1160-99 206Cal 273, 274P57; CalA 266 P307; 124Kan584, 261P603; 190NC 549, 130SE186.
1160-1 214Ala387, 107S846; 256 IllA 197; 124Kan584, 261P603; 318Mo 969, 2SW(2d)733; MoA 21SW(2d)926 (in determining premium due dates).
1160-2 23AlaA205, 123S94(2dcase).
1160-3 124Kan584, 261P603.
1160-4 35GaA723, 134SE804; 124Kan 584, 261P603; MoA 282SW454. [b] **Unless referred to in policy, or attached,** application is no part of policy. 35GaA 723, 134SE804. [c] **Where no reference is made to application,** it must be assumed that policy alone expresses contract. NJCh 150A564.
1160-4½-New. , or application is attached. 35GaA723, 134SE804.
1161-6 318Mo 969, 2SW(2d)733; 85Pa Super63 (time of paying premiums).
1161-8½-New. Modification to an application prevails over the original application and policy. 318Mo 969, 2SW(2d) 733.
1161-9 Ala 129S466; 40GaA131, 149SE 68; 234Ky608, 28SW(2d)955; NJCh 150 A564.
1161-12 Ill 172NE57.
1161-22½-New. Amendments to an application, made a part of the policy by reference, are to be construed with the policy. 124Kan584, 261P603.
1162-24 35F(2d)122; 35F(2d)213; 196Cal179, 237P33; 86CalA671, 261P 486; 87CalA28, 261P499; 120Kan756, 244P862, 864 [quotCJ]; 252Mass432, 147NE904; 261Mass245, 158NE764; 219MoA121, 272SW79; 252NY449, 169 NE642; 122 Or615, 260P229; 53SD305, 220NW525; 157Tenn618, 11SW(2d)872; TexCivA 16SW(2d)360; 193Wis179, 214 NW616; Wis 230NW87. [b] **Federal courts will interpret contracts** in conformity with state statutes. 12F(2d) 986.
1162-25 120Kan756, 244P862, 864 [quotCJ]; 162La1090, 111S466; 261 Mass245, 158NE764; 122 Or615, 260P 229; 145Va694 134SE728; 187Wis15, 203NW743.
1162-26 120Kan756, 244P862, 864 [quotCJ].
1162-27 120Kan756, 244P862, 864 [quotCJ].
1162-29 171Ark952, 287SW199; 120 Kan756, 244P862.
1162-29½-New. , nor to a statute which operates prospectively. 120Kan756, 244 P862.
1162-30 135SC89, 133SE215, 45ALR 1172.
1162-31 162La1090, 111S466.
1163-39 Ill 173NE465.
1163-43 [b] **Where parties had agreed** that application, certificate, and by-laws should constitute contract, by-laws may not be disregarded. 180Ark140, 20SW (2d)611.
1163-46 Tex 23SW(2d)282 (general language of policy cannot be limited by by-laws).
1163-47 TexCommnA 12SW(2d)183.
1163-48 TexCommnA 12SW(2d)183.
1164-57 TexCivA 31SW(2d)1103 (where insurance contract does not expressly make constitution and by-laws part thereof). [c] **Amendment to constitution and by-laws construed prospectively.**-TexCivA 31SW(2d)1103.
1164-59 243Mich500, 220NW721.
1164-69 96CalA295, 273P1093; 124 Kan584, 261P603; 295Pa286, 145A286; Wash 287P894. [a] (1) 221MoA519, 290SW109. (2) 25F(2d)555. (5) Employer's liability policy dated back to date of written certificate held in force from date, though actually issued after employer's death certificate contained agreement that insurance should be effective from, and premium was charged to, insured on, that date. 209Ky279, 272SW740. (6) Antedating policy is supported by sufficient consideration where lower rate is obtained and indebtedness to insurer is canceled. 221 MoA519, 290SW109. (7) Acceptance by insurance company of application for workmen's compensation insurance, though conditional on report as to risk proving favorable, has been held to relate to application as originally made, calling for insurance effective on date specified therein. TexCivA 13SW(2d) 148. (8) Date clause commences to run is effective date of policy, which by its terms may be date of application and due date, and not date on policy. 25 F(2d)555. [d] **Date of policy or payment of first premium** or date of execution or delivery do not necessarily determine effective date, which is time of commencement of risk. 25F(2d)555. [e] **Application may stipulate** risk shall commence on certain day, thereby covering loss occurring before issuance of policy. TexCivA 27SW(2d)846. [f] **Loss already suffered** is not covered by policy. 36F(2d)43. [g] **Policy effective on stated contingency.**-35F(2d)73. [h] **Provision that policy is not effective till delivery** makes delivery date time from which policy commences. 179Ark842, 19SW(2d)1013. [i] **Risk under life policy** commences with completion of contract. 220Ala314, 124S886. [j] **Parties may agree** that policy shall issue as of earlier or later date than day of signing by insured's officers. NJCh 150A564.
1165-70 266Mass255, 165NE476; 267 Mass135, 166NE571; TexCommnA 285 SW603; 145Va694, 134SE728; 150 Wash611, 274P106(2dcase).
1165-71 TexCivA 27SW(2d)846 (commencement of contract).
1165-72 19F(2d)142; 6LaA503. [a] **Premium due date** does not necessarily fix effective date of policy. 19F(2d)142.
1165-76 215Ala142, 110S275, 276 [quot CJ].
1165-79½-New. Assignee of a policy insuring an employee while employed could not recover where the employment terminated before death. 82NH543, 136 A400, 50ALR1276.
1165-79⅓-New. Where a group insurance policy, issued to an employer, provided that insurer would furnish an employee a statement as to insurance protection, a certificate to the employee, promising to pay if death occurred during employment, sufficiently stated protection. 82NH543, 136A400, 50ALR 1276.
1165-79¼-New. Where limit of obligation of insurer was stated in a master policy, as terminating with a close of employment, insurer was not obligated to use the same form of expression in an individual certificate issued to an employee. 82NH543, 136A400, 50ALR 1276.
1165-79⅕-New. Where an authorized agent takes risk as of a prior date of application for insurance, insurer is bound, in absence of fraud or concealment, although loss occurs before execution and delivery of policy; 13F(2d) 779.
1165-79⅙-New. and the fact that insured did not know with what company he was dealing when making application does not affect such liability. 13F (2d)779.

1165-80 Tex 23SW(2d)282.

1166-82½-New. Losses insured against. "Tourist's policy," insuring against loss of personal property arising through risks of fire, lightning, navigation, and transportation, including loss by theft while being transported by any carrier, but not while articles are in custody of insured, covers loss by dropping or leaving articles in a public conveyance. 127 Okl 166, 260P6.

1166-84 [a] (2) Where wife signs both agreement and assignment, she assents to substitution of insurer as beneficiary. 131Misc806, 229NYS113.

1166-92 [a] (1) 131Misc806, 229NYS 113. (2) 131Misc806, 229NYS113.

1166-94 [d] **Statutory rate.**-262Mass 399, 160NE266.

1166-96 22AlaA7, 112S99.

1166-1 22AlaA7, 112S99.

1167-1191-4 10LaA259, 120S714.

1167-1191-5 [c] **Facts held to show waiver of default.**-10LaA259, 120S714.

1167-1191-14 131Misc806, 229NYS113.

1167-1191-15½-New. A provision in a life insurance policy for an automatic premium loan based upon the cash value less the amount of the unpaid premium, and any indebtedness against the policy is inoperative where such premium and outstanding indebtedness is equal to, or in excess of, the cash value of the policy. 120 Okl 24, 250P 113.

1192-2 [a] **Unearned premium** is that part of premium which must be returned to insured on cancellation of policy. 315Mo 113, 285SW65.

1192-5 12F(2d)998; 25 OhNPNS187.

1192-16 297Pa474, 147A239.

1193-22 [a] **Construction.**-230Ky744, 20SW(2d)735.

1193-23 Mass 169NE657 (automobile insurance).

1193-24 122 Or615, 260P229.

1193-27 104NJL218, 141A92.

1195-70 49Philippine737.

1195-71 23AlaA590, 129S487 (necessity of entering in receipt book).

1195-72½-New. Building contract held sufficient consideration for premiums. TexCivA 296SW693.

1196-77 [a] **Premiums must be paid** in full when due or within grace period. 54ND466, 209NW965, 47ALR446. [b] **"Persistent paying policy holder"** within participation clause means policy holder persistent in paying premiums. 130Kan600, 287P591.

1196-78½-New. Parties to an insurance policy may legally agree to pay premiums to be subsequently fixed which shall relate back to the date of policy. 243NY261, 153NE68.

1196-81 165Minn186, 206NW162 (by statute).

1196-82 239 IllA427, 434 [quotCJ].

1196-83 239 IllA427, 434 [quotCJ]; 85 PaSuper63.

1196-84 239 IllA427, 434 [quotCJ].

1196-88 85PaSuper63.

1196-92½-New. Where surety bond for specified premium does not stipulate for annual premiums, insured is not liable for an additional premium because the contract was not completed within one year. RI 131A312.

1196-95 249 IllA231; 157SC469, 154SE 855. [g] **Effect of extension.**-24F(2d) 714.

197-96 [d] 204 Iowa706, 213NW753, 53ALR1528.

1197-8 288Pa325, 135A614, 616 [citCJ]. See also 295Pa455, 145A505.

1197-9 86PaSuper605.

1197-10 MoA 16SW(2d)712; TexCivA 288SW271; 148Wash277, 268P869. See also 5LaA644.

1198-11 233Ky840, 27SW(2d)422.

1198-13½-New. An agent who voluntarily pays a premium before acceptance of the policy by insured has no remedy against insured. 21SaskL239, [1927] 1 DomLR542, [1927] 1WestWkly133.

1198-14 217Ala114, 115S8; 172Ark98, 287SW758; 246NY63, 158NE21.

1199-16 217Ala114, 115S8.

1199-17 295Pa286, 145A286.

1199-25 239 IllA532; 246NY63, 158NE 21; 198Wis202, 223NW444.

1200-27 217Ala114, 115S8; 126Misc 874, 215NYS225; 295Pa286, 145A286. [a] (4) Broker employed by insured to obtain insurance is usually regarded as agent of insurance company for purpose of collection and remittance of premiums. 120Kan415, 243P1023. [b] 126 Misc874, 215NYS225.

1200-31½-New. But custom and usage of charging a premium to a broker may not control or override established law nor contradict express or implied agreement between parties constituting such broker an agent of insurer for collection of the premium. 126Misc874, 215NYS 225.

1200-36½ 93PaSuper314. [a] **Agent's authority** to issue receipts cannot be denied where company gives agent its printed receipts. 10LaA70, 120S72(2d case).

1201-37 26F(2d)499; 109Conn609, 145 A44; 193NC481, 137SE422; NC 154SE 21.

1201-40 120Kan53, 242P455.

1201-44 TexCivA 10SW(2d)178; TexCivA 13SW(2d)406; TexCivA 17SW(2d) 1088.

1201-45 31Ariz161, 251P458, 459 [cit CJ]; CalA 287P107; 130 Okl 118, 265P 642; 50SD606, 211NW444. [a] (6) Note not paid at maturity held judgment of premium, though stipulating nonpayment at maturity should release insurer. 48SD571, 205NW382. [o] **Note held not void for failure to comply with statute** requiring note to state on its face that it is taken for insurance. 208 Iowa1042, 226NW772.

1203-47 [b] **Settlement of account** by insured's payment of balance due agent held equivalent to payment in cash even though premium was larger than payment made. 109Conn609, 145A44.

1203-48 120Kan53, 242P455 (crediting amount of premium on debt owed individually by agent to insured is not payment, in absence of remittance to company or its knowledge of and recognition of validity of such payment). [a] (2) Soliciting agent of life insurance company cannot bind principal by agreement that premium shall be applied in payment of his personal debt to insured. 179Minn545, 229NW879.

1203-51½-New. Where a general agent was authorized to receive checks in payment, the fact that he wrongfully indorsed checks received and failed to account for the money does not destroy the effect of the checks as payment. 216 MoA673, 271SW538.

1204-59 But see 295Pa286, 145A286.

1204-63 165Minn186, 206NW162

1204-65½-New. A provision of a policy requiring payment of premium to be proved by exhibiting a receipt signed by a designated officer is not binding on the beneficiary. TexCivA 18SW(2d)702 (2dcase).

1204-67 Sask [1925] 3DomLR720 (prima facie evidence).

1204-71½-New. Insured, although not paying a renewal premium when due, is entitled to possession of a renewal receipt sent the broker by insurer. 223 AppDiv169, 227NYS619.

1205-72 241Mich675, 217NW908, 909 [citCJ].

1205-79 221MoA1007, 300SW550.

1206-92 [b] 172Ark1176, 290SW53.

1207-99 123Kan82, 254P391.

1208-3 [a] 123Kan82, 254P391.

1208-8 123Kan82, 254P391; 50SD606, 211NW444.

1208-21½-New. Under a policy providing for fixation of premiums to become effective as of the date stipulated in the indorsement, the indorsement providing that increased premiums take effect as of the date of the policy, was held binding. 243NY261, 153NE68.

1208-21⅓-New. Where a surety bond to a contractor, requiring completion of a contract within two years, specified an agreed premium but did not stipulate for annual premiums, insured is not liable for an additional premium because the contract was not completed within one year. RI 131A312.

1209-33½-New. Where the policy delivered is substantially different from the policy applied for, the person contracting may refuse to accept it. The tender of a policy substantially different from that ordered will not, unless accepted by insured, entitle insurer to recover premiums for the same. 118 Nebr116, 223NW655.

1209-36 104NJL518, 141A92; 246NY 507, 159NE413; TexCivA 293SW1114.

1210-44 12LaA145, 125S303.

1210-45 TexCivA 293SW1114.

1210-46 See also 134SC96, 131SE428, 430 [quotCJ].

1211-47 See also 134SC96, 131SE428, 430 [quotCJ].

1211-48 See also 134SC96, 131SE428, 430 [quotCJ].

1211-49 See also 134SC96, 131SE428, 430 [quotCJ].

1211-51 [a] (2) Liability on note for premium accruing after cancellation is terminated. 22AlaA273, 114S785.

1212-57 [c] **Sheriff's bond.**-Surety company is entitled to recover premiums for entire term of bond though sheriff, after first year, procured personal sureties. 230Ky534, 20SW(2d)284.

1212-65 TexCivA 293SW1114; TexCivA 296SW693.

1213-74 TexCivA 296SW693.

1213-76 286Pa119, 133A217.

1214-16 142Miss558, 107S754.

1214-18 142Miss558, 107S754 (installment note for deferred part of premium not without consideration because of acceleration).

1215-39½-New. Where directors have acted under discretionary power, their conduct cannot be reviewed. 16F(2d) 707.

1216-54 [a] **After change from assessment to legal reserve company,** assessments sufficient in number and amount to pay current assessment members' death losses may be made. 208 Iowa 1053, 223NW257.

1218-99 16F(2d)707; 205 Iowa1099, 212NW473.

1218-2 16F(2d)707; 205 Iowa1099, 212 NW473.

1218-19 TexCivA 4SW(2d)1041, 1044 [citCJ].

1218-20 129Misc337, 221NYS500.

1219-26 TexCivA 12SW(2d)1068.

1219-42 200Wis363, 228NW491.

1223-39 TexCivA 4SW(2d)1041, 1044 [citCJ].

1230-58½-New. A classification of divisions of a mutual life insurance company for the purpose of assessment of death benefits into white division and colored division is not unreasonable. 175Ark1045, 1SW(2d)74.

1230-68 MoA 289SW967.

1231-91 TexCivA 20SW(2d)142 (recovery of premiums paid on policies void under Mexican law does not contravene public policy of state).

1232-96½-New. An insurance agency, representing various insurance companies as principals, acting as del credere agent, making contracts in its own behalf, is entitled to maintain suit in its own name. 28 OhA139, 162NE641.

1232-98 85Colo 591, 277P811. See also 135Misc103, 236NYS673.

1233-25½-New. Under a policy providing that the company would by indorsement on the policy waive payment of premiums thereafter becoming due if insured furnished satisfactory proof that he had become wholly and permanently disabled, notice of disability is a condition precedent to waiver of the premiums, and premiums paid while insured is insane cannot be recovered where no notice of disability was given the company. 295Pa518, 145A530.

1233-27 192Wis204, 212NW67.

1233-31 178Ark775, 12SW(2d)865.

1234-32 173Ark9, 292SW396.

1234-43½-New. A premium paid under an accident insurance policy during a year when insured was disabled and insurer was not entitled to the premium may be recovered. 55ND647, 215NW93, 54ALR289.

1234-43⅓-New. Premiums paid during period of insured's total disability, notice of which was not given to insurer until after insured's death, are not recoverable. 136Misc748, 240NYS666.

1234-44 See also MoA 8SW(2d)1018.

1235-60 10LaA70, 120S72(2dcase). [a] **In absence of protest by insurer** when receiving application by unauthorized wife for husband, amount wrongfully collected by agent may be recovered by husband where policy is not issued. 10 LaA70, 120S72(2dcase).

1236-68 120Kan86, 242P133, 134 [quot CJ].

1236-69 120Kan86, 242P133, 134 [quot CJ].

1236-70 120Kan86, 242P133.

1236-72½-New. Whether the agent's representations as to what policy would contain were or were not fraudulent is immaterial as to insured's right to recover premium paid. 120Kan86, 242P133.

1236-77 NJ 151A627.

1237-94 220Ala382, 125S396 (age); 105 WVa215, 141SE880, 882 [citCJ].

1237-95 169Ark136, 273SW378. See also MoA 8SW(2d)1018.

1237-98 80CalA122, 251P657; 263Mass 341, 161NE589.

1238-14 120Kan86, 242P133.

1238-16 TexCivA 13SW(2d)720.

1238-28 216Ala111, 112S424; 94Nebr 748, 144NW801 (where premium paid under agreement for forfeiture if applicant refused to take medical examination). [a] **Complaint held insufficient.**–144SC448, 142SE648.

1238-28½-New. Complaint in action to recover premium paid because policy did not conform to agreement held to sufficiently allege authority of agent to collect premium. 120Kan86, 242P133.

1239-34½-New. Defendant's plea, in an action by the company on a premium note, has been held sufficiently to state fraud in its procurement. 216Ala111, 112S424.

1239-34½-New. In an action for the return of premiums on insurance policies to be performed in Russia, repudiated by a domestic insurer, plaintiff is not required to plead Russian law. 217AppDiv685, 217NYS226.

1239-45½-New. In a suit involving the right of holders of life policies to the return of premiums on the ground the insurance contracts are void under foreign law where delivered, admission of applications, not accompanying the policies, and requiring delivery as a condition to an obligation under the policies, and of other evidence of time and place of delivery, to show that the contracts were made in such foreign country, is not error. TexCivA 13SW(2d) 720.

1239-51½-New. Evidence held to show that a building contractor signed an application for workmen's compensation insurance with the understanding that the owner should pay premiums. Tex CivA 296SW693.

1239-51½-New. Where the invalidity of contracts under the law of Mexico is asserted, insurer's rule book and testimony as to instructions regarding the delivery of policies is competent to show when and where the contracts were finally made. TexCivA 20SW(2d) 142.

1239-51¼-New. Evidence held not to show that insured had notice insurer was doing business in Mexico without a permit, so as to estop him from asserting the invalidity of contracts. Tex CivA 20SW(2d)142.

1240-56½-New. In an action against a mutual insurance company to recover money deposited with it by a policyholder the question whether the policies were assigned upon a sale of the property insured is one for the jury on conflicting evidence. 168Minn97, 209NW 880.

1240-56⅓-New. Ratification is a question for the jury. 175Ark806, 300SW 420.

1240-56¼-New. In an action to recover premiums brought after insurer's notice that the face value of the policy would be reduced to the amount that the premium would have purchased at the correct age of insured, evidence as to insured's fraud has been held insufficient for the jury. 152Miss413, 118S 826.

1240-68 [c] **That buyer thought he bought seller's interest in policy** does not justify judgment against insurer. 13LaA358, 127S411(1stcase).

1240-69 198Cal91, 243P431; MoA 24 SW(2d)211; 149Wash378, 271P69. [a] **Insurable interest of assignee.**–168Ark 698, 271SW324. [b] **Validity of assignment.**–166Ga683, 144SE258.

1241-70 6F(2d)533, 43ALR496; 328 Ill 571, 160NE145, 146 [quotCJ]; 202 Iowa 1291, 211NW716; NJCh 151A272.

1241-70½-New. Assignment of a policy of insurance, consented to by insurer, effectuates a new contract with the assignee. 38GaA505, 144SE332.

1241-73½-New. Liability insurer's possession of a policy, and failure to refuse to transfer it to the new owner of the premises, estops insurer from claiming forfeiture. 221AppDiv760, 223NYS 595.

1241-73⅓-New. Assignee of a claim under an insurance policy takes only such rights as assignor had. TexCivA 299SW943.

1242-79 MoA 289SW967.

1242-83½-New. Where the railroad commission demands cancellation of a policy and substitution thereof, public interest is not involved in keeping the first alive until the other is substituted. 179Ark1097, 20SW(2d)125.

1243-96 25F(2d)423; 179Ark1097, 20 SW(2d)125; 208 Iowa1053, 223NW257; 193Wis16, 213NW649.

1244-10 197NC385, 148SE432.

1244-19 95CalA500, 272P1111.

1245-34 179Ark1097, 20SW(2d)125; 226Ky424, 11SW(2d)87.

1246-38 NJSup 130A543.

1246-41 [b] **Agent for insurance company could not waive right to cancel fire insurance policies** unless waiver be written on, or attached to, policies. 30 F(2d)169.

1246-42½-New. Right to cancel must be exercised in good faith. 35Porto Rico 408.

1246-44 MoA 24SW(2d)211; 127Misc 66, 215NYS276. [a] **Statute providing that fire policy shall not be declared void by insurer** for breach of condition if insurer has not been injured, etc., relates to denial of liability after loss and not to insurer's right by contract or statute to cancel before loss. 245 Mich566, 222NW737.

1246-48 103WVa574, 138SE381.

1247-64 82NH482, 136A136.

1247-66 252Mass336, 147NE851; 91Pa Super422.

1247-68 204 Iowa528, 215NW598.

1247-72½-New. In Philippines tender of premium and notice of cancellation before suit is commenced on policy operates to rescind contract for false representations. 51Philippine725.

1248-81 243NY266, 153NE70; 133Misc 440, 232NYS351.

1248-82½-New. This notice is for the benefit of insured, and failure to give notice required by policy does not invalidate a new policy written in its place. 220Ky173, 294SW1035.

1248-87 225AppDiv115, 232NYS168; 133Misc440, 232NYS351.

1248-89 See also 245Mich104, 222NW 100. [a] (2) **Thus** notice of repudiation and return of premium is sufficient. 196 Cal 179, 237P33.

1248-90 245Mich104, 222NW100.

1249-95 245NY279, 157NE138.

1249-3 133Misc440, 232NYS351.

1249-10 129Misc536, 221NYS838. [a] (3) Mailing of notice of cancellation of policy by registered mail, requiring addressee's personal receipt, not received by insured, held ineffective. 129 Misc536, 221NYS838.

1249-17 NJSup 130A543.

1250-24 35PortoRico 408.

1250-25½-New. Question suggested but not decided whether premature notice of intention to cancel may be regarded as valid notice of such intention in view of insurer's later letter to insured urging reinstatement. 122Kan778, 253P 559.

1250-28 Ind 168NE869.

1250-30½-New. Where a statute so requires, notice of cancellation of a policy under the Workmen's Compensation Act must be given to the industrial board. 83 IndA594, 149NE371.

1250-34 226Ky424, 11SW(2d)87; 133 Misc440, 232NYS351.

1251-39 226Ky424, 11SW(2d)87.

1251-41 133Misc440, 232NYS351.

1252-48 111Conn549, 150A706 (time of tender); 336 Ill 542, 168NE637; Iowa 221NW383, 385 [citCJ]; 198Wis561, 225NW174. But see 19F(2d)410. [a] **Insured's letter to insurer that it had received credit from agent for unearned premium** "closing your account with us" does not, under circumstances, release insurer from obligation to pay unearned premium. 109Conn609, 145A44.

1252-51 203 Iowa282, 211NW383, 385 [citCJ].

1252-52 179Ark1097, 20SW(2d)125; 91 PaSuper422.

1252-53 But see 133SC472, 131SE22 [citCJ].

1252-54 111Conn549, 150A706 (cancellation does not become effective when full amount of premium paid is earned); 203 Iowa282, 211NW383, 385 [citCJ]; 228AppDiv428, 240NYS463. See also 133SC472, 131SE22 [citCJ].

1253-60 109Conn609, 145A44.

1253-76 [a] **In case of death** tender of premium should be to administrator, not beneficiary. 217MoA302, 261SW340.

1254-83 336 Ill 542, 168NE637.

1254-86 226Ky424, 118W(2d)87; 245 Mich104, 222NW100; 82NH482, 136A 136.

1254-87 203 Iowa282, 211NW383.

1255-5 245Mich104, 222NW100; 229 AppDiv349, 243NYS249.

1255-10 133Misc440, 232NYS351.

1255-19 82NH482, 186A136, 137 [cit CJ]; 229AppDiv349, 243NYS249.

1256-23 [a] **Evidence insufficient to establish waiver by insured.**–111Conn549, 150A706; Ill 168NE637.

1256-40 256 IllA197.

1256-54 150Wash626, 274P704.

1257-66½-New. Where insurer admitted liability and paid part of it, insured cannot rescind and obtain return of balance of premium. MoA 24SW(2d) 715.

1258-92 151Wash494, 276P549.

1258-94 40F(2d)384; 252Mass336, 147 NE851.

1259-1½-New. On failure of insured, under a marine policy issued by British underwriters, to pay the premium installment to an American broker on the due date after notice, the broker may cancel the policy although credit has been extended to him for the premium. 18F(2d)948.

1259-1⅓-New. Insured's inability through lack of funds to procure other insurance does not affect such right. 18 F(2d)948.

1259-12 238Mich300, 212NW970, 972 [citCJ].

1260-23 [a] **Procuring of new fire insurance for term commencing before expiration of term of existing insurance with intent to have new insurance take place of existing insurance** constitutes in law voluntary cancellation. 151Wash 494, 276P549.

1260-32 32F(2d)807.

1261-61½-New. Cancellation of policy for nonpayment of premium held not abrogated due to agent's statement and company's subsequent acts. NJSup 130 A543.

1261-63 179Ark1097, 20SW(2d)125 (cancellation held not conditional).

1261-64 [a] **Insured paying surrender value of life insurance policy to insured** is relieved from all liability though insured delivered policy to beneficiary reserving right to cancel it and take surrender value. 90CalA362, 265P882.

1261-65 133Misc440, 232NYS351.

1261-76½-New. Ambiguity as to whether the instrument constitutes cancellation should be construed most strongly against the party seeking forfeiture. 32F(2d)807.

1262-79 See also 150Wash626, 274P704.

1262-97 203 Iowa282, 211NW383.

1263-9 [a] NJSup 130A543; 228App Div428, 240NYS463.

1263-13 [a] 29F(2d)291; 179Ark1097, 20SW(2d)125. [b] 86Colo 229, 279P719; Miss 115S346; MoA 118W(2d)59; 33 OhA253, 169NE311; TexCivA 13SW(2d) 895.

1264-24½-New. Insurance broker has no right of action against company for company's breach of contract with customer. 240NY511, 148NE661.

1264-36 238Mich300, 212NW970.

1265-41 214Ala387, 107S846.

1265-55 118 Okl 243, 247P401. [a] **Present value of policy wrongfully re-**

scinded by insurer is face of policy less amount of premiums required to carry it during life expectancy and interest on remainder for life expectancy plus interest on total premiums for life expectancy. 118 Okl 243, 247P401. [b] **Life expectancy** is determined from life expectancy tables and from physical condition of assured at time of breach if likely to shorten expectancy. 118 Okl 243, 247P401. [c] **Evidence held sufficient** to support judgment for plaintiff. 118 Okl 243, 247P401. [d] **Evidence held insufficient** to sustain finding as to damages. 118 Okl 243, 247P401.

1266–63 127Misc68, 215NYS277.

1266–68 19F(2d)410; 34F(2d)116 (false statement may consist of warranty or representation of fact); 34F(2d)215.

1266–69 127Misc66, 215NYS276. But see 138Misc182, 244NYS426.

1266–70 19F(2d)410. [a] **Held not barred by laches.**–27F(2d)915 (nothing suggesting that application was false).

1266–83 TexCivA 118SW(2d)614; 19F(2d)410; 263Mass341, 161NE589.

1267–98 263Mass341, 161NE589.

1267–2 102NJL85, 132A106.

1267–8 102NJL85, 132A106.

1267–12 Contra 263Mass341, 161NE589.

1268–28 28Hawaii99, 102 [quotCycper Peters.CJ].

1268–29 28Hawaii99, 102 [quotCycper Peters.CJ].

1268–33 34F(2d)215 (state statutes held inapplicable in such proceeding); 28 Hawaii99, 102 [quotCycperPeters,CJ]; 211Ky12, 276SW981; 127Misc66, 215NYS276; 127Misc68, 215NYS277. [b] **On death of insured** insurer has cause of action against beneficiary to cancel policy for fraud and need not sue estate of insured. 138Misc182, 244NYS426.

1268–34 28Hawaii99, 102 [quotCycper Peters.CJ].

1268–36 122Kan831, 832, 253P431 [quot CJ].

1268–39 MoA 28SW(2d)193; 127Misc 66, 215NYS276. See also 161Ga568, 131 SE490.

1269–40 15F(2d)303; 22F(2d)241; 127 Misc66, 215NYS276.

1269–41 19F(2d)410.

1269–46½–New. Conditions of policy must be complied with before insured can recover from insurer. Mass 168NE 737.

1269–49 [b] **Conduct held not laches.**–35F(2d)337.

1269–53½–New. In suit after loss by insurer against fire to obtain cancellation, where the policy was alleged to have been procured by a general agent to be substituted for the policy of another insurer who desired cancellation of its policy, and where plaintiff's policy had not been delivered to insured, plaintiff is not required to join the other insurer as a party to the litigation. Vt 145A147.

1269–56 [b] **Counterclaim under disability clause improper** in action to rescind. 127Misc68, 215NYS277.

1269–63 [a] TexCivA 25SW(2d)664. [b] 24F(2d)241; 33F(2d)827; 34F(2d)116; 246NY63, 158NE21 (company's proving false statement as to prior medical attention, and insurer's making no explanation or excuse, held prima facie case of material misrepresentation); 229 AppDiv211, 241NYS441.

1269–65 15F(2d)646; 17F(2d)450, 451 [citCJ]. [a] **Evidence held sufficient.**–161Ga568, 131SE490.

1269–67 [a] (3) Where defendant counterclaims, issues raised by reply, if triable at all, must be tried after insurer has had trial in equity. 127Misc68, 215 NYS277.

1270–82 15F(2d)549; 24F(2d)714; 318 Ill 369, 149NE243; 247 IllA547; LaA 130S839; 104NJL30, 139A725; 55ND 112, 212NW518; 134SC532, 133SE440; 159Tenn531, 19SW(2d)229; TexCivA 283SW910; TexCivA 292SW569; Tex CivA 31SW(2d)859; TexCivA 31SW(2d) 1103; 100Vt425, 138A780; 193Wis72, 213NW669.

1270–84 193Wis72, 213NW669.

1270–88½–New. It is inequitable to allow insurer to take advantage of a provision in a policy that neither party intended it to contain. 239Mich396, 214 NW118.

1270–88 228AppDiv330, 239NYS496. [a] **Where application is not part of policy for lack of reference,** material averments do not void policy if false, unless they are fraudulent. 35GaA723, 134 SE804.

1270–89 109Conn673, 145A38.

1270–92 8F(2d)706; 206Cal 273, 274P 57.

1270–93 219Ky727, 294SW489.

1270–95 11F(2d)838; NJSup 130A544. [a] (2) Good faith of insured is immaterial where insurer was misled. 212Ky 763, 280SW123.

1270–96½–New. Philippine statute providing that right to rescind must be exercised prior to action on contract is inapplicable to defense of fraud in action on policy. 51Philippine80.

1271–1 160La439, 107S298.

1271–6 [a] **Statutory definitions.**–In Philippines concealment is defined as neglect to communicate that which party knows and ought to communicate. 51 Philippine725.

1271–11 109Conn673, 145A38.

1271–12 196Cal 179, 237P33.

1271–12½–New. In Philippines failure to exercise right of rescission cannot prejudice any defense which concealment may furnish. 51Philippine725.

1271–13 196Cal 179, 237P33; 128Misc 703, 219NYS756; Oh 155NE187.

1271–14 109Conn673, 145A38; 36GaA 695, 138SE86.

1271–15 15F(2d)946, 948 [quotCJ].

1271–16 15F(2d)946, 948 [quotCJ].

1271–18 51Philippine725.

1271–19 15F(2d)946, 948 [quotCJ]. But see 40F(2d)659.

1272–21 212Ky763, 280SW123.

1272–23 27F(2d)544; 32F(2d)995.

1272–25 40F(2d)659.

1272–28 287Pa128, 134A474.

1273–35 Ill 172NE57.

1273–40 11F(2d)838; 239Mich10, 214 NW216, 217 [quotCJperBird,J]; 105 WVa215, 141SE880.

1273–41 239Mich10, 214NW216, 217 [quotCJperBird,J]; 310Mo378, 276SW 877; 85Mont149, 278P116; 105WVa252, 142SE447, 449 [citCJ].

1274–42 Ill 172NE57 (warranty is in nature of condition precedent); 120 Or 694, 252P559.

1274–56 31F(2d)411.

1275–60 30Ariz599, 249P761; 49SD319, 207NW49; [a] **Occasional or incidental violations** of promissory warranty merely suspend liability of insurer. 49SD 319, 207NW49.

1275–73½–New. Parties to insurance contract may agree that statements will be treated as representations or as warranties. 39F(2d)528.

1276–93 261Mass121, 158NE350 (Gen. L. c 175 § 186).

1276–94 261Mass121, 158NE350.

1276–95 261Mass121, 158NE350.

1277–96 261Mass121, 158NE350.

1278–26½–New. A misstatement that the automobile was a 1915 instead of 1912 did not bar insured from recovering. 224 IllA606.

1278–26½–New. A statement that an automobile cost eight hundred dollars instead of seven hundred dollars does not vitiate the policy. 224 IllA606.

1279–37 31F(2d)571; 206Cal 273, 274P 57.

1279–38 31F(2d)571.

1279–45 109Conn67, 145A565.

1279–47 11F(2d)838 (Ohio statute).

1279–49 Wash 290P820. [a] **Statutory requirement as to intent to deceive** does not apply to warranty for maintenance of sprinklers after insurance is effected. 135Wash547, 238P565.

1279–50 170Minn60, 212NW5.

1279–51 122 Or547, 259P902.

1280–56 31F(2d)571.

1280–60 239Mich10, 214NW216, 217 [citCJperBird,J]; 299Pa11, 148A855.

1280–61 164La95, 113S779.

1282–87 MoA 25SW(2d)554.

1283–92 35GaA723, 134SE804; 36GaA 695, 138SE86 (dictum); 40GaA131, 149 SE68; Ill 172NE57; 256 IllA197; 105 WVa215, 141SE880.

1283–93 37GaA704, 141SE498. See also 39F(2d)528. Contra 122 Or547, 259 P902.

1284–99½–New. An answer in an application for burglary insurance that two watchmen would be maintained at all times constituted an agreement and required substantial performance. 31F (2d)411.

1285–12 31F(2d)571. [a] **Representation is presumed to refer** to time contract of insurance was completed. 196 Cal 179, 237P33.

1285–13 16F(2d)660; 21SaskL283, [1927] 1DomLR403, [1927] 1WestWkly 67.

1285–14 16F(2d)660; 35F(2d)945; 241 NY318, 150NE129, 43ALR522 (dictum).

1285–18 [a] **Beneficiary is bound** by false representations only as if made in his own application. 181Ark1127, 29SW (2d)680.

1285–24 [a] **Where answers of insured in application for life insurance are transcribed in good faith and their correctness certified by applicant,** they must be construed as written. 152Va 38, 146SE353.

1285–30 239Mich150, 214NW117.

1285–31 OhA 166NE906(2dcase).

1285–32 22F(2d)241.

1286–37 35GaA723, 134SE804; 287Pa 128, 134A474; 297Pa418, 147A76; 54SD 125, 222NW676; Wash 292P445.

1286–38 16F(2d)660.

1286–39 16F(2d)660; 101NJEq527, 139 A520; 287Pa128, 134A474; Ont [1929] 1DomLR900.

1286–40 16F(2d)660; 220Ky626, 295 SW900; 26 OhA287, 159NE486.

1287–42 [a] **Insured cannot be heard to say that he did not understand questions** plain on their face. 152Va38, 146SE 353.

1287–44 NJ 151A627; TexCivA 282SW 633; 105WVa240, 141SE878.

1287–45 85Mont149, 278P116. But see TexCivA 299SW281. [a] **Recovery is permissible** where misstatements, though material, were inadvertently made. 287Pa128, 134A474.

1287–46 36F(2d)176.

1287–48 101NJEq527, 139A520.

1287–49 201 Iowa1334, 208NW213; 169 Minn106, 210NW846.

1288–53 12F(2d)986; 30Ariz599, 249P 761; 201 Iowa1334, 208NW213; 228Ky 399, 15SW(2d)242(2dcase); 239Mich10, 214NW216, 217 [citCJperBird,J]; 85 Mont149, 278P116; 128Misc703, 219NYS 756; 221AppDiv380, 223NYS143; 120 Or694, 252P559; 284Pa299, 131A186; 297Pa418, 147A76; TexCivA 282SW633.

1288–54 24F(2d)1; 83 IndA500, 149NE 137; 212Ky763, 280SW123; 212Ky770, 280SW127; 228Ky399, 15SW(2d)242 (2dcase); NJ 151A627; 218AppDiv695, 219NYS64; 284Pa299, 131A186; TexCivA 299SW281; Ont [1925] 3DomLR 269. But see 43F(2d)809.

1289–56 239Mich10, 214NW216. [a] **Where representation is contained in answer to question in application made part of policy,** inquiry and answer are tantamount to agreement that matter inquired about is material, especially when policy was issued without medical examination. 109Conn67, 145A565.

1289–58 105WVa240, 141SE878; 105 WVa215, 141SE880.

1290–66 219Ky727, 294SW489.

1290–67 39F(2d)528 (honest belief of party).

1290–68 Ill 172NE57; 85Mont149, 278 P116.

1290–69 12F(2d)986; 25F(2d)555, 284 Pa299, 131A186.

1290–73 8LaA538.

1290–74 219Ky681, 294SW138.

1291–78 218Ky473, 291SW760.

1291–79 MoA 25SW(2d)554; 243NY 385, 153NE844; 284Pa299, 131A186.

1291–83 CalA 293P133. [a] **Such a breach does nevertheless constitute a defense.**–CalA 293P133.

1291–84 243NY385, 153NE844.

1292–96 TexCivA 295SW242.

1292–4 Ill 172NE57; Can [1928] 3DomLR577.

1293–21 49RI 112, 140A469, 471 [cit CJ]; Man [1928] 1DomLR677.

1293–24 MoA 279SW246; MoA 295SW 833 (rule not changed by statute); 120 Or694, 252P559; Man [1928] 1DomLR 677.

1294–27 TexCivA 276SW956, 958 (age of applicant); TexCivA 31SW(2d)850.

1294–28 39F(2d)528; 43F(2d)532; Ill

172NE57; MoA 27SW(2d)476.
1294-30 43F(2d)532, 535 [citCJ].
1296-52 30Ariz599, 249P761, 762 [cit CJ]; 174Ark783, 297SW847, 54ALR600; 101CalA334, 281P668(2dcase); 162Ga 313, 133SE741, 742 [citCJ]; 152Va715, 148SE811 (life policy); Eng [1920] 3 KB669. [a] **Court will not read into policy** invalidating clause not actually incorporated therein. TexCivA 292SW 569. [b] **Clause in life insurance policy** requiring notice of permanent disability of insured should be construed liberally in favor of insured. 174Ark783, 297SW 847, 54ALR600.
1298-65 NJ 138A516.
1298-71 134SC532, 133SE440.
1300-92 204 Iowa706, 213NW753, 53 ALR1528.
1300-93 31Ariz122, 250P882.
1300-93½-New. Clear intent to claim forfeiture is necessary. 318 Ill 369, 149 NE243.
1301-99 41F(2d)12; 213Ala300, 301, 104S522 [citCJ]; 38GaA623, 144SE674; 204 Iowa804, 213NW757; LaA 122S909 (2dcase); 142Miss558, 107S754; 135Misc 103, 236NYS673; 190NC757, 130SE612 (no room for construction of such clause in life policy); NC 154SE743; 85PaSuper63; 131SC403, 127SE836; Tex CommnA 27SW(2d)111. But see 221 MoA1151, 298SW103. [a] **Default in payment of premium note** given to secure extension of time for payment of premium forfeits policy where policy so provides. 221MoA519, 290SW109. [b] **Premium note is not payment beyond time of default in payment of note.**-221MoA519, 290SW109.
1302-2 217Ky826, 290SW673; 197NC 621, 150SE114. [a] **Provision is valid.**-235Ky529, 31SW(2d)899.
1302-4 56ND319, 217NW273.
1303-10 216Ky19, 287SW16.
1303-13½-New. Where a premium is not paid within the time stipulated in the policy and, within the grace period, an extension agreement is made evidenced by a note and a conditional receipt, they govern with reference to the termination of the policy on nonpayment. 49ND619, 193NW48.
1303-18 TexCivA 288SW1111.
1303-19 TexCivA 288SW1111. [a] **Insured protected only for period for which premiums were paid under terms of policy.** Wash 290P698.
1303-21 35F(2d)122.
1303-23½-New. The act of a company in writing a letter to insured declaring a policy suspended during default period is not tender of breach of contract where the letter was in accord with terms of contract of insurance. 36GaA789, 138SE 276.
1303-25 15F(2d)547, 549 [citCJ]; 214 Ala585, 108S524; Alta [1929] 1DomLR 324.
1304-37½-New. A statutory provision that a policy of insurance issued by an assessment insurance association may be canceled by the association on five days' notice has no application to a policy provision which suspends membership of the policyholder and denies him the right of recovery for loss while he is delinquent in the payment of assessments. 201 Iowa263, 207NW117.
1305-47 216Ala562, 114S132, 134 [cit CJ].
1305-49 41F(2d)12 (notice held reasonable).
1305-53 Ala 114S133, 134 [citCJ].
1306-83 31Ariz122, 250P882; 174Ark 783, 297SW847, 54ALR600; 299Pa11, 148A855.
1306-84 174Ark783, 297SW847, 54ALR 600; 138SC253, 136SE304.
1306-86 159Tenn564, 20SW(2d)1040 (failure of insurer to follow agreed method of collection out of insured's wages).
1307-96½-New. Failure to pay premiums on policy issued in foreign country is excused by withdrawal of insurer from such foreign country. 126Misc 109, 212NYS722.
1308-11 30F(2d)929; 35F(2d)122; 174 Ark783, 297SW847, 54ALR600; 178Ark 775, 12SW(2d)865; 181Ark407, 26SW (2d)94; 151Miss387, 118S195. [a] **Insurer's assistant superintendent agreeing to deduct premium from amount due insured on another policy** is binding on company and policy cannot be forfeited. 152Va715, 148SE811.
1308-13½-New. Insured need not apply cash value of the policy to payment of premiums in the absence of a request therefor. 31F(2d)862.
1309-40½-New. Insurer cannot treat policy as forfeited for nonpayment of installments of premiums while it has larger sum of money due insured than is required to pay installment. 181Ark 156, 25SW(2d)23(2dcase).
1310-71½-New. Communication of insured by mail, tendering delinquent premium, invites and authorizes response by mail. 204 Iowa804, 213NW757.
1310-73 181Ark156, 25SW(2d)23(2d case).
1311-75 204 Iowa804, 213NW757; 10Pa Dist&Co 549. [a] **Retention of check by insurer for five days** for overdue premium on policy which by its terms had lapsed does not amount to acceptance of check or payment. 204 Iowa804, 213NW 757.
1311-83 [a] **Acceptance of note** for larger sum than original premium note is abandonment of contract. 221MoA 1151, 298SW103.
1311-84 204 Iowa706, 213NW753, 53 ALR1528.
1311-86 11LaA547, 123S408 (where company accepted agent as debtor by issuing policy).
1311-87 26F(2d)499; 242Mich181, 218 NW669.
1311-88 206Cal 475, 274P957; 198Wis 561, 225NW174.
1312-1 245 IllA180.
1312-4 250Mich398, 230NW181.
1312-9 254 IllA206.
1313-16 204 Iowa804, 213NW757, 759 [citCJ]; Mass 170NE62.
1313-18 204 Iowa804, 213NW757, 759 [citCJ].
1313-27 213Ala300, 104S522; Ark 31 SW(2d)405.
1314-29 [b] **Statute must be strictly complied with.**-53SD305, 220NW525. [c] **Notice held insufficient.**-53SD305, 220NW525.
1314-30 243 IllA200.
1314-31 MoA 24SW(2d)653; 299Pa11, 148A855.
1314-45 252NY330, 169NE403; 131 Misc691, 227NYS220; 192NC8, 133SE 337, 339, 47ALR645 [quotCJ]; 200Wis 574, 229NW117. [a] **Statute, providing bankruptcy of insured does not release insurer from liability to party injured** does not deprive insurer of defenses which it could urge against insured. 126Misc380, 213NYS522. [b] **Dependents of deceased employee** have no cause of action on policy void or voidable at option of insurer. 196Cal 179, 237P33.
1314-46 37F(2d)90; 43F(2d)82.
1315-47 167Minn183, 208NW819; 192 NC8, 133SE337, 339, 47ALR645 [quot CJ].
1315-48 250NY281, 165NE293; 251NY 302, 167NE450. But see Mass 170NE49.
1315-49 227Ky652, 13SW(2d)1005; 192NC8, 133SE337, 339, 47ALR645 [quotCJ].
1315-50 181Ark637, 27SW(2d)786; 192NC8, 133SE337, 339, 47ALR645 [quotCJ].
1315-51 192NC8, 133SE337, 339, 47 ALR645 [quotCJ].
1315-51½-New. Provisions in policy limiting employer's rights cannot exempt insurer from liability to employee where award was made directly against insurer. 111Conn229, 149A679.
1315-55 216Ala562, 114S132; 176Ark 349, 3SW(2d)18; 176Ark1149, 6SW(2d) 28; 124Kan804, 262P571; 6LaA95; 239 Mich396, 214NW118; 82NH177, 131A 352; Ont [1927] 2DomLR502.
1315-57 35GaA723, 134SE804; 120 Kan415, 243P1023; 55ND112, 212NW 518; 134SC532, 133SE440.
1315-59½-New. Good faith is required on the part of insurer as well as insured. TexCivA 3SW(2d)539.
1315-60 131SC403, 127SE836.
1316-62 SC 155SE577. [a] **Foundation of waiver doctrine** is that insurer by its conduct induced insured to believe that insurance would not be affected by variance from strict letter of policy. 235Ky529, 31SW(2d)899.
1316-63 219Ala530, 122S658.
1316-66 69Utah172, 253P200.
1316-67 69Utah172, 253P200.
1316-67½-New. It is not essential, to constitute waiver, that insured be misled to his prejudice or to an altered position. 216Ala562, 114S132.
1316-71 Minn 231NW401.
1316-74 216Ala562, 114S132; 174Ark 827, 296SW718, 54ALR458; 55ND415, 213NW961.
1317-75 216Ala562, 114S132, 134 [cit CJ]; Ariz 289P985; 96CalA318, 274P 79; 108Conn652, 144A298; 6LaA95 (conditions may be waived); 124 Okl 112, 254P105; 134SC532, 133SE440; TexCivA 13SW(2d)916; Vt 151A565.
1317-78 See also 157Miss163, 127S268.
1317-79 MoA 278SW780.
1317-82 245Mich378, 222NW731.
1317-83 220Ky142, 294SW1059; 55ND 415, 213NW961; RI 139A39, 42 [cit CJ].
1317-84 See also 69Utah172, 253P200.
1318-87 40F(2d)687; 223AppDiv169, 227NYS619; 131SC403, 127SE836 (extension of time not in itself waiver); TexCivA 17SW(2d)849.
1318-88 120Kan297, 243P300; 227Ky 88, 11SW(2d)976.
1318-92 NJSup 133A513.
1318-94 36GaA447, 136SE803; Oh 155 NE187. Contra 160La381, 107S232.
1319-95 219Ala530, 122S658; 220Ky 167, 294SW1048; TexCivA 118W(2d) 340. But see 220Ky167, 294SW1048.
1319-96 19F(2d)419.
1319-1 SC 155SE577; Vt 151A565.
1320-3 160La381, 107S232, 233 [cit CJ].
1320-4 160La381, 107S232, 233 [cit CJ].
1320-5 160La381, 107S232, 233 [citCJ].
1321-13 But see 41GaA386, 153SE102.
1321-19 216Ala562, 114S132; Tex CommnA 290SW500.
1321-20 See also 26F(2d)580.
1321-21 35F(2d)763; 165Ga193, 140 SE496; 242Mich181, 218NW669; MoA 279SW246; Oh 155NE187.
1322-30 35GaA723, 134SE804.
1322-31 35GaA723, 134SE804.
1322-32 Ariz 289P985, 989 [quotCJ].
1323-37 TexCivA 295SW242.
1323-43 198NC568, 152SE792.
1323-44 172Ark958, 291SW82; 35GaA 723, 134SE804; 239Mich396, 214NW 118; 239Mich10, 214NW216; 167Minn 362, 209NW27; MoA 22SW(2d)88; 26 OhA270, 159NES57; 8PaDist&Co 662; TexCivA 3SW(2d)539; TexCivA 27SW (2d)270. See also Eng 30TLR139. But see 138Misc307, 245NYS406.
1324-47 316Mo 1292, 295SW571.
1325-50 167Minn362, 209NW27.
1325-58 11F(2d)838 (Ohio statute).
1325-60 35F(2d)253; 216Ala553, 114 S187; 172Ark958, 291SW82; 176Ark 349, 3SW(2d)18; 35GaA723, 134SE804; 226Ky328, 10SW(2d)1079; 231Ky426, 21SW(2d)794; 242Mich394, 218NW776; 135SC89, 133SE215, 45ALR1172; Wis 230NW612 (under statute).
1325-61 Iowa 215NW244.
1325-62 Iowa 215NW244.
1326-66 239Mich10, 214NW216; MoA 279SW246.
1326-71 TexCivA 289SW1032.
1327-78½-New. An insurance agency is deemed the agent of insured and not insurer's agent where the agency was not the accredited and legal agent of insurer. 146Wash484, 263P953.
1327-82 160La381, 107S232; Mass 167 NE252; 242Mich394, 218NW776.
1327-84½-New. The medical examiner's approval of insured's false statements in an application does not justify insured's own falsehood to the officer passing on the policies. 24F(2d)241.
1327-91 [a] **Cashier of branch office** held without power to extend time of payment of premiums or waive lapses. 6F(2d)300.
1328-3 177Ark927, 9SW(2d)26; 158 Md73, 148A267; 82NH177, 131A352; 102NJ414, 131A910; 49ND176, 191NW 350. [a] **Payment of claim by insured; reimbursement.**-Agreement by general agent permitting insured to pay claim of injured employee and promising re-

imbursement is within scope of his authority, binding insurer, entitling insured to recover money thus paid. 82 NH177, 131A352(3dcase).

1328-4 217Ala114, 115S8, 9 [citCJ]; 316Mo 278, 290SW429; 82NH177, 131A 352; 102NJL414, 131A910.

1329-7 220Ky142, 294SW1059.

1329-12 102NJL414, 131A910; Tex CommnA 12SW(2d)147.

1330-15 Mo 8SW(2d)941; 228AppDiv 837, 239NYS12 (need not be general agent); 284Pa129, 130A322; 134SC 532, 133SE440; TexCivA 295SW638. [b] **Soliciting agent placing age of insured lower** than given by him is binding on insurer. TexCivA 295SW638.

1330-17 Ariz 289P985, 988 [quotCJ]; 100WVa728, 132SE714, 715 [quotCJ].

1331-24 Ky 29SW(2d)557; 242Mich 394, 218NW776; 245Mich378, 222NW 731.

1331-27 TexCommnA 283SW161.

1331-28 TexCommnA 283SW161.

1331-37 TexCommnA 12SW(2d)147.

1331-38 TexCommnA 280SW551.

1332-44 102NJL414, 131A910.

1332-45 23AlaA561, 129S300 (beneficiary signing insured's name to application bound by limitations).

1332-46 35F(2d)132; 227AppDiv256, 237NYS344.

1332-47 40GaA375, 149SE798; 43 Ida 222, 253P379; 316Mo 278, 290SW429; 102NJL414, 131A910; 49ND176, 191NW 350.

1332-48 49ND176, 191NW350.

1332-49 43 Ida222, 253P379.

1333-59 220Ky167, 294SW1048.

1333-62 31F(2d)411; 31F(2d)571; 38 F(2d)972; 85CalA263, 259P121; 40GaA 131, 149SE68; 229Ky173, 16SW(2d) 759; 168La307, 121S876; 170Minn60, 212NW5; 316Mo 559, 291SW499, 502 [quotCJ]; MoA 291SW508, 510 [quot CJ]; MoA 22SW(2d)88; 34NM579, 286 P420; 241NY318, 150NE129, 43ALR 522; 141 Okl 90, 284P624 (erroneous valuation in policy); 294Pa406, 144A 294; TexCivA 31SW(2d)333. [a] **That information on which erroneous statement was based was obtained by agent's employee** does not change rule. 85CalA 263, 259P121. [b] **Application need not be expressly represented by agent to be correct.**-MoA 291SW508.

1334-66 85CalA263, 259P121; 40GaA 131, 149SE68.

1334-69 241NY318, 150NE129, 43ALR 522.

1334-70 MoA 291SW508, 510 [quotCJ].

1334-73 MoA 291SW508, 510 [quotCJ].

1335-82 TexCivA 9SW(2d)765. [b] **Where insurer without questioning** placed age at forty-five, that insured was over age limit held not misrepresentation avoiding policy. TexCivA 292 SW569.

1337-90 MoA 291SW508.

1337-91 31F(2d)411.

1337-94 MoA 22SW(2d)88.

1337-95 170Minn60, 212NW5; 34NM 579, 286P420.

1337-96 TexCivA 276SW956, 958 [cit CJ].

1337-98 TexCivA 276SW956, 958 [cit CJ].

1337-99 See also 169Minn106, 210NW 846. [a] **Insured not charged with notice** of misrepresentation in application merely by accepting and retaining policy with application attached. 169Minn106, 210NW846.

1338-2 MoA 22SW(2d)88; 148SC355, 146SE147.

1338-9 226Ky621, 11SW(2d)434; 159 Tenn202, 17SW(2d)904.

1338-11½-New. After action is commenced, insurer's letter withdrawing the defense of lack of prompt notice is not a waiver of notice on affiliated company. 220AppDiv434, 221NYS574.

1339-16 68CalA688, 229P1017; 160La 381, 107S232.

1339-25 100WVa728, 132SE714, 716 [quotCJ].

1339-28 104NJL339, 140A448.

1340-34 197Wis487, 222NW831.

1340-35 284Pa129, 130A322.

1340-35½-New. Such provision does not preclude waiver in some other way. 256Mass358, 152NE370.

1340-42 30F(2d)887.

1341-49 18F(2d)585; 173Ark263, 292 SW102; 174Ark827, 296SW718, 54ALR 458; 89CalA227, 264P501; 318 Ill 369, 149NE243; 234Ky788, 29SW(2d)557; 82NH177, 131A352; 229AppDiv232, 241 NYS417; 193NC344, 137SE137; 294Pa 406, 144A294; TexCommnA 12SW(2d) 147. [d] **Insurer wrongfully inserting representation not made by insured** is estopped from setting up such representation as misrepresentation. 241NY318, 150NE129 (insured having right to rely that no representations which he did not make would be inserted).

1342-51 174Ark827, 296SW718, 54ALR 458. [a] **Return by agent, without change, of policy sent to him for correction of misstatements therein** estops insurer from denying liability because of such misstatements. 239Mich10, 214NW 216.

1342-52 228AppDiv330, 239NYS496.

1342-53½-New. A claim of insurer's estoppel by having denied the contract's existence held not available where letters to insured merely gave notice of cancellation. 292Pa81, 140A621.

1342-55 318 Ill 369, 149NE243.

1343-58 40F(2d)687.

1343-64 96CalA318, 274P79; 161La 229, 108S464, 45ALR1521; LaA 130S561 (issuance of life policy without medical examination); 146Wash484, 263P953.

1343-65 MoA 279SW246. [a] **Where answers are complete on their face,** insurer is not estopped to avoid policy for incompleteness of answers. MoA 279SW 246.

1343-66 Ariz 289P985; 172Ark958, 291 SW82; 220Ky142, 294SW1059; 160La 381, 107S232; 161La229, 108S464, 45 ALR1521; 168La307, 121S876; 85Mont 149, 278P116; 243NY385, 153NE844; 53ND391, 206NW225; TexCivA 13SW (2d)435; 100WVa728, 132SE714, 716 [quotCJ].

1345-72 222AppDiv36, 225NYS341.

1345-75 29F(2d)607 [aff 29F(2d)609]; Ont [1930] 1DomLR472.

1345-76 243NY385, 153NE844.

1345-81 213Ala300, 301, 104S522 [cit CJ]; 325 Ill 452, 156NE307.

1346-85 213Ala300, 104S522; 219Ala 530, 122S658.

1346-86 219Ky119, 292SW765; 231Ky 426, 21SW(2d)794; 235Mich446, 209NW 569.

1346-90 136Wash686, 241P292, 293 [quotCJ].

1346-91 136Wash686, 241P292, 293 [quotCJ].

1346-93 316Mo 278, 290SW429; MoA 26SW(2d)818; 82NH177, 131A352.

1347-96 30F(2d)887.

1348-1 200 Iowa699, 205NW355; MoA 290SW88; 223AppDiv169, 227NYS619; TexCivA 4SW(2d)1041.

1348-2 35GaA565, 134SE341; 37GaA 22, 138SE589; 200 Iowa699, 205NW355; MoA 290SW88.

1348-2½-New. The rule applies notwithstanding a stipulation that a provision for forfeiture shall not be considered waived by the company's act of grace in accepting overdue premiums. 37GaA22, 138SE589.

1348-8 217Ky826, 290SW673.

1348-11 174Ark772, 296SW724; 37GaA 70, 139SE365; 40GaA536, 150SE436(2d case); 318 Ill 369, 149NE243; IndA 171 NE212; 5LaA633(1stcase); 235Mich446, 209NW569; 243Mich395, 220NW758; 149Miss289, 115S569, 570 [citCJ]; 316 Mo 278, 290SW429; 8PaDist&Co 662; TexCivA 13SW(2d)435; TexCivA 17SW (2d)849; TexCivA 27SW(2d)270.

1350-18 But see 235Ky529, 31SW(2d) 899.

1350-20 318 Ill 369, 149NE243; 1LaA 119, 123 [quotCyc]; 8LaA691; 149Miss 289, 115S569; MoA 276SW87; 193NC 344, 137SE137. But see TexCivA 29SW (2d)813.

1350-23 234Ky838, 29SW(2d)563.

1350-23½-New. Acceptance of past-due premiums takes effect from the time they were due so as to keep the policy in continuous force within a provision for days of grace where a policy has been in continuous force for a stated time. 149Miss289, 115S569.

1350-24 31F(2d)859.

1350-27 Alta [1929] 1DomLR324.

1351-35 232Mich204, 205NW163.

1351-38 40F(2d)687; 213Ala300, 104 S522.

1351-39 40F(2d)687 (unconditional demand); 174Ark772, 296SW724.

1351-40 [a] **Refusal of insured to pay past-due note when insurer offered to waive forfeiture on payment** constitutes waiver of insurer's waiver. 156Miss16, 125S409.

1351-41 But see TexCivA 29SW(2d) 813.

1351-43 See also 226AppDiv839, 234 NYS513.

1351-46½-New. A provision of a life, accident, and sick policy that subsequent acceptance of a past-due premium shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after acceptance, does not refer to payment of the principal sum in case of death so as to defeat recovery. 149Miss289, 115S569.

1351-47 31F(2d)715; 178Ark293, 10 SW(2d)891; 85Colo 591, 277P811; 321 Mo 140, 9SW(2d)929; MoA 278SW1053; MoA 58SW(2d)660; 222MoA763, 9SW (2d)673; 144SC448, 142SE648; Tex CivA 13SW(2d)435. [a] (1) 219Ky727, 294SW489.

1351-48 198NC166, 150SE877.

1352-51 MoA 295SW833; TexCivA 295 SW242.

1352-54 321Mo 140, 9SW(2d)929.

1352-56½-New. The right of an insurance company to ignore an insurance policy written by an insurance agent on his own property without the knowledge or approval of the company, is not lost by mere delay in returning the premium sent in by the agent, when the delay has caused the agent no loss nor prevented him from obtaining insurance from some other company. 58ND13, 224NW891.

1352-58 88 IndA658, 165NE327; MoA 287SW663.

1352-64 213Ala500, 104S522; 217Ky 826, 290SW673.

1353-70½-New. Retention of a note issued for a policy is deemed a waiver of a provision in the policy that it be void unless signed by an agent. 35GaA766, 134SE791.

1353-81 Md 136A893; 239Mich92, 214 NW308; 222AppDiv36, 225NYS341. [a] **Requesting examination under oath,** under policy provision, waives breach. 138Misc307, 245NYS406.

1354-88½-New. or where no contract of insurance was in fact in existence, 239Mich92, 214NW308.

1354-95 168Ark80, 269SW62.

1354-1 IndA 148NE501; Mass 172NE 99; 117Nebr265, 220NW285; 122 Or 547, 259P902.

1354-2 247Mich188, 225NW527; 247 Mich226, 225NW549; 248Mich634, 227 NW696(2dcase); 122 Or547, 259P902.

1354-3 24F(2d)694; 127Kan512, 274P 210; 78Mont532, 255P1052.

1355-7½-New. Denial by insurer of existence of an insurance contract is a waiver of other defenses and estoppel to set up any other defense. 213Ala 534, 105S901.

1355-10 82NH177, 131A352.

1355-11 See also 53SD570, 221NW599.

1355-13 200Wis363, 228NW491.

1355-14½-New. Where insurer authorized insured to pay settled claim of injured employee, it is estopped from thereafter contending that the claim was not valid. 82NH177, 131A352.

1355-15 Md 136A893; 55ND112, 212 NW518; 146SC41, 143SE668. [a] **Payment held not waiver.**-37F(2d)474.

1355-16 TexCivA 271SW118, 119 [cit CJ].

1355-18½-New. Where insurer did not cancel a policy on nonpayment of premiums known to it and negotiated subsequently for settlement of losses without denial of liability because of misrepresentation of insured's title, its right to rely on such defense was waived. 239Mich362, 214NW212.

1355-20½-New. Payment of loss on

promise of reimbursement does not estop insurer from denying liability. 325 Ill 452, 156NE307.

1355-20½-New. Insurer's payment after theft of an automobile to mortgagee held a waiver of insured's breach of warranty. **TexCommnA** 296SW500.

1355-21 216Ala562, 114S132; 12LaA 311, 124S551.

1356-38 Iowa 221NW57.

1356-45 [a] **Check of insurer's agent** is as effective to reinstate policy as if insured's check were sent. 234Ky838, 29 SW(2d)563.

1357-46 32F(2d)61; 142Miss558, 107S 754 (provision for reinstatement valid); **TexCivA** 13SW(2d)406.

1357-52 33F(2d)72, 74 [citCJ].

1357-57 29F(2d)318.

1357-58 259Mass573, 156NE721. But see 178Ark293, 10SW(2d)891.

1357-60 17F(2d)4, 7 [citCJ]; 39GaA 197, 146SE506(2dcase); Iowa 221NW 57.

1357-63½-New. Writings by which insurer reinstated a policy and extended time for payment of premium must be considered as a whole. 24F(2d)714.

1357-66 [b] **Supplemental contracts covering total disability attached to life policies** as component parts thereof are subject to incontestable clauses in policies. 191NC32, 131SE395, 45ALR 1360.

1358-70 259Mass573, 156NE721.

1358-70½-New. Insurers seeking to avoid liability on the ground that risk was not covered do not contest the policy under a statute making a policy incontestable after one year. 22F(2d) 136.

33 C. J.—7-76. **TexCivA** 272SW828, 829 [citCJ] (statute permitting notice of loss to nearest office not applicable to stipulation as to filing proof of loss).

7-86 128Misc223, 218NYS221.

7-89 146SC41, 143SE668.

7-92 **TexCivA** 288SW625; **TexCivA** 28 SW(2d)573 (application of statute).

7-92½-New. A stipulation in a policy requiring notice and proof of loss as therein specified or within the minimum period prescribed by law does not violate the statute. **TexCivA** 285SW 951.

7-97 35Ariz115, 274P784; 174Ark346, 295SW388; 119 Or591, 250P227, 228 [citCJ]; **TexCommnA** 27SW(2d)111; Wash 290P333.

9-19 52ND34, 202NW657, 659 [citCJ].

9-44 122Misc159, 202NYS410.

9-49 52ND34, 202NW657, 659 [citCJ].

10-54 52ND34, 202NW657, 659 [citCJ].

10-69 Oh 171NE591.

11-84 34 OhA551, 171NE419 (though not in employ of insurer at time).

11-1 RI 141A309.

11-3 119 Or591, 250P227, 228 [citCJ].

11-4 119 Or591, 250P227, 228 [citCJ].

11-5 122Misc159, 202NYS410.

12-6 44F(2d)31; NJSup 133A772; 118 OhSt237, 160NE707; 92PaSuper90.

12-9 122Misc159, 202NYS410.

12-10 92PaSuper90.

13-14 **TexCivA** 285SW951; **TexCivA** 28SW(2d)573; 194Wis333, 216NW653; 198Wis561, 225NW174. [a] **Theft insurance clause** held not within statute. **TexCivA** 28SW(2d)573.

13-17 CalA 287P510; 106Conn519, 138 A462.

13-19 226Ky328, 10SW(2d)1079.

14-24 [a] **Validity.**—203 Iowa428, 212 NW576.

14-26 [a] **Applicability of statutes.**—203 Iowa428, 212NW576.

14-30 265Mass509, 164NE442.

14-41 38F(2d)724; 169Ark230, 275SW 519, 41ALR379 (insured claiming under total disability clause of life policy bound to ascertain condition and give notice within time stipulated).

14-43 108Conn707, 145A33, 62ALR 926; 39GaA337, 147SE171.

14-44 30Ariz599, 249P761; 108Conn 707, 145A33, 62ALR926.

15-47 **TexCivA** 272SW828, 829 [citCJ] (proof of loss under burglary and theft policy).

15-54 118 OhSt237, 160NE707, 709 [quotCJ]. [b] **In Iowa.**—201 Iowa378, 207NW351.

15-55 196NC717, 147SE6. [c] 30F(2d) 929.

16-61 198Wis561, 225NW174.

16-62 But see 118 OhSt237, 160NE 707.

16-63 122Misc159, 202NYS410.

16-75 36GaA447, 136SE803.

16-82 But see NJSup 133A772; 226Ky 328, 10SW(2d)1079.

17-88 16F(2d)721; 250Mich185, 229 NW509.

17-90 16F(2d)721; Iowa 228NW88 (statement sworn to by two disinterested witnesses describing land, corn acreage, and number of bushels grown during season held compliance with requirement of hail insurance contract in case of partial loss); 296Pa89, 145A 697(1stcase); Utah 290P937.

17-91 See also **TexCivA** 272SW828, 829 [citCJ].

17-95 16F(2d)721.

17-96 16F(2d)721.

18-4 253 IllA148.

18-20½-New. A letter by the insured to the insurer may not be deemed to constitute proof of loss where it was not so intended and contained an inquiry as to what proof should be made. 201 Iowa378, 207NW351.

18-20½-New. Proofs prepared by an agent of insurer must be construed most strongly against the company. 323 Ill 143, 153NE744.

18-22 30F(2d)18.

18-27 232Mich101, 205NW116; 152 Wash272, 277P999(2dcase).

19-28 232Mich101, 205NW116.

19-31 254 IllA248.

19-35 254 IllA248 (insurer not estopped from denying validity of mortgage stated in proofs to have been placed on automobile).

19-38 251NY208, 167NE223(2dcase); 129 Or485, 278P104.

20-49 [a] **Proof of loss based on estimates of machinist** held not to contain false statements precluding a recovery. 39F(2d)21.

20-51 But see 39F(2d)21.

20-64 174Ark827, 296SW718, 54ALR 458; 207 Iowa1068, 224NW65; 124 Okl 112, 254P105; 48RI 473, 139A212.

21-65 [a] (2) Statutory provision has been held inapplicable to hail and tornado policy. Mass 172NE799.

21-66 102NJL414, 131A910.

21-68 124 Okl 112, 254P105.

21-70 36GaA447, 136SE803.

21-70½-New. An insurance corporation may ratify unauthorized waiver by its agent of written proof of loss. 48RI 473, 139A212.

22-81 Mo 8SW(2d)941.

22-83 85Mont149, 278P116; 124 Okl 112, 254P105.

22-84 52ND688, 204NW344 (no decision on question).

22-85 124 Okl 112, 254P105.

22-86 96CalA318, 274P79.

23-98 36GaA447, 136SE803; 256Mass 358, 152NE370; 102NJL414, 131A910.

23-99 239 IllA532; 256Mass358, 152NE 370; 102NJL414, 131A910.

23-1 102NJL414, 131A910; 135Wash 558, 238P569, 240P565.

23-2 226Ky328, 10SW(2d)1079; 53SD 228, 220NW503, 505, 61ALR306 [citCJ]. [c] **Effect of agent's failure to notify company** of possibility of its becoming liable will not relieve company of its responsibility. 226Ky328, 10SW (2d)1079.

23-3 48RI 473, 139A212.

23-4 53SD228, 220NW503, 61ALR306.

23-4½-New. An agent authorized to represent insurer in the adjustment of a loss has apparent authority to waive compliance with requirements of the policy for presenting proofs of loss. 135 Wash558, 238P569, 240P565.

23-4½-New. An agent authorized to represent insurer in the adjustment of a loss has apparent authority to waive compliance with requirements of the policy for presenting proofs of loss. 135 Wash558, 238P569, 240P565.

24-6 44F(2d)31.

24-10 102NJL414, 131A910.

24-12 RI 141A309.

24-15 43 Ida222, 253P379, 382 [citCJ]; Utah 290P937.

25-16 43 Ida222, 253P379.

25-18 106Conn119, 137A241; 36GaA 447, 136SE803; 124 Okl 112, 254P105; 53SD228, 220NW503, 505, 61ALR306 [citCJ]; NS [1928] 1DomLR420.

25-19 36GaA447, 136SE803; 141 Okl 90, 284P624; **TexCommnA** 285SW603. [a] **Facts need not amount to estoppel.**—124 Okl 112, 254P105.

25-21 108Conn652, 144A298; 52SD513, 219NW119, 120 [citCJ].

25-23 36GaA447, 136SE803; 201 Iowa 378, 207NW351.

26-28 See also 228AppDiv330, 239NYS 496.

26-30 221MoA798, 288SW80, 83 [quot CJ].

26-34 221MoA798, 288SW80; **TexCivA** 281SW217.

26-36 167La608, 120S24; LaA 130S 828.

26-38 MoA 24SW(2d)686. [a] **That policy prohibits waiver of conditions except in writing** does not affect rule. MoA 24SW(2d)686.

27-46 253 IllA148.

27-55 36GaA447, 136SE803; 52ND324, 202NW657; 129 Or485, 278P104.

27-57 39GaA337, 147SE171.

28-60 52ND324, 202NW657.

28-63 36GaA447, 136SE803.

28-66 52ND324, 202NW657, 659 [cit CJ].

29-71 52ND324, 202NW657.

29-72 52ND324, 202NW657 (objection waived, that proof of loss was verified by agent of partnership and not by one of its members).

30-81 256Mass358, 152NE370.

30-83 124 Okl 112, 254P105.

30-84 142Miss369, 107S523, 524 [cit CJ].

30-85 127Kan264, 273P416.

30-86 124 Okl 112, 254P105.

31-88 256Mass358, 152NE370.

31-92 130Kan774, 288P536.

31-95 127Kan783, 275P131(2dcase). [a] **Defenses to claims omitted from proofs of loss and not known to insurer** are not included in waiver of defects in proofs of loss arising from offer of settlement. 127Kan783, 275P131(2dcase).

31-12 RI 141A309.

32-13 But see 130Kan774, 288P536.

32-19 IndA 170NE351 (partial payment).

32-23 39F(2d)50; 96CalA318, 274P79; 108Conn652, 144A298; 253 IllA76; 153 Miss60, 120S836; MoA 7SW(2d)746; 102 NJL414, 131A910; 243NY266, 153NE 70; 127 Okl 13, 259P582, 586 [quotCJ]; 122 Or547, 259P902; 129 Or485, 278P 104; 52SD513, 219NW119, 120 [quot CJ]; **TexCivA** 292SW569; **TexCivA** 31 SW(2d)333; Vt 147A352.

33-25 IndA 148NE505; 245Mich104, 222NW100; 179Minn19, 228NW440; 127 Okl 13, 259P582, 586 [quotCJ]. Contra 36GaA447, 136SE803 (dictum).

34-26 37GaA337, 147SE171.

34-27 169Ark230, 275SW519, 41ALR 379 (claim under total disability clause of life policy); 37GaA337, 147SE171; **TexCivA** 28SW(2d)573.

34-28 MoA 7SW(2d)746; 102NJL414, 131A910; 127 Okl 13, 259P582, 586 [quotCJ].

34-29 102NJL414, 131A910.

34-30 Nebr 231NW148.

35-31 44F(2d)31.

35-38 36GaA447, 136SE803.

36-43 102NJL414, 131A910.

36-57½-New. Insured's revocation of his consent to arbitration of loss after the arbitrators disagreed does not render an action on a hail insurance policy premature under a by-law providing that the amount of loss may be submitted to arbitration by mutual consent and that the loss shall not be payable until thirty days after award. Iowa 228 NW88.

36-59 [a] **Appraiser's acts** in excess of authority are not binding. **TexCivA** 300 SW185.

37-69 130 Or50, 278P87.

37-73 29F(2d)988; 263Mass168, 160 NE786.

37-74 256Mass358, 152NE370; 247 Mich226, 225NW549.

37-75 130 Or50, 278P87.

37-76 256Mass358, 152NE370.

37-76½-New. , although in some cases authority to make a settlement is held to be broader than authority to make adjustment of losses. 51ND1, 198NW

546 (evidence showing authority to settle).

37-78½-New. An adjuster holds a position of trust requiring knowledge and skill, and his relation to his principal is analogous to that of an independent contractor. 130 Or195, 279P539.

38-92½-New. Interpretation of award is held not affected by letters of arbitrator giving award different interpretation than umpire's, where other arbitrator concurred without qualification. 127Misc73, 215NYS250.

38-92½-New. Difficulty of construing award is held no indicia of legal ambiguity. 127Misc73, 215NYS250.

38-92¼-New. An award of arbitrators so disproportionate to the loss as to show misapprehension by arbitrators of their duties will be set aside. Iowa 229 NW221.

38-99½-New. In the absence of a statute forbidding a provision for prorating liability, such provision would be enforceable against all kinds of insurance. 157Tenn597, 12SW(2d)365.

38-4 See also 240Mich167, 215NW401 (arbitration award of no loss is void where in violation of restricted procedure prescribed by articles of association and by-laws of insurer).

39-31 168Ark1017, 272SW355; Tex CivA 6SW(2d)387.

39-32 TexCivA 24SW(2d)739.

39-39 172Ark841, 291SW417.

39-41½-New. An agreement in proof of loss authorizing adjusters to collect the claim and agreeing that settlement by them with a local agent should discharge the claim has been held not binding on insured. 323 Ill 143, 153NE 744.

39-41½-New. A statute prohibiting any provision in a policy authorizing settlement for less than the amount assured by the policy includes all policies payable on contingency of death whether from natural or accidental causes. 157Tenn597, 12SW(2d)365.

39-42 [b] **Company held bound.**-27 F(2d)1.

40-48 168Ark1017, 272SW355 (where assured made full and long independent investigation before accepting settlement); 175Ark1170, 300SW415; 129 Kan713, 284P371; 229AppDiv670, 243 NYS579; TexCivA 24SW(2d)739. [a] **Evidence held sufficient** to show that settlement was not fraudulently induced by company. 168Ark1017, 272SW355. [b] **Adjuster's ignorance of lapse of policy** did not defeat compromise in accordance with settlement between adjuster and insured. TexCivA 24SW(2d)739.

40-51½-New. A compromise between insured and insurer against a claim for damages does not divest insured's judgment creditor of rights previously accrued. 251NY302, 167NE450.

40-61 51ND1, 198NW546 (evidence sufficient to show fraud).

41-67 171Ark77, 284SW12.

41-84 131 Okl 240, 268P309.

42-4½-New. A claim by insured becomes assignable after loss. 328 Ill 571, 160NE145.

42-8 [d] **Transfer of money to general agent** of foreign company does not constitute payment to insured. 323 Ill 143, 153NE744.

42-11 [a] **Proof of giving of check held** insufficient to support plea of payment. 193NC166, 136SE291.

42-12½-New. Statute imposing penalty for failure to pay losses promptly is penal statute and is to be strictly construed. 151Tenn103, 268SW117.

42-16½-New. **Disability indemnity policy** may provide for payment of one half of accrued indemnity at certain periods to insured and the balance to the executor or administrator at his death. 32 F(2d)61.

42-18 127Misc602, 216NYS783; BC [1930] 3DomLR1007.

42-24 208 Iowa348, 223NW366.

42-25 215Ala13, 112S225; 176Ark349, 3SW(2d)18.

43-26½-New. Where amounts received by insured from insurer and tort-feasors was less than loss, insurer not participating in action against tort-feasor is held not entitled to recover insurance money paid. 128Misc870, 220NYS336.

43-26⅓-New. Where insured settles with railroad causing collision, he is obliged to return smaller sum to insurer where subrogation exists. 218AppDiv 536, 218NYS534.

43-26¼-New. Mistaken payment of excessive amount has been held not waiver of provision limiting right to payment for disability to six months before proof, as respects recovery of payment. 250Mich540, 230NW929(2dcase).

43-37 [a] **Provision for pro rata payments held inapplicable.**-TexCivA 5SW (2d)545.

43-37½-New. As a prerequisite to enforcing contribution between insurers it is essential that same risk shall have been insured. 19F(2d)448.

43-42 25F(2d)75; Ala 129S15; 170 Ark1039, 282SW975; 194Cal 114, 228P 11; 243 IllA60; 123Kan515, 255P1115; 12LaA315, 125S150; 167Minn183, 208 NW319 (automobile theft insurance); 310Mo 419, 276SW614; 246NY162, 158 NE60; 132Misc22, 227NYS746; 132 Misc132, 229NYS81; TexCivA 297SW 352; 141Wash534, 252P98; BC [1925] 3DomLR734 (holding assignment of claim to insurer unnecessary). See also MoA 20SW(2d)971. [a] **Statutes providing for subrogation** by state bonding fund to right of judgment creditor on payment of judgment rendered against it, or principal on account of default of principal, does not amount to contract giving bonding fund right of subrogation in competition with creditor where creditor's claim only partially satisfied. 52ND1, 201NW993. [b] **Action to enforce subrogation; parties.**-Where insurer has paid loss but has taken no assignment of policy, insurer must bring action against wrongdoer in insured's name and is neither a proper nor necessary party plaintiff. BC [1925] 3DomLR734. [c] **Action by insurer.**-123Kan 515, 255P1115. [d] **Before payment of loss,** insurer is not entitled to subrogation. TexCivA 290SW286. [e] **Rights of owner of stolen bonds.**-134Misc525, 235NYS546.

43-43 246NY162, 158NE60; 132Misc 132, 229NYS81; Eng 33TLR131; BC [1925] 3DomLR734. But see 246NY162, 158NE60. [a] **If insurer pays part of loss,** right of action against person causing loss remains in insured, who becomes trustee for insurer to extent of loss paid. 25F(2d)75.

43-44 128Misc870, 220NYS336.

43-44½-New. Insurer cannot recover twice for same loss but recovery is limited to indemnity. 128Misc870, 220NYS 386.

43-44½-New. Where an insured releases a railroad company from liability for an injury to an insured automobile, thereby depriving insured of its right to subrogation under a provision of the policy, insurer is released from liability on the policy. 146Miss600, 111S584.

43-44¼-New. In an action by insurer against theft as assignee of insured, it is immaterial whether policy covered loss of property. 85 IndA674, 155NE 533.

43-44⅙-New. Where carrier negligent, fire insurers cannot be subrogated. Tex CommnA 296SW485.

43-44⅙-New. Insurers may not recover against railroad on theory of equitable subrogation under plea in avoidance of liability on policy. TexCommnA 296SW 485.

43-44⅐-New. Insurer does not lose rights of subrogation against a railroad which obtained a release from insured for less than full damages, with notice of indemnity. 246NY162, 158NE60.

43-44⅛-New. And whether release from insured to the wrongdoer, where there are several grounds of damage, is intended to release indemnitor's right of subrogation for particular damage is a question of fact. 246NY162, 158NE60.

43-44⅑-New. Insured who releases insured's right of indemnity is liable only for loss caused. 246NY162, 158NE60.

43-44 1/10-New. and, before insurer can recover against insured for such release, it must show that insured committed a wrong. 246NY162, 158NE60.

43-44 1/11-New. and that it could have recovered on the claim released. 246NY 162, 158NE60.

43-44 1/12-New. If insured receives payment from the wrongdoer before payment by insurer, such sum will be applied pro tanto in discharge of the policy. 132Misc22, 227NYS746.

43-44 1/13-New. An automobile owner can maintain an action in his own name to recover damages for the theft of an automobile, although the insurance company has paid the amount remaining due on the sales contract to the holder of a conditional vendor's right where there still remains an amount due to him after such payment. 177Minn10, 224NW271.

43-44 1/14-New. A cause of action of the owner of an automobile against the bailee for damages to a car stolen while in the bailee's possession is assignable to insurer against theft. IndA 165NE 255.

43-44 1/15-New. Insured, having received payment for damage to an automobile stolen from the bailee's possession, under a theft policy requiring insured to assign causes of action and subrogate insurer, is not the "real party in interest." IndA 165NE255.

43-44 1/16-New. The state treasurer's execution of a written assignment of the commonwealth's claim as depositor in an insolvent bank to a surety on a bond securing the deposit, where made without warrant of law, gave no greater rights to the assignee than those required under the equitable doctrine of subrogation. 295Pa433, 145A520.

43-44 1/17-New. Where insured recovered judgment against defendant for the amount of loss in excess of insurance, insurer cannot recover of defendant, the amount paid to insured. 25F(2d)75.

43-44 1/18-New. Where the insurance paid covers the entire loss, insurer may bring action against the person causing the loss. 25F(2d)75.

44-48 [a] 330 Ill 608, 162NE178.

44-53 157Tenn241, 7SW(2d)803.

44-59 But see 6F(2d)228.

45-79 See also 82Colo 72, 257P246.

46-98½-New. **In Canada** an offer to undertake reinsurance to the extent stipulated of further risks to be assumed by the offeree becomes a binding contract without notice of acceptance from the time of performance by the offeree by placing insurance. [1928] 2DomLR399.

49-49 27F(2d)265.

49-54 27F(2d)265.

50-59 Alta [1930] 1DomLR525.

50-60 But see 27F(2d)265.

50-64½-New. Reinsurance agreement is held not to have been obtained through false representation. 19F(2d)448.

50-66 [b] **Particular contracts construed.**-TexCivA 23SW(2d)491.

50-70 [b] **Reinsurance contract, requiring original insurer to retain liability** to extent of at least one hundred fifty thousand dollars, was not breached, where original insurer retained liability of one hundred thousand dollars, and was liable, at same time, under other bonds of same principal, to extent of seventy-five thousand dollars. 27F(2d)265. [c] **Bond.**-Evidence and broad descriptive terms of instrument by which indemnity company assumed liabilities of company it succeeded shows that instrument includes indemnity bond indemnifying against all expense occurring as result or on account of certain litigation. Tex CommnA 12SW(2d)189.

50-70½-New. The contract is to be liberally construed in favor of insured. 213Ala248, 104S425.

50-71 289Pa426, 137A598.

51-88½-New. A contract of the principal and sureties under bond does not apply to a bond not listed therein. Tex CivA 299SW676.

51-88⅓-New. A bond indemnifying a bank against loss by suit is construed as a contract of suretyship, not of insurance, as against reinsurer of principal and surety on bond. TexCivA 299SW 676.

51-88¼-New. The use of the word "insurance" without qualifying words, does not exclude indemnity against the expense incurred by reason of or on account of litigation as provided by the bond on which assignor was obligated.

TexCommnA 12SW(2d)189.
51-88½-New. Statute providing that representations in application for insurance shall constitute part consideration for issuance of policy has been held not applicable to reinsuring company which took over liabilities of assessment company. 180Ark1048, 24SW(2d)966.
52-4½-New. Debt from reinsurer to insurer arises on the happening of loss. TexCommnA 15SW(2d)1028(2dcase).
52-5 SD 233NW276(1stcase).
52-7 TexCivA 299SW676. See also 203 Iowa179, 210NW775.
52-10 289Pa426, 137A598.
52-12 99Vt473, 134A585.
53-13 269US118, 46SCt29, 70L ed187; 213Ala248, 104S425.
53-14½-New. Surety compromising claim against bank to which he is subrogated is not required to account to reinsurer on basis of full recovery of claim. 19F(2d)448.
53-14¾-New. Where state treasurer and deputy both defaulted, surety on separate bonds of both paying judgment on bond of treasurer covering all losses is not liable to reinsurer on theory of surety's right to recourse against itself on deputy's bond. 19F(2d)448.
53-24 [a] **Binder and policy have been held not to have imposed** upon insurer liability for premium deposit paid to former insurer. 177Minn36, 224NW253.
54-42½-New. Reinsurer of state treasurer's surety is not relieved from liability by failure of surety to report an investigation of rumors of principal's dishonesty. 19F(2d)448.
54-42¾-New. Reinsured suspicious of irregularities on part of principal in bond reinsured is not under duty to reinsurer to act without knowledge of specific misconduct. 19F(2d)448.
54-43 [a] **Reinsurer under participation contract** cannot complain of cancellation by receivers of original insurer's outstanding insurance by return of unearned premiums. 269US118, 46SCt29, 70L ed187.
54-53 213Ala248, 104S425.
56-74 205 Iowa1085, 217NW268, 56 ALR463. [a] **Right of reinsurers to benefit of standard pro rata coinsurance clause.**–Lessened liability which insurer automatically acquires under standard pro rata clause automatically works pro rata reduction in liability of reinsurers who have contracted that total loss shall be prorated among them. 205 Iowa1085, 217NW268, 56ALR463. [b] **Where reinsuring policies contain pro rata clause** (1) such clause limits liability of each to proportionate amount stipulated in pro rata clause of original policy. 205 Iowa1085, 217NW268, 56ALR463. (2) Where coinsurance is shown after judgment fixing liability of insurer and reinsurers, proportionate liability of such coinsurer should be applied pro rata on respective judgments against reinsurers. 205 Iowa1085, 217NW268, 56ALR463.
57-97 See also 203 Iowa179, 210NW 775. [a] **Under clause providing that reinsured shall settle all claims** and reinsurer shall be liable pro rata, in case of voluntary settlement, reinsurer may require reinsured to prove that the policies were valid up to the time of the loss, though he cannot urge in defense any matters occurring at time of, or subsequent to, the loss. 69CalA730, 232P 728.
57-97½-New. **Arbitration between reinsured and reinsurer.** The umpire's award, construing reinsurance contract in determining losses and premiums, requires deduction of salvage under two existing reinsurance treaties specified in determining losses, but in fixing premiums deduction of salvage under all existing treaties. 126Misc300, 212NYS567.
57-97¼-New. The umpire's award cannot be construed or impeached in light of fact that before he delivered it he received concurring memorandum from reinsurer's arbitrator interpreting award in accordance with their view. 126Misc 300, 212NYS567.
57-97¼-New. The arbitrator's letter to superintendent of insurance, interpreting the award in accordance with views of reinsured, cannot be considered in construing the award, where it was written after he had become functus officio. 126Misc300, 212NYS567.
57-99 269US118, 46SCt29, 70L ed187. [a] **Right of reinsurers to benefit of pro rata clause in their contract** is not affected by fact that original insurer became insolvent after reinsuring his risk in part. 205 Iowa1085, 217NW268, 56 ALR463.
57-3½-New. Insurance commissioner liquidating affairs of insurer may make contract of reinsurance with another company. 213Ala248, 104S425.
57-3¾-New. and thereby make changes in terms of the original policies as merely binding the contracting parties to the reinsurance contract. 213Ala248, 104S425.
57-4 205 Iowa1085, 217NW268, 56ALR 463. [a] **In equity liability of reinsurers to original insured** is measured by their liability to principal insurer. 205 Iowa1085, 217NW268, 56ALR463.
58-18 213Ala248, 104S425 [citCyc] (contract made by commissioner of insurance liquidating for original insurer).
59-32 180Ark140, 20SW(2d)611 (reinsurer acquires no rights not available to original insurer); Okl 292P349 (suicide clause). [a] (1) 180Ark140, 20SW (2d)611. [b] **Original insurer is liable for amount of reinsurance** (1) Where policy remained in force either under extended insurance clause or automatic premium loan clause after lapse of premiums. 213Ala248, 104S425. (2) Insurer or its representative in contract of reinsurance cannot make contract which abrogated rights of policyholder as against insurer's liability without knowledge or consent of insured. 213 Ala248, 104S425.
60-63 But see 19F(2d)448.
60-65 [a] **Suit against stipulated rate assessment insurance company for damages** for breach of reinsurance contract by raising premiums is properly brought in county of plaintiffs' residence, under Arkansas statute. 179Ark 164, 15SW(2d)321.
62-86½-New. No action lies for failure to issue reinsurance policy where original agreement was invalid. 82Colo 72, 257P246.
62-93½-New. County suing county treasurer and his sureties had no cause of action against reinsurers. SD 233 NW276(1stcase).
62-96 [a] (1) 213Ala248, 104S425. [b] **Pleading held insufficient.**–82Colo 72, 257P246.
62-97 [a] (1) 213Ala248, 104S425 (defensive matter necessary to be pleaded). [c] **Pleading held proper.**–229AppDiv 470, 242NYS405.
62-97½-New. An allegation on an express contract precludes recovery on an implied contract. TexCivA 299SW676.
63-13 [a] **Evidence held inadmissible.**–27F(2d)265.
63-27 [a] (3) To show second accident policy was issued in place of and in cancellation of first policy so as to render reinsurance inoperative. 69CalA730, 232P728. [b] (3) To show that two accident policies were both in force so as to render reinsurance operative. 69CalA 730, 232P728. (4) To show wrongful or fraudulent concealment of material facts. 27F(2d)265.
65-44 35GaA766, 134SE791.
66-52 TexCivA 11SW(2d)614.
67-69½-New. Ultra vires held not available as defense. 198NC286, 151SE629.
68-95 LaA 127S635; 132 Okl 18, 269P 279.
68-99 40GaA771, 151SE518.
68-3 [a] **Petition held demurrable** on ground that no right to premiums was shown. TexCivA 295SW292.
68-11 40GaA771, 151SE518.
69-35 8PaDist&Co 406.
69-39½-New. In an action in which no issue is raised by pleadings or evidence as to any cancellation of insurance after defendant conveyed a hotel to another, the trial court is not required to pass on what defendant's rights might have been if he had canceled the policies. 98 CalA33, 276P368.
70-62 [a] **In action to recover premiums** due on an insurance rider, required to be signed by an authorized representative, insurer has burden of proving signature as required. 200 Iowa1035, 205NW845.
70-72 205Cal 225, 270P371; CalA 263 P279; 40GaA771, 151SE518. [a] **Evidence held inadmissible.**–104NJL218, 141A92.
70-81½-New. In an action on an indemnity agreement, proof of a different agreement than specified is incompetent in the absence of a plea of mutual mistake. 230Ky235, 18SW(2d)1001.
70-83 36GaA779, 38SE275; 12LaA475, 125S303; Or 284P179; 95PaSuper456 (verdict for plaintiff sustained). [d] (2) 137 Okl 164, 278P626(2dcase). [i] **Consideration for note.**–137 Okl 164, 278 P626(2dcase). [j] **Recovery.**–39GaA185, 146SE502(2dcase). [k] **Application for policy.**–95CalA500, 272P1111. [l] **Evidence held to show** vice-president performed duties of superintendent requiring payment of premium on his salary. 41GaA405, 152SE919.
71-90½-New. Where insurer returned a life policy to defendant, sued as insured for premium after defendant's refusal to accept, the conclusion is justified that insurer attempted to force on defendant the policy against his wish and without his authority, expressed or implied. 95CalA500, 272P1111.
71-93 MoA 23SW(2d)209.
71-95 [a] **Dismissal as of nonsuit** should have been ordered rather than rejection of demand where neither claim for premium nor payment thereof was established. 11LaA628, 124S595(1st case).
71-96 169Ark136, 273SW378; 104NJL 218, 141A92; 195NC860, 142SE221; 198 NC286, 151SE629; 85PaSuper418; 133 SC17, 130SE62. [a] **Evidence held insufficient to go to jury** on defense of false representation in action on premium note. 50SD606, 211NW444.
71-99 104NJL218, 141A92.
71-1 TexCivA 11SW(2d)614.
72-9½-New. **Fees and costs.** Surety company is not entitled to recover fees and costs of suit under agreement to pay expenses consequent to execution of bond. TexCivA 293SW1114.
72-12½-New. **Attorney's fees and costs of suit** not allowed in recovery. TexCivA 293SW1114.
72-18½-New. **Attorney's fees.** Attorney's fees have been held not to be recoverable. 122 Or615, 260P229.
72-23 [c] **Record.**–50SD606, 211NW 444.
73-29 [a] **Where reformation necessary.**–25F(2d)847.
73-38½-New. Claim upon policy is not a liquidated claim and therefore not subject of a special writ under Ontario practice. Ont [1927] 2DomLR266.
74-54 40F(2d)344 (provision requiring notice of accident held condition precedent); 43F(2d)82; 44F(2d)31; TexCivA 28SW(2d)573 (notice of theft as notice of claim for damages); 200Wis 574, 229NW117. [a] **Reformation of policy.**–233Mich305, 206NW503.
74-54½-New. **Tender of release** at trial before judgment is sufficient compliance with policy where sufficiency of complaint is not challenged and defense of failure to present release before suit is not pleaded. 15F(2d)906.
74-58 256Mass358, 152NE370; Mass 172NE799.
75-59 Mass 172NE799.
75-62 [a] **Sufficient demand shown.** TexCommnA 25SW(2d)1093.
75-74 53SD228, 220NW503, 61ALR306.
75-75 108WVa22, 150SE385.
76-77½-New. A by-law requiring all losses to be settled on or before a stated date in a succeeding year does not fix the due date within the statute prohibiting suit until loss becomes due in accordance with the articles of incorporation and the by-laws of insurer. Iowa 228NW88.
76-82 Alta [1929] 4DomLR946 (statute held applicable to oral contracts). [a] **Standard provisions statute** held not applicable to policy in force when statute became effective. 319 Ill 311, 150NE 256.
76-85½-New. A statute providing that in suits against corporations prescrip-

tion shall be interrupted by filing the suit applies to insurance companies. 11 LaA430; 123S507.

76-86 NJSup 133A766; 252NY69, 168 NE832; 150Wash502, 273P745.

77-87 TexCivA 288SW625.

77-88 Wis 231NW257. But see 108 WVa317, 150SE718.

77-94½-New. A clause in an insurance policy, requiring that action thereon be brought within twelve months after loss or within the shortest period of limitation permitted under the laws of the state in which the policy is issued, is a contractual limitation, not a condition precedent, and stands on no firmer footing than an ordinary statute of limitations. 266Mass543, 165NE682.

78-16 219Ky514, 293SW1076.

79-26 135Misc909, 240NYS188.

79-39 319 Ill 311, 150NE256; OhA 173NE29. [d] 319 Ill 311, 150NE256.

80-41 130Misc52, 223NYS563; OhA 173NE29; 48RI 473, 139A212.

80-53½-New. Defense is not waived in the absence of knowledge of facts. 247 Mich188, 225NW527 (individual interest of agent).

80-53¼-New. The remedy by a county against a treasurer and his official bond does not relieve insurer of liability to the county on a policy issued to the treasurer against loss by robbery or theft. 33F(2d)473.

80-53¼-New. Waiver of defense of fraud by accepting renewal premiums after filing of defense. 230AppDiv361, 244NYS576.

81-61 158Tenn554, 13SW(2d)795.

81-70½-New. As respects the right to injunction against a suit upon a policy, the beneficiary under a life policy has the exclusive right to bring suit thereon at any time and place which he may elect. 158Tenn554, 13SW(2d)795.

81-75 181Ark637, 27SW(2d)786. [b] **Mortgagee's transfer of notes and mortgage** and guaranteeing payment has been held not to deprive him of right to sue on policy. 181Ark637, 27SW(2d) 786.

81-76 55ND585, 214NW901.

81-78 MoA 29SW(2d)423 (mortgagor held entitled to sue on theft policy payable to mortgagee).

81-79 71CalA701, 236P335. [b] **Policy payable to persons as interest may appear.**-71CalA701, 236P335.

82-80½-New. **Bailee** of property insured for full value may sue on policy. 216AppDiv252, 214NYS693.

82-81 253 IllA148; 38GaA505, 144SE 332; 85 IndA590, 155NE181. See also 66Misc143, 121NYS332.

82-84½-New. or has assigned the proceeds of the policy, 222MoA439, 7 SW(2d)434.

82-90½-New. [§ 792a] F½. **Process.** In New York, nonresident plaintiff may obtain service on foreign insurance company by service on insurance superintendent. 128Misc851, 220NYS309.

82-95 [a] 249 IllA280; 51ND1, 198NW 546 (cause of action stated on policy and not one for damages on account of fraud). [b] 215Ala36, 109S156; 33 GaA642, 127SE892; 41GaA639, 154SE 194(2dcase); 41GaA644, 154SE198; 207 Iowa1068, 224NW65. [e] MoA 24 SW(2d)1086. [h] **Showing as to jurisdiction.**-36GaA530, 137SE293.

83-6 TexCivA 248W(2d)739.

83-7 130 Okl 118, 265P642. [a] **Defenses of false representations or concealment** of material facts need not be anticipated by plea of estoppel. 114 Or 545, 234P542.

83-18 TexCivA 293SW677.

83-22 [g] (3) Foreign law must be pleaded to show that there can be recovery under that law. 125Misc417, 211 NYS270. [h] **Petition held to authorize recovery.**-24 OhA357, 157NE311. [i] **Authority of insurer to enter into contracts of kind sued on** need not be alleged. 33Ariz206, 263P584.

84-25 58ND617, 226NW810(2dcase).

84-26 [a] MoA 288SW369.

84-27 [b] **When set out in hæc verba** policy is part of pleading for all purposes requiring court to pass on legal effect. 251 IllA272.

84-28 TexCivA 23SW(2d)853.

84-30 141Miss681, 105S769; 147Miss 237, 111S455.

84-31 147Miss237, 111S455.

84-33 117Nebr265, 220NW285. [a] **Filing copy of certificate insufficient compliance with statute.**-147Miss237, 111S455.

84-35 207Cal 355, 278P861.

85-41 See also MoA 282SW454.

85-41½-New. By force of statute it may not be necessary to attach a copy of what may be written or printed upon the policy, except what appears upon the face or in the body of the policy. 38GaA328, 144SE29.

85-42 IndA 173NE236.

85-44 TexCivA 21SW(2d)547 (ownership of property sufficiently alleged).

85-52 248 IllA209. [a] 217MoA429, 266 SW1001.

85-54 33GaA634, 127SE798; 235 IllA 344; 86 IndA291, 157NE103; TexCivA 285SW951. [a] Ind 169NE524.

86-59 221Ky582, 299SW186.

86-61 247 IllA562.

86-67 Iowa 232NW140.

87-76 235 IllA344; 316Mo 278, 290SW 429; MoA 24SW(2d)686; 8PaDist&Co 393.

87-77 121 Or187, 253P883; 127 Okl 13, 259P582; TexCommnA 280SW551. But see 138SC253, 136SE304.

87-78 [b] (1) TexCivA 23SW(2d)853. (2) Where facts alleged show waiver, it need not be averred in terms. 121 Or187, 253P883. [c]**Complaint held defective for failure to allege willingness to perform.** 135Misc103, 236NYS673.

87-79 127 Okl 13, 259P582.

87-83 86 IndA291, 157NE103; 1LaA 718.

87-85 [a] (2) May be implied from other allegations. MoA 288SW369, 372 [cit CJ].

88-88 [a] 35GaA606, 134SE336 (not demurrable as stating conclusion). [b] **Allegations held insufficient.**-40GaA30, 148SE666.

88-92 87PaSuper140. [g] **Affidavit of defense held insufficient.** 97PaSuper 376.

88-93 12PaDist&Co 410 (copy of notice of cancellation must be attached to affidavit of defense setting up cancellation of policy).

88-94 216Ala537, 113S615; 172Minn 398, 215NW783; 117Nebr318, 220NW 277.

88-2 172Minn398, 215NW783.

88-3 See also 132SC10, 129SE84.

88-4 216Ky19, 287SW16.

88-5 106Conn519, 138A462; 242Mich 41, 217NW770 [citCJ]; 117Nebr685, 222 NW332; 49ND176, 191NW350.

89-6 172Minn398, 215NW783; 130 Okl 118, 265P642. [b] **Showing of prejudice is not necessary** where breach is made express cause for forfeiture. 43F(2d) 82.

89-8 Iowa 232NW140.

89-12 Iowa 232NW140.

89-13 [b] (3) Defense good, though application not in policy. 219Ky549, 293 SW1061.

89-15 Iowa 232NW140.

90-21 24F(2d)216; 201 Iowa378, 207 NW351 (answer held sufficient); 172 Minn398, 215NW783.

90-23½-New. Plea by insurer failing to allege that representations as to previous health were material held sufficient. 214Ala4, 106S335.

90-23½-New. Insurer may plead any defense not waived before suit. 152 Wash637, 278P702.

90-30 But see 127 Okl 166, 260P6.

90-31 [a] **In suit on contract to issue automobile theft policy** sustaining demurrer to allegation that insured sold automobile and received in part payment another automobile of reasonable value of $450 held error. TexCivA 283 SW886.

90-34 219Ala96, 121S84.

90-41 See also 232Ky785, 24SW(2d) 616.

90-43 [a] (1) But see 223AppDiv175, 228NYS54.

90-46 219Ala96, 121S84. [a] 215Ala 36, 109S156. [b] (1) CalA 287P510.

91-47 235 IllA344; 49ND176, 191NW 350.

91-49 [b] 128 Okl 142, 261P927.

91-52½-New. Where insurer denied liability on automobile policy on ground that insured was not sole owner, a reply alleging that insured paid premium to cover whatever interest he had in car was held not demurrable. 86 IndA129, 154NE36.

91-56 92Fla237, 109S421.

91-63 TexCivA 5SW(2d)244. Contra 104WVa605, 149SE681.

91-68 Mass 171NE448; MoA 16SW(2d) 716. [a] (2) 224AppDiv350, 231NYS 124.

92-70 135Misc334, 239NYS267.

92-71 49ND478, 191NW772.

92-73 225Ky688, 9SW(2d)1013.

92-82 [a] **Names of physicians by** whom insured in life insurance policy is alleged to have been treated need not be disclosed. 230AppDiv855, 245NYS1.

92-85 [a] **Pleadings held not to support** defense of insurer being estopped. 28F(2d)272.

92-91 [a] **In action on life insurance policy** plaintiff is entitled to know disease for which insured is alleged to have been treated during period mentioned in application. 230AppDiv855, 245NYS1.

93-87 40F(2d)659.

93-91 [a] **General denial in action on hail insurance policy** does not authorize defense that crop was of no value irrespective of hail. 128Kan172, 276P 833.

95-8 TexCivA 293SW942.

95-9 227Ky613, 13SW(2d)784.

95-10 108Conn563, 143A847.

95-11 221MoA727, 285SW772; TexCivA 283SW886. TexCivA 293SW677.

96-23 CalA 287P510. [b] (1) 221MoA 1151, 298SW103. [d] **Allegation of performance** admits proof of waiver of notice of loss. 235 IllA344.

97-26 [c] (1) TexCivA 295SW242.

97-27 259Mass573, 156NE721.

97-28 316Mo 278, 290SW429 (waiver); 53SD148, 220NW466. [a] MoA 16SW (2d)1007. [b] 85 IndA450, 150NE31; MoA 16SW(2d)1007.

98-37 IndA 148NE505; 172Minn398, 215NW783.

99-44 TexCivA 28SW(2d)573.

100-50 CalA 290P662. [c] (3) Cir. Ct. Rules, rule No. 23, requiring notice of special defense to be given where breach of condition of policy is relied on, covers precedent as well as subsequent conditions. 242Mich4, 217NW906, 908 [cit CJ]. (4) Under such rule, and under 3 Comp. L. (1915) § 12464, defense that notice of accident was not given to insurer under indemnity policy immediately after accident is not available where notice of special defense was not given with plea of general issue. 242Mich4, 217NW906, 908 [citCJ].

100-54 [l] (3) 242Mich4, 217NW906, 908 [citCJ].

101-62 55ND112, 212NW518.

102-65 35F(2d)73.

102-68 TexCommnA 276SW887; Tex CivA 288SW271.

103-79 218Ala616, 119S635.

104-91 181Ark156, 25SW(2d)23(2d case). [a] (6) That place where insured finally accepted policy was place where he resided. 217Ky846, 290SW690. (7) That safe complied with policy requirements. 149Wash70, 270P96. [e] **Conditions precedent.**-247NY392, 160NE651.

104-92 NJCh 151A105(2dcase) (act within agent's authority).

104-93 202 Iowa1270, 211NW860, 862 [citCJ].

104-94 202 Iowa1270, 211NW860, 862 [citCJ]; 125Misc417, 211NYS270.

104-95 202 Iowa1270, 211NW860, 862 [citCJ].

104-98 82NH489, 136A124; 82NH543, 136A400, 50ALR1276.

105-99 [a] **That agent had opportunity** to ascertain facts concerning insured's health is presumed. LaA 129S 238.

105-1 8F(2d)285[citCJ]; 15F(2d)646.

105-3½-New. The appearance of an erroneous description on the face of a policy does not justify the presumption that the error resulted from insured's fraudulent misrepresentation in the application. TexCivA 19SW(2d)848.

105-9 220Ala344, 125S217.

105-14 19F(2d)969; 177Ark737, 7SW (2d)778; 261Mass469, 159NE461; Wash 287P894. See also TexCivA 23SW(2d) 853.

105-15 19F(2d)969; 105Conn402, 135 A388, 54ALR463; IndA 173NE236.
105-16 202 Iowa1270, 211NW860.
106-18 20AlaA531, 104S895 (complaint admitted inferentially by special defenses seeking to avoid it by reason of special matter).
106-19 216Ala562, 114S132, 134 [cit CJ]; 20AlaA531, 104S895; 247 IllA547; 85 IndA450, 150NE31; 202 Iowa1270, 211NW860; 208Ky429, 271SW444; 292 Pa219, 140A905; 108WVa22, 150SE385. See also 170La775, 129S161.
106-20 204 Iowa1108, 216NW702.
106-20½-New. , exception in policy, MoA 28SW(2d)125.
106-21 184 IllA259.
106-32 181Ark1072, 29SW(2d)279 (not relieved because of difficulty of proof); TexCivA 288SW271. See also 226Ky 376, 10SW(2d)1074.
107-33 [a] **Authority of maker.**–Burden is on party claiming under insurance contract to prove, not only making thereof, but authority of person by or through whom it was made. 29F(2d) 357.
107-34 See also 178Ark319, 11SW(2d) 772 (meeting of minds as to all essential elements of contract).
107-37 134Misc274, 235NYS195.
107-42 214Ala373, 108S5; Iowa 228 NW98; Iowa 230NW381; 219Ky681, 294SW138; 220Ky626, 295SW900; NJ Sup 149A262; 23 OhA202, 155NE406; 297Pa418, 147A76.
107-43 233 IllA559.
108-44 31F(2d)571; 228Ky399, 15SW (2d)242(2dcase); 23 OhA202, 155NE 406.
108-45 23 OhA202, 155NE406. But see 57ND941, 224NW894.
108-45½-New. and without fault of defendant, 31F(2d)571.
108-46 31F(2d)571; 220Ky626, 295 SW900; 228Ky399, 15SW(2d)242(2d case).
108-47 216Ala1, 110S283.
108-54 30F(2d)929; 108Conn163, 142 A808; 34 OhA551, 171NE419; 296Pa 552, 146A135, 63ALR504(2dcase).
108-55 168La271, 121S863.
108-56 168La271, 121S863.
109-58 Ala 129S15; 215Ala349, 110S 571; 190NC867, 129SE727. [a] **Burden of proving that conditions were implied in binder rests on insurer in absence of state regulations.** 247NY392, 160NE 651.
109-59 247NY392, 160NE651.
109-63 34 OhA551, 171NE419.
109-64 118 OhSt237, 160NE707.
109-65 218Ala520, 119S230.
109-66 226Ky594, 11SW(2d)415.
110-70 172Ark98, 287SW758; 85 IndA 450, 150NE31 (dictum).
110-71 193NC344, 137SE137.
110-72 204 Iowa804, 213NW757; Mo 26SW(2d)962.
110-74 IndA 148NE505; Sask [1925] 3DomLR720.
110-75½-New. , or where plaintiff possesses a proper premium receipt. Sask [1925] 3DomLR720.
110-76 218Ala505, 119S11; IndA 148 NE505.
110-79 85 IndA450, 150NE31.
110-82 15F(2d)549, 550 [citCJ]; 265 Iowa1099, 212NW473; TexCivA 4SW (2d)1041.
110-83 15F(2d)549, 550 [citCJ]; Tex CivA 4SW(2d)1041.
110-85 IndA 148NE505; 85 IndA450, 150NE31; 197NC621, 150SE114.
111-86 296Pa552, 146A135, 63ALR504 (2dcase); 53SD275, 220NW521.
111-90 245Mich418, 222NW699; 155 Wash113, 283P668.
111-92 174Ark827, 296SW718, 54ALR 458.
111-93 135Misc909, 240NYS188.
111-95 Iowa 230NW381; Iowa 228NW 98.
112-3 34F(2d)833.
112-8 223AppDiv175, 228NYS54.
112-12 215Ala246, 110S402; Va 153SE 685. [a] (3) Custom of company in entering policy number on insurance notes. 136SC307, 133SE29.
112-13 33GaA642, 127SE892; 253 IllA 148; TexCivA 288SW625; TexCivA 1 SW(2d)369. [a] (5) Custom to issue policy despite medicine or surgical treatment within five years. TexCivA 275SW248. (6) Habits and industry of insured. 204 Iowa1108, 216NW702. (7) Book of instructions to agents not known to insured. 8PaDist&Co 662.
113-16 226Ky706, 11SW(2d)968.
113-27 Ala 129S466; 217Ky160, 289 SW219; 12LaA311, 124S551; 89PaSuper167. [b] (2) TexCivA 275SW313 (omission of copy of name of applicant).
114-30 [b] **Ohio Gen. Code §§ 9387, 9388** applies to policies issued before the enactment of such sections and § 9389 to policies issued after such enactment which had attached thereto photostatic copy of application and refusal to furnish copy to beneficiary did not make application inadmissible by insurer. 11F(2d)838.
114-30½-New. Application filled in by insurance agent is held admissible to contradict defendant denying that such application was made. 215Ala246, 110 S402.
114-31 See also 170Minn60, 212NW5.
115-41 [e] **Certificate evidencing contract of insurance.** Ala 127S812.
115-51 81Mont99, 261P880; 48RI184, 136A764, 765 [citCJ].
116-60 202 Iowa1002, 210NW129; 241 Mich396, 217NW62.
116-62 167Minn362, 209NW27.
116-66 135SC89, 133SE215, 45ALR 1172.
117-69 219Ky549, 293SW1061.
117-71 162La620, 110S880; TexCivA 292SW569; TexCivA 19SW(2d)848.
117-74 104WVa353, 140SE61, 62 [cit CJ].
117-74½-New. The fact that a part of the application not relied on is illegible does not prevent the use of the legible part, attached to the policy, as a ground for avoidance for misrepresentation. 22 F(2d)241.
118-81 170Ark745, 281SW354; Tex CivA 1SW(2d)348; TexCivA 4SW(2d) 1041; TexCivA 10SW(2d)178.
118-82 MoA 6SW(2d)66. [a] (4) To show payment of premium. IndA 148 NE505.
118-84 57ND941, 224NW894.
118-89 TexCivA 4SW(2d)1041.
120-12 23F(2d)921; 68CalA688, 229P 1017; 120 Or353, 252P556. [a] 41GaA 581, 153SE794; 234Ky788, 29SW(2d) 557; 82NH543, 136A400, 50ALR1276.
121-17½-New. Parol evidence of insurer's knowledge was held not admissible in suit on policy to avoid effect of breach of warranties incorporated in policy that other insurance had not been canceled or refused. 243NY385, 153NE 844.
121-19 [a] (3) Other evidence held inadmissible. Mo 8SW(2d)941.
121-21 141 Okl 90, 284P624 (evidence of declaration of nonliability by insurer or his agent of authority).
122-30 Ala 129S78.
122-31 Ala 130S797.
122-35 177Ark638, 7SW(2d)332; 127 Okl 166, 260P6; TexCommnA 15SW (2d)544; TexCivA 1SW(2d)348; Tex CivA 21SW(2d)547.
122-41 [a] (2) Letters relating to receipts of proof of loss and refusal to pay are material to prove refusal to pay. 57ND941, 224NW894.
122-46 177Ark737, 7SW(2d)778; Tex CivA 13SW(2d)895; 144Wash523, 258P 33. [a] (5) **To show change of ownership.**–135Wash558, 238P569, 240P565 (assignment indorsed on policy but not accepted by insurer nor delivered to assignee). (6) To show sufficient demand to permit recovery of penalty and attorney's fees. 36F(2d)152. (7) To show insurer's agent had authority to execute assignment of insurer's rights as subrogee to insured. CalA 286P428.
123-47 19F(2d)969; 174Ark827, 296 SW718, 54ALR458; IndA 148NE505; 85 IndA450, 150NE31; 32 OhA316, 168 NE61. [a] (1) 219Ky119, 292SW765; 32 OhA316, 168NE61. (4) 220MoA753, 275SW973; MoA 32SW(2d)111. (6) To warrant finding that firm, at whose instance insurance broker obtained policies, was not authorized to act for corporation sued for premiums. 286Pa119, 133A217. (7) To show that agent who had interest in property when policy was issued was not agent at time of subsequent modification of policy. 202 Iowa1270, 211NW860. (8) To show that proof of loss was given. 128Kan 172, 276P833. (9) To establish that loss occurred within period permitting institution of action. 150Wash502, 273 P745. (10) Other findings. TexCivA 23SW(2d)765. (11) Other instances. Utah 290P937. (12) To show authority of special agent to contract for insurer. GaA 155SE105(2dcase). [b] (2) 40GaA 262, 149SE304(1stcase). (4) To show change of ownership. 135Wash558, 238 P569, 240P565 (assignment indorsed on policy but not accepted by insurer nor delivered to assignee). (5) To support allegation that insurer in violation of contract required insured to sign application for reinstatement. 259Mass573, 156NE721. (6) To show unconditional acceptance of death benefit certificate. TexCivA 285SW889. (7) To show that firm, at whose instance policies were obtained, was agent of mortgagee. 286 Pa119, 133A217. (8) To show mental capacity sufficient to charge beneficiary. 173Ark1181, 293SW1023. (9) To establish fraud in procurement of releases and cancellation of policies. 27F(2d) 1. (10) To show that plaintiff was owner of insured truck. 229Ky392, 17 SW(2d)206. [c] **Evidence held to show** broker was insured's agent. CalA 287 P535.
123-48 [a] (3) Certificate of commissioner of insurance authorizing insurer to do business as fraternal benefit society is held not evidence of compliance with statute. TexCivA 293SW942.
124-55 [a] (3) To support finding of ownership by plaintiff after attempted assignment. 135Wash558, 238P569, 240 P565.
124-58 [a] (1) 180Ark757, 22SW(2d) 387; 248Mich634, 227NW696(2dcase); TexCivA 20SW(2d)1093; TexCivA 28 SW(2d)196; Wis 231NW252. [b] (1) 36GaA325, 136SE535; 119Kan502, 240 P411 (oral contract not established). (3) To take to jury question of insurer's ratification of policy. TexCivA 288 SW487.
124-59 [a] (1) 153Md179, 138A16, 53 ALR487.
124-60 [a] 85CalA542, 259P1108; Tex CivA 23SW(2d)780. [b] **Evidence held insufficient** to show acceptance of policy. TexCivA 24SW(2d)774.
124-66 53SD570, 221NW599.
124-67 19F(2d)177. [a] (1) 221MoA 727, 285SW772; TexCivA 23SW(2d)507. [b] (1) 250Mich464, 231NW87.
125-70 [a] (1) TexCivA 276SW956. (2) IndA 148NE501; 170Minn518, 212NW5. (7) To show that insured falsely represented ownership of goods destroyed. 213AppDiv798, 211NYS198. (8) To show beneficiary on life insurance policy participated in fraud. 219Ky681, 294 SW138. [b] (1) TexCivA 19SW(2d)916. (4) To show plaintiff made false declaration. 241NY318, 150NE129, 43ALR 522.
126-86 [a] Utah 290P937.
126-87 [a] 219Ala37, 121S25. [b] 243 IllA200; TexCivA 282SW633.
126-92 [b] (1) 36F(2d)171; 172Ark 98, 287SW758; 204 Iowa804, 213NW 757. (3) 8LaA158.
127-97 86 IndA291, 157NE103. [a] (4) To show prima facie timely notice. 34F (2d)833. (5) Other instances. TexCivA 23SW(2d)765. [b] 105NJL613, 146A 215; 9PaDist&Co 514; Wash 290P333.
127-4 105Conn162, 134A789. [a] 55 ND415, 213NW961.
127-5 [a] (1) 219Ky119, 292SW765; 220Ky142, 294SW1059; 122 Or547, 259 P902. (3) To show insurer had possession of policy surrendered to soliciting agent. 24 OhA29, 155NE806. [b] (1) TexCommnA 27SW(2d)111.
128-6 [a] (1) 200 Iowa699, 205NW355; 120 Or353, 252P556. (2) 120 Or353, 252 P556. [b] TexCivA 285SW889.
128-7 141 Okl 90, 284P624. [a] Mo 8 SW(2d)941; 141 Okl 90, 284P624; 53 SD228, 220NW503, 61ALR306. [c] **Authority of agent to waive.**–53SD275, 220 NW521.
128-8 31F(2d)859; TexCivA 31SW(2d) 859; 100Vt425, 138A780.
128-10 169Minn106, 210NW846.
128-13 [a] (1) CalA 292P987; 168La

945, 123S635; LaA 125S748; Mass 169 NE414; 32PortoRico 112; 152Va698, 148 SE815.

129-20 Mo 8SW(2d)941. [a] (3) To sustain finding that amputation of leg permanently and wholly prevented insured from performing any work for compensation or following gainful occupation within meaning of life insurance policy. TexCivA 294SW675. (4) To support judgment of trial court. Nebr 231NW148.

130-37 [b] Where practically all evidence was written requiring only application of law, directed verdict is proper. 221MoA1151, 298SW103.

130-38 226Ky706, 11SW(2d)968.

130-40 Ala 130S797; NJSup 133A772; 243NY34, 152NE456.

130-41 33Ariz206, 263P584; 181Ark 1146, 30SW(2d)853; 224 IllA606 (as to whether insured or agent supplied certain information in policy); 227 IllA577 (whether notice was given); 208 Iowa 348, 223NW366; 220MoA1112, 296SW 257; MoA 28SW(2d)411; 124 Okl 112, 254P105; 127 Okl 166, 260P6; 320Mo 146, 6SW(2d)920. [a] (1) 136SC307, 133SE29. (2) 38F(2d)557; 180Ark1167, 21SW(2d)856. (6) 91PaSuper422. (8) 322Mo 1236, 18SW(2d)21; 220MoA753, 275SW973; MoA 21SW(2d)880. But see 317Mo 1078, 298SW83. (9) Forfeiture of policy. Ala 127S840. (10) Renewal of policy. 250Mich398, 230NW 181. (11) Whether claim under theft insurance was assigned for valuable consideration before bankruptcy. 250Mich 398, 230NW181. (12) Negligence of insured preventing him from showing fraud in securing his signature to receipt in full. MoA 20SW(2d)941. (13) Whether policy was in force at time of loss. MoA 20SW(2d)971. (14) Whether insurer issued group employees' disability policy with knowledge of union rule. 198NC578, 152SE688.

131-42 38GaA415, 144SE53; 216Ky401, 287SW928; 104NJL364, 140A307; 124 Okl 112, 254P105.

131-43 243NY34, 152NE456; TexCivA 276SW956. [a] 32 OhA10, 166NE586. [b] (1) 36GaA325, 136SE535; 117Nebr 318, 220NW277. [c] Refusing instruction for insurer held erroneous under evidence showing sale of subject matter by insured. Ala 127S812.

132-46 MoA 295SW833; 135Wash558, 238P569, 240P565 (agency of insurance adjuster).

132-47 226Ky424, 11SW(2d)87; 252 Mass336, 147NE851 (authority to return policies for cancellation).

132-49 217Ala114, 115S8; CalA 286P 428; 316Mo 278, 290SW429.

132-52 31F(2d)817; 221Ky582, 299SW 186; 235Mich4, 209NW104; MoA 25 SW(2d)554; 120 Okl 108, 250P892.

132-53 120 Okl 108, 250P892.

132-55 120 Okl 108, 250P892.

133-57 284Pa299, 131A186; TexCivA 299SW281. [a] (1) TexCivA 276SW956.

133-58 12F(2d)986; Ala 130S797; CalA 266P307; 38GaA328, 144SE29; 255Mass 528, 152NE345; 256Mass358, 152NE370; 241Mich195, 216NW916; 167Minn362, 209NW27; 122 Or547, 259P902; 284Pa 299, 131A186; 157SC123, 154SE98; 144 Wash523, 258P33.

134-59 40F(2d)659.

134-60 122 Or547, 259P902.

134-61 135SC89, 133SE215, 45ALR 1172.

134-63 157SC123, 154SE98.

134-68 284Pa299, 131A186; TexCivA 282SW633.

135-69 316Mo 278, 290SW429.

135-70 316Mo278, 290SW429; 49ND 176, 191NW350; TexCivA 9SW(2d)388.

135-71 284Pa299, 131A186.

135-77 36F(2d)171; TexCivA 20SW (2d)1093 (whether entire payment was applicable as premium).

135-78 217Ala114, 115S8; 231Ky591, 21SW(2d)985, 66ALR1526; 193NC538, 137SE580. [a] (4) Whether agent's payment to general agents of premium constituted payment by insured. 228 AppDiv428, 240NYS463.

136-80 200 Iowa699, 205NW355; 193 NC344, 137SE137; 49ND798, 193NW 471.

136-81 See also 38GaA505, 144SE332.

136-82 TexCivA 290SW552; TexCivA 48W(2d)1041.

137-87 Iowa 228NW88.

137-96 125Me234, 132A523; 124 Okl 112, 254P105; 127 Okl 13, 259P582; 136 Okl 271, 277P591; 8PaDist&Co 393; 135Wash558, 238P569, 240P565.

138-97 127 Okl 13, 259P582.

138-1 38F(2d)557; 26F(2d)580; 319 Ill 311, 150NE256; Iowa 203NW17; 202 Iowa1291, 211NW716; 226Ky328, 10SW(2d)1079; 151SC326, 149SE2.

138-2 31F(2d)715; 318 Ill 369, 149NE 243; 319 Ill 311, 150NE256; 219Ky119, 292SW765; 316Mo 278, 290SW429; Mo A 291SW508; 193NC344, 137SE137; 48 RI 473, 139A212; 141SC64, 139SE176, 53ALR1119; 151SC44, 148SE648; 157 SC123, 154SE98; TexCivA 15SW(2d) 668. [c] Whether insurer waived provision that policy not effective until delivery held question for court sitting without jury. MoA 31SW(2d)108.

138-5½-New. But what facts are necessary to constitute waiver is question of law. 318 Ill 369, 149NE243.

138-6 252Mass336, 147NE851 (waiver of notice of cancellation); TexCivA 290 SW552.

138-9 12LaA315, 125S150 (intention of garage employee in taking insured's automobile); 125Me234, 132A523; NC 155 SE254; TexCivA 1SW(2d)348.

138-10 [a] Whether damage was direct fire loss, where it was caused by concussion from dynamiting neighboring building to prevent spread of fire held for jury. 220Ala162, 124S239, 65ALR 921.

138-13 149Miss361, 115S43; TexCivA 1 SW(2d)348.

139-18 248 IllA209.

139-20 37GaA756, 142SE183; 135Wash 558, 240P565.

139-22 106Conn519, 138A462; 135 Wash558, 238P569, 240P565. [c] Instructions held proper.-33F(2d)809.

139-23 40GaA439, 150SE447(2dcase) (false information unknowingly given in good faith).

140-26 [b] Instructions held not too general.-MoA 291SW508.

140-29 [a] (1) TexCivA 294SW675. (7) 33F(2d)809. (8) As to rule for computing recovery for corn crop under hail insurance policy. Iowa 232NW804.

140-33 IndA 169NE57.

140-36 106Conn519, 138A462. [a] (3) As to issue as to action being premature. Utah 273P963.

141-38 MoA 20SW(2d)950; 226AppDiv 429, 235NYS584; 52ND324, 202NW657.

141-51 221MoA727, 285SW772; 154SC 267, 151SE579. [a] Instruction held proper.-225Ky280, 8SW(2d)408.

141-53 Ark.-169Ark230, 275SW519, 41 ALR379; MoA 28SW(2d)411.

142-56 243NY34, 152NE456.

142-57 49ND478, 191NW772; 136 Okl 271, 277P591.

142-59 33F(2d)473; 136 Okl 271, 277 P591. [b] Requested instruction precluding treasurer or county from recovering if treasurer violated depositary law held properly refused. 33F(2d)473.

142-62 TexCivA 25SW(2d)994.

142-64 Mass 172NE799; TexCivA 25 SW(2d)994.

143-69 [a] (2) Finding that insurer canceled risk and demanded return of burglary policy is held not finding that cancellation was in writing within terms of policy. 243NY266, 153NE70.

143-71 [a] Finding held against evidence.-Utah 290P937.

143-74 245NY279, 157NE138. [a] (1) 120Kan297, 243P300 (as to waiver of forfeiture for nonpayment of premium note). [b] Findings held inconsistent.-TexCivA 21SW(2d)45.

143-77 TexCivA 19SW(2d)916 (conflict, if any, between findings).

144-84 TexCivA 8SW(2d)196. [a] Findings held to support judgment.-CalA 287P510.

144-3 248 IllA209.

145-10 125Me234, 132A523.

145-11 171Ark135, 284SW4.

145-12 319 Ill 311, 150NE256.

145-12½-New. Nor, in absence of exceptions, will it presume jury was not fully instructed as to law. 125Me234, 132A523.

145-13 214Ky156, 282SW1072.

145-18 258Mass127, 154NE563; IndA 169NE57 (error harmless in view of other instructions).

146-33 122 Or547, 259P902; Ark 32 SW(2d)310.

146-34 122 Or547, 259P902.

146-35 [a] Judgment on policy necessary.-127Kan251, 273P406.

146-39 Iowa 232NW804; LaA 122S909 (2dcase); 218AppDiv536, 218NYS534; 38 OklACR58; 127 Okl 166, 260P6; 135 Wash558, 238P569, 240P565. [a] Amount held not excessive.-TexCivA 19 SW(2d)916 (hail insurance).

147-40 See also 32PortoRico 112.

147-41 237NY60, 142NE352; TexCivA 9SW(2d)290. [b] On demurrer to evidence on fire policy jury should find amount insured is entitled to recover, if anything not value of property destroyed Va 155SE699.

147-42 205 Iowa1085, 217NW268, 56 ALR463.

147-47½-New. Under the provisions of some tourists' policies, where property insured is in different places, insured is entitled to recover only such proportion of the value of the property cost as such value bears to the amount of the policy covering property at the place of loss. 127 Okl 166, 260P6.

147-47½-New. In a theft insurance policy to recover for the loss of an automobile, the measure of damages is the reasonable cash value immediately before it was stolen. MoA 297SW175.

147-47¼-New. In an action at law for breach of contract of insurance payable in periodical installments, only installments in default at the time suit was brought may be recovered. 160Tenn158, 22SW(2d)631.

147-49 Iowa 232NW804; SC 155SE747. [a] But see 172Ark169, 287SW1000.

147-52½-New. Court can reserve computation of interest upon award and enter judgment on verdict with added interest. 250Mich398, 230NW181.

149-72 38F(2d)557; 180Ark170, 21SW (2d)414; 41GaA639, 154SE194(2dcase); 322Mo 1236, 18SW(2d)21; MoA 276SW 87; TexCivA 8SW(2d)291; TexCivA 23 SW(2d)491. See also 316Mo 278, 290SW 429.

149-73 175Ark359, 299SW366; 8LaA 308; 120 Or353, 252P556; TexCivA 8 SW(2d)291. [c] Additional attorney's fees should not be allowed because of second trial where judgment for plaintiff was reversed on appeal. 18F(2d) 223. [d] Reasonableness of fee.-Tex CommnA 58W(2d)767. [e] Fee of only one attorney is contemplated by statute. TexCommnA 58W(2d)767.

149-78 TexCivA 31SW(2d)333.

149-79 [b] Amendment of pleading reducing amount of demand does not affect right to penalty and attorney's fees. 173Ark362, 292SW657.

149-80 See also 7LaA99. [e] Though attorney's fees appeared reasonable, court would not allow sum asked, without proof of its reasonableness. Tex CivA 16SW(2d)842.

149-81 175Ark359, 299SW366; Ark 32 SW(2d)310; TexCivA 3SW(2d)539; TexCivA 9SW(2d)388. [a] Possibility of appeal cannot be considered in determining amount of attorney's fee. 120 Or353, 252P556. [b] Allowances held not excessive.-TexCivA 22SW(2d)1112 ($250 attorney's fees on award of $675).

150-84 [a] Confession of liability on retrial and tender of insurance, costs, and interest does not defeat right to attorney's fee. Or 289P1057.

150-87½-New. Insured may not recover penalty and attorney's fees, where insurer offers to confess judgment for face of policy after deducting premiums. 173 Ark668, 293SW1018.

150-87½-New. Assignee of policy may not recover penalty where insured agrees to pay face of policy after deducting unpaid premiums. 173Ark668, 293SW 1018.

150-87¼-New. Vexatious delay must begin to occur before filing suit. 322Mo 1236, 18SW(2d)21.

150-87½-New. Some statutes are applicable only as to insured and do not apply to beneficiary. 6LaA212.

150-89 But see 173Ark668, 293SW1018.

150-91 40F(2d)606; MoA 26SW(2d)

818; 151Tenn103, 268SW117; 156Tenn 517, 3SW(2d)163.

150-92 30Ariz599, 249P761; 181Ark 637, 27SW(2d)786; MoA 26SW(2d)818; 156Tenn517, 3SW(2d)163. [c] **Not applicable to beneficiary.**–6LaA212.

150-93 30Ariz599, 249P761. [c] **Statute, providing that insured may recover against insurance company** amount representing penalty and attorney's fees, where insurer is guilty of bad faith in failing to pay loss arising under policy, is not restricted in application to any particular class of insurance companies, but applies to fidelity insurance companies, insuring employers against defalcations of their employees. 39GaA 337, 147SE171.

150-5 219MoA121, 272SW79.

151-12 317Mo 1078, 298SW83; 220MoA 1112, 296SW257; 222MoA439, 7SW(2d) 434; Mo 25SW(2d)783; MoA 21SW(2d) 926 (where previous decisions of supreme court had long since settled every point raised adversely to insurer's claim).

151-13 12F(2d)986; 18F(2d)457; 35F (2d)73; 35F(2d)667; 38F(2d)557; 3 LaA256; 6LaA95; 7LaA469; 322Mo 1236, 18SW(2d)21; 220MoA1112, 296 SW257; 222MoA439, 7SW(2d)434; MoA 291SW508; 221MoA1151, 298SW103. [a] (1) 313Mo 143, 281SW47, 45ALR 189; 220MoA1112, 296SW257; MoA 22 SW(2d)364; MoA 32SW(2d)111. (2) Where insurer relied on opinion of appellate court, refusal to pay is not vexatious, though case should no longer be followed. MoA 22SW(2d)364. [b] (1) 173Ark668, 293SW1018. (4) Where amount deposited in court, no special damages. 173Ark668, 293SW1018. [d] **In suit by insurer for cancellation of policy** on ground of misrepresentation, defendant was held not entitled to double indemnity and attorney's fees, since plaintiff's contentions were not wholly unfounded or unreasonable. 168 La271, 121S863.

151-20 180Ark895, 23SW(2d)251.

151-21 18F(2d)457; 322Mo 1236, 18 SW(2d)21.

152-24 316Mo 278, 290SW429.

152-26 316Mo 278, 290SW429.

152-27 316Mo 278, 290SW429; MoA 285SW783. [b] (1) 307Mo 417, 270SW 691; MoA 291SW508; Mo 25SW(2d) 783. (4) To justify assessment of penalty and attorney's fees for delay in paying loss. 38F(2d)557.

152-30 38GaA505, 144SE332; TexCivA 16SW(2d)374. [a] **Statute requiring demand of correct amount** has no reference to amount demanded in suit, but to demand made on company before institution of suit. TexCivA 16SW(2d)374.

152-31 [c] **In Arizona.**–286P183.

152-32 316Mo 278, 290SW429. [b] **Complaint held sufficient** to authorize recovery of attorney's fees under Oregon statute. 132 Or673, 288P196. [c] **Evidence held sufficient** to sustain finding that proper demand was made as required for recovery of attorney's fees. 132 Or673, 288P196.

152-33 29F(2d)460; 36F(2d)152. [d] (2) Letter written by attorney offering to settle claim was held sufficient demand. TexCivA 16SW(2d)374.

152-34 29F(2d)460. See also 38GaA 505, 144SE332. But see TexCivA 28SW (2d)220.

153-35 36F(2d)152.

153-55½-New. Creditor's suit against transferee of foreign company. Creditor of a Russian insurance company must exhaust legal remedies against it before proceeding against its American assets transferred to an American company in good faith, for value, while solvent, and before confiscation of its Russian assets; 220AppDiv404, 221NYS739.

153-55½-New. and burden is on the creditor to show that consideration paid was not received by those responsible for the corporation's debts. 220AppDiv 404, 221NYS739.

154-58 See also 192NC115, 133SE424.

154-70 103NJL290, 136A718.

154-71 [b] **Where such appointment has been made,** statute permitting service on any agent found in county does not apply. 145Miss314, 110S770. [c] **Service on such agent is as effective** as service on company itself. 145Miss314, 110S770. [d] **Failure of agent to notify company of service** of process or pendency of suit cannot be complained of by company. 145Miss314, 110S770.

154-72 [a] **One not paid or in regular employ of company** is not agent on whom service of summons can be made. 38F(2d)766.

154-73 35F(2d)189; 318Mo 181, 300 SW294; SD 231NW942; TexCivA 276 SW757. See also 285Pa464, 132A531. But see 146Miss22, 111S741.

155-79 38F(2d)766 (licensed to do business).

155-80 40F(2d)357; 223AppDiv857, 228NYS423. But see 35F(2d)189.

155-80½-New. These statutes do not apply, even though all other requirements are fulfilled, where the elements of the insurance transaction obtained outside the state. 279US405, 49SCt360, 73Led762.

155-80¼-New. Such statutes do not affect domestic insurance companies. 247Mich67, 225NW618.

155-81 See also 176Minn143, 222NW 901.

155-83 36GaA530, 137SE293. But see 285Pa464, 132A531; TexCr 18SW(2d) 321.

155-84½-New. Where the statute prescribes the county wherein process on a domestic company must be served, service on an officer of the company in another county renders a default judgment void. 247Mich67, 225NW618.

155-86 TexCivA 276SW757.

155-88½-New. Service of summons on a foreign insurance company by delivery to the state insurance commissioner in compliance with requirements of statute is valid, although the commissioner makes an error in copying the summons and forwards the erroneous copy to the insurance company. 121 Okl 48, 247P343.

155-88¼-New. After delivery of a valid summons against a foreign insurance company to the state insurance commissioner he is the agent of the insurance company in making a copy of the summons and forwarding it to the company and his acts are the acts of the company. 121 Okl 48, 247P343.

155-88¼-New. Under some statutes process in the usual form directed to the sheriff of the county in which a foreign insurance company had an agent at the time the policy sued on was issued, as alleged in the petition, is valid. 36GaA530, 137SE293.

155-88⅓-New. Service of such process may be made by leaving a copy of the petition with defendant's agent in the county. 36GaA530, 137SE293.

155-88⅓-New. That insurer has no agent in such county at the time of the suit does not affect the validity of such process but only the validity of service. 36GaA530, 137SE293.

155-90 131Misc158, 226NYS92.

156-13 [a] **In Georgia.**–165Ga815, 142 SE851.

156-16½-New. Missouri insurance company is not suable in Arkansas in a contract covering property in Missouri made in Missouri with a resident thereof. 173Ark480, 292SW677.

156-16⅓-New. Under constitutional provision action is not maintainable in county of insured's residence. CalA 288 P444.

INSURE

157-5 148Md289, 129A660 [quotCJ].

INSURRECTION AND SEDITION

161-74 [a] **Advocacy of force and violence in overturning government of state** is within definition of sedition. CalA 290P93.

161-76 [a] **Absence of overt act.**–CalA 290P93.

161-84½-New. , assembly, CalA 290P 93.

161-87½-New. , meeting, CalA 290P 93.

161-87⅓-New. , "opposition," CalA 290 P93.

161-88⅓-New. Anarchy has been defined as absence of government or state of society where there is no law. CalA 290P93.

162-16½-New. , display of red flag at meeting place. CalA 290P93. [a] **Elimination of reference to opposition to organized government or** stimulus to anarchistic or seditious action would not render statute unconstitutional. CalA 290P93. [b] **Publicity of meeting place.**–CalA 290P93. [c] **What constitutes public place or meeting place.**–CalA 290P93.

162-17½-New. Public advocacy of revolutionary doctrine cannot be interfered with if adoption in practice is advocated by constitutional means. CalA 290P 93.

162-17¼-New. Teaching of anarchy and sedition can be prohibited by constitutional statute. CalA 290P93.

162-26 195Cal 445, 234P91 (particular means and methods prohibited).

162-29 194Cal 49, 227P908; 68CalA487, 229P896.

163-34 195Cal 445, 234P91.

164-63 [a] 68CalA487, 229P896.

164-75 295Pa311, 145A295; 93PaSuper 323.

164-79 295Pa311, 145A295.

164-81½-New. Obstructing officer in discharge of official duty does not constitute "sedition" under statute. 226 Ky617, 11SW(2d)432.

164-83 295Pa311, 145A295.

164-91 [b] (3) 195Cal 445, 234P91. [c] (1) 295Pa311, 145A295. [d] **Conspiracy to commit criminal syndicalism.**–Indictment held sufficient. 195Cal 445, 234P91.

165-92 68CalA621, 230P221. [c] **Sedition.**–93PaSuper323. [d] **Displaying red flag as aid to seditious propaganda.**–CalA 290P93.

165-93 [a] (2) 195Cal 445, 234P91. (5) 68CalA621, 230P221. (9) 195Cal 445, 234P91; 68CalA487, 229P896; 71 CalA500, 236P311. (10) 71CalA500, 236 P311. (15) To show knowledge of purposes of organization. 195Cal 445, 234 P91. (16) To show membership in organization. 71CalA500, 236P311. (17) To show that I. W. W. taught and practiced acts of criminal syndicalism to further its purpose. 71CalA500, 236P 311. (18) To support conviction of conspiracy to promote criminal syndicalism. 195Cal 445, 234P91. (19) To show that I. W. W. advocated overthrow of present government of United States. 71CalA500, 236P311. (20) To show that red flag displayed at camp was aid to anarchistic action. CalA 290P93. (21) To support conviction for displaying red flag as aid to seditious propaganda. CalA 290P93. [b] (4) 195Cal 445, 234P91. [c] (1) 93PaSuper323.

165-94 [a] (2) Statutory definition of "sabotage" governs and others are immaterial. 68CalA621, 230P221.

165-95 [a] (1) 274US328, 47SCt650, 71 Led1077; 93PaSuper323. [c] **Instructions erroneously refused.**–68CalA621, 230P221.

165-96 [a] (7) Whether accused had guilty knowledge of character of organization of which he was member. 68 CalA487, 229P896. (8) Quality of acts of organization. 195Cal 445, 234P91. (9) Whether membership cards found in defendants' possession and bearing their names were issued to them by I. W. W. 71CalA500, 236P311. [b] 195Cal 445, 234P91.

165-99 195Cal 445, 234P91; 71CalA 500, 236P311 (declarations of I. W. W. official invested with authority to secure recruits and declare principles of organization). [e] **On question whether change had been made in means and methods of organization** letter written by general secretary treasurer of organization to local branch in reference to censoring literature is admissible. 195Cal 445, 234P91.

165-3 195Cal 445, 234P91; 71CalA 500, 236P311.

166-9 71CalA500, 236P311.

166-12 274US328, 47SCt650, 71Led 1077.

INTENT

168-73 36GaA643, 137SE794; 160La 548, 107S402.

168-87 36GaA643, 137SE794.

168-91 160La548, 107S402.

168-92 160La548, 107S402.
168-97 232Mich310, 205NW188.
168-1 232Mich310, 205NW188; 158 Tenn323, 13SW(2d)318.
168-1½-New. Intent is purpose for which criminal act was committed. 215 AppDiv282, 213NYS532.
168-1¾-New. Motive is mental attitude that prompts commission of the criminal act. 215AppDiv282, 213NYS 532.
169-2 158Tenn323, 13SW(2d)318.
169-34 [d] **Testator's intention** means settled direction of mind toward accomplishment of particular act, 138Misc 42, 244NYS673.

INTEREST

178-1 21F(2d)1002; 261Mass134, 158 NE539; 287Pa190, 134A455; SC 155SE 291. [a] 37F(2d)918; 118Nebr390, 224 NW866; 124 Or112, 258P193, 60ALR 528; 283Pa449, 129A329. [b] (2) 156 Miss22, 125S429. [g] **"Earning power of money"** is interest it will earn. 170 La923, 129S531.
179-2 132SC276, 129SE44, 46 [citCyc].
179-6 Fla 129S589.
180-21 MoA 287SW657, 660 [citCJ].
182-35 Can [1927] 3DomLR40.
182-36 178Ark355, 11SW(2d)465; CalA 285P384; Mass 170NE69; 172 Minn24, 214NW750; 102NJL616, 133A 479; 219AppDiv184, 219NYS78; 34 PortoRico 849 (no right to interest on debt where no express agreement); Sask [1930] 4DomLR123.
182-37 102NJL616, 133A479; 219App Div184, 219NYS78. [b] **Statutory liabilities do not bear interest.**–Tex CommnA 278SW425.
182-39 318 Ill 500, 149NE495.
182-40 318 Ill 500, 149NE495.
183-41 8F(2d)859; 219AppDiv184, 219 NYS78.
183-43 85Colo 530, 277P306; 102NJL 616, 133A479; TexCommnA 278SW425 [citCJ]; TexCivA 299SW943; 195Wis 366, 218NW440, 57ALR352.
184-51 218Ala448, 118S760.
184-56 219AppDiv733, 219NYS695.
184-58 215Ala538, 112S105; 218Ala 448, 118S760; MoA 287SW657. [c] **Guaranty contracts** are governed by rate where guaranteed interest payable in absence of other agreement. 215Ala 538, 112S105.
185-60 37F(2d)918; 218Ala448, 118S 760.
186-65 213AppDiv607, 211NYS53.
186-66 33F(2d)767. [c] **Law of forum** controls as respects allowance of interest, where money is paid by mistake. 28F(2d)373.
186-72 [c] (2) 317Mo1344, 300SW798.
187-77 See also 245Mich558, 222NW 752.
187-79 114Nebr18, 205NW577 (constitutional provision giving congress power to regulate the value "of money does not forbid state regulation in rate" of interest).
187-83 245Mich558, 222NW752.
187-84 TexCivA 271SW142.
187-84½-New. In some jurisdictions, interest statutes have been held declaratory of the common law. MoA 287SW 657.
187-85 51Philippine894.
187-86 CalA 284P250; TexCommnA 284SW933. See also 135Wash605, 238 P572, 573 [citCJ].
188-88 228Ky13, 16SW(2d)455; 145 Va225, 133SE800.
189-94 249 IllA610, 616 [quotCyc].
189-10 287Pa354, 135A130.
189-12 178Ark355, 11SW(2d)465.
190-13 76CalA635, 245P432.
190-14 19F(2d)828; 164La440, 114S89. [e] (5) Failure to calculate interest in stating balance due in receipt for monthly payment will not constitute waiver. NJ 130A2. (6) Possession of funds as collecting agent and use of such funds to pay note. 126Kan429, 268P828. [g] **Successful party taking writ of error and subsequently withdrawing** it loses right to interest on judgment. 13PortoRicoFed129.
190-16½-New. Right to interest under express contract can only be waived by some method recognized in the law. NJ 130A2.
190-16¾-New. Holder who, before notes began to bear interest, converted property of maker sufficient to pay them is not entitled to interest. Tex CivA 8SW(2d)194.
191-28 141SC136, 139SE217.
191-33 Ida 286P618.
192-36 270US476, 46SCt428, 70Led 694; 30Hawaii359; 201 Iowa148, 205 NW833; 52ND366, 203NW195; 137SC 337, 135SE357.
192-37 [d] **In Porto Rico.**–32Porto Rico 442.
192-39 See also 46Philippine460. [b] **In Porto Rico.**–32PortoRico 442.
192-40 42F(2d)384; Ida 286P618.
193-42 Ida 286P618.
193-43 But see Fla 129S589.
195-62 Ida 286P618.
195-73 [a] (3) Contract that transferor of note should receive interest during lifetime construed as not entitling him to interest not collected by transferee. TexCivA 291SW627. [c] **Contract to pay debt and contract to pay interest** are regarded as in reality separate contracts, although contained in same writing. 220Ala56, 124S93.
195-75 [a] **Contracts held not contracts for interest.**–SC 155SE291.
196-80 TexCivA 275SW200.
197-85 But see Mass 170NE69.
197-86 Mass 170NE69. See also NB [1928] 3DomLR602.
197-89 219AppDiv184, 219NYS78.
198-7 [a] 283Pa449, 129A329.
199-11 205 Iowa408, 216NW71.
200-20 32F(2d)23; 33F(2d)437; 299 Pa503, 149A702.
200-21 [b] (4) Where delay was due to contractor's not having work ready for inspection, and to necessary formalities in preparing settlement, he was not entitled to interest. 128Misc227, 218 NYS375.
201-27 253 IllA380 (right dependent upon construction of contract).
201-28 128Misc227, 218NYS375.
202-38 94CalA94, 270P695.
202-40 TexCommnA 284SW933, 934 [citCJ].
202-45 CalA 284P956; 9PaDist&Co 324; TexCommnA 16SW(2d)530; Tex CivA 18SW(2d)334.
203-48 33PortoRico 102.
203-49 146SC355, 144SE73.
203-50 Mass 170NE69; 33PortoRico 102.
203-54 94CalA94, 270P695; 122Kan 339, 252P468, 469 [citCJ]. But see 163 La651, 112S518. [h] **Rule as to payment of interest** for detention in payment of liquidated sum has no application to state agencies or political subdivision. 197Cal 482, 241P552.
204-57 32F(2d)406.
204-63 150Va82, 142SE373. [l] **In New Brunswick.**–Imp [1929] 3DomLR 657.
205-68 16F(2d)654; 15DelCh31, 131A 202.
207-86 18F(2d)971, 974 [citCyc]; 178 Ark355, 11SW(2d)465; 130Kan711, 288 P537. [c] 101CalA615, 281P1102. [j] **In Oregon.**–120 Or633, 253P520.
208-87 318 Ill 500, 149NE495; Tex CivA 23SW(2d)755; 135Wash512, 238 P17.
208-88 141SC136, 139SE217.
209-89 TexCivA 22SW(2d)322 (verified open account). [c] **In Oregon.**–11 Or565, 249P1100.
209-91 172Ark209, 287SW1010; 166 Ga709, 144SE250.
210-97 See also 156Tenn517, 3SW(2d) 163.
210-98 28F(2d)373; 89CalA361, 265P 271; TexCivA 280SW282, 286 [citCJ]. See also 219AppDiv184, 219NYS78; 90 PaSuper463.
210-99 166Ga709, 144SE250; GaA 155 SE782.
211-7 Ala 127S204; 70CalA204, 232P 1002; 41GaA189, 152SE141; 121Kan 279, 246P1004; 130Kan711, 288P537; 233Ky728, 26SW(2d)1041; 299Pa503, 149A702; 141Wash186, 251P127. [i] **Interest not allowed on expenses of litigation.**–283Pa449, 129A329.
211-8 35F(2d)736; 36F(2d)591; 43 F(2d)355; 172Ark198, 288SW4; 207 Cal 617, 279P650; 75CalA283, 242P735; 89CalA361, 265P271; 91CalA636, 267P 553; 167Ga231, 145SE68; 141Wash 186, 251P127; 141Wash372, 251P570. See also 219AppDiv184, 219NYS78.
211-10 43F(2d)355.
211-10½-New. Denial of liability on contract does not make sums due by its terms unliquidated and not subject to interest. 14F(2d)852.
211-11 80CalA1, 251P830; Wash 288 P927. [a] (1) 124 Or569, 265P1117; TexCivA 6SW(2d)425. (4) In action for attorney's fees. 84CalA750, 258P 673. (5) For legal services. 101CalA 58, 281P407.
212-12 80CalA1, 251P830; 86CalA523, 261P721; 127Kan668, 274P745(1st case).
212-18 28F(2d)373 (contract); 43 F(2d)1; 207Cal727, 279P795; 76CalA 635, 245P432; 89CalA361, 265P271; 119Kan394, 239P1106; 156Miss775, 125 S826; 128Misc227, 218NYS375; 135 Wash406, 237P1002.
212-18½-New. The existence of a dispute between the parties as to the quality of work or materials furnished does not render a demand therefor unascertainable by computation. 76CalA635, 245P432.
212-21 [a] 316 Ill 488, 147NE459.
212-22 213AppDiv607, 211NYS53.
212-26 27 OhA133, 160NE881. [b] (2) Instruction that plaintiff was entitled to interest as matter of right has been held error. 34GaA192, 129SE19.
212-28 Md 150A118; 150Va82, 142SE 373.
213-29½-New. , or until paid. Tex CivA 276SW947.
213-37½-New. Where interest is pleaded for and facts found authorize it, the court may properly add interest to the verdict. TexCommnA 292SW860.
213-37¾-New. The court may add interest to the jury verdict in a contract action where the amount is fixed by law. TexCivA 288SW504.
213-37¼-New. Unsuccessful claimants of funds in an interpleader suit are not liable for interest on funds paid into court. TexCivA 299SW943.
214-45 MoA 274SW520; 222AppDiv 508, 226NYS601.
214-48 92CalA537, 268P679.
214-50 [a] 24F(2d)206.
215-56 92CalA537, 268P679; 38GaA 430, 144SE149.
215-59 156Tenn517, 3SW(2d)163.
216-65 [a] (2) Decree, allowing account of executor or administrator, is not within operation of statute providing for computation of interest where judgment is entered upon award. 252 Mass510, 147NE845.
216-65½-New. Judgment for the amount of a preferred claim against a bank in liquidation properly provided for interest. MoA 11SW(2d)1090.
217-83 [a] **Where note providing for twelve per cent interest** and attorney's fees is merged in judgment, only statutory interest is allowable. 81Colo 459, 256P10.
217-86 135 Okl 147, 274P464. [c]240 Mich333, 215NW381. [d] **In Georgia.**–161Ga919, 132SE535, 45ALR559.
217-86 [e] **Alaska** allows eight per cent interest on all money after it becomes due. 38F(2d)199.
217-87 78CalA759, 248P1068 1074 [citCJ].
217-88 115Nebr395, 213NW514.
218-99 149Wash360, 271P76.
219-12 TexCivA 6SW(2d)186.
220-13 [a] 170La163, 127S587.
221-24 232Mich210, 205NW165, 41ALR 973 [citCJ].
223-48 178Ark355, 11SW(2d)465; 167 La995, 120S623.
224-52½-New. In an action on a note for the price of goods sold and in the alternative on the original indebtedness in which judgment is rendered on the original indebtedness, interest at the increased rate is properly allowed where a mortgage executed as part of the contract expressly provided therefor. Tex CivA 274SW210.
224-57 43F(2d)1; 15DelCh31, 131A 202; 129Kan272, 282P579; NJ 130A2; 119 Okl 236, 249P412.

225-64 Ark 31SW(2d)521(2dcase). [c] **Statute limiting rate** has no application after maturity. 107Conn276, 140A202.
225-66 16F(2d)654; TexCivA 6SW(2d)186. But see Ark 31SW(2d)521(2dcase). [b] (2) 84Mont285, 275P743.
226-69½-New. Where note and mortgage provide for stated rate until maturity and greater rate thereafter, mortgagee declaring whole debt due before maturity can recover only lesser rate until decree. Ark 31SW(2d)521(2dcase).
226-78 217Ala511, 116S681; 218Ala448, 118S760; CalA 291P886; 169La29, 124S135; 130Misc191, 223NYS672; 134Misc70, 235NYS209; 53SD282, 220NW482; TexCivA 286SW680. See also TexCivA 4SW(2d)111.
227-80 165La1027, 116S546; 145Va225, 133SE800. But see TexCivA 286SW680.
228-89 255Mass206, 150NE902. [d] **Rate of six per cent.**-255Mass206, 150NE902. [e] **Judgment for penalty on delinquent taxes** is money judgment bearing interest at no more than six per cent under statute. 316Mo398, 289SW925. [f] **Judgment on special drainage tax bill** bears interest at rate prescribed by general statute where drainage statute fails to prescribe rate. MoA 286SW832.
228-92 29F(2d)457; TexCivA 24SW(2d)1113.
229-93 25F(2d)673; 49Nev299, 245P292; TexCivA 290SW532; TexCivA 295SW281. [d] **Where city is authorized to issue tax certificate bearing eight per cent per annum** interest, judgment in suit on such certificate should draw such rate of interest. TexCivA 290SW532.
229-94 49Nev299, 245P292.
230-1 29F(2d)457.
230-1½-New. Where interest is awarded merely as damages for breach of contract, the rate is governed by the law of the state where the court sits. 14F(2d)852.
230-2 214Ala176, 106S862; 34Ariz95, 268P181, 184 [citCJ]; 178Ark355, 11SW(2d)465; 207Cal617, 279P650; 80CalA609, 252P733; 107Conn439, 140A814; 36GaA396, 137SE85; 254IllA484; 213Ky670, 281SW791; 167La995, 120S623; 128Me287, 147A208; 238Mich617, 214NW179; NJSup 145A225(2dcase); 245NY156, 156NE649; 123Or193, 261P422; 298Pa411, 148A709; TexCivA 20SW(2d)797. [b] **Administratrix is chargeable with interest on judgment** against her in proceeding to surcharge settlement from date estate was settled. 228Ky719, 15SW(2d)511. [c] **Interest should be allowed on judgment** rendered in action for damages from construction of drainage improvement without notice, only from date of judgment. 29OhA505, 163NE919. [d] **On account,** from time account was closed. 13LaA657, 127S101. [e] **Bonds secured by indenture** bear interest from date when payment is refused. 134Misc417, 236NYS37. [f] **Coupons on bonds** bear interest from date of presentment and dishonor. 134Misc417, 236NYS37. [g] **From date of decree.-Utah** 290P161.
230-3 238Mich617, 214NW179.
230-4 See also CalA 284P715.
230-6 10LaA304, 121S677; 134Okl25, 272P414, 417 [quotCJ].
231-7 88IndA665, 165NE341.
231-8½-New. Upon rescission of contract, interest upon money paid may not be recovered for period before date of contract rescinded, although there was a previous agreement between the parties. 135Wash605, 238P572.
231-8½-New. Judgment against the purchaser, compelling him to complete the contract, should bear interest only from the date the decree was amended and affirmed by the supreme court, where the property was revenue producing, and the purchaser acted in good faith in insisting upon having title confirmed by a judicial decree. 167La1063, 120S857.
231-9 178Ark355, 11SW(2d)465; TexCommnA 284SW933. See also 145Va225, 133SE800. [a] (9) From date of instrument. 112OhSt219, 147NE641, 40ALR819. (10) Lender is entitled to interest on money laid aside for building installments, from date of note. 112OhSt219, 147NE641, 40ALR819. (11) Notes for money, laid aside for holding installment bearing interest only on amount actually advanced after maturity of notes. 112OhSt219, 147NE641, 40ALR819. [g] **Money due.**-316Ill488, 147NE459, 464.
231-10½-New. Where vendor's suit for specific performance is necessary to establish his title to property by prescription, interest has been held allowable only from the date of the judgment. 158La1026, 105S52.
232-12 TexCommnA 284SW933. [c] **Upon recovery of money advanced to partnership and invested in homestead** in possession of which party advancing fund shared, interest does not begin till party abandons possession. 168Ark1066, 272SW363.
232-12½-New. Where the owner elects to treat tortious taking as an implied sale, interest runs from the date of the taking. 34F(2d)744.
232-13 175Ark437, 1SW(2d)1004.
232-14 CalA 266P823.
233-16½-New. Where lease provides for maturing of all the rent notes on default of any one, interest on all accrues from the date of maturity of the first unpaid note. 10LaA648, 121S193.
233-26 254IllA484; 266Mass462, 165NE485; Mass 172NE858; 318Mo969, 2SW(2d)733; 82Mont312, 267P207; 245NY1, 156NE76; 219AppDiv184, 219NYS78; 129Misc911, 223NYS408; 34Porto Rico422; TexCommnA 296SW490. [e] **Common counts.**-129Misc911, 223NYS408.
234-27 127Me65, 141A102; 157Miss149, 127S265; MoA 14SW(2d)491; Utah 278P529.
234-28 228Ky13, 16SW(2d)455.
234-30 Mo 29SW(2d)79; NJ 130A736.
234-34 213AppDiv578, 211NYS262.
234-34½-New. In some jurisdictions interest is allowable for money paid by mistake from the time of demand for a specific amount. 28F(2d)373.
235-38 159La560, 105S620 (action on open account). [a] **Interest runs from date of demand** rather than date of judgment where vendor removed water heater after sale. 161La1017, 109S822, 48ALR1143.
236-47 16F(2d)66; 166La497, 117S568; 155Miss600, 125S89; 245NY1, 156NE76. [b] 159La560, 105S620.
236-52 82CalA249, 255P529.
237-61 MoA 25SW(2d)125.
238-70 99Fla395, 126S489(2dcase).
238-70½-New. or to date of tender of amount due. CalA 266P823.
238-78 TexCivA 275SW721, 724 [cit CJ]; 197Wis65, 221NW378.
239-88 35OhA549, 172NE672. [b] **Allowing interest on liens only up to thirty days after sheriff's sale** held proper under local rule. 35OhA549, 172NE672.
239-90 TexCivA 275SW721, 724 [cit CJ].
240-4½-New. In an action on a note executed with mutual understanding that the maker and payee would at a later date agree on and adjust certain set-offs against the note, interest on such set-offs may properly be allowed from date of filing of answer pleading set-offs. 201Iowa148, 205NW833.
241-16 TexCivA 283SW189; TexCivA 285SW659.
241-20 16F(2d)417; 45Ida541, 263P1002; 134SC207, 132SE620. [b] **Offer to pay on happening of contingency** does not stop full interest. TexCivA 293SW939.
242-21 246IllA457. Contra 88CalA20, 263P538.
242-22 135SC1, 133SE451.
243-35 16F(2d)417.
243-36 TexCivA 283SW189.
243-40 16F(2d)417.
243-43 TexCivA 285SW659, 662 [cit CJ].
244-57 [b] (2) 249NY139, 163NE129 (rule applies only where proceeds are insufficient to pay all creditors in full).
246-75 161Ga287, 130SE580, 588 [cit CJ]. [a] (2) Where holder of county warrants was enjoined from collecting them by restraining orders in action to which county and county commissioner were made parties, county is not liable for interest during time when collection was enjoined though it was not expressly restrained from making payment. 161Ga287, 130SE580.
247-81 43F(2d)358(1stcase).
247-82 239Mich575, 215NW13.
248-93 But see 310Mo104, 274SW770.
250-19 Fla 129S589.
250-20 [a] (2) In action on supersedeas bond for recovery of rentals by plaintiffs in whom title to land was quieted, court should consider each rental period as rest for purpose of figuring interest on damages. 206Iowa884, 221NW661.
250-22 30Hawaii359, 377 [quotCJ]; 249IllA274; 127Misc21, 215NYS181; 157SC371, 154SE641. See also 164La440, 114S89 (in absence of pleadings as to how payments were imputed, interest cannot be allowed on balance except from judicial demand).
252-35 TexCivA 285SW659, 662 [cit CJ].
252-41 214AppDiv455, 212NYS690. See also 127Misc855, 217NYS595.
253-45 299Pa503, 149A702.
254-54 TexCivA 6SW(2d)425.
254-64 127Misc21, 215NYS181.
254-68 [b] **In New Jersey.**-103NJL401, 135A374.
255-76 127Misc21, 215NYS181. But see 164La440, 114S89.
256-80 127Misc21, 215NYS181. [a] **But where payment is specifically applied by creditor to partial payment of principal,** rule is applied and interest on such part payment is waived since such conduct constitutes severance of part paid from whole and extinguishment of principal pro tanto. 127Misc21, 215NYS181.
257-95 99NJEq251, 132A77.
257-97 99NJEq251, 132A77, 78 [citCJ per Berry,VC].
257-98 Mass 172NE82.
257-4½-New. Failure to allege time from which interest on claim became due does not deny cause of action otherwise stated. 220Ala332, 124S884.
257-5 [a] **Insufficient petitions.**-37GaA788, 142SE170.
257-10 88CalA601, 263P1031; 33GaA684, 127SE665; 164La57, 113S763; 164La521, 114S119; MoA 9SW(2d)655; 123Or469, 259P1064, 260P1099; 127Or364, 272P281. See also 34F(2d)616. [d] **Sufficiency of pleading.**-169La362, 125S272.
258-11 See also 164La57, 113S763.
258-12 TexCivA 294SW963.
258-14 169La362, 125S272. [a] (2) Where parties treated cost of completing building after contractor abandoned work as certain, court properly allowed interest from date of filing complaint. 102CalA192, 282P974.
258-23 218Ala448, 118S760. [a] **Admission by failure to deny.**-1LaA9.
259-55 [a] (5) To justify inference that interest on note was paid. 213Ala125, 104S403. (6) To show that interest should be paid on certain notes. TexCommnA 284SW933.
260-63 213AppDiv607, 211NYS53.
261-73 Mass 170NE69.
261-74 33F(2d)437.
261-75½-New. Interest has been held question for discretion of chancellor. 153Tenn176, 281SW785, 45ALR610.
261-75½-New. Where there is no controversy as to the amount of recovery, the court may not instruct the jury as to interest. MoA 198SW(2d)541.
261-18 160La261, 107S103.
262-9 [o] **Closing agreement precludes recovery of taxes** regardless of illegality of taxing statute. 43F(2d)711.
262-42 79Mont166, 255P340, 60ALR1.
262-43 79Mont166, 255P340, 60ALR1.
262-45 20F(2d)474; 254Mass292, 150NE95.
263-98 101NJEq757, 139A828.

INTERESTED

266-69 219AppDiv594, 220NYS331.

INTEREST REIPUBLICÆ UT SIT FINIS LITIUM

267-96 144Miss319, 109S853; 115Nebr335, 212NW765; 69Utah293, 254P784. [c] 158La874, 104S747 (court re-

fusing to dimiss action because prematurely brought since it would require suit to be filed anew); 32PortoRico 336; 69Utah293, 254P784.

INTERFERE

267-99 187Wis161, 204NW773, 778 [quotCJ entire paragraph].

INTERIM

267-7 [b] Interim certificate.-25 OhA 138, 157NE414.

INTERLOCUTORY

268-23 12CustA307.
268-27 12CustA307.

INTERMARRIAGE

268-30½-New. The act of marrying. 243NY595, 154NE620.

INTERNAL REVENUE

278-7 23F(2d)44; 219Ky432, 293SW 944. [d] As capital stock tax.-245 IllA473.
278-8 [b] Gasoline and mill taxes held excise taxes. 32Ariz235, 257P648.
278-18½-New. [§ 7a] H. Merchandise. The term as used in Tariff Act (1922) § 401 means goods, wares, and chattels of every description, 18F(2d) 442.
278-18⅔-New. Including merchandise the importation of which is prohibited. 18F(2d)442.
278-19 30F(2d)73 [certiorari den 279 US860, 49SCt418(9thcase), 73L ed1000].
278-20 19F(2d)260.
278-21 272US321, 47SCt154, 71L ed 279, 47ALR1025; 30F(2d)620; 42 F(2d)779. [c] Power to fix value of personalty at time of decedent's death as basis for determining profit. 280US 327, 50SCt115, 74L ed457. [d] Statute held not invalid as conferring judicial powers upon administrative officers. 42 F(2d)177.
278-24 274US289, 47SCt634, 71L ed 1052.
278-25 274US289, 47SCt634, 71L ed 1052; 23F(2d)44.
279-26 [a] Excess profits tax (1) may be imposed by congress, applicable to income or excess profits of entire year, though part of year has elapsed. 8 F(2d)913. (2) They may be imposed on corporation which has, during same year, voluntarily dissolved, and measure of liability is income earned during portion of year when it was in existence. 8F(2d)913. [b] Congress, in levying excess profits tax, might compute it as it chose within certain limitations. 29F(2d)487 [certiorari den 279US842, 49SCt263(5thcase), 73L ed 988].
279-27 8F(2d)641; 34F(2d)506.
279-32 23F(2d)44.
279-35 23F(2d)44.
279-36 [e] One class of property may be taxed and another class omitted. 23 F(2d)44.
279-37 But see 275US142, 276US594, 48SCt105, 72L ed206; 18F(2d)798; 33 F(2d)1018. [a] Statute held not to deny due process.-42F(2d)144.
279-38 30F(2d)620.
280-44½-New. Gift tax imposed by Revenue Act (1924) §§ 319-324 is an excise tax, and constitutional. 16F(2d) 970.
280-46 [a] (3) Future Trading Act Aug. 24, 1921 § 3 held unconstitutional. 269US475, 46SCt165, 70L ed365.
280-47½-New. Congress must, in clear and concise language, state what property is taxable. 8F(2d)529.
280-47⅓-New. Everyday operation and incidents of taxation rather than scientific or economic arguments are tests to be applied when passing on the constitutionality of statutes. 8F(2d) 641.
280-47¼-New. Provision in a statute imposing gifts tax, requiring payment of a tax on gifts made during the calendar year, does not invalidate the law as rendering it retroactive. 16F(2d) 970.
280-47⅙-New. A graduated excise tax is permissible if it affects profiteering methods. 23F(2d)44.
280-47⅙-New. Law shortening interest period in respect to overassessment is not unconstitutional as depriving taxpayer of vested right. 41F(2d)892.
280-52½-New. Congress may authorize the commission of internal revenue to prescribe formal administrative features of time and form to be observed in making returns under revenue acts. 8F(2d)913.
280-56 [a] Differences in state law may not be read into revenue act to spell out lack of uniformity. 282US 101, 51SCt58.
280-57 43F(2d)679. [a] (4) Gift tax, graduated and subject to exemptions. 280US124, 50SCt46, 74L ed226.
280-66 45Philippine1. [a] (4) 45 Philippine1.
281-71 277US508, 48SCt591, 72L ed 968. [a] (11) Income of lessee from operations on lands of state held for benefit of university. 38F(2d)680 (oil and gas production). [d] Tax on income of consulting engineer of state held not tax on instrumentality of state. 269US514, 46SCt172, 70L ed384. [e] Maintenance by state of state university constitutes strictly governmental activity. 38F(2d)680. [f] Lessee of state university lands under oil and gas lease is not exempt from tax on income from oil and gas produced as state instrumentality. 41F(2d)483.
281-76 276US233, 48SCt244, 72L ed 544, 56ALR379; 18F(2d)239; 39F(2d) 991.
282-78 18F(2d)239. See also 45Philippine1.
282-78½-New. Double taxation should be avoided unless required by express words of act. 38F(2d)162.
282-81 48Philippine35. [a] Tax on sales and not on purchases.-49Philippine136.
282-82½-New. Tests involving great subtlety and refinement of analysis should be avoided, if possible. 43F(2d) 450.
282-87 10CustA244; 48Philippine352. [b] Construction of particular statutes.-49Philippine811.
283-5 32F(2d)537. [a] Substance, rather than form, is to be regarded. 42 F(2d)522.
283-20 21F(2d)320; 39F(2d)109; 42 F(2d)193. [c] Trade terms construed according to meaning which they possessed. 21F(2d)320. [d] Statute taxing accessories for automobiles held to tax storage batteries. 21F(2d)320. [e] Statute held to put manufacturers of automobiles and accessories on same basis for taxation purposes. 21F(2d) 320. [f] "Property" is transferrable contract right which has ascertainable market value, even where not evidenced by document and not relating to tangible property or to payment of definite sums of money. 31F(2d)924.
284-54 42F(2d)522.
284-57 11F(2d)878.
284-60 18F(2d)239.
285-63 39F(2d)383; 42F(2d)408. See also 32PortoRico 530.
285-69 45Philippine1 (policy of law is to uphold rather than defeat revenue laws).
285-73 278US181, 49SCt121, 73L ed 255; 13F(2d)655.
285-83 8F(2d)106; 18F(2d)239.
286-84 32PortoRico 530 (construing local internal revenue statute).
286-85 281US489, 50SCt367, 74L ed 984; 8F(2d)56; 20F(2d)935; 8F(2d) 106; 11F(2d)878; 12F(2d)998; 15 F(2d)410; 17F(2d)36; 18F(2d)239; 20 F(2d)970; 26F(2d)805; 33F(2d)53; 33F(2d)969; 35F(2d)416 (rule applies to federal estate tax statute); 37F(2d) 373; 39F(2d)425; 43F(2d)395; 43 F(2d)904; 43F(2d)39; 32PortoRico 530 (question being whether certain article is taxable, doubt should be decided in favor of its exemption).
286-88 [b] (1) 20F(2d)419; 26F(2d) 139. (2) But this rule is not applicable where public policy dictates more liberal attitude. 20F(2d)419.
286-88½-New. The intent of congress to relieve a taxpayer of taxes due before the effective date of the statute is not lightly to be presumed. 34F(2d)60.
286-99 21F(2d)320.
286-1 14F(2d)553; 15F(2d)626, 629 [citCyc]; 21F(2d)320; 24F(2d)918; 43 F(2d)904. [a] 11F(2d)878.
286-4 21F(2d)320. [d] Departmental regulations held valid as to method of computing income tax. 35F(2d)832.
287-6 See also NS [1928] 1DomLR701.
287-8 42F(2d)852.
287-10 15F(2d)626; 42F(2d)408.
287-11 33F(2d)53.
287-12 15F(2d)626.
287-13½-New. Departmental interpretation of the Revenue Act has no retroactive effect. 16F(2d)995.
287-13⅓-New. Secretary of agriculture's classifications of chocolate and candy under pure food laws are not controlling in determining whether word "candy" in revenue act includes chocolate. 42F(2d)408.
287-14 39F(2d)383; 39F(2d)759. [a] Departmental regulation has force of law when not in conflict with statutes. 37 F(2d)275. [b] Treasury regulation has force of law.-42F(2d)128.
287-14½-New. Departmental regulation prescribing the manner of making inventories by a taxpayer must receive strict construction. 14F(2d)995.
287-14⅓-New. Regulations held not inconsistent. 42F(2d)344.
287-17 28F(2d)205.
287-17½-New. Statutes exempting from taxation are to be strictly construed in favor of the government. 30F(2d)792; 31F(2d)740(2dcase).
287-30½-New. A statute providing that, where parties agree before expiration of an assessment tax to an assessment thereafter, the period agreed on covers the assessment is not an amendment of a prior act. 29F(2d)865.
288-35½-New. Where a subsequent tax statute absolutely repeals an earlier act, without any express saving clause, the earlier statute is obliterated as completely as if it had never existed, and all rights and powers derived wholly therefrom, including not only the remedy for collection of the tax, but the tax itself, are completely extinguished, save only those rights which became vested or which accrued while the repealed statute was in force. 28F(2d)205.
288-36 30F(2d)542; 39F(2d)492 (legislative intent). [a] Transactions untaxed when they took place cannot be reached by later statute. 39F(2d)540.
288-37 7F(2d)483; 8F(2d)641; 14F (2d)539; 38F(2d)155; 38F(2d)381; 39 F(2d)41; 42F(2d)596.
288-38 24F(2d)91; 39F(2d)492 (statute has been held not to apply retroactively). [a] 14F(2d)539. [c] Tax on club dues held not to apply to past dues paid by life member. 17F(2d)295. [d] Statutes held applicable and invalid.-276US440, 48SCt353, 72L ed645. [e] Provision as to date for determining value of property does not affect construction of earlier taxing statute. 280US 327, 50SCt115, 74L ed457. [f] Tax on income from revocable trust is not retroactive as respects payments of income after enactment of statute. 34F(2d) 656.
288-40 22F(2d)249; 33F(2d)961. [a] Statute computing tax for part of year when taxpayer changes accounting period has retroactive effect and is not invalid. 39F(2d)540.
288-40½-New. It is not within the power of congress to enact legislation to recreate the liability extinguished by the limitations statute. 27F(2d)782 [certiorari granted 278US597, 49SCt178 (2dcase), 73L ed527].
288-40⅓-New. Rate of taxation may be retroactively changed at least for periods under one year. 39F(2d)540.
288-44½-New. Income tax cannot be levied on income received before the law went into effect. 16F(2d)944.
289-54½-New. In Porto Rico, Acts (1919) No. 80 is considered in amendment of federal law governing matter passed by legislature pursuant to acts of congress of Oct. 3, 1917 and Febr. 24, 1919. 34PortoRico 464.
289-61½-New. Under War Revenue Act of 1917, transportation of freight

shipped from Japan to New York is not subject to the transfer tax imposed on freight "consigned from one point in the United States to another." 14F(2d)984.

289-62 33F(2d)1018.

289-72 28F(2d)888.

289-73 17F(2d)295.

289-77 278US339, 49SCt123, 73L ed410, 66ALR397; 278US327, 49SCt126, 73L ed 405, 63ALR388; 29F(2d)149; 32F(2d) 69.

289-78 8F(2d)641; 26F(2d)380.

289-78½-New. a tax on gifts not in contemplation of death; 280US124, 50 SCt46, 74L ed226.

290-80½-New. a tax on membership in a club; 23F(2d)840.

290-84½-New. , and a tax on transportation by pipe line, 16F(2d)717.

290-84½-New. and a tax on initiation fees and dues of a social club. 12F(2d) 951; 17F(2d)295.

290-84¼-New. ; the tax on gifts. 28 F(2d)873.

290-84⅓-New. Income tax law requiring inclusion in income of payments received subsequent to change to sales method of accounting does not improve direct tax on capital. 40F(2d)126.

290-84⅓-New. Tax on life membership in social club is not direct tax. 44F(2d) 266.

293-22 [a] 13F(2d)631. [d] (1) 41F (2d)524. [f] (4) Whether loss to be deducted depends on circumstances of each case. 24F(2d)486. (5) Sale of property is only one method of determining depreciation. 24F(2d)486. (6) Transaction whereby loss was determined in return for 1910 will not be reopened to fix tax under act of 1919. 24F(2d)486.

294-36½-New. Congress has the power to tax incomes derived from criminal transactions. 15F(2d)809.

295-38 271US170, 46SCt449, 70L ed 886; 29F(2d)132.

295-41½-New. Sixteenth Amendment to the constitution conferred no power on congress to tax gifts. 15F(2d)890.

295-41⅓-New. The meaning of federal income tax statutes must be found in the statutes, and may be broader than constitutional immunity of the state. 22F (2d)165.

295-42 [b] **Income includes** gain derived by taxpayer from exchange of property. 36F(2d)611.

295-45½-New. No part of the value of a bona fide gift is taxable as income in the hands of the donee. 15F(2d)890.

295-45⅓-New. Liability of donee for income must be based on the value of the gift at the time of delivery. 15F(2d) 890.

295-45¼-New. "Income" must be new property acquired or increment detached from a former investment. 25F(2d)997.

295-47 [a] (18) That tax on total income of domestic corporations from all sources, including foreign business and on income of foreign corporations from sources within United States only violated due process clause. 267US442, 45 SCt135, 348, 69L ed703. [b] **Revenue Act of 1921 has been held constitutional.**-280US409, 50SCt164, 74L ed516. [c] **Revenue Act of 1924, 1926** has been held constitutional. 36F(2d)1009. [d] **Revenue Act of 1928 has been held constitutional.**-37F(2d)373.

296-48½-New. The Revenue Act of 1926, in so far as it authorizes the commissioner of internal revenue to assess and collect the liability at law or in equity of a transferee of property of a taxpayer in respect of the tax imposed on taxpayers, is violative of the Fifth Amendment to the federal constitution. 18F(2d)798.

296-48⅓-New. Such statute is an improper attempt to vest judicial power in the commissioner of internal revenue. 18F(2d)798.

296-48¼-New. The Revenue Act of 1918, placing a high tax on net income derived from government war contracts, is not invalid as based on arbitrary classification, 30F(2d)630.

296-48⅕-New. nor does the provision, taxing corporations organized in the United States on income from profits on foreign sales but exempting competitors in insular territories, violate the due process clause of the Fifth Amendment. 30F(2d)620.

296-48⅙-New. The Revenue Act of 1921, requiring a donee of stock selling at profit, to pay an income tax on the difference between the selling price and the value when acquired by the donor, is valid. 278US470, 49SCt199, 73L ed460, 64ALR362.

296-48⅐-New. The Revenue Act of 1924, taking income from a revocable trust to the settlor, may be applied to a trust created before the passage where the statute was passed during the year the income accrued. 30F(2d)135.

296-48⅛-New. and is valid as with power of congress to pass statutes to prevent evasion of surtaxes. 30F(2d) 135.

296-48⅑-New. Under the Revenue Act of 1928, a provision that payment of an additional tax after the statute of limitations barred collection shall not be considered as overpayment within the meaning of the statute where a claim in abatement was filed and collection stayed does not deprive a taxpayer of his vested right. 32F(2d)857.

296-48⅒-New. A statute authorizing a tax against the grantor of a revocable trust is not unconstitutional as arbitrary or capricious. 34F(2d)656.

296-48⅑-New. Revenue Act of 1918, authorizing assessment of income and profits taxes on accrual basis of accounting, is not in conflict with 16th Amendment. 38F(2d)935.

296-48½-New. Act providing for taxation of gain derived by taxpayer from exchange of realty is constitutional. 36 F(2d)611.

296-48⅓-New. Where measure of tax is income from all sources, enactment is not objectionable because it includes property which cannot, as such, be directly taxed. 38F(2d)155.

296-48¼-New. Act of 1923 placing upon taxpayer burden of gain as income and granting him credit for loss in exchange of stocks is not violative of due process because retroactive. 38F(2d) 155.

296-66 [a] **Construction of Canadian acts.**-[1926]CanSC457, [1926] 3DomLR 531.

297-67 39F(2d)41.

297-71 8F(2d)106. See 17F(2d)36.

297-73½-New. Courts, in the absence of clear direction to the contrary, construe the Revenue Law as intended to reach actual income. 14F(2d)323.

297-73⅓-New. Income and profit taxes are personal obligations of the taxpayer, directed against him and not against his property. 18F(2d)798.

297-73¼-New. Enumerated section of Revenue Act has been held applicable for determining invested capital for computation of excess profits tax, when definitive section is inapplicable. 21F(2d) 495.

297-73⅕-New. The substance, and not the form of the transaction as a whole, governs application of income tax laws thereto. 25F(2d)425.

297-73⅙-New. Taxing power under the act is construed with latitude to realize the purposes intended. 25F(2d)653.

297-73⅐-New. Courts, in the absence of a positive law to the contrary, will construe a revenue act as intended to reach actual income. 26F(2d)805.

297-73⅛-New. **Avoidance of liability.** That corporate officers receiving extra compensation for past years owned stock does not show bad faith as an attempt by the corporation to evade a tax. 32F (2d)42.

297-73⅑-New. Waiver by a husband of half of the community property and earnings and constituting himself the trustee does not convert his future earnings into the wife's separate estate so as to avoid a tax. 30F(2d)217.

297-73⅒-New. A taxpayer's instrument of waiver or grant of earnings should be unequivocal and unconditional, in order for him to escape liability for income tax, 30F(2d)217.

297-73⅓-New. and the court may consider the motive or purpose of the person executing the instrument to avoid liability for income tax, in construing the instrument and determining its true intent. 30F(2d)217.

297-73½-New. Situation confronting congress and mischief designed to be abated considered in determining intent of statute. 38F(2d)755.

297-73⅓-New. In interpreting equivocal transactions; material to income tax assessment, motives may be considered. 42F(2d)81.

297-75 [b] **Community income** in California is taxable wholly against husband. 269US315, 46SCt148, 70L ed285.

297-77½-New. **Time of earning or receiving.** 29F(2d)834; 30F(2d)622; 30F (2d)683; 31F(2d)924; 32F(2d)949.

297-79 8F(2d)529; 32PortoRico 649 (local internal revenue statute).

297-80 25F(2d)47.

297-85 19F(2d)271; 21F(2d)547; 21 F(2d)550; 26F(2d)734; 27F(2d)214; 27F(2d)493; 29F(2d)448 [certiorari den 279US848, 49SCt345(8thcase), 73L ed 992]; 29F(2d)543; 29F(2d)698; 32 F(2d)225(2dcase). [a] **Company, operating hotel as lessee,** held not "personal service corporation." 7F(2d)900. [b] **Statute defining term does not classify stockholders** on basis of amount of stock owned or held or distinguish between majority and minority stockholders. 23 F(2d)959. [c] **Insurance agency corporation** held personal service corporation. 24F(2d)44. [d] **Corporation conducting business college** with one hundred thousand dollars capital, twelve branches, and fifty-four teachers held not "personal service corporation." 24 F(2d)176. [e] **Brokerage corporation,** requiring use of capital, part of which it borrowed on credit of its assets, is not personal service corporation. 23F(2d) 714. [f] **Considerations affecting classification.**-23F(2d)959. [g] **Controlling test** of whether corporation is personal service corporation. 23F(2d)959. [h] **Limitations in statutory definition** should not be construed so as to defeat purpose of statute. 23F(2d)959 (purpose of statute stated). [i] **Advertising agency corporation** held personal service corporation. 23F(2d)959. [j] **Corporation engaged in business as advertising agency** with practically all stockholders devoting entire time to its business and having only nominal capital stock is personal service corporation. 37F(2d)970. [k] **Requisites.**-35F(2d) 614. [l] **Held personal service corporations.**-35F(2d)426. [m] **Held not personal service corporations.**-35F(2d)614; 36F(2d)193; 36F(2d)326.

297-90 278US470, 49SCt199, 73L ed460, 64ALR362.

297-91 271US170, 46SCt449, 70L ed 886; 23F(2d)343; 28F(2d)247; 28 F(2d)918; 33F(2d)53; 35F(2d)312; 43F(2d)327. [c] **Proceeds from cemetery lots.**-21F(2d)194. [d] **Lessor's income tax paid by lessee** (1) cannot be held not to be income merely because never received by lessor. 23F(2d)343. (2) But such payment is not taxable as income of lessor since there is no gain to lessor from transaction and incidence of tax should not be considered in levying tax. 23F(2d)343. [e] **Bond coupons** given as gift to charitable fund are not taxable as income. 33F(2d)423. [f] **Certain transaction or device to avoid or lessen burden of taxation** does not render transaction illegal. 39F(2d)777. [g] **Bonds received by stockholder** in excess of stock or interest in oil lease is income. 36F(2d)611. [h] **Income from securities** is taxable where there is no completed gift in that donor retained possession and dealt with securities as his own. 33F(2d)423. [i] **Items held income.**-Amount of income tax refunded to corporation proportionately taxable in hands of stockholder. 36F(2d)464. [j] **Items held not income.**-Amounts to reimburse for losses sustained under long-term contract are not income, and where such losses have been claimed, taxpayer is not estopped to deny that subsequent recoupment is income. 35F(2d)312. [k] **Earnings become "income"** for tax purposes when received, not when distributed. 36F(2d) 347. [l] **In case of purchase of annuities,** annual sums received by purchaser

cannot be taxed as income. 42F(2d) 193. [m] **Amount received as damages for infringement by purchaser of patent** is not taxable as income. 43F(2d)1008.

297-93 15F(2d)669.

297-94 271US170, 46SCt449, 70Led886; 28F(2d)247; 32F(2d)288; 33F(2d)53; 33F(2d)695. [a] (2) Purpose of statute is to extend tax to all species of income possible. 35F(2d)832. [b] **Additional taxable income.**-44F(2d)95. [c] **Adjustment to reflect actual income.**-44F(2d) 95.

297-94½-New. Other decisions determining what constitutes "income." 274US259, 47SCt607, 71Led1037; 14F(2d) 564; 19F(2d)121; 19F(2d)148.

297-94⅓-New. Annuity of widow instead of statutory rights in estate held not taxable as income. 22F(2d)415.

297-94¼-New. "**Community income**" under California statute is taxable to husband. 22F(2d)932.

297-94⅕-New. Premium on bonds sold, received before 1904, is not income taxable under the act, although invested in improvements and treated as capital. 26F(2d)409.

297-94⅙-New. A contractor was not justified, in determining income tax, to carry payments as liability for a period of five years and determine the tax due at such time. 28F(2d)985.

297-94⅐-New. Moneys derived from the sale of cemetery lots must be treated as income for tax purposes, and no part of that income may be deducted simply because the cemetery corporation has made a general agreement for perpetual maintenance. 28F(2d)918.

297-94⅛-New. The amount paid insured under an insurance policy, being in no sense an indemnity for, or repayment of, an economic loss suffered by insured, is taxable as income. 279US573, 49SCt426, 73Led851, 61ALR906.

297-94⅑-New. Year for which income should be taxed. 281US11, 50SCt184, 74Led668.

297-94⅒-New. Where an employee was bound to invest part of his share of the corporation's profit in its capital stock, which was to be held in trust, such share is treated as the employee's income for the year in which purchased. 33F(2d)1003.

297-94 1/11-New. What constitutes income under revenue acts is determined from circumstances existing at close of taxable year. 38F(2d)480.

297-94 1/12-New. Corporate bonds payable at future date, having recognized market value, are "property." 36F(2d) 611.

297-94 1/13-New. Amount paid in advance as rental or bonus for leasehold interest is income in year received. 37F(2d)670.

297-94 1/14-New. Rent payable to taxpayer is income in year when paid. 37F(2d)728.

297-94 1/15-New. Annuity bequeathed by will and chargeable against corpus of estate is not taxable as part of annuitant's income. 38F(2d)162.

297-94 1/16-New. Income taxes operate upon income accrued and paid to taxpayer as income to him within period for which they are imposed. 38F(2d) 566.

297-94 1/17-New. A tax on a lessor, under federal law, is not a tax on the income of the lessor from the property as such, but a tax on the net income of the lessor and a personal tax against him. Mo 20SW(2d)51.

297-94 1/18-New. Contractor returning in each year profits of cost plus contract estimated on basis of expenditures is taxable on income during years in which expenditures were made. 43F(2d)166.

297-94 1/19-New. In determining what constitutes income form must give way to substance. 43F(2d)78.

297-94 1/20-New. Part of judgment for attorney's fees representing fees earned after March 1, 1913 is taxable as income when paid where returns were made on cash basis. 43F(2d)291.

297-94 1/21-New. Agreements by royalty owner to pay share of income therefrom to wife held to leave title in husband so as to leave him liable for income tax accruing on royalty. 43F(2d)494.

297-94 1/22-New. Annual delivery of installment of shares under contract providing for transfer of stated number of shares held to constitute income of year when contract was made. 43F(2d)642.

297-94 1/23-New. Where seller suffered loss on contract, buyer's subsequent voluntary payment of loss is not taxable income. 41F(2d)339.

297-94 1/24-New. Commission charged for loan and deducted from amount thereof is accrued income where books are kept on accrual basis. 41F(2d)923.

297-94 1/25-New. Income tax of lessor paid by lessee under mistake of law and without misrepresentation is not taxable as additional income. 41F(2d)533.

297-94 1/26-New. Contingent right to receive money is not income within statute. 42F(2d)193.

297-94 1/27-New. Income need not necessarily be received in money. 42F(2d) 81.

297-94 1/28-New. Income paid to residuary legatee during administration is taxable as income. 42F(2d)150.

297-94 1/29-New. "Income" under Canadian Income War Tax Act see Can [1930] 3DomLR162.

297-94 1/30-New. Dividends, interest, withdrawal accruals, and employer's contributions under employee's stock acquisition plan held not taxable as income until distributed. 41F(2d)803.

297-94 1/31-New. Manufacturer, constructing machine for special purpose, may account for profits in year contract was completed. 41F(2d)339.

297-94 1/32-New. Oral understanding giving wife half interest in farm held insufficient to establish her right to royalties from future oil leases relieving husband from tax on entire income. 43F(2d)494.

297-94 1/33-New. Part of judgment representing attorney's fees earned prior to March 1, 1913 is not taxable as income. 43F(2d)291.

297-94 1/34-New. Moneys received by contractor in year succeeding completion of contract held properly returned as income of preceding year. 43F(2d) 166.

297-94 1/35-New. Title of wife to land can be attacked by government to hold husband as legal owner for income taxes. 43F(2d)494.

297-94 1/36-New. Acquisition and retention of legal title to land by husband subjects him to entire tax on income. 43F(2d)494.

297-94 1/37-New. Income tax attaches to income before it passes to assignee by transfer effective in future. 43F(2d) 494.

297-95 274US259, 47SCt607, 71Led 1037; 32F(2d)916. [a] **In California.**-5F(2d)690. [b] **Salary of president of New York Society for Prevention of Cruelty to Children has been held taxable** as that of office of private philanthropic organization. 17F(2d)264. [c] **Citizen of United States,** domiciled elsewhere, is required to pay income tax on entire income. 24F(2d)918. [d] **British subject who expects to return to England** at some indefinite time in future may be "resident alien." 24F(2d) 918. [e] **Income derived from exploitation of Indian lands** by non-Indian lessee is subject to taxation. 275US232, 48SCt65, 72Led256. [f] **Compensation of auditor** appointed by orphans' court is not exempt from taxation on theory that he was officer or employee of state. 27F(2d)128. [g] **Indians.**-40F(2d)305. [h] **Entire tax on spouses' aggregate earnings for services rendered** in California has been held chargeable to husband, notwithstanding agreement to divide earnings equally. 39F(2d)74. [i] **Assignment of contracts to individual** and performance by latter lessening income and excess profits taxes has been held immaterial. 39F(2d)777. [j] **Income of property transferred in good faith** is not taxable against transferor. 35F(2d)990. [k] **Exemption of "officer or employee of state".**-44F(2d)168(1st case).

298-99½-New. Accrual basis, once adopted, must be consistently adhered to by a taxpayer. 26F(2d)805.

298-99⅓-New. A husband and wife may divide the year's earnings, after lawful deductions, into two funds for the purpose of tax payments, rather than having the entire community fund taxed to the husband. 27F(2d)140.

298-99¼-New. The seller of a business must pay an income tax on account of earnings of the business prior to sale, and cannot by contract with the buyer escape a tax. 30F(2d)628 [certiorari den 279US853, 49SCt348(7thcase), 73Led995].

298-99⅕-New. Oil royalties are not included within taxable income of plaintiffs not owning, receiving, or controlling them, ownership being vested in another when they accrued owing to an agreement under which a lawsuit regarding title to land was compromised. 29F(2d)884.

298-99⅙-New. Where, under contract, a father gave each of three sons twenty-five per cent of the amount received from the business, to be held in trust until marriage or the age of twenty-five, such shares are taxable against each son. 31F(2d)574.

298-99⅐-New. Control by husband of community property held not to constitute him owner thereof and liable for income tax. 38F(2d)642.

298-99⅛-New. Restricted full-blood Osage Indian allottee whose property is under supervising control of United States is not liable for income tax. 38F(2d)976.

298-99⅑-New. White woman without Indian blood and not member of Osage tribe, but who inherited from her children, members of tribe, lands allotted to them, is liable for income tax. 38F(2d)976.

298-99 1/10-New. Osage allottee with gross income from tribal mineral leases and owner by inheritance of land from another allottee and receiving certificate of competency is liable for income tax. 38F(2d)976.

298-99 1/11-New. Bank maintaining separate department for sale of securities is "dealer in securities" for income tax purposes. 43F(2d)950.

298-1 31F(2d)286.

298-6½-New. Income tax return of a nonresident alien, a member of a foreign partnership selling its products in this country, is properly surcharged with so much of interest on capital contribution as is properly allocable to the American business, since interest paid to a partner on firm capital is merely a way of distributing profits. 31F(2d) 286.

298-9 39F(2d)43. [a] **Slight activity in carrying on corporate affairs to earn profit** constitutes doing business. 39F(2d)43. [b] **Trust created to distribute estate** has been held not "association" taxable as corporation. 39F(2d)43.

298-10 [a] **Joint stock** corporation, technically partnership under state law, is not "partnership" under Revenue Act as to income and excess profit taxes. 269US110, 46SCt48, 70Led183.

298-11 [a] **Power to tax association** as corporation is not affected by its want of legal entity, or capacity to hold property or by liability of its stockholders. 269US110, 46SCt48, 70Led183. [b] **Unincorporated joint stock association** may be taxable as corporation under Revenue Act of 1918. 269US110, 46SCt48, 70Led183.

298-15 21F(2d)501.

298-16 But see 26F(2d)670(2dcase).

298-17½-New. A subsidiary company's accumulated earnings on stock sold to a parent company cannot be added to the cost of the stock in determining the taxable gain from resale to avoid double taxation. 33F(2d)77.

298-18 16F(2d)328. But see 39F(2d) 984. [a] **Liability of stockholders to whom assets distributed.**-102WVa601, 135SE840.

298-19 See also 35F(2d)924.

298-19½-New. Payments of lessee telegraph company to stockholders of lessor company constitute "taxable income" of lessor company. 19F(2d)157.

298-19⅓-New. Corporation cannot re-

cover tax as paid where individuals had already reduced tax payable under claim of "corporate" business. 16F(2d)274.

298-19¼-New. Act of Febr. 26, 1926, referring to regulations not in force when the 1918 tax was computed, is inapplicable in determining the validity of the tax under the act of Oct. 3, 1917. 16F(2d)98.

298-19½-New. "Invested capital," as used in Revenue Act (1918) § 326a (3), has not the same meaning as invested capital of commerce, but is unique and arbitrary and means only the items therein specified. 15F(2d)815.

298-19¾-New. Previous impairment of invested capital does not deprive the corporation of the right to treat as part of its invested capital surplus or undivided profits employed in its business during a tax year and earned prior thereto. 15F(2d)815.

298-19$\frac{7}{8}$-New. Income derived from the operation of a bankrupt corporation by a trustee is not income of the corporation and is subject to tax only if the revenue acts authorize a tax against a trustee. 277US239, 48SCt472, 72L ed 866.

298-19¾-New. The seller of bank stock is liable for any government tax that accrues prior to the date of sale, when under the terms of the contract the purchaser is not required to assume the burden. 128 Okl 280, 262P680.

298-19$\frac{9}{16}$-New. To justify consolidation of corporations for income tax purposes, one must be the subsidiary of the other and engage in the same or allied business. 22F(2d)204.

298-19$\frac{1}{10}$-New. A mining lease cannot be considered as intangible property of a corporation for income tax purposes, but is invested capital to the extent of its value. 22F(2d)204.

298-19$\frac{1}{11}$-New. As respects invested capital for income tax purposes, the cost of a mining lease to a corporation, and not to the stockholders or to its corporate transferor, controls. 22F(2d)204.

298-19$\frac{1}{12}$-New. The value of tangible property, and not stock given therefor, determines whether the corporation has "invested" capital or "nominal" capital. 22F(2d)204.

298-19$\frac{1}{13}$-New. Profits tax liability for the fiscal year ending June 30, 1918 is properly computed by comparison with representative corporations, under the terms of the statute of 1918, since tax is imposed by that law, although governed in part of the act of 1917. 25F(2d)536.

298-19$\frac{1}{14}$-New. Under Revenue Act of 1917, a company using capital by purchasing commodities for resale is not one having "nominal capital." 25F(2d)408.

298-19$\frac{1}{15}$-New. Money declared as a cash dividend and retained by the company under an agreement with stockholders is "borrowed capital," excluded from the basis for tax. 26F(2d)17.

298-19$\frac{1}{16}$-New. Surplus dividends retained under an agreement with the stockholders is "invested capital." 26F(2d)540.

298-19$\frac{1}{17}$-New. Accumulated salaries, retained pursuant to an agreement with the stockholders, is "invested capital." 26F(2d)540.

298-19$\frac{1}{18}$-New. Good will, paid for by income bonds payable from future earnings, is not "invested capital.' 26F(2d)187.

298-19$\frac{1}{19}$-New. The right of an assignee, under contract with a coal company giving assignor the privilege of selling merchandise and supplies on the coal company's property, to be paid for by the coal company's checks, has been held taxable as tangible property. 28F(2d)83.

298-19$\frac{1}{20}$-New. An organization operating under a declaration of trust is a corporation for income purposes where capital stock was issued to beneficiaries, and trustees were given full power and management, and were to call stockholders' meetings and declare dividends, and where shares of stock were transferable, and only assets of trusts were liable for debts. 29F(2d)137.

298-19$\frac{1}{21}$-New. Earnings of street railway held taxable as income. 36F(2d)347.

298-19$\frac{1}{22}$-New. Under Act of 1918, separation of corporation from affiliated group during year does not end taxable year for purpose of determining consolidated net income. 38F(2d)365.

298-19$\frac{1}{23}$-New. Corporation having no accounting period ending on last day of month has no fiscal year within act of 1918. 38F(2d)365.

298-19$\frac{1}{24}$-New. In arriving at the taxable income of a company engaged in fabrication and erection of structural steel plates, the inventory value of stock of steel set apart as an emergency or reserve is not to be considered. 33F(2d)53.

298-19$\frac{1}{25}$-New. A holding corporation which took over a theater company's sole asset held liable for a claim against the theater company. 34F(2d)579.

298-19$\frac{1}{26}$-New. Stockholders' advances to corporation for construction of building held not invested capital but borrowed capital. 41F(2d)66.

298-19$\frac{1}{27}$-New. Indebtedness of insolvent corporation canceled by creditors held not income of debtor corporation. 43F(2d)327.

298-19$\frac{1}{28}$-New. **Determination of consolidated invested capital of corporation.** 43F(2d)931.

298-19$\frac{1}{29}$-New. Corporation is without right to include in invested capital, as paid in surplus, alleged cash value of good will. 42F(2d)327.

298-22½-New. Item of accrued interest on loan to corporation in receiver's hands has been held not taxable as income. 37F(2d)34.

298-23 [a] (3) Corporation held subject to excess profit tax as "corporation having no invested capital and no more than a nominal capital." 7F(2d)781.

299-25 [a] **Reinsurance contract.**-DC 32F(2d)940.

299-26 272US613, 47SCt205, 71L ed439.

299-28 But see 40F(2d)743. [a] (2) Under Revenue Act of 1916 as amended, Jewelers Safety Fund Society held not liable for tax on balance of member's deposits after paying losses, such balance not being "income." 24F(2d)385. (3) Use of word "premium" in by-laws of society is not conclusive on whether amounts paid by members constitute income. 24F(2d)385. (4) Interest on invested deposits of society, which deposits, after paying losses, are returned to members, is not "income" of society subject to tax. 24F(2d)385.

299-31½-New. Income tax included tax on interest from investment of premium receipts and reserves of an automobile indemnity association under which subscribers agree to pay pro rata proportion of loss of fellow members. 21F(2d)501.

299-31⅓-New. Exception of insurance companies from application of statutes imposing tax on net income of corporations based on gross income must be strictly construed. 41F(2d)793.

299-32 267US408, 45SCt322, 69L ed685; 15F(2d)287; 21F(2d)241; 38F(2d)965 (tax imposed on partner's share of net income of partnership under act of 1921); 34PortoRico 464 (after distribution of profits each allotment is subject to separate income tax). [b] **Taxation of income of partners in** Porto Rico under Local Revenue Act of 1919 see 32Porto Rico 649. [c] **Individual loss** must be shown before partner is entitled to make deduction from individual income for firm losses. 15F(2d)445. [d] **Particular organizations held to be partnerships.**-21F(2d)241. [e] **Returns.**-38F(2d)965 (required to include respective proportions of partnership income). [f] **Partnership profits have been held apportioned among partners** according to interests in profits. 39F(2d)420. [g] **Liability of partner on his distributive share of assets.**-39F(2d)458. [h] **Matters included as part of income.**-39F(2d)540; 39F(2d)546. [i] **Effect of transfer of interest.**-44F(2d)83. [j] **Adjustment on death of partner.**-44F(2d)83.

299-35½-New. A gift to married women of interest of their husbands in a partnership, made without notice to a third partner, not registered and not followed by participation of assignees in management of the company, is not void, as to the commissioner of internal revenue. 30F(2d)289. [a] **Where written contract** between husband and wife provided that earnings, including salaries and fees, of either spouse should be treated by them as joint tenants, and not otherwise, husband's personal earnings become joint property of himself and wife immediately on being earned, and not taxable as community property. 30F(2d)898.

299-35⅓-New. That a husband, as partner, received a salary for personal services, does not render other income from partnership operations his separate property. 32F(2d)222.

299-35¼-New. Contributions of community funds to a joint or partnership enterprise are not ipso facto converted into separate property of the husband. 32F(2d)222.

299-35⅙-New. Surviving partners forming no new partnership with deceased partner's estate are liable for tax on their shares of copartnership profits notwithstanding payments to estate for deceased's interest. 38F(2d)309.

299-35⅛-New. Effect of separate instruments executed by members of partnership upon retirement of one. 44F(2d)83.

299-37 21F(2d)547; 38F(2d)812 (facts precluding classification as personal service corporation). [a] **Corporations held to be personal service corporations.**-21F(2d)547. [b] **Corporations held not to be personal service corporations.**-21F(2d)550. [c] **Burden is on corporation** clearly to establish right to be classified as personal service corporation. 21F(2d)550. [d] **Rule of strict construction in favor of government** is applicable to exemption of personal service corporation. 31F(2d)96. [e] **Corporations held to be public service corporations.**-33F(2d)733.

299-38 [a] **Borrowed capital, accumulated profits, bailments, and money left for reinvestment** constitute employed capital within law excepting personal service corporation from taxation. 39F(2d)583 (income producing factors). [b] **Corporations held not public service corporations.**-42F(2d)181.

299-38½-New. Whether a corporation is a personal service corporation depends on the facts of the particular case. 21F(2d)550.

299-38⅓-New. A sanitarium corporation is a personal service corporation, although the only capital used is furniture. 25F(2d)1016.

299-38¼-New. A company doing three classes of business, only one of which required no capital, and where no net income was derived from this class of business, is not a "personal service corporation," under the Revenue Act of 1917. 25F(2d)408.

299-38⅙-New. The Revenue Act of 1918 exempts a training school corporation for young women to be physical education teachers. 25F(2d)748.

299-38⅙-New. Revenue acts should be construed liberally to end, clearly intended, that such corporations be put on a parity with partnerships doing the same kind of business. 27F(2d)214.

299-38⅐-New. That a shipwright corporation employed clerks and laborers in conduct of business is immaterial in determining whether it is a personal service corporation. 27F(2d)214.

299-38⅛-New. Where authorized capital stock of an insurance agency corporation was twenty-five thousand dollars, and such capital was not primarily an income-producing factor, the real income-producing agency being personal service of stockholders, such corporation should be classified as a "corporation having not more than nominal capital." 26F(2d)734.

299-38⅑-New. A boarding school, owned by two principals, held exempt from tax as a personal service corporation. 34F(2d)281.

299-38$\frac{1}{10}$-New. The president of a corporation who devoted several hours a

day to the direction of business, fixed prices, and saw customers is "regularly engaged in active conduct of affairs of the corporation" within the statute exempting personal service corporations. 33F(2d)733.

299–38 1/11–New. Business leagues corporation held not a business league. 33F(2d)445.

299–38 1/12–New. In determining whether a corporation is a public service corporation, the fact that officers receive no salary or only a nominal salary is to be taken into account. 33F(2d)733.

299–38 1/13–New. Corporation with capital materially contributing to gross income was not classified as personal service corporation though trading as principal merely incidental to brokerage business. 41F(2d)280.

299–38 1/14–New. "Income" as used in phrase "income producing factor" in act of 1918 means gross income. 41F(2d)280.

299–38 1/15–New. Taxpayer could not be classed as personal service corporation where sixty per cent of stock was held by deceased stockholder's estate. 42F(2d)609.

299–41 30F(2d)73 [certiorari den 279US860, 49SCt418(9th case), 73L ed1000]. [a] **Revenue Act (1916) § 2 (b)** does not create tax, but deals with method of computing and collecting income tax. 18F(2d)668.

299–43 [a] **Income earned during administration** held "permanently set aside" by will itself for residuary charitable legatees, and not subject to income tax. 20F(2d)350. [b] **Income is taxable as entirety** regardless of its ultimate destination. 18F(2d)668. [c] **Additional income and surtaxes** apply to incomes of estates of decedents. 18F(2d)668. [d] **Dividends on corporate stock specifically bequested** but not at once transferred on books of corporation are income received by state where received by executors. 18F(2d)668. [e] **Income from trust fund distributable annually or regularly to beneficiaries** is taxable on basis of individual shares of beneficiaries. 18F(2d)668. [f] **Estate is treated as fund in course of administration for living** and not as property still owned by deceased. 23F(2d)941. [g] **Estate is treated as entity distinct from decedent.**–23F(2d)941. [h] **Income from trust estate** accepted in lieu of dower has been held not taxable as income. 27F(2d)760.

299–44 24F(2d)233; 27F(2d)598; 36F(2d)710. [a] **After irrevocable assignment by beneficiary** of trust estate, future payments under trust are not taxable to such beneficiary as income. 24F(2d)436. [b] **Agreement in form of trust and ancestor's express trust distinguished.**–39F(2d)43. [c] **Trust transacting business held taxable at corporation rate.**–35F(2d)149. [d] **Income added to corpus of trust estate** is taxable as income held for future distribution. 33F(2d)1016. [e] **Income from trust is not exempt from taxation** unless instrument creating trust provides for payment or permanent setting aside during year for charitable purpose. 42F(2d)257.

299–45½–New. A will providing for annuities from funds set apart by a trustee is held taxable as income. 17F(2d)743.

299–45¼–New. Rate of tax on income of estate held fixed by the amount of shares of individual distributees. 19F(2d)218.

299–45¼–New. An annuity payable first out of income, but if necessary out of the principal of a similar trust fund, acquired solely in lieu of, and in consideration for relinquishment of valuable statutory rights in decedent's estate, has been held exempt from taxation until the purchase price shall have been returned. 27F(2d)952.

299–45⅓–New. Income given a taxpayer for life from the residue of an estate has been held taxable as income without deduction for exhaustion. 28F(2d)823 [certiorari den 278US654, 49SCt179 (7thcase), 73L ed564].

299–45⅓–New. Where the beneficiary of a testamentary trust made an irrevocable assignment of certain annual payments out of such income to her husband and children, the assignments were valid, and money paid to assignees thereunder constituted taxable income of assignees and not of assignor. 28F(2d)789.

299–45½–New. The government has a right to tax on earnings in the hands of trustees or distributees. 28F(2d)823 [certiorari den 278US654, 49SCt179(7th case), 73L ed564].

299–45⅙–New. Fiduciary, exercising discretion and distributing all income in accordance with the terms of the will, was relieved from payment of a tax on the income as an entity. 26F(2d)765.

299–45⅙–New. Statute requires that income from revocable trust be taxed to grantor though paid to beneficiary. 281US376, 50SCt336, 74L ed916.

299–45 1/10–New. Beneficiary under trust is not taxable on trust income which he never claimed or received. 38F(2d)527.

299–45 1/11–New. Beneficiary of trust under will agreeing for consideration to make specified payment of part of net income of trust is not liable for tax on such part. 38F(2d)566 (assignee of income liable).

299–45 1/12–New. A statute taxing income from a revocable trust to the grantor prevails although the grantor is required to give the trustee six months' notice of an intention to revest. 34F(2d)506 (income taxable for entire taxable year).

299–45 1/13–New. Words "amount actually distributed," in law exempting trust to distribute earnings and principal to employees, mean money consisting of earnings and principal of fund distributed. 41F(2d)803.

299–51 25F(2d)47.

300–54 5F(2d)723 (in determining for income and excess profits tax purposes whether a contract for the purchase of material by a corporation for a term of years at a stated price was enforceable, possibility that selling corporation might terminate contract before end of term held not factor to be considered). [b] **Sales made but not collected in tax year** (1) are not income for that year, when cash basis for return is used. 21F(2d)247. (2) But such sales are income where accrual basis is used. 21F(2d)247. [c] **Conditional sales.**–21F(2d)247. [d] **Disputed items.**–21F(2d)247.

300–55 [a] **Under War Revenue Act of 1917,** exempting compensation of officers of state or local subdivision of state consulting engineers advising states or subdivisions thereof as to water and sewerage projects are not "officers" or employees thereof with earnings exempt. 269US514, 46SCt172, 70L ed384. [b] **Income of state officer** must come from state to be exempt from federal taxation, and compensation of state employee, employed to report to court financial standing of corporations applying for approval as sureties, coming wholly from such corporations, is taxable by federal government. 22F(2d)165. [c] **Exemption of state officers and employees.**–35F(2d)326; 35F(2d)977; 36F(2d)473. [d] **Income received by attorney in representing state** is not taxable. 34F(2d)263. [e] **Exemption of municipal officers or employees.**–35F(2d)326.

300–56 39F(2d)743.

300–57 28F(2d)909. [b] **Proceeds or moneys which did not come into possession of taxpayer** cannot be considered as taxable income. 38F(2d)480.

300–57½–New. Income from exempt Indian allotment is not taxable. 21F(2d)94.

300–57⅓–New. The amount collected from accounts listed worthless in the prior year is gain or profit to be included in the gross income for the current year. 28F(2d)551.

300–59½–New. Both manufacture and disposition of goods in the United States is not required, either being sufficient. 30F(2d)239 [certiorari den 279US861, 49SCt419(1stcase), 73L ed1000].

300–60 29F(2d)132.

300–61 [a] **Interest items collected by consolidated** bank held taxable where merger agreement specifically excluded accrued interest in determining capital furnished by merging bank. 41F(2d)602.

300–62 29F(2d)884.

300–67½–New. Rent from ninety-nine-year lease of coal rights is taxable income in part not standing for capital. 25F(2d)699.

300–67⅓–New. Rental paid on January 1 for last six months of preceding year held properly reported as income of year when paid. 42F(2d)620.

300–67¼–New. Payment of rental when due does not show that it had during earlier period been definite and certain income. 42F(2d)620.

300–72 13F(2d)951; 41F(2d)139. [a] 13F(2d)951.

300–72½–New. But where the agent agrees, prior to March 1, 1913, to surrender the right to receive commissions on renewal premiums in return for a stated payment each year for a period of years, any particular payment is not income but payment of debt and is not taxable except as to discount. 13F(2d)951.

300–73½–New. Value of first liberty bonds, received in payment of salary, must be considered. 14F(2d)991.

300–73⅓–New. A brokerage firm is not a personal service corporation. 26F(2d)139.

300–73¼–New. Stock gained by a trust company in a transaction is not taxable as compensation for personal services. 25F(2d)997.

300–73⅙–New. Where compensation of taxpayers is credited to them during the tax year, without substantial limitation or restriction as to time, manner, or condition on which payment should be made, and they might have drawn it out at any time, the fact that it was not drawn out in part is unimportant in determining income tax. 31F(2d)399.

300–73⅙–New. Payment by an employer of an employee's income taxes constitutes "additional income" to the employee, being derived by the employee from his labor. 279US716, 49SCt499, 73L ed918.

300–73⅐–New. One half of the amount of compensation received by a husband for personal services, which was properly returnable by his wife as income of a Texas marital community, has been held to constitute "earned income," within the Revenue Act of 1924, allowing a maximum of ten thousand dollars as earned net income. 30F(2d)789.

300–73⅛–New. Income received by a taxpayer and attorney under a contract to attend to all legal matters for the county to which at any time during such period he was assigned by the board of county commissioners is not subject to federal income tax. 29F(2d)892.

300–73⅛–New. Employee's share of profits received in stock placed under trust pursuant to agreement is income subject to tax. 40F(2d)408.

300–73 1/10–New. That stock is subject to option to purchase at future book value is immaterial as respects income tax liability. 40F(2d)408.

300–73 1/11–New. Husband can be taxed for income tax on whole salary and attorney's fees earned although husband and wife agreed that property should be held as joint tenants. 281US111, 50SCt241, 74L ed731.

300–73 1/12–New. Commissions for procuring loan are not considered income until loan has been paid. 39F(2d)462 (1stcase).

301–78½–New. Purely local mutual associations. A county mutual benefit or life association has been held not included in exemption of Rev. Act (1918) § 231 par 10. 21F(2d)252 (Comp. St. § 6336⅛o).

301–78⅓–New. But under the amendment of 1924, "benevolent life insurance associations of a purely local character" are included in the exemption of par 10. 21F(2d)252.

301–79 See also 278US55, 49SCt39, 73L ed180.

301-81 29F(2d)840. [a] **Construction.**–15F(2d)400.

301-82 [a] **Income ultimately passing** to such corporations as residuary legatees of estate held exempt, though not distributed or credited during taxable year. 15F(2d)400.

301-82½-New. Jobber's credit bureau not organized for pecuniary gain held not within exemption of business leagues, chambers of commerce, and boards of trade. 37F(2d)880.

301-82⅓-New. Exemption of leagues, chambers of commerce, and boards of trade, not organized for profit. Association of hay merchants held business league and not chamber of commerce. 37F(2d)83.

301-83 268US161, 45SCt475, 69Led897 (income from trust created by will is taxable "income" and not "gift" or "bequest"); 8F(2d)368 (gift); 15F(2d)367; 15F(2d)669. [a] **Amount paid to general superintendent and director of corporation** under directors' resolution for distribution held not to constitute gift, but taxable income. 15F(2d)669. [b] **Statement or conduct not constituting gift of future profits.**–39F(2d)540. [c] **Intention of testator** determines whether money directed to be paid executor was intended as gift or as compensation for services. 39F(2d)338. [d] **Payment to corporate officer in recognition of past services** is gift not subject to tax. 33F(2d)286.

301-84 31F(2d)935. But see 22F(2d)465 [dist 282Fed851]; 24F(2d)115; 39F(2d)338.

301-84½-New. Where a contract of hire of convict labor was assigned to a corporation free of charge, the value of such contract was properly excluded from invested capital of the corporation in determining its income and profit taxes. 28F(2d)557.

301-84⅓-New. Income received by executors on specific legacies pending administration of the estate of deceased is subject to an additional income tax imposed by statute, which raised the rates of both normal and additional tax. 30F(2d)73 [certiorari den 279US860, 49SCt418(9thcase), 73Led1000].

301-84¼-New. [§ 69a] 1. **Exemption of Government Instrumentalities.** Whether one seeking exemption from income tax as to profits on state contracts is a state employee or an independent contractor is determined by the construction of the contracts. 32F(2d)594.

301-84½-New. A partner of a firm engaged in the construction of state buildings is not "a state officer or employee" so as to exempt his profits from such contracts from taxation as income. 32F(2d)594.

301-84⅔-New. Payment made under a will has been held compensation for service, and not a gift or bequest, and subject to income tax. 14F(2d)993.

301-84¾-New. Money distributed to corporate officers and employees is not rendered taxable income in the hands of recipients by the fact that it is not a valid gift. 8F(2d)368.

301-85 [a] **Payment of net income taxes,** assessed against lessor, by lessee, constitutes "additional income," taxable to lessor. 279US732, 49SCt505, 73Led929.

301-86 35F(2d)832. [a] **Assessment of corporation's income** on basis of percentage of gross sales held erroneous. 4F(2d)871.

301-87½-New. Taxpayer keeping books on accrual basis could compute net income on same basis. 39F(2d)109.

301-87⅓-New. Under tax law of 1921 government is entitled to tax true net income computed as law allows. 37F(2d)728.

301-87¼-New. Amounts received from installment sales in prior years are to be included in net income under installment sales method of accounting. 40F(2d)126.

301-89 [a] **Surtax on income from sale of oil properties** held properly computed according to ratio thereof to taxpayer's total income not exceeding twenty per cent of price. 40F(2d)225.

301-89½-New. Revenue Act (1918) § 211 (g), providing that a portion of the income surtax attributable to the sale of oil or gas wells shall not exceed twenty per cent of the selling price, must be read with § 211(a), and the portion of the tax attributable to such sale is the part thereof bearing the same proportion to the total surtax which the income from the sale bears to the total net income. 11F(2d)895.

301-90 42F(2d)837. See also 39F(2d)425. [b] **Capital stock originally invested** in vessel held "invested capital." 7F(2d)301. [c] **Net profits or surplus** retained in treasury and used in business held "invested capital" and not "borrowed capital." 7F(2d)54. [d] **Held to constitute "invested capital" and not "borrowed capital."**–34F(2d)800 (assets conveyed to corporation). [e] **Notes given for stock did not constitute invested capital** to be considered in determining income. 39F(2d)726. [f] **Contingent right of insurance agent to commission on renewal premiums** cannot be impressed with characteristics of capital so long as right is contingent. 41F(2d)139. [g] **Good will of** banks amalgamated construed as not constituting "invested capital." DC 33F(2d)646. [h] **"Paid-in surplus."**–DC 33F(2d)646.

301-90½-New. Invested capital cannot be increased by commissions paid for the sale of corporate stock or by discount from par to purchasers of stock. 33F(2d)75.

301-90⅓-New. In determining value of good will, large sales volume is no evidence of its amount. 35F(2d)987.

301-91 279US333, 49SCt337, 73Led720; 279US573, 49SCt426, 73Led851, 61ALR906; 14F(2d)137; 25F(2d)997; 29F(2d)955. But see 16F(2d)358. [a] **Under Revenue Act (1926) § 1207,** in determining income and profit taxes, it is proper to reduce invested capital in sum equal to income and profits tax for preceding year, constituting accrued liability. 26F(2d)771. [b] **Payments for good will and trade-mark** may constitute "invested capital," but advertising expense cannot be included without showing what increase in good will value was due to advertising. 35F(2d)987. [c] **Moneys invested in street railway's own stock** held invested capital, and not return. 36F(2d)347.

301-92½-New. Method of computing tax on profit from sale of oil wells. 16F(2d)925.

301-92⅓-New. To constitute invested capital, there must be laying out of money or money's worth, and acquirement of something of permanent use or value in business. 23F(2d)574.

301-92¼-New. Profit on whisky made and stored until ready for sale is not taxable as capital, it being part of stock in trade. 31F(2d)676.

301-92⅕-New. When the value of tangible property, acquired by a corporation in exchange for stock, clearly and substantially exceeds the par value of such stock, the excess may be treated as paid-in surplus in computing invested capital. 32F(2d)288.

301-92⅙-New. Assumed pro rata accrual of income and profits taxes is not deductible from current earnings in determining the amount of earnings available for payment of dividends, as regards the question of the amount of invested capital. 30F(2d)522.

301-92⅐-New. Where surplus used as capital is a material factor in producing income, it should, for purposes of determining the classification of the taxpayer, be considered as "capital." 31F(2d)274.

301-92⅛-New. Inventories. Where inventories of material carried in stock are necessary to determine income, "base stock" method is improper. 281US264, 50SCt263, 74Led848 (reserve stock fluctuating yearly in amount could not be valued at constant price).

301-92⅑-New. Whisky manufactured and sold to trade, constituted part of "stock in trade" as regards right to more favorable rate. 280US387, 50SCt156, 74Led501.

301-92⅒-New. Revenue Act of 1918 applied on reorganization to prevent allowance of greater value of assets where control of fifty per cent. or more remained in same persons. 38F(2d)447 (fact that reorganization was bona fide not preventing application of statute).

301-92 1/11-New. Landowner's income from sale of oil and gas belonging to him by virtue of royalty retained under lease is capital gain and not taxable as income. 38F(2d)256.

301-92 1/12-New. As regards assessment of income tax, noninterest-bearing notes are not worth their face value at time of execution. 39F(2d)726.

301-92 1/13-New. Any excess value of tangible property transferred to corporation by one given rights to subscribe for capital stock constituted paid-in surplus. 39F(2d)888.

301-92 1/14-New. Where new corporation issued stock to old corporation in exchange for tangible property, latter can be included in invested capital only at cash value. 43F(2d)372.

301-92 1/15-New. Amount represented by mortgage given by corporation to secure notes of stockholders to third persons held invested capital and not money or property borrowed. 43F(2d)366.

301-92 1/16-New. Appreciation in value is not income until actually realized by disposition of property. 41F(2d)803.

301-93 8F(2d)178; 20F(2d)921; 21F(2d)1003; 26F(2d)805; 37F(2d)34. [b] **Taxes are not laid and collected on theory** but on situation actually existing as shown by facts. 20F(2d)921. [c] **Accrual basis may be adopted** for determining income and excess profits though banks are kept on cash basis where books do not reflect true income. 21F(2d)1003.

301-94 20F(2d)921; 26F(2d)805; 35F(2d)987. [a] **Books of account cannot be used by government** to show uncollected gains or profits. 37F(2d)277.

302-95½-New. Gross receipts. Where a reserve from net income is made for the payment of federal income taxes payable during the succeeding year, and such taxes are paid during the succeeding year, while from a bookkeeping standpoint it may appear proper to include such reservation as a part of the gross receipts of such succeeding year, such reserve is not a part of the gross receipts of that year for income tax purposes. 27Hawaii336.

302-96 281US11, 50SCt184, 74Led668. [a] **Gain from sale** is taxable as income for year when sale is consummated, not when option contract is made. 35F(2d)620.

302-96½-New. A transaction involving payment for a lease constitutes income. 31F(2d)667.

302-97 278US470, 49SCt199, 73Led460, 64ALR362; 14F(2d)459; 25F(2d)87; 29F(2d)132; 38F(2d)915; 42F(2d)299. But see 29F(2d)532. [a] 274US295, 47SCt608, 71Led1054; 15F(2d)669; 24F(2d)233. [d] **Sale of cloth on credit** with ten per cent addition held "income." 261Mass134, 158NE539. [e] **Extent.**–25F(2d)87. [f] **Not executory.**–25F(2d)87. [g] **Profits from sales of municipal securities** held not subject to federal income tax. 35F(2d)29. [h] **Amounts received under oil and gas leases** are not "gain from sale of capital assets" but rent or royalty taxable as ordinary income. DC 33F(2d)641. [i] **Sale of stock.**–33F(2d)77 (statute not requiring gains to be disregarded). [j] **Net profit under agreement for sale.**–44F(2d)95. [k] **Stock dividends theretofore received are properly included** in computing gain and profits on sale of stock. 42F(2d)300. [l] **Contract for sale of voting trust certificates** effectuates transfer thereof rendering gain or profit subject to income tax. 42F(2d)81. [m] **Conveyance of property in consideration of annual payments for life** is properly treated for income tax purposes as sale of annuity for property. 42F(2d)186. [n] **Adjustment of income tax realized on sale of assets.**–44F(2d)95. [o] **Completed sale.**–44F(2d)83.

302-98 278US470, 49SCt199, 73Led460, 64ALR362; 26F(2d)690; 42F(2d)193. [a] (1) Exchanging partnership interest for stock in new corporation

which was mere paper transaction does not subject partner to tax. 34F(2d)941. [c] **Computation of fair market value** of exchanged property. 42F(2d)193.

302–99 38F(2d)527 (legatee's securities valued as of date of testator's death). [c] **Changing investments.**–42F(2d)852. [d] **Exchange of property for property of like kind.**–42F(2d)852 (construing act of 1921).

302–2 14F(2d)137; 30F(2d)614; 35F (2d)620.

302–2½–New. The proceeds from the sale of stock of an affiliated company in excess of the price paid for assets thereof is not "taxable gain." 21F(2d)160.

302(3) [a] **Effect given to market value of property** on March 1, 1913, in determining taxable gains, is equally applicable in determining deductible losses. 268US98, 45SCt420, 69L ed865.

302–3½–New. The substance of the transaction determines if the transaction is a sale of the corporate assets or of stock. 25F(2d)608.

302–3⅓–New. Profit for the sale of stock is figured on the basis of the total cost of the stock sold and the new stock purchased. 25F(2d)534.

302–3¼–New. An enhanced value of manufactured goods prior to sale is an "increment," but does not become a "profit" until reduced to possession by sale. 30F(2d)239 [certiorari den 279 US861, 49SCt419(1stcase) 73L ed1000].

302–3½–New. Such part of the proceeds of the sale of stock as is donated to the administrative staff of the corporation without consideration constitutes a gift and is not taxable as income. 31F(2d) 755.

302–3¾–New. An administrator is not subject to income tax on funds derived from profits made on sale of the estate's interest on a contract for the purchase of land, interest being considered real estate. 33F(2d)39.

302–3⅞–New. An accepted contract to organize a corporation to hold title to leases for development in the interest of owners constitutes the corporation a trustee as regards taxation of stock received in exchange. 34F(2d)390.

302–3⅛–New. Stockholders in a bankrupt corporation, advancing money to a new corporation to buy assets of the old, and receiving stock in the new, do not make taxable profit on the bankrupt's assets. 34F(2d)563.

302–3⅛–New. Transfer by stockholder of stock and interest in oil lease to another corporation constitutes separate transaction based on individual consideration. 36F(2d)611.

302–3 1/10–New. Where a taxpayer is unable to identify stock sold as one last acquired by him, the stock sold must be taken to be that first acquired by him in determining income tax. 34F(2d) 575.

302–3 1/11–New. One exchanging property for marketable corporate stock, not to be sold without other stockholders' consent, may receive taxable profit. 40F (2d)225.

302–3 1/12–New. Exchange of stock for bonds is exchange on which no gain or loss is recognized where both are held for investment purposes. 40F(2d)398.

302–3 1/13–New. Sale of stock by daughter after transfer to her by mother held not to produce taxable profit to mother. 40F(2d)398.

302–3 1/14–New. Taxpayer cannot shift income from one year to another by agreement with associates not to sell until all consent. 41F(2d)743.

302–3 1/15–New. Husband's assignment of profits from joint adventure in marketing stock held gift to wife and profits held not taxable as income of husband. 41F(2d)501.

302–4 27F(2d)1000; 28F(2d)629; 28 F(2d)803 [certiorari den US 49SCt254 (1stcase)]; 34F(2d)140; 39F(2d)41; 39F(2d)73; 39F(2d)159 (profits cannot be allocated to single year); 39F(2d) 849; 39F(2d)917. [a] (5) Loss incurred by sale of stock for less than market value on March 1, 1913, is not deductible where amount received was still in excess of amount originally paid for it. 268US98, 45SCt420, 69L ed865. (6) Transaction held to be purchase and sale of stock within Revenue Act. 8F (2d)431. (7) Noninterest-bearing notes received for interest held properly discounted at five per cent. compounded semi-annually. 26F(2d)30. (8) Fair market value on March 1, 1913 is basis for computing profit on sale of real estate acquired before such date. 24F(2d) 748. (9) Internal revenue commissioner's finding of amount of profit from sale of contract is prima facie correct. 39F(2d)849. (10) No taxable profit came to plaintiff by mere change of title from building company in exchange for shares held in company. 39F(2d)159 (mere purchase of property does not show profit). (11) To make taxable profit, realty must be sold for cash at advance over purchase price and expenses incurred. 39F(2d)159. (12) Fair market value of stock at testator's death and not at date of distribution is basis for determining gain. 280US327, 50SCt115, 74L ed457. (13) In order to show intrinsic value of property exchanged to determine taxable gain, it is necessary to show that there would be market value if offered for sale. 34F(2d)390. (14) Stock which cannot be sold for amount reasonably approximate to its real value has no exchangeable or market value. 34F(2d)390. (15) In exchange of property there is no taxable gain unless property received in exchange has value realizable in money's worth. 34F(2d) 390. (16) Where stockholders in bankrupt corporation advance money to new corporation to purchase assets of old at bankruptcy sale in 1915 and receive stock of new corporation, amount so advanced should be used as cost for purpose of computing gain on sale of stock in 1917. 34F(2d)563 (bankruptcy sale not considered reorganization in determining taxable property). [b] But see 268US106, 45SCt423, 69L ed869. [e] **Profit on sale of assets of estate.**–23F (2d)941. [f] **Value as of March 1, 1913** must be ascertained, allowable capital additions added, and allowable depreciation deducted, to determine taxable profit. 35F(2d)924; 41F(2d)606. [g] **Gain on property acquired by gift** is cost to donor. 280US409, 50SCt164, 74L ed516. [h] **Cost of property** transferred, not value thereof, controls in determining whether there was gain. 36F(2d)611. [i] **Computation of income on supplies taken over and later returned by director general.**–36F(2d)719. [j] **Evidence sufficient to sustain decision** as to value of stock. 44F(2d)244.

303–6½–New. In computing original cost, deduction must be made of depreciation and depletion charges. 274US 295, 45SCt608, 71L ed1054.

303–6⅓–New. Sales not for cash are taxable as of the year of completion. 26 F(2d)489.

303–6¼–New. Fair market price or value of corporate stock at a particular time is a question of fact depending on the circumstances. 24F(2d)191.

303–6⅕–New. Gain or loss on securities sold by a legatee is the difference between the amount received and their value at the time of distribution to the legatee. 25F(2d)915.

303–6⅙–New. Interest and taxes are not to be added to the cost of realty to determine the profit on sale thereof. 25F (2d)653.

303–6⅐–New. Inventories may be made only on the basis prescribed by the commissioner. 25F(2d)721.

303–6⅛–New. Such market price implies existence of a market, supply and demand, sellers and buyers. 24F(2d) 191.

303–6⅑–New. A trust company's purchase of part of common stock of a new corporation, taking over assets of the old corporation reorganized by a syndicate of which the purchaser was a member, at five dollars per share, is purchase in good faith, from which no taxable profit, except dividends, would be derived until disposal of such stock, although stock not purchased by the syndicate members was sold to the public at forty dollars per share. 28F(2d)767.

303–6 1/10–New. Under an act relating to exchanges of property, there is no taxable gain and no deductible loss unless the property received in exchange has a value realizable in money's worth. 27 F(2d)564.

303–6 1/11–New. Bonds paid to the holder of a patent process have been held subject to income and profit taxes at their market value. 26F(2d)690.

303–6 1/12–New. The market value of bonds will be treated as cash value for the purpose of income tax. 26F(2d)690.

303–6 1/13–New. Where the government's computation of a defunct corporation's net profits from the sale of properties is less than the amount of liquidating stockholders' computation, the former computation will be adopted for the purpose of fixing the tax. 27F(2d)1000.

303–6 1/14–New. Stock, having no market value, other than that established by appraisal of assets, cannot be treated as the equivalent of cash for the purpose of establishing loss by exchange. 27F (2d)564.

303–6 1/15–New. Gain derived by a legatee from the sale of stock acquired under will is determinable, for the purpose of fixing an income tax, by subtracting from the sale price the value of the stock at the date of the testator's death, since that date, and not the date of distribution of the estate, marked the time of the legatee's acquisition of the property. 30 F(2d)604 [certiorari granted 279US831, 49SCt418(8thcase), 73L ed981].

303–6 1/16–New. Where a taxpayer received a conveyance of property before 1913 for nominal consideration and mortgage which was to be canceled in case title should fail, and concluded the transaction after 1913 by making a part payment of the mortgage to grantor in full settlement of the purchase price and by recording a deed, the property was acquired before March 1, 1913, for the purpose of determining the gain derived from the sale thereof, and the fair market price or value as of that date was the basis of estimate, as distinguished from the cost of the property under the final settlement. 30 F(2d)787. [a] **Fair market price or value** on March 1, 1913, for purpose of determining income tax on gain derived from sale thereof was true value of property undiminished by adverse claims outstanding at that time, where taxpayer's title was subsequently held valid. 30F(2d)787.

303–6 1/17–New. A corporation purchasing its subsidiary stock cannot take into account the subsidiary's accumulated earnings in determining taxable gain realized from a subsequent sale to outsiders. 33F(2d)77.

303–6 1/18–New. Where new corporation is organized, taxable income consists of difference between cost of property transferred and value of stock received in return. 36F(2d)842.

303–6 1/19–New. Profits from short sales of sugar made to cover anticipated losses held properly allocated between two businesses. 38F(2d)391.

303–6 1/20–New. In determining the profit from the sale of land it is proper to take into account the amount of depreciation the building suffered during the years before the sale. 34F(2d)448.

303–6 1/21–New. Cost of shares received and sold by taxpayer is value of assets, including good will, given by him in exchange therefor. 40F(2d)697.

303–6 1/22–New. Stock received in exchange for property has fair market value for determining taxable gain where taxpayer can sell certificates of beneficial ownership therein although not title. 41F(2d)743.

303–8 30F(2d)774. But see **DC** 36F (2d)546.

303–10 15F(2d)669.

303–11 35F(2d)178. [a] **Resolution providing for division of net profits** to be credited to stockholder's individual surplus accounts held not declaration of dividends. 7F(2d)54, 57 [quot14CJ798].

303–13 32F(2d)192; 39F(2d)3.

303–14 276US233, 48SCt244, 72L ed544.

56ALR379; 39F(2d)3; 39F(2d)556. See also 17F(2d)79.

303-17 DC 36F(2d)543 (earnings credited to stockholder's account held dividends taxable as of year when credited). [b] **Amount refunded** by stockholders from distribution of earnings of corporation is not taxable as income. 36F(2d)961. [c] **Dividends declared and payable** on one year are taxable in hands of stockholder as income for such year, though not actually received till following year. 35F(2d)503.

304-18 32F(2d)537.

304-26½-New. Dividend declared on March 27 held to be from earnings of the current year. 14F(2d)137.

304-26⅓-New. A dividend is a gain or profit. 18F(2d)239.

304-26¼-New. Dividends declared and paid to stockholders during January, 1917 before the corporation had earned any net profits for that year have held to be taxable at the 1916 rate. 275US175, 48SCt50, 72L ed223.

304-26⅙-New. Dividends declared in 1916, but not paid until January, 1917, are to be considered as distributions made in 1917 and part of distributee's income received in that year. 275US175, 48SCt50, 72L ed223.

304-26⅛-New. Under the act of 1917, dividends declared prior thereto and paid thereafter are not taxable, "distribution" being declaration and not payment. 26F(2d)126.

304-26⅐-New. Dividends, although unpaid for sixty days, are no part of invested capital. 26F(2d)131.

304-26⅛-New. Under the Revenue Act of 1916, dividends on capital stock specifically bequeathed by will, received by executors during settlement of the estate, is "income received by the estate" and taxable to the executors. 30F(2d)73 [certiorari den 279US860, 49SCt418 (9thcase), 73L ed1000].

304-26⅑-New. The date of payment, and not the date of the declaration of the dividend, is considered as the date of distribution of the dividend for income purposes. 34F(2d)583.

304-26 1/10-New. Stockholder receiving dividends in bonds is liable for tax on bonds only to extent of market value. 42F(2d)471.

304-26 1/11-New. Dividends held to constitute income when payments were made. 43F(2d)593.

304-27 32F(2d)37.

304-28 8F(2d)56. [a] **Distribution takes place** when declaration of dividend is made and not when dividend is paid. 8F(2d)56; 24F(2d)195.

304-29 32F(2d)37. [a] (3) "Distribution made" means dividends paid. 13F(2d)702. [b] **Corporate dividends,** paid during 1917, not in excess of earnings for that year, held to have been paid from such earnings, and so taxable. 269US204, 46SCt85, 70L ed235. [c] **Where there were no profits for such year,** effect was to distribute old surplus not liable to tax. 36F(2d)464.

304-30½-New. Undivided profits accumulated during 1916 but not paid until later do not come under the act where accumulation is not shown to have been to evade taxes. 32F(2d)37.

304-30⅓-New. Pro rata share of the entire year's earnings may be treated as representing the earnings for a fraction of the year prior to payment of the dividend. 32F(2d)37.

304-30¼-New. The "most recently accumulated undivided profits" must be judged from the end of the fiscal year during which the income was received. 13F(2d)702.

304-31 39F(2d)3. [b] 8F(2d)56. [e] (2) Dividend declared in October, 1916, payable in February, 1917, is not to be taxed at 1917 rate. 8F(2d)56. (3) Dividend declared Jan. 24, 1917, payable in April and July, is not to be taxed at 1917 rate. 8F(2d)56. (4) There is distinction between year in which stockholder receives payment of income and year corporation accumulates undivided profits or surplus. 8F(2d)56.

304-32 39F(2d)3.

304-34 32F(2d)192.

305-37 31F(2d)740(2dcase). See also 27F(2d)168.

305-38 [a] **Resolution of directors** reciting dividend was payable in stock does not conclusively make it stock dividend. 39F(2d)986. [b] **Corporate dividend declared payable in stock** must be considered cash dividend as regards tax liability, where all stock had been issued and proceeds of dividends credited as borrowed money. 39F(2d)986.

305-40 [a] **What constitutes stock dividend.**-44F(2d)246.

305-41 20F(2d)959.

305-42 25F(2d)884. See also 27F(2d)168.

305-43 See also 32F(2d)192.

305-43½-New. Plaintiff, prevented by the government's suit from receiving corporate dividends when declared, is entitled to pay an income tax, as though dividends were received when declared. 17F(2d)659.

305-43⅓-New. Dividends retained by a corporation subject to court order are held taxable, under the Revenue Act, as income accumulated in trust for an unascertained person. 17F(2d)659.

305-43¼-New. Dividend is taxable as income of the year when actually received 20F(2d)395.

305-43⅙-New. and not as of the date of the court order requiring its payment. 20F(2d)395.

305-43⅛-New. Payments of proceeds of the sale of real estate to a new corporation as dividend to cover subscriptions to such new corporation constitute separation of assets and is not a current stock dividend. 25F(2d)425.

305-44½-New. Gain realized in liquidation of a corporation which is in fact a distribution of earnings or profits accumulated since Feb. 28, 1913 constitutes dividend exempt from normal tax. 18F(2d)239.

305-45 26F(2d)532.

305-45½-New. Income tax on amounts received on liquidation of a corporation applies to partial liquidation of assets, where the company's former assets had been separated. 25F(2d)425.

305-51 28F(2d)1005.

306-54 36F(2d)1013 (bank is entitled to credit for discounts accruing where changing to cash basis).

306-55½-New. Under the act of 1913, life insurance companies could not include as income in any year such portion of any actual premium received from any individual policyholder as was paid back or "credited" to such policyholder. 8F(2d)851.

306-55⅓-New. The word "credited" in such provision of the statute means finally and irrevocably credited, 8F(2d)851.

306-55¼-New. and does not include overpayments of premiums during the taxable year on deferred dividend policies, set apart in a special fund to await apportionment among the policyholders surviving at the distribution period. 8F(2d)851.

306-55⅕-New. Former stockholders who are liable for an additional tax assessed against the corporation may credit for overpayment on personal incomes due to reporting the transaction as a sale of stock instead of a sale of assets. 25F(2d)608.

306-57 35F(2d)832. [a] **Only deductions authorized by statute are allowable.**-43F(2d)78.

306-58 19F(2d)230; 28F(2d)660 (taxpayer held not entitled to deduct amount of difference between bank balance shown by cash book and that shown by books of bank, where evidence did not explain discrepancy); 36F(2d)212. [a] **Payment for stock by member of social club is not deductible as "initiation fee"** where member owned stock in most respects like stockholder in ordinary corporation. 18F(2d)553. [b] **Reserves** set up to cover contingent liabilities are not deductible in computing net income. 280US445, 50SCt202, 74L ed538, 67ALR1010. [c] **Charitable subscriptions** not paid during taxable year properly disallowed where return was on cash basis. DC 35F(2d)873. [d] **Contributions.**-42F(2d)616.

306-59 36F(2d)893 (dividends held deductible as interest on loan and not capital expenditure); 42F(2d)144. [b] **Percentage** of net profits paid stockholders as partial consideration for consolidation agreement is deductible in determining corporation's income tax. 16F(2d)164; 31F(2d)843; 32F(2d)220. [c] **Holding corporation paying dividend** to former stockholders of subsidiary in accordance with agreement is entitled to deduction for amount so paid. 34F(2d)568. [d] **Statute construed.**-44F(2d)186. [e] **Annuity writer may deduct portion of annual payment** representing interest in computing income. 42F(2d)186. [f] **Rebate on which taxpayer may predicate claim in abatement** is something returned to purchaser to accomplish reduction in purchase price. 42F(2d)251.

306-60 21F(2d)489. [a] **Under War Revenue Act of 1914** property held by bank in fiduciary capacity is not considered in determining tax due on capital. 5F(2d)504.

306-61 37F(2d)277 (showing unpaid losses). [a] **Accrual, or receipts and disbursements, basis.**-24F(2d)230. [b] **Bookkeeping method held unlawful.**-35F(2d)283. [c] **Only actual cash payments can be deducted** where bookkeeping system is on cash received and disbursed basis. 42F(2d)158.

306-61½-New. Judgment recovered in 1919, paid on affirmance in 1921, held not deductible for income tax purposes in 1919, notwithstanding the books were kept on accrual basis. 19F(2d)382.

306-61⅓-New. In apportioning an income tax between the beneficiary and trustee of a tax free annuity, income taxable at a certain rate should be so figured, and deductions, definitely ascribable to certain income, deducted therefrom. 48RI370, 136A440, 51ALR451.

306-61¼-New. Provision of Revenue Act of 1918, authorizing deduction of income permanently set aside, applies to estates in process of settlement. 20F(2d)350.

306-61⅕-New. Deduction to be made for income tax purposes from the proceeds of life insurance policies at maturity of the term determined. 21F(2d)68.

306-61⅙-New. Coal was an article contributing to the prosecution of the war under Revenue Act (1918) § 234a (8), providing for allowance of a deduction for amortization of the cost of facilities for the production thereof. 21F(2d)489.

306-61⅐-New. Opening and development work necessary for working of a coal mine are "constructions" and "facilities" for the production of an article contributing to the prosecution of war. 21F(2d)489.

306-61⅛-New. Bona fide gift may be made to a member of the family although for the purpose of reducing the total income tax. 22F(2d)450.

306-61⅑-New. Granting clause of an instrument creating annuity payable from rents, income, and profits did not pass interest or create a rent charge precluding taxation of interest to grantor. 22F(2d)450.

306-61 1/10-New. Income from property to which the owner had assigned sums payable from net income, retaining control thereof, held not taxable to the owner. 22F(2d)450.

306-61 1/11-New. Income is taxable to the owner granting it as a gift in advance of a receipt. 22F(2d)450.

306-61 1/12-New. Deductions for charitable contributions cannot exceed fifteen per cent of the individual's net income, excluding the part taxed as corporate income. 25F(2d)1014.

306-61 1/13-New. Where a member of a partnership made erroneous entries on his books, showing as part of his gross income moneys which in fact belonged to the partnership, and subsequently corrected the error by crediting the amount of the excess in the partnership's favor, the partner was entitled to allowance of the deduction on his income tax, in accordance with the readjusting entries made after the close of the year. 28F(2d)660.

306-61¼-New. The market value of policies on March 1, 1913, determines the deduction allowed from the proceeds of an endowment life policy at maturity. 27F(2d)237 [certiorari granted 273US 594, 49SCt80(5thcase), 73L ed526].

306-61¼5-New. A corporation, committing a breach of contract and setting up in its books a reserve for such liability, and filing a return on the accrual basis, could deduct from its gross income for such year the amount of its liability, as established by judgment rendered in a subsequent year. 30F(2d)222.

306-61¼6-New. Where an individual elects to have his business income taxed as income of the corporation charitable contributions cannot be deducted. 29F (2d)677 [certiorari den 279US849, 49SCt 346(2dcase), 73L ed992].

306-61¼7-New. The value of an endowment policy on March 1, 1913, as compared with the value in fact later received by insured, determines the deduction allowable. 279US573, 49SCt426, 73 L ed851, 61ALR906.

306-61¼8-New. A taxpayer may deduct the capital return but this does not necessarily mean that no tax can be imposed until the entire capital is received. 31F(2d)924.

306-61¼9-New. amortization as to production of articles contributing to prosecution of war see 30F(2d)962.

306-61½0-New. Pro rata return of the value of a contract right at the death of the owner is deductible from the gross income of the estate. 31F(2d) 924.

306-61½1-New. Assignment of an option for mining leases is not a mere royalty agreement subjecting payments thereunder to income tax without deduction of value of rights transferred. 31 F(2d)924.

306-61½2-New. Where sons received an absolute conveyance from their father, and as a consideration promised to pay annuity to the parents, the amount of such annuity cannot be deducted from the sons' gross income from property conveyed in determining income tax. 29 F(2d)472.

306-61½3-New. When net income and profits of partnership have been fixed, all is taxable to partners without deductions. 38F(2d)165.

306-61½4-New. Where property is bought for the enlargement of a plant, the value of buildings demolished is not deductible in determining the tax. 34 F(2d)513.

306-61½5-New. The total cost as measured by the original contract, plus other sums allowed under a modified agreement increasing the price, are allowed as a deduction. 34F(2d)714.

306-61½6-New. Where a taxpayer makes a return on an accrual basis, charges incurred in one year, but entered on the taxpayer's books the next year, are deductible when incurred and not when entered. 34F(2d)714.

306-61½7-New. Status of income determined by relation to property producing it. 42F(2d)837.

306-61½8-New. Attorney's fees held not deductible as capital expenditure. 42F (2d)820.

306-62 28F(2d)769; 28F(2d)792; 35F (2d)283 (liability must be fixed before it is deductible where accounts are on accrual basis); 35F(2d)968(2dcase) (executives' compensation partly fixed salary and partly on percentage basis); 37F(2d)728; 39F(2d)109; 39F(2d)393; 39F(2d)540 (absolute certainty in fixing expenses not required); 42F(2d)83; 42F(2d)287; 44F(2d)147. [a] (1) But see 268US55, 45SCt429, 69L ed846. (2) Cost of transporting workmen and materials for betterments held not deductible operating expenses. 40F(2d)372. (3) Penalties for violating statutes and regulations held not deductible. 40F (2d)372. [b] (11) Expenditures by railroad as lessee for additions and betterments, acquisition of private rights in old pier, and construction of new pier under pier leases were held to be capital expenses and not deductible. 268US55, 45SCt429, 69L ed846. (12) Matters not expenses of doing business. 39F(2d) 459; 39F(2d)460. (13) Other instances. 39F(2d)425; 42F(2d)849. [c] **Whether repairs were actually paid for** during fiscal year held immaterial. 15F(2d) 345. [d] **Only an aliquot part of rent** under lease for a term is deductible each year notwithstanding large part of rent is payable first year under terms of lease. 11F(2d)878. [e] **Federal corporate income tax is expense** of corporate business. 165La874, 116S218. [f] **Coal company became liable for coal** when removed without authority regardless whether willfully or unintentionally. 39 F(2d)109 (payment of judgment for removal of coal). [g] **Loan to former partner** to be paid from partner's earnings has been held not deductible from income. 39F(2d)540. [h] **Bankers' commissions on sale of corporate taxpayer's stock** are not deductible as ordinary and necessary expenses. 33F(2d) 75. [i] **Part of cost of restoring building after fire** cannot be allowed as ordinary expense. 36F(2d)724. [j] **Commission paid broker for procuring lease for landlord** is deductible. 37F(2d)728. [k] **Credit subsequently extinguished.**-37F(2d)877. [l] **Ordinary expense of carrying on business does not include:** (1) Cost of paper to be used in catalogues remaining on hand at end of year. 37F(2d)988. (2) Payments to estate of deceased partner under agreement for payment of share of net profits. 38F (2d)165. (3) Commission paid by corporation for financing sale of its stock. DC 37F(2d)798. [m] **Expense of operation of automobile in connection with business** is deductible. 38F(2d)391. [n] **Taxpayer on cash basis** can deduct expense only in year when paid. 37F (2d)728. [o] **Contribution to building fund of hospital** made to avoid enlargement of dispensary facilities of factory is deductible. DC 37F(2d)798. [p] **Matters not deductible as expenses from taxable income.**-39F(2d)393; 39F(2d) 420. [q] **Operating racing and breeding stables** for gain is business or transaction for profit entitling deduction for expenses and losses sustained. 33F(2d) 833. [r] **Items held not exempt as expenses.**-36F(2d)347. [s] **Items held not deductible expenses.**-34F(2d)854. [t] **Sums paid as self-insurer under compensation act into reserve fund** are not deductible. 43F(2d)78. [u] **Contribution to civic improvement fund.**-41F(2d)314. [v] **Determination of what items should be charged to expense.**-42F(2d)83. [w] **Cost of acquiring asset** is not deductible as business expense. 42F(2d)128.

306-63 281US115, 50SCt273, 74L ed733 (reasonable additional compensation of officers for services in prior years is deductible for year paid, but allocation to previous years is not permissible); 28F(2d)677; 28F(2d)781; 36F(2d)768 (rendered during taxable year); 39F (2d)940; 165La874, 116S218. [b] **Allowance limited to reasonable salary.**-24F(2d)844. [c] **Compensation having no substantial relation** to measure of services cannot be regarded as within meaning of statute. 278US282, 49SCt 129, 73L ed379; 32F(2d)42. [d] **Extra compensation** voted officers for services in past years is deductible in year in which voted, though books were kept on accrual basis. 31F(2d)874; 32F(2d)42 (extra compensation held reasonable). [e] **Disallowance** of part of deduction of increases in salaries of corporate officers cannot be complained of where such increases were disguised distribution of dividends. 32F(2d)229. [f] **Salary payment to compensate for inadequate salary** for previous years is not deductible. 26F(2d)771. [g] **Deduction is not limited to services rendered within taxable year** but may be made for year in which liability accrued. 36F(2d)599. [h] **Amount paid as salary where no services were performed** is in reality no salary and taxable. 36F(2d)961. [i] **Payment to stockholders of corporation** has been held distribution of profits and not deductible as compensation payments. 39F(2d)393. [j] **Salaries voted stockholders** held not ordinary and necessary expenses of doing business. 42F(2d)181.

306-64 See also DC 32F(2d)949. But see DC 35F(2d)873 (plantation manager's contingent compensation held not deductible). [a] **Amounts credited employee for first year's profit** under several years' contract for division of profits and losses cannot be deducted where credit is extinguished by subsequent losses. 33F(2d)196. [b] **Part bonus** on profits for period of years, not payable till expiration of period, is not deductible for years prior to expiration notwithstanding return on accrual basis. 34F(2d)257. [c] **Extra salary held excessive.**-38F(2d)114. [d] **Forgiveness of debt of deceased employee** held properly treated as bonus. 38F(2d)258. [e] **Bonus must be deducted in year when paid.**-38F(2d)258. [f] **Bonus is not deductible from income of year before it was voted.**-38F(2d)114.

306-67½-New. Term includes bonus paid to investors by a mortgage loan company. 274US99, 47SCt520, 71L ed 946.

306-67½-New. If profits from the illegal sale of liquor are income, the taxable portion thereof must be reached by deducting the expenses of carrying on the business. 14F(2d)564.

306-67¼-New. Attorney's fees paid in defending an accounting suit by a former partner are deductible as "ordinary and necessary" business expenses. 276 US145, 48SCt219, 72L ed505.

306-67½-New. Extra rental paid for the first year of the term is not deductible for that year, but prorated during the term. 23F(2d)676.

306-67¼-New. Life insurance premiums are not deductible as expenses, even where the policy is used as collateral for business loans, where the policy is payable to the estate. 25F(2d)453.

306-67⅐-New. Expenses accrue only when events have occurred from which they can be determined. DC 32F(2d) 949.

306-67⅛-New. Cost of permanent improvements is not deductible as business expense. 32F(2d)404.

306-67⅛-New. In determining whether lessee's expenditures are deductible as business expense or whether they constitute a capital expenditure for permanent improvements, no fixed or rigid rule is applied. 32F(2d)404.

306-67⅒-New. Amount paid in advance as rental or bonus for leasehold interest may be prorated by lessee over period of term. 37F(2d)670.

306-67⅑-New. Reserves to cover contingent liabilities are not deductible. 43F(2d)78.

306-67½-New. Amount paid for five-year partnership interest held not deductible as payment for mere right to do business for fixed period. 43F(2d) 232.

307-69 [a] **Statute is unconstitutional** if it denies deduction of interest on sums borrowed to carry tax-exempt securities by dealer therein. 36F(2d)145. [b] **Taxpayer making returns on accrual basis** has been held not entitled to deduct in 1920 interest paid during year which accrued in prior years. 39F(2d) 890.

307-70 28F(2d)761; 38F(2d)925 (interest paid joint-stock land banks on bonds is not deductible). [a] (8) Under the act of 1913, full amount of twenty nine thousand and twenty five dollars, annual interest paid by corporation having two thousand dollars paid-up capital stock, held not deductible from gross income under statute. 20F(2d)348. (9) Interest paid to stockholders held not deductible. 25F(2d) 1003. [b] **Obligations and securities within exception.**-38F(2d)925. [c] **Where bonds are sold at discount,** discount may be amortized over life of bonds and proportionate part can be deducted each year as accrued interest from gross income. 33F(2d)695. [d] **Corporation taking over assets and liabilities of corporation selling bonds at discount** is entitled to deduct amortized portion of discount each year as accrued interest. 33F(2d)695.

307-70½-New. A taxpayer may show true facts as against the government asserting that interest payments are in fact dividends. 23F(2d)833. [a] **Transaction held loan rather than sale of preferred stock** as affecting right to

deduct interest in calculating income. 23F(2d)833.

307-70⅓-New. Dividends on stock of an intermediate corporation, being a part of the capital expenditure, is not deductible as interest. 29F(2d)576.

307-71 271US1, 46SCt415, 70L ed795, 44ALR1432; 17F(2d)660; 31F(2d)669; 39F(2d)109; 39F(2d)890; 27Hawaii 336. [c] **Corporations making returns** on accrued basis held required to deduct all reserve, including reserve for income tax, from gross income. 269US 422, 46SCt131, 70L ed347. [d] **Income and profit taxes erroneously collected** have been held improperly deducted from invested capital. 39F(2d)645. [e] **Under Revenue Act of 1916.**-282US92, 51SCt11.

307-72 26F(2d)249. [c] **Under Revenue Act of 1918,** where estate's income tax return was on basis of income actually received during year, federal estate tax accruing during year, but not actually paid till following year, is not deductible. 271US9, 46SCt418, 70L ed 799.

307-77½-New. Tax assessed against income of railroad for 1921, which included payment on final settlement for a period of federal control from January, 1918, to March, 1920, held not an "assessment" for the period of federal control so as to render the United States liable for the part thereof representing the normal tax. 271US310, 46SCt493, 70L ed962.

307-77⅓-New. Under the act of 1916, where a tax return is made on an accrued basis, the tax on profits in 1916 should be deducted from the 1916 return, although paid in 1917. 24F(2d) 230.

307-77¼-New. The Revenue Act of 1924 permits a deduction by the legatee of an inheritance tax paid the state by the executor on gift and life income. 25F(2d)763.

307-77⅙-New. Taxes paid in a foreign country are deductible. 26F(2d)249.

307-77⅛-New. Regardless of the difficulty of measurement, the legatee may deduct a proportionate amount of an inheritance tax. 25F(2d)763.

307-77½-New. A corporation which paid an income tax on interest which it paid on its "tax-free covenant bonds," without deduction for the tax, was not a "taxpayer" within the Revenue Act, entitled to deduction. 28F(2d)370.

307-77⅛-New. Where taxes are returned by the government, a taxpayer's income tax returns may be readjusted so as to eliminate such deduction. 31 F(2d)867.

307-77⅙-New. Foreign tax payments are deductible from income of taxpayer keeping book on accrual basis at time they accrued. 281US357, 50SCt251, 74 L ed901.

307-77⅒-New. Where, under will, inheritance taxes were paid by executor and deducted before distribution of residue in which widow took share, she is not entitled to further deduction to extent of her proportionate share. 38 F(2d)527.

307-78 24F(2d)520.

307-79 20F(2d)935.

307-79½-New. A tax levied against a bank under a state law providing for assessment of taxes against stockholders, and payment by the bank, with liability over against stockholders, held not deductible by the bank. 27F(2d) 882.

307-80 13F(2d)258; 19F(2d)230; 28 F(2d)629; 28F(2d)748; 30F(2d)54 [certiorari den 279US849, 49SCt346(7th case), 73L ed993]; 31F(2d)399; 37 F(2d)277 (necessity of paying loss); 39F(2d)361; 39F(2d)381 (losses on property must be supported by inventory); 42F(2d)729. [a] **Losses from sale** are deductible from gross income. 33F(2d)77 (statute not requiring losses to be disregarded). [b] **Partially worthless debts.**-38F(2d)550. [c] **Losses incurred in trade or business.**-38F(2d)755; 38F(2d)810. [d] **Worthless debts.**-38F(2d)810 (loss not sustained). [e] **Losses held not deductible.**-35F(2d)139; 35F(2d)938; 36F(2d) 11; 39F(2d)381; 42F(2d)833. [f] **Evidence held insufficient** to show loss. 34F(2d)677. [g] **One guaranteeing debt of another** and paying it sustains deductible business loss. 34F(2d)450 (1stcase) (loss deductible as of year when notes were given). [h] **Partial loss** is allowable for debt partially bad, and it is unnecessary to await termination of debtor's receivership to determine amount uncollectable. 35F(2d) 713.

307-81 274US398, 47SCt598, 71L ed 1120; 275US243, 48SCt63, 72L ed262; 8F(2d)91; 29F(2d)668; 31F(2d)867; 38F(2d)711; 39F(2d)58; 42F(2d)781; 42F(2d)849. See also 34F(2d)255. [a] **Loss arising from bad debt** is not character of loss allowable as deduction under Revenue Act (1918) § 234(a) (4), where not ascertained to be worthless and charged off during taxable year. 8 F(2d)91. [b] **Act of 1913.**-8F(2d)851. [c] **Abandonment of trade name.**-38 F(2d)718 (loss not deductible under facts). [d] **Losses deductible.**-31F(2d) 79; 35F(2d)445. [e] **Losses not deductible.**-30F(2d)166; 31F(2d)15; 31 F(2d)706; DC 35F(2d)880. [f] **"Worthless debt."**-(1) 31F(2d)47. (2) 35 F(2d)713. [g] **Loss resulting from sale of property for depreciated value.**-38 F(2d)718 (loss of good will not deductible). [h] **In determining income and profit taxes of affiliated corporations,** under Revenue Act (1918) § 240 (a), the consolidated invested capital was properly ascertained by setting off losses of one corporation against undivided profits of others. 26F(2d)771. [i] **Cost of acquiring asset** is not deductible as loss. 42F(2d)128. [j] **Corporation on surrender of insurance policies on officers' lives** can deduct as loss difference between premiums paid and surrender value. 42F(2d)287.

307-82 28F(2d)803 [certiorari den US 49SCt254 (1stcase)]; 31F(2d)999; 36 F(2d)724 (necessity of showing worth of property damaged by fire); 37F(2d) 703 (loss because bread wrappers purchased during war were too small for loaves baked after armistice); 39F(2d) 383; 43F(2d)256. [a] **Losses incurred in trade or business.**-23F(2d)975 (stock farm held not operated as business); 43F(2d)348. [b] **Losses reasonably certain in fact** and ascertainable in amount are deductible before realized, under certain circumstances. 280US445, 50 SCt202, 74L ed538, 67ALR1010. [c] **Loss sustained in one year** cannot be deducted for subsequent year in which loss was ascertained. 37F(2d)275. [d] **Losses from bankrupt stock** should be claimed in year of adjudication, and cannot be deducted in subsequent year. 34F(2d)677. [e] **Loss during year when stock becomes worthless** is deductible though future event might give it value. 40F(2d)697. [f] **Loss of deposit resulting from closing of bank.**-44F(2d)54.

307-83 274US398, 47SCt598, 71L ed 1120; 8F(2d)91; 27F(2d)882; 28F(2d) 551; 28F(2d)803 [certiorari den US 49 SCt254(1stcase)]; 33F(2d)793; 34F (2d)439; 38F(2d)509. See also 34F(2d) 777. [c] **Under Revenue Act of 1913.**-271US109, 46SCt436, 70L ed859. [d] **Under Revenue Act of 1918.**-15F(2d) 626. (2) 22F(2d)536. [e] **Losses in closed transaction** include losses due to seizure of subsidiary under Trading with Enemy Act, despite possibility of claim before mixed claims commission. 274US398, 47SCt598, 71L ed1120. [f] **Cost of oil-burning equipment,** less salvage, because it failed to work, held deductible as loss. 25F(2d)455. [g] **Payments pursuant to judgments.**-38F (2d)509 (amount must have been finally determined). [h] **Loss of building.**-38 F(2d)718 (formerly constructed and used as brewery). [i] **Loss by breach of contract** is not deductible as of year of breach where judgment was recovered several years subsequent to breach. 280US445, 50SCt202, 74L ed538, 67ALR 1010. [j] **Affiliated corporation** is entitled to benefit of deduction of net loss from net income for preceding year regardless of separation of one corporation from group. 38F(2d)365. [k] **Losses occasioned by abandonment of mail cuts** are deductible by corporation selling out business. 34F(2d)795. [l] **Loss by affiliated company** cannot be claimed by corporation which had loss deducted from its income in following year. 41F(2d)55. [m] **Taxpayer ought not to be penalized for deferring claim for deductions on account of losses** until he has resorted to reasonable measures for avoiding or minimizing threatened loss. 43F(2d)904. [n] **Loss due to embezzlement by corporation's president** is deductible. 43F(2d)904. [o] **Loss from breach of contract** is deductible in year of breach only if contract is performable in comparatively short period. 43F(2d)503. [p] **Taxpayer under contract to sell at loss** cannot deduct estimated loss where contract was not completed until following year. 43F (2d)503.

303-84 276US582, 48SCt326, 72L ed 714; 17F(2d)522 (loss in sale of taxpayer's residence is not deductible, as purchase of residence is not transaction entered into for profit); 18F(2d)452; 28F(2d)78; 28F(2d)748; 39F(2d)351 (character of transaction at time entered controls); 39F(2d)358; 39F(2d) 360. But see DC 36F(2d)551. [a] **Loss sustained where taxpayer subscribed to fund to restore company's solvency** was difference between subscription in 1906 and amount received. 39F(2d)351. [b] **"Transaction entered into for profit."**-43 F(2d)256. [c] **Contribution by director to pool to take over bank's questionable assets** is not deductible. 43F(2d)348.

308-85 [b] (2) 41F(2d)865. (3) Single isolated activity or transaction does not constitute "business or trade" within act of 1921. 41F(2d)865. (4) "Trade or business regularly carried on" within act of 1921 is vocation and not occasional or isolated transaction. 41F (2d)865.

308-86 30F(2d)622; 39F(2d)361; 39F (2d)473 (deductible even though loss not sustained through full twelve months' taxable period).

308-86½-New. Losses are deductible without establishing the impossibility of eventual recoupment. 274US398, 47 SCt598, 71L ed1120.

308-86⅓-New. Partnership cannot deduct loss personally assumed by partner and deducted in partner's personal return. 16F(2d)928.

308-86¼-New. Taxpayer may deduct from gross income damage from wreck of automobile on icy road as loss from "other casualty." 16F(2d)995.

308-86⅕-New. A corporation is held not entitled to deduct notes receivable from income as loss sustained during the year because of notes becoming nonnegotiable. 21F(2d)65.

308-86⅙-New. A corporation could not deduct notes given for lease royalties as loss, where it was required to pay royalty in any event, the notes being a credit against royalty. 21F(2d)65.

308-86⅐-New. Foundry did not sustain loss of good will, authorizing deduction therefor, by sale of capital assets. 21F(2d)492.

308-86⅛-New. A note due a bank for a loan is held a debt not deductible where not ascertained to be worthless and charged off during the taxable year. 20F(2d)935.

308-86⅑-New. To entitle a bank to deduction for worthless loans, improperly negotiated by its officers as losses through embezzlement, fraudulent intent must be shown. 20F(2d)935.

308-86⅒-New. To secure deduction, worthless debts must be charged off in the year they are, or should be, ascertained to be worthless. 22F(2d)6.

308-86 1/11-New. Attorney's fees for defending an accounting action brought by a former partner are not losses under the Income Tax Law. 276US145, 48SCt219, 72L ed505.

308-86 1/12-New. Losses on sale of securities, transferred in trust, but withdrawn, are deductible from personal income of donor. 22F(2d)184.

308-86 1/13-New. Loss of good will on liquidation of corporation does not require deduction. 25F(2d)425.

308-86 1/14-New. Damages to trees about

residence, due to storm, is deductible. 25F(2d)520.

308–86½5–New. Loss for sale of stock is determined on basis of total cost of stock sold and new stock purchased. 25F(2d)534.

308–86½6–New. Loss on note executed before March 1, 1913, is deductible only for difference in value on such date and date charged off. 26F(2d)547.

308–86½7–New. Guarantor's claim against corporation is deductible only in year it was charged off, and was not "loss." 25F(2d)608.

308–86½8–New. Corporation doing business in foreign country may deduct as losses depreciation of assets due to deflation of value of foreign money. 26 F(2d)249.

308–86½9–New. Life tenant, receiving net income, is held not entitled to deduct allowance for losses to principal of estate because it was distribution of capital. 25F(2d)528.

308–86½0–New. Where a bank determined that three of seven notes, all representing liability of a particular individual, were worthless, but charged off thirty five per cent of the total paper, instead of the amount of the three worthless notes, in order to avoid impairment of its surplus, and charged off proportionate amounts of the paper during subsequent years, the amount first charged off was not deductible from the bank's gross income. 27F(2d)762; 28F(2d)763.

308–86½1–New. A taxpayer may apply a net loss during an intervening period less than a year against the preceding fiscal year's net income on a voluntary change from the fiscal to the calendar year. 27F(2d)762.

308–86½2–New. Loss on a hedging contract is deductible for the year the contract closed notwithstanding the contract was entered into for preventing speculation under a future sales contract completed the following year. 26 F(2d)705.

308–86½3–New. A taxpayer cannot deduct a loss from the 1919 income on exchanging property for stock of a corporation adjudicated bankrupt in 1921. 27F(2d)564.

308–86½4–New. For the purpose of an income tax, one who in 1901 abandoned residence and leased it for profit, and in 1920 sold it, is entitled to deduction from his gross income for 1920 of the difference between the sale price and its greater value on March 1, 1913. 27 F(2d)1012.

308–86½5–New. A taxpayer cannot deduct loss resulting from an exchange by showing that at the time of the exchange there was no market value of the stock received in exchange. 27F (2d)564.

308–86½6–New. Fact that stock issued on incorporation of partnership had small aggregate par value will not permit deductions from income of partnership. 38F(2d)965.

308–86½7–New. Net income of partnership is not subject to deduction of losses sustained or expected to be sustained in year following taxable year for which partners required to pay tax. 38F(2d) 965.

308–86½8–New. Evidence held to sustain finding that net loss did not result from business regularly carried on, so as to be deductible in following year. 36F(2d)614.

308–86½9–New. Loss resulting from worthlessness of process purchased is not deductible as loss of year of purchase where it was not discarded until subsequent year. 37F(2d)703.

308–86½0–New. Corporation accepting president's note for amount appropriated by him is not entitled to deduct amount as loss. 37F(2d)775.

308–86½1–New. Loss resulting from the purchase of a worthless patented process is deductible only as of the year when tested. 34F(2d)513.

308–86½2–New. The amount on the face of the note claimed worthless cannot be considered prima facie the value or cost thereof in determining deductions to be allowed. 34F(2d)576 (no evidence of ascertainment of worthlessness).

308–86½3–New. Uncollectible portion of debts may be deductible where amount of loss is fixed by identifiable events such as adjudication in bankruptcy. DC 37F(2d)806.

308–86½4–New. Rebates allowed on sales because of breach of warranty are not deductible. DC 37F(2d)821.

308–86½5–New. Advancements over the amounts agreed to be paid, treated as a debt, settled and cancelled by agreement, are not deductible. 34F(2d)714.

308–86½6–New. Advances over the amount agreed to be paid for merchandise are not deductible where it is not shown that amount was lost beyond recovery or that litigation was impending. 34F(2d)714.

308–86½7–New. Damage to timber caused by insects is deductible during the years the damage was actually incurred. 34F(2d)714.

308–86½8–New. Such deduction is unauthorized without determination that obligation was worthless and charging it off as required by statute. 37F(2d) 775.

308–86½9–New. That act of 1921 expressly provides for partial charge off of debt recoverable only in part is not conclusive that prior act did not authorize it. DC 37F(2d)806.

308–86¼0–New. Amount credited to buyer for breach of warranty on sale of goods in previous year is not rebate pursuant to contract made in previous year. DC 37F(2d)821.

308–86¼1–New. Deduction for loss based on difference between accrued liabilities and inventory of assets can include only liabilities owing at close of tax year. 40F(2d)412.

308–86¼2–New. Debt to be deductible must be worthless and charged off within taxable year. 40F(2d)695 (worthless note not charged off held not deductible).

308–86¼3–New. Taxpayer cannot claim loss as of year later than that in which it occurred. 40F(2d)697.

308–86¼4–New. Ninety per cent of amount of bonds of imperial Russian government held deductible where they were quoted on market at ten per cent of par value. DC 41F(2d)111.

308–86¼5–New. Worthless debt must be deducted during year when worthlessness is ascertained. 43F(2d)348.

308–86¼6–New. Worthless debt has been charged off where taxpayer in good faith forms mental determination to charge debt off. 43F(2d)348 (contribution by bank director to pool to take over questionable assets held charged off).

308–87 26F(2d)690; 28F(2d)995; 32 F(2d)812; 42F(2d)837. But see 42 F(2d)942. [b] **Lessee's interest under mining lease** is "property" to which provisions for deduction for "wear and tear of property" and "a reasonable allowance for depletion" are applicable. 267US364, 45SCt274, 69Led660. [c] **Lessee of mine** has been held entitled to charge depletion against royalty income from sublease in computing income and excess profits tax. 267US 364, 45SCt274, 69Led660. [d] **Computation of depletion of oil reserves from gradual sale of property.**–40F(2d)493. [e] **Where taxpayer transferred undivided half interest in oil lease for cash consideration,** deduction cannot be made for depletion. 40F(2d)892. [f] **Provision construed.**–42F(2d)942. [g] **Allowance for depreciation on patents** begins from date of patent. 43F(2d)1008. [h] **Trust beneficiaries under will entitled to deductions.**–42F(2d)837. [i] **Royalties are income to extent they exceed depletion.**–42F(2d)837. [j] **Contracts relating to oil lease have been held not mortgage,** pledge, sublease, or sale, but assignment of interest. 42 F(2d)942. [k] **Extraction of ore as depletion.**–42F(2d)837.

308–88 280US227, 50SCt96, 74Led385; 30F(2d)369 [certiorari granted 279US 831, 49SCt352(3dcase), 73Led981]. [a] (3) But see 279US333, 49SCt337, 73Led 720. (15) In determining capital invested during taxable year for corporations engaged in coal mining, depletion charge for ton of coal mined in accordance with amount written off for such year by taxpayer, without regard to rate used in preceding years, is proper. 26F(2d)771. [c] (2) Commissioner may properly compute depreciation of coal mining corporation's machinery and equipment on basis of tonnage produced according to original, not revised, estimate of coal recoverable. 28F(2d)995. (3) In fixing March 1, 1913, value of coal mine lease for purposes of depletion, future profits from commissary need not be considered. DC 36F(2d)545. (4) Other instances. 35F(2d)31.

308–89 20F(2d)977; 38F(2d)707 (no deduction for obsolescence of good will due to state Prohibition Law); 44F(2d) 147. See also 279US333, 49SCt337, 73 Led720. [a] **Obsolescence of good will** of business of distilling and selling whisky due to prohibition is not deductible. 280US387, 50SCt156, 74Led 501. [b] **Items not subject to deduction** for depreciation. 44F(2d)144. [c] **Loss due to depreciation falls on remainderman** in computing tax. 44 F(2d)144.

308–90 30F(2d)219 [certiorari granted 279US832, 49SCt419(3dcase), 73Led 981]; 35F(2d)351(2dcase) (regardless of possible monopoly of business). See 27F(2d)17. But see 42F(2d)216(2d case); 42F(2d)343. [a] **Congress may tax income** without deduction for exhaustion of capital. 5F(2d)723. [b] **Deduction for obsolescence of good will** is not within purview of statute. 8 F(2d)180. [c] **Held not entitled to allowance.**–27F(2d)17. [d] **Burden of proof.**–27F(2d)17. [e] **Deductions held allowable.**–31F(2d)676. [f] **Deductions held not allowable.**–31F(2d)676. [g] **Obsolescence of good will** of brewery destroyed by prohibition is not deductible. 280US384, 50SCt155, 74Led498. [h] **Deductions are limited** to depreciable property. DC 33F(2d)559. [i] **Allowance as basis for computation of depreciation** held properly refused. 34 F(2d)861.

308–91 24F(2d)115; 27F(2d)200 [certiorari granted 278US594, 49SCt37(3d case), 73Led525]; 36F(2d)724; 39 F(2d)338 (life tenant). [b] **Depreciation is deductible from cost** in figuring gain from sale of property. 25F(2d) 453. [c] **Credits taken for repairs and machines abandoned** reduced allowance for depreciation. 39F(2d)645. [d] **Patents.**–34F(2d)492. [e] **Use of inexperienced labor during war period** reducing life of machinery more rapidly did not show insufficient allowance for depreciation. 39F(2d)645. [f] **Deductions for amortization** may be spread over entire period amortized facilities were in use as wartime facilities. 39 F(2d)645 (determination of amortization allowance).

308–92 29F(2d)498 [certiorari den 279 US876, 49SCt349(7thcase), 73Led 1010]; 31F(2d)676; 35F(2d)38 (commissioner's computation of depreciation in determining net gain from sale of assets held justified); 37F(2d)191 (computation of deduction of exhaustion in certain patents). But see 41 F(2d)66. [a] **Under Revenue Act of 1916** no deduction is allowable for diminished value of contract arising solely from lapse of time. 5F(2d)723. [b] **Under Revenue Act of 1918** deduction is allowable for diminished value of contract arising from lapse of time. 5F(2d)723; 15F(2d)626. [c] **Corporation holding contract March 1, 1913** for purchase of material, having seventy six months to run, held entitled to deduct each year from its gross income twelve seventy sixths of fair value of contract on March 1, 1913 consisting of present value on that date of differences between market value and contract price of material which it was reasonably certain to purchase. 5F(2d) 723. [d] **Insurance companies.**–8F(2d) 851. [e] **Exhaustion of leaseholds** will not be allowed as deduction in absence of showing unexpired terms, provisions thereof, or investment therein. 24F(2d)

176. [f] **Change in usefulness of bread wrappers** does not involve deductible loss. 34F(2d)513. [g] **Basis for deduction** is based on theory that at end of useful business life aggregate of sums deducted will equal original cost. **DC** 33F(2d)372. [h] **Lessee held not entitled to deduction:** (1) Of contingent replacement fund for terminal facilities where it had no capital investment therein. **DC** 36F(2d)541. (2) For depreciation of leased hotel building. 36F(2d)51(1stcase). [i] **Deduction for exhaustion not allowed.**–36 F(2d)107. [j] **Determination of amount of corporation's invested capital** for purpose of computing depreciation. 34 F(2d)861. [k] **Allowance for exhaustion of patents** should be computed on basis of remaining life of patent at date acquired. 43F(2d)1008. [l] **Expenditure of organizing corporation with twenty-year charter** is properly charged to capital and amortized over life of charter and allowed as depreciation. 43F(2d)298. [m] **Corporate franchise** is used in trade or business within provision for allowance for depreciation. 43F(2d)298.

309-92½-New. Returns required of income from violation of prohibition law held valid. 274US259, 47SCt607, 71 Led1037.

309-92⅓-New. Under the Revenue Act of 1918 depreciation of the value of German marks does not come under the clause relating to depreciation or loss, without an actual loss. 15F(2d) 445.

309-92¼-New. Depreciation as used in the statute is intended to cover the estimated lessening in value of the original property due to wear and tear in spite of current repairs. 20F(2d)921.

309-92⅕-New. Coal company may deduct cost of opening shafts under provision relating to amortization of cost of buildings, etc., or other facilities. 23F(2d)673.

309-92⅙-New. "Building, machinery, and equipment" do not limit meaning of "other facilities," in provision for deduction. 23F(2d)673.

309-92⅐-New. Loss of good will due to closing of wine business under Prohibition Law is not "obsolescence," deductible under statute. 26F(2d)77.

309-92⅛-New. Invested capital is determined by deducting two per cent annually from the value of the buildings for depreciation, although the entire property has appreciated to at least an equal extent. 25F(2d)42.

309-92⅛-New. A corporation having a branch business in France is entitled to deduction because of depreciation, in terms of dollars, of value of franc. 26F(2d)249.

309-92⅒-New. Actual expense incurred in securing an agreement from the government is regarded as the basis for deduction from income tax for exhaustion. **DC** 33F(2d)372.

309-92 1/11-New. Obsolescence of brewery company's property because of imminent prohibition legislation is deductible under act of 1918 without abandoning assets. 38F(2d)217.

309-92 1/12-New. Theater owners compelled to organize corporation and issue stock to persons who had obtained theater lease held not entitled to deduction for amortization of lease. 38F(2d) 354.

309-92 1/13-New. Depreciation for exhaustion of a leasehold is not allowed. 34F(2d)698.

309-92 1/14-New. A contract to manufacture guns, including services, is not a sufficient basis of "capital" for deduction for exhaustion. **DC** 33F(2d) 372.

309-92 1/15-New. Determination of depreciation reserve by commissioner. 35 F(2d)10.

309-92 1/16-New. Statute and regulations providing for deductions for amortization of cost of facilities constructed to produce war materials are inapplicable where facilities are continued in use. 40F(2d)425.

309-92 1/17-New. Such statute is inapplicable to items not actually used as facilities during war period. 40F(2d) 425.

309-92 1/18-New. For purpose of amortization of cost of such facilities continued in use fair value for such use constitutes residual value. 40F(2d) 425 (commissioner's calculation held proper).

309-92 1/19-New. Only part of cost of such facilities can be charged against war income where there was partial loss during post-war period. 40F(2d) 425.

309-92 1/20-New. Certain claimed deductions for such purpose disallowed. 40 F(2d)425.

309-92 1/21-New. "Reasonable allowance" for depreciation depends on peculiar facts of each case. 43F(2d)345.

309-92 1/22-New. Depreciation deductible must be reasonable. 43F(2d)331.

309-92 1/23-New. March 1, 1913, fair market value of patents previously acquired, is basis upon which income tax should be computed for income tax purposes in subsequent years. 43F(2d) 619.

309-92 1/24-New. Depreciation deductible represents reduction during year of capital assets through wear and tear of plant. 43F(2d)331.

309-92 1/25-New. Additional costs and expenses paid by manufacturer to procure completion of additional plant within limited time are deductible. 43 F(2d)331.

309-93 [d] **Estimated value of future premiums** waived on proof of total and permanent disability held not deductible as addition to "reserve funds." 271US 109, 46SCt436, 70Led859. [e] **Special fund set aside** to meet unreported losses during year held not deductible as addition to "reserve funds." 271US109, 46SCt436, 70Led859. [f] **Addition to fund set aside** for payment of annuities to former agents held not deductible as addition to "reserve funds." 271US 109, 46SCt436, 70Led859.

309-98 [a] **Amount required of insurance company** by insurance superintendent of another state on account of unsettled loss as condition precedent to right to do business in such state held not deductible as addition to reserve funds in ascertaining net income. 269 US197, 46SCt97, 70Led232.

309-2 42F(2d)158; 42F(2d)729. [a] **Attorney's fees for defending accounting action** brought by former partner are not personal, living, or family expenses. 276US145, 48SCt219, 72Led 505. [b] **Gifts to birth control league** are not deductible. 42F(2d)184.

309-3 42F(2d)128. [a] **Agreement to increase annual payments in consideration of conveyance** is without consideration, and amount of increase is not deductible in computing income. 42F(2d) 186. [b] **Items not deductible.**–44F(2d) 254.

309-4½-New. A "reserve" from net income derived during the taxation period for the payment of federal income taxes payable during the succeeding year is not deductible. 27Hawaii336.

309-4⅓-New. Value of buildings demolished on property purchased for enlargement of corporation's plant is not deductible. 37F(2d)703.

309-4¼-New. Where the cost of merchandise is lower than the market, a taxpayer cannot deduct the percentage therefrom. 36F(2d)379.

309-4⅕-New. Amount set up in publishing corporation's books as reserve for return of magazines from distributors held not deductible. 40F(2d)145.

309-7 [a] **Under Revenue Act of 1913,** permitting insurance companies to deduct premiums paid back or credited to policyholder, over payments of premiums awaiting apportionment under deferred dividend policies are not deductible. 271US109, 46SCt436, 70Led859.

309-8 282US101, 51SCt58; 282US118, 51SCt62(1stcase); 282US122, 51SCt62 (2dcase); 282US127, 51SCt64. [a] **Right of wife to make separate return.**–38F(2d) 642 (where her interest in community property is vested); 38F(2d)649 (joint owners); 38F(2d)651 (where her interest in community property is vested).

309-17 28F(2d)81; 28F(2d)916; 35 F(2d)381 (consolidated return held not justifiable); 42F(2d)11. [a] **Evidence held to establish corporations were "affiliated"** so as to authorize filing of consolidated returns. 37F(2d)285. [b] **Revenue Act (1921) § 1331** held constitutional. 43F(2d)782.

309-23 42F(2d)820.

310-34 48Philippine764.

310-35½-New. Book entries, although evidential, are not conclusive in determining income. 26OhNPNS201.

310-35⅓-New. A claim will not lie against a corporation for tax on funds fraudulently passed through corporate accounts, but against individual promoters of the fraudulent scheme. 26 OhNPNS201.

310-35¼-New. A taxpayer cannot repudiate waiver of limitations against assessment of income taxes. 35F(2d)620.

310-35⅕-New. Notice of deficiency required to be sent to a taxpayer is insufficient to extend the limitation period where sent to an executor after his discharge. 36F(2d)207.

310-36 [a] **Dissolved corporation is not properly chargeable** for portion of year not in existence. 39F(2d)984.

310-38 15F(2d)264; 26F(2d)670(2d case); 26F(2d)690; 27F(2d)882; 28 F(2d)781. [b] (2) Royalty from phonograph records sold in, but made before, 1917, is properly included in 1917 excess profits tax as income from "business," such income not being from property arising from ownership. 23F(2d) 328. [c] (1) 13F(2d)906. (9) "Invested capital" is limited to actual contributions of cash or property at cash value in exchange for stock of corporation, and actual accessions by way of surplus valued at time of acquisition, and does not include enhanced market value of property after its acquisition. 13 F(2d)906. (10) Amusement corporation, with capital fixed at minimum sum required by law, operating under plan that expenditures should be met out of receipts, held to have no more than nominal capital. 14F(2d)553. (11) Where good will is purchased with shares of corporation, it may be included in invested capital for purpose of determining excess profits taxes at value not to exceed its actual cash value at time of such purchase, and in amount not to exceed twenty per cent of shares of capital stock outstanding. 26F(2d) 670(2dcase). (12) Money borrowed by brokerage corporation, and proceeds of stock dividends claimed to have been left in business and used therein, held not "invested capital." 28F(2d)906. (13) "Invested capital" is laying out of money, in acquiring interest in concern with view to obtaining income or profit from conduct of its business, or by concern itself in acquiring something of permanent use. 28F(2d)878. (14) Molds, patterns, flasks, and fallow boards used by corporation engaged in manufacture of cast-iron furnaces, stoves, and ranges could be classed as invested capital if value of articles were properly set up. 28F(2d)878. (15) "Nominal capital" is that which is capital in name only and which is not substantial; not real or actual; merely named, stated, or given, without reference to actual conditions. 31F(2d)274. (16) Instances of capital held not nominal see 31F(2d) 274. (17) Test whether capital is nominal is not amount of business carried on by corporation. 31F(2d)274. (18) Burden of proving that capital is nominal is on taxpayer. 31F(2d)274. (19) Subsequent events are admissible to show bona fides at time notes were paid in, in determining whether value of notes taken for stock should be included in invested capital. 31F(2d)274. (20) Illustrations of invested capital. 30 F(2d)189; 31F(2d)545; 31F(2d)594. (21) Illustrations of what is not invested capital. 29F(2d)487 [certiorari den 279 US842, 49SCt263(5thcase), 73Led988]. (22) Illustrations of what is not "earned surplus." 31F(2d)594. (23) Corporation held not corporation having "not more than nominal capital." 34F(2d) 977. (24) Items held to constitute "invested capital." 35F(2d)360. (25) "Capital" does not include money used by corporate advertising agency for sal-

aries, office rent, supplies, and incidental expenses of operation. 21F(2d)636. (26) Corporate advertising agency held to have only nominal capital. 21F(2d) 636. (27) Merchandise brokerage corporation deriving income primarily from commissions on sales, though buying occasionally to fill in pool car shipments for benefit of lower freight rates, is taxable as personal service corporation having only nominal capital. 25F(2d)894. (28) Cost of extending slopes in coal mine should be included. 24F(2d)180. (29) Consolidated corporation in computing invested capital can count only cash value of property paid for its stock by affiliated corporation. 43F(2d)782. (30) Instances of capital held not nominal. 42F(2d)609. [g] **Liability in particular cases.**-8F(2d)913. [h] **Dividends from old surplus** held not subject to excess profits tax. 36F(2d)464.

310-39 275US215, 48SCt71, 72L ed247; 38F(2d)935 (borrowed capital defined by Revenue Act (1918) § 325 properly excluded as part of invested capital); 39 F(2d)726 (notes given for stock did not constitute invested capital to be considered in determining profits tax); 39 F(2d)986; 42F(2d)837; 42F(2d)849. [a] **"Borrowed capital"** of corporation is excluded from basis for tax on corporation. 26F(2d)17. [b] **Payments to contractor** under agreement for cancellation of original war contract were attributable to original contract, within meaning of Revenue Act. 30F(2d)630. [c] **Expenditures of government war contractor** in remodeling plant after cancellation of contract were proper deductions in arriving at net income taxable under Revenue Act. 30F(2d)630. [d] **Corporation, committing breach of contract** and setting up in books reserve to meet liability and filing return on accrual basis, can deduct from income for year amount established by later judgment. 30F(2d)222. [e] **Same income is to be ascertained** for use both in computation of excess and war profits tax and income tax. 39F(2d)991.

310-40 [a] **Where taxpayer had "heretofore maintained reserve" for bad debts,** subsequent deduction for bad debts, as matter of technically correct form, should have been charged as addition to reserve for bad debts. 29F(2d)339. [b] **Percentage** of net profits paid stockholders as partial consideration for consolidation agreement, is deductible in determining corporation's profits tax. 32 F(2d)220.

310-43½-New. Relative to excess profit tax, agreement of partner with other partners personally to stand any loss that might occur in the partnership on two accounts held not to inure to the benefit of the firm, but of other partners. 14F(2d)987.

310-43¼-New. [§ 96a] E. **Evasion of Income Tax.** A bona fide contract for the sale of lumber business and a lease fixing the valuation of good will is not impeachable by the government as mala fides and illegal evasion of the income tax on such valuation. 8F(2d)106.

310-43¼-New. Good will paid for by shares is "invested capital" under statutes, to extent of actual value, not in excess of twenty per cent of total shares. 26F(2d)139.

310-43½-New. Thus, brokerage firm paying thirty thousand dollars for good will is not exempt from tax on ground of having no invested capital. 26F(2d) 139.

310-43⅛-New. "Invested capital" does not include intangible good will paid for by income bonds, to be redeemed from future earnings. 26F(2d)187.

310-43⅛-New. Capital and income of real estate business is held to belong to partnership and not subject to excess profits tax as property of corporation. 23F(2d)511.

310-43⅛-New. Jewelry Safety Fund Society, returning to members balance of their deposits after paying losses, is held not subject to excess profits tax. 24F(2d)385.

310-43⅙-New. Bonds paid to the holder of a patent process are subject to profit tax at the market value. 26F(2d) 690.

310-43 1/10-New. A tax paid by a bank under a state law making a stockholder liable therefor is not deductible by the bank. 27F(2d)882.

310-43 1/11-New. An insurance agency corporation having authorized capital of twenty five thousand dollars was a corporation having not more than nominal capital for the purpose of a profit tax where income producing agency is a personal service of stockholders. 26 F(2d)734.

310-43 1/12-New. The value of a contract assigned to a corporation free is properly excluded from its invested capital. 28F(2d)557.

310-43 1/13-New. Excess profits taxes accrue at the end of the year. 30F(2d) 683. [a] **Transaction is complete and rights vest** at time of acceptance, and subsequent delivery of deed and collection of purchase price do not affect vendor's obligation to allocate profit from transaction to such year for profits tax purposes. 30F(2d)680.

310-43 1/14-New. or when they are fixed and enforceable liability is created. 30 F(2d)680.

310-43 1/15-New. The value of good will as determined for taxable year, under Rev. Act (1918) § 326(a) (4), is properly taken as the value for prewar years in determining war profits credit, although it appreciated in value prior to the tax year. 29F(2d)654 [certiorari den 279 US855, 49SCt351(4thcase), 73L ed997].

310-43 1/16-New. An organization operating under a declaration of trust is a corporation for profits tax purposes. 29 F(2d)137.

310-43 1/17-New. Consolidated entity held entitled to deduction of percentage of invested capital from income before applying excess profits tax rates. 38F(2d)248.

310-43 1/18-New. Under act of 1918 separation of corporation from affiliated group during year does not end taxable year for purpose of determining consolidated net income. 38F(2d)365.

310-43 1/19-New. Professional singer held not exempt from liability for excess profits tax on royalties received in 1917 from sales of duplicate phonograph records made prior thereto. 38F(2d) 57.

310-43 1/20-New. Value of circulation of newspaper gratuitously received cannot be included in invested capital of corporation in determining profits tax. 37 F(2d)783.

310-43 1/21-New. Loans paid by issuance of stock constitute invested capital. 37 F(2d)660.

310-43 1/22-New. Fair cash value of obligation of lessee under long term railroad lease to discharge lessor's funded debt is invested capital for purpose of excess profits credits. 37F(2d)670.

310-43 1/23-New. Money borrowed to be used in business cannot be considered as invested capital within statute imposing flat rate on business having no invested capital. 37F(2d)778.

310-43 1/24-New. Unrealized profits on installment sales must be excluded from computation of invested capital under installment method of accounting. 40 F(2d)126.

310-43 1/25-New. Entries in taxpayer's books of charges to current expenses are not conclusive in determining invested capital. 40F(2d)432.

310-43 1/26-New. Cash paid for reissued stock turned in for purpose of liquidation of assets other than good will of corporation taken over by taxpaying corporation held invested capital. 40 F(2d)454.

310-43 1/27-New. Cash paid in excess of their value for tangible assets of corporation to rid purchaser of guaranty obligations held not invested capital. 40 F(2d)454.

310-43 1/28-New. Stockholders' advances to corporation for construction of building held not invested capital but borrowed capital. 41F(2d)66.

310-43 1/29-New. Reduction of invested capital by claimed depreciation of store fixtures held unjustified. 41F(2d)66.

310-43 1/30-New. Provision of revenue act of 1918 for computing invested capital in case of reorganization of trade or business includes reorganization of corporation. DC 41F(2d)117. [a] **Word "control"** in provision, when applied to corporation, relates to control by stockholders. DC 41F(2d)117 (transfer held to leave more than fifty per cent of stock in control of old stockholders).

310-43 1/31-New. Model drawings of taxpayer engaged in manufacture of machinery held invested capital. 40F(2d) 432.

310-43 1/32-New. Cash paid for corporate stock not reduced by operating deficits held invested capital. 40F(2d)454.

310-43 1/33-New. Cash paid in by one taking over assets and assuming liabilities held not paid in surplus when sum was insufficient to make good capital impairment. 40F(2d)454.

310-43 1/34-New. Actual expense incurred in securing an agreement from the government can be regarded as "invested capital." DC 33F(2d)372.

310-43 1/35-New. Purchase price of whisky bought for resale for which taxpayer gave notes is not invested capital within such statute. 37F(2d)778.

310-43 1/36-New. Where books are kept and return made on accrual basis, income and profits taxes for preceding year should be deducted in computing invested capital for given year. 37F(2d) 783.

310-43 1/37-New. A coal company held entitled to capitalize money laid out in constructing three mine slopes to depths reached at the beginning of the year for invested capital and depreciation. 33 F(2d)796.

310-43 1/38-New. Taxpayer engaged in buying and selling whisky with only nominal capital used to defray expenses is entitled to computation of tax on flat rate. 37F(2d)778.

310-43 1/39-New. In determining income available for payment of dividends paid after first sixty days of year proportionate amount of federal tax for year should be deducted. 37F(2d)783.

310-43 1/40-New. The value of a lease is properly excluded from a corporation's invested capital for profits tax purposes. 34F(2d)698.

310-43 1/41-New. A company held entitled to have the total actual cost of constructing tenant houses considered in computing invested capital and depreciation. 33F(2d)796.

310-43 1/42-New. A company's exemption rate in computing excess profits taxes for the year held nine per cent of invested capital. 33F(2d)796.

310-43 1/43-New. Before the right of comparison with similarly circumstanced corporations can be invoked, there must be existing invested capital. DC 33F(2d)372.

310-43 1/44-New. "Cost plus contract" precludes the determination of invested capital by comparison with similar corporations. DC 33F(2d)372.

310-43 1/45-New. A corporation succeeding a partnership held not to establish the right to have good will of the partnership and contract included as invested capital. 34F(2d)706.

310-43 1/46-New. Difference between book value of properties of consolidated corporation and amount allowed for invested capital held erroneously deducted from cash value of property paid in for stock. 43F(2d)782.

310-43 1/47-New. Profits accruing to contractor under agreement whereby government canceled wartime contract held taxable as income having source in war contract. 43F(2d)161.

310-43 1/48-New. Where new corporation issued stock to old corporation in exchange for tangible property, latter can be included in invested capital only at cash value. 43F(2d)372.

310-43 1/49-New. Amount represented by mortgage given by corporation to secure notes of stockholders to third persons held invested capital and not money or property borrowed. 43F(2d)366.

310-43 1/50-New. Paid-in legal reserve has been held "invested capital" in determining excess profits tax. 44F(2d) 167.

311-53 [a] (4) Legacy taxes not recoverable on estate distributed before July 1, 1902, though assessed after July 1,

1902. 269US102, 46SCt33, 70L ed180.

312-54 [a] (5) 269US102, 46SCt33, 70 L ed180.

312-55½-New. Saving clause of the Revenue Act is inapplicable to estate taxes. 28F(2d)205.

312-56 [b] **No authority existed** for collecting estate tax accruing under act of 1916 after enactment of Revenue Act of 1921. 7F(2d)478.

312-58½-New. Saving clause of Revenue Act of 1921, providing that parts of the repealed act shall remain in full force for assessment and collection of taxes which have accrued thereunder when such parts cease to be in effect, has been held inapplicable to authorized tax under act of 1918 on estate of decedent who died March 17, 1921. 28 F(2d)205.

312-58⅓-New. The Revenue Act of 1924 is not retroactive so as to impose a tax on the proceeds of insurance received by beneficiaries. 33F(2d)1018.

312-59 274US531, 47SCt710, 71L ed 1184, 52ALR1081; Me 137A50.

312-61 274US531, 47SCt710, 71L ed 1184, 52ALR1081.

312-62 279US151, 49SCt291, 73L ed 647; 32F(2d)69.

312-62½-New. Both elements may be made the basis of taxation. 28F(2d) 888.

312-63 33F(2d)724; Me 137A50.

312-65 274US531, 47SCt710, 71L ed 1184, 52ALR1081; 278US327, 49SCt 126, 73L ed405, 63ALR388; 281US497, 50SCt356(2dcase), 74L ed991, 69ALR 758; 30F(2d)976; 32F(2d)69; 42F(2d) 596. [c] **Tax on tenants by entireties.**–30F(2d)395. [d] **Construction subjecting value of dower relinquished by accepting provisions of will to estate tax** does not render statute unconstitutional. 40F(2d)208.

312-65½-New. Congress may tax any transmission of property effected by death, although by law of decedent's domicile such property is no part of his estate. 34F(2d)600.

312-66 281US238, 50SCt286, 74L ed 826, 67ALR1244; 24F(2d)237; 33F(2d) 567.

313-68 19F(2d)362; 24F(2d)150; 24 F(2d)237; 36F(2d)571. See also 248 NY280, 162NE79. [a] 34F(2d)600. [c] 12F(2d)625; 40F(2d)208. [e] **Estate tax accrues,** within saving clause of Revenue Act, immediately on death. 37 F(2d)383; 39F(2d)950; 44F(2d)43.

313-69 274US531, 47SCt710, 71L ed 1184, 52ALR1081; 17F(2d)605; 19 F(2d)126. See also 27F(2d)47.

313-70 274US531, 47SCt710, 71L ed 1184, 52ALR1081.

313-71 274US531, 47SCt710, 71L ed 1184, 52ALR1081; 17F(2d)317; 17 F(2d)605; 290Pa3, 137A733. [b] **Transfer by decedent four years prior to death** held not taxable. 17F(2d)317.

313-73 274US531, 47SCt710, 71L ed 1184, 52ALR1081; 36F(2d)867 (property held in trust by decedent is not subject to tax). [b] **Community property.**–23F(2d)897. [c] **Proceeds of life insurance policies constitute property belonging to beneficiaries** and not property transferred to them from insured's estate at his death. 33F(2d)1018. [d] **Property subject to decedent's control,** but not belonging to him at death, may be subjected to estate tax. 45F(2d)765.

313-74 25F(2d)896 (estate in Missouri); 29F(2d)149; 40F(2d)208. [a] **Statutory marital interest of widow** electing to take under will is not exempt from federal estate tax. 36F(2d)571.

313-74½-New. Value of widow's dower relinquished by accepting provisions of will is subject to estate tax as interest of decedent when he died. 40F(2d)208.

313-76½-New. Substance and not form is controlling in determining whether or not a transfer of property on the creation of a trust was complete. 8F(2d) 641.

313-77½-New. This tax is not an income tax. 215AppDiv166, 213NYS181.

313-77⅓-New. Federal estate tax includes all property conveyed by decedent in his lifetime by trust or otherwise, possession and enjoyment of which on the part of the grantee is postponed until the grantor's death. 14F(2d)616.

313-77¼-New. In determining the effect of a conveyance the substance, rather than the form, controls. 14F(2d)616.

313-77⅕-New. Trust for the donor's benefit for life, with power to alter, modify, or revoke, is testamentary in character, making the fund subject to the federal estate tax. 14F(2d)616.

313-77⅙-New. Whether a power is "general" within the statute relating to property passing by appointment does not depend on the manner of exercise but on the absence of limitations. 15 F(2d)591.

313-77⅐-New. Under a trust instrument, wherein the founder retained complete power of disposition, the trust did not take effect in possession until his death, and was subject to an estate tax. 15F(2d)706.

313-77⅛-New. Remainders of a trust in which the founder reserves control of the subject matter is so ambulatory as to render them testamentary in character and within tax liability of the estate. 15F(2d)706.

313-77⅑-New. Money in trust agreement constituting marriage settlement, being subject to revocation by founder, was subject to estate tax. 15F(2d)706.

313-77 1/10-New. Beneficiaries' shares in trust fund are not taxable as "income" of trust estate, but as separate units to several distributees. 19F(2d)917.

313-77 1/11-New. Whether corporation is charitable corporation, within provisions of the Revenue Act, must be determined from its charter, rather than the form of its actual organization. 20F(2d)419.

313-77 1/12-New. Corporation organized to promote "practical benevolence" held organized exclusively for "charitable purposes," within the provisions of the Revenue Act. 20F(2d)419.

313-77 1/13-New. Inheritance tax levies made by the state on charitable bequests held improperly deducted from such bequests in calculating federal estate tax. 20F(2d)419.

313-77 1/14-New. The liability for the estate tax is fixed at the time of decedent's death. 18F(2d)660.

313-77 1/15-New. Liberty Bonds constituting portion of trust estate of deceased are held exempt from estate tax. 22F (2d)464.

313-77 1/16-New. Proceeds of insurance payable to wife in trust and undisposed of by will are subject to estate tax. 24 F(2d)459.

313-77 1/17-New. **Exemption of property acquired in exchange** for property taxed within five years previous to legatee's death is granted under Revenue Act of 1921. 22F(2d)298.

313-77 1/18-New. Under such statute securities acquired by legatee through purchase with securities or money received in lieu of bequest taxed within five years previous is exempt, 22F(2d) 298.

313-77 1/19-New. since term "exchange" extends to reinvestment involving more than single transaction or exchange, where property can be traced and identified. 22F(2d)298.

313-77 1/20-New. Statutes and rules of decision in state where property is located control in determining whether interest of surviving spouse is subject to federal estate taxes. 25F(2d)896.

313-77 1/21-New. Revenue Act of 1921, repealing estate tax, saved taxes accrued and those not accrued at time of repeal of Revenue Act of 1918. 25F(2d)951.

313-77 1/22-New. Proceeds of life insurance policies on decedent's life, aggregating three hundred thousand dollars, held improperly included in estate for tax purposes, where policies aggregating two hundred seventy thousand dollars antedated the act, which exempts insurance up to forty thousand dollars from the terms thereof. 27F(2d)454.

313-77 1/23-New. Estate tax under act of 1924 upheld unless clearly within inhibition of some rule of law. 38F(2d) 659.

313-77 1/24-New. A wife's share of her husband's real and personal property is subject to tax. 33F(2d)567.

313-77 1/25-New. A husband's share in his deceased wife's estate is subject to tax. 33F(2d)576.

313-77 1/26-New. Credit on federal estate tax, allowed to state, must arise from state statute creating tax solely as state revenue measure. Del 152A124.

313-77 1/27-New. Determination of value of stock for purpose of transfer tax see 44F(2d)126.

313-78 24F(2d)91; 30F(2d)774; 35F (2d)416 (not limited to personalty); 44 F(2d)141 (insurance policies); 248NY 280, 162NE79. [b] **Revenue Act of Febr. 24, 1919** relating to inclusion of life insurance in determining gross value of decedent's estate applies only to policies issued after its passage. 268US238, 45 SCt487, 69L ed934. [c] **Real estate must be subject to administration expenses** in order to be taxable. 35F(2d)416. [d] **Value of Statutory Marital interest of widow** is not deductible from value of gross estate of testator. 36F(2d)571. [e] **Statute construed.**–35F(2d)416. [f] **Real estate held not subject to tax** in view of Missouri statute exempting realty from payment of administration expenses. 35F(2d)416. [g] **Property held not part of gross estate.**–282US55, 51SCt 49.

313-79 38F(2d)659 (corpus of revocable trust).

313-80½-New. Real estate, not subject to expenses of administration under a law of the state, is not included in determining an estate tax. 28F(2d)510.

313-80⅓-New. An estate tax exacted by inclusion in the estate of amounts receivable by the beneficiaries as insurance under life insurance policies on decedent's life, which were issued between Oct. 7, 1904, and April 16, 1919, held illegally collected. 27F(2d)456.

313-80¼-New. A widow's statutory interest in her deceased husband's estate is subject to estate tax. 32F(2d)69.

313-81 [a] **Transfer held absolute** so as not to retain taxable interest in securities transferred to children for consideration. 35F(2d)982. [b] **Time of occurrence of transfer.**–39F(2d)748. [c] **Transfer intended to take effect in possession or enjoyment after death** includes reversion in fee retained by grantor in deed conveying life estate and contingent remainder. 42F(2d)596.

313-82 278US327, 49SCt126, 73L ed405, 63ALR373; 12F(2d)625; 17F(2d)181; 21F(2d)177; 21F(2d)188; 28F(2d)888; 35F(2d)222 (some special contemplation of death must exist); 39F(2d)998; 43 F(2d)277. But see 40F(2d)555. [d] (3) First deed for benefit of grantor's children more than two years before death and when grantor was vigorous and in active charge of business affairs held not made in contemplation of death. 7 F(2d)146. (4) That aged grantor must realize that death is not distant is not alone sufficient. 21F(2d)188. (5) Transfer by woman eighty-three years old to children, in connection with making will, of two thirds of her property is held in contemplation of death. 21 F(2d)177. (6) Revocable trust is subject to tax on securities constituting trust fund. 34F(2d)443. (7) Irrevocable trust, directing portion of income to be paid to settlor for life and distribution of corpus to heirs on death, held not subject to estate tax in absence of claim of transfer in contemplation of death. 34F(2d)488. [g] **Trust deed for benefit of grantor's children** held not transfer to take effect in possession or enjoyment at death. 7F(2d)146. [h] **"In contemplation of death"** does not mean general expectancy of death entertained by all persons. 21F(2d)188. [i] **Under Revenue Act (1924) §§ 301, 302 (c) (1),** transfer in contemplation of death is taxable if it, in effect, bestows bounty or benefaction and is not transfer for money's worth irrespective of its form. 27F(2d)662. [j] **Thought of death,** arising from known infirmity, likely to cause death, must actuate transfer under statute. 25F(2d)951. [k] **Transfer in trust effective thirty years after creation,** and divesting decedent of all interest, held not subject to tax. 273US545, 47SCt 461, 71L ed764, 49ALR855. [l] **Gift, to be valid,** must intentionally and irrevocably divest donor of dominion and con-

trol. 33F(2d)788. [m] **Law of state where land is located** determines whether parol gift of lands is valid. 33F(2d) 788. [n] **Provision for termination of trust upon election of settlor and consent of one of beneficiaries** does not alone render transfer taxable. 43F(2d) 277. [o] **Rebuttal of presumption** that transfer was in contemplation of death. 44F(2d)43. [p] **Transfers not in contemplation of death** are not taxable. 281US238, 50SCt286, 74L ed826, 67ALR 1244. [q] **Transfers held not in contemplation of death.**–35F(2d)222; 41F(2d) 732; 41F(2d)895. [r] **Transfers held not within rule.**–44F(2d)43. [s] **Trust in securities reserving life interest to founder** held not transfer in contemplation of death. 43F(2d)69.

313-82½-New. It need not be in contemplation of imminent death. 21F(2d) 177.

313-82⅓-New. Gifts inter vivos are not taxable unless testamentary in purpose. 25F(2d)951.

313-83 7F(2d)146; 12F(2d)625; 30F (2d)696. See also 12F(2d)625. [b] **Transfer of properties,** held in trust by decedent before passage of act of Febr. 24, 1919, held not subject to federal estate tax. 7F(2d)146.

314-85 30F(2d)976; 32F(2d)453; 38 F(2d)381. But see 21F(2d)188; 42F (2d)596. [a] **Provision held invalid** as arbitrary, capricious, and amounting to confiscation. 24F(2d)237.

314-86 38F(2d)879 (repealing clause construed as to meaning of accrued taxes). [a] **Trusts** in form of life estates with remainders over are not subject to estate tax where life estate terminates after donor's death. 278US339, 49SCt123, 73L ed410, 66ALR397; 32F (2d)374. [b] **Transfer of remainder interest beyond recall at time made** is not taxable as intended to take effect after death. 41F(2d)895.

314-87½-New. A transfer of securities to children agreeing to pay an annuity to decedent's wife and, after her death, to him, if living, does not create a trust. 35F(2d)982.

314-89 27F(2d)237.

314-89½-New. Valid transfer of realty including power of disposition is not taxable. 274US531, 47SCt710, 71L ed 1184, 52ALR1081.

314-89⅓-New. A trust to take effect in possession or enjoyment thirty years after its creation by a decedent when fifty-seven years old is intended to take effect after his death, and the fund is subject to the estate tax. 6F(2d)551.

314-89¼-New. Gifts inter vivos are not taxable except to the extent that they are in fact a testamentary disposition. 13F(2d)857.

314-89½-New. A husband's gift to his wife before death is not taxable, although by statute it was revocable at any time and could be reached by the husband's creditors. 18F(2d)447.

314-89¼-New. Transfer of property by woman to her children, made two years before her death when in good health, is not made in contemplation of death. 21F(2d)460.

314-89⅓-New. Where, however, part of such property was retransferred to decedent as security for an annuity, such part is subject to tax. 21F(2d)460.

314-89⅛-New. Donor's reservation of power to modify, control, and use income of trust, to take effect after his death does not prevent vesting of remainders so as to render transfer taxable under subsequent statute, 24F(2d) 237.

314-89⅙-New. and donor is not required to surrender such reserved rights in order to avoid effect of such statute. 24F(2d)237.

314-89⅒-New. To escape tax, donee must have possession, use, and disposal of property without reference to donor's death. 25F(2d)1004.

314-89⅑-New. Trust corpus given to donees only on donor's death is taxable. 25F(2d)1004.

314-89⅓-New. Property transferred to a trustee, reserving the income from the property during life, with remainder to named beneficiaries, is not subject to inheritance tax. 30F(2d)696.

314-89⅓-New. The amount paid to a widow in settlement of a dower right is not a claim against the estate so as to be exempt. 32F(2d)40.

314-89¼-New. In the absence of evidence of fraud, a gift otherwise valid will not be invalidated solely on the ground it resulted in reduction of the donor's liability. 31F(2d)574.

314-89⅕-New. If decedent intended to make a complete gift to his wife of shares of stock included in his gross estate for tax purposes and actually did so, his reasons are immaterial. 31F(2d) 574. [a] **Sufficiency of gift.**–31F(2d) 574.

314-89⅙-New. What law governs. Law of decedent's domicile determines whether shares of stock decedent gave wife should be administered as part of his estate. 31F(2d)574.

314-89⅐-New. Tax is laid, not on interest to which some person succeeds on another's death, but on interest which ceased by reason of death. 248NY280, 162NE79.

314-89⅛-New. A transfer made in accordance with an agreement of a deceased partner is not such transfer as to be subjected to tax. 34F(2d)700.

314-89⅑-New. Law imposing tax on gifts has been held constitutional. 39 F(2d)748.

314-89⅒-New. The taking of deceased husband's property by the widow is a "transfer" subject to tax. 33F(2d)567.

314-89⅒-New. That a state collects an inheritance tax on a gift of stock is not res judicata of the taxability thereof under federal law. 35F(2d)222.

314-89½-New. Transfers in trust reserving right to alter disposition of income or principal after death with consent of trustee held not part of estate subject to tax. 43F(2d)765.

314-89⅓-New. Person may make absolute gift reserving net income during life without subjecting gift to transfer tax. 43F(2d)69.

314-90 31F(2d)946(2dcase); 33F(2d) 724. [a] **Property held by entirety** may not be included in gross estate, there being no "transfer" as contemplated by Revenue Act. 35F(2d)339.

314-91 15F(2d)6.

314-93 28F(2d)888.

314-93½-New. In California, community property is subject to estate tax as entirety on death of husband. 21F(2d) 493.

314-93⅓-New. Under the Revenue Act of 1924, real and personal property owned and held by a husband and wife as tenants by entireties is not subject to an estate tax, there being no transfer from one to the other on the death of either. 30F(2d)395.

314-94 42F(2d)779. See also 43F(2d) 320. [a] **"General Power" under act** depends not on method of exercise, whether by will or deed, but on whether it is restricted as to appointees or beneficiaries. 21F(2d)164. [b] **General power of appointment.**–34F(2d)600. [c] **Construction of statute** is for United States district court. 35F(2d)963. [d] **Where property would have passed under will of donor of power** in default of appointment, federal tax is not imposed. 13PaDist&Co 667.

314-96½-New. Under the Revenue Act of 1924 property passing under a general power of appointment exercisable by will only is properly included in the gross estate, and taxable. 35F(2d)963.

314-97 42F(2d)779.

314-98½-New. The corpus of a trust fund is not part of decedent's net estate subject to estate tax, notwithstanding decedent had reserved power to appoint a remainderman by will, to and among his issue, and to revoke the trust with the trustee's consent. 29F(2d)14.

314-1 279US151, 49SCt291, 73L ed647; 8F(2d)175; 18F(2d)660; 20F(2d)1002 (executors held entitled to deduct credit for cost of monument paid after return); 30F(2d)761; 30F(2d)774; 30F (2d)792; 30F(2d)915; 31F(2d)482; 32 F(2d)112; 32F(2d)817; 38F(2d)477 (agreed trustee's fee not deductible as administration expense); 38F(2d)791 (notes held not to represent any right of estate which could be included in determining tax). But see 42F(2d)918. [a] **Value of property received in exchange for inheritance** extends to any number of exchanges provided property can be traced. 25F(2d)13. [b] **Widow not electing to take seventy-five thousand dollars stipulated in antenuptial contract** cannot deduct such sum from value of gross estate. 34F(2d)233. [c] **"Claims against estate"** deductible under statute are claims presented and allowed and actually paid or to be paid. 34F(2d)233. [d] **Notes given by decedent to children** are deductible when given for consideration. 41F(2d)71.

314-2 31F(2d)30.

314-2½-New. Tax itself is not a proper deduction in determining amount of net estate. 15F(2d)105.

314-2⅓-New. Net estate is taxable in entity and tax on each bracket is not to be deducted in computing tax on following brackets. 15F(2d)105.

314-2¼-New. Mortuary tables held improperly used to determine the value of the life estate of a widow, surviving her husband only few hours, in computing the estate tax. 19F(2d)362.

314-2½-New. Declining corporation's stock not sold in open market, at the time of the owner's death, held intrinsically worth only one hundred and ten dollars per share. 19F(2d)362.

314-2⅙-New. Taxing authorities are not permitted to estimate or approximate or indulge in speculation as to probable amounts of deductions. 18F(2d)660.

314-2⅐-New. Such rule does not preclude the use of mortuary or experience tables. 18F(2d)660.

314-2⅛-New. The present value of charitable trusts held determinable by mortality tables. 34F(2d)174.

314-3 26F(2d)765.

315-7½-New. Allowances to dependents under state laws are deductible. 18F(2d)660.

315-10 19F(2d)346.

315-12½-New. Uniformity is not violated because the statute applies to a state which has no inheritance tax. 273 US12, 47SCt265, 71L ed511.

315-12⅓-New. Excess of state tax increased by failure to make lawful deductions held deductible. 42F(2d)918.

315-13 276US487, 48SCt347, 72L ed667; 18F(2d)660; 24F(2d)186; 24F(2d)745; 27F(2d)887; 42F(2d)522; 43F(2d)881. [a] **Testamentary direction for invasion of corpus if necessary for comfort and support of widow** does not prevent deduction of present value of charitable bequests. 43F(2d)39. [b] **Necessity for bequest to or for use of corporation under statute.**–43F(2d)881. [c] **"Charitable" means directed to or proceeding from charity.**–43F(2d)881.

315-14 34F(2d)174 (tax thereon held illegal).

315-20 248NY280, 162NE79. [a] **Will speaking of delivery of shares of stock on conditions stated in escrow paper signed by testator** does not modify construction thereof as not shifting burden of federal transfer tax to donee from estate. 248NY280, 162NE79.

315-21 248NY280, 162NE79. [b] **Where devise specifically charged with payment of "any or all taxes,"** federal estate tax is included. 290Pa3, 137A733.

315-24½-New. Statement of claim in the government's action for deficiency in an estate tax held subject to demurrer, for averring merely what others had found, instead of how much of assets had, within five years, measured a like tax. 14F(2d)989.

315-24½-New. Transfer tax is measured by the value of interest transferred at decedent's death. 34F(2d)443.

316-34 27F(2d)625; 27F(2d)777. [b] (6) Corporation instrument under seal, in form of note, held "note" and not bond. 25F(2d)560. [g] (2) Words "known generally as corporate securities" in Revenue Act must be held to refer to bonds, debentures, or certificates of indebtedness as well as to those instruments specifically referred to as being issued by corporations. 13F(2d) 997. (3) First mortgage participation certificates issued by corporation pursuant to trust agreement held corporate securities. 38F(2d)184. [o] (2) In-

strument evidencing loans by savings association to its member borrowers is promissory note, and not bond, within Revenue Act of 1917. 8F(2d)183. [q] (7) "Loan" and "return" transactions incidental to stock sales held taxable transfers. 269US443, 46SCt152, 70L ed 352. (8) Value of shares is par value as disclosed by charter at time of transfer. 273US100, 47SCt263, 71L ed558. (9) "Face value" as used in act means par value. 273US100, 47SCt263, 71L ed 558. [x] **Reënactment of provision after** administrative interpretation held to show purpose to continue act as so construed, in view of subsequent express change. 269US443, 46SCt152, 70L ed 352. [y] **Nonnegotiable instruments,** taken by building and loan association as evidence of indebtedness by member, held not taxable as bonds of indebtedness or securities. 13F(2d)997. [z] **Tax is on transfer of legal title.**–273US100, 47 SCt263, 71L ed558. [aa] **Nomination of employee** to take title to stock is not taxable where transfer is for employer's sole benefit. 26F(2d)391.

317–36 273US100, 47SCt263, 71L ed 558; 27F(2d)777.

317–36½–New. Massachusetts real estate trust is not subject to stamp tax on issue of stock as a corporation. 21F (2d)82.

317–37½–New. Certificates of membership in coöperative nonprofit association do not require a stamp tax. 14F(2d)242.

317–37½–New. Act of 1914 includes "bonds" which may be instrument under seal containing promise to pay sum certain, secured by mortgage included by reference. 26F(2d)292.

318–65 See also 49Philippine749.

320–4 29F(2d)236; 27Hawaii763; 7Pa Dist&Co 470.

322–22 281US580, 50SCt422, 74L ed 1051 (motor vehicle parts or accessories); 39F(2d)466 (beverage sales by news agents); 39F(2d)556 (capital stock tax payable in advance).

322–23 39F(2d)556.

322–28½–New. Under Revenue Act (1917) § 209, corporations are classified according to their trade or business having no invested capital or not more than a nominal capital, 21F(2d)547.

322–28½–New. and the sole question is whether the corporation had any invested capital or more than a nominal capital. 21F(2d)547.

322–28¼–New. The Revenue Act defines invested capital. 21F(2d)547.

322–28½–New. To bring the corporation within classification of Act (1917) § 209, the invested capital must be used or employed in the business. 21F(2d) 547.

322–28¼–New. Surplus in possession of individual stockholders or invested in stock of other corporations does not come within the designation of invested capital. 21F(2d)547.

322–28½–New. Even if surplus was capital and was used and employed in the business under the same circumstances, it cannot be considered more than nominal capital. 21F(2d)547.

322–28⅛–New. Sale of leaf springs to persons not manufacturers for use on particular automobiles held taxable under statute. 23F(2d)495.

322–28½–New. Beverage manufacturer may collect tax from purchaser where he separately itemized each item. 23F (2d)539.

322–29 26F(2d)319.

323–52½–New. It is still an offense to carry on the business of retail liquor dealer without having paid a license tax, although no tax may be in fact paid, and permission cannot be granted to conduct the business. 30F(2d)485.

323–57½–New. Any person willfully concealing, or aiding in the concealment, of distilled spirits on which tax has not been paid, may be convicted, whether he knew of the original removal from the distillery. 31F(2d)71.

324–84 [c] **Gin, rectified after distillation,** to restore chemical stability, is subject to tax, though "produced by the redistillation of a pure spirit over juniper berries and other aromatics" with proviso exempting gin so produced. 5 F(2d)167.

325–97 27F(2d)413. [i] (3) But see 36F(2d)350. (5) Repairs of automobiles held not subject to excise tax on sale of parts as manufacturer or producer. 14F(2d)857. (6) Timers not designed exclusively for use as part of, or in connection with, automobiles held not subject to manufacturer's excise tax. 42F(2d)719. [o] **Tax on act of selling tickets to amusement places** away from box office is constitutional. 23F(2d)44. [p] **Transportation** of oil by pipe line eight thousand feet to railroad is subject to tax. 24F(2d)804.

325–97½–New. Premium tax on insurance companies is held properly chargeable against mutual insurance company, although it is not subject to income or excess profits tax. 24F(2d)385.

327–10½–New. Intoxicating liquor, although made for beverage purposes in violation of the National Prohibition Act, is subject to tax. 25F(2d)788.

329–45 [a] **Cigarette manufacturer** held entitled to recover as drawback "floor tax" paid on cigarettes subsequently exported. 267US471, 45SCt 359, 69L ed741. [b] **Special excise tax** on manufacturers of cigarettes is held not affected by fact that product was exported. 22F(2d)707.

329–51 26F(2d)319 (export of part of product is immaterial).

330–67 [d] **"Artificial coloration"** as used in statute is opposite of natural coloration. 24F(2d)722. [e] **Matters not constituting artificial coloration.**–24 F(2d)722.

330–69½–New. Statute taxing products classed as oleomargarine includes substitutes for butter made of vegetable oil. 41F(2d)627.

331–4 [a] **Use of boxes** reserved for stockholders of corporations owning opera house held not within statute imposing tax on tickets sold in excess of regular charge. 270US245, 46SCt248, 70L ed566. [b] **Hotel merely providing dance orchestra** without requiring dancers to order food or pay for dancing is not taxable as cabaret or roof garden. 30F(2d)440. [c] **Social clubs.**–37F(2d) 982; 38F(2d)130; 43F(2d)257. [d] **"Dues and membership fees"** include assessment against active and subscribing members of social club for operating expenses. 40F(2d)293. [e] **What constitutes "social club."**–44F(2d)239 (1stcase).

331–5½–New. So-called life membership in social club, requiring payment of annual dues and providing for suspension on failure to pay, is not life membership within the meaning of the statute authorizing exemption from tax. 12F(2d)951.

331–5⅓–New. Purchase price of stock required as condition of membership in social club held not taxable as initiation fee. 17F(2d)119.

331–5¼–New. A corporation organized for investigation, discussion, and improvement of municipal conditions is not a social club or organization within the Revenue Act. 24F(2d)743.

331–7 [d] **Corporation organized to hold stock** and finance another corporation which made bond issue and loaned proceeds held "doing business" within stock taxing statutes. 270US452, 46SCt 345, 70L ed678. [e] **Lending money to its stockholders not for profit** not subject to tax. 14F(2d)189. [f] **Automobile indemnity insurance company** held not entity for taxing purposes. 12F (2d)998. [g] **Automobile insurance exchange** does not come under statute. 12F(2d)998. [h] **Taxes collected from automobile insurance exchange** not authorized under statute. 12F(2d)998.

331–7½–New. An incorporated business college is entitled to have its tax computed under the Revenue Act of 1917, applicable to a trade or business having only a nominal capital. 35F(2d) 426.

331–8 15F(2d)410; 27F(2d)1013. [a] 43F(2d)450. [b] **Holding company** held taxable under act. 26F(2d)82. [c] **Corporation holding stock for another corporation,** and having no independent office, rent, or salaries, is not "engaged in business" within statute. 22F(2d)497. [d] **Elevated railway company operated by state** was subject to tax. 24F(2d)758. [e] **Lessor railroad company** performing all necessary acts to enable lessee to operate was carrying on business within law. 41F (2d)870. [f] **Amount of business transacted** is not determinative of whether corporation is carrying on business within act. 41F(2d)870. [g] **"Capital stock tax"** is excise tax on privilege of doing business in corporate capacity. 41F(2d)870. [h] **Each of several corporations taking part in business** which cannot be carried on separately is liable for tax. 41F(2d)870.

331–9 26F(2d)708; 26F(2d)729; 26F (2d)732; 26F(2d)733; 28F(2d)876. [a] (2) Corporation which stopped business and merely received and distributed avails of its reorganized affairs is not "doing business," within statute. 34F(2d)725. (3) Corporation organized for definite business, involving profits, which pursues activities to carry out purpose, is "doing business." 34F(2d) 725. (4) Corporation engaged in buying and selling coal lands and owning four hundred acres of undeveloped coal land is "doing business" though not engaged in mining and selling coke. 34 F(2d)725. (5) Corporation held not subject to capital stock tax under Revenue Act of 1924 as "doing business." 34F(2d)944; 34F(2d)947. (6) Corporation's liability to capital stock tax for "doing business" depends on purposes. 34F(2d)944. (7) And its activities both before and after taxable periods may be considered in determining purposes. 34 F(2d)947. [b] **Right to recover excise taxes** on corporations depends on acts of congress in force when taxes were levied. 7F(2d)3. [c] **Refusal to deduct excessive salary,** in determining net income as basis for excise tax, held proper. 7F(2d)3. [d] **Corporation may deduct** judgment for patent infringement in determining net income. 7F (2d)3. [e] **Corporation organized to hold timber land** and resell same at profit is held not corporation "organized to do business," under act. 25F (2d)958. [f] **Corporation merely maintaining corporate existence** and holding lands is not "engaged in business." 26 F(2d)136. [g] **Capital stock tax.**–34F (2d)60; 34F(2d)504. [h] **Affiliated corporations.**–44F(2d)92; 44F(2d)257; 44F(2d)273.

331–9½–New. , and 1924. 38F(2d)907 (corporation held to be carrying on and doing business).

331–9⅓–New. In assessing capital stock tax, the fact that the fair value of stock throughout the preceding year was not same nor as much as on June 30 should be considered in appraising the fair average value of capital stock for the preceding year under the Revenue Acts of 1918 and 1921. 8F(2d)278.

331–9¼–New. Surcharges made for good will of a corporation acting as distributing agent under a yearly contract held erroneous. 14F(2d)548.

331–9⅕–New. Loss or depreciation of property, deductible from income, may be established by any competent proofs. 19F(2d)365.

331–9⅙–New. Transfer by the collector of income deduction allowed taxpayer in prior year to another year within the "prewar period," with the effect of increasing its war profit tax, held unwarranted. 19F(2d)365.

331–9⅐–New. Collector is without power to reopen and readjust settled accounts with the taxpayer to affect its liability under a subsequent statute. 19F(2d)365.

331–9⅛–New. Holding company holding assets of estate for profit to heirs is corporation "doing business" and subject to tax. 21F(2d)91.

331–9⅛–New. Corporate capital stock is based on corporation's activities, and not charter powers. 22F(2d)102.

331–9 1/10–New. Corporation holding property and lending money to stockholders for their accommodation, not for profit, is not "doing business" subjecting it to capital stock tax. 22F(2d) 102.

331-9 1/11-New. Mere holding of property with the expectation that increment may produce profit is not equivalent of "carrying on or doing business," within the meaning of the Federal Capital Stock Tax Act. 28F(2d)876.

331-9 1/12-New. Title insurance company guaranteeing real estate mortgages held not exempt from capital stock tax as insurance company subject to income tax. 41F(2d)793.

331-9 1/13-New. Supercarburetors are not taxable as automobile parts or accessories. 42F(2d)325.

331-9 1/14-New. Mere holding company, owning realty or securities and turning over profits to stockholders, is not doing business within statute. 42F(2d) 219.

331-9 1/15-New. Club organized for educational purposes is not taxable as social club. 42F(2d)321.

331-9 1/16-New. Corporation primarily organized as holding company, but reinvesting surplus to make profits and engaging in other activities is doing business. 42F(2d)219.

331-9 1/17-New. Incidental activities of holding company, such as paying taxes and voting capital stock, is not doing business. 42F(2d)219.

332-19½-New. The Bank of North Dakota held subject to capital stock tax. 33F(2d)848.

333-28 [c] **In Philippines** merchants as used in sales tax law (Administrative Code § 1459) includes manufacturers selling their own products and commission merchants, but not merchandise brokers. 45Philippinel.

333-29 26F(2d)571. [a] But see 42F (2d)408. [c] **"Price for which sold"** in computation of sales tax on candy is price paid by purchaser. 19F(2d)664. [d] **Tax on sale of "automobile trucks."** -6F(2d)964. [e] **Sales tax on conditional sale** of jewelry is to be computed on amount actually received and not on price contracted for. 21F(2d)874. [f] **Automobile accessories or parts.**-34 F(2d)969 (truck parts or accessories). [g] **Motor propelled combination hearses and ambulances** are taxable at rate imposed on ambulances when removal of ambulance equipment is required before they can be used as hearses. 40 F(2d)156. [h] **"Automobile parts."**-42 F(2d)595; 43F(2d)259(2dcase); 43F (2d)264. [i] **"Automobile tool kits."**-43F(2d)263. [j] **Jewelry.**-41F(2d)556. [k] **Timing gears** especially adapted and designed for use on automobile and truck held subject to manufacturer's excise tax. 41F(2d)561. [l] **"Articles sold for consumption or use"** include ornamental articles given to purchasers in exchange for coupons received with sale of merchandise. 43F(2d)266.

333-29½-New. Sales tax in Philippines. Administrative Code § 1459 imposing tax on merchants' sales held not applicable to foreign corporation buying copra for oil manufacturing purposes. 45Philippinel.

333-30 13F(2d)655; 28F(2d)106. [b] **Where manufacturer paid war tax without advancing price to dealers,** his actual sales price for purpose of tax is ten-elevenths of invoice tax. 18F(2d) 970.

333-30½-New. Under Canadian Special War Revenue Act, flowering plants and potted plants raised for production of cut flowers are not nursery stock, sales of which are exempt from sales tax. Can [1928] 2DomLR352.

333-30½-New. Under Act of 1924 parts or accessories for automobiles are subject to excise tax. 44F(2d)278.

333-31 [b] (1) 16F(2d)717. (5) Oil refinery obtaining crude oil through its own pipe lines running to well is not subject to tax on business of transporting oil under Revenue Act of 1918. 5F (2d)996. (6) Oil refinery collecting crude oil through its own pipe lines, if considered as common carrier of oil, is not liable to tax under Revenue Act of 1918, since such commodity is necessary for its use in conduct of its business. 5F(2d)996. (7) Oil producer, transporting oil through its own pipe line, is held subject to tax. 23F(2d)888. [e] **Act of 1917 applies to private,** as well as common, carriers. 19F(2d)531. [f] **Where cement company and subsidiary company operate single ship** for carrying bulk cement between plants of cement company, their activities are so inseparably linked as to constitute one operation as affecting liability of cement company for transportation tax. 19F(2d)531. [g] **Transportation of lumber sold to county** under bill of lading calling for delivery to seller or order at designated point was not service rendered to county, subject to exemption. 281US572, 50SCt419, 74L ed 1047.

333-31½-New. Railroad, having agreement for free exchange of services with a telegraph company, held liable on tax for messages sent at regular commercial rates. 19F(2d)356.

333-31⅓-New. Iron company operating a line of boats as incident to its business is not a common carrier. 21F(2d) 457.

333-31¼-New. Commissioner of internal revenue cannot by regulations extend the Revenue Act to include as common carriers those not mentioned therein. 21F(2d)457.

333-31⅙-New. Revenue Act relating to transportation tax applies only to common carriers, except where other agencies are expressly included. 21F(2d) 457.

333-31⅙-New. Steamship line furnishing vessel's entire passenger accommodation for lump sum and issuing membership cards to identify passengers held liable for ticket tax under Act of 1926. 43F(2d)615.

334-32 [b] **Exemption.**-25F(2d)1010.

334-33 12F(2d)978. See also 273US 242, 47SCt395, 71L ed628.

334-42 274US289, 47SCt634, 71L ed 1052.

334-42½-New. Gasoline and substitutes. In Porto Rico, which has its own revenue laws, tax on "gasoline, imitation, or substitute thereof" held inapplicable to denatured alcohol for use as fuel in motor vehicles, "alcohols intended for use as fuel" being tax exempt by another statute. 32PortoRico 530.

334-42⅓-New. [§ 170a] **K. Tax on Issuance of Insurance Policies.** Revenue Acts of 1917 and 1918 provide for levy and collection of taxes on the issuance of insurance policies. 21F(2d) 501 (statute construed).

334-48 [c] **Sections of revenue laws in direct conflict** with National Prohibition Act are repealed thereby. 36F(2d)401.

335-49 30F(2d)968.

335-51 272US321, 47SCt154, 71L ed 279, 47ALR1025; 25F(2d)788.

335-53 272US321, 47SCt154, 71L ed 279, 47ALR1025.

335-54 See also 272US321, 47SCt154, 71L ed279, 47ALR1025; 17F(2d)372. [b] **No tax is imposed on wholesale liquor dealers** since passage of Volstead Act. 5F(2d)437.

335-56 [c] 6F(2d)573; 17F(2d)34.

335-58½-New. The provision of National Prohibition Act, tit 2 § 35 is in direct conflict with statutes imposing per gallon tax and repeals such in respect to liquor illegally manufactured. 5F(2d)1.

336-60 12F(2d)706. [a] **Scope.**-5F (2d)1.

336-61 272US321, 47SCt154, 71L ed 279, 47ALR1025; 12F(2d)706; 14F(2d) 582. See also 6F(2d)573. [a] (2) Rev. St. § 3296, forbidding removal or concealment of distilled spirits on which legal tax has not been paid, was reënacted by Willis-Campbell Act. 28F(2d) 695. [c] **Forfeiture of offending vehicle** held valid under prior acts. 272US 321, 47SCt154, 71L ed279, 47ALR1025.

336-63 272US321, 47SCt154, 71L ed 279, 47ALR1025.

336-64 [a] (1) 4F(2d)852.

337-84 272US321, 47SCt154, 71L ed279, 47ALR1025.

337-85 [b] **Act taxing distilled spirits withdrawn from warehouse for beverage purposes** was not repealed by Prohibition Act. 41F(2d)369.

337-87½-New. Floor tax on distilled spirits on which internal revenue tax was paid held applicable to imported, as well as domestic, spirits. 20F(2d) 355.

337-93½-New. Whisky stolen from warehouse held not "withdrawn" within tax statute. 41F(2d)369.

337-93⅓-New. Tax is effective on imported distilled spirits only after importation is completed. 23F(2d)336.

337-97 272US321, 47SCt154, 71L ed 279, 47ALR1025.

337-99 240 IIIA12.

337-1 240 IIIA12.

337-7½-New. Failure to pay tax renders illegally made liquor subject to forfeiture. 272US321, 47SCt154, 71L ed 279, 47ALR1025.

338-14 See also 32PortoRico 530.

338-14½-New. Alcohol withdrawn under permit for special denaturing and sale to persons who would clean and use it for beverage purposes is taxable as diverted. 40F(2d)422.

340-65 Contra 6F(2d)573.

340-68½-New. Regulation requiring registry of stills with prohibition administrator has been held to impose on district prohibition administrators same power and duty to accept registration which was imposed on district collectors. 28F(2d)805 [certiorari den 278 US658, 49SCt187(1stcase); 73L ed566].

340-73 14F(2d)118; 19F(2d)855.

344-78 28F(2d)666.

344-87 But see 6F(2d)573.

345-3½-New. Forfeiture of property for defrauding government of tax on alcohol illegally diverted is not improper on ground statute is in conflict with Prohibition Act. 40F(2d)422.

345-15½-New. Tax on distilled spirits illegally diverted is not penalty so as to prevent forfeiture. 40F(2d)422.

346-39 [a] **Transporter of moonshine whisky** is not chargeable with intent to defraud United States of tax thereon, where this particular provision has been held repealed by implication. 5F (2d)1.

346-40 5F(2d)113 (covered by Rev. St. § 3450).

346-41 But see 5F(2d)113.

346-42 5F(2d)113, 115 [citCyc] (under Rev. St. § 3450).

346-42½-New. The intent to defraud may be shown by the circumstances. 5F(2d)113, 115 [citCyc] (in proceeding to forfeit auto).

349-12 [b] **Powers are statutory.**-29F (2d)865. [c] **Right to reëxamine and redetermine tax liability** as determined by predecessor. 44F(2d)268.

349-16½-New. Records and acts of commissioner are not open to question for lack of technical precision and formality. 41F(2d)273.

349-18 17F(2d)522. [a] **Rules and regulations of commissioner of internal revenue,** not in conflict with purpose and intent of statute, have force of law. 40 F(2d)293.

349-19 But see 26F(2d)489.

349-20 34F(2d)328.

349-22 [a] (2) Commissioner may require all facts relied on in support of claim for refund of taxes to be clearly set forth under oath. 33F(2d)907. [b] **Regulations interpreting law** may be promulgated. 41F(2d)901.

349-23 [b] **Regulations held valid.**-21 F(2d)241.

350-25 17F(2d)522.

350-26 [a] **Regulations held reasonable.**-40F(2d)154; 40F(2d)425.

350-28 13F(2d)651; 13F(2d)655; 31F (2d)867; 33F(2d)53; 41F(2d)901. [b] **Commissioner of internal revenue cannot supply omissions in law.**-40F(2d)293.

350-36½-New. It is their duty, when credibly informed that the owner withdrawing the liquor intends to apply it to unlawful beverage use, to reject payment of the tax and prevent withdrawal until an investigation is had. 17F(2d) 339.

352-88½-New. The officer has no authority to bind the government not to use a tax return or affidavit in a legal proceeding. 31F(2d)19.

352-4 17F(2d)829.

353-8 8F(2d)581.

353–9 8F(2d)581. [a] (2) **Prohibition** agent has authority to execute search warrant issued on charge of violating internal revenue laws. 25F(2d)872.

353–13½–New. Limitation on searches of private dwellings in National Prohibition Act applies to searches under liquor revenue laws. 22F(2d)998.

353–17 [b] **Declaration held sufficient.**–19F(2d)961.

354–33½–New. Owner of merchandise is entitled to make reasonable deduction from cost price in returning market value. 23F(2d)671.

355–52 [c] **Whether proper basis for deduction of losses and bad debts from gross income** has been made is primarily for determination of commissioner. DC 37F(2d)806. [d] **Commissioner determines** whether corporate dividend is stock or cash dividend. 39F(2d)986. [e] **Evidence held sufficient** to justify findings of tax commissioner. 42F(2d)148.

355–53 35F(2d)910 (additional assessment not barred by limitation statute where waiver was executed); 36F(2d)529 (commissioner of internal revenue has authority to revise tax liability of taxpayer); 39F(2d)356 (statute prescribing steps for making final payment of tax); 39F(2d)892 (affiliated corporations); 39F(2d)991 (determination of consolidated net income). [a] **Assessment of estate tax** more than four years after date held too late. 7F(2d)478. [b] **Evidence held sufficient** to authorize assessment of corporation's profit and income taxes against partnership taking over its business. 18F(2d)611. [c] **Companies organized to promote common interest and dominated by one** have been held affiliated corporations as regards assessment of tax. 39F(2d)830. [d] **In proceedings to surcharge railroad's tax returns,** commissioner is justified in assuming supplies returned by director general were equal to supplies requisitioned. 36F(2d)719. [e] **Commissioner has authority to make repeated reexaminations,** redeterminations, and reassessments subject to limitation of four years. 35F(2d)10. [f] **Commissioner has right to assess taxes** more than five years after date of filing of return where taxpayer signed waivers. 35F(2d)620. [g] **Commissioner has right to make additional assessment** upon new and further facts received from later reports of comparative corporations. 35F(2d)910. [h] **Where return is made on accrual basis,** commissioner may make corrections on such basis in same way as if filed on cash basis. 35F(2d)832. [i] **Term "stock" in statute relating to affiliated corporations** means stock with potential voting power. 39F(2d)830. [j] **Failure of commissioner to apportion assessment among affiliated corporations,** in absence of notice of agreement, cannot be excused by taxpayer's neglect. 39F(2d)892. [k] **Commissioner's order cannot change legislative will.**–39F(2d)356. [l] **Matters of discretion.**–39F(2d)434. [m] **Commissioner's notice of decision is necessary** for determination of approval of engineer's report recommending allowance for amortization. 39F(2d)645. [n] **Basis of assessment.**–42F(2d)653.

355–55 24F(2d)29; 30F(2d)628 [certiorari den 279US853, 49SCt348(7thcase), 73L ed995].

355–56 31F(2d)730; 38F(2d)935 (has authority to determine taxable income on accrual basis of accounting). [a] **Statutes of limitation.**–281US245, 50SCt297, 74L ed829, 67ALR1350 (when limitation period begins to run); 38F(2d)425; 38F(2d)563; 38F(2d)816.

355–57½–New. Showing that taxpayer's books did not reflect his income held insufficient to warrant assessment of income tax on the basis of the average profit of those engaged in like business. 14F(2d)323.

355–57⅓–New. In determining taxable income, books of account are only evidential, and neither indispensable nor conclusive. 14F(2d)323.

355–57¼–New. Inventory by income taxpayers held substantially to comply with regulations. 14F(2d)995.

355–57⅛–New. Petition for redetermination of deficiency in income tax payment held properly filed within statutory period, notwithstanding nonpayment of filing fee. 19F(2d)16.

355–57⅙–New. Commissioner of internal revenue has no authority to proceed otherwise than by the precise method prescribed by statute in making assessment. 18F(2d)611.

355–57⅐–New. Taxes may be assessed and collected by an administrative body without giving the taxpayer any right to resort to the court prior to the payment of the tax. 18F(2d)798.

355–57⅛–New. In absence of statute, there is no limitation as to period within which United States may assess corporate income and profit taxes. 22F(2d)249.

355–57⅑–New. Where congress enacts a statute limiting the time for assessment of such taxes, it may impose conditions on taxpayer, provide for tolling of statute, and make it retroactive. 22F(2d)249.

355–57⅒–New. Stipulation for extending assessment a year does not require both assessment and collection within the year. 26F(2d)505.

355–57 1/11–New. Assessment made within time fixed by statute is timely despite delay in notice. 26F(2d)365.

355–57 1/12–New. Where receivership proceeding has definitely fixed value of claim charged off in return, tax should be computed and allowed on such value. 23F(2d)717.

355–57 1/13–New. Provision for mailing registered notice of determination of tax deficiency implies appropriate address. 23F(2d)831.

355–57 1/14–New. Petition for review of tax deficiency filed sixty-one days after mailing of notice is held filed in time. 23F(2d)831.

355–57 1/15–New. Address of notice of determination of tax deficiency should contain name of tenant in whose care taxpayer's mail was received at office building. 23F(2d)831.

355–57 1/16–New. Where a taxpayer executed a return on March 13, 1920, the period for assessing the tax did not expire until five years later; and where the commissioner and the taxpayer entered into an agreement extending the period for making the assessment for one year, an assessment made on March 10, 1926, on which taxes were paid on May 11, 1926, was not barred by limitations. 26F(2d)690.

355–57 1/17–New. A departmental regulation fixing the value of transmission of franked messages by a telegraph company for a railroad company, for the purpose of taxation, at the amount ordinarily charged the public, has been held not unreasonable. 28F(2d)33.

355–57 1/18–New. A waiver agreement by corporations and the commissioner of internal revenue has been held to set up a five-year restriction on assessment. 28F(2d)54.

355–57 1/19–New. Waivers extending time for assessment are not invalid as without consideration when acted upon. 37F(2d)703.

355–57 1/20–New. Failure of commissioner to produce waivers of limitation raises inference that waivers do not exist. 39F(2d)378.

355–57 1/21–New. Matters held not waiver of limitation against tax assessment. 39F(2d)378.

355–57 1/22–New. Board properly fixed taxes on basis of fiscal year, where taxpayer who failed to produce books had applied to change fiscal year. 39F(2d)540.

355–57 1/23–New. Claim for abatement of tax does not estop taxpayer from setting up limitations against additional tax. 39F(2d)643.

355–57 1/24–New. Statute allowing six years after assessment for collection of tax has been held inapplicable to assessment made before act, though waiver of limitation for assessment was then in force. 39F(2d)643.

355–57 1/25–New. Five year period of limitations under Revenue Act of 1921 applies to assessment of deficiency made subsequent to Jan. 1, 1921. 37F(2d)763.

355–57 1/26–New. Plea in abatement after notice of deficiency, but before assessment of tax, is proper. 37F(2d)763.

355–57 1/27–New. Five-year limitation for making deficiency assessment is extended where appeal is taken to five years and time intervening between mailing of deficiency letter and decision of board. 37F(2d)922.

355–57 1/28–New. There is no authority for execution of waivers permitting a delay in the collection of taxes after the statute of limitations against assessment and collection has run. 34F(2d)795.

355–57 1/29–New. Determination of the amount of shrinkage in inventory value to abate taxes must be postponed until the close of the year. 34F(2d)605.

355–57 1/30–New. Limitations held not to have run against assessments in view of waivers. 37F(2d)922.

355–57 1/31–New. Assessment is not competent evidence to determine the value in 1913 of property bought in 1910 and sold in 1920 at a profit. 34F(2d)140.

355–57 1/32–New. Two state banks amalgamating into a new bank are not "affiliated corporations," under the statute, for tax purposes. DC 33F(2d)646.

355–57 1/33–New. Findings of primary facts by the board of tax appeals will not be reviewed by the circuit court of appeals when supported by testimony. 33F(2d)733.

355–57 1/34–New. Where a return for the 1919 calendar year was filed on March 11, 1920, assessment for the year of 1919 on March 10, 1925 is within the five-year period of limitation. 33F(2d)653.

355–57 1/35–New. Where several returns are necessary for different parts of the year, the statute of limitations does not run until the last return is filed. 33F(2d)653.

355–57 1/36–New. The signature of the commissioner of internal revenue to a tax waiver need not be signed by him personally. 34F(2d)513.

355–57 1/37–New. Where the assessment period under waiver would expire subsequent to the enactment of the 1926 Revenue Act, the authorized collection period was extended to March, 1930. 34F(2d)513.

355–57 1/38–New. Where tax waivers waiving limitation were filed in the office of the commissioner of internal revenue, the signature to the waiver, purporting to be that of the commissioner, was authorized. 34F(2d)513.

355–57 1/39–New. Failure of assessment to include good will in invested capital cannot be objected to on recomputation of tax liability for subsequent years. 34F(2d)859.

355–57 1/40–New. Statutory consent for redetermination of income tax entered into after expiration of period of limitation is invalid. 38F(2d)563.

355–57 1/41–New. Matters held not to entitle taxpayer to special assessment. 41F(2d)24.

355–57 1/42–New. Commissioner accepting change in accounting period to calendar year basis should compute tax for period between end of fiscal calendar year. 41F(2d)141.

355–57 1/43–New. Waivers extending time for assessment of tax deficiency held valid. 41F(2d)300.

355–57 1/44–New. Threat of immediate assessment and collection of tax in advance of investigation held duress invalidating waiver of limitation and consent to redetermination. 38F(2d)563.

355–57 1/45–New. Commissioner need not state grounds for refusing special assessment nor record fact. 41F(2d)24.

355–57 1/46–New. Such waiver and consent construed and effect stated. 38F(2d)563.

355–57 1/47–New. Tax authorities have duty of fixing deduction for salaries to which corporation is entitled. 42F(2d)419.

355–57 1/48–New. Refusal of taxpayer's attorney in fact to make return on property returned by alien property custodian without assessment authorizes deputy collector to make return and assess tax. 43F(2d)61.

355–57½₉–New. Assessment of additional tax within six years of return held timely where taxpayer's waiver extended period. 43F(2d)34.

355–57½₀–New. Duty of ascertaining reasonable allowance for depreciation in corporate franchise rests with commissioner of internal revenue. 43F(2d)298.

355–57½₁–New. Depreciation deductible in computing income tax is fact determinable from testimony of competent witnesses. 43F(2d)345.

355–57½₂–New. Waiver of limitation of time for assessment of income tax executed by secretary of corporation is valid. 43F(2d)369.

355–57½₃–New. Waiver of limitation of time for assessing income tax held to cover unpaid balance of tax shown on original return. 43F(2d)375.

355–57½₄–New. Five-year limitation for assessment of income taxes controls as to taxes levied under prior acts. 43 F(2d)782.

355–57½₅–New. Commissioner 'can base deficiency assessment upon tentative return filed, since commissioner is free to use any information he regards trustworthy, and is not bound by return. 43 F(2d)814.

355–57½₆–New. Consolidated income tax return filed in good faith and substantially complying with statute is sufficient to start running of limitations against assessment of additional income tax. 43F(2d)553.

355–57½₇–New. Any one of deputies employed by commissioner of internal revenue can lawfully sign assessment roll. 43F(2d)814.

355–57½₈–New. Deficiency claim for income taxes held barred after five years from date of taxpayer's return. 41F(2d) 308.

355–57½₉–New. Commissioner of internal revenue is not estopped by former action from making second investigation and entering determination accordingly. DC 41F(2d)429.

355–57½₀–New. Limitation statute does not deny right to go back indefinitely to examine taxpayer's books to ascertain depreciation. 41F(2d)725.

355–57½₁–New. Commissioner may delegate to subordinate authority to sign waiver. 41F(2d)751.

355–57½₂–New. Whether reasonable cause existed for failure to file income tax return within extension granted is question of fact for commissioner in first instance. 41F(2d)966.

355–57½₃–New. Determination of excess war profits taxes of foreign corporation held within commissioner's administrative discretion, and not subject to judicial control. 41F(2d)862.

355–57½₄–New. Straight rate of depreciation on taxpayer's property cannot be applied where facts presented are inconsistent. 41F(2d)308 (computation at arbitrary fixed rate held unwarranted).

355–57½₅–New. Decision fixng partnership's profit for tax purposes as entire amount received for good will of steamship agency is justified. 42F(2d)160.

355–57½₆–New. Taxpayer can waive benefit of statute providing that taxpayer shall not be subjected to unnecessary examinations or investigations. 42F(2d) 653

355–58 14F(2d)995; 21F(2d)495; 22 F(2d)797; 25F(2d)453; 29F(2d)339; 30F(2d)628 [certiorari den 279US853, 49SCt348(7thcase), 73L ed995]; 33F(2d) 464; 34F(2d)677; 34F(2d)861; 35 F(2d)10 (commissioner's determination held sustained by evidence); 35F(2d) 910 (making additional assessment); 39 F(2d)159 (best evidence of value of property); 41F(2d)300; 42F(2d)81; 42 F(2d)99; 42F(2d)160; 43F(2d)782; 44 F(2d)144; 44F(2d)157; DC 41F(2d) 429; DC 42F(2d)346. [b] **Assessment held prima facie correct as against taxpayer.**–26F(2d)830. [c] **Deficiency assessments made by commissioner prima facie correct.**–26F(2d)830. [d] **Burden is on taxpayer** to show that action of commissioner in making additional assessment grew out of circumstances which did not warrant it. 35F(2d)910. [e] **Failure to object to assessment of entire deficiency tax** has been held not implied agreement to be so taxed. 39 F(2d)892. [f] **Burden of proof** is on corporation claiming excess value of tangible property if invested as paid-in surplus. 39F(2d)888. [g] **Taxpayer has heavy burden** of proving commissioner's action was plainly arbitrary. 41 F(2d)743. [h] **Refusal to grant special assessment** held not error. 44F(2d)26. [i] **Sufficiency of evidence.**–39F(2d)888.

355–59 277US551, 48SCt587, 72L ed 985; 27F(2d)200 [certiorari granted 278US594, 49SCt37(3dcase), 73L ed525]; 44F(2d)157. [b] **Burden of proof on taxpayer** (1) to establish tax is not valid. 14F(2d)995. (2) Burden of establishing loss sustained during taxable year is on taxpayer. 22F(2d)536. [c] **Burden is on corporation** to show itself within classification of public service corporation, exempt from taxation. 33 F(2d)733. [d] **Burden of proof on taxpayer.**–34F(2d)255, 34F(2d)390; 41 F(2d)363.

355–60½–New. Tax is not invalidated by fact that name in which assessment was made did not indicate who was taxpayer. 21F(2d)501.

355–62½–New. Where government proves all facts and produces all records connected with the income tax assessment, the presumption of compliance with all prerequisites does not apply. 19 F(2d)399.

355–62⅓–New. Taxpayers, obtaining abatement of income tax assessments without asserting invalidity, because of absence of returns, held not estopped to assert invalidity of assessments. 19 F(2d)399.

355–62¼–New. Deficiency assessments of income and excess profits taxes were not void, because corporation had dissolved prior to the assessments, where the taxes had accrued before dissolution. 26F(2d)830.

355–62⅓–New. That a taxpayer originally sought a deduction from profits tax and also an addition to its reserve for bad debts, to only one of which it was entitled, did not destroy its real rights, taxpayer's rights, under conditions here disclosed, not being determinable on merely technical grounds. 29F(2d)339.

355–62⅙–New. Closing agreement between taxpayer and commissioner under act of 1926 is binding. 43F(2d)711.

355–62⅐–New. Statute as to closing agreements excludes mistakes of fact and law as grounds for rescission. 43 F(2d)711.

355–62⅛–New. Purpose of statute as to closing agreements held finally to settle income taxes for disputed years and prevent reaudits. 43F(2d)711.

355–62⅑–New. Closing agreement made before repealing act was approved held valid. 43F(2d)711.

355–62⅒–New. Act prohibiting court from entertaining action to modify closing agreement construed to define court's duty' and not to limit its jurisdiction. 43F(2d)711.

355–66 38F(2d)618 (deduction for amortization properly redetermined); 38F(2d)699; 38F(2d)704; 39F(2d)356; 39F(2d)645 (amortization allowance). [a] **Return of collector** is necessary for assessment of extra estate tax in case of mistake in executor's return. 7F(2d) 478.

355–67½–New. An additional tax imposed after erroneously refunding an overassessment is assessed when made as a jeopardy assessment, notwithstanding the board of tax appeals has not determined appeal therefrom. 6F(2d)660.

355–67⅓–New. Statute limiting time for levy of additional income tax assessment against wife runs from date of original sole return of husband not from date of wife's separate amended return, 22F(2d)1000.

355–67¼–New. Although assets of corporation have been distributed, assessment for additional income and profit taxes within five years after dissolution is valid. 22F(2d)249.

355–67⅕–New. Such assessment income of taxpayer making return is sufficient, regardless of who may be liable for payment. 22F(2d)249.

355–67⅙–New. Authority to reassess must be in statute expressly or by clear implication. 26F(2d)178.

355–67⅐–New. Reassessment of stock after numerous confirmations of assessment made as of 1913 valuation is unauthorized. 26F(2d)178.

355–67⅛–New. A "deficiency" assessment held not a new assessment and therefore within the limitation period. 36F(2d)342.

355–67⅑–New. In absence of agreement that determination of commissioner computing income taxes should be conclusive, commissioner may make new determination. 43F(2d)395.

355–70 [c] **Right of husband and wife to elect whether to make joint or separate** return terminates on expiration of time for filing returns. 24F(2d)115. [d] **Corporation filing separate return has made election** precluding filing of consolidated return without permission. 42 F(2d)984.

355–71 19F(2d)399; 33F(2d)788 (government is entitled to rely on sworn income tax returns); 39F(2d)58 (affiliated corporations); 39F(2d)892. [b] **Returns on cash or accrual basis.**–21F(2d) 247. [c] **Right of affiliated corporations** to make consolidated returns. 29F(2d) 955; 30F(2d)1; 30F(2d)230; 30F(2d) 645. [d] **After filing joint return** and payment petitioner is properly refused right to file separate returns. 29F(2d) 695. [e] **Where unverified return is filed** period of limitations within which deficiency assessment may be made commenced to run at time of original filing. 33F(2d)245. [f] **Estoppel to deny correctness of corporate return.**–39F(2d) 984. [g] **Commissioner has been held not authorized to infer agreement** between affiliated corporations regarding proportionate assessments, where consolidated return showed no agreement. 39F(2d)892. [h] **Affiliated corporation has been held not by subsequent conduct estopped** to deny existence of agreement regarding proportionate assessments. 39F(2d)892. [i] **Commissioner can decline to accept separate returns** filed after time expired. 39F(2d)340. [j] **Method of accounting.**–40F(2d)412. [k] **Consolidated returns.**–40F(2d)436. [l] **Change in accounting period** is approved by commissioner by acceptance of return making change to calendar year basis. 41 F(2d)141. [m] **Computation of taxes on fiscal year basis is proper** where accounts are kept on fiscal year basis and returns are made on calendar year basis. 41F (2d)141. [n] **Basis on which return filed.**–282US92, 51SCt11. [o] **Affiliation of corporations for income tax purposes.**–41F(2d)533. [p] **Income tax return merely estimating taxes** is insufficient. 41F(2d)966.

355–71½–New. Corporation changing from calendar year to fiscal year basis beginning June 1, 1917 must compute net income in accordance with method regularly employed in keeping its books, under Revenue Act (1918) §§ 200, 212b. 15F(2d)75.

355–71⅓–New. Corporation computing income for fiscal year ending in 1918 cannot use cash basis as to tax attributable to calendar year 1917 and accrued basis for balance of fiscal year. 15F(2d)75.

355–71¼–New. Provision of the Revenue Act 1917 § 13d, permitting a taxpayer to make returns on the basis on which accounts were kept, requires one changing from cash to accrued basis to adhere thereto. 15F(2d)75.

355–71⅕–New. Const. Amendm. XVI does not prohibit the internal revenue commissioner from determining the income of corporations on any other basis than that of actual receipts and disbursements. 33F(2d)187.

355–71⅙–New. Entries are not conclusive in determining a taxpayer's income, and books will be accepted only in so far as they reveal actual conditions. 33 F(2d)196.

356–75 [a] **Taxpayer's erroneous belief regarding expiration date of extension for filing return** is not reasonable ground for failure. 41F(2d)966.

356–76 [b] **Improper consolidated income tax return** does not establish that

it was false or fraudulent. 35F(2d)381. **356-78** 280US412, 50SCt177, 74Led518 (return on "basis of keeping accounts"). [h] **Provision of Revenue Act of 1924** requiring preparation of lists of returns for public inspection is not unconstitutional. 55AppDC341, 5F(2d)764. [i] **Corporation properly files returns on calendar year basis** where it takes monthly balance sheets, though physical inventories are annually taken May 31. 25F(2d)900. [j] **Joint and separate returns of spouses.**-22F(2d)1000. [k] **Affiliation.**-25F(2d)375; 33F(2d)787; 41F(2d)925; 42F(2d)360; 42F(2d)413. [l] **Accrual system as basis of accounting** in return of income tax. 35F(2d)832. [m] **Finding that books were kept and returns made on cash receipts and disbursements basis** held warranted in view of treasury regulations. DC 35F(2d)873. [n] **Consolidated returns by affiliated corporations.**-38F(2d)248 (computation of income and excess profits taxes must be based strictly on consolidated returns); DC 37F(2d)801 (corporations held properly affiliated in separate groups). [o] **Filing of separate returns by husband and wife.**-36F(2d)807. [p] **Taxpayer failing to file return** cannot thereby evade tax liability. 37F(2d)231. [q] **Taxpayer having made returns on fiscal year basis** cannot retroactively change basis so as to compute income on calendar year basis. 37F(2d)231. [r] **Joint and separate returns of spouses.**-40F(2d)504. [s] **Affiliated returns.**-41F(2d)925. [t] **"Affiliated corporations"** required to make consolidated return of income. 43F(2d)931. [u] **Separate income tax returns should be made by corporations** where old corporation transfers assets to new corporation. 43F(2d)372. [v] **Adoption of one of several methods of making return is optional,** and method adopted is taken cum onere. 42F(2d)299.

356-79 [a] **Computation.**-41F(2d)966. [b] **Compromise.**-41F(2d)966.

356-79½-New. Requirement of the Revenue Law, that a person receiving an income from the violation of law must make a return, is in violation of the constitution as compelling a person to be a witness against himself. 15F(2d)809.

356-79¼-New. Under the provision for the assessment of income or profit taxes within five years after filing a return, deficiency cannot be assessed after the expiration of such time on the ground that the return was inaccurate. 17F(2d)109.

356-79¼-New. Filing an informatory or amended return for 1918 in income tax is not a waiver of right to rely on limitation. 19F(2d)643.

356-79½-New. False return renders one liable for perjury. 273US202, 47SCt341, 71Led610.

356-79⅓-New. As regards a taxpayer's right to deduct judgment from the return, books setting up "accounts receivable," "accounts payable" and inventories, held kept on an "accrual basis." 19F(2d)382.

356-79½-New. Where the return of a corporation does not show the full amount of the tax due and payment is made on the basis of the return, such corporation is liable for interest on deficiency, although it voluntarily files an amended return showing the correct amount. 21F(2d)856.

356-79⅔-New. Under the Act of 1917, where the commissioner determines that the return does not reflect the true income, he should levy tax upon cash basis. 20F(2d)970.

356-79½-New. Failure to make proper book entry or returns on correct theory is correctable. 26F(2d)187.

356-79$_{10}$-New. A previously decided case, holding that particular profits were not income, has been held reasonable cause for failure to file a tax return at the time when otherwise due, but not protection against imposition of a penalty for failure to make such return for more than two years after the case relied on had been reversed. 27F(2d)530.

356-79$_{11}$-New. A tax could be assessed on information from a revenue agent without a return when the taxpayer, making a false or no return, was transferring property. 27F(2d)250 [certiorari den 278US634, 49SCt32(2dcase), 73Led551].

356-79$_{12}$-New. A claim in abatement based on a decline in prices has been held not to be a binding revaluation. 27F(2d)347.

356-79$_{13}$-New. Commissioner of internal revenue has discretionary power to credit return of one year with amount included in return and taxed in prior year. 36F(2d)1013.

356-79$_{14}$-New. Disallowance of an item shown on the books of a can company as a deduction was not a rejection of an accrual basis, on which they filed returns, and hence did not entitle them to file returns on a cash basis. 33F(2d)187.

356-79$_{15}$-New. The court is not bound by rulings of the board of tax appeals as to the statute of limitations not beginning to run from the date of filing a tentative return but from the date of a completed return. 33F(2d)969.

356-79$_{16}$-New. An electric railroad corporation which acquired the majority of stock of a connecting railroad held entitled to make a consolidated return under the Revenue Act of 1918. 34F(2d)316.

356-79$_{17}$-New. Evidence held sufficient to justify the inclusion in a corporate taxpayer's returns of invested capital of items for the value of good will and the value of patents. 34F(2d)439.

356-79$_{18}$-New. The internal revenue commissioner is not without power to audit a return and adjust items in accordance with the basis on which filed. 33F(2d)187.

356-79$_{19}$-New. Definitions of taxable net income in a section providing for returns on a cash basis are applicable to all returns, including those by corporations keeping books on an accrual basis. 33F(2d)187.

356-79$_{20}$-New. Under income tax law selection of system of keeping books is primarily for taxpayer. 42F(2d)620.

356-79$_{21}$-New. Cash receipts and disbursements during period furnish prima facie correct test for computing income. 42F(2d)620.

356-79$_{22}$-New. Taxpayer customarily employing combination of cash and accrual methods in bookkeeping does not change methods by classifying new income in accordance with judgment after changing business. 42F(2d)620.

356-81 See also 27F(2d)930.

357-6 6F(2d)660. [a] **Decisions of commissioner** are not conclusive on courts. 7F(2d)146. [b] **Bonds pending appeal.**-21F(2d)211. [c] **Filing of petition for redetermination of deficiency in income and excess profits taxes within sixty days after notice** is jurisdictional and petition must be dismissed by board of tax appeals when not filed within such time. 23F(2d)972. [d] **Payment of fee for filing petition for redetermination of deficiency in income and excess profits taxes.**-Statutory time is not jurisdictional. 23F(2d)972. [e] **Procedure.**-279US716, 49SCt499, 73Led918; 29F(2d)253; 29F(2d)262 [certiorari den 279US844, 49SCt265(1stcase), 73Led989]; 29F(2d)339; 29F(2d)502; 29F(2d)532; 29F(2d)543; 29F(2d)559; 29F(2d)698; 29F(2d)865; 30F(2d)130; 30F(2d)622; 30F(2d)628 [certiorari den 279US853, 49SCt348(7thcase), 73Led995]; 30F(2d)630; 30F(2d)645; 30F(2d)807; 30F(2d)818(1stcase); 31F(2d)89; 31F(2d)96; 31F(2d)248; 31F(2d)274; 31F(2d)286; 31F(2d)399; 31F(2d)652; 31F(2d)655; 31F(2d)667; 31F(2d)753; 31F(2d)935; 32F(2d)42; 32F(2d)225(2dcase); 32F(2d)229; 32F(2d)753; 32F(2d)780; 36F(2d)342; 39F(2d)73; 41F(2d)454; 43F(2d)298; 43F(2d)331; 43F(2d)345; 43F(2d)509; 43F(2d)556. [f] **Board of Tax Appeal's findings entitled to great weight.**-26F(2d)805. [g] **Assessment by commissioner** is recognized only as prima facie correct. 26F(2d)805 (and only for practical purposes). [h] **Finding of commissioner** prima facie correct. 27F(2d)91. [i] **Taxpayer has burden** of proving that tax is invalid. 27F(2d)91 (burden not sustained). [j] **Evidence sufficient to support finding** of Board of Appeals, denying allowance for leases as invested capital, in determining income and profit taxes. 26F(2d)771. [k] **Board of tax appeals' findings** will be reviewed only to extent of determining whether there is evidence to sustain them. 37F(2d)660; DC 37F(2d)808. [l] **Taxpayer petitioning for review has burden** of showing action of commissioner was plainly arbitrary. 281US264, 50SCt263, 74Led848. [m] **Petitioner proceeding with case on merits** waived objection that commissioner failed to comply with rules relative to extensions of time for answer. 35F(2d)139. [n] **Finding of board of tax appeals.**-35F(2d)167. [o] **Burden is on petitioner** to establish invalidity of deficiency assessment by commissioner. 35F(2d)167. [p] **Decision of commissioner properly upheld** by board of tax appeals. 35F(2d)504. [q] **Taxpayer has burden** of overcoming presumption that decision of commissioner is prima facie correct. 35F(2d)504. [r] **Review by board of tax appeals** brings before it merits of taxpayer's liability and amount thereof. 36F(2d)342. [s] **Opinion evidence** that compensation allowed officers of corporation was reasonable is not binding on board of tax appeals in determining whether deductions were excessive. 35F(2d)167. [t] **Applicability of related sections of statute** under which taxpayer seeks review cannot be denied by him. 38F(2d)425. [u] **Decision of board of tax appeals not appealed from conclusive.**-38F(2d)489 (redetermination proceeding). [v] **Review by court of order of board of tax appeals.**-38F(2d)810 (burden of proof on taxpayer). [w] **Review by court of orders of board of tax appeals.**-38F(2d)550. [x] **Review by court** of decision of board of tax appeals sustaining internal revenue commissioner's order reducing credit claimed by taxpayer. 38F(2d)755 (correct amount controlling question). [y] **Proceedings after affirmance of decision of board of tax appeals.**-38F(2d)986. [z] **Scope of review.**-37F(2d)660. [aa] **Admissibility of evidence.**-40F(2d)398. [ab] **Assignments of error.**-43F(2d)298. [ac] **Board of tax appeals cannot consider parts of depositions not in evidence.**-DC 37F(2d)801. [ad] **Board of tax appeals' determination of questions of fact** will not be interfered with when supported by substantial evidence. 42F(2d)419. [ae] **Board of tax appeals' findings** are not conclusive. 43F(2d)509. [af] **Burden of proof.**-40F(2d)372; 42F(2d)609. [ag] **Burden of proving taxpayer's intent to change domicile** rests on commissioner of internal revenue. DC 37F(2d)808. [ah] **Commissioner's determination as to percentage to be used as deduction of invested capital** is discretionary and not subject to judicial review. 38F(2d)248. [ai] **Conclusiveness of commissioner's findings.**-41F(2d)966. [aj] **Decisions of board of tax appeals reviewable.**-41F(2d)481. [ak] **Decisions held not so clearly wrong as to require reversal.**-41F(2d)517. [al] **Decision of commissioner.**-41F(2d)300; 43F(2d)345; 43F(2d)509; 43F(2d)556. [am] **Duty of ascertaining reasonable allowance for depreciation in corporate franchise** rests with board of tax appeals. 43F(2d)298. [an] **Estoppel to deny competency of evidence.**-40F(2d)372. [ao] **Evidence admissible.**-41F(2d)131. [ap] **Evidence before board of tax appeals held to show** that fifty per cent of taxpayer's automobile expense was incurred in connection with business, and was deductible. 38F(2d)391; DC 37F(2d)801. [aq] **Evidence held sufficient.**-37F(2d)894; 38F(2d)69; 38F(2d)155; 38F(2d)180; 41F(2d)131; 42F(2d)372; 42F(2d)419; DC 37F(2d)808. [ar] **Evidence held insufficient.**-41F(2d)454. [as] **Examination of entire record.**-40F(2d)398. [at] **Fair market value of property** is peculiarly question of fact for board of tax appeals. 42F(2d)99. [au] **Findings.**-40F(2d)833; 41F(2d)131. [av] **Findings of board of tax appeals** having support in evidence are not reviewable. 38F(2d)55; 38F(2d)180; 43F(2d)39; 43F(2d)

61; 43F(2d)298. [aw] **Finding of commissioner** prima facie correct. 41F(2d)454. [ax] **Harmless error.**–DC 37F(2d)801. [ay] **Jurisdiction of board of tax appeals is exclusive if it first acquires it.** 38F(2d)144. [az] **Motion to dismiss appeal from board of tax appeals** for not timely preparing and transmitting record should be granted where good excuse is not shown. 43F(2d)39 (sufficient excuse shown). [ba] **Necessity for preservation of evidence.**–41F(2d)20. [bb] **Necessity for transcript of evidence.**–40F(2d)833. [bc] **On review of decision of board of tax appeals** facts on which conclusions are based will be reviewed to determine whether law has been properly applied. DC 37F(2d)808. [bd] **Pleading limitations.**–41F(2d)308. [be] **Positive testimony as to depreciation cannot be disregarded by board of tax appeals** in absence of independent knowledge of facts. 43F(2d)345. [bf] **Presumptions.**–40F(2d)336; 40F(2d)398; 41F(2d)20; 41F(2d)24. [bg] **Question not raised before board of tax appeals** cannot be considered by court on review. 42F(2d)653. [bh] **Questions of fact.**–40F(2d)372; 41F(2d)20; 41F(2d)24. [bi] **Questions of fact for board of tax appeals.**–41F(2d)905. [bj] **Questions of law and fact.**–39F(2d)420. [bk] **Questions reviewable.**–40F(2d)833. [bl] **Question of deduction for salaries of corporate officers** is one of fact. 42F(2d)419. [bm] **Question of value of good will of business** held primarily one for board of tax appeals. 42F(2d)372. [bn] **Reasonable deduction for depletion** question for board of tax appeals. 42F(2d)837. [bo] **Record not showing error.**–40F(2d)336. [bp] **Record on appeal from board of tax appeals.**–43F(2d)39. [bq] **Review of discretion.**–41F(2d)24. [br] **Rules of board of tax appeals.**–43F(2d)509. [bs] **Scope of review.**–43F(2d)39. [bt] **Strict compliance with statutory provisions** is required for review of commissioner's determination by board of tax appeals. 41F(2d)299. [bu] **Taxpayer cannot question commissioner's finding on question whether securities had readily realizable market value** where he presents no evidence from which question can be determined. 38F(2d)155. [bv] **Time for appeal.**–40F(2d)634. [bw] **Valuation of decedent's remainder interest by board of tax appeals** may be based on what is was sold for after his death where evidence is conflicting. 38F(2d)55. [bx] **Where issue as to depreciation is disputed** order of board of tax appeals, making additional deduction will not be disturbed. 41F(2d)725.

357–8½–New. The commissioner of internal revenue, on subpœna, must disclose to the board of tax appeals evidence considered in making a finding as to a deficiency in taxes. 17F(2d)663.

357–8⅓–New. Jurisdiction of the board of tax appeals is not limited by discretionary powers vested in the commissioner, nor by inhibitions as to secrecy. 17F(2d)663.

357–8¼–New. Payment of filing fee after sixty-day statutory period does not affect consideration of the petition for redetermination of deficiency in payment of income tax where the petition was filed within the statutory period. 19F(2d)789.

357–8⅙–New. Determinations of commissioner of internal revenue as to whether special assessment should be made as to excess profits of corporation under Revenue act of 1918 are held subject to review by board of tax appeals. 275US220, 48SCt87, 72Led249.

357–8⅛–New. The court's jurisdiction to review decisions of the board of tax appeals is limited to errors of law. 22F(2d)6.

357–8⅐–New. Taxpayer's honest belief in ascertaining and charging off worthless debts is not binding on board of tax appeals. 22F(2d)6.

357–8⅛–New. Board of tax appeals properly treated internal revenue commissioner's decision as prima facie correct and cast burden of disproving it on appellant. 22F(2d)6.

357–8⅑–New. On review of decision of board of tax appeals, court cannot substitute its opinion on facts for that of board. 22F(2d)6.

357–8⅒–New. Decision of board of tax appeals on evidence introduced and arguments presented before the enactment of the Revenue Act of 1926 is not reviewable. 24F(2d)390.

357–8 1/11–New. Review of decision of board of tax appeals is limited to questions of law. 24F(2d)390.

357–8 1/12–New. Board of tax appeals is held justified in entering finding respecting income as based on exhibits in record. 25F(2d)534.

357–8 1/13–New. Court on appeal may consider facts which are basis for conclusions of board of tax appeals. 26F(2d)540.

357–8 1/14–New. Where vital parts of board of tax appeals' decision are inconsistent, justice requires reversal and remand for rehearing. 22F(2d)536.

357–8 1/15–New. The burden is on appellant before the board to show the deductions were incurred during the taxable year. 25F(2d)538.

357–8 1/16–New. The decisions of the board of tax appeals are not reversible for difference of opinion as to weight of evidence. 25F(2d)538.

357–8 1/17–New. Deductions disallowed for one year need not necessarily be granted for succeeding year, 25F(2d)538.

357–8 1/18–New. A statute conferring jurisdiction to review decisions of the board of tax appeals confers jurisdiction to review, not questions of fact, but only matters of law. 27F(2d)91.

357–8 1/19–New. The board of appeals, in determining income and profit taxes, is not required to accept opinion evidence relative to the value of leases owned by the taxpayer and claimed as invested capital. 26F(2d)771.

357–8 1/20–New. The board of tax appeals has jurisdiction of the entire controversy on appeal for redetermination of existing deficiency assessment. 28F(2d)661.

357–8 1/21–New. A supplemental petition is not an abandonment of the original petition, without restatement of facts stated in the original petition. 28F(2d)247.

357–8 1/22–New. The board of tax appeals, having disallowed deficiency determined by the commissioner of internal revenue before suit for refund was brought, a subsequent appeal did not suspend the effect of such decision, and no taxes were unpaid when the petition was filed. 27F(2d)994.

357–8 1/23–New. The circuit court of appeals does not review facts found by the board of tax appeals on petition for review, where facts are supported by substantial evidence, but reviews questions of law only. 28F(2d)748.

357–8 1/24–New. A taxpayer, on petition to review a decision of the United States board of tax appeals denying deductions, has the burden to prove that property rights acquired in return for an agreement to pay installments for maintenance of transferors were worthless. 28F(2d)748.

357–8 1/25–New. An allegation, in a petition for review of decision of the board of tax appeals, that the board erred in its conclusion that a specified sum received from the sale of "ownership certificates" was properly included in partnership income for the taxable year, has been held to raise the issue whether such sum was capital or taxable income. 28F(2d)247.

357–8 1/26–New. A decision of the board of appeals on evidence submitted and arguments made prior to Feb. 26, 1926, was not appealable. 27F(2d)116.

357–8 1/27–New. The commission may require an official of a telegraph company to produce documents relative to a taxpayer's receipt of money, in determining the latter's tax liability. 32F(2d)844.

357–8 1/28–New. The sole remedy of either the commissioner of internal revenue or a taxpayer for an adverse decision of the board of tax appeals is review by the circuit court of appeals. 24F(2d)819.

357–8 1/29–New. A decision by the board of tax appeals rendered after effective date of Revenue Act of 1926, on hearings held before such date, may not be reviewed by the circuit court of appeals. 24F(2d)819.

357–8 1/30–New. Findings of primary facts committed to board of tax appeals will not by received by circuit court of appeals when supported by substantial evidence. 39F(2d)583.

357–8 1/31–New. District court has been held without jurisdiction to review commissioner's determination of 1918 excess profits tax rate. 39F(2d)645.

357–8 1/32–New. Board of tax appeals has jurisdiction of taxpayer's petition contesting correctness of commissioner's final determination of jeopardy assessment in connection with abatement claim filed after enactment of act of 1924. 39F(2d)753.

357–8 1/33–New. Board of tax appeals in absence of evidence before it except stipulation of facts is under duty to base decision upon such facts. 39F(2d)777 (reviewing decisions of board of tax appeals).

357–8 1/34–New. Petition filed by taxpayer with board of tax appeals stated taxes for such years as were stated in deficiency letter of commissioner. 36F(2d)614.

357–8 1/35–New. Statute requiring board of tax appeals to include in report its findings of fact or opinion is applicable to pending proceedings. 36F(2d)842.

357–8 1/36–New. No rule of board of tax appeals can deprive commissioner of internal revenue of right to notice and hearing. 37F(2d)442.

357–8 1/37–New. Board of tax appeals may modify its own rules when justice requires it. 37F(2d)442.

357–8 1/38–New. Extension of time for pleading granted by board in derogation of own rule is discretionary and not reviewable in absence of abuse. 37F(2d)442.

357–8 1/39–New. Jurisdiction of board is revisory and has duty of hearing additional evidence in redetermining case. 37F(2d)442.

357–8 1/40–New. Rules of board of tax appeals are merely procedural and cannot limit jurisdiction of board. 37F(2d)442.

357–8 1/41–New. In proceeding for redetermination of deficiency in income and profits tax, motion to amend pleadings to conform to proofs held timely. 37F(2d)660.

357–8 1/42–New. Decision of board of tax appeals in proceeding for redetermining deficiency finding overpayment, affirmed on appeal, is as enforcible as any judgment for refund. 38F(2d)144.

357–8 1/43–New. Proper exercise of discretion held to require allowance of amendment of petition by board of tax appeals setting up bar of statute of limitations. DC 37F(2d)805.

357–8 1/44–New. The board of tax appeals is without authority to assess a deficiency tax based on a new computation submitted by the commissioner, without giving the taxpayer opportunity to meet it. 33F(2d)464.

357–8 1/45–New. Where the sole question before the board of tax appeals was whether a taxpayer and another were affiliated, it was without power to determine any other question. 33F(2d)464.

357–8 1/46–New. Board of tax appeals' denial of permission to amend petition for redetermination of deficiency to conform to proofs held abuse of discretion. 37F(2d)660.

357–8 1/47–New. Whether income derived from the sale of oil leases by a corporation should be computed could not be presented to the board of tax appeals for the first time at the hearing. 34F(2d)390.

357–8 1/48–New. Refusal of the commissioner of internal revenue to permit the consolidated return of income held not subject to review. 33F(2d)120.

357–8 1/49–New. Where it is clear that the use of inventories distorts the income, a taxpayer has a right to invoke the aid of the court. 33F(2d)53.

357-8½₀-New. Where notice of deficiency was given within the period extended by agreement, an appeal therefrom had the effect of further extending the period for assessment. 34F(2d)322.

357-8½₁-New. A conclusion of the board of tax appeals is entitled to considerable weight in determining whether corporations are entitled to make a consolidated income tax return. 34 F(2d)316.

357-8½₂-New. The circuit court of appeals must accept findings of fact made by the board of tax appeals, where there is any substantial evidence to sustain them. 34F(2d)255.

357-8½₃-New. A finding of the board of tax appeals that advancements by a taxpayer were loans held sustained by the evidence. 34F(2d)255.

357-8½₄-New. A reviewing court is not at liberty to substitute its opinion for that of the board of tax appeals on facts shown on the record. 34F(2d)255.

357-8½₅-New. A statute providing for an extension of the limitation period in case an appeal has been filed held to extend the period even where notice was mailed during the waiver period. 33 F(2d)441.

357-8½₆-New. Finding of the tax board as to a question of fact will be sustained if there is any substantial evidence to support it. 34F(2d)859.

357-8½₇-New. Refusal of the board to reopen the case and make redetermination of the corporation's invested capital and tax liability held not an abuse of discretion. 34F(2d)859.

357-8½₈-New. Refusal of the board of tax appeals to permit revaluation of the firm's merchandise held proper. 35 F(2d)139.

357-8½₉-New. Only errors of law will be inquired into by the court on review of a determination of the board of tax appeals. 35F(2d)167.

357-8½₀-New. A taxpayer, in applying to the board of tax appeals to review a determination of the commissioner must show that the determination is erroneous. 35F(2d)178.

357-8½₁-New. The circuit court of appeals is confined to the board's findings of fact on appeal. 35F(2d)326.

357-8½₂-New. The circuit court of appeals has no power to weigh evidence on appeal from the board of tax appeals. 35F(2d)614.

357-8½₃-New. Review of an order of the board of tax appeals, confirming a determination of a deficiency in income taxes, is not defeated by failure to specify the provision of the statute in the petition. 35F(2d)713.

357-8½₄-New. The appellate court, in reviewing a decision of the tax board, should determine the legal effect of undisputed facts in the case. DC 35F(2d) 880.

357-8½₅-New. A finding of the board of tax appeals, supported by evidence, cannot be reviewed in the absence of abuse of discretion. 36F(2d)51(2d case).

357-8½₆-New. The board of tax appeals may increase the amount of the deficiency on the commissioner's request. 36F(2d)107.

357-8½₇-New. The decisions of the board of tax appeals are reviewable as to questions of law only. 36F(2d)193.

357-8½₈-New. A finding of the board of tax appeals, when supported by substantial evidence, cannot be disturbed. 36F(2d)326.

357-8½₉-New. Weight of evidence is matter for judgment of board of tax appeals. 44F(2d)157.

357-8½₀-New. Taxpayer assessed for deficiency has burden as to set-off claimed. 43F(2d)814.

357-8½₁-New. Failure of taxpayer to plead statute of limitations in hearing before board of tax appeals is immaterial in view of express waiver. 43F(2d) 968.

357-8½₂-New. Either party to hearing before board of tax appeals may, with consent of board, raise new issue any time before final disposition. 43F(2d) 968.

357-8½₃-New. Corporation seeking redetermination of assessment of tax on ground of insufficient allowance for consolidated invested capital has burden of proof. 43F(2d)931.

357-8½₄-New. Board of tax appeals may not ignore preponderance of undisputed testimony. 43F(2d)950.

357-8½₅-New. Statute empowering commissioner to compromise cases is inapplicable to contested proceedings before board of tax appeals. 43F(2d) 593.

357-8½₆-New. Acquiescence by commissioner in decision of board of tax appeals is subject to withdrawal at any time within year after final decision. 43F(2d)593.

357-8½₇-New. Whether dues or fees of club are taxable as those of social club is primarily question of fact. 42F(2d) 321.

357-8½₈-New. Transferee of taxpayer's assets may as taxpayer petition board of tax appeals and court for review of assessment. 42F(2d)177.

357-8½₉-New. Refusal of board of tax appeals to allow taxpayer to amend pleadings so as to raise question of limitation is error. 42F(2d)213.

357-8½₀-New. Court may not interfere with finding of board of tax appeals where authorized under evidence. 42F(2d)148.

357-8½₁-New. Assignment of error by commissioner is insufficient to raise question of error in allowance for depreciation by board of tax appeals. 42 F(2d)186.

357-8½₂-New. Court's review of decision of board of tax appeals fixing income taxes is limited to correction of obvious errors. 42F(2d)184.

357-8½₃-New. Court has no power to review finding of board of tax appeals unless discretion is abused or board proceeded on erroneous view of law. 42F(2d)99.

357-8½₄-New. Provision for hearing appeals from board of tax appeals in case of stipulation applies to appellate courts of circuit where taxpayer has color of residence. 42F(2d)189.

357-8½₅-New. Circuit court of appeals is without jurisdiction of corporate taxpayer's petition to review assessment where taxpayer made return to collector in another circuit. 42F(2d)189.

357-9 [a] Right to full payment not released without express declaration or necessary implication. 23F(2d)717.

357-12½-New. To obtain dismissal of a proceeding for the collection of a tax by summary assessment, aided by a suit in equity, a taxpayer need only prove that the method of assessment was unauthorized. 19F(2d)399.

357-12½-New. Precise method prescribed by statute must be followed. 18F(2d)611.

357-12¼-New. However, taxpayer may resort to any legal method to depreciate his liability for tax. 25F(2d)1015.

357-12½-New. Tax retroactively levied after distribution of corporate assets to stockholders was potential liability of corporation which they are subject to notice. 26F(2d)227.

357-12¾-New. In such case the stockholders are dealt with as if the corporation were insolvent where not enough funds are left to pay such tax. 26F(2d) 227.

357-12½-New. If a tax is due and owing from a corporation when liquidated, the beneficiaries of such corporation become liable therefor. 27F(2d)1000.

357-12¼-New. A surety's liability on a bond has been held extinguished by extinguishment of the tax liability prior to an action on the bond by the limitations of revenue acts. 27F(2d)782 [certiorari granted 278US597, 49SCt178 (2dcase), 73L ed527].

357-12½-New. An action on a bond given by a taxpayer and surety in connection with filing of a claim for abatement before limitation of the Revenue Act is maintainable against collection of income after expiration of limitations. 27F(2d)628.

357-12¼₀-New. The court will hold parties bound by the government's settlement of tax claims. 27F(2d)550.

357-12¼₁-New. In Porto Rico the statute applicable to assessment and collection of income tax does not authorize the treasurer to credit taxes paid under an earlier act on taxes collected under the later act. 29F(2d)523.

357-12½-New. The surety on a bond for extension of time for payment of income tax cannot have a lien enforced on the theory of subrogation or exoneration before payment of the tax. 24 F(2d)836.

357-12¼₃-New. A collector, in collecting income and profit taxes, acts as an agent of the United States. 34F(2d) 328.

357-12¼₄-New. The commissioner of internal revenue may have authority to require a tentative return method of collecting income and profits tax. 33 F(2d)739.

357-12½₅-New. A taxpayer cannot repudiate a waiver of limitations against collection of income taxes. 35F(2d) 620.

357-12½₆-New. Collection of income tax is not barred by the statute of limitations, although assessment is made five years after filing of return, where such assessment is timely made. 35 F(2d)620.

357-12½₇-New. Validity and construction of contract settling claims for income taxes. 35F(2d)990.

357-12½₈-New. Act of 1928 provides that payment where collection was "stayed" after claim in abatement shall not be considered overpayment as to payments after expiration of limitation. 38F(2d)483 ("stayed" means voluntary stay as well as legal stay).

357-12½₉-New. Place of payment of income tax is question of federal regulation requiring representative to file and pay tax. 136Misc261, 241NYS82.

357-12½₀-New. To render trustee personally liable for federal taxes he must have notice sufficient to put prudent person on inquiry respecting government's claim. 40F(2d)673 (notice held insufficient).

357-12½₁-New. Bond given commissioner of internal revenue to secure delay in collection and conditioned for payment if abatement denied is valid. 42F(2d)227.

357-12½₂-New. In action on bond given to delay collection, improper assessment of taxes, is matter of defense, not raised by demurrer to declaration. 42F(2d)227.

357-12½₃-New. Facts proving bond sued on was obtained by duress must be pleaded and proved as matter of defense. 42F(2d)227.

357-12½₄-New. Stockholder receiving liquidating dividends larger than amount of deficiency taxes assessed against dissolved corporation is liable for entire amount of tax. 42F(2d)177.

357-12½₅-New. Persons liable for tax. Widow of testator. 44F(2d)144.

357-13 [a] (2) Corporation voluntarily paying additional tax on amended return, though before audit of return, is liable for interest thereon. 24F(2d)788. [c] **Interest on deficiency assessment** on account of income tax, and war profits, and excess profit tax, under Revenue Act of 1921, is payable at rate of one half of one per cent from date tax or installment thereof was due, even though taxpayer was not at fault. 14 F(2d)539.

358-16½-New. A manufacturer, failing to bill a tax on soft drinks as a separate item, is liable for tax on increased sales price for the purpose of covering the tax thereon, notwithstanding it had notified its customers beforehand that the tax had been paid. 278US175, 49 SCt100(1stcase), 73L ed251.

358-18 27F(2d)250 [certiorari den 278 US634, 49SCt32(2dcase), 73L ed551]. [b] **Tax lien of United States** is not extinguished by mortgage foreclosure in state court. 5F(2d)991. [c] **Lien of additional income tax** dates from collector's receipt of assessment list. 7F(2d) 777. [d] **Priority.**-23F(2d)926.

358-20 [a] **Tax lien of United States for taxes due from mortgages** is subordinate to purchase-money mortgage, real estate taxes, and water charges. 5 F(2d)991.

358–21 7F(2d)478. [a] **Lien on corporate property** for income tax attaches immediately on receiving assessment lists and neglect to pay tax on demand. 24F(2d)836.

358–22 [a] (1) 8F(2d)426. (3) Government's expressions of expectation and requirement held sufficient demand to create lien. 5F(2d)553. (4) Demand may be waived by taxpayer. 5F(2d) 553. (5) Facts held to show waiver of demand. 5F(2d)553. [c] **Assessments covered by notice of lien** are conclusively presumed valid, and costs of proceedings to determine claims under Revenue Act (1924) § 1030 are on plaintiffs. 5F (2d)991.

358–23 279US80, 49SCt321, 73L ed621.

358–23½–New. After levy has been made, a lien relates back to the time when taxes became due and payable. 8 F(2d)426.

358–23⅓–New. As regards a lien for income taxes on the lessor's property, the lessor cannot insist that the lessee discontinue payments to the lessor's stockholders. 19F(2d)157.

358–23¼–New. Right of stockholders of a lessor telegraph company to payments from a lease is not property of the lessor, authorizing a government lien thereon for its income taxes. 19F(2d)157.

358–23⅕–New. Telegram from a revenue agent, recommending immediate assessment of income taxes, to attach taxpayer's bank deposits, held not a "return," authorizing a tax lien. 19F(2d) 399.

358–23⅙–New. Under the trust fund doctrine, where a partnership is successor of a corporation, the partnership and its members are liable for payment of profit and income taxes due by the corporation to the extent of the assets received. 18F(2d)611.

358–23⅐–New. Suit to restrain execution of distress warrant for internal revenue taxes against a distillery is not maintainable on the ground that lien of taxes was divested by sheriff's sale of property. 21F(2d)494.

358–23⅛–New. In Pennsylvania ordinarily internal revenue lien is not divested by sheriff's sale of property unless tax is paid. 21F(2d)494.

358–23⅑–New. Assessment list transferred from another district does not create a lien in the absence of a showing that the assessment was made in, or transferred to, such district. 25F(2d) 1007.

358–23⅒–New. A certified copy of a capital stock tax assessment is not a lien on fire insurance money of corporation's transferee. 25F(2d)1007.

358–23⅑–New. No lien exists on property or insurance thereon never owned by corporation assessed. 25F(2d)1007.

358–23⅓–New. The statutory remedy for the enforcement of a lien for income tax is exclusive, the lien being statutory. 24F(2d)836.

358–23⅓–New. The lien is the exclusive property of the United States, and a collector of internal revenue has no right to dispose of it. 24F(2d)836.

358–23¼–New. A petition to cancel a government tax lien held to state a cause of action. 33F(2d)553.

358–23⅕–New. A government tax lien cannot be canceled without a proceeding to which the government is party. 33F (2d)553.

358–25 40F(2d)562.

358–27 4F(2d)852.

359–41½–New. Under the act of 1921, distraint and sale must be within five years. 273US346, 47SCt389, 71L ed676.

359–41⅓–New. Waiver of objections to sale. Officer serving legally issued warrant for distraint for income and profit taxes may exact waiver of limitations and technical objections to the sale as a condition to postponing the sale. 17 F(2d)407.

359–41¼–New. Collection of tax outlawed by limitations by distraint is illegal notwithstanding statute providing in effect that outlawed tax is as if never laid. 24F(2d)205.

359–41⅕–New. Trust company cannot resist collection by distraint of tax from person to whom they were indebted on ground tax was barred by statute. 43 F(2d)829(2dcase).

359–49½–New. The government cannot resort to equity to enforce payment of income taxes by levy on moneys due under a leasing agreement. 19F(2d)157.

359–49¼–New. Limitations. In the absence of statute there is no limitation as to period within which the United States may sue to collect corporate income and profit taxes. 22F(2d)249.

359–49¼–New. Where congress enacts a statute limiting the time for collection of such taxes, it may impose conditions on the taxpayer, provide for tolling of statute, and make it retroactive. 22 F(2d)249.

359–49⅓–New. A suit to impress a trust for such taxes upon assets distributed to stockholders is held not barred under statute. 22F(2d)249.

359–45 [a] **Under Revenue Act (1924) § 1030** district court cannot extinguish United States tax liens, but merely provide for their removal as clouds on title. 5F(2d)991.

359–46 [a] **Under Revenue Act (1924) § 1030** cloud of tax liens on title of premises sold under foreclosure of mortgage in state court is removable only by sale free and clear of liens under order of district court. 5F(2d)991.

359–50 27F(2d)250 [certiorari den 278 US634, 49SCt32(2dcase), 73L ed551]; 27F(2d)933. [h] **Filing of proof of claim in bankruptcy court** for income taxes is equivalent of suit and proceeding in court for collection of taxes within meaning of tax statute. 21F(2d)538. [i] **Burden of proof.**–26F(2d)830. [j] **Evidence held insufficient** to prove that defendant stockholder had received property from corporation, which under trust fund doctrine should apply to payment of taxes assessed against corporation. 26F(2d)830.

360–54 [a] **Action at law** by United States for collection of estate tax under the act of 1918 is unauthorized. 7F(2d) 478. [b] **United States cannot bring** action at law for extra unassessed estate tax. 7F(2d)478.

360–54½–New. Under the Revenue Act of 1926, a general equitable action of following trust funds is not excluded. 32F(2d)1.

360–55 [a] (2) Provision in Revenue Act of 1924 and Revenue Act of 1926 extends provisions of limitation for tax collection to six years. 21F(2d)538.

360–56 15F(2d)528. But see 281US489, 50SCt367, 74L ed984. [a] **Formal assessment is not necessary condition precedent** to action to collect tax. 24F (2d)234. [b] **Statutes of limitation.**–38 F(2d)425; 38F(2d)816 (no consideration required for waiver). [c] **Five year limitation for collection of income taxes** controls as to taxes levied under prior acts. 43F(2d)782. [d] **Written waivers extending limitation for collection of income tax,** signed by employee acting under authority of commissioner is sufficient. 43F(2d)782. [e] **Statutes of limitation barring collection of taxes must receive strict construction** in favor of government. 43F(2d)836.

360–57 35F(2d)38 (burden on defendants to show invalidity of additional assessment of income tax). But see 31F (2d)655. [a] **Dissolution of corporation** does not extend time to bring suit for collection of taxes. 5F(2d)827.

360–57½–New. Limitation barring collection of taxes will not be presumed, in the absence of clear congressional action. 31F(2d)268.

360–57⅓–New. Proceedings by the United States for collection of taxes by the issuance of a warrant of distraint more than five years after filing the original and complete return is barred, under statute requiring that assessment must be made for taxes, and proceeding for collection must be begun within five years after the return is filed, with an additional period of six years for beginning suit after assessment of the tax. 31F(2d)89. [a] **Suit after expiration of additional period** is barred. 32F(2d)1. [b] **Taxes previously barred** are not covered by law extending period for collection of tax. 32F(2d)830. [c] **Provision for additional period** applies to actions against transferee of corporate assets. 32F(2d)1.

360–57¼–New. An action to recover an additional income tax, brought more than five years after the return was made, is barred by limitations. 278US 181, 49SCt121, 73L ed255; 31F(2d)935.

360–57⅕–New. The statutory period begins to run on the termination of the extended period for filing returns, 31F (2d)268. [a] **Agreement held to extend limitation.**–29F(2d)896(2dcase).

360–57⅙–New. or from the date of the completed return. 29F(2d)896(2dcase).

360–57⅐–New. Where no return is filed, that the government made an audit which disclosed the condition of the corporation's business as fully as if the return had been made has no effect as to limitation provisions. 32F(2d)1.

360–57⅛–New. Limitation period within which to sue for income and profits tax runs from date of completed return. 41F(2d)563.

360–58 [a] **It is question of fact** whether sums paid as salary include part of profits in computing excise tax. 7F(2d) 3. [b] **Whether directors acted in good faith** in voting manager eighty-five per cent of profits as salary is question for jury. 7F(2d)3. [c] **Jury's finding of good faith** in voting salary and as to reasonable value of services held conclusive on appeal. 7F(2d)3.

360–59 26F(2d)747. But see 16F(2d) 163; 27F(2d)782 [certiorari granted 278 US597, 49SCt178(2dcase), 73L ed527]; 28F(2d)30 [certiorari dism 278US664, 49SCt178(1stcase), 73L ed570]; 28F (2d)914. But see DC 37F(2d)805. [a] (2) Applicable to suit for recovery of money erroneously refunded. 35F(2d) 765. [c] **Bill in equity** brought more than five years after return will not be dismissed on motion. 5F(2d)827. [d] **Under act of 1921** fine limitation was imposed on collection of income and excess profit taxes running from date of filing return. 8F(2d)913. [e] **Federal statute of limitations.**–18F(2d)449; 23F(2d) 897. [f] **Revenue acts setting up limitations.**–21F(2d)538. [g] **Extension by written consent** of taxpayer and Commissioner relieves bar from collection of taxes after statutory period. 280US 453, 50SCt215, 74L ed542. [h] **Under Revenue Act of 1921** period of limitations in respect to excess profits taxes begins to run from filing of return for excess profits tax. 38F(2d)239. [i] **Statute of limitations begins to run against suit** for collection from date of completed return. 280US453, 50SCt215, 74L ed542. [j] **Revenue Act of 1928 relating to stay of collection** controls Revenue Act of 1921 requiring suit for collection within five years after return. 37F(2d)373. [k] **Revenue acts setting up limitations.**–US 41F(2d)751; 42F (2d)579; 300Pa355, 150A658. [l] **Under act of 1921,** tentative tax return by corporation held one from which five-year period of limitation must be counted. 33F(2d)739. [m] **Revenue Act of 1928** ratified unauthorized collection of taxes after limitation had run. 34F(2d)328. [n] **Collection of tax for year ending June 30, 1918** has been held barred when collected Sept. 8, 1925, though year's extension was granted by waiver signed Dec. 13, 1923. 34F(2d) 328.

360–59½–New. Period of limitations for income taxes, prescribed prior to the Act of 1924, is applicable to taxes assessed prior to the act's effective date. 21F(2d)463.

360–59⅓–New. Statutory limitation for collection of taxes does not apply to recovery of tax refunded through mistake. 21F(2d)493.

360–59¼–New. Waiver as to assessment and collection of taxes for 1917, received by the commissioner of internal revenue subsequent to his general order fixing the date of expiration for unlimited waivers for 1917 income taxes, has been held either to have a limitation of one year from the date of signing and mailing, or to be an unlimited waiver. 28F (2d)914.

360–59⅕–New. Waiver agreement may

limit the time of collection to five years from the return. 28F(2d)54.

360-59½-New. Where a taxpayer filed a return about March 15, 1918, the bureau of internal revenue could not consider a claim for abatement after the date of a so-called waiver on Nov. 16, 1925. 34F(2d)57.

360-59½-New. Waiver of the period of limitation, given after its expiration, must be freely given to be effective. 34F(2d)57.

360-59⅛-New. Where a taxpayer filed a return about March 15, 1918, and waiver was signed on Nov. 16, 1925, a collector had no right to collect an additional tax at the time the waiver was signed. 34F(2d)57.

360-59½-New. Waiver of the period of limitation by a taxpayer as to the time for collecting a tax was void where there was a failure of consideration which was clearly expressed. 34F(2d)57.

360-60 [a] **Burden of proof.**-United States, in action at law to recover tax, must prove that tax is due. 30F(2d)244. [b] **Burden of showing illegality of tax** rests on taxpayer after government shows regular assessment and demand. 43F(2d)366.

360-64½-New. Sole stockholder taking over all assets of dissolved corporation worth more than debts is liable for taxes. 15F(2d)528.

360-64⅝-New. Sole stockholder taking over without sale or transfer all assets of dissolved corporation held not good faith purchaser in suit to collect taxes. 15F(2d)528.

360-64¼-New. In action on bond to collect tax, validity of assessment cannot be collaterally attacked. 16F(2d)367.

360-64½-New. Suit is barred after five years. 273US346, 47SCt389, 71Led676. [a] **Action on bond** given to prevent collection of tax pending claim for abatement is not suit to collect taxes within statute of limitations. 23F(2d)367.

360-64⅛-New. Stockholders receiving assets of dissolved corporation are liable as trustees in a suit for excess profits or income taxes. 8F(2d)913.

360-64½-New. Whether same persons own or control substantially all stock of corporations, so as to require consolidated income tax return, is question for court. 19F(2d)260.

360-64⅛-New. Whether corporations should file consolidated income tax return as affiliated corporations is a question of law. 19F(2d)260.

360-64½-New. Failure to file consolidated income tax return for affiliated corporations held not fraudulent as respects running of limitations against government's suit. 19F(2d)260.

360-64½0-New. Statute authorizing the government, in case of a false or fraudulent income tax return, to sue within six years after assessment held not retroactive. 19F(2d)260.

360-64½1-New. Evidence held to show transaction to be taxable under law. 25F(2d)608.

360-64½2-New. Decree can be only for balance due, after deducting defendant's credits. 25F(2d)608.

360-64½3-New. Court has jurisdiction in suit to collect excess profits tax, although no notice of assessment was given. 25F(2d)746.

360-64½4-New. Suit for excess profits tax started more than six years after assessment is barred. 25F(2d)746.

360-64½5-New. Stipulation for assessment and collection within year held not to require collection within the year. 26F(2d)505.

360-64½6-New. Government action for collection held not barred. 26F(2d)505.

360-64½7-New. Government has six years to file suit where assessment is made five years after return. 26F(2d)503.

360-64½8-New. Suit may not be barred for delay in notice where assessment was within five years after filing return. 26F(2d)365.

360-64½9-New. Corporation which has long ceased business and distributed assets is not necessary party to suit against stockholders to collect income tax for years when doing business. 24F(2d)844.

360-64½0-New. In a suit against stockholders for the income tax of a corporation, officers cannot be required to account for excessive salaries received, although the excess is not deducted in determining the tax. 24F(2d)844.

360-64½1-New. Part of estate tax erroneously refunded is not "deficiency" rendering notice to executrix necessary before bringing suit for collection. 24F(2d)234.

360-64½2-New. Action to recover estate tax may be brought in district where estate was settled. 24F(2d)234.

360-64½3-New. Allegations that defendants had received moneys, assets, and properties of the dissolved corporation have been held not supported by evidence showing that a particular defendant had taken over the dissolved corporation's liabilities and assumed its obligations. 29F(2d)650.

360-64½4-New. In determining income and profits tax, par value of stock is questionable evidence of the value of the property for which the stock was issued. 30F(2d)917. [a] **Evidence held insufficient** to overcome presumption of correctness of determination changing value of property, stocks, and bonds. 30F(2d)917.

360-64½5-New. Limitations as to the collection of a tax do not apply to proceedings for recovery of a bond issued pending determination of the taxpayer's claim in abatement. 279US370, 49SCt366, 73Led743.

360-64½6-New. In identifying funds received by inheritance and mingled with other funds, a taxpayer is not aided by the presumption in case of trust funds that withdrawals are from individual funds. 25F(2d)13.

360-64½7-New. A provision discharging the executor from personal liability for an additional tax on payment of the amount assessed does not bar an action against him in his representative capacity. 25F(2d)13.

360-64½8-New. Under the terms of a bond given to release a distraint warrant, recovery was made dependent on the success of the government in another case. 34F(2d)57.

360-64½9-New. Authorization by Commissioner of another to sign waivers of limitation against tax collection has been held inferred from Commissioner's demands for waivers, acknowledgment of receipts, filing and reliance thereon. 39F(2d)645.

360-64½0-New. Waiver of period of limitation for collecting tax need not be personally signed by Commissioner. 39F(2d)645.

360-64½1-New. Consent extending time for assessment of income and profits taxes likewise extended time for collection of tax. 39F(2d)753.

360-64½2-New. Tentative return of income and profits tax is insufficient to set in motion the statute of limitations. 39F(2d)753.

360-64½3-New. Waivers extending time for collection of 1918 income and profits taxes are not invalid as without consideration when acted upon. 37F(2d)703.

360-64½4-New. Action may be maintained on bond for payment of income and excess profits tax assessed within statutory period although bond was given after collection was barred. 37F(2d)720.

360-64½5-New. Limitations held not to have run against collection of deficiency assessments of income and excess profits taxes in view of waivers. 37F(2d)922.

360-64½6-New. Unexplained delay of eight years in serving complaints after demand for copies held to require dismissal. 37F(2d)926.

360-64½7-New. Government loses no right to collect excess profits tax unless expressly so provided by statute. 38F(2d)239.

360-64½8-New. A finding that a corporation engaged in business as a live stock commission agency was not exempt from an additional tax held justified. 34F(2d)436.

360-64½9-New. In a suit to impress trust on assets of a dissolved corporation for payment of corporate income taxes the evidence supported valuation of oil leases and equipment sold at their actual market value. 35F(2d)924.

360-64½0-New. Under revenue acts of 1924 and 1926 suit to collect additional taxes can be brought within six years after assessment although more than six years have expired since return. 43F(2d)34.

360-64½1-New. Writing construed as extending time for assessment and collection of income tax beyond five-year limitation. 43F(2d)653.

360-64½2-New. Waiver of limitations construed as waiver of limitations both as to assessment and collection of income and profits taxes. 43F(2d)592.

360-64½3-New. Taxpayer's waiver of time assessing 1918 income tax enlarged time for making collection. 43F(2d)772.

360-64½4-New. Order of member of division of board of tax appeals settling determination held final decision within statute prescribing one year limitation against commissioner. 43F(2d)593.

360-64½5-New. Word "assessment" in agreement waiving limitation for making assessment of income and profits taxes does not include collection. 42F(2d)681.

360-64½6-New. Findings and decision of board of tax appeals made by division of board held not final decision within such statute. 43F(2d)593.

360-66 39F(2d)473. [a] **Taxpayer's protest against delinquency assessment** at hearing of such questions is not "claim for refund" of previous payments. 39F(2d)473.

360-67 30F(2d)395. [a] **Taxpayer obtaining reduction** by reason of advance payments on refund is entitled to recover only amount paid, not amount of assessment. 270US163, 46SCt229, 70Led524. [b] **Discretion of commissioner.**-38F(2d)139. [c] **Facts not authorizing refund.**-44F(2d)249. [d] **Where invested capital is decreased by commissioner** statute contemplates refund for overpayment of income taxes. 43F(2d)619. [e] **Statute of limitation.**-42F(2d)918. [f] **Amount of refund.**-43F(2d)619.

360-68 38F(2d)707; 38F(2d)716; 38F(2d)354; 33F(2d)1000.

360-69 29F(2d)695; 30F(2d)817. See also 43F(2d)679.

360-69½-New. Board of tax appeals may order refund of payment not made voluntarily, although of tax barred by limitation. 24F(2d)576.

360-72½-New. Attorney in fact for interinsurance subscribers held to have right to maintain suit for refund of taxes. 12F(2d)998.

360-72½-New. No refund allowed to stockholder paying taxes on personal service corporation, later held not to be such corporation, where such corporation did not pay the tax. 22F(2d)367.

360-72¼-New. Crediting tax refund against uncollected tax outlawed by limitations is illegal notwithstanding statute providing in effect that outlawed tax is as if never laid. 24F(2d)205.

360-72½-New. Refund to corporation including all subsidiaries in return should be allocated to them proportionately. 26F(2d)503.

360-72½-New. Revenue Act of 1928 relative to overpayment is not limited in application to cases in which claim in abatement is filed and collection of tax thereby stayed. 37F(2d)763.

360-72½-New. Proviso of statute relative to filing of bond for redistribution of refund does not prevent refund to manufacturer paying tax without passing it on to consumer. 38F(2d)135.

360-72½-New. Ambiguity in statute defining right to refund for overpayment must be resolved against taxpayer. 41F(2d)273.

360-74 [b] **Determination of Commissioner** that claim for refund has been filed is mere administrative act and not conclusive. 39F(2d)730. [c] **Taxpayer at time of filing amended income and profit tax return showing overpayment** has been held to have also filed proper claim for refund. 39F(2d)1019.

360-75 42F(2d)729. [a] **Filing of waiver under statute** does not constitute

informal claim of refund of overpayment. 39F(2d)730.

360-76 DC 39F(2d)505.

360-78 38F(2d)477; 39F(2d)759; 35F(2d)260; 35F(2d)379. [a] **Failure to file waiver extending time to file claim for refund** does not deprive commissioner of power to grant refund. 35F(2d)379. [b] **Amendment to claim for refund** may be submitted, even though statute of limitations has expired. 35F(2d)379. [c] **Income and profits taxes assessed against taxpayer without allowing proper deduction** are erroneously assessed within statute. 37F(2d)771. [d] **Evidence held sufficient** to show claim for refund was filed. 36F(2d)961. [e] **Taxpayer's letter stating he proposed to claim refund** is not claim for refund under statute. 37F(2d)19. [f] **Revenue Act of 1928 respecting stay of collection** as stopping limitations statute is applicable where filing of claim in abatement results in delay in collecting taxes. 37F(2d)373. [g] **Statute is not unconstitutional** in barring remedy for recovery of erroneous assessments before right accrued. 37F(2d)19.

360-79 [a] **Within two years after disallowance of claim** limitations does not begin to run until notification that claim for refund is rejected. 37F(2d)38.

360-80½-New. Statute limiting the time for filing a claim for refusal does not apply to a tribal Indian. 21F(2d)94.

360-81 DC 39F(2d)505 (commissioner may insist upon literal compliance with statute as to time for filing of claim).

361-82 38F(2d)577 (defects may be waived). [b] **Sufficient claim.**-37F(2d)977; 38F(2d)258; 44F(2d)238.

361-83 25F(2d)1011.

361-84 [a] **Theory.**-38F(2d)258.

361-84½-New. Pending a taxpayers' appeal to the board of tax appeals, the court is held without jurisdiction to determine taxpayers' liability. 14F(2d)227.

361-84⅓-New. Claim for refund of taxes on blank furnished by department and referring to the statute of limitations, and specifying law relied on, is sufficient. 19F(2d)643.

361-84¼-New. Refund on tax prior to sale held to belong to vendor. 160La 261, 107S103.

361-84⅕-New. Refund of overassessment for one year to the credit of an additional assessment for another year is unauthorized. 28F(2d)914.

361-84⅙-New. Petition for refund held sufficient. 36F(2d)710.

361-84⅐-New. Revenue Act of 1928 indicates intent to ratify illegal collection and prevent return of taxes properly assessed. 37F(2d)373.

361-84⅛-New. Filing of bond is not prerequisite to refund of manufacturer's excise tax wholly borne, and paid by manufacturer without reimbursement from purchasers. 38F(2d)139.

361-84⅑-New. Stockholders of a merged corporation had a right to file a waiver in behalf of the merging corporation to procure a tax refund. 33F(2d)891(2dcase).

361-84 1/10-New. A claim for refund held insufficient. 34F(2d)217.

361-84 1/11-New. Executors of an estate who received credit in court for overpayment of taxes had no interest in a claim against the collector of internal revenue for refund of taxes. 34F(2d)350.

361-84 1/12-New. A claim against the government for refund of taxes is not assignable, and is not a "debt" within subrogation laws. 34F(2d)350.

361-84 1/13-New. A taxpayer who made a return on a cash basis could not receive a refund for taxable years for credit subsequently determined by the court and paid. 34F(2d)350.

361-84 1/14-New. The commissioner waived defects in the original claim for refund by retention thereof without objection. 35F(2d)379.

361-84 1/15-New. The commissioner waived irregularity in the claim for refund of excess profits tax by recomputing the tax and not objecting. 35F(2d)870.

361-84 1/16-New. Statute requires immediate refund of overpayments of income tax only in event of net balance in taxpayer's favor and not before decision of taxpayer's appeal from deficiency assessment. DC 42F(2d)346.

361-85 20F(2d)675; 30F(2d)193; 42F(2d)729. [b] **Recovery of tax refunds.**-23F(2d)897. [c] **Taxpayer not alleging fraud or other irregularities** is not entitled to review action of Commissioner in denying special assessment. 37F(2d)574.

361-88½-New. Interest on refund.-55 AppDC376, 6F(2d)679.

361-88⅓-New. Compromise of tax claim held binding in absence of illegality. 16F(2d)694.

361-88¼-New. Commissioner's rejection of refund claim does not preclude suit to recover taxes erroneously or illegally collected. 38F(2d)135.

361-90 43F(2d)773 (commissioner's letter held notice of rejection). [a] **Letter from Commissioner that claims "would be rejected"** is insufficient notice of rejection to bar action for refund. 37F(2d)38.

361-93½-New. United States can recover refund of sales tax erroneously made. 23F(2d)495.

361-93⅓-New. Plenary action must be brought by United States to recover amount of erroneous refund paid to tax payer. 38F(2d)988.

361-93¼-New. The government may maintain action for recovery of money erroneously refunded. 35F(2d)765.

361-97 24F(2d)95. [a] **Provision of Revenue Act of 1923** for payment of interest on refunds must be construed in light of difficulty of government bookkeeping and accounting. 270US163, 46SCt229, 70L ed524. [b] **Refund of income and profit taxes** is "allowed" only when finally approved by commissioner. 270US163, 46SCt229, 70L ed524.

362-4 [a] **Request for special assessment is not protest or claim for refund** within statute so as to authorize recovery of interest. 37F(2d)196.

362-4½-New. Interest on refund of income taxes allowed after enactment of the Revenue Act of 1924 held computable thereunder rather than under the Revenue Act of 1921. 271US348, 46SCt506, 70L ed983.

362-4⅓-New. Taxpayer entitled to refund of income taxes under the Revenue Act of 1924 held not entitled to have interest computed as of the date of each quarterly payment on the amount by which that payment exceeded one fourth of the proper tax, but only to interest on and from the date of payments made after the full amount of the proper tax had been paid. 271US348, 46SCt506, 70L ed983.

362-4¼-New. Under Revenue Act (1921) § 1324 subd [a] date of allowance of income tax refund for purpose of fixing interest occurs on date of approval by commissioner. 276US160, 48SCt236, 72L ed509.

362-4⅕-New. Taxpayer granted refund before enactment of Revenue Act of 1924 is held not entitled to interest award based thereon. 276US160, 48SCt236, 72L ed509.

362-4⅙-New. General statement in protest of tax paid is insufficient, and protest must detail reasons and basis thereof, on payment of tax, in order to recover interest. 276US160, 48SCt236, 72L ed509.

362-4⅐-New. Where a taxpayer, after execution of a bond guaranteeing payment of an additional tax assessed, becomes bankrupt, the surety is liable, on disallowance of abatement, for payment of the tax, notwithstanding the failure of the collector, or the United States, to file a claim against the bankrupt estate, and the fact that a claim of a surety in the name of the United States for the tax was disallowed. 30F(2d)244.

362-4⅛-New. The successor to the collector of internal revenue has authority to sue on a bond executed by a taxpayer, guaranteeing payment of an additional tax in case a claim for abatement is disallowed. 30F(2d)244.

362-4⅑-New. Claims for refund under Act of 1926 held sufficient. 38F(2d)814.

362-4 1/10-New. The Revenue Act of 1924, providing for refund, does not apply to corporations withholding a tax of two per cent on their bonds. 33F(2d)102.

362-4 1/11-New. A taxpayer held entitled to interest at six per cent on overpayments from the date of payments to the date when an additional assessment tax, against which credit was taken, was made. 34F(2d)205.

362-4 1/12-New. Railroad companies liable under the Revenue Act of 1921 for a tax of two per cent of interest on bonds are not "taxpayers" under the Revenue Act of 1924, entitling them to a refund. 33F(2d)102.

362-4 1/13-New. The statute in effect when credit for overpayment was allowed governs the period for which interest is payable. 34F(2d)205.

362-4 1/14-New. Where the commissioner approved a schedule of overassessment in 1926 for 1918 overpayments, the Revenue Act of 1924, and not that of 1926, governed the period for which interest was payable. 34F(2d)205.

362-4 1/15-New. Provision of act of 1926 that overpayment shall be credited against any tax due is mandatory. 40F(2d)148.

362-4 1/16-New. After liability for deficiency becomes finally fixed taxpayer cannot defeat credit against overpayment under such statute before steps to make credit effective were taken. 40F(2d)148.

362-4 1/17-New. Act of 1926 shortening interest period to date schedule of overassessments was signed was applicable to overpayment refunded after enactment. 41F(2d)892.

362-4 1/18-New. Credit as respects interest on overpayment is allowed on approval by proper executive officer and not when commissioner signs schedule of overassessment for transmission to collector. 41F(2d)898.

362-5 [a] **Refund allowed** but withheld may be recovered by suit without demand. 22F(2d)459.

362-9 26F(2d)670(2dcase); 26F(2d)743; 27F(2d)952; 28F(2d)781; 28F(2d)991; 39F(2d)466 (change of contention has been held not change of position); 39F(2d)473 (jurisdictional allegations). [a] 24F(2d)459. [b] 6F(2d)660; 8F(2d)368; 24F(2d)115; 26F(2d)481; 38F(2d)577; 38F(2d)637; 38F(2d)842; 40F(2d)564; 45Philippine202; 32PortoRico649 (remedy under local statute). [e] 20F(2d)390; 33F(2d)788 (right to action at law). [h] (2) 13F(2d)655; 41F(2d)69. (3) Petition held insufficient where no ground therein was stated in claim for refund. 15F(2d)356. (4) Petition held sufficiently to describe nature of surplus distributed in liquidation of corporation. 18F(2d)239. (5) Complaint held insufficient. 20F(2d)905. (6) General allegations held sufficient. 31F(2d)545. (7) Complaint held insufficient. 34F(2d)203; 39F(2d)434. (8) Other instances of sufficiency of petition. 39F(2d)473. [i] (2) Question whether expenditures were for repair or improvement of building held for jury under evidence. 15F(2d)345. (3) Validity of gift by deceased more than two years before death is for jury on undisputed evidence permitting of different inferences. 25F(2d)837 (evidence held to require submission of case to jury). [k] (2) 269US422, 46SCt131, 70L ed347; 271US9, 46SCt418, 70L ed799; 15F(2d)410; 19F(2d)382; 22F(2d)308; 24F(2d)722; 25F(2d)897; 30F(2d)628 [certiorari den 279US853, 49SCt348(7thcase), 73L ed995]; 32F(2d)857; 34F(2d)575; 34F(2d)706; 38F(2d)57; 38F(2d)155; 40F(2d)145; 40F(2d)154; 40F(2d)408; 40F(2d)697; 43F(2d)395. (4) To prove that deduction was valid. 19F(2d)382. (5) Rule as to burden of proof applicable to tax exemption claims does not apply in determining whether corporation has merely nominal capital. 21F(2d)636. (6) To show correct amount. 22F(2d)800. (7) To show that income is not attributable to use of capital. 25F(2d)408. (8) Corporation, suing to recover excessive income and excess profits tax on theory that allowance should have been made in certain amount for good will, has burden of proving that corporation is-

suing stock as consideration for good will hereby acquired assets of equal value, and evidence relative thereto must be clear. 26F(2d)670(2dcase). (9) Though burden is on taxpayer enjoying corporate form of organization to show in which class corporation is to be placed for income and profits tax purposes, corporation must establish fact only by fair weight of testimony. 26 F(2d)734. (10) Corporation, seeking to include excess in value of tangible property over par value of stock exchange in computation of invested capital, has burden of proving stock was issued for tangible property and that its actual cash value substantially exceeds par value. 32F(2d)288. (11) To establish amount of alleged excess. 34F(2d)174. (12) To prove liability was incurred during taxable year in order to justify deduction. 36F(2d)599. (13) To show compliance with requirements of law affording relief. 40F(2d)695. (14) Corporation claiming classification as personal service corporation has burden of proving capital was not material income producing factor. 41F(2d)280. (15) To prove that deduction was valid. 34F (2d)492. (16) Other matters. 39F(2d) 645; 39F(2d)986; 39F(2d)998. (17) To show whether assessment for capital stock is erroneous or excessive. 42F (2d)219. [l] (2) Stockholder suing to recover tax as paid under protest may recover prior unpaid refunds. 25F(2d) 425. (3) Judgment has been held erroneous. 281US580, 50SCt422, 74L ed 1051. [o] **Changing defense.**–45Philippine202. [p] **Under standard form of contract,** authorized by Federal Control Act, § 1, railroad cannot recover expenses of suit against United States for taxes paid during federal control where tax was found not to be payable by the director general. 271US310, 46SCt493, 70L ed962. [q] **Ground of recovery.**–15 F(2d)626. [r] **Parties.**–17F(2d)407. [s] **Amendment of pleadings.**–15F(2d) 345. [t] **Presumptions.**–Natural presumption is that taxpayer will not overvalue estate for purpose of taxation. 8 F(2d)175. [u] **Weight and sufficiency of evidence.**–8F(2d)106 (preponderance insufficient); 14F(2d)995; 22F(2d)308; 25F(2d)897. [v] **Review of valuations.**–8F(2d)175. [w] **Government is precluded from pleading estoppel** to claim refund as to balance after claim for refund had been considered by government and part of claim allowed. 8F(2d)175. [x] **Taxpayer's return estops him** from pursuing theory that property is community property where he listed it as his own. 8F(2d)431. [y] **Agreement approving assessment** does not preclude action. 20F(2d)390. [z] **Action to recover income tax is personal one against collector,** and United States is not bound thereby. 18F(2d)357. [aa] **Objection that assessment of profit and income taxes was not made within statutory period** is not available when not raised before commissioner of internal revenue. 18F(2d)611. [ab] **Claim against internal revenue collector** on issuance of certificate of probable cause is converted into claim against government. 36F(2d) 609. [ac] **Evidence held sufficient.**–24 F(2d)[illegible]; 32F(2d)[illegible]; 39F(2d)998; 40F(2d)673; 40F(2d)697; 41F(2d)530. [ad] **Complaint held to state cause of action.**–36F(2d)807. [ae] **Recovery refused.**–38F(2d)453. [af] **Admissibility of evidence.**–33F(2d)807 (taxpayer may rely only on evidence presented to commissioner); 39F(2d)645. [ag] **Evidence held insufficient.**–39F(2d)645; 39F(2d) 730. [ah] **Bar of action.**–Where taxpayer offers to compromise all civil and criminal liability, acceptance of offer results in compromise of both tax liability and penalty, barring action by taxpayer. 34F(2d)429. [ai] **Weight and sufficiency of evidence.**–33F(2d) 788 (insufficient to justify finding of estoppel); 34F(2d)492 (taxpayer held to sustain burden of proof); 34F(2d) 709. [aj] **Taxpayer's action to recover tax collected after bar of limitations** has been held not destroyed by administrative provisions for refunding tax. 39F (2d)643. [ak] **Presumption,** that transfers are made in contemplation of death cannot stand against ascertained and proven facts to contrary. 39F(2d)998. [al] **Parties.**–33F(2d)788; 34F(2d)700 (capacity in which sued). [am] **Demurrer.**–34F(2d)217. [an] **Filing of taxpayer's claim for abatement** without agreement for stay or suspension of payment did not operate as stay. 35 F(2d)197. [ao] **Taxes barred by limitations.**–40F(2d)129; 41F(2d)273. [ap] **Deposit by collector of customs of fines into treasury** does not bar judgment against him. 40F(2d)220. [aq] **Where parties have made "closing agreement"** under statute respecting taxes assessed against insurance companies on certain bonds taxpayer cannot recover notwithstanding illegality of taxing statute. 40F(2d)965. [ar] **Action for money had and received lies against collector** illegally collecting moneys with notice that they were paid under protest. 40F(2d) 220. [as] **Decision of commissioner of internal revenue** is only prima facie evidence of its correctness in action to recover taxes paid under protest. 275US 101, 48SCt43, 72L ed184. [at] **Burden of proof** that property not transferred in contemplation of death is on plaintiff seeking to recover tax. 275US101, 48SCt 43, 72L ed184. [au] **Question for jury** whether property transferred in contemplation of death. 275US101, 48SCt 43, 72L ed184. [av] **Ground not contained in claim for refund** filed with commissioner cannot be considered. 20 F(2d)935. [aw] **Presumption** is that calculations of assessment are correct in absence of assignment or complaint of incorrectness. 25F(2d)699. [ay] **Presumption,** that taxing official acted solely on statutory presumption that gift was taxable as in contemplation of death, must give way to inconsistent facts. 25F(2d)951. [az] **Evidence held to show** that gifts were not made in contemplation of death. 25F(2d)951. [ba] **Action held not barred by compromise agreement** alleged to have been made by executor in estate tax deposition. 23F(2d)275. [bb] **Jurisdiction.**–25F(2d)1010. [bc] **Distributee, forced to return securities** illegally distributed, may recover taxes paid thereon. 25F (2d)1015. [bd] **Findings held to support judgment** dismissing action to recover taxes. 25F(2d)408. [be] **Action cannot be based on rejection of claim for amortization for war facilities** not deducted at time of filing return and where no such claim was filed on or before June 15, 1924. 38F(2d)887(2d case). [bf] **Amendment of petition for refund.**–41F(2d)369. [bg] **Overpayments of income tax** due to mistake of law or fact may be recovered. 43F(2d) 642. [bh] **Act precluding action by taxpayer entering into closing agreement** applies to actions against collector as well as actions against United States. 43F(2d)711. [bi] **Grounds of action** confined to those presented to commissioner unless taxpayer agrees with government as to additional grounds. 43 F(2d)773. [bj] **Defense that claim for tax was not filed held sufficiently presented.**–43F(2d)150. [bk] **Effect of pending appeal** to Board of Tax Appeals. 44F(2d)126.

362–10 36F(2d)375 (recovery of additional assessment paid).

362–10½–New. Whatever may be the liability of the United States to one who makes an overpayment of gift tax, by reason of her mistake in overvaluing the gift, the collector of internal revenue, who merely accepted her representations, valuation, and voluntary payment, and, in due course of his agency, paid the money into the public treasury, is not liable to indemnify her mistake. 29F (2d)203.

362–12 24F(2d)449 (suit may be brought against collector, though out of office).

362–13 277US508, 48SCt591, 72L ed 968; 16F(2d)267; 17F(2d)34; 18F(2d) 970; 21F(2d)501; 22F(2d)1000; 27F (2d)550; 27F(2d)992; 27F(2d)994; 28 F(2d)878; 28F(2d)990; 32F(2d)830; 38 F(2d)814 (where collector of tax still in office); 38F(2d)935 (right to object to method of commissioner in computing net income denied in absence of showing amount as determined was erroneous); 43F(2d)836. [a] (2) Court has jurisdiction to define relative obligation between parties, regardless of whether compromise and settlement is nullity or not. 35F(2d)990. [b] (2) Presentation of claim within proper time. 27F(2d) 284. (3) Allegations do not show taxpayer's right to maintain suit for recovery of taxes in absence of application to board of tax appeals to review commissioner's decision. 36F(2d)334. [c] 281US357, 50SCt251, 74L ed901; 38 F(2d)935. [d] **Evidence held to support jury's finding of value.**–16F(2d)358. [e] **Burden of proof is on taxpayer.**–16F(2d) 358. [f] **Jurisdiction of court of claims.**–277US551, 48SCt587, 72L ed985. [g] **In suit for refund of additional income tax,** burden was on petitioner to establish that deduction claimed by it constituted part of its ordinary and necessary expenses in maintenance and operation of its business and properties. 278US282, 49SCt129, 73L ed379. [h] **In action for reasonable deduction in income for amortization of cost of** acquired war facilities, in which plaintiff makes prima facie case by showing cost of nondetachable facility, burden of going forward with proof is on government, notwithstanding ultimate burden is on plaintiff. 30F(2d)962. [i] **Evidence** held sufficient. 31F(2d)924. [j] **Findings.**–Held not to show that percentage of profits paid directors pursuant to bylaws in excess of amount allowed by commissioner of internal revenue constituted part of taxpayer's ordinary and necessary expenses. 278US282, 49SCt 129, 73L ed379. [k] **Reviewing court** treats findings of trial court as verdict of jury. 25F(2d)42. [l] **Presumption is that taxes paid** are rightly collected on assessments correctly made by commissioner. 281US357, 50SCt251, 74L ed 901. [m] **Taxes paid after period of limitations had run** are not recoverable under Revenue Act of 1926 where taxes had been rightfully assessed. 37F(2d) 793. [n] **Evidence held insufficient.**–280 US227, 50SCt96, 74L ed385; 38F(2d)57. [o] **Pendency of refund proceeding before board of tax appeals** deprives court of claims of jurisdiction of action to recover taxes paid. 38F(2d)140. [p] **Pendency of suit to redetermine deficiency before board of tax appeals** deprives court of claims of jurisdiction of action to recover taxes paid. 38F(2d) 143. [q] **Revenue Act of 1926** did not give right to maintain action for taxes collected prior to its enactment unless tax was overpaid. 37F(2d)763. [r] **Right rests on statute.**–37F(2d)793. [s] **District court cannot review** determination of internal revenue commissioner on application for refund through special assessment. 33F(2d)1006. [t] **Burden is on taxpayer** of establishing illegality of exactions. 280US227, 50 SCt96, 74L ed385. [u] **Burden is on claimant** to prove facts justifying claim. 280US227, 50SCt96, 74L ed385. [v] **Evidence held to require decree** denying corporation's recovery of increased assessment paid. 34F(2d)976. [w] **Burden of proof.**–36F(2d)379; 41F (2d)561; 43F(2d)836. [x] **Trust filing returns required for trusts although it was association** may recover capital stock taxes paid. 43F(2d)450. [y] **Filing of tentative return** by taxpayer does not start running of limitations. 36F (2d)529. [z] **Presumption is that tax was not overpaid.**–37F(2d)793. [aa] **Refund of tax credited on tax for previous year** to which limitation for collection had expired is not recoverable. 42F (2d)312. [ab] **Court of Claims is without jurisdiction of suit** after agreement that determination and assessment should be final. 42F(2d)313. [ac] **Taxpayer's deposit pending determination of claim in abatement** prevents recovery of tax thereafter collected after limitation period. 42F(2d)309. [ad] **Action for refund of taxes on whisky in warehouse on other grounds than destruction by fire** may be maintained without showing arbitrary rejection of application by secretary of treasury. 41 F(2d)369.

363-14 15F(2d)863; 16F(2d)367.

363-14½-New. Club collecting tax from its members acts as government agent and has no right of action for taxes illegality imposed. 12F(2d)951.

363-14⅓-New. In executor's action to recover federal estate tax paid under protest, residuary legatees are the proper but not the necessary parties plaintiff. 14F(2d)616.

363-14¼-New. Plaintiff may set up ground of refund not specified in the claim for refund. 20F(2d)419.

363-14⅕-New. All heirs of decedent are proper parties plaintiff in an action to recover an estate tax paid. 21F(2d)460.

363-14⅙-New. While an income tax, imposed by the Revenue Act 1918, was a single tax on the entire net income of a corporation, the whole act would not fall because of inclusion in the gross income of income beyond congress' power to tax, nor would the tax be recoverable in only one proceeding. 27F(2d)994.

363-14⅐-New. Under a statute authorizing the commissioner to compromise a claim with advice and consent of the secretary of treasury and a filed opinion of the department solicitor, in the absence of the secretary's assent and filing of the solicitor's opinion neither the government nor the taxpayer are bound, although ratified by the commissioner in making an additional assessment. 278US282, 49SCt129, 73Led379.

363-14⅛-New. Taxpayer's arrangement for deposit pending consideration of plea in abatement and subsequent release of deposit on payment precludes recovery on ground of collection after period of limitations. 37F(2d)986.

363-14⅑-New. Word "stayed" in statute providing for recovery of taxes paid after limitation period unless collection was stayed includes cases of delay from filing claim without formal stay. 38F(2d)239.

363-14⅒-New. Taxpayer cannot recover amount repaid by him on reassessment under duress after erroneous refund of sum involved. 38F(2d)988.

363-14 1/11-New. That taxpayer was granted special assessment does not preclude suit for overpayment where commissioner after special assessment, sent sixty day letter giving final determination. 37F(2d)783.

363-14 1/12-New. After rejection of refund claim by commissioner, taxpayer may bring suit to recover taxes erroneously or illegally collected. 38F(2d)135.

363-14 1/13-New. Proceedings instituted before board of tax appeals after commissioner's determination of deficiency do not deprive court of claims of jurisdiction of suit begun before mailing of deficiency notice. 38F(2d)144.

363-14 1/14-New. Court of claims has jurisdiction of suit to recover overpayment notwithstanding action before board of tax appeals which reached final determination before hearing in court of claims. 37F(2d)783.

363-14 1/15-New. Payment of more than total tax and inclusion thereof in closing agreement does not give court jurisdiction to set aside determination. 42F(2d)319.

363-15 275US228, 48SCt45, 72Led253; 14F(2d)701; 15F(2d)626; 16F(2d)337; 24F(2d)459; 27F(2d)284; 27F(2d)882; 28F(2d)265 (oral claim for refund made to department field agent held insufficient, statutory requirement of filing meaning that written claim must be "filed"); 28F(2d)991; 39F(2d)759. See also 43F(2d)773. But see 39F(2d)730. [d] **Action for refund** is required to be upon same grounds and only such as are presented in claim. 15F(2d)356. [e] **Grounds not specified in claim for refund** may be basis of suit to recover taxes illegally collected. 24F(2d)449. [f] **Application to board of tax appeals** to review commissioner's determination is necessary before suit. 36F(2d)334. [g] **Insufficient claims.**-37F(2d)771. [h] **Literal compliance with statute** may be insisted upon by collector. 43F(2d)773. [i] **Petitions held not to seek recovery on ground different from claims presented to commissioner.**-41F(2d)369.

363-15½-New. Under the Revenue Act of 1926, filing a claim with the commissioner is a condition precedent to recover a tax erroneously paid. 19F(2d)251.

363-15⅓-New. It is not essential that claim should first be presented to board of tax appeals. 24F(2d)561.

363-15¼-New. An Indian, not presenting to the commissioner of internal revenue a claim for refund of income tax within the time fixed by statute, may not recover as a ward of the United States. 27F(2d)284.

363-15⅕-New. The board of tax appeals has no power to adjudicate the total liability of a taxpayer appealing from a deficiency determination of the Commissioner. 27F(2d)994.

363-15⅙-New. A division of the board of tax appeals upholding the inclusion of bond premiums in the gross earnings of a railroad is not res judicata in a suit for refund. 27F(2d)994.

363-15⅐-New. That the commissioner's field agent discovered overpayment in examining a taxpayer's books has been held not to dispense with the filing of a claim. 28F(2d)265.

363-15⅛-New. Literal compliance with the requirement that a claim for refund be filed with the commissioner of internal revenue before suing for income and excess profits taxes paid may be insisted on by the internal revenue collector or the United States. 28F(2d)991.

363-15⅑-New. Where the government insists on strict compliance with the statute, suit to recover taxes cannot be maintained, unless a prior claim for refund has been duly filed and the claim sued on is of the same nature. 28F(2d)991.

363-15⅒-New. Literal compliance with statutory requirements is a condition precedent to suit to recover taxes paid, if insisted on. 32F(2d)288. [a] **Waiver.**-Where collector concedes in brief that one issue was taxpayer's right to additional deduction for depletion of ore bodies, he does not waive compliance with statutory requirements. 32F(2d)288.

363-15 1/11-New. A field agent whose duty is to audit accounts is not authorized to waive limitations of the Revenue Act of 1926. 28F(2d)265.

363-15 1/12-New. A claim is "filed" with the commissioner when it is filed in his office or in the office of the collector of internal revenue. 28F(2d)265.

363-15 1/13-New. Action to recover income taxes paid cannot be maintained until after claim for credit or refund is filed. 40F(2d)971 (claim filed before payment held insufficient).

363-15 1/14-New. Under Revenue Act of 1926 filing of claim of refund is condition precedent to recovery of overpayment of income tax. 43F(2d)150.

363-15 1/15-New. Taxpayer's prior claim for refund based on improper charge of theoretical reserve for depreciation does not warrant recovery of overpayment for same year on claim for deduction. 43F(2d)150.

363-16 16F(2d)367; 38F(2d)887(2d case). [a] **Collector voluntarily staying collection** after taxpayer filed claim for abatement, till five-year period of limitation had run, bars recovery thereon. 35F(2d)586. [b] **Limitation period is applicable to amount illegally collected.**-42F(2d)316. [c] **Day on which collector received check** is date of payment unless check is returned dishonored. 40F(2d)781.

363-18 38F(2d)887(2dcase). [a] **Time not extended** by second letter of rejection sent as matter of courtesy by commissioner. 38F(2d)887(2dcase). [b] **Motion for rehearing kept matters before department** till claim was finally denied. 39F(2d)940. [c] **Second refund claim filed after expiration of time to sue** held not to extend time to sue. 40F(2d)781. [d] **Where five year limitation works injustice** suit for tax refund may be brought within two years after commissioner disallowed claim. 41F(2d)369.

363-18½-New. Suit held barred by four-year period of limitations under Revenue Act of 1924. 20F(2d)935.

363-18⅓-New. Under the Revenue Act 1924, a taxpayer's claim for refund of overpayment is not within the specified exceptions to the four-year statute of limitations as reënacted by the Revenue Act of 1926, and is barred. 29F(2d)404.

363-18¼-New. Taxpayers are not deprived of a right of action for recovery of taxes unlawfully collected more than five years after the date of return. 29F(2d)209.

363-18⅕-New. Suit on a claim for refund filed more than four years from the date of payment of the tax is barred under the Revenue Acts of 1924, 1926. 27F(2d)882.

363-20½-New. Taxpayer claiming benefit of the law requiring assessment of 1918 taxes within four years must show that the return was filed prior to that period. 19F(2d)643.

363-20⅓-New. Evidence has been held sufficient to show that the taxpayer filed an income tax return within the five-year period of limitation. 19F(2d)643.

363-20¼-New. Refund cannot be credited on tax for another year which is barred by limitation. 22F(2d)459.

363-20⅕-New. Taxpayer's statement of claim must show that action is brought within statutory time. 24F(2d)233.

363-20⅙-New. Delivery to collector of certificate of overpayment is payment sufficient to authorize recovery. 26F(2d)131.

363-20⅐-New. The government having insisted on literal compliance with an act requiring a claim for refund before suing for internal revenue taxes paid, by objecting to admission in evidence of letters from claimant's attorney to the commissioner of internal revenue, claimant, not complying therewith, cannot recover. 28F(2d)991.

363-20⅛-New. A taxpayer claiming credit for taxes due for a prior year is not estopped to claim the benefit of the statute of limitations. 28F(2d)914.

363-20⅑-New. Waivers signed by corporate officers may prevent running of statute of limitations. 37F(2d)703.

363-20⅒-New. Letters of commissioner of internal revenue held to constitute definite rejection of claim for refund as respected statute of limitations. 37F(2d)783.

363-20 1/11-New. Claim for refund is necessary before recovery thereon may be had. 35F(2d)379.

363-20 1/12-New. Revenue Act of 1928, relating to recovery of income tax overpayments, held not unconstitutional as depriving a taxpayer of his vested right under the limitations statute. 36F(2d)529.

363-20 1/13-New. Effect of filing claim for abatement on right to recover tax barred by limitation. 33F(2d)229; 34F(2d)328; 34F(2d)708.

363-20 1/14-New. Bar of the statute of limitations to recover the amount of additional assessments was removed by the Revenue Act of 1928. 34F(2d)709.

363-20 1/15-New. The Revenue Act of 1928 does not retroactively ratify the collection of a tax paid by a taxpayer subsequent to the expiration of the statute of limitations. 33F(2d)135.

363-20 1/16-New. A corporation's claim for the refund of an overpayment in 1917, by virtue of the commissioner's increase in invested capital in the 1918 return, held barred by the four-year limitation statute. 34F(2d)446(1st case).

363-20 1/17-New. The act depriving a taxpayer of a right to recover a tax collected after the running of the statute of limitations, where delay in collection is caused by filing a claim in abatement, does not deprive the taxpayer of its property rights. 34F(2d)328.

363-20 1/18-New. Right of taxpayer to recover income taxes collected by distraint after limitation period is withdrawn, where claim in abatement is filed and collection stayed. 42F(2d)235.

363-20½₁₉-New. Construction of statutes withdrawing taxpayer's right to recover taxes collected after expiration of limitation period. 42F(2d)235.

363-20½₂₀-New. Necessity of filing waiver within statutory time. 44F(2d) 253.

363-20½₂₁-New. Construction of waiver. 44F(2d)70.

363-20½₂₂-New. Action to recover income taxes held barred when not brought within five years after payment two years after rejection of claim, or six years of accrual of cause of action. 43F(2d)653.

363-20½₂₃-New. Statute preventing recovery of tax paid after limitations, if claim in abatement was filed and collection stayed is not unconstitutional. 43F(2d)679.

363-20½₂₄-New. Right to repudiate waiver see 44F(2d)70.

363-20½₂₅-New. Acts of revenue agents in investigating taxpayer's records held not to fix assessment date as respects limitations. 43F(2d)772.

363-20½₂₆-New. Tax not recoverable where properly assessed but paid after limitations under duress where delay in collection caused by filing claim for abatement. 43F(2d)679.

363-20½₂₇-New. Revocation of waiver. 44F(2d)70.

363-20½₂₈-New. Statute declaring payment after limitations not considered overpayment if claim in abatement filed forbids recovery by action. 43F(2d) 679.

363-20½₂₉-New. Where collector was stayed and delayed enforcement while commissioner passed on claim for abatement, payment of tax is not, under statute, deemed overpayment as made after expiration of limitation. 43F(2d)679.

363-20½₃₀-New. Effect of waiver. 44 F(2d)70.

363-20½₃₁-New. Waiver of right to claim suit prematurely brought. 42 F(2d)918.

363-21 270US163, 46SCt229, 70Led 524; 29F(2d)836(1stcase) [aff 29F(2d) 837(1stcase)]; 39F(2d)643 (payment after statutory period for collection). But see 24F(2d)449. [b] (4) Protest is not necessary in order to recover drawback on cigarettes imported after payment of tax. 267US471, 45SCt359, 69Led741. (5) Failure to pay income tax under protest is not bar to subsequent suits for refund pursuant to proper refund claims. 43F(2d)1008. [c] **Protest must be specific** to entitle payer to interest from time of payment on income and profit tax refund. 270 US163, 46SCt229, 70Led524. [d] **Taxpayer is entitled to recover taxes paid under protest** where collection is barred by limitation at time of payment. 42 F(2d)214.

363-21½-New. An act providing that payment of a tax under protest is not a condition precedent to maintenance of an action for the recovery of an illegally collected tax has been held prospective entirely. 27F(2d)952.

363-24 [a] (2) Statute relating to recovery of overpayments is not limited to cases where collection is stayed by filing of plea of abatement. 36F(2d) 529.

364-21 But see 42F(2d)918.

364-25 8F(2d)175, 177 [citCJ]; 16 F(2d)694; 21F(2d)1008; 27F(2d)952; 28F(2d)81; 35F(2d)990. But see 36 F(2d)529 (statute relating to recovery of overpayments is not limited only to cases of voluntary payment).

364-26 21F(2d)188; 23F(2d)856; 35 F(2d)990 (duress not shown).

364-27 But see 21F(2d)1008. [a] **Waiver.**—Taxpayer, by designating particular liability to which he preferred to have money applied, waived protest and consented to retention of money by collector, payment under such circumstances was voluntary, and taxpayer was not entitled to refund. 31F(2d) 89.

364-30 But see 16F(2d)694.

364-31 21F(2d)188. But see 16F(2d) 694.

364-32½-New. Taxes may be paid under protest after dismissal of petition before board of tax appeals, without prejudice to right to sue to recover such payment. 26F(2d)247.

364-33 30F(2d)395; 35F(2d)560; 44 F(2d)249. [b] (2) Statute allowing interest only to date of entry of judgment is controlling. 36F(2d)609. [c] (2) Other instances. 39F(2d)739. [d] (2) Six months after date of demand to date commissioner signed schedule of refunds. 39F(2d)1019. (3) Date schedule of refunds and credits is approved. 39F(2d)739. [e] 21F(2d)247. [f] But see 45Philippine1. [g] **Treasury officials,** not parties to suit, cannot be ordered to pay interest on final judgment after its date. 7F(2d)139. [h] **Acceptance of principal** of refund of overassessment does not preclude suit for additional interest. 270US163, 46SCt229, 70Led524. [i] **Interest on refund** of overassessment of income and profit taxes is recoverable only to date of allowance. 270US163, 46SCt229, 70 Led524. [j] **To what date.**—39F(2d) 746. [k] **Taxpayer could not recover interest after due date of additional taxes.**—39F(2d)757. [l] **Computation.**—44F(2d) 101; GaA 155SE782. [m] **Credit for overassessments is "allowed,"** as respects interest, at time commissioner signs schedule of refunds and credits. 42F(2d)573(2dcase). [n] **Taxpayer is not entitled to additional interest** on overpayments credited against unpaid positions of original tax due on returns for other years. 42F(2d)573(2dcase).

364-34 31F(2d)628.

364-36 See also 27F(2d)395.

364-36½-New. An action to recover interest on tax payments illegally exacted is maintainable against the United States only. 26F(2d)743; 26F(2d) 744.

364-36⅓-New. Where the commissioner of internal revenue, on March 14, 1924, determined there had been an overassessment, and forwarded to the collector a schedule of overassessments, but the collector did not act until after June 2, the effective date of the Revenue Act of 1924, plaintiff was entitled to recover interest on the overassessment of the income and profit taxes paid for the fiscal year 1918. 27F(2d)395.

364-36¼-New. For the purpose of determining what statute applied in computing interest, credit for overpayment of taxes was not allowed when the schedule of overassessments was forwarded to the collector. 27F(2d)395.

364-36⅕-New. Under revenue act of 1926 taxpayer is not entitled to recover interest in case of overpayment for 1920 applied as credit against deficiency for 1918. 37F(2d)965.

364-36⅙-New. Credit against overpayment is taken within interest statute when commissioner approves schedule of refund and credits. 40F(2d)131.

364-36⅐-New. Credit against overpayment is taken within interest statute when commissioner approves schedule of refund and credits. 40F(2d)136.

364-36⅛-New. Credit against overpayment is taken within interest statute when commissioner approves schedule of refund and credits. 40F(2d)142.

364-36⅑-New. Interest should be computed under 1924 statute where overpayments were credited and balance paid before 1926 statute became effective. 40F(2d)692.

364-38 15F(2d)356. But see 45Philippine1.

365-40 28F(2d)81. [a] **Execution cannot issue** against collector of internal revenue after allowance of certificate of probable cause. 7F(2d)139. [b] **Congress may provide** that execution shall not issue against collector of internal revenue for recovery in excess income taxes after certificate for probable cause for act done under color of authority. 7F(2d)139.

365-44 6F(2d)660; 8F(2d)378; 14 F(2d)701; 17F(2d)407; 41F(2d)385. [c] **Not repealed** by implication by Revenue Act of 1924. 8F(2d)378. [d] **Inadequacy of remedy at law** does not authorize relief to manufacturer seeking to prohibit collection of tax from dealers. 41F(2d)385.

365-46 16F(2d)927; 24F(2d)416.

365-47 6F(2d)660; 17F(2d)407; 38 F(2d)841.

365-55 6F(2d)660; 14F(2d)701; 24 F(2d)416. See also 33F(2d)961.

365-55½-New. , nor although collection is barred by limitations. 24F(2d) 576.

365-57 273US12, 47SCt265, 71Led511; 6F(2d)660. [c] **Where payment of tax has been demanded by taxing authorities,** courts will not inquire into or determine its legality or validity till it has been paid. 6F(2d)660.

365-61 25F(2d)637.

366-62 6F(2d)660; 17F(2d)661.

366-63 6F(2d)660; 17F(2d)661.

366-64 6F(2d)660.

366-68 13F(2d)642.

366-71 20F(2d)948; 34F(2d)325. [b] **Enforcement of jeopardy assessment** can be stayed only by giving bond as provided by statute. 24F(2d)434. [c] **Circumstances held insufficient** to constitute exceptional case. 33F(2d)961.

366-71½-New. A complaint to enjoin the sale of property held not dismissible on the ground that complainants had an adequate remedy at law. 34F(2d)325.

366-73 20F(2d)948.

366-75½-New. Statute prohibiting refund unless the taxpayer has overpaid the tax does not destroy the effect of the statute prohibiting injunction since such statute applies only to voluntary refunds; 17F(2d)407.

366-75⅓-New. and an action at law against the collector individually to recover a tax demanded, and to collect which distraint is issued, would not be precluded under such statute. 17F(2d) 407.

366-75¼-New. The liability or inequity of a transferee of property of a taxpayer is not a tax within the federal statute prohibiting suit to restrain assessment or collection of any tax. 18 F(2d)798.

366-75⅕-New. A transferee of property of a taxpayer against whom deficiency assessments of income and profit taxes have been made may enjoin enforcement of his liability by the commissioner of internal revenue under an unconstitutional statute. 18F(2d)798.

366-75⅙-New. Provision authorizing injunction pending inquiry before board of tax appeals applies only to contested deficiency tax. 24F(2d)576.

366-75⅐-New. A taxpayer, appealing to the board of tax appeals for redetermination of deficiency assessment, has been held entitled to enjoin the collector's sale under distraint. 28F(2d)661.

366-75⅛-New. Injunction does not lie to enjoin the collection of a tax on the ground that it is barred by limitations, since plaintiff has an adequate remedy at law. 26F(2d)747.

366-75⅑-New. Action may be maintained against collector to enjoin collection by distraint where tax is not against plaintiff. 40F(2d)673.

366-75¹⁄₁₀-New. Bill to remove tax lien held insufficient. 41F(2d)58(2dcase).

366-79½-New. Profits from the illegal sale of liquor are taxable, and concealment of fact thereof is punishable, construing Tax Law (1921) §§ 213, 253, and National Prohibition Act. 11F(2d)938; 14F(2d)564.

366-79⅓-New. One who knowingly delivers supplies to a distillery operated without bond aids and abets the carrying on of its unlawful business, and can be prosecuted and punished as a "principal." 28F(2d)666.

366-79¼-New. While a mere employee may be guilty, as an accomplice, of making an illegal sale of liquor, one cannot be regarded as either an accomplice or principal in conducting a retail liquor business, unless he is in fact one of the proprietors whose duty it is to pay the license tax. 30F(2d)485.

367-96½-New. Organizer of corporation to give boxing exhibitions, acting as its agent, may be guilty of failure to pay tax on admissions and to make returns to collector of internal revenue. 268US220, 45SCt496, 69Led925.

368-6 23F(2d)336.

368-15½-New. Repeal of statute without saving clause held not to abate prosecution. 33PortoRico 39.

368-16 14F(2d)459.

368-17 [a] **Action on bonds given by** taxpayers pending determination of claims is not subject to five-year statute of limitations, and action may be brought by United States, though bond was to collector and his successors. 35 F(2d)57.

368-17½-New. Limitation of prosecution for filing false return was extended from two to three years by the Revenue Act of 1921. 13F(2d)923.

368-21 7F(2d)146.

369-41 [a] **Interest required to be paid on overdue deficiency tax** is not penalty. 21F(2d)856. [b] **Interest on delinquent income tax** held not affected by fact that abatement claim is bona fides. 24F(2d)447.

369-42 [a] **Trustee held not liable to penalty** for failure to make regular return till supreme court reversed decision upon which he relied. 34F(2d) 128.

369-44½-New. Where the statute provides a penalty in addition to other punishment, it need not necessarily be imposed, and failure to do so does not invalidate a sentence of fine and imprisonment. 6F(2d)573.

369-44¼-New. The government is not entitled to recover a penalty for nonpayment of transportation taxes collected by a navigation company under Revenue Act (1918) § 502, which is applicable only against a taxpayer and not to collecting company. 8F(2d)859.

369-44¼-New. A tentative return of a taxpayer was a sufficient return within the statute providing for penalties. 33 F(2d)969.

369-44½-New. Twelve per cent interest on deficiency tax on income is not allowable in absence of showing that errors in returns were made fraudulently. 42F(2d)471.

369-49 26F(2d)706. [a] **Action to recover tax imposed on retail liquor dealer is barred** after his conviction and sentence under National Prohibition Act. 37F(2d)269.

369-51½-New. Tax assessed under prohibition act tit 2 § 35 is penalty and collection by distraint without opportunity for constitutional hearing is unauthorized. 40F(2d)562.

369-55 37F(2d)120. [b] **Imports.**-13 F(2d)548. [c] **Court has jurisdiction to order officer detaining property** to institute forfeiture proceedings promptly or return property. 39F(2d)561.

369-56 24F(2d)538; 37F(2d)120 (government may adopt unauthorized seizure); 42F(2d)861(1stcase).

370-57 [a] **Intent to defraud** is essential. 15F(2d)621.

370-60 [c] **Statute held not to authorize forfeiture of all personal property on** premises where intoxicating liquor was found. 37F(2d)397.

370-66½-New. There are no constitutional obstacles to forfeiture of the offending article. 272US321, 47SCt154, 71L ed279, 47ALR1025.

370-66½-New. Statute providing forfeiture for removal or concealment of goods with intent to defraud government of taxes applies only to goods produced within United States. 40F(2d)74.

370-66¼-New. Conviction of conspiracy to violate prohibition act does not bar libel for forfeiture of property for defrauding government of tax on alcohol illegally diverted. 40F(2d)422.

370-66½-New. Cargo of liquor brought in by coast guard held not subject to forfeiture under law taxing distilled spirits in bond or those produced or imported. 40F(2d)74.

370-67 272US321, 47SCt154, 71L ed279, 47ALR1025; 17F(2d)372; 28F(2d)44; 39F(2d)107; 39F(2d)141. [a] (7) Commodities are "removed" within intent to defraud when transported from place where it should be taxed or seized for nonpayment to any other place with intent to defraud. 5F(2d)113. [c] (1) 272US321, 47SCt154, 71L ed279, 47ALR 1025. (2) Intent held sufficiently proved. 29F(2d)424. (3) Forfeiture of vehicle used in removing distilled spirits must be limited to cases where actual intent to defraud enters into act. 34 F(2d)942. [f] **Depositor concealment** may be "in any place." 5F(2d)113. [g] **Abandoned truck containing beer without stamps** is not subject to forfeiture under Revenue Law. 25F(2d)788. [h] **Harrison Anti-Narcotic Act** (1) is not within statute, provisions being inconsistent. 31F(2d)490. (2) Provisions of Harrison Anti-Narcotic Act, being inconsistent with those of Rev. St. § 3450, latter act cannot be invoked in enforcement of former. 31F(2d)488. [i] **Vehicle seized as being used for lawful transportation of liquor** has been held not subject to forfeiture under section applicable to removing liquor with intent to defraud government of tax. 281 US528, 50SCt385, 74L ed1016. [j] **Mere illegal possession of liquor** is insufficient to found inference of evasion of taxes authorizing forfeiture of truck. 37F(2d)617(1stcase). [k] **Evidence has been held to show** (1) that still was set up ready for operation and therefore subject to forfeiture. 39F(2d)240; 39 F(2d)427.

370-70 272US321, 47SCt154, 71L ed279, 47ALR1025; 8F(2d)942; 21F(2d)628. [a] **Can proceed criminally against person** and by forfeiture proceeding against car at same time. 21F(2d)628. [b] **Where intent to evade payment of taxes is established** and prosecution cannot be had under prohibition act, government may forfeit vehicle used in unlawful transportation. 40F(2d)599. [c] **Automobile seized by state officers while unlawfully transporting liquor** and turned over to federal officers is subject to forfeiture under revenue act. 41F(2d)538. [e] **Intent to avoid tax** is essential to authorize forfeiture of truck containing beer. 41F(2d)849.

370-71 29F(2d)1009; 30F(2d)830; 32 F(2d)121; 32F(2d)866; 33F(2d)353; 34F(2d)38; 35F(2d)928 (forfeiture of automobile used in transporting liquor). See also 28F(2d)50. But see 247Mich 141, 225NW625. [b] **Where no prosecution under National Prohibition Act** was had, forfeiture proceedings may be brought. 17F(2d)372; 17F(2d)373; 17 F(2d)374. [c] **Possession** of liquor must be shown incidental to transportation. 29F(2d)424.

370-72 8F(2d)267; 33F(2d)228; 34F (2d)318; 43F(2d)829(1stcase). [c] **Conviction of driver under Volstead Act** precludes forfeiture under Rev. St. § 3450. 17F(2d)483. [d] **Intent to violate National Prohibition Act** is not same thing as intent to evade taxation. 34F (2d)942. [e] **Vehicle engaged in transportation of liquor** cannot be forfeited under revenue law. 42F(2d)446.

370-73 38F(2d)848 (government proceeding under prohibition act held to have made election).

370-74 272US321, 47SCt154, 71L ed 279, 47ALR1025.

371-76 5F(2d)113 (conditional seller); 21F(2d)628. But see 24F(2d)538. **Erratum.-"Operation of forfeiture against innocent persons** see infra § 171" should be "§ 297." 5F(2d)1.

371-78 21F(2d)628.

371-81½-New. Transportation of whisky on which tax is unpaid by a later owner not under duty to pay tax and not a distiller is a "removal" within Rev. St. § 3450 providing for forfeiture of vehicle used. 5F(2d)1.

371-81⅓-New. Prosecution of an automobile for transporting liquor bars subsequent proceeding to declare forfeiture of the automobile for failure to pay a tax. 17F(2d)587.

371-81¼-New. Vessel and cargo which never arrived within collection district are not subject to seizure and forfeiture under the Customs Act, irrespective of whether or not the contact boat could reach land within an hour, where the treaty rendering seizure valid applies only to the National Prohibition Act and not to the Customs Act. 8F(2d)788.

371-81⅙-New. Proceeding for the forfeiture of an automobile, under Rev. St. § 3450, cannot be maintained during pendency of prosecution of persons in charge of the vehicle for violation of the National Prohibition Act, 18F(2d)927.

371-81⅙-New. nor after conviction of such persons. 18F(2d)927.

371-81⅐-New. Innocent owner's or lienor's interest in an automobile used for carrying liquor and seized by an enforcement officer is not subject to confiscation under the revenue statute. 21 F(2d)477.

371-81⅛-New. Confiscation of an automobile under the Prohibition Act is governed by terms thereof, not by the Revenue Act. 21F(2d)477.

371-81 1/10-New. Rev. St. § 3450, relative to confiscation of vehicles used in carrying liquor, is solely a revenue and not a prohibition enforcement measure. 21 F(2d)477.

371-81 1/10-New. The provisions of the United States Revised Statutes concerning the seizure and forfeiture of distilled spirits is inapplicable to a case in which the government is seeking forfeiture of a vehicle in which liquor has been deposited and concealed and where no one is claiming it. 25F(2d)788.

371-81 1/11-New. Automobile seized while used in transporting liquor is not subject to forfeiture under statute where driver had not been convicted thereunder. 43F(2d)829(1stcase).

371-81 1/12-New. Failure to arrest driver and seize automobile when illegal transportation of liquor was discovered does not permit subsequent forfeiture under revenue laws. 43F(2d)219.

371-81 1/18-New. Government prosecuting for possession of liquor is precluded from forfeiting defendant's automobile as regards bona fide lienholder, 41F(2d) 496.

371-81 1/14-New. , although prosecution was based on liquor found in home. 41 F(2d)496.

371-83 35F(2d)90 ("distiller").

372-90 247Mich141, 225NW625.

372-93½-New. Conviction for possessing liquor and maintaining nuisance does not preclude forfeiture of personal property found in same place as liquor. 37F(2d)120.

372-95 [a] **Under Canadian Excise Act** goods seized will not be forfeited when they belong to innocent third person who claims them. Man [1929] 4DomLR 154. [a] **Where liquor with tax unpaid is found in Indian country** automobile in which it is found may be forfeited without regard to rights of mortgagee. 41F(2d)782.

372-96 16F(2d)604. [b] **Proceedings for forfeiture of automobile seized for transporting liquor** do not affect interest of conditional seller as innocent lienor. 198NC799, 153SE455.

372-97 See also 16F(2d)604.

372-1½-New. The court can release on bond, pending trial, an automobile seized on land and libeled for forfeiture. 17F(2d)661.

372-1⅓-New. An automobile should be released to the owner on a bond pending trial where it is seized for violation of internal revenue laws by a borrowing friend. 17F(2d)661.

372-2 37F(2d)120 (strict construction not required).

372-5 7Alaska426. But see 38F(2d) 106. [a] 21F(2d)628.

372-5½-New. Proceedings are judicial in nature. 272US321, 47SCt154, 71L ed 279, 47ALR1025.

372-5⅓-New. Judgment of conviction of the owner of car of offense of concealing intoxicating liquors is conclusive of guilt of car named, in subsequent forfeiture proceedings. 21F(2d)628.

372-5¼-New. Proceedings for forfeiture of a vehicle used in transporting liquor to defraud the government of a tax are in rem and personal service on the owner is unnecessary. 247Mich141, 225NW625.

372-5⅙-New. Forfeiture proceedings are in rem. 38F(2d)108.

373-6 4F(2d)928 (libel for forfeiture of Norwegian steamship must allege place of seizure). [a] **Informations held sufficient.**-42F(2d)446.

373-9 272US321, 47SCt154, 71L ed279, 47ALR1025.

373-15 [b] **Amendment after conclusion of evidence,** at time motion to quash was first urged, held not error. 32F(2d) 121.

373-16½-New. On appeal, allegations of libel are deemed true. 272US321, 47 SCt154, 71L ed279, 47ALR1025.

373-16½-New. [§ 299a] 8. **Parties.** Owner and charterer of vessel and own-

er of cargo may appear and defend against proceedings. 23F(2d)336.

373-17 [a] (2) Rev. St. § 3462 authorizes search but not seizure. 33F(2d)4. [b] **Truck escaping from distillery** without unloading cans to be delivered and abandoned on road has been held "within yard," authorizing seizure. 39F(2d)427.

373-18 272US321, 47SCt154, 71Led279, 47ALR1025; 4F(2d)928; 40F(2d)422; 247Mich141, 225NW625.

373-28 [a] **Who may petition.**-40F(2d)72.

373-29½-New. Proceeding for forfeiture of car under National Prohibition Act must be under act and not under Internal Revenue Law. 21F(2d)971.

373-29⅔-New. A court must acquire personal jurisdiction of a person or officer having the custody of property seized under revenue laws before it can exercise its discretion thereto. 33F(2d)897(2dcase).

373-29¼-New. On petition for return of truck seized for violation of revenue laws court cannot forfeit truck but will grant government right to institute forfeiture proceedings. 41F(2d)849.

373-30 [d] **Where release would hamper compromise negotiations,** subsequently instituted, seized automobile will not be released on bond. 13F(2d)948.

374-40 [a] **Indictment held sufficient.**-24F(2d)814.

374-42 11F(2d)938.

374-45 11F(2d)938; 12F(2d)765.

374-49 [a] (5) Information charging "attempt to defeat and evade the income taxes" by swearing to and filing false and fraudulent return held sufficient. 13F(2d)923.

374-51 [e] **Indictments held defective.**-35F(2d)598(2dcase).

375-64½-New. **Amended return.** Although the statute does not mention the amended return, evading or attempting to evade a tax is a grave offense and filing of a false amended return constitutes an offense. 11F(2d)938; 13F(2d)923.

375-65 [a] **Indictment held to charge offense of distilling** with intent to defraud government of tax. 12F(2d)706.

375-69½-New. Counts of an indictment alleging that defendants had in their possession a still not registered with the collector of internal revenue do not state an offense, since the duties imposed on the revenue collectors have been delegated to prohibition administrators, pursuant to the Prohibition Reorganization Act, and regulations thereunder, making it no longer a crime to possess a still not registered with the collector, if properly registered with the administrator. 29F(2d)694.

376-74 [a] **Libel for forfeiture of Norwegian vessel** held defective in not alleging use of vessel in removal and concealment of intoxicating liquor within distance of coast to which jurisdiction is extended by treaty with Norway of July 2, 1924. 4F(2d)928.

376-74½-New. Indictment failing to allege that spirits were untax-paid is fatally defective. 26F(2d)63.

376-74⅔-New. An indictment charging the removal of distilled spirits to a place other than a "distillery warehouse," instead of a "bonded warehouse," charges an offense. 29F(2d)225.

376-81 22F(2d)441. See also 32Porto Rico 69. [b] **United States** held precluded from proceeding to forfeit car containing liquor by driver's plea of guilty of possession where neither driver nor owner had been convicted or acquitted of transporting liquor therein. 22F(2d)441.

376-88 5F(2d)113 (dictum).

376-88½-New. But this provision does not shift the burden of the government of intent to defraud as against claimant of the vehicle in proceedings to forfeit it. 5F(2d)113.

376-91 [b] 18F(2d)927.

376-91½-New. **Presumptions.** Where the natural and probable result of acts intentionally done is to defraud, an intention to defraud is presumed, 5F(2d)113, 115 [cit'cyc].

376-91⅓-New. but such presumption may be rebutted by showing on actual absence of intent. 5F(2d)113, 115 [cit Cyc].

376-91¼-New. Evidence of concealment in transportation of alcohol in five-gallon packages, bearing no stamp or mark indicating payment of tax, warrants a finding of intent to defraud in proceedings for forfeiture of an automobile in which it was transported under Rev. St. § 3450. 18F(2d)927.

376-91⅕-New. In such proceeding alcohol found in an automobile, whether legally or illegally made, must be deemed subject to basic production tax. 18F(2d)927.

376-91⅙-New. Presumption is that tax on liquor imported into bone dry state had not been paid. 22F(2d)441.

376-91⅐-New. Possession of persons from whom liquor was seized is presumptively unlawful as respects right to return thereof. 37F(2d)617(1stcase).

377-93 NB [1927] 2DomLR793.

377-94 33F(2d)684 (burden of proof held not shifted). [a] 33F(2d)684. [b] **Not necessary to offer still in evidence** as its existence may be proved by eye-witness. 32PortoRico 69.

377-95 But see 24F(2d)782.

377-97 39F(2d)1.

377-5 [a] **Witness need not be expert** to testify to existence of still. 32Porto Rico 69.

378-17 [b] **Evidence held sufficient** to establish intent to defraud government, 32F(2d)121. [c] **Evidence held insufficient** to entitle government to forfeit stills. 43F(2d)1001.

378-18 22F(2d)441.

378-19½-New. In absence of direct proof circumstances showing intent to possess and transport liquor negative implied intent to avoid payment of tax. 21F(2d)971.

378-19⅓-New. The existence of smuggled liquors at large is proof that taxes were unpaid, and an intent to defeat taxes by their illicit removal will be inferred in a proceeding for the forfeiture of an automobile used in transportation. 28F(2d)44.

378-20 16F(2d)197. [a] **Intent to deprive government of liquor tax** may be implied from illegal transportation. 40F(2d)599.

378-21 [b] (2) Automobile not shown to have been used with intent to defraud United States out of customs duty on liquor smuggled from Canada. 8F(2d)942.

378-27½-New. Evidence that a truck with unstamped beer was abandoned after an attempt to escape officers shows an intent to defraud the government of a revenue tax so as to justify forfeiture. 31F(2d)680.

378-27⅓-New. Evidence held competent to show defendant's connection and responsibility for still. 35F(2d)598(2dcase).

378-30 [a] **Evidence of state** is admissible to prove carrying in of business of selling. 7F(2d)45.

378-32 20F(2d)90.

378-32½-New. unlawful possession of forged and counterfeit strip stamps in imitation of internal revenue engraved strip stamps, 8F(2d)581. [a] **Evidence held insufficient.**-8F(2d)581.

379-37 [a] 22F(2d)441. [b] **Evidence held insufficient.**-16F(2d)197; 20F(2d)127; 33F(2d)684.

379-38 [a] 29F(2d)225; 33F(2d)684. [b] **Evidence held sufficient.**-5F(2d)113; 28F(2d)704.

379-41 [a] 16F(2d)197; 28F(2d)805 [certiorari den 278US658, 49SCt187(1st case), 73Led566]; 29F(2d)504; 32PortoRico 69.

379-43 15F(2d)195.

379-44 39F(2d)1 (rectifier of spirits); 39F(2d)19. [a] 14F(2d)398. [b] **Carrying on business of selling liquor** at wholesale or retail is essential to conviction. 7F(2d)45. [c] **Test as to whether one has actually carried on business** of selling liquor without payment of tax is same as if occupation tax were imposed on one following business of selling any other article. 7F(2d)45. [d] **Conviction for carrying on business** of retail liquor dealer does not require proof that defendant had barroom or usual appliances of dealers. 7F(2d)45. [e] **Evidence insufficient.**-16F(2d)197.

379-45½-New. Unlawfully carrying narcotics in automobile sought to be forfeited held not shown by evidence. 25F(2d)755.

379-49 23F(2d)44.

379-51 [a] **Whether still was in defendant's custody or control** is for jury. 36F(2d)699.

379-51½-New. In a prosecution for carrying on the business of retail liquor dealer without paying a tax, the question whether the premises at which the business was carried on were sufficiently identified as the premises described by street number in the indictment is for the jury. 30F(2d)485.

379-54½-New. In prosecution for violation of statute requiring individuals to make income tax returns question of guilt held for jury. 37F(2d)713.

379-54⅓-New. Various questions in criminal prosecutions have been held questions of fact for jury. 40F(2d)164.

379-59 [a] **Instructions held erroneous.**-7F(2d)45.

380-67 30F(2d)485.

380-68 [a] **Punishment is invalid as to excess** over maximum provided by statute. 12F(2d)706.

380-76½-New. **Under indictment charging defendants as members of partnership** with making false income tax returns, it is not error to impose separate sentences on individual partners. 5F(2d)598.

380-76⅓-New. Sentence authorized for one statutory offense may be imposed without aid from another statute respecting a different offense, although both offenses are charged. 6F(2d)573.

380-76¼-New. Where statute provides penalty in addition to fine and imprisonment, failure to impose penalty does not invalidate a sentence of fine and imprisonment. 6F(2d)573.

381-98½-New. In Manitoba right to costs against the Crown of person whose goods were seized without probable cause is not defeated by Canadian Excise Act. **Man** [1929] 4DomLR154.

INTERNATIONAL LAW

391-37½-New. In event of conquest or revolution, the people change their allegiance. **TexCivA** 273SW993.

391-37⅓-New. Their relation to each other and their rights of property remain undisturbed. **TexCivA** 273SW993.

391-37¼-New. Valid judgment by competent court under Mexican government was not affected as a valid obligation by revolution and change of government. **TexCivA** 273SW993.

391-37⅕-New. Act of congress of the republic of Dec. 22, 1836 provided that all process heretofore issued for an amount of one hundred dollars and upward should be returned to the first term of the district courts of their counties respectively. **TexCivA** 273SW993.

391-37⅙-New. Process has been held to embrace the records of judgments. **TexCivA** 273SW993.

391-38 [d] (2) Under Labour Part (part XIII) of Treaty of Versailles and corresponding provisions of other treaties of peace, members of League of Nations undertake to submit recommendations for regulating hours of labor to proper authorities for enactment into legislation. **Can** [1925] 3DomLR111.

392-6 8F(2d)287; 8F(2d)361.

394-61 249NY149, 147NE703.

394-63 240NY149, 147NE703.

394-66 30F(2d)278. See also 33F(2d)202. [b] (2) Court will treat decree of Soviet government as nullity except to promote justice and equity. 247NY262, 160NE364. (3) Birth certificates depending on authentication of officials of Soviet Russia, which is not recognized by United States are sufficient under Compensation Act. 229AppDiv36, 240NYS619.

395-69 33F(2d)202.

395-73½-New. The refusal of the political department to recognize a for-

eign government does not affect private rights dependent upon proof of existing conditions in such state. 33F(2d)202.

395-75 30F(2d)278.

397-90 31F(2d)199.

397-91 115Tex21, 275SW388, 41ALR737; 115Tex46, 275SW396.

397-92 115Tex32, 275SW392. [a] **Validity of decrees and legislation of belligerent** does not depend on existence of hostilities but on ultimate success of its arms. 115Tex21, 275SW388, 41ALR737.

397-95½-New. A foreign state is the true owner of its property, and its government is its representative. 21F(2d)396.

398-4 TexCivA 278SW251. [b] **Libel in personam may be maintained against United States,** under statute, by foreign national for damage to ship by United States battleship where foreign nation permits similar suit. 41F(2d)550.

398-5 5F(2d)659; 8F(2d)287; 13F(2d)468; 33F(2d)202; 43F(2d)705; 127Misc86, 215NYS255; TexCivA 278SW251, 252 [citCJ]. [e] (2) Suggestion claim by consul general of France of his country's ownership of libeled vessel held insufficient to show lack of jurisdiction on ground of immunity. 13F(2d)469. (3) Plea by foreign state's agency, claiming immunity, is not sufficient, as claim must be made by foreign state. 32F(2d)195. [f] (1) 32F(2d)308. (4) 43F(2d)705. (9) Foreign government, filing insufficient claim of title to libeled vessel, should not be charged with waiver but allowed additional time for filing new claim. 13F(2d)469. (10) Other instances. 43F(2d)705. [h] **Corporation organized by foreign government** (1) retaining right to appoint part of directors and right to approve by-laws and rules and to receive net profit after paying dividend, is subject to suit on its contracts. 21F(2d)180. (2) In suit for breach of contract against such corporation, foreign government is proper defendant. 21F(2d)180. [i] **Actions against officers of foreign state** (1) not clothed with diplomatic immunity, based on acts done within scope of their duties, are actions against foreign state. 32F(2d)308. (2) Where consul is sued and foreign country is not joined as defendant, consul cannot claim immunity. 32F(2d)308. [j] **Person and property of foreign sovereign** (1) and those who represent him are inviolable, whether their acts are commercial, tortious, or criminal, and no matter where performed, but no one else enjoys such immunity. 31F(2d)199. (2) Corporation cannot claim immunity from suit on its own behalf, or on behalf of any of its officers, agents, or employees on ground that they are acting as agents of foreign government, since agent does not cease to be answerable personally for his illegal acts because he is agent, even though he may be instrumentality of government. 31F(2d)199. (3) Officers and agents of corporation are not officers or agents of its stockholders, and hence action against officer or agent of corporation in which sovereign state is stockholder is not action against sovereign state. 31F(2d)199.

399-6 271US562, 46SCt611, 70Led1088; 5F(2d)659; 8F(2d)287; 13F(2d)468; 43F(2d)705 (plea of immunity sufficient). [b] (10) Mexican government operating national railways of Mexico is immune from suit as regards such operation. 5F(2d)659. (11) Vessel owned and in possession of Italian government, though engaged as merchant vessel, is immune from seizure on process from American courts. 13F(2d)468. (12) But property of corporation organized by foreign government which appoints some directors, approves by-laws and rules, and gets net profits after paying dividends, is not exempt from execution as property of government. 21F(2d)180. [e] **Evidence sufficient to support findings** that railroad was owned by Mexican government. Tex CivA 278SW251. [f] **Railroads.**-Tex CivA 278SW251. [g] **Execution.**-43F(2d)705. [h] **Consent to seizure of its property,** is not given by consent of foreign government to be sued. 43F(2d)705.

399-7 [b] (3) Where Russian bank was nonexistent by reason of laws of Soviet government not recognized by United States, and former directors of bank failed to show authority from stockholders to recover deposit with defendant bank, and court was unable to afford defendant bank protection against suit by other parties to recover same deposit in country recognizing Soviet government, court must refuse to take jurisdiction of action to recover deposit. 133Misc527, 233NYS255. (4) Acts of other governments are not binding on court, which must determine for itself questions involved. 133Misc527, 233NYS255.

399-8 33F(2d)202.

399-10 [a] **Corporate shipowner** owned by foreign government and petitioning for limited liability must comply with federal statutes and court rules as to dedimus potestatem. 7F(2d)235.

400-13 127Misc86, 215NYS255. [a] **Intervener's counterclaim,** in action by sovereign, tending only to diminish recovery, held not plea for affirmative relief. 127Misc86, 215NYS255.

400-14 127Misc86, 215NYS255. See also 126Misc269, 212NYS421.

400-15 8F(2d)287.

400-15½-New. The immunity of a sovereign against a suit arising out of unlawful acts of its representative does not extend to those who acted in its name, and cannot be set up by them as a bar to suit brought against them for unlawful acts. 98NJEq665, 130A523.

400-15⅓-New. State court held to have jurisdiction in suit by German national against public trustee of foreign sovereign. 98NJEq665, 130A523.

400-15¼-New. Instrumentality of government, notwithstanding it is created for purpose of very great importance, does not cease to be personally answerable for act done under color of authority conferred upon it, but in fact, in excess of that authority and without legal justification. 98NJEq665, 130A523.

405-66 [a] (1) But see 250NY313, 165NE460. (3) But see 250NY313, 165NE460. [b] (17) It is not unlawful for foreign ship to be sailing with cargo of liquor outside territorial jurisdiction of United States. 30F(2d)441.

407-75 [f] **Bays with headlands over six miles apart.**-There is no definite rule of international law governing jurisdiction over bays, headlands of which are over six miles apart, and such jurisdiction rests in undisputed assertion of jurisdiction by power possessing inclosing shoreline. 200Cal235, 252P722.

408-77 19F(2d)925.

408-78 274US501, 47SCt735, 71Led1171. [a] (4) United States may seize vessels beyond twelve-mile limit for violation of revenue laws. 274US501, 47SCt735, 71Led1171. [f] **Right of United States** to seize vessels for violation of law is not limited to any particular distance from shore, seizure outside territorial limits being subject only to diplomatic consideration and British treaty does not affect such right. 6F(2d)326.

408-78½-New. Only authority for search and seizure on high seas is international law. 19F(2d)925.

411-9 See also 44Philippine292 (obligation of municipal council continued under new sovereignty).

412-23½-New. A corporation which has been nationalized by the Soviet government, which has not been recognized by the United States, cannot sue in courts of the United States. 240NY149, 147NE703.

413-30 [b] **Irish Republic never existed as de facto government.**-129Misc551, 222NYS182.

414-38½-New. Suggestion filed in libel by Republic of France held not to conform to an order requiring it to be presented through diplomatic channels. 15F(2d)711.

414-38⅓-New. Suggestion filed in libel, alleging that libeled motorship "is the property of the Republic of France," held insufficient as not alleging ownership at the time the claims arose. 15F(2d)711.

414-38¼-New. Republic of France held to subject itself to jurisdiction of district court by moving in libel proceeding to stay sale of vessel, except subject to a lien in its favor, and to be bound by the court's decrees. 15F(2d)713.

414-38⅕-New. Republic of France, claiming a mortgage lien on ships, is in no different position than a private litigant. 15F(2d)713.

414-38⅙-New. Foreign government may sue in federal courts. 21F(2d)396.

414-38⅐-New. In an action brought by the imperial Russian government and continued by a representative of the provisional government in the name of the state of Russia, the representative being recognized by the political department, the fact that the Russian Socialist Federated Republic was actually in charge of the government of Russia does not affect the action. 21F(2d)396.

414-38⅛-New. The judiciary will recognize the government of a foreign state last recognized by the political department, notwithstanding withdrawal of the ambassador. 21F(2d)396.

414-38⅑-New. Suit begun by the imperial Russian government did not abate by change in the form of Russian government. 21F(2d)396.

414-38⅒-New. Recognized government of Russia may carry on a suit until a new government is recognized. 21F(2d)396.

414-38⅑-New. Where the Russian government took over defendant's business and assets, a citizen thereof cannot enforce the Russian policy against Russian assets at the expense of American policyholders having no recourse to such fund. 135Misc103, 236NYS673.

414-38½-New. The courts of American jurisdiction will not take cognizance of acts of Mexican or other nationals to conspire to overthrow their own government. 135Misc165, 237NYS267 (sufficiency of complaint).

414-38⅓-New. Suit at law by exiled directors of Russian Bank abolished by Soviet Government to recover moneys deposited with defendant bank. 253NY23, 170NE479.

414-40 [c] **Submission of recommendations to member legislatives; construction.**-Can [1925] 3DomLR1114.

414-41 [a] **De facto government, replacing de jure government,** does not interrupt its perpetual succession. 129Misc551, 222NYS182. [b] **Irish Free State** (1) succeeded de jure British government and not revolutionary organization in rebellion. 129Misc551, 222NYS182. (2) Such state could not claim funds collected by revolutionary organization by derivative title. 129Misc551, 222NYS182. (3) It cannot claim funds raised for insurrection to establish independent republic by title paramount. 129Misc551, 222NYS182. [c] **Where de jure government had not adopted loan contracts,** it is not entitled to funds collected by revolutionary organization. 129Misc551, 222NYS182.

415-48 229AppDiv637, 243NYS35.

415-50 21F(2d)396.

415-50½-New. Refusal to recognize the new government does not mean that the foreign state loses recognition as an international person. 21F(2d)396.

415-50⅓-New. A foreign state survives its form of government. 21F(2d)396.

415-50¼-New. Acts by or affecting the new government of Russia, performed outside of Russia, cannot be validated by recognition of the new government. 21F(2d)396.

415-50⅕-New. Defendant paying judgment to a recognized agent of the state of Russia will be protected against a claim of a subsequently recognized government. 21F(2d)396.

INTERPLEADER

419-10 16F(2d)439; 91Fla593, 109S 212, 48ALR957; 235 IllA1; 220MoA 1238, 290SW459; TexCivA 273SW657.
419-11 16F(2d)439; 91Fla593, 109S 212, 48ALR957; 99Fla887, 128S622; 235 IllA1; 160Tenn325, 24SW(2d)888; TexCommnA 286SW163. [a] (1) 91Fla 593, 109S212, 48ALR957; Fla 117S 710.
420-12 214Ala544, 108S369; 91Fla593, 109S212, 48ALR957; 99Fla887, 128S 622; 235 IllA1; Mass 172NE888; NJ 147A408; TexCivA 273SW657, 659 [quotCJ]; TexCivA 22SW(2d)542. See also MoA 18SW(2d)572.
420-17 98Fla253, 123S762; 91Md585 46A957, 80AmSR470; 47Nev21, 213P 1045; 44 OhSt613, 10NE160.
420-20 [a] (6) One becoming party to suit to cancel notes and mortgage, alleging purchase thereof for valuable consideration without notice of defects and praying foreclosure, is intervener and not interpleader, though he styles himself interpleader. 172Ark744, 290SW 357.
421-28 30F(2d)14; 7PaDist&Co 505. See also Nebr 231NW781.
421-28½-New. A statute authorizing insurance companies to file a bill of interpleader when there are adverse claims does not enlarge equitable principles of interpleader, but enlarges jurisdiction of the court. 33F(2d)157(2dcase).
421-31½-New. Action of interpleader is the proper proceeding to determine claims of assignee of contractor and trustee in bankruptcy of such contractor to money alleged due from city. 214 AppDiv202, 212NYS60.
421-37 216Ala321, 113S495.
421-40 216Ala321, 113S495.
422-41 [a] (7) Possessor of goods sought to be recovered in detinue cannot deliver goods to another and claim right as stakeholder to be relieved by obligations and force plaintiff to litigate with third person. 21AlaA91, 105S725. [b] **New ground for interpleader not created by statute,** merely summary procedure in court of law, otherwise had only by bill in chancery. 21AlaA91, 105 S725.
422-52 206Cal 592, 275P794.
422-56 163La332, 111S776. [b] **Statutory concursus.**–160La636, 107S473.
423-60 218Ala296, 118S513.
423-63 236Mich41, 209NW824; 236 Mich37, 209NW929.
424-71 38F(2d)212.
424-77 91Fla593, 109S212, 48ALR957; MoA 14SW(2d)537. But see 127Me340, 143A266, 60ALR712. [e] (1) 214Ala544, 108S369.
426-91½-New. The remedy of interpleader is efficacious and wholesome, and is allowed as a substantial right to complainant who, under proper circumstances, invokes the same. TexCivA 276SW 741.
426-96½-New. An action on a certificate of deposit assigned to plaintiff by the person to whom it was issued is not one "to recover for moneys on deposit," within the statute permitting interpleader of an adverse claimant to a deposit. 132Misc514, 230NYS446.
426-97½-New. The holder of an unaccepted draft or uncertified check drawn against bank deposits may not assert such claims against the deposit as will entitle the bank to interpleader. 126 Misc642, 213NYS678.
426-99 236 IllA447; 221MoA428, 289 SW349; Or 293P410. [d] **Gratuitous stockholder** of money held in escrow is entitled to interplead. TexCivA 295SW 210.
427-9½-New. Sheriff seizing property in foreclosure of chattel mortgage may bring action to determine rights of claimants. 46Philippine400.
427-13 40F(2d)38.
427-23 40F(2d)38 (multiplicity of suits).
427-24 31F(2d)217 [aff 31F(2d)220 (1stcase)]; 205Cal 309, 271P100, 60ALR 630; 336 Ill 522, 168NE640; 236 IllA 447; 165La571, 115S755; 143Miss299, 108S494 (nonresident debtor whose debt was payable in Mississippi, garnisheed in state of residence subsequent to assignment valid in Mississippi, may file bill of interpleader in state of residence); 219AppDiv294, 219NYS692; 96 PaSuper488. See also 127Misc69, 215 NYS252.
428-27 24F(2d)107.
428-28½-New. Where an escrow holder is under duty to maintain escrow until it can be closed by reason of a provision preventing rescission without joint consent, the escrow holder cannot be relieved of responsibility through suit in interpleader. CalA 265P303.
428-29 127Misc69, 215NYS252.
429-35 See also 127Misc69, 215NYS252.
429-43 99NJEq758, 134A179; 127Misc 69, 215NYS252.
430-48 220Ala148, 124S207; 127Misc 69, 215NYS252.
430-49 127Misc69, 215NYS252.
430-50 205Cal 309, 271P100, 60ALR 630. [a] (2) Claim of insured is not adverse to that of his attaching creditor. 33F(2d)157(2dcase).
430-57 [b] **Doubt may be either on question of fact or question of law.** Tex CivA 273SW657.
430-58 127Misc69, 215NYS252; Tex CivA 276SW741; WVa 153SE107. [b] **Possibility that defendant is liable to both claimants** is not bar to interpleader. 127Misc69, 215NYS252.
431-59 130Misc99, 223NYS508.
431-60 209Ky145, 272SW412; 227App Div552, 238NYS342.
431-61 99NJEq70, 132A507; Tex CommnA 14SW(2d)829.
431-63 Sask [1930] 3DomLR314.
432-65 TexCivA 276SW741.
432-66 209Ky145, 272SW412 (claim of bona fide purchaser of note).
432-67 TexCivA 276SW741. See also 221MoA428, 289SW349.
432-69 TexCivA 276SW741.
433-70 127Misc69, 215NYS252.
433-72 127Misc69, 215NYS252.
433-79 [b] **Notice to bank by depositor corporation** that check deposited by officer to individual account is property of corporation entitles bank to interpleader. 126Misc462, 213NYS678.
433-84 91Fla593, 109S212, 48ALR957; 99Fla887, 128S622; 127Me340, 143A266, 60ALR712; 247Mich538, 226NW218, 219 [citCJ]; 99NJEq758, 134A179. [d] **No requirement** that claimants derive their rights from stakeholder. 99NJEq 758, 134A179.
434-85 Fla 117S710. See also 127Me 340, 143A266, 60ALR712.
434-86 See also 127Me340, 143A266, 60 ALR712.
435-1 91Fla593, 109S212, 48ALR957.
435-2 53ND6, 204NW892.
436-10 205Cal 309, 271P100; 127Me 340, 143A266, 60ALR712; WVa 155SE 662. [c] **In case of reasonable doubt** as to stockholder's rights to interpleader, it should be allowed. TexCivA 16SW (2d)922.
436-11 30F(2d)14; 91Fla593, 109S212, 48ALR957; Mass 172NE888; 82Mont 21, 265P673; 99NJEq758, 134A179; 10 PaDist&Co 547. [d] **Allegation of forgery of notes** does not deprive maker of single note of right to concursus to determine which of six persons claiming to hold genuine note is holder thereof. 165La571, 115S755.
436-12 218Ala296, 118S513; Ala 127 S505; 91Fla593, 109S212, 48ALR957; 99NJEq758, 134A179. [b] (3) Administrator is vested with exclusive legal title to personalty and cannot maintain interpleader against distributees' demands. WVa 155SE662.
437-14 169La789, 126S62.
438-26 221MoA428, 289SW349.
438-27 221MoA428, 289SW349.
438-28 91Fla593, 109S212, 48ALR957.
438-32 91Fla593, 109S212, 48ALR957.
438-42 38F(2d)212; 40F(2d)38; 91Fla 593, 109S212, 48ALR957; TexCivA 276 SW741.
438-43 152Tenn302, 278SW56.
439-46 205Cal 309, 271P100, 60ALR 630; 99Fla887, 128S622; 127Me340, 143 A266, 60ALR712; 236Mich37, 209NW 929; MoA 287SW877; 10PaDist&Co 547, 548 [citCJ]; 152Tenn302, 278SW 56. [m] **Escrow holder** (1) who has assumed definite and independent liability to one of parties to escrow may not bring interpleader action. CalA 265P 303. (2) That escrow holder also held bonds and evidences of indebtedness of vendor does not defeat right to bring interpleader action to relieve it of liability on account of claims between vendor and purchaser. CalA 265P303.
440-51 127Me340, 143A266, 60ALR712.
440-54 236Mich41, 209NW824; MoA 297SW982, 983 [quotCJ].
441-59 [d] Insurance company waives any interest in outcome of action on policy. 114 OhSt109, 150NE748.
441-65 [f] (2) Where owner exercises right of stoppage in transitu, and demands possession of goods, and title to property is disputed, carrier should file interpleader. 40GaA448, 150SE100(2d case).
442-66 227AppDiv413, 237NYS200 (interplead maker of note certified by bank on order to stop payment).
442-75 [b] 214Ala544, 108S369.
442-76 24F(2d)345; 30F(2d)14; 155 Miss445, 124S492; TexCivA 276SW741; TexCivA 31SW(2d)359.
443-77 38F(2d)212; 40F(2d)38; 181 Ark444, 26SW(2d)115.
443-81 99Fla887, 128S622; 170La783, 129S202.
443-82 NJ 147A408.
443-83 See also 247Mich538, 226NW 218.
444-87 23Philippine76.
444-88 MoA 14SW(2d)537 (trustee in bankruptcy).
444-95 [a] (15) Executrix of payee of cashier's check is properly substituted for drawer. CalA 268P688. (16) Other instances. 148Md157, 129A18.
445-96 168Ga547, 148SE396. [a] (3) Where elevator company receives grain and issues storage receipts therefor with knowledge that it is subject to chattel mortgage and refuses to comply with mortgagee's demand for delivery of grain or proceeds but subsequently, when made defendant in garnishment proceedings in action against mortgagor, deposits duplicate storage tickets with clerk of court, it is not entitled to benefit of North Dakota statute. 49ND502, 191NW955. [d] **Life insurance companies.**–30F(2d)715.
445-98-99 99Fla887, 128S622.
445-5½-New. In "concursus" proceeding by the owner of a building, joining a contractor and all interested parties, issue need not be joined between contestants for fund. 163La1, 111S470.
445-5⅓-New. In concursus proceeding by the owner against a contractor, surety on bond, and lien claimants, the surety is entitled to the defense that the owner make advance payments. 161La 876, 109S534.
445-5¼-New. An agreement to accept postponed payments, made without consideration by one of claimants, has been held no bar to interpleader. 127 Misc69, 215NYS252.
446-24 [a] **Motion to dismiss is not proper procedure** by defendant on paying fund into court but should conform to rules of interpleader by hearing after filing claims. 101NJEq394, 138A121.
446-24½-New. In a controversy between residents of the state for a fund paid into court by insurer, the parties will be governed by the same rules of law and procedure as if one had filed a bill against other. 220Ala344, 125S 217.
446-29½-New. The court was held to have jurisdiction where one thousand dollars on deposit was involved. 336 Ill 522, 168NE640.
446-39 TexCivA 294SW923. See also 24F(2d)107.
446-40 TexCivA 294SW923.
447-45 TexCivA 18SW(2d)209.
447-47 [a] **Where claim filed.**–160La 636, 107S473.
447-53 [a] (2) Ill 172NE35.
448-62 99NJCh70, 132A507. But see TexCr 18SW(2d)325.
448-67½-New. Where decree merely adjudges debtor's liability to claimants, reserving respective rights of claimants to fund, the court has jurisdiction of the debtor's bill of interpleader. 24 F(2d)345.
449-75 MoA 14SW(2d)537 (holder of proceeds of chattel mortgage is proper party). [h] **Surety on bond of con-**

tractor for public building to protect labor and materials is necessary party to interpleader suit by contractor to determine rights as to sum due insolvent subcontractor and claimed by various creditors, where amount due was insufficient to satisfy claims. 236Mich 41, 209NW824. [i] **Minor heir of insured** is neither necessary nor proper party to insurer's interpleader against beneficiary and administrator of insured's estate. 179Ark952, 18SW(2d)909.

449-78½-New. One claiming the right to be joined as defendant need only show reasonable foundation for claim. 219AppDiv464, 219NYS639.

449-78⅓-New. He need not set forth evidence upon which his claim rests. 219AppDiv464, 219NYS639.

449-78¼-New. Under some statutes, a person having an interest in subject of action is entitled, in discretion of court, to be made defendant. 219AppDiv464, 219NYS639.

449-85 163La332, 111S776.

449-91 But see 82NH321, 133A447.

450-98 5PaDist&Co 711.

450-7½-New. Sheriff's return must be definite as to all essential facts. 5Pa Dist&Co 711.

450-7⅓-New. Defective service is ground for extension of time. 5PaDist &Co 711.

450-20 125 Okl 230, 257P288. [a] **Amount deposited by owner filing concursus** proceeding is unliquidated sum subject to attack. 170La783, 129 S202.

451-21 But see 167La712, 120S61.

451-23 214Ala446, 108S345; 165La 571, 115S755; 221MoA428, 289SW349. See also 82Mont21, 265P673.

451-35 206Cal 592, 275P794; 128Kan 745, 280P756; 126Misc462, 213NYS678 (in absence of bad faith or collusion); TexCivA 31SW(2d)359.

451-37 But see 82Mont21, 265P673.

451-43 11LaA59, 123S132.

452-47 93Fla253, 123S762; 165La571, 115S755; NJ 147A408.

452-64 220Ala395, 125S640.

452-65 [a] (1) 221MoA428, 289SW 349. [b] MoA 18SW(2d)572; WVa 153 SE107.

453-71½-New. In Alabama complaint was held defective in omitting to aver that property was "in gremio legis." 21AlaA91, 105S725.

453-71⅓-New. Bill should show that complainant has no adequate legal remedy. WVa 155SE662.

453-73 94Fla1226, 115S530; 125 Okl 230, 257P288.

453-76 125 Okl 230, 257P288.

453-82 92PaSuper235.

454-93 220Ala148, 124S207 (bill not demurrable on that ground); 125 Okl 230, 257P288.

455-94½-New. In the absence of an averment that some person not a party to the action claims a right to the thing sued for, the court is without authority to require parties plaintiff to interplead. 92PaSuper235.

455-96 125 Okl 230, 257P288.

455-12 [a] 98Fla253, 123S762.

456-14½-New. Where an affidavit was before the chancellor when considering a demurrer to a bill, it was immaterial whether it was filed with the clerk or the chancellor. 98Fla253, 123S762.

456-14⅓-New. Where the affidavit is attached before the court disposes of the demurrer, the filing is sufficient. 98Fla253, 123S762.

457-46 Fla 117S710; 153Md14, 137A 523 [citCJ].

457-47 153Md14, 137A523.

457-52½-New. One defendant to a bill of interpleader may not demur to an answer or cross bill of another defendant. 153Md14, 137A523.

457-56 98Fla253, 123S762.

458-68 MoA 8SW(2d)1087.

458-68½-New. Defendant, by answering subsequent to overruling of his demurrer, waived the ruling thereon. MoA 8SW(2d)1087.

458-78½-New. The answer construed as not amounting to pleas of non est factum or forgery. 168Ga782, 149SE 133.

458-78⅓-New. Answers held timely. 170La10, 127S347(2dcase).

458-78¼-New. Answer filed by claimants prior to any default is timely. LaA 130S667.

459-90½-New. Affidavit of defense. Rule for judgment for want of sufficient affidavit of defense is not warranted. 97PaSuper258.

459-98 101NJEq69, 139A526, 527 [cit CJ].

459-1 163La1073, 113S459.

461-50 21F(2d)263.

461-56 169La789, 126S62.

461-57 254 IllA377.

461-60½-New. In concursus proceeding by the owner to compel payment of mechanics' liens, claimants have the right to show that work was done not covered by the original contract. 161 La876, 109S534.

461-61 21F(2d)263; 254 IllA377. [a] (5) Where certificate provided for payment to widow if designated beneficiary became disqualified, widow can raise question of disqualification in interpleader suit. 199Wis635, 227NW268.

462-62 82Mont574, 268P787.

462-63 21F(2d)263.

462-65 [a] (2) Answer held to put in issue validity of contract to pay codefendant attorney half of distributive share recovered in probate court. MoA 31SW(2d)533.

462-84 [a] **Questions held questions of fact for court.**–MoA 31SW(2d)583.

463-96 98PaSuper277.

463-97 126Me591, 136A288.

463-98 226Ky647, 11SW(2d)700; 148 SC369, 146SE220.

463-11 91Fla593, 109S212, 48ALR957.

463-12 91Fla593, 109S212, 48ALR957; Fla 117S710.

463-13 [a] **Submission of intervener's right** to insurance fund held error in view of absence of proof of right thereto by intervener. 193NC8, 136SE243.

463-15 148SC369, 146SE220.

463-17½-New. Evidence held admissible. 298Pa322, 148A471.

463-19 [a] (3) TexCivA 276SW741. (6) To sustain finding that, before suit was filed, plaintiff offered to pay debt and attempted to secure releases from all defendants who claimed right to receive debt. TexCr 1SW(2d)325. (7) Other evidence held sufficient. 30F(2d) 597 [certiorari den 279US856, 49SCt351 (7thcase), 73Led997]; 148SC369, 146 SE220. [c] **Prima facie case** having been established by introduction of policy and indorsement of change of beneficiary thereon, plaintiff is entitled to proceeds. 298Pa322, 148A471. [d] **Evidence held insufficient** to show owner anticipated payments to contractor in violation of contract. 170La10, 127 S347(2dcase).

464-25 [c] **Title to insurance money.**–Trustee under mortgage, interpleaded on adverse claim to insurance money, has burden of showing title thereto. 221AppDiv180, 222NYS671. [d] **Intervener in action on insurance policy** has burden of proof of right to fund. 193 NC8, 136SE243.

464-26 170La783, 129S202. [a] 221 AppDiv180, 222NYS671.

464-27 [a] (1) CalA 284P956; Sask [1926] 3DomLR110. [b] (2) To sustain finding. 82Mont574, 268P787.

464-37½-New. Where the court finds that the rights of the parties rest in an action for conversion, it may dismiss the action as to the interpleaded parties without prejudice to their rights against the tortfeasor. 53ND6, 204SW 892.

464-37⅓-New. A judgment ordering payment to one claimant on executing a bond for repayment in case the judgment is reversed is proper. 168Ga782, 149SE133.

464-39 See also 4LaA172.

464-46 98Fla253, 123S762.

465-59½-New. Where a rival claimant is brought in as a party defendant on motion of defendant, an order should provide for service upon former of original complaint, with leave to serve a further complaint, and require added defendant to appear and plead. 219 AppDiv294, 219NYS692.

466-65 Mass 172NE888.

466-70 Contra 5PaDist&Co 710.

466-71 214Ala544, 108S369; 218Ala 296, 118S513; 98Fla253, 123S762; 85 Mont229, 278P143.

466-76½-New. Where plaintiff filed a bill of interpleader and no order was made sustaining the prayer therein, the court had no jurisdiction to render judgment upon the issues between the interpleaders. MoA 8SW(2d)1087.

466-76⅓-New. Where a party agrees with the surety not to file a lien if the surety furnished a bond, and the surety, furnishing a bond, was required to complete the work, such party is not entitled to a pro rata share of the fund deposited by the owner. 168La578, 122S856.

466-76¼-New. Without establishing the fact that interpleader lies, defendants cannot have a contention between themselves. 98Fla253, 123S762.

467-81 170La783, 129S202.

468-6 But see 82NH321, 133A447.

468-9½-New. Where some of several defendants in interpleader fail to appear, they renounce all interest in the property and are not entitled to notice of subsequent proceedings. 82NH321, 133A447.

468-14 214Ala446, 108S345; MoA 14 SW(2d)537.

469-20 131 Okl 119, 268P250.

469-25 MoA 8SW(2d)1087.

469-35 21F(2d)158; 27F(2d)464; 98 Fla253, 123S762; 127Me340, 143A266, 60ALR712; TexCivA 289SW1045; Tex CivA 15SW(2d)1056; TexCivA 16SW (2d)922; TexCr 1SW(2d)325. [c] **Concursus proceeding.**–La 129S671.

470-36 TexCivA 274SW276.

470-37 TexCivA 273SW657, 659 [cit CJ].

470-38 19F(2d)866; TexCivA 273SW 667, 659 [citCJ].

470-39½-New. Rules governing allowance of costs in interpleader are the same as in other cases. TexCivA 299 SW943.

470-42½-New. Plaintiff guilty of unreasonable delay in bringing interpleader suit is not entitled to costs. 15F(2d) 126.

470-43 27F(2d)464; 35F(2d)330; 164 La521, 114S119; 169La731, 125S871 (fee held not excessive); 170La783, 129 S202; TexCommnA 286SW163; Tex CivA 273SW657, 659 [citCJ]; TexCivA 289SW1045; TexCivA 299SW943; Tex CivA 1SW(2d)334; TexCivA 15SW(2d) 1056 (even though judgment was reversed); TexCivA 16SW(2d)922; Tex CivA 28SW(2d)173; TexCr 1SW(2d) 325; 150Wash436, 275P717(1stcase). See also TexCivA 23SW(2d)761. But see 159Tenn478, 19SW(2d)269. [a] **Discretion of court.**–160Tenn325, 24 SW(2d)888. [b] **Allowance not matter of right** but in sound discretion of court, and should not be made unless clear necessity demanded filing of bill. 159 Tenn478, 19SW(2d)269.

470-45 See also CalA 284P956.

470-46 98Fla253, 123S762 (proceedings brought for complainant's own protection).

470-48 [a] **Attorney's fee reduced** where claim of owner in concursus proceeding was reduced. 169La319, 125S258.

470-49 27F(2d)464; 98Fla253, 123S 762; 164La521, 114S119; 170La783, 129S202; La 129S671; 127Me340, 143 A266, 60ALR712. [b] **Unnecessary services** cannot be compensated for out of fund. TexCivA 273SW657. [c] **Allowances held excessive.**–TexCr 1SW(2d) 325.

470-49½-New. In some jurisdictions interpleader is not one of those actions in which counsel fees are expressly allowed by statute, 197Cal 103, 239P847.

470-49⅓-New. and a plaintiff in such an action is not entitled to be compensated for attorney's fees incurred in prosecution thereof. 197Cal 103, 239P 847.

470-49¼-New. Statutes in some of such jurisdictions expressly leave question of counsel fees to the agreement of the parties where not provided by statute. 197 Cal 103, 239P847.

470-49⅕-New. Holder of escrow agreement bringing action of interpleader to determine rights of parties is concluded by such statutes from recovery of attorney's fees. 197Cal 103, 239P847.

470-49½-New. Nor can such holder of an escrow agreement in such action brought after failure of parties to agree recover attorney's fees under statutes permitting recovery of necessary expenses by trustee of an express trust. 197**Cal** 103, 239**P**847.

470-49½-New. Where a bank, interpleaded as stakeholder, wrongfully refused a demand of a receiver appointed by the court to turn over the fund, it was held not entitled to counsel fees. **TexCommnA** 286**SW**163.

470-49½-New. With certain exceptions the right of interpleader to a solicitor's fee depends on his freedom from blame or responsibility and on the fact that others are responsible for the situation involved. 159**Tenn**478, 19**SW(2d)**269.

470-49½-New. Attorney collecting fund from deceased's estate for defendants has been held to have acted as agent and not as trustee, and hence not entitled to attorney's fees. **CalA** 284**P**956.

470-49 1/10-New. Where necessity for interpleader was due to complainant, attorney's fees are properly disallowed. 108**WVa**594, 152**SE**321.

470-49 1/11-New. Where interpleader by an insurance company was necessitated by conflicting transfers of a policy by insured to secure debts, the company was entitled to bring the fund into court to protect itself, and an allowance of reasonable solicitor's fees was proper. 159**Tenn**478, 19**SW(2d)**269 (fees allowable without specific prayer).

470-53 218**Ala**296, 118**S**513.

470-54 TexCivA 1**SW(2d)**334.

471-56 170**La**783, 129**S**202. [a] **Liability for costs measured by terms of contract.**–170**La**783, 129**S**202.

471-62 TexCivA 289**SW**1045. But see 103**NJEq**279, 143**A**318.

471-63 TexCivA 14**SW(2d)**906. See also **MoA** 32**SW(2d)**292.

471-64 164**La**521, 114**S**119.

471-66½-New. Under a statute allowing a creditor attorney's fees where he files suit against a contractor and surety, the furnisher of supplies is not entitled to such allowance where he is brought into suit by interpleader. 164 **La**521, 114**S**119.

471-69 TexCivA 299**SW**943.

INTERROGATORIES

474-25 NJ 149**A**761.

INTERSECT

474-49 257**Mass**575, 154**NE**268.

474-56 285**Pa**399, 132**A**194.

475-68 257**Mass**575, 154**NE**268.

475-70 126**Kan**188, 192 [citCJ]; 268**P** 119; 285**Pa**399, 132**A**194; 8**PaDist&Co** 207. [d] **Similar definitions.**–**Mass** 171 **NE**662.

INTERVENTION

477-28 172**Ark**744, 290**SW**357, 358 [cit CJ].

477-29 Erratum.–"**At law** see Parties [31 Cyc 512]" should read "**At law** see Pleading [31 Cyc 512]."

477-30 6**F(2d)**666; 172**Ark**744, 290**SW** 357, 358 [citCJ]; 195**Cal** 739, 235**P**999. [b] (3) Intervention does not constitute new cause of action. **TexCivA** 29 **SW(2d)**479.

477-32 172**Ark**744, 290**SW**357, 358 [cit CJ].

INTESTATE

477-47 [c] **Person does not die "intestate"** as to defeasible fee which he could not dispose of by will. 190**NC**815, 130 **SE**867.

477-50 26 **OhNPNS**387.

INTIMATE

478-72 [d] 128 **Okl** 213, 262**P**196.

478-79½-New. , having illicit sexual intercourse. Webster New Int. D. [quot 128 **Okl** 213, 262**P**196].

INTIMIDATION

478-96 170**Ga**70, 152**SE**114.

478-97 170**Ga**70, 152**SE**114.

INTOLERABLE CRUELTY

479-26½-New. Under statute means "when the cumulative effect of defendant's cruelty upon the suffering victim has become such that the public and personal objects of matrimony have become destroyed beyond rehabilitation." 102**Conn**755, 129**A**275.

INTOXICATE

479-34 See also 5**LaA**49. [a] (3) Person is intoxicated when he is so far under influence of intoxicating liquors that his passions are visibly excited or his judgment impaired. 200 **Iowa**483, 203 **NW**806.

INTOXICATING LIQUORS

491-2 31**F(2d)**950.

491-3 20**F(2d)**903; 100**CalA**245, 279**P** 819; 31 **OhA**417, 165**NE**740. [a] **Construction of word "fit"** in phrase "fit for beverage purposes." 41**F(2d)**544.

491-3½-New. Other statutes use the same definition. 190**NC**684, 130**SE**854.

491-4 112**TexCr**635, 18**SW(2d)**162. See also 316**Mo** 115, 289**SW**862. [d] (2) Mixture containing high percentage of alcohol and containing raisins and other innocuous ingredients requiring liquid to be drained off before use as beverage is not improperly designated intoxicating liquor. 121**Kan**837, 250**P**258.

492-9 4**F(2d)**915. [a] (4) "All mixtures or preparations reasonably likely or intended to be used as a beverage, which shall contain an excess of one half of one per cent. of alcohol by volume." 121 **Or**561, 254**P**1010, 1012.

492-10½-New. In Ohio, under the interpretation given by Gen. Code § 6212-14, wine is an intoxicating liquor. 23 **OhA**137, 154**NE**814.

492-11 200 **Ind**149, 162**NE**51; 200 **Ind** 493, 163**NE**266.

492-14 15 **OhA**520. [a] (1) **MoA** 272 **SW**992.

493-18 149**Wash**509, 271**P**584, 274**P**192 (1stcase).

493-23½-New. To come within the statute relative to intoxicating liquors, the liquor need not be fit, proper, or suitable for a beverage. 121 **Or**561, 254 **P**1010.

493-23½-New. "Potable" means drinkable. 177**Minn**500, 225**NW**431.

493-31½-New. "**Bootlegger**" is defined by statute in some jurisdictions. 200 **Iowa**1239, 206**NW**247 (includes any person who shall keep or carry around on his person any intoxicating liquor as defined by statute with intent to sell or dispose of it).

494-36 [f] "**Hootch, moonshine, and corn whiskey**" means spirituous liquor, illegally distilled or manufactured. 318 **Mo** 1233, 3**SW(2d)**365.

495-66 214**Ala**673, 108**S**587 [citCJ]; 159**La**872, 106**S**364, 365 [citCJ&quot Cyc]. [a] "**Corn whisky**" must be whisky, not some other kind of liquor, made of, or containing a product of corn, intoxicating and potable. 312**Mo** 99, 279 **SW**144. [b] "**Hootch,**" "**moonshine**" **and** "**corn whisky**" **compared.**–"Hootch" and "moonshine" both include "corn whisky," but are broader terms and are names applied to other liquors as well. 312**Mo** 99, 279**SW**144.

495-67 159**La**872, 106**S**364, 365 [citCJ &quotCyc].

496-76½-New. [§ 16a] N. **Moonshine Whisky** is alcoholic spirit illicitly distilled and is included within the term "moonshine." **Mo** 12**SW(2d)**39.

496-78 18**F(2d)**573; 39**F(2d)**62; 23 **AlaA**162, 122**S**309(2dcase); 170**Ark** 974, 281**SW**903; 174**Ark**1179, 298**SW** 337; 78**Colo** 3, 237**P**1114; **Del** 143**A** 792; 198 **Ind**690, 154**NE**667; 199 **Ind** 158, 154**NE**865; 200 **Ind**61, 161**NE**297; **Ind** 170**NE**848 ("white mule" whisky); 210**Ky**645, 276**SW**560 (moonshine whisky); 177**Minn**500, 225**NW**431 (moonshine); 312**Mo** 626, 280**SW**703; 316**Mo** 596, 292**SW**32; **Mo** 292**SW**39; **Mo** 296 **SW**152 (corn whisky); 318**Mo** 827, 1 **SW(2d)**106; **Mo** 12**SW(2d)**39 (moonshine whisky); **Mo** 24**SW(2d)**1032; 34 **NM**449, 282**P**819(2dcase); **OklCr** 272 **P**490(2dcase); 121 **Or**561, 254**P**1010; 138**SC**459, 136**SE**739, 741 [quotCJ]; 101 **TexCr**434, 276**SW**289; 101**TexCr**495, 276**SW**438; **TexCr** 25**SW(2d)**350; **Tex Cr** 25**SW(2d)**832(2dcase); **TexCr** 28 **SW(2d)**135; **TexCr** 31**SW(2d)**640(2d case).

496-78½-New. corn whisky, 311**Mo** 630, 279**SW**135.

496-78½-New. hootch, 311**Mo** 630, 279 **SW**135.

496-78½-New. moonshine, 311**Mo** 630, 279**SW**135; 37**Wyo** 478, 263**P**616.

496-79 18**F(2d)**573; 97**CalA**179, 275**P** 482 (jackass brandy); 138**SC**459, 136 **SE**739, 741 [quotCJ].

497-80 138**SC**459, 136**SE**739, 741 [quot CJ].

497-81 21**AlaA**588, 110**S**320; 138**SC** 459, 136**SE**739, 741 [quotCJ].

497-82 138**SC**459, 136**SE**739, 741 [quot CJ].

497-83 138**SC**459, 136**SE**739, 741 [quot CJ].

497-84 20**F(2d)**903.

497-85 243 **IllA**457; 143**Miss**694, 109**S** 732; **MoA** 282**SW**1043.

497-86 18**F(2d)**573; **Ind** 169**NE**842; 164**Minn**499, 205**NW**450.

497-88 89 **IndA**25, 165**NE**557(2dcase).

497-95 20**F(2d)**903; 106**TexCr**346, 292 **SW**246; 112**TexCr**563, 17**SW(2d)**1075; 113**TexCrl**, 18**SW(2d)**179; **TexCr** 27**SW** (2d)220; **TexCr** 29**SW(2d)**789; **TexCr** 32**SW(2d)**458(1stcase).

498-97 TexCr 29**SW(2d)**765 ("home-brew").

498-4 38**F(2d)**234.

498-7½-New. or apricot choc, **OklCr** 279**P**365.

498-8 [a] **Alcoholic content of "home brew"** is not subject to judicial knowledge. **TexCr** 25**SW(2d)**838.

498-9½-New. Court will not take judicial notice of evil effects of present day intoxicants. 283**Pa**468, 129**A**453.

498-9½-New. Court will not take judicial notice that beer made from hops will develop two and eight tenths per cent alcoholic content if left to stand. 196 **Ind**686, 148**NE**411.

498-9¼-New. Toddy is understood to be a drink, one of ingredients of which is whisky. 210**Ky**645, 276**SW**560. But see 199**Cal** 590, 250**P**684.

498-9½-New. Judicial notice is taken that beer in brewing will develop alcoholic content in excess of that permitted by law to be sold. 17**F(2d)**151.

498-9½-New. Some courts take notice of high percentage of alcohol in fluid extracts, essences, and tinctures. 160 **La**26, 106**S**662.

498-9½-New. "Home brew" not judicially noticed as intoxicating liquor. 25 **OhNPNS**347.

498-9½-New. The court does not judicially know what percentage of alcohol is the minimum required to give liquor actual capacity to intoxicate. 200 **Ind** 30, 161**NE**249.

498-9½-New. Court will not take judicial notice that home brew is intoxicating. 23**AlaA**431, 126**S**495(3dcase); 232 **Ky**404, 23**SW(2d)**594.

498-9 1/10-New. A court judicially knows that blue is the color of the flame made by grain alcohol. 159**Tenn**451, 19**SW(2d)**276.

498-9 1/11-New. Court will not take judicial cognizance that "home brew" is beverage prohibited by law. **GaA** 155 **SE**354.

498-9 1/12-New. Court will not take judicial notice that home brew is intoxicating. **GaA** 155**SE**354.

498-10 119 **Or**674, 250**P**833.

498-11½-New. Court cannot take judicial notice that beverage containing less than one half of one per cent of alcohol by volume is not intoxicating. 71 **CalA**522, 235**P**1029.

498-12 119 **Or**674, 250**P**833.

498-13 OklCr 272**P**490(2dcase). [a] **That whisky is generally used as beverage** is judicially noticed. 312**Mo** 626, 280**SW**703.

498-19 [a] **Judicial notice is taken that** "moonshine" is illicitly manufactured alcoholic liquor. 21**AlaA**625, 111**S**188.

[b] **Courts have no knowledge** of constituent elements of substance described as "shinny." 21**AlaA**625, 111**S**188.

498-20 104**TexCr**628, 286**SW**234; 112 **TexCr**84, 14**SW(2d)**272.

498-24 Mass 168**NE**208 (moonshine mash).

498-27½-New. Nor can the court take judicial notice that certain mash was of the kind customarily used in making

distilled liquor. 188Wis259, 205NW 822.

499-28½-New. Court takes judicial notice that the words "hootch," "moonshine," and "white mule" are generally used in connection with unlawful manufacture of whisky. 312Mo 626, 280SW 703.

499-28⅓-New. The court has no judicial knowledge of the contents of home brew. 112TexCr635, 18SW(2d)162.

499-28¼-New. It is common knowledge that "moonshine" means whisky illegally made. 318Mo 1173, 2SW(2d) 777.

499-28⅕-New. As a matter of common knowledge, "while mule" is corn whisky. Mo 292SW41.

499-29½-New. Manufacturing. The court will not take judicial notice that certain articles are used in manufacturing liquor. 22AlaA163, 113S623; 22 AlaA146, 113S625.

499-30 156Miss66. 125S558.

499-32 36F(2d)778; 284Pa361, 131A 286; 100TexCr468, 274SW978. [b] **Eighteenth Amendment** has been held to confer power on congress to make possession of intoxicating liquor an offense. 14F(2d)5.

500-39 4F(2d)915.

500-41 130Misc660, 224NYS535; 100 TexCr468, 274SW978.

500-43 [a] **In Porto Rico.**–12PortoRico Fed411.

500-49 12PortoRicoFed167.

500-51 But see 272US312, 47SCt103, 71 L ed270, 48ALR1102.

500-53 272US581, 47SCt210, 71L ed 422, 49ALR575.

500-53½-New. State courts and judges are bound to assist in its enforcement. 126Misc574, 214NYS187.

500-53⅓-New. The amendment applies to "all territories subject to jurisdiction" of the United States. 12F(2d)761.

500-53¼-New. Amendment declares national policy carrying duty of support by states. 216Ala522, 113S541.

500-54 272US581, 47SCt210, 71L ed 422, 49ALR575; 284Pa361, 131A286.

500-55 272US581, 47SCt210, 71L ed 422, 49ALR575.

500-57 272US581, 47SCt210, 71L ed 422, 49ALR575.

500-58 272US581, 47SCt210, 71L ed 422, 49ALR575.

501-62 272US581, 47SCt210, 71L ed 422, 49ALR575.

501-64 [a] **Eighteenth Amendment does not empower congress** to prohibit use of alcohol for industrial purposes. 5F(2d)262.

501-66 43F(2d)222; 127Misc244, 216 NYS442.

501-70 272US312, 47SCt103, 71L ed 270, 48ALR1102; 161La368, 108S773; 284Pa361, 131A286.

501-76 272US312, 47SCt103, 71L ed 270, 48ALR1102.

502-86 309Mo 520, 275SW36.

502-87 272US581, 47SCt210, 71L ed 422, 49ALR575; 276US505, 48SCt400, 72L ed676; 35F(2d)96.

502-89 [b] **In Porto Rico.**–12PortoRico Fed411.

502-93½-New. Regulations prescribed by the prohibition commissioner, approved by the secretary of the treasury, under the National Prohibition Act, have force and effect of law. 30F(2d) 971.

502-94 15F(2d)977.

502-95 15F(2d)977. [a] **Volstead Act is not unconstitutional** because enacted before Eighteenth Amendment became effective. 269US36, 46SCt14, 70L ed 151. [b] **Neither National Prohibition Act nor regulations pursuant to § 1 of tit 2 thereof,** limiting amount of sacramental wines which each Jewish family may use each year, are violative of First Amendment to constitution, guaranteeing religious liberty. 30F(2d) 971.

502-97 5F(2d)673.

502-98 37F(2d)203.

502-1 33F(2d)597.

502-2 Wis 229NW657. [a] (4) Provision for enjoining of carrying liquor with intent to sell or soliciting or accepting orders as nuisance does not violate due process or trial by jury clauses of constitution. 33F(2d)597.

502-9½-New. Provision for limitation of amount of prescription by physicians held adopted to enforce Eighteenth Amendment. 272US581, 47SCt210, 71 L ed422, 49ALR575.

502-9⅓-New. Such regulation is not violative of fundamental rights of a physician. 272US581, 47SCt210, 71L ed 422, 49ALR575.

502-9¼-New. A contention that the National Prohibition Act is a deprivation of free exercise of religion, by restricting the use of sacramental wine and contrary to a constitutional guaranty of religious liberty, under the First Amendment, is without merit. 30 F(2d)971.

502-9⅕-New. Jones Act is not void because of provision relative to penalties prescribed in criminal prosecutions. 40F(2d)889.

502-10 22F(2d)867; 26F(2d)373; 41 F(2d)759; 225AppDiv198, 232NYS 449. [b] **Court should give liberal interpretation** to accomplish purpose of the act. 37F(2d)552.

502-11 See also Cal 284P693. But see 4F(2d)915.

502-11½-New. Prohibition statute is penal, and must be strictly construed. 25F(2d)372.

502-12 30F(2d)968.

502-13 16F(2d)604.

503-19 272US312, 47SCt103, 71L ed 270, 48ALR1102. [a] **Authority of state to enact statute** prohibiting manufacture of alcoholic liquors and possession of still is not dependent on Eighteenth Amendment or Volstead Act, but would be authorized under Amendment. 178 Ark1167, 13SW(2d)603.

503-21 322 Ill 384, 153NE729; 297Pa 498, 147A527.

503-22 216Ala522, 113S541; 198NC 728, 153SE410; 284Pa361, 131A286.

503-25 272US465, 47SCt133, 71L ed 354, 47ALR1044; 284Pa361, 131A286; 155Tenn102, 291SW839.

503-26 272US465, 47SCt133, 71L ed 354, 47ALR1044; 284Pa361, 131A286. [a] **Law held not repugnant** to Prohibition Act. 198NC352, 151SE721.

503-30 272US465, 47SCt133, 71L ed 354, 47ALR1044; MoA 14SW(2d)515; 148Wash149, 268P167.

503-31 272US465, 47SCt133, 71L ed 354, 47ALR1044; 125Me319, 133A738; 100TexCr478, 274SW978 (Eighteenth Amendment sufficient source of legislative power of state independent of validity of amendment to state constitution).

503-33 272US465, 47SCt133, 71L ed 354, 47ALR1044; 58ND792, 228NW 199; ND 230NW729.

503-34 250NY83, 164NE864; 284Pa 361, 131A286.

503-34½-New. Neither the state, 125 Misc658, 211NYS705.

503-34⅓-New. its citizens, 125Misc658, 211NYS705.

503-34¼-New. nor its courts can override the National Prohibition Act. 125 Misc658, 211NYS705.

503-34⅕-New. The state derives all its power to enforce the National Prohibition Act from the federal constitution. 125Misc658, 211NYS705.

503-34⅙-New. A state cannot refuse process of its courts for prosecution of actions authorized by the Volstead Act, 125Misc658, 211NYS705.

503-34⅐-New. and it cannot forbid its officers exercising the powers, 125Misc 658, 211NYS705.

503-34⅛-New. or performing the duties conferred and imposed by such law. 125Misc658, 211NYS705.

503-34⅑-New. State cannot nullify provision of National Prohibition Act giving district attorney authority to bring action in state court. 125Misc 658, 211NYS705.

503-34⅒-New. Same act may constitute offense against United States and state. 43F(2d)222.

503-35 272US465, 47SCt133, 71L ed 354, 47ALR1044; 16F(2d)115; 91Fla 893, 109S630; 309Mo 520, 275SW36; ND 230NW729; 284Pa361, 131A286.

504-37 16F(2d)115; 284Pa361, 131A 286.

504-39 26F(2d)373; 43F(2d)222.

504-40 272US465, 47SCt133, 71L ed 354, 47ALR1044; 258Mass103, 154NE 570; 31NM220, 243P333.

504-41 101TexCr495, 276SW438. See also 100TexCr468, 274SW978.

504-43 101TexCr495, 276SW438.

505-46 272US465, 47SCt133, 71L ed354, 47ALR1044; 88CalA621, 264P298.

505-47 160La269, 107S106.

505-51 272US465, 47SCt133, 71L ed 354, 47ALR1044.

505-52 272US465, 47SCt133, 71L ed354, 47ALR1044.

505-54½-New. A state is not required to adopt the same legislative power as congress. NM 242P440.

505-56 NM 242P440; 31NM220, 243P 333; 127Misc244, 216NYS442.

505-57 127Misc244, 216NYS442.

505-59 272US312, 47SCt103, 71L ed 270, 48ALR1102; 167Ga165, 144SE726, 60ALR747; 337 Ill 469, 169NE265; 77 Mont8, 249P574, 52ALR454.

506-60 322 Ill 384, 153NE729; 197 Ind 463, 150NE365.

507-61 196 Ind643, 148NE146; 155 Tenn102, 291SW839.

507-63 116 Or416, 241P390.

507-65 89 IndA555, 167NE345(2d case); Mich 209NW939 (for owner's personal use).

507-67½-New. The legislature may prohibit the possession of articles intended to be used as a means for manufacturing intoxicating liquors. 116 Or 416, 241P390.

507-67⅓-New. The legislature may prohibit the manufacture of intoxicating liquor in its incipient stages. 116 Or 416, 241P390.

507-67¼-New. A statute making it unlawful to keep or possess on any premises any still worm or still is constitutional. OklCr 277P687(2dcase).

510-90 [b] **Does not limit power legislature otherwise possessed** except as to acts falling within prohibitions of its provisions. ND 230NW729.

510-1 4F(2d)915; 198 Ind284, 152NE 166; 162La353, 110S556; 236Mich549, 211NW349; 100TexCr164, 272SW177 (Dean Law declared constitutional). See also 80Colo 417, 252P350.

511-7½-New. Statute prohibiting possession of intoxicating liquor held not unconstitutional either on the ground that criminal intent is not made necessary or on the ground of indefiniteness. 198 Ind693, 154NE671.

511-7⅓-New. Such statute is intended to be liberally construed. 314Mo 333, 284SW433.

511-7¼-New. Act prohibiting possession of distilling apparatus for manufacture of intoxicating liquor held not invalid as not sufficiently defining the offense or prescribing punishment. 198 Ind487, 154NE280.

511-7⅕-New. Indiana statute forbidding possession of liquor has been held not unconstitutional for failure to provide for disposition of liquor on hand when the law took effect. 198 Ind284, 152NE166.

511-7⅙-New. Exemption of regularly ordained clergymen, priests, or rabbis, in a statute making it unlawful to possess liquor, reflects sound public policy within the power of the legislature to provide. 152Wash284, 277P856.

511-7⅐-New. Statute making mere possession of intoxicating liquors an offense does not contravene constitutional limitation on legislative power. ND 230NW 729.

512-12 11PaDist&Co 60. [c] 156Miss 66, 125S558.

513-15 [a] **Priest not having permit to withdraw wine** for sacramental purposes cannot enjoin interference of federal officers with his procuring wine for such purpose. 5F(2d)954.

515-40 219Ky432, 293SW944.

516-51 219Ky432, 293SW944.

516-57 211Ky766, 278SW134. [h] **Statute failing to make distinction** between possession and other violations held valid despite such distinctions in Volstead Act. 211Ky766, 278SW134.

517-60 196 Ind529, 149NE51; 100WVa 543, 131SE11. [j] (1) SD 227NW73 (liquors found in house); 100TexCr295,

273SW582; 100WVa543, 131SE11 (possession of liquor seized under search warrant is prima facie evidence of intention of possessor to sell it). (3) Statute making possession of liquor seized under search warrant conclusive evidence of intended sale would be unconstitutional. 100WVa543, 131SE11. (4) Statute making possession of more than quart prima facie evidence of possession for unlawful purpose is valid. 100Tex Cr419, 273SW566. [k] **General reputation as violator of prohibition law.**–142 Va596, 128SE638; 142Va577, 128SE633. [l] **Law authorizing evidence of offenses before date of indictment** is no denial of any constitutional right. 146Misc66, 111S850.

517–62 [a] **Failure of indictment to inform defendant as to whom he is alleged** to have sold liquor is not violation of constitution. 146Miss66, 111S850.

518–68 272US465, 47SCt133, 71Led 354, 47ALR1044; 321 Ill 484, 152NE 500; 329 Ill 223, 160NE582. See also 265Mass135, 163NE893. [a] **Statute failing to require evidence heard on application for search warrant to be reduced to writing** is not violative of constitutional provision requiring justice to take testimony to find probable cause. Mo 18SW(2d)841.

518–71 Ala 128S785; 124Kan143, 257P 731; NC 153SE634.

518–72 272US465, 47SCt133, 71Led354, 47ALR1044; 124Kan143, 257P731; NC 153SE634.

518–77½–New. One of several light housekeeping apartments when occupied as a home is entitled to same constitutional protection as separate house used as a home. 35 OklACR681.

518–77½–New. Const. Amendm. IV. relating to issuance of search warrants, applies to warrants issued under the National Prohibition Act. 8F(2d)581.

518–77¼–New. A statute providing for the restoration of a vehicle seized for violation of the Prohibition Law, provided the owner is a resident of Virginia or the District of Columbia, is unconstitutional as a denial of equal protection of the laws. 153Va57, 149SE523.

519–78 198 Ind23, 152NE171; 202 Iowa 640, 210NW784; 128Kan627, 278P752 (padlocking premises); 235Mich272, 209NW158; 285Pa511, 132A572; 8Pa Dist&Co 760 (padlocking); Wis 229NW 657.

519–81 103NJL323, 136A741.

519–86 Contra 199Cal 590, 250P684. But see 200 Ind30, 161NE249.

520–87 71CalA522, 235P1029; 199Cal 590, 250P684, 685 [citCJ]; 200 Ind30, 161NE249; 112TexCr528, 17SW(2d) 1074. [c] **Grape juice,** though permitted to be manufactured and used as beverage, when fermented to contain four and nine-tenths per cent of alcohol by volume is intoxicant. possession of which is unlawful. 234Mich106, 207NW 879.

520–90 62 OntL248, [1928] 3DomLR 208; Ont [1930] 1DomLR460 (effect of cancellation of permit under Liquor Control Act). [e] **In Ontario.**–62 OntL 248, [1928] 3DomLR208.

520–91½–New. Where the operation of the Canada Temperance Act is suspended as to a province by order in council and the province changes to a system of government control, the Canada Temperance Act remains suspended unless the governor general considers the new provincial legislation less restrictive than the Temperance Act. NB [1928] 2 DomLR468.

520–94 160La5, 106S654. [b] (2) That municipal ordinance authorizes court to impose more severe penalties than are permitted under state prohibition act does not render it unreasonable or void where regulatory provisions of ordinance are different from those of state law. 199Cal 582, 250P681. (3) That ordinance authorizes court to impose more severe penalties than are permitted under state prohibition act does not render it unreasonable or void where it does not undertake to punish precisely same acts. 199Cal 590, 250P684.

521–95 93Fla585, 112851; 107TexCr 342, 296SW528.

521–99 199Cal 582, 250P681.

521–3 35F(2d)248; Mont 285P178 (suppression of liquor traffic); 107Tex Cr342, 296SW528; 149Va418, 141SE126. [d] **Authorization of existing legislation included in authority to legislate.**–Authority to enact ordinances authorizes appropriate legislation in force at time of enactment of statute. 165Minn150, 206NW51. [e] **Neither federal nor state prohibition laws,** either expressly or by implication, broaden or extend regulatory powers of municipalities. 198Wis 411, 224NW106. [f] **Possession of liquor as evidence of unlawful possession.**–Va 154SE498.

522–4 21AlaA337, 109S571. [c] (1) 165 Minn150, 206NW51. (2) Under this power city may prohibit sale, manufacture, and possession of liquors by inhabitants. 125Misc882, 212NYS400.

524–11½–New. An ordinance so far as it prohibited keeping for sale, possession, or transporting liquor within three miles of city limits is not within the city's authority. 149Va418, 141SE126.

524–14½–New. Under a constitutional grant of police power, a municipality may enact an ordinance regulating the filling by pharmacies of prescriptions for intoxicating liquor if its provisions are not in conflict with state law. 199 Cal 582, 250P681. [a] **In California** statute adopting provisions of Volstead Act is not so comprehensive as to exclude such local regulation. 199Cal 582, 250P681.

524–14½–New. Power to prohibit the sale of intoxicating liquor includes the power to regulate by imposition of conditions and restrictions. 199Cal 582, 250 P681.

524–15 337 Ill 469, 169NE265 (municipality is bound by definition in statute).

524–17 168Minn467, 210NW394; Wis 233NW82.

524–17½–New. Where the state has prohibited sale of liquor, a municipality has authority under its inherent police power to suppress sale within its limits. 160La5, 106S654.

525–23 50Philippine748.

525–28 50Philippine748.

526–32 50Philippine748.

526–39 81Mont19, 261P876.

526–40 199Cal 582, 250P681; 81Mont 19, 261P876; Wis 233NW82.

526–40½–New. But if entire field of prohibitory legislation in regard to intoxicating liquor is covered by state law, there is no vacant field left for municipal legislation on that subject. 71CalA 522, 235P1027.

526–40⅓–New. Wright act of California held to occupy whole field of prohibition of intoxicating liquors leaving no room for municipal legislation on that subject. 71CalA522, 235P1029.

527–45 172Ark1177, 288SW390; 126 Or 297, 269P864.

527–48 [a] 199Cal 590, 250P684.

528–53 71CalA522, 235P1029 (conflict with Wright Act); 81Mont19, 261P876. [b] 199Cal 582, 250P681; 199Cal 590, 250P684. [d] 199Cal 582, 250P681; 199 Cal 590, 250P684. But see 71CalA 632, 235P1033. [e] **Ordinances held conflicting** with state and federal statutes. 95Fla914, 117S793.

528–54 See also 220Ky95, 294SW766.

528–54½–New. A prohibitory ordinance is not invalid because it does not apply to a licensed dealer where it prohibits licenses contrary to the federal constitution or any law passed in conformity therewith or any state prohibitory law. 165Minn150, 206NW51.

528–56 But see 165Minn150, 206NW51.

528–58 [b] 315Mo 1320, 289SW935. [c] Mo 273SW1039; MoA 14SW(2d)515; Nebr 230NW503.

528–58½–New. But repeal of state enforcement act of the Eighteenth Amendment does not nullify effect of this amendment in the state. 126Misc574, 214NYS187.

529–67½–New. When a permit is issued, the right of the permittee to continue to enjoy privileges granted is to be tested by provisions of the act authorizing revocation of permits. 31 F(2d)235.

529–67⅓–New. Under federal statutes federal authorities have authority to issue permits to manufacture medicinal preparations unfit for beverage purposes. 12PaDist&Co 280.

530–80 20F(2d)233; 292Pa127, 140A 858. [b] **Applicant** has no absolute right to get license. 20F(2d)233. [c] **Commissioner decides** whether denial of license was abuse of discretion. 20 F(2d)233.

532–10½–New. Under the National Prohibition Act and regulations thereunder, vesting in prohibition administrators authority to issue permits for sale by physicians and druggists of intoxicating liquor for medicinal purposes, such permits issued by a prohibition administrator are valid. 29F(2d)651.

533–15 See also 28F(2d)637.

533–23 [a] **Dealcoholizing high powered beer** must be done in accordance with regulations. 37F(2d)484.

533–26½–New. Permittee to manufacture toilet articles has been held subject to departmental regulations requiring a permit to use and to withdraw. 13F(2d) 1004.

533–26⅓–New. and entitled to injunction against refusal of withdrawal permits, so long as basic permit stood unrevoked. 13F(2d)1004.

533–26¼–New. Permit authorizes only lawful acts. 36F(2d)568.

533–26½–New. Basic permit to operate a denaturing plant has been held not to carry with it the right to procure any alcohol for denaturation. 36F(2d)496 (2dcase).

533–26⅙–New. Changes in bonds tended to show that several permits were separate transactions and that each earlier permit was surrendered. 43 F(2d)461.

534–29½–New. Holder may consent to termination of permit on suggestion of prohibition officers. 36F(2d)778.

534–30 7F(2d)59.

534–33½–New. Permit for manufacture of cereal beverages is violated by placing beer in portable containers or storing it in racking room before alcoholic content is reduced to legal limit. 13 F(2d)946.

534–36 [c] **Effect of removal.**–34F(2d) 648.

535–42 [a] **Permit to use specially denatured alcohol** held not limited to fifty gallons in thirty days. 7F(2d)408.

535–43 [a] **Statute prohibiting sale** without making permanent record applies only to permittees. 5F(2d)527.

535–48 281US599, 50SCt412, 74Led 1063; 281US610, 50SCt415, 74Led1070 (construction of statute); 30F(2d)818 (2dcase); 39F(2d)155; 39F(2d)193; 39F(2d)219; 41F(2d)848. [a] **Permit to manufacture denatured alcohol by virtue of National Prohibition Act** remains in force without yearly renewal thereof. 30F(2d)818(2dcase). [b] **Expiration on named date.**–Permits to manufacture substances defined in Prohibition Law need not expire by calendar under provision requiring permit to "designate and limit" time. 34F(2d) 642. [c] **Acceptance of alcohol permit without reserving rights under prior indefinite permit** has been held surrender of prior permit. 43F(2d)461.

535–49 41F(2d)848. [b] **Refusal of subsequent alcohol permits.**–42F(2d) 507.

536–52½–New. Renewal held subject to new rules of the treasury department. 16F(2d)279.

536–52⅓–New. Hearing held in effect a proceeding for revocation. 16F(2d) 279.

536–52¼–New. Treasury department ruling limiting the term of alcohol permits held not beyond its power. 16 F(2d)279.

536–52⅕–New. Basic permit to use denatured alcohol held to expire on December 31 after issuance under statute. 16F(2d)279.

536–52⅙–New. Upon refusal to renew permit to withdraw alcohol right to dispose of product on hand may be limited. 39F(2d)219.

536–52⅐–New. Acceptance of new permit may be waiver of any rights under old permits. 40F(2d)747.

536–52⅛–New. Acceptance of permit without reservation of rights under

previous permit has been held to constitute consent to surrender and abandonment of rights under previous permit. 40F(2d)749.

536-52⅕-New. Permit is suspended while premises are closed because of maintenance of nuisance. 36F(2d)568.

536-52 1/10-New. A circular letter attempting to extend whisky permits so as to "continue until surrendered" does not extend beyond December 31 of the succeeding year any permit which by its terms was limited to a date certain, 34 F(2d)642.

536-52 1/11-New. nor revive a permit already expired. 34F(2d)642.

536-52 1/12-New. Prohibition Administrator cannot renew alcohol permit until reversal of his order revoking it. 40 F(2d)963.

536-52 1/13-New. Upon refusal to renew permit possession of liquors purchased under expired permit is lawful. Man [1930] 1DomLR672.

536-62½-New. The commissioner may permit the use of whisky in the manufacture of an extract, if the use thereof is in good faith. 31F(2d)290.

536-62⅓-New. The commissioner of internal revenue may, in his discretion, permit the use of whisky instead of ethyl alcohol in the manufacture of the articles specified in the National Prohibition Act. 31F(2d)292.

536-62¼-New. Inclusion of another product in a permit to manufacture should not be refused by the commissioner, unless there is something in fact situation to call for such refusal. 29 F(2d)408.

536-62⅙-New. A supply of alcohol to manufacture a product cannot be obtained until the formula of manufacture has been approved; but permission to obtain a supply of alcohol, although necessary to the manufacture, does not follow as of course the approval of the formula. 29F(2d)408.

536-62⅛-New. National Prohibition Act relating to liquor permits is controlling as to all permits except as expressly limited. 36F(2d)657.

537-66½-New. National Prohibition Act held to contemplate that one to whom denatured alcohol is released shall himself manufacture product of which it is ingredient. 39F(2d)219.

537-66⅓-New. Permit to manufacture liquor under National Prohibition Act does not authorize keeping liquor except in process of manufacture. 36 F(2d)568.

538-76½-New. Under national prohibition laws, congress has power to regulate amount of liquor to be prescribed. 272US581, 47SCt210, 71Led422, 49ALR 575.

538-76⅓-New. Prohibition commissioner is not bound by evidence or recommendations of the hearer as to the granting of a permit for the use of denatured alcohol for manufacturing purposes. 25F(2d)80.

538-76¼-New. Druggist, having permit under National Prohibition Act, had right to complain of an illegal search and seizure by patrolman who was member of police department of city. 37 F(2d)415.

539-84½-New. Under National Prohibition Act no permit is required for purchase and sale of warehouse receipts covering distilled spirits in government bonded warehouses. 210Ky633, 276SW 538.

539-84⅓-New. A permit is required, however, for the sale 210Ky633, 276SW 538.

539-84¼-New. or purchase of liquor. 210Ky633, 276SW538.

539-84⅕-New. Permits for sale and purchase are essentially different, so that permit to sell does not authorize a purchase. 210Ky633, 276SW538.

539-84⅙-New. Under the Prohibition Act, a permit from the attorney-general to own a still is prerequisite to owning and operating a still. 324Ill26, 154NE 467.

539-84 1/7-New. Under the National Prohibition Act, the commissioner of internal revenue is a necessary party to a suit to secure a permit authorizing transportation by stockholders of their pro rata shares of ale stored by a corporation at the time of its dissolution. 18F(2d)408.

539-90½-New. So, possession of a federal permit to sell intoxicating liquor for beverage purposes does not authorize sale thereof in violation of state laws or dispense with necessity of obtaining a state license. 284Pa361, 131A286.

540-3 [f] **Manufacturer of denatured alcohol and manufacturer of flavoring extracts.**-41F(2d)784.

543-15 [a] (3) That the building was not unoccupied. MoA 32SW(2d)111.

543-24 [b] **Whether facts stated in application are true** is within power of commissioner to determine. 22F(2d) 891.

543-25 7F(2d)408.

548-74 8F(2d)773.

548-76½-New. Tender of hearing, on trial of a bill for injunction and a bill of review, after denial of a permit to operate an industrial alcohol plant, held sufficient. 14F(2d)362.

548-76⅓-New. Hearing in case of cancellation of a permit is not required where the permit expires by lapse of time. 14F(2d)362.

548-76¼-New. Hearing before refusal of permit is not required under the National Prohibition Act. 14F(2d)362.

548-76⅕-New. Discrepancy in representations as to method of delivering manufactured product can be considered in determining good faith of applicant for alcohol permit. 43F(2d)165.

548-76⅙-New. That place where applicant for alcohol permit manufactured preparation appeared to be unused may be considered in determining truthfulness of applicant's records. 43F(2d) 165.

549-81 41F(2d)791.

549-82 22F(2d)913; 30F(2d)503; 36 F(2d)489(2dcase).

549-85 36F(2d)489(2dcase). [a] (2) Necessity of physical presence of witnesses. 42F(2d)923.

550-87 281US599, 50SCt412, 74Led 1063 (renewal of permit); 14F(2d)362; 41F(2d)791.

550-91 43F(2d)461. But see 36F(2d) 489(2dcase).

550-91½-New. Design or intent of applicant for permit to manufacture malt extracts, that liquid malt sold by it should be used in unlawfully manufacturing intoxicants, cannot be guessed at or suspected but must be proved, 8 F(2d)773.

550-91⅓-New. either as an independent fact or by circumstance which would be proper to submit to a jury. 8F(2d) 773.

550-93 [c] 32F(2d)971; 33F(2d)41 (evidence of savings and associations of stockholders held not to justify refusal of corporation's application for permit to manufacture dealcoholized beverages); 34F(2d)646 (evidence held to justify commissioner's conclusion that applicant for permit to use whisky as ingredient in drugs could not be trusted with whisky). [d] 8F(2d)773. [g] **Liquor withdrawal permit.**-21F(2d)969. [h] **Evidence held insufficient** to sustain decision of prohibition administrator refusing permit to withdraw alcohol for manufacturing purposes. 30F(2d)503. [i] **Evidence held sufficient.**-31F(2d) 108; 31F(2d)290. [j] **Evidence as to connection between customer and applicant** for increased withdrawal which was not satisfactory authorized refusal to decline increase. 27F(2d)522.

550-93½-New. On hearing an application to amend a permit for the use of alcohol, the prohibition administrator can consider any testimony as to applicant's fitness and character. 34F(2d) 721 (record of testimony in former hearing for revocation of permit).

550-95 41F(2d)791; 43F(2d)461.

550-96 17F(2d)81 (refusal to continue permit held not arbitrary); 39F(2d) 479 (connection of permittee with known law violator).

551-1 31F(2d)290.

551-6½-New. Noncompliance with the literal terms of the treasury department regulation requiring equipment of five thousand dollars for manufacturing purposes is not a ground for refusal of a permit to withdraw alcohol. 30F(2d) 503.

551-6⅓-New. The fact that applicant for a permit to withdraw alcohol for manufacturing purposes testified that he had never been arrested, although in fact he had some years before been arrested in connection with a labor dispute, has been held not a sufficient ground in itself to justify refusal of the permit. 30F(2d)503.

551-7½-New. To authorize refusal of a permit, the design or intent to use liquid malt in the manufacture of intoxicants must be asserted. 8F(2d)773.

551-7⅓-New. Such design or intent cannot be inferred from the intrinsic nature of the preparation or its adaptability therefor. 8F(2d)773.

551-7¼-New. Presiding officers cannot, in considering testimony of witnesses, remember his past experience with other permittees in the same business as applicant. 8F(2d)773.

551-7⅕-New. Reasonable ground to believe denial of renewal permit is necessary to prevent improper diversion is sufficient. 39F(2d)219.

551-7⅙-New. Failure to comply with statute justifies denial of permit. 40F (2d)749.

551-7 1/7-New. Where permit was renewed for many years conduct since must be basis of finding of unfitness. 42F(2d)923.

551-9 But see 42F(2d)923.

552-13½-New. In granting a withdrawal permit, a condition may be attached that applicant agree to manufacture only in the presence of a government agent. 21F(2d)969.

552-13⅓-New. The prohibition commissioner need not give reasons for his decision on an application for a permit to withdraw denatured alcohol, but failure to do so involves the risk of reversal for failure of the record to support the decision. 25F(2d)80.

552-20 271US479, 46SCt544, 70Led 1046; 14F(2d)113; 19F(2d)235; 20 F(2d)233; 20F(2d)235; 22F(2d)891; 25F(2d)80; 31F(2d)292; 36F(2d)489 (1stcase) (withdrawal permit); 36F (2d)489(2dcase); 36F(2d)496(2dcase) (prohibition administrator); 38F (2d)831 (prohibition commissioner); 39F(2d)219; 41F(2d)784; 41F(2d)961 (2dcase); 217MoA415, 266SW765 (permit to physician to prescribe liquor); 9PaDist&Co 554. See also 33F(2d)897 (1stcase). [b] **Commissioner held to have like discretion** to grant or refuse supply of alcohol for new use as he had on first application for permit. 29F(2d) 408. [c] **Prohibition Commissioner required to prevent diversion** of alcohol having competent evidence that any amount withdrawn might be unlawfully diverted. 39F(2d)479. [d] **Prohibition Commissioner cannot disregard legitimate needs of trade** in regulating use of denatured alcohol. 39F(2d)219. [e] **Prohibition Commissioner may decide what type of individual** or corporation shall receive alcohol permits. 39F(2d) 219. [f] **Refusal of prohibition officers in exercise of their discretion** to issue withdrawal permit ordered by judge has been held not in contempt. 36F(2d)496 (1stcase).

553-21 7F(2d)408; 8F(2d)773; 14F (2d)113; 20F(2d)233; 20F(2d)235; 42 F(2d)507; 42F(2d)923. [a] (4) or for prohibition commissioner to refuse large increase in withdrawals of specially denatured alcohol where circumstances were suspicious (33F(2d)281). (5) Other instances. 39F(2d)219; 39F(2d) 479; 41F(2d)791. [c] **Delay in granting application for permit** to withdraw specially denatured alcohol held abuse of discretion. 7F(2d)408. [d] **Application of druggist for permit under federal statute** cannot be refused on mere belief or suspicion. 13PortoRicoFed223. [e] **Refusal of alcohol permit held not abuse of discretion.**-43F(2d)165.

553-23 [a] **Prohibition administrator cannot refuse permit** on ground that there was no need for granting of brewery permit in that section. 32F(2d)971. [b] **Permit for only one month** cannot be issued by Prohibition Commissioner,

yearly permit being exclusive. 38F(2d) 831.

553-25 7F(2d)408; 20F(2d)233; 20F (2d)235; 25F(2d)80; 26F(2d)373; 31 F(2d)108; 36F(2d)489(2dcase); 36F (2d)496(2dcase); 39F(2d)219; 39F(2d) 479; 41F(2d)791; 41F(2d)961(2dcase); 42F(2d)507; 9PaDist&Co 230. [a] **Applicant has burden of proof** of showing abuse of discretion. 21F(2d)969. [b] **Notwithstanding failure to introduce testimony or give reasons for decision** (1) refusal of permit may be affirmed where applicant's case shows situation not justifying permit. 25F(2d)80. (2) Evidence held to justify refusal of permit to withdraw alcohol. 25F(2d)80.

554-26½-New. Under National Prohibition Act, the court may review the refusal of a permit to deal in denatured alcohol. 15F(2d)115.

554-26⅛-New. Refusal of a permit is not an act purely administrative in character, and where questions are controverted, an opportunity to be heard should be granted. 15F(2d)115.

554-26¼-New. Refusal of application without a hearing is unlawful. 15F(2d) 115.

554-26⅓-New. Applicants are entitled to a hearing as to whether the amount applied for was excessive. 15F(2d)115.

556-45 8F(2d)773.

556-48 22F(2d)891; 13PaDist&Co 693.

556-49 22F(2d)891.

556-50½-New. Failure of administrator to be guided by court's view in matter of refusing permittee to withdraw whisky constitutes error at law. 42F (2d)774.

557-53 26F(2d)373; 42F(2d)572. See also 36F(2d)489(1stcase). [a] **Dismissal of bill for injunction and for review of denial of permit** held proper. 14F (2d)362. [b] **Permits for denatured alcohol** are included in provision for review of refusal of permit. 33F(2d)281. [c] **Court is without power** to grant preliminary injunction pending review. 40F(2d)745(1stcase). [d] **Court is without power** to grant preliminary injunction pending review. 40F(2d)746. [e] **Burden of proving right to alcohol permit** rests on applicant denied permit. 43F(2d)165.

557-53½-New. District court, in reviewing a decision of the commissioner refusing to issue a permit and denying a hearing, may give relief necessary to prevent further abuse of administrative authority. 15F(2d)115.

557-53⅓-New. The court may retain jurisdiction and direct that a hearing be had. 15F(2d)115.

557-55½-New. In Porto Rico order sustaining bill should direct prohibition director to approve issuance of permit, not to issue one. 13PortoRicoFed233.

557-55⅛-New. Where it is shown that druggist applying for permit has illegally possessed intoxicating liquors his bill will be dismissed. 13PortoRicoFed 223.

557-55¼-New. Order dismissing bill on ground of prior violations of prohibition act will be recalled and issuance of permit directed where violations were with permission of director. 13Porto RicoFed230.

557-55⅓-New. In a suit to review the prohibition administrator's refusal to grant a whisky permit, plaintiff is not entitled to a license pendente lite. 34 F(2d)646.

557-59 11PaDist&Co 627.

558-63 30 OhA305, 164NE798.

559-66 30 OhA305, 164NE798; 14Pa Dist&Co 133. [e] (5) Bond given by permittee under National Prohibition Act permitting sale for other than beverage purposes is indemnity, not forfeiture, bond. 271US332, 46SCt532, 70L ed973.

560-67 [d] **Appeal.**-11PaDist&Co 305.

561-70 14PaDist&Co 133.

561-71 [g] **Amount of recovery.**-12Pa Dist&Co 736 (full amount of bond).

561-74½-New. Where a liquor tax certificate was transferred for a note for its agreed value, it was held there was no failure of consideration notwithstanding the ratification of the Eighteenth Amendment made it a bad bargain. 243NY156, 153NE33.

562-76 20F(2d)233; 30F(2d)400; 36 F(2d)657 (authority of Prohibition Administrator); 40F(2d)963. [a] **Permit not complying with terms of statute** may be revoked. 22F(2d)913. [b] **Not revocable at commissioner's will.**-Permit under National Prohibition Law held not to reserve power of revocation at commissioner's pleasure or contrary to statute. 34F(2d)642. [c] **In absence of revocation,** permit though limited to one month will run for one year. 38F (2d)831. [d] **Permit to dispose of surplus stock after revocation.**-42F(2d)424. [e] **Regulation effective September 1, 1927,** does not revoke permit for withdrawal of whisky for medicinal purposes. 42F(2d)774. [f] **Surrender or abandonment of basic permit.**-42F(2d) 511. [g] **Applicability of regulation to basic permit.**-42F(2d)511.

562-77 [a] **Prohibition Commissioner need not revoke basic permits** to temporarily withhold approval of withdrawal permits for alcohol. 39F(2d)479.

562-78 [a] 15F(2d)56.

562-79 42F(2d)511.

562-79½-New. Pendency of proceedings to revoke a permit does not temporarily revoke it. 14F(2d)976.

562-79¼-New. A person who for two years, under color of appointment by a federal prohibition director, issued and served citations and revoked permits, has been held a de facto officer, and his acts valid. 15F(2d)609.

562-79¼-New. A permit is revoked, not as punishment for a crime, but to enforce conditions under which the permit was granted. 6F(2d)658.

562-79⅓-New. The commissioner is charged with responsibility of continuance of the privilege granted under a permit, as well as in granting the permit in the first instance. 28F(2d)637.

562-79⅙-New. The prohibition commissioner had power to revoke a permit required by regulations. 27F(2d) 568.

562-79½-New. Permit, effective until surrendered or canceled for violation of statute or regulation, cannot be terminated by general regulations. 281 US610, 50SCt415, 74L ed1070.

562-79⅛-New. Power of Prohibition Commissioner to make regulations does not authorize regulation providing for revocation of permits in violation of express statutory provisions. 281US599, 50SCt412, 74L ed1063.

562-79⅙-New. Revocation proceedings unnecessary where permit has expired. 39F(2d)193.

562-80 20F(2d)233; 28F(2d)637; 32 F(2d)531; 37F(2d)484; 9PaDist&Co 554. [a] **Permit to use alcohol** for manufacturing purposes should not be revoked where permittee has acted in good faith, but erroneously failed to conform to act. 5F(2d)262. [b] **Failure of employees,** not in bad faith, to remove labels on barrels containing denatured alcohol is not ground for revocation of permit to use alcohol for manufacture of toilet preparations and perfumes. 5F(2d)262. [c] **Attempt to influence government agent in official capacity** shows bad faith justifying revocation of withdrawal permit though actual bribe is not shown. 22F(2d)477. [d] **Failure to have books available for inspection** is violation of regulations justifying revocation of withdrawal permit. 22F(2d)477. [e] **Acts complained of must have occurred during term of permit.**-25F(2d)904. [f] **Inability to account for bills of lading for export shipments covered by canceled invoices on file** does not authorize revocation of withdrawal permit. 24F(2d) 738. [g] **Belief that purchasers are diverting denatured alcohol in products sold** is not ground for revocation of seller's withdrawal permit. 24F(2d) 738. [h] **Incompleteness of permittee's manufacturing record** does not justify revocation of withdrawal permit in absence of bad faith or improper motive. 24F(2d)738. [i] **Revocation held justified** where ten barrels of denatured alcohol, for which permittee was liable, disappeared overnight. 27F(2d)529. [j] **To constitute "diversion" permitting revocation of permit** to use specially denatured alcohol, there must be proof that permittee intended it for illegal use. 32F(2d)531. [k] **Evidence raising mere suspicion** of liquor law violation held insufficient to warrant revocation. 40F(2d)561. [l] **Revocation proper** where permittee unlawfully manufactured and possessed intoxicating liquor. 38F(2d)270.

562-81 30F(2d)155. [a] (2) Evidence held sufficient to justify revocation. 14 F(2d)191. (3) Bad faith of denaturer in making false statements in applying for withdrawal permits. 22F(2d)913. [b] 20F(2d)1000.

562-81½-New. Judgment of acquittal of permittee on a charge of selling denatured alcohol to persons unauthorized is not sufficient, on the theory of res judicata, to affect the commissioner's action in revoking the permit. 28F(2d) 637.

562-81⅛-New. Previous revocation of the permit of a corporation to operate a denaturing plant is not of itself a sufficient ground for revocation of the permit of another corporation, all of whose capital stock was owned by the former company. 28F(2d)422.

562-81¼-New. Discretionary power of the prohibition administrator as to revocation of a liquor permit cannot be controlled or directed by the consequences of the actions of grand or petit juries in criminal prosecutions against permittee, 28F(2d)875.

562-81⅛-New. , but if permittee is merely an agent or tool for the former company, its permit may be revoked. 28F(2d)422.

562-82 12F(2d)646; 25F(2d)281; 26 F(2d)745; 28F(2d)875; 29F(2d)815; 30F(2d)155; 31F(2d)235; 41F(2d)784. [a] **Right of government to revoke permit for violation of Prohibition Law** is dependent on testimony before commissioner or his agent. 29F(2d) 949 [aff 29F(2d)950(1stcase)]. [b] **Discretion of administrator in weighing testimony.**-23F(2d)944. [c] **Sufficiency of evidence to sustain findings.**-23F(2d) 944; 23F(2d)947; 24F(2d)738. [d] **Burden of proof is on prohibition administrator** to sustain revocation of permit to use specially denatured alcohol. 32 F(2d)531. [e] **Revocation of permit to use specially denatured alcohol** for manufacturing must be based on more than mere suspicion and speculation. 32F(2d)531. [f] **Power granted by National Prohibition Act, to permit authorities to make rules and regulations having force of law,** does not authorize permit authorities to revoke basic permit otherwise than by judicial finding, based on proved evidentiary facts. 30F(2d)400. [g] **Evidence sufficient** to justify revocation of permit. 38F(2d) 689. [h] **Questions considered in reviewing decision revoking permit.**-38 F(2d)689. [i] **Burden to justify termination** of liquor permit is on government. 281US599, 50SCt412, 74L ed 1063. [j] **Nature of proceeding to revoke alcohol permit.**-41F(2d)74. [k] **Evidence held sufficient** to justify revocation of permit to use denatured alcohol in toilet preparations. 43F(2d) 659.

562-83 25F(2d)173.

562-84 35F(2d)704. [a] **That proceeding to cancel permit** to use denatured alcohol was brought in wrong district is not ground for dismissal before hearing. 5F(2d)987.

562-85 38F(2d)270.

562-85½-New. Permittee, pending proceedings to revoke basic permit to operate denaturing plant, held not entitled to injunction against denial of withdrawal permits. 14F(2d)318.

562-85⅓-New. Proceedings must be instituted immediately after the commissioner has knowledge of the acts charged. 25F(2d)904 (delay of two and one half months held unauthorized).

562-85¼-New. The right to revoke a permit depends on the testimony before the commissioner or his agent. 22 F(2d)477.

562-85⅓-New. Evidence held sufficient to sustain revocation. 26F(2d)46.

562-85⅙-New. An order revoking a

permit is prima facie evidence of facts found as a basis for the order. 28F(2d) 579.

562-85½-New. Failure to give notice required for hearing on revocation of a permit is not available as a ground for attack on the revocation order, where permittee obtained adjournments at the hearing, offered affirmative evidence in his own behalf, and insufficiency of notice was not claimed until trial. 28 F(2d)422.

562-85⅛-New. Unexplained delay of nearly three months on the part of the prohibition commissioner, after receiving proof of permittee's violation of a permit to sell liquor for medicinal purposes, has been held to preclude exercise by the commissioner of power of revocation, under the National Prohibition Act. 29F(2d)912.

562-85⅛-New. A decision in favor of permittee in a suit to padlock a brewery has been held res judicata on matter of the permit board's right to revoke the permit because of some alleged violation. 296Pa149, 145A711.

562-85 1/10-New. Order citing permittee to appear before Commissioner held not unduly delayed. 33F(2d)270.

562-85 1/11-New. Where permit provided that all operations should be discontinued on issuance of citation permittee taking review cannot complain of guards. 38F(2d)690.

562-85 1/12-New. Evidence held not to warrant revocation of a permit to manufacture denatured alcohol. 33F(2d) 782.

562-85 1/13-New. Where violations of law are shown, the prohibition administrator can continue revocation proceedings even after permittee surrenders his permit. 34F(2d)167.

562-85 1/14-New. Bad faith in sale of denatured alcohol in toilet preparations held not to warrant revocation of permits for sale of liquor and use of alcohol in medicinal preparations. 43 F(2d)659.

563-86 4F(2d)859; 13F(2d)1019; 22 F(2d)417. But see 23F(2d)944; 33 F(2d)904 [aff 33F(2d)905]. [a] **Government must plead derelictions** on which it relies as justification for revoking permit. 5F(2d)262. [b] **Findings as to credibility of witnesses at administrator's hearing** should not be disturbed. 24F(2d)738. [c] **Sole question on review** of order revoking permit is sufficiency of evidence. 37F(2d)484. [d] **Court can only determine** whether revocation of permit was warranted. 37F(2d)552.

563-87 But see 22F(2d)913; 25F(2d) 281. [a] **Right of review** given by statute requires trial of case and not trial of administrative trial. 5F(2d) 262.

563-88 23F(2d)944; 33F(2d)999.

563-89 5F(2d)533.

563-91½-New. On review of revocation of a withdrawal permit under the national Prohibition Act, the court looks only into whether the revocation was supported by evidence or is arbitrary or capricious. 26F(2d)46.

563-91½-New. Diversion of a shipment of alcohol consigned to a permittee is prima facie evidence that it was by his act. 21F(2d)534.

563-91¼-New. and in the absence of any other evidence would support an order of revocation of the permit. 21 F(2d)534.

563-91½-New. but the permit cannot lawfully be revoked unless the finding of guilt is made under all the evidence. 21F(2d)534.

563-91⅛-New. although evidence of guilt beyond all reasonable doubt is not required. 21F(2d)534.

563-91⅞-New. Suspicion of guilt founded upon attempted diversion is insufficient. 21F(2d)534.

563-91⅛-New. There must be evidence fairly supporting the finding of guilt to warrant revocation on the ground of diversion. 21F(2d)534.

563-91⅙-New. A permittee is entitled to a decree setting aside the wrongful revocation of its permit notwithstanding the commissioner's order terminating all such permits. 33F(2d)782.

563-91 1/10-New. On review of order revoking permit, court cannot revive permit that has expired. 36F(2d)657.

563-91 1/11-New. On review of order revoking permit, finding of Prohibition Commissioner raises an issue of law if unsupported by substantial evidence. 36F(2d)657.

563-91 1/12-New. District Court has jurisdiction to review revocation of permits. 37F(2d)31.

563-91 1/13-New. In some jurisdictions revocation of permit will not be disturbed unless it is apparent that either an error of law was committed or that findings were wholly unsupported by evidence, or were clearly arbitrary or capricious. 37F(2d)552.

563-91 1/14-New. On review, court can only determine whether action of Commissioner was based on error of law or wholly unsupported by evidence or arbitrary. 38F(2d)270.

563-91 1/15-New. Where a finding of the fact of violations is based on some evidence, the commissioner's action cannot be held arbitrary or capricious. 33 F(2d)999.

563-91 1/16-New. Evidence held not to justify the setting aside of the revocation of a permit to use denatured alcohol. 33F(2d)904 [aff 33F(2d)905].

563-91 1/17-New. Where findings of the prohibition commissioner are based on evidence, and his proceedings are legal, his action in revoking a permit will be sustained. 33F(2d)999.

563-91 1/18-New. Prohibition Administrator's order revoking alcohol permit is reviewable within reasonable time. 40F(2d)963 (procedure).

563-94 20F(2d)233. [a] **Legal evidence** must have been presented to commissioner of internal revenue to justify revocation of permit. 4F(2d)859.

563-96 [f] **Findings of hearer** in proceeding to revoke alcohol permit are merely advisory and are basis of examination by prohibition administrator. 35F(2d)704.

563-97 4F(2d)859; 37F(2d)31. [a] **Holder of permit** cannot take advantage of delay in revocation of permit. 37 F(2d)31.

564-1 4F(2d)859; 36F(2d)657; 37 F(2d)484; 42F(2d)262. [c] **Permittee is presumed** to have falsified books or acted in bad faith in action to review revocation of permit. 4F(2d)859.

564-2 35F(2d)704.

564-5 35F(2d)704; 36F(2d)489(2d case); 42F(2d)262; 11PaDist&Co 345; BC [1926] 4DomLR784, [1926] 3West Wkly253.

565-14 [a] **Permittee receiving denatured alcohol** for special purpose and covering up diversion by fictitious sales is not acting in good faith under provision authorizing revocation for failure in good faith to conform to provisions of National Prohibition Act. 4 F(2d)859.

565-17 [t] **An act of omission** is as much failure to act in good faith in conforming to provisions of National Prohibition Act, justifying revocation, as one of commission. 4F(2d)859.

567-31½-New. Temporary injunction to continue a revoked permit disturbs status quo and will be denied. 16F(2d) 279.

567-31⅓-New. Permittee has been held entitled to temporary injunction where administrator's refusal to permit withdrawal was not based upon unlawful use of whisky. 42F(2d)774.

569-64 [a] **In Ohio.**-(1) 24 OhA527, 157NE431.

569-65½-New. A mulct tax certified and levied two years after a violation of intoxicating liquor statutes and after the repeal of statutes authorizing the levy of such tax and after the property has passed into the hands of an innocent party is void as to such party. 203 Iowa529, 212NW718.

570-74 [a] **In Ohio** levy on goods and chattels under Dow-Aiken Tax Law is superior to all other liens, mortgages, conveyances, or encumbrances. 25 Oh NPNS175.

570-76½-New. A court of equity may enjoin collection of a wholly void mulct tax and remove the lien thereof as a cloud on title. 203 Iowa529, 212NW 718.

571-93 200 Ind496, 163NE596. [g] **In New York.**-219AppDiv584, 219NYS 348.

572-7 [a] **Regulations adopted by Commissioner of Prohibition,** with approval of Secretary of Treasury have force of law. 41F(2d)759.

573-12 [c] **Permit under National Prohibition Act** to use denatured alcohol for specific purpose should be strictly construed. 5F(2d)987.

573-13½-New. Prohibition agents are proper officers to demand samples of alcoholic product for analysis. 5F(2d) 987.

573-13⅓-New. Federal Prohibition Commissioner has no power to make regulations in respect to state liquor law. CalA 288P61.

573-16 [b] **Refusal of one, having permit to use denatured alcohol** for manufacture of insecticide, to permit prohibition agents to analyze insecticide, because formula is secret one, held unwarranted. 5F(2d)987.

573-20 [e] **Regulations of commissioner** may change kind of denatured alcohol which may be withdrawn without depriving permittee of due process. 22F (2d)697.

574-30 [c] **Unlawful seller** is not punishable for failure to keep record of sales, such requirement being applicable only to permittees. 271US354, 46 SCt513, 70Led986.

575-40½-New. Release of large quantities of alcohol in past, has been held not to estop government from discontinuing releases, absent bad faith. 39F(2d)219.

575-40⅓-New. Prohibition Administrator has power to limit quantity of alcohol to be withdrawn in case of basic permit and withdrawal or purchase permits. 39F(2d)479.

575-42 [c] **National Prohibition Act** requires permits for druggists or pharmacists to obtain alcohol to be approved by commissioner at Washington. 12 PortoRicoFed417. [d] **Cancellation of permit.**-12PortoRicoFed215.

575-49 220AppDiv110, 221NYS96.

575-50 40F(2d)74; 34F(2d)275; 196 Ind433, 148NE403; 134SC140, 132SE45.

576-52 288Pa510, 136A791.

576-54 23AlaA431, 126S495(3dcase); 240Mich59, 214NW935; 88PaSuper155; 77Mont8, 249P574, 52ALR454; 52SD91, 216NW858.

576-54½-New. Louisiana statute does not make transportation of intoxicating liquor under particular circumstances a crime so as to charge a person with the crime of interest. 162La719, 111S72.

576-55 151Wash114, 275P75.

576-56 41F(2d)759; 315Mo 1279, 289 SW792; 148Wash149, 268P167; 103 WVa631, 138SE323. [a] **Guest placing liquor in car, unknowingly,** is not guilty of transporting. 102TexCr413, 278SW 211.

576-57 262Mass180, 159NE633; 243 Mich559, 220NW709; 108TexCr274, 1 SW(2d)308.

576-60½-New. Plain terms of the statute cannot be evaded although the act provides for liberal construction. NJ QuartSess 139A401.

576-60⅓-New. Offenses of distilling alcoholic liquors and unlawful possession of a still are susceptible of joint commission. 23AlaA115, 121S499(1stcase).

576-60¼-New. While the National Prohibition Act is a law of the state of New York under U. S. Const. art 6, nevertheless violation of the act constitutes no offense against the peace and dignity of the state. 250NY336, 165NE518.

576-60½-New. Substantive offense under liquor laws may be committed, though there is no conspiracy to commit such offense. 43F(2d)906.

576-63 35F(2d)584; 36F(2d)401; 155 Md13, 141A383; 146Miss66, 111S850. [b] **Statute denouncing possession of apparatus for manufacturing intoxicating**

liquor is not impliedly repealed by statute denouncing manufacture of whisky and brandy. 159Tenn245, 17SW(2d) 919. [c] **Statutes held not inconsistent.**–199 Ind49, 155NE209. [d] **Willis-Campbell Act did not repeal any part of the National Prohibition Act.**–38F(2d)441.

576–63½–New. Acts have been held independent and not amendatory of other acts. 196 Ind576, 149NE649.

577–64 159Tenn451, 19SW(2d)276 (sufficient showing).

577–65 [a] **Ordinance, making violations of state penal laws amounting to misdemeanor violation of town ordinances when committed within corporate limits,** incorporated into municipal ordinances offenses defined in subsequent ordinance, prohibiting sale of certain alcoholic preparations except for medicinal or household purposes. 156Miss 66, 125S558.

577–66 24 OhA85, 155NE811. See also 196 Ind229, 147NE778.

577–67 [c] **In California.**–88CalA621, 264P298.

577–70 96PaSuper155.

577–76½–New. Although a state statute adopts the penal provisions of Volstead Act by reference, the two acts represent different sovereignties. 69CalA94, 230 P1001.

577–76¼–New. In such case the state statute is to be regarded as though it had been enacted independently of the Volstead Act and should be construed without reference thereto. 69CalA94, 230P1001.

577–76¼–New. Statute construed to authorize granting immunity from prosecution under liquor law to one testifying in liquor law prosecution. 140Miss 245, 105S500.

577–76⅓–New. The object of Virginia Prohibition Act is to break up and prevent use of ardent spirits as a beverage. 142Va620, 128SE578.

577–76¼–New. Statute held not repealed by National Prohibition Act. 15 F(2d)621.

577–76⅓–New. An indictment for possessing intoxicating liquor with intent to sell has been held valid although presented after the act omitting the offense charged was passed. 198 Ind511, 154NE 282.

577–76⅓–New. Snyder Act held penal and to be strictly construed. 288Pa510, 136A791.

577–76⅙–New. The terms of the Volstead Act cannot be read into it. 288 Pa510, 136A791.

577–76 1/10–New. The state having instituted a prosecution under a statute which is not broad enough to cover the situation must abide by the limitations of the statute. 205 Iowa581, 218NW269.

577–76 1/11–New. Conspiracy to violate the Prohibition Law is not punishable under the statute punishing a conspiracy as a misdemeanor where the minimum punishment prescribed is less than that prescribed by the constitution. 38 OklCr379, 262P503.

577–76 1/12–New. Willis-Campbell Act reenacts all statutes in force before the Prohibition Act, except directly conflicting provisions. 25F(2d)738.

577–76 1/13–New. Prohibition statute should be fairly construed, in the light of its enactment. 149Va418, 141SE126.

577–76 1/14–New. Provisions of a federal law as to the right to possess liquor in a dwelling house, not contained in a state statute, constitutes no defense to a charge under the state law. 322Mo 1203, 18SW(2d)58.

577–76 1/15–New. A statute, making possession of more than a quart of intoxicating liquor prima facie evidence of guilt, has been held not in conflict with a statute declaring presumption of innocence and making the jury exclusive judges of the facts and weight of testimony, in view of an exception in the latter statute. 111TexCr17, 10SW(2d) 1008.

577–76 1/16–New. Rev. St. § 3242, relating to retail and wholesale liquor dealers, was revived by Willis-Campbell Act, if repealed by the National Prohibition Act. 28F(2d)768.

577–76 1/17–New. The offense of unlawful possession of intoxicating liquor in violation of a state statute adopting the Volstead Act is governed by the state penal code as regards the character of the offense and not by the federal penal code. 87CalA36, 261P1048.

577–77 106WVa194, 145SE269.

577–78 23AlaA339, 125S382; 223Ky8, 2SW(2d)1029; 243Mich555, 220NW764; 311Mo 630, 279SW135 ("hootch," "moonshine," or "corn whisky"); 220MoA 1308, 289SW963; 25 OhNPN8350; 107 TexCr342, 296SW528; 149Wash509, 271 P584, 274P192(1stcase); Wash 288P 236. [b] (3) Druggist is not required to have federal permit to sell double strength tincture of ginger, found by court to be fit for beverage purposes, where such liquid is classed as unfit for beverage purposes by federal authorities. 159La451, 105S451. [d] **In Missouri.**–312Mo 99, 279SW144. [e] Alcohol, whisky, rum, etc., are considered fit for beverage purposes unless rendered unfit by addition of some other ingredient. 39F(2d)62. [f] **That alcohol would not be used without dilution** does not render it "unfit for beverages purposes." 39F(2d)62.

578–79 22AlaA564, 117S801; 23AlaA 431, 126S495(3dcase); 232Ky404, 23SW (2d)594; 262Mass180, 159NE633; Mo 280SW48; 156SC363, 153SE340. [a] **Sale of liquor containing wood alcohol** has been held not violative of National Prohibition Act. 135Misc446, 238NYS 616.

578–80 TexCr 20SW(2d)1050.

578–81 156SC363, 153SE340.

578–82 [a] **Defendants can be convicted,** if liquid can be put in customary condition for beverage purposes by a simple change. 37F(2d)316.

578–83 [a] **In Mississippi.**–144Miss726, 111S139.

578–84½–New. Specially denatured alcohol is not alcoholic liquor within national prohibition act. 43F(2d)659.

578–86 [a] **Construction of statute.**–CalA 288P61.

578–91 [a] (1) 198NC728, 153SE410; Mass 168NE208. (2) 117Nebr514, 221 NW439. [e] But see Man [1929] 4Dom LR896.

578–84½–New. Whether liquor was suitable for beverage purposes has been held immaterial if it was in fact used as a beverage and prohibited by law. 21AlaA548, 109S896.

578–84½–New. National Prohibition Act exempts a person manufacturing nonintoxicating cider and fruit juices exclusively for use in his home. 8F(2d) 487.

578–84¼–New. Whisky is a potable beverage of intoxicating quality, made from ardent spirits distilled chiefly from grain, and, if illicitly distilled, is moonshine whisky or moonshine. 150Md278, 132A624.

578–84½–New. Penalties for violation of provisions as to denatured alcohol held to apply until the liquor is used for the purpose for which withdrawal was permitted. 25F(2d)491.

578–89½–New. Sale of cider containing more than one half of one per cent by volume of alcohol is a violation of both state and federal prohibition laws. 8Pa Dist&Co 641.

578–90 156Tenn331, 1SW(2d)784, 785 [citCJ].

578–91 [a] (1) 174Ark156, 294SW385; 3Del 255, 138A401; 253Mass458, 149NE 140; 312Mo 626, 280SW703; 156Tenn 331, 1SW(2d)784; Wash 238P638. (6) Provision of Prohibition Act permitting manufacture "for domestic consumption at his home" refers to place of manufacture and not place of consumption. 142 Va620, 128SE578. [b] (3) 198 Ind679, 154NE489. (8) Mingling of alcohol and water. 14F(2d)35. (9) "Manufacture" covers active efforts and means employed to make liquor. 200 Ind283, 163NE91. (10) Manufacture of moonshine whisky by any process is violative of statute, even though still is not used. Mo 128SW (2d)25. [c] 312Mo 99, 279SW144 (though fermented and distilled). [d] (1) 169Ark332, 275SW659. [e] 253Mass 458, 149NE140. [f] (2) Moonshine is whisky which has been illicitly distilled or produced. 75Mont78, 242P343. [h] **Permit.**–253Mass458, 149NE140. [i] **"Manufacture" means "to make."** 253 Mass458, 149NE140. [j] **Acts constituting crime and not merely attempt.**–127 Or294, 271P742. [k] **Technical violation of Prohibition Law by defendant and his wife in making vinegar for domestic purposes** held not to warrant conviction on liquor charge. 23AlaA38, 120S301 (1stcase). [l] **Brewing of beer for home consumption** is allowed under Canadian Excise Act where householder gives notice of intention. NB [1929] 1DomLR 813 (householder cannot be convicted of unlawful possession, under Provincial Act, of beer so brewed).

578–91½–New. To be guilty of the crime, manufacture must be for unlawful purpose. 312Mo 99, 279SW144.

579–92 21AlaA463, 109S369; 21AlaA 624, 111S50; 175Ark1170, 1SW(2d)46; 198 Ind679, 154NE489; 161La945, 109 S771; 6PaDist&Co 499; 40Wyo 64, 275 P110. [a] **Unnecessary to show nature of liquid** forming at end of coil of still. 40Wyo 64, 277P8. [b] **In prosecution for making mash** suitable for use in distillation of alcoholic liquors, it is not essential to conviction that mash should have reached alcoholic stage. 177Ark 509, 7SW(2d)802. [c] **That only teaspoonful of whisky had been run off** does not constitute defense. AlaA 130S 317.

579–94 198 Ind679, 154NE489; 6Pa Dist&Co 499. [b] **That still lacked coil** does not prevent finding defendant had made whisky. TexCr 31SW(2d)1077(2d case).

579–95 6PaDist&Co 499. [a] **Manufacturing or possessing mixture "fit for distillation"** or for manufacture of alcoholic liquors (1) is offense in some jurisdiction. 38 OklACR120. (2) "Fit for distillation" may apply to mixture which, when first assembled, has no alcoholic content whatever. 38 Okl ACR120.

579–98 171Ark655, 286SW818; 321Mo 633, 12SW(2d)37. [a] **Intent to claim ownership** need not be shown to establish offense of possession, ownership, and operation of still. 100CalA279, 279 P1046.

579–1½–New. It is not necessary to show that accused was in immediate contact with a still. 103TexCr160, 280 SW219.

579–6½–New. If it appears that defendant merely prepared mash in a wooden barrel for hog feed which fermented, and he does not attempt to use it for any other purpose, he is not guilty. 312Mo 99, 279SW144.

579–6½–New. Under a statute making it unlawful for any person to manufacture or be interested in manufacturing intoxicating liquor, presence when liquor is manufactured is not essential to constitute the offense. 174Ark156, 294 SW385.

579–6¼–New. The purpose for which the liquor is manufactured must be unlawful in order that defendant be guilty of the crime. 312Mo 99, 279SW144.

579–6½–New. Mere knowledge that whisky was possessed or manufactured at place where still was found and defendant arrested has been held not violation of law. TexCr 23SW(2d)368.

579–6¼–New. In some jurisdictions person who makes or possesses mash for purpose of making intoxicating liquors is guilty of misdemeanor irrespective of manner of making liquors. 108WVa652, 152SE313.

579–6⅓–New. Under statutes for possessing mash fit for the manufacture of intoxicating liquors, it is not essential to establish defendant's guilt that the mash should contain alcohol. Or 282P 560.

579–7 173Ark989, 294SW33. [a] 149 Miss274, 115S202. [b] **In Arkansas.**–173Ark989, 294SW33.

579–7½–New. Some statutes except a householder making beer and wine in his home for use of himself, family, and guests from prohibition of manufacture. 160La155, 106S728.

579–8½–New. Unlawful possession of intoxicating liquor and manufacture of intoxicating liquor for sale for beverage purposes are separate and distinct offenses, with separate and distinct penal-

ties fixed by act. 68CalA645, 230P193.

580-11 [a] **In Arkansas.**-173Ark989, 294SW33. [b] **Statute prohibiting unlicensed manufacture** of "still" refers to finished product, usable for producing alcoholic spirits. 173Ark989, 294SW33.

580-14 22AlaA307, 115S149; 233 IllA 504; 196 Ind509, 149NE57; 77Mont8, 249P574, 52ALR454; 39 OklACR221; 122 Or113, 256P649; 103TexCr663, 281 SW1061; 107TexCr165, 295SW622; 107 TexCr281, 296SW518. [a] (2) 22AlaA 146, 113S625. (7) Evidence that mash was found in ordinary rain barrel is not evidence of illegal possession of mash tub. 217MoA524, 269SW410. (8) Still must be completed. 22AlaA125, 113 S625. (9) Boiler with pipe attached for coil. 171Ark882, 286SW1013. (10) Possession of tub, without worm, essential to manufacture liquor, is not unlawful. MoA 278SW1089. (11) Word "still" includes receiver into which distilled liquor is discharged. 93CalA796, 269P 969. (12) Possession of boiler, vat, tank, or other vessel of household use, though capable of use in manufacturing liquor, is not "possession of still" unless so used. MoA 296SW440. (13) Possession of complete still is essential to crime of having possession of still for manufacturing liquor denounced by Code (1923) § 4656. 22AlaA577, 117S 911; 23AlaA215, 123S107(1stcase). (14) In prosecution for possession of liquor manufacturing equipment fact that coil was unconnected when officers arrived is immaterial, where cooking had not reached stage when it was needed. Tex Cr 31SW(2d)635. (15) In such prosecution adequacy of equipment held immaterial under circumstances. TexCr 31SW(2d)635. (16) Pipe connection capable of being connected with still held not stilling device. CalA 291P857 (2dcase). (17) Other instances.-198NC 728, 153SE410. [b] (2) Nor is mere visitor guilty in absence of such knowledge. 142Miss100, 107S376. [d] 178Ark1199, 10SW(2d)25; 122 Or113, 256P649. [e] (2) It is offense to possess mash and equipment for manufacturing liquor or to be furnished them for such purpose under Pen. Code (1925) art 666. 101 TexCr626, 276SW695. (3) Statute does not require that equipment found be in and of itself sufficient for purpose. 105TexCr572, 289SW1012. [f] **"Stilling device" defined.-CalA** 291P857(2dcase). [g] **Ownership of mash or equipment** is not necessary to constitute possessor principal. TexCr 31SW(2d)635. [h] **Ownership of still** is not necessary where defendant was present and exercised acts of ownership. AlaA 130S317.

580-15 36GaA283, 136SE832. [a] 103 TexCr364, 280SW804. [b] **Exclusive control of premises** (3) is not essential to conviction. 100CalA279, 279P1046.

580-16 171Ark1187, 286SW1013(1st case); 171Ark882, 286SW1013(2dcase); 117 Or204, 243P77. [c] (2) Where different parts of still are not connected up but are in immediate control of person, he is guilty. 171Ark1083, 287SW387.

580-17 114Nebr831, 211NW171. See also 22AlaA254, 114S425. See also 250 IllA585; 10PaDist&Co 18. [b] **Time when it is intended to manufacture liquor** is immaterial where intention to manufacture exists. 22AlaA353, 115S 698.

580-17½-New. Intention or dominion over the forbidden still. Aiding or abetting of another in such possession, to constitute the offense, must be shown. 21AlaA239, 107S34.

580-18 178Ark1167, 13SW(2d)603; 179 Ark28, 13SW(2d)821; MoA 281SW142; 77Mont8, 249P574, 52ALR454. [a] **Possession itself held unlawful** and not merely when it violates some other statute. 196 Ind433, 148NE403.

580-18½-New. A person may be guilty of possession of a still although he does not own or operate it. 103TexCr364, 280 SW804.

580-18¾-New. Where a person does not possess a still for manufacturing liquor, he is not guilty of possession although the still is on his premises or in his house. 103TexCr364, 280SW804.

580-18¼-New. It is illegal to possess mash with intent at the time to use it in the manufacture of intoxicating liquor. MoA 11SW(2d)1100.

580-19 14F(2d)35.

580-20 [a] **Statute construed** to make possession of mash usable in manufacture of ardent spirits an offense. 147 Va609, 136SE595. [b] **Possession of mash** which may have fermented or is likely to not crane. MoA 2SW(2d) 145; MoA 2SW(2d)146.

580-20½-New. Some statutes prohibiting the possession of mash, wort, or wash are intended to prohibit such possession for the purpose of the manufacture of intoxicating liquor. 116 Or416, 241P390.

580-20¾-New. Unless actually used for manufacture of whisky, a wooden barrel is not a utensil for such manufacture. 312Mo 99, 279SW144.

580-20¼-New. Some statutes prohibiting possession of an unregistered still make no reference to the time the still must be kept to constitute the offense denounced. 122 Or113, 256P649.

580-20½-New. Mere possession of parts of a still not set up or connected for operation does not constitute the offense of setting up a still. 39 OklCr16, 262P 706.

580-20¾-New. Under the Canadian Excise Act, notice of seizure is not a condition precedent to a prosecution for possession of a still without a license. Man [1929] 2DomLR636.

580-22 190NC684, 130SE854.

580-23 23AlaA339, 125S382; Mo 18SW (2d)52 (misdemeanor); 113TexCr58, 18 SW(2d)641. [a] (1) 196 Ind562, 149NE 62; 197 Ind8, 149NE442; 198 Ind45, 152 NE161; 205 Iowa1042, 218NW957; 252 Mass126, 147NE582; 312Mo 140, 279SW 99; 316Mo 596, 292SW32; 220MoA1308, 289SW963; 190NC684, 130SE854; 89 PaSuper60; 41QueKB349, [1926] 4Dom LR1064. (2) May transport from lawful place of manufacture in home to lawful place of storage in home. 142Va620, 128 SE578. (3) Transportation of liquor made on land in one county to home in another county held unlawful. 142Va 620, 128SE578. [b] 39F(2d)52; 39F(2d) 62. [e] (1) 207 Iowa319, 222NW866; 207 Iowa322, 222NW867. (3) Possession of liquor without proper marks or labels is not of itself violation of statute prohibiting transportation of liquors not properly marked or labeled. 205 Iowa 581, 218NW269. [f] **Statute permitting transportation of lawfully made "corn whisky"** held not to apply to transportation of "hootch or moonshine." 312 Mo 140, 279SW99.

581-24 201 Iowa574, 207NW566 (under amendment).

581-26 201 Iowa574, 207NW566 (individuals doing illegal transportation); 123Kan591, 256P957.

581-26½-New. Every form of transporting ardent spirits within the state, not authorized by statute, is illegal. 143Va554, 130SE416.

581-26⅓-New. In New York transportation of intoxicating liquors into hotels or other public places is disorderly conduct. 126Misc574, 214NYS187 (even in absence of state enforcement act).

581-26¼-New. The fact that the amount of liquor transported was less than a gallon in amount does not preclude it from constituting a violation of law. 198 Ind39, 151NE132.

581-26½-New. A statute permitting possession in a private dwelling for family consumption does not permit purchase and transportation for such purpose. 194NC243, 139SE240.

581-26⅙-New. Possession of intoxicants in former Indian territory, and transportation to the place of possession are different offenses. 27F(2d)94.

582-31 [a] **"Transportation"** means physical movement from place to place for unlawful purposes. 73Mont376, 237 P486.

582-31½-New. It is not necessary that transportation shall be completed. 206 Iowa1169, 221NW847.

582-34 73Mont376, 237P486; 116Nebr 219, 216NW556. But see Ont [1926] 3DomLR138. Contra MoA 256SW542. [b] **Handing of liquor to automobile driver** has been held insufficient to constitute transportation. 43F(2d)360(1st case).

582-35 73Mont376, 237P486; 109TexCr 258, 4SW(2d)56. See 148Wash402, 269 P3. See also 252Mass126, 147NE582. [a] **Facts held to make out case** of transportation. 105TexCr29, 285SW312.

582-35½-New. Transportation need not be for hire. 197 Ind8, 149NE442.

582-35⅓-New. Any form of transportation over which accused has charge or control and which he personally accompanies or personally attends is violation of statute. 146Wash101, 261P779.

582-36 155Tenn102, 291SW839.

582-37 155Tenn102, 291SW839. [b] (3) "Place" as used in statute means "region or locality." OklCr 278P398 (2dcase).

582-38 [a] (2) Defendant's carrying of liquor in his possession for short distance, with admitted intent to take it to his home, was sufficient transportation to justify conviction for transporting liquor. 111TexCr650, 13SW(2d)702(1st case). [b] **Conveyance of liquor** for short distance constitutes offense. 73 Mont376, 237P486.

582-39 156Tenn509, 3SW(2d)159. [a] **Transportation need not be completed** by delivery. 104TexCr312, 283SW809.

582-40 112TexCr498, 17SW(2d)821. [a] (2) Transportation for less than forty feet along highway in automobile is sufficient, distance being immaterial. 196 Ind258, 148NE143. (3) Removing bottle from rear to front seat of slowly moving auto on city street and additional movement of car from stepping on gas when arrested by officer, total distance one hundred and fifty feet, is transportation. 51SD209, 213NW21. (4) Carrying beer from one car to another a few feet away held transportation. 52SD104, 216NW863.

582-41 179Ark1094, 20SW(2d)114(2d case); 198 Ind45, 152NE161; 198 Ind 422, 154NE7; 200 Ind551, 165NE316, 65 ALR980; 116Nebr219, 216NW556; 155 Tenn15, 290SW28; TexCr 27SW(2d) 803. But see 35 OklCr261, 250P437. [a] **Carrying of liquor from room to room in dwelling house** held not transportation within statute. 198 Ind422, 154NE7. [b] **Carrying of liquor from house yard into house** held not transportation within statute. 198 Ind422, 154NE7.

582-43 Contra 116Nebr219, 216NW556.

582-45½-New. Carrying of liquor about the person in a suit case is not carrying it "on person" within the meaning of a statute excepting liquor carried "on person" from its prohibition against transportation of liquor. 219MoA587, 282SW149.

582-45⅓-New. Transportation need only be within the state, regardless of origin or destination. 155Tenn102, 291 SW839.

582-45¼-New. Actual presence of defendant on liquor-laden boat is not essential. 16F(2d)682.

582-45⅕-New. To sustain a conviction for transporting liquor found on premises, transportation must have been from off defendant's premises to, or on, the premises by defendant. 198 Ind422, 154 NE7.

582-45⅙-New. Where the removal of intoxicating liquor from one place to another is for an illegal purpose, the space or distance over which it is removed is immaterial. 35 OklCr261, 250 P437.

582-45⅐-New. A guest who unknowingly places liquor in a car is not guilty of transportation. 102TexCr413, 278SW 211.

582-45⅛-New. Transportation of liquor has commenced when the vehicle in which the liquor is placed is started. 103TexCr654, 281SW1052.

582-45⅑-New. What is transportation in a given case depends upon the facts therein. 116Nebr219, 216NW556.

582-45 1/10-New. Some statutes apply only to a case where there is a consignor, a carrier, and a consignee. 205 Iowa 1042, 218NW957.

583-50 23AlaA193, 122S698 [certiorari den 219Ala431, 122S699(1stcase)].

583–52 [a] **Owner held not entitled** to remove to his home liquor stored in warehouse, not in any special room or under owner's exclusive possession and control. 7F(2d)373.

583–54 42F(2d)374; 88PaSuper155.

583–55 100TexCr468, 274SW978 (purpose of sale not necessary). [a] **That transaction may also have amounted** to sale of liquor is immaterial to offense of illegal transportation. 73Mont376, 237P486.

583–60 236Mich549, 211NW349.

583–61 TexCr 27SW(2d)175(2dcase). See also 209Ky191, 272SW378.

583–65 Mo 6SW(2d)838; 110TexCr456, 7SW(2d)530.

583–65½–New. Under some statutes knowledge that the liquors had been illegally sold or procured is an essential element of the offense. 132SC199, 128SE882.

583–65¼–New. In a prosecution for transportation of intoxicating liquors, it is not necessary to show that defendant knew that the liquor contained alcohol in excess of the amount permitted. 88PaSuper155.

583–67 206 Iowa1169, 221NW847; 100 TexCr649, 274SW564; 110TexCr456, 7 SW(2d)530.

583–69 109TexCr258, 4SW(2d)56.

583–70 200 Ind420, 164NE269.

584–75 196 Ind137, 147NE323 (not offense in 1923); 196 Ind229, 147NE778; 196 Ind681, 149NE440; 198 Ind422, 154 NE7; 208 Iowa796, 223NW873; 258 Mass85, 154NE569; 146Miss659, 111S 752; 148Miss593, 114S389. [c] **Pouring liquor in glass for inspection** and then throwing it away did not render defendant guilty on theory that liquor was "otherwise furnished." 196 Ind137, 147 NE323.

584–76 196 Ind357, 149NE58; 196 Ind 529, 149NE51; 196 Ind681, 149NE440; 198 Ind422, 154NE7; 192NC766, 136SE 121.

584–77 35PortoRico 331; 35PortoRico 701. [a] **Possession of whiskey while pouring a drink from friend's flask** has been held too trivial offense to warrant prosecution and punishment. 39F(2d) 664.

584–78 35PortoRico 331. But see 5F (2d)586.

584–79 18F(2d)529.

584–81 26F(2d)717 (it is unlawful for one to have in his possession intoxicating liquor on premises which he himself is using, partly as dwelling and partly as saloon).

584–82½–New. **But acquiring possession after passage of law** is illegal, 6Pa Dist&Co 27.

584–82¼–New. , and purchaser may be convicted of unlawful possession. 6Pa Dist&Co 27.

584–86 190NC684, 130SE854. [a] **Under indictment charging unlawful possession of cider** for beverage purposes containing more than one half of one per cent of alcohol, evidence that cider was possessed for making vinegar held properly excluded. 5F(2d)586.

584–86½–New. Possession of liquor coming from unlawful transportation is illegal. 126Misc762, 214NYS781.

584–86¼–New. Storing liquor in three separate buildings on lot owned by defendant constitutes three separate offenses. 13F(2d)848.

584–86¼–New. Possession means actual possession by person accused. 18F(2d) 509.

584–86½–New. A person has possession within the act where he has intoxicating liquor under his control or dominion. 18F(2d)509.

584–86¼–New. Possessing denatured alcohol without a permit is an offense under the Prohibition Act. 25F(2d)491.

584–86½–New. Private person is not required to label liquor in his possession. 35PortoRico 742.

584–86¼–New. Retention of liquor after termination of permit. 42F(2d)424.

584–87 22AlaA650, 119S595(1stcase); 220Ala268, 125S606; 178Ark659, 12 SW(2d)407; 40GaA622, 150SE923. [a] 22AlaA582, 118S241 [certiorari den 218 Ala168, 118S242]. See also 21AlaA40, 104S886. [e] 119Kan757, 241P119. [f] 212Ky161, 278SW577. [g] 239Mich 105, 214NW130. [h] 133SC238, 130SE 641; 144SC5, 142SE62. [j] 155Tenn624, 299SW796. [o] 203 Iowa86, 210NW571; 205 Iowa587, 218NW266. (2) 205 Iowa 581, 218NW269. [p] Wyoming.–35Wyo 41, 246P241. [q] North Carolina.–190NC 684, 130SE854; 193NC848, 137SE869. [r] Montana.–77Mont8, 249P574, 52ALR 454. [s] Illinois.–318 Ill 307, 149NE262. [t] Indiana.–196 Ind608, 149NE166; 198 Ind284, 152NE166; 198 Ind693, 154NE 671. [u] Louisiana.–165La650, 115S812. [v] Wisconsin.–194Wis229, 215NW896; 232NW539. [w] North Dakota.–58ND 792, 228NW199.

584–88 CalA 288P45; 80Colo 417, 252P 350; 243 IllA457. [a] In Mississippi.–140Miss179, 105S457.

584–89 [c] 52SD121, 216NW870; 54SD 536, 223NW733. [e] 195Wis532, 218NW 720. [h] **Statute construed** not to create offense but merely statement of rule of evidence as to prima facie proof. 188 Wis259, 205NW822; 194Wis229, 215 NW896.

585–90 35 OhA37, 171NE615. See also 148Miss593, 114S389.

585–92 136Wash453, 240P562. [a] In Georgia.–35GaA392, 133SE285.

585–93 23AlaA398, 126S182; 41GaA349, 152SE922; 312Mo 212, 278SW1030; 144 SC81, 142SE61.

585–94 208 Iowa816, 225NW854; Mo 273SW1039.

585–95 103TexCr123, 280SW592. [a] **Offense of permitting another** to possess intoxicating liquor on defendant's premises is separate offense from that of possessing liquor. 122Kan517, 253 P554.

585–97 15F(2d)929; 37F(2d)248; 92 Fla1038, 111S285; 200 Ind575, 165NE 314; 122Kan517, 253P554; 212Ky161, 278SW577; 218Ky737, 292SW315; Mich 208NW705; 239Mich334, 214NW 128; 321Mo 1237, 14SW(2d)624; Mo 24 SW(2d)1005; 117 Or238, 243P563, 564 [quotCJ]; 119 Or583, 250P738; 120 Or 372, 251P305; 120 Or546, 252P967, 968 [quotCJ]; 121 Or202, 253P1042; 106 TexCr564, 293SW1101; 105WVa495, 144SE295; 192Wis414, 212NW664. [a] (7) Mere knowledge that owner of automobile has liquor in car does not constitute illegal possession by invited guest riding in car. 234Mich623, 208 NW705. (8) Mere taking of drink of intoxicating liquor at invitation of friend does not constitute unlawful possession. 15F(2d)929; 117 Or238, 243P 563. [b] (2) Possession may be joint. 119 Or583, 250P738; 120 Or546, 252P 967. [c] **"Possession" defined** as "having, holding or detention of property in one's power or command; ownership, whether rightful or wrongful; actual seizing or occupancy." 212Ky161, 278 SW577, 578. [d] **Exclusive possession** need not be proved, but merely possession with right of control at the time. 144Miss726, 111S139. [e] **Possession need not be exclusive.**–152Miss216, 119 S174.

585–97½–New. and the plenary power of disposal, 15F(2d)929.

585–98 234Mich623, 208NW705; 146 Miss659, 111S752; 317Mo 299, 296SW 121, 122 [quotCJ]; MoA 297SW413, 414 [quotCJ]; 221MoA148, 297SW708; MoA 21SW(2d)190; 117 Or238, 243P 563, 564 [quotCJ]; 120 Or546, 252P 967, 968 [quotCJ]; 129 Or115, 276P 683(1stcase).

585–98½–New. Possession must be conscious. 121 Or561, 254P1010.

585–98⅓–New. Possession for purpose of taking a drink, which purpose is consummated, constitutes possession under some statutes. 193NC848, 137SE 869.

585–99 213Ala332, 104S834; 40GaA622, 150SE923; 214Ky232, 282SW1065; 234 Mich623, 208NW705; 148Miss240, 114 S345; MoA 27SW(2d)730; 120 Or546, 252P967, 968 [quotCJ]; 111TexCr17, 10SW(2d)1008.

585–1 21AlaA498, 109S557; 92Fla1038, 111S285; 331 Ill 636, 163NE352; MoA 279SW733, 735 [quotCJ]; 154Miss457, 122S534; 190NC684, 130SE854 (possession may be actual or constructive); 119 Or583, 250P738; 120 Or372, 251P305; 120 Or546, 252P967, 968 [quotCJ]. [a] 205 Iowa849, 216NW710.

585–1½–New. One may have constructive possession if he is the owner or has control and power to dispose of the liquor. 120 Or372, 251P305.

585–1¼–New. as would also one who has or claims to have such power and has knowledge of place of concealment of liquor. 120 Or372, 251P305.

585–1¾–New. Where liquor is concealed on land not actually in the possession of anyone, the person who had knowledge of the place in which the liquor was hid may be said to have symbolic possession of it. 120 Or372, 251P305.

585–2 120 Or546, 252P967, 968 [quot CJ].

585–2½–New. Possession need not be exclusive but may be jointly with another. 74CalA464, 241P275.

585–3 133SC238, 130SE641.

585–4½–New. The act of storing is a separate and distinct offense from the act of keeping in possession. 133 SC238, 130SE641.

585–5 23AlaA385, 125S795(1stcase); Ind 169NE531; 234Mich600, 208NW 687; MoA 286SW744; 20 OhA112, 153 NE157; 119 Or583, 250P738; 121 Or 561, 254P1010; 192Wis414, 212NW664. See also 23AlaA135, 122S186; 39GaA 125, 146SE337; Va 154SE598. But see 236Mich549, 211NW349. Contra 113 TexCr343, 21SW(2d)529. [b] **If one knows of liquor placed in his car by another,** he may by his subsequent conduct in regard to it become chargeable with possession thereof. 101TexCr577, 276SW697.

585–8 119Kan757, 241P119; 58ND792, 228NW199; 136Wash453, 240P562 (in prosecution for offense aggravated by prior convictions). But see 54SD611, 224NW228; Man [1929] 4DomLR896.

585–9 See also 160La121, 106S716.

585–9½–New. Under a statute adopting the penal provisions of the Volstead Act, the possession of intoxicating liquor except as authorized by the federal statute is one of the acts denounced by the state statute as a criminal offense. 70CalA483, 233P805.

585–9¼–New. Possession of grape juice which has been permitted to ferment and become intoxicating constitutes violation of a statute prohibiting possession of intoxicating liquors although the change in character of the product was due to the processes of nature. 19 OhA 173.

585–9¾–New. Where a person, after having been arrested on a military reservation on suspicion of having committed a felony, is compelled by federal officers to drive his automobile into a county and intoxicating liquor is there found in the automobile, he is not guilty of the offense of possessing intoxicating liquors in such county. 135Wash500, 228P19.

585–9½–New. Associates for disposition of liquor may each be guilty of possession. 123Kan591, 256P957.

585–9¼–New. One charged with possessing may show such possession to have been lawful. 203 Iowa86, 210NW 571.

585–9½–New. Proprietor of tailor shop who knowingly permits moonshine whisky to remain therein and takes active part in dispensing portion of it is in possession of liquor within statute. 77Mont 307, 250P603.

585–9¼–New. A person who deposits liquor in a place of concealment has legal possession of it. 119 Or583, 250P 738.

585–9½–New. The words "other intoxicating" in a statute prohibiting possession of "spirituous, vinous, malt, fermented or other intoxicating liquors of any kind," do not qualify the words "spirituous, vinous, malt, fermented . . . liquors." 152Miss372, 118S715.

585–9¼₁₀–New. Possession of one keg or one hundred kegs having the odor of whisky about them is not violation of the law. 23AlaA135, 122S186.

585–9¼₁₁–New. Where original possession was unlawful, an intention to use the liquor for a nonbeverage purpose is no defense. 89PaSuper308.

585–10 75Mont78, 242P343 (possession

justified only by showing permit or physician's prescription). [a] (1) 160 **La**121, 106**S**716; 104**TexCr**1, 282**SW** 218. (3) Possession only while taking drink of liquor belonging to another does not constitute illegal possession. 234**Mich**623, 208**NW**705. [b] (2) In Nova Scotia. **NS** [1930] 2**DomLR**343. [e] **Possession need not be under advice of physician or anyone else.**–104**TexCr**1, 282**SW**218. [f] **Liquor obtained under prescription.**–**MoA** 14**SW(2d)**515; 87**Pa Super**594.

586–11 78**CalA**554, 248**P**964. [a] 3**Del** 255, 138**A**401; 192**NC**766, 136**SE**121; 193**NC**668, 137**SE**866; 194**NC**243, 139 **SE**240; 290**Pa**121, 138**A**90; 36**Man**11, [1926] 4**DomLR**863, [1926] 2**WestWkly** 768. See also 156**Tenn**331, 18**SW(2d)**784. [b] (1) 290**Pa**121, 138**A**90; 21**SaskL**115, [1926] 4**DomLR**715, [1926] 2**WestWkly** 759; **Man** [1928] 4**DomLR**717; **Sask** [1928] 1**DomLR**288. (9) Place in which intoxicating liquors are possessed which were illegally manufactured are obtained cannot be regarded as private dwelling under some statutes. 19 **OhA** 82. (10) Place in which intoxicating liquors are possessed which were illegally manufactured or obtained cannot be regarded as private dwelling under some statutes. 19 **OhA**173. (11) Apartment, hotel, boarding house, or house used partly for business may be dwelling. 290**Pa**121, 138**A**90. [e] **Liquor illegally acquired** is not within protection of provision of Volstead Act permitting possession of liquor in private dwelling. 13**F(2d)**529.

586–11½–New. Possession in store. State of Arkansas prohibits possession of liquor in a store. 170**Ark**936, 282 **SW**4.

586–12 **Conn** 151**A**526. [a] 91**Fla**893, 109**S**630; 196 **Ind**608, 149**NE**166; 196 **Ind**681, 149**NE**400; 198 **Ind**422, 154**NE** 7; 164**Minn**287, 204**NW**942 (distinguishing offense of maintaining nuisance); 20 **OhA**112, 153**NE**157; 105**TexCr**409, 288**SW**1089; 108**TexCr**92, 299**SW**249; **Vt** 147**A**273 (liberal construction).

586–13 101**TexCr**336, 275**SW**829.

586–14½–New. That ownership of premises is in another than accused will not necessarily prevent his conviction of possession of intoxicating liquor found on such premises. 110**TexCr**101, 7**SW (2d)**955.

586–15 105**TexCr**107, 286**SW**1100. See also 16**F(2d)**434.

587–18 [a] (1) 101**TexCr**267, 275**SW** 837. (3) Possession implies detention, may be in one person for another, or for themselves and others not actually present. 190**NC**239, 129**SE**600. [c] **Keeping by employee.**–Conviction for unlawfully possessing liquor cannot be predicated on evidence showing that employee possessed liquor without defendant's knowledge or consent. 225**Ky** 163, 7**SW(2d)**1066.

587–19 190**NC**239, 129**SE**600.

587–20 22**AlaA**264, 114**S**674; 248 **IllA** 462; 164**La**543, 114**S**151. [b] **Keeping medicinal preparations for sale** does not constitute offense under some statutes unless proposed sale is for use as beverage. 210**Ky**404, 276**SW**111 (jamaica ginger).

587–24 See also 105**TexCr**409, 288**SW** 1089.

587–25 101**TexCr**606, 276**SW**713 (statute making possession of any amount crime is not repealed by amendment making possession of more than one quart prima facie evidence of guilt).

588–40 130**Misc**660, 224**NYS**535. See also 250**NY**83, 164**NE**864.

588–41 127**Misc**244, 216**NYS**442.

588–41½–New. Proof that defendant has on a certain day committed an offense under the National Prohibition Act does not of itself permit conviction under the state law for maintaining a public nuisance or disorderly house. 250 **NY**83, 164**NE**864.

588–42 16**F(2d)**434; 16**F(2d)**712; 6**Pa Dist&Co** 93; 41**F(2d)**144. [a] **Maintenance of premises for sale of liquor in violation of Volstead Act** is held not crime against state of New York. 127 **Misc**244, 216**NYS**442. [b] **Mere possession of liquor by defendants in automobile and use of automobile for transportation thereof** has been held not to render defendants guilty of maintaining common nuisance in vehicle. 31**F(2d)** 439. [c] **Conduct of business though only small part of liquor sold** is kept on premises is maintenance of nuisance. 40**F(2d)**593.

588–43 16**F(2d)**712; 18**F(2d)**509; 73 **CalA**162, 238**P**802; 73**CalA**214, 238**P**814 (2dcase); 73**CalA**213, 238**P**814(1stcase); 73**CalA**216, 238**P**815. [a] (1) 16**F(2d)** 712; 73**CalA**183, 238**P**809; 73**CalA**208, 238**P**812.

588–45 But see 16**F(2d)**712.

588–47½–New. It is not necessary to prove ownership in defendant. 8**F(2d)** 711.

588–47½–New. Automobile used in mere transportation of intoxicating liquor is not a common nuisance within National Prohibition Act. 8**F(2d)**738.

588–47¼–New. Mere transportation does not constitute a nuisance under National Prohibition Act. 8**F(2d)**140.

588–47½–New. A single sale or instance of possession may, with other facts, amount to a nuisance. 26**F(2d)**315.

588–47¼–New. Defendant, arrested while alone in a room tending a still in which alcohol was being made, cannot be convicted of maintaining a nuisance. 28**F(2d)**805 [certiorari den 278**US**658, 49 **SCt**187(1stcase), 73**L ed**566].

588–47½–New. A state statute providing for notice to one maintaining a public nuisance is inapplicable to a common nuisance under the Volstead Act. 91 **CalA**150, 266**P**860.

588–47½–New. Period of time during which liquor is kept is immaterial. 39 **F(2d)**1.

588–48 [a] 16**F(2d)**59; 196 **Ind**529, 149 **NE**51; 198 **Ind**23, 152**NE**171; 204 **Iowa** 410, 214**NW**612; 134**Misc**550, 236**NYS** 126. [b] **Common nuisance is** (1) place where intoxicating liquor is kept for sale, barter, or delivery in violation of laws of state. 196 **Ind**137, 147**NE**323. [c] **To sustain conviction of maintaining common nuisance, in violation of statute,** it is not necessary to prove that defendant sold, bartered, or gave away liquor, but manufacture of it is sufficient. **Ind** 165**NE**560.

588–49 73**CalA**162, 238**P**802; **CalA** 288 **P**28 (allowing guests to consume liquor brought by them); 126**Me**153, 136**A**908. [a] (1) 198 **Iowa**71, 199**NW**270; 204 **Iowa**410, 214**NW**612; 208 **Iowa**816, 225**NW**854; 221**MoA**893, 288**SW**77. [b] **In Ohio.**–24 **OhNPNS**540.

589–52 35**Wyo** 41, 246**P**241. [a] (1) 199 **Ind**38, 154**NE**872.

589–55 **Iowa** 232**NW**684. [a] **Sale of intoxicating liquor is not essential element of offense.**–206 **Iowa**615, 220**NW** 59.

589–60 19**F(2d)**139; 89 **IndA**454, 166 **NE**675.

589–60½–New. In New York person maintaining such place is guilty of misdemeanor. 125**Misc**658, 211**NYS**705.

589–60½–New. A person may be guilty of maintaining a liquor nuisance by maintaining a place where liquors are kept although there is no building there. 207 **Iowa**1033, 222**NW**423.

589–62 19**F(2d)**139; 35**F(2d)**905 (sale and not storage is nuisance); 89 **IndA** 500, 167**NE**147; 149**Wash**520, 271**P**333; 154**Wash**336, 282**P**220 (not necessary to keep supply there).

589–70 149**Wash**40, 270**P**96; 151**Wash** 557, 276**P**857.

590–74 128**Wash**166, 222**P**218.

590–77 239**Mich**84, 214**NW**129.

590–82½–New. In New York a place where intoxicating liquor is dealt with in an unlawful way is a public nuisance. 126**Misc**574, 214**NYS**187 (Pen. L. § 1530).

590–82½–New. Persons conducting 126**Misc**574, 214**NYS**187.

590–82¼–New. or permitting such use are guilty of maintaining a nuisance. 126**Misc**574, 214**NYS**187 (Pen. L. § 1532).

590–82½–New. One in charge of a "speak easy" where intoxicating liquor is openly sold and consumed by customers is guilty of disorderly conduct. 126 **Misc**574, 214**NYS**187 (Pen. L. § 722).

590–82¼–New. Sale of denatured alcohol according to government formula is held not offense under Liquor Act. 143**Wash**333, 255**P**116.

590–82½–New. Sale of intoxicating liquor in home to friends and acquaintances without annoying public is held not public nuisance within statute. 220 **AppDiv**110, 221**NYS**96.

590–82½–New. In prosecution against several defendants charged as jointists in conducting place for unlawful sale of intoxicating liquors, it is not necessary to prove continuity of ownership for alleged period, 142**Wash**612, 254**P**234.

590–82½–New. showing of continuity in conducting being sufficient, regardless of whether defendants conducted as owners or agents thereof. 142**Wash**612, 254**P**234.

590–90 250**NY**83, 164**NE**864.

591–99 321**Mo** 1063, 13**SW(2d)**1067.

591–1 319**Mo** 24, 3**SW(2d)**229.

591–2 175**Ark**1169, 299**SW**40. See also 102**TexCr**456, 278**SW**203.

591–10 30**F(2d)**640. [b] 36**GaA**190, 136**SE**107.

591–10½–New. **In New York** public sale of intoxicating liquors anywhere within the state is disorderly conduct. 126**Misc** 574, 214**NYS**187 (within Pen. L. § 722, even in absence of state enforcement act).

591–10½–New. Selling intoxicating liquor is not, under federal law, a crime involving moral turpitude. 220**AppDiv** 110, 221**NYS**96.

591–11 See also **OklCr** 291**P**159. [b] **In prosecution for selling liquor,** evidence showing that defendant contracted sale of liquor and received agreed price but sheriff intercepted delivery supported conviction for attempting to sell liquor. 39**GaA**680, 148**SE**283(1stcase).

591–12 14**F(2d)**659; 319**Mo** 24, 3**SW (2d)**229.

591–14 34**F(2d)**99 (delivery of water instead of liquor is not sale).

591–15 36**GaA**190, 136**SE**107; 241**Mich** 182, 216**NW**408; 54**SD**245, 222**NW**681. [a] **Individual right of purchaser** does not enter into essence of offense. **Me** 149**A**389.

592–17 319**Mo** 24, 3**SW(2d)**229.

592–19 **TexCivA** 278**SW**272; 106**Tex Cr**235, 291**SW**564.

592–20 180**Ark**970, 23**SW(2d)**615.

592–21½–New. or where seller delivers liquor to purchasee who after tasting it hands it back to seller and refuses to pay agreed price for it. 36**GaA**190, 136 **SE**107.

593–46 126**Misc**762, 214**NYS**781; 214 **NYS**778 (by one in legal possession of liquor); 49**SD**56, 206**NW**468 (liquor lawfully possessed). But see **Mo** 24**SW (2d)**1032.

593–46½–New. Nor is consumption of such liquors by guests violation of the act. 126**Misc**762, 214**NYS**781; 214**NYS** 778.

594–50 **Mo** 280**SW**48. [a] (2) **Mo** 14 **SW(2d)**441.

595–52 37**GaA**804, 142**SE**212; 154 **Wash**336, 282**P**220 (maintaining place for unlawful sale of liquor). See also 31**F(2d)**544.

596–57 6**F(2d)**199.

596–62 See also 111**TexCr**400, 13**SW (2d)**109.

596–64 **Ont** [1925] 3**DomLR**625.

596–65 **Ont** [1925] 3**DomLR**625. [a] **Beer containing more than half of one percent alcohol.**–95**PaSuper**493.

597–72 48 **Ida**112, 279**P**616; 142**Miss** 104, 107**S**381; 149**Miss**684, 115**S**705; 316**Mo** 144, 290**SW**142; 33**Wyo** 360, 239 **P**952.

597–74 113**TexCr**120, 18**SW(2d)**623.

597–76 See also 215**Ala**528, 112**S**102.

598–77 [a] **Under statute,** unlicensed drug store clerk had no right to sell intoxicating liquor for medicine or medical purposes. 89 **IndA**136, 165**NE**918.

598–78 See also 210**Ky**404, 276**SW**111.

598–80 52**ND**946, 204**NW**867 (sale on public street in front of accused's premises constitutes bootlegging). [b] **Sale in city street** is held sale on premises not owned, kept, maintained, or controlled by defendant within Bootlegging Act. 53**ND**429, 206**NW**786.

599–84 [a] 187**Wis**115, 203**NW**760

(nonintoxicating liquor).
599-85 284Pa361, 131A286.
599-93 See also 158La294, 105S50.
599-93½-New. Permits under National Prohibition Act. Permit to manufacturer based on unlawful regulation, making sale of extracts and fruit juices unlawful, and not authorizing manufacture for sale nor selling of such preparations, does not make sale thereof violation of permit. 8F(2d)773.
599-93½-New. Possession of federal permit does permit sale in violation of state laws. 284Pa361, 131A286.
601-3 169Minn364, 211NW319. [a] 107TexCr110, 295SW925; Man [1930] 1DomLR730. [g] **Gift in spirit of hospitality or good fellowship** is within prohibition of some statutes. 169Minn 364, 211NW319. [h] **Person purchasing or procuring** liquor for minor cannot defend on ground that he was minor's agent. 170Minn81, 211NW956. [i] **Mistake of fact as** to minority is available as defense in prosecution for sale to minor. 107TexCr110, 295SW 925. [j] **Failure of minor to drink.**-46 Ida765, 271P322.
603-6 205 Iowa604, 218NW145.
605-29 7F(2d)458.
605-36 196 Ind137, 147NE323; 316 Mo 240, 289SW568. [d] **In New York.**-126Misc574, 214NYS187 (within Pen. L. § 722, even in absence of state enforcement act).
605-37 [h] **One taking an order** for sale of beverage containing no trace of alcohol when delivered is not engaged in liquor traffic. 53ND429, 206NW78.
606-41 208 Iowa802, 226NW57 (actual sale held immaterial). [a] (1) 200 Iowa 1239, 206NW247; Iowa 228NW307. [c] (1) 141Wash355, 251P273; 142 Wash539, 253P811.
606-42 [a] (1) 136Wash232, 239P553. (3) 136Wash232, 239P553.
606-53½-New. Consumption of intoxicating liquors in any public place is disorderly conduct within Pen. L. § 722. 126Misc574, 214NYS187 (even in absence of state enforcement act in New York).
606-53½-New. Under statute prohibiting transporting or selling a still or brewing apparatus, conviction may be had for simply transporting one's own still. 235Mich206, 209NW87.
606-53¼-New. Statute prohibiting transportation of a still is violated although transportation has not been completed. 235Mich206, 209NW87.
606-53½-New. Offense of having possession of intoxicating liquor is included within offense of being a persistent violator of Prohibition Law. 69Utah 444, 256P109.
606-54 220Ala260, 125S384 (merely riding in car, knowing of presence of liquor, is no felony); 40GaA622, 150SE 923; 142Miss100, 107S376 (mere visitor in home, knowing nothing of still therein, may not be convicted of possession thereof). [c] 103Conn138, 130A96 (dictum relative to accessories under statute).
607-55 44F(2d)51; 103Conn138, 130A 96; 219Ky323, 292SW779; 162La719, 111S72; 109TexCr331, 4SW(2d)553. [a] **One who directs illegal transportation and disposition** of intoxicating liquor is not excluded as accessory on principle exclusio unius est exclusio alterius, by statutory provision that one accompanying vehicle engaged in illegal transportation "may" be punished as accessory. 103Conn138, 130A96. [b] **Merely being present** may not be offense. 23AlaA573, 129S311(2dcase).
607-56½-New. One who permits the use of his house with knowledge that it will be used as a place for illegal manufacture, sale, possession, or bartering of intoxicating liquor is equally guilty. 125Misc658, 211NYS705 (by statute).
607-56½-New. That accused was a special officer with a warrant for arrest of one charged with felony is no defense to prosecution for felony in violation of Prohibition Law while armed. 143Va 554, 130SE416.
607-56¼-New. In Texas by statute one who is in possession of liquor for sale for himself or another is a principal offender. 104TexCr42, 282SW585.
607-56⅓-New. A person in charge of a whole house is responsible for liquor found there. MoA 281SW107.
607-56⅙-New. Mere presence in automobile transporting intoxicating liquor is not criminal offense where automobile is not owned, possessed or controlled by him. Va 152SE362.
607-56½-New. Hotel proprietors, knowing guest kept whisky with intent to sell, would be guilty of possessing liquor with intent to sell. Wash 287P 667.
607-58 15F(2d)494; 44F(2d)51. See also 125Misc658, 211NYS705.
607-60½-New. Knowledge of landlord that rented premises are being used for unlawful manufacture of liquor, and acquiescence therein, makes him aider and abettor and liable as principal. 15 F(2d)179.
607-66 TexCr 24SW(2d)830 (possession).
607-69 IndA 167NE548; Ont [1930] 3 DomLR151 (holding husband liable as principal although absent at time of sale).
607-70 331 Ill 636, 163NE352.
608-71 248Mich225, 226NW834.
608-72 18F(2d)685.
608-75 311Mo 664, 279SW395 (joint possession need not be proved); 144SC 121, 142SE236.
608-76½-New. In some jurisdictions where intoxicating liquors are kept in house occupied by husband and his family, he is guilty of aiding and abetting in the commission of a misdemeanor if he knowingly allows such liquors to remain there, 34GaA155, 128SE686.
608-76½-New. irrespective of who owned them or who put them there. 34 GaA155, 128SE686.
608-76¼-New. This is true although the husband may have previously deeded the premises to his wife for a consideration of "natural love and affection." 34GaA155, 128SE686.
608-76½-New. A wife is liable as principal for her presence at sales by her husband when she gave warnings to customers. 83Colo 162, 262P1009.
608-86 But see NB [1928] 4DomLR 292.
608-94½-New. The president of a brewing company cannot be convicted of manufacture and possession unless he had knowledge of the offense charged. 8PaDist&Co 608.
609-99 [e] (2) In Iowa.-206 Iowa314, 217NW545.
609-4 [k] **What law governs.**-20F(2d) 1000.
611-12½-New. A statutory provision that a possessor of lawfully obtained intoxicating liquor may keep it in his private residence does not prohibit a physician from keeping in his office liquor for use in the legitimate practice of his profession. 217MoA538, 269SW627.
611-12⅓-New. A statute permitting a physician in good faith to possess and dispense intoxicating liquor in the legitimate course of practice of his profession has been held not to have been repealed by later prohibition acts. 217 MoA538, 269SW627.
611-13 [b] **Registered pharmacist** may legally have government alcohol in his possession and use it in his business as pharmacist. 206 Iowa314, 217NW545.
613-31 31F(2d)423. [a] **Mere employees** of manufacturer are not guilty of possession or control of property designed for unlawful manufacture. 7 F(2d)804.
613-32 215Ala616, 110S798; 23AlaA 412, 126S188; 199 Ind484, 158NE241; Kan 292P793; 145Va818, 133SE683; 146Wash101, 261P779.
613-34 192Wis414, 212NW664; 194 Wis67, 214NW359.
614-36 89 IndA454, 166NE675.
614-45½-New. The owner of intoxicating liquor who rides in an automobile in which it is being transported with his knowledge and consent is guilty of transportation although the automobile is driven by another. 159Tenn263, 17 SW(2d)899.
615-47 Man [1930] 2DomLR227 (corporations held liable for acts of servants without knowledge of executive officers).
615-48 100Tex521, 271SW900; 109 TexCr392, 5SW(2d)145; TexCr 27SW (2d)217(2dcase); 135Wash309, 237P 726.
616-49 21AlaA459, 109S368; 109TexCr 513, 5SW(2d)771; 195Wis532, 218NW 720; 40Wyo 162, 275P122, 64ALR420. [b] **One charged with unlawful possession** cannot be acquitted because his possession was agent for another. 5F (2d)901. [c] **That defendant was employee of owner of searched premises** and lodged there would not place him in possession or control of any liquor found outside of his room. MoA 285SW 1039.
616-50 [a] **In prosecution under jointist statute,** instruction that clerk or agent, left in charge of place where liquors were illegally sold, was keeper, has been held not erroneous. 150Wash 671, 274P711.
616-53½-New. Where employees of road house endeavor to prevent consumption on premises, they are innocent of offense. 16F(2d)434.
616-53⅓-New. Possession of a building and its liquor contents does not lodge in a mere employee engaged in work on the premises. MoA 297SW 712.
616-59 39F(2d)414; 41F(2d)682; 23 AlaA598, 129S491; 21AlaA489, 109S521; 22AlaA299, 115S72; 170Ark786, 281SW 11; 170Ark974, 281SW903; 40GaA662, 150SE919; 40GaA622, 150SE923; 200 Ind149, 162NE51; 128Kan291, 276P799 (1stcase); 208Ky655, 271SW701; 214 Ky578, 283SW1034; 154Miss457, 122S 534; 120 Or546, 252P967; 100TexCr11, 271SW380; 104TexCr312, 283SW809; 109TexCr513, 5SW(2d)771; 141Wash 302, 251P586; 40Wyo 162, 275P122, 64 ALR420. See also 142Wash340, 253P 126. But see 160La925, 107S698. [a] (2) That one aided or assisted another in making whisky or possessing still for accommodation does not render him guiltless. 109TexCr513, 5SW(2d)771. [e] **Under statute denouncing personal transportation,** defendant cannot be guilty of aiding and abetting crime. 156Tenn337, 1SW(2d)782. [f] **As affected by ownership of property involved.**-That intoxicating liquor made, or still possessed, belonged exclusively to another does not affect question of defendant's guilt as principal. 109TexCr 513, 5SW(2d)771.
617-60 22F(2d)672; 23AlaA339, 125S 382; 172Ark1177, 288SW707; 212Ky 245, 278SW620; 143Miss210, 108S497 (furnishing still used in unlawful manufacture); 315Mo 1320, 289SW935; 108 TexCr182, 299SW411.
617-61 Ind 166NE661; 142Wash340, 253P126.
617-62 40GaA496, 150SE464; 212Ky 245, 278SW620.
617-63½-New. But mere knowledge alone of fact of manufacture of intoxicating liquor is not sufficient to sustain conviction of one as a participant therein. 145Miss237, 110S513.
617-63⅓-New. All concerned in plot to set up barrels of mash on another's premises are principals. Iowa 232NW 636.
617-64 281US624, 50SCt425, 74Led 1078, 68ALR892; 29F(2d)744(2dcase); 38F(2d)515 (purchaser not ipso facto guilty as aider and abettor of seller); 40F(2d)307; 22AlaA369, 115S769; 22 AlaA562, 118S238 [certiorari den 218 Ala168, 118S239]; 23AlaA100, 123S86 (1stcase); 175Ark1169, 299SW8; 119 Kan674, 240P407; 221MoA893, 288SW 77, 79 [citCJ]; 99TexCr642, 271 SW380; 113TexCr244, 20SW(2d)198. But see 11PaDist&Co 445. [a] **Where defendant merely bought whisky to accommodate witness,** defendant would not be guilty of selling intoxicating liquors. 179Ark647, 17SW(2d)307. [b] **Purchase of liquor by general public is not a crime** under the National Prohibition Act. 38F(2d)515.
617-67 21AlaA503, 109S558; 21AlaA 648, 111S320; 237 IllA178; 152Miss622, 120S574; 111TexCr163, 12SW(2d)225 (1st case).
617-68 237 IllA178; 113TexCr460, 21 SW(2d)1066(2dcase).

617-70 30Ariz113, 244P1020; 24 OhA 85, 155NE811; 134SC140, 132SE45. See also CalA 288P50. But see 16F(2d)682; Wis 229NW633. [a] **Conviction for possessing and transporting** same quantity of liquor may be sustained on both counts. 158La511, 104S308.

617-71 7Alaska446; 89 IndA555, 167 NE345 (2dcase). [a] 18F(2d)477; 38 Wyo 340, 266P1056.

617-71½-New. Possession and sale of intoxicating liquors constitute distinct offenses. 18F(2d)955.

617-71½-New. The possession of a still may be a separate offense from its operation, particularly where defendant has it some time before it is set up and put to work. 99CalA682, 279P211.

617-71¼-New. Offense of unlawfully possessing liquor is distinct from that of unlawful sale. 23AlaA504, 127S911.

617-72½-New. Proof of one sale is sufficient to warrant conviction of crime of engaging in liquor traffic which is not a continuing offense. 53ND669, 207NW 991.

617-72½-New. Possessing and selling constitute distinct offenses punishable as such. 18F(2d)507.

617-75 78CalA554, 248P964.

617-76½-New. , and similarly, where the premises are the same and the time is the same, possession of all whisky on the premises of which the owner has guilty knowledge, and of which he has control, is one possession and may not be split up into numerous prosecutions. 22AlaA536, 117S607.

618-86 21AlaA173, 106S205; 207 Iowa 1201, 224NW510. See also 8F(2d)251.

618-87½-New. That defendant sold liquor which he possesses for sale does not render him less guilty of possession for purpose of sale. 101TexCr336, 275 SW829.

618-87½-New. Possession of a still for the purpose of manufacturing whisky and operation of the still in such manufacture are two separate offenses. 106 TexCr111, 290SW536.

618-87¼-New. Where defendant is convicted of manufacturing intoxicating liquor, he cannot either in the same or a subsequent trial also be convicted of, and punished for possession of identical liquor so manufactured. 37Wyo 155, 259P810.

618-87½-New. Possession of parcels of liquor in different places does not make possession of one a distinct offense from possession of the other. 205 Iowa849, 216NW710.

618-87½-New. Some statutes forbidding manufacture, sale, possession, or giving away of intoxicating liquor and providing for only one punishment create only one offense. MoA 279SW 199.

618-87½-New. The offenses of manufacturing moonshine whisky and of using a still and other equipment in process of manufacturing intoxicating liquor for sale and transportation for sale are distinct offenses. Mo 1SW(2d)830.

618-87½-New. The receiving and concealment of smuggled liquor and the transporting of it are separate offenses. 34F(2d)279.

618-88 170Ark974, 281SW903; 69CalA 94, 230P1001; 87CalA36, 261P1048; 203 Iowa86, 210NW571; 169Minn364, 211NW319; Mo 273SW1039; 116Nebr 219, 216NW556; 116Nebr313, 217NW 89; 116Nebr635, 218NW432.

618-89 169Minn364, 211NW319. [b] **Manufacture of whisky.**–Mo 289SW938.

618-90 [a] **Extent of authority of prohibition agents.**–Va 155SE689.

636-92 103NJL323, 136A741.

637-94 [a] **Liberal construction.**–103 NJL323, 136A741.

643-81½-New. Defendants, sued for the sale of denatured alcohol with knowledge that it was to be drunk, cannot deny that the liquid was fit for beverage purposes. 33 OhA292, 169NE 317.

644-1 [c] **In New Jersey.**–103NJL323, 136A741.

646-35 315Mo 535, 286SW53.

646-44 33 OhA292, 169NE317.

648-67 [b] (12) As to liability of codefendant who assisted in procuring liquor which caused intoxication, under National Prohibition Act. 315Mo 535, 286SW53. [e] 33 OhA292, 169NE317.

649-81 But see 315Mo 535, 286SW53.

649-83½-New. Joinder. In action for death from intoxication cause of action for benefit of estate under the statute may be joined with one for benefit of distributees. 103NJL323, 136A741.

650-94 [a] (1) 315Mo 535, 286SW53. (9) That liquor sold was "pear extract" is held admissible as to fitness for beverage. 162La531, 110S744.

651-99 [a] (1) 102NJL241, 132A202.

653-31 103NJL323, 136A741.

654-36 315Mo 535, 286SW53.

654-50 [b] **Instructions held proper.**–103NJL323, 136A741.

657-1 102NJL241, 132A202. [c] (1) 315Mo 535, 286SW53.

657-5½-New. Codefendant's willful, deliberate, and systematic violations of the Prohibition Law may be considered on question of punitive damages. 315 Mo 535, 286SW53.

658-22 102NJL241, 132A202. [b] (2) $25,000. 315Mo 535, 286SW53 (not excessive where healthy man of thirty incapacitated from performing manual labor and rendered semi-invalid for life). [c] **Damages held not excessive.**–$12,000. 102NJL241, 132A202 (for supplying liquor causing death of thirty-two-year-old man earning thirty dollars a week).

658-23 31F(2d)217 [aff 31F(2d)220(1st case)]; 218AppDiv584, 219NYS46; 12 PortoRicoFed167.

659-25 322 Ill 384, 153NE729.

659-32 MoA 273SW125.

659-33 MoA 273SW125.

659-34 MoA 273SW125. [a] 245NY 272, 157NE136.

659-35 218AppDiv584, 219NYS46.

659-35½-New. The clauses declaring that intoxicating liquor is not property are to be regarded as police regulations to protect officers in exercise of their duties. 125Misc791, 211NYS433.

659-35½-New. But as between private persons there may be property in such liquor, 125Misc791, 211NYS433.

659-35¼-New. until the government has taken proceedings to confiscate it. 125Misc791, 211NYS433.

659-38 218AppDiv584, 219NYS46.

659-43½-New. Where whisky was the lawful subject of property, a warehouse having title thereto could require through suit in equity its removal from a bonded distillery warehouse, subject to a provision in a decree requiring necessary permits for withdrawal and removal of whisky. 31F(2d)217 [aff 31 F(2d)220(1stcase)].

659-44 [b] **Necessity of showing legal right to possession.**–130Misc719, 224NYS 337.

660-49 316Mo 240, 289SW568; 225App Div198, 232NYS449; 287Pa87, 134A384. [a] (1) 129 Or138, 276P1086. [b] (8) Contract of employment embracing legal and illegal sale of liquor. 287Pa87, 134 A384. (9) Other instances. 129 Or138, 276P1086. [c] (1) 210Ky633, 276SW 538; 135Misc446, 238NYS616. [e] **Complaint, held to state cause of action** alleging unlawful sale of beverage containing wood alcohol in violation of Farms and Markets Law. 135Misc446, 238NYS616.

661-50½-New. Where illegal transportation of liquor enters into a contract, the contract is illegal and unenforceable. 82NH232, 131A690.

661-56½-New. Cancellation of a permit authorizing a manufacture of wine for nonbeverage purposes did not render it contraband so as to preclude recovery on a fire policy for destruction thereof, unless the wine in question was intended for use in violation of the Prohibition Act or had been so used at the time of its destruction. 28F(2d)579.

661-56½-New. In Ontario where sale of liquor is illegal under Liquor Control Act, buyer has no insurable interest therein. Ont [1929] 4DomLR486.

661-57 284Pa361, 131A286; Sask [1929] 2DomLR241.

661-59 284Pa361, 131A286.

662-73½-New. Purchase and sale of intoxicating liquors under the national Prohibition Act are mala prohibita, rather than mala in se. 130Misc660, 224NYS535.

662-73½-New. Purchase of liquor for beverage purposes is presumed unlawful and the burden of proving contrary is on the purchaser, suing for breach of warranty. 130Misc660, 224NYS535.

662-73¼-New. Buyer cannot recover for breach of warranty that liquor unlawfully purchased was fit for beverage purposes. 130Misc660, 224NYS535.

662-73½-New. Buyer of intoxicating liquor is in pari delicto with the seller. 130Misc660, 224NYS535.

662-73½-New. The rule that, where a contract is merely malum prohibitum, the court will interfere if guilt rests chiefly on one party does not apply to a contract involving unlawful purchase of liquor. 130Misc660, 224NYS535.

662-74 33 Ariz220, 263P626, 627 [quot CJ].

662-75½-New. Contract for sale of intoxicating liquors, made in Mexico, and not contemplating violation of laws of United States or state in which suit is brought, is enforcible in this country. 30Ariz316, 247P117, 49ALR994.

663-88 266Mass176, 164NE812; 37Wyo 93, 259P520.

664-91½-New. 215Ala133, 110S299.

664-93½-New. Where no illegality in the original contract for sale of certificates representing whisky in a bonded warehouse, permitted by the National Prohibition Act, was shown, settlement of an action based on such contract was a valid consideration for notes sued on. 266Mass176, 164NE812.

664-94 TexCivA 278SW462. [f] **Note given for sale of liquor is void.**–TexCivA 278SW462. [g] **Note given to reimburse plaintiff for cashing check for third person,** who sold whisky, does not necessarily defeat recovery. TexCivA 278SW462.

664-97 TexCivA 278SW462, 463 [cit CJ]. [a] **Evidence held to show** note was given for whisky. TexCivA 278 SW462.

665-13½-New. In a suit to recover amount paid on contract for sale of whisky by which plaintiffs assumed obligation of getting proper government permit, that plaintiffs could not obtain permit did not entitle them to verdict. NJSup 134A308.

665-14 [a] (4) Answer states no defense where it fails to plead resales were in violation of state and national prohibition acts but only stated resale was in violation of local option statute. 214Ky76, 282SW769. (5) In suit to recover price of intoxicating liquor sold, affidavit, overruling sale was illegal and in violation of federal and state laws, sufficiently alleges illegality of contract. 284Pa361, 131A286.

665-15 [a] (1) TexCivA 278SW462. (2) 98CalA65, 276P597. [c] Minn 168 Minn108, 209NW635 (evidence sufficient to sustain recovery for price of flavoring extracts containing four per cent. to eighty per cent. of alcohol); TexCivA 278SW462. [d] (2) 215Ala 133, 110S299.

666-16 [a] (1) 215Ala133, 110S299. [c] (2) Instructions held correct. NJ Sup 134A308.

666-22 298Fed656; 222AppDiv835, 226NYS669. But see 225AppDiv198, 232NYS449. [a] **Withdrawal permits.**–298Fed656.

666-23 298Fed656.

666-23½-New. But where a buyer having a permit to purchase liquor was unable to obtain a withdrawal permit, whether by change in federal regulations 215AppDiv511, 214NYS19.

666-23½-New. or by change in interpretation of statute, he is entitled to recover a deposit from the seller. 215App Div511, 214NYS19.

667-26 16F(2d)320. [a] **Court is without power to condemn intoxicating liquor** absent authorizing statute. 40 F(2d)307.

667-27 [a] 272US465, 47SCt133, 71 Led354, 47ALR1044; 281US528, 50SCt 385, 74Led1016 (duty to investigate violations); 216Ala522, 113S541; 253 Mass581, 149NE613; 258Mass85, 154 NE569; 258Mass103, 154NE570; 146 Miss351, 111S860; NJQuartSess 140A 586; NC 153SE634; 127 Or565, 273P 338; 85PaSuper92; 85PaSuper188 (title held sufficient); 5PaDist&Co 199. [b] 5PaDist&Co 191. [d] (1) But see

85PaSuper188. [f] **Aptness of title.**–85PaSuper188. [g] **Prohibition Act applicable to Revenue Law violation.**–22F(2d)507.

667–29½–New. For the purpose of a search warrant, intoxicating liquor illegally held in this state is on the same basis as stolen property. 24 OhNPNS1.

667–29⅓–New. They must be strictly construed. 16F(2d)788.

667–29¼–New. National Prohibition Act controls state prohibition acts where inconsistent as to search of private dwellings. 16F(2d)115.

667–29⅕–New. A defendant cannot complain of illegal search of premises not owned or possessed by him. 197 Ind575, 150NE371.

667–29⅙–New. Decree forfeiting automobile used in transporting prohibited liquors is held not defective because of defendant's minority. 215Ala319, 110S573.

667–29⅐–New. Search and seizure is a preliminary proceeding looking to destruction of liquors seized. 8F(2d)512 (distinguished from other proceedings).

667–29⅛–New. State law relative to search and seizure held applicable to search under federal warrant where evidence was turned over to state officer. 44 Ida43, 254P788.

667–29⅑–New. A motion to quash an affidavit and search warrant because not in compliance with law is not proper procedure. 107TexCr559, 298SW569.

667–29 1/10–New. Purchase of liquor by prohibition agents on premises of defendant has been held not search and seizure. 199 Ind484, 158NE241.

667–29 1/11–New. Defendant cannot complain of an illegal search where he is a stranger to the ownership and possession of the premises. 89 IndA122, 165NE920; 110TexCr186, 7SW(2d)548; 110TexCr612, 9SW(2d)1040; 111TexCr 83, 11SW(2d)323.

667–29 1/12–New. Right of search and seizure while enforcing state vehicle law. 44F(2d)224.

667–29 1/13–New. Vessel engaging in unlawful trade contrary to license need not be proceeded against under national prohibition act because contraband cargo is liquor. 43F(2d)491.

667–30 17F(2d)390. But see 41Wyo 438, 286P390.

667–30½–New. Unlawful arrest cannot be foundation for lawful search. 198 Ind55, 152NE278.

668–33 [b] (8) Explanation of brewer that employees loading contraband beer on freight car did so through mistake is held insufficient. 15F(2d)447.

668–40½–New. Under the National Prohibition Act to effect forfeiture of a vessel and cargo of whisky, it is necessary to plead and prove conviction of person in charge thereof. 8F(2d)788.

668–42 24F(2d)538. [a] 40F(2d)307; 321 Ill 484, 152NE500. [d] (6) Forfeiture may be declared only when seized under search warrant, or while being transported in violation of law, after conviction of person so transporting. 23F(2d)713. (7) Property subject to forfeiture for use in manufacturing liquor held limited to property designed for manufacture of liquor. 33F(2d)225. (8) Empty whisky cans, bottles, jugs, barrels, cardboard cartons, demijohns, bags, boxes of corks, sealing wire, wrappers for whisky bottles, together with labels, flavoring extracts, and other articles, assembled and put on sale with intoxicating liquor, are subject to forfeiture. 34F(2d)30. (9) Electric plant generating electricity for legitimate purposes with which plant wire was connected from building wherein illegal stills were operated held not subject to forfeiture. 33F(2d)225. (10) Medicinal preparation made pursuant to permit cannot be seized until it is condemned. 41F(2d)759. [e] **Alcoholic preparation fit for use as beverage** after saponification and distillation held subject to forfeiture. 40F(2d)565.

669–43 309Mo 520, 275SW36.

669–51 [a] **Entire stock of malt extract, sugar, and yeast,** held for sale to all who wished to buy, whether for legal or illegal purposes, was not subject to forfeiture, though sale of extract was unlawful, under National Prohibition Act, prohibiting sale of preparations designed or intended for use in unlawful manufacture of intoxicating liquor; "designed" referring to things planned for sole or dominant purpose of making such liquor. 28F(2d)213. [b] **Unlawful intent.**–To forfeit entire stock of lawful goods because of alleged "unlawful intent" to sell for use in manufacture of intoxicating liquor, in violation of National Prohibition Act, unlawful intent proved must be as broad as forfeiture claimed. 28F(2d)213.

669–52 [a] But see 21F(2d)585.

669–53½–New. Possession of alcohol on board American vessel beyond twelve-mile limit is not illegal per se so as to render it subject to seizure under National Prohibition Act. 6F(2d)579.

669–53⅓–New. Foreign vessels may lawfully carry liquor outside United States territorial jurisdiction. 20F(2d)353. [a] **Liquor-laden vessel,** seized fourteen miles from coast, is held not subject to forfeiture for unlawfully possessing liquor. 20F(2d)353.

669–53¼–New. Provisions of statute for seizure, without warrant of instrumentalities used in presence of officer for violating Liquor Law, must be construed in connection with other law on same subject. 109TexCr11, 2SW(2d)453.

669–53⅕–New. That property not subject to seizure was taken does not invalidate lawful proceedings. 41F(2d)945.

669–53⅙–New. To warrant forfeiture under National Prohibition Act of property because designed for manufacture of intoxicating liquors, dealer must be in business catering to manufacturers of liquor. 43F(2d)207.

669–53⅐–New. Provision for confiscation of such property must not be construed so as to jeopardize liberty and property of legitimate dealers. 43F(2d)207.

669–54 41F(2d)945; 81Colo 379, 256P4; 258Mass103, 154NE570. But see 43F(2d)207. [i] **Containers, corks, labels and cartons** designed for, and offered for sale in manner to attract purchasers to use in "manufacture." 281US389, 50SCt344, 74L ed923.

669–56 312Mo 99, 279SW144. [a] **Saddle may not be seized** as article incidental to crime. 312Mo 99, 279SW144. [b] **Revolver may be seized** as indication of armed resistance to law officers. 312Mo 99, 279SW144.

669–56½–New. Property affixed to real estate. National Prohibition Act confers no authority to seize property affixed to real estate under warrant issued pursuant to Espionage Act. 13F(2d)242.

669–56⅓–New. Search warrant directing seizure of property affixed to real estate is invalid as directing illegal seizure. 13F(2d)242.

669–58 41F(2d)849.

670–59 213Ala325, 104S826; 213Ala583, 105S589; 215Ala319, 110S573; 166Ga256, 142SE879; 124Kan143, 257P731; 261Mass504, 159NE613, 61ALR548; 170Minn349, 212NW591; 8PaDist&Co 169. But see 39F(2d)120. [a] 18F(2d)1005. But see Va 155SE689. [c] (2) 220Ala418, 125S655(1stcase). [d] But see 152Va982, 146SE198; 152Va508, 147SE243. [g] (3) In Iowa liquor need not be found in vehicle at instant of seizure. 205 Iowa597, 218NW346. (4) In Virginia statute does not require that liquor be in automobile when stopped. Va 155SE689. (5) Fact that automobile had previously been used for transportation of liquor does not authorize seizure. Va 155SE689. [j] (3) Sale under Tariff Act, of automobile used in transporting intoxicating liquor is in legal operation equivalent to sale under judicial decree of condemnation. 31F(2d)494(2dcase). (4) Seizure on high seas by coast guard of vessel carrying contraband liquor. 42F(2d)558. (5) American vessel sailing high seas under customs number held subject to seizure and forfeiture for transporting prohibited liquor. 42F(2d)558. (6) Other instances. 39F(2d)120. [t] **Proceeding to condemn conveyance** is proceeding in rem and does not abate with owner's death. 33GaA786, 127SE659. [u] **Where evidence does not show transportation or finding of whisky,** automobile is not subject to forfeiture. 217Ky278, 289SW285. [v] **Interveners claiming title are not estopped from attacking validity of order of sale** rendered void by want of notice of application to defendant. 166Ga256, 142SE879. [w] **Seizure may be adopted** by customs department and car forfeited under Tariff Act. 31F(2d)494(2dcase). [x] **Where conviction is unlawful,** confiscation of automobile cannot be predicated thereon. 200 Ind512, 165NE57. [y] **Authority of officer to seize vehicle.**–Va 155SE689.

670–61 6F(2d)288; 17F(2d)855; 37F(2d)890 (assignee of conditional sales contract); 39F(2d)245; 39F(2d)288; Ala 130S771; 71CalA601, 236P198; DC 41F(2d)984; 37GaA253, 139SE577; 204 Iowa1155, 216NW611; 225Ky618, 9SW(2d)714; 170Minn349, 212NW591, 593 [citCJ]; MoA 276SW884; NH 146A860 (rights of innocent holders of liens on automobile are unaffected by conduct of one who never had rightful possession thereof as against lienor); NC 153SE634 (effect of sale); 115 OhSt235, 152NE903, 47ALR1049; 5PaDist&Co 199; 155SC426, 152SE678; 157SC419, 154SE410; 118Tex189, 12SW(2d)968. See also 41F(2d)744; 9PaDist&Co 413. [f] (14) In California actual knowledge of unlawful use or intent to use must be shown, mere failure to exercise diligence in discovering use or intent to use being insufficient. 71CalA590, 236P194. (15) Owner's knowledge of unlawful use or intent to use may be shown by circumstances and must go further than to show he might have discovered unlawful use by constant espionage. 71CalA590, 236P194. (16) In Alabama seller or mortgagee of automobile need not inquire whether buyer or mortgagor intends to use for unlawful purposes unless he knows facts sufficient to put him on inquiry. 213Ala122, 104S255. (17) Sellers' knowledge of purchaser's reputation is not conclusive and inquiries made without learning anything derogatory to purchaser's intent in buying car showed reasonable care and good faith sufficient to afford them protection due bona fide purchasers. 213Ala169, 104S401. (18) If owner assessed, his ownership of liquor is immaterial. 213Ala583, 105S589. (19) Notice sufficient to excite conditional seller's suspicion as to use for which buyer intends car may be imputed by law from general character of buyer as violator of Prohibition Law. 213Ala122, 104S255. (20) Notice to conditional seller of automobile of facts existing at time of inquiry depends on facts of each particular case. 213Ala122, 104S255. (21) Conditional seller is not put upon inquiry as to intended use of automobile merely because buyer's father had reputation of being bootlegger. 213Ala122, 104S255. (22) Statutory distinction between owner and bailor held reasonable. 5PaDist&Co 234. (23) Conditional vendor is protected to extent of unpaid installments of purchase price. 8PaDist&Co 491. (24) Under Tariff Act § 618, refusal by secretary of treasury of application for return of forfeited car is discretionary and not subject to judicial review. 31F(2d)494(2dcase). (25) In South Carolina mortgagee's right to recover confiscated automobile is determined by his guilt or innocence. SC 155SE231. (26) Other statutes construed. 86PaSuper532; 90PaSuper376. [g] (2) Fact that owner of automobile who aided and assisted in knowingly and unlawfully transporting liquor was not interested therein as owner is immaterial and no defense against forfeiture. 213Ala583, 105S589. (3) To impute to vendor buyer's reputation as violator of Prohibition Law, so as to prove culpable negligence, it must be general reputation existing at vendor's place of residence, business, or occupation, at time of sale. 214Ala120, 106S868. (4).

Where evidence is insufficient to show notice to vendor of buyer's bad character and show negligence in sale, sale will be directed only of purchaser's interest. 214Ala120, 106S868. [j] (2) Owner or lienor cannot be relieved from forfeiture unless he comes within all form requirements of statute. 146Va287, 135SE673. [k] **In California.**–71CalA134, 234P856. [l] **Conditional vendor of automobiles** is not bound to be "reasonably diligent" to ascertain use to which each car sold is put on penalty of forfeiting his interest. 71CalA134, 234P856. [m] **Mortgage provision authorizing foreclosure in case of illegal use** does not prevent condemnation and sale of vehicle unlawfully used by bailee without mortgagee's consent. 124Kan143, 257P731. [n] **In Kentucky.**–216Ky335, 287SW939. [o] **In South Dakota.**–224NW176; 229NW307. [p] **If conditional sales contract is not recorded before seizure,** automobile is subject to forfeiture for transportation of liquor by purchaser. 208Iowa794, 226NW48. [q] **Where amount due under lease is greater than proceeds of sale,** proceeds will be paid to lessor. 14PaDist&Co 250. [r] **Perfection of title by lenor** is required by some statutes. Va 155SE689.

670–61½–New. Mere knowledge of use of car is held not to render mortgagee's interest liable to forfeiture. MoA 276SW884.

670–61¼–New. Mortgagee must participate before he can be held liable for mortgagor's acts. MoA 276SW884.

670–61¼–New. Mortgagee's control is essential. MoA 276SW884.

670–61½–New. Default of mortgage debt added to mortgagee's knowledge of illegal use of auto is held not to render his interest subject to seizure. MoA 276SW884.

671–62 272US465, 47SCt133, 71L ed354, 47ALR1044; 6F(2d)288 (Kansas statute held unconstitutional); 15F(2d)621; 124Kan143, 257P731; 83NH288, 141A 473; 5PaDist&Co 199; 7PaDist&Co 367; 50SD408, 210NW194; SD 224NW 176. [a] **Mortgagee in possession** takes risk of having automobile used to carry liquor and cannot be innocent holder under statutes. 50SD408, 210NW194. [b] **Provision in mortgage** that automobile should not be used to carry intoxicating liquor does not prevent forfeiture. 50SD408, 210NW194.

671–63 272US465, 47SCt133, 71L ed354, 47ALR1044; 91PaSuper600; 8Pa Dist&Co 169; 9PaDist&Co 75; 13Pa Dist&Co 714; SD 229NW307. [a] **Automobile purchaser's general reputation for violating prohibition laws** charges seller with knowledge thereof. 215Ala 16, 108S863. [b] **Under statute providing for forfeiture and sale of automobile used in transporting liquor unless good cause is shown to contrary by owner** conditional vendor is not "owner." SD 224NW176. [c] **Assignee of seller's conditional sales contract** stands in same position as original seller. SD 224NW 176.

671–63½–New. Where statute plainly indicated automobile should be forfeited, it should not be given strained construction to protect interest of mortgagee. 50SD408, 210NW194.

671–63½–New. It is the illegal use that is made of an automobile in transportation of liquors that determines the right of forfeiture without regard to the guilt or innocence of the owner. 50SD408, 210NW194.

671–64 30F(2d)413; 86Colo 545, 283P 534; 124Kan143, 257P731. [a] **Automobile placed by owner in possession of another for general use** is subject to forfeiture though owner had no knowledge of unlawful use. 119Kan874, 241 P112.

671–66 119Kan874, 241P112; 124Kan 143, 257P731.

672–67 13F(2d)83; 13F(2d)548; 19F (2d)934; 22F(2d)441; 33F(2d)228 (method of forfeiture of automobile prescribed in National Prohibition Act is exclusive when applicable); 6PaDist&Co 67. [b] (1) See also 12PortoRicoFed 185; 12PortoRicoFed195. (3) There must be transportation within United States. 13F(2d)433. (4) Forfeiture is justified only when driver of vehicle is discovered in act of transporting intoxicating liquor. 33F(2d)353. [c] (1) 13F(2d)548; 14F(2d)426; 18F(2d)1005; 23F(2d)126; 9PaDist&Co 265; 9Pa Dist&Co 267. (5) After conviction of driver, forfeiture of car used to transport liquor is properly decreed. 25F(2d)372. [f] (1) 12PortoRicoFed201. (2) Conditional seller held not put on constructive notice that automobile might be used in illegal transportation of liquor so as to authorize forfeiture. DC 35F(2d) 875. [s] **British vessel** which had previously landed intoxicating liquors held subject to seizure on high seas. 6F(2d) 326. [t] **In California.**–71CalA134, 234P 856. [u] **Act in conflict with Rev. St. § 3450,** as regards rights of good faith owner or lienholder, prevents forfeiture for illegal transportation under Prohibition Act. 5F(2d)1. [v] **Libeled vessel cannot be released** on application and bond by mortgagee or person other than owner. 16F(2d)129. [w] **Estoppel to urge unlawfulness of arrest.**–13F(2d) 949. [x] **Seizure of automobile on probable cause** to believe it contains liquor held valid. 16F(2d)320. [y] **Breach of condition in bond.**–6Pa Dist&Co 67. [z] **Seizure of ship** on open seas is held not shown to be invalid in absence of allegation that ship was foreign vessel. 7F(2d)413. [aa] **Boat seized and unloaded** by state policemen is not subject to forfeiture. 7F(2d)189. [bb] **Only officers given power and protection** by National Prohibition Act can seize liquor or means of transportation. 7F(2d)189. [cc] **Bona fide holder of lien.**–15F(2d)621. [dd] **Seizure of boat fifty-seven miles off Farallon Islands** is held valid under treaty with Great Britain. 273US593, 47SCt531, 71L ed 793. [ee] **Automobile used without owner's knowledge** may not be forfeited. 17F(2d)855. [ff] **Absence of manifest** is no ground for forfeiture of liquor-laden foreign vessel. 20F(2d)353. [gg] **Foreign vessels** may lawfully carry liquor outside United States territorial jurisdiction. 20F(2d)353. [hh] **Indorsee of purchase-money notes** of automobile seized held entitled to protection of lien in absence of notice or knowledge of its use to carry liquor. 25F(2d) 372. [ii] **Person with knowledge** of use of car in transporting liquor cannot claim as bona fide lienholder. 25F(2d) 372. [jj] **Seller's failure to investigate** court records of buyer's convictions of violating Liquor Law is held not notice that car was to be used to carry liquor. 25F(2d)372. [kk] **Rights of innocent owner and innocent lienor distinguished.** –SD 224NW176. [ll] **Knowledge of assignor imputable to assignee.**–30F(2d) 413. [mm] **Forfeiture provision of statute must be strictly construed.**–DC 35 F(2d)875. [nn] **That liquor seized was small quantity and in owner's pocket** does not prevent forfeiture of automobile. 38F(2d)520. [oo] **Bond** must be approved by officer making seizure. 13 PortoRicoFed440. [pp] **Where no arrest is made at time of seizure of automobile,** proceeding cannot be instituted against automobile by libel under National Prohibition L. § 26. 13Porto RicoFed440. [qq] **Findings.**–40F(2d) 825. [rr] **What constitutes notice to lienor.**–40F(2d)825. [ss] **Seizure of vessel after landing liquor.**–42F(2d)458. [tt] **Proceeding summarily for forfeiture or by libel after conviction.**–42F (2d)858.

672–67½–New. **Where owner has given bond,** such will be forfeited upon condemnation of automobile, and thereupon proceedings may be commenced for collection of the penal sum in bond. 6Pa Dist&Co 658.

672–67⅓–New. A vehicle is subject to forfeiture only when found in use in illegal transportation. 21F(2d)99.

672–68 8F(2d)54; 25F(2d)238; 71 CalA590, 236P194. See also 17F(2d) 483.

672–69 31F(2d)325.

672–70 8F(2d)54; 18F(2d)1005; 21 F(2d)639; 25F(2d)238; 31F(2d)325; 32F(2d)832; 42F(2d)908; 71CalA590, 236P194; 12PortoRicoFed195. [c] **Claimant need not inquire in absence of knowledge exciting suspicion.** 219Ala 360, 122S463. [d] **Notice necessary to excite suspicion and stimulate inquiry** depends on facts of particular case. 219 Ala360, 122S463.

673–71 19F(2d)535; 42F(2d)908; 43 F(2d)259(1stcase); 219Ala52, 121S52 (1stcase). [a] (3) Automobile controlled and constantly used by minor owner's parents, often for violation of Prohibition Law, is subject to forfeiture for illegal use by one borrowing it from owner's father, though owner was not present at time of loan. 25F(2d)912. (4) Where bad reputation of automobile driver was established, claimant's failure to inquire or investigate further before loaning car constituted lack of due diligence though driver promised to use car for legal purpose. 219Ala362, 122 S464. [c] **Entrapment.**–25F(2d)912.

673–71½–New. Misuse by a husband acting as chauffeur by his wife owning an automobile will infect the machine despite her personal ignorance. 12Porto RicoFed201.

673–72 232Ky199, 22SW(2d)587 (single sale is sufficient). [d] **Articles forming integral parts of realty** cannot be forfeited under statute making it unlawful to possess property designed for manufacturing liquor. 42F(2d)663(2d case).

673–73 5F(2d)282 (warrant for search of premises for liquor did not justify seizure of records as being means or instrument of crime).

673–75 See also 35F(2d)209. But see 16F(2d)202.

673–75½–New. The search of premises for intoxicating liquors held unreasonable, in that a cabinet file of papers and documents was seized. 33F(2d)982.

673–76 113TexCr31, 19SW(2d)49 (places other than private dwellings). [f] **Where house** has characteristics of "business place," it is such place under statute, despite lack of label as such. 290Pa121, 138A90. [g] **Private residence.**–28OhA75, 162NE604. [h] **Rooms in hotel,** occupied by permanent guests, do not constitute dwellings immune from search. 34F(2d)952. [i] **Revenue Act** does not empower prohibition officer to search for liquor. 41F(2d)227.

673–77 275US149, 48SCt46, 72L ed211; 19OhA82; 31OhA417, 165NE740; 35 OhA87, 172NE301 (traffic destroying immunity may be shown by circumstantial evidence); 34OklCr199, 245P906; 37OklACR61; 36OklCr36, 251P614; 36OklCr39, 252P71; OklCr 274P694; OklCr 277P672; OklCr 279P978; 290 Pa121, 138A90. [a] 309Mo 89, 273SW 736. [b] **Private house must be known** to be used for sale of liquor. 290Pa121, 138A90. [c] **In Oklahoma.**–Cr 274P 694.

674–78 12F(2d)771; 13F(2d)905; 19 F(2d)92; 21F(2d)575; 22F(2d)134. [a] (1) But see 24F(2d)557. (2) 22F(2d) 507. (7) Room in garage in which employee slept and cooked his meals is not private "dwelling." 267US498, 45SCt 414, 69L ed757. (8) Search warrant for search of cellar under private dwelling used for operation of commercial stills is held valid. 19F(2d)92. (9) Provision held limited to searches for evidence of violation of Prohibition Act. 19F(2d) 92. (10) That prohibition agent smelled fermenting mash from outbuilding does not authorize search of private dwelling. 24F(2d)965. (11) Act applies in Alaska. 275US149, 48SCt46, 72L ed211. (12) Private dwelling used in manufacture of liquor, either sold there or removed for sale, is subject to search. 22F(2d)867. (13) "Used for unlawful sale of liquor" means used in business of selling unlawfully. 25F(2d) 346. [b] (4) Shed or outhouse on premises occupied by dwelling house is not "private dwelling" so as to exempt from search under warrant charging manufacture of intoxicating liquor. 5 F(2d)424; 13F(2d)905. (5) Cellar is part of "private dwelling house" protected by statute. 22F(2d)507.

674–78½–New. Volstead Act guarantees freedom from unlawful search to buildings other than dwellings. 17F(2d)274.

674–79½–New. **American vessel beyond twelve-mile limit** is not within territorial waters of United States so as to

render possession of alcohol thereon per se illegal and subject to seizure under National Prohibition Act. 6F(2d)579.

674–80 142Miss462, 107S672; 143Miss 247, 108S903; 37 OklCr410, 259P152; OklCr 271P951; OklCr 273P366(1st case); OklCr 282P180(2dcase); 46RI 485, 129A596; 110TexCr416, 10SW(2d) 113.

674–82 46RI 485, 129A596.

674–84 See also MoA 285SW1039; 136 Wash374, 240P360.

674–86½–New. Officer may search person without warrant where he has reasonable cause to believe that he is violating Prohibition Law. 239Mich329, 214NW88.

674–87 8F(2d)492; 214Ky84, 282SW 762; 314Mo 333, 284SW433; 106TexCr 564, 293SW1101; 108TexCr184, 299SW 642. See also 5PaDist&Co 205. [f] **Second search warrant** based on affidavit alleging sale prior to issuance of first warrant held improper. 6F(2d) 121. [g] **Affidavit is not invalid** because based on facts obtained by deputy sheriff when calling on defendant to interrogate him concerning burglary. 234Mich 164, 207NW876. [h] **Affidavit held sufficiently positive,** validating seizure in daytime. NJQuartSess 150A44. [i] **Affidavits held sufficient.**–TexCr 27 SW(2d)540(1stcase); TexCr 28SW(2d) 160.

674–88 [h] **Filing.–Ind** 165NE755.

674–91½–New. Interval of thirteen days between affidavit and issuance of search warrant does not affect validity of warrant. 17F(2d)937.

674–91¾–New. Knowledge obtained by an illegal search cannot be the basis of a subsequent legal search. 221Ky535, 299SW168.

675–96 316 Ill 376, 147NE472; 316Mo 602, 292SW36; 316Mo 1152, 295SW568. [a] **Before officer is authorized to swear to affidavit on which search warrant is to be issued to search "bona fide" private residence,** under Gen. Code § 6212—27, he must first investigate, and have reasonable grounds to believe that that which appears to be bona fide private residence is in fact not such. 28 OhA75, 162NE604.

675–96½–New. Affidavit cannot be made by wife of accused in jurisdictions where statutes forbid wife to testify against husband. 214Ky84, 282SW762.

675–97½–New. Judge or justice of the peace is without power to issue warrant upon his own knowledge. 214Ky84, 282 SW762.

675–97¼–New. Under some statutes affidavits of two credible persons are required to authorize issuance of search warrant for search of private dwelling. 107TexCr553, 298SW604.

675–97¼–New. Under some statutes two affiants are required where warrant is sought for search of private dwelling. 108TexCr298, 1SW(2d)288.

675–97½–New. Under some statutes affidavits of two credible persons are required to authorize the issuance of a search warrant for the search of a private dwelling. 113TexCr31, 19SW(2d) 49.

675–97⅔–New. The affidavit of one credible person is sufficient to search a place other than a private dwelling. 113 TexCr31, 19SW(2d)49.

675–97½–New. Under statute requiring two affiants where warrant is sought for search of private dwelling, one affiant is sufficient to authorize search of barn remote from dwelling. TexCr 31 SW(2d)455.

675–98 19F(2d)841; 29F(2d)8; 32 F(2d)936; 316Mo 1152, 295SW568; 113 TexCr219, 18SW(2d)654; TexCr 32SW (2d)204. [a] (11) 5F(2d)312. (13) Affidavit held insufficient to show probable cause for belief that private dwelling was used for unlawful sale. 5F(2d) 312. (14) Affidavit for search warrant held not to identify or show probable cause for seizure of records taken at time of seizing intoxicating liquors. 5F(2d) 282. (15) Facts omitted from affidavit cannot be cured by testimony before commissioner. 5F(2d)282. (16) Affidavit held insufficient and warrant void. 26F(2d)444. (17) Person not in possession at time of search and claiming no ownership cannot raise question of legality of search. 26F(2d)444. (18) Sufficiency of affidavit must be tested by statements therein, and not by result of search. 22F(2d)507. (19) Affidavit held sufficient basis for warrant for search of garage in basement of residence used for handling liquor in commercial way. 25F(2d)346. (20) Affidavit that affiant purchased "home-brew beer" held insufficient to show probable cause in absence of proof of alcoholic content. 32F(2d)760. (21) Affidavit reciting that on certain date affiant went to defendant's dwelling house and purchased quart of red wine of defendant's wife is sufficient. 28 F(2d)73. (22) Affidavit must show that liquor was sold in dwelling house. 40 F(2d)968 (naming wrong person as seller held immaterial). [f] **Right of seizure** of liquor illegally transported is not determinable by character of penalty to which transporter is subject. 267US132, 45SCt280, 69L ed543. [g] **Affidavit alleging that liquor was purchased by Richard Roe** is not invalid because true name of purchaser is not given. 239Mich428, 214NW404.

675–99 152Miss844, 120S209. [a] TexCr 31SW(2d)452.

675–99½–New. The same nicety of pleading is not required as in an indictment. 231Mich678, 204NW709.

675–1 22F(2d)507; 31F(2d)440; 198 Ind1, 151NE405; 152Miss844, 120S209; 152Miss555, 120S444(1stcase); 314Mo 333, 284SW433; 41Wyo 438, 286P390 (statement in alternative held insufficient to charge more than mere possession). [a] 113TexCr527, 22SW(2d) 1069. [e] **Affidavits construed**–41Wyo 438, 286P390 (word "possessed" not interpreted to mean kept for sale).

675–1½–New. That different acts mentioned in the statute as constituting the offense are alleged in the disjunctive, this does not render the affidavit insufficient. 231Mich678, 204NW709.

675–2 17F(2d)334; 44 Ida43, 254P788, 52ALR463, 316 Ill 376, 147NE472; 241 IllA439; 199 Ind317, 157NE657; 210 Ky441, 276SW116 (where affidavit stated as ultimate fact that intoxicating liquor was possessed on premises); 212 Ky90, 278SW562; 214Ky84, 282SW762; 214Ky240, 282SW1097; 216Ky270, 287 SW726; 219Ky139, 292SW771; 221Ky 173, 298SW382; 221Ky216, 298SW685; 226Ky36, 10SW(2d)471; 227Ky157, 12 SW(2d)280; 318Mo 531, 300SW829; 74 Mont377, 240P984; 75Mont476, 244P 280; 35 OklCr91, 249P354; 32 OklCr203, 240P1075; 36 OklCr36, 251P614; OklCr 272P391; OklCr 272P886; OklCr 273P 288; OklCr 274P41; OklCr 281P153(2d case); 10PaDist&Co 647; 158Tenn431, 284SW356 (that ground for belief is information furnished by reputable citizen not stating nature of information given); 107TexCr579, 298SW573; 107 TexCr551, 298SW596; 108TexCr202, 299SW413; 108TexCr351, 300SW639; 108TexCr636, 2SW(2d)253; 108TexCr 650, 2SW(2d)272; 109TexCr11, 2SW (2d)453; 109TexCr127, 3SW(2d)441; 109TexCr83, 3SW(2d)447; 109TexCr 402, 4SW(2d)966; 110TexCr90, 7SW (2d)551; 111TexCr193, 11SW(2d)516; 111TexCr355, 12SW(2d)1033(2dcase); 113TexCr1, 18SW(2d)179. See also OklCr 279P986. [a] (1) 7F(2d)760; 14 F(2d)398; 33F(2d)400; 33F(2d)402; 34F(2d)495 (statement that affiant smelled odor of beer mash in process of fermentation held allegation of possession of intoxicating liquor); 43F(2d) 399; 322 Ill 353, 153NE604; 324 Ill 160, 154NE907; 329 Ill 223, 160NE582; 89 IndA541, 167NE347; 206 Iowa615, 220 NW59; 212Ky90, 278SW562; 216Ky 220, 287SW704; 219Ky323, 292SW779; 220Ky768, 295SW1072; 225Ky603, 9SW (2d)719; 230Ky573, 20SW(2d)457; 231 Mich678, 204NW709; 233Mich169, 206 NW506; 234Mich209, 207NW801; 233 Mich670, 207NW832; 235Mich198, 209 NW74; 235Mich360, 209NW84; 234 Mich686, 209NW157; 238Mich171, 213 NW159; 239Mich105, 214NW130; 240 Mich59, 214NW935; 244Mich679, 222 NW122; 247Mich629, 226NW673; 247 Mich698, 226NW710 (affidavit based on observance of people coming and going); 251Mich253, 231NW557(1stcase); Mo 278SW700; 314Mo 646, 285SW474; 316 Mo 602, 292SW36; 316Mo 977, 292SW 60; 316Mo 1014, 292SW61; 318Mo 585, 300SW826; 318Mo 531, 300SW829; Mo 1SW(2d)827; Mo 1SW(2d)837; MoA 7SW(2d)375; 73Mont272, 235P716; Okl Cr 271P953; OklCr 274P487; OklCr 275 P401(1stcase); 159Tenn263, 17SW(2d) 899; 111TexCr272, 12SW(2d)568; 109 TexCr127, 3SW(2d)441; 109TexCr573, 6SW(2d)115; 110TexCr90, 7SW(2d) 551; 110TexCr99, 7SW(2d)953; 112 TexCr628, 18SW(2d)158; TexCr 23 SW(2d)387; TexCr 25SW(2d)860; Tex Cr 25SW(2d)875; TexCr 26SW(2d)211; TexCr 26SW(2d)244; TexCr 26SW(2d) 655; TexCr 31SW(2d)651. (5) 217Ky 503, 289SW1108. (8) Positive statement that illicit distilling apparatus, etc., were used on premises described in which intoxicating liquor was kept and stored is sufficient to authorize issuance of search warrant. 6F(2d)497. (9) Recital in affidavit, "I personally saw a keg of intoxicating beverages in said barn," without disclosing how affiant ascertained contents of keg, is statement of fact sufficient if believed by magistrate to show probable cause. 75Mont476, 244P 280. (10) Affidavit that certain person was possessing a still and distilling apparatus at a certain place. 13F(2d) 108. (11) Affidavit stating affiant saw still seventy-five yards from defendant's house, with well beaten path running between. 214Ky166, 282SW1058. (12) Affidavit stating belief based on purchase of liquor at designated place. 326 Ill 481, 158NE134. (13) Affidavit stating that person had no liquor when he went in store, but had pint when he came out. 247Mich656, 226NW685. (14) Affidavit stating that affiants were supplied with whisky which they paid for, tasted, and found to be poor grade of whisky. NJQuartSess 147A330(2d case). (15) An affidavit that affiant bought whisky from person in hotel and that there was more whisky left in bottle. 34F(2d)952. [b] (1) 17F(2d)334; 36F(2d)881; 37F(2d)287. (2) 17F(2d) 334; 21F(2d)575. (3) 21F(2d)575; 33 F(2d)402. (6) Affidavits describing recent sales with approval of management are sufficient to show probable cause. 5F(2d)651. (7) Under provision requiring affidavits to be "positive" to authorize search in nighttime, affidavit based on observations and purchases three weeks before it was made held insufficient. 5F(2d)651. (8) Affidavit held insufficient to support finding of probable cause. 8F(2d)581. (9) Affidavit of purchase of "colored distilled spirits from bartender in soft drink saloon," though stating conclusion, also states fact sufficient to show probable cause for issuance of search warrant. 13F(2d) 952. (10) Affidavits held to justify issuing warrant to search brewery premises. 17F(2d)151. (11) Affidavit showing purchase forty-three days before its date is held insufficient. 7F(2d)861. (12) Warrant based on detection of odor insufficient to authorize search of dwelling. 24F(2d)557. (13) Affidavit of prohibition agent that dwelling house is being used for unlawful sale of liquor and that liquor is now on premises is sufficient to authorize issuance of warrant, though based on information contained in affidavit of another made before commissioner at same time. 24 F(2d)665. (14) It is only when private dwelling is to be searched that affiant must show that place is used for sale of intoxicating liquor, and, where place is not private dwelling, it is sufficient to show unlawful possession therein. 34 F(2d)495. (15) Affidavits held to show probable cause for issuance of warrant. 40F(2d)309. [c] 34F(2d)495; 238Mich 171, 213NW159. See also 21F(2d)575. [d] See also 318Mo 531, 300SW829. But see 318Mo 585, 300SW826. Contra 320 Mo 202, 7SW(2d)262. [e] (2) Affidavit stating that another told affiant that on certain date he purchased gallon of whisky from defendant and that defendant had whisky on premises has been held sufficient. 228Ky691, 15SW(2d) 444. (3) Statement at end of affidavit "that affiants have been informed that" such persons keep intoxicating liquor for sale has been held sufficient though it

qualified remainder of affidavit. 112 **TexCr**219, 15**SW(2d)**1048. [f] (2) Affidavit based on hearsay reports as to existence and operation of distillery is sufficient. **TexCr** 21**SW(2d)**739. [i] (1) 74**Mont**377, 240**P**984. (2) As not stating facts sufficiently recent to create probable cause for belief as to possession. 218**Ky**718, 292**SW**314. (3) Even though person arrested is not charged with felony for driving while intoxicated but merely with misdemeanor for drunkenness. 109**TexCr**573, 6**SW(2d)**115. (4) Alleging statements of another as ground for belief without showing when made. 209**Ky**143, 272**SW**403. (5) To authorize search in nighttime. 14**F(2d)** 670. (6) Statement that affiant had personal knowledge that automobiles were operating all night from paint shop to be searched is held too vague and indefinite. 216**Ky**270, 287**SW**726. (7) Alleging that information was obtained from others without showing they had personal knowledge. 155**Tenn**624, 299 **SW**796. [l] **Affidavit must show facts** justifying issuance of warrant, and it is not enough that facts subsequently shown would have sufficed. 5**F(2d)**312. [m] **Affidavit stating ultimate facts sufficient.**–212**Ky**90, 278**SW**562. [n] **Where affidavit concludes with statement** of knowledge, prior averment of belief is immaterial. 212**Ky**90, 278**SW**562; 218 **Ky**718, 292**SW**314; 218**Ky**791, 292**SW** 316. [o] **Source of information.**–159**Tenn** 263, 17**SW(2d)**899. [p] **Information obtained while arresting one driving automobile while intoxicated** may be used in procuring search warrant. 109**TexCr** 573, 6**SW(2d)**115. [q] **Where ultimate fact** is stated as fact, and would, if true, furnish probable cause, issuance of warrant is justified. **TexCr** 26**SW(2d)**208 (1stcase). [r] **Where facts set out show probable cause,** affidavit on information and belief is sufficient. **TexCr** 31**SW (2d)**452.

675–2½–New. A statute providing that no statement by affiant that he smelled odor of intoxicating liquor in or about a private dwelling shall constitute probable cause is held to have no application where odor comes from pool room. 238 **Mich**171, 213**NW**159.

676–3 321 **Ill** 484, 152**NE**500; 200 **Ind** 579, 164**NE**274; **Ind** 165**NE**755; 89 **IndA** 547, 166**NE**23; 153**Miss**710, 121**S**147; 316**Mo** 204, 289**SW**554; 316**Mo** 977, 292 **SW**60; 316**Mo** 1014, 292**SW**61; 113**Tex Cr**527, 22**SW(2d)**1069; **TexCr** 24**SW (2d)**45; **TexCr** 27**SW(2d)**545; 150**Wash** 187, 272**P**729. But see 200 **Ind**173, 162 **NE**233; 200 **Ind**397, 164**NE**27(1stcase); 200 **Ind**405, 164**NE**276; 200 **Ind**457, 164 **NE**314.

676–3½–New. General rule is that facts to be stated must be such as to create reasonable belief in mind of officer who issues the warrant as a discreet and prudent person that the person against whom it is issued harbors the guilty evidence sought to be discovered. 214 **Ky**166, 282**SW**1058.

676–3⅓–New. It is not essential that such facts would create belief or conviction of guilt beyond reasonable doubt, as required in a final trial. 214 **Ky**166, 282**SW**1058.

676–3¼–New. Where the ultimate fact of defendant's violation of the liquor law is stated as a fact in the affidavit for a search warrant, and not merely on information and belief, the search warrant is properly issued, provided the things stated as facts would, if true, furnish "probable cause." 110**TexCr**90, 7**SW(2d)**551.

676–4 234**Mich**686, 209**NW**157; 311 **Mo** 664, 279**SW**395, 398 [quotCJ]; 316 **Mo** 602, 292**SW**36; 320**Mo** 202, 7**SW(2d)** 262; **OklCr** 267**P**490. See also 110**Tex Cr**90, 7**SW(2d)**551.

676–4½–New. Where the affidavit is sufficient to give the court jurisdiction, such jurisdiction cannot be taken away by parol proof on the trial. 239**Mich** 105, 214**NW**130.

676–5 161**La**988, 109**S**787; 89**PaSuper** 467; 137**Wash**156, 242**P**6.

676–5½–New. When no joint interest is apparent, showing of probable cause against one tenant confers no right to search home of another tenant in the same building. 35 **OklACR**681.

676–5⅓–New. Affidavit must aver that affiant "does believe," and mere allegation that he has "reason to believe" is insufficient. 140**Miss**221, 105**S**497.

676–6 318**Mo** 585, 300**SW**826; 89**Pa Super**467.

676–8 214**Ky**240, 282**SW**1097. But see 324 **Ill** 160, 154**NE**907. [b] **Other designations.**–253**Mass**581, 149**NE**613.

677–9 253**Mass**581, 149**NE**613; 152**Miss** 844, 120**S**209; **TexCr** 25**SW(2d)**839. [a] **Affidavits held defective.**–**TexCr** 28 **SW(2d)**160. [b] **If name only is unknown,** description of offender must be given. **TexCr** 28**SW(2d)**160. [c] **Warrant held unauthorized** where affidavit stated that persons were unknown, but did not describe them. **TexCr** 24**SW (2d)**844.

677–9½–New. Affidavit stating that deponent had seen liquor purchased on premises should state from whom it was purchased, 231**Mich**187, 203**NW**865.

677–9⅓–New. and the time when alleged drinking and purchase were seen. 231**Mich**187, 203**NW**865.

677–13 OklCr 287**P**736; 111**TexCr**292, 12**SW(2d)**790(1stcase); 112**TexCr**119, 14**SW(2d)**280(2dcase); 113**TexCr**1, 18 **SW(2d)**179; 113**TexCr**31, 19**SW(2d)**49 (warrant for search of private dwelling may issue only upon affidavits of two credible persons showing that residence is place where intoxicating liquor is sold or manufactured in violation of law). [a] 236**Mich**75, 209**NW**944. [b] **Affidavit insufficient** for failure to allege that residence to be searched was place where intoxicating liquors were sold or manufactured. 113**TexCr**406, 21**SW(2d)**1061(1stcase); 113**TexCr**395, 22**SW(2d)**136; 113**TexCr**371, 22**SW(2d)** 140.

677–13½–New. The showing of probable cause need not be sufficient to justify a conviction. 74**Mont**377, 240**P**984.

677–13⅓–New. The showing of probable cause may be made by circumstances as well as by direct evidence. 74**Mont**377, 240**P**984.

677–13¼–New. A showing of violation of the law on a given day does not constitute probable cause for believing that like illegal acts were being committed twenty-five days thereafter. 74**Mont** 377, 240**P**984.

677–13⅕–New. Where an affidavit concludes with a date and the only possible conclusion is that such date had reference to the happening of the events narrated immediately preceding it, the affidavit is not fatally defective for failure to allege the time. 234**Mich**621, 208 **NW**674.

677–13⅙–New. Affiant must allege public possession of liquor in dwelling house used partly for business. 290**Pa** 121, 138**A**90.

677–13⅐–New. The sufficiency of an affidavit for a search warrant is to be determined by the entire context including the jurat and signatures. 106 **TexCr**75, 290**SW**1103.

677–13⅛–New. The use of the word "his" in the caption of an affidavit does not render the affidavit insufficient as not sworn to by two witnesses, when the remainder of the affidavit shows that it was sworn to by two witnesses. 106**TexCr**75, 290**SW**1103.

677–13⅑–New. Falsity of statements made in the affidavit cannot affect the validity of the warrant. 155**Tenn**20, 290**SW**1.

677–13⅒–New. Affidavit is sufficient without reference to whether criminal prosecution for offense had been commenced. 197 **Ind**539, 151**NE**427.

677–13 1/11–New. Affidavit need not charge defendant with crime. 326 **Ill** 481, 158**NE**134.

677–13 1/12–New. Complaint verified ten days after purchase held sufficient. 326 **Ill** 481, 158**NE**134.

677–13 1/13–New. Failure of an affidavit to state that defendant and his automobile were in the county when the warrant was issued does not render it defective where the affidavit recites that defendant was in possession of intoxicating liquor which he was driving in the county and had agreed to make delivery on the night when the affidavit was made and it does not appear that he had not reached the county. 159 **Tenn**263, 17**SW(2d)**899.

677–13 1/14–New. Probable cause may be shown by affidavit or testimony before magistrate and need not be shown in information. **Iowa** 232**NW**684.

677–15 214**Ky**240, 282**SW**1097; **MoA** 274**SW**110; **Okl** 268**P**1116; **OklCr** 277 **P**602; 89**PaSuper**467. [a] 4**F(2d)**805; 13**F(2d)**108; 329 **Ill** 223, 160**NE**582; 197 **Ind**539, 151**NE**427; 200 **Ind**579, 164**NE** 274; **Ind** 167**NE**135; 219**Ky**323, 292 **SW**779; 233**Mich**670, 207**NW**832; 235 **Mich**198, 209**NW**74 (description of premises by house number held sufficient, though new and different number had been provided, it appearing that new number had not come into actual use); 146**Miss**593, 111**S**595; 152**Miss** 844, 120**S**209; 314**Mo** 333, 284**SW**433; 316**Mo** 1152, 295**SW**568; 318**Mo** 585, 300 **SW**826; 318**Mo** 1198, 2**SW(2d)**767; **Mo** 7**SW(2d)**256; **OklCr** 277**P**260; **OklCr** 278**P**356; 106**TexCr**75, 290**SW**1103; 111**TexCr**193, 11**SW(2d)**516; **TexCr** 24 **SW(2d)**45; **TexCr** 31**SW(2d)**453; 137 **Wash**156, 242**P**6; 192**Wis**352, 212**NW** 628. [b] 145**Miss**237, 110**S**513; **Okl** 268 **P**1116; 35 **OklACR**681 (apartment in apartment house); 32 **OklCr**203, 240**P** 1075; **OklCr** 277**P**602; **OklCr** 281**P**818 (2dcase) (not stating in what town street named was located); **TexCr** 26**SW(2d)** 244; 196**Wis**99, 219**NW**281.

677–16 143**Miss**694, 109**S**732 (description of automobile as owned and driven by named person in named city).

677–16½–New. if officer can readily locate place. 316**Mo** 1152, 295**SW**568.

677–17 233**Mich**670, 207**NW**832; 192 **Wis**352, 212**NW**628.

677–19 36 **OklCr**36, 251**P**614; 36 **OklCr** 39, 252**P**71; **OklCr** 278**P**356; 113**Tex Cr**679, 22**SW(2d)**943(2dcase); 113**Tex Cr**527, 22**SW(2d)**1069. [a] 36 **OklCr**39, 252**P**71; **OklCr** 279**P**978; **TexCr** 24 **SW(2d)**1089; **TexCr** 31**SW(2d)**453. [b] **Statutory language** need not be used but language of equivalent meaning is sufficient. 36 **OklCr**39, 252**P**71.

677–20½–New. Petition need not state name of accused or owner of premises which are described with reasonable certainty. 316**Mo** 1152, 295**SW**568.

677–20⅓–New. Where the place to be searched is described as a private residence, only the mansion house can be searched. 113**TexCr**31, 19**SW(2d)**49.

677–20¼–New. Describing place as defendant's residence is unnecessary under facts showing premises to be liquor distillery. **TexCr** 26**SW(2d)**211.

677–21 29**F(2d)**836(2dcase) (though certificate of government's official chemist as to alcoholic content of liquor should have been verified, it was sufficient without such verification to support allegations as to alcoholic content contained in affidavit for search warrant). [b] **Affidavit need not be signed** by affiant. 142**Miss**71, 107**S**281. [c] **Statute requiring oaths of two credible persons** is not satisfied where only one of two affiants made required oath. 112 **TexCr**142, 15**SW(2d)**617(2dcase).

677–22 218**MoA**448, 279**SW**200.

677–23 146**Miss**662, 111**S**865, 51**ALR** 336; 89**PaSuper**467.

677–25 See also **MoA** 295**SW**808. But see 316 **Ill** 376, 147**NE**472.

677–27½–New. Notary public may take oath. 217**Ky**316, 289**SW**225.

677–30 [a] **Variance held not fatal.**–238**Mich**171, 213**NW**159.

677–31 19**F(2d)**92; **MoA** 26**SW(2d)** 801 (authority of justice of peace to issue warrant for search of premises in another township of county). [a] (7) Prohibition agents are limited to the means provided by the National Prohibition Act exclusively. 18**F(2d)**1002.

678–32 245**Mich**1, 222**NW**171. But see 18**F(2d)**1002.

678–33 197 **Ind**517, 151**NE**416; 321**Mo** 570, 12**SW(2d)**61; 220**MoA**349, 285**SW** 1021; 100**WVa**505, 130**SE**669 (search warrant issued by justice of peace while out of his district is invalid). [c] (3) Justice of peace in one district of county may issue warrant returnable before justice of another district. 145**Miss**66,

111S131. (4) Justice of peace may issue warrant for search in district of county other than his and returnable in his district. 144Miss452, 110S239. [d] **It is justice's duty as soon as practicable after application is filed** to issue or refuse to issue search warrant. 220 MoA349. 285SW1021.

678–34 6F(2d)570; 197 Ind179, 150NE 50. [a] **City judge.**–197 Ind179, 150NE 50.

678–35 153Miss886, 122S199(1stcase); 309Mo 520, 275SW36; 309Mo 534, 275 SW41 (last two of which hold that warrant is void where issued by circuit court clerk without order of court); 188 Wis266, 205NW813. [a] **In Iowa.**–202 Iowa1116, 211NW503; 202 Iowa1162, 211NW694.

678–35½–New. Unlawful search of another's premises may not be complained of by one who admits liquor found thereon was his. 188Wis266, 205NW813.

678–35⅓–New. A verdict of guilty in a prosecution for possessing a still, manufacturing liquor, and maintaining nuisance does not carry with it finding that defendant had an interest in the property searched so as to permit him to object to the legality of the search. 198 Ind683, 154NE1.

678–35¼–New. The sole purpose of a search warrant is discovery and seizure by proper officers of specific articles which constitute evidence of crime. 198 Ind182, 150NE367.

678–35½–New. Search warrant sworn out by official charged with enforcement of National Prohibition Law is sufficient. 6F(2d)570.

678–35⅗–New. The warrant is properly issued by the justice to the sheriff in some jurisdictions. 197 Ind517, 151 NE416.

678–35½–New. An order of the prohibition commissioner quashing a search warrant is not an order of the district court from which the appeal will lie, but the district court may vacate or modify such order. 36F(2d)86.

678–36 15F(2d)644; 31F(2d)204; 200 Ind415, 164NE259(1stcase); 89 IndA 30, 165NE558(1stcase); 89 IndA91, 166 NE769; 89 IndA225, 166NE11 (evidence held to show probable cause); 214Ky 84, 282SW762; 216Ky270, 287SW726; 74Mont377, 240P984; 290Pa121, 138A 90; 188Wis266, 205NW813. See also 10PaDist&Co 127. [a] (2) 32F(2d) 760. (7) Detection of order of alleged liquor held alone not sufficient probable cause. 17F(2d)270. (8) Affidavits held to show probable cause. 17F(2d)937. (9) Information obtained by agent while on defendant's premises without his knowledge may be used in obtaining search warrant. 6F(2d)584. (10) Information and observations by prohibition agents while on premises, though without a search warrant, may be used and is sufficient to warrant issuance of search warrant. 6F(2d)569. (11) Affiant's detection of odor of liquor emanating from warehouse, in connection with circumstance of incoming and outgoing motor vehicles from different states and presence of numerous cans, afforded probable cause for issuance of search warrant. 34F(2d)30. (12) Warrant held issued without probable cause. 42F(2d)424. (13) In determining existence of probable cause, commissioner exercises judicial discretion. 28 F(2d)898. (14) Other evidence held to show probable cause for search and seizure. 30F(2d)968. [c] (3) Probable cause held shown. 35 OhA87, 172NE 301. [f] 329 Ill 223, 160NE582. [j] **Probable cause requires reasonable certainty** of violation of law. 290Pa121, 138A90. [k] **Magistrate issuing warrant** must investigate if dwelling house is being used for sale of liquor. 290Pa 121, 138A90. [l] **Act is not unconstitutional as violating provision** against issuing warrants without probable cause, by reason of failure to limit time within which officer must return same. 161La988, 109S787. [m] **Evidence held sufficient** to show probable cause for searching premises. 198 Ind182, 150 NE367; IndA 167NE548; NJQuartSess 147A330(2dcase). [n] **Finding of probable cause** sustained by application and affidavit. 318Mo 1198, 2SW(2d)767. [o] **Finding of probable cause for issuance of warrant** is sufficiently supported by affidavit directly and positively charging possession of still. Ind 168 NE577. [p] **Probable cause shown** where men were observed going in place sober and coming out intoxicated. Ind A 168NE715(1stcase). [q] **Evidence and affidavit held sufficient** to show probable cause for issuing search warrant. IndA 169NE63.

678–37 28F(2d)898; Ind 166NE769; Iowa 232NW684 (examination of informant in addition to information); 316Mo 1014, 292SW61; 316Mo 1152, 295 SW568; 188Wis266, 205NW813 (merely filling out blank application and swearing to it is not sufficient). [c] In Missouri.–312Mo 425, 279SW102; 1SW (2d)841; A 14SW(2d)40. [d] **Search warrant is void** where only affidavit considered by commissioner was made before notary public. 36F(2d)316.

678–37½–New. Probable cause does not exist unless magistrate is convinced, by competent and material evidence, that there is reasonable ground for suspecting that liquor is possessed for prohibited purposes. 324 Ill 160, 154NE907.

678–37⅓–New. Finding of probable cause by judge issuing warrant can be impeached only when want thereof appears on record. 316Mo 602, 292SW36.

678–37¼–New. After preliminary examination or waiver thereof, on a criminal charge arising from the possession of things seized under a search warrant, a United States commissioner has no further power, and cannot entertain proceedings to controvert grounds on which the warrant was issued. 28F(2d) 898.

678–37⅕–New. Magistrate held not to have abused discretion in deciding probable cause existed for issuance of warrant. TexCr 26SW(2d)211.

678–38 4F(2d)881, 883 [citCJ]; 12F (2d)956; 14F(2d)500; 17F(2d)274; 17 F(2d)390; 23F(2d)38; 30F(2d)298; 34 F(2d)275 (entry held not made for purpose of arrest); 219Ky519, 293SW1072; 226Ky101, 10SW(2d)606; 235Ky825, 32 SW(2d)416; 118 Okl 262, 247P377 (unless violation of prohibitory law committed in officer's presence); 35 OklCr 91, 249P354; OklCr 280P476; 154Tenn 56, 289SW532; 192Wis347, 212NW631; Sask [1930] 1DomLR830 (private dwelling house). But see 113TexCr219, 18SW (2d)654. [c] 37 OklCr402, 258P814. [e] **Trespass by officer on defendant's land** so near outbuilding as to enable him to observe still in operation does not violate constitutional prohibition against unreasonable searches and seizure. 73 Mont535, 237P495. [f] **Search of woodland**, thirty yards from defendant's residence, without warrant is held illegal. 220Ky656, 295SW987. [g] **Entry under warrant for arrest which is not made** does not authorize seizure of liquor or use thereof in evidence. 17F(2d)390. [h] **Search of woodland pastures or fields** not within curtilage or close proximity of dwelling house may be made without warrant where commission of offense is suspected. OklCr 267P682. [i] **Reasonable cause for belief that felony is being committed in dwelling** does not authorize search without warrant. 39Wyo 299, 270P1065. [j] **Private dwelling.**–34F(2d)495. [k] **Drug store** cannot be searched without warrant where officer did not observe any violations of law and cannot be justified under statute making records, subject to inspection, in absence of request to inspect them. 37F(2d)415. [l] **Officer lawfully in residence to execute warrant of arrest** of person may arrest for additional offense evidence of which is seen by him and which finding there he may seize. 27 OhNPNS473.

678–39 5F(2d)673; 6F(2d)224 (prohibition agent may enter soft drink place and without warrant arrest proprietor found in possession of liquor); 13F(2d) 110; 15F(2d)953; 21F(2d)830; 24F (2d)111; 40F(2d)271(1stcase); 40F(2d) 295; 40F(2d)904; Conn 151A526; 196 Ind665, 149NE348; Ind 165NE757; 219 Ky519, 293SW1072; 234Ky695, 28SW (2d)976; 234Mich361, 208NW457; 244 Mich346, 221NW302; 169Minn513, 211 NW463; 39 OklACR227; OklCr 280P, 476; 106TexCr357, 292SW880; 108Tex Cr650, 2SW(2d)272; 112TexCr158, 15 SW(2d)629; 112TexCr307, 17SW(2d)56 (2dcase); 113TexCr122, 18SW(2d)618; TexCr 28SW(2d)134; TexCr 28SW(2d) 556. See also 226Ky101, 10SW(2d)606.

678–40 24F(2d)639; 219Ky519, 293SW 1072. [a] **Statement by defendant** on being shown search warrant to "go ahead and search" is not invitation to search, but statement of intention not to resist search, and is not waiver of constitutional rights. 34 OklCr434, 246 P1109. [b] **Invitation to search person held not consent to search of car.**–219 Ky519, 293SW1072. [c] **Remark of defendant's brother**, on being told that officer had search warrant, "all right, go ahead and search," does not show authorized consent. 110TexCr529, 7SW (2d)1083.

678–40½–New. In some jurisdictions defendant does not waive his constitutional right by consenting to search made under authority of search warrant. 35 OklCr91, 249P354.

678–41 22F(2d)134.

678–42 17F(2d)390; 28F(2d)639; 152 Miss209, 119S179. See also 43F(2d) 1005. [a] **Search of residence** without warrant and not in connection with valid arrest is unlawful. 37 OklCr402, 258 P814; Wyo 246P241.

679–43 22F(2d)690.

679–43½–New. Procurement of a search warrant after unlawfully entering a house and finding intoxicating liquor does not legalize the unlawful search where a search after the issuance of the warrant was only a continuance of the unlawful search. 152Miss209, 119S179.

679–44 13F(2d)848; 23F(2d)38; 77 Mont299, 250P615; 37 OklCr415, 259P 150; 120 Or643, 253P533; 159Tenn428, 19SW(2d)248; 112TexCr119, 14SW(2d) 280(2dcase). See also 275US192, 48SCt 74, 72Led231. But see 34F(2d)275; 222Ky670, 1SW(2d)1072; 149Miss849, 116S104; 159Tenn373, 19SW(2d)239.

679–44½–New. To authorize a search by an officer without a warrant he must have probable cause to believe that the law is being violated in his presence. 74 Mont428, 240P978; 120 Or643, 253P533.

679–44⅓–New. It is the duty of an officer to seize liquor and arrest the offender where the law is being violated in his presence. 74Mont428, 240P978.

679–44¼–New. To justify a seizure without a warrant, it must appear that there was a violation of the prohibition law in the presence of the officer. 120 Or643, 253P533.

679–44⅕–New. To justify a search without a warrant on the ground that a crime is committed in the presence of the officer, it is not necessary that the offender be present. 120 Or643, 253P 533.

679–45 142Miss462, 107S672.

679–46 Mo 18SW(2d)509.

679–47 [a] **Mere suspicion** is insufficient. 235Ky429, 31SW(2d)709.

679–48 40F(2d)267 (without reasonable cause); 230Ky767, 20SW(2d)730 (accidental discovery thereof in opening door for purpose of obtaining shelter from rain); 237Mich215, 211NW742; Miss 111S381; 37 OklCr396, 258P812; OklCr 267P1038; OklCr 280P475 (without having reason to believe that car contained whisky); OklCr 289P792 (mere suspicion aroused by increased speed held not to justify search); OklCr 290P344; 155Tenn102, 291SW839 (dictum); 159Tenn537, 20SW(2d)1045(2d case) (appearance of car not warranting search). See also 149Miss849, 116S104; 113TexCr142, 18SW(2d)663. But see TexCr 29SW(2d)354. Contra 153Miss 691, 121S293. [a] **Attempt of deputy sheriff** to search automobile held unlawful, in absence of search warrants or absolute personal knowledge. 192NC 692, 135SE866. [b] **Occupant of automobile who does not own it has no right to interpose objection** to search of automobile for liquor, even if it was without probable cause. 111TexCr154, 11SW (2d)794(2dcase); 111TexCr388, 13SW (2d)106. [c] **If occupant of automobile**

is lawfully arrested, search thereof and seizure of liquor is proper. 40**Wyo** 508, 281P17.

679–50 219**Ky**519, 293**SW**1072; 240 **Mich**107, 214**NW**954; 51**ND**98, 199**NW** 196; **OklCr** 278**P**409(1stcase); 110**Tex Cr**569, 9**SW(2d)**740; 112**TexCr**612, 18 **SW(2d)**625. [a] **"Search me"** held invitation to search person, not car. 219 **Ky**519, 293**SW**1072. [b] **Admission by defendant of having whisky in car** waives necessity of search warrant by officer searching car. 113**TexCr**433, 22 **SW(2d)**659.

679–50½–New. , or unless he has probable cause to believe the law is being violated. 196 **Ind**562, 149**NE**62.

679–50¾–New. Information obtained through an illegal search of defendant's automobile, in which part of the whisky was taken from the car, did not render legal the return trip of the officers, in which the remainder of the whisky was taken. 110**TexCr**569, 9**SW(2d)**740.

679–51 5**F(2d)**622 (evidence held to show reasonable grounds for searching automobile); 8**F(2d)**219; 44**F(2d)**165; 216**Ala**522, 113**S**541; 30**Ariz**258, 246**P** 548; **Ind** 168**NE**124 (where officer has probable cause for believing that vehicle is being used for unlawful transportation); **Ind** 168**NE**581 (abandonment of car by defendant); 120**Kan**301, 243**P** 299; 243**Mich**688, 220**NW**714; 250**Mich** 692, 230**NW**918; 146**Miss**351, 111**S**860; 316**Mo** 179, 289**SW**954; 24 **OhNPNS**124; 155**Tenn**102, 291**SW**839 (on reasonable suspicion); 112**TexCr**250, 16**SW(2d)** 244; 112**TexCr**313, 16**SW(2d)**1077(2d case); **TexCr** 27**SW(2d)**173 (probable cause). See also 38**F(2d)**106; 44**F(2d)** 224; 120 **Or**444, 250**P**220; 111**TexCr** 627, 13**SW(2d)**849; **Va** 155**SE**689; 38 **Wyo** 455, 268**P**571. But see 246**Mich** 524, 224**NW**364. [b] **National Prohibition Act** authorizing seizure of automobile upon reasonable grounds of belief does not apply to stores, dwellings, and other structures. 4**F(2d)**881. [c] **Officer may use reasonable means** to stop automobile if he learned facts warranting reasonably prudent man to believe it was illegally transporting liquor. 5**F(2d)**280. [d] **Warrant to search automobile** or other vehicle is unnecessary where officers have probable cause for suspecting presence of liquor. 267 **US**132, 45**SCt**280, 69**L ed**543; 155**Tenn** 40, 290**SW**4. [e] **Measure of legality** of seizure of liquor without warrant in course of transportation is that officer shall have reasonable and probable cause to believe liquor is being illegally transported. 267**US**132, 45**SCt**280, 69**L ed**543. [f] **Probable cause for search** held essential element for valid exercise of power. 216**Ala**522, 113**S**541; 156**Tenn**303, 300**SW**4. [g] **Statutes dealing with search warrants** held not to deal with search of automobiles. 216 **Ala**522, 113**S**541. [h] **State officers have same authority to seize** and search automobiles as federal officers. 216**Ala** 522, 113**S**541. [i] **Statute prohibiting unlawful search** is not violated by search of automobile for liquor based on probable cause. 106**TexCr**330, 292**SW**550. [j] **Evidence held admissible** to show probable cause for searching automobile. 112**TexCr**533, 17**SW(2d)**1050. [k] **Probable cause for search without warrant.–Ind** 168**NE**22; **TexCr** 31**SW(2d)** 826(1stcase); 154**Wash**87, 280**P**922(2dcase). [l] **Probable cause shown.–35 F(2d)**599; **TexCr** 20**SW(2d)**769; **TexCr** 20**SW(2d)**770; **TexCr** 20**SW(2d)**782. [m] **Officer arresting defendant for driving automobile at excessive speed** may search automobile. 247**Mich**536, 226**NW** 337(1stcase). [n] **Anonymous information** received over telephone is not alone sufficient to justify search without warrant. 154**Wash**87, 280**P**922(2dcase).

679–51½–New. A search of an automobile without a warrant is authorized where an officer has reasonable ground for suspecting that a felony is being committed in his presence. 233**Mich**449, 206**NW**988.

679–51¾–New. Bottles, seen through the window of a closed automobile, and intoxicated condition of men who are in possession of the automobile, justify a search and seizure of liquor therein. 232**Mich**366, 205**NW**95.

679–51¼–New. The question of probable cause or information of an officer making a search of an automobile without a warrant is a judicial one for court. **Miss** 108**S**721; 150**Miss**293, 116 **S**430.

679–51⅓–New. There must be reasonable belief or probable cause for search of an automobile without warrant, 145 **Miss**210, 110**S**588.

679–51⅙–New. and the search and seizure must be made within a reasonable time after information is received. 145**Miss**210, 110**S**588.

679–51⅐–New. Probable cause, justifying search of an automobile for liquor, does not exist unless facts and circumstances within the officer's knowledge would warrant a belief that liquor was being transported therein. 15 **F(2d)**623.

679–51⅛–New. In some jurisdictions officers may search automobile without warrant when informed that they might catch person with whisky if they hurried and time is insufficient to procure warrant. **TexCr** 31**SW(2d)**818.

679–53½–New. Accused cannot complain of search and discovery of articles on lands of another. 15**F(2d)**953; 312**Mo** 99, 279**SW**144.

679–53⅓–New. An officer making a search must make known the authority under which he acts. 200 **Ind**69, 155**NE**817.

679–53¼–New. Where occupants disclaim knowledge of the presence of liquor, no warrant is necessary for removal. 15**F(2d)**563.

679–53⅕–New. The act of a customs officer in taking a sealed, unstamped envelope from a ship's purser and directing its delivery to the customs collector who found that it contained records of illegal liquor sales is not unlawful. 15**F(2d)**762.

679–53⅙–New. Under the National Prohibition Act, the right to inspect a druggist's records includes the right to inspect his liquor supply. 11**F(2d)** 892.

679–53⅐–New. No warrant is needed to search a soft drink parlor, it being a public place. 200 **Ind**69, 155**NE**817.

679–53⅛–New. Accused cannot complain of search of another's property over which he has no control. 219**Ky** 444, 293**SW**955.

679–53 1/9–New. Driving an automobile of defendant to jail, after his arrest, has been held not unlawful. 106**Tex Cr**391, 293**SW**178.

679–53 1/10–New. Where an officer has made an authorized arrest for a felony or misdemeanor, although without a warrant, he may search the premises for evidence of the crime; 312**Mo** 99, 279**SW**144.

679–53 1/11–New. but a search not incidental to an arrest may not be made in either case, without a warrant. 312 **Mo** 99, 279**SW**144.

679–53½–New. Merely looking into an automobile and there seeing intoxicating liquor which is not concealed is not illegal search. 36 **OklCr**55, 252**P** 72.

679–53 1/13–New. Disclaimer of ownership of liquor is a waiver of the right to complain of unlawful search and seizure. 17**F(2d)**829.

679–53 1/14–New. Disclaimer of ownership is waiver of right to complain. 17 **F(2d)**829.

679–53 1/15–New. Where an officer went to a house to serve a warrant for nonpayment of a road tax, knocked the door down, entered without a search warrant, and found liquor, the entrance was not lawful so as to give the officer a right to seize the contraband. 152**Miss**209, 119**S**179.

679–53 1/16–New. Seizure of goods for use in the manufacture of intoxicating liquor may be valid without a search warrant. 27**F(2d)**903.

679–53 1/17–New. A shipment of liquor landed at a dock and retained by the collector of customs is subject to forfeiture, although seized without a search warrant. 24**F(2d)**772.

679–53 1/18–New. No warrant is needed to search a public road or ditch or uninclosed grounds not used in enjoyment of the dwelling of accused. 113**TexCr** 69, 18**SW(2d)**659.

679–53 1/19–New. As respects the right to search without a warrant an outbuilding in which defendants were violating the liquor law, defendant could not complain that the officer was a trespasser up to the time he stepped into the building which defendants occupied as lessees, since he had not trespassed on the premises. 33**F(2d)**193.

679–53 1/20–New. Probable cause for believing that liquor is possessed for sale does not authorize search without warrant of building used as habitation and barber shop. **TexCr** 31**SW(2d)**650.

679–54 4**F(2d)**817; 5**F(2d)**604; 7 **F(2d)**247; 7**F(2d)**295; 7**F(2d)**309; 7 **F(2d)**370; 8**F(2d)**737; 13**F(2d)**848; 14 **F(2d)**398; 15**F(2d)**644; 16**F(2d)**59; 24 **F(2d)**111; 35**F(2d)**209; 37**F(2d)**751(1st case); 38**F(2d)**450; 40**F(2d)**565; 43 **F(2d)**173; 43**F(2d)**207; 32**Ariz**121, 256 **P**362; 28**Hawaii**173; **Ind** 156**NE**560; 200 **Ind**583, 164**NE**315; 222**Ky**218, 300 **SW**596; 233**Mich**559, 207**NW**334; 234 **Mich**361, 208**NW**457; 234**Mich**683, 209 **NW**110 (where sheriff entering soft drink place was told by owner that liquors sold were intoxicating); 238**Mich** 543, 213**NW**683; 246**Mich**524, 224**NW** 364; 247**Mich**557, 226**NW**232; 146**Miss** 351, 111**S**860; 153**Miss**299, 120**S**731; **Mo** 280**SW**1044; **Mo** 300**SW**485; 73**Mont** 535, 237**P**495; 77**Mont**299, 250**P**615; 19 **OhA**82; 118 **Okl** 262, 247**P**377; **Okl** 271 **P**432(2dcase); 36 **OklCr**55, 252**P**72; 37 **OklCr**47, 256**P**70; 37 **OklCr**415, 259**P** 150; **OklCr** 268**P**993; **OklCr** 274**P**1095; 120 **Or**643, 253**P**533; 12**PortoRicoFed** 436; 155**Tenn**40, 290**SW**4; 157**Tenn**199, 7**SW(2d)**805; 159**Tenn**428, 19**SW(2d)** 248; 111**TexCr**260, 12**SW(2d)**586; 103 **TexCr**575, 281**SW**861; **TexCr** 291**SW** 231; 106**TexCr**391, 293**SW**178; 107**Tex Cr**196, 296**SW**523; 107**TexCr**285, 296 **SW**542; 108**TexCr**337, 300**SW**63; 110 **TexCr**646, 10**SW(2d)**724; 111**TexCr**325, 13**SW(2d)**86; 111**TexCr**226, 13**SW(2d)** 87; 111**TexCr**245, 13**SW(2d)**95; 112**Tex Cr**1, 13**SW(2d)**837; 112**TexCr**122, 14 **SW(2d)**282; **TexCr** 24**SW(2d)**433; **Tex Cr** 28**SW(2d)**556; **TexCr** 32**SW(2d)**476; 105**WVa**346, 143**SE**88; 108**WVa**277, 150 **SE**736; 192**Wis**347, 212**NW**631. See also 26**F(2d)**769; 110**TexA**290, 8**SW** (2d)119. But see 243 **IllA**348; 27 **Oh NPNS**473. [b] **Reasonable and probable cause for search.–Ind** 170**NE**539.

679–55 4**F(2d)**817 (prohibition officer may seize liquor and vehicle if circumstances would cause reasonably cautious person to believe liquor was being illegally transported); 8**F(2d)**219; 199 **Ind**727, 160**NE**449; **Ind** 166**NE**430; 235**Mich**144, 209**NW**57; 146**Miss**351, 111 **S**860; 153**Miss**691, 121**S**293; 312**Mo** 212, 278**SW**1030; 316**Mo** 878, 292**SW**29; 318 **Mo** 592, 300**SW**685; 113 **OhSt**512, 150 **NE**74, 42**ALR**1151; 36 **OklCr**55, 252**P** 72; 155**Tenn**102, 291**SW**839; 111**Tex Cr**223, 12**SW(2d)**564; 107**TexCr**663, 298 **SW**598; 108**TexCr**659, 2**SW(2d)**455; 111**TexCr**154, 11**SW(2d)**794(2dcase); 111**TexCr**337, 12**SW(2d)**804; 111**TexCr** 355, 12**SW(2d)**1033; 111**TexCr**325, 13 **SW(2d)**86; 111**TexCr**348, 13**SW(2d)** 102; 111**TexCr**388, 13**SW(2d)**106; 111 **TexCr**395, 13**SW(2d)**114; 112**TexCr**1, 13**SW(2d)**837; 111**TexCr**482, 14**SW(2d)** 278 (that defendant was drunk is relevant on issue of probable cause); 112 **TexCr**149, 15**SW(2d)**624; 111**TexCr**558, 15**SW(2d)**633; 112**TexCr**313, 16**SW(2d)** 1077(2dcase); 112**TexCr**352, 16**SW(2d)** 1082; 112**TexCr**533. 17**SW(2d)**1050; 112**TexCr**538, 17**SW(2d)**1060; 112**Tex Cr**615, 18**SW(2d)**168; 113**TexCr**142, 18 **SW(2d)**663; **TexCr** 27**SW(2d)**177; 151 **Wash**114, 275**P**75; 101**WVa**160, 132**SE** 366; 40**Wyo** 508, 281**P**17. See also 25 **F(2d)**346; **Ind** 156**NE**560; **Mo** 148**SW** (2d)434 (arrest on probable cause and search thereupon held lawful).

679–56 43**F(2d)**1005; 240**Mich**107, 214 **NW**954; 142**Miss**462, 107**S**672; 37 **Okl Cr**410, 259**P**152. See also 27 **OhNPNS** 445.

679–56½–New. That defendant threw a bottle of whisky out of an automobile while being pursued by officers whose purpose was to search the car for liquor did not justify a search without

a warrant. 153Miss616, 121S278.

679-56⅓-New. Evidence held to justify search, where officers went to premises on complaint of a fire violation. 36 F(2d)699.

679-57 216Ala522, 113S541; Mo 278 SW1028 (on probable suspicion that liquor is being carried); 31 OhA417, 165 NE740; 111TexCr288, 12SW(2d)582; 107TexCr324, 296SW579; 110TexCr478, 9SW(2d)352; 192Wis619, 213NW318; 195Wis375, 218NW185. [c] (4) In Alabama, similar rule is applied. 216 Ala522, 113S541. [d] (2) Discovery that occupant had drunk intoxicating liquor held insufficient to warrant search. 148Miss673, 114S748. [e] **Statute held constitutional.**-216Ala522, 113 S541. [f] **Automobile on premises** which are used as soft drink parlor under license is part of premises which may be searched without warrant. 192Wis 619, 213NW318. [g] **Probable cause** shown to entitle officer to search soft drink parlor without warrant. 192Wis 619, 213NW318. [h] **In Texas.**-108Tex Cr298, 1SW(2d)288. [i] **Search of automobile.**-153Miss755, 121S481. [j] **In Oklahoma.**-No search warrant is necessary to justify search of field which is no part of curtilage. Cr 274P487; Cr 290P417(1stcase). [k] **In Pennsylvania.**-91PaSuper544. [l] **Where sheriff did not believe** and had no reason to believe that liquor was being transported in automobile before he halted it, there was no probable cause for search. 151Miss580, 118S413(2dcase).

680-58 OklCr 274P1095; 106TexCr130, 290SW766. [a] (2) Suit case carried by hand along public highway is not "other vehicle" within proviso of statute prohibiting search except on certain conditions. 195NC747, 143SE538. [b] See also 105TexCr568, 290SW762; 106TexCr1, 290SW743. [f] **"Baggage,"** as used in statute prohibiting search of baggage except on certain conditions, does not include suit case containing four and one half gallons of contraband liquor. 195NC747, 143SE538.

680-59 140Miss841, 105S479 (seizure without warrant held authorized, where person with kegs of liquor in automobile stated, in answer to question of sheriff before making arrest, that kegs contained whisky); 105TexCr568, 290SW 762; 106TexCr1, 290SW743; 106TexCr130, 290SW766. [b] **Evidence held sufficient to show probable cause** for seizure and search without warrant. 106TexCr130, 290SW766; 108TexCr 313, 1SW(2d)303. [c] **Search of automobile on public highway** may be made without warrant, under statutes, where officer has knowledge or information constituting probable cause. Miss 115 S427, 105TexCr568, 290SW762; 105 TexCr641, 290SW764; 106TexCr1, 290 SW743.

680-66½-New. A seizure, under local law relative to issue of search warrant which is invalid, is unlawful. 125Misc 882, 212NYS400.

680-66⅓-New. **In Ohio** search of dwelling of defendant not engaged in bartering is illegal. 23 OhA137, 154NE814.

680-67 [a] **State troopers** are not agents of United States authorized to make searches or seizures for enforcement of national Prohibition Act. 23F(2d)696.

680-68 5F(2d)667; 6F(2d)569; 21F (2d)191; 37F(2d)316; 38F(2d)442. [a] **Whether search and seizure of automobile was reasonable** must be determined by court in each case from facts. 34PortoRico 111 (sufficient reason shown).

680-70 [a] **Search of automobile in defendant's yard without warrant** is authorized where officers having reason to believe that it was transporting liquors could not prevent its entering yard. 13 PortoRicoFed410. [b] **Property designed for manufacture of intoxicating liquors** may, under proper circumstances, be seized without search warrant. 43F(2d)207.

680-73 33F(2d)467 (odor of fermenting mash and burning kerosene held not to justify search); 34F(2d)877. But see 36F(2d)164. [a] **Buildings other than private dwellings** may be searched without warrant if search is made without malice and upon probable cause. 23F (2d)38. [b] **Provision must be given reasonable construction** to aid in enforcement of prohibition. 34F(2d)952. [c] **Search warrant for country hotel** is not invalidated because it is later discovered for first time that number of rooms therein are occupied as private dwellings. 34F(2d)952.

680-73½-New. That statute places burden of proving that possession of liquor was lawful on possessor does not deprive him of the right to protection against unlawful search and seizure. 12 F(2d)956.

680-73¼-New. Search by police officers under direction of federal prohibition agents, where the agents were without authority to act themselves, is unlawful, and evidence obtained should be suppressed. 13F(2d)259.

680-73¼-New. Probable cause shown for issuance of a warrant to search a freight car and brewery for intoxicating liquors. 21F(2d)119.

680-73⅓-New. State troopers are not officers under the terms of the national Prohibition Act, since its terms include only federal officers. 275US310, 48SCt 137, 72L ed139, 52ALR1381.

680-73½-New. Defendant not connected with the place where whisky was seized cannot complain of its seizure without warrant. 23F(2d)235.

680-73½-New. The rule against search without a warrant of an abode of any person suspected of crime does not apply to automobiles, railroad stations, public stores, or other public places. 12Porto RicoFed350.

680-73⅔-New. As a prerequisite to the search of a private residence without a warrant as an incident to arrest, there must be a certainty of knowledge of both the nature and the instant perpetration of the crime. 34F(2d)275.

680-74 248 IllA462; 197 Ind16, 164NE 93; 89 IndA91, 165NE769; 234Mich335, 207NW818; OklCr 267P867; 108TexCr 511, 1SW(2d)888; 152Va368, 147SE267. [a] 13F(2d)905. [d] (2) Direction to bring liquor seized before officer issuing warrant held not to vitiate warrant as inconsistent with statute directing officer to hold thing seized till disposed of by law. 144Miss87, 109S263. [e] 210Ky 698, 276SW495. [f] 198 Ind1, 151NE 405; 162La357, 110S557; 314Mo 646, 285SW474; 316Mo 252, 289SW821; NJ QuartSess 150A44. [i] **In Montana.**-73 Mont535, 237P495. [j] **Federal warrant.**-210Ky610, 276SW537. [k] **Warrant issued by commission of safety** has been held sufficient. 213Ala649, 106S 44. [l] **Recital of facts stated in affidavit.**-235Mich646, 209NW915. [m] **Statute** held not invalid. 326 Ill 230, 157 NE195. [n] **Failure to describe magistrate's official title** does not render search warrant invalid. 326 Ill 230, 157 NE195. [o] **Affidavit of one person** held sufficient for search warrant, notwithstanding statute. 106TexCr564, 293SW 1101. [p] **Warrant need not describe** affiant as a "credible person" and is not for this reason invalid in absence of motion to quash. 145Miss66, 111S131. [q] **Warrants not made returnable within ten days** are defective. NJQuart Sess 139A401. [r] **Warrant not containing directions** as to whether service should be made by day or any time of night held void. NJQuartSess 139A 392. [s] **Validity of search warrant** is essential, even though search is made by consent. 110TexCr274, 8SW(2d)133. [t] **Failure to invoke statute** authorizing evidence regarding validity of search warrant may preclude objection. NJ QuartSess 150A44. [u] **Affiants' testimony** held to refute contention that court lacked real evidence when warrant was issued. NJQuartSess 150A44. [v] **Requirement that writ run in name of state** held complied with. NJQuart Sess 147A330(2dcase). [w] **Allegations as to offense held sufficient.**-TexCr 25 SW(2d)875.

681-75 [a] **Warrant issued by commission of public safety** has been held not invalid. 213Ala649, 106S44. [b] **Official signature not essential** when warrant discloses its official nature. 326 Ill 230, 157NE195.

681-76 [b] **In Indiana.**-197 Ind179, 150 NE50.

681-77 109TexCr83, 3SW(2d)447; 112 TexCr142, 15SW(2d)617(2dcase).

681-78½-New. It should be directed to a person responsible for its proper execution. 13F(2d)905.

681-78¼-New. A search warrant directed to an internal revenue officer by a federal prohibition agent is insufficient in not being directed to the person responsible for proper execution. 13F(2d) 905.

681-81 See also 312Mo 425, 279SW102. But see Mo 1SW(2d)841.

681-82 146Miss677, 111S738; 150Miss 808, 117S115. [a] (3) That warrant is made returnable before police justice residing outside of district of justice of peace who took affidavit and issued warrant is immaterial. 146Miss593, 111S 595.

681-83 108TexCr310, 300SW69.

681-84 316Mo 252, 289SW821; NJ QuartSess 139A401; TexCr 25SW(2d) 839. [b] 102WVa234, 134SE919. [c] **Warrant directed against unknown owner of premises sufficient.**-213Ala649, 106 S44. [d] **Use of fictitious name** not insufficient because affiant and commissioner knew names of persons living on premises. 213Ala649, 106S44 (such knowledge not equivalent to knowing person in charge of premises or responsible therefor). [e] **Name of person.**-217Ky503, 289SW1108; 24 OhNPNS1. [f] **Mistake in naming person** does not invalidate warrant. 198 Ind182, 150NE 367.

681-86 5F(2d)651; 73Mont272, 235P 716; 47RI 269, 132A734; 157Tenn538, 11SW(2d)879; 100WVa476, 130SE806; 102WVa234, 134SE919. See also OhA 173NE307(1stcase). [a] **Use of fictitious name** does not invalidate search warrant. 213Ala649, 106S44. [b] **That affiant and officer issuing warrant knew names of persons living on premises** does not invalidate warrant issued to fictitious name. 213Ala649, 106S44 (such knowledge not being equivalent of knowing who owned premises). [c] **Search warrant, in which name of owner of premises was erased, and another inserted,** after warrant had been placed in hands of officers, has been held not invalid for that reason. 198Wis21, 222NW824.

681-87 47RI 269, 132A734.

681-87½-New. Warrant may direct an officer to hold property to be dealt with according to law. 17F(2d)276.

681-87⅓-New. Warrant directing search without alleging occupancy of any part of premises by defendant held void. 198 Ind496, 154NE278.

681-87¼-New. Where one consents to search, irregularities in the issuance of a search warrant are waived. 105TexCr 365, 288SW202.

681-87½-New. A warrant should contain a direction that it be executed forthwith. NJQuartSess 139A392.

681-87⅙-New. Defendant, waiving examination before a United States commissioner, after arrest, waived right to controvert grounds on which warrant was issued. 28F(2d)898.

681-87⅐-New. One not the owner of the premises may not complain of a defective search warrant. 101TexCr101, 7 SW(2d)955.

681-87⅛-New. A search warrant based on a proper affidavit may authorize a search at any time of the day or night. 24F(2d)890.

681-87⅑-New. Search warrant need not allege that dealing with liquor was for beverage purposes. NJQuartSess 150A 44.

681-87⅒-New. Search warrant need not allege precise date on which liquor was sold. NJQuartSess 150A44.

681-87⅓₁₁-New. Issue of warrant thirteen days after purchase of liquor and seizure twenty days after issuance of warrant held not unreasonable invalidating search. NJQuartSess 150A44.

681-87½₁₂-New. Search warrant issued by justice of the peace is not invalid because directed to deputy sheriff or any constable of county. 108WVa692, 152 SE749.

681-88 44 Ida43, 254P788, 52ALR463; 246 IllA248; 309Mo 89, 273SW736; **NJ QuartSess** 139A401. [a] 267US498, 45 SCt414, 69L ed757; 4F(2d)805; 6F(2d) 570; 326 Ill 230, 157NE195; 240Mich59, 214NW935; Mo 1SW(2d)837; 321Mo 570, 12SW(2d)61; 89PaSuper238. [b] **NJQuartSess** 139A401. [e] **In Michigan.** -233Mich169, 206NW506. [f] **Commissioner in finding probable cause** and issuing warrant exercises judicial power. 5F(2d)292. [g] **Complaint alleging reasonable belief** held sufficient. 326 Ill 230, 157NE195.

681-89½-New. Under some statutes a warrant for search of a private dwelling must recite the material facts alleged in the affidavit upon which it is based. 234 Mich335, 207NW818.

681-89¾-New. A warrant failing to comply with such requirement is void. 234Mich335, 207NW818.

681-89¼-New. Lack of probable cause in an affidavit as to liquor in a barn is cured by search of the house only. 326 Ill 481, 158NE134.

681-89½-New. The date of purchase need not be alleged in connection with probable cause. 326 Ill 481, 158NE134.

681-89¾-New. A single sale is sufficient to show probable cause. 326 Ill 481, 158 NE134.

681-90 6F(2d)570; 16F(2d)802; 23F (2d)929; 43F(2d)399; **NJQuartSess** 139 A401; **OklCr** 279P986; 153Tenn431, 284 SW356 (referring to affidavit for description); 103WVa588, 138SE384. [a] **Papers improperly seized** under warrant, not describing them, are inadmissible in evidence. 7F(2d)760. [b] **Search and seizure under warrant containing mere general description** are invalid. 23F(2d) 929. [c] **Affidavit praying search warrant to search for liquor** held not to warrant searching for stolen goods. **Wash** 288P923.

681-91 24 OhNPNS81. But see 16F (2d)317. [a] **Under warrant valid as authorizing search** for liquor, but void as authorizing seizure of records, such seizure is not justified on ground that officers were lawfully on premises. 5F (2d)282.

681-91½-New. An officer searching premises under a warrant authorizing a search for articles designed for the manufacture of intoxicating liquors has a right to seize intoxicating liquors discovered on the premises by the use of his own senses. 121 Or561, 254P1010.

681-92 [c] 267US498, 45SCt414, 69L ed 757; 16F(2d)802; 321 Ill 484, 152NE 500; 316Mo 252, 289SW821; 322Mo 1203, 18SW(2d)58; **NJQuartSess** 139A 401; 290Pa181, 138A682.

682-94 [a] (1) 321 Ill 484, 152NE500. [c] **Property to be seized** need be described with only reasonable certainty. 4F(2d)848.

682-96 267US498, 45SCt414, 69L ed757; 6F(2d)570; 29F(2d)187; 29F(2d)294; 7Alaska37; 246 IllA248; 210Ky698, 276 SW495 [citCJ] (essential that warrant describe property to be searched with sufficient accuracy to locate it with reasonable certainty); 211Ky766, 278SW 134; 316Mo 252, 289SW821; **OklCr** 269 P376; **OklCr** 276P784; **OklCr** 277P602; 103WVa148, 136SE842. [a] (1) 5F(2d) 651; 7F(2d)937; 8F(2d)318; 24F(2d) 965; 29F(2d)8; 30F(2d)640; 196 Ind 229, 147NE778; Ind 167NE135; 208Ky 478, 271SW548; 210Ky698, 276SW495 (omission of name of street not fatal, when city named is not large one); 211 Ky766, 278SW134; 218Ky841, 292SW 499; 219Ky323, 292SW779; 162La357, 110S557; 235Mich198, 209NW74 (description by old number held sufficient, where new number was not in actual use); 146Miss593, 111S595; 152Miss 566, 120S462; 157Miss600, 128S753; 316 Mo 977, 292SW60; 318Mo 1198, 2SW (2d)767; 321Mo 603, 12SW(2d)57; 321 Mo 570, 12SW(2d)61; MoA 295SW808; MoA 22SW(2d)835; **OklCr** 290P420(1st case); 155Tenn20, 290SW1; 157Tenn 538, 11SW(2d)879; 105TexCr646, 290 SW164; **TexCr** 23SW(2d)733; **TexCr** 32SW(2d)651; 152Va368, 147SE267; 101WVa492, 133SE106; 197Wis78, 221 NW394. (2) Street and number. 24 OhNPNS81. (3) Warrant need not name owner or occupant. 24 OhNPNS81. [b] 14F(2d)670; 317Mo 461, 296SW413; MoA 297SW977; **NJQuartSess** 139A401; **OklCr** 288P369; 153Tenn431, 284SW356 (referring to affidavit for description). [c] (1) But see 8F(2d)318. (2) Search warrant which gives street number of building, and states that premises are occupied by certain named person as store, is sufficient. 247Mich656, 226NW 685. [e] (2) Mere error in giving street number is immaterial where other parts of description are sufficient. **Wash** 238 P638. [g] **Dwelling house, not mentioned in warrant,** may be searched where warrant describes "farm, houses, buildings and other places." 211Ky766, 278SW134. [h] **Change by officer of description in warrant** to fit place actually searched held unauthorized. **OklCr** 291P158.

682-97 197Wis78, 221NW394.

682-98 267US498, 45SCt414, 69L ed757 (warrant to search "garage located in the building" at specified address, building being described as "used for business purposes only," authorizes search of entire building); **TexCr** 23SW(2d) 388. See also 29F(2d)8; 147Wash71, 265P160. But see 157Tenn538, 11SW (2d)879. [a] **Search for liquor in outbuildings is authorized** under warrant for search of premises identified by street and number, which were dwelling houses. 21F(2d)575.

682-2 89PaSuper238.

682-4½-New. Objection that the place was not the property described in the warrant cannot be raised by the owner of liquor found thereon who was not the owner of the premises. 188Wis266, 205 NW813.

682-4¾-New. A warrant describing the property to be searched as an automobile owned by a named person and driven by him in a specified city justifies a search of an automobile owned by such person in which he was riding outside of the city limits, but in the same district with the city. 143Miss694, 109 S732.

682-4¼-New. A search warrant designating a place on the highway as the place, and an automobile as the thing, to be searched is sufficient although it erroneously describes the automobile as a Chevrolet instead of as a Ford. 312 Mo 425, 279SW102.

682-4½-New. A warrant need not state the name of accused or the owner of the premises which are described with reasonable certainty. 316Mo 1152, 295 SW568.

682-4¾-New. Search warrant has been held not invalid where it was not claimed that the description did not cover real estate of which defendant had possession, but defendant claimed that the owner of the land named in the affidavit owned two farms and that the evidence did not show which one was searched. 200 Ind283, 163NE91.

682-4⅞-New. A warrant to search certain premises of a named person does not authorize search of other property consisting of uninclosed lands leased by such person. 155Miss390, 124S479 (2dcase).

682-4⅛-New. Warrant need not allege that private residence to be searched was place where liquor was sold or manufactured. **TexCr** 31SW(2d)453.

682-5 16F(2d)317; 144Miss401, 110S 122; 321Mo 603, 12SW(2d)57.

682-6 43F(2d)399; MoA 274SW110.

682-6½-New. A warrant for the search of a dwelling must be rigidly construed. 24F(2d)557.

682-8 [a] (1) 152Va368, 147SE267. (2) Delay of fifteen days held reasonable. 103WVa148, 136SE842. [b] 267US 505, 45SCt417, 69L ed757; 38F(2d)442. [f] **Mere presence of prohibition agent** at search by police does not make search one under federal authority. 5F(2d) 673. [g] **Issuance to federal prohibition agents** is lawful, since such agents are "officers" authorized to serve such warrant. 6F(2d)497. [h] **Search warrant, addressed to sheriff,** may be issued by city judge. 197 Ind179, 150NE50. [i] **Authority of justice of peace to appoint constable** held not to forbid him to issue search warrant to sheriff under another statute. 197 Ind363, 151NE4. [j] **Designation of prohibition agent as internal revenue officer** is insufficient to confer on him power of internal revenue officer to execute search warrant, under Rev. St. § 3462, for fraud on revenue laws for purpose of enforcing National Prohibition Act. 18F(2d)1002. [k] **In Mississippi.**-155Miss574, 124S789.

683-9 4F(2d)848 (evidence obtained by valid warrant not excluded because of failure to deliver copy of warrant to person in charge or to return proper inventory); **NJQuartSess** 147A330(2d case) (search warrant held executed "forthwith"); **OklCr** 289P782. [a] (5) Other decisions as to time of service. 324 Ill 66, 154NE432; 102WVa607, 135 SE908. (6) Search warrant must be executed with reasonable promptness and not at unlimited discretion of officer whose duty it is to serve it, and time officer may take varies with circumstances, such as distance to place to be searched, condition of roads, facilities of travel, and demands upon time of officer. 332 Ill 110, 163NE359. (7) Under Oklahoma statute service of search warrant not made within three days is void. **OklCr** 289P782. [b] **Proceedings held not defective** for failure to give defendant copy of warrant and receipt for property taken. **NJQuartSess** 139A392. [c] **Delivery of copy of warrant issued under national Prohibition Act** need not be made before making search or seizure. 24F(2d)665. [d] **Posting of warrant** held not necessary. 249Mich619, 229NW516. [e] **Receipt for property seized.**-**NJQuartSess** 147A330(2dcase) (inventory held sufficient receipt). [f] **Absence of judge's name from copy of warrant served** renders search of home thereunder illegal. **OklCr** 287P805.

683-9½-New. See also 210Ky698, 276 SW495.

683-10 159Tenn263, 17SW(2d)899. But see 247Mich583, 226NW231. [a] (2) 23F(2d)141. [c] But see **NJQuartSess** 139A392.

683-10½-New. A search warrant executed about midnight without positive proof required by statute is illegal and evidence obtained by such search inadmissible. 245Mich1, 222NW171.

683-11 Ind 164NE258.

683-12 89 IndA564, 166NE158(2dcase); 145Miss66, 111S131; 136Wash374, 240 P360; 147Wash71, 265P160. [a] **Second search of building** is not illegal where original search was not abandoned or completed. 146Miss593, 111S 595. [b] **Completion of search.**-Search at night, interrupted by failure of flash light, and continued next morning does not constitute two separate searches, latter without warrant, so as to justify suppression of evidence. 315Mo 203, 285SW990. [c] **That justice who issued warrant participated in search** does not render search illegal where marshal served warrant. 146Miss593, 111 S595.

683-13 See also 5PaDist&Co 205. [a] **Failure to make arrest as directed** does not violate search and seizure clause of constitution. Mo 1SW(2d)837.

683-14½-New. Search of woodshed under void warrant not directed against defendant is no invasion of his rights where he did not own or control the woodshed although he claimed bottles found there on search. 309Mo 520, 275 SW36.

683-14¾-New. Search made after the return day of the warrant is illegal. Miss 107S676.

683-14¼-New. Execution must be within a reasonable time, depending on the circumstances of cases. 103WVa148, 136SE842.

683-14⅛-New. In some jurisdictions statutes provide summary ex parte proceeding for issuance and service of search warrants and contemplate immediate action. 220MoA349, 285SW1021.

683-14⅛-New. Service of notice on defendant in jail that the officer had a search warrant held unnecessary. 106 TexCr391, 293SW178.

683-14⅞-New. An officer executing a search warrant has no right to comman-

deer claimant's building for storing property seized, and may remain only long enough on the premises to search, seize, and remove property. 13F(2d) 242.

683-14⅛-New. A federal officer executing a search warrant may enter the premises and seize liquors unlawfully possessed and personal property designed for manufacture, provided the property is properly described and capable of being moved within a reasonable time. 13F(2d)242.

683-14⅙-New. Failure of officers to leave a copy of a warrant or give a receipt for property taken does not render invalid a search made under a lawful warrant. 13F(2d)108.

683-14⅒-New. Entry through an adjoining building does not render the search illegal. 18F(2d)283.

683-14 1/11-New. The right of search under a warrant is limited to the place therein described. OklCr 276P784.

683-14 1/12-New. The mere connection of a dwelling with a garage, through a rear window of the dwelling opening into the garage, has been held not sufficient to establish that the garage was part of the dwelling house, so as to make search of the garage unlawful. 31F(2d)204.

683-14 1/13-New. Seizure of property other than that described in search warrant is illegal. 37F(2d)677.

683-14 1/14-New. Taking of guns to be used as evidence is illegal where search warrant authorized search for intoxicating liquor. 37F(2d)677.

683-14 1/15-New. Receipt for property seized held sufficient. NJQuartSess 150 A44.

683-14 1/16-New. Seizure of property in unlicensed portion of premises under void warrant is illegal, although licensed portion may be searched without warrant. Wis 229NW857.

683-15 126Me363, 138A566; 315Mo 203, 285SW990. [a] **Defective return** does not invalidate warrant. 152Miss844, 120 S209.

683-16 [a] 24F(2d)665.

683-18 See also Mo 278SW700.

683-20 4F(2d)846 (erroneous statement of date of seizure does not render liquor seized inadmissible in evidence).

683-23 147Miss118, 112S868.

683-23½-New. Where receipt left for property seized is not indicated by return of warrant, return is amendable to conform to fact. NJQuartSess 150A44.

683-23⅓-New. Return not showing that it was by officer to whom warrant was directed will be regarded as amended where fact appears. Wyo 292P2.

683-23¼-New. Official return and certificate of officer making search under warrant are presumptive evidence of facts stated therein. Wis 232NW539.

683-24 81Colo379, 256P4; 153Tenn 162, 281SW936 (liquor seized is subject to order of court where indictment is pending).

683-29½-New. Search is not rendered void by destruction of part of liquor seized, in jurisdictions where statutes declare such liquor contraband and require officers to destroy it. 314Mo 646, 285SW474.

683-29⅓-New. Rights of a judgment creditor, who has levied on alcohol, will be protected in a subsequent proceeding to condemn such alcohol for guilty acts of the owner, notwithstanding judgment was for money loaned to enable the borrower to purchase alcohol. 14F(2d)351.

683-29¼-New. Claimant of liquor testifying to unlawful possession is not entitled to its return. 15F(2d)563.

683-29⅕-New. An attorney taking, with notice, an assignment of client's property, used in violation of the Prohibition Law, acquires no title as against the state's claim to forfeiture asserted promptly thereafter, 81Colo 379, 256P4.

683-29⅙-New. and he may not complain that the state, in declaring forfeiture, failed to seize property. 81Colo 379, 256P4.

683-29⅐-New. Motion lies to suppress evidence of possession of liquor obtained without warrant upon unreasonable search. 27 OhNPNS445.

683-29⅛-New. Petition for suppression of evidence is not defective because defendant does not claim to own property seized. 41Wyo 438, 286P390.

683-30 [a] **Destruction of liquor found on premises** under search warrant does not render whole proceeding trespass ab initio. 41F(2d)365.

684-31 15F(2d)448; Conn 151A526; 205 Iowa597, 218NW346. [a] **Under Volstead Act,** application to review act of prohibition commissioner is in nature of bill in equity. 12PortoRicoFed167. [b] **Government must follow same course** with reference to offending vehicle as against transporters. 41F(2d) 538.

684-32 23F(2d)799; 38F(2d)106; 33 GaA786, 127SE659; IndA 172NE196; 205 Iowa597, 218NW346; 118Kan775, 236P647; 120Kan731, 244P1053; 124 Kan143, 257P731; 253Mass581, 149NE 613; 261Mass504, 159NE613, 61ALR 548; 91PaSuper165; 12PortoRicoFed 195. See also 258Mass103, 154NE570. [a] **Motion to forfeit bond** given for release of motor boat may be made in forfeiture proceedings. 42F(2d)278.

684-33 115 Oh235, 152NE903, 47ALR 1049. [a] **Filing libel** held election to proceed under prohibition. 20F(2d)189. [b] **Issuance of warrant** held not in itself election to proceed under national Prohibition Law. 20F(2d)189.

684-34 115 Oh235, 152NE903, 47ALR 1049.

684-35 206 Iowa356, 220NW324. See also 42F(2d)458. [b] **Whether transporter is guilty of felony** or misdemeanor is immaterial so far as validity of seizure without warrant is concerned. 267US 132, 45SCt280, 69Led543.

684-36 But see 23F(2d)263. [b] But see 23F(2d)263.

684-36½-New. Failure to follow statutory procedure does not invalidate a warrant or seizure thereunder. 47RI 269, 132A734.

684-38½-New. Under some statutes conviction of owner's companion in automobile renders automobile subject to forfeiture without conviction of the owner. SD 229NW307.

684-39½-New. Proceedings for forfeiture of a vehicle used in illegal transportation, for which the driver has been convicted under the Prohibition Act, must be under that act. 19F(2d)841.

684-39⅓-New. Where an arrest for transporting intoxicating liquor has been made under the National Prohibition Act, the prosecution must be made under such law, and proceedings to forfeit an automobile used in such transportation must be made under such act. 30F(2d)830.

684-40 [a] **Forfeiture proceedings fail** where seizure was illegal. 7F(2d)835, 836 [citCJ]; 23F(2d)879. [b] **Where it is stipulated that search resulting in seizure of wine was unlawful,** seizure of res necessarily falls, and proceeding for forfeiture, together with right to hold res, falls with it. 31F(2d)495. [c] **Reasonableness of commencing action.**-Conn 151A526. [d] **Procedure under statute dealing with procedure under search warrant** is inapplicable where wine was taken without search warrant. Conn 151A526.

684-40½-New. Statute authorizing courts to condemn or declare a forfeiture must be pursued with at least reasonable strictness. 14F(2d)389.

684-40⅓-New. Where a confiscation order for liquor illegally kept failed to state the quantity or nature of containers, it will be quashed on appeal. NB [1927] 2DomLR565.

684-40¼-New. Where libel for forfeiture was based on violation of the Prohibition Law and a customs law, the government may proceed under the latter charge. 14F(2d)874.

684-40⅕-New. Procedure for forfeiture held in substantial compliance with National Prohibition Act. 13F(2d)1019.

684-40⅙-New. Action of prohibition administrator in returning property seized does not prevent forfeiture proceedings. 14F(2d)677.

684-40⅐-New. Government may adopt seizure by municipal officers. 272US 530, 47SCt191, 71Led392.

684-40⅛-New. , although without knowledge that mortgagee was not entitled to recover the automobile seized. 115 Oh235, 152NE903, 47ALR1049.

684-40⅑-New. Mortgagee may establish a lien by intervention or otherwise at hearing and may collect the lien according to his priority from funds realized from the sale. 23F(2d)799; 115 Oh235, 152NE903, 47ALR1049.

684-40 1/10-New. A proceeding to forfeit an automobile under the national Prohibition Act is not barred by seizure thereon under the revenue statute. 23 F(2d)799.

684-40 1/11-New. The government should inform claimant under a conditional sales contract that proceedings to forfeit the automobile would be taken under the national Prohibition Act where seizure was for violating the Revenue Law. 23F(2d)799.

684-40 1/12-New. Proceedings for the forfeiture of a consignment are not barred within five years. 24F(2d)772.

684-42 115 OhSt235, 152NE903, 47ALR 1049; 94PaSuper430. [c] **Lessee of property** is not necessary party to proceedings and is not affected by forfeiture. 232Ky199, 22SW(2d)587.

684-43 165Ga119, 139SE860; 253Mass 581, 149NE613; 115 Oh235, 152NE903, 47ALR1049; 12PortoRicoFed167. [a] (4) Personal service may be made on administrator of owner, though service by publication has also been made. 33 GaA786, 127SE659. (5) Notice must be issued to possessor of automobile as well as owner. 12PortoRicoFed185. [b] (4) In Georgia statute authorizing service by publication is not mandatory. 33GaA786, 127SE659. [e] (2) Failure to notify conditional seller of automobile does not invalidate proceedings. 258Mass103, 154NE570. [i] (2) Refusal to permit mortgagees without notice to intervene after sale is erroneous. IndA 172NE196. [k] **Sale without public notice of vehicle** for transporting intoxicating liquor is constructively fraudulent and void. 115 OhSt235, 152 NE903, 47ALR1049.

685-46 118Kan775, 236P647; 253Mass 581, 149NE613.

685-46½-New. One who files an intervention in which title is claimed to a vehicle against which condemnation proceedings have been instituted is chargeable with notice of an application already on file in the same court praying for a short order of sale of the property. 36 GaA370, 136SE800.

685-47 37F(2d)890 (intervention of assignee of conditional sales contract is equitable in character); 253Mass581, 149NE613 (motion for return of property rightly denied, when made after adjudication of forfeiture); 115 Oh235, 152NE903, 47ALR1049.

685-49½-New. Intervening petitioner asserting ownership and seeking to prevent forfeiture of an automobile must show good cause to the contrary. 13 F(2d)1019.

685-49⅓-New. Claimant may bring an action for abandonment of seizure or return of property seized for violation of the National Prohibition Act, after unreasonable delay in forfeiture proceedings. 14F(2d)432.

685-49¼-New. The proprietary right of a defendant accused of violating the liquor law to beverages illegally seized can be determined only in an independent proceeding where they were not received from a common carrier in violating the law. 155Tenn467, 295SW 66.

685-49⅕-New. Where failure to produce automobile pursuant to bond given for its release was due to its destruction by fire without fault of accused, the principal and sureties are liable only for its value at the time of destruction. 18F(2d)338.

685-49⅙-New. No bond is required by intervener seeking possession. 204 Iowa 1155, 216NW611.

685-49⅐-New. Intervening lienholder claimant must show that the lien was recorded before seizure. 206 Iowa356, 220NW324; 206 Iowa361, 220NW327.

685-49⅛-New. A sheriff's return of service of the petition for forfeiture, cor-

rect upon its face, raises a presumption that the statutory notice was indorsed upon the petition and is conclusive in the absence of evidence to the contrary. 91PaSuper385.

685-49½-New. A statute providing for forfeiture of automobiles used in illegal transportation of liquor is not unconstitutional for failure to provide for personal notice to owner. SD 229 NW307.

685-50 247Mich141, 225NW625.

685-53 255Mass515, 152NE325.

685-54 23F(2d)713; Va 155SE689. [a] 124Kan143, 257P731; 299Pa496, 149A 710; 13PaDist&Co 145; 105WVa483, 143SE157.

685-55 14F(2d)389; Conn 151A526; 255Mass515, 152NE325.

685-55½-New. Municipal court judge has been held without jurisdiction to issue a warrant for federal search and seizure. 273US28, 47SCt248, 71L ed520.

685-55¼-New. Under Volstead Act a prohibition commissioner or director is an administrative officer and does not exercise part of the jurisdiction of the district court. 12PortoRicoFed167.

685-55¼-New. But although not a judge in the condemnation of liquor, he acts in a judicial capacity, and review of his acts is limited by a provision of law. 12PortoRicoFed167.

685-55½-New. If a commissioner's jurisdiction has not attached, the court will reverse his decision but preserve the status quo for a reasonable time to allow the commissioner to act. 12 PortoRicoFed167.

685-55¾-New. Right to forfeiture under National Prohibition Act of automobile seized by state officers. 41F(2d) 538.

686-57 23F(2d)263. [a] (4) Libel for forfeiture of vessel held defective is not alleging arrest and conviction of person in charge. 4F(2d)928. (5) Libel held insufficient to allege unlawfulness of possession. 23F(2d)263. (6) Where libel fails to state that seizure of liquor was lawful or facts from which such inference can be drawn, it is insufficient. 32F(2d)630. [c] **Libel for forfeiture** of Norwegian steamship must state place of seizure. 4F(2d)928. [d] **Cause of forfeiture** for transportation is not properly pleaded in absence of allegation of arrest and conviction of person in charge of liquors and vessel. 7F(2d)413. [e] **Denials of possession and operation of auto** seized for transporting liquor puts burden of proving this on plaintiff. 215 Ala546, 112S114. [f] **Averments held sufficient.**-34F(2d)30. [g] **Manner res came into possession of libelant** and facts connected with seizure should be set forth in libel. 40F(2d)307. [h] **Petition held sufficient.**-232Ky199, 22 SW(2d)587.

686-59 73Mont272, 235P716 (in absence of verified claim, claimant has no right to be heard). [f] **Answer held sufficient** to justify trial. 29F(2d)929. [g] **Stipulation of facts agreed upon by counsel** is insufficient to justify award to bailor where amount due under lease is not set forth. 14PaDist&Co 247.

686-61 216Ky335, 287SW939.

686-62½-New. Possession under seizure, in violation of the National Prohibition Act, will not support libel for forfeiture. 8F(2d)1.

686-62¼-New. Unlawful possession by the government is not made lawful so as to sustain libel by subsequent attachment of property. 8F(2d)1.

686-62¼-New. Whether lessor knew that outbuildings were used for manufacture of liquor is not considered on motion to quash a search warrant. 24 F(2d)557.

686-62½-New. An answer denying the allegations of the petition and alleging that defendant was irresponsible, presented a good defense. 232Ky199, 22 SW(2d)587.

686-64 219Ala415, 122S638; 35GaA 723, 134SE625; 290Pa121, 138A90; 85PaSuper180. [a] (2) 31F(2d)495. But see 29F(2d)929. (4) Though proceeding is in rem, allegations of complaint must be proved as in other criminal cases. 258Mass85, 154NE569. [b] **On proof of seizure in dwelling used as saloon,** burden is on defendant to show lawful possession. 290Pa121, 138 A90. [c] **Shifting burden.**-23F(2d) 263. [d] **Prima facie case** must be established by government before claimant is required to prove possession lawful. 23F(2d)263. [e] **Prima facie case.**-219Ala415, 122S638. [f] **Claimant has burden to explain possession.**-40F(2d) 565.

686-64½-New. Intent to sell must be shown in some jurisdictions. 258Mass 85, 154NE569.

685-65 [a] (2) Presumption that automobile was used for transporting liquor will not be indulged unless intent is clear and presumption does not infringe on constitutional rights. 219Ala415, 122 S638.

686-66 25F(2d)372; 89IndA316, 166 NE263; 205Iowa597, 218NW346; 14 PaDist&Co 247. Contra 35GaA723, 134 SE625. [a] **Intervener** has burden of showing lack of notice. 25F(2d)372.

686-66½-New. Claimant of goods appropriate for use in the unlawful manufacture of intoxicating liquor has the burden of explaining the purpose and character thereof in order to avoid forfeiture. 27F(2d)903.

686-67 223Ky691, 4SW(2d)637; 90 PaSuper376; 5PaDist&Co 193; 14 PaDist&Co 247 (proof of sum due on bailment lease); Va 155SE689. [b] 220 Ala418, 125S655(1stcase). [f] **Before claimant is required to prove superior right,** state must make out prima facie case for condemnation. 214Ala432, 108 S246.

686-68 40F(2d)825; 213Ala122, 104S 255; 213Ala325, 104S826; 6PaDist&Co 453; 90PaSuper376; 12PortoRicoFed 195. [e] **In South Dakota.**-224NW179. [f] **Lack of knowledge and good faith of assignor.**-32F(2d)511.

687-69½-New. Under rules of some courts, testimony must be noted. 214 Ala432, 108S246.

687-69¼-New. Where no note of testimony is made as required by such rule, decree of forfeiture will be reversed. 214Ala432, 108S246.

687-69¼-New. The presumption of innocence does not apply. 91PaSuper165.

687-69½-New. Where claimant of interest in seized automobile establishes his right of recovery, burden is on state to show that value of automobile exceeds claim. Iowa 229NW173.

687-69¾-New. Burden on claimant to show good cause why liquor should not be destroyed and boat sold. 42F(2d) 858.

687-71 217Ala102, 115S1, 2 [citCJ]; 223Ky691, 4SW(2d)697. [f] 117Okl 147, 245P652. [g] 69Utah441, 256P107. [i] **State may show use of admitted dwelling as saloon.**-290Pa121, 138A90. [j] **Testimony showing lack of information justifying search without warrant** is admissible. 154Miss212, 122S398.

687-76½-New. Owner's declarations against interest connecting him with the illegal act are admissible without predicate therefor. 217Ala102, 115S1.

687-76¼-New. A judgment of acquittal of violating the law relative to intoxicating liquors is not res judicata in a proceeding to condemn the liquors. 91PaSuper165.

687-76¼-New. Evidence in a criminal prosecution is not competent or admissible in chief to prove the facts relied on to secure a forfeiture of liquors. 91 PaSuper165.

687-76½-New. Defendant failing to make motion in advance of trial to suppress evidence as procured by unreasonable search waives objection. 38F (2d)1005.

687-77 205Iowa597, 218NW346; 120 Kan731, 244P1053; 117Okl147, 245P 652; 87PaSuper38; 91PaSuper165. Contra 90Fla554, 106S414. [a] (1) 14F(2d) 874; 20F(2d)186; 27F(2d)903; 38F (2d)1005; 213Ala325, 104S826; Ala 128 S785; 118Kan775, 236P647; 120Kan 312, 243P296; 120Kan301, 243P299; 120Kan731, 244P1053; 121Kan706, 249 P584; 124Kan143, 257P731; 120Or 640, 253P366; Ont [1929] 3DomLR926. (2) 120Or640, 253P366. (3) 213Ala583, 105S589; 215Ala319, 110S573; 215Ala 431, 111S1; 124Kan143, 257P731; 87 PaSuper38. (4) 25F(2d)372. (8) To show that officers had probable cause for seizing liquor in transportation without warrant. 267US132, 45SCt280, 69 L ed543. (9) To show that owner of car, though not interested in liquor as owner, aided and assisted owners of it in knowingly and unlawfully transporting. 213Ala583, 105S589; 217Ala 102, 115S1. (10) Other evidence held sufficient. 15F(2d)448; 214Ala77, 106 S399; 215Ala319, 110S573; 21AlaA519, 109S844. (11) To justify forfeiture of vessel. 36F(2d)430. [b] (1) 21F(2d) 639; 42F(2d)858; 214Ala563, 108S571; 219Ala360, 122S463; 205Iowa597, 218 NW346; 69Utah441, 256P107. (2) 258 Mass85, 154NE569. (3) 219Ala415, 122 S638; 85PaSuper180. (6) Other evidence held insufficient. 23F(2d)865; 90 Fla554, 106S414; 69Utah441, 256P107. (7) To show lien on forfeited vehicle. 42F(2d)908. (8) Other matters. Iowa 231NW385. [c] **Proceeding being penal in character,** no one should be visited with consequences unless illegality is satisfactorily shown. 15F(2d)448. [d] **Evidence should be clear and convincing** and not founded on mere suspicion. 21F(2d)639. [e] **Owner's knowledge of unlawful use of vehicle** may be shown by statutory presumption arising from finding of liquor in conveyance or by any competent evidence in absence of such presumption. 205 Iowa 597, 218NW346.

687-78 [a] (3) 116Nebr854, 219NW331. (4) Other evidence held sufficient. 214 Ala68, 106S337; 214Ala673, 108S587; 215Ala546, 112S114; 35GaA723, 134SE 625. (5) To show that master of vessel had no knowledge of intoxicating liquor in vessel. 12PortoRicoFed343. (6) To show claim of wife to automobile, registered in name of company organized by her husband, was simulated. 218Ala18, 117S463. (7) To find that driver was real owner. 219Ala258, 122S174. (8) To show that transaction whereby driver obtained possession of auto from claimant would not have aroused suspicion of reasonably prudent person. 219Ala360, 122S463. (9) To sustain finding that claimant of automobile under conditional bill of sale did not know of or consent to unlawful use. Iowa 229NW173. (10) To establish right of claimant of automobile under statute. Iowa 229NW 173. [b] (1) 152Va508, 147SE243. See also 36GaA46, 135SE218. (3) To show A had property rights sufficient to prevent forfeiture. 5PaDist&Co 193. (4) To show that defendant was within exception of statute. 89PaSuper467. (5) To show lawful acquisition, use, and possession of liquor. 29F(2d)929. (6) To show right to return of automobile where not shown to be registered in claimant's name. Iowa 221 NW189. (7) To establish "good cause" why automobile should not be forfeited. SD 224NW179. (8) To acquit seller and mortgagee of negligence sufficient to recover car. 218Ala553, 119S662(2d case).

687-78½-New. Verdict of not guilty on criminal charge is of no controlling significance in forfeiture proceeding. 120Kan731, 244P1053.

687-79 214Ala563, 108S571; 93Pa Super84.

687-81 23F(2d)263.

687-81½-New. In some jurisdictions proof given of transportation of liquor is prima facie evidence that it was transported for beverage purposes. 85 PaSuper188.

687-81¼-New. To support conviction that it is not necessary that liquor be seized while actually in course of transportation. 85PaSuper188.

687-81¼-New. Recital in return under search warrant characterizing liquor seized as illicit, admitted in evidence without objection or limitation, establishes fact prima facie. Wis 232NW 539.

687-82 40F(2d)825. [b] **When issue**

is same with respect to all claims, motion for separate trials should be denied. 253**Mass**581, 149**NE**613. [c] **Sufficiency of evidence to raise question of fact.–Ala** 130**S**771. [d] **Reasonableness of search or seizure** is question for court. **Conn** 151**A**526.

688–84 [a] **Jury trial.**–87**PaSuper**38.

688–85 32**F(2d)**511. Contra 5**PaDist&Co** 167. [a] **In Pennsylvania.**–94**Pa Super**430 (what constitutes hearing and conclusion thereof).

688–85½–New. The direction of a verdict for confiscation of an automobile alleged to have been used in conveying intoxicating liquors over a designated public road is reversible error where the evidence does not demand a finding that it was so used. 35**GaA**166, 132**SE**258.

688–85⅓–New. In some jurisdictions, in proceedings to forfeit a vehicle, there must be a jury trial if either the commonwealth or claimant demands it within statutory time; 85**PaSuper**43.

688–85¼–New. but if neither demands it within such time, a jury trial is deemed waived. 85**PaSuper**43.

688–85⅕–New. In such jurisdictions, where claimant files a written jury demand with the claim or thereafter before expiration of time, he is entitled to a jury trial. 85**PaSuper**43.

683–85⅙–New. Negligence of the vendor of a vehicle in ascertaining the purchaser's reputation has been held for the jury. 214**Ala**77, 106**S**399.

688–85⅐–New. Question of negligence of the seller of an automobile in ascertaining the reputation of the buyer as a violator of liquor laws is for the trial court. 216**Ala**341, 113**S**274.

688–85⅛–New. Where the right to a jury trial exists, it may be waived. 120 **Or**640, 253**P**366.

688–85⅛–New. Whether alcohol was intended for use in violation of law is for the court. 20**F(2d)**186.

688–85 1/10–New. Questions of fact as to identity of an automobile, illegal use, etc., may be submitted to the jury in proceedings to condemn an automobile used in transporting liquor. 149**Va**442, 141**SE**123.

688–85 1/11–New. The question whether the court should relieve the owner from forfeiture of an automobile transporting liquor is not for the jury. 149**Va** 442, 141**SE**123.

688–85½–New. The trial judge is vested with considerable amount of discretion in determining whether good cause has been shown by the owner why an automobile should not be forfeited. **SD** 224**NW**179.

688–85 1/13–New. Intent to sell the entire stock of lawful goods for use in the manufacture of intoxicating liquor is a fact question. 28**F(2d)**231.

688–85¼–New. A transaction whereby a wife claimed ownership of an automobile operated in the name of her husband should be closely scrutinized, where the automobile is sought to be condemned for transportation of prohibited liquors. 218**Ala**18, 117**S**463.

688–85 1/15–New. Intent of owner of car to evade the law is a question for the jury. 7**Alaska**236.

688–85 1/16–New. Court will not consider affidavit as to probable cause where defendant waived right to object and failed to offer affidavit. 38**F(2d)**1005.

688–90 8**F(2d)**1.

688–95 [a] **Judgment declaring automobile** seized for transporting liquor nuisance cannot penalize innocent conditional vendor by ordering proceeds of sale to be paid into county treasury. 71**CalA**134, 234**P**856. [b] **Under statute requiring a conveyance seized** to be returned forthwith by officer having custody on acquittal of persons charged with illegal transportation, court is not bound, on acquittal, immediately to order officer to comply with law. 236**Mich**383, 210**NW**338. [c] **Judgment directing sale** of seized automobile by chief of police, instead of sheriff, held erroneous. 220**Ky**836, 295 **SW**1029. [d] **Right of innocent lienor.**–44**F(2d)**170(2dcase).

688–96½–New. Where the statute as to summons and other procedure was not complied with, it is error to enter a judgment for confiscation. 224 **Ill A**515.

688–96⅓–New. Court may make summary orders involving temporary possession of goods claimed by the state as contraband. 81**Colo** 379, 256**P**4.

688–96¼–New. A judgment in favor of an intervener holding title to the automobile sought to be condemned under a retention of title contract of sale, where he did not know of, or consent to, the illegal use of the vehicle, and the state does not seek to condemn the buyer's equitable interest, although the evidence shows that the value of the vehicle exceeds the unpaid purchase money. 37**GaA**253, 139**SE**577.

688–96⅕–New. Five days allowed after hearing before decree may be entered. 5**PaDist&Co** 167.

688–96⅙–New. An order for sale of a forfeited automobile may not provide that the sale shall be subject to a mortgage. 126**Kan**796, 271**P**278.

688–97 87**PaSuper**38. But see 91**Pa Super**385.

688–97½–New. or where the petition fails to contain essential averments required by statute, 85**PaSuper**185 (place of seizure).

688–99½–New. In proceedings to condemn a vehicle, where claimant offers no valid excuse for failure to file answer in time, it is not error to refuse permission to file the answer when offered. 85**PaSuper**185.

688–99⅓–New. The Pennsylvania statute permitting a claimant of seized property to present a petition any time before sale and to prove that unlawful use was without his knowledge does not apply to a claimant against whom proceedings have been instituted and who has been served with statutory notice. 91**PaSuper**385.

688–4½–New. Where an innocent mortgagee of an automobile used in transporting liquor intervened in a suit to condemn the car, complete title passed at the sale, but the proceeds became subject to the mortgagee's claim, and, but for the intervention sale, would be subject to lien. 118**Tex**189, 12**SW(2d)**968.

688–5½–New. In collateral attack on judgment of forfeiture, the facts established cannot be questioned by parol evidence. 258**Mass**103, 154**NE**570.

688–7 87**PaSuper**38. [a] **Trial de novo on appeal** is not authorized in some jurisdictions. 205 **Iowa**597, 218**NW**346.

688–10 39**F(2d)**288 (lien claimant).

688–10½–New. Defendants, not having appealed from a judgment of forfeiture, are not necessary parties to appeal by an intervening lienholder, involving only the question of whether it could share in the disposition of the proceeds of sale of the car, a question in which they are not interested. **Tex CivA** 14**SW(2d)**893.

689–12 35**GaA**166, 132**SE**258; 120 **Or** 640, 253**P**366. [a] (2) It is too late to object in superior court that complaint originally filed in district court is insufficient in form. 253**Mass**581, 149**NE** 613.

689–13 253**Mass**581, 149**NE**613; 91**Pa Super**385.

689–14 214**Ala**77, 106**S**399; **Ala** 128**S** 785; 35**GaA**723, 134**SE**625; 205 **Iowa** 597, 218**NW**346; 149**Va**442, 141**SE**123. [a] **If evidence is not before reviewing court,** contention cannot be sustained that truck could not be found to be implement of sale or container. 253**Mass** 581, 149**NE**613; 258**Mass**103, 154**NE** 570. [b] **Where there is no evidence of illegal transportation,** judgment of forfeiture therefor should be reversed. 85 **PaSuper**180.

689–16 23**F(2d)**263.

689–19½–New. Where the court issuing a search warrant had no jurisdiction to do so or to hear and determine any fact on which the right to condemn and destroy liquors depended, certiorari lies to prevent such action before judgment is rendered on the issue of ownership. 202 **Iowa**1116, 211**NW**503.

689–19⅓–New. Where, on appeal from default judgment by claimant, it appears that the petition failed to state the place of seizure, judgment will be reversed and the vehicle ordered returned unless the commonwealth files a new corrected petition. 85**PaSuper** 185.

689–19¼–New. Proceedings for forfeiture of liquor in which a citizen asserts right to its possession is evidence illegally seized as regards the right of review. 155**Tenn**467, 295**SW**66.

689–19⅕–New. In proceedings to controvert a search warrant, the finding of the United States commissioner that the search warrant was issued without probable cause and that the article seized should be returned to the petitioner is not conclusive on the court. 33**F(2d)** 402.

689–19⅙–New. Under Ontario statute orders of a magistrate confiscating liquors seized for violation of the Liquor Control Act and refusing to direct redelivery cannot be quashed on certiorari on the ground that the depositions show that there was no evidence to support the orders or that the magistrate misdirected himself in considering the evidence. **Ont** [1929] 3**DomLR**926.

689–20 [a] **On demurrer in suit against sheriff to enjoin** destruction of liquor, it will be assumed that there was no intention to destroy without lawful order of court. 267**US**188, 45**SCt**264, 37 **ALR**1378.

689–21 36**F(2d)**772; 118**Kan**659, 236**P** 819 (county attorney prosecuting forfeiture action is entitled to fee to be taxed as costs). [a] 35**F(2d)**264; 204 **Iowa**1155, 216**NW**611.

689–22 299**Pa**496, 149**A**710; 13**PaDist &Co** 145. But see 165**Ga**119, 139**SE**860.

689–23 23**AlaA**437, 126**S**607(2dcase) (after conviction, provision for destruction of liquor is mandatory); **Conn** 151 **A**526; 314**Mo** 646, 285**SW**474. [c] **Disposition of bottles.**–12**Porto RicoFed**102, [d] **Under Volstead Act,** liquor in government warehouse before passage of act is subject to act and in proper case will be destroyed. 12**PortoRicoFed**93. [e] **In Pennsylvania.**–9**PaDist&Co** 18. [f] **In Connecticut.**–151**A**526.

689–24½–New. Court may dispose only of property properly seized. 17**F(2d)** 274.

689–24⅓–New. Where a permit for the manufacture of cereal beverages gives prohibition agents the right only to supervise the business pending a hearing on citation, they must release to permittee so far as necessary for reasonable supervision. 13**F(2d)**946.

689–24¼–New. An automobile containing liquor must be disposed of under the national Prohibition Act where the driver was convicted of unlawful possession, such provision being mandatory. 276**US**226, 48**SCt**232, 72**L ed**541.

689–24⅕–New. The court may turn over to the prohibition department a seized automobile. 23**F(2d)**799.

689–24⅙–New. Only lienholders may share in the proceeds of a forfeited vessel engaged in illegal liquor traffic. 24 **F(2d)**604.

689–24⅐–New. Mortgagee of a vessel is not a maritime lienholder entitled to share in the proceeds of forfeiture sale of the vessel. 24**F(2d)**604.

689–25 33**F(2d)**402; **Conn** 151**A**526; 12**PortoRicoFed**11. See also 81**Colo** 379, 256**P**4. [b] **Turning property seized under search warrant** over to commissioner or magistrate has been held sufficient compliance with statute. **NJ QuartSess** 147**A**330(2dcase).

689–26 49**ND**851, 193**NW**928.

689–27 49**ND**851, 193**NW**928.

689–28 49**ND**851, 193**NW**928.

689–28½–New. State may control property without being required to destroy it. 81**Colo** 379, 256**P**4.

689–28⅓–New. Where vehicle is seized, county commissioner must provide suitable facilities for its storage and safekeeping pending condemnation proceedings. 6**PaDist&Co** 331.

689–28¼–New. A general policy of federal courts is to retain alcohol and compounds suited for sick use and distribute them among hospitals from time to time. 12**PortoRicoFed**11.

689–30 115 **ObSt**235, 152**NE**903, 47**ALR** 1049 (innocent mortgagee may have priority in funds realized from sale);

118Tex189, 12SW(2d)968. See also 5 PaDist&Co 191. [a] **Where confiscation was made and sale ordered by justice of peace without jurisdiction,** true owner may recover vehicle from purchaser. 105WVa483, 143SE157.

689-30½-New. Sheriff may sell seized alcohol. 5PaDist&Co 633.

689-30⅓-New. After conviction of offender, disposal of automobile is held mandatory. 272US564, 47SCt165, 71 Led412.

689-30¼-New. Under the National Prohibition Act, one having a lien on an automobile seized for transportation of liquor is entitled to satisfaction of his lien from the proceeds of sale only after the costs have been paid. 18 F(2d)1005.

689-30⅕-New. Under the Pennsylvania statute the holder of a chattel mortgage on a motor vehicle used in illegal transportation of intoxicating liquors, whose mortgage is recorded in another state, is not entitled to payment of the mortgage debt out of the proceeds of sale although the mortgagee knows nothing of the illegal use. 88 PaSuper24.

689-31 6F(2d)144; 16F(2d)345; 23 F(2d)375; 153Tenn162, 281SW936. [d] **Petition, filed after petitioner's discharge,** for order for return of automobile seized in connection with arrest for illegal transportation, held properly denied where automobile was then in custody of federal officers. 236 Mich383, 210NW338. [e] **Evidence of possession alone** is sufficient to give court jurisdiction to determine propriety of search and seizure and to pass on motion for return where property seized under National Prohibition Act was not of character imposing on possessor burden of showing rightfulness of possession. 23F(2d)929.

690-32 33F(2d)973 (wine containing more than one half of one per cent of alcohol is unlawful); 125Misc882, 212 NYS400; 89PaSuper467; 91PaSuper 544; 6PaDist&Co 24; 34PortoRico 111.

690-34 6F(2d)758; 16F(2d)345; 13 PortoRicoFed115 (on acquittal of charge of violation); 13PortoRicoFed259 (liquors seized under illegal search warrant). [b] But see 29F(2d)929.

690-35 16F(2d)345. But see 5F(2d) 366. [a] **Summary proceeding** for return of liquor unlawfully seized is possessory. 6F(2d)758. [b] **Petition held insufficient.**-37F(2d)124.

690-36 4F(2d)848; 6F(2d)758. But see 33F(2d)400.

690-37 33F(2d)973 (possession of large quantity of wine indicated proposed commercial use).

690-39 24F(2d)185. See also 28F(2d) 639.

690-42 See also 17F(2d)151.

690-42½-New. Where the statute does not make provision for sale of vehicles seized while being used in the illegal transportation of intoxicating liquors, the owner of a vehicle so seized is entitled to its return. 235Mich124, 209NW 64.

690-42⅓-New. In some jurisdictions one claiming ownership may petition for return of vehicle seized where its unlawful use was without his knowledge or consent. 85PaSuper198.

690-42¼-New. In some jurisdictions either the owner or one claiming a right of possession may assert a claim any time prior to sale if unlawful use was without his knowledge or consent, 85 PaSuper188.

690-42⅕-New. and in such case both ownership and right of possession need not be asserted and proved, either is sufficient. 85PaSuper188.

690-42⅙-New. Under a statute permitting a claim by one "claiming ownership," a bailor may assert such claim. 85PaSuper188.

690-42⅐-New. Acquittal of transporting liquor does not ipso facto discharge the car used in transportation. 118Kan 775, 236P647.

690-42⅛-New. In Pennsylvania a bailor, where unlawful use was without his knowledge or consent, may receive repayment from proceeds of sale, or, in the court's discretion and under certain circumstances, a return of the vehicle. 85PaSuper182.

690-42⅑-New. A bailor under a bailment or lease contract, where unlawful use was without his consent, although sale of vehicle proceeds, is entitled to repayment from the proceeds of sale; 85PaSuper92.

690-42⅒-New. and an owner of a vehicle or one entitled to possession thereof, where unlawful use was without his consent, may have the vehicle returned when the court so orders. 85 PaSuper92.

690-42⅑-New. On quashal of an illegal warrant, property and liquors so seized are returnable without further proof by claimants. 16F(2d)345.

690-42⅓-New. A police officer seizing an automobile is under a duty to return it to the owner forthwith on his acquittal. 247Mich141, 225NW625.

690-42⅓-New. A statute requiring the return of an automobile on the owner's acquittal cannot be construed to require the return to him if ownership was forfeited. 247Mich141, 225NW625.

690-42¼-New. A verdict of acquittal of violating the law relative to intoxicating liquors does not carry with it a right to return of the liquors. 91Pa Super165.

690-42⅕-New. Where it appears that owners of seized steamship were ignorant that intoxicating liquor was being transported by crew, return of steamer should be ordered without bond. 13 PortoRicoFed279.

690-43 [a] **Return to owner on vacation of search warrant.**-42F(2d)424.

690-44 33F(2d)400. [a] **Action of commissioner** in vacating search warrant under Espionage Act is reviewable by district court. 5F(2d)282. [b] **Certiorari is not available** to review proceedings of commissioner in issuing search warrant. 5F(2d)292. [c] **Court's disciplinary power over own officers** has been held not to give it jurisdiction to order prohibition administrator to return property illegally seized. 39 F(2d)561.

690-45 13F(2d)242.

690-48 14F(2d)677; 32F(2d)873; 39 F(2d)561; 42F(2d)571.

690-49½-New. In a bill seeking restoration of alleged illegally seized sacramental wine, a Jewish congregation which is the owner of the wine, is the proper party to bring the action. 30 F(2d)971.

691-51½-New. An owner can institute proceedings to recover property with notice to the district attorney by a hearing similar to that held where the commonwealth has instituted a proceeding to condemn and forfeit property. 85PaSuper198.

691-51⅓-New. Under statute allowing either restitution or payment out of proceeds of sale to owner or bailor of vehicle used unlawfully without owner's consent, the court has discretion as to which remedy shall be given. 85 PaSuper188.

691-51¼-New. Where a vehicle seized is no longer needed as evidence, the owner need not wait until the district attorney institutes condemnation proceedings before instituting proceedings for return. 85PaSuper198.

691-51⅕-New. In proceedings by a bailor for return of a vehicle, it is not error to dismiss the petition where he fails to prove that he will not be fully protected by statutory remedy permitting reimbursement from proceeds of sale. 85PaSuper182.

691-51⅙-New. Where, to recover, the owner has the burden of proving that unlawful use was without his knowledge or consent, merely proving circumstances, sale, or transfer of possession is insufficient. 85PaSuper92.

691-51⅐-New. Bailor's rights to forfeited car are solely for the balance due under contract. 5PaDist&Co 375.

691-51⅛-New. The remedy of an innocent owner is by plea, not petition, for action. 5PaDist&Co 211.

691-51⅑-New. Act is construed as protective of innocent owner. 5PaDist&Co 211.

691-51⅒-New. The right of an innocent owner to part of the sale price is determined by the court. 5PaDist& Co 212.

691-51⅒-New. Remedy is by petition, not by rule, to open decree. 5PaDist &Co 233.

691-51⅒-New. Bailor receives only unpaid amount due on bailment. 5PaDist &Co 413.

691-51⅓-New. Conditional seller held not guilty of laches in failing to file a claim until four and a half months after forfeiture of the automobile. 23 F(2d)799.

691-51¼-New. The burden of proof is on the petitioner to prove alleged ownership. 26F(2d)717.

691-51⅕-New. In a proceeding to recover liquor seized, after acquittal of the petitioner's husband, the court is not bound by what happened in a criminal proceeding regarding the question of the petitioner's ownership of the liquor. 26F(2d)717.

691-51⅙-New. The court could take into account the surrounding circumstances and determine whether there was any reason to doubt the petitioner's contention of ownership. 26F(2d) 717.

691-51⅐-New. The petitioner for the return of intoxicating liquors must prove that the intoxicating liquor was lawfully acquired, possessed, and used by him, or, if unlawfully used by another, that such use was without his knowledge or consent. 92PaSuper59.

691-51⅛-New. Petition for return of intoxicating liquors must allege that petitioner is owner. 13PortoRicoFed4.

691-51⅑-New. Petition for return of intoxicating liquors must allege that liquors were lawfully acquired and possessed before seizure. 13PortoRicoFed 387.

691-51⅒-New. Defective petition for return of intoxicating liquors may be amended. 13PortoRicoFed387.

691-51⅒-New. Construction of bond for release of motor boat. 42F(2d) 278.

691-51½-New. Service on United States attorney as notice or process to prohibition administrator. 42F(2d)571.

691-51⅓-New. Necessary parties and service in proceedings for return of vehicle. 42F(2d)570.

691-51¼-New. Mortgagee's knowledge or consent to illegal use of automobile may be established by circumstantial evidence. SC 155SE231.

691-51⅕-New. In mortgagee's action to recover confiscated automobile cross-examination of seller as to prior sale to purchaser's brother held proper. SC 155SE231.

691-51⅙-New. In such action question whether seller was mortgagee's agent held for jury. SC 155SE231.

691-51⅐-New. In such action question of mortgagee's knowledge of illegal use held for jury. SC 155SE231.

691-51⅛-New. In such action introduction in evidence of papers prepared by seller to procure return held not prejudicial error. SC155SE231.

691-52 [a] **Order directing return of liquor seized is premature** prior to trial on indictment for violation of Intoxicating Liquor Law in which such liquor was evidence of crime. 89PaSuper198.

691-54½-New. Evidence obtained under unlawful seizure should not be suppressed. 125Misc882, 212NYS400.

691-54⅓-New. A motion to suppress evidence in a prosecution for possession of liquor on the ground that the application for search warrant was made on hearsay is properly overruled. 314Mo 646, 285SW474.

691-54¼-New. Evidence by defendant to controvert facts set out in the application for search warrant is properly excluded on motion to suppress evidence. 314Mo 646, 285SW474.

691-54⅕-New. Liquor seized as in violation of a permit may be retained by prohibition authorities pending action on citation. 13F(2d)946.

691-54⅙-New. Where liquor is being held as evidence, hearing on motion to compel return and trial of offense involved are independent proceedings. 23 OhA137, 154NE814.

691-54½-New. The hearing on motion to return liquor seized as evidence is a condition precedent to hearing on merits in criminal prosecution. 23 **OhA**137, 154**NE**814.

691-55 30**F(2d)**971.

691-56½-New. An attorney who replevied contrabrand assigned him by client and sold them before disposition of suit, disobeying a court order, is liable for the proceeds of the sale to the state on its successful intervention in replevin suit. 81**Colo** 379, 256**P**4.

691-61 [a] **Burden is on officer** to show probable cause for search without warrant. 216**Ala**522, 113**S**541.

691-62½-New. Discovery of liquor on premises does not condone crimes in cause of unlawful search and seizure. 290**Pa**121, 138**A**90.

691-62½-New. Respondeat superior is not applicable to hold a prohibition commissioner liable for unlawful search by a prohibition inspector. 28 **OhA**75, 162**NE**604.

691-62¼-New. Officers with or without a warrant have no right to enter and search a "bona fide" private house, and on doing so are trespassers ab initio, and liable for at least nominal damages, 28 **OhA**75, 162**NE**604.

691-62½-New. and ignorance that the building searched was a private residence is no defense. 28 **OhA**75, 162**NE** 604.

691-62⅛-New. Nonresistance to searchers of a private house is not a waiver of the right to damages for wrongful search. 28 **OhA**75, 162**NE**604.

691-65½-New. The purpose of the National Prohibition Act, authorizing suits to abate liquor nuisances, is preventive, not punitive. 31**F(2d)**305.

691-66 [a] 318 **Ill** 307, 149**NE**262; 86 **IndA**666, 152**NE**873; 202 **Iowa**1217, 211 **NW**721; 235**Mich**272, 209**NW**158; 77 **Mont**361, 251**P**137, 49**ALR**627; 125**Misc** 658, 211**NYS**705; 128 **Okl** 3, 261**P**366; 8**PaDist&Co** 760; 35**Wyo** 430, 251**P**460 (impliedly repealed); 35**Wyo** 482, 251**P** 468.

691-68½-New. Provisions as to abatement of liquor nuisance are to be construed as if all had been enacted at the same time. 118**Kan**659, 236**P**819.

691-69 [a] **Process** must be served on owner, lessee, tenant, or occupant. 26 **F(2d)**189.

692-70 202**Cal** 10, 258**P**942.

692-71½-New. The nuisance exists as soon as violations of the act occur. 103 **Conn**7, 130**A**249.

692-71⅛-New. Evidence held to require stay of injunction upon landlord giving bond. 12**F(2d)**985.

692-71¼-New. The question is whether there is reasonable probability that, unless enjoined, the premises will be used in the future for unlawful purposes. 28**F(2d)**774.

692-71⅛-New. The state may secure abatement of a liquor nuisance by proceedings in rem. 128**Kan**627, 278**P**752.

692-71⅛-New. One part of a building may be used in such manner as to make it a nuisance, without affecting the legal character of another part, as regards abatement for violation of liquor laws. 265**Mass**135, 163**NE**893.

692-71½-New. Purpose of law authorizing closing of premises is to prevent continuance of nuisance, not to inflict punishment. 39**F(2d)**363.

692-72 318 **Ill** 307, 149**NE**262.

692-74½-New. The absence of state statute providing for the equitable remedy for violation of the National Prohibition Act does not lessen the duty of state officers and courts to enforce such remedy. 103**Conn**7, 130**A**249.

692-76½-New. Conviction for the crime does not create the nuisance, nor of itself give the right to abate it by injunction. 103**Conn**7, 130**A**249.

692-77 120**Kan**731, 244**P**1053.

692-78 25**F(2d)**37; 31**F(2d)**807; 103 **Conn**7, 130**A**249; 317 **Ill** 197, 148**NE**5; 86 **IndA**666, 152**NE**873; 120**Kan**731, 244 **P**1053.

692-78½-New. Not involving any element of punishment, 103**Conn**7, 130**A** 249.

692-79 317 **Ill** 197, 148**NE**5; 245 **IllA** 202; 207 **Iowa**636, 223**NW**363.

692-80 17**F(2d)**965; 18**F(2d)**779; 36 **F(2d)**568. See also 125**Misc**658, 211**NYS** 705 [citCJ]; 11**PaDist&Co** 669. [b] (4) Restaurant where patrons consumed intoxicating liquor brought with them, and which supplied patrons with ginger ale and cracked ice therefor, and thereby tacitly consented to violations of National Prohibition Act by patrons, has been held a "nuisance," within National Prohibition Act. 31**F(2d)**220(2dcase). (5) Dining room of hotel constituted nuisance as place where intoxicating liquor was "kept" where patrons habitually brought intoxicating liquor and consumed it there. 35**F(2d)**76. [c] **Restaurant to which intoxicating liquor is brought** and consumed is place where liquors are "kept." 17**F(2d)**965. [d] **Sale.**–31**F(2d)**305. [e] **Hotel dining room** where patrons were permitted after dinner hour to bring and consume liquor and were served with cracked ice and ginger ale by management, and were required to pay cover charge, and in which liquor was found in cupboard, desk, and waiter's coat, has been held nuisance. 32**F(2d)**324.

692-81 18**F(2d)**779.

692-83 14**F(2d)**574. [a] **Suit to enjoin nuisance** deals not with forbidder's act of sale, but with place of forbidden character. 6**F(2d)**182.

692-84 6**F(2d)**182. [a] **Number of sales** of liquor may or may not determine fact of nuisance. 6**F(2d)**182.

692-85½-New. Maintaining a place for the sale of intoxicating liquor was not a nuisance at common law and is not made so by the Penal Law of New York. 130**Misc**660, 224**NYS**535.

692-85⅛-New. A statute declaring the keeping or carrying of intoxicating liquors with the intent to sell or soliciting or accepting orders for sale to be a nuisance which may be enjoined is not limited in its application only to those who travel about to sell liquor. 33**F(2d)**597.

692-85¼-New. A statute providing for forfeiture of property used or designed for the manufacture of liquor intended for use in violating the act does not supply a remedy in an action in equity to abate the nuisance under statute. 34 **F(2d)**34.

692-86 [d] (7) May be any room, house, building, boat, vehicle, structure, or any other place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of law. 125**Misc**658, 211 **NYS**705. [g] **Place must be used for sale of liquor habitually,** continuously, and recurrently to permit abatement. 39**Wyo** 314, 271**P**13.

693-88½-New. Creation of nuisance in future may not be enjoined under a statute authorizing abatement of nuisance. 318 **Ill** 307, 149**NE**262.

693-88⅛-New. Judgment of conviction establishes only existence of nuisance described in indictment. 203 **Iowa**207, 212**NW**476.

693-88¼-New. A person shown to be engaged in bootlegging may be enjoined from trafficking in intoxicating liquors. 204 **Iowa**144, 214**NW**610.

693-83⅛-New. The fact that a person engaged in bootlegging has no permanent place of business does not prevent his being enjoined from trafficking in intoxicating liquor. 204 **Iowa**144, 214 **NW**610.

693-83⅛-New. The mere presence of intoxicating liquor in a vehicle on premises does not constitute the maintenance of a liquor nuisance thereon, where the liquor had not been delivered, 204 **Iowa** 144, 214**NW**610.

693-88½-New. although there was an unexecuted purpose to deliver it. 204 **Iowa**144, 214**NW**610.

693-88⅛-New. In order that premises may constitute a nuisance which may be enjoined, there must be some use of the premises for the prohibited purpose, or a prohibited act must be done thereon. 204 **Iowa**144, 214**NW**610.

693-90 118**Kan**775, 236**P**647 (statute applies though liquor is not in possession of driver). [a] **In Illinois.**–318 **Ill** 307, 149**NE**262.

694-96 86 **IndA**666, 152**NE**873.

694-98 [b] **Padlock order** cannot be issued on preliminary injunction. 6**Pa Dist&Co** 93.

694-99 6**PaDist&Co** 93.

694-99½-New. Included under such injunction may be a bar over which liquor is sold, 125**Misc**556, 211**NYS**465.

694-99⅛-New. and rooms used in connection with such bar. 125**Misc**556, 211 **NYS**465.

694-2 269**US**36, 46**SCt**14, 70**L ed**151. [a] **Injunction, wrongfully issued** without notice, is not void. 269**US**36, 46**SCt** 14, 70**L ed**151.

694-3 22**F(2d)**686.

694-4 [d] 243 **IllA**521.

694-5 22**F(2d)**686. [c] **In Oklahoma.**– 121 **Okl** 266, 249**P**725.

694-6 22**F(2d)**686.

694-9½-New. Dropping of injunction suit from calendar after issuance of temporary injunction against liquor nuisance does not terminate latter where statute requires notice to county attorney as prerequisite to dismissal or abandonment. 200 **Iowa**530, 204**NW**292.

694-10 91**PaSuper**201.

694-11½-New. Padlocking orders against buildings upon an ex parte showing or prior to entry of judgment is not authorized in a prosecution for conducting unlawful business in such building. 50**SD**342, 210**NW**155.

694-12 39**F(2d)**363.

694-13 24**F(2d)**133. See also 40**F(2d)** 941.

694-14 202 **Iowa**1217, 211**NW**721; 202 **Iowa**1213, 211**NW**731; 204 **Iowa**150, 214 **NW**594; 9**PaDist&Co** 158. [a] **Though property need not be in unlawful use at time of hearing** in order to justify injunction, it must have been so used at or about time petition was filed. 9 **PaDist&Co** 215.

695-15 202 **Iowa**1199, 211**NW**719; 202 **Iowa**1213, 211**NW**731; 204 **Iowa**147, 214 **NW**550; 204 **Iowa**150, 214**NW**594.

695-17 202 **Iowa**1217, 211**NW**721. See also 202 **Iowa**1199, 211**NW**719.

695-17½-New. The trial court has a large discretion in determining whether an injunction should issue where a liquor nuisance has been voluntarily abated before the commencement of an action to enjoin its maintenance. 204 **Iowa** 150, 214**NW**594.

695-20 276**US**494, 48**SCt**329, 72**L ed**670, 59**ALR**620. [a] **That building was closed and locked,** under levy of landlord's attachment, when action to abate was brought, does not constitute abatement of nuisance. 202 **Iowa**742, 210**NW** 909.

695-21½-New. That the owner of premises evicted a tenant who was maintaining a liquor nuisance and abated the nuisance after the commencement of the action does not preclude the court from ordering abatement and closure. 202 **Iowa**1137, 211**NW**372.

695-21½-New. A change of tenants pending suit will not deprive the government of the right to abate a nuisance although the new tenant is not charged with violation of the law. 25**F(2d)**37.

695-22 [a] **Under Volstead Act** district attorney of county where nuisance is located may bring action in name of United States. 215**AppDiv**624, 214**NYS**438.

696-26 [f] **Under Volstead Act,** operator of restaurant permitting patrons to consume liquor is liable to abatement as nuisance. 24**F(2d)**133.

696-27 21**F(2d)**318; 31**F(2d)**807; 202 **Iowa**640, 210**NW**784; 204 **Iowa**843, 215 **NW**973.

696-28 40**F(2d)**941; 202 **Iowa**640, 210 **NW**784; 204 **Iowa**843, 215**NW**973 (knowledge of owner held not necessary). But see 28**F(2d)**774. Contra 21 **F(2d)**318. [a] (6) Knowledge may be shown by attending circumstances. 202 **Iowa**640, 210**NW**784. (7) Owner may not willfully close his eyes to use of premises. 202 **Iowa**640, 210**NW**784. (8) Knowledge of lessee's violation of National Prohibition Act need not be brought home to owner of premises before they may be padlocked as common nuisance. 31**F(2d)**307. (9) Owner of premises, though not made party in abatement proceedings by state for maintenance of nuisance, is presumed in law to know what use tenant is making of property. 84**Colo** 582, 272**P**662, 63 **ALR**693. [b] **Lessees acquiring interest** after abatement decree without notice of suit are not entitled to relief. 6**F(2d)** 1014.

696-28½-New. Some statutes requiring notice to the owner before filing of complaint for the abatement of a liquor nuisance relate only to temporary injunctions, and such notice is not necessary where only a permanent injunction is sought. 75**CalA**349, 242**P**1073.

696-28¾-New. A prosecution to enjoin a liquor nuisance and to assess a mulct tax may be dismissed as to the vendor of the property where it appears that the purchaser had leased the property to law violators. 202 **Iowa**640, 210**NW**784.

696-28¼-New. A tenant disclaiming ownership of the premises cannot complain of a decree closing it as a nuisance, although he may object to a part of the decree affecting him personally in the absence of proof of personal guilt. 24 **F(2d)**174.

696-28½-New. A waiter, for six years employed in premises where liquor was sold, may be enjoined from taking further orders of sale. 26**F(2d)**189.

696-28⅝-New. To effect preventive objects of abatement of a nuisance, interests of innocent persons may be divested. 25**F(2d)**37.

696-39 202 **Iowa**744, 210**NW**968.

696-39½-New. A special defense alleging conviction and payment of fine and that injunction would be imposing additional penalty without trial by jury and therefore against the constitution was held bad, as proceeding is a civil one not involving elements of punishment, with no issue of fact raised. 103**Conn**7, 130 **A**249.

696-39⅛-New. Injunction cannot be avoided by a claim that the nuisance was fully abated prior to the injunction proceedings by the act of officers in seizing and removing liquors and paraphernalia under search warrant. 202 **Iowa**1199, 211**NW**719; 202 **Iowa** 1217, 211**NW**721.

696-39¼-New. That the owner did not participate in the criminal act is no defense. 276**US**494, 48**SCt**329, 72**L ed**670, 59**ALR**620.

696-39½-New. An action brought two months after the unlawful sales on which it is based is timely. 39**Wyo** 314, 271**P** 13.

696-39¾-New. In padlocking proceedings it is no defense that it will injure other legal business conducted in the place. 11**PaDist&Co** 359.

696-40 215**AppDiv**624, 214**NYS**438; **Wis** 229**NW**657. [a] (5) In county court where alleged nuisance is located. 215 **AppDiv**624, 214**NYS**438.

696-41 [a] 171**Ark**987, 287**SW**190. [e] **In Pennsylvania.**–285**Pa**511, 132**A**572.

697-42 Iowa 227**NW**337 (suit to enjoin traveling bootlegger is maintainable in county other than defendant's residence and in any county where he operates).

697-43½-New. That state has expressly refused to pass legislation to enforce the National Prohibition Act does not deprive state court of jurisdiction to abate liquor nuisance. 125**Misc**658, 211 **NYS**705.

697-43⅓-New. In New York, as an action to abate a liquor nuisance is triable by court without jury, the issues in such action may be heard in any county within the judicial district. 215**AppDiv**624, 214**NYS**438.

697-43¼-New. Court is not deprived of jurisdiction because proceeding was brought under repealed statute, where petition contains necessary allegations under existing statute. 35**Wyo** 430, 251 **P**460; 35**Wyo** 482, 251**P**468.

697-43½-New. Defects in petition do not deprive court of jurisdiction. 35 **Wyo** 430, 251**P**460.

697-43⅝-New. The court's jurisdiction in a suit to abate a liquor nuisance could not be based on substituted service on the theory that the suit was in rem. 22**F(2d)**422.

697-44 220**MoA**1222, 299**SW**155 (lessors are owners by entirety).

697-45 8**F(2d)**432; 18**F(2d)**779; 25 **F(2d)**37.

697-46 84**Colo** 582, 272**P**662, 63**ALR** 693.

697-48 [b] **That defendant intends to continue such violations** need not be alleged. 33**F(2d)**597. [c] **That United States would suffer irreparable injury if injunction is not granted** need not be alleged. 33**F(2d)**597.

697-50 But see 36**F(2d)**568.

697-56 [a] 317 **Ill** 197, 148**NE**5; 153 **SC**354, 150**SE**786; 35**Wyo** 430, 251**P**460.

697-57 86 **IndA**666, 152**NE**873.

697-62 153**SC**354, 150**SE**786.

698-65½-New. Pleadings in contempt for violation of injunction held sufficient. 317 **Ill** 197, 148**NE**5.

698-65⅛-New. Allegation of date of sale one day before that proved is not error in absence of showing injury. 13 **F(2d)**845.

698-65¼-New. Ownership of a business charged as a nuisance cannot be proved by admission in the answer of codefendant. 24**F(2d)**174.

698-65½-New. The amendment of a petition changing the cause of action so as to enjoin an act of bootlegging will render the decree void. 206 **Iowa**139, 220**NW**70.

698-66 28**F(2d)**774. [a] (1) See also 40**F(2d)**941. (2) Proof that defendant has been repeatedly convicted of violating prohibition laws warrants presumption that violations will continue unless he is enjoined. 25 **OhNPNS**152. [b] **Evidence held insufficient in suit against landlord.**–9**PaDist&Co** 158. [c] **Closing of premises requires some evidence** from which court can infer probable continuance of offense. 39**F(2d)**363.

698-66½-New. Presumption is that nuisance would have continued but for removal of the illegal property by officers. 202 **Iowa**1217, 211**NW**721.

698-67 31**F(2d)**305. [a] (1) 276**US**494, 48**SCt**329, 72**L ed**670, 59**ALR**620; 8 **F(2d)**709; 13**F(2d)**845 (sufficient); 18 **F(2d)**779; 19**F(2d)**630; 21**F(2d)**318; 27**F(2d)**719; 28**F(2d)**774; 31**F(2d)**307; 36**F(2d)**568; 86 **IndA**666, 152**NE**873; 202 **Iowa**640, 210**NW**784; 202 **Iowa**1202, 211**NW**727; 202 **Iowa**1213, 211**NW**731; 204 **Iowa**147, 214**NW**550; 204 **Iowa**144, 214**NW**610; **Iowa** 227**NW**909 (knowledge of presence of liquor); 126**Kan**658; 128**Kan**627, 278**P**752; 250**Mich**99, 229 **NW**403; 9**PaDist&Co** 417; 153**SC**354, 150**SE**786; **TexCivA** 283**SW**703; 35**Wyo** 482, 251**P**468; 39**Wyo** 314, 271**P**13. (2) Evidence sufficient to support finding that intoxicating liquor was kept and sold on premises. 215**AppDiv**624, 214 **NYS**438. (3) Evidence held sufficient to support finding that liquor was intoxicating. 215**AppDiv**624, 214**NYS**438. (4) Proof of sales on single day may be sufficient. 39**Wyo** 314, 271**P**13. [b] **Equity rule as to weight of evidence applicable.**–13**F(2d)**740. [c] **Failure to show violation of Prohibition Act at time of trial and judgment** does not prevent abatement. 39**Wyo** 314, 271**P**13.

698-70½-New. Where a liquor nuisance is shown to have existed, the burden is on defendant to show that it has been abated. 25**F(2d)**37.

698-70⅝-New. A nuisance once shown to exist is presumed to continue especially in the absence of a change of environment. 25**F(2d)**37.

698-71 21**F(2d)**318; 202 **Iowa**1217, 211 **NW**721. [b] (3) Evidence held insufficient to show defendant's ownership. 26**F(2d)**189. (4) Liquor found in hotel dining room is presumed to have been kept there whole day, within USCA tit 27 §§ 33, 34. 32**F(2d)**324. [c] 31**F(2d)** 305.

698-73 202 **Iowa**1202, 211**NW**727; 126 **Kan**658; 35**Wyo** 482, 251**P**468. [a] **Inadmissible in absence of statute.**–35**Wyo** 482, 251**P**468.

698-76 24**F(2d)**174.

698-76½-New. Proof of a single sale of liquor may establish a nuisance in violation of the National Prohibition Act tit 2 § 21 unless circumstances show the contrary. 103**Conn**7, 130**A**249.

698-76¼-New. A single sale plus evidence of defendant having various intoxicating liquors in his possession for sale and of his reputation for selling liquors makes defendant guilty of a nuisance as a matter of law. 103**Conn** 7, 130**A**249 (where not explained satisfactorily).

698-78 39**F(2d)**363.

698-78½-New. Evidence showing the class of frequenters of an alleged nuisance is immaterial. 32**F(2d)**324.

699-80 12**F(2d)**985.

699-81½-New. Police officer is competent to testify to the general reputation of a place. 202 **Iowa**1321, 210**NW**782.

699-81⅛-New. A petition to restrain the sale and possession of intoxicating liquor should not be granted unless facts justify and support the petition. **Tex CivA** 283**SW**703.

699-81¼-New. General reputation of the place is admissible on the question of the owner's knowledge of the tenant's illegal use of the premises. 202 **Iowa** 1137, 211**NW**372.

699-81½-New. Proof is admissible of sales after filing of bill to show continuing nature of the offense. 16**F(2d)**595.

699-81⅝-New. Collateral inquiry into the mode in which evidence was obtained will not be allowed. 8**F(2d)**709.

699-81¾-New. Proof that defendant had been repeatedly convicted for violating the Prohibition Law warrants a presumption that such violations will continue unless injunctive relief is granted. 25 **OhNPNS**152.

699-81⅞-New. Insufficient evidence precludes closing of premises. 26**F(2d)**189.

699-81⅞-New. To forfeit a lease for maintaining a liquor nuisance, it is not enough to show guilt of the sublessee, but is sufficient to show that the lessee had such knowledge as a reasonable person would act upon. 24**F(2d)**786.

699-81⅞-New. Some actual notice must be fastened on the lessee, evidence merely raising a likelihood that he knew what was going on being insufficient. 24**F(2d)**786.

699-82 8**F(2d)**730 (under National Prohibition Act); 31**F(2d)**807; 118**Kan** 775, 236**P**647; 215**AppDiv**624, 214**NYS** 438; 296**Pa**106, 145**A**718(1stcase).

699-83 31**F(2d)**305.

699-89½-New. A statute providing for trial of injunction proceedings at the first term after due service of notice of commencement of action is permissive and not mandatory. 204 **Iowa**150, 214 **NW**594.

699-89⅛-New. Remoteness of hearing from the date of the offense has been held no bar to an abatement decree. 21**F(2d)**318.

699-89¼-New. In an action to enjoin and abate a liquor nuisance, it was not error for the presiding judge, after testimony had been taken, to have an analysis of the seized liquor made without anyone's knowledge and reopen the case for introduction of such analysis. 208 **Iowa**1001, 224**NW**588.

699-89½-New. Although a suit for abatement must be seasonably brought, the fact that the hearing is remote from the commission of the offense will not, in the absence of proof of abatement, prevent the decree. 25**F(2d)**37.

699-89⅝-New. Delay of nearly two months after the filing of affidavits shortly after the offense, before the filing of a bill to abate the nuisance, is held not unreasonable. 25**F(2d)**37.

699-90½-New. Imposition of mulct tax.–202 **Iowa**1321, 210**NW**782; 202 **Iowa**744, 210**NW**968.

699-91 8**PaDist&Co** 760; **Wis** 229**NW** 657. [a] (2) 203 **Iowa**207, 212**NW**476.

699-92 202 **Iowa**742, 210**NW**909; 202 **Iowa**1213, 211**NW**731; 208 **Iowa**1001, 224**NW**588; 8**PaDist&Co** 760; 11**PaDist &Co** 749. See also 103**Conn**7, 130**A**249. But see 34**F(2d)**34. [d] **Property of innocent persons** may be destroyed where reasonably necessary to abate nuisance. 5**F(2d)**362. [e] **Provision in National Prohibition Act** for destination of property applies to machinery and equipment. 5**F(2d)**362. [f] **Possession of beer in brewery,** after revocation of permit, is nuisance which authorized destruction of equipment. 5**F(2d)**362. [g] **Decree justified under evidence.**–38**F(2d)** 545.

699-92½-New. Under National Prohibition Act tit 2 § 22, the court in its discretion may prohibit occupancy for not more than one year or permit use of the property on defendant's giving bond. 103**Conn**7, 130**A**249.

699-94 32**F(2d)**324; 8**PaDist&Co** 760. But see 4**F(2d)**857. [a] 24**F(2d)**133; 38**F(2d)**545 (court cannot require that tenant be approved by court). [b] **Evidence sufficient** to require court to order giving of bond. 103**Conn**7, 130**A** 249. [c] **Validity.**–203 **Iowa**207, 212**NW**

476. [d] **Liability on bond; duress.**–203 **Iowa**207, 212**NW**476.

699–95½–New. Abatement order as to premises other than those charged in the indictment, although owned by the same person, held void. 203 **Iowa**207, 212**NW** 476.

699–95⅓–New. Under some statutes furniture, fixtures, and contents of buildings to the extent that they are used in violation of the Prohibition Law may be seized and sold to satisfy the costs of abatement of the nuisance. 235 **Mich**272, 209**NW**158.

699–95¼–New. Under some statutes the court is given discretion whether to close buildings used in violation of the Prohibition Law and seize and sell the contents thereof. 235**Mich**272, 209**NW**158.

699–95⅕–New. In an action to abate a liquor nuisance in which the owner by cross bill sought cancellation or forfeiture of a lease, the court is without jurisdiction to grant relief, where one of the colessees named as party defendant was not served. 33**F(2d)**339.

699–95⅙–New. Relief decreed will not constitute enforcement of forfeiture or unauthorized exercise of jurisdiction. **Wis** 229**NW**657.

700–97 See 27**F(2d)**719.

700–99 34**F(2d)**34.

700–2 128 **Okl** 3, 261**P**366.

700–3 [a] **Court may permit occupancy of premises** on giving bond. 276**US**494, 48**SCt**329, 72**L ed**670, 59**ALR**620.

700–6½–New. Under some statutes the assessment of a mulct tax against property is authorized where the owner knew or had reason to know that it was being used as an intoxicating liquor nuisance. 204 **Iowa**147, 214**NW**550.

700–6⅓–New. Under some statutes a mulct tax can be imposed only where a permanent injunction issues enjoining the maintenance of a nuisance. 204 **Iowa** 144, 214**NW**610.

700–6¼–New. Although the evidence does not establish the keeping of a nuisance on premises, defendant may be enjoined from trafficking in intoxicating liquors where the evidence shows that he was a bootlegger and such relief is prayed for. 204 **Iowa**144, 214**NW**610.

700–7½–New. [§ 413a] 3. **Dismissal.** An action for injunction may not be deemed dismissed because of the fact that for a number of years the cause has remained quiescent and without appearance on the calendar and that during such time the citizen plaintiff has died and no substitution has been made. 200 **Iowa**580, 204**NW**292.

700–7⅓–New. A decree takes effect when defendant has knowledge thereof although it provides for a later issuance of the writ under seal of court. 318 **Ill** 230, 149**NE**297.

700–7¼–New. Mulct tax under Iowa statute. 202 **Iowa**1213, 211**NW**731.

700–7⅕–New. An injunction to abate a nuisance under the National Prohibition Act is not perpetual, but effective only for one year. 14**F(2d)**574.

700–7⅙–New. A decree forbidding manufacture forbids taking or soliciting orders or accepting them. 26**F(2d)** 364.

700–7½–New. It is within the discretion of the court to grant a permanent injunction. 208 **Iowa**1001, 224**NW**588.

700–7⅛–New. Where a permanent injunction is granted in an action to abate a liquor nuisance, the court may properly impose a mulct tax against the premises under some statutes. 208 **Iowa** 1001, 224**NW**588.

700–7⅑–New. Ex parte temporary injunction enjoining nuisance until further order of court does not become inoperative by mere lapse of time. 130 **Kan**472, 287**P**232.

700–7 1/10–New. Before any injunctional relief is granted, circumstances must warrant conclusion that fine or imprisonment will be inadequate. **Wis** 229 **NW**657.

700–7 1/11–New. Injunction order is not suspended by agreement of counsel to amend petition by bringing in another defendant. 130**Kan**472, 287**P**232.

700–12 202 **Iowa**1202, 211**NW**727; 208 **Iowa**1001, 224**NW**588. [a] **Discretion of trial judge** in determining fact of nuisance is reviewable only for its abuse. 6**F(2d)**182. [b] **Granting of injunction notwithstanding voluntary abatement of nuisance before trial** will not be disturbed on appeal. 204 **Iowa**150, 214**NW** 594.

700–14½–New. The appellate court has no power to modify a judgment imposing a mulct tax under provisions of a mandatory statute. 204 **Iowa**150, 214 **NW**594.

700–14⅓–New. A decree will not be affirmed because only one disclaiming interest alone appealed where necessary parties were not joined. 26**F(2d)**189.

700–17 [a] (1) 204 **Iowa**843, 215**NW** 973. (6) 202 **Iowa**1137, 211**NW**372. (9) 202 **Iowa**1321, 210**NW**782; 204 **Iowa**843, 215**NW**973. [b] **In New York.**–125**Misc** 658, 211**NYS**705. [c] **Under federal procedure.**–31**F(2d)**807.

701–18 126**Kan**658. [a] (1) 202 **Iowa** 1321, 210**NW**782; 204 **Iowa**843, 215**NW** 973. (6) Fee not taxed against owner without knowledge of use of premises. 204 **Iowa**843, 215**NW**973. [b] (2) County attorney prosecuting abatement action is entitled to fee to be taxed as costs. 118**Kan**659, 236**P**819. [c] **In Wyoming.**–39**Wyo** 314, 271**P**13.

701–20½–New. Under Michigan statute, it has been held only sufficient of contents of building could be sold to pay costs of abatement proceedings. 249 **Mich**226, 228**NW**774.

701–22 [a] 206 **Iowa**314, 217**NW**545. [b] (1) 35**Wyo** 430, 251**P**460 (single unlawful sale).

701–23 116**Tex**515, 295**SW**910; 35**Wyo** 430, 251**P**460, 463 [cit**CJ**].

701–24 35**Wyo** 430, 251**P**460, 463 [cit **CJ**].

702–26 [a] (2) Knowledge of injunction where marshal's return of service order which was filed with the order is made part of information. 18**F(2d)**374. (3) Other informations held sufficient. 35**Wyo** 430, 251**P**460. (4) Information charging violation of specific liquor nuisance injunction on two occasions is not defective for failing to state that defendant was maintaining liquor nuisance. 35**Wyo** 430, 251**P**460. [c] (4) It is not necessary to jurisdiction of court in contempt proceedings that accused should be brought before court on warrant, especially where he appears at, and participates in, hearing. 317 **Ill** 197, 148**NE**5.

702–27 200 **Iowa**1339, 206**NW**139. [a] **Petition held sufficient.**–318 **Ill** 230, 149 **NE**297.

702–28 202 **Iowa**50, 209**NW**522. [a] 221**MoA**721, 285**SW**765.

702–29½–New. In Arkansas official oath of prosecuting attorney is a sufficient verification of information. 171 **Ark**987, 287**SW**190 (construing statute).

702–30 [a] **On death of plaintiff** in injunction proceeding, no substitution need be made to punish for contempt. 200 **Iowa**580, 204**NW**292.

702–31 35**Wyo** 430, 251**P**460.

702–31½–New. That a citizen plaintiff in an action for injunction against the unlawful sale of intoxicating liquors dies and that no new plaintiff is substituted is no obstacle to the institution by the county attorney of contempt proceedings for violation of a temporary injunction issued in the action. 200 **Iowa**580, 204**NW**292.

702–31⅓–New. Proceedings in punishment of violation of injunctions will be upheld when in accordance with practice before enacting of Prohibition Act prescribing the method therefor regardless of validity of that act. 318 **Ill** 230, 149 **NE**297.

702–41½–New. One who has been served with original notice of filing of petition for injunction against unlawful sale of intoxicating liquor must take notice of the resulting decree against him. 200 **Iowa**1339, 206**NW**139.

702–41⅓–New. though not served with an order of injunction nor having knowledge of granting thereof. 200 **Iowa**1339, 206**NW**139.

702–41¼–New. Injunction against maintaining a liquor nuisance on specified premises is not violated by sale on other premises. 202 **Iowa**923, 211**NW** 403.

702–41⅕–New. One with knowledge of proceedings is subject to punishment for violation of decree without showing of actual notice of decree. 202 **Iowa**762, 211**NW**403.

702–42 [c] **Acquittal by jury** for maintaining nuisance and disagreement as to selling liquor is no defense for violating liquor injunction. 50**SD**645, 211**NW** 691. [d] **Where order enjoined removal of any fixtures from premises,** fact that fixtures removed by defendant were not used in liquor business enjoined is no defense to charge of contempt. 221**MoA** 721, 285**SW**765.

703–44½–New. Advice of counsel is no defense. 318 **Ill** 230, 149**NE**297.

703–46 207 **Iowa**1201, 224**NW**510.

703–50½–New. That decree is void is a valid defense. 318 **Ill** 307, 149**NE**262.

703–50⅓–New. Judicial notice of injunction order may be taken by the court. 35**Wyo** 430, 251**P**460.

703–52 [b] **Affidavits attached to information** may be used in evidence. 50 **SD**645, 211**NW**691.

703–52½–New. Evidence that defendant broke jugs smelling of liquor at a raid has been held proper in considering a contempt charge. 202 **Iowa**762, 211**NW** 403.

703–53½–New. Evidence is not rendered inadmissible because obtained by an insufficient search warrant. 202 **Iowa**50, 209**NW**522.

703–53⅓–New. Intoxicating liquors which were seized on the premises of defendant are admissible in evidence although they have not been finally adjudicated and declared forfeited. 202 **Iowa**686, 210**NW**933.

703–53¼–New. Affidavits are admissible in the absence of a demand for a cross-examination of the affiant. 202 **Iowa**675, 210**NW**900.

703–53⅕–New. Testimony as to the result of a chemical examination of duly identified liquors is admissible. 202 **Iowa**675, 210**NW**900.

703–53⅙–New. Liquor found on premises and marked money taken from defendant when arrested may be admissible. 23**F(2d)**141.

703–54 [a] 33**F(2d)**489; 202 **Iowa**762, 211**NW**403.

703–55 202 **Iowa**570, 210**NW**780. [a] (1) 318 **Ill** 230, 149**NE**297; 202 **Iowa**104, 209**NW**274; 202 **Iowa**570, 210**NW**780; 202 **Iowa**675, 210**NW**900; 202 **Iowa**686, 210**NW**933; 202 **Iowa**762, 211**NW**403; **Iowa** 228**NW**14(1stcase); 221**MoA**721, 285**SW**765; 35**Wyo** 430, 251**P**460 (sales). (11) To authorize finding that defendant was informed of proceeding to enjoin liquor nuisance and result thereof and was willfully in contempt in violating injunction. 202 **Iowa**255, 207**NW** 752. (12) To show defendant had knowledge of injunction decree. 318 **Ill** 230, 149**NE**297. [b] (1) 206 **Iowa** 314, 217**NW**545; 207 **Iowa**1201, 224**NW** 510.

703–56 202 **Iowa**104, 209**NW**274.

703–58 202 **Iowa**104, 209**NW**274.

704–59 [a] (4) Fine of three hundred dollars and costs and ninety days in jail and further confinement in lieu of unpaid fine is not excessive. 202 **Iowa** 50, 209**NW**522. [d] **In Illinois.**–317 **Ill** 197, 148**NE**5.

704–62 245 **IllA**202.

704–64½–New. A fine of five hundred dollars and imprisonment for six months has been held not excessive. 202 **Iowa** 255, 207**NW**752.

704–64⅓–New. Entry of judgment of contempt before filing of notes of reporter cannot stand. 202 **Iowa**923, 211 **NW**403.

704–64¼–New. A judgment that accused pay a stated fine, or, in lieu of payment thereof, with costs and attorney's fee, be committed to jail for a stated period, is satisfied in toto by serving a term of imprisonment. 203 **Iowa**458, 212**NW**572.

704–64⅕–New. Commitment. A recital in commitment that defendant kept liquor for sale, not supported by evidence or pleading, does not render the commitment fatally defective where evidence showed other violations of the injunction. 221**MoA**721, 285**SW**765.

704–65 221**MoA**721, 285**SW**765. [a] **In**

Illinois.–318 **Ill** 230, 149**NE**297.

704-67½-New. Appeal is sometimes treated as pending on writ of error where an appeal is provided for by statute and appellee joins in error. 318 **Ill** 230, 149**NE**297.

704-67½-New. On error to review an order punishing for contempt, a claim of want of jurisdiction of the lower court because the petition for abatement of a nuisance fails to state the cause of action is a collateral attack on the injunction order leaving for review only the question of the trial court's jurisdiction. 35**Wyo** 430, 251**P**460.

704-67¼-New. Motion for a new trial of contempt proceedings is addressed to the sound discretion of the trial court. 56**AppDC**325, 13**F(2d)**297.

704-67½-New. Denial of a new trial, where the witness recanted as to identity of defendant, held not abuse of discretion. 56**AppDC**325, 13**F(2d)**297.

704-69 202 **Iowa**50, 209**NW**522 (order for improper punishment may be revised). [b] (2) 202 **Iowa**610, 210**NW** 791. (6) Court must determine whether facts clearly and satisfactorily establish contempt. 206 **Iowa**435, 220**NW**22 (conflicting evidence found sufficient).

704-71½-New. [§ 416a] R. **Padlocking for Violation of Injunction.** The court, issuing an injunction restraining violation of a liquor law on certain premises, has power, under statutes, on violation thereof to padlock the building. 128**Kan**627, 278**P**752.

704-73 [a] (10) Violation of terms of bond. 23**F(2d)**885.

705-78 [a] 327 **Ill** 218, 158**NE**354.

706-84 [a] (3) Defendant has burden to prove double jeopardy. 23**F(2d)**885. [c] 85**Colo** 324, 275**P**895.

706-93 245 **IllA**202; 246 **IllA**53. [a] **Applicability of criminal code to Prohibition Act.**–Excepting crimes specified in Prohibition Act, enforcement of terms and provisions of act is within protection of appropriate sections of criminal code. 6**F(2d)**668.

708-93½-New. Prosecution by prohibition officers or state policemen should not be begun without first submitting evidence to the district attorney and securing his approval. 6**PaDist&Co** 100.

706-93½-New. Jurisdiction conferred by congress on the insular courts of Porto Rico should be exercised in accordance with local rules of procedure. 33**PortoRico** 379.

706-95 162**La**1060, 111**S**421.

706-96 7**Alaska**28. See also 126**Misc** 762, 214**NYS**781. [a] **Insular courts of Porto Rico** have no jurisdiction under Volstead Act. 34**PortoRico** 40.

706-97 205**Cal** 411, 271**P**202.

707-98 128**Me**293, 147**A**212; 171**Minn** 292, 213**NW**910.

707-99 234**Ky**776, 29**SW(2d)**32; 126 **Or** 297, 269**P**864.

707-1½-New. Congress had power to confer upon insular courts of Porto Rico concurrent jurisdiction in violations of the National Prohibition Act. 33 **PortoRico** 949.

707-1½-New. Under statute conferring concurrent jurisdiction upon insular courts of Porto Rico federal district court cannot transfer case to insular court without consent of accused and federal attorney. 13**PortoRicoFed**203.

707-1¼-New. Under statute conferring concurrent jurisdiction upon insular courts of Porto Rico federal district court cannot transfer case to insular court. 13**PortoRicoFed**337.

708-7 [d] **In Canada.**–21**SaskL**237, [1927] 1**DomLR**940, [1927] 1**WestWkly** 53.

703-9 21**AlaA**194, 106**S**680; 173**Minn** 95, 216**NW**540; 35 **OhA**311, 172**NE**401; 119 **Or**341, 249**P**635.

703-10 23**AlaA**598, 129**S**491; 119 **Or** 341, 249**P**635. [a] 6**PaDist&Co** 655. [c] 196 **Ind**229, 147**NE**778. [d] (6) Oral complaint for unlawful manufacture, properly sworn to and inserted in court record, is sufficient. 171**Minn**292, 213 **NW**910. [j] 198 **Ind**690, 154**NE**667. [k] (1) 196 **Ind**332, 147**NE**624; 196 **Ind** 229, 147**NE**778. [n] 199 **Ind**73, 155**NE** 196. [t] **CalA** 288**P**45. [w] **Firearms or guns.**–196 **Ind**359, 147**NE**279.

709-11 196 **Ind**359, 147**NE**279. [a] (12) Maintenance of common liquor nuisance. 41 **Ida**353, 238**P**525. (13) That both defendants were actually arrested. 41**Ida**353, 238**P**525. [b] (3) Maintaining liquor nuisance. 171**Minn** 295, 213**NW**909. [c] **Complaint in prosecution** under city ordinance held unaffected by amendment of Prohibition Law relating to pleading and proof in prosecution under state statutes. 137 **Wash**414, 242**P**389.

709-12 226**Ky**36, 10**SW(2d)**471.

709-13 21**AlaA**194, 106**S**680.

710-16 [a] (3) Affidavit in prosecution for possession and sale of liquor and maintaining nuisance, in violation of statute, sworn to before deputy prosecuting attorney, is sufficient. 200 **Ind** 528, 164**NE**271. [b] (3) Seal of prosecutor or his deputy is not required on affidavits sworn to before him in his official capacity. **IndA** 168**NE**612.

710-18½-New. Defects in an affidavit making allegations in the alternative are waived where demurrer does not point out the defects. 22**AlaA**562, 118**S** 238 [certiorari den 218**Ala**168, 118**S**239].

710-18½-New. Designation of accused by initials in affidavit is matter to be raised by plea in abatement, and not demurrer. 22**AlaA**562, 118**S**238 [certiorari den 218**Ala**168, 118**S**239].

710-18¼-New. Complaint need not be filed in the circuit court by the solicitor. 22**AlaA**323, 118**S**264.

710-18½-New. A complaint for violation of the National Prohibition Act filed in a municipal court in Porto Rico in the name of the United States and including also the people of Porto Rico complies with the provisions of Jones Act § 10. 33**PortoRico** 379.

710-21 52**SD**121, 216**NW**870. [e] **Amendment correcting date of sale** may be made on appeal to correct court. 147 **Miss**85, 113**S**191. [d] **Second affidavit** held not an amendment but rather a duplication of identical charge. 35 **OhA** 311, 172**NE**401.

710-22 14**F(2d)**193. [a] **Search warrant** addressed to commissioner could not be served by prohibition agents. 14 **F(2d)**193.

710-23 212**Ky**245, 278**SW**620; 215**Ky** 758, 286**SW**1038; 216**Ky**451, 287**SW**951. [a] 212**Ky**245, 278**SW**620; 215**Ky**236, 284**SW**1051. [e] 210**Ky**372, 275**SW**878; 105**WVa**480, 143**SE**151.

710-24 See also 210**Ky**717, 276**SW**812. [c] **Amendments.**–195**NC**241, 141**SE**585.

710-25 210**Ky**372, 275**SW**878; 210**Ky** 717, 276**SW**812; 212**Ky**245, 278**SW**620; 215**Ky**236, 284**SW**1051. [a] **Warrant and affidavit** do not constitute pleading. 216**Ky**182, 286**SW**1042.

710-30 86**PaSuper**382.

710-34 41 **Ida**353, 238**P**525 (waiver by both defendants shown).

711-40 [e] **Order of commitment** held not fatally defective. 41 **Ida**353, 238**P** 525. [f] **Requirements generally held sufficiently complied with.**–321**Mo** 603, 12 **SW(2d)**57.

711-40½-New. In Kentucky prosecution in quarterly court for violation of liquor laws is intended by statute to be in the same manner as in police and magistrates' courts. 210**Ky**764, 276**SW** 809.

711-43 71**CalA**2, 234**P**438.

711-49 28**F(2d)**548; 246 **IllA**376; 202 **Iowa**450, 209**NW**468.

711-52 23**AlaA**357, 127**S**799; 119**Kan** 467, 239**P**749; 212**Ky**47, 278**SW**160; **Mo** 296**SW**152; **TexCr** 29**SW(2d)**350.

711-55 35**F(2d)**552. [a] 21**AlaA**207, 106**S**872; 22**AlaA**407, 116**S**900; 23**AlaA** 403, 126**S**183(3dcase); 177**Ark**1193, 9**SW** (2d)327; 41 **Ida**353, 238**P**525; 196 **Ind** 433, 148**NE**403; 196 **Ind**654, 149**NE**161; 198 **Ind**502, 154**NE**273; 119**Kan**467, 239 **P**749 (persistent violation of liquor law); **Mo** 278**SW**700; 318**Mo** 1173, 28**W** (2d)777; **MoA** 32**SW(2d)**129; **TexCr** 293**SW**1116; **TexCr** 26**SW(2d)**273.

712-56 329 **Ill** 223, 160**NE**582; **Mo** 295 **SW**104.

712-56½-New. as to repugnancy, 322 **Ill** 471, 153**NE**696.

712-57 [b] **Mo** 289**SW**938; 108**TexCr** 77, 299**SW**259; 152**Wash**111, 277**P**388. [c] (8) Manufacture, transportation, and possession with intent to sell held proper charge in one count. 197 **Ind**16, 148**NE**420.

713-58 243 **IllA**146; **Mo** 291**SW**1078 (1stcase). [b] 121**Kan**137, 245**P**1032.

713-59 322 **Ill** 384, 153**NE**729; 197 **Ind** 374, 151**NE**98; 200 **Ind**176, 161**NE**265; 202 **Iowa**450, 209**NW**468; **Mo** 28**SW(2d)** 784; **Mo** 18**SW(2d)**16(1stcase); 217**MoA** 156, 273**SW**1098; **MoA** 284**SW**152; **MoA** 291**SW**151; **MoA** 292**SW**1069; 119 **Or** 446, 249**P**817; 6**PaDist&Co** 655. [a] 197 **Ind**374, 151**NE**98; 119**Kan**467, 239**P**749.

714-60 [a] **Allegation of previous conviction** is proper where statute permits more severe punishment for subsequent convictions. 136**Wash**453, 249**P**562.

714-62 13**F(2d)**620; 171**Ark**1187, 286 **SW**1013; 239 **IllA**273; **TexCr** 32**SW(2d)** 356(2dcase). [b] 41**F(2d)**144; 21**AlaA** 237, 107**S**28; 23**AlaA**569, 129**S**314; 248 **IllA**220; 234**Ky**635, 28**SW(2d)**953(1st case); 311**Mo** 630, 279**SW**135. [e] **Indictments held insufficient.**–171**Ark**1187, 286**SW**1013; 196 **Ind**654, 149**NE**161.

714-63 116**Nebr**287, 216**NW**807. But see 92**Fla**711, 109**S**807.

715-67 202 **Iowa**450, 209**NW**468. See also 246 **IllA**53. [c] **Verification held sufficient.**–28**F(2d)**509.

715-69 18**F(2d)**208.

715-73½-New. Complaint is demurrable which charges liquor offense but does not set out substance of ordinance. 21**AlaA**253, 107**S**41.

715-76 6**PaDist&Co** 655. [a] **Under Jones Act** indictment need not allege whether offense is casual or involves habitual violations. 40**F(2d)**889.

715-80 214**Ky**472, 283**SW**437; 316**Mo** 179, 289**SW**954; 77**Mont**8, 249**P**574, 52 **ALR**454. See also 154**Miss**451, 122**S**731 (2dcase).

716-81 6**F(2d)**144 (unlawful intent sufficiently alleged); 54**SD**611, 224**NW**228.

716-83 93**CalA**796, 269**P**969.

716-84 246 **IllA**53; 107**TexCr**19, 294**SW** 564; 110**TexCr**230, 8**SW(2d)**165; 111 **TexCr**384, 12**SW(2d)**792.

716-85 38**Wyo** 352, 267**P**89.

716-88 [b] **In Tennessee.**–153**Tenn**139, 281**SW**924.

716-89 239**Mich**84, 214**NW**129, 130 [quotCJ]. [a] 15**F(2d)**977; 177**Ark** 1076, 9**SW(2d)**320; 101**Vt**53, 140**A**492.

716-90 15**F(2d)**977, 980 [citCJ]; 18**F** (2d)208; 80**CalA**583, 251**P**222; 329 **Ill** 223, 160**NE**582; 239**Mich**84, 214**NW**129, 130 [quotCJ].

717-91 239**Mich**84, 214**NW**129, 130 [quotCJ].

717-93 203 **Iowa**207, 212**NW**476; 239 **Mich**84, 214**NW**129.

717-97 203 **Iowa**207, 212**NW**476.

717-99 82**CalA**485, 255**P**846; 329 **Ill** 223, 160**NE**582; 197 **Ind**16, 148**NE**420; 202 **Iowa**450, 209**NW**468; 203 **Iowa**207, 212**NW**476. [a] **Description held sufficient.**–82**CalA**485, 255**P**846.

718-6 **NJSup** 135**A**339.

718-10 18**F(2d)**208; 23**AlaA**524, 128**S** 774. [a] (1) 15**F(2d)**977; 77**Mont**297, 250**P**612. [b] 9**PaDist&Co** 754; 100**Tex Cr**604, 272**SW**180. [e] 100**TexCr**604, 272 **SW**180. [h] **Amendment,** by alleging under videlicet date of illegal transportation and sale of liquor, is permissible where time is not essence of offense. 235 **Mich**620, 209**NW**915.

718-11 [a] (2) Exact hour at which sale was made need not be set forth. 158**La**674, 104**S**612.

719-22 **CalA** 288**P**45; 326 **Ill** 197, 157 **NE**233; 19 **OhA**173; 110**TexCr**230, 8**SW** (2d)165. [d] **Purpose for which bought** need not be alleged. 160**La**316, 107**S** 123.

719-23 [a] 197 **Ind**16, 148**NE**420.

719-24 30**F(2d)**394(2dcase); 216**Ky** 823, 288**SW**754; **MoA** 256**SW**141. But see 86**PaSuper**382.

720-29½-New. Allegation of sale of intoxicating liquor need not allege that it was sold for beverage purposes. 15 **F(2d)**977.

721-39 15**F(2d)**977; 23**AlaA**524, 128**S** 774; 24 **OhA**312, 157**NE**800; **OklCr** 283 **P**587; 108**TexCr**77, 299**SW**259. [a] 22 **AlaA**392, 117**S**398; 100**CalA**295, 279**P** 1054; 213**Ky**68, 280**SW**474; 162**La**938, 111**S**335; 164**La**167, 113**S**805; 309**Mo** 520, 275**SW**36; 106**TexCr**29, 290**SW**167; 108**TexCr**92, 299**SW**249; **TexCr** 22**SW**

(2d)944. [c] (1) 158La674, 104S612. (3) In indictment charging conspiracy to violate National Prohibition Act by conspiring to sell intoxicating liquor for beverage purposes, charge that liquor was intoxicating meant that it contained as much as one half of one per cent of alcohol, and, under statute, indictment was not required to plead percentage. 29F(2d)651. (4) Indictment held sufficient though not charging that liquor contained one half of one per cent of alcohol by volume. MoA 282 SW1043. (5) Indictment for selling liquor, in words of statute, need not allege alcoholic content where statute defining offense does not. MoA 291SW 151. (6) Information for unlawful possession of intoxicating liquor for beverage purposes at place other than defendant's residence need not charge percentage of alcohol contained. 222MoA 499, 280SW718.

721–40 [a] **Information charging transportation of "hooteh,"** "moonshine," and "corn whisky" held sufficient. 312Mo 140, 279SW99.

721–42 214Ky797, 284SW80; OklCr 281P983 (that Choctaw beer manufactured by defendant contained more than one half of one per cent alcohol by volume). [a] **Charge that liquor was intoxicating** was not negatived by allegation that it was beer. 196 Ind686, 148NE411.

721–43 Mo 292SW39; OklCr 272P490 (2dcase); OklCr 284P74.

721–44 21F(2d)32; 167Cal65, 144SE 726, 60ALR747; 152Miss372, 118S715.

722–45 226Ky220, 10SW(2d)812.

722–46 110TexCr497, 9SW(2d)340.

722–47 [a] **Indictment alleging sale of liquor "capable of producing intoxication"** has been held sufficiently to charge offense. 112TexCr67, 13SW(2d)868.

722–49 70CalA531, 234P438 (need not allege that liquors contained more than one half of one per cent of alcohol).

722–52 222MoA499, 280SW718.

722–53 70CalA531, 234P438 (need not allege that intoxicating liquors were sold for beverage purposes); 322 Ill 353, 153 NE604; 322 Ill 384, 153NE729; 334 Ill 524, 166NE96; 243 IllA146; 312Mo 212, 278SW1030.

722–54½–New. An information for sale of intoxicating liquor need not allege that it was capable of being used as a beverage where the liquor sold was not a mixture or compound. 49SD406, 207NW482.

722–54⅓–New. An indictment need not allege that the liquor sold contained more than one half of one per cent of alcohol by volume. MoA 282SW106.

722–55 18F(2d)208; 27F(2d)366; 217 MoA156, 273SW1098. [a] **Indictment charging possession of** "intoxicating liquors for beverage purposes" is not defective for failure to allege that it was "fit" for beverage purposes. 6F(2d)145.

722–57 18F(2d)208; 213Ala332, 104S 834 ("prohibited liquors"); 23AlaA524, 128S774; 85CalA165, 259P119; 322 Ill 384, 153NE729; 331 Ill 636, 163NE352; Ind 164NE625(1stcase); 215Ky278, 284 SW1071; 168Minn467, 210NW394; MoA 282SW106; MoA 8SW(2d)1075(2dcase); 74Mont201, 239P1002 (construing St. § 11111); Mont 286P1113; 105TexCr465, 288SW1080; 111TexCr328, 12SW(2d) 1025.

723–58 TexCr 9SW(2d)339.

723–60 18F(2d)208.

723–61 [c] **Allegations held sufficient.**– 23AlaA524, 128S774; 23AlaA520, 128S 777.

723–62 126Me363, 138A566; Mo 279 SW133; 101Vt53, 140A492.

724–75 89 IndA104, 165NE767(3dcase); 89 IndA717, 165NE767(2dcase); 226Ky 220, 10SW(2d)812; 160La316, 107S123, 124 [citCJ]; TexCr 27SW(2d)653(2d case). [a] **Under National Prohibition Act,** information need not name persons to whom sales were made. 4F(2d)884. [b] **Indictment held to sufficiently show name of purchaser.**–TexCr 27SW(2d) 217(2dcase).

724–76 15F(2d)977; 40F(2d)889; 41F (2d)215; 68CalA615, 229P1000; 70CalA 531, 234P438; 158La674, 104S612; 160 La316, 107S123, 124 [citCJ]; Mo 292 SW39. [b] (1) Mo 279SW133; Mo 296 SW152; Mo 18SW(2d)16(1stcase); MoA 274SW496. [f] **National Prohibition Act** specifically provides that name of purchaser need not be stated but may be supplied, if desired, upon application for bill of particulars. 15F(2d)977.

725–83½–New. An indictment charging the manufacture and possession of equipment therefor need not set out the names of purchasers. 105TexCr159, 287SW269.

725–88½–New. Stating the name of the purchaser sufficiently identifies the offense. 25F(2d)581.

726–4½–New. Naming the purchaser of liquor is descriptive and an averment of sale to one is not supported by proof of a joint sale. 108TexCr590, 2SW(2d) 229.

726–6 But see 155Md13, 141A383.

726–11 322 Ill 416, 153NE693; 326 Ill 481, 158NE134; 334 Ill 524, 166NE96; 235 IllA587; 125Me319, 133A738. But see 164La735, 114S635. [d] **In Illinois.** –235 IllA587.

726–12 158La209, 103S742; 166Minn 116, 207NW19. [d] (1) 150Md278, 132 A624.

727–16 [a] 322 Ill 416, 153NE693; 331 Ill 636, 163NE352. [b] 326 Ill 481, 158 NE134; 254 IllA120.

727–19 316 Ill 376, 147NE472; 321 Ill 484, 152NE500.

727–20½–New. An indictment charging unlawful sale qualified by the phrase "except as authorized" in the statute held sufficient on a motion to quash. 322 Ill 384, 153NE729.

727–22 202 Iowa450, 209NW468. [a] (1) 116 Or416, 241P390. [b] (2) Amendment makes it no longer necessary to negative exceptions. 100TexCr 291, 272SW787 (manufacture of intoxicating liquor). (3) Indictment charging manufacture need not negative exceptions. 101TexCr491, 276SW287. (4) In liquor prosecution, statement need not allege that liquor was not legally manufactured by virtue of some of exceptions named in statute and constitution. 101TexCr483, 276SW277. [d] **In Mississippi.**–141Miss18, 106S443; 145Miss 207, 110S447. [e] **In Missouri.**–A 279SW 221.

727–24 15F(2d)977; 30Ariz258, 246P 548; 85CalA165, 259P119; 88CalA59, 262P780; 92Fla711, 109S807; 93Fla 993, 112S892; 233 IllA608; 245 IllA 119; 245 IllA145; 245 IllA388; 196 Ind 316, 148NE197; 196 Ind654, 149NE161; 197 Ind173, 150NE58; 200 Ind149, 162 NE51; 200 Ind420, 164NE269; Ind 168 NE22; 126Kan792, 271P275; 210Ky 717, 276SW812; Mo 22SW(2d)1049 (held unnecessary to negative exception); MoA 289SW664; 34NM449, 282 P819(2dcase); 49ND648, 192NW974; 52ND81, 202NW131; 55ND83, 212NW 442; 116 Or459, 241P383; 101TexCr68, 274SW133; 111TexCr384, 12SW(2d)792 (not necessary to negative exceptions); 103WVa555, 138SE120; 36Wyo 532, 257 P2. But see Mo 7SW(2d)256. [a] 322 Ill 416, 153NE693. [b] **In prosecution for unlawful possession,** state need not allege and prove purpose for which defendant had possession or that such purpose was unlawful. 122Kan182, 250P 1071. [c] **In Missouri.**–A 279SW733.

728–25 212Ky245, 278SW620; 130WVa 555, 138SE120. [c] 101TexCr185, 274 SW634.

723–27 Wash 288P236.

729–30½–New. Any information for violation of a state statute prohibiting unlawful manufacture of intoxicating liquors or the possession of appliances therefor need not negative the proviso of such statute permitting intoxicating liquors to be manufactured, sold, furnished, and possessed when permitted by the federal statute. 49ND648, 192 NW974.

729–30⅓–New. A complaint in a prosecution for unlawful possession of mash fit for distillation need not negative the exception permitting possession by holders of federal permits for manufacture of alcohol for denaturation. 116 Or416, 241P390.

729–33½–New. Complaint charging unlawful transportation of intoxicating liquor in violation of Minneapolis ordinance need not negative provisos or exceptions. 164Minn499, 205NW450.

729–33¼–New. A complaint, under a city ordinance denouncing possession of intoxicating liquors for sale or transportation, need not negative exceptions in the ordinance. 168Minn467, 210NW 394.

729–33¼–New. The state need not negative an exception in the statute prohibiting transportation. 199 Ind520, 157 NE49.

729–33⅓–New. Information charging willful possession for beverage purposes need not negative exceptions relating to householders appearing in later clauses. 162La242, 110S336.

729–33⅓–New. It is not necessary to negative an exception in a separate article of the statute, and not contained in the enacting clause. 322 Ill 443, 153 NE691; 322 Ill 471, 153NE696.

729–33½–New. An indictment for possession need not negative exceptions. MoA 278SW1073.

729–33⅓–New. An indictment need not negative the fact that defendant had possession prior to the enactment of the Prohibition Act. 331 Ill 636, 163NE 352.

729–33⅓–New. An indictment for transportation need not negative exceptions contained in another section. 107WVa 163, 148SE127.

729–33 5F(2d)586; 8F(2d)113; 8F (2d)320; 16F(2d)816; 18F(2d)573; 35 F(2d)96; 7Alaska23; 97CalA608, 275 P1010(1stcase); 6PaDist&Co 655; 100 TexCr177, 272SW185.

729–39 8F(2d)937; 11F(2d)933; 15F (2d)977; 18F(2d)573.

729–41 [a] **Indictment charging conspiracy** to sell without making permanent record should allege that seller had permit to sell liquor. 5F(2d)527. [b] **Indictment for violation of National Prohibition Act** need not negative possibility that unlawful manufacture or sale may have been for legitimate nonbeverage purposes. 31F(2d)19.

729–41½–New. The necessity for reference to exceptions, limitations, and provisions found in the act is eliminated. 18F(2d)208.

729–42 20AlaA613, 104S554; 233 IllA 504; 196 Ind433, 148NE403; 196 Ind 686, 148NE411; 196 Ind665, 149NE348; Mo 18W(2d)153; MoA 299SW821; 119 Or446, 249P817; 107TexCr281, 296SW 518; 103WVa361, 137SE749. [a] 21 AlaA207, 106S872. [b] 171Ark1188, 286 SW943; 178Ark1167, 13SW(2d)603. [c] (1) 37GaA160, 142SE306(1stcase); 37GaA827, 142SE306(2dcase); 319 Ill 386, 150NE249; 196 Ind509, 149NE57; 197 Ind123, 150NE24; 198 Ind198, 152 NE814; 307Mo 411, 270SW282 (information); Mo 279SW141; 312Mo 626, 280SW703 (white corn whisky); Mo 280 SW1044; Mo 285SW82; Mo 285SW736; Mo 289SW865; Mo 300SW684; 321Mo 603, 12SW(2d)57; MoA 281SW142; 77 Mont8, 249P574, 52ALR454; 49ND488, 192NW91; 119 Or341, 249P635; 100 TexCr442, 273SW845; 107TexCr13, 294 SW592; 110TexCr430, 10SW(2d)108; 106WVa299, 145SE604; 41Wyo 256, 284 P764. (3) For aiding and abetting in unlawful manufacture. 208Ky655, 271 SW701. [d] 171Ark1188, 286SW943. [e] 316Mo 55, 289SW890. [f] 318 Ill 424, 149NE226; 217MoA396, 266SW738 (articles named not ones described in statute under which information was drawn). [h] **Where statute prohibits possession of contrivances capable of use for distillation** of alcoholic liquor, indictment substituting "manufacture" for "distillation" is insufficient. 188Wis 259, 205NW822. [i] **Information held insufficient** for want of definiteness. MoA 7SW(2d)386.

730–45 101TexCr491, 276SW287.

730–47 101TexCr491, 276SW287.

730–51 23AlaA147, 122S307.

730–53½–New. **Affidavit charging possessing of a still need not allege that it was not registered under federal law.** 196 Ind665, 149NE348.

730–54 [a] **Indictment using word "buy" in alternative charge** held not invalid. 23AlaA390, 128S129(1stcase).

730–54½–New. , or for failure to give an itemized statement of articles constituting such equipment. **TexCr** 276 SW694.

730–55½–New. Indictment alleging that defendant had possession of a still is not sufficient to charge setting up of the still. 171**Ark**1188, 286**SW**943.

730–56½–New. Complaints for possession of unregistered stills have been held insufficient. 117 **Or**204, 243**P**77.

730–56⅓–New. Allegation of manufacture for beverage purposes is sufficient. 314**Mo** 333, 284**SW**433.

730–56¼–New. An indictment for an attempt to manufacture intoxicating liquor alleging the assembling of wood and fuel at a distillery for the purpose of burning it in manufacture of liquor need not allege that such act was adapted for such purpose.. 145**Miss**821, 111**S** 300.

730–56⅕–New. An indictment alleging possession of liquor on a certain date is sufficient in the absence of a motion for a bill of particulars. 24**F(2d)**890.

730–56⅙–New. In Porto Rico an indictment for possession of an unregistered still need not allege that the still was capable of distilling alcohol of forty degrees. 33**PortoRico** 881.

730–56½–New. Indictment for possessing mash fit for manufacturing intoxicating liquors held sufficient. **Or** 282 **P**560.

730–56⅛–New. Information charging possession of mash, wort, and wash held sufficient under statute. **OklCr** 282**P** 683.

730–58½–New. Indictment for possession of an unregistered still need not allege that the still was not registered by anyone. 13**F(2d)**108.

730–59 197 **Ind**8, 149**NE**442; 316**Mo** 179, 289**SW**954. [a] **AlaA** 128**S**774; 23 **AlaA**353, 125**S**800(2dcase); 30**Ariz**113, 244**P**1020; 196 **Ind**258, 148**NE**143; 196 **Ind**562, 149**NE**62; 197 **Ind**8, 149**NE**442; 198 **Ind**389, 153**NE**773; **Ind** 168**NE**456; 309**Mo** 534, 275**SW**41 (alleging act through defendant's agent); 316**Mo** 179, 289**SW**954; 316**Mo** 596, 292**SW**32; **Mo** 300**SW**485; **Mo** 300**SW**719; 320**Mo**228, 7**SW(2d)**259; **Mo** 21**SW(2d)**758(3d case); **Mo** 23**SW(2d)**11; **Okl** 280**P**1112; **OklCr** 291**P**142; 144**Wash**516, 258**P**319.

730–60 116**Nebr**287, 216**NW**807.

730–61 [a] **In Tennessee.**–160**Tenn**530, 26**SW(2d)**151.

730–62½–New. , nor that of the carrier or person from which, or from whom, defendant received it. 196 **Ind**258, 148 **NE**143.

730–62⅓–New. , or the particular road on which the liquor was transported. 110**TexCr**378, 9**SW(2d)**348.

730–63½–New. or whisky, 101**TexCr** 495, 276**SW**438.

730–67 310**Mo** 179, 289**SW**954. [a] 101 **TexCr**495, 276**SW**438.

730–68 316**Mo** 179, 289**SW**954.

730–70 But see 196 **Ind**258, 148**NE**143 (actual movement less than forty feet). [a] **Where place from which liquor was conveyed is unknown,** it need not be stated. **OklCr** 277**P**685(1stcase).

731–72 35**F(2d)**580; 316**Mo** 179, 289 **SW**954; 317**Mo** 361, 296**SW**125; **Mo** 300 **SW**767; 155**Tenn**15, 290**SW**28; 156**Tenn** 509, 3**SW(2d)**159; 101**TexCr**185, 274 **SW**634.

731–73 40**F(2d)**338.

731–80½–New. The indictment need not allege the manner of, or vehicle used in, transportation. 100**TexCr**309, 272 **SW**795.

731–80½–New. Where the liquor was undeniably carried from one place to another, it is not necessary to define "transport." 100**TexCr**309, 272**SW**795.

731–81 334 **Ill** 524, 166**NE**96; 199 **Ind** 217, 156**NE**513; 197 **Ind**16, 164**NE**93; 118**Nebr**249, 224**NW**278 (complaint held sufficient); **OklCr** 287**P**743(2dcase); 104 **TexCr**432, 284**SW**574. [a] 35**GaA**664, 134**S**328. [b] **Indictment held sufficient.**–163**La**11, 111**S**473. [c] **Allegations held insufficient.**–237 **IllA**325.

731–85 [a] **Indictment charging that defendant "kept" liquors,** contrary to law, is equivalent to charge that he had in his possession such liquor. 22 **AlaA**650, 119**S**595(1stcase).

731–86 [a] (3) Charge in information under Prohibition Act that defendant possessed intoxicating liquor for purpose of sale was equivalent to charge of possession with intent to sell. 334 **Ill** 524, 166**NE**96. [d] (2) Information charging unlawful possession with intent to sell is sufficient without adding "with intent or for purpose of evading the law." 50**SD**197, 208**NW**979.

731–88 97**CalA**288, 275**P**495.

731–91½–New. Information for possessing intoxicating liquor held insufficient. 318 **Ill** 424, 149**NE**226.

732–92 [a] 243 **IllA**348; 89 **IndA**590, 166**NE**300.

732–93 167**Ga**165, 144**SE**726, 60**ALR** 747; 203 **Iowa**86, 210**NW**571; 146**Miss** 351, 118**S**860. [b] **Allegation held insufficient.**–318 **Ill** 615, 149**NE**579, 580.

732–93½–New. Information charging that accused "did then and there again unlawfully keep for sale intoxicating liquor" is insufficient in Illinois. 318 **Ill** 293, 149**NE**241.

732–94 **Mo** 7**SW(2d)**256; **MoA** 289**SW** 654. But see 160**La**121, 106**S**716.

732–95 **TexCr** 28**SW(2d)**135. See also 96**PaSuper**450.

732–98½–New. Under statutes making unlawful the possession for sale of any quantity of liquor, it is not necessary for the state to allege possession of more than a quart because it expects to rely on evidence of possession of such quantity. 101**TexCr**606, 276**SW**713.

732–98½–New. An indictment charging unlawful possession for sale of a preparation containing in excess of one per cent of alcohol in volume is insufficient where it does not allege that the preparation was potable. 103**TexCr**108, 280. **SW**218.

732–98¼–New. Under some statutes an indictment merely charging receipt of intoxicating liquors is insufficient. 198 **NC**668, 137**SE**866.

732–98⅕–New. In a prosecution for violation of an ordinance prohibiting possession of intoxicating liquors, the complaint failing to state the substance of the ordinance was defective. 21**AlaA** 548, 109**S**896.

732–98⅙–New. Count of affidavit charging unlawful possession held sufficient in form and substance. 22**AlaA**172, 113 **S**643.

732–2½–New. Where liquor is stored in several buildings on a lot owned by defendant, a separate indictment for each is authorized. 13**F(2d)**848.

732–2⅓–New. An indictment for illegal possession need not charge that alcohol referred to was for use for beverage purposes. 18**F(2d)**573.

732–2¼–New. Complaint charging possession without averring act showing intent to violate law charges no crime. 35**PortoRico** 331.

733–9 [g] **Sale to minor.**–77**CalA**301, 246 **P**557.

733–12 80**CalA**583, 251**P**222; 148**Wash** 310, 268**P**874.

733–15 But see 80**CalA**583, 251**P**222.

734–23½–New. Information that defendant unlawfully possessed liquor containing more than half of one per cent of alcohol by volume, which was potable and capable of use as a beverage, is sufficient under statute, both as to form and substance. 314**Mo** 646, 285**SW**474.

734–24 82**CalA**485, 255**P**846; 200 **Ind** 112, 161**NE**565. [a] 202 **Iowa**450, 209 **NW**468; 121**Kan**762, 250**P**296; 177**Minn** 278, 225**NW**20. [b] **Affidavits held insufficient.**–199 **Ind**704, 160**NE**296; 200 **Ind**430, 164**NE**263.

734–25 126**Me**484, 139**A**677.

734–26 73**CalA**208, 238**P**812.

734–32 [a] **Information for maintaining nuisance by maintaining place where intoxicating liquor was sold is sufficient,** though not charging that more than one sale was made. 97**CalA**185, 275**P**462.

734–33 97**CalA**185, 275**P**462.

735–42½–New. A description of the place which defendant is charged with keeping is essential. 119**Kan**757, 241**P** 119.

735–42⅓–New. A complaint for maintaining a liquor nuisance is insufficient which fails to state the number of the ordinance defining a nuisance or the date of its passage, 171**Minn**295, 213 **NW**909.

735–42¼–New. and which does not state in what manner the nuisance was created or maintained. 171**Minn**295, 213**NW** 909.

735–43 13**F(2d)**620; 97**CalA**185, 275**P** 462; 102**CalA**527, 283**P**129.

735–47½–New. Indictment must show acts by which place was used unlawfully. 13**F(2d)**620.

735–49 212**Ky**47, 278**SW**160; **Mo** 22 **SW(2d)**774. [e] 246 **IllA**376; **Mo** 289 **SW**646; **Mo** 289**SW**804; **Mo** 291**SW**1078 (2dcase); **Mo** 292**SW**39; 318**Mo** 581, 300 **SW**765; **OklCr** 281**P**158. [f] **Simple statement of facts** constituting offense is sufficient. 166**Minn**116, 207**NW**19. [g] **Information held insufficient.**–318 **Ill** 293, 149**NE**241; 199 **Ind**704, 160**NE**296.

735–50 169**Minn**364, 211**NW**319, 320 [citCJ].

735–52 169**Minn**364, 211**NW**319, 320 [citCJ].

735–53 169**Minn**364, 211**NW**319, 320 [citCJ]. [a] **Indictment sufficiently charges crime of selling intoxicating liquor** where it alleges separately sales of drinks of spirituous, vinous, malt, fermented, and intoxicating liquor. **OklCr** 279**P**971.

735–54 100**CalA**295, 279**P**1054.

735–54½–New. Amount sold need not be alleged. 311**Mo** 531, 279**SW**134.

735–57½–New. An indictment charging defendant with having sold and furnished intoxicating liquor to a girl of the age of sixteen years sufficiently alleges a gift. 169**Minn**364, 211**NW**319.

735–57⅓–New. Omission of formal parts does not make an indictment defective. 115**Nebr**535, 213**NW**839.

735–57¼–New. The price paid is immaterial, and an allegation of sale implies payment of price. 15**F(2d)**977.

735–57⅕–New. An indictment for selling Jamaica ginger need not charge that it was sold contrary to the order of the treasury department construing the Volstead Act. **MoA** 291**SW**151.

736–65 199 **Ind**129, 154**NE**802; **OklCr** 279**P**968; **OklCr** 280**P**317(1stcase).

736–68½–New. A charge of selling liquor which was for beverage purposes need not further allege that liquor was sold for beverage purposes. 8**F(2d)**113.

736–68⅓–New. Averment that liquor of defendant was seized when being delivered to another person does not sustain charge of sale. 35**PortoRico** 742.

736–73 15**F(2d)**977; 158**La**674, 104**S** 612; 74**Mont**201, 239**P**1002.

736–75 20**AlaA**543, 104**S**46 (in prosecution for violation of ordinance, proof of ordinance is essential); 80**CalA**583, 251**P**222; 54**SD**611, 224**NW**228. [a] **That alleged offense was not within excepted class** need not be proved by the state. **CalA** 288**P**45.

737–78 198 **Ind**39, 151**NE**132. [a] (2) In prosecution for transportation of liquor, allegation of amount of liquor transported is not so descriptive as to require proof thereof. 198 **Ind**39, 151 **NE**132.

737–80 21**AlaA**169, 106**S**205; 198 **Ind**39, 151**NE**132; 49**SD**463, 207**NW**470; 101 **TexCr**185, 274**SW**634 (excepted purposes not requiring to be alleged); **TexCr** 276 **SW**694 (possession of equipment for manufacture of liquors).

737–81 198 **Ind**198, 152**NE**814; 318**Mo** 531, 300**SW**829; 33**PortoRico** 881. [a] **In prosecution for transportation,** it need not be proved that liquor was not denatured alcohol. 30**Ariz**258, 246**P**548. [b] **In prosecution for unlawfully and jointly possessing liquor,** fact that only separate possession was proved is not material variance. 214**Ky**232, 282**SW** 1065.

737–82 21**AlaA**169, 106**S**205.

737–88½–New. Under indictment for manufacturing, evidence of sales may be admitted to show intent. 105**TexCr** 159, 287**SW**269.

737–89 53**ND**756, 208**NW**556, 558 [cit CJ]; 108**WVa**5, 150**SE**144. [b] 100**CalA** 413, 279**P**1086; 329 **Ill** 223, 160**NE**582; 196 **Ind**556, 147**NE**714; **Mo** 300**SW**815; 113**TexCr**583, 22**SW(2d)**918.

737–90 199 **Ind**622, 158**NE**513; 105 **TexCr**75, 286**SW**1091.

737–91 22**F(2d)**934.

738–93 151**Miss**46, 117**S**369.

738–95 [a] 198 **Ind**695, 154**NE**666; 103 **TexCr**607, 281**SW**848.

732-96 OklCr 287P1112.

732-99 112TexCr4. 138W(2d)698(2d case); 112TexCr450, 178W(2d)50(2d case). See also 108TexCr69, 299SW245.

732-4 112TexCr67, 138W(2d)868. [a] **Where indictment is for sale to two jointly,** it is not necessary to prove pro rata payment. 102TexCr558, 278SW1102.

732-5 102TexCr54, 276SW908; 113TexCr384, 228W(2d)665. [a] **Rule applied** where sale was made to one person and liquor afterward divided between several. 102TexCr54, 276SW908.

739-18 Wyo 292P2.

739-23½-New. Proof showing possession of more than a quart is not variance from indictment not alleging any specific amount. 101TexCr606, 276SW713.

739-25 127Me440, 144A206; 51ND875, 201NW242 (state held bound to prove that liquor found contained more than one half of one per cent of alcohol and was fit for use for beverage purposes); 99TexCr653, 271SW607; 113TexCr611, 218W(2d)1052(2dcase); TexCr 228W(2d)944. But see 74Mont201, 239P1002.

739-26 127Me440, 144A206; Miss 130S696; 99TexCr653, 271SW607. [a] **Must be shown liquor was potable as beverage** to sustain conviction on charge of transporting intoxicating liquors. 169Minn422, 211NW475.

739-23 17F(2d)12.

739-28½-New. Where the information charged carrying whisky, proof that whisky was in some of the containers was sufficient. 146Wash101, 261P779.

740-29 41GaA544, 152SE776(3dcase); 321Mo1063, 138W(2d)1067; MoA 15SW(2d)931; MoA 276SW1034; 106TexCr419, 292SW898. But see 316Mo55, 289SW890. [b] 162La471, 110S723; 175Minn475, 221NW681(2dcase); MoA [illegible]

740-31 47RI371, 133A444. [a] 27F(2d)366. [b] **On proof that substance sold was alcohol,** state need not prove it was sold or fit for beverage purposes. 53ND429, 206NW786.

740-32 216MoA644, 271SW875; Mo 285SW995; 112TexCr1, 188W(2d)179.

740-33½-New. There must be proof of possession of identical liquor referred to in information in prosecution for possession of liquor. 142Wash483, 253P[illegible]

740-33½-New. In prosecution for manufacturing white corn whisky, proof of manufacture of whisky is sufficient without showing it was white corn whisky. 312Mo626, 280SW703.

740-35 148Miss52, 113S445; 142Wash482, 253P793.

740-36 148Miss52, 113S445.

740-37 88CalA589, 262P823; 196Ind332, 147NE624; 199Ind484, 158NE241; 165La650, 115S812; NM 290P739(1st case); 9PaDist&Co754; 14PaDist&Co174.

740-42 14PaDist&Co174.

741-44½-New. Where appellant and another were charged with the offense of being jointists on a specific day, proof of the offense by appellant on that day was necessary to support his conviction. 135Wash682, 239P207.

741-53 [a] 144Wash311, 258P12; 145Wash677, 261P284; Wash 288P221.

741-55½-New. In a prosecution for possessing liquor in Indian territory, it is unnecessary to prove that the place of the offense was also Indian country, although such fact is unnecessarily alleged. 15F(2d)991.

741-56 5F(2d)887.

741-57 [a] **If indictment charged keeping of certain building for illegal sale and illegal keeping of intoxicating liquor,** legal variance would result if proof was that one of tenants in same building occupied that tenement for that purpose. 265Mass135, 163NE892.

742-67 101TexCr185, 274SW634 (excepted purposes not requiring to be alleged need not be proved); 110TexCr278, 98W(2d)248.

742-76 20AlaA564, 103S914. [a] **Court will not take judicial notice** that "home brew" is intoxicating liquor. 25OhNP N8247.

742-80 [a] **Manager of apartment house prosecuted on jointist charge is** conclusively presumed to have custody and control of all apartments in building. 151Wash262, 275P569. [b] **Verdict that one is guilty of having received intoxicating liquor** from carrier contrary to statute, is not foundation from which inference may be drawn that same person is guilty of having made unlawful sale. 200Ind393, 163NE835. [c] **Accident to automobile, without other extrinsic evidence,** raises no presumption that person driving it was intoxicated, or had liquor in his possession. 149Wash670, 272P62.

742-81 [a] (3) 254Mass512, 150NE321. (9) Attempted destruction of liquid during search of premises under warrant warrants presumption of its intoxicating quality. 202Iowa530, 210NW551. (10) Destruction of evidence does not make prima facie case but merely raises unfavorable presumption under statute. 25OhNPNS347. [b] **Statutory presumptions.**–Va 153SE821. [c] **Facts and circumstances held not to create presumptions.**–That liquor of foreign production. 44F(2d)131.

742-83 21AlaA73, 105S426; 122Or399, 259P423.

742-84½-New. Where there is no evidence tending to show that Choctaw beer was undergoing fermentation when it was seized, there is no presumption of an increase in its alcoholic content when it was analyzed ten days after seizure. OklCr 273P279.

742-87½-New. That proof showed sales of liquor were made on separate dates does not authorize the inference that the sales were continuous, constituting one offense under the Volstead Act. 91CalA150, 266P860.

743-88 51ND875, 201NW342. [a] (6) 121Kan706, 249P584 (whisky). (10) 78Colo3, 237P1114; 96Fla553, 119S145. [c] **Liquor containing specified proportion of alcohol** is conclusively presumed to be intoxicating under some statutes. 200Ind30, 161NE249. [d] **Presumption of knowledge of intoxicating qualities.**–107WVa163, 148SE127.

743-89 21AlaA629, 111S188.

743-91½-New. Wife's sales in husband's store will be more readily supposed to have been with authority then would sales by a stranger. 98Vt466, 129A306.

743-91½-New. The statutory presumption as to possession of intoxicating liquors arising from destruction of liquids in the face of a search is of little moment where the attempt to destroy was unsuccessful and the liquor is produced in court. 234Mich623, 208NW705.

743-91¼-New. Liquor lawfully purchased for lawful use and in a lawful place is not presumptive evidence of an illegal act. NB [1929] 1DomLR745.

743-91½-New. Presumed that husband owns household effects including intoxicating liquors. 41GaA349, 152SE922.

743-93 150Wash136, 272P48.

743-95 6F(2d)121; 6F(2d)224; 21F(2d)318; 21F(2d)830; 94PaSuper389 (presumption that it was intended for beverage purposes). [c] **Presumption from possession** does not arise in prosecution for maintaining common nuisance. 73CalA162, 238P802.

743-97 92Fla1038, 111S285; 205Iowa604; 218NW145; 161La135, 108S312; 234Mich600, 208NW687; 75Mont78, 242P343; 77Mont307, 250P603; 288Pa510, 136A791, 792 [citCJ]; 89PaSuper244; 89PaSuper249; 49SD56, 206NW468; 53SD435, 221NW53; 112TexCr395, 16SW(2d)1092; 135Wash153, 237P292; 146Wash101, 261P779; 148Wash402, 269P3; 36Man11, [1926] 4DomLR863, [1926] 2WestWkly768. See also 51SD277, 213NW504. But see CalA 288P852. [c] (2) Possession of liquor creates no presumption that place where liquor was possessed was a joint. 141Wash146, 250P1090. [e] **In California.**–70CalA444, 233P401. [f] **In South Dakota.**–54SD611, 224NW228. [g] **Possession must be knowing** and not merely constructive. 54SD611, 224NW228. [h] **Presumption under government liquor control statutes.**–Man [1930] 1DomLR605.

743-98 194Wis229, 215NW896. [a] 126Kan373, 267P963 [citCJ].

744-99 OklCr 287P1062(1stcase); 101TexCr267, 275SW337; 101TexCr667, 276SW698 (more than one quart); 103TexCr276, 280SW590; 103TexCr288, 280SW789; 106TexCr147, 291SW251; 107TexCr559, 298SW569; 136Wash453, 240P562. [a] **Possession of large quantity of intoxicating liquor unexplained** is presumed to be with unlawful intent. 125Me301, 133A433. [b] **In Oklahoma.**–OklCr 287P1075(3dcase). [c] **Possession of half pint of whisky** held not to raise presumption under statute providing that possession of more than one gallon of intoxicating liquor shall be prima facie evidence of unlawful purpose. 199Ind720, 160NE289.

744-2 118Nebr517, 225NW479; 192Wis414, 212NW664. But see 196Ind229, 147NE778. [c] (6) No prima facie presumption of guilt of owner of premises leased and controlled by another. 144Va544, 131SE207. (7) For presumption to arise against owner of premises, he must be in actual possession or control. 144Va544, 131SE207. [d] **Presumption of control as between husband and wife.**–Prima facie presumption is that liquor in joint possession of husband and wife was under control of husband. 151Miss897, 119S825.

744-4 49SD56, 206NW468.

744-5 35PortoRico742.

744-7 125Me301, 133A433; 148Miss593, 114S389; 51SD277, 213NW504. [a] **Presumption from possession did not require defendant to introduce evidence** sufficient to raise reasonable doubt as to his intent. Wash 286P81.

744-7½-New. The presumption should be connected in connection with all of the other presumptions and other evidence in the case. 35OklCr238, 250P142.

744-8 125Me301, 133A433; 288Pa510, 136A791; 103TexCr276, 280SW590; 103TexCr288, 280SW789; 109TexCr58, 28W(2d)857; 146Wash101, 261P779. [a] 103TexCr276, 280SW590. [b] **To overcome presumption of knowledge** from possession, evidence must be of direct, positive, and credible character. 234Mich600, 208NW687.

744-10½-New. The presumption is only applicable in prosecutions, under the statute, and not in a civil case where illegality of the liquor sold is set up as a defense. Alta [1925] 3DomLR805.

744-10½-New. One in possession of premises is not necessarily presumed to have possession of liquor therein where public has free access to place where liquor was found. MoA 26SW(2d)1002.

744-11 28F(2d)613. [a] **There is no presumption that accused owns ardent spirits stored on adjoining property** which he does not own or control. 144Va630, 131SE204.

744-12 36GaA661, 137SE789.

744-14 234Mich600, 208NW687. 51ND875, 201NW342.

744-15 21AlaA428, 109S174; 38GaA369, 143SE905. [b] (2) Statute making possession of articles commonly made for or suitable in manufacture of prohibited liquor is not applicable to authorize conviction in absence of testimony that the articles found in defendant's possession were such. 22AlaA146, 113S625.

744-16 92Fla1038, 111S285, 286 [cit CJ]; 37GaA513, 140SE903; 207Iowa742, 223NW546; 164La89, 113S777, 778 [citCJ]; MoA 286SW143; MoA 286SW744; MoA 13SW(2d)1107; 77Mont57, 249P571; 77Mont387, 250P976; 100Vt259, 136A835; Vt 147A273; Wash 290P336. But see MoA 286SW135; 196NC431, 146SE69. [a] 219Ky482, 293SW984. [b] **Presumption is that whisky found in house belonged to husband** (1) as head of family. 34GaA155, 128SE686. (2) Presumption is rebutted where undisputed evidence shows that house and everything in it except whisky found is owned by defendant's wife. 34GaA155, 128SE686. [c] **Liquor found in automobile** is presumed to be in possession of owner of car where owner is present and in control of car. MoA 218SW(2d)190.

744-16½-New. Statutory presumption

of ownership of apparatus for making liquor in person occupying premises is not applicable, in aid of accused, in prosecution of different person who does not actually occupy premises. 142Va 628, 128SE565.

744-16½-New. Where husband and wife reside together, there is presumption that intoxicating liquor in house belongs to husband. 100Vt259, 136A 835.

744-16¼-New. Conduct of defendant's wife, after being informed by defendant that premises were being searched for liquor, is presumed done with his knowledge and authority, although not in defendant's presence. 100Vt259, 136A 835.

744-16⅓-New. A statute making possession of a still or other apparatus used or intended for use for manufacturing intoxicating liquor prima facie evidence of purpose to manufacture liquor does not create a criminal offense but establishes a rule of evidence. 159 Tenn245, 17SW(2d)919.

744-16⅙-New. A like rule applies to a statute providing that the offense of manufacturing or attempting to manufacture whisky or brandy shall be deemed to have been committed either by assembling apparatus therefor or by doing any act preparatory to such manufacture. 159Tenn245, 17SW(2d) 919.

744-22 20AlaA564, 103S914; 22AlaA 425, 116S413; 23AlaA493, 127S681; 70 CalA444, 233P401 (illegality of possession); 205 Iowa604, 218NW145; 148 Miss593, 114S389; MoA 295SW808; TexCivA 271SW383; 99TexCr554, 270 SW1020; 109TexCr58, 2SW(2d)857; TexCr 26SW(2d)266; TexCr 29SW(2d) 365; 153Va974, 151SE154. [a] (1) 207 Iowa742, 223NW546. (8) That defendant had possession of intoxicating liquor in prosecution for possession. 120Kan 499, 243P1060. (9) To connect accused by clear and positive proof with possession of liquor found on land adjoining his premises. 144Va630, 131SE 204. (10) Under Indiana statute proof necessary that agency conveying liquor is carrier. 199 Ind217, 156NE513. (11) In trial on indictment for manufacturing still state must prove accused manufactured a completed still. 173Ark989, 294SW33. (12) That defendant maintained or assisted in maintaining common nuisance as defined by statute. 199 Ind38, 154NE872. (13) In prosecution for possession of still for manufacturing liquor, that defendant had care, control, and management of still. 110TexCr276, 8SW(2d)118. (14) Illegality of possession. 97CalA179, 275P482. (15) That defendant manufactured intoxicating "liquor" mentioned in statute. 177Ark 1053, 9SW(2d)241. (16) Where defendant, charged with transporting intoxicating liquor, was not present at time offense was committed, state was required to prove that she was party to agreement to commit crime, and that, at time of its commission, she did something in furtherance of common purpose. 111TexCr52, 10SW(2d)1001. (17) Fact of possession. 34F(2d)12. [b] (7) 52 ND659, 204NW350.

745-23 [b] **Ordinance prohibiting possession** of intoxicating liquor "other than alcohol" does not cast burden on defendant. 137Wash414, 242P389.

745-24 326 Ill 230, 157NE195; 203 Iowa 86, 210NW571.

745-25 [a] **Establishment of prima facie case** does not shift "burden of proof" to defendant. CalA 288P852.

745-33 316Mo 240, 289SW568; 99Tex Cr554, 270SW1020; 109TexCr527, 5SW (2d)989; Man [1929] 1DomLR202. [a] 262Mass180, 159NE633.

745-34 25 OhNPNS347; Man [1929] 1 DomLR202.

745-35 25 OhNPNS347.

746-36 23AlaA312, 125S603(2dcase).

746-43 80CalA583, 251P222; 161La 135, 108S312; 162La719, 111S72; 148 Miss593, 114S389; 24 OhNPNS23; 8Pa Dist&Co 608.

746-44 38GaA369, 143SE905.

746-45 47RI 371, 133A444.

746-53 3Del 255, GenSess 138A401; 200 Ind380, 165NE522; 102TexCr522, 278 SW436; 104TexCr298, 283SW810; 36 Wyo 532, 257P2. [b] (1) 174Ark891, 298SW359. (2) Registration of still and furnishing of bond must be shown by defendant. 22F(2d)934. [d] **Transportation.**-102TexCr522, 278SW436. [e] **Where defendant raises reasonable doubt,** burden to prove legality of his act is discharged. 102TexCr522, 278 SW436. [f] **Defendant, in prosecution for possessing intoxicating liquor,** seeking to exclude evidence obtained by search warrant, regular on its face, had burden to show that affidavit upon which warrant issued was defective. 111TexCr252, 12SW(2d)566(2dcase).

746-54 18F(2d)529; 203 Iowa86, 210 NW571; MoA 279SW733; 75Mont78, 242P343; 55ND83, 212NW442; 19 OhA 173; 116 Or416, 241P390; 6PaDist &Co 27; 101TexCr55, 273SW856; 101 TexCr185, 274SW634; 101TexCr483, 276SW277; Va 154SE598.

747-55 144Miss726, 111S139; 142Va 620, 128SE578.

747-57½-New. Giving or failing to give receipt to defendant for seized liquors is immaterial and presents no defense. 105TexCr374, 288SW230.

747-59 92Fla1038, 111S285; 331 Ill 636, 163NE352; 126Kan373, 267P963 [citCJ]; 322Mo 1203, 18SW(2d)58; 75 Mont78, 242P343; 12PaDist&Co 331 (that he had the liquor prior to Prohibition Act); 133SC238, 130SE641, 643 [citCJ]; 100TexCr55, 273SW856; Wash 286P81. See also 125Me301, 133A433. [c] **Failure to assume burden of showing lawful possession** does not as matter of law conclude defendant, burden of proving guilt beyond reasonable doubt remaining with state. 133SC238, 130SE641. [d] **Possession must first be established.**-Burden is on defendant to prove legality of acquisition, possession, and use only where jury are satisfied that he was in possession of liquor found in house. 34F(2d)12.

747-61 33F(2d)402; 34F(2d)12 (provision upheld).

747-63½-New. The burden does not rest on the state, in a prosecution for illegal possession of appliances for manufacture of intoxicating liquor, to show that possession was for an unlawful purpose, but the burden of showing possession for a lawful purpose rests on accused. 217MoA524, 269SW 410.

748-63⅓-New. Burden of overcoming prima facie evidence arising from possession of part of still. AlaA 129S713 (2dcase).

748-65 243 IllA146; 246 IllA53; 164 La735, 114S635; 125Me319, 133A738; 252Mass126, 147NE582; 116 Or416, 241 P390; 117 Or204, 243P77; 33PortoRico 881, 883 [citCyc]; 194Wis229, 215NW 896; 36Wyo 532, 257P2.

748-66 116 Or416, 241P390.

749-71½-New. In a prosecution for possession of an unregistered still, the burden rests on defendant to produce a certificate of registration. 117 Or234, 243P77.

749-71⅓-New. In a prosecution for possession of an unregistered still, the burden rests on defendant to prove that a still found in his possession was registered. 33PortoRico 881.

749-74 44F(2d)165.

749-79 [b] TexCivA 271SW383.

749-88 Va 152SE362.

749-89 27F(2d)94; 40F(2d)837; 43F (2d)44; 21AlaA188, 106S510; 21AlaA 352, 108S351; 21AlaA373, 108S631; 21 AlaA404, 108S635; 21AlaA460, 109S294; 23AlaA288, 124S401; 177Ark549, 7SW (2d)2; 41GaA241, 152SE622; 248 IllA 220; 197 Ind463, 150NE365; 199 Ind 126, 155NE551; 126Kan792, 271P275; 162La471, 110S723; 126Me484, 139A 677; 258Mass109, 154NE562; 132 Or 363, 285P817; 99TexCr561, 271SW104; 100TexCr169, 272SW463; 100TexCr389, 273SW575; 100TexCr480, 273SW842; 101TexCr149, 274SW593 (that another occupant of defendant's car was intoxicated); 103TexCr658, 282SW221; 104TexCr386, 283SW796; 104TexCr612, 286SW230; 107TexCr165, 295SW622; 108TexCr678, 2SW(2d)457; 111TexCr 154, 118SW(2d)794 (2dcase); 111TexCr 482, 14SW(2d)278; TexCr 24SW(2d) 427(2dcase); TexCr 26SW(2d)265 (objects thrown from pursued automobile); TexCr 29SW(2d)364; TexCr 32SW(2d) 191(2dcase); 136Wash691, 241P297. [a] (1) 12F(2d)771; 15F(2d)770; 22AlaA 114, 113S279; 23AlaA460, 126S890(2d case); 23AlaA376, 125S791(2dcase); 243 IllA457; IndA 170NE89; 156Miss 365, 126S38; 318Mo 1173, 2SW(2d)777; MoA 279SW221; 195NC241, 141SE585; 99TexCr561, 271SW104; 112TexCr482, 17SW(2d)1057; TexCr 28SW(2d)141; TexCr 28SW(2d)556; 113TexCr644, 21 SW(2d)1054(2dcase). (3) In proving general reputation of place in liquor prosecution, proof of specific acts is not proper. 26F(2d)773. (6) As to defendant's going on replevin bonds and paying fines of men charged with drunkenness. 221Ky211, 298SW672. [d] Evidence held relevant.-2AlaA79, 105S 425. [e] **Evidence held admissible.**-TexCr 27SW(2d)544(1stcase).

749-90 73CalA208, 238P812; 100TexCr 512, 271SW625; TexCr 23SW(2d)368; 113TexCr342, 21SW(2d)670(1stcase); 113TexCr401, 22SW(2d)138(2dcase); TexCr 29SW(2d)387(2dcase). [a] (1) 108TexCr611, 28SW(2d)259. (4) Other instances. Ala 129S722(1stcase); CalA 288P61; TexCr 24SW(2d)404; TexCr 27SW(2d)159(2dcase). [b] (1) 15F(2d) 369; 17F(2d)877; 22AlaA65, 112S178; 21AlaA255, 107S230; 21AlaA304, 107S 719; 21AlaA346, 108S261; 21AlaA562, 110S563; AlaA 129S720; 176Ark173, 2 SW(2d)17; 198 Ind511, 154NE282; 211 Ky766, 278SW134; 159La903, 106S375; 234Mich623, 208NW705; Mo 291SW1078 (2dcase); 321Mo 540, 11SW(2d)1040; 116 Or451, 241P846; 101TexCr28, 274 SW147; 104TexCr308, 283SW817; 105 TexCr505, 289SW390; 109TexCr195, 3 SW(2d)811; 149Wash670, 272P62; 192 Wis414, 212NW664. (7) Physical condition of defendant's wife. 22AlaA314, 115S290. (8) Testimony of officer of finding mash barrel, being pure conclusion. Mo 12SW(2d)444. (9) In prosecution for possessing intoxicating liquor, to prove by officers that things stated by them in affidavit supporting search warrant as unequivocal facts amounting to probable cause were really based on information and belief. 111 TexCr252, 12SW(2d)566(2dcase). (10) In prosecution for selling whisky, sheriff's authority to search automobile and arrest owner without warrant for possessing whisky is immaterial. Mo 296 SW367.

749-90½-New. Much latitude is permitted in proving an alleged liquor nuisance. 6F(2d)522.

749-90⅓-New. Testimony as to defendant's use of intoxicating liquor and that he was drunk when arrested is admissible on prosecution for transporting liquor. 108TexCr566, 2SW(2d)227.

750-92 23AlaA299, 124S406(2dcase); 169La251, 125S67; 320Mo 280, 6SW(2d) 849; MoA 294SW121; MoA 297SW413; 102TexCr511, 278SW451. [f] **Statements of accused after arrest** are admissible to prove corpus delicti. 102 TexCr511, 278SW451. [g] **Statements not constituting admissions.**-Mo 300SW 717.

750-93 100TexCr476, 273SW561.

750-96 162La872, 111S264.

750-96½-New. Statement of third person.-158La791, 104S717.

750-97 107TexCr236, 296SW543.

750-99 71CalA2, 234P438 (evidence held not to show entrapment); 320 Mo 280, 6SW(2d)849; 190NC868, 129 SE808; 112TexCr658, 18SW(2d)176(1st case). [a] 102Conn634, 129A714.

750-5 See also 326 Ill 481, 158NE134. [d] (2) Search warrant held inadmissible where contents not relevant. 111 TexCr45, 10SW(2d)999.

751-6 200 Ind579, 164NE274. But see MoA 294SW448. [f] 321 Ill 484, 152NE 500.

751-8 85PaSuper7.

751-8½-New. Admission of affidavit charging defendant with possession of prohibited liquor is held error. 21AlaA 254, 107S223.

751-11 24F(2d)802; 25F(2d)258; 22

AlaA15, 112S186; 20AlaA601, 104S845; 21AlaA629, 111S188; 23AlaA467, 126S896(1stcase); 176Ark654, 3SW(2d)980; 162La719, 111S72; MoA 276SW1034; 221MoA592, 283SW468; 51SD277, 213NW504; 159Tenn263, 17SW(2d)899; 102TexCr360, 278SW223; 102TexCr395, 278SW449; 102TexCr546, 278SW848; 104TexCr174, 283SW527; 105TexCr274, 1SW(2d)308; 110TexCr176, 4SW(2d)549; 111TexCr226, 13SW(2d)87; TexCr 248SW(2d)828; TexCr 29SW(2d)364. [a] (1) 100TexCr128, 271SW909; 102TexCr360, 278SW223; 98Vt466, 129A306. (5) On indictment for transporting fact of finding of bottle of liquor on horse belonging to accused and on which he had been riding until shortly before arrest is admissible. 100TexCr395, 653, 273SW568. (6) Unlawful possession. 113Or149, 231P926; 108TexCr348, 300SW933. (7) Other evidence held admissible. 21AlaA498, 109S557; 102TexCr395, 278SW449; 104TexCr174, 283SW527. (8) In prosecution for possession of liquor for sale. 112TexCr307, 17SW(2d)56(2dcase). (9) In general. TexCr 25SW(2d)875. (10) Other instances. Iowa 233NW55. [b] (4) Testimony that witness never saw defendant doing work of any kind. 106TexCr 472, 293SW169.

752-12 22AlaA65, 112S178; 22AlaA59, 112S182; 23AlaA94, 121S446; 20AlaA601, 104S845; 21AlaA208, 106S874; 21AlaA239, 107S834; 23AlaA86, 122S613 (1stcase); AlaA 130S674; 171Ark756, 286SW949; 219Ky139, 292SW771; 158La300, 103S821; 161La250, 108S471; 169La251, 125S67; 197NC146, 147SE742(1stcase); NC 155SE567(1stcase); 101TexCr220, 276SW228; 102TexCr546, 278SW848; 104TexCr612, 286SW230. [a] (1) 22AlaA59, 112S182; 20AlaA601 104S845; 21AlaA208, 106S874; 22AlaA 310, 115S862; 197NC25, 147SE618. (2) 100TexCr451, 273SW578. (13) That three young negro women accompanied defendants, white men, in car riding up and down road, drinking from same bottle and sitting in laps of defendants is admissible. 21AlaA14, 105S712. (14) Contraband articles found near still prior to time of arrest. 23AlaA53, 120S465(2dcase). [b] (1) 219Ky519, 293SW1072.

752-13 33F(2d)265; 169Ark342, 275SW665; 68CalA615, 229P1000 (possession three days after sale charged); 39GaA673, 148SE309(2dcase); 40GaA265, 149SE301; 44Ida636, 258P553, 554 [citCJ]; 210Ky33, 275SW369; 152Miss 41, 118S373; 116Nebr635, 218NW432, 436 [citCJ]; 51SD277, 213NW504; 102TexCr511, 278SW451; 112TexCr337, 17SW(2d)48(1stcase); 112TexCr615, 18SW(2d)168; Vt 147A273; 148Wash65, 268P133. But see 127Kan471, 274P197. [d] **Evidence held inadmissible.**–219Ky519, 293SW1072.

752-14 22AlaA422, 116S411; 23AlaA405, 126S185; 169Ark221, 275SW327. [b] (2) Testimony as to rumors with reference to place where articles were found. 214Ky228, 282SW1060.

752-15 [a] **Automobile.**–104TexCr522, 286SW209.

752-16 99TexCr647, 271SW389; 102TexCr511, 278SW451.

752-18 243 IllA146; 131Or209, 282P233; 101Vt105, 141A596. [a] **Discretion of court.**–142Wash636, 254P233.

752-21½-New. How long still had been in certain place is held immaterial. 22AlaA16, 111S897.

752-24 [a] **Evidence that defendant was drinking man** should be confined to twelve months before issuance of warrant. 219Ky444, 293SW955.

752-25 18F(2d)218; 113TexCr486, 22SW(2d)458; TexCr 27SW(2d)202. [b] **Testimony as to transportation and delivery** of carton of jamaica ginger at defendant's store six months before alleged sale too remote to be admissible. 309Mo 520, 275SW36; 309Mo 534, 275SW41.

753-29 13F(2d)453; 19F(2d)749; 21AlaA422, 109S118; 22AlaA300, 115S149; 41GaA225, 152SE594; 44Ida636, 258P553, 554 [citCJ]; 200Ind579, 164NE274; 161La167, 108S324; 127Me488, 144A400; 236Mich75, 209NW944 (under search warrant); 309Mo 89, 273SW736; 317Mo 413, 297SW63; 120Or90, 250P 633, 251P307; 105TexCr497, 288SW 1072; TexCr 27SW(2d)544(1stcase); TexCr 23SW(2d)388; TexCr 29SW(2d) 774; 98Vt466, 129A306; 99Vt473, 134A 585; 144Wash370, 258P24. [a] (1) 13F(2d)453. (7) Rental of place on which liquor was found and knowledge of its presence admissible. 190NC239, 129SE 600. (8) In prosecution for selling liquor whisky purchased by policemen from defendant is admissible. 85PaSuper509. (9) Samples of liquor found in defendant's premises where sheriff testifies he had them locked in his vault from time of seizure. MoA 295SW808. [c] (2) Where policemen testified to having bought case of twelve bottles of whisky from defendant and the case with only eleven bottles is produced with explanation of loss of other, there was sufficient identification to render it admissible. 85PaSuper509. [d] **Fact that place where liquor was found was accessible to public** does not render such evidence inadmissible. 161La167, 108S 324. [e] **Marking seized liquor for identification.**–85PaSuper509. [f] **What disposition finally made** of seized whisky may be shown. 21AlaA653, 111S648.

754-30 20F(2d)383; 22AlaA15, 112S186; 21AlaA201, 106S683; 22AlaA335, 115S529; 44Ida636, 258P553, 554 [citCJ]; 208Iowa816, 225NW854; 144Miss 872, 110S690; Mo 22SW(2d)795; 120Or90, 250P633, 251P307; 100TexCr604, 272SW180.

754-31 73Mont177, 235P336 (possession by defendant of two thousand five hundred bottles of beer two months before offense charged held admissible); Ont [1926] 3DomLR419.

754-31½-New. If evidence obtained by search of defendant's premises is objected to, the search warrant and affidavit upon which it was issued must be produced before such evidence may be admitted. 147Miss31, 113S173.

754-32 22AlaA300, 115S149; 22AlaA 314, 115S290; 119Kan757, 241P119; 167La73, 118S697(1stcase); 106TexCr 205, 291SW901. [a] (6) In prosecution for transportation defended on ground liquor was for medicinal purposes finding of whisky and mash on premises of defendant admissible to show intent and contradict defense. 101TexCr167, 274SW615. (7) In barn fifty yards from store. 149SC84, 146SE695. (8) Other instances. 148Wash310, 268P874. [b] (1) Mo 22SW(2d)774 (house of defendant's brother). (4) Finding of jamaica ginger bottles across street from defendant's store four months after sale. 309Mo 520, 275SW36. (5) Possession of less than a quart of intoxicating liquor creates no presumption that it is possessed for sale. 106TexCr205, 291SW 901. [c] **Defendant may show** some one placed bottle of whisky in his dresser before raid. Kan 291P751.

754-33 78Mont35, 252P376.

754-34 See also 31F(2d)737; 200Ind 420, 164NE269. Contra 7Alaska39; 7Alaska103; 235 IllA587; 236Mich75, 209NW944. [b] **Denial of defendant's motion** to suppress as evidence liquor seized in his possession, as illegally obtained precludes further evidence on subject later at trial for illegal possession. 235Mich144, 209NW57. [c] **Where evidence obtained under warrant to** search automobile is suppressed and only evidence procured thereunder was jug of whisky, such is not admissible on theory that jug was found six feet away from automobile. MoA 289SW 663; MoA 289SW669.

754-34½-New. Search warrant need not be introduced in evidence, where it was before the court on motion to suppress the evidence. 235Mich198, 209NW74.

754-34¾-New. Where defendant was arrested while driving an automobile on a federal reservation and was compelled to drive the automobile into a county, intoxicating liquor found in his automobile after arrival in such county is not admissible in evidence in a prosecution against him for possession of such liquor there. 135Wash500, 228P19.

754-34¼-New. , or if it was procured after defendant consented to search without warrant. 196Ind665, 149NE348.

754-34½-New. Evidence seized by lawful search of an automobile is admissible in evidence on the trial of the offense charged. 120Or444, 250P220.

754-34⅝-New. In a prosecution for possession of a still worm or a still without having registered it, portions of the still found in defendant's possession are admissible in evidence as an exhibit. 119Or446, 249P817.

754-34⅞-New. under an indictment not alleging that it was for the purpose of manufacturing intoxicating liquor. 119Or446, 249P817.

754-35 26F(2d)769 (articles lawfully seized); 21AlaA318, 108S82; 21AlaA 631, 111S190; 22AlaA178, 114S890; 22AlaA533, 118S231 [certiorari den 218Ala 168, 118S232]; 180Ark285, 21SW(2d) 188; 107TexCr196, 296SW523; 100TexCr604, 272SW180; TexCr 31SW(2d) 1077(2dcase). [g] **Testimony as to how much mash was found** at still is admissible. 21AlaA318, 108S82. [h] **Though search warrant was void,** evidence held admissible in prosecution for manufacturing liquor where officer smelled liquor before entering house. 316Mo571, 292SW78.

754-36 22F(2d)934; AlaA 129S720; 113TexCr257, 20SW(2d)196(2dcase); TexCr 31SW(2d)1077(2dcase).

755-41 41GaA331, 153SE84(2dcase); 208Ky478, 271SW548; NJSup 132A333.

755-42 23F(2d)305; 22AlaA300, 115S149; 261Mass292, 158NE782.

755-43 198Ind61, 152NE274; 81Mont 19, 261P876; OklCr 267P491; OklCr 268P994; OklCr 280P728; 141Wash364, 251P562; 143Wash426, 255P663; 147Wash132, 265P462 (where there was direct testimony of proprietor's knowledge). But see 89IndA229, 166NE31; 135Wash309, 237P726; 143Wash355, 255P661. [a] (3) Nor in prosecution for transporting liquor. 100TexCr169, 272SW463. [d] **Evidence that complaints had been made** of violation of Prohibition Law held inadmissible to show general reputation. 122Kan520, 253P598. [e] **In Washington.**–144Wash340, 258P 21. [f] **In Oklahoma.**–OklCr 287P1060 (1stcase).

755-46 12F(2d)668; OklCr 267P491; OklCr 268P994; OklCr 272P387; OklCr 272P887; OklCr 274P487; OklCr 279P910(2dcase); OklCr 287P1109; OklCr 279P934(2dcase); OklCr 280P728; OklCr 281P319; OklCr 282P692(2dcase). [c] **Necessary predicate.**–OklCr 277P669. [d] **In prosecution for selling liquors at residence,** proof of general reputation as place for selling liquors is inadmissible. OklCr 273P280(2dcase). [e] **Admission in evidence of search warrant** and application therefor reciting facts inadmissible without preliminary evidence is erroneous. OklCr 281P 319.

755-46½-New. Reputation evidence is not admissible where the evidence shows actual sale by defendant. 145Wash697, 260P1073.

755-47½-New. Evidence of prior raids is not admissible in prosecution for manufacturing. 102TexCr379, 278SW 428.

755-48 21AlaA14, 105S712 (evidence of persons accompanying defendants and conduct of latter held admissible); 171Ark1008, 287SW208; 261Mass292, 158NE782.

756-50 89IndA463, 166NE883.

756-51 111TexCr226, 13SW(2d)87; 111TexCr618, 13SW(2d)379; 113TexCr 608, 21SW(2d)1063. See also 133SC 238, 130SE641, 643 [citCJ].

756-54 100TexCr489, 272SW141.

756-58 220Ala260, 125S384; 21AlaA 230, 106S873; 21AlaA277, 107S327; 22AlaA370, 115S771; 250 IllA520; 233Mich169, 206NW506 (where only evidence against defendant was obtained by illegal search warrant, he should be discharged); 52ND659, 204NW350; 133SC 238, 130SE641, 643 [citCJ] (burden remains on state on general issue); 144Va644, 131SE195; 145Va818, 133SE683; NS [1929] 3DomLR622. [a] 12F(2d) 670; 20F(2d)383; 44F(2d)51; 21AlaA 64, 106S52; 21AlaA128, 106S69; 22AlaA 324, 115S418; 23AlaA457, 126S895; 170Ark936, 282SW4; 171Ark68, 283SW 23; 171Ark658, 285SW367; 171Ark

1187, 286SW1020; 171Ark1188, 286SW 1028; 175Ark391, 299SW386; 36GaA 306, 136SE331; 41GaA241, 152SE622; 317 Ill 159, 147NE916; 326 Ill 481, 158 NE134; 196 Ind686, 148NE411; 197 Ind 169, 150NE56; 197 Ind218, 150NE311; 200 Ind69, 155NE817; 204 Iowa137, 214 NW531 (bootlegging); 119Kan656, 240 P844 (persistent violation); 126Kan 792, 271P275; 126Kan799, 271P291; 211Ky766, 278SW134; 211Ky786, 278 SW129; 212Ky28, 278SW141; 215Ky 766, 286SW1038; 162La719, 111S72; MoA 294SW448; NJSup 132A338; OhA 173NE307(1stcase); 86PaSuper382; 105TexCr72, 286SW1093; 108TexCr182, 299SW411; TexCr 28SW(2d)799; 143 Va504, 129SE259 (of one of four defendants); 146Wash187, 262P146. [b] 34 F(2d)12; 44F(2d)21; 22AlaA104, 113S 85; 22AlaA112, 113S86; 23AlaA91, 121S 445; 22AlaA425, 116S413; 23AlaA333, 125S202; Ark 29SW(2d)1079(1stcase); 256 Ill A422; 197 Ind193, 150NE99; 204 Iowa135, 214NW568 (bootlegging); 215 Ky278, 284SW1071; 215Ky705, 286SW 1043; 232Ky356, 23SW(2d)547; 134 SC72, 131SE767; Va 129SE259 (of three of four defendants); Va 152SE362. [c] **Evidence obtained by unlawful search** is insufficient. 37 OklCr402, 258 P814; 37 OklCr410, 259P152.

756–59 29F(2d)995; 20AlaA615, 104S 556; 20AlaA690, 104S923 (evidence raising suspicion of guilt not basis for holding presumption of innocence has been overcome); 21AlaA230, 106S873; 21 AlaA274, 107S321; Miss 110S124; 147 Miss31, 113S173; 317Mo 451, 296SW 149; 136SC300, 132SE613; TexCr 28 SW(2d)548; 144Va644, 131SE195 (evidence indicating guilt of all in immediate neighborhood as clearly as that of defendant insufficient); 153Va974, 151SE 154 (bad reputation for violating prohibition law); 153Wash323, 279P578. But see MoA 293SW486.

756–60 [a] **That liquor was poured out or destroyed** held not shown by evidence that daughter drank something from glass. 198 Ind61, 152NE274.

757–61 Va 152SE362.

757–62 [a] **Insufficiency of evidence** to justify refusal to grant motion to return liquors illegally seized does not warrant reversal where probable cause was amply established at trial. 267US 132, 45SCt280, 69Led543. [b] **Defendant's claim that he comes within exception of statute** need be shown by evidence on his behalf raising reasonable doubt as to his guilt in minds of jury. 101TexCr185, 274SW634.

757–65 74Mont201, 239P1002.

757–67 74Mont201, 239P1002.

757–68 162La531, 110S744; NS [1930] 1DomLR511.

757–71 36GaA209, 136SE96; 36GaA 264, 136SE542; 36GaA315, 136SE556; 199 Ind520, 157NE49; 215Ky278, 284 SW1071; 164La543, 114S151; 128Me 415, 148A144; MoA 279SW749; 31 OhA 417, 165NE740; 100TexCr122, 272SW 131; 153Wash323, 279P578; 192Wis391, 212NW662. [a] **Evidence sufficient to warrant finding** that defendant had such control of liquor as to authorize conviction. 34 OhA384, 170NE881.

757–72 100TexCr485, 273SW601.

757–73 38GaA353, 144SE133(1stcase). [a] **Evidence held insufficient** to support conviction. 198 Ind440, 154NE4.

757–74 35GaA401, 133SE314; 36GaA 264, 136SE542; 36GaA625, 137SE788; 36GaA638, 137SE840; 37GaA159, 139SE 160; 217Ky427, 289SW676; 37 OklCr 396, 258P812; 104WVa545, 140SE531.

757–76 100TexCr584, 272SW139; 107 TexCr281, 296SW518; 194Wis229, 215 NW896. See also 133SC238, 130SE641. [a] **Statute making proof of possession of intoxicating liquor prima facie evidence of intent to sell** applies in prosecution for bootlegging. 135Wash153, 237P292. [b] **Statute declaring pouring out fluid during search of premises prima facie evidence** held inapplicable to breaking bottle by accused arrested and searched on highway. 199 Ind720, 160 NE289. [c] **Mere presence of person in automobile** transporting liquor is not prima facie evidence of his transportation. Va 152SE362.

757–77 OklCr 286P806; 100TexCr584, 272SW139; 135Wash153, 237P292; 146 Wash101, 261P779; NS [1930] 2DomLR 133.

758–80 21AlaA514, 109S763; 21AlaA 660, 109S923; AlaA 130S62(1stcase); AlaA 130S168; 175Ark396, 299SW391; 100TexCr485, 273SW601. [a] 8F(2d) 145; 14F(2d)886; 15F(2d)644; 18F (2d)477; 21F(2d)962; 31F(2d)423; 31 F(2d)426; 35F(2d)847; 36F(2d)86; 37 F(2d)74; 22AlaA49, 112S91; 22AlaA17, 112S185; 22AlaA162, 114S67; 23AlaA 87, 121S441(2dcase); 20AlaA454, 103S 912; 20AlaA594, 104S352; 21AlaA18, 104S880 (and proof of corpus delicti sufficient); 21AlaA239, 107S34; 21AlaA 419, 109S114; 21AlaA664, 109S923; 21 AlaA671, 109S924; 22AlaA492, 117S396; 23AlaA215, 123S107(1stcase); 23AlaA 459, 127S252(2dcase); 23AlaA386, 126 S100(1stcase); 23AlaA400, 126S181; AlaA 130S674; 168Ark167, 269SW355 (possession of unregistered still); 169 Ark324, 274SW1; 169Ark332, 275SW 659; 169Ark1212, 275SW660; 169Ark 1211, 275SW661; 169Ark1212, 278SW 1; 170Ark786, 281SW11; 170Ark1193, 281SW13; 170Ark1194, 281SW382; 171 Ark68, 283SW23; 171Ark1187, 285SW 356; 171Ark655, 286SW818; 171Ark 756, 286SW949; 171Ark759, 286SW944; 171Ark1083, 287SW387; 172Ark76, 287 SW586; 172Ark1176, 289SW469; 172 Ark613, 290SW59; 173Ark711, 293SW 32; 174Ark156, 294SW385; 173Ark 1054, 294SW390; 173Ark1115, 295SW 29; 174Ark1180, 295SW401; 174Ark 1179, 297SW827; 175Ark1170, 1SW(2d) 46; 176Ark153, 2SW(2d)1108; 176Ark 578, 3SW(2d)962; 176Ark725, 3SW(2d) 977; 176Ark654, 3SW(2d)980; 177Ark 549, 7SW(2d)2; 177Ark431, 7SW(2d) 769; 177Ark1194, 9SW(2d)237(1st case); 177Ark1029, 9SW(2d))237(2d case); 178Ark1199, 10SW(2d)25; 178 Ark1200, 10SW(2d)853; 179Ark1, 13SW (2d)820; 179Ark189, 14SW(2d)1113; 179Ark344, 15SW(2d)987; 179Ark346, 15SW(2d)988; 181Ark1146, 27SW(2d) 996(2dcase); 180Ark1168, 23SW(2d) 610; 180Ark873, 23SW(2d)627; 181Ark 1146, 25SW(2d)20; 181Ark1147, 25SW (2d)772(1stcase); 180Ark285, 21SW(2d) 188; 180Ark613, 22SW(2d)40; Ark 30 SW(2d)822; 208Cal 142, 280P681; 88 CalA589, 263P823; 91CalA298, 266P 1020; CalA 271P112; 94CalA341, 271 P205; 99CalA396, 278P501; 78Colo 474, 242P633; 84Colo 340, 270P551; 86Colo 35, 278P594, 65ALR1260; 108Conn454, 143A561; Fla 112S91; 165Ga326, 140 SE889; 39GaA124, 146SE348; 33GaA 683, 127SE656; 34GaA234, 129SE5; 35 GaA162, 132SE241; 35GaA175, 132SE 243; 35GaA592, 134SE333; 36GaA94, 135SE512; 36GaA128, 135SE516; 36 GaA671, 137SE789; 36GaA657, 137SE 794; 36GaA648, 137SE798; 36GaA769, 138SE286; 37GaA345, 140SE427; 37 GaA386, 140SE528; 37GaA378, 140SE 640; 39GaA7, 145SE903; 39GaA71, 146 SE774; 40GaA217, 149SE292(2dcase); 40GaA546, 150SE460; 41GaA418, 153SE 221; 41GaA621, 154SE287(1stcase); 44 Ida298, 256P1118; 196 Ind182, 147NE 711; 196 Ind665, 149NE348; 198 Ind 182, 150NE367; 197 Ind575, 150NE371; 197 Ind517, 151NE416; 197 Ind550, 150 NE762, 151NE401; 197 Ind663, 151NE 722; 198 Ind679, 154NE489; 199 Ind 284, 157NE280; 198 Ind198, 152NE814; 200 Ind283, 163NE91; 200 Ind579, 164 NE274; Ind 165NE757; 89 IndA312, 166NE290; Ind 166NE663; Ind 166NE 769; Ind 167NE125; Ind 168NE577; IndA 167NE544; 123Kan386, 255P83; 128Kan291, 276P799(1stcase); 210Ky 33, 275SW369; 212Ky112, 278SW568; 214Ky86, 282SW777; 214Ky228, 282SW 1060; 214Ky578, 283SW1034; 214Ky 689, 283SW1030; 216Ky419, 287SW917; 231Ky494, 21SW(2d)808; 158La869, 104S746; 169La251, 125S67; 234Mich 203, 208NW45; 169Minn280, 211NW2; 169Minn513, 211NW463; 171Minn292, 213NW910; Miss 105S640; 143Miss312, 108S723; 149Miss681, 115S776; 150 Miss547, 117S511; 152Miss154, 118S 719; Miss 119S175; 152Miss622, 120S 574; 146Miss718, 111S834; 312Mo 626, 280SW703; 315Mo 1, 285SW429; 315 Mo 203, 285SW990; Mo 278SW700; Mo 280SW1044; 316Mo 252, 289SW821; 316Mo 55, 289SW890; 317Mo 293, 295 SW743; Mo 285SW87; Mo 289SW938; Mo 300SW815; Mo 1SW(2d)153; 320 Mo 196, 6SW(2d)853; Mo 12SW(2d)25; Mo 12SW(2d)28; 321Mo 633, 12SW(2d) 37; 321Mo 603, 12SW(2d)57; MoA 281 SW115; 221MoA358, 273SW247; 221 MoA592, 283SW468; MoA 293SW87; MoA 293SW498; MoA 297SW422; MoA 299SW821; MoA 11SW(2d)1100; 77 Mont8, 249P574, 52ALR454; 77Mont382, 251P143; 114Nebr132, 206NW731; 117 Nebr514, 221NW439; NJ 148A735; 190 NC876, 130SE713; 196NC802, 144SE 925; 198NC728, 153SE410; 49ND648, 192NW974; 49ND677, 193NW148; 24 OhNPN823; OklCr 267P680; OklCr 267 P682; OklCr 271P432(2dcase); OklCr 269P1063; OklCr 270P337; OklCr 272 P390; OklCr 272P392(1stcase); OklCr 272P493; OklCr 276P696; OklCr 277 P261; OklCr 277P282(2dcase); OklCr 277P952(2dcase); OklCr 277P955; Okl Cr 279P514(1stcase); OklCr 279P514(2d case) (mash); OklCr 287P743(1stcase); OklCr 287P756(1stcase); OklCr 287P 1108; OklCr 288P365(2dcase); OklCr 279P709; OklCr 281P152(1stcase); Okl Cr 281P157(2dcase); OklCr 281P810; OklCr 281P984(2dcase); OklCr 282P476 (1stcase); OklCr 283P255(3dcase); Okl Cr 283P256; OklCr 289P1113; OklCr 290P417(2dcase); OklCr 292P880; 116 Or451, 241P846; 119 Or312, 249P364; 119 Or329, 249P367; 119 Or341, 249P 635; 122 Or404, 259P424; 132 Or363, 285P817; 132 Or693, 288P215; 89PaSuper222; 52SD615, 219NW830; SD 231 NW915; 159Tenn245, 17SW(2d)919; 99 TexCr512, 270SW1018; 99TexCr605, 271SW83; 99TexCr612, 270SW1027; 99 TexCr647, 271SW389; 100TexCr541, 271 SW915; 100TexCr46, 271SW925; 100 TexCr65, 271SW926; 100TexCr604, 272 SW180; 100TexCr188, 272SW486; 101 TexCr182, 274SW153; 101TexCr544, 276 SW261; 101TexCr545, 276SW263; 101 TexCr531, 276SW429; 101TexCr615, 276SW924; 102TexCr501, 278SW441; 102TexCr534, 278SW852; 102TexCr546, 278SW848; 103TexCr364, 280SW804; 104TexCr358, 281SW556; 105TexCr26, 285SW329; 105TexCr32, 285SW328; 105TexCr35, 284SW954; 105TexCr138, 286SW988; 105TexCr222, 288SW210; TexCr 289SW42; 105TexCr529, 289SW 52; 105TexCr572, 289SW1012; 106Tex Cr305, 292SW218; 106TexCr556, 293SW 1111; 107TexCr196, 296SW523; 108Tex Cr460, 1SW(2d)282; 108TexCr379, 1 SW(2d)306; 108TexCr378, 1SW(2d) 307; 110TexCr430, 10SW(2d)108; 112 TexCr39, 13SW(2d)852; 112TexCr119, 14SW(2d)280(2dcase); 111TexCr520, 14 SW(2d)855; 111TexCr552, 15SW(2d) 646; 112TexCr284, 16SW(2d)240; 112 TexCr448, 17SW(2d)49; 112TexCr482, 17SW(2d)1057; 112TexCr628, 18SW (2d)158; 113TexCr219, 18SW(2d)654; 113TexCr442, 21SW(2d)739; 113TexCr 460, 21SW(2d)1066(2dcase); 113TexCr 506, 22SW(2d)667; TexCr 26SW(2d) 918; TexCr 27SW(2d)824; TexCr 28 SW(2d)560; TexCr 29SW(2d)350; Tex Cr 29SW(2d)379; TexCr 31SW(2d)637; TexCr 31SW(2d)1077(2dcase); Utah 269 P1006; 142Va602, 128SE454; 142Va639, 128SE456; 142Va644, 128SE463; 142 Va609, 128SE555 (while armed); 142Va 577, 128SE633; 142Va596, 128SE638; 143Va546, 129SE233; 145Va865, 134SE 699; 147Va671, 137SE469; 147Va660, 137SE492; Va 153SE821; 135Wash301, 237P511; 142Wash340, 253P126; 143 Wash15, 253P1073; 142Wash636, 254 P233; 147Wash361, 265P736; 152Wash 65, 277P387; 153Wash223, 279P588(1st case); 106WVa299, 145SE604; 188Wis 259, 205NW822; 33Wyo 424, 239P1044; 37Wyo 155, 259P810; 38Wyo 340, 266 P1056; 38Wyo 352, 267P89; 40Wyo 64, 277P8. [b] 8F(2d)487; 13F(2d)114; 18F(2d)477; 25F(2d)864; 31F(2d)289 (2dcase); 39F(2d)782; 22AlaA114, 113 S279; 23AlaA88, 121S442(2dcase); 20 AlaA572, 104S142 (possession of still); 20AlaA593, 104S287; 20AlaA597, 104S 351; 20AlaA615, 104S556; 20AlaA624, 104S686; 21AlaA26, 104S869 (of possessing still); 21AlaA230, 106S873; 21 AlaA274, 107S321; 21AlaA316, 108S79; 21AlaA356, 108S350; 21AlaA368, 108S

350; 21AlaA623, 111S49; 22AlaA147, 113S480; 22AlaA125, 113S625; 22AlaA 81, 112S460; 22AlaA254, 114S425; 22 AlaA375, 115S848; 22AlaA424, 116S413; 23AlaA222, 123S110; 23AlaA268, 123S 292(1st case); 171Ark1083, 287SW387; 173Ark989, 294SW33; 176Ark725, 3SW (2d)977; 177Ark1053, 9SW(2d)241; 78 Colo 480, 242P632; 35GaA401, 133SE 314; 36GaA626, 137SE791; 36GaA677, 137SE792; 37GaA373, 140SE792; 37 GaA505, 141SE64; 39GaA411, 147SE 398; 39GaA473, 147SE590(1st case); 326 Ill 212, 157NE174; 196 Ind357, 149NE 58; 196 Ind594, 149NE168; 196 Ind681, 149NE400; 197 Ind615, 151NE728; 198 Ind440, 154NE4; 198 Ind502, 154NE 273; 198 Ind138, 152NE802; 199 Ind 615, 159NE550; Ind 167NE135; Ind 167 NE545; Ind 171NE7; 210Ky398, 276 SW125; 210Ky782, 276SW803; 217Ky 427, 289SW676; 217Ky588, 290SW315; 218Ky593, 291SW1012; 218Ky655, 291 SW1053; 219Ky628, 294SW164; 221Ky 758, 299SW963; 225Ky194, 7SW(2d) 1050; 229Ky69, 16SW(2d)503(1st case); 171Minn367, 214NW60; 143Miss856, 108 S177; Miss 112S176; 147Miss31, 113S 173; 148Miss227, 114S347; 151Miss549, 118S625; Miss 119S175; Mo 6SW(2d) 855; Mo 12SW(2d)444; Mo 22SW(2d) 781; 217MoA396, 266SW738; MoA 256 SW572; MoA 281SW142; MoA 2SW(2d) 145; MoA 2SW(2d)146; MoA 7SW(2d) 386; 114Nebr831, 211NW171; 196NC 385, 146SE6; 25 OhNPNS347; 37 OkCr 47, 256P70; OkCr 267P494; OkCr 270 P337; OkCr 276P508; OkCr 277P251; OkCr 278P359; OkCr 279P704; OkCr 280P629; OkCr 282P372 (mash, wort, or wash); OkCr 283P257; OkCr 290P 352; OkCr 291P150; OkCr 292P880; 37 OkACR61 (unlawful possession of mash); 122 Or399, 259P423; 122 Or 399, 259P423; 136SC300, 132SE613; 101 TexCr595, 276SW710; 103TexCr106, 280 SW209; 103TexCr623, 281SW547; 104 TexCr325, 283SW792; 111TexCr147, 12 SW(2d)217; TexCr 29SW(2d)365; 145 Va825, 133SE753; 147Va645, 136SE594; 104WVa217, 139SE704; 104WVa545, 140 SE531; 104WVa586, 140SE532; 188Wis 259, 205NW822. [c] **Possession of mash.**–Evidence held insufficient to show unlawful possession of whisky mash fit for distillation into corn whisky. OkCr 279P362.

758–80½–New. or of possession of ingredients in process of fermentation from which liquor is customarily made, 188Wis259, 205NW822.

758–81 [a] 41GaA313, 153SE201(2d case); 118Kan618, 236P826; 146Miss 303, 111S362. [b] 34GaA224, 129SE123; 35GaA175, 132SE243; 37GaA498, 140SE 775. [c] **Evidence held insufficient to sustain conviction.**–39GaA664, 148SE303.

758–83 [b] **Evidence held sufficient to sustain conviction.**–36GaA283, 136SE832.

758–83½–New. or of making mash fit for distillation of intoxicating liquor, 168Ark167, 269SW355. [a] **Evidence held sufficient to support conviction.**–168Ark167, 269SW355.

758–83⅓–New. In a prosecution for making mash suitable for use in the distillation of alcoholic liquor, evidence has been held sufficient to sustain conviction. 177Ark509, 7SW(2d)802.

758–84 21AlaA277, 107S327; 173Ark 711, 293SW32.

758–85 21AlaA175, 106S217. [a] (1) 233 IIIA504. (6) Evidence that parts of still found were commonly or generally used for, or suitable to be used in, manufacture of liquor, held sufficient, though not all parts were found. 21 AlaA230, 106S873. (7) Proof that still found by officers was to be used to manufacture intoxicating liquors or was suitable for such use is essential. 22 AlaA363, 115S765. (8) Finding still filled with beer establishes corpus delicti. 23Ala392, 127S499(2d case). [b] **Evidence showing manufacture of "shinny"** does not support conviction of manufacture of alcoholic liquors. 21AlaA625, 111S188. [c] **Intent.**–207 Iowa772, 223 NW491. [d] **That articles were actually used for manufacture of intoxicating liquors** must be proved where they are not technically intended for such use. MoA 299SW821. [e] **That articles were intended for use in manufacture of intoxicating liquor** held sufficiently shown. MoA 299SW821. [f] **Possession.**–OkCr 279P692(2d case) (to sustain conviction of possessing mash, wort, and wash fit for distillation).

758–86½–New. Unlawful and conscious possession of intoxicating liquor may be shown by circumstantial evidence. 116 Or451, 241P846.

758–87 78Colo 474, 242P633; 36GaA94, 135SE512; 36GaA673, 137SE798; 37 GaA373, 140SE792; 214Ky578, 283SW 1034; 218Ky655, 291SW1053; 77Mont 8, 249P574, 52ALR454; 103TexCr106, 280SW209; 104WVa545, 140SE531. See also 36GaA677, 137SE792.

758–88 36GaA626, 137SE791; 215Ky 850, 287SW22; 218Ky585, 291SW714; 220Ky768, 295SW1072; Miss 112S176.

758–89 20AlaA454, 103S912 (testimony that defendant was pouring beer into still admissible on issue as to operation and possession); 177Nebr514, 221 NW439. [a] **Evidence held sufficient to** show unlawful possession of mash fit for manufacture of intoxicating liquors. 131 Or455, 282P560.

758–90 175Ark1170, 1SW(2d)46. [a] **Evidence of neither liquor** nor apparatus necessary to convict of manufacturing for beverage purposes. 158La209, 103 S742.

758–91 22AlaA557, 117S804; Mo 300 SW717; 320Mo196, 6SW(2d)853. [a] **Evidence held sufficient to support conviction.**–158La869, 104S746 (defendants approaching still in woods carrying sack of sugar and firing shots when confronted by officers).

758–92 21AlaA454, 109S281; 22AlaA17, 112S185; 22AlaA353, 115S698; 22AlaA 577, 117S911; 24 OhNPNS23. See also 22AlaA254, 114S425. [a] **Evidence held sufficient** to connect defendant with premises and possession or operation of still. 198 Ind182, 150NE367. [b] **Evidence held to sustain conviction** for possession of ardent spirits. 152Va973, 146SE260. [c] **Possession of liquor as** prima facie evidence of manufacture for sale. Wash 286P81.

758–94 TexCr 276SW694.

758–95 20AlaA454, 103S912 (finding warm whisky); 21AlaA199, 106S682; 22AlaA500, 118S249 [certiorari den 218 Ala169, 118S250]; 101CalA7, 281P100; 200 Iowa333, 202NW77; 146Miss237, 111S303; 100TexCr167, 272SW456 (that accused was drunk when he reported to sheriff pursuant to sheriff's prior direction); 101TexCr220, 276SW228; 102 TexCr546, 278SW848; 103TexCr216, 280SW785; 103TexCr364, 280SW804; 103TexCr410, 281SW210; TexCr 31SW (2d)455. [a] **Defendant has right to explain his possession** of parts of still in prosecution for possession of still for purpose of manufacturing liquor, in which there was evidence of defendant's possession of several parts of still. 22AlaA577, 117S911.

759–96 20AlaA606, 104S551 (that whisky found near defendant's house was such whisky as was made by kind of still also found there is inadmissible conclusion or opinion of witness); 116 Or451, 241P846. [c] **Prior raids.**–102 TexCr379, 278SW428.

759–97 [a] **Evidence held inadmissible** to show manufacture of medicinal purposes. 105TexCr490, 288SW1075.

759–97½–New. Mere presence of one at or near a still does not warrant conviction for possessing such still. 21AlaA 230, 106S873.

759–97⅓–New. Where a still and equipment are found in defendant's house, it is not necessary to show that he had any part of it in his hand in order to sustain a conviction for possession of a still. 103TexCr364, 280SW782.

759–97¼–New. Proof that another placed a still in defendant's house is not sufficient to authorize an acquittal of possession of a still. 103TexCr364, 280 SW782.

759–97⅙–New. In a prosecution for manufacturing, and being interested in manufacturing, intoxicating liquor, the state need not show what interest defendant had. 174Ark156, 294SW385.

759–97⅙–New. A witness need not be an expert in order to testify whether certain apparatus is a still. 33Porto Rico 881.

759–98 180Ark1167, 20SW(2d)625; 180Ark636, 22SW(2d)24; Ind 168NE 581; 228Ky587, 15SW(2d)467; OkCr 292P883(1st case); 112TexCr1, 13SW (2d)837; TexCr 20SW(2d)769; 113Tex Cr288, 21SW(2d)508; 113TexCr597, 21 SW(2d)1061(2d case). [a] 275US106, 48SCt77, 72LEd186; 8F(2d)219; 15 F(2d)496; 40F(2d)837; 40F(2d)904; 44F(2d)155; 23AlaA234, 123S289; 23 AlaA412, 126S188; 23AlaA467, 126S896 (1st case); 32Ariz150, 256P1117; 176 Ark173, 2SW(2d)17; 180Ark823, 22SW (2d)1010; CalA 288P50; 35GaA348, 133SE267; 37GaA155, 139SE81; 37 GaA520, 140SE788; 332 Ill 40, 163NE 360; 196 Ind145, 147NE625; 196 Ind 258, 148NE143; 196 Ind643, 148NE 146; 196 Ind499, 149NE50; 196 Ind 483, 149NE51; 197 Ind212, 150NE315; 197 Ind360, 151NE97; 198 Ind407, 151 NE616; 198 Ind389, 153NE773; 199 Ind126, 155NE551; 199 Ind180, 156NE 161; Ind 156NE560; 200 Ind149, 162 NE51; 200 Ind193, 163NE266; 200 Ind583, 164NE315; 200 Ind572, 165NE 313; 89 IndA312, 166NE290; Ind 168 NE22; Ind 168NE581; Ind 169NE842; Ind 170NE848; Ind 173NE326; 89 IndA110, 165NE779; 89 IndA421, 166 NE544; IndA 167NE544; 89 IndA576, 167NE567; 207 Iowa624, 223NW362 (bootlegging); 119Kan873, 241P114; 120Kan314, 243P265; 123Kan591, 256 P957; 127Kan640, 274P199; Kan 291 P949; 212Ky245, 278SW620; 250Mich 75, 229NW413; 164Minn499, 205NW 450; 168Minn129, 209NW903; 169Minn 320, 211NW310; 179Minn187, 228NW 615; Minn 232NW335; 312Mo 425, 279 SW102; Mo 280SW1044; Mo 285SW 723; Mo 289SW648; 318Mo 592, 300 SW685; 318Mo 705, 300SW707; 318 Mo 628, 300SW743; Mo 1SW(2d)142; 318Mo 1173, 2SW(2d)777; 320Mo 228, 7SW(2d)259; 320Mo 271, 8SW(2d)57; Mo 12SW(2d)39; Mo 22SW(2d)1050; Mo 23SW(2d)1; Mo 29SW(2d)686; 73 Mont376, 237P486; 197NC146, 147SE 742(1st case); 36 OkCr55, 252P72; Okl Cr 267P1057; OkCr 268P322; OkCr 269P508(2d case); OkCr 270P341; Okl Cr 277P263(1st case); OkCr 278P403; OkCr 281P823; OkCr 282P179; Okl Cr 282P477(2d case); OkCr 283P1032 (1st case); OkCr 287P727(2d case); OkCr 287P812; OkCr 288P998; Okl Cr 290P932; OkCr 291P138; 85PaSuper412; 87PaSuper50; 88PaSuper142; 134SC386, 132SE838; 142SC24, 140SE 258; 49SD364, 207NW160 (admission); 53SD523, 221NW251; 155Tenn20, 290 SW1; 99TexCr609, 270SW1030; 100 TexCr11, 271SW380; 100TexCr128, 271 SW909; 100TexCr165, 272SW449; 100 TexCr281, 272SW784; 100TexCr395, 653, 273SW568; 101TexCr185, 274SW 634; 101TexCr430, 276SW286; 101Tex Cr645, 276SW906; 101TexCr615, 276 SW924; 102TexCr395, 278SW449; 102 TexCr522, 278SW436; 102TexCr563, 278SW846; 103TexCr282, 280SW588; 103TexCr377, 280SW791; 108TexCr 575, 281SW861; 103TexCr628, 281SW 1049; 103TexCr654, 281SW1052; 103 TexCr542, 282SW216; 104TexCr281, 283SW790; 104TexCr312, 283SW809; 105TexCr191, 287SW272; 105TexCr 458, 288SW1071; 106TexCr127, 290 SW1100; TexCr 291SW231; 106TexCr 95, 291SW233; TexCr 291SW248; 107 TexCr404, 295SW1097; 108TexCr240, 299SW904; 108TexCr337, 300SW63; 108TexCr263, 300SW944; 108TexCr 457, 1SW(2d)627; 109TexCr190, 3SW (2d)806; 109TexCr298, 4SW(2d)41; 109TexCr331, 4SW(2d)553; 110TexCr 359, 7SW(2d)558; 110TexCr499, 7SW (2d)559; 110TexCr230, 8SW(2d)165; 110TexCr471, 9SW(2d)341; 110TexCr 542, 9SW(2d)347; 110TexCr569, 9SW (2d)740; 110TexCr439, 10SW(2d)384; 110TexCr395, 10SW(2d)564; 111Tex Cr32, 10SW(2d)996; 111TexCr197, 11 SW(2d)518; 111TexCr154, 11SW(2d) 794(2d case); 111TexCr262, 12SW(2d) 563(2d case); TexCr 12SW(2d)1023(2d case); TexCr 12SW(2d)1031(1st case); 111TexCr352, 12SW(2d)1035; 111Tex Cr618, 13SW(2d)379; TexCr 13SW(2d) 840(1st case); 112TexCr352, 16SW(2d) 1082; 112TexCr341, 16SW(2d)1098;

112TexCr498, 17SW(2d)821; 112TexCr491, 17SW(2d)829(2dcase); 113TexCr142, 18SW(2d)663; 111TexCr315, 12SW(2d)800; TexCr 25SW(2d)619; TexCr 26SW(2d)238; TexCr 26SW(2d)246; TexCr 27SW(2d)180(1stcase); TexCr 27SW(2d)183(1stcase); TexCr 27SW(2d)823; TexCr 29SW(2d)769; TexCr 31SW(2d)439; 143Va554, 130SE416; 149Va464, 141SE125; 152Va1036, 148SE783; 153Va974, 151SE154; 141Wash302, 251P586; 148Wash402, 269P3; 105WVa36, 141SE400; 106WVa414, 145SE751(1stcase). [b] 21F(2d)508; 35GaA193, 132SE453; 36GaA90, 136SE92; 196 Ind681, 149NE440; 198 Ind45, 152NE161; 198 Ind61, 152NE274; 199 Ind73, 155NE196; 200 Ind372, 163NE593(1stcase); 210Ky336, 275SW807; 217Ky278, 289SW285; 220Ky836, 295SW1029; Me 152A265; Minn 233NW309(2dcase); Mo 289SW934; Mo 6SW(2d)838; 321Mo548, 118SW(2d)1033; Mo 18SW(2d)6; Mo 22SW(2d)779; MoA 275SW59; NC 154SE730; 37 OklCr396, 258P812; 37 OklCr410, 259P152; Okl Cr 268P311; OklCr 269P321; OklCr 271P172; OklCr 271P951; OklCr 276P513; OklCr 277P247(1stcase); OklCr 278P398(2dcase); OklCr 278P399; Okl Cr 279P698; OklCr 279P700; OklCr 279P914; OklCr 283P258(2dcase); Okl Cr 283P588(1stcase); OklCr 288P398(2dcase); OklCr 289P792; 153SC177, 150SE682; 156Tenn337, 1SW(2d)782; 100TexCr122, 272SW131; 109TexCr524, 5SW(2d)988; 111TexCr52, 10SW(2d)1001; 142Va673, 128SE444; 145Va848, 133SE755; 153Va984, 151SE132; Va 152SE362; 153Wash60, 279P123.

759-99 [a] Mo 21SW(2d)758(3dcase).

759-3 [b] 198 Ind502, 154NE273.

759-5 200 Iowa1239, 206NW247 (insufficient in prosecution for bootlegging); 85PaSuper412. [a] (7) Evidence held sufficient to establish corpus delicti. Mo 285SW723. [b] Evidence held insufficient to sustain finding of guilty. 198 Ind422, 154NE7. [c] Proof of existence of consignor, carrier, and consignee is necessary. 205 Iowa1042, 218NW957.

759-6 197 Ind8, 149NE442. [b] It makes no difference whether driver knew he was transporting liquor if he was actually doing so. 97PaSuper328.

759-7½-New. It is not necessary to show a completed journey. 103TexCr628, 281SW1049.

759-8 103TexCr628, 281SW1049.

760-10 196 Ind104, 147NE278 (evidence sufficient to warrant finding transportation did not come under uses not prohibited in law); Mo 285SW723; 102TexCr522, 278SW436.

760-11 23AlaA568, 129S308(1stcase); 210Ky336, 275SW807; 145Va848, 133SE755. [a] Throwing out of car, when pursued, jug of whisky in which defendant had no interest is insufficient to sustain charge of transportation. 202 Iowa425, 210NW421.

760-12 102TexCr511, 278SW451. But see 132SC362, 128SE709.

760-13½-New. or in automobile being used by him; 140Miss841, 105S479.

760-13¾-New. departure of accused from another state with liquor in his automobile; 103TexCr377, 280SW791.

760-13¼-New. dropping of a bottle of liquor from defendant's automobile; 103TexCr377, 280SW791.

760-14 Iowa 228NW22 (found in defendant's automobile).

760-14½-New. labels on bottles found in defendant's possession; 105TexCr401, 288SW1084.

760-15 180Ark636, 22SW(2d)24.

760-16½-New. evidence of other shipments from garage rented by accused; 103Conn138, 130A96.

760-16¼-New. his presence on road where bottles were found; Iowa 228NW22.

760-20½-New. ; taking from a car and breaking of a jar of whisky when overtaken by officers. 109TexCr258, 4SW(2d)56.

760-24 But see 109TexCr258, 4SW(2d)56.

760-24½-New. The issue whether accused was transporting liquor to be used for medicinal purposes may be raised otherwise than by his own testimony. 100TexCr202, 272SW460.

760-24¼-New. Evidence is admissible in behalf of accused to show that it was by mere chance that he was in an automobile in which liquor was being transported. 103TexCr98, 280SW779.

760-24¾-New. Testimony that liquor was being transported for medicinal purposes is admissible. 103TexCr521, 281SW1050.

760-24⅞-New. Testimony as to what the witness saw, smelled, and heard when a house was raided has been held not erroneous. 110TexCr499, 7SW(2d)559.

760-24⅛-New. In a prosecution under the Iowa statute for transporting liquor not properly labeled, the state must prove absence of labels and that there was a consignor and a consignee. 207 Iowa322, 222NW867.

760-24½-New. Evidence tending to show that permits for transportation furnished by defendant to his drivers were fraudulent and counterfeit is admissible. 88PaSuper142.

760-25 22AlaA440, 116S511; 83Colo219, 263P412; 203 Iowa86, 210NW571; 123Kan201, 254P378; 146Miss685, 112S479; 103TexCr311, 280SW817; 103TexCr578, 280SW1079; 103TexCr679, 282SW220; 104TexCr1, 282SW218; 111TexCr252, 12SW(2d)566(2dcase); 100Vt259, 136A835; Wash 287P667.

760-26 321Mo1237, 14SW(2d)624.

760-27 51SD277, 213NW504; 110TexCr566, 9SW(2d)742. [a] Criminal intent is essential element of offense of possessing moonshine liquor. 100WVa377, 130SE520.

760-28 36GaA668, 137SE860.

760-29 36GaA668, 137SE860.

760-30 78CalA415, 248P693; 123Kan201, 254P378.

760-31 36GaA668, 137SE860.

760-32 70CalA444, 233P401; 235Mich698, 209NW917; 94PaSuper330 (sales within two years of indictment admissible).

760-33 200 Ind496, 163NE596. See also 36GaA299, 136SE806. But see 132SC362, 128SE709.

760-34 164La940, 114S844; 121 Or561, 254P1010.

760-38 154Wash383, 282P216 (empty kegs).

760-41 261Mass292, 158NE782; 49RI397, 143A604; 109TexCr307, 4SW(2d)54.

761-42 261Mass292, 158NE782; 100TexCr476, 273SW561 (that witness saw people drunk in defendant's premises soon after prosecuting witness had seen same people there drinking).

761-43 120 Or372, 251P305.

761-44 231Ky139, 21SW(2d)139 (defendant's reputation of handling intoxicants should be restricted to reasonable time preceding finding of indictment); 104TexCr522, 286SW209.

761-45 126Me363, 138A566.

761-46 161La250, 108S471; MoA 21SW(2d)190 (mere circumstance); 145Wash638, 261P388. See also 194Wis646, 217NW326.

761-48 110TexCr529, 7SW(2d)1083.

761-52½-New. On behalf of defendant testimony that doctor had advised that accused's husband should have whisky and she had obtained it while he was suffering is properly excluded where there was no showing as to compliance with statute requiring permit or physician's prescription. 75Mont78, 242P343.

761-52⅓-New. Admission of evidence of the use of a road by the public and rejection of evidence to disprove dedication held proper in a prosecution for possession in a public place. 52SD121, 216NW870.

761-53 21AlaA480, 109S758; Kan 291P949; 214Ky173, 282SW1078; MoA 275SW58; MoA 275SW59; 52ND659, 204NW350; OklCr 267P490; OklCr 290P936; 144Va630, 131SE204 (that accused was owner of ardent spirits stored on land of another. [a] 4F(2d)846; 7F(2d)324; 8F(2d)145; 8F(2d)219; 13F(2d)632; 14F(2d)886; 15F(2d)496; 16F(2d)62; 18F(2d)477; 18F(2d)887; 22F(2d)672; 24F(2d)413; 26F(2d)58; 26F(2d)63; 26F(2d)246; 26F(2d)315; 26F(2d)773; 28F(2d)613; 31F(2d)544; 31F(2d)737; 35F(2d)594; 36F(2d)356; 37F(2d)74; 40F(2d)609; 44F(2d)155; 21AlaA70, 105S423; 21AlaA64, 106S852; 21AlaA266, 107S328; 22AlaA65, 112S178; 22AlaA97, 112S810; 22AlaA77, 112S813; 22AlaA335, 115S695; 170Ark936, 282SW4; 171Ark1187, 286SW932; 175Ark694, 1SW(2d)45; 178Ark190, 10SW(2d)26; 70CalA444, 233P401; 70CalA489, 233P413; 74CalA464, 241P275; 85CalA413, 259P465; 94CalA543, 271P552; 97CalA179, 275P482; CalA 288P50; CalA 288P852; 77Colo432, 236P1022; 80Colo430, 252P341; 83Colo219, 263P412; 108Conn454, 143A561; 92Fla1038, 111S285; 35GaA242, 132SE651; 35GaA465, 134SE120; 36GaA129, 135SE495; 36GaA128, 135SE516; 36GaA95, 135SE756; 36GaA92, 136SE112; 36GaA264, 136SE542; 36GaA273, 136SE556; 36GaA661, 137SE789; 36GaA626, 137SE791; 36GaA662, 137SE853(1stcase); 36GaA664, 137SE853(2dcase); 36GaA660, 137SE863; 36GaA653, 137SE912; 36GaA664, 137SE915; 36GaA668, 137SE860; 36GaA762, 138SE245; 36GaA770, 138SE262; 36GaA770, 138SE267; 36GaA787, 138SE287; 37GaA41, 138SE527; 37GaA12, 138SE528; 37GaA155, 139SE81; 37GaA378, 140SE378; 37GaA350, 140SE428; 37GaA506, 140SE506; 37GaA375, 140SE526; 37GaA374, 140SE528; 37GaA386, 140SE640; 37GaA475, 140SE772; 37GaA509, 140SE776; 37GaA513, 140SE903; 165Ga326, 140SE889; 39GaA125, 146SE337; 38GaA688, 145SE476(1stcase); 38GaA728, 145SE504; 39GaA665, 148SE281; 40GaA164, 148SE918; 40GaA224, 149SE154; 40GaA265, 149SE301; 40GaA542, 150SE438(2dcase); 40GaA548, 150SE444; 40GaA544, 150SE447(1stcase); 40GaA504, 150SE651(1stcase); 40GaA662, 150SE919; 40GaA622, 150SE923; 40GaA733, 151SE396; 40GaA727, 151SE400; 40GaA730, 151SE401; 41GaA351, 152SE911(1stcase); 41GaA327, 152SE920(1stcase); 41GaA331, 153SE84(2dcase); GaA 155SE378; 42 Ida210, 245P74; 322 Ill353, 153NE604; 324 Ill261, 155NE34; 331 Ill636, 163NE352; 198 Ind284, 152NE166 (police testimony that liquor found in possession was intoxicating is sufficient); 199 Ind158, 154NE865; 199 Ind122, 155NE549; 199 Ind481, 157NE100; 199 Ind284, 157NE280; 199 Ind484, 158NE241; 199 Ind617, 159NE465; 199 Ind653, 160NE41; 200 Ind283, 163NE91; 200 Ind370, 163NE594; 200 Ind575, 165NE314; 89 IndA122, 165NE920; 89 IndA304, 166NE289; Ind 166NE439; 89 IndA450, 166NE672(1stcase); Ind 168NE30(1stcase); Ind 169NE531; 89 IndA517, 165NE759; 89 IndA91, 165NE769; 89 IndA110, 165NE779; 89 IndA86, 165NE781(2dcase); 89 IndA152, 166NE20; 89 IndA564, 166NE158(2dcase); IndA 166NE775(2dcase); IndA 167NE145; IndA 167NE548; 89 IndA576, 167NE567; IndA 168NE33; IndA 169NE535; IndA 169NE693(1stcase); IndA 170NE89; 203 Iowa86, 210NW571; 205 Iowa604, 218NW145; Iowa 230NW522; Iowa 232NW684; 119Kan674, 240P407; 119Kan679, 240P566; 119Kan873, 241P114; 119Kan757, 241P119; 120Kan314, 243P265; 120Kan312, 243P296; 120Kan499, 243P1060; 121Kan524, 247P846; 121Kan685, 249P622; 121Kan837, 250P258; 122Kan182, 250P1071; 123Kan201, 254P378; 123Kan386, 255P83; 123Kan591, 256P957; 124Kan37, 257P731; 126Kan373, 267P963; 126Kan660; 127Kan640, 274P199; 127Kan510, 274P209; 128Kan229, 276P802(1stcase); 128Kan293, 278P20; 128Kan376, 278P58(1stcase); 130Kan532, 287P231; 130Kan759, 288P735; Kan 291P742; 210Ky441, 276SW116; 210Ky645, 276SW560; 211Ky766, 278SW134; 211Ky786, 278SW129; 212Ky28, 278SW141; 221Ky84, 295SW1019; 225Ky163, 7SW(2d)1066; 225Ky712, 9SW(2d)1075; 230Ky732, 20SW(2d)731; 234Ky302, 28SW(2d)19; 234Ky695, 28SW(2d)976; 160La121, 106S716; 169La777, 126S57; 126Me363, 138A566; 126Me484, 139A677; Me 149A153(1stcase); 234Mich203, 208NW45; 241Mich182, 216NW408; 250Mich75, 229NW473; 173Minn95, 216NW540; 141Miss18, 106S443; Miss 107S384; 148Miss240, 114S345; 151Miss361, 118S137; 151Miss897, 119S825; 309Mo89, 273SW736; 312Mo212, 278SW1030; 314Mo646, 285SW474; Mo 11SW(2d)1024; MoA 15SW(2d)931; 322

Mo 1203, 18SW(2d)58; MoA 256SW512; MoA 274SW500; MoA 274SW853; MoA 279SW733; MoA 281SW105; MoA 281SW107; MoA 285SW1009; MoA 290SW82; MoA 297SW177; MoA 299SW828; MoA 9SW(2d)253(2dcase); MoA 10SW(2d)962(1stcase); MoA 13SW(2d)1107; MoA 27SW(2d)730; MoA 30SW(2d)631(1stcase); 73Mont281, 235P719; 75Mont78, 242P343; 77Mont57, 249P571; 77Mont307, 250P603; 77Mont382, 251P143; 116Nebr287, 216NW807; 118Nebr517, 225NW479; 118Nebr812, 226NW438; NJ 143A735; 34NM208, 279P562(1st case) (keeping for sale); 189NC516, 127SE590; 197NC25, 147SE618; 197NC146, 147SE742(1stcase); 52ND659, 204NW350; 54ND127, 208NW835; 34 OhA384, 170NE881; 35 OhA37, 171NE615; 39 OhlACR227; 37 OklCr415, 259P150; OklCr 267P681; OklCr 267P1037; OklCr 268P993; OklCr 274P1095; OklCr 275P401(1stcase); OklCr 275P1070(2dcase); OklCr 276P243; OklCr 276P498(1stcase); OklCr 277P683; OklCr 277P684; OklCr 279P930(1stcase); OklCr 281P151(1stcase); OklCr 281P987(1stcase); OklCr 282P176; OklCr 282P178(1stcase); OklCr 282P180(1stcase); OklCr 282P182; OklCr 282P369(3dcase); OklCr 282P374; OklCr 282P687; OklCr 282P901; OklCr 283P587; OklCr 283P803; OklCr 283P1023(1stcase); OklCr 283P1032(2dcase); OklCr 286P350; OklCr 286P909; OklCr 287P735; OklCr 287P778(1stcase); OklCr 287P808; OklCr 287P1059(1stcase); OklCr 287P1065; OklCr 287P1066(1stcase); OklCr 288P348(1stcase); OklCr 288P351(3dcase); OklCr 288P353; OklCr 288P399(1stcase); OklCr 288P399(2dcase); OklCr 289P1117(2dcase); OklCr 290P340(2dcase); OklCr 290P420(1stcase); OklCr 290P933; OklCr 290P1109; OklCr 291P136; OklCr 291P137(1stcase); OklCr 291P137(2dcase); OklCr 291P157(1stcase); OklCr 292P895; OklCr 293P270; OklCr 293P276(2dcase); 113 Or149, 231P926; 116 Or451, 241P846; 120 Or372, 251P305; 120 Or546, 252P967; 121 Or561, 254P1010; 85PaSuper412; 89PaSuper222; 89PaSuper308; 94PaSuper389; 94PaSuper586; 98PaSuper13; 131SC438, 128SE409; 131SC546, 128SE726; 133SC50, 130SE558; 133SC238, 130SE641; 138SC417, 136SE738; 142SC17, 140SE256; 155SC495, 152SE738; 156SC363, 153SE340; 49SD56, 206NW468(prosecution of orthodox Jew defended on ground of possession for sacramental purposes); 49SD476, 207NW475; 52SD566, 219NW252; 54SD536, 223NW733 (in public place); 155Tenn20, 290SW1; 159Tenn451, 19SW(2d)276; 160Tenn530, 26SW(2d)151; TexCivA 276SW707; 100TexCr419, 273SW566; 100TexCr288, 273SW571; 101TexCr667, 276SW698; 103TexCr276, 280SW590; 103TexCr592, 281SW1053; 104TexCr386, 283SW796; 104TexCr522, 286SW209; 104TexCr612, 286SW230; 105TexCr252, 288SW221; 105TexCr487, 288SW1078; 105TexCr497, 288SW1072; 105TexCr646, 290SW164; 106TexCr328, 291SW1104; 107TexCr54, 295SW604; 108TexCr92, 299SW249; 108TexCr348, 300SW933; 108TexCr332, 18SW(2d)301; 108TexCr274, 18SW(2d)308; 108TexCr511, 18SW(2d)888; 109TexCr173, 3SW(2d)802, 57ALR407; 110TexCr40, 7SW(2d)541; 110TexCr324, 7SW(2d)550; 110TexCr525, 9SW(2d)337; 110TexCr566, 9SW(2d)742; 110TexCr636, 10SW(2d)546; 111TexCr14, 10SW(2d)1003; 111TexCr17, 10SW(2d)1008; TexCr 12SW(2d)1022(2dcase); 111TexCr240, 13SW(2d)111; 111TexCr677, 13SW(2d)836(2dcase); 112TexCr502, 17SW(2d)811(1stcase); 113TexCr69, 18SW(2d)659; 113TexCr81, 18SW(2d)661(2dcase); TexCr 20SW(2d)775; TexCr 20SW(2d)1060(2dcase); TexCr 21SW(2d)668; 113TexCr501, 21SW(2d)1057(2dcase); TexCr 21SW(2d)1070(1stcase); TexCr 23SW(2d)726(2dcase); TexCr 24SW(2d)60(1stcase); TexCr 24SW(2d)60(2dcase); TexCr 24SW(2d)420; TexCr 25SW(2d)832(2dcase); TexCr 26SW(2d)241(1stcase); TexCr 26SW(2d)655; TexCr 27SW(2d)242; TexCr 27SW(2d)542; TexCr 28SW(2d)803; TexCr 29SW(2d)774; TexCr 29SW(2d)789; Utah 266P265; Utah 266P716; 100Vt259, 136A835; 142Va602, 128SE454; 147Va671, 137SE469; 150Va605, 143SE740; 152Va941, 146SE270; 135Wash392, 237P1000, 241P966; 135Wash446, 237P1005; 136Wash453, 240P562; 144Wash598, 258P484; 148Wash664, 269P1046; 149Wash517, 271P335; 150Wash131, 272P53; 150Wash398, 273P193; 154Wash383, 282P216; Wash 290P336; 105WVa495, 144SE295; 108WVa283, 150SE722(1stcase); 188Wis266, 205NW813; 192Wis347, 212NW631; 192Wis391, 212NW662; 192Wis619, 213NW318; 193Wis476, 214NW365; 194Wis646, 217NW326; 195Wis166, 217NW653 (proof of ownership of moonshine is unnecessary); 38Wyo 98, 264P1011. See also 44F(2d)165. [b] 7F(2d)467; 15F(2d)945; 18F(2d)477; 18F(2d)509; 37F(2d)248; 39F(2d)312; 20AlaA598, 104S352; 21AlaA174, 106S206; 21AlaA231, 106S889; 22AlaA264, 114S674; 22AlaA276, 114S787; 23AlaA135, 122S186; 23AlaA437, 126S607(2dcase); 23AlaA556, 129S310(2dcase); 23AlaA559, 129S323(2dcase); 178Ark659, 12SW(2d)407; 33GaA678, 127SE618; 34GaA155, 128SE686; 34GaA238, 129SE111; 33GaA822, 129SE799; 35GaA193, 132SE453; 36GaA35, 134SE807; 36GaA90, 136SE92; 36GaA215, 136SE284; 36GaA211, 136SE286; 36GaA272, 136SE461; 36GaA304, 136SE539; 36GaA315, 136SE556; 36GaA576, 137SE702; 36GaA625, 137SE788; 36GaA666, 137SE793; 36GaA638, 137SE840; 39GaA411, 147SE398; 39GaA482, 147SE594; 39GaA533, 147SE785; 40GaA621, 151SE48(1stcase); 324 Ill261, 155NE34; 243 IllA348; 196 Ind357, 149NE58; 196 Ind681, 149NE440; 198 Ind502, 154NE273; 199 Ind217, 156NE513; 199 Ind615, 159NE550; 199 Ind720, 160NE289; 199 Ind739, 161NE2; 215Ky751, 286SW1063; 217Ky705, 290SW693; 244Mich346, 221NW302; 245Mich197, 222NW173; 249Mich336, 228NW712; Miss 110S124; Miss 113S445; 316Mo204, 289SW554; 317Mo299, 296SW121; Mo 24SW(2d)1005; MoA 274SW1097; MoA 278SW825; MoA 286SW135; MoA 286SW422; MoA 293SW487; MoA 293SW493; MoA 293SW507; MoA 296SW825; MoA 297SW177; MoA 297SW712; MoA 13SW(2d)1107; MoA 21SW(2d)190; MoA 26SW(2d)1002; 77Mont326, 250P613; 78Mont35, 252P376; 114Nebr132, 206NW731; 20 OhA528, 153NE301; 25 OhNPN546; OklCr 267P671; OklCr 267P684; OklCr 267P867; OklCr 269P381; OklCr 270P863; OklCr 271P1044; OklCr 272P386; OklCr 272P886; OklCr 277P672; OklCr 277P674; OklCr 277P948; OklCr 279P360; OklCr 280P475 (conviction based on illegal search); OklCr 281P150; OklCr 281P152(2dcase); OklCr 281P153(1stcase); OklCr 281P597(2dcase); OklCr 281P809; OklCr 281P986(2dcase); OklCr 282P477(1stcase); OklCr 287P736; OklCr 287P789(2dcase); OklCr 287P793; OklCr 287P1059(2dcase); OklCr 288P353; OklCr 288P392; OklCr 288P504; OklCr 288P608; OklCr 290P348; 153SC177, 150SE682; 54SD611, 224NW228; 102TexCr572, 278SW855; 103TexCr94, 280SW777; 103TexCr399, 281SW565; 109TexCr58, 2SW(2d)857; 111TexCr546, 15SW(2d)12(2dcase); TexCr 24SW(2d)830; TexCr 25SW(2d)838; TexCr 26SW(2d)279; TexCr 28SW(2d)548; TexCr 29SW(2d)767(1stcase); Utah 269P476; 142Va673, 128SE444; 144Va630, 131SE204 (of possessing ardent spirits found on land adjoining premises of accused); 150Wash110, 272P52; 155Wash31, 283P482; 105WVa124, 141SE633, 634 [cit CJ]; 105WVa495, 145SE607; 194Wis67, 214NW359; 199Wis269, 225NW933; 200Wis145, 227NW306; 36Wyo390, 256P76. [c] **Evidence of possession held insufficient.**–20 OhA112, 153NE157. [d] **Conviction on evidence obtained under search warrant** issued on insufficient proof cannot stand though guilt appears without controversy. 196Wis99, 219NW281. [e] **Evidence held sufficient to sustain conviction for permitting others to keep liquor on premises.**–128Kan11, 275P1089.

762–54 36GaA638, 137SE840; 37GaA482, 141SE87; 144Va630, 131SE204. [a] **Intoxication** alone is not sufficient to show possession. MoA 297SW413.

762–54½–New. Mere presence near a still is not enough evidence to sustain a conviction of possession of still. 191NC526, 132SE281.

762–55 36GaA281, 136SE323; 36GaA272, 136SE461; 36GaA264, 136SE542; 36GaA273, 136SE556; 36GaA299, 136SE806; 36GaA625, 137SE788; 36GaA638, 137SE840; 37GaA477, 140SE772; 37GaA482, 141SE87; 40GaA621, 151SE48(1stcase); 40GaA707, 151SE394; 41GaA559, 154SE190(2dcase).

762–56 21AlaA23, 104S867 (evidence insufficient to overcome presumption of innocence); 37GaA494, 141SE86; 217Ky705, 290SW693.

762–57 [a] 52ND659, 204NW350. [b] 208Ky527, 271SW563. [c] 36GaA770, 138SE267; 198 Ind511, 154NE282; 125Kan175, 263P1042; 210Ky364, 275SW878; 211Ky766, 278SW134; 211Ky786, 278SW129; 212Ky28, 278SW141; 214Ky232, 282SW1065; 168Minn467, 210NW394; 172Minn130, 214NW778; MoA 297SW413; ND 229NW363; 52ND659, 204NW350; OklCr 271P953; OklCr 278P354; OklCr 278P358; OklCr 282P476(2dcase); 103TexCr151, 280SW777; 103TexCr276, 280SW590; 103TexCr381, 280SW782; 107TexCr559, 298SW569; TexCr 8SW(2d)156; 111TexCr17, 10SW(2d)1008; TexCr 31SW(2d)647; Vt 147A273 (wife as accused's agent). [d] 26F(2d)773; 33GaA678, 127SE618; 36GaA215, 136SE284; 36GaA625, 137SE788; 36GaA638, 137SE840; 207 Iowa742, 223NW546; 208Ky527, 271SW563; Miss 118S422; MoA 285SW793; MoA 297SW413; MoA 21SW(2d)190; OklCr 277P602; OklCr 281P154(2dcase); OklCr 287P739; 103TexCr94, 280SW777; 103TexCr399, 281SW565. [f] **Presence and participation** in manufacture is not sufficient to sustain conviction for possession of still or alcohol. 7F(2d)295. [g] **Possession of dregs from empty bottles** amounting to ounce of liquor is insufficient to show unlawful possession. 15F(2d)945. [h] **Evidence held sufficient** to show defendant knowingly possessed liquor. Utah 290P962.

762–58 145Miss824, 111S295; NC 154SE730; Okl 288P392; OklCr 280P628; 54SD611, 224NW228; 103TexCr399, 281SW565; TexCr 31SW(2d)632; Wis 229NW632(1stcase). [a] 198 Ind511, 154NE282; 168Minn467, 210NW394; 172Minn130, 214NW778; 173Minn95, 216NW540; 145Miss824, 111S295; ND 229NW363; OklCr 281P953; OklCr 272P387; OklCr 278P354; OklCr 278P358; OklCr 280P1113; OklCr 282P476(2dcase); OklCr 282P896; OklCr 283P586(2dcase); 51SD277, 213NW504; 103TexCr151, 280SW777; 103TexCr276, 280SW590; 103TexCr592, 281SW1053; 107TexCr559, 298SW569; 113TexCr587, 22SW(2d)943(1stcase); 113TexCr679, 22SW(2d)943(2dcase); TexCr 23SW(2d)388; TexCr 31SW(2d)440; TexCr 31SW(2d)647. [b] **Bare possession** with guilty knowledge is insufficient to sustain conviction of possession for sale. 20AlaA600, 104S351. [c] **Evidence held insufficient.**–148Miss593, 114S389. [d] **Mere knowledge of presence of liquor on premises** is insufficient to convict. TexCr 26SW(2d)275.

762–59 68CalA645, 230P193; 145Miss824, 111S295; 316Mo204, 289SW554; 20 OhA112, 153NE157; OklCr 282P895(2dcase); 194Wis67, 214NW359. See also 22AlaA276, 114S787.

762–60 OklCr 286P806; 96PaSuper351; 106TexCr147, 291SW251; 110TexCr525, 9SW(2d)337; 199Wis63, 225NW191. [a], (5) Bottle found in front of defendant's house insufficient to sustain conviction. 20AlaA640, 104S687. (6) Liquor found fifteen to twenty feet from house insufficient evidence of possession. 20AlaA625, 104S678. (7) Mere fact that whisky was found in room rented to another is not conclusive of innocence of owner of premises. 21AlaA372, 108S614.

762–60½–New. Evidence of possession supplemented by evidence connecting defendant therewith was sufficient to sustain conviction. 167La73, 118S697(1stcase).

762–61 36GaA995, 135SE756; 36GaA264, 136SE542; 37GaA485, 140SE773; 42 Ida210, 245P74; 125Kan364, 263P1055; 162La357, 110S557; NM 292P

228(1stcase); 52ND659, 204NW350; 20 OhA112, 153NE157; OklCr 269P383; 116 Or451, 241P846; 120 Or372, 251P 305; 120 Or546, 252P967; 121 Or561, 254P1010.

762–62 175Ark694, 1SW(2d)45; 68 CalA645, 230P193; 160La548, 107S402; NM 292P228(1stcase); 20 OhA112, 153 NE157; 51SD277, 213NW504; OntSup [1928] 1DomLR828.

763–63 100TexCr419, 273SW566; 101 TexCr667, 276SW698.

763–64½–New. Defendant's denial of ownership of liquor found in his possession has been held not to rebut the presumption of a prima facie case. 101 TexCr533, 276SW266.

763–64¼–New. Although mere presence at still will not warrant conviction for possession of still. 21AlaA81, 105S431.

763–64¼–New. Acts of defendant indicating he is aiding in its possession may be sufficient basis for guilt. 21AlaA81, 105S431.

763–64½–New. Where the only evidence connecting defendant with liquor found in his room is proof of its presence there, an admission of a witness that he put it there without knowledge of defendant is sufficient to rebut presumption against him. 145Va838, 133SE761.

763–64¼–New. The liquor possessed need not be offered in evidence. 172 Minn130, 214NW778.

763–65 36GaA661, 137SE789.

763–63 36GaA661, 137SE789; 316 Ill 376, 147NE472; 100TexCr107, 271SW 928.

763–73 103TexCr399, 281SW565; 109 TexCr177, 3SW(2d)435; 110TexCr33, 7 SW(2d)557; TexCr 31SW(2d)818. [a] (1) 103TexCr399, 281SW565. [c] **Statute held constitutional.**–100TexCr 218, 272SW452. [d] **Possession may be explained** and shown to be legal. 109 TexCr58, 2SW(2d)857.

763–74 125Me301, 133A433; OklCr 279 P911; OklCr 279P917. See also 108Tex Cr92, 299SW249.

763–75 106TexCr346, 292SW246.

763–78 111TexCr260, 12SW(2d)586.

763–79 [a] (4) That sheriff disguised himself as negro did not render his testimony and that of negro companion as to sale of whisky to latter by defendant inadmissible. 111TexCr281, 12SW(2d) 581.

763–80 171Ark271, 284SW17; 99TexCr 659, 271SW91.

763–82 111TexCr400, 13SW(2d)109.

763–87 169Ark1212, 276SW860; 262 Mass180, 159NE633. [a] (8) That intoxicating extracts were sold in stores other than defendant's. 164La1057, 115 S268. (9) Evidence that other persons other than owners could obtain licenses for operation of soft drink stands. 30F (2d)513. (10) Testimony of witness of purchase of liquor from others than defendant held properly excluded. 30 F(2d)518.

763–89 262Mass180, 159NE633.

764–90 [c] **In prosecution for selling liquor for beverage purposes,** evidence that purchaser represented that he had cramps is relevant. 160La26, 106S662.

764–91½–New. Search after the day of the alleged sale and the finding of liquor held admissible. 36GaA668, 137SE860.

764–91½–New. Evidence that empty vessels smelling of whisky were found on premises is admissible. 21AlaA220, 107S800.

764–91¼–New. Evidence that a witness saw accused near the scene of the alleged sale prior thereto, and that after accused left he found a jar containing whisky nearby, held admissible. 104TexCr38, 282SW225.

764–91½–New. Admission of testimony, by an officer identifying whisky taken from a person after he had purchased it from defendant, was held not erroneous. 111TexCr106, 10SW(2d)102.

764–91¼–New. Cross-examination of a purchaser of liquor, which would have disclosed that it was purchased for use as medicine for a sick woman, which fact was communicated to defendant at the time, was erroneously excluded. 110 TexCr390, 10SW(2d)549(2dcase).

764–98 [g] (1) 108TexCr157, 300SW 48.

764–99 [g] OklCr 290P340(1stcase); TexCr 299SW411.

764–1 MoA 256SW1092. [a] 26F(2d) 63. [b] 36Wyo 390, 256P76. [d] (3) Corroboration of testimony of purchaser of liquor is not essential to conviction. 172Ark1177, 288SW707. [g] 12F(2d) 670; 13F(2d)632; 14F(2d)366; 14F (2d)562; 15F(2d)770; 20F(2d)382; 21 F(2d)828; 24F(2d)413; 26F(2d)246; 32F(2d)607; 37F(2d)557; 40F(2d)609; 41F(2d)741; 22AlaA97, 112S810; 22 AlaA582, 118S241; 32Ariz200, 256P1054; 32Ariz152, 256P1118; 168Ark731, 271 SW338; 168Ark1168, 273SW1031; 169 Ark293, 274SW10; 169Ark342, 275SW 665; 169Ark1212, 276SW860; 169Ark 1211, 278SW14; 170Ark725, 280SW986; 171Ark1188, 285SW1; 171Ark589, 285 SW18; 171Ark1189, 288SW380; 172 Ark1177, 288SW707; 172Ark609, 290 SW66; 177Ark1194, 294SW380; 173Ark 1182, 294SW390; 173Ark1172, 294SW 397; 174Ark296, 295SW53; 174Ark 1179, 298SW337; 175Ark1169, 299SW8; 175Ark1169, 299SW40; 177Ark1076, 9 SW(2d)320; 177Ark1193, 9SW(2d)327; 178Ark1200, 10SW(2d)499; 179Ark785, 18SW(2d)336; 179Ark1198, 20SW(2d) 114(1stcase); 180Ark1167, 20SW(2d) 625; 181Ark1035, 27SW(2d)94; 78CalA 87, 248P255; 77Colo 432, 236P1022; 78 Colo 3, 237P1114; 84Colo 166, 268P536; 86Colo 401, 282P252; 35GaA465, 134SE 120; 36GaA664, 137SE853; 36GaA769, 138SE336; 37GaA165, 139SE94; 37GaA 350, 140SE428; 37GaA356, 140SE526; 37GaA509, 140SE776; 40GaA164, 148SE 918; 41GaA565, 153SE780; 322 Ill 384, 153NE729; 324 Ill 261, 155NE34; 330 Ill 562, 162NE140; 239 IllA498; 196 Ind556, 147NE714; 199 Ind122, 155NE 549; 199 Ind484, 158NE241; 199 Ind 622, 158NE513; 200 Ind458, 163NE260 (1stcase); 200 Ind544, 165NE321; 89 IndA136, 165NE918; 89 IndA312, 166 NE290; 89 IndA293, 166NE292; Ind 166NE439; Ind 168NE30(1stcase); 89 IndA117, 165NE773; 89 IndA86, 165NE 781(2dcase); 89 IndA424, 166NE7; 89 IndA222, 166NE17; 89 IndA152, 166NE 20; IndA 169NE693(1stcase); 121Kan 685, 249P622; 124Kan37, 257P731; 124 Kan429, 260P611; 128Kan229, 276P802 (1stcase); 128Kan293, 278P20; Kan 291P742; 205Ky834, 266SW653; 209 Ky342, 272SW880; 210Ky366, 275SW 873; 210Ky564, 276SW521; 211Ky765, 278SW103; 231Mich687, 204NW731; 237Mich507, 212NW86; 241Mich182, 216NW408; 167Minn520, 208NW995; 168Minn329, 210NW65; 171Minn503, 214NW474; 176Minn305, 223NW141; 177Minn518, 225NW426(1stcase); 177 Minn500, 225NW431; Mo 289SW804; 316Mo 210, 289SW953; Mo 292SW39; Mo 296SW84; Mo 300SW722; 318Mo 581, 300SW765; 318Mo 619, 300SW793; Mo 9SW(2d)256; Mo 198SW(2d)755; Mo 22SW(2d)795; Mo 23SW(2d)16; MoA 256SW141; MoA 279SW749; MoA 282 SW1043; MoA 284SW152; MoA 284SW 520; MoA 284W823; 77Mont307, 250P 603; 116Nebr287, 216NW807; 190NC 876, 130SE713 (violation of statute prohibiting manufactnre and sale); 55ND 842, 215NW536; 32 OklCr379, 240P753; OklCr 267P679; OklCr 267P686; OklCr 278P411; OklCr 279P368; OklCr 279P 694(1stcase); OklCr 279P708; OklCr 279P916; OklCr 280P627; OklCr 281P 158; OklCr 283P272; OklCr 289P364; OklCr 291P575; OklCr 291P987(1st case); 54SD245, 222NW681; 153Tenn 319, 283SW986; 111TexCr281, 12SW (2d)581; 99TexCr605, 271SW83; 100 TexCr580, 272SW173; 100TexCr660, 273 SW852; 101TexCr329, 275SW713; 103 TexCr171, 280SW213; 103TexCr264, 280 SW813; 103TexCr299, 280SW783; 103 TexCr671, 282SW237; 104TexCr628, 286SW234; 105TexCr325, 288SW212; 107TexCr43, 294SW549; 107TexCr527, 298SW281; 109TexCr164, 3SW(2d)804; 110TexCr49, 7SW(2d)542; 110TexCr87, 7SW(2d)567; 110TexCr296, 8SW(2d) 186; 110TexCr381, 10SW(2d)990; 111 TexCr163, 12SW(2d)225(1stcase); 111 TexCr278, 12SW(2d)574; 111TexCr621, 13SW(2d)834; 112TexCr543, 17SW(2d) 829(1stcase); 112TexCr632, 18SW(2d) 620; 113TexCr640, 21SW(2d)738; Tex Cr 24SW(2d)425(2dcase); TexCr 24SW (2d)433; TexCr 27SW(2d)175(1stcase); TexCr 27SW(2d)653(2dcase); TexCr 27 SW(2d)817; TexCr 29SW(2d)387(1st case); TexCr 32SW(2d)357; 98Vt466, 129A306; 153Va904, 150SE392; 150 Wash136, 272P48; 103WVa144, 136SE 835; 193Wis476, 214NW365; 196Wis 111, 219NW272; 33Wyo 424, 239P1044. [h] (1) 14F(2d)659; 33GaA678, 127SE 618; 38GaA264, 143SE914; 41GaA324, 152SE910; GaA 155SE354; 324 Ill 261, 155NE34; 196 Ind357, 149NE58; 196 Ind 608, 149NE166; 196 Ind681, 149NE440; 198 Ind61, 152NE274; 199 Ind704, 160 NE296; 229Ky121, 16SW(2d)777; 249 Mich336, 228NW712; Mo 289SW558; Mo 296SW367; 77Mont326, 250P613; OklCr 277P604; OklCr 280P856; Okl Cr 287P1112; 100TexCr164, 272SW177; 100TexCr509, 272SW204; TexCr 28SW (2d)141; TexCr 28SW(2d)793(1stcase); Man [1928] 2DomLR783. (2) Presumptions of possession, handling, absolute transfer of illegally manufactured whiskey, payment or promise of money or equivalent. Mo 296SW367. (3) To warrant conviction under statute forbidding sale of liquids having appearance, odor, and taste of beer except in bottles, etc., having original label and name of brewer and manufacturer. 308 Mo 584, 274SW466. [k] **Sufficiency of evidence in trial for more than one offense.**–169Ark636, 276SW365; 176Ark 1205, 28SW(2d)40.

765–2 [a] **Buyer's uncontradicted testimony** held sufficient to sustain conviction. 174Ark1078, 298SW357.

765–6½–New. Evidence has been held sufficient to support a conviction of an attempt to sell intoxicating liquor. 35 GaA382, 133SE104.

765–6½–New. In a prosecution for sale of liquor containing more than the given percentage of alcohol, the state need only prove the sale and alcoholic content of the liquor. 104TexCr628, 286SW234(2d case).

765–6¼–New. Testimony in positive terms regarding the sale of liquor, to warrant a conviction, need not be corroborated. 180Ark1167, 20SW(2d)625.

765–9 241Mich182, 216NW408.

765–12 47RI 371, 133A444.

765–15 35GaA465, 134SE120.

765–16 102TexCr456, 278SW203.

766–22 [a] 211Ky765, 278SW103; 149 SC371, 147SE314. [b] **Evidence held to show that Jamaica Ginger sold was intended for beverage purposes.**–89 IndA 136, 165NE918.

766–23 [b] 252Mass44, 147NE345.

766–25 205 Iowa430, 216NW610. [a] 205 Iowa604, 218NW145; 241Mich182, 216NW408; MoA 289SW962; 189NC 516, 127SE590.

767–45 121Kan137, 245P1032.

767–48 [a] 171Minn429, 214NW270; 75Mont22, 241P522; OklCr 271P952; OklCr 272P1031; OklCr 290P931; 107 TexCr110, 295SW925.

768–72 223Ky8, 2SW(2d)1029.

769–9 53ND669, 207NW991. [a] **Single unlawful sale** by druggist with permit may be sufficient to show that it was instance of habitual practice. 7 F(2d)59.

769–11 58ND773, 228NW190.

770–17 [a] (1) 7F(2d)458; 16F(2d) 62; 19F(2d)46; 20F(2d)383; 22F(2d) 67; 25F(2d)871; 26F(2d)315; 26F(2d) 773; 28F(2d)663; 31F(2d)426; 33 F(2d)292; 33F(2d)443; 40F(2d)609; 41F(2d)741; 80CalA50, 251P244; 91 CalA150, 266P860; 92CalA391, 268P 453; 97CalA185, 275P462; 102CalA 527, 283P129; 196 Ind137, 147NE323; 197 Ind709, 151NE721; 198 Ind1, 151 NE405; 199 Ind484, 158NE241; 199 Ind700, 160NE291; Ind 164NE258; 89 IndA27, 165NE558(2dcase); Ind 165 NE560; Ind 166NE439; 89 IndA454, 166NE675; Ind 168NE30(1stcase); 89 IndA19, 165NE695; 89 IndA86, 165NE 781(2dcase); 89 IndA424, 166NE7; 89 IndA547, 166NE23; 89 IndA564, 166 NE158(2dcase); 89 IndA541, 167NE 347; 89 IndA610, 167NE550(1stcase); IndA 167NE634; IndA 168NE598;

IndA 169NE63; IndA 169NE535; IndA 169NE693(1stcase); 200 Iowa660, 204 NW278; 200 Iowa882, 205NW498; 202 Iowa450, 209NW468; 202 Iowa348, 209 NW474; 202 Iowa530, 210NW551; 204 Iowa410, 214NW612; 206 Iowa615, 220 NW59; Iowa 229NW231; Iowa 232NW 636; 119Kan873, 241P114; 120Kan 207, 243P313; 121Kan762, 250P296; 124Kan37, 257P731; 124Kan429, 260P 611; 128Kan229, 276P802(1stcase); 128Kan293, 278P20; 130Kan813, 288P 731; 127Me488, 144A400; 166Minn98, 207NW137; 170Minn517, 212NW4; 172Minn389, 215NW672; 177Minn278, 225NW20; 77Mont387, 250P976; 196 NC802, 144SE925; OklCr 279P910(2d case); OklCr 288P400; OklCr 289P355 (1stcase); OklCr 289P1110; OklCr 290 P351; RI 133A649; 141Wash660, 252 P118; 147Wash426, 266P174; 149 Wash53, 270P100; 151Wash262, 275P 569; 151Wash420, 276P88; Wash 290 P703. (4) Evidence that liquor purchased was moonshine, potable as beverage, and intoxicating is sufficient to sustain verdict. 166Minn466, 208NW 189. (5) Sustain state's contention that defendant was jointly interested with codefendant in operation of place. 110TexCr290, 8SW(2d)119. (6) Show defendant's participation in maintenance of nuisance. 32F(2d)644. [b] (1) 7F(2d)324; 7F(2d)467; 18F(2d) 509; 26F(2d)773; 196 Ind229, 147 NE778; 196 Ind357, 149NE58; 196 Ind529, 149NE51; 196 Ind608, 149NE 166; 198 Ind61, 152NE274; 199 Ind 704, 160NE296; 200 Ind112, 161NE565; 200 Ind370, 163NE594; 200 Ind405, 164 NE276; 89 IndA229, 166NE31; 89 IndA500, 167NE147; 77Mont307, 250P 603; 36 OklCr52, 252P74; OklCr 268P 317; OklCr 272P887; OklCr 273P289; OklCr 279P934(2dcase); OklCr 282P 692(2dcase); 135Wash682, 239P207. (2) Presence of accused on premises for purpose of buying liquor will not justify conviction for maintaining nuisance. 200 Iowa884, 205NW518. [c] **Finding and forfeiture as prima facie evidence of nuisance.**–Iowa 232NW684.

770–18 Iowa 227NW589 (may be established by circumstantial evidence).

770–19 80CalA50, 251P244; 200 Ind 411, 164NE268; 77Mont307, 250P603.

770–20 32F(2d)602; 80CalA50, 251P 244. [b] **Single sale of whisky** has been held to constitute nuisance though defendant's shop had just opened. 7 F(2d)881.

770–20½–New. It is incumbent upon the state to prove beyond reasonable doubt that defendant was conducting the place in question. 135Wash682, 239P207.

770–20¼–New. Presumption of ownership or control from a license previously issued to defendant is overcome by direct and positive evidence that the place had subsequently been sold to another who applied for a license. 135 Wash682, 239P207.

770–21 73CalA162, 238P802; 207 Iowa 334, 221NW556; 77Mont307, 250P603; 81Mont19, 261P876.

770–22 73CalA162, 238P802; 77Mont 307, 250P603.

770–22½–New. Conviction may be had without any direct proof of a sale on the date alleged. 166Minn466, 208NW 189.

770–27 82CalA485, 255P846; 127Me 488, 144A400; 77Mont387, 250P976. [c] **That persons called and asked for liquor** during raid may be shown. 22 AlaA335, 115S691. [d] **General character and surroundings of place** may be shown. 22AlaA335, 115S691.

770–29 82CalA485, 255P846; 77Mont 387, 250P976. [b] **Presence of defendant** where still was operating is not evidence of maintaining nuisance. 7 F(2d)295.

770–30 78CalA554, 248P964; OklCr 273P1017. [a] **Sales in absence of defendant** may be shown where his connection with place is otherwise proved. 200 Iowa660, 204NW278.

770–32½–New. Evidence of purchase of liquor may be shown without first showing presence of defendant proprietor at time of sale. 200 Iowa660, 204NW 278.

770–32½–New. Testimony of officers entering an open barroom as to what occurred at the time is admissible. 47 RI 269, 132A734.

770–32¼–New. Evidence of ownership and occupancy of premises prior and subsequent to the time set out in the indictment is admissible where defendant denied ownership or occupancy. 47 RI 269, 132A734.

771–37 81Mont19, 261P876.

771–39 6F(2d)120; IndA 169NE535.

771–40½–New. Testimony that persons entered defendant's hotel and asked for liquor in the presence of officers is competent to support a charge of maintaining a nuisance. 22F(2d)67.

771–40½–New. In a prosecution for being jointists, where it was not established by defendants that hotel rooms wherein evidence of guilt was found were occupied by guests, it was not error for the court to permit introduction of evidence concerning the liquor found in searching such rooms. 149 Wash53, 270P100.

771–41 [a] **Evidence held sufficient.**–166 Minn98, 207NW137.

772–61 [b] (1) 316Mo55, 289SW890.

772–64 [a] 235Mich620, 209NW915.

772–68 See also 22AlaA550, 117S610.

772–73 32F(2d)130.

772–74 [a] (1) 200 Ind528, 164NE271; 103WVa144, 136SE835. (2) 79CalA523, 250P204. (5) To show sale in premises not owned, kept, maintained, or controlled by defendant. 53ND429, 206NW 786. [b] 140Miss182, 105S496.

773–75 [a] (1) 79CalA523, 250P204.

773–77 [a] 153Va904, 150SE392.

773–84 [c] **Evidence held sufficient.**–198 Ind690, 154NE667.

773–87 [a] (1) 321Mo570, 12SW(2d) 61. (3) 170Ark974, 281SW903; Mo 280 SW48; Mo 23SW(2d)11 (hootch, moonshine, or corn); 102TexCr537, 278SW 434; 111TexCr339, 12SW(2d)803; Tex Cr 28SW(2d)151(2dcase); 40Wyo162, 275P122, 64ALR420. (5) 17F(2d)88. (7) Beverage containing alcohol. 187 Wis115, 203NW760. (8) Spirituous liquor. 101TexCr386, 276SW432. (9) Corn whisky. 321Mo1063, 13SW(2d) 1067. (10) Home brew. GaA 155SE 780.

773–92 35GaA663, 134SE333; Mo 279 SW133; Mo 289SW804; 318Mo1173, 2 SW(2d)777; Mo 22SW(2d)1050; Mo 23 SW(2d)11 (officers with experience); NJSup 132A338; 47RI 371, 133A444; TexCr 20SW(2d)762. [b] (1) Mo 18 SW(2d)509. [g] **Alcohol.**–53ND756, 208 NW556.

774–93 70CalA489, 233P413. See also 190NC684, 130SE854.

774–94 Ala 130S777; 70CalA489, 233P 413; Ind 156NE560; Ind 168NE581; 201 Iowa1, 206NW281; 233Mich514, 206 NW996; Mo 285SW90; Mo 23SW(2d) 16; 101Vt416, 144A193. See also 140NC 684, 130SE854.

774–95 70CalA489, 233P413; 201 Iowa 1, 206NW281; Mo 23SW(2d)16; 47RI 371, 133A444. See also 190NC684, 130 SE854.

774–96 MoA 272SW992.

774–5 160La26, 106S662. [d] **Evidence of identification admissible.**–Identification of bottle by label, and by tasting and smelling contents, may be made by ordinary witness. 160La26, 106S662. [e] **Order of proof.**–160La26, 106S662. [f] **Evidence held sufficient.**–98PaSuper 34.

774–10½–New. The provision of the Volstead Act casting on accused the burden of showing that intoxicating liquor was lawfully acquired was not adopted by the Wright Act in California. 69 CalA94, 230P1001.

774–12½–New. Whether extract of Jamaica ginger was fit for beverage purposes may be testified to by a witness not specially qualified as an expert. 160La26, 106S662.

774–12⅓–New. To determine the potability of the liquor, a chemical analysis is not essential. 169Minn422, 211NW 475.

774–12¼–New. Testimony as to poisonous ingredients of seized liquor held competent. 14F(2d)886.

774–12⅙–New. Evidence has been held insufficient to show that the liquor or compound was capable of being used as a beverage. OklCr 270P863.

774–12⅙–New. In prosecution for transportation, testimony as to payment of price on defendant's sale is relevant on the character of the liquor sold. 53ND 523, 221NW251.

774–12⅐–New. The finding of liquor in the possession of a person other than that allowed by law is prima facie evidence that it was moonshine. 106WVa 194, 145SE269.

774–12⅛–New. Proof that the article sold was whisky and intoxicating has been held to negative the exceptions of the statute. 34NM449, 282P819(2d case).

774–14 8F(2d)487; 24F(2d)690; 36GaA 626, 137SE791; 38GaA256, 144SE16; 171Minn503, 214NW474; OklCr 279P 365 (that apricot choc contains one half of one per cent by volume); OklCr 281 P822; 103TexCr123, 280SW592; TexCr 9SW(2d)339; 112TexCr635, 18SW(2d) 162; TexCr 31SW(2d)650 (home brew). But see 39GaA406, 147SE402(2dcase). [d] (1) 23AlaA54, 120S465(1stcase); 23 AlaA312, 125S603(2dcase); 23AlaA511, 128S120; 70CalA489, 233P413; 100CalA 245, 279P819; Del 143A792; 39GaA415, 147SE407; 42 Ida219, 245P77; 331 Ill 636, 163NE352; 199 Ind158, 154NE865; Ind 170NE848; 89 IndA307, 166NE262; 89 IndA283, 166NE264; IndA 168NE 612; 119Kan674, 240P407; 121Kan137, 245P1032; 121Kan837, 250P258; 213 Ky68, 280SW474; 164Minn499, 205NW 450; 168Minn467, 210NW394; 146Miss 685, 112S479; Mo 285SW995; 317Mo 413, 297SW63; 322Mo1203, 18SW(2d) 58; MoA 275SW591; 53ND429, 206NW 786; 41 OklACR191; 86PaSuper382; 33PortoRico 600; 101TexCr434, 276SW 289; 109TexCr527, 5SW(2d)989; 112 TexCr84, 14SW(2d)272; TexCr 29SW (2d)392; 149Wash520, 271P333; 149 Wash509, 271P584, 274P192(1stcase); 155Wash31, 283P482; 199Wis63, 225 NW191; 37Wyo478, 263P616. (2) That at time liquor was seized it contained as much as one half of one per cent of alcohol measured by volume. 41 OklACR191. [e] 8F(2d)487; CalA 288P 61; 36GaA626, 137SE791; 199 Ind38, 151NE872, 874 [citCJ]; 199 Ind704, 160 NE296; 229Ky486, 17SW(2d)401; Mass 168NE208; 25 OhNPNS347; 25 OhNP NS546; OklCr 281P822; 103TexCr123, 280SW592; 111TexCr171, 12SW(2d)209. [f] **Proof of possession of beer** is sufficient to sustain conviction under indictment charging possession of intoxicating liquor. 103TexCr123, 280SW592.

774–14½–New. at time of seizure, 238 Mich171, 213NW159.

775–15 174Ark1179, 298SW337; 198 Ind690, 154NE667; OklCr 281P822; 50 SD645, 211NW691, 693 [citCJ]; 113Tex Cr1, 18SW(2d)179; TexCr 29SW(2d) 789.

775–16 169La289, 125S126; 315Mo 1320, 289SW935; 198NC45, 150SE615; 47RI 371, 133A444; 102TexCr537, 278 SW434; 150Wash131, 272P53; 106 WVa194, 145SE269. [b] **Moonshine whisky** is whisky within meaning of statute, providing that intoxicating liquors shall include whisky. 74Mont 201, 239P1002. [c] **Whisky.**–102TexCr 537, 278SW434.

775–17 106TexCr346, 292SW246; Tex Cr 20SW(2d)787. [a] (2) Evidence held insufficient under statute making fluid poured out during search prima facie intoxicating liquor. 199 Ind739, 161 NE2.

775–18 23AlaA54, 120S465(1stcase); 22AlaA562, 118S238 [certiorari den 218 Ala168, 118S239]; 42 Ida219, 245P77, 78 [quotCyc]; 55ND842, 215NW536; Okl Cr 279P365; 99Vt473, 134A585; 142 Wash463, 253P645. [b] **Evidence held admissible to show alcoholic content.**–317Mo 413, 297SW63.

775–19 See also 97CalA179, 275P482. [a] 72CalA543, 237P769; 245Mich197, 222NW173; 171Minn503, 214NW474. [b] **Evidence held insufficient** to warrant finding that substance found on premises was beverage within mean-

ing of statute. **Mass** 168NE208.

775-22 But see 47**RI** 371, 133A444.

775-24 198 **Ind**284, 152NE166.

775-25 103**TexCr**136, 280SW775.

775-26 103**TexCr**136, 280SW775.

775-32½-New. Where testimony shows that liquor was intoxicating when diluted, the court may assume that it was intoxicating in its original condition. 18F(**2d**)573.

775-32¼-New. Mere finding of fluid on the floor together with broken glass is not prima facie evidence of the intoxicating quality of the liquid. 25 **Oh NPNS**546.

775-32¼-New. Under charge of possessing intoxicating liquors, namely choctaw beer containing more than one-half per cent alcohol, proof of intoxicating character or alcoholic content is sufficient. **OklCr** 287P808.

775-34 4F(**2d**)846; 22**AlaA**178, 114S890; 198 **Ind**284, 152NE166; 119**Kan**874, 241P112; 158**La**1021, 105S50 (chemical analysis not exclusive method); 160**La**26, 106S662, 665 [quotCJ]; 167**La**386, 119S401; 169**Minn**422, 211NW475; 74**Mont**201, 239P1002; **OklCr** 281P822; 50**SD**645, 211NW691, 693 [cit CJ]; 53**SD**523, 221NW251 [citCJ]; 141 **Wash**660, 252P118; 100**WVa**150, 130SE124. See also **MoA** 15SW(**2d**)865(2d case); 110**TexCr**393, 10SW(**2d**)552. [a] **Opinion based on odor.**–100**WVa**150, 130SE124. [b] **Testimony based on color, taste, or smell.**–Witness may testify as to character of liquor from its color, taste, or smell. 70**CalA**489, 233P413. [c] **Whether beverage contained alcohol.**–22**AlaA**574, 117S910. [d] **Opinion formed by merely looking at liquor** is inadmissible. 22**AlaA**562, 118S238.

776-38 262**Mass**180, 159NE633; 112 **TexCr**635, 18SW(**2d**)162.

776-39 **MoA** 272SW992.

776-40 42 **Ida**219, 245P77; **Kan** 292P793.

776-50 [a] **Exclusion of testimony held error.**–112**TexCr**299, 16SW(**2d**)816.

776-51½-New. Testimony as to driving an automobile off a bridge after drinking wine purchased from defendants has been held admissible to show the effect of the liquor and its intoxicating properties. 149**Wash**520, 271P333.

776-52 121**Kan**837, 250P258; 259**Mass** 109, 156NE71; 41 **OklACR**191; **OklCr** 281P822. See also 22F(**2d**)549; 112**Tex Cr**498, 17SW(**2d**)821. But see 158**La** 1021, 105S50.

776-53 200 **Iowa**660, 204NW278 (testimony of delivery to witness for analysis of liquor identified as that bought from defendant held not prejudicial); 100**WVa**150, 130SE124.

776-53½-New. When alcoholic contents approach the border line, and the liquor may not be intoxicating in fact, chemical analysis may be required. 160 **La**26, 106S662; **Minn** 211NW475.

776-55½-New. Conviction for unlawful possession cannot be based on the evidence failing to show an unbroken chain of handling after seizure where the handling and transportation must have caused fermentation prior to analysis. **NB** [1929] 1**DomLR**606.

777-57 21**AlaA**498, 109S557; 110**Tex Cr**176, 48SW(**2d**)549; 141**Wash**660, 252P118. [e] **Evidence held admissible.**–104**TexCr**522, 286SW209. [f] **To show interest in still,** evidence that defendant procured purchaser is competent. 171**Ark**756, 286SW949.

777-58 22**AlaA**89, 112S540; 218**Ky**655, 291SW1053; **MoA** 299SW828; **OklCr** 280P856. [a] (1) 112**TexCr**219, 15SW (**2d**)1048. [c] (1) 22**AlaA**162, 114S67; 23**AlaA**226, 127S245(2dcase) (notwithstanding defendant's evidence of alibi); 100**CalA**279, 279P1046; 165**Ga**326, 140SE889; 35**GaA**348, 133SE267; 246 **IllA** 53; 197 **Ind**550, 150NE762, 151NE401; 119**Kan**674, 240P407; 169**La**777, 126S57; 171**Minn**503, 214NW474; 316**Mo** 55, 289SW890 (evidence independent of confession); 116 **Or**451, 241P846; 100 **TexCr**395, 653, 273SW568; 113**TexCr** 634, 21SW(**2d**)1041; **TexCr** 24SW(**2d**) 427(2dcase); **TexCr** 24SW(**2d**)835; 195 **Wis**532, 218NW720. (2) 100**TexCr**395, 653, 273SW568. (6) To sustain conviction, as against contention that there was no evidence, that whisky, received in evidence, was sold by defendant. 232**Mich**1, 204NW742. (7) Establish identification of accused from distance of two hundred or two hundred and fifty yards. 147**Va**640, 136SE495. (8) Identify defendants captured after pursuit. 146**Wash**101, 261P779. (9) Justify finding that still, whisky, and mash were in defendant's possession and control. 110**TexCr**539, 9SW(**2d**)353. (10) Show participation in misdemeanor and therefore guilt as principal. 40**GaA**662, 150SE919. (11) To raise inference of joint enterprise connecting brother with offense. 97**PaSuper**328. [d] (1) 22 **AlaA**89, 112S540; 198 **Ind**175, 152NE 817; **OklCr** 281P156; **TexCr** 29SW(**2d**) 389. See also 316**Mo** 169, 289SW844. (3) To connect defendant with offense. 22**AlaA**422, 116S411; 22**AlaA**424, 116S 413. (4) Connection of defendant with transportation. 317**Mo** 380, 295SW747. (5) To show manufacture of liquor. 40 **GaA**506, 150SE459. (6) To show guilt as principal. 113**TexCr**352, 22SW(**2d**) 661. (7) To show violation of prohibition law. 23**AlaA**294, 124S399(1st case). (8) Other instances. **TexCr** 27 SW(**2d**)242.

777-59 **Mo** 300SW717; 116 **Or**451, 241 P846; 120 **Or**372, 251P305, 307 [citCJ].

777-60 197 **Ind**550, 150NE762, 151NE 401; 198 **Ind**718, 153NE765; 250**Mich** 75, 229NW473; 120 **Or**372, 251P305, 307 [citCJ]; **TexCr** 23SW(**2d**)388; 142 **Va**658, 128SE459.

777-61 21**AlaA**175, 106S217; 169**Ark** 636, 276SW365 (evidence held sufficient to support finding as to identity of person selling liquor). [a] 145**Va**834, 133 SE658. [c] **Admission by defendant** that liquor is his, where transportation thereof at time is undisputed, is sufficient. 105**TexCr**458, 288SW1071.

777-62 37**GaA**504, 140SE762; 37**GaA** 494, 141SE86. [b] (1) 21**AlaA**38, 104 S884 (not sufficient to justify conviction). (2) Contra 35**GaA**581, 134SE186. (3) 35**GaA**592, 134SE323. (6) Mere presence with knowledge of commission of offense and flight have been held insufficient to sustain conviction. **TexCr** 20SW(**2d**)1056(2dcase).

777-63 **TexCr** 27SW(**2d**)159(2dcase).

777-64 124**Kan**429, 260P611; 107**Tex Cr**620, 298SW424; 145**Va**818, 133SE683. [c] **Evidence sufficient to show interest in transportation.**–89**PaSuper**219.

778-65 [a] (1) 208**Ky**695, 271SW1044; 89**PaSuper**219. (2) 143**Miss**210, 108S 497 (operation of still in unlawful manufacture). (4) 124**Kan**429, 260P611. (7) To show that accused directed and participated in removal of liquor and transported it. 85**PaSuper**412. (8) Aided, assisted, and abetted in possession of intoxicating liquor. 94**PaSuper** 586. [b] (1) 7F(**2d**)861; 198 **Ind**718, 153NE765; 216**Ky**417, 287SW930. (2) Action of wife in merely referring buyer to her husband upon request for liquor held insufficient to justify her conviction of unlawful sale. 73**Mont**205, 235P702. [c] 198 **Ind**718, 153NE765. [e] **Mere fact that defendant accompanied purchaser** held insufficient to show aiding and abetting seller. 216 **Ky**417, 287SW930.

778-76 100**TexCr**521, 271SW900.

778-77 120 **Or**372, 251P305, 307 [cit CJ].

778-80 **Mo** 22SW(**2d**)774; 108**TexCr** 348, 300SW933.

778-81 199 **Ind**484, 158NE241 (evidence held competent).

779-82 199 **Ind**484, 158NE241. [b] (3) Evidence held sufficient to show son's agency. 237**Mich**507, 212NW86. [b] (4) Age of defendant's minor son obtaining whisky for one entering defendant's store is admissible on issue of double punishment. 112**TexCr**433, 17 SW(**2d**)818(2dcase). [c] 237**Mich**507, 212NW86.

779-83 [d] 199 **Ind**484, 158NE241. [e] **Statute against drunkenness** is not such part of prohibitory liquor law of Kansas that second offense thereunder constitutes offender persistent violator of prohibitory liquor law. 128**Kan**139, 276 P80.

779-84 331 **Ill** 636, 163NE352; 108**Tex Cr**348, 300SW933.

779-85 199 **Ind**484, 158NE241.

780-12 **Wash** 287P3. [a] **Mo** 285SW 723.

780-15 309**Mo** 534, 275SW41; 7**PaDist &Co** 446.

780-15½-New. Intent may be shown by direct or circumstantial evidence. 219**Ky**514, 293SW1076.

780-16 161**La**135, 108S312; 151**Wash** 420, 276P88.

780-17 21F(**2d**)508; 20**AlaA**600, 104S 351; 219**Ky**514, 293SW1076; 161**La** 135, 108S312; 162**La**719, 111S72; **MoA** 17SW(**2d**)353; 20 **OhA**112, 153NE157; 121 **Or**561, 254P1010.

780-23 See also 86**Colo** 35, 278P594, 65 **ALR**1260. [a] **Evidence held inadmissible.**–142**Va**644, 128SE463.

780-24 100**TexCr**128, 271SW909 (it may show he was engaged in no work incompatible with bringing liquor into county).

781-31 22**AlaA**652, 119S594(3dcase); 153**Va**974, 151SE154.

781-32 21**AlaA**29, 104S870; 238**Mich** 171, 213NW159; 100**TexCr**387, 272SW 798 (bootlegger). See also 111**TexCr**45, 10SW(**2d**)999. Contra 145**Va**818, 133SE 683. [a] **Statute making reputation as violator of prohibition act admissible** (1); not applicable in prosecution for violation of prohibition ordinance, town having failed to adopt such provisions. 143 **Va**540, 129SE257. (2) In prosecution for manufacturing liquor, it was held that evidence of general reputation as violator of prohibition laws is admissible under statute. 145**Va**825, 133SE753. [b] **Evidence held admissible.**–142**Va**644, 128 SE463. [c] **Where witness for state volunteers information** that defendant is "bad egg," questions as to source of his information should be allowed. 102 **TexCr**506, 278SW843.

781-33 33**GaA**827, 128SE217 (no error in permitting state to introduce evidence of reputation for whisky making after accused put in issue by statement to jury); 35**GaA**502, 133SE749; 160**La**435, 107S296; 33 **OhA**338, 169NE588 (testimony sufficient to allow rebuttal); 147 **Va**660, 137SE492; 147**Va**709, 137SE528. [a] **Remoteness of evidence of reputation** affects weight only. 147**Va**660, 137 SE492.

781-36 143**Va**546, 129SE233.

781-39 33 **OhA**338, 169NE588.

781-40 [a] (5) Evidence as to whether or not accused drinks whisky inadmissible. 21**AlaA**29, 104S870. [b] **Evidence held admissible.**–33 **OhA**338, 169 NE588.

781-41 147**Va**709, 137SE528.

781-43 142**Va**644, 128SE463.

781-47 [a] (2) 86**PaSuper**571. (3) 239 **Mich**105, 214NW130; 104**TexCr**556, 286 SW239. (4) Owner of place. 142**Wash** 636, 254P233. [c] **Evidence sufficient to go to jury** as to whether manager of roadhouse unlawfully maintained place for sale of liquor. **Wash** 287P22.

781-49 200 **Ind**69, 155NE817. [a] **Temporary possession,** merely for purpose of taking a drink, is not "possession" within statute. 200 **Ind**69, 155NE817.

781-50 101**CalA**7, 281P100; 247**Mich** 672, 226NW671; 221**MoA**592, 283SW 468, 471 [citCJ]. [c] **When finding of joint possession is warranted,** any evidence tending to connect either defendant with possession would be relevant. 21**AlaA**583, 110S157.

781-51 [a] (3) "That he was running the place." 98**Vt**466, 129A306.

782-52 221**MoA**592, 283SW468, 471 [cit CJ]; 221**MoA**893, 288SW77, 79 [citCJ].

782-55 [a] **Man living in house** with his wife and family is in possession of wine therein. 234**Mich**600, 208NW687.

782-63 221**MoA**893, 288SW77, 79 [cit CJ]. **Vt** 147A273.

782-66 89**PaSuper**222.

782-69½-New. Where testimony showed that the house was defendant's home, refusal to permit cross-examination to show defendant was not the owner of the premises on which liquor was found held proper. 136SC68, 134SE213.

783-2½-New. In the absence of proof of the issuance of a federal permit therefor, evidence of possession of intoxicating liquor for medicinal purposes is

properly rejected. 99Vt275, 131A798.

785–30 Va 152SE362. [b] (2) If prosecution cannot produce original warrant court should stay proceedings until warrant is found or supplied. 207Ky254, 268SW1103.

785–39 6F(2d)121 (character witness may be asked in cross-examination whether he ever heard of defendant's being arrested for violation of National Prohibition Act).

785–42½–New. Refusal of continuance to defendant to permit analysis of liquor where three weeks have elapsed since arraignment is not abuse of discretion. 164La1057, 115S268.

786–43 146Miss351, 111S860.

786–44 15F(2d)179; 22AlaA574, 117S910; 74CalA464, 241P275; 326 Ill481, 158NE134; 211Ky786, 278SW129; Mo 289SW648; Mo 289SW938; MoA 9SW(2d)253(2dcase); 190NC868, 129SE808; 55ND83, 212NW442; 122 Or404, 259P424; 192Wis391, 212NW662.

786–45 211Ky786, 278SW129; 126Me484, 139A677; 49SD463, 207NW470.

786–46 15F(2d)179; 74CalA464, 241P275; 78CalA415, 248P693; 37GaA165, 139SE94; 119Kan674, 240P407; 211Ky786, 278SW129; 55ND83, 212NW442; 14PaDist&Co174; 49SD463, 207NW470; 54SD245, 222NW681; 146Wash187, 262P146; 150Wash136, 272P48; 192Wis391, 212NW662. [a] (1) 74CalA464, 241P275; 40Wyo64, 277P8. (2) MoA 297SW177; 105TexCr505, 289SW390.

786–48 22AlaA81, 112S460; 165Ga326, 140SE889; 326 Ill230, 157NE195; 124Kan277, 259P680; 243Mich489, 220NW678; 191NC526, 132SE281.

786–49 Va 153SE321.

786–50 22F(2d)280; 33F(2d)265; 41F(2d)741; 21AlaA117, 105S706; 21AlaA165, 106S348; 21AlaA637, 111S314; 22AlaA415, 116S903; 23AlaA400, 126S181; 23AlaA404, 126S183(2dcase); 23AlaA412, 126S188; AlaA 130S62(1stcase); 314Mo574, 285SW997; 316Mo115, 289SW862; 121 Or202, 253P1042; 159Tenn451, 19SW276; 105TexCr465, 288SW1080; 107TexCr165, 295SW622; Wash286P67.

786–51 Ark 31SW(2d)528; MoA 256SW554; 106TexCr615, 294SW561. [a] 7F(2d)295; 26F(2d)665; 34F(2d)406; 21AlaA73, 105S426; 22AlaA648, 119S512; 22AlaA653, 119S596(1stcase); 21AlaA366, 108S268; 21AlaA367, 108S401; 21AlaA428, 109S174; 21AlaA514, 109S763; 22AlaA178, 114S890; 22AlaA407, 116S900; 22AlaA609, 118S500; 23AlaA81, 121S7; 23AlaA510, 128S118; AlaA 130S674; 173Ark1181, 295SW54; 177Ark1193, 9SW(2d)327; Ark 30SW(2d)851; 74CalA464, 241P275; 200Iowa882, 205NW498; 203Iowa694, 213NW220; 205Iowa581, 218NW269; 206Iowa364, 220NW57; 207Iowa1033, 222NW423; Iowa 227NW589; Iowa 228NW266; Iowa 229NW231; 210Ky441, 276SW116; 210Ky443, 276S138 (possession of moonshine still); 211Ky766, 278SW134; 214Ky578, 283SW1034; 214Ky703, 283SW1041; 224Ky325, 6SW(2d)245; 226Ky802, 11SW(2d)959; 228Ky684, 15SW(2d)473; 157Miss600, 128S753; Mo 279SW133; Mo 279SW141; Mo 279SW701; 314Mo333, 284SW433; Mo 292SW41; 316Mo571, 292SW78; Mo 295SW1081; Mo 300SW1081; Mo 1SW(2d)830; Mo 7SW(2d)256; Mo 24SW(2d)1006; Mo 24SW(2d)1032; MoA 299SW83; MoA 300SW318; MoA 11SW(2d)1094(2dcase); NJ 143A735; 190NC239, 129SE600; 197NC25, 147SE618; 138SC459, 136SE739; 143SC340, 141SE605; 49SD427, 206NW576; 160Tenn681, 28SW(2d)338; 135Wash153, 237P292; 135Wash301, 237P511; 142Wash539, 253P811; 147Wash426, 266P174; 150Wash326, 272P964; Wash 288P249. [b] **Evidence held insufficient to raise issue of accused's guilt for determination of jury.**–37F(2d)867.

786–52 [a] 15F(2d)179; 19F(2d)749; 26F(2d)904; 215Ala616, 110S798; 22AlaA638, 119S26(1stcase); 20AlaA457, 103S902; 20AlaA559, 103S917; 20AlaA594, 104S352; 21AlaA169, 106S205; 21AlaA301, 106S683; 21AlaA209, 106S889; 21AlaA216, 106S894; 21AlaA266, 107S328; 21AlaA304, 107S719; 21AlaA300, 107S731; 21AlaA320, 108S83; 21AlaA319, 108S84; 21AlaA457, 109S366; 21AlaA660, 109S923; 23AlaA546, 129S97(2dcase); AlaA 130S161; 174Ark835, 297SW836; 179Ark1155, 19SW(2d)1009; 202Iowa450, 209NW468; 202Iowa348, 209NW474; 207Iowa334, 221NW556; 206Iowa1169, 221NW847; 208Iowa796, 223NW873; 232NW636; 210Ky330, 275SW808; 211Ky766, 278SW134; 212Ky245, 278SW620; 225Ky712, 9SW(2d)1075; 254Mass512, 150NE321; 146Miss237, 111S303; 149Miss508, 115S593; 314Mo333, 284SW433; Mo 285SW82; 315Mo1, 285SW429; Mo 285SW717; 315Mo1320, 289SW935; 317Mo477, 296SW147 (transportation); Mo 296SW155; Mo 300SW485; Mo 300SW719; 318Mo619, 300SW793; 318Mo525, 1SW(2d)137; Mo 2SW(2d)756; 318Mo1198, 2SW(2d)767; Mo 12SW(2d)39; MoA 15SW(2d)938; 221MoA358, 273SW247; MoA 274SW1097; MoA 294SW121; MoA 7SW(2d)432; MoA 8SW(2d)1075(2dcase); MoA 10SW(2d)320; 191NC526, 132SE281; 132 Or627, 287P681; 93PaSuper432; 137SC391, 135SE361; 102TexCr501, 278SW441; 102TexCr524, 278SW444; 104TexCr225, 283SW832; 105TexCr465, 288SW1080; 112TexCr466, 17SW(2d)46(2dcase); 113TexCr263, 20SW(2d)200; TexCr 29SW(2d)774; 100Vt259, 136A835; 136Wash20, 238P903; 137Wash288, 242P31; 141Wash355, 251P273; 141Wash302, 251P586; 147Wash315, 265P742 (possessing liquor with intent to sell); 149Wash670, 272P62; Wash 287P667; 193Wis478, 214NW337. [b] 37F(2d)248; 22AlaA654, 119S596(2dcase); 21AlaA174, 106S206; 21AlaA208, 106S894; 22AlaA147, 113S480; 23AlaA234, 123S285(1stcase); 23AlaA235, 123S287; 23AlaA385, 125S795(1stcase); 23AlaA501, 127S910; 225Ky595, 9SW(2d)717; 227Ky356, 13SW(2d)243; 316Mo240, 289SW568; 317Mo380, 295SW747; Mo 296SW117; Mo 296SW139; 317Mo451, 296SW149; 319Mo24, 3SW(2d)229; MoA 15SW(2d)938; MoA 286SW143; OklCr 279P919; OklCr 283P1035(2dcase); 122 Or399, 259P423; 134SC226, 132SE610; 101Vt105, 141A596.

786–53 19F(2d)749; 21AlaA526, 109S612; 21AlaA558, 110S164; 21AlaA637, 111S314; 22AlaA239, 114S423; Mo 29SW(2d)686; 121 Or202, 253P1042; 138SC459, 136SE739, 741 [citCJ]; 192Wis391, 212NW662.

786–54 [a] (1) 210Ky698, 276SW495; MoA 287SW826; 138SC459, 136SE739, 741 [citCJ]; Wash 290P878. (2) 39F(2d)414. (5) 23AlaA138, 122S299; 179Ark913, 18SW(2d)913. (6) 22F(2d)934; 113TexCr608, 21SW(2d)1063. (10) 215Ala616, 110S798; MoA 293SW485. (12) MoA 293SW485. (16) 110TexCr381, 10SW(2d)990. (18) 83NH275, 141A307 (as to keeping for sale); 138SC459, 136SE739, 741 [citCJ]. (19) 138SC459, 136SE739, 741 [citCJ]. (21) 39F(2d)414; 180Ark970, 23SW(2d)615. (28) Whether accused buried liquors on vacant lot adjoining his home. 70CalA444, 233P401. (29) Maintaining common nuisance. 73CalA183, 238P809. (30) Transportation. 212Ky245, 278SW620. (31) Whether defendants were maintaining rooms in hotel as place for sale of liquor. 141Wash270, 251P289. (32) Whether subtenant of defendant transferred his lease to third person or whether such person was servant of defendant. 74CalA464, 241P275. (33) Whether defendant occupied place on which liquor was found to have been manufactured. 141Wash222, 251P118. (34) Whether defendant manufactured, or procured another to manufacture, whisky. 215Ala616, 110S798. (35) Whether accused possessed intoxicating liquor. 214Ky703, 283SW1041. (36) Evidence insufficient to go to jury on question of defendant's possession of part of still. 220MoA290, 286SW432. (37) Whether accused was carrying liquor about for purpose of sale. 142Wash539, 253P811. (38) Whether defendant was coprincipal. 111TexCr673, 13SW(2d)842(2dcase). (39) As to unlawful possession of liquor and maintenance of nuisance. 31F(2d)754. (40) Whether apparatus found in defendant's possession was still within meaning of statute. 151Wash619, 276P541. (41) Whether intoxicating liquor found under floor of dog house in defendant's yard had been placed there by him. 94CalA543, 271P552. (42) Whether defendant's home was place maintained for sale of intoxicating liquor. 149Wash520, 271P333. (43) Whether defendant was present at still and participated in its operation. 22AlaA566, 118S325 [certiorari den 218Ala180, 118S326]. (44) Possession. 22Ala627, 118S766(1stcase). (45) Identity of package containing liquor with package seen in defendant's possession. Iowa 228NW266. (46) Of operating still. 35F(2d)847. (47) Of aiding and abetting another in transporting liquor. 23AlaA267, 125S60(2dcase). (48) Guilt of defendant in transporting liquor. 23AlaA339, 125S382. (49) Whether defendants were innocent bystanders at still or helpers. 180Ark285, 21SW(2d)188. (50) Intent. 153Wash60, 279P123. (51) Other instances. 205Iowa604, 218NW145; 316Mo571, 292SW78; 192NC766, 136SE121; 138SC96, 136SE29. [b] (2) Manufactured spirituous or intoxicating liquors. Mass 168NE208. [c] **Evidence insufficient to authorize submission to jury.**–232Ky404, 23SW(2d)594.

787–55 213Ala534, 105S704; 23AlaA593, 129S484(3dcase); 21AlaA195, 106S679; 21AlaA198, 106S679; 21AlaA199, 106S681; 21AlaA209, 106S889; 21AlaA216, 106S894; 21AlaA300, 107S731; 21AlaA304, 107S719; 21AlaA504, 109S563; 21AlaA637, 111S314; 22AlaA63, 111S583; 22AlaA172, 113S643; 22AlaA392, 117S398; 23AlaA163, 122S604; 23AlaA270, 124S123(1stcase); 23AlaA273, 124S125(1stcase); 23AlaA511, 128S120; 215Ky725, 286SW1046; 216Ky419, 287SW917; 100TexCr309, 272SW795; 101TexCr329, 275SW713; TexCr 12SW(2d)1031(1stcase).

787–56 6F(2d)187; 8F(2d)211; 34F(2d)12; 215Ala616, 110S798; 20AlaA700, 104S926 (defendant's possession of liquor in car in which he was riding with another for the jury under evidence); 21AlaA216, 106S894; 22AlaA239, 114S423; 23AlaA269, 123S294(2dcase); 97CalA179, 275P482; 202Iowa450, 209NW468; 204Iowa410, 214NW612; 210Ky441, 276SW116; 211Ky766, 278SW134; 214Ky641, 283SW1001; 221Ky184, 298SW378; 221Ky287, 298SW686; 128Me542, 147A342; Me 149A153(1stcase); 239Mich334, 214NW128; 248Mich225, 226NW834; 146Miss685, 112S479; 151Miss361, 118S137; MoA 276SW1034; MoA 299SW83; MoA 285SW1039; MoA 286SW124; MoA 6SW(2d)638; MoA 15SW(2d)865(2dcase); 197NC548, 149SE860; 121 Or202, 253P1042; 102TexCr524, 278SW444; Vt 147A273; 142Wash539, 253P811; 105WVa495, 144SE295. [a] **Evidence of possession of more than one quart of wine** is sufficient to raise question of guilt for jury. 102TexCr524, 278SW444.

787–57 MoA 298SW1044.

787–58 215Ala616, 110S798; 22AlaA163, 113S623; 21AlaA209, 106S889; 21AlaA300, 107S731; 21AlaA320, 108S83; 21AlaA495, 109S528; 23AlaA135, 122S611; AlaA 129S713(2dcase); 207Iowa772, 223NW491; 104TexCr358, 284SW556. See also 21AlaA18, 104S880. But see 224Ky221, 5SW(2d)1051.

787–60 [a] **Question of lawful possession held for jury** on state's prima facie case. 133SC238, 130SE641.

787–61 197Ind517, 151NE416; 288Pa510, 136A791; TexCr 31SW(2d)440; 146Wash101, 261P779. See 22AlaA577, 117S911.

787–61½–New. The court should submit to the jury only the possession of those articles the submission of which is warranted under the evidence. 217MoA524, 269SW410.

787–61¾–New. Whether the possession of intoxicating fruit juices in a dwelling was for beverage purposes is a question for the jury. 93PaSuper381.

787–62 21AlaA617, 110S913; 21AlaA648, 111S320; 23AlaA330, 125S200(2dcase); 321Mo548, 11SW(2d)1033.

787–63 See also 51SD209, 213NW21.

787–64 215Ala316, 110S476; 22AlaA65, 112S178; 22AlaA17, 112S185; 22AlaA15, 112S186; 21AlaA279, 108S616; 21AlaA304, 107S719; 21AlaA345, 108S

269; 21AlaA372, 108S614; 21AlaA468, 109S387; 21AlaA472, 109S384; 21AlaA501, 109S561; 21AlaA562, 110S563; 208Ky534, 271SW570; 214Ky641, 283SW1001; 214Ky703, 293SW1041; 225Ky808, 10SW(2d)302; 143Miss210, 108S497; NJSup 129A480; 103NJL534, 138A203; 119Or341, 249P635; 119Or583, 250P738; 133SC289, 130SE885 (where accused offered no evidence that he had liquor in possession for medicinal purposes); 139SC539, 138SE352; 105TexCr465, 288SW1080; 111TexCr618, 13SW(2d)379; 136Wash20, 238P903.

787-65 17F(2d)81; 17F(2d)88; 215Ala316, 110S476; 22AlaA65, 112S178; 22AlaA17, 112S185; 21AlaA30, 104S875 (where evidence sufficient to sustain conviction); 21AlaA304, 107S719; 21AlaA472, 109S384; 21AlaA468, 109S387; 21AlaA562, 110S563; 22AlaA178, 114S890; 23AlaA288, 124S401; 93CalA478, 269P670; 210Ky564, 276SW521; 214Ky641, 283SW1001; NJSup 129A480; 116Or451, 241P846; 119Or341, 249P635; 139SC539, 138SE352; 105TexCr465, 288SW1080; 105TexCr505, 289SW390; TexCr 295SW550; 109TexCr448, 5SW(2d)154; TexCr 20SW(2d)421; 113TexCr411, 22SW(2d)304(1st case). [a] (1) 21AlaA472, 109S384. (3) Where accused's evidence is mere denial of testimony of state which is sufficient to convict. 21AlaA31, 104S871.

787-66 215Ala316, 110S476; 20AlaA664, 104S865; 21AlaA198, 106S679; 21AlaA199, 106S681; 21AlaA304, 107S719; 21AlaA468, 109S387; 21AlaA562, 110S563; 215Ky236, 284SW1051; 105TexCr465, 288SW1080.

787-67 21AlaA169, 106S205; 21AlaA319, 108S884; 21AlaA270, 108S617; 21AlaA468, 109S287; 22AlaA258, 114S479; 175Ark1169, 299SW40; 200Iowa1394, 206NW607; 214Ky578, 283SW1034; 103NJL534, 138A203; 190NC684, 130SE854; 139SC539, 138SE352; 136Wash20, 238P903.

787-68 20AlaA606, 104S551.

787-69 22AlaA100, 113S316; 21AlaA320, 108S883; 21AlaA498, 109S557; 113TexCr447, 21SW(2d)1055.

787-71 22AlaA65, 112S178; 21AlaA503, 109S558; 119Or583, 250P738.

788-72 21AlaA480, 109S758; 239Mich334, 214NW128.

788-75 21AlaA274, 107S321; 21AlaA315, 108S878; 22AlaA444, 116S706; 219Ky514, 293SW1076; 128Me415, 148A144; Miss 110S124; 117Or238, 243P563 (where offense not shown under undisputed stipulated facts); 135Wash682, 239P207. [a] **Where all evidence was secured by unlawful search** peremptory instruction for defendant should be given. 151Miss580, 118S413(2dcase).

788-76 23AlaA28, 119S863(2dcase); 20AlaA572, 104S142; 21AlaA175, 106S217; 21AlaA274, 107S321; 21AlaA315, 108S878; 21AlaA368, 108S350; 22AlaA106, 112S900; 22AlaA424, 116S413(1st case); 22AlaA425, 116S413(2dcase); 23AlaA236, 123S291(2dcase).

788-77 22AlaA163, 113S623.

788-77½-New. or where there is no evidence of commission of the offense charged, 20AlaA642, 104S778.

788-78 219Ky514, 293SW1076.

788-80 21AlaA230, 106S873; 21AlaA299, 107S730; 21AlaA356, 108S350; 22AlaA311, 115S289; 22AlaA316, 115S291; 22AlaA370, 115S771; 221Ky535, 299SW168. Miss 110S124; 35OklCr91, 249P354; 194Wis67, 214NW359.

788-80½-New. or where all the evidence on the part of the state was obtained by unlawful acts of officers of the court. 37OklCr402, 258P814.

788-85 16F(2d)682; 18F(2d)208; 70CalA489, 233P413; 33GaA683, 127SE656; 324Ill261, 155NE34; 199Ind704, 160NE296; 89IndA293, 166NE292; IndA 168NE612; Iowa 229NW231; 159La451, 105S451; 150Md278, 132A624; 262Mass180, 159NE633; 153Miss620, 121S281; 156Miss659, 126S477; Miss 130S687; 316Mo115, 289SW862; Mo 289SW648; Mo 23SW(2d)11 (that liquor was hootch, moonshine, or corn whisky); MoA 273SW141; MoA 291SW151; 55ND83, 212NW442; OklCr 279P520; 47RI371, 133A444; 138SC459, 136SE739, 741 [quotCJ]; 149SC84, 146SE695; 102TexCr524, 278SW444; 99Vt473, 134A585; Vt 147A273; 144Wash516, 258P319; 149Wash509, 271P584, 274P192(1stcase). [b] **Grape wine.**-102TexCr524, 278SW444. [c] **Whether liquor designated by witness as white mule** was in fact within terms of information is for jury under evidence. Mo 22SW(2d)787.

789-90 162La465, 110S721.

789-91 21AlaA588, 110S320; 22AlaA324, 115S418; 175Ark1169, 299SW40; 83Colo162, 262P1009; 215Ky236, 284SW1051; 254Mass512, 150NE321; 258Mass410, 155NE448; Mo 278SW704; Mo 278SW1014; 316Mo210, 289SW953; Mo 289SW646; Mo 291SW1078(2dcase); Mo 296SW152; Mo 2SW(2d)755; 318Mo1233, 3SW(2d)365; Mo 22SW(2d)777; 116Nebr313, 217NW89; 100TexCr660, 273SW852; 104TexCr522, 286SW209; 150Wash136, 272P48; 193Wis478, 214NW337; 196Wis111, 219NW272.

789-92 254Mass512, 150NE321.

789-94 209Ky342, 272SW880; 317Mo408, 297SW368.

789-95 179Ark647, 17SW(2d)307; 261Mass460, 158NE902; 112TexCr67, 13SW(2d)868; 98Vt466, 129A306; 154Wash336, 282P220.

789-98 223Ky8, 28SW(2d)1029.

789-3 254Mass512, 150NE321; OklCr 279P917 (in keeping liquor); OklCr 287P1062(1stcase).

789-4 22AlaA114, 113S279; 23AlaA430, 126S497(2dcase); 152Miss195, 119S176; 217MoA538, 269SW627; 49SD476, 207NW475 (purpose of possession); 103TexCr521, 281SW1050; 108TexCr274, 1SW(2d)308; 109TexCr435, 5SW(2d)146; TexCr 24SW(2d)60 (1st case).

789-5 40F(2d)338; 20AlaA543, 104S46; 21AlaA372, 108S614; 23AlaA392, 127S499(2dcase); 38GaA369, 143SE905; 219Ky319, 292SW806; 243Mich559, 220NW709; 51ND875, 201NW342; 8PaDist&Co608; 103TexCr578, 280SW1079; 106TexCr615, 294SW561; 110TexCr569, 9SW(2d)740.

789-10 18F(2d)208; 111TexCr610, 13SW(2d)368(3dcase).

789-11 215Ky236, 284SW1051.

790-16 38Wyo140, 265P25.

790-16½-New. the character of defendant: 22AlaA59, 112S182.

790-17 19F(2d)749; 37F(2d)867; 22AlaA100, 113S316; 216Ala557, 114S67; 23AlaA87, 121S441(2dcase); 20AlaA632, 104S678; 21AlaA24, 104S867 (manufacture; 21AlaA269, 108S75; 22AlaA162, 114S67; 22AlaA422, 116S411; 23AlaA40, 120S308; 23AlaA120, 122S310 [certiorari den 219AlaA312, 122S311(1st case)]; 23AlaA386, 126S100(1stcase); 23AlaA493, 127S681 (defendant's operation of still); 169Ark1212, 275SW660; 169Ark636, 276SW365; 179Ark28, 13SW(2d)821; 35GaA581, 134SE186 (explanation, of presence of distilling plant); 35GaA592, 134SE333 (whether attempted explanation of accused of presence and conduct at still was reasonable and satisfactory); 38GaA345, 143SE923; Iowa 232NW636; 210Ky330, 275SW808; 263Mass138, 160NE531; 316Mo115, 289SW862; 321Mo1163, 14SW(2d)617; MoA 281SW107; 193NC566, 137SE590; 101TexCr495, 276SW438; 103TexCr578, 280SW1079; 106TexCr399, 292SW549; 108TexCr590, 2SW(2d)229; 110TexCr290, 8SW(2d)119; TexCr 28SW(2d)811(2dcase); TexCr 24SW(2d)835.

790-17½-New. whether he was proprietor of business constituting liquor nuisance, 200Iowa660, 204NW278.

790-18 40F(2d)909; 23AlaA486, 127S264; 20AlaA632, 104S678; 23AlaA299, 124S406(2dcase); 208Ky478, 271SW548; 234Mich623, 208NW705; 247Mich602, 226NW337(2dcase); 110TexCr90, 7SW(2d)551.

790-18½-New. manufacture, 198Ind679, 154NE489.

790-19 33F(2d)65; 23AlaA581, 129S483; 21AlaA266, 107S328; 21AlaA220, 107S800; 23AlaA368, 125S902(2dcase); 83Colo162, 262P1009; 162La357, 110S557; 234Mich623, 208NW705; 239Mich334, 214NW128; 318Mo827, 1SW(2d)106; 321Mo1237, 14SW(2d)624; MoA 285SW777; MoA 289SW664; MoA 290SW1026; 154SC386, 151SE572; 157SC142, 153SE924(1stcase); 99TexCr616, 270SW1029; 100TexCr584, 272SW139; TexCr 23SW(2d)388; 100Vt259, 136A835; 193Wis478, 214NW337. [b] **Evidence held for jury** on question of defendant's guilt of possessing intoxicating liquors. 21AlaA60, 106S55. [c] **Evidence held to raise question for jury.**-21AlaA60, 106S55.

790-20 208Ky478, 271SW548; 239Mich334, 214NW128; 103TexCr578, 280SW1079.

790-20½-New. whether liquor was being transported for medicinal purposes, 101TexCr495, 276SW438.

790-20¾-New. his explanation of possession of liquor, 21AlaA266, 107S328.

790-20¼-New. distance and purpose for which defendant transported liquor, 109TexCr521, 5SW(2d)993.

790-21 21AlaA24, 104S867; 20AlaA632, 104S678; 21AlaA437, 109S181; 22AlaA364, 115S767; 23AlaA407, 127S246(2dcase); 23AlaA487, 127S795; 23AlaA405, 126S185; 23AlaA548, 129S99(2dcase); Me 149A629(1stcase); Mo 292SW52; 99Vt473, 134A585.

790-21½-New. whether a still is suitable for the manufacture of liquor, 21AlaA434, 109S172.

790-22½-New. whether defendant manufactured liquor, 102TexCr501, 278SW441.

790-22¾-New. whether bottles of liquor introduced in evidence were the same bottles as those taken from defendant, 144Wash516, 258P319.

790-22¼-New. whether the articles found constituted a crude still suitable for distillation of intoxicating malt, 122Or404, 259P424.

790-24 100TexCr660, 273SW852.

790-29½-New. In a prosecution for maintaining and conducting a place for unlawful sale of intoxicating liquors as jointists, the question of continuity in maintaining the place, has been held for the jury. 142Wash612, 254P234.

790-32½-New. On evidence, issue of whether defendant "dispensed" liquor held for jury. 203Iowa694, 213NW220.

790-32¾-New. Whether defendant was guilty of manufacturing liquor is for the jury. 14F(2d)35.

790-32¼-New. Whether defendant unlawfully transported liquor may be a question for the jury. 228Ky587, 15SW(2d)467.

790-32½-New. Evidence as to defendant's ownership of roadhouse is sufficient to take case for maintaining place for sale of liquor to jury. Wash 287P22.

790-32⅛-New. Proceedings under search warrant held for jury, under statutory prima facie evidence of nuisance. Iowa 232NW684.

790-34 126Kan799, 271P291; TexCr 29SW(2d)774; 40GaA496, 150SE464; 122Or113, 256P649. [a] 23AlaA403, 126S183(3dcase); 196Ind95, 147NE276; 196Ind137, 147NE323; 162La719, 111S72; 166La842, 118S40; 144SC121, 142SE236; 100TexCr90, 272SW163; 102TexCr410, 27SW210; 102TexCr413, 278SW211; 106TexCr669, 294SW555; 111TexCr531, 15SW(2d)23. [b] 26F(2d)63; 23AlaA367, 125S693(1stcase); 23AlaA371, 125S783; 23AlaA431, 126S495(3dcase); 245IllA100; 198Ind502, 154NE273; 208Iowa802, 226NW57; 144Miss526, 110S439; 155Tenn624, 299SW796; 104TexCr522, 286SW209; 145Va865, 134SE699. [c] 7F(2d)60; 22AlaA574, 117S910; 23AlaA193, 122S698 [certiorari den 219Ala431, 122S699(1st case)]; 170Ark936, 282SW4; 36GaA662, 137SE853(1stcase); 36GaA664, 137SE853(2dcase); 237IllA178; 199Ind122, 155NE549; 199Ind217, 156NE513; 202Iowa530, 210NW551; 204Iowa137, 214NW531; 206Iowa615, 220NW59; 118Kan618, 236P826; 119Kan679, 240P566; 120Kan314, 243P265 possession and transportation); 120Kan499, 243P1060; 123Kan201, 254P378; 214Ky173, 282SW1078; 215Ky763, 286SW1041; 226Ky802, 11SW(2d)959; 228Ky819, 16SW(2d)448; 235Mich206, 209NW87; 240Mich107, 214NW954; 241Mich67, 216NW398; 141Miss18, 106S443; 143Miss210, 108S497; 216Mo644, 271SW875; Mo 278SW700; Mo 278SW704; 315Mo

1279, 289SW792; 321Mo 603, 12SW57; Mo 12SW(2d)424; MoA 279SW733; MoA 284SW152; 51ND875, 201NW342; 52 ND946, 204NW867; OklCr 283P803; 120 Or372, 251P305; 86PaSuper468; 138SC 459, 136SE739; 155SC495, 152SE738; 156SC427, 153SE287; 156SC363, 153SE 340; 103TexCr364, 280SW804; 104 TexCr522, 286SW209; 105TexCr107, 286 SW1100; 105TexCr379, 288SW468; 108 TexCr384, 300SW942; 108TexCr387, 300SW945; TexCr 25SW(2d)875; TexCr 27SW(2d)180(1stcase); 136Wash 453, 240P562 (possession); 150Wash 136, 272P48; 153Wash379, 279P1102; Wash 290P702. [d] 122Kan182, 250P 1071. [f] 240Mich107, 214NW954. [g] **Instruction held not to indicate that any control or dominion** amounts to possession. 80Colo 430, 252P341. [h] **Refusal to give requested instructions** held proper. 163La502, 112S396. [i] **Instruction on law of principals** held authorized by evidence. 108TexCr329, 300SW61. [j] **Refusal of declaration of law** in nature of demurrer has been held proper. Mo 11SW(2d)1024.

790–36 [a] 196 Ind145, 147NE625; 119 Or446, 249P817; 137SC391, 135SE361. [b] (1) 200 Iowa892, 205NW517. (4) Instruction defining offense of maintaining liquor nuisance as unlawful possession inside a building held erroneous. CalA 238P302. (5) Or as not submitting to jury time of first offense. 226Ky 802, 11SW(2d)959. [e] **Failure to state rule as provided by statute** upon which instruction is based disapproved as more than incomplete. 199 Ind18, 154 NE867.

790–37 200 Iowa892, 205NW517; Utah 266P265. [b]' (1) 168Ark167, 269SW 355 (as to homemade or substitute still which was in fact still); 73CalA183, 238 P809; 199 Ind18, 154NE867; 234Mich 623, 208NW705; Mo 292SW52; 321Mo 633, 12SW(2d)37; TexCr 29SW(2d)404. (2) As placing too great burden on accused by conjunctively stating matters, some of which, under statute alone, would entitle accused to acquittal. 111 TexCr531, 15SW(2d)23. [c] 237 IllA 178; Ind 165NE757; 234Mich203, 208 NW45; 307Mo 411, 270SW282; 312Mo 140, 279SW99; MoA 15SW(2d)931; 106 WVa299, 145SE604. [e] **Omitting word "unlawful"** from instruction submitting question of possession held prejudicial error. 221Ky84, 295SW1019. [f] **Failure to instruct** that possession must have been unlawful held error. 219Ky 444, 293SW955. [g] **Where unlawfulness of manufacture** is element of offense, court should charge thereon. 312 Mo 99, 279SW144.

790–38 OklCr 270P337. [a] 142Wash 483, 253P793. [b] 196 Ind258, 148NE 143. [c] **Failure to instruct** as to time within which offense must have been committed held error. 219Ky444, 293 SW955.

791–39 [a] 32F(2d)602.

791–40 171Ark759, 286SW944; 288Pa 510, 126A791; 103TexCr225, 280SW 585; 103TexCr623, 281SW547; TexCr 27SW(2d)186(3dcase); 103WVa631, 138 SE323. [a] 106TexCr669, 294SW555; TexCr 29SW(2d)387(2dcase). [b] 131 Or209, 282P233; 103TexCr160, 280SW 219; 104TexCr599, 285SW1091; 105 TexCr295, 288SW452; 107TexCr673, 298SW586. [c] **Refusal of instruction as to defense** held error. 102TexCr413, 278SW211. [d] **Instruction held erroneously refused.**–104TexCr599, 285SW 1091. [e] **Refusal to give requested instruction held error.**–TexCr 27SW(2d) 803.

791–41 [a] See also 37GaA160, 142SE 306.

791–43 6F(2d)121 (omitting element of intent in instruction as to possession of article designed for manufacture being unlawful); 22AlaA32, 111S762; 234 Mich623, 208NW705; 49SD56, 206NW 468; 100TexCr389, 273SW575; TexCr 29SW(2d)765. [a] 196 Ind258, 148NE 143; 198 Ind389, 153NE773; 198 Ind 679, 154NE489; 120Kan314, 243P265; 121Kan137, 245P1032; 213Ky68, 280 SW474; 141Miss18, 106S443 (not conflicting); 146Miss237, 111S303; 321Mo 540, 11SW(2d)1040.

791–44 20AlaA454, 103S912; 170ArK 1194, 281SW382; 245 IllA100; 161La 135, 108S312; 51SD209, 213NW21; 100 TexCr389, 273SW575; 112TexCr528, 17 SW(2d)1074. [a] 196 Ind529, 149NE51; 204 Iowa137, 214NW531; Mo 279SW 141; 100TexCr512, 271SW625; 101Tex Cr28, 274SW147 (charge on principals); 101TexCr9, 274SW156; 104TexCr174, 283SW527. [b] **Instructions held not applicable to case.**–338 Ill 128, 170NE 240.

791–45 Ind 166NE430; Ind 166NE661; 200 Iowa892, 205NW517; Kan 291P 751; 218Ky703, 292SW305; 51SD209, 213NW21. [b] **Instructions held objectionable.**–TexCr 20SW(2d)788; Tex Cr 21SW(2d)670(2dcase).

791–46 6F(2d)199; 21AlaA460, 109S 294; 22AlaA363, 115S765; 174Ark1179, 298SW877; 71CalA2, 234P438; 245 Mich197, 222NW173; 165Minn79, 205 NW692; 159Tenn263, 17SW(2d)899; 100TexCr512, 271SW625; 100TexCr389, 273SW575; 101TexCr44, 273SW861; 101TexCr185, 274SW634; 101TexCr577, 276SW697; 111TexCr646, 13SW(2d)847 (1stcase); 36Wyo 532, 257P2. [a] 22 AlaA566, 118S325; 101CalA7, 281P100; 101CalA7, 281P100; 39GaA665, 148SE 281; 237 IllA178; 202 Iowa530, 210NW 551; 128Kan293, 278P20; 234Mich203, 208NW45; 311Mo 630, 279SW135; Mo 279SW141; 311Mo 664, 279SW395 (as to conjunction of husband and wife in commission of offense); MoA 5SW(2d)95; 131 Or455, 282P560; 139SC539, 138SE 352; 49SD56, 206NW468; 100TexCr11, 271SW380; 100TexCr512, 271SW625; 100TexCr309, 272SW795 (charge not embracing exceptions other than one relied on by accused); 106TexCr127, 290 SW1100; 110TexCr40, 7SW(2d)541; 111TexCr673, 13SW(2d)842(2dcase); TexCr 29SW(2d)777; TexCr 31SW(2d) 637; 142Wash612, 254P234. [b] **Instruction authorizing conviction of maintaining nuisance,** based on unlawful possession, held erroneous where only evidence was of unlawful possession. CalA 238P302. [c] **Instructions held improper under evidence.**–36Wyo 532, 257P2. [d] **Argumentative admonition** in favor of strict enforcement disapproved. 199 Ind18, 154NE867.

791–47 37F(2d)867; 20AlaA629, 104S 674; 21AlaA60, 106S55 (patently incorrect); 21AlaA279, 108S616; 21AlaA437, 109S181; 21AlaA501, 109S561; 23AlaA 330, 125S201(1stcase); 170Ark1194, 281 SW382; 78CalA415, 248P693; 81CalA 122, 252P1067; 41GaA349, 152SE922; 196 Ind145, 147NE625; 196 Ind556, 147 NE714; 198 Ind39, 151NE132; Ind 163 NE710; IndA 168NE598; 207 Iowa334, 221NW556; 122Kan520, 253P598; 129 Kan827, 284P616; 141Miss18, 106S443; 143Miss210, 108S497 (ignoring law making accessories before fact guilty as principals); 311Mo 664, 279SW395 (that neither husband nor wife can be convicted unless joint possession is shown); MoA 300SW521; MoA 14SW(2d)515; 121 Or561, 254P1010; 122 Or113, 256P 649; 144SC5, 142SE62; 101TexCr44, 273SW861; 101TexCr533, 276SW266; 102TexCr440, 278SW205; 102TexCr492, 278SW440; 113TexCr460, 21SW(2d) 1066(2dcase); TexCr 24SW(2d)404; TexCr 25SW(2d)621; 113TexCr506, 22 SW(2d)667; 141Wash146, 250P1090; Wash 290P702. [c] **Instructions properly refused as patently incorrect.** 21 AlaA60, 106S55. [d] **Possession.**–102 TexCr440, 278SW205.

791–48 22AlaA100, 113S316; 172Ark 1177, 288SW707; 177Ark509, 7SW(2d) 802; 240Mich59, 214NW935; 141Miss 18, 106S443; 312Mo 202, 278SW661; 121 Or561, 254P1010; 122 Or113, 256 P649; 105TexCr268, 287SW1097; 105 TexCr374, 288SW230; 107TexCr13, 294 SW592; 109TexCr513, 5SW(2d)771.

791–48½–New. where they are on the weight of the evidence, 107TexCr559, 298SW569.

791–49 100CalA279, 279P1046; 103 Conn138, 130A96; 196 Ind529, 149NE 51; 200 Ind380, 165NE522; 162La867, 111S262; 162La872, 111S264; Miss 130 S285; Miss 130S687; 312Mo 202, 278 SW661; 317Mo 293, 295SW743; Mo 22 SW(2d)1050; MoA 289SW664; 77 Mont387, 250P976; 101TexCr533, 276 SW266; 103TexCr272, 280SW827; 103 TexCr304, 280SW811; 103TexCr383, 280SW815; 103TexCr611, 281SW853; 104TexCr417, 284SW559; 106TexCr621, 294SW580; 107TexCr559, 298SW569; 110TexCr416, 10SW(2d)113; 110TexCr 393, 10SW(2d)552; 142Va628, 128SE 565.

791–50 6F(2d)121; 21AlaA279, 108S 616; AlaA 130S317; 73Mont376, 237P 486; 122 Or113, 256P649; 142Va628, 128SE565.

791–51 21AlaA279, 108S616; 196 Ind 145, 147NE625.

791–51½–New. It is not error to instruct the jury that whatever they thought of prohibition it was their duty to abide by it and enforce laws passed for its enforcement whenever violations are shown. 192Wis347, 212NW631.

791–51¾–New. An instruction which warrants conviction of defendant for the possession of whisky, for the manufacture of which he was convicted, is erroneous. 37Wyo 155, 259P810.

791–52 322 Ill 443, 153NE691; 101TexCr 617, 276SW926; 151Wash114, 275P75; 36Wyo 532, 257P2. [a] **Instructions held erroneous.**–OklCr 287P743(2dcase) (placing burden of overcoming presumption of intent to sell on defendant); 101TexCr185, 274SW634 (as to burden being on defendant to prove transportation was for excepted purpose). [b] **Instructions held not erroneous.**–OklCr 281P823 (as shifting burden of proof).

791–53 21AlaA629, 111S188; 245 IllA 100; 202 Iowa530, 210NW551; Tex CivA 278SW205; 101TexCr75, 273SW 608; 106TexCr127, 290SW1100; 112 TexCr563, 17SW(2d)1075; TexCr 32 SW(2d)474; 146Va279, 135SE700; Va 154SE598; 141Wash101, 250P950. [b] 36GaA661, 137SE789; 37GaA513, 140 SE903; 37GaA160, 142SE306; 207 Iowa772, 223NW491; 243Mich489, 220 NW678; OklCr 277P260; TexCivA 278 SW205; 103TexCr276, 280SW590; 103 TexCr288, 280SW789; 105TexCr503, 289SW411; 107TexCr24, 294SW550; 148Wash310, 268P874. [c] 219Ky482, 293SW984; 104TexCr556, 286SW239. [d] **Instruction held properly refused,** as inapplicable and immaterial. 142 Va628, 128SE565. [e] **Instructions held erroneous or properly refused.**–That possession of liquor creates presumption that place where liquor was possessed was joint. 141Wash146, 250 P1090.

792–54 21AlaA624, 111S50; 202 Iowa 348, 209NW474 (sufficient); Iowa 230 NW522 (not prejudicial). [d] **In prosecution for possessing still** for manufacturing intoxicating liquors, instruction that ownership of still was immaterial held erronecus. 141Wash367, 251P567. [e] **Instructions held not improper.**–22AlaA577, 117S911.

792–55 [a] 108TexCr590, 2SW(2d)229.

792–56 [a] (4) Consideration of shooting of state witness by accused in liquor prosecution. 101TexCr637, 276SW 925. (5) As being in opposition to statute. 237 IllA178. (6) Right to consider with other evidence fact that at time of his arrest defendant had glass in his hand containing intoxicating liquor, though such fact did not in itself constitute violation of law against possession of liquor. 121 Or 202, 253P1042. (7) Charge on question of acts of ownership, dominion, or control of still held to invade province of jury. 21AlaA491, 109S521. (8) Other instructions held erroneous. 101 TexCr75, 273SW608. [b] (5) Other instances. 41GaA565, 153SE780.

792–57 106WVa299, 145SE604. [d] **Quantity of liquor introduced in evidence.**–100TexCr468, 274SW978.

792–58 108TexCr384, 300SW942. See also MoA 297SW413. [a] **Instruction held not erroneous.**–207 Iowa742, 223 NW546.

792–59 147Wash402, 266P173. But see 101TexCr44, 273SW861.

792–60 320Mo 280, 6SW(2d)849; Mo 18SW(2d)509; 142SC24, 140SE258. [a] **Failure to define term** held not error. 212Ky161, 278SW577 (possession).

792–61 200 Ind380, 165NE522; 102

TexCr546, 278SW848. See also 104 TexCr522, 286SW209. [b] 196 Ind562, 149NE62; Ind 163NE710; Mo 289SW 648; 120 Or372, 251P305; 102TexCr 546, 278SW848; 105TexCr430, 289SW 44; TexCr 24SW(2d)530; 145Wash 638, 261P388; 146Wash101, 261P779 ("carrying about"). [c] **"Possess" defined** as actual personal control, care, and management of property alone or with others, held sufficient. 102TexCr 546, 278SW848. [d] **"Still" defined** as equipment intended for, and capable of use to, manufacture spirituous, vinous, or malt liquor, held sufficient. 102 TexCr546, 278SW848. [e] **Definition of "transport,"** without regard to distance, held prejudicial. 109TexCr521, 5SW(2d)993. [f] **Definitions held erroneous.**–129Kan588, 283P630, 67ALR 1520 (possession); MoA 296SW440.

792–62 21AlaA367, 108S401.

792–63 [a] **Instructions held not erroneous.**–TexCr 20SW(2d)762.

793–64 23AlaA299. 124S406(2dcase); 112TexCr618, 18SW(2d)167(2dcase); TexCr 24SW(2d)427(2dcase).

793–67 21AlaA367, 108S401; TexCr 24 SW(2d)427(2dcase).

793–69 Kan 292P793; 102TexCr546, 278SW848. [a] 258Mass410, 155NE 448; 102TexCr546, 278SW848.

793–70 102TexCr392, 278SW206. [a] 103TexCr171, 280SW213. [b] **Instructions held prejudicial and erroneous.**–102TexCr392, 278SW206.

793–71 41GaA360, 153SE94(1stcase).

793–72 113TexCr616, 21SW(2d)737.

793–74½–New. When there is evidence that defendant is an accomplice, and he is indicted as a principal, facts should be submitted with proper instructions. 105TexCr39, 287SW823.

793–74¼–New. An instruction to convict if defendant acted with any other person in transporting liquor is proper. 108TexCr566, 2SW(2d)227.

793–74¼–New. Where the evidence justifies application of the theory of principal, a charge requiring guilt to depend on defendant's own acts is properly refused. 108TexCr566, 2SW(2d)227.

793–75 80CalA583, 251P222. [a] 207 Iowa772, 223NW491; 211Ky765, 278 SW160; 107TexCr24, 294SW550; 151 Wash114, 275P75. [b] (2) 73Mont272, 235P716. [c] 102TexCr456, 278SW203. [d] **Refusal to instruct as to intent** held error. 102TexCr410, 278SW210. [e] **Instructions held erroneous.**–155Wash 260, 284P85.

793–76 224Ky325, 6SW(2d)245; 112 TexCr532, 17SW(2d)831(1stcase); 112 TexCr618, 18SW(2d)167(2dcase). [b] (2) Failure to instruct jury to acquit if sale was for medicinal purposes is held error. 113TexCr120, 18SW(2d)623. [c] (2) Charge to convict if defendant unlawfully possessed for purpose of sale as beverage potable liquor containing in excess of one per cent alcohol by volume is not erroneous by reason of use of words "as beverage." 108TexCr274, 1 SW(2d)308. [d] **Failure to charge held error.**–TexCr 27SW(2d)186(2dcase).

793–77 209Ky191, 272SW378 ("unlawfully" not equivalent to "knowingly"); 212Ky245, 278SW620; 228Ky684, 15SW (2d)473; 111TexCr384, 12SW(2d)792; TexCr 26SW(2d)265; TexCr 26SW(2d) 275; TexCr 32SW(2d)466. [a] 100TexCr376, 272SW791; 105TexCr430, 289 SW44; 110TexCr456, 7SW(2d)530. [b] (2) 41GaA349, 152SE922; 161La135, 108S312; 106TexCr621, 294SW580. [d] **Instructions held erroneous.**–8PaDist& Co 608; TexCr 23SW(2d)368; TexCr 26SW(2d)202; 144Va544, 131SE207. [e] **Instruction improperly refused.**–225 Ky163, 7SW(2d)1066.

793–78 234Mich623, 208NW705; 105 TexCr39, 285SW823; 111TexCr345, 13 SW(2d)98. [b] **Error in refusing to charge that jury should acquit if possession is satisfactorily explained.** 21 AlaA428, 109S174.

793–79 20AlaA664, 104S865 (instruction held correctly to submit defense of not knowing liquor was in pocket).

793–80 107TexCr110, 295SW925.

793–81 31F(2d)423; 21AlaA195, 106S 680; 164La89, 113S777; MoA 274SW 1097; 101TexCr577, 276SW697 (no evidence of knowledge and defendant contended he had no knowledge).

794–85 194NC582, 140SE212.

794–86 167Ga165, 144SE726, 60ALR 747; OklCr 270P337; TexCr 20SW(2d) 421. See also 318Mo 1233, 3SW(2d)365. [c] **Instructions held sufficient.**–311Mo 630, 279SW135; Mo 292SW39. [d] **"Corn whisky."**–312Mo 99, 279SW144. [e] **Instruction defining "moonshine" as "any intoxicating liquor unlawfully made"** held not prejudicial where charge was for transportation of hootch, moonshine, and corn whisky, and evidence showed transportation of "moonshine whisky." 312Mo 140, 279SW99. [f] **Instruction held not erroneous.**–Mo 289 SW804. [g] **Definition of "hootch" and "moonshine"** as intoxicating liquor illegally distilled is proper. Mo 22SW (2d)1050.

794–87 OklCr 287P793; 108TexCr92, 299SW249. [c] 100CalA245, 279P819; 102Conn634, 129A714; 311Mo 630, 279 SW135; 141Wash101, 250P950. [d] 200 Ind61, 161NE297. [e] **Effect of evidence that liquor is intoxicating.**–101 TexCr386, 276SW432. [f] **In Missouri.**–312Mo 212, 278SW1030.

794–88 [a] 23AlaA54, 120S465(1st case); 51ND875, 201NW342.

794–90 103TexCr225, 280SW585; 111 TexCr459, 14SW(2d)849 (1stcase). [a] 213Ky68, 280SW474; 53ND558, 207NW 226. [c] **In Alabama.**–21AlaA247, 107S 42.

794–91 Mo 280SW43; MoA 276SW 1034; TexCr 20SW(2d)421 (instruction held not to submit offense at variance with that charged). [a] **Instruction authorizing conviction on finding of unlawful transportation of some of liquors named in information** is proper, though other kinds of liquors are also named. Mo 22SW(2d)1050.

794–93 104WVa536, 140SE536 (moonshine).

794–94 121 Or561, 254P1010; 106TexCr95, 291SW233. [a] (1) 143Wash15, 253P1073. (2) 121 Or561, 254P1010; 101TexCr28, 274SW147; TexCr 27SW (2d)540(1stcase); TexCr 27SW(2d)545. (3) Wine. MoA 282SW1043.

794–94½–New. What constitutes particular kind of liquor in evidence need not be defined. 311Mo 630, 279SW135.

794–94¼–New. It is not error for the court to fail to instruct that whisky was fit for beverage purposes. MoA 15 SW(2d)865(2dcase).

794–96 121Kan837, 250P258; 216MoA 644, 271SW875.

794–96½–New. It is improper for the court to charge that chock beer and home brew are intoxicating. 127Kan 471, 274P197.

794–97½–New. An instruction in a prosecution for possession of intoxicating liquor which permits a conviction if the jury finds that defendant possessed moonshine liquor is not erroneous. 210 Ky441, 276SW116.

795–98 Mo 23SW(2d)11; Mo 23SW(2d) 16 (in both cases instruction held not erroneous).

795–99 MoA 281SW105. [a] **Instructions held not misleading.**–Mo 279SW 141; Mo 22SW(2d)1050.

795–99½–New. Under an indictment for possessing intoxicating liquor, an instruction authorizing conviction for possessing liquor of alcoholic content in excess of that prescribed by different statutes is reversible error. 105TexCr 409, 288SW1089.

795–99¼–New. An instruction that the destruction of liquid during search was prima facie evidence it was intoxicating is properly refused where the destruction was by defendant's wife. 206 Iowa 354, 220NW77.

795–2 TexCr 29SW(2d)346(2dcase).

795–4 105TexCr172, 287SW264. [c] Mo 280SW48; 102TexCr492, 278SW440. [d] **Instructions held erroneous.**–TexCr 26SW(2d)266 (possessing for sale liquor for medicinal purposes only).

795–5 [d] **Refusal to define term "sale"** is not error. 101TexCr44, 273SW861.

795–7 171Ark271, 284SW17.

795–14 162La465, 110S721.

795–15½–New. , or a peremptory instruction. 101TexCr44, 273SW861.

795–15⅓–New. When accused admitted the sale, a charge that proof thereof is not required is proper. 162La465, 110S 721.

795–15¼–New. An instruction as to possession alone is not sufficient where prosecution is for sale. 102TexCr456, 278SW203.

795–15⅙–New. An instruction to acquit if liquor was possessed for any other purpose than for sale should be given in a prosecution for possession of liquor, if requested. 103TexCr679, 282SW 220.

795–15⅛–New. Failure to charge that liquor found must be for the purpose of sale is reversible error. 105TexCr112, 286SW1098.

795–15½–New. Where the information charges both unlawful sale and furnishing of intoxicating liquor, submission of the case as one of furnishing rather than selling is not objectionable. 241 Mich67, 216NW398.

795–15⅛–New. An instruction relative to the sale of liquor need not state the quantity sold. Mo 296SW152.

795–16 22AlaA493, 117S396; 68CalA 645, 230P193; 250 IllA526; Mass 168 NE208; 110TexCr263, 8SW(2d)184. [a] Mo 289SW804; Mo 300SW815; MoA 294SW422.

795–18 317Mo 293, 295SW743; 221Mo A592, 283SW468; NJSup 129A480 (verdict of guilty not against weight of evidence); 144Wash598, 258P484.

795–19 221MoA592, 283SW468.

795–20 243 IllA146. [a] (2) Where accusation contains two counts, one charging sale and one possession, both charges growing out of same transaction, general verdict of guilty cannot be sustained on evidence justifying conviction of possession only. 35GaA652, 134SE 202. (3) That sentence did not exceed that which might have been imposed on conviction of possession only does not affect foregoing rule. 35GaA652, 134SE 202.

796–21 200 Ind458, 163NE260(1stcase); 159Tenn451, 19SW(2d)276 (sufficient). [b] 144Wash598, 258P484. [c] **In Ontario.**–[1925] 2DomLR959. [d] **Evidence warranting conclusion** that appellant was aware of use to which his premises were put. 100TexCr442, 273 SW845. [e] **Findings held warranted by evidence.**–179Ark913, 18SW(2d)913.

796–25 27F(2d)648; 196 Ind671, 149 NE347; 110TexCr285, 7SW(2d)578. [b] **Special finding as to former convictions held sufficient.**–136Wash453, 240P562.

796–26 336 Ill 286, 168NE332 (words misspelled); 120 Or90, 250P633, 251P 307 (sufficient). [a] **Attempt to distill.**–20AlaA642, 104S778. [b] **Verdict held sufficient.**–Mo 296SW84.

796–28 120 Or90, 250P633, 251P307.

796–28½–New. A verdict finding defendant guilty of possessing intoxicating liquor is not fatally defective because of omission of the word "unlawful." 120 Or90, 250P633, 251P307.

796–29 92CalA42, 267P564; 136Wash 453, 240P562 (special finding as to former convictions).

796–30 100TexCr587, 272SW165 (finding contrary to uncontradicted evidence of an unimpeached witness declared arbitrary and reversed); 136Wash453, 240 P562 (admission by accused).

796–33½–New. A finding that defendant did not possess or make a particular sale of liquor does not amount to a finding that he did not maintain a liquor nuisance. 198 Ind643, 154NE2.

796–33¼–New. A verdict finding accused guilty on count of unlawful sale of intoxicating liquor and acquitting on count charging unlawful possession of liquor has been held not inconsistent. 28F(2d)770(1stcase).

796–34 36F(2d)401 (Jones Act); 157 Md372, 146A242; Miss 113S218. [b] **In California.**–100CalA245, 279P819.

796–36 145Va901, 134SE542.

796–37 205Cal 408, 271P201; 72CalA 543, 237P769; 169Minn364, 211NW319; 147Miss29, 112S601; Miss 113S218; 114Nebr661, 209NW330; 114Nebr659, 209NW332; 115Nebr634, 214NW256; 116Nebr604, 218NW414; 189NC516, 127SE590; 132SC199, 128SE882; 101 TexCr645, 276SW906; 106TexCr278, 291SW903. [a] (2) 196Cal 723, 239P 708; 126Me330, 138A547. (3) 153Miss

710, 121S147. [c] (2) In determining whether sureties are required on bond, court must look to purpose of legislature. 234Ky546, 28SW(2d)757. (3) Peace bond must be executed by one or more sureties. 234Ky546, 28SW(2d) 757. [e] (11) Statute controlling as to sentence imposed for possessing still before new act became effective. 20AlaA 613, 104S554. (12) Information held to authorize sentence under section of Prohibition Act making possession of still unlawful. 329 Ill 223, 160NE582. [f] 15F(2d)194; 196Cal 723, 239P708 (first offense); 45 Ida668, 264P875; 46 Ida 646, 270P140; 161La368, 108S773; 164 Minn287, 204NW942; 315Mo 199, 285 SW984; 145Va838, 133SE761. [h] In Nebraska.–115Nebr174, 211NW1002. [i] **Padlock order** should only be issued on final hearing and cannot be issued on preliminary hearing. 6PaDist&Co 93. [j] **Hard labor.**–21AlaA316, 108S79. [k] **Punishment imposed held not authorized** by statute. 115Nebr535, 213 NW839.

797–39 28F(2d)609; 77Colo 432, 236P 1022 (accused clearly proved guilty cannot complain that sentence authorized by law is excessive); 126Me330, 138A 547; MoA 283SW61. [a] (4) 36 OklCr 39, 252P71. (5) OklCr 268P322; Okl Cr 289P1113 (for manufacturing liquor). (10) Two hundred and fifty dollars and ninety days for possessing liquor. 146Miss662, 111S865, 51ALR 836. (11) Imprisonment for three months in county jail and fine of five hundred dollars. 147Miss29, 112S601. (12) Fine of five hundred dollars and thirty days imprisonment for sale to minor. OklCr 271P952. (13) Imprisonment for sixty days and fine of three hundred and fifty dollars for possession of still. OklCr 277P955 (reduced to fine of two hundred dollars). (14) Imprisonment for sixty days. OklCr 268P998(1stcase). (15) Fine of two hundred and fifty dollars and imprisonment for four months in county jail for possession of still. OklCr 277P687 (1stcase). (16) Sentence of five years imprisonment on conviction of transporting liquor as second offense. OklCr 286P351 (held excessive by three years). (17) Imprisonment for ninety days and fine of five hundred dollars for maintaining nuisance. OklCr 289P1110 (reduced to imprisonment for ninety days and fine of two hundred and fifty dollars). (18) Other instances. 153Miss 593, 121S275; OklCr 275P1070; OklCr 282P687; OklCr 291P575. [b] (1) 15F (2d)496; 316Mo 210, 289SW953; 318 Mo 1173, 2SW(2d)777; MoA 281SW105. (22) Punishment within provision of statute. 317 Ill 159, 147NE916. (23) One year in jail. 201 Iowa1, 206NW 281; 142SC24, 140SE258. (24) Sixty days imprisonment, first and last twenty days of which to be on bread and water diet. 114Nebr653, 209NW328. (25) Fine of three hundred dollars and confinement in jail for ninety days with provision for enforcement of fine and costs by additional confinement until paid, such additional confinement not to exceed ninety days. 164Minn287, 204NW942. (26) Imprisonment for five months in county jail and fine of six hundred dollars for bootlegging. 204 Iowa137, 214NW531. (27) One year on public works without alternative of fine. 137SC379, 135SE361. (28) Five hundred dollars and ten months in jail under statute permitting one thousand dollars fine and year in jail. 203 Iowa192, 210NW749. (29) Fine of one thousand dollars and one year in jail for each of two defendants for maintaining liquor nuisance. 202 Iowa450, 209NW468 (where they were in possession of seventy gallons of liquor for immediate distribution). (30) Five hundred dollars fine and ninety days in jail for possession of liquor. Miss 114 S529. (31) Imprisonment of one year in county jail and fine of one thousand dollars. MoA 273SW141. (32) Defendant sixty four years of age sentenced to twelve months at hard labor. 137 SC364, 135SE360. (33) Twelve months imprisonment, six months of which was suspended, for possession. 142SC17, 140SE256. (34) Five hundred dollars fine and ninety days in jail at hard labor for unlawful possession of liquor. 38Wyo 98, 264P1011. (35) Fine of two hundred and fifty dollars and thirty days' imprisonment for possession of liquor. 151Miss897, 119S825. (36) Imprisonment for four years for unlawful transportation of intoxicating liquors in mortgaged automobile without written consent of owner of mortgage. 318Mo 525, 18W(2d)137. (37) Fine of one hundred dollars and imprisonment for sixty days in county jail for possession of intoxicating liquors. OklCr 277P684. (38) Imprisonment for nine months for possession, with proviso for suspension after three months, during good behavior. 154SC266, 151SE472 (1stcase). (39) Under Jones Act. 40F (2d)889. (40) Other instances. 208 Iowa867, 226NW81; 155SC495, 152SE 738; 156SC363, 153SE340; TexCr 26 SW(2d)1070(2dcase); TexCr 28SW(2d) 556.

797–39½–New. Where a statute provides a penalty in addition to other punishment, failure to impose the penalty does not invalidate a sentence of fine and imprisonment. 6F(2d)573.

797–39½–New. Where the penalty is by fine and imprisonment, an alternative sentence is erroneous. 162La471, 110S 723.

798–44 32F(2d)128; 35F(2d)863.

798–45 [b] **Sentence to hard labor to** pay fine and costs held authorized. 23 AlaA288, 124S401.

798–46 336 Ill 286, 168NE332 (fine and imprisonment is unauthorized); 146 Miss685, 112S479.

798–47 [a] (3) Sentences for manufacturing cannot be both fine and imprisonment. 7F(2d)295.

798–48 40F(2d)889 (Jones Act); 22 AlaA239, 114S423; 138SC24, 135SE651; 149SC84, 146SE695.

798–49 315Mo 199, 285SW984; 194Wis 646, 217NW326; 36Wyo 532, 257P2.

798–51½–New. Requiring a peace bond in addition to fine held proper. Miss 122S479.

798–57 [a] (3) Such sentence is not excessive. 162La496, 110S732.

798–59 TexCr 30SW(2d)329.

798–60 20SaskL591. [1926] 4DomLR 829, [1926] 2WestWkly582.

799–72 258Mass103, 154NE570.

799–74½–New. Jury held properly to have made a distinction as to the punishments to be meted out to defendants due to age and experience and the difference in their respective relations to crime. Mo 22SW(2d)795.

799–76 7F(2d)804; 14F(2d)366; 15F (2d)369; 16F(2d)563.

799–77 [a] See also 16F(2d)59.

799–78 See also 92CalA384, 268P422. [a] **Double punishment.**–34F(2d)279.

799–78½–New. Conviction under counts charging possession of liquor and maintenance of a nuisance does not result in double punishment for a single offense. 89 IndA555, 167NE345(2dcase).

799–79½–New. Sentence authorized for one statutory offense may be imposed without aid from another statute respecting a different offense, although both offenses are charged. 6F(2d)573.

799–79¼–New. Storage of liquor in three separate buildings on a lot owned by defendant is sufficient to support three separate sentences. 13F(2d)848.

799–79¾–New. Conviction upon each of the counts for bootlegging and transportation of liquor held proper. 146 Wash101, 261P779.

799–81 85CalA165, 259P119; 54ND 768, 210NW971; 131 Or371, 283P751; 135Wash609, 238P638; 136Wash453, 240P562; Wash 286P102 (statute held not repealed). [b] (2) Act (1921) No. 39 § 3 applies only to one violating law by manufacturing, possessing for sale, or selling liquor, and not to possession for beverage purposes. 160La 1, 106S653. (3) Indictment charging former conviction for possessing liquor and subsequent sale held not to charge second offense under statute. 322 Ill 416, 153NE693. [c] **Acquittal on charge of sale of liquor as second offense** does not prevent use of same prior conviction as basis, in conjunction with different alleged second offense, for prosecution as persistent violator. 121Kan 331, 246P508. [d] **Prior convictions for manufacturing and for possessing** may both be considered in prosecution for subsequent offense, under Washington statute. 135Wash609, 238P638. [e] **Violation of Prohibition Law as of second offense held to involve moral turpitude** within statute fixing increased penalty and excluding from its operation offenses made felonies by statute not involving moral turpitude. ND 230 NW735.

799–82 69CalA94, 230P1001; 208 Iowa 811, 225NW852. [a] In Iowa.–206 Iowa 623, 220NW118.

799–83 92Fla1038, 111S285. But see Sask [1928] 4DomLR623. [c] In California.–(1) 69CalA94, 230P1001. [d] In West Virginia.–108WVa652, 152SE313.

799–84 [a] **That prior convictions were in respect of same liquor** not shown by fact that convictions, one for making and one for possessing, were before same justice and on same day. 135Wash 609, 238P638.

799–86 37 OklACR602, 244P461 (information held sufficient).

799–87 44 Ida636, 258P553; Ida 290P 387; 129Kan719, 284P357 (charge held sufficient); 193NC290, 136SE709; 144 Wash598, 258P484.

799–88 44Wash636, 258P553; 194NC 622, 140SE435.

800–89 [a] (1) 120Kan220, 242P1016. [b] **Evidence held sufficient.**–120Kan 220, 242P1016.

800–89½–New. Under some statutes a violation of the prohibition law may be charged as a second offense, although at the time of the charge an appeal from the prior conviction was pending. 234 Mich683, 209NW110.

800–89¾–New. Under some statutes the intent with which accused possessed liquor, for possession of which he was previously convicted, does not constitute an essential element of the aggravated offense. 136Wash453, 240P562.

800–89¼–New. Sentence as for a third conviction is proper upon entering a plea of guilt. 153Wash110, 279P573.

800–92½–New. Under the Nova Scotia Temperance Act, a conviction for a second offense is proper although the conviction for the previous offense was had more than the limitation period for prosecutions under the act before the commission of the offense charged as the second offense. NS [1928] 2DomLR 771.

800–93 248 IllA220.

800–94 [a] (2) In absence of express statutory authority, there can be no appeal by prosecution from directed verdict of acquittal. 121 Or297, 254P 798.

800–99 NB [1928] 4DomLR561.

800–3 [a] **Affidavit made by officer of corporation** need not expressly state that he has authority to make it. NB [1928] 4DomLR292.

801–8 16F(2d)597; 17F(2d)81; 21AlaA 198, 106S679; 243 IllA457; 245 IllA100; 245 IllA388; 246 IllA248; 198 Ind389, 153NE773; 123Kan201, 254P378; 236 Mich75, 209NW944; Mo 289SW648; Mo 289SW804; Mo 292SW41; Mo 295SW 1081; MoA 295SW808; MoA 297SW177.

801–9 243 IllA427; 243 IllA457; 245 IllA119; 245 IllA145; Mo 289SW648; MoA 292SW1069; MoA 295SW515.

801–11½–New. dismissal of an appeal. 129Kan175, 281P872 (for want of merit).

801–14 243 IllA457; 245 IllA100; 245 IllA145; Mo 289SW648.

801–17 236Mich75, 209NW944.

801–18 36GaA787, 138SE287; 214Ky 797, 284SW80.

801–18½–New. where the evidence demanded the verdict, 37GaA12, 138SE 528.

801–19 21AlaA195, 106S679; 36GaA787, 138SE287; 243 IllA146; 245 IllA388; 204 Iowa137, 214NW531; 210Ky366, 275 SW873; MoA 295SW808; MoA 6SW (2d)638; 89PaSuper219.

801–20 326 Ill 481, 158NE134. [a] Re-

fusing to direct verdict on evidence raising jury question is not error. 21AlaA 73, 105S426. [b] **Refusal of general affirmative charge for defendant** has been held proper where there was abundant evidence to support verdict. 21AlaA70, 105S423. [c] **Where jury question is presented on evidence,** refusal of affirmative charge based on insufficiency of evidence held proper. 21AlaA111, 105S425.
801-21 33F(2d)402; 70CalA444, 233P 401; 243 IllA146; 245 IllA388; 246 IllA 53; 200 Ind61, 161NE297; 89 IndA344, 166NE298; 89 IndA515, 165NE782; 89 IndA468, 165NE783; 89 IndA576, 167 NE567; 204 Iowa137, 214NW531; 121 Kan837, 250P258; 238Mich401, 213NW 715; Mo 289SW804; Mo 289SW865; Mo 295SW1081; MoA 17SW(2d)353; 86Pa Super382; 86PaSuper468; 89PaSuper 219.
801-22 OklCr 268P999.
802-25 Mo 12SW(2d)442; OklCr 271P 172.
802-25½-New. or the giving of instructions: MoA 15SW(2d)931 (use of term "intoxicating liquor" instead of "whisky").
802-28½-New. Failure of the jury to heed instructions that, where offense is intentional, jail sentence may be omitted, is reversible error. 145Va872, 134SE 565.
802-28¾-New. Where it appears that the trial court denied a hearing on motion to compel the return of liquor illegally seized and held as evidence, conviction will not be sustained. 23 OhA 137, 154NE814.
802-29 101TexCr645, 276SW906 (sentence); TexCr 19SW(2d)61(1stcase).
802-34 93PaSuper432; 54SD245, 222 NW681. [a] (5) 54SD245, 222NW681. [c] **In Colorado.**-75Colo 94, 224P225. [d] **Imprisonment for nonpayment.**-NB [1929] 1DomLR804.
802-36½-New. But where the prosecution was brought in good faith, an order placing costs on the prosecutor will be stricken off, and costs will be placed on the county. 6PaDist&Co 100.

INTOXICATION

802-2 BC [1930] 3DomLR1007.
802-7 155Tenn549, 296SW20.
803-17 See also 5LaA49.

INTRINSIC

803-33 [d] **Intrinsic fraud is fraud involved** in issues actually determined, which will not authorize equitable relief against judgment. TexCivA 291SW605.

INURE

805-91½-New. , to devolve upon. Century D.; Bouvier L. D. [quot 76CalA207, 244P936].

INVALID

805-95 [b] **Invalidity distinguished from "illegality" and "inadequacy."**-95 CalA690, 273P86.

INVEST

807-52 131 Okl 282, 268P1100, 1103 [quotCJ]; 124 Or112, 258P193, 60ALR528.
807-53 124 Or112, 258P193, 60ALR528.
807-56 124 Or112, 258P193, 196 [quot CJ], 60ALR528.
807-62 124 Or112, 258P193, 60ALR528.

INVESTIGATION

808-95 155Md86, 141A518, 523 [citCJ perParke,J dis op]; 130Misc456, 224 NYS210.

INVESTMENT

808-6 NC 153SE855.

INVITEE

810-67 [a] 212Ky802, 280SW107.

INVOICE

811-79 MoA 5SW(2d)682, 685 [citCJ].
811-85½-New. Synonymous with "bill." 14F(2d)852.
811-90 241 IllA146.
811-96 169Minn140, 210NW861.

INVOLUNTARY

812-13 221MoA626, 287SW1053.

INVOLVE

813-56 191NC412, 131SE750.
813-58½-New. "Involving moral turpitude" means inherently base, vile, or depraved; against accepted rules of morality. 22F(2d)120.

I. O. U.

813-59 119 Or430, 249P1049, 1052 [quotCJ].

IRREGULAR

814-6 191NC818, 133SE186.

IRREGULARITY

815-34 31NM667, 250P18, 20 [citCJ]; 32NM344, 256P179.

ISLAND

817-97 24 OhNPNS209, 214 [quotCyc].

ISSUE

818-40 175Ark678, 300SW382, 385 [quotCJ].
818-55 17F(2d)666, 667 [citCJ]; 171 Ark117, 283SW379.
818-56 17F(2d)666, 667 [citCJ].
818-57 17F(2d)666, 667 [citCJ]; 29Hawaii278, 280 [quotCJ].
819-88 17F(2d)666, 668 [citCJ].
819-89 17F(2d)666, 668 [citCJ].
819-90 17F(2d)666, 668 [citCJ].
819-91 17F(2d)666, 668 [citCJ].
819-92 17F(2d)666, 668 [citCJ].
819-97 127Misc459, 215NYS780.
820-11 103Conn122, 130A116.
820-15 103Conn122, 130A116; 126Misc 769, 215NYS781.
821-18 29Hawaii278, 280 [quotCJ].
821-23 103Conn122, 130A116, 119 [cit CJ].
822-24 126Misc769, 215NYS781.
822-27 257Mass72, 153NE337.
822-39 132SC306, 128SE31 (bodily issue in deed).
823-60 17F(2d)668.
827-74 27 OhA341, 161NE342.
828-96 TexCivA 270SW1083.
828-97 [b] **Other definitions.**-TexCivA 29SW(2d)500.
828-15 84Mont478, 276P958.
829-19 103NJL519, 138A370.

ITEM

830-63 43 Ida175, 249P1067.

JACQUARD FIGURED GOODS

831-14 See also US 11CustA102.

JAILER

832-34 317Mo 671, 296SW808.

JASPER

833-46½-New. An opaque, many-sided variety of quartz. 204 Iowa619, 215NW 668.
833-46¾-New. An opalescent stone that takes a high polish and the particular ingredient of which is silica. 204 Iowa 619, 215NW668.

JETTY

834-77 See also 189NC679, 128SE17.

JITNEY

834-5 [d] **Other definitions.**-50RI37, 144A891.

JOINT ADVENTURES

841-1 13F(2d)794; 20F(2d)647, 651 [quotCJ]; 23F(2d)825, 827 [quotCJ]; 205 Iowa902, 218NW898, 901 [quotCJ], 63ALR901; 169La893, 126S228; 118 Okl 212, 247P1004, 1006 [quotCJ]; TexCivA 275SW242, 246 [citCJ]; TexCivA 293SW587, 588 [quotCJ]. [a] (1) LaA 129S250; 118 Okl 66, 246P619; 127 Or 134, 271P49, 53 [citCJ]; 149Wash192, 270P304, 62ALR436. (4) 235Mich36, 209NW154, 48ALR1049; 241Mich266, 217NW43. [b] (1) 107Conn342, 140A 745. (2) There must be community of interest in profits and liability for losses. TexCivA 286SW513. [e] 118 Okl 212, 247P1004. [g] **Joint enterprise** is not legal term and has no definite legal meaning. TexCivA 275SW 242. [h] **Agreement of wholesale coal dealers** to lend money for third person's purchase of mine, in consideration of exclusive agency to sell output, is held joint adventure. 20F(2d)647. [i] **Relations of "joint adventurers" do not arise out of social relations,** but joint undertaking grows out of financial or business enterprise, and springs from contract. 198Wis163, 223NW408(2dcase).
841-4 76CalA58, 243P869; 235Mich36, 209NW154, 48ALR1049; 318Mo 784, 1 SW(2d)163, 169 [citCJ], 58ALR493. [a] (4) Participation in profits on realty to be improved by purchasers is not conclusive of partnership. CalA 290P602. [c] 107Conn342, 140A745.
842-5 99CalA17, 277P1053; 205 Iowa 902, 218NW898, 901 [quotCJ], 63ALR 901; 164La275, 113S846; 169La893, 126S228; 235Mich36, 209NW154, 48ALR 1049; 241Mich266, 217NW43; 50Nev 191, 255P1010, 1013 [citCyc]; 116 Okl 266, 244P182; 118 Okl 212, 247P1004; 136 Okl 40, 275P643; 121 Or259, 253P 873; 124 Or332, 263P391; TexCivA 276 SW340; 66Utah373, 242P950, 956 [cit CJ]; 199Wis482, 227NW14. But see 117 Or387, 244P91, 48ALR1043.
842-6 128Me22, 145A250; 50ND256, 195NW558, 561 [citCyc]; 66Utah373, 242P950, 956 [citCJ]; 68Utah585, 251 P374.
842-11 TexCivA 293SW587, 588 [quot CJ].
842-11½-New. **Where one of parties is corporation.** "Joint adventure" has been held to be but another name for a "special partnership" where one of the parties is a corporation, TexCivA 286SW 513.
842-11¾-New. and the relationship is the same as that of a limited partnership except that a corporation, instead of an individual, is a party thereto. TexCivA 286SW513.
842-13 91CalA677, 267P550; 107Conn 342, 140A745, 748 [citCJ]; 169La893, 126S228; 241Mich266, 217NW43; 135 Misc774, 238NYS533; 116 Okl 266, 244 P182; 117 Or387, 244P91, 93 [quot CJ], 48ALR1043; TexCivA 276SW340; 66Utah373, 242P950, 956 [citCJ]. [a] 205 Iowa902, 218NW898, 63ALR901.
842-14 TexCivA 276SW340.
842-16 23F(2d)825, 827 [citCJ]. [a] 12LaA356, 125S486.
843-19 NJSup 136A424; TexCivA 9SW (2d)501.
843-22 76CalA58, 243P869, 876 [cit CJ]; 247Mich508, 226NW228, 229 [cit CJ].
843-23 96CalA536, 274P423.
843-31 76CalA58, 243P869, 876 [cit CJ]; 152Wash205, 277P447. [a] (3) Contract by state fair with another for presenting pageant at latter's own expense on fair grounds for percentage of gate receipts is not joint adventure but lease, though for short duration. TexCivA 286SW513. [b] **Where defendant charged fifteen per cent of gross sales** for use of space, furnishing light, heat, and janitor service has been held relation of landlord and tenant, not joint adventure. 152Wash205, 277P447.
843-31½-New. Various agreements have been held to create joint adventures rather than relation of landlord and tenant. 28F(2d)472 [certiorari den 279US839, 49SCt253(2dcase), 73Led 986].
843-31¾-New. Property sold at an auction sale belonging to a landlord and a tenant jointly is merely the sale of joint property and not a joint adventure. 208 Iowa1370, 227NW410.
843-32 See also 46 Ida431, 268P37, 39 [citCJ].
844-37 76CalA58, 243P869, 876 [citCJ].
844-40 153Md586, 139A285. [a] (2) Contract giving one party for limited time and at his own expense right to sell property of another and account for sales in specified manner creates agency only. 201 Iowa1253, 207NW586.
844-45 [a] (4) Between real estate broker and salesman to give latter half of commissions on sales produced by him. 21F(2d)596. (5) Between broker

and defendant under which broker was to assist defendant in purchasing public utility securities. 110Conn571, 148A658.

844–46 [a] (3) Between owner of real estate and one rendering services in acquiring the property. 289Pa1, 137A120.

844–47 [a] (4) Between promoter and person acquiring property and conducting logging enterprise. 117Or387, 244P91, 48ALR1043.

845–50 21F(2d)596.

845–50½–New. A contract between special agents for the sale of apples shipped by the principals to share the expenses and divide the proceeds of the sale has been held an agreement creating a joint adventure. 178Ark458, 10SW(2d)892.

845–53 118Nebr290, 224NW292, 63ALR896.

845–55 76CalA58, 243P869, 876 [cit CJ].

845–61 76CalA58, 243P869, 876 [citCJ].

845–62 See also 136Wash155, 239P2, 4 [citCyc].

845–63½–New. where property is pooled by the owners for sale at a particular price, 136Wash155, 239P2.

845–66½–New. [§ 15a] J½. **Contractor and Subcontractor.** A contract whereby one party, who had previously contracted to furnish material and labor to construct grading on a state highway, agreed that the other party should do the work and furnish material for half of the net profits, has been held to establish the relationship of contractor and subcontractor rather than joint adventurers. 36Wyo 249, 254P121.

845–67 85CalA196, 259P106, 107 [cit CJ]; 101CalA291, 281P628; CalA 288P834; 226AppDiv97, 234NYS406; 50ND256, 195NW558; 118 Okl 212, 247P1004 (brokers held engaged in joint adventure for sale of oil lease under contract fixing commission at excess of price derived on sale over stated sum). [a] **Director of joint adventure** is not necessarily member, as he may be agent. 220Ala350, 124S904.

845–68 128Me22, 145A250.

846–70 Mass 170NE833; 159Tenn635, 21SW(2d)386; 199Wis482, 227NW14.

846–71 56ND215, 216NW891.

846–72 95CalA15, 272P353; TexCivA 29SW(2d)441.

846–73 135 Okl 142, 276P193.

846–78 TexCivA 275SW242 (property may be already owned by one member).

846–79 But see 110Conn571, 148A658.

846–82 MoA 3SW(2d)286.

846–86 See also 175Minn563, 222NW335.

846–89 255 IllA1.

847–95 See also 41F(2d)230.

847–95½–New. An agreement to obtain an option on property, submit a proposition for sale or lease, and split the commissions, has been held a joint adventure. NJ 147A492.

847–2½–New. An agreement to form a new corporation, granting the new corporation exclusive license to processes and giving the licensor one third of the stock of the new company, did not create a joint enterprise. 135Misc113, 236NYS692.

847–2¼–New. Parties assisting each other in certain work are not joint adventurers in absence of agreement to share in profits as such. 40F(2d)468.

847–2¼–New. Agreement between law partners on dissolution that unfinished business will receive joint attention of both makes them joint adventurers as to unfinished business. Mo 30SW(2d)1.

847–4 85CalA196, 259P106, 107 [cit CJ]; 91CalA677, 267P550 (agreement to furnish artists); CalA 288P834; 241Mich266, 217NW43; 318Mo784, 1SW(2d)163, 169 [quotCJ], 58ALR493; 289Pa1, 137A120, 121 [quotCJ].

847–5 76CalA58, 243P869, 876 [citCJ entire section]; 153Md586, 139A285, 286 [citCJ]; 318Mo1155, 6SW(2d)947, 952 [quotCJ]; 289Pa1, 137A120, 121 [quot CJ]; 152Wash205, 277P447.

847–6 209Ky178, 272SW424 (contract for tanning hides held not to create joint adventure); 241Mich266, 217NW43; 154Wash57, 280P932. See also 195Wis565, 217NW290. [e] **Evidence held sufficient to show joint adventure.**–84CalA448, 258P418 (improvement of land for sale). [f] **Evidence sustained finding** that one selling plaintiff's diamonds to defendant was not joint adventurer. 180Minn447, 231NW408.

847–9½–New. It is not necessary for the relation of joint adventure to exist before the property with which the parties are to operate is purchased, TexCivA 275SW242.

847–9½–New. but the relation may be created with reference to property already owned by one of them and in which the other obtains an interest with intention of selling or using it for profit. TexCivA 275SW242.

847–19 [a] (2) Agreement to buy and sell land, so as to realize agreed upon commissions both from sellers and purchasers, held valid. TexCivA 293SW231.

847–22 CalA 293P152; 107Conn342, 140A745; 128Me22, 145A250; 158Md243, 148A216; 118 Okl 212, 247P1004; TexCommnA 13SW(2d)74; 108WVa354, 151SE1 (corporations agreeing to do road construction work under contract made between one of them and state road commission).

847–22½–New. A contract, whereby one agrees to assist another in financing farming operations and to provide the necessary equipment to operate the farms, does not render the first party liable for bills made in operation. 179Ark578, 17SW(2d)284.

847–22½–New. A joint enterprise in the purchase and sale of realty has been held to be an entire one as dependent for success on the price being made by associates as a class. 89CalA209, 264P507.

848–24 89CalA209, 264P507.

848–25 Pa 151A573.

848–27 [a] (2) Where parties for several years deduct federal income and excess profits taxes to ascertain net profits, their conduct constitutes practical construction of contract that must continue to be adhered to. 158La804, 104S722. [c] **Stipulations of contract, not entries in books** of one party, must be consulted in ascertaining legal rights and obligations of parties. 158La804, 104S722. [d] **Particular contracts construed.**–159Tenn635, 21SW(2d)386.

848–29 43F(2d)664; CalA 293P152; 107Conn342, 140A745.

848–31 See also 28F(2d)472 [certiorari den 279US839, 49SCt253(2dcase), 73 L ed986]. [a] (4) Contract to share profits made on purchase of insolvent's assets and subsequent sale thereof, for aid in securing purchase and in managing and selling assets has been held supported by sufficient consideration. 132Misc755, 230NYS596. [c] **Waiver.**–NJ Ch 135A266(1stcase).

848–35 89CalA209, 264P507; 99CalA17, 277P1053.

848–37 [b] **Mere repudiation without offer of restitution** or assignment of his interest therein did not entitle one to recover his whole investment. Mass 170NE833.

849–38½–New. Methods of severance of joint tenancy. 138Misc85, 245NYS636.

849–38¼–New. Effect of severance. 138Misc85, 245NYS636.

849–45 169La893, 126S228.

849–47 But see 95CalA15, 272P353.

850–54 135 Okl 142, 276P193.

850–55 See also 258Mass573, 155NE606.

850–63 138Misc85, 245NYS636; TexCivA 275SW242, 246 [citCJ].

850–65 249NY458, 164NE545; TexCivA 275SW242, 246 [citCJ].

850–66 TexCivA 275SW242, 246 [cit CJ].

850–70 [a] (2) On sale being decreed by court, sale is subject to same rules as sale of partnership property upon dissolution. 149Wash419, 271P80. [b] **Suit not maintainable** where no attempt to deprive plaintiff of rights, and dissolution would result in loss to plaintiff and members. 30 OhA135, 164NE534 (2dcase).

850–71 28F(2d)472 [certiorari den 279US839, 49SCt253(2dcase), 73L ed986]; 107Conn342, 140A745, 748 [citCJ].

851–82½–New. A coadventurer making unauthorized withdrawals of funds must pay interest from the date of withdrawal until repaid or account is made therefor. 108WVa1, 150SE371.

851–83 13F(2d)794; 20F(2d)647; 76CalA58, 243P869; CalA 293P152; Mass 170NE833; 175Minn226, 220NW822, 823 [citCJ]; NJCh 151A124; 249NY458, 164NE545; 222AppDiv634, 227NYS338; 224AppDiv614, 231NYS265; 118 Okl 212, 247P1004; 138 Okl 245, 280P826; TexCivA 275SW242, 246 [quot CJ].

851–84 13F(2d)794; Ala 127S506; 76CalA58, 243P869; CalA 293P152; 128Me22, 145A250; NJCh 151A124; 118 Okl 212, 247P1004; 135 Okl 142, 276P193; TexCivA 275SW242, 246 [quot CJ]. [a] **Test** is whether transaction is in relation to social property or within scope of social business. 249Mich35, 227NW732.

852–85 249NY458, 164NE545; TexCivA 275SW242, 246 [quotCJ].

852–86 TexCivA 275SW242, 246 [quot CJ].

852–87 TexCivA 275SW242, 246 [quot CJ].

852–88 CalA 293P152; TexCivA 275SW242, 246 [quotCJ].

852–89 236Mich633, 211NW59; 249Mich35, 227NW732; Mo 30SW(2d)1; TexCivA 275SW242, 246 [quotCJ]. [b] **One violating his fiduciary duty** to the other by not disclosing his actions as a broker is guilty of fraud entitling the other to damages. Mass 170NE833.

852–90 TexCivA 275SW242, 246 [quot CJ].

852–91 TexCivA 275SW242, 246 [quot CJ].

852–92 But see 246Mich25, 224NW377.

853–10½–New. One may be relieved from contribution by an agreement subsequent to the beginning of the venture. 105Conn539, 136A85.

853–11 But see 138Misc85, 245NYS636.

853–14 89CalA209, 264P507.

854–25½–New. Where two persons associated in a common enterprise give their word to third persons, and the one having the instrument of authority in his hands refuses to carry out their promise, the other may endeavor to carry forward the plan agreed upon. 215Ala195, 110S278.

854–28 Can [1925] 3DomLR786.

854–32 But see Can [1925] 3DomLR786.

855–39 222AppDiv177, 225NYS502; 149Wash419, 271P80 (where contract, providing for repayment of advances, fixed no time for repayment of advances, law assumes repayment will be made within reasonable time).

855–44 128Me22, 145A250.

855–52 Ala 127S506.

856–53 20F(2d)647; 236Mich633, 211NW59; 226AppDiv563, 235NYS405; 118 Okl 66, 246P619, 622 [citCJ]; 118 Okl 212, 247P1004, 1006 [quotCJ].

856–54 236Mich633, 211NW59; TexCivA 275SW242.

856–56 236Mich633, 211NW59; 118 Okl 212, 247P1004, 1006 [quotCJ].

856–57 118 Okl 212, 247P1004.

856–61 56ND215, 216NW891.

856–64 118 Okl 212, 247P1004.

856–66 128Me22, 145A250.

856–68 20F(2d)647; 249NY458, 164NE545.

857–70 Ala 127S506; 249Mich35, 227NW732; 175Minn226, 220NW822.

857–71 236Mich633, 211NW59.

857–74 159Tenn635, 21SW(2d)386.

857–76½–New. Retention by a joint adventurer of money paid to him by his associate for transmission to the seller constitutes a conversion. 159Tenn635, 21SW(2d)386.

857–79 13F(2d)794.

858–80 13F(2d)794, 796 [citCJ].

858–81 13F(2d)794, 796 [citCJ]; Mass 170NE833.

858–84 13F(2d)794; Ala 127S506; 236Mich633, 211NW59; 224AppDiv614, 231NYS265; 118 Okl 66, 246P619.

858–90 128Me22, 145A250. But see 89CalA209, 264P507.

858–91 153Wash683, 280P68.

858–92 128Me22, 145A250; 117 Or387, 244P91, 48ALR1043 (interest in equipment established). See also TexCivA 32SW(2d)511.

858-92½-New. The title of one contracting for purchase before a joint enterprise agreement is that of vendee whose interest ends on default of such contract, not superseded by a subsequent agreement. 89**CalA**209, 264**P**507.

858-93 But see **TexCivA** 32**SW(2d)**511.

858-97 89**CalA**209, 264**P**507; **Can** [1925] 3**DomLR**786.

858-97½-New. Where legal title is taken in the name of one who is to hold for speculation, the other cannot demand transfer of his individual share, and, failing to receive it, repudiate his part of the transaction and obtain the return of the purchase money. **Can** [1925] 3**DomLR**786.

859-98 28**Hawaii**581; 50**ND**256, 195 **NW**558, 561 [citCyc].

859-6½-New. A joint adventurer is a beneficiary of a constructive trust. 89 **CalA**209, 264**P**507.

859-8 136 **Okl** 40, 275**P**643.

859-16 See also 149**Wash**419, 271**P**80.

859-17 But see 196**NC**381, 146**SE**63.

860-26 But see 164**La**275, 113**S**846.

860-30 119 **Or**645, 250**P**760.

860-34½-New. Where parties to a joint adventure are jointly sued in reference to the subject matter thereof, it is equally the duty of all to defend. 119 **Or**645, 250**P**760.

860-36 50**ND**256, 195**NW**558, 561 [cit Cyc].

860-38 167**La**221, 119**S**28.

860-40 219**Ky**180, 292**SW**794; 6**LaA** 110; 131**Misc**759, 228**NYS**1; 117 **Or** 387, 244**P**91, 93 [quotCJ], 48**ALR**1043; 68**Utah**585, 251**P**374. See also 132**Misc** 755, 230**NYS**596.

861-41½-New. Where an agreement does not contemplate that one member shall devote time and labor to the enterprise, but due to the fault of the other member he is compelled to do so, he is entitled to compensation. 258**Mass** 118, 154**NE**575.

861-43 128**Me**22, 145**A**250; 170**Minn** 434, 212**NW**937; **TexCivA** 28**SW(2d)**337; **Utah** 275**P**772. [a] **Contract construed** as giving vendors one half of profits as such on realty improved by purchasers. **CalA** 290**P**602.

861-48½-New. Willful and wrongful abandonment of enterprise precludes right to profits subsequently made by other joint adventurers. 49**SD**592, 207 **NW**972, 45**ALR**1126.

861-48⅓-New. Where there are no net profits, no recovery can be had. 144 **Miss**7, 108**S**796.

861-48¼-New. Division of profits derived from the sale of land is confined to sales of lands included in a contract between the parties. 194**NC**19, 138**SE** 348.

861-48⅙-New. Where a defendant in selling timber lands covered by a land contract in which he and plaintiff had equal interests, in order to consummate the sale, found it necessary to include other property in which plaintiff had no interest, it has been held that plaintiff was not entitled to any profit on the sale of such other timber lands which was accomplished without his knowledge or the use of any of his funds. 245**Mich**642, 224**NW**409.

861-48⅛-New. The right to an accounting from a coadventurer for profits is not restricted by any apparent rights of third persons in so far as they became possessed of proceeds of the transaction or benefited or profited thereby without any consideration. 245**Mich**642, 224**NW**409.

861-49 77**CalA**187, 246**P**134; 233**Ky** 164, 25**SW(2d)**46 (under agreement to share profits plaintiff cannot recover where no profits are shown). [b] **Deduction may be made from member's share of amount paid by other member** for equipment to be supplied by first member under agreement and which remains his personal property. 131**Misc** 759, 228**NYS**1.

861-50 77**CalA**187, 246**P**134; 107**Conn** 342, 140**A**745, 748 [citCJ]. See also 138**Misc**85, 245**NYS**636.

861-51 99**CalA**17, 277**P**1053. But see 138**Misc**85, 245**NYS**636.

861-53 105**Conn**539, 136**A**85; **Mo** 32 **SW(2d)**602.

861-54 77**CalA**187, 246**P**134; 78**CalA** 293, 248**P**555; 166**La**70, 116**S**673; 170 **Minn**434, 212**NW**937; **NJCh** 151**A**124; 217**AppDiv**468, 216**NYS**755. [c] (2) Contract, contemplating extensive operations by one of the parties including payment of expenses and collection of proceeds from sales and division of profits, places duty upon him to keep accounts in such manner that they can be used as basis for settlement. 117 **Or** 387, 244**P**91, 48**ALR**1043.

862-55 76**CalA**58, 243**P**869, 876 [citCJ entire section].

862-55½-New. Reasonable expectation that a permit to build would be granted and a contract would be let held not asset of joint enterprise for which, on death of associate architect, survivor must account. 262**Mass**577, 160**NE**417.

862-55⅓-New. Surviving architect owes no duty to estate of associate in joint undertaking beyond accounting for earnings to date of associate's death. 262**Mass**577, 160**NE**417.

862-55¼-New. That associate architect paid large part of his share of expenses before death did not make accounting on basis of commissions earned inequitable. 262**Mass**577, 160 **NE**417.

862-57 118 **Or**359, 244**P**308, 312 [quot CJ].

862-60 But see 175**Ark**306, 299**SW**24.

862-62 77**CalA**187, 246**P**134; 229**App Div**702, 241**NYS**151 (held immaterial that contract had expired before accounting suit). But see 12**LaA**356, 125 **S**486.

861-64 **Ont** [1930] 1**DomLR**309 (secret profit).

862-65 164**Minn**217, 204**NW**947; 248 **NY**67, 161**NE**421; 295**Pa**222, 145**A**131. [f] **Where contract excluded plaintiff from profits as to certain number of unspecified lots** then contracted to be sold by defendant, who permitted plaintiff to hold title to entire tract of land, held deduction of like number of lots from those conveyed by plaintiff was proper upon accounting, all lots being equal in value. 258**Mass**118, 154**NE**575.

862-65½-New. Where the profits of a joint adventure depend upon the happening of a contingency, and the ultimate profits are uncertain and unpracticable of determination by any trustworthy mode of computation, an action by one joint adventurer against the other for one half the net profits of the venture is premature. 112 **Okl** 20, 239 **P**674.

862-66 50**ND**256, 195**NW**558.

862-67½-New. Plaintiff claiming no interest in property has been held not chargeable with the cost of preservation after the date of accounting. 259 **Mass**546, 156**NE**841.

862-67⅓-New. One holding goods for sale under joint venture is not entitled to profits on merchandise unsold at the time the parties severed relationship. 222**AppDiv**177, 225**NYS**502.

862-67¼-New. Where one coadventurer in a road construction contract completes work after default of the other, he is not liable to the defaulting coadventurer for materials and equipment supplied by him in addition to accounting for profits of work. 108**WVa**354, 151**SE**1.

862-68 See also 164**Minn**217, 204**NW** 947.

863-74 6**LaA**110. See also 164**Minn** 217, 204**NW**947. [b] **Exception to rule.** –164**Minn**217, 204**NW**947.

863-82 [b] **Practical construction by parties.**–158**La**804, 104**S**722.

863-84 20**F(2d)**647; 158**La**804, 104**S** 722 (federal income and excess profits taxes); 164**Minn**217, 204**NW**947.

864-87 **NJ** 147**A**492.

864-88 131**Misc**759, 228**NYS**1. [b] **Percentage of commission broker paid** to bring about successful conclusion of joint transaction is deductible as expense necessarily incurred. **NJ** 147**A** 492.

864-91½-New. Discounts allowed have been held improper deductions from receipts, where there was no proof from which discounts obtained could be computed. 117 **Or**387, 244**P**91, 48**ALR**1043.

864-97 117 **Or**387, 244**P**91, 48**ALR**1043. But see 241**NY**544, 150**NE**547. But see 241**NY**544, 150**NE**547.

864-97½-New. The expense of keeping accounts cannot be allowed, if they have been kept in a way which precludes ascertainment of the cost. 117 **Or**387, 244**P**91, 48**ALR**1043.

864-98 246**Mich**25, 224**NW**377; **NJ** 147 **A**492. But see **Ala** 130**S**893.

864-1 246**Mich**25, 224**NW**377.

865-4 131**Misc**759, 228**NYS**1, 4 [cit CJ].

865-5½-New. The payments of an individual income tax on the profits from a transaction are not chargeable against the syndicate. 246**Mich**25, 224**NW**377.

865-12 **Ala** 127**S**506.

865-15½-New. After division, property and profits belong to each owner, and future gains or losses from each share belong to, or are suffered by, its owner alone. **Iowa** 228**NW**16.

865-15⅓-New. Syndicate members not excluded from recovering profits of land development by execution of receipts showing settlement in full. **Pa** 151**A**573.

865-17 152**Wash**205, 277**P**447. [b] **Theatrical venture contract** construed as not to relieve party of liability to stand share of losses. 240**NY**479, 148**NE**651.

865-18 91**CalA**428, 267**P**127.

865-19 76**CalA**58, 243**P**869, 876 [citCJ entire section].

865-20 99**CalA**17, 277**P**1053; 240**NY** 479, 148**NE**651 [rev 123**Misc**344, 205 **NYS**249] (construing contract not to relieve party from liability to stand one-fourth loss).

866-21 132**Misc**755, 230**NYS**596; 229 **AppDiv**832, 242**NYS**704.

866-28 91**CalA**428, 267**P**127.

866-28½-New. On the dissolution of a joint adventure, either of the parties to an enterprise may require its property to be applied to discharge of valid debts. 99**CalA**17, 277**P**1053.

866-29 22**F(2d)**360, 363 [citCJ]; **Ala** 130**S**893.

866-33 40**F(2d)**468; **TexCivA** 293**SW** 587, 588 [citCyc].

866-37 76**CalA**58, 243**P**869, 876 [cit CJ].

867-38 136**Misc**62, 239**NYS**107.

867-39½-New. On termination of the enterprise either party may sue for a final settlement. 6**LaA**110.

867-40 76**CalA**58, 243**P**869, 876 [citCJ entire section]; 40**F(2d)**468; 42**F(2d)** 65; 128**Me**22, 145**A**250; 77**CalA**187, 246 **P**134; 122**Kan**533, 253**P**578; 230**App Div**571, 245**NYS**432; 159**Tenn**635, 21 **SW(2d)**386 (fraudulent misrepresentation as to option price). [a] 102**NJEq** 189, 140**A**251. [b] **Court has discretion** whether to retain suit or relegate it to remedy at law. 102**NJEq**189, 140**A**251. [c] **Plaintiff held not entitled to injunction** against patenting or disposition of inventions, but only against the disposition of his contractual interest in profits. 229**AppDiv**702, 241**NYS**151.

867-42 40**F(2d)**468; **Ala** 128**S**379; 134 **Misc**330, 235**NYS**188.

867-43 **Ala** 130**S**893.

867-47 122**Kan**533, 253**P**578; 222**App Div**634, 227**NYS**338. [a] (2) Delay of two years after discovering fraud before suing held no bar to action. 222**AppDiv** 634, 227**NYS**338.

867-48 20**F(2d)**647. See also **CalA** 293 **P**152.

868-49½-New. A suit to establish a trust in a mining claim based on a grubstake agreement may be barred by laches. 48 **Ida**18, 279**P**293.

868-52 118 **Okl** 66, 246**P**619.

868-55 **TexCivA** 6**SW(2d)**377.

868-58 134**Misc**452, 235**NYS**41. See also 59 **OntL**368, [1926] 4**DomLR**345.

868-63 **Utah** 275**P**772.

868-74 77**CalA**562, 247**P**264.

869-79 251**NY**402, 167**NE**514.

869-81 [a] 218**Ala**207, 118**S**389; 167 **Minn**279, 209**NW**7 (action at law for recovery of overpayment by plaintiff on his share of purchase price of land purchased jointly); **TexCivA** 13**SW(2d)**432. [b] (2) Allegation sufficient to set up joint adventure. 13**F(2d)**794; 84**CalA** 1, 257**P**545. (3) Complaint alleging that corporations agreed that one should purchase property in behalf and for

use of both held to charge joint adventure. 50Nev191. 255P1010. (4) Complaint held to state cause of action based on joint adventure. Nev 287P274. [e] **Complaints held insufficient.**–251NY 402. 167NE514.

869-85½-New. Complaint has been held sufficient to set forth a cause of action for fraudulently inducing plaintiff to enter a joint adventure entitling him to sue for deceit. 13F(2d)794.

869-85½-New. Allegation of joint adventure to acquire one hundred-acre mineral tract is not at variance with proof of defendant's joint acquisition of one hundred forty-acre tract. Tex CivA 28SW(2d)337.

869-86 76CalA58, 243P869; 95CalA15, 272P353.

869-90 76CalA58, 243P869, 876 [citCJ entire section].

870-1½-New. Counterclaim seeking to recover money judgment for breach of contract, not asking for settlement or accounting or alleging account stated is insufficient. 136Misc62. 239NYS107.

870-3 40F(2d)468. [a] **Plaintiff alleging oral contract** in nature of joint adventure with corporation has burden of proving contract with corporation and not with individual stockholders. 236 Mich77. 210NW217.

870-19 89CalA209, 264P507. [c] **In action for accounting.**–128Kan502, 278P 715.

871-20 128Kan502, 278P715; 238Mich 376, 213NW87; 239Mich639, 214NW 833; 170Minn434, 212NW937; 68Utah 585, 251P374; BC [1929] 4DomLR261. [b] (1) 241Mich266, 217NW43. [g] (3) To show that joint adventure was not abandoned. 118 Okl 212, 247P1004. [h] **Evidence held to show** amount found by referee as reasonable value of extra work done to complete play after death of coauthor as insufficient. 214AppDiv455, 212NYS690. [i] **Evidence held insufficient** to establish grubstake agreement. 48 Ida18, 279P293.

871-20½-New. Denial of directed verdict held warranted by evidence. 260 Mass566, 157NE702.

871-21 [a] (1) 89CalA209, 264P507; 99CalA17, 277P1053; 128Me22, 145A 250; 170Minn434, 212NW937; 175Minn 560, 222NW278; 176Minn419, 223NW 770; Nev 287P274; 50ND256, 195NW 558; 56ND215, 216NW891; SD 225NW 201; TexCivA 276SW340; 66Utah373, 242P950. (4) 225AppDiv354, 233NYS 99; 180Ark1036, 24SW(2d)879. (8) 166 La70, 116S673. (13) To show that certain lands were part of property of joint adventure. TexCivA 275SW242. (14) To show such adventurer liable for proportionate share of building and improvement costs on land. 51ND913, 201 NW341. (15) To show that joint adventure was continued by substitution of brother for one of joint adventurers who died. 50ND256, 195NW558. (16) To establish right of joint adventurer, contributing services as housekeeper, to rights in land, as against brother who took place of deceased joint adventurer. 50ND256, 195NW558. (17) To show that certain lands were part of property of joint adventure. TexCivA 275SW242. (18) In action for accounting for relief on ground of fraud to warrant overruling of demurrer to evidence. 122Kan 533, 253P578. (19) To entitle member to injunction and appointment of receiver. 50Nev191, 255P1010. (20) To sustain finding that one of two joint owners of contract to purchase timber lands never consented to bringing a third party into the deal and to split the profits three ways, and that he was entitled to half interest in profits. 245 Mich642, 224NW409. (21) To sustain finding of plaintiff's knowledge of his status in transaction. Mass 170NE 833. (22) To sustain finding that defendant in effect rescinded his declaration of withdrawal from agreement. Nev 287P274. [b] (1) 40F(2d)468; 78 CalA298, 248P270; 175Minn115, 220NW 551; 220AppDiv156, 221NYS164; 226 AppDiv97, 234NYS406; 127 Or134, 271 P49; 289Pa1, 137A120. (2) Nev 287P274. (3) 239Mich639, 214NW833. (6) 164Minn217, 204NW947. (8) To show failure to sustain burden of proving contract with defendant corporation. 236Mich77, 210NW217. (9) To show defendant effected withdrawal from agreement before his discovery of ore. Nev 287P274.

871-21½-New. In an action against several defendants under a contract, plaintiff is not bound by his evidence to connect all the defendants in order to recover a judgment against defendant liable under the contract. 78CalA293, 248P555.

871-21½-New. Instructions held not misleading. 158Md243, 148S216.

871-23 118 Okl 66, 246P619; Wash 288 P275; 105WVa46, 141SE434. See also 315Mo 254, 286SW16. But see 40F(2d) 468.

871-25½-New. or whether plaintiff had been fraudulently induced to enter the joint adventure entitling him to sue for deceit. 13F(2d)794.

871-26 315Mo 254, 286SW16.

871-26½-New. [§ 97a] 7½. **Instructions.** Instructions held confusing. 220 AppDiv156, 221NYS164.

871-26½-New. Denial of a requested instruction that there was no partnership held not error in view of failure to except to a charge defining "relation," miscalled a "partnership." 260Mass566, 157NE702.

871-26¼-New. In an action for an accounting of profits, evidence that defendant entered on the venture and made a large number of sales has been held to warrant a denial of a motion for nonsuit. 78CalA293, 248P555.

871-26½-New. Conflicting testimony presented question for the jury. 158Md 243, 148A216.

871-29 [c] (4) Defendants, intrusted with money for purchase of property and fraudulently over-stating purchase price, may be ordered to refund excess received by them and to contribute amounts which they agreed to contribute. 122Kan533, 253P578. [g] (2) Where one member disposed of note for his individual interest exclusively, it has been held that other member is entitled to recover one half of determined value. TexCivA 293SW231. [h] (2) In action for accounting in which plaintiff claimed that transaction by which he purchased goods was joint adventure or partnership but court found, on sufficient evidence, that defendant sold goods to plaintiff, plaintiff is not entitled to judgment for share of discount obtained by defendant from original seller. 85 CalA196, 259P106. [n] **Deduction,** from amount found due in accounting, of advance where coauthor was paid one half of such amount is erroneous. 214App Div455, 212NYS690. [o] **Judgment dismissing bill** against corporation affirmed on appeal without prejudice to other proceedings in relation to transaction shown. 236Mich77, 210NW217. [p] **Joint adventurer required to account** for portion of commissions on coal sold is liable for interest from date of filing suit. 20F(2d)647. [q] **Interest.**–131Misc 759, 228NYS1. [r] **Judgment of dismissal,** where evidence on bill for accounting disclosed no indebtedness by defendant to plaintiff, was held proper. 32F(2d) 732. [s] **Interest allowed before final decree** on amount found due is error. Ala 128S215. [t] **Report of master,** in mutual accounting between coadventurers, crediting one with expenses subsequent to termination of joint adventure is erroneous. Ala 128S215. [u] **Action of trial court in ordering partition** of property by sale thereof, in absence of request therefor from either party is error. 12LaA356, 125S486. [v] **Judgment held improper.**–TexCivA 24SW(2d) 87.

872-30 255 IllA35; 205 Iowa902, 218 NW898, 901 [quotCJ], 63ALR901; 226 AppDiv563, 235NYS405; 227AppDiv32, 237NYS20; 121 Or64, 253P373; 124 Or 332, 263P391; 199Wis482, 227NW14 (liability upon note executed by trustees to take up mortgages). See also TexCivA 286SW513.

872-31 96CalA536, 274P423.

872-33 43 Ida758, 254P797, 798 [cit CJ]. [a] **Evidence held sufficient** to show that contract was separate deal. 43 Ida758, 254P797.

872-33½-New. Where a contract provides for the disposal of whisky by a general committee, the majority of the owners had no power to authorize compensation. 19F(2d)866.

872-33½-New. One liable with others as a joint adventurer for value of work done is individually liable. 84CalA448, 258P418.

872-35 CalA 290P602.

873-39 258Mass573, 155NE606.

873-41 TexCivA 272SW325.

873-43 Pa 151A573.

873-44 Pa 151A573.

873-45½-New. Resolution that business should be transacted by majority held not to change contract with development company. Pa 151A573.

873-46 205 Iowa902, 218NW898, 63 ALR901.

873-50 117Nebr154, 219NW896, 898 [quotCJ].

873-52 216Ala400, 113S401, 402 [cit CJ]; 175Minn563, 222NW335.

873-52½-New. The negligence of one joint adventurer in the management of the means and agencies used to execute the common purpose will be attributed to both. 235Mich36, 209NW154, 48ALR 1049.

873-54 See also 217Ala62, 114S796, 798 [citCJentire paragraph].

874-63½-New. Right between plaintiff and a third party whose dealings with plaintiff's coadventurer are involved are to be determined according to the rules of the law of joint adventures applicable thereto. 136 Okl 40, 275P643.

874-64½-New. Where a broker permits one joint adventurer, clothed with power of attorney to speculate in stocks for the venture, to withdraw securities for individual advantage, the broker is held liable for loss to other members. 226 AppDiv563, 235NYS405.

874-64½-New. A bill for an accounting has been held to state a cause of action against the purchaser. 218Ala207, 118 S389.

874-65½-New. Rights of syndicate members. Syndicate member purchasing another's share entitled to double allowance against development company for profits. Pa 151A573.

874-70½-New. Where one joint adventurer conveyed his interest, and after his death his coadventurer sued to establish a constructive trust, the administrator of deceased was not a necessary party. 85Mont352, 278P998.

874-71 [a] **Questions of law and fact.**–Question of scope of business of joint adventurers is generally one of fact. 43 Ida758, 254P797.

874-73 [a] **Pleading.**–CalA 290P602.

874-74 [a] **Evidence held sufficient** to show that contractor never held itself out as joint adventurer with subcontractor to owner of road-grading outfit. 36Wyo 249, 254P121. [b] **Evidence held insufficient** to show joint adventure between contractor and subcontractor. 36 Wyo 249, 254P121.

874-77 258Mass573, 155NE606.

874-77½-New. In an action against joint adventurers on a note alleged to have been given for defendants' joint use, evidence of one defendant that the note was for the personal use of the other held improperly excluded. 66Utah 82, 240P1105.

874-77½-New. Questions for jury. 220 Ala350, 124S904.

874-77¼-New. Sufficiency of evidence. 220Ala350, 124S904.

874-77½-New. Evidence that defendants were engaged in joint adventure is not objectionable as variance from complaint alleging joint adventure. CalA 290P602.

874-78½-New. The fact that a person ordering from time to time supplies of fuel for an industrial plant directed them to be charged to him, and that the seller made load tickets and stubs accordingly is not conclusive that no one else was liable therefor. 121Kan665, 249P678.

874-78½-New. and the evidence may be such as to support a finding implied by the general verdict that the owner of the plant was concerned in its operation and liable for fuel supplied to it, although thus charged to another by his

direction. 121Kan665, 249P678.

874–78¼–New. In action by materialman against joint adventurers on book account in name of one of them, plaintiff need not allege that defendants were joint adventurers. CalA 290P602.

874–78½–New. That materialman did not remember names of buyer's associates disproves reliance on ostensible agency from joint adventure. CalA 290P602.

874–78¾–New. Evidence held to show that joint adventurer lacked authority to bind coadventurers. CalA 290P602.

JOINTIST

875–21 136Wash603, 241P4.

JOINTLY

875–31 15F(2d)209.

JOINT STOCK COMPANIES

878–1 [a] (5) 115Tex53, 274SW554. [c] **Syndicate having neither president nor capital stock** held not joint-stock company. 199Wis482, 227NW14.

878–3 216Ky467, 287SW960.

879–10½–New. A trust estate engaged in the business of furnishing electric current to public is properly treated as a public service corporation. 150Md304, 133A141.

879–11 [d] **In Texas.**–CivA 272SW325. [e] **In Indiana.**–86IndA196, 156NE584.

879–14 33Ariz64, 262P489.

879–18 [a] **Expression "common-law trust"** is held to have reference to method of creation rather than to powers, duties, and liabilities of trustees and cestuis. 90Fla343, 106S408.

879–19 115Tex53, 274SW554; 115Tex71, 274SW561; 115Tex49, 274SW562; 115Tex158, 274SW563. [a] **Declarations of trust** empowering shareholders to elect trustees and terminate trust but giving them no interest in property or management creates trust rather than partnership. 39F(2d)621.

879–23 170Ga832, 154SE357.

880–39 81CalA502, 253P971, 972 [quot CJ]; 170Ga832, 154SE357; 115Tex53, 274SW554; 115Tex49, 274SW562; 115Tex158, 274SW563; TexCivA 285SW631; 116Tex154, 287SW902; TexCommnA 287SW1091; TexCivA 286SW1111; TexCivA 297SW265. [a] **Distinction.**–TexCivA 271SW233.

880–41 214Ala666, 108S583; 170Ga832, 154SE357; TexCivA 284SW289. [a] 170Ga832, 154SE357. [b] **Distinction between partnership and business trust.**–225AppDiv102, 232NYS224.

881–42 214Ala666, 108S583.

881–43 170Ga832, 154SE357; 118Tex370, 15SW(2d)609.

881–46 CalA 285P734.

881–48 TexCivA 284SW289 [quotCJ].

881–53 [a] **In Texas.**–CivA 271SW233.

881–57½–New. [§ 8a] D. **Name.** A statutory requirement that a business must be carried on in the name of the real party in interest unless the assumed name is duly certified and recorded does not apply to an unincorporated joint-stock association. 218Ky323, 291SW391.

882–65 TexCivA 284SW289.

882–72 [b] **Liable for obligations and fraud of association.** TexCivA 271SW233.

883–98½–New. Persons who advanced money to pay interest on mortgage bond are mere general creditors. 150Md304, 133A141.

883–98⅓–New. Furnishing supplies prior to receivership does not entitle seller to preference as to mortgage bond holders. 150Md304, 133A141.

883–98¼–New. Such persons are not creditors furnishing current supplies and are not to be preferred on that ground. 150Md304, 133A141.

884–14 TexCivA 273SW940.

884–15 But see TexCivA 272SW326.

884–19½–New. Agreement does not constitute a pure trust operated free from any management of the directors, but does constitute a common-law agreement controlled by a board of directors. TexCivA 273SW940.

884–21 TexCommnA 287SW1091; TexCivA 272SW325. [a] **By-laws.**–Stockholders "must take notice of the by-laws." TexCommnA 292SW207. [b] **Association formed in violation of trust agreement** of members is invalid. Md 150A37.

884–28 TexCivA 278SW321. [a] **Regardless of nature of property owned by company,** shares, like those of corporation, are personal property. TexCivA 278SW321.

884–29 TexCivA 278SW321.

885–42½–New. Where nonresident joint stockholder becomes bankrupt, subscriber who gave note for part of purchase money and pledged stock as collateral therefor and received dividends or other benefits from his contract is liable on the notes. 142Miss43, 107S195.

885–42⅓–New. In such case within notice by company to subscriber that, in default of payment of note, stock will be canceled and resold to other parties, will not avoid his liability on note in absence of proof that the stock was canceled or resold. 142Miss43, 107S195.

885–42¼–New. Agreement if subscription is not paid at maturity to forfeit amount paid at date of contract is sustainable as provision for liquidated damages. 218Ky323, 291SW391.

886–63 [a] **Under trust agreement,** proprietor can assign interest only by consent in writing by those entitled to majority of profits. Md 150A37.

886–66 [b] (2) Rescission for fraud. TexCivA 271SW233. [c] **Rescission** not estopped by giving proxies, without full knowledge of facts. TexCivA 271SW233. [d] **Not liable for subscription commissions** paid. TexCivA 271SW233. [e] **Parties.**–TexCivA 271SW233.

886–68 [a] **Special agreement relating to purchase of stock** on termination of employment. 249Mich489, 229NW462.

886–71½–New. Transferable receipts or certificates for interests in a voluntary unincorporated association are not chattels or documents of title, but equitable choses in action. 267Mass28, 165NE701.

886–71⅓–New. Transfer as collateral security.–91CalA246, 266P981 (pledgor entitled to sue for accounting).

887–17½–New. A member present by proxy and refusing to vote or voting against the proposition offered does not assent nor is he bound by waiver or estoppel. TexCivA 271SW233.

888–25 [a] **Keepers of records** of trust organizations may be compelled to permit holders of shares to examine records. 5F(2d)715.

888–26½–New. A partner who participated in the organization of an unincorporated joint-stock association, signed articles, became an officer, and knew that the agreement limited liability to partnership assets, cannot in an action on a contract between himself and the partnership assert that the partners are individually liable. 213Ky81, 280SW483.

888–26⅓–New. Where such contract was made on behalf of the company and contemplated binding the partnership assets only, a partner cannot be held personally liable because he executed the contract and indicated by the use of the word "I" that it was an individual contract. 213Ky81, 280SW483.

888–26¼–New. The rights of members are governed by the rules as to the rights of stockholders in a corporation. TexCivA 278SW932.

888–41½–New. So long as trustees under a common-law trust deed act in good faith, the sole right of a cestui que trust is to have property administered in their interest by trustees, to receive the income while the trust lasts, and their share of the corpus when the trust comes to an end. 294Pa163, 143A786.

888–42 TexCommnA 292SW207.

888–52 TexCivA 23SW(2d)875.

889–53 TexCommnA 299SW860.

889–57 [a] (1) See also TexCivA 273SW694. [b] (1) 213Ky81, 280SW483.

889–58 214Ala666, 108S583; 81CalA502, 253P971, 973 [quotCJ]; 216Ky467, 287SW960; 115Tex53, 274SW554; 115Tex71, 274SW561; 115Tex49, 274SW562; 115Tex158, 274SW563; TexCivA 272SW325; 115Tex158, 274SW563, 278SW177; TexCommnA 287SW1091; TexCommnA 285SW307; TexCivA 284SW289; TexCivA 285SW331; TexCivA 286SW1111; TexCivA 293SW194; TexCivA 13SW(2d)142. [b] **Members are entitled to exhaustion of company assets** before personal liability attaches. 115Tex158, 274SW563, 278SW177. [c] **Where certificate holders are cestui que trustent in business trust** and not members of joint-stock company, they are not personally liable for obligation incurred by trustees. CalA 285P734.

889–59 81CalA502, 253P971, 973 [quot CJ]; TexCommnA 292SW165. See also TexCivA 272SW325.

889–60 But see MoA 18SW(2d)123.

889–61 81CalA502, 253P971, 973 [cit CJ]; 213Ky81, 280SW483; 216Ky467, 287SW960; TexCivA 272SW222; TexCivA 272SW325. [a] **Knowledge of declaration of trust exempting members from liability** for debts creates estoppel to insist on payment. 198NC381, 151SE865(2dcase).

890–66 214Ala666, 108S583.

890–66½–New. He may be liable for subsequent debts to creditors who had knowledge of his membership but no notice of his withdrawal. 214Ala666, 108S583.

890–70½–New. Cestui que trust of a valid business trust are not personally liable on the theory that they were undisclosed principals of trustees. 252Mass37, 147NE272.

892–6½–New. Stockholders, although they are considered partners, may vest legal title to property and active management in one of their number as fiduciary. TexCommnA 299SW846.

892–22 TexCommnA 27SW(2d)142. See also 118Tex370, 15SW(2d)609. [a] **Failure to record trust instrument of Massachusetts trust** cannot deprive trustees of power conferred by terms of trust. 39F(2d)621.

893–27 CalA 288P845 (not affected by omitting to include in note personal exemption).

893–32 118Tex370, 15SW(2d)609 (company is not liable on unauthorized contract of president though it did not deny partnership).

893–33 [a] **Thus** common-law trust which can contract only by joint action of two or more trustees cannot be held liable on quantum meruit where one trustee only has made contract with third person. 317Ill348, 148NE19.

894–54½–New. Trustees of Massachusetts trust empowered to mortgage trust property can execute obligations of trust to secure which mortgage is given. 39F(2d)621.

894–54⅓–New. A trustee, holding under a declaration of trust, is not disqualified to act by reason of the fact that he is allowed reasonable compensation for services. 98Fla1103, 125S521.

894–62 TexCivA 273SW940 (member of board of directors and officer occupies fiduciary position of trust and must discharge duties with utmost good faith).

894–63 [e] **Trust agreement held impliedly to prohibit** trustee from doing for his individual benefit things for which association was organized. Ark 294SW25.

895–64 TexCivA 273SW940 (duty of director and officer to obey instruction of board of directors).

895–69½–New. A trustee of a syndicate is in duty bound to act for the promotion of interests of the cestui que trust. 35F(2d)462.

895–73 TexCommnA 292SW165.

895–74 MoA 178SW(2d)357; 225AppDiv102, 232NYS224.

895–75 256Mass19, 152NE69.

896–99 Ark 294SW25.

896–3 294Pa163, 143A786.

896–6 98Fla1103, 125S521.

896–6½–New. Execution of a quitclaim deed by the trustee on order of the referee in bankruptcy was made without authority. 35F(2d)462.

896–7½–New. A creditor of a discount corporation which did not participate in amalgamation trust could not share in property conveyed to the trust by another corporation. 259Mass528, 156NE859.

896–7⅓–New. Receiving royalty and percentage is held not to release holders of ownership certificates from liability to its creditors. 116Tex154. 287SW902.
896–7¼–New. Where a joint-stock association through trustees sells all its assets, and trustees assume its debts under an agreement for reimbursement by stock issued by a corporation, and the association goes out of business, it is not liable to a trustee for money advanced by him to enable the association to carry on business. **TexCivA** 281SW 221.
897–20½–New. Service on trustees authorizes judgment against trustees individually, as trustees, and against association. **TexCivA** 285SW631.
897–20½–New. Bill by shareholders has been held insufficient to entitle them to require trustees to account or produce account books. 294Pa141, 143A 786.
897–23 90Fla343, 106S408; 115Tex158, 274SW563, 278SW177. But see **Tex CommnA** 285SW307. [a] **To marshal assets of company** all claimants of shares must be before court. 115Tex 158, 274SW563, 278SW177.
897–29 140Wash586, 250P346.
897–33 Contra **TexCivA** 284SW289 [dist **TexCivA** 220SW105].
897–38 **TexCivA** 285SW631.
897–39 218Ky172, 291SW21; **TexCivA** 272SW325. [a] **In Texas.–CivA** 10SW (2d)144.
898–47 **TexCommnA** 299SW860.
898–51½–New. Petition stated a good cause of action. **TexCivA** 273SW940.
898–51⅓–New. Rule that action at law by one partner against another does not lie without an accounting is not applicable to a joint stock association against its director. **TexCivA** 273SW940.
898–51¼–New. It is not necessary as a condition to suing a director to recover losses that there be an accounting and dissolution. **TexCivA** 273SW940.
898–51½–New. Evidence declared to show want of care resulting in damage. **TexCivA** 273SW940.
898–51⅙–New. Pleadings. Petition in an action by a stockholder against company is held sufficient. **TexCommnA** 287 SW1091.
898–51½–New. Significance of presence of alleged stockholder at directors' meeting after time he claimed his stock had been transferred to another is question for jury. 214Ala666, 108S583.
898–51¼–New. Other questions for jury. 214Ala666. 108S583.
898–51⅓–New. **TexCommnA** 3SW(2d) 65.
898–51 1/10–New. Evidence. Plaintiff suing on note executed by trustees had burden to prove that defendants were liable thereon. 198NC381, 151SE865(2d case).
898–55 **TexCivA** 276SW787; **Tex CommnA** 299SW860.
898–55½–New. A judgment against a joint-stock company is valid against it and the joint and partnership funds of its stockholders. 218Ky172, 291SW21.
898–55⅓–New. Where a company was not joined as a party defendant, judgment of foreclosure of vendor's lien against stockholders and trustee would not bar company's right to redeem. **Tex CivA** 284SW289 (dictum).
898–55¼–New. Persons obtaining a judgment against a joint-stock company are creditors thereof. 218Ky172, 291 SW21.
898–55⅙–New. Evidence held sufficient as to other matters. **TexCommnA** 3SW (2d)65.
898–55⅙–New. A judgment against a joint-stock company was not void because it was dismissed as to certain members. **TexCivA** 13SW(2d)142.
899–59½–New. A party granted a lien against a company is held without the right to have judgment reformed to run only against members, as the company assets must first be exhausted. 115Tex 158, 274SW563, 278SW177.

JOINT TENANCY

901–1 326 Ill 633, 158NE428; 325 Ill 253, 156NE352; 126Me84, 136A459. [a] **Existence of common-law marriage** between parties is immaterial in determining character of property and relative rights when joint tenancy exists under statute. 99CalA293, 278P454(2dcase).
901–9 [b] **TexCivA** 11SW(2d)611.
901–12 [a] (2) Parties may, nevertheless, contract for a joint ownership with right of survivorship. 120 Oh542, 166 NE687.
901–14 **CalA** 284P941; 219Ky116, 292 SW748; 233Mich249, 206NW366 (joint tenancy not abolished); 125Misc579, 211NYS606 (even though words "joint tenancy" or "joint ownership" are not used). [d] **In Pennsylvania** intent necessary to establish survivorship as incident to estate, held by joint tenants, must be expressed with sufficient clearness to overcome presumption arising from statute. 293Pa13, 141A629 (agreement authorizing bank to deal with survivor as owner of deposit held sufficient).
902–24 131Misc720, 228NYS652; 132 Misc209, 229NYS799.
903–28 **CalA** 286P439 (joint bank account); **CalA** 283P865; 325 Ill 253, 156 NE352; 260Mass165, 156NE870; Mass 171NE479; Minn 231NW401; 115Nebr 781, 215NW117; 83NH489, 144A848; 227AppDiv620, 235NYS668; 230AppDiv 1, 242NYS523; 134Misc511, 236NYS 275; 134Misc596, 236NYS329; 300Pa 156, 150A465; 8PaDist&Co 443; 50RI 429, 148A321. [a] (2) Where joint tenant died after bringing action for partition, his executor was held not entitled to judgment of partition. 218Misc471, 219NYS667.
903–29 220Ky589, 295SW863, 864 [cit CJ].
903–36½–New. The right of survivorship in personalty may be created by the expressed act of the parties. 239 Mich452, 214NW418.
903–39 233Mich249, 206NW366; 192 NC505, 135SE332.
904–42 103Conn308, 130A483.
904–43 8PaDist&Co 443. [a] **Decedent's interest cannot be subjected to sale** by administrator. 167 Iowa436, 149 NW613, AnnCas1917B116.
904–47 331 Ill 437, 163NE327, 62ALR 511.
904–51 [b] (2) Bank holding joint deposit "payable to either or survivor" is liable to deceased depositor's administrator for full amount. 126Me251, 137A 641. (3) Joint tenancy is not created by deposit in joint account payable to owner or survivor. 126Me84, 136A459. (4) Action of deceased in changing title of his bank account to include himself or his wife, and in making account payable to either or survivor, did not create joint tenancy. 127Me480, 144A 399.
904–58½–New. The right to withdraw money from a bank does not create a joint account. 131Misc188, 226NYS415.
904–58⅓–New. Form of checking account is not in itself sufficient to establish the intent to create a joint account. 131Misc188, 226NYS415.
904–58¼–New. The word "or" connecting the names of two depositors is synonymous with the word "and" as affects a joint agency. 131Misc188, 226 NYS415.
904–61 251Mich483, 232NW192; 102NJ Eq436, 141A175.
904–62 233Mich249, 206NW366.
905–64 324 Ill 560, 155NE334; 132Misc 570, 230NYS558; 133Misc69, 231NYS 165.
905–65 233Mich249, 206NW366; 133 Misc69, 231NYS165.
905–69 324 Ill 560, 155NE334.
905–69½–New. 220MoA1165, 297SW 415.
905–74½–New. Joint deposit in statutory form fixes respective rights of depositors, where unexplained by other evidence. 126Misc155, 213NYS230; 220 MoA1165, 297SW415.
905–74½–New. But as between the depositors, the presumption may be rebutted by proof of actual agreement. 126Misc155, 213NYS230; 220MoA1165, 297SW415.
905–74¼–New. Where a fund, deposited in a joint account payable to either or survivor, belonged originally to one, it must be shown that the fund was deposited in statutory form with knowledge and consent, express or implied, of the owner of the fund. 126Misc155, 213 NYS230.
905–74⅙–New. Where a joint deposit is not opened in statutory form, ownership thereof is determined under common law, without regard to statute. 126 Misc155, 213NYS230.
905–74⅙–New. A bank deposit changed to the name of the original depositor and another, either or survivor to draw, being in statutory form, is presumed to be under joint ownership, with right of survivorship. 126Misc155, 213NYS230.
905–74⅓–New. In such case the burden of proving the contrary is on the adverse party. 126Misc155, 213NYS230.
905–74⅛–New. Evidence held to show intent to create joint tenancy with right of survivorship. 126Misc155, 213NYS 230.
905–75 204 Iowa1367, 217NW456.
905–80 324 Ill 560, 155NE334; 245 IllA 227 [citCyc]; 126Me84, 136A459; 233 Mich249, 206NW366; 251Mich483, 232 NW192; 131Misc188, 226NYS415; 47 RI 215, 132A439. [d] (3) NJ 144A10.
906–81 320Mo 989, 9SW(2d)58.
906–82 111Conn165, 149A790; 324 Ill 560, 155NE334; 265Mass428, 164NE616. See also 82Colo 474, 261P659. [b] **Words "joint tenancy" or "joint ownership" not necessary** where other words clearly disclose intent to create relationship. 125Misc579, 211NYS606.
906–84 Fla 129S857. [a] **Deed to persons not intermarried as tenants by the entireties** is held to create joint tenancy. 152Md512, 137A287.
906–85 152Md512, 137A287; 235Mich 509, 209NW576.
906–86 115Nebr781, 215NW117.
906–87½–New. Statute making deposit, by one in his name and another payable to either or survivor, a joint tenancy, does not apply unless account is opened in substantially statutory form. 126 Misc155, 213NYS230.
906–87½–New. A contract of account providing that all moneys in a bank account were to belong to parties to the contract as joint tenants is sufficient to create a joint tenancy and ownership in the survivor. 98NJEq574, 131A514.
906–88 47RI215, 132A439. [a] (2) Evidence that funds for which certificates of deposit were issued in joint names and payable to order of either or survivor were partnership funds will not overcome presumption of ownership in survivor. 235Mich509, 209NW576. [b] **Evidence held sufficient** to show joint tenancy. 338 Ill 400, 170NE208(2dcase). [c] **Evidence held insufficient** to show joint tenancy. 232Ky602, 24SW(2d) 301.
906–88½–New. Joint tenancies must be clearly established. 126Me84, 136A459.
906–88⅓–New. Burden of establishing joint tenancy is on one asserting it. 126 Me84, 136A459.
906–88¼–New. Evidence held sufficient to warrant finding that joint tenancy was created. 259Mass534, 156NE865.
906–88⅙–New. In a suit to set aside a contract creating a joint tenancy, on the ground of mental incapacity of one of tenants, evidence has been held sufficient to authorize setting aside contract. 98 NJEq574, 131A514.
906–88⅛–New. The burden is on the survivor to prove the gift was a joint tenancy and not in common. 132Misc 209, 229NYS799.
906–98⅓–New. Evidence has been held sufficient to show joint tenancy. 320 Mo 989, 9SW(2d)58.
906–94 239Mich452, 214NW418; 242 Mich639, 219NW641; 247Mich468, 226 NW234; 116Nebr686, 218NW739; 83 NH489, 144A848. [b] 70CalA180, 232 P755.
907–95 [b] 251NY380, 167NE506; 135 Misc389, 237NYS715; 114 Oh241, 151 NE373, 48ALR182.
907–97½–New. Owners of a bank deposit with the right of either to withdraw are not strictly joint tenants. 258 Mass417, 155NE457.
907–2 331 Ill 437, 163NE327, 62ALR 511; 126Me84, 136A459; 225AppDiv

162, 232NYS454; 192NC505, 135SE332.
907-3 126Me84, 136A459; 233Mich249, 206NW366.
907-4 126Me84, 136A459; 233Mich249, 206NW366.
907-5 126Me84, 136A459; 233Mich249, 206NW366.
907-7 126Me84, 136A459; 233Mich249, 206NW366; 56ND152, 217NW150. [b] **Proof of right to appropriation of property** negatives joint tenancy. 126Me84, 136A459.
907-8 [d] **Commencement of action for partition** does not constitute severance. 218Misc471, 219NYS667.
908-9 242 IllA390, 394 [citCJ]. [a] **Depositor in joint account payable to survivor** does not lose right to money by withdrawing it and placing it in separate account. CalA 291P454.
908-10 325 Ill 253, 156NE352; IndA 167NE617(2dcase); 126Me 84, 136A459.
908-11 201Cal 518, 258P55.
913-18½-New. By statute in New York a joint tenant may maintain an action at law to recover his just proportion of rent, where the tenant has received more than his just proportion. 125Misc849, 211NYS507.
908-18⅓-New. Where a judgment creditor filed a memorial of the judgment with the registrar before the death of debtor, the joint tenant transferee of survivor was entitled to cancellation of judgment. 328 Ill 468, 160NE85.
909-28 230AppDiv1, 242NYS523.
909-31 242 IllA390, 394 [citCJ].
909-36½-New. A statute to the effect that a joint deposit with a trust company might be paid to either of joint tenants during the lifetime of both or to the survivor after the death of one is applicable to accounts opened before the enactment of such statute. 320Mo 989, 9SW(2d)58.
909-37 251NY380, 167NE506 (savings bank deposits).
910-68 265Mass428, 164NE616.
910-70 But see 99CalA293, 278P454(2d case).
911-82 See also 49Philippine808.
911-93 228Ky538, 15SW(2d)454.
912-97 101CalA638, 281P1077.
912-99 But see 1LaA482.
913-13 135Misc512, 239NYS49.
909-37 126Me84, 136A459; 58 OntL 251, [1926] 1DomLR767, 768 [citCJ].
909-43 43 Ida724, 254P210, 212 [cit CJ].
909-43½-New. A joint tenant may not make resistance authorized by statute to prevent other cotenant from taking possession of property owned. 43 Ida 724, 254P210.
909-49 58 OntL251, [1926], 1DomLR 767, 768 [citCJ].
910-70 214Ky290, 283SW88.
911-73 214Ky290, 283SW88.
911-75½-New. Under circumstances of particular case making it unjust to hold tenants in possession to strict liability to cotenant abandoning possession, such tenants have been held liable only for cotenant's share of net profits prior to suit; 214Ky290, 283SW 88.
911-75⅓-New. but after commencement of suit to reasonable rental value of land. 214Ky290, 283SW88.
912-3 215Ky57, 284SW410.
912-4 215Ky57, 284SW410.
913-13 [c] **Petition held to allege merely conversion of proceeds.** Tex CivA 295SW289.
913-17 [a]. 258Mass417, 155NE457; 262Mass509, 160NE337.
913-26 38GaA676, 145SE465.
913-28 [a] **Equity has jurisdiction, concurrent with law,** in case where tenant seeks to recover his just proportion of rent, where tenant sued has received more than his just share. 125Misc849, 211NYS507.
913-28½-New. A claim on a demurrer, that the suit filed is for the purpose of determining the question of title to the property described, possession of which is not held by plaintiff, but is admittedly held adversely, is without merit. 38GaA676, 145SE465 (petition by city against county).
913-28⅓-New. Party asserting joint interest in funds withdrawn from bank must show title by preponderance of evidence. Mo 31SW(2d)28.
913-28¼-New. Joint deposit raising presumption that joint interest follows funds withdrawn by either. Mo 31SW (2d)28.
913-29 69CalA370, 231P380, 382 [quot CJ].
913-30 131Misc602, 228NYS388; Tex CivA 21SW(2d)92.
913-32 [b] **Refusal of joint tenant to join with others in oil and gas lease and subsequent decrease in leasing value** do not render him liable in damages to his cotenants. 131 Okl 222, 268P279.
914-33 TexCivA 11SW(2d)611.
914-44½-New. Joint tenants who have executed mortgage to secure debt of one tenant have right, in foreclosure proceeding, to require interest of tenant primarily liable for debt to be sold before their interest is offered for sale. TexCivA 276SW935.
914-46 33PortoRico 144; TexCivA 276 SW935.
914-45½-New. and the holder of a lien or mortgage may foreclose on such interest. TexCivA 276SW935.
915-59 81CalA535, 254P310; 133Misc 69, 231NYS165; 33PortoRico144; Tex CivA 276SW935. [c] **In civil law** coowner has right of legal redemption, which he may exercise, in Philippines, under Civ. Code art 1524, "within nine days, counted from the date of the record of the transfer in the Registry of Deeds, or in default thereof, from the time the redemptioner may have had knowledge of the sale." 44Philippinel, 2.
915-61 81CalA535, 254P310; 326 Ill 633, 158NE428.
915-67 [c] **In Utah.**-67Utah553, 248P 496.

JUDGES

924-18 19 OhA458.
925-51 223Ky242, 3SW(2d)639.
925-58 [a] 85CalA413, 259P465. [b] 223Ky242, 3SW(2d)639.
925-59 135Misc707, 238NYS256.
925-62 [a] **Other definitions.**-Mass 171 NE237.
926-71 [a] **Judge as thirteenth juror.**-122Kan587, 253P242.
927-97 [a] **"Judge of the Supreme Court".**-BC [1928] 4DomLR572.
930-82 254NY375, 173NE265.
930-91 169Ga622, 151SE28 ("ordinary").
931-94 NJCh 148A570; NJCh 149A 369.
931-3 NJSup 150A770.
931-5 197Cal 539, 241P879; 122 Okl 297, 255P150.
931-7 105NJL511, 146A428(2dcase).
931-8 122 Okl 297, 255P150.
931-10 119 Oh546, 164NE760.
931-11 218AIa149, 117S473.
931-16 NJCh 148A570 (intention of legislature in creating office of vice-chancellor); TexCivA 25SW(2d)259. [c] **In California.**-197Cal 521, 241P868; 197 Cal 519, 241P873; 197Cal 539, 241P879.
932-24 NJSup 150A770. [a] (2) Statute as to assignment for service of additional circuit judges holding office under act creating commerce court is held not repealed by repeal of Commerce Court Act. 269US49, 46SCt55, 70Led159.
932-32½-New. The office of judge may not be indirectly abolished by fixing the salary so low that no man will have office. 223Ky727, 4SW(2d)695.
932-32⅓-New. A statute providing for appointment of special sessions justices as justices of the supreme court held not to delegate power to the mayor to reduce the number of justices of special sessions. 222AppDiv437, 226NYS329.
932-45 154Tenn679, 290SW399.
932-48 242NY144, 151NE158; 137Misc 900, 245NYS621. [a] 242NY144, 151 NE158. [b] **Private persons** may not inquire into title of persons clothed with evidence of such office, and in apparent possession of powers and functions. 242NY144, 151NE158. [c] **In Tennessee.**-154Tenn679, 290SW399.
933-57½-New. A county judge, claiming the right to hold office until his successor has qualified, may sue in his own name to enjoin interference from an illegally appointed claimant. 154 Tenn624, 288SW731.
933-59 194NC459, 140SE26.
933-60 130Kan754, 288P761.
933-61 242NY144, 151NE158.
933-64 168La976, 123S645; 169La55, 124S143(2dcase).
933-65 154Miss493, 122S539.
933-70½-New. Litigants may rely on the certificate of justice as showing him to be at least de facto judge and his judgment cannot be claimed invalid because rendered after becoming seventy years of age where certificate showed him to be under seventy at the time. 242NY144, 151NE158.
934-82 [d] (5) Where attorney who appeared for defendant is appointed city magistrate, no further action can be taken till there is substitution of attorneys. 227AppDiv668, 236NYS209.
935-98 [f] **Transient and incidental duties.**-127Misc791, 217NYS477.
935-13 132 Or185, 284P825.
936-25 [a] (7) Under statute providing for appointment as special judge of courts other than courts of continuous session of any attorney of state possessing proper qualifications, appointee need not be member of local bar. 230 Ky594, 20SW(2d)449.
936-26 93Fla948, 113S113.
936-31 But see Can [1925] 2DomLR 753. [a] **In Oklahoma.**-122 Okl 297, 255P150.
937-45 [a] **Appointment before existence of office held unauthorized.**-157 Miss648, 128S878.
937-46 208Ky787, 271SW1074 (governor may not appoint regular circuit judge as judge of court of continuous sessions).
937-56 But see 157Miss648, 128S878.
937-58 [a] **Law providing for election of Municipal Court justices in New York City in even numbered years** held valid. 254NY375, 173NE265.
937-62 NJCh 148A570 (chancellors appointing vice-chancellors).
938-68 169Ga622, 151SE28 (qualified voter). See also 154Tenn679, 290SW 399.
938-71 247 IllA554.
938-73 See also 167Ga57, 144SE900.
938-76 NJ 144A169; 154Tenn624, 288 SW731; 155Tenn1, 290SW396.
938-78 284Pa421, 131A253. But see 155Tenn1, 290SW396.
938-78½-New. A statute requiring that a county judge shall be learned in law does not require that he shall be a licensed attorney. 154Tenn566, 290SW 15, 50ALR1152.
939-82½-New. Under the amendment to the California constitution relative to municipal courts it is essential qualification for judge of a municipal court that the person shall have been admitted to practice for a period of at least five years immediately preceding his election or appointment to such office. 197Cal 524, 241P884.
939-82⅓-New. Under such amendment a judge of a police court of a municipality which has not been admitted to practice before the supreme court for at least five years prior to the establishment of a municipal court with territorial jurisdiction coextensive with that of the police court does not become a judge of such municipal court. 197 Cal 524, 241P884.
939-86 93Fla948, 113S113.
939-89 121 Okl 119, 248P642.
939-3 See also 200 Ind623, 162NE441. [a] (2) **Illegality not shown.**-TexCivA 28SW(2d)921.
940-28 [a] **Tenure of office during good behavior** imports not only length of term but also extent of service. Mass 171NE237.
940-31 Mass 171NE237.
940-33 [a] **Constitutional provision relating to retirement** held exclusive of all legislative provisions. Mass 171NE 237.
941-42 [a] **Construction as to time, statute extending term of office** to four years became effective. 180Ark989, 23 SW(2d)969.
941-46½-New. Legislation respecting voluntary retirement of judges held within power of Legislature over courts created by it. Mass 171NE237.
941-54 Mass 171NE237.
941-56 118Tex449, 16SW(2d)809; Tex

CivA 22SW(2d)348.
941-69 93Fla948, 113S113.
942-80 16CustA191.
942-88 [a] (5) Or to judges of municipal court of city of New York. 125 Misc607, 211NYS655. [b] **Proposed legislation held to make retirement compulsory** and therefore invalid. Mass 171 NE237.
942-88½-New. Litigants may rely on certificate of justice accepting office as showing justice to be qualified to discharge duties at least as defacto judge. 242NY144, 151NE158.
942-88¼-New. **Termination after specified period of service** is optional with judge under some statutes. Mass 171 NE237.
942-88¼-New. Chief justices of superior, municipal, and land courts cannot retire voluntarily or be retired by compulsion to service as associate judge. Mass 171NE237.
942-95 247 IllA554; 113TexCr436, 22 SW(2d)919 (judge having successor enjoined from receiving certificate of election); TexCivA 28SW(2d)921. [c] **Judge running for reëlection** is not entitled to remain in office after expiration of term pending election contest where governor has appointed temporary judge pursuant to statute. 154 Tenn435, 288SW728.
943-7½-New. Judge whose term expires because of age and who continues to act in so far as third parties are concerned is a defacto judge. 242NY144, 151NE158.
943-17½-New. Appointment of justice of court of special sessions of New York City as justice of children's court thereby created terminated his former office and created no vacancy to be filled. 248 NY357, 162NE282.
943-25 137Misc748, 244NYS445.
944-40 [a] **Since statute as to removal of officers generally** would be void as repugnant to constitution, if construed as including judges, court must hold that legislature did not intend to include them. Ind 164NE489.
944-48 [c] **Circuit court judges can be** removed only by supreme court proceedings for conviction of corruption or other high crime. Ind 164NE489.
945-63 227AppDiv246, 237NYS248.
945-79 [a] TexCivA 28SW(2d)921.
945-80½-New. **Trial.** Questions for jury. TexCivA 28SW(2d)921.
945-81 [a] **Statutory provisions for impeachment of judges** on other grounds than conviction of corruption or other high crime as specified in constitution are void. Ind 164NE489.
945-95 27Hawaii509; 222AppDiv696, 225NYS226; 44Philippine611. [d] **Changing records to show false state of facts** is ground for removal. 163La 242, 111S691. [e] **Not fixing bond** so that person forced to stay in jail is ground for removal. 163La242, 111S 691. [f] **False return as to bail bond** ground for removal. 163La242, 111S 691. [g] **Releasing prisoners from custody without suspending sentence** is ground for removal. 163La242, 111S 691. [h] **Transferring prisoner, though not ill,** so as to in effect release him, is ground for removal. 163La242, 111S 691. [i] **Though order a nullity,** if wrongful, ground for removal. 163La 242, 111S691. [j] **Conduct not warranting removal.**-229AppDiv654, 241NYS 601.
946-96 [b] **Necessity for public good.**-27Hawaii509.
946-2 229AppDiv511, 242NYS696.
946-8 162La596, 110S826; 229AppDiv 654, 241NYS601.
946-14 Ind 164NE489.
946-15 177Ark1124, 9SW(2d)574.
947-30 197Cal 539, 241P879.
947-53 But see 137Misc900, 245NYS 621.
947-54 215Ky566, 286SW797.
947-58 169Ga622, 151SE28 (ousting of occupant from office did not create vacancy).
948-63½-New. **If the act creating office provides that incumbent of another office shall fill office created** and such incumbent is prohibited by the constitution from holding such office, there is no vacancy. 124 Okl 270, 255P690.
948-64 197Cal 539, 241P879; 197Cal 524, 241P884. [b] (8) 227Ky591, 13 SW(2d)761. (11) Where no appeal was taken from order of fiscal court fixing salaries of county judge and county attorney, order became binding and unchangeable during terms for which they were elected. 227Ky591, 13SW(2d)761.
948-66 197Cal 539, 241P879.
948-68 194Wis34, 215NW447.
948-75 132 Or185, 284P825.
949-91½-New. Some constitutions and statutes manifest a policy to fill vacancies for the office of district judge by election as soon as practicable after the vacancy occurs. 48Nev419, 233P527.
949-93 197Cal 539, 241P879; 197Cal 524, 241P884; ND 231NW862; TexCivA 278SW250. [b] **Vacancies in municipal court in California.**-197Cal 539, 241P879.
949-94 TexCivA 278SW250.
949-95 292Pa300, 141A249.
949-99 [b] **In Texas** de facto commissioners court may appoint. TexCivA 28SW(2d)921.
950-5 140Wash636, 250P66.
950-5½-New. **Some constitutions** and statutes manifest a policy to fill a vacancy by election as soon as practicable after a vacancy occurs. 48Nev419, 233 P527.
950-12 [a] (3) Where statute requires thirty days' notice of election, vacancy occurring eighteen days before date of election cannot be filled at such election. 140Wash636, 250P66.
950-14 But see 246NY237, 158NE315.
950-16 [a] **In New York.**-Law, providing that election of municipal court justices in New York City to fill vacancies shall be for full term, except that, if such term would expire in an even-numbered year, it is to end December 31st next preceding, held constitutional. 246 NY237, 158NE315.
950-18 ND 231NW862.
950-20 197 Ind507, 151NE407.
951-24 126Kan390, 268P101.
951-27½-New. California constitution confers on legislature power to prescribe time and manner of payment as well as to fix amount thereof. 198Cal 170, 244P323.
951-28 115Nebr372, 213NW371; SC 132SE54; 161Tenn557, 30SW(2d)274. [a] **Effect of appointment of temporary judge** on predecessor's right to salary. 161Tenn557, 30SW(2d)274.
952-34 161Tenn557, 30SW(2d)274.
952-43½-New. Although a temporary judge has been appointed pending an election contest the person finally declared elected is entitled to full salary for the term. 154Tenn435, 288SW728.
952-46 [b] **In Pennsylvania.**-8PaDist &Co 425.
953-58 [a] **Power to determine salary after induction** into office. 236Ky63, 32SW(2d)554.
953-61 198Cal 170, 244P323; 327 Ill 11, 158NE418; 328 Ill 607, 160NE115; Mass 171NE237.
953-64 [a] But see 327 Ill 11, 158NE 418. [b] (1) 223Ky727, 4SW(2d)695. (4) 223Ky727, 4SW(2d)695. (7) 223 Ky727, 4SW(2d)695. (10) Circuit court has jurisdiction on appeal from fiscal court. 223Ky727, 4SW(2d)695. (11) Evidence that county was in debt is admissible. 223Ky727, 4SW(2d)695. (12) Order of fiscal court, made in 1913, appropriating money out of levy for year of 1914 to pay salaries of county judge and county attorney, did not fix salaries for future terms. 227Ky591, 13 SW(2d)761.
954-72 [b] **Act providing that salary of police justice shall not be changed during term of office,** except that it may be fixed within thirty days of adoption of said act, limited power of trustees to change salaries, and such power ceased on expiration of the thirty day period. 226AppDiv165, 235NYS250.
954-73 225Ky135, 7SW(2d)836; 115 Oh168, 152NE658; 116 OhSt113, 155NE 691.
955-74 115 Oh168, 152NE658.
955-75 115 Oh168, 152NE658.
956-96 See also TexCivA 32SW(2d) 485(2dcase). [d] **As affected by amount of service.**-Compensation of judges of court of common pleas in Ohio does not vary with amount of service rendered. 115 Oh168, 152NE658.
957-8 226Ky501, 11SW(2d)133.
957-9 [b] **Statute allowing compensation for services as jury commissioners.**-317Mo 744, 296SW431 (statute held applicable to probate judge).
957-10 236Ky63, 32SW(2d)554; 12Pa Dist&Co 408 (statutes construed). [b] **Act allowing six hundred dollars annual compensation to all members of judicial council,** except those receiving compensation up to limit prescribed by constitution does not violate § 133, requiring that compensation of circuit judges be equal and uniform throughout state. 226Ky501, 11SW(2d)133. [c] **Acts establishing judicial council of commonwealth,** are held not objectionable as allowing salaries to members who are circuit judges for services which general assembly had power to impose on them as such judges. 226 Ky501, 11SW(2d)133. [d] **For presiding at misdemeanor trials.**-236Ky63, 32 SW(2d)554.
957-11 [b] **Provision construed as to** compensation of circuit judge sitting outside of circuit on special assignment. 235Mich95, 209NW195.
957-26½-New. Law for increased salaries made payable out of judicial expense fund is held invalid. 163La777, 112S718.
957-27 126 Okl 134, 258P909. [a] **Pending election contest.**-154Tenn435, 288SW728.
958-29 115 Oh168, 152NE658.
958-29½-New. Under other provisions it is paid monthly, although fixed on a yearly basis. 126 Okl 134, 258P909.
958-31½-New. Some constitutions require that certain judges shall receive the compensation provided by law at stated times. 115 Oh168, 152NE658.
958-41 [b] TexCivA 271SW414; TexCivA 26SW(2d)288 ("actual cash receipts"). [b] (2) Right of county judge to commission on cash receipts of executors and administrators on final account extends to cash receipts of administrator while carrying on road construction contract of decedent. TexCommnA 280SW512. (3) "Executor" was meant to refer to executor administering estate under control of probate court. TexCivA 26SW(2d)288.
958-42 TexCivA 274SW251 (county judge held not entitled to fees for examining and approving account of independent executrix after settlement with heirs).
958-51 109TexCr148, 4SW(2d)79.
960-63 23AlaA96, 122S606.
960-70 [a] **Judicial function requires sinking of individual feeling to produce** harmony. 290Pa95, 137A811. [b] **Judges are not adjuncts, advisers, or investigating instrumentalities** of other agencies of government. 247NY401, 160NE655.
960-70½-New. , but not solely so. 123 Or521, 262P954.
960-73 123 Or521, 262P954.
960-81 [a] **Judges are not the courts.**-19 OhA458.
961-94½-New. Where two judges of a bench of three issue an order conflicting with an order of third, the sheriff must obey the majority order. 8Pa Dist&Co 155.
961-99½-New. There is no demarcation between what a judge does at the court and what he does elsewhere if the act lies within the scope of his judicial authority. 8PaDist&Co 155.
961-6 RI 131A553. [a] **Judicial discretion involves equitable decision of** what is just and proper procedure under the circumstances. RI 131A553.
962-17 317Mo 751, 297SW378. [d] **In Hawaii.**-27Hawaii844. [e] **Judges limited** to deciding questions in court upon a set of pleadings or motion papers and should not give advisory opinions. 101NJEq9, 137A151. [f] **Authority of local masters in Saskatchewan.**-Sask [1928] 1DomLR365. [g] Chancellor may hear any cause or matter, though preliminary applications should be

made to vice-chancellors of vicinage. NJCh 149A585.
962-24 NJCh 149A369.
962-30 TexCommnA 276SW426.
963-33½-New. Effect of temporary assignment of judge of another circuit on powers of resident judge.-91Fla670, 108S675.
963-38 See also 14F(2d)316.
963-39 [a] (2) After resignation, district judge cannot be required to perform judicial duties. 48 Ida572, 285P 456.
964-59 [a] Failure to file due to neglect of stenographer.-74Mont558, 241P 636.
964-69 Iowa 226NW925 (criminal cases); MoA 283SW61; 101Vt195, 142A 762.
964-70 TexCivA 11SW(2d)244.
965-77 46Philippine473.
965-81 100Vt387, 138A867.
965-89 246 IllA225 [citCJ].
966-99 127Me493, 144A652.
966-1 71CalA97, 234P432.
966-12 46 Ida551, 269P412.
968-87½-New. authorize the use of the transcript of testimony in a previous case; 208 Iowa623, 226NW32 (in absence of opposing party).
968-95½-New. pass on a motion for a new trial; 71CalA97, 234P432.
969-15 CalA 276P641.
969-27 [a] In Vermont.-99Vt335, 131 A797.
969-29 [c] (2) 8 PaDist&Co 155. [g] In Arizona.-29Ariz523, 243P601.
970-33 48Philippine193.
970-34 Iowa 232NW819.
971-43½-New. A special judge appointed for a court of a particular county is without jurisdiction to hear matters arising elsewhere in the circuit not within the jurisdiction of such court. 132SC380, 129SE207.
971-46 242NY144, 151NE158; 194NC 459, 140SE26; 161Tenn248, 30SW(2d) 255 (no distinction exists between holdover status of regular judge and that of judge elected by attorneys). [a] De facto judge assumes exercise of part of prerogatives of sovereignty. 242NY 144, 151NE158.
971-48 130Kan754, 288P761; 154Miss 493, 122S539; 242NY144, 151NE158 (as valid as those of de jure judge); 135Misc707, 238NYS256.
971-49 Utah 269P103.
971-50 242NY144, 151NE158; 194NC 459, 140SE26, 29 [citCJ]. [b] (13) Where judgment and orders of judge are rendered after he passes age limit, they may not be claimed as invalid where certificate of acceptance, filed, showed him to be under age limit. 242 NY144, 151NE158.
972-53½-New. This is especially true where judge is required to file certificate containing certain information with secretary of state. 242NY144, 151 NE158.
972-53½-New. No third person may, so long as state allows certificate to remain on file, question truth of information therein contained. 242NY144, 151NE158.
972-60 165La1091, 116S568; 103NJL 300, 136A736.
972-61 129Kan14, 281P865; 223Ky 70, 2SW(2d)1049.
972-68½-New. In New York no supreme court justice may make new findings in case, after expiration of former trial justice's term. 126Misc 868, 215NYS89.
972-68½-New. Successor to deceased judge. In view of Surrogate's Court Act § 20 subd 20, issues raised on accounting before a deceased surrogate may be tried on evidence already taken in. 125Misc265, 211NYS463.
972-68¼-New. And any additional evidence may be offered by either of the parties. 125Misc265, 211NYS463.
972-69 See also 46Philippine862.
973-75 55ND897, 215NW476, 54ALR 948.
973-90 213Ky703, 281SW824; 223Ky 70, 2SW(2d)1049.
974-2 126Misc868, 215NYS89.
974-10 235 IllA488.
974-11 194NC427, 139SE835.
975-34½-New. A statute, providing for the adjudication of illegal tax levies creating a court with power to grant prompt relief and authorizing the sending of district judges out of their district and away from their regular duties for which they were elected, is not in violation of a constitutional provision that persons elected to an office shall give personal attention to the duties of the office. 134 Okl 288, 273P 352.
975-36 NJ 150A689.
975-41 49Philippine151.
975-42 33NM318, 267P70.
975-43 112TexCr459, 17SW(2d)42(2d case). [b] District judge may try action pending in another district when requested in writing to do so by judge of other district. 58ND680, 227NW228.
976-46 [e] Chief justice may authorize commerce court circuit judge to act as district judge or in circuit court of appeals. 269US49, 46SCt55, 70L ed159. [f] In California.-289P629 (insanity hearing after expiration of assignment). [g] In Iowa.-Iowa 229NW205.
977-64 198NC548, 152SE632(2dcase).
977-66 [c] In Iowa.-201 Iowa16, 206 NW292. [d] Judges of the courts of appeal of Ohio competent to act in any district are a properly constituted court to hear a case submitted to them at a county seat at a time agreed upon by the parties. 19 OhA458.
977-67 But see 19 OhA458.
977-71 [a] (3) Action of judge in continuing preliminary injunction at hearing out of district at time when superior court of county within district where action had been instituted was in session is held erroneous. 196NC105, 144 SE521(1stcase). (4) Judge of superior court may not, even in his own district, except by consent or in accordance with statute, hear adversary proceeding other than interlocutory, substantially affecting rights of parties outside county in which action was pending. 196 NC105, 144SE521(1stcase).
978-75 218Ala149, 117S473.
978-84 200Cal 522, 254P896; 243 IllA 362; 52ND26, 202NW391; TexCommnA 32SW(2d)18f; TexCivA 25SW(2d)259.
978-85 TexCommnA 32SW(2d)181.
978-88 TexCivA 25SW(2d)259.
978-90 6F(2d)130; 121 Oh321, 168NE 473 (judges of court of appeals); TexCivA 10SW(2d)438; TexCivA 25SW (2d)259. [f] In North Dakota.-231NW 846.
979-91 153Tenn268, 283SW450.
979-91½-New. In Florida, in chancery cause, where judge was disqualified, cause may be heard and determined by judge of another circuit; 94Fla185, 114 S517.
979-91¼-New. but in the absence of disqualification the judge of another circuit has no jurisdiction. 94Fla185, 114S517.
979-94 200Cal 522, 254P896.
980-5 Oh 171NE330.
980-11 33Ariz225, 263P630.
980-12 48Philippine645.
980-13 [b] In North Dakota.-ND 231 NW846.
981-28½-New. Under some statutes where chancellors exchange circuits for a single date one of them is without authority to make a vacation order after such date affecting a cause tried outside of his circuit. 174Ark1156, 298SW 505.
981-46 171Ark1132, 287SW398; 39 GaA508, 147SE401; 223Ky291, 3SW (2d)616; 128 Okl 162, 261P545; 148 Va424, 139SE252, 55ALR279.
982-49 82Colo 173, 257P1086.
983-55 171Ark1132, 287SW398; 82 Colo 173, 257P1086; 82NH159, 131A 155, 42ALR757; 135Misc881, 238NYS 599; 148Va424, 139SE252, 55ALR279.
983-56 128 Okl 162, 261P545.
983-57 82Colo 173, 257P1086; 223Ky 291, 3SW(2d)616.
984-59 78Mont114, 252P803; 128 Okl 162, 261P545.
984-61 148Va424, 139SE252, 55ALR 279.
984-65 78Mont114, 252P803.
984-70 171Ark1132, 287SW398; 128 Okl 162, 261P545.
985-90 143 Okl 218, 289P337.
985-91 143 Okl 218, 289P337.
985-92 212Ala475, 103S451.
985-94 231Ky112, 21SW(2d)147.
986-96 214Ala510, 108S604.
986-1 [b] In Alabama.-212Ala475, 103 S451.
986-11½-New. A judge is liable for the interest on a sum lost for failure to require a sufficient guardian's bond only for a two-year period where another judge was in office at the expiration thereof. 231Ky112, 21SW(2d) 147.
987-38 [a] (3) Probate judge may show what amount of principal estate was used by guardian for maintenance and education of minors and what should have been credited to him on settlement to show what damage sustained on insufficient bond. 214Ala510, 108S604.
987-42 160Tenn109, 23SW(2d)239.
987-52 82Colo 391, 260P524.
987-59 232Ky115, 22SW(2d)440.
988-65 [b] Indictment held sufficient.-232Ky115, 22SW(2d)440.
988-72½-New. Questions for jury. Whether a judge maliciously procured an affidavit and issued a warrant of arrest, after being informed that the charge was untrue, has been held for the jury. 232Ky115, 22SW(2d)440.
988-75 Mo 9SW(2d)156; 142 Okl 115, 285P951; 142 Okl 150, 286P321.
988-76 207 Iowa41, 217NW477.
988-77 207 Iowa41, 217NW477; 239 Mich605, 215NW29.
989-86 239Mich605, 215NW29.
989-93 [a] In Kansas.-123Kan10, 254P 401.
989-95 159La903, 106S375.
989-96 23AlaA46, 121S429 [certiorari den 219Ala139, 121S432(1stcase)].
989-98 164La334, 113S867. [a] Contra 17F(2d)831 (holding terms of statutes will be strictly followed).
989-99 198Cal 373, 245P814 (irrigation district is "public agency" within statute relating to disqualification of judges).
989-100 239Mich605, 215NW29; Nev 287P957 ("place of trial" in venue statute refers only to change in venue or place of trial and does not mean judge or court).
989-3 124Kan350, 259P1068, 1070 [cit CJ]; NJ 148A894.
990-24 95Fla699, 116S633.
990-28 143Miss270, 108S807.
990-32½-New. Relative as to disqualifying judge, proceeding is new as to one brought in as defendant when case was ready for final judgment. 13F(2d) 497.
990-34 CalA 286P492; 125 Okl 42, 256 P681.
991-48 35Ariz164, 275P8; 124Kan350, 259P1068; 140Miss340, 105S753, 42 ALR1525.
991-49 124Kan350, 259P1068; 34NM 346, 282P7 (statute providing that judge of conservancy court shall not be disqualified by ownership of property in conservancy district is not unconstitutional).
991-53 273US510, 47SCt437, 71L ed749, 50ALR1243; 93Fla1030, 113S280; 125 Okl 24, 256P681, 690 [quotCyc].
991-54 95Fla699, 116S633.
991-55 273US510, 47SCt437, 71L ed749, 50ALR1243.
991-55½-New. but the principle does not apply to members of board of public safety performing public duties in deciding between a policeman and the city they represent on the question of the dismissal of the policeman on charges. 198 Ind30, 152NE174.
991-57 273US510, 47SCt437, 71L ed749, 50ALR1243; 17F(2d)831; 212Ala660, 103S835; 214Ala684, 108S864; 146Miss 533, 112S675; 117 Oh481, 159NE594, 57 ALR284; 125 Okl 24, 256P681, 690 [quotCyc]; 109TexCr148, 4SW(2d)79, 80 [citCyc]; 111TexCr54, 10SW(2d)728.
992-58 93Fla1030, 113S280; 146Miss 533, 112S675; 125 Okl 24, 256P681.
992-60 99Fla562, 126S747; 125 Okl 24, 256P681, 690 [quotCyc].
992-61 125 Okl 24, 256P681, 690 [quot Cyc].

992-62 29Ariz60, 239P506 [quotCJ].
992-63 273US510, 47SCt437, 71L ed749, 50ALR1243; 212Ala660, 103S835; 220 Ala349, 125S221; 29Ariz60, 239P506, 512 [quotCJ]; 93Fla693, 112S462; 93 Fla1107, 113S563, 564 [citCJ]; 95Fla 699, 116S633, 635 [quotCJ]; 98Fla273, 123S738; 25 OhNPNS580; 111TexCr 54, 10SW(2d)728. But see 125 Okl 66, 256P704, 52ALR1270. [a] **Mere fact of indebtedness** of judge to a party, or vice versa, does not disqualify judge unless such fact affected interest of judge in outcome of suit. 29Ariz60, 239P506.
992-65 29Ariz60, 239P506, 512 [quot CJ]; 93Fla693, 112S462; 93Fla1030, 113S280.
992-66 17F(2d)831; 29Ariz60, 239P 506, 512 [quotCJ]; 103NJEq505, 143A 836.
992-67 29Ariz60, 239P506, 512 [quot CJ].
992-68 29Ariz60, 239P506, 512 [quot CJ]; Tex 25SW(2d)150.
992-69 273US510, 47SCt437, 71L ed749, 50ALR1243; 29Ariz60, 239P506, 512 [quotCJ]; 93Fla693, 112S462; Tex 25 SW(2d)150.
993-70 273US510, 47SCt437, 71L ed749, 50ALR1243.
993-71 95Fla699, 116S633, 635 [quot CJ].
993-73 95Fla699, 116S633, 635 [quot CJ].
993-76 220Ala349, 125S221.
993-79 273US510, 47SCt437, 71L ed749, 50ALR1243; 29Ariz60, 239P506.
993-81 95Fla699, 116S633.
994-87 29Ariz60, 239P506; 198Cal 373, 245P814; 86CalA347, 260P942; 95Fla 699, 116S633; Fla 129S340(2dcase); Tex 25SW(2d)150; 109TexCr148, 4SW(2d) 79, 81 [quotCJ].
994-88 Tex 25SW(2d)150.
994-89 Tex 25SW(2d)150.
994-91 117Tex218, 300SW44.
994-93 125Me494, 135A198; 125 Okl 24, 256P681, 691 [citCyc].
994-94 125 Okl 24, 256P681, 691 [cit Cyc].
994-95 OklCr 288P354; OklCr 288P 357(1stcase).
994-99½-New. or that he was appointed to office by same official who appointed litigant officer before him. 26F(2d) 161.
994-8 TexCommnA 32SW(2d)181.
995-11 198Cal 373, 245P814 (judge owning property in irrigation district is disqualified from acting in suit directly affecting the district).
995-16 198Cal 373, 245P814; 199Cal 408, 249P1084, 48ALR610; 95Fla699, 116S633; 48 Ida507, 283P42.
995-16½-New. That a judge is a stockholder in a corporation which is a creditor of an insolvent bank does not disqualify him from appointing receivers for such bank. 93Fla1030, 113S280.
995-18 201Cal 438, 257P521.
995-27 199Cal 408, 249P1084, 48ALR 610. [a] **Failure to make corporation,** holding deed of trust, of which judge was stockholder, a party is immaterial. 199Cal 408, 249P1084, 48ALR610.
995-27½-New. Judge related within prohibited degrees to stockholder of capital stock corporation is held not disqualified from trying case wherein corporation was a party. 117Tex218, 300 SW44.
995-27¼-New. Same rules governing qualification of judge should be applied when marketing association is party as are applied under general corporation laws. 117Tex218, 300SW44.
995-27¼-New. Certificate member of marketing association has no direct interest in suit against association by other members and is not party to suit. 117Tex218, 300SW44.
995-27½-New. Judge related as brother-in-law to certificate members of marketing association not party to suit against association is held not disqualified from trying suit. 117Tex218, 300 SW44.
995-34 273US510, 47SCt437, 71L ed749, 50ALR1243 (dictum); 93Fla693, 112S 462; Tex 25SW(2d)150. [a] **Where other judge is available,** such interest disqualifies judge. 273US510, 47SCt 437, 71L ed749, 50ALR1243.
996-35 TexCivA 11SW(2d)209.
996-39 93Fla693, 112S462; 99Fla562, 126S747; Tex 25SW(2d)150.
996-43 [a] (2) 99Fla562, 126S747. (5) Judge owning land in irrigation district, affected by suit, though not party thereto. 198Cal 373, 245P814.
997-58 See also 117 Oh503, 159NE477. But see 25 OhNPNS580.
997-59½-New. But a contrary view has been taken. 225Ky212, 7SW(2d)1048.
997-62 111TexCr85, 10SW(2d)383.
997-63 OklCr 288P354; OklCr 288P 357(1stcase). Contra 26 OhNPNS368.
997-66 167Ga833, 146SE734.
997-67 299Pa517, 149A733. But see TexCivA 30SW(2d)569. [a] **Judge held not disqualified.**–Tex 28SW(2d)515.
997-83 168Ga738, 148SE913.
998-87 168Ga738, 148SE913.
998-18½-New. Disqualification is not dissipated by refusal to permit pleadings to be filed making him party and by striking out such pleadings after they are filed. 198Cal 373, 245P814.
998-22 123Kan10, 254P401, 403 [quot CJ].
998-23 123Kan10, 254P401, 403 [quot CJ].
998-24 29Ariz60, 239P506, 512 [citCJ]. See also 239Mich605, 215NW29, 31 [quot CJperBird,J].
999-25 29Ariz60, 239P506, 512 [quot CJ]; 201Cal 438, 257P521; 123Kan10, 254P401, 403 [quotCJ]; Nev 287P957; 222AppDiv591, 604, 227NYS47, 51 [cit CJ]. See also 239Mich605, 215NW29, 31 [quotCJ&CycperBird,J].
999-26 See also 239Mich605, 215NW 29, 31 [quotCJperBird,J].
999-27 Mass 172NE232; 125 Okl 24, 256P681; 130 Okl 89, 265P139; 142 Okl 150, 286P321; Sask [1928] 4DomLR 944. See also 239Mich605, 215NW29, 31 [quotCJperBird,J]. [d] **Rule of disqualification for bias** yields only in cases of great necessity. 212Ala660, 103S835. [e] **Mere indebtedness** of judge to party does not disqualify him per se under such statute. 29Ariz60, 239P506.
999-29 See also 239Mich605, 215NW29, 31 [quotCJperBird,J].
999-30 See also 239Mich605, 215NW29, 31, [quotCJperBird,J].
999-34½-New. , and litigant cannot obtain a fair and impartial trial. 29Ariz 60, 239P506.
999-36 29Ariz60, 239P506; 123Kan10, 254P401, 403 [quotCJ].
999-37 123Kan10, 254P401, 403 [quot CJ].
999-40 95Fla42, 115S519.
1000-44½-New. A judge is presumed not to be influenced by statements and rumors heard out of court. 159La903, 106S375.
1000-44½-New. Disqualification of county judge to have individual declared incompetent is not evidence of disqualification to act in administration of estate in which alleged incompetent is administratrix. 143 Okl 288, 288P 955.
1000-44¼-New. Claim of disqualification cannot be based on unavoidable act of clerk of court. Cal 290P293.
1000-45 101Vt195, 142A762.
1000-48 29Ariz60, 239P506, 512 [quot CJ]; 151Md484, 135A591. See also 239 Mich605, 215NW29. But see 118 Or77, 245P1074, 46ALR1173.
1000-49 33F(2d)577. [d] 29Ariz60, 239P506; 101CalA110, 281P435; 35 PortoRico 224 (held no injustice done defendant).
1000-53½-New. The requirements of impartiality are not any more exacting in case of a judge than in that of a juror. 29Ariz60, 239P506.
1000-55 [a] **It is not objectionable for party to arrange with judge for arrest adjacent to chambers** so that he may apply at once for writ of habeas corpus, or other writ or order, to end that he may secure instant preliminary relief. 103NJEq505, 143A836.
1000-60 CalA 290P662; OklCr 275P660 (1stcase); 101Vt195, 142A762.
1001-67 29Ariz60, 239P506, 512 [quot CJ].
1001-68 29Ariz60, 239P506, 512 [quot CJ].
1001-69 26F(2d)161; 29Ariz60, 239P 506, 512 [quotCJ]; 230Ky599, 20SW (2d)464.
1001-70 29Ariz60, 239P506, 512 [quot CJ]; 103NJEq505, 143A836.
1001-76 13F(2d)497; 124Kan823, 262 P542; 158La713, 104S627; 159La903, 106S375.
1001-77½-New. A judge having, during proceedings expressed doubt that any evidence could remove previous conviction was disqualified as having admitted bias. 101Vt195, 142A762.
1001-77¼-New. Judge who, while trying case, formed opinion that defendants were falsifiers is disqualified to hear other cases against them in which they are material witnesses. CalA 290 P662.
1001-78 215Ala55, 109S290; 95Fla42, 115S519; 239Mich605, 215NW29.
1001-79 40F(2d)894; 95Fla42, 115S 519, 525 [citCJ]; 103NJEq505, 143A 836; 143 Okl 288, 288P955; 101Vt195, 142A762.
1001-80 101Vt195, 142A762.
1001-85 103NJL246, 136A164.
1002-91 103NJL246, 136A164.
1002-92 95Fla42, 115S519.
1002-93 103NJL246, 136A164.
1002-96 22F(2d)605.
1002-5½-New. Regularity of procedure in a preliminary proceeding does not affect the judge's qualifications to hear issues under indictment. 103NJL246, 136A164.
1002-7 CalA 290P293; Mass 172NE 209.
1002-10 [a] **Where contempt and disbarment proceedings were for circulation of cartoons involving judge and his father,** judge should not have sat at hearing. Pa 152A33 (judge may hear disbarment proceedings against member of bar of his own court).
1002-10½-New. The fact that the court instructed information for contempt to be filed does not entitle the contemptor to disqualify the court in proceedings to hear and determine the cause. 125 Okl 66, 256P704, 52ALR1270.
1002-10½-New. Legislation for change of judges in civil cases has no application to contempt proceedings, 35Wyo 430, 251P460.
1002-10¼-New. and in the absence of statute specially providing therefor a party accused of contempt is not entitled to change of judge for bias or prejudice. 35Wyo 430, 251P460.
1002-16 36GaA636, 137SE909; 27 Hawaii60; 27Hawaii637; 123Kan10, 254P401, 403 [quotCJ].
1002-17 123Kan10, 254P401, 403 [quot CJ]; 130Kan754, 288P761.
1003-19 123Kan10, 254P401, 403 [quot CJ]; 124Kan350, 259P1068, 1070 [cit CJ]; TexCivA 283SW555.
1003-20 123Kan10, 254P401, 403 [quot CJ]. [a] **Judge who was attorney-general** at time action against superintendent of insurance was defended by assistants in attorney-general's office is not disqualified from sitting on hearing of appeal in such case to supreme court. 124Kan350, 259P1068.
1003-22 73Cal 260, 238P731; 36GaA 636, 137S7909; 41GaA587, 153SE785 (2dcase) (statute construed); 27Hawaii 60; 29Hawaii256; 29Hawaii438; 310 Mo 500, 276SW625.
1003-26 124Kan350, 259P1068, 1070 [citCJ].
1003-30 171Ark759, 286SW944.
1003-32 But see 123Kan10, 254P401.
1004-40 TexCivA 286SW905.
1004-41 TexCivA 286SW905.
1004-42 TexCivA 286SW905.
1004-53½-New. Reviewing judge is not disqualified where he represented defendant in a previous suit against codefendants. TexCivA 295SW679.
1004-57 4HawaiiFed1.
1005-66 73CalA260, 238P731; 36GaA 636, 137SE909.
1005-69 36GaA636, 137SE909.
1005-70 73CalA260, 238P731.
1005-72 124Kan350, 259P1068, 1070 [citCJ].
1005-78½-New. Disqualification precludes a valid order forfeiting a bond or granting rule nisi on forfeiture. 36 GaA636, 137SE909.
1005-83 233Ky501, 26SW(2d)43.
1006-85 146Miss533, 112S675; 310Mo

500, 276SW625; 193NC304, 136SE868, [citCJ]; TexCommnA 24SW(2d)391.

1006-86 [b] (2) Refusal of judge in manslaughter case, who was deceased's cousin, to vacate bench held error. 218 Ky675, 291SW1047.

1006-87½-New. In contempt proceedings, there can be no interest of affinity or consanguinity to disqualify a judge. 125 Okl 66, 256P704, 52ALR 1270.

1006-88 TexCivA 297SW265.

1007-89 [d] **In suit to enjoin trustees of school district** from interfering with patrons of another district, trial judge erroneously overruled suggestion of disqualification by reason of relationship to chairman of board of trustees. Tex CivA 12SW(2d)806.

1007-4 TexCivA 297SW265.

1007-6 40GaA523, 150SE438(1stcase); 161La882, 109S536.

1007-8 216Ky842, 288SW755.

1008-19 40GaA523, 150SE438(1stcase); TexCivA 10SW(2d)184.

1008-20½-New. Fact that judge's son was stockholder in bank affiliated with plaintiff bank will not disqualify judge. 201Cal 438, 257P521.

1008-22 177Minn169, 225NW109.

1008-25½-New. Supreme Court judge is not disqualified in case in which son appeared as assistant attorney-general of state. 164La334, 113S867.

1008-31 But see 41GaA205, 152SE298.

1008-34 TexCivA 276SW757.

1009-46 112TexCr176, 15SW(2d)628. But see TexCivA 298SW154.

1009-51 [a] **Advisory opinions** should not be given by judges. 101NJEq9, 137 A151.

1009-53 Cal 286P425; 96CalA204, 273 P1097; 124Kan823, 262P542.

1009-54 CalA 290P662; 101NJEq9, 137A151.

1009-58½-New. By statute in Georgia approval or disapproval of verdict may disqualify judge from presiding at new trial. 41GaA462, 153SE781 (disqualification not shown).

1010-64 5F(2d)592; 130 Okl 89, 265P 139.

1010-67 17F(2d)831; CalA 283P119; 216Ky842, 288SW755; NJSup 136A709. [c] **Where judge expressed decided opinion of guilt at first trial,** in pressing sentence, held he was disqualified to preside at second trial. 134SC392, 133SE 101.

1010-69 17F(2d)831.

1010-70 [b] **Judge who granted application for warrant to search for intoxicating liquors** is not disqualified from presiding at trial for violation of liquor law. 34NM449, 282P819(2dcase).

1010-73 16Hawaii476.

1010-73½-New. Members of supreme court not disqualified to review proceeding because of dismissal of appeal in another action to which petitioner not party. Cal 290P293.

1011-81 NJ 144A169.

1011-90 OklCr 279P927. But see 130 Okl 89, 265P139.

1011-92 Kan 289P444.

1011-94 OklCr 279P927.

1011-96½-New. A party is not entitled to call the presiding judge as a witness and thereby disqualify him without theretofore having made proper averments as to the materiality and necessity of his testimony. 125 Okl 66, 256P704, 52ALR1270.

1011-97 Utah 269P103.

1012-5 89Fla388, 104S598; MoA 272 SW99.

1012-7 130Kan754, 288P761.

1012-9 130 Okl 89, 265P139.

1012-14 204Cal 470, 268P909.

1012-25 NJSup 130A647 (certiorari is not proper procedure to bring into question impropriety alleged).

1012-26 33F(2d)577.

1013-27 [b] **Intervenor's interest in defendant's success** may object to qualification of judge. 195Cal 111, 231P726.

1013-28 [b] **In North Dakota.**-52ND786, 204NW828.

1013-29 [a] **Intervening irrigation district** is "public agency" which has right to object to judge acting in case relating to real estate in certain county. 195 Cal 111, 231P726.

1013-30½-New. The number of applications which a party or attorney may make in any action or proceeding is limited to a specified number by some statutes. 118 Or77, 245P1074, 46ALR 1173 (two).

1013-30¾-New. In constructing which the word "party" is held to be used in a collective sense so that if there be a plurality of plaintiffs or defendants in either case they are deemed only one party litigant, 118 Or77, 245P1074, 46 ALR1173.

1013-30¼-New. and where there is more than one attorney appearing for a party each is deemed to have joined in the application. 118 Or77, 245P1074, 46ALR1173.

1013-34 8F(2d)840; 16F(2d)410; 148 Miss164, 114S268. [c] 26F(2d)444. [d] 174Ark1127, 298SW507; 168Ga766, 149 SE138 (during progress of trial); 88 IndA86, 163NE279; 233Ky545, 26SW (2d)489; 135Wash625, 238P610 (application not made on first appearance).

1013-35 5F(2d)592; 16F(2d)410; 148 Miss164, 114S268; 103NJEq505, 143A 836; PrEdwIsl [1929] 2DomLR289. [a] **Conversely,** application filed as soon as bias and prejudice is ascertained and as soon as petitioners discover that judge intends to hear case is timely. CalA 290P662.

1013-36 8F(2d)840; 16F(2d)410; 16 F(2d)712; 236Ky18, 32SW(2d)542.

1013-38 16F(2d)712; 33F(2d)33; IndA 168NE127; 122 Or644, 259P780; 130 Or 444, 277P722.

1014-40 229Ky353, 17SW(2d)204; 233 Ky545, 26SW(2d)489.

1014-41 29Ariz60, 239P506 (at common law if facts known to recusing party).

1014-41½-New. before or within one day after the issue joined; 122 Or644, 259P780.

1014-42 233Ky545, 26SW(2d)489.

1014-44 5F(2d)592; 16F(2d)410; 55 ND892, 215NW680. [a] **Affidavit filed after case is set for trial** held too late. 117 Or525, 244P660.

1014-45 16F(2d)712; 33Ariz383, 265P 609; 146Miss533, 112S675; 148Miss164, 114S268. [b] **Statute does not require filing of affidavit of prejudice** at least three days before time of trial in cases where it is impossible to identify judge before whom case is to be tried at least three days before trial. 120 Oh216, 165 NE848.

1014-45½-New. or, if made after trial, before the judge has lost control of judgment; 146Miss533, 112S675.

1014-45¾-New. before case is submitted for trial; 88 IndA580, 169NE533.

1014-46 5F(2d)592 (refusal to allow filing of affidavits on day of trial held not error); 16F(2d)712.

1014-46½-New. or at any time by person not estopped; 29Ariz60, 239P506.

1014-50 114 Or6, 233P563, 234P262; 116 Or108, 239P541 (after decision in divorce case).

1014-50½-New. , or after judge has lost control of judgment. 143Miss270, 108S807.

1014-50¾-New. Objection to qualifications of a special chancellor to try an action of partition cannot be first raised by exceptions to a report of the sale by the commissioner. 174Ark1127, 298 SW507.

1014-50¼-New. That defendant after pleading not guilty is permitted to withdraw his plea and interpose a demurrer does not destroy the effect of his plea at the time for a motion for change of judge. 122 Or644, 259P780.

1014-51 5F(2d)592; 198Cal 373, 245P 814. [a] **Motion to transfer** held not too late though plaintiff had perfected appeal from judgment. 199Cal 408, 249 P1084, 48ALR610.

1014-57 40GaA496, 150SE464.

1014-58 [b] **In Arizona.**-29Ariz60, 239 P506. [c] **In Missouri.**-24SW(2d)1008.

1014-61 TexCivA 297SW265.

1014-62½-New. Filing of a mandamus petition for reinstatement of an affidavit of prejudice stricken from files by respondent is sufficient to challenge the propriety of any further action by him in bankruptcy proceedings. 8F(2d)840.

1014-65 17F(2d)831.

1014-73 210Ky299, 275SW866; 159La 903, 106S375; OklCr 279P927; TexCivA 1SW(2d)426. [b] **In Arizona.**-29Ariz 60, 239P506. [c] **Motion stating interest, but merely showing grounds for prejudice,** held properly overruled. 159 La903, 106S375.

1015-74 159La903, 106S375.

1015-77 8F(2d)840.

1015-81 33F(2d)577 (certificate of good faith).

1015-84 17F(2d)831.

1015-87 116 Or459, 241P383.

1015-89 5F(2d)592. [a] **Effect of presence of immaterial allegations.**-210Ky 469, 276SW139.

1015-90 94Fla185, 114S517; 210Ky299, 275SW866 (court not permitted to file counter-affidavits); 229Ky137, 16SW (2d)787.

1015-91 163La140, 111S654.

1015-93 118 Or77, 245P1074, 46ALR 1173 [citCJ].

1015-97 195Cal 352, 233P108 (counter-affidavit of judge held sufficient as denial of charges of bias and prejudice).

1016-9 32Ariz307, 257P986, 56ALR 169; 118 Or77, 245P1074, 46ALR1173.

1016-10 118 Or77, 245P1074, 46ALR 1173.

1016-12 32Ariz307, 257P986, 56ALR 169; 33Ariz383, 265P609; 208Ky735, 271SW1079; 118 Or77, 245P1074, 46 ALR1173.

1016-13 32Ariz307, 257P986, 56ALR 169; 118 Or77, 245P1074, 46ALR1173.

1016-15 17F(2d)831.

1016-16 16F(2d)712; 35F(2d)355; 95 Fla42, 115S519; Fla 130S617; 216Ky 842, 288SW755. [f] 14F(2d)507. [g] 35F(2d)355; 210Ky299, 275SW866; 231 Ky505, 21SW(2d)828; 128 Okl 162, 261 P545. [h] **Affidavit that judge will not afford** impartial trial held to cover disqualification by relationship to deceased. 218Ky675, 291SW1047.

1016-17 216Ky842, 288SW755.

1017-18 216Ky842, 288SW755.

1017-19 16F(2d)712; 17F(2d)831; 216 Ky842, 288SW755.

1017-20 14F(2d)369; 14F(2d)507; 94 Fla185, 114S517.

1017-22 121 Or451, 255P897, 900 [cit CJ].

1017-23½-New. Judge passes on sufficiency of affidavit of bias or prejudice. 17F(2d)831.

1017-26 14F(2d)507; 17F(2d)831; 121 Or451, 255P897, 900 [citCJ].

1017-27 17F(2d)831.

1017-29 125 Okl 66, 256P704, 52ALR 1270.

1017-34 322Mo 48, 14SW(2d)447.

1017-35 Mo 29SW(2d)125.

1017-37 174Ark1127, 298SW507, 510 [quotCJ].

1017-38 29Ariz60, 239P506; 174Ark 1127, 298SW507, 510 [quotCJ]; 149Miss 718, 115S879.

1017-39 174Ark1127, 298SW507; 29 Hawaii560; 140Miss340, 105S753, 42 ALR1525. [a] **Evidence held sufficient.**-103TexCr293, 280SW216.

1017-43 198Cal 373, 245P814.

1017-45 17F(2d)831; 29Ariz60, 239P 506; 94Fla185, 114S517; 149Miss718, 115S879.

1017-46 33F(2d)577 (cannot pass upon truth or falsity of facts); 35F(2d)355. See also 96Fla277, 118S5. [a] **Judge may use his judicial knowledge** to determine sufficiency of affidavit. 17F(2d) 831. [b] **Every allegation of fact** must be taken as true by judge when set out upon affiant's belief. 17F(2d)831.

1017-47 See also 26F(2d)444. [a] (4) Where party requests recusation because of interest, judge has right to be informed of how he is interested. 161La 882, 109S536. (5) But if judge denies interest, he must refer motion to another judge. 161La882, 109S536. (6) On motion based on interest and relationship, question of interest should first be determined in view of resulting difference in procedure. La 109S506. [b] **In Florida.**-95Fla42, 115S519. [c] **Statute inapplicable to summary contempt proceeding.**-CalA 290P293.

1018-50 125 Okl 24, 256P681.

1018-50½-New. Demurrer to challenge admits facts but denies their legal sufficiency. 103NJL246, 136A164.

1018-50¾-New. Where jurisdiction of judge of one circuit depends on disqualification of judge of another, former may

not adjudicate latter's disqualification. 94Fla185, 114S517.

1018–50¼–New. Where judge challenged for erroneously entering order that he is not disqualified, statute does not authorize another judge peremptorily to assume jurisdiction. 94Fla185, 114S517.

1018–51 14F(2d)507; 33Ariz383, 265P609; 94Fla185, 114S517; 95Fla42, 115S519; 322Mo 48, 14SW(2d)447; Mo 24SW(2d)1008; Mo 29SW(2d)125.

1018–55 17F(2d)831; 33Ariz383, 265P609; 84Colo 367, 270P663; 204 Iowa 1306, 214NW743; 120 Okl 12, 249P920. [c] **In Utah.**–269P1000.

1018–56 [a] **Defendant cannot disqualify all ten judges** in circuit for prejudice in murder case. Mo 30SW(2d)750.

1018–57 17F(2d)831.

1018–58 17F(2d)831. [a] **Where, in denying application for change of venue,** court is acting within its jurisdiction, the decision is not subject to collateral attack. 21F(2d)881.

1018–59 118 Oh487, 161NE532.

1018–60 94Fla185, 114S517; 120 Okl 12, 249P920.

1018–62½–New. , but correctness of court's ruling on motion to vacate bench must be measured wholly by affidavits filed. 210Ky299, 275SW866.

1018–63 120 Okl 12, 249P920.

1018–65 [a] **Not subject to collateral attack.**–21F(2d)881.

1018–65½–New. A judge's refusal to testify as a witness, which would disqualify him to preside at the trial, held not error where the testimony could not have changed the result of the contest. 153Va437, 150SE389.

1018–65¾–New. Where facts are undisputed, disqualification of judge is question of law. CalA 290P662.

1018–66 142 Okl 115, 285P951.

1019–79 Miss 114S353. [b] **Burden of proof** of waiver of judge's disqualification is on party asserting it by showing facts on which he relies. 29Ariz60, 239P506. [c] **Intervener is not bound** by stipulation of original parties naming disqualifications of judge. 195Cal 111, 231P726.

1019–84 29Hawaii438; TexCivA 1SW(2d)732.

1019–85 26 OhNPNS476.

1019–86 125 Okl 1, 256P340, 345 [cit CJ].

1019–87 148Miss599, 114S395; 125 Okl 1, 256P340.

1019–88 117 Oh481, 159NE594, 57ALR284.

1019–89 148Miss599, 114S395.

1019–91 146Miss533, 112S675; 153 Tenn469, 284SW372.

1019–93 153Tenn469, 284SW372.

1019–94 146Miss533, 112S675.

1020–98 [d] **In criminal case** disqualification of judge to preside at trial under constitutional or statutory provision because of having been counsel in cause cannot be waived by parties. 153Tenn206, 281SW151.

1020–3 40GaA496, 150SE464. [d] 29 Ariz60, 239P506 (common knowledge in county of venue that judge was indebted to plaintiff no ground of implied waiver as to nonresident); TexCommnA 24SW(2d)391.

1020–6 36GaA636, 137SE909.

1020–7 8F(2d)840; 29Ariz60, 239P506; 95Fla775, 116S618; 225Ky135, 7SW(2d)836; 233Ky501, 26SW(2d)43; 146Miss533, 112S675; 149Miss219, 115S436; 9 PaDist&Co 258; 46Philippine374. See 101Vt195, 142A762.

1020–15 32Ariz307, 257P986, 56ALR169; 55ND892, 215NW680.

1021–16 36 OklACR157 [citCJ]; 247 IllA313; 83Mont377, 272P553; TexCommnA 24SW(2d)391; TexCivA 1SW(2d)732; TexCivA 8SW(2d)571.

1021–17 32Ariz318, 257P985.

1021–19 163Ga825, 137SE244; 309Mo465, 274SW731 (judge not divested of power to order executions for fines imposed by judgments of conviction).

1021–29 [b] **In Utah.**–269P1000.

1021–31 308Mo 390, 272SW940. [a] **In Oregon.**–124 Or351, 264P463.

1021–33 116 Or459, 241P383.

1021–37½–New. A defendant in a criminal prosecution who has obtained a change of venue, on the ground of bias, from a judge of another division of the trial court to a judge of another division is not entitled to another change of venue from the judge of the latter division on the same ground. 311Mo 391, 279SW23.

1022–42 41GaA587, 153SE785(2dcase); 125 Okl 1, 256P340, 345 [citCJ]; 36 Okl ACR157 [citCJ].

1022–45 168Ga738, 148SE913; 310Mo500, 276SW625 (judge who was related to deceased and had been retained to assist in prosecution competent to receive indictment in the case).

1022–48 36F(2d)882; 29Ariz60, 239P506; 148Miss599, 114S395; 125 Okl 1, 256P340, 345 [citCJ].

1022–49 29Ariz60, 239P506; 125 Okl 1, 256P340, 345 [citCJ].

1022–50 125 Okl 1, 256P340, 345 [cit CJ].

1022–51 29Ariz60, 239P506; 125 Okl 1, 256P340, 345 [citCJ].

1022–52 29Ariz60, 239P506.

1023–57 149Miss718, 115S879, 882 [cit Cyc].

1023–58 29Ariz60, 239P506.

1023–59 NM 290P798.

1023–60 36GaA636, 137SE909.

1023–64 89Fla388, 104S598; TexCivA 283SW618.

1023–65 CalA 286P492; TexCivA 297SW265; TexCivA 1SW(2d)732; 111TexCr54, 10SW(2d)728.

1023–72 TexCivA 283SW618.

1023–73 92Fla1019, 111S118.

1024–86 317Mo 751, 297SW378.

1024–91 317Mo 751, 297SW378.

1024–93 161Tenn557, 30SW(2d)274.

1024–95 200Cal 522, 254P896; 310Mo500, 276SW625; 316Mo 1152, 295SW568; MoA 293SW798; 132 Or185, 284P825. [a] **Statute providing that temporary justice be member of same political party** as justice to whose office he has been appointed held unconstitutional. 227AppDiv246, 237NYS248.

1024–4½–New. Congress has authority in a created judicial district to assign a judge from another district thereto. 15F(2d)496.

1024–4¾–New. A statute providing for the appointment of a temporary judge pending a contest of election for the office is not violative of the constitutional provision that an officer shall hold office until his successor is elected or appointed and qualified. 154Tenn435, 288SW728.

1025–5 [a] (3) Statute authorizing appointment of temporary judge pending election contest held applicable only to judges in state courts. 154Tenn624, 288SW731.

1025–25 99TexCr634, 271SW334.

1025–28 317Mo 1078, 298SW83; 112TexCr176, 15SW(2d)628 (whether selected by agreement or otherwise).

1026–40 TexCivA 8SW(2d)571.

1026–55 TexCivA 7SW(2d)895; TexCivA 8SW(2d)571; 35Wyo 430, 251P460.

1026–58 253NY243, 170NE905.

1027–62 [b] **In contempt proceedings** judge on whom attack has been made may properly invite another judge to sit. 267US517, 45SCt390, 69Led767.

1027–63½–New. Under some statutes the governor is not authorized to appoint a temporary judge pending a contest of election for the office of county judge. 154Tenn624, 288SW731.

1027–65 MoA 272SW99.

1027–66 TexCivA 8SW(2d)571.

1027–69 TexCivA 278SW250; 110TexCr206, 7SW(2d)1086. [b] (2) Statute providing judge shall be considered absent while serving by requirement of law in another court does not apply to other causes of absence. 317Mo 426, 297SW358.

1027–70 91Fla670, 108S675; 130Kan754, 288P761; 234Ky268, 27SW(2d)946; TexCivA 278SW250.

1028–73 TexCivA 278SW250; TexCivA 8SW(2d)571.

1028–77 Utah 269P103.

1028–89 [a] **Special judge should not be elected** to preside at trial until case is pending in court. 100WVa599, 131SE353.

1028–90½–New. The selection may be made on the fourth day, although the court is adjourned from the first day and the statute provides for an adjournment from day to day. 110TexCr206, 7SW(2d)1086 (where adjournment was not for term).

1029–9 35 OhA418, 172NE551(2dcase).

1029–13 [b] **In Utah.**–269P103.

1029–22 202Cal 400, 261P476; 317Mo751, 297SW378.

1029–23 TexCivA 278SW250; TexCivA 8SW(2d)571; 104TexCr661, 285SW617. But see MoA 293SW798. [b] **In Texas.**–CivA 278SW250.

1030–24 100TexCr480, 273SW842.

1030–25 103WVa282, 137SE227.

1030–29 112TexCr176, 15SW(2d)628.

1030–32 TexCivA 8SW(2d)571; 103WVa282, 137SE227. But see 100TexCr480, 273SW842.

1030–32½–New. Judge is properly chosen where, from a list of five submitted by court, attorneys for parties each strike two names. 199 Ind129, 154NE802.

1030–32¾–New. The agreement must be entered in the proper order book of the court. 103WVa282, 137SE227.

1030–34 200Cal 522, 254P896. [a] **Statute authorizing temporary appointment** held not unconstitutional as providing dual method of choosing justices, or shortening terms. 253NY243, 170NE905.

1030–35 200Cal 522, 254P896.

1030–36 98Fla999, 124S457. See also 200Cal 522, 254P896.

1030–39 162Ga153, 132SE768; 166Ga611, 144SE19. [a] **Validity of selection by clerk.**–166Ga611, 144SE19.

1030–41 TexCivA 278SW250; 105TexCr341, 288SW452; 105TexCr342, 288SW450. [a] (2) In some jurisdictions certification must be made by clerk upon motion or request of one of parties. 198 Ind207, 151NE610. [b] **Recitals in governor's order.**–91Fla670, 108S675. [c] **Entry of order of resident circuit judge certifying his disqualification** is not necessary prerequisite to governor's authority to appoint another judge. 91Fla670, 108S675. [d] **Effort of parties to agree on judge** is condition precedent to validity of appointment by governor. TexCivA 7SW(2d)895.

1030–41½–New. or by the chief justices of the supreme court. 200Cal 522, 254P896.

1030–41¾–New. In some jurisdictions the appointment of special judge must be made within a certain time after the bench has been vacated. 198 Ind207, 151NE610.

1030–41¼–New. This provision is construed to prevent either party from moving for appointment by the governor within that time, 198 Ind207, 151NE610.

1030–41⅛–New. but that such limitation does not pertain to an appointment by the regular judge unless and until either party has moved clerk by proper request after lapse of time limited from time bench had been vacated. 198 Ind207, 151NE610.

1030–43 198 Ind207, 151NE610.

1030–46 317Mo 751, 297SW378.

1031–52 198 Ind253, 151NE697.

1031–52½–New. Where a letter specifying the cases in which a special judge is to preside is signed by the governor and refers to and accompanies a written commission, there is a substantial compliance with a statute requiring specification of cases. 210Ky385, 275SW819.

1031–52¾–New. Executive order need not specify reason other than that necessity exists. 99Fla673, 127S331.

1031–53 110TexCr206, 7SW(2d)1086; 103WVa282, 137SE227.

1031–54 MoA 25SW(2d)499 (one elected held qualified, though regular judge failed to make effort to obtain judge from another circuit as required by statute); TexCivA 278SW250.

1031–54½–New. Under some statutes notice stating the time, place, and cause of holding such election must be issued by the clerk of the court. 100WVa555, 131SE264; 103WVa282, 137SE227.

1031–54¾–New. Such notice must be served upon at least one of the attorneys of record for each of the parties

to the cause in such manner as to give them reasonable opportunity to attend. 100WVa555, 131SE264; 103WVa282, 137SE227.

1031-54¼-New. The clerk of the court must declare the result of the election and enter it of record. 103WVa282, 137SE227.

1031-56 100WVa555, 131SE264; 103WVa282, 137SE227. [a] (4) Where election was properly held fact that regular judge made no effort to procure another judge is immaterial. Mo 12SW(2d)53. [b] **Nunc pro tunc order reciting that regular chancellor failed to appear for holding of** adjourned day of court, and that another was duly elected special chancellor in accordance with provisions of constitution, and entered upon his duty as such, is held sufficient. 173Ark1019, 14SW(2d)245(2dcase).

1035-57 216Ky761, 288SW701.

1031-58 216MoA644, 271SW875, 878 [quotCJ].

1031-59 216MoA644, 271SW875, 878 [quotCJ].

1031-60 MoA 25SW(2d)499.

1031-69 95Fla412, 116S475.

1031-74 [a] **In North Dakota.**-49ND 117, 190NW309.

1032-77 See also MoA 12SW(2d)761.

1032-79 [d] **Recital in order directing judge to hold regular or special term** is not essential. 95Fla412, 116S475.

1032-80 [b] **Entry on minutes not necessary.**-166Ga611, 144SE19.

1032-85 195Ind620, 148NE602 (statute establishing pay of special judges held applicable also to special judges in city courts). [a] **In South Dakota.**-226NW561 (moral turpitude not involved in promise of judge to give plaintiff business for serving as judge pro tempore).

1032-86 [c] **Change of venue.**-195Ind 620, 148NE602.

1032-87 [a] **Special judges entitled to compensation only for time actually served,** regardless of number of cases heard. 195Ind620, 148NE602.

1032-92 [a] **Powers of substitute judge as measured by stipulation.**-229AppDiv 413, 242NYS174.

1032-94 NC 155SE719.

1032-95 200Cal 522, 254P896; 98Fla 999, 124S457; 99Fla673, 127S331; 47 Ida149, 273P945; 160Tenn366, 24SW(2d)886.

1032-96 IndA 169NE89.

1033-3 99Fla673, 127S331.

1033-25½-New. Proceedings before a special judge selected by the consent of the parties where a regular judge is not disqualified are void. TexCivA 8SW(2d)571.

1034-34 [a] **District judge, participating with supreme court justices in hearing of case,** may participate in decision and in petition for rehearing after vacancy caused by death which was occasion of his being called has been filled. Utah 269P103.

1034-37 89IndA472, 166NE776.

1034-49 [a] (8) Regular judge sitting as special judge has power to sign bill of exceptions at subsequent term. 232Ky 267, 22SW(2d)914.

1035-50 228Ky294, 148SW(2d)1058. But see 317Mo1078, 298SW83.

1035-54 88IndA86, 163NE279.

1035-56½-New. A judge retains jurisdiction of a cause completed by him subsequent to a term where he is empowered to act until the disposition of all the matters before him during the term. 205Cal 260, 270P455.

1035-56½-New. Though judge pro tempore is appointed for definite term, he is authorized to try cases until regular judge resumes bench. 88IndA580, 169NE533.

1035-58 216Ky761, 288SW701.

1035-59 196Ind451, 148NE401.

1035-60 83Mont452, 272P998.

1035-61 97CalA676, 275P967; 198Ind 207, 151NE610; 309Mo465, 274SW731.

1035-64 139Okl128, 281P574 (fixing amount of decree). [a] **Granting of parole** is no part of trial whether deemed conditional suspension of sentence or conditional pardon. 309Mo465, 274SW731.

1035-65 58ND680, 227NW228 (orders).

1035-66 Contra 309Mo465, 274SW731.

1035-67 139Okl128, 281P574 (approving appeal bond).

1035-69 309Mo465, 274SW731 (upon determination of guilt or innocence of accused). [b] **Cannot parole accused.**-309Mo465, 274SW731. [c] **Judgment of conviction on plea of guilty** rendered by special judge ends his powers, after which he could not parole accused. 309Mo465, 274SW731.

1035-71½-New. Judge pro tempore loses jurisdiction of cause submitted under parties' agreement when provision establishing office is repealed. 202Cal 400, 261P476.

1036-76 198NC702, 153SE263.

1036-78 147Miss885, 113S552.

1036-87 See also TexCivA 6SW(2d)414.

1036-2 93Fla693, 112S462.

1037-3 93Fla693, 112S462. But see 33NM318, 267P70. [a] **Record held sufficient.**-113TexCr532, 22SW(2d)921.

1037-4 [a] (2) 317Mo426, 297SW358.

1037-8 See also 4LaA467.

1037-10 TexCivA 18SW(2d)722.

1037-12 34PortoRico435.

1037-24 104TexCr661, 285SW617.

1038-27 130Kan754, 288P761.

1038-36 But see TexCivA 7SW(2d)895.

1038-39 130Kan754, 288P761; TexCr 31SW(2d)653.

1038-43 88IndA86, 163NE279; 228Ky 294, 14SW(2d)1058.

1039-46 IndA 169NE533; 113TexCr 532, 22SW(2d)921.

JUDGMENT CREDITOR

1040-25 [c] **Plaintiff recovering judgment for alienation of affections** has been held "judgment creditor" under New York statutes. 137Misc420, 242NYS308.

JUDGMENT DEBTOR

1041-27½-New. Defined to mean the agent minor child or ward in a case where the judgment is entered against a principal parent or guardian because of the operation of a motor vehicle by such agent child or ward. 251Mass617, 147NE680.

JUDGMENTS

1047-1 284Pa455, 131A265; 7PaDist&Co 273, 275 [quotCJ]; 141SC290, 139SE 633. [b] (1) 7F(2d)855. (18) 46Philippine542. (19) Judgment is judicial act declaring court's decision of law. TexCivA 18SW(2d)681.

1048-3 [a] (2) 217AppDiv55, 216NYS 466.

1049-10 See also 13CustA579, 583 [cit CJ]. [a] (1) 115Nebr260, 212NW431, 51ALR237; 127Okl3, 259P256. [e] **Final order in habeas corpus proceedings after trial** is judgment, or if not judgment decree for payment of money in court of record. 126Misc103, 213NYS 476.

1050-11 217AppDiv55, 216NYS466.

1050-12 217AppDiv55, 216NYS467.

1051-21 [a] **Judgment does not create debt** but recognizes obligation and makes it executing. 159La576, 105S626.

1051-21½-New. Judgments rendered by courts of competent jurisdiction fix and determine the rights of the parties to proceedings. 70Utah296, 259P1044, 54ALR1463.

1051-23 83CalA25, 256P603.

1051-24 [a] (4) Opinion of court is not judgment. 7F(2d)855.

1052-27 [a] (3) Entire judgment reversed when error only in judgment on counterclaim. 102NJL268, 132A247.

1052-28 TexCivA 3SW(2d)835.

1052-33 83Colo518, 266P1110; 204Iowa1186, 216NW769, 771 [citCJ]; 80Mont339, 260P401, 404 [quotCJ]; 114Okl47, 242P234 [quotCJ]. [e] **Court speaks through judgment, not opinion.**-242Mich225, 218NW757.

1053-36 13CustA451, 455 [citCJ]; 13CustA579, 583 [citCJ]; 80Mont339, 260P401, 404 [quotCJ]; 114Okl47, 242P234 [quotCJ].

1053-37 80Mont339, 260P401, 404 [quotCJ]; Utah 276P159.

1053-38 80Mont339, 260P401, 404 [quotCJ].

1053-39 80Mont339, 260P401, 404 [quotCJ].

1053-41 80Cal166, 22P86; 1Nev110, 114; 7DalyNY95, 99, 53HowPr25.

1054-44 215Ala348, 110S565 [quotCJ]. [b] (3) **Tax sale judgment** has been held final judgment. TexCivA 22SW(2d)688.

1055-54 7F(2d)855; 196Cal439, 238P357; 79CalA669, 251P247; 252IllA203.

1056-65 TexCivA 29SW(2d)461; 144Va 692, 130SE902 (especially consent judgments); 188Wis24, 205NW404.

1056-66 81CalA427, 254P606. [e] (2) Judgment for money recognizes old obligation and makes it executory. 159La576, 105S626. [f] **As creating debt.**-159La576, 105S626.

1057-72 219AppDiv312, 219NYS628.

1059-93 See also 6LaA577.

1060-12 164Ga440, 138SE910.

1061-30 20F(2d)803, 808 [citCJ]; 175Ark253, 299SW44; 125Me206, 132A421; 261Mass261, 158NE662; TexCommnA 12SW(2d)961; TexCivA 18SW(2d)425. See also 94Fla236, 113S730, 734 [citCJ]; 128Misc456, 219NYS135; TexCommnA 13SW(2d)73. [a] (9) Judgment is final which decides case on its merits, without reservation for other and future directions of court. 197NC452, 149SE 585(2dcase). [e] (5) Order confirming sale of property in creditors' suit for settlement of estate and sale of decedent's property is final order. 215Ky 186, 284SW1020. (6) Judgment abating action. 80CalA433, 251P935. (7) Judgment in action for personal injuries. 165La606, 115S796. (8) Judgment on application by way of originating notice to determine right of person to share as beneficiary of estate is final. Sask [1929] 3DomLR80. [f] (10) Other illustrations of interlocutory judgments. 51Nev162, 271P691; 297Pa74, 146A569. [i] **Judgment is final even if subject to reversal on appeal.**-128Misc456, 219NYS 135.

1062-32 125Misc538, 211NYS401.

1063-36 218Ky666, 291SW1019. [a] **Equity decree.**-322Mo281, 15SW(2d)809.

1063-39 TexCommnA 276SW218.

1063-47½-New. Only one final judgment can be entered in a cause. TexCivA 286SW584.

1063-47⅓-New. There must be some point in every court proceeding when the cause is finally disposed of, unless the party is brought in again by some appropriate new process. 96Fla756, 119S131.

1063-48 232IllA359.

1064-49 145Miss566, 110S591; 82Mont 141, 265P710.

1064-59 [e] **Cannot be validated by** subsequent retroactive statute. 83Mont 282, 272P543(2dcase).

1064-60 Mont 289P1035.

1064-61 220MoA825, 278SW1047, 1049 [quotCJ].

1064-62 284Pa455, 131A265.

1065-72 [d] **Failure to give notice adjourning case** does not render judgment void. 136Misc56, 239NYS128.

1066-73 195Cal364, 233P337 (act authorizing holding of sessions of superior court of Los Angeles County at Long Beach is unconstitutional).

1066-74 [a] **Time and place** are as essential to proper functioning of court as presence of duly constituted officers. 195Cal364, 233P337.

1066-78 [a] (1) 213Ky687, 281SW831.

1066-79 181Ark474, 26SW(2d)589 (grand jury room).

1067-81 107Conn380, 140A724 (before close of next term); 109Conn45, 145A 151; 247IllA358; TexCivA 16SW(2d)403.

1067-82 But see TexCivA 28SW(2d)1104.

1067-88 163Ga489, 136SE433.

1068-89 [g] (1) 151Miss734, 118S425. [i] **In Vermont.**-100Vt176, 136A22; 100Vt387, 138A867.

1069-94 156Miss8, 125S912(2dcase) (order during term time for submission for decree in vacation held sufficient evidence of consent); TexCivA 289SW 425.

1070-96 But see TexCivA 289SW425.

1071-14 117Oh481, 159NE594, 57ALR 284.

1072-20½-New. Judgment by two members of a court of appeals with a third member recused is valid. TexCivA 295SW679.

1072-21 [a] **In Mississippi.**–152Miss 120, 118S711.
1072-23 [a] **Irregularity of appointment** of judge does not make judgment void. 35 OhA418, 172NE551(2dcase).
1072-27 216Ky761, 28SSW701; **Tex CivA** 278SW250.
1072-28 TexCivA 278SW250.
1072-29 220MoA825, 278SW1047, 1049 [quotCJ].
1072-30 220MoA825, 278SW1047, 1049 [quotCJ]; 284Pa455, 131A265.
1072-31 29PortoRico 954; Utah 269P 135.
1073-33 20F(2d)425; 23F(2d)109; 24 F(2d)38, 41 [citCJ]; Ala 128S443; 89 CalA505, 264P1115; CalA 290P512; 91 Fla709, 109S677; 160Ga535, 128SE773; 333 Ill 267, 164NE685; 242 IllA508; 230 Ky191, 18SW(2d)1003; 255Mass132, 150 NE870; MoA 26SW(2d)816; 76Mont117, 245P539; 189NC703, 128SE20; 191NC 668, 132SE664, 666 [citCJ]; 194NC321, 139SE451; 25 OhNPNS161; 133 Okl 173, 271P833; 35 OklACR506; 284Pa 455, 131A265; TexCommnA 292SW174; TexCommnA 24SW(2d)813(3dcase); Tex CivA 282SW339.
1074-37½-New. Jurisdiction of court must be clear to uphold judgment obviously erroneous. 50SD232, 209NW355.
1074-38 318 Ill 174, 149NE14.
1074-43 34Ariz278, 271P25, 29 [citCJ]; 91Fla709, 109S677; 35GaA428, 133SE 306; 36GaA815, 138SE244; 318 Ill 174, 149NE14; 209Ky54, 272SW9; 220Ky 830, 295SW1027; 255Mass132, 150NE 870 (dictum); 131Misc401, 227NYS163; 25 OhNPNS161; 133 Okl 173, 271P833; 134 Okl 63, 272P878; 50SD232, 209NW 355; TexCivA 283SW177; TexCivA 291 SW645; 144Va692, 130SE902 (jurisdiction of person essential).
1075-45 233 IllA559; MoA 282SW739; 131Misc85, 226NYS263; TexCivA 283SW 177.
1075-47 253Mass205, 148NE609, 41ALR 658; 50SD232, 209NW355.
1075-48 96CalA460, 274P769.
1075-52 233Ky588, 26SW(2d)481.
1075-58 165La1005, 116S488; 309Mo 224, 274SW758.
1075-59½-New. Defendant becomes liable to personal judgment if being cited he does not except. 164La532, 114S148.
1075-59½-New. The court's jurisdiction over nominal parties binds not only the actual parties, but a subsequent encumbrancer. SD 226NW343.
1075-61 34Ariz278, 271P25, 29 [citCJ]; 91Fla709, 109S677; 164Ga162, 137SE 829; 328 Ill 472, 160NE76; 220Ky830, 295SW1027; 255Mass132, 150NE870; MoA 282SW739; 129Misc283, 221NYS 462; 135Misc134, 237NYS106; 189NC 703, 128SE20; 25 OhNPNS161; 133 Okl 173, 271P833; 134 Okl 63, 272P878; 135 Okl 57, 275P327; TexCommnA 25SW (2d)820; TexCivA 278SW247; TexCivA 291SW645; 144Va692, 130SE902 (divorce decree transferring realty to wife valid only so far as court had jurisdiction of subject matter).
1076-62 164Ga162, 137SE829; 47 Ida 560, 277P554(1stcase).
1076-70 25 OhNPNS161; 133 Okl 173, 271P833; 134 Okl 63, 272P878, 879 [quot CJ]; 144Va692, 130SE902.
1076-71 29Ariz51, 239P299; 34Ariz278, 271P25, 29 [citCJ]; 220Ky830, 295SW 1027; 133 Okl 173, 271P833; 134 Okl 63, 272P878, 879 [quotCJ]; 54SD277, 223NW50; TexCommnA 18SW(2d)1086, 1087 [citCJ]; 67Utah371, 248P83; 144 Va692, 130SE902. [b] **Judgment correcting errors and restoring parties** to former positions is authorized where court has jurisdiction of subject matter and parties. 318 Ill 174, 149NE14.
1077-72 133 Okl 173, 271P833; 136 Okl 146, 276P762; 136 Okl 150, 276P765; 35 OklACR506; 67Utah60, 245P966.
1077-74 79CalA468, 250P195, 199 [quot CJ].
1077-75 79CalA468, 250P195, 199 [quot CJ]; 129Misc283, 221NYS462; TexCivA 293SW658, 659 [citCJ]; 144Va692, 130 SE902.
1078-79 137Wash262, 242P370.
1079-82 29Ariz51, 239P299, 300 [cit CJ]; 203Cal 306, 265P246; 91Fla709, 109S677; 218Ky846, 292SW513; 145 Miss31, 110S857; 82NH159, 131A155, 42 ALR757; 36 OklACR362; TexCivA 280 SW243, 244 [citCJ]; Utah 289P132; 141Wash389, 250P106. [a] (5) Judgment on false testimony. 83Colo 282, 264P662.
1079-83 36 OklACR362.
1079-92 215Ala328, 110S566; TexCivA 287SW299; TexCivA 10SW(2d)261(2d case). See also 13F(2d)740; 151Val43, 144SE606.
1079-93 CalA 293P117.
1079-94 203Cal 306, 265P246; 35GaA 428, 133SE306; Ga 155SE8; 211Ky799, 278SW121; 214Ky400, 233SW410; 218 Ky93, 290SW1061; 160La790, 107S576; 160La1089, 108S100; 10LaA379, 120S 905; 169La1022, 126S513(2dcase); 253 Mass205, 148NE609, 41ALR658; 246 Mich465, 224NW630; 153Miss796, 121 S823; 317Mo 1078, 298SW83, 88 [cit CJ]; MoA 283SW59; 81Mont442, 264 P108; 135Misc134, 237NYS106; 137 Misc258, 244NYS448; 189NC703, 128SE 20 (failure to obtain jurisdiction because of lack of service of process); 192NC 422, 135SE127; 195NC484, 142SE706; Oh 171NE92; 128 Or64, 264P439; 132 Or252, Z84P279; 51Philippine980; 48 RI 267, 137A221, 222 [citCJ]; TexCivA 283SW177; TexCivA 283SW914; Tex CivA 286SW598; TexCivA 9SW(2d)407; Utah 263P751; 57 OntL353, [1925] 3 DomLR1018. [a] (3) In suit to enjoin trespass, judgment for costs against defendant, who was never served with process and did not answer, is erroneous. 143Va57, 129SE251. [g] **Where no summons was executed** on defendant on cross actions to enforce mechanics' liens, though cross petitions prayed for personal judgments, decree giving liens only was held valid. 220Ky830, 295SW 1027. [h] **Service in cross action after plaintiff's nonsuit.**–TexCivA 288SW584. [i] **Decisions on collateral questions** where parties are before court are not within rule. 203Cal 306, 265P246.
1080-95½-New. ... or waives service of process. 57 OntL353, [1925] 3DomLR 1018.
1080-96 244Mich456, 221NW614; 320 Mo 20, 6SW(2d)597; 57 OntL353, [1925] 3DomLR1018. [d] (4) Other instances. 232Ky333, 23SW(2d)545.
1080-96½-New. A judgment in a mortgage foreclosure suit is not void, because there was no process under a cross-petition of defendant asserting a homestead. 226Ky261, 10SW(2d)824.
1081-97 181Ark1140, 29SW(2d)1077; 108Conn13, 142A389; 154Md226, 140A 62; 48RI 267, 137A221; TexCivA 270 SW1079; TexCivA 284SW303; TexCivA 286SW598; TexCivA 299SW458. See also 13F(2d)740. [c] 168Ark570, 270 SW955. [e] **Judgment sustained as in effect original suit** upon service of the last summons not purporting to be an alias. 161Tenn155, 25SW(2d)580.
1081-1 [b] (2) Notice in foreclosure action notifying assignor of note and mortgage that no demand was made against him except as disclosed in petition which prayed only to have lien held by him declared subsequent to that of plaintiff's does not give court jurisdiction to render personal judgment against such assignor for fraud. 200 Iowa1129, 206NW33.
1082-4 274US352, 47SCt632, 71Led 1091; 211Ky799, 278SW121; 136 Okl 286, 277P930(2dcase); 57 OntL353, [1925] 3DomLR1018. [c] 205 Iowa227, 217NW626. [e] **Service held sufficient** to authorize personal judgment. 230Ky 365, 19SW(2d)983.
1083-9 Ill 173NE486.
1083-11 161Ga457, 131SE172; 42 Ida 479, 246P1; 128Misc309, 219NYS333; 194NC48, 138SE405; 127 Okl 295, 260P 745.
1084-14 48 Ida147, 279P1090 (where affidavit of attachment irregular but not void); 191NC166, 131SE648, 44ALR 610; 153Tenn380, 284SW354.
1084-15 161Ga457, 131SE172.
1084-15½-New. Where affidavit, on which order of publication is based, is defective in mode of statement or sufficiency of proof, resulting judgment is not void. 126Misc326, 215NYS1 (voidable on direct attack only).
1084-17 Iowa 231NW671; 54SD170, 222NW665; TexCivA 286SW315.
1085-19 54SD170, 222NW665; Tex CivA 286SW315.
1085-27 TexCivA 281SW349.
1085-29 244NY182, 155NE93; 248NY 261, 162NE73; TexCivA 281SW221. [a] (3) To sustain personal default judgment against foreign corporation, it must appear that it is doing business in state and has been served with process or voluntarily appeared. 226Ky159, 10SW(2d)633.
1085-30 145Miss627, 111S155; 157 Miss810, 128S877; 244NY182, 155NE 93.
1085-31 274US352, 47SCt632, 71Led 1091; 167Ga144, 145SE87; 324 Ill 276, 155NE288; Ind 172NE124; 220Ky504, 295SW457; 164La532, 114S148; 194 NC48, 138SE405; TexCivA 283SW265. But see 206 Iowa712, 221NW217.
1086-33 33F(2d)545; 34Ariz217, 270P 625; 168Ga182, 147SE494; Iowa 230 NW532; 128Misc778, 220NYS262; 135 Misc713, 238NYS207; 153SC496, 151SE 63.
1086-34 TexCivA 299SW457. See also 274US352, 47SCt632, 71Led1091.
1086-36 Ind 172NE124. See also 147 Miss717, 112S872.
1087-38 [b] **Evidence held sufficient** to show negligence on part of defendant. 176Ark737, 4SW(2d)528.
1087-41 Ala 127S505; 170Ga669, 153 SE737.
1087-41½-New. Transient. Judgment cannot be rendered against defendant on constructive service as transient unless he is in fact shown to be a transient. TexCivA 286SW598.
1087-43 324 Ill 276, 155NE288; 308Mo 547, 274SW30; 191NC166, 131SE648, 44 ALR610.
1088-47 92Fla360, 109S458; 154Miss 481, 122S535; MoA 287SW874; Tex CivA 293SW625.
1088-49 111Conn124, 149A246; 165La 587, 115S789; 253Mass205, 148NE609, 41ALR658; 156Tenn383, 1SW(2d)1013.
1088-51 150Va473, 143SE750.
1088-53 [d] 34GaA688, 128SE688.
1088-57 160La831, 107S590. [b] **Effect of void attachment.**–20 OhA209, 151NE 778.
1089-59 22AlaA595, 118S229; 160La 1089, 108S100; Miss 130S302; 10Mont 311, 25P1032; 140NC310, 53SE755; 193 NC568, 137SE718; 194NC48, 138SE405; 195NC484, 142SE706; TexCivA 20SW (2d)413 (foreign corporation garnishee). But see TexCivA 20SW(2d)413. [b] (3) 42F(2d)362. (4) Attachment is prerequisite to render default judgment against nonresident. 131Misc462, 227NYS194. [d] **Where indebtedness of garnishee is not of requisite nature** court acquires no jurisdiction of nonresident debtor and decree against nonresident and garnishee is void. 157Miss810, 126S399.
1089-61 35F(2d)829.
1090-67 10LaA435, 121S320; 220MoA 970, 272SW373 (void alias); 51SD249, 213NW14, 15 [quotCJ]; 156Tenn383, 1 SW(2d)1013; TexCivA 275SW286; Tex CivA 275SW287; TexCivA 285SW 695; TexCivA 27SW(2d)916 (provisions as to citation held mandatory); TexCivA 32SW(2d)488(2dcase). [b] (1) TexCivA 21SW(2d)54(1stcase). (2) 152Miss4, 119S911(1stcase). (21) Alias summons when not tested at return term of preceding summons. 220 MoA970, 272SW373. (22) Citation containing wrong file number. TexCivA 17 SW(2d)144(3dcase). [e] (1) TexCivA 24SW(2d)518. (4) Citation commanding officer to summon named person as officer of corporation will not sustain default judgment against corporation although served on agent. TexCivA 24 SW(2d)518. [f] (11) Original notice directed to and served on "Frank Genero" confers no jurisdiction to enter judgment by default against "Frank Geneva." 200 Iowa1173, 206NW132. [k] **Original notice, not signed** by plaintiff or attorney is nullity. Iowa 231NW440.
1091-68 32F(2d)625. [a] (9) Original notice was sufficient notwithstanding failure to state date on which term would convene. Iowa 231NW440. [b] (4) That answer date is fixed at same date as summons constitutes irregularity not rendering judgment void. 121 Okl 186, 249P343. [e] (2) 19 OhA127.

[1] (3) **Publishing in wrong paper, and erroneously naming such paper in copy of order as served.** 221**AppDiv**280, 223 **NYS**329.

1092–76 10**LaA**121, 121**S**377; 315**Mo** 276, 286**SW**3; 121 **Okl** 186, 249**P**343, 344 [quotCJ]; **TexCommnA** 276**SW**887.

1093–77 [a] (7) Service of citation on opening day of term in violation of statute confers no jurisdiction over person. **TexCommnA** 6**SW(2d)**89. (8) Delivery of summons and complaint to director of corporation instead of to person named in statute. 51**Nev**206, 273**P**659. (9) Other instances. **TexCivA** 28**SW(2d)** 608.

1093–78 [a] (8) Judgments irregularly entered in cases wherein nonresident suitors and witnesses are in attendance on trial and immune from process are voidable only. **Iowa** 230**NW**548.

1093–80 See also 160**Ga**583, 128**SE**744. [b] (12) Court will look at entire record, and, if it appears from all affidavits before court issuing process that essential facts to confer jurisdiction were duly sworn to, judgment will not be declared void. 127 **Okl** 56, 259**P**861.

1094–81 153**Wash**485, 279**P**1098 (where return of service was made in manner required by statute).

1094–83 **TexCivA** 276**SW**757. [c] **Where citation is not returned to clerk of court who issued it,** but mailed by sheriff to plaintiff's counsel who failed to return it to clerk's office till after filing of motion for new trial, court was without jurisdiction to enter default judgment. **TexCivA** 276**SW**757. [d] **Where sheriff's return is not indorsed on or attached to declaration,** as required by statute, judgment on default is void. 242**Mich**49, 217**NW**922.

1094–84 219**Ala**123, 121**S**412; 10**LaA** 435, 121**S**320; **TexCivA** 284**SW**303; **Tex CivA** 19**SW(2d)**847 (return must state what officer served); 144**Va**508, 132**SE** 310. [b] **Proof of service held defective.**–136**Wash**63, 238**P**992.

1095–85 219**Ala**123, 121**S**412. See also 93**Fla**337, 112**S**45. [a] **Default judgment** held properly entered where return was regular on its face. 39 **OklACR** 385.

1095–86½–New. Such an improper return renders a judgment voidable and not void. 284**Pa**32, 130**A**264.

1095–87½–New. A citation which may be good, although the return of service is irregular, or null, although the return is perfect, is an important legal fact on which the validity of the judgment rests, the return being simply evidence in respect thereto. 168**La**877, 123**S**605.

1095–89 35**GaA**428, 133**SE**306; 48**RI** 267, 137**A**221; **TexCivA** 283**SW**177; **Tex CivA** 286**SW**584.

1095–90 324 **Ill** 276, 155**NE**288.

1096–97 55**ND**253, 212**NW**931; **Tex CivA** 291**SW**919.

1097–9 128**Misc**352, 218**NYS**46.

1097–10 128**Misc**352, 218**NYS**46.

1097–12 277**US**274, 48**SCt**507, 72**L ed** 880; 80**Colo** 499, 252**P**816; 255 **IllA**314; 204 **Iowa**1195, 213**NW**264; 207 **Iowa**923, 223**NW**737.

1098–14 144**Va**113, 131**SE**217.

1098–15 207 **Iowa**505, 223**NW**182. [c] (1) 99**NJEq**843, 133**A**387. [d] 93**PaSuper**203. [f] 93**PaSuper**203. [g] 99**Fla** 782, 128**S**258 (hypothetical or theoretical questions).

1098–16 144**Va**113, 131**SE**217 (Australia and Canada). [a] (1) 59 **OntL**348, [1926] 4**DomLR**793. (3) Declaration of attorney's lien refused. 62 **OntL**374, [1928] 3**DomLR**879. [d] **In Manitoba.**–[1929] 3**DomLR**763.

1099–19 [a] (16) In action to quiet title against restrictions in deed and for declaratory judgment defendants are actors and are called upon to set forth their respective rights with reference to lot owned by each and other lots in tract as against plaintiff and each other. 201 **Cal** 555, 258**P**71. (17) In such action court has power to render whatever judgment, binding on defendants served, defining and determining their respective rights in tracts, as is fairly within issues tendered by complaint. 201**Cal** 555, 258**P**71. (18) Act applies in cases of actual controversy only. 125**Kan**558, 264**P**740. (19) **Refusal of relief for** each of jurisdictions without leave to amend and without pointing out where relief might be had is held error. 207 **Cal** 215, 277**P**487; 207**Cal** 786, 277**P**489. (20) Enjoining disposition of property as ancillary to relief sought in declaratory action is proper. 88**CalA**528, 264 **P**516. (21) Provision in trust agreement for payment of money conditioned on validity of trust is held not within requirements of statute as to declaratory judgment. 203**Cal** 641, 266**P**526. (22) Trial court's dismissal of wife's action against husband for declaratory relief relative to community property, under Code Civ. Proc. §§ 1060, 1061, is within court's discretionary power under statute, and not subject to review, where abuse of discretion is not shown. 206 **Cal** 254, 274**P**326. (23) Court will not act where nothing of public interest is involved nor any dispute. 97**CalA**12, 275 **P**253. (24) Complaint held sufficient. 94**CalA**88, 270**P**688. [b] (3) Under Declaratory Judgment Act, courts are not required to give general advice on matters which have not arisen at time jurisdiction is invoked. 80**Colo** 499, 252 **P**816. (4) Complaint under Declaratory Judgment Act does not state cause of action to determine validity of contract with board of regents of university where it does not show that question has arisen under contract. 83**Colo** 582, 267**P**407. (5) Under Declaratory Judgment Act (L. (1923) pp 268–270) action to determine validity of proposed plan of assessment to pay cost of constructing sewer improvements cannot be maintained in absence of final judgment by city or where all interested property owners are not parties. 85**Colo** 198, 274 **P**743. [c] (7) Where declaratory judgment is sought, pleadings should so state with precision. 107**Conn**117, 139**A** 703. (8) Rights of parties will be determined on facts found and court is not limited by issues joined or by claims of counsel. 107**Conn**656, 142**A**301. [d] 99 **Fla**782, 128**S**258. [f] (1) 124**Kan**728, 262**P**563; 125**Kan**88, 262**P**1032. (4) Declaratory judgment act not designed to question rights which have been exercised for years without controversy and on the faith of which vast sums have been expended. 126**Kan**764, 271**P**270. (5) In action for declaratory judgment, court is not warranted in making declaratory order on questions in which person not party to action is vitally interested. 127**Kan**72, 272**P**106. (6) Where facts are admitted. 130**Kan**749, 288**P**733. (7) Where petition sets forth facts showing actual controversy concerning matter covered by statute it is duty of court to proceed. 130**Kan**421, 286**P**230. (8) All persons interested must be made parties. 128**Kan**516, 279 **P**1. [j] (8) Declaratory judgment of legal right cannot be had in equity. 103 **NJEq**159, 142**A**560. (9) Other decisions. 98**NJEq**85, 129**A**617. [k] (1) 128**Misc** 232, 218**NYS**412. (2) Under Civ. Pract. Rules, rule 212 authorizing court in its discretion to decline jurisdiction for any reason, court will not entertain action where to do so would amount to reviewing validity of judgment of court of concurrent jurisdiction. 127**Misc**374, 216**NYS**278. (3) Jurisdiction in actions for declaratory judgment is discretionary. 246**NY**140, 158**NE**51. (4) In rendering declaratory judgment on rights of parties under note and contract governed by law of another state and secured by collateral there, court of forum after stating rights should not declare extent of enforcement to be given by other state. 246**NY**194, 158**NE**70. (5) Complaint held sufficient for declaratory judgment as to marital status where defendant procured colorable divorce in Mexico and procured alleged illegal marriage in Connecticut. 222**AppDiv**460, 226**NYS**576. (6) Discretion in declining declaratory judgment determining marital status should be exercised only on trial. 222**AppDiv**460, 226**NYS**576. (7) In refusing to pronounce declaratory judgment court should state grounds of refusal. 222**AppDiv**514, 227**NYS**26. (8) On lessor's election to terminate lease for lessee's failure to make structural alterations necessitated by encroachment, lessee is entitled to sue for declaratory judgment under Civil Practice Rules, rule 211. 131**Misc**365, 226 **NYS**702. (9) Lessee entitled to judgment as to right to sublet or assign lease. 132**Misc**366, 229**NYS**86. (10) Complaint under statute is held sufficient. 225**AppDiv**562, 234**NYS**2. (11) Fact that plaintiff cannot specify all possible legal rights does not defeat right to relief as to existing rights. 225**App Div**562, 234**NYS**2. (12) In passing on motion to dismiss complaint in action for declaratory judgment, only question is plaintiff's right to opportunity to allegations of pleadings and whether, if proved, court should enter some judgment. 225**AppDiv**562, 234**NYS**2. (13) In proceedings to obtain declaratory judgment establishing matrimonial status of plaintiff and one of defendants, court is without authority to enjoin defendants, whose marriage was declared null and void, from representing themselves as husband and wife, and from attempting or purporting to have marriage ceremony performed during plaintiff's life, or to restrain female defendant from assuming or using codefendant's surname. 250**NY**382, 165**NE**819. (14) Under Civil Pract. Act § 473, where defendants did not assent to plaintiff's termination of contract or its validity but claimed certain rights thereunder and plaintiff claimed rights under termination, declaratory judgment is proper. 134**Misc**129, 234**NYS**147. [n] **In Hawaii.**–(1) 27**Hawaii**420, 424 (Sess. L. [1921] act 162); 29**Hawaii**122. [o] **In Kentucky.**–209**Ky**723, 273**SW**552; 214**Ky** 400, 283**SW**410; 225**Ky**135, 7**SW(2d)** 836; 226**Ky**20, 10**SW(2d)**466; 229**Ky** 226, 16**SW(2d)**1039. [p] **In Virginia.**–144**Va**113, 131**SE**217 (Acts [1922] p 902); 147**Va**460, 137**SE**488, 51**ALR**1517. [q] **In Pennsylvania.**–284**Pa**455, 131**A** 265 (P. L. p 840; St. Suppl. [1924] § 12805a-1); 289**Pa**101, 137**A**132; 291**Pa** 507, 140**A**506; 294**Pa**368, 144**A**274; 297 **Pa**13, 146**A**262; 93**PaSuper**203; 5**Pa Dist&Co** 54; 7**PaDist&Co** 263; 8**PaDist &Co** 671; 8**PaDist&Co** 752; 13**PaDist& Co** 683. [r] **In Arizona.**–34**Ariz**13, 267 **P**412. [s] **In Oregon.**–129 **Or**530, 277**P** 1003. [t] **In Tennessee.**–158**Tenn**554, 13 **SW(2d)**795; 160**Tenn**170, 22**SW(2d)** 229; 160**Tenn**102, 22**SW(2d)**359

1101–23 34**Ariz**13, 267**P**412; 124**Kan** 728, 262**P**563; 129**Kan**365, 282**P**720 (action by newspaper publishers against probate judge for construction of statute giving requirements of newspapers entitled to publish legal notice held to present no actual controversy); 284**Pa** 455, 131**A**265; 96**PaSuper**434; 9**PaDist &Co** 392; 144**Va**113, 131**SE**217 (words "actual controversy" intended to prevent consideration of moot question); 145**Va** 568, 134**SE**570. [c] (3) Where declaratory judgment would not terminate uncertainty in controversy because necessary parties were not brought in, declaratory judgment should not be rendered. **Ariz** 283**P**281. (4) Nonresident owners of property in assessment district are necessary parties to action for declaratory judgment to determine controversies arising under paving contract pursuant to **Arizona** Street Improvement Act. **Ariz** 283**P**281. (5) Where it is apparent from face of complaint that nonresident owners of property in assessment district, not made parties, are necessary or indispensable parties to action to determine controversies arising under paving contract, demurrer to complaint should be sustained. **Ariz** 283 **P**281. (6) Other instances. 160**Tenn** 102, 22**SW(2d)**359. [d] **Proper parties.**–**Ariz** 284**P**350.

1101–24 **Ariz** 283**P**281; 284**Pa**455, 131 **A**265; 6**PaDist&Co** 431. [b] **Rendering declaratory decree is no less "judicial" act** when made before right invaded and no consequential relief granted. 99 **Fla**782, 128**S**258.

1101–25 **Ariz** 283**P**281; 88**CalA**528, 264 **P**516; 99**Fla**782, 128**S**258; 233**Ky**588, 26**SW(2d)**481; 102**NJL**590, 134**A**752; 284**Pa**455, 131**A**265; 5**PaDist&Co** 54; 144**Va**113, 131**SE**217. [a] (6) Appeal to United States Court of Customs Ap-

peals from findings and recommendations of Tariff Commission under Tariff Act (1922) § 316 calls for judicial judgment and is not in contravention of constitution. 16CustA191.

1101-26 284Pa455, 131A265; 8PaDist &Co 425; 144Va113, 131SE217. [a] **Except for coercive element there is no difference** between declaratory and other judgment. 99Fla782, 128S258.

1101-27 284Pa455, 131A265. [b] **Court may follow practice in other jurisdictions** where similar statutes are in force. 99Fla782, 128S258 (scope of declaratory judgment should be kept liberal).

1101-27½-New. A complaint reciting a dispute between the parties and asking for a declaration of rights of the parties has been held sufficient, as against a motion to dismiss at the opening of the trial. 128Misc768, 220NYS761.

1101-27½-New. A complaint seeking a declaratory judgment cannot be dismissed for insufficiency in advance of trial. 128Misc768, 220NYS761.

1101-27¼-New. In all jurisdictions where declaratory judgment practice obtains the rule is established that it is a matter of judicial discretion whether or not the jurisdiction will be taken of any particular case. 8PaDist&Co 235.

1101-27½-New. And that a proceeding to obtain such judgment will not be entertained where another statutory remedy has been specially provided for the character of the case in hand. 8PaDist &Co 235.

1101-28 [a] (45) Purchasers at executor's sale unauthorized by will but with approval of devisee since deceased may maintain chaneery suit to establish title as against children of devisee claiming undivided interests. 144Va113, 131 SE217. (46) Landlord held entitled to declaratory judgment determining respective rights under lease, where tenant sublet for term beyond original lease and failed to give timely notice of removal. 128Misc838, 221NYS269. (47) That sheriff could levy on alcohol. 5 PaDist&Co 633. [c] (1) 11PaDist& Co 102. [d] 132Misc217, 228NYS 539. [f] Ariz 284P350 (questions involved in action to determine validity of lease by city held real). [g] 99Fla 782, 128S258; 284Pa455, 131A265; 289 Pa101, 137A132; 6PaDist&Co 757; 13 PaDist&Co 634. [h] 102NJL590, 134 A752. [j] (1) 13PaDist&Co 201; 156 Tenn278, 300SW565; 156Tenn346, 1SW (2d)786; 157Tenn582, 12SW(2d)372. (5) Petition to construe Annexation Act held not within statute, petitioner having no special rights but only same as others. 6PaDist&Co 36. (6) Quo warranto, questioning right of electric light company to operate under franchise ordinance alleged to be void, held to present actual controversy. 129Kan592, 283P919. [m] 156Tenn595, 3SW(2d) 1062. [n] **Jurisdiction of orphan's court.**-11PaDist&Co 783. [o] **Declaratory judgment may be futile** when matter involved has already been determined by federal supreme court. 276US294, 48 SCt309, 72L ed580. [p] **The same formalities in the pleadings as in other cases** are observed. 10PaDist&Co 577. [q] **Where pleadings raise issue of fact** it must be determined before entering judgment. 9PaDist&Co 607. [r] **Declaratory judgments acts liberally construed.**-157Tenn582, 12SW(2d)372.

1101-28½-New. The courts will not entertain jurisdiction and award a declaratory judgment when it appears from the pleadings that the wrongful acts complained of have already been committed. 27Hawaii420.

1101-28½-New. and that a cause of action already exists, but will leave the party whose rights have been invaded to seek redress according to established methods of procedure. 27Hawaii420.

1101-28¼-New. Where another remedy is specifically provided petition for declaratory judgment will be dismissed. 96PaSuper488.

1103-29 45 Ida369, 263P988; 47 Ida135, 273P1; 220MoA825, 278SW1047, 1049 [quotCJ]. [c] 40 Ida638, 236P536. [f] **Judgment held sufficient,** where it ordered escrow holder to deliver on payment by plaintiff. 31Ariz267, 252P189.

1104-30 215Ala348, 110S565; 217Ky 87, 288SW1045; 310Mo 339, 275SW529; TexCivA 295SW214.

1104-31 160La430, 107S294.

1104-38 1LaA267.

1104-39 13CustA451, 455 [citCJ]; 13 CustA579, 583 [citCJ]; 15CustA206.

1105-40 83CalA18, 256P298, 299 [cit CJ].

1105-42 TexCivA 283SW189.

1105-45 MoA 15SW(2d)945; 220MoA 825, 278SW1047, 1049 [quotCJ]. [f] **Designation of parties.**-TexCivA 5SW (2d)579. [g] **Judgment against person in his assumed or trade name not void.**-170Ga757, 154SE262.

1105-54½-New. Failure to join all persons interested in the subject matter of the suit as parties does not render the judgment void. TexCivA 11SW(2d) 212.

1106-58 8F(2d)65; 214Ala32, 106S182; 177Ark681, 7SW(2d)325, 58ALR1124; 87CalA375, 262P48; 98CalA306, 277P 123; 99CalA74, 277P883; 81Colo 195, 254P779; 82Colo 313, 260P105; 97Fla 517, 121S562; Ill 173NE486; 243 IllA 159; 247 IllA440; 202 Iowa646, 210NW 793; 125Kan553, 264P1041; 226Ky326, 10SW(2d)1071; 229Ky510, 17SW(2d) 448; 234Ky591, 28SW(2d)787, 70ALR 335; 162La83, 110S97; 317Mo 228, 295 SW794; 220MoA1050, 279SW723; 127 Misc332, 215NYS374; 138Misc15, 245 NYS398; 49ND814, 193NW602; 23 OhA 273, 155NE573; 300Pa68, 150A90; 47 RI 359, 133A348; TexCivA 278SW501; TexCivA 280SW911; TexCivA 281SW 221; TexCivA 288SW609; TexCivA 11 SW(2d)605; TexCivA 14SW(2d)290; TexCivA 24SW(2d)796; Utah 271P225, 226 [citCJ]; Vt 146A417; 108WVa 665, 152SE533. [a] (4) Judgment could not be rendered against infant's father, not party to infant's suit to cancel trust deed, on cross-complaint charging fraudulent conveyance by him to plaintiff. 81Colo 195, 254P779. (5) Question as to propriety of exclusion of members of fraternity from trust benefits cannot be determined in suit to which they are not parties. 264Mass 343, 162NE691. [d] TexCivA 281SW 221. [j] (2) In some jurisdictions judgment awarding property to purchaser pendente lite from party may be rendered without substitution. 125 Or 507, 265P420.

1107-59 See also 32Porto Rico 278.

1107-66 14F(2d)33 [citCJ]; 214Ala 309, 107S812, 813 [citCJ]; 81Colo 459, 256P10; 229Ky109, 16SW(2d)771; 10 LaA707, 122S128; 2LaA359; 3LaA746; 310Mo 150, 274SW1075.

1107-68 14F(2d)33 [citCJ]; 229Ky 109, 16SW(2d)771; 147Va196, 136SE 597.

1108-69 TexCivA 27SW(2d)548.

1109-74 146Va442, 132SE839, 44ALR 1175.

1109-75 [a] (7) Civil Pract. Act § 478, providing that, if either party dies after interlocutory judgment, but before final judgment has been entered, court must enter final judgment in names of original parties, applies only to actions not abating on death of party. 133Misc373, 231NYS469.

1110-79½-New. Presumption of death from absence. Judgment, in a suit to recover land, against one who disappeared ten years before and has not been heard of since, and his unknown heirs, is valid, and vests all title in plaintiff. TexCivA 283SW330.

1110-92 Fla 130S432; 162Ga610, 134 SE603. [d] **Rule applied to judgments** in joint action to recover land. 162Ga 610, 134SE603.

1110-93 86CalA507, 261P747; CalA 285P1081.

1111-95½-New. Judgment for the wife alone, in a suit by the husband and wife jointly, for personal injuries to her, held final, being against the husband by necessary implication. TexCivA 282 SW305.

1111-95½-New. Where a landowner sued on behalf of himself and all others similarly situated who should come in and contribute to the expense of the action to have declared void and released a claim of a lien by defendant on lands of plaintiff for drilling wells, and before the trial the claim of a lien on plaintiff's lands was released and no other parties joined as parties plaintiff, the only decree that can be entered is one in favor of plaintiff. 47 Ida402, 276P305(2d case).

1111-98 97Fla679, 122S107(2dcase). See also MoA 296SW191.

1112-99 MoA 31SW(2d)86; Oh 172 NE157.

1113-13 161La641, 109S341; NJ 143 A864; OhA 173NE33; 300Pa37, 150A 162; 88PaSuper381; 143Wash229, 255 P123.

1114-16 [a] (1) 158La874, 104S747 (rendering judgment separately for defendant's proportionate share of damages, but in solido for costs). (2) Where plaintiff prays for judgment in solido judgment may be rendered against single defendant, if testimony discloses only one was at fault. LaA 130S648.

1115-18 Va 153SE711.

1115-18½-New. Process against joint tort-feasors. A joint judgment against three tort-feasors of whom two were not validly served is void under some circumstances. MoA 18SW(2d)106.

1115-22 227AppDiv32, 237NYS20.

1115-24 32Ariz381, 259P397.

1118-29½-New. Service of notice on all persons interested in deceased's estate is a prerequisite to a valid judgment. 128Me96; 145A896, 64ALR790.

1118-31 244NY182, 155NE93.

1118-34 TexCivA 280SW911.

1119-36 TexCivA 295SW245.

1119-40 226Ky261, 10SW(2d)824.

1120-51 244NY182, 155NE93.

1120-52 244NY182, 155NE93; 86Pa Super545.

1121-59 244NY182, 155NE93.

1122-73 138 Okl 15, 280P301.

1124-97 98Fla759, 124S49.

1124-8 TexCivA 283SW298. See also TexCivA 275SW603.

1125-11 LaA 130S645; 317Mo 1344, 300SW798; TexCommnA 285SW307. But see 216Ky674, 288SW301.

1126-13 315Mo 535, 286SW53.

1126-22½-New. Two judgments against vendor, broker, and surety may be consolidated into one judgment. 161La 1070, 109S841.

1126-22½-New. Where the liability sued on is joint and several, a joint and several judgment is proper. TexCivA 286SW633.

1126-23 254NY363, 173NE223.

1127-31 [b] **Where jury renders separate verdicts for same amount** judgment can only be entered for such amount against all defendants. 254NY363, 173 NE223.

1127-32 315Mo 535, 286SW53.

1127-35 98Fla759, 124S49.

1128-36 310Mo 339, 275SW529.

1128-37 98Fla759, 124S49.

1129-43 CalA 290P86.

1129-47 27 OhNPN533.

1129-53 38Wyo 223, 266P128, 131 [quotCJ].

1129-55 221MoA505, 282SW128; Tex CivA 295SW308. [a] **Judgments of both trials together held valid** final judgment, court having power to issue second judgment. TexCivA 295SW308.

1129-56½-New. In some jurisdictions separate parties may proceed to final judgment without waiting for judgments as to other parties where the court, in its discretion, permits them to litigate their controversy separately. 198Cal 525, 246P39.

1129-56¼-New. Judgment against city treasurer and surety for failure to pay unsecured deposit in an insolvent state bank, and against the bank and banking commissioner for such deposit under Guaranty Depository Law is not erroneous as allowing double recovery. Tex CivA 283SW213.

1129-56¼-New. Judgments taken together constitute final judgment. Tex CivA 295SW308.

1130-60 9PaDist&Co 143. [d] **Judgment in equity** may be valid as to one defendant and invalid as to another. 49 SD381, 207NW217.

1131-63 TexCivA 283SW914, 920 [quotCJ].

1131-67 127Misc421, 216NYS320; 134

Misc155, 235NYS118. [a] **Not in favor of plaintiff.**–127Misc421, 216NYS320.

1132–70 226Ky689, 11SW(2d)717; 246 Mich77, 224NW340; TexCivA 5SW(2d) 862.

1132–73 But see 9PaDist&Co 701.

1132–79 Tex 285SW637; TexCivA 272SW562 (county court); TexCivA 11 SW(2d)578.

1132–80 21AlaA441, 109S179; 93Fla 611, 112S768; 220Ky769, 295SW1039; MoA 273SW145; 133 Okl 140, 271P852, 854 [citCJ]; 115Tex158, 274SW563; Tex 285SW637; TexCivA 278SW326; TexCivA 300SW972; TexCivA 3 SW(2d)835; TexCivA 5SW(2d)552.

1132–83 93Fla611, 112S768; Tex 285 SW637; TexCivA 295SW297.

1132–85 35F(2d)859; Ida 288P416; 230Ky365, 19SW(2d)983; 129Misc643, 222NYS225, 227 [citCJ]; 133 Okl 140, 271P852, 854 [citCJ]; TexCivA 278 SW326.

1132–86 TexCivA 287SW299.

1132–87 [a] (2) Judgment in favor of interveners cannot be sustained on direct attack on appeal where judgment in their favor was entered without any pleadings having been filed in their behalf when trial began and without plaintiff in error having been given opportunity to offer any defense to intervention. 115Tex158, 274SW563.

1133–95 19F(2d)903; 99Fla371, 126S 759; Ida 291P1060; 213Ky670, 281SW 791; 220Ky476, 295SW440; 224Ky83, 5SW(2d)482; 229Ky109, 16SW(2d)771; 156Miss396, 124S437, 66ALR614; Miss 130S105; TexCommnA 296SW484; Tex CivA 272SW562; TexCivA 278SW326; TexCivA 278SW488; TexCivA 300SW 247; TexCivA 25SW(2d)627; TexCivA 32SW(2d)527(2dcase); 136Wash322, 239P1015. See also 228Ky737, 15 SW(2d)531. [a] (6) **Failure to plead waiver of exception in policy by insurer precludes sustaining judgment for insured.** TexCivA 278SW488. (7) Where default judgment was based on insufficient complaint. 136Wash322, 239 P1015. (8) In action by creditor to cancel bill of sale from debtor to wife, judgment held not supported by pleadings except as to property sufficiently described. 102CalA582, 283P866. [c] (3) Judgment by default rendered against defendant served outside of county is erroneous where petition does not state residence of defendant. Tex CivA 281SW349.

1133–96 80CalA393, 252P337; 86CalA 700, 261P492; 117 Okl 195, 246P472. But see 21AlaA441, 109S179. But see 168La682, 123S122, 65ALR706.

1134–1 89CalA209, 264P507; 220Ky 830, 295SW1027; 175Minn597, 222NW 281; NJ 143A736(2dcase); 191NC818, 133SE186, 187 [citCJ]; TexCivA 283 SW877 (pleadings held sufficient to support judgment); TexCivA 16SW(2d) 377; Utah 272P200. [a] (4) Judgment for sale of land not set aside for uncertainty because petition referred to land as "more fully" described in recorded deed. 161Ga374, 131SE161. [e] **Error in claim of cross claim** must be corrected by amending cross action. 222Ky561, 1 SW(2d)989.

1134–5½–New. A judgment is never void for defects in a petition which can be amended. Utah 272P200.

1134–5½–New. An admission in an answer of defendant may be sufficient to support a finding and judgment. 86 CalA142, 260P305.

1134–10 See also CalA 288P1086.

1135–22 TexCivA 278SW488; WVa 153SE148.

1135–25½–New. Where defenses were controverted by record, defendant's motion for judgment non obstante veredicto is properly overruled. 215Ky487, 284SW1107.

1135–26 247Mich590, 226NW229; Tex CivA 278SW488; TexCivA 10SW(2d) 412; 195Wis593, 219NW344. See also 226Ky261, 10SW(2d)824. [a] (4) Where merits are not presented because of defects in pleadings or evidence, with such fullness as to enable court to decide real questions involved, court should refuse to decree on merits until defects remedied. 100WVa585, 131SE 449.

1136–27 310Mo 339, 275SW529; Tex CommnA 286SW193; TexCivA 278SW 488; TexCivA 284SW228; TexCivA 13 SW(2d)146. But see TexCommnA 276 SW211. [d] **Cross action.**–TexCivA 290 SW299. [e] **Judgment held proper.**–CalA 288P110. [f] **Avoidance of multiplicity of suits.**–Mo 30SW(2d)49.

1136–29 TexCivA 271SW186 (rule applied to plaintiff).

1136–30 TexCivA 282SW958; TexCivA 6SW(2d)173.

1137–31 208Ky803, 272SW52 (also issues made by traverse of intervening petition).

1137–32 [a] **Disposition by implication.**–TexCivA 283SW298.

1137–37 20AlaA648, 104S891 (trial court must find every fact in issue essential to recovery and judgment cannot be aided by intendment or reference to extrinsic facts); 205Cal 782, 272P1048; 108Conn515, 143A900; MoA 256SW528; Utah 280P239. [f] (2) Findings should be incorporated in decree in equity case. 80Colo 536, 252P 815.

1137–38 TexCivA 270SW1066 (general verdict sufficient to support judgment); TexCivA 272SW550 (judgment of rescission not supported by jury's finding of injury to plaintiff erroneous). See also TexCivA 19SW(2d)156. [a] (2) 141Wash18, 250P450, 49ALR1297. [d] TexCommnA 283SW154.

1138–39 [a] MoA 281SW98. [b] **Verdict to become basis of judgment** must be received in court. TexCivA 271SW 263.

1138–40 See also 224AppDiv568, 232 NYS26.

1138–41 TexCivA 7SW(2d)115. [a] **Special verdict containing no finding** on vital issue of fact as to which testimony is conflicting is insufficient to support judgment. 51ND13, 198NW475.

1138–42½–New. Findings are unnecessary where judgment is by default. 80 CalA393, 252P337.

1139–51 217AppDiv194, 216NYS507; TexCivA 283SW206; TexCivA 2SW (2d)488.

1139–52 15F(2d)10; 34GaA33, 128SE 211; 88 IndA235, 151NE835; 124Kan 171, 257P955; 124Kan296, 259P791, 261P589; 215Ky181, 284SW1034; 218 Ky516, 291SW1039; 220Ky476, 295SW 440; 216Ky652, 288SW299; LaA 128S 536; 310Mo 339, 275SW529; MoA 273 SW145; MoA 31SW(2d)86; NJSup 131 A87; 217AppDiv194, 216NYS507; 228 AppDiv14, 238NYS477; 116 Okl 74, 243 P512; 52SD20, 216NW531; 153Tenn 268, 283SW450 (decree void, if beyond fair scope of pleadings); TexCommnA 290SW726; TexCivA 270SW1052; Tex CivA 271SW186; TexCivA 273SW638; TexCivA 274SW323; TexCivA 275SW 459; TexCivA 283SW206; TexCivA 285 SW840; TexCivA 287SW100; TexCivA 10SW(2d)391; TexCivA 11SW(2d)543; TexCivA 22SW(2d)504 (pleadings of both parties must be considered); Tex CivA 24SW(2d)488; TexCivA 27SW (2d)653(1stcase); 67Utah60, 245P966; 67Utah371, 248P83; 195Wis635, 219 NW343. [b] (5) If allegations of complaint are sufficient to warrant recovery either on express contract or for reasonable value of services, it will support judgment for reasonable value of services. 69CalA291, 231P563. [g] **Judgment on cross action abandoned by amendment** is erroneous. TexCivA 274 SW227. [h] **Judgment held not objectionable.**–CalA 288P830.

1141–53 MoA 273SW145; TexCivA 276 SW470; TexCivA 300SW973.

1141–54 TexCommnA 12SW(2d)552; TexCommnA 294SW537; TexCommnA 1SW(2d)571; TexCivA 271SW186; TexCivA 278SW488; TexCivA 19SW (2d)75; TexCivA 19SW(2d)94; Tex CivA 23SW(2d)781. See also TexCr 12 SW(2d)228.

1141–57 35F(2d)859; 41F(2d)542 (judgment cannot stand if entered on evidence that cannot be true); Cal 292 P123; 233 IllA559; 88 IndA235, 151 NE835; 124Kan171, 257P955; 130Kan 766, 288P595; 210Ky244, 275SW625; 220Ky476, 295SW440; 7LaA302; Mo 274SW741; SD 229NW392; Tex CommnA 276SW676; TexCommnA 14 SW(2d)823; TexCivA 275SW459; Tex CivA 295SW204; TexCivA 1SW(2d) 400; TexCivA 2SW(2d)488; TexCivA 15SW(2d)120. See also 146SC496, 144 SE233. [d] **Judgment based on evidence obtained independently by trial judge** outside court room and with parties absent is erroneous. TexCivA 22 SW(2d)1074.

1142–58 83CalA69, 256P594; TexCivA 8SW(2d)527. [b] **Judgment rendered on open account duly verified** is not void or voidable because of absence of additional evidence, in absence of verified denial. 137 Okl 278, 279P329.

1142–59 233 IllA559; 209Ky330, 272 SW751 (no offer of proof to support intervening petition traversed in toto); 50Philippine624; TexCivA 273SW640; TexCivA 26SW(2d)687.

1142–60 104Conn389, 133A35; 97Fla 679, 122S107(2dcase); 88 IndA235, 151 NE835; 232Ky683, 24SW(2d)584; 164 La767, 114S647; 257Mass91, 153NE 322; 132Misc746, 230NYS583; 145SC 91, 142SE811; Tex 12SW(2d)601; Tex CommnA 290SW726; 136Wash7, 238P 990.

1143–61 88 IndA235, 151NE835; Tex CommnA 290SW726; TexCivA 272SW 550 (acquiescence in submission of case for damages election not to claim rescission); TexCivA 274SW238; Tex CivA 274SW266.

1143–62 310Mo 339, 275SW529; Tex CivA 4SW(2d)1046, 1053 [quotCJ].

1143–62½–New. But though judgment may be void as to certain matters because not supported by proper allegations and proof, such infirmity does not render whole judgment void. 35GaA5, 131SE524.

1143–65 [a] (4) Where answer is composed solely of negatives, pregnant evidence in behalf of plaintiffs is not necessary to support judgment. 213Ky90, 280SW486. [b] **Disclosure of joint liability by answer,** though complaint does not allege partnership and no evidence is shown connecting one of two defendants with transaction, if answer discloses joint liability by affirmative admission, joint judgment is proper. Tex CivA 283SW298.

1143–67 TexCivA 296SW948.

1144–79 161Ga374, 131SE161; Tex CivA 276SW342.

1144–80 [a] **Estoppel.**–TexCivA 284SW 228(2dcase).

1144–80½–New. In an action on a note for the price of goods sold secured by chattel mortgage and in the alternative on the original indebtedness, a judgment for plaintiff is supported by proof of the original indebtedness. TexCivA 274SW210.

1144–82 24F(2d)38, 41 [quotCJ]; 215 Ala231, 110S31; 220Ala90, 124S82; 34 Ariz565, 273P728; 168Ark263, 270SW 961; 92CalA360, 268P459; CalA 274P 368; 81Colo 100, 253P1057; 106Conn 287, 137A751; 110Conn208, 147A675; 94Fla586, 114S366; 40 Ida638, 236P 536; 317 Ill 468, 148NE323; 84 IndA 676, 151NE26; 210Ky820, 276SW983; 212Ky222, 278SW565; 214Ky505, 283 SW954; 160La392, 107S236; 162La49, 110S84; 169La312, 125S134(2dcase); 126Me462, 139A593; 319Mo 149, 3SW (2d)1008; 114Nebr563, 208NW669; NJSup 131A87; 244NY182, 155NE93; 197NC609, 150SE116; 54SD261, 223 NW64; TexCivA 271SW186; TexCivA 274SW323; TexCivA 283SW206; Tex CivA 285SW840; TexCivA 300SW953; TexCivA 1SW(2d)462; TexCivA 12SW (2d)831; TexCivA 13SW(2d)184; Tex CivA 31SW(2d)828; TexCivA 31SW (2d)1101; 67Utah371, 248P83; Utah 292P913; 99Vt25, 130A691; 102WVa 584, 135SE665; Wis 232NW697. [a] (13) Judgment based on pleading, showing no interest, cannot be sustained. 212Ky222, 278SW565. (14) In action at law to determine title to real property, where petition contains no allegation affording basis for affirmative equitable relief, court is without jurisdiction to decree specific performance of contract for sale of realty. Mo 20SW(2d)899. (15) In suit to quiet title, decree adjudging plaintiff indebted

to defendant for property conveyed, vesting title in plaintiff and divesting defendants of any interest, is in effect one for specific performance and is unauthorized. **Mo** 20SW(2d)899. [c] **Where alternative counts, one for foreclosure of mortgage and other for conversion,** are pleaded, judgment awarding relief on both counts is erroneous. **TexCivA** 284SW332. [d] **Decrees held within pleadings.–MoA** 287SW1069.

1145–83 But see 141SC60, 139SE171.

1145–84 10**La**A22, 119S905; **MoA** 14 SW(2d)537.

1145–85 24F(2d)38, 41 [quotCJ]; 177 **Ark**288, 6SW(2d)292; 40 **Ida**638, 236P 536, 537 [citCJ]; 218**Ky**402, 291SW 362; **TexCommnA** 14SW(2d)1009.

1145–86 161**Ga**374, 131SE161 (prayers held sufficient for relief sought).

1146–88 **TexCivA** 292SW631.

1146–89 [a] 74**CalA**333, 240P39.

1146–90 200 **Iowa**1129, 206NW33.

1146–91 79**CalA**787, 251P319; 80**CalA** 363, 252P656; 317**Mo** 442, 297SW39.

1146–92 207**Cal** 617, 279P650 (interest); 80**CalA**363, 252P656; **CalA** 289P 645; 235**Ky**701, 32SW(2d)57; 176**Minn** 117, 222NW527.

1147–93 80**CalA**363, 252P656; 48 **Ida** 750, 285P461 (relief authorized); 200 **Iowa**1129, 206NW33; 195**Wis**481, 218 NW727, 728 [citCJ]. [b] (6) In action to foreclose mortgage personal judgment may not be entered against defaulting defendant where no claim was made against him in original notice and no cause of action was stated against him in original petition and prayer of petition merely asked that his lien be declared inferior to plaintiff's lien. 200 **Iowa**1129, 206NW33 (action by assignee of note and mortgage in which mortgagee defaulted). (7) In such case it is immaterial that such defendant appeared at trial and participated therein to some extent and that, after trial, plaintiff amended petition so as to pray for personal judgment. 200 **Iowa**1129, 206NW33. (8) In action by stockholder against directors praying that board be required to require member to account personal judgment against such director is unauthorized. 48 **Ida**750, 285P461. [g] (2) 48 **Ida**750, 285P461.

1148–2 210**Ky**820, 276SW983; 231**Ky** 65, 21SW(2d)127; **MoA** 25SW(2d)566; **TexCommnA** 288SW127. But see 84 **Colo** 535, 271P1118.

1148–3 98**Fla**397, 123S809 (rescission, though not specifically prayed for, can be granted under prayer for general relief, in an action for declaratory decree determining purchaser's rights under contract for purchase of realty); 166 **Ga**186, 142SE680; 45 **Ida**571, 264P229; 317 **Ill** 468, 148NE323; 235**Ky**164, 30 SW(2d)876; 9**LaA**279, 119S893; 9**LaA** 706, 119S902; 168**La**241, 121S757; 267 **Mass**279, 166NE828; 316**Mo** 968, 293 SW116; **MoA** 29SW(2d)165; 121 **Or** 469, 256P195; **TexCommnA** 23SW(2d) 675; **TexCivA** 292SW281; **TexCivA** 20 SW(2d)843; **TexCivA** 25SW(2d)923. [c] **On bill to have absolute deed declared void** complainant may, under general prayer, have decree declaring conveyance to create trust. 90**Fla**7, 105 S134.

1149–4 **Iowa** 229NW855; 266**Mass**180, 165NE14; **Mo** 20SW(2d)899; **MoA** 6 SW(2d)968; **TexCivA** 293SW252; 144 **Va**848, 130SE784.

1149–4½–New. A prayer for general relief does not authorize relief exceeding the issue presented by the pleadings or voluntarily submitted to the court and tried by it. 201**Cal** 87, 255P 827.

1149–5 177**Ark**292, 6SW(2d)292; 87 **CalA**262, 262P61(2dcasc); 90**CalA**276, 265P1010; 84 **IndA**77, 149NE358; 129 **Okl** 28, 263P448; 117**Tex**107, 298SW 419; **TexCivA** 292SW281.

1150–8 166**Ga**278, 142SE855; 41 **Ida** 673, 241P1022; 201 **Iowa**353, 207NW 330; 165**La**874, 116S218; **RI** 151A893; 52SD20, 216NW581.

1150–9 41 **Ida**673, 241P1022; **Mo** 29 SW(2d)83; 52SD20, 216NW581. See also **TexCivA** 16SW(2d)973.

1150–10 177**Ark**288, 6SW(2d)292; **Mo** 298SW47; **TexCivA** 271SW186; **Tex CivA** 291SW261.

1151–14 **TexCivA** 5SW(2d)872.

1151–16 **MoA** 297SW457. [e] **In Oklahoma.–136 Okl** 257, 277P639.

1151–17 180**Ark**578, 21SW(2d)952 (matters not within issues raised by pleading and proof cannot be incorporated in decree); 201**Cal** 754, 258P 1099; 89**CalA**612, 265P885; 111**Conn** 38, 149A393; 29**Hawaii**849, 852 [cit CJ]; 48 **Ida**750, 285P461; 323 **Ill** 309, 154NE120; **Me** 149A804; 319**Mo** 149, 3 SW(2d)1008; **Mo** 31SW(2d)1026; **Mo** 32SW(2d)91; **MoA** 282SW158; **MoA** 6 SW(2d)968; **MoA** 31SW(2d)274; 78 **Mont**370, 254P179; 84**Mont**601, 277P 411; 116**Nebr**603, 218NW401; 32 **OhA** 111, 167NE614; **TexCommnA** 18SW(2d) 571; **TexCivA** 283SW206; **TexCivA** 13 SW(2d)184.

1151–19 34F(2d)585 (trial court is without jurisdiction to reserve issue for future determination not raised by pleadings); 85**CalA**633, 260P367; **CalA** 288P863; 106**Conn**287, 137A751; 110 **Conn**208, 147A675; 42 **Ida**619, 248P13; 45 **Ida**554, 263P997; 335 **Ill** 260, 167 NE68; 234 **IllA**455; 84 **IndA**694, 151 NE12; 205 **Iowa**227, 217NW626; 213 **Ky**312, 280SW134; **LaA** 128S536; **Mo** 20SW(2d)899; **MoA** 24SW(2d)229; 118 **Or**339, 246P361; **TexCivA** 294SW633; **TexCivA** 23SW(2d)414; **TexCivA** 29SW (2d)493; **Utah** 272P200; 153**Va**118, 149 SE441. See also 319**Mo** 149, 3SW(2d) 1008. [b] **Fact that property ordered sold is depreciating** and receiver has no money to meet expenses merely authorizes order necessary for protection of parties. 234**Ky**558, 28SW(2d)737. [c] **Pleadings cannot be taken as true against nonresident defendants** before court only by warning order, as regards entry of judgment beyond scope of issues. 234**Ky**558, 28SW(2d)737. [d] **Judgments held not beyond scope of pleading.–Mo** 30SW(2d)616 (action to quiet title).

1152–20½–New. Decreeing a recovery of part of the commission against a third party is proper where the court determined plaintiff was entitled to a commission. 179**Ark**488, 16SW(2d) 579.

1152–21 84 **IndA**694, 151NE12; 130 **Kan**766, 288P595; 113 **Okl** 150, 240P 104; **TexCommnA** 285SW307; **Tex CivA** 271SW186; **TexCivA** 278SW488. [a] (3) In action on note and to enforce lien of judgment on land, in which one of parties filed general denial, judgment that part of proceeds should be applied to such party's lien held erroneous as not being within issues. **IndA** 151NE7. [c] (4) Judgment based on holding that failure to give notice of dishonor of checks was fatal to recovery was properly reversed when no plea raised question of discharge by failure to give notice of dishonor. **Tex CommnA** 285SW307.

1152–22 29**Ariz**288, 240P1033 (money judgment where setting aside of contract and deed asked); 201**Cal** 87, 255 P827; 92**CalA**141, 267P748; 225**Ky**21, 7SW(2d)499; 234**Ky**138, 27SW(2d)673 (judgment held not beyond issues); 168**La**870, 123S603; **Mo** 31SW(2d) 1026; **MoA** 31SW(2d)274; 76**Mont**117, 245P539; 113 **Okl** 150, 240P104; 116 **Okl** 279, 244P588; 133 **Okl** 173, 271P 833; 133 **Okl** 140, 271P852, 854 [cit CJ]; 136 **Okl** 118, 276P718; 39 **Okl ACR**322; 50SD484, 210NW726; 67 **Utah**553, 248P496; 101**WVa**31, 131SE 638; **WVa** 153SE507.

1153–25 50SD484, 210NW726.

1154–26 201**Cal** 87, 255P827.

1154–28 201**Cal** 87, 255P827.

1154–31 **IndA** 169NE349. [c] (3) When parties not covered by pleadings are injected into action, one so injecting does so at peril of any judgment he may obtain. 86**CalA**288, 260P838. [d] **Where proof shows plaintiff and another as joint tenants,** plaintiff cannot be decreed sole owner. **CalA** 291P 663.

1154–32 But see **TexCivA** 293SW584.

1155–37 218**Ky**93, 290SW1061. See also 35**PortoRico** 112. [b] **Judgment for relief by one defendant against co-**defendant not served with pleading held void. 50SD652, 211NW688.

1155–37½–New. Evidence of an alleged joint tort by two which fails to identify one of parties jointly charged does not warrant judgment against the alleged joint tort-feasors. 89**Fla**396, 104S584.

1155–39 [a] But see 136**Wash**7, 238P 990.

1155–40 [a] **TexCivA** 271SW288.

1155–44 124**Kan**296, 259P791, 261P 589.

1155–48 138**Misc**179, 245NYS98.

1156–57 125**Kan**53, 262P1022. [b] **Complaint authorized by statute to quiet title is insufficient** to sustain judgment establishing constructive trust or one declaring deed equitable mortgage. 33NM613, 273P917.

1156–58 95**CalA**117, 272P614; 106 **Conn**468, 138A438; 131**Misc**51, 225NYS 659; **TexCivA** 283SW206; **TexCivA** 291 SW919; **TexCivA** 1SW(2d)525; **Tex CivA** 4SW(2d)630; **TexCivA** 16SW(2d) 969; 150**Wash**178, 272P511

1156–59 217**AppDiv**194, 216NYS507; **TexCivA** 282SW874.

1156–60 220**AppDiv**723, 221NYS494; **TexCivA** 283SW206.

1157–62 21F(2d)139; 104**Conn**283, 132 A467; **MoA** 28SW(2d)127; 217**AppDiv** 194, 216NYS507; **TexCivA** 285SW631; **TexCivA** 292SW260. [a] (17) Judgment for breach of warranty, not supported by petition, based on rescission and to recover price. 217**AppDiv**194, 216NYS507. [e] **Defendant's failure to demur to complaint** will not justify judgment against him upon issues not pleaded. 111**Conn**38, 149A393.

1158–66 217**AppDiv**194, 216NYS507; **TexCivA** 18SW(2d)750; 198**Wis**595, 225NW200.

1159–67 34**Ariz**347, 271P720; 206**Cal** 753, 276P336; 217**AppDiv**194, 216NYS 507; 131**Misc**42, 225NYS730; **TexCivA** 272SW562; **TexCivA** 9SW(2d)494. [a] (14) On complaint appropriate to recovery of purchase price for sale, judgment based on damages for breach of contract should be reversed. 215 **AppDiv**857, 212NYS307 (where action for price is wrong remedy).

1160–68 85**Colo** 419, 276P972; 217 **AppDiv**194, 216NYS507.

1160–69 233**Mich**403, 206NW328.

1161–75 71**CalA**767, 236P183 (sufficient); **TexCivA** 273SW638 (judgment based on defense not pleaded); **Tex CivA** 12SW(2d)843.

1161–79½–New. But plaintiff may recover on either tort or contract alleged where defendant does not request separation. 77**Colo** 289, 236P777.

1162–83 107**Conn**207, 139A780.

1162–85 88 **IndA**235, 151NE835.

1163–92 **Mo** 20SW(2d)899.

1163–93½–New. In a suit in equity, mere pleading of equitable defense will authorize the affirmative relief the pleader shows himself entitled to, and he is not concluded by prayer or the form of pleading. 85**Mont**352, 278P 998.

1163–95 97**CalA**600, 275P970; 81**Colo** 100, 253P1057; 333 **Ill** 90, 164NE224; 124**Kan**296, 259P791, 261P589; **MoA** 31SW(2d)274; 78**Mont**228, 253P257; **NJSup** 131A87; 194NC809, 140SE300; 118 **Or**300, 246P718; 118**Tex**149, 12SW (2d)550; **TexCivA** 281SW1110. [d] **Where petition declared on notes and on judgment thereon** in alternative judgment should be rendered on amount shown by notes. **MoA** 297SW999. [e] **In revocatory action defendant is not entitled to judgment for items not claimed** in reconventional demand. 170 **La**898, 129S522.

1164–96 331 **Ill** 25, 162NE142; 160**La** 683, 107S489; **TexCivA** 294SW317; 41 **Wyo** 198, 283P1100.

1164–1 220**Ala**413, 125S649; 205**Cal** 11, 269P612; **Cal** 277P862; 208**Cal** 508, 282P787; 87**CalA**359, 262P339; 100 **CalA**338, 279P1006; 81**Colo** 100, 253P 1057; 103**Conn**491, 130A844; 222**Ky** 329, 300SW871; 162**La**772, 111S91; 165**La**874, 116S218; **LaA** 127S425; 250 **Mich**217, 229NW422; **MoA** 298SW 1040; 78**Mont**228, 253P257; 82**Mont** 312, 267P207; 51**Nev**403, 277P980;

NJSup 131A87; **TexCivA** 13SW(2d) 398; **TexCivA** 31SW(2d)839. [d] (4) **Utah** 286P633 (not pleaded).

1166-3 Fla 126S746(2dcase) (attorney's fees not supported by evidence, stricken from decree). [a] **Attorney's fees cannot be allowed** in absence of demand therefor in prayer of petition. **LaA** 130S142.

1166-5 [c] **In Connecticut** variance has been held waived under statute where proof was admitted without objection. 109**Conn**539, 145A271.

1166-10 204**Cal** 141, 267P102.

1166-11 76**Mont**143, 245P529 (rule applies where only one of several defendants answer).

1166-13½-New. Where defendant did not counterclaim for the amount due for repairs, but plaintiff offered to deduct the amount from the damages allowed, the judgment should be modified by deducting the amount due for repairs. 224**AppDiv**433, 231**NYS**365.

1167-14 38**GaA**430, 144**SE**149; 229 **Ky**640, 17**SW(2d)**741; 246**Mich**361, 224 **NW**348(2dcase); **NJSup** 131A87.

1167-18 80**CalA**609, 252**P**733; 124**Kan** 296, 259**P**791, 261**P**589; **NJSup** 131A 87.

1167-20 NJSup 131A87.

1167-22 TexCivA 273**SW**640.

1168-26 35**F(2d)**907; 92**CalA**537, 268 **P**679; 38**GaA**430, 144**SE**149; 130**Kan** 360, 286**P**269; 164**La**57, 113**S**763; 165 **La**536, 115**S**742; **Mo** 23**SW(2d)**64; 292 **Pa**142, 140A772; **TexCivA** 278**SW**865; **TexCivA** 283**SW**877; **TexCivA** 292**SW** 631; **TexCivA** 294**SW**317; **TexCivA** 299**SW**687.

1168-28 [a] (1) 137 **Okl** 278, 279**P**329.

1169-36 15**F(2d)**10; 23**F(2d)**266; 34 **Ariz**489, 272**P**921; 196**Cal** 439, 238**P** 357; **Cal** 286**P**1017; 69**CalA**87, 230**P** 453; 77**CalA**287, 246**P**345; 77**CalA**308, 246**P**347; **CalA** 292**P**157; 161**Ga**374, 131**SE**161; 162**Ga**635, 134**SE**753; 37 **GaA**24, 138**SE**797; 255 **IllA**209; 196 **Ind**520, 148**NE**474; 83 **IndA**626, 149 **NE**655; 124**Kan**296, 259**P**791, 261**P**589; **MoA** 25**SW(2d)**566; 190**NC**418, 130**SE** 7; 191**NC**319, 131**SE**641; **TexCommnA** 288**SW**133; **TexCommnA** 29**SW(2d)** 989; **TexCivA** 274**SW**247; **TexCivA** 274**SW**991 (no alternative unless verdict set aside); **TexCivA** 275**SW**214; **TexCivA** 278**SW**298; **TexCivA** 29**SW** **(2d)**811. See also **TexCommnA** 13**SW** **(2d)**59. [c] 80**CalA**20, 251**P**232; 85 **CalA**87, 258**P**969; 167**Ga**20, 144**SE**780; 198**NC**719, 153**SE**335; 117 **Or**438, 243 **P**773.

1170-37 71**CalA**723, 236**P**322; 72**CalA** 94, 236**P**346 (judgment supported by findings); 161**Ga**374, 131**SE**161 (verdict, construed with pleadings, held sufficient as against motion to set aside judgment); **IndA** 151**NE**7; 129 **Or**58, 276**P**260; **TexCivA** 12**SW(2d)**1106; **Tex CivA** 16**SW(2d)**969; 101**WVa**533, 133 **SE**79 (judgment for plaintiff for wrongful payment of money by defendant erroneous when plaintiff owes defendant in excess of sum paid); 37**Wyo** 169, 260 **P**174. [b] (8) In action on note and to enforce lien of judgment on land in which one of parties filed general denial, judgment that part of proceeds should be applied to such party's lien is held erroneous as not following findings. **IndA** 151**NE**7. (9) Recital in judgment that contract was not rescinded is held contrary to finding showing rescission. 99**CalA**360, 278**P**907. [c] 71**CalA**767, 236 **P**183. [f] **Judgment held supported by findings.**-56**ND**94, 216**NW**197.

1170-38 37**Wyo** 169, 260**P**174.

1171-46½-New. Although findings must be construed, if possible, so as to support the judgment, specific facts found may not be rejected, and conclusions of law in conflict therewith be accepted, in order to sustain the judgment. 71**CalA**723, 236**P**322.

1171-46½-New. A trial court cannot submit case to jury on one theory and then render judgment on an entirely different theory. **TexCivA** 291**SW**650.

1171-47 83**CalA**666, 257**P**538; 220**MoA** 743, 276**SW**409; **TexCommnA** 14**SW(2d)** 1020(1stcase); **TexCivA** 278**SW**298; **Tex CivA** 284**SW**600; 142**Wash**344, 253**P**457. [a] **TexCivA** 284**SW**600. [c] (1) 142 **Wash**344, 253**P**457. (2) Inconsistent findings held insufficient to support judgment. 214**AppDiv**164, 212**NYS**43. [f] **Judgment based on answer to special issue held erroneous.**-**TexCivA** 278**SW** 298.

1171-48 TexCivA 276**SW**932.

1171-49 69**CalA**87, 230**P**453; **Tex CommnA** 289**SW**996; **TexCivA** 276**SW** 932; **TexCivA** 294**SW**633; **TexCivA** 29 **SW(2d)**480.

1172-50 95**CalA**633, 273**P**119; 109**Conn** 577, 145A27; 162**Ga**635, 134**SE**753; **Tex CivA** 275**SW**214; **TexCivA** 3**SW(2d)**563; **TexCivA** 5**SW(2d)**782; **TexCivA** 22**SW** **(2d)**753. [b] (2) 80**CalA**20, 251**P**232. [d] (1) **TexCommnA** 288**SW**133; **Tex CommnA** 291**SW**868; **TexCivA** 286**SW** 957; **TexCivA** 289**SW**1023; **TexCivA** 297**SW**584. (2) **TexCivA** 274**SW**247; **TexCivA** 18**SW(2d)**804. (7) While court may disregard material findings it must render judgment on all material findings and not on part thereof. **TexCivA** 271 **SW**441. (8) Judgment ignoring special issues is erroneous. **TexCivA** 280**SW** 347. (9) No judgment can be entered on jury's findings on special issues until there is judicial pronouncement of law as applied to such findings. **Tex CivA** 6**SW(2d)**387. (10) Immaterial or noncontrolling findings may be disregarded. **TexCivA** 2**SW(2d)**980. (11) Court is bound by ultimate facts especially found by jury, **TexCivA** 2**SW** **(2d)**980. (12) Statute requiring court to render judgment in case verdict is returned on special issues, is mandatory. **TexCivA** 11**SW(2d)**627.

1172-51 170**Gal**, 152**SE**65.

1172-52 74**Mont**420, 240**P**821; **TexCivA** 289**SW**436; **TexCivA** 1**SW(2d)**525.

1173-53 [d] **In New York.**-220**AppDiv** 690, 222**NYS**379.

1173-55 [b] **Inconsistencies between conclusions** do not vitiate judgment supported by findings. **CalA** 290**P**613.

1173-56 See also 80**CalA**513, 252**P**630.

1173-57 124**Kan**804, 262**P**571.

1173-58 161**Ga**638, 131**SE**475 (judgment properly, entered by court in conformity with findings of referee); 192 **NC**714, 135**SE**862.

1174-64 68**CalA**530, 229**P**860; **TexCivA** 281**SW**877.

1174-69 TexCivA 283**SW**1073; **Tex CivA** 289**SW**428.

1174-70 TexCivA 283**SW**1073.

1174-70½-New. When all issues submitted were immaterial and verdict is without support in the pleadings and either is entitled as matter of law to judgment which is the only one which could be properly rendered, the court may render a judgment on its own findings. **TexCivA** 294**SW**633.

1174-71 78**CalA**203, 248**P**553; 255 **IllA** 209; **TexCivA** 284**SW**314.

1174-72 252 **IllA**203; 201 **Iowa**1283, 207**NW**238.

1175-75 TexCivA 278**SW**501. [b] **Judgment against three defendants valid,** where based on verdict against all defendants, and there were but these three. **TexCivA** 278**SW**501. [c] **If verdict is for plaintiff** in action against master and servant judgment mistakenly entered against master alone is not void. 82**CalA**660, 256**P**457.

1175-79 93**Fla**387, 112**S**264, 273 [cit Cyc].

1175-81 212**Ala**602, 103**S**586.

1175-81½-New. One suing as an individual cannot claim as representative of the heirs of the founder as a class, where his suit is not brought as a class suit. 280**US**1, 50**SCt**5, 74**L ed**131.

1175-83 77**CalA**308, 246**P**347; 83**CalA** 582, 257**P**156; **CalA** 284**P**943 (findings held to authorize judgment); 40 **Ida**638, 236**P**536; 124**Kan**296, 259**P**791, 261**P** 589; **TexCivA** 273**SW**884. [b] **Judgment based on answer to special issue** as to value held erroneous. **TexCivA** 278**SW**298.

1175-84 176**Ark**356, 3**SW(2d)**49; 81 **Colo** 310, 255**P**985; **TexCivA** 297**SW** 1096. [a] (1) 238**Mich**253, 213**NW**150, 151 [citCJ]. [d] **Counterclaim** cannot recover more than amount stated in schedule. 101**NJL**564, 129A148.

1176-85 180**Minn**540, 231**NW**222; 34 **OhA**464, 171**NE**346.

1176-87 [b] **Correction on motion** in court below after remand may properly be allowed when judgment is affirmed, error being clerical error only. 209**Ky** 593, 273**SW**449.

1176-90 87**PaSuper**129; **TexCivA** 274 **SW**671.

1176-93 [a] **TexCivA** 292**SW**251.

1176-95 124**Kan**296, 259**P**791, 261**P** 589; **TexCivA** 274**SW**671.

1177-1 CalA 273**P**161; **NC** 155**SE**254. But see 38**GaA**430, 144**SE**149; 214**Ky** 602, 283**SW**944; 224**Ky**254, 6**SW(2d)** 234; 315**Mo**1091, 287**SW**610; 27 **OhA** 133, 160**NE**881; **TexCivA** 271**SW**397; **TexCivA** 271**SW**401; **TexCivA** 290**SW** 299; **TexCivA** 292**SW**631. But see **Tex CivA** 288**SW**855. Contra 187**Wis**347, 203**NW**360.

1177-2 27 **OhA**133, 160**NE**881.

1177-3 77**Colo** 442, 237**P**151 (in absence of dispute that plaintiff was entitled to interest); **TexCivA** 292**SW**917.

1177-7½-New. In a suit on a verified open account plaintiff obtaining judgment has been held entitled to the interest thereon without the necessity of a finding as to interest by the jury. **Tex CivA** 22**SW(2d)**322.

1178-9 TexCivA 275**SW**214; **TexCivA** 20**SW(2d)**849. See also **TexCivA** 272 **SW**283. [e] **Judgment ignoring finding on immaterial special issue** is not judgment non obstante veredicto. **Tex CommnA** 280**SW**194. [f] **Trial court's right to enter judgment,** notwithstanding verdict, is same as right to grant nonsuit. **Cal** 291**P**190.

1178-10 Mich 233**NW**220.

1178-11 94**CalA**318, 271**P**121. [a] (1) 232**Mich**420, 205**NW**177 (entry of judgment n. o. v. five months after trial sustained on facts). (2) Finding of jury had no effect on motion for judgment notwithstanding verdict, where motion for directed verdict, reserved under statute, was made before submission of cause to jury, since it must be considered on situation as it existed before submission. 245**Mich**93, 222**NW**183. [b] 315**Mo**1091, 287**SW**610; **Tex CommnA** 296**SW**486. See also **MoA** 30 **SW(2d)**1035. [f] (1) 118**Tex**196, 13**SW** **(2d)**340; **TexCommnA** 16**SW(2d)**530, 66 **ALR**758; **TexCivA** 288**SW**1111; **Tex CivA** 293**SW**346; **TexCivA** 29**SW(2d)** 446. (2) **TexCivA** 18**SW(2d)**938. (3) **TexCivA** 275**SW**214 (verdict not supported by evidence or pleadings). (4) It must appear, as matter of law, from pleadings and undisputed testimony that no other judgment could have been rendered, and that issues found by jury were immaterial. **TexCivA** 287**SW**115. (5) As general rule court is not authorized to render judgment notwithstanding findings. **TexCommnA** 11**SW(2d)** 158. (6) Disregard of findings upon immaterial issues is not violative of rule prohibiting such judgment. **TexCivA** 286**SW**336. (7) Where under no view of pleadings and evidence plaintiff is entitled to recover findings of jury may be ignored by court. **TexCommnA** 11 **SW(2d)**158. (8) Rule prohibiting judgment non obstante veredicto is not violated by giving of summary instruction or withdrawing case from jury. **Tex CommnA** 1**SW(2d)**878. (9) Issue having been submitted to jury and found it was error for court to enter judgment contrary thereto. **TexCommnA** 13**SW** **(2d)**59. (10) Court is not authorized to disregard findings of jury except where court has submitted immaterial issue. **TexCivA** 16**SW(2d)**316. (11) Where finding did not support judgment, latter should not have been rendered. **Tex CivA** 16**SW(2d)**316. [i] **In Idaho.**-45 **Ida**229, 261**P**673. [j] **In Oklahoma.**-126 **Okl** 270, 259**P**528.

1178-11½-New. Judgment for party entitled to peremptory instruction held not non obstante veredicto merely because verdict was against him on issue of limitation. **TexCivA** 288**SW**861.

1178-11½-New. A motion for a judgment in a larger amount than the verdict is a motion non obstante, although not so designated. 82**Colo** 369, 260**P**108.

1178-11¼-New. State court may render judgment notwithstanding verdict in action under Federal Employers' Liability Act. 180**Minn**578, 230**NW**585.

1178-12 33**Ariz**499, 266**P**14, 15, 62**ALR** 183, [quotCJ]; 45 **Ida**229, 261**P**673.

1179-14 85**Colo** 184, 274**P**821; 45 **Ida** 229, 261**P**673; 314**Mo** 262, 284**SW**505.

1179–15 45 **Ida**229, 261**P**673; 314**Mo** 262, 284**SW**505.
1179–16 **NC** 155**SE**166.
1179–17 32 **OhA**537, 168**NE**547.
1179–18 [d] **In Kentucky.**–232**Ky**680, 24**SW(2d)**553.
1180–19 234**Ky**91, 27**SW(2d)**684; 163 **Minn**257, 204**NW**965; 114 **Okl** 126, 244 **P**758.
1180–20 180**Ark**1018, 24**SW(2d)**328 (complaint held not so defective as to entitle defendant to judgment notwithstanding verdict); 220**Ky**226, 294**SW** 1073; 228**Ky**604, 15**SW(2d)**477; 170 **Minn**326, 212**NW**595; 180**Minn**1, 230 **NW**260; 195**NC**231, 141**SE**586 [cit CJ]; 32 **OhA**537, 168**NE**547; 31 **OhA** 525, 166**NE**698; 114 **Okl** 126, 244**P**758; 128 **Okl** 165, 261**P**913; 130 **Okl** 7, 266**P** 753; 134 **Okl** 251, 273**P**243; 136 **Okl** 165, 277**P**657(2dcase); 143 **Okl** 33, 287 **P**722; 138 **Okl** 201, 280**P**570. [d] **In Oklahoma.**–135 **Okl** 116, 274**P**671. [e] **Unless defects are cured by pleading of adverse party** judgment notwithstanding verdict cannot be rendered on pleading failing to state facts constituting basis of recovery. 232**Ky**680, 24**SW(2d)** 553.
1180–20½–New. And only where the pleadings are insufficient to support a judgment on the verdict. 154**Tenn**507, 297**SW**735.
1180–21 163**Minn**257, 204**NW**965; 170 **Minn**326, 212**NW**595.
1180–22 33**Ariz**499, 266**P**14, 62**ALR** 183.
1180–23 154**Tenn**507, 297**SW**735.
1180–23½–New. A motion for such judgment is directed to the state of the pleadings. 123 **Or**647, 263**P**881.
1180–24 285**Pa**413, 132**A**355; 286**Pa** 152, 133**A**33. [a] 134**Wash**188, 235**P**27; 145**Wash**481, 260**P**996.
1181–25 224**Ky**83, 5**SW(2d)**482; 163 **Minn**257, 204**NW**965; 285**Pa**413, 132**A** 355; 10**PaDist&Co** 217; 10**PaDist&Co** 593.
1181–25½–New. Judgment non obstante veredicto must be on same issues as those submitted to jury. 97**PaSuper**389.
1181–26 **TexCivA** 21**SW(2d)**1080 (2d case).
1181–28 251 **Ill**414; 86 **IndA**75, 156 **NE**176; 314**Mo** 262, 284**SW**505; 315**Mo** 1091, 287**SW**610; 123 **Or**343, 262**P**247.
1181–30 **Fla** 129**S**765; 34 **OhA**217, 170 **NE**658 (general denial); 132 **Okl**191, 270**P**33.
1181–30½–New. Where the jury returned a verdict for amounts less than asked in respective plaintiffs' complaints in actions on open accounts for goods sold and delivered in which plaintiffs filed sworn itemized accounts, the correctness of which was not challenged by defendant, the court erred in granting plaintiffs' motion for judgment notwithstanding the verdict for the larger amounts claimed by them. 177**Ark**993, 8**SW(2d)**457.
1181–31 99**Fla**483, 126**S**784; 205 **Iowa** 51, 217**NW**557; 154**Tenn**507, 297**SW**735, 736 [quotCJ]; 118**Tex**196, 13**SW(2d)** 340.
1182–25 **Ill** 173**NE**390.
1182–32 154**Tenn**507, 297**SW**735, 736 [quotCJ]. [c] **Where allegation of petition is traversed,** failure to traverse same allegation in answer does not entitle defendant to judgment. 234**Ky**173, 27**SW(2d)**695.
1182–33 128 **Okl** 222, 262**P**205; 154 **Tenn**507, 297**SW**735, 736 [quotCJ].
1182–33½–New. All inferences must be resolved in favor of plaintiff on defendant's motion for judgment n. o. v. 5**Pa Dist&Co** 783.
1182–37 205 **Iowa**271, 215**NW**649, 217 **NW**874.
1183–42 315**Mo** 1091, 287**SW**610; 285 **Pa**273, 132**A**364.
1183–45 82**Colo** 369, 260**P**108; 315**Mo** 1091, 287**SW**610; 26 **OhA**240, 159**NE** 850; 141 **Okl** 256, 284**P**866 (in absence of special finding); 117 **Or**22, 242**P**600; 123 **Or**343, 262**P**247.
1183–47 169**Ark**1154, 278**SW**32; 135 **Okl** 116, 274**P**671; 123 **Or**343, 262**P**247; 154**Tenn**507, 297**SW**735, 736 [quotCJ]; **TexCivA** 292**SW**958. But see **Cal** 291**P** 190. [c] 134 **Okl** 251, 273**P**243. [f] **In Washington.**–143**Wash**58, 254**P**850. [g] **Insufficiency of evidence to support allegations of complaint** does not justify court in granting judgment non obstante veredicto. 195**NC**231, 141**SE**586.
1183–48 169**Ark**1154, 278**SW**32; 50**ND** 642, 197**NW**596; 154**Tenn**507, 297**SW** 735, 736 [quotCJ]; **TexCivA** 291**SW**281; **TexCivA** 293**SW**638; 134**Wash**188, 235 **P**27 (court may not weigh evidence); 141**Wash**369, 251**P**585; 99**WVa**575, 130 **SE**139. See also **Ark** 32**SW(2d)**624; 98 **CalA**568, 277**P**529(2dcase); 296**Pa**222, 145**A**861; **TexCivA** 30**SW(2d)**362.
1183–48½–New. nor where the evidence is conflicting, 82**Colo** 369, 260**P**108.
1184–49 **Cal** 291**P**190; 10**LaA**715, 123 **S**172; 248**Mich**241, 226**NW**880; 248**Mich** 668, 227**NW**540; 168**Minn**70, 209**NW** 484; 58**ND**239, 225**NW**794; 291**Pa**205, 139**A**858; 293**Pa**28, 141**A**621; 296**Pa** 380, 146**A**30(2dcase); 85**PaSuper**346 (failure of proof); 94**PaSuper**327; 154 **Tenn**507, 297**SW**735, 736 [quotCJ]; 118 **Tex**196, 13**SW(2d)**340; **TexCivA** 29**SW** (2d)500 (undisputed fact issues); 136 **Wash**681, 241**P**298; 143**Wash**46, 254**P** 459; 143**Wash**229, 255**P**123; 153**Wash** 549, 280**P**50 (where testimony conflicts, court cannot grant judgment notwithstanding verdict); 154**Wash**376, 282**P** 205; 155**Wash**167, 283**P**1085. See also 142**Va**397, 128**SE**561; 134**Wash**188, 235 **P**27; 136**Wash**4, 238**P**982; 150**Wash** 185, 272**P**731. But see 169**Ark**1154, 278 **SW**32; **Cal** 291**P**184; **Cal** 291**P**190; 248 **Mich**516, 227**NW**750. [c] **Judgment non obstante veredicto** (1) is proper in absence of evidence or reasonable inference from evidence to support verdict. 143 **Wash**46, 254**P**459. (2) Such judgment is rendered only in absence of substantial evidence to support verdict, and never on conflicting evidence. 143**Wash**229, 255**P**123. [d] **In Washington.**–155**Wash** 597, 285**P**657 (evidence held not to require granting of motion).
1184–49½–New. The motion should be overruled where there is any competent evidence reasonably tending to support the verdict of the jury. 111 **Okl** 257, 239**P**656.
1184–50 168**Minn**152, 210**NW**70; 123 **Or**647, 263**P**881; 290**Pa**21, 137**A**867; 9**PaDist&Co** 460; 154**Tenn**507, 297**SW** 735, 736 [quotCJ]; **TexCivA** 291**SW**281; **TexCivA** 25**SW(2d)**916; 99**WVa**575, 130 **SE**139.
1184–50½–New. A judgment notwithstanding the verdict cannot be entered for a party on evidence merely warranting, but not requiring, a finding for it. 297**Pa**418, 147**A**76.
1184–51 [a] (6) In action by special administration under Federal Employers' Liability Act to recover for death of deceased workman, in which defendant pleaded in bar judgment on same cause of action in another state in favor of domiciliary administrator and payment thereof and plaintiff replied admitting existence of judgment and identity of cause of action but pleading matters in avoidance, failure of plaintiff to adduce proof of fraud and conspiracy alleged because of misapprehension as to effect of admissions in reply should not result in judgment non obstante veredicto but in new trial. 168**Minn**152, 210**NW** 70. (7) Judgment non obstante will be ordered only when evidence is conclusive against verdict. 171**Minn**130, 213**NW** 536. (8) Evidence held to warrant judgment for defendant notwithstanding verdict. 171**Minn**105, 213**NW**541. [c] (1) 292**Pa**58, 140**A**551. (2) 8**PaDist&Co** 413. (3) Other decisions. 283**Pa**573, 129**A**574. (4) After jury have disagreed twice it is proper to deny motion. 86**PaSuper**49. (5) Judgment can be granted on whole record only where binding instructions should have been given. 14**PaDist&Co** 21. (6) New trial should be granted if court cannot say that, on consideration of whole record, judgment should be given for moving party. 14**PaDist&Co** 21.
1185–52 199**Cal** 750, 251**P**637; 77**Colo** 496, 238**P**38; 127**Kan**828, 275**P**153; 237 **Mich**147, 211**NW**56; 238**Mich**25, 213**NW** 118; 167**Minn**140, 208**NW**655; 173**Minn** 378, 217**NW**379; 173**Minn**522, 217**NW** 939; 173**Minn**587, 218**NW**125; 175**Minn** 361, 221**NW**241(1stcase); 178**Minn**417, 227**NW**426(2dcase); 51**ND**346, 199**NW** 763; 53**ND**621, 207**NW**1003; 56**ND**937, 220**NW**446; 57**ND**356, 222**NW**36; 57 **ND**538, 223**NW**37; **ND** 228**NW**812; 87 **PaSuper**507; 90**PaSuper**266; 92**PaSuper**367; **Wis** 232**NW**851. See also 85 **PaSuper**346. [a] (1) 51**ND**755, 200**NW** 1012; 58**ND**812, 228**NW**212. (4) Failure to decide motion for directed verdict within time limited by Michigan Court Rule does not direct court of power to enter judgment n. o. v. 234**Mich**74, 208 **NW**47. (5) Record held to show motion for directed verdict was made so as to authorize judgment n. o. v. 234**Mich**74, 208**NW**47. (6) Duty of court either on its own motion or on motion of aggrieved party. 199**Cal** 750, 251**P**637. [c] (1) 199**Cal** 750, 251**P**637. (2) Judgment, notwithstanding verdict, may be entered after court improperly denies motion for directed verdict. 89**CalA**55, 264**P**766.
1185–53 135 **Okl** 116, 274**P**671. Contra 89**CalA**55, 264**P**766. [a] **In California.**–198**Cal** 594, 246**P**805.
1185–54 171**Minn**130, 213**NW**536. [a] **Variance cannot be reached** by motion for judgment notwithstanding verdict. 234**Ky**389, 28**SW(2d)**474.
1185–55 177**Minn**494, 225**NW**432.
1185–56 205 **Iowa**271, 215**NW**649; 129 **Kan**577, 283**P**485; 232**Mich**271, 205**NW** 122; 164**Minn**425, 205**NW**286; 166**Minn** 308, 207**NW**644; 168**Minn**19, 209**NW** 487; 169**Minn**278, 211**NW**462; 171**Minn** 130, 213**NW**536; 179**Minn**411, 229**NW** 566; **ND** 231**NW**854; 285**Pa**34, 131**A** 588; 87**PaSuper**402; **TexCivA** 26**SW** (2d)422; **TexCivA** 20**SW(2d)**273; 134 **Wash**450, 235**P**958; 136**Wash**695, 240**P** 362; 137**Wash**190, 242**P**13; 140**Wash** 670, 250**P**32; 141**Wash**422, 251**P**868; 143**Wash**665, 255**P**1033; 145**Wash**189, 259**P**383; 145**Wash**455, 260**P**995; 146 **Wash**95, 261**P**788; 148**Wash**122, 268**P** 180; 148**Wash**287, 268**P**881; 154**Wash** 344, 282**P**218; 200**Wis**353, 228**NW**745. [b] **Granted only where court can say as matter of law** that there is neither evidence nor reasonable inference from evidence sufficient to sustain verdict. 140**Wash**670, 250**P**32.
1185–56½–New. nor where evidence is in sharp conflict on material questions; 167**Minn**130, 208**NW**538.
1186–57 164**Minn**425, 205**NW**286; 167 **Minn**430, 209**NW**320; 171**Minn**130, 213 **NW**536; 177**Minn**487, 225**NW**441; 179 **Minn**46, 228**NW**342.
1186–57½–New. Power to enter such judgment depends upon there being certain and sufficient evidence in case to decide it upon the merits. 147**Va**758, 133**SE**788.
1186–59 79**CalA**572, 250**P**575; 166**Minn** 124, 207**NW**23; 175**Minn**592, 222**NW** 272; 180**Minn**1, 230**NW**260; 50**ND**558, 197**NW**146.
1186–59½–New. The trial court, in determining whether the jury's verdict should be set aside and a final judgment entered non obstante, is not required to consider the evidence as on a demurrer thereto. 152**Va**38, 146**SE**353.
1186–60 169**Ark**1154, 278**SW**32. [b] See also 94**PaSuper**362.
1186–62 232**Mich**420, 205**NW**177.
1187–69 90**PaSuper**360.
1187–71 **IndA** 163**NE**517; 120**Kan**354, 243**P**331; 123**Kan**290, 255**P**32; 129**Kan** 458, 283**P**661; 138 **Okl** 201, 280**P**570. [b] **Judgment non obstante veredicto must be after special verdict** and on sufficient pleadings. 169**Ark**1154, 278**SW** 32.
1187–75 [b] **Where verdict is only advisory** motion is unnecessary. **SD** 230 **NW**805(3dcase).
1187–76 [e] **In Iowa.**–229**NW**909.
1187–77 180**Ark**1018, 24**SW(2d)**328; 79 **CalA**572, 250**P**575, 576 [citCJ]; 97**Fla** 679, 122**S**107(2dcase); 315**Mo** 1091, 287 **SW**610; **SD** 227**NW**81.
1187–77½–New. In some jurisdictions, when the time to appeal from a judgment has expired the trial court has no authority to entertain a motion for judgment notwithstanding the verdict over objection of the adverse party unless the

final character of the judgment has been suspended by proceedings commenced within the time allowed by law for appeal from the judgment. 49ND948, 194 NW661.

1188-78 Contra 139 Okl 123, 281P586.

1188-79 See also 94PaSuper346.

1188-80 But see Iowa 229NW909.

1188-80½-New. A motion for a directed verdict does not suspend the final character of the judgment so as to enlarge the time for moving for judgment notwithstanding the verdict. 49ND948, 194NW661.

1188-80½-New. An inappropriate motion for judgment notwithstanding verdict will not be construed as motion to amend verdict where there is nothing to amend. 315Mo 1091, 287SW610.

1188-81 See also 139 Okl 123, 281P586.

1188-82½-New. Motion should not be considered where it presents same questions presented by prior motions for nonsuit and directed verdict. 117 Or22, 242P600.

1188-85 [a] **Entry of separate decision unnecessary.**-Where motion for judgment non obstante veredicto was reserved, subsequent entry of judgment decided such motion and it was not necessary to enter separate decision upon record. 243Mich544, 220NW750.

1188-85½-New. [§ 117½] Q½. **Validating Judgments.** Payments made by judgment debtor on judgment with knowledge of defects therein is held to preclude it from attacking judgment as void. 160La831, 107S590.

1188-85¼-New. Plaintiff's motion raises the question of the legal sufficiency of defendant's special pleas. 251 IllA414.

1188-85¼-New. Plaintiff's motion for judgment non obstante veredicto is equivalent to demurrer to answer. 34 OhA217, 170NE658.

1188-85⅓-New. Where defendant makes a motion for judgment on the theory that the jury's findings are immaterial, it is not precluded from questioning the sufficiency of the evidence. TexCivA 20SW(2d)1093.

1188-85⅓-New. Motion for judgment notwithstanding verdict must be based upon facts warranting court in granting motion without trespassing on province of jury. Cal 291P184.

1188-87 27Hawaii8; TexCivA 31SW (2d)843. See also 13CustA579, 583 [cit CJ].

1189-94 205Cal 197, 270P453; Utah 276 P159.

1190-95 [a] (4) Recital in clerk's minutes that "court renders judgment for defendants as per journal entry to be filed," transcribed into record, does not constitute judgment. 132 Okl 216, 270 P2.

1190-96½-New. A judgment must be final. 125Misc538, 211NYS401.

1190-96¼-New. complete and entire, 125Misc538, 211NYS401.

1190-96¼-New. and must settle the rights of the parties. 125Misc538, 211 NYS401.

1190-97 196Cal 439, 238P357.

1190-99 244 IllA38, 43 [quotCJ].

1190-1 222AppDiv762, 225NYS508; 110 Okl 8, 234P625.

1191-2 244 IllA38, 43 [quotCJ]; 110 Okl 8, 234P625.

1191-13 131Misc401, 227NYS163.

1191-15 Mo 30SW(2d)77.

1192-16 100Vt176, 136A22.

1192-20 [b] (9) Judgment, incorporating all findings of fact preceded by words, "It is ordered and decreed," was held not proper in form. 241NY550, 150 NE550.

1192-21 But see 241NY550, 150NE550.

1192-22 Utah 276P159.

1193-37 218Ala320, 118S553; 46 Ida 541, 269P89; 9LaA183, 119S456; 243 Mich406, 220NW812; Mo 28SW(2d) 1017; 51Nev162, 271P691; 225AppDiv 6, 232NYS82; 132 Okl 45, 269P257; TexCommnA 276SW218; TexCivA 20SW (2d)838; Wash 291P710. See also 94 CalA433, 271P363. [j] (2) Judgment dismissing petition for enforcement of attachment lien and quieting title will not prevent court from subsequently determining right of another to part of property under prayer of cross petition. 230Ky586, 20SW(2d)451. [l] **Where judgment affirmed as to one party and reversed as to another.**-Affirmance of judgment for abutting owners sued with city for injuries caused by defective sidewalk does not preclude judgment against city after reversal of judgment and remand for new trial as to it. 221 MoA505, 282SW128.

1193-37½-New. Under some statutes, separate judgment should be rendered on plea in abatement separately tried, and single judgment on plea and on merits after verdict is irregular. MoA 24SW(2d)699.

1194-39 252 IllA584; 198 Ind207, 151 NE610.

1194-39½-New. A later decree prevails over the former if unconsistent in proceedings for an adjudication of water rights. 85Colo 555, 277P763.

1194-40 Iowa 230NW415; Mo 29SW (2d)83; 102NJL517, 133A81; TexCivA 15SW(2d)82. See also 235Mich656, 209 NW832.

1194-42 46 Ida595, 269P591, 592 [cit CJ].

1195-43 Mich 233NW357; 319Mo 1120, 6SW(2d)870; 80Mont339, 260P401, 403 [quotCJ].

1195-57 99Fla1151, 128S801(2dcase); 37Wyo 169, 260P174.

1195-60 13CustA579, 583 [citCJ]; Iowa 231NW448; TexCivA 287SW683. See also TexCivA 15SW(2d)1085. [b] **Findings and conclusions of court constitute statement of court's decision.**-78 CalA203, 248P553.

1195-60½-New. A judgment is sufficient if it finds ultimate facts essential to sustain it, without reciting evidentiary facts. 332 Ill 126, 163NE319.

1195-62 200 Iowa958, 205NW774; 208 Iowa545, 223NW891; 6LaA563; 110 Okl8, 234P625; WVa 154SE874. [b] 85CalA388, 259P484; 40GaA556, 150SE 563; 7LaA64; TexCivA 286SW307.

1196-64 32PortoRico 565; TexCivA 282 SW351, 352 [citCJ].

1196-65 125Misc538, 211NYS401, 403 [citCJ]. [a] (4) Intimation of judge that he would set aside verdict in action for damages for pollution of waters if defendant would agree to install sewage disposal plant to abate nuisance does not render conditional a judgment signed after defendant's announcement that it could not accept offer. 191NC 1, 131SE407. (5) Other instances. 41 F(2d)634.

1197-70 231Ky96, 21SW(2d)123; TexCivA 27SW(2d)877.

1197-76 230AppDiv867, 245NYS138.

1197-78 See also 22AlaA252, 114S422.

1198-79 226Ky261, 10SW(2d)824.

1198-81 See also 10PaDist&Co 113; 10 PaDist&Co 132.

1198-82 221MoA807, 287SW1079, 1083 [quotCJ].

1198-83 92CalA203, 268P396.

1199-92½-New. Judgment in an action against one designated as director general of railroads, and who was neither director general nor agent of president, is void. 8F(2d)907.

1199-93 Ill 173NE92.

1200-97½-New. That a judgment in a suit to set aside deeds made by a decedent to a defendant and for the appointment of a receiver did not include the name of a minor defendant does not render the judgment invalid, where the principal defendant, in whose favor the judgment was rendered, was trustee of the interest and of the estate of the minor defendant. 321Mo 1052, 15SW (2d)329.

1200-97⅓-New. The court may properly insert a precautionary clause to the effect that the judgment is not binding on unserved and nonappearing parties. 206 Iowa172, 218NW895.

1200-10 See also 10PaDist&Co 243.

1200-15 142Miss591, 107S764 (misnomer of corporation defendant under name applicable to either of several corporations renders judgment void for uncertainty).

1200-17 TexCivA 291SW271, 272 [cit CJ].

1200-18 217Ala150, 115S174, 175 [cit CJ]; 79Mont136, 255P25; 160Tenn403, 23SW(2d)897. See also TexCivA 8SW (2d)1100. [a] **Judgment entered on nonappearance** is valid where partnership is sued as corporation by service of summons on principal officer of concern who occupied same position prior to dissolution of corporation and formation of partnership. 79Mont136, 255P 25.

1200-19 22AlaA377, 115S860.

1201-20 TexCivA 291SW271, 272 [cit CJ].

1201-21 TexCivA 291SW271, 272 [cit CJ].

1201-23 89CalA86, 264P497; 40 Ida 638, 236P536, 538 [citCJ]; 315Mo 972, 287SW485, 488 [citCyc].

1202-27½-New. It is error to include amount of previous judgment which is in full force and effect. 83 IndA626, 149 NE655.

1202-28 See also 130 Or631, 280P660.

1203-30 49Philippine634, 644 [citCJ].

1203-32 49Philippine634, 644 [citCJ].

1203-40½-New. A judgment for a designated amount for two parties without distinguishing separate claims is illegal. 105NJL575, 146A212.

1204-52 MoA 29SW(2d)170; 29Porto Rico 852. [c] **Interest prior to verdict; by whom awarded.**-130Misc579, 224NYS 333.

1204-54 Mass 173NE428. See also Mass 173NE428. [d] **Authority of clerk** to add interest from date of writ. Mass 173NE428.

1204-56½-New. Judgment not specifically allowing interest as against assets of bank after date of insolvency is not erroneous as allowing such interest. TexCivA 283SW189.

1204-56⅓-New. The court's computation of an additional amount due up to the entry of the judgment is held not erroneous as including an interest on such sum, where no objection was made to the calculation and the judgment expressly provided that no interest was to be recovered on the additional amount provided for. 96CalA289, 273P1079(2d case).

1204-56¼-New. Where judgment for plaintiff was interlocutory, subsequent judgment for defendant on counterclaim should be deducted from plaintiff's claim before computing interest. Tex CivA 24SW(2d)770.

1205-61 49Nev299, 245P292.

1206-87 [f] **Determination of exchange value at time of commencement of suit** rather than time of entry of judgment is proper. 23F(2d)927.

1209-20 195Cal 132, 231P987; Cal 271 P471; 231Ky223, 21SW(2d)269(2d case); 315Mo 972, 287SW485, 488 [cit Cyc]; TexCivA 18SW(2d)950.

1210-21 195Cal 132, 231P987.

1210-22 195Cal 132, 231P987.

1210-23 195Cal 132, 231P987; 315Mo 972, 287SW485, 488 [citCyc].

1210-24 195Cal 132, 231P987.

1210-25 161Ga374, 131SE161. [a] (4) Uncertainty of description does not make judgment nullity unless court can see nothing is described. 195Cal 132, 231P987.

1210-29 195Cal 132, 231P987.

1210-30 195Cal 132, 231P987.

1210-33 194NC11, 138SE345.

1211-49 MoA 22SW(2d)836 (decree establishing lien on proceeds of sale of mortgaged property in accordance with agreement for sale and payment of proceeds held erroneously to order execution against bank in which proceeds were deposited); TexCivA 12SW (2d)839.

1212-71 Cal 292P647. [c] **Without prejudice provision held not severable from entire judgment.**-Cal 292P647.

1212-72 [a] **Reservation in decree should be clear and explicit.**-147Va277, 137SE503.

1212-73½-New. Cause tried and submitted on merits only should not result in judgment without prejudice, CalA 284P701.

1212-73⅓-New. Judgments which are not res adjudicata in whole or in part are without prejudice and may so state. CalA 284P701.

1212-73¼-New. Judgment without prejudice in personal injury action, after trial on merits, is not entirely void. CalA 284P701.

1212-74 300Pa321, 150A642.
1213-75 197Cal 649, 242P725; 224 IllA 550 (where judgment was entered by clerk); 234 IllA199; 168La675, 123S 120.
1213-76 233Ky840, 27SW(2d)422. [a] (10) Capital letter "S" is held insufficient signature though first letter of judge's name. 10LaA10, 120S427(1st case). [c] (4) Judgment signed prematurely is not effective until expiration of prescribed time. 169La1046, 126 S548. (5) Judgment not void because not signed within prescribed time. 169 La1046, 126S548. [f] (2) Successor has authority to sign judgment under St. § 977. 226Ky776, 11SW(2d)956. [i] (2) Judgment signed in district other than where case was tried is not invalid. 34PortoRico 661.
1214-77 235Ky490, 31SW(2d)727. [b] **Unsigned judgment afterwards signed** is, as between parties, valid from beginning. 235Ky490, 31SW(2d)727.
1214-82 85Mont562, 281P345 (not proper to enter judgment on merits).
1215-83 11LaA602, 123S367.
1215-84 48 Ida100, 279P621.
1215-85 Ida 288P897.
1215-87 204Cal 515, 269P433.
1215-90½-New. A cause which is tried and submitted only on the merits should not result in a judgment without prejudice. CalA 280P392.
1215-90½-New. A judgment without prejudice in a personal injury action after trial on the merits is not entirely void, since such a reservation may be properly made where the evidence in the proceedings at the trial warrants such a judgment. CalA 280P392.
34 C. J.—31-2 148Miss560, 114S340, 341 [quotCJ].
31-5 See 38GaA287, 143SE912.
31-7 37GaA8, 138SE863; 38GaA287, 143SE912; 40GaA568, 150SE569(2d case); 264Mass337, 162NE689; 322Mo 158, 16SW(2d)190; 116Tex1, 285SW 1063 (void judgments).
32-11 37GaA8, 138SE863.
32-17 [c] (3) This provision held not to prevent discharge of poor debtor's surety from liability for amount of judgment entered on debtor's default after his discharge in bankruptcy. Mass 169 NE548.
33-22 But see 39GaA49, 145SE913.
33-27 116Tex1, 285SW1063.
33-30 18F(2d)817; 216Ala120, 112S 447. See also 206 Iowa562, 218NW306.
33-31 TexCivA 8SW(2d)1100.
33-34 93Fla177, 111S516.
34-38 221MoA807, 287SW1079.
34-41 37GaA8, 138SE863.
35-45 323 Ill 498, 154NE226; 86 IndA 695, 159NE761. [a] 206 Iowa672, 218 NW509.
36-56½-New. A motion in arrest of judgment for insufficiency of the petition is properly denied where the sufficiency of the petition depends on facts necessarily established by the evidence and not admitted by the pleadings. 322 Mo 158, 16SW(2d)190.
36-56⅓-New. Pendency of undisposed of demurrer to petition is not ground for arresting judgment where petition is amendable. GaA 155SE227.
37-65 MoA 18SW(2d)518.
37-68 IndA 153NE179.
38-69 99Fla483, 126S784; 35GaA5, 131 SE524; 86 IndA213, 156NE520.
38-70 99Fla483, 126S784; 86 IndA695, 159NE761. [a] 86 IndA695, 159NE761.
38-71 35GaA5, 131SE524.
39-72 221MoA807, 287SW1079.
39-73 221MoA807, 287SW1079.
39-75 104Conn738, 132A451; 264Mass 337, 162NE689.
39-78 158Md233, 148A453; 322Mo 158, 16SW(2d)190.
39-79 [a] **Fact which defendant must prove cannot be taken advantage of by motion in arrest of judgment.** 322Mo 158, 16SW(2d)190.
39-83 158Md233, 148A453.
40-92 MoA 274SW1098.
40-94 Md 150A850.
40-96 MoA 279SW230.
41-9 Del 143A544.
42-30½-New. A common-law motion in arrest of judgment was in the nature of a general demurrer, based on unamendable defects appearing on the face of the pleadings. 38GaA287, 143 SE912.
42-30¼-New. Where motion for new trial is granted motion in arrest of judgment is ineffective. Mo 28SW(2d) 1035.
42-30¾-New. Petition to vacate judgment for defects appearing on record is in nature of motion in arrest of judgment. GaA 155SE227.
42-30⅓-New. Motions have been construed as in arrest of judgment rather than to set aside judgment for irregularity. Mo 31SW(2d)1026.
42-32 34F(2d)889 (failure to renew motion at close of all evidence held waived); Mo 28SW(2d)1035.
42-33 40GaA568, 150SE569(2dcase); Mo 31SW(2d)1026. [c] (2) Motion must be made during term. 38GaA287, 143SE 912. [e] (1) MoA 7SW(2d)301. (2) If motion filed in term but four days after trial and it is not acted on, it does not carry case over to next term. 311Mo128, 277SW916. (3) Motion filed on day when judgment is rendered is filed within four days after trial, "after trial" meaning after conclusion of trial or rendition of judgment. 322Mo 802, 16 SW92. [k] **In Tennessee.**–153Tenn373, 284SW353. [l] **In Iowa.**–206 Iowa1070, 221NW809.
43-34 See also 38GaA287, 143SE912.
43-41 105Conn528, 136A76; 323 Ill 498, 154NE226; 322Mo 158, 16SW(2d)190.
44-56½-New. Where motion for new trial is overruled, and defendant's motion in arrest of judgment is sustained plaintiffs failure to appeal would end case. Mo 28SW(2d)1035.
44-56⅓-New. Order sustaining motion in arrest of judgment after verdict had been set aside has been held ineffectual for any purpose. Mo 28SW(2d)1035.
44-57 16F(2d)206; 247 IllA358; 220 MoA825, 278SW1047, 1048, 1049 [quot CJ]; 31NM430, 246P899, 900 [citCJ]; 123 Okl 59, 252P845, 846 [citCJ]; 116 Or113, 239P829; TexCivA 281SW575; 189Wis461, 205NW388, 389 [citCyc]; 192Wis269, 212NW643. [a] (2) "Rendition of judgment is determination of interests of the parties involved." 126 Misc256, 212NYS240. [d] **Rendition of judgment** makes it final determination or judgment of court. 126Misc103, 213 NYS476. [e] **Necessity of judgment.**–42F(2d)475.
45-58 16F(2d)206; 220MoA825, 278SW 1047, 1048, 1049 [quotCJ]; 31NM430, 246P899; 116 Or113, 239P829; Tex CivA 281SW575; 189Wis461, 205NW 388, 389 [citCyc].
45-59 16F(2d)206; 220MoA825, 278SW 1047, 1048, 1049 [quotCJ]; 31NM430, 246P899; 116 Or113, 239P829; TexCivA 281SW575; 189Wis461, 205NW388, 389 [citCyc]. [a] (1) TexCivA 281SW575. (6) Judgment derives its force, not from its entry of record, but from rendition by court. Mo 30SW(2d)77.
45-60 82Colo 323, 259P1031, 1032 [cit CJ]; 31NM430, 246P899. [a] **Direction to clerk to withhold journal entry from record** does not have effect of vacating, opening, or modifying judgment. 123 Okl 59, 252P845.
45-62 175Ark253, 299SW44, 48 [quot CJ].
46-63 [d] **Where merits not fully presented** to enable court to decide real questions decree should be refused. WVa 154SE870.
46-72½-New. A special term has power to grant a motion for judgment after a special verdict at the trial term. 134 Misc147, 235NYS24.
46-74 176Ark982, 5SW(2d)316.
46-76 175Ark253, 299SW44, 48 [quot CJ]; 203 Iowa384, 212NW731.
47-78 35Wyo 108, 247P699, 706 [quot CJ].
47-82 [b] **Notation held insufficient.**–116Tex29, 285SW1079, 48ALR355.
48-83 [a] (4) Judgment may be rendered by filing written findings of fact, conclusions of law, and judgment authenticated by signature of trial judgment, though act of signing was not performed in county where case was pending. 197Cal 687, 242P701.
48-85 35Wyo 108, 247P699. [a] **Announcements merely intended to acquaint parties with views to be embodied in judgment** do not constitute pronouncement of judgment. Mo 30SW(2d) 77.
48-87 Contra 199 Ind634, 157NE51.
49-92 155SC340, 152SE652.
49-97 [a] (3) Where demurrer to declaration is rightly sustained. 254Mass 198, 150NE164.
49-98 TexCivA 281SW305. [b] **Nature of motion.**–TexCivA 281SW305.
50-10½-New. Where the record in an action at law shows no pleas or issues joined thereon, no impaneling of a jury, and no verdict except an indorsement on the declaration, a judge of the court not in office when the case was tried may properly deny a motion for judgment on such verdict. 101WVa31, 131SE638.
50-11 [f] **Order does not become final** until signed by judge. 236Kyl, 32SW (2d)548.
52-31 [a] (2) Court's action is necessary before judgment can be entered on report of special referee appointed to report facts. CalA 291P861.
52-38 [a] **Entry of judgment as granting motion for directed verdict.** Mich 233NW220.
52-39 126Misc256, 212NYS240; Or 287 P222; TexCivA 1SW(2d)681; 189Wis 461, 205NW388. [a] **Entry of judgment as entry of fiat endorsed thereon.**–Sask [1928] 1DomLR652.
52-42 164Ga23, 137SE390; 37GaA433, 140SE408; 31NM430, 246P899.
52-43 42F(2d)142; 173Ark468, 292SW 675; 70CalA732, 234P409; 126Misc103; 213NYS476; TexCivA 283SW610, 611 [citCJ]; TexCivA 1SW(2d)681; Tex CivA 7SW(2d)949.
54-48 197Cal 649, 242P725; 208Cal 590, 283P810; Cal 290P1033; 97CalA474, 275 P886; 164Ga23, 137SE390; Iowa 228 NW83 (for defendants on counts as to which court found that jury returned verdicts for defendants); NJ 151A64 (2dcase); 229AppDiv520, 242NYS644; 41 OklACR48. But see 68CalA639, 230P27.
54-49 214Ala489, 108S379, 381 [citCJ].
54-52 33Ariz225, 263P630, 632 [quot CJ]; 34Ariz26, 267P416, 418 [quotCJ]; 197Cal 649, 242P725; 145Wash420, 260 P666. [b] 33Ariz225, 263P630.
55-57 31NM430, 246P899, 900 [citCJ]. [a] 85CalA80, 258P1003.
55-58 233Ky840, 27SW(2d)422; 31NM 430, 246P899, 900 [citCJ].
55-58½-New. In some jurisdictions the winning litigant is entitled to a formal judgment entry if he demands it. 203 Iowa384, 212NW731.
55-58⅓-New. If a nonsuit is granted, no decision is rendered in favor of either of the parties within the requirements of the statute relative to entry of judgment. 100CalA526, 280P538.
55-65 Utah 276P159.
55-66 145Wash420, 260P666. See also 116Tex29, 285SW1079, 48ALR355.
56-72 145Wash420, 260P666.
57-82 41 OklACR48; 189Wis461, 205 NW388. [b] **Entry on minutes of court** is necessary to give validity to judgment. 144Miss1, 108S725.
57-83 [b] **In Oklahoma.**–116 Okl 84, 243 P218.
57-84 199 Ind634, 157NE51.
58-96 [b] (3) Special judge may sign record at any time (199 Ind634, 157NE 51), (4) and upon his failure to do so, case may be mandated (199 Ind634, 157 NE51). [g] **Each judgment as entered** need not be signed but judge is only required to sign record of each days proceedings. 199 Ind634, 157NE51.
59-97 30F(2d)869; 116 Or113, 239P 829; 115Tex537, 285SW296.
59-98 [c] **Clerk's erasure of entry of default on docket by court** is held mere clerical error insufficient to vary judgment. 163Ga843, 137SE550. [d] **Entry by clerk under order of court is entry by court.**–88PaSuper525.
59-1 129Misc183, 221NYS52; 116 Okl 84, 243P218; 95PaSuper47 (effect of failure to comply with statute requiring address of creditor to be furnished clerk before he may enter judgment). [c] **Court reporter's duty** is not to record judgment. 35Wyo 108, 247P699.
59-2 190NC478, 130SE113.

59-5½-New. , or voluntary nonsuit. 189NC805, 128SE329.

59-5¼-New. Statutes authorizing entry by clerk do not deprive the court of jurisdiction to render judgment in term time. 189NC805, 128SE329.

59-6 133Misc83, 230NYS765.

60-7 41 Ida572, 240P597.

60-9 33Ariz225, 263P630; 135Misc724, 238NYS310.

60-11 208 Iowa1252, 226NW114.

60-12 [a] (2) In such case judgment entered by clerk is nullity. 41 Ida572, 240P597. (3) In case involving equitable issues, where phase of case is submitted to jury under stipulation that questions in equity will thereafter be submitted to court, verdict is special and clerk is without authority to enter judgment thereon, unless rendered by court. 41 Ida572, 240P597.

60-13½-New. But statute providing, with certain exceptions, that judgment must be entered by clerk upon direction of court does not deprive judge of power to enter. 187Wis633, 205NW557.

60-13⅓-New. By statute clerk may on order of court enter judgment non obstante veredicto. 287Pa202, 134A625.

60-13¼-New. Trial judge may not arbitrarily refuse to enter judgment on verdict covering all facts necessary. 116 Tex412, 292SW875.

60-13⅙-New. Authority of prothonotary to enter judgment on a note must be strictly construed. 290Pa454, 139A 159.

60-13¼-New. Statute requiring filing at same number and term as judgment of certificate stating precise residence address of creditor is not mandatory substantial compliance being sufficient. 12PaDist&Co 218.

60-16 115Tex537, 285SW296.

61-18 See also 133Misc685, 233NYS 285.

61-19 129Misc183, 221NYS52.

61-27 68CalA639, 230P27; TexCivA 4 SW(2d)1008. [c] **It is not necessary for court to give notice** when judgment is to be entered where cause has been finally submitted and taken under advisement. MoA 19SW(2d)553.

62-32 [c] In Arizona.-284P353.

62-33 But see 85CalA80, 258P1003.

62-38 [b] **Court held not to have abused discretion** in submitting case and entering judgment where delay of five years was due to defendant. 214Ky521, 283SW973.

62-43 35Wyo 108, 247P699 (statement of judge ordering removal of defendant before directed verdict had been rendered has been held not to be judgment of removal). [i] (4) Entry of judgment after trial before court without jury is not authorized till court has made and filed decision disposing of issues. 131 Misc401, 227NYS163. [l] (2) Judgment on merits before perfecting appeal from decision on plea of privilege held not premature. TexCivA 293SW204. [n] **Entry in clerk's minutes** that court ordered removal from office, "verdict to include costs," held not to be proper entry of judgment. 35Wyo 108, 247P 699. [o] **Verdict that officer had been guilty** of misconduct and malfeasance, though recorded in journal, is not judgment of removal. 35Wyo 108, 247P699. [p] **In Michigan.**-248Mich581, 227NW 723(1stcase).

63-44 [i] **Before written decision.**-51SD 443, 214NW842.

63-47 MoA 19SW(2d)553 (to subsequent term).

63-50 NM 290P1015. [b] **Judgment held not void** because trial was before return date of original citation, where defendant answered and presented evidence. TexCivA 297SW573.

64-55 29Ariz538, 243P402.

64-61 [c] (3) 198Cal 641, 246P1041.

65-62 79CalA669, 251P247.

65-71 TexCivA 21SW(2d)1080(2dcase).

66-72 But see Conn 151A512.

66-75 127 Or16, 270P922; TexCivA 290 SW841; TexCivA 24SW(2d)805.

66-78 But see Conn 151A512.

66-79 270US349, 46SCt284, 70Led624.

66-80 [a] **Statutory provisions.**-329 Ill 528, 161NE110.

67-1 See also 236IllA307.

68-5 34Cal 476; 159Cal 65, 112P866, 37 LRANS934, AnnCas1912B1148; 81Md 397, 32A249; 76Mont288, 246P536.

68-6 [c] **On hearing motion at subsequent term trial judge may determine** from trial docket amount of verdict and judgment to be rendered. 151Miss734, 118S425.

68-11 167Ga737, 146SE739; 214Ky514, 283SW1059; 225Ky823, 10SW(2d)277; 151La669, 92S272.

70-30 198Cal 594, 246P805 (date of signing and filing of decree); 205Cal 420, 271P477; 203 Iowa384, 212NW731; 205 Iowa1180, 219NW326; TexCivA 288 SW566; 35Wyo 108, 247P699.

71-36 115Tex537, 285SW296, 301 [quot CJ].

71-38 118 OhSt434, 161NE282; 115Tex 537, 285SW296, 301 [quotCJ]. [a] (2) 116 Or108, 239P541. (6) TexCivA 3SW (2d)937. (8) Object is to supply matters of evidence and to rectify clerical misprisions but not to enable court to correct judicial errors. 73CalA687, 239 P65. (9) Object and purpose of entering judgment nunc pro tunc is to have such judgment properly exhibited of record in order to constitute legal evidence thereof. TexCivA 7SW(2d)613.

71-38½-New. A recital in a judgment entry of the date on which the cause came on for trial does not in itself constitute a nunc pro tunc order that a subsequently entered judgment shall be a lien from the recited date. 205 Iowa 1180, 219NW326.

71-39 4HawaiiFed325, 330 [citCyc]; 236 IllA307; 230Ky316, 19SW(2d)994; 252Mass376, 147NE903; 137Okl 112, 278 P278; 120 Oh621, 169NE295; 115Tex 537, 285SW296, 301 [quotCJ]; TexCivA 283SW220; TexCivA 1SW(2d)681; Tex CivA 7SW(2d)613; TexCivA 24SW(2d) 488; 155Wash351, 284P343, 68ALR254. See also 169Ark979, 277SW48, 49 [cit CJ]; TexCivA 7SW(2d)949.

71-40 115Tex537, 285SW296, 301 [quot CJ].

71-41 230Ky316, 19SW(2d)994; 115 Tex537, 285SW296, 301 [quotCJ]. See also 169Ark979, 277SW48, 49 [citCJ].

71-41½-New. Where the parties agreed that a cause should be submitted and judgment rendered nunc pro tunc, plaintiff could not complain that a nunc pro tunc judgment signed by the successor of the judge trying the case was irregular, where the judgment was entered in conformity with a former judge's opinion. 226Ky776, 11SW(2d) 956.

71-42 176Ark982, 5SW(2d)316; 236 IllA307; 115Tex537, 285SW296, 301 [quotCJ].

72-43 254Mass14, 149NE604; 115Tex 537, 285SW296.

72-44 115Tex537, 285SW296, 301 [quot CJ].

72-46 115Tex537, 285SW296, 301 [quot CJ].

72-47 115Tex537, 285SW296, 301 [quot CJ]. [a] 145Va513, 134SE552.

72-48 36F(2d)591; MoA 282SW451; 115Tex537, 285SW296, 301 [quotCJ]; TexCommnA 296SW871; TexCommnA 15SW(2d)579; TexCivA 283SW220; Tex CivA 286SW650. [f] **Failure through neglect of counsel** to enter formal decree in harmony with opinion modifying decree in favor of plaintiff is held to justify nunc pro tunc judgment. 236Mich 84, 210NW299. [g] **Where judgment actually rendered upon agreed statement of facts,** it is error to refuse order nunc pro tunc. 145Va513, 134SE552.

72-50 115Tex537, 285SW296, 301 [quot CJ].

72-51 236 IllA307, 309 [citCyc&CJ]; 115Tex537, 285SW296, 301 [quotCJ]; TexCivA 7SW(2d)613; 155Wash351, 284 P343, 68ALR254. [b] **Under Federal District Court Rules, rule 22** it is contemplated that, when cause is ripe for judgment and no judgment has been awarded until after expiration of term, judgment shall be entered as of last day of term. 16F(2d)27.

73-52 115Tex537, 285SW296, 301 [quot CJ]; 155Wash351, 284P343, 68ALR254.

73-53 115Tex537, 285SW296, 301 [quotCJ].

73-54 197 Indl, 149NE434; 180Minn 168, 230NW464 (rights of third persons not affected); 115Tex537, 285SW296, 301 [quotCJ]; 155Wash351, 284P343, 68ALR254.

73-55 115Tex537, 285SW296, 301 [quotCJ].

73-56 115Tex537, 285SW296, 301 [quotCJ].

73-57 54ND519, 210NW3; 115Tex537, 285SW296, 301 [quotCJ].

74-61 78Colo 461, 242P634; 98Fla627, 125S2; 197 Indl, 149NE434; 220MoA 825, 278SW1047, 1048, 1049 [citCJ]; TexCommnA 15SW(2d)579; TexCivA 274SW179; TexCivA 283SW220.

75-62 75CalA488, 242P1085; 99NJEq 825, 134A646; 155Wash351, 284P343, 68ALR254; 103WVa514, 138SE93.

76-69 316 Ill 563, 147NE390; 121Kan 873, 250P341.

76-70 24F(2d)172; 73CalA687, 239P 65; 316 Ill 563, 147NE390; 121Kan873, 250P341; 238Mich253, 213NW150; 321 Mo 282, 10SW(2d)914; 56ND380, 217 NW537; 21 OhA282, 152NE757; Tex CivA 4SW(2d)577; TexCivA 11SW(2d) 207; TexCivA 13SW(2d)745; Utah 267 P779.

77-72 180Ark578, 21SW(2d)952.

77-75 180Ark578, 21SW(2d)952; 197 Indl, 149NE434; TexCivA 3SW(2d) 937; TexCivA 16SW(2d)959.

77-76 73CalA687, 239P65.

77-78 197 Indl, 149NE434; 115Tex 537, 285SW296, 301 [quotCJ]. See also MoA 282SW451; 137 Okl 112, 278P278. [c] **Correction of judgment entry** may be made even after appeal and review of the judgment. 121Kan873, 250P341.

78-79 316 Ill 563, 147NE390; 112 Oh 526, 147NE808 (court may not alter conclusions by entry at subsequent term); 115Tex537, 285SW296, 301 [quotCJ].

78-80 [c] 115Tex537, 285SW296.

78-82 115Tex537, 285SW296, 301 [quotCJ].

78-83 115Tex537, 285SW296, 301 [quotCJ].

78-85 115Tex537, 285SW296, 301 [quotCJ]. See also MoA 282SW451.

78-86 180Minn168, 230NW464.

78-88 [e] **Order** need not set out evidence on which based. MoA 282SW451.

79-94 TexCivA 7SW(2d)613.

79-95 See also TexCivA 7SW(2d)613.

79-95½-New. Failure to submit defensive issue to jury may be waived by failure to request submission. TexCivA 24SW(2d)488.

79-1 [b] 137 Okl 112, 278P278.

79-3 5F(2d)6, 7 [quotCJ]; 219Ala123, 121S412; 223Ky70, 2SW(2d)1049, 1053 [quotCJ].

81-4 [b] (1) See also TexCivA 4SW (2d)195 (court itself will decide whether it made order not shown by record).

81-6 [d] **Rule that evidence should be clear** to permit entry of nunc pro tunc judgment does not apply where order is collaterally attacked. 173Ark192; 292SW106.

81-8½-New. Court has discretion to submit to jury question whether order or judgment was actually rendered. TexCivA 4SW(2d)195.

81-9 Ala 112S449; 223Ky70, 2SW(2d) 1049, 1052 [quotCJ]; MoA 277SW939.

82-19½-New. In some jurisdictions the record is the judgment roll. 79CalA 468, 250P195.

82-20 [d] **Term "judgment roll" is equivalent of "judicial record"** when latter is employed as referring to judgment and proceedings leading up to it. 68CalA639, 230P27.

83-38 8LaA689.

83-40 129Misc183, 221NYS52.

83-41 129Misc183, 221NYS52.

83-43 129Misc183, 221NYS52.

84-50 Ida 293P323.

84-57 [a] (1) 137 Okl 95, 278P311. [c] 37 OklACR588.

85-65 51Nev38, 268P45.

85-79 216Ala610, 114S204.

86-91½-New. Record on default judgment entered on amended complaint must show acquisition of jurisdiction over defendant by service of amended pleading or waiver thereof. 75Mont466, 244P277.

87-4 See also 99Cal 278, 33P878.

87-8 138 Okl 15, 280P301 (mortgage

canceled and merged in judgment).
87-13 102CalA342, 283P312.
87-16 [b] (5) Order confirming or modifying findings of referee to ascertain facts. 92CalA318, 268P412.
87-17 216Ala321, 113S495. [g] (1) 80 CalA393, 252P337.
88-26 76CalA354, 244P1089.
88-32 See also 129Misc183, 221NYS52.
89-34 223Ky70, 2SW(2d)1049.
89-35 48 Ida310, 282P72 (judgment properly signed by judge instead of clerk).
89-35½-New. Failure of a judge to read and sign the minutes of the court on the last day of the session does not invalidate judgment rendered during the term. TexCivA 22SW(2d)311.
89-36 [b] (2) 69Utah527, 256P792. (15) Orders of settlement, distribution, and discharge of administrator on final accounting are no part of judgment roll in application for writ of prohibition against enforcement of money judgment against him. 74CalA704, 241P584. (16) Stipulation referred to in decree complete in itself and requiring no explanation. 33NM356, 267P74. (17) Motion to substitute. 137 Okl 67, 277P 1029. (18) Other instances. 111 Conn209, 149A838. (19) Motion to dismiss and amended motion to dismiss and exhibits attached to latter motion. Ida 289P74.
89-46 See also 163Ga843, 137SE550.
89-49 126Misc103, 213NYS476. See also 217AppDiv55, 216NYS466.
90-61 229AppDiv520, 242NYS644.
90-64 [a] **County clerk must provide books,** ruled in columns, for making judgment entries. 229AppDiv520, 242 NYS644.
91-67 [a] **Statutory requirements held directory.–NM** 291P924.
91-68 297Pa49, 146A150. [b] **County clerk must use reasonable care** to properly index name of judgment debtor. 229AppDiv520, 242NYS644. [c] **Though name of judgment debtor** does not appear in proper index column, judgment entered in accordance with statute is legal judgment. 229AppDiv 520, 242NYS644.
91-74 NH 147A898(1stcase).
91-77 9PaDist&Co 660.
92-83 9PaDist&Co 660.
92-85 [k] **In Pennsylvania.–297Pa285,** 146A899(2dcase).
93-96 MoA 24SW(2d)698. [a] (8) Transcript may be properly certified by county clerk as clerk of district court. NM 291P924. (9) **In Oklahoma.–Okl** 293P209.
93-10 170Ark949, 281SW904.
94-15 136Misc215, 239NYS347. [a] (2) 91PaSuper172. (10) New York Justice Court Act § 426 does not prevent county court from vacating judgment of which transcript was filed where justice was without jurisdiction. 136Misc215, 239NYS347.
95-19½-New. Filing in County Court of transcript of void Justice Court judgment did not validate such judgment. 136Misc215, 239NYS347.
95-22 78CalA203, 248P553; 339 Ill 356, 171NE548; 115Tex537, 285SW296. But see TexCivA 7SW(2d)613.
96-32½-New. It will be presumed that the judgment entered in the record was the one actually rendered by the court unless the presumption is overcome by the evidence with reference to the records, clerk's minutes, or docket. MoA 17SW(2d)566.
96-32⅓-New. A judgment declared in the record is not conclusive and may be impeached by proper pleading in direct attack for illegality. TexCivA 7 SW(2d)613.
96-34 296Pa192, 145A804.
97-54 See also Okl 291P546.
98-63 256 IllA445; TexCivA 19SW (2d)421.
98-70 [a] **Note and warrant over one signature** is held one instrument. 234 IllA214.
99-81½-New. Cognovit need not confess judgment favoring any person but may be general. 234 IllA214.
99-81⅓-New. Taking judgment on cognovit note without service or notice during correspondence between plaintiff and defendant's attorney, regarding claims of defense may amount to fraud in procuring judgment. 84Colo 519, 271P625.
99-83 TexCivA 297SW692.
99-84 TexCivA 297SW692.
99-88 14PaDist&Co 209.
99-95½-New. Judgment for deficiency by confession may be entered after foreclosure of mortgage. NJSup 146A789.
99-1 287Pa454, 135A122. [a] **Before default.–287Pa454,** 135A122.
100-3 NJ 142A649; 12PaDist&Co 403.
100-5 287Pa454, 135A122. [a] **"Execution"** on such judgment may be issued after default, and then only for amount due. 287Pa454, 135A122.
100-9 287Pa454, 135A122.
100-10 287Pa454, 135A122.
101-21 Ill 173NE92.
107-32 Ill 173NE92.
101-35 234 IllA214; Wash 288P223.
101-40 [b] **Offer to confess judgment indorsed on acknowledgment of service of summons** is not judgment by confession where court hears evidence in open court. 132 Okl 44, 269P320.
102-50 MoA 7SW(2d)447; 287Pa224, 134A460; 291Pa550, 140A515; 98Pa Super560.
102-55 287Pa224, 134A460.
102-56½-New. But Pennsylvania statute is construed to be mandatory as to the mode of procedure and in derogation of common-law rights. 287Pa224, 134A 460.
103-71 242Mich481, 219NW705.
103-75 248 IllA438 [citCJ]; 195NC491, 142SE772; 5PaDist&Co 407.
103-77 5PaDist&Co 407.
104-82 Mass 171NE232 (does not destroy validity of note); 293Pa478, 143A 186; 285Pa432, 132A360; 87PaSuper 575.
104-83 7PaDist&Co 312.
104-86 248 IllA438 [citCJ].
104-87 NJSup 146A789 (statute in relation to entry of judgment by confession on bonds and warrants is not unconstitutional).
104-93 NJ 142A649.
104-94 92PaSuper1; 92PaSuper14; 92 PaSuper30; 94PaSuper32 (statement of creditor's address held sufficient); 160 Tenn390, 25SW(2d)578.
105-95 297Pa131, 146A533; 9PaDist &Co 682.
105-3 7PaDist&Co 334.
106-21½-New. Delivery of an instrument with a space for the amount left blank is grant of authority to plaintiff to fill the blank with the amount due at the time when he desires to enter judgment. 8PaDist&Co 23.
106-29 Oh 171NE92 (warrant of attorney in promissory note is power coupled with an interest and is irrevocable). [b] **Particular warrants construed.–300Pa** 321, 150A642.
107-30 25 OhNPNS445.
107-31 85Colo 546, 277P782; 25 OhNP NS445.
107-32 25 OhNPNS445; 297Pa131, 146 A533.
107-33 25 OhNPNS445; 5PaDist&Co 183.
107-34½-New. Judgment note payable "as per agreement after date" does not create liability aside from agreement. 290Pa348, 139A114.
107-42 287Pa224, 134A460.
108-43 But see 287Pa224, 134A460.
108-47½-New. A waiver of a right of appeal does not prevent an objection to the judgment in favor of a third party. 297Pa131, 146A533.
108-53 297Pa131, 146A533; 300Pa321, 150A642 (immaterial that use plaintiffs were added).
108-54 287Pa224, 134A460.
108-56 287Pa224, 134A460.
109-60 See also 297Pa131, 146A533.
109-62 [a] 6PaDist&Co 83; 88PaSuper 40; 93PaSuper134. (2) Agreement by assignee to perform all obligations undertaken in lease by original tenant does not confer authority to lessor to enter judgment by confession against assignee under warrant in original lease. 88PaSuper40.
109-63 But see 245 IllA276.
109-69 [a] (2) Joint judgment cannot be entered against maker and guarantor of note on separate confessions. 88 PaSuper245. [b] **Judgment void or voidable.–Joint judgment entered on separate confessions** is void. 88PaSuper 245.
109-73 10PaDist&Co 520.
109-74 25 OhNPNS445.
109-76 232 IllA44; 247 IllA51; 12Pa Dist&Co 551. [c] **Later extensions held no bar to validity** of judgment confessed on maturity. 232 IllA44.
110-79 See also 244 IllA357.
110-82 See also 297Pa74, 146A569. **Erratum.–Text** should read "at any time hereafter," instead of "at any time thereafter."
111-93 Va 154SE488.
111-97 8PaDist&Co 550 (sufficient).
111-3 14PaDist&Co 209.
111-10 85PaSuper296 (on face of instrument); 93PaSuper277; 7PaDist&Co 589. [a] (3) Warrant in lease to confess judgment in ejectment will not authorize confession of money judgment for arrears of rent. 12PaDist&Co 551.
111-11 [c] **Confession in lease for term certain refers to rent for such term** and not to time of holding over where term of lease definitely expires. 93PaSuper 575 (rule inapplicable where holding over is in accordance with terms of lease).
111-11½-New. , and where warrant neither mentions nor refers to any amount and it does not appear what amount is authorized to be confessed, prothonotary may not fix amount. 85 PaSuper296.
112-18 256 IllA445; 287Pa454, 135A 122. [b] **Showing credits.–287Pa454,** 135A122.
112-20⅓-New. Where a warrant for confession of judgment contained in an assignment of a note states no amount, and although the note itself does state the amount that may be confessed, judgment may not be entered by the assignee against the assignor for any amount. 85PaSuper296.
112-24 98PaSuper99; 12PaDist&Co 242.
113-28 [a] 9PaDist&Co 604.
113-31 287Pa454, 135A122; 291Pa228, 139A862; 95PaSuper132; 12PaDist&Co 229 (against indorsers after judgment against makers of note); 12PaDist&Co 638.
113-33 95PaSuper132.
113-34 287Pa454, 135A122.
113-35½-New. Where note contains two warrants, separate judgments may be entered on each. 291Pa228, 139A862.
113-39 160Tenn390, 25SW(2d)578.
113-42½-New. , or by insanity of grantor. 237 IllA233.
113-44 TexCivA 19SW(2d)421.
113-49 290Pa348, 139A114; 11PaDist &Co 186.
114-58 293Pa478, 143A186.
114-61 98PaSuper560. [b] 8PaDist &Co 111. [c] **Statement or affidavit of cause of action is not necessary** to support judgment where confession of judgment is express and unconditional. 8PaDist&Co 23.
114-63 MoA 7SW(2d)447.
115-76 31NM667, 250P18.
116-91 97PaSuper263.
116-94½-New. Where liability is contingent on future business, and note does not restrict entry of judgment until after specific default, an allegation as to the amount due at the time of filing is not required. 287Pa454, 135 A122.
119-52 [a] **Notice of intention to enter deficiency judgment** held sufficient although it stated that it was intended to commence action on bond on which judgment was entered. NJSup 151A395.
119-53 [a] **In Pennsylvania.–92PaSuper** 1; 92PaSuper14; 92PaSuper30.
119-55 87PaSuper575.
119-58½-New. Plaintiff, in a proceeding to enter judgment by confession for deficiency, need not set out in his affidavit that notice of intention to enter judgment for deficiency has been filed. NJSup 146A789.
119-58⅓-New. Where judgment was authorized on a warrant in a lease after default, judgment on the defective record will be stricken where no averment of default is filed. 94PaSuper252.
119-62 256 IllA445 (sufficient jurisdiction); Wash 288P223 (court of record).
120-67½-New. Bonds may authorize

obligee to confess judgments in another state against resident obligors on default, without service of process. 130 **Misc**624, 224**NYS**386.

120–74 5**PaDist&Co** 407; 10**PaDist&Co** 520; 95**PaSuper**551; 12**PaDist&Co** 315.

120–85 87**PaSuper**575. But see 291**Pa** 550, 140A515. [b] **Statute mandatory but manner of compliance directory.**–291**Pa**550, 140A515 (as to placing on record residence of holder of note). [c] **Certificate of creditor's residence** must be produced. 299**Pa**173, 149A198 (designation of address held sufficient).

121–88 8**PaDist&Co** 23; 95**PaSuper**47 (averment of default required for entry of judgment on bond).

121–89 296**Pa**16, 145A584; 87**PaSuper** 336. [a] (3) Default in conditional lease of personal property must be averred. 12**PaDist&Co** 802.

121–93½–New. Certificate of evidence is unnecessary when contained in the lease. 5**PaDist&Co** 274.

122–15½–New. If authority is unconditional, no affidavit is required. 5**Pa Dist&Co** 274.

123–20 See also **NJSup** 145A225(2d case).

123–28 12**PaDist&Co** 551.

123–33½–New. It is immaterial what action is denominated in judgment by confession on note. **Wash** 288P223.

123–37. 290**Pa**454, 139A159; 292**Pa**518, 141A475.

123–41 **NJSup** 146A789 (judgment by confession may be entered on two bonds in one proceeding).

124–54 164**Minn**81, 204**NW**923.

125–67 8**PaDist&Co** 423.

125–69½–New. Where a married woman who had signed a note as security for her husband signed it a second time after his death, judgment may be entered against her. 8**PaDist&Co** 423.

125–69⅓–New. although the note under her first signature was void as to her. 8**PaDist&Co** 423.

125–75 But see 244 **IllA**366.

126–82 See also 244 **IllA**366.

126–92 [b] **Recital of time of entry.**–**NJSup** 151A395.

126–96½–New. A judgment by confession must be self-sustaining on the record. 6**PaDist&Co** 83.

126–96⅓–New. Statute requiring certificate of creditor's residence held sufficiently complied with. 12**PaDist&Co** 328 (where creditor non-resident of state).

126–99 8**PaDist&Co** 23.

126–99½–New. It is immaterial that the amount appearing on the face of the instrument was entered thereon after execution of the instrument. 8**PaDist& Co** 23.

126–6 94**PaSuper**272 (agreement as to amount not invalid as lacking consideration).

127–17 299**Pa**423, 149A731.

127–26 130**Misc**188, 223**NYS**678.

128–52 11**PaDist&Co** 240.

128–54½–New. The entry of judgment before maturity of a note which authorizes the entry after maturity is an irregularity rendering judgment voidable only. 88**PaSuper**245.

128–54⅓–New. Judgment by confession for deficiency after foreclosure of a mortgage, following statutory requirements, cannot be invalidated by it appearing, in a subsequent report of the receiver, that plaintiff received, or will or may receive, rents from the receiver. **NJSup** 146A789.

129–71 289**Pa**252, 137A257.

130–73 198**NC**604, 152**SE**797(1stcase). [b] **Partition judgment from which party receiving land does not appeal** can be regarded as an "agreed judgment" so far as he and his assignee were concerned. **TexCivA** 29**SW(2d)**461.

130–75 216**Ala**74, 112**S**342; 191**NC**68, 131**SE**372 (ordinarily is binding contract); 191**NC**143, 131**SE**305; 191**NC** 190, 131**SE**656; 191**NC**253, 131**SE**659; 192**NC**274, 134**SE**852; 134**SC**34, 131**SE** 768; 115**Tex**310, 280**SW**523; **TexCivA** 275**SW**673.

130–76 191**NC**190, 131**SE**656.

130–79 194**NC**308, 139**SE**610.

130–80 334 **Ill** 137, 165**NE**598, 65**ALR** 344.

131–82 203 **Iowa**645, 212**NW**564.

131–83 But see 191**NC**68, 131**SE**372.

131–86 201 **Iowa**984, 206**NW**827, 828 [citCJ] (not deciding question).

132–96 131**Misc**502, 227**NYS**282.

132–98 105**WVa**246, 142**SE**63.

132–1 [a] (1) 155**Miss**316, 124**S**365.

132–1½–New. An agreement incorporated in the judgment is sufficient. 216 **Ala**74, 112**S**342.

132–3 **TexCivA** 26**SW(2d)**382.

132–7½–New. **Twelve-month bond** is a creature of statute; an obligation known to Spanish civil law. **TexCivA** 273**SW**993.

132–7⅓–New. A stipulation for judgment is a consent to entry of judgment. 76**CalA**538, 245**P**442.

132–7¼–New. Consent decree entered without notice to one of two adversely interested defendants is insufficient and must be vacated. 202 **Iowa**804, 211**NW** 366.

132–7⅕–New. Consent decree under Anti-Trust Act is not void because entered without support of facts where allegations of bill are not specifically denied. 276**US**311, 48**SCt**311, 72**L ed** 587.

132–8 100**NJEq**479, 135A545.

132–13½–New. One of two adversely interested defendants cannot appear to consent to decree. 202 **Iowa**804, 211**NW** 366.

133–19 See also 194**NC**308, 139**SE**610 (mere irregularity in proceedings cannot invalidate consent judgment).

133–24 334 **Ill** 137, 165**NE**598, 65**ALR** 344.

133–26 207 **Iowa**236, 222**NW**363.

133–30½–New. Where a resolution of the county board of education selecting a school site authorized judgment in a pending litigation with the county commissioners upon approval of the resolution by the latter, the judgment, by operation of law, became a consent judgment without signature of counsel. 192 **NC**274, 134**SE**852.

133–31 228**AppDiv**54, 239**NYS**28.

133–32 276**US**311, 48**SCt**311, 72**L ed**587; 216**Ky**736, 288**SW**733; 191**NC**190, 131 **SE**656; 191**NC**253, 131**SE**659; 192**NC** 274, 134**SE**852; 195**NC**264, 141**SE**885; **TexCivA** 275**SW**673; **TexCivA** 284**SW** 310; 144**Va**692, 130**SE**902, 911 [citCJ]. [c] **Where enforcement would be violation of law,** it is not binding. **TexCivA** 284**SW**310. [d] **Must be binding on both parties.**–**TexCivA** 284**SW**310. [e] **Supplemental judgment held contrary to terms of consent judgment.**–191**NC**190, 131**SE**656.

133–32½–New. Consent decree is not a judicial determination by the court of any litigated right. 260**Mass**242, 157**NE** 540.

133–33 191**NC**190, 131**SE**656.

133–34 216**Ala**74, 112**S**342.

133–36½–New. Prior negotiations are merged in the judgment. 216**Ky**736, 288**SW**733.

133–36⅓–New. The law will not inquire into the reason for making a consent judgment. 192**NC**274, 134**SE**852.

133–36¼–New. Where the judgment recites that both parties appeared in person and by their attorneys it is conclusively presumed that the parties understood the intent and content of the judgment. 207 **Iowa**236, 222**NW**363.

133–36⅕–New. Adverse vote of electors terminated city's right to take over water plant under resolution and made consent judgment as to price to be paid ineffectual. 300**Pa**439, 150A652.

133–37 42**F(2d)**304; 80**Colo** 452, 252**P** 343; 110**Conn**208, 147A675 (right to raise question that judgment based on facts not in issue); 99**NJEq**486, 133**A** 529; 117**Tex**10, 295**SW**917.

133–38 276**US**311, 48**SCt**311, 72**L ed**587; 216**Ala**74, 112**S**342; 76**CalA**538, 245**P** 442; 102**CalA**650, 283**P**366; 334 **Ill** 137, 165**NE**598, 65**ALR**344; 99**NJEq**486, 133 **A**529; 191**NC**68, 131**SE**372 (ordinarily is binding contract); 191**NC**143, 131**SE** 305; 134**SC**34, 131**SE**768; 144**Va**692, 130**SE**902, 911 [citCJ]. But see 25 **OhA** 344, 158**NE**203. [a] **Judgment by consent** does not affect rights of others not parties to proceedings. 67**Utah**553, 248 **P**496.

134–42 42**F(2d)**304; 196**Cal** 380, 238**P** 81 (judgment not appealed); 92**CalA** 537, 268**P**679.

134–43 42**F(2d)**304.

134–47 196**Cal** 380, 238**P**81.

134–50½–New. Consent of judgment may be impeached by evidence of want of jurisdiction, 196**Cal** 380, 238**P**81.

134–50⅓–New. or by showing collusion between the parties. 196**Cal** 380, 238**P** 81.

134–50¼–New. The judgment can only be set aside on grounds of fraud or mutual mistake. 191**NC**190, 131**SE**656; 191**NC**253, 131**SE**659.

134–50⅕–New. If the parties have authority, a consent judgment cannot be changed, altered, or set aside without consent of the parties to it. 191**NC**190, 131**SE**656; 191**NC**253, 131**SE**659.

134–52 76**CalA**538, 245**P**442; **TexCivA** 3**SW(2d)**925, 927 [quotCJ]; **TexCivA** 10 **SW(2d)**412.

135–68 [c] **Filing.**–131**Misc**99, 226**NYS** 199.

138–85½–New. Consent of nonresident defendant admitting service to entry of judgment is equivalent to offer of judgment. 131**Misc**99, 226**NYS**199.

139–97 175**Ark**891, 1**SW(2d)**11, 13 [quotCJ].

141–20 175**Ark**891, 1**SW(2d)**11, 13 [quotCJ].

141–23 131**Misc**99, 226**NYS**199.

141–25½–New. The court cannot in effect require plaintiff to accept defendant's offer of judgment for a specified sum. 216**AppDiv**548, 215**NYS**338.

142–40 But see **TexCivA** 20**SW(2d)**822.

142–50 248**Mich**447, 227**NW**723(2d case).

143–54 6**F(2d)**27.

143–56 71**CalA**717, 236**P**371 (admission not conclusive of issues in cause).

143–58 5**PaDist&Co** 310.

144–77 339 **Ill** 384, 171**NE**531.

147–6 **TexCivA** 17**SW(2d)**1114; 136 **Wash**322, 239**P**1015, 1016 [citCJ].

147–9½–New. Where an issue has not been joined by answer or legal default, the judgment rendered is null. 10**LaA** 435, 121**S**320.

147–10 **MoA** 284**SW**808; **MoA** 26**SW (2d)**815.

147–13 46**Philippine**79.

147–13½–New. A judgment for want of sufficient affidavit of defense is not a judgment by default. 85**PaSuper**285.

147–14 **Mont** 285**P**668; **TexCivA** 276 **SW**757, 763 [quotCJ].

147–15 **TexCivA** 276**SW**757, 763 [quot CJ].

148–17 **TexCommnA** 284**SW**210.

148–19 244 **IllA**241.

148–22 [a] (4) By a nil dicit judgment defendant impliedly confesses judgment and waives all errors of pleading and proof except such as appear were not intended to be waived. **TexCommnA** 284**SW**210. (5) Nil dicit judgment is to be distinguished from judgment by default arising when defendant has answer on file but fails to call it to attention of court. **TexCommnA** 284**SW**210.

149–37 173**Minn**606, 218**NW**127. [b] (3) Judgment for default in suit for unliquidated damages held void. **Tex CivA** 292**SW**610.

149–38 5**PaDist&Co** 178.

149–44 170**La**105, 127**S**380 (intervenors).

149–49 **TexCivA** 283**SW**914.

150–69 213**Ala**279, 104**S**523.

150–70 213**Ala**279, 280, 104**S**523 [cit CJ].

151–72 311**Mo** 49, 277**SW**562.

151–75 223**AppDiv**355, 228**NYS**170.

151–85 **AlaA** 130**S**534.

152–6 146**Miss**22, 111**S**741; 48**RI** 267, 137A221.

152–8 226**Ky**159, 10**SW(2d)**633; **Tex CivA** 283**SW**177.

152–9 **TexCivA** 276**SW**757.

153–10½–New. **In New York** the county judge is without jurisdiction to grant such default judgment in an action pending in the supreme court. 133**Misc** 128, 231**NYS**275.

153–10⅓–New. Default judgments have

been held not void on the ground that failure to give defendant statutory notice of the filing of a controverting plea at the term in which filed deprived the court of further jurisdiction, where defendants waived such notice by appearing at a subsequent term and filing the motion, to dismiss the controverting plea. TexCivA 10SW(2d)235.

153–13 13F(2d)969, 971 [quotCJ]; 219 Ala399, 122S359; 223Ky389, 3SW(2d) 762; 230Ky82, 18SW(2d)883; 196NC 256, 145SE236(2dcase); 39 OklACR322; TexCommnA 291SW845; TexCivA 276 SW757, 763 [citCJ]; TexCivA 292SW 610; TexCivA 24SW(2d)805 (petition in action for fraud held sufficient). [a] (3) Other complaints held insufficient. TexCommnA 291SW845; TexCivA 284 SW301; TexCivA 292SW610; 195NC 299, 141SE892. (4) Other instances. TexCommnA 26SW(2d)195. [d] **Court will not examine petition** for purpose of determining legal sufficiency of averments to state cause of action. Tex CommnA 284SW210. [e] **Complaint in action on contract** must allege both contract and breach thereof. 195NC299, 141SE892.

154–17 [b] **Allegation in suit in life insurance policy** showing policy was changed so as to make it payable to plaintiff held sufficient to support default judgment. TexCommnA 291SW 845.

154–18½–New. Where defendant, in an action of replevin, files a verified answer setting up facts sufficient to defeat plaintiff's right to recover, and to entitle defendant to judgment for money against plaintiff who files no reply, the court is without authority to render a default judgment against defendant. 122 Okl 67, 251P33.

154–18⅓–New. In an action on a contract, a judgment cannot be entered for want of reply to a plea of recoupment setting up a breach of the contract and damages resulting therefrom, where the plea does not contain data from which the court can determine on the face of the pleading the extent of the damages. 152Miss704, 120S834.

154–19 TexCivA 276SW757. [a] **Petition held sufficient.–TexCivA** 276SW 757.

154–19½–New. , even though subject to special exceptions. TexCivA 276SW 757.

154–21 73CalA368, 238P820; 46 Ida 671, 270P618.

154–22 127Kan383, 273P464; Tex CommnA 291SW845; TexCivA 280SW 621.

154–23 130 Okl 270, 267P239.

154–24 69CalA705, 231P766; MoA 282 SW158; TexCivA 276SW757.

154–26 127Kan383, 273P464; 191NC 818, 133SE186; 131 Okl 196, 268P258.

155–32 [a] **After plaintiff has voluntarily dismissed his action,** defendant cannot, while order of dismissal is in force, take default judgment on cross-petition filed after order of dismissal was made. 136 Okl 106, 276P233.

156–51 152Md335, 136A648.

156–52 76CalA530, 245P451; 231Mich 689, 204NW706. [f] **In Maryland.–152** Md335, 136A648.

156–58 [d] 10PaDist&Co 39.

157–64 199CalA523, 250P397; 35GaA 5, 131SE524; 35GaA159, 132SE644; 76 Mont117, 245P539.

157–64½–New. but not in case of formal amendment alleging no new facts, 35GaA5, 131SE524.

157–65 199Cal 523, 250P397; 201 Iowa 791, 208NW323.

157–66 199Cal 523, 250P397; 201 Iowa 791, 208NW323; 75Mont466, 244P277.

157–68 35GaA5, 131SE524; 35GaA159, 132SE644.

158–91 78Mont329, 253P889; 87Pa Super602; 6PaDist&Co 153. But see TexCivA 32SW(2d)384. [a] **Interlocutory decree pro confesso,** where defendant did not appear or answer, must stand. 252Mass574, 147NE847. [b] **Total failure of appearance** held essential to warrant judgment. 78Mont329, 253 P889.

159–94 52ND845, 204NW840.

159–7½–New. Where defendant withdrew before trial, it was held error for court to render judgment for plaintiff without dismissing cross petition. 316 Mo 609, 291SW462.

159–7⅓–New. Where only one of several defendants appeared, but defaulted in pleading, its subsequent consent to an entry of judgment was in effect a withdrawal of its appearance, and authorized plaintiff to proceed as though said defendant had not appeared. 133Misc 128, 231NYS275.

159–10 173Ark417, 292SW391.

160–14 136Wash322, 239P1015. See also 108Conn173, 143A51. [a] (2) To foreign judgment where defendant appeared and demurred, but complaint set up no cause of action. 136Wash322, 239 P1015.

160–15 98Cal 738, 277P867; 253 IllA91 (in action for negligence where answer presents issue); MoA 24SW(2d)715; TexCivA 293SW335; 34Wyo 509, 245P 295.

160–16 222AppDiv615, 227NYS156.

160–18 But see TexCivA 294SW1115.

160–19 20AlaA531, 104S895 (plaintiff entitled to default judgment or nil dicit on defendant's failure to appear at trial and meet burden cast by special defenses inferentially admitting complaint).

160–20 [b] But see 20AlaA531, 104S 895.

160–23 But see TexCivA 24SW(2d)757. Contra TexCivA 294SW1115. [d] **Where only defensive matters are pleaded,** judgment for defendant on plaintiff's failure to appear is error. 41 GaA684, 154SE458.

161–27 76CalA223, 244P162; 176Ark 553, 3SW(2d)307; 164Ga313, 138SE 793; 13LaA141, 127S456(2dcase); 309 Mo 224, 274SW758; TexCivA 299SW 514. But see 170Ark1194, 282SW17.

161–31½–New. Defendant has an absolute right to stand in default and cannot be required to plead by order of court. MoA 23SW(2d)1092.

161–34 [b] 203 Iowa581, 213NW413.

161–37 22AlaA153, 113S492; 78Mont 329, 253P889.

162–45 See also TexCivA 17SW(2d) 1114.

162–59 10LaA379, 120S905.

163–61 180Ark46, 20SW(2d)317; 93 Fla1128, 114S425; 40GaA568, 150SE569 (2dcase); 85Mont604, 281P540 (whether statute declares default or not); Tex CivA 287SW291; 35 OhA73, 171NE868.

163–62 91CalA652, 267P320.

163–67 37GaA433, 140SE408; 116Tex 146, 287SW241.

164–68 75Mont332, 243P576, 581 [quot CJ].

164–69 75Mont332, 243P576, 581 [quot CJ].

164–70 75Mont332, 243P576, 581 [quot CJ].

164–73½–New. Where the trial can be disposed of in the ordinary way, in term, and trial on the merits cannot harm plaintiff, the court should not summarily deny a hearing because defendant is caught unawares through the attorney's inadvertence or willful neglect. 146Miss842, 112S368.

164–82½–New. Defendant presenting a plea, before default judgment is taken, on the same day, is entitled to a trial on the merits where failure to present the plea in time was caused by the attorney's inadvertence and only a slight delay will result. 146Miss842, 112S368.

164–85 29 OhA530, 163NE307. See also MoA 18SW(2d)119.

165–86 203Cal 306, 265P246, 250 [cit CJ].

165–87 [a] 203Cal 306, 265P246.

165–89 203Cal 306, 265P246.

165–91 203Cal 306, 265P246.

165–4 37GaA433, 140SE408.

166–5 242 IllA370.

167–24 300Pa92, 150A165.

167–39 5F(2d)582.

167–40 127Kan817, 275P176, 65ALR 696; 218MoA187, 265SW866; 33Porto Rico 288.

168–43½–New. In some jurisdictions a default judgment cannot properly be entered against a defendant whose demurrer has been overruled until the statutory notice of the overruling of the demurrer has been given, 89CalA396, 265P306.

168–43⅓–New. and the time allowed thereafter for answering has expired. 89CalA396, 265P306.

168–45½–New. Where change of venue is granted and defendant fails to plead further, judgment by nil dicit may be taken against him. TexCommnA 284 SW210.

168–46 92Fla396, 109S471.

168–51 85Mont604, 281P540 (whether statute declares default or not).

168–53 MoA 13SW(2d)659; 73Mont 180, 235P770.

168–55 192NC731, 135SE861.

169–59 Mo 25SW(2d)472.

169–59½–New. Failure to reply where defendant's answer is merely affirmative denial will not entitle defendant to default judgment. 222Ky139, 300SW 328.

169–63 [g] **Unauthorized withdrawal of answer by attorney** does not authorize entry of judgment by default. SD 227 NW567.

169–64 35GaA286, 132SE921; 35GaA 284, 134SE174; 243 IllA497. See also 37GaA433, 140SE408.

169–65 171Minn405, 214NW261.

169–70 22AlaA153, 113S492.

169–71 244 IllA241; 153Miss51, 120S 821; 35 OhA73, 171NE868; 121 Okl 292, 250P89 [quotCJ].

170–73 121 Okl 292, 250P89 [quotCJ].

170–74 153Miss51, 120S821; 121 Okl 292, 250P89 [quotCJ].

170–75 121 Okl 292, 250P89 [quotCJ]. [b] **Null plea** is one so void of substance that it cannot, within rules governing amendments, be cured by amendment. 153Miss51, 120S821.

170–76 121 Okl 292, 250P89 [quotCJ].

170–79 See also 49RI 407, 143A615.

171–90 244 IllA78.

171–1 99Fla592, 127S333; MoA 12 SW(2d)95; 121 Okl 292, 250P89 [cit CJ]. [a] **Motion must be one, granting of which would be inconsistent** with right of plaintiff to judgment by default on complaint filed. 85Mont604, 281P 540.

171–3 121 Okl 292, 250P89 [citCJ].

172–8 Utah 276P908. [a] **Default judgment will not be prevented by motion** made on last day for defendant to plead where he failed to submit answer or request extension of time on receipt of bill of particulars for plaintiff. Utah 276P908.

172–12 128Kan541, 278P725.

172–17 But see 133Misc512, 231NYS 676.

172–18½–New. Where, without a præcipe being filed and without other authority, the court clerk issues a summons upon the filing of a cross petition, a motion to quash such service of summons, filed out of time, is not such a pleading, properly filed, as, while undisposed of, will affect the validity of a judgment by default on the cross petition. 121 Okl 292, 250P89.

172–18⅓–New. Where plaintiff filed no pleading or motion to new matter in the answer, his motion to strike certain allegations from the answer, to which no reply was necessary, did not toll time to reply or demur to new matter. 85 Mont604, 281P540.

172–29 190NC235, 129SE626; 198NC 411, 151SE884; Sask [1929] 3DomLR 676. [a] **Interlocutory** till there is proper assessment of damages by jury on execution of writ of inquiry. 213 Ala223, 104S402.

173–37½–New. In a tort action, the question of whether defendant was a charitable organization was not adjudicated when judgment was taken by default. 224 IllA367.

173–37⅓–New. A judgment against one of defendants, not appealed from, has been held final. 10LaA287, 120S684.

173–39 TexCommnA 284SW210.

173–49 Cal 290P447; 199Cal 523, 250 P397; 35GaA284, 134SE174; Ind 168 NE873; 315Mo 535, 286SW53; MoA 296SW176; 128Misc149, 218NYS373; 121 Or76, 252P708; TexCivA 276SW 757; TexCivA 286SW581, 584 [citCJ perWillson,CJ]; TexCivA 288SW586, 587 [citCJ]; TexCivA 1SW(2d)466; 101 WVa118, 132SE487. [a] 35GaA284, 134 SE174. [d] **Where there is alternative count,** nil dicit by defendant imposes primary liability upon him. Tex

CommnA 284SW210.
174-56 220Ky464, 295SW442.
175-64 But see 41GaA818, 155SE92.
175-68 199Cal 523, 250P397.
175-73 13F(2d)969, 971 [quotCJ]; 201 Cal 555, 258P71; 114 Okl 153, 244P744; 36 OklACR569; 121 Or469, 256P195; TexCivA 276SW757, 763 [citCJ].
176-80 41 Ida538, 240P600, 602 [cit CJ]; 48RI 155, 136A306; TexCivA 286 SW581, 584 [citCJperWillson,CJ].
176-81 35GaA284, 134SE174; 41 Ida 538, 240P600, 602 [citCJ]; 252NY347, 169NE605; TexCommnA 284SW210; TexCivA 286SW581, 584 [citCJperWillson,CJ]; Utah 276P908.
176-83 41 Ida538, 240P600; 103WVa 561, 138SE313.
176-91 Cal 290P447. [a] (2) Defaulting defendants are not entitled to be served with answers of codefendants wherein no further relief is sought that is grantable under terms of complaint. 201Cal 555, 258P71.
177-96 91CalA65, 266P821.
177-98 91CalA65, 266P821.
177-3 253 IllA333. [b] **In Florida.**–98 Fla970, 124S729.
177-4½-New. Where a superior court rule provided that every Monday should be law and motion day, defendant's counsel, who filed a general demurrer to the complaint, were bound to watch the call of said calendar. 35Ariz78, 274P 776.
177-6 149Md474, 132A70. [b] (4) Lack of verified answer to verified complaint. 189NC724, 128SE324.
177-8½-New. fails to have default entered, 74Mont509, 241P227.
177-9 51SD527, 215NW692. But see 91CalA65, 266P821.
177-12 85Mont604, 281P540.
178-19 33PortoRico 214; 33PortoRico 214.
178-19½-New. Although the jury has been demanded in writing, the court may enter the judgment without the aid of the jury. 219Ala410, 122S405.
178-23 193NC802, 138SE167. [d] **Montana statute** is construed as directory rather than mandatory. 74Mont 509, 241P227.
178-24 129Misc643, 222NYS225.
178-25 98Fla497, 124S19; 74Mont509, 241P227.
178-29 88CalA16, 263P253.
178-31 92Fla396, 109S471; 85Mont 375, 278P832, 65ALR968; 191NC818, 133SE186; 194NC321, 139SE451.
178-43 91CalA65, 266P821; 41 Ida538, 240P600; 238Mich119, 213NW143; 173 Minn606, 218NW127.
178-44 33PortoRico 214. [a] **If interested party applies to court,** and court elects to render judgment, such judgment is absolutely valid. 33PortoRico 214.
179-47 41 Ida538, 240P600; 74Mont 509, 241P227; 252NY347, 169NE605.
179-52 80CalA352, 251P959; 91CalA 65, 266P821.
179-56 85Mont604, 281P540; 35Porto Rico 112; 47RI 85, 129A813. [b] **In Missouri.**–315Mo 535, 286SW53.
179-57 315Mo 535, 286SW53.
179-61 81Mont459, 264P127. [b] **Failure to cause entry of default is implied extension of time to appear.**–81Mont459, 263P127.
179-66 37GaA433, 140SE408.
180-71 76CalA530, 245P451. [a] (5) Prior to time defendant was substituted as party defendant. 76CalA530, 245P 451. (6) Against codefendant on cross action, before he is served with cross action. TexCivA 283SW188. [b] **Mere entry of words "in default"** on docket at proper time by court amounts to entry of default judgment. 163Ga843, 137 SE550. [c] **Judgment held not premature.**–300Pa92, 150A165 (nullification of statute not effected).
180-80½-New. Under some statutes it is the duty of the clerk to enter judgment immediately after entry of default. 80CalA352, 251P959.
180-82 31NM537, 249P109; Wash 290 P991.
180-84 31NM537, 249P109.
181-98 31NM537, 249P109.
181-2½-New. A default judgment is properly entered on defendant's failure to "discharge a rule to answer" although it is contended that the rule was not served. 86 IndA276, 157NE114.
182-5½-New. Judgment against codefendant on cross action filed during the term at which the main case was tried is premature where codefendant was not served with cross action, filed no answer thereto, and entered no appearance thereon. TexCivA 283SW188.
182-8 See also TexCivA 272SW519.
182-13 [a] **Time begins to run** only after proper entry of default in "default docket." 91Fla1015, 109S220.
182-15 98Fla759, 125S1.
183-29½-New. Where there are several defendants, the trial court may, as convenience dictates, either render judgment by default against the nonappearing parties before final hearing or await the trial and render appropriate judgment as to all parties at that time. 213 Ala279, 104S523.
183-49 91Fla490, 107S625.
184-52 [b] 214Ala260, 107S804.
184-57 41 Ida538, 240P600.
184-65½-New. Statement of facts is unnecessary in action against foreign corporation resulting in default judgment against it. TexCivA 28W(2d)360.
185-68 165Minn460, 206NW951 (action for goods sold and delivered); 137Misc707, 244NYS206; 33PortoRico 565. [a] (2) Where note provides for unliquidated reasonable attorney's fee in event of suit, clerk is without authority to enter judgment by default for principal, interest and attorney's fee. 41 Ida538, 240P600. [c] **Where damages are unliquidated by terms of contract itself,** clerk is not authorized to enter default judgment. 41 Ida538, 240P600.
185-82 242 IllA370; 250 IllA122. [a] (3) **In Oklahoma.**–137 Okl 67, 277P1029. [d] (1) 135Wash313, 237P726. [e] **In Vermont,** where plaintiff does not file motion for default judgment within six months from time entitled thereto, he cannot take judgment till he has taken and served order on defendant to file answer. 100Vt187, 136A28 (Chancery Rules, rule 35 pur 2).
186-83 233 IllA72; LaA 129S167 (after expiration of reasonable time to answer).
186-84 100NJEq1, 134A875.
186-87 52ND845, 204NW840. See also 128Misc149, 218NYS373.
186-95 TexCivA 281SW326.
186-97 244Mich397, 221NW276.
187-7 TexCivA 281SW326.
188-21 [a] (1) 158La745, 104S701 (action for partition, holding that default puts all essential allegations of petition at issue).
188-25 253 IllA333; 192NC195, 134SE 423; TexCivA 286SW581, 584 [citCJperWillson,CJ]; TexCivA 1SW(2d)466; 101WVa118, 132SE487. See also 21 SaskL118, [1926] 9DomLR48, [1926] 3 WestWkly127. [c] (1) 35GaA286, 132SE 921; 35GaA284, 134SE174. [d] (1) 284 Pa521, 131A363. (4) Where statement filed does not disclose proper cause of action default may be set aside. 97 PaSuper255. (5) When essentials to cause of action are absent from statement of claim judgment will be opened. 97PaSuper291. [e] It is proper for plaintiff to submit case on statement of claim and affidavit of defense. 97Pa Super392.
188-28 98Fla497, 124S19; TexCivA 283SW531. [a] (7) In action for damages for misapplication of bank funds. TexCivA 286SW581. (8) In action to establish interest in land. TexCivA 283 SW531. (9) Action to quiet title. 98 CalA738, 277P867.
188-29 [a] **Default based on personal service** outside state does not dispense with proof. 41 Ida756, 242P798.
189-37 TexCivA 10SW(2d)1010.
189-43 252NY347, 169NE605.
189-46 91Fla1015, 109S220; 223Ky 441, 3SW(2d)1068; 146Miss468, 111S 747; 315Mo 535, 286SW53; 190NC235, 129SE626 (entitled only to damages flowing from cause of action, and amount to be ascertained by jury); 195 NC299, 141SE892; 198NC411, 151SE 884; 284Pa521, 131A363; 48RI 155, 136A306; TexCivA 286SW581, 584 [cit CJperWillson,CJ]; Utah 276P908.
189-48 195NC299, 141SE892. See also 237 IllA299.
190-52 190NC235, 129SE626; 197NC 189, 148SE36.
190-55 [a] (1) 10LaA30, 121S196(1st case); 3LaA286.
191-77½-New. In Alberta an affidavit of nonfiling of a statement of defense is not a condition precedent to signing default judgment. Alta [1927] 2Dom LR1039, [1927] 1WestWkly1011.
191-77½-New. On defendant's motion, under statutes for plaintiff's failure to plead to new matter, the pleading should not be held insufficient unless clearly bad or there is reasonable doubt as to its sufficiency. 85Mont604, 281P540 (complaint held sufficient).
191-82 88CalA16, 263P253; 121 Or 469, 256P195. [c] **Issues without record** can have no bearing on correctness of relief awarded. 121 Or469, 256P195.
191-85 202Cal 312, 260P545; 48 Ida 750, 285P461; 86Mont387, 284P128. See also 203Cal 438, 264P1098.
192-88 [a] **Where partial foreclosure of mortgage is unauthorized,** judgment therefor cannot be rendered though defendant fails to appear. 135Misc391, 239NYS558.
192-90½-New. On plaintiff's default it is error to award defendant damages where no issue of damages was raised in the pleadings. 86CalA412, 260P832.
192-91 86Mont387, 284P128.
192-92 84 IndA676, 151NE26.
192-98½-New. Where plaintiff fails to reply to separate affirmative defenses in the answer, as required by statute, allegations of such defenses become an agreed statement of facts upon which alone the court is required to enter such judgment as defendant is entitled to. 85Mont604, 281P540.
192-1 252NY347, 169NE605.
192-4 84 IndA676, 151NE26; 54SD 149, 222NW688. [a] **Default judgment for sum of money** held unauthorized. 84 IndA676, 151NE26.
193-10½-New. The court may enter a default judgment for attorney's fees, where a note so provides, without submitting reasonableness of the fee to the jury. 92Fla210, 109S632.
193-29 See also 163Ga843, 137SE550.
194-36½-New. Default judgment, which was not to take effect until the maturity of the note sued on, was in conformity with the code and hence not void. 225Ky529, 9SW(2d)302.
194-38 [a] 20AlaA643, 104S774 (but not void and will support appeal).
194-39 See also 238Mich119, 213NW 143.
194-43½-New. Where several persons are sued on their joint and several liability on notes, and some of them default, and judgment is entered against them prior to a similar entry of judgment against their codefendant, who appeared by counsel, the final determination of the action constitutes one judgment, not two judgments, and a single execution issued thereon was sufficient to keep the judgment alive against each of the judgment debtors. 127Kan587, 274P239.
194-46 [a] **Where, before execution of writ of inquiry,** defendant files affidavit denying he owes any part of debt sued on, he is entitled to have default judgment as to him set aside. 103WVa561, 138SE313.
194-51 219Ala399, 122S359; 91Fla 1015, 109S220. [b] **In Rhode Island.**–47RI 85, 129A813.
195-54½-New. It is interlocutory where rendered in advance against one of several defendants. 213Ala279, 104S 523.
195-54½-New. Such judgment is subject to the control of the court until final judgment in the cause is entered. 213Ala279, 104S523.
195-62 CalA 288P442 (no appeal taken within sixty days).
195-69 [c] **Irregularity in reason stated for default** held immaterial. 233 IllA72.
196-71 22AlaA594, 118S227; 298Pa 193, 148A77.

196-74 219Ala399, 122S359.
196-75 316Mo 398, 289SW925.
196-75½-New. Default judgment, reciting that defendant made default, was not erroneous on its face for failure to dispose of all the issues and the parties, in that the word "defendant" may be used as a collective noun including all parties defendant. **MoA** 148W(2d) 686.
196-75¾-New. Where a motion by plaintiff, to direct the clerk to enter a judgment and incorporate therein the statement, "Defendant liable to arrest and imprisonment on execution," was served on the clerk and attorney for defendants, who defaulted, the motion should be granted on default. 133Misc 267, 231NYS646.
196-86 22AlaA594, 118S227.
196-87 [b] (3) Recital, service showing want of appearance is insufficient to show jurisdiction. **TexCivA** 168W(2d) 298.
198-25 250Mich273, 230NW170.
199-27 130Misc168, 223NYS401.
199-28 169Ga13, 149SE565.
199-31 [a] **Object of motion for summary judgment** is to separate what is formal or pretended in denial from what is genuine and substantial. 242 NY346, 152NE110, 45ALR104.
199-31½-New. Summary judgment on admissions made in examination for discovery will not be given where there appears still to be a substantial question to be tried. **Alta** [1927] 2**DomLR** 1013.
199-33 248Mich612, 227NW715; 250 Mich273, 230NW170.
199-36 104NJL254, 140A273; 221**App Div**399, 223NYS85; **Pa** 151A879.
199-36½-New. The rule applies to express contract for payment of money, 215**AppDiv**448, 213NYS730.
199-36¾-New. or where agreement to pay arises out of contract relation, as on quantum meruit or quantum valebat. 215**AppDiv**448, 213NYS730.
199-48 **NJSup** 133A178; 224**AppDiv** 371, 231NYS115. [a] (1) 130**Misc**359, 223NYS785. (9) Civ. Proc. Rules, rule 113 applies only to debt on liquidated demand. 216**AppDiv**72, 215NYS50. (10) Does not apply to partition action. 216**AppDiv**72, 215NYS50. (11) Action to recover initial payment on realty. **NJSup** 133A178. (12) Rule for summary judgment is inapplicable to action under statute relating to levy on earnings or income of judgment debtor. 131**Misc**46, 225NYS638. [c] **NJSup** 133 A178. [d] (1) 130**Misc**359, 224NYS344. (5) 247NY20, 159NE708. (9) Action held not one on debt within rule. 132 **Misc**38, 228NYS599. (10) If facts shown by defendant are insufficient to sustain a verdict in his favor they will not be deemed sufficient to permit him to defend. 130**Misc**359, 223NYS785. (11) Application for summary judgment under rule should not be extended beyond action for debt or counts in assumpsit, and where amount is unliquidated, it should be proved. 221**AppDiv** 644, 224NYS505. (12) Denial of motion for judgment on assignment of notes, on ground that plaintiffs were required to allege and prove presentment to defendant of assignments as condition precedent to right to sue, has been held error. 224**AppDiv**376, 231NYS 201. (13) Rule 113 is not applicable to action for specific performance of contract for sale of real property. 226**App Div**695, 233NYS460. (14) Rule 113 does not apply to mortgage foreclosure action. 226**AppDiv**70, 234NYS400. (15) No summary judgment in action to foreclose mortgage. 226**AppDiv**244, 235NYS17. (16) Foreign divorce judgment, awarding alimony, is not within rule 113. 133**Misc**259, 232NYS391. (17) Action for breach of contract for services on agreed compensation is within rules. 226**AppDiv**532, 235NYS8. [h] **Where claim for liquidated demand** is joined with a different kind of claim, no summary judgment will be allowed unless there is no defense on merits or defense is only for delay. **Alta** [1927] 2**DomLR**175. [i] **Liquidated damages. -NJCh** 139A490; **RI** 150A610. [j] **In West Virginia.**-108**WVa**658, 152SE527 (action on bond of justice of peace).
200-50 130**Misc**569, 224NYS330; 226 **AppDiv**322, 235NYS101.
200-51 [a] (4) Joint maker, suing comaker for half amount of note paid, held entitled to summary judgment where defendant's answer and opposing affidavit admit liability for one third and allege partnership liability without showing notes are partnership notes or liability of third party for balance. 130**Misc**168, 223NYS401.
200-54 [a] (2) 136**Misc**598, 240NYS 364 (not denied because defendant had no knowledge of decree which was matter of public record). [b] (2) 241NYS 729. (4) Action by judgment creditor of corporation to recover, from single stockholder jointly liable, amount of unpaid stock which is more than plaintiff's judgment and aggregate debts of corporation. 130**Misc**565, 224NYS339. (5) As to whether summary judgment may be ordered in action to enforce stockholder's liability generally, query. 130**Misc**565, 224NYS339.
201-55 128**Misc**445, 218NYS314.
201-56 220**AppDiv**189, 221NYS179.
201-58 130**Misc**454, 224NYS34.
201-59 See also 130**Misc**454, 224NYS 34.
201-60 246NY79, 158NE27; 216**App Div**72, 215NYS50 (issue of validity of settlement agreement, consenting to probate of will); 128**Misc**13, 217NYS187; 130**Misc**359, 224NYS344; 218**AppDiv** 418, 218NYS500; 130**Misc**168, 223NYS 401. [b] **Facts alleged in defenses, sufficient** on face, must be accepted as true. 228**AppDiv**449, 240NYS118.
201-61 248**Mich**672, 227NW666; 216 **AppDiv**618, 215NYS693; 128**Misc**116, 217NYS673; 130**Misc**168, 223NYS401; **Ont** [1930] 3**DomLR**838.
201-62 216**AppDiv**342, 215NYS127 (question is whether there is real defense); 217**AppDiv**59, 216NYS437; 130 **Misc**359, 224NYS344; 130**Misc**538, 224 NYS257; 128**Misc**116, 217NYS673; 218 **AppDiv**847, 219NYS28.
201-63 248**Mich**672, 227NW666; 248 **Mich**447, 227NW723(2dcase); **Mich** 233 NW421; 246NY447, 159NE393; 216 **AppDiv**618, 215NYS693; 127**Misc**897, 217NYS224; 130**Misc**659, 224NYS297; 130**Misc**730, 225NYS7; 218**AppDiv**418, 218NYS500; 218**AppDiv**847, 219NYS 28; 218**AppDiv**669, 219NYS212; 221 **AppDiv**170, 223NYS19; 221**AppDiv**399, 223NYS85; 226**AppDiv**479, 235NYS529; 227**AppDiv**261, 238NYS22; 228**AppDiv** 546, 240NYS582; 230**AppDiv**486, 245 NYS365; 138**Misc**295, 245NYS551; 299 **Pa**51, 149A87; 89**PaSuper**11.
201-64 216**AppDiv**92, 214NYS705; 217 **AppDiv**59, 216NYS437; 127**Misc**373, 216NYS273; 218**AppDiv**847, 219NYS28.
201-65 23F(2d)107; 41F(2d)958; 245 **Mich**52, 222NW104; 246NY79; 158NE 27; 254NY374, 173NE228; 215**AppDiv** 796, 213NYS418 (where there is issue of fact); 216**AppDiv**92, 214NYS705; 216 **AppDiv**618, 215NYS693; 217**AppDiv**59, 216NYS437; 224**AppDiv**38, 229NYS576; 127**Misc**373, 216NYS273; 127**Misc**897, 217NYS224; 128**Misc**12, 217NYS204; 128**Misc**13, 217NYS187; 130**Misc**659, 224NYS297; 131**Misc**74, 225NYS739; 131**Misc**696, 227NYS235; 133**Misc**640, 231NYS640; 214**AppDiv**81, 211NYS32; 215**AppDiv**651, 211NYS876 (where there are facts from which varying inferences could be drawn); 128**Misc**116, 217NYS 673; 218**AppDiv**418, 218NYS500; 218 **AppDiv**847, 219NYS28; 218**AppDiv**669, 219NYS212; 220**AppDiv**189, 221NYS 179; 221**AppDiv**170, 223NYS19; 221 **AppDiv**399, 223NYS85; 224**AppDiv**387, 231NYS97; 133**Misc**555, 232NYS223; 225**AppDiv**256, 232NYS592; 133**Misc** 787, 233NYS520; 226**AppDiv**758, 234 NYS80; 225**AppDiv**616, 234NYS129; 226**AppDiv**70, 234NYS400; 134**Misc**246, 234NYS693; 134**Misc**447, 235NYS847; 226**AppDiv**322, 235NYS101; 226**App Div**479, 235NYS529; 228**AppDiv**449, 240NYS118; 229**AppDiv**702, 241NYS 192; 20 **OhA**394, 152NE671; 87**PaSuper**537; 92**PaSuper**267; **NB** [1928] 4 **DomLR**388. [d] **On question of existence of account stated,** even in absence of proof controverting it, issue should be tried at trial. 127**Misc**79, 214NYS 675 (summary judgment not allowed). [e] **Allegation in answer and opposing affidavits** held to raise issue requiring denial of motion. 127**Misc**79, 214NYS 675. [f] **Purchaser, defaulting before discovering contract is invalid,** is not entitled to summary judgment in action to recover payments made under such contract. 125**Misc**559, 212NYS441. [g] **Counterclaim** for services rendered to action on note raises issue for jury as to whether services were to be paid and summary judgment properly denied 123**Misc**330, 213NYS413 (question not to be determined on affidavits). [h] **Where issue is whether defendant was primary debtor or not,** depending on facts, so as to determine whether or not usury is good defense to action on note. 214**AppDiv**212, 212NYS108. [i] **Technical defects in answer** held not available on motion for summary judgment. 217**AppDiv**59, 216NYS437. [j] **Issue presented** where counterclaim is interposed in purchaser's action for down money because title was unmarketable. 218**AppDiv**516, 218NYS568.
201-67 128**Misc**116, 217NYS673; **Pa** 151A879; 87**PaSuper**432. [c] **Where one of several defenses is genuine, presenting material issue,** motion should be denied. 128**Misc**116, 217NYS673.
201-67½-New. or although defendant's pleading contains technical defects, 127 **Misc**373, 216NYS273.
202-68 249**Mich**86, 227NW668; 128 **Misc**12, 217NYS204; 128**Misc**13, 217NYS 187; 127**Misc**79, 214NYS675; 218**App Div**847, 219NYS28; 226**AppDiv**771, 234 NYS329(1stcase); 230**AppDiv**146, 243 NYS682; **NB** [1927] 3**DomLR**704. [b] **Defendant adducing apparent defense** should be allowed to defend. 127**Misc** 79, 214NYS675.
202-68½-New. whether or not plaintiff denies such allegations, 128**Misc**13, 217 NYS187.
202-71 130**Misc**168, 223NYS401; 135 **Misc**455, 238NYS337.
202-72 223**AppDiv**623, 229NYS216; 130**Misc**359, 224NYS344; 131**Misc**61, 226NYS457; 131**Misc**301, 226NYS732; 131**Misc**691, 227NYS220; 127**Misc**760, 217NYS588; 128**Misc**116, 217NYS673; 136**Misc**284, 240NYS640; 136**Misc**286, 240NYS643.
202-73 245**Mich**558, 222NW752; 130 **Misc**359, 224NYS344; 130**Misc**538, 224 NYS257; 127**Misc**760, 217NYS588; 225 **AppDiv**85, 232NYS290; 135**Misc**341, 238 NYS1; 136**Misc**139, 239NYS26.
202-74 130**Misc**168, 223NYS401. [a] (2) Plaintiff is entitled to summary judgment on note where answer admits making thereof for consideration but denies that plaintiff was holder or that anything was due thereon, and defendant's affidavit set up limitations, but neither payment nor limitations pleaded, and note actually accompanied petition. 130 **Misc**168, 223NYS401. [b] **For plaintiff to succeed** it must appear that defense or denial interposed is sham or frivolous. 127**Misc**79, 214NYS675.
202-74½-New. or that the facts set up by defendant are insufficient to sustain a directed verdict for him; 130**Misc**359, 224NYS344.
202-75½-New. A statement of a conclusion of law or fact is not sufficient to raise an issue of fact, but defendant must show by allegations of fact that such an issue exists. 132**Misc**875, 230 NYS720.
202-75¾-New. The presence of counterclaim, unsupported by facts tending to show that it is meritorious, or that defendant is entitled to defend, does not of itself bar summary judgment. 224 **AppDiv**376, 231NYS201.
202-78 [a] **Where defendants are jointly liable,** summary judgment may not be ordered against one of them. 130**Misc** 565, 224NYS339.
202-84 146**Va**215, 135SE823.
202-86 [a] **Allegations of ultimate facts** is not evidentiary proof necessary under Civ. Pract. Rules, rule 113. 125**Misc**818, 211NYS623 (allegation that loan not consummated).
203-91 148**Va**601, 139SE288. [b] **Objection that notice in detinue does not affix value to each item claimed must be**

raised in first instance by demurrer and cannot be raised after verdict. 148 Va601, 139SE288.

203-2½-New. An answer containing as sham or frivolous, when papers on defenses or denials may be stricken out motion for summary judgment make it appear that the answer falls within either category. 216AppDiv342, 215NYS 127.

203-3 Va 154SE568.

203-6 148Va601, 139SE288. [a] **Purpose of notice** is to acquaint defendant with grounds on which he is to be proceeded against. 103WVa287, 137SE226.

203-8 104WVa178, 139SE653.

203-9 104WVa178, 139SE653. [a] (2) Notice of motion in detinue is defective where it fails to affix value of each article claimed. 148Va601, 139SE288. [b] 103WVa287, 137SE226.

203-10 104WVa178, 139SE653; 105 WVa523, 143SE305. [a] (1) 104WVa 178, 139SE653. (4) Sufficient under liberal construction as required by statute. 143Va656, 129SE687. (5) Parties to note in suit need not be alleged affirmatively, when they may be ascertained with reasonable certainty from entire notice. 99 WVa399, 129SE462. [b] (2) Of action by two indorsers of note against its other indorsers. 102WVa584, 135SE665. [f] **Technicality of common-law pleading not required.**-103WVa287, 137SE226.

203-11 Va 154SE568; 102WVa85, 134 SE469 (sufficient); 104WVa178, 139SE 653. [a] **Conversely,** notice is sufficient where it clearly informs defendant of nature and object of plaintiff's claim and demand. 103WVa110, 136SE783; 103 WVa287, 137SE226.

203-13 104WVa178, 139SE653.

204-17½-New. Failure to allege nonpayment of note in suit is not material, if averred in affidavit. 99WVa399, 129 SE462.

204-23 103WVa110, 136SE783.

204-26 [a] **Special term.**-108WVa250, 150SE731.

204-33 [a] **Sufficiency of return.**-103 WVa287, 137SE226.

204-36 216AppDiv618, 215NYS693.

204-37 145Va429, 134SE677.

204-38½-New. Proceedings are not in control of the court until return is made to the clerk. 146Va215, 135SE823.

204-40 [f] **In New Jersey.**-145A634. [g] **Motion held sufficient** as against demurrer. Va 154SE572.

205-49 234Mich371, 208NW449; 241 Mich63, 216NW382; 213AppDiv796, 210 NYS759; 130Misc359, 224NYS344; 130 Misc538, 224NYS257; 127Misc79, 214 NYS675; 220AppDiv194, 221NYS177; 104WVa206, 139SE702. See also 14Pa Dist&Co 188. [b] (3) In absence of opposing affidavits. 215AppDiv448, 213 NYS730. (4) Affidavit stating that affiant had personal affidavit on behalf of plaintiff, and that amount of note sued on, with interest, was due and unpaid, is sufficient in form and substance. 238 Mich550, 213NW698. (5) Plaintiff held entitled to summary judgment for rent against defendant, merely denying erroneous allegation that lease was for entire building, where supporting affidavits showed lease excluded stores. 220AppDiv195, 221NYS189. (6) To show acceptance of goods in action to recover purchase price. 130Misc359, 223 NYS785. (7) Where special indorsement on writ alleges presentation of bill of exchange sued on, affidavit which does not swear to presentation, but verifies the claim as indorsed on bill is sufficient. NS [1928] 1DomLR1103. [c] **Burden is on plaintiff moving for summary judgment** to show that answer is shown and absence of real defense. 214NYS675 (Civ. Pract. Act § 476, Civ. Pract. Rules, rules 113, 114). [d] **Absence of statutory averment that there is no defense** is not fatal where equivalent language is used. NJ 148A717.

205-51 104WVa206, 139SE702. [a] 104WVa206, 139SE702.

205-52 NJ 146A176.

205-53 [a] (1) See also 132Misc38, 228 NYS599. (2) Affidavit held not sufficient under statute requiring "verifying the plaintiff's cause of action." 234Mich 371, 208NW449. (3) Other instances. 41F(2d)958.

205-55 [c] **Correspondence relied on must be served with motion papers** to justify consideration thereof. 131Misc 671, 227NYS612.

205-56 32F(2d)838.

205-57 213AppDiv796, 210NYS759; 130Misc730, 225NYS7; 131Misc696, 227 NYS235. [a] (3) Where evidence alleged is inadmissible, motion will be denied. 5PaDist&Co 668.

205-58 128Misc445, 218NYS314.

205-59 131Misc696, 227NYS235.

205-62½-New. Summary judgment cannot be aided by extrinsic proof in some jurisdictions. 152Tenn682, 280SW694.

205-62⅓-New. In New York filing of affidavits by both parties indicates a motion for summary judgment and not on pleadings. 217AppDiv59, 216NYS 437.

205-62¼-New. Allegations in an affidavit must be on personal knowledge. 220 AppDiv194, 221NYS177.

205-62⅕-New. Information on all important matters must be furnished. 5 PaDist&Co 310.

205-62⅙-New. Pleadings need not be verified in a motion for a summary judgment in a municipal court where the cause of action is verified by affidavit of plaintiff. 130Misc186, 223NYS684.

206-75 23F(2d)107; 32F(2d)838; 37F (2d)578; 241Mich19, 216NW430; 213 AppDiv796, 210NYS759; 130Misc359, 224NYS344; 131Misc691, 227NYS220; 132Misc38, 228NYS599; 127Misc79, 214 NYS675 (defendant may oppose motion in this way); 220AppDiv657, 223NYS 401; 133Misc555, 232NYS223; 225App Div530, 233NYS592; 226AppDiv769, 234 NYS379; 229AppDiv466, 242NYS583 (issues raised by affidavit); 106WVa67, 145SE584. See also 132Misc875, 230NYS 720. [c] **Allegation held insufficient defense.**-130Misc533, 224NYS257. [d] **Affidavits held sufficient.**-NJ 151A72. [e] **Defendant's affidavit must be taken as true.**-137Misc535, 242NYS705.

206-76 241Mich19, 216NW430; 130 Misc359, 224NYS344; 130Misc168, 223 NYS401; 134Misc246, 234NYS693; 137 Misc704, 244NYS242. [a] **Facts, not conclusions,** should be stated. 241Mich 19, 216NW430.

206-77 130Misc168, 223NYS401; 135 Misc455, 238NYS337 (where answer is general denial).

206-79 32F(2d)838; 248Mich672, 227 NW666 (defendant layman's affidavit held not insufficient).

206-80 238Mich550, 213NW698; 241 Mich493, 217NW401; 250Mich273, 230 NW170; 251Mich614, 232NW403; 125 Misc726, 210NYS35 (invalid counterclaim); 131Misc276, 226NYS721; 130 Misc168, 223NYS401; 225AppDiv781, 232NYS280; 136Misc284, 240NYS640; 136Misc286, 240NYS643; 137Misc648, 244NYS145. [a] **Where answering affidavit denies knowledge or information,** as to whether plaintiff paid judgment as alleged in complaint, and plaintiff's affidavit states that he has satisfaction piece which he would deliver to defendant on being paid amount expended, plaintiff is entitled to summary judgment, having produced it in court. 216 AppDiv342, 215NYS127 (in action on policy indemnifying plaintiff against loss from liability imposed by law for damages arising out of use of plaintiff's automobile). [b] **Answering affidavit** held to raise no issue as asserting right to defend because of denial of knowledge or information. 216AppDiv342, 215NYS127.

206-80½-New. and an answering affidavit claiming repayment has been held an admission that money was borrowed; 130Misc168, 223NYS401.

206-80⅓-New. and that a denial in the answer was false. 130Misc168, 223 NYS401.

206-80¼-New. Where a counter-affidavit sustains a defense and puts in issue an allegation of the complaint, summary judgment should not be rendered. 252NY24, 168NE450.

206-81½-New. An allegation on information in answering affidavit, which is not denied, is equivalent to a statement of fact. 125Misc838, 211NYS486.

206-81⅓-New. and plaintiff cannot claim surprise in such case where a similar statement was contained in opposing affidavit to a prior motion for summary judgment. 125Misc838, 211NYS 486.

206-81¼-New. It is not necessary to submit opposing affidavits to allegation stating the ultimate fact only. 125Misc 818, 211NYS623.

206-81⅕-New. Under the general issue in a proceeding by motion for judgment on a note, defendant may show that the note was never intended as a binding obligation and was without consideration. 102WVa205, 135SE7.

206-81⅙-New. Where defendant files affidavits in opposition, the court is bound to consider them although he has not served copies on plaintiff's attorney as directed, and plaintiff has not had an opportunity to reply thereto. 128 Misc13, 217NYS187.

206-83 152Tenn682, 280SW694.

206-86½-New. Where plaintiff filed an affidavit that a specific sum had been agreed upon for his services, summary judgment in excess of that amount is not proper. 248Mich672, 227NW666.

206-91½-New. A court or judge in chambers may enter a judgment after the answer has been struck out by the commissioner. 105NJL336, 146A372.

206-91⅓-New. An entry of order and judgment is good practice. 226AppDiv 479, 235NYS529.

206-92 [b] **Test** of such motion is whether pleadings, affidavits, and exhibits supporting it are sufficient to overcome opposing papers and justify finding, as matter of law, that there is no defense. 127Misc79, 214NYS675. [c] **When motion is granted, judgment may be entered without order striking** answer or directing judgment. 217App Div59, 216NYS437. [d] **In action for down payment because title was unmarketable,** summary judgment is not necessarily allowed. 218AppDiv516, 218 NYS568. [e] **Answer may be stricken out** as sham or frivolous for failure to establish real defense. 130Misc538, 224 NYS257. [f] **Court has power only to determine** whether meritorious issue is presented. 41F(2d)958.

207-93 See also 130Misc454, 224NYS 34. But see 293Pa52, 141A728.

207-94½-New. or where an issue is created by the affidavits, which must be tried; 125Misc838, 211NYS486.

207-95 218AppDiv536, 218NYS534.

207-96 See also 141Wash560, 252P133.

207-1½-New. In absence of contrary showing allegations in plaintiff's affidavits are assumed as true. 215AppDiv 448, 213NYS730.

207-1⅓-New. To justify refusal of a judgment on an affidavit of demand, mere reluctance to grant motion is not enough. 3Del 221, 134A47.

207-1¼-New. Technical defects in defendant's pleading are not available to plaintiff on application for summary judgment. 127Misc373, 216NYS273.

207-1⅕-New. It is error to grant a motion for summary judgment respecting certain issues when other issues are left undisposed of. 218AppDiv354, 218NYS262.

207-1⅙-New. Doubt as to right to summary judgment should be resolved in favor of plaintiff where his statement of claim is attacked by raising of question of law alone. 284Pa414, 131A236.

207-1½-New. In notice of motion for judgment on a bond with collateral conditions, a writ of inquiry is necessary. 103WVa561, 138SE313.

207-1⅓-New. In a proceeding by motion for judgment on a note, where there is any appreciable evidence sustaining a defense that the note was never intended as a binding obligation and was without consideration, it is error to take the case from the jury and instruct for plaintiff. 102WVa205, 135 SE7.

207-1¼-New. Complaint amended as of course to allege Florida Usury Law on plaintiff's motion for summary judgment. 222AppDiv381, 226NYS379.

207-1½o-New. Court does not become trier of fact under rule authorizing it to determine whether facts make jury issue. 130Misc359, 223NYS785.

207-1½j-New. Allegations in answer denying personal service of summons on defendant are treated as admitted. 131 Misc85, 226NYS263.

207-1½-New. Doubt should be resolved against a summary judgment. 296Pa449, 146A119.

207-1½s-New. Where defendant sets up counterclaim and admits allegations of complaint, plaintiff is entitled to summary judgment only for difference between claim and counterclaim. 228App Div141, 239NYS152.

207-1½t-New. Where doubt exists as to whether summary judgment should be entered, it should be resolved against entry. 299Pa51, 149A87.

207-1½s-New. Permitting amendment to motion after evidence was in, has been held not erroneous. Va 154SE553.

207-5 16F(2d)977; 19F(2d)915; 24F (2d)3; 32F(2d)159; 215Ala321, 110 S469; 169Ark657, 276SW586; 176Ark 1023, 58W(2d)330; 95Fla910, 117S393; Fla 129S889; 169Ga432, 150SE645; 35 GaA203, 132SE916; 38GaA287, 143SE 912; 40GaA568, 150SE569(2dcase); 40 GaA756, 151SE557 (judgment or decree not based on jury verdict); 328 Ill 27, 159NE237; 329 Ill 418, 160NE742; IndA 149NE451; 202 Iowa784, 211NW404; 120Kan90, 242P124; 123Kan235, 255P 30; 220Ky226, 294SW1073; 225Ky823, 108W(2d)277; 230Ky97, 188W(2d)965; 315Mo 437, 285SW992; 315Mo1091, 287 SW610; MoA 280SW57; MoA 294SW 1019; MoA 17SW(2d)629; MoA 26SW (2d)815; 25 ObA239, 157NE708; 32 ObA111, 167NE614; 34 ObA84, 170NE 443; ObA 173NE255; 124 Okl 273, 255 P704; 40 OklACR53; 116 Or113, 239P 329; 118 Or416, 247P143; 119 Or682, 250P1098; 123 Or72, 260P999; 6PaDist &Co 476; 44Philippine30; 148SC386, 146SE249; 49SD167, 206NW688; 153 Tenn40, 281SW932; 141Tex511, 272SW 435; TexCommnA 271SW75; TexCivA 283SW211; TexCivA 108W(2d)1030; TexCivA 248W(2d)457; TexCivA 27SW (2d)373; 109TexCr289, 48W(2d)19 [cit CJ]; TexCr 24SW(2d)396 [quotCJ]; Wyo 291P918. See also 38GaA287, 143 SE912. [g] (2) Judgment in partition is subject to modification so long as court has control over fund resulting therefrom as wife's contingent dower. 240NY470, 148NE639. [h] **Motion for judgment non obstante verdicto** does not deprive court of control of judgment during term though provisions of statute are not strictly followed. 92Pa Super114.

210-8 Mo 298W(2d)126; BC [1929] 1 DomLR1002. See 45Philippine94. [b] (4) Trial judge cannot alter final judgment after it has been signed except through action of nullity under statute. 165La606, 115S796. [c] (2) After judgment of district court has been rendered, it cannot be set aside except on motion for new trial. 73Mont490, 237P483. [f] (1) 146Wash154, 262P235. [g] In Manitoba.-[1925] 3DomLR75.

210-9½-New. Authority of clerk. The clerk has the right without fraud and within term to convict judgment to follow bench notes and verdict of jury before minutes are signed. 20AlaA531, 104S895.

210-10 25 OhNPNS445, 456 [quotCJ].

210-11 6F(2d)553; 20F(2d)998; 169 Ark261, 273SW1032; 176Ark982, 58W (2d)316; 180Ark578, 21SW(2d)952; 40 GaA625, 150SE921 (interlocutory ruling); 329 Ill 418, 160NE742; 253 IllA 274; 197 Ind1, 149NE434; 118Kan717, 236P841; 223Ky749, 4SW(2d)689; 226 Ky665, 11SW(2d)725; 315Mo 437, 285 SW992; 321Mo 282, 10SW(2d)914; 322 Mo 281, 15SW(2d)809; Mo 24SW(2d) 133; 190NC152, 129SE177; 25 OhNPNS 445, 456 [quotCJ]; 29 OhA476, 163NE 719; 131 Okl 196, 268P258; 118 Or416, 247P143; 132 Or545, 286P503; 152 Tenn360, 277SW898; 153Tenn40, 281 SW932; TexCommnA 24SW(2d)394; TexCommnA 25SW(2d)295; TexCivA 274SW1006, 1008 [citCyc] (no authority to set aside judgment of dismissal and reinstate condemnation proceeding at subsequent term); TexCivA 286SW 629; 109TexCr289, 48W(2d)49; 105 WVa355, 142SE520. See also 94Fla60, 113S736, 743 [citCJ]. [b] **Change of date from which interest allowed** may not be made after term as judicial error distinguished from clerical. 108 Conn271, 142A891.

212-12 276US1, 48SCt208, 72LEd439; 7F(2d)855; 30F(2d)813; 33F(2d)976; 41F(2d)439; 215Ala321, 110S469, 471 [citCJ]; 20AlaA532, 103S600; 169Ark 261, 273SW1032; 175Ark253, 299SW44; 109Conn45, 145A151; 168Ga321, 147SE 527; 320 Ill 382, 151NE250; 334 Ill 539, 166NE118, 65ALR887; 338 Ill 158, 170NE320 (on affidavit); 125Kan722, 266P41; 221Ky616, 299SW559; 223 Ky405, 38W(2d)779; 226Ky665, 11SW (2d)725; 231Ky23, 20SW(2d)1008; 315Mo 437, 285SW992; 322Mo 281, 15 SW(2d)809; Mo 24SW(2d)133; MoA 31SW(2d)241; 225AppDivS98, 233NYS 183; 25 OhNPNS445, 456 [quotCJ]; 42 OklACR296 [reh pending]; 118Or416, 247P143; 132 Or545, 286P553; 85Pa Super285; 9PaDist&Co 235; TexCivA 25SW(2d)240; 110TexCr512, 9SW(2d) 358, 60ALR290. See also 94Fla236, 113 S730. [e] **Memorandum** of court has been held neither special finding of facts nor final judgment so as to prevent reopening at subsequent term. 7F(2d) 855.

214-13 6F(2d)553; 215Ala321, 110S 469, 471 [citCJ]; 322Mo1017, 18SW (2d)13; 25 OhNPNS445, 456 [quotCJ]; Or 286P553; 108WVa721, 152SE783. See also 109Conn45, 145A151. [f] But see Mo 31SW(2d)1026. [h] (2) But application for leave to appear as amicus curiæ and show cause for revocation is not sufficient to keep matter in fieri. IndA 148NE163.

215-14 25 OhNPNS445, 456 [quotCJ].

215-15 69CalA72, 230P468; 118Kan 717, 236P841; 25OhNPNS445, 456 [quotCJ]; 42 OklACR296 [reh pending]; 118 Or416, 247P143; Tex CivA 286SW629; TexCivA 299SW699. [a] **Substantial compliance with statutory requirements is necessary.**-123 Okl 59, 252P845.

215-16 180Ark578, 21SW(2d)952; 104 Conn107, 132A395; 160Ga362, 127SE 849 (may be amended after affirmance by supreme court); 329 Ill 418, 160NE 742; Minn 232NW322; MoA 29SW(2d) 183; ND 230NW288.

215-17 297Pa49, 146A150.

215-18 Ill 168NE647.

215-20 250 IllA247; 43 OklACR50 [reh pending].

216-23 [b] **To give court further jurisdiction** over final decree or judgment there must be substantial compliance with terms of statute. 116 Okl 86, 243 P240.

216-27 169Ark261, 273SW1032.

216-30 215Ala348, 110S565 [citCJ]; 207 Iowa177, 222NW403; 214Ky514, 283SW1059; 132 Okl 45, 269P257, 258 [quotCJ]; 297Pa74, 146A569. See also 94Fla236, 113S730, 734 [citCJ]; 225Ky 764, 108W(2d)298.

217-32 38F(2d)109; DelSuper 143A 460; 94Fla60, 113S736, 743 [citCJ]; 98Fla1196, 125S694; 232Ky336, 23SW (2d)551(2dcase); MoA 31SW(2d)241; 76Mont117, 245P539; 25 OhNPNS445, 457 [quotCJ]; 39 OklACR294; 118 Or 416, 247P143; 115Tex405, 283SW135; TexCommnA 6SW(2d)89, 90 [citCJ]; TexCivA 299SW699.

219-33 25 OhNPNS445, 457 [quotCJ].

219-33½-New. The court must strike off a void judgment at any time upon its attention being called to it. 290 Pa454, 139A159.

219-34 25 OhNPNS445, 457 [quotCJ].

220-39 320 Ill 382, 151NE250.

220-48 100WVa408, 130SE442.

220-50 122 Okl 160, 252P410.

221-52 169Ark979, 277SW48, 49 [cit CJ].

221-53 169Ark979, 277SW48, 49 [cit CJ].

221-54 220Ala448, 126S110; 134Misc 222, 235NYS739; 25 OhNPNS445, 457 [quotCJ]; 46Philippine173; 146Wash 114, 261P775, 777 [quotCJ]. [b] (21) **Judgment granting motion to abate action** is final judgment terminating action and trial court cannot set it aside or revive action except on motion for new trial or upon application for relief under Code Civ. Proc. § 473. 80CalA 433, 251P935. (22) Motion to set aside judgment after affirmance by supreme court on ground that judgment was void because of disqualification of trial judge under Code Civ. Proc. § 170 subd 1, should be brought in court where action was brought, not in appellate court. 206Cal436, 274P534. (23) Trial court may vacate judgment and enter new judgment on basis of amended conclusions without motion for new trial. 91CalA529, 267P342. (24) Statute authorizing modification on specified grounds measures court's jurisdiction. CalA 283P956. [k] (4) Power of district court to modify judgment fair on its face ceases at expiration of six months after its entry. 85Mont225, 278 P108. [o] (13) Failure of judgment to follow direction of statute is irregularity remediable by motion in court granting judgment when made within permitted period. 134Misc775, 236NYS 245. [p] (2) County court is without power except for causes and at time and in manner prescribed by statute. 55ND700, 215NW152. [q] (3) After rendering of final judgment and expiration of term, there must be substantial compliance with statute to give court jurisdiction to vacate or modify judgment. 115 Okl 87, 241P473. (4) Substantial compliance with statute is essential where it is sought to set aside judgment at subsequent term. 124 Okl 273, 255P704. [w] **In Alabama.**-215 Ala321, 110S469. [x] **In North Carolina.**-189NC805, 128SE329. [v] **In Oregon.**-130 Or590, 280P511. [z] **In Porto Rico.**-33PortoRico 214. [aa] **In Texas.**-CivA 286SW629. [ab] **West Virginia.**-100WVa408, 130SE442.

223-55 25 OhNPNS445, 457 [quotCJ].

223-56 25 OhNPNS445, 457 [quotCJ]; 114Tex511, 272SW435 (statutes relating to new trials).

224-57 25 OhNPNS445, 457 [quotCJ].

224-58 25 OhNPNS445, 457 [quotCJ].

224-58½-New. In the absence of statutory authority, courts have no jurisdiction to alter their final judgments. 78CalA595, 248P715.

224-59 25 OhNPNS445, 457 [quotCJ].

224-60 25 OhNPNS445, 457 [quotCJ].

224-63 Fla 129S889. But see 40GaA 568, 150SE569(2dcase); 168La675, 123 S120; 156Miss729, 126SS824(1stcase). [a] (2) Where no grounds exist, single judgment rendered on consolidation of actions cannot be interfered with by amendment or vocation. 202Cal478, 261P1001. [q] **Specific performance.**-160Ga362, 127SE849. [r] **Judgment of dismissal.**-99CalA589, 279P191.

225-67 20AlaA641, 104S688 (granting motion to amend nunc pro tunc is error where judgment was previously declared void by appellate court).

225-67½-New. Judgments and orders based on the verdict of a jury are not within the power to revise or vacate. 38 GaA287, 143SE912.

225-67½a-New. Where no proper or formal judgment has been rendered, there is no judgment to vacate. 252 IllA203.

225-69 4LaA244.

225-70 52ND589, 204NW333.

225-75 78CalA203, 248P553; 223Ky 719, 4SW(2d)723; 161La721, 109S400; 221MoA466, 282SW68, 70 [citCJ]; 149 Wash443, 271PS7. See also TexCivA 32SW(2d)485(1stcase). But see NJSup 129A202. Contra 119 Okl 157, 244P444. [n] (4) Supreme court has inherent power to relieve from judgment irregularly and fraudulently procured. 222 AppDiv615, 227NYS156. [q] **In North Carolina.**-189NC805, 128SE329.

227-76 216Ala262, 113S85; 104Conn 107, 132A395; 261Mass299, 159NE51; 44Philippine30 (order for taking deposition under Code Civ. Proc. § 355 subs 5 vacated).

227-78½-New. On appeal from second judgment on cause as to which former judgment was res judicata, first judg-

ment may not be amended. 215AppDiv 609, 214NYS402.

227-78⅓-New. Statutes authorizing courts of record to set aside orders irregular on their face include county courts made courts of record by statute. Mo 24SW(2d)133.

228-80 73CalA687, 239P65; 77CalA 727, 247P594; 98CalA145, 276P394(2d case); 95Fla940, 117S393; 250 IllA 266; 132Misc861, 231NYS133; 112 Okl 173, 240P124; 123 Or72, 260P999; Tex CivA 3SW(2d)524; TexCivA 9SW(2d) 203. See also 94CalA433, 271P363. [f] **Judgment on partition** is subject to modification, so long as court has control of fund of such sale. 240NY470, 148NE639. [g] **Upon motion to amend judgment,** court could order correction based upon facts outside record. Wis 230NW607.

228-80½-New. No modification will be made if judgment follows findings. 83 IndA622, 149NE448.

229-83 24F(2d)172; 29Ariz227, 240P 351, 354 [citCJ]; 175Ark352, 299SW 16; 205Cal 163, 270P192; 68CalA709, 230P218; 98CalA145, 276P394(2dcase); 104Conn107, 132A395; 109Conn45, 145 A151; Conn 151A491; 94Fla60, 113S 736, 743 [citCJ]; 94Fla86, 113S745, 746 [citCJ]; 163Ga843, 137SE550; 41 Ida686, 241P1021; 252 IllA560; 199 Ind311, 157NE441; 202 Iowa1334, 212 NW145; 126Kan429, 268P828; 213Ky 544, 281SW795; 218Ky259, 291SW32, 35 [quotCJ], 51ALR281; 231Ky65, 21 SW(2d)127 (entry of personal judgment not prayed for is not clerical misprision); 180Minn168, 230NW464; Minn 232NW322; 221MoA466, 282SW 68; 76Mont1, 245P532; 76Mont117, 245P539; 79Mont73, 254P1067; 79 Mont530, 257P465; 85Mont225, 278P 108; Nev 280P95; 31NM564, 249P108, 109 [citCJ]; 225AppDiv6, 232NYS82; ND 230NW288; 115 ObSt247, 153NE 289, 48ALR1176; 116 Okl 84, 243P218; 117 Okl 174, 245P548; 123 Or72, 260P 999; 51SD443, 214NW842; Tex CommnA 25SW(2d)295; TexCivA 280 SW609; TexCivA 293SW593; TexCivA 13SW(2d)745. [b] **Correction of journal entry to conform to judgment of court** does not constitute rendition of new judgment. 117 Okl 174, 245P548.

231-84 Minn 232NW322; 51SD443, 214NW842. [c] (4) Judgment may be modified to conform to pleadings. 99 CalA352, 278P889. [d] 51SD443, 214 NW842.

232-85 79Mont530, 257P465.

232-85½-New. A statute permitting modification of a judgment for "irregularity" in obtaining it includes a case where the court has acted upon an erroneous understanding of the facts. 120Kan32, 242P143.

232-85½-New. Where petition in action to quiet title included, by mistake, allegation that an oil and gas lease on one of the parcels had been forfeited, judgment by default rendered in accordance with petition may be modified on plaintiff's motion so as to correct error. 120Kan32, 242P143.

232-87 94Fla60, 113S736, 743 [citCJ]; 123Kan110, 253P1094; TexCivA 24SW (2d)457; 145Wash420, 260P666.

232-88 180Ark578, 21SW(2d)952 (order nunc pro tunc).

232-90 7F(2d)576; 109Conn45, 145A 151; Conn 151A491; 94Fla60, 113S736, 743 [citCJ]; 83 IndA598, 147NE287; 85 IndA621, 155NE221; 123Kan110, 253P 1094; Minn 232NW322 (error in conclusions of law and judgment in failing to state property was not benefited by improvement held judicial error); 154 Miss378, 122S487; 79Mont73, 254P1067; 85Mont225, 278P108; 132 Or545, 286P 553; 160Tenn93, 21SW(2d)1038; Tex CommnA 25SW(2d)295; TexCivA 1SW (2d)441; TexCivA 11SW(2d)237; 100 WVa408, 130SE442; 196Wis260, 219NW 203. See also MoA 297SW439. [c] 220 AppDiv595, 222NYS176.

234-91 69CalA72, 230P468; 78CalA 203, 248P553; 249 IllA516; 79Mont73, 254P1067; 79Mont530, 257P465; 227 AppDiv751, 237NYS105. [a] (2) Failure to allow intervener sums not mentioned in findings held judicial error which cannot be corrected by amendment. 78 CalA203, 248P553.

234-92 68CalA709, 230P218; 69CalA 72, 230P468; 78CalA203, 248P553; 89 CalA375, 265P260; 123Kan110, 253P 1094; 76Mont1, 245P532; 76Mont117, 245P539; 79Mont73, 254P1067; 79Mont 530, 257P465; 251NY39, 166NE797; 190NC152, 129SE177 (judgment rendered in term can be reviewed for error only upon appeal upon exceptions duly noted); 198Wis457, 224NW735.

235-93½-New. On dismissal of complaint as not stating cause of action, plaintiff is not entitled to have judgment amended to permit amendment of his complaint. 241NY505, 150NE530 (where he has appealed from judgment).

235-99 [b] (6) Plaintiff is not entitled to modification of judgment permitting amendment of complaint after it has been dismissed. 241NY505, 150NE530. [c] Court order directing sale of property to satisfy mechanics' liens by sheriff cannot be modified after term by directing sale by receiver. 322Mo 281, 15SW(2d)809.

235-1 77CalA519, 247P218; 94Fla60, 113S736, 743 [citCJ]; TexCivA 271SW 137; 145Wash420, 260P666.

236-2 94Fla60, 113S736, 743 [citCJ]; 227AppDiv751, 237NYS105.

236-3 54SD592, 223NW824. See also TexCivA 283SW193. [a] (1) 48 Ida750, 285P461.

236-4 Nev 280P95.

237-8 160Ga362, 127SE849; 167Ga848, 146SE768; 196 Ind520, 148NE474; 199 Ind311, 157NE441; 236Kyl, 32SW(2d) 548; 49SD167, 206NW688. See also 154 Wash154, 281P484.

237-8½-New. Motion to modify judgment will be denied where judgment conforms to conclusions of law. Ind 155 NE55.

237-8¼-New. **Where judgment follows court's finding,** a motion to modify is properly overruled. 85 IndA39, 152NE 293.

237-9 [a] **Date of entry** is not part of judgment as regards changing date. 35 OhA450, 172NE565.

237-10 247Mich150, 225NW535; 50SD 269, 209NW544, 545 [citCJ]. But see 76 Mont117, 245P539.

238-11 See also 233Ky438, 25SW(2d) 1020.

238-14 9PaDist&Co 143. [d] **Judgment against corporation not suable** and others may be amended by striking its name therefrom. 35GaA5, 131SE524.

238-15 82CalA660, 256P457; 203 Iowa 1152, 211NW423, 427 [citCJ]; 238Mich 253, 213NW150. But see 133Misc83, 230NYS765.

238-16 203 Iowa1152, 211NW423, 427 [citCJ].

238-17 126 Or487, 270P778; 9PaDist& Co 701.

239-18 LaA 129S197.

239-19½-New. In jurisdictions where a judgment against a county in other than its corporate name is not binding on the county, judgment cannot be amended after the term ended so as to run against the county in its true name. 251 IllA371.

239-20 31NM564, 249P108.

239-22 234Ky138, 27SW(2d)673.

239-22½-New. Judgment in an action against one designated as the director general of railroads, and who was neither the director general nor an agent of the president, is void and not amendable. 8F(2d)907.

240-27 30Hawaii1; 124Kan604, 261P 840; 92PaSuper114; TexCivA 3SW(2d) 519.

240-28 124Kan604, 261P840.

240-29 30Hawaii1, 9 [quotCJ]. [a] **Judgment ordered to be paid** out of funds in hands of highway commissioner may be amended to require payment out of funds in hands of transferee. 162 La836, 111S182.

240-31 TexCivA 11SW(2d)237.

240-32 30Hawaii1; TexCivA 1SW(2d) 441.

240-34 108Conn93, 142A469.

240-35 30Hawaii1, 9 [quotCJ].

241-37 TexCivA 12SW(2d)1045.

241-38 NJSup 131A87; 121 Or582, 256 P646; 51SD443, 214NW842.

241-41 [a] **Judgment for rent due after abandonment** need not be amended by deducting sum collected from subsequent tenant for same period. 158La 405, 104S187.

241-42 125Kan441, 265P57; 234Ky91, 27SW(2d)684 (plaintiff held entitled to supplemental judgment); 154Miss378, 122S487.

241-45 30Hawaii1, 9 [quotCJ]; Tex CommnA 25SW(2d)295.

242-48 27 OhNPNS409.

242-49 30Hawaii1, 9 [quotCJ].

242-50 44 Ida560, 260P150; 222App Div458, 226NYS623; 134Misc775, 236 NYS245 (amendment to order allowing interest did not involve merits of determination nor present error in substance). [b] **Judge held empowered** to modify judgment by addition of interest. 7F(2d)561.

242-51 30Hawaii1, 9 [quotCJ]; 221 AppDiv777, 223NYS464. [a] (2) 125 Kan441, 265P57. [d] **Interest from date of breach of contract** to date of judgment cannot be added to verdict for damage. TexCommnA 292SW203. [e] **Where no objection was made to verdict not allowing interest,** court cannot amend judgment to allow interest. 315 Mo 1091, 287SW610.

242-51½-New. However, interest that may be collected on execution will not be added by amendment. 25F(2d)397.

243-54 MoA 17SW(2d)566.

243-55 36GaA731, 137SE905. But see 92CalA639, 268P695.

243-55½-New. After entry of judgment the court who rendered it cannot by amendment remove statutory limitation as to amount of costs. Man [1925] 3 DomLR75.

243-58 180Minn482, 231NW220.

243-59 [e] 84 IndA694, 151NE12.

244-61 114Tex511, 272SW435, 437 [cit CJ].

244-62 116 Okl 84, 243P218. [b] **Office of motion** is to change judgment so as to make it follow finding. 197 Ind393, 150NE368.

244-64 [b] **Thus** judgment of dismissal may be amended to be without prejudice to bring another action on same cause against same defendant by motion. 214AppDiv328, 212NYS199.

244-67 See also TexCivA 283SW193.

244-69½-New. An application to amend cannot serve the purpose of an appeal where the time for appeal had expired. 198Wis457, 224NW735.

244-69¼-New. The remedy against erroneous judgment is a motion to modify, not for a new trial. 200 Ind616, 165NE 911.

244-75 99Fla592, 127S333 (any time).

244-76 [d] (2) Action to have judgment corrected or reformed is barred after expiration of four years. TexCivA 3SW(2d)937. [e] (2) In order to have final judgment in probate proceeding modified after time for appeal had expired, plaintiff must present some ground warranting court in determining that he was not bound by terms of such final judgment. 198Wis457, 224NW735. [f] **In Montana.**-85Mont225, 278P108. [g] **In Alabama.**-129S72.

245-77 8LaA387; 11LaA353, 123S358; 177Minn369, 225NW282; 154Miss378, 122S487. [c] **Motion to include statutory damages** need not be filed within time for filing suggestions of error. 154 Miss378, 122S487.

245-84 TexCivA 289SW1050, 1051 [quotCJ].

245-86 [a] (3) Seller, sued with manufacturer for negligence, could have judgment for plaintiff amended to determine rights against manufacturer. 134Misc500, 235NYS116.

246-91 205 Iowa482, 218NW253; Minn 232NW322; 116 Okl 84, 243P218; Tex CivA 28W(2d)341. See also Iowa 232 NW487.

247-93 321Mo 282, 10SW(2d)914.

247-94 91CalA37, 266P1002.

247-99 Cal 290P447.

247-4 TexCivA 280SW609.

247-4½-New. A requirement that notice be given to the adverse party is satisfied by giving notice to a person to whom the adverse party has transferred his interest. 120Kan32, 242P143.

247-7 Ind 172NE124 (without reference to exhibits); MoA 29SW(2d)183 (fail-

ure to swear to motion).

247-8 221**MoA**466, 282**SW**68.

247-9 **TexCivA** 289**SW**1050, 1051 [cit CJ].

247-12 163**Ga**843, 137**SE**550; 112 **Okl** 173, 240**P**124. [b] (2) Where question is whether order was made vacating judgment, fact must be proved by record evidence and cannot be proved by parol. 112 **Okl** 173, 240**P**124.

248-13 215**Ala**418, 110**S**799; 217**Ala** 381, 116**S**419, 420 [citCJ]; 219**Ala**123, 121**S**412; 176**Ark**308, 4**SW(2d)**507; **Cal** 290**P**447; 167**Ga**848, 146**SE**768; 338 **Ill** 158, 170**NE**320; 218**Ky**259, 291**SW**32, 35 [quotCJ], 51**ALR**281; 221**MoA**466, 282**SW**68, 70 [citCJ]; **TexCivA** 11**SW (2d)**237. [c] **Burden is on party seeking to correct judgment record** to overcome presumption of truth of court's recitals of fact in record. 205 **Iowa**225, 217**NW**820.

248-15 [h] **Evidence held sufficient to show error in judgment** as charged by clerk. 163**Ga**843, 137**SE**550.

249-16 215**Ala**418, 110**S**799.

249-20½-New. In a proceeding for correction of clerical mistake, evidence must be clear and convincing that mistake was clerical and not judicial. 41 **Ida**686, 241 **P**1021.

249-20¼-New. **Evidence held insufficient** to warrant correction, on ground of clerical mistake in adjudicating priority of water right as of certain year. 41 **Ida**686, 241**P**1021.

249-23 321**Mo** 282, 10**SW(2d)**914.

249-25 [a] **Motion to modify judgment** presents only question whether judgment conforms to findings as actually made. 196 **Ind**520, 148**NE**474. [b] **In proceeding to correct clerk's entry of judgment** court can only correct clerk's entry to show true judgment rendered. 116 **Okl** 84, 243**P**218.

249-26 [a] **CalA** 268**P**918.

250-33½-New. Order correcting judgment signed on street without hearing is ineffectual. **TexCivA** 2**SW(2d)**341.

250-33¼-New. Unintentional default on a motion to amend will be opened to have the decision on the merits. 134 **Misc**155, 235**NYS**118.

250-34 239 **IllA**506; 121**Kan**793, 250**P** 286. [b] **Motion to modify judgment properly overruled** where finding did not support applicant's contention. 197 **Ind** 393, 150**NE**368.

250-36 239 **IllA**506.

251-49½-New. Where a statute requiring an adjudication that there is a good cause of action before a judgment is vacated on plaintiff's motion is construed as applying to the modification of a judgment, a modification of a judgment rendered in accordance with an allegation included in the petition by mistake so as to correct the error satisfies the statute. 120**Kan**32, 242**P**143.

251-49¼-New. An order amending a clerical error in the original judgment has been held not to supersede the judgment or incorporate it into the order. 78**CalA**203, 248**P**553.

251-49¼-New. The act of a clerk correcting the original judgment pursuant to an order of court is ministerial. 78 **CalA**203, 248**P**553.

251-51 199 **Ind**311, 157**NE**441.

251-54 **Iowa** 228**NW**582.

251-59½-New. **Judgment of dismissal** of action for negligence is properly amended by adding the words "but without prejudice to the right of the plaintiff to bring another action to recover from the defendant upon the same cause of action," even though dismissal purported to be on the merits, where no decision on merits could have been rendered. 214**AppDiv**328, 212**NYS**199.

251-60 169**Ark**657, 276**SW**586; 77**CalA** 519, 247**P**218; 115 **OhSt**247, 153**NE**289, 48**ALR**1176; **TexCivA** 278**SW**225. See also 203 **Iowa**1064, 213**NW**801. [c] **Amendment is not separate judgment.**–**TexCivA** 278**SW**225.

251-61 [d] **Change materially affecting judgment and rights of parties** amounts to new judgment. 78**CalA**203, 248**P**553.

251-63½-New. An amendment of a default decree in a foreclosure suit made after entry by inserting a description from that contained in the complaint cannot be sustained upon the theory that the decree as amended implied an amendment of the pleadings to conform thereto, where the successor of one of the defendants whose rights were affected by the decree as amended failed to appear relying on the description as contained in the complaint. 76**Mont**117, 245**P**539.

251-63¼-New. Striking name of party not suable does not affect validity of judgment as to others. 35**GaA**5, 131**SE** 524.

251-63¼-New. Not every alteration of a judgment by the court which rendered it will operate as a readjudication of the case. 78**CalA**203, 248**P**553.

252-64 115 **OhSt**247, 153**NE**289, 48**ALR** 1176.

252-72 169**Ark**657, 276**SW**586 (only for good cause shown); 199**Cal** 523, 250**P** 397; 89**CalA**396, 265**P**306; 163**Ga**843, 137**SE**550; 38**GaA**287, 143**SE**912; 214 **Ky**411, 283**SW**405; 169**Minn**136, 210 **NW**66, 867 [citCJ]; **NJCh** 145**A**721 (2dcase); 190**NC**536, 130**SE**315; 195**NC** 373, 142**SE**224; 195**NC**354, 142**SE**320; **TexCivA** 283**SW**211.

253-73 106**Conn**90, 137**A**19.

253-76 190**NC**536, 130**SE**315. [b] **Power to vacate judgments was conceded by common law to all its courts,** and exercised in variety of circumstances, subject to various restraints. 190**NC** 536, 130**SE**315.

254-77 See also 38**GaA**287, 143**SE**912. [d] **In Philippines.**–51**Philippine**980.

254-79 See also **TexCommnA** 287**SW** 1087. [a] **Petition to obtain relief against judgment** improperly obtained is in effect motion for new trial. 38**GaA** 287, 143**SE**912.

255-80½-New. The purpose at common law was to permit a litigant to vacate a judgment obtained in violation of a rule of practice. 38**GaA**287, 143**SE** 912.

255-80¼-New. One will not be relieved of his duty under an order, unless that order is first obeyed. 103**NJEq**416, 143 **A**559.

255-80¼-New. It is not necessary that there be a judgment of contempt against a person to deny him relief against an order of the court, if he stands in the position of a contemner. 103**NJEq**416, 143**A**559.

255-81 5**F(2d)**885, 886 [quotCJ]; 234 **IllA**214; 300**Pa**321, 150**A**642.

255-82½-New. A motion to open up a default judgment necessarily includes a request for leave to plead to the merits. 253 **IllA**128.

255-84 99**Fla**592, 127**S**333 (any time).

255-85 175**Ark**1169, 1**SW(2d)**807; 95 **CalA**144, 272**P**610; **CalA** 292**P**139 (reasonable diligence); **Fla** 129**S**889; 163 **Ga**843, 137**SE**550; 237 **IllA**441; **Mont** 285**P**668; 31**NM**443, 247**P**306; 130 **Okl** 99, 265**P**637; 89**PaSuper**403 (judgment on verdict not opened after term except for fraud at trial); 196**Wis**260, 219 **NW**203. But see 99**Fla**592, 127**S**333. [b] **Facts not tolling statute.**–**Mont** 285 **P**668.

256-87 92**Fla**1015, 110**S**532; 116**Tex**29, 285**SW**1079, 48**ALR**355. [b] **In Pennsylvania.**–13**PaDist&Co** 514.

256-88 **Mont** 285**P**668 (where complaint is insufficient); 116**Tex**29, 285 **SW**1079, 48**ALR**355; 155**Wash**176, 283 **P**681. See also 94**Fla**60, 113**S**736, 743 [citCJ]. [b] (1) **Conn** 151**A**491. (2) Vacation for such purpose is not due to clerical or judicial error. **Conn** 151 **A**491.

257-89 98**Fla**1196, 125**S**694; 252 **IllA** 140; **MoA** 283**SW**57; **NJSup** 147**A**722; 55**ND**231, 212**NW**925; 55**ND**253, 212**NW** 931; 116 **Okl** 279, 244**P**588; 136 **Okl** 286, 277**P**930(2dcase); 34**PortoRico** 491 (judgment entered without new trial); 144**SC**509, 142**SE**602, 611 [quotCJper Blease,J]; **TexCommnA** 287**SW**1087.

257-90 127**Me**167, 142**A**377; 116**Tex**29, 285**SW**1079, 48**ALR**355.

257-91 **TexCivA** 293**SW**899.

257-92 114**Nebr**442, 207**NW**935; **Tex CivA** 293**SW**899; 196**Wis**260, 219**NW** 203.

257-94 298**Pa**193, 148**A**77. [d] **In Oklahoma.**–130 **Okl** 249, 266**P**777.

257-95 129 **Okl** 96, 98, 263**P**656 [quot CJ].

257-96½-New. The court, whose jurisdiction is limited to a term, has no power after the term to set aside a judgment and reënter it as of a later date, to extend or revive the time for appeal therefrom. 6**F(2d)**553.

257-96¼-New. It is at all times during the term competent and proper for the court to set aside erroneous judgment theretofore rendered at such term. **TexCivA** 283**SW**211.

257-96¼-New. That nonresident defendant was cited by publication held not to compel such defendant to wait until the court adjourned for the term before moving to set aside a default judgment. **TexCivA** 283**SW**531.

258-97 216**Ala**262, 113**S**85; 245**Mich** 438, 222**NW**759; 246**Mich**210, 224**NW** 361; 247**Mich**237, 225**NW**554.

258-99 101**CalA**599, 281**P**1058; 40**GaA** 568, 150**SE**569(2dcase); 33**PortoRico** 214; 199**Wis**602, 227**NW**270. [a] (1) 220**Ala**448, 126**S**110 (later statutes). (3) 21**AlaA**446, 109**S**184. [b] (1) 200 **Cal** 77, 251**P**912; 200**Cal** 374, 253**P**148; 200**Cal** 382, 253**P**317; 100**CalA**452, 280 **P**375(3dcase). (2) 198**Cal** 594, 246**P** 805. (3) 89**CalA**759, 265**P**491. (5) 89 **CalA**759, 265**P**491. (8) Where application under Code Civ. Proc. § 473, to set aside default and default judgment, is too late as regards the default, it would be an idle act to set aside judgment; as, default being in force, defendant could take no further steps affecting plaintiff's right of action, and it would be court's duty immediately to render another judgment of like effect. 95**CalA**144, 272**P**610. (9) "Rendition of judgment," within code provision, is when court's order for judgment is entered in official minutes and not when judgment is finally entered. 88**CalA**296, 263**P**298. (10) Default judgment is not subject to attack on ground of fatally defective service of summons after expiration of one year from entry of judgment in absence of allegation of extrinsic fraud. 89**CalA**759, 265**P**491. [d] (1) 37**GaA**450, 140**SE**636. (3) Under Civ. Code (1910) §§ 5957, 5958, motion may be made at any term within statute of limitations. 38**GaA**287, 143**SE**912. (4) Motion is not available in vacation. 38 **GaA**287, 143**SE**912. [e] (2) Rule applicable only to final judgments and not to conditional orders. 233 **IllA**346. [g] (1) 45 **Ida**211, 261**P**242. (6) Unless judgment is void on its face, court has no power to set it aside after expiration of statutory time. 46 **Ida**418, 267**P**1076. (7) After expiration of one year from entry of judgment court cannot set it aside on motion on ground that defendant was not personally served with process. 46 **Ida**418, 267**P** 1076. (8) Where motion to vacate default judgment is not made within statutory time, court can grant relief only where void character of judgment appears from judgment roll. 46 **Ida**671, 270**P**618. [i] (1) 124**Kan**815, 262**P** 569; 126**Kan**479, 268**P**797. [j] (6) Court cannot set aside judgment settling title to land four or six years after finally rendered. 218**Ky**666, 291**SW** 1019. [l] (1) **Mo** 24**SW(2d)**133; 220 **MoA**840, 295**SW**487; **MoA** 19**SW(2d)** 553. (2) 220**MoA**840, 295**SW**487. [n] (1) 191**NC**166, 131**SE**648, 44**ALR**610. (3) Statute inapplicable to irregular judgments. 191**NC**166, 131**SE**648, 44 **ALR**610. (4) Statute is highly remedial. 192**NC**626, 135**SE**627. [o] (2) Actual knowledge of default judgment satisfies statute as to notice. 54**ND**753, 210**NW**525. (3) Insanity of defendant does not toll statute. 54**ND**753, 210**NW** 525. [p] (1) 129 **Okl** 36, 263**P**447; 129 **Okl** 244, 264**P**162; 130 **Okl** 249, 266 **P**777; 136 **Okl** 118, 276**P**718; 141 **Okl** 106, 283**P**1015; **Okl** 292**P**343. (2) Proceedings to vacate judgment for fraud practiced in procuring it or for unavoidable casualty or misfortune preventing prosecution or defense must be commenced within two years after judgment is rendered or disability is removed. 129 **Okl** 184, 265**P**646. (3) Time for bringing suit in district court to vacate judgment of justice court by person against whom judgment was rendered without notice either by service

of summons or otherwise is computed from time of discovery of judgment under statute providing for relief on ground of fraud. 131 **Okl** 214, 268P287. (4) Time for bringing suit in district court to vacate judgment of justice court by party against whom such judgment was rendered without notice by summons or otherwise begins to run from time of discovery of judgment rather than from date of rendition. 132 **Okl** 237, 270P28. [s] (3) Laws relating to time for filing motions for new trial have been held inapplicable, where suit was by publication and only appearance by attorney ad litem. **Tex** 26 **SW(2d)**905. [t] (1) **Utah** 269P1017. (2) Judgment, not void on its face, cannot, in same proceeding by motion, be opened or vacated by court which rendered it except within six months after adjournment of term at which judgment was rendered. **Utah** 273P961. (3) Trial court is without jurisdiction nearly year after adjournment of term to vacate proceedings had before judge pro tempore where there has been no motion for new trial or appeal within time limited by law therefor. **Utah** 273 P961. [x] **In Porto Rico.**–29**PortoRico** 795; 33**PortoRico** 214; 33**PortoRico** 406. [y] **Time.**–198**Cal** 594, 246P805. [z] **In Michigan.**–238**Mich**119, 213**NW** 143. [aa] **In Ohio.**–22 **OhA**528, 154**NE** 55.

260–1 34**Ariz**184, 269P80; 200**Cal** 382, 253P317; 207**Cal** 221, 277P490; 71**CalA** 155, 234P910; 97**CalA**430, 275P868(2d case); 45 **Ida**211, 261P242; 248 **IllA**301; 83 **IndA**598, 147**NE**287; 124**Kan**815, 262 P569; 126**Kan**479, 268P797; 217**Ky** 465, 290**SW**349; 246**Mich**210, 224**NW** 361; 176**Minn**59, 222**NW**520; **NJSup** 136A598; 31**NM**443, 247P306; 55**ND** 700, 215**NW**152; 115 **Or**580, 239P202; 127 **Or**16, 270P922; 33**PortoRico** 214. [e] **Conditional judgments** may be vacated after statutory time. 233 **Ill** 346. [f] **Order opening default void** under District Court Act where made more than thirty days after entry of judgment. **NJ** 142A650.

261–2 99**Fla**592, 127S333; 37**GaA**450, 140**SE**636; 117**Nebr**291, 220**NW**298.

261–3 95**CalA**144, 272P610; 41**GaA**671, 154**SE**456(2dcase); 247**Mich**237, 225**NW** 554; 35**Wyo** 108, 247P699.

262–4 91**CalA**590, 267P372; **Ont** [1926] 4**DomLR**969.

262–10 37 **OklACR**537 (motion held one for new trial and not one to vacate void judgment).

262–12 199**Wis**602, 227**NW**270.

263–17 127 **Or**16, 270P922.

263–18 39 **OklACR**352; 41 **OklACR**196.

263–18½–New. Statute providing for relief from default judgments should be liberally construed. **IndA** 156**NE** 578.

263–19 38**F(2d)**109; 33**Ariz**232, 263P 625; **Ariz** 284P159; 168**Ark**747, 271**SW** 704; 84**Colo** 445, 271P177; 239 **IllA**490; 249 **IllA**479; 147**Miss**737, 113S346; **MoA** 25**SW(2d)**490; 73**Mont**180, 235P770; 80**Mont**266, 260P124; **NJSup** 129A178; **NJSup** 134A110; 128**Misc**553, 220**NYS** 188; 190**NC**151, 129**SE**190 (reasonably prompt action by movant after notice, called for); 51**ND**329, 199**NW**766; 54 **ND**108, 208**NW**852; 41 **OklACR**196; 154 **SC**140, 151**SE**276; **TexCivA** 271**SW**134; **TexCivA** 3**SW(2d)**590 (after term).

265–20 **Man** [1929] 4**DomLR**1065.

265–21 **TexCivA** 289**SW**1050, 1051 [quotCJ].

265–22 50**Philippine**708. [a] (2) Application within month of entry of judgment and notice thereof is held seasonable. 200**Cal** 374, 253P148.

265–23 See also **TexCivA** 283**SW**211.

265–24 98**Fla**1196, 125S694.

265–25 **TexCommnA** 299**SW**231, 233 [citCJ].

265–26 **TexCommnA** 299**SW**231, 233 [citCJ].

266–27 290**Pa**280, 138A768.

266–28 [a] 38**F(2d)**109; 164**Minn**504, 205**NW**636; 147**Miss**737, 113S346; 80 **Mont**266, 260P124; **NJSup** 135A669; 148**Wash**279, 268P867. [b] **Ariz** 284P 159; **DelSuper** 143A460; 236 **IllA**412; 137**Misc**876, 244**NYS**48; 56**ND**297, 217 **NW**172; 94**PaSuper**79; **TexCivA** 283 **SW**211. [c] **What constitutes reasonable time is matter within court's reasonable discretion.**–85**CalA**381, 259P373.

266–28½–New. No laches can run against a void judgment. 290**Pa**454, 139A159.

267–29 98**Fla**1196, 125S694; 232**Ky** 336, 23**SW(2d)**551(2dcase); 190**NC**536, 130**SE**315 (reasonable promptness and ordinary showing of merit required); 191**NC**818, 133**SE**186. See 191**NC**166, 131**SE**648, 44**ALR**610.

267–32 232**Ky**336, 23**SW(2d)**551(2d case) (judgment prematurely rendered).

267–33 127 **Okl** 117, 260P32.

267–36 **Or** 286P546.

267–37 34**Ariz**184, 269P80; 86**Colo** 130, 278P607; 87**Colo** 544, 289P606; **NJSup** 150A240.

268–45 [e] **In North Dakota.**–55**ND**700, 215**NW**152. [f] **Credibility** of witnesses is, to some extent, included in wide latitude of court to vacate judgment. **Iowa** 231**NW**440.

268–47 **LaA** 130S870; **Md** 152A109. See also 85**Mont**604, 281P540. But see 225**Ky**521, 9**SW(2d)**528.

268–48 But see 190**NC**478, 130**SE**113.

268–49 135 **Okl** 35, 273P898(2dcase). [b] **In Illinois.**–252 **IllA**560.

268–50 [a] **Court cannot reopen case after term to try question** whether holder and agent had good title, irrespective of payee's fraud. **Mo** 28**SW(2d)**1017.

268–51½–New. Judgments should not be set aside unless upon the strongest and most convincing grounds. **Nebr** 226 **NW**914.

268–51¾–New. A judgment cannot be vacated and set aside for insufficiency of evidence to support the verdict except on motion for a new trial. **SD** 227**NW** 81.

269–52 25 **OhNPNS**445, 457 [quotCJ].

269–53 25 **OhNPNS**445, 457 [quotCJ].

269–54 25 **OhNPNS**445, 457 [quotCJ].

269–55 25 **OhNPNS**445, 457 [quotCJ].

269–56 276**US**311, 48**SCt**311, 72**L ed** 587; 25**OhNPNS**445, 447 [quotCJ].

269–57 215**Ala**449, 111S28; 89**CalA**505, 264P1115; 89**CalA**375, 265P260; **CalA** 288P442; 91**Fla**709, 109S677; 94**Fla**60, 113S736, 742 [citCJ]; 36**GaA**815, 138**SE** 244; 40**GaA**568, 150**SE**569(2dcase); 122 **Kan**762, 253P424; 227**Ky**661, 13**SW(2d)** 1011; 227**Ky**670, 13**SW(2d)**1025; 76 **Mont**117, 245P539; 190**NC**536, 130**SE** 315 (by court in which it was rendered); 25 **OhNPNS**445, 457 [quotCJ]; 122 **Okl** 80, 251P59; 136 **Okl** 146, 276P762; 136 **Okl** 150, 276P765; 138 **Okl** 15, 280P301; 39 **OklACR**322; 298**Pa**193, 148A77; 300 **Pa**321, 150A642; 11**PaDist&Co** 456; 50 **SD**232, 209**NW**355. [h] **It is duty of court to cancel entry** of void judgment when it is called to court's attention. 76 **Mont**117, 245P539. [i] **Judgment void on face** is subject to direct attack. 190 **NC**536, 130**SE**315. [j] **Filing answer** admitting amount due and authorizing clerk to enter judgment prevents vacation as of right. 169**Minn**234, 211**NW**5. [k] **Final judgment not void,** motion to vacate held properly denied. 91**Fla**490, 107S625. [l] **Judgment cannot be vacated as void** on account of amendable defects where it was rendered by court having jurisdiction in absence of other party or counsel. 136 **Okl** 118, 276P718.

270–58 25 **OhNPNS**445, 457 [quotCJ].

270–59 25 **OhNPNS**445, 457 [quotCJ].

270–60 25 **OhNPNS**445, 457 [quotCJ].

270–61 25 **OhNPNS**445, 457 [quotCJ].

270–61½–New. The refusal of a trial court to vacate a judgment on the ground that the attorneys had no authority to file a suit is an abuse of discretion. 222**MoA**1176, 15**SW(2d)**946.

270–63 219**Ala**482, 122S643; 175**Ark** 1107, 1**SW(2d)**558; 203**Cal** 462, 264P 751; 160**Ga**583, 128**SE**744; 35**GaA**428, 133**SE**306; **Iowa** 232**NW**118; 129**Kan** 321, 282P585; 209**Ky**54, 272**SW**9; 152 **Md**335, 136A648; 154**Md**226, 140A62; 53**ND**238, 205**NW**674; 58**ND**273, 225 **NW**798; **ND** 229**NW**923; 129 **Okl** 243, 264P179; 133 **Okl** 93, 271P247; **Tex CivA** 286**SW**598; **BC** [1930] 2**DomLR** 720; 20**SaskL**11, [1925] 3**DomLR**1044. [d] (2) Order vacating default judgment irregularly entered without showing proof of service has been held not abuse of discretion. 244**Mich**397, 221 **NW**276. [g] **Where service was by publication,** judgment can be attacked only by showing defendant was in state when such process was served. **Cal** 246P685. [h] **To open default judgment defendant must show** not only lack of service but also lack of knowledge of proceedings. 172**Ark**125, 287**SW**743.

271–66 233 **IllA**102; 121 **Okl** 186, 249P 343; **Wash** 286P664. [d] **Failure to file proof of service of summons within statutory time** is not ground for vacating default judgment where defendant was not prejudiced by delay. 135**Misc**792, 239**NYS**669.

272–67 169**Ark**393, 275**SW**703; 181**Ark** 1140, 29**SW(2d)**1077; 1**LaA**285; 221 **AppDiv**280, 223**NYS**329; 121 **Okl** 186, 249P343.

272–69 **TexCivA** 299**SW**699.

272–70½–New. Petition to set aside default for lack of service is held properly denied, where previous motions to quash return were denied and no appeal taken. 15**F(2d)**610.

274–76 337 **Ill** 141, 168**NE**647 (after term); 123 **Or**406, 262P833. See also 151**Va**143, 144**SE**606.

274–79½–New. Unauthorized answer by attorney employed to represent complaining party is not ground for vacating judgment, unless answer was prejudicial to party's rights and judgment was based in whole or in part upon such answer. 118 **Okl** 111, 246P851; 118 **Okl** 144, 247P346.

274–80½–New. A judgment may be regular and at the same time erroneous. 191**NC**818, 133**SE**186.

274–81 41**GaA**671, 154**SE**456(2dcase); **MoA** 26**SW(2d)**804; 30**NM**517, 239P865 (failure to give notice of entry of judgment in case taken under advisement); 33**NM**624, 274P50(2dcase); 190**NC**536, 130**SE**315 (set aside within reasonable time by motion of party showing merit); 127 **Okl** 117, 260P32; 133 **Okl** 64, 271P167; 135 **Okl** 228, 275P306(2d case); 144 **Okl** 190, 290P338; 149**Wash** 443, 271P87; 154**Wash**154, 281P484; **Wash** 290P430. See also 196**NC**256, 145 **SE**236(2dcase). But see 190**NC**854, 129 **SE**192. [b] **Judgment is irregular** when not entered in accordance with practice and course of proceeding where rendered. 190**NC**536, 130**SE**315.

275–83 225**AppDiv**6, 232**NYS**82; 190 **NC**536, 130**SE**315. [a] (4) Failure of prosecuting attorney to plead after proper service on county commissioners is not irregularity within statute. **OhA** 173**NE**255. [b] (2) 31**NM**667, 250P18. [c] (1) 127 **Okl** 117, 260P32. (36) 231 **Mich**689, 204**NW**706 (default judgment without service of declaration); 23 **OhA** 285, 155**NE**256; 113 **Okl** 224, 241P173 (judgment without retrial after new trial granted); 131 **Okl** 196, 268P258; 135 **Okl** 164, 274P659; 148**Wash**87, 268P 135.

276–84 [a] (45) Failure to order stenographer to take evidence in default proceedings. 218**MoA**187, 265**SW**866. (46) Inclusion of irrelevant papers in judgment roll. 219**AppDiv**261, 219**NYS** 709.

277–85 36**GaA**620, 137**SE**911; 87 **IndA** 603, 162**NE**239.

278–86 190**NC**471, 130**SE**154; 41 **Okl ACR**196; **Pa** 151A889.

278–87 **MoA** 26**SW(2d)**804; 7**PaDist& Co** 419.

278–89 213**Ala**33, 104S244; 35**Ariz**357, 278P375; 201**Cal** 210, 256P210; 101 **CalA**599, 281P1058; 198 **Ind**516, 154**NE** 284; **IndA** 169**NE**91; 124**Kan**815, 262P 569; 216**Ky**742, 288**SW**696, 698 [quot CJ]; 114**Nebr**442, 207**NW**935; 126 **Okl** 121, 258P749; 141 **Okl** 291, 285P67; 123 **Or**237, 261P689; **Or** 286P546; 5**PaDist &Co** 161; **TexCivA** 283**SW**230; **TexCivA** 288**SW**1098; **TexCivA** 24**SW(2d)**99; 149 **Wash**443, 271P87.

279–90 216**Ky**742, 288**SW**696, 698 [quotCJ].

279–92 216**Ky**742, 288**SW**696, 698 [quotCJ].

280–93 216**Ky**742, 288**SW**696, 698 [quotCJ].

280–96 83 **IndA**655, 149**NE**646; 202 **Iowa**1114, 211**NW**481; 124**Kan**815, 262 P569; 126**Kan**479, 268P797; 168**Minn** 152, 210**NW**70 (stating law of Iowa); 49**Nev**18, 234P688; 127**Misc**898, 217 **NYS**647; 119 **Okl** 157, 244P444; 124 **Okl** 123, 254P53; 133 **Okl** 300, 272P412; **TexCivA** 291**SW**605, 608 [quotCJ]; **Tex**

CivA 293SW899. [b] (1) 96PaSuper198. [s] **Intrinsic fraud** consists of fictitious cause and false evidence. 124Kan815, 262P569.

281-97 38 OklACR424.

282-2 168Minn152, 210NW70 (stating law of Iowa); TexCivA 283SW230.

282-3 252 IllA560. [e] **Erroneous conclusion** by trial court held not fraud entitling vacation after term. 175Ark 1169, 1SW(2d)807.

282-4 220Ky574, 295SW869. [b] **Receipt of frequent statement from seller for amount less than alleged in petition** till default judgment obtained is not good charge of fraud, accident, or mistake. 160Ga583, 128SE744.

283-5½-New. But party participating in fraudulent procurement of judgment or decree cannot ask court for relief against it. 93Fla709, 112S622.

283-6 40GaA835, 151SE682; 220Ky 590, 295SW896; 322Mo 654, 15SW(2d) 842.

283-8 124Kan815, 262P569.

284-10 83 IndA655, 149NE646; 202 Iowa1114, 211NW481; 142 Iowa385, 121 NW27; 161 Iowa148, 140NW359; 203 Iowa1390, 214NW545; 158La961, 105S 28, 30 [quotCJ entire section]; 127Misc 898, 217NYS647.

284-12 [a] (2) For perjury not appearing on record judgment may be set aside. 38GaA287, 143SE912. [c] 148 Wash279, 268P867.

285-14 158La961, 105S28, 30 [quotCJ]; 8LaA603 [cit CJ]; 26 OhNPNS9.

285-16 35Ariz12, 273P986; TexCivA 288SW1098. See also TexCivA 22SW (2d)725. But see 40GaA387, 149SE705 (2dcase).

286-18 80Mont266, 260P124; NJSup 147A721.

286-19 201 Iowa614, 206NW37.

286-20½-New. Where, in consideration for defendant's not taking appeal from judgment, parties make compromise settlement which defendant claims he has fully paid, the court will not open judgment on petition that plaintiff has issued a fieri facias in violation of settlement, but will submit to jury issue of amount due. 85PaSuper285.

286-21 181Ark1140, 29SW(2d)1077; 5 LaA534; Mass 168NE726; 322Mo 1118, 17SW(2d)935; 52ND681, 204NW7 [cit CJ]; 23 OhA15, 154NE343.

287-23 90PaSuper550; 7PaDist&Co 283.

287-27 [a] (1) 50SD366, 210NW191.

287-29 90PaSuper370.

287-30 7PaDist&Co 564.

288-34 But see 190NC854, 129SE192.

288-38 226Ky699, 11SW(2d)694; 251 NY39, 166NE797; 148Wash87, 268P135.

289-41 35PortcRico 414 (judgment entered on motion to withdraw suit). But see 179Minn315, 229NW133.

289-42 276US311, 48SCt311, 72L ed 587; 89CalA375, 265P260; NM 239P 862; 88PaSuper568.

290-53 138Misc300, 245NYS350.

290-55 250 IllA255.

291-57 [a] (5) Judgment held improperly vacated. 255 IllA41. [c] **In Ohio.**– 25 OhA249, 158NE320.

291-58 248 IllA572. [a] (3) But see 255 IllA189.

291-59 202Cal 478, 261P1001; 32NM 344, 256P179. Contra 200Cal 310, 253P 145.

291-61 228Ky554, 15SW(2d)492. But see 126Kan195, 268P84. [d] (2) Nonjoinder of comaker of note or anomalous indorser as surety, not served, is not cause for setting aside judgment good as against those served. 35GaA5, 131SE 524.

291-61½-New. or to allow a subsequent purchaser to be substituted and put in complaint, 50SD353, 210NW198.

292-64½-New. A judgment, good as to at least some of defendants, may be opened but will not be stricken. 9Pa Dist&Co 143.

292-66½-New. A party cannot attack the judgment as being beyond the jurisdiction of the court of rendition, where the defect is of parties, which must be attacked by special demurrer. 33 OhA 247, 169NE39(2dcase).

292-67 79CalA215, 249P34, 36 [quotCJ]; 221Ky616, 299SW559; 74Mont558, 241P636, 644 [quotCJ]; NJSup 136A 596.

293-76 37GaA563, 140SE902. [b] **Judicial errors and irregularities.**–32NM 344, 256P179. [c] **Judgment will not be set aside** on showing of specific defenses not provable under general denial. 51 SD31, 211NW806.

293-77 35GaA5, 131SE524; 37GaA563, 140SE902; GaA 155SE227.

293-79 35GaA5, 131SE524; 37GaA563, 140SE902.

293-83 41GaA737, 154SE655.

293-83½-New. Verification of complaint not in compliance with statute is ground for setting aside judgment. 130 Misc654, 224NYS271.

294-86 115Tex405, 283SW135. [d] **Entry pending motion for directed verdict.** –Judgment entered on verdict while decision on motion for directed verdict was reserved may be set aside on motion as inadvertently entered. 245Mich58, 222 NW163.

294-87 252Mass423, 147NE899.

294-89 36F(2d)979. [e] **Before expiration of time to plead after demurrer overruled.**–89CalA396, 265P306.

295-90 TexCivA 297SW235 (plea of privilege not disposed of). But see GaA 155SE227.

295-91 252 IllA383; 78Mont329, 253P 889.

295-91½-New. A judgment may be vacated as premature when entered after trial before the court without a jury before any decision in writing by the court. 51SD443, 214NW842.

295-97 36GaA636, 137SE909.

296-4 194NC812, 140SE439; 191NC166, 131SE648, 44ALR610; 193NC802, 138SE 167; 23 OhA15, 154NE343; 50SD512, 210NW735. [e] **Statute applies only to valid judgments.**–195NC203, 141SE587. [f] **Both default and judgment entered thereon** must be subject to relief by reason of mistake, surprise or excusable neglect. 83Mont400, 272P525.

296-4½-New. And such is the rule where the statute authorizes setting aside default judgment for "good cause." 101WVa273, 132SE741; 101WVa314, 132SE744.

296-5 52ND681, 204NW7; 54ND108, 208NW852.

296-6 [a] (3) Refusal to open judgment held proper where party neglected to answer. SC 155SE594. [b] **Motion properly denied.**–52ND74, 201NW991.

296-6½-New. Where plaintiff by inadvertence fails to reply to counterclaim, he is entitled to have default opened. 125Misc762, 211NYS851 (where no serious delay or inconvenience ensued).

296-7 200Cal 374, 253P148; 89CalA659, 265P339; IndA 156NE578; 169Minn234, 211NW5; 75Mont332, 243P576; 52ND 410, 203NW182, 39ALR915; 127 Okl 117, 260P32, 34 [quotCJ]. [a] See also Can [1928] 3DomLR519.

296-7½-New. In determining whether a default judgment should be vacated upon the grounds of inadvertence or excusable neglect, each case must depend on its own facts. 80Mont266, 260P 124.

296-7⅓-New. A motion to vacate a judgment and require the filing of findings and conclusions was properly granted, where the consent of plaintiff to waive the findings was inadvertently given. 95CalA224, 272P760.

296-8 115 Or580, 239P202.

296-8½-New. Judgment on findings of fact and conclusions of law will not be set aside on the ground of mistake and surprise where the judgment follows the findings of fact and conclusions of law and a new judgment rendered must be the same as the one vacated. 115 Or580, 239P202.

296-9 199Cal 523, 250P397; 101CalA 599, 281P1058; 106Conn90, 137A19; Ind 159NE753; 202 Iowa784, 211NW 404, 217AppDiv176, 216NYS505; 190NC 437, 130SE12; RI 131A197; TexCivA 283SW193; TexCivA 288SW586; Tex CivA 288SW1098.

297-10 217AppDiv176, 216NYS505; RI 131A197. [b] **Erroneous advice of sheriff.**–84CalA379, 258P105.

298-11 [a] (1) 88CalA111, 263P260. [a] (3) Neglect to file answer based on reasonable mistake of law is excusable. CalA 291P262.

298-12 198NC411, 151SE884.

298-15 106Conn90, 137A9, 20 [citCyc].

298-17 69CalA633, 232P165 (judgment on partition by consent not vacated because party did not receive all he expected to).

299-20 131SC418, 127SE834 (attorney's mistake amounting to excusable neglect).

299-25 223Ky771, 4SW(2d)734; Tex CivA 288SW1098; 146Va553, 131SE835. [b] **Irregular placing of cause on calendar** by plaintiff's attorney, who was granted new trial with order to place cause on next trial calendar, is ground for opening default. 125Misc923, 212 NYS295.

299-26 40GaA568, 150SE569(2dcase); TexCivA 285SW1096; TexCivA 288SW 1098. [g] **Mistake held not excused** by attorney's letter. 101WVa314, 132SE 744.

299-28 106Conn90, 137A19, 20 [citCJ]; 116 Okl 40, 243P157.

300-29 128Kan296, 278P15; 116 Okl 40, 243P157.

300-32 TexCivA 288SW1098. See also 1LaA628.

300-33½-New. Where the court or an officer thereof by his conduct has misled the parties as to the time the cases will be tried, the absence of such parties will be excused. 116 Okl 40, 243P 157.

300-38 CalA 291P262; 221Ky501, 299 SW205. [a] **Return of service not filed.**– 75Mont332, 243P576.

300-33½-New. A person served with summons and complaint cannot have default set aside on the ground that he mistakenly thought such papers could not be issued and signed by attorney without authentication of court. 54ND 864, 211NW818.

300-39 TexCivA 288SW586.

301-44 SD 227NW369.

301-47 Ind 159NE753; 214Ky411, 283 SW405; 232Ky333, 23SW(2d)545; 104 NJL475, 141A663; TexCivA 12SW(2d) 237; 40Wyo 449, 278P538. But see 190 NC854, 129SE192. [e] **Surprise as to term of trial** held not cause for setting aside. 101WVa314, 132SE744.

302-48 [a] (3) Where defendant was expressly notified that complaint would be filed at expiration of 30 days, it was held he could not claim surprise. 191 NC224, 131SE584.

302-57½-New. Failure of an attorney to perform his engagement to serve an answer constitutes a surprise within the meaning of some statutes. 49SD92, 206 NW239.

302-58 199Cal 246, 248P923; Ind 159 NE753; Minn 231NW241(2dcase); Nebr 229NW13; 112 Okl 237, 240P713; 195 NC354, 142SE320; 123 Or237, 261P 689; SD 225NW57(2dcase); TexCivA 283SW193; TexCivA 288SW1098. But see 190NC854, 129SE192. [a] **Excuse for delay in presenting plea** must be shown. 92Fla210, 109S632. [b] **Absence of willful negligence** shown. Tex CivA 8SW(2d)296.

303-60 75Mont332, 243P576; TexCivA 283SW193.

304-63 [a] (4) Failure of corporation's former attorney to forward to his successor summons sent by corporation's agent not knowing of change of attorneys held excusable neglect. 75Mont 332, 243P576.

304-66 RI 131A197; TexCivA 288SW 1098.

304-66 [b] (4) Advice of third person that it was not necessary to answer does not excuse failure to do so. 40GaA835, 151SE682.

305-69 200Cal 374, 263P148. [d] (1) 199Cal 246, 248P923; 200Cal 374, 253P 148; 75Mont332, 243P576 (miscarriage of letter sent by defendant to his attorney directing him to look after case); 217AppDiv176, 216NYS505; 195NC203, 141SE587; 49ND64, 189NW681; 56ND 98, 216NW199; 50SD341, 210NW155. [e] (1) 33Ariz232, 263P625; 89CalA295, 264P552; CalA 290P492; 165Minn308, 206NW447; 198NC659, 153SE112(2d case); 115 Or580, 239P202 (reliance on erroneous statement of clerk that no de-

cree had been filed). (2) 80Mont266, 260 P124. (3) Discussion of settlement does not excuse plaintiff for failure to reply to new matter alleged in defense, or to demur or answer counterclaim, or from making timely appearance. 73Mont180, 235P770. [g] **Determination as to existence of excusable neglect.**–200Cal 374, 253P148.

305–70 213Ala164, 104S512; 35Ariz78, 274P776; 13LaA19, 127S754; 147Miss 737, 113S346; 75Mont332, 243P576; 116 Okl 40, 243P157; 218AppDiv396, 218 NYS504; 23 OhA15, 154NE343; 123 Or 237, 261P689; TexCivA 283SW230; Tex CivA 271SW134; TexCivA 17SW(2d) 113(1stcase); Wash 288P277. [a] (2) Defendant must give litigation such attention as man of ordinary prudence usually bestows on important business. NC 154SE662. [c] **Inattention of attorney** is held not to excuse negligence of party to action. 23 OhA15, 154NE343. [d] **Negligence of corporate officer on whom writ was served** does not excuse failure of corporation to enter appearance. RI 133A660.

306–71 NC 154SE662.

306–73 214Ky70, 282SW785. See also 213Ala164, 104S512.

307–74 TexCivA 4SW(2d)1008, 1012 [quotCJ].

307–76 147Miss737, 113S346.

307–78 147Miss737, 113S346; 32Porto Rico 155. [c] **Error to vacate judgment** because prejudiced party did not receive notice of trial, not required by statute. 32PortoRico 155.

307–79 Ida 288P893.

307–79½–New. Failure to file answer because of unsuccessful efforts to employ attorney without payment of retainer is not sufficient to excuse default. TexCivA 283SW230.

307–80 NJSup 137A415; NC 154SE 662; 23 OhA15, 154NE343; TexCivA 278SW229; Sask [1926] 4DomLR174, [1926] 2WestWkly671. [b] **Attorney may not be repudiated** in order to have judgment set aside. 198NC659, 153SE 112(2dcase).

307–81 213Ala339, 105S171 (defendant accountable for neglect of counsel permitting default); 77CalA120, 245P1104; 255 IllA30; IndA 156NE578; Iowa 229 NW694; 147Miss737, 113S346; MoA 14 SW(2d)686; 48Nev230, 229P386; 193 NC256, 136SE635; 144 Okl 213, 291P 80; 118 Or416, 247P143; 32PortoRico 155; 34PortoRico 638; TexCivA 285SW 1096; TexCivA 288SW586; TexCivA 293SW677; 34Wyo 509, 245P295. But see 192NC626, 135SE627.

308–82 TexCommnA 276SW887 (failure to move for new trial during term default judgment entered held excused); Sask [1929] 3DomLR606.

308–83 180Ark46, 20SW(2d)317; 147 Miss737, 113S346; TexCivA 288SW 586; TexCivA 293SW677. [a] (2) Where defendant's attorney had notice from defendant and also from plaintiff's attorney that he had failed to file plea and enter appearance. 243Mich600, 220 NW791.

309–84 CalA 285P857 (failure to appear on trial); 147Miss737, 113S346; 32 PortoRico 155; TexCivA 285SW1096.

309–85 32PortoRico 155.

309–86 146Miss842, 112S368; 145Miss 897, 112S588; 48Nev230, 229P386; 192 NC626, 135SE627; 195NC203, 141SE 587; 300Pa540, 151A12; 49SD92, 206 NW239; TexCivA 278SW229; 34Wyo 509, 245P295; 38BC49, [1927] 1DomLR989. [b] CalA 285P857. [c] **Where prejudice to rights of adverse party will not result** it is not abuse of discretion to grant motion to vacate default judgment at same term. 34Wyo 509, 245P 295.

309–89 Ariz 284P159; IndA 156NE 578; 23 OhA15, 154NE343; TexCivA 296SW643. [b] (1) IndA 156NE578; 225AppDiv696, 232NYS414. [c] (1) 203 Cal 547, 265P194; 95CalA390, 272P 1080; 174Minn197, 219NW85. (4) See also 35Ariz78, 274P776. (7) Where default was deliberate. 217AppDiv665, 217NYS378.

310–90 213Ala339, 105S171; CalA 285 P857.

310–94 200Cal 374, 253P148; 90CalA 753, 266P574; Sask [1929] 3DomLR606. See also 202 Iowa784, 211NW404. [a] (4) Court should not countenance taking of snap defaults due to mistake in answering calendars. 135Misc228, 237NYS 509. [b] (2) TexCivA 293SW677.

311–99 170Ark794, 281SW368; 200Cal 374, 253P148; 96CalA422, 274P579; 48 Ida232, 281P372; 146Miss842, 112S368; 116 Okl 40, 243P157; TexCivA 281SW 590. See also CalA 287P558. But see CalA 292P139. [b] **Addressed to discretion of court.** 92Fla210, 109S632.

311–2 116 Okl 40, 243P157; 136 Okl 202, 277P239.

311–3 242 IllA228; NJ 147A863(1st case) (position of case on calendar); 135Misc228, 237NYS509.

311–4 49ND165, 190NW813; 116 Okl 40, 243P157. [a] (7) It is not duty of court clerk to notify party or attorney of setting of case for trial and his failure to do so is not ground for vacating judgment rendered in absence of party or his attorney. 113 Okl 251, 241P138.

311–5 TexCivA 285SW1096. [a] (7) That attorney on leave of absence overlooked case. 36GaA445, 136SE828. [b] (3) Delay in amending complaint based on verbal stipulation with opposing party is held excusable. 200Cal 374, 253P 148. (4) Mistake in failing to amend complaint within time allowed is held not inexcusable. 200Cal 374, 253P148.

312–6 69CalA719, 232P734 (unskillful presentation of case is not ground for relief); 217Ky77, 288SW1039.

312–8 See also 85CalA189, 259P105. [a] (3) See also 87PaSuper569.

312–9 88CalA111, 263P260.

313–15 Wash 289P527.

313–16½–New. The misconduct of plaintiff's attorney in failing to disclose to the court the name of an unknown opponent counsel renders proper vacating nil dicit judgment during the term. MoA 294SW1019.

313–17½–New. or misunderstanding between counsel and the court may require setting aside of judgment; 50ND357, 195NW656.

313–20 172Ark599, 289SD769; RI 131 A197. [a] 90CalA337, 265P867.

313–21 CalA 285P895 (sufficient).

314–23 217Ky77, 288SW1039; 217Ky 202, 289SW245; 113 Okl 251, 241P138; 113 Okl 220, 241P186; 122 Okl 125, 251 P482; 132 Okl 256, 270P84; 133 Okl 233, 271P248; Okl 290P1098. [b] (1) OhA 173NE255; 39 OklACR130; 40 Okl ACR10 [reh pending]. (9) Failure through mistake of nonresident counsel to take and file proof. 217Ky202, 289SW 245. (10) That neither defendant nor his attorneys of record had notice of hearing of demurrer and overruling same and of granting of time to plead, after expiration of which default judgment was rendered. 123 Okl 79, 251P 1004. (11) Other instances. Mass 173 NE405. [l] 113 Okl 220, 241P186. [m] (1) 113 Okl 251, 241P138. [n] **Misunderstanding of ambiguous language of court** does not constitute unavoidable casualty. 129 Okl 232, 264P210.

315–25 101WVa314, 132SE744.

315–26 Mass 168NE726.

315–27 [b] (3) Detention on criminal charge held not sufficient under facts. 101WVa314, 132SE744.

315–29 126Kan807, 271P385; 132 Okl 256, 270P84.

315–32 82CalA624, 256P220. See also MoA 3SW(2d)1051.

316–33 [a] (5) 218MoA187, 265SW866; TexCivA 287SW1103; 36Wyo 48, 252P 1019.

316–37 179Ark589, 17SW(2d)323.

316–39 [a] **In Louisiana.**–166La30, 116 S583.

316–40 Mo 284SW808.

316–43 214Ala489, 108S379; 130Misc 198, 223NYS674; 34PortoRico 638.

316–43½–New. Attorney's absence from office at time when citation reached there did not excuse defendant from failure to answer. TexCivA 293SW677.

316–44 98CalA638, 277P516; CalA 277 P518; 214Ky411, 283SW405; 228Ky 554, 15SW(2d)492; 128Me542, 148A565 (defaulting defendant instead of continuing case held error).

317–50 50ND388, 196NW108.

317–51½–New. Death of member of defendant's family causing much mental and physical distress, accentuated by nervousness due to divorce proceedings against husband, has been held to justify opening and reforming judgment. TexCivA 283SW193.

317–52 213Ala339, 105S171 (poor health of counsel not ground where retained four months without action and defendant indifferent to suit); 206Cal 18, 272P 1042; 215Ky45, 284SW425; 23 OhA15, 154NE343; RI 150A125; TexCivA 273 SW951. [a] (5) Where no explanation was made of month's delay, relief was denied. TexCivA 287SW692. (6) Where counsel did not notify court of his condition. 164Ga733, 139SE344.

318–63 248 IllA90; 252Mass423, 147NE 899; Mass 168NE732; 107WVa370, 148 SE326 (cannot be set aside except in some lawful mode of review). [f] **Where default judgment is erroneous,** plaintiff's remedy is by appeal, not by motion. 191 NC818, 133SE186.

319–64 But see 38GaA287, 143SE912.

319–64½–New. The court may treat a motion to strike off a judgment as an application to open it and let defendant into a defense. 10PaDist&Co 704.

319–65 38F(2d)109 (motion for rule to show cause); 40GaA568, 150SE569 (2dcase) (motion to vacate judgment necessarily comes within rules governing motion for new trial); 233 IllA102; IndA 149NE451; 122Kan762, 253P424; MoA 283SW57; Nebr 226NW914 (proceeding to vacate is continuation of action); 190NC418, 130SE7; 133 Okl 93, 271P 247; Tex 26SW(2d)905; Wis 231NW 585; Sask [1926] 4DomLR1192, [1926] 3WestWkly699. See also 245 IllA307; 190NC536, 130SE315. [g] 233 IllA102. [k] **In California.**–71CalA705, 236P162. [l] **In Oklahoma.**–115 Okl 205, 242P207. [m] **In Texas.**–CivA 280SW276. [n] **In North Carolina.**–191NC818, 133SE186.

320–68 213Ky703, 281SW824; 43 Okl ACR50 [reh pending]. [c] (1) 192NC 731, 135SE861.

320–69 122Kan762, 253P424 (void).

320–73 [a] (2) Judgment rendered in pursuance of stipulation which does not follow stipulation cannot be corrected by motion for relief, but only by motion for new trial or appeal from judgment. 69CalA633, 232P165. (3) Judgment in partition proceedings covering by misdirection of judge land outside of property partitioned can be corrected only by motion for new trial. 69CalA 633, 232P165. (4) Motion to set aside judgment is not proper remedy in this jurisdiction for procurement of judgment through fraud of movant's attorney. 71CalA705, 236P162.

320–75 5PaDist&Co 609.

321–78 40GaA582, 150SE471; 40GaA 568, 150SE569(2dcase) (proceeding not technically statutory petition, but is in effect motion for new trial).

321–80 See also 109Conn45, 145A151.

321–81½–New. Motion to set aside a judgment only is not subject to same rules of practice as motion to set aside verdict and judgment. 36GaA185, 136 SE93.

321–81½–New. Where a motion for a new trial or vacation of judgment in an equitable action is made when the court has control of the judgment, effect thereof is to suspend the judgment until the court passes on the motion. 225Ky823, 10SW(2d)277.

321–83 190NC536, 130SE315; TexCivA 283SW193.

321–86 163Ga547, 136SE423; 190NC 536, 130SE315; 122 Okl 59, 250P795. [b] **As dependent on whether fraud is intrinsic or extrinsic.**–120Kan209, 243P 306.

322–87 163Ga547, 136SE423; TexCivA 283SW193. See also 54ND65, 208NW 564, 566.

322–88 See also 163Ga547, 136SE423.

323–99½–New. Defendant, relying upon special matter not going to merits of case, must raise it by special pleading. 252Mass423, 147NE899.

323–1 115 Okl 87, 241P473; 124 Okl 240, 255P700. [a] (4) Initial step is presentation of petition for order for supersedeas. 220Ala448, 126S110.

323–1½–New. Such remedy is not available during term at which judgment is

rendered. **IndA** 149NE451.

323-2 220Ala448, 126S110; **Mass** 168 NE726. But see 36**Wyo** 427, 256P339. [a] (3) Under Code § 12787 party seeking to have judgment set aside for fraud must proceed by ordinary proceedings entitled as in original action. 205 **Iowa**382, 218NW62.

324-6 129 **Okl** 36, 263P447. [a] **On ground that judgment was rendered before action stood for trial,** no summons held necessary. 129 **Okl** 36, 263P447.

325-15 **Mo** 30SW(**2d**)77; 190**NC**536, 130 SE315.

325-16 **Or** 286P546.

325-17½-New. Vacation after long delay has been held unauthorized. **Ida** 291P1074.

326-25 216**Ala**393, 113S397; 37**GaA**307, 140SE41; **Iowa** 231NW453 (holding prima facie showing established as required); 114 **Okl** 124, 244P435; 50**Philippine**708. See also 215**Ky**186, 284SW 1020.

326-33 [c] **Motion for new trial should be treated as motion to vacate judgment,** though filed too late as motion for new trial, where trial court announced that verdict ought to be set aside. 175**Ark** 1028, 1SW(**2d**)84.

327-35 96**CalA**422, 274P579; 116 **Okl** 40, 243P157. See also 168**Ga**658, 148 SE592.

327-44 136**Misc**215, 239**NYS**347 (prayer for further relief held sufficient).

327-47 172**Ark**832, 291SW56; 71**CalA** 155, 234P910; 76**CalA**331, 244P951; 163**Ga**870, 137SE16; 126**Kan**479, 268P 797; **TexCivA** 275SW168; **TexCivA** 285 SW852; **TexCivA** 283SW230; 103**WVa** 701, 138SE463. See also 309**Mo** 224, 274 SW758. [g] **Complaints held insufficient.**–83 **IndA**655, 149NE646; **TexCivA** 293SW338. [h] **"Good cause"** held shown. 13F(**2d**)969. [i] **Joint judgment.**–22 **OhA**275, 154NE166. [j] **Petition demurrable** which merely states absence of defendant and counsel without reasons. 38**GaA**287, 143SE912.

328-50 83**Colo** 370, 265P681; 116 **Okl** 40, 243P157 (application held sufficient); 122 **Okl** 125, 251P482; 97**Pa Super**588; **TexCivA** 275SW168; **Tex CivA** 287SW692; 103**WVa**701, 138SE 463.

328-51 [a] **TexCivA** 271SW644.

329-51½-New. Under some statutes, where the record shows on its face that the court had jurisdiction to render the judgment sought to be vacated, a petition to vacate on the ground of unavoidable casualty or misfortune filed at a subsequent term is demurrable where, as matter of law, the facts pleaded are insufficient to show unavoidable casualty or misfortune within the meaning of the statute, although the defense pleaded, if proved would be complete. 122 **Okl** 42, 249P358.

329-52 216**Ala**393, 113S397; 80**Colo** 516, 252P813; 164**Ga**733, 139SE344; 239 **IllA**506; 203 **Iowa**1390, 214NW545; 204 **Iowa**655, 215NW749; **MoA** 22SW (**2d**)178(2dcase); 54**ND**108, 208NW852; **TexCivA** 283SW193; **TexCivA** 283SW 230; **TexCivA** 287SW692; **TexCivA** 288 SW586; **TexCivA** 293SW677; **TexCivA** 297SW476; **TexCivA** 4SW(**2d**)1008, 1012 [quotCJ]; 101**WVa**314, 132SE744; 103**WVa**701, 138SE463. [c] **Diligence shown.**–134**Wash**340, 235P803; 136 **Wash**696, 240P565. [d] **Allegations held sufficient.**–2**LaA**24.

329-53 97**PaSuper**588; **TexCivA** 283 SW230; **TexCivA** 4SW(**2d**)1008, 1012 [quotCJ]. [a] 80**Colo** 516, 252P813.

329-55 213**Ala**13, 104S129; 216**Ala**677, 114S306; 168**Ark**180, 269SW565; 168 **Ark**570, 270SW955; 174**Ark**346, 295SW 388; 175**Ark**1107, 1SW(**2d**)558; 176 **Ark**1205, 5SW(**2d**)344; 178**Ark**1019, 14 SW(**2d**)245(2dcase); 35**GaA**203, 132SE 916; 36**GaA**185, 136SE93; 36**GaA**620, 137SE911; 239 **IllA**490; 239 **IllA**506; 252 **IllA**262; **Ind** 159NE753; 201 **Iowa** 1021, 206NW674; 204 **Iowa**655, 215NW 749; 206 **Iowa**1301, 221NW932; 234**Ky** 199, 27SW(**2d**)959; **Mass** 168NE732; 251**Mich**602, 232NW367; **MoA** 22SW (**2d**)178(2dcase); 104**NJL**475, 141A663; **NJSup** 131A98; 127**Misc**42, 215NYS175; 129**Misc**541, 222NYS250; 191**NC**224, 131 SE584; 192**NC**503, 135SE327; 192**NC** 626, 135SE627; 195**NC**299, 141SE892; 195**NC**354, 142SE320; **NC** 154SE625; **NC** 154SE662; 54**ND**108, 208NW852; 57**ND**590, 223NW346; 22 **OhA**528, 154 NE55; 116 **Okl** 86, 243P240; 122 **Okl** 42, 249P358; 125 **Okl** 101, 256P722; 138 **Okl** 253, 280P812; 286**Pa**37, 132A801; 97**PaSuper**506; 97**PaSuper**588; 6**PaDist &Co** 153; 50**Philippine**756; **RI** 131A 553; **TexCommnA** 280SW554; **TexCivA** 272SW507; **TexCivA** 275SW168; **Tex CivA** 283SW193; **TexCivA** 283SW230; **TexCivA** 285SW852; **TexCivA** 287SW 692; **TexCivA** 288SW586; **TexCivA** 288 SW1098; **TexCivA** 289SW124; **TexCivA** 293SW677; **TexCivA** 296SW643; **Tex CivA** 296SW976; **TexCivA** 297SW476; **TexCivA** 25SW(**2d**)1115; **TexCivA** 28 SW(**2d**)825; 142**Wash**642, 253P1088; **Wash** 286P664; 101**WVa**314, 132SE744; **Sask** [1925] 3**DomLR**501. See also 190 **NC**599, 130SE498, 500 [citCyc]. [b] (2) Showing of good defense upon merits to substantial portion of cause of action is required. 50**ND**388, 196**NW** 108.

332-56 125 **Okl** 101, 256P722.

332-57 [b] **In Oklahoma.**–39 **OklACR** 320.

332-58 168**Ark**180, 269SW565 (statement of defense alone insufficient). See also 190**NC**536, 130SE315.

333-59 35**GaA**203, 132SE916; 36**GaA** 185, 136SE93; **MoA** 274SW475; 217 **AppDiv**665, 217NYS378; 6**PaDist&Co** 153; **TexCivA** 283SW230; **TexCivA** 293 SW677.

333-61 168**Ark**180, 269SW565; 194**NC** 811, 140SE302.

333-62 38 **OklACR**538; 43 **OklACR**50 [reh pending]; **TexCivA** 283SW230; **TexCivA** 299SW458, 464 [quotCJ].

334-65 35**GaA**203, 132SE916.

334-73 266**Mass**228, 165NE89; **MoA** 294SW1019; **MoA** 26SW(**2d**)815.

335-76 177**Ark**1186, 9SW(**2d**)803; 201 **Iowa**496; 207NW589; 213**Ky**703, 281 SW824; **NJCh** 149A539; 131**Misc**571, 226NYS613; 53SD425, 220NW857; **Tex CivA** 273SW951; **TexCivA** 275SW168; **TexCivA** 276SW757; **TexCivA** 283SW 230; **TexCivA** 287SW692; **TexCivA** 293 SW338; **Sask** [1925] 3**DomLR**501.

336-80 **TexCivA** 297SW476.

336-82½-New. **Names of witnesses** by whom proposed defense is expected to be proved should be stated. 127**Misc**42, 215NYS175.

337-83 **NJSup** 131A98; 116 **Okl** 86, 243 P240; 94**PaSuper**568 (defense insufficient to take case to jury); 143SC127, 141SE278.

337-84 116 **Okl** 86, 243P240; **TexCivA** 13SW(**2d**)959.

337-86 Contra **TexCivA** 283SW193.

337-92 216**Ala**677, 114S306; 116 **Okl** 86, 243P240, 242 [quotCJ].

338-96 **Wash** 286P664. See also **Tex CivA** 13SW(**2d**)750. [a] (9) That sheriff's sale was void under judgment. 116 **Okl** 86, 243P240. (10) Failure to allege acceptance of defendant's offer of judgment for certain sum. 36**Wyo** 48, 252P 1019. (11) Employer's claim, in compensation case, that due to insurer's misrepresentations he was not insured. **Mont** 290P274. [b] **Defenses held sufficient.**–148**Wash**87, 268P135.

338-96½-New. Where grounds of defense have been pleaded and the issues have been tried and, on appeal from the judgment rendered thereon, the defenses have been adjudicated to be without merit, such defenses, in the absence of allegation of fraud in procurement of judgment, are not available. 129 **Okl** 232, 264P210.

338-2 81**Colo** 6, 252P889; 54**SD**149, 222 **NW**688. [b] **Costs as element of tender after suit commenced.**–**Sask** [1925] 3**DomLR**501.

338-10 169**Ark**393, 275SW703; **Ariz** 284P159; **SD** 231NW936; **TexCommnA** 276SW887 (pleading and proof failing to show completed contract sued on); **TexCivA** 29SW(**2d**)849.

339-13 **TexCivA** 8SW(**2d**)296.

339-17 131**Misc**571, 226NYS613; 54**ND** 65, 208NW564; 57**ND**496, 222NW620; 49**Philippine**330, 332 [citCyc]; 49**Philippine**747; 50**SD**512, 210NW735; **Tex CivA** 296SW643. [a] 98**CalA**638, 277P 516; **CalA** 277P518. See also 29**Porto Rico** 795. [b] (1) 75**Mont**332, 243P576; 29**PortoRico** 795. [c] (1) 206 **Iowa**637, 220NW67; 131**Misc**571, 226NYS613.

340-19 225**AppDiv**874, 232NYS643 (1st case).

340-20½-New. But failure to file it seasonably did not vitiate proceedings, where contents were read in open court. **RI** 136A244.

340-21 98**CalA**638; 277P516; **CalA** 277 P518; 49**ND**577, 192NW765; 52**ND**74, 201NW991; 56**ND**98, 216NW199.

340-22 [b] **Although affidavit did not appear to have been filed seasonably,** it was held not abuse of discretion under facts. **RI** 136A244.

341-25 131**Misc**571, 226NYS613.

341-26½-New. In Porto Rico, where a satisfactory showing of a meritorious defense is made, the manner in which it is made is immaterial. 33**Porto Rico** 802.

341-27 90**CalA**183, 265P550; 48 **Ida** 232, 281P372; 131**Misc**571, 226NYS613. But see 123**Kan**295, 255P30. [i] **In Texas.**–**CivA** 273SW951.

342-39 [b] **Answer of minority stockholder, in action to foreclose mortgage on corporate property,** is not insufficient because allegations of complaint are denied on information and belief where additional positive allegations show that secured notes were without consideration. **Ariz** 284P159.

342-40 [a] (2) 135 **Okl** 112, 274P673.

342-42 75**Mont**332, 243P576; 39 **Okl** 328; 138 **Okl** 253, 280P812.

343-46 [a] (5) See also 87**PaSuper**602.

343-50 [a] But see 245 **IllA**307.

343-52 **IndA** 154NE780; **TexCivA** 271 SW644. [a] (3) Demurrer to petition is not authorized under some statutes. 36**Wyo** 427, 256P339. (4) No demurrer is necessary in order to authorize court to dismiss petition for failure to state facts sufficient to warrant relief. 36 **Wyo** 427, 256P339.

344-56 224 **IllA**367 (where demurrer is made); 233 **IllA**102; 92**PaSuper**254.

344-57 130 **Or**177, 279P550 (answer equivalent to affidavit of merits though not technically verified in manner required by law).

344-58½-New. Effect of variance between petition and replication. 98**Pa Super**49.

344-60 See also **TexCommnA** 15SW(**2d**) 579. [c] (2) In action to set aside divorce granted testator executrices of his will are necessary parties. **TexCivA** 1 SW(**2d**)708.

344-67½-New. The court has discretion to allow the owner of property to be made a party at the hearing of proceedings to set aside a judgment requiring the sheriff to deliver a tax deed of property to a purchaser, although the owner did not appear in the suit. 35 **Ariz**12, 273P986.

344-69 76**Mont**117, 245P539, 543 [cit CJ]; 225**AppDiv**594, 234NYS15; 198 **NC**411, 151SE884.

345-70 37**GaA**535, 140SE800; 76**Mont** 117, 245P539, 543 [citCJ]; **Okl** 293P255. [e] **Garnishee cannot attach judgment** on ground of dormancy. **TexCivA** 292 SW642.

345-72 175**Ark**1036, 1SW(**2d**)76.

345-73 76**Mont**117, 245P539, 543 [cit CJ]. Contra 136 **Okl** 118, 276P718.

346-77 [a] (1) But see 52**SD**271, 217 **NW**195. [e] **Class actions.**–235**Ky**600, 31SW(**2d**)928.

346-80 213**Ala**33, 104S244 (surety on guardian's bond may apply for rehearing of order of final settlement).

347-82½-New. Judgment setting aside judgment and sale is erroneous when made on motion by one whose counterclaim and cross petition had been dismissed. 222**Ky**419, 300SW858.

347-82½-New. Plaintiff obtaining judgment against a highway contractor has no standing to resist a motion to quash the judgment obtained by the contractor against the highway district merely because it has garnished the district on its judgment against the contractor. 179**Ark**875, 19SW(**2d**)1014.

347-85 86**Mont**83, 282P268. See also **NJCh** 145A721(2dcase).

347-92 219**AppDiv**261, 219NYS709; 285 **Pa**241, 132A185.

348-99 201**Cal** 210, 256P210.

348-99½-New. And creditors who fail

to object to allowance of claims in receivership proceeding, and fail to appeal within the time allowed, cannot thereafter attack judgment for mistake or fraud. 25 OhA 165, 157NE903.

348–5 12PaDist&Co 218.

349–16 WVa 153SE507.

349–21 53SD200, 220NW527, 529 [cit CJ].

350–22 [d] In Indiana.–85 IndA581, 151 NE15.

350–23 215Ky186, 284SW1020; NS [1929] 2DomLR111.

351–24 IndA 154NE780; 53SD200, 220 NW527, 529 [citCJ]; TexCommnA 287 SW1087.

351–32 124 Okl 240, 255P700.

351–36 71CalA336, 235P86; 71CalA 705, 236P162. [a] (3) Where notice of motion stated that motion would be made on affidavit and proposed answer and affidavit set up grounds for defendant's failure to appear, court had jurisdiction to hear and pass on merits of application. CalA 280P701. [d] Waiver of objection.–71CalA705, 236P 162. [e] Failure of notice to state grounds of motion is waived by failure to object and by filing counter affidavit. 203Cal 504, 265P180.

352–50 213Ala33, 104S244; 174Ark346, 295SW388; 206Cal 436, 274P534; 161 Ga495, 131SE470; 204 Iowa532, 216NW 501; 164Minn440, 205NW438; 80Mont 464, 260P1038; Mont 290P274; 58ND 273, 225NW798; 117 Okl 273, 246P409; 40 OklACR10 [reh pending]; 132 Or 252, 284P279; 6PaDist&Co 102; 142 Wash642, 253P1088. [d] Plaintiff held relieved of burden to prove no execution issued where defendant pleaded as execution order of sale which was insufficient. TexCivA 292SW642.

352–51 Ind 159NE753; 164Minn440, 205NW438; 123 Okl 218, 253P99; Tex CivA 271SW644.

353–55 174Ark346, 295SW388.

353–56 IndA 156NE578; 51SD144, 212 NW866.

353–57½–New. Uncontradicted facts stated in verified motion to set aside default judgment should be taken as true. TexCivA 288SW1098.

353–60 [a] Preference not allowed under this rule.–14F(2d)284.

353–62 80Mont464, 260P1038. [a] (2) Court may, on motion, grant leave to file additional affidavit and consider affidavit filed pursuant to such leave. 203 Cal 504, 265P180.

354–65½–New. Where verified amended complaint was served and filed, plaintiff was held not required to file affidavits. 200Cal 374, 253P148.

354–69 71CalA155, 234P910 (supporting affidavit held to show affiant not entitled to relief sought); 234 IllA325.

354–71 203 Iowa1390, 214NW545; Tex CivA 296SW643.

354–72 234 IllA325.

355–75 See also 29PortoRico 795.

355–82 174Ark346, 295SW388; Tex CommnA 280SW554, 556 [quotCJ]. [c] Failure to object to affidavit does not imply admission of truth of its contents by adverse party. 33PortoRico 214.

355–84 98CalA638, 277P516; CalA 277 P518; 81Colo 1, 252P886; TexCommnA 280SW554, 556 [quotCJ].

356–85 TexCommnA 280SW554, 556 [quotCJ].

356–88 TexCivA 273SW951 (court will look not only to allegations in motion but to proof offered thereunder).

356–90 117 Okl 273, 246P409; Tex CivA 273SW951.

356–93 238Mich119, 213NW143.

357–95 153Miss170, 118S722, 68ALR 380; 153Miss796, 121S823.

357–96 Contra 238Mich119, 213NW 143; 129 Okl 243, 264P179.

357–97 286Pa421, 133A554; 300Pa321, 150A642. But see 37GaA450, 140SE636.

358–98½–New. Statement of facts, proved on trial and filed as part of record, is held admissible to show whether default judgment was supported by evidence. TexCivA 283SW531.

358–98½–New. In a wife's suit to set aside divorce, a newspaper item not shown to have been published with the husband's consent is inadmissible. Tex CivA 18W(2d)708.

358–99 101CalA561, 281P1101; 83Colo 370, 265P681, 682 [citCJ]; Nebr 229 NW13; 22 OhA528, 154NE55; 126 Okl 121, 258P749; 128 Okl 97, 261P209; 6 PaDist&Co 102; 6PaDist&Co 608. [a] 169Ark393, 275SW703; 205Cal,202, 270 P451; 160Ga378, 127SE750; 202 Iowa 784, 211NW404; Iowa 231NW453; 128 Kan43, 276P283; MoA 22SW(2d)178 (2dcase); 55ND206, 212NW830; 56ND 568, 218NW605; 116 Okl 258, 244P184; 131 Okl 214, 268P287; 43 OklACR50 [reh pending]; 92PaSuper394; 154SC 390, 151SE617; TexCivA 286SW598. [b] (1) 83Colo 370, 265P681; 233 IllA 77; Ind 159NE753; 204 Iowa532, 215 NW501; Iowa 232NW811; 217Ky465, 290SW349; Mass 168NE732; Mass 172 NE223; 145Miss897, 112S588; 218MoA 187, 265SW866; 80Mont464, 260P1038 (claimed lack of notice in time to defend); Nebr 226NW914; 193NC256, 136SE635; 58ND273, 225NW798; 22 OhA528, 154NE55; 126 Okl 121, 258P 749; 123 Or237, 261P689; 132 Or252, 284P279; SD 230NW765; TexCivA 287 SW692; 86PaSuper499; 91PaSuper 265; TexCivA 198W(2d)410; TexCivA 24SW(2d)805. (5) Affidavits denied by affiants who subscribed them. 51 Philippine960. (6) To show defendant's freedom from neglect. 107WVa 664, 150SE6. [e] (2) Other instances. 137Misc830, 245NYS69.

358–1 219Ala482; 122S643; TexCivA 282SW670.

359–2 169Ark393, 275SW703.

359–3 286Pa37, 132A801; 98PaSuper 270; 88PaSuper34; 6PaDist&Co 102.

360–7 MoA 26SW(2d)854(2dcase).

360–11 72CalA268, 236P930 (abuse of discretion not shown in finding that motion to vacate order settling accounts of trustee and terminating was not filed within reasonable time).

360–12 309Mo 312, 273SW1050 (suit to quiet title brought by constructive notice to unknown parties). [a] (1) 195Cal 132, 231P987. [b] (1) 126Kan 362, 267P995; 309Mo 312, 273SW1050; 54ND753, 210NW525; 123 Or237, 261P 689.

361–21 228Ky294, 14SW(2d)1058. [c] In Virginia.–153Va190, 149SE537.

362–22 See also 246Mich77, 224NW340.

362–24 86Mont83, 282P268.

362–27 38F(2d)109.

362–29 [a] Motion for new trial by attorney not employed by party and order of court overruling such motion does not bind party. 38 OklACR424.

362–33 142 Okl 265, 286P799.

362–34 See also 116 Oh361, 156NE188.

363–36 154SC140, 151SE276. [a] (7) Default judgment can be set aside if against innocent party. 21AlaA446, 109 S184.

363–40½–New. One who moves to vacate a judgment and invites an inquiry into a defense on the merits waives a mere irregularity in the procedure in the entry of the judgment. 88PaSuper 245.

363–48 Mass 168NE732 (judge could consider statements based on erroneous rulings not objected to); 24 OhA109, 156NE420; 294Pa176, 144A84.

364–49 24 OhA109, 156NE420.

364–51 58ND273, 225NW798. [a] (2) Where evidence as to service of writ is contradictory, issue should be directed to determine such fact. Sask [1925] 3DomLR95.

364–53 [a] Question whether, on hearing of motion to set aside default judgment, defendant acquitted itself of negligence held question of fact. 220Ala 305, 124S879. [b] Submitting merits on special issues does not have effect of setting aside default judgment where defendant did not request submission of issue as to excuse. TexCommnA 24 SW(2d)810; TexCivA 24SW(2d)805.

364–54 TexCivA 299SW458.

364–56 8PaDist&Co 466.

364–58 [a] (5) On motion under Code Civ. Proc §§ 663, 663a no facts can be considered except those which are embraced in findings of court. 68CalA198, 228P734. (6) Such motion is to be considered in light of pleadings in action. 68CalA198, 228P734. (7) Generally only question considered on motion to vacate default judgment is whether facts are sufficient to establish case of excusable neglect. 84CalA379, 258P105.

364–66½–New. Uncontradicted facts in verified motion should be taken as true. TexCivA 288SW1098.

364–66½–New. Where a motion to vacate a default judgment was filed during the term at which the judgment was rendered but not ruled upon, the court does not lose jurisdiction by the continuance of the motion to the succeeding term. 129 Okl 243, 264P179.

364–66¼–New. The court, even on its own motion, may reopen the case after submission for the purpose of receiving additional evidence. Ariz 284P159 (denial of motion to strike supplemental affidavit held in effect reopening case for additional evidence).

365–67 15F(2d)610; 216Ala262, 113S 85; 21AlaA446, 109S184; 174Ark346, 295SW388; 199Cal 246, 248P923; 200 Cal 374, 253P148; 77CalA120, 245P 1104; 82CalA624, 256P220; CalA 287P 558; 107Conn164, 140A114; 109Conn 45, 145A151; Conn 151A491; 36GaA 445, 136SE828; 329 Ill 82, 160NE193; 247 IllA454; Iowa 231NW440; 121Kan 793, 250P286; 123Kan217, 254P1028; 128Kan43, 276P283; 214Ky411, 283SW 405; 267Mass528, 166NE874; Mass 168NE726; Mass 168NE732; Mass 172 NE223; 250Mich105, 229NW622; 171 Minn327, 214NW57; 172Minn462, 215 NW859; 178Minn549, 228NW150(1st case); 179Minn315, 229NW133; 315 Mo 209, 286SW25; MoA 283SW57, 58 [citCJ]; MoA 3SW(2d)1051; 80Mont 464, 260P1038; Mont 285P668; 103 NJL194, 135A354; NJSup 137A712; NJCh 150A436; 31NM639, 249P1013; 131Misc571, 226NYS613; 49ND577, 192 NW765; 53ND312, 205NW623; 54ND 864, 211NW818; 55ND206, 212NW830; 113 Okl 224, 241P173; 120 Okl 190, 250 P1025; 127 Okl 117, 260P32; 133 Okl 233, 271P248; 136 Okl 246, 277P583(2d case); 286Pa37, 132A801; 287Pa24, 134A418; Pa 151A683; 86PaSuper405; 11PaDist&Co 205; 51Philippine960; RI 131A553; RI 136A244; 143SC127, 141 SE278; 50SD341, 210NW155; TexCivA 272SW507; TexCivA 283SW230; Tex CivA 286SW598; TexCivA 296SW643; 152Wash624, 279P106; Wash 289P527; 191Wis628, 211NW775; 194Wis29, 215NW433; 199Wis602, 227NW270. See also 222MoA1171, 12SW(2d)764. [a] (3) Showings of inadvertence and excusable neglect. 54SD149, 222NW 688. [j] Where relief is sought on ground of surprise, inadvertence, or excusable neglect, each case must be judged by, and rest upon, its particular facts. 82CalA624, 256P220. [k] Denial of application held not abuse of discretion.–58ND443, 226NW491.

369–68 171Minn327, 214NW57; 222 MoA1171, 12SW(2d)764.

369–70 199Cal 246, 248P923; 214Ky 411, 283SW405; 127 Okl 117, 260P32. [c] Statute law may not be ignored or held meaningless. 89CalA295, 264P552.

370–71 90PaSuper452; 97PaSuper588.

370–72 173Minn606, 218NW127; 33 PortoRico 406, 408 [quotCyc].

370–73 335 Ill 181, 166NE503; 176 Minn59, 222NW520 (jurisdictional defect); 49ND64, 189NW681; 127 Okl 117, 260P32, 34 [quotCJ].

371–74 208 Iowa1391, 227NW417(2d case); 222MoA1171, 12SW(2d)764; 155 Wash176, 283P681.

371–77 CalA 291P262.

371–78 Mass 172NE223. (b) Law condemns successive hearings of same point, once decided, after proceedings under settled practice not vitiated by any error. Mass 167NE656.

372–79 72CalA244, 236P962 (refusal to vacate held not abuse of discretion where application was part of policy of intentional delay); 143SC127, 141SE278.

372–81 172Minn462, 215NW859; 145 Miss897, 112S588. [a] Delay of trial.–145Miss897, 112S588.

372–82 38F(2d)109.

372–84 90CalA753, 266P574; Mont 285 P668.

373–85 143SC127, 141SE278.

373–87½–New. , or where motion was

not made within time limited by statute. Mont 285P668.

373-88 But see 41GaA602, 154SE157.

373-91½-New. A statute providing sixty days' limit for decision by court after submission of question is directory only, and does not deprive court of authority set aside judgment thereafter. 232Mich 630, 206NW359.

373-94 122 Okl 42, 249P358.

373-95 122 Okl 42, 249P358.

374-97 52ND934, 204NW831 (motion to vacate on sole ground that judgment is void denied where judgment not void). 122 Okl 42, 249P358. [b] **Finding that petition did not state facts** sufficient to warrant vacation justifies dismissal. 36 Wyo 48, 252P1019.

374-2 168Ark180, 269SW565; NJCir 134A885; 125 Okl 101, 256P722, 724 [citCJ]; 40 OklACR10 [reh pending]; Sask [1925] 3DomLR501.

375-4 [a] **In New York.**-131Misc462, 227NYS194.

375-5 See also TexCivA 278SW229.

375-6 TexCommnA 280SW554; TexCivA 296SW643; TexCivA 25SW(2d) 1115; 148Wash24, 267P775; Sask [1925] 3DomLR501.

375-7 50ND388, 196NW108, 109 [cit Cyc] (meritorious defense to substantial part of cause of action sufficient); TexCivA 25SW(2d)1115; 148Wash24, 267P775; Sask [1925] 3DomLR501.

375-8 Sask [1925] 3DomLR501.

376-12 218AppDiv743, 218NYS122.

376-14 [a] (2) Court may strike from its record what purports to be judgment but is not because entered without authority. 190NC536, 130SE315.

376-16 35GaA203, 132SE916.

376-17 [a] (2) Court is authorized to set aside judgment and enter new judgment in accordance with correct conclusions. 99CalA17, 277P1053. (3) Where court acquires jurisdiction under this section, it may set aside judgment, amend conclusions of law and enter judgment irrespective of prayer of movant. CalA 284P496.

376-18 [b] **In Pennsylvania.**-92PaSuper565.

376-18½-New. The court cannot change the findings and set aside the judgment as not supported by the findings. 88 CalA290, 263P382.

376-18½-New. A motion "to open up, vacate, and set aside" judgment will be treated as one merely to vacate and set aside where parties so treat it. 253 IllA 128.

376-20 46 Ida671, 270P618; CalA 288 P442. See also 168Ark180, 269SW565.

377-22 169Ark393, 275SW703; 49SD 381, 207NW217. [b] (2) Where husband's motion to vacate default judgment against him was not granted, word "vacated" in order vacating judgment is limited by words "so far as relates to her," and judgment is left in full force against husband. 49SD381, 207NW217. (3) Judgment against homestead of husband and wife in certain amount and against husband in larger amount, part of which is joint judgment with wife, cannot be considered as entirety so that setting it aside as to wife would vacate it as to husband. 49SD381, 207NW217. [e] **On application of one of several defendants to vacate default judgment entered against him,** court cannot vacate judgment as to other defendants not applying. 77Colo 578, 238P40.

377-28 220Ala305, 124S879; 156Md16, 142A488; 191NC373, 131SE740. [h] (5) Extension of time in which to file answer. 191NC373, 131SE740.

379-31 94CalA356, 271P349.

379-33 20SaskL11, [1925] 3DomLR 1044.

379-37 131Misc597, 227NYS568; 20 SaskL11, [1925] 3DomLR1044.

379-38½-New. In Saskatchewan where right to have judgment set aside ex debito justitiæ is established, court should not impose terms without granting costs of the application. Sask [1929] 3DomLR625.

380-47 But see 35 OhA73, 171NE868.

381-49 191Wis633, 211NW759.

381-50 See also 247 IllA203.

381-52 168Ga321, 147SE527.

381-61 See also 160Ga583, 128SE744.

382-66½-New. Application for rehearing under statute must be disposed of without regard to the ability of complaining party to pay costs. 220Ala305, 124S879.

382-69 [a] (3) Words "any recovery" in bond do not include judgment against any defendants where surety undertakes to answer only for defendant furnishing bond. 131Misc679, 227NYS189.

382-73 181Ark739, 28SW(2d)70; 234 IllA214; 169Minn240, 211NW7. [a] (2) Judgment continued to preserve lien. 169Minn234, 211NW5.

383-78 234 IllA214.

384-90 [b] **Judge's notation on docket** that judgment is set aside does not have effect of setting aside judgment. TexCivA 3SW(2d)544.

384-94 [b] **In Kentucky.**-IndA 169NE 693(2dcase).

385-97½-New. The proper granting of motion to set aside and vacate a judgment based on erroneous conclusions of law, not supported by findings of fact, requires the entry of another and different judgment under statutes in some jurisdictions, 196Cal 439, 238P357.

385-97½-New. and failure of court to enter such judgment renders its action on such motion both erroneous and void. 196Cal 439, 238P357.

385-97¼-New. Entry by court in minutes that "as entered by the court on the 15th day of October, 1924, is the judgment in this action" is not an entry of new judgment where no judgment had been entered in fact on such date. 196 Cal 439, 238P357.

385-97½-New. Until the motion is properly disposed of, the action of the court thereon, as contemplated by the statute, has not taken place. 196Cal 439, 238P357.

385-97½-New. Until the proper judgment is entered, the motion is still pending and undetermined. 196Cal 439, 238 P357.

385-97½-New. Order is not final judgment when conditional. 214Ala95, 106 S594.

385-97½-New. Truth of allegations of valid defense will not be considered on motion to vacate default. 23 OhA327, 154NE350.

385-98 199Cal 190, 248P665; 247 IllA 541; 225Ky823, 10SW(2d)277; 132 Okl 159, 269P1091, 1094 [quotCJ]; TexCivA 21SW(2d)707.

385-99 12LaA412, 124S578.

385-1 53ND238, 205NW674; 125 Or 258, 266P238; TexCommnA 29SW(2d) 314.

385-2 294Pa197, 144A88.

385-6 [a] (5) Where purchaser at execution sale, under judgment by default on service by publication, pledges property before judgment is vacated and default is opened and case dismissed at same term, pledgee has no defense against demand for surrender of property and is liable for its value or return. 123Kan235, 255P30.

387-20½-New. Where an order vacating a judgment quieting title was void, the court properly adjudged the title in substituted plaintiffs. 207Cal 221, 277P 490.

387-20⅓-New. Where a judgment is opened, the scope of issue, for the jury is within the discretion of the court. 294Pa197, 144A88.

387-20¼-New. Where a judgment was opened and defendant filed an affidavit of defense without further pleadings being required by the court, plaintiff was entitled to rebut defendant's affidavit of defense without filing a replication. 294 Pa197, 144A88.

387-21 69CalA633, 232P165 (refusal to vacate for mistake, inadvertence, surprise, or excusable neglect is finding of fact that no mistake existed).

387-22½-New. Plaintiff and defendant, confessing nullity of default judgment by moving to set it aside, and recognizing it as nullity by submitting defendant's prayer for oyer filed with petition immediately after annulment order, are estopped to deny that judgment was a nullity. 168La92, 121S585.

387-27 174Minn344, 219NW184.

388-28 168Ga321, 147SE527.

388-29 226AppDiv676, 233NYS227. [c] 174Minn344, 219NW184.

388-33 128Kan43, 276P283.

388-34 228AppDiv413, 240NYS477.

389-35 133Misc784, 233NYS497. [a] **Second motion papers to vacate default on newly discovered evidence** not referring to papers or proceedings used upon previous motion are defective. 228App Div413, 240NYS477.

389-37½-New. Leave to renew application is improperly allowed in order, where papers showed defendant suffered inexcusable default and twice refrained from showing meritorious defense and naming witnesses. 127Misc42, 215NYS 175.

389-37⅓-New. The renewal of an oral motion at a subsequent term without filing a written motion comes too late. 39GaA798, 148SE541(2dcase).

389-40½-New. Where partial payment on a judgment is made pursuant to an agreement in consideration of withdrawal of execution and opening default, and the action is subsequently dismissed defendant is not entitled to restitution in the absence of a provision therefor in the agreement. Sask [1925] 3DomLR 418.

389-40⅓-New. In Porto Rico, in a proceeding for nullity, the court has broad powers to restore the status quo. 33 PortoRico 319.

389-41 39GaA242, 146SE640; 227App Div757, 236NYS484.

389-42 223Ky405, 3SW(2d)779.

389-44 202Cal 478, 261P1001. [b] **An erroneous order denying motion to set aside default** may be made at any time during term and judgment vacated under some statutes. 207 Iowa1382, 224 NW596.

389-45 214Ala95, 106S594.

389-46 **Erratum.**-[c] "10 Porto Rico 270" should read "10 Porto Rico Fed. 270."

389-47 29 OhA476, 163NE719.

390-48 [a] **Appeal from entry of judgment by clerk** lies to judge of court. 189NC805, 128SE329.

390-51 41 Ida718, 241P1020 [citCJ].

390-52½-New. A petition to reinstate a petition to vacate a default judgment after dismissal of such petition for failure to prosecute is in effect a motion for a new trial on the petition to vacate and is governed by statutory provisions requiring motion to be made at the term at which the order was made. 117 Okl 36, 247P372.

390-53 [a] **In Porto Rico.**-29Porto Rico 795.

390-56 90Fla844, 107S535; 92Fla740, 110S259, 262 [citCJ]. See also 94Fla 32, 113S630, 635 [citCJ]. [b] **Exclusiveness of remedy.**-338 Ill 158, 170NE 320.

391-60 94Fla32, 113S630, 635 [citCJ].

391-63 224 IllA367 (holding that essentials of proceeding remain same while writ has been abolished).

391-64 323 Ill 90, 153NE732; 224 IllA 367. But see 253 IllA274. [a] **Substituted motion** (1) is new suit. 224 IllA 367. (2) Issues and judgment are separate and distinct from those in original suit. 224 IllA367.

392-67 MoA 25SW(2d)490.

392-68 [c] (1) 252 IllA443.

392-70 339 Ill 146, 171NE122.

392-78 92Fla740, 110S259, 262 [citCJ].

392-79½-New. A motion in the nature of the writ lies to vacate a default judgment against a charitable corporation sued in tort. 224 IllA367.

393-88 90Fla844, 107S535. [a] **Writ may be issued in civil cases.** TexCr 27 SW(2d)805.

393-90 90Fla844, 107S535.

393-1 195Cal 249, 232P457, 36ALR 1435; 338 Ill 158, 170NE320; MoA 18 SW(2d)147.

394-2 195Cal 249, 232P457, 36ALR 1435; 338 Ill 158, 170NE320; 337 Ill 141, 168NE647. See also 339 Ill 146, 171NE122. [a] MoA 18SW(2d)147.

394-3 195Cal 249, 232P457, 36ALR 1435; MoA 26SW(2d)804; MoA 31SW (2d)269. [c] 252 IllA560.

394-4 195Cal 249, 232P457, 36ALR 1435; 338 Ill 158, 170NE320; 252 IllA 476; MoA 31SW(2d)269.

394-5 250 IllA508.
394-6 338 Ill 158, 170NE320; MoA 6 SW(2d)998; MoA 31SW(2d)269. [b] **In Illinois.**-252 IllA560.
395-9 338 Ill 158, 170NE320.
395-13½-New. A motion in the nature of a writ of coram nobis is the proper remedy to set aside an adjudication of insanity for the court's erroneous assumption of an insane person's residence. MoA 18SW(2d)147.
395-15 22AlaA44, 111S896; 195Cal 249, 232P457, 36ALR1435; 338 Ill 158, 170NE320.
395-17 195Cal 249, 232P457, 36ALR 1435; 338 Ill 158, 170NE320.
395-19 195Cal 249, 232P457, 36ALR 1435.
396-20 195Cal 249, 232P457, 36ALR 1435.
396-23 MoA 14SW(2d)692.
405-24½-New. Allegations of meritorious defenses and other essentials are jurisdictional. TexCivA 299SW699.
397-40 MoA 31SW(2d)269. But see 195Cal 249, 232P457, 36ALR1435.
397-46 MoA 18SW(2d)147.
397-47 MoA 31SW(2d)269.
398-57 246 IllA79. But see 252 IllA 476.
398-60 252 IllA476.
398-65 90Fla844, 107S535. [a] (2) Default judgment cannot be vacated by writ after judgment term on ground that return of sheriff has been impeached. 224 IllA367.
398-70 MoA 18SW(2d)147.
399-80 92Fla740, 110S259.
400-91 90Fla844, 107S535; 92Fla740, 110S259, 262 [citCJ].
401-28 224 IllA367 (as to status of defendant corporation).
401-37½-New. A movant for a writ to set aside an adjudication for want of jurisdiction not only that one adjudicated in same was nonresident but that the court did not try the question of residence. MoA 18SW(2d)147.
401-40 250 IllA508 [citCJ].
401-45 See also 94Fla32, 113S630, 635 [citCJ].
401-49½-New. The writ must be brought before the judge who rendered the original judgment. 252 IllA476.
402-67 TexCivA 30SW(2d)690 (rules as to diligence inapplicable).
402-68 TexCivA 30SW(2d)690 (rules as to diligence inapplicable).
402-72½-New. If right to have judgment nunc pro tunc, dismissing contest of compensation award, is lost by laches or dormancy of judgment, that could be made the basis of assignment or motion for a new trial in an appeal or writ of error. TexCivA 22SW(2d)151.
402-78 [d] **Petition for review of default judgment properly denied where return showed statutory service on defendant.** 309Mo 415, 274SW712.
403-84½-New. Objections urged against the validity of a judgment which would render judgment voidable should have been raised in a motion for a new trial, or in an appeal from judgment, and cannot be raised in a bill of review or direct action. TexCivA 11 SW(2d)826.
403-84½-New. Abandonment of case after appeal from order transferring case may be ground for setting judgment aside. TexCivA 32SW(2d)384.
404-9 TexCivA 21SW(2d)707.
404-12 TexCivA 14SW(2d)931 (without coming within provisions complainant not entitled to statutory remedy).
405-13 TexCivA 8SW(2d)241.
405-15 TexCivA 21SW(2d)707 (only original parties to suit are necessary to give notice).
405-17 [b] **Motion for new trial so styled,** is held good bill of review where it contained essential elements. Tex CivA 278SW226. [c] **Pleading must set up valid defense to be sufficient as bill of review.**-TexCivA 278SW226.
405-18 TexCivA 21SW(2d)309; Tex CivA 30SW(2d)690.
405-21 TexCivA 21SW(2d)309.
405-24½-New. Bill in suit in nature of bill of review held as against general demurrer to state cause of action. Tex CivA 25SW(2d)240.
406-46 39 Okl 328 (record held to require affirmance of judgment).
406-49½-New. The evidence did not authorize the disturbance of judgment of a trial court in its discretion denying an injunction. TexCivA 14SW(2d) 931.
407-69 287Pa454, 135A122.
407-76 101CalA599, 281P1058 (order made after court denied motion to vacate is invalid); 242 IllA66; 242 IllA 532; 154Md366, 141A121; 24 ObA366, 156NE618; 85PaSuper78; 87PaSuper 571. [a] **In West Virginia.**-100WVa 408, 130SE442.
408-78 246 IllA222; 286Pa299, 133A 504; 89PaSuper471; 85PaSuper78.
408-82 287Pa454, 135A122; 87PaSuper575.
408-83 287Pa454, 135A122.
408-84 287Pa454, 135A122; 87PaSuper575.
408-84½-New. Motion to vacate judgment is not proper practice where defendant pays judgment, but motion for entry of satisfaction of record should be made. 254 IllA36.
408-86 [a] 252 IllA536; 256 IllA445.
408-87 [a] **Allegations of mere conclusions** unsupported by facts are insufficient. 252 IllA536.
409-93 95PaSuper47. [a] (2) Under Code § 81, court did not lose jurisdiction after one year to set aside judgment procured by fraud. 84Colo 519, 271P625.
409-95 86Colo 177, 279P43; 294Pa226, 143A908. [a] (10) Other instances. Colo 292P599. [b] 81Colo 1, 252P886; 242 IllA66.
409-97 154Md1, 139A539. [b] **Meaning of "next term."**-242 IllA532.
409-98 286Pa175, 133A150.
409-1 285Pa286, 131A859.
410-15 296Pa434, 146A111(1stcase). See also 245 IllA307.
410-15½-New. Judgment on judgment note will not be stricken off on ground praecipe was signed by stranger to the record. 95PaSuper551.
410-16 12PaDist&Co 403.
410-19 242 IllA66.
410-20½-New. that evidence sufficiently raised issue as to validity of judgment note because executed by married woman as surety for husband; 285Pa 286, 131A859.
410-23½-New. Judgment entered by confession for rent accruing after expiration of term covered by lease is held not subject to be stricken where lease was by its own terms continued by lessee's failure to give notice of termination. 289Pa429, 137A605.
410-23½-New. Court cannot vacate judgment on note upon proof that payments were after judgment entered. 254 IllA36.
411-26½-New. Judgment by confession is properly vacated, if the proceeding was not begun within the period prescribed by statute after accrual of cause of action. 164Minn81, 204NW923.
411-29 87PaSuper336.
411-36 84Colo 519, 271P625; NJSup 143A511.
412-49 94PaSuper573.
412-51 256 IllA445; 12PaDist&Co 315.
412-52½-New. Confessed judgment against an infant should be set aside, if the court did not consider whether it was for the best interests of infant. 234 Mich547, 208NW677.
412-55 81Colo 1, 252P886; Colo 292P 599; 242 IllA418; 245 IllA276; 154Md 1, 139A539; 158Md587, 149A270; 287 Pa454, 135A122; 296Pa16, 145A584; 85 PaSuper78 (equitable defense shown); 86PaSuper130; 94PaSuper575; 96Pa Super213. [b] **Mistake of law.**-85Pa Super78.
412-56 245 IllA276; 287Pa454, 135A 122; 96PaSuper248; 12PaDist&Co 425.
413-60 300Pa321, 150A642; [c] **That note was under seal** does not prevent striking out judgment to let in defense of consideration. 158Md587, 149A270.
413-61 85PaSuper78 (illegal conveyance by married woman).
413-64 256 IllA29. But see 256 IllA 445.
414-68½-New. An unliquidated claim is no ground for opening the judgment. 90PaSuper452.
414-72 252 IllA536; 154Md366, 141A 121; 294Pa176, 144A84.
414-74½-New. One not designated as lessor has the burden to establish his interest to recover under the provision authorizing a confession against the lessee. 297Pa131, 146A533.
414-76½-New. Consideration of evidence not technically admissible is not error. 286Pa175, 133A150.
414-78 154Md366, 141A121, 123 [cit CJ]; 287Pa24, 134A418; 294Pa226, 143 A908; 96PaSuper330. [a] (1) 252 IllA 536; 291Pa188, 144A403; 299Pa244, 149A315(2dcase); 89PaSuper34; 93Pa Super575; 94PaSuper345; 94PaSuper 263; 96PaSuper330. [b] **Evidence held sufficient.**-154Md366, 141A121.
415-81 97PaSuper37 (unless evidence is sufficient to sustain verdict in his favor).
415-86 285Pa286, 131A859.
415-88 See also 12PaDist&Co 311.
415-88½-New. Where there was no proof that defendant, petitioning to open the judgment entered on a judgment note, on the ground of forgery, actually signed the note, the writing is given no weight of itself. 294Pa226, 143A908.
415-90 246 IllA222; 249 IllA544. [a] (1) 242 IllA480.
415-91 [a] **Facts must be taken as true,** but not conclusions. Ill 172NE35.
415-93 Ill 172NE35; 248 IllA188.
415-93½-New. Averments of sworn statement accompanying amicable action and confession of judgment must be taken as true. 289Pa429, 137A605.
416-94 [b] **Counter-affidavits** denying defensive matters averred by defendant should not be considered. 81Colo 4, 252 P887.
416-98 294Pa226, 143A908.
416-1 294Pa176, 144A84.
416-4 [a] **Counter-affidavits** should not be considered as denials of defensive matter. Colo 292P599.
416-6½-New. On application to strike off judgment only question that can be considered is regularity of judgment entered. 287Pa454, 135A122.
416-7 298Pa17, 147A833; 89PaSuper 471; 97PaSuper37.
417-10 242 IllA63; 242 IllA66.
417-19½-New. The court could control an execution on a confessed judgment without opening it, where the sole question related to whether the interest payment had been postponed. 297Pa74, 146 A569.
417-28 296Pa467, 146A102.
417-29 But see 252 IllA329.
418-37½-New. An order setting aside an order denying a motion to vacate judgments by confession without notice to movant or showing that the first order is improvidently made or fraudulently obtained is void. 101CalA599, 281P 1058.
418-37½-New. After judgment by confession has been vacated and defendant given permission to defend, it is irregular to enter a second judgment under the power to confess. 252 IllA165.
418-37¼-New. The status of the original confessed judgment as a judgment is not affected by order to open. 297Pa 496, 147A519(1stcase).
418-37½-New. Where judgment by confession is vacated and defendant is given permission to defend and plaintiff files an amended statement of claim, defendant should be ruled to plead or answer or his petition to vacate should be ordered to stand as his answer. 252 IllA165.
418-40 243 IllA139.
418-46 218AppDiv773, 218NYS557; 198 NC604, 152SE797(1stcase). See also 52 ND589, 204NW333.
418-53½-New. In some jurisdictions a consent decree setting aside certain deeds made by a testator, entered on consent of all the legatees under the will for the sole purpose of facilitating the carrying out of the provisions of the will, is properly modified by striking therefrom a provision giving to some of the legatees a right in the estate to which they were not entitled under subsequent events provided for by the will. 203 Iowa645, 212NW564.
418-53½-New. Costs on a petition to such decree should not be taxed against executors who were served with notice of the application but made default. 203 Iowa645, 212NW564.

418-53¼-New. but should be taxed against those opposing the application. 203 **Iowa**645, 212**NW**564.

418-55 198**NC**604, 152**SE**797(1stcase).

419-60 107**WVa**192, 147**SE**877, 66**ALR** 102.

419-62 218**AppDiv**773, 218**NYS**557.

419-70 334 **Ill** 137, 165**NE**598, 65**ALR** 344; **TexCivA** 26**SW(2d)**382.

419-75 [a] **Refusal to set aside held not erroneous** when it did not appear that there was no consent. 214**Ky**400, 283**SW**410.

419-76 192**NC**274, 134**SE**852.

419-79 206 **Iowa**179, 215**NW**606; 192 **NC**274, 134**SE**852.

420-81 107**WVa**192, 147**SE**877, 66**ALR** 102.

420-90 153**SC**472, 150**SE**897.

421-9 225**Ky**246, 8**SW(2d)**401; **MoA** 283**SW**57; 130**Misc**399, 223**NYS**637; 228 **AppDiv**413, 240**NYS**477; 123 **Or**461, 260 **P**1014; 90**PaSuper**75; **TexCivA** 283**SW** 193. [d] **In Michigan.**–238**Mich**119, 213 **NW**143. [e] **Substantial compliance only** held required with statute regulating setting aside default judgments. 238**Mich**119, 213**NW**143.

421-11 [a] (1) 35**GaA**5, 131**SE**524; 40 **GaA**568, 150**SE**569(2dcase. (2) Statutes providing for opening of default have no application to case in which no judgment of default has been entered since plea to merits filed before judgment is not too late. 40**GaA**568, 150**SE**569(2d case). (3) Where verdict and judgment are taken against defendant as though case were in default, rules governing opening of default are without application. 40**GaA**568, 150**SE**569(2dcase). [f] **In California.**–86**CalA**37, 260**P**573.

421-12 20**AlaA**531, 104**S**895; 179**Ark** 589, 17**SW(2d)**323; 88 **IndA**503, 164**NE** 639; **MoA** 28**SW(2d)**418; 221**AppDiv** 717, 225**NYS**423; 149**Wash**443, 271**P** 87.

421-15 226**AppDiv**746, 233**NYS**586; 69 **Utah**527, 256**P**792.

421-16 220**Ky**574, 295**SW**869; 69**Utah** 527, 256**P**792.

422-19 **MoA** 16**SW(2d)**1007. See also 128**Me**528, 149**A**149.

422-21½-New. A default judgment against a foreign corporation can be vacated only if defendant did not consent to the court's jurisdiction or was not doing business in the state. 226**Ky** 159, 10**SW(2d)**633.

422-23 214**AppDiv**83, 211**NYS**50. See also 13**LaA**19, 127**S**754.

422-24 **OhA** 173**NE**255.

422-25 **Ala** 129**S**37(2dcase); 73**CalA** 459, 238**P**783; 89**CalA**659, 265**P**339; 95 **CalA**144, 272**P**610; **CalA** 280**P**701; 40 **GaA**835, 151**SE**682; 252 **IllA**262; **Iowa** 229**NW**833; **Iowa** 232**NW**118; 214**Ky** 70, 282**SW**785; **MoA** 282**SW**447; 75 **Mont**332, 243**P**576; **NJSup** 134**A**110; 136 **Misc**293, 240**NYS**729; 194**NC**811, 140 **SE**302; 50**ND**388, 196**NW**108; 132 **Or** 252, 284**P**279; 97**PaSuper**463; **RI** 131 **A**553; **RI** 133**A**660; **TexCivA** 283**SW** 193; **TexCivA** 283**SW**230; **TexCivA** 288 **SW**1098; **TexCivA** 292**SW**920; **TexCivA** 293**SW**677; **TexCivA** 299**SW**699; **Tex CivA** 17**SW(2d)**113(1stcase); **TexCivA** 24**SW(2d)**805; 142**Wash**642, 253**P**1088; **Wash** 288**P**277; 100**WVa**117, 130**SE**94 (decision to set aside default depending on interpretation of rule of court held to be based on good cause); 103**WVa** 701, 138**SE**463. See also 160**Ga**446, 128 **SE**66. But see **TexCivA** 30**SW(2d)**728. [b] 88**CalA**111, 263**P**260; **NJL** 134**A**110; 214**AppDiv**83, 211**NYS**50; 142**Wash**642, 253**P**1088. [c] **Default held not deliberately suffered** where defendant demands jury trial but is not notified by clerk before cause appeared on calendar and default is taken on theory that case was nonjury one. 125**Misc**444, 211**NYS** 591. [d] **Knowledge of proceedings.**–168 **Ark**747, 271**SW**704. [e] **Essential element of "good cause"** required by statute is that movant be free from neglect. 107**WVa**664, 150**SE**6.

422-25½-New. The stronger the defense shown the less will be required on the question of excusability of neglect. 142**Wash**642, 253**P**1088.

423-28 207**Cal** 221, 277**P**490; 35**GaA** 428, 133**SE**306; 41**GaA**818, 155**SE**92. [a] See also 54**SD**149, 222**NW**688.

423-29 41**GaA**737, 154**SE**655; **Iowa** 232 **NW**118; 161**Minn**246, 201**NW**323.

423-31 **TexCivA** 19**SW(2d)**410.

423-32 146**Miss**799, 112**S**168; 33**Porto Rico** 581; 128**Misc**501, 219**NYS**83; 34 **Wyo** 509, 245**P**295. [a] (2) Default judgment is properly set aside on ground that plaintiff after entry of default amended his pleadings by increasing amount of claim and took judgment on amended pleadings. 201 **Iowa**791, 208**NW**323. [c] **Where case is peremptorily called on first day of term,** it is error to enter default judgment in plaintiff's absence. 146**Miss**799, 112**S**168.

423-34 [a] (1) **Utah** 281**P**200. (3) 161 **Minn**246, 201**NW**323. (4) But see 83 **Colo** 207, 263**P**715. (5) Attorney for defendant misled as to time for appearance by fact that return to service of summons had not been filed. 75**Mont** 332, 243**P**576. (6) Court abused discretion in refusing to set aside default where defendant nonresident had no actual notice of setting for trial at unusual time but was relying on statute fixing jury term and previous custom, and there was in the file of the case certificate of reversal of former appeal and opinion of supreme court declaring defendant entitled to instructed verdict. 20**AlaA**531, 104**S**895. [a] (7) Other grounds held sufficient. 203**Cal** 199, 263 **P**234; 94**CalA**356, 271**P**349; 78**Mont** 329, 253**P**889; **NJSup** 146**A**196(1st case); 128**Misc**501, 219**NYS**83; 54**ND** 108, 208**NW**852; 56**ND**563, 218**NW**606; 35 **OhA**199, 172**NE**411; 122 **Okl** 67, 251 **P**33; **RI** 131**A**553; **TexCivA** 288**SW** 1098; **TexCivA** 28**SW(2d)**341 (absence of attorney, who became lost in returning to courthouse); 142**Wash**642, 253**P** 1088. (8) Where conflict in assignment of counsel placed attorney for defendants in position where he could not avoid default. 225**AppDiv**763, 232**NYS** 441. (9) Counterclaim not served on plaintiff who did not demur or reply to counterclaim. 197**NC**249, 148**SE**250. (10) Defendants not served and not appearing. 168**Ga**658, 148**SE**592. (11) Any good reason for defendants' failure to present defense. 335 **Ill** 181, 166**NE** 503. (12) Judgment entered without notice. **TexCivA** 25**SW(2d)**1115. [f] (2) Default judgment cannot be set aside because not supported by evidence or sufficient legal evidence. **TexCivA** 1**SW(2d)**466. [g] **"Adventitious circumstance"** as ground for setting aside default is one which is unusual, unexpected, beyond movant's control, and free from his neglect. 107**WVa**602, 149 **SE**838 (failure of foreign corporation to receive summons by registered mail).

424-35½-New. One must not only show he was not summoned, but that he did not know of the proceeding in time to make a defense. 178**Ark**1019, 14**SW(2d)** 245(2dcase).

424-35⅓-New. In British Columbia a judgment creditor cannot have a default judgment set aside in order to have a joint debtor added as defendant. **BC** [1929] 4**DomLR**978.

424-38 191**NC**166, 131**SE**648, 44**ALR** 610; 116 **Okl** 258, 244**P**184. [c] See also 207**Cal** 221, 277**P**490. [k] (2) Notice is not presumed and adversary has burden of proving it where constructive service is not calculated to give actual notice. **Utah** 290**P**950. (3) Determination of right to open default. **Utah** 290 **P**950. [o] **In Oregon.**–5**F(2d)**885. [p] **In Minnesota.**–166**Minn**430, 208**NW**136.

425-39 35**Ariz**532, 281**P**215.

425-41 **Utah** 290**P**950.

425-44 **Ark** 32**SW(2d)**435; 126**Kan**362, 267**P**995.

426-46 154**Wash**137, 281**P**340.

426-47 191**NC**599, 132**SE**605; 132 **Okl** 65, 269**P**248; **Utah** 290**P**950. [b] **That defendant challenged validity of service and jurisdiction of court to render any judgment** will not justify denial of application to have judgment opened. 132 **Okl** 65, 269**P**248.

426-48 166**Minn**430, 208**NW**136.

426-49 [b] **Uncorroborated parol testimony** that summons was not served is not sufficient to warrant setting aside default judgment. 139 **Okl** 141, 281**P** 558.

427-52 35**Ariz**532, 281**P**215; 166**Minn** 430, 208**NW**136. [a] **TexCivA** 280**SW** 276; **TexCivA** 4**SW(2d)**988.

427-55 116 **Okl** 258, 244**P**184.

427-57 **Ont** [1926] 4**DomLR**969.

427-63 116 **Okl** 258, 244**P**184.

427-64 **Mont** 290**P**274; **NJ** 137**A**717; 193**NC**802, 138**SE**167; 197**NC**671, 150**SE** 200; 23 **OhA**327, 154**NE**350; 123 **Or**651, 262**P**263; 49**Philippine**330, 332 [cit Cyc]; **TexCivA** 24**SW(2d)**805. [a] **Refusal to open judgment by default where there is valid defense is abuse of discretion.**–23 **OhA**327, 154**NE**350.

427-65 See also 98**CalA**645, 278**P**257 (1stcase).

428-66 71**CalA**336, 235**P**86; **Iowa** 232 **NW**118; 298**Pa**193, 148**A**77.

428-69 [a] **Judgment against sureties on official bond** is held properly vacated on showing that defalcation was before bond was given. 169**Minn**234, 211**NW**5.

428-69½-New. Whether or not defendant had a good defense is the most important consideration on a motion to open a default judgment. 142**Wash**642, 253**P**1088.

428-70 **CalA** 280**P**701.

428-71½-New. **Showing meritorious cause of action.**–Plaintiff moving to open default in serving complaint must show existence of meritorious cause of action. 216**AppDiv**733, 214**NYS**251.

428-75 [e] **In California.**–86**CalA**700, 261**P**492. [f] **Litigants may rely on** court's conducting proceedings according to court rules. 35 **OhA**199, 172**NE** 411.

429-76 **Ariz** 284**P**159.

429-79 5**F(2d)**582; 20**AlaA**531, 104**S** 895; 199**Cal** 246, 248**P**923; 200**Cal** 374, 253**P**148; 71**CalA**336, 235**P**86; 76**CalA** 223, 244**P**162; 77**CalA**120, 245**P**1104; 86**CalA**37, 260**P**573; 86**CalA**700, 261**P** 492; 87**CalA**121, 261**P**760; 96**CalA**422, 274**P**579.

429-79 101**CalA**328, 281**P**656 (refusal to set aside default judgment held not abuse of discretion); 101**CalA**561, 281 **P**1101; 77**Colo** 578, 238**P**40; 83**Colo** 370, 265**P**681; 84**Colo** 498, 271**P**630; 86 **Colo** 441, 282**P**874; 87**Colo** 573, 290**P** 274; 35**GaA**5, 131**SE**524; 201 **Iowa**791, 208**NW**323; **Iowa** 229**NW**694; **Iowa** 229**NW**833; **Iowa** 232**NW**811 (refusal to set aside judgment held not abuse of discretion); 122**Kan**793, 253**P**214; 214**Ky**70, 282**SW**785; 220**Ky**574, 295 **SW**869; 169**La**421, 125**S**435(3dcase) (granting new trial); 128**Me**528, 149**A** 149; 246**Mich**487, 224**NW**610; 175**Minn** 112, 220**NW**435; 176**Minn**59, 222**NW** 520; 177**Minn**619, 225**NW**283(1stcase); **Minn** 231**NW**241(2dcase); **MoA** 297**SW** 721; **MoA** 22**SW(2d)**178(2dcase); **MoA** 26**SW(2d)**854(2dcase); 75**Mont**332, 243 **P**576 (facts held to show abuse); 80 **Mont**266, 260**P**124; 85**Mont**604, 281**P** 540 (refusal not abuse of discretion); **NJSup** 147**A**721 (refusal to set aside judgment held not abuse of discretion); **NJ** 151**A**98 (discretion not abused); 49 **ND**993, 194**NW**689; 52**ND**74, 201 **NW**991; 53**ND**312, 205**NW**623; 54**ND** 108, 208**NW**852; 54**ND**864, 211**NW**818; 56**ND**297, 217**NW**172; 56**ND**568, 218 **NW**605; 58**ND**273, 225**NW**798; 58**ND** 664, 227**NW**188; 35 **OhA**32, 171**NE**415; 35 **OhA**199, 172**NE**411; 128 **Okl** 139, 261 **P**931; 135 **Okl** 164, 274**P**659; 136 **Okl** 202, 277**P**239; 143 **Okl** 286, 288**P**986; 123 **Or**651, 262**P**263; 130 **Or**177, 279**P** 550; 97**PaSuper**463; **RI** 131**A**553; 48 **RI** 155, 136**A**306; 51**Philippine**930; 50 **SD**341, 210**NW**155; 50**SD**512, 210**NW** 735; **SD** 230**NW**765; **TexCivA** 280**SW** 276; **TexCivA** 283**SW**230; **TexCivA** 297 **SW**235; 66**Utah**22, 239**P**475; 69**Utah** 527, 256**P**792; 150**Wash**605, 274**P**177; 154**Wash**137, 281**P**340; 155**Wash**176, 283**P**681; 34**Wyo**509, 245**P**295. But see **ND** 229**NW**923. [a] **Discretion not abused.**–77**CalA**120, 245**P**1104; 176**Minn** 59, 222**NW**520; 54**SD**149, 222**NW**688 (in vacating judgment). [b] **Refusal to set aside default judgment** on ground of mistake, inadvertence, surprise, and excusable neglect held not to show abuse of discretion. **IndA** 168**NE**37.

429-80 101**CalA**561, 281**P**1101; 75 **Mont**332, 243**P**576; 221**AppDiv**717, 225 **NYS**423; 112 **Okl** 237, 240**P**713 (policy of law to allow litigant to be heard up-

on merits of his cause free from technical pitfalls).

429-82 199Cal 246, 248P923; 86CalA 37, 260P573; 89CalA659, 265P339; **IndA** 156NE578; **Iowa** 232NW811; 221 Ky501, 299SW205; **SD** 225NW57(2d case); **Utah** 276P908. [a] **Utah** 276P 908 (power of court exceeded in imposing condition).

429-83 199Cal 246, 248P923; 200Cal 374, 253P148; 86CalA37, 260P573; 86 CalA700, 261P492; **IndA** 156NE578; 201 Iowa791, 208NW323; **Iowa** 232NW 811; 208 Iowa1391, 227NW417(2d case); **MoA** 22SW(2d)178(2dcase); 75 Mont332, 243P576; 31NM639, 249P 1013; 35PortoRico 923.

430-84 201Cal 10, 255P182; 86CalA37, 260P573; 89CalA659, 265P339; 89Pa Super322; 89PaSuper332. [d] **Aggrieved party held not entitled to have judgment vacated** where he knew of proceedings in time to make defense and did not appeal from judgment or use diligence in seeking to vacate it. 168 Ark747, 271SW704.

430-85 221AppDiv717, 225NYS423; 139 Okl 6, 281P297 (negligence of attorney is question of fact).

430-87 155Wash176, 283P681.

430-88 176Minn59, 222NW520; 51 Philippine786. [c] **Default judgment** should be set aside where no intervening rights have arisen. 220Ky574, 295 SW869.

430-90 201 Iowa791, 208NW323 (court may give due consideration to customs and practices of local bar relative to pending actions).

430-90½-New. Court may consider the fact of defendant's failure first to make demand on plaintiff for particulars of his claim before moving to compel him to render a bill of particulars. 76CalA 223, 244P162.

430-91 213Ala223, 104S402; 207 Iowa 793, 223NW475; 83Mont400, 272P525. See also Wash 290P991. [c] See also 31NM537, 249P109. [d] (3) Since county judge was without jurisdiction to enter default judgment under Civ. Pract. Act §§ 489, 491, in mortgage foreclosure action pending in supreme court, judgment so entered was absolutely void, and not mere "irregularity," within § 521, prescribing one-year limitation on motions to vacate judgments because of irregularities therein. 133Misc128, 231NYS275. [f] **In North Dakota.**–50ND388, 196NW108. [g] **In Arkansas.**–169Ark463, 275SW905. [h] **In Idaho.**–43 Ida784, 255P909.

430-92 91CalA65, 266P821; 43 Ida784, 255P909; 31NM443, 247P306.

430-94 [a] **Defendant not moving to open default until collection of judgment assured** and willfully in default is not entitled to opening of default. 219 AppDiv736, 220NYS81.

430-95 130 Okl 270, 267P239. [b] (2) Nonresident defendants who received no legal notice may assert their rights at any time, and their recovery is not barred by estoppel or laches. 249NY 122, 163NE124. [c] **In Alabama.**–213 Ala223, 104S402.

430-95½-New. Applicant must apply promptly for relief, 50SD512, 210NW 735

430-95⅓-New. and under statute has burden of proving that he acted promptly. 50SD512, 210NW735.

431-96 OhA 173NE255.

431-97 [a] (1) 94PaSuper413. [b] **In Oklahoma.**–112 Okl 237, 240P713; 128 Okl 139, 261P931.

431-98 172Ark832, 291SW56; 101CalA 328, 281P656; 131Misc474, 227NYS171; But see 191NC675, 132SE594.

431-99 139 Okl 6, 281P297 (within discretion of court).

431-2 31NM443, 247P306. [a] (2) 244 Mich397, 221NW276. (4) Whether default judgment was irregularly entered so as to authorize judge to vacate same after expiration of six-month period must be determined from face of record. 244Mich397, 221NW276.

431-3 244Mich397, 221NW276; **Tex CivA** 1SW(2d)466.

431-5½-New. Terms and conditions. It is error to open default on condition that case be tried without a jury, where defendant demanded a jury trial, but was not notified by the clerk before the cause appeared on the calendar and default was taken on the theory that the case was a nonjury one. 125Misc 444, 211NYS591.

431-5⅓-New. Denial of application is not abuse of discretion where character of excuse for default is doubtful and delay in seeking relief is unexplained. 50SD512, 210NW735.

431-5¼-New. In Texas. A suit in the nature of a bill of review, to set aside default judgments has been held a direct attack on such judgment. **CivA** 10SW(2d)235.

431-5½-New. Plaintiffs, in a suit in the nature of a bill of review to set aside default judgments on the sole ground that a judgment on the same cause of action had been taken in another jurisdiction, have been held not entitled to a relief, in the absence of an allegation or proof that they had paid judgments or were about to be compelled to do so. **TexCivA** 10SW(2d)235.

431-5⅓-New. Error in refusing to dismiss motion for failure to excuse default renders further proceedings nugatory. 40GaA835, 151SE682.

431-5⅔-New. After expiration of term court cannot suspend or vacate default judgment unless statute is strictly complied with. **OhA** 173NE255.

431-7½-New. Application may be denied where defendant has not paid costs. 35GaA5, 131SE524.

431-7⅓-New. Where issue as to service of writ is decided in favor of defendant, he is entitled to costs against plaintiff; otherwise, he is liable for costs to plaintiff. **Sask** [1925] 3DomLR95.

431-8 See also 191NC599, 132SE605.

432-1 130Or211, 279P939 (public policy); **Or** 290P233 (suit to set aside judgment); **TexCivA** 1SW(2d)466. [a] **Reason for rule.–Or** 290P233.

432-12 See also 206 Iowa1301, 221NW 932.

432-18½-New. Upon vacation by trial court of a judgment entered upon defendant's failure to appear at the trial, the trial court may use its sound discretion in permitting withdrawal or amendment of pleadings. 34Wyo 509, 245P295.

432-18⅓-New. A default judgment having been annulled on both parties' motions, there was no valid judgment in the case when a new default was taken after the overruling of defendant's rule for oyer, and a judgment confirming such a default was valid. 168La92, 121S585.

432-18¼-New. Where plaintiff amended a complaint and caused the action to be set for trial after an order vacating default and judgment, plaintiff was not estopped to question the jurisdiction of the trial court. 100CalA452, 280 P375(3dcase).

432-18½-New. Where judgment canceling assignment of lease for fraud was rendered by default on service by publication and plaintiff assigned to third person, the action properly proceeded in name of plaintiff after defendant was later allowed to defend where record showed that any judgment for defendant would have cleared their title. 123 Kan568, 256P162.

432-1 93Fla319, 111S630; 201 Iowa984, 206NW827, 828 [citCJ]. [a] **Except for palpable fraud** rules and limitations established and recognized by courts of equity render direct attack almost as difficult of accomplishment as would be collateral attack. 66Utah459, 244P210.

432-2 201 Iowa984, 206NW827, 828 [cit CJ].

433-3 99NJEq492, 133A703; 53ND231, 205NW676.

433-5 234Mich431, 208NW452 (equity will not intervene because of complications of plaintiff's own making).

433-6 155Md693, 142A590. But see 31 OhA512, 167NE486.

433-7 102NJEq115, 139A887.

433-8 102NJEq115, 139A887.

433-10 TexCivA 1SW(2d)466.

433-11 91CalA37, 266P1002.

433-11½-New. Equity will grant relief from a judgment only when it is against conscience to execute it. 201 Iowa984, 206NW827.

433-11⅓-New. Equity will not set aside a judgment for a debt which complainant admits that he owes and which he in no way offers to discharge. 201 Iowa984, 206NW827.

433-11¼-New. A judgment may be attacked by an action on the equity side of the court. 146SC385, 144SE82.

433-11⅙-New. Petition to vacate judgment is original action and from decision appeal or exceptions as case may be, will lie. **Mass** 170NE815.

433-11⅛-New. Rules governing vacation of decrees in equity and judgments at law are the same. 86Mont83, 282P 268.

433-12 223Ky836, 48W(2d)1112; **NJ Ch** 145A231(1stcase). [b] **Courts with power to decide own jurisdiction** and exercise it to final judgment, without setting forth in its proceedings facts and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to contrary, is one of the courts whose judgments are conclusive, if not removed to appellate court. 91Fla709, 109 S677.

433-16 IndA 162NE249. [a] **Some excuse of moment** must exist to carry over rights to another judicial forum after entry of unappealed judgment. 234Mich 431, 208NW453.

434-19 See also Mass 173NE507.

434-19½-New. By statute equity jurisdiction to set aside a judgment is not excluded where complainant is not a party to the suit. 19F(2d)880.

434-20 91CalA37, 266P1002; **DelCh** 139A761; 167Ga136, 144SE741 [reh den 167Ga143, 144SE745]; 205 Iowa382, 218 NW62; 234Mich431, 208NW452; 243 Mich557, 220NW697; 117Nebr291, 220 NW298, 300 [citCyc]; 99NJEq492, 133 A703; 53ND231, 205NW676; 135 Okl 66, 273P991; 298Pa182, 148A94; **Tex CommnA** 281SW1045.

434-21 82Mont434, 268P512; 53ND231, 205NW676.

434-22 TexCivA 7SW(2d)930.

434-24 205 Iowa382, 218NW62; 130 Okl 180, 266P448.

434-25 167Ga384, 145SE652; **TexCivA** 288SW281. But see 108Conn13, 142A 389; **Utah** 268P1029, 1032 [quotCJ]. [a] **If judgment in partition is void,** proper remedy is trespass to try title. **TexCivA** 291SW615.

435-28 253 IllA546; 86Mont83, 282P 268; **NC** 155SE868. See also 35 OhA95, 172NE303.

435-33 82Mont434, 268P512.

435-35 TexCivA 7SW(2d)930.

436-39 TexCivA 296SW977.

436-40 116Nebr118, 216NW309; **Tex CommnA** 281SW1045; **TexCivA** 295SW 316; **TexCivA** 32SW(2d)248.

436-42 213Ky142, 280SW930; 208Ky 519, 271SW598; 161La270, 108S478; 165Minn479, 205NW637; **MoA** 17SW (2d)559; 126 Okl 290, 259P247; 292Pa 483, 141A296, 297 [quotCJ]; **Tex CommnA** 281SW1045; **TexCivA** 299SW 272; **TexCivA** 13SW(2d)405; **TexCivA** 24SW(2d)94; **TexCivA** 20SW(2d)849; **TexCivA** 21SW(2d)59; 66Utah459, 244 P210.

437-44½-New. , or has an appeal then pending. 161La270, 108S478.

437-47 116Nebr118, 216NW309.

437-49 82Mont434, 268P512; **TexCivA** 298SW614.

437-49½-New. where judgment is void on its face. **TexCivA** 290SW831.

437-50 116Nebr118, 216NW309.

437-54 [c] **Where legal entity of drainage district was destroyed** and collection of assessments enjoined by state court, holder of bonds held without adequate remedy. 15F(2d)145.

437-57 116Nebr118, 216NW309; 53ND 231, 205NW676; **TexCivA** 295SW950; **Utah** 268P1029. But see **TexCivA** 20SW (2d)849.

438-58 205 Iowa353, 218NW78.

438-61 253 IllA546; 99NJEq492, 133A 703; 53ND231, 205NW676; **Or** 290P

233; TexCivA 1SW(2d)466; TexCivA 23SW(2d)811.

438-62 5F(2d)907.

438-63 CalA 277P909; 168La1, 121S 171(5thcase). [e] **Widow may maintain action in some jurisdictions** where there are no lineal descendants of deceased. 163Ga899, 137SE561.

439-65 TexCivA 11SW(2d)212. But see Ida 291P1048.

439-68½-New. Where the state has disposed of its interest in real property which constituted the subject matter of an action, it is not the proper party to move to set aside a judgment therein. 137 Okl 67, 277P1029.

439-69 But see 205Cal 207, 270P366; 98CalA400, 277P163; 196NC603, 146SE 576. [b] **Void judgments.**-Cal 265P493.

439-71 201Cal 210, 256P210.

439-71½-New. , or one deriving rights from creditor with notice of lien. 162 Ga654, 134SE762.

440-75 See also 115Tex576, 285SW1060.

440-88½-New. Suit to set aside judgment, being a collateral attack, cannot be maintained against subsequent purchasers under judgment. TexCivA 291 SW615.

440-88⅓-New. If judgment is not void, relief cannot be had against those who have no connection with alleged fraud of those connected with judgment. Tex CivA 291SW615.

440-88¼-New. No right exists against an escrow holder of a deed and contract by a purchaser under an unrecorded deed against whom a subsequent purchaser obtained a judgment quieting title. 98CalA400, 277P163.

440-88½-New. A judgment procured by unfair methods will not be disturbed where to do so causes injury to innocent third party. TexCommnA 23SW (2d)300.

440-91 Wash 288P241; Wis 231NW 585.

441-92 [a] (6) Garnishment judgment. TexCommnA 281SW1045.

441-92½-New. A voidable judgment can be set aside only in an equitable proceeding in which equitable grounds are set up. TexCivA 11SW(2d)373.

441-92⅓-New. Judgment absolutely void upon its face is entitled to no authority or respect and cannot be set aside by a court of equity. MoA 19SW (2d)776.

441-95 117Nebr291, 220NW298.

441-7 201 Iowa984, 206NW827, 828 [cit CJ]. But see Wis 231NW585.

442-16 [a] **Person who, for consideration, consented to judgment on forged cognovit note** cannot, after performance by judgment creditor, attack judgment on ground that his signature was forged. 27 OhA93, 160NE860.

442-16½-New. Equity will not set aside a consent judgment in the absence of showing of fraud where the court had jurisdiction to render the judgment. 201 Iowa984, 206NW827.

442-23 159La570, 105S624.

442-27 20F(2d)473, 474 [quotCJ]; 36 F(2d)466; 216Ala597, 114S1; 198Cal 500, 246P53; 98CalA400, 277P163; 111 Conn103, 149A218; Me 149A622; 152 Miss421, 120S168; TexCommnA 281SW 1045; TexCommnA 288SW406; Tex CommnA 29SW(2d)963; TexCivA 293 SW850; TexCivA 1SW(2d)466; Tex CivA 13SW(2d)405; TexCivA 23SW(2d) 811; Wis 231NW585. See also 190NC 599, 130SE498, 500 [citCyc].

442-27½-New. But a good defense alone is insufficient ground for setting aside judgment. 220Ky212, 294SW1027.

443-28 198Cal 500, 246P53. But see 228Ky110, 14SW(2d)410.

443-29 TexCivA 1SW(2d)466.

443-32 [b] **Judgment void on face of record** can be enjoined without showing meritorious defense. TexCivA 297 SW560.

443-33 216Ala677, 114S306. [a] **Where plaintiff is seeking to enforce judgment,** rule is not applicable. Ala 128S786(2d case).

444-40 66Utah459, 244P210.

444-42 36F(2d)466; 51Nev420, 279P27 (defense held meritorious); TexCivA 13 SW(2d)724.

444-43 99NJEq492, 133A703; 100NJEq 238, 34A866; 102WVa394, 135SE228. [a] But see 168Ga178, 147SE560. [b] **Complainant may not deny correctness of the judgment at law.** RI 150A76.

445-44 318Mo 373, 300SW778; 102 NJEq254, 140A584.

445-45 213Ky142; 280SW930; 137SC 450, 135SE558. See also IndA 162NE 249. [a] **Bill held without equity.**-6F (2d)559.

445-46½-New. or that cogent, satisfactory, and controlling reasons exist for disturbing the judgment. 204 Iowa 1394, 213NW225.

445-55 TexCommnA 3SW(2d)423.

445-56 160Tenn329, 24SW(2d)881. But see Cal 287P470.

446-59 91Fla709, 109S677; 58ND295, 225NW806; 130 Okl 180, 266P448; Tex CommnA 281SW1045; TexCivA 295SW 950; TexCivA 5SW(2d)594. See also 160Ga535, 128SE773.

446-60 169Ga101, 149SE786(2dcase); 233 IllA102; 208 Iowa1226, 227NW116; 130 Okl 180, 266P448.

446-61 233 IllA102; 198 Ind127, 149NE 350.

446-64 Ga 155SE204.

446-68 233 IllA102.

447-70 178Ark768, 12SW(2d)404; CalA 277P909; 92Fla360, 109S458; 261Mass 209, 158NE836; TexCommnA 287SW 1087; TexCivA 5SW(2d)559; Utah 268 P1029.

447-73 35GaA428, 133SE306; 252 IllA 178; TexCommnA 287SW1087.

447-79 TexCivA 271SW137.

447-80 92Fla360, 109S458.

448-85 317 Ill 362, 148NE42; 234Mich 675, 209NW116; 106WVa487, 145SE824.

448-86 233 IllA102.

448-87 MoA 13SW(2d)581.

449-93 155Miss242, 124S344.

449-96 155Miss242, 124S344.

450-6 [a] **Nonobservance of statute requiring action to be brought in name of** real party in interest does not justify equitable relief where contract on which action was brought was thereafter assigned as security, but judgment recovered in name of assignor. 234Mich431, 208NW452.

450-10 252 IllA24.

451-18 120Kan209, 243P306; 221MoA 466, 282SW68; TexCommnA 14SW(2d) 1018; TexCivA 20SW(2d)383; TexCivA 26SW(2d)921.

451-21 98Fla759, 124S49; 170Ga555, 153SE419; 168Ga307, 147SE529; 213 Ky142, 280SW930; 216Ky796, 288SW 738; 249Mich485, 229NW411; TexCivA 291SW605. [a] (18) Noncompliance with rules in perfecting appeal. 236 Mich60, 209NW923. (19) Misconduct of jurors shown by affidavit of juror made ground for new trial by statute. Tex CivA 291SW605.

452-22 121Kan212, 246P506.

452-23 205 Iowa353, 218NW78; 121 Kan212, 246P506.

452-25 TexCivA 30SW(2d)395.

452-26 168Ga15, 147SE87; 121Kan212, 246P506; 213Ky142, 280SW930; 66 Utah459, 244P210.

453-27 220MoA812, 278SW818 (perjured evidence).

453-28 121Kan212, 246P506.

453-31 TexCivA 291SW605.

453-34 221MoA466, 282SW68, 70 [cit CJ].

453-40 221MoA466, 282SW68, 70 [cit CJ]. [a] (4) Failure of judgment to direct sale of collateral and application of proceeds to debt before entering personal judgment. 66Utah459, 244P210.

454-41 TexCivA 13SW(2d)724.

454-44 221MoA466, 282SW68, 70 [cit CJ]; Mo 31SW(2d)984.

454-45 6F(2d)559; 32F(2d)625; CalA 177P163; 15DelCh229, 135A482; 164Ga 313, 138SE793; 168GaA307, 147SE529; Iowa 228NW56; 103NJEq339, 143A361; 99NJEq492, 133A703; 102NJEq115, 139 A887; 157Tenn553, 12SW(2d)370; Tex CivA 291SW615; TexCivA 16SW(2d) 395. But see Cal 287P470.

456-53 Ga 155SE675.

456-54 TexCivA 24SW(2d)805.

456-61 6F(2d)559.

456-73 102NJEq254, 140A584.

458-96 233 IllA591.

459-7 92Fla360, 109S458, 462 [citCyc perBrown,CJ].

459-15 252 IllA24; TexCivA 280SW 892.

460-19 233 IllA102; 99NJEq492, 133A 703; TexCivA 30SW(2d)395.

460-20 36F(2d)466; 216Ala597, 114S1; 98CalA400, 277P163; 99NJEq492, 133A 703; TexCommnA 29SW(2d)963; Tex CivA 10SW(2d)181; TexCivA 13SW(2d) 724.

460-21½-New. Judgment valid on its face will not be set aside without showing equities and sufficient excuse for not presenting them in suit prior to rendition. TexCivA 290SW831.

460-21⅓-New. Knowledge of a defense by the counsel and judge is no excuse. TexCivA 16SW(2d)395.

460-25 215Ala660, 111S913; 102NJEq 254, 140A584; 66Utah459, 244P210.

461-26 102NJEq254, 140A584; 99NJEq 492, 133A703; 102NJEq115, 139A887; 66Utah459, 244P210; 100WVa64, 130SE 151.

461-29 100WVa64, 130SE151 (belief that summons was only subpœna as witness); 199Wis466, 226NW303.

461-33 100NJEq238, 134A866.

462-34 99NJEq492, 133A703.

462-35 213Ala267, 104S639; 165Ga252, 140SE366; Mo 31SW(2d)984; TexCivA 5SW(2d)1007.

462-37 213Ala267, 104S639; MoA 31 SW(2d)585; TexCivA 4SW(2d)1008; 100WVa64, 130SE151.

462-38 84Mont98, 274P288.

462-39 TexCivA 4SW(2d)1008.

462-43 221MoA466, 282SW68, 70 [cit CJ].

462-46 But see NJCh 150A436.

463-52 TexCivA 291SW605.

463-60 213Ala267, 104S639; 165Ga252, 140SE366; Mo 31SW(2d)984; 102NJEq 254, 140A584; TexCivA 5SW(2d)1007. [b] (1) TexCivA 287SW96. [f] **Inability of party to discover evidence necessary to constitute defense** is not unavoidable casualty and misfortune within statute. 142 Okl 134, 285P839.

464-61 TexCivA 20SW(2d)383.

464-63 213Ala267, 104S639; 178Ark 1019, 14SW(2d)245(2dcase); 215Ky254, 284SW1005; 228Ky263, 14SW(2d)1057; 100WVa64, 130SE151.

464-64 98CalA400, 277P163.

464-66 215Ky254, 284SW1005.

464-68 220Ky212, 294SW1027.

464-72 TexCivA 21SW(2d)305.

464-73 216Ala597, 114S1; 115Nebr309, 212NW622; 102NJEq115, 139A887; 24 OhA481, 157NE811; TexCivA 4SW(2d) 1008; TexCivA 20SW(2d)383.

465-74½-New. Each case must be determined upon its own facts. 80Mont 266, 260P124.

465-74⅓-New. In a suit in equity to set aside a default judgment on the ground of excusable neglect, where no attempt was made to invoke the liberal statutory remedy, a stronger showing must be made to warrant relief than would have been required had defendant proceeded promptly under the statute. 80Mont266, 260P124.

465-75 See also 228Ky110, 14SW(2d) 410.

465-75½-New. , or that summons was subpœna as witness. 100WVa64, 130 SE151.

465-78 120Kan209, 243P306, 310 [cit CJ]; 84Mont98, 274P288; 102NJEq115, 139A887; 151Va143, 144SE606. Contra TexCivA 278SW229. [c] **Suit to set aside judgment** for neglect of counsel is tried under equitable powers of court. TexCivA 278SW229.

466-79 73CalA459, 238P783.

466-80 120Kan209, 243P306, 310 [cit CJ].

466-85 120Kan209, 243P306, 310 [cit CJ].

466-86 Contra TexCivA 278SW229.

466-87 36F(2d)466.

466-88 36F(2d)466.

466-2 218Ala80, 117S645; 73CalA459, 238P783, 785 [citCJ]; 91CalA37, 266P 1002; 167Ga384, 145SE652; 224Ky356, 6SW(2d)497; 99NJEq492, 133A703; 102NJEq115, 139A887; 130 Or211, 279 P939; TexCivA 284SW1063; TexCivA 26SW(2d)663.

467-4 TexCivA 284SW1063.

467-5 219Ala404, 122S620. But see 98 CalA400, 277P163.

467-5½-New. Denial of motion before

judgment to have default vacated is not res judicata precluding resort to equity. 82Mont434, 268P512.

467-8 219Ala131, 121S420; Ala 127S544 (diligence should be shown); 149Miss892, 116S299. [e] **No advantage will accrue to judgment creditor** if debtor seeking to enjoin collection was precluded from discovering set-off by concealment or fraud. Ala'127S544.

468-10 Ala 127S544. [a] **Delay in bringing action** has been held no bar in restraining enforcement of judgment. MoA 29SW(2d)721. [b] **Failure to consolidate actions** has been held not to bar judgment debtor from enjoining execution of judgment where judgment creditor filed counterclaim in original suit. MoA 29SW(2d)721. [c] **Failure to plead cause of action on note** did not preclude relief where note was not due when first suit was filed. MoA 29SW(2d)721.

468-11 219Ala131, 121S420; Ala 127S544; MoA 29SW(2d)721.

468-15 Ala 127S544.

469-34 127 Or578, 273P334. See also TexCivA 12SW(2d)674.

469-37 127 Or578, 273P334.

469-38 149Miss892, 116S299, 300 [cit CJ]; 114Nebr834, 211NW168.

470-40 149Miss892, 116S299.

470-44 214Ala587, 108S529; 215Ala334, 110S574; 219Ala453, 122S440; 76CalA481, 245P459; 80CalA20, 251P232; 165Ga252, 140SE366; 336 Ill 316, 168NE259; 233 IllA77; 201 Iowa174, 206NW819; 120Kan209, 243P306; 151Miss784, 119S301; 317Mo 1298, 298SW732, 55ALR489; MoA 18SW(2d)119; Mont 292P730; NH 152A272; 102NJEq254, 140A584; 195NC772, 143SE868; 53ND231, 205NW676; 117 Oh1, 157NE482; 118 Okl 178, 246P848; 36 OklACR362; 37 OklACR551; TexCivA 294SW909.

471-45 OhA 173NE243.

471-46 159La570, 105S624 (where fraud was practiced on court by giving false testimony); 112 Okl 180, 240P321; 118 Okl 178, 246P848; 39Wyo 379, 272P12.

471-47 37 OklACR551.

471-48 214Ala587, 108S529; Mich 233NW357. [a] (2) It must prevent real trial on the issues involved. 80CalA20, 251P232.

471-51 120Kan209, 243P306.

471-56 214Ala587, 108S529.

471-59½-New. The power of a court of equity to grant relief from a judgment obtained by fraud does not depend upon statute but is inherent. 74Mont558, 241P636.

472-66 Ala 129S23 (fraud merely antecedent to rendition of judgment insufficient); 76CalA481, 245P459; 80CalA20, 251P232; 93CalA97, 269P468; 98CalA400, 277P163; 120Kan209, 243P306; 121Kan212, 246P506; 124Kan815, 262P569; 74Mont558, 241P636; 82Mont434, 268P512; NC 155SE452; 112 Okl 180, 240P321; 118 Okl 178, 246P848; 124 Okl 123, 254P53; 36 OklACR362; 37 OklACR551; TexCivA 291SW605. [a] (2) 80CalA20, 251P232; 74Mont558, 241P636; Mont 292P730. [c] **Fraud** in procurement of note on which judgment was based does not authorize setting aside judgment. 222Ky147, 300SW341. [d] **Misrepresentations which would not have prevented recovery of judgment** will not warrant equitable relief against judgment. Wis 231NW585.

472-67 80CalA20, 251P232; 96CalA558, 274P421(1stcase); 98CalA400, 277P163; 120Kan209, 243S306; 121Kan212, 246P506; 74Mont558, 241P636; 99NJEq492, 133A703; 102WVa394, 135SE228, 229 [quotCJ].

473-68 99NJEq492, 133A703.

473-69 99NJEq492, 133A703.

473-69½-New. , or unless defendant was ignorant of the facts constituting the fraud pending suit. 99NJEq492, 133A703.

473-78 33F(2d)667; 213Ala267, 104S639; 91CalA65, 266P821; 163Ga6, 135SE72; 165Ga252, 140SE366; 336 Ill 316, 168NE259; 159La570, 105S624; 99NJEq492, 133A703; 53ND231, 205NW676; 112 Okl 180, 240P321; 37OklACR551; TexCivA 294SW909; TexCivA 5SW(2d)1007; TexCivA 286SW954. [e] **That plaintiff's attorney drew answer for guardian ad litem of infant defendant** does not constitute fraud. 120Kan209, 243P306. [f] **Misinformation by clerk** that case would not be called does not justify setting aside default judgment on ground of fraud. 175Ark548, 18W19. [g] **Creditor's knowledge of defendant's discharge in bankruptcy** when he took default judgment cannot be made basis of charge of fraud in taking judgment. Iowa 229NW672.

473-79 165Ga252, 140SE366; 215Ky254, 284SW1005; 99NJEq492, 133A703; 53ND231, 205NW676; TexCivA 294SW909; 100WVa64, 130SE151.

473-79½-New. That mortgagor's attorneys abandoned defense does not render judgment void or voidable where they advised the mortgagor that they were retained by the adverse party and other attorneys took up the mortgagor's defense. TexCivA 294SW618.

473-80 27F(2d)470; 214Ala587, 108S529; 215Ala334, 110S574, 575 [citCJ]; 220Ala666, 127S154; Ala 129S23; 163Ga899, 137SE561; 40GaA582, 150SE471; 336 Ill 316, 168NE259 (maxim that fraud vitiates every transaction applies to judgments as well as to contracts); 233 IllA77; 234 IllA346; 201 Iowa174, 206NW819; 223Ky749, 4SW(2d)689; Mo 31SW(2d)984; 82Mont434, 268P512; 102NJEq115, 139A887; 231NYS635; 31 OhA512, 167NE486 (judgment rendered in proceeding which has for its basis fraudulent foundation is void); 118 Okl 178, 246P848; 141 Okl 60, 283P1004; 38 OklACR461 (fraud extraneous to judgment); TexCivA 286SW519; TexCivA 5SW(2d)559; 102WVa394, 135SE228. See also 43F(2d)485. [a] **That fraud involved violation of court rule forbidding consideration of oral stipulations of counsel** does not deprive court of power to set aside default judgment. 82Mont434, 268P512. [b] (6) Failure of vendor, suing for breach of contract to trade property, to disclose resale price, held not to constitute fraud. OhA 173NE243.

474-81 163Ga899, 137SE561; 31 OhA512, 167NE486. [b] (6) Where duebill contained provision specifically waiving citation and service and confessed judgment, filing of suit thereon without previous notice or demand was neither fraud nor ill practice authorizing annulment of definitive judgment. 11LaA454, 123S442. (7) Equity, in suit to set aside default judgment rendered on ground of fraud, will not review validity of claim where there is no circumstance tending to show fraud in addition to fact that claim may have been baseless. MoA 19SW(2d)776. (8) Other instances. TexCivA 26SW(2d)663.

474-83 83CalA137, 256P484.

474-86 TexCivA 4SW(2d)1008; TexCivA 19SW(2d)132.

474-87 228Ky110, 14SW(2d)410.

474-87½-New. Decrees of the probate court, in matters of probate, are conclusive on the courts of common law, and cannot be set aside, even for fraud. 261Mass209, 158NE836.

474-87½-New. Equity courts will not examine probate decrees, even though fraud in their procurement is alleged. 261Mass209, 158NE836.

474-88 220Ala666, 127S154; IndA 169NE91; 36 OklACR362.

474-90 98CalA400, 277P163.

475-93 220Ala420, 125S662.

475-98 165Ga252, 140SE366; 233 IllA77.

475-99 Wash 286P282.

475-4 [a] (3) Wife may bring action of nullity to set aside judgment of divorce by default where husband committed fraud on court by false testimony. 159La570, 105S624. [b] **Mere false testimony** is not enough to set aside judgment if disputed matter is issue in case in which it is claimed that it is given. 179Ark829, 19SW(2d)1030.

475-5 TexCivA 21SW(2d)305.

475-6 6F(2d)230; 213Ala412, 104S770 (holding such to be rule when unmixed with accident or fraud by successful party which prevented other from making his defense); 215Ala334, 110S574; 220Ala666, 127S154; 73CalA459, 238P783; 80CalA20, 251P232; 243 IllA227; 234Mich431, 208NW452; 220MoA812, 278SW818; 74Mont558, 241P636; 115 Okl 7, 240P1072; 118 Okl 178, 246P848; 130 Or211, 279P939; TexCivA 291SW605; 149Wash591, 271P885. See also Ga 155SE675. [c] **In Oklahoma.**-142 Okl 134, 285P839 (false testimony held not extraneous to issue).

476-7 TexCivA 291SW605.

476-8 [a] (1) 167Minn484, 209NW325. (7) Statute giving right of action to set aside judgment obtained by perjury and fraud was not intended to give retrial of same issues tried and determined in original action. 167Minn484, 209NW325; 173Minn149. 216NW800. [b] **In North Carolina.**-NC 155SE452 (litigant must protect himself against unscrupulous antagonist).

476-9 80CalA20, 251P232.

476-12 220Ala666, 127S154; 115 Okl 7, 240P1072; 118 Okl 178, 246P848; 155Wash52, 283P704 (perjury alone is not sufficient to annul judgment); Wash 286P282. [a] **Perjury as to jurisdictional facts** whereby court was induced to assume jurisdiction where it in fact had none is ground for vacating judgment. 118 Okl 178, 246P848.

477-14 88 IndA352, 163NE846(2dcase); LaA 130S870; 249Mich303, 228NW716 (violating agreement for continuance); Mont 292P730 (oral stipulation extending time for answer); TexCivA 294SW909.

477-16 88 IndA503, 164NE639.

477-21 TexCivA 294SW909.

477-25½-New. Judgment against the indorser of a note will be set aside as fraudulent where he was induced by the holder of the note to refrain from settling with the maker who subsequently went into bankruptcy, whereby the indorser lost opportunity of reimbursement. 201 Iowa174, 206NW819.

478-34 But see MoA 17SW(2d)558.

478-37 TexCivA 291SW605.

478-40 202 Iowa1236, 211NW868; 99NJEq492, 133A703.

479-44 202 Iowa1236, 211NW868; 215Ky254, 284SW1005; 102NJEq115, 139A887.

479-50 202 Iowa1236, 211NW868. [a] **Where such evidence falls far short of presenting strong equitable considerations,** is largely incompetent, and, within range of competency, militates strongly against equities of applicant, court will refuse to exercise its power. 202 Iowa1236, 211NW868.

479-51 202 Iowa1236, 211NW868.

479-53 243 IllA227; 115Nebr176, 211NW1007; 115Nebr309, 212NW622.

479-57 TexCivA 286SW954.

480-64 109Conn45, 145A151; TexCommnA 288SW406; TexCivA 296SW977.

480-63½-New. Where proceeding to modify or set aside judgment is in effect a new suit, it must comply with the statutory provisions as to pleadings and invoking jurisdiction. TexCivA 286SW629 (habeas corpus to determine custody of child).

480-70 167Ga136, 144SE741 [reh den 167Ga143, 144SE745].

480-72 [d] **Where no consideration was received by insane mortgagor,** his guardian need not offer to place defendants in statu quo in suit to vacate foreclosure judgments and decrees. 204Iowa1394, 213NW225.

481-73½-New. A suit to set aside a decree for fraud and to cancel a security deed is held not subject to dismissal on the ground that the petition was filed in vacation. 165Ga168, 140SE373.

481-74 214Ala587, 108S529; 80Mont266, 260P124. [a] **Reasonable time under circumstances** (1) held to measure laches. 214Ala587, 108S529. (2) Six years of delay held to bar bill for laches. 214Ala587, 108S529. [b] **Suit to declare judgment null for want of jurisdiction** is not barred by prescription or by silence of party for any time. 164La532, 114S148. [c] **Where relief is sought on ground of perjury or suppression of facts,** equity will not interfere in absence of showing that due diligence

was used in presenting matter to court and that question could not have been litigated at trial by use of diligence. 129 **Okl** 184, 265**P**646.

481–75 214**Ala**587, 108**S**529; **TexCivA** 3**SW**(**2d**)484.

481–76 154**Md**307, 141**A**368. [a] 214 **Ala**587, 108**S**529. [b] (6) Suit to vacate judgment quieting title is not barred after one year. **CalA** 277**P**909. [e] 124 **Kan**815, 262**P**569. [i] (1) **TexCivA** 278 **SW**239. (6) Suit to vacate judgment held barred by four-year statute of limitation. **TexCivA** 292**SW**642. (7) Statute does not apply where injunction is auxiliary to direct suit to vacate judgment. **TexCivA** 278**SW**239. (8) Defendant who did not seek relief from voidable judgment either by appeal or writ of error, but permitted it to become final, cannot be heard to complain of it in court of equity six years later. **Tex CivA** 11**SW**(**2d**)373. [k] **In Iowa.**–202 **Iowa**1236, 211**NW**868; 205 **Iowa**382, 218 **NW**62. [l] **In Oklahoma.**–137 **Okl** 67, 277**P**1029.

481–77 See also **Iowa** 229**NW**672 (petition praying judgment be set aside held not to allege defense discovered since judgment rendered).

481–78 But see **Iowa** 229**NW**672.

481–82½–New. Where forgetfulness does not excuse delay. 80**Mont**266, 260 **P**124.

481–82¾–New. Judgment will not be set aside for extrinsic fraud, after expiration of statutory time for setting it aside on motion, where fraud could have been discovered within such time. **Iowa** 229**NW**149.

481–82¼–New. In some jurisdictions action to set aside foreclosure of land contract must be brought within time limited for actions to recover lands. 249**Mich**485, 229**NW**411.

481–83 10**LaA**212, 120**S**666.

482–84 159**La**570, 105**S**624.

482–85 243 **IllA**227; 80**Mont**266, 260 **P**124; **NJCh** 147**A**776; **NJCh** 150**A**436; **TexCivA** 286**SW**954; **TexCivA** 291**SW** 615. [a] (10) **Or** 290**P**233. (12) Two years and three months. 73**CalA**459, 238**P**783, 785. (13) One year. 80**Mont** 266, 260**P**124.

482–86 249**Mich**485, 229**NW**411.

482–91 **TexCivA** 291**SW**615.

482–94½–New. Laches is not applied in cases where the state is interested for reasons of public policy. 109**Conn**45, 145**A**151.

483–1 161**La**721, 109**S**400.

484–11½–New. Proceedings to modify judgment awarding custody of child, which is in effect a new suit, is not confined to the court rendering judgment. **TexCivA** 286**SW**629.

484–11¾–New. Jurisdiction in such proceeding may not be assumed by the judge of his own motion, but must be invoked by a proper petition. **TexCivA** 286**SW**629.

484–11¼–New. The trial court has jurisdiction to enjoin enforcement of judgment affirmed by the appellate court for reasons arising after rendition. 115**Tex**576, 285**SW**1060.

484–12 204 **Iowa**587, 215**NW**646; 313 **Mo** 182, 281**SW**411, 416 [quotCJ]. But see 82**Mont**434, 268**P**512.

484–13 313**Mo**182, 281**SW**411, 416 [quotCJ].

484–15 **TexCivA** 3**SW**(**2d**)835.

484–18 **TexCivA** 286**SW**344.

484–20 **TexCommnA** 288**SW**165. [b] **Grantors who were not parties to default judgment foreclosing lien of judgment against them on realty conveyed** are improperly joined as plaintiff in action to enjoin enforcement of default judgment. **TexCivA** 1**SW**(**2d**)466.

485–30 44 **Ida**447, 258**P**365, 368 [cit CJ]; **TexCommnA** 299**SW**231. [c] **Nonjoinder of defendants** to judgment dead at time original suit was instituted, and not interested, is not fatal. **TexCivA** 7**SW**(**2d**)930.

485–31 330 **Ill** 511, 162**NE**137.

485–33 **TexCommnA** 299**SW**231.

485–41 242**Mich**656, 219**NW**620.

486–48½–New. Party securing judgment over against plaintiff is not necessary party. 176**Ark**553, 3**SW**(**2d**)307.

486–48¾–New. In proceedings to expunge from the journals of various courts various judgments and final orders, clerks of court of different counties, judges of courts of appeal of different districts, and judges of common pleas courts of different counties could not properly be joined in a single action. 120**Oh**222, 165**NE**843.

486–48¼–New. In suit attacking attachment and judgment against nonresident by defendant's children on ground of ownership of realty involved, defendant in attachment held not necessary party. **Ida** 291**P**1048.

486–51 **TexCommnA** 288**SW**406.

486–52 **TexCommnA** 288**SW**406.

487–96 **TexCivA** 11**SW**(**2d**)327(2dcase).

488–4½–New. The amendment nunc pro tunc of a judgment so as to cure certain defects therein, pending an action attacking the judgment, does not entitle judgment plaintiff to dissolution of a temporary injunction restraining execution where other defects complained of remain to be determined on the trial on the merits. **TexCivA** 280**SW**312.

488–14 **TexCivA** 278**SW**858. [a] 98**Fla** 554, 125**S**351(2dcase); 235**Ky**600, 31**SW** (**2d**)928; **Utah** 268**P**1029. [d] **Petition substantially following statute** sufficient. 213**Ala**267, 104**S**639. [e] **Averments must show exercise of due diligence** in discovery of fraud. 214**Ala**587, 108**S**529. [f] **Complaint held demurrable** as attempt to relitigate issues in original action. 130 **Or**211, 279**P**939.

489–16½–New. In a direct attack on a judgment it is unnecessary to allege that the judgment on its face shows its invalidity. **TexCommnA** 299**SW**231.

489–16¾–New. A motion to reinstate a bill of review alleging dismissal without knowledge and stating cause of action is sufficient to confer jurisdiction as suit for equitable relief. 117**Tex**214, 299**SW**888.

489–18 216**Ala**677, 114**S**306; 176**Ark** 940, 4**SW**(**2d**)932; 198**Cal** 500, 246**P**53; 227**Ky**554, 13**SW**(**2d**)771; 152**Miss**421, 120**S**168; **TexCivA** 294**SW**909; **TexCivA** 13**SW**(**2d**)979; **TexCivA** 30**SW**(**2d**)511; 100**WVa**64, 130**SE**151. [a] **Prima facie showing of meritorious defense** held sufficient. **TexCivA** 294**SW**909. [b] **Failure to allege existence of meritorious defense** held not fatal in view of original bill. **Ala** 128**S**786(2dcase).

489–20 220**Ky**212, 294**SW**1027; **MoA** 25 **SW**(**2d**)118 (sufficient); 151**Va**143, 144 **SE**606. [a] (4) Other averments held sufficient. **TexCommnA** 11**SW**(**2d**)299.

490–22 **TexCivA** 271**SW**253, 255 [quot CJ].

490–23 **Ala** 127**S**544; 175**Ark**548, 1**SW** (**2d**)19; 170**Ga**872, 154**SE**350(2dcase); 44 **Ida**447, 258**P**365, 368 [citCJ]; 130 **Or** 211, 279**P**939; **TexCivA** 271**SW**253, 255 [quotCJ]; **TexCivA** 294**SW**909; **Tex CivA** 1**SW**(**2d**)466; **TexCivA** 4**SW**(**2d**) 218; **TexCivA** 20**SW**(**2d**)383; **TexCivA** 21**SW**(**2d**)305; **TexCivA** 30**SW**(**2d**)511; 100**WVa**64, 130**SE**151. [b] **Complaint should state what defenses were made** in first case. 130 **Or**211, 279**P**939. [c] **Must state reasons why he did not see that his rights were protected** in first case and make averments showing that equities are in his favor. 130 **Or**211, 279 **P**939.

490–24 **TexCivA** 271**SW**253, 255 [quot CJ].

490–25 **TexCivA** 271**SW**253, 255 [quot CJ].

490–26 **TexCivA** 271**SW**253, 255 [quot CJ].

491–31 220**Ky**212, 294**SW**1027; 227**Ky** 554, 13**SW**(**2d**)771; 20 **OhA**493, 152**NE** 731; **TexCivA** 271**SW**253; **TexCivA** 278 **SW**858; **TexCivA** 1**SW**(**2d**)426; 100 **WVa**64, 130**SE**151. [a] **Ala** 127**S**544; 168**La**1, 121**S**171(5thcase); 242**Mich**656, 219**NW**620; **MoA** 25**SW**(**2d**)118. [b] 165**Ga**252, 140**SE**366 (mistake); 170**Ga** 466, 153**SE**182(1stcase); 221**MoA**466, 282**SW**68; **TexCivA** 1**SW**(**2d**)466. [c] **Averment in amended petition held too late** where original failed to detail frankly precise grounds for vacation. **TexCivA** 278**SW**858.

491–32 **TexCivA** 271**SW**253.

491–33 214**Ala**587, 108**S**529; 168**Ga**15, 147**SE**87; 44 **Ida**447, 258**P**365, 368 [cit CJ]; **LaA** 126**S**559 (insufficient); 82 **Mont**434, 268**P**512; 153**Wash**102, 279**P** 402; **Wash** 286**P**282; 100**WVa**64, 130**SE** 151. [a] 176**Ark**553, 3**SW**(**2d**)307; 178 **Ark**588, 11**SW**(**2d**)469; **CalA** 287**P**149; 161**Ga**739, 132**SE**83; 163**Ga**899, 137**SE** 561; 168**Ga**178, 147**SE**560; 215**Ky**254, 284**SW**1005; 196**NC**553, 146**SE**214; 117 **Okl** 223, 246**P**217; **TexCivA** 30**SW**(**2d**) 371. [e] **Complaint insufficient.**–85 **IndA** 649, 155**NE**611; 173**Minn**149, 216**NW** 800; 31**NM**316, 244**P**893. [f] **Amendment of petition to set up fraud.**–200 **Iowa**1314, 206**NW**253. [g] **Averment held insufficient.**–214**Ala**587, 108**S**529. [h] **Bill held insufficient.**–**Ala** 129**S**23.

492–34 40**GaA**582, 150**SE**471; 117 **Okl** 223, 246**P**217.

492–35½–New. Must plead ignorance of fraud. **TexCivA** 300**SW**225.

492–50 91**CalA**37, 266**P**1002. [a] **Petition held to state no cause of action,** where every issue tendered thereby was presented by plaintiff's appeal from such judgment. 161**La**270, 108**S**478.

493–54½–New. An additional prayer for rule nisi in a petition to set aside a verdict and decree for fraud and cancel a deed is held not to affect the equitable character of the proceeding. 165**Ga** 168, 140**SE**373.

493–56 220**Ky**212, 294**SW**1027.

493–59 227**Ky**661, 13**SW**(**2d**)1011.

493–69 [a] **Laches** held sufficiently pleaded. **Or** 290**P**233.

493–71 40**GaA**582, 150**SE**471 (demurrer held too general); 142 **Okl** 134, 285**P**839. [b] **Where allegations of petition substantially comply with statute,** it is improper to sustain demurrer. 213**Ala**267, 104**S**639.

493–74 215**Ky**254, 284**SW**1005.

494–75 But see **TexCivA** 7**SW**(**2d**)930.

494–81½–New. A judgment should be introduced in a suit to restrain the filing of an abstract of a void judgment in another county. **TexCivA** 17**SW**(**2d**) 153.

494–82 92**Fla**360, 109**S**458, 461 [citCJ perBrown,CJ]; 233 **IllA**591; 313**Mo** 642, 285**SW**462; 108**WVa**346, 151**SE**180 (recitals of decree as to issuance and service of process presumed true). But see 233**Ky**507, 26**SW**(**2d**)37; **TexCivA** 13**SW** (**2d**)979.

494–84½–New. Where there is doubt in a suit for relief from judgment as to the sufficiency of facts to show mistake, inadvertence, or excusable neglect, the court will resolve such doubts in favor of applicant. 84 **IndA**676, 151**NE** 26.

494–85 214**Ala**587, 108**S**529; 92**Fla**360, 109**S**458, 461 [citCJperBrown,CJ]; 86 **IndA**276, 157**NE**114; 161**La**1085, 109**S** 909; 155**Miss**242, 124**S**344; 130 **Or**492, 280**P**499 (release or equitable satisfaction); 66**Utah**459, 244**P**210 (that he was prejudiced).

494–87 **TexCivA** 10**SW**(**2d**)181.

494–88 198**Cal** 500, 246**P**53.

495–89 198**Cal** 500, 246**P**53; 100**WVa** 64, 130**SE**151.

495–90 **TexCivA** 16**SW**(**2d**)839; 66**Utah** 459, 244**P**210 (that service of written notice of overruling of demurrer on attorney by mail was insufficient); 100 **WVa**64, 130**SE**151.

495–91 170**Ga**872, 154**SE**350(2dcase); **TexCivA** 15**SW**(**2d**)722; 100**WVa**64, 130 **SE**151.

495–92 100**WVa**64, 130**SE**151.

495–93 215**Ala**660, 111**S**913; **TexCivA** 292**SW**947. But see **NC** 155**SE**452.

495–97 169**Ga**243, 150**SE**76 (evidence held irrelevant and properly excluded); 221**MoA**466, 282**SW**68. [d] **More latitude is allowed** in admission of evidence on direct attack on judgment on ground of insufficiency of service of process than on collateral attack. 66**Utah**103, 240**P** 165. [e] **Extrinsic evidence,** as well as record evidence, is admissible on direct attack on judgment for insufficiency of service of process. 66**Utah**103, 240**P**165. [f] **Evidence held inadmissible.**–**NC** 155 **SE**452 (perjury).

495–98 [b] **Error in admission of evidence** for defendant is harmless where complainant fails to prove his case. 317 **Ill** 362, 148**NE**42.

495–99 **MoA** 19**SW**(**2d**)776.

495–2 **TexCivA** 24**SW**(**2d**)805.

495–5 See also 151**Miss**784, 119**S**301.

495–5½–New. Respondent cannot attack his own record by parol proof of mistake. 221MoA466, 282SW68.

495–5⅓–New. The absence of jurisdiction over a party by the court rendering the judgment may be shown in the absence of a sheriff's return purporting to show the service of a valid process. 221 MoA466, 282SW68.

495–5¼–New. A respondent in prohibition who relied upon the records of the court which appointed him guardian cannot attack the records by parol proof of mistake. 221MoA466, 282SW68.

495–6 92Fla360, 109S458, 461 [citCJper Brown.CJ]; 233 IllA591; TexCivA 5SW (2d)559. [a] (1) TexCivA 15SW(2d)722. [b] (3) Suit to nullify default judgment for failure of plaintiff to cause notice of trial to be served on defendant or counsel must fail, where constable positively testified that notice was served on counsel. 12LaA158, 125S163. [d] (1) 168Ga 15, 147SE87; 213Ky152, 280SW942; 11 LaA218. 122SE483(1stcase); TexCivA 16SW(2d)874; 151Va143, 144SE606. (4) 169Ark393, 275SW703; 169La1022, 126 S513(2dcase). (9) To show that judgment debtor's failure to appear and defend was due to "unavoidable casualty or misfortune." 220Ky212, 294SW1027. (10) To show diligence in contesting suit. TexCivA 287SW96. (11) To justify court in setting aside verdict of jury on question of genuineness of signature of indorser of note and to dismiss suit. 146Va715, 132SE688. [d] (12) To show that defendant was not represented by counsel. 222Ky472, 1SW(2d)772. [e] (1) 175Ark548, 1SW(2d)19; 164Ga313, 138SE793; 86IndA276, 157NE114; 203 Iowa1139, 212NW709; 228Ky263, 14 SW(2d)1057; 151Va143, 144SE606. (2) 249Mich647, 229NW514; TexCivA 289 SW1024; TexCivA 12SW(2d)1045; 108 WVa346, 151SE180. (3) 10LaA212, 120 S666. (5) To sustain burden of proof of showing good excuse for failure to answer. TexCivA 10SW(2d)181. (6) To show excuse for failure to move for new trial. TexCivA 23SW(2d)811. [f] **Recitals of decree as to issuance and service of process** should be taken as true in absence of contrary showing in record where process and proof of service have been lost and there is sharp conflict in evidence. 108WVa346, 151SE 180.

495–6½–New. Where motion for new trial after default was by joint defendants, evidence must warrant new trial as to both. 86IndA276, 157NE114.

496–7 130Or492, 280P499.

496–10 216Ala677, 114S306; 198Cal 500, 246P53; TexCommnA 29SW(2d)963; TexCivA 13 SW(2d)979. [a] (1) 169 Ark393, 275SW703; 227Ky554, 13SW (2d)771.

496–11 OhA 173NE243.

496–14 214Ala587, 108S529; 198Cal 500, 246P53; 225Ky52F, 9SW(2d)528; 155Miss242, 124S344; 220MoA812, 278 SW818. See also 28F(2d)118. [a] (1) 201Iowa174, 206NW819; 130Kan359, 286P247; 220MoA812, 278SW818. (2) 203Cal 379, 264P240. (4) To show conspiracy. TexCivA 16SW(2d)874. (5) To present issue of fraud. Wis 231NW 585. (6) To support finding warranting setting judgment aside. TexCivA 30 SW(2d)371. [b] (1) 198Cal 500, 246P 53; 121Kan212, 246P506; 11LaA454, 123S442; 322Mo 654, 15SW(2d)842; MoA 19SW(2d)776; 55ND392, 213NW495. (3) To show conspiracy. 228Ky110, 14 SW(2d)410.

496–15 316Mo1310, 293SW414; Mo 19 SW(2d)654; 220MoA812, 278SW818. [a] **Evidence held insufficient.**–Mo 19SW (2d)654 (to establish fraud or conspiracy).

496–19 198Cal 500, 246P53.

497–21 115Nebr309, 212NW622.

497–29 IndA 170NE791; TexCivA 278 SW229. [a] **Finding of intent to defraud unnecessary.**–83CalA137, 256P484.

497–29½–New. The entire controversy will be heard in one proceeding. TexCivA 296SW977.

497–31 Pa 151A683 (necessity of sending case to jury where testimony conflicts); TexCommnA 11SW(2d)299; TexCivA 294SW909; TexCivA 13SW (2d)979. But see OhA 173NE243. [b] **Excuse for failure to be at trial** held for jury. TexCivA 294SW909.

497–35½–New. Hearing goes only to prima facie showing of meritorious defense, and not to its validity. TexCivA 294SW909.

497–35⅓–New. Facts set up as excuse for defendant's absence at trial held for the court, as to their sufficiency to avoid judgment. TexCivA 294SW909.

497–35¼–New. Facts alleged as basis for setting aside dismissal are for trial court's determination. 117Tex214, 299 SW888.

497–35⅙–New. Doubt as to the sufficiency of the facts alleged should be resolved in favor of applicant. 88IndA 352, 163NE846(2dcase).

497–35⅙–New. Two trials are not permitted, but every issue raised on both issues of the case must be disposed of on one trial. TexCivA 11SW(2d)329 (1stcase).

497–35⅐–New. In a suit to set aside an order of dismissal and to try the case on its merits, the right to have such order set aside and plaintiff's right to recover, if the order was set aside, may be determined in one proceeding. TexCivA 15SW(2d)722.

497–37 See also 198Cal 500, 246P53.

498–47 15F(2d)145; 241NY546, 150NE 549; TexCommnA 299SW231; TexCommnA 29SW(2d)963.

498–48 84IndA676, 151NE26.

498–54 TexCivA 28SW(2d)825.

498–56 206Cal 436, 274P534; 101NJEq 60, 137A828.

498–57 241NY546, 150NE549.

499–58 [a] **Trust may be engrafted on property** in hands of beneficiary where judgment was procured by fraud. TexCivA 300SW225.

499–60 [a] **Trial on merits is for jury** where jury case is presented. OhA 173 NE243.

499–61 TexCivA 7SW(2d)930.

499–62 169Ark393, 275SW703.

499–63 TexCivA 3SW(2d)835. [b] **Application.**–241NY546, 150NE549.

499–65½–New. A grantee under an unregistered deed is not entitled to assert a claim for betterments in a suit to enjoin the enforcement of a judgment obtained against his grantor. 190NC 14, 128SE494, 40ALR273.

499–65⅓–New. The court has authority to render a substitute judgment on redetermination of the issues. TexCivA 7SW(2d)930.

499–65¼–New. Defendant, in a suit to set aside a default judgment against a garnishee, can take judgment against the garnishee even though defendant's attorney knows of the garnishee's settlement of the same claim in another case. MoA 19SW(2d)776.

499–68 84IndA676, 151NE26, 152NE 2; 201Iowa984, 206NW827, 828 [cit CJ]; 55ND392, 213NW495, 498 [cit CJ]. [d] **Compensation for expenses.**–55ND392, 213NW495.

500–73½–New. A judgment rendered in a proceeding attacking a judgment on the ground of fraud will not be reversed unless the judgment is clearly against the weight of the evidence. 36 OklACR362.

500–80 See TexCivA 293SW223.

500–83 24OhA342, 156NE237.

500–90 39Wyo 379, 272P12.

500–90½–New. Under statutes an injunction does not release errors going to the jurisdiction but only those available on appeal. 155Miss242, 124S344 (injunction against judgment because of unauthorized appearance of attorney).

500–92 [d] (1) 233 IllA591.

501–4 333 Ill 267, 164NE685; TexCivA 295SW653.

501–5 83NH115, 139A184; TexCivA 295SW653, 656 [quotCJ]. [a] (2) Also on other courts. 82NH170, 131A44. [b] **Particular judgments construed.**–5 LaA44.

501–6 169Ark399, 275SW890; 231Ky 682, 22SW(2d)111; 156Miss8, 125S912 (2dcase); TexCivA 295SW653, 656 [quotCJ]; TexCommnA 16SW(2d)523; TexCivA 283SW189; 147Wash497, 266 P688.

501–7 135Okl 159, 274P655; TexCivA 295SW653, 656 [quotCJ].

502–8 200Cal 743, 254P1101; 228App Div314, 239NYS71; TexCivA 295SW 653, 656 [quotCJ].

502–9 167LaA1063, 120S857; 82Mont 222, 266P406; 135Okl 159, 274P655; TexCommnA 276SW199; TexCivA 295 SW653, 656 [quotCJ].

502–10 TexCivA 295SW653, 656 [quot CJ].

502–11 169Ark399, 275SW890; TexCivA 295SW653, 656 [quotCJ].

502–12 208Iowa559, 223NW274; 230 Ky586, 20SW(2d)451; MoA 17SW(2d) 566; TexCommnA 293SW563; TexCivA 295SW653, 656 [quotCJ].

502–13 TexCivA 295SW653, 656 [quot CJ].

502–14 TexCommnA 276SW199; TexCivA 295SW653, 656 [quotCJ].

502–15 100CalA24, 279P677; 120Kan 209, 243P306; 135Okl 159, 274P655; TexCivA 283SW189; TexCivA 295SW 653, 656 [quotCJ]; 105WVa567, 143 SE347 [quotCJ].

502–16 MoA 287SW1069; TexCivA 283SW189; TexCivA 295SW653, 656 [quotCJ]; 195Wis88, 217NW726. [b] **Mere fact that court refused to permit motion to make judgment more explicit** does not compel inference of construction which would make it erroneous. TexCivA 283SW189.

503–17 TexCivA 295SW653, 656 [quot CJ].

503–18 24F(2d)42; TexCivA 283SW 189; TexCivA 295SW653, 656 [quot CJ]. See also 156Md284, 144A231.

503–19 TexCivA 283SW189; TexCivA 295SW653, 656 [quotCJ].

503–20 34NM127, 279P72; TexCivA 295SW653, 656 [quotCJ]. But see TexCivA 283SW189.

503–20½–New. Judgment is to be construed with reference to the issues it meant to decide. 13F(2d)394.

503–20⅓–New. In determining the meaning of a word, the courts must take into consideration their conjunction with other words and the purpose of their use. 14F(2d)284.

503–20¼–New. A court's interpretation of its own decree is binding on other courts; 82NH170, 131A441.

503–20⅕–New. but in absence of interpretation, other courts may be called upon to construe a decree, but the question does not thereby become one of local law. 82NH170, 131A441.

503–20⅙–New. Where a journal entry of judgment contains the words "It is by the court ordered, adjudged, and decreed," the order following such words is the final and controlling portion of the judgment of the court, and where it is clear and unambiguous, it must be given effect. 120Okl 13, 250 P117.

503–20⅐–New. Judgment which is plain and unambiguous leaves no room for construction. TexCommnA 1SW (2d)597.

503–22 See also TexCivA 27SW(2d) 561.

503–26 TexCommnA 1SW(2d)597, 600 [citCJ].

503–26½–New. Judgment for want of jurisdiction cannot be aided by a recital that the court had jurisdiction. TexCivA 282SW339.

503–26⅓–New. Recitals, constituting a review of proceedings authorizing sentence of law, form no part of sentence but merely show justification for pronouncing it. Wis 217NW726.

503–28 46Ida595, 269P591, 592 [cit CJ]; 119Kan358, 239P1110, 43ALR 1387; 230Ky586, 20SW(2d)451; LaA 129S185; MoA 287SW1069; 115Or 580, 239P202, 205 [citCJ]; TexCivA 282SW351; TexCivA 295SW653, 656 [quotCJ]; 136Wash7, 238P990. See also 226Ky261, 10SW(2d)824.

504–29½–New. The scope of a judgment cannot be extended to parties not named therein by a recital in an execution issued thereon. 102CalA172, 282 P984.

504–31 TexCivA 29SW(2d)893.

504–33 115Or580, 239P202, 205 [cit CJ]; 147Wash386, 266P187.

504–33½–New. An informal opinion of

the trial judge does not control a subsequent formal judgment on the same subject. 149Wash489, 271P589.

504-37 TexCommnA 14SW(2d)813; TexCivA 291SW271. [a] (3) Judgment held one against incorporated insurance association and not against officials named as defendants individually. MoA 282SW478.

505-43 105Conn557, 136A108.

505-43½-New. A joint judgment in favor of several plaintiffs on its face entitled each to his proportionate share of the sum due. 221MoA215, 300SW 1054.

505-44 TexCivA 18SW(2d)231.

505-45 104Conn107, 132A395.

505-49 TexCivA 285SW835.

505-51 See also 44Philippine186.

505-52 See also 44Philippine186.

505-53 29PortoRico897. [b] (3) Where jury's verdict was gross sum in remainderman's suit for land sold at tax sale, rent will be deducted from other items to determine amount due. 171Ark594, 285SW365. (4) In action for damages and encroachment, judgment reciting that allegations in plaintiff's petition are true and that plaintiff is damaged in sum of five hundred dollars does not relate to prospective damages. 32 OhA111, 167NE614. [d] Mesne profits.-29PortoRico 897.

506-58 317Mo 1336, 298SW34; TexCivA 295SW653, 656 [quotCJ].

506-59 161Ga287, 130SE580; 146Miss 600, 111S584, 586 [citCJ]; TexCommnA 29SW(2d)967 (entry on court's trial docket).

506-60½-New. The fact that failure to perform the condition of an alternative judgment must be shown by evidence dehors the record does not affect its character as a final judgment. 210Ky 166, 275SW517.

506-63 316Mo 398, 289SW925.

507-68½-New. Opinions of judge or minute orders of judge preceding decision and judgment are merged in, and controlled by, judgment. 196Cal 439, 238P357.

507-76½-New. An unappealed decree which is sustainable only on a finding of certain fact will prevail over a contrary finding of fact in the decree. Iowa 209NW442.

507-83 83 IndA415, 148NE435.

507-89½-New. Judgment is not rendered bad because the trial court refuses to fix the amount and conditions of a supersedeas bond. 93Fla383, 112 S621.

507-89¼-New. A declaratory judgment that a party is the owner of an undivided interest in property is not an adjudication of partnership. 88 CalA528, 264P516.

507-89¼-New. In prior suit against lessor and lessees finding that lease had been executed in bad faith did not effect annulment but lease remained valid. Me 150A319.

508-91 [a] **Order made on exceptions** must give way to judgment on merits. TexCivA 18SW(2d)425.

508-93 See also 126Misc256, 212NYS 240. But see 80CalA704, 252P667.

508-94 Can [1930] 1DomLR918.

508-95 210Ky166, 275SW517.

508-95½-New. Effect of judgment nisi. Md 150A118.

508-3 191NC818, 133SE186.

508-4 191NC818, 133SE186.

508-7 39F(2d)594; 168Ark747, 271 SW704; 91Fla709, 109S677; 121Kan 39, 245P743; Mo 30SW(2d)77; 82NH 159, 131A155, 42ALR757; 190NC536, 130SE315; 117 Okl 195, 246P472; 132 Okl 180, 269P1052; 284Pa346, 131A 244; 48Philippine123; TexCommnA 281SW1045; TexCivA 282SW879, 883 [citCJ]; TexCivA 286SW519; 144Va692, 130SE902. See also TexCivA 7SW(2d)678.

509-9 [a] See also TexCivA 25SW(2d) 192. [b] (3) Where affidavit used as basis for order of publication is defective in mode of stating or sufficiency of proof, resulting judgment is not void. 126Misc826, 215NYS1 (voidable by direct attack).

509-10 98Fla759, 125S1.

509-12 191NC818, 133SE186. [a] **In theory of law void judgment** is no judgment, and can therefore have no effect. 170Ark285, 284SW770.

509-13 145Miss429, 110S861, 862 [cit Cyc]; 160Tenn329, 24SW(2d)881; TexCommnA 281SW1045; TexCivA 282SW 879. See also 22AlaA60, 112S96 (judgment which usurps no authority or jurisdiction is not void).

509-14 164Ga162, 137SE829; 255Mass 132, 150NE870; 189NC703, 128SE20; 190NC536, 130SE315; TexCommnA 281 SW1045; TexCivA 284SW315; 144Va 692, 130SE902. [a] **Void judgment of appellate court** has no more efficacy than void judgment of any other court. Mo 28SW(2d)662.

510-19 But see 91Fla709, 109S677.

510-19½-New. A void judgment may be quashed ex mero motu. 189NC703, 128SE20.

510-23 207Cal 221, 277P490; CalA 265P327; 129 Okl 244, 264P162; 133 Okl 1, 270P846; 137 Okl 67, 277P1029.

510-24 128Me96, 145A896, 64ALR790. [a] **Where judgment on cross-complaint would be unenforceable if vacated as to defendants not served,** judgment is void in toto. 89CalA375, 265P260.

510-27 29Ariz51, 239P299; TexCivA 13SW(2d)146; 144Va692, 130SE902. [b] In Indiana.-IndA 150NE12.

510-36 123 Or501, 262P946, 948 [quot CJ].

511-46 274US316, 47SCt600, 71L ed 1069; 8F(2d)813; 14F(2d)33; 30F(2d) 211; 215Ala660, 111S913; 220Ala448, 126S110; 7Alaska84; 173Ark192, 292 SW106; 176Ark786, 4SW(2d)897; Ark 31SW(2d)530; Cal 271P471; 71CalA 204, 234P903; 73CalA95, 238P133; 90 CalA675, 266P817, 820 [citCJ]; 91Fla 709, 109S677; 37GaA398, 140SE403; 38GaA526, 144SE670; 44 Ida283, 256P 368; 46 Ida595, 269P591; Ida 291P 1051; 318 Ill 591, 149NE517; 320 Ill 11, 150NE339; Ill 173NE352; 234 IllA 53; 118Kan595, 236P640; 124Kan573, 261P569; 211Ky817, 278SW152; 214 Ky200, 282SW1085, 1086 [quotCyc]; 216Ky674, 288SW301; 218Ky289, 291 SW381; 220Ky196, 294SW1039; 223 Ky70, 2SW(2d)1049; 223Ky561, 4 SW(2d)380, 381 [citCJ]; 232Ky254, 22 SW(2d)605; 164La458, 114S96; 164La 767, 114S647; 6LaA676; 7LaA161; 258 Mass425, 155NE454; Mass 173NE507; 241Mich15, 216NW407; 166Minn320, 207NW639; 314Mo 333, 284SW433; 318 Mo 373, 300SW778; 221MoA466, 282SW 68; MoA 18SW(2d)119; MoA 23 SW(2d)231; 78Mont170, 253P313; Nev 290P1024; 82NH221, 131A688; 103 NJL407, 136A174; 104NJL67, 139A62; 252NY284, 169NE386 (order directing arbitration); 131Misc401, 227NYS163; 133Misc843, 233NYS632; 121 Oh321, 168 NE473; 20 OhA267, 153NE140; 127 Okl 59, 259P854; 133 Okl 173, 271P833; Okl 292P15; 131 Or554, 284P172; 96 PaSuper556; 141SC290, 139SE633; 155 Tenn422, 295SW62; TexCommnA 13 SW(2d)679; TexCivA 296SW929; Tex CivA 300SW959; TexCivA 1SW(2d) 520; TexCivA 11SW(2d)212; TexCivA 12SW(2d)839; TexCivA 13SW(2d) 921; 143Va281, 129SE327; 151Va773, 145SE317; 136Wash265, 239P385; 103 WVa423, 137SE703; 199Wis82, 225NW 830; Man [1929] 1DomLR896; NS [1929] 2DomLR459. See also TexCivA 8SW(2d)790; Utah 268P1029, 1035 [citCJperStraup,J]. [b] **Court will merely determine** whether court had jurisdiction of subject-matter and parties. 235Ky21, 29SW(2d)598.

513-47 IndA 158NE299; 156SC43, 152 SE721.

513-48 274US316, 47SCt600, 71L ed 1069; 14F(2d)33; 21AlaA589, 110S697; 91Fla709, 109S677, 688 [citCJ]; 234 IllA53; IndA 157NE450; 124Kan573, 261P569; 211Ky817, 278SW152; 225 Ky228, 7SW(2d)863; 82NH221, 131A 688; 189NC703, 128SE20; 124 Okl 128, 254P38; 133 Okl 173, 271P833; 284Pa 346, 131A244; TexCivA 21SW(2d)380.

514-49 8F(2d)907; 177Ark870, 9 SW(2d)24; 195Cal569, 234P371; 237 IllA606; 200 Iowa1173, 206NW132; 211 Ky817, 278SW152; 225Ky228, 7SW(2d) 863; 232Ky254, 22SW(2d)605; MoA 19SW(2d)776; 189NC703, 128SE20; 190NC418, 130SE7; 30 OhA218, 164NE 765; 133 Okl 173, 271P833; 38 Okl ACR716 [citCyc]; 284Pa346, 131A244; 32PortoRico 740; TexCivA 13SW(2d) 142; TexCivA 17SW(2d)153; TexCivA 26SW(2d)921; TexCivA 29SW(2d)461; 143Va281, 129SE327; 145Va391, 135SE 21; 145Va429, 134SE677. See also 146 SC385, 144SE82.

514-50 8F(2d)907; 178Ark1019, 14 SW(2d)245(2dcase); 74CalA704, 241P 584; 237 IllA606; Okl 291P529; 32 PortoRico 740.

514-51 74CalA704, 241P584; TexCommnA 13SW(2d)355; TexCivA 18W (2d)520; TexCivA 21SW(2d)380. [a] **Invalidity must appear affirmatively on face of record or one of accepted ways** to permit successful collateral attack. 189NC703, 128SE20. [b] **Judgment is at most only voidable** where record shows jurisdiction of subject matter and of parties defendant. 137SC450, 135SE558.

514-53 32PortoRico 740.

514-54 32PortoRico 740; 34PortoRico 216.

514-57½-New. Judgment appearing on its face to be valid is not subject to collateral attack. 196Cal 414, 238P687.

514-57¼-New. In some jurisdictions the only ways to attack a judgment are by motion for a new trial, by an appeal, by a motion for relief under statutory provisions, and by an independent suit in equity. 79CalA468, 250P195.

514-57¼-New. A judgment may be attacked collaterally only when its defects and infirmities are apparent. 146SC385, 144SE82.

514-57⅛-New. Judgment by the court of general jurisdiction cannot be attacked outside the record, although the record does not, on its face, show jurisdictional facts. 232Ky254, 22SW(2d) 605.

515-58 181Ark683, 27SW(2d)106; 72 CalA18, 236P570, 576 [quotCJ]; 234 IllA53; 246Mich465, 224NW630; 149 Va82, 140SE314, 57ALR490; NS [1929] 2DomLR459, 461 [citCJ].

515-59 220Ala529, 126S102; 234 IllA 53; TexCommnA 292SW191.

515-66 178Ark1019, 14SW(2d)245(2d case); 318 Ill 591, 149NE517.

515-69 [a] 103NJEq254, 143A425.

515-71 14F(2d)33; 133Misc843, 233 NYS632. [a] **Questions determined by first judgment** may not be collaterally examined on appeal from second judgment on same cause. 215AppDiv609, 214NYS402.

515-73 [b] **Amended judgment in foreclosure entered after due notice** cannot be collaterally attacked by holder of mortgage. 193Wis14, 213NW286.

516-85 214Ky200, 282SW1085.

516-87½-New. The rule of immunity of judgment from collateral attack applies with equal force to orders of court. 74CalA704, 241P584.

516-90 122Kan269, 251P1100; 133 Misc843, 233NYS632.

516-91 176Ark941, 5SW(2d)360; 203 Cal 306, 265P246; Iowa 232NW118; 121Kan471, 247P643; 169Minn434, 211 NW838; 217AppDiv96, 216NYS395; 128Misc456, 219NYS135. But see 136 Wash322, 239P1015.

517-98 85CalA413, 259P465; 124Kan 573, 261P569; 250Mich110, 229NW454; 314Mo 333, 284SW433; TexCr 31SW (2d)827; 65Utah609, 239P25, 26 [citCJ] (not deciding question); 69Utah181, 253 P204; 150Wash121, 272P72.

517-99 318 Ill 380, 149NE271; Utah 284P318 (judgment void on its face).

517-4 [a] (25) Insanity inquisition. 136Wash265, 239P385. (26) Determination of inheritance tax. 196Wis242, 219NW197.

517-5 Miss 130S106; 314Mo 333, 284 SW433; 100WVa253, 130SE456. [a] (1) 336 Ill 316, 168NE259; 318Mo 991, 2SW(2d)582; 126 Okl 71, 258P732.

518-6 TexCivA 1SW(2d)907.

518-14 213Ala38, 104S328; 181Ark27, 24SW(2d)865; 165Ga125, 139SE864; 44 Ida211, 256P369; 46 Ida379, 268P2; 261Mass209, 158NE836; 240Mich655, 216NW467; 242Mich284, 218NW679; 175Minn68, 220NW406; 177Minn34, 224 NW270; Nebr 228NW852; 253NY260, 170NE912; 227AppDiv160, 237NYS162 (court of equity's duty to respect decree of surrogate's court); 124 Okl 181, 254P

972; 141 Okl 24, 284P60; 37 OklACR 250; TexCommnA 280SW742; 100Vt51, 134A863.

519-16 189NC703, 128SE20 (dictum); TexCommnA 18SW(2d)1086. See also TexCivA 286SW298.

519-22 318Mo 373, 300SW778, 780 [cit CJ]; TexCivA 18SW(2d)520.

520-34 178Ark768, 12SW(2d)404; 72 CalA18, 236P570, 576 [citCJ]; 82NH 221, 131A688; 112 Okl 180, 240P321; 38 OklACR461, 463 [citCJ]; TexCivA 6SW (2d)129, 131 [quotCJ].

520-35 209Ky54, 272SW9; 316Mo 1310, 293SW414; 317Mo 1298, 298SW732, 55 ALR489; 318Mo 373, 300SW778; 82NH 221, 131A688; 37 OklACR250, 252 [cit CJ]; 38 OklACR461, 463 [citCJ]; 284 Pa346, 131A244; 51SD144, 212NW866; TexCommnA 281SW1045; TexCommnA 299SW231; TexCivA 3SW(2d)576. [d] **"Direct attack" is proceeding** to amend, correct, reform, vacate, or enjoin execution, while "collateral attack" is attempt to avoid it. TexCivA 292SW642.

520-36 137Misc407, 244NYS473; 284 Pa346, 131A244; 51SD144, 212NW866; TexCommnA 281SW1045; TexCommnA 299SW231; TexCivA 3SW(2d)576. [d] **"Direct attack" is proceeding** to amend, correct, reform, vacate, or enjoin execution, while "collateral attack" is attempt to avoid it. TexCivA 292SW642.

520-36 137Misc407, 244NYS473; 284 Pa346, 131A244; 51SD144, 212NW866; TexCommnA 300SW31, 68ALR377. See also 146SC385, 144SE82.

520-37 TexCommnA 299SW231.

520-38 178Ark1158, 13SW(2d)617; 181 Ark683, 27SW(2d)106; 72CalA18, 236P 570; 203Cal 44, 262P1084; 89CalA375, 265P260; 205Ky54, 272SW9; 82NH221, 131A688; TexCommnA 299SW231; Tex CivA 6SW(2d)129, 131 [citCJ].

520-39 240Mich387, 215NW295; 37 Okl ACR250, 252 [citCJ]; 39Wyo 379, 272 P12.

520-42 112 Okl 180, 240P321.

520-43 72CalA18, 236P570; 203Cal 44, 262P1084.

521-47 240Mich387, 215NW295; Tex CivA 286SW344; TexCivA 7SW(2d)930; TexCivA 22SW(2d)688 (direct attack may be incident to trespass to try title).

521-48 Ida 291P1048; TexCivA 21SW (2d)703.

521-48½-New. An action for a declaratory judgment to determine the validity of a lease, authorized by a former judgment, is a collateral attack. 127Misc 374, 216NYS278.

521-49 TexCivA 6SW(2d)129; Tex CivA 18SW(2d)786; 153Wash102, 279P 402. See also 178Ark1019, 14SW(2d) 245(2dcase). But see 34F(2d)66; 114 Okl 5, 242P766.

521-50 Ind 172NE124; 177Minn34, 224NW270; 137Misc407, 244NYS473; 190NC536, 130SE315; TexCivA 18SW (2d)786; 153Wash485, 279P1098.

521-51 21AlaA584, 110S323; 137Miss 407, 244NYS473; 190NC536, 130SE315; 284Pa346, 131A244; TexCivA 284SW 315; TexCivA 2SW(2d)324; 136Wash 196, 239P391; 136Wash265, 239P385; 153Wash485, 279P1098. [a] **Nonjoinder of parties to original judgment** in attack thereon renders attack collateral. Tex CivA 22SW(2d)688.

521-52 72CalA18, 236P570; 84 IndA77, 149NE358; 146Miss600, 111S584, 586 [citCJ]; 35 OhA374, 172NE537; 39 Okl ACR191; 284Pa346, 131A244; TexCivA 3SW(2d)576; TexCivA 22SW(2d)688; 136Wash265, 239P385. [b] **In action for false imprisonment,** there can be no collateral attack of judgment of insanity, valid on face, set up as defense. 136Wash265, 239P385. [c] **Statutory provisions.**-Attack not made as provided by statute, if any, is collateral. 232Ky 254, 22SW(2d)605.

521-53 46 Ida595, 269P591, 592 [cit CJ]; 316Mo 1310, 293SW414; 318Mo 373, 300SW778, 780 [citCyc].

521-54 CalA 265P327; TexCivA 3SW (2d)544.

522-55 213Ala46, 104S330; 35Ariz73, 274P632; 181Ark683, 27SW(2d)106; 98 Fla627, 125S2; 40 Ida751, 236P863; 205 Ky54, 272SW9; 227Ky358, 13SW(2d) 260; 318Mo 373, 300SW778; TexCivA 284SW608; TexCivA 3SW(2d)576, 580 [citCJ]; 136Wash196, 239P391.

522-56 [a] (14) Petition for prohibition to prevent punishment for contempt for violating order appointing receiver is collateral attack upon order. 72CalA 18, 236P570. (15) Other instances. 57 ND474, 222NW615.

522-57 220Ky458, 295SW452; 223Ky 558, 4SW(2d)378; 189NC703, 128SE20; 113 Okl 265, 242P185.

522-57½-New. Even if supplemental petition attacking previous final decree is not excepted to, it may be regarded as collateral attack. TexCivA 2SW(2d) 324.

522-60 [a] **Claim that judgment made basis of action for contribution was not final** does not constitute collateral attack on judgment. TexCommnA 276SW 218.

522-60½-New. The name of the remedy by which a fraudulent judgment is attacked is immaterial, whether it is direct or collateral. 36 OklACR567.

522-60¾-New. A suit in the nature of a bill of review to set aside a default judgment because of an estoppel by a prior judgment is not a collateral attack. Tex CivA 10SW(2d)235.

522-60¼-New. The test, in determining whether an attack is direct or collateral, is whether all parties to be affected by the result of the suit are before the court. TexCommnA 15SW(2d)579.

522-60½-New. A suit to exercise the right of redemption is not a collateral attack on the decree under which land was sold. 179Ark305, 15SW(2d)990.

522-60¼-New. Within the rule precluding a party at whose instance a judgment is rendered from contending in collateral proceedings that the judgment is invalid, a "collateral proceeding" is a proceeding other than by an appeal or by motion during the term. 39Wyo 163, 273P176.

522-60½-New. A suit to set aside a judgment involves a collateral attack when it does not join all persons who are parties to the judgment. TexCivA 118SW(2d)212.

523-61 19F(2d)693; 258Mass425, 155 NE454; 246Mich278, 224NW341.

523-64 195Cal 364, 233P337, 43ALR 1309 (contention in suit to compel court to enforce judgment for alimony that place of sitting of court was unauthorized is collateral attack); 170La868, 129 S374.

523-65 248Mich380, 227NW755 (in suit to reach assets claimed to have been fraudulently conveyed).

523-71 118Nebr373, 224NW860.

523-72 219Ala453, 122S440; 318Mo 373, 300SW778; TexCommnA 281SW 1045; TexCivA 1SW(2d)466; 66 Utah 459, 244P210; Wash 288P241. But see 131 Or554, 284P172.

523-73 178Ark1019, 14SW(2d)245(2d case); 112 Okl 180, 240P321; 131 Or 586, 283P8; TexCommnA 300SW31, 68 ALR377; TexCivA 291SW615; TexCivA 300SW225.

524-75 126 Okl 71, 258P732.

524-80 112 Okl 180, 240P321 (fraud extraneous to record); 126 Okl 71, 258P 732.

524-80½-New. Where the invalidity of a judgment is only incidental and important in obtaining some other relief, an attack thereon must be made in the court having power to grant ultimate relief. TexCivA 8SW(2d)778.

524-80¼-New. A petition for a writ of mandamus and a writ of procedendo to expunge judgments from journals of courts has been held a collateral attack. 120 Oh222, 165NE843.

524-81 197Cal 649, 242P725; 74CalA 704, 241P584. But see 221MoA466, 282 SW68.

524-81½-New. A proceeding to prohibit the enforcement of an order of the probate court appointing an administrator with the will annexed on the ground that certain legatees and devisees had not been served with citation constitutes collateral attack on the judgment. 79CalA468, 250P195.

524-82 154Wash154, 281P484 (direct attack may be by cross complaint or answer).

524-84 317Mo 687, 297SW43, 44 [cit CJ]; MoA 17SW(2d)636.

524-85 See also TexCivA 6SW(2d)129. But see TexCivA 292SW642.

524-86 178Minn225, 226NW697(2d case); 153Wash485, 279P1098.

525-91½-New. Suit to quiet title on theory that a deed under judgment of foreclosure was void has been held "collateral attack." 220Ky196, 294SW1039.

525-91¾-New. Subsequent suit by an unsuccessful plaintiff in a former suit on the same issues constitutes a collateral attack. 82NH221, 131A688.

525-91¼-New. Insured's action on a policy covering stock of goods is a collateral attack on his conviction for burning identical property with intent to defraud insurer. 149Va82, 140SE314, 57 ALR490.

525-93 69CalA251, 230P993; 245 IllA 400; Ind 172NE124; 136Wash196, 239P 391. [c] **Where wife sues to quiet title,** judgment against her husband and community cannot be questioned. 136Wash 196, 239P391.

525-94 69CalA251, 230P993; 238Mich 296, 212NW968; TexCivA 29SW(2d) 461. [i] **Trustee and beneficiary.**-127 Misc374, 216NYS278.

526-98 213Ala173, 104S530 (equitable right of one not party, unaffected by decree); 228NYS711; 117 Oh152, 157NE 897; TexCommnA 291SW537; TexCivA 286SW519; TexCivA 23SW(2d)421. See also 7Alaska476.

526-99 TexCivA 274SW260; 144Va692, 130SE902, 906 [citCJ].

526-3 [b] **Plaintiff held not entitled to attack** judgment on notes because interveners did not summon defendant, without setting aside agreement pursuant to which judgment was rendered and under which defendant paid money to plaintiff and interveners for assignment of their claim and offering to return compensation received. 218Ky846, 292 SW513.

527-4 164La458, 114S96; TexCivA 286 SW519; 144Va692, 130SE902, 906 [cit CJ].

527-5 144Va692, 130SE902, 906 [cit CJ].

527-7 214Ala510, 108S604 [quotCJ entire section perSomerville,J]; 190NC 14, 128SE494, 496, 40ALR273 [citCJ].

528-14 23F(2d)109; 20AlaA514, 104S 561; 215Ala660, 111S913; 32Ariz532, 260P1023; 87CalA375, 262P48; CalA 290P512; 91Fla709, 109S677; 91Fla 709, 109S677; 94Fla104, 113S892; 98 Fla627, 125S2 (scope of inquiry is confined to jurisdictional defects); 161Ga 524, 131SE517, 44ALR534; 164Ga162, 137SE829; Ida 291P1051; 328 Ill 242, 159NE199; 328 Ill 472, 160NE76; 242 IllA508; 218Ky221, 291SW29; 3LaA7; 255Mass132, 150NE870; Mass 171NE 672; 241Mich34, 216NW390; 151Miss 676, 118S286(2dcase); 76Mont117, 245P 539; 83Mont282, 272P543(2dcase); 101 NJEq540, 138A369; 131Misc401, 227 NYS163; ND 229NW3 (judgment void on its face); 133 Okl 173, 271P833; 134 Okl 63, 272P878; 127 Or639, 271P983; 284Pa346, 131A244; 34PortoRico 222; 50SD484, 210NW726; 159Tenn586, 21 SW(2d)396; TexCommnA 300SW31, 68 ALR377; TexCommnA 2SW(2d)834; TexCivA 21SW(2d)380; 67Utah371, 248 P83; 144Va692, 130SE902.

530-15 23F(2d)92, 93 [citCJ]; 181Ark 474, 26SW(2d)589; CalA 291P451; 199 Ind467, 157NE721; Ida 291P1048; IndA 170NE341; 209Ky199, 272SW426; 220Ky196, 294SW1039; 228Ky42, 14 SW(2d)152; 322Mo 654, 15SW(2d)842; MoA 24SW(2d)175; 81Mont170, 261P 962; 81Mont442, 264P108; 115Nebr 838, 215NW107, 53ALR1057; 190NC 536, 130SE315 (judgment void on face subject to direct or collateral attack); 113 Okl 265, 242P185; 117 Okl 223, 246 P217; 127 Okl 59, 259P854; 128 Okl 27, 261P167; 133 Okl 173, 271P833; Tex CommnA 287SW1087; TexCivA 284SW 315; TexCivA 300SW225. See also 226 Ky214, 10SW(2d)837; TexCommnA 1 SW(2d)1086; TexCivA 7SW(2d)613. [d] **Affirmative showing on record** that contract was not to be performed in county of suit, giving court jurisdiction, held not made. 209Ky199, 272SW426. [e] **Sufficiency of pleading.**-232Ky254, 22 SW(2d)605.

531-17 Ida 291P1048; 309Mo 224, 274 SW758; TexCivA 284SW315, 317 [cit CJ].

531-19 84Colo 459, 271P180; 255Mass 132, 150NE870; 235Mich90, 209NW76 (jurisdiction lost by dismissal); 36 Okl ACR362.

531-20 Ariz 285P684; 201Cal 87, 255P

827; 133 Okl 173, 271P833; 135 Okl 177, 274P867; 50SD484, 210NW726; TexCommnA 1SW(2d)1086; Tex CommnA 2SW(2d)834.

531-21 201Cal 87, 255P827; MoA 31 SW(2d)274; 76Mont117, 245P539; ND 232NW314; 133 Okl 173, 271P833; 50 SD484, 210NW726.

531-22 255Mass132, 150NE870; 133 Okl 173, 271P833.

532-26 91Fla709, 109S677.

532-28 77Colo 504, 238P64; 91Fla709, 109S677, 683 [quotCyc]; 94Fla104, 113 S892; 52SD448, 218NW597; 36 Okl ACR362. [b] (4) Taking of testimony by court in unauthorized place does not render proceedings absolutely void so as to be vulnerable to collateral attack. 195Cal 364, 233P337.

532-30½-New. Where a judgment is void in fact for want of jurisdiction but is not void on its face, the better practice is to attack it by a separate action. 195Cal 569, 234P371.

532-31 38 OklACR420 (pleading held sufficient); TexCivA 282SW339, 346 [citCJperJones,CJ].

532-32 TexCivA 282SW339, 346 [cit CJperJones,CJ].

532-35 175Ark1138, 1SW(2d)805; 91 Fla709, 109S677; TexCivA 19SW(2d) 421 (appearance). Contra 136Wash265, 239P385.

533-38 22AlaA595, 118S229.

533-39 40F(2d)357 (where motion to quash service overruled); 203Cal 306, 265P246; 36 OklACR567; 51Philippine 980; TexCivA 18SW(2d)786. [a] 66 Utah103, 240P165. [e] Where sheriff made return of service of duly issued summons, its verity cannot be impeached in collateral action on judgment in absence of claim of fraud and meritorious defense. 86 IndA12, 155 NE614.

533-40 38GaA526, 144SE670; Tex CivA 10SW(2d)420. [a] Complaint must allege what record of judgment discloses on subject of notice. Ind 172 NE124.

533-41 38GaA526, 144SE670.

533-42½-New. Where a judgment is silent as to method of service, the record may be looked at to ascertain whether there is such defect as to render the judgment void. TexCivA 284 SW608.

534-43 126Kan195, 268P84; MoA 17 SW(2d)636; TexCommnA 300SW31, 68 ALR377.

534-44 223Ky558, 4SW(2d)378; Tex CommnA 300SW31, 68ALR377; Tex CivA 284SW608; TexCivA 292SW642; 143Va281, 129SE327.

535-45 203Cal 306, 265P246.

535-48½-New. Where service is sufficient to give the party notice, judgment is not subject to collateral attack after the term at which it was rendered. TexCivA 293SW850.

535-57 249NY122, 163NE124.

536-58 126Misc826, 215NYS1.

536-63 93Fla337, 112S45; TexCivA 292SW642. [a] (6) After trial judgment may not be attacked for failure to return notice within five days. 143 Va281, 129SE327.

537-68 88 IndA68, 163NE295; 322Mo 1017, 18SW(2d)13.

537-69 BC [1930] 2DomLR663.

537-72 220Ala448, 126S110; Ala 128S 440; 169Ark179, 281SW5; 170Ark771, 281SW379; 173Ark192, 292SW106; 176Ark941, 5SW(2d)360; 178Ark1019, 14SW(2d)245(2dcase); 74CalA704, 241 P584; 75CalA418, 242P894; 79CalA 468, 250P195, 197 [citCJ]; CalA 265P 327; 46 Ida595, 269P591, 592 [citCJ]; 328 Ill 472, 160NE76; 242 IllA508; Ind 172NE124; 94Fla60, 113S736; 41GaA 701, 154SE294(2dcase); 202 Iowa255, 207NW752; 209Ky199, 272SW426; 223Ky242, 3SW(2d)639; 233Ky507, 26 SW(2d)37; 231Ky494, 21SW(2d)808 (court complied with provisions of code); Mass 171NE672; 236Mich60, 209NW923; 146Miss581, 111S836; 115 Nebr838, 215NW107, 53ALR1057; 119 Okl 9, 247P379; 123 Okl 218, 253P99; 127 Okl 59, 259P854; 128 Okl 27, 261P 167; 155Tenn422, 295SW62; TexCivA 284SW608; 161Tenn155, 25SW(2d)580; TexCivA 3SW(2d)576 (county court); TexCivA 5SW(2d)579; TexCivA 11SW (2d)212; TexCivA 25SW(2d)1108; 135 Wash640, 238P639 (judgment of court of general jurisdiction). [b] (4) Mass 167NE655 (replevin).

538-73 202 Iowa255, 207NW752; 146 Miss581, 111S836; 115Nebr838, 215NW 107, 53ALR1057.

538-74 79CalA468, 250P195; 199Cal 523, 250P397; 233 IllA553; 333 Ill 267, 164NE685; 322Mo 654, 15SW(2d)842; TexCivA 3SW(2d)576, 580 [citCJ]; TexCivA 5SW(2d)579.

539-75 74CalA704, 241P584; 79CalA 468, 250P195; 233 IllA553; IndA 157 NE450; 322Mo 654, 15SW(2d)842; 112 Okl 183, 240P708.

540-76 79CalA468, 250P195; 233 IllA 553; IndA 157NE450.

540-77 72CalA18, 236P570; 199Cal 391, 249P517; IndA 157NE450; MoA 279SW751; 160Tenn329, 24SW(2d)881.

540-78 79CalA468, 250P195; 46 Ida 379, 268P3; 38 OklACR716.

541-88 112 Okl 183, 240P708.

541-91½-New. that order entered on minutes was entered on its date; Tex CivA 3SW(2d)576.

541-96 199Cal 523, 250P397, 398 [quot CJ].

542-98 216Ala282, 113S261; 209Ky 199, 272SW426, 427 [citCJ]; 86Mont 193, 282P1042; 158Tenn233, 12SW(2d) 714; TexCommnA 14SW(2d)813; Tex CivA 7SW(2d)613. [g] Rule not confined to cases involving ancient records. -209Ky199, 272SW426.

542-99 199Cal 523, 250P397. But see 81Mont442, 264P108.

542-2 TexCivA 5SW(2d)579.

542-3½-New. The presumption that process was properly served cannot be overcome by testimony of the clerk from memory dehors the record. 209 Ky199, 272SW426.

543-5 317 Ill 231, 148NE53.

544-8 158Tenn233, 12SW(2d)714; 160 Tenn329, 24SW(2d)881.

545-10 137Misc1, 242NYS408; 114 Okl 151, 152, 244P447, 448.

545-11 126 Okl 71, 258P732.

545-14 30F(2d)932; 32F(2d)625.

545-15 313Mo 642, 285SW462; Tex CommnA 15SW(2d)579; TexCommnA 25SW(2d)309; TexCivA 19SW(2d)862.

547-19 75CalA418, 242P894; 80CalA 393, 252P337; 46 Ida379, 268P3 (probate court); Ind 172NE124; MoA 18 SW(2d)119; TexCommnA 287SW1087; TexCommnA 29SW(2d)969; TexCivA 286SW344.

547-20 219Ala7, 121S423; 75CalA418, 242P894 (dictum); 141Miss96, 106S 106 (clerk's work of filing date of petition will not control over recitals in judgment of prior filing of petition); ND 229NW3.

547-21 75CalA418, 242P894 (dictum).

547-23 80CalA393, 252P337; 58ND 478, 226NW608; TexCivA 295SW950; TexCivA 21SW(2d)59.

548-25 169Ark179, 281SW5.

548-26½-New. In some jurisdictions a judgment must be held valid on a collateral attack unless the judgment roll shows it to be void, 79CalA468, 250P 195.

548-26½-New. and is the only evidence that may be considered. 79CalA468, 250 P195.

548-29 Wis 231NW585.

548-30 168Ga15, 147SE87; TexCivA 21SW(2d)703 (held to import absolute verity). But see TexCivA 5SW(2d)799. [c] Decree finding service of process by publication on affidavit of nonresidence cannot be collaterally attacked by showing only affidavit in files was one of "due diligence." 101WVa304, 132SE652.

549-33 181Ark683, 27SW(2d)106; 72 CalA18, 236P570 (recital of service of notice of motion appointing receiver cannot be attended because record shows want of notice of motion appointing receiver, since discharged, earlier in the action); 203Cal 44, 262P1084; 74CalA 704, 241P584; 79CalA468, 250P195; 244 IllA137; 226Ky214, 10SW(2d)837; 30 OhA94, 163NE214; TexCivA 284SW 315; TexCivA 284SW608; TexCivA 286 SW261; TexCivA 286SW344; TexCivA 2SW(2d)324; 67Utah371, 248P83. [g] If there is an objection, evidence contradicting recitals in judgment cannot be received. TexCivA 284SW315.

550-35 TexCivA 286SW298. See also 145Va429, 134SE677. [c] Questions determinable by examination of extraneous matter.-181Ark683, 27SW(2d)106.

550-36 91Fla858, 109S315; 40 OklACR 591, 596 [reh pending, and citCyc]; Tex CivA 284SW608.

550-37 40 OklACR591, 596 [reh pending, and citCyc].

551-39 35Ariz383, 278P381; 72CalA 18, 236P570; 242 IllA508; 119 Okl 9, 247P379; 40 OklACR591 [reh pending]; 38 OklACR716; TexCivA 27SW(2d)548; 67Utah60, 245P966. See also 333 Ill 267, 164NE685; TexCivA 17SW(2d)153. [a] Judgment founded on record showing disregard of fundamental law is subject to direct and collateral attack. 67Utah 60, 245P966.

551-41 333 Ill 267, 164NE685.

552-42 333 Ill 267, 164NE685.

552-43 80Colo 380, 252P353; 38 Okl ACR716 [citCyc]; 40 OklACR591 [reh pending].

552-44 43F(2d)254; 175Ark1138, 1SW (2d)805; 309Mo 224, 274SW758; MoA 18SW(2d)147; 247NY25, 159NE710; 133Misc538, 232NYS603; 134Misc491, 235NYS281; 52SD448, 218NW597; Tex CivA 22SW(2d)348 (supreme court's taking jurisdiction is conclusive on court of civil appeals). But see 40F(2d) 357; 145Va429, 134SE677. [a] (2) Cannot be disturbed after time to appeal has elapsed. 91Fla709, 109S677. [c] Where judgment adjudicating insanity did not show insane person's residence had been tried, oral evidence of nonresidence was admissible on motion to set aside judgment. MoA 18SW(2d)147.

553-45 35Ariz383, 278P381; 309Mo 224, 274SW758.

553-47 See also 91Fla709, 109S677.

553-51 98Fla627, 125S2.

554-53 117 Okl 195, 246P472, 473 [cit CJ]; TexCivA 3SW(2d)925, 927 [quot CJ]. [b] TexCivA 3SW(2d)925.

554-66 But see 96CalA460, 274P769.

555-75 274US316, 47SCt600, 71L ed 1069; 22F(2d)541; 28F(2d)869; 33F (2d)753; 21AlaA584, 110S323; 35Ariz 383, 278P381; 199Cal 391, 249P517; 203Cal 306, 265P246; 74CalA704, 241 P584; 80CalA660, 252P669; 91CalA37, 266P1002; 84Colo 459, 271P180; 98Fla 627, 125S2; 165Ga125, 139SE864; 84 IndA305, 151NE355; 208 Iowa1226, 227 NW116; 118Kan595, 236P640; 124Kan 573, 261P569; 233Ky148, 25SW(2d)35; MoA 31SW(2d)274; 83Mont282, 272P 543(2dcase); 104NJL67, 139A62; 112 Okl 183, 240P708; 119 Okl 57, 248P321; 124 Okl 128, 254P38; 36 OklACR362; 37 OklACR450; 133 Okl 173, 271P833; 131 Or554, 284P172; 284Pa346, 131A 244; 51SD513, 215NW494; TexCommnA 2SW(2d)834; TexCommnA 5SW(2d) 754; TexCivA 282SW879; TexCivA 291 SW615; TexCivA 5SW(2d)870; Tex CivA 6SW(2d)129; TexCivA 26SW(2d) 921; 149Va82, 140SE314, 57ALR490; Wash 289P51; 103WVa423, 137SE703; 108WVa75, 150SE365. [g] Evidence aliunde, though introduced without objection, is incompetent to impeach judgment as against collateral attack. Tex CommnA 292SW191. [h] Court will not review propriety of judgment rendered or rejudge merits on proof adduced. 235 Ky21, 29SW(2d)598.

558-76 203Cal 306, 265P246.

558-79 274US316, 47SCt600, 71L ed 1069; 203Cal 306, 265P246; 118 Okl 129, 247P31; TexCivA 29SW(2d)461; 141Wash389, 250P106; 196Wis242, 219 NW197. [a] That judgment is based on unconstitutional statute does not render it subject to collateral attack. TexCivA 291SW645.

558-82 133 Okl 173, 271P833, 834 [cit CJ].

559-85 50ND87, 194NW937.

559-86 234Ky580, 28SW(2d)783; MoA 22SW(2d)52; 116Nebr397, 217NW577 (partnership); 33NM356, 267P74; Tex CivA 282SW879, 883 [citCJ&Cyc].

559-87 176Ark941, 5SW(2d)360; Tex CivA 284SW673, 675 [citCJ]; TexCivA 5SW(2d)822.

560-90 See also 226Ky689, 11SW(2d) 717. [b] (3) Where judgment against partner as individual, as to whom jury

made no finding. 21AlaA589, 110S697.
560–92 82NH221, 131A688.
560–94 30Ga(2d)211; Cal 287P450; 121 Kan474, 247P868; Mo 30SW(2d)94. [d] **Where complaint in other action is before court,** judgment cannot be saved from collateral attack by presumption that it was supported by pleadings. 86 Mont387, 284P128.
560–96 Ida 288P416; TexCivA 38SW (2d)925, 928 [quotCJ].
560–97 91Fla709, 109S677.
560–98 203Cal 61, 263P200; 121Kan 474, 247P868; Mo 30SW(2d)94; 42 Okl ACR122 [reh pending]; 65Utah609, 239 P25, 26 [citCJ] (not deciding question); 39Wyo 379, 272P12. But see 136Wash 322, 239P1015.
561–3 33NM356, 267P74.
561–7½–New. Mere misplacement of papers cannot affect the judgment, since the pleadings are presumed to support the record. 226Ky214, 10SW(2d)837.
561–8 178Ark1019, 14SW(2d)245(2d case); 203Cal 306, 265P246; 80CalA 393, 252P337; 162Ga589, 134SE299; 332 Ill 316, 163NE707; 198 Ind480, 154 NE10; 89 IndA537, 166NE30; 223Ky 558, 4SW(2d)378; 226Ky103, 10SW(2d) 619; Mo 32SW(2d)91; 36 OklACR535; 196Wis242, 219NW197. [b] (13) Action properly triable at law tried in equity without objection. 91Fla709, 109S677. (14) Failure to take down testimony in writing and file it. 91Fla709, 109S677. (15) Failure to arraign or plead in prosecution for keeping house of ill fame. 198 Ind480, 154NE10. [h] **Order of sale.–TexCivA** 286SW315.
562–10 105Conn245, 135A39.
562–14 203Cal 306, 265P246.
562–17½–New. attorney's fees, 67Utah 573, 248P815.
562–21 121Kan474, 247P868.
562–22 227Ky258, 12SW(2d)693; 233 Ky148, 25SW(2d)35.
563–26 89 IndA537, 166NE30; 86Mont 193, 282P1042 (voidable and not void); NM 290P1015; 284Pa346, 131A244.
563–28½–New. or inconsistent with conclusions of law, 197Cal 649, 242P 725.
563–29 80CalA660, 252P669; 121Kan 474, 247P868; 131Misc401, 227NYS163, 169 [citCJ]; 66Utah459, 244P210. But see 86Mont387, 284P128.
563–30 80CalA660, 252P669; 121Kan 474, 247P868.
563–31 [d] (2) Failure to enter equity order or decree in chancery order book. 98Fla627, 125S2.
564–32 32Ariz532, 260P1023; 168Ark 747, 271SW704 (error of form); Tex CivA 12SW(2d)608.
564–35 232 IllA93 (dictum); 78Mont 170, 253P313, 316 [quotCJ].
564–36 78Mont170, 253P313.
564–37 78Mont170, 253P313, 316 [quot CJ].
564–38 78Mont170, 253P313, 316 [quot CJ].
564–39 78Mont170, 253P313, 316 [quot CJ]. But see MoA 31SW(2d)274.
564–40 78Mont170, 253P313, 316 [quot CJ].
564–41 78Mont170, 253P313, 316 [quot CJ].
564–41½–New. If the court grants relief of a character which it has no power to grant, its judgment is, in this respect, void. 54SD277, 223NW50.
565–50 38GaA526, 144SE670; 164La 458, 114S96; 176Minn120, 222NW646 (2dcase); 153SC78, 150SE473; Tex CivA 276SW961; TexCivA 286SW519. But see 117 Okl, 157NE482.
566–51 TexCivA 286SW519; TexCivA 300SW225; TexCivA 78SW(2d)678.
566–52 36F(2d)634; Ida 291P1051; 227AppDiv160, 237NYS162 (use of surrogate's court to defeat rights of contingent remaindermen amounts to fraud which equity will not enforce, though attack is collateral); 141 Okl 291, 285P 67. [a] **Collusive acts or fraud extrinsic or collateral to issues involved in trial of cause** is ground for collateral attack. 36 OklACR362.
566–54 117 Okl152, 157NE897.
566–55 213Ala38, 104S328; 213Ala46, 104S330; 161Ga739, 132SE83 (knowingly false allegation in petition necessary to give court jurisdiction); 117 Okl152, 157NE897; 112 Okl 180, 240P 321; 141 Okl 24, 284P60.
566–56 112 Okl 180, 240P321; 37 Okl ACR551; 117 Okl152, 157NE897.
566–58 36 OklACR362.
566–63 92Fla360, 109S458, 462 [citCyc perBrown,CJ]; 84Mont238, 275P267.
567–67 37GaA307, 140SE41; 203 Iowa 995, 213NW609; 246Mich278, 224NW 341; 313Mo 448, 285SW459; 133 Okl 1, 270P846, 847 [citCJ]; 137 Okl 90, 278P 281. [a] (2) 34 OhA252, 170NE611.
567–73 40GaA835, 151SE682.
568–75 24F(2d)646, 648 [citCJ]; 55 ND475, 214NW461; 33Wyo 326, 239P 531, 533 [citCJ].
568–77 33Wyo 326, 239P531, 533 [cit CJ].
568–81 274US434, 47SCt698, 71L ed 1139; 24F(2d)646; 85 IndA144, 152NE 849; 75Mont512, 244P488; 55ND475, 214NW461; Va 154SE587.
569–83 161Tenn298, 30SW(2d)253.
569–87 274US434, 47SCt698, 71L ed 1139; 55ND475, 214NW461.
569–92 28Hawaii395; 205 Iowa1385, 219NW537; 115Nebr260, 212NW431, 51ALR237; 190NC14, 128SE494, 40 ALR273; 192NC148, 134SE427; 141SC 290, 139SE633.
570–96 68CalA198, 228P734; 332 Ill 561, 164NE23, 63ALR658; 205 Iowa 1385, 219NW537. [a] **Judgment lien stands by itself,** exclusive of remedy by execution. 103Conn732, 132A20.
570–4½–New. The court may not decree that a judgment for damages shall be a lien upon specific property and direct a sale under execution to foreclose such lien. 68CalA198, 228P734.
570–4⅓–New. Such decree is not a proper exercise of equitable jurisdiction. 68CalA198, 228P734.
570–4¼–New. Such decree is not authorized by a statute providing that a person who gains a thing by fraud, accident, mistake, undue influence, violation of trust or other wrongful act is an involuntary trustee for the benefit of the person who would otherwise have had it. 69CalA198, 228P734.
570–5 82CalA691, 256P258.
571–11 66Utah194, 240P458, 460 [cit CJ].
571–13 29Ariz325, 241P515; 66Utah 194, 240P458, 460 [citCJ]. [e] **Judgment rendered without notice to defendant** does not create lien as to subsequent purchasers of property for value unless rule protecting judgment valid on face from collateral attack is binding on them. TexCivA 286SW519.
571–14 66Utah194, 240P458, 460 [cit CJ].
571–15 66Utah194, 240P458, 460 [cit CJ].
571–16 66Utah194, 240P458, 460 [cit CJ].
571–17 But see 317 Ill 126, 147NE793.
571–18½–New. In the absence of fraud or imposition, a court of chancery cannot, where the record shows a general judgment only, directly or indirectly, impose a debt involved therein as a lien on land. 103NJEq450, 143A553.
572–36 39 OklACR108; TexCivA 21SW (2d)326.
573–44½–New. In New York by filing transcript of judgment in county clerk's office, judgment creditor makes that judgment one of county court for purposes of collection and enforcement only. 125Misc683, 212NYS127.
573–45 But see 8F(2d)546; 115Nebr246, 212NW543; 190NC260, 129SE605; 57 ND17, 220NW130. [e] 115Nebr246, 212 NW543. (2) Transcript does not become lien when filed in another county till entered upon judgment record thereof. 117Nebr229, 220NW244 (judgment of federal courts of district of state).
574–48½–New. Recital in judgment against deceased person's estate that execution should issue does not interfere with right to have copy certified to probate court of another county for further proceedings in that court. Mo 27SW(2d)6.
574–50 28Hawaii395; TexCivA 274SW 292. [e] **Statute must be substantially complied with.–MoA** 24SW(2d)698. [f] **In Colorado.–**87Colo 541, 289P598.
575–60 28Hawaii395. [e] **Date of judgment** erroneously shown as three days prior to true date is held sufficient compliance. TexCivA 293SW248.
575–62 MoA 280SW439. [a] (5) Other applications of rule. TexCivA 273SW 957.
576–68 308Mo 422, 272SW964; 57ND 17, 220NW130; TexCivA 282SW671. But see 219Ala256, 122S12(2dcase). [h] **One asserting lien** must show that abstract was properly indexed. TexCivA 282SW671. [i] **Where court of equity decrees lien** on specified tract of land, lien exists independent of statute providing for docketing money judgments. 178Minn531, 227NW895.
577–79½–New. Right to have judgment registered should be enforced, independently of appeal, by proceedings in court of original jurisdiction. 164La 844, 114S707.
577–83 190NC260, 129SE605 (no valid lien where judgment creditor's name did not appear in index); 39 OklACR 108; TexCivA 274SW281; TexCivA 2 SW(2d)992; TexCivA 19SW(2d)426. See also 296Pa192, 145A804.
578–91 190NC260, 129SE605.
579–2 TexCivA 21SW(2d)326 (indexing insufficient).
579–8 215Ala632, 112S209; 242NY267, 151NE448, 45ALR554; 190NC260, 129 SE605.
579–10 219Ala256, 122S12(2dcase).
580–15 [a] (3) Judgment docketed to Theresa Weisner is not lien on premises purchased from her. 126Misc620, 214 NYS292.
580–23 [b] **"Bess" and "Elizabeth"** held to be synonymous. 242NY267, 151NE 448, 45ALR554.
581–41½–New. A certificate in the name of an individual is not defective where he is the sole owner of the partnership. 219Ala256, 122S12(2dcase).
581–44 219Ala256, 122S12(2dcase).
581–45 TexCivA 293SW248.
582–51 TexCivA 21SW(2d)326 (record of judgment insufficient).
582–58 5F(2d)75; Nebr 229NW121 (judgment affirmed on appeal); 194NC 320, 139SE443.
582–59 4F(2d)913; 5F(2d)75 (date of filing of abstract); 28Hawaii395; 205 Iowa1180, 219NW326; 144Miss482, 110 S428; 101NJEq134, 136A749; 103NJ Eq450, 143A553; 198NC190, 151SE255; 143 Okl 57, 287P414.
583–62 28 OhA255, 162NE645.
583–64 194NC320, 139SE443.
583–65 34GaA129, 128SE688 (lien of judgment on merits entered after finding for defendant of issue on his traverse of plaintiff's attachment affidavit runs from date of judgment only and not from levy of attachment).
583–66 194NC320, 139SE443.
583–67 **Cross references** see Mortgages § 651.
584–81½–New. Judgment lien not filed until within four months of affirmance of trial court's judgment on appeal is held not to relate back to date of rendition, as filing is necessary within four months of date of judgment. 103Conn732, 132A20.
584–85 28Hawaii395.
585–86 200 Ind501, 165NE60; MoA 256 SW114. [b] **Receivers appointed by federal court** take personal property free of judgment lien, where no execution has issued. 4F(2d)913.
585–90 125Kan290, 264P47; 78Mont 395, 255P1049.
585–95 See also 10PaDist&Co 243.
586–7 142 Okl 163, 286P327.
586–10 252Mass146, 147NE562 (piazza).
587–13 Ariz 290P155; 68CalA198, 228 P734; 246 IllA355; 147SC259, 145SE 113; TexCivA 21SW(2d)586.
587–15 Ala 128S784; 339 Ill 628, 171 NE629; 118Nebr76, 223NW641. See also 96Fla667, 119S116. [a] (3) Ala 128 S784.
587–22 217MoA554, 272SW1006; 32 OhA352, 168NE57 (in absence of levy). See also 204 Iowa401, 213NW769. [a] (11) Vendor's lien notes, mortgages, or deeds of trust liens. TexCivA 293SW 907. [c] **Unsatisfied judgment foreclosing such lien** gives no greater interest. TexCivA 293SW907.
588–23 146Miss225, 110S709; 145Miss

60, 111S92; 141SC290, 139SE633. [a] (2) When cotton crop is ready for harvest, judgment lien attaches. 150Miss 729, 116S731. [c] **Lien on automobile** attaches when filed at debtor's residence in county where automobile is located. 212Ala655, 103S839. [d] **Shares of stock.**–160Ga372, 127SE729.

588–26 [b] (2) Solicitor's right under decree allowing him fee for services in suit is "intangible property" not subject to lien of judgment against him. Miss 130S292.

588–28½–New. Judgment is a lien only against property of the judgment debtor. SD 226NW740.

588–29 94CalA223, 270P999. [f] **Rendition of judgment against corporation** does not fix lien on corporate realty previously conveyed to corporation's president and reconveyed to purchaser thereof. 170Ark1029, 282P355.

583–31 3Del 81, 130A498.

589–35 [b] **Judgment lienors are entitled to all interest of debtor** in land previously transferred by unrecorded deed, in satisfaction of judgment. 190NC14, 128SE494, 40ALR273.

589–35½–New. Lien of judgment attached where a previous conveyance by quitclaim deed was disregarded by all parties. TexCivA 273SW957.

589–38 170Ga906, 154SE445; 230Ky 351, 19SW(2d)988; Va 152SE376; 200 Wis11, 227NW392. See 39Wyo266, 270P 1072.

589–39 39Wyo 266, 270P1072, 1075 [cit CJ].

589–40 170Ark41, 278SW654. [c] **Judgment lien does not attach** to lands fraudulently conveyed, by levy of execution returned nulla bona. 170Ark41, 278SW654.

590–45 32F(2d)719; Ariz 290P155.

590–47 68CalA198, 228P734. But see 17F(2d)294.

591–55 Ariz 290P155; 180Ark238, 21 SW(2d)162; CalA 266P833, 835(2dcase) [quotCJ]; 94CalA223, 270P999; 332 Ill 561, 164NE23, 63ALR658; 202 Iowa 1053, 208NW853; 202 Iowa498, 210NW 559; 203 Iowa1352, 214NW513; 205 Iowa1385, 219NW537; Iowa 231NW 470; 173Minn225, 217NW136; 115Nebr 260, 212NW431, 51ALR237; 142 Okl 163, 286P327; 143 Okl 57, 287P414; Okl 293P218; 92PaSuper263; 152Va 707, 148SE581; Va 154SE587; Wash 289P1016; 105WVa270, 142SE65. [e] **Existing equities.**–115Nebr260, 212NW 431, 51ALR237. [f] **Lien of judgment against heir** attaches only to portion of real estate of intestate distributed by county court to judgment debtor. 142 Okl 163, 286P327.

592–57 TexCivA 293SW907.

593–59 78Mont445, 253P890. [a] But see 165Minn198, 206NW170, 43ALR41. [b] **In Louisiana.**–6LaA187.

593–62 180Ark238, 21SW(2d)162.

593–62½–New. Clearly no lien attaches, if at time of judgment property has been converted into personalty by operation of a will. 200 Iowa926, 205NW755.

593–62½–New. Judgment creditor has no lien as to property of judgment debtor sold at mortgage foreclosure sale for full value. 199 Ind24, 155NE42.

593–70 23 OhA484, 156NE146.

593–72 125Kan290, 264P47.

593–74 **Erratum.**–Strike out "Wilson v. Langhorne, 102Va631, 47SE871."

593–77 [a] **Judgment does not create lien** on ordinary oil and gas lease. 122 Kan134, 251P192.

594–79 55ND475, 214NW461, 464 [cit CJ].

594–80 336 Ill 594, 168NE666; TexCivA 273SW957.

594–81 Wash 289P1016.

595–84 202 Iowa498, 210NW559; 150 Va203, 142SE389.

595–91 202 Iowa498, 210NW559; SD 229NW376. [a] **Payment or tender of amount necessary to secure reconveyance** is necessary to render judgment lien on land. SD 229NW376.

596–5½–New. Contract right to reconveyance can be made subject to lien of judgment by equitable proceeding to have amount necessary for reconveyance determined and tendering amount. SD 229NW376.

596–6 CalA 266P833(2dcase); TexCivA 293SW907; TexCivA 25SW(2d)231. [k] **Lien of creditor's judgment such creditor relying on resulting trustee's possession** and being without notice of secret equity is held to attach to legal and equitable interests in land. 163 Ga551, 136SE528. [l] **Cestui of resulting trust who took title after trustee in possession used land** to secure credit is held estopped to assert trust to bar judgment lien of such credit. 163Ga551, 136 SE528.

596–7 But see 206Cal 378, 274P528.

597–12 TexCivA 293SW907.

598–26 202 Iowa1053, 208NW853.

598–27 78Mont395, 255P1049, 1051 [cit CJ]; 292Pa184, 140A860. [b] **Interest of heir.**–143 Okl 57, 287P414.

598–31½–New. A judgment lien does not attach to the debtor's interest in land as tenant in common where the debtor's title is undisclosed of record. 78Mont395, 255P1049.

598–32 132 Okl 183, 270P69.

598–33 180Ark238, 21SW(2d)162.

598–34 Wash 289P1016. But see Iowa 231NW470.

599–38 158Tenn374, 13SW(2d)798.

600–49 205Cal 715, 272P1063; 132 Okl 183, 270P69. But see 46SD532, 194NW 840, 30ALR501.

600–50 13PaDist&Co 762. [d] (1) 13 PaDist&Co 762.

601–57 39GaA165, 146SE495; Iowa 228 NW357; 102NJEq460, 141A265.

602–61½–New. A judgment confirming the stipulation fixing a lien did not establish the priority of such lien against the lien of a judgment creditor docketed on the same day that the stipulation was entered into, but established the existence and amount of the lien. 231NYS 635.

602–64 37GaA402, 140SE511. [b] **Election of remedies** is held to give landlord no priority where judgments were rendered in same term. 37GaA402, 140SE 511.

603–69 58ND1, 224NW901, 67ALR1294. [d] **Effect of issuance of execution and sale thereunder.**–58ND1, 224NW901, 67 ALR1294.

603–75½–New. or to bring an action in aid of execution, 23 OhA484, 156NE146.

603–76½–New. Priority in service of summonses of garnishment gives no priority of lien upon funds caught by the garnishment in favor of the garnishment first served. 39Ga165, 146SE495.

604–80 133 Okl 152, 271P683.

605–4 180Ark238, 21SW(2d)162; Cal 273P822; 161Ga543, 132SE99; 246 IllA 355; 200 Iowa990, 205NW760; 205 Iowa 1385, 219NW537; 153Md50, 137A509; 78Mont445, 253P890; 231NYS635; 34 OhA230, 170NE580; 287Pa358, 135A 216. See also 196NC603, 146SE576. [g] **Taking deed of trust to secure notes previously secured by vendor's lien** does not subordinate lienholder to previously subordinate judgment lien. Tex CommnA 23SW(2d)291.

607–5 317 Ill 126, 147NE793; TexCivA 293SW907.

607–6 317 Ill 184, 148NE2.

607–7 TexCivA 15SW(2d)1095.

607–8 See also TexCommnA 24SW(2d) 393.

607–10½–New. Judgment lien yields to superior equity of prior specific lien. 153Md50, 137A509.

607–12 117 Okl 195, 246P472; 296Pa 285, 145A836; TexCivA 293SW907.

607–14 81Colo 244, 254P989; 165Minn 198, 206NW170, 43ALR41; 178Minn55, 226NW201; 152Tenn648, 280SW408.

608–17 190NC14, 128SE494, 40ALR273. [b] (2) Judgment lien does not attach to interest conveyed by debtor by deed in escrow to be delivered on performance of condition. 180Ark238, 21SW (2d)162.

608–18 But see 43F(2d)340.

608–19 165Minn198, 206NW170, 43 ALR41. [b] (2) Statute held not to apply to conveyances which require aid of equity to establish. TexCivA 293SW 907.

609–28½–New. Under other statutes a judgment which may have priority over an unrecorded deed must be a judgment affecting the title to the property in question. 91CalA88, 266P836.

609–34 82Colo 98, 257P351; 147Miss 551, 113S189. [a] (5) Evidence held sufficient to sustain finding that judgment creditor had notice of unrecorded deed. 82Colo 98, 257P351. [e] **Assignee of judgment with notice of debtor's prior conveyance** cannot enforce judgment against land conveyed. 147 Miss551, 113S189. [f] **Creditor who has fixed lien on real estate by judicial process** or by abstracting judgment in deed record is creditor within statute. Tex CommnA 24SW(2d)393.

610–37 112 Okl 240, 240P739; 118 Or 39, 245P724.

610–41 101NJEq134, 136A749; 118 Or 39, 245P724. [e] (3) Where one under contract to purchase from his father, judgment debtor, lived on farm and cultivated it and had for years been in open and exclusive possession of it. 317 Ill 184, 148NE2. (4) Where judgment debtor and his son, third party claimant, were both in occupation of land, farm, possession must be exclusive. 317 Ill 184, 148NE2.

611–48 179Ark259, 15SW(2d)396(2d case); 28Hawaii395; 246 IllA355; 88 IndA197, 163NE600; Iowa 232NW720; 13PaDist&Co 762. See also Ill 173NE 281.

612–51 231NYS635. See also 296Pa192, 145A804.

612–53 13PaDist&Co 762.

612–54 230Ky61, 18SW(2d)884.

612–58½–New. A judgment creditor is not a purchaser for value entitled to a lien on land conveyed to the judgment debtor in trust. CalA 266P833(2dcase).

614–78½–New. The lien of a mortgage on personalty given contemporaneously with the sale thereof to secure the purchase money is of superior dignity to that of a judgment rendered against the mortgagor prior to the purchase and giving of the mortgage. 37GaA280, 139 SE910.

614–79 78Mont445, 253P890; 132 Okl 183, 270P69. But see 101NJEq414, 136 A333; 57ND426, 222NW480. [a] **Undivided vendors interest,** of administrator, is superior to lien of earlier judgment against legatee. Iowa 231NW470.

614–80 78Mont445, 253P890.

614–82½–New. Lien of judgment against equitable interest of vendee under an executory contract for the sale of land is not superior to a prior unrecorded bona fide assignment of the contract for value, given as security for debt. 55ND475, 214NW461.

615–93 16F(2d)109.

615–96½–New. Judgment lien will not be canceled because docketed in misspelled name. 126Misc620, 214NYS292 (though execution will be enjoined).

615–3½–New. Execution will be enjoined against property purchased from judgment in name different from that under which judgment was docketed. 126Misc620, 214NYS292 (though lien will not be canceled).

616–13 [b] **By intervening petition in receivership.**–That such petition was ex parte and without notice does not render void order establishing priority of judgment creditor's claim. TexCommnA 23 SW(2d)339.

616–17 34Wyo 378, 244P216, 44ALR 1255 [citCJ].

616–25 28Hawaii395; 161Tenn298, 30 SW(2d)253. [n] (6) Where personal property, subject to purchase-money mortgage for full value, is surrendered to seller in satisfaction of entire purchase price by the mortgagor acting in good faith and without fraud, property is not subject to antecedent or intervening judgment against the mortgagor. 37GaA280, 139SE910. (7) Rule is otherwise where mortgage was given to secure only part of purchase price. 37 GaA280, 139SE910.

617–29½–New. A purchaser of personal property which is subject to the lien of an enrolled judgment is charged with knowledge of the lien and takes subject thereto. 145Miss60, 111S92.

618–39 214Ala608, 108S525, 527 [cit CJ].

619–51 162La864, 111S261; 190NC512, 130SE323.

620–56 TexCivA 21SW(2d)586.

620-57 190NC772, 130SE611; 50ND87, 194NW937. See also **TexCivA** 9SW(2d) 419. [g] **Purchaser from judgment debtor who maintains adverse possession** for three years before suit to foreclose lien discharges land therefrom. **TexCommnA** 23SW(2d)291.
621-58 85 **IndA**144, 152NE849.
621-59 85 **IndA**144, 152NE849; 161 **Tenn**298, 30SW(2d)253. [a] **In Tennessee.**-161**Tenn**298, 30SW(2d)253.
622-70½-New. One purchasing land from a judgment debtor, and maintaining possession adversely for more than three years before the commencement of a suit to foreclose a judgment lien, acquires an adverse title independent from the title formerly held by the judgment debtor, thus discharging the land of the lien of the judgment creditor. **TexCivA** 9SW(2d)419.
623-30 234 **IllA**455.
624-81 234 **IllA**455. [a] (2) What constitutes issue. **Ill** 173NE281.
624-86 **ND** 232NW599.
625-88 321**Mo** 654, 12SW(2d)438.
625-92 294**Pa**474, 144A430.
626-95 165**Ga**890, 142SE277.
626-4 **MoA** 9SW(2d)538.
626-8 See also **CalA** 266P833(2dcase).
627-24 161**Tenn**298, 30SW(2d)253. See also 85 **IndA**144, 152NE849.
628-26 161**Tenn**298, 30SW(2d)253.
628-27, 135 **Okl** 61, 273P893.
629-51 161**Tenn**298, 30SW(2d)253.
630-57½-New. Where a judgment debtor conveyed land by a deed reciting that it was subject to the judgment, but his grantee agreed to pay the judgment, the lien on lands received in exchange is not discharged by the creditor's release of his lien on the lands conveyed reserving rights against the debtor, made without knowledge of the grantee's agreement. 127**Kan**825, 275P137.
630-60 74**Mont**513, 241P523, 527 [cit CJ].
631-97 297**Pa**74, 146A569.
631-99 [b] **Appeal from order vacating judgment.**-17F(2d)503.
632-6 170**La**363, 127S869.
632-14½-New. A judgment creditor does not waive his lien on personal property of the judgment debtor by authorizing the sheriff to release the first levy of execution. 145**Miss**60, 111 S92.
634-60 219**Ala**216, 121S517; **TexCivA** 273SW957, 961 [citCJ]. See also 84 **CalA**165, 257P889. [b] (2) Judgment debtor is not necessary party to suit to establish and foreclose lien against land conveyed by him, though plaintiff seeks to establish conveyance while insolvent with intent to hinder, delay, and defraud creditors. **TexCivA** 1SW(2d) 466.
635-64 [d] **In Alabama.**-128S595.
635-64½-New. The only remedy which a judgment creditor might have exercised but which was lost to her after the commencement and during the pendency of a trespass to try title suit against her judgment debtor, was the right to foreclose and sell lots under a judgment lien by a separate and independent proceeding. **TexCivA** 7SW(2d)634.
636-73 **Mass** 169NE145; **Miss** 130S292. [d] **In Kentucky.**-231**Ky**223, 21SW(2d) 269(2dcase).
637-76½-New. An assignment may be made pending an appeal although not enforceable until the appellate procedure is terminated. 105**NJL**336, 146A372.
637-77½-New. Partial assignment. Judgment creditor, without the assent of the judgment debtor, cannot assign part of judgment. 27**Hawaii**642.
637-77⅓-New. Such partial judgment does not change legal title to judgment. 27**Hawaii**642.
637-81 246**Mich**278, 224NW341.
637-95 246**Mich**278, 224NW341; 157 **Miss**358, 128S93 (municipal corporation).
638-2 157**Miss**358, 128S93.
638-8 102**CalA**286, 282P963 (written assignment held not to include judgment under which execution was issued).
638-10½-New. A judgment may be assigned by any method sufficient for the assignment of any other chose in action. **TexCivA** 14SW(2d)132.
639-18 231**Ky**223, 21SW(2d)269(2d case).
639-19 21**AlaA**442, 109S187.
639-23 215**Ala**150, 110S46.
639-27 21**AlaA**442, 109S187.
639-29½-New. The validity of an assignment is determined by the law of the state where the judgment is recovered. 246**Mich**278, 224NW341.
639-31 [b] **Where deed under void execution sale was set aside,** there was an equitable assignment of judgment to purchaser's vendee. 195**NC**339, 142SE 226.
640-45 **TexCivA** 14SW(2d)132. [a] (4) Transfer to clerk to secure costs is not valid. 21**AlaA**442, 109S187.
640-52 181**Ark**1121, 29SW(2d)682 (strict compliance).
641-54 104**WVa**561, 140SE537, 540 [cit CJ&Cyc].
641-57½-New. Mistake as to prospective action of appellate court regarding judgment does not invalidate assignment where assignor acquired no unconscionable advantage. **Ida** 292P222.
641-58 205**Cal** 373, 270P946.
641-59 39**GaA**294, 147SE137.
643-91 104**WVa**561, 140SE537, 540 [cit CJ&Cyc].
644-5 But see 33NM245, 264P951.
644-6 **NJ** 146A202. See also 7**LaA**150, 158 [citCJ].
644-8 102**Conn**429, 129A221. See also 231**Ky**223, 21SW(2d)269(2dcase).
645-13½-New. Where judgment debtor refuses to consent to partial assignment of judgment, the original judgment creditor may maintain an action in his own name for the full amount. 27 **Hawaii**642.
646-29 104**WVa**561, 140SE537, 540 [cit CJ].
646-35 104**WVa**561, 140SE537, 540 [cit CJ].
646-36½-New. or entry of satisfaction on the record by the judgment creditor, 104**WVa**561, 140SE537.
646-37 104**WVa**561, 140SE537.
646-41 [a] (2) Claim by assignee to title by estoppel based on ignorance of any claim to equitable set-off was affirmative defense. **MoA** 29SW(2d)721.
646-42 126**Me**529, 140A201; **MoA** 22 SW(2d)61; 127 **Or**578, 273P334.
647-43 78**CalA**713, 248P750.
649-65 104**WVa**561, 140SE537.
649-73½-New. A warehouse company has been held not to have violated an agreement to assign judgment for storage charges to a purchaser by causing execution to issue. 11**LaA**631, 124S580.
649-76 21**AlaA**442, 109S187.
650-87 89**CalA**35, 264P293; 36 **OklACR** 555.
650-90 36 **OklACR**555; 104**WVa**561, 140SE537; 40**Wyo** 367, 277P711, 63**ALR** 285. [a] (16) Right to lien of attachment and to enforce same. 104**WVa**561, 140SE537.
652-4½-New. The rights which pass with the judgment are only such as are vested in the assignor by virtue of the particular judgment and do not include those arising out of another and different proceedings, 36 **OklACR**555.
652-4⅓-New. although such other proceeding is a contest over the particular method of enforcing the judgment assigned. 360 **OklACR**555. [a] **Supersedeas bond given in different proceeding.**-36 **OklACR**555.
652-12 But see **Ida** 292P222.
652-15½-New. or a subsequent assignee, 246**NY**152, 158NE56.
653-37 But see **Me** 150A609; **MoA** 12 SW(2d)768.
655-63 135 **Okl** 61, 273P893. [e] (3) Judgment does not become dormant by reason of failure to issue execution where enforcement of judgment is restrained by injunction. **TexCivA** 274 SW255. (4) Order of sale is "execution" within statute providing that, if no execution issues within twelve months, judgment becomes dormant. **TexCivA** 292SW642. (5) Order of sale of partnership property not being construed as execution against individual defendants, judgment held dormant as to them. **TexCivA** 292SW642. (6) Second execution issued within ten-year period, but not placed in hands of officer, held insufficient to keep judgment alive. **TexCivA** 4SW(2d)133.
656-67 [a] **Force of execution** cannot be attributed to order of sale when both judgment and order of sale provide otherwise. **TexCivA** 292SW642.
656-72 37**GaA**13, 138SE795. [a] **Tex CivA** 20SW(2d)849 (where one party to one cause of action appeals and other parties to other cause of action fail so to do judgment as to them is final as respects time in which execution must be issued).
657-77 **TexCivA** 11SW(2d)826.
657-80 **TexCivA** 19SW(2d)795. [a] (2) Inaccuracy in recitals of execution as to date of judgment does not vitiate execution where parties were not misled. 127**Kan**587, 274P239. (3) Failure of execution to recite partial payment does not vitiate execution. 127**Kan**587, 274 P239. [c] **Judgment against defendants sued jointly.**-127**Kan**587, 274P239.
657-86 **TexCivA** 19SW(2d)795.
657-87½-New. The filing of an affidavit of illegality by a defendant to a levy made against him alone does not prevent the judgment from becoming dormant as against other defendants. 35 **GaA**131, 132SE233.
657-88 170**Ga**666, 153SE757; 37**GaA** 282, 140SE48. [f] **Necessity of record on public dockets.**-37**GaA**282, 140SE48.
658-4 165**Ga**890, 142SE277.
658-6 134 **Okl** 89, 272P408.
659-16½-New. Failure to revive does not invalidate judgment of foreclosure against comaker of note, where deceased comaker had parted with interest in land securing payment of note. 220**Ky** 196, 294SW1039.
659-19½-New. The death of a party does not render ineffective a self-operative judgment which requires no execution or other process for its enforcement. 120**Kan**32, 242P143 (judgment quieting title).
659-19⅓-New. Where further proceedings are had on such judgment such as modification, a revivor is necessary. 120 **Kan**32, 242P143.
659-29 220**Ala**134, 124S305.
659-30 101**NJEq**140, 136A740.
660-44 23**AlaA**32, 120S300.
660-46 **CalA** 289P685.
660-49½-New. Where an assignee is entitled to revival and no part of judgment has been paid, judgment should be revived in its entirety as it existed at time of assignment. **Nebr** 229NW17.
660-53 But see 129**Kan**244, 282P732.
660-57 But see 300**Pa**250, 150A586.
660-58½-New. In Texas a dormant judgment may be revived against a defunct corporation. **TexCivA** 292SW 973.
660-58⅓-New. A decree against a representative of deceased administratrix for settlement of former administration may be revived against administratrix de bonis non of deceased administratrix. 214**Ala**155, 107S66.
662-87½-New. Where copy of justice's judgment filed with clerk of circuit court was not certified transcript required by statute, judgment of revival is void. **MoA** 24SW(2d)698.
662-87⅓-New. Judgment of revivor cannot be revived in proceeding by scire facias to revive judgment. **MoA** 25 SW(2d)575.
662-89 220**Ala**134, 124S305; 247 **IllA** 315; 300**Pa**250, 150A586; 90**PaSuper** 470; 8**PaDist&Co** 591.
662-91 24F(2d)289; **MoA** 21SW(2d) 777 (claim that judgment has been destroyed by proceedings in probate court against estate of judgment debtor).
663-10½-New. Defendant, obtaining judgment on plea that former judgment against him was res judicata, cannot set up second judgment as defense in suit to revive former judgment. **TexCivA** 286SW900.
663-17 See also 4**LaA**334, 336 [citCJ].
663-18 But see 32NM478, 259P614, 55 **ALR**467.
663-19 8**PaDist&Co** 591.
664-25 90**PaSuper**470.
664-27 But see 300**Pa**250, 150A586.
664-32 300**Pa**250, 150A586.
664-33 300**Pa**250, 150A586.
664-33½-New. That judgment was erroneously classified in the probate court does not prevent proceedings against

heirs of the judgment debtor to revive a lien of the judgment. **MoA** 21SW(2d) 777.

664-34 [c] **After death of judgment debtor,** proceedings to revive lien of judgment must be taken in court where judgment was rendered and not in probate court. **MoA** 21SW(2d)777.

665-43 26F(2d)346; 37GaA282, 140SE 48; **Nebr** 229NW17.

666-50 215Ala682, 112S238; 179Ark 364, 16SW(2d)179.

666-51 294Pa474, 144A430. [a] (2) **MoA** 25SW(2d)575. [b] (3) Under some statutes time within which judgment may be revived begins to run from issuance of last execution. **TexCivA** 19 SW(2d)795. [d] **In Georgia.**–37GaA282, 140SE48.

666-55 [a] **In Oklahoma.**–37 OklACR 579.

666-57 120Kan32, 242P143 (two years).

667-66 33NM356, 274P1068.

667-67 See also **TexCivA** 4SW(2d)144, 151 [citCJ].

667-69 **TexCivA** 19SW(2d)795.

667-71 **MoA** 17SW(2d)378; **TexCivA** 283SW189.

668-75 [a] (3) Burden of proof as to payment is on defendant. 4LaA334.

668-81 179Ark364, 16SW(2d)179.

669-83 33NM356, 274P1068.

669-2 8PaDist&Co 591.

670-12 220Ala134, 124S305.

671-29 222MoA805, 10SW(2d)317.

674-69 222MoA408, 7SW(2d)279. [a] **Failure to have alias scire facias issued at return term and succeeding pluries writs at every succeeding term** does not cause discontinuance of proceeding where orders continued case. 222MoA 408, 7SW(2d)279.

675-83 See also 222MoA805, 10SW(2d) 317.

675-88 But see 247 IllA315.

675-90 But see 220Ala134, 124S305.

675-92 [a] **Failure to serve** one of two defendants affords merely defense to defendant served. 41GaA717, 154SE653.

678-36½-New. Where one of several defendants in a dormant judgment is dead and has left no estate, or his estate is insolvent, the judgment may be revived against the surviving defendants only. 35GaA131, 132SE233 [citCJ].

678-36⅓-New. In such case a petition for scire facias showing such facts is not demurrable for failure to seek judgment against all defendants. 35GaA 131, 132SE233.

678-36¼-New. Where the judgment is not dormant as to a deceased defendant, his estate need not be made a party to a proceeding to revive the judgment. 35 GaA131, 132SE233.

679-46 **TexCivA** 292SW973.

679-48½-New. A petition to revive a dormant judgment is not demurrable for want of service, **TexCivA** 292SW 973.

679-48⅓-New. and need not set out judgment hæc verba. **TexCivA** 292SW 973.

679-48¼-New. A petition to revive a dormant judgment against a defunct corporation need not allege the date of entry of forfeiture of charts on record. **TexCivA** 292SW973.

680-74 But see 220Ala134, 124S305.

680-85 311Mo 234, 278SW671, 674 [quotCyc].

680-86 211Mo 234, 278SW671, 674 quotCyc].

680-90 But see 120Kan32, 242P143.

681-93 **MoA** 25SW(2d)575.

681-96 **MoA** 25SW(2d)575.

682-2 9PaDist&Co 243.

682-12½-New. Validity is unaffected by mere irregularities in the motion and scire facias. 179Ark364, 16SW(2d)179.

682-12⅓-New. In proceedings against heirs of a deceased judgment debtor to revive the judgment, error in assigning the judgment to the wrong class when filed in the probate court cannot be corrected. **MoA** 21SW(2d)777.

682-14 100Vt109, 135A3.

682-15 94PaSuper79.

684-55 179Ark364, 16SW(2d)179.

684-59 215Ala682, 112S238.

685-67 [a] (4) Land conveyed to terretenant after lien of original judgment had expired is not bound by revival. 96PaSuper208.

685-74 124Kan15, 257P953.

686-91 33GaA797, 127SE795.

686-92 214Ala534, 108S333.

687-2 [c] **Foreign judgment paid in currency of foreign country** has been held satisfaction only to extent of value of that money in American money. 221AppDiv321, 223NYS174.

687-11 221AppDiv321, 223NYS174.

688-23½-New. Payment of a lesser sum than due, upon plaintiff's promise to discharge it, will not bar recovery of the balance if there is no additional consideration for the promise. 99NJEq 558, 134A119.

688-23⅓-New. By accepting payment of stipulated installments on judgment after due date judgment creditor is not estopped from claiming default respecting subsequent installments. 132Misc 126, 228NYS647.

689-47 **Mo** 30SW(2d)71 (debtors primarily liable); **TexCivA** 271SW936; **TexCivA** 283SW193. But see **CalA** 290 P1053. [b] **Partial payment.**–221App Div321, 223NYS174.

689-48 **TexCivA** 271SW936; **TexCivA** 283SW193.

689-49 254NY363, 173NE223; 120Oh 133, 165NE719; 95PaSuper338; **Tex CivA** 271SW936.

690-54 **Mo** 30SW(2d)71; **TexCivA** 283 SW193; **TexCivA** 3SW(2d)937.

690-55 [a] **Under statute authorizing such assignment,** joint obligor must pay entire debt or more than his proportionate share as condition precedent to demand assignment of judgment. 198 NC190, 151SE255. [b] **Instruction that one joint debtor acquired no rights,** as against his joint debtor's grantee, by having judgment assigned to trustee held improperly refused. 198NC190, 151SE255.

690-59 **CalA** 289P685.

690-67 **TexCivA** 3SW(2d)937.

690-69 **OhA** 173NE241; **TexCivA** 280 SW286; **TexCivA** 283SW914. But see 46 Ida36, 267P460.

690-70 177Ark1193, 9SW(2d)783.

691-73 162La47, 110S84. [h] **In Nebraska.**–229NW17.

691-75 46 Ida36, 267P460.

691-79 **TexCivA** 283SW193.

692-36½-New. A litigant is entitled to only one recovery for breach of contract, whether paid by party who breached it or by a stranger. 143Va 802, 129SE491.

693-7 **MoA** 27SW(2d)711 (statute held not stayed); 126Misc103, 213NYS476. See also **MoA** 274SW491.

693-18 214AppDiv786, 210NYS703.

695-49 239NY220, 146NE342.

696-68 98PaSuper172. [a] 70CalA184, 232P997 (part payment).

696-69 239NY220, 146NE342.

696-78 85PaSuper285 (to determine amount remaining due).

697-90½-New. Merger takes place only where inferior security or indebtedness passes into one of superior degree. 83 IndA415, 148NE435.

697-94 83 IndA415, 148NE435.

697-95 [b] (1) **MoA** 21SW(2d)777 (where suit in equity was brought for purpose of collecting prior judgment).

697-97 **MoA** 21SW(2d)777.

698-99½-New. Courts will not hold that a judgment is merged in a subsequent judgment thereon where there is any reason why the creditor needs more than one judgment to collect his debt. **MoA** 21SW(2d)777.

698-99⅓-New. Judgment of the probate court allowing a claim on a judgment obtained against deceased in his lifetime does not destroy the vitality of the original judgment. **MoA** 21SW (2d)777.

698-8 **TexCivA** 283SW193.

698-12 124Kan287, 259P703.

699-17 [a] (10) Judgment on sealed instrument can be released only by sealed instrument but entry of satisfaction will raise estoppel. 155Md51, 141A434, 58ALR767.

699-20 128Misc528, 220NYS177.

699-23 See also 249 IllA127.

699-24½-New. The discharge of a judgment in which a note was merged is not limited by the methods of discharging negotiable instruments. 218 Ala390, 119S4.

699-25 248NY1, 161NE201.

699-30 101NJL447, 130A442.

700-33 [a] (4) Where defendant ceased the prosecution of his appeal upon the payment of the lesser sum. 101NJL 447, 130A442.

700-34 100NJL447, 130A442.

700-39 **TexCommA** 17SW(2d)772; **TexCivA** 281SW1113.

700-40 120 Oh133, 165NE719.

700-41 251 IllA184 (rule as to express reservation preserving rights against others held applicable).

700-42½-New. A release of one joint judgment debtor on payment of less than the amount of the judgment by an instrument providing that codebtors shall continue liable is effective to release the debtor agreed to be released. **TexCivA** 281SW1113.

701-44 221AppDiv321, 223NYS174; 152 Wash624, 279P106. See also **TexCivA** 9SW(2d)401.

701-48 **TexCivA** 280SW892. [b] (4) Release of alimony judgment for less than due thereon is without consideration as to balance. **MoA** 290SW624.

701-52 **Ida** 289P610.

701-54 **Conn** 151A312; 126Me529, 140 A201, 202 [citCJ].

701-57 123 **Okl** 203, 254P494, **51ALR** 1265. [b] **Right can only be overcome** by facts external to judgment. **TexCivA** 23SW(2d)449.

703-61 [b] **Partnership firms excluded from statute.**–**Alta** [1930] 1DomLR280.

703-62 188Wis24, 205NW404.

703-63 188Wis24, 205NW404.

704-68 29Hawaii702, 710 [quotCJ]; **MoA** 22SW(2d)61.

704-73 [a] (2) Set-off of mutual judgments is clear legal right. 212Ala501, 103S474.

704-74 188Wis24, 205NW404.

705-76 188Wis24, 205NW404.

705-77 118Kan717, 236P841; 188Wis 24, 205NW404.

705-79 118Kan717, 236P841; **TexCivA** 23SW(2d)449.

706-80 13PaDist&Co 167; 188Wis24, 205NW404. [a] **Countervailing equities** to be considered as ground for refusing to set off judgments must be equities existing at time application for set-off is made. 188Wis24, 205NW404.

706-90 188Wis24, 205NW404.

706-95 44 Ida403, 258P370.

707-98 **Alta** [1930] 1DomLR280 (foreign judgment).

707-2 188Wis24, 205NW404.

708-9 188Wis24, 205NW404.

708-10 188Wis24, 205NW404.

710-39 **Sask** [1930] 1DomLR980.

710-43 [a] **Set off not allowed.**–213Ala 490, 105S651.

711-58½-New. The assignee of a judgment cannot use it as a set-off to defeat the debtor's exemption. 13PaDist &Co 167.

711-60 338 Ill 154, 170NE250.

711-61 252 IllA275.

712-68 118Kan717, 236P841.

714-87 [b] (2) Evidence held sufficient to show insolvency of judgment debtor at time of assignment of judgment. 252 IllA275.

714-88 [b] **Suit against assignee of judgment.**–Claim by assignee to title by estoppel is affirmative defense requiring proof. **MoA** 22SW(2d)61. [c] **Suit not barred by failure to plead cause of action** on note in prior suit where note was not due when first suit was filed. **MoA** 22SW(2d)61. [d] **Suit not barred by failure of plaintiff to consolidate suits.**–**MoA** 22SW(2d)61.

714-95 [c] **Laches not shown.**–252 IllA 275.

715-12 9LaA726, 120S223(1stcase); 196NC450, 146SE74.

716-22 [b] **County not assenting** to partnership's assignment of claim against it to one partner held entitled to set off judgment for tort against partner and partnership. **TexCivA** 297 SW918. [c] **Joint and several judgment** may be set off against separate demand of one of judgment debtors. **TexCivA** 297SW918.

716-32 127 Or578, 273P334.

716-33 219Ala131, 121S420; 158La405, 104S187; 169LaS09, 126S69 (defendant is not entitled to set off double credit); 32NM478, 259P614, 55ALR467; **Tex**

CivA 12**SW(2d)**674. [a] (3) Other instances. 169**La**809, 126**S**69.
716-34 169**La**809, 126**S**69.
717-39 168**Minn**280, 210**NW**15.
717-40½-New. A partnership indebtedness, not shown to have arisen out of, or to be incidental to or connected with, the transaction in which a note on which the judgment was based was given, is too remote and cannot be set off against the judgment. **TexCivA** 12 **SW(2d)**674.
717-42 **TexCivA** 12**SW(2d)**674.
717-46½-New. A claim for damages for breach of contract against plaintiff's assignor, being a claim for unliquidated damages, cannot be set off. 316**Mo** 812, 293**SW**760.
717-46½-New. In a suit by the assignee of a judgment from a nonresident who is the real party in interest, defendant may prove facts showing right to set off for an unliquidated claim against the assignor. 316**Mo** 812, 293**SW**760.
717-48 101**NJEq**140, 136**A**740, 741 [cit CJ].
718-53½-New. A default judgment against a third party is not subject to satisfaction under execution on judgment against copartnership. 102**CalA** 172, 282**P**984.
718-59 91**CalA**606, 267**P**392.
719-74 76**Mont**117, 245**P**539, 543 [cit Cyc].
719-76 76**Mont**117, 245**P**539, 543 [cit Cyc].
719-80 76**Mont**117, 245**P**539, 543 [cit Cyc].
721-16 But see 215**AppDiv**277, 213**NYS** 463. [e] **Imprisonment temporarily suspends** judgment or rights of judgment creditor. 215**AppDiv**277, 213**NYS** 463.
721-18½-New. But statute prohibiting imprisonment of prisoner under like process in same action does not affect rights or remedies of other creditor obtaining judgment in same action. 215 **AppDiv**277, 213**NYS**463.
721-20 221**AppDiv**321, 223**NYS**174, 183 [citCJ].
722-24 249**Mich**567, 229**NW**590.
722-25½-New. Voluntary release and satisfaction by attorneys of judgment entered erroneously, in their favor for attorney's fees as part of costs is effectual to cancel and satisfy the judgment. **Iowa** 227**NW**584(1stcase).
722-29½-New. Lapse of time. In Washington by statute lapse of time of six years after rendering of judgment satisfies the demand just as payment. 5 **F(2d)**75.
722-30 **Md** 151**A**21; 152**Tenn**166, 274 **SW**544.
722-37 232**Mich**2, 204**NW**764; **Mo** 20 **SW(2d)**502; **MoA** 9**SW(2d)**531; 27 **Oh NPNS**465 (joint tort-feasors). See also 244**Mich**367, 221**NW**287.
723-38 232**Mich**2, 204**NW**764.
723-43 4**LaA**244, 247 [quotCyc]; 314 **Mo** 13, 283**SW**51, 45**ALR**1466. [e] **Francs.**-128**Misc**528, 220**NYS**177. [f] **Reservation in instrument satisfying French judgment** does not keep surrogate's decree alive. 128**Misc**528, 220**NYS** 177.
724-50½-New. Satisfaction paid by offending party will not relieve another distinct offender from consequences of violation by him of an entirely different obligation. 143**Va**802, 129**SE**491.
724-57 102**CalA**286, 282**P**963 (court may not vacate execution and declare judgment satisfied on uncorroborated affidavit of judgment debtor).
725-85 222**MoA**510, 281**SW**75.
727-12 222**MoA**510, 281**SW**75, 77 [quot CJ].
727-13 222**MoA**510, 281**SW**75, 77 [quot CJ]. But see 218**Ala**390, 119**S**4.
728-28 222**MoA**510, 281**SW**75, 77 [quot CJ].
728-29 222**MoA**510, 281**SW**75, 77 [quot CJ].
730-50 [b] **Evidence held sufficient.-Iowa** 232**NW**695.
730-53 See also **TexCommnA** 17**SW(2d)** 772.
731-71 95**PaSuper**108 (order discharging rule to satisfy judgment affirmed).
731-86½-New. Damages are not allowed without proof as to amount. **Iowa** 232**NW**695.
732-2 115**Nebr**260, 212**NW**431, 51**ALR** 237; **SD** 228**NW**466.
732-9 **MoA** 280**SW**57.
733-21 115**Nebr**260, 212**NW**431, 51**ALR** 237.
733-25 249**Mich**22, 227**NW**710.
734-26½-New. or where payment was not in fact made, 115**Nebr**260, 212**NW** 431, 51**ALR**237.
734-26½-New. or where satisfaction has become inoperative by reason of the reversal of the judgment, 115**Nebr**260, 212**NW**431, 51**ALR**237.
734-27 115**Nebr**260, 212**NW**431, 51**ALR** 237.
734-30 **MoA** 280**SW**57.
734-37 115**Nebr**260, 212**NW**431, 51**ALR** 237.
734-39 115**Nebr**260, 212**NW**431, 51**ALR** 237.
734-40 222**Ky**374, 300**SW**889; 115**Nebr** 260, 212**NW**431, 51**ALR**237; **SD** 228**NW** 466.
735-54 **MoA** 290**SW**624.
736-57 **MoA** 290**SW**624; **Nebr** 230**NW** 446 (petition on motion held not demurrable).
736-60 [a] **Evidence held to sustain judgment** overruling motion to set aside release. **MoA** 290**SW**624.
736-61 [a] **Claim that satisfaction piece was delivered on unfulfilled condition raises issue** determinable only at trial, so that motion to vacate should be denied. 126**Misc**561, 214**NYS**37.
736-66½-New. An execution creditor suing debtor on loss of property purchased to correct record showing credit on judgment is not required to plead that judgment is still in force. 222**Ky** 374, 300**SW**889.
736-68 [a] **Statutes inapplicable.**-115 **Nebr**260, 212**NW**431, 51**ALR**237.
737-74 104**WVa**561, 140**SE**537. [c] **Amount to which assignee is entitled may be corrected** by record of original decree in cause and decreed accordingly. 104**WVa**561, 140**SE**537.
737-82½-New. The court has jurisdiction to proceed in an original divorce suit on motion to set aside satisfaction of alimony judgment. **MoA** 290**SW**624.
737-83 168**Ark**700, 271**SW**710 (court of superior jurisdiction); 43 **Ida**675, 256**P** 529.
737-84 168**Ark**700, 271**SW**710.
738-85 168**Ark**700, 271**SW**710.
738-88½-New. Where plaintiff, a sole heir, recovered judgment as administrator after his discharge as such and later secured an order substituting himself individually as plaintiff, the validity of such order is not vital to enforcement of judgment. 74**CalA**704, 241**P**584.
738-88½-New. Judgment may not be obstructed in the collection by anything short of properly meritorious defense thereto. **NJ** 144**A**110.
739-15½-New. . or where suit on the judgment is against a defendant not a party to the original action, 261**Mass**409, 158**NE**763. [a] **Suit against insurer to recover judgment obtained against insured** in action in which insurer was not party is properly brought in equity under statute. 261**Mass**409, 158**NE**763.
741-44 170**La**1011, 129**S**619.
742-56 **NJ** 148**A**781.
743-71 **TexCivA** 294**SW**698, 699 [quot CJ].
743-72 46 **Ida**595, 269**P**591, 592 [quot CJ]; 220**Ky**154, 294**SW**1063; 125**Me**38, 130**A**513, 514 [quotCJ]; **TexCivA** 294 **SW**698, 699 [quotCJ].
743-76 104**Conn**585, 134**A**73; 110**Conn** 432, 148**A**365; 91**Fla**103, 107**S**261; 37 **GaA**228, 139**SE**681; **Ill** 173**NE**368; 171 **Minn**492, 214**NW**666; 222**MoA**518, 281 **SW**64. [a] (2) Parties cannot litigate same issues more than once. 180**Ark** 136, 20**SW(2d)**630.
744-78 15**F(2d)**652; 215**Ala**328, 110**S** 566; 223**Ky**561, 4**SW(2d)**380, 381 [quot CJ]; 242**Mich**234, 218**NW**783; 137**SC** 496, 135**SE**538; **TexCivA** 6**SW(2d)**175, 178 [citCJ]. [a] (2) Doctrine has application only after final decree. 260 **Mass**242, 157**NE**540.
744-78½-New. The doctrine should be supported, and its application should not be restricted by technical requirements. 289**Pa**260, 137**A**252.
744-78½-New. Identity of parties and subject matter and adjudication in a former suit of the precise question sought to be raised in the second suit are essential elements of res judicata. 147**SC**448, 145**SE**193.
745-79 203**Cal** 522, 265**P**195; 171**Minn** 492, 214**NW**666; 217**AppDiv**521, 217 **NYS**522.
745-82 **TexCivA** 2**SW(2d)**967, 970 [cit CJ].
745-83 241 **IllA**159; 172**Minn**8, 214**NW** 669.
745-84 313**Mo** 448, 285**SW**459, 461 [quot CJ].
745-85 37**F(2d)**137; 313**Mo** 448, 285**SW** 459, 461 [quotCJ].
745-86 172**Minn**8, 214**NW**669; **Tex CivA** 2**SW(2d)**967, 970 [citCJ].
746-88 318**Mo** 1206, 5**SW(2d)**46, 49 [cit CJ]; **TexCommnA** 290**SW**739, 741 [cit CJ].
747-92 37**F(2d)**137; 257**Mass**91, 153**NE** 322.
747-93 181**Ark**444, 26**SW(2d)**115.
747-94 288**Pa**250, 135**A**648. See also 252**Mass**513, 147**NE**837.
748-5 168**La**433, 122**S**281.
749-9 34**PortoRico** 170.
749-13 156**Tenn**655, 4**SW(2d)**358, 360 [quotCJ].
749-16 101**CalA**687, 282**P**532. [c] (2) Acts (1924), c 290, permitting taxpayer to renew application for relief from double assessment after denial of former application, held to waive benefit of former judgment. 145**Va**644, 134**SE**721.
750-18 **TexCivA** 289**SW**1035.
750-19 [c] (4) 118 **Okl** 51, 246**P**588, 590 [citCJ]. (5) 39**Wyo** 379, 272**P**12.
750-22½-New. A plaintiff seeking to have a judgment set aside as void for want of jurisdiction may not rely on it as an estoppel against defendant. 74 **Mont**558, 241**P**636.
750-24 274**US**316, 47**SCt**600, 71**L ed** 1069; 19**F(2d)**944; 22**F(2d)**574; 23**F (2d)**81; 33**F(2d)**323; 37**F(2d)**137; 181 **Ark**444, 26**SW(2d)**115 (test of conclusiveness is priority of judgment); 201 **Cal** 502, 258**P**337, 390 [quotCJ]; 204**Cal** 515, 269**P**433; 77**CalA**562, 247**P**264; 83 **CalA**758, 257**P**161, 162 [citCyc]; 104 **Conn**585, 134**A**73; 92**Fla**446, 109**S**617; 38**GaA**483, 144**SE**345; 46 **Ida**595, 269**P** 591, 592 [citCJ]; 205 **Iowa**789, 218**NW** 502; 125**Kan**330, 263**P**1048; 208**Ky**492, 271**SW**581; 216**Ky**530, 287**SW**979; 5 **LaA**131; 151**Md**133, 134**A**37; 257**Mass** 91, 153**NE**322; **Mass** 172**NE**335; 248 **Mich**503, 227**NW**678(1stcase); 172**Minn** 290, 215**NW**211; **MoA** 31**SW(2d)**215; 50**Nev**56, 250**P**369; 217**AppDiv**521, 217 **NYS**522; 126**Misc**188, 213**NYS**623 (where whole question is determined by court, decision is res adjudicata in subsequent proceeding); 130**Misc**262, 223 **NYS**705; 192**NC**371, 135**SE**288; 138 **Okl** 288, 281**P**141; 132 **Or**338, 285**P**813(2d case); 155**Tenn**639, 299**SW**785, 55**ALR** 932; 116**Tex**1, 285**SW**1063, 1070 [cit CJ]; **TexCommnA** 24**SW(2d)**813(3d case); **TexCivA** 275**SW**238, 241 [citCJ]; **TexCivA** 294**SW**698; **TexCivA** 297**SW** 509; **TexCivA** 2**SW(2d)**324; 143**Va**920, 129**SE**700; 101**WVa**457, 132**SE**882, 884 [citCyc]; 198**Wis**545, 224**NW**485. [a] **Former judgment is bar** unless new conditions or subsequent change in law has changed legal relations of parties. 114 **Oh**98, 150**NE**621. [b] **For case to be "res judicata"** there must be identity in things tried for, cause of action, parties, and right in which parties sue. **TexCivA** 291**SW**1115. [c] **Operation of estoppel must be mutual.**-217**AppDiv**521, 217**NYS**522.
752-33 332 **Ill** 467, 163**NE**769; **Iowa** 230**NW**561; 10**LaA**363, 120**S**890; 217 **AppDiv**521, 217**NYS**522; 225**AppDiv**332, 233**NYS**206; 114 **Okl** 153, 244**P**744; 140 **Okl** 122, 282**P**674; **TexCivA** 285**SW**894; **TexCivA** 286**SW**900 [quotCJ]; 152**Wash** 47, 277**P**79.
752-34 144**Wash**38, 256**P**331, 333 [cit CJ].
752-35 180**Ark**148, 20**SW(2d)**636 (owner cannot twice recover for damage to same property); 77**Colo** 234, 236**P**556, 557 [citCyc]; **Ida** 289**P**610; 205 **Iowa** 417, 216**NW**68; 192**NC**262, 134**SE**643; 53**SD**560, 221**NW**371, 372 [citCJ]; 116

Tex1, 285SW1063, 1070 [citCJ]; Tex CivA 280SW307, 310 [quotCJ]; 144 Wash33, 256P331, 333 [citCJ].

753–36 TexCivA 280SW307, 310 [quot CJ].

754–41 218Ala390, 119S4; MoA 297SW 999; TexCivA 283SW914.

754–43 77Colo 234, 236P556, 557 [cit Cyc]; 115Nebr593, 214NW6; 38Wyo 515, 269P45, 60ALR418.

754–48 115Nebr593, 214NW6.

755–53 217Ala73, 114S679.

755–53½–New. Although a debt may be merged as to certain property, it may remain open as an effective cause of action against other property or funds. 115Nebr593, 214NW6.

755–53½–New. The doctrine of merger will not be so applied as to destroy protection of guaranty fund to a depositor who has reduced his claim for deposit to judgment. 115Nebr593, 214NW6.

755–58 41CalA427, 254P606; 115Nebr 593, 214NW6.

755–61 115Nebr593, 214NW6.

756–64 15F(2d)652; 215Ala328, 110S 566; Ariz 286P930; 174Ark90, 294SW 361; 91Fla103, 107S261; 266Mass483, 165NE479; 105NJL567, 147A455(2d case); 34NM50, 277P31; 217AppDiv 521, 217NYS522; 214AppDiv164, 212 NYS43; 228AppDiv105, 239NYS173; 229AppDiv377, 241NYS724; 192NC371, 135SE288; OhA 173NE241; 123 Okl 98, 252P45; 300Pa73, 150A88; 141SC121, 139SE181; TexCivA 289SW1060; 67 Utah25, 245P381, 45ALR882. See also 142Va493, 129SE247.

757–65 91Fla103, 107S261; 105NJL 567, 147A455(2dcase); 123 Okl 98, 252 P45; TexCivA 289SW1060.

757–66 Ariz 286P930; 123 Okl 98, 252 P45; 289Pa260, 137A252, 253 [citCJ].

757–67 217AppDiv521, 217NYS522.

757–68 5LaA108.

757–70 246 IllA416; 222MoA816, 10SW (2d)316.

758–74 Utah 292P913. But see 32 OhA 343, 168NE67.

758–78 126 Okl 133, 258P891. See also 195NC793, 143SE827(2dcase).

758–79 193NC448, 137SE319. [b] **Decision rendered by legislative committee** held not to operate as bar. 193 NC448, 137SE319.

759–84½–New. Legality of sheriff's removal is not rendered res judicata by prior advisory opinion of justices. 126 Me147, 136A810.

759–86 214AppDiv164, 212NYS43, 52 [quotCJ]; OhA 173NE443. [b] **Judgment otherwise bar to subsequent action**, being rendered by municipal court does not deprive it of force. 214App Div164, 212NYS43.

759–87 214AppDiv164, 212NYS43, 52 [quotCJ]. [a] **Judgment in action in forcible detention of real property**, prosecuted by one of two joint owners, in which plaintiff also sought judgment for unpaid rent, judgment declaring that no rent is due, will not bar joint owners from prosecuting subsequent action for recovery of all unpaid rent. Kan 272P171.

759–87½–New. But inferior court decision is not binding on superior court in another action of which former would have no jurisdiction. 214AppDiv164, 212NYS43.

759–89 [a] 316Mo 968, 293SW116.

759–90 242Mich274, 218NW663; 126 Okl 133, 258P891; 287Pa499, 135A219.

759–93 Iowa 228NW578(2dcase); 146 Miss44, 111S739; 287Pa311, 135A227, 229 [citCJ]; TexCivA 283SW611. [b] **Railroad commission's order** to discontinue stage line held not res judicata on question whether operator thereof was common carrier, raised in damage action by one authorized to operate such line. 208Cal 397, 281P620.

760–99 115 OhA490, 154NE736; Tex CivA 283SW693; TexCivA 287SW75.

760–4 33F(2d)323; 197Cal 733, 242P 718; 81Colo 459, 256P10; 161La734, 109S405. [a] (4) Court's allowance of claim against mortgagor's estate on note. 81Colo 459, 256P10; 249Mich673, 229NW618.

760–10 TexCivA 3SW(2d)497.

760–10½–New. In an action on a fire insurance policy, rejection of evidence of plaintiff's conviction for arson is error under defendant's plea of conviction and res judicata. 149Va82, 140 SE314, 57ALR490.

760–10½–New. Conviction of insured for willfully burning stock of goods is a bar to a subsequent action to recover against insurer on the policy. 149 Va82, 140SE314, 57ALR490.

760–11 201Cal 502, 258P387, 392 [quot CJ]; 238Mich533, 213NW680; 194Wis 207, 216NW513.

760–12 88CalA191, 262P1114; 194Wis 207, 216NW513.

761–16 31F(2d)65; 218Ala83, 117S 620; 40GaA364, 149SE656; 203 Iowa 1099, 212NW335; 103NJL440, 135A 897; 134Misc860, 236NYS351.

761–18 218Ala83, 117S620; NJCh 151 A289; NJCh 152A184; 115 Oh490, 154 NE736.

762–25 104Conn585, 134A73; 225App Div806, 232NYS435; 226AppDiv268, 235 NYS508; 194Wis207, 216NW513. [a] (7) In mandamus to compel new election for city treasurer, prior judgment in mandamus on the merits is res judicata. 70CalA61, 232P720.

763–34 83NH115, 139A184.

763–35 324 Ill 549, 155NE477.

763–39 162La92, 110S100.

763–42 167La1032, 120S767(1stcase); 126Misc585, 214NYS59 (nonappealable order); 135Misc697, 238NYS245 (denial of motion to dismiss complaint, affirmed on appeal, does not determine defense on merits); 6PaDist&Co 126; TexCivA 271SW183. [c] **Ex parte order** declaring order valid which on face of mandatory record is void is not res judicata. 67Utah60, 245P966.

764–50 318Mo 761, 300SW755; 136 Okl 222, 277P216; TexCivA 271SW183; TexCivA 289SW1035, 1038 [citCJ]; TexCivA 294SW698, 699 [quotCJ]. [b] (4) Order not appealable does not prevent consideration of merits in subsequent action. 126Misc585, 214NYS59.

765–60 But see 315Mo 525, 289SW825.

765–62 TexCivA 8SW(2d)228. See also 219AppDiv614, 219NYS719.

765–71 35F(2d)1006; 233Ky840, 27SW (2d)422; Mass 171NE485 (order for decree); MoA 300SW298. See also 97 CalA99, 274P1012. [i] **Right must be adjudicated or released.**–CalA 265P327.

766–76 CalA 265P327.

766–90 35F(2d)1006; 169Minn39, 209 NW308.

767–91 104NJL67, 139A62.

767–94 Mo 19SW(2d)662; 83NH115, 139A184; 135SC446, 134SE1.

767–94½–New. Judgment on master's report is not prevented from being res judicata by the fact that defendant has the right to open and close. 83NH115, 139A184.

767–95½–New. Auditor's report on construction of will is res judicata. 8Pa Dist&Co 140.

767–1 205 Iowa1139, 217NW255; 169 Minn39, 209NW308. [c] 35F(2d)1006.

767–5½–New. A determination of a federal court in a receivership proceeding which disallows a claim on exceptions to the master's report and is signed by the judge is a final judgment which constitutes a bar to litigation of the same subject matter in another court. 169Minn39, 209NW308.

768–7 23F(2d)92, 93 [citCJ]; 38F(2d) 275; 41F(2d)704; 215Ala328, 110S566; 88CalA523, 263P842; 81Colo 10, 253P 394; 167Ga555, 146SE173; 168Ga235, 147SE394; 200 Ind448, 163NE269; 231 Ky606, 21SW(2d)1010; 2LaA24; 249 Mich577, 229NW416; 189NC703, 128 SE20 (estops no one); 118 Okl 188, 247 P392; 130 Okl 133, 265P648; 135 Okl 111, 274P646; 29PortoRico 954 (judgment not complying with direction for new trial upon remand); 48RI 441, 138 A190; TexCivA 24SW(2d)440. See also 220MoA115, 279SW740. [a] (5) Judgment on petition which does not state cause of action is not res judicata. 215 Ky62, 284SW421. [e] **Where prior judgment is void for want of notice to parties**, it is error to admit it in bar. 81Colo 10, 253P394.

768–8 See also 85Colo 176, 274P812.

769–12–13 274US316, 47SCt600, 71L ed 1069; 37F(2d)237; 170Ark22, 278SW 627, 632 [citCJ]; 208Cal 496, 281P1017; 68CalA670, 228P1057; 71CalA421, 236P 377; 3Del 73, 130A395; 91Fla709, 109S 677; 331 Ill 80, 162NE119; 333 Ill 284, 164NE678; 234 IllA199; 198 Ind608, 154NE378; Ind 167NE526; 120Kan209, 243P306; Kan 289P461; 226Ky526, 11 SW(2d)109; 128Me171, 146A247; 239 Mich136, 214NW154; 170Minn414, 213 NW53; 83NH115, 139A184; 139NC703, 128SE20 (voidable judgments estop all parties); 190NC418, 130SE7; 138 Okl 15, 280P301; 51SD513, 215NW494, 495 [citCJ]; SD 226NW343; TexCommnA 11SW(2d)294; TexCivA 291SW645; 152 Va27, 146SE193; 108WVa75, 150SE365. [a] (3) Judgment based on unconstitutional statute establishing in favor of wife her sole and exclusive right to rents and revenues of separate estate held bar to subsequent suit. TexCivA 291SW645. [b] 138 Okl 288, 281P141.

769–12–13½–New. Application of doctrine of res judicata does not depend on procedural differences such as right to open and close. 83NH115, 139A184.

769–14 NC 143SE868; 296Pa285, 145A 836.

769–15 TexCivA 24SW(2d)99; 39Wyo 379, 272P12.

770–19 CalA 286P1089; 286Pa421, 133 A554.

770–20 86 IndA621, 158NE916; 225Ky 746, 9SW(2d)1090; 226AppDiv617, 236 NYS423; 138Misc90, 245NYS173 (abandonment of appeal); 112 Okl 114, 240P 74; TexCivA 293SW204; TexCivA 2SW (2d)324. [b] **Partial final decree** has been held not res judicata on whole claim. 40F(2d)442.

770–21 30F(2d)654; CalA 286P443; CalA 286P1089 (as affecting property or rights, judgment is not final if subject to reversal); 82 Colo 503, 261P874; 129Kan853, 284P611; 10LaA363, 120S 890; 288Pa314, 136A221; TexCivA 286SW612; TexCivA 15SW(2d)126. [b] (5) Iowa 229NW171; Iowa 233NW 51; 11LaA161, 123S183; 11LaA515, 124S312; MoA 25SW(2d)541; 35 OhA450, 172NE565; Or 289P375; 286Pa421, 133A554; SD 232NW 289; TexCivA 290SW900; TexCivA 22SW(2d)151. (6) Decree of partition reserving right to apply for any order necessary to carry it into effect is final. 135SC446, 134SE1. [c] (3) Judgment declaring neither party entitled to relief and that court will not take cognizance of case but will leave parties as found is not final judgment. TexCivA 286SW612. (4) Decree directing trustee to pay only net income to beneficiary till further order is not res judicata of application to have part of principal given beneficiary. Iowa 230NW353.

770–22 13F(2d)1014; 168La128, 121S 598; 169La384, 125S280; 85Mont310, 278P1002; NJ 150A367; 93PaSuper 591; TexCivA 286SW612. [a] (5) 50 Philippine552 (order denying petition for termination of trust).

771–23 TexCivA 293SW204, 207 [quot CJ].

771–25½–New. Judgment on a plea of privilege controverted and tried as a separate issue becomes res judicata on the issue of venue. TexCivA 290SW842.

771–25½–New. Judgments of courts of record should be so construed and enforced as to give them every quality of finality of which they are susceptible. TexCivA 291SW602.

771–25¼–New. and to bar further litigation upon the matters brought into controversy or any matter material which could properly have been litigated. TexCivA 291SW602.

771–25½–New. A judgment not appealed from is final. 162La571, 110S759.

771–30 38GaA483, 144SE345; Mo 28 SW(2d)1017.

771–35 208Cal 172, 280P947; CalA 274 P552; 100CalA416, 280P181(2dcase); CalA 286P1089; CalA 289P206; NJ 148 A897; Utah 273P515. See also 168Ark 700, 271SW710.

772–36 218Ala83, 117S620; Conn 151A 309; 169Minn39, 209NW308, 310 [cit CJ]; 121 Or187, 253P883, 886 [quotCJ]. But see 168Ark700, 271SW711.

772–41 124Kan672, 261P585; 126 Okl 133, 258P891.

773–42 TexCivA 23SW(2d)468 (affirmance of judgment sustaining general de-

murrer to petition). See also 129Misc 241, 221NYS726.

773–50 322 Ill 185, 152NE601; 243 IllA 418; 208Ky461, 271SW551; 121 Or187, 253P883; TexCivA 282SW278, 279 [citCyc]; 149Wash227, 270P825.

774–54½–New. Decree quieting title to land protects innocent purchaser for value, although later it is set aside or reversed on appeal on proceedings taken after the purchase. 99NJEq551, 134 A305.

774–59 8F(2d)455, 459 [quotCJperGilbert,CJ]; 77Colo 603, 237P1113, 1114 [citCJ]; 29PortoRico 954; Tex 282SW 278, 279 [citCyc]. See also 260Mass242, 157NE540.

774–61 Cal 288P775; Mo 31SW(2d) 1041; 300Pa169, 150A604.

775–64 274US316, 47SCt600, 71L ed 1069; 15F(2d)652; 23F(2d)81; 37F (2d)87; 43F(2d)711; 215Ala328, 110S 566; 217Ala73, 114S679; 218Ala318, 118 S563; 201Cal 169, 256P413, 417 [cit Cyc]; CalA 265P327; 100CalA302, 279 P1024; CalA 280P392; 91Fla103, 107S 261; 201 Iowa107, 204NW294, 48ALR 394; Mass 168NE725; 134Misc22, 235 NYS125; 228AppDiv105, 239NYS173; 228AppDiv450, 240NYS170; 121 Or221, 253P1051; 132 Or338, 285P813(2dcase); 5PaDist&Co 95; 153Va118, 149SE441; 99WVa615, 129SE459.

776–67 162Ga488, 134SE310; 83NH 225, 140A708; TexCivA 271SW183.

776–68 TexCommnA 29SW(2d)967.

776–72 216Ala189, 113S16; 204Cal 515, 269P433; CalA 265P327; 41GaA20, 151 SE827; 151Miss784, 119S301; MoA 31 SW(2d)215. See also 218AppDiv591, 218NYS641.

777–80 110Conn564, 148A662; Sask [1928] 4DomLR498.

777–81 220MoA1268, 290SW633.

778–85 CalA 265P327.

778–89½–New. Where the court in prior action determined that it was not premature, claimant cannot maintain subsequent action on theory that first action was premature. 37F(2d)347.

779–3 42F(2d)304; 80Colo 452, 252P 343; Iowa 231NW482; Kan 289P461; Mass 172NE336; NH 152A272; 252NY 502, 170NE121; 231NYS635; 191NC 143, 131SE305; TexCivA 280SW307, 310 [quotCJ]; TexCivA 28W(2d)936. [a] **Claim that consent judgment was agreed to by insurer's attorney** without plaintiff's knowledge is insufficient against res judicata plea. Mass 172NE336.

779–4 TexCivA 280SW307, 310 [quot CJ]; TexCivA 16SW(2d)961.

780–8 255Mass52, 151NE167.

780–9 255Mass52, 151NE167.

780–13 279US218, 49SCt310, 73L ed 669; Iowa 229NW833; Mass 168NE 726; 147Miss737, 113S346; 84Mont238, 275P267; 57ND474, 222NW615; 38 OklACR116.

781–34 24F(2d)377; 74CalA621, 241P 567; 75CalA44, 242P109; 108Conn484, 143A898; 169La312, 125S134(2dcase); 169La701, 125S860; 1LaA440; 126Me 458, 139A480; 247Mich291, 225NW569; 79Mont198, 255P737; 85Mont562, 281P 345; Mont 289P388; 285Pa241, 132A 185; 286Pa449, 133A642; 11PaDist&Co 703. [b] 145Miss429, 110S861.

782–35 24F(2d)377; 286Pa449, 133A 642.

783–41½–New. Judgment on refusal of a motion to set aside nonsuit is conclusive of plaintiff's case if unappealed from, under some statutes. 288Pa164, 135A742.

783–43 145Miss429, 110S861.

784–46 285Pa241, 132A185.

784–47 145Miss429, 110S861.

784–49 Cal 286P693.

784–51 CalA 292P179.

784–54 See also 11PaDist&Co 703.

785–63 245NY152, 156NE647; TexCivA 290SW900.

785–66 214Ala58, 106S182; 215Ala328, 110S566; 218Ala192, 118S385; 204Cal 515, 269P433; 72CalA757, 238P143; CalA 265P327; 162Ga488, 134SE310; NJ 150A393; 228AppDiv450, 240NYS 170 (dismissal in ejectment); 197NC 609, 150SE116; ND 231NW278; 286Pa 449, 133A642; 48Philippine986; 142 Wash60, 252P151; BC [1928] 3DomLR 301. [a] **"Dismissal" of action frequently signifies that it is not decision on merits.** Mass 172NE335.

786–71 205Cal 581, 271P1083; 237Mich 172, 211NW29; MoA 293SW441; 252 NY141, 169NE118; 121 Or221, 253P 1051; 132 Or338, 285P813(2dcase); Tex CivA 293SW896. [d] (2) Voluntary dismissal with prejudice is conclusive. 179 Ark752, 18SW(2d)327.

786–72 121 Or221, 253P1051.

787–77 [a] **Judgment of voluntary dismissal** after filing of uncontroverted plea of privilege held res judicata of venue in subsequent suit. TexCommnA 292SW 174.

787–84 207Cal 739, 279P1001; 56App DC381, 15F(2d)895; 122Kan269, 251P 1100; Mass 168NE725; 198Wis145, 223 NW422. See also 97CalA193, 275P503 (2dcase); 132Misc566, 230NYS464. But see 260Mass242, 157NE540. [b] **Judgment of dismissal pursuant to agreement that each party shall pay his own costs** is judgment on merits. CalA 265P327.

788–88 252NY141, 169NE118.

788–93 260Mass242, 157NE540.

788–95 31F(2d)742; 32F(2d)581; 215 Ala328, 110S566, 570 [citCJ]; 328 Ill 148, 159NE222; 240 IllA419; 247Mich 464, 226NW261; 245NY152, 156NE647; 215AppDiv609, 214NYS402; Alta [1928] 3DomLR69. See also 219Ala645, 123S 38; 224AppDiv523, 231NYS520 [rev. on other grounds 166NE350(1stcase)]. But see 221AppDiv16, 222NYS756. [d] (1) 29Ariz549, 243P413, 415 [citCJ]; Ark 32SW(2d)304. (2) Other instances. 40F(2d)247. [h] **Dismissals held not within rule.**–50Nev191, 255P1010.

790–96 24F(2d)137; 38GaA286, 144SE 33; 328 Ill 148, 159NE222. [a] **Bill showing no grounds for equity jurisdiction.**–99WVa615, 129SE459.

790–98 198NC575, 152SE692.

790–99 CalA 265P327.

790–1 153Va52, 149SE470; 39Wyo 331, 271P217, 69ALR840.

790–3 But see 267US479, 45SCt431, 69 L ed745.

790–8½–New. In New York by statute judgment of dismissal not reciting "without prejudice" at close of plaintiff's case is final determination on merits. 215AppDiv609, 214NYS402.

790–10 28F(2d)579 [certiorari den. 279 US837, 49SCt251(9thcase), 73L ed984]; 31F(2d)75; 88CalA192, 263P325; CalA 265P327; 77Colo 603, 237P1113, 1114 [citCJ]; 130Kan691, 288P745; 217Ky 715, 290SW702; 170La233, 127S611(2d case); Mass 171NE713; 250Mich668, 230NW904(1stcase); 53ND728, 207NW 997; 132 Or338, 285P813(2dcase); 296 Pa285, 145A836; 296Pa68, 146A448; Pa 152A33; TexCommnA 25SW(2d) 1093; TexCivA 5SW(2d)606, 609 [cit Cyc]; 142Wash60, 252P151. See also 177Ark586, 9SW(2d)23.

791–11 242Mich515, 219NW752, 754 [citCJ].

792–17 NJ 150A393.

792–20 97CalA367, 275P515; 220MoA 115, 279SW740.

793–23 97CalA367, 275P515.

793–29 CalA 265P327; 208 Iowa531, 222NW19.

793–35 214Ala57, 106S180, 181 [citCJ]; 217Ala73, 114S679.

794–38 38GaA286, 144SE33; 201 Iowa 107, 204NW294, 298 [citCJ], 48ALR394; NC 154SE83.

794–39 229Ky234, 16SW(2d)1053; 3 LaA590; 253NY166, 170NE532; 225 AppDiv634, 234NYS177. But see 9LaA 295, 119S543. [a] **Examination into sufficiency of complaint in new action** is not precluded by dismissal of complaint in prior action. 253NY166, 170 NE532.

794–40 229Ky234, 16SW(2d)1053.

794–43 [a] **Dismissal of counterclaim** for lack of affirmative proof of damage is equivalent to nonsuit. 228App Div138, 239NYS178.

794–44 286Pa449, 133A642. [a] 24 F(2d)377. [b] **In Pennsylvania.**–286Pa 449, 133A642.

795–46 240 IllA419. [a] (2) Judgment dismissing petition to establish boundary line because no evidence is introduced has been held res judicata in subsequent petition between same parties involving same boundary line. 153 Va52, 149SE470.

795–49 80CalA176, 250P289; 159La18, 105S85 (judgment dismissing intervenors call in warranty on plea to jurisdiction held to reserve whatever right of action intervenor had); 299 Pa51, 149A87; 12PortoRicoFed269; TexCivA 19SW(2d)87.

796–53 177Ark145, 5SW(2d)941; 201 Cal 169, 256P413, 417 [citCyc]; 80CalA 176, 250P289; CalA 265P327; La 114 S148; Mass 168NE165; Mass 168NE 725 (constitutes only final disposition of particular case).

796–55 [b] **In Massachusetts.**–168NE 165.

797–65 CalA 280P392 (judgments which are not res judicata in whole or in part are without prejudice, and it is proper for judgment to state so); 208 Iowa345, 223NW685; 169La701, 125S 860; 75Mont122, 242P421, 424 [quot CJperStark,J]; 116Nebr806, 219NW 187; TexCivA 290SW849, 850, 851 [cit CJ]. [b] **Determination without prejudice** preserves other original rights of party except as circumscribed by conditions attached to order. 242Mich515, 219NW752.

797–66 75Mont122, 242P421, 424 [quot CJperStark,J]; TexCivA 290SW849, 850, 851 [citCJ].

797–74 Ill 173NE368; 151Md181, 135 A139, 142 [quotCJ]; TexCivA 23SW (2d)468.

797–75 166Ga206, 142SE859; IndA 169 NE695; 218Ky813, 292SW489; 236Ky 42, 32SW(2d)536; 169La819, 126S72; LaA 130S870; 151Md181, 135A139, 142 [quotCJ]; 43 OklACR91, 98 [reh pending, and citCJ].

798–76 94Fla961, 114S779; 126Kan511, 513, 268P851 [quotCJ]; 224Ky56, 5 SW(2d)271; 226Ky762, 11SW(2d)916; 151Md181, 135A139, 142 [quotCJ]; 43 OklACR91, 98 [reh pending, and cit CJ]; 34PortoRico 170; 132SC45, 128 SE40.

798–77 23F(2d)81; 24F(2d)137; 37 F(2d)87; 38F(2d)775; 215Ala150, 110 S46; CalA 265P327; 168Ga763, 149SE 132; TexCivA 23SW(2d)468; 152Va684, 148SE680.

798–77½–New. Judge's oral statement of reasons for decree sustaining demurrer is not a finding or opinion showing matters concluded by judgment. 259Mass550, 156NE709.

799–78 32Ariz164, 256P356, 359 [quot CJ]; CalA 265P327; 35GaA460, 133SE 351.

799–79 32Ariz164, 256P356, 359 [quot CJ]. See also 164Ga440, 138SE910.

799–80 23F(2d)81; 215Ala150, 110S46; 166Ga206, 142SE859; 37GaA433, 140SE 408; GaA 155SE794; 235Ky523, 31SW (2d)913; 158La148, 103S721; 164La 787, 114S654; 313Mo 130, 280SW1035, 44ALR1328; 141 Okl 113, 284P52; 153 SC67, 150SE345; 154SC201, 151SE472 (2dcase); TexCivA 275SW238, 241 [cit CJ]; TexCivA 294SW248; 152Va684, 148SE680. But see 17F(2d)924. [b] 23F(2d)81.

800–82 43F(2d)711; 93CalA65, 268P 1073; GaA 155SE794; 235Ky523, 31 SW(2d)913; 158La148, 103S721; 164 La787, 114S654; 170Minn414, 213NW 53.

800–84 164Ga440, 138SE910.

801–86 40GaA268, 149SE296. But see IndA 169NE695.

801–87½–New. Judgment sustaining demurrer is not final on merits until the time for pleading has expired without amendment. 215Ala150, 110S46.

801–88 See also 222MoA307, 297SW 129.

802–6 274US316, 47SCt600, 71L ed 1069; 15F(2d)652; 18F(2d)483; 27F (2d)423; 34F(2d)250; 38F(2d)389; Ariz 286P930; 206Cal 125, 273P581; CalA 289P242; 91Fla103, 107S261; 92 Fla445, 109S617; 38GaA696, 145SE 481; 324 Ill 562, 155NE475; Ill 173NE 281; Ind 163NE483; 205 Iowa417, 216 NW68; 208 Iowa559, 223NW274; 165 La536, 115S742; 9LaA339, 120S490; 264Mass166, 162NE300; 248Mich425, 227NW817; 166Minn134, 207NW198; 172Minn290, 215NW211; 178Minn40, 226NW415; 113Nebr721, 204NW786; 49Nev254, 243P817; 105NJL567, 147A 455(2dcase); NJ 148A781; NJSup 138 A112; 129Misc10, 220NYS469; 131Misc 534, 227NYS384; 136Misc913, 242NYS

618; 198NC235, 151SE266; 23 OhA266, 153NE905; 20 OhA19, 153NE163; 36 OklACR354; 287Pa139, 134A515; 141 SC121, 139SE181; 116Tex1, 285SW 1063, 1070 [citCJ]; TexCommnA 290 SW155; TexCivA 289SW1060; Tex CivA 11SW(2d)621; Utah 292P913; 145 Wash477, 260P664. [a] (15) General judgment for guarantor in action on notes is not bar to subsequent action by payee on contract of guaranty. 3 Del 73, 130A395 (defense in prior action being fraud in procurement of notes). (16) Decree in chancery construing a will will not bar action or claim against decedent founded on contract for services. 146Va747, 132SE 694. (17) Other instances. 40GaA785, 151SE553; TexCivA 23SW(2d)414.

804-7 274US316, 47SCt600, 71L ed 1069; 39F(2d)496; 40F(2d)330; Conn 151A309; 324 Ill 540, 155NE279; Ill 173 NE368; 258Mass45, 154NE525; 170 Minn414, 213NW53; 172Minn290, 215 NW211; 229AppDiv526, 242NYS398; 289Pa260, 137A252; 290Pa331, 138A 849, 54ALR1285; 146Wash350, 262P 958. [a] (5) Quo warranto judgment that corporate directors might remove president at any time held bar to action for salary after removal. 104NJL 341, 140A286.

805-6 216Ky530, 287SW979; 172Minn 290, 215NW211.

805-9 NJSup 138A112.

805-10 19F(2d)275.

805-11 IndA 170NE84.

805-14 15F(2d)652; 18F(2d)269; 24F (2d)137; 216Ala189, 113S16; 218Ala 498, 119S229; 172Ark681, 290SW577; 85Colo 176, 274P812; 92Fla446, 109S 617; 93Fla470, 112S253, 264 [citCJ]; 216Ky434, 287SW698; 216Ky530, 287 SW979; 170Minn414, 213NW53; 175 Minn201, 220NW606; Nev 283P593; 105NJL567, 147A455(2dcase); 230App Div459, 245NYS400; 129Misc10, 220 NYS469; 198NC568, 152SE792; 114 Okl 153, 244P744; 38 OklACR116, 117 [quot CJ]; 128 Or191, 274P128; 116Tex1, 285 SW1063, 1070 [citCJ]; 99Vt85, 130A 583; 142Va493, 129SE247; 150Wash 559, 274P102; 194Wis298, 216NW502.

806-15 15F(2d)652.

806-17 6F(2d)582; 18F(2d)707, 710 [citCJ]; 176Ark1205, 3SW(2d)13; 164 Ga440, 138SE910; Ind 163NE483; 124 Kan521, 261P820; 193NC299, 136SE873; TexCivA 23SW(2d)468. See also 108 Conn484, 143A898. But see 218Ala296, 118S513.

806-18 6F(2d)582.

806-19 41GaA287, 152SE589(2dcase); 10LaA65, 120S533(2dcase); 169La199, 124S827 (recovery of receiver's salary as expense after refusal thereof as costs); 248Mich425, 227NW817.

807-21½-New. where, having failed to establish priority of claim against insolvent corporation under statute, plaintiff sues to establish trust in property in hands of receiver; 6F(2d)582.

807-28 77Colo 603, 237P1113, 1114 [quotCJ]; 142SC531, 141SE156.

808-35 27F(2d)881; Iowa 228NW578 (2dcase); 259Mass550, 156NE709; 172 Minn290, 215NW211; 243NY295, 153 NE79; 51SD611, 216NW349. [a] (7) Action to rescind contract for fraud is bar to action for damages for fraud. 243 NY295, 153NE79. (8) Judgment on merits, refusing rescission of contract for exchange for false representations as to boundaries of land contracted to be given in exchange, is bar to action for rescission on ground of mistaken belief that land lay in rectangle. 172 Minn290, 215NW211.

808-36 24 OhA368, 156NE613.

808-38 11F(2d)845; 15F(2d)652; 38F (2d)470; 38F(2d)945; 215Ala150, 110 S46; 217Ala378, 115S866; 176Ark786, 4SW(2d)897; 81CalA427, 254P606; 109 Conn529, 147A181; 164Ga440, 138SE 910; 245 IllA531; Ind 163NE483; Iowa 230NW353; 208Ky492, 495, 271SW581 [quotCyc]; Mo 19SW(2d)487; MoA 3 SW(2d)279; Nev 283P593; 127Misc104, 215NYS354; 53SD315, 220NW913; Tex CommnA 285SW305; 152Wash47, 277P 79; 155Wash459, 284P738. [a] (11) Injunction against officers of labor union, with subsequent contempt proceedings, held not res judicata in proceedings for injunction twelve years later, involving different state of facts, though referring to same subject matter. 15F(2d)652. [1] **Recovery under contract as bar to rescission.**—Plaintiff's recovery of judgment at law for services under contract does not render defective subsequent judgment rescinding contract without restoration of benefits. 129Misc612, 222NYS315.

810-41 24F(2d)137; 39F(2d)594; NJ 147A405; TexCivA 27SW(2d)1110 (venue statute passed after commencement of prior suit); 146Wash350, 262P958.

810-42 233Ky634, 26SW(2d)538; 242 Mich234, 218NW783.

811-47 Iowa 230NW561; 172Minn290, 215NW211.

811-49 8F(2d)932; 38F(2d)470; 42 F(2d)1005; Kan 272P171; Mass 169NE 508; 217AppDiv521, 217NYS522; 131 SC488, 127SE565.

811-52 289Pa260, 137A252; 99Vt85, 130A583, 584 [citCJ].

812-56 8F(2d)932; 15F(2d)652; 23 F(2d)92; 206Cal 389, 274P536(2dcase); 91Fla103, 107S261; 205Iowa1151, 216 NW58; Kan 272P171; 253Mass230, 148 NE619; 217AppDiv521, 217NYS522, 229 AppDiv21, 241NYS17; 192NC371, 135SE 288; 52ND351, 202NW807; 287Pa139, 134A515; 300Pa73, 150A88; 141SC121, 139SE181; 53SD315, 220NW913; Tex CivA 285SW927; TexCivA 289SW1060; Utah 262P965; 193Wis108, 213NW657.

813-58 99Vt85, 130A583.

813-62 23F(2d)32, 33 [quotCJ]; 248 Mich425, 227NW817; 214AppDiv164, 212NYS43.

813-63 DC 38F(2d)541; 213AppDiv 374, 211NYS184; 284Pa47, 130A417; 142Va493, 129SE247.

813-66 40F(2d)91; Ala 127S553; 172 Ark681, 290SW577; Conn 151A309; 41GaA91, 151SE815; Iowa 230NW561; 130Kan196, 285P620; 161La734, 109S 405; 171Minn492, 214NW666; MoA 12 SW(2d)937; Nev 283P593; NJSup 150A 237; 38 OklACR116; 289Pa260, 137A 252, 253 [citCJ]; 51SD611, 216NW349, 350 [citCJ]; TexCivA 275SW238, 241 [citCJ]; 143Wash622, 255P945. [a] (3) Judgment in unlawful detainer by landlord held to adjudicate tenant's right to possession precluding subsequent action for damages. 143Wash622, 255P945. (4) Ejectment by grantee and action by grantor to have deed declared mortgage. 139 Okl 110, 281P243.

814-67 8F(2d)905; 207Cal 54, 276P 1011; 77CalA562, 247P264; 161La734, 109S405; 51SD611, 216NW349, 350 [citCJ].

815-68 [a] **Judgment in employee's interstate action** is not res judicata in employee's intrastate action based on same facts. NC 155SE167(2dcase).

815-69 18F(2d)707, 710 [citCJ]; Ill 173NE368; 203 Iowa384, 212NW731; 251Mich96, 231NW59; 192NC330, 135 SE141; 194Wis298, 216NW502.

815-70 194Wis298, 216NW502.

816-75 122Kan91, 251P420; 161La734, 109S405; 131Misc47, 225NYS740. But see 150Wash559, 274P102. [c] But see 245Mich351, 222NW768(1stcase).

816-77 Cal 291P178. [a] (2) Judgment for defendant in action on express contract on ground that plaintiff failed to prove sale alleged is not bar to action for conversion against defendant and another. 178Minn93, 226 NW417.

816-80 234 IllA332; 11LaA87, 120S 253; 168La1005, 123S655, 67ALR1183; LaA 130S133.

817-82 24F(2d)42; 168Ga763, 149SE 132; 41GaA91, 151SE815; Ill 173NE 368; 208 Iowa1347, 227NW344(1stcase); 216Ky530, 287SW979.

817-83 176Ark99, 2SW(2d)1102; 324 Ill 562, 155NE475; 234 IllA332; 9LaA 339, 120S490; 223AppDiv423, 228NYS 497. See also 173Minn572, 218NW115.

817-84 272US21, 47SCt9, 71L ed145; 274US316, 47SCt600, 71L ed1069; 6 F(2d)559; 23F(2d)92; 168Ark201, 269 SW571; Conn 151A309; 164Ga316, 138 SE851; 234 IllA199; 234 IllA332; Iowa 232NW816; 123Kan420, 426, 256P155 [citCJ]; 98NJEq432, 131A117; 229App Div206, 242NYS34; 52ND351, 202NW 807; 51SD611, 216NW349.

817-87 289Pa260, 137A252.

818-88 234 IllA199; 123Kan420, 426, 256P155 [citCJ].

818-92 274US316, 47SCt600, 71L ed 1069; 281US470, 50SCt374; 74L ed972; 6F(2d)559; 23F(2d)81; 34F(2d)250; 39F(2d)693; 213Ala24, 104S230; 174 Ark1052, 298SW870; 92Fla446, 109S 617; 93Fla470, 112S253, 261 [citCJ]; 168Ga763, 149SE132; 35GaA208, 132SE 260; Ill 173NE368; 234 IllA199; 208 Ky492, 495, 271SW581 [quotCyc]; 223 Ky561, 4SW(2d)380, 381 [citCJ]; Mass 172NE347; 168Minn57, 209NW537; 313Mo 448, 285SW459; 317Mo 1078, 298 SW83; MoA 236SW401; MoA 2SW(2d) 115; MoA 9SW(2d)531; 98NJEq432, 131A117; 213AppDiv374, 211NYS184, 187 [citCJ]; 230AppDiv538, 245NYS 675; 114 Okl 153, 244P744; 39 OklACR 284; 116Tex1, 285SW1063, 1070 [cit CJ]; TexCivA 290SW276; 142Va493, 129SE247 (as to any other admissible matter which might have been offered for that purpose). [e] (5) Where bill is filed to have absolute deed declared void, if complainant does not seek decree declaring conveyance trust, he may not after adverse decree declaring deed valid maintain another cause against same party on same conveyance to declare it to create a resulting trust in his own favor. 90Fla7, 105S134.

822-93 92Fla446, 109S617; 234 IllA 199; 89 IndA94, 163NE119; 208Ky492, 495, 271SW581 [quotCyc]; 213AppDiv 374, 211NYS184.

822-94 218Ala318, 118S563; 208Ky 492, 495, 271SW581 [quotCyc]; 131 Misc534, 227NYS384, 389 [quotCyc].

822-95 92Fla446, 109S617; 234 IllA 199; 208Ky492, 495, 271SW581 [quot Cyc]; 242Mich234, 218NW783.

822-96 208Ky492, 495, 271SW581 [quotCyc]; 130 Or364, 280P331.

823-97 208Ky492, 495, 271SW581 [quotCyc].

823-99 234 IllA332; 146Va747, 132SE 694.

823-1½-New. or which were prevented by fraud from being brought in. 141Wash86, 250P947.

823-4 23F(2d)32, 34 [quotCJ].

823-7 274US316, 47SCt600, 71L ed 1069; 25F(2d)355; 204Cal 262, 267P 705; 41GaA257, 152SE606; Ida 289P 74; 234 IllA332; 166Minn134, 207NW 198; TexCivA 297SW509; 145Wash477, 260P664; 193Wis108, 213NW657.

824-8 23F(2d)32, 34 [quotCJ]; 5Pa Dist&Co 389.

826-11 234 IllA332; TexCivA 8SW(2d) 267.

826-12 174Ark35, 294SW62.

826-19 [a] (3) Where plaintiff voluntarily limits recovery to temporary damages, though permanent, recoverable under pleading and evidence, he may not subsequently sue for further damages. MoA 2SW(2d)115.

827-26 274US316, 47SCt600, 71L ed 1069; 281US470, 50SCt374, 74L ed972; 32F(2d)502; 34F(2d)250; 200 Iowa 1308, 206NW291 (setting apart of exempt property in bankruptcy not splitting of causes of action); 205 Iowa1151, 216NW58; 233Mich633, 208NW28; 221 MoA1178, 299SW629; 129 Or224, 277P 101. [f] **Splitting must be voluntary** to preclude later action. 16F(2d)578.

828-27 6F(2d)559.

828-32 274US316, 47SCt600, 71L ed 1069 (dictum); 16F(2d)578, 581 [cit CJ]; 205 Iowa417, 216NW68; Utah 292 P913.

829-39 167Ga439, 145SE851, 62ALR 256.

829-41 36F(2d)671; Me 149A574; 157 Md626, 147A529 (contract provision held not to authorize suit on part of installments when all were due); 249Mich331, 228NW715; NJ 145A112; 125Misc908, 211NYS649; 12PortoRicoFed155. [h] 125Kan417, 265P53.

831-42 204Cal 262, 267P705; Iowa 227 NW503 (promise to pay interest evidenced by coupon attached to principal note).

831-48 TexCivA 300SW963.

832-56 87Colo 27, 284P776.

832-58 121Kan246, 246P997.

833-63 121Kan246, 246P997.

833-67 218Ala498, 119S229; 123Kan 420, 426, 256P155 [citCJ]; MoA 27SW (2d)28; 197NC100, 147SE686, 64ALR

1047; **TexCivA** 299SW293.

834-68 85Colo 176, 274P812; **TexCivA** 16SW(2d)338.

834-72 144Miss319, 109S853.

835-76 338 Ill 35, 169NE729; 146Miss 600, 111S584; 155Tenn639, 299SW785, 55ALR932.

835-79 37GaA439, 140SE386; 105NJL 567, 147A455(2dcase); 217AppDiv521, 217NYS522.

835-82 85Colo 176, 274P812; 207 Iowa 1052, 224NW89; Kan 289P461; 208Ky 492, 271SW581; MoA 2SW(2d)115; 119 Okl 285, 250P93.

836-83 119 Okl 285, 250P93.

836-85 152Miss106, 119S155; 53ND 113, 205NW5; 69Utah293, 254P784.

836-87 53ND113, 205NW5; 69Utah 293, 254P784.

836-88 MoA 2SW(2d)115; 69Utah293, 254P784.

836-91 53ND113, 205NW5.

836-92 30Hawaii276, 284 [quotCJ]; 123Kan72, 254P362; LaA 124S688.

838-96½-New. One who has obtained a judgment for specific performance of a contract for the conveyance may maintain a subsequent action to recover rents and profits from the time possession of the property should have been given. 123Kan72, 254P362.

838-1 157Miss879, 127S694; 227 AppDiv351, 238NYS577 (action by railroad to recover tax refunds).

838-3 37F(2d)259; 78CalA266, 248P 264; 85Colo 397, 277P5; MoA 272SW 1032; 224AppDiv475, 231NYS571; Tex CivA 11SW(2d)618.

839-4½-New. Recovery and collection of a judgment in an action on a note is not a bar to a subsequent action for attorney's fees on the note. 218AppDiv 234, 218NYS271.

839-7 [a] (2) 247Mich481, 226NW262; TexCivA 11SW(2d)621.

839-8 221MoA639, 283SW747, 749 [cit CJ].

839-10 11F(2d)845; 13F(2d)210; 215 Ky558, 286SW847; Me 149A574; 154 Wash236, 281P996(2dcase). [a] (2) Other instances. Me 149A574. [c] **Where maturity is accelerated on default,** judgment authorizing recovery of some installments is res judicata of right to recover other installments. 41GaA 406, 152SE909(2dcase).

840-11 126Misc585, 214NYS59; 226 AppDiv617, 236NYS423; 29 OhA402, 163 NE636.

840-13 NJ 133A750.

840-16 TexCivA 23SW(2d)890.

840-18 213Ala24, 104S230. [c] **Replevin of chattel under conditional sale** cannot be maintained where seller recovered judgment for part of installments when all were due. 157Md626, 147A529.

841-30 220Ky154, 294SW1063; 221 MoA779, 288SW959, 960 [quotCJ].

842-36 207 Iowa1123, 224NW24; 208 Ky492, 271SW581; 127 Okl 40, 259P 650.

842-37 207 Iowa1052, 224NW89; 208 Ky492, 271SW581; 127 Okl 40, 259P 650.

843-42 MoA 284SW521.

844-45 213AppDiv374, 211NYS184; TexCivA 13SW(2d)424.

845-55 220MoA1268, 290SW633.

846-62 252NY502, 170NE121.

847-70 39F(2d)933; 180Ark136, 20 SW(2d)630; 72CalA757, 238P143; 100 CalA302, 279P1024; DC 39F(2d)512; 118Kan767, 236P638; Mass 167NE264; 157Miss469, 128S343; 217AppDiv521, 217NYS522; 152Wash47, 277P79. See also 39GaA264, 146SE794. [b] **Judgment in action for fraudulent representations in sale of stock of one corporation** is not bar to action for materially different fraudulent representations in sale of stock of another corporation, though actions grew out of same contract of purchase. 205 Iowa417, 216NW 68.

848-73 23F(2d)32, 34 [quotCJ].

848-77 94CalA330, 271P206.

848-79 [b] 134Wash163, 235P8.

848-80 134Wash163, 235P8.

849-88 217AppDiv521, 217NYS522.

850-1 217AppDiv521, 217NYS522. [d] (1) 137Misc517, 243NYS740; 151SC433, 149SE226. [j] **Master and servant.-105** NJL567, 147A455(2dcase).

851-3 32NM1, 249P1011; 190NC480, 130SE319.

852-8 84Mont397, 276P437.

852-9 103NJL95, 134A820.

852-12 172Ark428, 289SW2; 180Ark 148, 20SW(2d)636; 40GaA587, 151SE114 (2dcase).

853-16 16F(2d)578.

853-17 But see 90CalA447, 265P1038.

853-21 128Me1, 145A241.

853-22 Or 290P233.

854-28 226AppDiv280, 235NYS220.

854-30 51ND300, 199NW941.

854-33 Or 290P233.

855-40 180Ark735, 22SW(2d)558; 37 GaA228, 139SE681; IndA 169NE86; 178 Minn535, 228NW148; 5PaDist&Co475; 141SC121, 139SE181; 154Tenn174, 285 SW569; 116Tex1, 285SW1063, 1070 [citCJ]; TexCivA 6SW(2d)175, 178 [citCJ]; TexCivA 27SW(2d)588; 143 Wash122, 254P1092, 1094 [quotCJ].

855-41 206Cal125, 273P581; 37GaA 228, 139SE681; NC 154SE746(2dcase); 116Tex1, 285SW1063, 1070 [citCJ]; 143 Wash122, 254P1092, 1094 [quotCJ].

855-42 143Wash122, 254P1092, 1094 [quotCJ].

855-44 54ND657, 210NW180.

856-47 37GaA228, 139SE681.

856-51 40F(2d)238; 143Wash122, 254 P1092, 1094 [quotCJ].

856-52 40F(2d)238; 180Ark735, 22SW (2d)558; IndA 169NE86; 205 Iowa1151, 216NW58; 165La769, 116S180, 182 [citCJ]; 98NJEq432, 131A117; 23OhA 198, 154NE350; 116Tex1, 285SW1063, 1070 [citCJ]; TexCivA 10SW(2d)235; 143Wash122, 254P1092, 1094 [quotCJ].

856-53 7Alaska84; LaA 129S244; 23 OhA198, 154NE350, TexCivA 278SW247; 143Wash122, 254P1092, 1094 [quotCJ].

858-54 6F(2d)559; 98NJEq432, 131A 117; 197NC687, 150SE330(2dcase); 116 Tex1, 285SW1063, 1070 [citCJ]; Tex CivA 6SW(2d)175, 178 [citCJ]; 143 Wash122, 254P1092, 1094 [quotCJ]. [d] **Application of rule of interlocutory orders.**-Defensive matter existing but not set up in response to order to show cause cannot afterward be made ground of application for order to show cause to restore status lost by responding party. 98NJEq432, 131A117.

858-56 236Mich610, 211NW267, 49ALR 546.

859-61 11F(2d)845; 165La145, 115S 439.

859-67 40F(2d)238.

860-75 80Colo522, 253P389.

862-94 TexCivA 294SW1115.

862-99 37GaA228, 139SE681; 216Ky 530, 287SW979; 225AppDiv412, 233NYS 404.

862-1 42F(2d)342; NJ 151A784.

863-6 37GaA228, 139SE681; 236Mich 610, 211NW267, 49ALR546.

863-13 See also 219Ala131, 121S420.

864-15 11F(2d)845; 32Ariz423, 259P 676, 679 [citCJ]; 204 Iowa1373, 215NW 658; 205 Iowa1151, 216NW58; 236Mich 610, 211NW267, 49ALR546; 114Nebr 834, 211NW168; 32NM478, 259P614, 55 ALR467; 126Misc601, 214NYS208; 128 Misc18, 217NYS193; 229AppDiv206, 242 NYS34; 158Tenn463, 14SW(2d)722; NB [1929] 1DomLR530. [h] In Nebraska.-114Nebr834, 211NW168.

865-18 32Ariz423, 259P676; 130Misc 262, 223NYS705.

865-23 84Mont238, 275P267.

866-30½-New. An assigned claim for damage to an automobile in a collision is not forever barred because not set up by the assignor as a counterclaim in an action against him for damage to the other car in the collision, commenced after the assignment. Utah 273P515.

866-31 131Misc391, 227NYS607.

866-32 [b] (2) 131Misc391, 227NYS607.

867-41 178Minn1, 226NW412.

867-42 20F(2d)473.

867-42½-New. A decree in a contractor's suit to foreclose a mechanic's lien is not res judicata in a subsequent action by the owner for damages for breach of a building contract not pleaded in recoupment in the prior action. 154 Tenn174, 285SW569.

867-42½-New. Where defendant's cross complaint was stricken out and all evidence thereunder was excluded, the judgment does not operate as an estoppel as to the claim asserted therein, although findings were made thereon. 68CalA189, 228P673.

867-42¼-New. , or unless the cause of cross action is involved in the issues of the former case as setoff, counterclaim, or defense. IndA 169NE86.

868-43 209Ky607, 273SW456, 457 [cit CJ].

868-43½-New. Where the court ruled that a cross complaint could not be litigated except in a separate action and it was not submitted or passed on, the judgment is not a bar to an action on the cause of action set up in the cross complaint. 46 Ida497, 269P94.

868-52½-New. , and judgment for defendant on counterclaim for damages is a bar to a subsequent action by plaintiff for value of services resulting in damages, 131Misc47, 225NYS740.

869-55 19F(2d)939, 940 [citCJ]; Iowa 231NW298; 149Miss461, 115S557, 559 [citCJ]; 307Mo 98, 270SW662; 133Misc 705, 232NYS641(2dcase).

869-56 274US316, 47SCt600, 71LEd 1069; 6F(2d)559; 15F(2d)952; 18 F(2d)226; 19F(2d)939, 940 [citCJ]; 22F(2d)574; 12CustA218; 169Ark179, 281SW5; 180Ark136, 20SW(2d)630; 201Cal 502, 258P387, 390 [quotCyc]; 85CalA8, 259P93, 95 [quotCyc]; 86Colo 173, 279P44; 110Conn432, 148A365; 3Del 73, 130A395; 92Fla446, 109S617; 163Ga69, 135SE439; 35GaA208, 132SE 260; 29Hawaii482; 317 Ill 401, 148NE 274; 324 Ill 562, 155NE475; 328 Ill 472, 160NE76; Ill 173NE352; 205Iowa789, 218NW502; Iowa 228NW578(2dcase); 124Kan77, 257P753; 125Kan26, 28, 262P 598 [quotCJ]; 208Ky492, 271SW581; 226Ky526, 11SW(2d)109; 234Ky211, 27 SW(2d)960; 6LaA37; 8LaA75; 125Me38, 130A513; 259Mass539, 156NE724; Mass 173NE420; 233Mich403, 206NW328; 283 Mich533, 213NW680; 171Minn492, 214 NW666; 319Mo 241, 3SW(2d)722, 725 [quotCJ]; 321Mo 1052, 15SW(2d)329; 217MoA554, 272SW1006; 79Mont198, 255P737; 98NJEq432, 131A117; NJCh 145A721(2dcase); 104NJL4, 139A884; 128Misc18, 217NYS193; 129Misc10, 220 NYS469; 127Misc895, 217NYS353; 133 Misc435, 232NYS545; 54ND509, 209NW 986, 987 [quotCJ]; 25OhNPNS419; 23 OhA198, 154NE350; 118 Okl 51, 246P 588; 123 Okl 91, 252P67; 124 Okl 181, 254P972; 284Pa47, 130A417; 289Pa65, 137A127; 156Tenn655, 4SW(2d)358, 359 [quotCJ]; TexCommnA 6SW(2d)341; TexCommnA 12SW(2d)1007; TexCivA 283SW244; TexCivA 294SW698; Tex CivA 9SW(2d)292; Can [1924] 2DomLR 922; BC [1929] 3DomLR864.

873-58 92Fla446, 109S617; 125Kan 26, 262P598.

874-59 19F(2d)939, 943 [quotCJ]. [a] **Action in which judgment** is set up as estoppel need not have been brought before action in which it is pleaded. 270 US611, 46SCt420, 70LEd757, 53ALR 1265.

874-60 19F(2d)939, 943 [quotCJ]; 221 Ky127, 297SW1106; 169La365, 125S 273.

874-61 19F(2d)939, 943 [quotCJ]; 322 Mo 450, 17SW(2d)505.

874-68 23F(2d)81; 35GaA208, 132SE 260; 307Mo 98, 270SW662; 156Tenn 655, 4SW(2d)358, 359 [quotCJ].

874-69 118 Okl 51, 246P588.

874-73 93Fla470, 112S253, 261 [citCJ].

875-76 [c] **Conviction of abandonment of children** held not to oust equity court of jurisdiction to settle custody and maintenance. 22AlaA160, 113S480.

875-78½-New. Judgments of a court competent by own constitution to decide on its own jurisdiction cannot be questioned except by appellate power. 91Fla709, 109S677.

875-83 33Ariz421, 265P622; 45 Ida 299, 261P773; 147Wash490, 266P703; 194Wis289, 215NW575.

876-85 But see 137 Okl 242, 279P306 (2dcase).

876-86 30F(2d)416; Mass 173NE507.

876-93½-New. The rule does not apply to United States commissioners. 22 F(2d)837.

876–95 19F(2d)454; 38F(2d)791; 195 Cal 95, 231P739; 202Cal 612, 262P34; 127Kan847, 275P173; 238Mich679, 214 NW320; 242Mich284, 218NW679; 313 Mo 642, 285SW462; 129Misc241, 221 NYS726.

877–96 238Mich679, 214NW320. [a] (5) Although accounting in probate court improperly included trusteeship under deed is res judicata by action of parties, it does not rule subsequent accounting or give probate court jurisdiction of accounting by trustee under deed. 233Mich499, 206NW979. (6) Order of probate court requiring administrator's inventory is not an adjudication that there is no such antenuptial contract, nor an interpretation of such contract. OhA 172NE626.

878–98 178Ark163, 10SW(2d)489; NC 154SE673.

879–18 39 OklACR94 (Dawes commission).

880–20 221Ky439, 298SW1089.

881–27 135Misc774, 238NYS533; Or 288P213. [b] (1) 201Cal 502, 258P387.

882–29½–New. A decision in an action on an insurance contract that a veteran was disabled is not res judicata in a mandamus proceeding to compel a disability rating. DC 26F(2d)997.

882–31 234 IllA199; 125Kan26, 262P 598; 311Mo 551, 279SW122.

882–32 234 IllA199.

883–33 159La1049, 106S561.

883–34 181Ark444, 26SW(2d)115; 236 Mich254, 210NW331; 103NJL440, 135 A897.

883–38 86Colo 340, 280P884 (judgment in quo warranto); 257Mass545, 154NE 255; 257Mass556, 154NE256. [a] (18) Judgment in condemnation proceedings. 253Mass200, 148NE441. (19) Findings of fact in mandamus action. 257Mass 545, 154NE255; 257Mass556, 154NE 256.

884–43 127Misc624, 216NYS337.

885–45 35GaA208, 132SE260; MoA 19 SW(2d)565; 254NY55, 171NE904; 226 AppDiv815, 234NYS528; TexCivA 271 SW183.

885–46 TexCivA 271SW183. [a] **Judgment refusing to vacate search warrant** held conclusive as to existence of probable cause on review of judgment of conviction for possession of liquor. 267 US505, 45SCt417, 69L ed761.

885–52 124Kan77, 257P753; 299Pa86, 149A163. [g] **Right must be adjudicated or released.**–CalA 265P327.

886–55 92Fla446, 109S617.

886–58 CalA 265P327.

887–68 23F(2d)81; 97CalA367, 275P 515; CalA 284P701; 124Kan77, 257P 753; 167Minn399, 209NW259. See also 212Ky142, 278SW832.

888–71½–New. That a pleading in an action is such as to limit the scope of the trial by excluding certain testimony does not prevent the trial from being one on the merits. 238Mich533, 213NW 680.

888–77 88PaSuper137.

888–81 207 Iowa374, 223NW106; 72 Mont318, 233P607, 612 [citCJ]; 230 AppDiv791, 244NYS652.

889–87 170Ark22, 278SW627; 196Cal 380, 238P81; 92Fla446, 109S617; BC [1929] 3DomLR864. [b] **Consent decree conclusive** where stipulation was for no interest to run on allowed claims of creditors, on question of interest. 170 Ark22, 278SW627.

890–89 203Cal 347, 264P477; 246 IllA 416. But see 212Ky142, 278SW832.

890–91 Iowa 228NW98; 142Wash142, 252P692.

891–93½–New. In trespass to try title, defendant is not estopped to deny bona fides of plaintiff's purchases by agreed judgment in another case with plaintiff's grantors. TexCivA 295SW679.

891–96 203Cal 306, 265P246; 80CalA 415, 252P752; 92Fla446, 109S617; 203 Iowa995, 213NW609; 147Miss737, 113 S346; 130Misc262, 223NYS705. But see 219AppDiv833, 220NYS477.

892–97 [a] **Judgment for defendant, pleading only defensive matters, on** plaintiff's failure to appear, if acquiesced in, is conclusive on plaintiff and assigns. 41GaA684, 154SE458.

892–3 54SD170, 222NW665.

892–4½–New. A creditor of a husband, made defendant with the husband in the wife's action to declare the husband trustee of land for herself, and to enjoin the creditor from selling it under attachment, is not bound by a default judgment against the husband obtained through indifference or collusion. 194 NC11, 138SE345.

893–11 103NJEq108, 141A562; Wash 291P1077 (voluntary nonsuit).

893–12 179Ark729, 17SW(2d)895; 72 CalA757, 238P143; 41CalA427, 254P606 (misjoinder); 27 OhNPNS598 (for refusal of plaintiff to answer interrogatories); TexCivA 5SW(2d)236.

893–14 170Ark258, 280SW357; 179Ark 729, 17SW(2d)895; 125Me38, 130A513. [e] **Dismissal for want of equity** held conclusive as to parties. 170Ark258, 280SW357.

894–17 [a] **Judgment upon plea of privilege** in prior suit dismissed without prejudice may be res judicata in subsequent suit involving same parties and subject matter. TexCivA 27SW(2d) 1110.

894–19 [b] **Entry, after final disposition,** reciting dismissal is without prejudice, does not affect conclusiveness of judgment. 35 OhA189, 172NE413.

894–21 218Ala192, 118S385.

894–27 TexCivA 6SW(2d)191 (venue).

894–31 23F(2d)81; 170Ark22, 278SW 627; 163Ga93, 135SE504; 121Kan254, 246P674; 151Md181, 135A139; 259 Mass550, 156NE709; TexCivA 275SW 238, 241 [citCJ]. [a] **Defendant is precluded by judgment** overruling his demurrer from urging that verdict was contrary to evidence. 34GaA201, 129 SE14. [b] **Decree sustaining demurrer for failure to state cause of action** held conclusive. 170Ark22, 278SW627. [c] **Judgment sustaining demurrer held as conclusive** as if facts were proved against plaintiff. 170Ark22, 278SW627.

895–32 164Ga440, 138SE910; 121Kan 254, 246P674; 158La148, 103S721.

895–33 318Mo 1206, 5SW(2d)46.

895–34 164Ga440, 138SE910; 169Ga40, 149SE573.

895–35 151Md181, 135A139.

895–36 32F(2d)476; 170Ark22, 278 SW627; 34GaA201, 129SE14; Ind 163 NE483; 221Ky127, 297SW1106; 158 La148, 103S721; 153SC67, 150SE345; TexCivA 275SW238, 241 [citCJ]. [b] **Cause of action.**–34GaA201, 129SE14.

895–37½–New. A judgment on demurrer is conclusive as to everything necessarily determined thereby. CalA 265P 327.

895–40 37GaA742, 142SE208.

896–43 27F(2d)657; 166La635, 117S 745; 85Mont1, 277P414; 54ND657, 210 NW180; TexCivA 13SW(2d)424.

896–46 Ariz 287P292; 124Kan77, 257P 753; 213Ky521, 281SW497; 158La183, 103S733; 134Misc99, 234NYS329(2d case); 50Philippine144. See also 219 Ala21, 121S76. [c] (6) 196Cal 380, 238P 81; Mass 173NE405; Wis 229NW68. (7) Judgment in mandamus proceeding not appealed from held final. 158La979, 105S35. [d] (1) 267US479, 45SCt431, 69L ed745. (5) Denial of petition to revoke letters of administration. 82 Colo 503, 261P874.

897–47 Can [1924] 2DomLR922.

897–47½–New. Where the opinion of the judge in the United States district court on petition for a bill of review, was merely an elaboration and extension of views on the case as originally presented, judgment in the district court was not prevented from being res judicata. 294Pa69, 143A482.

897–48 Mass 173NE405.

898–57 80CalA415, 252P752; 232Mich 505, 205NW583. But see 84Mont178, 274P834. [d] **Issue from which appeal not taken** is res judicata. SC 131SE33.

898–59–60 27F(2d)992.

899–62 Ida 290P211.

899–70 MoA 296SW191.

899–71 29PortoRico 954.

899–74 8F(2d)455, 459 [quotCJper Gilbert,CJ].

899–77 124Kan77, 257P753; Mass 171 NE672. [a] **Order of probate court** is not binding on interested parties where statute has not been complied with. 238Mich679, 214NW320.

900–78 197Cal 364, 240P1015; 124Kan 77, 257P753.

900–79 321Mo 639, 12SW(2d)453.

900–80 See also 29PortoRico 954.

900–80½–New. That the county court was without jurisdiction to entertain a plea in reconvention because the amount involved was in excess of its jurisdiction did not affect the conclusiveness of its judgment on the issue who breached the contract. TexCivA 9SW(2d)292.

900–80⅓–New. Although the decree directing the commissioner to convey interest of an infant to a purchaser was void, it did not affect the rights of those claiming under the infant, entitled to share in the proceeds of sale only. 150 Va534, 143SE716.

900–82 TexCivA 24SW(2d)99; 141 Wash86, 250P947.

901–84 207Cal 515, 279P134.

901–87 28F(2d)195; 33F(2d)323; 30 Ariz7, 243P606; 170Ark22, 278SW627; 169Ark179, 281SW5; 173Ark898, 294 SW1; 68CalA270, 228P1057; CalA 276P 1069(1stcase); 234 IllA199; 120Kan209, 243P306; 215Ky558, 286SW847; 129 Okl 232, 264P210; 137 Okl 67, 277P1029; 91PaSuper41; TexCivA 291SW645. See also 206Cal 733, 276P103. [c] **On appeal from decision that judgment was res judicata,** validity of such judgment is immaterial. 234 IllA199. [d] **Subsequent contrary holding by court of last resort on appeal in similar case** does not authorize retrial of issues concluded by judgment not appealed from and in conformity to holding of court of last resort at time it was rendered. 123 Okl 228, 253P95.

902–90 3Del 73, 130A395.

902–92 274US316, 47SCt600, 71L ed 1069; 18F(2d)469; 30F(2d)912; 32F(2d) 639; 37F(2d)687; 40F(2d)238; 215Ala 150, 110S46; 30Ariz7, 243P606; 171Ark 943, 287SW163; 206Cal 733, 276P103; CalA 260P796; CalA 283P381; 80Colo 522, 253P389; DC 37F(2d)995; 3Del 73, 130A395; 161Ga629, 131SE505; 163Ga 69, 135SE439, 163Ga547, 136SE423; 166 Ga228, 142SE885; Ga 155SE469(1st case); 168Ga175, 147S558(2dcase); 37 GaA439, 140SE386(dictum); GaA 155SE 47; 317 Ill 126, 147NE793; 319 Ill 66, 149NE580; 241 IllA159; 245 IllA361; 247 IllA289; Iowa 230NW550; 120Kan 115, 242P656; 124Kan77, 257P753; 127 Kan318, 273P429; 208Ky492, 495, 271 SW581 [quotCyc]; 215Ky558, 286SW 847; 227Ky508, 138SW(2d)515; 168La 701, 123S296; 125Me38, 130A513; 251 Mich506, 232NW355(1stcase); 170Minn 414, 213NW53; 171Minn492, 214NW 666; 307Mo 98, 270SW662; 307Mo 417, 270SW691; 316Mo 812, 293SW760; MoA 24SW(2d)175; 75Mont122, 242P421; Nebr 231NW148; Nev 290P1024; 100 NJEq448, 136A320; NJCh 150A764; 230AppDiv127, 243NYS187; 246NY 203, 158NE74; 215AppDiv609, 214NYS 402 (conclusive evidence of facts in issue); 128Misc18, 217NYS193; 196NC 58, 144SE535; 58ND435, 226NW498; 117 Oh64, 157NE475; 24 OhA368, 156 NE613; 25 OhA165, 157NE903; 32 OhA 202, 167NE690; 36 OklACR362; 123 Okl 228, 253P95; 133 Okl 194, 271P 946; 121 Or187, 253P883; 284Pa242, 130A503; 289Pa65, 137A127; 290Pa 331, 138A849, 54ALR1285; 300Pa169, 150A604; 49SD262, 207NW98; Tex CivA 291SW305; TexCommnA 68W (2d)341; TexCivA 28W(2d)967; Tex CivA 6SW(2d)191; TexCivA 13SW(2d) 424; TexCivA 16SW(2d)961; TexCivA 30SW(2d)934; 140Wash427, 249P778; 198Wis461, 224NW702; Sask [1929] 2 DomLR443. See also TexCommnA 286 SW185. [c] **As between codefendants,** nothing is adjudicated by joint judgment against them. TexCivA 283SW 914.

905–94 14F(2d)808; 245 IllA531; Ind 163NE483; 208Ky492, 495, 271SW581 [quotCyc]; 125Me38, 130A513; 48Philippine100.

905–95½–New. A change in conditions which are in degree only and not in kind may be urged in avoidance of the doctrine of res judicata. 240Mich250, 215NW378.

906–96 170Ark22, 278SW627, 632 [citCJ]; 77CalA562, 247P264; 100NJEq

174, 134A744; 146Wash520, 264P8, 11 [quotCyc].

906–98 160La605, 107S461; 173Minn 242, 217NW337; 129Misc106, 221NYS 598; 192NC371, 135SE288; TexCivA 289SW1060.

906–99 5F(2d)240.

906–4 See also CalA 288P1111; 166La 635, 117S745.

906–6 83Colo 592, 267P604; 152Tenn 486, 279SW797; TexCivA 289SW1060. [b] **Express reservation as res judicata.**–208 Iowa559, 223NW274.

906–6½–New. It has been held that estoppel by judgment extends to issues of fact only, and not to the evidence by which such issues are to be determined. TexCivA 285SW927.

906–6½–New. Uncertainty as to what was actually litigated inures to party denying res judicata. 134Misc99, 234 NYS329(2dcase).

907–15 TexCommnA 280SW563, 44 ALR1143.

907–18 129Misc241, 221NYS726. [b] **Effect of affirmance.**–129Misc241, 221 NYS726.

908–23 TexCivA 296SW916; TexCivA 21SW(2d)540. [i] **Judgment in creditor's action to enforce stockholder's statutory liability** holding defendant not a stockholder is conclusive of bankruptcy trustee's action for unpaid subscriptions. 125Misc521, 211NYS405.

909–31 267US505, 45SCt417, 69L ed 761; 274US316, 47SCt600, 71L ed1069; 6F(2d)559; 7F(2d)284; 24F(2d)137; 28F(2d)398; 32F(2d)476; 32F(2d)502; 32F(2d)639; 36F(2d)91; 215Ala150, 110S46; 215Ala328, 110S566; 218Ala 318, 118S563; 218Ala498, 119S229; Ala 130S226; 29Ariz173, 239P1028, 1029 [cit Cyc]; 168Ark297, 270SW953, 955 [quot Cyc]; 172Ark681, 290SW577; 176Ark 1166, 5SW(2d)735; 179Ark766, 19SW (2d)1018, 64ALR1258; 180Ark420, 21 SW(2d)610; 180Ark735, 22SW(2d)558; Ark 32SW(2d)304; 201Cal 502, 258P 387; 206Cal 125, 273P581; 204Cal 180, 267P538; CalA 288P1111; 85Colo 176, 274P812; 104Conn585, 134A73; 3Del 73, 130A395; 162Ga589, 134SE299; 163Ga 69, 135SE439; 165Ga765, 142SE139; 41 GaA91, 151SE815; 328 Ill 148, 159NE 222; 331 Ill 80, 162NE119; 246 IllA416; IndA 169NE86 (issue as to priority of tax lien held concluded by foreclosure, though it might have been defense); 204 Iowa1373, 215NW658; 205 Iowa 1151, 216NW58; 205 Iowa662, 216NW 700; 125Kan330, 263P1048; 125Kan 417, 265P53; 130Kan388, 286P231; 208 Ky461, 271SW551; 209Ky154, 272SW 402 (defendant not member of partnership sued); 209Ky127, 272SW419; 215 Ky40, 284SW386; 215Ky558, 286SW 847; 216Ky434, 287SW698; 220Ky113, 294SW804; 220Ky154, 294SW1063; 224 Ky356, 6SW(2d)497; 233Ky148, 25SW (2d)35; 165La769, 116S180, 182 [cit CJ]; 128Me171, 146A247; Me 150A609; Mass 170NE567; Mass 170NE621; 238 Mich533, 213NW680; 249Mich485, 229 NW411; 307Mo 576, 271SW365 (claim for waste is concluded by action of ejectment and cannot be considered in subsequent suit for value of improvements brought by defendant in ejectment); 310Mo 171, 275SW44; 313Mo 448, 285SW459; 315Mo 525, 289SW825; MoA 272SW1032; 83NH225, 140A708; 98NJEq432, 131A117; NJCh 150A764; NJCir 134A885; 246NY203, 158NE74; 250NY304, 165NE456; 213AppDiv374, 211NYS184; 128Misc18, 217NYS193; 129Misc10, 220NYS469; 132Misc73, 228 NYS116; 134Misc22, 235NYS125; 226 AppDiv280, 235NYS220; 230AppDiv538, 245NYS675; 196NC58, 144SE535; 118 OhSt48, 160NE453; 23 OhA198, 154NE 350; 36 OklACR362; 131 Or586, 283P8; 129 Or409, 274P919; 289Pa260, 137A 252; 91PaSuper458; 147SC448, 145SE 193; 50SD366, 210NW191; 160Tenn21, 22SW(2d)242; TexCivA 278SW247; TexCivA 290SW276; TexCivA 3SW(2d) 497; TexCivA 16SW(2d)395; TexCivA 16SW(2d)961; 149Va584, 140SE670; Utah 269P776; 146Wash520, 264P8, 11 [quotCJ]; 100WVa22, 130SE89; BC [1929] 4DomLR389. See also 166La883, 118S70 [reh den 166La891, 118S73]. [a] **In action for conversion of policy.**–215AppDiv53, 213NYS1 (since all matters and questions should have been settled in former action which supersedes present one).

910–32 30F(2d)33 [writ of certiorari den 279US860, 49SCt418(1stcase), 73 L ed1000]; 32F(2d)476; 35F(2d)84; 215Ala150, 110S46; 33Ariz156, 262P 1002, 1003 [quotCJ]; 168Ark297, 270 SW953, 955 [quotCyc]; 170Ark366, 280 SW641; 180Ark420, 21SW(2d)610; CalA 265P327; IndA 169NE86; 203 Iowa384, 212NW731; 165La769, 116S 180; Mass 170NE567; 98NJEq432, 131 A117; 213AppDiv374, 211NYS184; 197 NC687, 150SE330(2dcase); 23 OhA198, 154NE350; 32 OhA202, 167NE690; 124 Okl 63, 253P1014; TexCivA 278SW247; Utah 291P298; BC [1928] 3DomLR631.

911–34 225AppDiv232, 232NYS530; TexCivA 290SW276.

911–35 18F(2d)707, 710 [citCJ]; 33F (2d)7, 9 [quotCJ]; 38F(2d)457; 32Ariz 423, 259P676, 679 [quotCJ]; 3Del 73, 130A395; Iowa 228NW316; 119Kan358, 239P1110, 1112 [citCJ]; 125Kan768, 266 P60; 215Ky558, 286SW847; 178Minn1, 226NW412; 307Mo 417, 270SW691; MoA 286SW401; 250NY304, 165NE456; 213AppDiv374, 211NYS184; 114 Okl 153, 244P744; 116 Or683, 242P826; SD 228NW189; TexCivA 297SW509, 511 [citCJ]. See also 11LaA87, 120S253. [c] (4) Grantee's former suit for specific performance is not res judicata of later suit to cancel grantor's deed subsequent to first suit. 247Mich464, 226 NW261.

912–36 93Fla470, 112S253, 264 [citCJ]; TexCivA 297SW509, 511 [quotCJ].

913–38 168Ga213, 147SE506.

913–42 129 Okl 232, 264P210.

913–43 23F(2d)92; 215Ala328, 110S 566; 137Misc666, 244NYS198; 34 OhA 157, 170NE601; 135 Okl 218, 275P317; 291Pa175, 139A734; 67Utah25, 245P 381, 45ALR882. See also 49SD370, 207 NW163.

913–44 215Ala328, 110S566; 201Cal 502, 258P387; 235Ky21, 29SW(2d)598.

913–46 274US316, 47SCt600, 71L ed 1069; 159La509, 105S602.

914–47 23F(2d)92; 201Cal 502, 258P 387; 121 Or187, 253P883; Tex 27SW (2d)526.

914–48 121 Or187, 253P883. [a] (5) Where boundaries are so related that fixing one fixes all, judgment fixing one may operate as estoppel regarding other parts of survey. TexCivA 19SW(2d) 926.

914–50 38F(2d)457.

915–52 30Ariz7, 243P606; 319 Ill 66, 149NE530 (right to deprive owners of property without compensation is different from right to deprive them of property with compensation); 159La 509, 105S602 (judgment in partition suit by adverse claimants of oil land not binding on question of prescription in suit by lessor for royalties).

915–54 272US21, 47SCt9, 71L ed145; 42 Ida158, 243P655; 260Mass216, 157 NE345; 131Misc47, 225NYS740; 194NC 671, 140SE435; NC 154SE673.

915–55 272US21, 47SCt9, 71L ed145; 5F(2d)358; 5F(2d)718; 15F(2d)952; 36F(2d)91; 215Ala328, 110S566; 180 Ark136, 20SW(2d)630; 203Cal 379, 264 P242; 77CalA241, 246P152; CalA 265 P327; CalA 287P121; Colo 292P87; Conn 152A142; 35GaA208, 132SE260; 46 Ida313, 268P31; 236 IllA549; Iowa 216NW719; Iowa 230NW561; Iowa 228 NW316; 125Kan641, 266P65; 130Kan 165, 285P563; 159La509, 105S602 (holding judgment in petitory action by adverse claimants of oil lands, having nothing to do with issue in suit by lessor for royalties, was not res judicata); 257Mass545, 154NE255; 240 Mich569, 215NW772; 148Miss316, 114S 609; MoA 278SW1062; Mo 29SW(2d) 1096; MoA 31SW(2d)215; 80Mont339, 260P401; 82Mont39, 265P10; 113Nebr 721, 204NW786; Nebr 230NW95; 49 Nev342, 246P688; 100NJEq174, 134A 744; 225AppDiv763, 232NYS443; 58ND 435, 226NW498; 23 OhA266, 153NE905; 129 Okl 232, 264P210; 133 Okl 222, 271 P1010; 135 Okl 218, 275P317; 141 Okl 212, 285P120; 300Pa217, 150A606; Tex CivA 280SW312; TexCivA 283SW611; TexCivA 284SW643; TexCivA 290SW 569; TexCivA 291SW279; TexCivA 291 SW305; TexCivA 19SW(2d)926; Tex CivA 31SW(2d)519; 144Wash358, 258 P10; Wash 291P471; NS [1930] 1 DomLR723 (fraud). [a] (6) Other instances. 37F(2d)11. [b] (8) Judgment holding valid contract for auditing books of county is no adjudication in actions attacking warrants as issued in excess of appropriations. 170Ark1004, 282SW367. (9) Other instances. CalA 287P121; 169Ga864, 151SE799; Iowa 230NW415; 264Mass253, 162NE319; 300Pa217, 150A606. (10) Where plaintiff materialman was made defendant in previous action, attempting to have priority of claims adjudicated, but judgment was silent thereon, there was no adjudication of his claim against contractor and surety. 154Wash181, 281P 488. (11) Judgment in life tenant's proceeding to mortgage dwelling is not res judicata in his action for declaratory judgment permitting removal of dwelling to erect apartment. 135Misc70, 237 NYS6. [p] Judgment in action for war risk insurance is not res judicata in action for compensation under World War Veterans' Act. 23F(2d)979. [q] **Record inadmissible** where different issues were involved. 12LaA567, 125S142.

919–56 274US316, 47SCt600, 71L ed 1069; 23F(2d)81; 116 Or683, 242 P826; 143Va920, 129SE700.

919–57 CalA 283P381; 35GaA208, 132 SE260; 286Pa449, 133A642.

920–58 171Ark817, 236SW971; CalA 285P1096; 35GaA208, 132SE260; 41GaA 51, 152SE148; 42 Ida158, 243P655; 166 Minn134, 207NW198; 286Pa449, 133A 642; 143Va920, 129SE700; 199Wis608, 227NW396 (judgment not determining joint liability of defendants is not res judicata as to right to contribution).

920–60 164Ga869, 139SE799; 200 Iowa 25, 202NW236, 41ALR495; 129Kan650, 284P823; 175Minn247, 221NW8; 133 Okl 222, 271P1010; 140Wash650, 250P59.

920–61 164Ga869, 139SE799.

920–63 240Mich250, 215NW378. See also 207 Iowa419, 223NW167.

920–67 272US21, 47SCt9, 71L ed145; 15F(2d)952; 31F(2d)547; 91Fla103, 107S261; 37GaA228, 139SE681; 236 IllA 549; 332 Ill 467, 163NE769; 253Mass 383, 149NE313; 221MoA1178, 299SW 629; 98NJEq432, 131A117; 98NJEq559, 131A108; TexCivA 271SW644; TexCivA 16SW(2d)961; 143Wash122, 254P1092; 145Wash61, 258P856.

920–68 215Ala150, 110S46; 37GaA228, 139SE681; 236 IllA549; Iowa 228NW 74; 313Mo 130, 280SW1035, 44ALR1328; TexCivA 271SW644; 143Wash122, 254P 1092; 148Wash549, 269P1040.

921–70 98NJEq350, 129A126; 98NJEq 35, 129A698 (or that issue was not ripe for decision and not tried or determined).

921–73 207Cal 181, 277P330.

921–73½–New. An issue which goes to judgment is conclusive where judgment is not set aside, 214AppDiv643, 212NYS 751.

921–73½–New. modified, 214AppDiv 643, 212NYS751.

921–73¼–New. or reversed. 214AppDiv 643, 212NYS751.

921–74 85Colo 154, 274P816; 37GaA228, 139SE681; 200 Iowa736, 205NW361 (right to foreclose mechanic's lien is lost by filing claim in mortgage foreclosure suit and failing to appeal from decree therein); 200 Iowa905, 205NW 541; 141Miss366, 106S768; 193NC299, 136SE873; 193NC464, 137SE418; 294Pa 69, 143A482; TexCivA 280SW312; 148 Wash549, 269P1040. See also 313Mo 448, 285SW459; 33NM356, 267P74. But see TexCivA 280SW307.

921–75 TexCivA 17SW(2d)174.

921–77½–New. That purchasers of leased premises in an action for recovery of rent and possession failed to state the cause of action for rent does not bar them from a further suit to collect rents if any are due them. MoA 14SW(2d)44.

921–78 268US169, 45SCt472, 69L ed 899; 6F(2d)559; 7F(2d)284; 7F(2d)875; 15F(2d)952; 23F(2d)230; 37F(2d)137; 43F(2d)521; 43F(2d)750; Ala 130S390; Cal 286P1005; 69CalA40, 230P24; 85 CalA8, 259P93; CalA 291P276; 77Colo

504, 238P64; 81Colo10, 253P394; 163Ga 547, 136SE423; 37GaA228, 139SE681; 168Ga213, 147SE506; 41GaA91, 151SE 815; 41GaA189, 152SE141 (where court in former action held issue not involved); GaA 155SE47; 319 Ill 437, 150 NE435; IndA 169NE86; 206 Iowa869, 221NW668; 207 Iowa419, 223NW167; 208 Iowa198, 225NW372; Iowa 228NW 109; 215Ky376, 285SW195; 216Ky434, 287SW698; 224Ky356, 6SW(2d)497; 233 Ky634, 26SW(2d)538; 124Me384, 130A 209; 149Md522, 131A834; Mass 156NE 725; Mass 170NE621; 172Minn8, 214NW 669; 175Minn247, 221NW8; 311Mo 551, 279SW122; 319Mo 128, 3SW(2d)726; MoA 284SW521; MoA 286SW401; 75 Mont122, 242P421; 116Nebr610, 218NW 584; 98NJEq432, 131A117; 98NJEq559, 131A108; 99NJEq788, 134A363; 33NM 356, 267P74 [quotCyc]; 224AppDiv105, 229NYS554; 133Misc538, 232NYS603; 226AppDiv280, 235NYS220; 229AppDiv 526, 242NYS398; 137Misc730, 244NYS 398; 195NC92, 141SE484, 488 [quotCyc]; 23 OhA266, 153NE905; 114 Okl 153, 244 P744; 137 Okl 30, 277P661; 283Pa292, 129A101; 284Pa47, 130A417 (conclusions of fact); 289Pa65, 137A127; 295Pa105, 144A900; 300Pa169, 150A604; 146SC225, 143SE796; 51SD591, 215NW878; SD 228NW390; TexCommnA 1SW(2d)585; TexCommnA 6SW(2d)341; TexCommnA 15SW(2d)563; TexCivA 13SW(2d)152; TexCivA 19SW(2d)926; 146Wash543, 264P705; 148Wash15, 267P767; 199Wis. 608, 227NW396. See also 246 IllA166; 158La921, 105S14. [c] (2) Judgment for defendant for rescission of contract for sale of automobile because of defective condition when delivered held bar to seller's subsequent action for damages to car except such as occurred after trial of first action. 215Ky376, 285SW195. (3) Where, in former action between same parties, issue of damages for fraud in misrepresentation of automobile was adjudicated, it was held it cannot be adjudicated affirmatively in subsequent action by defendant for damages for plaintiff's misrepresentation. 23 OhA 266, 153NE905. [h] **Final judgment in mandamus ordering issuance of building permits** held bar to injunctive suit by property owners to restrain construction of such buildings. 158La979, 105S 35. [i] **Illustrations.**—215AppDiv609, 214 NYS402; 125Misc354, 211NYS626.

922–79 272US21, 47SCt9, 71L ed145; 42F(2d)101; 200 Iowa736, 205NW361; 195NC92, 141SE484, 488 [quotCyc]; 116 Or683, 242P826.

922–79½–New. Judgment setting aside rate to universal legatee and declaring heirs entitled to property does not prevent probate of will subject to such rights. 165La769, 116S180.

922–81 24 OhA368, 156NE613.

922–82½–New. Where two distinct issues of fact were raised and litigated and appropriate findings made, one may not be disregarded as immaterial, merely because finding on the other issue was sufficient to sustain the conclusion of law. 169Minn15, 208NW952.

923–85½–New. A person who was not a party to an action may not claim that an issue was adjudicated in his favor therein where the judgment was entered on a motion for a directed verdict based on numerous grounds and sustained generally. 200 Iowa25, 202NW236, 41ALR 495.

923–87 281US470, 50SCt374, 74L ed 972; 23F(2d)979; 33F(2d)473; 217 Ala10, 115S77; 206Cal733, 276P103; 86Colo 240, 280P884; 39GaA326, 147 SE133; 332 Ill 467, 163NE769; 200 Iowa751, 205NW359; 204 Iowa1373, 215 NW658; Iowa 227NW627; 208Ky764, 271SW1077; 125Me38, 130A513; 253 Mass383, 149NE313; 217MoA554, 272 SW1006; 317Mo 1078, 298SW83; 128 Misc18, 217NYS193; 130Misc262, 223 NYS705; 131 Or586, 283P8; 133 Okl 194, 271P946; 91PaSuper458; Tex CommnA 6SW(2d)341; TexCivA 273 SW900; TexCivA 283SW244; TexCivA 284SW606; TexCivA 294SW1115; Can [1930] 3DomLR582. [a] (9) Decree annulling marriage because of defendant's impotency in action which he defended is conclusive against him in subsequent action to cancel bond and mortgage given him in consideration for his marrying plaintiff's daughter. 215 AppDiv91, 213NYS460. [b] (2) Where defendant had made unsuccessful motion to vacate judgment for want of jurisdiction, he cannot again raise question of jurisdiction in suit against him on judgment. 149Md522, 131A834. [c] (3) Where defendant made unsuccessful motion to vacate judgment because appearance by attorney was not authorized, he cannot again raise question of attorney's authority in suit against him on judgment. 149Md522, 131A834. [j] 199Wis273, 226NW306. [aj] 130 Or 364, 280P331. [am] TexCivA 22SW(2d) 955. [aw] **Suit for redemption** necessarily includes claims for rents or waste. 180Ark420, 21SW(2d)610. [ax] **Title to property.**—41GaA713, 154SE388(1st case).

927–95 319Mo 241, 3SW(2d)722.

927–96 33F(2d)7, 17 [quotCJ&Cyc]; 42F(2d)507; Ala 130S226; 29Ariz325, 241P515; 201Cal 502, 258P387; CalA 265P327; 87Colo 27, 284P776; GaA 155 SE47; 336 Ill 506, 168NE294; IndA 162 NE249; 149Md86, 131A834; Mass 173 NE420; 232Mich62, 204NW694; 249 Mich527, 229NW476; 152Miss390, 119 S320; Mo 31SW(2d)1059; 83NH115, 138A184; 129Misc211, 221NYS118; 230 AppDiv538, 245NYS675; 139 Okl 110, 281P243; TexCivA 283SW244; Tex CivA 26SW(2d)663. See also 294Pa69, 143A482. [a] (3) Final orders in proceedings for nonpayment of rent held conclusive on existence of tenant and landlord relation. 129Misc211, 221NYS 118.

928–98 272US21, 47SCt9, 71L ed145; 23F(2d)979; 77CalA241, 246P152; 153 Miss170, 118S722, 68ALR380; 126Misc 382, 212NYS639 (judgment in suit to restrain sale of property by water company in which findings as to excess rate received were not necessary to adjudication is not res judicata as to suit to declare rates unreasonable); 152Va864, 148SE869; 151Wash61, 275P60.

929–1 23F(2d)979; 27F(2d)101; CalA 265P327; 141Miss366, 106S768; 152 Miss390, 119S320; 115 Okl 152, 243P 732; 39 OklACR94; TexCivA 30SW(2d) 934.

929–3 75Mont122, 242P421.

930–6 272US21, 47SCt9, 71L ed145; 210Ky498, 276SW487.

930–7 210Ky498, 276SW487 [quotCJ].

930–17 8F(2d)905; 170Ark366, 280SW 641; 170Minn414, 213NW53; 128Misc 18, 217NYS193.

930–20 274US316, 37SCt600, 71L ed 1069; 18F(2d)707, 710 [citCJ]; 206Cal 733, 276P103; CalA 265P327; 126Kan 71, 266P751, 753 [quotCJ]; 215Ky149, 284SW1029; 316Mo 626, 291SW488; 49 RI 449, 144A158; SD 228NW189; 154 Wash163, 281P327. See also MoA 2 SW(2d)115; TexCivA 16SW(2d)312.

931–21 18F(2d)707, 710 [citCJ]; 110 Conn432, 148A365; 121Kan126, 245P 1028; 126Kan71, 75, 266P751 [quot CJ].

931–25 68CalA189, 228P673; 77CalA 265, 246P344; 165La536, 115S742; Iowa 230NW381; Iowa 228NW98; 252 Mass504, 148NE134; 195NC92, 141SE 484; 128 Or191, 274P128; TexCivA 290 SW849. See also 166La635, 117S745.

932–29 272US21, 47SCt9, 71L ed145; 6F(2d)285 (finding that claims against railroad in receivership proceedings held not adjudication that claims were not for current expenses, payable under state statute by purchaser at sale); 8 F(2d)532; 14F(2d)809; 15F(2d)794; 18F(2d)707; 23F(2d)979; 27F(2d)101; 32F(2d)639; 42F(2d)101; 29Ariz304, 241P307; 30Ariz581, 249P755; 31Ariz 80, 250P562; 174Ark847, 298SW201; 177Ark392, 7SW(2d)15; 198Cal 32, 243 P423; 72CalA550, 237P808; 76CalA 590, 245P434; 77CalA241, 246P152; 77 CalA265, 246P344; 79CalA203, 249P42; 204Cal 262, 267P705; 93Fla470, 112S 253, 264 [citCJ]; 161Ga543, 132SE99; 198 Ind429, 153NE890; 203 Iowa645, 212NW564; 204 Iowa1373, 215NW658; 121Kan126, 245P1028; 217Ky601, 290 SW467; 217Ky749, 290SW705; 161La 1032, 109S827; 10LaA650, 121S358; LaA 124S688; Mass 156NE725; 170 Minn479, 213NW38; 307Mo 417, 270SW 691; 113Nebr721, 204NW786; 243NY 499, 154NE538; 250NY304, 165NE456; 125Misc629, 211NYS845 (obiter dictum); 126Misc769, 215NYS781; 127 Misc459, 215NYS778; NC 154SE631; 23 OhA266, 153NE905; 118 Or182, 245 P729; 128Or191, 274P128; 34Porto Rico 576; TexCivA 290SW569; Tex CivA 297SW888; TexCivA 6SW(2d)175. [a] (4) Action to establish debt did not bar action for fraud in contracting such debt. 190NC499, 130SE164. (5) Judgment in action for construction of will in which committee of incompetent was party individually and also as representative of incompetent held to constitute no bar to examination of committee's conduct in representing incompetent. 243NY499, 154NE538. (6) Record in former action in which element of knowledge of deceit was absent held not conclusive proof of fraud in subsequent action for damages for misrepresentation. 23 OhA266, 153NE905. [j] **Findings or representations** in action to restrain sale by water company of some of its property to city that water company could continue to serve consumers at rates then obtaining does not estop company raising rates, if new rates are fair and reasonable. 126Misc382, 212 NYS639.

935–30 272US21, 47SCt9, 71L ed145; 79CalA203, 249P42; 203 Iowa645, 212 NW564; 49Nev254, 243P817; TexCivA 290SW569.

935–33 36F(2d)222; 29Ariz304, 241P 307; CalA 287P121; 161Ga543, 132SE 99; 165Ga384, 141SE42; 202 Iowa38, 209NW410; 160La555, 107S425; 307 Mo 576, 271SW365; MoA 284SW521; MoA 274SW1106; 79Mont198, 255P737; 102NJL626, 133A401; NJCirCt 134A 885; 136Misc122, 238NYS753; 118 Or 182, 245P729; TexCivA 290SW569; TexCivA 297SW1045; TexCivA 13SW (2d)424.

936–35 10LaA363, 120S890; Can [1927] 3DomLR128.

937–40 23F(2d)979; 204Cal 262, 267P 705; 198Cal 32, 243P423; 68CalA189, 228P673; 77CalA241, 246P152; 329 Ill 507, 161NE57; 152Miss390, 119S320; 126Misc769, 215NYS781; 127Misc459, 215NYS778; 46Philippine542; 54SD 592, 223NW824; 107WVa109, 147SE 484. [aj (5) 126Misc769, 215NYS781.

937–43 238Mich533, 213NW680; 230 AppDiv538, 245NYS675; TexCivA 290 SW849.

938–47 Ala 130S226; 204Cal 180, 267P 538; 262Mass343, 160NE7; 99NJEq 486, 133A529; 198Wis145, 223NW422.

938–48 Mass 172NE76.

938–53 85Colo 154, 274P816.

938–55 See also 225AppDiv562, 234 NYS2.

938–59 99NJEq486, 133A529.

938–65½–New. The question of the custody of a child cannot become matter of res judicata. 218Ala330, 118S575.

938–67 15F(2d)731; 23F(2d)81; 29 F(2d)257 [certiorari den 279US843, 49 SCt264(5thcase), 73L ed988]; 42F(2d) 541; 216Ala539, 113S617; 177Ark1194, 9SW(2d)83; 202Cal 394, 260P878; 206 Cal 441, 274P746; 206Cal 733, 276P 103; 206Cal 730, 276P106; 208Cal 193, 281P61; 73CalA304, 238P822; Colo 253P389; 86Colo 178, 279P44; 318 Ill 591, 149NE517; 204 Iowa443, 215NW 599; Iowa 232NW816; 220Ky98, 294 SW785; 226Ky526, 11SW(2d)109; 167 La878, 120S583(1stcase); Mass 170NE 384(2dcase); 247Mich210, 225NW565; 171Minn488, 214NW283; 145Miss728, 110S847; 311Mo 551, 279SW122 (validity of deed); Mo 18SW(2d)50; Mo 32 SW(2d)569; NJCh 145A721(2dcase); NJCh 150A764; 196NC58, 144SE535; 198NC433, 152SE34; 58ND435, 226NW 498; 35 OhA526, 172NE629; 123 Okl 228, 253P95; 289Pa65, 137A127; Tex CommnA 6SW(2d)341; TexCivA 13SW (2d)437; TexCivA 17SW(2d)174; Tex. CivA 29SW(2d)911; TexCivA 31SW(2d) 172; 144Wash661, 258P853. But see TexCivA 7SW(2d)674. [f] (5) 80Colo 522, 253P389. [j] 5F(2d)289; 15F(2d) 731; 149Miss892, 116S299; Mo 26SW (2d)609; MoA 295SW522; TexCivA 290SW827. [l] (3) Determination of title to part of tract all of which rests on identical grounds is conclusive be-

tween privies of original litigants when title to the whole tract is in question. So of suit to eject city from part of parcel followed by claim in proceedings to condemn whole tract that title is in city though defeated in first suit defended on claim of title to entire tract. 213AppDiv187, 210NYS387. [m] (3) Holding that legal title to property was in wife does not preclude court in divorce proceeding from decreeing that such property shall become property of husband. 32 OhA274, 167NE897. [n] **Judgment decreeing possession** founded on deed conveying dower or life interest operates as estoppel during widow's life only but not against decedent's heirs after her death. 189NC790, 128SE404.

940-68 7F(2d)875; Ala 130S226; 195Cal107, 231P724; 80Colo 522, 253P389; 225Ky21, 7SW.(2d)499; TexCivA 17SW(2d)174.

941-69 204Iowa443, 215NW599; 145Miss728, 110S847; 247NY457, 160NE913; TexCivA 271SW644. [a] **Oil and gas lease.**–208Ky764, 271SW1077.

941-70½-New. But where judgment fixes title to timber under a deed without defining "timber," in an injunction suit to enforce rights under judgment, the court may look to the deed to determine the meaning of the word "timber." 72CalA433, 237P758.

941-72 180Ark128, 20SW(2d)866; 195Cal49, 231P735; 93CalA346, 269P760; 110Conn432, 148A365; 162Ga743, 135SE95; Ga 155SE678; 169La365, 125S273; 170Minn479, 213NW38; MoA 274SW1106; 82Mont39, 265P10; 34PortoRico150; TexCommnA 148SW(2d)829; 152Va864, 148SE869. [b] TexCivA 21SW(2d)382. [i] 201Iowa834, 208NW508, 44ALR1516 (probate order requiring bank to deliver property to administrator stating it was not adjudication of property rights).

942-73 82Mont39, 265P10; 34PortoRico150.

943-75 162Ga743, 135SE95.

943-77 Iowa 221NW830.

943-78 TexCivA 271SW644.

943-81 31F(2d)65; 218Ala296, 118S513; 180Ark918, 25SW(2d)452; CalA 289P242; CalA 292P529; 170Ga62, 152SE112; 218Ky15, 290SW1031; Mass 170NE567; 224AppDiv758, 229NYS755; 58ND435, 226NW498; 294Pa69, 143A482; TexCivA 27SW(2d)588. [d] 110Conn432, 148A365 (of marriage). [j] **Where two claims arising out of same contract** are in existence, then judgment upon one is bar upon other. 125Misc908, 211NYS649.

944-82 31F(2d)547; 77CalA241, 246P152; 79CalA203, 249P42; Or 292P319. [e] **Judgment against plaintiff** in suit for breach of warranty that alfalfa sold by defendant was all good green color held not res judicata in suit for breach of warranty by defendant that it was ninety five per cent pure first cutting alfalfa. 137Wash203, 242P362.

944-83 201Cal502, 258P387; 80Colo522, 253P389; 165Ga121, 139SE863 (bonds); 48Ida662, 284P557.

944-84 80Colo522, 253P389; 197NC251, 148SE239.

945-87 80Colo522, 253P389.

945-90 226AppDiv755, 234NYS152.

946-93 240Mich250, 215NW378; 250NY304, 165NE456; 294Pa69, 143A482.

946-97 127Kan846, 274P1110; 159La1019, 106S550; 227Ky258, 12SW(2d)693; 244Mich692, 222NW156; TexCommnA 280SW185; BC [1929] 3DomLR864. [f] (6) Judgment in summary proceedings to forfeit land contract as adjudicating vendee's possession. 242Mich110, 218NW680. (7) Final judgment adjudicating homestead in former suit between same parties is conclusive on property status. TexCivA 31SW(2d)519. [g] **Location of old patent by court of last resort** should be adhered to in subsequent actions unless it is shown that mistake was made. 210Ky121, 275SW513. [h] **Specific performance.**–289Pa65, 137A127.

946-98 105Conn80, 134A250.

946-99 TexCommnA 280SW185.

946-1 TexCommnA 280SW185.

946-2 TexCommnA 280SW185.

946-2½-New. Purchaser of land, ignorant of grantor's fraud in legal proceedings affecting title and without notice of anything to put him upon inquiry, will be protected as against a person claiming to have been defrauded. 323Ill585, 154NE414.

946-2⅓-New. A decree in a former case denying specific performance of a covenant in a deed and holding the use of a pier not violative thereof is binding in a suit to enjoin repairing the pier. 98NJEq559, 131A108.

946-2¼-New. Judgment in a possessory action is not res judicata in a petitory action. 11LaA244, 123S405.

947-12½-New. Writ of entry action would not adjudicate mortgagee's rights under sale, by virtue of power in mortgage, subsequent to date of writ. Mass 171NE281.

947-15 202Cal394, 260P878; 88IndA671, 164NE317.

948-18 Ala 130S226.

949-33 155SC258, 152SE518 (addition of plaintiff immaterial).

950-37½-New. Under some statutes a judgment in ejectment is conclusive as to title between the parties unless the jury find for plaintiff less than the fee. 168Ga734, 148SE916 (conclusive where judgment is for defendant claiming under deed from plaintiff).

950-40 170Ark1194, 281SW23; 208Ky461, 271SW551; 238Mich296, 212NW968.

951-45 93CalA346, 269P760; 137Misc165, 241NYS552. [b] (2) Ejectment involving issue of possession is not estoppel on title. 189NC790, 128SE404.

952-54 TexCommnA 291SW855.

952-60 100CalA87, 280P176(2dcase) (in absence of appeal); 331Ill483, 163NE401; 311Mo551, 279SW122; 322Mo654, 15SW(2d)842; TexCivA 291SW615.

953-65 320Ill11, 150NE339; 160La555, 107S425; Mo 19SW(2d)284; Mo 32SW(2d)91. But see MoA 5SW(2d)457.

953-66 322Mo654, 15SW(2d)842; 100WVa22, 130SE89.

954-72 215Ala646, 112S219; 160La555, 107S425.

955-84 320Ill11, 150NE339; 321Ill368, 151NE905; 84IndA555, 151NE740; 232Ky751, 24SW(2d)555 (infant remainder men and bona fide purchasers); 167La1063, 120S857; 322Mo654, 15SW(2d)842; 100WVa22, 130SE89.

956-88 321Ill368, 151NE905.

956-90 5LaA755.

957-96 216Ala416, 113S35; 140Wash427, 249P778.

957-98 216Ala416, 113S35, 39 [citCJ].

958-14 TexCivA 275SW238.

958-16 TexCivA 275SW238.

959-20 TexCivA 285SW927.

959-27 168Ark718, 271SW970 (confirming cotenant's tax title conclusive in action to cancel lease and mineral deeds and for partition); 196Cal380, 238P81 (consult judgment); 119Kan358, 239P1110, 1112, 43ALR1387 [citCJ]; 316Mo626, 291SW488. See also 23F(2d)81 (equitable action to set aside deeds conclusive in subsequent ejectment suit). [a] (2) Judgment on former suit held conclusive as to constitutionality of statute relating to suits to quiet title. 309Mo312, 273SW1050. [b] **Judgment in suit by wife against husband to quiet title** to property alleged to have been conveyed by husband to wife in fraud of creditors is bar to subsequent action by nonstatutory assignee for benefit of creditors to quiet title to same property where deed to wife was recorded prior to assignment. 196Cal380, 238P81.

959-28 213Ala46, 104S328, 330 [citCJ]; IndA 158NE299; 119Kan358, 239P1110, 1112, 43ALR1387 [citCJ]; 220Ky154, 294SW1063; 98NJEq62, 130A809. [a] (2) Decree in action brought by constructive notice to nonresidents is conclusive against nonresident defendant after lapse of two years. 308Mo547, 274SW30.

959-30 Cal 292P467; 119Kan358, 239P1110, 43ALR1387; 145Wash477, 260P664. [a] (7) Where defendant in action to foreclose mortgage pleaded forgery and asked for cancellation and for judgment quieting title, judgment setting aside mortgage and quieting defendant's title is not bar to subsequent action by plaintiff to make amount expended in satisfying valid existing liens a charge against property by subrogation. 119Kan358, 239P1110, 43ALR1387.

960-38 79CalA347, 249P545; 86Mont387, 284P128.

960-39 [a] **Judgment in suit on appeal bond** given in forcible entry and detainer action is not res judicata in action to declare deed and bond to recover mortgage. 39OklACR376.

960-40 Ill 172NE923.

960-42 174Ark527, 295SW970; 35PortoRico114.

960-43 91PaSuper41. [a] (3) Judgment in favor of landlord in forcible entry and detainer does not bar action by tenant against landlord for breach of contract to give lease. 20OhA19, 153NE163.

961-45 91PaSuper41.

961-47 125Misc168, 210NYS519.

961-48 142Va197, 128SE644.

961-49½-New. Judgment in forcible detention is not bar to subsequent action by joint owners for unpaid rent and to forfeit option contract. 128Kan142, 277P289.

961-50 39OklACR376.

962-62 NJCh 146A353.

962-71 138Okl288, 281P141.

962-73 214Ala443, 108S47; 163La891, 113S137; 153Va52, 149SE470.

962-79 144Miss292, 109S792.

963-2 [a] 245IllA400.

965-24 216Ala416, 113S35, 39 [citCJ].

966-44 16F(2d)578.

966-44½-New. The court's holding that there was no default on the mortgage is res judicata. 22MoA230, 297SW115.

966-49 274US123, 47SCt511, 71Led959; 274US225, 47SCt616, 71Led1013; 106Conn220, 137A741, 742 [quotCJ].

966-50 274US123, 47SCt511, 71Led959; 274US225, 47SCt616, 71Led1013; 173Ark761, 293SW33; 106Conn220, 137A741; NH 151A705; 228AppDiv54, 239NYS28.

967-53 228AppDiv54, 239NYS28.

967-55 137Misc603, 244NYS508.

967-57 274US225, 47SCt616, 71Led1013.

968-72 335Ill317, 167NE16.

968-77 220Ky804, 295SW1041. See also 332Ill467, 163NE769.

968-81 124Kan521, 261P820.

969-87 24F(2d)967; Mo 30SW(2d)94; 56ND357, 217NW531, 536 [citCJ]. But see 158La262, 103S761.

969-89 30F(2d)482 [certiorari den 279US855, 49SCt351(6thcase), 73Led997]; 232Ky500, 23SW(2d)940.

969-90 295Pa264, 145A89.

969-92½-New. Prior judgment of acquittal is conclusive on all questions of law and fact distinctly put in issue and directly determined. 24F(2d)855.

969-92⅓-New. A plea of res judicata is effective, when a plea of former jeopardy would not lie, where final judgment has been entered, discharging defendant not put in jeopardy. 30F(2d)482 [certiorari den 279US855, 49SCt351(6thcase), 73Led997].

969-94 56ND357, 217NW531; 22AlaA583, 118S242. [a] (3) Verdict of acquittal in prosecution in which defendant interposed defense of alibi will not sustain plea of res judicata on subsequent trial under indictment charging commission of different crime at same time and place alleged in former indictment. 18OhA471.

969-95 146Miss753, 112S167.

969-96½-New. Res judicata has no application as between findings by the jury in the same prosecution of acquittal on one count and conviction on another made simultaneously with reference to each other. 121Kan881, 250P284.

969-96⅓-New. A prior conviction for a second offense is not res judicata to the sentence of defendant as a second offender. 169La215, 124S832.

970-99½-New. Adjudication in another prosecution of insanity is incompetent to prove defendant's insanity at the time of the commission of another crime. 336Ill324, 168NE336.

970-4 7Alaska506, 507 [citCJ]; 174Ark191, 294SW407; 319Ill437, 150NE345; 220MoA5, 285SW148; 131Misc401, 227

NYS163; NJJuv 150A824. See also 263 Mass270, 160NE887. [a] (3) Order directing payment of weekly sum in criminal prosecution for desertion does not preclude court in action for divorce from determining application for alimony. 98 NJEq151, 130A244 (where husband is admittedly in default of payment under order). (4) Suit by people may be brought against former treasurer for accounting after his acquittal in criminal prosecution. 319 Ill 437, 150NE345.

970-5 212Ala496, 103S558 (prosecution for abandonment of decree for support money is no bar to proceedings in equity for alimony and attorney's fees); 108Conn572, 143A890; 199 Ind660, 161 NE251; 12LaA692, 127S16; 126Me17, 135A524; 220MoA5, 285SW148 [citCJ]; 220MoA5, 285SW148; 245NY423, 157NE 730; 26 OhNPNS245; Va 153SE832. But see Mich 233NW414. [c] (2) Judgment of domestic relations court for support money is not res judicata of action in equity court for alimony and attorney's fees. 212Ala496, 103S558.

971-6 220MoA5, 285SW148 [quotCJ].

971-7 10CustA133; 174Ark191, 294SW 407; 207 Iowa636, 223NW363; 219Ky 41, 292SW504. See also 28F(2d)817.

971-7½-New. Nor is transcript showing defendant's conviction in criminal case admissible in civil damage trial based on same facts. 220MoA5, 285SW 148.

971-9 220Ala302, 125S36; 220MoA5, 285SW148 [citCJ].

971-10 30F(2d)482 [certiorari den 279 US855, 49SCt351(6thcase), 73Led997].

972-16 250Mich110, 229NW454.

972-23½-New. In action for divorce for adultery, record of conviction of defendant of adultery after trial is admissible as persuasive evidence and is prima facie sufficient proof of guilt. 101NJEq 72, 137A404.

972-24 175Minn174, 220NW547, 549 [citCJ]; 180Minn378, 230NW818.

973-26½-New. Padlock proceedings. Padlock decree entered pro confesso by federal court, 125Misc464, 211NYS445.

973-26½-New. and stipulation withdrawing answer does not constitute res judicata available in summary proceeding to recover possession of premises on ground of their being used for illegal purpose. 125Misc464, 211NYS445 (where defendants were not named in decree).

973-27 138SC393, 136SE641.

973-30½-New. If a defendant, removed from office because of a conviction for an offense, contends, in a proceeding to try title to the office, that part of the criminal sentence is void, the fact that the sentence is unappealed from does not make it res judicata. 298Pa319, 148 A311.

973-33 205Cal 128, 270P188; CalA 289 P892; 204 Iowa346, 213NW240; 220Ky 154, 294SW1063; 228Ky396, 15SW(2d) 239; 135Misc766, 239NYS432; 192NC 87, 133SE427 (dictum); 287Pa139, 134 A515; TexCivA 291SW279; TexCivA 23 SW(2d)479.

974-34 [a] TexCivA 289SW1060.

974-35½-New. Party cannot rely on existence of judgment that in no way concerns or binds him. 41Wyo 168, 285 P788.

974-36 204 Iowa346, 213NW240; 228 Ky554, 15SW(2d)492; 81Mont509, 264 P396; 125Misc161, 210NYS513; 227App Div607, 235NYS211; 70Utah534, 262P 266, 55ALR1032. But see MoA 275SW 592.

975-40 289Pa260, 137A252.

975-46 NJSup 152A239(1stcase); TexCommnA 13SW(2d)673. [a] 222MoA 518, 281SW64. [d] **Cestui and trustee.**-127Me293. 143A66.

976-47 But see 192NC87, 133SE427.

976-50 97CalA367, 275P515; 127Me 293, 143A66.

976-51 125Misc685, 211NYS395.

976-51½-New. A judgment against a principal has been held to be a bar to a subsequent suit against an agent. 126 Me458, 139A480.

976-52½-New. Judgment obtained after discovery of identity of undisclosed principal, against either, is res judicata against the other. 127Me293, 143A66.

976-54 22 OhA220, 153NE924.

976-55 167Minn84, 208NW546, 548 [cit CJ]; 125Misc685, 211NYS395.

977-64 37GaA433, 140SE408 (dictum); 107WVa536, 149SE606; BC [1929] 4 DomLR978.

978-80 [b] 123 Okl 98, 252P45.

979-88 37GaA433, 140SE408; 228Ky 844, 16SW(2d)482; 53ND1, 204NW847.

981-7 222MoA518, 281SW64; NJSup 135A667; 134Misc351, 235NYS634; 194 NC671, 140SE435. [d] **Transcript of judgment** against connecting carrier is admissible for defendant in action against initial carrier. 222MoA518, 281 SW64.

981-13 123Kan420, 425, 256P155 [quot CJ]. [b] **Where one defendant defaults,** recovery against other defendant is limited to amount of default judgment. 128 Or310, 274P915.

982-16 232 IllA193; 152Miss814, 119S 199. See also 170Minn332, 212NW533.

982-17 232 IllA193.

982-18 290Pa331, 138A849, 54ALR1285.

982-19 222MoA518, 281SW64. [a] (2) Judgment for corporation in action against it for damages for fraud of officers is bar to subsequent action against officers for damages. Kan 289P952.

983-21 34F(2d)50; 217Ala105, 115S2 (except for costs); 123Kan420, 256P 155; 220Ky508, 295SW421; 241Mich 15, 216NW407, 408 [quotCJ]; 311Mo 49, 277SW562; MoA 25SW(2d)484 (2d case); MoA 27SW(2d)28; Oh 173NE 194; Okl 267P641, 642 [quotCJ]; TexCivA 271SW936; 104WVa335, 140SE 51. But see 195NC92, 141SE484.

983-22 311Mo49, 277SW562; TexCivA 271SW936 (payment by employer releases employee).

983-22½-New. Except as to costs. 104 WVa586, 141SE532.

983-28 But see TexCivA 271SW936.

983-29 123Kan420, 425, 256P155 [quot CJ].

984-31 20 OhA148, 151NE806 (partial satisfaction not inuring to another tortfeasor whose concurrent negligence caused injury). [a] **Passenger who receives satisfaction of judgment against city** for injuries received in stepping from street car into hole in street may sue street car company for additional sum necessary to afford full compensation. 20 OhA148, 151NE806.

984-32½-New. Satisfaction of a judgment for a former railroad conductor in a libel suit against a person complaining to the railroad is a bar to recovery against the railroad for the record showing an alleged false reason for discharge. 204Cal 63, 266P541, 57ALR 1066.

984-35 27Hawaii544, 571 [quotCyc]; 246 IllA416; 137 Okl 251, 279P683.

984-36 35F(2d)84; 35F(2d)273 (judgment for defendant in action by undisclosed recipient of goods is not bar to action for breach by known negotiator); 43F(2d)705; 218Ala564, 119S651; 220Ala210, 124S420 (unsuccessful suit against partnership of which defendant is member held no bar to suit against him individually); 172Ark417, 288SW 912; 195Cal 107, 231P724; 104Conn585, 134A73; 109Conn460, 146A847 (former judgment can only be admitted in subsequent suit between same parties or privies); 160Ga894, 129SE433; 35GaA 681, 134SE632; 27Hawaii544, 571 [quot Cyc]; IndA 152NE866; 87 IndA636, 158 NE922; 204 Iowa346, 213NW240; 124 Kan77, 257P753; 208Ky492, 271SW 581; 210Ky498, 276SW487; 228Ky554, 15SW(2d)492; 165La1005, 116S488; 252Mass513, 147NE837; 170Minn352, 212NW533, 145Miss1, 110S851; Mo 31 SW(2d)1059; 217AppDiv521, 217NYS 522; 134Misc459, 234NYS643; 192NC 87, 133SE427 (dictum); 23 OhA266, 153 NE905; 123 Okl 98, 252P45; 129 Okl 232, 264P210; 135 Okl 218, 275P317; 287Pa139, 134A515; 33PortoRico 586, 588 [citCyc]; 35PortoRico 132; TexCommnA 290SW155; TexCivA 286SW 519; TexCivA 286SW900; TexCivA 294 SW317; TexCivA 28SW(2d)317; TexCivA 29SW(2d)831; 67Utah25, 245P 381, 45ALR882; 100WVa22, 130SE 89; 33Wyo 249, 238P654, 656 [quotCyc]. See also 127Me286, 143A101; 104NJL4, 139A884.

988-37 IndA 152NE866. **Evidence held sufficient.**-Iowa 232NW670.

988-38 43F(2d)705.

988-40 See also 218Ala390, 119S4. But see NJSup 135A352.

988-41 215Ala150, 110S46; 219Ala131, 121S420; 241 IllA159; 214Ky400, 283 SW410; 229Ky640, 17SW(2d)741; 317 Mo 1078, 298SW83, 88 [citCJ]; 214App Div164, 212NYS43; 192NC371, 135SE 288; 33PortoRico 586, 588 [citCyc]; 70 Utah534, 262P266, 55ALR1032; 108WVa 443, 152SE205.

989-42 290Pa331, 138A849, 54ALR1285.

990-43 290Pa331, 138A849, 54ALR1285.

990-44 [b] (1) 241Mich15, 216NW 407; 82NH221, 131A688. (2) See also 82NH221, 131A688. (5) Judgments for or against them in courts of competent jurisdiction are conclusive of issues litigated. 28F(2d)398. [c] (1) 28F(2d) 398. [e] **Indians.**-28F(2d)398.

990-45 6F(2d)559; 15F(2d)465; 29F (2d)712; 179Ark349, 16SW(2d)184; Fla 129S865; 164Ga316, 138SE851; 321 Ill 368, 151NE905; Ill 173NE352; 246 IllA416; IndA 158NE299; 125Kan417, 265P53; 12LaA275, 124S609 (decree on substituted plaintiff's appeal is res judicata on original plaintiff); 98NJEq 432, 131A117; 284Pa47, 130A417; TexCivA 283SW324; TexCivA 286SW519; 99Vt85, 130A583. See also 168Lal, 121 S171(5thcase).

991-47 99Vt85, 130A583.

991-51 Oh 170NE633.

991-55 172Ark699, 290SW67.

992-58 134SC348, 132SE824, 825 [quot CJperCothran,J].

992-59 134SC348, 132SE824, 825 [quot CJperCothran,J].

992-60 44 Ida211, 256P369; 226App Div62, 234NYS614; 134SC348, 132SE 824, 825 [quotCJperCothran,J].

992-61 134SC348, 132SE824, 825 [quot CJperCothran,J].

992-62 104Conn585, 134A73; 126Kan 246, 267P1105; 134SC348, 132SE824, 825 [quotCJperCothran,J].

993-63 157Md619, 147A596; 134SC348, 132SE824, 825 [quotCJperCothran,J]; TexCivA 31SW(2d)172; 153Va484, 150 SE403 (holder of purchase-money bonds for property purchased at judicial sale has sufficient interest to be bound by subsequent proceedings).

993-64 MoA 293SW524.

994-69 See also 1LaA665, 680 [quotCJ].

994-70½-New. A person learning of a suit instituted in a foreign jurisdiction in his name without authority is not required to appear formally and disavow authority, but it is sufficient if he takes such steps as circumstances seem to demand to inform the person who might suffer from lack of knowledge. 34NM58, 277P965.

994-73 TexCivA 8SW(2d)1100.

994-80 41 Ida690, 241P1023, 1024 [cit CJ]; 320Mo 938, 9SW(2d)609.

995-83 250Mich162, 229NW441(2dcase). But see MoA 13SW(2d)42.

995-84 TexCivA 29SW(2d)911.

995-90 215Ala328, 110S566, 569 [cit CJ]; 284Pa47, 130A417.

996-98 222MoA816, 10SW(2d)316; 101 NJEq740, 139A24; 225AppDiv412, 233 NYS404; 130 Or364, 280P331; 284Pa 47, 130A417 [quotCyc] (additional nominal plaintiff); 287Pa311, 135A227.

996-1 See also 284Pa47, 130A417 [quot CJ]. But see 159Tenn465, 19SW(2d) 238.

996-2 219Ala258, 121S910; 96Fla609, 118S730; 204 Iowa278, 213NW804; 204 Iowa286, 213NW809; 10PaDist&Co 665; 49SD370, 207NW163, 164 [citCyc]; 15 F(2d)263; 34F(2d)528; 125Kan553, 264 P1041; 222MoA816, 10SW(2d)316. [i] **As heir and mortgagee.**-Decree against defendant as heir does not adjudicate her interest as mortgagee. 102NJEq 144, 140A229.

998-11 5F(2d)718.

998-12 132SC117, 128SE860. But see 218Ala548, 119S675.

998-13 249NY335, 164NE242 [motion to amend remittitur den 166NE315(5th case)]; 125Misc405, 211NYS371 (administratrix); 126Misc17, 211NYS864; 159Tenn582, 21SW(2d)389; TexCivA 1

SW(2d)708; 108WVa443, 152SE205. See also CalA 286P442.
998-19 13PortoRicoFed175.
999-20 204 Iowa689, 216NW83, 85 [cit CJ].
999-21 120 Oh110, 165NE576, 64ALR 441 [aff 31 OhA113, 166NE818(2dcase)].
999-23 35F(2d)84; 215Ala328, 110S 566, 569 [citCJ]; 323 Ill 397, 154NE216; 236 IllA549; 289Pa252, 137A257; Tex CivA 271SW213; TexCivA 288SW609. See also 133Misc197, 231NYS58. [j] Trustor is not bound by judgment against trustee. 95CalA727, 273P147.
1000-26 68CalA270, 228P1057; 323 Ill 397, 154NE216; IndA 158NE299.
1000-27 323 Ill 397, 154NE216; 321 Ill 368, 151NE905; IndA 158NE299; 316Mo 949, 292SW51. [b] 321 Ill 368, 151NE905; 190NC37, 128SE477.
1000-27½-New. The applicability of the rule is the same whether the claim is made through title by deed or will. IndA 158NE299.
1001-29 68CalA270, 228P1057.
1001-30 317 Ill 535, 148NE317; IndA 152NE866. See also IndA 158NE299. [c] See also Ind 158NE299.
1002-35 206Cal 400, 274P538; 165Ga 296, 140SE886; 135Misc456, 238NYS 354 (in suit against trustee and member of bondholders); 134SC348, 132SE 824, 825 [citCJ]; TexCivA 287SW75.
1002-39 134SC348, 132SE824, 825 [cit CJ].
1003-43 19F(2d)880; 83CalA627, 257 P163; 48 Ida454, 282P868; TexCivA 23 SW(2d)421.
1003-44 270US611, 46SCt420, 70L ed 757, 53ALR1265; TexCommnA 293SW 563; TexCivA 288SW609.
1003-45½-New. , or where he ratifies, approves, and accepts the fruits of the adjudication. 127Misc374, 216NYS278.
1003-46 233Ky588, 26SW(2d)481; 315 Mo 276, 286SW3; 246NY133, 158NE48. [h] Presumption is that trustee had authority to represent beneficiary. Tex CivA 288SW609.
1003-47 315Mo 276, 286SW3.
1004-50 315Mo 276, 286SW3.
1004-51 315Mo 276, 286SW3.
1004-59 Iowa 232NW831.
1004-60 221MoA215, 300SW1054; 50 ND872, 198NW675; 25 OhA165, 157NE 903. [a] (2) Where claim allowed against depositary in receiver's hands and time to appeal expires, another creditor is bound by judgment, as receiver represented all creditors. 25 OhA165, 157NE903.
1005-62 261Mass426, 158NE891.
1005-66 54ND509, 209NW986; Tex CivA 21SW(2d)363 (purchaser of mortgaged chattel intervening in mortgagee's foreclosure suit); 144Wash38, 256P331.
1005-67 13F(2d)321.
1005-69 34F(2d)528.
1005-70 201 Iowa107, 204NW294, 298 [citCJ], 48ALR394; TexCivA 29SW(2d) 831. [a] Right to recover proceeds of original suit. 170Ga731, 154SE231.
1005-71 201 Iowa107, 204NW294, 298 [citCJ], 48ALR394.
1005-72 201 Iowa107, 204NW294, 298 [citCJ], 48ALR394.
1005-73 201 Iowa107, 204NW294, 298 [citCJ], 48ALR394.
1005-74 201 Iowa107, 204NW294, 298 [citCJ], 48ALR394.
1006-78 104Conn585, 134A73; 114 Okl 103, 243P228; TexCivA 297SW1063; TexCivA 21SW(2d)540.
1006-82 147Wash490, 266P703, 704 [quotCJ].
1006-83 13F(2d)321, 324 [citCJ]; 34F (2d)528; 203 Iowa1152, 211NW423, 427 [citCJ]; 213Ky464, 281SW471; 214Ky 16, 282SW187, 189 [quotCJ]; 267Mass 355, 166NE837; 116Nebr397, 217NW 577; NJ 151A58.
1007-84 214Ky16, 282SW187, 189 [quot CJ].
1007-85 203 Iowa1152, 211NW423; 214 Ky16, 282SW187, 189 [quotCJ].
1007-86 214Ky16, 282SW187, 189 [quot CJ].
1007-87 See also 203 Iowa1152, 211NW 423.
1008-89½-New. Rights of persons voluntarily coming in as parties defendant will be disposed of. TexCivA 17SW(2d) 84.
1008-92 227Ky358, 13SW(2d)260; 246 Mich674, 225NW613, 66ALR797; 144 Wash661, 258P853. See also 158La901, 105S7.
1009-94 TexCivA 30SW(2d)902.
1009-97 See also 299Pa276, 149A176.
1009-1 271US432, 46SCt561, 70L ed 1023.
1009-2 135Misc134, 237NYS106 (being called as witness not equivalent to being made party); 54ND509, 209NW986, 987 [citCJ]; 294Pa174, 144A93; 154 Wash181, 281P488. See also 264Mass 166, 162NE300.
1009-3 See also 329 Ill 482, 160NE759.
1009-3½-New. [§ 1430½] (6½). Attorneys.-An attorney representing parties to a suit is bound by the decree although not a party to the suit. 323 Ill 397, 154NE216.
1009-4 214Ala510, 108S604; 178Ark 28, 9SW(2d)793; 197Cal 733, 242P718; 80Colo 522, 253P389; 160Ga449, 128SE 393; 167Ga248, 145SE73; 236 IllA549; IndA 158NE299; 125Kan417, 265P53; 212Ky118, 278SW557 (dictum); 226Ky 685, 11SW(2d)708; 227Ky258, 12SW (2d)693; 253Mass383, 149NE313; 98 NJEq432, 131A117; 101NJEq740, 139 A24; 217AppDiv521, 217NYS522; 192 NC371, 135SE288; 35 OhA224, 172NE 383; 114 Okl 103, 243P228; 287Pa139, 134A515; 7PaDist&Co 534; TexCivA 283SW324; TexCivA 286SW519; Tex CivA 23SW(2d)479; 144Wash661, 258 P853; 147Wash490, 266P703, 704 [quot CJ].
1010-7 17F(2d)71, 75 [quotCJ]; 234 IllA581; 206 Iowa265, 217NW865; 217 AppDiv521, 217NYS522; TexCivA 286 SW519, 525 [citCJ]; TexCivA 7SW(2d) 161, 162 [citCJ]; 70Utah534, 262P266, 55ALR1032. [e] To be in privity, person must be either privy in blood, or estate, or in law. 214Ala510, 108S604. [f] "Privity of contract" is relationship existing between contracting parties. 118 OhSt48, 160NE453.
1011-8 TexCivA 286SW519, 525 [cit CJ]. [h] Where there is no identity of interest, there is no privity. 214Ala 510, 108S604.
1011-9 215Ala218, 110S24, 26 [citCJ]; 118 OhSt48, 160NE453; TexCivA 286 SW519, 525 [citCJ].
1012-10 259Mass539, 156NE724; Tex CivA 286SW519, 525 [citCJ].
1012-11 206 Iowa265, 217NW865.
1012-12 54ND509, 209NW986, 987 [cit CJ]; TexCivA 286SW519, 525 [quot CJ].
1012-14 85Colo 154, 274P816.
1012-18 42F(2d)957.
1013-20 [b] One acquiring adverse possession in government land before applying for homestead right therein is not affected by holding, in suit between government and third party in which he was not party. 172Ark417, 288SW912.
1013-24 139SE799; 208 Iowa1354, 227 NW400; 214Ky400, 283SW410; NJCh 144A319; 134SC348, 132SE824, 825 [quotCJ]; Tex 287SW121; TexCivA 21SW(2d)72.
1013-25 134SC348, 132SE824, 825 [quotCJ].
1013-26 219AppDiv825, 221NYS83.
1013-27 27Hawaii544, 571 [citCyc]. But see 84Colo 582, 272P662, 63ALR 693. [a] (2) But see 168Ark718, 271 SW970.
1014-29 179Ark574, 17SW(2d)296; 229Ky640, 17SW(2d)741; 156Md284, 144A231; 135SC446, 134SE1; TexCivA 298SW154; TexCivA 11SW(2d)195; TexCivA 13SW(2d)735(2dcase). But see 193Wis108, 213NW657.
1014-30 197Cal 733, 242P718; 232Ky 751, 24SW(2d)555 (unborn children); Or 292P319; TexCivA 296SW629. [b] But child has been held not to be bound by judgment in suit involving trustee's accounting rendered before its birth. 130Misc110, 222NYS532.
1014-32 222Ky846, 2SW(2d)1042. [a] (2) Award of damages for taking land to life tenant as owner does not debar remaindermen of their interest therein. 307Mo 536, 271SW374. (3) Neither trial court's decree canceling deed conveying property to defendants with remainder to their body heirs nor affirmance of decree on appeal affects rights claimed by body heirs not made parties. 153Va98, 149SE509.
1014-36 29F(2d)932; 176Ark714, 3SW (2d)993; 195Cal 107, 231P724; 197Cal 733, 242P718 (validity and effect of building restrictions); 164Ga694, 139 SE346; 219Ky74, 292SW480; 226Ky 258, 10SW(2d)825; 226Ky685, 11SW (2d)708; 162La601, 110S828; 101NJ Eq740, 139A24; 190NC14, 128SE494, 40ALR273 (defenses available to grantor not available to grantee under unregistered deed after judgment); 114 Okl 103, 243P228 (judgment binding on purchaser pendente lite, in case of purchase from person for whose benefit and at whose expense litigation was maintained); 130 Okl 253, 267P245, 246 [citCyc]; TexCommnA 285SW305; Tex CivA 273SW993 (privies by purchase); TexCivA 296SW629, 631 [citCJ]; Tex CivA 2SW(2d)936; TexCivA 13SW(2d) 735(2dcase); TexCivA 16SW(2d)961. See also 249Mich485, 229NW411. [a] Where judgment debtor repudiates purchase by covendee, judgment cannot be made executory against covendee's grantee. 13LaA337, 125S507.
1015-38 12F(2d)766; 86Mont180, 282 P1050; 135Misc134, 237NYS106; 117 Okl 195, 246P472; TexCivA 286SW519. See also 172Ark417, 288SW912. [b] But see 117 Okl 195, 246P472. [f] (2) Innocent purchaser from grantee holding under recorded deed is not affected by judgment in grantor's subsequent action against grantee to set aside deed where purchaser's intervention pleading was stricken for technical defects and he took no further part in case. 201 Iowa107, 204NW294, 48ALR 394.
1015-39 240Mich41, 214NW948.
1016-40 165Ga404, 140SE873; 210Ky 498, 276SW487 (holding that reasons stated orally by judge for his judgment were not res judicata as to grantor of grantor of party).
1016-41 See also 37F(2d)687.
1016-43 But see Wis 231NW172.
1016-43½-New. In a suit for specific performance of a contract to convey realty and for abatement of the purchase price because of shortage of some forty-two acres in a tract alleged to contain one hundred and ninety-five acres, the fact that the court decided against the vendor in its prior suit for abatement of the purchase price avails the vendor nothing. 103NJEq 121, 142A441.
1016-44 Cal 286P693. [e] Bank pledgee of purchase-money bonds covering purchase of realty at judicial sale and pledged without authority held bound by subsequent decree settling pledgor-commissioner's account, though not party thereto. 153Va484, 150SE 403.
1016-45 TexCivA 283SW920.
1016-45½-New. A decision allowing a creditor a lien upon hotel furniture in a suit in which the purchaser of the hotel company's real property at foreclosure sale was an active participant is res judicata of such purchaser's right to enjoin sale of the furniture under execution on the ground of a prior equitable lien on furniture obtained through the mortgage and foreclosure. 27F(2d)254.
1016-46 164La767, 114S647. See also 153Tenn386, 284SW363.
1017-47 But see 153Wash116, 279P 390.
1017-49½-New. Judgment in a replevin action by a finance company against the purchaser from a dealer in possession of an automobile was not res judicata, in an action for conversion of the automobile by the assignee of the judgment in replevin against defendants, purchasing the car from the person financing the purchase from the dealer and receiving the car back during the replevin action, but who was not a party to the replevin or purchaser pendente lite. 148Wash542, 269P842.
1017-50 154SC147, 151SE274(2dcase).
1017-51 52SD11, 216NW592; TexCivA 29SW(2d)831; Wash 291P1105. See also 198Wis461, 224NW702.
1017-52 TexCommnA 291SW1088.
1017-53 TexCivA 29SW(2d)831.
1018-57 190NC480, 130SE319 (settle-

ment with either mortgagor or mortgagee is bar to action by others).
1018–57½–New. or vice versa; **MoA** 22 **SW(2d)**185.
1018–58½–New. On vendor's foreclosure, a subsequent purchaser has been held not concluded. 163**La**976, 113**S** 167.
1018–59 116**Nebr**610, 218**NW**584; **Tex CivA** 296**SW**916; 146**Wash**520, 264**P** 8, 11 [quotCJ]. [a] **Assignee of funds belonging to mortgagor** in hands of receiver is not bound by judgment in garnishment against receiver to which he was not party. 49**SD**275, 207**NW**97.
1018–60 86**Mont**180, 282**P**1050. See also 77**CalA**265, 246**P**344. [b] **Assignee of mortgagors,** knowing of pending foreclosure suit, held not required to intervene. **TexCommnA** 291**SW**1088.
1019–63 154**SC**147, 151**SE**274(2dcase).
1019–66 But see 241**Mich**416, 217**NW** 42.
1019–72 243 **Ill**A526.
1019–73 18**F(2d)**903; 329 **Ill** 334, 160 **NE**597; 70**Utah**534, 262**P**266, 55**ALR** 1032.
1019–79 163**Ga**250, 135**SE**845. [a] **Knowledge of suit is not equivalent to notice.**–163**Ga**250, 135**SE**845.
1019–80 154**Md**581, 141**A**343.
1020–81 212**Ky**118, 278**SW**557; **Tex CivA** 300**SW**159. [a] **Landlord, with notice of injunction,** held not concluded by judgment against tenant. 212**Ky** 118, 278**SW**557.
1020–82 212**Ky**118, 278**SW**557.
1020–3 218**Ala**564, 119**S**651; 102**CalA** 582, 283**P**866; 163**Ga**250, 135**SE**845; 85**Mont**389, 278**P**836; 217**AppDiv**521, 217**NYS**522; **TexCivA** 278**SW**292; **Tex CivA** 278**SW**306; **Wash** 291**P**1077. [h] **Action for alienation of affections.**–219 **AppDiv**682, 221**NYS**73. [i] **Action for criminal conversation.**–219**AppDiv**682, 221**NYS**73. [j] **Judgment against husband does not divest** wife of title to separate property. **TexCivA** 278**SW** 306.
1021–5 But see 35**PortoRico** 132.
1021–6 85**Colo**154, 274**P**816; **Wash** 282 **P**911 (judgment against both spouses because of community interest in property binds both). [b] **TexCommnA** 1 **SW(2d)**1090.
1022–10 176**Ark**714, 3**SW(2d)**993; 248 **Mich**139, 226**NW**823.
1022–16½–New. Where ownership of joint bank deposit was adjudged in suit between wife and sheriff to belong to husband bank cannot set up wife's title in supplementary proceedings directing bank to pay over money to be applied on judgment against husband. **Mont** 285**P**193.
1022–17 **TexCivA** 278**SW**292; **TexCivA** 291**SW**948; **TexCivA** 2**SW(2d)**317.
1022–19½–New. Order of bankruptcy court setting aside pretended homestead does not estop wife, not party to proceedings, from claiming homestead. **TexCivA** 2**SW(2d)**317.
1022–24 217**AppDiv**521, 217**NYS**522.
1022–25 247 **IllA**98; 319**Mo** 241, 3**SW** **(2d)**722.
1022–27½–New. Unborn children cannot be made parties to litigation or their contingent interest bound by the result of litigation to which they are not parties and in which they are not represented. 323 **Ill** 397, 154**NE**216.
1023–31 84**Mont**397, 276**P**437.
1023–32 84**Mont**397, 276**P**437.
1023–33 **Mo** 28**SW(2d)**84(2dcase).
1023–33½–New. A parent suing in a child's behalf for damages recoverable in his own right is presumed to have waived rights and is concluded by judgment in such action. 104**Conn**585, 134 **A**73.
1023–38 215**Ala**328, 110**S**566; 86**Colo** 391, 282**P**255; **IndA** 171**NE**385; 82**NH** 221, 131**A**688; 190**NC**354, 129**SE**820; 198**NC**420, 152**SE**39; **TexCivA** 283**SW** 611.
1023–43½–New. Orders in a guardian's accounting proceeding are not binding on wards not otherwise represented than by guardian. 152**Wash**250, 277**P** 846.
1023–43½–New. Where infant defendants were properly before court and represented by guardian ad litem who filed answer after service of process they are bound by judgment. 198**NC** 420, 152**SE**39.
1023–46 15**F(2d)**263.
1023–52 197**Cal** 716, 242**P**483 (undisclosed principal); 108**WVa**75, 150**SE** 365.
1024–55 197**Cal** 716, 242**P**483.
1024–60 225**AppDiv**232, 232**NYS**530.
1024–66 217**AppDiv**521, 217**NYS**522.
1024–67 [c] **Judgment for personal injuries to truck driver** in action against street car company arising out of collision does not bar master's action for injury to truck. 217**AppDiv**521, 217 **NYS**522.
1024–67½–New. In a prohibition proceeding by a corporation and its employees who performed its dental work to restrain dental examiners from taking further action in proceedings to revoke licenses of individual petitioners for alleged unprofessional conduct, a decision in quo warranto proceeding that such corporation had no right to practice dentistry has been held conclusive against petitioners as to the right of the corporation to employ dentists to practice dentistry in its name. 85**Colo** 321, 275**P**933.
1024–68 But see 29**F(2d)**737.
1024–70 See also 67**Utah**578, 248**P**815.
1024–70½–New. Judgment against a bankrupt is not binding on the bankrupt's receiver. 219**AppDiv**825, 221**NYS** 83.
1024–72 But see 172**Ark**198, 288**SW4.**
1024–75 214**Ala**202, 107**S**46.
1024–79½–New. Bailee is not bound to discharge judgment on a delivery bond, in replevin suit, in the absence of an agreement to assume liability and finding value therein not conclusive on him. 172**Ark**198, 288**SW4.**
1025–80 **NJDistCt** 149**A**637.
1025–83 267**Mass**422, 166**NE**857.
1025–85 See also 192**NC**87, 133**SE**427.
1025–86 218**Ala**83, 117**S**620.
1025–87 **TexCivA** 293**SW**884.
1025–88½–New. The makers, in a suit by the holder of a note, could not defend on the ground of illegality of transfer by the payee bank, where, in a suit between the holder and the bank, the holder was adjudged to have title. **MoA** 22**SW(2d)**52.
1025–93 **NC** 154**SE**673; 143**Va**920, 129 **SE**700.
1025–96 83**Mont**477, 272**P**992.
1025–2½–New. Where a judgment, subsequently reversed as to a copartnership, does not show that the partners are included as individuals, the judgment holder is precluded from withholding moneys taken under an execution. 102**CalA**172, 282**P**984.
1026–5½–New. In a suit by a single partner to recover partnership account with a bank, judgment in his favor on margin account composed of his individual money is a bar to a subsequent suit for margin account. **TexCivA** 286 **SW**487.
1026–5½–New. Judgment against a partnership is not necessarily conclusive as to a question of liability of the partners among themselves. 228**Ky**396, 15**SW(2d)**239.
1026–5¼–New. Where, in a suit against partners by an employee of one of the partners operating a sawmill, each of defendants pleaded that there was no partnership as to the operation of the sawmill, and that the contract made by one of the partners was not binding on the other, the partners were not adversary parties, and judgment rendered against the partners in that action did not estop one partner from recovering against the other partner an amount paid by the former under the judgment. 228**Ky**396, 15**SW(2d)**239.
1026–5⅙–New. In Porto Rico final judgment against individual member of firm on firm obligations however erroneous is res judicata preventing plea that he is not solidary debtor. 34**Porto Rico**830.
1026–5⅙–New. A partner in a brokerage firm who assigned his interest in a certain commission to plaintiff partner is not in privity with plaintiff so as to be bound by the judgment. **TexCivA** 19**SW(2d)**104.
1026–9 [a] **Action by grand lodge held** not res judicata of suit by officer of local lodge for same fund against same defendant. **TexCivA** 291**SW**1115.
1026–13½–New. Where parties in a former action involving ownership of a franchise pleaded their right to do business as an association, they cannot avoid estoppel of the former judgment by claiming that in the former proceedings they were acting individually, whereas in the present action they were acting as an association. 206**Cal** 733, 276**P**103.
1026–16 162**La**941, 111**S**336; 226**App Div**195, 234**NYS**449; 118 **Okl** 279, 248**P** 601; **Utah** 264**P**975.
1026–17 **Or** 286**P**546 (not bound).
1026–18 **SC** 155**SE**141.
1026–18½–New. A judgment recovered against a corporation is binding as to the amount in a suit by a judgment creditor against the stockholders. 290 **Pa**356, 139**A**118.
1027–23 **TexCivA** 283**SW**324.
1027–25 264**Mass**253, 162**NE**319.
1027–28 [a] **Judgment in minority stockholder's suit** is not res judicata in subsequent action against corporation of purchaser of assets where different relief is sought. 50**Nev**56, 250**P**369.
1027–30½–New. A decree that subscriptions constitute a trust fund for the creditors of an insolvent corporation is binding only as to stockholders made defendants in a contested hearing on allowance of the claim. **Iowa** 227**NW** 627.
1027–31 36**F(2d)**697 (binding on trustee in bankruptcy); 41**F(2d)**353 (chief owner and general manager).
1028–46 71**CalA**421, 236**P**377; 204 **Iowa**355, 213**NW**938; **TexCivA** 17**SW** **(2d)**174.
1028–46½–New. or state agency, 71 **CalA**421, 236**P**377.
1028–47 71**CalA**421, 236**P**377.
1028–51½–New. So all officers in privity with an officer enjoined are bound. 203 **Iowa**1099, 212**NW**335.
1028–52 215**Ky**558, 286**SW**847.
1028–54 215**Ky**558, 286**SW**847.
1028–56½–New. Conclusive effect of judgment is not changed by the fact that after judgment the city is transferred, by the act of the legislature, from third to second class. 215**Ky**558, 286**SW**847.
1028–62½–New. A judgment enjoining an old school district from levying a tax on plaintiff's lands is not res judicata as to a new enlarged district not a party to the suit. **TexCivA** 20**SW(2d)**214.
1028–66 170**Ark**22, 278**SW**627; 180**Ark** 122, 20**SW(2d)**624; 201**Cal** 502, 258**P** 387, 392 [quotCJ&citCyc]; 165**Ga**121, 139**SE**863; 165**Ga**296, 140**SE**886; **Ind** 167**NE**526; 157**Miss**336, 128**S**91; 116 **Nebr**359, 217**NW**610, 612 [citCJ]; **Tex CivA** 26**SW(2d)**364. See also 42**F(2d)** 541.
1029–67 33**Ariz**156, 262**P**1002; 170**Ark** 22, 278**SW**627; 165**Ga**296, 140**SE**886; 235**Ky**600, 31**SW(2d)**928; 157**Md**619, 147**A**596 (though absence of representative authority not demurred to in first action); 149**Miss**461, 115**S**557; 147**SC** 448, 145**SE**193.
1029–71 85**Colo** 198, 274**P**743; **Ill** 172 **NE**772. [c] (3) Where, in suit by street railway company against city to enjoin levy and collection of special assessment for street improvement against railway company's land, city permits judgment to be entered against it by confession, such adjudication does not of itself foreclose question of invalidity of original assessment in proceeding to reassess benefits as to other abutting property owners not parties to such suit. 135 **Okl** 155, 274**P**651.
1030–72 **Ill** 172**NE**772.
1030–76 165**Ga**121, 139**SE**863; 168**Ga** 379, 147**SE**764; 168**Ga**502, 148**SE**273; 147**SC**448, 145**SE**193; **TexCivA** 26 **SW(2d)**364.
1030–77 37**F(2d)**504.
1030–80 See also 330 **Ill** 522, 162**NE**150.
1030–82 198**Cal** 560, 246**P**322.
1031–88 [c] **Thus,** in action to establish title, city and county were held not concluded in absence of evidence that city had any interest in property involved. 198**Cal** 560, 246**P**322.
1031–95 See also **TexCommnA** 27

SW(2d)532. [a] (5) Judgment in mandamus requiring commissioner to pay warrant is binding on new board. 166 Ga616, 144SE107.

1031-4 46 Ida551, 269P412; 170Minn 332, 212NW533. But see 203 Iowa1152, 211NW423.

1031-6 214Ky16, 282SW187, 189 [quot CJ]; 252Mass432, 147NE904; MoA 26 SW(2d)843; 246NY270, 158NE618.

1032-7 31F(2d)117; 214Ky16, 282SW 187, 189 [quotCJ].

1032-8 214Ky16, 282SW187, 189 [quot CJ].

1032-9 214Ky16, 282SW187, 189 [quot CJ].

1032-10 214Ky16, 282SW187, 189 [quotCJ].

1032-11 214Ky16, 282SW187, 189 [quotCJ].

1032-12 214Ky16, 282SW187, 189 [quotCJ].

1032-16 142SC125, 140SE443, 451 [quotCJ].

1033-31 246NY270, 158NE618.

1033-32 246NY270, 158NE618.

1033-45 214Ky16, 282SW187, 189 [quotCJ].

1033-46 214Ky16, 282SW187, 189 [quotCJ].

1033-47 214Ky16, 282SW187, 189 [quotCJ]; 222MoA518, 281SW64.

1034-49 56ND110, 216NW203, 205 [cit CJ].

1034-64 236 IllA549; TexCivA 273SW 993.

1034-65 317 Ill 86, 147NE382; 333 Ill 284, 164NE678; 309Mo 433, 274SW789; TexCivA 273SW993; TexCivA 27 SW(2d)894.

1035-75 See also 236 IllA549.

1036-78 26F(2d)47, 50 [citCJ].

1036-79 171Minn423, 214NW267 [quot CJ].

1036-81 [f] **Children not parties or who could not have been made parties** may not complain of service of notice where administrator could not complain. 143Va281, 129SE327.

1036-86 172Ark699, 290SW67.

1037-7½-New. Judgment in a death action brought by the surviving wife individually and as personal representative of her three children for the benefit of all is conclusive in an action brought by the personal representative of the estate of which the parties in the first case are the beneficiaries and for whose benefit the second action is brought. 137 Okl 251, 279P683.

1037-9 Mass 156NE725.

1037-10 300Pa169, 150A604. [c] **Decree after wife rejected will,** that trustee should execute will as if wife were dead, held adjudication, binding in subsequent case, that rejection did not defeat testamentary scheme. TexCivA 298SW470. [d] **Heirs not parties on record** are not bound by decree allowing fees and costs of special master. 157Miss788, 128S560.

1037-17 23F(2d)81; 157Md357, 146A 791.

1038-18 TexCivA 296SW929.

1038-19 TexCivA 296SW929.

1038-21 291Pa175, 139A734.

1038-27 40F(2d)91; 136Misc615, 241 NYS648.

1038-28 205 Iowa662, 216NW700; 228 Ky259, 14SW(2d)1096.

1039-42 215Ala328, 110S566.

1039-49½-New. Adjudication that judgment creditors of an heir indebted to the estate had a prior lien on his interest has been held not to affect rights of another creditor not before the court. 155Tenn313, 292SW459.

1040-60 71CalA421, 236P377 (judgment against municipal board of trustees directing calling of special election on question of consolidation of two cities has been held to bind state).

1040-60½-New. or officers thereof, 71 CalA421, 236P377.

1040-64½-New. State is not a party in interest in proceeding to enforce its laws merely from its general interest in their enforcement. 71CalA421, 236P377.

1040-65 NM 291P290(2dcase).

1040-74 122 Okl 196, 253P1002, 1004 [quotCyc].

1040-75 122 Okl 196, 253P1002, 1004 [quotCyc]; 284Pa47, 130A417.

1040-76 23F(2d)201.

1040-78 MoA 13SW(2d)42; 72Mont 318, 233P607; 122 Okl 196, 253P1002, 1004 [quotCyc]; 142Wash155, 252P 531; 33Wyo 249, 238P654, 656 [citCyc].

1041-79 174Ark90, 294SW361; 228Ky 396, 15SW(2d)239; 231Ky229, 21 SW(2d)246; 168La1, 121S171(5thcase); 72Mont318, 233P607; 122 Okl 196, 253 P1002, 1004 [quotCyc]; 118 Or182, 245 P729; TexCivA 288SW609; 142Wash 155, 252P531.

1041-80 249 IllA290; 72Mont318, 233P 607; 122 Okl 196, 253P1002, 1004 [quot Cyc]; Okl 291P26; 118 Or182, 245P 729; 287Pa311, 135A227, 229 [citCJ]; 142Wash155, 252P531.

1041-81 122 Okl 196, 253P1002, 1004 [quotCyc]; 142Wash155, 252P531.

1042-82 122 Okl 196, 253P1002, 1004 [quotCyc].

1042-84 270US611, 46SCt420, 70L ed 757, 53ALR1265.

1042-96 137Misc103, 243NYS55. [a] (2) Judgment in action against autoist and railroad holding latter liable is not admissible as res judicata in action by autoist against railroad. 224AppDiv 238, 230NYS34.

1043-14 271US432, 46SCt561, 70L ed 1023; 13F(2d)743; 15F(2d)263; 17 F(2d)894; 18F(2d)782; 23F(2d)230; 39F(2d)46; 42F(2d)832; 42F(2d)957; 214Ala510, 108S604; 215Ala328, 110S 566; Ariz 290P155; 172Ark417, 288SW 912; 174Ark943, 298SW212; CalA 286 P442; 235 IllA532; 236 IllA457; 202 Iowa1244, 211NW891; Iowa 212NW 353; 204 Iowa443, 215NW599; 204 Iowa1378, 215NW754; 206 Iowa1326, 221NW937; 125Kan553, 264P1041; 218 Ky617, 291SW1042; 221Ky272, 298SW 691; 228Ky554, 15SW(2d)492; 162La 319, 110S489; 164La913, 114S834; 150 Md333, 134A124; 238Mich632, 214NW 226, 53ALR194; 241Mich240, 217NW2; 242Mich515, 219NW752; 145Miss643, 112S482; 316Mo 665, 291SW481; Mo 292SW7; 320Mo 341, 7SW(2d)1013; 221MoA757, 288SW73; 78Mont357, 254 P174, 177 [citCyc]; 86Mont130, 282P 1050; 217AppDiv521, 217NYS522; 223 AppDiv626, 229NYS315; 127Misc332, 215NYS374; 132Misc48, 228NYS624; 226AppDiv195, 234NYS449; 228AppDiv 105, 239NYS173; 230AppDiv548, 245 NYS256; 195NC398, 142SE487; 135 Okl 218, 275P317; 141 Okl 113, 284P52; 129 Or602, 278P93; 130 Or211, 279P939; 132 Or415, 286P151; Tex 28SW(2d) 512; TexCivA 275SW850; TexCivA 280 SW254; TexCivA 281SW580; TexCivA 284SW643; TexCivA 294SW270; Tex CivA 295SW947; TexCivA 296SW929; TexCivA 297SW555; TexCivA 300SW 242; TexCivA 6SW(2d)403; TexCivA 30SW(2d)902; 70Utah534, 262P266, 55 ALR1032; Utah 291P493. See also 27 F(2d)748.

1044-15 235 IllA532; 236 IllA457.

1044-16 17F(2d)594; 30F(2d)281; 214 Ala510, 108S604; 172Ark417, 288SW 912; 178Ark300, 10SW(2d)885; Ark 30 SW(2d)825; 86CalA664, 261P497; 97 CalA398, 275P861; 84Colo 582, 272P 662, 63ALR693; 28Hawaii494; 235 IllA 532; 236 IllA457; 204 Iowa443, 215NW 599; 227Ky670, 13SW(2d)1025; 230 Ky235, 18SW(2d)1001; 150Md333, 134 A124; 145Miss643, 112S482; 78Mont 357, 254P174, 177 [citCyc]; 83NH501, 144A787; 83NH482, 145A142; 127Misc 332, 215NYS374; 135Misc134, 237NYS 106; TexCivA 17SW(2d)856; TexCivA 23SW(2d)421; Utah 280P1065; Vt 146 A1; 151Va913, 145SE311; 199Wis608, 227NW396.

1045-17 235 IllA532; 218Ky617, 291 SW1042; 145Miss643, 112S482; 298Pa 85, 148A63.

1045-18 180Ark118, 21SW(2d)421; 85 Colo 17, 273P648; 235 IllA532; 229Ky 640, 17SW(2d)741; 241Mich240, 217NW 2; 130 Or211, 279P939; 284Pa47, 130A 417; 161Tenn557, 30SW(2d)274.

1045-19 13F(2d)743; 150Md333, 134A 124.

1045-20 236 IllA457; 203 Iowa100, 212 NW352; 78Mont357, 254P174; Wyo 292 P897.

1045-21 236 IllA457.

1046-25 172Ark417, 288SW912.

1046-30 128Me335, 147A417 (plaintiff not estopped as against purchaser of personalty from trespasser); 70Utah 534, 262P266, 55ALR1032.

1046-31 109Conn460, 146A847.

1046-36 15F(2d)145.

1047-46 94Fla236, 113S730.

1047-48 172Ark417, 288SW912; 150Md 333, 134A124.

1047-51 128Me335, 147A417 (successful plaintiff in real action is not precluded from suing third person for conversion of fruits of tenant's waste).

1047-57 86 IndA329, 157NE443.

1047-63 204 Iowa443, 215NW599; Mo 31SW(2d)1059; 230AppDiv52, 243NYS 57; SD 228NW404(2dcase).

1047-66 83Colo 510, 267P605.

1048-67 127Misc332, 215NYS374.

1048-68 100CalA482, 280P383.

1048-70 86Mont180, 282P1050.

1048-75 27F(2d)286.

1048-76 147Wash57, 265P473. [a] (9) Probate judge in suit against him and surety for failure to require guardian to make good and sufficient bond is not bound by judgment rendered in probate court on settlement of guardian's account. 214Ala510, 108S604. (10) Other instances. 170Ga773, 154SE 264; 121 Oh17, 166NE806.

1048-78½-New. The court has no power to order the sale of property of a corporation not a party to a suit to pay a debt not its own. 13F(2d)743.

1048-79 145Miss643, 112S482; Tex CommnA 24SW(2d)14.

1048-83 Can [1928] 3DomLR258.

1048-84 217AppDiv521, 217NYS522. [a] **Judgment against one of several persons liable held not conclusive against another** not involved in former action. 217AppDiv521, 217NYS522.

1049-87 TexCivA 25SW(2d)184 (judgment not bar against nor binding on him).

1049-88½-New. A corporation is not affected by a suit, although its stock is owned by an individual who is a party. 13F(2d)743.

1049-4 218MoA98, 262SW450 (insurer, not party to suit, is bound by judgment determining insured's interest in land).

1050-12½-New. Absence of technical privity held not to preclude bar where party had opportunity to defend. 203 Iowa1152, 211NW423.

1050-13 8F(2d)932; 31F(2d)396; 145 SC53, 142SE828, 832 [citCJ]; 149SC 424, 147SE315; TexCommnA 290SW155.

1052-18 TexCivA 275SW850.

1052-20 82Mont150, 266P869; 84Mont 178, 274P834. [a] **Prima facie case may be overcome by evidence.**–84Mont 178, 274P834.

1052-26 145SC53, 142SE828.

1052-28 145SC53, 142SE828.

1053-34 214Ala510, 108S604, 609 [quot CJperSomerville,J]; 127Kan456, 274P 132; 82Mont150, 266P869.

1053-35 214Ala510, 108S604, 609 [quot CJperSomerville,J].

1053-36 214Ala510, 108S604, 609 [quot CJperSomerville,J].

1053-37 214Ala510, 108S604, 609 [quot CJperSomerville,J].

1054-43 145Miss1, 110S851.

1054-44 74CalA363, 240P796; 58ND 478, 226NW608; 116 Or83, 240P229.

1054-45 TexCommnA 280SW189.

1054-46 199 Ind146, 155NE819.

1054-47½-New. In an action to determine water rights, a prior decree in a suit to which some defendants were not parties is admissible, and is prima facie evidence against them. 80Mont339, 260 P401.

1054-47½-New. Where such prior decree merely awards costs, it is inadmissible. 80Mont339, 260P401.

1054-48 145SC53, 142SE828, 833 [cit CJ].

1055-55 145SC53, 142SE828, 833 [cit CJ].

1055-57 145SC53, 142SE828, 833 [quot CJ].

1055-61 145SC53, 142SE828, 833 [quot CJ].

1055-64 39F(2d)639; 204Cal 408, 268P 640; 74CalA494, 241P270; 163Ga694, 137SE17; 169Ga864, 151SE799; 328 Ill 53, 159NE193; Ill 173NE281; 205 Iowa 237, 216NW12; 208 Iowa698, 223NW 756(2dcase); Iowa 233NW126; 177 Minn53, 224NW461; Mo 28SW(2d)84

(2dcase); 221MoA657, 284SW204; 215 AppDiv609, 214NYS402; 193NC448, 137 SE319; 114 Oh523, 151NE645; 31 OhA 482, 166NE423; 135 Okl 262, 275P347; 137 Okl 251, 279P683; TexCommnA 12 SW(2d)130; TexCivA 12SW(2d)242; 100WVa441, 130SE670. But see 230Ky 384, 19SW(2d)1085. [f] (3) Other instances. NC 154SE674(1stcase).

1056–66 310Mo 171, 275SW44.

1056–67 169Ga864, 151SE799; 249Mich 527, 229NW476 (question is properly raised by special plea in bar by notice under plea of general issue); MoA 280 SW76.

1056–68 15F(2d)952; 170Ga153, 152 SE246; 156Tenn655, 4SW(2d)358. See also 215AppDiv609, 214NYS402. [a] **In Saskatchewan.**–[1929] 2DomLR443.

1057–71 163Ga694, 137SE17; 121Kan 474, 247P868; 226Ky258, 10SW(2d) 825; 119 Or292, 247P145. See also CalA 260P316. But see 94CalA349, 271 P343. [c] (2) That plaintiffs in action to quiet title to mining property did not set up previous judgment quieting title in them by original complaint, but set it up only by their supplemental complaint, has been held not to show waiver of rights secured by this judgment. 205Cal 102, 269P1105.

1057–72 74CalA494, 241P270.

1057–73 118 Okl 51, 246P538.

1057–76 74CalA494, 241P270; 119 Or 292, 247P145; 156Tenn655, 4SW(2d) 358.

1058–79 74CalA494, 241P270; Ida 289 P74; TexCivA 32SW(2d)248.

1058–80 74CalA494, 241P270.

1058–80½–New. It is not a plea to the jurisdiction, 74CalA494, 241P270.

1058–80½–New. nor can it be given the effect of depriving the court of jurisdiction. 74CalA494, 241P270.

1058–81 50Philippine22; SD 230NW 763; Wis 230NW75. [b] **Former adjudication constituting estoppel by record** should be pleaded by answer, not special plea in bar. 132SC45, 128SE40.

1058–82½–New. Plea that court had no jurisdiction of cross action because it showed on its face that damages resulted from taking of land duly condemned, and proper remedy was by appeal, presented matter of res judicata. TexCivA 272SW575.

1058–82½–New. Where the petition sets up a former action which is not denied, the matter alleged to have been adjudicated is taken as conclusively determined. 26 OhNPNS223.

1058–83 213Ala38, 104S328, 330 [cit CJ]; 215Ala150, 110S46, 49 [citCJ]; 94Fla104, 113S892; Ga 155SE523; 298 Pa215, 148A92; 100WVa441, 130SE670, 672 [citCJ].

1058–84 152Miss106, 119S155; 100 WVa441, 130SE670, 672 [citCJ].

1058–85 29F(2d)296; 111Conn663, 151 A190; Ida 289P74; 245Mich430, 222 NW749(2dcase); 132Misc73, 228NYS 116; 135 Okl 262, 275P347; 100WVa 441, 130SE670, 672 [citCJ].

1058–85½–New. Evidence of a former adjudication cannot be received or considered on a verbal motion to strike out a pleading unless pleading on its face forms a basis for the evidence. 100WVa 441, 130SE670.

1058–86 100WVa441, 130SE670, 672 [citCJ].

1058–92 GaA 155SE47.

1059–94 85Colo 397, 277P5; 300Pa169, 150A604.

1059–95 Ill 173NE281; 43 OklACR91 [reh pending]. [c] 208 Iowa698, 223 NW756(2dcase). [d] 151Miss594, 118S 434; 135Misc305, 237NYS171. [e] **Plea of res judicata, without alleging facts necessary to make defense complete,** held sufficient as against general demurrer in absence of motion to make more specific. 197 Ind128, 150NE18. [f] **Estoppel need not be formally pleaded** where facts constituting estoppel are alleged. 156Tenn655, 4SW(2d)358. [g] **Sufficiency of plea depends on facts involved** not on designation of former action. 87Colo 27, 284P776.

1059–1 90Fla7, 105S134.

1059–3 218Ky805, 292SW508.

1060–8½–New. Plea of former judgment was properly overruled in so far as pleadings were concerned where answer denied existence of judgment and notice of suit. 37F(2d)69.

1060–13 **Permitting amendment to set up res judicata** is within court's discretion. Mass 173 E507.

1060–14 196Cal 414, 238P687; 3Del 221, 134A47; 86Mont33, 281P753; Tex CivA 272SW575.

1060–16 Or 287P224.

1061–22 96Fla210, 117S844; 137 Okl 251, 279P683; TexCivA 272SW575. [b] (2) Complaint in action to enjoin sale of real property for assessment lien held insufficient. 86 IndA329, 157NE 443. [c] **Same capacities required.**–137 Okl 251, 279P683.

1061–23 22AlaA518, 119S601(2dcase); 137 Okl 251, 279P683; TexCivA 272SW 575.

1061–24 169Ga864, 151SE799; 137 Okl 251, 279P683.

1061–25 16F(2d)559; 22AlaA303, 115S 145; Mo 28SW(2d)84(2dcase) (plea held insufficient). [f] (8) Other pleas held sufficient. 16F(2d)559.

1062–26 137 Okl 251, 279P683.

1062–29 22AlaA303, 115S145; 41GaA 51, 152SE148 (insufficient plea).

1062–32½–New. Objection of res judicata going only to part of cause of action is not ground for dismissing complaint. 131Misc129, 226NYS162.

1063–36 217Ala73, 114S679; 43 OklA CR91 [reh pending]; TexCivA 280SW 312. [h] **On demurrer.**–Merely indicating that former adjudication on demurrer was based on inadequacy of pleading is defective. 38GaA286, 144S 33.

1064–40 31NM564, 249P108, 109 [cit CJ]; 137 Okl 251, 279P683.

1064–42 See also 82Colo 503, 261P874.

1064–52 [d] **Plaintiff relying on after-acquired title** to defeat plea of res judicata must show title was so acquired. TexCommnA 291SW855.

1065–53 See also Okl 291P546. But see 168Minn152, 210NW70.

1065–54½–New. Where former judgment of no cause of action is pleaded by supplemental answer plaintiff is entitled to contest facts alleged and raise question on issues. 135Misc334, 239 NYS267.

1065–60½–New. Where a reply to an answer pleading a prior judgment in bar admits rendition of the judgment and the identity of the cause of action, defendant is not required to prove the existence of such judgment. 168Minn 152, 210NW70.

1065–62 230Ky384, 19SW(2d)1085; 155Tenn639, 299SW785, 55ALR932.

1066–71 107WVa275, 148SE78.

1067–74 95CalA35, 271P1107; MoA 30 SW(2d)1101; 103NJL440, 135A897; TexCivA 30SW(2d)934.

1067–79 30Ariz581, 249P755; 171Ark 817, 286SW971; CalA 265P327; Ida 291P1055; GaA 155SE340(2dcase); 234 IllA332; 245 IllA531; 72Mont318, 233 P607, 612 [citCJ]; 49Nev254, 243P817, 818 [citCyc]; 226AppDiv211, 234NYS 649; 226AppDiv280, 235NYS220; 129 Okl 232, 264P210; TexCivA 297SW509; TexCivA 297SW1045; TexCivA 13SW (2d)448; 100WVa441, 130SE670. See also 218AppDiv612, 219NYS34.

1068–81 42F(2d)987; 94CalA35, 270P 463(2dcase). See also IndA 158NE299. [b] **After twenty years** decree on distribution would be presumed paid. 216 Ala619, 114S208.

1068–82 29F(2d)167; 42F(2d)987 (examination of record); 168Minn152, 210 NW70.

1068–83 172Ark619, 290SW64; 143 Wash122, 254P1092.

1068–84 143Wash122, 254P1092.

1068–86½–New. The burden is on plaintiff, in an action against a street railway company for injuries to a passenger stepping from a car into a hole in street, to show that the amount received from the city in full satisfaction of judgment against it for the same injuries was not full compensation. 20 OhA 148, 151NE806.

1068–86½–New. There is no presumption that dismissal signed by plaintiff is given for a consideration, and therefore bars a subsequent action. 97CalA 367, 275P515.

1068–87 Ida 289P74; 328 Ill 148, 159 NE222; MoA 30SW(2d)1101; 105NJL 147, 143A433; 140 Okl 122, 282P674; 131 Or522, 284P189. [g] **Judgment roll is not inadmissible** because of defective verification of complaint not objected to. 85Mont375, 278P832, 65ALR 968. [h] **Affidavit and order for attachment,** though not part of judgment roll, may be considered where physically introduced in evidence. 48 Ida147, 279P1090.

1069–90 TexCivA 21SW(2d)707. But see CalA 265P327.

1069–91½–New. Where judgment is pleaded but facts as to jurisdiction not stated defendant may show by record that court had no jurisdiction. 35Porto Rico 642.

1069–92 TexCivA 10SW(2d)746.

1069–93 133 Okl 194, 271P946; TexCivA 290SW196.

1069–94 179Ark110, 14SW(2d)1104. See also 245 IllA531. [b] **Evidence held insufficient** to support plea of res judicata. 35F(2d)1006.

1069–95 [f] **Findings** without judgment are insufficient. 72Mont318, 233P 607.

1070–2 129Misc106, 221NYS598. See also 215Ky149, 284SW1029.

1070–8 [b] (1) TexCivA 10SW(2d)235.

1071–10 24F(2d)377.

1071–13 140Miss635, 105S759.

1071–20 [a] (1) 24F(2d)377.

1072–21 85Colo 154, 274P816; 83NH 225, 140A708; 131Misc534, 227NYS384. See also 156Md284, 144A231.

1072–23 Mass 168NE166; 127Misc624, 216NYS337; 114 Okl 153, 244P744; 126 Or177, 269P216, 220 [citCJ], 60ALR 504; TexCivA 275SW401.

1072–24 Ariz 284P149; TexCivA 275 SW401.

1073–25 Ida 289P74; 127Misc624, 216 NYS337.

1073–31 85Colo 176, 274P812; 161Ga 594, 131SE478; 248Mich425, 227NW 817; 229AppDiv162, 241NYS282; Tex CivA 28SW(2d)967.

1074–34 339 Ill 384, 171NE531.

1074–37½–New. Judgment without jurisdiction is not validated by sale under it. 215Ala660, 111S913.

1074–38 Mass 170NE621; Mass 172NE 335; 286Pa449, 133A642.

1074–39 [a] **Entire record may be examined.**–CalA 265P327. [b] **Precise ground on which entry of disposition was made** may be shown in appropriate instances. Mass 172NE335. [c] **Postea,** when accompanied by verdict and judgment, is competent evidence. NJ 147A405.

1074–40 Nev 283P593; TexCivA 275 SW401; Utah 269P776. But see Iowa 230NW565.

1075–44 Nev 283P593.

1075–50 Mass 168NE166.

1076–58 336 Ill 506, 168NE294.

1076–59 See 259Mass550, 156NE709.

1076–62 3Del 73, 130A395.

1076–63 339 Ill 384, 171NE531.

1076–64 169Ga864, 151SE799; 241 IllA 159; 125Me38, 130A513; NJDistCt 149 A637; NC 154SE673; 20 OhA148, 151 NE806 (not collateral attack); TexCivA 290SW196; TexCivA 297SW509.

1077–65 169Ga864, 151SE799.

1078–74 172Ark619, 290SW64; 169Ga 864, 151SE799; 234 IllA332. See also 218AppDiv612, 219NYS34. [a] **Fact that record happens to be in same court** does not alter rule that formal tenders of evidence including record are required to establish prior adjudication. 286 Pa449, 133A642.

1078–76 40GaA431, 149SE799(2dcase).

1078–78 MoA 31SW(2d)215; 127Misc 624, 216NYS337. [a] 160Ga400, 128SE 397; Nebr 229NW769 (no new facts shown). [b] 180Ark16, 20SW(2d)609; CalA 291P419; 41GaA51, 152SE148; Ida 289P74; 127Misc624, 216NYS337; Tex CivA 297SW1045.

1079–79 [a] 99Vt85, 130A583. [b] 208 Ky835, 272SW34.

1079–85½–New. Plaintiff is entitled to show that recovery of title by defendant in a former suit was for the purpose of holding in trust. TexCivA 273SW 900.

1079–85⅓–New. Original petition in partition suit is not conclusive evidence as to the parties to such action. TexCivA 275SW617.

1079–89½–New. In determining the issues adjudicated in a prior action and the sufficiency of the pleadings therein to support the judgment rendered, the court will consider the pleadings of both parties. TexCivA 13SW(2d)735(2d case).

1079–90 35F(2d)273; 74CalA494, 241P270; 220MoA1268, 290SW633; Sask [1930] 4DomLR677.

1079–91 132Misc772, 230NYS353. [b] **Whether amount received in satisfaction of judgment against city** was full compensation so as to bar action against street railway company for personal injuries is for jury. 20OhA148, 151NE806. [c] **Whether prior judgment,** relied on as bar, resulted from unauthorized proceedings is for jury. 146Miss130, 110S234.

1080–93 74CalA494, 241P270; 258Mass360, 155NE16.

1080–95 CalA 287P121.

1080–95½–New. Where a judgment has been received in evidence on a particular issue, it is error for the court to refuse to instruct, on request, that the judgment is not res judicata on another issue which was not involved in the former proceedings. 198Cal32, 243P423.

1080–96 129Okl232, 264P210.

1080–3 217Ala295, 116S144; 79Mont136, 255P25; TexCivA 283SW189.

1080–5 MoA 17SW(2d)378.

1080–8 79Mont136, 255P25.

1080–9 92CalA424, 268P461; IndA 169NE56; 79Mont136, 255P25.

1081–10 79Mont136, 255P25.

1081–14 IndA 169NE56.

1082–17 [a] **Judgment plaintiff may renew his action ad infinitum** upon each successive judgment recovered, provided action is brought within period of limitations. IndA 169NE56.

1082–21 252NY24, 168NE450.

1082–22 [c] **Before expiration of time to appeal,** action may be brought on judgment unless there has been supersedeas as provided by statute. 17F(2d)383.

1083–29 30Ariz310, 246P1036.

1085–50 SD 226NW270 (leave not jurisdictional).

1086–66 120Kan555, 245P161.

1086–67 26F(2d)545; IndA 169NE56; 228Ky209, 14SW(2d)750; 79Mont136, 255P25; 46Philippine827.

1086–68 TexCivA 21SW(2d)586.

1086–72½–New. In Nova Scotia action on justice's court, judgment may be brought in a municipal court within twenty years from date thereof. 59NS109, [1927] 1DomLR231.

1087–75 [a] **Final order in habeas corpus after trial** is judgment, or decree for payment of money, rendered in court of record within statute. 126Misc103, 213NYS476.

1087–77 NC 153SE863.

1087–78 MoA 29SW(2d)212 (judgment for alimony). [a] **Final order in habeas corpus proceeding is not judgment decree for money,** and ten-year statute applies, and not twenty-year statute applicable only to "judgments or decrees." 217AppDiv55, 216NYS466.

1087–83 192NC663, 135SE794.

1087–85 173Minn263, 217NW126.

1087–86 159La576, 105S626; 49Philippine359. But see 192NC663, 135SE794. [e] **In New York.**–126Misc103, 213NYS476.

1087–87 But see 159La576, 105S626. [a] (1) 98CalA457, 277P185.

1088–93 MoA 29SW(2d)212. [b] **In Missouri.**–MoA 29SW(2d)212.

1088–1 159La576, 105S626.

1088–2 159La576, 105S626.

1088–2½–New. or a devolutive appeal, 159La576, 105S626.

1088–2⅓–New. or during delays allowed for, and pending, on application for rehearing. 159La576, 105S626.

1089–12 164La894, 114S725; 13LaA61, 127S108.

1089–14 210Ky498, 276SW487.

1089–15 180Minn482, 231NW220. But see 218Ala390, 119S4.

1091–50 IndA 169NE56.

1091–55½–New. The suit must be in the same court from which execution issued. 231Ky223, 21SW(2d)269(2dcase).

1091–56 [b] **Consent judgment.**–191NC253, 131SE659.

1091–63 13F(2d)321. [a] **Third party recovering judgment against agent,** not knowing of undisclosed principal, cannot sue principal on such judgment. 248Mich486, 227NW794.

1091–65 But see 35F(2d)842.

1092–72 234Ky697, 27SW(2d)975.

1092–78 231Ky223, 21SW(2d)269(2d case).

1092–78½–New. And if there is an earlier assignee entitled to priority he is a necessary party. 246NY152, 158NE56.

1093–80½–New. Where defendant was misnamed in the judgment sued on, the pleader may connect the real party with the judgment by averring his proper name without amendment of the judgment by nunc pro tunc order. 217Ala150, 115S174.

1094–84 BC [1930] 2DomLR720.

1094–12½–New. , or that the judgment is unpaid and remains in force. 313Mo448, 285SW459 (foreign judgment).

1094–15 231Ky223, 21SW(2d)269(2d case).

1094–16 17F(2d)283.

1095–30 231Ky223, 21SW(2d)269(2d case).

1095–31 86CalA377, 260P937.

1096–42 145Miss566, 110S591.

1097–47 145Miss566, 110S591.

1097–55½–New. Plea, defective for failure to show that judgment was on the merits, held sufficient in absence of demurrer. 216Ala189, 113S16.

1097–55⅓–New. Plea of res judicata is not good in a suit to annul a judgment. 163La911, 113S144.

1098–56 [c] **Plea of nul tiel record not stricken** as general denial. 22F(2d)807.

1100–90 22F(2d)807.

1100–91 See also 22F(2d)807.

1100–93 22F(2d)807.

1100–94 22F(2d)807.

1101–9½–New. General denial and allegation that it is ten years since judgment elapsed puts in issue only the date of rendition of judgment. MoA 17SW(2d)378.

1101–14 [a] (6) 22F(2d)807. (7) Fraud in procurement. 22F(2d)807.

1101–22 IndA 170NE332.

1102–42½–New. Original complaint and minutes of judgment in a former suit are admissible. 216Ala189, 113S16.

1103–61 Wis 231NW585.

1104–76½–New. Taking of a second judgment does not change character of debt. 83IndA415, 148NE435.

1104–76⅓–New. In a suit to enforce payment of a judgment a second personal judgment should not be rendered. 231Ky223, 21SW(2d)269(2dcase).

1104–77 CalA 286P1093; 105NJL336, 146A372; 102NJEq393, 141A16; NJCh 150A840. See also 242 IllA508.

1105–92 30Hawaii637; TexCivA 283SW1082. [c] **When judgment is not final** and defendant directly attacks it for want of jurisdiction, if items of debt claimed in alternative plea are merged, it will not operate to bar or abate the action. TexCivA 283SW1082. [d] **Before expiration of time to appeal,** action may be brought on foreign judgment unless there has been supersedeas. 17F(2d)383.

1105–95 35F(2d)842; 214Ala345, 348, 107S843 [quotCJ]. [c] 125Kan386, 265P46. [d] **Deficiency** may constitute basis for personal judgment. 136Okl107, 276P179.

1106–96 170Ark949, 281SW904.

1106–96½–New. Decree of a foreign court directing conveyance of property to a divorced wife does not affect title to land in the state where situated, 75CalA569, 243P445.

1106–96⅓–New. yet is sufficient basis for an action in the courts of the latter state to compel such conveyance. 75CalA569, 243P445.

1107–19 TexCivA 15SW(2d)694; TexCivA 18SW(2d)231.

1107–22 Contra 102NJEq393, 141A16.

1109–36 122Kan105, 251P405, 407 [cit CJ].

1110–40 Mont 289P1035.

1110–42 146Miss491, 112S385, 52ALR564; TexCivA 160SW293. [a] **Three years.**–146Miss491, 112S385, 52ALR564.

1110–46 90CalA675, 266P817; 122Kan105, 251P405. But see CalA 286P1093.

1111–63 MoA 11SW(2d)754; 105NJL336, 146A372; NJ 148A781; NJCh 150A840; 195NC491, 142SE772.

1111–64 NJ 148A781; NJCh 150A840.

1111–65 MoA 11SW(2d)754; 105NJL336, 146A372; NJ 148A781; NJCh 150A840.

1112–67 TexCivA 19SW(2d)421.

1113–70½–New. Interest of a third person as coindorser with defendant on a note does not affect the right to recover against defendant alone in an action on a foreign judgment obtained on such note. 264Mass414, 163NE63.

1113–72 170Ark949, 281SW904, 905 [cit CJ]; 316Mo812, 293SW760, 762, 52ALR723 [citCJ]; 105NJL336, 146A372.

1114–76 [c] (2) Counterclaim for malpractice cannot be maintained. 105NJL298, 145A865.

1114–87 TexCivA 294SW921.

1115–93 264Mass414, 163NE63. [c] **Though judgment against one of two defendants would release other defendant in foreign state,** suit may be maintained against one if only one subject to process. 264Mass414, 163NE63.

1115–93½–New. Guardian ad litem must be appointed to render judgment valid, where state of forum does not provide for suit by next friend, as does state rendering judgment. 131Misc618, 227NYS109.

1115–93⅓–New. Bondholders fraudulently deceiving federal court into assuming jurisdiction of action by another on bonds are not entitled to intervene in state court action to enforce judgment. 143Okl35, 287P386.

1115–94 Wash 288P223.

1116–1½–New. or that no appeal is pending, or that the time to appeal has expired, 17F(2d)383.

1116–2 See also 206Cal8, 272P751.

1116–8 Ariz 275P975; 90CalA675, 266P817; 157Md641, 147A715.

1117–11 TexCivA 290SW559.

1117–14½–New. In a suit on a foreign judgment, an allegation that a summons was served in the action in which judgment was rendered was not an averment that a copy of the complaint was not served. Ariz 275P975.

1117–16 145Miss566, 110S591. But see 17F(2d)383.

1118–27 TexCivA 283SW1082, 1084 [cit CJ].

1119–59 [b] **Variance** held not material. 256Mass598, 153NE11.

1120–67½–New. Evidence that judgment is not final may be admissible under a general denial. TexCivA 283SW1082.

1120–68 214Ala345, 348, 107S843 [cit CJ].

1120–75½–New. Sufficiently authenticated judgment and certificate held admissible in evidence despite use of insufficiently authenticated copy used in petition. 36GaA706, 137SE842(1stcase).

1120–78 219AppDiv120, 219NYS284; TexCivA 18SW(2d)231. [c] **Judgment presumed based on law and procedure** in foreign jurisdiction. 219AppDiv120, 219NYS284.

1120–78½–New. Court cannot assume that foreclosure of mortgage in foreign state was in personam rather than in rem. Iowa 233NW126.

1120–81 27Hawaii642.

1120–82 170Ark949, 281SW904; 75CalA418, 242P894.

1121–83 264Mass414, 163NE63.

1121–83½–New. In an action on a foreign judgment, the burden of proof was on plaintiff to show that defendants had waived, or were estopped to assert as a defense, fraud in procuring the original judgment. MoA 11SW(2d)754.

1121–84 27Hawaii642.

1121–87 TexCivA 294SW921.

1121–88 CalA 285P336(2dcase).

1121–92½–New. A party sued on a foreign judgment by confession may not testify as to the legal effect of a warrant of attorney on which judgment was confessed. 195NC491, 142SE772.

1122–5 Ariz 275P975; TexCivA 5SW(2d)559; 136Wash261, 239P545. [b] (1) TexCivA 5SW(2d)559. (2) 136

Wash261, 239P545. (3) 168Minn280, 210NW15. (5) To show that creditor in bringing action on judgment in another state acted bona fide and not to defeat limitations. **Wash** 291P476. [c] **Production of judgment itself is sufficient,** and entire record need not be produced. 33F(2d)365(2dcase). [d] **Evidence held to raise presumption** that makers of note, secured by mortgage, were not within jurisdiction necessary for judgment in personam on foreclosure. **Iowa** 233NW126.

1123-10 TexCivA 290SW559.

1123-11 [a] (8) To show fraud in procuring foreign judgment. 169Ark363, 275SW748. (9) To show that judgment debtor was denied opportunity to interpose defense in foreign court. **TexCivA** 19SW(2d)421. [b] 222MoA12, 300SW538; 137Misc407, 244NYS473; 136 Okl 107, 276P179.

1123-11½-New. In the absence of any exemplification of a foreign deficiency judgment or of any docket entry thereof authenticated and certified as required by statute, testimony of witnesses that such judgment was entered and judicial admissions of the judgment debtor in an ancillary proceeding in the foreign jurisdiction do not constitute sufficient evidence of the judgment. 116 **Okl** 202, 244P170.

1123-11½-New. Evidence held not to show claim barred by laches. **Wash** 291P476.

1123-15 136Wash261, 239P545.

1123-18½-New. Failure to mention payment by coindorser does not require the dismissal of an action on a foreign judgment against another indorser on the ground of conspiracy to defraud. 264Mass414, 163NE63.

1123-18½-New. Instructions have been held not objectionable as placing on plaintiff the burden of establishing the validity of the judgment. 40GaA324, 149SE579(2dcase).

1123-19 [a] **Failure to limit judgment** in action on Illinois confessed judgment to defendant separately has been held not error. **Wash** 288P223.

1123-23½-New. Summary judgment will not be awarded in action on foreign judgment obtained in action for personal injuries where complaint does not allege locale of accident. 13JMisc85, 226NYS263.

1124-24 [d] **Allowance of payment on note** after entry of judgment thereon is not foreclosed by full faith and credit clause. 264Mass414, 163NE63.

1124-37 224AppDiv576, 231NYS529.

1125-42 195NC143, 141SE471.

1125-45 CalA 285P336(2dcase).

1126-48 275US449, 48SCt142, 72Led 149, 53ALR1141; 22F(2d)541; CalA 292P285; 129Kan470, 283P644; 242NY 381, 152NE121 (dictum); 131Misc642, 227NYS593; TexCivA 26SW(2d)453; Wis 231NW585.

1127-55 138 Okl 222, 280P801(2dcase) (judgment conferring majority rights upon minor).

1127-57½-New. Courts of a state are the final judges of the occasions on which the exercise of comity as respects recognition of judgments of a sister state will make for justice or morality. 132Misc551, 230NYS579.

1128-61 23AlaA510, 128S115(2dcase); 232 IllA93; 126Kan506, 268P830; Kan 268P831; 256Mass598, 153NE11; 168 Minn152, 210NW70; Mont 289P1035; 130Misc624, 224NYS386; 226AppDiv 62, 234NYS614; 195NC143, 141SE471; 195NC491, 142SE772; 136 Okl 107, 276 P179; 298Pa377, 148A524 (duly authenticated copy of foreign juvenile court's adjudication held admissible in evidence); 136Wash322, 239P1015, 1016 [citCJ].

1128-62 CalA 285P336(2dcase); 226 Ky689, 11SW(2d)717; TexCivA 19SW (2d)421; 136Wash322, 239P1015, 1016 [citCJ]. [a] (5) Default judgment in Oregon based on outlawed Washington judgment held void and unenforceable in Washington. 136Wash322, 239P 1015.

1129-63 136Wash322, 239P1015, 1016 [citCJ].

1129-68 275US449, 48SCt142, 72Led 149, 53ALR1141. [b] (2) Where attorney's authority to confess judgment does not comply with local statutory requirements, foreign judgment confessed thereunder can not be recognized. 249Mich403, 228NW796.

1129-69 275US449, 48SCt142, 72Led 149, 53ALR1141.

1129-70 136Wash322, 239P1015.

1130-74 128Misc778, 220NYS262.

1130-74½-New. Full faith and credit must be given to a judgment rendered in a sister state where it is voidable only. **Iowa** 230NW548.

1130-82 36GaA706, 137SE842 [citCJ]; 168Minn152, 210NW70; 291Pa282, 189 A853.

1131-89 [b] Ariz 286P930.

1131-90 36GaA706, 137SE842.

1131-91 88PaSuper343.

1132-93½-New. A judgment in favor of a domiciliary administrator in an action under the Federal Employers' Liability Act for the death of his intestate is a bar to a subsequent action for the same cause of action in another state by a special administrator appointed there. 168Minn152, 210NW70.

1132-3 275US449, 48SCt142, 72Led 149, 53ALR1141; 256Mass598, 153NE 11.

1132-4 213Ala491, 105S643 (indebtedness adjudicated); 217Ala378, 115S866; Cal 293P47; 74CalA494, 241P270; 75 CalA418, 242P894; 90CalA675, 266P 817; 100CalA195, 279P1064; 36GaA 706, 137SE842 [citCJ]; 232 IllA93; 233 IllA398; 88 IndA649, 165NE330; 210 Ky166, 275SW517; 211Ky799, 278SW 121; 215Ky774, 286SW1071; 216Ky 736, 288SW733; 226Ky689, 11SW(2d) 717; 256Mass598, 153NE11; 240Mich 1, 215NW24; 145Miss566, 110S591; 222 MoA12, 300SW538; Nebr 231NW682; 103NJL150, 134A755; 128Misc778, 220 NYS262; 130Misc188, 223NYS678; 195 NC143, 141SE471; 287Pa139, 134A515; TexCivA 15SW(2d)694; 147Va331, 137 SE473; 136Wash261, 239P545; Wash 288P223. But see 137Misc407, 244NYS 473. [a] **In absence of direct attack,** foreign judgment is final as is domestic judgment. 75CalA418, 242P894.

1133-5 145Miss566, 110S591; 130Misc 188, 223NYS678.

1133-6 254 IllA254; 211Ky799, 278SW 121; 128Misc778, 220NYS262; 287Pa 139, 134A515; 291Pa282, 139A853; Wis 231NW585 (court acts as foreign state court would do).

1133-7½-New. The fact that the enforcement of a foreign judgment will work a hardship affords no reason why the full faith and credit clause may be disregarded. 210Ky166, 275SW517.

1133-9½-New. Neither full faith and credit clause nor comity prevents collateral attack on a foreign judgment to determine applicability of either principle. 92Fla818, 110S539.

1133-10 256Mass598, 153NE11.

1133-11 256Mass598, 153NE11.

1133-12 256Mass598, 153NE11; 67 Utah371, 248P83 (order of court of sister state cannot have greater effect than interlocutory order of Canadian court on which it was based).

1134-14 TexCivA 32SW(2d)214.

1134-16 222AppDiv494, 226NYS570.

1134-19 256Mass598, 153NE11. [a] (5) 195NC143, 141SE471. (15) Judgment quieting title. 83Mont501, 272P 994.

1135-22 180Minn298, 230NW823 (temporary restraining order); 180Minn310, 230NW826 (temporary restraining order).

1135-25 TexCivA 15SW(2d)694. [i] **Complete inquiry is permissible** into circumstances of judgment to determine whether it binds person against whom invoked. Mass 171NE815. [j] **Guardian and ward.-Wash** 290P1003.

1135-26 277US1, 48SCt410, 72Led749; Cal 293P47; 164La1085, 115S278; 152 Md661, 136A905; 318Mo 784, 1SW(2d) 163, 58ALR493; Ont [1930] 4DomLR 820.

1135-29½-New. Resident stockholders are concluded by judgment of court of another state declaring a banking corporation insolvent and levying assessment on stockholders generally in proceedings for receivership and winding up its affairs although not made parties nor served with process in such action. 54ND614, 210NW342, 48ALR660.

1135-30 240Mich1, 215NW24; 247 Mich464, 226NW261 (delivery of deed by escrow holder in accordance with decree of foreign court held not subject to attack); 145Miss566, 110S591; 313 Mo 448, 285SW459; 83Mont501, 272P 994; NH 146A395(2dcase); NJCh 150 A840 (anterior defenses); NJCh 151A 117 (discretionary matters); 130Misc 789, 226NYS436; 287Pa139, 134A515; 96PaSuper556; TexCivA 15SW(2d)694; 136Wash261, 239P545. [e] (1) 217Ala 373, 115S866 (judgment not res judicata in state where rendered entitled to no greater weight in sister state); 166 Ga670, 144SE206. (3) As to facts occurring before entry of order of foreign court determining right of custody and considered by it, order of foreign court is conclusive. 100CalA284, 279P834(2d case).

1136-31 [c] **Findings of fact in determining custody of children** in foreign court must be treated as established in another jurisdiction as between same parties. 298Pa416, 148A524.

1136-32 IndA 163NE616; 246Mich361, 224NW348(2dcase); 136Wash261, 239 P545 (counterclaim).

1136-33 313Mo 448, 285SW459.

1136-34 164La1085, 115S278; 152Md 661, 136A905; 313Mo 448, 285SW459; SD 224NW937. [a] (5) Judgment of court of another state that defendant was insane has been held insufficient to prevent court from placing him on trial for burglaries committed at later date. CalA 284P709. [d] **Judgment not conclusive as to status of citizenship.**-217 Ala378, 115S866.

1136-34½-New. Where a foreign decree is modified on appeal, the effect thereof is for the decision of the foreign court according to which the decree, as modified, will be given full force and effect. 145Miss566, 110S591.

1136-34½-New. Language of foreign judgment is controlling on whether judgment was entered by clerk of court in recess or in vacation. CalA 285P336 (2dcase).

1137-37 145Miss566, 110S591; 248NY 33, 161NE321. But see 250Mich637, 231NW89(2dcase).

1137-38 But see Wash 288P223.

1137-39 74CalA494, 241P270; 150 Wash355, 272P978.

1138-41 233 IllA398; 118Kan717, 236 P841, 844 [citCyc].

1138-56 TexCivA 18SW(2d)231. But see 137Misc407, 244NYS473.

1138-57 170Ark949, 281SW904, 905 [citCJ]; CalA 285P336(2dcase); 35 GaA40, 132SE108; 242 IllA508; 211 Ky799, 278SW121; Mo 19SW(2d)888; Nev 269P987; 99NJEq106, 132A674; 223AppDiv89, 227NYS421; 127Misc284, 215NYS796; 131Misc85, 226NYS263; 135Misc486, 238NYS723; 142 Okl 181, 286P299; 8PaDist&Co354; TexCivA 13 SW(2d)146; TexCivA 32SW(2d)214. [a] **In New Jersey.-Sup** 136A593.

1140-60 35GaA40, 132SE108; 40GaA 324, 149SE579(2dcase); 152Misc365, 118S721; Mo 19SW(2d)888; 131Misc85, 226NYS263. [a] **State court may inquire** into facts necessary to give court of sister state jurisdiction over subject matter of judgment. Mass 171NE815.

1140-61 129Kan244, 282P732.

1140-62 75CalA418, 242P894; 199 CalA523, 250P397; 101CalA492, 281P 1049; 232 IllA93; IndA 163NE616; 83 Mont501, 272P994; 225AppDiv256, 232 NYS592; 137Misc407, 244NYS473; 195 NC491, 142SE772; 87PaSuper60; 147 Va331, 137SE473; 136Wash261, 239P 545; Ont [1930] 4DomLR820.

1142-67 136Wash261, 239P545.

1142-71 See also 214Ala345, 107S843. But see 75CalA418, 242P894.

1142-72 Mass 171NE815; 168Minn152, 210NW70; Mo 19SW(2d)888; NJCh 150A840; 127Misc284, 215NYS796; 195 NC491, 142SE772; TexCivA 18SW(2d) 231.

1143-73 127Misc284, 215NYS796; 195 NC491, 142SE772.

1144-80 213Ala491, 105S643, 644 [cit CJ].

1144-84 213Ala491, 105S643; 242 IllA

508; 248Mich465, 227NW769; 316Mo 812, 293SW760, 762, 52ALR723 [citCJ]; 225AppDiv256, 232NYS592; 195NC491, 142SE772. [c] 40GaA324, 149SE579 (2dcase).

1145-86½-New. Where the recitals in the record of a judgment of a sister state show that the court acquired jurisdiction, the judgment is good as against collateral attack after a lapse of many years. 307Mo 462, 271SW370.

1145-87 75CalA418, 242P894; 316Mo 812, 293SW760; 134Misc256, 234NYS 326; 8PaDist&Co 354.

1146-90 19F(2d)163.

1146-92 222MoA782, 9SW(2d)867; 127Misc284, 215NYS796; 136Misc752, 240NYS804; 142 Okl 181, 286P299.

1146-93 [d] **Failure of court of sister state to consider immunity from service** by one attending hearing before federal court may be noticed on direct or collateral attack on judgment. 67Utah371, 248P83.

1146-95 127Misc284, 215NYS796.

1146-96½-New. In Canada judgment of a court of Quebec is conclusive in a court of the province of Ontario only if defendant was personally served with a Quebec process in the province of Quebec. Ont [1929] 1DomLR130.

1146-1 232 IllA359; 124Kan77, 257P 753; 142 Okl 181, 286P299; TexCivA 5 SW(2d)559.

1147-2 232 IllA359.

1147-5 157Md641, 147A715.

1147-8 248Mich465, 227NW769.

1147-16 248Mich465, 227NW769.

1147-17 See also IndA 163NE616.

1148-22 225AppDiv256, 232NYS592; TexCivA 19SW(2d)421 (showing that warrant of attorney had expired).

1149-29 134Misc256, 234NYS326.

1149-32 168Ark756, 271SW954, 956 [quotCJ].

1150-46 34F(2d)174.

1151-53 TexCivA 18SW(2d)231.

1151-61 Iowa 230NW548.

1151-62 147Wash497, 266P688.

1151-65 232 IllA93; 246Mich361, 224 NW348(2dcase); 137Misc407, 244NYS 473; 5PaDist&Co 164. [h] **Foreign court is presumed to have found that** time to answer expired when entering default. 137Misc407, 244NYS473.

1153-74 19F(2d)690; 254 IllA254 (as affecting jurisdiction); 99NJEq106, 132 A674; 195NC491, 142SE772; Or 286P 546; TexCivA 5SW(2d)559; TexCivA 19SW(2d)421; Alta [1929] 3DomLR 572. [b] **Fraud cannot be pleaded as mere defensive matter** in action at law on foreign judgment. Wis 231NW585.

1153-75 88 IndA649, 165NE330; 215 Ky774, 286SW1071; 168Minn152, 210 NW70. But see 78Colo 320, 241P543. [b] **Evidence must be satisfactory and convincing** to impeach judgment. 147 Va331, 137SE473. [c] **Irregularities in proceedings in action wherein judgment was rendered** cannot be considered as fraud invalidating judgment. 147Wash 497, 266P688.

1153-75½-New. Fraud in obtaining a judgment must be extrinsic of the matter in controversy to be available in a collateral attack proceeding. 128Misc 778, 220NYS262.

1153-76 23AlaA510, 128S115(2dcase); 168Minn152, 210NW70; 222MoA12, 300 SW538.

1153-77 168Minn152, 210NW70; 222 MoA12, 300SW538; 222MoA825, 10 SW(2d)344; 128Misc778, 220NYS262; 147Wash497, 266P688. See also 246 Mich361, 224NW348(2dcase). [a] In Nova Scotia.-[1930] 2DomLR169.

1154-80½-New. Plaintiff who sued in a sister state as the next friend of an injured minor sister cannot contend that, because the minor had a guardian within this state, the judgment of the foreign state was a fraud upon the law and courts of this state, since, if that be true, it was a fraud to which plaintiff herself connived. TexCivA 15SW(2d) 694.

1154-83 170Ark949, 281SW904; 105 NJL336, 146A372.

1155-90 329 Ill 458, 160NE847.

1155-93 [a] **Foreclosure of mortgage on land in foreign state securing note not canceled remaining in plaintiff's hands shows no judgment in personam.** Iowa 233NW126.

1155-94 Iowa 233NW126.

1155-98 But see TexCivA 19SW(2d) 428.

1155-3 196NC322, 145SE612.

1155-11 122Kan814, 253P600.

1156-19 Nebr 228NW852.

1156-31 40F(2d)247.

1157-32 40F(2d)91.

1157-33 274US123, 47SCt511, 71L ed 959; 8F(2d)813; 14F(2d)149; 19F(2d) 454; 21F(2d)953; 29F(2d)167; 30F (2d)707; 35F(2d)186.

1157-34 24F(2d)38; 25F(2d)794; 33F (2d)185; 39F(2d)616; 40F(2d)330; 43 F(2d)98. [a] 19F(2d)454.

1157-35½-New. The remedy of a party unsuccessful in the highest state court is by appeal to the United States supreme court. 15F(2d)846.

1157-38 28F(2d)713.

1157-39 281US470, 50SCt374, 74L ed 972; 13F(2d)40; 13F(2d)267; 16F(2d) 943; 24F(2d)42; 25F(2d)393; 25F(2d) 602; 35F(2d)933; 39F(2d)594; 39F (2d)616.

1158-41 25F(2d)602; 37F(2d)617(2d case); 41F(2d)715.

1158-42 25F(2d)393. [b] 24F(2d)443.

1158-42½-New. Change in prayer for relief does not affect a decree in a state court as a bar to a suit subsequently brought in a federal court on the same facts. 13F(2d)267.

1158-42¾-New. Every presumption must be indulged in favor of validity and fairness of judgment approved by highest state court. 43F(2d)640.

1158-43 269US42, 46SCt61, 70L ed155; 274US123, 47SCt511, 71L ed959; 14F (2d)149; 14F(2d)225; 15F(2d)846; 21 F(2d)71; 22F(2d)574; 25F(2d)866; 28 F(2d)398; 32F(2d)502; 33F(2d)185; 33F(2d)323; 40F(2d)91 (probate and construction of wills); 40F(2d)247; 42 F(2d)775. [c] (2) Adjudication of state court that bankrupt's wife has had homestead set apart to her, made in proceeding to which husband was party, is conclusive on his claim to second selection of different property. 34F(2d) 268.

1158-44 274US123, 47SCt511, 71L ed 959; 8F(2d)813; 14F(2d)225; 26F(2d) 47; 28F(2d)596; 33F(2d)323; 34F(2d) 18; 35F(2d)84; 35F(2d)907; 39F(2d) 969; 42F(2d)21. See also 27F(2d)909.

1158-44½-New. and as to points which might have been raised or adjudicated, 8F(2d)813.

1159-45 25F(2d)794, 800 [quotCJ]; 42 F(2d)775.

1159-46 39F(2d)37. [c] **Trustee in bankruptcy.**-34F(2d)528.

1159-48 [a] (2) Finding of orphans' court that death occurred on day when party was last seen is not conclusive in action on war risk policy. 25F(2d)335. (3) United States assisting orphans' court in determining precise date of death is not bound by such finding. 25 F(2d)335.

1160-54 37F(2d)687.

1160-56 23F(2d)347.

1160-59 14F(2d)16; TexCivA 25SW (2d)1108. [c] 85Mont532, 281P341. [f] **States in same circuit.**-82NH170, 131A 441.

1160-61 253 IllA315; 35 OhA374, 172 NE537; TexCivA 25SW(2d)1108; 37 Wyo 11, 258P576.

1161-64 Cal 286P693; 130Misc110, 222 NYS532.

1161-65 [a] (4) See also 120 Or687, 252 P948.

1161-66 247Mich141, 225NW625; Mont 279P253 (United States court judgment that cause was not removable held binding on state court); 130Misc853, 225 NYS507; 222AppDiv698, 225NYS407; 30 OhA230, 164NE77(1stcase); 131 Or 522, 284P189; Or 287P224; TexCivA 16 SW(2d)961; TexCivA 25SW(2d)1108; TexCivA 29SW(2d)911; Wash 287P677 (2dcase).

1162-68 149Miss361, 115S43; NJ 148 A753; 218AppDiv594, 218NYS539; 117 Or107, 241P62; 156SC43, 152SE721; TexCivA 25SW(2d)1108 (question of law and fact). [a] (2) Judgment of state court that land was not homestead is not inconsistent with judgment of bankruptcy court that reasonable time to establish homestead had not expired. 230Ky696, 20SW(2d)734. [b] (2) Decree of federal court in suit to determine rights under will, determining that residuary property passed intestate, does not preclude state court from thereafter probating trust deed as part of will and is not conclusive in subsequent suits where facts are different. 34F(2d) 18.

1162-70½-New. Suppression by a federal court of evidence does not preclude its reception in a state court. 111 TexCr486, 16SW(2d)228(2dcase).

1162-71 27F(2d)748; 117Tex247, 1 SW(2d)609; Utah 273P303.

1162-72 34F(2d)13; 48 Ida424, 282P 943; 226Ky438, 11SW(2d)116; 131 Or 522, 284P189; 117Tex247, 1SW(2d) 609; TexCivA 12SW(2d)847.

1162-73 DC 40F(2d)159; 50Nev191, 255P1010; 143 Okl 35, 287P386.

1163-90 33F(2d)667; 74CalA494, 241 P270; Ont [1930] 4DomLR703.

1164-93 But see 74CalA494, 241P270.

1164-95 But see 34PortoRico 50.

1164-1 30F(2d)933.

1164-4 19F(2d)417.

1165-16 50ND662, 197NW862.

1165-17 But see 30F(2d)933.

1165-24 15F(2d)459.

1165-26 157Md641, 147A715; 242NY 381, 152NE121; 219AppDiv120, 219 NYS284; 221AppDiv321, 223NYS174.

1165-28 273US541, 47SCt451, 71L ed 762; 33F(2d)667. See also 219AppDiv 120, 219NYS284. But see 221AppDiv 321, 223NYS174.

1165-29 [a] **Courts need not give** greater effect to foreign judgment than they give to that of sister state. 67 Utah371, 248P83.

1165-30 219AppDiv120, 219NYS284. [b] **Each sovereign power determines for itself local effect of foreign judgments.** 219AppDiv120, 219NYS284.

1165-33½-New. A foreign judgment will not be enforced if contrary to policy or prejudicial to interests of state or rights of its citizens. 221AppDiv 321, 223NYS174.

1165-34 23F(2d)927.

1166-35 [a] **Judgment obtained in France payable and paid in francs** is bar to subsequent suit in United States notwithstanding decline in value of franc. 23F(2d)927.

1166-36 221AppDiv321, 223NYS174.

1166-38 127Misc898, 217NYS647. [a] **Principle of comity permits only recognition** of judgments by courtesy between equals, and does not apply where, in jurisdiction where judgment was rendered, foreign judgments are only prima facie evidence of claims. 127 Misc898, 217NYS647.

1166-41 273US541, 47SCt451, 71L ed 762; 33F(2d)667; 242NY381, 152NE 121; 248NY1, 161NE201; 127Misc898, 217NYS647; 219AppDiv120, 219NYS 284.

1166-42 225AppDiv332, 233NYS206. See also 225AppDiv261, 232NYS569. [b] **Rule applied where foreign judgment** is not against public policy of state. 219AppDiv120, 219NYS284.

1167-43½-New. Evidence declared to show that judgment of alcalde of jurisdiction was pronounced in 1834 and that terms thereof were as described in subsequent suit by judgment creditor to enjoin execution. TexCivA 273SW 993.

1167-43¾-New. Whether presumption of existence of judgment eighty years in past be considered rebuttable or conclusive, the existence of the judgment is established as a matter of law when there is direct evidence of its existence and no evidence to the contrary. TexCivA 273SW993.

1167-43¼-New. By decree of Coahuila No. 39 and Texas of June 21, 1827 it is apparent that the alcalde's court was one of competent jurisdiction. Tex CivA 273SW993.

1167-50 [b] (2) In action on judgment of court of another province in action in which debtor appeared, defendant cannot plead cross demand constituting part of defense in original action. Can [1929] 4DomLR73.

1167-51 273US541, 47SCt451, 71L ed

762; 157Md641, 147A715; NJ 148A882 (where law of jurisdiction in which res is located is more beneficial to infant in distribution of personalty).

1167-52 272US541, 478Ct451, 71L ed 762.

1167-55 272US541, 478Ct451, 71L ed 762.

1168-62 NJ 148A882; 242NY381, 152 NE121.

1168-65 NJ 148A882.

1168-67 242NY381, 152NE121. [a] **Judgment held not res judicata as to persons not parties.**–129Misc551, 222 NYS[illegible].

1168-68 157Md641, 147A715; 226App Div56, 234NYS202.

1169-69 135Misc205, 237NYS171.

1170-75 33F(2d)667; 242NY381, 152 NE121.

1170-84 255 IllA462; 242NY381, 152 NE121; NS [1929] 4DomLR48. But see 33F(2d)667.

1170-86 127Misc898, 217NYS647. [a] **Remedy for foreign judgment based on alleged false testimony** is by procedure for new trial there. 127Misc898, 217 NYS647.

1171-89 324 Ill 276, 155NE288; 232 IllA359, 373 [citCyc]. [b] 134SC348, 132SE824, 825 [citCJ].

1171-90 134SC348, 132SE824, 825 [cit CJ]. [a] (14) Judgment to reimburse beneficiary of fraternal benefit policy by enforcement of lien on benefit fund held not in rem. 232 IllA359. (15) Judgment dismissing complaint in action for damages to automobile truck. 109Conn460, 146A847.

1171-94 168Ark718, 271SW970 (jurisdiction is founded on presence of property); 324 Ill 276, 155NE288; 78Mont 192, 253P254; 82Mont141, 265P710, 712 [quotCJ]; TexCivA 208SW(2d)413. [a] **Where property has been seized,** court has jurisdiction to subject it to satisfaction of plaintiff's demand. 78Mont 192, 253P254. [b] **Property subject to sale must have been impounded.**–TexCivA 208SW(2d)413. [c] **That property has been impounded by legal process must affirmatively appear** where validity of judgment depends on whether property has been impounded. TexCivA 208SW(2d)413.

1171-95 324 Ill 276, 155NE288.

1171-98 TexCivA 297SW317, 320 [quot CJ].

1172-99 50Nev282, 257P831.

1172-4 50Nev282, 257P831.

1172-4 232 IllA359 (dictum).

1172-5 Mass 171NE672.

1172-6 Mass 171NE672.

1172-7 324 Ill 276, 155NE288; 232 IllA359; Mass 171NE672, 78Mont192, 253P254.

1172-9 TexCivA 297SW317, 320 [quot CJ].

1172-13 279US388, 498Ct356, 73L ed 752; 197Cal364, 240P1015; 109Conn 460, 146A847; 329 Ill 458, 160NE847; 232 IllA359; 153Md50, 137A509; 317 Mo 1078, 298SW83; 131 Or586, 283P8 (water rights); 294Pa376, 144A283; TexCivA 178SW(2d)174; TexCivA 27 SW(2d)861; Ont [1925] 2DomLR790.

1173-14 Mo 268SW(2d)609; Ont [1925] 2DomLR790.

1173-17 317Mo 1078, 298SW83; Mo 268SW(2d)609; Ont [1925] 2DomLR790.

1173-18 168Ark718, 271SW970; 232 IllA359 (dictum); Nebr 229NW769 (binding on successors in title). [a] **Admissibility as evidence.**–Mo 268W (2d)609.

1173-20 317Mo 1078, 298SW83, 89, 90 [citCJ]. [b] **Judgment is not conclusive on strangers as adjudication of incidental facts.**–329 Ill 458, 160NE847 (question of heirship). [c] **Finding in proceeding for appointment of administrator** that decedent was nonresident is not res judicata in subsequent action by distributee against administrator's surety in which status as officer was not attacked. 317Mo 1078, 298SW 83.

1174-21 317Mo 1078, 298SW83, 90 [cit CJ].

1174-21½-New. Judgment against a trustee personally does not render a subsequent proceeding in rem res judicata. 168Ga448, 148SE100(2dcase).

1174-28 14F(2d)496.

1175-43 232 IllA359, 373 [citCyc].

1175-45 232 IllA359, 373 [citCyc].

1175-53½-New. or decree establishing a lien against a benefit fund of a mutual benefit insurance society; 232 IllA359.

1076-64 Oh 172NE361.

1176-66 254 IllA552 (as to property of defendant).

1176-66½-New. will contests; Mo 19 SW(2d)487.

JUDICIAL

1178-33 129Misc82, 220NYS696, 700 [citCJ].

1179-56 129Misc82, 220NYS696, 700 [citCJ]; 126 Or641, 270P513, 515 [quot CJ].

1179-57 129Misc82, 220NYS696, 700 [citCJ].

1180-72 43 OklACR186 [reh pending].

1180-74 124 Or547, 265P428.

1181-84½-New. duty of passing on evidence and deciding; 82NH159, 131A 155, 42ALR757.

1182-12 274US123, 478Ct511, 71L ed 959.

1182-18 274US123, 478Ct511, 71L ed 959.

1183-45 114 ObSt658, 151NE760.

1184-47 114 ObSt658, 151NE760.

1184-51 324 Ill 285, 155NE318.

1186-89½-New. "judicial judgment," 16CustA191 (judgment of United States court of customs appeals on appeal from findings and recommendations of United States tariff commission under Tariff Act [1922] § 316).

JUDICIAL SALES

35 C. J.—7-1 79CalA45, 248P1035.

8-4 79CalA45, 248P1035.

8-5 79CalA45, 248P1035.

8-6 79CalA45, 248P1035.

8-7 79CalA45, 248P1035.

8-10 26F(2d)537.

8-19 Del 149A307; 122Kan131, 254P 407 [citCJ].

9-25 117 Okl 79, 245P866.

9-27½-New. Passing of title to property to bankrupt's trustee is not judicial sale. 26F(2d)450.

10-32½-New. A sale under execution on a sale bond is in the nature of a decretal sale. 213Ky429, 281SW157.

10-34 79CalA45, 248P1035.

11-49½-New. **Whose property saleable.** Property of a corporation not a party to a suit cannot be sold to pay a debt not its own. 13F(2d)743.

11-49½-New. Where property ordered sold does not sell for two thirds of appraised value, equity of redemption may be sold for satisfaction of debt. 234Ky558, 28SW(2d)737.

11-56 164Ga858, 139SE666.

12-61 102WVa59, 135SE171, 173 [cit CJ].

12-62½-New. Court cannot order sale of property of third person without opportunity on request to assert rights. Wyo 292P897.

12-66 [a] **Necessity of notice of application under Speedy Sale Statute** see 166Ga256, 142SE879.

12-69 [d] **What constitutes compliance.**–Va 154SE587.

14-92 95CalA647, 273P122.

15-18 [a] (2) Provision requiring purchaser to pay one fifth of purchase price on day of sale is prejudicial to purchaser as unreasonable credit. 234Ky558, 28 SW(2d)737.

16-29 234Ky558, 28SW(2d)737 (ordering sale on credits less than fixed by statute).

16-45 225Ky764, 10SW(2d)298; 230Ky 129, 18SW(2d)946 (provision as to manner in which property shall be offered for sale may be changed).

17-49 NJCh 148A161(2dcase) (by purchaser).

17-51 234Ky558, 28SW(2d)737 (property held real estate within statute).

19-2 16F(2d)371; 166La553, 117S588.

20-17 [c] **Unless ordered by court** notices need not be posted upon the property. 232Ky135, 300SW337.

21-28 TexCivA 68SW(2d)129, 133 [quot CJ].

21-30 TexCivA 68SW(2d)129, 133 [quot CJ].

21-39 [a] (2) Thirty days between first publication and day of sale has been held sufficient. 37 OklACR327. [c] **Twenty days.**–32PortoRico 858.

21-48 32PortoRico 858.

22-53 37 OklACR327.

22-63 150Md107, 132A616.

22-65 150Md107, 132A616. [b] **Description held sufficient.**–150Md107, 132 A616.

23-90 16F(2d)371.

24-92 150Md107, 132A616.

24-93 150Md107, 132A616, 618 [citCJ].

24-10 169Ga166, 149SE905.

25-24 [a] **In Washington.**–290P844.

26-28 [b] 168Ark449, 270SW610.

27-59½-New. It is better practice for the officer to make proper entries in a book to be filed. 151SC114, 148SE704, 63ALR965.

27-60 But see 34PortoRico 216.

28-87 [a] (4) 228Ky390, 15SW(2d)251. (12) Commissioner is entitled to allowance of only seven dollars and fifty cents where five tracts were ordered sold if necessary to pay judgment, but commissioner sold only two tracts and made but one sale. 228Ky390, 15SW(2d)251. (13) Allowance has been held excessive. 228Ky390, 15SW(2d)251.

29-6 225Ky764, 10SW(2d)298.

29-8 172Ark379, 288SW889.

29-7 172Ark379, 288SW889.

30-40½-New. That the purchaser has ascertained the correct amount due under a mortgage does not make it his duty to challenge the statement of the officer. NJCh 147A334.

30-40½-New. Realty subject to a mortgage, the amount of which is announced, is sold subject only to the balance due after deducting credits. NJCh 147A334.

33-88 142Miss56, 108S274, 278 [citCyc].

33-94 336 Ill 316, 168NE259.

33-97½-New. A judgment debtor cannot complain that a decree in an action to subject his real estate to the lien of the judgment ordered a sale on terms different from the terms of deeds of trust constituting prior liens where he made no complaint before the sale and deed of trust creditors do not complain. 148 Va718, 139SE249.

33-98 210Ky338, 275SW803, 804 [cit CJ].

35-21 210Ky338, 275SW803, 804 [cit CJ]. [c] **Decree authorizing commissioner to fix date of sale** on judicial sale controlled by Civ. Code Pract. § 696 is not erroneous. 210Ky338, 275SW803.

35-24 [a] **In Kentucky.**–210Ky338, 275 SW803.

36-65 222Ky135, 300SW337.

37-73 164Ga858, 139SE666; 228Ky390, 15SW(2d)251.

37-76 164Ga858, 139SE666. See also 31Ariz370, 253P633.

37-80 148Va718, 139SE249. See also 31 Ariz370, 253P633. [a] **Decree in suit to subject real estate to judgment lien** may order sale first in parcels and then as whole where court believes that it will redound to benefit of debtor. 148Va718, 139SE249.

37-91 But see 164Ga858, 139SE666 (sale is void).

39-25 144Va824, 130SE768.

39-26 144Va824, 130SE768.

40-46 [a] (4) Where interested party falsely stated to would-be bidder that sale was friendly affair. 165La288, 115 S490.

40-47 165La288, 115S490; 136 Okl 162, 276P735.

41-51 12PortoRicoFed119.

42-70 46 Ida657, 270P621.

43-19 56AppDC340, 13F(2d)311. [a] **Other definitions.**–196NC242, 145SE231.

43-20 179Ark845, 18SW(2d)371.

43-21 196NC242, 145SE231.

43-22 219Ala681, 123S220 (sale confers no title till confirmation); 36GaA27, 134 SE840; 332 Ill 177, 163NE343; Iowa 228NW641; 48Philippine824; 144Va824, 130SE768 (approval of court is necessary to make offer of highest bidder permanently effective). [c] **In South Carolina.**–156SC443, 153SE487.

44-23 228Ky554, 15SW(2d)492.

44-30 36GaA27, 134SE840.

46-72½-New. In some jurisdictions the hearing is confined to the face of the proceedings to determine whether the sale has been made in a regular manner

according to law. 123 Okl 245, 253P92.

46-72½-New. Only status existing when sale was made can be considered in deciding whether sale should be confirmed. 224Ky360, 6SW(2d)477.

46-72¼-New. Right of exemption under federal law cannot be considered. Nebr 228NW541.

46-75½-New. The fact that a special master conducting the sale of machinery under a court's decree made the announcement that one of the parties had taken a lease on the premises containing the machinery has been held not to prevent confirmation of the sale, where the evidence indicated that none of the bidders were surprised by the information, and that the bidding was not materially affected. 28F(2d)911 [certiorari den 279 US837, 49SCt251(7thcase), 73L ed984].

47-83 36GaA27, 134SE840; 133 Okl 283, 271P1033; 139 Okl 56, 281P238; 153Va 429, 150SE255.

47-87 Iowa 228NW641.

47-90 NJCh 146A346.

47-91 29F(2d)321 [certiorari den 279 US850, 49SCt347(2dcase), 73L ed993].

48-6 123 Okl 245, 253P92.

48-13 123 Okl 245, 253P92.

49-20 But see 224Ky360, 6SW(2d)477.

49-25 36GaA27, 134SE840.

50-37 215Ky181, 284SW1034.

50-47 133 Okl 283, 271P1033.

51-71 215Ky181, 284SW1034. See also 146Va33, 135SE707.

51-73 152Va842, 148SE687.

52-79 117 Okl 79, 245P866, 867 [cit CJ].

52-80½-New. A purchaser at a judicial sale is bound by the order confirming the sale as in case of a default judgment. 218Ky221, 291SW29.

52-82 123Kan110, 253P1094, 1095 [cit CJ].

52-88 15F(2d)909; 196NC242, 145SE 231.

53-91 159La864, 106S332.

53-96½-New. Only complete evidence of payment of purchase price at sheriff's sale is deed duly executed by sheriff. 159La864, 106S332.

54-17 See also 5LaA756.

55-39½-New. The bond must be executed within a reasonable time. 225Ky 338, 8SW(2d)378.

57-84 [a] **In Kentucky.**-217Ky712, 290 SW486.

57-88½-New. Under some statutes, a purchaser at a decretal sale may not deduct from the purchase price the amount of drainage assessments to become due in future. 213Ky352, 281SW169.

57-99 [b] **Damages can properly be assessed against one making purchase and his undisclosed principal.**-42F(2d)712.

59-34 18F(2d)749. But see 32 OhA22, 165NE744. [d] **Fine for contempt.**-18F (2d)749.

59-39 222AppDiv100, 225NYS250.

61-78 [a] **Registration** of deed in Porto Rico see 32PortoRico 858.

61-82 172Ark379, 288SW889. [a] **Additional order of court not necessary.**-172Ark379, 288SW889.

62-92 117 Okl 79, 245P866.

62-10½-New. Subjection to prior lien. Condition in order of sale that land should be sold subject to prior lien need not be recited in the deed. 172Ark379, 288SW889.

62-14 TexCivA 281SW315.

63-18 TexCivA 281SW315.

64-46½-New. Although a deed is absolute on its face, it conveys no greater title than the order of sale on which it is based. 172Ark379, 288SW889.

64-50½-New. If land is included which the decree did not authorize the sale of, and which was not sold, grantee receives only a color of title to land so included without authority. 102WVa59, 135SE 171.

64-54 15F(2d)909; 153Md582, 139A 283; 26 OhNPNS431.

65-69 See also 7LaA565.

66-90½-New. It is proper to order sale of property to satisfy prior liens before passing on inferior liens. 221Ky745, 299 SW723.

66-98 155Md221, 142A525; 8PaDist& Co 378. See also 155Md221, 142A525.

67-24-25½-New. The owner of property sold at a judicial sale loses the power to regain the property if it is not subject to redemption. 227Ky3, 12SW(2d) 358.

67-27 205 Iowa789, 218NW502, 505 [quotCyc].

67-28 143Miss56, 108S274 (two-year statute not operative unless purchase money paid and sale made in good faith).

68-34 [b] **Upon insertion of terms in contract** by agent of seller, not agreed upon by buyer, he may refuse to pay for goods upon arrival. 171Ark719, 285SW 385.

69-52 31Ariz370, 253P633.

69-56 318 Ill 182, 149NE21.

69-69 205 Iowa789, 218NW502, 505 [quotCyc].

71-95 [a] **Purchaser is not liable for** excess over income of expenses of receiver appointed to manage property pending redemption from sale nor can such excess be made lien on realty. 119 Kan724, 241P252.

72-16 224Ky360, 6SW(2d)477.

72-20 But see 46 Ida657, 270P621.

72-24½-New. Purchaser is not liable for amount sufficient to enable sheriff to satisfy liens and incumbrances against property. LaA 130S631.

72-25 169Ark383, 275SW762; 218Ky 221, 291SW29; 100WVa464, 130SW807, 810 [citCJ].

72-28 Ida 290P402, 403 [citCJ].

72-29 Ida 290P402, 403 [citCJ].

72-31 100WVa464, 130SE807.

73-36 Cal 284P905; 120Kan492, 243P 1021, 1022 [citCJ]; 151SC152, 148SE 722 (notices given by persons claiming interests held unavailing to limit purchaser's title). [a] (2) Defendant has no legal or equitable interest in land after sale and no right to place obstruction thereon. 233Ky299, 25SW(2d)730.

73-37 120Kan492, 243P1021, 1022 [cit CJ]; 299Pa117, 149A165 (depends on record at time of sale).

73-38 120Kan492, 243P1021, 1022 [cit CJ].

73-40 177Ark849, 8SW(2d)440; 178 Ark709, 13SW(2d)294; 127Kan601, 274 P240.

73-41 237 IllA606.

74-42½-New. Purchaser obtains no greater title than that provided by order of sale. 172Ark379, 288SW889.

74-45 But see 233Ky410, 25SW(2d) 1034.

74-52 197NC177, 148SE45.

74-53½-New. Legislature may prescribe terms and conditions under which crop will pass by judicial sale of realty. 154Wash110, 281P9, 66ALR1417.

74-54 13LaA612, 128S688.

74-62 145Va578, 134SE701, 703 [cit CJ].

74-63 145Va578, 134SE701, 703 [cit CJ]. But see 226Ky214, 10SW(2d)837.

75-67 37F(2d)854; 177Ark849, 8SW (2d)440; 178Ark1172, 14SW(2d)222; Ark 32SW(2d)621; 111Conn605, 151A 248; GaA 155SE793; 205 Iowa1103, 216NW109; 222Ky721, 2SW(2d)390; 223Ky719, 4SW(2d)723; 232Ky410, 23 SW(2d)592; 245Mich571, 222NW736; 102NJEq144, 140A229.

75-71 111Conn605, 151A248; 251NY 435, 167NE578.

76-74 237 IllA606; 250 IllA244.

76-78 237 IllA606; TexCivA 275SW 673.

76-79 TexCivA 275SW673.

76-87 38Wyo 515, 269P45, 60ALR418.

76-89 163Ga525, 136SE545; 132 Okl 14, 269P289, 68ALR649.

76-90 Del 149A307. [a] **In Oklahoma.**-124 Okl 181, 254P972.

78-12 172Ark379, 288SW889; NJ 151A 609; 104WVa70, 138SE758; 38Wyo 515, 269P45, 47, 60ALR418. [citCJ].

78-15 21SaskL276, [1927] 1DomLR529, [1927]WestWkly49.

78-25 [d] **In Kentucky.**-217Ky312, 287 SW273.

79-29½-New. In general, property should not be sold free from liens, transferring lien to proceeds, unless there is a reasonable prospect of a surplus for general creditors. 21F(2d)414.

79-41 164Ga861, 139SE674. [b] (1) 214Ky186, 282SW1099. (4) Right of purchaser either to pay outstanding tax lien and take credit on sale bond, or to have it discharged out of purchase money, exists as rule of property, adopted as equitable adjustment between purchaser and owner. 214Ky186, 282SW 1099. (5) Future drainage assessments cannot be credited on bond for purchase price of property at judicial sale. 217 Ky312, 289SW273. (6) Such right is not affected by question of notice of lien at time of sale. 214Ky186, 282SW1099.

80-50 [a] **In Pennsylvania.**-88PaSuper 117.

80-54 100WVa205, 130SE432.

81-55 160La694, 107S493 (lease).

81-57 225AppDiv227, 232NYS433.

81-59 237 IllA606.

81-60 226Ky214, 10SW(2d)837; 161La 31, 108S114.

82-63 113 Okl 265, 242P185.

82-76 148Md695, 130A330; 137 Okl 116, 278P294.

83-82 TexCivA 293SW658, 659 [citCJ].

84-87 204 Iowa724, 215NW946.

84-92 56ND811, 219NW569, 573 [cit CJ] (mortgagee).

84-97 121Kan229, 246P521.

84-6 163Ga525, 136SE545.

84-7 152Wash269, 277P694.

84-9½-New. Purchaser is not entitled to possession on a void sale of land in gross. 164Ga858, 139SE666.

84-9⅓-New. The right of possession of a tenant for years shall be deemed paramount to that of a purchaser at a judicial sale, if the letting to him shall precede the entry of judgment. 14PaDist &Co 151.

84-13 [a] **Evidence held insufficient** to justify rescission for false representation. 251Mich129, 230NW942.

85-22½-New. Some statutes requiring notice by an execution purchaser before entering motion for judgment for possession do not apply to executions on sale bonds issued under order of court in equitable actions in which the property is under control of the court and defendant in execution is a party. 213 Ky429, 281SW157.

85-25 169Ark383, 275SW762; IndA 154 NE392.

85-25½-New. , despite pendency of ejectment proceedings. IndA 154NE392.

86-51 Contra 163Ga276, 136SE62.

86-52 163Ga276, 136SE62.

88-79 244NY274, 155NE123.

88-81 244NY274, 155NE123.

88-83 NJ 146A40(2dcase).

91-39 32 OhA22, 165NE744.

93-68 56AppDC340, 13F(2d)311; 244 NY274, 155NE123. [a] 244NY274, 155 NE123. [e] **Notice to put referee in default.**-217AppDiv771, 217NYS130.

93-72 24 OhA45, 156NE241; 117 Okl 17, 244P754, 755 [quotCJ].

93-73 117 Okl 17, 244P754, 755 [quot CJ].

94-79 24 OhA45, 156NE241; 117 Okl 17, 244P754, 755 [quotCJ].

94-86½-New. Conveyances by successful bidder after sale and before confirmation take effect on confirmation and delivery of the deed. 15F(2d)909.

94-89 117 Okl 17, 244P754, 755 [quot CJ].

94-90 117 Okl 17, 244P754, 755 [quot CJ].

94-91 117 Okl 17, 244P754, 755 [quot CJ].

96-21 98NJEq548, 131A122; 144SC509, 142SE602. [a] **Every reasonable intendment** will be made in favor of validity. TexCivA 282SW935.

96-24 20F(2d)425.

96-27 16F(2d)939.

96-30 3Del 146, 132A737, 738 [citCyc]; 244NY274, 155NE123; 124 Okl 236, 254 P968; 139 Okl 56, 281P238; 294Pa22, 143A488; 95PaSuper226. [a] **Held not abuse of discretion.**-244NY274, 155NE 123.

96-33 94Fla236, 113S730.

96-34 124 Okl 236, 254P968. See also 95PaSuper226.

97-40 294Pa309, 144A136 (only for fraud after acknowledgment, delivery and recording of deed).

97-41 105WVa530, 143SE301, 303 [cit CJ].

97-44½-New. After term of confirmation, the court is without power to vacate or modify the order of confirmation. 218Ky221, 291SW29.

98–65 74Mont355, 240P667, 672 [quot CJ].
98–66 74Mont355, 240P667, 672 [quot CJ].
98–67 223Ky719, 4SW(2d)723; 160La 694, 107S493; 249Mich485, 229NW411; 74Mont355, 240P667, 672 [quotCJ]; 105WVa530, 143SE301. [a] (11) Other instances. 136 Okl 162, 276P735.
98–68 74Mont355, 240P667, 672 [quot CJ]; 24 OhA45, 156NE241.
98–69 74Mont355, 240P667, 672 [quot CJ].
98–70 74Mont355, 240P667, 672 [quot CJ].
98–72 98Fla203, 123S561(1stcase); 128 Kan766, 280P778; 74Mont355, 240P667, 672 [quotCJ].
99–73 74Mont355, 240P667, 672 [quot CJ].
99–81 [a] **In Porto Rico.**–32PortoRico 818.
99–84 105WVa530, 143SE301.
99–85½–New. A judgment by which a sale is confirmed is separate and distinct from the judgment under which the sale was made as regards the right to have it set aside. 218Ky221, 291SW29.
100–96 12PortoRicoFed119.
100–1 98Fla203, 123S561(1stcase); 130 Misc858, 225NYS393.
101–7 124 Okl 236, 254P968.
101–8½–New. Mistake on the part of plaintiff's attorney in thinking that an arrangement had been made with the county attorney whereby he would represent plaintiff at the sale is insufficient. 124 Okl 236, 254P968.
101–10 [b] **Parties interested in sale have no right to rely on agreement made with officer** whose duty it is to conduct sale to effect that officer will notify party of exact time at which sale will be made. 117 Okl 17, 244P754.
101–15 98Fla203, 123S561(1stcase); 117 Okl 17, 244P754; 124 Okl 236, 254 P968.
101–16 29Ariz173, 239P1028; 168Ark 903, 271SW962; 179Ark845, 18SW(2d) 371; 180Ark973, 23SW(2d)983; 94Fla 236, 113S730; 222Ky108, 300SW331; 235Ky328, 31SW(2d)377(2dcase); NJCh 148A771; 210AppDiv826, 206NYS183; 117 Okl 17, 244P754; 124 Okl 236, 254 P968; 95PaSuper226; Utah 26SP781.
102–17 105WVa530, 143SE301, 303 [cit CJ].
102–18 [b] **Chancellor has authority to set aside sale during term for gross inadequacy in price,** if he exercised sound judicial discretion in so doing. 144Va 824, 130SE768. [c] **Vacating decree confirming sale, and ordering resale, for gross inadequacy in price three days thereafter and during term,** held wise exercise of chancellor's discretion. 144 Va824, 130SE768. [d] **Slight irregularities** may be sufficient to justify vacation. 318 Ill 182, 149NE21.
102–19 29Ariz173, 239P1028; 169Ark 463, 275SW905; 94Fla236, 113S730; 144Va824, 130SE768 (one thousand dollars is grossly inadequate price for land valued at two thousand five hundred dollars); 105WVa530, 143SE301. [f] **Slight circumstances indicating fraud** where price was grossly inadequate is ground for equitable interference. 339 Ill 628, 171NE629.
102–19½–New. Inadequate price resulting from mistake, accident, surprise, misconduct, fraud, or irregularity will justify vacation in some states. 318 Ill 182, 149NE21.
102–19¾–New. To retain title where the price is grossly inadequate, the purchaser must show freedom from fraud or irregularity. 318 Ill 182, 149NE21.
102–19¼–New. In determining whether the price for which unimproved city land without streets or highways was adequate, possibility of opening streets and highways is not to be considered. 150 Md107, 132A616.
103–25 29Ariz173, 239P1028; 168Ark 903, 271SW962; 226Ky644, 11SW(2d) 696(2dcase); 294Pa309, 144A136; 10 PaDist&Co 173.
104–26 337 Ill 605, 169NE741; 124 Okl 236, 254P968.
104–26½–New. Such additional circumstances must show that the inadequate consideration was the result of fraud, mistake, or undue influence of the sheriff or the purchaser. 124 Okl 236, 254P 968.
104–30 12PortoRicoFed119; 105WVa 530, 143SE301.
105–44 168Ark903, 271SW962.
105–45 168Ark903, 271SW962; Va 155 SE694. [b] **Effect of reservation of right** to reject any and all bids is at most to give right to reject bids at time of sale, not to set aside sale to first bidder and accept subsequent higher bid of another. 168Ark903, 271SW962. [c] **Setting aside sale held error** where only reason was increased bid of another and there was no inadequacy of price coupled with fraud or other element of unfairness. 168Ark903, 271SW962.
106–55 153Va429, 150SE255. [b] **Burden is on one attacking original bid** to show that it was grossly inadequate. 153Va429, 150SE255.
107–74 NJCh 150A436.
108–93 100WVa464, 130SE807.
108–94 224AppDiv390, 231NYS158.
108–96½–New. A motion to vacate a judgment sale can be prosecuted only by one who is an interested party to the action, or otherwise affected by said sale. 133 Okl 220, 271P1022.
108–97 100WVa464, 130SE807.
108–12 94Fla236, 113S730.
109–13 94Fla236, 113S730.
109–15 94Fla236, 113S730.
109–18 94Fla236, 113S730, 734 [citCJ].
109–19 130Misc858, 225NYS393.
109–20 94Fla236, 113S730, 734 [citCJ].
109–21½–New. , or moves on legally sufficient grounds. 94Fla236, 113S730.
109–23 94Fla236, 113S730.
109–32 94Fla236, 113S730; 105WVa 530, 143SE301. [a] **Burden of proof** is on party attacking sufficiency of proceedings leading up to judicial sale. 37 OklACR327.
109–40 94Fla236, 113S730; TexCivA 6SW(2d)129, 130 [quotCJ]. [a] **Evidence.**–318 Ill 182, 149NE21.
109–40½–New. Before confirmation, a bill in equity will not lie. 219Ala681, 123SE220.
110–63 167La1103, 120S872; 155Miss 554, 125S79 (statute construed as to meaning of "payment" of purchase money). [a] **Bar effective only against parties to record or privies.**–155Miss554, 125 S79.
110–65 93Fla983, 113S117; 94Fla236, 113S730.
111–67 [a] **Rule requiring joinder is not jurisdictional** and order is binding on parties before court, where no timely objection is made. 93Fla285, 112S617.
111–71½–New. In the absence of appropriate allegations, it will be presumed that there was no report and confirmation of sale. 219Ala681, 123S220.
111–82 269US163, 46SCt50, 70Led213.
111–83 2LaA323; 100WVa464, 130SE 807.
111–86 33PortoRico 980, 983 [quotCJ].
112–89 But see 205 Iowa1139, 217NW 255.
112–95 249Mich485, 229NW411.
113–2 [a] **Effect of notification** is to rest ownership in equity in purchaser who is liable for losses and entitled to benefits to estate between notification and conveyance. 150Md211, 132A635, 45ALR582.
114–7 Mo 7SW(2d)1010; 37 OklACR 250 (though proceedings were set aside for extrinsic fraud).
115–25 37 OklACR250.
116–38 37 OklACR250.
118–81 34Wyo 332, 243P394, 397 [quot CJ].
118–82 34Wyo 332, 243P394, 397 [quot CJ].
118–83 34Wyo 332, 243P394, 397 [quot CJ].
118–84 159La864, 106S332; 34Wyo 332, 243P394, 397 [quotCJ].
118–92 34Wyo 332, 243P394, 397 [cit CJ].
119–4 239 IllA487.
119–20 34Wyo 332, 243P394, 397 [quot CJ].
119–21 239 IllA487; 34Wyo 332, 243P 394, 397 [quotCJ].
120–38 239 IllA487.
120–44 239 IllA487.
122–82½–New. Where plaintiff fails to pay bid, adjudication to association may be disregarded. 159La864, 106S 332.
122–82½–New. Sheriff and seizing creditor are not allowed to keep deposit paid down at sheriff's sale. 159La864, 106S333.
122–84 178Ark130, 10SW(2d)37.
122–89 228Ky357, 15SW(2d)298.
124–29 TexCommnA 288SW161, 162 [citCyc].

JUNCTION

126–56 168Ark146, 269SW51 (where two or more tracks of railroad or railroads meet or cross, whether owned by same railroad or not).

JUNIOR

127–68½–New. Junior party. In patent interference proceeding the party who last filed the application. 25F(2d)218.

JUNK

127–78 See also 14CustA112.
127–84 318 Ill 131, 149NE18.

JURA

128–99 [g] **Ont** [1930] 4DomLR553.

JURIES

140–1 187Wis384, 204NW589 (under direction of court).
140–3 90Fla381, 106S741.
140–7½–New. In courts having both civil and criminal jurisdiction, the same jury may try both classes of cases. IndA 154NE806.
141–17 102NJL537, 134A733.
141–18 234Ky45, 27SW(2d)410 (accused has duty to make proper showing and request); 103NJL64, 134A760. [a] **Discretion not abused.**–233Ky533, 26SW (2d)23.
141–19 103NJL64, 134A760; 102NJL 537, 134A733.
143–58 187Wis384, 204NW589 (charged with duty of finding certain facts).
143–59 316 Ill 609, 147NE487; 187Wis 384, 204NW589 (holding essential of jury that they find facts under direction of court). [c] **They were used at adoption of constitution** and always, it is believed, before that time and almost always since in single sense. 316 Ill 609, 147NE487. [d] **Terms "jury" and "trial by jury"** are, and for ages have been, well known in language of law. 316 Ill 609, 147NE487.
144–68 316 Ill 609, 147NE487; 190NC 363, 130SE12; 187Wis384, 204NW589.
145–70 209Ky734, 273SW489; 221Ky 823, 299SW983; 190NC363, 130SE12; 133SC491, 131SE603. [b] 316 Ill 609, 147NE487.
145–72 La 130S865.
145–73 La 130S865. [b] (1) La 130S 865. (5) But crime committed when former constitutional requirement of twelve jurors was in effect must be tried by that number. 161La963, 109S778.
146–75 [b] **In New Jersey.–Sup** 146A 666(2dcase).
146–78 316 Ill 609, 147NE487.
147–34 [c] **Effect of detachment of counties from district.**–14F(2d)369.
147–85 [c]. **In Nebraska.**–114Nebr393, 207NW668.
147–87 90Fla844, 107S530.
147–90 90Fla844, 107S530.
147–91 41 Ida747, 242P314, 243P654.
147–93 But see 250Mich273, 230NW170.
147–94 152Miss731, 118S350, 351 [cit CJ]; 7PaDist&Co 183.
147–95 142Miss256, 107S200.
147–1 [a] (6) "Act No. 84 [1919] was apparently designed, in so far as misdemeanors are concerned to protect the jurisdiction of municipal courts and to make a jury trial imperative in the cases wherein the fiscal elected to proceed in district court. But in cases against corporations he had no such election" the procedure to be followed being that determined by Code Cr. Proc. § 458 which provides that in cases against corporations prosecution must be by information. 32PortoRico 5, 8.
148–6 21AlaA326, 108S81; 30Ariz45, 243P916; 94Fla469, 114S450; 234Mich 277, 207NW890; 147Miss186, 113S433; 120 Or254, 251P701, 50ALR81. See also TexCivA 275SW96.

148-7 [a] (3) **Word heretofore as used** evidently relates to past and in order to determine true meaning of words "the right to trial by jury as heretofore enjoyed, it is necessary to go back to the common law of England. When this is done it will be found that the right of trial by jury constitutes certain specified things, which cannot be dispensed with or disregarded on the trial of a person charged with felony." 316 **Ill** 609, 147**NE**487, 490.

148-7½-New. Upon application for jury trial applicant must file affidavit verifying his pleading or by itself show a cause of action. 38**BC**310, [1927] 2 **DomLR**827, [1927] 1**WestWkly**580.

148-8 73**CalA**268, 238**P**787. But see 30 **Ariz**45, 243**P**916. [a] **In Colorado.**-83 **Colo** 300, 264**P**718; 85**Colo** 87, 273**P**1030.

148-9 212**Ala**519, 103**S**541; **Cal** 243**P** 659; 203**Cal** 128, 263**P**226; 204**Cal** 470, 268**P**909; **Cal** 289**P**830; 73**CalA**268, 238 **P**787; 94**CalA**297, 271**P**132; 161**Ga**287, 130**SE**580; 165**Ga**667, 672, 142**SE**121 [cit Cyc]; 41 **Ida**747, 242**P**314, 243**P**654; 43 **Ida**46, 248**P**442; 318 **Ill** 570, 149**NE**469; 311**Mo** 234, 278**SW**671; 136**Misc**831, 241 **NYS**26; 136**Misc**784, 242**NYS**257; 53**ND** 54, 205**NW**9; 121 **OhSt**393, 169**NE**301 (2dcase); 285**Pa**511, 132**A**572; 292**Pa** 127, 140**A**858; **TexCivA** 275**SW**96; 196 **Wis**292, 220**NW**197; **Wis** 231**NW**634.

149-10 143**Wash**229, 255**P**123.

149-11 311**Mo** 234, 278**SW**671; 120 **Or** 254, 251**P**701, 50**ALR**81.

149-12 143**Wash**229, 255**P**123. [a] **Legislature has no power under guise of regulating elections** to deprive citizen of jury trial. 200**Wis**518, 228**NW** 895, 69**ALR**348(2dcase).

149-13 120 **Or**254, 251**P**701, 50**ALR**81.

149-15 **CalA** 286**P**723; 41 **Ida**747, 242 **P**314, 243**P**654; 47**RI** 431, 133**A**812; 49 **SD**181, 207**NW**77 (action to establish will). See also 147**Miss**186, 113**S**433.

150-17 165**Ga**667, 142**SE**121; 41 **Ida**747, 242**P**314, 243**P**654; 292**Pa**127, 140**A**858; 9**PaDist&Co** 554. [a] 41 **Ida**747, 242**P** 314, 243**P**654.

150-17½-New. Right to jury trial is invoked according to nature of prohibited act, and does not vest alone on mode in which it is to be tried; substance, not form, controls. 102**NJL**74, 131**A**89.

150-17½-New. Right to jury trial does not guarantee antiquated forms. 155 **Tenn**266, 292**SW**451.

150-21 8**F(2d)**476; 174**Minn**457, 219 **NW**770, 58**ALR**607.

150-22 264**Mass**337, 162**NE**689.

150-26 **Iowa** 227**NW**136; 198**Wis**202, 223**NW**444.

151-36 120 **Or**254, 251**P**701, 50**ALR**81.

151-43 49**ND**248, 191**NW**485.

151-45 51**Nev**170, 271**P**689, 690 [cit CJ].

151-48 [e] (5) Agreements by heirs with testator not to contest will, being cognizable only in equity, heirs are not entitled to jury trial of issue whether agreements are binding. 244**NY**63, 154 **NE**823.

152-51 42**F(2d)**239.

152-54 16**F(2d)**702; 162**Ga**263, 133**SE** 469; **Ill** 172**NE**722; 202 **Iowa**640, 210 **NW**784, 785 [citCJ]; 159**La**674, 106**S** 28; 140**Miss**829, 105**S**458 (provision of federal constitution is not controlling on state court even in case arising under federal statute); 119 **OhSt**349, 164 **NE**359; 149**SC**52, 146**SE**686; 101**Vt** 514, 144**A**856.

152-56 53**ND**54, 205**NW**9.

153-57 11**F(2d)**860.

153-65 16**F(2d)**702; 36**F(2d)**926; 30 **Ariz**45, 243**P**916; 99**Fla**309, 126**S**151; 337 **Ill** 600, 169**NE**739 (application of discovery statute); 254 **IllA**115; 126 **Kan**385, 267**P**1098; 166**La**24, 116**S**580; 123 **Or**111, 261**P**72; 135**SC**33, 133**SE** 222; **TexCivA** 258**W(2d)**666.

153-66 128**Kan**600, 278**P**736; 248 **Mich**574, 227**NW**767; 218**AppDiv**350, 218**NYS**254; 24 **OhA**451, 158**NE**193. [a] (3) Attorney's action for fees against client and adverse party settling with notice of lien is law action triable to jury. 143 **Okl** 206, 288**P**964.

154-69 **TexCommnA** 1**SW(2d)**878.

154-70 102**NJL**262, 132**A**86.

154-71 [a] **Character of right or title asserted** usually controls question. **SD** 227**NW**469.

154-72 147**Wash**354, 266**P**148.

154-73 30**Hawai**468, 472 [quotCJ].

154-76 10**PaDist&Co** 159.

154-81 120 **Or**254, 251**P**701, 50**ALR**81. [a] **Statute held inapplicable** to action brought under intermeddling statute. 87 **IndA**462, 151**NE**735.

154-84 143**Wash**229, 255**P**123.

155-86 212**Ala**519, 103**S**541.

155-88 83**Colo** 300, 264**P**718.

155-89 129**Misc**268, 221**NYS**6; **Tex CivA** 16**SW(2d)**303; 21**SaskL**63, [1926] 4**DomLR**273, [1926] 2**WestWkly**817. [a] **In Manitoba.**-[1925] 3**DomLR**326. [b] **In New York.**-129**Misc**268, 221 **NYS**6.

155-90½-New. The provision in the statute that, where a case is referred to an auditor, his report shall be taken as prima facie correct, and the burden shall be upon the party making the exception, is not unconstitutional, for the alleged reason that it violates the provision in our constitution declaring that the right of trial by a jury shall remain inviolate. 167**Ga**766, 146**SE**754.

155-99 225**Ky**365, 8**SW(2d)**626; 48 **SD**477, 205**NW**38 (action for damages for illegally taking money from agent to whom it had been entrusted for particular purpose).

156-3½-New. **In Manitoba** an action for malpractice by a physician or surgeon is not triable by a jury in court's discretion. **Man** [1925] 3**DomLR**326.

156-3½-New. Plaintiff in action for personal injuries is entitled to jury trial where damages in case of success would be substantial. **Man** [1929] 4 **DomLR**1083(1stcase).

156-5 230**AppDiv**543, 245**NYS**95.

156-6 120 **Or**254, 251**P**701, 50**ALR**81.

156-15 40**F(2d)**679; 218**AppDiv**172, 218**NYS**68; 221**AppDiv**341, 223**NYS**424; 227**AppDiv**516, 238**NYS**222; 124 **Okl** 79, 254**P**75; **TexCivA** 280**SW**303. [b] (1) 175**Ark**421, 299**SW**738. [f] **In action in nature of trespass to try title to boundary of land,** though in form for injunctive relief, defendants are entitled to jury trial. 210**Ky**121, 275**SW**513.

157-17 218**AppDiv**172, 218**NYS**68; 130 **Okl** 71, 265**P**117.

157-19 42**F(2d)**353; 81**CalA**427, 254**P** 606; 42 **Ida**624, 248**P**22; 203 **Iowa**792, 206**NW**586; 123**Kan**508, 256**P**119; 129 **Kan**551, 283**P**616; **MoA** 9**SW(2d)**664; 118**Nebr**54, 223**NW**625; 227**AppDiv**105, 237**NYS**156; 53**ND**607, 207**NW**446; 125 **Okl** 254, 257**P**372; 129 **Okl** 48, 262 **P**682; 38 **OklACR**598; 49**SD**543, 207 **NW**536; 149**Wash**400, 271**P**82; 150 **Wash**529, 273**P**752; 193**Wis**54, 213**NW** 644. [e] **Issues included.**-**SD** 232**NW** 910.

158-20 129 **Okl** 48, 262**P**682.

158-23 [a] (2) Action to establish title to land appropriated for park purposes where equitable relief is sought. 125**Misc**809, 213**NYS**12 (Civ. Pract. Act § 425, Real Prop. L. § 504).

158-24 49**SD**543, 207**NW**536; 193**Wis** 54, 213**NW**644.

158-25 203 **Iowa**792, 206**NW**586; 125 **Okl** 254, 257**P**372.

158-26 193**Wis**54, 213**NW**644.

158-27 49**SD**543, 207**NW**536; **SD** 232 **NW**910.

158-28 [a] (24) To recover money damages for fraud. 193**Wis**54, 213**NW** 644. (25) On amendment of petition on notes to claim on oral contract. **Tex CivA** 291**SW**578. (26) To recover taxes illegally levied and alleged to have been paid under protest. 53**ND**607, 207**NW** 446. (27) Issues on counterclaim in replevin suit alleging parties' joint sale of property and praying determination of rights in proceeds. **SD** 227**NW**469. (28) Other actions. **MoA** 8**SW(2d)**1076. [b] (1) 147**Wash**648, 267**P**39.

159-31 See also 16**F(2d)**702.

159-32 50**RI** 283, 146**A**634, 68**ALR**303.

159-33 71**CalA**97, 234**P**432; 76**CalA** 232, 245**P**235; 161**Ga**287, 130**SE**580; 48 **Ida**654, 284**P**840; **Ida** 290**P**395; 119 **Kan**831, 241**P**257; 122**Kan**607, 253**P** 230; 261**Mass**409, 158**NE**763; 168**Minn** 84, 209**NW**907; 171**Minn**65, 212**NW** 738; 174**Minn**219, 219**NW**82; 174**Minn** 457, 219**NW**770, 58**ALR**607; 147**Miss** 186, 113**S**433; 116 **Okl** 192, 244**P**198; 117 **Or**83, 243**P**78; 140**Wash**586, 250**P** 346.

160-35 76**CalA**232, 245**P**235; 119**Kan** 831, 241**P**257; 234**Ky**597, 28**SW(2d)** 760; 136**Misc**656, 241**NYS**445; 126 **Okl** 25, 258**P**263.

160-36 76**CalA**232, 245**P**235; **Ida** 290**P** 395; 248**NY**206, 161**NE**472; 116 **Okl** 192, 244**P**198; 126 **Okl** 25, 258**P**263.

160-39 126 **Okl** 25, 258**P**263. [c] **It is only where issues present case of purely equitable cognizance** that jury trial will be denied. 121 **Okl** 7, 246**P**1091.

161-40 168**Minn**84, 209**NW**907.

161-43 **IndA** 171**NE**310 2dcase).

161-46 But see 97**CalA**264, 275**P**533. [h] **Statute that on appeals** from county to circuit court jury's verdict shall have force of verdicts in actions at law held void so far as applying to action in chancery. 49**SD**181, 207**NW**77.

161-50 But see 30**Ariz**45, 243**P**916; 97 **CalA**264, 275**P**533; 92**Fla**784, 110**S**350; **Ida** 290**P**395; 168**Minn**84, 209**NW**907; 147**Miss**186, 113**S**433.

162-53 197 **Ind**222, 150**NE**312; 204 **Iowa**1254, 215**NW**261; 232**Ky**741, 24 **SW(2d)**560; 119 **OhSt**588, 165**NE**296; 35 **OhA**384, 172**NE**446. See also 216 **AppDiv**552, 215**NYS**494. [c] **Equitable, joined with legal, causes of action may be tried at same or different times** as court may direct. 197 **Ind**222, 150**NE** 312.

162-55 265**Mass**249, 163**NE**848; 126 **Okl** 57, 259**P**136; 130 **Okl** 71, 265**P**117.

162-57 218**AppDiv**350, 218**NYS**254.

162-58 208**Cal** 82, 280**P**368; **CalA** 286 **P**723; 147**Miss**186, 113**S**433; **MoA** 9**SW (2d)**839; 126 **Okl** 25, 258**P**263.

163-63 198 **Ind**393, 153**NE**768.

163-64½-New. Under some statutes where plaintiff declares upon two causes of action involving title to real estate, the one in equity and the other in law, it is the duty of the court to submit the law case to the jury, 125 **Okl** 254, 257**P** 372.

163-64½-New. , and it may, in its discretion and for its advice, submit the equity case to the jury, 125 **Okl** 254, 257 **P**372.

163-70 196**Cal** 467, 238**P**1034.

163-73 121**Kan**728, 250**P**324.

163-77 196**Wis**182, 218**NW**839.

164-78 78**Colo** 421, 242**P**638; 168**Minn** 84, 209**NW**907; 118**Nebr**601, 225**NW** 759, 761; 150**Wash**494, 273**P**739. [b] 87 **IndA**220, 159**NE**28.

164-86 32**F(2d)**511; 125**Kan**299, 302, 264**P**17 [citCJ]; **Mo** 31**SW(2d)**978; 135 **Okl** 161, 274**P**657.

165-88 208**Cal** 82, 280**P**368 (complaint held to present case for foreclosure of vendor's lien).

165-89 **MoA** 16**SW(2d)**674. [b] **In Oklahoma.**-123 **Okl** 118, 252**P**834.

166-99 124**Kan**315, 259**P**681; **Okl** 291**P** 550; **Okl** 293**P**223; **Okl** 293**P**224; 33 **Wyo** 474, 240**P**683. [a] **Questions not incidental to foreclosure of mortgage** not within equity jurisdiction. 197 **Ind** 222, 150**NE**312.

166-1 124**Kan**315, 259**P**681; 74**Mont** 293, 240**P**384; 141**SC**232, 139**SE**465.

166-2 32**NM**344, 256**P**179; 135 **Okl** 117, 274**P**648.

166-4 74**Mont**293, 240**P**384, 386 [cit CJ].

166-7½-New. Where the purchaser of land gave a note to the vendor and executed a mortgage on the land to protect his surety, and the vendor sued on the note and the mortgage, it was held that the question whether the surety's mark on the note was forged was a question for the jury. 197 **Ind**222, 150 **NE**312.

166-7½-New. A suit by a mortgagee to foreclose an unrecorded real estate mortgage, in which the immediate grantee of the mortgagor files his answer and cross-petition setting up title in himself, and asks for cancellation of the mortgage is, as between plaintiff and cross-petitioner, one in equity and not in law, and cross-petitioner is not entitled to a trial by the jury as a matter of right. 135 **Okl** 260, 275**P**314.

166-10 26 **OhNPNS**223; 147**Wash**354,

266P148. [a] **Action to enforce oral trust** in which defendant's legal title is recognized. 126Misc42, 212NYS612.
166-14 208Cal 82, 280P368; 71CalA97, 234P432; 126Kan354, 267P968; 128 Kan383, 277P1023; 125 Okl 254, 257P 372; 144 Okl 144, 289P706; 156SC203, 152SE878; 143Wash352, 255P147; 191 Wis550, 211NW771; Alta [1930] 2Dom LR696.
167-15 143Wash352, 255P147.
167-21 39 OklACR373; 138SC151, 135 SE875.
163-27½-New. Act giving remedy against insurance, in nature of creditor's bill, is not unconstitutional. Mo 31SW (2d)7.
168-30 212Ala519, 103S541; 133 Okl 94, 271P241; 144 Okl 144, 289P706; 137 SC450, 135SE558.
168-31 Ind 147NE635. [a] **In California.**-201Cal 87, 255P827.
168-34 Mich 233NW393; 142 Okl 251, 286P778. [a] (1) 126 Okl 57, 259P136. [b] 212Ala519, 103S541. [f] **Bill to quiet title** though legacy is possession of complainant's and nonpossession by defendants is not demurrable because statute is unconstitutional as to facts not alleged. 212Ala519, 103S541.
169-54 [b] (1) 220AppDiv690, 222NYS 379. (4) One seeking to establish trust in land and partition must establish ownership in equity before he is entitled to jury trial as matter of right. 248NY206, 161NE472. [c] **Decedent's children by first wife,** not in possession, suing to have children by second wife declared trustees of property, and for partition thereof, entitled to jury trial. 221AppDiv341, 223NYS424 (Civ. Pract. Act §§ 1012, 1023). [d] **In Alabama.**-220Ala511, 125S655(2dcase).
170-57 40F(2d)679.
170-61 IndA 172NE316; 147Miss186, 113S433; 221MoA853, 288SW88; 83NH 91, 138A428.
170-62 [a] (3) Right to jury trial though act sought to be enjoined is criminal. Ind 171NE199.
171-68 8F(2d)730; 33F(2d)597; 38F (2d)545; 133Ala569, 31S934; 48CalA 790, 192P325; CalA 284P962; 93Fla 415, 111S801, 52ALR51; 318 Ill 198, 149 NE294; 232Mass88, 122NE162; 31Mich 290; 174Minn457, 219NW770, 58ALR 607; 304Mo 685, 264SW775; 21NJEq 576; 135Misc151, 238NYS197; 149SC 12, 146SE601; 83Wash676, 145P986; Wis 229NW657.
171-70 [a] (1) 135Misc151, 238NYS 197. (2) 93Fla415, 111S801, 52ALR51.
171-71 285Pa511, 132A572. [b] **Applications of rule.**-103Conn7, 130A249.
172-72 285Pa511, 132A572.
173-78 234Ky385, 28SW(2d)465.
173-82 CalA 286P723; Mo 27SW(2d)6.
173-94½-New. In plenary suit in equity for relief from judgment, either party is entitled to jury finding on issues involving excuse for failure to defend and alleges meritorious defense. TexCivA 296SW977.
173-94½-New. In a suit to set aside a judgment of dismissal for want of prosecution, either party is entitled to a jury trial if demanded. TexCivA 9SW(2d) 472.
174-13 Cal 292P970; 71CalA64, 234P 420, 422 [citCJ]; Vt 150A148.
175-14 121 Okl 7, 246P1091.
175-16 71CalA64, 234P420, 422 [quot CJ]; 80CalA301, 251P841; MoA 1SW (2d)203; 148Wash170, 268P143; 151 Wash561, 276P863.
175-19 MoA 297SW457.
176-25 SD 229NW301.
176-26 See also 116Nebr25, 215NW462.
176-39 47 Ida542, 277P554(2dcase).
176-41 159La789, 106S305; 123 Orl11, 261P72.
177-49 48 Ida654, 284P840; 141SC232, 139SE465; 33Wyo 474, 240P683. [c] (8) Where issues raised by counterclaim in equity action are triable by jury, rule for framing issues, applicable where jury trial is discretionary, do not apply. 231AppDiv11, 245NYS505.
177-51 137Misc18, 242NYS118.
177-52 38 OklACR598.
178-63 25F(2d)107; 30F(2d)144; 73 CalA268, 238P787; 161Ga287, 130SE 580, 586 [citCJ]; 250Mich273, 230NW 170; 102NJL262, 132A86; NJSup 132 A88. [h] **Claim of homestead exemption** where invoked by remedy strictly at law entitles either party as matter of right to trial by jury. 136 Okl 174, 276 P707.
178-65½-New. Statutes providing for the regulating and registering of real estate brokers and salesmen and creating state real estate commission to administer the act and prescribe its powers have been held not invalid as denying the right to a jury trial. 97Fla710, 122S225.
178-65½-New. A provision of the Workmen's Compensation Act, to the effect that appeals from orders of the state industrial accident commission shall not be a stay, has been held not in violation of the constitution relating to the right of a trial by jury. 156Md482, 144A696.
179-68 315Mo 101, 285SW980, 46ALR 1472.
179-77 [b] **In Georgia.**-160Ga752, 128 SE913.
179-78 81CalA427, 254P606.
179-78½-New. When, on an alternative writ, an issue of fact is raised, the case normally calls for a trial by the jury. NJSup 143A73.
179-80 81CalA427, 254P606.
179-86 311Mo 234, 278SW671 (to revive judgment).
180-87 [b] (3) Issues of fact raised by pleas of prior payment, satisfaction, or release of judgment are triable by jury under present constitution. 311 Mo 234, 278SW671.
180-92 263Mass121, 160NE424.
180-93 242NY342, 151NE821. [b] (2) Applications for orders in probate which necessitate construction of will have no place on jury calendar and it is reversible error to refuse to exclude them therefrom. 201 Iowa884, 208NW281. (3) In probate proceedings, jury trial is provided for only in contest over probate of will or in contested claim against estate. 201 Iowa 884, 208NW281. [d] **In New York.**-242 NY342, 151NE821. [e] **In Wyoming.**-35Wyo 300, 249P81 (trial of claim by widow to have homestead and other property set aside). [f] **In suit to determine reasonable value of attorney's fees,** either party is entitled to jury trial. 136Misc110, 240NYS532.
180-99 252NY155, 169NE122.
180-3 158La585, 104S377. [a] 158La 585, 104S377.
180-4 [g] **In New York.**-220AppDiv 480, 221NYS675.
181-8 201Cal 162, 256P204; CalA 292 P167.
181-13 201Cal 162, 256P204; 51Nev 170, 271P689; 136Misc400, 241NYS 102; 136Misc784, 242NYS257. [b] **In Nevada.**-51Nev170, 271P689.
182-22 [a] **In Michigan.**-238Mich308, 213NW167.
182-26 77Colo 310, 236P995.
182-27 NJCh 151A274. [b] (1) Tex CivA 291SW950.
182-33 223AppDiv378, 228NYS106; 50 SD639, 211NW460.
183-34 14F(2d)931.
183-36½-New. Attorney employed by banking department, liquidating an insolvent bank, is not entitled to jury trial on the issue of a portion of collections which he should turn over. 50 SD639, 211NW460.
183-39 261Mass556, 159NE70.
183-40 103NJL294, 132A503.
183-44 14F(2d)326; 292Pa262, 141A 44; 142Va512, 129SE384. [a] **At common law right to jury trial** in condemnation proceedings by municipal corporations did not exist. Mo 30SW (2d)729.
184-46 142Va512, 129SE384.
184-49 102WVa251, 135SE246.
184-52 75Mont116, 241P1075 (ouster for willful or corrupt malfeasance in office). [b] **Charge of nonfeasance in same court with malfeasance (1) will** not bring accusation within statute making nonfeasance triable by court. 75Mont116, 241P1075. (2) Where accusation charged sheriff with participation in crime of bribery triable by jury as malfeasance charge in same count of nonfeasance in failing to arrest his partner in crime will not bring accusation within statute making it triable by court. 75Mont116, 241P1075.
185-64 73CalA268, 238P787, 794 [cit CJ]; 292Pa127, 140A858.
185-65 But see 97Fla710, 122S225. [c] (1) 162Ga263, 133SE469. (4) Jury trial is not indispensable to due process and physician is not entitled thereto where not provided by statute. 201 Iowa579, 207NW769.
185-65½-New. In some jurisdictions on appeal from revocation of physician's license by board of medical examiners physician is entitled to trial de novo with trial by jury. 194NC 37, 138SE339.
185-69 218Ala235, 118S271(2dcase).
186-81½-New. Plaintiff in suit to recover tax paid under protest has no right to jury trial under federal constitution but only such right as arises by implication from provisions of statute. 275US101, 48SCt43, 72L ed 184.
186-84 34F(2d)663; 223Ky90, 2SW (2d)1038; Mass 167NE749.
187-99 272US465, 47SCt133, 71L ed 354, 47ALR1044; 102NJL74, 131A89; 149SC52, 146SE686.
187-1 102NJL74, 131A89. [a] **Validity of statute.**-102NJL74, 131A89.
187-4 272US465, 47SCt133, 71L ed354, 47ALR1044.
187-5 272US465, 47SCt133, 71L ed354, 47ALR1044.
187-6 272US465, 47SCt133, 71L ed354, 47ALR1044.
187-7 19F(2d)841; 120 Or254, 251P 701, 50ALR81. See also 44F(2d)57(1st case).
187-8 32F(2d)630.
187-9 17F(2d)372; 32F(2d)849; 120 Or254, 251P701, 50ALR81.
187-9½-New. and in some jurisdictions in such case right to jury trial is conferred where either state or claimant makes proper demand therefor. 85 PaSuper43.
187-10 120 Or254, 251P701, 50ALR81.
188-21 123Kan405, 256P147.
188-31 320Mo 870, 8SW(2d)998.
189-47 [b] (3) Upon substantial compliance with statute party is entitled to jury trial. NJ 137A846.
190-49 191NC731, 133SE16.
190-50 191NC731, 133SE16.
190-51 191NC731, 133SE16.
190-59 [a] **Statute authorizing injunction** against violation of National Prohibition Act has been held unconstitutional as denying jury trial. 37F(2d) 349.
190-60 Ill 172NE722.
190-61 320 Ill 553, 151NE535; 336 Ill 404, 168NE321; 338 Ill 56, 170NE14; 199 Ind401, 156NE548; 153Md204, 137 A396; 27 OhNPNS252. [e] **In Oregon.** -117 Or466, 242P440.
190-62 23AlaA559, 129S323(2dcase).
190-64 [c] **No jurisdictional requirement** that all criminal cases be tried by jury. 254Mass190, 150NE172.
191-65 282US63, 51SCt52. [d] **Every one charged with crime** is entitled to trial by fair and impartial jury. 215 Ky244, 286SW790.
191-66 [a] **Every person charged with** felony is entitled to trial by jury. 199 Cal 451, 249P859.
191-68 7PaDist&Co 25.
191-69 292Pa127, 140A858.
191-71 103NJL159, 134A750.
191-72 167La827, 120S382; 116Nebr 702, 218NW743 [citCJ]; 27 OhA297, 161NE284. See also 245 IllA202.
191-73 NJCh 133A519; NJ 141A591; NJSup 140A420.
191-78 282US63, 51SCt52; 163La18, 111S481; NJSup 130A601; NJSup 133 A536. [c] **Inherent nature of offense** and punishment prescribed determine class of offense. DC 38F(2d)535.
192-79 29 OhA135, 163NE56.
192-87 NJCh 133A519; NJSup 133A 536; 10PaDist&Co 743. [a] (4) DC 38 F(2d)535; 102NJL71, 130A805; 103 NJL159, 134A750. (6) Offense of keeping banking game where first offense is punishable by fine. 158La203, 103 S740. (7) Driving motor vehicle while intoxicated. NJSup 133A536. (8) Violation of state prohibition laws where imprisonment is not part of penalty. 118 Oh129, 160NE623. (9) Separate indictments for keeping banking house

as first offenses. 168La807, 123S332(2d case).

192-89 See also 282US63, 51SCt52; Alta [1927] 3DomLR539.

193-96 165Minn150, 206NW51.

193-1 DC 33F(2d)535.

193-6½-New. , or on a petition for a writ of error coram nobis. 89CalA 219, 264P343.

193-6¾-New. , or in a proceeding for increased punishment for second and subsequent offenses. 169La215, 124S 832.

193-6¼-New. A plea of insanity is triable by jury if the offense is so triable. 168La958, 123S639, 67ALR1447(2d case).

193-6½-New. Statute prescribing procedure when insanity plea is entered held not unconstitutional because no provision was made for trial before court on waiver of jury. CalA 291P 845.

194-11 162Ga327, 133SE843.

194-12 162Ga327, 133SE843.

194-14 13F(2d)371; 23F(2d)141; 23 F(2d)303 (civil contempt); 36F(2d) 601; Ariz 281P944; 161Ga287, 130SE 580 (violation of mandamus absolute); 317 Ill 197, 148NE5; 242 IllA565; 337 Ill 169, 168NE882; 202 Iowa50, 209NW 522; 260Mass344, 157NE684, 54ALR 1422; 77Mont361, 251P137, 49ALR627; 253NY221, 170NE898; 125 Okl 66, 256 P704, 711 [quotCJ], 52ALR1270; 13 PortoRicoFed428; 50SD645, 211NW 691; 102WVa677, 136SE202, 49ALR 968.

194-15 161Ga287, 130SE580; 125 Okl 66, 256P704, 717 [quotCJ], 52ALR1270; 102WVa677, 136SE202, 49ALR968. [a] (1) OklCr 290P345.

194-16 21F(2d)483; 23F(2d)141; 125 Okl 66, 256P704, 717 [quotCJ], 52ALR 1270; 102WVa677, 136SE202, 49ALR 968.

194-17 125 Okl 66, 256P704, 717 [quot CJ], 52ALR1270.

194-18 125 Okl 66, 256P704, 717 [quot CJ], 52ALR1270.

194-19 81Colo 431, 256P319, 324 [cit CJ&Cyc]; 81Colo 420, 256P325; 125 Okl 66, 256P704, 717 [quotCJ], 52ALR 1270; 102WVa677, 136SE202, 49ALR 968.

195-20 23F(2d)141; 125 Okl 66, 256P 704, 717 [quotCJ], 52ALR1270; 102 WVa677 136SE202, 49ALR968.

195-24 Iowa 229NW205; Iowa 227NW 136; 129Kan859, 284P396; 151Miss 398, 118S184, 60ALR1325.

195-28 48Philippine25, 32 [quotCyc].

195-29 83Colo 300, 264P718.

195-35 129Kan859, 284P396.

196-36 [b] In Indiana.-170NE853.

196-38 316 Ill 609, 147NE487.

196-38½-New. Statute providing that judgment of the appellate court of Illinois shall be final as to the facts in controversy is valid. 318 Ill 570, 149 NE469.

196-39½-New. Right of trial by jury does not entitle the party to have the facts reviewed by the supreme court. 318 Ill 402, 149NE422.

196-40 [a] On appeal from assessment for improvements, question of validity of proceedings are for court, and questions of fact for the jury, on demand. 216Ala351, 113S312.

196-43 317Mo 484, 297SW374.

196-44 50RI 23, 144A673.

196-45 213Ala178, 104S494; 49SD181, 207NW77. [a] 180Minn256, 230NW781 (in discretion of court).

197-46 Nebr 228NW537.

197-48 274US195, 47SCt566, 71L ed 996; 33F(2d)997 (where bill is within color of equity jurisdiction); 30Ariz 45, 243P916; 196Cal 677, 239P317; 200Cal 706, 254P560; 32NM311, 255P 633; 130 Okl 40, 265P110; 49SD543, 207NW536 [quotCJ]; 194Wis85, 216 NW134.

197-51 200Cal 706, 254P560.

197-52 49SD543, 207NW536; 193Wis 370, 214NW374, 53ALR771. [c] Congress has power to waive government's right to jury trial in eminent domain proceedings. 14F(2d)326.

198-56½-New. Interposing legal counterclaim in equity suit is waiver of jury trial of counterclaim. 21F(2d)893.

198-58 196Cal 677, 239P317; 316Mo 596, 292SW32; 197NC513, 149SE729 (1stcase); 91PaSuper485; 133SC491, 131SE603; 108TexCr379, 18W(2d)306. [b] In Oklahoma.-Cr 274P682. [c] After plea of not guilty, defendant cannot waive right to jury trial without changing plea. 197NC691, 150SE330 (1stcase) (applicable to misdemeanors).

198-65 91PaSuper485.

199-68 281US276, 50SCt253, 74L ed 854; Ill 172NE722; 246Mich481, 224 NW628; 49ND348, 191NW628; 152Va 941, 146SE270. [b] 7PaDist&Co 684, 703 [citCJ]. [g] Consent of court and government counsel must be had before waiver of jury can become effective. 281 US276, 50SCt253, 74L ed854. [h] Provision held not against public policy granting person accused of serious crime right to waive jury. 281US276, 50SCt 253, 74L ed854. [i] Trial court must exercise discretion to avoid unreasonable departures. 281US276, 50SCt253, 74L ed854. [j] Court is fully organized and competent to transact business without presence of jury. Ill 172NE 722.

199-69 281US276, 50SCt253, 74L ed854.

199-71 91PaSuper485.

199-72 326 Ill 197, 157NE233; Ill 172 NE722; 225Ky135, 7SW(2d)836; 116 Nebr702, 218NW743 [citCJ]; 160Tenn 258, 23SW(2d)656; 98TexCr335, 265SW 701. See also 36GaA113, 136SE111.

199-74 326 Ill 197, 157NE233; 254 Mass190, 150NE172; 152Va941, 146SE 270.

200-76 250Mich334, 230NW196.

200-77 156Md581, 144A710; MoA 274 SW1098. [b] That landowner consented to continuing with eleven jurors, because he would not dare to insist on termination of trial and begin afresh before another jury of twelve, was not involuntary. 156Md581, 144A710.

200-82 156Md581, 144A710.

201-87 133Misc492, 233NYS140; OklCr 287P840(2dcase).

201-88 133Misc492, 233NYS140.

201-89 200Ky734, 273SW489; 221Ky 823, 299SW983, 984 [citCJ].

201-90 258Mass262, 154NE753; 116 Nebr702, 218NW743.

201-91 49SD356, 207NW153.

201-94 25 OhA273, 157NE813.

201-95 25 OhA273, 157NE813.

201-99 100WVa375, 130SE496. See also 51Nev105, 269P600, 602 [citCJ].

201-7 274US195, 47SCt566, 71L ed996; NH 149A498; 223NYS167; TexCivA 18 SW(2d)715. [c] Stipulation to discharge juror during trial has been held valid waiver of right to trial by jury of twelve men. 49SD356, 207NW153. [d] Waiver by United States.-14F(2d)326.

202-8 21AlaA326, 108S81.

202-9 21AlaA326, 108S81; 204 Iowa 1254, 215NW261.

202-10 42 Ida624, 248P22; TexCivA 25SW(2d)666.

202-11½-New. Form of waiver of intervention of the jury in misdemeanor cases is not jurisdictional. 152Va941, 146SE270.

202-12 [c] Legislature may enable party to waive right to trial by jury by statutes but cannot take away constitutional right to trial by jury. 50 RI 187, 146A477.

202-14 [a] Statute providing for waiver of trial by jury in writing is intended to make waiver of trial by jury waiver for all time. 50RI 187, 146A477.

202-15 98CalA702, 277P747.

203-17 274US195, 47SCt566, 71L ed 996.

203-17½-New. Statutory provision for waiver of right by failure to demand trial by jury does not exclude waiver in other ways. 30Ariz45, 243P916.

203-17¾-New. and certainly not an express waiver. 30Ariz45, 243P916.

203-19 99CalA123, 278P466.

203-22 [a] (1) 18F(2d)833.

204-29½-New. Anticipatory provision in lease waiving right to jury is ineffective as not being one of statutory methods of waiving a jury. 125Misc444, 211 NYS591.

204-30 19F(2d)841; 31NM76, 239P 862, 864 [quotCJ]; 32NM344, 256P 179; 195NC119, 141SE344; 135SC33, 133SE222.

204-31 83NH91, 138A428; 31NM76, 239P862, 864 [quotCJ]; 32NM344, 256 P179; TexCivA 18W(2d)421; 194Wis 85, 216NW134; 200Wis429, 228NW497.

205-38 See also 230AppDiv580, 245 NYS488.

205-46 13F(2d)119; 264Mass592, 163 NE178; 135SC33, 133SE222.

206-49 223NYS167.

207-61 192NC188, 134SE419; 198NC 282, 151SE635. [a] Where report favorable.-198NC282, 151SE635.

207-62 192NC188, 134SE419. [c] Failure to tender issues on exceptions of other party is not waiver in some cases. 198NC282, 151SE635.

207-63 193NC851, 138SE121; 193NC 842, 137SE581. [b] Party must object at time order is made.-198NC282, 151 SE635.

207-64 196NC428, 146SE68.

207-70 218AppDiv350, 218NYS254; 137Misc122, 241NYS386.

207-74 14F(2d)903; 33F(2d)997 (failure to move to dismiss bill till case was set for trial and witnesses subpœnaed).

207-75 14F(2d)903.

208-77 NJ 143A822(1stcase); 130Misc 192, 223NYS710; 193NC842, 137SE581. [f] In West Virginia.-100WVa375, 130 SE496.

208-85½-New. Ordinarily, where there is a demand for jury trial in the complaint, defendant who fails to appear for trial has a right to rely on plaintiff's demand for jury trial as to his liability vel non. 20AlaA531, 104S895.

208-85¾-New. But where there are pleas of special defenses inferentially admitting complaint and seeking to avoid by reason of special matter, plaintiff who has demanded jury trial is entitled to a judgment nil dicit or by default in defendant's failure to appear for trial. 20AlaA531, 104S895.

208-89 [a] Jury trial not waived by appellant obtaining delay to week in which cases without jury came up. Miss 130S53.

209-93 49SD543, 207NW536.

209-94 Contra 21AlaA326, 108S81.

209-1 18F(2d)617; Ind 166NE2.

209-2 10PaDist&Co 159 [citCyc].

209-2½-New. Children filing a petition of intervention to prevent sale of property to satisfy judgment against father have been held not to have waived their right to a jury trial on the issue of their liability for debts of the dissolved conjugal partnership. 21F(2d)56.

210-3 274US195, 47SCt566, 71L ed996; 8F(2d)435; 213Ala178, 104S494; 22 AlaA594, 118S227; 72CalA202, 237P 386; 201Cal 162, 256P204; 80CalA704, 252P667; 170Ga13, 152SE91; 253 IllA 229; Mass 172NE221; Mo 32SW(2d) 69; NJSup 140A436; 136Misc831, 241 NYS26; 230AppDiv445, 245NYS222; 85 PaSuper205. But see 135 Okl 228, 275 P306(2dcase). [d] 128Kan115, 275P 1091. [e] Failure to demand jury on issues of cross bill held waiver. 274US 195, 47SCt566, 71L ed996. [f] On appeal from justice court to county court, no demand for jury is necessary. Miss 130S53.

210-4 216Ala610, 114S204; 40GaA756, 151SE557; 228AppDiv275, 239NYS328 (statute construed); 286Pa114, 133A31; 50RI 339, 147A756 (statute applicable to action pending before effective date of statute); 142Va493, 129SE247. [a] 51Nev105, 269P600, 602 [citCJ]. [b] Waiver is not equivalent to stipulation.-Wash 292P424.

211-8 See also Wash 292P424.

211-9½-New. In some jurisdictions both parties must expressly designate on pleadings whether they demand or waive a jury trial. 85PaSuper205.

211-9½-New. In such case where plaintiff waives jury trial but defendant fails to designate whether he demands or waives jury, defendant cannot claim after trial that he did not intend to waive jury, but will be held to have done so under such circumstances. 85PaSuper 205.

211-9¼-New. Ordering case to trial without jury because no demand made held abuse of discretion in view of practice to impanel jury without demand. 249Mich438, 229NW1.

211-12 23AlaA330, 125S200(2dcase) (misdemeanor cases); 98CalA702, 277P747.
211-22 230AppDiv712, 243NYS246.
211-22½-New. Personal reasons arising in detail work of attorney's office held no excuse for failure to demand in time. 136Misc831, 241NYS26.
212-29 102Conn640, 129A786.
212-33 [a] **In New York.**-126Misc488, 214NYS552.
212-34 213Ala356, 104S801; 20AlaA507, 103S909; 215Ala491, 111S205; 216Ala351, 113S312; 22AlaA77, 112S813; 102Conn640, 129A786; 136Misc831, 241NYS26; 138Misc345, 244NYS698; 197NC766, 150SE621 (in apt time); 50RI513, 149A859; 145Wash335, 259P1084; Wash 290P222 (discretion of court). See also 234Ky448, 28SW(2d)494. [c] (4) In superior court claim must be made before regular assignment day. RI 150A610. [d] **Withdrawal of notice** and service of new notice will not restore right to jury trial. 136Misc831, 241NYS26.
213-39 [b] **As to special pleas.**-152Miss731, 118S350.
213-46 145Wash335, 259P1084.
214-47 TexCivA 17SW(2d)469.
214-52 27 OhNPNS252.
214-53 Mass 172NE221; 152Miss731, 118S350; Wash 292P424. See also 138Misc291, 245NYS420.
214-54 230AppDiv712, 243NYS246. [a] **Where plaintiff in forcible detainer withdrew request in complaint for jury,** without consent of defendant, after latter's appearance, court may properly grant defendant's subsequent request for jury. 34Ariz547, 273P538.
214-56 152Miss731, 118S350 (refusal of jury trial after filing of original plea has been held not abuse of discretion).
214-58 49SD543, 207NW536.
214-59 88 IndA631, 165NE251.
215-60 131Misc172, 227NYS133; 55ND505, 214NW805. See also 89CalA219, 264P343.
215-63½-New. Failure to demand a jury trial in an equitable action within a reasonable time is waiver thereof; 221Ky741, 299SW730.
215-63½-New. and what is a reasonable time is a question for the trial court. 221Ky741, 299SW730.
215-63¼-New. Delay until proof has been taken and the case is ready for submission justified overruling a motion to transfer an equity case for jury trial. 221Ky741, 299SW730.
215-63½-New. The failure to demand a jury trial at the time prescribed by a rule of court does not constitute a waiver of the right to a jury trial where the rule does not so provide. 89CalA160, 265P298.
215-63⅞-New. After waiver court cannot allow demand nunc pro tunc under its discretionary power to correct irregularities. 228AppDiv275, 239NYS328.
216-84½-New. Extension of time for filing objections in probate proceedings as affecting right to demand jury trial. 230AppDiv296, 243NYS438.
216-85 35GaA168, 132SE395.
216-87 274US195, 47SCt566, 71Led996; Nebr 216NW850.
216-89 Ind 170NE853.
216-90 201Cal162, 256P204; 35GaA168, 132SE395.
217-95 99CalA759, 279P491(2dcase).
217-93½-New. If defendant desires to rely upon his constitutional right, it is his duty to assert it in some appropriate form. 32NM311, 255P633.
217-98½-New. A demurrer is inadequate for such purpose. 32NM311, 255P633.
217-98¼-New. Whether the trial shall be by jury is best tested by motion as to calendar. 193Wis382, 214NW366.
217-93⅛-New. Placing case on jury list is election of right to jury trial. NH 149A498.
218-9 21SaskL63, [1926] 4DomLR273, [1926] 2WestWkly817. [c] **Where a party defaults after demanding jury** it is error to refuse jury trial after opening default. 135Misc326, 239NYS161.
218-12½-New. Withdrawal of demand. Under statutes in some jurisdictions contestant in a will contest in a probate court may withdraw a demand for a jury trial. 213Ala178, 104S494.
218-14 Contra 101CalA218, 281P681.
218-15 But see CalA 279P474.
218-19 200Cal706, 254P560.
219-24 [a] NJSup 140A436.
219-26 200Cal706, 254P560.
219-27 Wash 292P424. See also 200Cal706, 254P560.
219-28 Wash 292P424.
219-32½-New. The failure to pay fees at the time prescribed by a rule of court does not constitute a waiver of the right to a jury trial where the rule does not so state. 89CalA160, 265P298.
219-33 100CalA600, 280P691.
220-41 100CalA557, 280P549(1stcase); 100CalA600, 280P691 (both holding waiver by counsel held insufficient); 243IllA216; 250Mich334, 230NW196.
220-42 233 IllA331.
220-53 136Wash146, 238P977.
220-54 223NYS167.
221-60 126Kan195, 268P84; NH 146A172.
221-63½-New. Waiver of number of jurors. In British Columbia, where parties waive number of jurors and consent to trial by less than legal number, the trial is that of arbitrators, not a court. BC [1925] 3DomLR940.
221-63⅓-New. Judgment is valid, although the court erred in denying jury trial to plaintiff where he acquiesced in denial. 145Va513, 134SE552.
221-63¼-New. A stipulation, waiving a jury trial of all present or future issues and for all trials in any court with consent to trial by a named judge of a local court or his regularly qualified successor, waives a jury trial in a court to which the case is taken on a change of venue. 322Mo450, 17SW(2d)505.
221-69 TexCivA 291SW578.
222-74 130 Okl 40, 265P110.
222-75 [a] (2) Refusal to permit withdrawal of waiver in bastardy proceeding held not abuse of discretion. SD 229NW934.
222-79 CalA 285P1086(2dcase).
222-76 [a] 18F(2d)833. [b] **Request for jury at close of evidence** comes too late, and right thereto cannot be revived at such time. Mass 167NE249.
222-33 233 IllA331. [a] **On amended information,** after quashal of original accusation, waiver of jury trial is inoperative. 233 IllA331.
223-90 291Pa341, 140A626.
223-90½-New. It is not an objection to a speedy trial and conviction that accused was tried on a charge other than that on which he was committed for trial if the charge is founded on evidence. Sask [1929] 41DomLR179.
223-90⅓-New. Defendant waiving jury trial is deemed to consent to trial of issues of not guilty and not guilty by reason of insanity before court. CalA 291P845.
223-93 50RI187, 146A477.
223-94 34F(2d)786.
223-94½-New. or comes up on amended information. 233 IllA331.
223-5 [b] (1) 220Ala305, 124S879. (2) 213Ala391, 108S789. [d] **Court erred by executing writ of inquiry without jury,** even where there was judgment by default, when jury are demanded in writing under statute. 219Ala410, 122S405.
224-10 85CalA353, 259P452; 89CalA160, 265P298. But see Mass 167NE249.
224-16 123 Or537, 262P936, 937 [quot CJ].
224-17 123 Or537, 262P936, 937 [quot CJ].
224-18 123 Or537, 262P936, 937 [quot CJ].
224-20 103Conn683, 131A420; 210Ky437, 276SW111; 152Miss731, 118S350, 353 [citCJperEthridge,J]; 196Wis292, 220NW197.
225-21 281US276, 50SCt253, 74Led854.
225-24 166La24, 116S580.
225-25 187Wis384, 204NW589 (statute providing for inquisitorial body in condemnation proceedings has been held invalid because not jury). [b] **Burden of proving that body is jury** is upon those who assert it. 187Wis384, 204NW589.
225-26 204Cal470, 268P909; Mass 169NE151; 152Miss731, 118S350; Miss 130S53; 50RI513, 149A859. [f] See also 161Tenn293, 30SW(2d)601. [j] **Uniform Declaratory Judgments Act** is not unconstitutional as denying trial by jury since it expressly provides therefor in proper cases involving determination of issue of fact. 284Pa455, 131A265. [k] **Statutory provision for trial of equitable issues before legal issues** does not wrongfully deprive defendant of jury trial. Iowa 227NW526(3dcase). [l] **Statutes providing for removal of cause** from one state court to another for jury trial does not impair right. Mass 169NE151.
226-33 123Kan508, 256P119.
226-32½-New. Right to jury trial does not prevent the court from setting aside verdicts or granting new trials for error in assessing damages. 193Wis370, 214NW374, 53ALR771.
226-32½-New. Right of trial by jury cannot be evaded by giving effect to verdict whose important terms are mutually destructive. TexCommnA 299SW852.
226-33 214Ala443, 108S47. [i] **Statute authorizing double damages in actions for unlawful detainer** does not infringe right to jury trial. 307Mo160, 270SW315. [j] **Statute making certificate of conciliator that attempt to make settlement has been made and failed** condition precedent to issuance of process does not deny right to jury trial. 49ND248, 191NW485. [k] **Statute giving equity court jurisdiction to establish disputed boundary lines,** though bill does not aver facts showing independent equity, held not to violate right of trial by jury. 214Ala443, 108S47. [l] **Giving prevailing party** option of accepting reduction of verdict or submitting to new trial does not infringe right of jury trial. 7F(2d)3. [m] **Clause in accident policy, limiting insurer's liability for insured's death** from discharge of firearm, unless shown to be accidental by eyewitness' testimony, has been held not in conflict with statute as depriving beneficiary of right to jury trial. 178Ark856, 13SW(2d)591. [n] **Striking out sham or frivolous answer and entering judgment** is not an infringement on right of trial by jury. 105NJL336, 146A372. [o] **Setting aside verdict and ordering new trial on one of issues** only does not deprive parties of constitutional rights to jury trial. 101Vt514, 144A856.
226-34½-New. or by providing for summary judgment where the answer is frivolous or sham, 130Misc168, 223NYS401.
227-38 228AppDiv275, 239NYS328; 230AppDiv712, 243NYS246; 50RI513, 149A859.
227-47 321 Ill431, 151NE884.
228-52 104WVa140, 139SE641.
228-54 194NC675, 140SE749; 104WVa140, 139SE641.
228-55 126Kan385, 267P1098.
228-57 104WVa140, 139SE641.
228-58 [b] (3) Statute held not to authorize final judgment, adjusting debt between city and town, enforceable by execution, and does not deprive city of jury trial. 213AppDiv382, 210NYS690.
229-61 22F(2d)33.
229-74 77Mont361, 251P137, 49ALR627.
229-76 36F(2d)401 (Jones Act); 40F(2d)338; 206Cal64, 273P779; 206Cal259, 274P63(2dcase); 169Ga515, 151SE23; 146Miss66, 111S850; Wis 231NW634. [a] (1) 206Cal35, 273P767. (12) Provisions for admissibility of evidence of offense prior to indictment date. 146Miss66, 111S850. (13) Permitting indictment to charge two or more offenses connected in commission or two or more offenses of same class though not connected in commission. 203Cal128, 263P226. (14) Authorizing denial of new trial by successor of trial judge. Mo 30SW(2d)750. [b] **So long as substance of right to trial by jury as guaranteed by constitution is preserved,** procedure is wholly within discretion of legislature under statute. 206Cal35, 273P767.
230-35 96Fla768, 119S380; 292Pa395, 141A289.
230-88½-New. Commitment of defendant to insane ward, after finding by jury of not guilty by reason of insanity,

does not deny him a jury trial. 146 Wash202, 262P970.

230-88¼-New. Constitutional guaranty of trial by jury is not broken by giving jurors exhibits offered in evidence pursuant to direction of trial judge over phone. 35F(2d)689.

230-88¼-New. A statute making a finding of the lunacy commission final upon a plea of insanity in a criminal case is unconstitutional. 168La958, 123 S639. 67ALR1447(2dcase).

231-10 285Pa511, 132A572.

232-16 Mass 171NE281 (effect of writ of entry).

232-20 13F(2d)361; 42F(2d)109. [a] 42F(2d)109. [f] **Re-examination of damages on motion for new trial** held not prohibited. 40F(2d)463. [g] **Suits included** in phrase "common law." 42 F(2d)109.

232-24 See also 321 Ill 431, 151NE884. [a] (1) 121 Or628, 257P16. (2) 121 Or 628, 257P16. [b] **In Mississippi.**-155 Miss893, 125S552.

232-24½-New. A judgment of an appellate court reversing judgment for a party after verdict by jury on conflicting evidence, without remanding the cause for new trial, deprives such party of the constitutional right to jury trial. 325 Ill 43, 155NE757.

232-24⅓-New. Requiring remittitur as a condition to overruling defendant's motion for new trial does not deprive him of his constitutional right to a jury trial. TexCivA 6SW(2d)432.

232-26 281US276, 50SCt253, 74L ed 854; 209Ky734, 273SW489; 221Ky823, 299SW983; 53ND54, 205NW9.

232-31 40F(2d)235.

233-32 [1930] 4DomLR1021 (1stcase) (Alberta statute).

233-34 206 Iowa1247, 220NW100.

233-35½-New. , and where the crime was committed before reduction, the former number is required under Act (1912) No. 9. 161La963, 109S778.

233-36 [b] **In municipal courts of New York City** to proceed with five jurors after excusing one juror for cause is error. 126Misc183, 212NYS725.

233-38 52SD51, 216NW600, 601 [quot CJ]. [a] **Guaranty of republican form of government** is not violated by such provision. 52SD51, 216NW600, 601 [quotCJ].

234-55 281US276, 50SCt253, 74L ed 854; 318 Ill 570, 149NE469; 53ND54, 205NW9; 53ND256, 205NW624.

234-58 53ND54, 205NW9; 53ND256, 205NW624 (dictum).

236-68 NJ 148A776.

236-76 217Ala219, 115S308.

236-76½-New. Where a new federal district is created, defendant, tried before a jury drawn from such district for a crime committed prior to the creation of such district in a territory made part of such district, is not deprived of his rights under Const. Amendm. 6. 22F(2d)95.

236-76⅓-New. Jury obtained after right of rejection has been exercised, if impartial, satisfies right to jury trial. 155Tenn266, 292SW451.

236-77 [c] **Qualifications of struck jurors** may be embodied in prior statute. NJ 148A776.

237-78 [a] **Excusing exempt jurors.**-TexCr 28SW(2d)813.

237-79 203Cal 139, 263P522; 319 Ill 403, 150NE290.

237-90 202Cal 81, 259P332; 159Tenn 667, 21SW(2d)390; TexCivA 31SW(2d) 496.

237-91 73Mont240, 235P712.

237-92 50Nev212, 255P1002. [b] **Holding of office.**-50Nev212, 255P1002.

237-95 [a] **Juror who is biased or prejudiced cannot be said to be fair-minded** and impartial, and if accepted would impair right to jury trial. 97Fla591, 121S793(2dcase).

238-3 [a] **Trial before court for original Eastern district of Oklahoma, including counties that had been transferred to another district** after offenses had been committed in accordance with provision of statute has been held not in violation of constitution, granting an accused person right to trial by jury of state and district wherein crime was committed. 279US63, 49SCt257, 73L ed 615.

238-4 Oh 170NE653.

238-10 43 Ida46, 248P442.

238-13 [a] 29 OhA505, 163NE919.

238-16 279US63, 49SCt257, 73L ed615.

238-17 [a] (1) 114Nebr393, 207NW668.

238-19 But see 118Kan641, 236P855 (holding that order that jurors from community where offense was committed should not be used for jury service was not erroneous where circumstances tended to show prevalent prejudice against defendant).

239-26½-New. Defendant is not entitled to jurors selected from counties transferred to a new district created after the commission of the crime. 22F(2d) 760.

239-26⅓-New. The right of defendant to be tried by jury in the county where the offense was committed is subject to power of the legislature to authorize a change of venue. 230Ky707, 20SW(2d) 721.

239-27 200 Iowa483, 203NW806.

240-45 69CalA87, 230P453 (rendering judgment on counts not submitted to jury); 103Conn683, 131A420; 142Miss 256, 107S200 (refusal of court to receive verdict complete in substance and responsive to issue and to act upon it); 147Wash269, 266P154. [d] **Requiring consent remittitur** as condition for affirmance and of refusing new trial is not violation of constitutional provision authorizing right of trial by jury. 20 OhA12, 151NE805. [e] **Reduction of damages fixed by jury in law action and directing absolute judgment for reduced amount** constitutes deprivation of right to trial by jury. 193Wis324, 214NW431.

240-46 [a] (2) Tennessee Workmen's Compensation Act authorizing recovery by employer for compensation paid against person liable for injury is constitutional. 160Tenn248, 23SW(2d)245.

240-49½-New. Statute authorizing the supreme court to direct entry of proper judgment confers no power to deprive the parties of right to jury trial without their consent. 193Wis370, 214NW 374. 53ALR771.

240-55 28F(2d)545; 119Kan844, 241P 433 (statute providing that fact that deposits were received or debts incurred by bank while insolvent or in failing condition shall be prma facie evidence that officers, agents, and managers of bank had knowledge of condition and consented to deposit or creation of debt).

241-62 25F(2d)366.

241-68 MoA 290SW451.

241-73½-New. A provision of a banking law that, upon failure of any officer of a bank to examine the bank, he shall be held to have had knowledge of its insolvency, or that it was in failing circumstances at the time deposits were unlawfully received is a rule of substantive law and does not deprive such officer of his right to a jury trial in an action to hold him liable for deposits so received. 119Kan844, 241P433.

241-73⅓-New. The appellate court's reduction of verdict from murder to manslaughter on the evidence is no infringement of right. 36Wyo 111, 253P14.

241-75 41F(2d)382; 198Cal 490, 246P 324 (discretion by supreme court to trial court to enter judgment of nonsuit).

241-76 157SC426, 154SE412.

242-77 40F(2d)463; 195Cal 59, 231P 744; 317Mo 221, 295SW116; Wash 291 P721.

242-77½-New. or to set aside verdict and grant new trial: 93Fla30, 111S525.

242-79 TexCivA 275SW214.

242-81 TexCivA 275SW214.

242-82 TexCivA 275SW214.

242-82½-New. Setting aside verdict of jury is infringement of constitutional right of trial by jury where the evidence was conflicting and the jury were not swayed by sympathy or prejudice. 103 Conn683, 131A420.

242-88 158Tenn350, 13SW(2d)321.

243-93 158Md46, 148A128.

244-4 171Minn177, 213NW545, 52ALR 916.

244-5 171Minn177, 213NW545, 52ALR 916.

244-7 197 Ind625, 150NE917; 171Minn 177, 213NW545, 52ALR916. [a] **Assembly has right to restrict, deny or enlarge right and duty** of jury service. Ill 173NE145(2dcase).

244-8 197 Ind625, 150NE917.

244-9½-New. Disqualification of jurors may be based on statute or on rules of common law. 103Conn537, 161A505.

244-9¼-New. To have the effect of a disqualification, the statute must be plain. 104WVa617, 141SE7.

244-9¼-New. If words used in a statute are consistent with a mere exemption as with a disqualification, they will be construed in the former sense. 104WVa617, 141SE7.

244-15 Ill 173NE145(2dcase).

244-20 [a] **Prior adjudication of insanity not conclusive,** and evidence showing normalcy at time of trial is sufficient to show competence for jury duty. 102TexCr517, 278SW840.

244-23 116Nebr512, 218NW129, 130 [citCJ].

244-25 95Fla289, 116S470; 171Minn 177, 213NW545, 52ALR916.

245-33 197 Ind625, 150NE917.

245-34 197 Ind625, 150NE917; 197 Ind 640, 151NE689. See also 7Alaska252.

245-37 [a] **Permitting women to sit on trial jury in felony case,** over objection, is not error. Ind 163NE710; 200 Ind380, 165NE522.

245-37½-New. Trial by jury composed partly of women is such as is guaranteed by Const. Amendm. 6. 15F(2d) 762.

245-38 109TexCr88, 3SW(2d)455; Tex CivA 9SW(2d)743.

245-40 [b] **Acceptance in another case** held to show competency despite allegation of bad hearing. 203 Iowa696, 213NW222.

245-42 [a] **At common law,** it has been said, infancy was ground for principal challenge or challenge to favor. 103 Conn537, 131A505.

245-42½-New. or under twenty-five, 103Conn537, 131A505.

245-43 215Ala229, 110S21; 23AlaA 290, 124S398.

245-43½-New. Statement by juror that he was sixty-five years old implies that he had passed his sixty-fifth birthday. 215Ala229, 110S21.

251-45 [a] (1) 135Wash312, 237P711. (3) Juror who paid no taxes because assessment on his household goods was not in excess of exemptions allowed is not taxpayer within statute. 135Wash 312, 237P711.

246-47 166La924, 118S85.

246-49 144Va330, 132SE320.

246-49½-New. or shall be of sound judgment and fair education, 103Conn 537, 131A505.

246-54½-New. A citizen cannot be removed from a jury list as not "intelligent" because of religious bigotry. 222 AppDiv50, 225NYS1.

247-67 144Va330, 132SE320.

247-67½-New. and approved integrity. 103Conn537, 131A505.

247-71 103Conn537, 131A505.

247-73 105TexCr57, 284SW952; 109 TexCr88, 3SW(2d)455.

247-74 109TexCr88, 3SW(2d)455.

248-75 30Hawaii468, 473 [quotCJ].

248-79 [a] **Conviction in federal court** disqualifies in state court. 105TexCr 57, 284SW952.

248-82 96CalA204, 273P1097.

248-83½-New. Court should be astute to preserve integrity of statute prohibiting disqualification of a juror on account of creed. 222AppDiv50, 225NYS1.

248-94 103Conn537, 131A505; 196NC 341, 145SE615.

248-96 [e] **American born son of alien father and American mother is qualified.** 316Mo 31, 292SW434.

249-5 [b] **Nonresidence not shown.**-161 La696, 109S391.

249-6 199 Ind89, 155NE257.

249-7 319Mo 28, 3SW(2d)230.

249-8 [c] (3) 165La822, 116S199. (5) Fact that juror does not know that he has acquired citizenship does not disqualify him. 165La822, 116S199.

250-44 [d] (2) 104TexCr633, 283SW 172, 1072 (holding proof of lack of qualification insufficient).

251-46 244Mich644, 222NW174.

252-51 171Minn177, 213NW545, 52 ALR916.
252-54 103Conn537, 131A505; 199 Ind 89, 155NE257.
252-55 SC 155SE385 ("qualified elector" means "registered elector").
252-56 199 Ind89, 155NE257.
252-57½-New. In some jurisdictions every registered male elector of a county is presumably a qualified voter. 29Ariz 247, 240P863.
252-57½-New. A statute requiring the selection of jurors in December of each year does not disqualify jurors registered when drawn, although not reregistered prior to service in the following year as required by the constitution requiring new registration every tenth year. 152SC178, 149SE753.
252-59 103Conn537, 131A505; 90Fla 381, 106S741. But see MoA 286SW143. [d] (6) Under Rev. St. (1919) §§ 4023, 6632, service for second time during same year is no disqualification or ground for challenge. Mo 290SW1007. (7) Under some statutes juror is disqualified only by service at next preceding term. 166Ga189, 142SE674. (8) Rev. Gen. St. (1920) § 2692 held to deal exclusively with disqualification of trial or petit jurors. 90Fla381, 106S741.
253-60 [a] 168Ark1122, 273SW353. [b] 168Ark1122, 273SW353. [e] In Illinois.-335 Ill 415, 167NE49.
254-73½-New. Prior service as grand juror, within one year, held not itself to disqualify prospective juror for service as trial juror in the same court. 90 Fla381, 106S741.
254-74 83Colo 162, 262P1009.
254-75 83Colo 162, 262P1009.
254-81 [h] In Georgia.-165Ga892, 142 SE285.
254-88 50Nev212, 255P1002, 1006 [quotCJ].
255-1 125Me325, 133A693.
255-3 [e] Policemen exempt. 29Ariz 523, 243P601. [f] Firemen exempt. 29 Ariz523, 243P601. [g] Women.-224Ky 154, 5SW(2d)901.
256-4 16F(2d)870; 90Fla381, 106S 741; 168La1099, 123S781; 125Me325, 133A693; 50Nev212, 255P1002; 104 WVa617, 141SE7. [c] Word "liable" in statute rendering jurors liable to service once in three years, and not after, means "bound" or "obliged," not "qualified." 125Me325, 133A693.
256-5 125Me325, 133A693.
256-8 125Me325, 133A693.
256-9 104WVa617, 141SE7.
257-22 103Conn537, 131A505.
257-23 125Me325, 133A693.
257-40 233Ky636, 26SW(2d)506 [quot CJ].
257-41 29Ariz523, 243P601.
257-43 29Ariz523, 243P601, 605 [cit CJ].
258-45 29Ariz523, 243P601.
258-54 246NY115, 158NE42.
258-60 19F(2d)897. [a] (3) Statutes of 1899, establishing commissioner of jurors in Albany County is unconstitutional as to appointment by supreme court justices. 246NY115, 158NE42. (4) Unconstitutionality of law of 1899, as to appointment of jurors' commissioner in Albany County, left commissioner appointed under acts of 1894 and 1896, as legal officer. 246NY115, 158 NE42.
259-61 NJSup 151A202. [a] Appointment by Governor of democratic jury commissioner without knowledge did not make appointment illegal. NJSup 151A482.
259-65 But see 103TexCr414, 281SW 212.
259-65½-New. Provision of federal judicial code that a commissioner shall be a well-known member of the principal opposing political party is not mandatory but advisory. 8F(2d)803.
259-65⅓-New. And a commissioner's continuance in office is not invalidated when the political party to which he belongs loses its standing as a principal opposition party. 8F(2d)803.
259-69½-New. Where a statute requires the appointment of jury commissioners at a previous term of court, failure to appoint them, if arbitrary, may be attacked by defendant, but if defendant is tried at special term which could not have been foreseen, it is unnecessary that the commissioners should have been appointed at a previous term. 108TexCr84, 299SW435.
259-69⅓-New. Appointment at regular term of jury commissioners to draw petit jury for special term called at regular term is proper. 108TexCr387, 300 SW945.
259-69¼-New. As regards right to office of jury commissioner, that Democrat voted twice in Republican primary box did not make him member of Republican Party. NJSup 151A482.
259-70 NJCh 142A410 (proceedings). [a] (3) Using office for political purposes is cause for removal. NJCh 142 A410.
259-70½-New. Governor has power to remove jury commissioner without hearing. NJSup 151A202.
259-70⅓-New. The power of the governor to peremptorily remove commissioner from office without hearing is conferred by statute. NJSup 151A482.
259-71 164La813, 114S696.
259-72 [b] (2) That two of jury commissioners reside in same town does not disqualify commission under such statute. 107TexCr559, 298SW569.
259-76 164La597, 114S171.
259-76½-New. It is not such disqualification as would nullify the action of jury commissioners that one was a deputy sheriff. 106TexCr482, 293SW173.
259-76⅓-New. or that one had served upon a jury within six months. 106 TexCr482, 293SW173.
259-76¼-New. That attorney at law is disqualified to act as jury commissioner does not disqualify him as elisor. 103NJL246, 136A164.
260-77 [f] Failure of member of jury commission to take oath within thirty days after appointment held not to render commission incomplete. 160La757, 107S564.
260-79 164La813, 114S696.
260-85 [a] In prosecution for murder, trial judge after refusing to quash regular venire of jurors because of relationship between jury commissioner and deceased had right to order substitute commissioner when special venire was drawn. 148SC360, 146SE116.
260-86 148SC360, 146SE116.
260-87 148SC360, 146SE116.
260-89 115Nebr26, 211NW175. [a] Refusal to quash fraud held proper where officers providing jury list were members of secret society which employed private detective to convict defendant. 115Nebr26, 211NW175.
260-91 Nebr 226NW793.
260-94½-New. After filing statutory affidavit of prejudice against sheriff refusal to quash panel is erroneous. Nebr 233NW452.
260-97 8F(2d)803.
261-2½-New. That jury commission did not meet within thirty days after appointment held not to invalidate subsequent acts. 160La757, 107S564.
261-7 [a] (3) Statutory allowance for expenses as judge not considered in determining compensation when acting as jury commissioner under statute. 317 Mo 744, 296SW431. (4) Service of judge as jury commissioner held duty imposed by virtue of office within terms of statute. 317Mo 744, 296SW431.
262-11 [c] Where county judges, authorized to select jurors, have on table a list prepared by prosecuting attorney, it is ground for reversal. MoA 256SW554.
262-17 160La850, 107S597.
262-19 169La55, 124S143(2dcase). [a] 168La976, 123S645.
262-24 322 Ill 195, 153NE357; 17Minn 177, 213NW545, 546 [citCJ], 52ALR 916. [a] It is duty of court to see that, when jury lists are submitted to litigants, none but qualified jurors are on them. 226Ky534, 118SW(2d)148.
262-25 [c] There is no impropriety in jury commissioner's inquiring of residents if they are eligible for jury duty and whether or not they desire to serve. NJCh 142A410.
263-26 95Fla289, 116S470; 171Minn 177, 213NW545, 546 [citCJ], 52ALR 916; 116Tex479, 294SW527. [e] (3) Selection will not be disturbed in absence of abuse of discretion. 87CalA5, 261P531.
263-28 [a] (3) Statute requiring jury wheel to be filled from tax lists in assessors' office for current year is complied with by use of latest complete tax list at time, though for preceding calendar year. 101TexCr114, 274SW981. (4) Provision of Texas statute that selection shall be made from tax list does not constitute limitation on authority of officers, but names of all qualified persons should be placed in jury wheel. 116Tex479, 294SW527.
263-28½-New. Under statute requiring list of jurors to be drawn from body of county, 50SD451, 210NW744.
263-28⅓-New. no irregularity arises from the fact that jurors were all residents of a city constituting a large part of the population of the county. 50SD 451, 210NW744.
263-28¼-New. Such statute does not require that the jury list shall be made up from all the municipalities of the county, 50SD451, 210NW744.
263-28⅕-New. or that it shall be distributed in any particular way over different parts of the county. 50SD451, 210NW744.
263-29 29Ariz523, 243P601, 605 [cit CJ] (policemen and firemen).
263-31 29Ariz247, 240P863; 8PaDist &Co 61; 34PortoRico 457.
264-33½-New. Use of the same names in the jury box when drawing the second panel as when drawing the first panel held proper. 160La850, 107S597.
264-42 118Nebr169, 223NW955.
264-44 8PaDist&Co 61. [b] After list is filed with clerk of court, court cannot form panel from list of previous year. 86Mont509, 284P266.
265-56 [e] (2) That jury commission emptied general venire box and refilled it with new names held not to affect legality of subsequent acts. 160La757, 107S564.
265-57 8PaDist&Co 61. [e] By whom wheel filled.-91PaSuper229.
265-60 213Ala160, 104S336. But see 169La55, 124S143(2dcase).
266-62 See also 166La924, 118S85.
266-71 91PaSuper229.
267-78 91PaSuper229.
267-82 [a] (4) Where only three of the six jury commissioners, appointed to revise jury list of county, were eligible, the revision by remaining three has been held unlawful as not being quorum. 168Ga370, 147SE762.
267-83 29Ariz523, 243P601; 164La 597, 114S171.
267-85 29Ariz523, 243P601, 605 [cit CJ].
267-86 29Ariz523, 243P601, 605 [cit CJ].
267-91 Fla 124S827.
267-95½-New. Where the names of persons entitled to claim exemption were erroneously omitted from the jury wheel, they may be placed in the wheel by the court's direction. 101TexCr514, 276SW233.
267-95⅓-New. Jury commissioners, in counties not shown to be under the operation of the jury where law, declared entitled under statute to be furnished with names of persons appearing from the record to be exempt or disqualified from jury service. 100TexCr537, 272 SW144.
267-95¼-New. That county commissioners struck from list persons named thereon who had died or moved from county held not to invalidate list. SD 231NW915.
267-97 [a] Use of tax list of latest year.-105TexCr396, 288SW1087.
268-98½-New. In refilling the jury wheel from tax lists it is proper to use the same lists as used at improper filling. 101TexCr114, 274SW981.
268-1 SD 231NW915. [b] (6) That list made in compliance with statute where no showing of material difference in number of persons qualified and liable to serve as jurors in county and list as made out by board of supervisors and certified by clerk. 29Ariz523, 243P601.

268-2 29Ariz523, 243P601, 604 [cit CJ]; 87CalA5, 261P531; 155Miss629, 125S115. But see 43F(2d)86.
268-3 29Ariz523, 243P601; 97Fla1059, 122S704; 35GaA391, 133SE650; 126Kan607, 270P590; SD 231NW915. [b] (6) Irregularity in matter of initials and names of members of jury commission held not to affect legality of commission's acts. 160La757, 107S564. (7) Court's testimony on motion to quash venire concerning residence of persons appointed as jury commissioners held not objectionable as enlarging original order. 160La757, 107S564.
268-3½-New. or quashing the venire; 220Ala160, 124S410.
268-4 [a] **Refurnishing of jury wheel** held in substantial compliance with statute. 100TexCr468, 274SW978. [b] **Failure to secure authority from commissioner's court for appointment of deputy district clerk** present at refurnishing jury wheel held not to amount to noncompliance with statute. 100TexCr468, 274SW978.
268-5 29Ariz247, 240P863.
269-8 See also 101TexCr114, 274SW981.
269-8½-New. Accused cannot have the panel of jurors set aside for failure to select the jury commission at a previous term. 113TexCr398, 22SW(2d)460(1stcase).
269-9 166Ga192, 142SE666; 210Ky108, 275SW363 (denial of motion to select jury in accordance with statute declared error, though action is under Federal Employers' Liability Act); TexCivA 299SW325. [b] **Drawing several panels from same list.**-53SD205, 220NW518 (drawing of two panels held not to prevent drawing of third from depleted list).
269-12 171Ark1151, 287SW394; 142Miss468, 107S757; 155Miss629, 125S115; 147Miss851, 112S790; 70Utah586, 262P113, 114 [citCJ].
269-14 [a] **Party has absolute right to** demand drawn jury in manner prescribed by statute. 171Ark1151, 287SW934.
269-15 320 Ill 553, 151NE535.
269-16 320 Ill 553, 151NE535; 142Miss468, 107S757; 86Mont509, 284P266. [b] **Drawing jurors with reference to certain cases** and in order to fill panel held irregular. 34GaA188, 129SE21. [c] **Jury composed from list of twenty-eight regularly chosen** held without irregularity, where others chosen irregularly did not serve. 34GaA188, 129SE21.
269-26 [a] **Venire not drawn from all summoned jurors** is proper, where others were drawn for another prosecution. 110TexCr621, 10SW(2d)554.
269-27½-New. Tax rendition list for 1925 is properly used in filling the jury wheel where, in January, 1926, an officer may add names of other persons known to be qualified. 106TexCr402, 292SW893.
269-27¼-New. Where the jury wheel was filled from the tax list of 1924 and was emptied by order of the judges, it was proper to refill it from the tax list of 1925. 106TexCr402, 292SW893.
269-31 [a] **Competency of jurors** cannot be determined by officers drawing venire. TexCr 31SW(2d)648.
270-32 [a] **Selection** held valid. 19F(2d)891.
270-32½-New. Trial court committed error in declining to draw regular venire for week of trial of capital case. 20AlaA481, 104S137.
270-32½-New. Officers need not check each other's work in the selection of a panel. 107TexCr504, 296SW513.
270-32¼-New. It cannot be said that the array is impaneled under statute until jurors are accepted for service and their names placed in the trial juror box. 86Mont509, 284P266.
270-33 [a] (1) 215Ala42, 109S109. [d] **Sheriff is not disqualified** because of fact of being called as witness to testify merely in corroboration. 117Nebr520, 221NW434, 60ALR1118.
270-34 But see 110TexCr341, 8SW(2d)136.
270-35 [d] **Disqualification of sheriff for prejudice** did not extend to participation with clerk in drawing panel. Nebr 233NW452.
270-38 [h] **Where drawing required to be in presence of judge, unless absent,** he is absent unless actual presence in clerk's office can be secured, though he may be presiding in same court house. 143Va592, 130SE398.
270-39 [a] (6) In absence of proof that chief deputy clerk was acting as member of jury commission, in absence of clerk, he is proper witness. 165La215, 115S464.
271-48 160La850, 107S597.
271-55 147Miss851, 112S790.
271-56 20AlaA481, 104S137; 70Utah586, 262P113.
271-57 20AlaA481, 104S137.
271-64½-New. A statute requiring the venire to be drawn by the clerk in the presence of the judge is not violated by drawing of the jury in the clerk's office, thirty feet from the bench in the presence of the judge. 103TexCr508, 281SW1054.
272-66 226Ky534, 11SW(2d)148; 310Mo1, 274SW1079. [f] **Where there are less than required number on panel,** names should be drawn from jury list by clerk and those persons summoned to make up required number, though bystanders have been summoned to make up required number in particular case. 320 Ill 553, 151NE535. [g] **Alaska statute** authorizing clerk, where names in jury box are exhausted, to draw additional names, held valid. 42F(2d)623.
272-67 207 Iowa760, 223NW535. [c] **In West Virginia.**-108WVa254, 150SE740.
272-68 Contra 161La532, 109S56. [a] **Where twelve engaged in another trial,** selection could be from remaining twenty-four. 21AlaA439, 109S182. [b] **Where juror is excused with defendant's knowledge** he cannot contend court erred in drawing forty seven instead of forty eight. Mo 30SW(2d)763.
272-79½-New. Regular jury panel of recorder's court has been held available to traffic and ordinance divisions thereof. 250Mich448, 230NW511(2d case).
272-83 Can [1930] 4DomLR1036 (order of judge necessary to allow departure from time limit of inspection).
273-85 [b] **Officers drawing jurors are under duty to list them as they are drawn.**-TexCr 31SW(2d)648.
273-93 TexCr 31SW(2d)648.
273-94 MoA 286SW143.
273-95 113TexCr171, 18SW(2d)622(1st case).
273-95½-New. Statute authorizing the court to appoint elisors is not impliedly repealed by a subsequent statute for the selection of a jury by commissioners. 103NJL246, 136A164.
274-12 212Ky87, 278SW623. [h] **On first day of term.**-212Ky87, 278SW623.
275-32 113 Okl 287, 241P490.
275-32½-New. Jury summons containing note to present excuse for not serving to judge is not illegal under statute prescribing no form of summons. Mont 284P1008.
276-36 226Ky850, 10SW(2d)827; 233Ky533, 26SW(2d)23.
276-42½-New. In summoning jury from adjoining county, trial court has no power to order sheriff of that county to summons them. 233Ky533, 26SW(2d)23.
276-44 Nebr 233NW452; 153Tenn130, 282SW206, 208 [quotCJ]. [b] **Membership in Ku Klux Klan** does not disqualify officers to summons jurors in prosecution for manufacturing intoxicating liquors. 101TexCr220, 276SW228.
276-49 153Tenn130, 282SW206, 208 [quotCJ]. [a] **Appropriation of half of fines** in liquor prosecutions to sheriff and deputies disqualifies them to select and summon jurors to try one indicted for violation of liquor law. 153Tenn130, 282SW206.
277-51 [b] (2) Where defendant's objection is only to certain members of jury summoned by officers who were disqualified on account of interest, he is entitled to challenge these jurors for cause. 153Tenn130, 282SW206.
277-54 117Nebr520, 221NW434, 60ALR1118; 153Tenn130, 282SW206, 208 [cit CJ].
277-56 153Tenn130, 282SW206, 208 [cit CJ]. Contra 113Nebr858, 205NW560. [a] **Overruling timely objection that sheriff** summoning special parol was disqualified because prosecuting witness held error. 113Nebr858, 205NW560.
277-57½-New. or his landlord, 91CalA298, 266P1020.
277-67 153Tenn130, 282SW206, 209 [cit CJ].
277-68 153Tenn130, 282SW206, 209 [citCJ].
278-68 153Tenn130, 282SW206, 209 [cit CJ].
278-70 81CalA590, 254P648, 655 [cit CJ]; 153Tenn130, 282SW206.
278-71 153Tenn130, 282SW206.
278-79 314Mo 612, 286SW29.
278-83 53SD205, 220SW518.
278-84½-New. Where two citizens of the same name and occupation reside in the same precinct, one over the age limit for jurors, and the name is drawn, the summons is properly served on the one within the age limit. 215Ala635, 112S212.
278-88 104TexCr207, 283SW787.
279-8 39GaA593, 148SE167(1stcase); OklCr 274P900(2dcase); OklCr 291P160.
279-9 21AlaA516, 109S892; 39GaA593, 148SE167(1stcase); 321 Ill 484, 152NE500; 103NJL246, 136A164; 155Miss794, 125S253; Mont 284P1008 (excusing traveling salesman held not to vitiate panel under statute restricting excusing of jurors); 113TexCr7, 18SW(2d)176(2dcase).
280-10 163La686, 112S650.
280-11 320 Ill 553, 151NE535; 153Miss15, 120S201.
280-12 212Ky87, 278SW623. [a] **That names of two jurors each appeared twice on venire,** thus reducing number of jurors on venire to ninety eight jurors, where court's order fixed number at one hundred jurors, has been held not ground for quashing venire. 23AlaA43, 121S432(2dcase) [certiorari den 219Ala116, 121S435(1stcase)].
280-13 [a] Unlawful discrimination in summoning jurors does not necessarily render the panel illegal. 95Fla289, 116S470.
280-15 108TexCr177, 299SW420; 108TexCr84, 299SW435.
280-19 23AlaA284, 124S408.
280-20 4HawaiiFed105.
281-23 164La813, 114S696. [b] (1) 22AlaA214, 114S279; 23AlaA560, 129S296. Contra 215Ala27, 109S161. (5) Where court's offer to strike name of misspelled juror was declined, defendant cannot refuse to select jury from list. 22AlaA133, 114S68.
281-24 22AlaA133, 114S68.
281-29 [a] **Provision for special venire** is intended only for emergency situations. 196Cal 677, 239P317.
281-31 163Ga406, 136SE448; 159La562, 105S621 (subsequent to first petit jury drawn). [b] 163Ga406, 136SE448.
282-34 163Ga406, 136SE448.
282-35 163Ga406, 136SE448.
282-37 See also 101CalA218, 281P681.
282-39 160La850, 107S597. See also 102NJL388, 132A93.
282-42 142Miss468, 107S757.
283-47 90Fla337, 106S406; 320 Ill 553, 151NE535; OklCr 276P698; OklCr 292P379.
283-52 320 Ill 553, 151NE535.
283-53 [1925] CanSC525, [1925] 3DomLR887.
283-55 [1925] CanSC525, [1925] 3DomLR887.
283-60 178Ark980, 13SW(2d)25; 114Nebr404, 207NW928; 90Fla337, 106S406; 163Ga406, 136SE448; OklCr 290P340(2dcase).
284-62 178Ark980, 13SW(2d)25.
284-65 TexCr 11SW(2d)172.
284-67 77Colo 546, 238P25.
284-69 77Colo 546, 238P25. [a] (2) Order in criminal cause directing sheriff to subpœna citizens qualified as jurors held error where court overruled motion to direct clerk to draw special venire. 199 Ind225, 156NE549.
284-71 159La562, 105S621 (statute construed to authorize impanelling of petit jury at term subsequent to first petit jury drawn thereunder); NJ 148A776 (statute construed); 109TexCr121, 3SW(2)87 [b] (1) 111TexCr77, 11SW(2d)316. (3) Trial without special venire, under indictment charging robbery, has

been held not error, where state elected to stand on second count, which use of firearms was not charged and capital offense not stated. 111TexCr296, 12SW(2d)794.

284-72 46Ida423, 267P950; 148Miss621, 114S390.

284-73 104TexCr302, 283SW836. [b] 20AlaA604, 104S280. [e] **Defendant cannot complain** where charge of murder in first degree was nol prossed before case went to jury. 22AlaA24, 113S414.

285-77 [a] **Prosecutor may not defeat accused's right** to special venire by stating he would not demand death penalty. 109TexCr121, 3SW(2d)87.

285-78 109TexCr121, 3SW(2d)87.

285-85 NM 292P609; TexCr 32SW(2d)471.

285-86 148Miss621, 114S390.

285-87 108TexCr84, 299SW435.

285-91 154Miss60, 119S507.

285-91½-New. It is not error to draw more names than was provided by order of court, if both the number drawn and the number provided by the order are within the limits established by law. 20AlaA481, 104S137.

285-93 90Fla337, 106S406.

285-95 90Fla337, 106S406; 110TexCr128, 7SW(2d)579.

286-96 90Fla337, 106S406; OklCr 276P698. [a] 179Ark20, 13SW(2d)805.

286-97 90Fla337, 106S406; 148Miss621, 114S390; OklCr 276P698.

286-99 320 Ill 553, 151NE535.

288-5 [c] (1) 217Ala219, 115S308. [d] **Venire of forty-five men held sufficient.** 21AlaA655, 111S649.

287-14 90Fla337, 106S406.

288-31 [a] 292Pa26, 140A611.

288-44 [a] **Fact that entire number of jurors ordered on special venire is not summoned** is not as general rule ground for quashing venire. TexCr 118SW(2d)172.

288-46 [a] (2) 105TexCr634, 289SW1016.

289-51 110TexCr128, 7SW(2d)579.

289-52 [b] (1) TexCr 8SW(2d)176.

289-58 110TexCr128, 7SW(2d)579; 105TexCr634, 289SW1016.

289-61 [a] **In absence of proof of lack of diligence in serving jurors summoned,** accused must show that number of jurors available under special venire is insufficient to enable him to obtain impartial jury. TexCr 11SW(2d)172.

289-63½-New. Denying motion for a special venire three days before trial and directing sheriff to subpœna jurors is error. 199 Ind225, 156NE549.

289-64 148Miss621, 114S390.

289-65 196Cal677, 239P317 (failure of clerk to enter on minutes order for special jury venue does not deprive court of jurisdiction to proceed with trial, though it may be reversible error); 148Miss621, 114S390; OklCr 292P379.

289-66 213Ala160, 104S336. [e] 20AlaA550, 104S50.

290-67 126Kan282, 267P109.

290-71 Ala 129S51 (lunacy inquisition); IndA 154NE806; 217Ky8, 288SW1059; 165La842, 116S206; 161La827, 109S505; 166La759, 117S820; 257Mass379, 154NE76; OklCr 290P340(2d case) (discretionary); OklCr 292P379. [d] **Inadvertent omission to exhaust regular panel** before calling talesmen is not ground for quashing venire or challenge for cause where, before examining talesmen, remaining juror on regular panel is placed in box and regularly drawn. 161La827, 109S505. [e] **After exhaustion of venire of jurors for session in which case was to be tried,** court may call jurors summoned in second session. 257Mass379, 154NE76.

291-76 217Ky8, 288SW1059.

291-80 155Miss794, 125S253.

291-81½-New. In some jurisdictions talesmen may be drawn before regular panel is exhausted. 161La827, 109S505.

291-81½-New. Tales jury box may be ordered opened before the regular venire is exhausted. 166La924, 118S85.

291-84 221Ky86, 295SW1050.

292-94 111TexCr77, 11SW(2d)316.

292-98½-New. A court may transfer a juror from one division to another. MoA 289SW22.

292-2 Ont [1929] 3DomLR279.

292-7 180Minn310, 230NW826 (discretion held not abused).

292-8 108TexCr522, 1SW(2d)635.

292-8½-New. Court filling panel from bystanders had no right to substitute such bystanders for excused members of the regular panel for the term. IndA 154NE806.

292-10 155Miss794, 125S253. But see 89 IndA42, 165NE776.

293-11 155Miss794, 125S253.

294-40 See also Mo 12SW(2d)25.

294-46 [d] In Missouri.-Mo 289SW575.

295-53 [b] (7) Reusing names of talesmen held proper where original drawing was quashed because box did not contain 100 names. 170La314, 127S735(2dcase).

295-53½-New. Obtaining jurors from list of talesmen summoned under venire facias returnable to same term of court for trial of another felony case is proper. 143Va592, 130SE398.

295-53½-New. Obtaining additional jurors by selection from names on list provided for by statute instead of having them drawn from box is proper. 143Va592, 130SE398.

295-54 103TexCr205, 280SW586.

295-56 166La924, 118S85.

295-65 See also 200 Ind460, 164NE632.

296-69 But see 111TexCr223, 12SW(2d)564; TexCr 28SW(2d)812.

296-79 102CalA787, 283P830; 161La532, 109S56; 161La827, 109S505; 170La314, 127S735(2dcase); 312Mo411, 278SW1036. [a] **Abuse of power or substantial injustice** must be shown by those who rely on insignificant irregularities. 143Va592, 130SE398.

296-80 IndA 154NE806.

296-81 161La532, 109S56; 161La827, 109S505.

296-81½-New. That names of bystanders were not drawn out of jury box as provided for regular panel was not ground for challenge. IndA 154NE807.

296-84 [f] In Alabama.-21AlaA204, 107S797.

297-96 [d] **That box is marked "Sheriff's Box"** instead of "Jury Box" may be immaterial. 165La842, 116S206.

297-97½-New. It is a preferable practice to order a trial jury to be drawn from the regular panel. CalA 279P474.

299-36 22AlaA547, 117S606; 30Ariz347, 247P122; 90Fla142, 105S816; 90Fla317, 105S845; 48Ida310, 282P72; 160La850, 107S597; 146Miss893, 112S586; 86Mont553, 284P769; 34NM112, 278P210; 287Pa539, 135A310; 48Pa Super394; OklCr 285P142; 96PaSuper76. [a] **Substitution by court of name farther down on list instead of one of first twelve** held not prejudicial error. 171Ark1151, 287SW394. [b] **Jury of both sexes.**-203Cal139, 263P522.

299-39 163La686, 112S650; 164La813, 114S696; 166La924, 118S85; 151Md309, 134A322; OklCr 288P388; 155Tenn266, 292SW451. [a] **Woman defendant has no more right to be tried by mixed jury** of women and men than her male codefendant. 166La924, 118S85.

300-40 90Fla142, 105S816; 166Minn7, 206NW934, 937 [citCJ]; 146Miss893, 112S586. [a] (1) 34NM112, 278P210. (2) 34NM112, 278P210.

300-41 166Minn7, 206NW934, 937 [cit CJ].

300-42 86Mont553, 284P769.

300-50 But see NS [1928] 1DomLR657.

300-54 5F(2d)471 (panel dismissed pending determination of preliminary questions).

300-55 [a] (2) When jury is being selected accused in criminal case is entitled to have put upon him all jurors legally impaneled unless on principal challenge for cause it is made to appear that one or more could not pass on case with absolute fairness and impartiality. 35GaA515, 133SE649.

300-56 19F(2d)472; 22AlaA108, 113S88. [c] In Oklahoma.-285P142.

301-57½-New. Panel chosen for a short period is a general panel, 103NJL663, 138A575.

301-57½-New. and trial panel drawn therefrom is a general panel under statute. 103NJL663, 138A575.

301-63 See also 166La924, 118S85.

302-75 166La924, 118S85.

302-85 158La842, 104S736 (twenty-five drawn from box of seventy instead of one hundred).

302-90½-New. In Louisiana, the statute expressly provides for impaneling of petit juries subsequent to first petit jury drawn thereunder. 166La924, 118S85.

303-92 212Ky87, 278SW623; 164La597, 114S171; 318Mo1173, 28SW(2d)777; 84Mont364, 275P750; 108TexCr285, 300SW75; 110TexCr374, 7SW(2d)1089. [c] **Summoning jury on first day of term** held not error. 212Ky87, 278SW623. [d] **Irregularity held waived.**-Mo 289SW562.

303-93 159La562, 105S621.

303-93½-New. Any objection to the manner in which the jury were drawn is waived by a stipulation agreeing to accept a majority verdict, made after the jury had twice reported inability to agree. 8F(2d)321.

303-99 168Ark1028, 272SW856 (names drawn from box).

304-9 168Ark1028, 272SW856.

304-18 22AlaA632, 118S765.

304-22 But see 23AlaA536, 129S96.

305-36 But see AlaA 130S674.

305-38 238Mich298, 212NW968.

306-65 [a] **Statute does not permit escape from jury duty upon payment of money.**-SC 155SE409.

306-75 20AlaA449, 103S706, 707 [cit CJ]; AlaA 130S527 (discretion held not abused); 162La310, 110S486; MoA 27SW(2d)778 (holding court to have large discretion in superintending selection of jury); Mont 284P1008.

307-77 Mont 284P1008 (jurors not competent to serve).

307-34½-New. age, 223Ky424, 3SW(2d)1080.

307-96 20AlaA449, 103S706, 707 [cit CJ]; OklCr 288P388.

307-97 20AlaA449, 103S706; 200 Iowa483, 203NW806; 162La310, 110S486.

308-98 200 Iowa483, 203NW806; Okl Cr 288P388.

308-1½-New. Excusing juror because he desired to leave for college held proper. 162La310, 110S486.

309-28 113TexCr130, 19SW(2d)52.

309-36 147Miss851, 112S790.

309-44 [d] (2) Using jury, drawn for service one week, two weeks later has been held not error. 170La232, 127S611(1stcase).

310-49½-New. Jurors from venire drawn to serve in a certain term may serve in a subsequent term instead, where the jurors had not been previously discharged and another venire had not been drawn. 161La856, 109S516.

310-49½-New. Holding in attendance panel from jury list from previous year when case was called for trial in February is not illegal where jury commissioners had failed to deliver list for present year. Mont 284P1008.

310-50 34NM530, 284P1018.

310-67 Me 149A808.

311-79 [e] **Juror is in county service** under appointment for hire. Oh 171NE35.

312-94 [b] **Held no disqualification** that juror would prefer to be excused but stating that it would not affect his verdict is not ground for challenge for cause. 132Misc410, 230NYS510.

312-97 7F(2d)867; 176Ark511, 3SW(2d)337; 177Ark355, 6SW(2d)299; 196Cal19, 235P721; 101CalA218, 281P681; 35GaA515, 133SE649; 200 Iowa483, 203NW806; 205 Iowa853, 216NW756; 205 Iowa858, 216NW759; 161La856, 109S516; Mo 20SW(2d)529(1st case) (rulings not limited to strict terms of governing statutes); 118 Or568, 247P815; 295Pa190, 145A85; 96PaSuper76; SC 155SE577.

312-99 34Ariz129, 268P611; 316 Ill547, 147NE428.

312-1½-New. The legislature must prescribe whatever will tend to procure impartial jurors. Mo 300SW726.

312-5 91PaSuper544.

313-22 50Nev212, 255P1002, 1006 [quotCJ].

313-23 30Hawaii697; 50Nev212, 255P1002, 1006 [quotCJ]; 150Wash664, 274P797. [a] (3) Deputy sheriff cannot be challenged for implied bias under constitutional guaranty of impartial jury. 50Nev212, 255P1002. (4) Statute enu-

merating grounds of challenge for implied bias excludes all others, such as holding of office of deputy sheriff. 50 Nev212, 255P1002. [d] **Reserve officer in military service** is not disqualified as juror in prosecution to defraud government. 23F(2d)420.

313-24 50Nev212, 255P1002, 1006 [quotCJ].

313-30 103Conn537, 131A505; 84 IndA 512, 151NE620. [e] 84 IndA512, 151NE 620.

314-39 177Ark186, 6SW(2d)34.

314-45½-New. That juror was surety for a witness on a bond unconnected with the suit does not disqualify him. MoA 298SW1044.

314-47 31Ariz39, 250P356; 103Conn 537, 131A505.

314-48 84 IndA512, 151NE620; 120 Okl 182, 250P926; OklCr 270P88.

315-53½-New. Pecuniary interest of pensioner of railroad company owning stock in defendant corporation is not such as to disqualify him. 103Conn 537, 131A505.

315-61½-New. Members of the Ku Klux Klan are incompetent to sit in a case in which it is defendant. 168Ga 825, 149SE193.

315-64 But see 5F(2d)604.

315-66 [a] 314Mo 438, 284SW471, 47 ALR25.

316-72 121 Or422, 253P5.

316-74 30Ariz347, 247P122; 144SC76, 142SE48. [b] In Ohio.-114 OhSt178, 151NE56.

316-75 233Ky215, 25SW(2d)377.

317-79 314Mo 438, 284SW471, 47ALR 25.

317-84½-New. , or against officer of city. 215Ala27, 109S161.

317-86 215Ala27, 109S161.

317-89 103Conn537, 131A505; 164Ga 53, 137SE784; 38GaA797, 145SE919(2d case).

317-90 163Ga186, 136SE72.

317-91 164Ga53, 137SE784; 209Ky823, 273SW520, 521 [quotCJ].

317-92 163Ga186, 136SE72; 164Ga53, 137SE784; 37GaA371, 140SE402; NC 155SE609.

317-92 [b] **Fact finding as to whether defendant was misled** may be required where relationship was not disclosed. NC 155SE609.

318-94 209Ky823, 273SW520, 521 [quotCJ]; 210Ky637, 276SW524, 526 [quotCJ].

318-95 210Ky637, 276SW524.

318-96 210Ky637, 276SW524, 526 [quotCJ]; 137SC58, 135SE635.

318-97 210Ky637, 276SW524.

318-3 109TexCr88, 3SW(2d)455, 456 [citCJ].

318-5 Ala 130S70. See also 210Ky 637, 276SW524.

318-6 90Fla381, 106S741; Mo 20 SW(2d)529(1stcase).

319-10 229Ky385, 17SW(2d)219, 64 ALR263. [a] (3) His wife was blood relation of plaintiff's husband. 161Ga 829, 132SE679.

319-11½-New. In order to disqualify juror by reason of his relationship by affinity with an interested party, it must affirmatively appear that the connecting relative, on account of the marriage with whom the relationship by affinity arose, is still living and marriage is otherwise undissolved, or that there is living issue of such marriage. 90Fla 381, 106S741.

319-12 167Ga271, 145SE510, 63ALR 179. [c] 22AlaA487, 116S414.

319-15 166Ga877, 144SE652.

319-16 [c] (2) Contra 37GaA195, 139 SE103; Mo 20SW(2d)529(1stcase).

320-21 Ga 154SE887.

320-22 145Miss215, 110S589.

320-23 146Miss696, 111S828.

320-24 163Ga186, 136SE72; 37GaA 371, 140SE402. But see 167La1080, 120 S864.

320-28 164Ga111, 137SE780; 36GaA 784, 138SE280.

320-29 164Ga111, 137SE780.

320-31 [b] (11) Juror in murder case is not disqualified because his wife was third cousin of deceased's widow. 161 La532, 109S56. (12) Juror related to murdered man in ninth degree according to rules of civil law is incompetent to serve on jury in prosecution for murder. 163Ga186, 136SE72. (13) But juror whose brother and deceased married sisters is disqualified. 161La532, 109S56. [c] (2) Cousin relationship between juror's wife and father of prosecutrix does not disqualify. 109TexCr 88, 3SW(2d)455.

321-37 163Ga186, 136SE72.

321-41 TexCr 27SW(2d)185.

321-41½-New. or one who assisted solicitor-general in striking a jury, 163Ga 43, 135SE410.

321-43 167Ga493, 146SE169.

321-45 Miss 118S708.

321-48½-New. [§ 336a] e. **Relationship Terminated by Divorce.** Relationship by affinity is terminated by divorce. Miss 118S708.

321-49 [e] **Refusal to answer question,** as to his business relations with accused, disqualifies juror. 111TexCr4, 10 SW(2d)730.

322-54 103Conn537, 131A505.

322-55 23F(2d)395; 176Ark511, 3SW (2d)337. See also Ariz 282P481. [e] **Discretion of court.**-12F(2d)852.

322-56 213Ala237, 240, 104S663 [quot CJ].

322-57 213Ala237, 240, 104S663 [quot CJ].

322-58 213Ala237, 240, 104S663 [quot CJ].

322-59 213Ala237, 240, 104S663 [quot CJ].

322-60 213Ala237, 104S663.

322-61 213Ala237, 240, 104S663 [quot CJ].

322-62 213Ala237, 240, 104S663 [quot CJ].

322-62½-New. Prior service as arbitrator for either side has been said to have been a ground of principal challenge at common law. 103Conn537, 131A505.

322-63 103Conn537, 131A505; 146Miss 696, 111S828 (dictum); 191NC408, 132 SE9; 135Wash27, 236P797. [i] **Statute making employment challenge for cause** where juror is employed within certain time by one employing attorney on either side of case is not invalid as denying due process or right to impartial jury. Mo 300SW726. [j] **Employees of heavy shippers are not disqualified by fact of employment** from trying case involving railroad but to disqualify them relations must cause bias. 219 Ala676, 123S57. [k] **Terminal company controlled by several railroads.**-27 Oh NPNS548.

323-69 [a] **Pensioner of railroad company owning stock of defendant corporation** is not disqualified. 103Conn537, 131A505.

323-71½-New. Relation of master or servant has been said to have been a ground of principal challenge at common law. 103Conn537, 131A505.

323-72 103Conn537, 131A505.

323-75½-New. But it has been said that at common law such relationship was ground for principal challenge. 103 Conn537, 131A505.

323-79 CalA 283P881.

324-80 [a] **In criminal prosecution** juror is not disqualified because he is client of prosecuting attorney in civil case. 200 Iowa1250, 206NW260.

324-81 219Ala112, 121S404, 64ALR640.

324-83½-New. or because a relative had occupied the same office as the attorney. 15F(2d)359.

324-87½-New. Court has inherent right to excuse a juror who is a client of one of the attorneys in the case. 307Mo 307, 270SW318.

324-89 23AlaA10, 119S243(2dcase); 35 GaA515, 133SE649. [a] 104TexCr511, 284SW561.

324-91 35GaA515, 133SE649.

324-93 224 IllA355.

324-94 219Ala24, 121S30. [c] **Not disqualified to hear issue of insanity** after determining issue of guilt. 94CalA192, 270P715.

325-11½-New. However, mere qualification as a juror, without service as such, is held not to render a juror incompetent. 316Mo 268, 289SW637.

325-13 23AlaA457, 126S895; 106TexCr 259, 291SW900.

325-14 141SC207, 139SE386.

325-15 OklCr 281P987(2dcase); 154 Wash29, 280P737.

325-16½-New. Refusal to set aside venire in trial for receiving stolen property on the ground that the jurors heard testimony in a larceny trial held not error. 162La299, 110S482.

325-16½-New. Juror serving in murder case against defendant acquitted is disqualified from serving in civil case based on same transaction. GaA 155SE789(2d case).

325-17 12F(2d)761; 164Ga638, 139SE 355; 148Miss243, 114S341; 122 Or113, 256P649. [c] **Juror sitting at bastardy trial of son** not disqualified to sit on bribery trial of father growing out of said trial. 177Ark1124, 9SW(2d)574.

325-18 12F(2d)761; 164Ga638, 139SE 355; 148Miss243, 114S341; 73Mont240, 235P712 (rape committed on person of same prosecutrix as in former case); OklCr 291P157(2dcase); 122 Or113, 256 P649; TexCr 31SW(2d)443; 101WVa 477, 133SE79.

325-18½-New. , and growing out of the same transaction. 122 Or113, 256P649.

326-19 4F(2d)884; 148Miss243, 114S 341; 73Mont240, 235P712 (juror not disqualified because at former trial for rape on same prosecutrix evidence of latter defendant's guilt was introduced); OklCr 290P935; 154Wash29, 280P737.

326-20 170Ga870, 154SE351.

326-21 15F(2d)690; 20AlaA578, 104S 347; OklCr 280P478; 106TexCr240, 291 SW904.

326-26 90Fla381, 106S741; TexCr 27 SW(2d)800.

326-30 89Fla353, 104S447.

327-37 118 Or568, 247P815, 823 [cit CJ]; 104WVa1, 138SE732.

327-38 168Ark528, 270SW974; 202Cal 81, 259P332; 103Conn537, 131A505; 35 GaA515, 133SE649; 210Ky637, 276SW 524; 253Mass527, 149NE320; MoA 289 SW22; 118 Or568, 247P815, 823 [citCJ]; 53SD60, 220NW139; 104WVa1, 138SE 732. [g] **Impartial jury.**-168Ark528, 270 SW974. [h] **At common law** it has been said that bias and prejudice were grounds of principal challenge or challenge to favor. 103Conn537, 131A505. [i] **Any other ground of prejudice** than those grounds in statute will disqualify as statutory ground is not exclusive. AlaA 129S787.

327-39 168Ark528, 270SW974; 118 Or 568, 247P815, 823 [citCJ]. [a] **Disqualifying bias** need not relate solely to party personally, but may relate to such party's case. TexCivA 292SW577.

328-40 168Ark528, 270SW974.

328-43 118Nebr533, 225NW462; 118 Or568, 247P815 (as decided by court's application of his judicial knowledge to facts of particular case).

328-44 103Conn537, 131A505.

328-45 168Ark528, 270SW974; 103Conn 537, 131A505; Mo 20SW(2d)529(1st case); 122 Or113, 256P649. [b] **In Texas.**-108TexCr499, 18W(2d)896.

328-46 170Ga859, 154SE344.

329-52½-New. The trial judge should see that the jury is fair and impartial where defendant is put on trial at the same term of court after mistrial. 22F (2d)52.

329-56 [a] **Slight preference for persons of one's own nationality** as against those of nationality of defendant is not disqualification. 69CalA257, 231P593.

329-58 MoA 27SW(2d)778 (holding that juror was a great believer in insurance did not indicate prejudice).

329-69 TexCr 27SW(2d)219(2dcase).

330-80 322Mo 892, 17SW(2d)528.

330-82 Mo 26SW(2d)760 (juror held competent).

330-83 87Colo 532, 289P1078.

331-85 Ark 30SW(2d)855; 143Miss 694, 109S732.

331-86 143Miss694, 109S732.

331-93 203Cal128, 263P226.

331-96 103Conn537, 131A505; 164Ga 53, 137SE784.

331-97 [a] **Where talesman was on strike against one of two defendant corporations** at time of trial and members of same shop craft to which he belonged worked for such corporations, challenge for cause should be sustained. 89Fla 405, 104S587.

331-2 103Conn537, 131A505.

332-9 TexCommnA 58W(2d)970, 971 [citCJ].

332-15½-New. Actual bias will not be implied from the mere relation of physician and patient, 118 Or568, 247P815.
332-15¾-New. although when considered with other facts and the nature of the case the juror may be disqualified. 118 Or568, 247P815.
332-15¼-New. , or in a murder case because he knew deceased, where he had not met him for fifteen years. 151 Md309, 134A322.
332-15½-New. Juror in a murder case who contributed to the relief of deceased's widow is not incompetent to act as a juror. 161La532, 109S56.
332-15¾-New. Pensioner of a railroad company which owns stock in defendant corporation is not disqualified in the absence of proof that he acted in bad faith; 103Conn537, 131A505.
332-15½-New. especially since ownership of stock is not such a matter of common knowledge that the pensioner can be presumed to know it. 103Conn 537, 131A505.
332-17½-New. or because the juror's niece is employed in the office of the litigant's counsel, 101CalA218, 281P681.
332-19 97Fla591, 121S793(2dcase); 145 Wash383, 260P245.
332-20 166La759, 117S820.
332-23 143Miss694, 109S732. [c] 101 TexCr220, 276SW228.
332-24 143Miss694, 109S732; 321Mo 870, 12SW(2d)469; 104WVa1, 138SE732. [b] Membership in Ku Klux Klan held not to disqualify juror. 104WVa1, 138 SE732.
332-28 216Ala43, 112S360.
332-29 220Ala120, 124S296 (member of union); 161La532, 109S56. [b] Fact that party to civil action was represented by general attorney for union of which party or juror was member is not cause for challenge. 220Ala120, 124S296.
332-33½-New. Nor does juror's membership in an order not shown to be unlawful in its object or purpose make him subject to challenge. 311Mo 630, 279SW135.
332-33¼-New. Membership in Ku Klux Klan has been held not alone sufficient to support challenge. 311Mo 630, 279 SW135.
332-36½-New. Juror in a murder case is not rendered incompetent by attending the funeral of deceased in the regalia of the Ku Klux Klan. 161La532, 109 S56.
333-42 But see 148SC392, 146SE245.
333-47 100TexCr147, 272SW493 (prejudice against person in possession of liquor); 110TexCr308, 7SW(2d)1091.
333-49 117Nebr520, 221NW434, 60ALR 1118; 118 Okl113, 247P87; TexCommnA 58W(2d)970.
334-50½-New. A juror's statements out of court before trial will not disqualify him where they do not show such bias as would overcome his sworn duty to render a verdict according to law and facts. 159Tenn667, 21SW(2d)390.
334-59 109TexCr108, 3SW(2d)91; TexCr 31SW(2d)443; 106WVa289, 145 SE634.
335-62 150Wash66, 272P89.
335-64 But see 103Conn537, 131A505.
335-65 See also 103Conn537, 131A505.
335-69 177Ark1031, 9SW(2d)236; 179 Ark1199, 20SW(2d)128; 110TexCr128, 7SW(2d)579.
335-76½-New. or because he knows that a codefendant has been tried, convicted, and sentenced; 147Miss171, 113 S177.
335-78½-New. That a juror heard an indictment in another case read and heard defendant plead not guilty does not disqualify him where he heard no evidence. 113TexCr130, 19SW(2d)52.
336-86 [a] (8) 101WVa136, 132SE375.
337-98 GaA 155SE789(2dcase).
337-99 196NC203, 145SE3.
337-2 163La686, 112S650; 196NC203, 145SE3 (being cause for challenge to favor).
337-9 163La609, 112S503; 165La842, 116S206. [d] Where juror stated he had heard cousin of deceased relate facts of killing, and facts as stated made some impression on his mind, but at time of trial he had no impression whatever, it was held that court properly refused to sustain challenge for cause. 167La1085. 120S865.
338-10 20AlaA578, 104S347.
338-14 7F(2d)867.
338-22 76Mont574, 248P179.
339-26 76Mont574, 248P179.
339-29 76Mont574, 248P179; OklCr 278P665(2dcase).
340-44 82NH493, 136A268.
340-46 131Misc62, 226NYS689.
340-58½-New. , or if he states he could not be fair and was prejudiced. 132 Misc410, 230NYS510.
340-58¼-New. Juror is disqualified, if he has opinion which will remain with him throughout the trial unless he hears evidence to the contrary and which will not allow him to give defendant benefit of presumption of innocence. 201 Iowa 1352, 208NW308.
341-62 163La686, 112S650; 163La701, 112S655.
341-63 159La562, 105S621; 169La22, 124S132; 319Mo 28, 3SW(2d)230; Mo 11SW(2d)1037; 50Nev212, 255P1002.
342-84 [a] 41GaA375, 153SE201(1st case).
342-85 111TexCr300, 12SW(2d)1018.
342-89½-New. That opinion may have been based on statements by witnesses or parties interested in case does not disqualify one, if he understood that his informants spoke not as witnesses, but from hearsay. 69CalA257, 231P 593.
342-93 179Ark20, 13SW(2d)805; Ark 30SW(2d)855; 161Ga332, 131SE80; 76 Mont574, 248P179. [a] In Texas.-100 TexCr409, 273SW570 (personal examination of demonstrative evidence prior to its introduction).
343-95 [a] (1) 76Mont574, 248P179. (2) "Report" is synonymous. 76Mont 574, 248P179. (3) "Hearsay" is synonymous. 76Mont574, 248P179. (4) "Story" is synonymous. 76Mont574, 248P179.
343-1 175Ark1169, 299SW360; 204 Iowa118, 214NW710; 118 Or568, 247P 815; 103TexCr318, 280SW202; 101WVa 136, 132SE375.
343-2 118 Or568, 247P815.
344-13 90Fla844, 107S530; 161Ga332, 131SE80; 204 Iowa118, 214NW710; 223Ky826, 4SW(2d)1109; Mo 7SW(2d) 264; 76Mont574, 248P179; OklCr 279P 358(2dcase); 118 Or568, 247P815; 121 Or545, 256P393; 103TexCr318, 280SW 202; 107TexCr541, 298SW293; 101WVa 136, 132SE375.
345-14 114Nebr404, 207NW928; 118 Or568, 247P815; 33PortoRico 48 (Code Cr. Proc. § 227).
347-47 Contra OklCr 287P834(2dcase).
347-50 153Miss381, 120S920.
347-51 168Ark528, 270SW974.
347-54 169La109, 124S188.
347-55 163La686, 112S650; 196NC203, 145SE3.
348-59 33PortoRico 627.
348-64 23AlaA457, 126S895; 23AlaA 415, 127S239; 162Ga422, 134SE95.
348-65 148Miss243, 114S341.
348-68 163La609, 112S503.
348-72 108TexCr444, 1SW(2d)617.
348-73 103Conn537, 131A505.
349-79 34Ariz129, 268P611; 163La609, 112S503; 106WVa289, 145SE634.
349-80 23AlaA221, 123S286; 179Ark 1199, 20SW(2d)128; 205 Iowa853, 216 NW756; 205 Iowa858, 216NW759; 208 Iowa818, 222NW394; 121Kan436, 247P 437; 123Kan88, 254P348; 159La562, 105S621; 165La842, 116S206; Mo 285 SW416; Mo 20SW(2d)529(1stcase); 76 Mont574, 248P179; 117Nebr304, 220 NW292; 108TexCr499, 1SW(2d)896; 101WVa136, 132SE375.
350-85 34Ariz129, 268P611; 118Kan 641, 236P855; 123Kan88, 254P348.
351-90 163La609, 112S503.
352-4 TexCr 28SW(2d)554; TexCr 29 SW(2d)392.
353-12 78CalA223, 248P716.
353-18 204 Iowa1306, 214NW743; 159 La779, 106S302; 54SD391, 223NW325; 155Tenn266, 292SW451.
354-21 143Miss694, 109S732.
354-25 103TexCr158, 280SW784.
354-29 Mo 18SW(2d)474 (life imprisonment for first degree robbery); 149SC439, 147SE441; 103TexCr158, 280 SW784.
354-32 Mo 12SW(2d)30.
354-34 162Ga777, 135SE187; 41 Ida 616, 243P359; 76Mont509, 248P201; 117 Nebr304, 220NW292; 50Nev271, 257P 619; 103NJL663, 138A575, 580 [citCJ]; 287Pa539, 135A310; 110TexCr128, 7 SW(2d)579; 41Wyo 308, 285P803.
355-35 Md 151A409.
355-42 287Pa539, 135A310, 312 [cit CJ].
356-49 50Nev271, 257P619, 621 [cit CJ].
356-52 319Mo 28, 3SW(2d)230.
356-54 143Miss694, 109S732.
356-56 143Miss694, 109S732; 287Pa 539, 135A310, 312 [citCJ]. [b] It is duty of juror to put aside his opinion and decide case on law and evidence. 82NH493, 136A268.
356-57 143Miss694, 109S732.
356-64 200 Iowa17, 202NW225.
357-66 159La674, 106S28.
357-67 218Ala660, 120S148; 162Ga777, 135SE187, 189 [citCyc].
357-70 162Ga777, 135SE187, 189 [cit Cyc]; 169Ga142, 149SE887. [a] (1) 217Ala212, 115S223.
358-88½-New. Ruling by the court, that only jurors who will not be influenced by unsavory reputation of the state's witness are competent, is erroneous. 171Ark1118, 287SW400.
358-89 [c] Right of challenge is right of exclusion, not selection. NJ 151A 781.
358-90 IndA 154NE806.
358-93 103Conn537, 131A505.
358-94 103Conn537, 131A505.
358-96½-New. The privilege of challenge of jurors is the right to reject and not the right to select. 310Mo 1, 274 SW1079.
358-97 209Ky730, 273SW555; 98Vt 466, 129A306.
360-28 15F(2d)977; Conn 151A325; 146Miss893, 112S586.
360-35 23AlaA516, 128S124; 146Miss 893, 112S586.
360-37 [b] Reason need not be assigned by judge in excluding juror. 15 F(2d)977.
361-39 15F(2d)977; 48PaSuper394. [a] (8) Where juror is from county in which crime was committed. 15F(2d) 977. [b] Burden of showing abuse of discretion is on party challenging exclusion by court as arbitrary. 15F(2d) 977.
361-45 33 OhA1, 168NE550.
361-46 OklCr 288P388.
362-68 20AlaA449, 103S706.
362-71 [a] (2) Not error for court to require defendant to challenge. 23AlaA 516, 128S124.
363-82 [b] Right to have jurors put on their voir dire under statute may be waived. 168Ga611, 148SE531.
363-85 159La562, 105S621; 49ND912, 194NW335; 160Tenn258, 23SW(2d)656.
363-86 34F(2d)630; 103Conn537, 131 A505; 203 Iowa696, 213NW222.
363-87 170Ark352, 280SW353; 80Colo 417, 252P350; 95Fla289, 116S470; 160 Tenn258, 23SW(2d)656. [c] Failure to challenge juror for cause or peremptorily held to waive objection. 80Colo 417, 252P350.
363-89 180Ark19, 20SW(2d)614.
364-95 208Cal 315, 281P70; 103Conn 537, 131A505; 41GaA462, 153SE781; 41GaA586, 154SE190(1stcase); 203 Iowa 696, 213NW222; 246Mich282, 224NW 607(1stcase); 316Mo 31, 292SW434; 116Nebr125, 216NW294; TexCr 31SW (2d)443; Va 154SE492.
364-96 103Conn537, 131A505; 161La 696, 109S391; 116Nebr125, 216NW294; 155Tenn266, 292SW451; WVa 153SE 496 (exception too late after verdict).
364-97 103Conn537, 131A505; TexCr 31SW(2d)443 (before argument).
365-98 Ark 32SW(2d)313; 203 Iowa 696, 213NW222; 161La696, 109S391; 283Pa468, 129A453.
365-1 169Ga808, 151SE493.
365-3 TexCommnA 1SW(2d)594.
366-10 283Pa468, 129A453.
366-11 [a] Mo 285SW412.
367-17 TexCr 27SW(2d)800.
367-24 103Conn537, 131A505; 167Ga 271, 145SE510, 63ALR179.
367-25 103Conn537, 131A505.
368-31 38GaA797, 145SE919(2dcase).
368-34 103Conn537, 131A505.
368-36 202 Iowa348, 209NW474.
368-37 159La562, 105S621; OklCr 276 P698.

368-38 41GaA499, 153SE375; 159La 562, 105S621; TexCivA 282SW876, 879 [citCJ]. [e] **Objection must be made before trial.**–165La758, 116S176.
368-39 TexCr 11SW(2d)172.
369-40 175Ark1115, 1SW(2d)553; 160 Tenn258, 28SW(2d)656.
369-42 80Mont431, 261P253.
370-57 168Ga611, 148SE531; 203 Iowa 696, 213NW222; 104TexCr511, 284SW 561; 107TexCr600, 298SW438.
370-58 216Ala275, 113S300; 221Ky622, 299SW556; 161La696, 109S391; 316Mo 31, 292SW434. [e] **Forgetting to examine on particular ground** held not to obviate rules. 316Mo 31, 292SW434.
370-67 203 Iowa696, 213NW222.
370-68 250Mich391, 230NW194.
370-69 178Minn296, 226NW938.
370-70 104TexCr511, 284SW561.
371-72½-New. that he was a nonresident; 161La696, 109S391.
371-76 TexCommnA 14SW(2d)1024.
371-78 165Ga55, 139SE877; 203 Iowa 696, 213NW222; 155Tenn266, 292SW 451; TexCivA 4SW(2d)1019. [b] **Refusal of trial court to sustain challenge of juror for cause** has been held not error, where court granted defendant an additional challenge, and where defendant accepted juror. TexCr 11SW(2d) 172.
371-80½-New. But it is otherwise, if discovery is due to failure to examine when presented with opportunity to do so. 216Ala275, 113S300.
371-81 161La827, 109S505; 116Nebr 73, 215NW789, 793 [quotCJ].
371-85 95Fla289, 116S470; 116Nebr 73, 215NW789. [b] **Acceptance of juror, subject to challenge for cause,** is not "good cause" for setting aside verdict and judgment. TexCivA 297SW 258.
371-86 159La562, 105S621; 108TexCr 455, 1SW(2d)619.
372-87 103Conn537, 131A505.
372-3 245 IllA158.
372-5 169Ark579, 275SW918.
372-7 118 Or568, 247P815; 68Utah557, 251P364, 366 [citCJ].
372-11 334 Ill 23, 165NE175.
373-13 334 Ill 23, 165NE175.
374-39 [a] **That plaintiff's counsel struck name of certain juror as panel** was being struck did not deprive plaintiff of right to review trial court in overruling plaintiff's challenge to said juror for cause. 219Ala112, 121S404, 64ALR 640.
374-41 114Nebr393, 207NW668, 669 [citCJ].
374-43 33Ariz383, 265P609.
374-48 91PaSuper229.
374-49 TexCr 11SW(2d)172.
374-53 [a] 100TexCr537, 272SW144.
374-54 208Cal 315, 281P70.
374-56 219Ala676, 123S57; 109Conn 571, 145A47; 165Ga191, 140SE287; 169 Ga468, 151SE34 (overruling of challenge to array held not error); 261Mass233, 158NE668; 168Minn329, 210NW65; 171 Minn177, 213NW545, 52ALR916; Mo 29SW(2d)89. See also 264Mass264, 162 NE349; 102NJL388, 132A93.
375-57 114Nebr393, 207NW668.
375-58 Fla 129S833; 162Ga556, 134SE 303; 164Ga638, 139SE355; 162Ga422, 134SE95; TexCr 31SW(2d)648.
375-61 196NC203, 145SE3.
375-64 [b] **Intentional discrimination** was not shown by mere fact that negroes had not been drawn for jury duty for many years. TexCr 7SW(2d)1078. [c] **Evidence held insufficient to show discrimination** especially where offense for which defendant was tried had not been committed when jury commissioners selected jurors. TexCr 7SW(2d)1078.
375-69 219Ala676, 123S57; 76CalA352, 244P625; 87CalA510, 262P442; OklCr 279P932; OklCr 291P157(2dcase). [a] (1) 213Ala160, 104S336; 20AlaA481, 104 S137; 22AlaA214, 114S279. (11) It is not ground for motion to quash venire that thirty-seven of eighty jurors have been excused or are out on another case. 20AlaA481, 104S137. [b] (3) Designation of week for which jury is summoned as beginning July 4, though a holiday, is proper. 165La842, 116S206. [c] 155 Miss794, 125S253.
376-70 OklCr 289P364.
376-71 76CalA352, 244P625; OklCr 289P364.
376-72 212Ala484, 103S458 (delay in serving list of veniremen on defendant not ground for quashing); 335 Ill 415, 167NE49; 253Mass527, 149NE320; 155 Miss298, 124S353(2dcase); OklCr 287P 842. [b] **Summarizing on first day of term,** when petit jurors heard charge to grand jury, held not prejudicial error. 212Ky87, 278SW623.
376-72½-New. A challenge to array because it appeared that newspaper articles, the basis of a motion for a change of venue, had been read to the panel in the jury room, has been held properly overruled, where none of the jurors accepted had either read the articles or heard them read while in the jury room. 109Conn571, 145A47.
376-72½-New. Challenge to array because of publication of prosecutor's article attacking defendant held without merit, where no member of the panel was shown to have read the article. 103 NJL361, 137A575.
376-72¼-New. It has been held that there is no error in overruling a challenge to array on the ground that the jury had determined the issue between the parties on a former trial in the absence of defendant's counsel. 196NC 203, 145SE3.
376-74 91PaSuper229.
376-75 [b] **Court is without jurisdiction to make determination on merits** on application of district attorney prematurely made before any indictment has been filed and before any defendant has been called upon to plead to any charge. 91PaSuper229.
377-78 168La1099, 123S781. [a] (1) 164La449, 114S92.
377-83 91PaSuper229; 5PaDist&Co 657.
377-84 164La449, 114S92. [a] **Challenge must be heard before trial.** Fla 129S833.
377-85 [a] (2) OklCr 279P525. (4) **Rule not changed by failure of party to discover irregularity until after challenges to polls.** 209Ky730, 273SW555.
377-86 OklCr 276P698; OklCr 289P 788; OklCr 291P157(2dcase).
377-89 164La449, 114S92; 5PaDist&Co 657; TexCivA 282SW876, 879 [citCJ]; 108TexCr177, 299SW420.
378-92 162Ga556, 134SE303; OklCr 276P698; OklCr 291P157(2dcase).
378-93 OklCr 274P41; 110TexCr560, 9 SW(2d)360.
378-97 OklCr 276P698; SD 232NW26. [f] **Challenge to array "for cause" is insufficient.** 4F(2d)884.
378-98 103NJL246, 136A164. [b] 103 NJL246, 136A164.
378-1 168La1099, 123S781; 50SD451, 210NW744.
379-5 103NJL246, 136A164; 50SD451, 210NW744; 108TexCr84, 299SW435.
379-11 [a] 118Nebr812, 226NW438. [b] (1) 318Mo 1222, 2SW(2d)780.
380-25 108TexCr177, 299SW420.
380-29 108TexCr177, 299SW420.
380-29½-New. Challenge to array on ground of prejudice not stating prejudice and bias is against defendant as insufficient. 103NJL246, 136A164.
380-29½-New. But an opinion of a witness as to whether there has been an expression of opinion by those ordinarily summoned is not admissible. 161 La532, 109S56.
381-51½-New. After agreeing to pass on a motion to quash venire, court may call jury to hear excuses before proceeding with other business. 165La842, 116 S206.
381-52 NJSup 133A46.
381-53 103Conn537, 131A505; 168Ga 825, 149SE193.
381-54 103Conn537, 131A505.
381-55 103Conn537, 131A505.
381-35½-New. , the grounds for the latter being of the same nature as principal challenge propter affectum, but of inferior degree. 103Conn537, 131A505.
381-56 196NC203, 145SE3.
382-61 155Tenn266, 292SW451.
382-62 Ala 129S51.
382-74 103Conn537, 131A505; 97Fla 591, 121S793(2dcase). [b] **At common law, challenge to polls as distinguished from challenge to array,** it has been said, lies for want of qualification, as for alienage or infancy, or prior conviction for crime, as well as bias and prejudice, and challenge for such cause could be either principal challenge or challenge to favor. 103Conn537, 131A505.
382-76 219Ala112, 121S404, 64ALR640.
382-77 219Ala112, 121S404, 64ALR 640; 20AlaA449, 103S706; 73Mont240, 235P712; OklCr 270P88, 89 [citCJ]; 118 Or568, 247P815, 823 [citCJ].
383-82 221Ky622, 299SW556; 316Mo 31, 292SW434; 116Nebr125, 216NW294. [c] **Before talesmen examined.**–87CalA 724, 262P795.
383-84 NJSup 133A46.
384-85 9PaDist&Co 161.
384-90 316Mo 31, 292SW434; NJSup 133A46.
384-91 30Hawaii697.
385-99½-New. In the absence of statute, it has been held that an order of exercising peremptory challenges is within the discretion of the court. 23 OhA237, 155NE569.
385-5 43 Ida762, 254P518; NJSup 133 A46.
385-6 76Mont574, 248P179 (statute mandatory).
385-9 164Ga638, 139SE355.
386-16 76Mont574, 248P179. See also 43 Ida762, 254P518.
386-17 76Mont574, 248P179; 50Nev 212, 255P1002. [b] (1) 50Nev212, 255P 1002.
386-19 43 Ida762, 254P518.
386-20 43 Ida762, 254P518.
386-22 217Ala65, 114S800; 21AlaA 439, 109S182; 168Ga825, 149SE193; 84 IndA512, 151NE620; Nebr 230NW440; 108TexCr175, 299SW641; TexCr 29SW (2d)785. [d] (2) Where parties could not in view of facts claim ignorance of fact that attorney who was county commissioner and had withdrawn from action in which county was party would participate as counsel in trial in view of fact that the action would be dismissed as to the county, such parties could not claim being deprived of opportunity to challenge jurors who might be influenced by their acquaintance with such attorney. 166Minn7, 206NW934. [f] **Not error** for court to interrogate jurors through questions propounded by counsel. 14F(2d)109.
387-26 218Ala656, 120S163; 120 Oh 154, 165NE730.
387-27 102NJL388, 132A93; NJ 151A 781.
387-30 102NJL388, 132A93.
387-33 Cal 265P231; 79CalA488, 250P 190; 81CalA772, 254P926; 151ND309, 134A322. [a] **Fishing to aid in deciding on peremptory challenge** is not permissible on examination of prospective jurymen. 151Md309, 134A322.
387-34 171Ark1118, 287SW400; Mo 274 SW726, 728 [citCJ]; 221MoA966, 281 SW973, 975 [citCJ]; 32 OklCr274, 240P 1078; 103TexCr485, 281SW855; 109Tex Cr455, 5SW(2d)152. See also 160La655, 107S479. [a] (12) OklCr 267P1038.
387-35 [a] (12) 217MoA156, 273SW 1098. (13) 27F(2d)323. (20) **His contribution in organization for prosecution of offense prosecuted.** 27F(2d)323. (21) **His relationship to parties.** MoA 284SW850.
388-37 103TexCr485, 281SW855.
388-38 84 IndA512, 151NE620; Mo 274 SW726, 728 [citCJ].
388-39 22AlaA22, 112S901; 171Ark 1118, 287SW400; 160La655, 107S479; 103TexCr485, 281SW855.
388-43 103TexCr485, 281SW855. But see CalA 267P589.
388-44 7F(2d)85; 103TexCr485, 281 SW855.
388-48 205 Iowa853, 216NW756. See also 155Miss629, 125S115.
389-54 205 Iowa853, 216NW756.
389-56 94CalA192, 270P715.
389-58½-New. Under some statutes the court may, before any evidence has been submitted on the main issue, put a juror on trial again as to his competency, where the evidence attacking his competency is brought to the attention of the court after his acceptance. 37GaA 156, 139SE156.
389-65 207Cal 507, 279P145 (adequate opportunity afforded). [b] **Reasonable**

examination as to law of case is proper. 335 Ill 596, 167NE786.

389-66 45 Ida73, 260P694; 166La924, 118885; 151Md309, 134A322.

389-67 25F(2d)726; 26F(2d)400; 220 Ala120, 124S296; 220Ala549, 126S869; 170Ark1193, 283SW29; 177Ark355, 6 SW(2d)299; 205Cal596, 271P1074; 87 Colo11, 285P157; 29Hawaii30; 45 Ida 73, 260P694; 166La924, 118885; 151 Md309, 134A322; 246Mich36, 224NW 434; Mo 228SW(2d)787; Okl 292P335 (2dcase); 11PaDist&Co 21; 137SC58, 135SE635; SC 155SE409; 101TexCr 277, 276SW291; 108TexCr408, 18W(2d) 615; 110TexCr153, 8SW(2d)150; TexCr 215SW(2d)632; 104WVal, 133SE732. [b] **Statutes regulating examination** are not intended to take away trial court's discretion. 220Ala120, 124S296.

389-68 170Ark1193, 283SW29; 92CalA 6, 267P906; 151Md309, 134A322; Okl 292P335(2dcase); 137SC58, 135SE635; 101TexCr277, 276SW291. [b] **Ability to follow instructions in reaching verdict.**–170Ark1193, 283SW29. [c] **Discretion not abused.**–220Ala549, 126S869.

390-69 309Mo155, 274SW734; 120 Oh 154, 165NE730; OklCr 284P74; 101Tex Cr454, 276SW715 (to determine whether he will exercise peremptory challenges in capital case).

390-71 22F(2d)52; 29F(2d)444; 220 Ala120, 124S296; 29Fla212, 103S636; 45 Ida73, 260P694; Okl 292P335(2d case); 108TexCr175, 299SW641. [b] (3) If he knows men charged jointly with defendant but tried separately. Mo 308SW(2d)763. [c] **To aid defendant in determining whether to use his peremptory challenges** in prosecution for murder he should be permitted to ask jurors what capital cases they had previously served in as jurors. 101TexCr454, 276SW715.

390-72 Ala 130S805; 151Md309, 134A 222.

390-73 220Ala120, 124S296; Ala 130S 805; 160La655, 107S479; 151Md309, 134A322.

390-75 168Ga575, 148SE500.

390-77 164La449, 114892; 166La924, 118885.

390-77½-New. Refusal to permit further examination after accused's challenge had been overruled held not error. 163La686, 112S650.

390-78 29F(2d)444; 40GaA15, 148SE 622; 101TexCr277, 276SW291. [a] (7) Whether he was interested in liability insurance company. MoA 297SW719. [c] **Counsel may interpose objections** to questions asked jurors on voir dire. 89 Fla212, 103S636.

391-32 91CalA189, 266P972; 166La 924, 118885; 112TexCr87, 138W(2d) 893.

391-86 171Ark1118, 287SW400.

391-87 53SD435, 221NW53 [cfCJ].

391-89 14F(2d)109; Mo 228W(2d) 787.

392-93 79CalA76, 249P20. But see 102 CalA787, 283P830.

392-99½-New. The proper place to examine a prospective juror is on voir dire and the mode of examination of questions to be propounded cannot be based on a previous inquest before the trial judge. 27 OhA119, 161NE20.

392-2 79CalA76, 249P20; 97CalA377, 275P840; 97CalA731, 276P149; 104W Val, 138SE732. [b] MoA 272SW105. [c] (3) On voir dire examination it is proper to ascertain relationship of prospective jurors to parties interested in outcome of case. MoA 178W(2d)994. [f] (2) In action against truck owner for death of passenger in automobile struck by truck, it is proper to refuse to permit jurors to be asked whether they are acquainted with truck drivers other than defendant's driver. 87CalA 99, 261P1049. [g] **In Missouri.**–A 272 SW105. [h] **Overruling question held not error.**–NJ 151A781.

392-3 34NM423, 282P870.

393-13 322Mo106, 16SW(2d)205; 32 OklCr274, 240P1078 (for purpose of intelligently exercising right of peremptory challenge, juror may be asked whether he belongs to Ku Klux Klan); OklCr 284P74 (Ku Klux Klan); 152Va 368, 147SE267.

393-15½-New. A juror may be questioned as to membership in the Ku Klux Klan. 105TexCr369, 288SW227.

393-19½-New. whether he entertains a prejudice against government agents making plans beforehand to procure evidence. 127Kan157, 272P666.

393-21 92Fla1062, 111S725; 164La449, 114892. [a] **Defendant has no right to ascertain his credibility as witness** in advance. 164La449, 114892.

393-26 176Ark511, 38SW(2d)337, 339 [cfCJ].

393-29 24F(2d)153; 84IndA512, 151 NE620; 321Mo870, 12SW(2d)469; Tex CivA 280SW251; 195Wis19, 216NW 522.

394-32½-New. In an action against a street railroad for injuries, the general question whether any of the jurors are stockholders in any traction or steam railroad company is proper. 25F(2d) 240.

394-33 Ark 32SW(2d)167; 171Minn 47, 213NW372; Mo 198W(2d)467; MoA 328W(2d)130; 195Wis19, 216NW522. [a] **Where one of two defendants carried no insurance.**–Mo 198W(2d)467 (refusal of examination by court held error).

394-34 24F(2d)153; 217Ala65, 114S 800; 219Ala336, 122S351; 220Ala201, 124S740; 181Ark1024, 28SW(2d)1052; 89CalA599, 252P739; 87CalA99, 261P 1049; 88CalA1, 262P1100; 97CalA87, 275P456; 97CalA731, 276P149; 102Cal A405, 283P148; CalA 293P78; 83Colo 147, 263P26, 56ALR814; 36GaA605, 137 SE636 [cfCJ]; 41GaA705, 154SE385; 84IndA512, 151NE620; IndA 165NE 764; 122Kan283, 251P1108; 239Mich 53, 214NW85 (whether any juror has policy in certain insurance company); 169Minn517, 211NW683; 172Minn591, 216NW537; Minn 231NW714; 319Mo 1169, 8SW(2d)580; 321Mo378, 11SW (2d)268; MoA 158W(2d)923; 322Mo 765, 18SW(2d)42; Mo 258W(2d)96; 218MoA698, 268SW102; MoA 278SW 783; MoA 282SW455; MoA 291SW163; MoA 294SW762; MoA 68W(2d)986; MoA 158W(2d)853 (plaintiff's counsel discontinuing further questioning of jury as to their interest in insurance company did not show lack of good faith); MoA 178W(2d)994; MoA 208W (2d)556; MoA 208W(2d)918; MoA 21 8W(2d)195; MoA 228W(2d)58; MoA 228W(2d)215; MoA 278W(2d)52 (right of uninsured defendant to complain); MoA 288W(2d)113 (necessity of good faith of counsel); NJSup 130A634; 191 NC408, 132SE9; 120 Oh154, 165NE730; 144Wash440, 258P321; 149Wash468, 271P266; 195Wis19, 216NW522. But see 221MoA966, 281SW973. [b] **Rule applies to mutual companies.**–MoA 228W (2d)215 (statement of counsel that insurer was mutual company held not error). [c] **That insurance company is defending litigant** is immaterial as regards interrogation of jurors. MoA 28 8W(2d)113. [d] **That suit is tried in semirural community** is not controlling on question of good faith in questioning juror's possible connection with insurance company. MoA 288W(2d)113.

394-35 MoA 295SW826; MoA 296SW 203; 191NC408, 132SE9.

394-36 169Minn229, 210NW997.

394-41 84IndA512, 151NE620; 145 Miss793, 110S833; Mo 198W(2d)467; MoA 168W(2d)649.

394-42 Iowa 229NW667; MoA 272SW 105.

394-43 24F(2d)153; 239Mich53, 214 NW85.

394-44 221MoA966, 281SW973; 191NC 408, 132SE9. [a] **Error cured by action of court.**–234Mich217, 207NW911.

394-45 97CalA377, 275P840; 245 IllA 158; Mo 274SW726. But see 172Minn 591, 216NW537; Mo 198W(2d)630. [a] **Question as to whether jurors being engaged in insurance business would prejudice them against action for wrongfully causing death** does not indicate that defendant is covered by insurance. 147Wash672, 267P433.

395-46 145Miss793, 110S833; MoA 277 SW360; 221MoA966, 281SW973; MoA 284SW850; MoA 68W(2d)986.

395-47 208Iowa687, 224NW46; 242 Mich402, 218NW795; 145Miss793, 110 S833; MoA 277SW360. See also 204 Cal446, 268P620; MoA 188W(2d)520. [a] **Misconduct not waived by defendant.**–208Iowa687, 224NW46.

395-48 145Miss793, 110S833; MoA 284 SW850; MoA 258W(2d)536 (bad faith not shown). [a] **Charge of bad faith will be rejected** where interest of insurance company was legitimate subject of inquiry though more was said about insurance than was necessary. MoA 228W(2d)215.

395-49 See also 27 OhA119, 161NE20.

395-49½-New. Where the record shows that an insurance company is interested in the result or that plaintiff has reasonable cause to believe that it is so, he need not show motive or lack of motive for asking questions. MoA 228W(2d) 215.

395-49¼-New. Good or bad faith in examining prospective jurors as to connection with insurance company depends on whether inquiries are legitimate subject of inquiry and not on motive of attorney who asks questions. MoA 228W(2d)215.

395-57 [b] (2) Refusal to permit examination not error when not prejudicial. 105TexCr78, 286SW1102.

395-62½-New. , or whether he heard previous case against accused's son for same offense. 109TexCr455, 58W(2d) 152.

395-64 103TexCr318, 280SW202.

396-70 Cal 286P998; 209Mo 155, 274 SW734 (such questions held not to deprive jury of discretion as to punishment). See also 166La924, 118885.

396-75½-New. And the law excusing upon certain prescribed conditions and circumstances the killing of a human being by another person. 79CalA76, 249P20.

396-75¼-New. Defendant may ask each juror if he believes in the law of self-defense. 79CalA76, 249P20.

396-83 127Kan157, 272P666.

397-92 Ala 130S69; 264Mass264, 162 NE349.

397-93 Ala 130S69; 264Mass264, 162 NE349.

397-2 15F(2d)970; 168Ga825, 149SE 193; 151Md309, 134A322. [a] (2) Court may inquire whether juror, within twelve months, has been indicted for felony or offense similar to that charged. 215Ala635, 112S212.

397-4 Ala 130S69; 206Cal81, 273P 575; 160La655, 107S479, 480 [cfCJ].

398-5 16F(2d)951; 23F(2d)420; 89 Fla212, 103S636. [c] **Court may require counsel** to submit questions to jurors and may personally interrogate jurors. 5F(2d)604; 15F(2d)970. [d] **Better practice** is for judge to examine. SC 155SE409.

398-7½-New. It is discretionary with the court to permit jurors to be examined in a different order from that in which they were drawn. 168La1099, 123S781.

398-11 137SC58, 135SE635.

398-15 NJSup 135A692.

398-21 CalA 267P589.

399-22 15F(2d)970; 20F(2d)754; 79 CalA488, 250P190; 87CalA510, 262P 442; 92CalA6, 267P906; 121Kan369, 247P1053; 163La701, 112S655; MoA 291SW163; TexCr 29SW(2d)785.

399-28½-New. **Exclusion of entire special venire from court room** at request of defendant is proper and should be granted unless there is some compelling reason for the refusal. 101TexCr12, 274SW599.

399-28¼-New. But refusal is not ground for reversal where defendant's rights not abridged or his defense prejudiced. 101TexCr12, 274SW599.

399-29 22AlaA339, 116S899; DC 41 F(2d)979; 151Md309, 134A322; 243 Mich546, 220NW790; 287Pa539, 135A 310.

399-30 See also 309Mo 155, 274SW734.

399-31 94Fla149, 113S726.

399-36 20F(2d)754; 316 Ill 547, 147 NE428.

399-40 6F(2d)121 (criticism of juror under examination for verdict in prior case held error). See also MoA 28SW (2d)113.

399-44½-New. Questions to prospective jurors should not be framed so as to indicate verdict on certain state of

facts. 287Pa539, 135A310.

399–44⅓–New. The refusal of a juror to answer a general question, is not reversible error when it is answered subsequently on a direct examination. MoA 289SW22.

399–45 [a] **That juror's niece is employed in office of litigant's counsel** is not ground for presumption of prejudice. CalA 279P474. [b] **It must be presumed that jury will be governed** by law and evidence in performance of duty. Mo 20SW(2d)529(1stcase).

399–46 213Ala237, 104S663; 219Ala 24, 121S30; 176Ark511, 3SW(2d)337; 90Fla381, 106S741; 104TexCr633, 283 SW172, 1072. [b] **On motion to quash special venire, burden rested upon accused** to prove that in selection of jury there was discrimination against his race, he being a negro. Tex 12SW(2d) 578(1stcase).

400–57 219Ala676, 123S57. [b] **Evidence is admissible** to rebut defendant's contention that crime at issue had been injected into election in ward from which jury were drawn. 161La532, 109 S56. [c] **Evidence as to funds subscribed for deceased's widow** is properly excluded on trial for her husband's killing. 161La532, 109S56. [d] **It is within discretion of court** whether other evidence than that of juror shall be received. 46 Ida423, 267P950.

400–60½–New. The court is not required to admit an unintelligible question. 161La532, 109S56.

400–62 [a] (2) Evidence held sufficient to support challenge for favor requiring investigation by court. 219Ala676, 123S57.

401–63 253Mass527, 149NE320; 99Tex Cr627, 271SW87. [b] (1) 87Colo 507, 289P1081; 89Fla353, 104S447; 104 WVa1, 138SE732. (10) To show juror's lack of qualification as neither householder nor freeholder. 104TexCr 633, 283SW172, 1072. (11) To show juror disqualified as nonresident of county. 106TexCr278, 291SW903.

401–64 Mo 271SW525.

401–66 90Fla381, 106S741.

401–68 100TexCr114, 272SW149.

401–68½–New. Disqualification of juror cannot be established entirely by presumption of law. 90Fla381, 106S 741.

401–68⅓–New. Grounds of disqualification must clearly appear. 90Fla381, 106S741.

401–71 Nebr 227NW443.

401–72 [c] **Challenge for principal cause is to be determined by trial court** in exercise of sound discretion, and its decision will not be disturbed on appeal unless abused. 219Ala112, 121S404, 64 ALR640.

404–13 219Ala112, 121S404, 64ALR640.

404–21 155Miss629, 125S115.

404–21½–New. Defendant's motion for leave to further examine a juror on discovery that the juror was the father-in-law of a witness in another case against same defendant is properly denied under some circumstances. OklCr 278P 401.

404–23 MoA 277SW360.

404–25 316 Ill 547, 147NE428 (overruling challenge to cause not error).

404–30 196Cal 19, 235P721; 68CalA 487, 229P896.

404–31 OklCr 278P401.

405–33 87Colo 532, 289P1078; 162Ga 422, 134SE95; 123Kan88, 254P348; Miss 111S381; OklCr 278P401; 104 WVa1, 138SE732.

405–35 18F(2d)531; 170Ark1193, 283 SW29; 205 Iowa853, 216NW756; OklCr 280P473(2dcase); 123 Or632, 263P 400; 100TexCr114, 272SW149.

405–36½–New. which amply supports the finding of the court. Miss 111S381.

405–38 226Ky584, 11SW(2d)410. [a] (1) 209Ky832, 273SW511. (2) 209Ky 832, 273SW511. (3) Even were such appeal allowable action of trial court in overruling challenge would not be reviewed in absence of showing that accused by reason of exhaustion of his peremptory challenge had been compelled to accept unqualified juror. 209 Ky832, 273SW511.

405–39 103TexCr485, 281SW855.

405–43 155Tenn266, 292SW451.

405–44 155Tenn266, 292SW451.

406–45 201 Iowa1352, 208NW308.

406–53 But see 158La842, 104S736.

406–54½–New. Sustaining one peremptory challenge and overruling another held not error in view of the judge's explanation and reëxamination and acceptance of the juror as to whom challenge was overruled. 162La299, 110S 482.

406–55 83NH86, 139A189.

406–56 Ala 129S51; CalA 285P918.

406–57 157SC426, 154SE412.

407–61½–New. and to quo warranto proceedings. 216Ala426, 113S289.

407–75 224AppDiv3, 229NYS492.

409–7 [d] **In Texas.–CivA** 283SW694.

409–9 21AlaA381, 108S652; 21AlaA 321, 108S654; Utah 290P774.

409–10½–New. Proceedings for impeachment of county officers are of a civil nature and number of strikes is regulated by rule applicable to such procedure. 216Ala275, 113S300.

409–11 CalA 285P918; TexCivA 274 SW284; 60 OntL8, [1927] 1DomLR 1091. [d] **Where defendants' interests were antagonistic** court may apportion challenges. 195NC788, 143SE861.

409–12 68Utah85, 249P437, 457 [quot CJ].

410–16 89Fla405, 104S587; Tex CommnA 292SW182; 68Utah85, 249P 437, 457 [quotCJ].

410–17 TexCivA 274SW284; 68Utah85, 249P437, 457 [quotCJ].

411–24 14F(2d)299.

411–25 36GaA519, 137SE290.

411–31 167La373, 119S261. [a] 316Mo 995, 292SW70; Mo 22SW(2d)809.

411–33½–New. Where defendant is not arraigned and does not ask for a drawn jury until a portion of the jury has been selected and accepted, and some of his peremptory challenges have been exercised, he is not entitled to exercise the full statutory number of challenges after arraignment, disregarding challenges made. 170Ark352, 280SW353.

411–38⅓–New. Defendant in a murder trial cannot complain of exhaustion of peremptory challenges where the jurors were challenged against whom the trial judge had properly refused to sustain challenge for cause. 161La532, 109S 56.

411–39 [a] **In Pennsylvania.**–92Pa Super404 (felonious entry).

412–40 129Kan830, 284P424.

412–49 81CalA506, 254P630, 635 [quot CJ]. See 166La924, 118S85.

413–55 39GaA829, 148SE618(2dcase); 227AppDiv167, 237NYS303.

414–67 41GaA544, 153SE776(3dcase).

414–68 203Cal 128, 263P226, 229 [cit CJ].

414–69½–New. Consolidation of indictments for separate capital offenses does not give defendant right to additional peremptory challenges. 69CalA 257, 231P593.

415–87 [b] **In California.**–85CalA789, 260P303.

415–91 [b] (3) Time for challenge is in discretion of court where statute specifies no time. 322Mo 69, 16SW(2d)30.

415–94 151Md309, 134A322; 237Mich 481, 212NW105; Mich 233NW373; 287 Pa553, 135A316; 155SC495, 152SE738. [a] 151Md309, 134A322.

417–10 74CalA10, 239P429.

417–14½–New. Under some statutes rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve persons are in jury box having qualifications of jurors. Nebr 230NW440.

417–15 237Mich481, 212NW105; 141 Wash660, 252P118.

417–16 199 Ind697, 160NE293.

417–17 32NM48, 250P842, 845 [quot CJ].

417–18 32NM48, 250P842, 845 [quot CJ]; 155SC495, 152SE738. [b] (1) 101TexCr91, 274SW155 (where juror has been sworn). (2) See also TexCivA 7SW(2d)926. [d] **Reasons for exercise of its discretion** may be required by court as to why accepted juror is, or is believed to be, inacceptable. 32NM48, 250P842.

417–22½–New. Causes of challenge propter defectum must be urged before verdict is returned. 35GaA591, 134SE 342.

418–23 199 Ind401, 156NE548; 116 Oh St265, 155NE800; 119 OhSt189, 162NE 802.

418–24 199 Ind401, 156NE548.

418–27 116 OhSt265, 155NE800.

418–36½–New. Whether right to exercise last peremptory challenge falls to state or defense held immaterial. 141 Wash660, 252P118.

419–51 167La373, 119S261.

419–51½–New. Failure of plaintiff to object to allowing lack of two defendants six peremptory challenges before all jurymen had been examined does not constitute a waiver of the right to object. TexCivA 274SW284.

419–51⅓–New. Error in allowing each of two defendants six peremptory challenges is not cured by plaintiff's dismissal of the action against one of the defendants. TexCivA 274SW284.

419–51¼–New. Allowing the prosecution to exercise peremptory challenge after defendant had exhausted his right and thereafter refusing to grant peremptory challenge to defendant may be a mere irregularity under the circumstances. 204Cal 470, 268P909.

419–51⅙–New. Failure to except to the impaneling of the jury except in a motion for a new trial is a waiver of any irregularity in not allowing defendant sufficient peremptory challenges. Mo 22SW(2d)809.

419–60 [a] **Application of statute to criminal cases.–Mo** 290SW1007. [b] **Substantial compliance is sufficient.–** OklCr 287P765; OklCr 287P842.

419–61 178Ark980, 13SW(2d)25.

420–70 287Pa553, 135A316.

420–76 155Miss629, 125S115.

420–77 MoA 277SW360.

420–79 Cal 289P830 (substitution of alternate held unauthorized); 155Tenn 266, 292SW451. [a] **Action of court in substituting juror** held not denial of fair and impartial trial where juror substituted was unbiased. 155Tenn266, 292SW451.

420–80 See also Cal 289P830.

420–81 155Tenn266, 292SW451.

420–83 155Tenn266, 292SW451.

421–92½–New. If, when only twelve names remain on list, the court substitutes, instead of one of the twelve, a person whose name was drawn by the clerk at the direction of the court, there is reversible error. 171Ark1151, 287SW 934.

421–92⅓–New. Refusal during trial to discharge a juror shown to be related to a clerk in the office of plaintiff's attorney is not an abuse of discretion where the juror was qualified on voir dire. CalA 279P474.

421–93 But see 137Misc314, 243NYS 590.

421–94 But see NC 154SE604.

421–95 Nebr 230NW440 (duty of trial court to determine facts as basis for acting); 137Misc314, 243NYS590; NC 154 SE604; 155Tenn266, 292SW451. [d] **Matters considered in determining necessity for discharge of jury.–Nebr** 230 NW440 (appearance and condition of drunken juror). [e] **Publication of newspaper article concerning prior trial** is not ground for discharging jury on motion where it does not appear that article came to knowledge of jurors. 131 Or631, 284P183.

421–96 NC 154SE604.

421–96½–New. relationship between juror and accused. 38GaA366, 143SE925.

421–98 [b] **Drunkenness of juror during recess** is accident or calamity within statute requiring discharge of jury where court determines on evidence and examination of juror that he is unfit to proceed with trial. Nebr 230NW 440.

421–1 137Misc314, 243NYS590. [b] **Failure of defendant in criminal prosecution to object to discharge of jury before verdict** waives objection thereto. NM 290P322(2dcase).

421–2 220MoA32, 285SW775; 50RI 207, 146A617 [quotCJ], 66ALR533.

421–2½–New. Motion to discharge jury because wheel was improperly filled will be considered in the light of a statute

applicable to challenge to array. 104 TexCr11, 282SW233.

421-2½-New. Under statutes, the court will not discharge the jury for erroneous admission of evidence unless so prejudicial as to warrant it. 314Mo 515, 284SW439.

421-3 See also 230Ky387, 19SW(2d) 1086.

422-13 168La925, 123S621 (any time before trial is commenced).

422-15 165La842, 116S206.

422-17 165La842, 116S206.

422-24 13F(2d)844. [a] **Swearing at beginning of term disapproved.**-13F(2d) 844.

423-36 206Cal 64, 273P779.

423-38 [a] (3) or upon prosecution for murder to change words "on mortal wound" to "one mortal wound." Mo 295SW791.

JURISDICTION

426-13 31NM120, 241P1027.

426-16 31NM120, 241P1027.

426-19 71CalA701, 236P335 (power to hear and determine); 93Fla611, 112S 768, 775 [citCJ]; 25 OhNPNS161.

426-20 14DelCh434, 127A421; 93Fla 611, 112S768, 775 [citCJ]. [a] **Distinguished from "practice" or "procedure."** -99Fla782, 128S258.

JUROR

428-51 [a] Oh 171NE35.

428-57 90Fla381, 106S741.

JUST

431-29 See also 12PaDist&Co 106, 109 [citCJ].

JUSTICE

434-96½-New. "ends of justice," 8F (2d)759.

JUSTICES OF THE PEACE

449-6 129Misc545, 222NYS696.

449-6½-New. In early times its jurisdiction was largely criminal. 129Misc 545, 222NYS696.

450-23 13PaDist&Co 248.

450-24 55ND383, 213NW481. [b] 13 PaDist&Co 595.

451-26 [b] **In Philippines.**-51Philippine370.

451-29 98Fla417, 123S817; 5PaDist& Co 717; 13PaDist&Co 248.

451-30 110Conn482, 148A551; 125Kan 428, 264P1054; 51Philippine370. See also 112TexCr574, 17SW(2d)823.

451-31 110Conn482, 148A551.

452-33 Miss 118S831; 152Miss421, 120 S168.

452-34 87Colo 261, 286P859; 193NC 583, 137SE724; 117 OhSt470, 159NE 591; 118Tex659, 23SW(2d)686; Wash 287P13; 194Wis229, 215NW896.

452-35 193NC583, 137SE724.

452-39 170Minn383, 212NW905.

453-51 120Kan162, 242P136; 170Minn 383, 212NW905; Mo 285SW416; 127 Misc662, 217NYS274; 25 OhA339, 158 NE552.

453-55 123 Or1, 260P1004. [h] **In Pennsylvania.**-6PaDist&Co 434.

453-58 123 Or1, 260P1004.

454-61 310Mo 620, 276SW20.

454-62 174Minn608, 219NW452; 123 Or1, 260P1004. But see 279US139, 49 SCt317, 73L ed642. [d] (7) In Indiana, establishment of municipal court in township thereby limits township to one justice of peace. 200 Ind522, 165 NE244. (8) City court has been held not a "municipal court" within statutes limiting number of justices of peace. 200 Ind506, 165NE239. (9) Statute relating to number of justices applies only to election following enactment and does not limit number prior to next election. OklCr 288P350.

455-70 98Fla417, 123S817 (cannot be abolished during term of election); 129 Misc545, 222NYS696. See also 164La 186, 113S812.

455-71 98Fla417, 123S817 (statute held not in conflict with constitution on same matter); 129Misc545, 222NYS 696.

455-72 [a] (2) County board of supervisors has power in some jurisdictions to abolish township and thereby abolish justice court formerly existing therein. 197Cal 529, 241P869.

455-73 [c] **In California.**-97CalA552, 276P110; CalA 276P128; 207Cal 341, 278P430.

456-76 98Fla417, 123S817.

456-86½-New. The amendment to the constitution relative to municipal courts did not abolish justice courts in townships lying partly within and partly without cities and cities and counties in which a municipal court has been established in respect to jurisdiction over those portions of the townships lying outside of cities. 197Cal 516, 241P867; 197Cal 521, 241P868; 197Cal 529, 241 P869; 197Cal 519, 241P873; 197Cal 504, 241P874; 197Cal 539, 241P879.

456-86¼-New. Notwithstanding such amendment the jurisdiction of justice courts continues in such outside territory. 197Cal 516, 241P867; 197Cal 521, 241P868; 197Cal 529, 241P869; 197Cal 519, 241P873; 197Cal 504, 241P 874; 197Cal 539, 241P879.

456-86¼-New. Under such amendment a justice of such town continues as justice of the portion of such township outside of such city. 197Cal 521, 241 P868.

456-86½-New. The office of justice of the peace in townships lying entirely within the boundaries of cities which have established municipal courts ceases to exist upon the establishment of such courts. 197Cal 529, 241P869.

456-89 But see 98Fla417, 123S817.

456-90 129Misc545, 222NYS696.

457-96½-New. A resolution by county commissioners, abolishing a justice district and creating a district coextensive with the courthouse square, which was not a district conformable as nearly as practicable and coextensive with the area of the voting district as required by statute, is void. 98Fla417, 123S817.

457-2 170Ga562, 153SE520 (holding petitioner to be eligible voter); 164La 869, 114S716.

457-8½-New. In Pennsylvania person is not eligible for office of justice where, at time of presenting nominating petition, he resides in territory outside of county annexed to borough of county. 13PaDist&Co 248.

457-16 5PaDist&Co 717. [a] **Statutes construed.**-307Mo 49, 269SW623.

458-17 13PaDist&Co 595. [d] (2) Appointment is made by governor general with advice and consent of Philippine senate. 51Philippine370.

458-23 [j] **Additional justice.**-315Mo 737, 287SW312.

461-60 100WVa253, 130SE456.

461-63 [a] (12) Police officer. 83NH 339, 143A704.

461-65 But see 39GaA508, 147SE401.

462-74½-New. No vacancy except by legal removal, death, or resignation. 5 PaDist&Co 717.

462-75½-New. Statute reducing number of justices held not to create vacancies in offices of justices as then existing. OklCr 288P350.

462-77 [c] (1) 100WVa253, 130SE 456. (2) County court has authority to make prospective appointment to fill vacancy to occur at definite future time named in resignation as time when it shall take effect. 100WVa253, 130SE 456.

462-84 25 OhA339, 158NE552. [b] **One appointed until "next regular election"** is held at least de facto officer. 25 OhA339, 158NE552.

463-85 25 OhA339, 158NE552.

463-96 [b] **County court.**-100WVa253, 130SE456.

463-97 100WVa253, 130SE456 (after appointment to fill vacancy).

463-97½-New. In some jurisdictions the county court has authority to accept the resignation of a justice of the peace to take effect on a future day. 100WVa253, 130SE456.

463-7 [b] **In Philippines.**-51Philippine370.

463-7½-New. In Philippines justice of peace of one municipality may be transferred to another where public interest requires it. 51Philippine370.

463-7¼-New. Such transfer can be made only by governor general with advice and consent of Philippine senate. 51Philippine370.

463-7¼-New. Such transfer is in legal effect a combined removal and appointment. 51Philippine370.

465-24½-New. To oust the justice of the peace after his election to office, the appointee to the office to fill the vacancy has burden to establish his right. 230Ky93, 18SW(2d)859(1stcase).

465-34 120Kan162, 242P136. [b] **Authority of de facto justice** may not be challenged by habeas corpus proceedings. 25 OhA339, 158NE552.

466-36½-New. An agreement between a justice of the peace and an attorney that the former will not collect costs from the latter or his clients is invalid. 38GaA485, 144SE328.

467-58 194Wis229, 215NW896.

467-63½-New. Justices while holding court act as judicial officers. 110Conn 482, 148A551.

467-66 [c] **Constitution providing for justices'** appointment refers to officers. wont to exercise administrative powers when not acting judicially. 110 Conn482, 148A551.

468-75 97CalA552, 276P110; 12LaA 219, 125S756; Oh 171NE404 (ordinance). [a] Ida 293P322; Wash 291P 1111. [b] (4) Wash 291P1111 (searches and seizures).

469-76 Ida 293P322.

469-77 Ida 293P322 (holding fee unauthorized under statute).

469-85½-New. Allowance of salary for conducting small claims court is held discretionary with county commissioners. 44 Ida228, 256P102.

469-86 237Mich390, 211NW665.

470-3 But see 101CalA418, 281P726.

471-42 39GaA508, 147SE401; 245 IllA 517; 148Va424, 139SE252, 55ALR279.

472-47 148Va424, 139SE252, 55ALR 279.

473-51 See also 39GaA508, 147SE401.

474-64 Utah 280P729 (retaining money delivered to him to satisfy garnishee executions after garnishment quashed and action dismissed).

475-73 Utah 280P729 (retention of garnishee money after setting aside garnishment). [a] **Acts held ministerial.**-Utah 280P729.

475-80 108WVa658, 152SE527.

477-8 148Va424, 139SE252, 55ALR 279.

477-22 Utah 280P729. [a] (3) To warrant finding that justice retained money delivered to satisfy execution after district court dismissed case. Utah 280P729. (4) To make prima facie case against justice. Utah 280P729.

480-90½-New. In some jurisdictions action at law on official bond of justice can be prosecuted only in name of state. 108WVa658, 152SE527.

481-5 245 IllA517.

481-6 245 IllA517.

482-32 108WVa658, 152SE527 (instruction held erroneous as ignoring proper measure of damages).

482-37 149Miss1, 115S112.

483-53 [c] 209Ky703, 273SW465 (indictment for willful neglect of duty).

484-61 86PaSuper5.

484-65 [a] 209Ky703, 273SW465 (willful neglect of duty).

484-66 [a] **Instruction held correct.**-86PaSuper5.

487-26 CalA 290P522; CalA 292P656; 220MoA676, 293SW512; 101WVa591, 133SE316.

488-27 208Cal 429, 281P611; 102CalA 675, 283P854; CalA 283P855; MoA 16 SW(2d)709; MoA 26SW(2d)816; Nev 284P766; 55ND383, 213NW481; 5Pa Dist&Co 179; 46Philippine407; 101 WVa591, 133SE316. [b] **Jurisdiction of stipendiary magistrate.**-NS [1925] 3DomLR101. [c] **In Mississippi.**-155 Miss179, 124S334(2dcase).

488-28 220MoA676, 293SW512. [a] 76 Mont366, 245P871.

488-29 220MoA676, 293SW512. [a] Cal 289P825 (jurisdiction dependent on population); 104NJL465, 142A341.

488-31 79CalA482, 250P183; 220MoA 676, 293SW512; Mont 293P315; 124 Okl 241, 255P154; 5PaDist&Co 179; 101WVa591, 133SE316.

489-32 CalA 250P183; CalA 292P656;

220MoA676, 293SW512; MoA 26SW (2d)874; Mont 293P315; 124 Okl 241, 255P154; 101WVa591, 133SE316.
489-33 218MoA611, 265SW991; 153 Tenn240, 280SW1019 (justice's court within its jurisdiction has all powers of court of record).
490-36 116Tex489, 294SW844; Tex CivA 14SW(2d)82. [b] In Connecticut.-110Conn482, 148A551.
490-38½-New. Time of jurisdiction. Jurisdiction of subject matter is conferred at time issue is joined. 126Misc 266, 214NYS139.
490-38½-New. Statute requiring justice to give preference to certain cases does not justify him in refusing to accept jurisdiction of unpreferred case over which he has jurisdiction. Wash 292P741.
490-41 95CalA414, 273P150.
491-43 Cal 289P825 (statute basing jurisdiction on population).
491-46 Cal 289P825.
491-50 [a] Mo 21SW(2d)767.
491-55½-New. A law relating to jurisdiction of justices of the peace in certain counties is not unreasonable because it denies the right to sue defendant in an adjoining township but permits him to be sued if he is found in such adjoining township. Mo 21SW(2d) 767.
491-58 [b] Township justice court is entirely different and distinct from city justice court though both have same boundaries. 207Cal 341, 278P430.
492-64 [a] (8) Suit of doctor for services rendered employee under contract with an employer. 154Tenn187, 289SW 505. (9) Garnishee from municipal corporation amount due from garnishee to judgment creditor. 152Wash327, 277P 852. (10) Confiscate goods offered for sale on Sunday. 149SC52, 146SE686.
494-80 87PaSuper411; 14PaDist&Co 103.
497-26 219Ala8, 121S33, 63ALR1453. [b] (1) 6PaDist&Co 475. [l] (1) 11Pa Dist&Co 231. (2) 9PaDist&Co 246; 9Pa Dist&Co 279; 10PaDist&Co 215; 10Pa Dist&Co 727; 10PaDist&Co 820; 13Pa Dist&Co 109. (4) Jurisdiction of alderman in action arising from automobile collision is limited to damages which are direct result of collision, that is, where action of trespass vi et armis would lie, and he has no jurisdiction to allow consequential damages. 13Pa Dist&Co 109.
498-40 8PaDist&Co 658.
499-45 13PaDist&Co 109. [a] (3) Alderman has no jurisdiction to allow consequential damages arising from automobile collision. 13PaDist&Co 109 (loss of use of automobile after collision held consequential damages). [c] Damages held direct.-13PaDist&Co 109.
499-49 50Nev125, 253P671; 189NC729, 128SE326; 58ND295, 225NW806.
500-52 See also 50Nev125, 253P671.
501-61 [f] (11) 7Alaska47.
501-62 189NC729, 128SE326.
502-64 189NC729, 128SE326.
502-68 155SC528, 152SE702 (title held not involved in cause).
503-84 [a] (3) Justice has jurisdiction of action on vendor's promise, made after conveyance by warranty deed, to discharge assessment lien existing at time of conveyance. 189NC729, 128SE 326.
504-99 [a] Recovery of assessment paid by purchaser.-189NC729, 128SE 326.
504-5 191NC412, 131SE750.
506-22 15DelCh195, 134A99; 132SC 130, 128SE718 (where tenant did not deny execution of lease and offered no evidence in support of allegation of duress and fraud); 41Wyo 509, 287P316 (action of forcible entry and unlawful detainer). [f] 80Mont53, 257P1034. [h] In South Carolina.-132SC130, 128SE 718. [i] In Indiana.-87IndA431, 155 NE185.
507-28 141SC29, 139SE208.
508-39 [e] (4) 30Hawaii160.
509-49½-New. An attempt to show that the title to real estate will come in question does not deprive the magistrate of jurisdiction to determine whether the relation of landlord and tenant exists. 141SC29, 139SE208.
510-62½-New. Justice has no jurisdiction where the city had not authorized or assented to bringing of suit as required by statute. 6PaDist&Co 196.
511-70 [a] Action on health and accident policy has been held not within jurisdiction of justice. Mich 233NW349.
512-98½-New. [§ 78a] 6. Nonresidents. Under constitutions and statutes a justice of the peace has jurisdiction of an action by a nonresident plaintiff against a nonresident defendant found and personally served with summons but neither a householder nor a freeholder in the district in which sued. 155Miss179, 124S334(2dcase).
512-1 82Colo 391, 260P524; 86 IndA 462, 158NE583; Mo 29SW(2d)83; 116 Tex489, 294SW844; TexCivA 276SW 746. [b] Where demand is not within justice's jurisdiction, it should be dismissed. 86 IndA462, 158NE583.
513-2 13PaDist&Co 109 (statute held not to limit jurisdiction of justice to one hundred dollars instead of three hundred dollars in action for damages resulting from automobile collision). [b] CalA 286P764. [d] 10PaDist&Co 163; 13PaDist&Co 19 (trespass to recover damages to automobile); TexCivA 276SW746. [j] In California.-289P825.
514-8½-New. Some statutes limiting jurisdiction to claims not exceeding a stated amount apply only to cases where defendant is nonresident of county in which damages were sustained. 13Pa Dist&Co 19.
515-13 116Tex489, 294SW844; Tex CivA 275SW163 (complaint in suit on note); TexCivA 287SW299. See also 11 PaDist&Co 101.
515-15 TexCivA 275SW163; 102WVa 367, 135SE280.
515-17 TexCivA 28SW(2d)233.
515-19 TexCivA 276SW746.
516-25 TexCivA 287SW299.
516-28 221MoA666, 283SW459.
518-58 TexCivA 276SW769. [a] Cross action.-TexCivA 276SW769.
519-68 102WVa367, 135SE280.
519-70 155Miss343, 124S430(2dcase).
519-71 155Miss343, 124S430(2dcase).
519-73 177Ark227, 6SW(2d)285.
520-84 245 IllA239.
520-92 But see 38GaA293, 143SE794. [c] In Oklahoma.-137 Okl 16, 278P273.
520-95 149Miss21, 115S116.
521-99 TexCivA 284SW643.
521-4 [b] In Oklahoma.-114 Okl 46, 243P935.
521-9 221MoA666, 283SW459.
521-11 149Miss21, 115S116.
522-12 149Miss21, 115S116.
522-16 149Miss21, 115S116.
522-17 MoA 296SW845.
522-24 See also 115Nebr366, 213NW 339, 341 [citCJ].
522-26 See also 115Nebr366, 213NW 339, 341 [citCJ].
523-31 Wash 292P412.
523-35 108WVa78, 150SE229. [a] Grouping items.-100WVa487, 130SE656.
523-41 149Miss128, 115S194.
524-47 163Ga825, 137SE244; 221MoA 666, 283SW459; MoA 297SW706. [a] 221MoA666, 283SW459.
524-48 163Ga825, 137SE244. [c] Claim held liquidated.-GaA 155SE535.
524-51 163Ga825, 137SE244.
525-58 221MoA666, 283SW459.
525-61½-New. Excess cannot be waived where a default judgment was entered on demand exceeding jurisdiction. 221MoA666, 283SW459.
527-91 MoA 280SW730; MoA 18SW (2d)119. [d] (1)MoA 297SW710.
528-96 TexCivA 8SW(2d)778.
528-2 MoA 280SW730.
528-4½-New. In a suit for possession and for rentals under deed and contract, defendant under general denial may show that the contract was something other than it purported to be on its face, and construction of the contract by the justice is not assumption of jurisdiction in equity. 220MoA1070, 282SW74.
529-13 TexCivA 296SW639. [a] (1) See also MoA 287SW824.
530-27 3Del118, 131A320.
530-28 248 IllA480.
531-31 3Del 118, 131A320.
531-33 19 OhA324.
532-38 [c] 19 OhA324.
532-40 [a] 35GaA618, 134SE179.
532-44 35GaA618, 134SE179.
533-52 23AlaA303, 124S503 (in landlord's suit for rent); 27 OhA116, 161NE 22; TexCivA 14SW(2d)82. [d] (1) 173 Ark48, 291SW989.
533-53 219Ala119, 121S398.
534-55 [a] (9) In Kansas justice may cause attachment of property in his county, though owner resides in another county and cannot be served in county of justice. 118Kan752, 236P823.
535-63 171Ark1097, 287SW384.
536-72 [a] (1) 81CalA711, 254P601. (3) Justice has no jurisdiction of defendant served outside of county in action on contract not to be performed therein where such defendant was not and never had been resident of county. 195Cal 569, 234P371. (4) In such case justice has jurisdiction to hear and determine motion to quash service of summons. 195Cal 569, 234P371. [e] (3) Justice of county in which cause of action arose acquires no jurisdiction of resident of another county by service of summons in latter county. 105WVa 4, 141SE396.
536-73 118 Okl 158, 247P370; 10Pa Dist&Co 322; 13PaDist&Co 248; 148 Wash265, 268P871, 61ALR374; 165W Va4, 141SE396. [e] In West Virginia.-101WVa591, 133SE316.
536-74 87Colo 178, 285P1104; 125Kan 428, 264P1054; 100WVa505, 130SE669. [a] Justice is town officer, and under Justice's Court Act § 16 his power and authority to hold court does not extend beyond limits of his town. 129Misc545, 222NYS696. [b] "Precinct" may be substituted for word "township." 87 Colo 178, 285P1104.
536-75 222MoA777, 9SW(2d)865; 222 MoA782, 9SW(2d)867. [a] But see 129 Misc545, 222NYS696.
536-76 [f] (3) MoA 11SW(2d)1094(1st case). (4) County court can limit justice's jurisdiction to territory outside justice districts. MoA 16SW(2d)709.
537-77 51Philippine370. But see CalA 289P651. [a] (4) Under L. (1927) c 29 separating city of Ogdensburg from town of Oswegatchie, justices residing in city have jurisdiction throughout entire town (129Misc545, 222NYS696). (5) but justices residing outside city limits have no jurisdiction to hold court in city (129Misc545, 222NYS696).
537-78 125Kan428, 264P1054. [a] Entering judgment in docket within jurisdiction does not give judgment validity. 125Kan428, 264P1054.
537-80 [b] (6) Justice cannot under Consol. St. § 1489 acquire jurisdiction of single defendant by summons issued in one county and addressed to officer of another county, though personally served in latter county. 193NC568, 137 SE718.
538-89 116Tex489, 294SW844.
538-99½-New. , or by incorrect statement of oral pleadings. 116Tex489, 294 SW844.
539-11½-New. Failure to enter judgment in statutory time does not cause loss of jurisdiction. 121Kan39, 245P 743.
539-19 222AppDiv440, 226NYS377; 25 OhNPNS161.
540-21½-New. , nor will refusal to grant continuance cause loss of jurisdiction, although statute is mandatory. 121Kan39, 245P743.
541-42 [d] In Kentucky.-223Ky291, 3 SW(2d)616.
542-48 146Miss533, 112S675; 111Tex Cr54, 10SW(2d)728. [f] 9PaDist&Co 276.
543-63 163Ga825, 137SE244; TexCivA 298SW618, 619 [quotCJ]. [a] (3) Relationship to a party does not disqualify a justice to issue an execution. 163Ga 825, 137SE244; TexCivA 298SW618.
543-65 146Miss533, 112S675.
545-80 See also 149Miss718, 115S879, 882 [citCJ]. [b] (2) Miss 118S831; 152 Miss421, 120S168.
545-89 MoA 28SW(2d)407.
546-99 245 IllA239; 125Kan428, 264P 1054.
546-6 87Colo 178, 285P1104; 221MoA

666, 283SW459; 7PaDist&Co 443; Tex CivA 296SW991.

547-7 87Colo 178, 285P1104.

547-9 221MoA666, 283SW459; MoA 25 SW(2d)541 (territorial jurisdiction cannot be waived).

547-15 146Miss533, 112S675; 148Miss 599, 114S395.

547-19 38GaA293, 143SE794; 146Miss 533, 112S675.

548-23 146Miss533, 112S675.

548-28 21AlaA469, 109S373; Del 151A 717; 318Mo 643, 300SW714, 715 [quot CJ]; 220MoA676, 293SW512; MoA 24 SW(2d)710; MoA 26SW(2d)816; MoA 26SW(2d)874; Mont 293P315; 124 Okl 241, 255P154; 5PaDist&Co 179.

549-30 MoA 287SW824.

549-32 318Mo 643, 300SW714, 715 [quotCJ].

550-34 240Mich495, 215NW420, 421 [quotCyclopedia].

550-40 TexCivA 293SW1113. [c] **Amount involved in foreclosure action** must be shown by pleadings. TexCivA 293SW1113.

551-43 SD 231NW897.

552-72 177Ark227, 6SW(2d)285; 195 Cal 569, 234P371; 87Colo 178, 285P 1104; 245 Ill A239; MoA 26SW(2d)874; Mont 293P315; 5PaDist&Co 179; Sask [1926] 4DomLR1126. But see 223Ky 291, 3SW(2d)616.

552-75 MoA 9SW(2d)549.

553-77 [a] **Statutes should be liberally construed.**–77Mont170, 253P271.

553-80½-New. Where a justice court case is commenced according to justice court procedure, it is and remains as such, and the procedure must be according to justice court procedure through to final disposition. 200Wis284, 227NW 24.

553-80½-New. Where the papers and record showed that the case was properly in the justice court branch of the municipal court, an objection that the procedure should be according to the circuit court procedure is untenable. 200 Wis284, 227NW24.

555-21 [b] **In Texas.**–CivA 297SW560.

556-31 55ND383, 213NW481.

556-32 222MoA852, 6SW(2d)1012; 55 ND383, 213NW481.

557-39 222MoA852, 6SW(2d)1012; 55 ND383, 213NW481, 482 [citCJ].

557-41 55ND383, 213NW481.

557-58 77CalA207, 246P165. [g] 78 Mont40, 252P313. [i] **Defendant's residence in township** is held jurisdictional requirement. 77CalA207, 246P165.

558-59 204 Iowa1032, 216NW715.

558-62 [d] **In Mississippi.**–143Miss652, 109S601.

559-63 21AlaA438, 109S176. [g] **Special contracts.**–101CalA619, 281P1031 (check held not special contract within statute where payment had been stopped).

559-64½-New. Service of a broker in supervising packing, checking, marking, and loading a stock of merchandise accepted by the seller as a part of the sales price of land, which service was merely incidental to the sale of the land by the broker, and was covered by commission theretofore agreed upon, is not within the meaning of the statute authorizing suits to recover for labor actually performed to be brought where such labor is performed. TexCivA 8SW (2d)557.

559-65 78Mont40, 252P313. [e] **Foreign corporations.**–78Mont40, 252P313.

559-66 [b] (2) MoA 8SW(2d)1086.

559-67 77CalA207, 246P165.

559-68½-New. Replevin by conditional vendor must be brought in county of defendant's residence. 77CalA207, 246P 165.

560-83 148Miss521, 114S323.

561-90 MoA 29SW(2d)193.

561-1½-New. Defendant cannot be deprived of statutory right to change of venue because codefendant fails to appear. 130Kan808, 288P563.

561-1½-New. Defendant demanding jury trial and applying for change of venue is "adverse party" within Kansas statute requiring change of venue. 130 Kan808, 288P563.

561-2 130Kan808, 288P563.

562-15 [d] (3) Failure to indicate justice court qualified to try case. Tex CivA 14SW(2d)959.

564-36 MoA 29SW(2d)193.

565-53 [d] **Where neither defendant nor his attorney was notified of trial,** judgment was premature and voidable. MoA 29SW(2d)193.

565-64 121Kan39, 245P743.

565-70 58ND295, 225NW806.

566-77 128Kan446, 279P4.

569-15 [c] MoA 280SW439. [g] **Where all of partners sued on partnership claim** are not before court, it is without jurisdiction of action. TexCivA 9SW(2d) 426.

570-42 247Mich546, 226NW258; 5Pa Dist&Co 252.

572-74 [d] (1) 14PaDist&Co 102.

572-80 [b] See also 3Del 525, 140A151. [g] **Short summons cannot be issued** against an artificial person. 6PaDist &Co 329.

572-84 5PaDist&Co 252, 253 [citCyc].

573-95 6PaDist&Co 329.

573-1 [c] 33NM620, 274P44. [g] (2) TexCivA 297SW532.

574-11 [d] **Standard of time.**–14PaDist &Co 53.

574-12 8PaDist&Co 56.

574-15½-New. In some jurisdictions a summons issued and returnable not to the regular term, but to a special day, is not void, but merely irregular. 153 Miss409, 121S121.

575-16 152Miss266, 119S186.

575-26 5PaDist&Co 252, 253 [citCyc].

576-31 5PaDist&Co 252.

576-35 [b] (2) Service made after expiration of term to which suit is returnable is no service, 39GaA205, 146 SE502(1stcase).

576-37 192NC497, 135SE291. [b] (1) 5PaDist&Co 252. (2) Summons directed by justice to constable in another county and served by such constable confers no jurisdiction upon justice, as not compliance with statute. 6PaDist &Co 40. [c] **Statute held mandatory.**–6 PaDist&Co 40.

576-39 10PaDist&Co 728.

576-40 [f] **Leaving summons with employee of defendant at place of business** does not give justice jurisdiction. 103 WVa712, 138SE365. [g] **Leaving copy at defendant's last place of abode,** without issuing attachment in further continuance of suit, is insufficient. 247 Mich546, 226NW258.

577-43 79CalA759, 250P1104.

577-48 [h] 127 Okl 195, 260P44.

578-53 [c] 153Miss796, 121S823.

580-66 [c] MoA 13SW(2d)581.

580-74 9PaDist&Co 445; 13PaDist&Co 226. [c] MoA 26SW(2d)874 (sufficient after judgment).

581-84½-New. Where return to writ against two persons not partners shows personal service on only one, judgment against the other for want of appearance is invalid. 13PaDist&Co 226.

581-85 See also 8PaDist&Co 658.

581-94 [a] **Where officer made good and valid return on writ of seizure** wherein defendants were summoned to appear and defend the action, justice had jurisdiction, though return on summons was defective. 142Miss403, 107S 551.

583-27 77CalA207, 246P165.

584-28 MoA 16SW(2d)709.

584-29 84Mont173, 274P495.

584-30 101CalA619, 281P1031.

584-41 77CalA207, 246P165.

585-44 170Ark945, 282SW1; MoA 16 SW(2d)709; 48Nev425, 233P40.

586-59 But see MoA 16SW(2d)709.

587-70 NM 290P1023(1stcase). [b] (1) MoA 8SW(2d)1086.

587-72 See also MoA 11SW(2d)1094 (1stcase).

587-74 86 IndA462, 158NE583; MoA 280SW448; 84Mont173, 274P495; 5Pa Dist&Co 252; 106WVa615, 146SE625.

587-75 170Ark945, 282SW1; 142Miss 403, 107S551; 195NC858, 142SE8; 106 WVa615, 146SE625.

590-15 193NC568, 137SE718.

590-18 See also 88 IndA450, 164NE501.

591-32 127 Or635, 271P992.

591-38 [f] 160Tenn329, 24SW(2d)881.

592-58 21AlaA469, 109S373.

593-89 193NC568, 137SE718.

594-7 21AlaA469, 109S373.

594-10 21AlaA469, 109S373.

597-61 117 OhSt298, 158NE541, 55 ALR1118.

598-86 127 Okl 195, 260P44.

599-5½-New. A sale of chattels taken under a writ of attachment is void where there has been no personal service of summons, and no appearance, and the case is not one allowing service by publication. 127 Okl 195, 260P 44.

599-19½-New. A statute prescribing procedure for releasing of attachments, is inapplicable to proceedings in justice courts. 97CalA409, 275P849.

599-22 117 OhSt298, 158NE541, 55 ALR1118.

600-34 Contra. 193NC568, 137SE718.

601-54 160Tenn329, 24SW(2d)881 (judgment against surety is void where justice lacked jurisdiction of subject matter in attachment proceeding).

602-84½-New. In some jurisdictions a prior adjudication that an attachment was wrongfully procured is not a condition precedent to liability for wrongful attachment. 127 Okl 117, 260P32.

603-12 235Mich191, 209NW102; 241 Mich34, 216NW390; 220MoA676, 293 SW512.

603-18½-New. In personal action before justice of peace, where garnishee summons is issued at commencement of action, procedure in, and effect of, garnishment is controlled by statutes relating to garnishment in attachment before justices of the peace. 116 Okl 13, 243P135.

604-26 [a] (2) No bond is necessary where garnishment is had in a justice's court. Okl 293P195.

604-30 [a] See also MoA 19SW(2d)22. [c] **Defect in summons may be waived** by filing answer. Okl 293P195.

604-36 220MoA676, 293SW512.

605-38½-New. Disclosure by garnishee of property or money in his possession or control is necessary before application may be made for a second summons. 55ND231, 212NW925.

605-42 [a] 55ND231, 212NW925.

605-58½-New. Prior lien of garnishee against fund or property garnished is not affected by lien of garnishment, where garnishee summons is issued at commencement of personal action. 116 Okl 13, 243P135.

606-69 39GaA462, 147SE720.

608-4½-New. In some jurisdictions where the garnishee defendant fails to appear and make disclosure on the return day, in a case where the judgment against the principal defendant has become final, the justice, by adjourning the case on the third day thereafter instead of entering judgment, loses jurisdiction and a judgment entered on the return day is void. 241Mich34, 216 NW390.

609-25½-New. **Corporation garnishee.** Under some statutes if judgment has been obtained in principal suit and has become final, justice may render judgment against corporation garnishee which has failed to make disclosure the third secular day after the return day unless the corporation shows cause. 235Mich191, 209NW102.

609-25½-New. If a judgment has not been obtained therein or has not become final, proceedings are required to be "the same as in cases against individuals," and a summons to show cause is prerequisite to a valid judgment. 235Mich191, 209NW102.

609-27½-New. In such a case an affidavit of illegality will not lie to an execution issued on the judgment. 36 GaA776, 138SE250.

610-41 310Mo 378, 276SW877 (false answer contributory to contingency on which policy becomes payable must be pleaded).

610-51½-New. A judgment in garnishment proceedings is subject to collateral attack where it was rendered after the justice had lost jurisdiction. 241Mich 34, 216NW390.

610-51½-New. Justice could not, by dismissing a suit for want of prosecution, prevent plaintiff from taking an appeal without moving to set aside the judgment of the justice of the peace. 178Ark191, 10SW(2d)8.

610-51½-New. A judgment is void where the summons or notice that a

bank was summoned as garnishee was not in writing as required by statute. **MoA** 19**SW(2d)**22.

610-59½-New. Reinstatement of a dismissed garnishment suit at a subsequent term, without notice to garnishee, is void. **TexCivA** 22**SW(2d)**334.

611-74½-New. A justice of the peace cannot retain money delivered to satisfy a garnishee execution after the district court sets aside the judgment and orders all executions quashed. **Utah** 280**P**729.

612-98 169**Ark**745, 276**SW**578; 34**GaA**190, 129**SE**6; 121**Kan**34, 245**P**1024; 124**Kan**582, 261**P**578; 313**Mo** 268, 281**SW**402; 315**Mo** 1229, 288**SW**13; **MoA** 278**SW**1084; **MoA** 280**SW**60; 222**MoA** 251, 296**SW**840; **MoA** 298**SW**1043; **MoA** 7**SW(2d)**1025; **MoA** 14**SW(2d)**536; **MoA** 26**SW(2d)**832; 76**Mont**366, 245**P**871; 194**NC**352, 139**SE**593; **TexCivA** 284**SW**643; **TexCivA** 291**SW**329; **TexCivA** 8**SW(2d)**256; 106**WVa**254, 145**SE**390; 36**Wyo** 191, 253**P**858. [c] (1) **TexCivA** 284**SW**643; **TexCivA** 291**SW**329.

613-1 169**Ark**745, 276**SW**578; 179**Ark**600, 17**SW(2d)**305; **Ark** 31**SW(2d)**539; 30**Hawaii**434; 76**Mont**366, 245**P**871; 116**Tex**489, 294**SW**844; **TexCivA** 1**SW(2d)**686; **TexCivA** 24**SW(2d)**735; **TexCivA** 26**SW(2d)**663.

613-4 121**Kan**34, 245**P**1024.

614-6 **TexCivA** 19**SW(2d)**216.

614-11 **MoA** 290**SW**90; 76**Mont**366, 245**P**871; 115 **Okl** 51, 241**P**749 (pleadings in justice court not strictly construed against pleader); 144 **Okl** 56, 289**P**703; **TexCivA** 13**SW(2d)**467; 36 **Wyo** 191, 253**P**858.

614-16 [a] (1) 173**Ark**705, 293**SW**43.

614-17 30**Hawaii**191; 194**NC**352, 139 **SE**593.

616-23 42 **Ida**443, 246**P**5; 313**Mo** 268, 281**SW**402. [h] **Designation of justice.**—**Wash** 292**P**741.

617-25 [a] **Justice court judgment showing cause of action was on open account for one hundred and eighty dollars** held short written statement of facts within meaning of statute providing that plaintiff shall file the account or short written statement of facts on which action is based. 170**Ark** 945, 282**SW**1.

617-27 **MoA** 280**SW**439.

617-42 **MoA** 277**SW**605.

617-47 313**Mo** 268, 281**SW**402; **MoA** 278**SW**1084; **MoA** 280**SW**54; **MoA** 280 **SW**60; **MoA** 285**SW**181; **MoA** 13**SW (2d)**1105; 115 **Okl** 51, 241**P**749 (pleading sufficient if cause of action upon any ground is stated). [s] (11) 169 **Ark**745, 276**SW**578 (allegations should be read as what is by fair intendment alleged); 149**Miss**334, 115**S**561; 313**Mo** 268, 281**SW**402; **MoA** 15**SW(2d)**943; **MoA** 285**SW**181. (12) To state cause of action for services rendered but not on judgment. **MoA** 13**SW(2d)**1105. (13) Other statements held sufficient. 157 **Miss**565, 128**S**567. [u] 11**PaDist&Co** 526. [v] **Petition on account held sufficient.**—40**GaA**119, 149**SE**67.

619-49 [è] (3) Allegations held insufficient. **MoA** 295**SW**491. [f] **MoA** 285 **SW**771. [g] (2) Words "and interest" added to statement of amount due for goods is sufficient to show that interest was sought. **MoA** 273**SW**133. [i] **MoA** 285**SW**771. [r] (11) **MoA** 285**SW**771.

620-51 313**Mo** 268, 281**SW**402; **MoA** 277**SW**605; **MoA** 278**SW**1084; **MoA** 290 **SW**90; **MoA** 295**SW**474; **MoA** 296**SW** 224; **MoA** 297**SW**468; **MoA** 7**SW(2d)** 1025. [d] (10) Sale of hay according to contract attached to statement, performance by plaintiff and breach by defendant is sufficient. 313**Mo** 268, 281 **SW**402. (11) In account for services. **MoA** 26**SW(2d)**832.

622-54 179**Ark**524, 16**SW(2d)**1000; 124**Kan**582, 261**P**578; 222**MoA**251, 296 **SW**840; 76**Mont**366, 245**P**871. [a] **MoA** 277**SW**949.

622-55 76**Mont**366, 245**P**871 (general denial).

622-61 220**MoA**1273, 290**SW**82.

622-65 **MoA** 296**SW**255. [a] **MoA** 295 **SW**482; **MoA** 31**SW(2d)**230.

623-71 See also 38**GaA**426, 144**SE**213.

623-74 36**Wyo** 191, 253**P**858. [c] (3) Sufficient to raise issue that plaintiff was not holder in due course of note sued on. 36**Wyo** 191, 253**P**858. [e] **Affidavits held insufficient.**—**MoA** 3**SW(2d)** 261.

624-80 76**Mont**366, 245**P**871 (may be oral).

624-83 [f] **That land is not situated in precinct of justice** can be raised only by plea in abatement. 213**Ala**9, 104**S** 127.

624-93 [a] **In Delaware** defendant must plead any cross account, demand, or cause of action as a set-off or counterclaim or, in default thereof, be forever barred from recovering same. 3 **Del** 118, 131**A**320.

624-94 [a] 141**Miss**92, 106**S**95.

624-98 **MoA** 14**SW(2d)**456. [g] **Mo** 29 **SW(2d)**83.

625-1 But see 87**PaSuper**411.

625-4 81**Mont**248, 263**P**693; 123 **Okl** 76, 250**P**136.

625-11 169**Ark**745, 276**SW**578.

625-12 169**Ark**745, 276**SW**578 (every fair and reasonable intendment indulged in support of pleading demurred to); 40**GaA**799, 151**SE**526. [c] (2) Cross petition, setting up counterclaim in amount exceeding jurisdiction of justice, is demurrable. 19 **OhA**324. (3) Can only be raised by demurrer or answer and not by motion. **Nev** 284**P**766. [d] (2) 42 **Ida**443, 246**P**5. (4) Want of allegation that defendant failed to return note has been held not ground for general demurrer, where it was alleged that plaintiff was at time of bringing suit lawful owner and holder of note. 42 **Ida**443, 246**P**5.

626-13 But see **TexCivA** 8**SW(2d)**256.

626-24 169**Ark**745, 276**SW**578.

628-46 **Ind** 166**NE**434.

628-52 [b] (1) **TexCivA** 11**SW(2d)**373.

629-63 106**WVa**254, 145**SE**390.

629-68 [c] **TexCivA** 2**SW(2d)**488.

629-69 124**Kan**582, 261**P**578.

630-83 124**Kan**582, 261**P**578. [d] (6) Bill of particulars reciting services of one hundred dollars is not inconsistent with complaint for sixty dollars where there were two payments. **Ind** 166**NE** 434. (7) Other instances. 254 **Ill**A63. [f] **As against demurrer** bill of particulars showing ground of recovery is sufficient. 144 **Okl** 56, 289**P**703.

631-87 124**Kan**582, 261**P**578.

631-95 [a] **MoA** 296**SW**845.

632-97 [b] (1) **MoA** 6**SW(2d)**1001.

633-21 **MoA** 280**SW**54.

633-22 315**Mo** 1229, 288**SW**13; **TexCivA** 11**SW(2d)**373.

634-27 123 **Okl** 76, 250**P**136.

634-29 [b] (2) **MoA** 31**SW(2d)**230. (5) **MoA** 31**SW(2d)**230.

635-35 [b] **MoA** 295**SW**482.

635-49 315**Mo** 1229, 288**SW**13; **MoA** 13 **SW(2d)**1105; **TexCivA** 291**SW**329.

636-50 **Ind** 166**NE**434.

636-55 124**Kan**582, 261**P**578.

636-56 **MoA** 278**SW**1084; **MoA** 29**SW (2d)**181.

637-57 124**Kan**582, 261**P**578.

637-61 173**Ark**25, 291**SW**813; **MoA** 15 **SW(2d)**943. [a] **In action on account** for merchandise by failing to require account to be made more definite and certain defendant waived any defects therein. **MoA** 7**SW(2d)**1025.

637-64 165**La**788, 116**S**186.

638-77 [c] **Judicial admissions** are evidential and dispense with necessity for further evidence for decision on merits and, when accepted, carry same probative force as testimony of witnesses. 85 **CalA**461, 259**P**491.

638-86 [b] 155**Miss**194, 124**S**333.

638-95 [c] (5) Evidence held sufficient to sustain finding that note sued on in justice's court had been properly filed with justice. 175**Ark**1107, 1**SW(2d)**558.

640-17 150**Miss**289, 116**S**286.

640-30 85**CalA**461, 259**P**491. [a] **Where only evidence consists in defendant's admissions** judgment must be on merits. 85**CalA**461, 259**P**491.

641-33 [b] (4) Under Code Civ. Proc. §§ 588 and 890a defendant is not entitled to dismissal where issue of law tried though not decided within two years. 81**CalA**396, 253**P**961.

641-40 192**NC**497, 135**SE**291.

642-63 241**Mich**34, 216**NW**390.

642-73 25 **OhNPNS**161.

642-78½-New. A continuance for more than ninety days is in legal effect a discontinuance. 25 **OhNPNS**161.

643-86 [a] **In Kansas.**—121**Kan**39, 245 **P**743.

644-2½-New. or on a garnishee, 193**NC** 568, 137**SE**718.

644-2½-New. although nonresident defendant has entered special appearance, 193**NC**568, 137**SE**718.

646-20½-New. Although on appeal from justice's court to circuit court allowance of costs is in discretion of court, 238**Mich**253, 213**NW**150.

646-20½-New. it is proper for court to announce award of costs in and by entry of judgment, 238**Mich**253, 213**NW**150.

646-20¼-New. rather than by a finding or conclusion made upon the main case, 238**Mich**253, 213**NW**150.

646-20½-New. even where judgment was entered by a judge other than the one making the findings. 238**Mich**253, 213**NW**150.

646-29 [e] **Failure of justice to notify** defendant of time to which continuance has been made at defendant's request does not deprive him of jurisdiction to render judgment against defendant. 200 **Iowa**850, 205**NW**510.

646-34 25 **OhNPNS**161.

648-70 104**Conn**291, 132**A**464.

649-89½-New. Trials may be had upon issues of law and issues of fact. 85**CalA** 461, 259**P**491.

649-89½-New. After case has been filed justice may exercise reasonable but not arbitrary discretion in arranging for trial. **Wash** 292**P**741.

650-23 85**CalA**461, 259**P**491.

651-32½-New. Where formal pleadings are not required there is no error in submitting an issue not pleaded. **MoA** 18 **SW(2d)**552 (fraud).

652-45 **Sale by one without title.** **BC** [1930] 4**DomLR**111.

653-92 137**Misc**832, 243**NYS**744.

654-5½-New. In some jurisdictions statutes provide for granting of new trial by justice of peace where verdict was obtained by fraud, partiality, or undue means, 36**Wyo** 191, 253**P**858.

654-5½-New. but such statutes have no application to a case tried by justice without jury. 36**Wyo** 191, 253**P**858.

654-10 [c] (2) Motion pending is overruled by operation of law after term expires. **TexCivA** 26**SW(2d)**921.

655-15 37**GaA**226, 139**SE**587.

655-18½-New. An appeal is a de novo investigation. 36**GaA**581, 137**SE**568.

655-19 37**GaA**226, 139**SE**587. [f] **Surety on bond may** be same party as surety on release bond in attachment. 37**GaA** 226, 139**SE**587. [g] **Bond suspends judgment** and presents de novo proceeding. 37**GaA**226, 139**SE**587.

656-33 36**GaA**581, 137**SE**568.

657-43 [a] **Clerical errors.**—240**Mich**468, 215**NW**360. [b] **Failure of judgment to recite service of process** does not render judgment void where docket entries show service. 150**Miss**729, 116**S**731.

657-44½-New. A judgment procured by fraud practiced upon defendant's attorney preventing him from attending court is binding until set aside in a court of equity. 163**Ga**825, 137**SE**244.

657-44½-New. Such fraud may be waived. 163**Ga**825, 137**SE**244.

657-44¼-New. Judgments of the justices of the peace, adjudicating the rights of parties to causes of which the justice courts had jurisdiction, are effective and valid until set aside in some manner provided by law. 178**Ark**163, 10**SW(2d)**489.

657-49 218**Ala**663, 120**S**475(2dcase); 195**Cal** 569, 234**P**371; **DelSuper** 143**A** 456; **MoA** 25**SW(2d)**541; 194**NC**208, 139**SE**222. See also **TexCivA** 11**SW(2d)** 373. [a] (3) Judgment rendered at date other than that fixed by commissioner's court for holding term of court is void. **TexCivA** 297**SW**560. [b] (1) 58 **ND**295, 225**NW**806.

657-50 136**Misc**215, 239**NYS**347.

657-51 222**AppDiv**440, 226**NYS**377; **TexCivA** 294**SW**345.

657-53 48**Nev**425, 233**P**40.

657-54 39GaA205, 146SE502(1stcase); 54Mont173, 274P495; 48Nev425, 233P40; 193NC568, 137SE718; 6PaDist&Co 329.
658-55 9PaDist&Co 445.
658-59 193NC568, 137SE718.
658-63½-New. Where a justice's court has jurisdiction of the parties and subject matter, the fact that the justice is related to one of the parties within fourth degree of consanguinity does not render his judgment absolutely void, but only voidable, and judgment cannot be attacked by affidavit of illegality on such ground. 38GaA293, 143SE794.
660-90 [a] (2) Where defendant in action to recover debt appears in person in response to summons on day set for trial and orally acknowledges judgment, judgment entered thereon is in effect one on pleadings and is not open to objection that as confession of judgment it was void because not evidenced by writing, executed by defendant. 77Mont170, 253P271 [overr 11Mont251, 28P296].
662-25 Nev 284P766.
663-26½-New. Where after service of defendant with summons plaintiff stipulates that if defendant pays amount sued for in specific installments he need not answer or otherwise plead until further written notice, defendant was entitled to such written notice before any further court action against him, 75 CalA770, 244P110.
663-26½-New. and act of plaintiff taking judgment with giving such notice constituted fraud. 75CalA770, 244P110.
663-36½-New. although defendant may have breached his agreement as to payment of indebtedness. 75CalA770, 244P110.
664-44 [c] But see 19 OhA127. [f] (3) Citation to summon "railroad" company, where pleading alleged "railway" company, and otherwise defective, held insufficient. TexCivA 208SW(2d)842. [r] In Mississippi.-153Miss409, 121S121.
665-50 [a] (3) Erroneous indorsement on summons of amount claimed does not render void judgment by default for less amount within jurisdiction of justice. 19 OhA127. [d] Judgment entered at regular term of court, but based upon return of process at special day named therein, from which case was continued to regular term is not void. 153Miss 409, 121S121.
665-59½-New. Upon default before court is authorized to render judgment damages must be ascertained and assessed upon evidence under statutes. Nev 284P766.
666-74 [c] Justice court may not enter default judgment for amount exceeding that stated in summons. MoA 26 SW(2d)816.
666-78 77CalA254, 246P340.
667-80 MoA 29SW(2d)193.
668-94 [b] (2) 100CalA146, 279P812, (10) Notice of rendition of judgment served on defendants is not invalid because not "signed by the justice." 100 CalA146, 279P812.
669-24 TexCivA 287SW299; TexCivA 291SW329.
670-25 TexCivA 291SW329.
670-33 196NC696, 146SE807. [a] 8Pa Dist&Co 109. [b] Discontinuance is not effected by withholding judgment for over four years after hearing where delay is not due to plaintiff's conduct. Ala 130S536. [i] In Alabama rules obtaining in circuit courts obtain in justice's court as to time for rendition of judgment, statute not providing therefor. Ala 130S536.
670-34 5PaDist&Co 337.
672-53 8PaDist&Co 109. See also 5Pa Dist&Co 337.
672-61 121Kan39, 245P743.
672-61½-New. nor cause him to lose jurisdiction of case, 121Kan39, 245P743.
672-63 46 Ida112, 268P8. [g] (1) 149 Miss334, 115S561. [h] (2) Other instances. 254 IllA211.
673-64 245 IllA314. [e] (3) Judgment in summary process finding defendant guilty and binding him over to court of common pleas. 102Conn640, 129A786. (4) Other instances. 158Tenn233, 12 SW(2d)714.
673-69 220MoA406, 286SW733.
673-70½-New. Mere finding of justice is not sufficient as judgment. 254 IllA 211.
674-94 CalA 286P1054. [g] 158Tenn 233, 128SW(2d)714.
676-18 [a] In West Virginia.-WVa 155 SE655.
677-38 [a] Res judicata, though entered in form of nonsuit, not void but erroneous. 145Miss31, 110S857.
677-45½-New. Defendant's claim for price not pleaded as counterclaim in buyer's action is barred by judgment for buyer. 126Misc266, 214NYS139 (where though defendant served summons on plaintiff for his claim for price one day before plaintiff served his summons, issue was joined on plaintiff's cause and trial had).
677-45½-New. Judgments establishing lien on lumber are not binding on purchaser not made a party. 173Ark823, 293SW709.
677-45¼-New. Failure to contest proceedings to dispossess before justice as barring subsequent suit for damages. 44F(2d)168(2dcase).
678-40 [a] Search of premises on return trip at request of defendant's wife to fix door and window pane broken on first trip, and seizure of whisky discovered in upstairs room, in which they had not been during previous search, has been held unlawful. 226Ky101, 10SW (2d)606.
678-48 [c] Where original judgment is void for failure of constable's return to jurisdiction, it cannot be vitalized by amendment. 48Nev425, 233P40. [d] Statute authorizing suit on contract by name under which contract was made and entry of judgment against persons shown on trial to be persons of whom name is descriptive does not authorize amendment where there was no trial. 48 Nev425, 233P40. [e] Amendment of docket on notice to make entry speak truth.-144 Okl 240, 291P84.
678-54 163Ga825, 137SE244; 41GaA 400, 153SE90(1stcase); MoA 29SW(2d) 193.
678-55 23AlaA58, 120S475(1stcase). [c] In Michigan.-234Mich166, 207NW 875.
679-56 171Ark74, 283SW364.
679-57 [d] In Delaware.-DelSuper 143 A456.
679-58 234Mich166, 207NW875; 152 Miss266, 119S186; 106WVa561, 146SE 372(1stcase).
679-59 234Mich166, 207NW875.
679-63 163Ga825, 137SE244.
679-63½-New. Justice of peace has no power to modify a judgment which is merely erroneous. 171Ark74, 283SW364.
679-64 10PaDist&Co 312.
679-65½-New. A judgment of a court having jurisdiction of a person and subject matter may be declared void on direct proceedings. AlaA 118S679.
679-78½-New. In the case of a judgment partly valid defendant is not entitled to relief without tendering the valid part. TexCivA 296SW991.
680-83 163Ga825, 137SE244; 249Mich 303, 228NW716.
681-84 [b] (2) But see MoA 282SW 469.
681-91 249Mich303, 228NW716; 222 AppDiv440, 226NYS377; TexCommnA 3 SW(2d)423; TexCivA 296SW958; Tex CivA 20SW(2d)842; 100WVa64, 130SE 151. [h] 58ND295, 225NW806. [j] Judgment debtor must have made motion to set judgment aside before bringing action to annul it. 75CalA770, 244 P110.
682-92 MoA 158SW(2d)910.
682-93 75CalA770, 244P110.
682-98 195Cal 569, 234P371; 149Mich 303, 228NW716. [d] 195Cal 569, 234P 371. [f] Where defendant improperly served with process outside of county moved to quash service, rule requiring legal remedies in action to be first availed of is satisfied whether such motion was before or after judgment. 195 Cal 569, 234P371.
683-99 MoA 282SW469.
683-14 152Miss266, 119S186 (bill held sufficient); 99Vt423, 134A47.
683-15 TexCivA 296SW991.
683-20½-New. , that judgment was wrong and that result would be different in another trial. 75CalA770, 244P 110.
684-27 [a] (4) Parole evidence is not admissible to controvert recitals in record of justice of peace. MoA 26SW(2d) 874.
684-28 TexCommnA 3SW(2d)423.
684-33 23AlaA58, 120S475(1stcase); AlaA 118S679; 180Ark667, 22SW(2d) 395(1stcase); 145Miss429, 110S861; MoA 26SW(2d)874; TexCivA 14SW(2d)82.
684-34 23AlaA58, 120S475(1stcase); AlaA 118S679; 180Ark667, 22SW(2d) 395(1stcase) (action in circuit court for malicious issuance of garnishment held collateral attack); 181Ark531, 26SW (2d)575; 145Miss429, 110S861.
685-38 TexCivA 14SW(2d)82.
685-39 222AppDiv440, 226NYS377.
685-42 163Ga825, 137SE244.
685-43 218Ala663, 120S475(2dcase); Mont 293P315; 116 Okl 13, 243P135; TexCivA 297SW560.
686-53 223Ky291, 3SW(2d)616.
687-60 19 OhA127 (erroneous indorsement on summons of amount claimed held not to render judgment by default for less amount within jurisdiction of justice subject to collateral attack by action to enjoin execution); TexCivA 14SW(2d)82.
688-75 TexCivA 274SW292.
688-84 TexCivA 4SW(2d)133.
688-85 [d] Issuance of execution against incompetent defendant for whom no regular guardian had been appointed prevents judgment from becoming dormant for ten years from its date. Tex CivA 274SW292.
690-24 181Ark531, 26SW(2d)575.
694-18 191NC334, 132SE17.
694-23½-New. Notations on a justice's docket showing execution issued did not show prima facie that it was placed in the hands of the proper officer, who made due return. TexCivA 4SW(2d) 133.
695-44 254 IllA211.
695-47 254 IllA211 (burden of proof to show valid judgment).
696-62 40GaA819, 151SE695.
697-70½-New. The issuance of an execution is a ministerial act. TexCivA 298SW618.
697-70½-New. Statute relative to issuance of legal process by justice's clerk on order of presiding justice has no general application to justice's courts. CalA 292P656.
697-71½-New. County clerk's certificate to writ of execution for service in another county failing to certify that there was any justice of the peace or acting justice at date of writ is fatally defective. CalA 292P656.
697-73 [a] Execution merely subscribed by clerk of justice of peace is void under statute. CalA 291P590.
698-82 [b] In California.-CalA 292P 656.
701-56 [a] Under Michigan statute levy is given same priority accorded to recorded conveyance. 240Mich468, 215NW 360.
702-73 [j] In Mississippi.-152Miss266, 119S186.
704-5 7Alaska560; 191Wis597, 211NW 780. [g] Costs should not be awarded against justice of peace honestly entering void judgment in proceedings to restrain enforcement. 191Wis597, 211NW 780.
705-9 218MoA611, 265SW991. [d] Matters not rendering legal remedy inadequate.-218MoA611, 265SW991. [e] That trustees of common-law trust were not served with process individually in action against trust and trustees is not ground for enjoining sale of their property under levy of execution where justice had jurisdiction of subject matter and execution was regular on its face. 218MoA611, 265SW991.
705-16½-New. Mandamus to justice's court to quash execution on judgment in an action dismissed by the superior court on appeal will be denied after subsequent vacation of order and dismissal of appeal. 73CalA95, 238P133.
706-36 TexCivA 298SW618.
706-37 TexCivA 298SW618.
706-38 TexCivA 298SW18.
706-38½-New. Where the property was

in the possession of the claimant at the time of levy, the burden of proof is on plaintiff in execution to show that it was the property of the execution debtor. TexCivA 298SW618.

706-40 [b] **In Mississippi.**–154Miss631, 122S773.

707-53 [b] **Failure to post notice of sale** does not render void sale to innocent purchaser. 240Mich468, 215NW360.

707-63½-New. A purchaser at an execution sale takes all of the interest which the judgment debtor had at the time of the levy. 240Mich468, 215NW360.

707-63½-New. Where the judgment debtor conveys the property after levy and after notice thereof has been recorded in the office of the register of deeds, it is not necessary for the judgment creditor to file a bill in aid of execution before proceeding with the execution sale. 240Mich468, 215NW361.

709-99 [g] **Filing of notice of appeal** by appellant waives notice of judgment. 72CalA443, 237P566.

709-5 193NC583, 137SE724.

710-9 137Misc592, 244NYS174.

710-14½-New. Where a justice removes from the town where elected, he must deposit his docket book with the clerk of that town. 125Misc281, 212NYS261 (Justice Court Act § 472).

710-14½-New. The justice has no right to give a replevin bond to the surety thereon for the purpose of removing it from the court files. 217Ala140, 115S28.

710-17½-New. In some jurisdictions a justice of the peace has no power to make nunc pro tunc entries. 218MoA448, 279SW200.

710-19 [f] **Violation of statute** must appear on record to support sentence imposing penalty prescribed by such statute. 6PaDist&Co 391.

711-30 6PaDist&Co 451.

711-31 6PaDist&Co 451.

713-58 169Ark745, 276SW578; 76Mont 366, 245P871; TexCivA 284SW643. [b] (4) By Rev. St. (1925) art 2382 subd 4, and art 2388, a docket recital "Suit upon docket for "125.00" is sufficient entry. TexCivA 9SW(2d)767.

715-95 119Kan333, 239P1103 (record admissible in another action to show first action was begun).

715-96 222MoA389, 5SW(2d)681.

715-98 Wash 287P13. [c] But see 222 MoA389, 5SW(2d)681 (cannot be collaterally attacked except for fraud, accident, or mistake which court may hear testimony to determine).

715-99 234Mich166, 207NW875.

716-5 44Philippine834.

717-6 15 OhA376.

717-13 [b] (2) Under Rev. St. (1919) § 2899, circuit court may compel justice of peace to amend his defective records. 221MoA834, 286SW144.

717-19 69CalA186, 230P967; 8PaDist&Co 658. [d] **In California.**–70CalA200, 232P995.

717-20 77CalA95, 246P82.

717-22 36Wyo 191, 253P858.

719-30 [f] (3) Injunction will not lie to avoid judgment in justice court where other remedy available. TexCivA 294SW 345. (4) Appearance of intervener in injunction suit affecting judgment against it in justice's court does not justify district court's retrying case on merits, CivA 294SW345.

720-31 102CalA375, 283P81 (statutes not retroactive). [a] **Where appeal was perfected when non-retrospective statute became effective** conformity therewith is unnecessary. CalA 283P945.

720-32 5PaDist&Co 175.

720-37 [a] CalA 292P1065.

721-38 [a] **In New York.**–125Misc681, 212NYS261.

721-42 140Miss610, 105S764; Mo 29SW (2d)83. [a] **Justices' erroneous attempt to render double judgment** did not destroy jurisdiction. Mo 29SW(2d)83.

721-43 140Miss289, 105S519; 221MoA 666, 283SW459; MoA 16SW(2d)709; MoA 25SW(2d)541; MoA 28SW(2d)407; 191NC362, 131SE752; 288Pa56, 135A 641; TexCommnA 283SW495; TexCivA 270SW1079; TexCivA 22SW(2d)334; TexCivA 26SW(2d)741; Utah 264P968, 973 [citCyc]. [a] (2) Justice's court having no jurisdiction to reinstate dismissed garnishment suit without notice to garnishee, county court acquired no jurisdiction by appeal. TexCivA 22SW(2d) 334. [d] MoA 297SW710; 33NM128, 262 P226.

722-44 TexCivA 270SW1079.

722-47 177Ark227, 6SW(2d)285; GaA 155SE535; 19 OhA324.

723-51½-New. Where damages accruing daily did not exceed the jurisdiction of the justice when a cross action therefor was filed, the county court had jurisdiction of appeal from judgment within jurisdictional amount notwithstanding damages accrued pending appeal. TexCommnA 272SW437.

723-54 [b] (2) Where justice of peace tries action involving title to real property, district court on appeal has jurisdiction to try case as though it had been certified for trial. 58ND295, 225NW 806. [c] **In Kansas.**–128Kan257, 276P 830.

724-63 [b] **Failure to comply with statutory procedure** for raising issue of title in magistrate court precludes tenant from raising question of jurisdiction on appeal. 132SC130, 128SE718.

724-63½-New. But appeal does not admit jurisdiction of justice of peace. 21AlaA469, 109S373.

724-67 MoA 25SW(2d)541.

724-74 See also 11PaDist&Co 108; 11 PaDist&Co 126.

725-78½-New. Where motion has been made to affirm on the ground of failure to give notice of appeal, a motion to overrule such motion should not be considered in the absence of proof that notice of the appeal was given. 218MoA 578, 266SW130.

725-78½-New. In such case the court is without jurisdiction to hear the motion to overrule the motion to affirm before determining whether notice of appeal has been given. 218MoA578, 266 SW130.

725-81 [v] **In South Dakota.**–SD 231 NW897.

726-86 82Colo 391, 260P524; Mo 29 SW(2d)88.

727-92 TexCivA 31SW(2d)324.

728-99 TexCivA 7SW(2d)605.

729-22 35GaA618, 134SE179.

729-27½-New. Where plaintiff pleads less than minimum jurisdictional amount, and defendant counterclaims in excess of maximum jurisdictional amount, there can be no appeal to superior court, 35GaA618, 134SE179.

729-27½-New. and defendant's appeal is properly dismissed in such case notwithstanding facts as to overpayment to plaintiff pleaded by defendant or facts as to plaintiff's breach may not have been well pleaded. 35GaA618, 134 SE179.

730-38 [b] Entry has been held not a "final judgment" within statute. Tex CivA 14SW(2d)959.

731-45 TexCivA 26SW(2d)740.

731-50 [a] (13) Order reinstating original judgment. 77CalA95, 246P82. [b] (1) 78CalA551, 248P784. (10) Order in special proceedings. 129Misc2, 221NYS302. (11) Orders after judgment. CalA 263P384.

732-72 [b] (8) Statute denying right to appeal where judgment was rendered on confession does not apply to prevent appeal by plaintiff where, by consent of defendant, judgment was rendered for less than amount of claim. 122Kan274, 252P234.

733-83 MoA 280SW448.

733-85 MoA 280SW448.

734-89 [a] (2) Judgment dismissing cause for want of witnesses was final judgment and not dismissal for want of prosecution. 179Ark338, 16SW(2d) 177.

735-18 [c] **In Oklahoma.**–114 Okl 112, 243P966.

735-21 120Kan183, 242P1023.

735-22 136Misc215, 239NYS347.

736-27 But see Del 143A456. [b] Tex CivA 7SW(2d)605.

736-31 245 IllA314.

737-47 24 OhNPNS579 (no appeal from Dayton municipal court's order overruling motion to dismiss attachment).

737-60½-New. A garnishee who has complied with the statute and fully stated the facts in the justice's court and who, by mistake, has paid money into court on the order of the justice of the peace, is entitled to assert his claim for a return of the money when the case is appealed to the district court by another party. 120Kan183, 242P1023.

738-81 49ND134, 190NW310.

738-82 49ND134, 190NW310.

738-85 [b] **Burden of proof** on issue whether payment was voluntary and appeal was abandoned is upon plaintiff. 191NC787, 133SE97. [c] **Question for jury.**–Where circumstances of payment are insufficient to show intent to abandon appeal, question may be submitted to jury. 191NC787, 133SE97.

739-93 178Ark93, 108SW(2d)29; MoA 278SW1084.

740-98 23AlaA303, 124S503 (defect in affidavit for attachment); MoA 280SW 60.

741-12 220Ala464, 126S101; 20AlaA 623, 104S576.

741-15 194NC208, 139SE222.

741-29 215Ala690, 112S344.

742-32 215Ala690, 112S344.

742-34 105WVa76, 141SE532.

742-35 MoA 280SW54.

743-48 69CalA186, 230P967; 125Misc 681, 212NYS261 (appeal must be taken in time and manner prescribed by statute).

743-55 CalA 286P1054; 146Miss672, 113S175; 125Misc681, 212NYS261; 115 Okl 199, 242P201 (appeals under Comp. St. (1921) c 4 art 9, not subject to the six months limitation, provided in § 798); 5PaDist&Co 337. But see 196 NC696, 146SE807.

744-57 [i] **In Alabama.**–218Ala21, 117 S464.

745-60 Cal 290P569(2dcase); CalA 286 P1054.

745-61 [a] **Oral statement of justice court's decision** in plaintiff's presence did not waive notice. CalA 286P1054. [b] **Taking out execution is waiver.**–CalA 286P1054. [c] **Waiver must be clearly indicated by facts of record.**–CalA 290P569(2dcase). [d] **Issuance of execution by justice** does not necessarily import application therefor by plaintiff as regards waiver of notice of entry. Cal 290P569(2dcase). [e] **Motion to quash execution and modify judgment** imports knowledge of entry of judgment as regards waiver of notice of entry. Cal 290P569(2dcase).

746-95 11PaDist&Co 707.

747-1 14PaDist&Co 138.

747-6 [b] (15) 14PaDist&Co 138.

748-10 107WVa669, 150SE1.

748-11 10PaDist&Co 506.

748-12 5PaDist&Co 337. [e] **Failure of the justice or victorious party to give notice of entry of judgment** is no excuse for failure to bring appeal in time. 125Misc681, 212NYS261 (where no effort was made to see docket alleged accessible).

749-21 MoA 285SW795.

750-43 11PaDist&Co 28.

750-50 [a](3) Meritorious cause must be shown. 5PaDist&Co 297.

753-93 164Ga260, 138SE151; 244 IllA 142; 250Mich565, 230NW947; 125Misc 681, 212NYS261. [b] **Object of rule is to protect officers of court.**–164Ga260, 138SE151.

753-98 125Misc681, 212NYS261.

753-99 164Ga260, 138SE151.

754-3 224 IllA142 (where payment within twenty days after judgment is required). [f] (2) Under Justice Court Act § 430, as amended by L. (1922) c 87, costs and fees of justice for making return must be paid at time of serving notice of appeal. 125Misc 681, 212NYS261.

754-4 240 IllA349; 256 IllA435.

755-26 [a] (3) Failure of justice to transmit fees to appellate court does not prevent jurisdiction in appellate court. 72CalA241, 236P938. [c] (3) Appeal held pending despite return of check, unpaid, given for costs. 164Ga260, 138 SE151. (4) Order of appeal upon payment of costs is held not cancelable by entry that costs were not paid. 164Ga 260, 138SE151.

756-29 69CalA60, 230P456 (appeal is

not brought into existence until undertaking is filed, though notice of appeal has been filed); 255 **IllA**523; **MoA** 285 SW795; 86**Mont**396, 284**P**537; **TexCivA** 28**W(2d)**893. But see **TexCivA** 280SW 614; **TexCivA** 218**W(2d)**51.

756-32 **TexCivA** 280SW614.

757-36 [c] **Attorney's check.**–57**ND**616, 223**NW**693.

757-37 6**PaDist&Co** 492. [b] **Certified check.**–12**PaDist&Co** 111.

757-42 **TexCivA** 278SW324. [d] **Tex CivA** 278SW324. [i] **Burden rests on party controverting affidavit** to disprove its contents. **TexCivA** 278SW324. [j] **Procedure.**–**TexCivA** 278SW324.

758-44 See also **TexCivA** 298SW300.

758-46 **TexCivA** 298SW300.

758-47 **TexCivA** 286SW334.

759-62 **TexCivA** 78W(2d)605.

759-66½-New. Where non-existent corporation named as obligee surety cannot be held liable. **MoA** 258W(2d) 520.

759-70 79**CalA**629, 250**P**702.

759-75 **TexCivA** 78W(2d)605.

760-79 5**PaDist&Co** 217.

760-80 5**PaDist&Co** 217.

760-82½-New. The absence of sureties, where not required by statute, is not fatal where the bond was approved by the justice. **TexCivA** 28W(2d)893.

760-92 71**CalA**532, 235**P**738.

760-93 71**CalA**532, 235**P**738.

762-9 151**Miss**325, 1178331. [e] **Filing undertaking constitutes no part of process of taking appeal** under California statute. 102**CalA**375, 283**P**81.

762-9½-New. , or the clerk, 69**CalA**60, 230**P**456.

762-13 49**ND**124, 190**NW**314.

762-16½-New. In order to execute an undertaking it is necessary that all of those things should be done which are necessary to render it a binding contract between the sureties and the respondent on appeal. 69**CalA**60, 230**P** 456.

762-16½-New. In some jurisdictions an undertaking is not executed until it is filed with the clerk. 69**CalA**60, 230**P** 456.

762-16¼-New. The attorney for the appellant is the agent of the sureties for the purpose of filing the undertaking. 69**CalA**60, 230**P**456.

762-18 146**Miss**672, 1138175.

764-43 [b] **Failure to deliver bond because of flood conditions** will not prevent dismissal. 151**Miss**325, 1178331.

764-47 **MoA** 28W(2d)208.

764-53 69**CalA**186, 230**P**967; 79**CalA** 629, 250**P**702; 142**Miss**379, 1078522; 135 **Okl** 83, 274**P**26.

765-55 **TexCivA** 108W(2d)217.

765-60 220**MoA**840, 295**SW**487.

765-66 220**MoA**840, 295**SW**487.

765-67 135 **Okl** 83, 274**P**26. [c] **Erroneous designation of appellate court** as court of county other than that in which justice's court is located will not vitiate instrument for purpose for which it was filed where it is otherwise sufficient and sureties could not have been misled. 69**CalA**186, 230**P**967.

765-67½-New. The undertaking must identify the appeal which it is intended to support. 69**CalA**60, 230**P**456. [a] **Illustrations of sufficient descriptions.**–69**CalA**60, 230**P**456.

766-76 142**Miss**379, 1078522; **TexCivA** 278W(2d)1108. [g] **Nev** 284**P**768 (on appeal from judgment for costs).

766-95 [a] (3) Undertaking in action of unlawful detainer that appellant will pay all costs is insufficient under statute requiring undertaking conditioned on payment of judgment and costs. 86 **Mont**396, 284**P**537.

766-96 [a] (4) Undertaking whereby sureties agree to pay all costs which may be awarded against appellant on his appeal or on withdrawal or dismissal thereof is sufficient, although party becomes entitled to costs on dismissal as incident of law rather than because of award. 69**CalA**60, 230**P**456.

767-93 41**Wyo** 494, 287**P**438.

768-3 216**Ala**527, 113**8**587.

768-6½-New. Where an indorsement by the justice of the peace showed that the bond on appeal to the county court was filed with him on a certain date, but his approval was not noted and the bond was filed within ten days after the rendition of the judgment, and four days later a transcript from a justice's court including the bond was filed in a county court, the approval of the bond by the justice of the peace must be presumed. **TexCivA** 108**W(2d)**217.

769-28½-New. Approval of bond gives immediate jurisdiction to appellate court. **TexCivA** 268**W(2d)**670.

769-30 69**CalA**186, 230**P**967.

769-32 69**CalA**186, 230**P**967; 128 **Okl** 41, 260**P**1059; 6**PaDist&Co** 492; **Tex CivA** 198**W(2d)**190 (statute allowing such amendment applies only to court of appeals, and county court has no such power). See also **TexCivA** 298**SW** 300. [d](1) 128 **Okl** 41, 260**P**1059. [e] 107**WVa**233, 148**SE**3. [f] **TexCivA** 24 **SW(2d)**735; 107**WVa**611, 149**SE**834.

770-33 69**CalA**186, 230**P**967. [a] (5) 79**CalA**629, 250**P**702.

770-33½-New. New bond may not be substituted for defective bond after dismissal of appeal because of such defective bond. 168**Minn**31, 209**NW**488.

771-44 71**CalA**532, 235**P**738.

772-64 246**Mich**490, 224**NW**424; 247 **Mich**578, 226**NW**216(2dcase); 250**Mich** 160, 229**NW**505 (rule held mandatory); **MoA** 298**SW**99; 129 **Okl** 91, 263**P**446.

773-65 [d] **Correspondence between appellee and surety on appeal bond** does not obviate necessity of formal notice of appeal. **MoA** 178**W(2d)**546.

773-68 101**WVa**273, 132**SE**741.

773-68½-New. Filing of notice of appeal constitutes written acknowledgment by appellant of notice of judgment. 72**CalA**443, 237**P**566.

773-69 101**CalA**423, 281**P**672; 247**Mich** 578, 226**NW**216(2dcase) (jurisdiction over appellee); 218**MoA**578, 266**SW**130; 51**ND**842, 200**NW**1010.

773-70 242**Mich**419, 218**NW**675 [quot CJ]; **MoA** 298**SW**99; **MoA** 98**W(2d)** 847.

774-77 246**Mich**490, 224**NW**424; **MoA** 178**W(2d)**546. [a] **Notice of retainer** does not take place of notice of appeal. 247**Mich**578, 226**NW**216(2dcase).

774-82 [b] **Notice held substantial equivalent** of notice of appeal. 246**Mich** 490, 224**NW**424.

775-88 But see 96**CalA**138, 273**P**870.

776-5 [d] **MoA** 298**W(2d)**227.

776-6 [d] 79**CalA**426, 249**P**830.

776-7 41**Wyo** 494, 287**P**438.

777-14 101**CalA**423, 281**P**672 (successful defendants entitled to notice); **MoA** 285**SW**795. [a] **Fact of service,** and not proof thereof, gives appellate court jurisdiction. 76**Mont**284, 246**P**249. [b] **Court rule relating to notice of appeal** held applicable only to final judgments where jury could be demanded. 248 **Mich**676, 227**NW**724. [c] **"Adverse party"** entitled to notice is party to record whose interest will be affected and includes nonappealing coparty. 101 **CalA**423, 281**P**672. [d] **In California.**–102**CalA**375, 283**P**81.

778-24 125**Misc**681, 212**NYS**261 (twenty days after entry of judgment). [h] **Notice of judgment.**–72**CalA**443, 237**P**566.

778-25 249**Mich**397, 228**NW**701(1st case) (rule of court). See also 10**Pa Dist&Co** 311.

778-26 **MoA** 298**W(2d)**227.

778-27½-New. Time to file is not extended by fact that former appeal has been dismissed for insufficient notice. 72**CalA**443, 237**P**566.

778-30 [b] **Service on wife of party** is not service "on opposite party" as required by rule of court. 249**Mich**397, 228**NW**701(1stcase).

778-36 218**MoA**578, 266**SW**130.

779-44 218**MoA**578, 266**SW**130 (notice by registered mail not received).

780-66 See also **MoA** 285**SW**795.

780-71 **MoA** 285**SW**795.

780-73½-New. The service of a listing card on the opposite party is not a substitute for a notice of appeal. **MoA** 285 **SW**795.

780-80 [b] **Appellee's actual knowledge of appeal** obtained through correspondence is not waiver of service of notice. **MoA** 178**W(2d)**546.

780-84 **MoA** 256**SW**511. [a] (2) Notice by appellee that depositions would be taken and which were not taken. **MoA** 256**SW**511. (3) Other instances. **MoA** 285**SW**795.

781-85 250**Mich**160, 229**NW**505. [e] **Motion in appellate court to amend return of officer who served summons in justice's court** constitutes waiver of necessity of notice of appeal. **MoA** 5 **SW(2d)**673.

781-88 250**Mich**160, 229**NW**505.

781-97 **MoA** 298**W(2d)**227.

781-2 33**NM**658, 275**P**97(1stcase). See also 33**NM**620, 274**P**44.

781-3 [a] **In New Mexico.**–33**NM**660, 275**P**97(2dcase).

781-7 164**Ga**260, 138**SE**151.

781-10 198**NC**69, 150**SE**631.

782-15 164**Ga**260, 138**SE**151.

783-20½-New. But where justice enters judgment on void process where there was no appearance, defendant may appeal and plead to jurisdiction of court without entering appearance. 140**Miss** 289, 105**S**519.

783-28 [a] **Appeal from justice's court upon questions of law and fact** accompanied by demand for new trial constitutes general appearance in appellate court. 53**ND**222, 208**NW**234.

784-40 [a] **After entry by justice of peace of judgment on void process** without appearance, defendant may appeal and plead to jurisdiction of court without entering appearance. 140**Miss**289, 105**S**519.

784-44 218**MoA**578, 266**SW**130; 218 **MoA**578, 266**SW**130 (appearance taking of depositions). [a] (2) Appearance answering ready for trial is not general appearance waiving defects. **MoA** 298**W** (2d)227.

784-48½-New. The court's action in sustaining appellant's motion to overrule appellee's motion to affirm being a nullity, appellee may move to dismiss. 218**MoA**578, 266**SW**130.

784-51 213**La**9, 104**S**127; 106**WVa**138, 145**SE**40, 41 [citCJ].

785-52 252 **IllA**178; 125**Kan**722, 266**P** 41.

785-53 87**PaSuper**411.

785-54 **TexCivA** 297**SW**532; 106**WVa** 138, 145**SE**40, 41 [citCJ].

785-57 10**PaDist&Co** 215.

786-61 **DelSuper** 143**A**456; 147**Miss**95, 113**8**196. [b] **Disapproval and rejection of bond by justice after timely acceptance and approval** does not defeat appeal. 147**Miss**95, 113**8**196.

786-64 164**Ga**260, 138**SE**151.

786-70 161**Ga**732, 132**SE**62. [a] **Judgment remains operative with all of its incidents** save in so far as it is incapable of enforcement pending appeal. 161**Ga** 732, 132**SE**62.

786-71 **TexCivA** 28W(2d)488.

786-74 **TexCivA** 258W(2d)887.

788-3 76**Mont**284, 246**P**249 [quotCyc]. **Erratum.**–Strike out "Ind.–Reeves v. Andrews, 7 Ind. 207."

788-5 147**Miss**95, 113**8**196; **TexCivA** 300**SW**966.

788-10 147**Miss**95, 113**8**196.

788-11 **TexCivA** 138W(2d)897. [e] (2) By clerk's issuance and service of notice of docketing of transcript, district court acquires jurisdiction of person of appellee. 37**Wyo** 165, 260**P**183.

789-29 78**CalA**551, 248**P**784; 143**Miss** 221, 108**8**505; **Miss** 115**8**726; 5**Pa Dist&Co** 297.

790-42 8**PaDist&Co** 658.

790-45½-New. Jurisdictional amount needs no affirmative showing. 116**Tex** 489, 294**SW**844.

791-46 8**PaDist&Co** 658.

791-52 116**Tex**489, 294**SW**844.

792-62 128**Misc**886, 221**NYS**201.

792-69 216**Ala**527, 113**8**587; **Miss** 107**8** 563; **MoA** 285**SW**1039.

793-82 218**MoA**578, 266**SW**130.

793-87 5**PaDist&Co** 297.

794-98 [i] **Citation no part of pleading.**–**TexCivA** 238W(2d)858.

794-99½-New. In Montana transcript need not show service of notice of appeal. 76**Mont**284, 246**P**249.

795-30½-New. After more than thirty days have elapsed from entry of judgment a municipal court judge acting as a justice of the peace has no power to settle a bill of exceptions. 200**Wis**284, 227**NW**24.

795-31 [a] 216**Ala**527, 113**8**587.

796-39 151**Miss**758, 118**8**898(1stcase); 155**Miss**705, 125**8**85(1stcase).

796-41 191**NC**787, 133**SE**97. [a] **Transcript must be filed in county court**

to show county court jurisdiction. **Tex CivA** 300SW188.

796-45 10**PaDist&Co** 507.

796-46 50**ND**735, 198**NW**114.

797-47 **TexCivA** 300SW188.

797-48 21**AlaA**469, 109S373.

797-58 [f] 178**Ark**96, 10**SW(2d)**28; 12 **PaDist&Co** 486.

798-59 See also 48**Nev**459, 233P843. [h] **In Nevada.**–48**Nev**459, 233P843.

798-61 **TexCivA** 300SW188. [a] **Delay held excused** by undenied explanation of pending negotiations for settlement. **TexCivA** 300SW188.

798-62 250**Mich**565, 230NW947.

798-63 160**Tenn**186, 22**SW(2d)**231.

799-66½-New. Transcript of appeal cannot be filed nunc pro tunc after return day. 13**PaDist&Co** 451.

799-74 5**PaDist&Co** 175.

800-78 130 **Okl** 130, 265P765; **TexCivA** 15SW(2d)1113. [g] 151**Miss**558, 118S 623.

801-90 [d] **In Texas.–CivA** 297SW532.

802-16 [c] 255 **IllA**523. [f] **Consent to four continuances** was waiver of defective transcript. **TexCivA** 15SW(2d) 1113.

802-18 240 **IllA**488.

803-27 **TexCivA** 28SW(2d)233.

803-29 216**Ala**527, 113S587.

804-31 [c] **Conflict between transcript and docket entries.**–Docket entry showing service of summons by deputy constable controls over certified transcript of record showing service by constable having same name. 153**Miss**796, 121S 823.

804-39 See also 29**Hawaii**539. [a] **Action against railroad,** tried as based on agreement to pay for repairs to damaged automobile, is not originally brought in justice's court as action for damages. **TexCivA** 297SW532.

804-47 243**Mich**508, 220NW706; 142 **Okl** 238, 286P341.

805-52 [a] **In Oklahoma.**–142 **Okl** 238, 286P341.

805-60 37**GaA**280, 139SE829; 218**MoA** 578, 266SW130. [b] (7) Where transcript fails to show fixing of amount of appeal bond. 240 **IllA**488. (8) In California. 79**CalA**746, 251P221 (nonappealing party's act not amounting to stipulation or estoppel to claim time had expired).

806-61 [a] (4) 11**PaDist&Co** 48; 11**Pa Dist&Co** 211.

806-63 29**Hawaii**539; **MoA** 2SW(2d) 208.

806-79 69**CalA**445, 231P354 (failure to bring appeal to trial within one year from filing authorizes dismissal of appeal, but not dismissal of action); 75 **CalA**35, 241P914; 79**CalA**370, 249P547. [h] (5) Statute is mandatory. 70**CalA** 200, 232P995; 79**CalA**370, 249P547. (6) Statute annuls all jurisdiction of superior court except to dismiss appeal where appeal is not brought to trial within one year from date of filing of appeal in superior court. 70**CalA**200, 232P995; 81**CalA**639, 254P647. (7) That congestion of calendars prevented trial within statutory time does not prevent operation of statute. 70**CalA**200, 232P995. (8) Statute requires dismissal of appeals rather than actions. 70**CalA** 200, 232P995. (9) Illness of appellant does not excuse failure to bring appeal to trial within one year. 79**CalA**370, 249P547. (10) Only exception in statute is where time is extended by written stipulation filed with clerk. 79**CalA**370, 249P547. (11) Consent of counsel to continuances of trial within one-year period is not equivalent to written stipulation to extend time for trial beyond such period. 79**CalA**370, 249P547. (12) Court cannot read into statute exceptions not contained therein. 79**CalA**370, 249P547. (13) Only method in which jurisdiction may be preserved to try appeal after expiration of statutory time is by written stipulation of parties filed with clerk of superior court. 81**CalA** 639, 254P647. (14) Appeal not brought to trial within statutory time should be dismissed although trial was had thereafter, pursuant to oral stipulation, and judgment was rendered for defendant. 81**CalA**639, 254P647. (15) Oral stipulation for continuance beyond statutory time does not constitute estoppel or waiver of right to move to dismiss for want of prosecution even after trial and judgment. 81**CalA**639, 254P647. (16) Stipulation that case may be "set for trial" does not necessarily include stipulation that it may be "brought to trial" on day set for hearing. 83**CalA**144, 256 P453. (17) Fact that after expiration of statutory period respondent stipulated that case "may be set for trial" did not affect his right to dismissal on ground case was not brought to trial within statutory period. 83**CalA**144, 256P453. [i] 70**CalA**200, 232P995. [j] **Where appellant fails to object to act of court in setting case for trial beyond time** prescribed by statute, he is deemed to have assented thereto and cannot complain of dismissal of appeal. 75**CalA**35, 241P 914.

807-80 [a] 169**Ark**85, 273SW395 (delay due to fault of appellant's attorney who had retired from practice without notifying him).

807-81½-New. Refusal to set aside dismissal of appeal where cause was pending nine months is not abuse of discretion. 173**Ark**506, 292SW690.

807-81½-New. Setting aside order of dismissal is in court's discretion. 173 **Ark**506, 292SW690.

807-81¼-New. Question of due diligence in preparing for trial is for trial judge and in the absence of abuse his decision therein will not be reversed. 173**Ark**506, 292SW690.

807-86 But see 10**PaDist&Co** 469.

807-94 37**GaA**280, 139SE829.

808-96 [c] **Assignment of wrong ground** is immaterial where court should dismiss appeal sua sponte. 37**GaA**280, 139SE829.

808-98 But see 218**MoA**578, 266SW130.

808-99 95**PaSuper**228 (appeal properly stricken off in absence of depositions).

809-16½-New. But the court has power to enter affirmance where the clerk erroneously entered judgment of dismissal on order for affirmance. 72**CalA**383, 236P364.

809-27 243**Mich**508, 220NW706; **Mo** 29SW(2d)83.

810-28½-New. The discontinuance of an appeal is not the same as a discontinuance or dismissal of the suit. 241 **Mich**544, 217NW904.

810-30 168**Minn**31, 209NW488.

810-31 50**ND**735, 198NW114. [b] 169 **Ark**85, 273SW395 (meritorious defense alleged, fault of attorney and due diligence of party in securing new attorney who made prompt application in proper form). [d] 169**Ark**657, 276SW 586.

810-37 75**CalA**35, 241P914.

810-41 [a] (2) Circuit court may consolidate pending cases between same parties depending on substantially same facts though amount in controversy as result of consolidation exceeds jurisdiction of justice court. 152**Miss**869, 120 S187.

811-57 126 **Or**466, 270P492, 495 [cit CJ].

812-64 [a] (3) It is duty of court to dismiss appeal from justice's court where appellant does not bring it to trial within one year from filing appeal unless extended by stipulation filed with clerk. 70**CalA**767, 234P408. (4) In mandamus to compel dismissal of appeal for failure to bring cause on for hearing within prescribed time, court cannot recognize any stipulation not entered on minutes of trial court. 71**CalA**564, 235 P739. (5) Code Civ. Proc. § 981a requires dismissal where appealing party fails to bring such appeal to trial within one year from date of filing it. 78 **CalA**33, 247P922 (provision mandatory); 82**CalA**165, 255P272.

813-66½-New. because the appeal bond is insufficient. 107**WVa**614, 149SE832.

813-83 241**Mich**544, 217NW904; 150 **Miss**849, 117S249. [a] (2) Voluntary nonsuits taken in circuit court amount to dismissals of appeals, leaving justices' judgments in force as if no appeals had been taken. 178**Ark**163, 10 **SW(2d)**489. [b] (2) Where cause is dismissed in circuit court without prejudice and no effort is had to have cause reinstated in justice's court, judgment of justice is nullity and execution thereon is void. 241**Mich**544, 217NW904.

815-4 146**Miss**703, 111S750; 150**Miss** 849, 117S249; **Mo** 29SW(2d)83; **MoA** 280SW448; 194**NC**674, 140SE442; **Tex CivA** 284SW643; **TexCivA** 11SW(2d) 849. [a] (2) 221**MoA**26, 297SW434. [e] (1) 102**CalA**375, 283P81. (2) 85 **CalA**461, 259P491. (3) Where unverified answer was filed in justice court denying all allegations of complaint but parties orally stipulated that facts were same as pleaded, judgment is based on facts so as to afford right to appeal on facts. 85**CalA**461, 259P491. [f] (4) When party appeals to district court on questions of fact, or on questions of both law and fact, action must be tried anew. 42 **Ida**443, 246P5. [n] (2) 36 **Wyo** 191, 253P858.

818-19½-New. Where the judgment was against plaintiff in the justice's court, the remedy is by appeal, not by bringing a new action in the higher courts. 7**PaDist&Co** 226.

818-21 [c] (3) But see 255 **IllA**523.

818-22 78**CalA**33, 247P922. [f] **In Missouri.**–222**MoA**566, 291SW1081.

819-26 6**Fla**279.

819-32 179**Ark**338, 16SW(2d)177; 124 **Kan**582, 261P578; **Mo** 29SW(2d)83; **TexCivA** 284SW643.

820-41½-New. Where the face of the proceedings does not show that the judgment of the justice was without jurisdiction, it must be made to appear by plea and proof. 194**NC**208, 139SE 222.

821-49 [c] (1) **MoA** 15SW(2d)945.

821-50 [c] 243 **IllA**450.

822-51 See also **MoA** 297SW439.

822-54 [a] 220**MoA**1331, 296SW836.

823-66 40**GaA**119, 149SE67 (petition held sufficient basis for amendment on appeal); 121**Kan**34, 245P1024; 146**Miss** 703, 111S750; **TexCivA** 11SW(2d)849. [j] **Conformity to evidence adduced in justice's court.**–**TexCivA** 284SW643.

824-69½-New. Bill of particulars. In some jurisdictions statutes authorizing court to order bill of particulars applies to cases coming to circuit court on appeal from justice of peace which are to be tried de novo. 143**Miss**870, 108S288.

824-71 121**Kan**34, 245P1024.

824-74 **TexCivA** 2SW(2d)488. [g] (6) **TexCivA** 271SW195.

825-78 [e] **Items accruing subsequent to filing of suit** cannot be added. 140 **Miss**610, 105S764.

826-80 13**PaDist&Co** 109. See also **MoA** 290SW90.

826-81 3**Del** 137, 132A217.

826-82 **TexCivA** 2SW(2d)488.

826-83½-New. Change from action for "goods sold and delivered" to "account stated" is held change of cause of action. 3**Del** 137, 132A217.

827-96 **TexCommnA** 283SW495.

827-97 13**PaDist&Co** 109; **TexCivA** 7 SW(2d)605. [c] **Limitation of rule.**–**TexCivA** 276SW746.

827-99 **TexCivA** 7SW(2d)605.

828-2 140**Miss**610, 105S764; 13**PaDist &Co** 109; **TexCommnA** 283SW495; **Tex CivA** 7SW(2d)605.

828-6 **GaA** 155SE535. See also 221 **MoA**26, 297SW434. [a] 194**NC**674, 140 SE442. [b] (4) 221**MoA**26, 297SW434; **TexCivA** 22SW(2d)764(1stcase).

830-26 221**MoA**26, 297SW434; **MoA** 300SW1000.

830-29 200 **Iowa**840, 205NW520 (counterclaim stricken in justice's court may be added by amendment on appeal); 12**PaDist&Co** 670. See also 3**Del** 118, 131A320.

830-33 86**Colo** 317, 281P363; 93**Pa Super**292.

830-37 **TexCivA** 28SW(2d)233.

832-63 Contra 191**NC**369, 131SE731.

832-65 **TexCivA** 271SW195 (pleading sufficient).

832-67 121**Kan**34, 245P1024; **MoA** 277 SW605; **MoA** 285SW181; 116**Tex**489, 294SW844; **TexCivA** 274SW168; **Tex CivA** 24SW(2d)735.

833-68 **Ind** 166NE434; 121**Kan**34, 245 P1024; 123 **Okl** 76, 250P136; 116**Tex** 489, 294SW844.

833-69 [e] **Complaint held insufficient.**–23**AlaA**303, 124S503.

833-73 [a] (2) On trial by jury in

any case, written complaint is essential. 23AlaA303, 124S503.

833-74 123Kan308, 255P76; MoA 275 SW566; 116Tex489, 294SW844; TexCivA 281SW288; TexCivA 286SW334; TexCivA 1SW(2d)686; TexCivA 278SW (2d)294. [a] **Statute requiring pleadings to be verified by affidavit** does not apply to cases tried before justice and appealed to circuit court. 106WVa254, 145SE390.

833-77½-New. That there were written pleadings in the county court does not show there were no additional oral pleadings. TexCivA 1SW(2d)686.

834-95½-New. Upon the sustaining of demurrer to complaint, plaintiff is entitled to file amended complaint. 42 Ida443, 246P5.

835-99 124Kan582, 261P578.

835-2 124Kan582, 261P578.

835-9½-New. Failure of the justice to note oral pleadings on his docket cannot be raised on appeal in the county court by objection to testimony but should be presented by motion to strike plaintiff's pleadings in the county court. TexCivA 284SW643.

835-16½-New. Where the record does not show want of jurisdiction by the amount claimed on entry of judgment below and does not show remittitur by plaintiff in the lower court, plaintiff relying on such remittitur in the circuit court should set it up by replication to pleas to jurisdiction renewed by defendant in the circuit court. 20AlaA623, 104S576.

836-31 Ind 166NE434; MoA 277SW 605; MoA 16SW(2d)624; MoA 21SW (2d)886 (agreed price or reasonable value may be shown under indefinite justice's court pleading not amended).

836-33 MoA 278SW1056; TexCivA 2 SW(2d)488. But see MoA 286SW133.

836-33 See also 313Mo 268, 281SW402.

837-48 [b] **Evidence held inadmissible.**—In action to recover possession of automobile, conditional sales contract covering automobile is inadmissible when not shown to have been executed by defendant and not part of record. 151 Miss890, 119S808(2dcase).

837-62 TexCivA 284SW643.

838-91 MoA 16SW(2d)624.

839-11 Okl 293P192 (dismissal of appeal held error); 105WVa174, 141SE 791.

840-26 [a] MoA 8SW(2d)1086.

841-60 11PaDist&Co 329.

841-63½-New. Jurisdiction of justice, 129Misc545, 222NYS696.

842-65 36Wyo 191, 253P858.

842-72 TexCivA 32SW(2d)382.

842-75½-New. Where the substance of oral pleadings is not noted on the justice's docket, the appellate court must presume that plaintiff orally pleaded in justice's court, and that failure to note pleadings on the docket is attributable to the justice. TexCivA 284SW643.

842-80 36Wyo 191, 253P858.

843-81 MoA 18SW(2d)552.

843-85½-New. Reversal of district court judgment is not required by fact that district court included in judgment justice's court costs which plaintiff had paid. 36Wyo 191, 253P858.

844-94 [b] (1) 77CalA95, 246P82. (2) Appeal from default judgment raises only questions of law. 78CalA551, 248 P784. [m] Hawaii.-30Hawaii908.

845-10 TexCivA 14SW(2d)959.

846-11 160Tenn329; 248W(2d)881 (void judgment of justice cannot be validated).

846-13 MoA 8SW(2d)1086.

847-25 139 Okl 26, 280P1083 (refusal to remand held not erroneous).

847-27 169Ark657, 276SW586 (against original defendant in action to assert laborer's lien on ties in which purchaser of ties was made defendant and as to whom cause of action was dismissed by plaintiff).

847-42½-New. One appealing from judgment of justice's court has the duty of appearing when the case is called in the circuit court and cannot complain of judgment by default taken against him. 171Ark935, 287SW847.

849-57 See also 214Ala324, 107S862.

849-61½-New. Court may award affirmative judgment for defendant on his plea of set-off in excess of that claimed by plaintiff. 3Del 118, 131A320.

849-63 TexCivA 2SW(2d)488.

850-78 77CalA95, 246P82.

851-95 [a] **Motion to affirm.**—MoA 285 SW795.

851-97½-New. Where plaintiff amended pleading in district court, defendant does not by amending his answer waive his right to affirmance of justice's court judgment rendered in his favor. 36Wyo 191, 253P858.

851-98 36Wyo 191, 253P858.

851-3 [c] **Where appellant perfects appeal** failure to list case for trial is no ground for affirmance. 222MoA566, 291 SW1081.

851-7 77CalA95, 246P82.

852-18½-New. Mere fact that plaintiff's petition was sufficient to entitle him to judgment is not ground for reversal of judgment for defendant who had answered petition and contested case. 36Wyo 191, 253P858.

852-23 173Minn29, 216NW252.

853-32 77CalA95, 246P82. [b] (2) Where on appeal in action of unlawful detainer it appears that title to land is in dispute or called in question, court should refuse to take further cognizance of case and remand same to justice's court with directions to proceed in accordance with section 901 Comp. St. (1921) § 901. 112 Okl 78, 239P571 (record held to show title to land in question).

855-44 220MoA840, 295SW487.

855-52 Sask [1926] 4DomLR1126.

856-54 85CalA461, 259P491; TexCivA 294SW702.

856-55 TexCivA 284SW643.

857-71 See also MoA 7SW(2d)1025.

857-77 TexCivA 294SW702.

857-78 [a] (2) Dismissal of suit as to one of two defendants against whom judgment entered in justice's court is presumed to have been without prejudice to right to renew it where made before submission on merits. 169Ark 657, 276SW586. (3) Order of dismissal of appeal from justice's court will be presumed correctly to state ground of motion on which order is based. 76 Mont284, 246P249.

858-84 TexCivA 286SW334.

859-20 220MoA676, 293SW512.

860-21 8PaDist&Co 658.

860-22 85CalA255, 259P95.

860-23 See also 220MoA676, 293SW 512.

860-24 142Miss866, 108S146.

860-26½-New. A proceeding by certiorari to remove a cause from a justice's court to a circuit court is not the commencement of a suit. 142Miss866, 108S 146.

860-26½-New. A writ of certiorari granted pursuant to Rev. St. (1925) arts 941-950, by the county court, to review an action of the justice's court, is not granted as a matter of right, but an application is addressed to the discretionary power of the court. TexCivA 9SW (2d)426.

861-29 220Ala464, 126S101.

861-33 TexCivA 9SW(2d)426.

862-36 148Miss521, 114S323. [b] (1) 34GaA185, 129SE14.

862-40 Nev 284P766; 8PaDist&Co 658. [a] (9) TexCivA 30SW(2d)341.

865-52 [c] **Excuses held insufficient.**—TexCivA 3SW(2d)847.

865-53 TexCivA 28SW(2d)236.

868-4 9PaDist&Co 279; 13PaDist&Co 226; TexCivA 9SW(2d)426.

869-14 239 IllA484.

869-20½-New. Where a judgment creditor within the statutory period, issued a writ of certiorari after the allowance of an exemption on the return of a writ of garnishment, he is not estopped to prosecute the writ of certiorari because the garnishee had paid out the money in his hands before filing of the petition. 142Miss866, 108S146.

869-24 TexCivA 9SW(2d)426.

870-28 TexCivA 9SW(2d)426. [b] TexCivA 9SW(2d)426; TexCivA 30SW(2d) 341. [c] 239 IllA484.

870-35½-New. Defects in an application under some statutes to review an action of the justice's court, will not be entertained, in the absence of a motion to dismiss the certiorari. TexCivA 9 SW(2d)426.

870-37 214Ala424, 108S260.

870-38 35GaA331, 132SE919 (petition assigning error only on failure to enter judgment against garnishee contains no assignment of error against defendant).

871-41 [b] **But defendant absent from trial** through attorney's negligence need not state evidence adduced. TexCivA 28SW(2d)236.

871-49 [b] TexCivA 3SW(2d)847.

871-50 [a] (1) TexCivA 20SW(2d)842 (holding remedies cumulative).

872-59 [b] **Bond held insufficient** (1) Bond covering only amount sued for, without including interest and costs. GaA 155SE353.

872-60 [a] **Garnishee is not made party** where bond is payable to defendant only. 35GaA331, 132SE919.

873-88 See also TexCivA 9SW(2d)440.

874-13½-New. Judge who fails to file answer by the first day of the term is subject to contempt, but that will not authorize a dismissal of certiorari. 34 GaA205, 129SE16.

874-13½-New. **In Georgia**, where there is agreement and consent of counsel and an order of the superior court, reciting that the first order based upon that ground, "was erroneously entered," and that the second order should be entered so as to show "the true ground" set forth, the failure of the magistrate to file his answer five days before the first day of the term was not jurisdictional. 34GaA205, 129SE16, 18.

876-37 34GaA205, 129SE16.

876-38 [a] **Exceptions to answer need not be filed at term at which it is returnable**, but may be disposed of after that term and may be filed before case is called for hearing. 34GaA205, 129 SE16.

876-49 36GaA609, 137SE641.

877-58 36GaA609, 137SE641.

877-60 252 IllA178; 220MoA676, 293 SW512.

877-61 220MoA676, 293SW512.

878-64 See also 3Del 525, 140A151.

878-73½-New. Where a motion under a statute to dismiss certiorari to review an action of the justice court, has been duly filed, a continuance of the case to one or more succeeding terms does not constitute a waiver or abandonment of the motion, where the continuance was granted without prejudice. TexCivA 9 SW(2d)426.

878-75 TexCivA 9SW(2d)440.

878-80 [a] **Failure to issue summons to garnishee within statutory period** is not ground for dismissal of writ of certiorari as to him where claim of exemption was allowed on return of writ of garnishment, and petition for writ of certiorari and bond were filed, and writ of certiorari was issued within proper time, and summons was issued for judgment defendant. 142Miss866, 108S146.

878-82 37GaA167, 139SE91.

878-83 36GaA609, 137SE641; 37GaA 167, 139SE91.

879-95½-New. Plaintiff's delay of more than a year in procuring an action on a motion to have a writ of certiorari issued to the justice court, dismissed for reason that the application was insufficient, has been held not ground for overruling the motion, where a county judge in office at the time was disqualified to act. TexCivA 9SW(2d)440.

879-1 TexCivA 28SW(2d)236.

879-3 TexCivA 3SW(2d)847.

879-9½-New. Discretion vested in a county court to grant certiorari to review an action of the justice's court is subject to review. TexCivA 9SW(2d) 426.

880-23 [a] 36GaA582, 137SE641.

880-29 220MoA676, 293SW512; NJ Sup 151A381.

880-30 154Miss631, 122S773.

881-39 154Miss631, 122S773.

881-41 TexCivA 9SW(2d)426.

882-42 But see Ala 126S101 (objection must be made before justice).

882-48 See also TexCivA 9SW(2d)426.

882-49 214Ala424, 108S260; TexCivA 25SW(2d)887. [c] **Defendant has right**

to assert as set off amount of judgment against plaintiff's assignee which defendant had acquired by assignment. TexCivA 258SW(2d)887.
882-55 220MoA676, 293SW512. But see MoA 24SW(2d)710.
883-61 23AlaA306, 126S100(2dcase).
883-73 36GaA323, 136SE473.
884-85 220MoA676, 293SW512. [a] (5) Giving judgment in excess of one hundred dollars. 6PaDist&Co 52.
884-87½-New. Questions of fact are for jury. 23AlaA306, 126S100(2dcase).
884-90 146Miss217, 111S291.
885-94 146Miss217, 111S291.
885-1 33GaA784, 127SE793; 40GaA 143, 148SE919(1stcase).
886-3 33GaA784, 127SE793.
886-14 [a] (1) 91PaSuper284 (rule not changed by P. L. [1889] p 158).
888-48 137 Okl 302, 277P594.
890-4 But see 125Kan781, 266P44.
890-10½-New. Surety on appeal bond is not released by dismissal on appeal as to one of two defendants against each of whom proper judgment was by justice of peace, 169Ark657, 276SW 586.
890-10⅛-New. nor by the subsequent erroneous setting aside of such dismissal. 169Ark657, 276SW586.
890-10¼-New. A bond given on removal of forcible detainer proceedings to the circuit court by certiorari, containing an agreement by the obligors to abide by the judgment of the circuit court, is not superseded by an appeal bond given to secure payment of the same judgment. 322Mo 450, 17SW(2d) 505.
891-14 See also TexCivA 25SW(2d) 887.
891-20 [c] **Interest in addition to penalty.**-322Mo 450, 17SW(2d)505.
892-23½-New. Written pleadings in the justice's court are not prerequisite to the recovery of rent on an appeal bond. TexCivA 280SW307.
892-23⅛-New. A certiorari bond containing an agreement of the obligors to abide by the judgment of the circuit court guarantees payment of the circuit court judgment after affirmance by the supreme court. 322Mo 450, 17SW(2d) 505.
892-23¼-New. A bond is a contract on which interest on the amount due is payable after demand for payment has been made. 322Mo 450, 17SW(2d)505.
892-37 169Ark657, 276SW586; 142 Miss403, 107S551; 156Miss483, 126S1 (mechanic's lien need not be established). [b] (2) Judgment need not be against sureties also. 142Miss403, 107 S551. [d] 142Miss403, 107S551.
893-40 220MoA840, 295SW487.
893-46 3Del 36, 130A30 (recognizance on issuance of certiorari).
893-50½-New. The capacity in which a defendant signed a certiorari bond is a question of fact to be determined from the bond and any other competent evidence. 322Mo 450, 17SW(2d)505.
894-60½-New. The obligee under a bond accompanying an application for certiorari to remove a forcible detainer proceeding to the circuit court may bring suit jointly against as many of the obligors as he chooses and may join any person liable in a representative character. 322Mo 450, 17SW(2d)505.
894-69 125Kan781, 266P44.
894-74½-New. Where defendant, in verified motion to quash an execution issued in forcible detainer action, denied that he joined in application or affidavit or bond for certiorari, given on removal of proceedings to circuit court, his administrators, admitted as parties to action on bond after his death, cannot contend that he executed the bond as principal. 322Mo 450, 17SW(2d) 505.
894-87 [a] (2) Petition in suit on certiorari bond, given for removal of forcible detainer proceedings to circuit court alleging that damage from loss of rents has been merged in judgment and that judgment was not paid, sufficiently alleges breach of condition for payment of judgment. 322Mo 450, 17SW(2d) 505.

JUSTIFY

896-23 262Mass477, 160NE427.

KEEP, KEPT, and KEEPING

898-2 17F(2d)965.
899-53 [c] **"Kept" and "used,"** as employed in burglary statute making it a crime to include entering building or structure "used, or kept for private or public use," are not synonymous. 233 Mich279, 206NW545.
899-63½-New. "Kept for private or public use" in reference to building entered, as used in burglary statute, may mean that building is not occupied but is being held for private or public use. 233Mich279, 206NW545.
899-64 17F(2d)965.

KIDNAPPING

903-1 [a] (5) "The taking and carrying away of a person, forcibly or fraudulently." 193NC754, 138SE136.
903-2 Utah 289P92.
903-10 [a] **Proof of any one of several methods** provided by statute is sufficient. 129 Or577, 278P974.
903-11 [a] **All children, regardless of** age are within protection of some statutes. 88CalA558, 263P857.
903-21 23AlaA168, 123S237.
903-32 23AlaA168, 123S237; 337 Ill 625, 169NE749.
903-33 [a] (3) Other instances. 47 Ida 328, 274P805, 62ALR195.
904-35 125Kan594, 264P1069. But see 158Tenn204, 12SW(2d)385.
904-42 Mo 29SW(2d)74.
904-43 82CalA459, 255P836. [c] **Malice** need not be proved. 41GaA499, 153SE 371.
904-46 220Ala30, 123S231, 68ALR712; 23AlaA537, 128S587.
905-59 41GaA499, 153SE371.
905-74 NJSup 134A290.
905-76 23AlaA537, 128S587 (holding that where girl voluntarily accompanied defendant the evidence was insufficient to sustain conviction).
906-82 CalA 286P502; 114Nebr121, 206NW21; 129 Or577, 278P974.
906-87 [a] **That parents previously permitted defendant** to go with daughter does not relieve defendant of criminal liability, 41GaA499, 153SE371.
906-95 23AlaA168, 123S237, 248 [cit Cyc]; Utah 289P92.
906-96 322Mo 210, 14SW(2d)621.
906-99 88CalA558, 263P857.
906-4½-New. A statute denouncing as a crime the enticing away of a child with intent to detain or conceal it from its parents defines two separate offenses, one to detain and one to conceal. 118 Nebr265, 224NW318.
907-12½-New. Proof of carrying, or intent to carry, victim out of state is unnecessary to convict of kidnapping. Wis 229NW83.
907-22 23AlaA168, 123S237.
907-23 337 Ill 625, 169NE749.
907-31 255Mass144, 150NE882. [b] **Fact that defendant did not have knowledge of decree** will not preclude conviction. 255Mass144, 150NE882.
908-36 255Mass144, 150NE882.
908-37 Utah 289P92.
908-40 But see 23AlaA168, 123S237.
908-50 Mo 29SW(2d)74.
909-77 Utah 289P92.
910-89 [b] (2) Intent must be proved by state. 23AlaA168, 123S237.
910-90 23AlaA168, 123S237, 248 [cit Cyc].
910-92 88CalA558, 263P857.
910-3 CalA 286P502.
910-4 [a] (2) Forcibly carrying away child for period of several hours, during which accused took indecent liberties with her person. 322Mo 210, 14SW (2d)621. (3) Accessory. 337 Ill 625. 169NE749.
910-5 [a] (2) Kidnapping of two girls by enticing them from their parents. 88CalA495, 263P560.
910-7 [c] **Evidence showed fraudulent taking.-CalA** 286P502.
911-8 [a] (1) 158Tenn204, 12SW(2d) 385.
911-9 CalA 286P502 (admission of plan by defendant showed intent).
911-24½-New. Evidence of the amount of liquor which the witness and the assaulted party had drunk on the way to church held admissible. 220Ala39, 123 S236.
911-26 Mo 29SW(2d)74. But see 23 AlaA168, 123S237, 244 [citCJ]. [h] **Affirmative charge for state** held error where one of witnesses denied defendant's participation in kidnapping. 23 AlaA168, 123S237.
911-28 [a] (1) 255Mass144, 150NE882. (6) Defining "kidnapping." 193NC754, 138SE136.
911-29 [c] **Instructions** held improperly refused. 36GaA645, 137SE795.
912-34 129 Or577, 278P974. [b] 255 Mass144, 150NE882.

KIN

914-25 [a] (2) But in some jurisdictions phrase is given broad interpretation so as to include husband and wife as well as collateral blood relatives. 22 OhA437, 155NE153.

KIPPER

915-65½-New. To cure. US 12CustA 421.

KNOW, KNOWING, KNOWN, and KNEW

916-2 160Ga824, 129SE95 (and means more than mere constructive record notice).

KNOWINGLY

918-73 195Cal 445, 234P91 (by statute).
919-79 195Cal 445, 234P91.

KNOWLEDGE

921-48 213Ala635, 105S897.
921-50 Iowa 228NW51.

KOSHUBA

922-69½-New. A Hebrew word meaning an antenuptial agreement or marriage settlement. 216AppDiv362, 215 NYS184.

LABOR or LABOUR

923-97 TexCivA 293SW647, 648 [cit CJ].
926-97½-New. "Sunday labor," 115 Tex569, 285SW293.

LABORER or LABOURER

927-39 160La489, 107S316.
927-41 50SD450, 210NW743.
927-43 50SD450, 210NW743.
928-66 160La489, 107S316.
928-67 160La489, 107S316.
929-69 6LaA423.
929-95 115 ObSt555, 155NE131.
929-95½-New. a millwright, 160La 489, 107S316.
930-33 160La489, 107S316.
930-51 94Fed828; 160La489, 107S316.
930-57 22Fed519, 22Blatchf520; 101 Fed989; 185Fed165; 15Philippine592.

LAC

931-3½-New. The dark-red resinous incrustation produced on certain trees by the puncture of an insect. US 12 CustA81.

LACK

931-8 [a] **Lack of jurisdiction.-Wis** 229NW636.

LAND

934-96 [a] **"Land" within tax law** is held to mean land only for purposes of taxation, and not for local improvements. 219AppDiv377, 219NYS597.

LANDLORD AND TENANT

951-1 [d] **Landlord and tenant is a phrase** used to denote familiar legal relation existing between lessor and lessee of real estate. 122Kan640, 253P553.
951-2 [a] (1) 122Kan640, 253P553. (6) One renting land and paying for it either in money or part of crop or equivalent. Nebr 230NW682.
952-9 150Miss766, 117S365, 367 [cit CJ].
952-13 122Kan640, 253P553; 150Miss 766, 117S365, 367 [citCJ]; 127Misc611, 217NYS488; 286Pa529, 134A494.
952-20 82NH249, 132A256.
952-21 82NH249, 132A256.

952-24 118Tex143, 12SW(2d)543.
952-25 127Me32, 141A70; TexCivA 286SW531, 532 [citCJ].
953-33 36GaA591, 137SE574.
953-36 118Tex143, 12SW(2d)543.
953-39 82NH249, 132A256 (dictum).
953-41½-New. In the absence of an express covenant to pay rent, the relationship between the parties is one of privity of estate. 222MoA566, 291SW1081.
954-53 127Me32, 141A70; 217AppDiv541, 217NYS256; 118 Or55, 245P727, 728 [citCJ].
954-54 MoA 32SW(2d)103; 126Misc807, 215NYS101 (as it creates irrevocable estate or interest in land); 223AppDiv48, 227NYS392. [a] 250 IllA209; 223AppDiv48, 227NYS392; 217AppDiv541, 217NYS256.
954-55 [a] 118 Or55, 245P727, 728 [citCJ].
954-58 127Me32, 141A70; 118 Or55, 245P727, 728 [citCJ].
954-59½-New. The language used is not controlling in determining whether instrument is lease or license, and court will look to nature of right rather than name by which it is called. 217AppDiv541, 217NYS256.
955-64 Wash 291P1101.
955-81½-New. An agreement to pay a stated percentage of gross sales as rent for floor space in a store creates the relation of landlord and tenant and not a partnership. 152Wash205, 277P447.
955-88 39GaA632, 147SE903.
956-92 194NC756, 140SE744.
956-2½-New. A contract for a lease of land, granting the privilege of the use of timber, is a lease and not a sale of the timber. TexCivA 11SW(2d)199.
957-7 111Conn697, 151A187. [c] **Law of other states not considered.** 163La185, 111S671.
957-15 122Kan640, 253P553; MoA 296SW1057.
957-16 170Ga538, 153SE420; 122Kan640, 253P553.
957-18 MoA 296SW1057.
957-21 130Misc403, 223NYS668.
957-24 219Ky537, 293SW1070.
958-26 127Misc611, 217NYS438; 111 Okl257, 239P656. [a] (4) Temporary occupancy by way of necessary ingress and egress to and from other lands or tenements with consent of owner is insufficient. 111 Okl 257, 239P656.
958-29 But see 134Misc677, 236NYS353.
959-35½-New. The fact that tenant was also janitor has no bearing on question of tenancy. 125Misc917, 212NYS315.
959-35⅓-New. The fact that tenant was paid for his services as janitor contemporaneous with his payment of rent does not affect rights as tenant. 125Misc917, 212NYS315.
959-37 IndA 168NE703.
959-43 36GaA701, 138SE81.
959-44 232Mich291, 205NW128; TexCivA 278SW518. [b] **Payment of rent negatives claim of ownership under alleged parol agreement.**-TexCivA 278SW518.
959-49 TexCivA 26SW(2d)1100.
960-62 178Ark902, 12SW(2d)895; 85CalA533, 259P1007 [citCyc]; 43 Ida306, 251P630 [citCJ]; 187Wis55, 203NW910, 911 [citCJ] (entry and payment of rent). But see 105NJL317, 144A720, 64ALR304.
960-63 187Wis55, 203NW910, 911 [citCJ].
960-69 203 Iowa100, 212NW352.
961-72 [a] **Character of tenancy is not determined by enforceability of contract under statute of frauds.**-228AppDiv832, 241NYS32.
961-74 203 Iowa100, 212NW352.
961-76 [b] **Contract construed to be lease** to be converted into contract of purchase if lessee complied with payment provisions. 172Ark1139, 292SW368, 51ALR1287.
961-82½-New. A contract requiring rental payments and conveyance after performance of certain conditions created a "tenancy." 175Ark1073, 1SW(2d)549.
961-82½-New. An entry under an option to use the premises, conditioned upon annual payments and accompanying option to purchase, creates the relation of landlord and tenant. TexCivA 14SW(2d)919.
961-85 169Ga719, 151SE381(1stcase).
962-89 Mont 286P691.
962-92½-New. Where purchaser's assignee terminates contract and notifies vendor, law implies promise to pay reasonable rent for occupation. Mont 286P691.
962-1 172Ark551, 289SW769.
963-7 TexCivA 278SW518.
963-27 36GaA591, 137SE574.
964-52 131Misc446, 226NYS129.
965-76 [a] **Attornment clause in mortgage.**-Alta [1930] 1DomLR909 (effect of bankruptcy of mortgagee).
965-77 119Kan534, 240P960; 220MoA1057, 279SW720.
966-92 102NJL154, 130A520. [a] **Lessor's conduct held attornment** in insisting that corporate assignee of lease join in agreement to surrender lease before term and other conduct held recognition as attorned sublessee. 216AppDiv299, 214NYS284. [b] **Correspondence recognizing lessor's successor as landlord** does not show attornment to successor. 138Misc23, 244NYS735.
966-93 138Misc23, 244NYS735.
966-96 220MoA1057, 279SW720.
967-2 175Ark107, 299SW6, 7 [quotCJ].
967-22 187Wis55, 203NW910 (entry and payment of rent).
968-49 [a] **Estoppel of landlord to attack lease** may be proved by parol. 170La573, 128S520.
968-50 118Tex143, 12SW(2d)543. [a] (3) Testimony of tenant as to rental from third party and landlord's controversy with tenant's wife claiming interest in land is competent to show whether there was rental contract. 190NC125, 129SE147.
969-54½-New. Party may contest issue of tenancy by any competent evidence. 190NC125, 129SE147.
969-56 202Cal622, 262P723. [a] (1) 77CalA82, 246P90; 37GaA741, 141SE680; 202 Iowa381, 210NW444; 10LaA779, 123S153; TexCivA 292SW953; TexCivA 11SW(2d)199; 152Wash205, 277P447. (2) Tenancy from month to month. 155Wash613, 285P654. [b] 172Ark551, 289SW769; 36GaA591, 137SE574; Iowa 219NW511; 168La714, 123S301; 144SC483, 142SE600. [d] (7) Held only preliminary agreement. 102NJEq33, 139A712.
970-68 144SC483, 142SE600.
970-68 37GaA741, 141SE680.
970-71 131Misc305, 226NYS630; 153SC118, 150SE478.
970-72 37GaA210, 139SE357; 335 Ill450, 167NE79; NJCir 139A435; 135Wash583, 238P899, 900 [quotCJ]. [b] **Leasehold interest** may be so worded as to give lease, ownership, or interest in land. 174Ark830, 298SW25.
971-73 135Wash583, 238P899, 900 [quotCJ].
971-77 155Tenn256, 291SW1074.
971-78 84Colo325, 270P650.
971-81 99Fla1229, 128S827(2dcase) (holding lessee during life of lease to hold outstanding leasehold estate, which is practically equivalent to absolute ownership). See also 37GaA210, 139SE357; 5PaDist&Co135.
972-92 248 IllA297; TexCivA 9SW(2d)423.
972-99 247 IllA574, 575 [citCJ].
973-20 9PaDist&Co113.
973-21 [a] (8) Clause restricting use of premises to lessees does not mean lease is only operative during lifetime of lessees. Mass 169NE777.
974-33 53SD565, 221NW601. [a] 53SD565, 221NW601.
975-42 TexCivA 9SW(2d)423.
975-57 251 IllA572; 252 IllA142.
975-58 252 IllA142; 244Mich330, 221NW293; NH 151A81(2dcase) (tenant at will); 28 OhA190, 162NE624.
976-60½-New. Tenant's agreement to rent premises to subtenant for future term has been held not rendered invalid because tenant had no contract for future term. 41GaA598, 153SE609(1st case).
976-64 228AppDiv367, 240NYS176.
976-66 226AppDiv755, 234NYS152; 228AppDiv367, 240NYS176.
977-83 90CalA41, 265P844; TexCivA 276SW445. [g] **Provision held not to prohibit assignment.**-133Misc156, 231NYS42.
972-92 145Wash295, 259P1079, 1082 [quotCJ].
972-93 145Wash295, 259P1079, 1082 [quotCJ].
972-94 145Wash295, 259P1079, 1082 [quotCJ].
973-3 80CalA513, 252P630.
973-9 86 IndA185, 156NE562.
973-21 123 Okl 7, 251P738; 154Tenn545, 290SW409. [a] (8) Lease for one year from September 1st expires on 31st day of following August, unless that day is Sunday, in which case term ends on following day. 6PaDist&Co764. [c] **Variance** between original and duplicate leases from which phrase "term of five years" had been stricken, held not to affect rental term. 262Mass29, 159NE443.
974-30½-New. A lease for a term not stated is for a year. TexCivA 5SW(2d)215.
974-34½-New. Under the Oklahoma statute where an original contract or lease was not in writing a continuation thereof expires with the calendar year without notice. 123 Okl 7, 251P738.
975-45 See also 37Wyo344, 262P238, 240 [citCJ].
975-47 [b] **Rule is** that where if present interest is to begin on certain date such day is included in the term. 6PaDist&Co764.
975-57 214Ala516, 108S257; 94Fla403, 114S431; 204 Iowa746, 216NW78; 83NH270, 141A304; 132Misc366, 229NYS86. [a] 214Ala516, 108S257.
975-58 132Misc366, 229NYS86. [c] **Right of way.**-128Misc24, 217NYS190.
976-60½-New. Provision in a lease permitting lessee to sublet is but an affirmance of common-law right. 105Conn488, 136A78.
976-63 94Fla403, 114S431.
977-78½-New. A second mortgage, containing an agreement to assign a lease was held to create no subtenancy in second mortgage. 254Mass434, 150NE196.
977-78⅓-New. A first mortgagee was held not entitled to set up an assignment of a lease to defeat the enforcement of mortgagor's agreement to assign lease to second mortgagee. 254Mass434, 150NE196.
977-78¼-New. Under a mortgage of leasehold providing for the appointment of receiver, the receiver is a matter of right on the lessee's default. 221AppDiv586, 224NYS532.
977-78½-New. An owner consenting to a mortgage of a leasehold is in priority with the mortgagee and agrees to remedies in the mortgage, 221AppDiv586, 224NYS532.
977-78⅙-New. , and any assignment to the owner is subject to the rights of the mortgagee. 221AppDiv586, 224NYS532.
977-80 [a] (1) 37GaA210, 139SE357. (2) Under Civ. Code (1910) § 3691 lease creating mere usufruct is not assignable without landlord's consent. 37GaA596, 141SE82. [d] (1) 220MoA736, 275SW779. (2) 220MoA736, 275SW779. (8) Lease, terms of which exceed two years, may be assigned. 220MoA736, 275SW779. [f] (1) TexCivA 283SW300. (2) TexCivA 297SW520. (6) This statutory provision becomes, by implication, part of every lease, unless terms thereof expressly exclude it. TexCivA 283SW300. (7) Provision in lease that it shall be binding on "assigns" does not operate as consent, though stipulation against assignment is absent. TexCivA 283SW300.
977-83 214Ala516, 108S257.
978-88½-New. Statutory provisions which in effect declare that an instrument is assignable, though prohibited by the instrument are not applicable to a lease of lands prohibiting assignment by tenant. 201 Iowa931, 208NW503.
978-88⅓-New. A lessor must bow to the occupancy of his premises by persons not of his own choosing only where the facts bring the case within the rule that the lessee is trustee for a partnership. 241Mich101, 216NW458.
978-89 77CalA548, 247P520; 26Hawaii118; 102NJL435, 131A880; 226AppDiv

755, 234NYS152; 228AppDiv367, 240 NYS176.

978-90 84CalA240, 257P914; 110Conn 507, 148A347; 252 IllA142; 102NJL435, 131A880.

978-91 237 IllA1.

978-92 105Conn488, 136A78; 26Hawaii 118; 237 IllA1; 243 IllA236; 127Me32, 141A70; 102NJL435, 131A880. [c] **Construction strict to avoid forfeitures.**–237 IllA1.

979-93 26Hawaii118. [a] **Unless prohibition especially appears in document itself,** court should not read into a lease a covenant against assignment. 102NJL 435, 131A880.

979-96 84CalA240, 257P914.

979-96½-New. Covenant not to sublet for any "objectionable" purpose is to be construed as to permit subletting, providing purpose was not "objectionable" in legal sense, as "deserving of disapproval, offense, or reprehensible." 25F (2d)530.

979-96¼-New. Thus, a landlord could not object to subletting because subtenant's business competed with the tenant next door. 25F(2d)530.

979-96¼-New. Covenants against assignments by executors of a tenant, to be effective, must be in "very special" language, and are jealously construed. 246NY516, 159NE416.

979-96½-New. General provisions against assigning or subletting and binding legal representatives of parties do not restrict tenant's representatives from transferring lease as asset of estate. 246NY516, 159NE416.

979-98 327 Ill 21, 158NE353; 130Kan 543, 287P618.

979-12 243 IllA236. [b] **Allowing store manager to use house as residence is** held to be subletting. 5PaDist&Co 552.

980-14 131Misc714, 227NYS721.

980-14½-New. An agreement giving another the right to operate and exclusively manage the premises but not parting with exclusive possession is not a breach of covenant against assigning or subletting. Ont [1929] 3DomLR583.

980-15 110Conn507, 148A347; 127Me 32, 141A70.

980-16 But see MoA 294SW728.

980-25 77CalA548, 247P520.

980-26 77CalA548, 247P520.

981-39 74CalA551, 241P429; 130Kan 543, 287P618; 103NJEq101, 142A360.

981-41 246NY516, 159NE416.

981-42 224 IllA130, 138 [citCyc].

981-44 See also 103NJL704, 137A417.

981-45 25F(2d)584; 83NH270, 141A 304; NH 147A896(2dcase); 101WVa 643, 133SE375, 376, 46ALR842 [citCJ].

982-61 137Misc82, 242NYS729.

982-62 85CalA717, 259P1013; 103NJEq 101, 142A360.

982-63 But see 232Mich609, 206NW325.

982-66 252 IllA337; 127Me32, 141A70; 102NJL435, 131A880; 197NC168, 148SE 26; 101WVa643, 133SE375, 46ALR842. [b] **Purported sublease for entire term of entire premises** is held assignment. 220AppDiv366, 221NYS371.

983-67 127Me32, 141A70; 82NH249, 132A256; 102NJL435, 131A880. But see 217AppDiv243, 216NYS734.

983-69 90CalA41, 265P844; 251 IllA 572.

983-70 88CalA20, 263P538.

983-72 105Conn488, 136A78, 81 [cit CJ]; 23 OhA340, 155NE159.

983-73 110Conn507, 148A347 (landlord to whom tenant sublet held to have waived breach of condition against subletting).

983-75 [b] **Evidence sufficient** to show ratification of sublease. TexCivA 275 SW292.

983-77 82CalA356, 255P537; 165Ga 810, 142SE70; 243 IllA236; 254 IllA60; MoA 29SW(2d)176; 226AppDiv755, 234 NYS152; NJCir 137A819; BC [1930] 2DomLR231 (where lessor's agent, at execution of lease, consented to subletting). See also TexCivA 275SW292. But see 241Mich493, 217NW401.

984-86½-New. Landlord's written approval of subletting is held not vague, indefinite, elusive, or deceptive. 128Misc 838, 221NYS269.

984-86½-New. Landlord's approval of subletting is held unilateral agreement not enforceable by landlord. 128Misc 838, 221NYS269.

984-91 105Conn488, 136A78; MoA 29 SW(2d)176 (signing written assignment not necessary).

984-93 327 Ill 21, 158NE353.

984-95 232Mich609, 206NW325.

985-93 90CalA41, 265P844; NJCirCt 137A819.

985-1 84CalA240, 257P914.

985-12 [f] (2) Lease providing that agreements shall be binding on parties, their heirs, legal assigns, and executors imports unrestricted right on part of lessees to assign leasehold for any lawful use. TexCommnA 291SW194.

986-14 1LaA135, 137 [citCyc]; 134 Misc149, 234NYS678.

986-14½-New. or refuse consent to assignment to tenant whose occupancy will diminish value of property. Tex CivA 276SW445.

986-22½-New. Right of landlord to refuse to consent to assignment is not impaired by lessee's breach of his contract. TexCivA 276SW445.

986-22¼-New. Lessor's consent is not required where the lessee had the right to sublet until the lessor signified willingness to accept surrender. 105Conn 488, 136A78.

986-22¼-New. A lease, granting easement requiring lessor's consent to assignment, is held assignable without consent of subsequent owner of servient property. 23 OhA340, 155NE159.

986-22½-New. Under a statute requiring lessor's consent, provision in lease that it shall bind "assigns" does not operate as consent, although stipulation against assignment is absent. TexCivA 283SW300.

986-22¼-New. An agreement by a lessor to advise later as to whether an assignment would be acceptable, and failure to do so, does not constitute a consent to an assignment. 241Mich493, 217 NW401.

986-22½-New. A lessee cannot grant to a subtenant the right to assign without the lessor's consent contrary to the stipulation in the lease. 90CalA41, 265P844.

986-22¼-New. A lessor does not bind himself by such contract by accepting a surrender of the lessee's interest in the lease after sublease. 90CalA41, 265P844.

986-22½-New. Where a lease binds only the successors or assigns of the lessee, the assignee of the lessee's assignee is not within a provision prohibiting the assignment of the lease without the lessor's written consent. 85CalA757, 260 P358.

986-22½-New. A provision following a restriction on the right to assign that the lessee may with the lessor's consent assign to persons of good repute and satisfactory to the lessor, does not create a covenant to consent to the assignment if such person is proposed. 90CalA41, 265P844.

986-22½-New. Under such provision the lessor is the sole judge of his own satisfaction subject only to the limitation that he must act in good faith. 90 CalA41, 265P844.

986-26 133Misc192, 231NYS443.

987-27 [a] (3) If lessor, knowing of assignment, accepts assignee as substituted lessee by receiving rents without objection, this is sufficient. 214Ala516, 108 S257.

987-32 217AppDiv243, 216NYS734.

987-33 [a] **Acceptance of lessee's offer** to extend sublease for balance of original term insufficient without lessor's consent. 159La291, 105S347.

987-34 [a] **Subletting for use as garage,** is for lawful use within lease permitting subletting for any lawful use. Tex CommnA 291SW194.

987-40 132Misc366, 229NYS86. [c] **Covenant is binding on lessor.**–146Wash 404, 263P593.

987-42 [a] (3) 252 IllA142 (refusal to consent to sublease to business competitor).

988-43 132Misc366, 229NYS86.

988-44 132Misc366, 229NYS86.

988-45 [b] **Sufficiency of evidence** as to whether refusal justified or unjustified. 132Misc366, 229NYS86.

988-45½-New. The proposed assignee is a proper party to an action to compel the lessor to specifically perform his covenant to consent to an assignment. 146Wash404, 263P593.

988-46 84CalA240, 257P914.

988-47½-New. Evidence has been held to support a finding that lessor did not breach an agreement to consent to an assignment to a responsible person. 32 NM469, 259P620, 61ALR767.

988-49 40F(2d)892; 216Ala466, 113S 656, 657 [citCJ]; 98CalA690, 277P752; 251 IllA572; 76Mont332, 247P166; 84 Mont178, 274P834; 104NJL418, 140A 292; 197NC168, 148SE26; 95PaSuper 139; 101WVa97, 132SE56.

988-50 98CalA690, 277P752; 99Fla1238, 128S844; 127Me32, 141A70; Pa 151A 879; TexCivA 272SW263.

988-52 216Ala466, 113S656, 657 [cit CJ]; 90CalA41, 265P844.

989-53 178Ark902, 12SW(2d)895.

989-56 90CalA41, 265P844; 99Fla1238, 128S844; 127Me32, 141A70. See also 77 CalA548, 247P520.

989-57 127Me32, 141A70; 254Mass434, 150NE196; 232Mich370, 205NW196.

990-70 76Mont332, 247P166 [citCJ]; 217AppDiv243, 216NYS734; 113 Okl 287, 241P490; TexCivA 28SW(2d)1114.

990-71 40F(2d)892; 88CalA20, 263P 538; 127Me32, 141A70; 76Mont332, 247 P166 [citCJ]; 84Mont178, 274P834; 197 NC168, 148SE26.

990-72 217AppDiv243, 216NYS734. See 132Misc435, 230NYS239.

990-73 See also 217AppDiv243, 216NYS 734.

990-76 127Me32, 141A70.

990-76½-New. It is a violation of a covenant against subletting for lessee to remove all of his personal belongings and deliver to another the exclusive possession of the premises. 8PaDist&Co 631.

990-76½-New. A tenant's reservation of a right of reentry on the failure of the transferee to pay rent or on violation of covenants creates a subtenancy. 85Mont 106, 277P612.

990-77 104NJL418, 140A292.

990-78 217Ala180, 115S230.

991-84 104NJL418, 140A292.

991-85 90CalA41, 265P844; NJCir 137 A819.

991-86 NJCir 137A819.

991-90 217Ala180, 115S230; 22AlaA1, 113S651; 85Mont106, 277P612; 76Mont 332, 247P166 [citCJ]; 102NJL435, 131 A880. [a] **Whether in legal effect the instrument is an assignment or sublease** depends on the intention of the parties. 85Mont106, 277P612.

991-93½-New. An agreement whereby the proposed sublessees guaranteed performance by the sublessor of conditions in the original lease in return for the lessor's consent to sublease is a sublease and not an assignment. 241NY489, 150 NE525.

991-98 Contra NJSup 131A619. [a] But see NJSup 131A619.

992-1 [a] **Payment by lessee** may be consistent with assignment. 13LaA277, 127S748.

992-4 22AlaA1, 113S651.

992-9½-New. One claiming as assignee of a partnership's interest in a sublease has the burden to prove the assignment. 99CalA73, 277P875(2dcase).

992-18½-New. Surrender of premises to assignee is legal consideration for promise to pay. 163La272, 111S702.

993-42 136Wash126, 238P901.

994-49 [c] **Constructive delivery** is sufficient. 159Tenn103, 15SW(2d)742.

994-50 228AppDiv367, 240NYS176 (possession not necessary).

994-55 See also 136Wash126, 238P901.

994-57½-New. Recording is not necessary as between the parties or persons standing in their place, 136Wash126, 238 P901.

994-57½-New. such as a devisee of a party. 136Wash126, 238P901.

994-60 127Me32, 141A70; 114Nebr184, 206NW744, 42ALR1102; 197NC168, 148 SE26.

994-61½-New. In an action by the assignee of the vendor of a leasehold interest against the vendee to secure an equitable lien for the unpaid purchase price, plaintiff is not entitled to judg-

ment where he fails to show default of purchaser or any equity requiring the court to hasten the time of payment beyond the express terms of the contract. 192Wis514, 213NW311.

994-63 CalA 290P1053; 13LaA277, 127S748; 114Nebr184, 206NW744, 42ALR1102; 229AppDiv681, 243NYS255; 148Va331, 138S637. [a] (3) 148Va331, 138SE637. [d] **Express covenants of lessee remain** during continuance of term obligatory on him. 114Nebr184, 206NW744, 42ALR1102. [e] **Sufficiency of assignment.**–CalA 284P954.

995-66 137Misc372, 243NYS522.

995-66½-New. Where the lease expressly provides that the lessee may assign in a manner prescribed therein and that an assignment thus made should release the lessee from all obligations under a lease subsequent to such assignment, and an assignment is made to one who takes and remains in possession performing all obligations of the lease with acceptance and knowledge of fact by the lessor, the lessor waives right to object to failure of assignment to conform to condition of lease, 114Nebr184, 206NW744, 42ALR1102.

995-66⅓-New. and the assignment is valid and effective to release and discharge the lessee according to the terms of the lease. 114Nebr184, 206NW744, 42ALR1102.

995-66¼-New. Assignors have no right of reëntry upon default and abandonment by the assignee, where the assignment stipulated against his liability for rents and was consented to by the landlord. 86 IndA246, 155NE618.

995-68½-New. Where both privity of contract and estate exist between a lessor or a lessee or assignee of a lease, the destruction of privity of estate does not necessarily destroy privity of contract, but the destruction of privity of estate will not create privity of contract which did not theretofore exist. 84Colo 325, 270P650.

995-69 80CalA513, 252P630; CalA 290P1053; NJCir 137A819. [a] **Privity of contract and estate** held created by assignment. 80CalA513, 252P630.

995-70 80CalA513, 252P630; MoA 29SW(2d)176; 82NH249, 132A256; 29OhA402, 163NE636.

995-70½-New. The destruction of privity of estate between a lessor and an assignee cannot create privity of contract not previously existing. 84Colo 325, 270P650.

995-72 214Ala516, 108S257; 80CalA513, 252P630; 99Fla1238, 128S844; NJCir 137A819; 115 Okl 294, 243P167 (notice of termination of tenancy); 286Pa237, 133A252, 255 [citCJ]. [f] 82NH249, 132A256. [g] **Assignee for purpose of selling** for assignor's benefit in suit to enjoin enforcement of forfeiture need not join assignor. OhA 154NE173. [h] **Written assignment** merges prior negotiations, leaving assignee under terms of lease. 80CalA513, 252P630. [i] **Where leasehold rights accrued before rights of mortgagee,** assignee performing covenants can remain in possession. Mass 171NE226.

995-73 178Ark972, 13SW(2d)614; Iowa 228NW77. [b] **Agreement as to removal of fixtures** is binding on lessee's assignee where agreement and lease constituted in effect one instrument. 39 Wyo 1, 269P31.

995-74 147Wash667, 267P46.

995-75 7PaDist&Co 109. See also 136Misc81, 240NYS238. [a] (2) Assignee after assignment by lease by assignor to corporation and bankruptcy of corporation cannot recover amount paid by lessee as consideration for lease and to be applied on rent of last year thereof. 71CalA73, 234P442.

996-77½-New. Assignee of a lease may sue to enjoin enforcement of forfeiture without joining his assignor. OhA 154NE173.

996-77⅓-New. Where the trustee in bankruptcy of vendors contracting to sell a leasehold refrains from assuming a contract, there is a breach entitling the purchaser to recover installments paid. 33F(2d)963.

996-80 MoA 29SW(2d)176; Pa 151A879. See also 84Colo 325, 270P650. [c] **Assignee must assume burdens under contract.**–39Wyo 1, 269P31.

996-81 199Wis428, 224NW98. [c] **Where assignment provided that obligations of lease were not assumed,** assignee held not obligated to pay rent commissions required of lessee. 169Ga411, 150SE590.

996-82 21F(2d)385; 98CalA675, 277P534; 114Nebr184, 206NW744, 42ALR1102.

996-83 21F(2d)385. See also 13LaA277, 125S171. [b] (2) Where corporation assignee of lease entered, paid rent, and, by subsequent agreements, assumed lease as tenant and agreed to pay additional rent, it was held that it became tenant of original lease and was bound by covenants thereof. 13F(2d)529.

996-85½-New. Assignee of lease is bound by practical construction of sublease by parties thereto. IndA 169NE596.

996-85⅓-New. Defendant cannot be liable at same time as lessee under one lease and as assignee of another lessee for same term of same premises. 228AppDiv708, 239NYS224.

997-92 [e] **Assignee may be estopped to deny** validity of assignment or possession under lease. CalA 287P375.

997-95 But see CalA 285P1077.

997-96 MoA 29SW(2d)176.

997-1 Mass 170NE414.

998-3 217Ky292, 289SW247, 248 [quot CJ].

998-9 Mass 170NE414.

999-17½-New. In an action by the assignee of a lease against a subsequent assignee, the intermediate assignees, whose assignments were absolute, were not necessary parties. 143Wash588, 255P936.

999-17⅓-New. Assignee of interest, reserved by the assignee of a lease in furniture and leasehold interest under a conditional sales contract, could assert a lien reserved as against title of a subsequent assignee who purchased with notice of lien. 143Wash588, 255P936.

999-17¼-New. Where the assignee of a leasehold interest subject to lien, upon the lienor's demand for possession, delivered furniture to a storage company for want of directions, she was not liable for storage. 143Wash588, 255P936.

999-24 [a] **Where assignee expressly declined to assume obligations of lease,** subsequent assignee assumed no greater burden though he does not expressly decline to assume obligations. 169Ga411, 150SE590.

999-29 Mass 170NE414.

999-32 233Mich279, 206NW542 (cannot complain that there was fraud in cancellation of lease and in contract of sale of premises to their associate and immediate assignor, lessee who had exercised his option under lease to purchase); 101NJEq94, 136A731; TexCivA 272SW263.

999-38 21OhA103, 153NE107. [g] **Rights in deposit made by sublessee.**–68CalA145, 228P722. [h] **Assignment as collateral security** does not prevent assignor from exercising option to renew, thereby preventing assignee from recovering money to be paid for summer following, in case lease should not be exercised. 140Wash410, 249P983. [i] **Expiration and revival of rights of assignor.** Vt 150A136.

999-38½-New. Assignee of lease stands in place of assignor and receives benefits of latter's contract. 101WVa97, 132SE56.

999-38⅓-New. Contract for lease pledged as security, being chose in action, is not subject to sale, in absence of special agreement. 131Misc6, 225NYS509.

999-38¼-New. A lease assigned as collateral security, subject to a prior assignment authorizing sale, can be sold at public auction by assignee of pledgee, 131Misc6, 225NYS509.

999-38⅕-New. and the right to sell is not affected by assignor's right to repossess himself of the lease. 131Misc6, 225NYS509.

999-38⅙-New. Right of assignee of pledgee of lease for years to acquire lease in default is not transfer of realty, lease for years being "personal property." 131Misc6, 225NYS509.

999-38⅐-New. Lessee's transfer of term held not assignment of full term of original lease, but merely sublease. CalA 284P954.

1000-39 [f] **In British Columbia.**–[1930] 2DomLR96.

1001-52 82Colo 320, 259P1027.

1001-56½-New. The assignee stands in place of the assignor and assumes the burden of the latter's contract. 101WVa97, 132SE56.

1001-61 84CalA240, 257P914.

1001-64 127Me32, 141A70; 197NC168, 148SE26. [a] **Sublessee is not bound by terms in original lease** at variance with terms of sublease. 102CalA254, 283P100.

1001-65 37GaA210, 139SE357; 285Pa426, 132A287.

1002-68½-New. Tenant's assignment of a lease after petition and precept in summary proceedings have been served and final order served is void. 128Misc342, 217NYS885.

1002-69½-New. Sublessee's knowledge does not excuse the breach by sublessor nor mitigate damages for breach of contract to deliver possession unless sublessee elects to treat lease as assignment of rents under prior sublease. 217Ala180, 115S230.

1002-69⅓-New. That the sublessees did not elect to follow their remedy against the landlord did not relieve a negligent third party's liability for damages. 102CalA254, 283P100.

1002-71 84CalA214, 257P890; IndA173NE292; Mass 173NE414; 102NJL154, 130A520. [c] **Sublease of right of way.**–128Misc24, 217NYS190.

1002-72 197Cal751, 242P926, 42ALR1165; 84CalA214, 257P890; 285Pa426, 132A287.

1002-73 197Cal751, 242P926, 42ALR1165; 37GaA210, 139SE357; 102NJL154, 130A520; 285Pa426, 132A287. [a] 133Misc849, 234NYS339. [d] **Sublease made subject to conditions of lease** cannot be construed as incorporating by reference covenant to apportion rent on termination of lease by paying to lessees all loss and damages occasioned by such termination. 197Cal751, 242P926, 42ALR1165.

1002-74½-New. But on surrender of lease by original lessee and his assignee under agreement with lessor where the lessor accepts rent from the assignee's sublessee, the latter becomes the lessor's tenant by operation of law, 216AppDiv299, 214NYS284.

1002-74⅓-New. with rights under the sublease on covenants contained, even though the original lease contained no such covenants. 216AppDiv299, 214NYS284.

1002-74¼-New. Covenants running with land. Covenant in sublease to supply sublessee with live steam runs with land so as to bind the lessor on the sublessor's surrender of the lease before the end of the term and the sublessee's attornment to the lessor. 216AppDiv299, 214NYS284 (where live steam necessary to sublessee's business).

1002-74⅕-New. Sublease indemnifying sublessees against damage to crops in case of termination of lease entitled them to damages for labor and time necessarily spent in preparing the soil for planting, although no crops were planted. 197Cal751, 242P926, 42ALR1165.

1002-74⅙-New. A sublessee has no right to enforce against the lessor the covenants contained in the original lease. 84CalA214, 257P890.

1002-74⅐-New. Where plaintiff owned land, but defendant was rightfully in possession under tenant at will, he could not be regarded as trespasser or disseizor. NH 151A81(2dcase).

1002-76½-New. Lessor is not directly liable to sublessee for breach of a contract. 46Philippine916.

1002-78 21F(2d)385; 73CalA782, 239P302; 84CalA214, 257P890; NH 151A81(2dcase). [b] **Where purchaser, who expressly assumed vendor's obligations to**

lessee, elected to cancel lease under option therein, and sublessee sued lessee for return of deposit, it was error to grant judgment for sublessee against purchaser brought in as additional defendant and to dismiss complaint against lessee, there being no priority between sublessee and purchaser. 125Misc178, 210NYS455. [c] **Election.**–37GaA210, 139SE357.

1003–79 102NJL154, 130A520.

1003–82 88CalA20, 263P538; 37GaA 210, 139SE357; Pa 151A879.

1003–83 73CalA782, 239P302.

1003–83½–New. Landlord is not entitled to possession from the assignee of the lessee having received rent from him, and he not conducting any illegal business. 128Misc342, 217NYS885.

1003–83¼–New. Where a subtenant remained in possession after the lease expired, without permission of the landlord, the landlord could hold tenant as holdover. 129Misc215, 220NYS681.

1003–84 216AppDiv299, 214NYS284.

1003–87 153Wash175, 279P566(2dcase) (lessee stands as to sublessee of part of building as though it were owner of fee). [b] **Action for damages for breach of covenant by sublessor.**–217Ala180, 115 S230. [c] **Sublessee's obligation is dependent** on lessor's maintenance of his own tenure. 134Misc657, 236NYS308. [d] **Construction of agreement.**–Mass 173NE429.

1003–88 128Me364, 147A655 (duration of liability).

1003–92 [a] **Evidence sufficient.**–68 CalA639, 230P27. [b] **Admissibility of evidence.**–41GaA598, 153SE609(1stcase). [c] **Subtenant's measure of damages** for tenant's breach of contract to transfer lease. 41GaA598, 153SE609(1stcase).

1003–92½–New. Where the lessee has no assignable interest in the lease at time of assignment, the assignee in seeking redress for the lessee's fraudulent misrepresentations is not bound by a covenant in the original lease to settle by arbitration the refusal of the lessor to consent to assignment. 68 CalA639, 230P27.

1003–94 83CalA173, 256P592.

1003–94½–New. Evidence has been held sufficient to show that the loss of the lessee's goods was due to the negligence of the sublessee. 169Minn62, 210NW608.

1003–94¼–New. Under a sublease giving a lessee the right to terminate the tenancy, if he disposed of his leasehold on condition of payment to the sublessee of a bonus and six-months notice, the sublessee on receiving the notice with a statement as to the payment of the bonus became entitled thereto on the date of the termination six months thereafter irrespective of redelivery of the premises. 222MoA1126, 17SW(2d) 677.

1003–94¼–New. A written agreement between a sublessee and an assignee of the lessee for alterations during a six-months period of continued possession did not extinguish the liability of the original lessee to the sublessee for a bonus on the termination of the original sublease. 222MoA1126, 17SW(2d) 677.

1003–94½–New. Where an assignee of a sublessor permitted the sublessee to remain in possession after the termination of the original sublease, it was in effect a surrender by the sublessee of his possession under the old sublease irrespective of the question of redelivery. 222MoA1126, 17SW(2d)677.

1003–94¼–New. Where under terms of original sublease a bonus was due the sublessee on the date of the termination specified in six-months notice, interest ran only from the date of the termination. 222MoA1126, 17SW(2d) 677.

1003–94½–New. A lessee cannot plead his own breach in discharge of his obligations to continue the rights granted to a sublessee. 98CalA218, 276P623.

1003–96 118Tex143, 12SW(2d)543.

1003–1½–New. The original lessee is liable for damage by a sublessee where the subletting is in violation of the lease. **NJSup** 148A15(1stcase).

1003–3 25F(2d)701.

1004–9½–New. Where a mortgage covered the right to appraisal upon the exercise of an option to cancel a lease, the mortgagee has the right to foreclose to realize the value of such right. 130Misc406, 224NYS37.

1004–10½–New. The assignment of a leasehold as security to the lessee's creditors is in the nature of a mortgage of real estate, and conveys no absolute estate. 84Colo 325, 270P650.

1004–10½–New. The rights and liabilities of a mortgagee of a leasehold to the owner are governed by the law of privity of estate and not by privity of contract. 84Colo 325, 270P650.

1004–21 81Md610, 32A276.

1006–50½–New. A mortgagee is not required to accept a share in a claim for damages against the lessor in lieu of the right to foreclose. 130Misc406, 224 NYS37.

1006–50½–New. A plea of embarrassment to lessee, in a suit for damages against lessor, and doubtful value of claim is not an equitable defense. 130 Misc406, 224NYS37.

1006–58½–New. Where the mortgagee paid ground rent to preserve the leasehold mortgaged, the amount can be added to the amount declared due in the notice of foreclosure sale. 247Mich 683, 226NW711.

1007–81½–New. Violation of agreement to deliver exclusive possession of the premises is ground for rescission of a contract to purchase a lease. 76 Colo 569, 233P622.

1007–81½–New. In an action for rescission of such contract the court may properly direct the return to plaintiff of rent paid while he was trying to obtain possession. 76Colo 569, 233P622.

1007–81¼–New. An agreement to assign or sublet gives the lessee the right to elect which alternative shall be performed. 266Mass550, 165NE873.

1007–81½–New. Misrepresentations may be waived. 266Mass550, 165NE 873.

1007–81½–New. Misrepresentations are waived by accepting a reduction in the purchase price of the lease. 266Mass 550, 165NE873.

1007–81½–New. Misrepresentations, not relied on, are not ground for avoiding an agreement. 266Mass550, 165NE 873.

1008–96 TexCivA 293SW667, 668 [cit CJ]. [a] (8) 262Mass463, 160NE245. (13) See also 13LaA266, 127S638. [b] (4) Statement that lessor of farm lands for term of two years that he would give lessee chance at getting land for another year if he did not sell it. 40 Ida402, 233P516. [c] (5) Use of term "renewal" in lease held to imply merely extension of term. 314Mo 288, 284 SW482. [f] **In Missouri.**–314Mo 288, 284SW482. [g] **Option for renewal and option for extension distinguished.**–262 Mass463, 160NE245.

1008–2 22 OhA432, 154NE53, 54 [quot CJ]; 140Miss769, 106S513 [citCJ].

1009–3 IndA 169NE82; 140Miss769, 106S513 [citCJ]; 22 OhA432, 154NE 53, 54 [quotCJ]; 31 OhA38, 166NE248.

1009–5 86CalA668, 261P488; 140Miss 294, 105S513.

1009–9 149Md163, 130A46; TexCivA 293SW667, 669 [citCJ]. [a] 233Mich 163, 206NW314.

1010–15 205Cal 675, 272P290(2dcase); 133Misc270, 231NYS622.

1010–17 235Ky12, 29SW(2d)550.

1010–22 205Cal 675, 272P290; 111 Conn700, 151A159; 13LaA266, 127S 638; 140Miss294, 105S513; 222AppDiv 467, 226NYS513. See also 314Mo 288, 284SW482.

1010–23 205Cal 675, 272P290; 140Miss 294, 105S513; 222AppDiv467, 226NYS 513. [a] MoA 17SW(2d)599. [c] **Right of renewal exists** whether called "option" or "lease." 289Pa525, 137A 673.

1010–24 205Cal 675, 272P290; 22 OhA 432, 154NE53, 54 [quotCJ]; 289Pa525, 137A673; TexCivA 293SW667, 668 [cit CJ].

1010–25 205Cal 675, 272P290; 22 OhA 432, 154NE53, 54 [quotCJ].

1010–27 111Conn700, 151A159.

1010–27½–New. Ambiguity should be resolved by considering the words used in the light of the object which the parties had in view. 107Conn724, 142A387.

1010–27¼–New. Ten-year lease containing option for five year extension held in effect present demise for full term of fifteen years. MoA 25SW(2d) 799.

1010–29 [a] (2) Promise of option to renew lease on lessee's withdrawal of objection to extension of heating pipes through store held without consideration. 260Mass143, 156NE896. [c] **Payment of mortgage for which lessee was bound** is sufficient consideration where he suffers some detriment or disadvantage on account of it. 179Ark71, 14SW(2d)240.

1011–32 93CalA116, 269P191; 232 IllA 287; Wis 230NW47. [b] 232 IllA287.

1011–34 [a] (2) Under five year lease providing for privilege of another term of five years if parties agreed upon rental, new term of five years is created when parties agree upon rental. 89 IndA640, 166NE607.

1011–37 222AppDiv467, 226NYS513.

1011–41 CalA 262P774.

1012–47 Mass 173NE414; 157Tenn1, 4SW(2d)959. [b] **Effect of exercise** is to fix new term to contract binding upon both parties. Tenant cannot thereafter avail himself of another option in same lease to terminate on sixty days' notice. It has been held that viewing contract as a whole, this latter was intended to apply only in case of a failure to exercise first option. 213AppDiv113, 210NYS60.

1012–51 Ala 130S64.

1012–51½–New. Lessee has only one election. 314Mo 288, 284SW482.

1012–51¼–New. Judgment of foreclosure forecloses tenant's right respecting balance of term including option to renew. 138Misc23, 244NYS735.

1012–52 86CalA58, 260P559.

1012–55 But see 86CalA58, 260P559.

1013–62½–New. Partnership may enforce contract of renewal. 289Pa525, 137A673.

1013–64 132 Or38, 284P562.

1013–71 214Ala516, 108S257, 259 [cit CJ]; 173Ark633, 293SW36; 86CalA668, 261P488; 132 Or38, 284P562; Vt 150 A136. [b] NH 147A896(2dcase).

1014–75½–New. A purchaser of personal property from a tenant under a bill of sale making no reference to the good will or lease of the premises wherein the property is situated has no paramount right to renewal of the lease. 145Miss585, 111S99.

1014–79 173Ark633, 293SW36; 255 Mass76, 151NE81, 45ALR1; 260Mass 127, 156NE856.

1014–90 See also 241NY489, 150NE 525. [e] **Option in sublease for renewal** for period for which sublessor under original lease might renew is not operative even where lessor gave consent for sublease before time for renewal but also contained provision against assignment and further subletting except upon consent. 241NY489, 150NE525.

1015–92½–New. Where consent of original lessor is necessary to renewal to sublessee, acceptance of rent by lessor after notice of sublessee's intention to exercise purported option to renew, is not waiver of right to refuse renewal to sublessee. 241NY489, 150 NE525.

1015–1 See also 93CalA116, 269P191.

1015–2 170La295, 127S729(1stcase).

1016–6 107Conn459, 140A808.

1016–11 241Mich580, 217NW774; 6Pa Dist&Co 599.

1016–14 260Mass127, 156NE856.

1017–16 134Misc313, 235NYS297.

1018–29 See also 252Mass352, 147NE 823. [a] **That value of property has increased** is immaterial. 86CalA668, 261 P488.

1019–34½–New. Where original lease required deposit of notes for rent, lessee desiring to avail himself of privilege of renewal must tender notes for rent during removal term. 141Miss163, 106S770.

1019–34½–New. Where lease was mod-

ified to substitute part of crop for money rent, option for extension is not destroyed by fact that crop was not gathered by rent day so that it could not then be paid in kind. 180Ark890, 258W(2d)19.

1019-37 27 OhA113, 160NE874.

1019-38 140Miss294, 105S513; 141 Miss163, 106S770.

1020-40 53SD565, 221NW601.

1020-42 232 IllA287, 290 [citCyc]; NJSup 133A868.

1020-43 232 IllA287, 290 [citCyc]; 170 La932, 129S534. [a] (2) But lapse of time between sending of tardy notice and landlord's rejection thereof is not acceptance of notice. 128Misc838, 221 NYS269.

1020-44 232 IllA287; 222Ky277, 300 SW612.

1020-45 But see 229Ky28, 16SW(2d) 487. [c] (5) Permitting lessee to make improvements. 229Ky28, 16SW(2d) 487.

1021-47 MoA 17SW(2d)599.

1021-48 18F(2d)828.

1021-49 140Miss294, 105S513. [a] Letter held sufficient written notice. 140Miss294, 105S513.

1021-50 [b] **Tender by lessee of renewal lease** conforming to terms of option, with request for its execution, is exercise of option. 214Ala516, 108S 257.

1021-51 Mass 173NE414.

1021-52 93CalA116, 269P191; 256 Mass226, 152NE615.

1021-53 93CalA116, 269P191.

1021-55 220AppDiv366, 221NYS371.

1021-57 170La932. 129S534. [d] **Notice by husband of lessee without disclosing he was acting for wife** is insufficient. MoA 17SW(2d)599.

1021-58 128Misc838, 221NYS269. [d] **Lease provision requiring one year's notice of lessee's intention to exercise option to renew** held reasonable. 128Misc 838, 221NYS269. [e] **Tenant's notice of election to renew lease sent** more than month after date required in lease held ineffective. 128Misc838, 221NYS269. [f] **Equity will relieve against effect of tenant's failure** to serve timely notice. 128Misc838, 221NYS269.

1021-59 93PaSuper134.

1022-63½-New. Notice, to one of two joint lessors, of tenant's desire to renew lease is sufficient. 83CalA48, 256P489.

1022-63¾-New. In Ontario, notice given to an agent, intrusted with the general management of the premises, is sufficient. Ont [1929] 2DomLR706.

1022-63¼-New. Where the lease does not provide as to how notice is to be given it need not be served on the landlord if he is absent from the country. Ont [1929] 2DomLR706.

1022-64 CalA 262P774.

1022-65 224AppDiv463, 231NYS338.

1022-66 [b] **Lessor's duty to prepare, execute, and tender sufficient lease** upon lessee's notifying him of desire to exercise right of renewal. 255Mass76, 151NE81, 45ALR1.

1022-67½-New. Landlord's retention of tenant's request to sublet is not a renewal of the original lease, in view of the rejection of tenant's tardy notice of renewal. 128Misc838, 221NYS269.

1022-72½-New. A lessor does not waive his right to refuse renewal to a sublessee by accepting rent after notice that the sublessee elected to exercise a purported option of renewal where the lease prohibited the sublessee from subletting without the written consent of the lessor. 241NY489, 150 NE525.

1022-73 86CalA58, 260P559.

1022-74 222Ky277, 300SW612.

1022-77½-New. Where balance of tenant's term is foreclosed, exercise of option to renew lease is merely offer to make new lease requiring acceptance. 138Misc23, 244NYS735.

1022-80 175Minn421, 221NW645.

1022-81 [i] **Where lease tendered by lessor** was materially different from lease in accordance with covenant to renew, no enforceable contract for renewal is shown. 256Mass226, 152NE 615.

1024-2 107Conn459, 140A808; 255 Mass76, 151NE81, 45ALR1.

1024-3½-New. The attempt of the lessee to give the sublessee an option for extension without the written consent of the lessor, as provided for in the lease, does not operate as a forfeiture of the lessee's rights. 241NY489, 150 NE525.

1024-6 85Mont310, 278P1002 (notice of intention to take advantage of provision for extension, together with conduct of parties, held to evidence extension of term); Wis 230NW140. See also 46Philippine868. [b] (3) Leaving ice-box, saws, blocks, etc. 4LaA601. (4) Letter by lessor's successor that it would hold tenant to exercise of option is not acceptance of tenant's offer to renew lease. 138Misc23, 244NYS735.

1025-11 255Mass76, 151NE81, 45ALR1.

1025-15 157Md602, 146A805.

1025-17 314Mo 288, 284SW482.

1025-20 111Conn700, 151A159; 314 Mo 288, 284SW482, 486 [citCyc]; 250 NY147, 164NE887; 131Misc714, 227 NYS721. [b] **Exercising option to renew** by tenant giving notice is not new letting, holding being merely continuous one for greater period which could be terminated only in same manner as original term. 126Misc176, 212NYS 685. [c] **Under sublease** on same terms as original lease permitting renewal, notice by sublessee creates new term without new sublease. 131Misc714, 227 NYS721.

1026-22 314Mo 288, 284SW482, 486 [citCyc].

1026-25 111Conn700, 151A159.

1026-28 262Mass463, 160NE245.

1026-32 86CalA668, 261P488; 93CalA 116, 269P191; 150Miss272, 116S294; 131Misc714, 227NYS721. [d] **Particular provisions construed.**–107Conn724, 142A387.

1027-34 140Miss294, 105S513. [b] **Option for five years** at expiration of lease held to be considered option for renewal for five years on same terms. 140Miss294, 105S513.

1027-36½-New. Consent to sublease extends only for the original term and must be obtained anew for extension of the sublease. 131Misc714, 227NYS721.

1027-37 283Pa529, 129A587; TexCivA 293SW667, 668 [citCJ]. [a] **Agreement construed to provide expressly** for tenant's option for extended term. Tex CivA 293SW667.

1027-38 283Pa529, 129A587.

1027-41 See also 243 IllA570.

1028-46 125Misc296, 210NYS717.

1028-47 77CalA82, 246P90; 10LaA 633, 120S535; 254Mass22, 149NE618, 43ALR1447. NJSup 133A868; 125Misc 296, 210NYS717; 294Pa300, 144A280; 12PaDist&Co 371; TexCivA 280SW 1076.

1029-55½-New. Where the lease was in force at the time the lessee agreed with the lessor's grantee to farm the land, there was no holding over after expiration of the term. 53ND749, 210 NW158.

1029-57 165La328, 115S579; 125Misc 842, 211NYS490 (tenant under renewal lease for year); 128Misc22, 217NYS 153; 289Pa525, 137A673; 53SD243, 220 NW490.

1030-58 153SC118, 150SE478; 53SD 243, 220NW490; 142Va73, 128SE640.

1030-59 70CalA268, 233P356; 99CalA 341, 279P462.

1030-62 155Tenn177, 290SW972, 973 [quotCJ].

1030-63 128Misc22, 217NYS153.

1030-64 [c] **In New York.**–133Misc702, 233NYS291.

1031-65 128Misc22, 217NYS153.

1031-70 77CalA82, 246P90; 35GaA556, 133SE633; MoA 6SW(2d)1001; 58ND 634, 227NW59.

1031-71 See also 216AppDiv295, 215 NYS20.

1031-73½-New. Failure to remove a "For Rent" sign posted after notice to quit given by the tenant who holds over after termination of his term does not constitute election by the lessor not to treat holding over as renewal of lease for another like term. 155Tenn 177, 290SW972.

1031-75 77CalA82, 246P90; IndA 172 NE198.

1031-77 99CalA341, 278P496 (holding that presumption of continuance in possession with permission of owner of undivided interest was overcome was warranted).

1032-79 77CalA82, 246P90.

1033-87 77CalA82, 246P90.

1033-91 155Tenn177, 290SW972.

1033-4 128Me269, 147A148.

1034-8½-New. Tenant does not hold over by obstructing on his property, adjoining leased premises a roadway in which lessor has a license or easement, though lease contains provision that roadway is to be kept open. 20 OhA 73, 153NE134.

1034-10 20 OhA73, 153NE134.

1034-17 But see 34Ariz536, 273P534.

1035-23 138Misc90, 245NYS173.

1035-24 26 OhA181, 159NE377.

1036-30 235Ky12, 29SW(2d)550; 314 Mo 288, 284SW482; 85Mont310, 278P 1002; 48Nev41, 226P1102; 27 OhA113, 160NE874; 288Pa196, 135A717; 53SD 565, 221NW601. [b] (1) 314Mo 288, 284SW482. [f] **No notice is necessary** to exercise option to extend lease. 48 Nev41, 226P1102.

1036-31 See also 314Mo 288, 284SW 482.

1036-32 256Mass138, 152NE317; 314 Mo 288, 284SW482.

1037-33 See also 250Mich322, 230NW 149.

1037-37 See also Ala 127S516. [a] (2) 128Misc648, 219NYS644.

1037-38 CalA 289P887. [b] (2) Where parties to monthly lease stipulated for notice from lessee to renew, it was held that upon acceptance by lessor of offer to renew original lease was renewed and continued. 160La1001, 107S780.

1037-39 8LaA281, 283 [quotCJ]; 68 Utah582, 251P373.

1037-40 229AppDiv681, 243NYS255.

1038-42 235Ky12, 29SW(2d)550.

1038-46 218Ky24, 290SW1040; 220 MoA736, 275SW779.

1038-47 See also 32PortoRico 554.

1038-53 Ind 157NE463, 464 [citCJ].

1038-55 Ind 157NE463, 464 [citCJ]; 100Vt204, 136A379, 50ALR1309.

1038-56 Ind 157NE463, 464 [citCJ].

1038-57 See also 27 OhA229, 161NE 215.

1038-57½-New. Consideration held sufficient. 102NJEq73, 139A709.

1038-58 205Cal 512, 271P1066; Ill 172 NE164; 167La707, 120S59. But see Mont 288P1018. [a] 206Cal 282, 274P 336.

1039-59 NJCh 134A337; 250NY178, 164NE897.

1039-64 194NC328, 139SE599; 100Vt 204, 136A379, 50ALR1309. But see Oh 170NE633.

1039-66½-New. Such option is an interest in real estate. 188Wis215, 205 NW812.

1039-66½-New. As regards forfeiture, option to buy in "lease" was a distinct bargain from the lease proper. 102NJ Eq73, 139A709.

1039-68 217Ky551, 290SW316.

1040-69 232Mich233, 205NW145; 145 Mass513, 14NE741. [b] (2) Contract for agreed price, "on terms to be agreed upon," sufficiently definite. 16F(2d) 175, 49ALR1461. (3) Contract for stated price, "on terms to be agreed upon," requires landlord to agree on reasonable terms and not arbitrarily to refuse to proceed with sale. 16F(2d)175, 49ALR1461.

1040-71 165Ga810, 142SE70; 232Mich 233, 205NW145; 254NY121, 172NE262; 213AppDiv95, 210NYS151. [c] (5) Right to purchase at agreed price only in case lessors decided to sell. 232Mich 233, 205NW145. (6) "To purchase the within property" does not entitle lessee to deed by metes and bounds with right of way over adjoining land. NJ Ch 134A337. (7) Option to purchase held to entitle lessee, on exercise of option, to premises, free of encumbrances, for price stated. 223AppDiv57, 227NYS 418. (8) Purchase of plant by lessor. DC 37F(2d)816. (9) Time of exercise of privilege. 339 Ill 504, 171NE494.

1040-74 27 OhA229, 161NE215.

1040–74½–New. Where an option to purchase provides for an allowance of credit for improvements made by the lessee, painting and papering house, putting glass in windows, rebuilding chimney tops, repairing windmill, pump, fixing barn floor, etc., constitute "repairs," as distinguished from "improvements." 88 **IndA**5, 163**NE**112.

1040–79 [c] **Encumbrance.**–224**AppDiv** 767, 230**NYS**292.

1041–85 88 **IndA**5, 163**NE**112; 217**Ky** 551, 290**SW**316; 132**Misc**502, 230**NYS** 262; **TexCommnA** 288**SW**133; 100**Vt** 204, 136**A**379, 50**ALR**1309.

1041–87 But see 316 **Ill** 318, 147**NE**266, 38**ALR**1151.

1041–91 88 **IndA**5, 163**NE**112.

1041–91½–New. A lessee exercising an option to purchase before the expiration of the lease is entitled to an allowance for burden of continuing lease. 250**NY** 271, 165**NE**289.

1041–92 [c] **Whether express notice of intention to exercise option to purchase was given** is immaterial where lessors refused to allow insurance money as credit on purchase price. 299**Pa**100, 149**A**108.

1041–96½–New. Notice of election mailed to owner's usual address is sufficient compliance with provision of lease. 316 **Ill** 318, 147**NE**266, 38**ALR**1151.

1041–2 100**Vt**204, 136**A**379, 50**ALR** 1309.

1042–7½–New. Payments made by optionee after expiration of time for exercise of option are under the terms of the contract construed as payments of rent under a tenancy at will and not in pursuance of the written contract. 163 **Ga**917, 137**SE**396.

1042–8 88 **IndA**5, 163**NE**112. [b] **Notice declared not to vary terms of option.** 316 **Ill** 318, 147**NE**266, 38**ALR** 1151.

1042–11 163**Ga**917, 137**SE**396; 128**Kan** 83, 276**P**59. [f] **Construction of option clause.**–213**AppDiv**95, 210**NYS**151. [g] **Clearing underbrush and trees.**–329 **Ill** 334, 160**NE**597.

1043–12 [e] **Acceptance of installments after maturity** is not waiver of forfeiture thereafter accruing. 220**Ala**657, 127**S**227 (lease sale contract).

1043–13 [a] 134**Misc**649, 236**NYS**241.

1043–15 134**Misc**649, 236**NYS**241. [d] **Failure of lessee to give notice of option within specified time** will not deprive him of right where he was excluded from possession by executor and residuary legatee of lessor who died prior to commencement of five-year lease. 223 **AppDiv**451, 228**NYS**455. [e] **After fire damaging buildings,** lessees may exercise option to purchase and have insurance moneys credited on purchase price. 299**Pa**100, 149**A**108.

1043–17½–New. A delay of four months while the title is being made merchantable does not forfeit the right to purchase. 86 **IndA**484, 156**NE**589.

1043–18 27 **OhA**229, 161**NE**215.

1044–22 163**Ga**917, 137**SE**396; 126**Kan** 63, 266**P**735; 167**La**707, 120**S**59; **NJ Ch** 134**A**337; 250**NY**178, 164**NE**897. [a] (3) Lessor need not convey where notice of exercise of option was not given within time stipulated. 214**AppDiv** 135, 211**NYS**833. [c] **Option to purchase during term or any renewal thereof** cannot be exercised after expiration of term. 19 **OhA**53.

1044–23 163**Ga**917, 137**SE**396. But see 250**NY**178, 164**NE**897. [a] **No act of defendant** held to have delayed or prevented acceptance within time specified. 214**AppDiv**135, 211**NYS**833.

1044–23½–New. It has been held that since there is no promise to buy by lessee under the option, 214**AppDiv**135, 211**NYS**833.

1044–23¼–New. there was no promise the performance of which could have been waived by lessor so as to require him to convey after notice given later than time stipulated. 214**AppDiv**135, 211**NYS**833.

1044–30 Contra 94**Fla**403, 114**S**431.

1044–31½–New. option to purchase leased premises is property, is transferable and runs with the land and may be specifically enforced in equity. 316 **Ill** 318, 147**NE**266, 38**ALR**1151.

1044–33 **NJ** 149**A**811 (option not forfeited).

1044–36½–New. The lessee's assignment of rights under an option passes no title to the assignee. 88 **IndA**5, 163 **NE**112.

1045–41 34**NM**111, 277**P**433(1stcase). But see **Ill** 172**NE**164.

1045–46 327 **Ill** 21, 158**NE**353.

1045–48 See also 220**Ala**657, 127**S**227; 225**Ky**320, 8**SW(2d)**414. [b] **Facts not showing estoppel.**–339 **Ill** 504, 171 **NE**494. [c] **Lessor is not estopped** from relying on lessee's default by alleged recognition of contract by agent, agency being disputed. 339 **Ill** 504, 171 **NE**494.

1045–50 [a] **Lessee, in default,** is not entitled to exercise provisions of option contract. 339 **Ill** 504, 171**NE**494.

1045–51 35**GaA**262, 133**SE**53.

1045–60 [b] **Sufficiency of evidence.**–225**Ky**320, 8**SW(2d)**414. [c] **Lessor need not notify** lessee of default in order to rely on default as defense to specific performance. 339 **Ill** 504, 171**NE** 494.

1045–60½–New. The lessor as vendor may sue. 132**Misc**686, 230**NYS**262.

1046–64 167**La**707, 120**S**59.

1046–72 93**PaSuper**588.

1046–76 179**Ark**138, 15**SW(2d)**979; 70 **CalA**268, 233**P**356; 99**Fla**1229, 128**S** 827(2dcase); 141**SC**251, 139**SE**614, 54 **ALR**1348. [a] 134**Misc**634, 235**NYS** 595; 288**Pa**196, 135**A**717; 6**PaDist&Co** 764. [c] (3) "Limitation," as applied to lease, implies expiration of term by happening of contingency provided in lease, independent of will of landlord or of any breach by tenant. 132**Misc** 435, 230**NYS**239. (4) Use of word "expire" is not indispensable for creation of limitation. 132**Misc**435, 230**NYS**239 (where lessor could "cancel" lease in certain contingency). [e] **Conditional limitation.**–132**Misc**435, 230**NYS**239.

1047–80½–New. A lease does not expire automatically by reason of breach of condition. 132**Misc**435, 230**NYS**239.

1047–82 **TexCivA** 9**SW(2d)**423. See also 132**Misc**435, 230**NYS**239. [c] **Sublease for definite term providing for occupation as long as sublessor should conduct stated business on premises** is not terminable on discontinuance of such business within specified term. 98 **CalA**218, 276**P**623.

1047–94 262**Mass**463, 160**NE**245. [a] **Service of statutory notice to pay rent or quit** and tenant's failure to comply therewith do not end relation of landlord and tenant. 46 **Ida**55, 266**P**433.

1047–95 70**CalA**268, 233**P**356; 77**CalA** 82, 246**P**90; 83 **IndA**368, 148**NE**425; 160**La**1001, 107**S**780; **MoA** 3**SW(2d)** 279; 125**Misc**842, 211**NYS**490 (by landlord to tenant under renewal lease for a year); 189**NC**740, 128**SE**150 (dictum); 123 **Okl** 7, 251**P**738; 153**SC**118, 150**SE** 478. [b] See also 125**Misc**649, 212**NYS** 62. [c] **In Porto Rico.**–32**PortoRico** 554.

1047–96½–New. Notice to quit is not necessary upon default by lessee in payment which, by its terms, terminates the lease at the option of the landlord. 189**NC**740, 128**SE**150.

1048–3 [a] 262**Mass**463, 160**NE**245.

1048–6 See also **SD** 230**NW**807.

1048–9 155**Wash**493, 284**P**782.

1048–10½–New. Where the lease provided for renewal, from year to year, unless either party gave thirty days' written notice before expiration, the tenant's liability thereunder was held not terminated by notice and vacation of premises one day before expiration of the term. 22 **OhA**432, 154**NE**53.

1048–10⅓–New. Where the lease provides for the cancellation by a landlord on giving the tenants sixty days' notice because of his desire to erect a new building, the date mentioned in the notice duly given is the exact date of the termination. 132**Misc**435, 230**NYS** 239.

1049–37 **CalA** 284**P**966.

1049–38 131 **Or**488, 283**P**34(2dcase).

1050–41 [a] **Landlord may forfeit lease** for action of sublessee under statute providing for giving of three days' notice to quit. 137**Wash**180, 242**P**381.

1051–68 **NJ** 133**A**292.

1051–70 [a] **Tenant's failure to vacate** has been held not to give tenant additional term. 137**Misc**182, 243**NYS**526.

1051–78 256**Mass**138, 152**NE**317.

1052–94 141**SC**251, 139**SE**614, 54**ALR** 1348. [c] **Acts not constituting termination by mutual consent.**–102**CalA**350, 283**P**78.

1052–96 See also 89**CalA**69, 264**P**511.

1052–99 **TexCivA** 295**SW**197. See also 132**Misc**435, 230**NYS**239.

1052–4 **Ga** 155**SE**192; 207 **Iowa**1340, 224**NW**467.

1052–6 93**PaSuper**123.

1052–7 92**PaSuper**40.

1052–8 153**SC**118, 150**SE**478. [d] **Contemplated improvements.**–90**CalA** 374, 265**P**987.

1052–9 [c] (3) Where lease provides for payment of two hundred dollars liquidated damages, lessee cannot claim further damages based on prospective profits. 30 **OhA**15, 164**NE**65. [e] (2) Where sublessee receives notice of termination by lessee, he becomes entitled to stipulated bonus, irrespective of redelivery of premises where sublease gives lessee right to terminate tenancy on condition of payment of bonus and giving notice. **MoA** 17**SW(2d)**677. (3) Lessee's liability to pay such stipulated bonus has been held not affected by agreement between sublessee and lessee's assignee. **MoA** 17**SW(2d)**677. (4) Interest on such bonus ran only from date of termination, and not from date of notice. **MoA** 17**SW(2d)**677. [f] (3) Lessee's right not waived by failure to deliver key to lessor. **SD** 230**NW**807. (4) Notice "without prejudice to lessee's rights under" previous notice held not waiver of such rights. **SD** 230**NW** 807. [g] **Tender.**–(1) Of sum payable to lessee on landlord's termination of lease is excused where it would not have been accepted. 72**CalA**379, 237**P**399. (2) Of sum payable to lessee on termination by lessor held not condition precedent to termination. 72**CalA**379, 237**P**399.

1053–13 33 **OhA**501, 170**NE**33.

1053–14 **Iowa** 232**NW**693.

1053–14½–New. Instrument not under seal, reciting consideration of one dollar whereby tenants agree to sell landlord the lease for a specified sum giving an option therefor for a stated period, is a mere offer and not an irrevocable option. 126**Misc**777, 215**NYS** 549.

1053–14½–New. Option to landlord to purchase lease is irrevocable if supported by a consideration. 126**Misc**177, 215**NYS**549.

1053–14¼–New. Option cannot be accepted by letter unaccompanied by the sum specified in the offer. 126**Misc**777, 215**NYS**549.

1053–14⅓–New. Tenant's sale of lease, of which the landlord had notice before he exercised option to purchase lease which amounted to mere offer to sell, is equivalent to formal revocation of the option to the landlord. 126**Misc** 777, 215**NYS**549.

1053–14⅙–New. Sale of a lease by one of two lessees conveys title to the lease where the other lessee accepted his share of the price with full knowledge of the facts. 126**Misc**777, 215**NYS**549.

1053–16 127**Kan**359, 273**P**422; 307**Mo** 160, 270**SW**315.

1053–17 73**CalA**229, 238**P**736; 204 **Iowa**746, 216**NW**78; **Mass** 169**NE**777 (lease restricted to sole use of lessees).

1053–19 141**SC**251, 139**SE**614, 54**ALR** 1348.

1054–24 100**Vt**204, 136**A**379, 50**ALR** 1309.

1054–27 34**Ariz**547, 273**P**538; 204 **Iowa**378, 213**NW**410; 247**Mich**47, 225 **NW**484(2dcase). [a] (2) Agreement has been construed as not entitling lessee who gave purchaser worthless check for rent to retain possession until lessor repurchased personalty. 34 **Ariz**547, 273**P**538. [d] **CalA** 290**P**673.

1054–29 **TexCivA** 9**SW(2d)**423.

1055–31 [e] **Provision for arbitration.**–126**Kan**150, 267**P**17.

1055–42 126**Kan**150, 267**P**17.

1056–46 204 **Iowa**378, 213**NW**410. [c]

Oral agreement, later reduced to writing held sufficient. 204 **Iowa**378, 213**NW** 410. [e] **Lessor's sale to wife, in good faith, held sufficient.** 204 **Iowa**378, 213 **NW**410.

1056–47 [a] **Partial performance by payment** under oral agreement held "sale" under terms of lease. 204 **Iowa** 378, 213**NW**410. [b] **Actual conveyances** of part of premises to wife of lessor in consideration of her agreement to sale of balance held not to preclude termination. 204 **Iowa**378, 213 **NW**410.

1056–48 204 **Iowa**378, 213**NW**410.

1056–49½–New. City's taking of property by condemnation amounted to "sale" thereof, within a lease reserving to the lessor the right to terminate it if the property of which the demised premises were a part were sold by the lessor during term. 149**Wash**690, 271**P** 896.

1056–50 **TexCivA** 98**W(2d)**423.

1056–52 See also 10**LnA**571, 121**S**646.

1056–54½–New. An execution sale of the lessor's interest in leased fixtures to satisfy a general judgment for the purchase price thereof does not terminate the lease as to such fixtures. 217 **MoA**554, 272**SW**1006.

1056–55 160**La**694, 1078493; **TexCivA** 293**SW**249.

1056–57 295**Pa**357, 145A434.

1056–59 154**Tenn**545, 290**SW**409.

1057–71½–New. Whether there is a merger is largely a matter of intention. 200 **Iowa**997, 205**NW**782.

1057–71¼–New. Purchase by tenant of undivided half interest in the reversion affects a merger only as to the half interest. 200 **Iowa**997, 205**NW**782.

1057–71¼–New. A lease in which a corporation with many stockholders is the lessee is not merged and thereby terminated because some of the stockholders acquire the equitable title to the real estate. 202 **Iowa**1094, 211**NW**488.

1057–75 146**Wash**404, 263**P**593.

1057–76 250**NY**271, 165**NE**289; 132 **Misc**686, 230**NYS**262.

1058–84 286**Pa**237, 133A252, 255 [cit CJ].

1058–87 248**NY**333, 162**NE**97; 141**SC** 251, 139**SE**614, 54**ALR**1348.

1058–90½–New. Summary proceedings instituted by the lessor to dispossess the lessee and sublessee do not terminate the sublease where they are discontinued as to him and the lessor recognizes his lease as in full effect with right to possession. 134**Misc**318, 235 **NYS**294.

1058–93 99**NJEq**527, 133A875.

1058–97 But see 82**NH**153, 130A741.

1059–99 **Sask** [1925] 3**DomLR**50 (no covenant to repair by landlord).

1060–8 **LnA** 129**S**229. [a] (1) 153**Md** 457, 138A266.

1060–12 See also 125**Misc**845, 211**NYS** 494. [b] (5) Where property does not fulfill object of lease because of inherent defect, lessee may abrogate lease, even though inconvenience is too light to authorize damage claim. 161 **La**806, 1098498. (6) Where lessors demolish walls of building for purpose of repair or reconstruction, lessee may vacate and cancel lease. 161**La**806, 1098 498. (7) Where building was condemned and tenant forced to vacate during reconstruction, tenant held entitled to have lease annulled, though building was subsequently tendered. 163**La**364, 1118787. (8) Landlord having leased building for garage, knowing that needed alteration could not be made therein, on condemnation, tenant was entitled to cancellation of lease. 160**La**778, 1078671.

1060–14 102**CalA**254, 283**P**100.

1060–16 153**Md**457, 138A266; 260**Mass** 117, 156**NE**840. [i] **In determining whether repairs are ordinary,** so as not to terminate lease, value of property and duration of lease may be considered. 153**Md**457, 138A266. [j] **That damage may be repaired in reasonable time** does not affect rule. 195**NC**616, 143**SE**2. [k] **Fire causing comparatively slight damage** does not render premises unfit for use. 181**Ark**24, 24**SW(2d)**951. [l] **"Unfit for use and occupancy" defined.** **NC** 155**SE**863.

1061–18 256**Mass**258, 152**NE**233. [c] **Destroyed or damaged so as to render unit for use and occupancy.**–256**Mass** 258, 152**NE**233.

1061–20½–New. **Landlord's election to rebuild.** **NJSup** 131A134.

1061–24 15**F(2d)**90 [aff 16**F(2d)**554]; 25**F(2d)**498; 41**F(2d)**560; 262**Mass**463, 160**NE**245. See also 16**F(2d)**780.

1061–24½–New. Lease reserving right of reëntry on bankruptcy of lessee is terminated only by reëntry. 13**F(2d)** 208.

1061–24½–New. **Dissolution of partnership** does not terminate lease under provision that it shall be voidable on bankruptcy of tenant partnership. 103 **NJEq**101, 142A360.

1062–30 161**La**806, 1098498.

1062–42 See also 25**F(2d)**255.

1062–44 214**Ala**516, 1088257; 204**Cal** 280, 267**P**877; 85**CalA**757, 260**P**358; 105**Conn**488, 136A78; 232**Mich**609, 206 **NW**325; **OhA** 154**NE**173; 292**Pa**427, 141A155; 155**Wash**493, 284**P**782. [c] **Lease will be canceled to save herd of cattle** where lessees of farm and cows allowed contagious disease to spread and did not provide necessary treatment. 142**Wash**489, 253**P**822. [d] **Whether damages would be inadequate compensation** for breach of covenant determines lessor's right to terminate lease. **CalA** 285**P**403.

1063–45 70**CalA**70, 232**P**744 (under lease of land and live stock, providing that at termination lessor and lessee should own as tenants in common natural increase of live stock, and that in event of breach lease should at option of lessor terminate and all rights thereunder be forfeited, lessee's interest in increase of livestock held not to be forfeited by termination of lease); 77**CalA** 548, 247**P**520; **CalA** 260**P**816; 6**LnA** 121; **OhA** 154**NE**173.

1063–46 204**Cal** 280, 267**P**877; 77**CalA** 548, 247**P**520.

1063–47 77**CalA**548, 247**P**520.

1063–48 6**PaDist&Co** 599.

1063–49 204**Cal** 280, 267**P**877; 74**CalA** 551, 241**P**429; 85**CalA**757, 260**P**358; 204 **Iowa**746, 216**NW**78; 136**Misc**332, 241**NYS**153 (consent unreasonably withheld); 294**Pa**212, 144A93; 292**Pa** 427, 141A152. [c] **Burden of proof is** on party claiming right of forfeiture to show that such was unmistakable intent of instrument. 74**CalA**551, 241**P** 429.

1063–54 255**Mass**127, 150**NE**872, 45 **ALR**6; **OhA** 154**NE**173.

1063–54½–New. Equity ordinarily will relieve against forfeiture for nonpayment of rent but not against breach of covenant to repair. 15**F(2d)**774.

1063–54½–New. Owner ordinarily has adequate remedy at law in action of ejectment for forfeiture of lease. 15 **F(2d)**774.

1063–58 25**F(2d)**255; **Can** [1930] 4 **DomLR**1022. [c] **Provision for forfeiture at lessor's option in certain cases** does not exclude option of lessor in another case. 25**F(2d)**255.

1063–59 See also 237 **IllA**1. [b] (2) All of lessor's heirs must concur and unite in election to enforce forfeiture for breach of entire and indivisible covenants, and no one of them alone is authorized by reason of his cotenancy to act for others. 40 **OklaCR**218 [reh pending].

1064–60 25**F(2d)**255.

1064–60½–New. An oral agreement that a tenant could leave immediately if the landlord did not furnish heat as promised was held to be a condition subsequent, effective at the tenant's election. 255**Mass**87, 151**NE**61.

1064–62 141**SC**251, 139**SE**614, 54**ALR** 1348. [b] (5) Failure to repair brick wall and removal of fence not waste as matter of law. 252**Mass**352, 147**NE**823.

1064–64 [a] **Under lease providing that term shall cease on entry by lessor for lessee's default,** lessee's estate is not terminated by default but continues till reëntry. 262**Mass**463, 160**NE**245. [b] **Lease is voidable only,** at option of lessor, even where words of forfeiture declare lease void. 99**Fla**1229, 1288827 (2dcase).

1064–65 255**Mass**127, 150**NE**872, 45 **ALR**6; 100**Vt**48, 134A635.

1065–73 **Vt** 147A270.

1065–75 25**F(2d)**498; **Cal** 291**P**178; 143**Miss**602, 1088704, 49**ALR**511; **NJ Ch** 146A667(2dcase).

1066–82 204**Cal** 73, 266**P**547 (assignment voidable only at option of lessor); 78**CalA**184, 248**P**280; 237 **IllA**1 (equity will not relieve against forfeiture for breach); 201 **Iowa**931, 208**NW**503; 217 **AppDiv**243, 216**NYS**734; 220**AppDiv** 366, 221**NYS**371; **TexCivA** 272**SW**263; **TexCivA** 288**SW(2d)**1114. [d] **Covenant to give notice of assignment** to any "persons" held breached on transfer to corporation without notice. 237 **IllA**1. [e] **Assignment to colessee** held not to work forfeiture. 77**CalA**548, 247**P**520. [f] **Subletting, where lessor consented only to assignment,** works forfeiture on lessee or assigns. 217**AppDiv**243, 216 **NYS**734. [g] **Covenant does not run with land** so as to be enforceable against assignee of lessee's assignee. 85**CalA**757, 260**P**358. [h] **Passing through bankruptcy proceedings** held not "alienation." 15**F(2d)**406. [i] **Consent by original owner** does not eliminate covenant, and subsequent owner may forfeit lease for subsequent sublease. 131**Misc**714, 227**NYS**721.

1066–84 [a] **Evidence held sufficient to show assignment.**–98**CalA**690, 277**P** 752.

1066–89½–New. Attempt of lessee to renew sublease for period for which he could not renew does not forfeit lessee's right under his lease. 241**NY**489, 150 **NE**525.

1066–89½–New. Mere violation by the lessee of a covenant against subletting or assigning does not, ipso facto, terminate or void the lease. 76**CalA**19, 243**P** 715.

1066–89¼–New. The lessor has the option of declaring the lease void or ignoring the breach and treating the lease as subsisting. 76**CalA**19, 243**P** 715.

1066–89⅛–New. The joint covenant by two lessees not to assign or sublet is not broken by one of the covenantors attempting to assign or sublet. 76**CalA** 19, 243**P**715.

1067–97 See also **Ont** [1929] 2**DomLR** 881.

1067–98 **CalA** 260**P**816 (single improper use only required); **CalA** 285**P**403; 214**AppDiv**790, 210**NYS**539; 22 **OhA** 426, 154**NE**57. [a] (2) Where cocaine was sold on premises in violation of statute, it was held that lessor could declare forfeiture in accordance with provisions of lease. 22 **OhA**426, 154**NE** 57. [f] **Improper use.**–**CalA** 260**P**816.

1067–3½–New. But violation of such covenant does not give lessor right to terminate lease on notice where an exclusive remedy is written into the lease, even though right to terminate is printed in the lease. 125**Misc**846, 211**NYS**499.

1067–4 86**CalA**80, 260**P**392; 84**Colo** 14, 267**P**608; 110**Conn**507, 148A347; 236 **IllA**487. [a] (2) Other instances. 35**F** (2d)14; 337 **Ill** 345, 169**NE**240. [i] **Shaking dice** for cigars and using punch boards held gambling as respects forfeiture of lease. 137**Wash**180, 242**P**381.

1068–5 236 **IllA**487; 248**Mich**593, 227 **NW**720. But see 5**PaDist&Co** 552.

1068–9 137**Wash**180, 242**P**381. [a] **Lease of part of premises** assigned to defendant at some time as lease to him of entire premises renders tenant of part subtenant for whose act, in permitting gambling, tenant was subject to be dispossessed. 137**Wash**180, 242**P**381.

1068–10 See also 204**Cal** 280, 267**P**877, But see **CalA** 260**P**816.

1068–12 **NJSup** 130A20; 131 **Or**488, 283 **P**34(2dcase). [d] **Trustee** being unaware taxes due, failure to pay will not be ground for forfeiture. 19**F(2d)**406.

1068–18 69**CalA**416, 231**P**355; 74**CalA** 782, 241**P**588; 104**Conn**112, 132A473; 101**NJEq**94, 136A731; 141**SC**251, 139**SE** 614, 54**ALR**1348; **TexCivA** 286**SW**552. See also 222**Ky**642, 18**W(2d)**1049. [b] (2) Provision giving right of reëntry if monthly rent remains in arrears for five days cannot be enforced where, for several years lessor acquiesced in payment after stipulated time. **NS** [1929] 4 **DomLR**698. [j] 82**NH**249, 132A256. [k] **Landlord's instituting summary dispossess action** does not divest Chancery

Court of jurisdiction to enjoin forfeiture. NJ 150A351.

1069-19 But see Oh 154NE173.

1069-20 143Miss602, 108S704. 49ALR 511. See also 214Ala516, 108S257.

1069-21 143Miss602, 108S704, 49ALR 511.

1069-22 [a] **Where prompt payment was waived** chancery court had jurisdiction to restrain landlord's forfeiture of lease on precise day fixed. NJ 150A351.

1069-23 155Wash493, 284P782.

1069-29 214Ala516, 108S257.

1069-30 104Conn112, 132A473; 190NC 563, 130SE156; OhA 154NE173. [d] **Tender of rent due and costs before judgment in action for forfeiture** prevents forfeiture. 195NC607, 143SE7.

1069-32 74CalA782, 241P588.

1069-32½-New. Where a lessor's assignee has served notice on a tenant to quit the premises, on the theory that the lessor had the right of termination, he cannot thereafter terminate the lease by reason of failure to pay the stipulated rental. 207 Iowa1340, 224NW467.

1069-34 275Fed453; 16F(2d)780; 29F (2d)346. [g] **"Or other operation of law"** included in such lease as ground of forfeiture is restricted to those transfers arising because of inability of lessee to meet his financial obligations. 74 CalA551, 241P429. [h] **Bankruptcy of one of several lessees** does not breach lease under provision that bankruptcy of lessees shall have such effect. 18F (2d)777.

1069-35½-New. Bankruptcy of lessee did not work a forfeiture automatically under a provision of the lease requiring the lessee to operate the business actively, and not to permit goods or fixtures on the premises to be seized under a legal process, or pass into the hands of a receiver or trustee in bankruptcy. 27F(2d)191.

1069-38 [e] (1) 248Mich593, 227NW 720. (3) Written lease, that lessor should furnish heat at such times and in such quantities as he should see fit, held abrogated in so far as it was inconsistent with subsequent oral agreement that tenant could move if landlord did not furnish proper amount of heat and hot water. 255Mass87, 151NE61.

1070-39 26F(2d)825; 10LaA366, 120S 720; 247NY245, 160NE359.

1070-40 94CalA66, 270P719.

1071-52 98CalA675, 277P534. [c] **Water entering premises through trap and flooding floor** does not justify tenant in vacating premises. 265Mass179, 163NE 892.

1071-55 See also CalA 260P816.

1071-60 38F(2d)76.

1072-84 104Conn112, 132A473; 255 Mass127, 150NE872, 45ALR6; 20 OhA 199, 153NE130.

1073-86 CalA 285P403.

1073-90 117 Okl 117, 245P608; TexCivA 286SW552; TexCivA 11SW(2d)199.

1073-93 104Conn112, 132A473.

1074-95½-New. Where landlord for several months accepted rent after it was due he must give notice of intention to insist on prompt payment before declaring forfeiture. 253 IllA579.

1075-11 76CalA19, 243P715; 104Conn 112, 132A473; 93PaSuper292; TexCivA 272SW263, 265 [citCJ]; Vt 147A270. [e] **Acts constituting declaration of forfeiture.**-39F(2d)16.

1075-14 TexCivA 272SW263, 265 [cit CJ].

1076-15 204Cal 280, 267P877; 102CalA 350, 283P78; TexCivA 286SW552. [a] (6) Where lessor dies leaving several heirs, all must join in notice. 40 Okl ACR218 [reh pending]. (7) Notice of forfeiture by wife has been held not insufficient because not signed by husband who signed lease declaring he had no interest in property. 86CalA193, 260P 605. [c] **Written notice may be waived** by abandonment. MoA 287SW816.

1076-21 [a] **Statutes relative to termination of tenancies at will** are inapplicable to lease for definite period, terminable if covenants are not fulfilled. 85 CalA149, 259P113.

1076-22 [a] **Strict compliance with statute** is necessary where lease does not provide for forfeiture. 89CalA665, 265P386.

1076-30 137Misc182, 243NYS526.

1077-33½-New. Where landlord serves statutory notice in lieu of exercising right under lease to terminate it without notice, lessee may pay rent within statutory time. 253 IllA579.

1077-41 221MoA639, 283SW747, 749 [citCJ].

1077-46 See also 251 IllA572.

1077-47 69CalA416, 231P355.

1077-50½-New. A forfeiture does not terminate the lease, 125Misc846, 211NYS 499.

1077-50½-New. nor does it give right to maintain summary proceedings. 125 Misc846, 211NYS499.

1077-50¼-New. It only gives the landlord a right to bring ejectment. 125 Misc846, 211NYS499.

1077-50½-New. After a forfeiture for nonpayment of rent lessor may recover mesne profits from a sublessee. 69CalA 416, 231P355.

1077-50¾-New. A lease may terminate by a forfeiture under the terms of the lease. 179Ark138, 15SW(2d)979.

1077-51 204 Iowa746, 216NW78; 7LaA 518; 255Mass127, 150NE872, 45ALR6; MoA 29SW(2d)176; 195NC274, 142SE 12.

1077-52 Fla 130S15.

1077-53 Fla 130S15; 255Mass127, 150 NE872, 45ALR6. [a] **Leniency in exacting prompt payment of rent** does not preclude forcing forfeiture for subsequent nonpayment. 39F(2d)16 (as against lessee's assignee).

1078-56 262Mass463, 160NE245; 100 NJEq78, 135A83. [a] But see 100NJEq 78, 135A83.

1078-58½-New. Scienter of lessee is not essential forfeiture by lessor for sublessee's conduct. 232 IllA282.

1078-59 But see 16F(2d)554. But see 85CalA757, 260P358.

1078-60 170La372, 127S872. [a] (3) Assertion of different ground in notice. MoA 16SW(2d)654.

1078-61 46 Ida55, 266P433; MoA 29 SW(2d)176; 20 OhA199, 153NE130.

1079-64 [g] 20 OhA199, 153NE130.

1079-64½-New. Failure to enforce payment of rent is not waiver of default for nonpayment. 178Minn344, 227NW 199(6thcase).

1079-66 82CalA356, 255P537; 88CalA 20, 263P538; 292Pa427, 141A152. [c] But see 39F(2d)16.

1079-69 See also 232 IllA282.

1080-71½-New. Breach of provision for payment by the lessee of taxes specified before the beginning of a new term is not waived by acceptance by the lessor of a part of the taxes during the term. NJSup 130A20.

1080-72½-New. But under lease for a year, permitting rent installments to remain unpaid, does not constitute waiver of default in payment where the tenant is not permitted to hold over into another year without payment of accrued rent. 143Miss602, 108S704, 49 ALR511.

1080-76 327 Ill 21, 158NE353.

1080-81 20 OhA199, 153NE130. But see 98CalA690, 277P752.

1080-88 255Mass127, 150NE872, 45ALR 6. [a] **Extension of leasehold** will prevent forfeiture in absence of notice to lessee, affording him opportunity to repair. 255Mass127, 150NE872, 45ALR6.

1080-91 214Ala516, 108S257; 85CalA 757, 260P358; 86CalA193, 260P605; 107 Conn459, 140A808; 232 IllA282; 237 IllA1; 255Mass127, 150NE872, 45ALR6; 168Minn312, 210NW34; MoA 218W(2d) 913; MoA 29SW(2d)176; 103NJEq176, 142A648; 220AppDiv366, 221NYS371; 20 OhA199, 153NE130 (breach of covenant against assignment or subletting); 292Pa427, 141A155; 8PaDist&Co 631; TexCivA 283SW679, 681 [quotCJ]; Tex CivA 25SW(2d)947 (right to end lease for subleasing without consent waived by acceptance of rent for year with knowledge); 142Wash489, 253P822; BC [1930] 2DomLR231. [b] (2) Right to claim forfeiture by reason of failure to repair premises was waived by acceptance of advance rent. 255Mass127, 150 NE872, 45ALR6.

1081-92 137Misc82, 242NYS729; Tex CivA 283SW679, 681 [quotCJ].

1081-93 TexCivA 283SW679, 681 [quot CJ].

1081-94 237 IllA1; 100NJEq78, 135A 83; TexCivA 283SW679, 681 [quotCJ]. [a] TexCivA 283SW679.

1081-95 [c] 204Cal 73, 266P547; 337 Ill 345, 169NE240.

1081-96½-New. Where a lease provides for quarterly payment of rent and, in lieu of additional rent, the payment of taxes before they became delinquent or penalty attaches and gives the lessor the right to declare a forfeiture for default in payment of rent or taxes, acceptance of rent after taxes have become delinquent does not waive the right to declare a forfeiture for nonpayment of taxes. 168Minn312, 210NW34.

1082-97 15F(2d)90.

1082-1 16F(2d)554; 86CalA193, 260P 605; 240 IllA292, 294 [citCyc]; 2LaA 283.

1082-2 214Ala516, 108S257.

1082-6 22 OhA426, 154NE57; TexCivA 283SW679, 681 [quotCJ]; 142Wash489, 253P822.

1082-7 22 OhA426, 154NE57; TexCivA 283SW679, 681 [quotCJ]; 137Wash180, 242P381.

1082-8 TexCivA 283SW679, 681 [quot CJ].

1082-9 TexCivA 283SW679, 681 [quot CJ].

1083-18 But see 16F(2d)554.

1083-25 137Misc182, 243NYS526.

1083-26 25F(2d)498.

1083-31 8PaDist&Co 627.

1084-47 141SC251, 139SE614, 54ALR 1348; TexCivA 48W(2d)84, 85 [quot CJ].

1084-48 127 Or539, 272P898; TexCivA 31SW(2d)515.

1085-58 [a] (2) Agreement that tenant's deposit be credited to July rent, and tenant's giving check for August rent is sufficient consideration for agreement that tenant would surrender by giving up possession before end of July, which was before expiration of term. 126Misc570, 214NYS45.

1085-64 [d] **Consideration.**-Unexecuted agreement declared not to bind the lessee where no consideration passed. 168Ark262, 271SW30.

1085-69½-New. Under a lease authorizing a landlord to cancel on election to erect a new building by giving a specified notice, and providing that the tenants agreed to surrender the lease on receiving the notice of cancellation, the surrender of the premises was required only after the time specified in the notice. 132Misc435, 230NYS239.

1086-75 32F(2d)304; CalA 287P113; 89 IndA490, 167NE151; 261Mass264, 158NE786; 172Minn369, 215NW515; Mo 23SW(2d)64; MoA 287SW816, 818 [citCJ]; 127 Or539, 272P898.

1086-76 MoA 287SW816; 195NC274, 142SE12. [b] **Surrender will not be implied against intention of parties** as manifested by acts. 195NC274, 142SE 12.

1086-78 [a] **Consent of lessee's assignee to sublessee's continued possession after termination of original sublease** amounts to surrender by sublessee. MoA 17SW(2d)677.

1087-89 68Utah582, 251P373, 374 [cit CJ]. [c] (1) 68Utah582, 251P373. (2) New lease held sufficient consideration for release from obligations of old lease. 68Utah582, 251P373.

1087-90 [c] (2) Other instances. 137 Misc693, 244NYS300.

1088-4 172Minn369, 215NW515.

1088-5 Cal 289P625 (failure to specifically release lessee). [e] **Two valid and enforceable leases** cannot be outstanding on same property for same term. Cal 289P625.

1088-9 172Minn369, 215NW515.

1088-10 172Minn369, 215NW515.

1088-13 Cal 289P625.

1089-14 172Minn369, 215NW515.

1089-15 172Minn369, 215NW515; 199 Wis428, 224NW98.

1089-16 172Minn369, 215NW515.

1089-18 73CalA199, 238P734; 111Conn 466, 150A696 (holding abandonment by lessee without lessor's fault terminated lease); 261Mass264, 158NE786; 114

Nebr184, 206NW744, 42ALR1102; 130 Misc385, 224NYS1. [a] (2) Terminates relation of landlord and tenant. 214AppDiv189, 212NYS95. [b] **Rescission of acceptance.**–154Md519, 141A355.

1089-20 291Pa507, 140A506; TexCivA 272SW263. [a] (7) 291Pa507, 140A 506. (8) Where lessee of part of building accepts new lease from corporation to whom owner subsequently leased entire premises, there is abandonment of original lease. 153Wash175, 279P566 (2dcase).

1090-21 232Mich370, 205NW196.

1090-22 [b] **Surrender of keys, under protest,** permits landlord to peaceably accept keys and possession. 152Wash 538, 278P428.

1090-34½–New. Surrender of possession is not always surrender of lease. 242NY28, 150NE591.

1090-35 CalA 287P113; 195NC274, 142 SE12; 127 Or539, 272P898.

1090-36 CalA 281P631.

1091-39 CalA 287P113.

1091-40 MoA 287SW816. [c] **Failure to repudiate surrender** made before August 1st, when term had not expired before he sued for rent Sept. 12th, is implied acceptance of surrender. 126Misc 570, 214NYS45. [d] **Acts held not to constitute acceptance.**–200Wis412, 228 NW515, 68ALR875.

1091-45 114Nebr184, 206NW744, 42 ALR1102.

1091-47 222AppDiv700, 225NYS217.

1091-51 195NC274, 142SE12.

1092-56 See also NJSup 135A350.

1092-57 221MoA639, 283SW747.

1092-58 MoA 30SW(2d)1049.

1092-61 NJSup 135A350.

1092-63 23F(2d)648.

1092-66 128Misc905, 220NYS507.

1092-70 128Misc905, 220NYS507.

1093-73 73CalA199, 238P734; CalA 287 P113.

1093-75 126Kan25, 266P925; MoA 287 SW816; 128Misc905, 220NYS507; 137 Misc372, 243NYS522; 161Tenn331, 30 SW(2d)245. See also 7LaA738. [a] **Reletting for long term.**–32NM469, 259 P620, 61ALR767.

1093-77 161Tenn331, 30SW(2d)245.

1093-79 161Tenn331, 30SW(2d)245 (refusal to accept surrender).

1093-80 [a] **Agreement for surrender of possession** between lessee and receiver of sublessee, whereby lessee as landlord reserves right to deficiency after reletting and providing for construction not to prejudice rights, is held not to end lease term. 242NY28, 150NE591.

1093-82 [b] But see 126Kan25, 266P 925.

1093-84 32F(2d)304.

1094-85 [a] 195NC274, 142SE12.

1094-86 126Kan25, 266P925; 195NC 274, 142SE12.

1094-88 195NC274, 142SE12.

1094-89 MoA 287SW816, 818 [citCJ]; NJSup 135A350.

1094-93 [a] 154Wash69, 280P745. [b] 172Minn369, 215NW515. [d] Cal A 287P113; 32NM469, 259P620, 61ALR 767. [e] **Evidence held to sustain finding** that lease was terminated through lessee's willful default. 111Conn466, 150A696.

1094-93½–New. Acceptance of surrender of possession is evidence from which surrender of lease may be inferred. 242 NY28, 150NE591.

1094-93¾–New. It does not have this effect if parties otherwise agree. 242 NY28, 150NE591.

1095-4 126Kan139, 266P941; 248Mich 516, 227NW750.

1095-5 32F(2d)304; 114Nebr184, 206 NW744, 748, 42ALR1102 [citCJ]; Wash 289P56.

1095-6 114Nebr184, 206NW744, 748, 42 ALR1102 [citCJ].

1095-7 86CalA284, 260P815.

1095-12 86CalA284, 260P815 (tenant estopped from asserting any right of possession).

1096-23 286Pa237, 133A252, 255 [cit CJ].

1098-38 94CalA729, 272P315.

1098-44 32PortoRico 554 (Civ. Code § 1484).

1099-45 32PortoRico 554. [c] **In Porto Rico.**–32PortoRico 554.

1099-47 232 IllA589, 593 [citCyc].

1100-66 Ont [1930] 1DomLR475.

1101-75 233Mich108, 206NW513.

1101-82 103NJL391, 139A15, 55ALR 284; NJSup 135A770; 124 Or30, 263P 888; 155Tenn177, 290SW972; 153Va 746, 151SE295; 58NS341, [1926] 4Dom LR683.

1101-82½–New. A like rule applies in case of a letting for a term of years. 124 Or30, 263P888.

1102-86½–New. A tenant "hold over" does not become a tenant from year to year after expiration of lease, even though lessor gave no notice of termination of lease. 125Misc842, 211NYS490.

1102-86½–New. A tenant who holds over after the expiration of a lease for years becomes a tenant for years in some jurisdictions. 19 OhA53.

1102-87 222AppDiv326, 225NYS709.

1102-96 89 IndA640, 166NE607.

1104-18 233Mich163, 206NW314 (finding that new arrangement created month to month tenancy sustained).

1104-20 77CalA82, 246P90, 92 [quot CJ]; 153SC118, 150SE478.

1104-21 153Va746, 151SE295.

1104-22 77CalA82, 246P90.

1104-27 213Ala31, 104S232; 232 IllA 589. [h] **Where landlord gave notice of changes in lease** before and during tenancy, tenant holding over holds under such new terms. 232 IllA589.

1105-28½–New. There is no presumption that the new lease will be on the same terms when an agreement to lease for a new term is made. 224 IllA538.

1105-38 Mont 293P315. See also 1LaA 164.

1105-41 132Misc116, 228NYS358.

1106-45 94CalA729, 272P315. [d] **Lessor who accepted rent from subsequent assignee** could not claim tenancy was merely from month to month. MoA 29 SW(2d)176.

1106-46 153Va746, 151SE295.

1106-48 See also MoA 29SW(2d)176.

1107-58 107WVa80, 147SE282.

1107-59 21 OhA62, 152NE790; 150 Wash151, 272P64.

1108-60 21 OhA62, 152NE790.

1108-65 140Wash528, 250P30.

1108-68½–New. Where a tenant, who remained in possession as statutory tenant under emergency rent laws, continued in possession after the termination of the statutory tenancy by statute, he holds as a tenant from month to month. 133Misc707, 233NYS357.

1109-89 CalA 273P587.

1109-93½–New. Executed modification of an old contract which does not alter the nature or break the continuity of the holding will not terminate the holdover tenancy. 58ND634, 227NW59.

1110-98 77CalA82, 246P90.

1110-99 [a] **In Oklahoma.**–38 OklACR 577.

1110-1 [a] **In Porto Rico.**–32PortoRico 554.

1110-6 259Mass146, 156NE6.

1111-10 Alta [1929] 3DomLR734.

1111-15 [j] 233Mich108, 206NW513. [p] 135Misc793, 239NYS683. [w] (2) Statutory notice before end of any month is sufficient. 155Wash613, 285P654.

1112-18 But see 208 Iowa1136, 225NW 858.

1112-21 254Mass22, 149NE618, 43ALR 1447.

1113-41 [a] **Substantial compliance with statute sufficient.**–155Wash613, 285 P654.

1113-43 254Mass22, 149NE618, 43ALR 1447.

1113-46 Alta [1927] 2DomLR1024. [a] (2) If particular day is named in notice, it must be one corresponding to conclusion of tenancy. 254Mass22, 149 NE618, 43ALR1447. [b] (2) Notice is insufficient, if it names day subsequent to termination of current year. 254Mass 22, 149NE618, 43ALR1447.

1115-84 89CalA119, 264P331, 332 [quot Cyc].

1115-87 See also NS [1928] 1DomLR 1012.

1116-7½–New. Tenant's abandonment of premises and commencement of divorce action and landlord's acceptance of rent from wife with knowledge of facts does not terminate tenancy. 130 Kan77, 285P532.

1116-8 132Misc116, 228NYS358. But see 48Philippine396.

1116-9 160La1001, 107S780; 132Misc 116, 228NYS358; 120 Okl 5, 249P910. See also 12PaDist&Co 172.

1116-17 232Ky267, 22SW(2d)914. [b] (2) 125Misc649, 212NYS62 (by statute). [c] (3) To "at once vacate the premises." 232Ky267, 22SW(2d)914.

1117-21 [a] **Notice by tenant.**–120 Okl 5, 249P910.

1117-22 [j] (1) 140Wash528, 250P30. (3) Compliance with statutory provision for twenty days' notice is sufficient even where invalid lease contains provision for longer period. 150Wash151, 272P64. (4) Where unacknowledged lease for term longer than one year, created tenancy from month to month, provision therein for termination on thirty-day notices was void, and lease was subject to termination by landlord by giving statutory notice of twenty days as provided by statute. 150Wash 151, 272P64.

1117-23 120 Okl 5, 249P910.

1117-28 179Minn349, 229NW312 (notice held to require surrender on rent date); NJSup 134A654; 140Wash528, 250P30. [c] **Notice requiring tenant to vacate on day following day monthly term expires** is not insufficient or defective. 179Minn349, 229NW312.

1118-33 140Wash528, 250P30.

1118-42½–New. In some jurisdictions a postal card notice of an intention to quit is sufficient. MoA 16SW(2d)727.

1118-55 NJSup 134A654.

1118-57 But see MoA 296SW1046.

1118-60 [a] **Matters not constituting waiver.**–130Kan77, 285P532.

1119-75 NH 151A81(2dcase).

1120-84 155SC528, 152SE702.

1120-91 NH 151A81(2dcase).

1120-92 83NH270, 141A304.

1120-95 83NH270, 141A304.

1120-96 267Mass143, 166NE622(1st case); Mass 171NE226. [a] **Mortgagee in possession after issuance of sheriff's deed under junior lien.**–201 Iowa923, 208 NW366.

1120-98 201 Iowa923, 208NW366; 118 Okl 219, 247P60.

1121-1 Mass 173NE419.

1121-7 102WVa489, 135SE604.

1121-8 102WVa489, 135SE604.

1121-12 102WVa489, 135SE604.

1122-18 122 Okl 258, 254P96.

1122-28 219Ky537, 293SW1070; NJCh 143A820. [b] **Temporary occupancy for ingress and egress to and from other lands and tenements** with consent of owner is insufficient to constitute tenancy at will. 111 Okl 257, 239P656.

1123-34 83NH270, 141A304.

1123-41 220Ala45, 124S87 (in nature of tenancy at will); Mass 170NE799; 134 Misc677, 236NYS353; 155SC528, 152SE 702; TexCivA 281SW1105 [citCJ].

1123-43 TexCivA 9SW(2d)423.

1124-55 IndA 168NE703; 166Minn190, 207NW498, 499 [citCJ]; 174Minn233, 219NW79; 98NJEq59, 130A839; 291Pa 223, 139A865. [b] (2) May establish tenancy at will even if it did not previously exist. 174Minn233, 219NW79.

1124-61 166Minn190, 207NW498; 174 Minn233, 219NW79.

1125-68 [b] 209Ky234, 272SW724 [cit CJ].

1125-71½–New. A tenant who enters possession pending negotiations for a lease becomes a tenant at will until the lease is completed. 94CalA729, 272P 315.

1125-74 CalA 290P309; 219Ky537, 293 SW1070; Mass 173NE414; 289Pa327, 137A459; 153Va746, 151SE295. But see 38 OklACR577. [d] Iowa 232NW 722. [e] (1) 255Mass87, 151NE61.

1126-76 [a] **In Indiana.**–89 IndA640, 166NE607.

1126-84 Mass 172NE526(2dcase).

1127-90 228AppDiv832, 241NYS32.

1127-98 263Mass318, 160NE829; Mass 170NE799; 83Mont244, 271P455; 120 Okl 5, 249P910; 52SD597, 219NW560; TexCivA 281SW1105; TexCivA 13SW (2d)176.

1128-5 267Mass143, 166NE622(1st case).

1128-8 See also 83NH270, 141A304.

1126-15 Contra 174Minn233, 219NW 79.
1129-28 TexCivA 13SW(2d)176.
1129-29 CalA 290P309; TexCivA 13 SW(2d)176.
1130-57 102Conn640, 129A786; NJCh 143A820.
1130-59 99NJEq271, 132A487.
1130-60 82NH387, 134A344; 98NJEq 59, 130A839; 99NJEq271, 132A487.
1131-64½-New. But necessity of notice is not dispensed with landlord's use of forcible means to present tenant's entrance of premises. 98NJEq59, 130A 839.
1131-65½-New. Notice is not necessary where there is no tenancy at will, by reason of nonexistence of the relation of landlord and tenant. 122 Okl 258, 254P96.
1131-71 TexCivA 9SW(2d)423.
1131-74 [m] 99NJEq271, 132A487. [s] In New Hampshire.-82NH387, 134A 344. [t] In Oklahoma.-120 Okl 5, 249P 910.
1132-78 82NH387, 134A344.
1132-81 82NH387, 134A344.
1133-95 99NJEq271, 132A487.
1133-5½-New. In some jurisdictions a notice to vacate given by filing suit on September 1 to remove the cloud arising from tenant's claim of a lease for the succeeding year and for possession is sufficient to terminate the lease at the end of the crop year on November 1. TexCivA 281SW1105.
1134-28 [a] Tenancy at sufferance exists without relationship of landlord and tenant or obligation to pay rent. 251Mich512, 232NW178.
1134-29 99Fla1229, 128S827(2dcase); 39GaA789, 148SE754; 99NJEq271, 132 A487; 123 Okl 7, 251P738.
1135-32 [a] In Porto Rico.-33Porto Rico 91.
1135-33 134Misc677, 236NYS353.
1135-34 But see IndA 168NE703.
1135-43 251Mich512, 232NW178.
1135-47½-New. One entering by the owner's permission under a void parol contract, a void lease, or pending negotiations for a written lease, may be a tenant at sufferance. IndA 168NE703.
1135-50 18F(2d)828; 123 Okl 7, 251P 738; 33Wyo 249, 238P654, 660 [quot CJ]; 41Wyo 509, 287P316 (after expiration of written lease). [e] In Massachusetts.-255Mass87, 151NE61.
1136-51 251Mich512, 232NW178.
1136-54½-New. In Porto Rico a person who does not retain possession without paying rent but who entered into possession under a contract for cultivating the land on shares cannot be held to be a tenant at sufferance. 33 PortoRico 91.
1136-54½-New. Where purchaser of leased property does not assume continuation of lease possession by lessee is equivalent to tenancy at sufferance. 34 PortoRico 745.
1136-60 Contra 174Minn233, 219NW79.
1137-81 235Ky621, 32SW(2d)3.
1137-82½-New. Tenant's notice in writing of intention to vacate is not defective because addressed to the landlord's attorney whose agency is not denied. 18F(2d)828.
1137-83 IndA 168NE703; 99NJEq271, 132A487; 123 Okl 7, 251P738.
1138-91 99NJEq271, 132A487. [b] 18 F(2d)828; 32F(2d)423. [c] 251Mich 512, 232NW178. [h] (2) Any date good, even next day. 99NJEq271, 132A 487. [i] (2) Acts held not waiver of statutory notice. 251Mich512, 232NW 178. [j] Notice of termination of employment is sufficient without any other notice. 235Ky621, 32SW(2d)3.
1139-7 122Kan640, 253P553.
1140-14 116 ObSt631, 157NE491; TexCivA 271SW408 (while lease conveys no actual interest in land itself, it does create right to use of land which falls within definition of property); TexCivA 284SW1057. But see NJCir 139A435.
1140-16 [a] (1) 122 Or285, 258P205, 58ALR339.
1140-18 234Ky400, 28SW(2d)477.
1140-20 335 Ill 450, 167NE79.
1141-23 34PortoRico 696.
1141-24 34PortoRico 696 (fixed price means money or money equivalent).
1141-25 [a] "Pujanza" (lease) contract in Philippines.-44Philippine369.
1141-26 31F(2d)197; 32PortoRico 58. [a] In Porto Rico.-32PortoRico 58 (Civ. Code § 1445).
1141-29 161Ga672, 132SE442; 122Kan 640, 253P553.
1141-31 122Kan640, 253P553.
1141-32 122Kan640, 253P553.
1142-48 TexCommnA 6SW(2d)94.
1142-59 122Kan640, 253P553.
1142-59½-New. as one who holds an estate by right of lease, 122Kan640, 253 P553.
1142-67 242 NY366, 152NE117.
1142-69 122Kan640, 253P553.
1142-75 234Ky400, 28SW(2d)477.
1142-77½-New. Whether a tenant executed a lease and rent not in good faith is determined by the conditions at the time of the execution and not at the transfer of the note. MoA 289SW977.
1143-92 27 OhA235, 161NE40.
1143-1 152Miss1, 119S911(2dcase).
1144-3½-New. Where the lessor accepts lessee's offer but sends lease for lessee's approval and execution, there is no unconditional acceptance. 224 IllA538.
1144-7 224 IllA538.
1144-11 20F(2d)67; 94CalA729, 272P 315.
1144-12 86 IndA185, 156NE562.
1145-20 1LaA516.
1145-22 [a] (2) Lease between fair association, and agricultural society based upon consideration of $1 per year and lessee bound itself to pay taxes, look after upkeep of buildings and pay insurance premiums is based upon adequate consideration. 249Mich107, 227 NW702. [f] Percentage of receipts valid consideration for lease. 158La737, 104S637. [g] Agreement to pay increased rent held consideration. Tex CivA 295SW305.
1145-27 217AppDiv541, 217NYS256.
1145-31 86 IndA185, 156NE562.
1146-36 [a] Covenant releasing landlord from all loss of property however occurring is sufficient to release from liability for loss by negligence of lessor or his servants. 89PaSuper235 (covenant held valid).
1146-38 217AppDiv541, 217NYS256 (holding that, where tenant, relying on efficacy of written lease, occupied premises for two years without landlord's objection, he acquired right to possession under lease).
1146-40 86 IndA185, 156NE562.
1146-44½-New. Lease does not lack mutuality because it does not contain express reciprocal promises, but such promises may be implied. 217AppDiv 541, 217NYS256.
1146-45 234Ky64, 27SW(2d)382 (holding one dollar sufficient consideration).
1146-53 [a] SD 226NW345.
1146-55 MoA 15SW(2d)961.
1146-56 307Mo 160, 270SW315.
1147-58 SD 231NW951.
1147-60 [a] Where receipt intended merely for preliminary execution, matter remains in fieri till execution of lease. 102NJEq33, 139A712.
1147-64½-New. Farm leases should be free from technical interference. SD 225NW661.
1147-65 86 IndA185, 156NE562; 222 AppDiv119, 226NYS135.
1147-67 86 IndA185, 156NE562; 222 AppDiv119, 226NYS135.
1148-77 1LaA487; 13LaA277, 127S 748; 157Miss565, 128S567 (holding lessee liable for year's rent after abandonment under oral contract for one year).
1148-84 MoA 15SW(2d)961.
1148-89 MoA 293SW441, 444 [citCJ].
1149-1 148Md589, 129A900 (specific performance of renewal clause denied for indefinite description).
1149-3 163Ga842, 137SE49.
1149-4 98NJEq59, 130A839.
1149-5 168Ark262, 271SW30; 163Ga 842, 137SE49.
1149-8 145Va191, 133SE669.
1150-19 224 IllA538; 145Wash295, 259 P1079.
1150-20 145Wash295, 259P1079, 1082 [quotCJ].
1150-21 145Wash295, 259P1079, 1082 [quotCJ].
1150-22 307Mo 160, 270SW315; 145 Wash295, 259P1079, 1082 [quotCJ].
1150-26 145Wash295, 259P1079, 1082 [quotCJ].
1151-36 [c] In Porto Rico.-32Porto Rico 554.
1151-36½-New. Parties may agree under what facts and circumstances and for what defaults the lease may be terminated. 134Wash450, 235P958; 136 Wash695, 240P362.
1151-42½-New. A lease executed by the lessee but not by the lessor is void for want of mutuality. 121 Or500, 255 P474.
1151-47 68CalA530, 229P860; 234Ky 400, 28SW(2d)477; 121 Or500, 255P 474.
1152-48 324 Ill 454, 155NE278; 249 Mich511, 229NW629.
1152-53½-New. Where a prospective lessor retains for an unreasonable time without signing it a lease executed and delivered by the lessee and the lessee does not enter into possession the document does not become operative against the lessee by the lessor's signing it thereafter when conditions have changed. Can [1929] 3DomLR108.
1152-54 [a] (1) SD 226NW735.
1152-57 68CalA530, 229P860; 82NH 249, 132A256.
1152-58 68CalA530, 229P860 (such lease is not rendered ineffectual because it contains covenant on lessee's part to make repairs).
1152-59 68CalA530, 229P860; 82NH 249, 132A256.
1153-67 165Ga359, 140SE869.
1154-84 91Fla900, 109S86; 19 OhA 521.
1154-85 19 OhA521.
1155-98 71CalA713, 236P156; 102CalA 272, 282P1019; 86CalA659, 261P519; 86Mont1, 281P537; TexCivA 293SW 653.
1155-99 86Mont1, 281P537; 103WVa 301, 137SE747.
1155-1 204 Iowa974, 215NW972.
1155-3 103WVa301, 137SE747.
1155-8 103WVa301, 137SE747.
1155-10 [b] Giving release without consideration is strong circumstance corroborating evidence of nondelivery. 39 OklACR371.
1155-12 39 OklACR371.
1155-13 39 OklACR371.
1155-16 204 Iowa974, 215NW972.
1155-17½-New. If circumstances indicate conditional rather than absolute delivery then no title passes until condition be fulfilled. 249Mich511, 229NW 629.
1155-19 [a] TexCivA 293SW653.
1156-25 [c] 68CalA530, 229P860.
1156-26 68CalA530, 229P860 (entry into possession is strong evidence of acceptance but it is acceptance and not entry which is essential of validity of lease).
1156-27½-New. Acceptance is consent to terms of lease, and taking or retaining possession of instrument is mere evidence of acceptance or consent. 68 CalA530, 229P860.
1156-35 Ont [1928] 4DomLR573.
1157-38 19 OhA521.
1158-44 [e] Verbal lease evidenced by affidavit.-1LaA487.
1158-49 205 Iowa1203, 219NW517; 39 OklACR202.
1158-58½-New. The same rules as to mental capacity apply to leases as apply to wills. 29 OhA109, 162NE780.
1158-58¾-New. Lessor is not incapacitated merely because of old age or resulting physical infirmities, unless, by reason thereof, he cannot protect property rights. 29 OhA109, 162NE780.
1158-61 95CalA251, 272P791.
1158-63 79CalA353, 249P238.
1158-65 141Miss487, 106S763.
1159-80 [a] (1) 68Utah407, 250P986. (2) 228Ky705, 15SW(2d)437.
1160-84 [d] Representations held legal fraud.-Ala 130S383 (sound-proofness of apartment).
1162-18 241 IllA74.

1162-29 But see **OhA** 173NE214.
1162-31 204 **Iowa**974, 215**NW**972.
1162-33 225**AppDiv**232, 232**NYS**530.
1164-89 215**AppDiv**355, 213**NYS**345; 127**Misc**608, 217**NYS**142; 136**Misc**646, 241**NYS**428.
1164-92 See also **NJSup** 135A348.
1165-94 **Wis** 229NW550.
1165-99½-New. Lease for gasoline station in business district is enforceable in the absence of a showing that authorities refused permits. 220**AppDiv**661, 222**NYS**371.
1165-7 [g] **Gasoline station and garage.** –127**Misc**608, 217**NYS**142. [h] **Where board of appeals has authority to vary Zoning Law,** lease providing for use of premises which is prohibited by Zoning Law is not necessarily illegal. 131**Misc** 827, 228**NYS**365.
1166-8½-New. A lease of premises to be used as dance hall is lawful, although the necessary license therefor is refused. 244**NY**438, 155**NE**733.
1166-10 **Wis** 229NW550.
1167-34½-New. Where both parties were ignorant of zoning restriction against use of premises for purposes for which leased, the tenant is not liable for rent and may recover back deposit and rent paid. 127**Misc**608, 217**NYS**142.
1168-38 52**SD**597, 219**NW**560.
1168-42 52**SD**597, 219**NW**560.
1168-44 228**AppDiv**308, 238**NYS**412.
1168-45 [a] **Option to purchase** contained in prohibited renewal lease held void. 228**AppDiv**308, 238**NYS**412.
1168-48 228**AppDiv**308, 238**NYS**412.
1168-53½-New. That the agreements as to agricultural land may under possible contingencies be performed within prohibited time does not validate them. 228**AppDiv**308, 238**NYS**412.
1169-55 242**NY**134, 151**NE**155. [b] **Defectively acknowledged lease cured** by subsequent conveyance subject to lease. **TexCivA** 282**SW**930.
1169-68 320 **Ill** 23, 150**NE**344.
1170-78 289**Pa**175, 137A189.
1170-80½-New. Where escrow instructions provided for delivery of money and note to landlord in payment for certain fixtures upon landlord's delivery of a bill of sale and a lease containing provision for renewal for a stated number of years, and the landlord tendered a lease with provision for renewal not stating any period of time, the tenant does not ratify such lease by remaining in possession after the expiration of the prior lease where, before such expiration, the landlord knew that the tenant refused to accept the proffered new lease. 68**CalA**166, 228**P**724.
1170-80¼-New. Where a lease for a drug store and chemist's establishment in a district zoned for residence purposes provides that it is subject to building restrictions and provisions of the Zoning Law, the tenant cannot assert illegality of the lease. 131**Misc**827, 228 **NYS**365.
1170-80¼-New. Provisions of constitution limiting terms of agricultural land leases may not be subject of waiver by parties. 228**AppDiv**308, 238**NYS**412.
1170-82 101**NJEq**397, 138A376.
1170-89½-New. Mere acceptance of rent is not an acknowledgment of the terms of the lease nor a waiver of any rights thereunder. 31 **OhA**38, 166**NE** 248.
1170-89¼-New. Lessor is not estopped to deny validity of lease void for violating constitutional provision as to agricultural land. 228**AppDiv**308, 238 **NYS**412.
1170-89¼-New. A lessor who consented and coöperated in the lessee's construction of buildings cannot thereafter assert uncertainty or want of mutuality in the lease. 154**Wash**485, 282**P**911.
1171-1 **Ida** 285P1023 (lease recorded by landlord after provision was struck out by tenant).
1171-3 [c] **Agreement to reduce rent** during term of oral lease held part of original rental contract and supported by sufficient consideration. **TexCivA** 297**SW**524.
1171-4 **Man** [1926] 4**DomLR**1167.
1171-6 168**Ark**875, 271**SW**951; **NJSup** 138A517. [a] **While lease is executory,** parties may modify or waive without additional consideration. 213**Ala**31, 104 S232.
1171-7 86**CalA**516, 261**P**751.
1171-9 260**Mass**265, 157**NE**532.
1172-14 218**Ala**674, 120S153; 260**Mass** 265, 157**NE**532. See also **TexCivA** 274 **SW**643, 646 [citCyc].
1172-17 See **Man** [1926] 4**DomLR**1167.
1172-18 252 **IllA**358.
1172-23 242**NY**134, 151**NE**155.
1172-24 97**PaSuper**551 (holding evidence to show modification).
1172-24½-New. A supplemental agreement subsequent to the original lease held to have effect of a new lease. 154 **Wash**485, 282**P**911.
1172-26 See also **Miss** 130S743.
1173-35½-New. Rescission by a subtenant is effective as of the date of the rescission. 92**CalA**236, 267**P**939.
1173-37 **Va** 153S**E**659 (company cannot retain benefits of lease on repudiating obligations under sales and license agreement).
1173-38 248**Mich**496, 227**NW**695; **NJ** 147A490. [a] **Lessee may not terminate lease** restricting use of premises to lawful purpose, on ground that fire department has ordered discontinuance of illegal use. 131**Misc**791, 229**NYS**17.
1173-45 167**Minn**338, 209**NW**15 (facts not showing ground for rescission); **NJSup** 136A597.
1173-46 167**Minn**338, 209**NW**15.
1173-49½-New. A tenant may rescind for the lessor's failure to observe building and zoning regulations. 128**Misc** 466, 219**NYS**4.
1173-49¼-New. Abrogation of leases is not favored except in extreme cases. 9 **LaA**388, 120S730(2dcase).
1173-49¼-New. Evidence, insufficient to support a claim for damages for breach of agreement giving an exclusive selling privilege, is insufficient to support a claim for a rescission for such breach. 87**CalA**169, 261**P**1051.
1173-49½-New. The law does not favor abrogation of leases. 10**LaA**126, 121S 198; 9**LaA**2, 118S840.
1173-49¼-New. Where the lessee was in default for a large payment of rent, his claim that the lessor could not rescind for breach of subordinate covenant for which damages might be recovered was not tenable. 131 **Or**488, 283P34(2d case).
1173-52 123**Kan**746, 256**P**997.
1173-53 250**Mich**419, 230**NW**188.
1173-56 [a] (3) 95**CalA**251, 272**P**791.
1173-56½-New. Where a lease for a drug store in a residence district places the burden of obtaining a modification of the Zoning Law on the tenant, he waives any right to rescind for failure of consideration by reason of restrictions, by paying rent for many months without prosecuting his application for modification to decision. 131**Misc**827, 228**NYS**365.
1174-57 See also 92**CalA**236, 267**P**939.
1174-59½-New. An attempt to repudiate a lease by tenant, several days after receipt of lease altered by landlord, is ineffectual where not accompanied by actual physical delivery. 125**Misc**866, 212**NYS**302.
1174-61 123**Kan**746, 256**P**997. But see 80**CalA**91, 251**P**654.
1174-62 123**Kan**746, 256**P**997.
1174-70 [c] **Fraud.–Ala** 130S383.
1174-75 291**Pa**507, 140A506, 509 [cit CJ].
1174-81 247 **IllA**289; 244**Mich**330, 221 **NW**293; **MoA** 158**W(2d)**961; 248**NY** 333, 162**NE**97; 254**NY**121, 172**NE**262 (court must give meaning to all words used in clause); **TexCivA** 275**SW**487, 490 [quotCJ]. [a] **Lease involving neither public policy nor right to contract** must be construed as written. 190**NC** 24, 128**SE**485.
1175-82 See also 127**Misc**59, 215**NYS** 244.
1175-83 213**AppDiv**259, 210**NYS**341.
1175-91 254 **IllA**19 (as to repayment of rent on termination at lessor's option); 120**Kan**637, 245**P**119; 307**Mo** 160, 270**SW**315; **Mo** 208**W(2d)**51; 219**MoA** 90, 266**SW**492, 494 [quotCJ]; 32**NM**469, 259**P**620, 61**ALR**767; **NJ** 147A439; 216 **AppDiv**218, 214**NYS**653; 133**Misc**225, 231**NYS**451; 225**AppDiv**263, 232**NYS** 614.
1175-92 219**MoA**90, 266**SW**492, 494 [quotCJ].
1175-93 219**MoA**90, 266**SW**492, 494 [quotCJ].
1175-95 111**Conn**422, 150A105; 120 **Kan**637, 245**P**119; 219**MoA**90, 266**SW** 492, 494 [quotCJ].
1176-98 219**MoA**90, 266**SW**492, 494 [quotCJ].
1176-99 219**MoA**90, 266**SW**492, 494 [quotCJ].
1176-1 219**MoA**90, 266**SW**492, 494 [quotCJ]; 216**AppDiv**218, 214**NYS**653; 149**Va**701, 141**SE**770.
1176-3 120**Kan**637, 245**P**119; 128**Misc** 875, 220**NYS**281; **Wis** 232**NW**851. [a] **Presumption exists** that language correctly expressed intent of parties. **Tex CivA** 30**SW(2d)**707.
1176-4 [a] **Omnibus expression of intention** cannot override plain language of lease. 149**Va**701, 141**SE**770.
1176-7 101**CalA**12, 281**P**129.
1176-8 250**NY**178, 164**NE**897; 134**Misc** 315, 235**NYS**277; **Or** 287P686.
1176-14 120**Kan**70, 262**P**536; 247**Mich** 73, 225**NW**587; 225**AppDiv**263, 232**NYS** 614.
1176-15 90**CalA**374, 265**P**987; 120**Kan** 637, 245**P**119; 247**Mich**38, 225**NW**587; 216**AppDiv**218, 214**NYS**653; **Man** [1928] 1**DomLR**12. [a] **Thus** lease prepared by landlord for restaurant requiring landlord to furnish heat between certain dates, but for failure to heat landlord was not to be liable, and not stating any limitation on time for heating, requires landlord to furnish heat sufficient to run restaurant. 216**AppDiv**218, 214**NYS**653 (all night where restaurant in night life district).
1177-23 91**CalA**213, 266**P**956; 127 **Or** 188, 270**P**927; **Va** 154**SE**518.
1177-24 197**Cal** 321, 240**P**965; 90**CalA** 374, 265**P**987; 99**CalA**666, 279**P**194; 253 **Mass**564, 149**NE**609; 216**AppDiv**218, 214**NYS**653; 149**Va**701, 141**SE**770.
1177-25 197**Cal** 321, 240**P**765; 250**NY** 228, 165**NE**273.
1177-26 107**Conn**459, 140A808.
1177-28 158**La**379, 104S122, 39**ALR** 1042; 131**Misc**714, 227**NYS**721.
1178-34 38**GaA**428, 144**SE**135(2dcase).
1178-36½-New. Thus, where lessor is given right to terminate on breach of covenant, by a printed clause, and then there is provided in writing a penalty by "forfeiture and injunction" for such breach, the writing was held to give an exclusive remedy. 125**Misc**846, 211**NYS** 499.
1178-37 197**Cal** 321, 240**P**765.
1178-40 **Mo** 208**W(2d)**51.
1178-45 86**CalA**310, 261**P**331; 90**CalA** 374, 265**P**987; **Mo** 208**W(2d)**51; 126 **Misc**260, 213**NYS**18; **TexCivA** 275**SW** 487, 490 [quotCJ]. [a] (4) Thereunder. 93**PaSuper**578.
1178-46 **TexCivA** 275**SW**487, 490 [quot CJ].
1178-47 **TexCivA** 275**SW**487, 490 [quot CJ].
1178-47½-New. Standard dictionaries may be used to establish ordinary meaning of words. 126**Misc**260, 213**NYS**18.
1179-50 82**NH**249, 132A256.
1179-51 84**CalA**214, 257**P**890, 892 [cit Cyc].
1179-55 82**NH**249, 132A256.
1179-70 170**La**372, 127S872.
1179-73 See also 232**Mich**370, 205**NW** 196.
1180-80 206**Cal** 315, 274**P**328; 90**CalA** 374, 265**P**987; 120**Kan**637, 245**P**119; **Mass** 167**NE**305; 216**AppDiv**218, 214 **NYS**653; 10**PaDist&Co** 101.
1180-81 120**Kan**637, 245**P**119.
1180-85 93**PaSuper**578.
1180-87 206**Cal** 315, 274**P**328; 295**Pa** 357, 145A434.
1180-88 235 **IllA**572.
1180-93 90**CalA**41, 265**P**844; 120**Kan** 637, 245**P**119; 148**Md**381, 129A362; **MoA** 287**SW**781; 86**Mont**478, 284**P**525; 216**AppDiv**218, 214**NYS**653; 127**Misc**59, 215**NYS**244 (difficulty of language is no bar to practical construction); 133**Misc** 225, 231**NYS**451. [d] 160**La**1001, 107S 780. [f] **Evidence admissible to show practical construction by parties.–IndA** 169**NE**596.
1181-94 120**Kan**637, 245**P**119; 249**Mich** 579, 229**NW**439; 98**NJEq**59, 130A839 (description of property).

1181–97 MoA 287SW781; 102NJL590, 134A752.

1181–2 25F(2d)530; 77CalA548, 247P 520; 86CalA58, 260P559; 239 IllA204; 244Mich330, 221NW293; NJ 152A73; NJSup 135A804; 216AppDiv218, 214 NYS653 (where lessor prepared lease); 126Misc260, 213NYS18; 127Misc338, 216NYS129; 131Misc714, 227NYS721; 127 Or188, 270P927; 132 Or38, 284P 562; 12PaDist&Co 551 (rule applied to construction of reservations in lease); 114Tex452, 270SW1014; TexCivA 293 SW667, 668 [citCJ]; 100Vt232, 136A 394, 398 [citCJ], 51ALR628; 149Va701, 141SE770. [b] **Additional liability not imposed on tenant** unless clearly within provisions of lease. 127Misc338, 216 NYS129.

1182–4 173Ark633, 293SW36; 30Hawaii 210.

1182–8 Wis 232NW851.

1182–10 43F(2d)17.

1182–12 90CalA374, 265P987; 100Vt 232, 136A394, 398 [citCJ], 51ALR628.

1182–14 See also 314Mo 288, 284SW 482. But see NJSup 135A804.

1182–17 90CalA41, 265P844; 86 IndA 185, 156NE562; 136Misc561, 241NYS 354; Va 153SE659.

1182–18 86CalA516, 261P751; 39Wyo 1, 269P31, 33 [quotCJ]. [d] **Lease and bond securing rent** executed at same time and referring to each other must be construed together in determining liability thereunder. Or 290P556.

1183–24 90CalA41, 265P844. [a] **Lease and sublease.**–90CalA41, 265P844.

1183–29 95CalA251, 272A791.

1184–48 90CalA41, 265P844; 82NH 249, 132A256; 250NY228, 165NE273; 131Misc365, 226NYS702.

1184–51½–New. Parties to lease may waive strict terms thereof. 262Mass 463, 160NE245.

1184–58 228AppDiv99, 239NYS257.

1184–60½–New. Where parties entering into a lease of premises for use as a dance hall knew that grant of the license therefor was discretionary, the court will not imply a condition providing for the contingency of refusal. 244 NY438, 155NE733.

1184–63 154Md135, 140A76, 164Minn 201, 204NW936; 102NJL279, 131A879, 880 [citCyc]; 134Misc657, 236NYS308.

1184–65 102NJL279, 131A879, 880 [cit Cyc].

1185–69 164Minn201, 204NW936 (covenant of lessor to pay third party reasonable value of dwelling house erected by lessee construed as independent covenant).

1185–75 164Minn201, 204NW936.

1185–78 But see 245Mich674, 224NW 319.

1185–79 MoA 16SW(2d)219.

1185–80 MoA 16SW(2d)219.

1185–82½–New. Covenant by landlord not to rent retained premises to negroes is valid. 215Ala363, 110S801.

1186–84 NJCh 149A587.

1186–87 153Wash175, 279P566(2dcase).

1186–89½–New. A landlord is not liable for other tenants' infringement of an exclusive selling privilege in a market house where the holder of such privilege failed to inform the landlord of the infringement. 87CalA169, 261P 1051.

1186–93 NJCh 149A587.

1187–12 [a] **Absence of express stipulation making covenants run with land,** though not decisive, may be considered in determining intention of parties. 127 Misc338, 216NYS129.

1187–14 [a] **Covenant for preservation of property itself** runs with land. 127 Misc338, 216NYS129.

1187–16 34Ariz547, 273P538; 219App Div321, 219NYS684; 127Misc338, 216 NYS129; 131Misc765, 228NYS702; 134 Misc96, 234NYS491.

1188–17 [b] **Insurance.**–127Misc338, 216NYS129.

1188–23 220MoA736, 275SW779; 22 OhA426, 154NE57. [a] **Provision forbidding acts on leased premises contrary to laws or ordinances** held to create covenant running with land. 22 Oh426, 154NE57.

1188–24 127Misc338, 216NYS129; 92 PaSuper40. [a] **Covenant to supply live steam at certain pressure** runs with land as it touches and concerns use of land for purpose of letting. 216AppDiv299, 214NYS284. [b] **Covenant for renewal of lease** held to run with land. 255Mass 76, 151NE81, 45ALR1. [c] **Covenant whereby lease may be terminated** generally runs with land and is enforceable by transferee of reversion. 92PaSuper 40. [d] **Covenant authorizing cancellation of lease** by landlord in event of election to erect new building has been construed as one running with land. 132 Misc435, 230NYS239.

1188–25 127Misc338, 216NYS129.

1189–32½–New. A conveyance of the reversion without an assignment of the lease brings the transferee into privity with the lessee and enables him to enforce covenants running with the land. 92PaSuper40.

1189–34 251 IllA202 (landlord's covenant to repair).

1189–35 42F(2d)53; 126 Okl 3, 258P 906.

1189–40 126 Okl 3, 258P906.

1189–50½–New. and custom of lessor in dealing with tenants. 120Kan637, 245P119.

1190–54 [a] **Modified agreement.**–168 Ark875, 271SW951.

1190–55 259Mass379, 156NE714; 262 Mass29, 159NE443; 232Mich370, 205 NW196; 213AppDiv113, 210NYS60; TexCivA 26SW(2d)460.

1190–63½–New. The rules as to impossibility of performance are inapplicable where the lease provides for its termination and the return of the lessee's deposit on the lessor's inability to acquire title and the lessees accept return of the deposit. 86CalA516, 261P751.

1190–63¼–New. Landlord is not guilty of violating covenant not to lease to another to conduct certain business, where other tenant after acquiring lease infringes on such right without participation by landlord. 37F(2d)904.

1190–63¼ New. In determining breach of covenant not to rent for same business, business must be taken as a whole. 137Misc320, 242NYS514.

1190–63½–New. Where the lessee was in default, the lessor does not breach the contract by terminating the lease under its terms. 131 Or488, 283P34(2d case).

1190–64 216AppDiv299, 214NYS284. [a] **That lessee remained in possession** long after discovery of defect in pressure of steam to be furnished is not waiver thereof as matter of law where lessee constantly complained of defect and was assured of improvement. 216 AppDiv299, 214NYS284.

1190–67 MoA 16SW(2d)219. See also 38GaA428, 144SE135(2dcase). [a] **Doctrine of election of remedies** has no application to suit for breach after attempted enforcement. TexCivA 26SW (2d)718.

1190–73 See also MoA 16SW(2d)219.

1190–77½–New. Landlord's changing furniture after lease was signed is no authorization to tenant to purchase entirely different furniture. 129Misc154, 220NYS122.

1190–77½–New. Where a purchaser from a lessor had actual knowledge of the provisions of the lease at the time he purchased the property, he was jointly liable with the lessor for breach of the lease for the difference between the agreed rental of the lease and the amount which he actually received for rent of the building, the lease providing that the lessee could rent all of the premises for fifty dollars per month, where purchaser leased them to others for one hundred dollars per month. 178 Ark159, 10SW(2d)10.

1191–84 [b] **Complaint held insufficient** as against demurrer. 218Ala684, 119S 685.

1191–85 215Ala363, 110S801.

1191–91 [a] (2) Evidence of profits from similar establishments admissible on question of loss of profits. 260Mass 265, 157NE532.

1191–92 [a] See also MoA 16SW(2d) 219.

1191–95 [a] (2) To show that tenant's contractor was not negligent. 160La 778, 107S571. (3) To show that condition of building at time lease was made was cause of its condemnation. 160La 778, 107S571.

1191–95½–New. Refusal to permit proof by the lessor that the lessee's crop failure was due to his financial inability has been held error. 102CalA333, 282P997.

1191–97½–New. Whether conveyance by lessor was a subterfuge to defeat the lease held question for the jury under evidence. 173Ark633, 293SW36.

1191–97⅓–New. Failure to furnish heat is question for jury, although lease exempts lessor from temporary failure. TexCivA 4SW(2d)591.

1191–97¼–New. In an action for a breach of contract of lease, a nonsuit is properly granted as to a defendant shown to be merely a dummy in the transaction to plaintiff's knowledge. 86 CalA516, 261P751.

1191–97½–New. In such action a nonsuit is properly granted as to a defendant who was not shown to have had any joint interest with the other defendants or to have entered into any agreements with plaintiff or the other defendants or to have received anything of value. 86CalA516, 261P751.

1191–97½–New. It is a fact question whether lease for groceries, candies, etc., breached a covenant not to rent for business of confectionery and cigar store. 137Misc320, 242NYS514.

1191–99 247NY245, 160NE359; 129 Misc154, 220NYS122; TexCivA 286SW 552.

1191–2 173Ark633, 293SW36; 46Philippine916; TexCivA 16SW(2d)919.

1192–5 178Ark159, 10SW(2d)10; 260 Mass265, 157NE532; 98PaSuper150.

1192–6 160La778, 107S571.

1192–11 260Mass265, 157NE532; 247 NY245, 160NE359.

1192–12 TexCivA 286SW552; TexCivA 26SW(2d)718. [a] MoA 16SW(2d)219. [b] **Evidence held admissible.**–MoA 18 SW(2d)102. [c] **Evidence held inadmissible.**–MoA 18SW(2d)102.

1192–13 [a] **Excluding testimony of such profits** so as to establish measure of damages held error. 228AppDiv168, 239NYS461.

1192–15 102CalA333, 282P997.

1192–16½–New. Suit for damages because building leased as garage was condemned. Elements of damages. 160 La778, 107S571.

1192–16⅓–New. The lessee cannot recover rent paid, where he had the use of the building rented. 168La527, 122 S716.

1192–16¼–New. Where the lessee may treat a lease as terminated by the lessor's breach, the lessor is not entitled to complain that in selling the business the lessee did not include the good will, as respects damages. MoA 16SW(2d) 219.

1192–20 102CalA333, 282P997; 291Pa 507, 140A506, 509 [citCJ].

1193–30½–New. Where the holder of an option for a lease is promised a tenantable property and exercises the option supposing that the property is tenantable, he may withdraw his election and refuse to accept the lease upon discovery, before the execution of the lease that the property is actually untenantable. 165Minn136, 205NW945.

1193–30⅓–New. In the absence of reentry and termination of a lease, the lessor is not entitled to recover for breach of covenant of the lease. Vt 147 A270.

1193–35 221MoA639, 283SW747. But see 97CalA166, 275P478.

1193–35½–New. Effort of landlord to secure tenants and thereby mitigate damages occasioned by lessee's repudiation of lease does not operate as forfeiture of his rights. TexCivA 276SW445.

1193–40 250 IllA112. See also 274US 195, 47SCt566, 71L ed996. [b] **In absence of fraud,** accident, mistake, or surprise equity will not relieve against forfeiture of lease. 27Hawaii812.

1194–51 176Ark1123, 5SW(2d)312; 126Kan139, 266P941; 200Wis412, 228 NW515, 63ALR875 (election of remedies); Can [1930] 4DomLR644.

1194–52 CalA 284P232 (election of remedies).

1194–53 CalA 281P631. But see 222 AppDiv12, 225NYS222.

1194-54½-New. Where a tenant of farm lands, under contract to pay an annual rental in money, breaches the contract by abandoning the planted crop and moving away, the landlord cannot cultivate the crop for the tenant and charge him with the expenses of bringing it to maturity. 37GaA734, 141SE672.

1194-54¾-New. In such case the landlord is entitled to recover advances made to the tenant before abandonment. 37GaA734, 141SE672.

1194-61 Mass 167NE272. [a] (2) In suit for breach of written lease, tenant answering by general denial only is not entitled to prove release or waiver of contract by landlord. TexCivA 289SW 113.

1194-65 [a] (6) If facts exist excusing tenant from liability, burden is on him to prove them. TexCivA 289SW113. (7) Burden of showing matters in mitigation of damages rests on lessee. 195 NC274, 142SE12. (8) Burden of proving subletting or assignment in violation of lease is on party asserting it. 110Conn507, 148A347. (9) Other instances. Mass 169NE435. [b] (6) Evidence that tenant orally agreed to execute lease held inadmissible where contract in writing was alleged. 27 OhA235, 161NE40. (7) Evidence held inadmissible in action to cancel lease. 95CalA685, 273P535. (8) Evidence of oral agreement held admissible. Mass 167NE272. [c] (9) Lease held not breached by tenant's failure to heat building with defective heating plant. 213Ala323, 104S799. (10) Evidence held sufficient to show breach excusing performance by lessee. 33PortoRico 136. (11) Evidence held sufficient to support judgment for landlord. TexCivA 289 SW113. (12) In suit by lessor to rescind lease, evidence has been held insufficient to sustain finding that lessee failed to cultivate open lands or to keep ditches drained. 9LaA277, 119S892. (13) Evidence held not to support judgment for defendant for loss of time and money in renting and furnishing larger house to plaintiff, in view of uncertainty of testimony. 11LaA314, 123S433.

1195-68 198NC112, 150SE705; 198NC 675, 153SE158.

1195-70 195NC274, 142SE12. [b] **Rental value, for which lessor must account on reëntering and using premises,** is fair market value. 195NC274, 142SE 12.

1195-73 126Kan139, 143, 266P941 [cit CJ]; 195NC274, 142SE12; TexCivA 289SW113.

1195-77 Can [1930] 4DomLR644.

1195-79 126Kan139, 266P941; 195NC 274, 142SE12; 195NC282, 142SE17.

1195-80 126Kan139, 143, 266P941 [quotCJ]; 195NC274, 142SE12.

1196-86½-New. On breach of a lease and abandonment of the premises by a tenant, the tenant is entitled to credit of the amount actually paid by him, of amount deducted from the full term because of the landlord's surrender of the original lease, and of the amount to which the tenant would have been entitled as a bonus to be paid him by the landlord because of the cancellation of the lease prior to its normal expiration. TexCivA 98W(2d)423.

1196-86¾-New. Damages for detention of past-due rentals may be assessed on the basis of interest at legal rate. Can [1930] 4DomLR644.

1196-98½-New. Adjustment of difficulties arising subsequent to making of agreement does not affect validity on completed agreement. 242NY134, 151 NE155.

1197-2 100CalA1, 279P455(2dcase) (omission of date when lease was to begin). [a] (1) But see 15DelCh140, 132 A688.

1197-4 IndA 168NE703; 11PaDist&Co 203.

1199-24 76CalA610, 245P455, 457 [cit CJ].

1199-34 86 IndA185, 156NE562.

1199-39 209Ky234, 272SW724.

1199-43 [a] **Agreement held offer to lease premises.**-Mass 173NE411.

1200-46 See also 66Utah487, 243P798.

1200-47 See also 66Utah487, 243P798.

1200-55 [b] **Acting on letters offering new lease** constitutes enforceable agreement for lease. 242NY134, 151NE155.

1200-57 40F(2d)497; 77CalA4, 245P 808; 265Mass487, 164NE450.

1200-58 152Md146, 136A651.

1201-60 84CalA174, 257P873; 168La 1095, 123S724(2dcase).

1201-65½-New. Agreement for lease is not avoided by possibility of some contingency arising not provided for, 131 Misc340, 225NYS767.

1201-65¾-New. or by adjustment of difficulties arising subsequent to making of agreement. 131Misc340, 225NYS 767.

1201-66 77CalA4, 245P808.

1201-67 Wis 230NW140.

1201-71½-New. or that certain plans should be approved, 77CalA4, 245P808.

1201-74 193Wis350, 214NW349, 352, 53ALR281 [quotCJperEschweiler,J].

1201-75 193Wis350, 214NW349, 352, 53ALR281 [quotCJperEschweiler,J].

1201-76 193Wis350, 214NW349, 352, 53ALR281 [quotCJperEschweiler,J].

1201-77 193Wis350, 214NW349, 352, 53ALR281 [quotCJperEschweiler,J].

1201-78 193Wis350, 214NW349, 352, 53ALR281 [quotCJperEschweiler,J]. [b] **Owner's implied promise held enforceable** as if expressed in writing. 193Wis350, 214NW349, 53ALR281.

1201-79 86 IndA185, 156NE562; 193 Wis350, 214NW349, 352, 53ALR281 [quotCJperEschweiler,J].

1201-80 193Wis350, 214NW349, 352, 53ALR281 [quotCJperEschweiler,J].

1202-88 80CalA98, 251P658; 152Md 146, 136A651.

1202-92 Mass 173NE411.

1202-3 209Ky562, 273SW24 (contract as to construction and insurance of building, lessor to receive two years' rent in advance construed); NJ 152A 196; TexCivA 275SW487, 490 [quotCJ].

1202-4 TexCivA 275SW487, 490 [quot CJ].

1202-5 TexCivA 275SW487, 490 [quot CJ].

1202-8 152Md146, 136A651.

1203-17½-New. Contract reserving right to rent upon terms to be mutually agreed upon reserves an option, 209Ky 234, 272SW724.

1203-17¾-New. and does not obligate the landlord to fix reasonable rent upon failure of parties to agree, 209Ky 234, 272SW724.

1203-17¼-New. hence the court upon failure of the parties to agree cannot fix a reasonable rent. 209Ky234, 272 SW724.

1203-27 Sask [1925] 3DomLR50 (effect on right to terminate tenancy).

1204-38 246Mich434, 224NW399. See also 40F(2d)497.

1204-47 OhA 173NE214.

1204-48 Fla 129S332.

1204-49½-New. Part performance of agreement to lease obviates any question as to mutuality. 86 IndA185, 156 NE562.

1204-50 33PortoRico 136; Alta [1927] 3DomLR24. [a] 33PortoRico 136. [d] **Delivery of premises** in condition agreed upon. 33PortoRico 136.

1205-61½-New. The lessor should demand acceptance of the lease tendered instead of offering a substitute. IndA 168NE703.

1206-78 See also 158La629, 104S479.

1206-90 Mass 169NE435.

1207-13 TexCivA 275SW487, 491 [quot CJ].

1207-14 TexCivA 275SW487, 491 [quot CJ].

1207-15 36GaA379, 136SE811; Tex CivA 275SW487, 491 [quotCJ].

1207-16 TexCivA 275SW487, 491 [quot CJ]. But see IndA 169NE333.

1207-17 TexCivA 275SW487, 491 [quot CJ].

1207-18 TexCivA 275SW487, 491 [quot CJ].

1207-25 246Mich434, 224NW399.

1208-28 Fla 129S332.

1208-29 See also 84CalA174, 257P873.

1208-31 246Mich434, 224NW399.

1208-37½-New. A party agreeing to lease premises with knowledge of a previous lease is not entitled to damages. 196NC561, 146SE228.

1208-39 [b] (2) 84CalA174, 257P873.

1208-40 [b] **Proof held to conform.**-28 OhA190, 162NE624. [c] **Parties.**-246 Mich434, 224NW399. [d] **Complaint held sufficient.**-TexCivA 295SW305.

1208-43 [a] (1) 86 IndA185, 156NE 562.

1209-44½-New. In the notes are cited cases in which complaints in actions for breach of contract to execute a lease have been held sufficient. 116 Or210, 240P877.

1209-46 33PortoRico 136.

1209-49 84CalA174, 257P873. [a] **When tenant was to have sublet** difference between rent that was to be paid to tenant on subletting and value of term is proper consideration for tenant's measure of damages. 28 OhA190, 162 NE624.

1209-59 IndA 169NE333 (acts of lessor not preventing recovery). [a] **Specific performance in Porto Rico.**-33PortoRico 136.

1209-59½-New. Lessor's failure to require lessee to perform certain acts as agreed does not defeat recovery for lessee's breach of contract. 86 IndA185, 156NE562.

1210-69½-New. Where proposed lessee refuses before beginning of term to accept possession or carry out terms of contract, lessor may recover damages. 220Ala424, 125S683.

1210-70 218AppDiv126, 217NYS877. [a] **Illustrations of damages recoverable.**-Mass 173NE411.

1211-81 [d] **Person having possession or ownership** may rent property and collect rent. 34PortoRico 635.

1212-3 164Ga96, 137SE833; 37GaA737, 141SE914; 163La442, 112S40; 25 OhA 450, 158NE654.

1212-18 But see Ariz 288P1029.

1214-45 189NC434, 127SE521 (tenant has constructive notice of recorded agreement of sale and assignment).

1214-49 217AppDiv555, 217NYS106.

1214-52 154Md135, 140A76; 255Mass 76, 151NE81, 45ALR1.

1214-54 37GaA737, 141SE914; 235 IllA 319; NJSup 136S720; TexCivA 286SW 315, 321 [citCJ]. But see Cal 286P1012. [g] **Estoppel.**-235 IllA319. [h] **Grantee is entitled to all rent falling due at next rent day** though owning reversion for part of time since last rent day. CalA 279P172. [i] **Grantee and successor of lessee.**-99CalA666, 279P194.

1215-61½-New. In Porto Rico, where a purchaser, who had knowledge of a lease, accepts rent from the original lessee and his successors, he cannot refuse to execute with such successors a deed ratifying the contract, merely because he was not bound by his vendor's contract. 33PortoRico 363.

1215-65 160La694, 107S493.

1215-66 173Ark633, 293SW36; 255 Mass76, 151NE81, 45ALR1; NJSup 136 A720.

1216-75 47RI 327, 133A85. [a] **Where breach was not continuous,** grantee held not entitled to avoid lease for breach begun before transfer. 235 IllA319. [b] **Right limited to breaches after transfer.**-235 IllA319.

1216-77 47RI 327, 133A85.

1217-83½-New. Landlord's conveyance of property to third party discharges tenant of liability upon lease to the landlord accruing after the conveyance. 214 AppDiv665, 212NYS738.

1217-83¼-New. Where an owner leased an apartment under a lease requiring him to furnish heat, and subsequently leased the entire building to another for a longer period, he could not thereafter be held liable for failure to supply heat. 322 Ill 337, 153NE682.

1217-83¼-New. Landlord after selling and delivering possession has been held not liable for injuries to tenant. 254NY 64, 171NE908.

1217-83½-New. Notice to tenant of change in possession and ownership by landlord is not necessary to change nature of tenancy. 254NY64, 171NE908.

1217-83¾-New. Generally, landlord's liability in negligence for condition of land ceases when premises pass out of his control. 254NY64, 171NE908.

1217-91½-New. A grantee, under a deed providing for the division of expenses incurred in securing possession from a

lessee, is entitled to half the amount expended to secure immediate possession during the term of the lease. 30 **OhA** 320, 164**NE**788.

1217-93 116**Tex**337, 291**SW**219.

1217-98½-New. Conditional judgment compelling conveyance of realty held not to give sufficient title to enable plaintiff, pending appeal, to assign rents. 129 **Misc**270, 220**NYS**502.

1217-98¼-New. Where land is conveyed before the rent is due an owner at due date gets the rent; rent, however, may be reserved. 216**Ala**116, 112**S**438.

1217-99 116**Tex**337, 291**SW**219.

1218-6 32**F(2d)**721.

1218-12½-New. A written assignment of rents, unaccepted by payer, does not operate as an assignment thereof. 171 **Ark**501, 284**SW**749.

1218-18 [a] **In Iowa.**-205 **Iowa**1203, 219**NW**517.

1218-20 288**Pa**56, 135**A**639; 292**Pa**476, 141**A**302, 303 [citCJ].

1218-24 **NJCh** 144**A**25; 288**Pa**56, 135**A** 639; 292**Pa**476, 141**A**302. [b] **Assignee is entitled to keep lease intact** notwithstanding lessor's attempt, in settlement agreement with lessee, to cancel lease. 292**Pa**476, 141**A**302.

1219-32½-New. A purchaser of an assignment of a lease takes subject to conditions in favor of his assignor, although the assignment is absolute on its face. 30**Ariz**172, 245**P**360.

1219-32¼-New. A naked oral promise or understanding to assign a nonexistent but contemplated lease is not good against the subsequently accruing rights of a stranger to the understanding. 201 **Iowa**275, 207**NW**399.

1219-32¼-New. Where a lessor's assignment of rights under a lease is accompanied by a parol trust to apply the proceeds in a certain way, a person accepting an assignment from the assignee as collateral security for a loan which is credited to the assignee's account but is never withdrawn by the assignee does not pay a valuable consideration for the assignment so as to be a purchaser for value free of the trust. 30**Ariz**172, 245 **P**360.

1219-32½-New. In such case the application of the proceeds of the loan to a preëxisting indebtedness does not make the holder of the assignment a purchaser for value. 30**Ariz**172, 245**P**360.

1219-32¼-New. One holding an assignment of a lessor's interest as security holds the lease for a valuable consideration as against a receiver appointed in subsequent foreclosure proceedings under a mortgage pledging the rents. 205 **Iowa**1203, 219**NW**517.

1219-32½-New. Where a grantee who has assumed mortgages assigns rents, the assignee is entitled to such rents so long as his assignor is entitled to possession. 53**SD**635, 222**NW**141.

1219-32¼-New. The rights of the assignee of a lease can rise no higher than the rights of a landlord assignor. **Iowa** 228**NW**632.

1219-37½-New. **Assignment made after default and abandonment of contract** by purchaser of farm does not transfer any title to crops raised by lessee under a later lease. 85 **IndA**100, 152**NE**838.

1219-39 204 **Iowa**1006, 216**NW**731, 732 [citCJ]; 219**MoA**90, 266**SW**492; **MoA** 297**SW**435.

1219-41 **MoA** 16**SW(2d)**672.

1220-60 [h] **Use of premises by sublessee** for camping purposes and storage of automobiles involving building of roads in violation of farming purposes for which premises were leased to lessee is injury to freehold. 219**MoA**90, 266 **SW**492.

1221-68 120**Kan**455, 244**P**16, 19 [cit CJ].

1221-69 3**LaA**274; **Va** 154**SE**518. [g] (2) Evidence is sufficient to support findings of court as to issue raised in cross complaint. 97**CalA**166, 275**P**478. (3) Evidence is sufficient to justify finding of waste committed by tenant. 97 **CalA**166, 275**P**478. [j] **Holes cut through ceiling** are not ordinary wear and tear and tenant is liable therefor. 126**Misc**371, 213**NYS**500. [k] **Questions of fact.**-97**CalA**166, 275**P**478.

1222-76 213**Ala**323, 104**S**799; 92**Fla** 847, 109**S**424.

1222-86 **TexCivA** 275**SW**305 (evidence sufficient to show tenant's negligence in using defective stove). [c] **Evidence sufficient** to show tenant's negligence. **TexCivA** 275**SW**305.

1223-6 213**Ala**323, 104**S**799 (landlord held not entitled to recover for tenant's misuse of heating plant without tender or payment of proportionate cost of running); 316 **Ill** 318, 147**NE**266, 38**ALR** 1151. [a] **Common-law action of waste is not maintainable** under landlord tenant relation. 170**Ga**538, 153**SE**420.

1223-7 97**CalA**166, 275**P**478.

1223-9½-New. Landlord's right of action suspended until it is known whether lessee will exercise option to purchase. 316 **Ill** 318, 147**NE**266, 38**ALR**1151.

1223-10 162**Ga**336, 133**SE**857; 166**Ga** 187, 142**SE**558. [a] **Where continuance or intended future repetition** is not averred and proved, waste by lessee is not ground for equitable interference. **NJ** 150**A**415.

1223-14 35**F(2d)**14; **NJCh** 150**A**825; **Va** 154**SE**518.

1223-17 103**NJEq**159, 142**A**560.

1223-17½-New. But it has been held that a technical waste which in fact improves instead of injures the land will not be enjoined. 28 **OhA**277, 162**NE**621.

1223-26 142**Wash**259, 252**P**939.

1223-27½-New. Evidence of cost of repairs and rental value was held sufficient to go to jury. 107**Conn**68, 139**A** 649.

1223-27⅓-New. The question whether the person whose negligence caused a fire was the tenant's agent or his tenant is one for the jury on conflicting evidence. 241**Mich**624, 217**NW**898.

1224-31 219**MoA**90, 266**SW**492.

1224-37½-New. Tenant is liable for cost of repair. 126**Misc**371, 213**NYS** 500.

1224-40 31**Ariz**378, 253**P**897, 898 [quot CJ]; 168**Ark**243, 269**SW**572; 198**Cal** 560, 246**P**322; 87**Colo** 339, 287**P**644; 102 **Conn**562, 129**A**525; 250 **IllA**231; 255 **IllA**314; 228**Ky**705, 15**SW(2d)**437; 158 **La**1019, 105**S**49 (where tenant rented from father and thereafter from plaintiff son who inherited); 163**La**442, 112**S** 40; 2**LaA**425; 8**LaA**184; **Mass** 171**NE** 229; 251**Mich**512, 232**NW**178; 314**Mo** 474, 283**SW**990; 317**Mo** 484, 297**SW**374; 220**MoA**1057, 279**SW**720; **Mont** 288**P** 616; 191**NC**412, 131**SE**750; 127 **Or**673, 273**P**332; 286**Pa**520, 134**A**402; 34**Porto Rico** 635; **TexCivA** 286**SW**315, 321 [cit CJ]; **TexCivA** 5**SW(2d)**215; 41**Wyo** 509, 287**P**316. [g] **Exceptions.**-27 **Hawaii**631; 165**La**490, 115**S**667; 286**Pa** 520, 134**A**402.

1227-41 31**Ariz**378, 253**P**897, 898 [quot CJ].

1227-45 12**LaA**45, 124**S**612.

1227-56 335 **Ill** 450, 167**NE**79.

1227-60½-New. A sublessee is not, by reason of his subtenancy, the confidential agent of his sublessor, and any additional rights acquired by him from the owner do not inure to the benefit of his sublessor. 40 **OklACR**218 [reh pending].

1228-64 7**F(2d)**838.

1228-66 160**Tenn**374, 24**SW(2d)**894.

1228-72 **Can** [1930] 3**DomLR**833.

1228-79 220**MoA**1057, 279**SW**720; 150 **Va**17, 142**SE**405.

1229-88 **SD** 226**NW**345.

1230-99 **TexCivA** 26**SW(2d)**308.

1231-7 198**Cal** 560, 246**P**322; 248**Mich** 496, 227**NW**695. [a] **Relationship arises out of contract,** and like all contracts is voidable for frauds. 198**Cal** 560, 246**P** 322.

1231-19 31**Ariz**378, 253**P**897; 220**MoA** 1057, 279**SW**720; 137**Misc**725, 244**NYS** 437; **TexCivA** 286**SW**315, 321 [citCJ].

1232-26 215**Ala**20, 108**S**854; 87**Pa Super**170.

1233-30 31**Ariz**378, 253**P**897.

1233-32 79**CalA**322, 249**P**217, 218 [cit CJ&Cyc].

1233-35½-New. Estoppel cannot be avoided by the tenant's proceeding in equity to restrain an action by the landlord on the theory of paramount title in another. 31**Ariz**378, 253**P**897.

1233-38½-New. In a suit for damages for being ejected, the lessee has been held not estopped to show that the lessor's title was defective. 12**LaA**45, 124 **S**612.

1233-39 191**NC**412, 131**SE**750; 34 **PortoRico** 635. Contra 27**Hawaii**631.

1234-43 22**AlaA**1, 113**S**651.

1234-44 31**Ariz**378, 253**P**897.

1234-47 220**MoA**1057, 279**SW**720.

1235-49 220**MoA**1057, 279**SW**720.

1235-51 132**SC**130, 128**SE**718.

1235-59 **TexCivA** 272**SW**587 (grantee); 105**WVa**180, 141**SE**787.

1236-75 But see 127 **Or**673, 273**P**332.

1237-78 [a] **Nonpayment of rent** for nearly one year before demand raises presumption in favor of tenant asserting that relationship of parties is merely mortgagor and mortgagee under deed absolute in form. 127**Misc**611, 217**NYS** 438.

1237-93 285**Pa**426, 132**A**287; **TexCivA** 286**SW**315; 150**Va**17, 142**SE**405. [a] **Purchaser at tax sale.**-86**CalA**712, 261**P** 1086.

1238-97 34**Ariz**547, 273**P**538.

1238-12 **TexCivA** 288**SW**598.

1238-16 41**Wyo** 509, 287**P**316.

1239-25 338 **Ill** 575, 170**NE**695.

1239-28 214**Ala**329, 107**S**830; 168**Ark** 243, 269**SW**572; 102**Conn**562, 129**A**525; 191**NC**412, 131**SE**750. [a] **Tenant in possession** is estopped to assert that he never intended to surrender premises at termination of lease. 201 **Iowa**760, 206 **NW**88.

1239-30 162**Ga**664, 135**SE**195.

1240-36 167**Minn**295, 208**NW**1001.

1240-40 See also 214**Ala**327, 107**S**816.

1241-44 102**Conn**562, 129**A**525.

1241-50 102**Conn**562, 129**A**525.

1241-61 31**Ariz**378, 253**P**897.

1241-66 [a] **Testimony as to extent of possession.**-50**Philippine**1.

1242-88 220**MoA**1057, 279**SW**720.

1242-97½-New. In British Columbia a lessee in possession under a lease is estopped from denying his landlord's capacity to make a lease. **BC** [1929] 2 **DomLR**114.

1242-6 286**Pa**529, 134**A**494, 496 [cit CJ].

1243-15 79**CalA**322, 249**P**217; 79**CalA** 353, 249**P**238; 127**Misc**611, 217**NYS**438.

1243-16 28**F(2d)**472; 79**CalA**322, 249 **P**217; **Miss** 114**S**36 [citCJ]; 317**Mo** 484, 297**SW**374, 377 [citCJ]; 101**WVa** 92, 132**SE**204.

1243-18 220**MoA**1057, 279**SW**720.

1244-34 79**CalA**322, 249**P**217.

1244-35 79**CalA**322, 249**P**217; 167**Minn** 295, 208**NW**1001.

1244-37 79**CalA**322, 249**P**217.

1244-41 215**Ala**20, 108**S**854.

1245-46 31**Ariz**378, 253**P**897, 898 [cit CJ]; 79**CalA**353, 249**P**238.

1245-47 191**NC**412, 131**SE**750.

1246-65 [b] **Burden of proof** is on tenant. **TexCivA** 295**SW**264.

1246-69½-New. Tenant can purchase certificate of decretal sale from purchaser at sale under mortgage. **Mont** 288**P** 616.

1247-86 215**Ala**20, 108**S**854.

1247-90 See also 87**Colo** 339, 287**P**644.

1247-94 But see 181**Ark**85, 24**SW(2d)** 972.

1247-99 164**Ga**805, 139**SE**678; 36**GaA** 701, 138**SE**81; 220**MoA**1057, 279**SW** 720; 55**ND**259, 212**NW**852; **TexCivA** 286**SW**315; 194**Wis**100, 215**NW**900. [b] **Mortgagor, taking lease from mortgagee,** who afterward, by simulated sale to third party, from whom he takes another lease, cannot question mortgagee's title as landlord. 163**La**442, 112**S**40.

1248-2 164**Ga**805, 139**SE**678.

1248-3 36**GaA**701, 138**SE**81; 55**ND** 259, 212**NW**852; **TexCivA** 286**SW**315.

1248-8 55**ND**259, 212**NW**852.

1248-10½-New. There is no attornment by the mere act of a tenant assigning his interest in the lease and placing the assignee in possession of the leased premises. 201 **Iowa**931, 208**NW** 503.

1248-11 **Mo** 292**SW**7.

1248-22 But see 82**Mont**150, 266**P**869.

1248-25 [a] **Tenant of mortgagor** may agree to become tenant of purchaser at foreclosure sale if mortgagor fails to redeem, without surrendering possession to mortgagor. 169**Minn**468, 211**NW**680.

1248-27 [c] **In Minnesota.**-167**Minn**295, 208**NW**1001.

1249-46 164**Ga**805, 139**SE**678; **Iowa** 227**NW**133; 214**Ky**247, 283**SW**106; 234

Ky64, 27SW(2d)382; 123 Or370, 261P 69.
1251-54 TexCivA 27SW(2d)302.
1251-55 TexCivA 8SW(2d)301.
1251-57 214Ky247, 283SW106; Tex CivA 31SW(2d)167.
1252-62½-New. A landlord's oral agreement to sell to a tenant is a sufficient basis for the tenant's claim of right by adverse possession. Iowa 227 NW133 (evidence sufficient to show oral agreement to sell).
1252-64 197NC574, 150SE13; TexCivA 286SW315. [b] In North Carolina.-191 NC329, 131SE646.
1253-68 150Va17, 142SE405.
1253-73 234Ky64, 27SW(2d)382.
1254-87 See also 214Ky247, 283SW106.
1254-97 214Ky247, 283SW106.
1255-8 TexCivA 286SW315.
36 C. J.-26-5 214Ky193, 282SW1102.
27-9 [a] (4) Where, in addition to particular description, coal mine lease recited that it was all land owned in county, court considered fact that lessees operated only on land particularly described. 214Ky193, 282SW1102.
28-15½-New. Words describing approximate capacity of rock crushing plant are not to be deemed an express warranty, 197Cal 723, 242P932.
28-15½-New. especially in absence of language indicating intention to warrant capacity. 197Cal 723, 242P932.
28-23 83Mont244, 271P455.
28-24 154Md438, 140A836; 253Mass 564, 149NE609.
28-25 253Mass564, 149NE609.
29-31 251Mich11, 231NW103.
29-33 251Mich11, 231NW103.
29-36 110Conn367, 148A139; 196NC 431, 146SE69.
30-43 TexCivA 293SW253, 254 [quot CJ].
30-45 TexCivA 293SW253, 254 [quot Cyc].
30-47½-New. Possession and control of a party wall for maintenance purposes remains in the landlord, where buildings are let to different tenants without a provision specifically regulating possession and control of the wall. Tex CommnA 298SW534.
30-48 88CalA20, 263P838.
30-53 122Misc630, 203NYS507; 196NC 431, 146SE69; TexCivA 293SW253, 255 [citCJ]; Wis 232NW851. [h] Absence of word "appurtenances" from lease does not preclude implied right to all appurtenances necessarily going with beneficial use of leasehold. 223AppDiv 281, 228NYS265.
31-55 Mass 169NE138 (right to use corridor not to be presumed). [a] (8) Lessor's lot adjoining lot leased to tenant. Pa 151A690.
32-63 223AppDiv281, 228NYS265.
32-66 122Misc630, 203NYS507. [d] Adjoining lands.-223AppDiv281, 228 NYS265.
33-80 Me 152A265; 128Misc24, 217 NYS190; 135Misc514, 239NYS52.
33-82 128Misc24, 217NYS190.
33-84 128Misc24, 217NYS190.
34-86 128Misc24, 217NYS190.
34-87 Mass 167NE305. [a] There is no implied right of way under lease reserving to landlord use of right of way over passageway. Mass 167NE305.
34-93½-New. Streets on land owned by a corporation or individual and used for employees' homes could be used by persons visiting the tenants for social or business purposes. 168Ga400, 147 SE887.
35-4½-New. Where a lease provides that a tenant shall cut a doorway through a wall as a means of access, and the lease does not mention appurtenances, the right to use the hallway and stairs is not granted by implication. 128Misc24, 217NYS190.
36-23 [a] Landlord cannot be held liable for failure to provide means of heating not expressly provided by statute. 215AppDiv586, 214NYS241.
36-26 222Ky238, 300SW615, 616 [quot CJ], 58ALR1430.
36-27 222Ky238, 300SW615, 616 [quot CJ], 58ALR1430.
37-48 11PaDist&Co 168.
38-65 [h] Covenant by landlord to use reasonable effort to restore heat if supply furnished through third party should be cut off imposes no obligation on lessee to surrender portion of premises for installation of heating plant. 209Ky269, 272SW734. [i] Phrase that landlord "agrees to furnish heat" is limited in meaning to premises as equipped when leased in absence of contrary provision. 95PaSuper420.
38-67 [a] (7) Lease held to entitle lessee to use all necessary electric power for irrigation, at any time, and at any cost, with right to be reimbursed by lessor as to cost exceeding certain amount. 29Ariz280, 240P1031. (8) Under lease giving lessee right to use electric power for irrigation and be reimbursed by lessor for costs in excess of fixed minimum it was held unnecessary to segregate amount used "on peak" and "off peak" where there was no dispute as to amount of costs in excess of minimum costs under lease. 29 Ariz280, 240P1031.
40-3 [a] (6) Illustration.-213Ala323, 104S799.
41-5 [a] (3) To warrant finding that tenant could have secured heat required in his restaurant by reasonable effort. 48RI 448, 138A177. [d] Question held for court.-48RI 448, 138A177.
42-38 48RI 448, 138A177. [a] (3) Tenant cannot permit his restaurant business to be ruined for lack of heat where he could have regulated furnace or installed heater without expense and he refused both. 48RI 448, 138A177.
43-50 [d] Evidence held inadmissible.-Value of business lost, where tenant did not accept landlord's offer to place heating plants at his disposal. 48RI 448, 138A177.
43-58 NJSup 146A671; 247NY94, 159 NE874; 228AppDiv270, 239NYS438 (rooming purposes); 122 Okl 31, 242P 239; 289Pa175, 137A189; 291Pa507, 140A506; Pa 151A690; 97PaSuper255; TexCivA 296SW680; 148Va331, 138SE 637.
44-59 122 Okl 31, 242P239; 148Va331, 138SE637; 146Wash31, 261P636.
45-81 170Ark512, 280SW979; 35GaA 51, 132SE257, 258 [citCJ]; NJ 147A490; NJ 150A427; 130Misc266, 223NYS839; 122 Okl 31, 242P239; 289Pa175, 137A 189; TexCivA 26SW(2d)460; TexCivA 30SW(2d)707; 148Va331, 138SE637; 135Wash588, 238P631 (recognizing rule); 146Wash31, 261P636.
46-85 TexCivA 26SW(2d)460.
46-86 [d] Notice that roof was ready for electric sign is not representation that it was ready for any sign lessee might choose to erect. 289Pa175, 137 A189.
48-32 BC [1930] 2DomLR96.
49-50 86PaSuper288.
49-51 170Ark512, 280SW979. [b] Caveat emptor is inapplicable where lessee cannot judge suitability. Tex CivA 26SW(2d)460.
49-52½-New. There is an implied guaranty that a building is structurally sound and good for the life of the lease. 146Wash119, 262P125.
50-57 146Wash119, 262P125.
50-66 Va 153SE824.
50-67 [a] (2) Stipulation that on lessee's default in any covenant lessor may reënter and repossess premises and put out and remove every other occupant signifies understanding and intention that premises should be possessed during term by occupant. 120Kan455, 244 P16. [b] Effect of covenants.-120Kan 455, 244P16. [c] Lease is in force as long as tenant pays rent.-39F(2d)632.
50-72½-New. Liability of tenant for failure to occupy and use premises. Landlord has right to have premises used by tenant in the way in which tenant is required by law to use them in absence of contractual stipulation showing different intent. 120Kan455, 244P16.
50-72¼-New. And the law will accord lessor redress for tenant's failure to so use and occupy the property if it thereby falls into a state of disrepair and deterioration such as would not occur if premises were put to proper use. 120 Kan455, 244P16.
50-72¼-New. If the lease is void, the tenant is not liable for failure to take possession or for any of the incidents of tenancy. 62 OntL364, [1928] 3DomLR 547.
50-73 161Ga842, 132SE76, 78 [quot CJ]; Va 153SE824.
50-74 158La1024, 105S51 (duty of lessor to deliver possession); 160Tenn21, 22SW(2d)242.
51-81½-New. Lessor in possession as employee of lessee must surrender possession on refusal to continue employment. MoA 24SW(2d)652.
51-96 161Ga842, 132SE76, 78 [quot CJ].
51-97 161Ga842, 132SE76, 78 [quot CJ].
51-99½-New. A contractor in possession during construction may prevent a prospective lessee from entering a building until completion. 3LaA326.
52-11 [a] Lessee held not entitled to damages for lessor's failure to deliver premises because of colessor's refusal to sign lease, lessee being aware of colessor's joint interest and knowing that his signature was essential to pass interest in property. 125Misc262, 210 NYS467.
52-11½-New. Delivery may be conditioned on option in a prior lease and on circumstances beyond the lessor's control. 86CalA209, 260P601.
52-12 Va 153SE824.
54-40½-New. A tenant's right to demand a refrigerating room called for by the lease is not waived by using a portion of the premises inclosed by him for such purpose, 204 Iowa391, 214 NW685.
54-40½-New. or by exercising an option contained in the lease for an extended term. 204 Iowa391, 214NW685.
54-44½-New. Lessee during occupancy holds both by privity of estate and of contract. 114Nebr184, 206NW744, 42 ALR1102.
54-47 247NY245, 160NE359.
54-51 Va 153SE824.
55-70 [e] Complaint held insufficient.-217Ala180, 15S230. [f] Petition held insufficient.-TexCivA 22SW(2d)975.
55-80½-New. A declaration not averring that the lessee was required to pay rent while the former lessee held over shows no cause of action for rental value. 160Tenn21, 22SW(2d)242.
56-83½-New. Defense that part of premises of which subtenant had possession was not covered by the lease is a complete defense which may be established under general denial. 217 Ala180, 115S230.
56-87 143Va802, 129SE491 (evidence inadmissible).
56-91½-New. Lessee's inducing promises are material. 204 Iowa974, 215NW 972.
56-93 [a] (4) To sustain verdict for damages for hauling, storage and loss of profits. 143Va802, 129SE491. (5) To show failure to give possession. 98 Vt433, 129A157. [b] (4) To show depreciation in value of merchandise. 160 La1001, 107S780.
56-94 [a] 160La1001, 107S780.
56-97 83Colo 136, 263P23.
56-98 83Colo 136, 263P23.
57-2 172Ark914, 290SW938; 178Ark 1196, 10SW(2d)857; 83Colo 136, 263P 23; 247NY245, 160NE359; 134 Okl 184, 272P831; 98Vt433, 129A157.
57-3 83Colo 136, 263P23, 25 [citCJ]; 134 Okl 184, 272P831. [a] (1) 160La 1001, 107S780. (6) Hire of employees. 160La1001, 107S780.
58-4 98Vt433, 129A157. [a] (4) Expenditures for plumbing and fixtures which, under contract, were to be had at lessee's expense. MoA 296SW245, 247 [citCJ].
58-5 172Ark914, 290SW938.
59-13 143Va802, 129SE491.
59-15 83Colo 136, 263P23; 143Va802, 129SE491.
60-40 [a] In Georgia.-161Ga842, 132SE 76.
60-47 6LaA69.
61-50½-New. Coal mine employees quitting work and refusing to surrender houses occupied by them are trespassers. 18F(2d)839 (construing West Virginia law).

61-73 **MoA** 29**SW(2d)**224.
62-95 30**Hawaii**853.
62-97½-New. Holdover tenant may be called in warranty in an action by a second lessee. 160**La**1001, 107**S**780.
63-20½-New. **Evidence admissible.** Allegations of financial loss through repairs caused by defendants would not admit evidence of loss in bakery business from failure to surrender premises. 102**NJL**222, 130**A**610.
63-24 But see **Alta** [1928] 2**DomLR**59.
63-26 **Alta** [1928] 2**DomLR**739.
63-27 **Miss** 126**S**471 (stipulation construed).
64-33 See also 13**LaA**620, 127**S**435.
64-37½-New. and rule applies to tenant's property left on premises and converted to landlord's use. 143**Miss**602, 108**S**704, 49**ALR**511.
64-45 143**Miss**602, 108**S**704, 49**ALR**511.
64-45½-New. Counterclaim for rent, not arising out of transaction in conversion, cannot be interposed in such action. 130**Misc**385, 224**NYS**1, 2 [cit CJ].
64-47 [b] **Evidence held insufficient.**–96**CalA**133, 273**P**1109; 9**LaA**277, 119**S**892.
64-49 96**CalA**133, 273**P**1109. See also 13**LaA**620, 127**S**435.
65-52½-New. Another tenant who goes into possession with notice of a defaulting tenant's ownership of personal property becomes an involuntary bailee. 96**CalA**133, 273**P**1109.
66-81 163**La**382, 111**S**794.
68-28 131**Misc**466, 227**NYS**103; 101 **TexCr**593, 276**SW**712 (breaking up and removing land which tenant had bedded and terraced).
68-29 12**LaA**174, 125**S**183.
69-33 [a] (2) Where plans and specifications provided for solid wall in entrance to upstairs of building, lessor is not liable to lessee for obstructing show window built opposite entrance way by lessee over lessor's protest. 84 **CalA**214, 257**P**890.
69-38½-New. Tenant's breach of covenant in a lease does not entitle the landlord to interfere with the tenant's enjoyment of the premises. 131**Misc**466, 227**NYS**103.
69-38¼-New. Lessee of building not obligated to supply awnings at windows of other lessees is not liable for damages for removal of awnings previously supplied by original owner. **ND** 230**NW**725.
69-40 101**TexCr**593, 276**SW**712.
69-44 **NS** [1929] 1**DomLR**540.
69-45 164**La**947, 114**S**846; **Va** 153**SE** 824.
70-48 6**LaA**107; 93**PaSuper**123. [b] **Adjoining property obstructing light and air of leased premises** with consent of lessor does not make lessor liable to lessee. 137**Misc**462, 244**NYS**439.
70-51 105**NJL**624, 146**A**180.
70-54½-New. The landlord is liable to a tenant who has made a premature entry of leased premises due to landlord's false representations that prior tenant was out of the premises, for which entry the new tenant was sued by the old. 125**Misc**844, 211**NYS**492.
70-54¼-New. A landlord is under no duty to contest the right of the state to close the premises because of the unlawful possession and sale of intoxicating liquors thereon by the tenant, although the landlord had no knowledge of such possession and sale. 33 **Wyo** 249, 238**P**654.
70-54¼-New. The landlord is under no obligation to furnish a bond to reopen premises closed by the state for such reason and his failure to do so does not prevent recovery of the rental value from the tenant during the period they were closed. 33**Wyo** 249, 238 **P**654.
70-60 **Vt** 150**A**136.
70-63 **Va** 153**SE**824.
71-69 7**LaA**637; 98**NJEq**59, 130**A**839.
71-74 **Ala** 130**S**64; **SD** 231**NW**951.
71-77 **Ala** 130**S**64; 137**Misc**637, 244 **NYS**231.
72-79 241**Mich**186, 216**NW**388.
72-82 103**NJEq**101, 142**A**360.
72-90½-New. Accounting is not available by tenant at will against landlord refusing to allow tenant on premises and taking income from property in own right adversely to tenant. 98 **NJEq**59, 130**A**839.
73-7 [a] 105**NJL**624, 146**A**180. [b] 105**NJL**624, 146**A**180.
73-11 110**Conn**507, 148**A**347.
74-18½-New. A tenant who has been sued for premature entry by reason of landlord's misrepresentations that prior tenant was out of premises is entitled to recover from landlord the reasonable rental value of the premises from the date of entry until the expiration of the prior tenant's term, 125**Misc**844, 211 **NYS**492.
74-18¼-New. together with any other expenses necessarily incurred in defense of the action brought by the former tenant. 125**Misc**844, 211**NYS**492.
74-18¼-New. The reasonable rental value cannot exceed what was fixed as the value thereof in the prior tenant's action. 125**Misc**844, 211**NYS**492.
74-34½-New. In an action by tenant who has been sued by prior tenant for premature entry caused by lessor's misrepresentations, the burden of proving the value of the premises fixed in the prior tenant's action is on the landlord. 125**Misc**844, 211**NYS**492.
74-40 **NJ** 147**A**236.
74-41 **Ariz** 291**P**1005; 175**Ark**791, 300 **SW**428; 81**Colo** 125, 254**P**156; 35**GaA** 505, 134**SE**173; 204**Cal** 643, 269**P**655; **CalA** 259**P**86; 46 **Ida**294, 267**P**828, 829 [citCJ]; **TexCivA** 275**SW**81; **TexCivA** 30**SW(2d)**707; **Utah** 266**P**1040, 1042 [cit CJ]. See also 158**La**1024, 105**S**51.
75-43 262**Mass**458, 160**NE**262.
75-45 266**Mass**33, 164**NE**807.
75-51½-New. Lessor of land not owned by him is not liable for breach of covenant of quiet enjoyment where lease was innocently made in reliance on description furnished by lessee. 81 **Colo** 125, 254**P**156.
75-52 81**Colo** 125, 254**P**156. [b] **Waiver exists where assignee of sublease takes with knowledge** that owner could terminate lease to build. 91**CalA**692, 267**P**555.
76-64 92**CalA**692, 267**P**555.
76-66 **Utah** 266**P**1040. See also 246 **Ill**521.
77-68½-New. Words "quiet enjoyment" in lease mean right to enjoy unimpaired physical status of property leased, at time of execution of lease. 27 **OhNPNS**354.
78-98 262**Mass**458, 160**NE**262; **Tex CivA** 275**SW**81 (implied covenant breached by lease to third party who evicts or trespasses on tenant); **Sask** [1926] 4**DomLR**1042.
79-1 204**Cal** 618, 269**P**645, 62**ALR**1239.
79-2 197**Wis**582, 222**NW**790. [b] **Breach of covenant in sublease.**–223 **AppDiv**464, 228**NYS**386.
79-3 **CalA** 284**P**472; 46 **Ida**294, 267**P** 828, 829 [citCJ]. But see 266**Mass**33, 164**NE**807. [d] (3) If landlord's conduct is so negligent as to render premises unfit for tenancy and is such as actually to deprive, and legally imports intent to deprive, tenant of enjoyment, it amounts in law to eviction. 35**GaA**505, 134**SE**173. [g] 266**Mass**33, 164**NE**807.
79-5 166**La**497, 117**S**568; 155**Wash** 493, 284**P**782.
80-10½-New. Lessor's reservation of the right to make renovations or changes held to authorize the substitution of a concrete for a wooden floor and the making of other structural changes without breach of covenant. 262**Mass** 458, 160**NE**262.
80-22 161**La**806, 109**S**498. [a] 27 **Oh NPNS**354.
81-31 [b] **Lessee subletting without consent of lessor in violation of covenant** cannot recover damages against lessor on implied warranty against constructive eviction. 113 **Okl** 287, 241**P** 490.
81-32 46 **Ida**294, 267**P**828.
82-41 135**Misc**637, 239**NYS**248 (right to use outer wall); 155**Wash**493, 284 **P**782 (means of access).
82-42 **CalA** 287**P**550.
82-43½-New. Until tenant rescinds he cannot recover damages for the breach. 126**Misc**260, 213**NYS**18.
82-46 266**Mass**33, 164**NE**807. [b] **Injunction allowed.**–27 **OhNPNS**354.
82-46½-New. Lessee is entitled to injunction against closing of alleyway constituting only entrance and exit for automobile. 159**La**467, 105**S**511.
82-50½-New. Failure of a lessee to pay rent after institution of a foreclosure action against the lessor does not preclude the lessee, after eviction by a purchaser, from maintaining an action against the lessor for breach of implied covenant of quiet enjoyment. 204 **Cal** 618, 269**P**645, 62**ALR**1239.
82-51 13**LaA**123, 127**S**448 (summons to lessor does not dispense with call).
82-58½-New. A lessee's assignees may bring action against the lessor. 204 **Cal** 618, 269**P**645, 62**ALR**1239.
83-65½-New. **Forfeiture of right** to quiet enjoyment is a matter of defense. 215**Ala**363, 110**S**801.
83-65¼-New. Evidence held admissible. 91**CalA**692, 267**P**555.
83-65¼-New. The complaint must allege facts constituting either actual or constructive eviction. 226**AppDiv**811, 234**NYS**399.
83-66 215**Ala**363, 110**S**801.
83-71 **TexCivA** 297**SW**676.
83-72½-New. **Evidence held sufficient** to support findings. 91**CalA**692, 267**P** 555.
83-74 [a] (3) Bad faith on part of lessor in respect to obligations owed to lessee. 204**Cal** 618, 269**P**645, 62**ALR** 1239.
83-74½-New. **Instructions.** An instruction requiring the lessor to establish by preponderance of evidence that the lessee misled him into leasing the wrong land is erroneous. 81**Colo** 125, 254**P**156.
83-74½-New. **Instructions.** Refusal of the court to commit to the jury the right to find some measure of substantial damage has been held error. 204 **Cal** 618, 269**P**645, 62**ALR**1239.
83-78 **TexCivA** 297**SW**676.
83-79 204**Cal** 618, 269**P**645, 62**ALR** 1239; 81**Colo** 125, 254**P**156; **TexCivA** 300**SW**159; **Sask** [1926] 4**DomLR**1042.
84-80 161**La**806, 109**S**498; **Can** [1927] 3**DomLR**19.
84-83 81**Colo** 125, 254**P**156; **TexCivA** 297**SW**676.
84-84 81**Colo** 125, 254**P**156.
84-88 83**CalA**173, 256**P**592; 81**Colo** 125, 254**P**156; 161**La**806, 109**S**498; **ND** 230**NW**725 (must be fairly attributable to wrong complained of); **TexCivA** 297 **SW**676; **Can** [1927] 3**DomLR**19.
84-90 [a] **Lessee is not entitled** to damages for expenditures, under legal advice, in underpinning wall, on discovering that breach of covenant would preclude his use of part of premises. **TexCivA** 297**SW**676. [b] **Lessee may recover cost of new wall** where easement, contrary to lease covenant, precluded heightening of building wall. **TexCivA** 297**SW**676.
84-92 161**La**806, 109**S**498; **Can** [1927] 3**DomLR**19.
84-94½-New. Lessee vacating premises for lessor's enjoyment has the duty to minimize damages, 161**La**806, 109**S** 498.
84-94½-New. and where, after rebuilding demolished walls, lessor invites lessee back, lessee cannot recover loss of profits for unexpired term. 161 **La**806, 109**S**498.
84-94¼-New. Damages for breach of covenant of quiet enjoyment allowed under statute cannot arise where sublease provides for disturbance of sublessee's possession, 197**Cal** 751, 242**P** 926, 42**ALR**1165.
84-94½-New. and therefore the sublessee cannot recover advance payments of rent as for breach of quiet enjoyment in the absence of express covenant in the sublease. 197**Cal** 751, 242**P**926, 42**ALR**1165.
84-94½-New. In an action on a lease, plaintiff is not required to elect between a claim for damages for labor and money expended and for lost profits. 81**Colo** 125, 254**P**156.
84-96 120**Kan**455, 244**P**16, 19 [citCJ]; 99**NJEq**622, 133**A**526; 253**NY**111, 170

NE512; 100Vt48, 134A635. [l] **Unrestricted use of premises** should be allowed under lease for great number of years. 336 Ill 137, 168NE116(2dcase).
85-99 250NY228, 165NE273.
85-2 159La467, 105S511.
85-6 150Miss272, 116S294.
85-7 296Pa126, 145A706.
86-17 [a] But see 212Ala573, 103S667.
86-19½-New. A doorway has been held to give a right to use an alley as appurtenant to use thereof. 99NJEq622, 133A526.
86-19½-New. Appurtenance of window is a right to look through it and obtain light and air through it. 99NJEq 622, 133A526.
86-25 243NY490, 154NE535; 135Misc 637, 239NYS248.
86-25½-New. or roof, 122Misc249, 203 NYS515.
86-28 243NY490, 154NE535; 253NY 111, 170NE512; ND 230NW725; Tex CivA 293SW253, 255 [quotCJ].
86-29 122Misc249, 203NYS515.
87-30 122Misc249, 203NYS515; ND 230NW725.
87-31½-New. Tenant cannot maintain advertising sign on outer wall not bounding premises leased. ND 230NW 725.
87-41 219MoA90, 266SW492, 494 [quot CJ].
87-42 219MoA90, 266SW492, 494 [quot CJ].
87-47½-New. Removal of advertising sign maintained by tenant only as licensee will not give him right to recover substantial damages. ND 230NW 725.
87-51 47RI 400, 133A797.
88-55 TexCivA 275SW397 (act making keeping of billiard rooms illegal did not justify landlord's action).
88-56½-New. Money paid under a lease of property for laundry purposes cannot be recovered on refusal of the municipality to grant a license for such use. Ont [1929] 3DomLR612.
88-60 253NY111, 170NE512.
88-61 212Ala573, 103S667; 250NY228, 165NE273; 122Misc249, 203NYS515; 136Misc81, 240NYS238 (restriction equivalent to covenant by lessee); 34 PortoRico 696. [c] (1) 131Misc791, 229NYS17. (11) Reservation to lessor of privilege of excluding from premises all persons but tenant and his family. 212Ala573, 103S667.
88-63 135Wash105, 236P805; 86CalA 80, 260P392. [a] Meat market.-135 Wash105, 236P805.
89-68 TexCivA 283SW679.
89-69 MoA 17SW(2d)682; 250NY228, 165NE273. But see 110Conn680, 149A 137. [b] 291Pa507, 140A506, 511 [cit CJ].
89-74½-New. A covenant not to carry on any business except that specified in the lease will be enforced. MoA 14SW (2d)526.
90-79 TexCivA 271SW435; 100Vt48, 134A635. [a] (8) 2LaA477. (22) As to sale of goods sold by bakeries, delicatessens, staple grocery stores, lunch rooms, or restaurants. 125Misc846, 211 NYS499 (violated by sale of butter, milk, cheese, and coffee in dairy). (23) For store, place of business, dwelling, or light manufacturing. 122Misc249, 203 NYS515 (prohibits erection of sign of other business). (24) For carrying on general mercantile business. 86CalA80, 260P392. [b] (6) See also CalA 260P816. (15) Covenant to bank not broken as matter of law by subletting to fruit store. 100Vt48, 134A635. (16) Other instances. MoA 14SW(2d)526. [c] (24) Against acts injuring reputation or value of premises. 135Wash105, 236P805 (not violated by operation of refrigerator plant). [g] **Exclusive sales right** under covenant in hotel cigar stand lease held to extend to outside storeroom. 154Md302, 140A363.
91-81 131Misc479, 226NYS361.
91-82 MoA 287SW781.
91-83 MoA 287SW781; 131Misc479, 226NYS361.
91-85 131Misc479, 226NYS361. [a] (3) Lease stating that property was to be used for real estate office held not to preclude use thereof for grocery and dairy. 131Misc479, 226NYS361.
91-86 [b] **Clause "general mercantile business"** embraces all commodities purchased and sold by merchants wholesale or retail. 86CalA80, 260P392 (fireworks and gunpowder).
92-90½-New. Covenant that lessor will not permit use of lower floor for certain purposes does not give lessee control of use thereof so as to disable lessor from granting unrestricted use, but merely gives lessee right of action for breach. TexCivA 283SW300.
92-96 [b] **Where location and dimensions of any new sign** were required to be substantially same as old sign, sixty-foot sign could be replaced with larger sign under ordinance permitting increased height. 199Wis8, 225NW135.
93-6 [b] **Death of surviving lessee** does not terminate provision as to sole occupancy by lessees where no notice to terminate lease was given. Mass 169 NE777.
93-15 99NJEq622, 133A526.
93-15½-New. A waiver is in turn waived by stipulating for a declaratory judgment as to rights of parties under lease. 122Misc249, 203NYS515.
94-18½-New. There goes with every rental of premises the right of beneficial enjoyment by the tenant for the purposes for which the premises are rented, at least to the extent disclosed to the lessor at the making of the lease. 241Mich186, 216NW388.
94-20 CalA 260P816; 22 OhA426, 154 NE57.
94-22 247 IllA187; 219MoA90, 266SW 492. [c] **Premises leased for farm purposes** cannot be sublet for camping purposes and storage of automobiles involving building of roads. 219MoA90, 266SW492 (lease void).
95-42 32PortoRico 313.
95-43 164Ga805, 139SE678. [c] **Action in equity to restrain violation of covenants implies** continuance of lease, not its cancellation and reëntry by lessor. 240NY96, 147NE540.
96-46 See also 32PortoRico 313.
96-47 164Ga805, 139SE678.
96-50½-New. Prohibition against lessor's permitting unrestricted use gives lessee right of action for breach thereof but not right of control of prohibited part so as to disable lessor from violating restriction. TexCivA 283SW300.
97-63 33Wyo 249, 238P654 (closing of premises by reason of maintenance of liquor nuisance).
97-64 124Kan252, 259P801.
97-67 [a] **Evidence held properly excluded.**-124Kan252, 259P801. [b] **Evidence held sufficient to sustain verdict.**-124Kan252, 259P801.
97-67½-New. Landlord held not guilty of laches. NJ 147A439.
97-69½-New. Instructions as to burden of proof held proper. 124Kan252, 259P801.
97-83 See also Iowa 227NW582.
97-83½-New. Where a tenant, after doing the fall plowing, abandoned the lease and surrendered possession, the landlord, on rerenting, may charge and retain the money paid by the new tenant for the plowing done. Iowa 227NW582.
98-88 [a] (22) To plant ground in any way lessees desired except in kaffir corn and cane, and providing for compensation for crops upon sale of land by lessor. 219MoA90, 266SW492. (23) To do in first class farmerlike manner all work necessary to carry out terms of lease. 134Wash450, 235P958; 136Wash 695, 240P362. (24) To cut and burn all noxious weeds before going to seed. 134 Wash450, 235P958; 136Wash695, 240P 362. (25) Lessee required to live on premises. 205Cal 776, 272P1039. (26) To plow and cultivate as lessor may direct. 205Cal 776, 272P1039. (27) To pay landlord one half of moneys received from pasturage of cattle. Tex CivA 19SW(2d)331 (limited to moneys received for pasturing for other people and not for his own).
98-94½-New. A lessee of alfalfa land is not liable for the destruction of alfalfa growing on the land due to a general rise of water table in the land where, to preserve the alfalfa, he would have had to drain the whole irrigation district. 74CalA782, 241P588.
99-6 [a] (3) To support inference that lessor waived provision of lease requiring lessee to live on tract. 205Cal 776, 272P1039.
99-10½-New. Where a contract authorized termination at option of either party, and provided for payments to tenant according to appraisal, judgment for plaintiff terminating the contract and awarding payment is justified. 105Conn 252, 135A42.
99-16½-New. Under contract, compensation to defendant for use of live stock not claimed in pleadings or at trial cannot be awarded. 105Conn252, 135A42.
99-17 [e] **Under lease requiring tenant to retain "female breeding stock"** and four hundred ninety-nine cows on premises at time of lease tenant must retain only those sufficiently matured, or one year old. 12F(2d)923.
100-19½-New. Where a lessee was authorized to sell cattle but was required to buy sheep with proceeds, he was held liable for conversion in converting the proceeds to own use. 101CalA592, 281P 1070.
100-21 Ida 285P1023 (manure made from feed produced on farm). See also 157Miss252, 128S111(2dcase).
100-22 157Miss252, 128S111(2dcase).
100-25 Ida 285P1023.
101-35 But see 40GaA183, 149SE97.
101-40 [a] (5) Tenant who rented from committee of insane owner of land cannot recover from such owner's estate for repairs and seed in absence of agreement. 217Ky835, 290SW683.
102-62 130 Or424, 278P981.
103-69 248Mich516, 227NW750.
103-71½-New. A tenant's right to crops after transfer by the landlord of a rent note is measured by the knowledge at the time the note was executed. MoA 289SW977.
104-4 25F(2d)498.
104-8 83CalA16, 256P274.
105-11½-New. A lessee who plants a crop knowing that his right of possession will expire before the crop matures and can be harvested must suffer the loss. 201 Iowa327, 207NW372.
105-14 25F(2d)498.
106-23 248Mich516, 227NW750.
106-24 25F(2d)498.
108-54 266Mass33, 164NE807.
108-61½-New. An exemption from liability for damage to leased premises from erection of dams contemplates actual invasion of possession and not exemption from liability for creation of unsanitary conditions resulting in nuisance outside premises. 190NC24, 128 SE485.
108-63 MoA 16SW(2d)672.
110-90 250 IllA462.
111-11½-New. Injunction restraining lessor from turning animals on land under cultivation will not lie without a showing of irreparable injury and lack of an adequate remedy at law. 175Ark 1105, 1SW(2d)548.
111-13 [a] **Tenant may, in his own name, maintain action** for injury to crop while it is being cultivated. 195NC415, 142SE327.
112-35 195NC415, 142SE327.
113-50 245 IllA153; 218Ky24, 290SW 1040; OhA 173NE40; 127 Or188, 270P 927; 10PaDist&Co 728; 38Wyo 505, 269 P43.
113-53 245 IllA153; 217Ky835, 290SW 683; 40Wyo 350, 280P889.
114-76 162Ga818, 135SE68; 218Ky24, 290SW1040; 127Misc59, 215NYS244. [d] (2) That lessee under lease for five years had option to purchase does not make him liable for taxes and assessments. OhA 173NE40. [h] **Mere leasing of land by tenant from owner** is not sufficient to show agreement as part of consideration of lease to pay assessments. 40Wyo 350, 280P889.
114-77 39F(2d)788; 127 Or188, 270P 927; 128Misc875, 220NYS281; 292Pa 287, 141A34.
115-77½-New. A provision for payment by the lessee of taxes specified before the beginning of a new term, if construed as a condition, is a condition precedent to the creation of the new term. NJSup 130A20.
115-88 133Misc423, 232NYS142. [b]

Where landlord exercises option to terminate lease before expiration of term, lessee held obligated to pay half of increase in taxes for entire year under covenant of lease. 132**Misc**329, 229**NYS** 560.

116–97 [c] **Income tax.**–127**Misc**59, 215 **NYS**244.

116–98 [c] **Landlord's payment of water bill** does not make tenant liable therefor in absence of proof that it was legal charge on premises. 131**Misc**856, 228**NYS**395.

116–99 230**AppDiv**563, 245**NYS**518. [a] (15) Covenant to pay all taxes "imposed on the income, rents and profits arising from demised premises" has been held not to include federal income tax. 321**Mo** 782, 12**SW(2d)**432, 433. (16) Agreement held not to require lessee to pay federal income tax or capital stock tax or state corporate franchise tax. **Mo** 20**SW(2d)**51. (17) Other agreements construed. 292**Pa**287, 141**A**34. (18) Other instances. 127 **Or**188, 270**P**927.

117–9 [b] **During renewal term** lessor is liable as on original lease where extension on same terms, except for amount of rent, is provided for. 99**CalA** 666, 279**P**194.

117–14 7**F(2d)**322; 245 **IllA**153; 247 **Mich**73, 225**NW**587; **OhA** 173**NE**40. [c] **Covenant to pay "annual taxes"** does not include special benefit assessments. 7**F(2d)**322.

118–16 133**Misc**225, 231**NYS**451.

118–29 127 **Or**188, 270**P**927.

119–33½–New. Under covenant to pay all taxes except special assessments, lessee is liable for all ordinary taxes. 161**La**803, 109**S**496. [a] **Taxes held ordinary and not special assessments.** 161 **La**803, 109**S**496.

119–40 [a] (1) 6**F(2d)**830. (4) Other instances. 39**F(2d)**788.

120–43 162**Ga**818, 135**SE**68.

120–44 222**AppDiv**22, 225**NYS**209.

120–50 [a] **Under covenant to pay taxes promptly when payable** lessee in possession after first of year is liable for taxes for last half of preceding year, though they become delinquent only on July 1st. 77**Colo** 421, 237**P**161.

120–62½–New. A covenant to pay an increase in taxes on and after a specified date is construed with reference to the time of levy and assessment, as not to include excess of taxes for the same year over the preceding year. 102**NJL** 590, 134**A**752.

120–62½–New. Transferee of lessee has been held not liable on a covenant to pay taxes not payable at the time the lease was surrendered. 258**Mass**4, 154**NE**190.

120–62¼–New. Covenant to pay all taxes unpaid has been held to cover taxes assessed during term. 173**Minn**247, 217 **NW**135.

121–67 **OhA** 173**NE**40.

121–67½–New. Covenant to pay taxes contained in lease signed and delivered to lessee in possession and signed by latter some time later relates back to time of lessor's execution and delivery. 77**Colo** 421, 237**P**161.

121–79½–New. Where assignee assumed to carry out terms of lease providing for payment of taxes by lessee, he could not receive credit for special assessments accruing during his tenancy which in the assignment he had expressly agreed to pay. 136**Wash**573, 240**P**906.

121–79¼–New. Agreement of assignee to pay real property taxes and assessments for a certain year does not include federal income tax for such year. 136 **Wash**573, 240**P**906.

122–92 But see **Mass** 170**NE**414.

123–14 41**GaA**731, 154**SE**708.

123–29 127**Misc**59, 215**NYS**244.

123–34½–New. In Saskatchewan where lessee covenants to pay one half of taxes for each year, he is liable for only one half of taxes without penalty. [1929] 4**DomLR**27.

124–37 [b] 41**GaA**731, 154**SE**708.

125–60 311**Mo** 551, 279**SW**122, 126 [cit CJ].

125–62 98**CalA**675, 277**P**534; 85**Colo** 357, 276**P**329; 108**Conn**676, 144**A**467; 55**AppDC**271, 4**F(2d)**938; 89 **IndA**640, 166**NE**607; 203 **Iowa**195, 212**NW**484; 222**Ky**150, 300**SW**359, 58**ALR**1423; 232 **Ky**680, 24**SW(2d)**553; 154**Md**135, 140**A** 76; **Mass** 173**NE**512; 219**MoA**186, 269 **SW**659, 660 [citCyc]; 311**Mo** 551, 279 **SW**122; **NJ** 130**A**730; 103**NJL**397, 135 **A**794; **NJ** 150**A**427; **NJSup** 146**A**671; 215**AppDiv**144, 213**NYS**62; 245**NY**256, 157**NE**129; **OhA** 173**NE**448; 136 **Okl** 55, 275**P**1054; 97**PaSuper**255; **TexCivA** 297 **SW**524; 192**Wis**326, 212**NW**526; **Wis** 233**NW**71; **BC** [1929] 1**DomLR**480.

126–65 222**Ky**238, 300**SW**615, 58**ALR** 1430; 152**Miss**117, 118**S**705; 219**MoA** 186, 269**SW**659, 660 [citCyc]; 154**Md** 135, 140**A**76; 130**Misc**266, 223**NYS**839; 6**PaDist&Co** 595.

127–66 But see 227**AppDiv**200, 237**NYS** 81 (obligation of owner to repair premises immediately after leasing held fairly to be implied).

127–67½–New. Duty to keep a wall or part of a building in repair held to be coextensive with control retained by landlord. 243**NY**490, 154**NE**535.

127–72 291**Pa**507, 140**A**506.

128–87 203 **Iowa**195, 212**NW**484 (dictum); **TexCivA** 297**SW**524.

128–90 **NJCh** 144**A**25. See also 90 **CalA**692, 266**P**369.

128–98 **Conn** 151**A**315; 4**F(2d)**938, 55 **AppDC**271; 222**Ky**238, 300**SW**615, 58 **ALR**1430; 82**NH**415, 135**A**20, 52**ALR** 858; **MoA** 318**W(2d)**229; 103**NJL**397, 135**A**794; **TexCivA** 296**SW**680, 682 [citCJ].

129–99 192**Wis**326, 212**NW**526.

129–2 12**PaDist&Co** 132, 135 [quotCJ].

129–4 **Conn** 151**A**315.

130–6 **Conn** 151**A**315.

130–11 90**CalA**692, 266**P**369.

130–14 311**Mo** 551, 279**SW**122, 126 [cit CJ].

130–23 [a] (2) Collapse of floor caused by tenant's overloading. 242**NY**120, 151 **NE**150.

131–27 35**GaA**51, 132**SE**257; 5**LaA**282; 161**La**505, 109**S**46; 161**La**806, 109**S**498; 232**Mich**291, 205**NW**128; 32**PortoRico** 517. See also 35**GaA**262, 133**SE**53 (implied covenant). [b] (3) **In Georgia.**–35**GaA**51, 132**SE**257. [g] **Failure to make repairs** is negligence per se. 232 **Mich**291, 205**NW**128. [h] **Obligation imposed on owner arises ex delicto.**–163 **La**59, 111**S**495.

131–30 125**Misc**845, 211**NYS**494.

131–34½–New. The lessee may make repairs required to be done by the landlord and charge the expense to the rent account. 94**CalA**66, 270**P**719.

131–34¼–New. In British Columbia lessee of building used as moving picture theater paying for repairs ordered by fire marshal under Fire Marshal Act may recover amount from owner. [1930] 3**DomLR**398.

131–35 121 **Okl** 115, 247**P**665.

132–38 136 **Okl** 55, 275**P**1054.

132–40 126**Misc**563, 214**NYS**136. [a] **Includes** stairways in hall, and stairway leading to yard which tenant could use. 126**Misc**563, 214**NYS**136. [b] **Statute does not apply** to movable ice box furnished by landlord. 134**Misc**327, 235 **NYS**285.

132–43½–New. **In New York** statute requiring landlord to keep tenement house in repair does not require keeping stoves and ranges in repair. 215**AppDiv**586, 214**NYS**241 (in view of Tenement House L. § 78 requiring place for stove, properly connected with chimney for each apartment).

132–43¼–New. Statute being in derogation of common law must be strictly construed. 215**AppDiv**586, 214**NYS**241.

132–43¾–New. A statute requiring a tenement house owner to provide the proper appliances to distribute sufficient water includes the duty to repair faucets. 135**Misc**373, 238**NYS**241.

132–49 12**LaA**702, 127**S**73; 13**LaA**660, 127**S**647(2dcase).

132–49½–New. Under a statute requiring a hirer to use ordinary care for preservation of the property in good condition and to repair deteriorations due to his failure to do so, a tenant does not fulfill his duty where he allows metal parts of a building to decay for lack of painting for ten years. 86**CalA**310, 261 **P**331.

132–52 222**Ky**238, 300**SW**615, 58**ALR** 1430. [a] **Certainty.**–252 **IllA**315.

132–55 [a] **Privilege to sublet under lessee's "exclusive responsibility"** held **not to show parties'** intention to relieve owner of obligation to keep premises in repair. 32**PortoRico** 688.

132–56 3**LaA**756.

132–57 **OhA** 173**NE**448.

132–58 108**Conn**676, 144**A**467; 156**Miss** 371, 126**S**46. See also 85**Colo** 357, 276 **P**329.

133–64½–New. A written lease requiring the tenant to make repairs is orally modified where the tenant with the knowledge and consent of the landlord makes the repairs and deducts the cost from rent and the landlord cannot thereafter recover the amounts deducted. 77 **Colo** 556, 238**P**42.

133–68 130**Misc**266, 223**NYS**839.

134–75 [a] (3) Stipulation that necessary repairs are concern of lessor. 146 **Wash**143, 262**P**131. (4) Written contract leasing building for conduct of designated business has been held to raise implied covenant that there would be no legal obstacles to making repairs. **TexCivA** 30**SW(2d)**707.

134–75½–New. A provision requiring the lessor to make repairs is none the less a covenant because it is in a separately executed addendum, where the addendum recites that it is part of the lease and identifies it. 252 **IllA**315.

134–80 131 **Or**488, 283**P**34(2dcase) (provision requiring lessee to repair not annulled or modified by subsequent provision).

134–81 [b] **Particular covenants construed.**–252 **IllA**315.

135–88 [a] **Tenant's covenant to make repairs absolves landlord** from his statutory duty to make repairs. 34**GaA**285, 129**SE**797.

135–91½–New. Acceptance of promise by tenant who remains in occupation furnishes sufficient consideration. 258 **Mass**188, 154**NE**764.

136–97 See also 134**Misc**315, 235**NYS** 277.

136–98 252 **IllA**315 (though contained in separately executed addendum referring to lease).

136–99 95**PaSuper**139.

136–11½–New. A provision in a sublease imposing the duty on a subtenant to make repairs will not relieve the tenant from obligations of his lease to make repairs. 134**Misc**443, 235**NYS**677.

137–19½–New. This is so whether the tenant remains in possession. 125**Misc** 889, 213**NYS**49.

137–27½–New. **Sureties.** Lessor has cause of action against surety on bond indemnifying lessor against loss due to failure of lessee to complete alterations required by lease. 216**AppDiv**198, 215 **NYS**90.

137–27¼–New. Surety is liable on such bond on lessee's failure to complete alterations. 216**AppDiv**198, 215**NYS**90 (in absence of denial, defense, or legal avoidance).

137–29 But see 98**CalA**675, 277**P**534.

138–40½–New. The grantee of a lessor owes no duty to the assignee of the lessee to repair. 98**CalA**675, 277**P**534.

138–41 220**AppDiv**704, 221**NYS**437.

139–67 34**GaA**285, 129**SE**797. [e] **Damage to residence by fire and smoke** has been held not slight damage within lease requiring landlord to make prompt repair of such damage. **NJDistCt** 151**A** 637.

139–69 262**Mass**458, 160**NE**262.

139–70 242**NY**120, 151**NE**150.

139–72 209**Ky**768, 273**SW**450.

139–75½–New. A covenant requiring tenant to keep premises in good and thorough repair should be construed as covenant to make necessary repairs as would keep building in good order and condition in accordance with its age and type. 125**Misc**870, 212**NYS**285 (where covenant required tenant to return premises at end of term in good order and repair).

139–75¼–New. A tenant is bound to repay the cost of restoring a floor to its original condition, if it was reasonably safe, but collapsed because of his negligence in overloading it. 242**NY**120, 151 **NE**150.

139–79 [a] (7) Under lease of house equipped with furnace, replacement of furnace held repair under covenant. 34 **GaA**285, 129**SE**797.

140–93½–New. Where a tenant makes a covenant to keep premises in repair, such covenant must be considered with reference to the use to which the premises were to be put and the business to be carried on. 255**Mass**127, 150**NE**872, 45**ALR**6.

141–97 [b] **Covenant "to pay all ordinary repairs" does not obligate** tenant to restore parts of building that were dilapidated or decayed, when term began, nor to install drain pipes where none were before. 209**Ky**768, 273**SW** 450.

141–99 [a] (1) Under covenant to put and keep premises in repair obligation is not limited by age or condition of building. 126**Misc**108, 212**NYS**576.

141–3 [a] **Tenant held not liable for defect from original construction of** building. 255**Mass**127, 150**NE**872, 45 **ALR**6.

142–13 223**AppDiv**140, 228**NYS**145; 127 **Misc**630, 217**NYS**306.

142–14 127**Misc**630, 217**NYS**306.

142–22 242**NY**120, 150**NE**150.

142–24 131**Misc**365, 226**NYS**702. [f] (11) Inclosing stairway in fireproof material. 134**Misc**443, 235**NYS**677.

143–26 242**NY**120, 151**NE**150; 131**Misc** 265, 226**NYS**702. [b] (4) Construction of cellar and reconstruction of foundation are of structural nature requiring owner to meet cost thereof. 242**NY**120, 151**NE**150.

143–27 242**NY**120, 151**NE**150.

143–28 242**NY**120, 151**NE**150.

145–44 291**Pa**507, 140**A**506, 510 [cit **CJ**].

145–46 125**Kan**70, 262**P**536; 291**Pa**507, 140**A**506.

146–47 291**Pa**507, 140**A**506. [a] **Other provisions in leases not imposing obligation** on lessor to rebuild. 291**Pa**507, 140 **A**506.

146–52 IndA 173**NE**292; 26 **OhNPNS** 455.

146–55 220**Ky**165, 294**SW**1034; 106 **WVa**322, 145**SE**606. [b] **Lessee's negligence held not shown** under facts. 220 **Ky**165, 294**SW**1034. [c] **Destruction.–** 220**Ky**165, 294**SW**1034.

146–60 [b] **Lease requiring lessor** "forthwith" to repair damage caused by fire from "proceeds" of insurance, if it is deemed proceeds are sufficient, required election within reasonable time after fire. **TexCommnA** 298**SW**397.

146–66 [g] **Covenant to rebuild in case of fire** does not oblige lessor to rebuild where lessee's negligence was proximate cause thereof. 207**Cal** 498, 279**P**152.

147–72 TexCommnA 298**SW**534.

147–78 [b] (6) Promise to paint and paper rooms and to stop leaks in roof is sufficient, definite, and certain without specifications to require landlord to do something toward repairs. 170**Minn**105, 212**NW**18. (7) Lease held not to require change of apartment house into rooming house. 228**AppDiv**270, 239**NYS** 438. (8) Restoration of building to former condition is required under provision as to repairs after fire. **TexCivA** 26**SW(2d)**699. [c] (6) Covenant by landlord to make repairs of damage rendering premises unfit for occupancy which can be repaired within four months does not require landlord to replace plate glass window broken by wind storm. 219**MoA**186, 269**SW**659. [f] **Reconstruction of building to conform to new street lines** after condemnation may be provided for in lease. 155 **Wash**493, 284**P**782.

148–79 223**AppDiv**140, 228**NYS**145. [b] (5) Wooden trestle for use as sand dump. 128**Kan**545, 278**P**712(2dcase).

149–84 [b] **Provision that tenant is to make repairs** other than those due to wind storm does not obligate landlord to repair plate glass window blown out by wind storm nor obligate tenant to make such repairs. 219**MoA**186, 269**SW** 659.

149–87 See also 134**Misc**315, 235**NYS** 277.

149–94 See also **TexCivA** 16**SW(2d)** 832.

150–99½–New. "Casualty" within provision relieving lessee from liability to repair damages caused by fire or other casualty is unforeseen accident. 41**GaA** 784, 154**SE**823.

150–9⅓–New. Covenant to keep building in repair held not to bind lessee to rebuild in case of fire. 27**Hawaii**698.

150–17½–New. Negligence of lessor in making repairs does not entitle lessee to damages unless they are direct and proximate result of negligence. 156**Miss** 371, 126**S**46.

152–53 217**Ky**379, 289**SW**278; 217**Ky** 835, 290**SW**683; 228**Ky**780, 15**SW(2d)** 528; **TexCivA** 297**SW**524, 529, 530 [quotCyc].

153–54 217**Ky**379, 289**SW**278; 131 **Or** 488, 283**P**34(2dcase).

153–56 134**Misc**315, 235**NYS**277. See also 197**Cal** 321, 240**P**765. [f] **Cost of repairs in excess of those authorized** by lease to keep premises in tenantable condition cannot be recovered by tenant, though beneficial and profitable to landlord. 228**Ky**780, 15**SW(2d)**528.

153–57 10**LaA**779, 123**S**153.

153–59 TexCivA 297**SW**524.

153–60½–New. Under agricultural lease with lessor's covenant to protect land from overflow tenant does not assume risk of losses from defects in levees which lessor expressly covenanted to repair within stated time which was made of essence of contract. 197**Cal** 321, 240 **P**765.

153–61 NJ 150**A**417; 220**AppDiv**482, 222**NYS**19.

153–62 220**AppDiv**482, 222**NYS**19.

153–63½–New. But where a landlord consents to repairs, mechanics' liens attach. 220**AppDiv**482, 222**NYS**19.

154–67 98**CalA**675, 277**P**534; 121 **Okl** 115, 247**P**665.

154–68 121 **Okl** 115, 247**P**665.

154–70 121 **Okl** 115, 247**P**665.

154–77 168**Ark**584, 270**SW**960.

155–85½–New. An agreement by the lessor to pay his share of the expense of plumbing is not sufficiently definite as to any particular share of the cost. 265 **Mass**335, 163**NE**876.

156–15 2**LaA**645.

156–17 83**CalA**173, 256**P**592. [a] 83 **CalA**173, 256**P**592.

157–24 98**CalA**675, 277**P**534; 219**MoA** 186, 269**SW**659, 660 [citCyc].

157–26 232**Mich**291, 205**NW**128.

157–27 232**Mich**291, 205**NW**128.

158–56 236 **IllA**44; 163**La**1008, 113**S** 356; **Tex** 297**SW**524, 529, 530 [quot Cyc]; **TexCivA** 18**SW(2d)**421, 423 [cit Cyc]. [a] **Damages.–**236 **IllA**44.

159–62½–New. Where lessee attempts to do work which lessor covenanted to do, he must use the care and diligence a man of ordinary prudence would use under the circumstances. 197**Cal** 321, 240**P**765.

159–63 149**Md**163, 130**A**46.

159–65 136**Misc**919, 242**NYS**630.

159–67 See also 136**Misc**332, 241**NYS** 153.

159–70 NJCh 150**A**825. [d] **Where consent is unreasonably withheld** sublessee may make alterations without consent. 136**Misc**332, 241**NYS**153 (landlord held to have violated lease).

160–78 MoA 32**SW(2d)**136.

160–80 [a] **Lessors mere failure to object** to use for different purpose did not impose obligation to consent to necessary alterations. 136**Misc**919, 242**NYS** 630.

160–84 [a] **Acceptance of rent is not waiver of written consent** under terms of particular lease. **MoA** 32**SW(2d)**136.

160–88 197**Cal** 321, 240**P**765.

160–89 197**Cal** 321, 240**P**765; 89 **IndA** 640, 166**NE**607; 217**Ky**379, 289**SW**278.

160–89½–New. But he cannot have both of two forms of relief. 197**Cal** 321, 240**P** 765.

160–90 218**Ala**674, 120**S**153; 128**Me**424, 148**A**281, 68**ALR**1192; 232**Mich**291, 205 **NW**128; 134**Misc**315, 235**NYS**277; 136 **Misc**647, 241**NYS**688.

160–94 Okl 242**P**239; 121 **Okl** 115, 247**P** 665; 128 **Okl** 234, 262**P**694.

161–98 MoA 282**SW**138.

162–21 MoA 29**SW(2d)**224.

162–23½–New. A tenant cannot recover for damage by rain leaking through the roof under a lease impliedly imposing the duty on landlord to repair the roof and also saving him from liability for damage from leakage. 134**Misc**315, 235 **NYS**277.

163–41½–New. or in an action by a landlord against a tenant for breach of covenant to repair. 128**Kan**545, 278**P** 712(2dcase).

163–43 [a] **Allegations held insufficient.–**218**Ala**674, 120**S**153. [b] **Necessary allegations.–**218**Ala**674, 120**S**153 (whether contract was verbal or in writing and whether there was any consideration therefor).

163–44 See also 34**Wyo** 397, 244**P**222.

163–45 See also 163**La**382, 111**S**794.

163–50½–New. Actions against sureties. Complaint need not specify rule of damages applicable, in action on bond indemnifying lessor against loss due to lessee's failure to complete alterations required by lease. 216**AppDiv**198, 215 **NYS**90.

163–50⅓–New. That rule of damages specified in complaint is erroneous does not deprive lessors of right to recover damages warranted by pleadings. 216 **AppDiv**198, 215**NYS**90.

163–53 [c] **Burden of showing that fire was caused by tenant's fault** rests on landlord. 106**WVa**322, 145**SE**606.

164–64½–New. A landlord suing a tenant for damage to a heating system had the burden of proving that the defect did not exist when the premises were leased. 12**LaA**120, 124**S**608.

164–67 TexCivA 26**SW(2d)**699.

164–70 128**Kan**545, 278**P**712(2dcase). [c] **Orders of building inspector.–NJ** 130 **A**730. [d] **Exclusion of evidence as to cost of repairs held error.–**125**Misc**870, 212**NYS**285 (in action where landlord counterclaims for damages due to tenant's breach of covenant to repair).

164–75 TexCivA 26**SW(2d)**699.

165–79 [a] (5) To support findings that work of plaintiff tenant seeking to make repairs landlord failed to do under his covenant was properly and skillfully done. 197**Cal** 321, 240**P**765. (6) Finding that building could not be restored with reasonable diligence within sixty working days held justified. 207**Cal** 498, 279**P**152. [b] (8) To support damages for breach of covenant of tenant to repair. **NM** 259**P**620. (9) To show that defect in premises did not exist when premises were leased. 12**LaA**120, 124**S** 608.

165–83 [a] (11) Where lessor failed to elect whether it would repair damage within reasonable time after fire. **Tex CommnA** 298**SW**397. (12) Other instances. 218**Ala**674, 120**S**153.

165–90 197**Cal** 321, 240**P**765 (damages recoverable under covenants to drain and render land cultivatable to secure which lessor executed mortgage to lessee). [c] **Market value of crop** at date of destruction by overflow due to lessor's failure to repair is recoverable. 197 **Cal** 321, 240**P**765.

166–92 NJ 130**A**730 (proposition that residue of term bore to entire term).

166–94 170**Minn**105, 212**NW**18. See also 134**Misc**315, 235**NYS**277; **TexCivA** 26**SW** **(2d)**699. [c] **Amount paid as rent furnishes basis** for finding of rental value if repairs had been made. 170**Minn**105, 212**NW**18.

166–98½–New. The damages cannot be measured by a personal injury to the tenant from the defect. 134**Misc**327, 235 **NYS**285.

167–10 197**Cal** 321, 240**P**765.

167–12 168**La**527, 122**S**716.

167–15 197**Cal** 321, 240**P**765.

167–15½–New. But tenant in such case cannot also recover damages sustained for crops destroyed, 197**Cal** 321, 240**P** 765.

167–15⅓–New. or for prospective profits for crops unplanted. 197**Cal** 321, 240 **P**765.

168–24 But see 34**Wyo** 397, 244**P**222.

168–25 See also **TexCivA** 11**SW(2d)**367 (1stcase).

169–41½–New. Sureties. Lessor is entitled to recover reasonable cost of making agreed alterations less reasonable cost of alterations actually made and paid for by lessee, irrespective of whether lessor actually completed alterations or type of alterations made by him. 216**AppDiv**198, 215**NYS**90 (in action on bond indemnifying lessor against loss due to lessee's failure to complete alterations).

169–43 217**Ky**835, 290**SW**683.

169-48 NJSup 136A720 [citCJ]; 127 **Misc**338, 216**NYS**129.

169-49½-New. , but a covenant that a tenant shall pay an increase in the first insurance rates on buildings or landlord's stock is a personal covenant in favor of the original landlord which does not run with the land. 127**Misc**338, 216 **NYS**129.

169-51 [i] **Agreement to pay fire insurance premiums** is no agreement to pay additional rent. 250 **IllA**346.

171-79 236 **IllA**44. [a] (2) Lessee subletting under his lease to one engaged in same business as lessee, and conducting business in same manner, is not liable to landlord under clause covering increased rate due to using premises "for any other purpose which may increase the rate." 161**La**925, 109**S**764. [b] **Tenant held not liable** for increases on rate of adjoining premises under terms of lease. 236 **IllA**44.

171-81½-New. A covenant of the lessee to reimburse the lessor for increased rate due to the character of the use of premises does not cover increased premiums on a building not mentioned in the lease. 318 **Ill** 416, 149**NE**420.

171-82½-New. A covenant to pay an increase in first insurance rates on buildings or landlord's stock is a personal covenant in favor of the original landlord whose assignee may not enforce it. 127**Misc**338, 216**NYS**129.

171-82½-New. Where the lessee covenants to pay any increase in "the first insurance rates or premiums," due to character of occupation, the tenant is obligated to pay difference between such premiums and the increased premiums throughout the term of the lease. 219 **AppDiv**321, 219**NYS**684.

172-3 246**NY**270, 158**NE**618.

172-6 246**NY**270, 158**NE**618.

172-6½-New. and reasonably to ascertain the intention of the parties, 246**NY** 270, 158**NE**618.

173-10½-New. Lease authorizing lessee tenant to erect a fireproof warehouse and garage does not limit construction to warehouse with incidental garage facilities. 126**Misc**260, 213**NYS**18.

173-13 44 **Ida**719, 260**P**158, 159 [cit CJ].

173-18½-New. Deposit as guaranty of performance. The lessor is not entitled to damages for failure of the lessee to make a deposit required as a guaranty of performance of a building lease. 86**CalA**41, 260**P**395.

173-18½-New. The lessor is not entitled to use or invest a deposit made by the lessee as a guaranty of performance or to receive or retain any earnings therefrom. 86**CalA**41, 260**P**395.

173-25 44 **Ida**719, 260**P**158, 159 [cit CJ]; 244**Mich**330, 221**NW**293.

174-28 See also 128**Misc**185, 218**NYS** 116.

174-31 28 **OhA**277, 162**NE**621. [e] **Structural changes** may not be made without landlord's consent under lease giving tenant right to install organ. 223**AppDiv**83, 227**NYS**22. [f] **Right** of lessee to "connect" building to be erected by him with adjoining one limited size of openings only as to structural integrity, but did not authorize encroachments from adjoining building or its heating by boilers of erected building. 103**NJEq**159, 142**A**560.

175-47 [b] (2) Right of action arises on breach and it is not necessary to wait expiration of lease. 44 **Ida**719, 260 **P**158.

175-48½-New. Upon completion of improvements by a tenant, a landlord cannot retain securities given for performance of contract, but his remedy is by counterclaim or independent action for damages sustained. **CalA** 275**P**951.

175-53½-New. Issues. Where the liability of a tenant to pay for an improvement made by the landlord after demand and refusal of the tenant to do so is a material issue, the court cannot decide the case on the pleadings as a matter of law. 246**NY**270, 158**NE**618.

176-59½-New. Such is also the proper measure of damages for the lessee's failure to make improvements and the lessor claims only general damages and offers proof in accordance with such rule: 135**Wash**527, 238**P**574.

176-68 87**CalA**478, 262**P**768; 130**Kan** 803, 287**P**706; 170**La**573, 128**S**520; 255 **Mass**87, 151**NE**61; 143 **Okl** 246, 289**P** 311; 46**Philippine**184; 48**Philippine** 396;; 51**Philippine**520; 104**WVa**449, 140**SE**285; **NB** [1927] 2**DomLR**209.

176-74 [a] **Tenant may remove refrigerator not constituting fixture,** but is answerable to landlord for injuries caused thereby. 84**CalA**665, 258**P**417.

177-80 See also 132**Misc**435, 230**NYS** 239.

177-81 [a] (2) Provision that certain buildings erected by tenant shall not be removed implies right to remove other buildings. 147**Miss**556, 113**S**180, 53**ALR** 288.

177-82 158**La**379, 104**S**122, 39**ALR**1042 (marble wainscoating and appurtenances for restaurant held "permanent improvements," within meaning of clause of lease which provided that such improvements were to become sole property of lessor). [b] **Measure of damages** for removal of improvements by lessee is cost of replacement. **TexCivA** 292**SW**596. [c] **Recording of such agreement** gives no constructive notice of rights of lessor. 156**Md**368, 144**A**641, 62**ALR**358.

177-85½-New. A recorded lease providing that everything in the demised premises shall become the property of the landlord does not give constructive notice as to unnamed chattels. 156**Md** 368, 144**A**641, 62**ALR**358.

178-93½-New. Where a sublease, providing that an organ should become the property of the owners of a building, was not required to be recorded, it gave no constructive notice of the lessor's rights. 156**Md**368, 144**A**641, 62**ALR**358.

178-6 [a] **TexCivA** 292**SW**596.

178-10 TexCivA 292**SW**596.

179-24 See also 156**Miss**371, 126**S**46.

180-30 ND [1927] 2**DomLR**209.

180-33 See also 6**LaA**200.

180-35½-New. Where a tenant suing for removable property stands by during sale by landlord and offers no objection, he cannot recover movable property which he installed without the landlord's knowledge. 239 **IllA**306.

180-35½-New. Where a tenant admits that he has not complied with the terms of the lease by paying rent, and that he is insolvent, equity will not permit him to remove improvements placed by him on the premises but will apply the value of the improvements as credit on past-due rent. 147**Miss**556, 113**S**180, 53**ALR** 288.

181-38 160**La**694, 107**S**493.

181-41 120**Kan**637, 245**P**119, 121 [cit CJ] (rule not applicable).

181-43 120**Kan**637, 245**P**119, 121 [cit CJ] (rule not applicable).

181-44 160**La**694, 107**S**493.

181-52 IndA 171**NE**667; 228**Ky**780, 15 **SW(2d)**528; 234**Ky**296, 28**SW(2d)**22; **LaA** 129**S**229; 223**AppDiv**83, 227**NYS**22.

182-57½-New. And where lease provides that incoming tenant shall pay outgoing tenant for improvements made by him, landlord is liable therefor if he does not provide a new tenant in accordance with his custom. 120**Kan**637, 245**P**119.

183-63½-New. Where a lease provides that improvements shall belong to lessor at the end of the term without compensation, lessee is nevertheless entitled to pro rata reimbursement for unexpired term where the lease is terminated by the lessor's wrongful act. 161**La**806, 109**S**498.

183-66 170**La**573, 128**S**520.

183-75 NC 155**SE**871(2dcase).

184-92 104**WVa**449, 140**SE**285.

184-95½-New. Where a lease provided that the lessee was to return the equivalent of articles listed on invoice, lessee could recover the value of furniture furnished by him at expiration of the lease. 217**Ky**379, 289**SW**278.

186-26 104**WVa**449, 140**SE**285.

188-55½-New. Where lessor having option does not renew lease or take buildings at valuation, lessee becomes tenant from year to year entitling lessor to terminate lease and take possession of all buildings by giving three months notice. 142**Va**73, 128**SE**640.

190-88½-New. Where a landlord fails to elect whether to pay a tenant the appraised value of a building or grant a new lease on completion of the appraisal, he may be compelled to do so in an action by the tenant. 250**NY**469, 166**NE** 169, 63**ALR**1151.

190-88½-New. If a landlord prevents appraisal of the value of a building, the tenant may continue in possession and pay rent reserved or vacate the premises and sue for damages. 250**NY**469, 166**NE** 169, 63**ALR**1151.

190-88½-New. An appraiser's failure to make a report at the end of the term extended the time of a landlord to elect whether to pay a tenant the value of the building as appraised or grant a new lease. 250**NY**469, 166**NE**169, 63**ALR** 1151.

190-88½-New. If a tenant rejects a landlord's offer of renewal, he loses the building and cannot compel the landlord to pay the appraised value thereof. 250 **NY**469, 166**NE**169, 63**ALR**1151.

190-97 133**Misc**270, 231**NYS**622.

190-1½-New. Where a landlord elects to pay for a building, whether the tenant must surrender possession prior to actual payment and be relegated to a lien as security depends on the lease in the particular case. 133**Misc**270, 231 **NYS**622.

190-1½-New. A tenant is not entitled to an equitable lien for the cost of improvements in the absence of the landlord's contract therefor. 208 **Iowa**1359, 227**NW**341(2dcase).

190-5 250**NY**469, 166**NE**169, 63**ALR** 1151.

191-14½-New. need not proceed like judicial hearing; 245**NY**393, 157**NE**506.

191-14½-New. need not fix the value which can be sustained by evidence in a court of law, 245**NY**393, 157**NE**506.

191-14½-New. Valuations need not be on the basis of reproduction cost, less depreciation. 245**NY**393, 157**NE**506.

191-16 245**NY**166, 156**NE**653; 245**NY** 393, 157**NE**506.

191-19½-New. A lease providing that appraisers value a building in its actual condition has been held not to provide the method or manner of valuation. 245 **NY**166, 156**NE**653.

191-19½-New. A lease requiring the lessor, electing not to renew to pay lessee the value of buildings, has been held to require appraisal on the basis of reproduction costs less depreciation. 219 **AppDiv**548, 220**NYS**382.

191-20 245**NY**166, 156**NE**653; 245**NY** 393, 157**NE**506.

191-21½-New. or that real estate experts on a hearing in court fix a higher valuation; 245**NY**393, 157**NE**506.

191-21½-New. or because judges would fix a different valuation. 245**NY**393, 157 **NE**506.

192-41½-New. Practice of lessor in dealing with tenants in regard to disposition of improvements is admissible. 120**Kan**637, 245**P**119.

192-45 [a] 208**Cal** 606, 283**P**936. (2) To show inadequacy of appraiser's award to lessee for buildings on premises. 219**AppDiv**548, 220**NYS**382. [b] **Evidence held insufficient** to sustain finding of written consent to, or waiver, or ratification of, subletting of leased premises, forbidden of terms of lease. 164**Minn**201, 204**NW**936.

192-53½-New. Where lessors wrongfully seize lessee's equipment in an attempt to hold the lessee for rent after violating warranties of the lease justifying lessee's abandonment, but do not convert same nor place same beyond lessee's reach, lessors are liable only for damage from depreciation and loss sustained. 161**La**806, 109**S**498.

193-54½-New. Provision for the valuation of a building in its actual condition does not require arriving at the value by deducting depreciation from the cost of reconstruction. 245**NY**166, 156**NE** 653.

193-54½-New. Valuation of a building under a lease providing for selecting arbitrators need not proceed like a judicial hearing but may be made in any fair and equitable way. 245**NY**166, 156**NE**653.

193-54½-New. Such building may be valued by deducting the value of vacant

land from the value of the entire property. 245NY166, 156NE653.

193-54½-New. Appraisal made under a provision in the lease will not be set aside because higher or lower than the court may determine after trial. 245NY 166, 156NE653.

193-54½-New. Testimony as to the value of a building on the basis of the cost of reconstruction, less depreciation, shows no unfairness in arriving at the value by deducting the value of the land from the value of the entire property. 245NY166, 156NE653.

193-54½-New. Court of equity does not acquire jurisdiction to interfere with an award of arbitrators, because of a difference of opinion due to conflict of testimony. 245NY166, 156NE653.

193-71 See also 201 Iowa148, 205NW 833.

194-75 220MoA736, 275SW779.

194-77½-New. The lessor's letter to the lessee, guaranteeing that the dead load on the ground floor of a building being erected would not injure the superstructure, or cause the floor to sag more than one inch, is not a guaranty that the floor would not sag more than an inch for other reasons than the load placed on it or weakness inherent in the building, in the absence of evidence that the lessor should have foreseen such possibility and provided against it. 248NY267, 162 NE75.

194-79 [f] **Jury's findings** that plans and specifications submitted by tenant were final held binding. 5F(2d)787. [g] **Furnishing well and pump.**-219MoA429, 275SW979.

194-81 24 OhNPNS435.

194-85½-New. That a floor was flooded by water coming through a trap on the backing up of a sewer is not a breach of covenant to install a complete concrete floor before tenancy began. 265 Mass179, 163NE892.

194-86 See also 220MoA736, 275SW779.

194-89 [a] (1) 76CalA460, 245P206.

194-91 220MoA736, 275SW779 (by assignment of lease).

195-97 201 Iowa148, 205NW833. [d] **Reduced rent.**-169Ark556, 275SW889.

195-99½-New. Assignee suing for breach is not required specifically to allege assignment of cause of action sued on. 220MoA736, 275SW779.

195-3 [a] (6) To show cause of action for loss of profits. 168La527, 122S716.

195-4 5F(2d)787 (implied, constructive, or quasi contract by tenant to pay for changes in building held sufficiently shown to go to jury).

195-4½-New. Whether contract of lessor to till land was part of lease is question for jury. 201 Iowa148, 205NW833.

195-6 201 Iowa148, 205NW833 (damages).

195-7 [a] (3) Money plaintiff might have earned in employment declined by him in reliance on lessor's agreement too remote. 169Ark807, 276SW598.

195-8 201 Iowa148, 205NW833.

196-15 169Ark807, 276SW598.

196-17 169Ark807, 276SW598.

196-19½-New. Where lessor's breach was complete and covenant was repudiated, the tenant's assignee is entitled to recover damages for the full term of the lease, although he had been in possession only part of the term. 220MoA736, 275 SW779.

196-22 5F(2d)787.

196-27 6LaA69; 149Md163, 130A46; 148Va331, 138SE637. [d] (2) Statute not imperative but may be modified by parties. 34PortoRico 696. [e] **Damages done while vacating.**-NJSup 131A619. [f] **Colessee has been held not liable** for lessee's tortious conduct in removing property after forfeiture of lease. MoA 29SW(2d)224.

197-31½-New. Where parties stipulated for vacation of premises on week's notice from landlord that premises had been leased to another tenant, landlord could not charge first tenant for repairs made after vacancy of premises. 136Misc591, 240NYS369.

197-32 223AppDiv140, 228NYS145. [d] **Fact that boiler and pipes were fixtures** which could not be removed without substantial damage to realty did not excuse their removal under contract. NJ Sup 148A161(1stcase).

198-37 See also NC 155SE863. [g] (2) Where statute provides that covenant shall not bind tenant to reconstruct buildings destroyed by fire without his fault or to pay for any part thereof, tenant who vacated part of premises rendered untenantable by fire for which he was not responsible is not liable for damages subsequently caused to remaining portion by action of elements to part of premises damaged by fire and in possession of landlord for purpose of repairs. 101WVa225, 132SE495. [k] **Tenant not bound to keep premises in repair** at all times as long as premises are left in same condition at end of term as they were at date of lease. 255Mass76, 151 NE81, 45ALR1. [l] **Covenant to deliver premises in as good order and condition as at time of lease** is to be construed in connection with provisions relating to reasonable wear and unavoidable casualties. 255Mass76, 151NE81, 45ALR1. [m] **Grazing privileges** are not appurtenant to land leased, and hence do not come under provision requiring return of property in same condition as received. 86Colo 202, 280P486.

198-40 223Ky603, 4SW(2d)388.

198-40½-New. Failure to replace iron fence, removed because of defective condition due to ordinary wear and tear, does not show as matter of law that waste has been committed. 252Mass352, 147NE823.

198-41 148Va331, 138SE637.

199-59 252Mass352, 147NE823.

199-59½-New. Landlord could not insist if performance of covenant of repair, where tenant asserted right to extension and term of lease had not expired. 252Mass352, 147NE823.

199-62 223Ky603, 4SW(2d)388.

199-63 [c] **Lease requiring restoration to original condition construed.** 318 Ill 416, 149NE420.

200-64 149Md163, 130A46 (independently of express covenant).

200-68 262Mass332, 159NE918.

200-74½-New. A landlord is under no obligation to rebuild after fire where there is no covenant to that effect, despite the fact that the tenant is not liable for rent until the premises are rebuilt. Ont [1927] 2DomLR219.

200-74½-New. A provision of a lease that improvements erected by the tenant shall become the property of the lessee on expiration of the lease does not require the tenant to rebuild improvements made by him and destroyed by fire. 131 Or302, 282P764.

200-75 101WVa225, 132SE495.

200-79 95PaSuper139.

201-95 [g] 21 OhA486, 153NE919. [i] **Exception contemplates deterioration in spite of ordinary care.**-86CalA610, 261P 331. [j] **Advertising signs painted on building** do not constitute ordinary wear and tear. 86CalA310, 261P331. [k] **Other illustrations of matters not constituting ordinary wear and tear.**-86CalA 310, 261P331.

202-3 [a] **Tenant is not exempted from liability for fire due to negligence.** 142 Wash259, 252P939. [b] **Whether tenant is exempted** from liability for damage from fire due to his own negligence depends on intention of parties. 142 Wash259, 252P939. [c] **Lessee is not exempted** from liability for damage from fire due to his own negligence unless lease clearly so provides. 142Wash259, 252P939.

202-12½-New. On cancellation of a lease of a farm and cows which lessee breached, and some of the leased cows died, lessor is entitled only to return of such leased stock as remained, where lessees had brought some cows of their own onto the farm. 142Wash489, 253 P822.

202-15½-New. Under a lease of a building for the manufacture of sal soda, exempting from liability for ordinary wear and tear, lessor cannot recover for injury resulting from manufacture in the usual manner. 22 OhA44, 153NE919.

202-15½-New. Landlord has option of suing on covenant or directly for waste. 223Ky603, 4SW(2d)388.

202-15¼-New. In Porto Rico the lessee and sublessees may be joined in an action after the expiration of the contract for delivery of leased urban property in the same condition in which they received it or to pay the cost of repairs and damages caused by fire. 33Porto Rico 350.

202-15¼-New. Where the lessee on expiration of the lease fails to restore the premises to the condition at the time of leasing, the lessor may recover for expenditures necessarily made in effecting such restoration. 178Minn391, 227 NW211.

202-15¼-New. An action is premature if begun before the expiration of a lease where the lease provides that lost personalty shall be paid for at the expiration of the lease. 101CalA592, 281P 1070.

202-15¼-New. Where the lessee fails to make repairs during the continuance of the lease, he need not be put in default before suit. 6LaA69.

202-17 [c] **Recovery under pleadings.**-223Ky603, 4SW(2d)388.

203-20½-New. In Porto Rico a complaint in an action against the lessee and sublessees after expiration of contract for delivery of leased urban property in the same condition in which they received it or to pay the cost of repairs and damages caused by fire need not allege that the fire occurred through the fault or negligence of the lessee. 33 PortoRico 350.

203-23 22 OhA44, 153NE919; 148Va 331, 138SE637.

203-27 148Va331, 138SE637. [a] **Proof by lessor that waste,** not considered as ordinary wear and tear, has been committed, requires lessee to show injury resulted from customary usage. 22 OhA 44, 153NE919.

203-34 [a] (2) 8LaA771. (6) To sustain verdict for tenant. 220Ky314, 295 SW152. [b] (2) To warrant judgment for lessee. 22 OhA44, 153NE919. [d] **Judgment for lessee** for injury resulting from manufacture of sal soda held unwarranted without proof that business was conducted in usual manner. 22 OhA 44, 153NE919.

203-36½-New. whether the tenant breached the covenant as to the condition of the premises at the expiration of the lease, MoA 238SW946.

203-37 94PaSuper602.

203-38 223Ky603, 4SW(2d)388.

203-38½-New. **Question of notice to restore** held for jury. 220Ky314, 295SW 152.

203-39 223Ky603, 4SW(2d)388. [b] **Instructions held proper.**-22 OhA44, 153 NE919; 142Wash259, 252P939. [c] **Instructions held erroneous.**-148Va331, 138 SE637. [d] **Instructions held erroneous or properly refused.**-94PaSuper602.

203-42 223Ky603, 4SW(2d)388; 86Pa Super189; 94PaSuper602.

204-44 318 Ill 416, 149NE420.

204-46 94PaSuper602 (evidence as to rental value held admissible).

204-55 77CalA610, 247P254; 84CalA 479, 258P426; 88CalA469, 263P838; 94 CalA66, 270P719; CalA 289P693; 103 Conn647, 131A408; 254Mass402, 150NE 89; Minn 233NW14; Mo 297SW32; NH 148A24; 103NJL474, 135A811, 58ALR 1450; NJ148A737; NJSup 133A78; 132 Misc402, 229NYS769; 194NC756, 140SE 744; 284Pa545, 131A537, 42ALR1081; 287Pa37, 134A467, 47ALR843; 86Pa Super173; TexCivA 289SW196. See also 232 IllA485. [d] **Contract provision.**-5LaA676.

205-56½-New. , nor can a tenant who has no lease or agreement, but merely pays rent base an action for personal injuries upon breach of contract. 232 Mich291, 205NW128.

205-57½-New. A landlord is not bound to repair in absence of a covenant, even if the premises are in a dangerous condition. NJSup 133A78.

205-57½-New. A master's duty to his servants is not the test of a landlord's duty to his tenants. NH 147A748.

205-59 108Conn676, 144A467; 39GaA 714, 148SE420; 222Ky238, 300SW615, 58ALR1430; 126Me403, 139A82, 58ALR 1405; 103NJL397, 135A794; 103NJL 474, 135A811, 58ALR1450; 129Misc906,

223NYS518; 121 OhSt432, 169NE443; TexCivA 292SW621.

206-67 35Ariz205, 276P322; CalA 284 P1077; 39GaA187, 146SE783; 222Ky 238, 300SW615, 58ALR1430; 126Me403, 139A82, 58ALR1405; 134Misc327, 235 NYS285; 153Tenn323, 283SW987. See also 2LaA409.

207-71½-New. The landlord is liable if, through a latent defect known to him, thin ice formed on stairs and caused injury to a tenant exercising care. 126 Me403, 139A82, 58ALR1405.

207-74 254NY64, 171NE908.

207-86 [a] **Landlord may not contract against liability to third persons.**-13LaA 277, 125S171.

208-87 TexCivA 292SW621, 623 [cit CJ].

208-88 122 Okl 31, 242P239.

208-89 Minn 233NW14.

208-90 36GaA44, 135SE220; 222Ky 238, 300SW615, 58ALR1430; 153Tenn 323, 283SW987.

208-92 34 OhA306, 170NE657.

208-93 287Pa37, 134A467, 47ALR843.

208-95 77CalA610, 247P254. But see Wis 233NW71.

208-97½-New. Lessor offering mechanical convenience as inducement to prospective tenant is bound to furnish appliance free from inherent and latent defect and warn tenant of inherent danger. Wash 291P1101 (folding bed).

208-98 103NJL566, 137A406, 407 [quot CJ]; 128Misc437, 218NYS269; 194NC 756, 140SE744. But see 287Pa37, 123 A467, 47ALR843. [a] **Under New York Tenement House Law,** landlord may be held liable. 128Misc437, 218NYS269.

209-7 103Conn647, 131A408.

210-10 254NY64, 171NE908.

210-13 267Mass183, 166NE577.

210-15 39GaA774, 148SE535; 39GaA 783, 148SE540(1stcase); 39GaA783, 148 SE540(2dcase). See also 8LaA13. [a] **In Porto Rico.**-32PortoRico 517, 519.

210-15½-New. Negligence in failure to keep premises in repair must be proximate cause of injury to justify recovery. 232Mich29, 205NW128.

211-24 243NY72, 152NE469.

211-26 243NY72, 152NE469. See also 132Misc402, 229NYS769.

211-28 122 Okl 31, 242P239.

211-31 163La185, 111S671.

211-32 163La185, 111S671.

211-35 2LaA112.

212-39½-New. Landlord is bound to know of defects. 163La185, 111S671.

212-41 CalA 290P660; Mass 172NE 602; Alta [1927] 2DomLR839.

212-42 92PaSuper537.

212-44½-New. In an action for injuries from a defective gas heater, it is no defense that the condition existed when tenancy began. 82NH415, 135A20, 52 ALR858.

212-44¾-New. Nor is it a defense that the gas heater was installed by the gas company. 82NH415, 135A20, 52ALR 858.

212-46 MoA 31SW(2d)229.

212-50½-New. The landlord will not be liable where a tenant uses a portion of the premises for a purpose not contemplated, for in such case the tenant is a mere licensee. 217AppDiv492, 217 NYS161 (use of fire escape for access to yard).

212-56 84CalA479, 258P426; Conn 151 A315; 262Mass317, 159NE728; 82NH 415, 135A20, 52ALR858; NH 148A24 (ordinary care to keep in safe condition); 130Misc714, 225NYS68; 218App Div494, 218NYS672; 27 OhA535, 161NE 365; TexCommnA 298SW534 [citCJ]; 144Wash387, 258P43.

213-57 258Mass123, 154NE556; 266 Mass267, 165NE124; Mass 169NE486; Mass 172NE526(2dcase); Mass 172NE 602.

213-58 26F(2d)594; 88CalA469, 263P 838; 103Conn647, 131A408; 108Conn 401, 143A635; 110Conn22, 148A139 (porch railing adjacent to stairway); Conn 151A315; 222Ky150, 300SW359, 58ALR1423; 235Ky204, 30SW(2d)900; 266Mass267, 165NE124; Mass 169NE 422; Mass 173NE413; MoA 68SW(2d) 978; 82NH294, 133A24; NH 148A24; 103NJL397, 135A794; NJ 148A737; 245NY615, 157NE880; 254NY64 171NE 908 (duty to repair); 222AppDiv449, 226NYS683; 125Misc73, 210NYS31; ND 231NW609; 23 OhA363, 155NE404; 25 OhA393, 158NE238; 27 OhA535, 161NE 365; 284Pa545, 131A537, 42ALR1081; 95PaSuper574; Wis 233NW71; Alta [1929] 4DomLR395 (defective condition constituting trap). [f] **Whether stairway was reserved by landlord is matter of intention.**-Conn 152A154.

214-59 258Mass12, 154NE187; 267 Mass183, 166NE577.

214-62½-New. The landlord's duty requires him to keep stairways in as safe condition structurally as they were at the beginning of the term. 126Me403, 139A82, 58ALR1405.

214-62⅓-New. Slippery condition of stairs while being washed, causing injuries to a tenant, does not make out a cause of action against the owner. 131 Misc475, 227NYS160.

214-62¼-New. A landlord is not liable for injuries to a tenant's roomer due to defects in a ladder leading to the roof which he was climbing to gratify his curiosity. 88CalA469, 263P838.

214-63 But see 204Cal 509, 269P437, 59 ALR435.

214-68 234 IllA403; 254Mass484, 150 NE225; 259Mass90, 155NE868; 263 Mass51, 160NE335; 265Mass233, 163NE 898; NH 147A748; 104NJL381, 140A 423; 253NY440, 171NE699; 134Misc 637, 236NYS299; ND 231NW609 (light over entrance steps); 118 OhSt334, 160 NE850; 27 OhA38, 160NE724; 300Pa 166, 150A299; Alta [1928] 1DomLR59. But see 88PaSuper381.

214-69 259Mass90, 155NE868.

214-70 259Mass90, 155NE868.

214-71 317Mo 1156, 298SW226. But see 265Mass233, 163NE898.

214-72 242NY262, 151NE447. [a] (2) Statute does not require light in stairway not designated by building commissioner as "main stairway." 263 Mass51, 160NE335. [b] (2) Under Tenement House Act § 126, owner of tenement houses over two stories high must keep lights burning on ground and second floors all night and not merely till 10 P. M. as on upper floors of building. 102NJL245, 131A631. (3) Duty of maintaining lights rests with one in control and possession of that portion of premises; lessee having full control the owner is not liable. NJ 150 A365. [c] (12) Under Tenement House Law, landlord is required to maintain light only when tenement house department has ordered its installation. 242 NY262, 151NE447. (13) Failure to light stairways of building not tenement house is not negligence. 219AppDiv 201, 219NYS553. (14) Building department's certificate of occupancy issued brief time before accident held to justify owner's leasing of premises not tenement house. 219AppDiv201, 219 NYS553. (15) Under building code of city of New York, where owner knowingly permitted stairway to remain in darkness, he was guilty of negligence. 132Misc485, 230NYS201. [e] **In Connecticut.**-108Conn401, 143A635. [f] **Lighting of cellar** held not within requirement of statutes. 111Conn22, 149 A139.

215-73 NJSup 140A924; NJSup 150A 223(1stcase) (holding landlord not absolute insurer against failure of lighting).

215-77 258Mass123, 154NE556.

215-78 136Misc404, 241NYS436 (violation held proximate cause of injury). But see Wis 233NW71.

215-79 317Mo 1156, 298SW226; 285Pa 193, 131A670.

215-81½-New. An unlocked door of an automatic elevator in an apartment house is an invitation by the landlord to a tenant's invitee to enter it. 146 Wash251, 262P643.

215-82 285Pa193, 131A670.

216-88 But see 267Mass44, 165NE696.

216-93 204Cal 145, 266P798; 147Wash 538, 266P185, 57ALR959. [a] **Landlord knowing automatic elevator would be run by number of persons** must exercise greater care in its selection. 158Md367, 148A543.

216-95½-New. Elevator without operator. Landlord providing freight elevator without operator owes to tenant and other lawfully on premises use of reasonable care in its construction and maintenance, 215AppDiv566, 214NYS 313.

216-95¼-New. and to see that it is reasonably safe for purpose for which used. 215AppDiv566, 214NYS313 (elevator shaft should be protected by sufficient guard or gate to prevent anyone from falling into it).

216-95¾-New. Landlord must exercise great care in selection and maintenance of elevators. 158Md367, 148A543.

216-97 NJSup 145A476.

216-98 82NH415, 135A20, 52ALR858.

217-9 103Conn647, 131A408; MoA 23 SW(2d)651; Alta [1930] 1DomLR179 (balcony). [a] **Post of veranda** is included in lease if veranda itself is included therein. 103Conn647, 131A408.

217-11 284Pa545, 131A537, 42ALR 1081.

217-12 NJ 151A640.

217-14½-New. A landlord in possession and control of a party wall must exercise reasonable care to maintain the wall in a reasonably safe condition, and is liable to tenants for damages suffered by them by reason of his failure to do so. TexCommnA 298SW534.

217-17 See also 29 OhA32, 163NE46.

217-18 129Misc342, 221NYS488.

217-20 258Mass377, 155NE4.

217-26½-New. The landlord is not liable for injuries to a tenant on a portion of the premises not included in the lease and used only by permission. 232 IllA 485.

217-26⅓-New. Permissive use of a hydrant in a washroom by a tenant imposes no duty on the landlord to repair or render the hydrant safe for use where it does not appear that the use of the hydrant was in common with other tenants. 222Ky238, 300SW615, 58 ALR1430.

217-27 94CalA66, 270P719; 92Fla652, 109S585, 588 [citCJ]; NJSup 133A78; 128Misc437, 218NYS269; 132Misc402, 229NYS769; 144Va473, 132SE179; 194 Wis167, 215NW816; BC [1928] 2Dom LR54.

218-35½-New. A stipulation in a lease relieving the lessor from liability for his negligence and that of his employees is valid. 179Minn25, 228NW175.

218-37 214Ala542, 108S362; 245NY 256, 157NE129. [a] **Contributory negligence.**-85PaSuper248.

218-37½-New. A tenant is not required to show that the defect has been made worse to hold the landlord for negligence in making gratuitous repairs. 245 NY256, 157NE129.

219-43 214Ala545, 108S362.

219-44½-New. Where a lease relieves the lessor from liability for accidental damage from specified causes or damage caused by employees, he is protected in making repairs authorized but not required. 179Minn25, 228NW175.

219-46 NJSup 149A538; 228AppDiv 557, 240NYS280 (liable only for danger inherent in work done).

219-49 228AppDiv557, 240NYS280 (negligence held not inherent in work done). [a] **Landlord is liable for own negligence** in not remedying defect resulting from contractor's negligent work. 214Ala545, 108S362.

219-50 Mo 25SW(2d)96.

219-51½-New. Landlord may be liable as joint wrongdoer for injuries following unauthorized entry of his contractor to make repairs. Mo 25SW(2d)96.

219-52 137Misc71, 241NYS472.

220-53 126Me403, 139A82, 58ALR1405; 254Mass402, 150NE89; Mass 169NE 486; 179Minn104, 228NW352; 219App Div529, 220NYS461; 218AppDiv686, 218NYS476; 192Wis326, 212NW526.

220-54 192Wis326, 212NW526.

220-58 26F(2d)594. But see Mass 169 NE918(1stcase).

220-59 See also 247NY94, 159NE874.

220-60½-New. A landlord can, by contract, assume the obligation to remove snow and ice. 126Me403, 139A82, 58 ALR1405.

220-63 125Misc651, 211NYS708 (dictum); TexCivA 292SW950; Can [1930] 2DomLR891.

220–64 258**Mass**1, 154**NE**265, **49ALR** 562.

221–69 3**LaA**228. [a] **Where landlord fully parts with possession,** he need not inspect and is not liable for injuries from defects without actual knowledge or notice and failure to repair. 39 **GaA**774, 148**SE**535.

221–70 224**AppDiv**160, 229**NYS**674.

221–74 258**Mass**477, 155**NE**637.

221–76 105**NJL**126, 143**A**323.

221–77½–New. Landlord is liable for failure to keep promise to make repairs after being notified by tenant of water seeping through ceiling. 34 **OhA**317, 170**NE**599.

221–78 103**Conn**647, 131**A**408.

222–85 **MoA** 31**SW(2d)**229.

222–86½–New. Landlord's failure to inspect premises does not of itself give rise to liability for failure to keep premises reasonably safe, although such fact may tend to show actual knowledge of condition. 103**Conn**647, 131**A**408.

222–87 39**GaA**774, 148**SE**535 (defects arising from proper use); 39**GaA**783, 148**SE**540(1stcase); 39**GaA**783, 148**SE** 540(2dcase); 82**NH**415, 135**A**20, 52 **ALR**858.

222–89 13**LaA**298, 127**S**22; 32**Porto Rico** 517. [b] (2) Provisions as to subletting and use held no defense to lodger's action for injuries. 13**LaA**83, 126 **S**739.

222–90 36**GaA**100, 135**SE**508; 126**Misc** 563, 214**NYS**136.

222–94 See also 32**PortoRico** 517. But see 36**GaA**100, 135**SE**508.

222–95½–New. Notice to a tenant of injury is not notice to an "occupant" of the premises under statute. 259**Mass** 336, 156**NE**697.

222–97 94**CalA**66, 270**P**719.

222–98 103**NJL**397, 135**A**794.

222–1 **Conn** 151**A**315; 245**NY**615, 157 **NE**880; 219**AppDiv**529, 220**NYS**461; 131**Misc**34, 225**NYS**446; 85**PaSuper**248 (gratuitous repair by landlord). See also 285**Pa**166, 131**A**668. [c] **Contributory negligence not shown.**–13**LaA**83, 126 **S**739; 13**LaA**298, 127**S**22.

223–2½–New. Even when the landlord has covenanted to repair defects or is guilty of constructive fraud in concealing hidden defects of which he has knowledge, the lessee may not recover damages for injuries, to which his own negligence proximately contributed. 94 **CalA**66, 270**P**719.

223–3 39**GaA**621, 147**SE**913; 126**Me** 403, 139**A**82, 58**ALR**1405; 104**NJL**381, 140**A**423; 219**AppDiv**529, 220**NYS**461; 85**PaSuper**248 (trifling outlay of time and money). [b] **Absence of light on stairway** did not constitute latent defect which could not be avoided by person exercising ordinary diligence. 134 **Misc**637, 236**NYS**299.

223–4 **Conn** 151**A**315; 10**LaA**85, 122**S** 90; 82**NH**294, 133**A**24; **NJSup** 151**A** 484. See also 103**Conn**647, 131**A**408.

223–4½–New. An invitee of a tenant in an apartment house has the right to assume, when he opens the door of an automatic elevator, that the elevator is at the floor. 146**Wash**251, 262**P**643.

223–5 94**CalA**66, 270**P**719; **CalA** 289**P** 693; 39**GaA**774, 148**SE**535; 39**GaA**783, 148**SE**540(2dcase); 39**GaA**783, 148**SE** 540(1stcase); 103**NJL**397, 135**A**794; **NJSup** 150**A**223(1stcase); 131**Misc**34, 225**NYS**446. See also 285**Pa**166, 131**A** 668. [a] (2) It is duty of renter to exercise reasonable care and diligence in inspecting premises which he proposes to rent. 94**CalA**66, 270**P**719. [d] (1) 39**GaA**714, 148**SE**420. (2) 36**GaA** 469, 137**SE**130. [e] **Landlord's duty to repair under statute** does not justify tenant's failure to avoid injury from unsafe condition of premises. 215**App Div**144, 213**NYS**62. [f] **Duty to use greater care.**–217**AppDiv**396, 217**NYS** 119.

224–6 **CalA** 290**P**660; **Conn** 151**A**315; 36**GaA**469, 137**SE**130; 215**AppDiv**144, 213**NYS**62.

224–6½–New. Plaintiff has burden of proving absence of contributory negligence in such case. 215**AppDiv**144, 213 **NYS**62.

224–10 102**NJL**626, 133**A**401; **NJ** 151**A** 640. But see 215**AppDiv**144, 213**NYS** 62; **TexCivA** 5**SW(2d)**869.

224–10½–New. In such case the tenant's only remedy is for damages is result of breach of covenant. 215**AppDiv** 144, 213**NYS**62.

224–11 **NJ** 151**A**640.

224–12 **Mass** 173**NE**424; 144**Wash**387, 258**P**43, 47 [quotCJ]. [a] **Landlord's wrongful acts must have been proximate cause of injury.**–205 **Iowa**1369, 219 **NW**399 (to tenant's boarder).

224–13 102**CalA**557, 283**P**97; **CalA** 290 **P**505; 108**Conn**401, 143**A**635; 39**GaA** 774, 148**SE**535; 163**La**59, 111**S**495; **MoA** 23**SW(2d)**651; **NJ** 148**A**737; 216**App Div**558, 215**NYS**502; 285**Pa**193, 131**A** 670; 287**Pa**37, 134**A**467, 47**ALR**843; 32 **PortoRico** 517; 135**Wash**588, 238**P**631 (implied agreement of landlord to keep light burning, based on conditions existing at time of letting); 144**Wash**387, 258**P**43, 47 [quotCJ].

224–14 144**Wash**387, 258**P**43, 47 [quot CJ].

224–15 254**Mass**402, 150**NE**89; 254 **Mass**484, 150**NE**225; 259**Mass**90, 155 **NE**868; 265**Mass**233, 163**NE**898; **Mass** 173**NE**413; 103**NJL**517, 138**A**307; 144 **Wash**387, 258**P**43, 47 [quotCJ].

224–15½–New. An innkeeper is not an insurer of his guest's safety, and his landlord owes no higher duty. **Tex CivA** 292**SW**950.

224–15¼–New. A hotel guest injured by jumping when cut off from a statutory fire escape is not entitled to recover from the lessor who has complied with the law. **TexCivA** 292**SW**950.

224–15¼–New. A hotel building lessor is not negligent in constructing walls and ceilings of beaverboard in absence of proof that it was not frequently so used. **TexCivA** 292**SW**950.

225–16 103**NJL**517, 138**A**307.

225–18 39**GaA**774, 148**SE**535; 39**GaA** 783, 148**SE**540(1stcase); 39**GaA**783, 148**SE**540(2dcase); 287**Pa**37, 134**A**467, 47**ALR**843.

225–19½–New. Lessee cannot, by assuming the obligation, absolve the owner from his responsibility. 163**La**59, 111**S**495.

225–19⅓–New. A landlord is not liable to a tenant's guests for injuries caused by the tenant's negligent maintenance of the premises. 83**NH**64, 139**A** 86.

225–19¼–New. User of elevator need not anticipate in absence of notice that door would suddenly close on fingers. 158**Md**367, 148**A**543.

225–20 287**Pa**37, 134**A**467, 47**ALR**843.

225–20½–New. Entrance to a cellar, guarded by door, does not constitute a nuisance per se to make the landlord liable. 287**Pa**37, 134**A**467, 47**ALR**843.

225–23 See also 214**Ala**281, 107**S**811.

225–24½–New. , or by lessee's contract of assumption of risk of injury to third parties, where owner's statutory duty to repair results in a cause of action ex debito. 163**La**59, 111**S**495.

226–25 216**AppDiv**558, 215**NYS**502.

227–37 **MoA** 23**SW(2d)**651 (landlord held not required to anticipate that boys would climb high railing across side of stairway enclosure); 217**AppDiv**492, 217**NYS**161.

227–39 31 **OhA**158, 166**NE**425; **Ont** [1929] 1**DomLR**160.

227–40 285**Pa**193, 131**A**670.

227–47 92**Fla**652, 109**S**585, 588 [cit CJ]; 39**GaA**774, 148**SE**535; 39**GaA** 783, 148**SE**540(1stcase); 39**GaA**783, 148 **SE**540(2dcase). [c] **Concubine of tenant** can recover. 32**PortoRico** 517. [d] **Lessee's paramour.**–3**LaA**769.

228–49 39**GaA**714, 148**SE**420; 137**Wash** 293, 242**P**14. [a] **Tenant held not liable** for injuries to minor child from falling into unguarded light well on roof. 137**Wash**293, 242**P**14.

228–57 77**CalA**610, 247**P**254; **TexCivA** 296**SW**680; 153**Wash**23, 279**P**120.

229–64 **TexCivA** 296**SW**680, 681 [cit CJ].

229–65 153**Wash**23, 279**P**120. [a] **Landlord not liable for injuries to first floor tenant** on stairway under control of second floor tenants. **Conn** 152**A**154.

229–70 317**Mo** 1156, 298**SW**226. [a] **Action against lessee.**–226**AppDiv**610, 235**NYS**431.

229–74 **Mass** 172**NE**602; 125**Misc**73, 210**NYS**31; 224**AppDiv**160, 229**NYS**674; 137**Misc**71, 241**NYS**472.

229–75 **Mass** 172**NE**602.

230–79½–New. A painter in the employ of a tenant when using a lavatory is an invitee. 29 **OhA**32, 163**NE**46.

231–93 251**NY**446, 167**NE**582.

231–98 229**Ky**693, 17**SW(2d)**720, 66 **ALR**1390; 128**Misc**18, 217**NYS**192 (dictum); 129**Misc**315, 221**NYS**198; **Can** [1927] 2**DomLR**835; **Alta** [1927] 2**Dom LR**839. [c] **Gratuitous repairs.**–128 **Misc**18, 217**NYS**192 (dictum).

231–99½–New. There is no common-law duty resting on a landlord to equip or maintain a building with auxiliary fire apparatus. 229**Ky**693, 17**SW(2d)** 720, 66**ALR**1390.

231–1 [b] **Where landlord suspects** defect dangerous to tenant's occupancy, he is liable to tenant for damages to tenant's property resulting from such defect. 82**NH**100, 130**A**216, 43**ALR**1281.

232–3 82**NH**100, 130**A**216, 43**ALR**1281.

232–3½–New. Landlord is not liable for defect in building unless he knew that such defect will cause damage to tenant property. 82**NH**100, 130**A**216, 43**ALR** 1281.

232–5½–New. Under Louisiana statute a landlord is liable for damages to a tenant's property from fire produced by defective electric wiring. 6**LaA**91(2d case).

232–8 229**Ky**693, 17**SW(2d)**720, 66**ALR** 1390; **Can** [1927] 2**DomLR**835; **Ont** [1929] 4**DomLR**514.

232–10½–New. Where a landlord rents premises but reserves the right to remodel them, he is under duty not to injure the tenant's property. **TexCivA** 9**SW(2d)**1047.

232–12 39**GaA**799, 148**SE**614(2dcase).

232–17½–New. Where a statute requires a lessor of a building intended for human habitation to put it in condition fit for such occupation and to repair all subsequent dilapidations, and authorizing the tenant to make necessary repairs where the landlord fails to do so after notice and to deduct the amount from the rent or to recover the same or to abandon the premises, the tenant cannot recover damages for injuries to his property due to the landlord's failure to repair. 121 **Okl** 115, 247**P**665.

232–18 128**Misc**18, 217**NYS**192.

233–26 90**CalA**692, 266**P**369; **NJ** 150**A** 427 (holding roof to stand on same basis, regarding landlord's liability, as passageways, stairs, etc.); 131**Misc**623, 227 **NYS**591; 95**PaSuper**219 (promise to repair defect); **TexCivA** 296**SW**680.

233–27 136 **Okl** 55, 275**P**1054. See also 254**Mass**290, 150**NE**90, 43**ALR**1280.

233–32 See also 223**AppDiv**621, 229**NYS** 169.

233–33 **NJ** 150**A**427.

233–34 **NJ** 150**A**427 (storeroom, where tenants and landlord had designated parts, was not in possession or control of landlord).

234–39 115 **Or**608, 239**P**105, 43**ALR** 1285.

234–43 222**Ky**150, 300**SW**359, 58**ALR** 1423; 234**Ky**665, 28**SW(2d)**974; 128 **Misc**15, 217**NYS**192; **TexCivA** 296**SW** 680; **Va** 152**SE**332. [a] **Failure to provide means for cutting off water.**–**Va** 152 **SE**332 (freezing and bursting of pipes).

234–45 234**Ky**665, 28**SW(2d)**974 (duty to use ordinary care).

234–48 128**Misc**18, 217**NYS**192.

234–49 128**Misc**18, 217**NYS**192.

234–50 128**Misc**18, 217**NYS**192.

235–54 **Va** 152**SE**332.

235–63 229**Ky**693, 17**SW(2d)**720, 66 **ALR**1390.

235–66 129**Misc**315, 221**NYS**198.

235–67 128**Misc**18, 217**NYS**192.

235–68 128**Misc**18, 217**NYS**192.

236–69 259**Mass**103, 156**NE**17.

236–70 [a] **Thus** landlord is not liable for janitor's failure to turn off escaping steam in absence of showing that damage occurred after janitor learned of such fact. 125**Misc**815, 211**NYS**570.

236–75 [a] **Lease exempting landlord from liability** for steam leakage does not exempt him from liability for negligence, or to repair defects called to his attention. 253**NY**453, 171**NE**704.

236-76 222**AppDiv**148, 225**NYS**589. But see **Alta** [1930] 3**DomLR**939.
236-77 90**CalA**692, 266**P**369; **Mass** 169 **NE**908.
236-84 **IndA** 163**NE**839; **Mass** 172**NE** 894; 152**Miss**117, 118**S**705; 135**Misc** 666, 239**NYS**344.
237-94 9**LaA**334, 120**S**498(2dcase); 125 **Misc**176, 210**NYS**422. [a] **Repairs made prior to beginning of term** while tenant was on premises with permission of landlord. 9**LaA**334, 120**S**498(2dcase).
237-96 See also 127**Misc**318, 216**NYS** 745.
237-98½-New. Notice to landlord of defective roof is necessary to his liability for damages for negligence causing leak. 223**AppDiv**621, 229**NYS**169.
237-99 But see 90**CalA**692, 266**P**369.
238-15 129**Misc**315, 221**NYS**198.
238-20 259**Mass**197, 156**NE**29.
239-32½-New. Sublessor, having no control over roof, held not liable to a subtenant for damage by rain leaking through the roof. 131**Misc**623, 227**NYS** 591.
239-37 39**GaA**774, 148**SE**535; 231**Ky** 779, 22**SW(2d)**274; 235**Ky**483, 31**SW (2d)**716; **NJ** 150**A**386 (stranger could not recover in absence of showing landlord's right to enter and repair); 241 **NY**470, 150**NE**519; 243**NY**490, 154**NE** 535; 246**NY**85, 158**NE**29; 19 **OhA**374; 129 **Okl** 10, 262**P**1066; 284**Pa**545, 131**A** 537, 42**ALR**1081. See also **Mass** 173**NE** 512. [a] 128**Me**349, 147**A**421. [b] (2) Ordinance requiring overhead guard on freight elevators may impose initial duty on owner of building. 116**Nebr** 418, 217**NW**952 (proximate cause of injury). [d] **Where act of occupier is not connected with conduct** of apartment house, owner is not responsible for injury resulting from negligent condition of premises. 284**Pa**545, 131**A**537, 42 **ALR**1081.
239-38 77**CalA**610, 247**P**254; 284**Pa**545, 131**A**537, 42**ALR**1081.
240-44 243**NY**490, 154**NE**535. [a] **Landlord under no duty** to see that sign erected on face of building is properly maintained after his consent had been given to erection. 243**NY**490, 154**NE**535.
240-46 129 **Okl** 10, 262**P**1066; 284**Pa** 545, 131**A**537, 42**ALR**1081.
240-46½-New. Lessor of building being demolished by tenant is not liable for death of pedestrian due to collapse of scaffolding. 241**NY**470, 150**NE**519.
240-47 296**Pa**126, 145**A**706. [b] **Negligence of tenant as to sidewalks** not attributable to landlord. 231**Ky**779, 22 **SW(2d)**274.
240-53 19 **OhA**374. Contra 87**PaSuper**6.
240-55 But see 246**NY**85, 158**NE**29.
241-59 220**MoA**863, 294**SW**1022; 102 **NJL**307, 131**A**905; **NJSup** 136**A**410; 19 **OhA**374.
241-64 220**MoA**863, 294**SW**1022; **NJ Sup** 136**A**410.
241-65½-New. Lessor of building is liable for injuries to stranger caused by fall of sign defectively fastened to building by tenant of part of premises, where entire building was leased to one subject to existing leases. 216**AppDiv**719, 214**NYS**205.
241-65½-New. A landlord leasing a whole building to another has been held not liable for continuing nuisance maintained by the tenant. 243**NY**490, 154**NE** 535.
241-65¼-New. A landlord, leasing property on which a nuisance exists, may be liable for damages from such nuisance thereafter if circumstances warrant. 243**NY**490, 154**NE**535.
241-65⅓-New. It is not a tort to lease property licensed as legitimate although the use may be dangerous. 128**Me**349, 147**A**421.
241-66 128**Me**349, 147**A**421.
241-69 **Iowa** 226**NW**928.
242-73 128**Me**349, 147**A**421; 19 **OhA**374.
242-74 246**NY**85, 158**NE**29.
242-77 255**Mass**35, 150**NE**905.
243-83 102**NJL**307, 131**A**905; 19 **OhA** 374.
243-90 81**CalA**76, 253**P**158; 96**CalA**345, 274**P**407; **MoA** 23**SW(2d)**651; 23 **OhA** 636, 155**NE**404. See also 218**AppDiv** 494, 218**NYS**672. [a] **Negligence necessary.-MoA** 23**SW(2d)**651. [b] **Trespassers.-MoA** 23**SW(2d)**651.
243-91 246**NY**85, 158**NE**29.
243-93 96**CalA**345, 274**P**407; 255**Mass** 35, 150**NE**905; 176**Minn**156, 222**NW**913; 217**NYS**36 (dictum).
244-95 [b] **Sidewalk elevator.-218App Div**145, 218**NYS**36.
244-96 255**Mass**35, 150**NE**905; 217 **NYS**36.
244-97 [a] **Grating over areaway** must be kept in repair. 215**AppDiv**500, 214 **NYS**6.
244-1 284**Pa**545, 131**A**537, 42**ALR**1081.
244-3 But see 221**MoA**993, 295**SW**830.
245-14 232 **Ill**A485 (dictum); 259**Mass** 103, 156**NE**17; 296**Pa**126, 145**A**706. [d] (2) Tenant is liable for failure to exercise reasonable care only so long as he is in control of premises, and if use is merely permissive, liability does not exist unless he is holding over. 285**Pa** 166, 131**A**668. [g] **Joint occupancy** of tenant with owner makes him equally bound to avoid injury to owner's invitee. 108**Conn**226, 142**A**739.
246-15 29 **OhA**513, 163**NE**918. But see 102**NJL**307, 131**A**905.
246-19½-New. The duty of a tenant toward a mere licensee is only to protect him from willful or wanton injury. 285**Pa**166, 131**A**668.
246-20½-New. Contributory negligence. Licensee who is guilty of contributory negligence, as where he knows of a defect, cannot recover from a tenant in possession of buildings. 285**Pa**166, 131 **A**668.
246-22 226**AppDiv**610, 235**NYS**431.
246-26 [a] **In action by employee of subtenant against lessee,** based on violation of labor law, common-law rules of negligence actions are not applicable. 226**AppDiv**610, 235**NYS**431.
247-38 59 **OntL**579, [1927] 1**DomLR** 235. [a] **Areaway in public sidewalk covered by grating,** not part of demises to tenant. 215**AppDiv**500, 214**NYS**6.
247-41 **Conn** 152**A**156.
248-56 **CalA**, 287**P**526 (lessee must exercise ordinary care). See also 284**Pa** 545, 131**A**537, 42**ALR**1081. [d] **That hydrant box was defective at time of lease** did not relieve lessee from exercise of ordinary care. **CalA** 287**P**526 (actual use of hydrant is immaterial).
248-57 But see **Mass** 170**NE**812.
248-61½-New. A tenant is not liable for injuries to a pedestrian who fell after stepping into a minute depression in the sidewalk caused by wear and travel of years, in the absence of showing of duty of the tenant to repair. 203 **Iowa**195, 212**NW**484.
248-61⅓-New. In the absence of affirmative acts of conduct causing the defect in the sidewalk, he is not liable to a pedestrian injured thereby. 203 **Iowa**195, 212**NW**484.
248-61¼-New. A trespasser has been held not entitled to recover against lessee. 235**Ky**483, 31**SW(2d)**716.
248-62 **MoA** 21**SW(2d)**919.
248-62½-New. But the tenant is under no obligation to keep the premises in any better repair than at the time of letting, although the defect constitutes a nuisance; 102**NJL**307, 131**A** 905.
248-62⅓-New. and where there has been no change in condition of premises during tenant's occupation, the landlord alone, and not the tenant, is liable. 102**NJL**307, 131**A**905.
248-63 13**LaA**277, 125**S**171. [a] **Where plaintiff also assumed responsibility** for elevators, he could not sue other lessee on latter's assumption of responsibility. 13**LaA**277, 125**S**171.
248-64 267**Mass**44, 165**NE**696 (use of elevator). [a] **Covenant indemnifying lessor not invalid as against public policy.-267Mass**44, 165**NE**696.
248-64½-New. A tenant's invitee using an elevator is a mere licensee as to the landlord, who is not liable where the tenant agreed to use it in common with others at his own risk and not to claim injury from its operation. 266**Mass**90, 164**NE**914.
249-69 **Iowa** 226**NW**928; 259**Mass**379, 156**NE**714.
249-72 93**PaSuper**533.
249-73 255**Mass**35, 150**NE**905.
249-75½-New. A tenant of part of premises is not liable to a stranger injured on an icy sidewalk resulting from a defect in a rain spout where the lessor had agreed to make repairs and the injured person was not transacting business with the tenant. 93 **PaSuper**533.
249-76 259**Mass**379, 156**NE**714.
249-77 **MoA** 21**SW(2d)**919; 87**Pa Super**6. But see 321**Mo** 766, 12**SW(2d)** 491, 62**ALR**1056. [a] **Landlord's obligation to repair** did not relieve tenant. **MoA** 21**SW(2d)**919.
249-79 114**Nebr**573, 208**NW**667.
250-84 259**Mass**336, 156**NE**697 (notice held not to occupant of house).
250-85½-New. Emergency Rent Law is not applicable to actions for injuries by tenants, paying over twenty dollars per room, who could have removed from premises. 131**Misc**34, 225 **NYS**446.
250-85½-New. Tenant's action for injuries is ex delicto pending rental contract and connected with it as regards damages. 13**LaA**298, 127**S**22.
250-85¼-New. Tenant's action against landlord for violation of statute is governed by ordinary rules of negligence. **NJ** 150**A**365.
250-87 68**CalA**117, 228**P**667; 88**CalA** 469, 263**P**838; 222**Ky**150, 300**SW**359, 58**ALR**1423; 34 **OhA**306, 170**NE**657. [a] (2) Petition held insufficient. 40 **GaA**500, 150**SE**433. [d] 214**Ala**542, 108 **S**362; 35**Ariz**205, 276**P**322; 84**CalA**479, 258**P**426; 92**Fla**652, 109**S**585; 36**GaA** 469, 137**SE**130; 39**GaA**187, 146**SE**783; **IndA** 163**NE**839; 128**Kan**423, 278**P**45; **OhA** 172**NE**679; **TexCivA** 296**SW**680. [f] **Complaint held sufficient.-96CalA** 345, 274**P**407. [g] **Complaint declared not to show negligence.-NJSup** 129**A** 484. [h] **Petition held insufficient.-39 GaA**714, 148**SE**420; 156**Md**310, 144**A** 478; 134**Misc**105, 234**NYS**486. [i] **Complaint held insufficient** to state cause of action. **Ala** 128**S**376.
250-88 36**GaA**100, 135**SE**508; 41**GaA** 560, 153**SE**619; **NJSup** 133**A**78; 192 **Wis**326, 212**NW**526. See also 39**GaA** 621, 147**SE**913. But see 214**Ala**542, 108 **S**362.
250-88½-New. But under a statutory provision for the liberal construction of pleadings, it is sufficient to allege facts on which the rule of res ipsa loquitur may be based. 29 **OhA**32, 163 **NE**46.
250-89 [a] **Inference of contributory negligence** not raised by pleading. **OhA** 172**NE**679.
250-91 36**GaA**100, 135**SE**508.
250-93½-New. A declaration in an action by a tenant of the lower floors of a building for damages to his goods caused by the falling of an upper floor, alleging that the fall was due to overloading by a tenant of an upper floor with the landlord's authority and consent, charges liability of the landlord and the tenant of the upper floor as joint tort-feasors. 107**WVa**226, 148**SE** 193.
251-97 [d] 38**GaA**517, 144**SE**341(2d case).
251-3½-New. Where an original complaint showed that an agreement to repair was made after entry under the lease, refusal to permit filing of a substitute complaint, showing that the tenant executed the lease only after the landlord promised to repair is error. 108**Conn**676, 144**A**467.
251-11 [a] (8) From injury to tenant's guest while attempting to use automatic elevator which was absent from floor, though door was open. 144**Wash** 387, 258**P**43. (9) From sudden and violent eruption of steam into bowl of lavatory. 29 **OhA**32, 163**NE**46. (10) Water escaping from one floor to another. **TexCivA** 14**SW(2d)**367. [b] (7) From falling into disused cesspool. 103**Conn**267, 130**A**571. (8) From collapse of building. 254**Mass**290, 150**NE** 90, 43**ALR**1280. (9) From falling down stairway after catching foot in torn rubber matting. **CalA** 290**P**660. [e] **That plaintiff's contributory negligence is question for jury** does not prevent application of doctrine. 146**Wash** 251, 262**P**643.

251-11½-New. Explosion of steam pipe is reasonably inferred to be due to defective pipe, hence to landlord's negligence, in absence of explanation. 253NY453, 171NE704.

251-13 36GaA100, 135SE508 (notice); Mass 173NE413; NJSup 137A414; 285 Pa166, 131A668; 300Pa1, 149A644.

251-14 215AppDiv144, 213NYS62.

252-20 Mass 172NE526(2dcase).

252-20½-New. Repairs by the landlord after injury to a tenant have been held not to raise the presumption of liability. 232 IllA485.

252-20½-New. The fact that the owner occupies part of a house leased to others raises no presumption of liability against him for injury to persons through negligence of a tenant. 284Pa545, 131A537, 42ALR1081.

252-20¼-New. Joint occupation of premises by the landlord and others raises no presumption as to liability of landlord or owners for injury occurring on or from the premises. 284 Pa545, 131A537, 42ALR1081.

252-20½-New. In an action against a landlord for injuries from falling on a common stairway at the entrance of a building leased to different tenants, it was not incumbent on plaintiff to prove, in order to establish the landlord's duty, that the landlord had actually undertaken to remove ice and snow from the steps, and pursued a course of conduct such as would entitle plaintiff or tenants to rely on its doing so. 26F(2d)594.

252-20½-New. Plaintiffs, offering no evidence that a gas heater vent pipe, displacement of which, so as to discharge noxious gases into a bathroom, was relied on in the complaint as a proximate cause of the tenant's death, was disconnected, or even that the gas heater was lighted, when the body was discovered, could not recover from defendant landlord. 94CalA66, 270P719.

252-22 262Mass317, 159NE728; Mass 173NE413; Mass 173NE512; Wash 286 P46. [d] **Incompetent evidence** not admissible. 101NJL526, 129A485. [e] **Precautions against injury.**-129Misc574, 221NYS747. [f] **Prejudicial error to admit evidence** that landlord warned tenant to guard opening to basement elevator. 218AppDiv145, 218NYS36. [g] **Evidence erroneously excluded.**-222 AppDiv449, 226NYS683.

252-27½-New. Testimony admissible on issue of whether tenant's employee suing landlord was a trespasser, licensee, or invitee is not to be excluded because it relates to a situation of the premises existing prior to the accident and before alteration of building. 20 OhA307, 152NE205.

252-27½-New. Use to which premises were put by tenant may be shown in an action against the landlord for injuries from a defective condition thereof. 103Conn647, 131A408.

252-27¼-New. And where injuries resulted from the giving way of a corner post of a veranda, testimony of a police officer as to empty beer kegs piled on the veranda and against the railing some years before the accident is admissible to show unjustifiable use. 103Conn647, 131A408.

252-27⅞-New. But in the absence of evidence that such use was the proximate cause of the injury, recovery will not be defeated. 103Conn647, 131A408.

252-28 81CalA76, 253P158; 103Conn 647, 131A408; Conn 152A154. [a] **Fact that landlord's employees used trapdoor** on roof of veranda is of small significance as matter of law in determining landlord's control of premises. 103Conn647, 131A408. [b] **Whether particular portion of premise not included in lease was reserved** by landlord is question of intent evidenced by use. 110Conn22, 148A139.

252-30½-New. or to show defective condition of premises, 103Conn647, 131A408.

252-31 103Conn647, 131A408; 110 Conn22, 148A139.

252-32½-New. So, also, evidence of repairs prior to the accident is admissible provided it is limited to the question of the landlord's control. 103Conn647, 131A408.

252-37½-New. Conversation between landlord and plaintiff's daughter prior to the accident relative to repairs is admissible to show landlord's control. 103Conn647, 131A408.

252-40 121 OhSt355, 169NE31.

253-43½-New. Although the landlord's failure to inspect the premises does not of itself give rise to liability for failure to keep premises reasonably safe, such evidence is admissible to show actual knowledge of their condition; 103Conn647, 131A408.

253-43½-New. but where such evidence is not offered to show such actual knowledge, it is properly excluded. 103Conn647, 131A408.

253-47 13LaA708, 129S182; 82NH294, 133A24. [a] (1) CalA 290P505; 11 LaA186, 123S166(1stcase); 267Mass 183, 166NE577; Mass 169NE422; Mass 172NE602; 103NJL474, 135A811, 58 ALR1450; NJSup 137A414; 125Misc 170, 210NYS437; 134Misc248, 234NYS 720; 227AppDiv68, 237NYS99; ND 231 NW609; RI 136A692. (2) 36GaA469, 137SE130; 265Mass186, 163NE742; 82NH415, 135A20, 52ALR858. (3) 258 Mass477, 155NE637; Mass 173NE512. (5) 205 Iowa1369, 219NW399; 258Mass 188, 154NE764. (7) Conn 152A154; 13 LaA277, 125S171; OhA 172NE836. (10) That areaway in sidewalk covered by iron grating, which collapsed under plaintiff's weight, was demised to tenant (215AppDiv500, 214NYS6), (11) or that tenant assumed dominion or control over it (215AppDiv500, 214 NYS6). (12) That decedent was invitee. 259Mass197, 156NE29. (13) Undertaking by landlord to light halls and stairways. 259Mass90, 155NE868. (14) Contract by tenant relieving landlord from duty of making repairs. 36 GaA518, 137SE282. (15) Negligence by landlord in making repairs. 128 Misc437, 218NYS269. (16) Faulty construction making lessor liable. 10LaA 751, 120S793. (17) That landlord contracted to keep stair steps free from ice. 126Me403, 139A82, 58ALR1405. (18) An affirmative case of negligence. 222AppDiv148, 225NYS589. (19) Knowledge of defect. CalA 284P1077. (20) Inspection by landlord. 102CalA 557, 283P97. (21) Undertaking by landlord to remove snow and ice. Mass 169NE486. (22) Change in condition for worse. Mass 172NE602. (23) Other matters. Mass 172NE526(2dcase). [b] (1) 90CalA692, 266P369; 102CalA 557, 283P97; 81Colo 121, 253P1066; 36 GaA469, 137SE130; - 36GaA518, 137SE 282; 37GaA54, 138SE800; 39GaA187, 146SE783; 266Mass90, 164NE914; Mass 169NE908; MoA 6SW(2d)978; 127Misc818, 216NYS745; 88PaSuper 381; TexCivA 275SW292. (2) 39GaA 187, 146SE783 (joint liability); IndA 163NE839; 127Misc818, 216NYS745; 144Va473, 132SE179. (3) 102CalA557, 283P97; 317Mo 1156, 298SW226. (4) 110Conn22, 148A139; 317Mo 1156, 298 SW226; MoA 21SW(2d)919. (5) 135 Misc373, 238NYS241. (6) 317Mo 1156, 298SW226; MoA 6SW(2d)978; 127Misc 818, 216NYS745. (9) That weakness of wall was contributory cause of collapse of the premises. 82NH100, 130A 216, 43ALR1281. (10) That water came from hydrant on second floor. TexCivA 275SW292. (11) That landlord knew of inadequate strength of the wall. 82 NH100, 130A216, 43ALR1281. (12) Pitfall to licensees. 20 OhA307, 152NE 205. (13) Whether plaintiff was injured by falling into unguarded pit while going to work for defendant's tenant. 20 OhA307, 152NE205. (14) To sustain finding in action by sublessee for damages that sublease was ratified by owner. TexCivA 275SW292. (15) To sustain finding that water causing damage to sublessee's property came from hydrant on floor controlled by owner. Tex CivA 275SW292. (16) Defect not trifling one. 163LaA185, 111S671. (17) That defective condition existed continuously for period extending from several months prior to execution of lease down to time of plaintiff's injury. 220 MoA863, 294SW1022. (18) To support judgment for landlord in tenant's action for damages. TexCivA 289SW196. (19) To show knowledge by defendant of defective condition prior to leasing of premises. 220MoA863, 294SW1022. (20) Defect was proximate cause. 163 LaA185, 111S671. (21) Contributory negligence of licensee. 285Pa166, 131A 668. (22) That lessor necessarily had knowledge of defect authorizes verdict for tenant. 36GaA44, 135SE220. (23) Duty of lessee to repair under statute. 226AppDiv610, 235NYS431. (24) Tenant's act proximate cause. 39GaA774, 148SE535; 39GaA783, 148SE540(1st case); 39GaA783, 148SE540(2dcase). (25) Contributory negligence of tenant. 118 OhSt334, 160NE850. (26) Assumption of written lease. 13LaA277, 127S 748. (27) Absence of contributory negligence of tenant falling down stairs after catching foot in torn matting. CalA 290P660. (28) That tenant's fall on stairway was caused by defective rubber treads. CalA 290P660. [c] **Findings held not warranted.**-215App Div500, 214NYS6. [d] **Evidence held to warrant inference** that tenant's employee met death by falling into unprotected elevator shaft. 215AppDiv566, 214NYS313. [e] **Evidence held sufficient to sustain judgment against defendant.**-220MoA863, 294SW1022.

253-48 See also 258Mass188, 154NE764.

253-49 [a] **Where there is no proof that proximate cause** of injury was failure of lighting, landlord is not liable. NJ Sup 150A223(1stcase).

253-50 82NH294, 133A24.

253-51 39F(2d)305; 96CalA345, 274P 407; CalA 290P505; 108Conn401, 143A 635 (proximate cause); 38GaA734, 145 SE502; 39GaA774, 148SE535; 39GaA 783, 148SE540(1stcase); 39GaA783, 148 SE540(2dcase); 158Md367, 148A543; 258Mass377, 155NE4; 259Mass103, 156 NE17; 262Mass317, 159NE728; 266 Mass303, 165NE116; Mass 172NE894; 168Minn319, 210NW75; 172Minn377, 215NW865; 317Mo 1156, 298SW226; MoA 31SW(2d)229; 82NH294, 133A24; 82NH415, 135A20, 52ALR858; NJ 130 A732; 102NJL626, 133A401; NJ 148A 737; NJSup 129A484; NJSup 135A55; NJSup 136A410; NJSup 149A126; 215 AppDiv566, 214NYS313 (question of reasonable care in construction and maintenance of elevator doors, etc.); 216AppDiv558, 215NYS502; 223AppDiv 675, 229NYS47; 125Misc73, 210NYS31; 126Misc563, 214NYS136 (evidence held to have established prima facie case for jury); 224AppDiv160, 229NYS674; 23 OhA363, 155NE404; 29 OhA32, 163NE 46; 31 OhA1, 166NE240; OhA 172NE 847; 19 OhA374; 92PaSuper537; 95Pa Super574; 7PaDist&Co 45; TexCivA 296 SW680; Va 152SE332; 135Wash588, 238P631 (question as to whether light was burning); 147Wash538, 266P185, 57ALR959; Wash 291P1101; 194Wis 167, 215NW816. But see 254Mass290, 150NE90, 43ALR1280; 180Minn565, 231 NW231. [a] **Where notice of defective condition is imputable to owner,** negligence is for jury. 126Misc327, 213 NYS347. [b] **Evidence held sufficient to go to jury** on issue of faulty construction. 216AppDiv558, 215NYS502. [c] **Where evidence is insufficient to go to jury on question of defendant's negligence,** it presents question of law for court. 242NY339, 151NE641. [d] **Particular questions held for jury.**-NJSup 136A410. [e] **Evidence insufficient to go to jury.**-108Conn401, 143A635; 134Misc 637, 236NYS299; Wash 286P46. [f] **Defendant held not negligent as matter of law.**-266Mass267, 165NE124. [g] **Nonsuit held proper.**-294Pa280, 144A77. [h] **Facts held to justify directed verdict.**-NJ 150A427. [i] **Cause of injury.**-Mass 173 NE424; OhA 172NE847.

254-52 94CalA66, 270P719; 108Conn 401, 143A635; Conn 151A315; 39GaA 187, 146SE783; 222Ky150, 300SW359, 58ALR1423; 258Mass188, 154NE764; 172Minn377, 215NW865; 317Mo 1156, 298SW226; NJ 130A732; NJSup 135 A55; NJSup 145A476; 243NY72, 152 NE469; 245NY615, 157NE880; 126Misc 563, 214NYS136. See also 39F(2d)305.

254-52½-New. and the question whether a person rightfully on the premises has been guilty of contributory negli-

gence, 135Wash588, 238P631; 144Wash 387, 258P43.

254-53 NJ 130A732; 217AppDiv396, 217NYS119; 285Pa166, 131A668; Tex CivA 5SW(2d)869. See also 38GaA734, 145SE502.

254-53½-New. Construction of written lease is for the court. 259Mass379, 156 NE714.

254-53½-New. The owner of a tenement building has been held, as matter of law, not to exempt himself from liability to an invitee, injured by the collapse of stairs, by employing an independent contractor to make inspection of the premises. 224AppDiv160, 229 NYS674.

254-54 81CalA76, 253P158; 84CalA479, 258P426; 103Conn647, 131A408; 110 Conn22, 148A139; Conn 152A154; Mass 169NE908.

254-54½-New. whether veranda was included in tenant's lease, 103Conn647, 131 A408.

254-55 38GaA517, 144SE341(2dcase); 228Ky473, 15SW(2d)265; NJSup 151A 484; 224AppDiv160, 229NYS674.

254-55½-New. whether plaintiff assumed the risk, 172Minn377, 215NW865.

254-56 40GaA747, 151SE554; 20 OhA 307, 152NE205 (whether plaintiff while going to work for defendant's tenant was licensee or invitee).

254-56½-New. whether plaintiff was licensee or invitee, 285Pa166, 131A668.

254-56½-New. whether the use which plaintiff made of stairs was such as the owner could have reasonably anticipated, 224AppDiv160, 229NYS674.

254-59½-New. the cause of the injury sustained, 168Minn319, 210NW75; 25 OhA393, 158NE238.

254-59½-New. whether there was a causal connection between the injury sustained and the act of negligence, 168 Minn319, 210NW75.

254-61½-New. By statute, issue of landlord's negligence as to condition of trapdoor held improperly submitted to the jury in the absence of evidence of the defective condition of the trap door. 104NJL51, 139A394.

254-61½-New. Where decayed condition of porch is admitted, such issue is properly withheld from jury. CalA 284 P1077.

254-61½-New. Landlord as matter of law is exempt from liability where bark on porch railing prevented detection of rotted condition. CalA 284P1077.

254-63 103Conn647, 131A408 (statement as to unjustifiable use of premises held proper); 222Ky150, 300SW359, 58 ALR1423; 223AppDiv621, 229NYS169; OhA 172NE847. [a] 103Conn267, 130A 571; 103Conn647, 131A408; 36GaA518, 137SE282; 235Ky204, 30SW(2d)900; 125Me178, 132A132; 258Mass520, 155 NE633; 259Mass90, 155NE868; 266 Mass303, 165NE116; OhA 172NE836; OhA 172NE847; 135Wash588, 238P631 (in absence of request to withdraw from jury certain allegation as to negligence or to make instructions more definite). [b] (1) 242NY262, 151NE447; 215AppDiv144, 213NYS862 (that if plaintiff believed premises dangerous and liable to cause injury she was not at liberty to remain and then sue for damages). (2) Instruction applying res ipsa loquitur to fall of plaster in action against landlord. 241NY284, 149NE859 (placing burden on landlord of explaining fall of plaster). (3) In general. 228Ky 473, 15SW(2d)265. (4) Negligence in permitting defective apparatus to be connected with its main cold water supply pipe. 29OhA32, 163NE46.

255-64 [c] **Instruction held inadequate.**-215AppDiv144, 213NYS862.

255-68½-New. Where evidence showed that landlord did not violate the law in failing to keep a light at a stairway hall, it was held that the charge to the jury should have eliminated such failure as an element of negligence. 242NY262, 151NE447.

255-76 CalA 261P1053, 1057 [citCJ]; NJ 147A236 (constructive eviction); 194 NC113, 138SE593, 594, 53ALR686 [quot CJ].

255-82½-New. Where plaintiff repaired property under an agreement for a life lease, defendant's refusal to execute such lease was not "ouster." 246Mich434, 224 NW399.

256-93 86PaSuper288.

257-94 256 IllA445; NJSup 148A648; 130Misc266, 223NYS839; 49RI 57, 139A 789. See also 243 IllA314.

257-95 Utah 266P1040, 1043 [citCJ].

258-98 155Wash328, 284P87 (voluntary surrender).

258-6 141SC251, 139SE614, 617 [quot Cyc], 54ALR1348.

260-22 CalA 260P372.

260-24 [a] **Mere issuance of warrant in summary proceedings** for possession does not constitute eviction, because warrant may never be executed. 226 AppDiv811, 234NYS399.

261-37 [a] (4) Refusal of city to approve plans for building to be erected under lease is actual eviction. 126Misc 260, 213NYS18.

261-46 215Ala363, 110S801, 804 [cit CJ]; 70CalA752, 234P426; 83CalA173, 256P592; 267Mass368, 166NE634; NJ Sup 135A350; 131Misc304, 226NYS739; 131Misc466, 227NYS103; 86PaSuper288.

262-48 86PaSuper288.

262-50 41GaA214, 152SE291; TexCivA 300SW159, 161 [quotCJ].

262-51 5LaA266; NJSup 135A450. [a] (6) Fraudulent concealment by landlord of facts rendering building unfit for habitation is equivalent to eviction. 224 IllA355.

262-52 NJSup 135A350.

262-54 NJSup 135A350; Wash 290P 809.

263-56 95PaSuper336.

263-57 37F(2d)767; 246 IllA521; 261 Mass149, 158NE264, 58ALR1047; NJ Sup 135A350; TexCivA 300SW159.

263-59 235 IllA572, 582 [quotCJ].

263-60 70CalA752, 234P426; 336 Ill 482, 168NE514; 246 IllA26; 249 IllA 532; MoA 282SW138; NJSup 131A635; 130Misc266, 223NYS839; 226AppDiv73, 234NYS409; 229AppDiv695, 242NYS 374; 112 Okl 301, 241P490; TexCivA 30 SW(2d)707.

264-61 37F(2d)767.

264-65 336 Ill 482, 168NE514; 255 IllA 216.

264-66 NJ 147A236; 112 Okl 301, 241P 490.

264-68 256 IllA325.

264-73 NJ 147A236; 223AppDiv787, 227NYS649; 112 Okl 301, 241P490; 136 Okl 150, 276P777, 780 [quotCJ]; 192Wis 297, 212NW633, 634 [citCJ].

264-76 35GaA505, 134SE173. [c] (4) Refusal of landlord to repair clogged drain pipe causing water to leak through roof into tenant's bedroom held not constructive eviction. NJSup 135A350.

265-77 130Misc266, 223NYS839. [a] (3) That floor of premises was flooded several times on sewer backing up is not eviction. 265Mass179, 163NE892.

265-79 224 IllA355 (where tenant rented dwelling during warm weather and landlord knew furnace was inadequate).

265-81 248 IllA350. [a] (1) 256 IllA 325.

266-88 255 IllA216 (duty of landlord to abate).

267-5½-New. Closing of road through military reservation to public traffic is not constructive eviction under lease of land on reservation for hotel purposes. 37F(2d)767.

267-8 136Misc57, 239NYS121 (failure to supply hot water).

267-8½-New. Renting another apartment to negroes is constructive eviction where a covenant not to so let is implied in the lease. 215Ala363, 110S801.

267-11 Wash 290P809.

267-12 See also 87CalA185, 261P1047.

267-13 TexCivA 299SW938.

267-14 255Mass477, 152NE46; Tex CivA 299SW938.

268-25½-New. Breach of an implied covenant constitutes constructive eviction. 215Ala363, 110S801.

268-30½-New. , nor where the tenant had vacated the premises before commencement of the work. 133Misc311, 231NYS455.

268-32 84CalA52, 257P542.

269-34 NJSup 148A157.

269-40 81Colo 50, 253P397; 263Mass 302, 160NE828.

269-43 86PaSuper405.

270-45 251 IllA202; 248NY243, 162NE 20.

270-52½-New. Refusal by a landlord to permit a tenant to make an exit on premises to be used as a factory, required by the department of labor, is constructive eviction. 109Conn164, 145 A751, 63ALR428.

270-55 256 IllA445; 194NC113, 138SE 593, 53ALR686; TexCivA 30SW(2d)707.

270-57 TexCivA 275SW81.

271-58 261Mass149, 158NE264, 58ALR 1047. [b] (1) But see 197Wis582, 222 NW790.

271-66 252NY92, 169NE100; 194NC 113, 138SE593, 53ALR686.

272-67½-New. One purporting to rent or lease land without having title or right of possession by reason of expiration of his lease from the city is liable to one taking the lease in good faith, relying on the lessor's authority, and to the assignee of such lease, for the value of the land taken from them by the true owners. TexCivA 9SW(2d)490.

272-68 317Mo 484, 297SW374, 377 [quotCJ].

272-69 [b] (6) Decree in foreclosure action appointing receiver to take charge of premises and collect rents and profits constitutes eviction. Iowa 228NW632.

272-73 317Mo 484, 297SW374, 377 [quotCJ].

272-75 317Mo 484, 297SW374, 377 [quotCJ]; 226AppDiv811, 234NYS399.

272-76 TexCommnA 12SW(2d)140 (purchaser at foreclosure); TexCivA 300SW159, 161 [quotCJ].

272-77 TexCivA 300SW159.

272-78 240NY99, 147NE541; TexCivA 300SW159.

272-79 TexCivA 300SW159.

273-82 240NY99, 147NE541.

273-82½-New. Attornment may mean the acknowledgment by a tenant that he held under a new lord who claims in title paramount. 240NY99, 147NE541.

273-83 239Mich65, 214NW219, 220 [cit CJ].

273-84 86PaSuper405.

273-89½-New. The assignee of a lessee cannot recover of the lessor's grantee for forced eviction by health authorities where the lease contained no covenant for repairs or warranty of the fitness for habitation. 98CalA675, 277P534.

274-91 See also 99NJEq525, 133A872.

274-95 [a] **Conditions precedent.**-Tenant is not entitled to possession without tender of rental and bond. 26 OhA513, 160NE476.

274-2 165Ga810, 142SE70. [a] **Temporary injunction** may properly be granted on condition of tenant's giving bond to answer for any rent found due on final hearing. 165Ga810, 142SE70.

274-8 84CalA52, 257P542; CalA 287P 142; CalA 287P550; CalA 293P91; 86 PaSuper288; 146Wash500, 263P949; Ont [1930] 1DomLR475. [a] **Demand for possession is unnecessary.**-CalA 287 P142.

274-9 93CalA337, 269P705.

274-14 [a] **Negligence of landlord.**-143Va250, 129SE228.

274-15½-New. Measure of damages. A tenant partially evicted after rent becomes due but remaining in possession may recover a proportionate part of the rent of the part from which evicted, 125Misc889, 213NYS49.

274-15½-New. consequential damages, 125Misc889, 213NYS49.

274-15¼-New. the difference between the actual rental value of part from which evicted and the proportionate part of the rent of the part, 125Misc889, 213 NYS49.

274-15⅙-New. and the loss of profits. 125Misc889, 213NYS49.

274-15⅙-New. Recovery for each of these items may be had only for the remainder of the term for which that rent was due, 125Misc889, 213NYS49.

274-15⅙-New. or until the eviction ends, if that occurs first. 125Misc889, 213NYS49.

274-15⅙-New. Should another payment of rent become due while tenant remains in possession, and he pays it or

admits liability therefor, he may claim damages for the further period covered by the additional rent. 125**Misc**889, 213 **NYS**49.

274–15⅛–New. Tenant who vacates the premises after partial eviction may recover the proportionate part of the rent due or paid, 125**Misc**889, 213**NYS**49.

274–15 1/10–New. the difference between actual rental value of whole premises and the rent from time of eviction to end of term of the lease, 125**Misc**889, 213**NYS**49.

274–15 1/11–New. and the loss of profits from time of eviction to end of term of the lease. 125**Misc**889, 213**NYS**49.

274–15 1/12–New. Where after partial eviction rent becomes due and tenant remains in possession disputing liability for rent, he has no claim for damages. 125**Misc**889, 213**NYS**49 (even though he is absolved from paying rent).

274–15 1/13–New. If tenant in such case vacates premises he may claim damages. 125**Misc**889, 213**NYS**49.

275–18½–New. Tenant can sue, although he surrendered the premises on demand of the owner of paramount title after a lien foreclosure suit to which he was not a party. **TexCivA** 300**SW**159.

275–25 But see 136**Misc**146, 239**NYS** 333.

275–29 233**Ky**370, 25**SW(2d)**1032 (where notice not in accordance with lease).

275–32 261**Mass**149, 158**NE**264, 58**ALR** 1047.

275–47½–New. Landlord cannot raise question of nonjoinder of plaintiffs in some cases. **CalA** 287**P**142.

276–51 84**CalA**240, 257**P**914; **CalA** 287**P** 142; **Kan** 289**P**444; **TexCivA** 297**SW**882. [a] **Continuance of lease** may be gathered by fair intendment from allegation that at one time tenant had leasehold estate. 84**CalA**240, 257**P**914. [b] **Performance of conditions subsequent** need not be alleged. 84**CalA**240, 257**P**914. [c] **Defenses need not be anticipated.**–84**CalA** 240, 257**P**914. [d] **Petition held sufficient.**–12**LaA**45, 124**S**612.

276–58½–New. Tenant need not allege compliance with terms of lease on his part. 215**Ala**363, 110**S**801.

276–58½–New. Petition held not subject to objection for misjoinder of parties or causes of action. 41**GaA**214, 152 **SE**291.

276–61 But see **TexCivA** 297**SW**882.

276–82½–New. The burden of showing landlord's negligence and damages to household furniture on eviction is upon the tenant in an action for damages. 143**Va**250, 129**SE**228.

277–86 CalA 287**P**142. [b] **Number of vacant houses on company premises** improperly admitted in employee's action for damage to household furniture on eviction from company house, pursuant to contract. 143**Va**250, 129**SE**228. [c] **Evidence as to whether warrant for unlawful detainer or judgment had been obtained** improperly admitted in employee's action for damage to household furniture on eviction from company house, pursuant to contract. 143 **Va**250, 129**SE**228. [d] **Value tenant had placed on furniture for tax purposes** was erroneously excluded in action for damage to furniture on eviction from company house. 143**Va**250, 129**SE**228. [e] **That children "cried"** was improperly admitted in employee's action for damage to household furniture on eviction from company house. 143**Va**250, 129**SE**228. [f] **Whether tenant owed rent,** not admissible, even on ground of showing feeling between parties, in employee's action for damages to household furniture on eviction from company house. 143**Va**250, 129**SE**228. [g] **Evidence as to malice** wrongfully admitted in employee's action for damages to household furniture on eviction from company house. 143**Va**250, 129**SE**228. [h] **Good faith of either party** is not pertinent in servant's action for damages to household furniture on eviction from company house pursuant to contract. 143**Va**250, 129**SE**228. [i] **In action for mental distress from constructive eviction** (1) evidence of unharmonious relations between plaintiff and wife is inadmissible since immaterial and hearsay. 215**Ala**363, 110**S**801. (2) So also evidence of sickness in plaintiff's family is inadmissible where connection with eviction is not shown. 215 **Ala**363, 110**S**801.

277–87 TexCivA 294**SW**631.

277–88 CalA 259**P**86.

277–89 NJ 130**A**730.

277–90 NJ 130**A**730.

277–95 [a] (6) Conspiracy to unlawfully evict tenant. 41**GaA**214, 152**SE**291. (7) That lessor, his agent and others effected eviction of tenant. 41**GaA**214, 152**SE**291. [b] (6) That landlord desired to embarrass tenants. **Wash** 290**P** 809. (7) That tenants were forced to leave by interference of landlord with subtenants. **Wash** 290**P**809. [c] (1) 205**Cal** 776, 272**P**1039; **CalA** 287**P**142 (amount of damage); **CalA** 293**P**91; 232**Mich**370, 205**NW**196; 219**AppDiv** 569, 220**NYS**293; **Utah** 273**P**298. (5) Jury's award of profits as element of damage. 219**AppDiv**569, 220**NYS**293. (6) That use of green lumber in laminated floors was improper construction. 146**Wash**119, 262**P**125. (7) Where evidence was conflicting as to extent of damage and time of expiration of oral lease. 87**PaSuper**58. [d] (1) 93**CalA** 337, 269**P**705. (2) For damages for partial eviction. 228**AppDiv**270, 239**NYS** 438.

278–98 CalA 287**P**142 (variant finding immaterial).

278–99 174**Ark**153, 294**SW**705; 109 **Conn**164, 145**A**751, 63**ALR**428. [d] **Instructions.**–**NJ** 130**A**730.

278–3 215**Ala**363, 110**S**801; **MoA** 24**SW** (2d)652; 197**NC**168, 148**SE**26.

278–5 41**GaA**214, 152**SE**291.

278–6 [b] **Question of what is reasonable time for tenant to vacate** is generally one of fact. 336 **Ill** 482, 168**NE**514.

278–7 CalA 284**P**472; 232**Mich**370, 205 **NW**196.

278–9 239**Mich**65, 214**NW**219.

279–28 215**Ala**363, 110**S**801; **TexCivA** 300**SW**159.

279–38½–New. Tenant evicted from dangerous premises could not recover general damages if premises had no rental value and were incapable of producing a return. **NJ** 130**A**730.

279–39 TexCivA 300**SW**159.

279–43 81**Colo** 125, 254**P**156.

279–45 81**Colo** 125, 254**P**156, 158 [quot CJ].

280–54 But see **NJ** 130**A**730.

280–59 205**Cal** 776, 272**P**1039.

280–79 219**AppDiv**569, 220**NYS**293; **TexCivA** 297**SW**882.

281–87 TexCommnA 12**SW(2d)**140.

281–3 *TexCommnA 12**SW(2d)**140; **TexCivA** 300**SW**159. See also **TexCivA** 9 **SW(2d)**1047. But see 6**LaA**91; 6**LaA** 786.

281–7 81**Colo** 125, 254**P**156.

282–14 215**Ala**363, 110**S**801; **Utah** 273**P** 298.

282–16 But see 215**Ala**363, 110**S**801.

282–16½–New. A tenant wrongfully evicted cannot recover damages for humiliation or mental suffering endured by his minor children. **TexCivA** 280**SW** 1076.

282–17 CalA 259**P**86, 89 [quotCyc]; 109 **Conn**164, 145**A**751, 63**ALR**428; 41**GaA** 598, 153**SE**609(1stcase). [e] **Lease not assignable.**–**TexCivA** 300**SW**159.

282–22 NJ 130**A**730.

283–35 239**Mich**65, 214**NW**219; 240**NY** 99, 147**NE**541 (lessee is under no duty to hold over upon new terms and damages, though uncertain before may be ascertained without difficulty when possession has been abandoned).

283–35½–New. Continued possession as though merely a tenant at will is a fact to be considered in reduction of damages. 240**NY**99, 147**NE**541.

283–46 TexCivA 300**SW**159.

283–46½–New. Measure of special damages in addition to moving expenses was the value of business for the residue of the term, unless the jury should find from the evidence that the lease would have been terminated sooner by authority of law or by destruction of subject matter. **NJ** 130**A**730.

284–57 But see 6**LaA**91(2dcase).

284–59½–New. In an action to recover damages for forcible eviction, whereby plaintiff lost two dogs, the measure of damages for the loss of the dogs, under Civ. Code § 3354, is the price for which two other dogs, equal in value to those lost, could be bought in the open market. 93**CalA**337, 269**P**705.

284–74 [c] 215**Ala**363, 110**S**801.

285–84 93**CalA**337, 269**P**705.

285–92 CalA 261**P**1053; 53**ND**711, 207 **NW**489. [a] (6) "Fixed compensation for a vested interest." 220**AppDiv**660, 222**NYS**288.

285–93 Ill 172**NE**35; 180**Minn**234, 230 **NW**645(2dcase); 53**ND**711, 207**NW**489.

285–94 136**Misc**704, 242**NYS**192; 287 **Pa**190, 134**A**455.

286–3 241 **IllA**471, 475 [citCJ]; 220**App Div**660, 222**NYS**288; 53**ND**711, 207**NW** 489.

286–4 53**ND**711, 207**NW**489.

286–6 53**ND**711, 207**NW**489.

287–24 [a] (3) 53**ND**711, 207**NW**489.

288–29 329 **Ill** 334, 160**NE**597.

289–46 241 **IllA**471, 475 [quotCJ].

289–47 241 **IllA**471, 475 [quotCJ].

289–48 241 **IllA**471, 475 [quotCJ].

289–49 241 **IllA**471, 475 [quotCJ].

289–50 241 **IllA**471, 475 [quotCJ].

289–51 241 **IllA**471, 475 [quotCJ].

289–52 146**Wash**520, 264**P**8, 11 [citCJ].

289–55 114**Nebr**184, 206**NW**744, 42**ALR** 1102.

290–65½–New. Rent is not synonymous with, or the equivalent of, the value of the use and occupation. 53**ND**711, 207 **NW**489.

290–74 227**Ky**607, 13**SW(2d)**772, 64 **ALR**630.

291–78 28**Hawaii**502, 506 [quotCJ].

291–79 28**Hawaii**502, 506 [quotCJ].

291–80 28**Hawaii**502, 506 [quotCJ].

291–81 [a] (5) Money consideration of fifteen hundred dollars payable yearly, stated in lease, has been held to be yearly rent, notwithstanding agreement to credit part of sum received on judgment against lessee. 127**Kan**796, 274**P** 1118. (6) Provisions that as part of consideration, lessee should clear land, plow or prepare it for ploughing, save all cedars and construct fences therewith, and put whole tract under cultivation has been construed as covenant to pay rent by making specified improvements. 135**Wash**527, 238**P**574.

291–84½–New. Agreement to pay rent is obligatory until discharged or modified. 34 **OhA**397, 171**NE**117.

292–88 34**GaA**66, 128**SE**220 (use of property by lessee).

292–89 34**GaA**66, 128**SE**220 (making of lease).

292–6 [a] (3) Covenant that no rent should be due until partitions should be completed and offices ready for occupancy. 253 **IllA**574.

292–11 111**Conn**77, 149**A**513; 155**Md** 167, 141**A**558.

293–12 46**RI** 472, 129**A**239 (unenforceable for uncertainty).

293–16 219**Ky**539, 293**SW**1078; 213 **AppDiv**259, 210**NYS**341.

293–18½–New. On the theory that rent is a normal and natural incident to occupancy, ambiguity in a lease will be construed against the tenant where the question of rent is involved. **NJSup** 131 **A**635.

293–18⅓–New. Where occupants of a house enter possession thereof under an arrangement by which they were to pay no rent, and subsequent purchasers of the property demand rent but suggest that they remain for a few days and decide whether to remain in possession at a specified rent, the occupants so remaining for about two weeks, after advising the purchasers that they were leaving, did not contract expressly or impliedly to pay the rent specified. 84 **Colo** 388, 270**P**872.

293–19 70**CalA**389, 233**P**389 (obligation to pay rent implied from lease); 6**Pa Dist&Co** 44; 187**Wis**55, 203**NW**910 (entry under such lease). [a] **Occupancy is to be construed** in light of pleaded and proved facts. 201 **Iowa**923, 208**NW** 366. [b] **Where property is sold** without formal assignment of lease, obligation is implied. 6**PaDist&Co** 44.

293–19½–New. Such obligation will not be implied if circumstances show that the parties did not contemplate contractual obligation. 6**PaDist&Co** 44.

293–22 153**SC**118, 150**SE**478 (quasi contract); 33**Wyo** 249, 238**P**654, 660 [cit

CJ] (tenant holding over liable for reasonable value of use and occupation).

294–31 But see 33**Wyo** 249, 238**P**654, 660 [citCJ].

295–44 [a] **Courts cannot release** party from his covenants. 219**Ky**539, 293**SW** 1078.

295–47 [a] **Matters not constituting accord and satisfaction.**–Where there was dispute as to whether lease terminated on January 15 or on February 15, acceptance by landlord, prior to January 15, of payment of installment falling due on such date tendered with statement that lease would terminate on such date and that payment was in full does not constitute accord and satisfaction. 37 **Ga**A790, 142**SE**177.

295–51 95**CalA**589, 273**P**145.

295–55½–New. A lessor may waive payments of rent in consideration of valuable lasting improvements previously made by tenant upon leased premises. 120**Kan**205, 243**P**324.

295–55⅓–New. Where the lessee, under a ninety-nine year lease did not erect a building within five years as therein provided and secured by bond, the lessee could not, in the lessor's action for rent and taxes, escape liability by tendering the amount of the bond and quitclaim deed back to the lessor. 31 **OhA** 105, 166**NE**398.

296–74 26**F(2d)**472: **IndA** 168**NE**717 (2dcase); 217**AppDiv**38, 216**NYS**490.

296–75½–New. Provision for security is a penalty, 214**AppDiv**665, 212**NYS** 738.

296–75⅓–New. and does not go with the land on lessor's conveyance thereof. 214**AppDiv**665, 212**NYS**738.

296–75¼–New. Deposit made at the time of execution of the lease is supported by consideration. 255**Mass**536, 152**NE**33.

296–76 4**F(2d)**843 (cash payment construed to be consideration for lease, not deposit for security recoverable by lessee's trustee in bankruptcy).

296–80 [c] **Payment on lease** was not deposit where lease did not indicate it or say for what deposit was security. 111**Conn**466, 150**A**696.

297–83 73**CalA**527, 238**P**1077. [b] **Whether payment is advance payment** of rent or deposit for security depends on intent manifested in lease in light of surrounding circumstances. 111**Conn** 466, 150**A**696.

294–84½–New. The amount retained by the owner, under a contract so providing as to the tenant constructing the building, to be applied to payment of rent, is not security but actual payment of rent. 94**CalA**682, 271**P**779.

298–12½–New. A lease providing for deposit as security for performance, and also relieving tenant from liability for rent in event of summary proceedings, relieves tenant from personal liability but does not release security. 241**NY** 231, 149**NE**841.

298–13 73**CalA**782, 239**P**302, 304 [cit CJ]; 128**Misc**400, 219**NYS**683. But see 133**Misc**435, 232**NYS**545. [b] **Where money is deposited as security in escrow,** it must be held intact in bank till time for application as rent at end of term. 217**AppDiv**38, 216**NYS**490. [c] **Landlord who uses deposit in his general account** is liable for conversion to extent of amount checked out. 217**App Div**38, 216**NYS**490. [d] **Obligation of tenant to maintain deposit under lease continues,** despite partial conversion by landlord. 217**AppDiv**38, 216**NYS**490. [e] **Investment of tenant's deposit by landlord** in state and city bonds held not conversion. 128**Misc**400, 219**NYS** 683.

298–14 **CalA** 290**P**1040.

298–15 73**CalA**527, 238**P**1077.

298–17½–New. Where lessee deposited money with lessor to obtain consent to assignment, and contract was made that deposit was to apply on rent for last five months of lease, and that assignee would refund the amount with interest when last five months period was reached, lessee was not entitled to recover the amount from the assignee before that time. 253**Mass**625, 149**NE**625.

298–21½–New. Although landlord converts security deposited by tenant, tenant's obligation to keep amount on deposit continues where he continues in possession. 131**Misc**466, 227**NYS**103.

298–21⅓–New. If tenant's deposit, converted by landlord, is restored to the original amount, less rent due, the landlord is entitled to have the tenant replenish security. 131**Misc**466, 227**NYS** 103.

298–21¼–New. Proper tender by a tenant, or ability to make such tender, of past-due rent before the landlord took possession of the tenant's furniture under a chattel mortgage in the lease, does not excuse failure to make tender on the date of taking possession so as to entitle the tenant to recover for conversion. 221**MoA**789, 287 **SW**1075.

298–21⅙–New. A tender of rent to the landlord in possession after condition broken does not entitle the tenant to sue for conversion. 221**MoA**789, 287 **SW**1075.

298–21⅙–New. Evidence has been held insufficient to show a valid tender by a tenant after default entitling the tenant to sue for conversion. 221**MoA**789, 287**SW**1075.

298–22 85**CalA**764, 260**P**361.

299–28 132**Misc**517, 229**NYS**788.

299–30 [a] **It is question of fact** whether there was ratification by lessee of transfer if it could be inferred from acquiescence. 133**Misc**318, 232**NYS**43.

299–31½–New. A penal statute, that a landlord failing to notify a tenant of transfer of a deposit shall be presumed to have committed a misdemeanor, does not discharge the landlord from transferring the deposit to the new owner or assignee of the lease. 133 **Misc**318, 232**NYS**43.

299–31⅓–New. If the lessor is a mere debtor of the lessee in respect of a deposit, he cannot relieve himself of obligation by assignment either of the deposit or his obligation. 133**Misc**318, 232**NYS**43.

299–31¼–New. If the lessor is a trustee or quasi-trustee of the deposit, notice to his lessee that he had transferred the trust fund to another will not absolve him of his obligation. 133 **Misc**318, 232**NYS**43.

299–31⅙–New. The lessee, upon notice by the lessor, of a transfer of deposit to another, is under no duty to protest on penalty of losing his rights against the lessor. 133**Misc**318, 232**NYS** 43.

299–36 **NJSup** 137**A**560, 561 [citCJ].

299–41 [f] **Substantial compliance with lease** entitles assignee of lessee to recover deposit made by lessee. 85**CalA** 764, 260**P**361. [g] **Claim to deposit by virtue of subsequent assignment of lease** was subordinate to claim of assignee of deposit theretofore securing acceptance of order. 39**F(2d)**842. [h] **Rights of assignee not affected or diminished** by subsequent agreement between landlord and tenant, made without consent or knowledge of assignee. **Mo** 238**SW(2d)**64.

299–43½–New. The assignee of a lease and deposit does not lose the right to recover the deposit by assignment of the lease without reference to the deposit. 85**CalA**764, 260**P**361.

299–47 **NJSup** 132**A**655; 218**AppDiv** 673, 219**NYS**199; 135**Misc**542, 239**NYS** 280.

299–48 248 **IllA**536; 218**AppDiv**673, 219 **NYS**199.

299–49 236 **IllA**215; **NJSup** 147**A**444 (1stcase) (stipulation that no waiver resulted from acceptance of rent arrearages held not to affect liability to return deposit). [a] **If money paid at execution of lease is guaranty of performance by lessee,** lessee is entitled to return thereof upon performance. **CalA** 290**P**1040.

299–51 26**F(2d)**472; **CalA** 290**P**496; 136**Misc**591, 240**NYS**369.

300–52 137**Misc**182, 243**NYS**526.

300–54½–New. The lessor, agreeing to return money in full if delivery of the premises to the lessee was prevented by circumstances beyond his control, was required to return only the deposit. 86 **CalA**209, 260**P**601.

300–61 [b] **Consent to deduction of rent due from deposit** in answer precludes lessee from recovering all of deposit. 126**Misc**680, 214**NYS**472.

300–65 248**NY**437, 162**NE**478.

300–68 127**Misc**608, 217**NYS**142. Contra 244**NY**438, 155**NE**733 [rev 215**App Div**355, 213**NYS**345]. [b] **Public authorities** preventing tenant from occupying premises for purpose leased is entitled to return of deposit. 215**AppDiv**355, 213 **NYS**345 (where to operate without license would be illegal).

300–70 26**F(2d)**472; 73**CalA**527, 238**P** 1077; 100**CalA**338, 279**P**1006; 236 **IllA** 215; **Mo** 238**SW(2d)**64; **NJSup** 137**A** 560 [citCJ]; 133**Misc**704, 233**NYS**293. See also 85**CalA**764, 260**P**361. But see 215**AppDiv**147, 213**NYS**337.

301–71 71**CalA**73, 234**P**442.

301–73 [a] **IndA** 168**NE**717(2dcase).

301–73½–New. After transfer of reversion lessee's breach of covenant is no defense to latter's, action to recover deposit from original lessor. 126**Misc** 680, 214**NYS**472.

301–73⅓–New. Under covenant to paint and repair giving landlord right to make repairs if tenant failed to do so after notice and charge expense to tenant, deposit may not be retained for failure to paint and repair if notice so to do is not given. 214**AppDiv**665, 212**NYS**738.

301–73¼–New. Under an agreement terminating lease, not expressly providing for return of deposit securing rent, tenant is not entitled to recover it where, by reason of breach, deposit is forfeited. 215**AppDiv**147, 213**NYS** 337.

301–73⅙–New. Where deposit has been applied by lessor to default, he cannot recover the same from stockholders of a lessee corporation. 23**F(2d)** 648.

301–77 127 **Or**539, 272**P**898 (sum forfeited held reasonable).

301–79 [a] 37**F(2d)**16; 247**NY**44, 159 **NE**718.

302–86 73**CalA**527, 238**P**1077; 89**CalA** 119, 264**P**331. But see 215**AppDiv**355, 213**NYS**345. [a] **Provisions construed for advance payments and not for deposits.**–73**CalA**527, 238**P**1077.

302–87 [c] **Lessor owning half interest,** but alone signing lease agreeing, in case premises were sold prior to termination of lease, to repay certain rent advanced, held liable therefor to assignee of lessee's rights. **TexCivA** 283 **SW**891, 893 [quotCJ].

302–99 10**PaDist&Co** 11.

303–3 100**CalA**338, 279**P**1006 (where lease is still in force); **CalA** 292**P**651 (1stcase); 104**NJL**286, 140**A**276. But see 242**NY**28, 150**NE**591.

303–8 [b] **Satisfaction of judgment in unlawful detainer.**–Deposit given as security for rent should be applied in satisfaction of judgment in unlawful detainer action where lessee was guilty of unlawful detainer after default in payment of rent. 86**CalA**651, 261**P**326.

303–10½–New. In claim for deficiency by lessees against sublessee after reletting under agreement, deposit to be applied to rent for last months of term should be applied against deficiency where only breach of covenant was payment of rent. 242**NY**28, 150**NE**591.

303–11 **NJSup** 132**A**655.

303–15 134**Misc**657, 236**NYS**308.

303–16 253**Mass**579, 149**NE**625. [a] (1) See also 219**AppDiv**275, 219**NYS**715. (2) Action premature where brought after reletting, but before termination of lease. 247**NY**44, 159**NE**718. (3) When brought after reëntry by landlord, but before lease had ended where lease provided that landlord might keep lease alive for its entire term for purpose of reletting. 248**NY**437, 162**NE**478. (4) Where lease provided for retention of deposit till 1936. 227**AppDiv**228, 237 **NYS**208.

303–18 See also 8**LaA**220; 128**Misc**466, 219**NYS**4.

303–18½–New. Upon eviction by the landlord, the right of a sublessee to the return of deposit with the lessee accrues, 73**CalA**782, 239**P**302.

303–18⅓–New. and an action to recover excess above the amount of rent unpaid may be maintained by sublessee

who had performed covenants of sublease. 73CalA782, 239P302.

303-18¼-New. In such action the fact that eviction occurred after rents sued for had accrued and that the action was brought before eviction did not deprive sublessee of the right to have the deposit applied as an offset as against such accrued rents, where the original lessee's estate was insolvent. 73CalA 782, 239P302.

303-18½-New. Where a lease is void because for a purpose prohibited by zoning ordinance, unknown to either party when the lease was entered into, the tenant may recover back a deposit paid. 127Misc608, 217NYS142.

303-20 127Misc608, 217NYS142.

304-25 248 IllA536.

304-28 [a] (2) Where complaint alleged that in event lessee is dispossessed deposit was to belong to lessor as liquidated damages, it is good against contention that action was premature. 219 AppDiv275, 219NYS715. [c] **Complaint** held insufficient. 236 IllA215.

304-37 [a] (2) To show deposit came into possession of plaintiff. 125Misc 845, 211NYS494 (in counterclaim by defendant tenant to action for rent).

304-39 [b] **Evidence held sufficient to** show that lease never became effective. 167CalA772, 28P1013.

304-41 [b] **Notice to quit held evidence of election to terminate lease.-NJ** Sup 147A444(1st case).

305-51 [a] **On tenant's counterclaim for deposit in summary action to dispossess,** evidence that landlord, in taking assignment of lease, assumed liability to return deposit held erroneously excluded. 123Misc467, 212NYS673.

305-51½-New. A tenant, denying the allegation that rent was unpaid for a certain year, has the burden of proving the payment of such rental. 88CalA60, 96P1022.

305-59 [a] **Judgment on counterclaim** in favor of defendant tenant is not warranted where evidence fails to show that deposit came into hands of plaintiff. 125Misc845, 211NYS494.

305-60½-New. Claim by tenant for rent collected by landlord, while tenant was in possession as lessee, is valid, but may be offset by larger counterclaim of landlord for arrears of rent when possession was surrendered. 247NY44, 159 NE717.

305-65 24 OhA202, 156NE919.

306-70 [b] **Bond does not modify** terms of lease or become part of it. 167Conn652, 129A716.

306-70½-New. A bond to pay the lessor a loss from the lessee's violation of statute must be reasonably construed. 249NY227, 164NE101.

306-70¾-New. The surety on a bond to pay the loss for violation of statute is not relieved of liability by the fact that the lessor might have sought modification of a padlock decree and permission to use the premises for other purposes. 249NY287, 164NE101.

306-70¼-New. The landlord need not bring dispossess proceedings or collect rent due under a lease as a condition precedent to recovery on a bond. 249 NY227, 164NE101.

306-72 249NY287, 164NE101; 24 OhA 202, 156NE919. [c] **Sureties on bond reciting execution of lease for one year** held liable for one year's rent though lease extended for three years. 24 OhA 202, 156NE919.

306-74 34 OhA397, 171NE417, 118 [cit CJ]; TexCivA 298W(2d)824(2dcase).

306-75 139 Okl 14, 280P1072(2dcase) (bond read in connection with whole contract). TexCivA 298W(2d)824(2d case). [a] (3) Bond held to secure payment of rents under sublease. 139 Okl 14, 280P1072(2dcase). [d] **Judgment is properly rendered against surety** upon finding of lien on cotton under bond to pay value of cotton if landlord adjudged lien thereon. 179Ark651, 17SW (2d)711.

306-75½-New. Where a bond is conditioned on payment of rent and moneys to patrons of lessee but does not state that it is for the benefit of any one except the lessor, the lessor cannot enforce the bond for the benefit of patrons of the lessee. 165Minn163, 205NW895.

306-77 [a] **Assignment of interest in** lease and guaranty by one of two lessors held not to release guarantors. 74 CalA68, 239P341, 343 [citCyc]. [b] **Intent that guaranty shall enure** to benefit of assignees of lessors may be inferred from fact that guaranty was of entire rental for full term of lease. 74 CalA68, 239P341.

306-80 [c] **Acceptance of rent from transferee of stock of corporate assignee** of lease held not to discharge sureties. Or 290P556.

306-82 [b] **Waiver of particular provisions as to bonds.**-24 OhA202, 156NE 919.

306-83 [a] **Priority of lessor's claim for rent against lessee's furniture mortgaged to secure rent** has been held preserved by bill of sale. Wash 289P56.

307-87 89CalA551, 265P551.

307-88 96CalA626, 274P608.

307-94½-New. Where a mortgage recites that it was concurrently executed with a lease for the purpose of securing payment of rent to become due, it may be reasonably inferred that mortgagors were the lessees named in the lease and had agreed to pay the rent therein reserved. 76CalA610, 245P455.

307-94½-New. In such case it may be fairly inferred that it was the intention of the parties that the mortgage should take immediate effect as security for the promise to pay rent including an installment becoming due on the first day of the term. 76CalA610, 245P455.

307-94¼-New. In a suit against the assignees of a lease for foreclosure of a mortgage given on furnishings for the purpose of securing rent, defendants who received assignment of the lease under a separate instrument are not entitled to avoid foreclosure, although assignment was accomplished without delivery of the original lease. 206Cal 15, 272P1059.

307-94½-New. The lessor's consent in writing to a sale of mortgaged chattels and assignment of lease, in violation of statute, did not operate as a waiver of a lien as to subsequently accruing rents, as to assignees of the lease becoming bound by its terms. TexCivA 118W (2d)668.

307-94½-New. In an action to recover possession of chattels, it was not necessary for the trial court to find when or whether the lease was terminated and the amount due, for which the mortgaged personalty was security. 96 CalA626, 274P608.

307-94½-New. A mortgage and rental note secured thereby under a certain lease are not affected by other leases which were never fully executed and delivered. 86Mont1, 281P547.

307-98 223Ky244, 38W(2d)634; 220 AppDiv660, 222NYS288; 141SC251, 139 SE614, 618 [quotCJ], 54ALR1348; TexCivA 275SW855. [c] **Where rent is to be paid "from occupancy,"** tenant is not liable for rent till he enters possession, though equitable title has passed to tenant. 223Ky244, 38W(2d)634. [d] **Landlord's rights are practically same** in case of refusal to take possession as in case of abandonment after entry. 195 NC274, 142SE12.

307-99 141SC251, 139SE614, 618 [quot CJ], 54ALR1348.

307-1 141SC251, 139SE614, 618 [quot CJ], 54ALR1348.

307-4 162Conn475, 129A45; TexCommnA 291SW194, 195 [citCJ].

311-54½-New. Entry by the landlord solely to placard premises for rent after notice of tenant's intention to vacate before the expiration of the term does not terminate the contract so as to relieve the tenant from liability for rent. 213Ky279, 280SW1112.

311-54½-New. Lessee, paying the amount of a month's rent to the lessor for a cash register included in the lease, may refuse to pay rent in advance for the following month after the unpaid vendor refused the lessee's offer to pay installment due and removed the register. 164La947, 114SS846.

311-54¼-New. In such case the lessor is not justified in law or fact in suing for rent for the entire term of one year and seizing the tenant's stock and equipment in the leased premises. 164La947, 114SS846.

311-54½-New. When a receiver is appointed at plaintiff's instance, and the tenant in unlawful detainer, does not elect to pay the rent found due, and again take possession, he cannot be required to pay any part of the rental during the receiver's possession. 94CalA 682, 271P779.

311-58 205Cal 93, 269P1109, 61ALR 366; CalA 261P1053, 1056 [citCJ]; 12 LaA174, 125SS183; NJSup 148A648; 247 NY245, 160NE359; 125Misc260, 213NYS 18 (eviction by refusal of landlord to approve plans of building allowed by lease); 86PaSuper288. [c] **Eviction must be from premises actually possessed.**-135Misc637, 239NYS248.

312-58 Ill 172NE35. [b] **Erection of building between leased premises and street** which does not deprive tenant of ingress and egress is not eviction. 145 Va191, 133SE669. [c] **Appointment of receiver in unlawful detainer proceedings,** who assumes possession and control and collects rents from subtenants, relieves tenant from payment of rent. CalA 261P1053.

312-60 256 IllA445; NJSup 135A350; 145Va191, 133SE669.

312-61½-New. Eviction must not be a mere trespass, but something of grave and permanent character. NJSup 135 A350.

312-61¾-New. In an action for rent, in which the lessee claimed eviction by the lessors placing beer cases in a building, padlocking a door, and permitting a third party to store an automobile in an outside shed, the court could consider the fact that at the time of the alleged eviction the lessee had practically vacated the premises and was not using any part of the building for purposes for which leased. Mo 88W(2d) 937.

312-62 [c] **Failure to call lessor in warranty** may defeat right to diminution in rent for loss of possession. 13 LaA123, 127SS448.

312-63 317Mo 484, 297SW374.

313-65 256 IllA445; 194NC113, 138SE 593, 594, 53ALR686 [quotCJ].

313-66 Ill 172NE35. [d] **Tenant's voluntary surrender of premises held not eviction.**-81Colo 50, 253P397.

313-67 111Conn697, 151A187; NJ 147 A236; NJSup 135A350.

314-72 Ariz 291P1005; 111Conn697, 151A187 (tenant must vacate premises); Mo 88W(2d)937; NJSup 146A588; 247 NY238, 160NE357; 135Misc637, 239NYS 248.

314-73 336 Ill 482, 168NE514.

315-86 205Cal 93, 269P1109, 61ALR 366.

315-88 TexCivA 228W(2d)698. [b] TexCivA 228W(2d)698.

315-92 95CalA589, 273P145.

315-94 Ill 172NE35; 218Ky466, 291 SW711; 130Misc266, 223NYS839; 132 Misc293, 229NYS498; 226AppDiv73, 234 NYS409. [c] **Exclusive lease by landlord of lavatory, right to use which was included in lease to prior tenant,** is partial eviction. 125Misc862, 212NYS 287 (where defendant sued for rent was excluded from lavatory by later tenant).

316-95 218Ky466, 291SW711; 125Misc 889, 213NYS49 (no liability for rent). See also 125Misc889, 213NYS49.

316-97 130Misc266, 223NYS839; 135 Misc637, 239NYS248.

316-2½-New. Where tenant is partially evicted and thereafter payment of rent becomes due, and he remains in possession, not paying rent and disputing his liability therefor, he is not liable for rent so long as eviction continues, 125Misc889, 213NYS49.

316-2½-New. but he may not claim damages. 125Misc889, 213NYS49.

316-2¼-New. Fact that tenant, who under his lease had right to use lavatory was unable to obtain injunction pendente lite against other tenant's exclusive use of lavatory in pursuance of landlord's later lease, has no bearing on defense of partial eviction to land-

lord's suit for rent. 125Misc862, 212 NYS287.

317-13 130Misc266, 223NYS839.

317-19 125Misc889, 213NYS49; Tex CivA 286SW552; 194Wis583, 217NW 423.

317-19½-New. or vacate the premises, 125Misc889, 213NYS49.

317-19⅓-New. In such case tenant may however claim damages. 125Misc889, 213NYS49.

318-21 132Misc293, 229NYS498.

318-28 La 121S364.

318-29 See also 23F(2d)648.

318-31 NJSup 148A648 (alterations and repairs).

318-33 226AppDiv73, 234NYS409.

319-46 201Cal 381, 257P526, 528 [cit CJ], 53ALR679.

319-47 NJSup 148A568.

319-49 201Cal 381, 257P526, 528 [cit CJ], 53ALR679.

320-54 See also 225AppDiv268, 232NYS 614.

320-57 Ala 129S26; 215AppDiv355, 213 NYS345. But see 245 IllA508; 244NY 438, 155NE733 [rev 215AppDiv355, 213 NYS345].

320-59 NJSup 135A349.

320-60 NJSup 146A588. [a] **Premises originally lawfully leased for purpose of conducting liquor business.**–Where after National Prohibition Act was effective premises were used only for lawful purposes lessor may recover unpaid rentals. 110Conn680, 149A137.

320-61 Ala 129S26. See also 249NY 287, 164NE101.

320-63 126Kan139, 266P941; NJSup 135A348; 291Pa507, 140A506.

321-65 [c] **Ordinance not preventing use of premises** but permit wrongfully refused. MoA 30SW(2d)157.

321-68 215AppDiv355, 213NYS345; 127Misc608, 217NYS142.

321-69 See also 244NY438, 155NE733.

321-79 220MoA657, 291SW515, 519 [cit CJ]; NJ 147A490 (in absence of fraud). [a] (3) No defense if inspection allowed and defects not latent. 289Pa 175, 137A189.

322-81 [c] **Condition of untenantable property subsequently aggravated.**–165 Minn136, 205NW945, 946.

322-87 [b] **Lessor cannot recover rent** for period required to make property habitable without showing it was habitable at time of lease. 136Misc751, 242 NYS40.

323-91½-New. A tenant may not surrender the property and cancel the lease because the premises have become untenantable because of vermin, where the lease contemplates surrender for other specified causes only. 213Ky279, 280SW 1112.

324-20 49RI 57, 139A789 [citCJ]. Contra 102NJL279, 131A879.

324-21 Ill 172NE35; 246 IllA26; LaA 129S178 (implied warranty of maintaining reasonably comfortable temperature); 102NJL279, 131A879.

324-27 336 Ill 482, 168NE514; 246 IllA 26.

324-28 Ill 172NE35. [b] **Unreasonableness of time.**–Ill 171NE35.

325-34 247 IllA183.

325-35 MoA 282SW138; 224AppDiv 758, 229NYS755.

325-40½-New. A lessee's right to refuse further to perform his contract because of the lessor's failure to complete repairs is waived by an agreement by which the lessee is allowed credit for rent during periods of repairs and executes notes in accordance therewith. 172Ark789, 290SW950.

325-42 NJDistCt 151A637; 194Wis583, 217NW423.

325-43 NJDistCt 151A637.

325-46½-New. Where a lessee is compelled to close a theater under the fire marshal's order because exits were permanently closed on complaint of owners of adjoining property, the lessee could recover advanced, but unearned, rent. 166La547, 117S586.

325-47 Ala 129S26; 93PaSuper389.

326-49 Ala 129S26.

327-55 291Pa507, 140A506.

327-59 198 Ind429, 153NE890, 893 [cit CJ].

327-60 NJDistCt 151A637.

327-66 [b] **Subsequent repair immaterial** where lease provided for termination if lessor, after fire, deemed premises unfit for occupancy. TexCivA 18SW(2d) 906. [c] **Where lessor had four months to keep lease in force,** tenant could not terminate lease. 252NY174, 169NE129.

329-79 153Md457, 138A266.

329-80 207 Iowa410, 221NW464.

329-80½-New. , if a building may be restored by ordinary repairs with no considerable interruption of tenant's business. 153Md457, 138A266.

329-81 Ala 129S26. But see NJSup 146 A674(2dcase).

329-85 194Wis583, 217NW423.

330-88 194Wis583, 217NW423.

330-91 NJSup 146A674(2dcase) (failure of tenant to meet burden of proving).

330-94½-New. In New Jersey, a statute providing that a tenant shall not be excused from paying rent by reason of fire unless he shows himself free from negligence expressly provides that it does not apply to cases where it conflicts with provisions of a lease. NJ Sup 131A134.

330-94⅓-New. Thus, where a lease provides that it shall terminate if the premises are so damaged that the landlord decides to rebuild, the statute is inapplicable. NJSup 131A134.

330-96½-New. , or by fire or other unavoidable accident. 153Md457, 138A266.

331-5 219MoA186, 269SW659, 660 [cit Cyc].

331-8 192NC756, 135SE849.

331-9 170La378, 127S874; 12LaA702, 127S873.

331-16½-New. Where tenant remains on premises until rent is due, although having right to remain because of landlord's failure to repair, he is liable in full for rent period, 125Misc845, 211NYS 494.

331-16⅓-New. and no deduction for days during which tenant is out of possession is proper. 125Misc845, 211NYS 494.

331-18 220MoA657, 291SW515, 519 [cit CJ].

331-19 TexCivA 26SW(2d)699; 155 Wash493, 284P782.

332-20 89IndA640, 166NE607; 123Kan 746, 256P997; MoA 282SW138; NJSup 131A635; 150SC490, 148SE549; Tex CivA 273SW642; TexCivA 26SW(2d) 699.

332-21 267Mass368, 166NE634.

332-24 251 IllA202; NJSup 131A635; 252NY174, 169NE129 (duty of landlord to remove débris in order to make repairs).

333-25 [b] **Construction against tenant.**–NJSup 131A635.

333-26½-New. Where a landlord fails to complete or make improvements in a building as agreed, the tenant may refuse to take possession and pay rent. 123Kan746, 256P997.

333-27 12LaA702, 127S873; 121 Okl 115, 247P665, 666 [quotCyc].

333-28 Ill 172NE35; 121 Okl 115, 247 P665, 666 [quotCyc].

333-35 NJSup 131A635.

334-45 [a] 123Kan746, 753, 256P997 [citCJ].

334-51 [a] (2) Other instances. Ill 172NE35. [c] **Waiver does not extend to subsequent failures.**–Ill 172NE35.

335-57 80CalA717, 252P786; 207 Iowa 410, 221NW464; 33LaA445; 136Misc 591, 240NYS369; 141SC251, 139SE614, 618 [citCJ], 54ALR1348.

335-59 180Ark136, 208SW(2d)630. [a] (1) But see 137Misc182, 243NYS526.

335-62 36F(2d)222 (rent and taxes); 141SC251, 139SE614, 618 [citCJ], 54 ALR1348.

336-63 93PaSuper292.

336-67½-New. Where a tenant exercises an option to purchase demised premises, his liability for rent ceases. 132Misc502, 230NYS262.

336-69 248NY333, 162NE97; 227App Div228, 237NYS208; 138Misc352, 245 NYS699; 141SC251, 139SE614, 618 [cit CJ], 54ALR1348. [b] (1) See 248NY 437, 162NE478. (9) Where court did not acquire jurisdiction in summary proceedings to recover possession, and no final order of removal was granted, tenant was not removed by "legal process" so as to entitle landlord to relet and hold tenant for deficiency. 131Misc 856, 228NYS395. (10) Right to relet survived under covenant for reëntry and reletting as agent of tenant "at any time." 248NY437, 162NE478. [a] **Construction.**–Every word of covenant relative to landlord's right to relet premises after reëntry must be given effect, if possible. 248NY437, 162NE478.

336-72 [c] **Termination by owner of unauthorized lease** allows tenants to retain possession without being chargeable for rent. 170La573, 128S520. [d] **Effect of notice** as terminating lease. 137 Misc182, 243NYS526.

336-72½-New. In Alberta, agreement for cancellation, if binding, held by its terms, not available as defense to pending action. Alta [1930] 2DomLR315.

337-74 26F(2d)472; 74CalA782, 241P 588; 204 Iowa739, 212NW573; 3LaA 778; 258Mass4, 154NE190; 261Mass 264, 158NE786; 128Misc648, 219NYS 644; 195NC274, 142SE12; 125 Or323, 267P398; 127 Or539, 272P898; 49Philippine7; 197Wis471, 220NW220. [a] (3) Failure to execute written surrender held waived by lessor's service of written notice which resulted in surrender by tenant. Wis 220NW222.

338-75 Wash 289P56.

338-78 Ill 172NE35 (parol agreement).

338-83 317Mo 484, 297SW374.

338-84½-New. Covenant to leave premises in the same condition as at the commencement of the lease does not affect the question of liability of the tenant surrendering premises for rent. 222 AppDiv326, 225NYS709.

338-84⅓-New. The lessor's written consent to the lessee's assignment of his interest in a lease to his cotenant and acceptance of rent from the assignee was not sufficient to constitute a "surrender" of the lease. 95CalA589, 273P 145.

338-85 39F(2d)632; 234Ky665, 28SW (2d)974; 261Mass264, 158NE786; MoA 287SW816; 114Nebr184, 206NW744, 748, 42ALR1102 [quotCJ]; 125 Or323, 267P398; 293Pa90, 141A640, 61ALR 763. [c] (4) Other instances. Ill 172 NE35. [d] (2) Consent is implied from reletting only where relation established thereby could not be enforced under original lease. 293Pa90, 141A640, 61 ALR763. [f] (2) Fact that tenant informed landlord that he rented only to sell furniture in premises, sold it, and landlord accepted rent from purchaser, showed prima facie surrender by operation of law. 222MoA566, 291SW1081. [g] **Failure of landlord to protest against vacation of premises** and election to stand on terms of lease when notified of tenant's purpose to vacate does not constitute agreement to terminate tenancy. 213Ky279, 280SW 1112; 293Pa90, 141A640, 61ALR763. [h] **Waiver of written acceptance.**–128 Misc12, 217NYS204. [i] **Acts implying acceptance** must be equivalent to agreement to accept surrender. 89 IndA490, 167NE151.

339-86 89 IndA490, 167NE151; 204 Iowa739, 212NW573; LaA 122S85; 154 Md519, 141A355 (thereafter landlord's leasing of property as owner for new term is not reletting as former tenant's agent); NH 146A525; 195NC274, 142 SE12; 11PaDist&Co 347. [a] 34F(2d) 594. [c] **Tenant moving at landlord's suggestion** to another store owned by landlord is not liable for further rent under lease of first store. NJ 143A720. [d] **Agreements to contrary.**–197Wis476, 222NW812.

339-87 197Wis471, 220NW220.

339-88 NJSup 135A350; 293Pa90, 141 A640, 61ALR763. [a] **Facts sufficient to constitute acceptance of surrender.**–CalA 284P232.

340-93 74CalA782, 241P588; 111Conn 697, 151A187; 89 IndA531, 167NE153; 250Mich322, 230NW149; 133Misc705, 232NYS641(2dcase); 195NC274, 142SE 12; 127 Or539, 272P898; 140Wash528, 250P30. [f] Thus tenant moving May 27th is liable for rent due May 1st. 125 Misc845, 211NYS494.

340-94 89CalA119, 264P331; 140Wash 528, 250P30; 197Wis471, 220NW220, 221 [quotCJ].

340-1 But see 4LaA509.

340-5 176Ark1123, 5SW(2d)312; 73 CalA199, 238P734; 126Kan139, 266P941; 127Kan12, 273P414 (after sale of farm and under stipulation in lease); 10LaA126, 121S198 (lessee held not to have established right to abandon premises on ground that there was defective water heater); 170La378, 127S874; 127 Me21, 140A687; Nebr 206NW744, 748, 42ALR1102 [quotCJ]; 220AppDiv660, 222NYS288; 218AppDiv673, 219NYS 199; 34 OhA285, 171NE78; 293Pa90, 141A640, 61ALR763; TexCivA 295SW 197; TexCivA 9SW(2d)423. See also 128Misc466, 219NYS4. [i] **As long as term remains alive** tenant remains liable for rent. 242NY28, 150NE591. [j] **Right accrues regardless of whether there was eviction** in summary proceedings. 218AppDiv673, 219NYS199. [k] **Abandonment in anticipation of warrant is equivalent to removal** under warrant in summary proceedings. 218AppDiv 673, 219NYS199. [l] **Actual consent of landlord is necessary.**–293Pa90, 141A640, 61ALR763. [m] **Stipulation for payment, even on abandonment or forfeiture,** is not invalid as in nature of penalty as distinct from liquidated damages. 127Kan12, 273P414. [n] **Abrogation of written leases** is not favored. LaA 129S178. [o] **Reasonable rental value of premises occupied** for period of occupancy can be recovered. 249 Mich473, 229NW427(1stcase). [p] **Acts not estopping landlord** from demanding rent. 170La378, 127S874.

341-6 265Mass179, 163NE892; NH 146 A525; 195NC274, 142SE12, 14 [citCJ].

341-8 TexCivA 29SW(2d)824(2dcase).

341-9 164La947, 1148846; Nebr 206 NW744, 748, 42ALR1102 [quotCJ].

342-10 114Nebr184, 206NW744, 748, 42 ALR1102 [quotCJ].

342-11 Cal 291P178.

342-12½-New. Acceptance of rent from tenant's wife with knowledge of tenant's abandonment of premises and commencement of divorce action does not estop landlord from claiming rent. 130 Kan77, 285P532.

342-15 Cal 291P178; 95CalA589, 273P 145; 219Ky539, 293SW1078; 234Ky 665, 28SW(2d)974; MoA 6SW(2d)1001; MoA 30SW(2d)1049; 220AppDiv660, 222NYS288; 293Pa90, 141A640, 61ALR 763; TexCivA 283SW300; TexCivA 9 SW(2d)423; TexCivA 29SW(2d)824(2d case); TexCivA 31SW(2d)515. See also 198NC112, 150SE705. [b] (4) 242 IllA 418. [c] **Reletting for prohibited use.**–TexCivA 283SW300. [d] **Rights on lessee's bankruptcy.**–TexCivA 31SW(2d) 515.

342-16 219Ky539, 293SW1078. But see 164La947, 1148846.

343-17 207 Iowa410, 221NW464; 153 SC118, 150SE478; 197Wis586, 222NW 811 (2dcase); 197Wis476, 222NW812. [a] **In Ohio.**–20F(2d)586.

343-21 176Ark1123, 5SW(2d)312; Cal 291P178; 134Misc344, 235NYS453. [a] 127Me21, 140A687.

343-22 Cal 291P178; 213Ky279, 280 SW1112, 1115 [citCyc]; 127Me21, 140 A687; 32NM469, 259P620, 61ALR767; 195NC274, 142SE12; 293Pa90, 141A640, 61ALR763; TexCivA 275SW855; Tex CivA 31SW(2d)515. [b] **That new lease provides for extension and payment for heating** does not relieve original lessee from liability for deficiency. 293Pa90, 141A640, 61ALR763.

343-23 126Kan139, 266P941.

343-24 195NC274, 142SE12.

343-26 176Ark1123, 5SW(2d)312; 265 Mass179, 163NE892; NH 146A525.

343-27 Mo 23SW(2d)64; MoA 30SW (2d)1049. But see NH 146A525. Contra 293Pa90, 141A640, 61ALR763.

344-30 Cal 291P178; 195NC274, 142SE 12; 161Tenn331, 30SW(2d)245.

344-32 Cal 291P178; 242NY28, 150 NE591; 247NY44, 159NE718; 218App Div673, 219NYS199; 134Misc344, 235 NYS453. [b] **Reletting during term** gives landlord right to rent, though amount collected on reletting is like payment on account. 242NY28, 150NE591. [c] **Covenant construed** to give landlord action for rent for deficiency not to damages. 242NY28, 150NE591 (where landlord may relet on vacation during term). [d] **Provision for payment of balance to tenant** after application of rent received from new tenant does not apply to tenant who under stipulation had vacated premises on notice that premises had been leased to another tenant. 136Misc591, 240NYS369.

344-33 [b] **Reletting after expiration of term** (1) gives landlord right to damages. 242NY28, 150NE591. (2) Though liable under covenant for subsequent deficiency. 242NY28, 150NE591.

344-37½-New. The liability of the tenant in such case is not destroyed by service of precept in summary proceedings in obedience to which tenant voluntarily abandons premises, 214AppDiv 189, 212NYS95.

344-37½-New. nor by any other termination of lease by reason of tenant's breach of covenant. 214AppDiv189, 212 NYS95.

344-37¼-New. Lessee as landlord reletting under agreement is not entitled to deficiency for rents accruing after he had surrendered his lease to holder of fee. 242NY28, 150NE591.

344-37⅛-New. Landlord is under no duty while endeavoring to relet to leave premises in idleness until new tenant is procured. 247NY44, 159NE718.

344-37⅛-New. Consent to reletting contained in a lease is valid only if the landlord acts within the limits prescribed. 134Misc344, 235NYS453.

344-39 169Ark512, 275SW754 (contract providing for annual rental of forty pounds of cotton per acre to be from first picking is not conditioned on enough cotton being grown to pay rent). [b] **Where lease provided for term rental in monthly installments out of gross receipts** of business after deducting expenses, accounts for rents must carry over from month to month. NJCh 144 A25.

345-40 166Minn190, 207NW498.

345-41½-New. Whether a tenant paid at a rate provided or a reasonable rental is immaterial where the reasonable value was the same as the rate provided. 86CalA284, 260P815.

345-41⅓-New. That a lease, fixing the rent of a building for a department store business on the basis of percentage of gross sales, provided for a minimum rental, did not give the lessee the right to remove two departments into an adjoining building without paying a percentage of the sales in such departments. 149Wash386, 270P1022.

345-44 201 Iowa923, 208NW366; 155 Wash613, 285P654.

345-53 129Misc768, 222NYS728. [c] **Fairness of reduction** is immaterial where landlord consents to same to defraud third parties and to benefit tenant. 129Misc768, 222NYS728.

346-54 138Misc352, 245NYS699.

346-61½-New. A purchaser of interest in leased premises under an unenforceable oral agreement hasn't sufficient interest in the property to modify the lease aside from an agency. 89CalA55, 264P 766.

346-65 77Colo 556, 238P42; 254Mass 22, 149NE618, 43ALR1447.

346-67½-New. Payment of increased rent for several months does not estop lessee from asserting that agreement to pay increase was without consideration. 254Mass22, 149NE618, 43ALR1447.

347-74 139 Okl 95, 281P259.

347-79 [a] **Threat to move** is not sufficient consideration to bring oral modification within executed oral agreement rule. 89CalA55, 264P766.

347-84 104Conn374, 132A916; MoA 291 SW178.

348-1 21 OhA62, 152NE790 (implied contract arises from silence of tenant).

349-18 179Ark690, 17SW(2d)305.

349-19 77Colo 556, 238P42 (matters showing agreement for reduction). [c] **Where renewal clause leaves rent to be fixed by agreement,** reasonable figure is implied and lease is not void for uncertainty. 32Ariz370, 259P282, 56ALR903.

350-26 41GaA672, 154SE378; 46Philippine184.

350-31 30Hawaii29; 245 IllA68; 21 OhA62, 152NE790; 69Utah15, 251P1073. [c] **Mailing of notice is sufficient** in absence of proof that it was not received. 126Misc203, 213NYS211.

350-32 Contra 21 OhA62, 152NE790.

350-34 21 OhA62, 152NE790 (can be held only for reasonable value of use and occupation as damages for trespass). But see 30Hawaii29.

351-44 [b] (1) 6F(2d)716.

351-46½-New. The defense of unreasonableness of rent applies to leases made before and after enactment of statute. 240NY252, 148NE512.

351-48 [c] **Tenant must be in actual occupation of premises** to be entitled to protection of emergency rent laws. 216 AppDiv295, 215NYS20. [d] **Act does not apply** to grantors occupying premises after time stated in deed reserving right to occupy premises for stated period rent free. 132Misc252, 228NYS 639.

351-52 [b] **Where tenant occupies rooms in dwelling house, but leases other rooms on weekly or monthly basis** (1) it is not house used for dwelling purposes. 216AppDiv295, 215NYS20 (it is house used for business). (2) Tenant is not statutory tenant as to rooms or floors sublet. 216AppDiv295, 215NYS 20. (3) Such tenant is holdover as matter of law on holding over by subtenant. 216AppDiv295, 215NYS20.

352-63½-New. Tenant who subleased apartment is not statutory tenant on subtenant's holding over on expiration of term. 216AppDiv295, 215NYS20.

352-66½-New. , or where the tenant has removed from the premises. 126 Misc273, 212NYS389.

352-81 128Misc359, 219NYS491.

353-84 128Misc359, 219NYS491. See also 221AppDiv574, 224NYS614 (increased rent is not contemplated under emergency rent laws in absence of agreement that rent, continued to be paid at lease rate, was accepted without prejudice to right subsequently to demand increase as reasonable value). [a] **Rent as on renewal for one year.**–126Misc558, 214NYS57 (where tenant holds over).

353-87½-New. In New York the landlord of a building completed after Sept. 27, 1920 may remove a tenant holding over by summary proceedings and so he may treat such tenant as holding over by operations of law. 126Misc273, 212 NYS389.

354-12½-New. Failure to notify the landlord is not jurisdictional. 19F(2d) 681.

355-37 243NY186, 153NE43.

355-38 243NY186, 153NE43.

356-49 243NY186, 153NE43.

356-54 132Misc252, 228NYS639.

356-61 [a] (2) Presumption that assessed valuation is real value of realty in estimating fair rate may be overcome by direct evidence. 132Misc252, 228NYS 639.

356-68 [e] **Cost of reconstructing building** as of time involved should be considered in ascertaining fair rental value. 243NY186, 153NE43.

357-86 243NY186, 153NE43.

357-88 [a] **Defense that rent held unreasonably applicable** to leases made both before and after enactment of statute. 240NY252, 148NE512.

357-95½-New. A provision for the selection of arbitrators to determine the rental value to be paid for renewal term is not an agreement for statutory arbitration. 222AppDiv526, 226NYS468.

357-1½-New. Agreement fixing rent due after certain date with reference to amount of business held insufficient to authorize court to fix rent. CalA 284P 253.

358-5½-New. Judgment appointing a third arbitrator to act with valuers selected by the parties is not objectionable. 207 Iowa505, 223NW182.

358-5⅓-New. Where the lessor and others refuse to coöperate by appointing an appraiser, the tenant may ask the court to determine the rental value, and the court has such power. 32F(2d)590.

358-26 207 Iowa505, 223NW182.

361-86 329 Ill 334, 160NE597.

362-2 248Mich593, 227NW720.

362-7 101CalA592, 281P1070 (annual

rental); 131Misc466, 227NYS103 (not relieved by subsequent acts of landlord). [d] **Terms of lease show** payment to lessor was payment in advance, not mere security. 111Conn466, 150A696.

363-20 289Pa369, 137A612; Ont [1929] 1DomLR911.

363-21 8LaA19; 289Pa369, 137A612.

363-23½-New. in case of transfer of a lease by assignment or by process of law, 93PaSuper173 (appointment of receiver for lessee constitutes transfer).

363-35 117 Okl 117, 245P608.

364-44 172Ark587, 289SW773; 132 Okl 27, 269P277; TexCivA 3SW(2d)932; 193 Wis503, 215NW571, 55ALR525. [c] **Payment to creditor of bankrupt lessor** does not extinguish debt. 233Ky427, 25 SW(2d)1016.

364-53½-New. An owner not entitled to possession under a lease until issuance of a warrant to dispossess is not entitled to rents from subtenants. 221 AppDiv586, 224NYS532.

364-53⅓-New. The lessee must pay rent to the person with whom he makes his contract, whether the landlord owns by entireties or not. 87PaSuper170.

364-54 170Ark65, 278SW634; 338 Ill 620, 170NE777; 200 Iowa997, 205NW 782 (action maintainable by assignee on express contract of lease); 208 Iowa 15, 221NW537; 215Ky373, 285SW198; 227Ky607, 13SW(2d)772, 64ALR630; MoA 10SW(2d)64; MoA 32SW(2d)126; 132 Okl 27, 269P277; TexCivA 3SW(2d) 932; 101WVa253, 132SE489, 490 [cit Cyc]. [d] **When grantee entitled to rent.**-215Ky373, 285SW198.

365-58 164Minn366, 205NW262.

365-59½-New. Possession necessary to give a right to rent must be by virtue of an estate entitling one enjoying it to be the landlord. 208 Iowa15, 221NW537.

366-61 CalA 286P177.

366-64 235 IllA319; 339 Ill 62, 170NE 705; MoA 10SW(2d)64. But see Cal 284P905.

366-66 235 IllA319; TexCivA 3SW(2d) 932, 934 [citCJ].

366-72 Cal 284P905; CalA 279P172.

367-84 7PaDist&Co 341.

367-87 208 Iowa15, 221NW537; 215 Ky373, 285SW198. [a] **Burden of proof to show severance.**-MoA 32SW(2d) 126.

368-92 MoA 32SW(2d)126.

368-94 170Ark65, 278SW634; MoA 289SW977, 982 [quotCJ].

368-5 292Pa476, 141A302.

368-6 See also 292Pa476, 141A302.

368-11½-New. Assignment of rent by mortgagor to mortgagee held not to effect landlord-tenant relationship as to rent payment. 136Misc166, 238NYS 700.

368-12 170Ark65, 278SW634.

369-16 CalA 284P954.

369-24 73CalA782, 239P302; 37GaA 210, 139SE357.

369-26 37GaA210, 139SE357.

369-32 RI 129A268. See also 76Mont 332, 247P166.

370-35 158La405, 104S187.

370-38 73CalA229, 238P736. But see 6LaA40.

370-44 12PaDist&Co 606 [citCJ] (demise under seal).

370-47 But see 169La29, 124S135.

371-60 90CalA75, 265P527, 529 [cit Cyc]; 229Ky818, 18SW(2d)281; 261 Mass264, 158NE786; 130Misc633, 224 NYS593; 114Nebr184, 206NW744, 42 ALR1102; NJSup 143A719(1stcase); NJSup 146A344; 132Misc366, 229NYS 86; 137Misc372, 243NYS522; 25 OhA 41, 157NE314; 29 OhA402, 163NE636; TexCivA 275SW855; TexCivA 6SW(2d) 390; 135Wash527, 238P574, 575 [cit CJ]; 199Wis428, 227NW6; Alta [1927] 1DomLR490, [1927] 1WestWkly9. [g] **Lessee joining in agreement** that reduction of rent by landlord should not create new tenancy, is liable for rent. 250 Mich552, 231NW105.

372-61 229AppDiv681, 243NYS255; 124 Or30, 263P888, 889 [quotCJ]; Tex CivA 275SW855; 135Wash527, 238P 574, 575 [citCJ]; 147Wash667, 267P 46.

372-62 IndA 169NE688; 261Mass264, 158NE786; 34 OhA397, 171NE117; 293 Pa90, 141A640, 61ALR763; TexClvA 275SW855; 135Wash527, 238P576, 575 [citCJ]. But see 244Mich656, 222NW 85. [a] 199Wis428, 224NW98.

372-63 216Ala625, 114S292. [c] (5) TexCivA 275SW855. [e] **Implied release cannot be raised** where release was expressly refused. TexCivA 275SW 855.

372-64 147Wash174, 265P166.

373-66 TexCivA 275SW855; TexCivA 6SW(2d)390.

373-70 82NH249, 132A256.

373-75 228AppDiv367, 240NYS176.

373-76 222MoA566, 291SW1081, 1083 [quotCJ].

373-79 216Ala466, 113S656; 99Fla 1238, 128S844; IndA 169NE82; 229Ky 818, 18SW(2d)281; 261Mass264, 158NE 786; MoA 29SW(2d)176; 114Nebr184, 206NW744, 42ALR1102; TexCivA 6SW (2d)390; TexCivA 11SW(2d)668. [f] **Assignee is "legal representative"** within provision of lease. 129Misc819, 222 NYS238.

374-81 99Fla1238, 128S844; 114Nebr 184, 206NW744, 42ALR1102; 129Misc 819, 222NYS238; 130Misc633, 224NYS 593; 131Misc765, 228NYS702. See also NJSup 142A755.

375-82 [b] **Assignee of chattel mortgage, covering unexpired term of lease,** in possession, held liable for rent. 129 Misc819, 222NYS238.

375-85 130Misc633, 224NYS593.

375-88 See also NJSup 131A619.

375-89 25 OhNPNS197, 201 [citCyc].

375-99 88CalA20, 263P538; IndA 169 NE82; 114Nebr184, 206NW744, 42ALR 1102; 199Wis428, 224NW98. See also NJSup 131A619. [a] **Mere abandonment of premises by assignee** does not relieve him from obligation to pay rent. 199Wis428, 224NW98.

376-1 114Nebr184, 206NW744, 42ALR 1102.

376-3½-New. Where a landlord takes possession of leased premises to mitigate damages, assignees are not liable for rent after abandonment of the premises. 199Wis428, 227NW6.

376-13 See also NJSup 131A619; 34 OhA285, 171NE78.

376-15 TexCivA 286SW552, 557 [cit CJ].

376-16 TexCivA 286SW552, 557 [cit CJ].

377-23 137Misc372, 243NYS522.

377-25 22AlaA1, 113S651.

377-27 216Ala466, 113S656, 657 [cit CJ]; 114Nebr184, 206NW744, 42ALR 1102.

377-28 104NJL320, 140A314.

378-30 130Misc633, 224NYS593.

378-32 114Nebr184, 206NW744, 42ALR 1102.

378-33 Mass 170NE414.

378-37 114Nebr184, 206NW744, 42ALR 1102.

378-39 37GaA210, 139SE357; IndA 169 NE688 (failure of lessee to occupy premises does not affect his liability); 261 Mass264, 158NE786; 132Misc366, 229 NYS86; TexCivA 26SW(2d)699.

378-40 37GaA210, 139SE357.

378-41 37GaA210, 139SE357. [a] **Election to substitute may be express or implied.**-37GaA210, 139SE357.

378-44 37GaA210, 139SE357.

378-45 37GaA210, 139SE357; IndA 169NE688; 261Mass264, 158NE786. [a] (1) 37GaA210, 139SE357. [b] **Substitution may take place** where rent is taken from subtenant as tenant, and not as agent for original tenant. 37GaA 210, 139SE357.

378-46½-New. or permitting the lessee to sublet a portion of the property in consideration of an additional payment, TexCivA 275SW855.

378-46⅓-New. or the mere submission of bills for rent by landlord to subtenant, 261Mass264, 158NE786.

379-48½-New. Estoppel. Landlord is not estopped to recover rent from lessee because of failure to keep alleged promise to notify tenant if subtenant ceases to pay direct, 261Mass264, 158NE 786.

379-48⅓-New. since failure to keep the promise cannot be construed as a statement of existing fact made when promise is broken. 261Mass264, 158NE786.

379-49 69CalA416, 231P355; 73CalA 782, 239P302, 304 [citCJ]; 37GaA210, 139SE357; 261Mass264, 158NE786; NJ Sup 131A619; 131Miss765, 228NYS702; 69Utah194, 253P676, 679 [citCJ]. [c] **Collecting rent from subtenant** creates no privity of estate between landlord and subtenant. 261Mass264, 158NE 786.

379-50 73CalA782, 239P302, 304 [cit CJ]; 69Utah194, 253P676, 679 [quot CJ].

379-52 73CalA782, 239P302, 304 [cit CJ].

379-53 See also NJSup 131A619.

379-54 37GaA210, 139SE357.

379-54½-New. In equity a landlord may maintain an action against sublessees. 69CalA416, 231P355.

379-54⅓-New. When the original lessee becomes insolvent, equity will compel the subtenant to make future payments of rent to the lessor according to terms of the sublease, 73CalA782, 239 P302.

379-54¼-New. on the theory of a trust or charge on lessee's estate binding the sublessee not to take profits without due discharge of rent out of them. 73 CalA782, 239P302.

379-55 99Fla1238, 128S844.

379-57 [a] (1) 172Ark696, 290SW593.

379-58 13LaA266, 127S638.

380-60 [b] **Reletting by lessee.**-242NY 28, 150NE591.

380-62 [a] **Agreement for "surrender and possession"** held not ending of lease term. 242NY28, 150NE591.

380-62½-New. A lessee, who relets for the sublessee, is not entitled to recover rent deficiency accruing after the surrender of his own lease. 242NY28, 150 NE591.

380-62⅓-New. After lessee's forfeiture of lease, lessee's assignment of rent to become due from sublessee is not binding on latter. 50Nev325, 258P1024, 58 ALR902.

380-62¼-New. Where a landlord refuses to perform his obligations to a superior landlord by paying rent and taxes, a tenant may refuse to pay rent. 134Misc657, 236NYS308.

380-62⅕-New. Rent reserved to a landlord must be paid as a condition to a continued receipt from an undertenant. 134Misc657, 236NYS308.

380-70 22AlaA1, 113S651.

380-76½-New. Failure of lease to convey all tenant intended to receive as respects use of outer wall gives tenant right to apportionment of rent. 135 Misc637, 239NYS248.

381-85½-New. As between original lessee and purchaser of leasehold, apportionment is based on terms of contract. 216AppDiv97, 214NYS710.

381-85⅓-New. Under contract for sale of lease, closed in September providing for apportionment pursuant to terms of lease, and performance of all covenants, conditions, and terms of lease by seller prior to closing date, apportionment should be based on amount payable for September under lease, and not an amount of yearly rent. 216AppDiv97, 214NYS710.

382-98 [b] **Lessor need not accept** less than stipulated rent because unforeseen crop conditions rendered year unprofitable to tenants. 172Ark1139, 292SW 368, 51ALR1287.

382-1 200 Iowa997, 205NW782.

383-10½-New. A lessee is not entitled to abatement of stipulated rent because of shortage of plantable area by reason of the existence of servitudes for canals and roads of which he is presumed to have had notice. 73CalA527, 238P1077.

383-14 [d] **Revocation of license to use vaults under sidewalk** does not entitle tenant to apportionment of rent or damages where he knew that vaults were held under revocable license and lease described premises by metes and bounds which did not include vaults. 223App Div426, 228NYS369.

383-15 218Ky466, 291SW711.

384-34 [a] **Tenant of predial estate** is not entitled to abatement by reason of overflow which is not extraordinary accident. 11LaA312, 123S479.

384–38½–New. In the absence of a covenant in a lease, a tenant deprived of beneficial enjoyment of the premises by an inevitable casualty without his or the landlord's fault is not entitled to apportionment of rent. 197**Cal** 751, 242**P** 926, 42**ALR**1165.

384–38½–New. Sublessee is not entitled to apportionment of rentals upon the owner's exercise of option to terminate the lease where the sublease did not provide for apportionment of rent paid in enumerating causes for damage upon such termination. 197**Cal** 751, 242 **P**926, 42**ALR**1165.

384–44 36**GaA**233, 136**SE**282.

384–45½–New. 286**Pa**529, 134**A**494.

385–52½–New. In Manitoba refusal of landlord to accept month's rent when due does not relieve tenant under monthly rental from duty of paying or tendering next installment when due. **Man** [1930] 2**DomLR**675.

385–65½–New. A provision for forfeiture of part of an advance payment of rent is void if intended to fix damages for breach of contract in advance. 92 **CalA**329, 268**P**463.

385–65½–New. Where lease required payment of last six months rental in advance, money so paid becomes property of lessor. **Or** 287**P**686.

385–66 32**PortoRico** 328.

385–66½–New. Payment due on a particular day which is a holiday may be made the next day. 32**PortoRico** 330 (citing Pol. Code § 389).

386–84 127**Kan**359, 273**P**422.

387–88 3**LaA**512; 135**Wash**527, 238**P** 574.

387–97 MoA 10**SW(2d)**64. [c] **Transfer of note as security** constitutes payment of rent. **MoA** 289**SW**977.

388–9 180**Ark**890, 25**SW(2d)**19 (rents due as crop gathered regardless of rent date stipulated in lease modified to substitute crop for money rent). [a] **Where proceeds of crop of cotton have been applied in full payment of rent,** landlord cannot maintain action for rent. **TexCivA** 284**SW**334.

390–56 32**PortoRico** 330. [a] **Consignation in court.**–32**PortoRico** 330.

391–75 [b] **Statutory presumption inapplicable** in absence of any receipt. 34 **PortoRico** 635.

391–81 Man [1929] 4**DomLR**1063(1st case).

391–93 [a] **Voluntary payments made after knowledge that building permit would not issue** cannot be recovered back. **OhA** 173**NE**214.

391–94 138**Misc**296, 245**NYS**352.

392–8½–New. A tenant cannot recover rent paid during occupation under a lease void for the landlord's failure to observe the Zoning Law. 128**Misc**466, 219**NYS**4.

392–8½–New. Where premises are leased for a purpose prohibited by a zoning ordinance, unknown to either party when the lease was entered into, the lease was void from the beginning, and the tenant may recover back rent paid in advance. 127**Misc**608, 217**NYS**142.

392–10 Or 287**P**686.

393–17½–New. Lessee may recover where foreclosure proceedings are begun before lessee enters land under lease. **Iowa** 229**NW**663.

393–23 75**CalA**785, 243**P**453; 92**CalA** 329, 268**P**463; 111**Conn**466, 150**A**696 (holding advance payments to belong to lessor on termination by default or abandonment by lessee). See also **Sask** [1928] 3**DomLR**608.

393–25 [a] **Rent paid in advance at beginning of term** in conformity with lease's terms becomes, on payment, the property of lessor. 111**Conn**466, 150**A** 696.

393–28½–New. Where leased land is sold under foreclosure proceedings and the lessee loses possession before he has time to plant the first crop, he is entitled to recover the entire rent paid in advance. 85**CalA**199, 259**P**97.

393–28½–New. A provision acknowledging receipt of rent in advance is not affected by a subsequent provision that part of the amount is retained as forfeiture in case of breach of condition. 92**CalA**329, 268**P**463.

393–29¼–New. Advance payment, under lease's term, of future rental for last year of term, becomes lessor's property upon arrival of time of payment. 111**Conn**466, 150**A**696.

394–35 [b] **In California.**–94**CalA**596, 271**P**500.

394–39 214**Ala**688, 108**S**746.

395–74 Ala 130**S**85.

395–89 [b] **Pendency of receivership** prevents collection of double rent only when control and possession by receiver prevents tenant from surrendering possession to landlord. 36**GaA**532, 137**SE** 283.

396–97 36**GaA**532, 137**SE**283.

396–2 36**GaA**701, 138**SE**81 [citCJ].

396–10 [b] **Notice of termination of lease and increase in rent thereafter** does not entitle landlord to treble rent as damages for failure to surrender premises. 69**Utah**15, 251**P**1073.

397–31½–New. Advice of counsel is not absolute defense. 217**Ky**594, 290**SW** 487.

397–50 [a] 217**Ky**594, 290**SW**487.

397–56 217**Ky**594, 290**SW**487.

398–60 [a] (1) 217**Ky**594, 290**SW**487.

398–61 217**Ky**594, 290**SW**487.

398–64 217**Ky**594, 290**SW**487.

398–66 See also 318**GaA**761, 145**SE**526.

398–78½–New. Interest on a judgment for double rent is allowable only from the date of the judgment. 217**Ky**594, 290**SW**487.

398–81 74**CalA**782, 241**P**588; **NJSup** 131**A**635; **NJCh** 146**A**667(2dcase).

398–82 176**Ark**1205, 3**SW(2d)**13.

399–83 NJSup 131**A**635.

399–84 See also 74**CalA**782, 241**P**588.

399–86 123**Kan**746, 256**P**997.

399–91½–New. After an assignment of a lease the lessor has two remedies, either of which may be prosecuted separately or both at the same time, 114**Nebr**184, 206**NW**744, 42**ALR**1102.

399–91⅓–New. although the lessor is entitled to but one satisfaction. 114 **Nebr**184, 206**NW**744, 42**ALR**1102.

399–91¼–New. One of the lessor's remedies is against the assignee during the time he is in possession of demised premises under the assignment, for rent accruing during his possession. 114 **Nebr**184, 206**NW**744, 42**ALR**1102.

399–91½–New. His other remedy is against the original lessee upon his personal covenant. 114**Nebr**184, 206**NW** 744, 42**ALR**1102.

399–92 NJSup 131**A**635.

400–18½–New. If a tenant refuses to pay rent or attorn to the purchaser of the leased premises, the latter has a remedy under some statutes, but under such circumstances may recover possession only. **MoA** 14**SW(2d)**44.

400–22 118**Tex**143, 12**SW(2d)**543.

401–31 240**NY**96, 147**NE**540.

401–36½–New. Bringing proceedings to recover rent immediately upon the tenant's abandonment of the premises is sufficient notice that the landlord insisted on liability for breach of covenant. **NH** 146**A**525.

401–37 But see 11**PaDist&Co** 25. [f] **Right to recover unpaid rent** presupposes due presentation of claim. 20 **AlaA**597, 104**S**350.

401–42 123**Kan**746, 256**P**997.

401–46 134**Misc**861, 236**NYS**339. [d] **In New York.**–127**Misc**274, 215**NYS** 764.

402–47½–New. In some jurisdictions an action for rent may be brought in any county where defendant resides or may be summoned. 123**Kan**746, 256**P**997.

402–49 176**Ark**1123, 5**SW(2d)**312; 163 **Ga**547, 136**SE**423.

402–51 176**Ark**1123, 5**SW(2d)**312; 86 **CalA**623, 261**P**484; **CalA** 281**P**631; 126 **Kan**139, 266**P**941.

402–63 But see 248**NY**333, 162**NE**97.

403–68½–New. Delay in seeking to collect rents, short of limitations, does not defeat plaintiff's rights. 129**Misc**270, 220**NYS**502.

404–76 [b] **No defense,** to allege that roof is insufficient to support an electric sign. 289**Pa**175, 137**A**189 (must be as to particular sign). [c] **Inconsistent defenses.**–10**LaA**648, 121**S**193.

404–78 [a] (13) That maker of notes for rent was denied possibility of making crop by reason of extraordinary and unprecedented flood of waters does not constitute defense where land was not destroyed. 152**Miss**327, 120**S**182 (2dcase). (14) Other instances. 84 **CalA**206, 257**P**907 (unprofitableness of cropping contract).

404–82 35**F(2d)**14.

404–88½–New. Tenant cannot be heard to say that lease executed by landlord did not contain terms of tenancy. 125 **Misc**866, 212**NYS**302 (where lease need be signed only by lessor).

405–98 215**Ala**517, 111**S**10.

405–12 [c] 128**Misc**359, 219**NYS**491.

406–18 127**Misc**883, 217**NYS**602; **Wis** 231**NW**585.

407–25 Mass 170**NE**58.

407–26 Wis 229**NW**550 (lessor not participating in illegal transaction).

407–31 [i] **In New York.**–128**Misc**359, 219**NYS**491.

403–35 Sask [1929] 2**DomLR**386.

408–43 35**F(2d)**14; 133**Misc**149, 231 **NYS**640. [l] **Amount due tenant by partnership which acted as agent of landlord,** who was member of firm, in transaction creating indebtedness. **Tex CivA** 284**SW**334. [m] **Charges for materials and services furnished** constitute legal offset. **Ariz** 286**P**819. [n] **Personal notes of landlord.**–**Iowa** 228**NW** 77.

408–44 Ariz 291**P**1005. [c] **TexCivA** 293**SW**221.

408–45 TexCivA 13**SW(2d)**467.

409–46 73**CalA**782, 239**P**302. But see 137**Misc**372, 243**NYS**522. [b] **In action by lessee against his sublessee,** after eviction by lessor, for rents theretofore accrued, counterclaim for portion of deposit unapplied under terms of sublease may be set up by sublessees. 73 **CalA**782, 239**P**302.

409–47 But see **NJCh** 144**A**25. [h] **Counterclaim for electric light** furnished office used by another cannot be interposed. 217**Ky**379, 289**SW**278.

409–47½–New. Lessee may recover rent for office used by lessor. 217**Ky**379, 289 **SW**278.

409–47⅓–New. Lessee cannot recover damages of lessor for refusing to accept another tenant on lessee's abandonment of premises, unless the tenant tendered was solvent. 219**Ky**539, 293**SW**1078.

409–48 But see 33 **OhA**462, 169**NE**829.

409–50½–New. Failure of landlord to relet premises cannot be deducted by tenant from full amount of rent due. 111**Conn**53, 149**A**237.

409–50⅓–New. A landlord's agreement to let the premises for the residue of the term and to apply the rent received on rent reserved by the lease, set up as a defense to an action for rent, does not lack consideration. 133**Misc**192, 231**NYS** 443.

409–52 154**Md**135, 140**A**76.

410–61 [b] (4) Other instances. 132 **Okl** 27, 269**P**277. [d] **Lessee may bring cross action against his assignee** to compel him to discharge rent and release him from liability. 229**Ky**818, 18**SW(2d)**281.

410–65½–New. A tenant, holding a landlord's personal notes when the mortgagee acquired a lien on rents and profits and an assignment of the lease, may set them off against the mortgagee. **Iowa** 228**NW**77.

410–71 35**GaA**505, 134**SE**173; 213**Ky** 279, 280**SW**1112. [d] (1) 131**Misc**673, 227**NYS**639. [e] **Landlord's conversion of notes securing performance of lease contract** held no counterclaim to suit for rent. 208**Cal** 606, 283**P**936.

411–72 [b] **Landlord converting property** covered by lien for rents must credit claims for rent with value of property. **TexCivA** 291**SW**974.

411–78 218**Ky**466, 291**SW**711; 226**App Div**73, 234**NYS**409. [a] (1) **Utah** 266 **P**1040. [b] (1) **CalA** 260**P**372; 30 **Hawaii**434. [i] **That lessee remains in possession** does not prevent assertion of damages because of lessor's interference with possession and beneficial enjoyment of premises. **Ariz** 291**P**1005.

412–79 35**GaA**505, 134**SE**173; 102**NJL** 626, 133**A**401.

412–81 [g] **Wrongful acts of landlord constitute no defense** to rent action but may be set up as counterclaim if arising

out of breach of contract of lease. 226 AppDiv73, 234NYS409.

412-81½-New. Lessee is not entitled to arbitrary reduction of rent as damages for lessor's interference with enjoyment of premises. 159La467, 105S511 (where no evidence of damages).

412-81½-New. His recourse is by action for any damage suffered. 159La 467, 105S511.

413-83 NJSup 130A536. [a] 229App Div456, 242NYS586. [b] TexCivA 26SW (2d)699. [c] 197Cal 321, 240P765.

413-84 169Ark556, 275SW889. [d] (3) See also 248NY243, 162NE20.

413-85 CalA 275P951.

414-89 [a] 232Ky680, 24SW(2d)553; 154Md135, 140A76.

414-2 249Mich31, 227NW672.

414-2½-New. A lessee making repairs for which the lessor was liable and which he refused to make may deduct the cost from the rent when it becomes due. 161La505, 109S46 (extent of right).

417-52½-New. Conveyance of undivided one-half interest in the real estate does not bar lessor or his assignee from bringing action in his own name for his proportionate share of the rent. 200 Iowa997, 205NW782.

417-69 [a] **Undertenant named in precept in summary proceeding and not mentioned in petition** is entitled to contest when tenant defaults. 127Misc491, 216NYS534.

417-75 70CalA390, 233P389 (sufficient); 187Wis55, 203NW910 (complaint for rent based on void lease is demurrable). [b] **Sufficient allegations of leasing from plaintiff.**-70CalA390, 233P389.

418-78 [a] 70CalA390, 233P389.

418-81 81CalA704, 254P599.

418-82 [a] 86CalA284, 260P815; 166 Ga757, 144SE241(1stcase); 81Mont573, 264P394; TexCivA 8SW(2d)806; 140 Wash528, 250P30.

418-85 See also 246 IllA1.

419-86 34PortoRico 635 (allegations sufficient for rental of house on soil of another).

419-87 70CalA390, 233P389.

419-92½-New. Where tenant was under possession under a void lease, complaint for rent based on lease instead of for reasonable value of use and occupation is bad on demurrer. 187Wis55, 203 NW910.

419-95 MoA 14SW(2d)44.

419-2 [b] **Allegations held sufficient.**-TexCivA 11SW(2d)668.

419-3½-New. While usually lessee, in order to recover rent from his assignee, must allege payment of rent to lessor, this is not necessary where assignment creates relation of landlord and tenant between lessee and assignee and contains express provision that assignee shall pay rent to lessee. 101WVa97, 132SE56.

419-5½-New. In Porto Rico a complaint in an action against sublessees to recover from them jointly and severally installments of rent due from the lessee must allege the date on which demand was made on them for payment in order to show when their obligation to the lessee arose and that they owed rent to the sublessor when demand was made. 33PortoRico 350.

420-7½-New. In an action for rent, the lessor need not allege that the premises were exempt from the operation of emergency rent laws and that he had a right to hold the tenant as tenant for another year. 134Misc344, 235NYS453 [dist 234NYS82].

420-22½-New. In an action for rent, attachment being issued, a plea in abatement which fails to deny statutory grounds for attachment is demurrable; 215Ala517, 111S10.

420-22½-New. likewise a plea denying indebtedness to be justly due is demurrable as not denying grounds of attachment. 215Ala517, 111S10.

421-30 102Conn475, 129A45; 246 IllA1.

426-32 192NC756, 135SE849.

421-33 73CalA527, 238P1077.

421-38 [a] **Not sufficient to plead generally an offer to give up premises and that outstanding contracts prevented earlier disaffirmance.** 289Pa175, 137A 189.

423-77 [a] **Sufficient allegations of part payment.**-TexCivA 294SW608.

424-87½-New. When payment is not made in money, pleader should disclose method of payment. 167Minn323, 209 NW32.

424-91 [a] (9) Counterclaim for damages by construction of sign by landlord interfering with tenant's sign, but not alleging interference with tenant's rights, held demurrable. 219Ky539, 293 SW1078.

424-94 8LaA575.

426-24 167Minn323, 209NW32 (amendment setting up supplementary contract for services to be rendered instead of payment of cash rent).

426-28 [b] **Bill of particulars as evidence against landlord.**-125Misc166, 210 NYS523.

427-33 [a] (12) Where tenant had not vacated premises on failure of landlord to make repairs, question of constructive eviction is not in case. NJSup 131A 635.

428-40 232 IllA165; 167Minn323, 209 NW32.

428-41 [d] (2) Where complaint, in action to recover rental, alleged joint lease with two defendants, and evidence disclosed separate lease with only one of defendants, there was no variance between pleading and proof amounting to failure of proof of cause of action against defendant who signed lease. 84 Mont283, 274P1067.

429-45 81Mont573, 264P394.

429-55 84CalA387, 258P141. [b] (17) Under general denial tenant sued for rent for balance of term of abandoned lease may show that lessor relet premises for balance of term at rental much less than he could have obtained. 86 IndA119, 155NE513. (18) Defendant's testimony, that plaintiff agreed to pay him certain sum, set up as payment or offset, for baling hay raised on leased farm. TexCivA 13SW(2d)467. (19) Other instances. IndA 172NE198; 27 OhA345, 161NE353; TexCivA 6SW(2d) 390.

430-57 167Minn323, 209NW32. [a] (14) When supplementary contract is made which materially changes terms of lease, defense thereunder should be pleaded so that plaintiff has no opportunity to reply thereto and so that definite issues will be framed. 167Minn323, 209NW32.

431-59 [a] (8) Under general denial defendant may introduce evidence to controvert evidence as to amount due. TexCivA 294SW608.

432-64 233Ky427, 25SW(2d)1016. [c] (2) Delivery presumed where evidence shows that both parties considered lease binding at time of signing. 103WVa301, 137SE747. [g] (1) TexCivA 11SW(2d) 654. [o] **Due diligence in reletting** to responsible party for reasonable amount must be shown by lessor, where lessee abandoned lease. 86 IndA119, 155NE 513. [p] **Lessor suing for rent, who admitted that he had entered premises during term,** had burden of justifying his action. 10LaA662, 121S364.

432-68 111Conn697, 151A187; 246 IllA 1; 12LaA59, 125S292; 137Misc182, 243 NYS526. [c] 246 IllA26. [e] (1) NJCh 144A25.

433-69 Ill 172NE35.

433-70 12LaA41, 125S191(1stcase).

434-71 127 Or539, 272P898; 293Pa90, 141A640, 61ALR763.

434-73 20AlaA597, 104S350; CalA 260 P372; 10LaA580, 121S349; 8LaA522.

434-77 [b] (3) Other instances. 94Pa Super29.

435-82 But see 102Conn574, 129A546.

435-87½-New. Where a vendor holding a mortgage on the property had been in possession operating a business at the time of his death and his administrator obtained an order authorizing continuance of business on the premises title to which was then in a purchaser at a sheriff's sale, it will not be presumed that the premises were to be occupied rent free. 201 Iowa923, 208NW366.

435-89 125Misc166, 210NYS523.

435-97 Ala 129S26; 102Conn574, 129A 546; 218Ky466, 291SW711; MoA 291 SW178; 153SC118, 150SE478; TexCivA 22SW(2d)737. [a] (9) Question as to what effect inability to heat house had on future business held admissible. NJ Sup 130A536.

436-98 86IndA92, 156NE181.

436-1 [b] (2) Exclusion of written lease held not error where both parties agreed they were acting under subsequent oral lease. 29Ariz112, 239P792. [c] **In action for rent of farm,** under written lease, oral agreement as to landlord's agreement to fence is inadmissible. 215 Ala517, 111S10.

437-5 [a] (7) Other evidence held admissible. 102Conn562, 129A525.

438-7 [b] (4) Tenant's testimony as to whether he had any money with which to pay rent. 84CalA206, 257P907.

438-8 [a] (7) Where tenant elected to terminate lease for breach of covenant to furnish heat, testimony of witness as to temperature of apartment was held competent. 255 Mass87, 151NE61. (8) Evidence that partitions had not been placed and that offices were not ready for occupancy held admissible. 253 IllA 574.

439-10 [a] (6) To show expenses of lessor for repairs to meet lessee's wants, under oral contract. 157Miss565, 128S 567. [c] **In action for rent, testimony that landlord failed to repair fence** causing tenant damage is admissible. 215 Ala517, 111S10.

439-12 173Minn155, 216NW802.

441-19 28 OhA356, 162NE746.

442-25 [a] (3) In action to recover increase in rental claimed unreasonable and oppressive, it is error to exclude evidence of fair market value of plaintiff's premises at time of increase. 243NY186, 153NE43. (4) In action to recover increase in rental claimed unreasonable and oppressive, it is error to exclude cost of reconstructing building at time of increase. 243NY186, 153NE43.

442-28 NJSup 135A349.

442-29 TexCivA 26SW(2d)308.

442-30 [a] (1) 36GaA467, 137SE131; 40GaA839, 151SE665(1stcase); 162La 952, 111S340; 3LaA223; 310Mo 158, 274SW774; 124 Or30, 263P888. (16) To warrant inference of reassignment to assignor or right to claim for rent. 65 Utah527, 238P245. (17) To sustain decree for two thousand dollars in tenant's note securing six thousand dollars. 172 Ark1139, 292SW368, 51ALR1287. (18) To show that tenant voluntarily vacated premises. 81Colo 50, 253P397. (19) To support finding that there was no mutual mistake. 82CalA123, 254P1116. (20) To warrant finding that before lessee abandoned premises lessor violated covenant against permitting drug store on any of his holdings. MoA 16 SW(2d)219. [b] (15) That defendant requested unpaid vendor to remove cash register included in lease. 164La947, 114S846. [c] (1) NJSup 148A12 (1st case). [f] **Evidence held to show** covenant in sublease taken over by original lessor did not require lessor to furnish more steam than plant was capable of producing. 216AppDiv299, 214NYS284.

443-31 [a] (14) To sustain finding that memorandum claimed to constitute lease was not accepted. 240Mich141, 215NW339.

443-34 [b] (3) To establish modification of lease in lessee's favor by either agreement, waiver, or estoppel. NJCh 144A25. (4) To show permanent reduction of rent. 39GaA375, 147SE169.

444-35 [a] (3) To show that lessor tried to mitigate damages by reletting. MoA 6SW(2d)1001. [b] (1) 20 OhA 73, 153NE134 (in allowing boats tied to adjacent property of lessee to swing down in front of property of lessor). (6) To show that corporation had previously occupied under yearly rental contract. TexCivA 11SW(2d)654.

444-37 [a] (1) 101WVa97, 132SE56.

444-38 [a] (1) 21F(2d)385. (11) To sustain finding that defendant conducted business on premises on his own account and for his individual benefit. 86 CalA284, 260P815.

444-39 [a] (1) CalA 287P375. (5) To show rent specified was not intended to apply where another room did not become vacant. 224Ky245, 5SW(2d) 1077. [b] (1) 233Ky427, 25SW(2d)

1016. (7) To require finding of such failure of consideration or breach of condition by failure to put premises in condition for occupancy that liability did not attach. 167Minn238, 209NW15.

444-40 [a] (9) To sustain finding that repairs and improvements were in part payment of rent. 176Ark677, 48W(2d)2. [b] (1) Iowa 202NW265; 10LaA580, 121S349.

444-41 [b] (2) To show delivery and acceptance of assignment. 228AppDiv267, 240NYS176.

445-42 25OhA41, 157NE214. [a] (7) To show thirty days' notice of lessee's intention to terminate lease was not received by lessor or her agent. 12LaA557, 126S540. (8) Other instances. LaA 129S178. [b] (1) 12LaA41, 125S191(lsteasc); TexCivA 275SW855. (2) 261Mass264, 158NE786 (waiver of right to rent). (8) To establish surrender by operation of law. NJSup 137A832. (9) To terminate lease. Ala 129S26. [f] Failure to notify lessee of sublessee's failure to pay rent direct to landlord is not evidence of lessee's surrender of premises and mutual understanding that liability has ceased. 261 Mass264, 158NE786.

445-43 [a] (2) LaA 122S85. (3) Mo 238W(2d)64. (7) IndA 169NE82. (10) To show surrender by tenant and landlord's acceptance thereof. 126Misc570, 214NYS845. [b] (2) 218AppDiv259, 218NYS135 (by oral agreement). [c] (2) Landlord's telling subtenant to move out in three days, "that he would like to have the place," is not conclusive evidence of acceptance of surrender. NJSup 135A348.

445-44 [a] (5) 124Or30, 262P288. [b] (1) 33GaA275, 147SE169; 10LaA648, 121S133; 261Mass264, 158NE786.

446-45 [a] (4) To show that lessee of farm accepted premises and improvements in condition they were when lease was executed. 127Kan12, 272P414. [d] Evidence held to support finding that heating plant became inadequate from ordinary wear and tear. MoA 27SW(2d)43.

446-46 [a] (1) TexCivA 228SW(2d)698. (8) To sustain implied finding that landlord furnished sufficient hot water. 170Ark512, 280SW979. (9) To show that premises were restored to tenantable condition after fire without disturbing tenants. TexCivA 286SW552. [b] (2) 41GaA664, 148SE723(lsteasc). (7) 267Mass368, 166NE634. (16) To show eviction generally. 81Colo 50, 253P397.

446-47 [a] (7) To show fraud as to landlord's stating that term was shorter than stated in lease. 127Misc883, 217NYS602. [b] (7) To show fraudulent concealment as to terms of lease. 59ND437, 198NW505. (8) To show reliance on representation regarding use of premises. 82CalA123, 254P116. (9) Other instances. 250Mich419, 230NW[illegible]

446-48 [c] Evidence held insufficient to show landlord's knowledge of illegal use. 245IllA508.

447-49 [b] (16) Proof of conversation in which tenant told landlord, at time of purchase of garage, that he intended to sell, is insufficient to support counterclaim for damages for loss of profits from sale of garage not consummated because of alleged fraud of landlord. 125Misc889, 213NYS849. (17) To support finding that landlord agreed to pay tenant for making alterations. 128Misc845, 220NYS376. (18) To sustain finding that no rent was due. 128Misc[illegible], 147AS[illegible]

447-52 [c] Effect of tenant leaving property on premises.–222AppDiv326, 225NYS709.

447-53 226Ala125, 124S226; 165Ark275, 274SW951, 41GaA672, 154SE375; 235IllA572; Mass 170NE658 (whether landlord had knowledge of illegal use of premises). [a] (2) 224IllA355; 329Ill75, 160NE155. [b] 95CalA589, 273P145; 89IndA531, 167NE153; 207Iowa410, 221NW464; MoA 287SW816; NJSup 135A350; 293Pa90, 141A640, 61ALR763. [c] (15) Whether building was ready for occupancy on date specified. NJSup 136A597. [e] (1) 94PaSuper29 (whether rent for certain month had been paid). (7) 207Iowa410, 221NW464. (16) Whether landlord had complied with terms of lease. 235IllA572. (17) Lessors' performance of collateral agreement to make repairs. Utah 266P1040. (18) Whether lessor on tenant's abandonment was required to relet to undesirable tenant in mitigation of damages. 207Iowa410, 221NW464. (19) Other illustrations. Ill 171NE35; 234Ky665, 288W(2d)974. [h] Where tenant did not deny that rent sued for had not been paid, dismissal of complaint was held error. 128Misc845, 220NYS376.

448-57 242NY126, 153NE43.

448-59 216Ala265, 114S292; 27OhA345, 161NE253. [b] (1) 178Minn177, 226NW411 (time of surrender); NJSup 135A350; TexCivA 48SW(2d)94. [e] (11) MoA 268SW(2d)802. (13) See also 89PaSuper30. (15) MoA 68W(2d)636. (26) 220Ala125, 124S286. (43) Whether landlord consented to surrender or was estopped to dispute alleged surrender. 73CalA199, 238P734. (44) Whether rent notes had been paid by check of assignee. 216Ala625, 114S292. (45) Whether owner failed to use reasonable diligence to rent property, after vacation by tenant. 197Wis586, 222NW811(2dcase). (46) Other evidence sufficient to take case to jury. RI 129A268. (47) Whether there was breach of implied covenant for quiet enjoyment. Ariz 291P1005. [g] Constructive eviction.–172Minn598, 216NW333.

449-60 Mo 88W(2d)937. [a] (11) Whether original lease was surrendered. NJSup 138A517.

450-61 NJSup 146A344. [a] (2) 153SC118, 150SE478. [b] (7) Payment of note given for rent by turning over proceeds of crop. Iowa 226NW922(1st case). [d] (20) Whether items alleged in counterclaim, namely, reduction of rent by agreement, delivery of money and cotton, mistakes in credits, and usury, were true. TexCivA 284SW334.

450-63 [a] (1) 89IndA490, 167NE151.

450-64 163Ga547, 136SE423; 246IllA26; 261Mass264, 158NE786. [a] (7) 326Ill482, 158NE514. (15) 261Mass264, 158NE786; MoA 287SW816. (18) 181Ark467, 268W(2d)69. (26) Novation and release by agent by acceptance of other tenants. 216Ala625, 114S292. (27) Counterclaim for leaving stock on premises. 32Ariz545, 260P1096.

451-68 [a] (3) 242NY186, 153NE43.

451-72 [a] (8) Other instances. MoA 282SW138. [d] Instruction held proper.–As to constructive eviction. 109Conn164, 145A751, 63ALR428.

452-73 [a] (4) Instruction that landlord's failure to replace furnace constituted constructive eviction held erroneous. 34GaA285, 129SE797. (5) Instruction as to nature of occupancy in determining rental value. 152Wash1, 277P74. (6) Other instances. 234Ky665, 288W(2d)974.

452-74 MoA 287SW816. [a] (4) 22AlaA1, 113S651. [b] (5) On measure of damages for breach of covenant to pay rent, not prejudicial. 102Conn562, 129A525.

452-75 22AlaA1, 113S651.

452-78 22AlaA1, 113S651.

452-79 MoA 296SW1057; 103WVa301, 137SE747.

453-80 216Ala625, 114S292; 103WVa301, 137SE747.

453-81 [a] Instructions improperly refused.–103WVa301, 137SE747.

453-87 [b] Forms held improper.–Ariz 291P1005.

453-88 [b] (2) Where evidence is conflicting on issue, court is required to find fact and should not find that there is no evidence to support allegation. 69Utah15, 251P1073. (3) Failure to make finding on disputed question as to whether certain part of building was occupied and used by tenant is erroneous. 69Utah15, 251P1073. [c] Immaterial question.–68CalA530, 229P860.

453-89 [a] (4) As to reasonable time for election to repair damage by fire. TexCivA 288SW656. [c] Finding held unwarranted.–DC 40F(2d)802.

453-89½-New. , certainty, 69Utah15, 251P1073.

453-90 [a] (4) Finding that leased premises contain eighty acres more or less does not imply that premises contain less than eighty acres. 73CalA527, 238P1077.

454-96 [a] (2) Lessee held liable for entire term has right to use or sublease property for unexpired term. 13LaA266, 127S638.

454-3 TexCivA 293SW221. [a] (3) Evidence that defendant turned possession over to successor and executed note for past-due rent held insufficient to support judgment for defendant. 89IndA531, 167NE153.

455-12 [a] Measure of damages on reletting.–TexCivA 318SW(2d)515.

455-13½-New. In the absence of a showing when the term of the tenant who moved out on May 29 ended, the landlord may not recover rent for June. 122Misc12, 217NYS294.

455-13½-New. A lessor, reducing rental for the first months of the lease on condition that the lessee would faithfully perform the covenants of the lease during the period of reduced rental, may be entitled to recover the balance due under the modified rental agreement to the end of the reduced rental period and the time of the lessee's abandonment, plus the amount of the deduction for that period, and full rent for subsequent months. 206Cal363, 274P240.

456-24 163Ga547, 136SE423.

456-26 81Colo 50, 253P397.

457-29 81Colo 50, 253P397; 131Or670, 282P1080.

457-31 42OklACR79 [reh pending].

457-37 232IllA589.

457-40½-New. A tenant failing to tender or pay into court during receivership of leased premises the amount of rent fixed by express contract, due and payable at definite dates, is chargeable with interest on the rental from the time it became in arrears. 77Colo 556, 238P42.

457-40½-New. That the landlord directed the tenant not to pay such rents does not relieve the tenant from liability for interest. 77Colo 556, 238P42.

457-43½-New. Interest on reasonable rental recovered is allowed only from the date of the decree, which determined the value of occupancy. 28F(2d)373.

457-46 Ala 129S26. But see IndA 169NE82. [a] (3) Reasonableness of fee. Ala 129S26. [b] Assignee of rent is entitled to recover attorney's fees. 100CalA338, 279P1006.

458-54½-New. Damages are not recoverable for attorney's indorsement of check drawn in plaintiff's favor without authority. 146Wash520, 264P8.

458-66 TexCivA 283SW300.

458-71½-New. An appeal from a money judgment for the landlord after surrender of possession by tenants sued for rent and restitution is governed by the general statute requiring appeals to be taken within six months after entry of judgment and not by the unlawful detainer statute. 69Utah15, 251P1073.

458-71½-New. Failure to include notice to tenant to quit premises, in record on appeal, is sufficient reason for affirmance. CalA 284P966.

459-74 [a] (2) Defendant held not liable for attorney's fees as costs. TexCivA 168SW(2d)919. [e] Assignee of lease for security who contests action, though not liable for rent, is liable for cost. TexCivA 286SW552. [f] Abuse of discretion not to impose costs on defendant.–34PortoRico 85.

459-74½-New. Where, on appeal by a tenant who was dispossessed, the lessor fails to uphold the burden of proof, the tenant is entitled to costs. 288Pa56, 135A641.

460-98 Iowa 227NW526(3dcase).

461-8 23AlaA317, 127S240(2dcase).

461-21 175Ark107, 299SW6, 8 [quot CJ].

462-25 147Miss169, 113S326.

462-44 126Kan534, 268P854; 152SC

108, 149SE340, 65ALR1427. [e] **Rents need not be due when suit by attachment is commenced,** but it is necessary that it be due and payable when suit is brought to trial. 219Ala662, 123 S45.

463-46 126Kan534, 268P854.

463-57 38 OklACR390.

465-84 MoA 31SW(2d)224.

468-63 See also 147Miss169, 113S326.

468-70 [a] **Affidavit was not objectionable because made before notary** instead of officer authorized to issue writ. 219Ala662, 123S45.

470-22 [a] (2) Amplification of description of premises. 219Ala662, 123 S45.

473-30½-New. If attachment is sued out for a cause of action on which the statute does not authorize its issuance, the proceedings being regular on their face, the appropriate method of reaching an objection that the writ will not lie is a rule on plaintiff to show cause against dissolution of the writ and its levy. 219Ala662, 123S45.

474-62½-New. A plea of tender of an amount due has been held demurrable for not alleging that tender was made before suit was commenced. 219Ala 662, 123S45.

475-68½-New. In the absence of a plea in abatement, sufficiency of the affidavit is not made an issue. 219 Ala662, 123S45.

475-68½-New. In the absence of a plea in abatement, it was not incumbent on the landlord to show demand made for payment before suit. 219Ala662, 123 S45.

475-95½-New. A charge that the jury must find for plaintiff if they believed all the evidence in the case has been held proper under the evidence. 219 Ala662, 123S45.

475-95½-New. A charge that the terms of a written lease control as to rent after expiration of the lease in the absence of another agreement has been held proper. 219Ala662, 123S45.

475-95¼-New. Where, on trial of a plea in abatement, the jury have found that the rent was payable in advance as contended by plaintiff, and affirmative charge for plaintiff on such question is proper. 220Ala308, 124S875.

478-75½-New. Where the landlord's agent wrongfully secures a writ, the tenant may recover attorney's fees expended. 147Miss169, 113S326.

479-37 86Colo 166, 279P51; SC 155SE 622.

479-90 158La405, 104S187 (rent held secured on property on premises by implied ratification of lease by successors on occupation); 170La638, 128S661.

479-93½-New. Under a lease creating a lien on personal property for rent, the property is bound for payment of rent where the tenant refuses to occupy the premises. 172Ark789, 290SW950.

480-13½-New. Statute giving lien for property, provisions, and animals does not apply to leasing of building. Tex CivA 31SW(2d)513.

480-22 [a] **Lien attaches** after execution of lease but before tenant's entry. 218Ala341, 118S578.

480-25½-New. Landlord signing tenant's note for purchase of mule, as surety, is entitled to no lien under statute for supplies, on account of having furnished the animal, 34GaA310, 129 SE296.

480-25⅓-New. nor can estoppel operate to create such lien where none exists under statute. 34GaA310, 129SE 296.

481-41½-New. Provision for the payment of a yearly sum to be secured each year by a first mortgage on crops, to be given whenever lessor demanded it, creates a lien and not a mere right to demand a mortgage. 79CalA685, 250 P705.

481-48 217MoA495, 268SW888 (landlord in same position, when lease is not recorded, as mortgagee of unrecorded mortgage); 32NM469, 259P620, 61ALR767.

482-50 79CalA685, 250P705.

482-52 157SC104, 153SE639. [k] **Crops** are subject to lien where rent money was used in gathering crop. Tex CivA 24SW(2d)457.

482-54 32NM469, 259P620, 61ALR767.

482-57 123Kan715, 256P993.

483-58½-New. A provision giving the lessor a lien on any and all property of the lessee kept in use upon the premises for all rent due or to become due will include after-acquired property. 123Kan715, 256P993.

483-64 [a] **"Improvements" held to include building alone.** 101CalA12, 281P 429.

484-80½-New. The lessor may be estopped to contend that the tenant had no interest in the subtenant's crop as against one advancing money to the tenant where the lessor has waived a lien on the crop. 144Miss877, 110S 686.

484-84 [a] **Evidence held to show** waiver of lien on cattle placed on premises under contract with lessee. 158La432, 104S197.

484-86½-New. Landlord's acceptance of one fourth of proceeds of cotton from merchant who made advances to tenant has been held not to waive landlord's lien. 181Ark1083, 29SW(2d)287.

484-86⅓-New. Cash advanced to tenants necessary to work cotton crop has been held within landlord's contract to waive lien for supplies. Miss 130 S95.

484-86¼-New. Payment of subtenant's fine has been held not necessary to operation of plantation within landlord's contract waiving rent lien for supplies. Miss 130S95.

484-86½-New. Cash advanced to tenant for purchase of horses and mules has been held not within landlord's contract waiving rent lien where they were subsequently sold and applied on tenant's debt. Miss 130S95.

484-86⅔-New. Word "supplies" within landlord's agreement to waive rent, lien includes any substance contributing materially to successful production of crops. Miss 130S95.

484-88 32NM469, 259P620, 61ALR767.

484-92½-New. Where lessees were released from obligation to pay second year's rent under lease, the right to a lien on their exempt property therefor, as provided in the lease, was also released. 206 Iowa35, 217NW879.

485-6 216Ala60, 112S347.

485-11½-New. Landlord may foreclose lien only to extent of rents due and not for advances made. TexCivA 31SW (2d)513.

485-19 171Ark872, 286SW1010; Tex CivA 278SW247. [a] **Tenant's turning over building to owner** not sufficient for latter to have lien on property of sublessee whose agreement was with tenant. TexCivA 278SW247.

485-20 TexCivA 278SW247.

485-24 36GaA233, 136SE282.

486-31½-New. A laborer, not filing a lien claim within the time required by statute, cannot attack the lessor's contract lien on the crop because of failure to file the contract for registration. TexCivA 283SW570.

486-32 79CalA685, 250P705.

486-33 79CalA685, 250P705.

486-34 79CalA685, 250P705.

486-35 79CalA685, 250P705.

486-45 122 Okl 208, 253P485.

486-47 14F(2d)917, 919 [quotCJ].

486-48 115 Or456, 239P98, 101 [citCJ].

487-51½-New. The burden of proving waiver of landlord's contract right to retain grain to pay cash rent is on defendant in landlord's action for conversion. 52SD359, 217NW635.

487-51⅓-New. To prove such waiver defendant must prove the landlord's consent to sale by the tenant and an actual sale. 52SD359, 217NW635. [a] **Evidence held sufficient** to take question to jury as to whether landlord waived right under contract to retain grain to pay cash rent. 52SD359, 217NW635.

487-53 42F(2d)33; TexCivA 19SW(2d) 331; TexCivA 26SW(2d)1100.

487-54 124 Okl 52, 254P59.

488-73 See also 2LaA643.

488-75 218Ala341, 118S578; 4LaA351. See also 214Ala425, 108S239.

489-88½-New. **Lease of right to extract turpentine from trees** on described land with other incidental rights is a "lease of land" within a statute giving landlord a lien. 24F(2d)295.

490-18 85 IndA35, 147NE922.

490-19 220Ala625, 127S194; 4LaA648, 652 [citCyc]; 108WVa37, 150SE228; 101WVa700, 133SE378, 379 [citCJ].

491-23 154Md519, 141A355; 156Md56, 143A591, 62ALR1100.

491-25 13LaA222, 127S47.

491-27 See also TexCivA 20SW(2d) 242.

491-28 214Ala430, 108S243; 220Ala 625, 127S194.

491-34 [d] **Mortgage of crop by landlord** to mortgagee who also holds mortgage on tenant's crop has been held to be assignment of landlord's lien on tenant's crop. 213Ala31, 104S232.

493-56 29F(2d)998.

493-69 22AlaA229, 114S675; 176Ark 1123, 5SW(2d)512.

494-72½-New. Lien of a landlord extends only to rents accrued at the time he received notice of the rights of the conditional vendor. 217Ala51, 114S678.

494-75 217Ala51, 114S678; 220Ala625, 127S194; 85 IndA35, 147NE922. [c] **In Washington.**-144Wash346, 258P7; 286P842.

494-79 214Ala297, 107S849; 215Ala 357, 110S813; 175Ark337, 299SW9; 176 Ark649, 4SW(2d)9; 36GaA322, 136SE 803.

495-84½-New. **Amount of lien** for property advanced in specie is the price or value at the time of the advance. 215 Ala357, 110S813.

495-84¾-New. Amount of lien for money advanced to purchase property is the amount advanced, not the value of the property purchased. 215Ala357, 110S 813.

495-92 36GaA322, 136SE803; 160Tenn 653, 28SW(2d)633.

495-3 But see 150Miss289, 116S286.

496-10 See also TexCivA 19SW(2d) 331.

496-13½-New. , and a like rule applies where tenant secured money to make his crop on note indorsed by landlord. 169Ark547, 275SW901.

497-32 [b] (2) Lien does not extend to entire sale value of stock furnished for making of particular crop. 160Tenn 653, 28SW(2d)633.

497-39½-New. Where landlord late in year before tenant moved on land furnished him with wagon in contemplation of contract already made for working land during next year, he has lien therefor on crop of next year. 141Miss564, 106S824.

497-41 [c] **In Mississippi.**-140Miss513, 106S447. [d] **In Alabama.**-215Ala357, 110S813.

498-42 140Miss513, 106S447; SC 155 SE622.

498-43 24F(2d)295 (Florida statute).

498-46½-New. A landlord's lien on furniture belonging to tenant attaches to whatever title or interest the tenant has. 22AlaA229, 114S675.

498-63 13LaA456, 126S712.

499-70 218Ala90, 117S681, 61ALR938; 172Ark696, 290SW593; 174Ark825, 296 SW717; 133 Okl 268, 272P1025. [h] **Wheat** held crop "raised on said land." 195NC452, 142SE486. [i] **Crop made in year subsequent to that in which advancements are furnished** held not subject to lien. 195NC452, 142SE486.

499-73 [a] **In Missouri.**-217MoA495, 268SW888.

499-75 129Kan632, 284P420.

499-75½-New. In Arkansas the landlord has no lien upon the tenant's crops for debts owing by the tenant for previous years. 170Ark928, 282SW3.

500-82 22AlaA229, 114S675.

500-87 229Ky280, 17SW(2d)223.

500-91 18F(2d)617 (except property of sublessees). [b] 159La957, 106S455. [c] (2) Right of landlord is not affected by reservation by third person of right to sell at will from goods. 159La957, 106S455. (3) Hope of profits is not equivalent to consideration for storage, so as to make contract one of storage or sublease, real object being sale of goods. 159La957, 106S455. [h] **Statute construed to give no lien on railroad equipment on leased right of way** applies to movables in leased house or store only. 163La720, 112S662. [i] **Railroad equip-**

ment.–163La720, 112S662.
500–93 9LaA293, 119S472.
501–14 169Ark547, 275SW901; 172Ark 696, 290SW593; 201 Iowa521, 207NW 579; 197NC452, 149SE585(2dcase).
501–17 172Ark696, 290SW593.
502–23 219Ala669, 123S209.
502–23½–New. Property of a tenant subjected to a landlord's lien, before transfer to a subtenant, is liable to attachment by the landlord. 219Ala669, 123S209.
502–23⅓–New. Property acquired by the subtenant from the landlord when no rent is due is not subject to a lien as against the subtenant not in default of rent. 219Ala669, 123S209.
502–32½–New. The word "undertenant" is not used in a broad sense, but as synonymous with "underlessee." 159 La957, 106S455.
503–41 232Ky662, 24SW(2d)576; Tex CivA 300SW953. But see 219Ala225, 121S526.
503–42 [a] **Under agreement between landlord's executor, tenant, and bank for sale of tenant's personalty,** proceeds obtained by bank were held by it in trust for executor who could sue therefor though landlord's lien had expired under statute. 208 Iowa1184, 225NW 957.
503–49 201 Iowa521, 207NW579.
503–50 See also TexCivA 26SW(2d) 1100.
503–51 216Ala252, 112S907.
503–59½–New. No lien is acquired on cattle feeding on the lessee's roughage on leased premises after the date of the commencement of the term where they were removed before the date possession was to be given under the lease. 207 Iowa816, 221NW831.
503–59⅓–New. A mere sale of property by a tenant does not of itself destroy the landlord's lien. Iowa 229NW190.
504–65 215Ala357, 110S813; 221Ky 579, 299SW189; 5LaA273.
504–71½–New. In Mississippi landlord has merely inchoate right as to tenant's goods, which may develop into preference in absence of seizure thereof under legal process, and he has no right superior to tenant's unsecured general creditors prior to such seizure. 140 Miss513, 106S447.
504–71⅓–New. In Missouri St. (1919) § 6893, goes no further than to protect landlord in enforcing his lien secured by statute, and does not extend to a lien acquired in some other way. 217 MoA495, 268SW888.
504–71¼–New. In Louisiana one who deposits moveables in the hands of the lessee has implied preference thereon, superior to a lien of the landlord having notice of the deposit. 159La957, 106S 455.
504–71⅕–New. Where property is placed in the hands of the lessee for sale, and not to be preserved and returned to the owner, such preference does not arise. 159La957, 106S455.
504–71⅙–New. In Alabama the lien of the landowner on live stock of a tenant for rent does not displace title of owner other than the tenant. 214Ala262, 107 S741.
504–73 194NC328, 139SE599.
504–74 But see 24F(2d)295.
504–76 213Ala89, 104S17. But see 31 F(2d)727.
505–86 18F(2d)617. [a] **Notice of landlord's statutory lien** held chargeable to one selling pipe organ to lessee, which was installed on premises. Tex CivA 291SW974.
505–94 22AlaA229, 114S675; 217Ala3, 114S677.
505–97 214Ala263, 107S743; 217Ala3, 114S677; 220Ala2, 127S241. [c] **Attaching landlord is not "innocent purchaser"** within Alabama Code of 1907 providing for recording of conditional sales prior to its amendment in 1923. 219Ala261, 122S167.
505–98 23AlaA317, 127S240(2dcase).
505–1 22AlaA229, 114S675.
506–5 [a] But see 40GaA447, 150SE 201. [e] **Where landlord's lien and mechanic's lien are contemporaneous in time,** and mechanic's lien is not filed within time to give notice to lienholder, landlord's lien has preference over mechanic's lien. TexCivA 275SW850.
506–9 Iowa 228NW272.
506–10 169Ark547, 275SW901 (crop of subtenant).
506–10½–New. A landlord's lien for advances on crop grown on rented land is superior to rights of an execution creditor of tenant. 169Ark547, 275SW 901.
506–13 [a] SC 155SE622.
507–35 215Ala357, 110S813; TexCivA 291SW974.
507–35½–New. or recorded thereafter, 101WVa700, 133SE378.
507–36 169Ark547, 275SW901 (crop of subtenant); 175Ark107, 299SW6; 124 Okl 52, 254P59.
507–39½–New. A landlord's statutory lien is superior to a subsequently recorded chattel mortgage. 18F(2d)617.
508–49½–New. In some jurisdictions, where the relation of landlord and tenant is evidenced by a written contract, it is not material to the priority of the landlord's statutory lien on crops whether the contract is executed before or after the chattel mortgage is executed. 124 Okl 52, 254P59.
509–57 3LaA139; 8LaA281.
509–59 169Ark547, 275SW901; 170Ark 1194, 282SW689.
509–63½–New. Landlord's lien for advances of property is superior to a subsequent chattel mortgage thereon. 215 Ala357, 110S813.
509–64 See also TexCivA 20SW(2d)242.
509–72 181Ark1083, 29SW(2d)287.
509–75½–New. Where landlord fails seasonably to exercise the privilege and permits lessee to ship crop to creditors to satisfy advances, creditors are not liable to the landlord for rent. 164La 989, 115S57.
510–81 220Ala625, 127S194; 79CalA 685, 250P705; 1LaA207; TexCivA 14 SW(2d)919.
510–85 23AlaA102, 121S452. [a] **That dealer, as agent of transferee of title retaining contract under which property was sold, temporarily stored property** does not give landlord lien though contract was not recorded. 23AlaA102, 121 S452.
510–89 21AlaA569, 110S63; 130Kan 844, 288P539. [c] **Lien for payment of rent can be created, evidenced, and preserved,** as against subsequent purchasers or incumbrancers in good faith, only by compliance with statutes requiring affidavit of good faith and filing of instrument for record. 151Wash344, 275 P733.
511–98 [b] 130Kan844, 288P539. [c] **Questions of fact.**–130Kan844, 288P539.
511–99 214Ala297, 107S849; 130Kan 844, 288P539.
512–10 214Ala297, 107S849.
512–11 See also 218Ala90, 117S681, 61 ALR938. [c] **All persons are chargeable with notice of relation of landlord and tenant** as to crops to be grown or being grown on rented land. 219Ala 263, 122S27.
513–33 214Ala297, 107S849; Iowa 229 NW190; TexCivA 300SW953. [a] (1) TexCivA 293SW881. [f] **Landlord not bound to resort to converted property** to enforce his lien. TexCivA 293SW881.
514–35½–New. The lessor's grantee, contracting with the lessee for farming of land before expiration of the lease reserving title to the crop, could not recover from the purchaser of the crop for conversion where he took with knowledge that his grantor had transferred all rights under the lease. 53ND 749, 210NW158.
514–41 214Ala297, 107S849; 218Ala90, 117S681, 61ALR938.
515–54½–New. A landlord can bring an equity suit against the mortgagee of a tenant who, knowing of landlord's lien, converted cotton. 171Ark872, 286SW 1010.
515–56½–New. A tenant's creditor, selling crop under execution, is liable for conversion. TexCivA 20SW(2d)242.
515–57 146Miss404, 111S569.
515–58½–New. For statute, requiring that rent in arrears, not exceeding one year, be paid before goods taken in execution on premises can be removed, to apply, there must be an execution against the tenant's, not a stranger's, goods. 156Md56, 143A591, 62ALR1100.
515–60 But see 154Tenn590, 288SW 355. [a] **One acting as selling agent only** of tenant's crop is not liable as "purchaser." 154Tenn590, 288SW355.
515–63 215Ala357, 110S813; 171Ark 872, 286SW1010.
516–72½–New. Nor is it a defense that defendant turned property over to a receiver in a foreclosure proceeding. 173 Ark141, 289SW764.
516–79 [a] 218Ala90, 117S681, 61ALR 938; TexCivA 26SW(2d)420.
516–82½–New. A complaint failing to allege notice to purchasers of landlord's lien is demurrable. 21AlaA569, 110S63.
516–86 Iowa 229NW190.
516–86½–New. To follow goods removed from the premises or recover rent before the execution creditor can remove them, the landlord must show that they are the tenant's goods, under statute. 156Md56, 143A591, 62ALR 1100.
516–86⅓–New. Landlord is not required to prove want of knowledge of sale by tenant, although he pleaded it. Iowa 229NW190.
520–92½–New. A landlord is not estopped to enforce his lien on crops raised on his property by failure to impound them and have them sold to satisfy his lien and by permitting them to be sold by a creditor under a mortgage where he informed the sheriff of his lien when the property was seized and instructed him not to move the property. 169Ark 525, 275SW765.
517–95½–New. Evidence that the purchaser of a crop knew that the tenant owned certain land is admissible as affecting the question of notice of the landlord's lien. 21AlaA569, 110S63.
517–95⅓–New. Evidence as to the disposition of proceeds of check given by the purchaser is admissible on the question of notice of the landlord's lien. 21 AlaA569, 110S63.
517–95¼–New. In an action by the landlord for destruction of a lien on cotton bales, evidence of lands controlled and crops grown by tenant was held admissible, 214Ala297, 107S849.
517–95⅕–New. as was also a note by the landlord to defendant bank, secured by tenant's note, in connection with evidence of a conversation at the time of the loan, wherein the bank was informed of tenancy. 214Ala297, 107S849.
517–96½–New. To show that landlord became bound for advances by the mortgagee to the tenant, evidence of the mortgage of the landlord and tenant is competent. 214Ala324, 107S862.
517–97 [a] (7) To support finding that landlord did not reserve title to crop which tenant sold to defendant. 53ND749, 210NW158 (no basis for claim of conversion). (8) To show purchase and conversion by defendants. Tex CivA 14SW(2d)919.
517–4½–New. In an action against a purchaser of crops for damages for destroying the lien of the landlord, the question of the purchaser's knowledge of the lien, where evidence was conflicting, was for the court sitting as a jury. 214Ala430, 108S243.
517–4⅓–New. Whether defendant had notice of lien for rent and that cotton was grown on rented land is a question for the jury on sufficient evidence, 219Ala263, 122S27.
517–4¼–New. and also whether the purchaser of the crop knew of facts which would put an ordinarily prudent man on inquiry as to the landlord's lien. 218Ala90, 117S681, 61ALR938.
517–4⅕–New. Whether landlord permitted tenant to retain rent money due for gathering crop in 1928 is question for jury. TexCivA 24SW(2d)457.
517–4⅙–New. Whether landlord is entitled to exemplary damages for willful trespass is question for jury. Tex CivA 24SW(2d)457.
517–8 214Ala297, 107S849.
517–8½–New. Instruction that notice to purchaser of crops of lien for rent is not notice of lien for advances is misleading. 214Ala297, 107S849.
517–8⅓–New. An instruction pretermitting all reference to notice of facts

sufficient to put defendant on inquiry is misleading and is properly refused. 214Ala297, 107S849.

517-8¼-New. An instruction assuming that plaintiff has a lien on all the crops in dispute, where some evidence showed but part thereof was grown on rented land, is improper. 214Ala297, 107S849.

517-8½-New. An instruction which fails to state and hypothesize that defendant, before receiving warehouse receipts, had notice of tenancy during year crops were grown, is misleading and improper. 214Ala297, 107S849.

518-17 215Ala357, 110S813.

520-86 Iowa 230NW559.

520-92½-New. A landlord, by consenting to sale of property by tenant, may estop himself from asserting lien. Iowa 229NW190.

521-98 170Ark1194, 282SW689.

521-99½-New. As between the purchaser of crops and mortgagee, the purchaser is not bound to take notice of waiver not indorsed upon the mortgage as required by statute. 175Ark337, 299SW9.

521-99¾-New. Such purchaser need only prove the lien of the landlord in an amount equal to the purchase price of crops grown on the rented premises. 175Ark337, 299SW9.

522-18½-New. A landlord does not relinquish his lien as against subsequent lienholders on corn and seed raised on his property by tenants by permitting them to use such property in making a crop the following year. 169Ark525, 275SW765.

522-18¾-New. Mere knowledge of a landlord of a sale of property by his tenant does not destroy the landlord's lien. Iowa 229NW190.

522-19 TexCivA 300SW953.

522-29 147Miss489, 112S697.

523-36 160Tenn653, 28SW(2d)633 (landlord selling stock under title retention contract held to waive lien on crop for price). But see 147Miss489, 112S697.

523-40 171Ark872, 286SW1010. [a] TexCivA 300SW253.

523-44 146Miss404, 111S569.

523-46 TexCivA 300SW953.

523-48 146Miss404, 111S569.

523-50 [a] **Notice by tenant to landlord** of intention to sell does not release landlord's lien. 85IndA35, 152NE294.

524-52 Iowa 229NW190.

524-59½-New. Sale of cotton grown on rented land for the purpose of raising the means to pay rents or advances, made with the landlord's consent, is not a waiver of lien against the proceeds. 219Ala263, 122S27.

525-77 170Ark1194, 282SW689.

525-79 179Ark651, 17SW(2d)314.

525-82½-New. A landlord's waiver, written in a tenant's mortgage to a bank to secure notes for supplies, of rents and any lien until notes secured by the mortgage are paid, merely postpones payment of rent in favor of the notes and gives the mortgagee no right to purchase the crop. 140Miss443, 106S10.

525-82½-New. Where machines sold to a tenant were considered as a whole, the landlord's waiver of a lien not specifying the model or number of machines is sufficient to cover all of them. 9LaA272, 120S119.

525-82¼-New. Landlord, after waiving lien, has no greater rights than those of unsecured creditor. TexCivA 26SW(2d)420.

525-83 [a] **Storage in mortgagee's warehouse to await better price conditions** does not destroy landlord's lien nor displace its priority. 219Ala263, 122S27.

525-83½-New. Landlord's statutory lien on tenant's crop continues until crop passes into hands of purchaser without notice. 21AlaA569, 110S63.

525-83¾-New. Under Alabama code the landlord's lien cannot be totally destroyed until the crop is disposed of and the proceeds are beyond the landlord's reach. 218Ala90, 117S681, 61ALR938.

525-94½-New. That the amount of rent alleged in claim and delivery was less than stated in distress held not to defeat a lien for rent and deprive the landlord of right of possession under warrant. 144SC386, 142SE514.

525-94¾-New. Where cotton, stored in a public warehouse, is sold to a third person by transfer of negotiable warehouse receipts, the landlord's privilege for supplies is lost. 9LaA624, 121S657.

525-94¼-New. A statute providing that an agricultural landlord making excessive charges shall not be entitled to a lien on a tenant's property and that the tenant may recover double the amount paid is unconstitutional. 118Tex491, 18SW(2d)585.

526-1 9LaA71, 119S96.

526-5 9LaA494, 121S316.

526-12 151Wash344, 275P733.

526-17 TexCivA 275SW850.

527-24 13LaA456, 126S712 (time for exercise of lien after sale).

527-31 See also 3LaA387.

527-36 12LaA174, 125S183.

527-41 85Mont310, 278P1002.

527-44½-New. Where a landlord, after seizure of property belonging to a tenant by the sheriff under a writ of fieri facias, intervenes by filing of third opposition within the statutory time, his privilege thereon is preserved without necessity of actual seizure of property. 9LaA494, 121S316.

527-45½-New. Under some statutes a lessor who has reasonable ground to believe that the lessee's property used or kept on the premises will be removed may commence action to foreclose his lien before actual maturity of rent. 144Wash346, 258P7.

527-45¾-New. Under such statutes a landlord cannot commence foreclosure proceedings before maturity of installments of rent unless he has reasonable cause to believe that delay will impair his security by probable loss of such property. 144Wash346, 258P7.

527-45¼-New. Such reasonable cause exists where the goods are about to be sold in proceedings to foreclose a mortgage given after the premises were leased. 144Wash346, 258P7.

527-45⅛-New. Foreclosure of landlord's lien should not be refused because "distress warrant" is quashed. TexCivA 300SW247.

527-45⅞-New. Removal or sale of personal property by the assignee of a lease contract did not affect the lessor's right to foreclosure of the landlord's lien against assignees. TexCivA 11SW(2d)668.

528-54 SC 155SE622 (distress and lien are cumulative).

528-58 201Iowa521, 207NW579. [a] **Seizure dissolved** where lessor had no good reason to believe tenant would remove property. 169LaS66, 126S219.

528-59 But see 85Mont310, 278P1002.

528-60½-New. Where property described in recorded conditional sale contract was levied on in an attachment suit by a landlord for rent, the conditional vendor as claimant thereof was held to prevail. 214Ala263, 107S743.

528-60¾-New. Fact that conditional sale contract was unrecorded held not to affect conditional vendor's rights as against landlord's attachment for rent. 214Ala267, 107S744.

528-60¼-New. Landlord's receipt of full value of attached hogs on sale does not release lien of attachment where money was applied to satisfaction of mortgage. Iowa 230NW559.

530-96 175Ark107, 299SW6.

530-1 36GaA233, 136SE282.

531-5 [a] **Action by landlord,** having lien on crop against bank receiving proceeds in payment of its indebtedness has been held barred by six months' limitation. 172Ark1165, 291SW832.

531-15 216Ala60, 112S347.

532-30½-New. In an action by a landlord to enforce his lien on a crop grown by a subtenant between whom and the landlord no privity of contract exists, the subtenant is not a necessary party. 201Iowa521, 207NW579.

532-30¾-New. In a suit to enforce a landlord's lien on mules furnished to tenant and mortgaged to another, the tenant mortgagor is a necessary party in order that the decree may bind him. 215Ala357, 110S813.

532-30¼-New. and the decree is erroneous and not binding as to him where he is not served with notice of amendment of complaint. 215Ala357, 110S813.

532-30⅛-New. but as to the mortgagee, the decree is binding, although the tenant mortgagor is not joined as a party. 215Ala357, 110S813.

532-39 215Ala357, 110S813. [a] **Should allege** that property was that of defendant and was on leased premises. TexCivA 300SW247.

532-41 [a] **Verified bill alleging due and unpaid notes** for rent held substantial compliance with statute requiring itemized claim before lien can be enforced. 154Tenn590, 288SW355. [b] **Petition alleging that defendants had failed and refused to pay rent** or any part thereof sufficiently alleged breach of rental contract without allegation as to demand. TexCivA 11SW(2d)668.

532-43½-New. Tenant claiming property was exempt must plead such exemption. TexCivA 300SW247.

532-61½-New. An intervener, claiming a lien on an automobile found on premises, has the burden of establishing that the automobile was there only transiently, under provisions of the statute. 11LaA617, 124S558.

532-66 [a] (1) 170Ark1194, 282SW689. (6) 170Ark1194, 282SW689. (7) That rents had not been paid. 171Ark872, 286SW1010. (8) To sustain finding that crop mortgagee had notice of landlord's equitable lien. 79CalA685, 250P705. (9) Funds upon which landlord's executor had lien for unpaid rent. 208Iowa1184, 225NW957. (10) To sustain decree adjudging lien for rent on cotton. 179Ark651, 17SW(2d)314. [b] (8) To show that automobile was only transiently on premises. 11LaA617, 124S558.

533-71½-New. **Reference** will not be ordered where the main issue is the amount due which is sufficiently shown by evidence. 215Ala357, 110S813.

533-72½-New. Refusal to submit question of existence of parol agreement is proper. TexCivA 300SW253.

533-78 Iowa 227NW526(3dcase) (entitled to judgment in rem and foreclosure of contractual lien).

533-81½-New. Decree intending to establish a lien on property advanced in specie should be made specific as to the exact property charged with the lien. 215Ala357, 110S813.

534-95 SC 155SE622.

535-6 [a] **In Ontario.**-59 OntL374, [1926] 4DomLR717.

536-33 6LaA556; SC 155SE622.

536-54½-New. Royalties and money by way of way-leave for use of coal mine are rent for which landlord may distrain. Alta [1925] 3DomLR154.

536-59 36GaA591, 137SE574; 154Md519, 141A355; 8PaDist&Co364; SC 155SE622. [b] **Where tenant sublet premises to another without consent of his landlord** and agreed with such third party for division of profits, relation of landlord and tenant did not exist between tenant and party to whom he sublet premises because of lack of consent of landlord, and third party was mere cropper so as to preclude distress proceedings by tenant as landlord. 118Tex143, 12SW(2d)543.

538-83½-New. Attornment clause in contract of sale held invalid where not introduced to create a reasonable tenancy. Sask [1927] 3DomLR57.

538-85 8PaDist&Co364.

538-86 SC 155SE622.

538-88 But see SC 155SE622.

539-3 285Pa507, 132A700; SC 155SE622.

539-13 37GaA547, 140SE904; 6LaA278; SC 155SE622.

540-14 37GaA547, 140SE904.

540-15 37GaA547, 140SE904.

540-15½-New. except where under the terms of the rent agreement delivery is required at a storage place beyond the limits of the rented premises, 37GaA547, 140SE904.

540-23 285Pa507, 132A700.

540-23½-New. Explicit provision in

a lease is necessary to accelerate the rent for the balance of the term or give the landlord the right to levy on the property removed from the premises for rent not due. 285Pa507, 132A700.

540-28 Man [1929] 4DomLR1063(1st case).

540-32½-New. Landlord's customary acceptance of rent after due date does not render demand for strict compliance with lease prerequisite to distraint. 289Pa369, 137A612.

543-2 Alta [1927] 3DomLR85; Alta [1930] 3DomLR959.

547-84 See also 40GaA190, 149SE102 (1stcase).

547-3 [a] (2) Attornment clauses in subsequent mortgages held inoperative where interest on first mortgage is fair rental and is taken under clause therein. Sask [1927] 3DomLR422.

548-27 156Md56, 143A591, 62ALR1100; 6PaDist&Co 228; 14PaDist&Co 159.

549-31 3Del 294, 136A280 (by statute); 11PaDist&Co 89; 14PaDist&Co 159.

550-39 SC 155SE622 (property must be owned by tenant in his own right); 108WVa37, 150SE228; Alta [1927] 3DomLR85.

550-42 7PaDist&Co 240.

550-43 But see 88PaSuper349.

551-50 91PaSuper281. [a] **In West Virginia.**–101WVa152, 132SE201.

551-67 See also 108WVa37, 150SE228.

552-82 88PaSuper550.

552-93 See also 98PaSuper504.

552-95 146SC257, 143SE820.

553-3 Alta [1927] 3DomLR85.

553-4 10PaDist&Co 186.

553-14 218Ky195, 291SW19.

553-19½-New. Goods in storerooms added to leased building under agreement that no additional rent should be charged for the same are subject to distraint for arrears of rent. 218Ky195, 291SW19.

556-78 88PaSuper550.

556-80 TexCivA 275SW850.

556-95½-New. Property which has been sold on foreclosure of a mechanic's lien is no longer in custodia legis and is subject to distraint by landlord under his preference lien. TexCivA 275SW850.

556-95½-New. The rule applies as to mortgaged chattels delivered to a trustee appointed by foreclosure decree. 156Md56, 143A591, 62ALR1100.

556-96 [a] **Where tenant obtains release of goods** by payment of execution debt to sheriff, goods become immediately subject to replevy by landlord. 9PaDist&Co 135.

557-20 [a] **But this rule has no application** to distress of another's goods on bankrupt's premises, as such goods are not in custodia legis. 3Del 294, 136A280, 282 [citCJ].

557-20½-New. A landlord cannot distrain property in the hands of a receiver in bankruptcy. 94PaSuper516.

558-33½-New. Where a lease of personal property gives the lessor the right to take possession in case of the lessee's bankruptcy, and receivers in bankruptcy take possession, the property passes out of the custody of law when the referee in bankruptcy makes an order for return of the property to the lessor thereof and the property is subject to distraint by the lessor of the realty. 88PaSuper550.

558-39 88PaSuper550.

562-25 97PaSuper197.

565-84 34F(2d)594 (notice must be given promptly).

566-7½-New. Where tenant pays sheriff execution debt and obtains release of goods, the landlord has no claim to the fund, there having been no sale. 9PaDist&Co 135.

566-14 93PaSuper173.

567-38 See also 294Pa300, 144A280.

567-40 294Pa300, 144A280.

569-74 3Del 294, 136A280; 94PaSuper556 (no judicial process which constable is compelled to serve).

569-74½-New. In New Jersey bill for specific performance of contract for alimony is properly filed in chancery court, although the contract was made in a foreign state. 98NJEq230, 130A463.

569-82½-New. Warrant may be qualified only for intrinsic defects appearing on its face. TexCivA 300SW247.

569-96 TexCivA 13SW(2d)467.

569-98 1LaA723.

570-8 [d] **In distress by heirs of person under whose contracts the rents are recoverable** they must allege facts showing their relationship to deceased. 105WVa540, 143SE309.

570-21 But see TexCivA 8SW(2d)806.

571-48 98PaSuper545.

571-56 105WVa540, 143SE309.

572-67 98PaSuper545.

572-73 [c] **In Pennsylvania.**–92PaSuper526.

572-87 92PaSuper526.

573-95½-New. A landlord, failing by lack of diligence to distrain a stranger's mortgaged chattels on demised premises for rent before they came in custodia legis by delivery to a trustee appointed by foreclosure decree, cannot recover the proceeds of the trustee's sale thereof as against the mortgagee, as application thereof to payment of rent would compel the stranger or the latter's mortgagee to pay rent. 156Md56, 143A591, 62ALR1100.

573-95⅓-New. A landlord may not distrain after levy by the sheriff. 34F(2d)594.

574-22 Alta [1928] 3DomLR744.

574-31 See also 34F(2d)594 (active seizure).

575-52 Man [1930] 2DomLR675.

577-12 152Miss390, 119S320.

577-18 1LaA179.

579-71 [a] **Sale will not be enjoined** because of court's failure, as promised, to notify constable that judgment absolute in mandamus to require papers to be returned to proper court was rendered. 163Ga119, 135SE500.

579-74 98PaSuper545.

581-31 104WVa226, 139SE711.

581-44 104WVa226, 139SE711.

582-69 158La432, 104S197 (claimant held entitled to recover attorney's fees). [a] **Claim of intervener held not responsive to pleadings.**–9LaA293, 119S472. [b] **Instrument showing loan agreement between third party and lessee** covering property distrained, in support of contention that it did not belong to lessee, held improperly excluded. TexCivA 16SW(2d)941.

582-76 [a] (2) But see TexCivA 11SW(2d)824.

583-10½-New. If landlord has no right to distrain in first instance, he is not entitled to recover possession in claim and delivery proceeding. SC 155SE622 (ownership of personalty held for jury).

585-57 GaA 155SE372.

586-80½-New. To distrain for rent before removal by an execution creditor, the landlord must, under a statutory provision, show that the goods belong to the tenant. 156Md56, 143A591, 62ALR1100.

586-96 41GaA713, 154SE472.

586-99 [a] **Instructions held erroneous.**–35GaA51, 132SE257.

586-1 41GaA713, 154SE472.

586-2½-New. It is error to charge that any removal of produce from the premises irrespective of the rights and duties of the tenant under contract would authorize the issuance of a warrant prior to the maturity of the rent obligation. 37GaA547, 140SE904.

587-13 TexCivA 8SW(2d)806.

588-61 Sask [1929] 2DomLR386.

588-64½-New. In Saskatchewan a second distress need not be confined to the goods previously distrained where the first distress was rendered ineffective by the obstruction of the debtor. Sask [1929] 2DomLR386.

589-75 289Pa369, 137A612; 142Va197, 128SE644 (at common law and under statute).

589-76 289Pa369, 137A612.

589-90½-New. That affidavit for distress warrant misdescribed the street number does not entitle defendants to judgment in cross action for damages, none being shown. TexCivA 8SW(2d)806.

589-90½-New. That default judgment in distress proceedings was had against tenant does not prevent his independent action for wrongful levy. TexCivA 7SW(2d)623.

589-94 142Va197, 128SE644.

590-95 TexCivA 7SW(2d)623.

590-99½-New. and liable for damages; 142Va197, 128SE644.

590-8 142Va197, 128SE644; Man [1929] 4DomLR1063(1stcase).

590-11 142Va197, 128SE644.

590-16½-New. A seller of goods reserving title and holding lien note for price may recover against a landlord selling the goods under distress warrant. Man [1929] 3DomLR305.

591-29 TexCivA 13SW(2d)467.

591-40 [b] (1) See also 90PaSuper163 (under act of 1772). (5) Action for trespass may be suspended pending determination of replevin suit. 9PaDist&Co 237.

593-82½-New. Ignorance of landlord will not relieve him from compensatory damages for mistake in issuance of distress warrant. 142Va197, 128SE644.

593-91 [a] **Tenant is not entitled to recover value of hay, injured or destroyed by officer in levying distress warrant on other hay,** in absence of allegation that landlord was responsible for such acts of officer. TexCivA 13SW(2d)467. [b] **Petition failing to allege that plaintiff was entitled to possession or use** of distrained property is demurrable. 228Ky71, 14SW(2d)156.

593-1½-New. Averments that conduct barred distraint without notice held not to state separate cause of action. 289Pa369, 137A612.

594-24 [a] (4) Testimony of landlord's offer to return goods on payment of rent held proper. 289Pa369, 137A612. (5) Testimony whether tenant had lien on stored goods held properly refused in absence of showing of damage from loss of lien. 289Pa369, 137A612.

594-25 91PaSuper281. [e] **Substantial damages.**–142Va197, 128SE644.

595-28 AlaA 129S791. [a] (4) Value of property at time of levy. 142Va197, 128SE644.

595-29 [c] 289Pa369, 137A612. [d] **Instructions held erroneous or properly refused.**–142Va197, 128SE644 (making price obtained at forced sale sole criterion of value of goods levied on).

595-41 [c] (2) But a recovery for damages in respect of credit has been permitted. 166La635, 117S745. [f] (2) Lessee is not entitled to attorney's fees for dissolving provisional seizure on trial on merits. 166La635, 117S745.

595-47½-New. The owner of property distrained under a distress warrant is not entitled to damages for detention where such detention is lawful. 228Ky71, 14SW(2d)156.

596-48 [e] **Depreciation and breakage.**–An award of one thousand five hundred dollars to lessee for depreciation and breakage was held inadequate by five hundred dollars. 166La635, 117S745.

597-74 142Va197, 128SE644.

597-75 289Pa369, 137A612.

597-78 Alta [1928] 3DomLR744.

597-80 TexCivA 7SW(2d)623.

597-86 125Me223, 132A550, 45ALR309.

597-87 [a] **Landlord could not oust undertenant of portion of premises** while permitting tenant at will to remain in possession of remainder. NH 151A81 (2dcase).

597-89 125Misc846, 211NYS499.

597-94 [b] **Payment of rent to administratrix de bonis non** on notification of her appointment gives her no right to begin proceedings for possession because of refusal to pay increased rental. 233Mich108, 206NW513.

598-1 133Misc311, 231NYS455.

598-6 TexCivA 297SW882; Vt 147A270. [a] 232Mich370, 205NW196 [citCJ].

598-7 83NH270, 141A304; TexCivA 294SW900, 904 [citCJ]. [d] **Lessor's right to reënter is restricted** to breach of specific covenant in lease. 255Mass76, 151NE81, 45ALR1.

598-12 See also 83NH270, 141A304.

598-14 24OhA202, 156NE919; TexCivA 294SW900, 904 [citCJ]. [a] **Right of entry for breach of condition subsequent** is not reversion or estate in hand. 99Fla1238, 128S844.

599-18 [c] **Substantial breach** of covenant must be shown; technical breach

is insufficient. 127Misc630, 217NYS306.
599-19 47RI 400, 133A797.
599-23 Vt 147A270.
599-23½-New. Reëntry clause in lease limited to breach of "stipulation" of this "agreement" excludes implied conditions. 100Vt48, 134A635.
599-26 143Miss602, 108S704, 49ALR 511; 5PaDist&Co 183; TexCivA 297SW 882. [c] **Statutory provision** giving right of entry should be treated as part of every lease contract. 99Fla1229, 128 S827(2dcase).
599-27 143Miss602, 108S704, 49ALR 511; NJSup 135A804.
599-29 99Fla1229, 128S827(2dcase); 101NJEq94, 136A731.
599-31 [a] (2) other instances. Man [1930] 4DomLR715.
599-33 89CalA69, 264P511.
600-36½-New. In Manitoba premature reëntry under lease providing for reëntry if rent is unpaid for fifteen days may result in lawful possession after subsequent default. [1930] 2DomLR 675.
600-42 TexCivA 294SW900, 904 [cit CJ].
600-52 143Va250, 129SE228, 230 [quot Cyc] (mining company is within rights in evicting employee tenant after notice and discharge in accordance with terms of contract). [c] **Reservation of right held essential** to give remedy without action in courts. TexCivA 294SW 900.
601-53 143Va250, 129SE228, 230 [quot Cyc].
601-55 125Me223, 132A550, 45ALR309.
601-58 143Miss602, 108S704, 706 [cit CJ], 49ALR511.
601-64 [a] **Illustration.**–143Va250, 129 SE228.
601-66 143Va250, 129SE228, 230 [quot Cyc].
602-69 143Va250, 129SE228, 230 [quot Cyc].
602-71 143Va250, 129SE228.
602-87 TexCivA 294SW900, 904 [cit CJ].
603-90½-New. Civil remedy of forcible entry and detainer held not to deprive landlord of common-law right of terminating tenancy at will by reëntry. 125Me223, 132A550, 45ALR309.
603-98 143Miss602, 108S704, 49ALR 511.
603-2 86IndA246, 155NE618. 620 [cit CJ].
603-7 But see 105NJL317, 144A720, 64 ALR304 (delay of two months and two days after expiration of lease before bringing ejectment is not of itself evidence of consent by owner to former tenant holding over).
603-8 168Minn312, 210NW34.
603-15½-New. Act constituting surrender of lease may be waived by acts of the landlord. Ont [1927] 2DomLR180.
603-17 81Mont1, 261P288, 291 [quot CJ].
603-18 81Mont1, 261P288, 291 [quot CJ].
604-19 81Mont1, 261P288, 291 [quot CJ].
604-34 TexCivA 294SW900; Man [1926] 3DomLR305, [1926] 2WestWkly 303, 36Man163, [1927] 1DomLR51.
605-51 128 Okl 118, 261P216, 221 [quot CJ]. [a] See also 35PortoRico 54.
605-54 132Misc435, 230NYS239.
607-81 296Pa493, 146A123.
607-83 127Misc630, 217NYS306; 131 Misc714, 227NYS721.
607-84 127Misc630, 217NYS306; 132 Misc435, 230NYS239.
607-87½-New. The right to statutory ejectment depends upon showing facts bringing the case within the statute. Vt 147A270.
607-89 See also 220MoA1057, 279SW 720.
608-91 220MoA1057, 279SW720.
608-96 99Fla1229, 128S827(2dcase).
608-99 99Fla1229, 128S827(2dcase).
608-6 99Fla1229, 128S827(2dcase).
608-9 164La332, 113S866.
609-22 CalA 262P774; 208Ky715, 271 SW1049; 105NJL317, 144A720, 64ALR 304.
610-44 232 IllA287; 32PortoRico 554 (defendant has burden to show longer term where shorter is presumed from rental agreement).
610-46 232 IllA282.
610-47 101WVa92, 132SE204. [b] **Landlord parting with title** cannot evict tenant after termination of lease, though tenant may not have attorned to landlord's grantee. 101WVa92, 132SE204.
611-56 See also 68Utah398, 250P982.
611-56½-New. In some jurisdictions only defenses available to defendant in unlawful detainer suit are that relationship of landlord and tenant does not exist because the lease is invalid. 68Utah398, 250P982.
611-56⅓-New. that there is no lease or contract to pay rent, 68Utah398, 250P 982.
611-56¼-New. or that no rent is past due. 68Utah398, 250P982.
611-56½-New. Amount paid by tenant for tax sales certificates not purchased in order to protect his unexpired term held not proper set off or counterclaim. 142 Okl 47, 285P89.
611-61½-New. In unlawful detainer one who is agent of owner to solicit lessee is not necessary or proper party. 68Utah398, 250P982.
611-66 143Wash525, 255P955.
611-66½-New. Lessee going into possession is proper defendant in action for possession of premises after expiration of lease. 165La328, 115S579.
611-69 95PaSuper250 (essentials of action to authorize judgment).
611-70½-New. Delivery of copy of writ of restitution to person of suitable age and discretion on premises is held sufficient, although copy was not mailed as required by statute. 146Wash500, 263P949.
611-70⅓-New. A statute providing for service of certain notices to be given by landlord to tenants does not control service of writs of restitution. 146Wash 500, 263P949.
611-72 [c] 102Conn640, 129A786; 164 Ga366, 138SE787; 166Ga757, 144SE 241(1stcase). [f] **Unnecessary allegations.**–Iowa 232NW693.
611-78½-New. Failure to verify petition held not demurrable. 164Ga366, 138SE787.
612-92 TexCivA 27SW(2d)885 (mandatory injunction).
612-95 [a] (9) Tenant, contending that landlord had parted with title prior to lease, cannot show attornment. 220MoA 1057, 279SW720. [b] (6) Evidence as to mistake of law by tenant as to effect lease would have on his possession as part owner. 79CalA353, 249P 238. (7) Testimony that tenant had claimed property for many years. 150 Va17, 142SE405.
612-96 47RI 400, 133A797. [b] (4) 142 Wash489, 253P822. (5) To authorize submission of issue whether operation of lunch counter, in violation of lease, was merely incidental to confectionery store. TexCivA 283SW679. (6) To show that tract of land claimed by defendant was same tract that was conveyed to plaintiff. 150Va17, 142SE405. (7) That unlawful possession of tenant commenced just prior to institution of action. 150Va17, 142SE405. [c] (7) To support findings of jury that son of lessee knew or should have known that sublessee was likely to use premises for immoral purposes. 216 AppDiv184, 214NYS514. (8) To afford slight inference that lessee's son knew or should have known premises were being used for gambling by sublessees. 216AppDiv184, 214NYS514 (to warrant ejectment by original lessor against original lessee). (9) To sustain claim of removal. 165La328, 115 S579. (10) To show implied contract releasing lessee from liability after subletting premises. IndA 169NE688.
613-6 105NJL317, 144A720, 64ALR 304. [a] **Directed verdict.**–Where holdover tenant disputes landlord's title. 168Ark1167, 271SW10.
613-7 174Ark153, 294SW705; 95Fla 321, 116S31; 204Iowa378, 213NW410; TexCivA 283SW542. [a] (4) Whether landlord orally agreed to review existing lease. TexCivA 283SW542. (5) Good faith of sale terminating lease by its terms. 204Iowa378, 213NW410.
613-8 [a] 174Ark153, 294SW705. [b] 37GaA686, 141SE326.
613-13½-New. Finding that tenancy did not cease on day alleged in complaint has been held not to negative allegation of wrongful occupancy as denial that tenancy terminated on some other day, and to support judgment in favor of defendant. 72CalA379, 237 P399.
613-16½-New. Judgment cannot be recovered for rent due when the statement and summons demand more. MoA 18SW(2d)902.
613-18 [a] (4) Judgment improperly entered. 95PaSuper250.
614-39½-New. Stipulated charge for land no part of rent reserved not recoverable in action for damages for failure to pay rent. 190NC563, 130SE156.
614-40 But see 33 OhA501, 170NE33.
614-42 Wash 291P721.
614-50½-New. Award to tenant of damages for removal from possession in addition to damages for injury to fixtures and merchandise held not an allowance of double recovery, where damages for removal were shown to have been awarded for lost profits. TexCivA 283SW542.
614-56 14F(2d)418.
615-62 27Hawaii362.
615-68 143Miss602, 108S704, 49ALR 511; 80Mont53, 257P1034; NH 151A 81(2dcase) (possessory in character); 219AppDiv462, 219NYS612; 137Misc 182, 243NYS526.
615-69 219AppDiv462, 219NYS612.
616-73 172Ark1177, 288SW914; 76 CalA478, 245P248; 80Mont53, 257P 1034; 33PortoRico 91. [b] **Remedy is for clear and simple violations;** detention that does not admit of explanation. 33PortoRico 91. [c] **In Missouri.**–A 23 SW(2d)214.
616-76 128Misc185, 218NYS116.
616-82 80Mont53, 257P1034.
616-87 126Misc488, 214NYS552; 133 Misc156, 231NYS42; 136Misc405, 241 NYS438.
616-89 96CalA383, 274P373. [b] **Relations under cropping contract** not within statute. 33PortoRico 91.
616-90 1LaA283; 80Mont53, 257P 1034; 126Misc488, 214NYS552; 100Vt 48, 134A635. [a] **All sections** of such statute must be read together. 126Misc 488, 214NYS552.
617-95½-New. Court in summary proceedings cannot determine title or declare tenant's deed a mortgage, tenant being in court of equity. 219App Div462, 219NYS612.
617-96 128Misc185, 218NYS116.
617-98 137Misc182, 243NYS526.
617-13½-New. That landlord may have proceeded under another section of the code is no reason why he should not invoke a simple and more summary method of "ejectment" provided by the code. 132SC130, 128SE718.
617-14 77CalA786, 247P543; 96CalA 383, 274P373; 32PortoRico 254. [a] (3) Action does not lie where defendant holds under cropping contract. 33 PortoRico 91. [b] **Unlawful detention of premises does not cease on appointment of receiver** where lessee is collecting rentals through tenant left in possession and is not paying rent. 86CalA 651, 261P326.
618-15 36GaA198, 136SE287; 39GaA 632, 147SE903; 40GaA274, 149SE325 (1stcase); 82NH249, 132A256; 127Misc 611, 217NYS438; 134Misc677, 236NYS 353; 135Misc542, 239NYS280; 190NC 125, 129SE147; 90PaSuper583; 144SC 483, 142SE600.
618-21 [b] **Where defendant held under lease from insular government,** relation of landlord and tenant held not to exist between him and plaintiff suing to have occupied houses removed. 32PortoRico 254.
619-24 128Misc185, 218NYS116. [d] **Termination of lease by landlord for tenant's failure to comply with terms** held not to deprive former of statutory remedy. 128Misc185, 218NYS116. [e] **In California.**–A 261P1053.
619-26 CalA 261P1053. [b] **Defendant taking possession to look after premises for compensation** could not be evicted as tenant at will in absence

of showing that employment had been terminated. 39GaA632, 147SE903.

619-27 33PortoRico 91; 41Wyo 509, 287P316. [a] **In Porto Rico.**-33Porto Rico 91.

619-31 127Misc611, 217NYS438.

619-32 155Wash613, 285P654. [c] **Grantee of purchaser at sale on defendant's default in payment of note** secured by trust deed cannot maintain action, conventional relation not existing. 96CalA383, 274P373.

619-33 127Misc611, 217NYS438.

620-47½-New. In Porto Rico an action of unlawful detainer will not lie where possession was taken under a lease for cultivation of land on shares. 33PortoRico 91.

620-50 127Misc611, 217NYS438.

621-57 See also 32PortoRico 254.

621-61½-New. The statutory remedy is not available where the relation is that of landlord and cropper. 36GaA 198, 136SE287.

621-70 128Misc218, 217NYS829.

621-73 128Misc218, 217NYS829.

622-79 128Misc630, 219NYS662.

622-82 [c] **Construction.**-L. (1926) c 6, and L. (1926) c 842, read together. 128Misc630, 219NYS662.

622-94 **Emergency rent laws.**-214App Div102, 211NYS223.

623-9 168Ark243, 269SW572; MoA 293 SW441.

623-10 168Ark243, 269SW572.

623-11 Or 288P1053. [a] **Matters not determinable.**-228AppDiv832, 241NYS32.

623-12 134Misc677, 236NYS353.

623-15 168Ark243, 269SW572; 35Porto Rico 469.

623-16 168Ark243, 269SW572; 32Porto Rico 728; 34PortoRico 738. [a] 155 Wash613, 285P654. [b] **Construction of lease.**-102Conn692, 129A716.

624-28 But see 235Mich379, 209NW137 (holding that judgment for whole or any part of premises described is authorized).

624-36 But see 136Misc561, 241NYS 354.

624-46 160Tenn21, 22SW(2d)242 (statute mandatory).

624-47 39GaA789, 148SE754. [c] **Statute is constitutional.**-307Mo 160, 270SW 315.

624-49 35GaA769, 134SE808.

625-50 [h] **Effect of award of damages on right to possession.**-Ark 32SW (2d)612.

625-52 [c] (7) Rents accruing during term after forfeiture. 197Wis476, 222 NW812.

626-62½-New. Statute providing for judgment for rent does not authorize judgment therefor against tenant not personally served with precept and not appearing. 127Misc603, 217NYS127.

627-75½-New. Whether summary action of "ejectment" covers case is to be determined by allegations of application and facts proved. 132SC130, 128 SE718.

627-76 262Mass463, 160NE245; NH 151A81(2dcase); BC [1928] 1DomLR 177. [b] **Disorderly conduct** is no ground, under statute, where landlord has no other tenants in neighborhood. 103NJL223, 136A594. [c] **Under L. (1926) c 842**, refusal to pay increase in rent gives landlord right to demand premises. 128Misc217, 217NYS829.

627-79 127Misc630, 217NYS306; 129 Misc659, 222NYS507.

627-80 127Misc630, 217NYS306; 132 Misc435, 230NYS239.

627-81½-New. The lessor may not maintain summary proceedings where the lease provides a remedy deemed exclusive. 125Misc846, 211NYS499.

627-81⅓-New. Although illegal use of premises had ceased, summary proceedings lie. 218AppDiv594, 218NYS539.

627-81¼-New. Federal padlock decree entered pro confesso, establishing use of premises for illegal purposes, gives landlord right of possession in summary proceedings. 218AppDiv594, 218 NYS539.

627-81⅓-New. Under some statutes, providing that a tenant of real property for a term less than life is guilty of unlawful detainer, the action is authorized for possession of a building leased for ninety-nine years. 205Cal 93, 269P1109, 61ALR366.

627-81⅙-New. Where tenant under lease greatly improved and increased value of farm landlord cannot, in unlawful detainer action, claim lease invalid because unacknowledged. Wash 291P1085.

627-82 76CalA478, 245P248; 233Mich 163, 206NW314. [a] **Statute relates to terms of lease** as expressed therein, not those implied in law. 100Vt48, 134A 635.

627-85 76CalA478, 245P248; 127Misc 630, 217NYS306; 132Misc435, 230NYS 239. [a] **Term of lease "expires"** under statute when term ends either by lapse of time or limitation. 132Misc435, 230 NYS239.

628-86 129Misc637, 222NYS241; 132 Misc435, 230NYS239. [a] (1) 127Misc 630, 217NYS306. (6) Provision that lease shall terminate on fifth day after notice on failure to pay rent. 129Misc 637, 222NYS241. (7) Lease, authorizing landlord to cancel it on election to erect new building on premises, by giving tenant sixty days' prior written notice. 132Misc435, 230NYS239 (conditional limitation). (8) Provision that, on lessee's default in complying with certain covenants and lessor's giving of notice of intention to terminate, lease would "expire and come to an end" on date filed in notice. 133Misc156, 231NYS42. [b] (1) 127Misc630, 217NYS306. [c] **Test to distinguish between conditional limitation and condition subsequent** is not whether termination of lease is at landlord's option, but whether event shall, when it occurs, end lease as if it, by its terms, had been limited to that time. 133Misc156, 231NYS42. [d] **Conditional limitation** in lease which provides that term shall expire at precise time after giving notice has been distinguished from limitation arising out of provision under which happening of contingency of itself works termination of lease. 132Misc435, 230NYS239. [e] **Condition favored.**-132Misc435, 230NYS 239.

628-99 127Misc630, 217NYS306.

628-1 39GaA789, 148SE754.

629-5½-New. Under lease giving landlord option to terminate lease upon breach of condition, the mere breach of condition and notice by landlord that he has exercised his option do not of themselves satisfy requirements of conditional limitation and constitute tenant a holdover tenant, giving remedy of summary proceedings, but landlord must give notice of intention to terminate at specified time and expiration of such time creates conditional limitation. 127Misc630, 217NYS306.

629-7 88CalA20, 263P538.

629-9 223AppDiv140, 228NYS145. [a] **Provision of lease giving landlord option to terminate on breach of covenants** on giving five days' notice operated as conditional limitation, and thereafter landlord could maintain summary proceedings for ouster. 134Misc443, 235 NYS677.

629-17 130Misc667, 224NYS694 (Labor Law). [a] **Failure or refusal of tenant to comply with statute** within reasonable time will entitle landlord to possession as matter of law. 130Misc667, 224NYS694 (eighteen months' delay).

629-20 [a] (1) 127Misc630, 217NYS 306; 223AppDiv140, 228NYS145.

629-21 127Misc630, 217NYS306; 223 AppDiv140, 228NYS145.

629-25 129Misc637, 222NYS241.

629-27 88CalA20, 263P538; 166Minn 190, 207NW498; NJCh 146A667(2d case); 136Misc166, 238NYS700; 32Porto Rico 330.

630-30 137Misc82, 242NYS729.

630-33 32PortoRico 330.

631-36½-New. Repeated acceptance of rent after due day held waiver of requirement, notwithstanding lease stipulation against such waiver. 129Misc 637, 222NYS244.

631-37 218AppDiv857, 219NYS111.

631-49 TexCivA 272SW263 (sufficient declaration of forfeiture).

631-52½-New. But where squatter is in possession by virtue of an invalid lease from tenant and without permission of landlord, landlord may summarily dispossess him. 128Misc24, 217 NYS190 (sublease of possession of portion of premises over which tenant has mere right of way).

631-54 128Misc74, 217NYS813. [c] **Termination of illegal use by federal authorities** no bar to summary proceeding. 128Misc74, 217NYS813. [d] **Landlord's knowledge and consent** no bar to summary proceeding. 128Misc74, 217 NYS813. [e] **Padlock decree** showing single violation of Prohibition Act does not authorize summary proceeding. 125 Misc464, 211NYS445.

631-55 But see 125Misc464, 211NYS 445 (holding that, where alleged illegal use has ceased before commencement of summary proceedings, action does not lie).

632-60 166Minn190, 207NW498. [d] **Pledgee** of lease, entitled to rent could maintain action of unlawful detainer. Wash 288P255.

632-62 166Minn190, 207NW498.

632-75 127Misc591, 216NYS153.

633-89 166Minn190, 207NW498.

633-5 166Minn190, 207NW498; 132 Misc435, 230NYS239.

633-6 MoA 285SW118.

634-16 122Kan640, 253P553.

634-17 160Tenn21, 22SW(2d)242 (not assignee of reversion under statute authorizing suit).

634-34 78CalA184, 248P280; 136Misc 405, 241NYS438 (law relative to bringing in necessary parties held inapplicable). [a] (3) Assignee is not necessary party where lessee is in actual possession, where no relief is sought against assignee. Wash 288P255. [b] **Proceedings to dispossess** individual lessees is void as to corporation previously organized by lessees, which was not made party thereto. 126Misc356, 214NYS254. [c] **Lessees** are proper parties even though prior to demand for possession lessees had organized corporation now in possession which was not made party to proceedings in absence of release by landlord of original lessees from lease. 126Misc356, 214NYS254.

635-41 32PortoRico 254 (privity held not shown). [b] **In Porto Rico.**-32 PortoRico 264.

635-45 88CalA20, 263P538.

635-47 78CalA184, 248P280. [b] **Deed of tenant to defendant operated as mere assignment of lease** and landlord could maintain action against defendant. 178Ark902, 12SW(2d)895.

636-59½-New. Action does not lie against purchaser in possession after default in payment. 77CalA786, 247P 543.

636-66 [a] See also 34PortoRico 182. [b] **Assignee of lessee** not in possession when summary proceeding is commenced nor when final order is made need not be made a party to the proceeding. 128 Misc342, 217NYS885.

636-70 205Cal 93, 269P1109, 61ALR 366; 69CalA35, 230P198; CalA 261P 1053.

636-74½-New. In some jurisdictions, by statute, the court is required to proceed and render judgments against individuals properly before it although there is a nonjoinder. 69CalA35, 230P 198.

636-80 41GaA110, 151SE926(1stcase).

637-1 36GaA701, 138SE81.

637-6 CalA 287P142. [b] **Notice to subtenants not in default** is unnecessary. CalA 261P1053.

638-16 [a] **Notice is sufficient when tenant may make tender of amount** claimed and avoid forfeiture. Wash 288 P255.

638-23 [a] **Notice construed.**-86CalA 651, 261P326.

638-24 89CalA665, 265P386; Wash 288 P255.

638-26 [a] (2) Wash 288P255 (holding notice sufficient as to number of months and amount due).

638-27 Utah 267P1009, 1010 [quotCJ]; [a] **Disputed claim of offset for amount claimed to be owing by lessor as subtenant** does not invalidate notice. CalA 261P1053.

638-36½-New. Premature service of notice to pay rent or quit premises made

on the same day as notice of default does not affect the lessor's right to proceed in unlawful detainer under a subsequent notice. **CalA** 261**P**1053.

638–37 89**CalA**55, 264**P**766.

639–48 218**AppDiv**857, 219**NYS**111.

639–50 89**CalA**665, 265**P**386. [b] **Notices held insufficient.**–89**CalA**665, 265**P** 386.

639–51 But see 89**CalA**665, 265**P**386.

639–55 220**Ala**45, 124**S**87.

639–57 288**Pa**56, 135**A**639.

640–60 **NJSup** 132**A**486.

640–68 70**CalA**268, 233**P**356; 260**Mass** 127, 156**NE**856; **MoA** 29**SW(2d)**234 (after foreclosure); 32**PortoRico** 554 (term deduced under Civ. Code § 1484 from rent agreement). [a] **Effect of holdover clause.**–70**CalA**268, 233**P**356.

640–71 70**CalA**268, 233**P**356.

640–75 36**GaA**701, 138**SE**81.

640–82 87**CalA**310, 262**P**47; **Mont** 293**P** 315.

641–10 88**CalA**20, 263**P**538.

641–11 See also **NJSup** 132**A**486.

641–11½–New. Waiver of notice rests on intent. 94**CalA**729, 272**P**315.

641–15 49**Nev**319, 245**P**703 (not necessary for notice signed by attorney to state whether he is attorney at law or in fact).

641–25 [b] **Statutes applicable.**–90**CalA** 311, 265**P**968.

642–38½–New. Notice given in May to end tenancy expiring Dec. 1 is held premature and insufficient. **NJSup** 135 **A**770.

642–42 241 **IllA**74.

642–44 220**Ala**45, 124**S**87 (notice to quit to tenant at will is not equivalent to statutory demand).

642–45 [b] **Notice held insufficient.**–**NJ Sup** 135**A**770.

643–57½–New. Service of precept issued by court on written petition showing expiration of term is sufficient notice under L. (1926) c 842. 128**Misc**218, 217 **NYS**829.

643–72 241 **IllA**74.

643–89½–New. Service of statutory notice in writing is sufficient where it is handed to tenant and he is informed of its contents, although he refuses to receive it. 214**Ala**688, 108**S**746.

643–91½–New. The validity of a landlord's notice to pay rent or quit the premises was not affected by the lessee's disputed claim of offset, based on the theory that the lessor owed the amount, remitted by it, as the lessee's subtenant under another name, in the absence of the showing of a reason for remission. 205**Cal** 93, 269**P**1109, 61**ALR** 366.

643–93 See also 205**Cal** 93, 269**P**1109, 61**ALR**366.

643–94 [a] **Peaceable reëntry on part** of leased premises and acceptance of rent from subtenants is not waiver of notice to quit and right to terminate lease. 235**Mich**379, 209**NW**137.

644–1 133**Misc**156, 231**NYS**42 (court has no jurisdiction).

644–2 **MoA** 296**SW**1046; 218**AppDiv** 857, 219**NYS**111.

644–4 [a] **Statute pertaining to time of actions on forcible detainer** does not apply where there is holding over of tenancy under contract. 229**Ky**28, 16 **SW(2d)**487.

644–6 172**Ark**1177, 288**SW**914.

644–12 35**GaA**556, 133**SE**633 (tenant not merely holding over but occupying premises under terms of accepted offer and of rental, for which rent was actually paid and accepted).

644–13 [a] **When charged with nonpayment of rent,** tenant may show by any defense that none is due. 127**Misc**611, 217**NYS**438.

644–14 70**CalA**137, 232**P**982; 158**La** 737, 104**S**637. [a], (3) or that deed under which petitioner is holding is in reality a mortgage (127**Misc**611, 217**NYS** 438).

645–20 288**Pa**56, 135**A**641; 32**Porto Rico** 554 (burden is on defendant to show longer term when shorter is presumed from circumstances).

645–25 [a] (3) A reconventional demand. 158**La**737, 104**S**637.

645–26½–New. , or otherwise defend upon the ground that plaintiff has taken inconsistent positions. **MoA** 285**SW** 118.

645–48½–New. The pendency of an appeal from a judgment in an action of unlawful detainer and a stay of execution pending appeal does not constitute a defense to a subsequent action of unlawful detainer based on nonpayment of rent. 70**CalA**137, 232**P**982.

645–48⅓–New. Landlord's conversion of security deposited by tenant precludes summary proceedings, 131**Misc** 466, 227**NYS**103.

645–48¼–New. and where unpaid rent and taxes exceed the deposit, conversion thereof is no defense. 131**Misc**466, 227 **NYS**103.

646–49 **MoA** 293**SW**441; 35**PortoRico** 726.

646–49½–New. , or that after possession a third party claimed ownership. 168**Ark**243, 269**SW**572.

646–53 254 **IllA**595.

646–55½–New. Mere pleading and evidence of title independent of plaintiff will not defeat action of unlawful detainer. 35**PortoRico** 930.

646–60 32**PortoRico** 330.

646–64 See also 32**PortoRico** 330.

646–66 [a] (6) Due date and day following being holidays, tender made next day held sufficient. 32**PortoRico** 330. (7) Tender must be kept good. 88**CalA**20, 263**P**538. [b] **Tenders after institution of proceedings** are insufficient where no one tender was sufficient, though amounts tendered in aggregate were equivalent to rent due. **Utah** 267**P**1009.

647–81 228**AppDiv**102, 239**NYS**259.

647–85 **MoA** 285**SW**118; **MoA** 293**SW** 441. But see **Wash** 291**P**1085.

647–87 127**Misc**611, 217**NYS**438.

648–88 76**CalA**478, 245**P**248.

648–89 225**AppDiv**232, 232**NYS**530.

648–90 [a] (4) Defense that landlord holds under deed given by corporation controlled by tenant, which deed is in fact a mortgage, is cognizable in municipal court, under Civ. Pract. Act § 1425, even though matter would constitute equitable counterclaim. 127**Misc** 611, 217**NYS**438.

648–90½–New. Under L. (1926) c 842, tenant must show he has tried to find other premises and give good reason for extension of time to remove. 128 **Misc**218, 217**NYS**829.

648–93 [c] (7) 128**Misc**400, 219**NYS** 683. (8) Harassment of tenant not followed by abandonment of premises. 134 **Misc**657, 236**NYS**308.

648–95 205**Cal** 93, 269**P**1109, 61**ALR** 366; 86**CalA**193, 260**P**605; 88**CalA**216, 262**P**818; 217**AppDiv**38, 216**NYS**490 (dictum). [a] **Partial conversion by landlord of tenant's security deposit permits set-off** and recovery by tenant of balance converted. 217**AppDiv**38, 216 **NYS**490.

648–96 217**AppDiv**38, 216**NYS**490.

648–97 86**CalA**193, 260**P**605.

648–3½–New. A tenant's counterclaim is an independent claim, triable separately if equitable and by jury if for money. 130**Misc**436, 223**NYS**838.

648–3⅓–New. In an action by purchasers of leased premises to recover possession and rent, where plaintiffs failed to allege a cause of action for rent based on contractual relationship of landlord and tenant as required by statute, defendant cannot recover anything on counterclaim which was based on terms of the lease. **MoA** 14**SW(2d)**44.

648–8 289**Pa**525, 137**A**673.

648–9 [b] **In New Jersey.**–103**NJL**223, 136**A**594.

649–12 104**Conn**291, 132**A**464.

649–19 90**PaSuper**583. [b] **Question of jurisdiction may be raised at any time.**– 223**AppDiv**140, 228**NYS**145.

649–30 289**Pa**525, 137**A**673.

649–39 166**Ga**229, 142**SE**882. But see 132**Misc**686, 230**NYS**262.

650–49 80**Mont**53, 257**P**1034.

650–55½–New. Statutes requiring summons in unlawful detainer to be issued as in other cases refers to issuance and not to contents of summons. 80**Mont**53, 257**P**1034.

650–59 80**Mont**53, 257**P**1034.

650–61 [c] (3) 131**Misc**856, 228**NYS** 395.

651–62 [d] **In New York.**–126**Misc**488, 214**NYS**552.

651–76 98**NJEq**471, 131**A**386.

651–78 98**NJEq**471, 131**A**386.

651–83 298**Pa**267, 148**A**110.

651–85 142**Va**170, 128**SE**643.

652–90 142**Va**170, 128**SE**643.

653–24 77**CalA**786, 247**P**543. [a] **Facts insufficient** to maintain summary proceeding. 125**Misc**649, 212**NYS**62. [b] **Jurisdictional facts** must be established by affidavit. **NJSup** 134**A**654.

653–25 77**CalA**786, 247**P**543.

653–27 [b] **Complaint held sufficient.**– 132**SC**130, 128**SE**718.

653–29 [a] **Failure to allege exemption from housing laws and nonincrease in rent** makes petition properly dismissible. 133**Misc**831, 234**NYS**82.

654–37 129**Misc**659, 222**NYS**507. [a] 39 **Wyo** 434, 273**P**541. [b] 77**CalA**786, 247 **P**543; **NJSup** 129**A**153.

654–43½–New. In an action by the purchaser of premises for possession, attornment to him by a tenant must be alleged and proved. **MoA** 14**SW(2d)** 44.

655–59 [b] 39**Wyo** 434, 273**P**541.

656–80 But see 205**Cal** 93, 269**P**1109, 61 **ALR**366.

657–96 [a] **Express allegation of wrongful and unlawful withholding of possession is unnecessary** where petition sets up facts. 41**Wyo** 509, 287**P** 316(1stcase).

657–99 89**CalA**665, 265**P**386; **MoA** 14 **SW(2d)**44.

657–3 89**CalA**665, 265**P**386.

658–18 127**Misc**591, 216**NYS**153; **Tex CivA** 32**SW(2d)**672. [a] That person signing name to affidavit in proceeding for partnership signed as agent of partnership will be presumed. **TexCivA** 32 **SW(2d)**672.

658–38½–New. Amendment seeking recovery for taxes and insurance erroneously allowed, where statute permits recovery of double rent in addition to eviction. 35**GaA**769, 134**SE**808.

658–40 [a] **Equitable defense** permitted under oral denial. 127**Misc**611, 217 **NYS**438.

658–44 [a] **After return of precept.**–126 **Misc**488, 214**NYS**552.

658–46 [b] (6) Answer alleging that after possession third party claimed ownership and that tenant deposited rents in bank pending settlement, and praying interpleader, is bad and subject to demurrer. 168**Ark**243, 269**SW** 572. (7) Counter-affidavit alleging debt from landlord because of expenditures by tenant in repairing and restoring premises because of landlord's misrepresentation of property at time of lease is insufficient where it does not specifically allege wherein property was defective and landlord failed to conform to representations. 36**GaA**532, 137 **SE**283. (8) Defense in summary proceedings, alleging appreciable decrease in market value of premises and maintenance expenses since prior adjudication, is held sufficient. 128**Misc**463, 219 **NYS**551. (9) Counter-affidavit alleging rent is not due because of indebtedness of landlord to tenant in excess of rent arising out of rental contract is insufficient where by rental contract such debt does not arise. 36**GaA**532, 137**SE**283. [d] **Tenant must plead waiver by landlord of notice to quit.**– 94**CalA**729, 272**P**315.

659–47 [b] **Proof of misrepresentation of existing or past fact** is not essential. **CalA** 290**P**470.

659–52 85**CalA**757, 260**P**358; 104**Conn** 112, 132**A**473. [b] **Answers held sufficient.**–70**CalA**137, 232**P**982.

659–54 [c] (1) 36**GaA**532, 137**SE**283. [d] **Where demand for possession is admitted,** date of demand is established as not later than date of execution of landlord's affidavit. 36**GaA**532, 137 **SE**283.

659–68 [a] **Absence of reply** to answer asserting contractual right to occupy premises is held not material. 220**Ky** 600, 295**SW**908.

659–72 But see 34**PortoRico** 182.

660–83½–New. Under L. (1926) c 842

landlord need only prove ownership, expiration of tenant's term, and use of premises for dwelling. 128Misc218, 217NYS829.

660-87 [b] **Striking out evidence** tending to show landlord's acceptance of rent check after service of precept and petition held error. 126Misc107, 213 NYS412.

661-90 MoA 285SW118.

661-96 [a] (9) Jurisdictional facts. NJSup 134A654.

661-98 [a] (4) Duration of term on renewal. 32PortoRico 554. (5) One taking possession of farm under agreement with lessee has burden of rebutting presumption of usual renting contract. TexCivA 286SW315.

661-7 [b] **Absolute deed as mortgage.**–127Misc611, 217NYS438.

662-8 228Ky250, 14SW(2d)784.

662-14 [a] (43) 214Ala688, 108S746. (48) Parol agreement permitting continued possession. 220Ala45, 124S87. (49) Negotiations leading up to execution of lease is admissible to show meaning of lessee's agreement. CalA 285P 403. (50) Other instances. 89PaSuper 572. [b] (21) Other instances. MoA 14SW(2d)44.

664-19 [a] MoA 285SW118. [c] (6) Acceptance of money is strong evidence of waiver of notice to quit. 94CalA 729, 272P315.

664-20 [d] (1) 71CalA713, 236P156; 37GaA741, 141SE680. [f] (1) 83CalA 48, 256P489; 122Kan640, 253P553; 128 Misc464, 219NYS133. (2) 220Ala45, 124 S87; 33GaA791, 127SE806; MoA 293 SW441. (47) That landlord did not intend waiver of notice to quit by accepting rent money. 94CalA729, 272 P315. (48) To warrant findings and decree restraining prosecution of unlawful detainer suit. MoA 16SW(2d) 654. (49) That tenant entered under oral contract to pay increased rent and not under former tenant's lease. 219 Ky662, 294SW164. (50) That landlord had permitted sublessee to take over lease as affected right to recover possession. 288Pa56, 135A639. (51) To show lessee breached terms of lease. CalA 285P403. (52) Tenancy at sufferance and not tenancy at will. 39 GaA789, 148SE754, 755 [citCJ]. (53) Landlord's breach of covenant. 134Misc 657, 236NYS308. [i] (1) 32PortoRico 405. (12) Surrender and forfeiture of lease. 204Cal 73, 266P547. (13) Illegal use of premises. 123Misc161, 204 NYS303. (14) To sustain allegations as to use of premises for sale of liquor. 128Misc342, 217NYS885. (15) Waiver by landlord of right to dispossess tenant for failure to make repairs by demanding complete rebuilding. 127 Misc630, 217NYS306. (16) Such substantial breach of covenant to repair as entitled landlord to terminate lease. 127Misc630, 217NYS306. (17) To establish that receiver's possession prevented tenant's surrender of premises to landlord. 36GaA532, 137SE283. [j] **Padlock decree** entered pro confesso held not to establish that premises were used for illegal business to give right to recover possession, even if enough to establish violation of prohibition act. 125Misc464, 211NYS445 (Civ. Pract. Act § 1410 subd 5). [k] **Stipulation withdrawing answer in padlock proceeding** held not to establish that premises were used for illegal business giving landlord right to recover possession. 125Misc464, 211NYS445.

665-26 32PortoRico 405. [a] **Though defendant offers no evidence** in support of his pleadings, if conflict of titles appears from evidence introduced by plaintiff, dismissal is proper. 32Porto Rico 405.

666-40 [b] **In New York.**–126Misc488, 214NYS552 (after issues are joined and answer filed).

666-56½-New. Adjournment of proceedings on return day of precept without joining issue is error. 126Misc488, 214NYS552 (where court required tenant three days after return day to proceed to trial without jury, though jury trial was then demanded).

666-59 See also Ark 32SW(2d)612. [a] (2) 172Ark1177, 288SW914. (18) 262 Mass463, 160NE245. (22) That sublessee refused to take over written lease and made oral lease as tenant at will instead. 288Pa56, 135A639. (23) Rental value during appeal. 214Ala688, 108S746. (24) Whether manufacture of umbrellas was incident of sale of umbrellas. MoA 17SW(2d)682. (25) Other instances. 177Ark1134, 10SW(2d) 45. (26) Part performance. Wash 291 P1085.

667-61 128Misc444, 218NYS316.

667-61½-New. Question of ownership of land by plaintiff is one of fact. 49 Nev319, 245P703.

667-62 34Ariz547, 273P538. [b] **Whether building is tenant factory,** within Labor Law relating to fire hazards, is question of law. 130Misc667, 224NYS 694. [c] **Whether tenants had reasonable time to comply** with provisions of Labor Law relating to fire hazards is question of law. 130Misc667, 224NYS 694.

667-63 235Misc379, 209NW137; 102 NJL154, 130A520.

667-66 [b] **Evidence held insufficient** to go to jury. 89CalA55, 264P766.

667-68 [a] SD 226NW345 (whether lease secured by fraud and whether oral agreement was made constituting lease for additional year).

667-69 [a] **Application.**–126Misc107, 213NYS412.

667-76½-New. The jury should be instructed as to applicable statutory provisions in a dispossess proceeding for failure of a tenant to comply with the Labor Law relating to fire hazards, 130 Misc667, 224NYS694.

667-76½-New. and should not be permitted to take a copy of the statutes into the jury room. 130Misc667, 224 NYS694.

668-97 CalA 260P571; 131Misc856, 228 NYS95; 136Misc50, 242NYS72. [a] **Declaration of forfeiture.**–86CalA651, 261P326. [b] **Statute authorizing final order awarding premises to petitioner,** if sufficient cause is not shown on return of precept, does not apply where answer has been interposed denying allegations of petition. 133Misc842, 234NYS149. [c] **Judgment is sufficient** if it clearly expresses intent to pronounce legal sentence on facts. MoA 14SW(2d)474.

668-4 242Mich366, 218NW658.

668-5 [a] **Judgment in unlawful detainer based on failure to pay rent** under unexpired lease need not embody statutory provision that execution shall not issue for five days. 204Cal 251, 268 P367. [b] **Judgment not awarding rents and profits** held authorized by verdict for possession of premises. MoA 14 SW(2d)474.

669-17½-New. On filing of counter-affidavit and bond by defendant he may be charged with double rent. 36GaA 701, 138SE81.

669-17½-New. Landlord is not entitled to final order where he continues to receive rent after commencing summary proceedings. 128Misc342, 217NYS885.

669-17¼-New. In a lessor's action for unlawful detainer on the lessee's failure to surrender possession on notice given after expiration of a five-year lease, in which there was no showing that the holding over was of willful, deliberate, or malicious character, which might call for imposition of punitive damages, refusal of the trial court to award treble damages has been held a proper exercise of discretion. 94CalA 596, 271P500.

669-21 [a] **Statute authorizing judgment to be given for rent due** in summary proceeding does not authorize judgment against one not personally served nor voluntarily appearing. 225 AppDiv403, 233NYS368. [b] **Where tenant filed answer and his motion for adjournment was refused,** it was error to award possession to landlord on failure of tenant to appear, without inquest. 133Misc842, 234NYS149.

669-33 137Misc182, 243NYS526.

669-34½-New. Final order in summary proceedings and surrender of demised premises terminates lease and lessee's rights thereunder. 214AppDiv665, 212 NYS738.

671-79 220Ky600, 295SW908. [a] **Failure of warrant to show relation of landlord and tenant** is held not ground for reversal where such objection was not made in lower court. 220Ky598, 295SW907.

671-84 [a] **Defective warrant** is waived by traverse. 220Ky598, 295SW907.

671-86½-New. Distress warrant is final process until arrested by bond. 37GaA 402, 140SE511.

671-91 [a] (2) 34PortoRico 182 [quot CJ].

671-92 90CalA169, 265P555, 557 [cit CJ]; 34PortoRico 130 (not including property fixed to soil).

671-93 [a] **Without any order for destruction of property** writ of execution cannot be extended to effect such destruction. 34PortoRico723.

671-99 [b] **Warrant describing defendant** as tenant of plaintiff is held to show relation of landlord and tenant. 220Ky 600, 295SW908.

671-99½-New. Judgment fixing time for execution estops defendant from claiming right of extension under contract causing unlawful detainer action. 35PortoRico 164.

671-2 [a] **Decree restraining landlord's interference** with lessee's occupancy pending appeal from magistrate will not be interfered with. 289Pa525, 137A 673.

671-10 [b] **Tender of suit due and all costs and charges of proceeding** (1) after judgment and before issuance of warrant of removal stays issuance of warrant in statutory dispossess proceeding under statutes in some jurisdictions. 28 Hawaii160.

671-14½-New. Where a judge has made an order recalling an order of restitution in ignorance of the fact that the judge who tried the case had denied similar relief, it is within his discretion to vacate his order. 70CalA137, 232P 982.

672-18 104Conn112, 132A473.

672-22 32PortoRico 441. [a] (6) Ruling on motion for extension of time fixed by judgment for execution not appealable. 35PortoRico 164.

672-22½-New. In Porto Rico, under the act of 1905, establishing unlawful detainer proceedings ("desahusio"), not more than one appeal is allowed in any case, from municipal court to district court, or from latter to supreme court in first instance. 32PortoRico 8.

672-25 See also 32PortoRico 8. [a] **In Porto Rico.**–32PortoRico 441. [b] **Period for filing statement of case** is regulated by code of civil procedure. 32 PortoRico 425. [c] **Amendment of complaint on appeal hearing** in district court, in suit originally brought in municipal court, does not prevent application of statutory rule that only one appeal should be allowed in any case. 32 PortoRico 441.

673-29 104Conn112, 132A473.

673-30 [a] **In Porto Rico.**–32PortoRico 425.

673-34 La 129S675. [c] **In Colorado.**–77Colo 581, 238P41.

673-35 32PortoRico 328. [a] **Payment of monthly rental in advance.**–32Porto Rico 328.

673-40 See also 5LaA101.

673-46½-New. Although execution on the judgment is staged pending appeal from a judgment in favor of the landlord in an action of unlawful detainer, rent continues to accrue and the tenant must pay or tender it in order to preserve his right to possession. 70CalA 137, 232P982.

673-46½-New. Where there was a departure on appeal from substance of case brought in justice's court, common pleas court had no jurisdiction. 288Pa 56, 135A639.

673-46¼-New. Appeal from judgment of ouster is not supersedeas. 289Pa525, 137A673.

673-47 104Conn112, 132A473; 104 Conn291, 132A464; 248NY243, 162NE 20. [b] **Sufficiency** of warrant cannot be first questioned on appeal. 220Ky 598, 295SW907; 220Ky600, 295SW908.

673-49 104Conn112, 132A473.

674-57 127Misc611, 217NYS438; 128 Misc444, 218NYS316.

674-58½-New. A writ of error by an

unsuccessful tenant will not be dismissed for failure to file in the trial court the bonds prescribed in case of appeal which operate to stay the execution. 77Colo 581, 238P41.

674-63 [a] (3) Defective appeal bond may be amended. 336 Ill 439, 168NE 346.

674-67½-New. Damages for withholding premises pending appeal may be allowed in some cases. TexCivA 32SW (2d)672.

674-71 178Minn460, 227NW656; 32 PortoRico 8.

675-77½-New. In Porto Rico such judgment is not appealable to the supreme court. 32PortoRico 8.

677-28 288Pa56, 135A641.

677-35½-New. In Porto Rico an order sustaining memorandum of costs is not appealable when no appeal lies from judgment authorizing such costs. 32 PortoRico 8.

677-49 37GaA402, 140SE511.

678-61 37GaA402, 140SE511. [a] **Stipulation held to show no election** to proceed against property on forthcoming bond. 37GaA402, 140SE511.

678-63 267Mass162, 166NE707.

679-86 88CalA20, 263P538.

679-90 [c] **Substantial right.**-205Cal 93, 269P1109, 61ALR366; CalA 261P 1053.

680-16 213AppDiv521, 210NYS265.

680-22 248NY437, 162NE478; 213App Div521, 210NYS265; 133Misc705, 232 NYS641(2dcase).

680-23 213AppDiv521, 210NYS265.

681-56½-New. One has no right of action for nullity of action of unlawful detainer and damages where he was not a party therein and in which he was not allowed to intervene. 35PortoRico 600.

682-59 [a] (3) Other evidence held admissible. 82NH387, 134A344.

682-67 34PortoRico 723 (value of house arbitrarily destroyed and its rents).

682-71 [a] (3) Increased cost of labor and materials used in making alterations. 258Mass360, 155NE16. [b] (5) Prospective profits. 258Mass360, 155 NE16.

682-79 12LaA362, 125S478(2dcase); 81Mont1, 261P238; Mont 288P616.

682-83½-New. or it may create relation of landlord and tenant as to land and tenants in common as to crops. 15 F(2d)181.

683-84 161La957, 109S776; 111 Okl 299, 239P637, 638 [citCyc]; 127 Okl 153, 260P60.

683-85 15F(2d)181; Nebr 230NW682; TexCivA 13SW(2d)733.

683-86 [a] (5) Other illustrations. CalA 290P673; 81Mont1, 261P288; 128 Okl 145, 261P929.

684-89 111 Okl 299, 239P637.

684-90 111 Okl 299, 239P637, 638 [cit Cyc]; 127 Okl 153, 260P60.

684-93 86Mont406, 284P140.

685-94 12LaA362, 125S478(2dcase); Nebr 230NW682; 127 Okl 153, 260P60.

687-15 [b] 128 Okl 145, 261P929.

687-16 13LaA612, 128S688.

687-21 131SC376, 127SE842.

688-32½-New. Statute, requiring tenant receiving notice of any proceeding to recover possession of real property immediately to inform landlord, applies to tenant of a contract holder of public lands receiving notice intended to affect immediate possession and ownership of crops. 55ND259, 212NW852.

688-33 [a] (5) Rent payable in shares. 208 Iowa1370, 227NW410.

688-34 141SC230, 139SE464.

689-39½-New. Subsequent agreement between landlord and tenant is held rescission and creates relation of employer and employee. TexCivA 290SW 289.

689-39½-New. In suing upon such subsequent agreement tenant is held to waive condition of rescission. TexCivA 290SW289.

689-48½-New. Where a tenant is in possession cultivating land on shares on terms customary in the neighborhood and the landlord agrees to rent the premises to him for the succeeding year, nothing being said as to different terms there is a valid contract for leasing of the premises for the succeeding year. TexCivA 280SW1076.

689-48⅓-New. Cropping contract reserving title in owner of land as security for advances is valid and enforceable. 56ND94, 216NW197 (not required to be filed as chattel mortgage).

690-56 111 Okl 299, 239P637.

690-60½-New. Interest of cropper in lease is chattel real. 200Cal 389, 253P 143.

690-60½-New. An amendment to the Alien Land Law, providing that a contract to crop is an interest in real estate, is confined to the Alien Land Law alone. CalA 273P587.

690-62 [b] **Purchaser from tenant of** matured cotton crop is liable for damages to premises caused by gathering crop. TexCivA 297SW520.

691-77 [a] **Where lessor consented to cropping of half of land,** he was not entitled to damages for lessee's failure to fallow half. CalA 277P374.

691-77½-New. Lease on shares is a personal contract. 232Mich370, 205NW 196.

691-78 [a] **Mortgagee of crop under no duty to gather same** after tenant's abandonment. TexCivA 26SW(2d)741.

691-80 [a] **Landlord's entry to harvest and pack apples,** being entitled to share thereof as rent, involved merely question of damages, if any, tenant sustained by entry. Ida 292P242.

691-84 [a] (8) Lessor held required to furnish all crates reasonably necessary for crops. 21 OhA444, 153NE313.

691-84½-New. Where each party is to furnish one half of supplies necessary for cultivation, payment in full by tenant creates an indebtedness against landlord in tenant's favor. 216Ky454, 288 SW285.

691-88 LaA 128S715. [e] **Lease contract** containing different provisions as to cropping arrangements is held severable as to provisions relative to different crops. 21 OhA444, 153NE313. [f] **Under contract requiring lessor** to furnish crates for harvesting onions, if no custom exists lessor must furnish all crates reasonably necessary. 21 OhA444, 153 NE313. [g] **Stipulation by tenant to do work desired by owner when not working crop** held not binding. 12LaA362, 125S478(2dcase).

692-3½-New. When forfeiture is enforced, rights of third parties fall with those of tenant. 79Mont468, 257P469.

692-3⅓-New. There can be no strictly voluntary surrender of lease where third parties have acquired interest through tenant. 79Mont468, 257P469.

692-3¼-New. Rule that surrender of lease does not affect third person's interest does not include lessee's mortgagee not vested with interest in lease. 79Mont468, 257P469.

692-3½-New. Landlord, knowing of tenant's mortgage on crops, and accepting secret surrender, without giving mortgagor chance to protect himself, is liable to mortgage. 79Mont468, 257P 469.

692-3⅔-New. Tenant leasing land on shares has been held to have no interest in a cause of action by the landlord, as purchaser of onion seed, for the seller's failure to make delivery at an agreed price, although the seed was furnished to the tenant. TexCivA 13 SW(2d)733.

692-3⅞-New. Where the lessee has knowledge of the lessor's default under contract to purchase, he has no better title to crops planted than the lessor has. 102CalA152, 282P986.

692-3⅛-New. Landlord advising bank not to lend tenant more than stated amount can be estopped from claiming tenant's interest only as to amount loaned within such limit. SD 231NW 904.

693-9 99Vt39, 130A578. [a] **Verbal lease not reduced to writing** did not justify lessee to abandon such lease and sue for labor and expenditure. 99Vt216, 130A578.

693-14½-New. Where a landlord puts a tenant into possession under an oral agreement for less than a year providing that the tenant shall cultivate the lands and raise certain crops, and the tenant proceeds with due diligence to perform his part of the agreement, but the landlord drives him off with force and arms and excludes him from the premises, injunction will lie to enjoin the landlord from committing such acts. 111 Okl 299, 239P637.

693-14½-New. Contract between landlord and tenant suing for accounting under lease has been held proper set-off to landlord's counterclaim for room and board. CalA 289P875.

693-16 TexCivA 280SW1076.

693-19 [a] (3) Petition in suit to enjoin landlord from interfering with tenant's possession held sufficient. 111 Okl 299, 239P637.

694-31½-New. In action for breach of cropping agreement, plaintiff must prove contract, his compliance with its terms, and defendant's breach. NC 154SE673.

694-32 [a] (4) 111 Okl 299, 239P637 (in suit to enjoin landlord's interference with tenant's possession). (5) To show that tenant performed terms of lease till ejected. CalA 289P875. [c] **Evidence held insufficient** to establish landlord's covenant to furnish water to irrigate land for crop to be grown by tenant. 86CalA216, 260P596.

694-40 [a] **Damages for additional expense** of employing labor where lessor failed to furnish crates for harvesting onions are limited to such as was reasonable and necessary. 21 OhA444, 153 NE313.

694-40½-New. In an action based on eviction knowingly and wrongfully done exemplary damages are recoverable where malice and want of probable cause are shown. TexCivA 280SW1076.

695-45 TexCivA 280SW1076.

695-52 21 OhA444, 153NE313. [b] **Failure to furnish crates.**-21 OhA444, 153NE313.

695-53 [a] **Measure of damages for** failure to furnish crates for harvesting onions is difference between value of lessee's share with number of crates actually furnished and value had sufficient crates been furnished. 21 OhA 444, 153NE313.

695-54½-New. In an action for failure to furnish crates, damages for additional expense for labor must be limited to such as was reasonable and necessary. 21 OhA444, 153NE313.

695-55 Sask [1927] 1DomLR550, [1927] 1WestWkly290. But see 175Ark 823, 1SW(2d)14.

696-79½-New. Defendant, under a written agreement for the operation of a farm on shares, having stated to the owner that he would take out hail insurance protecting both their interests, whereupon the owner did not insure his interest, and loss having occurred and insurance money having been paid to defendant, defendant must account for the insurance money on the basis which he represented to the owner that he procured it. 54SD34, 222NW487.

697-83½-New. Landlord cannot recover where evidence shows that he did not intend to crop the land. Sask [1927] 1 DomLR73.

697-1 79Mont468, 257P469.

697-5 79Mont468, 257P469.

697-6 TexCivA 294SW900, 904 [citCJ].

697-10 79Mont468, 257P469.

698-12½-New. Where tenants' interests were merged in landlord on landlord's reëntry, it was immaterial whether landlord's action constituted enforcement of forfeiture or surrender. 79Mont 468, 257P469.

698-12½-New. Giving notice in writing to tenant present in person, repudiating lease is held not required. 79Mont468, 257P469.

698-21 [a] **Right to recover treble damages is waived** by suing for half of proceeds of farm during period of detention. 195Wis504, 218NW821. [b] **Complaint** seeking to recover one half of proceeds of farm produce during period of detention and at same time treble damages for unlawful detainer is not basis for recovery of treble damages under Wisconsin statute. 195Wis504, 218 NW821.

698-28 169Ark567, 275SW909 (where share cropper is to pay one half of crop for use of land, with tools and team and feed therefor, then title to crop is in tenant); 204 Iowa746, 216NW78; 81

Mont1, 261P288; 86Mont406, 284P140; 152Tenn166, 274SW544; TexCivA 297SW520. See also 161La957, 109S776.

699-31½-New. A landlord's interest in the title to crops grown by his cropper is only to extent of value of landlord's portion of crops and any indebtedness for advances made to cropper. 34GaA254, 129SE114.

699-31¼-New. Corn in possession of a tenant is presumptively his property. Iowa 221NW789.

699-32 15F(2d)181; 160La294, 107S118; 136SC9, 134SE145. [a] **Tenant and landlord** may each sell his interest after delivering to the other part of the crop belonging to other. 160La294, 107S115.

699-36 MoA 294SW433.

699-37 171Minn461, 214NW288.

699-38½-New. , but under such statute his title to his share does not become complete until maturity of the crop. 118Kan147, 233P802.

700-44 175Ark780, 1SW(2d)36; 29Hawaii734; NC 155SE575; 50SD434, 210NW675; 53SD89, 220NW142; Tex CivA 290SW289; Sask [1930] 3DomLR 1004(2dcase).

700-45 See also Mont 288P616. [c] **Agreement regarding sale of rent cotton and application of proceeds to landlord's debt to tenant** constituted assignment of landlord's rent claims. TexCommnA 17SW(2d)768.

700-47½-New. Under such an agreement the interest of lessor prior to division of crop is coextensive with the entire mass of crop produced. 51ND367, 199NW865.

700-48 86Mont406, 284P140; 111Okl299, 239P637; '128 Okl145, 261P929.

700-49 Contra 58ND634, 227NW59.

701-62 85Colo462, 277P786; Iowa 231NW366. [a] (6) Contract contemplating compensation according to total sum paid for 1922 crop and not partial payment or advance on purchase price thereof plus balance paid for 1921 crop during 1922. 78CalA145, 248P283. (7) Lease requiring tenant to sell crops and pay as rent one third of value thereof means sale for cash where there is no stipulation as to manner of sale. 82CalA474, 255P775. (8) Erroneous construction. Ida 292P613. [j] **Waiver.**-ND 231NW859.

702-65 [a] **Landlord is entitled to be present** when tenant weighs or divides cotton. LaA 128S715.

702-70½-New. Tenant having separate storage tickets issued for his and landlord's shares of crops effects separation of landlord's share. Mont 289P561.

703-79 See also 79Mont590, 257P475.

703-87 See also LaA 128S715.

703-91 39GaA172, 146SE512(1stcase) (where cropper delivered all crop to landlord, and cropper's share is more than sufficient to pay all advances, landlord must account for cropper's share).

703-93½-New. Where crop is damaged by rain, the landlord must bear his own loss. 72CalA481, 237P756.

703-93¼-New. Under some contracts payment by the tenant of a water assessment and of the amount to be paid for summer pasturage are conditions precedent to the landlord's duty to divide the crops. 47Ida507, 276P966.

704-3 53SD9, 219NW888.

704-15 48Ida236, 281P374 (complaint held sufficient to state cause for accounting and recovery of half of crop); MoA 297SW706. [b] **Cropper may recover his share by suit on contract** or by laborer's lien foreclosure. 39Ga172, 146SE512(1stcase).

704-15½-New. A mere cropper cannot maintain conversion prior to division of the crop. MoA 297SW706.

704-16 [a] (3) Evidence held sufficient to support verdict and judgment for defendant. 134Okl70, 272P857.

705-18 171Minn461, 214NW288.

705-20 [a] (3) Evidence that tenant agreed to sale of undivided property held admissible in tenant's action for amount claimed due from operation of leased ranch. SD 231NW904.

705-25½-New. An action by a share cropper, under a parol contract based on the refusal of the owner and contracting party to permit him to tend the crop, is one for breach of contract, and not for conversion. 129Okl57, 263P146.

705-25½-New. Evidence held to establish a right of the lessee to compensation for summer fallowing of land under a lease uncertain as to such right. CalA 277P374.

705-26 CalA 293P91; 12LaA362, 125S478(2dcase); 98PaSuper483.

706-38 [b] **Pleading.**-13LaA612, 128S688.

706-41½-New. Where a farm lease provides for filling of silos and payment by the landlord of a stated part of the cost of filling, and the silos are not filled, payment of such sum by the landlord is not a condition precedent to an action by him for failure to comply with other provisions. 47Ida507, 276P966.

706-42 [b] **Tenant's removing or selling** cotton without accounting is sufficient grounds for issuing writ of provisional seizure. LaA 128S715.

706-47 [a] **Where lease gives tenant no right to hay** in fructus naturales, he may be held for value in action for claim and delivery where he wrongfully severs it. 56ND921, 219NW946.

707-54½-New. Possessory warrant does not lie against a tenant to recover cotton which had been sold with the consent of the landlord where a check of the purchaser was taken in the name of the tenant. 37GaA170, 139SE130.

707-57 174Minn283, 219NW91.

707-66 98PaSuper483.

708-81 See also 82CalA474, 255P775.

708-92 [d] **Evidence held to show** that defendant was not claiming as owner of land. 13LaA612, 128S688. [e] **Nonsuiting** of landlord's claim is error, tenant failing to establish claim. LaA 128S715.

708-93 [b] **Judgment held erroneous** under uncertain testimony. LaA 128S715.

709-99½-New. Rule, restricting the owner's recovery against an adverse claimant or trespasser harvesting crops to the value of use and occupation, does not apply between the landlord's vendee and the tenant. 56ND921, 219NW946.

709-4 169Ark567, 275SW909; Tex CommnA 17SW(2d)768. [a] **Whether rent is to be paid in crops or in money** is immaterial under some statutes. 152Tenn166, 274SW544.

709-5 169Ark567, 275SW909; 160Ga215, 127SE847 (equivalent to common-law distress); TexCivA 32SW(2d)396.

709-13 171Minn461, 214NW288.

709-15 50SD434, 210NW675. [a] **Agreement need not be filed as chattel mortgage.**-50SD434, 210NW675.

709-18½-New. Under Minnesota statute except as security for rent or the purchase price of the land, landlord cannot acquire valid lien on crops to be grown later than season beginning May 1st next following date of contract. 171Minn461, 214NW288.

710-21½-New. Under a lease of part of the premises for cash rent and part for a share of the crop, the contract being entire, the landlord has a lien on the crop for the money rent as well as to insure delivery of his share of the crop. 129Kan632, 284P420.

710-26 [a] **Filing as chattel mortgage** is not necessary to render effective provision in farm lease on share plan reserving title to crops in owner of land. 49ND592, 192NW723 (instructions stating contrary rule held erroneous).

710-28½-New. He may not recover where he has notice of landlord's lien. 21AlaA91, 105S725.

710-28¼-New. When tenant's agreement is to pay as rent one fourth of crops produced and owner sells land and leases from vendee, latter cannot subject the three-fourths interest of the tenants in crop to payment of rent note given by vendor. 144Miss223, 109S698.

710-31 Iowa 231NW366 (by payment). [a] See to same effect TexCivA 272SW821.

710-32 [a] (4) Deed by landlord to tenant expressly reserving crops, which was recorded, did not destroy landlord's lien. 21AlaA91, 105S725 (operated as notice to all dealing with tenant of landlord's interest in crop).

711-40¼-New. Landlord's lien has been held satisfied by delivery of corn awarded him as rent by arbitrator. Iowa 231NW366.

711-57½-New. Landlord's lien when merged in title acquired at sheriff's sale on valid process established title superior to one claiming through tenant. 21AlaA91, 105S725.

711-57¼-New. Landlord's lien for supplies does not ripen until foreclosure, but exists from time supplies are furnished. 160Ga215, 127SE847.

711-63 128Okl145, 261P929.

712-65½-New. Where lease reserves title in landlord until division, anyone who converts any portion of the common mass of crop prior to division is liable in action by lessor for damages for such conversion. 51ND367, 199NW865.

712-66 140Okl45, 282P157.

712-70 128Okl145, 261P929.

712-72½-New. , and the landlord cannot maintain replevin against the tenant even though statute limitations have been run against purchaser of land. 164Minn366, 205NW262.

712-78 116Tex337, 291SW219.

712-81 171Minn461, 214NW288.

712-87 [a] **Title of land in landlord's wife** does not affect landlord's rights. 136SC9, 134SE145. [b] **Tenant, subletting without authority,** where rental of one fourth of cotton crop was resumed, may sell the cotton, where purchase was before landlord sequestered farm. TexCivA 297SW520.

713-96 TexCivA 272SW263; TexCivA 297SW520.

713-3 [b] **Purchaser from tenant** of matured cotton crop may gather and sell it subject to landlord's lien. Tex CivA 297SW520. [c] **Tenant's delivery of landlord's share or storage ticket therefor to third person** does not affect landlord's title. Mont 289P561.

713-10 126Kan349, 353, 267P965.

713-13 [a] **Purchaser depositing to landlord's credit** latter's share of proceeds of sale is not liable for any greater amount. TexCivA 297SW520.

714-21 Where the tenant is the owner of a crop grown on shares before severance, they are not subject to levy against the owner of land until division. 24F(2d)553.

714-34 46Ida431, 268P37; 84Mont579, 277P805.

715-46 53SD89, 220NW142. But see 152Tenn166, 274SW544. [a] (2) Under Georgia statute. 39GaA625, 147SE904.

715-47 34GaA254, 129SE114 (landlord can recover only his interest in balance of crop sold by tenant); 57ND43, 220NW630.

715-48 See also 141SC230, 139SE464.

715-50¼-New. A purchaser of land at foreclosure sale who rented it to another for a third of the crop had such interest in his share after harvest and division that he could maintain an action of claim and delivery therefor where it was sold under foreclosure of a crop mortgage given by a prior owner of the land. 48Ida80, 279P1097.

715-52 [b] **Complaint held insufficient.**-TexCivA 16SW(2d)1112.

715-55 57ND43, 220NW630.

716-56 164Minn366, 205NW262. [a] (4) Landlord has burden of proving amount due him from tenant. 216Ala312, 113S59. (5) Landlord, seeking to establish ownership of corn levied on and sold to defendant under execution on judgment against tenant, has burden of proof. Iowa 221NW789.

716-57 [a] (5) 174Ark224, 294SW1010. (6) To show that mortgagor had not agreed to turn over crop rentals to agent for mortgagee to apply on mortgage. 76Mont415, 248P199. (7) To show that elevator company was fully advised of landlord's claim to two thirds of wheat delivered by tenant, and was guilty of conversion. 80Mont426, 260P709. [b] (3) To show landlord's ownership of share of crop in replevin action after sale of land while crops were growing. 164Minn366, 205NW262. (4) To establish landlord's claim to lien on corn sold on execution under judgment against tenant. Iowa 221NW789.

716-59 [a] (3) Authority to sell. 216Ala312, 113S59. (4) Previous course of conduct to determine rights of parties. 216Ala312, 113S59. (5) Evidence of

tenant's indebtedness for jury. 216Ala 312, 113S59.

716-59½-New. Plaintiff's testimony showing that he was landlord in share-crop arrangement is sufficient to deny motion for nonsuit. 136SC9, 134SE145.

716-59¾-New. Landlord against whom tenant's notes secured by mortgage are sought to be enforced may counterclaim for damages caused by claimant's announcement of lien at sale. SD 231 NW904.

717-91½-New. Where an alleged landlord could not recover rents collected by another, it was held that such landlord could not recover damages for alleged unlawful interference with tenants arising out of the same transaction. TexCivA 8SW(2d)312.

717-95 155Miss484, 124S641.

718-6½-New. Statutes must be construed to harmonize with constitutional provisions prohibiting slavery or involuntary servitude. 155Miss484, 124S641.

718-15 [c] **Instructions held warranted under evidence.**-180Ark952, 23SW(2d)609.

718-24 164La405, 114S76, 55ALR309; 154Miss646, 122S771.

718-28 154Miss646, 122S771.

LAPSE

720-41 48RI 200, 136A434.

LARCENY

734-13 119 Or320, 249P360 [quotCJ]. [a] (1) 92Fla262, 109S463, 464 [citCJ]; 170La51, 127S361; 117 Or179, 242P 1116. (2) 75CalA9, 241P931. (3) 195 NC496, 142SE583. [d] (1) TexCr 28 SW(2d)804. [e] (1) 92Fla262, 109S 463; 95Fla737, 116S629.

735-22 16F(2d)535.

735-24 [a] (5) 15F(2d)911.

735-26 [a] 257Mass459, 154NE177.

735-31 CalA 284P487; CalA 289P890; 245NY111, 156NE632; 106TexCr496, 293SW817. [b] (1) 105TexCr608, 290 SW179. (2) There was held to be no conflict between theft statute and statute of malicious mischief. 106TexCr 496, 293SW817.

736-34 Alta [1927] 3DomLR539.

736-41 But see 218AppDiv584, 219NYS 46.

736-42 235Ky466, 31SW(2d)718. [a] **Unauthorized use of complainant's spinning facilities** held not "appropriation" of personal property such as to constitute larceny. 220AppDiv498, 222NYS 24.

736-43 78CalA62, 247P916.

736-49 96CalA186, 273P837; 90CalA 476, 265P1040; 218AppDiv584, 219NYS 46; 117 Or179, 242P1116; 143Wash464, 255P910, 911 [quotCJ].

737-54 78CalA426, 248P1021.

737-58 220AppDiv498, 222NYS24, 28 [quotCJ].

739-3 14PaDist&Co 161.

739-10½-New. or reduced to possession in a trap. 22F(2d)977.

740-39 34NM217, 279P947 (offense of killing without keeping hide unmutilated for certain period, as defined by statute, is not element of offense of grand larceny of cattle).

741-54 129 OhA187, 163NE311.

741-69 See also 235Ky466, 31SW(2d) 718.

742-94 152Md553, 137A339; Or 289P 1063.

744-23 221Ky461, 298SW1107, 1108 [citCJ]; 110TexCr384, 10SW(2d)561.

744-33 NH 146A503.

745-44 132Misc554, 230NYS614.

745-46 Mont 292P717.

745-51 50Philippine598.

745-60 90CalA476, 265P1040.

747-95 9PaDist&Co 629.

747-95½-New. Alcohol, 105NJL529, 147A325.

747-95¾-New. intoxicating liquor, 230 Ky656, 20SW(2d)484, 66ALR1297.

747-1 218AppDiv584, 219NYS46.

747-2 Utah 279P950; 143Wash281, 255P91. [b] **Liquors taken by accused held subject of larceny,** even though they had served purpose of testimony in prohibition cases prior to theft. 143 Wash281, 255P91.

747-6 218AppDiv584, 219NYS46.

747-7 22AlaA640, 119S243(1stcase); 34Ariz9, 267P206 [citCJ]; 179Ark972, 19SW(2d)1024; 72CalA102, 236P944; 167La550, 119S870; 32NM219, 252P994; 159Tenn297, 17SW(2d)913.

748-8 34Ariz9, 267P206 [citCJ]; 72 CalA102, 236P944; 96Fla232, 118S20.

748-11 100TexCr380, 272SW197; 108 TexCr427, 18SW(2d)619.

748-14 SD 230NW850; 67Utah325, 247 P497.

748-15½-New. That defendant might have been prosecuted for receiving stolen property is no defense to prosecution for larceny. 235Ky466, 31SW(2d)718.

748-16 220AppDiv493, 222NYS24; OklCr 292P878.

749-31 220AppDiv498, 222NYS24.

749-32 72CalA102, 236P944.

749-35 [a] (7) 89 IndA683, 167NE138.

750-38½-New. To constitute asportation, it is necessary that the property shall have been in the entire or absolute possession of the taker. 72CalA 102, 236P944.

750-40 96Fla232, 118S20; 220AppDiv 498, 222NYS24.

750-53 96Fla232, 118S20.

751-61 314Mo 585, 285SW97, 47ALR 783.

751-63 72CalA102, 236P944; 314Mo 585, 285SW97, 47ALR783.

751-64 72CalA102, 236P944; 75CalA9, 241P931; 245NY111, 156NE632. [b] **Larceny by fraud or stealth.**-128 Okl 142, 261P927.

752-69 117 Or179, 242P1116, 1118 [cit CJ].

752-70 117 Or179, 242P1116, 1118 [cit CJ].

752-83 22AlaA628, 118S768.

753-96 16F(2d)535.

754-97 78CalA426, 248P1021.

754-1 16F(2d)535.

754-4 16F(2d)535.

755-19 But see 311Mo 510, 278SW1040 [disappr 98Mo 283, 11SW728].

756-62 72CalA102, 236P944; 93Fla 247, 111S519. See 224AppDiv291, 230 NYS24.

756-63 72CalA102, 236P944; 95Fla 737, 116S629 [citCJ].

756-64 170La638, 128S661; 145Va800, 133SE764. [a] **Defendant's right, under agreement, to receive profits from sale of cotton** for partnership as compensation for his services, did not give him property interest therein, nor right of possession to sell or pledge it without being guilty of larceny. 179Ark 309, 15SW(2d)389.

756-65 CalA 262P761. [f] **Unincorporated association** is included within term "another." 13PaDist&Co 66.

756-67 104TexCr533, 286SW204.

757-82 171Ark40, 283SW25; 204Cal 599, 269P447; 72CalA102, 236P944, 950 [citCJ]; MoA 31SW(2d)559; OklCr 276 P791. [a] 106TexCr293, 292SW234. [n] **Joint or part ownership.**-171Ark40, 283SW25.

757-82½-New. Ownership may be general or special. 311Mo 510, 278SW1040.

757-82¾-New. Actual status of legal title to stolen property is of no concern to the thief. 72CalA102, 236P944.

757-82¼-New. Where property on which lien has been impressed is stolen, lienor has ownership. NJSup 132A482.

757-84 22AlaA628, 118S768; MoA 31 SW(2d)559; TexCr 26SW(2d)229. [e] **Possession of owner** may be either actual or constructive. 311Mo 510, 278 SW1040.

758-92 101TexCr40, 274SW580.

758-94 101TexCr40, 274SW580.

758-4½-New. Possession of one from whom property is stolen is sufficient although illegal and ownership is properly laid to such person. 72CalA102, 236P944 [citCJ].

759-7 72CalA102, 236P944; Ida 288P 154; 235Ky657, 32SW(2d)17; 318Mo 605, 300SW823, 825 [citCJ]; 159Tenn 297, 17SW(2d)913.

759-9 216Ala151, 112S761; 326 Ill 358, 157NE171.

760-30 72CalA102, 236P944; 98CalA 502, 277P121; 245NY111, 156NE632. [a] **Wrongdoer holds property without right** in such case, and against right and without consent of owner. 72CalA 102, 236P944. [b] **Fraud vitiates transaction** and owner is deemed still to retain constructive possession of property. 72CalA102, 236P944.

760-31½-New. Under some statutes proof that accused used some fraudulent scheme or device to procure possession of the property or intended to appropriate it to his own use or benefit at the time of taking is necessary where the property was taken with the owner's consent. 103TexCr589, 281SW1072 (2dcase).

760-31¾-New. Where delivery of a deed is procured by fraud and trickery, there is no larceny, as the deed is undelivered. 90CalA476, 265P1040.

760-33 But see 108TexCr427, 18SW(2d) 619.

760-38 108TexCr427, 18SW(2d)619. [a] 108TexCr427, 18SW(2d)619.

761-50½-New. Furnishing facilities, without implication of consent, is limited purposely to exposing property, or neglecting to protect it, or removing obstacles under expectation of taking. 316Mo 585, 292SW54.

761-50¾-New. Where a store manager voluntarily handed goods to persons fraudulently placing an order in the name of another, as the manager knew, there was consent to the taking. 316Mo 585, 292SW54.

761-50¼-New. And persons fraudulently placing such order were not guilty of larceny. 316Mo 585, 292SW54.

761-52 CalA 290P470; 326 Ill 358, 157 NE171.

761-58 15F(2d)911; AlaA 129S795; 72 CalA102, 236P944; 92Fla262, 109S463; 168Minn381, 210NW108; Nebr 230NW 504; NJSup 132A482; NJSup 143A50; 244NY147, 155NE79; 127Misc751, 217 NYS504, 508 [citCJ]; 117 Or179, 242P 1116; 106TexCr162, 291SW225; 107 TexCr414, 296SW585; 145Va800, 133 SE764; 148Va733, 138SE510. [c] (2) Term "felonious" as used in definition of larceny is synonymous with "fraudulent." 117 Or179, 242P1116. [f] **Felonious intent abrogated as element by statute, as to automobiles.**-127Misc751, 217NYS504. [g] **"Taking with intent to steal" synonymous with "fraudulent conversion."**-40GaA543, 150SE469.

763-60½-New. Original fraudulent intent is not necessary in conversion of money intrusted to one. NH 146A503.

763-61 15F(2d)911; 127Misc751, 217 NYS504, 508 [citCJ]; 7PaDist&Co 240.

764-72 107TexCr414, 296SW585.

764-75 22AlaA640, 119S243(1stcase); 200 Ind585, 165NE434; NJSup 132A 482; OklCr 282P170; 104TexCr351, 283 SW805; 145Va800, 133SE764; 152 Wash393, 278P164.

766-83 89CalA451, 265P276.

766-85 15F(2d)911.

766-86 117 Or179, 242P1116.

766-90 112TexCr343, 16SW(2d)1074 (theft by child for father).

767-99 127Misc751, 217NYS504.

767-1 15F(2d)911.

767-3 15F(2d)911; 101TexCr40, 274 SW580 (finding lost property).

768-13 TexCr 32SW(2d)197(2dcase).

769-21 TexCr 25SW(2d)855 (boats).

771-43 72CalA102, 236P944.

771-55 15F(2d)911; 72CalA102, 236P 944; CalA 291P698; 167La550, 119S 870; 228AppDiv371, 240NYS150.

771-55¼-New. A single larceny may be committed by more than one act of asportation, 203 Iowa94, 212NW339.

771-55¾-New. but it must be shown that when defendant took away certain items he intended to have taken all the property alleged to have been stolen. 203 Iowa94, 212NW339.

771-56 151Miss576, 118S412.

772-57 CalA 290P470; 132Misc455, 230NYS102; 106WVa276, 145SE383, 384, 62ALR351 [citCJ].

772-62 72CalA102, 236P944; 151Miss 576, 118S412.

773-73 **Erratum.**-Insert "Contra" before "State v. Ducker, 8 Or. 394, 34 Am R 590."

773-74 [a] See also 29Hawaii30.

774-77 Miss 110S691.

774-81 93Fla706, 112S575; 34GaA194, 129SE9; 170Minn43, 211NW947, 948 [citCJ].

775-95 246Mich68, 224NW375.

776-97 167La550, 119S870.

777-13 72CalA102, 236P944; 36GaA 773, 138SE257; 327 Ill 305, 158NE729; 170Minn43, 211NW947, 948 [citCJ].

777–15 244NY355, 155NE670.
778–16 327 Ill 305, 158NE729. [d] **Receipt of property for purchase at price to be agreed on** under agreement to return same if price not agreed on, and subsequent conversion without agreeing on price, constitutes larceny. 327 Ill 305, 158NE729.
778–26 72CalA102, 236P944, 950 [cit CJ].
779–29 [a] **Title to money delivered to defendant to bribe officials** in manner he should see fit remains in owner till purpose accomplished. 72CalA102, 236 P944.
779–32 80CalA167, 251P327.
779–32½–New. Under some statutes, in a prosecution of a contractor for grand larceny based on appropriation of money received under a contract for work and materials for the price of which a lien might have been filed, the state need not show that a lien was actually filed but only that a lien could have been filed. 141Wash148, 251P115.
780–44 104TexCr533, 286SW204.
781–58 95Fla737, 116S629, 630 [cit CJ]. [a] **Acceptance of goods by owner from finder after loss by pledgee** does not constitute larceny. TexCivA 3SW (2d)849.
781–61 126Kan129, 266P939.
782–69 134Misc689, 236NYS357.
783–83 124Kan216, 217, 257P944 [cit CJ].
784–7½–New. janitor, 119 Or430, 249P 1049.
784–7½–New. deputy sheriff, 119 Or 430, 249P1049.
784–8 119 Or430, 249P1049, 1051 [quot CJ].
784–20 327 Ill 416, 158NE680.
784–21 327 Ill 416, 158NE680; 119 Or 430, 249P1049, 1051 [quotCJ].
784–23 119 Or430, 249P1049, 1051 [quotCJ].
786–35½–New. or to be pledged, 50 Philippine65.
786–42 167La550, 119S870.
787–49 [a] **Fraudulent withdrawal from customs warehouse** by owner's agent's employee with intent to assist in misappropriation held larceny. 44 Philippine66.
787–60 145Wash375, 260P257.
788–66½–New. nor is such seller guilty of larceny of the money received. 36 GaA773, 138SE257.
789–77 322 Ill 67, 152NE584; 325 Ill 99, 156NE257; 57ND567, 223NW303; 93PaSuper92. But see 44Philippine720. [c] (2) Garage employee not bailee of car in possession of garage owner. 329 Ill 514, 161NE60. [f] See also 93 PaSuper53. [n] **There is no larceny of pledged goods** where bailee is willing and ready to return them on compliance with terms of pledge. 12PaDist&Co 305.
789–77½–New. In Texas a guardian who after his discharge agreed to apply property of his ward to the payment of a debt of the ward's mother and failed to do so is properly prosecuted under the statute relative to larceny by a bailee and not under the statute relative to conversion of estates by guardians, although he may have converted the property before his discharge. 105 TexCr669, 290SW534.
789–77½–New. A borrower of an article may be guilty of theft even though there did not exist in his mind, at the time of taking, any fraudulent intent to appropriate. 110TexCr240, 8SW(2d) 183.
790–87 See also TexCr 29SW(2d)377.
792–2 40GaA543, 150SE469 (simple larceny under statute); 101TexCr40, 274SW580.
793–7 [a] 101TexCr40, 274SW580.
793–15 44Philippine720.
795–39 [b] **Customs employee**, combining with customs broker's employee to commit larceny of imported merchandise see 44Philippine66.
795–57½–New. The fact that a witness in a prosecution for grand larceny was an accomplice in the larceny of other cattle subsequent to the commission of the offense charged did not constitute him an accomplice in particular crime. 84Mont348, 275P757.
796–58 92CalA323, 268P417; 40GaA 722, 151SE397; 152Md553, 137A339, 342 [citCyc]; 9PaDist&Co 629; 44 Philippine66 (falsifying commercial documents to procure fraudulent withdrawal of goods from customs warehouse); 148Wash412, 269P337.
796–63½–New. Accomplice in theft must unite with principal and aid or encourage him in common design. 108 TexCr427, 18SW(2d)619.
797–67 108TexCr427, 18W(2d)619.
797–74 Mo 24SW(2d)1023; 51ND130, 199NW187; 85PaSuper302; 53SD257, 220NW473.
797–75 113TexCr124, 18SW(2d)1070.
798–76 85PaSuper302.
798–79 34Ariz9, 267P206.
798–81 34Ariz9, 267P206; 320Mo 248, 6SW(2d)839. See also 85PaSuper302. [c] **Assisting in butchering and marketing stolen steer.**–153Wash280, 279P607.
798–87 117 Or179, 242P1116, 1118 [cit CJ]; 49Philippine437; 100Vt380, 138 A736.
799–88 203 Iowa94, 212NW339.
799–89 203 Iowa94, 212NW339; 117 Or179, 242P1116, 1118 [citCJ].
799–95 49Philippine437, 442 [citCJ].
800–1 118Kan629, 236P816; 100Vt380, 138A736; 143Wash464, 255P910, 911 [quotCJ]; Alta [1927] 3DomLR539. [a] **Amendment of statutes.**–72CalA102, 236P944. [b] **Other definitions.**–Mo 8 SW(2d)3.
800–3 163La146, 111S656.
800–8 117 Or179, 242P1116.
800–9½–New. Larceny and knowingly receiving stolen property are not degrees of same offense. 235Ky349, 31 SW(2d)380.
801–12 82CalA98, 255P261; 118Kan 629, 236P816.
801–13 118Kan629, 236P816.
801–14 [c] **In Texas.**–109TexCr430, 5 SW(2d)507.
801–17 171Ark1018, 287SW201, 48ALR 1165; CalA 286P459; 117 Or179, 242P 1116; 107WVa213, 148SE1.
801–19 148Wash57, 268P139, 140 [cit CJ].
801–23 117 Or179, 242P1116.
803–71 [a] **Slipping hand in another's pocket** with intent to steal money is simple larceny as well as larceny from person. 41GaA368, 153SE199.
804–83 Minn 231NW804; 311Mo 510, 278SW1040; Mo 11SW(2d)1029.
804–87 78CalA426, 248P1021.
805–97 118Kan629, 236P816 (stealing steer is grand larceny).
805–5 69CalA267, 231P377.
806–44½–New. To constitute the statutory offense the property appropriated must belong to a consignee other than the railroad company. 218Ky233, 291 SW45.
806–45 [b] **Statute held not repealed.** –34F(2d)244.
807–61½–New. Making of representations in attempt to commit larceny is not deprived of criminal character by fact alone that intended victim was at the time engaged in a related criminal transaction. 168Minn505, 210NW589.
807–63 79CalA514, 249P1090. [c] **Evidence.**–79CalA514, 249P1090.
808–80 155Miss684, 124S801.
810–2 135Misc564, 238NYS712.
810–3 170La51, 127S361; 311Mo 700, 278SW724; TexCr 27SW(2d)197(2d case). [a] (1) 92Fla262, 109S463; Kan 291P950; 172Minn139, 214NW785; Mo 284SW799(2dcase); 122 Or377, 257P 699; 123 Or490, 262P950. (4) Mo 281 SW437; 122 Or537, 259P427 (by bailee). (5) 311Mo 700, 278SW724. (8) Fraudulent conversion of property by person other than bailee. 35GaA588, 134SE203. (9) Larceny by false pretenses. 168 Minn13, 209NW633. (10) Larceny as bailee. 324 Ill 96, 154NE705. (11) Grand larceny. 316Mo 243, 289SW852. (12) Larceny of corn. 89 IndA569, 166 NE294. (13) Grand larceny of hog. Mo 289SW806. (14) Grand theft. 89CalA 646, 265P364; 91CalA788, 267P718. [b] (1) 135Misc564, 238NYS712. (10) Larceny from building. 172Minn139, 214 NW785. [e] 98CalA502, 277P121; Ill 173NE357; 126Kan129, 266P939; 144 Miss1, 108S725; Mo 278SW982; 196NC 259, 145SE281(1stcase); 122 Or537, 259 P427; 123 Or490, 262P950.
811–7½–New. Duplicity. Under Missouri statute burglary and larceny may be charged in same count. 307Mo 500, 271SW55.
811–9 88CalA575, 263P862; 122 Or377, 257P699.
811–12 [a] 35PortoRico 194.
812–29 [c] (3) Indictment charging obtaining loan by false representations that warehouse receipts were valid is held sufficient to charge larceny by misrepresentation. 130Misc105, 222NYS 595.
813–32½–New. Charge of taking by "picking pocket" is held sufficient. 236 IllA1.
813–36 170La51, 127S361; 126Me163, 136A726.
813–37 173Ark674, 293SW714; 221Ky 461, 298SW1107; 126Me163, 136A726. [b] **"Boxes of raisins"** charges theft of raisins only, not of boxes. CalA 286P459.
813–38 126Me163, 136A726; 106WVa 276, 145SE383, 62ALR351.
813–41 [c] **Bonds.**–87CalA236, 261P 1103 (description held sufficient).
814–46 But see 175Ark870, 300SW451.
814–47½–New. or as "personal property valued at more than one hundred dollars," 32PortoRico 864.
814–53 126Me163, 136A726.
814–74 113TexCr589, 22SW(2d)936. [o] **"Ford and "Dodge"** radiators. 331 Ill 268, 162NE839. [p] **"Goodyear Diamond tread casing."**–113TexCr589, 22SW(2d)936. [q] **"Blankets"** held sufficient description. 100Vt380, 138A736. [r] **"Coffee percolator"** held sufficient description. 100Vt380, 138A736. [s] **"Ford wire wheels and tires."**–82Mont 110, 265P5.
815–77 100Vt380, 138Vt736.
815–89 126Me163, 136A726. See also 100Vt380, 138A736, 739 [citCJ].
816–91 331 Ill 501, 163NE371.
817–99 WVa 155SE649.
817–17 21AlaA532, 109S611.
820–56 221Ky461, 298SW1107. [a] (4) "Checks, bills of exchange and other security for money and things of great value." 126Me163, 136A726.
820–57 221Ky461, 298SW1107.
822–2 101TexCr79, 273SW860.
823–16½–New. "one red calf of the age of one week;" OklCr 287P1110.
823–23 Fla 130S34.
823–25 See also 175Ark1169, 1SW(2d) 1006.
823–32 OklCr 280P855.
823–34 35GaA392, 133SE285.
825–72 [a] **Auto parts.**–331 Ill 268, 162 NE839.
826–75½–New. Larceny of windshield is sufficiently described as "one 1920 model Studebaker automobile windshield, taken from the garage of" named person on certain street in city and state. 35GaA483, 138SE749.
826–76 242 IllA14; 170La51, 127S361; 100Vt380, 138A736.
826–79 126Me163, 136A726.
826–80½–New. Under Nevada statute value of property as being fifty dollars or more is essential element of grand larceny and must be alleged. 49Nev 110, 238P998.
826–82 116Nebr1, 215NW459, 460 [quotCJ].
827–98 57ND567, 223NW303 (sufficiently alleging grand larceny). [c] (2) Indefinite description of various kinds of money held insufficient where value given was aggregate value of such property and securities. 126Me163, 136 A726.
827–12 49Nev110, 238P998 (construing Rev. L. § 6645).
827–17 126Me163, 136A726; 112TexCr 231, 15SW(2d)1042; 100Vt380, 138A736.
828–19 123 Or490, 262P950.
828–24 13PaDist&Co361.
828–28 22F(2d)977; 200 Ind336, 163NE 268; MoA 272SW710. [e] **Indictment charging intent to deprive owner of "his" property** sufficient where property owned by an estate. 222Ky89, 300SW 365.
829–29 105NJL529, 147A325.
829–30 [c] (2) State is not bound to allege individual ownership. 153Wash 280, 279P607.
829–39½–New. In Missouri averment of ownership of property stolen is essential. 311Mo 510, 278SW1040.

830-47 [a] **Allegations held sufficient.**–34F(2d)244.
830-49½-New. In a prosecution for larceny of property in the possession of a common carrier for transportation the indictment must show that the property belonged to a consignee other than the carrier. 218Ky233, 291SW45.
830-62 Mo 285SW976.
831-67½-New. Failure to state whether a company was a partnership, corporation, or trade-name is a fatal defect. Mo 289SW540.
831-67⅓-New. Where the indentification of a transaction is established so that in the event of a second prosecution defendant may protect himself by proper plea, an allegation of ownership is immaterial. 100CalA792, 281P79 (3dcase).
831-69 131 Or314, 282P105 (ownership of all cattle in person named at time and place of theft held sufficiently alleged).
831-70 OklCr 276P791.
832-98 311Mo 510, 278SW1040; 101 TexCr523, 276SW282.
832-99 311Mo 510, 278SW1040; 100 TexCr380, 272SW197; 101TexCr523, 276SW282.
833-6 22AlaA90, 112S759.
833-11 104TexCr351, 283SW805.
835-36 317Mo 388, 295SW82, 83 [quot CJ].
835-37½-New. In information for burglary and larceny in breaking into a business place and stealing an adding machine, belonging to an employee but used in the course of his employment, ownership might properly be laid in the employer. Mo 11SW(2d)1029.
835-43 AlaA 130S169(2dcase).
836-64 Mo 18SW(2d)10.
839-21 101TexCr40, 274SW580.
842-95½-New. Where a bailment was made with the owner's agent, an indictment must directly allege that the agent was duly authorized to make such contract. 103TexCr142, 280SW583.
843-9 230Ky603, 20SW(2d)441(2d case).
843-10 But see OklCr 289P791.
844-21 169Ark1038, 278SW45.
844-28 92Fla262, 109S463; 316Mo 1, 289SW945.
844-29 92Fla262, 109S463.
845-37 See also 160La9, 106S656.
845-38 TexCr 32SW(2d)654.
845-44 [a] (3). Allegation of intent to convert hide and carcass of calf killed held sufficient. 316Mo 1, 289SW945.
845-44½-New. An indictment charging the stealing of property of a corporation, and also that the stealing was for the purpose of permanently depriving the corporation of its property, is good. 221Ky424, 298SW1087.
846-47 21AlaA554, 110S58. [b] **Allegations as to place held sufficient.**–153 Wash280, 279P607.
846-48 [c] **In Missouri.**–311Mo 700, 278 SW724.
846-48½-New. Where indictment for grand larceny states amount covered by statute, place from which goods were stolen need not be alleged. 21AlaA172, 106S71.
846-56 311Mo 510, 278SW1040.
847-74 126Kan17, 266P937; 131 Or314, 282P105 ("on the —— day of June, A. D. 1928").
848-86 142Wash530, 253P801. [a] (3) In information for attempt to commit larceny by false representations, averment that representations were made is sufficient charge of overt act. 168 Minn505, 210NW589. [c] **Indictment held sufficient.**–CalA 289P215.
848-2 OklCr 287P1055 (indictment need not allege facts showing larceny in another county); TexCr 31SW(2d) 1082(2dcase).
848-3 TexCr 28SW(2d)804.
849-4 TexCr 28SW(2d)804.
849-5 200 Ind156, 162NE49.
849-8 23AlaA557, 129S310(1stcase); 311Mo 700, 278SW724 (evidence on question of ownership insufficient to prove essential animus furandi); 135 Misc564, 238NYS712. See also Mo 256 SW769. [e] **Conviction under information** charging larceny by trick must be sustained by evidence establishing larceny. 192Wis15, 211NW936.
849-9 111TexCr471, 14SW(2d)1028(2d case).
850-11½-New. Where value of goods stolen constitutes grand larceny, proof that goods were stolen from cotton house where not alleged in indictment is not fatal variance. 21AlaA172, 106S 71 (place not ingredient of crime).
850-11⅓-New. Testimony in proof of conspiracy is competent, although such is not charged in indictment. 173Ark 674, 293SW714.
850-13 110TexCr306, 8SW(2d)143 (taking from possession of person in whom possession is alleged).
850-14 SD 230NW850.
850-19 98CalA502, 277P121.
850-29 196NC725, 147SE7.
851-36 175Ark870, 300SW451; 177Ark 286, 6SW(2d)304; 131 Or314, 282P105 (no variance).
852-39 175Ark878, 18SW(2d)23.
852-40 35GaA592, 134SE328. [a] (4) Cotton seed unnecessarily described as "short staple" must be proved as laid in indictment. 35GaA592, 134SE328.
853-66½-New. checks on bank deposit, 80CalA167, 251P327.
853-67 21AlaA532, 109S611.
854-80½-New. **Proof of fraudulent taking** of check by accused with intent to appropriate funds is held sufficient, and no proof need be made that check, given in return by accused under representation that it should be cashed later, was presented for payment. 75CalA9, 241P931.
854-97 103TexCr488, 280SW1068.
856-47 But see 177Ark286, 6SW(2d) 304.
856-51 155Miss684, 124S801.
856-70 21AlaA384, 108S656. [c] **Proof of value of property stolen** is essential unless it is money. 200 Ind336, 163 NE268.
857-76 143Wash464, 255P910, 911 [quotCJ].
857-77 21AlaA585, 111S43.
857-83 123 Or490, 262P950.
857-84 168Ark580, 271SW330, 332 [quotCJ].
857-85 168Ark580, 271SW330, 332 [quotCJ].
857-86 168Ark580, 271SW330, 332 [quotCJ]; 165La296, 115S493; 123 Or 490, 262P950.
858-87 123 Or490, 262P950.
858-92 21AlaA384, 108S656; 123 Or 490, 262P950.
858-93 21AlaA384, 108S656.
858-4 311Mo 452, 278SW740, 742 [cit CJ].
858-7 123 Or490, 262P950.
859-21 34GaA226, 129SE19; 172Minn 139, 214NW785; 175Minn607, 222NW 280 (variance not shown); 195NC306, 141SE883; Or 289P1063; 100TexCr19, 270SW1031; 101TexCr523, 276SW282. But see 84CalA10, 257P555.
860-23 169Ark1038, 278SW45; 311Mo 510, 278SW1040 [citCJ]; Or 289P1063.
860-24 169Ark1038, 278SW45; 311Mo 510, 278SW1040. [d] **Allegation of possession, supported by proof,** is sufficient and allegation of ownership becomes immaterial. 169Ark1038, 278SW 45. [e] **Proof that person named was in actual care, control, and management** supports allegation of ownership. Or 289P1063.
860-25 40GaA644, 150SE864.
860-27 100TexCr19, 270SW1031.
861-49 104TexCr351, 283SW805; 105 TexCr608, 290SW179.
862-62½-New. An indictment charging larceny from a dwelling will not be sustained where the proof shows the owner had not been in the house for a great length of time. 39GaA517, 147 SE726.
862-65 23AlaA425, 126S418.
862-75 23AlaA372, 125S790(2dcase).
862-76 Ind 168NE692 (omission of word "company" held not fatal variance); 234Ky224, 27SW(2d)957(2d case).
864-98½-New. Proof of corporate existence of corporation named as owner in indictment is not necessary where allegation is simply matter of description. 311Mo 452, 278SW740.
864-98⅓-New. In some jurisdictions it is not necessary to prove that the owner was a corporation. Mo 24SW(2d) 1023.
864-99 [a] (3) Variance held immaterial. 100CalA792, 281P79(3dcase).
864-6 103TexCr142, 280SW583.
866-20 311Mo 700, 278SW724 (animus furandi).
866-24 172Minn139, 214NW785.
866-29½-New. Where allegation and proof of amount stolen constitute grand larceny, proof of place from which stolen where not alleged in indictment is not fatal variance. 21AlaA172, 106S71 (place no ingredient of offense).
867-41 253Mass65, 147NE833.
867-47 152Wash393, 278P164.
867-49 23AlaA536, 129S96; 169Ark359, 275SW701; 169Ark505, 275SW739; Ark 32SW(2d)158; 34GaA178, 128SE689; 45 Ida720, 264P875; 215Ky772, 286SW 1057; 219Ky251, 292SW754; 229Ky 765, 17SW(2d)1021; 127Me313, 143A 99; 265Mass119, 163NE855; Mo 6SW (2d)900; 114Nebr853, 211NW188; 221 AppDiv310, 223NYS353; 109TexCr71, 2SW(2d)856; 110TexCr122, 7SW(2d) 960; 108WVa494, 151SE713. Contra 144Wash425, 258P29.
869-51 21F(2d)939; 146Va574, 131SE 841.
869-52 229Ky765, 17SW(2d)1021.
869-53 21F(2d)939; 23AlaA33, 120S 304(2dcase); 23AlaA425, 126S418; Tex Cr 27SW(2d)165.
869-54 206 Iowa344, 220NW39; 106 TexCr80, 291SW228; 70Utah570, 262 P107, 110 [quotCyc]. See also 221 AppDiv310, 223NYS 353.
870-55 221AppDiv310, 223NYS353; 106 TexCr80, 291SW228.
870-56 329 Ill 182, 160NE190; 206 Iowa 344, 220NW39; 70Utah570, 262P107, 110 [quotCyc]; 146Va574, 131SE841.
870-57 TexCr 27SW(2d)165.
870-61 221AppDiv310, 223NYS353; 123 Or490, 262P950.
871-62 [c] **Evidence held sufficient** to raise presumption of guilt. TexCr 27SW (2d)165.
871-86 127Me313, 143A99.
872-93 208 Iowa995, 221NW569.
873-97 [a] (2) Mere finding of some of articles in hotel room occupied by defendant and woman not his wife, with no evidence that defendant was near place of theft when committed, insufficient to support conviction. 221AppDiv310, 223 NYS353.
873-2 Iowa 230NW436; Mo 279SW109; Mo 6SW(2d)900; Nebr 230NW587; 51 ND130, 199NW187 (tending to show guilt); OklCr 274P43; 50SD29, 208NW 166 (may be rebutted by satisfactory explanation); 53SD257, 220 NW473; 110 TexCr294, 8SW(2d)120. See also 86 CalA390, 260P913.
873-3 207 Iowa219, 222NW389; Nebr 230NW587; OklCr 274P43.
873-5 203 Iowa94, 212NW339; 124 Or 61, 262P859, 862 [citCJ].
873-6 23AlaA355, 125S901; Mo 256SW 814; 53SD257, 220NW473.
874-9 33GaA700, 127SE622; 311Mo 391, 279SW23.
874-10 331 Ill 268, 162NE839; Mont 286P1108.
874-13 70CalA515, 233P395; 144Wash 425, 258P29.
874-15 35Ariz317, 277P978; 84CalA10, 257P555; 96Fla796, 119S332; 207 Iowa 1345, 224NW594; 144Wash425, 258P29.
875-20 169Ark330, 275SW652; 169Ark 359, 275SW701; 169Ark505, 275SW739; 200 Ind156, 162NE49; 219Ky251, 292SW 754; 241Mich111, 216NW434; Mo 256SW 814; 114Nebr853, 211NW188; 221 AppDiv310, 223NYS353; 106TexCr80, 291SW228.
875-21 70CalA515, 233P395; SD 230 NW850.
876-22 169Ark505, 275SW739; 70CalA 515, 233P395; 200 Ind156, 162NE49; OklCr 288P502.
876-31 70CalA515, 233P395.
876-44 Iowa 230NW436. [b] **Accused is not bound to prove truth of explanations.**–Mont 286P1108.
877-46 29F(2d)741(1stcase); 70CalA 515, 233P395; 84CalA10, 257P555; Mont 286P1108. [a] (1) 23AlaA536, 129S96.
878-49 38GaA348, 144SE8.
878-56½-New. False testimony of defendant in explanation of possession of

the stolen property may be considered by the jury as indicative of guilt. 70 CalA515, 233P395.

878-56⅓-New. Where accused in his statement makes no explanation of how he came into possession of the goods, but merely denies he was ever in such possession, the presumption of guilt from recent possession is not rebutted. 34GaA178, 128SE689.

878-56¼-New. In the absence of proof that shells of the same kind as those stolen and found in defendant's possession were part of the shells stolen, defendant is under no duty to account for his possession thereof. Mo 22SW(2d) 647.

878-60 NH 146A503. [a] 175Ark878, 1SW(2d)23; 72CalA102, 236P944; 82 CalA98, 255P261; 37GaA816, 142SE216 (fictitious draft given for stolen cattle); 119 Or430, 249P1049; 122 Or537, 259P 427; TexCr 31SW(2d)1082(2dcase); 40Wyo 95, 275P112. [b] (1) 88CalA 575, 263P862; 89CalA451, 265P276; CalA 290P470; 119 Or430, 249P1049; 122 Or 537, 259P427; 50SD548, 210NW980; 111 TexCr417, 13SW(2d)113; TexCr 29 SW(2d)754; 133Wash579, 234P448. (58) Reason for not having licensed broker's license in prosecution for false representation by defendant that he was licensed broker. 72CalA226, 237P66. (59) Other instances. TexCr 25SW(2d) 848. [c] (1) CalA 215P327. [d] **Opinion evidence held inadmissible.**–23AlaA 255, 123S280. [e] **Admission of owner's testimony on condition of ground** at place to which another had taken him was not error. TexCr 26SW(2d)214.

879-63 NJSup 132A289.

879-65 175Ark1169, 299SW1004.

880-84 [a] 106TexCr293, 292SW234.

880-85 [f] **Stolen property may be traced** by testimony of witness who handled it after defendant sold it. 106 TexCr293, 292SW234.

880-90 Mo 8SW(2d)3.

881-12 103TexCr474, 281SW555.

882-26 [a] (1) 164La449, 114S92; 207 Iowa224, 222NW407, 61ALR882; Kan 291P950; SD 228NW395. [b] **Opinion evidence held admissible.**–113TexCr124, 18SW(2d)1070.

882-29 164La449, 114S92.

882-32 164La449, 114S92.

882-36½-New. Testimony as to results of experiments with chickens purchased from defendant is admissible to show identity and ownership. 124Kan 496, 260P618.

882-38 164La449, 114S92; 111 Or455, 227P306; 107TexCr465, 296SW892. [b] 111 Or455, 227P306.

883-39 46 Ida775, 271P325.

883-40 164La449, 114S92.

883-52½-New. Evidence of value may be relevant to prove identity. 21AlaA 585, 111S43.

883-55 235Ky466, 31SW(2d)718; 105 TexCr434, 288SW1090. [a] **Evidence properly excluded.**–110TexCr240, 8SW (2d)183.

883-56 23AlaA186, 122S305; 82Mont 110, 265P5.

883-61 105TexCr434, 288SW1090.

883-62 328 Ill 602, 160NE125; 105 TexCr434, 288SW1090.

884-63 206 Iowa365, 218NW936; 107 WVa213, 148SE1. [b] **Evidence of bona fide offer to purchase before theft** is admissible if it is shown that person making offer had fair knowledge of market value and such value had not declined at time of theft. 107WVa213, 148SE1.

884-65 105TexCr434, 288SW1090. But see 171Ark1018, 287SW201, 48ALR1165. [a] (8) Evidence of wholesale value. 165La120, 115S407.

884-74 97CalA253, 275P518.

884-75 107TexCr127, 295SW927.

885-86½-New. Evidence of corporate existence of owner of premises from which property was stolen is admissible only when tending to show guilt or innocence of accused. 311Mo 452, 278SW 740.

885-93 311Mo 700, 278SW724 (such record is res inter alios acta, issues and burden of proof differing).

886-3½-New. Evidence of the identity of the owner of a brand and the owner of cattle has been held sufficient to justify the admission in evidence of a certified copy of the brand and testimony as to markings. 131 Or314, 282P105.

887-21 131 Or314, 282P105.

887-38 CalA 290P470.

887-44 [a] (4) Testimony of owner that if defendant took property it was all right. 318Mo 605, 300SW823.

888-48 72CalA102, 236P944.

888-52 168La95, 121S586. [d] **Evidence that defendant had taken steps** to incorporate held inadmissible where he obtained money by stating that he represented existing corporation. 72 CalA226, 237P66.

888-56 148Va733, 138SE510. [a] (4) Testimony as to total amount of expenses paid by accused for complainant is admissible where it is claimed that property was taken as offset against such expenses. 89CalA451, 265P276.

889-57 TexCr 30SW(2d)310.

889-66 NH 146A503.

891-99 NH 146A503. [a] (1) 23AlaA 379, 125S788; 82Mont110, 265P5; NH 146A503; 106TexCr577, 294SW207; 106 WVa409, 145SE754. (8) As to what larceny victim's companion did with stolen money given him by defendant. 135Wash377, 237P727. (9) Policeman's testimony as to finding stolen money in house of larceny victim's companion who had placed it there after defendant had given it to him. 135Wash377, 237P727. [b] (1) NH 146A503.

891-1 21AlaA445, 109S888.

892-12 119Kan649, 240P568; 84Mont 364, 275P750. [d] **Gifts of liquor to employees** of accuser to obtain permission to weigh material, later stolen, are admissible. 204Cal 599, 269P447.

892-13 119Kan649, 240P568.

892-16 168La95, 121S586.

892-18 108TexCr457, 1SW(2d)627.

893-27½-New. or a sale of property of the same kind as that stolen, 119Kan 649, 240P568.

894-48 49SD535, 207NW547 (conversation between alleged conspirators in jail excluded as meaningless and not rebuttal).

895-75½-New. Exclusion of report made by a witness for receivers in bankruptcy of defendant's estate has been held not error. 256Mass159, 152 NE307.

895-80 21AlaA561, 110S53; 175Ark279, 298SW1021; 179Ark1064, 20SW(2d) 113; CalA 288P838; OklCr 292P873; 107TexCr465, 296SW892.

895-87 [a] (3) Testimony that drug store bought from defendant drugs which were handled only by robbed store is held competent. 173Ark674, 293SW714.

896-99½-New. Recent possession. Possession of saddles stolen within six days is held recent within rule making it evidence of guilt. 36Wyo 466, 256P 1040.

896-1 35Ariz317, 277P978; 124 Or61, 262P859.

897-3 124 Or61, 262P859.

897-5 40Wyo 95, 275P112.

897-6 128Kan314, 277P794.

897-7 200 Ind156, 162NE49; 113TexCr 124, 18SW(2d)1070.

898-14 But see 113TexCr282, 21SW(2d) 525.

898-17 110TexCr410, 10SW(2d)551.

898-18 109TexCr42, 2SW(2d)861.

899-29 85Colo 479, 277P1(2dcase).

899-32 But see 311Mo 700, 278SW724.

899-34 95CalA225, 272P755; 39GaA 818, 148SE601(1stcase); 335 Ill 415, 167 NE49; Mo 29SW(2d)71. [a] (1) 21 AlaA193, 106S623; 32Ariz151, 256P 1118; 169Ark330, 275SW652; 169Ark 505, 275SW739; 169Ark1038, 278SW45; 169Ark1212, 278SW360; 171Ark1189, 287SW578; 172Ark846, 290SW599; 173 Ark674, 293SW714; 176Ark1204, 4SW (2d)908; 179Ark972, 19SW(2d)1024; 180Ark278, 21SW(2d)176 (to support verdict of guilty of grand larceny); 83 CalA236, 256P569; 90CalA317, 265P 893; 95CalA242, 272P794; 97CalA253, 275P518; 98CalA40, 276P401; 98CalA 502, 277P121; CalA 290P470; CalA 291 P866; 110Conn403, 148A350 (verdict not palpably against evidence); 95Fla 919, 117S378; 35GaA474, 133SE746 (simple larceny in obtaining money fraudulently); 35GaA659, 134SE360; 36GaA585, 137SE413; 36GaA674, 137 SE354; 41GaA368, 153SE199 (simple larceny); 41GaA635, 154SE209; 41GaA 620, 154SE203; 335 Ill 604, 167NE797; Ill 173NE86; Ill 173NE97; 198 Ind277, 151NE725; 89 IndA569, 166NE294; 203 Iowa94, 212NW339; 119Kan682, 240P 408; 119Kan658, 240P567; 119Kan670, 240P848; 121Kan849, 250P280; 122 Kan177, 251P193; 123Kan743, 256P 1017; 219Ky251, 292SW754; 215Ky700, 286SW1052; 234Ky224, 27SW(2d)957 (2dcase); Mich 233NW324; 168Minn 381, 210NW108; 180Minn579, 230NW 476(1stcase); 150Miss159, 116S533; 152 Miss597, 120S570; 307Mo 500, 271SW 55; 311Mo 391, 279SW23; 318Mo 548, 300SW678; Mo 6SW(2d)900 (silks); MoA 31SW(2d)559; 85Mont581, 281P 351; NJSup 135A666; 32NM83, 251P 384; 56ND716, 219NW218; 57ND900, 225NW319; ND 228NW453; OklCr 267 P1044; OklCr 269P788(2dcase); OklCr 269P1061; OklCr 274P1092(2dcase); OklCr 275P405; OklCr 289P791; 88Pa Super190; 35PortoRico 925; 99TexCr 597, 271SW86; 100TexCr88, 271SW621; 105TexCr389, 286SW1085; TexCr 296 SW563; 108TexCr311, 300SW69; TexCr 11SW(2d)322(1stcase); 112TexCr74, 13 SW(2d)864; 113TexCr591, 23SW(2d) 731(2dcase); TexCr 28SW(2d)820(1st case); TexCr 32SW(2d)467; 106WVa 409, 145SE754; WVa 155SE537; 36 Wyo 466, 256P1040. (6) 113TexCr216, 18SW(2d)675(3dcase). [b] 21AlaA554, 110S58; 72CalA102, 236P944; 95CalA 202, 272P754; 96CalA358, 274P592(2d case); 100CalA78, 280P178; 36GaA651, 137SE792 (after trust); 318 Ill 157, 149 NE27; 324 Ill 289, 155NE271; 215Ky 827, 287SW23; 216Ky286, 287SW721; 253Mass65, 147NE833; 257Mass459, 154 NE177; 311Mo 537, 278SW723; 314Mo 635, 285SW437; 85Mont138, 277P961 (1stcase); NJSup 132A289. [c] 325 Ill 307, 156NE369. [d] 76CalA310, 244P 627; 80CalA167, 251P327; 37GaA341, 140SE900; 321 Ill 590, 152NE564; 130 Misc105, 222NYS595; 221AppDiv751, 222NYS601 (by misrepresentations). [g] (1) 21AlaA285, 107S724; 179Ark 1153, 15SW(2d)976; 39GaA834, 148SE 756; Okl 277P605; OklCr 292P79(1st case); OklCr 292P392. [i] (1) 15F(2d) 911; 176Ark398, 3SW(2d)37; 79CalA 265, 249P213; 95CalA563, 272P1103; 35GaA257, 132SE647; GaA 155SE776; 321 Ill 254, 151NE870; 333 Ill 104, 164 NE138; 206 Iowa397, 220NW13; 119 Kan564, 240P416; 130Kan497, 287P 599; 219Ky101, 292SW753; 228Ky128, 14SW(2d)375; Mo 24SW(2d)1008; Mo 22SW(2d)642; Mo 22SW(2d)783; 221 AppDiv485, 224NYS163; 131Misc256, 226NYS741; OklCr 273P376; OklCr 273 P1024; OklCr 282P899; OklCr 292P 878; 49SD532, 207NW465; 101TexCr 635, 276SW907; 103TexCr291, 280SW 779; 107TexCr51, 294SW546; 108TexCr 457, 1SW(2d)627; 111TexCr464, 14SW (2d)283; 112TexCr355, 15SW(2d)643; 112TexCr412, 16SW(2d)1083; 112TexCr 365, 16SW(2d)1084; 67Utah325, 247P 497; TexCr 26SW(2d)1070(1stcase). (3) Parts from automobile. 108WVa 453, 151SE432. [j] 175Ark120, 298SW 867; 119Kan658, 240P567; 119Kan670, 240P848; OklCr 287P1086(2dcase); Tex Cr 24SW(2d)403. [k] 169Ark359, 275 SW701; 94Fla1040, 114S779; 146Miss 322, 111S564; Mo 29SW(2d)80; OklCr 275P655 (domestic animal); OklCr 285 P985; OklCr 280P317(2dcase); OklCr 287P752; Okl 290P1108; TexCr 31SW (2d)450; Wis 230NW41. [l] (1) 43F (2d)890; 77Colo 445, 236P1009; 58ND 327, 226NW505 (petit larceny). [m] (1) 175Ark1169, 299SW1004; 175Ark 1169, 1SW(2d)1006; 180Ark1168, 20SW (2d)305(1stcase); 45 Ida720, 264P875; Ida 291P313; 120Kan376, 244P225; 129 Kan120, 281P910; 130Kan668, 288P 551; Kan 291P745; 235Ky634, 32SW (2d)16; Mo 25SW(2d)79; 76Mont351, 246P956; 84Mont348, 275P757; 85Mont 428, 278P993 (sheep); 117Nebr531, 221 NW420; ND 232NW473; OklCr 277P 263(3dcase); OklCr 288P494; OklCr 292P371(2dcase); OklCr 292P873; 106 TexCr567, 294SW210; TexCr 28SW(2d) 242; 112TexCr343, 16SW(2d)1074; Tex Cr 7SW(2d)1117(2dcase); 153Wash280, 279P607. [n] 50SD29, 208NW166

(calves). [o] (1) 37GaA376, 140SE406; 324 Ill 190, 154NE900; 335 Ill 424, 167 NE20; 89 IndA326, 166NE296; Iowa 230NW513; Iowa 233NW110; 124Kan 119, 257P726; Miss 113S352; Mo 289 SW806; Mo 292SW56; Mont 286P1108; OklCr 283P584(2dcase); 49SD572, 207 NW539; TexCr 28SW(2d)252; TexCr 24 SW(2d)408(1stcase); TexCr 26SW(2d) 214; 103WVa377, 137SE534. [p] 171 Ark1188, 286SW933; 179Ark1198, 18 SW(2d)914; Ill 173NE128; 205 Iowa 1047, 218NW616; 123Kan253, 254P 1036; 124Kan496, 260P618; 228Ky526, 15SW(2d)425; 229Ky98, 16SW(2d)778; 234Ky681, 28SW(2d)977; 308Mo 695, 274SW470; Mo 289SW961; 318Mo 1185, 2SW(2d)731; 318Mo 1179, 3SW(2d)369; 322Mo 1173, 18SW(2d)19; Nebr 232NW 614; OklCr 276P499; OklCr 282P889; OklCr 287P1047; OklCr 288P499; Okl Cr 292P868; OklCr 292P870; OklCr 292 P876; OklCr 292P879; OklCr 292P882; 134SC483, 133SE460; 50SD530, 210NW 722; 101TexCr120, 274SW565; 100WVa 418, 130SE607; Ont [1928] 4DomLR 859. [r] (1) 82CalA126, 255P233; 311 Mo 537, 278SW723; 108TexCr404, 1SW (2d)318. [s] (1) 175Ark878, 1SW(2d) 23; 337 Ill 300, 169NE182 (in prosecution for burglary and larceny); 253Mass 549, 149NE417; 234Mich95, 207NW867; 311Mo 510, 278SW1040. [v] 336 Ill 580, 168NE650. [w] 7F(2d)263. [x] 101 TexCr40, 274SW580. [y] (4) 73CalA 495, 238P1059. (9) Evidence held sufficient to sustain finding that attempt to commit grand larceny was not voluntarily abandoned. 73CalA495, 238P 1059. [z] (1) 15F(2d)911. [aa] Every essential ingredient of the crime must be proved beyond reasonable doubt. 92 Fla209, 109S301. [bb] Larceny by false representations.–130Misc105, 222NYS 595. [cc] Larceny in nighttime.–173 Minn543, 217NW683.

903–35 [a] 171Ark705, 285SW380; 99 Fla1119, 128S267; 35GaA574, 134SE 188; 40GaA135, 149SE170; 339 Ill 297, 171NE121 (money); 152Miss597, 120S 570; 315Mo 1305, 292SW45; Mo 6SW (2d)912(3dcase) (tires); 221AppDiv521, 224NYS670; 224AppDiv291, 230NYS24; 103TexCr441, 281SW555; 107TexCr576, 298SW582; 112TexCr600, 17SW(2d) 1071; 113TexCr298, 21SW(2d)512 (misdemeanor theft). [b] (1) Nebr 230NW 504; 196NC357, 145SE691; 29 OhA495, 163NE923; 112TexCr404, 16SW(2d) 824; 106WVa276, 145SE383, 62ALR351. [c] (1) 36GaA600, 137SE574. [d] 70 Utah570, 262P107 (sheep). [f] (1) 97 Fla330, 120S846(2dcase); 97Fla455, 121 S469(1stcase); 76Mont351, 246P956 (cow); 32NM219, 252P994, 996 [quot CJ]; 50SD548, 210NW980; SD 230NW 850; 113TexCr657, 22SW(2d)938; Tex Cr 20SW(2d)792 (circumstantial evidence); TexCr 20SW(2d)1065; 113Tex Cr412, 22SW(2d)456(2dcase) (circumstantial evidence); TexCr 26SW(2d) 654; TexCr 27SW(2d)165; TexCr 27 SW(2d)231. (5) Evidence insufficient to show conspiracy to steal steer. 49SD 535, 207NW547. [g] (1) 36GaA670, 137SE915; OklCr 282P170; 103WVa 377, 137SE534. [h] (1) Iowa 221NW 814; Mo 29SW(2d)80; 106TexCr80, 291 SW228. [k] 105TexCr554, 289SW402. [m] Larceny of automobile tires.–OklCr 281P989.

904–37 96Fla768, 119S380; 152Miss 602, 120S569.

904–38 21AlaA193, 106S623; 200 Ind 156, 162NE49; Iowa 233NW110; 121 Kan849, 250P280; Mont 286P1108. [a] (1) 21AlaA193, 106S623; 199 Ind44, 154 NE865; Iowa 232NW692 (poultry); 121Kan849, 250P280; 124Kan119, 257 P726; Mo 273SW409; Mo 22SW(2d) 647. [b] 103WVa377, 137SE534.

905–39 21AlaA193, 106S623. [a] Evidence held sufficient.–Mo 273SW409.

905–44 96Fla768, 119S380; 37GaA341, 140SE900; 199 Ind44, 154NE865; Miss 130S487; Nebr 230NW504. [a] (1) 22 AlaA372, 115S772; Miss 130S487. [b] Evidence held sufficient.–173Minn543, 217NW683.

905–48 See also 111TexCr166, 11SW (2d)793 (evidence barely raising suspicion that defendant might have been person in possession of stolen car).

905–53 [a] (1) 69CalA267, 231P377 (facts sufficient to prove asportation of live animal); 72CalA102, 236P944; 97 Fla987, 122S579(1stcase); 221Ky178, 298SW390 (cutting and carrying away timber).

906–56½–New. Proof of trespass required in ordinary larceny cases is unnecessary in criminal conversion of funds. 314Mo 585, 285SW97, 47ALR 783.

906–56¼–New. Evidence that defendant participated in loading and selling cattle held sufficient to support conviction for larceny. 40GaA722, 151SE397.

906–57 103TexCr474, 281SW555.

906–58 110TexCr52, 7SW(2d)532.

906–59 215Ky700, 286SW1052. [a] (1) 82CalA98, 255P261; 48 IdaA251, 281P7 (1stcase); Ill 173NE86; 208 Iowa995, 221NW569; 316Mo 49, 289SW856 (chickens); 35PortoRico 194. [b] 109 TexCr318, 4SW(2d)552.

907–69 [a] (1) 168Ark1168, 273SW717; 177Ark286, 6SW(2d)304; 324 Ill 190, 154NE900; Mont 287P214; 101TexCr 120, 274SW565.

907–71 36GaA120, 135SE758.

907–74 [a] (1) 36GaA120, 135SE758; 110TexCr52, 7SW(2d)532.

908–76 [a] 82Mont110, 265P5; 112 TexCr115, 14SW(2d)271.

908–85 206 Iowa365, 218NW936.

908–86 But see 23AlaA379, 125S788.

908–95 Ill 173NE86.

909–98 175Minn607, 222NW280. [a] 175Ark870, 300SW451; 180Ark1136, 24 SW(2d)317; 180Ark448, 21SW(2d)616; 80CalA252, 251P682; CalA 285P386; 37GaA84, 138SE917; 328 Ill 602, 160NE 125; 121Kan849, 250P280; 221Ky178, 298SW390; 175Minn607, 222NW280; 32 OhA133, 165NE596; Mont 287P933; OklCr 278P1117(1stcase); OklCr 283 P582; 106TexCr293, 292SW234; 109 TexCr512, 5SW(2d)769; 148Wash57, 268P139. [c] 178Minn118, 226NW206 (1stcase). [d] (1) 21AlaA285, 107S724; 99CalA321, 278P454(1stcase); 106TexCr 114, 290SW1102.

909–98½–New. In a prosecution for grand larceny, the market value of the thing stolen, if it has a market value, must be proved beyond a reasonable doubt. 107WVa213, 148SE1.

910–15 85Colo 479, 277P1(2dcase) (unknown ownership); 200 Ind336, 163NE 268; Iowa 230NW513 (hogs). [a] Evidence held sufficient to refute defendant's claim that note left with bank for safe-keeping became asset of bank except through fraud of former bank president constituting criminal conversion. 314Mo 585, 285SW97, 47ALR783.

910–18½–New. Exact title need not be shown by proof of cogent character essential to sustain conviction. 311Mo 510, 278SW1040.

910–20 [a] Evidence held sufficient to sustain finding that title to land from which growing timber was stolen was in others than defendant. 221Ky178, 298 SW390.

910–23 [a] (2) Evidence held sufficient to sustain allegation that railroad was corporation. 336 Ill 580, 168NE650.

910–25 [a] (1) 69CalA267, 231P377; 72 CalA292, 237P390; Ida 288P154; 324 Ill 190, 154NE900; 329 Ill 514, 161NE60; Ill 173NE86; Ill 173NE128; 209Ky848, 273SW477; Or 289P1063; 101TexCr79, 273SW860; (4) 180Ark656, 22SW(2d) 172; 154Miss446, 122S538. (9) 171Ark 40, 283SW25. (10) 169Ark1038, 278SW 45. (11) Evidence held sufficient to overcome presumption from failure to call material witness. 72CalA292, 237P390. [c] (1) 200 Ind336, 163NE268; 100TexCr 19, 270SW1031; 107TexCr2, 294SW211. (11) Ownership cannot be proved solely by testimony as to ex parte identification by owner out of presence and hearing of accused. 106TexCr293, 292SW234.

910–25½–New. Convictions of larceny have been affirmed on proof that defendant did not own the property involved, while actual ownership could not be positively shown. 145Wash654, 261P383.

911–28 85Colo 479, 277P1(2dcase); Ida 288P154; Ida 291P313. [b] (1) 100 CalA792, 281P79(3dcase); 318Mo 605, 300SW823; 119 Or320, 249P360; 108 TexCr480, 1SW(2d)627. [f] (3) Evidence held to show money was obtained by false pretenses rather than by larceny by trick. 192Wis15, 211NW936. [g] Evidence held to sustain finding that hogs were taken larcenously without owner's consent. Iowa 233NW110.

912–36 [b] Nonconsent of owner may be shown by circumstantial evidence. 119Or320, 249P360.

912–42 72CalA102, 236P944; 117Or179, 242P1116. See also 244NY147, 155NE79. [b] (1) 72CalA102, 236P944; 75CalA9, 241P931; 40GaA143, 148SE921(2dcase) (3) 99TexCr254, 272SW782 (conviction supported though defendant offered reasonable excuse for possession). (4) 15 F(2d)911. (18) Grand larceny by trick and device. 81CalA398, 253P773. [c] (1) 41GaA654, 154SE216(1stcase); 151 Miss576, 118S412.

915–90 Erratum.–After word "property" in last line of section insert 90½. Erratum.–Note [a] should be keyed to 90½.

915–90 Erratum.–Note [a] should be keyed to 90½.

915–90½ [a] (3) Other instances. Mont 292P717.

912–42 [c] (1) Nev 282P1024; NJSup 143A50; 228AppDiv371, 240NYS150; 152Wash393, 278P164. (2) 243 IllA378. (3) Other instances. 41GaA376, 153SE 79(1stcase). [d] Evidence held sufficient to support implied finding that at time of acquiring possession of money by fraud defendant had preconceived intention to convert it to his own use. 72CalA102, 236P944.

913–47 [a] Evidence held to sustain finding that defendant knew that title to land from which he was charged with stealing timber was in others than himself. 221Ky178, 298SW390.

913–54 117Or179, 242P1116.

914–62 311Mo391, 279SW23 (possession of property unexplained).

914–63 325 Ill 307, 156NE369. See also 70CalA515, 233P395.

915–92 [a] 72CalA102, 236P944.

916–98 169Ark345, 275SW666 (as principal and not as employee). [a] 168Ark 1082, 272SW833 (unexplained possession of property recently stolen); 178Ark212, 10SW(2d)366; 96Fla232, 118S20; 331 Ill 268, 162NE839; 331 Ill 501, 163NE 371; 225Ky600, 9SW(2d)717; 29 OhA72, 163NE40; 110TexCr557, 9SW(2d)736; TexCr 10SW(2d)560; 145Wash117, 259 P29. [c] 169Ark359, 275SW701; NJSup 132A289; 107TexCr51, 294SW546; 113 TexCr589, 22SW(2d) 936. [d] (1) 321 Ill 254, 151NE870 (that defendant took car); 234Mich95, 207NW867; Mo 281 SW437; 119 Or320, 249P360; 85PaSuper 302; 145Wash117, 259P29.

916–99 [a] (1) 38GaA741, 145SE500; 224AppDiv415, 231NYS153. [b] (1) 20 AlaA603, 104S444; 327 Ill 416, 158 NE680; 154Tenn66, 289SW515; 103 TexCr449, 281SW863. (5) Evidence insufficient to show defendant accessory after fact in larceny of steer. 49SD535, 207NW547.

917–2 [a] (1) 79CalA576, 250P588. [b] (2) No corroboration at all. 327 Ill 416, 158NE680.

917–4 21AlaA585, 111S43; 95Fla401, 116S11; 36GaA120, 135SE758; Mo 289 SW557; 110TexCr52, 7SW(2d)532. [a] Circumstantial evidence held insufficient to convict for stealing automobile. Ark 298SW20.

917–8 221AppDiv521, 224NYS670.

918–12 221AppDiv521, 224NYS670.

918–15 36GaA120, 135SE758; 321 Ill 254, 151NE870.

918–16 20AlaA603, 104S444.

918–16½–New. If accused lies as to his presence near the place of the crime, such fact may be considered as evidence of guilty presence. 221AppDiv521, 224 NYS670.

918–16¼–New. But the weight the jury may give such inference varies according to the amount and weight of other evidence of guilt. 221AppDiv521, 224NYS 670.

918–18 21AlaA585, 111S43; 22AlaA90, 112S759; Mont 286P1108.

918–24 88CalA575, 263P862; 163La 952, 113S159.

918–25 Ida 288P154; 146Miss322, 111 S564; 107TexCr127, 295SW927.

918–28 22AlaA27, 112S221; 73CalA495,

238P1059 (attempt); 92CalA778, 269P465; 222Ky89, 300SW365; 117 Or179, 242P1116; 107TexCr414, 296SW585; TexCr 32SW(2d)197(2dcase); 103WVa442, 137SE886.

919-30 122Or537, 259P427; Or 289P1063.

919-33 203Iowa94, 212NW339.

919-33½-New. Whether there was a voluntary abandonment of an attempt to commit grand larceny or whether the abandonment was due to an outside cause is a question for the jury. 73CalA495, 238P1059.

919-38 [b] 148Wash57, 268P139.

919-47½-New. Refusal to submit question of whether or not alleged stolen property was in possession of alleged owner held not erroneous. TexCr 23SW(2d)372(2dcase).

920-49 169Ark359, 275SW701; Ill 173NE357; 203 Iowa1008, 213NW603; Mo 8SW(2d)3; 106TexCr397, 292SW545.

920-50 203 Iowa532, 211NW244; 203 Iowa94, 212NW339; 311Mo 391, 279SW 23; 311Mo391, 279SW23; Mo 279SW 109; Mo 8SW(2d)3; Mont 287P214; 110TexCr152, 7SW(2d)532; TexCr 25 SW(2d)840.

920-51 23AlaA33, 120S304(2dcase); 33 GaA680, 127SE891; 203 Iowa94, 212NW 339; 213AppDiv331, 210NYS535; 67 Utah325, 247P497; 36Wyo 466, 256P 1040.

920-54½-New. Evidence of possession of stolen property not satisfactorily explained is alone sufficient to submit question of larceny to jury. 219Ky251, 292SW754.

920-55 Ind 167NE129.

920-56 21AlaA561, 110S53; 95Fla401, 116S11; 326 Ill 216, 157NE211; Iowa 230NW379; 221AppDiv310, 223NYS 353; 124 Or61, 262P859; 103WVa442, 137SE886.

921-58 169Ark359, 275SW701; 176Ark 1204, 4SW(2d)908, 909 [quotCyc]; Ark 32SW(2d)158; 41GaA620, 154SE203; GaA 155SE777(1stcase); 208 Iowa995, 221NW569; 215Ky772, 286SW1057; 311Mo 391, 279SW23; 311Mo 391, 279 SW23; Mont 286P1108; 67Utah325, 247 P497; 53SD257, 220NW473; 103WVa 442, 137SE886, 887 [citCJ].

921-60 45Ida720, 264P875.

921-61 95Fla401, 116S11.

921-62 229Ky765, 17SW(2d)1021.

921-63 22AlaA29, 111S759; NH 146A 503.

921-64 23AlaA278, 124S391; 23AlaA 384, 125S898; 23AlaA396, 126S174 (1stcase); 169Ark1038, 278SW45; 179 Ark972, 19SW(2d)1024; 73CalA495, 238 P1059; 81CalA381, 253P938; 205 Iowa 1047, 218NW616; 207 Iowa219, 222NW 389; 207 Iowa224, 222NW407, 61ALR 882; 125Kan599, 264P1035; 234Ky224, 27SW(2d)957(2dcase); 235Ky634, 32 SW(2d)16; 127Me313, 143A99; Mo 279 SW109; Mo 289SW895; 320Mo 248, 6 SW(2d)839; Mo 18SW(2d)10; Mo 24 SW(2d)1023; 117 Or179, 242P1116; 85 PaSuper302; 88PaSuper190; 103TexCr 474, 281SW555; Utah 272P635; 148Va 733, 138SE510; 141Wash148, 251P115; 143Wash88, 254P456. [d] (1) 22AlaA 428, 116S415; (1) 228Ky128, 14SW(2d) 375; 311Mo 391, 279SW23; NJSup 140 A435; 143Wash88, 254P456. [e] (1) 218Ky836, 292SW497. [f] (1) Mo 296 SW138. [o] Larceny of turkeys.-133SC 83, 130SE511. [p] Larceny by bailee.-324 Ill 96, 154NE705.

922-65 227Ky205, 12SW(2d)288; 320 Mo 245, 6SW(2d)869; Mo 18SW(2d) 10 (larceny of corn); Mo 22SW(2d)647; MoA 294SW452.

923-68 124 Or61, 262P859; 130 Or 379, 280P335; 104TexCr468, 284SW564; 106TexCr80, 291SW228. [i] Larceny of drugs.-173Ark674, 293SW714. [j] Directed verdict held properly denied.-257Mass459, 154NE177.

923-69 23AlaA557, 129S310(1stcase); 122 Or537, 259P427. [b] 23AlaA111, 121S457(1stcase).

923-72 79CalA265, 249P213 (sufficient); 167Minn216, 208NW761 (instructions sufficient); 122 Or377, 257P 699; 99TexCr597, 271SW86; 103TexCr 589, 281SW1072(2dcase); 106TexCr 162, 291SW225; 143Wash88, 254P456.

923-76 NH 146A503.

924-79 104TexCr468, 284SW564; 82 CalA126, 255P233.

924-79½-New. Evidence authorized charge on conspiracy. 33GaA680, 127 SE891.

924-81 107TexCr465, 296SW892; 111 TexCr471, 14SW(2d)1028(2dcase). [b] (2) Evidence held to warrant charge that defendant could not be convicted of theft if he merely accompanied thief in automobile, knowing that it was stolen. 113TexCr354, 22SW(2d)662. [f] 21AlaA 445, 109S888. [g] Omission of word "take" is not prejudicial or misleading where "larceny" properly defined in preceding instruction. 50SD29, 208NW 166.

924-87 [b] CalA 290P470. [h] Obtaining property by false pretext.-113TexCr 282, 21SW(2d)525.

924-84 [a] Charge held improper.-102 TexCr421, 278SW197.

926-3 112TexCr74, 13SW(2d)864.

926-10 123 Or490, 262P950.

926-20 108TexCr33, 299SW242; 143 Wash464, 255P910, 911 [quotCJ]. [a] 307Mo 500, 271SW55.

926-21 143Wash464, 255P910, 911 [quotCJ].

927-23 143Wash464, 255P910, 911 [quotCJ].

927-25 221Ky178, 298SW390; 143 Wash464, 255P910, 911 [quotCJ].

927-27 But see Ind 168NE692.

927-29 108TexCr245, 299SW909. [a] (3) Where indictment alleged ownership in A and it was shown that property is in A's wife, it was held error to charge that, under law, such finding supported allegation of ownership. 34GaA226, 129 SE19. [g] (3) 177Ark286, 6SW(2d)304.

928-32 179Ark309, 15SW(2d)389 (2dcase) (instruction held proper).

928-35 Mo 281SW437.

928-38 [b] Instruction held proper.-171Ark40, 283SW25.

929-51 Mo 281SW437.

929-53 But see 219Ky251, 292SW754.

930-60 [b] Instruction held proper.-CalA 290P470.

930-66 23AlaA216, 123S103; 171Ark 705, 285SW380; 194NC409, 139SE774; 107TexCr414, 296SW585. [b] (2) Explanation of felonious intent erroneous. AlaA 129S795. [c] 179Ark309, 15SW (2d)389(2dcase).

930-67 TexCr 25SW(2d)345.

931-70 180Ark1136, 24SW(2d)317; 307 Mo 500, 271SW55.

931-71 Mo 289SW895.

931-73 105TexCr608, 290SW179.

931-76 108TexCr267, 300SW934.

931-79 112TexCr343, 16SW(2d)1074.

932-82 [a] 122 Or537, 259P427.

932-84 Mo 281SW437. See also 37GaA 386, 140SE415.

933-93 219Ky251, 292SW754.

933-99 233Ky184, 25SW(2d)77 (where evidence of value very unsatisfactory); 108TexCr33, 299SW242. [a] 179Ark972, 19SW(2d)1024; 72CalA102, 236P944; 92CalA778, 269P465.

933-1 213Ky323, 280SW1094; 108TexCr33, 299SW242. [a] (3) Statute fixing theft of automobile as grand larceny dispenses with necessity of instruction on petit larceny. 92CalA778, 269P465.

934-2 235Ky349, 31SW(2d)380.

934-2½-New. Where there is no evidence of value less than amount necessary to constitute grand larceny, failure to charge the law of petit larceny is not error. 133SCS3, 130SE511.

934-3 222Ky89, 300SW365.

934-6½-New. Instruction is not rendered erroneous by failure to use term "market value." Iowa 230NW379.

934-8½-New. In larceny from a person, evidence may warrant submission of larceny as an included offense. 206 Iowa 373, 220NW106.

934-9 [a] Instructions held correct.-311Mo 510, 278SW1040.

934-10 [c] Instruction has been held erroneous.-AlaA 129S713(1stcase).

934-13 [a] (5) On trial for larceny and burglary, charge that conviction may be for one or other crime is proper. Mo 274SW54.

935-17 [a] (1) 82CalA126, 255P233; 311Mo 391, 279SW23; Mo 289SW557; 150Wash197, 272P719. [c] (1) 23AlaA 355, 125S901; 82CalA126, 255P233; 150 Wash479, 273P731.

935-19 [b] 203 Iowa1008, 213NW603.

935-20 75CalA404, 242P1067. [a] (4) Refusal of charge to acquit unless defendant was original taker is held proper. 106TexCr293, 292SW234.

935-21 130 Or379, 280P335.

936-23 221Ky461, 298SW1107. [a] Instruction on felony only held proper.-40GaA657, 150SE863(1stcase).

936-39 [d] Instructions on intent held warranted by evidence.-206 Iowa397, 220 NW13. [e] Requested instructions held properly refused.-206 Iowa373, 220NW 106.

937-40 [b] Requisite instructions properly refused.-72CalA102, 236P944 (instruction as to purpose with which money was delivered to defendant misleading).

937-48 [b] (1) 128Kan314, 277P794; Kan 291P745; 103TexCr474, 281SW555. (6) To warrant instruction to find defendant, charged with larceny of automobile, guilty, if he aided and abetted in commission of offense. 120Kan166, 241P1083. [c] (1) 177Ark1193, 9SW (2d)240; 71CalA181, 235P72; 40GaA 722, 151SE397; 324 Ill 190, 154NE900; 208 Iowa995, 221NW569; 127Me313, 143 A99; 100WVa418, 130SE607. [d] (1) 130Kan668, 288P551; 123 Or490, 262P 950. [f] (1) 86CalA390, 260P913.

938-49 [d] (1) Utah 272P635.

939-61 169Ark359, 275SW701.

939-63 167La1050, 120S853.

940-73 206 Iowa344, 220NW39.

941-82 [d] (1) 81CalA752, 254P666; 117Nebr531, 221NW420; 51ND130, 199 NW187. [f] (1) 207 Iowa1345, 224NW 594; Iowa 230NW436.

943-6 86CalA390, 260P913.

943-20 253Mass549, 149NE417.

944-23½-New. In the Philippines one charged with estafa cannot be convicted of theft. 50Philippine598.

944-37 215Ky827, 287SW23.

946-64 9PaDist&Co 626; 36Wyo 241, 254P120 [citCJ].

946-67 100Vt380, 138A736; 36Wyo 241, 254P120.

946-68 36Wyo 241, 254P120. But see 332 Ill 222, 163NE694.

946-72 Mont 292P250.

946-78 23AlaA379, 125S788.

948-7 236 IllA1.

948-8 [a] 131Misc657, 228NYS361; 34 NM499, 285P501.

948-9 [c] In Illinois offense is felony punishable by penitentiary sentence. 236 IllA1.

948-17 [a] (1) 58ND327, 226NW505; TexCr 27SW(2d)197(2dcase); NS [1928] 2DomLR687. (2) Fine for petit larceny held unauthorized where conviction requires jail sentence or hard labor. 23AlaA338, 125S207.

949-22 318Mo 1185, 28SW(2d)731; 131 Misc657, 228NYS361.

949-26½-New. Sentence to the state reformatory for not less than eighteen months or more than three years for grand larceny, where accused was young in years, of good family, and never before was accused of wrongdoing, and, at the time of sentence, had already been confined in the county jail for four months, has been held a proper exercise of judicial discretion. 150Wash197, 272P719.

949-27 [a] (9) Four years, two months, one day for larceny of two boxes of onions worth seventeen pesos. 45Philippine167. (10) Two years' imprisonment for larceny of eight chickens. Okl Cr 292P868. [b] (11) Two years' imprisonment for larceny of fowls. 205 Iowa1047, 218NW616. (12) Ten years for theft. 113TexCr632, 21SW(2d)1045.

949-29 [a] In Philippines.-44Philippine 66.

952-79 321 Ill 128, 151NE505; 144 Wash363, 258P23.

LASCIVIOUSLY

953-31 [b] Other definitions.-MoA 256 SW496.

LATERAL

956-33 153Tenn283, 282SW382.

956-35 153Tenn283, 282SW382.

LAW

957-86 CalA 288P858; Wash 286P839.
958-1 198Cal170, 244P323.
958-7 [a] 284Pa455, 131A265.
959-9 [a] See also 29Ariz318, 241P511.
960-29 156Tenn523, 38W(2d)161, 162 [quotCJ].
960-32 191NC780, 133SE164.
963-74 191NC780, 133SE164.
963-77 321Mo378, 118W(2d)268; 156 Tenn523, 38W(2d)161, 162 [quotCJ]; 153Wash379, 279P1102.
963-80 156Tenn523, 38W(2d)161.
963-97 [a] 153Tenn451, 284SW365.
963-98 17SaskL52, [1923] 2WestWkly 600.
963-99 17SaskL52, [1923] 2WestWkly 600.
964-26 [a] NJCh 144A546.

LAW ABIDING

967-7 Mo 78W(2d)253.

LAY

971-19 13PaDist&Co 119.
971-21 Mont 288P455.

LEATHER

973-85 [d] **"Skin" distinguished.**–14 CustA36.

LEAVE

973-86 [a] **Permit.**–116Tex82, 286SW 458.
973-86½-New. , license. 116Tex82, 286 SW458.
974-30½-New. "leaving from whatsoever cause," 25OhA100, 157NE393 (holding term applicable to involuntary as well as voluntary cause).

LEG

975-60 Webster Int D [quot 238Mich 572, 214NW174, 175].
975-61 Webster Int D [quot 238Mich 572, 214NW174, 175].

LEGAL

976-90 [a] **Legal claim against state** is one recognized or authorized by law of state or which might be enforced at law if state were private corporation. 76Mont429, 247P332, 47ALR424.
976-91 79CalA726, 251P241.
977-13½-New. or who stands clearly in a representative capacity; 187Wis432, 204NW331.
977-16 187Wis432, 204NW331 (insurance policy).
977-22 [a] (1) MoA 295SW811; 187 Wis432, 204NW331.
978-27 115OhSt639, 155NE227.
978-38½-New. trustee; 187Wis432, 204 NW331.
978-38⅓-New. receiver; 187Wis432, 204NW331.
979-51 187Wis432, 204NW331.
979-52 MoA 228W(2d)206.
983-53 33F(2d)767; 115OhSt639, 155 NE227.
979-57 115OhSt639, 155NE227
981-23 100TexCr167, 272SW456.
981-37½-New. "legal error," 160Ga865, 129SE528.

LEGISLATION

986-41 116Or264, 240P418, 422 [quot CJ].
986-42 116Or264, 240P418, 422 [quot CJ].
986-43 116Or264, 240P418, 422 [quot CJ].
986-44 116Or264, 240P418, 422 [quot CJ].
986-45 116Or264, 240P418, 422 [quot CJ].
986-48 116Or264, 240P418, 422 [quot CJ]. [a] (1) 116Or264, 240P418, 422 [quotCJ]. (2) 116Or264, 240P418, 422 [quotCJ]. [b] 116Or264, 240P418, 422 [quotCJ]. [c] 116Or264, 240P418, 422 [quotCJ].

LEGISLATIVE

987-77 324Ill285, 155NE318.

LEGITIME

988-58 160La555, 1078425.
988-59 160La555, 1078425.

LESS

990-19 [b] 285Pa16, 131A482.

LEVEES AND FLOOD CONTROL

997-1 [a] (2) "An embankment intended to prevent inundation." Anderson L. D. & Webster D. [quot 317Ill92, 147NE479, 481]. (3) "An embankment beside a river or an arm of the sea to prevent overflow, as in southern United States." Standard D. [quot 317Ill92, 147NE479, 481].
997-10½-New. The primary duty of maintaining levees and protecting adjacent lands still rests on the state acting through the agency of its taxing districts. 148Miss511, 114S326(2dcase).
998-11 168Ark809, 271SW458 (legislature may appoint or prescribe method of selecting district directors); 72CalA 68, 237P59.
998-12 [d] (3) It is duty of state to control flood waters under Const. art 8 § 52 and art 16 § 59, and statutes enacted. 116Tex82, 286SW458. (4) Statute creating levee improvement districts, pursuant to Const. art 16 § 59, held not violative of constitutional provisions as to due process of law and equal and uniform taxation. TexCivA 38W(2d)888. [e] **Conservancy Act of New Mexico** is not unconstitutional. 31 NM188, 242P683. [f] **In New Mexico.**–34NM346, 282P1.
998-13 [b] **Levee district** may be given drainage district powers. 159La483, 1058593. [c] **In Texas.**–117Tex34, 297 SW206.
998-14½-New. Election of directors of levee district without publication of notice is void under special statute. 168 Ark809, 271SW458.
998-17 TexCivA 118W(2d)263.
998-18½-New. Act has been held constitutional as not attempting to grant to levee district powers of drainage district or authorizing it to create drainage system apart from, and not incidental to, levee system. 159La483, 105 S593.
998-18⅓-New. Conservancy Act of New Mexico is not invalid because attempt might be made to use its provisions solely for reclamation purposes. 31NM188, 242P683.
998-18¼-New. A statute is held not invalid as authorizing courts to create levee improvement districts out of territory located in several counties. Tex CivA 282SW339.
998-18⅕-New. A statute permitting an officer or agent of a corporation owning land in diking district to vote at district elections only if he resides in the county is held not unconstitutional. 143 Wash525, 255P955.
998-18⅙-New. A statute authorizing the creation of levee improvement districts and affording a landowner opportunity to be heard has been held not to violate the due process clause. 117 Tex342, 78W(2d)1071.
998-18⅐-New. A statute empowering district courts to create conservancy districts has been held unconstitutional as conferring legislative power on courts. Kan 289P966.
998-20 [a] (1) 254IllA289. (2) Canals Act (Gen L. 34th Leg. c 146) makes General Law relating to collection of county taxes apply to levee improvement districts. TexCivA 287SW302. (3) Provision for reassessing benefits under certain conditions held not to permit levy of tax without hearing. Tex CommnA 23SW(2d)325. [b] **Constitutional provision construed.**–168La1037, 123S705.
998-25 167La612, 120S25. [a] 169Ark 33, 273SW711.
999-29 37F(2d)602.
999-35 205Iowa64, 217NW464.
999-40 74CalA528, 241P418.
999-41 [b] **Under federal and state statutes, consents of federal and state authorities are necessary** before construction of levee by drainage district affecting capacity of navigable river to carry flood waters. 330Ill121, 161NE 300.
999-44 [a] See also 34NM346, 282P1. [b] **Conservancy Act of New Mexico** giving district court jurisdiction to try condemnation cases involving lands beyond district is constitutional. 31NM 188, 242P683.
1000-55 [a] 168Ark565, 270SW963.
1001-85 But see 40F(2d)873.
1001-85½-New. Levee district created by special act may be authorized to contract for completion of levee to comply with standard required by federal government to secure federal aid. 169 Ark19, 273SW713.
1001-85⅓-New. The board of levy commissioners has power to enter into a contract to build or repair levees and to pay the contractor. 155Miss115, 124 S251(2dcase).
1001-90 330Ill121, 161NE300.
1001-94 See also 205Iowa64, 217NW 464.
1001-95 40F(2d)873.
1002-8 [a] **Contracts construed.**–205 Iowa64, 217NW464.
1002-9½-New. Letting contract for dike without competitive bidding is held not ground for restraining issuance of bonds. 143Wash525, 255P955.
1002-9⅓-New. Surety bonds on each of three contracts in amount of contract price are held sufficient, although earlier statute requires two bonds each in twice such amount. 143Wash525, 255 P955.
1002-19 205Iowa64, 217NW464; 161 La1002, 1098816; 154Miss233, 122S475 (stipulation excusing performance because of conditions resulting from war will not be implied). [a] **Waiver.**–142 Miss123, 105S502.
1002-21 167La896, 1208589.
1002-21½-New. A contractor requesting the levee board to increase contract prices because of World War conditions is liable to the board for an excess paid him above the contract price because of war conditions. 154Miss233, 122S 475.
1002-25½-New. A provision that any extension shall waive no other obligation does not affect claim for liquidated damages for delay prior to end of extension period. 172Ark460, 289SW753.
1002-25⅓-New. Extension held to constitute new contract concerning time for completion. 172Ark460, 289SW753.
1002-25¼-New. A board resolution, extending the time and reciting that claim for liquidated damages then due was not waived, is held not a new contract to pay damage. 172Ark460, 289SW753.
1002-25⅕-New. Extension held to release contractor, by necessary implication, from liability for not having completed work. 172Ark460, 289SW753.
1003-28 167La896, 1208589. [a] **In California.**–197Cal482, 241P552. [b] **To determine actual reasonable cost** of reclamation work by reclamation district, exigencies of such case must be considered. 197Cal482, 241P552. [c] **Discretion of reclamation board** of California as to items constituting "actual reasonable cost of construction" is final in absence of showing of want of good faith or abuse of discretion. 197Cal482, 241P552.
1003-30 [b] **Fact that certain portions of work** of "bank protection" were not within scope of plans on basis of which assessments were predicated is immaterial in determining "actual reasonable cost of construction" as basis for compensation to be paid under construction contract. 197Cal482, 241P552.
1003-32 [a] **Determination by reclamation board** that interest incurred by reclamation district on warrants issued for construction were proper costs of construction held to be final. 197Cal 482, 241P552.
1003-34½-New. Payments in excess of contract provision are prohibited and excess payments may be recovered by levee board or state revenue agent. 142 Miss123, 105S502.
1003-34⅓-New. The surety on a contractor's bond is not liable for an excess paid the contractor above the contract price. 154Miss233, 122S475.
1003-34¼-New. The amount due from a subcontractor for gasoline and oil used to operate machinery is collectable out of the contractor's bond. 12LaA 305, 125S465.
1003-35½-New. A levee contractor is entitled to pay a subcontractor's indebtedness for gasoline and oil used to operate machinery and charge the

amount against the amount due the subcontractor without waiting to be forced to make payment. 12LaA305, 125S465.

1003-36 [c] **Denial of recovery for breach of contract to repair levee,** on ground performance was prevented by floods damaging levee, authorized. 181 Ark629, 27SW(2d)793.

1004-45½-New. A claim for groceries, feed, and other supplies furnished a contractor has been held not liennable. 167 LaS96, 120S589.

1005-58 35F(2d)235; 74CalA528, 241 P418; 169La427, 125S437.

1005-64½-New. Recovery for damage from flooding will be denied for inability of the jury to determine what amount of damage was caused by improvements and what would have resulted notwithstanding only where the amount of recovery is wholly a matter of speculation and conjecture. 115Tex 263, 280SW532.

1005-64½-New. Levee board is not liable in tort for the removal of earth from adjacent land in an emergency, 165La241, 115S473.

1005-64½-New. but such board is liable to the owner for compensation for property taken, although there is no contract therefor. 165La241, 115S473.

1005-64½-New. Failure of a landowner to appear, pursuant to a notice for construction of an additional levee, to object to construction does not constitute a waiver of a claim for damages. 147 Miss783, 113S897.

1005-64½-New. Some statutes, providing that the failure of commissioners to return an assessment of damages shall be deemed a finding that no damage will be sustained, are applicable only when such failure appears by assessment roll. 147Miss783, 113S897.

1005-64½-New. Water flooding adjoining land from an unauthorized ditch becomes surface water. **TexCivA** 178SW(2d)841(2dcase).

1005-64½-New. A landowner is entitled to additional damages resulting from a change in the reclamation plan. **TexCivA** 198SW(2d)197.

1005-64½-New. The extent and duration of injuries must be based on conditions prevailing after completion of the reclamation plan. **TexCivA** 198W(2d)197.

1005-64½-New. Temporary damages are recoverable although the reclamation plan is incomplete. **TexCivA** 198W(2d)197.

1005-64½-New. The record of the reclamation plan is incomplete by failing to disclose permanent injuries. **TexCivA** 198W(2d)197.

1005-64½-New. In an action for damages, an amended petition attacking the reclamation plan is timely although made nineteen months after appeal from the commissioners' award. **TexCivA** 198W(2d)197.

1005-64½-New. In an action for damages, the suit must have been filed in a district court having no jurisdiction over an appeal in condemnation proceedings, thereby precluding consolidation. **TexCivA** 198W(2d)197.

1005-64½-New. Appeal to the court from an award by the commissioners of appraisement is properly dismissed when no written notice required by statute is given. **TexCivA** 198W(2d)615.

1005-70 See also. **TexCivA**, 198W(2d)197. [b] (2) If crops would be damaged notwithstanding negligent construction of reformation plan, there can be no recovery. **TexCivA** 198W(2d)197.

1005-72 See also 75CalA395, 242P902.

1005-76 170La210, 127S603(2dcase).

1006-80½-New. Statute limiting liability of officers to cases where plaintiff used due care is held inapplicable where it is shown that plaintiff did not use levee, 75CalA395, 242P902.

1007-98 199Cal668, 251P207.

1007-2 **TexCivA** 275SW137.

1007-3 **TexCivA** 275SW137.

1007-10½-New. Diking system, consisting of principal dike, pumping plant, and back dike is held sufficient without system of internal drainage. 143Wash 525, 255P955.

1007-12 74CalA528, 241P418.

1007-16 **TexCivA** 296SW974. See 117 Tex342, 78SW(2d)1071. [c] **Constitution of statute.**–Court should keep constitutional purpose in view and resolve all doubtful language consistently with constitutional requirements. 117Tex342, 78W(2d)1071. [d] **Purpose of legislature** is to authorize creation of public corporations according to unified system for purpose of reclaiming land fit for agricultural purposes from overflows. 117 Tex342, 78W(2d)1071.

1007-17 117Tex342, 292SW164; **Tex CivA** 275SW137. [a] (3) Statutes are not void under constitution because authorizing levee districts to be created out of parts of more than one county. **Tex CivA** 275SW137.

1007-18 205 Iowa64, 217NW464; **Tex CivA** 296SW974.

1007-18½-New. The legislature has exclusive control of matters pertaining to the construction of levees, and may prescribe the number of petitioners and remonstrators. 198 Ind305, 151NE692.

1008-26 **TexCivA** 275SW137; **TexCivA** 38SW(2d)888. [b] **Express recitals showing statutory requirements** complied with purports absolute verity on collateral attack. **TexCivA** 275SW137.

1008-26½-New. by an owner of land in the levee district; **TexCivA** 275SW 137.

1008-28 **TexCivA** 275SW137.

1008-32 See also **TexCivA** 275SW137.

1008-33½-New. Matters of expediency or judgment on the part of the city, in the exercise of its power to establish levee district does not affect validity of charter provision or ordinance providing such levee district. 305Mo577, 259 SW89.

1008-34 See also 117Tex342, 78W(2d) 1071.

1008-39½-New. but a district may not be created both as a levee and a drainage district with a board functioning separately for both. 159La483, 105S593.

1008-45 **TexCivA** 275SW137; **TexCivA** 208W(2d)1085.

1008-47½-New. An act authorizing organization of any portion of county into diking district is held to authorize inclusion of second-class tidelands. 143 Wash525, 255P955.

1009-51½-New. Under some statutes it is not necessary that the maps and plans filed show the names of the property owners, but a showing of the location and extent of the improvement district is sufficient to charge them with notice. 141Miss41, 105S741.

1009-53½-New. The court may permit an interested person to intervene. 198 Ind305, 151NE692.

1009-67 [a] **Description held sufficient.**–143Wash525, 255P955.

1009-68 **MoA** 228SW(2d)651 (jurisdiction not affected by petition incorrectly describing owners). [b] **Petition held sufficient.**–143Wash525, 255P955.

1010-71½-New. In the absence of evidence as to the number of landowners affected, the court may find that the required number did not sign the remonstrance. 198 Ind305, 151NE692.

1010-72½-New. Mere irregularities in publication will not invalidate it. 143 Wash525, 255P955.

1010-80½-New. The burden of proof is on remonstrators to show they constitute the required number fixed by statute. 198 Ind305, 151NE692.

1010-81 198 Ind305, 151NE692. [a] (2) Evidence held to show that objections to establishment of district were not sufficient in number or acreage owned. 31NM188, 242P683.

1010-82½-New. Findings held to sustain jurisdiction. 143Wash525, 255P 955.

1010-87 **TexCivA** 158SW(2d)1067.

1011-92¼-New. Jurisdiction of the court is not affected by insufficient description of the course of the levee or failure properly to locate its terminus. 198 Ind305, 151NE692.

1011-92½-New. Only persons directly affected may appeal. 198 Ind305, 151 NE692.

1011-92¼-New. Remedy for defective description is correction of report, not motion to dismiss. 198 Ind305, 151NE 692.

1011-94 [a] **Constitutionality of statutes.**–315Mo92, 285SW972. [b] **Notice to landowners.**–315Mo 92, 285SW972. [c] **Collateral attack upon order extending boundaries.**–315Mo 92, 285SW972.

1011-7 [a] **Subdistricts** to be organized when portions of land are in need of more particular drainage than remainder. 319 Ill 379, 150NE259.

1012-26 31LaA785.

1012-28½-New. Commissioners of appraisement of levee district are held not "court," but constitute valid special tribunal. **TexCivA** 282SW339.

1012-31 **TexCivA** 275SW137.

1012-32 [a] **Failure of appointees** to qualify creates vacancy authorizing appointment by governor. 145Miss142, 110S240.

1012-38 [d] **Approval of bond.**–145 Miss142, 110S240. [e] **Failure of commissioner** to give new bond on reappointment is held to disqualify him. 145Miss163, 110S243. [f] **Vacancy occurs in office of commissioner** on failure of successor in office to qualify. 145 Miss163, 110S243.

1012-40 [b] **In Mississippi.**–145Miss 142, 110S240. [c] **Failure of reappointed commissioner** to give new bond creates vacancy in office. 145Miss163, 110 S243.

1012-41 **TexCivA** 275SW137.

1013-42 142Miss123, 105S502.

1013-44 [b] **Power to sue in own name.**–163La929, 113S150.

1013-45 176Ark834, 48W(2d)520.

1013-46 176Ark834, 48W(2d)520.

1013-58½-New. Debt represented by proposed bond issue for construction of dikes is held not "general district obligation" affected by constitutional debt limit. 143Wash525, 255P955.

1013-58½-New. No liability for tortious acts of officers. 7LaA639.

1013-60 197Cal482, 241P552 (reclamation board has large measure of discretion in determining what items of expenditure constitute "actual and reasonable cost of construction" of levees by Reclamation District No. 1500 under contract with Sacramento and San Joaquin drainage district); 85CalA525, 260P386. [a] **In dealing with problem of reclamation** and flood control in California, legislation did not intend to pamper public agencies in performance of work so as to reasonable payment for cost thereof. 197Cal482, 241P552.

1013-67½-New. Decision of board of supervisors as to benefits to land assessed is not subject to collateral attack. CalA 285P374.

1014-73¼-New. , but power may not be conferred on a levee board to construct a system of drainage apart from, and not incidental to, the levee system, or to levy and collect an acreage tax therefor. 159La483, 105S593.

1014-75¼-New. A levee and drainage district has power to protect its lands from overflow, although some other person is liable for damages caused by the overflow. 336 Ill 267, 168NE283.

1014-88 [a] **Records.**–Mo 238SW(2d) 167.

1014-91 85CalA525, 260P386; 159La 483, 105S593.

1014-92 [a] **Members of board not individually liable** for acts done in good faith and without fraud or corruption. 155Miss115, 123S251(2dcase).

1014-93 **TexCivA** 288SW606.

1015-97 205 Iowa64, 217NW464.

1015-16 CalA 271P518.

1015-27 316Mo 398, 289SW925. [a] **In Arkansas.**–172Ark942, 290SW948.

1016-34 [c] **Statute imposing tax on railroads at different rate per mile where they have more or less than stated mileage** is invalid. 154Miss317, 122S 366.

1016-47 316Mo 398, 289SW925.

1016-49 34NM346, 282P1. [a] **Conservancy Act of New Mexico** does not violate provision requiring equality and uniformity in taxation. 31NM188, 242 P683.

1016-50 [a] **Conservancy Act of New Mexico** does not violate constitutional tax exemption provision. 31NM188, 242P683.

1016-58 [a] 159La483, 105S593; 34 NM346, 282P1 (provision for install-

ment payments with interest).

1017-60 [a] **Conservancy Act of New Mexico** does not authorize taxation without representation. 31NM188, 242 P683.

1017-60½-New. , that assessments are required to be levied and collected as general county taxes are collected does not change character of charge as special assessment. 78CalA173, 248P532.

1017-65½-New. Lands of a district may be assessed for money borrowed by the district to protect the levee during flood. 336 Ill 267, 168NE283.

1017-65½-New. Where, after levy of a preliminary tax for organization expenses, the district was dissolved on a report of the commissioners, the necessary additional tax may be levied to cover a deficiency in the costs and obligations incurred by the board. MoA 22SW(2d)651.

1017-73 159La483, 105S593.

1017-76 15F(2d)637.

1017-77 15F(2d)637.

1017-78 15F(2d)637.

1017-79 [a] (4) Construction of levee is held of benefit to railroad having track constructed on embankment and trestle over lakes within district. 15 F(2d)637.

1017-79½-New. Operative and nonoperative property of public utility is held taxable. 78CalA173, 248P532.

1017-80 274US175, 47SCt561, 71L ed 982; 78CalA173, 248P532.

1018-88 176Ark834, 4SW(2d)520.

1018-96 [a] **Acreage tax** levied pursuant to act giving levee district power of drainage district held valid. 159 La483, 105S593.

1018-96½-New. The poles, wires, arms, guy poles, and stays of a telephone and telegraph company constituting its pole line are permanent fixtures subject to assessment for special benefits. 141 Miss1, 105S741.

1018-96½-New. United States land within levee district becomes subject to assessment on final certificate's being issued to purchasers. 175Ark934, 2SW(2d)32.

1018-7 See also 207Cal709, 280P366.

1019-8 [a] **Statute construed.**-207Cal 697, 280P360.

1019-12 CalA 285P374. [c] **Benefits conferred on levee district by existence of railroad** do not relieve railroad from further levee district taxes. 39 F(2d)884.

1019-26 171Ark412, 284SW731.

1020-34 [a] **In Texas.**-TexCivA 297SW 652.

1020-35 CalA 271P518.

1020-36 But see Mo 23SW(2d)167.

1020-44½-New. Commissioners of appraisement of levee district cannot assess benefits for hill drainage not embraced in plan of reclamation. TexCivA 282SW339.

1020-44¼-New. In the absence of a statute providing therefor a landowner whose property has declined in value while other property in the district has increased in value is not entitled to a reassessment of benefits based on changed values. 172Ark792, 290SW 363.

1020-44¼-New. Assessments are not invalid because assessor made new assessment roll each year. CalA 285P374.

1020-44½-New. Construction of assessment as to property on which it falls. CalA 285P374.

1020-44¼-New. Assessment of damages accruing to respective properties on ad valorem basis, without considering benefits is proper. TexCivA 32SW(2d) 275.

1021-56 See also CalA 271P518.

1021-58 [b] **Valuation for general taxation** has no necessary relation to benefits, but may be related to benefits. 39F(2d)884.

1021-59 [b] **Arbitrary flat assessment** on all land is erroneous where local improvements are of no benefit to entire district. 319 Ill 379, 150NE259.

1021-60 319 Ill 379, 150NE259. [b] **Assessments held excessive.**-170Ark 1106, 282SW1002; 319 Ill 379, 150NE 259.

1021-63 [a] **Purpose of statute as to** taxation for construction of sea walls was to limit taxation and provide for financing. TexCivA 297SW652.

1021-69½-New. Act authorizing state tax commission to raise and lower values to make assessments uniform does not apply to special taxation. 15F(2d) 637.

1021-69½-New. Court may comply with request of levee district to indicate what taxes would be reasonable in view of practical benefit. 39F(2d)884.

1021-71 [a] **Issues to be submitted to jury.**-319 Ill 379, 150NE259.

1022-80 172Ark942, 290SW948. [b] **Assessments not to exceed four per cent annually on valuation** are not per se invalid. 39F(2d)884.

1022-86 274US175, 47SCt561, 71L ed 982.

1022-89 274US175, 47SCt561, 71L ed 982.

1022-90 274US175, 47SCt561, 71L ed 982.

1022-95½-New. On proposal of additional improvements, a property owner is entitled to a hearing on the assessment of benefits before tax can be levied. TexCommnA 23SW(2d)325.

1022-97 [a] **Estoppel.**-15F(2d)637.

1022-98 205 Iowa64, 217NW464.

1022-4½-New. The final judgment of the commissioners has the same conclusiveness as the judgment of a domestic court of general jurisdiction and is supported by the same presumptions. TexCommnA 28SSW165.

1023-5 [a] **Collateral attack.**-TexCivA 3SW(2d)888.

1023-6 334 Ill 383, 166NE90(1stcase). [d] **Time for review.**-170Ark1106, 282 SW1002. [e] **Original judicial review.**-170Ark1106, 282SW1002. [f] **Property owner, not having appealed** from decision of commissioners on issue of damages, cannot complain. TexCivA 32 SW(2d)275.

1023-8 [c] **Effect of issue of bonds.**-170Ark1106, 282SW1002.

1023-11 La 129S658.

1023-13 La 129S658. [d] **Prior adjudication as to validity.**-159La483, 105S 593. [e] **Supplemental bill.**-39F(2d) 884.

1023-13½-New. Action of commissioners of appraisement in assessing benefits is held subject to bill of review by court of equity. TexCivA 282SW339.

1023-13⅓-New. An act creating a levee district, providing for determination of assessments by board of directors, is held not to provide an administrative remedy as a necessary prerequisite to judicial challenge of assessment. 15F(2d)637.

1023-13¼-New. Interlocutory order overruling objections is nonappealable. 334 Ill 383, 166NE90(1stcase).

1023-15 205 Iowa64, 217NW464.

1023-17½-New. Payment of large amount of illegal taxes by railways not recoverable cannot relieve railways from paying further taxes to levee district. 39F(2d)884.

1023-17⅓-New. Time when taxes are due and payable is fixed by statute. TexCivA 20SW(2d)1085.

1023-20 TexCivA 9SW(2d)396. [a] **Under some statutes** county collector is not entitled to any commission on delinquent taxes collected by execution sales under judgments obtained by levee district and paid direct to district treasurer by sheriff. 218MoA490, 279SW 195.

1023-20½-New. Parties. Purchaser of bonds sold before suit was instituted is not a necessary party. TexCivA 275 SW137.

1023-20⅓-New. Commissions of tax collectors. No commission can be recovered by tax collector appointed by levee board subsequently held to have been acting without authority. 145 Miss578, 110S845.

1023-20¼-New. Collectors appointed by board having no authority cannot recover commission. 145Miss578, 110S 845.

1023-20⅓-New. Some statutes, requiring notice by the county collector of the time and place for payment of installment taxes, are directory only, 316 Mo 398, 289SW925.

1023-20¼-New. and the date of delinquency is not affected by failure to give notice. 316Mo 398, 289SW925.

1023-20½-New. Under some statutes a county collector is entitled to a commission on delinquent taxes collected by him. 316Mo 398, 289SW925.

1023-20⅙-New. but such commission cannot be taxed as costs in an action against a delinquent landowner to collect taxes or penalties, or both. 316Mo 398, 289SW925.

1023-20⅙-New. In such action a reasonable attorney's fee for plaintiff's attorney may be taxed as costs. 316Mo 398, 289SW925.

1023-20⅒-New. An attorney's fee of ten per cent of the judgment in such action has been held reasonable. 316 Mo 398, 289SW925.

1023-20⅓1-New. Where there is no danger of irreparable injury, temporary injunction will not issue to enjoin acts already done. 32F(2d)124.

1023-20½2-New. Under some statutes, when land is sold to the state for taxes, levee district taxes remain in abeyance until the land is redeemed or sold. 156 Miss396, 125S416.

1023-21 172Ark792, 290SW363.

1024-24 [a] **Validity of statutes.**-316 Mo 398, 289SW925.

1024-24½-New. The Mississippi statute, authorizing the board of levee commissioners to recover a tax of ten dollars on each bale of cotton removed without paying a tax thereon and without the consent of the board, imposes a penalty. 153Miss783, 121S856.

1024-24¼-New. Such penalty cannot be recovered where the board, for a period of several years, had acquiesced in the practice of the cotton tax to and through banks without having consented to the removal of cotton before payment of the tax. 153Miss783, 121S856.

1024-24¼-New. Suit to enforce a lien is barred by limitations when the tax is so barred. 118Tex334, 15SW(2d)1028 (1stcase).

1024-25 [a] (2) Landowners cannot directly attack creation and organization of district in absence of bondholders as parties. TexCivA 3SW(2d)888. [b] **Hearing.**-TexCivA 3SW(2d)888.

1024-32½-New. Statute of limitations is no defense in suit for levee tax. TexCivA 295SW293.

1024-34 [a] **Two-year statute of limitations** is held defense in suit by levee improvement district to recover taxes. 117Tex342, 292SW164.

1024-35½-New. In Texas statute prohibiting delinquent taxpayers from pleading is held to apply to levee improvement assessments. TexCivA 287 SW301; TexCivA 287SW303.

1024-35⅓-New. The defense of limitations is available. 118Tex334, 13 SW(2d)337(2dcase).

1024-35¼-New. A taxpayer may plead the statute of limitations in an action by the state to collect delinquent taxes due a levee district. TexCivA 20SW(2d) 1085.

1024-35½-New. A plea of limitations is available to a taxpayer in a suit for taxes due the district. TexCommnA 23SW(2d)325.

1024-35⅙-New. The statute of limitations does not commence to run against such action until the taxes are delinquent. TexCivA 20SW(2d)1085 (taxes for stated years held not barred).

1024-35½-New. Suit for taxes due district filed within two years from time taxes became delinquent has been held not barred by two-year limitation. TexCommnA 28SW(2d)1083.

1024-38 See also TexCivA 275SW137.

1024-39½-New. Final action of board of appraisers of benefits after statutory hearing is not subject to collateral attack in action to collect assessment because of misrepresentations of supervisors of district as to use of assessment, TexCivA 275SW137.

1024-39⅓-New. nor because commissioners of appraisal imperfectly discharged their duty by considering elements of benefits they were not authorized to consider. TexCivA 275SW137.

1024–39¼–New. Under statutes judgment creating district by its recitals showing compliance with statute purports absolute verity upon collateral attack made upon the ground that the plan of reclamation had never been adopted or report of state reclamation engineer filed. **TexCivA** 275**SW**137.

1024–40 TexCivA 9**SW(2d)**396; **Tex CivA** 10**SW(2d)**765.

1024–40½–New. Defense that commissioners of appraisement exceeded powers in including benefits not within the plan is improper as a collateral attack against the judgment of the commissioners. **TexCommnA** 288**SW**165.

1024–40⅓–New. Bondholders of a levee district are interested parties in an attack on the validity of the judgment of the commissioners assessing benefits. **TexCommnA** 288**SW**165.

1024–40¼–New. An allegation showing the absence of jurisdictional facts is necessary to constitute a valid collateral attack on the judgment of commissioners assessing benefits. **TexCommnA** 288 **SW**165.

1024–40½–New. Under some statutes the defense of limitation is not available against an action for delinquent taxes due the district. **TexCivA** 7**SW(2d)**639; **TexCivA** 8**SW(2d)**1101.

1024–40¼–New. In a suit brought by the district for delinquent taxes assessed against a benefited tract of land, the landowner cannot complain of a change in the location of a portion of the levee in the vicinity of the land after benefits had been assessed without showing lessening of benefits assessed against his property. **TexCivA** 7**SW (2d)**639.

1024–40½–New. In a suit brought by a district organized under statute for delinquent taxes, a taxpayer could not complain of the inadequacy of the remedy afforded by statute, providing for reappraisement of benefits when inequality should arise by reason of changing conditions, since he voluntarily invoked the benefits of the statute which contained a provision for adjusting inequalities as they arose. **TexCivA** 7**SW(2d)** 639.

1024–40½–New. Parties. Bondholders of a district are necessary parties to an action for collection of taxes wherein defendants attack the district and appraisement and assessments, where taxes constitute the sinking fund for bonds. **TexCivA** 20**SW(2d)**1085.

1024–44½–New. Parties. Purchaser of bonds sold before suit to collect assessment, was instituted is not a necessary party thereto. **TexCivA** 275**SW**137.

1025–53 MoA 22**SW(2d)**651 (sufficient after judgment). [b] **Complaints held sufficient.–TexCivA** 3**SW(2d)**888.

1025–54½–New. An answer in a suit to recover an assessment, alleging that a benefit not within the reclamation plan was assessed against defendant, does not set out with required definiteness and certainty things which would render the commissioners' judgment invalid. **TexCommnA** 288**SW**165.

1025–57 TexCivA 3**SW(2d)**888.

1025–58½–New. Presumption that only benefits resulting from a plan of reclamation were assessed by commissioners is conclusive as against an allegation requiring evidence outside the records, and such evidence is inadmissible. **TexCommnA** 288**SW**165.

1025–58⅓–New. [§ 79a] (6½). **Trial.** In a suit by a levee improvement district to collect delinquent taxes, wherein the landowner filed a cross action for damages from improper construction and maintenance of an improvement, the court did not err in refusing to submit special issues as to damages for years eliminated by the court in sustaining exceptions, upon the ground that it appeared that such claims were barred by limitation. **TexCivA** 9**SW(2d)**396.

1025–58¼–New. That there was no proof of benefits is no defense to a landowner in a suit to foreclose a tax lien for an additional levy imposed on dissolution of the district to meet the deficiency in organization expenses. **MoA** 22**SW(2d)**651.

1025–58⅓–New. Plaintiff district is not required to prove that the tax has not been paid. **MoA** 22**SW(2d)**651.

1026–74½–New. Personal judgment should not be rendered against one not the owner of the land at the time the tax accrued. **TexCivA** 287**SW**303.

1026–74⅓–New. In a suit for delinquent taxes levied against a number of separate tracts of land, a judgment making the aggregate amount of taxes or penalties a lien against each tract is erroneous. 316**Mo** 398, 289**SW**925.

1026–74¼–New. A judgment in such action can constitute a lien only on the particular tract on which the taxes are levied. 316**Mo** 398, 289**SW**925.

1026–75 181**Ark**898, 28**SW(2d)**721 (applicability of statute); **CalA** 285**P**374 (railroad right of way). [b] **Priority of lien** as regards selling delinquent land free of lien for other taxes. 181 **Ark**898, 28**SW(2d)**721.

1026–82 [e] **Insufficient description.–** 177**Ark**52, 5**SW(2d)**718.

1027–94 TexCivA 20**SW(2d)**148.

1027–5 But see **CalA** 271**P**518. [a] **Recovery denied.–**160**La**727, 107**S**506.

1027–7½–New. An act, relating to a refund of the balance remaining in the fund of a district, is inapplicable in an action for repayment of an assessment, on the ground that the project was abandoned. 96**CalA**76, 273**P**839.

1027–7⅓–New. Voluntary payment of an excess tax is not recoverable. 179 **Ark**299, 15**SW(2d)**986.

1027–7¼–New. In an action for repayment on abandonment of a project, illegal expenditure could not avail to the credit of the county. 96**CalA**76, 273 **P**839.

1027–7⅓–New. Where the purpose for which an assessment was levied was abandoned, the property owner could recover the proportion of the money remaining in the treasury. 96**CalA**76, 273 **P**839.

1027–11 See also 96**CalA**76, 273**P**839.

1028–19½–New. That the legislature imposed the greater part of the burden of providing funds on landowners directly benefited does not affect the right of the state subsequently to determine what portion of the cost of the improvement it will bear. 199**Cal** 668, 251**P**207.

1028–19⅓–New. Where the precise procedure for providing funds to pay the cost of work done in reclamation and flood control within a drainage district is provided by statute, the mode thus provided is the measure of the powers and duties of state agencies and officials charged with the prosecution of the work and with the disposition of funds in payment of the cost. 199**Cal** 668, 251 **P**207.

1028–19¼–New. Where funds are available for installments of the state's appropriation for reclamation and flood control work within a drainage district, it is the duty of the state controller to draw warrants therefor and of the state treasurer to pay them and of the reclamation board to apply them in the manner provided by the appropriation acts. 199**Cal** 668, 251**P**207.

1028–29½–New. Under some statutes the state treasurer is not required to pay warrants payable from drainage district assessments as funds become available where the bonds have been authorized to pay such warrants but have not been sold. 199**Cal** 668, 251**P** 207.

1028–30 La 129**S**658. [a] (4) Recovery on bonds is not defeated because issue was excessive. **TexCivA** 15**SW(2d)** 1067.

1028–31 40**F(2d)**873; **La** 129**S**658; **TexCivA** 15**SW(2d)**1067.

1028–38 199**Cal** 668, 251**P**207. [a] **Mo** 23**SW(2d)**167. [b] **Offer to purchase held not in compliance with statute.–** 199**Cal** 668, 251**P**207.

1028–40½–New. Under some statutes holders of warrants of a drainage district stand in no different position as bidders from others desiring to purchase bonds. 199**Cal** 668, 251**P**207.

1028–40⅓–New. Bonds may be sold only in compliance with the statute regulating the mode and manner of sale. 199**Cal** 668, 251**P**207.

1028–40¼–New. In a suit brought by the district for collection of delinquent taxes, bonds for payment of which the tax was levied must be treated as valid outstanding obligations for which the district had the right to levy and collect a tax sufficient for payment. **Tex CivA** 7**SW(2d)**639.

1028–40⅓–New. Taxes held not pledged to payment of bonds to exclusion of other purposes. **La** 129**S**658.

1029–46½–New. In a suit for delinquent taxes brought by the district, where, after bonds had been issued for an improvement, the second bond issue was authorized without reappraisement of benefits to the land in the district as a basis for an additional tax, which additional indebtedness was for completing the original plan, making repairs, and some additional drainage ditches essential to reclamation, under statute authorizing creation of additional indebtedness, reappraisement of benefits was unnecessary. **TexCivA** 7**SW(2d)** 639.

1029–54 [a] **Preliminary injunction** against interference with construction of levee held properly refused under evidence. 165**La**209, 115**S**462. [b] **Liability of state.–**(1) 169**La**427, 125**S**437; 169**La**438, 125**S**441.

1029–59½–New. Injunction is the proper remedy to prevent illegal expenditure of funds. 168**La**1037, 123**S**705.

1029–63½–New. Where an assessment under the Los Angeles County Flood Control Act was invalid for failure to comply with the requirements of such statute, payment of a tax under protest and suit to recover back the amount so paid does not give a plain, speedy, and adequate remedy. **CalA** 271**P**518.

1029–64½–New. Where an assessor and supervisors proceeded irregularly to make assessment, under the Los Angeles County Flood Control Act, and failed to acquire jurisdiction to levy assessments against the city property, and further action on the part of the tax collector to sell the city's property to the state for the delinquent assessment would result in uselessly adding to a cloud on the city's title, by imposing thereon additional apparent burdens of penalties, interest, and costs of sale, and the added threat of ultimate sale and deed by the state, based on a void foundation, the city was entitled to injunctive relief. **CalA** 271**P** 518.

1029–64½–New. An injunction lies to prevent the colorable lien of a void special assessment attaching to lands in an assessment district, where it is necessary to resort to extrinsic evidence to defeat the lien of the assessment. **CalA** 271**P**518.

1029–74 254 **IllA**289 (when action for damage accrues and computation of time).

1030–77½–New. Service on an employee of defendant board at its business office is sufficient. 168**La**877, 123 **S**605.

1030–86½–New. Under statute levee officers may be sued for negligence causing injury. 75**CalA**395, 242**P**902.

1030–88 [c] (2) Declaration in action for damages caused by construction of levee is demurrable where it fails to show authority of commissioners to construct levee. 147**Miss**783, 113**S**897. [f] **Allegations** that trustees of reclamation district were negligently doing what they had lawful right to do without showing facts that they were performing lawful act in negligent manner fail to state cause of action. 74 **CalA**528, 241**P**418. [g] **Compaint held demurrable** for ambiguity and uncertainty in not stating whether lands of plaintiff suing for damages were injured by surface waters or by flood waters. 74**CalA**528, 241**P**418. [h] **Pleading held sufficient** to state cause of action against levee officer. 75**CalA**395, 242**P**902.

1030–90 [a] (2) Burden is on plaintiff to show due care to avoid injury. 75 **CalA**395, 242**P**902.

1030–91 [a] (4) Evidence to show pop-

ulation of district in action for damage by flood. 254 IllA289. (5) Evidence of proper elements of damages. 254 IllA 289. [b] (4) Documentary evidence as to cause of flood. 254 IllA289.

1031-92 [a] (2) To show assessment to be in excess of benefits to be derived from proposed improvement. 319 Ill 379, 150NE259.

1031-92½-New. In action for damages caused by flood fact acts of others than plaintiff contributed to cause of damage is no defense. 254 IllA289.

1031-92½-New. In a suit to impose personal liability on members of a levy board for excess compensation unlawfully paid, the contractors' mistake does not divest the members as a matter of law of the defense of good faith. 155 Miss115, 124S251(2dcase).

1031-93 [a] **Cause of flood for jury.**-254 IllA289.

1031-94 [a] 115Tex263, 280SW532.

LEVEL

1031-3½-New. So applied to waters in boxes, under statute regulating changing of such level, means "the average or mean level obtaining under fairly normal or average weather conditions, allowing proper range, between high- and low-water mark in average years. Rev. Gen. St. §§ 1190, 1191. 94Fla502, 113S708.

LEVY

1032-44 191Wis233, 212NW790, 791 [citCyc].

1032-46 191Wis233, 212NW790, 791, 54ALR266 [citCyc].

1032-47 191Wis233, 212NW790, 791, 54ALR266 [citCyc].

1032-69 79CalA1, 248P1049, 1051 [quotCJ].

1032-70 79CalA1, 248P1049, 1051 [quotCJ].

1032-72 79CalA1, 248P1049, 1051 [quotCJ].

1032-73 79CalA1, 248P1049, 1051 [quotCJ]. [a] (1) 79CalA1, 248P1049, 1051 [citCJ]. (2) 79CalA1, 248P1049, 1051 [citCJ].

1033-74 79CalA1, 248P1049, 1051 [quotCJ].

LEWDNESS

1035-13 [a] (1) 33 OklCr434, 244P208 [citCJ].

1035-17 [a] **Other definitions.**-MoA 256SW496.

1035-23 152Va965, 146SE289 (does not alter common law as to punishment).

1035-24 See also 171Minn505, 214NW 479.

1036-31 107TexCr258, 296SW530.

1036-33 MoA 17SW(2d)544.

1036-34 81CalA648, 254P628; 152Va 965, 146SE289.

1036-35 89 IndA107, 165NE763(1st case).

1036-35½-New. The parties must have had an act of sexual intercourse while living together. 103TexCr436, 281SW 856.

1036-36 107TexCr258, 296SW530.

1036-39 Me 150A490.

1036-40 77Colo 563, 238P71.

1036-41 77Colo 563, 238P71; Me 150A 490; 308Mo 560, 274SW70; MoA 17SW (2d)544.

1037-43 22AlaA290, 115S68. [a] 77 Colo 563, 238P71.

1037-47 107TexCr258, 296SW530.

1038-58 308Mo 560, 274SW70 (act of sexual intercourse at night in schoolhouse yard in secluded spot is not within definition of statutory lewdness).

1038-59 MoA 17SW(2d)544.

1038-60 152Va965, 146SE289.

1039-70 Mass 173NE506.

1039-74 126 Or579, 269P884.

1039-86 53ND222, 205NW234.

1042-31 Me 150A490.

1042-38 [a] (1) 81CalA648, 254P628; 53ND222, 205NW234. (4) Evidence of bad reputation of consort in lewdness admissible against female. 53ND222, 205NW234.

1042-43 22AlaA290, 115S68.

1042-46½-New. or against her, 53ND 222. 205NW234.

1043-49 Mass 173NE506. [a] (1) 81 CalA648, 254P628.

1043-50 100TexCr508, 271SW907; 100 TexCr506, 271SW907. [a] (1) 151Miss 82, 117S360. (6) 202 Iowa352, 209NW 514. (7) For immorality. 53ND222, 205NW234. (8) Sexual perversity. 126 Or579, 269P884. (9) Common-law misdemeanor of open or public lewdness and lasciviousness. 152Va965, 146 SE289. [b] (2) 225Ky268, 8SW(2d) 387; MoA 17SW(2d)541; MoA 17SW (2d)544. (7) For lewdly exposing person. 33 OklCr434, 244P208. (8) For associating in public places and abiding together in common household. MoA 17SW(2d)541. (9) For unlawful cohabitation. 154Miss80, 121S106(3dcase). (10) For outraging public decency and morals. OklCr 292P395.

1043-52 100TexCr506, 271SW907.

1043-52½-New. Uncorroborated testimony of a female codefendant is sufficient, if believed beyond a reasonable doubt by the jury, to sustain a conviction for unlawful cohabitation. 154 Miss80, 121S106(3dcase).

1043-61 MoA 17SW(2d)541 (adultery).

1044-71 77Colo 563, 238P71; MoA 272 SW697. [a] 22AlaA290, 115S68.

1044-72 100Vt373, 137A465. [a] **Evidence held insufficient** for submission to jury. 100Vt373, 137A465.

1044-73 100Vt373, 137A465.

1044-75 MoA 256SW496; MoA 272SW 697. [c] **Instructions held erroneously refused.**-103TexCr436, 281SW856.

1044-85 MoA 256SW496; 152Va965, 146SE289. [a] (2) Sentence to nine months hard labor on first conviction cannot stand. 23AlaA528, 128S464(2d case).

LEX NEMINEM COGIT AD VANA SEU INUTILIA

1048-72 32F(2d)800.

LEX VIGILANTIBUS, NON DORMIENTIBUS, SUBVENIT

1049-16 141 Okl 22, 283P561.

LIABILITY

1050-28 TexCivA 280SW282, 285 [quot CJ].

1050-43 83Mont581, 273P1055; Tex CivA 280SW282.

1050-52 213Ala329, 104S831 [citCJ].

1051-69 [a] **Fixed liability absolutely owing.**-6F(2d)581.

1051-79 TexCivA 280SW282.

1051-81 TexCivA 280SW282, 285 [quot CJ].

1051-82 TexCivA 280SW282, 285 [quot CJ].

1052-3 See also 102NJEq445, 141A174.

1052-16 141Wash642, 252P143.

LIABILITY INSURANCE

1056-3 240NY37, 147NE351.

1057-32½-New. Intention of insurer covering claims for personal injury and death is to insure the individual, not the automobile. 25 OhNPNS331.

1057-34 MoA 26SW(2d)818; 193Wis 179, 214NW616.

1057-36 MoA 3SW(2d)272; 13PaDist &Co 69.

1057-39 27 OhNPNS264; 145Wash660, 261P388.

1057-41 156Tenn127, 299SW788.

1058-42 231Mich642, 204NW727, 728 [quotCJ]; 13PaDist&Co 69.

1058-43 231Mich642, 204NW727, 728 [quotCJ].

1058-45 MoA 17SW(2d)685.

1058-48 [b] **Regulation of automobile liability insurance** is within police power of state. 267US126, 45SCt320, 69 Led538. [c] **Statute** making automobile liability insurer liable to persons for injury to person or property held authorized. 33F(2d)440.

1058-52½-New. Statute denying right to do liability insurance business with paid up capital less than two hundred thousand dollars applies to all companies seeking to do liability business and not construed as applying only to companies incorporated under other laws. 114Tex457, 270SW1011.

1058-52½-New. Statute not construed as prohibiting general insurance company from amending charter to include liability insurance, nor as repealing requirement that liability companies have capital of two hundred thousand dollars. 114Tex457, 270SW1011.

1058-52¼-New. A statute authorizing recovery on a policy where the injury was caused by negligence is held not to deprive the company of the right to limit coverage or to issue such contracts as it chooses. 194Wis8, 215NW589.

1059-57 [c] **Statutory requirements.**-201Cal 29, 255P512.

1059-60 201Cal 29, 255P512.

1059-62 220Ala491, 125S676.

1059-65½-New. Insured has insurable interest on vessel on which insured was making repairs. 222AppDiv608, 226 NYS676.

1060-73½-New. In British Columbia policy insuring automobile owner or any person riding in or operating car with owner's consent against liability to others is not gaming contract. BC [1930] 2DomLR562.

1060-74 15F(2d)946.

1060-79 156Miss853, 127S555.

1061-97 128Misc510, 219NYS84; 114 Okl 237, 246P238; 120 Or381, 250P717; 157Tenn301, 8SW(2d)473; 148Va829, 139SE513. [a] **Court may omit printed words** where they defeat apparent intention in light of typewritten insertions. 128Misc510, 219NYS84.

1061-98 MoA 7SW(2d)309; 81Mont99, 261P880; 218AppDiv455, 218NYS332; 114 Okl 237, 246P238; 120 Or381, 250P 717; 148Va829, 139SE513. [d] **Banker's blanket bond.**-218AppDiv455, 218 NYS332. [e] **"Vicinity" construed** as including a place within same county, eighteen miles away. NJSup 134A911. [f] **Where terms of policy have been agreed upon,** they will not be disregarded if they are reasonable. 50RI 166, 146A412.

1061-1 81Mont99, 261P880; 120 Or381, 250P717.

1061-2 76CalA207, 244P936; 315Mo 1007, 287SW455; 221MoA230, 1SW(2d) 242; TexCivA 284SW321.

1062-3 CalA 276P410; CalA 276P 412; 135Misc352, 238NYS313; 193Wis 179, 214NW616; 200Wis585, 229NW26. See also 76CalA207, 244P936.

1062-3½-New. A policy issued to a motor bus operator and an ordinance pursuant to which it was given are to be construed together in determining the liability of insurer. 21 OhA521, 153 NE206.

1062-4 33F(2d)235; CalA 276P410; 111Conn549, 150A706; Kan 289P427 (2dcase); 250Mich38, 229NW626; 315 Mo 1007, 287SW455; 221MoA230, 1SW (2d)242; MoA 7SW(2d)309; 81Mont99, 261P880; 222AppDiv608, 226NYS676; 223AppDiv331, 227NYS633; 114 Okl 237, 246P238; 120 Or381, 250P717; 50 RI 269, 146A410; TexCivA 285SW648; 66Utah600, 245P343; 148Va829, 139SE 513; Wis 231NW252. [a] (2) Policy indemnifying physician against claim or suit for damages for malpractice in general language will be construed as insuring against liability rather than loss in absence of "no action" clause. 221MoA868, 287SW819. (3) Policy containing no action clause followed by agreement to indemnify subscriber against loss and giving insurer right to defend held to permit suit by insured without payment of judgment. Pa 152 A104. [e] **Courts prevent, if possible, exceptions** and conditions from devouring policy. CalA 293P133.

1062-4½-New. But the court is not authorized to make a new contract or adopt a construction not justified by the language or intent of the policy. 148 Va829, 139SE513.

1062-6 MoA 3SW(2d)272.

1062-19 MoA 23SW(2d)209.

1063-25 208Ky634, 271SW670.

1064-44 208Ky634, 271SW670 (advancements to operators of small mines whose output is purchased by employer); 209Ky188, 272SW380 (employees of independent contractors not on premises of insured or under his control).

1064-49 222Ky683, 2SW(2d)383.

1066-80 See also Can [1930] 1DomLR 689.

1068-7 MoA 23SW(2d)209.

1068-8 200 **Iowa**1035, 205**NW**845 (where premium is computable at certain rate on amount paid to workmen in limited and special class of work, failure to prove amount so paid prevents recovery).

1068-16 [a] (10) To support finding as to amount due. 173**Minn**65, 216**NW**539.

1069-28 [a] **Person injured by vendee of insured or by any person other than insured** is not protected by bond expressly stating that liability shall cease upon sale of automobile. **TexCivA** 284 **SW**321.

1069-28½-New. Acceptance of policy by assignee is necessary, possession alone being insufficient. **MoA** 24**SW(2d)**211.

1069-29 MoA 24**SW(2d)**211; 247**NY** 423, 160**NE**774.

1069-32½-New. Assignment without consent of insurer is good between parties so as to transfer right to unearned premium. **MoA** 24**SW(2d)**211.

1069-35½-New. Assignment as security for payment of judgment against insured because of accident does not bar recovery on policy where all interested parties are before court. **TexCommnA** 58**SW(2d)**976.

1070-37½-New. Automobile indemnity policy cannot be canceled after injured party's identity established. **Or** 291**P** 495.

1070-38 See also 141**SC**303, 139**SE**619, 55**ALR**1237.

1070-40 [b] **Notice of cancellation must be filed** with commissioner of motor vehicles. **NJ** 151**A**852.

1070-40½-New. Where insurer delivers a policy for a premium greater than that agreed, it cannot collect the higher premium and insurer's refusal to correct it is an involuntary cancellation of the policy. **TexCivA** 284**SW**634.

1070-41 111**Conn**549, 150**A**706. See also 141**SC**303, 139**SE**619, 55**ALR**1237. [b] **Surrender of policy by broker** without notice to insured is insufficient cancellation. **MoA** 24**SW(2d)**1077.

1070-47½-New. Losses caused by employees' refusal to return to work after month's stoppage of work by employers held not cessation of work by employees under policy. 152**Md**392, 136**A**892, 52 **ALR**158.

1070-51½-New. Under a policy covering loss arising from negligence of a shipowner, such gross negligence as to amount to willful, deliberate, and intentional wrong constitutes fraud rendering insurer not liable. 15**F(2d)** 946.

1070-51½-New. Under such policy, strict rule of maritime insurance as to fraudulent concealment does not apply, and nondisclosure of fact must be intentionally fraudulent in order to vitiate policy. 15**F(2d)**946.

1070-59 [b] **Proof of noncompliance with condition** in keeping automobile in certain place, and that fact was material to risk, is defense. **CalA** 293**P** 133.

1070-61 [a] **Injury caused by automobile driven by seventeen-year old boy** held not covered by policy where statute limits driving age unaccompanied by chauffeur to eighteen. 215**AppDiv** 170, 213**NYS**188.

1070-61½-New. Boy under sixteen, unlawfully employed, will avoid policy as coming under exception. 21**F(2d)**909.

1070-61½-New. A stipulation in a policy of automobile liability insurance against coverage if the car is operated by a particular individual is confined to actual operation by driving and does not extend to control and direction exercised by him over another person who actually does the driving. **Ont** [1929] 2**DomLR**70.

1071-72 221**AppDiv**604, 225**NYS**274.

1071-78½-New. Insured's breach of promissory warranty held no defense to insurer's liability. 131**Misc**691, 227 **NYS**220.

1073-16½-New. The defense that insured failed to aid in defending the action may be waived by insurer. 227 **AppDiv**311, 237**NYS**494.

1074-36 136**SC**439, 134**SE**387.

1075-65 134**Misc**514, 235**NYS**626.

1077-91 223**NYS**230.

1077-95 Minn 231**NW**817; **Minn** 232 **NW**790; **NH** 152**A**272; 25 **OhNPNS**331; 144 **Okl** 81, 289**P**776; 297**Pa**216, 146 **A**571; **Pa** 152**A**104; 100**Vt**425, 138**A** 780; **BC** [1929] 2**DomLR** 867. [a] (2) 134**Misc**514, 235**NYS**626.

1077-97 105**NJL**616, 147**A**483.

1078-6 107**Conn**446, 140**A**816, 818 [citCJ]. See also 32**F(2d)**425. [b] **Insured does not waive right to sue on liability policy** by refusal to permit insurer to defend action with reservation limiting liability. 50**RI** 509, 149**A**795.

1078-10 [a] **MoA** 22**SW(2d)**867 (insurer's letter to employer held **not** waiver of exemption clause).

1079-13 244 **IllA**241; 261**Mass**469, 159 **NE**461.

1079-14½-New. That insurer proceeds with defense after deliberate failure by insured to coöperate therein is not waiver or estoppel to assert failure of insured to coöperate in defense of action. 27 **OhA**208, 161**NE**232.

1079-14½-New. Insurer held not estopped to deny liability on judgment against person, not assured, operating automobile by reason of having defended action against him and insured. **Nebr** 231**NW**770.

1079-14¼-New. Insurer conducting defense estopped to raise trivial defenses in suit by insured. 42**F(2d)**789.

1079-15 50**RI** 509, 149**A**795 (notice of disclaimer of liability held sufficient reservation of right to assert defense).

1079-19 See also **MoA** 16**SW(2d)**1007.

1079-22 151**Miss**189, 117**S**524; **TexCommnA** 276**SW**170; 194**Wis**8, 215**NW** 589. [a] (4) Judgment for damages against insured, entered with consent of insurer, is within a policy agreeing to indemnify insured against "liability imposed by law." 215**Ky**168, 284**SW** 1038. [d] **Loss sustained "through misplacement."**-218**AppDiv**455, 218**NYS** 332. [e] **That liability sought to be enforced is indirect** held immaterial under policy, even where insured had indemnified coemployee of person injured. 315 **Mo** 1007, 287**SW**455. [f] **Policy indemnifying charitable** institution against loss does not cover liability for torts of employees for which institution is not liable. 223**Ky**355, 3**SW(2d)**753. [g] **Minor child injured by negligence of parent** cannot recover of insurer, where liability insurance is not compulsory. 109**Conn**77, 145**A**753.

1079-24 223**AppDiv**780, 227**NYS**618; 136**Misc**47, 239**NYS**203; 13**PaDist&Co** 1 (insured's son held not entitled to recover amount of judgment rendered against him for accident occurring while he was driving father's car for his own pleasure where policy insured father against liability resulting from use of automobiles by himself or his executive officers); 194**Wis**8, 215**NW** 589. [b] **Insurer not liable for losses to lighter moored to ship being repaired by insured** and burned by latter's negligence, on policy covering losses on vessels in insured's possession. 128 **Misc**510, 219**NYS**84. [c] **Liability on automobile indemnity policy** held to arise only in case insured's negligence produced accident. 222**Ky**157, 300**SW** 347. [d] **In determining cause of loss** when concurring causes appear, proximate cause is dominant efficient one that sets other causes in operation, and not incidental causes, though they be nearest in time and place to loss. 81 **Mont**99, 261**P**880.

1080-25 TexCivA 285**SW**648, 649 [quot CJ].

1080-28 TexCivA 285**SW**648, 649 [quot CJ].

1080-29½-New. Subscriber and insurer may not enter such contract of idemnity as will restrict rights of employee under Compensation Act. **TexCivA** 285**SW**648, 649.

1080-32 77**Colo** 130, 235**P**343; 131 **Misc**301, 226**NYS**732; 54**ND**449, 209**NW** 990.

1080-34 70**CalA**650, 234**P**116; **CalA** 285**P**707; **Kan** 289**P**427(2dcase); 228 **Ky**1, 148**SW(2d)**211; 227**Ky**746, 14**SW (2d)**213; **Mass** 170**NE**839 (treasurer of corporation performing workman's services); 132**Misc**899, 230**NYS**673. [a] (5) Where workmen's compensation insurance policy issued to typographical union expressly exempted insurer from liability for injury to any person having title of vice president, injury to vice president is not covered by policy though he was injured while serving on committee appointed to gather information regarding cost of living. 70**CalA** 650, 234**P**116. (6) Employee whose compensation is not included in payroll upon which premium computed is not covered by the policy. 240 **IllA**438. (7) Policy covering city employees, expressly including policemen, covers injuries to policemen, though they are not included in terms of Workmen's Compensation Act. 35**GaA**759, 134**SE**788. (8) Other instances. 155**Wash**402, 284 **P**792. [d] **Employees of another aiding in work** are held included in policy. 315**Mo** 1007, 287**SW**455. [e] **Held to constitute employee.**-27**F(2d)**42. [f] **Outgoing partner, not covered by policy covering employees only,** in order to come within policy, must show not only dissolution of partnership but that he had no interest therein. **CalA** 285**P** 707.

1081-37 141**SC**303, 139**SE**619, 55**ALR** 1237.

1081-41 See also **TexCivA** 23**SW(2d)** 799.

1081-42 [c] **Policy indemnifying owner of factory** constructing additions against damages on account of bodily injuries "by reason of performance of the work let by assured to independent contractors" does not cover injuries to employees of subcontractor through negligence of assured's employees. 235 **Mich**4, 209**NW**104.

1081-46½-New. Policy limited to plants of employer in New York does not cover New Jersey plant on theory that employee was temporarily employed there. 221**AppDiv**722, 225**NYS**332.

1082-49½-New. A policy issued to a copartnership does not cover liability to an employee of a new firm. 225 **AppDiv**439, 233**NYS**477.

1082-49½-New. A contract of compensation insurance with a copartnership cannot be extended to cover liabilities of a new firm, or its individual members. 225**AppDiv**439, 233**NYS**477.

1082-51½-New. An insurer issuing a policy in the name of a partnership, covering injuries to employees under the Workmen's Compensation Act, cannot avoid liability on the death of an employee on the ground that one of the partners had died at the time the policy was issued. **TexCivA** 5**SW(2d)**812.

1082-53 226**AppDiv**829, 235**NYS**669. [a] (3) Limited to named mine. 208**Ky** 634, 271**SW**670. [b] **Policy extending liability beyond obligation of employer** under workmen's compensation act may render company liable for accidental injury occurring at place not on employer's premises. 129**Kan**650, 284**P**823.

1082-55 But see 156**Miss**853, 127**S**555.

1082-58½-New. Bond indemnifying against forgeries of depositors' names is held not to protect against forgery by depositor of name assumed by him. 245 **NY**340, 157**NE**260.

1082-58½-New. Policy, providing indemnity for loss of life which shipowner becomes liable to pay and does pay, covers damages paid by insured for loss of life arising from negligence of ship or shipowner; 15**F(2d)**946.

1082-58¼-New. but such policy does not cover loss of life resulting from negligence so gross as to amount to willful, deliberate, and intentional wrong, since such negligence would amount to fraud. 15**F(2d)**946.

1082-58½-New. There is no implied warranty of seaworthiness in such policy, as in case of ordinary marine policy, and unseaworthiness does not of itself bar recovery. 15**F(2d)**946.

1082-58½-New. Policy covering loss for injuries sustained by persons other than insured's employees, by reason of maintenance or use of saddle and pack horses, covers injuries by reason of operation of horses in insured's business. 81**Mont**99, 261**P**880.

1082-62 91**CalA**304, 266**P**988; 252**NY** 114, 169**NE**108; 155**Wash**402, 284**P**792. [a] (4) Changes in sawmill not affecting liability. 37**GaA**759, 142**SE**182. (5) Li-

ability policy covering junk dealer's work has been held to cover injuries to employees from building wrecking. 86 **Colo** 93, 278**P**609.

1083–63 24**F(2d)**55, 56 [citCJ]; 242**NY** 272, 151**NE**450; 217**AppDiv**417, 216**NYS** 760. [a] (7) Other instances. 24**F(2d)** 55. (8) Other instances. 41**F(2d)**573. [b] **Where declaration of classes of occupations was not intended to limit list of operations** but only to fix premium applicable to particular operations described, the effect of engaging in work outside of such classifications was simply to require insured to pay different premium and did not deprive him of protection of policy. 194**Cal** 127, 228**P**1.

1083–66 See also 222**AppDiv**608, 226 **NYS**676.

1083–67 [a] (2) Tearing down interior walls and replacing them, and changing floors and window frames, held to involve "structural change" under policy. 22**F(2d)**731.

1084–74 76**CalA**207, 244**P**936; 77**CalA** 343, 246**P**1055; 88 **IndA**112, 161**NE**569; **MoA** 16**SW(2d)**613; 292**Pa**156, 140**A**855 (unloading girder from truck); 188**Wis** 140, 205**NW**800. [b] (2) Absence of passenger at time of accident does not relieve from liability. **NJ** 150**A**243. [e] **Liability held limited to negligence** of insured, agents, or servants. 77**CalA** 343, 246**P**1055. [f] **That insured and persons injured were friends** does not prevent recovery on policy in absence of bad faith and collusion. 292**Pa**219, 140**A**905. [g] **Use of trailer** has been held not within prohibition of policy for hire of car. 250**Mich**38, 229**NW**626. [h] **Policy limiting insurer's liability to bodily injuries** is in conflict with statute requiring insurance against liability for all damages. 135**Misc**352, 238**NYS** 313. [i] **Injury need not be proximate result of use of truck,** but only must be result of such use. **TexCivA** 23**SW(2d)** 799.

1084–75 35**F(2d)**104; 88**CalA**100, 262**P** 790; 250**Mich**38, 229**NW**626; 227**App Div**37, 237**NYS**40; 197**NC**286, 148**SE** 261. [a] (3) Protection against liability and protection against law distinguished. 209**Ky**626, 273**SW**536. (4) Suspension of liability while insured bus was used for rental or livery purposes has been held not to prohibit use of bus by borrower in emergency. 50**RI** 269, 146**A**410. (5) Person injured by third person operating such automobile on private mission cannot recover on such policy. **Nebr** 231**NW**770 (person so driving automobile held not assured or additional assured). (6) Policy applied for by corporation, including automobile of salesman's wife used in corporation's business covers automobile only when used in such business. **Nebr** 231 **NW**770. [b] **Repairs.**–96**NJL**456, 115**A** 401. [c] **Assault by insured's driver.**– 118 **OhSt**429, 161**NE**278.

1085–76 77**CalA**343, 246**P**1055.

1085–77 37**F(2d)**449 (employee using car with insured's implied permission); 220**Ala**491, 125**S**676; 77**CalA**343, 246**P** 1055; 80**CalA**687, 252**P**672; 135**Misc** 352, 238**NYS**313 (loss of services of wife falls within category "injuries to person"); 135**Misc**883, 238**NYS**613 (policy issued to garage proprietor includes damage to automobile being towed); 136**Misc**740, 242**NYS**60; 157**Tenn**301, 8 **SW(2d)**473; **TexCivA** 23**SW(2d)**799 (truck); 153**Va**204, 149**SE**448. But see 33**F(2d)**363. [a] **Policy insuring against liability for injuries from operation of sales agency, garage, and service stations,** includes all departments of business. **MoA** 285**SW**753.

1085–78 82**CalA**137, 255**P**260.

1085–79 31**F(2d)**919. See also 281**US** 34, 50**SCt**165, 74**L ed**683. [a] **Person riding in automobile at time of accident** is "assured" within terms of policy. **Wash** 286**P**59.

1085–80½–New. In collision cases, injury and cause are usually so inseparable that injury naturally flows from cause. 77**CalA**343, 246**P**1055.

1085–80⅓–New. Term "accident" as used in policy is held to refer to single cause producing injuries, although latter be several. 77**CalA**343, 246**P**1055.

1085–80¼–New. Policy covering "claims arising from accident" is held to cover several claims arising from single collision. 77**CalA**343, 246**P**1055.

1085–80⅕–New. Where insured had only one truck, automobile liability insurance policy was held to cover it, even though it described chassis under preceding policy which had been replaced. 143**Wash**193, 254**P**852.

1085–80⅙–New. Policy does not cover injuries by operator under owner's permission where former went beyond extent of permitted use. 26**F(2d)**76.

1085–80⅐–New. An indemnity insurance company is not liable to a prospective purchaser paying damages from her negligent operation of a car where the policy's indorsement limited insurance to named insured. 196**NC**348, 145**SE**679 (2dcase).

1085–80⅛–New. Defense that insured operated automobile in violation of liability policy is not open to insurer in action by injured person against insured. 50**RI** 509, 149**A**795.

1085–80⅑–New. Under some policies person driving automobile with owner's consent is person insured against liability for injury or damage to person or property of others. **Ont** [1930] 2**Dom LR**1.

1085–80 1/10–New. That driver used automobile for purpose other than that for which he asked owner's permission does not release insurer under policy available to person operating with owner's permission. **Minn** 232**NW**790.

1085–80 1/11–New. Husband of assured driving assured's automobile at time of accident with knowledge and consent of assured held "assured" within policy. **CalA** 292**P**527.

1085–81½–New. But in the absence of such provision, insurer's obligation does not vary or depend on jurisdiction in which insured drives his automobile. 48**RI** 433, 138**A**186.

1085–82 142**Miss**783, 107**S**548. [a] But see 108**Conn**598, 143**A**885. [d] **In Ontario.**–[1929] 4**DomLR**351.

1085–83 142**Miss**783, 107**S**548.

1085–84½–New. Police excluding use for commercial delivery means the regular almost habitual use of the car for such purpose, 8**PaDist&Co** 141.

1085–84⅓–New. and not the temporary or incidental use thereof. 8**PaDist&Co** 141.

1085–84¼–New. Liability may exclude guest. 194**Wis**8, 215**NW**589.

1085–85 **CalA** 287**P**377; 153**Va**204, 149 **SE**448; **Wash** 286**P**59; **BC** [1925] 3 **DomLR**133 (breach of statutory duty not being cause of accident).

1085–85½–New. To absolve insurer from liability, illegality of use must be between guest and owner. **Wash** 286**P** 59.

1085–87 15**F(2d)**946.

1085–88 [b] **Even though carrier was engaged, at time of injury, in such place that statute did not require him to carry insurance,** passenger may recover from insurer, where such risk was covered by insurance contract. **NJSup** 134**A**911.

1086–96 See 249**NY**21, 162**NE**571.

1087–19 194**Wis**8, 215**NW**589.

1087–20 **NJ** 148**A**790; **TexCivA** 23**SW (2d)**799; 194**Wis**8, 215**NW**589. But see 228**AppDiv**393, 240**NYS**105. [a] (3) Under policy "against loss from liability imposed by law" husband cannot be indemnified for injury done by him to wife. **Miss** 105**S**640. (4) Liability limited to injuries caused on premises or adjacent thereto. 77**Colo** 130, 235**P**343. (5) Injuries by horse-drawn vehicle driven by person under sixteen. 224 **AppDiv**500, 231**NYS**319.

1087–22½–New. An act of a driver's helper, driving without authority and contrary to his employer's rules, is not binding on the employer under a policy exempting insurer where the injuries were inflicted while the horse-drawn vehicle was driven by a person under sixteen years of age. 251**NY**51, 167**NE**169.

1088–23 **CalA** 293**P**133 (holding one operating vehicle while intoxicated to be "legally operating automobile" within policy); 244 **IllA**241; **BC** [1930] 3**Dom LR**1007. But see 250**Mich**38, 229**NW** 626. [a] **Clause confined to liability** when automobile is driven by certain permitted person and not when driven by owner. 250**Mich**38, 229**NW**626. [b] **Provision policy applying to those "legally operating automobile"** does not limit policy to instances where negligence is not made penal by statute. **CalA** 293**P**133.

1088–24 [a] **Age limit for automobile operators fixed** by ordinance is fixed by law within meaning of policy. 281**US** 34, 50**SCt**165, 74**L ed**683.

1088–27½–New. That insured operated a car without license in violation of law does not prevent recovery on the liability insurance. 242**Mass**367, 136**NE** 154, 23**ALR**1467.

1088–29 **Cal** 287**P**468 (workmen's compensation policy held not ambiguous); 35**GaA**24, 131**SE**919 (policy construed to refer to Child Labor Act); 208**Ky** 429, 271**SW**444; **TexCivA** 293**SW**306, 308 [citCJ]; 148**Va**829, 139**SE**513.

1088–30 [a] **Effect of failure to post list of employees under sixteen years of age.**–220**MoA**649, 291**SW**522.

1088–31 150**Va**495, 143**SE**747.

1088–32 142 **Okl** 208, 286**P**7; **TexCivA** 293**SW**306, 308 [citCJ].

1088–35 35**GaA**24, 131**SE**919 [citCJ].

1089–38 **IndA** 154**NE**881.

1089–41 25 **OhNPNS**331. [e] **Valued policy operates** to liquidate damages. 5**PaDist&Co** 660. [f] **Automobile liability insurance.**–200**Wis**574, 229**NW**117.

1089–42 34**F(2d)**833; 213**AppDiv**152, 210**NYS**57; 216**AppDiv**342, 215**NYS**127; 25 **OhNPNS**331; 160**Tenn**294, 23**SW(2d)** 669. But see **TexCommnA** 5**SW(2d)**976.

1090–46½–New. Judgment dividing recovery between insured and assignees of policy, some of whom were injured, was not a double recovery where the amount did not exceed judgment against insured. **TexCivA** 291**SW**674.

1090–46⅓–New. Insurer, on satisfaction of judgments against insured to the full extent of its liability, including costs, is discharged from further liability for the amount of the policy. 50**RI** 275, 146 **A**770.

1090–46¼–New. Where maximum of automobile liability policy was greater than judgment rendered against and paid by insured, he can recover full amount of loss notwithstanding other policy covering same loss. **OhA** 173**NE** 241.

1090–49 121 **Or**187, 253**P**883.

1090–54 297**Pa**216, 146**A**571; **TexCivA** 291**SW**674.

1090–55½–New. Motor bus company is entitled to recover the amount of judgments against it notwithstanding other claims growing out of the same accident had not been reduced to judgment. 223**AppDiv**331, 227**NYS**633.

1090–62 158**Tenn**194, 11**SW(2d)**684; **TexCivA** 291**SW**674.

1091–63 **Wash** 290**P**850. But see 114 **Okl** 237, 246**P**238. [d] **TexCommnA** 276 **SW**170.

1091–65 But see 114 **Okl** 237, 246**P**238.

1091–66 86**CalA**671, 261**P**486.

1092–77 **TexCivA** 18**SW(2d)**826.

1092–77½–New. Insurer is not liable for costs and expenses where it did not voluntarily assume such expenses by undertaking the defense. 36**F(2d)**186.

1092–78 216**AppDiv**342, 215**NYS**127 (costs in all courts taxed against insured plus interest thereon from entry of respective judgments).

1092–86 **Ala** 129**S**15 (statutory penalty improperly assessed). [a] **Insured held liable.**–137**Misc**252, 241**NYS**753.

1092–89 216**AppDiv**342, 215**NYS**127.

1094–13 **NJ** 146**A**202.

1094–17 244**NY**166, 155**NE**87; 137**Misc** 252, 241**NYS**753. But see 213**AppDiv** 152, 210**NYS**57.

1094–18 See also 33**F(2d)**235; 86**CalA** 671, 261**P**486.

1094–21 36**F(2d)**186.

1095–25 [b] **Insurer electing to defend and appeal** is liable for interest on face amount from date of injury to entry of judgment, plus interest on latter sum plus face to date of payment. 216 **AppDiv**342, 215**NYS**127.

1095-34 [a] **Hospital and medical expenses for eight weeks** held not covered by policy covering expenses incurred at time of injury. 223**AppDiv**780, 227**NYS** 618.

1095-36½-New. As to others than employees the liability of the company is confined to a reasonable period after the accident within which insured could and should have given notice, and such further time as might have been reasonably required for insurer to take action. 225 **Ky**335, 8**SW(2d)**409.

1095-40 **CalA** 285**P**876.

1096-47 [a] **"Expenses of litigation"** agreed to be borne by insurer on defending suit in names of insured include special statutory damages recoverable on affirmance of judgment in favor of party suing for personal injuries. 140 **Miss**257, 105**So**39.

1096-48 [c] (2) Litigation of open question of law. 32**F(2d)**425. [d] **Attorney's fees are not recoverable** in suit by insured to reform policy and recover thereon amount paid insured's employee. 168**La**422, 122**So**278.

1096-50 **MoA** 7**SW(2d)**309.

1096-51 233 **IllA**451.

1096-52 233 **IllA**451.

1096-55 [a] **In Ohio.**–21 **OhA**70, 152**NE** 791.

1096-58 281**US**233, 50**SC**308, 74**Led** 823 (workmen's compensation cases); 315**Mo**1007, 287**SW**455; 221**MoA**230, 1 **SW(2d)**242; 242**Mich**95, 219**NW**69; **Pa** 152**A**104; 145**Wash**660, 261**P**388; 193 **Wis**179, 214**NW**616.

1096-59 244 **IllA**241; 245 **IllA**361; **MoA** 16**SW(2d)**1007; 297**Pa**216, 146**A**571; 157 **SC**381, 154**SE**221; 193**Wis**179, 214**NW** 616. [a] **Under marine insurance policy,** covering carrier's legal liability, bankruptcy of carrier will not defeat recovery by cargo owner on policy. 20 **F(2d)**640, 642 [cit CJ].

1097-60 134**Misc**386, 235**NYS**445; 192 **NC**545, 135**SE**460. [a] **Disability beginning prior to date of policy.**–**Wis** 232**NW** 542.

1097-62 315**Mo**1007, 287**SW**455; 134 **Misc**386, 235**NYS**445.

1097-63 74**CalA**171, 239**P**1100; 82**CalA** 137, 255**P**260; 221**MoA**230, 1**SW(2d)**242; **MoA** 5**SW(2d)**648; 244**NY**166, 155**NE** 87; 215**AppDiv**19, 213**NYS**138, 141 [quot CJ]; 134**Misc**386, 235**NYS**445; 137 **Misc**252, 241**NYS**753.

1097-64 215**AppDiv**19, 213**NYS**138, 141 [quot CJ].

1097-65 But see 11**LaA**176, 123**So**162. [a] **"Liability imposed by law"** in policy is not fixed till final determination of all appeals or judgment against insured. 136**Misc**205, 243**NYS**649.

1097-65½-New. Amount of insurer's liability under policy covering bodily injuries including death at any time resulting thereof is fixed by policy provisions existing at the time of the accident and not at the time of death. 126 **Misc**205, 231**NYS**649 (even though decedent's representative's right to sue did not accrue till death).

1097-67 233 **IllA**451; 221**MoA**230, 1 **SW(2d)**242; 221**MoA**868, 287**SW**819; 134**Misc**386, 235**NYS**445; 192**NC**545, 135 **SE**460; 193**NC**266, 136**SE**726; 297**Pa** 216, 146**A**571; **Pa** 152**A**104, 50**RI** 502, 149**A**797; 145**Wash**660, 261**P**388, 193**Wis** 179, 214**NW**616. [a] **In Ohio.**–21 **OhA** 70, 152**NE**794. [b] **Contract is valid.**– 233 **IllA**451. [c] **Construction.**–233 **IllA** 451.

1098-69 233 **IllA**451; 50**RI** 166, 146**A** 412.

1098-70 233 **IllA**451.

1098-71 See also 156**Tenn**127, 299**SW** 788.

1098-72 **MoA** 14**SW(2d)**535; 245**NY** 54, 157**NE**852; 156**Tenn**127, 299**SW**788.

1098-72½-New, and under some policies such "payment" must be in money; 245**NY**547, 157**NE**852.

1098-72¾-New, and although insured is imprisoned under body execution for inability to pay judgment, he cannot recover without such money payment. 245 **NY**547, 157**NE**852.

1098-74 [a] **Till appeal is decided,** cause does not accrue even though judgment is paid. 88**CalA**724, 264**P**278.

1098-75 [a] (2) **Failure to defend suit of which it had due notice and which in policy it had agreed to defend** is waiver of "no action clause." 317 **Ill** 251, 148 **NE**42.

1098-75½-New. Contract of indemnity against loss or damage is not changed by no action clause except as it defines manner and time for payment. **Pa** 152**A** 104.

1099-76 [b] **What constitutes liability imposed by law.**–131**Misc**836, 228**NYS** 314.

1099-78½-New. Under a statute and policy providing that insolvency of insured shall not release insurer, insolvency is prima facie established by return unsatisfied of execution issued to the sheriff of the county of insured's domicile, although insured was temporarily absent from the United States. 131**Misc** 836, 228**NYS**314.

1099-78¼-New. Where indemnitor assumes defense, indemnitee may sustain action when loss is determined by final judgment. **Pa** 152**A**104.

1099-78¾-New. That assured has sustained no loss because of previous insolvency does not relieve insurer of liability under insolvency clause. 43**F(2d)**82.

1099-81 121**Or**187, 253**P**883; **Pa** 152**A** 104.

1100-3 [a] (3) Other instances. 234**Ky** 739, 29**SW(2d)**6.

1100-6 234**Ky**739, 29**SW(2d)**6; 163**La** 969, 113**So**165; 131**Misc**836, 228**NYS**314; 200**Wis**574, 229**NW**117. But see 197**NC** 286, 148**SE**261.

1101-7 50**RI** 166, 146**A**412; 200**Wis**574, 229**NW**117.

1101-20 11**LaA**176, 123**So**162. See also 27**F(2d)**859. But see 221**AppDiv**394, 223 **NYS**93; 21 **OhA**521, 153**NE**206.

1101-21 47 **Ida**386, 279**P**627 (condition precedent to maintenance of action).

1102-23 43**F(2d)**82; 27 **OhA**405, 161**NE** 360.

1102-26½-New. Where papers in a damage suit were, through a misunderstanding, served on the attorney of another, failure of the attorney to transmit the papers to the proper insurance company has been held not to constitute a breach of condition of a liability policy requiring insured to transmit suit papers forthwith, although insured subsequently employed the attorney to defend suit in her behalf. 108**Conn**652, 44**A**298.

1102-34½-New. Policy not requiring personal service of notice of claim of loss. **Mo** 31**SW(2d)**7.

1103-51 [a] **"Prompt written notice"** means reasonable notice. 108**WVa**93, 150**SE**521.

1103-53 See also 32**F(2d)**425.

1103-54 41**F(2d)**470.

1103-56 173**Minn**114, 216**NW**784.

1103-57 See also **Alta** [1930] 2**DomLR** 835.

1103-58 234**Ky**739, 29**SW(2d)**6; 173 **Minn**114, 216**NW**784; 198**NC**156, 150**SE** 887; 157**SC**381, 154**SE**221; **Tex CommnA** 5**SW(2d)**976; **TexCivA** 291 **SW**674.

1103-60 43**F(2d)**82.

1103-61 108**Conn**652, 144**A**298; 228 **AppDiv**108, 239**NYS**196.

1103-62 118**OhSt**237, 160**NE**707. [a] (2) Other instances. **Mo** 31**SW(2d)**7. [b] **Notice held insufficient.**–251**NY**302, 167**NE**456.

1104-64 131**Misc**596, 227**NYS**481; 226 **AppDiv**429, 235**NYS**584. [a] (3) 234**Ky** 739, 29**SW(2d)**6. (10) 41**F(2d)**470.

1104-65 [a] **Process not forwarded to insurer till seven months elapsed** is not "immediately" forwarded. 43**F(2d)**82.

1104-67 [a] (2) Knowledge of accident not attributable to act or omission of insured does not call for immediate notice to secure benefit of covenant to defend groundless suit. 173**Minn**114, 216 **NW**784.

1104-72 41**F(2d)**470; **Mich** 233**NW**333.

1104-73 43**F(2d)**82.

1105-74 36**F(2d)**559 (notice of service of process); 108**Conn**652, 144**A**298.

1105-75 **TexCivA** 291**SW**674.

1105-77 **Alta** [1930] 2**DomLR**835.

1105-81 108**Conn**652, 144**A**298; **NJSup** 144**A**179(2dcase).

1105-84 228**AppDiv**108, 239**NYS**196.

1105-85½-New. The rider required by the West Virginia statute to be attached to insurance policies taken out by taxicab companies prior to issuance of a certificate of convenience does not affect the contractual relations between insured and insurer. 108**WVa**93, 150**SE**521.

1106-92½-New. Failure of a corporation to forward process, pleadings, and papers to an attorney for the indemnitor is not excused by the fact that service was made on a county auditor of the county where the corporation had its principal place of business. 47 **Ida**386, 279**P**627 (insured is required to exercise ordinary care in acquiring knowledge in order that insurer may be promptly notified of proceeding against insured).

1106-93 108**Conn**652, 144**A**298. But see 131**Misc**836, 228**NYS**314.

1106-95 118 **OhSt**237, 160**NE**707.

1106-1 32**F(2d)**425.

1106-2 158**Tenn**194, 11**SW(2d)**684.

1107-7 37**F(2d)**90.

1107-9 292**Pa**219, 140**A**905. [b] **Necessity of prejudice from defects.**–292**Pa**219, 140**A**905.

1107-11 292**Pa**219, 140**A**905, 907 [cit CJ].

1107-16 105**Conn**162, 134**A**789; 163**La** 969, 113**So**165; **WVa** 153**SE**584.

1107-18 108**Conn**652, 144**A**298.

1108-33 250**NY**281, 165**NE**293.

1108-40½-New. An adjuster of insurer has been held to have authority to waive compliance with conditions of policy as to notice of claim. 105**Conn**162, 134**A** 789.

1109-59½-New. Insurer which appeared and settled suit waived lack of notice in a subsequent suit by insured to recover for medical and surgical expenses incurred. 225**Ky**335, 8**SW(2d)**409.

1109-65 17**F(2d)**961; 163**La**969, 113**So** 165; 158**Tenn**194, 11**SW(2d)**684 (taking charge of suit against insured, interviewing witnesses, having doctors examine plaintiff, consulting with insured's attorneys, and promising to file plea). [b] **Continuing defense** after learning at hearing, of employer's failure to notify does not waive breach. **Mich** 233 **NW**333.

1109-68 40**F(2d)**344; 250**NY**281, 165 **NE**293; 131**Misc**836, 228**NYS**314; 221 **AppDiv**394, 223**NYS**93. [a] **Insured's consent to insurer's reservation of right to repudiate liability may be express or implied.**–131**Misc**836, 228**NYS**314.

1109-71 See also 105**Conn**162, 134**A**789.

1110-78 [c] **Having undertaken to represent insured in actions covered by policies,** insured has right to expect insurer to continue representation till notice of its withdrawal. **Mass** 168**NE** 111.

1110-89 42**F(2d)**789.

1110-90 But see **Wis** 231**NW**257.

1110-94 12**PaDist&Co** 754 (insurance carrier under Workmen's Compensation Act).

1110-95 173**Minn**114, 216**NW**784; 157 **Miss**27, 127**So**579 (suit by one not employee suing as such).

1110-96 261**Mass**469, 159**NE**461. [a] **Disclaimer of duty to defend by insurer** is not established by statement to insured that his unwillingness to attend trial is violation of terms of policy. **Mass** 168**NE**111.

1110-97 148**Va**829, 139**SE**513.

1111-98 148**Va**829, 139**SE**513.

1111-99 But see 148**Va**829, 139**SE**513.

1111-99½-New. Where a policy excludes insured from participation in the defense or settlement of any claim, insurer cannot, after undertaking the defense of a suit, withdraw from the defense and cast the burden thereof on insured. 120 **Or**381, 250**P**717.

1111-3 [a] (2) In suit by injured minor on two grounds, one covered by policy, other not so covered, insurer in defending, after due notice to employer, did not lose its right to claim exemption from liability on ground of unlawful employment. 208**Ky**429, 271**SW**444.

1111-4 208**Ky**429, 271**SW**444.

1111-4½-New. Where, under a liability policy, the legality of the employment determined the liability, both employer and insurer could protect its own interest and neither was under duty to surrender defense to the other. 208**Ky**429, 271**SW**444.

1111-12 121 **OhSt**220, 167**NE**884 (insured may recover cost and expense of defense); 34 **OhA**496, 171**NE**372; 121

Or187, 253PS83; Wis 231NW257.

1111-18½-New. Insurer refusing to defend plaintiff's suit without reserving right to contest its liability to defendant is liable for reasonable allowance of attorney's fees. LaA 125S748.

1112-19 MoA 25SW(2d)215; Wis 231NW257 (conduct must be closely scrutinized).

1112-20 MoA 23SW(2d)215; 157Tenn559, 11SW(2d)889; Wis 231NW257.

1112-21 157Tenn559, 11SW(2d)889.

1112-22 See also 157Tenn559, 11SW(2d)889.

1113-35 Ont [1928] 3DomLR150. See also BC [1930] 2DomLR156.

1113-37 But see 208Ky429, 271SW444 (where interest is based on different grounds of liability, each may protect its own interest).

1113-39½-New. In absence of provision in policy, insured is under no obligation to discourage wife's suit or refuse to testify. 83NH206, 140A174.

1113-40 219Ala37, 121S25; 219Ala307, 122S175; 27OhA208, 161NE232; 97Pa Super13 (otherwise where no stipulation is in policy). But see 9PaDist&Co 663. [a] (3) Evidence held not to show bad faith or failure of insured to coöperate in defending action. 5F(2d)498. (4) Nonprejudicial refusal of insured to execute pleadings in defense does not justify repudiation of obligation by insurer. 292Pa219, 140A905 (refusal to execute affidavit of defense). (5) Where assured removed to another city at time of trial and refused to come to court at his own expense, insurer was not relieved from liability since such conduct was not substantial lack of coöperation and no effort was made to take his deposition. 219Ala307, 122S175. [b] **Matters constituting violations.**—Provision is violated by refusal of insured to give information, by his absenting himself from trial, or by his making misstatement in collusion with injured person. 292Pa219, 140A905. [c] **Where bankrupt insured fully coöperated with liability insurer in defense of action** by insured's tenant for injury sustained in falling down unlighted stairway, and frankly told insurer that he had failed to keep stairway lighted between sunset and sunrise, insured's removal to another state was not prejudicial to insurer, since his testimony could not help insurer, and did not constitute such "refusal to coöperate" with insurer, as to vitiate policy and preclude recovery by tenant from insurer, under statute. 225AppDiv49, 232NYS255. [d] **Insurer is estopped to disclaim liability** on insured's breach of condition to aid in defending suits where set up after unfavorable termination of suits against it. Mass 168NE111. [e] **Requirement is valid.**—MoA 26SW(2d)843. [f] **Effect of breach.**—MoA 26SW(2d)843. [g] **Clause violated.**—227AppDiv311, 237NYS494. [h] **What constitutes breach.**—MoA 26SW(2d)843.

1113-44 Contra 274Mo537, 203SW822 [rev 186MoA318, 172SW458].

1113-51 Wis 231NW257 (right not affected by adverse interest).

1114-55 Wis 231NW257 (absent agreement preventing insured from adjusting claim).

1114-58½-New. Insured had a right to make settlement and sue insurer for amount of its liability under the policy, but it could not fail to make the settlement and then hold insurer liable because it refused to pay its total liability when, if the employee was unlawfully employed, it was not liable. 208Ky429, 271SW444.

1114-67 TexCommnA 15SW(2d)544.

1115-71 246Mich645, 225NW643; 175Minn181, 221NW61; 247NY451, 160NE911; TexCivA 295SW257.

1115-72½-New. Where insured is clearly liable, the refusal of insurer, after assuming the defense, to make a prudent settlement unless insured will contribute a portion of the amount required can be justified only when made in good faith and upon reasonable grounds for believing that the amount demanded is excessive. 169Minn377, 211NW317.

1115-79 NJ 146A202.

1115-81 288Pa325, 135A614.

1115-83 [a] **After settlement by insured,** insurer paying loss has no right of subrogation against wrongdoer, who made payment without knowledge of insurer's right of subrogation. 122Kan445, 252P215.

1115-83½-New. Where general agent of insurer authorized insured to settle with injured employee, and agrees to reimburse him therefor, such agreement is within scope of agent's authority and binding on insurer entitling insured to recover money thus paid; 82NH177, 131A352.

1115-83¾-New. and in action to recover such payment, insurer is estopped from contending that claim was not valid. 82NH177, 131A352.

1115-83¼-New. Assured may be justified in satisfying a judgment against him pending appeal where his business is threatened by execution. 32F(2d)425.

1116-93 244 IllA241; 169Minn377, 211NW317; 120Or381, 250P717; 89PaSuper281; 8PaDist&Co 141.

1116-94 169Minn377, 211NW317; 120Or381, 250P717; 89PaSuper281. [a] **Items which cannot be included** in claim against insurer are legal expense not incurred in connection with defense and attorney's fees incurred in prosecuting claim against insurer. 89PaSuper281.

1116-97 169Minn377, 211NW317.

1116-99 89PaSuper281.

1116-2 89PaSuper281.

1116-4 But see MoA 23SW(2d)215.

1117-6½-New. A payment by insured to insurer of part of a settlement is without consideration where insurer was liable for full amount at time it paid. MoA 23SW(2d)215.

1117-6¾-New. Insured and insurer may enter into a contract of settlement with claimant, which will constitute accord and satisfaction of the original contract. MoA 23SW(2d)215.

1117-6¼-New. A compromise agreed to by insured and insurer waives a provision that insurer can discharge its liability only by full payment up to the policy limit. MoA 23SW(2d)215.

1117-6½-New. Insured cannot insist on such contract as waiver of a policy provision and reject it for the purpose of disclaiming liability for the amount paid. MoA 23SW(2d)215.

1117-6¼-New. Insured cannot recover from insurer the amount contributed to settlement within the policy limit on the ground of want of consideration where he thereby escaped large contingent liability. MoA 23SW(2d)215.

1117-9½-New. Provision in insurance policy to give person injured by automobile action against insurance company if execution is returned unsatisfied is held to give injured person independent right to sue regardless of acts of insured. 214Ky16, 282SW187.

1117-9¾-New. Where named insured was not liable to injured person for employee's negligence, insurer could not require direction in writing from named assured before paying insurance. 37F(2d)449.

1117-9¼-New. Employee must be presumed, after injury, to have accepted and acted in reliance on provisions of policy made for his benefit, although he may not have known of policy in force. MoA 24SW(2d)211.

1117-9½-New. Employee's rights under insurance contract to compensation which accrued after date of agreement could not be abrogated to employee's detriment. TexCommnA 24SW(2d)370.

1117-15 But see Va 153SE685. [a] 209Ky626, 273SW536.

1117-15½-New. By statute judgment creditor of insured may sue insurer provided all valid conditions precedent stipulated in the policy as binding on insured have been complied with. 21OhA70, 152NE794.

1118-20 [a] **Defendants may not complain** of judgment for their own tort, where insurer paid amount for which it was liable. TexCivA 297SW352.

1118-20½-New. Insurer's offer to exchange new car for insured's damaged automobile is held not to constitute plea in confession and avoidance in action on policy. 214Ala528, 108S342.

1118-20¾-New. Insured who paid loss could recover interest from insurer in absence of valid tender. TexCivA 295SW257.

1118-20¼-New. Payment of the amount of a liability policy to insured after entry of judgment against him is not fraudulent as to the injured person having no rights under the policy. 248Mich390, 227NW542.

1118-22 132Misc583, 230NYS273; 226AppDiv50, 234NYS144.

1118-23½-New. Insurer may recover from an injured person, to whom it has paid a judgment obtained in an action against insured, a part of the amount paid for which insurer was not liable under the policy, where all the elements of recovery of payment under mistake exist. 132Misc583, 230NYS273.

1118-25 31F(2d)817. [a] **Insurer protecting itself by coinsurance clause** cannot be compelled to contribute to coinsurer paying more than its share. 31F(2d)817. [b] **To recover proportionate amount from third insurer,** insurers paying loss were required to prove defendant's liability to insured and their subrogation to rights of insured. 31F(2d)817.

1118-30 224AppDiv500, 231NYS169; 90PaSuper201. [a] **"Existing law"** in appropriation act refers to statute law. DC 41F(2d)424.

1118-31 See also 240NY37, 147NE351.

1119-35 LaA 129S234 (reserved claim against tort-feasor).

1119-36½-New. The subrogee acquires rights which as between it and insured are beyond the power of cancellation and destruction by the latter. 240NY37, 147NE351.

1119-36¾-New. Insurer and the surety on an appeal bond, whose offer to pay judgments against the owner and the lessee for injuries sustained from falling window glass on assignments of judgments was refused by the injured persons, are entitled to a temporary injunction restraining the injured persons from issuing execution. 224AppDiv500, 231NYS169.

1119-36¼-New. The owner's indemnity insurer and surety on an appeal bond from judgment against the owner and the lessee for injuries caused by the lessee's negligence is subrogated to the rights of the owner against the lessee agreeing to save the owner harmless. 224AppDiv553, 231NYS494.

1119-37 34OhA478, 171NE414; 14PaDist&Co 153.

1119-38 224AppDiv500, 231NYS169.

1119-45 86IndA150, 155NE182; 240NY37, 147NE351 (may recover only for claims satisfied). [a] **Insurer is entitled to be reimbursed** from amount recovered by him for personal injuries where plaintiff voluntarily waived his claim for damages to automobile truck covered by insurance. 14PaDistCo 153.

1119-52 137Misc379, 244NYS20. [a] **liability of indemnity company** cannot be litigated. Mich 233NW419.

1119-52½-New. Settlement. Defendant is chargeable with notice of insurer's rights as subrogee of insured who made a settlement with bankruptcy trustee subject to rights of insurer. 240NY37, 147NE351.

1119-52¾-New. Release by defendant where insurer is in no way a party to the settlement is a fraud upon insurer and will not be allowed to stand. 240NY37, 147NE351.

1119-52¼-New. Release by defendant is not operative against insurer's right of subrogation on ground that its product was to be set afloat through another, and individual suffering loss thereby had cause of action directly against defendant independent of any cause arising in favor of distributor. 240NY37, 147NE351.

1119-53 240NY37, 147NE351.

1119-55 [b] **Plaintiff need not allege subrogation** where policy provides for subrogation. LaA 127S35.

1120-58½-New. To establish the defense that plaintiff is not a real party in interest, it must have appeared that the adjustment made by plaintiff with the

insurance company was at least equal to the amount of the claim asserted by plaintiff against defendant. 225**AppDiv** 788, 232**NYS**511.

1120-58½-New. Plaintiff must prove payment in order to recover. **LaA** 127 **S**35.

1120-63 201**Cal** 29, 255**P**512.

1120-64½-New Compliance of insured with terms of policy, in absence of statute, is generally of essence of contract and condition precedent to recovery. **TexCivA** 291**SW**674.

1120-64½-New. Failure of the company to defend suit against insured put an end to company's right to insist on compliance with terms of policy by insured. **TexCivA** 291**SW**674.

1121-80 **Mich** 233**NW**333.

1121-83 [a] (2) Where action against principal of insured, defended by insurer, was dismissed, judgment therein was reversed after expiration of limitation. 141**AppDiv**493, 126**NYS**555 [mod 206**NY** 733, 100**NE**454].

1121-89 214**Ky**16, 282**SW**187; 215 **Ky**168, 284**SW**1038. [a] (2) Insurance company defending action against insured is bound by judgment, and cannot, in action by injured party against it, relitigate matter of contributory negligence. 214**Ky**16, 282**SW**187. [d] **Finding that injured plaintiffs were employees of defendant** held not res judicata in subsequent action by defendant on liability policy. 261**Mass**469, 159 **NE**461. [e] **Where notice of action was not given to insurer** as required by policy, insurer is entitled to defend on merits action by injured person as judgment creditor of insured under default judgment. 147**Wash**579, 266**P**682, 63 **ALR**1040. [f] **Upon insurer's withdrawal,** plaintiff may deal with insured appearing in his proper person. **NH** 152**A** 272. [g] **Consent judgment,** pursuant to agreement between plaintiff and insured, after withdrawal of insurer, is binding on insurer. **NH** 152**A**272.

1122-91 88**CalA**100, 262**P**790.

1122-95½-New. In some jurisdictions statutes do not make the return of execution unsatisfied a prerequisite to the commencement of an action on the policy. 201**Cal** 29, 255**P**512.

1122-95½-New. Matters not constituting waiver of right to interfere after consent judgment. **NH** 152**A**272.

1122-96 **Mass** 170**NE**49.

1123-7 141**SC**303, 139**SE**619, 55**ALR** 1237.

1123-12½-New. Statute permitting joining insured and insurer as defendants has been held not unconstitutional. 46**RI** 478, 129**A**339.

1123-12½-New. Insured's debt being incontrovertibly established by judgment, failure to join him as party defendant in judgment creditor's suit did not preclude recovery. **Mass** 170**NE**49.

1123-12¼-New. Insured against whom no relief is sought is not necessary party to guest's action directly against insurer. **Wis** 230**NW**87.

1124-21 [a] (3) In action on settlement made by insured. 169**Minn**377, 211**NW** 317. (4) Complaint alleging basic elements of action and legal effect of indemnification contract is proper pleading. 201**Cal** 29, 255**P**512. (5) Where complaint alleges insolvency of insured and his inability to pay any part of judgment against him on date of accident and continuously thereafter, and demand and refusal to pay, it is sufficient as statement of contractual relation between parties to suit. 201**Cal** 29, 255**P**512. (6) Alleging that insured incurred medical expenses. 225**Ky**335, 8 **SW(2d)**409. (7) In action on automobile policy, to state cause of action. 218 **Ala**520, 119**S**230. (8) Allegation relative to whether judgment against insured was rendered after trial of issue, and stating that action came on regularly for trial and verdict was returned by jury. 27**F(2d)**859. (9) To show defendant's consent to assignment of ownership. 32**F(2d)**606.

1124-22 244 **IllA**241; 157**SC**381, 154**SE** 221 (insufficient allegation of fraud). [b] **Liability insurer's defense of bankrupt insured's breach of contract,** asserted against injured party claiming right to recover from insurer, under statute, providing that insolvency or bankruptcy of insured shall not release liability insurer, where execution against insured is returned unsatisfied, must be considered in light of remedial character of statute and be scrutinized accordingly. 225**AppDiv**49, 232**NYS**255. [c] **That injured tenant of bankrupt insured was ignorant of existence of insured's release of liability insurer,** which admitted insured's breach of policy requirement of immediate written notice of accident, does not estop insurer from setting up release as defense. 225**App Div**49, 232**NYS**255.

1124-24 121 **Or**187, 253**P**883.

1124-26 108**Conn**563, 143**A**847. [a] **In action for expenses in defending suit against insured,** petition may state cause of action though it does not allege that automobile covered by policy was in fact involved in accident. 121 **OhSt**220, 167**NE**884.

1125-29 [d] **Where plaintiff had automobile indemnity insurance** in sum of five thousand dollars, its petition against insurer after recovery against it in personal injury action of more than fourteen thousand dollars, alleging that defendant, who defended personal injury action, refused to settle case for four thousand dollars, states cause of action. **TexCommnA** 15**SW(2d)**544.

1125-30½-New. Allegation and proof of insolvency of the judgment debtor is sufficient compliance with any applicable statute providing for the return of a writ of execution by the sheriff unsatisfied as a prerequisite to the commencement of an action on the policy. 201**Cal** 29, 255**P**512.

1125-33 250**Mich**38, 229**NW**626. [b] **Under general denial,** evidence has been held admissible to show that money which it was claimed, was used to pay judgment was advanced by attorneys of employee. 52 **IndA**228, 97**NE**1026.

1125-34 81**Mont**99, 261**P**880; 155**Wash** 402, 284**P**792.

1125-35 See also **LaA** 130**S**247. [a] **Excuse for delay in giving notice.**-251**NY** 302, 167**NE**450.

1125-36 [a] (3) To show notice to insurer of accident. 240 **IllA**431. [a] (4) Evidence showing that those injured were not employees. 261**Mass**469, 159 **NE**461. (5) In action on automobile insurance policy, asking mechanic whether new body was required to "suitably replace and repair" held not objectionable. **TexCivA** 297**SW**879. (6) Other instances. **NJSup** 149**A**262. (7) Other findings. 232**Ky**556, 24**SW(2d)**278. [b] (1) 22 **F(2d)**731. (2) In action against automobile indemnity insurer based on defendant's failure, while defending personal injury action against plaintiff, to accept offer of settlement, testimony that it was rule of defendant never to make settlement for more than one-half amount of policy is admissible. **TexCommnA** 15**SW(2d)**544. (3) Letter advising counsel of liability insurer of dismissal of suit and commencement of action in different county is immaterial as to notice of service of process. 36 **F(2d)**559. [d] **In suit for refusing settlement,** evidence of injuries held inadmissible. **TexCivA** 295**SW**257.

1125-37 97**CalA**434, 275**P**963. See also **LaA** 130**S**247. [a] (1) 91**CalA**304, 266**P**988. (8) To show good faith by insurer in refusing settlement. **TexCivA** 295**SW**257. (9) To justify finding that insurer was not liable for amount paid by employer on judgment for death of minor unlawfully employed. 148**Va**829, 139**SE**513. (10) To sustain finding that insurer was not prejudiced by delay in giving notice of accident. 194**Wis**333, 216**NW**653. (11) To establish that use of automobile injuring plaintiff was without owner's consent. 26 **OhA**455, 160**NE**506. (12) Deliberate evasion by insured of his duty to coöperate in defense of action against insured. 27 **OhA** 208, 161**NE**232. (13) To sustain finding that temporary coverage pending renewal of policy had expired at time of injury to employee. 175**Minn**577, 222**NW** 72. (14) To support finding that plaintiff was insured within statute. 88**CalA** 724, 264**P**278. (15) To show that operator of automobile causing injuries was insolvent within provision of liability insurance policy authorizing action by injured person against insurer, where insured was insolvent and execution was returned unsatisfied. 219**Ala**37, 121**S**25. (16) To support finding that truck was covered by policy. **NJ** 144**A** 179. (17) To support finding that liability was not limited to five thousand dollars. 31**F(2d)**751. (18) To justify finding that disability from occupational disease followed change of insurance carrier. **Wis** 232**NW**542. (19) Other instances. **NJSup** 149**A**262; 34 **OhA**551, 171**NE**419; **Wis** 231**NW**257. [b] (3) That liability insurer was not notified of accident until nearly three months afterward. 163**La**969, 113**S**165. (4) To show claim was one for liability not within exception of policy. 240 **IllA**438. (5) To present issue for jury as to whether member of insured's household gave express permission to operate motor vehicle. 194**Wis**293, 215**NW**431. (6) To sustain finding that car of insured was being operated with permission of member of his household. 194**Wis**293, 215**NW** 431. (7) To support assessment against indemnity insurer of damages and attorneys for vexatious refusal to pay loss. 32**F(2d)**425. [c] **Prima facie proof of insolvency of judgment debtor** is made by return of execution unsatisfied. 105**NJL** 616, 147**A**483.

1126-38 173**Minn**114, 216**NW**784; **Tex CivA** 291**SW**674. [a] (4) Other instances. 34 **OhA**551, 171**NE**419. [b] (5) To show that notice was not timely. 225 **AppDiv**49, 232**NYS**255. [c] **Failure promptly to deny liability** constitutes some proof that delay in giving notice was not unreasonable. **TexCommnA** 5 **SW(2d)**976.

1126-39 83**NH**206, 140**A**174. [b] 292 **Pa**219, 140**A**905.

1126-41 [b] (3) To rebut presumption of defendant's representative's good faith. 246**Mich**645, 225**NW**643. (4) To show that insured consented that person to whom he delivered car should loan it to strangers for purposes of pleasure. 35**F(2d)**104.

1126-42 [a] (4) To show that damages resulting from collision were caused by mismanagement and negligence of driver under stipulated age. 142**Miss**783, 107 **S**548.

1126-45 [a] **Presumption that policy was valid one** has been held rebutted. 5**PaDist&Co** 660.

1127-57 But see 225**AppDiv**439, 233 **NYS**477.

1127-61 255 **IllA**263; 234**Ky**739, 29**SW (2d)**6; 261**Mass**469, 159**NE**461; 83**NH** 206, 140**A**174; 130 **Or**50, 278**P**87; **SC** 155**SE**747. [a] (6) What constitutes failure of coöperation by insured in rendering assistance to insurer in making defense to action. 219**Ala**37, 121**S**25. (7) Whether injury to plaintiff's hand precluded him from performing any substantial part of his duties. 33**F(2d)**7. (8) Whether insured rendered to insurer required co-operation and assistance. 252**NY**330, 169**NE**403. (9) Whether oral contract of insurance covering public liability was entered into and subsisting at time of accident. 32 **OhA**316, 168**NE** 61. (10) Other instances. **MoA** 284**SW** 824 (coöperation with insurer in defense of damage suit). (11) Whether stipulation in policy was material. **CalA** 293**P** 133.

1127-62 17**F(2d)**961; 105**Conn**162, 134 **A**789; 108**Conn**652, 144**A**298; 240 **IllA** 431; 221**AppDiv**394, 223**NYS**93; 198 **NC**156, 150**SE**887; **Oh** 172**NE**361; 157 **SC**381, 154**SE**221; **TexCommnA** 58**W (2d)**976; **TexCivA** 291**SW**674.

1127-62½-New. whether company suffered loss because of delay in giving notice, **TexCivA** 291**SW**674.

1128-64 [a] (4) Evidence as to reasonableness of notice to employer that insurer disclaimed liability and refused to defend action held sufficient for jury. 148**Va**829, 139**SE**513. (5) Whether injury to surgeon's hand constituted total disability. 31**F(2d)**547.

1128-64½-New. what constitutes co-

operation with insurer in defense of action, **MoA** 26**SW(2d)**843.

1128-64½-New. whether insured breached condition requiring coöperation with insurer, **MoA** 26**SW(2d)**843.

1128-64¼-New. whether insured's failure to coöperate with insurer was ground of forfeiture, **MoA** 26**SW(2d)**843.

1128-64½-New. whether insurer used such diligence in attempting to procure attendance of insured at trial of action as would defeat liability for failure to coöperate, **MoA** 26**SW(2d)**843.

1128-66 32**F(2d)**61; 214**Ala**528, 108**S**342; 232**Ky**556, 24**SW(2d)**278; 234**Ky**739, 29**SW(2d)**6; 246**Mich**645, 225**NW**643; 133**Misc**713, 233**NYS**330; 50**RI**509, 149**A**795 (whether insured violated automobile liability policy); **TexCivA** 24**SW(2d)**799.

1128-66½-New. Whether insurer is estopped to rely on a provision exempting it from liability by reason of defending a negligence action with knowledge of the facts may be a question for the jury. 251**NY**51, 167**NE**169.

1128-67 [b] **Erroneous request** held properly refused. 124**Kan**705, 261**P**831.

1128-69 [b] **In suit on automobile insurance policy,** instruction that "suitable repairs and replacements" meant repairs which would restore injured automobile as nearly as possible to prior condition held not error. **TexCivA** 297**SW**879.

1128-70 **Kan** 289**P**427(2dcase). [b] **Instruction held properly refused.**-170**Mass** 173, 49**NE**110; 64**AmSR**291. [c] **Instructions held inapplicable to evidence.**-130 **Or**50, 278**P**87.

1128-73 But see 180**Ark**53, 20**SW(2d)** 320.

1128-74½-New. A judgment providing that it cannot be collected until after insured shall first pay a judgment in an action against it substantially complies with a provision in a policy that no recovery can be had by insured until it has been sued and has paid the judgment in such suit. **TexCommnA** 276**SW**170.

1128-74⅓-New. Where the record does not show the ground of the verdict, there can be no inquiry into such question in employer's action against insurer. 208**Ky**429, 271**SW**444.

1128-74¼-New. It is proper to inquire of the jury whether company was prevented from making any defense or preserving any substantial right by delay of insured in giving notice of accident. **TexCivA** 291**SW**674.

1128-74⅕-New. Finding of collusion held not equivalent to finding of fraud. 83**NH**206, 140**A**174.

1128-74⅙-New. Verdict in excess of amount specified by policy is excessive. 50**RI** 509, 149**A**795.

1128-76 80**CalA**590, 252**P**739; 34**GaA** 203, 128**SE**915; **MoA** 286**SW**428; 221 **MoA**1212, 299**SW**103; 115**Nebr**1, 211 **NW**190, 56**ALR**1403; 83**NH**23, 136**A** 751; 193**NC**266, 136**SE**726; 27 **OhA**386, 160**NE**863; 122 **Okl** 200, 253**P**504; 118 **Or**248, 246**P**723; **TexCivA** 12**SW(2d)** 1067; **TexCivA** 19**SW(2d)**825; 101**WVa** 263, 132**SE**885; 101**WVa**337, 132**SE**887; 105**WVa**135, 141**SE**628. But see 91 **PaSuper**522. [b] (2) In action for injuries in automobile collision, plaintiff's cross-examination of physician, as to who requested examination of plaintiff for purpose of showing that it was made at request of insurance company, is improper. 97**CalA**731, 276**P**149. [c] (2) Where answer of witness disclosing that defendant was insured was not responsive and counsel did not deliberately bring question into case and court took every precaution to avoid prejudice. 234**Mich**217, 207**NW**911; 144**Wash**404, 258**P**25. [c] (3) Testimony that part of witness' statement was stricken out by "man from the insurance company" and that he went to lawyer's office in "Insurance Exchange Building." 253 **Ill**540.

1129-77 34**GaA**203, 128**SE**915; 27 **OhA** 386, 160**NE**863; 118 **Or**248, 246**P**723; 122 **Okl** 200, 253**P**504; 101**WVa**263, 132 **SE**885. But see 37**GaA**265, 139**SE**825. [a] **Where questions not necessarily calling for disclosure of defendant's insurance** are answered by plaintiff in good faith and answers are promptly stricken out, reference to insurance in such answers does not require reversal. 169**Minn**218, 210**NW**996.

1129-77½-New. Action of plaintiff or his counsel in apprising the jury that defendant is covered by indemnity insurance is not rendered harmless by an instruction to the jury not to consider it. 105**WVa**135, 141**SE**628.

1129-77⅓-New. The court's instruction to the jury not to consider such evidence does not cure the error. **TexCivA** 19 **SW(2d)**825.

1129-78 **MoA** 286**SW**428; **NJSup** 147 **A**233 (interest of witness); 27 **OhA**386, 160**NE**863; 122 **Okl** 200, 253**P**504; **Tex CivA** 280**SW**234; 101**WVa**337, 132**SE** 887. But see 218**Ky**59, 290**SW**1044; **TexCivA** 19**SW(2d)**144.

1129-78½-New. Unanswered question designed to inform the jury that one of the defendants is covered by insurance is not ground for a new trial where the court was not requested to instruct the jury to disregard it. 170**Minn**155, 212**NW**180.

1129-79 203**Cal** 621, 265**P**814; **MoA** 286**SW**428; **MoA** 18**SW(2d)**528; **NC** 154**SE**674(2dcase). [b] **In Nebraska.**-117**Nebr**809, 223**NW**663.

1129-80 177**Minn**13, 224**NW**259; **Miss** 119**S**824; 219**MoA**590, 282**SW**141 (doctor employed by insurance company); 81**Wash**526, 143**P**99.

1129-81½-New. There is no hard and fast rule requiring the court to penalize plaintiff by directing a mistrial because evidence that defendant is protected by indemnity insurance has gotten to the jury. 121 **Or**604, 256**P**641.

1129-81⅓-New. Where plaintiff by questionable practice gets such evidence before the jury, the trial court should direct a mistrial. 121 **Or**604, 256**P**641.

1129-81¼-New. Testimony by plaintiff's witness that plaintiff's employer carried compensation insurance did not require a mistrial, not being detrimental to defendant. 296**Pa**561, 146**A**141.

1129-81⅕-New. Admission of testimony relative to indemnity insurance is not error, where at the time it was admitted the insurance company was a party to the proceedings. **TexCommnA** 12**SW(2d)**990.

1129-81⅙-New. A showing in a deposition that defendant carried insurance is not reversible error where counsel did not properly mark objectionable matter and the court sustained objections, granted a motion to strike out, and directed the jury to disregard the testimony stricken. 203**Cal** 621, 265**P** 814.

1129-81⅐-New. It is not error for the court to refuse to discharge the jury because of a voluntary irresponsive statement of a witness, who was an assistant to a doctor employed by an insurance company, indicating that the insurance company would indemnify defendant. 219**MoA**590, 282**SW**141.

1129-81⅛-New. especially where the witness gave testimony tending to minimize plaintiff's injury. 219**MoA**590, 282 **SW**141.

1129-83 265**Mass**158, 163**NE**874; 134 **Misc**386, 235**NYS**445; 35**PortoRico** 506; **TexCivA** 280**SW**869. [a] (2) Resident injured in automobile accident, caused by nonresident in state, cannot proceed directly against insurer, where policy was issued in another state to resident in another state. 48**RI** 433, 138**A**186.

1130-85 245**NY**525, 157**NE**843; 296**Pa** 206, 145**A**813 (automobile public liability insurance). [a] **Construction of provision.**-33**F(2d)**235. [b] **Provision giving injured person right to sue when insured is insolvent** alters policy by modifying normal meaning of indemnity. **Pa** 152**A**104.

1130-85½-New. An injured person has no better or other rights than insured. 249**NY**21, 162**NE**571.

1130-86 [a] **Representative of insurer having authority to settle claim** against insured had power to accept injured person's ratification of release executed by latter's wife. 222**MoA**1098, 14**SW(2d)** 31.

1130-91 317 **Ill** 251, 148**NE**12.

1130-93 214**Ala**646, 108**S**761.

1130-96 27**F(2d)**76; 219**Ala**37, 121**S** 25; 221**Ky**114, 298**SW**182; 225**AppDiv** 49, 232**NYS**255 (effect of release); 296 **Pa**206, 145**A**813; 100**Vt**425, 138**A**780. See also 201**Cal** 672, 258**P**602; **CalA** 290 **P**628; See also 13**PaDist&Co** 69. [c] **Defenses.**-Lack of coöperation by automobile operator as insured in rendering insurer assistance in making defense may be good defense to action by injured party against insurer. 219**Ala**37, 121**S**25. [d] **Such action is not premature** where time for appeal from judgment against insured had expired, and no motion to set aside judgment was made, and no appeal taken therefrom, it being unnecessary to defer action full year, within which defendant could apply to set aside judgment. 97**CalA**434, 275**P**963. [e] **Injured person need not prove insolvency of insured** in such action. 97**CalA**434, 275**P**963. [f] **Insurer is not liable,** where there is no proof of insolvency or proceedings to charge insured's interest with judgment. 225 **AppDiv**451, 233**NYS**378. [g] **Evidence held sufficient** to show insolvency. 27 **F(2d)**76.

1130-97 **MoA** 17**SW(2d)**685.

1130-99½-New. The amount of an insurance fund is available only to those who prosecute their claims against insured, secure judgment, and proceed to enforce it. 50**RI** 275, 146**A**770.

1131-3½-New. Insurer's liability on "final determination after trial of issue" is held to warrant default judgment against it for person injured despite possibility of reversal of judgment against insured on appeal. 128 **Misc**456, 219**NYS**135.

1131-3½-New. Insurer is estopped to attack default judgment permitted against itself collaterally by motion to open, where there is prior judgment against insured. 128**Misc**456, 219**NYS** 135.

1131-4 27 **OhA**208, 161**NE**232.

1131-5 [a] **Policy providing for greater liability on part of insurer than that demanded by statute** is held not contrary to public policy or statute. **NJ Sup** 134**A**911.

1131-6 267**US**126, 45**SCt**320, 69**L ed**538 [aff 236**NY**577, 142**NE**290 (aff 206 **AppDiv**630, 198**NYS**949)]; 193**Wis**179, 212**NW**289; **Ont** [1929] 3**DomLR**662.

1131-8 **Can** [1930] 1**DomLR**609 (sufficiency of proof and defenses). [b] (3) St. (1925) § 8525 does not create liability or confer right of action where none exists under terms of policy, only effect thereof being to permit insurer to be made party defendant where policy creates liability. 194**Wis**293, 215**NW** 431. (4) Under Wis. St. (1927) § 8525, liability insurer is proper party defendant which may be sued directly. 33 **F(2d)**440. [c] **In New York.**-125**Misc** 65, 210**NYS**88. [d] **That insurer's obligation under the policy was greater than required by statute** is held no defense to such an action. **NJSup** 134**A** 911. [e] **In Ontario.**-**Ont** [1929] 3**Dom LR**662.

1131-8½-New. Such statute does not apply where the policy is issued without the state to a nonresident. 48**RI** 433, 138**A**186.

1131-9 37**F(2d)**449; **Mo** 318**SW(2d)**7. [b] (7) Person injured is subrogated to rights of insured. 265**Mass**158, 163**NE** 874. [c] (1) 247**NY**271, 160**NE**367. (3) 251**NY**51, 167**NE**169. (4) 247**NY** 271, 160**NE**367. (5) Statute providing that bankruptcy of insured shall not release insurer from liability to injured person does not deprive insurer of any defense it could urge against insured. 126**Misc**380, 213**NYS**522; 247**NY**271, 160**NE**367. (6) Provision in policy that no action shall be brought until "the amount of loss shall have been fixed either by a final determination of the litigation (against insured) after trial of the issue or by agreement," etc. is not defense to action on policy where damages of plaintiff have been fixed after judgment by default. 213**AppDiv** 152, 210**NYS**57. (7) In action by injured person against insurer to recover amount of judgment previously obtained against insured, insurer can assert any defense that it might have asserted in action by insured. 131**Misc**836, 228**NYS** 314. (8) Insured's written statement exonerating himself and different testi-

mony at trial held admissible to show failure of insured to coöperate in defense. 132Misc134, 229NYS257. (9) Where insured was in fact insolvent, it was not necessary for injured person to have execution returned unsatisfied. 134Misc499, 235NYS194. (10) Insurer of copartnership is not liable to injured person recovering judgment against partners individually, on which execution was returned unsatisfied. 251NY 205, 167NE222. (11) Proof of appointment of receivers for insured by judgment of federal court reciting insolvency of insured is sufficient to show insolvency of insured and that such insolvency was cause of return of execution unsatisfied. 226AppDiv429, 235NYS584. (12) Release of liability insurer, executed by bankrupt insured, which admitted his breach of contract by failing to give insurer immediate written notice of accident, though binding on insured, does not defeat injured tenant's right to recover from insurer, under insurance law. 225AppDiv49, 232NYS255. (13) Person injured stands in shoes of insured. 136Misc47, 239NYS203. [d] (3) General Law of 1923 is held not to authorize suit based on policy made in another state. RI 132A305. (4) Insurer has good defense against such action when notice of litigation against insured is not given as required by policy. 50 RI 166, 146A412. (5) Person injured in automobile accident, recovering judgment against owner of automobile which remained unsatisfied, is entitled to maintain separate action against owner's liability insurance carrier to recover amount of unsatisfied judgment under R. I. Gen. L. of 1923. 265Mass 158, 163NE874. [e] **In Ohio.**–21 OhA70, 152NE794; 21 OhA521, 153NE206; 25 OhNPNS72. (2) Under Gen. Code § 9510—3, 9510—4, action may be maintained against insurer by one who has recovered final judgment for loss or damage on account of bodily injury or death against insured. 115 OhSt472, 154NE736. [f] **In California.**–86CalA 671, 261P486. [g] **In Iowa.**–30F(2d) 654. [h] **In Kansas.**–129Kan650, 284P 823. [i] **In Missouri.**–MoA 24SW(2d) 211. [j] **In Ontario.**–[1930] 2DomLR1. [k] **In Wisconsin.**–200Wis585, 229NW 26. [l] **In British Columbia.**–[1929] 4 DomLR701.

1132–10 193Wis179, 212NW289. [b] **In Alabama.**–217Ala150, 115S174. [c] **In Wisconsin.**–197Wis303, 222NW221; 199Wis59, 225NW401.

1132–10½–New. A father had a right of action to recover for the death of his son, under California statute, authorizing recovery against insurer by injured person, or his heirs or personal representatives, in case death resulted from an automobile accident. 30F(2d)759.

1132–12 76CalA207, 244P936; **Or** 291 P495; 296Pa206, 145A813; 157Tenn 301, 8SW(2d)473; 150Wash278, 272P 736; **BC** [1930] 4DomLR654 (person driving automobile with permission of owner). See also 179Wis478, 192NW57. [b] **Employee of county** is held entitled to recover from company insuring policy for benefit of injured employees for injuries compensable under Workmen's Compensation Act and amounts to be measured by such law. 122Kan486, 252 P196. [c] **Other person entitled to benefit under policy** does not include executrix. 200Wis581, 229NW62.

1132–13 15 OhA392; **Wis** 229NW28. See also **NJSup** 143A3 (under terms of policy). [a] **Where policy gives judgment creditor right of action** against insurer if execution is returned unsatisfied in suit against insured and provides that insolvency or bankruptcy of insured shall not release insurer, unsatisfied execution is intended as proof of insured's insolvency. 11LaA 176, 123S162.

1132–14½–New. Right of injured person to recover on return of execution unsatisfied against assured's son is contingent on son's right to recover on payment of judgment. 41F(2d)470.

LIABLE

1132–4 315Mo 485, 286SW371.
1132–5 315Mo 485, 286SW371.
1132–13 125Me325, 133A693.
1132–15 [a] 125Me325, 133A693.

LIBEL AND SLANDER

1142–27 Mo 31SW(2d)1045.
1143–44 237 IllA349; 222Ky350, 300 SW907; 148Md569, 129A797, 799 [cit CJ]; 254Mass424, 150NE190; 128Misc 428, 219NYS233; 35 OhA343, 172NE 389; 122 Or408, 259P307; 159Tenn1, 15SW(2d)737(2dcase). [a] (1) 148Md 569, 129A797, 799 [citCJ]; 170Minn420, 212NW898, 899 [citCJ]. (10) 134SC 198, 132SE584, 46ALR558. (22) 134SC 198, 132SE584, 46ALR558. (75) "Any unprivileged, false and malicious publication which by printing, writing, signs, or pictures tends to expose a person to public scorn, hatred, contempt or ridicule constitutes an actionable libel." 148Md569, 129A797, 799 [citCJ].
1145–45 292Pa277, 141A50, 51 [quot CJ].
1145–46 [a] 123Kan550, 256P153, 154, 55ALR850; 120Kan3, 242P472; 80 Mont70, 258P242.
1145–47 Mo 31SW(2d)1045; TexCivA 1SW(2d)471, 474 [citCJ].
1145–56 108TexCr228, 300SW86.
1146–59 [a] (5) 158La352, 104S112. (6) "The maliciously defaming of a person in his reputation, profession or livelihood by words." 158La352, 104S 112 [quotWhart.L.D.]. [b] 33GaA620, 127SE790.
1146–67 93Fla1085, 113S378; 132 Or 82, 284P575.
1146–68 132 Or82, 284P575.
1146–77 199Wis124, 225NW742, 63 ALR1113. But see 149Md533, 131A762.
1146–82 248Mich8, 226NW669. [a] **Other definitions.**–Malice which may be implied or presumed from use of certain words. 190NC113, 129SE151.
1147–86 But see TexCivA 282SW334.
1147–90 TexCommnA 24SW(2d)361.
1147–91 149Md533, 131A762 (ill will).
1147–92 248Mich8, 226NW669.
1147–93 149Md533, 131A762. [a] **Other definitions.**–Malice in which there is ill will, grudge, desire to be avenged on particular person. 190NC113, 129SE 151.
1147–94 149Md533, 131A762.
1147–97 149Md533, 131A762.
1147–99 18F(2d)912; 149Md533, 131A 762.
1147–1 149Md533, 131A762; 254NY95, 172NE139.
1147–2 149Md533, 131A762.
1147–7 16F(2d)734.
1147–10 17F(2d)255.
1147–11 17F(2d)255.
1147–12 17F(2d)255.
1148–15 318 Ill 482, 149NE466.
1148–20 203 Iowa68, 212NW326; 254 Mass424, 150NE190; 80Mont70, 258P 242.
1148–22 203 Iowa68, 212NW326.
1148–23 148Md569, 129A797.
1148–28 22AlaA231, 115S80; 318 Ill 482, 149NE466; 121 Okl 241, 249P145, 49ALR253.
1148–37 [a] **"The right of the individual to rest secure** in the possession of his good name, fame and reputation is a valuable privilege, of which no one may deprive him through falsehood and malice without liability to him for the injury." 148Md569, 129A797.
1148–38 217Ala16, 114S357, 358 [cit CJ], 55ALR171; 124Kan657, 261P851.
1148–39 217Ala16, 114S357, 358 [cit CJ], 55ALR171.
1149–40 217Ala16, 114S357, 358 [cit CJ], 55ALR171.
1149–42½–New. Publication of decedent's picture without consent of his heirs or next of kin is not actionable. 129Misc417, 220NYS677.
1149–42½–New. Civil action for libel will not lie merely because publication may be punishable as libelous. 129 Misc417, 220NYS677.
1149–45 138 Okl 71, 280P419.
1149–46 138 Okl 71, 280P419.
1149–47 138 Okl 71, 280P419.
1149–48 217Ala16, 114S357, 358 [cit CJ], 55ALR171; 124Kan657, 261P851.
1149–55 267Mass166, 166NE550(2d case); 127Misc531, 217NYS117; 36 Okl ACR613.
1149–56 36GaA117, 135SE765.
1149–57 225Ky638, 9SW(2d)999; 138 Okl 71, 280P419.
1149–58 212Ala670, 103S842.
1150–62½–New. Neither strong words nor extravagant language constitutes libel or slander. 161La11, 108S107.
1150–62½–New. Putting in express language matter which is necessarily implied from nonlibelous language cannot be libelous per se. 127Misc531, 217NYS 117.
1150–62¼–New. A public announcement by a hotel proprietor that he has breached a contract to serve a banquet is not a libel against a person who arranged for the banquet where no libelous reason is given for the breach. 21 OhA422, 153NE213.
1150–68 TexCivA 1SW(2d)471, 473 [cit CJ].
1150–69 217Ala16, 114S357, 55ALR171; Mass 169NE491.
1150–71 13F(2d)186; 105Conn533, 136 A90; 138 Okl 71, 280P419.
1150–71½–New. Publication does not have to charge commission of crime to constitute libel. 80Mont70, 258P242.
1150–72 203 Iowa68, 212NW326; 315 Mo 1214, 289SW639, 642 [citCJ], 50ALR 268; 80Mont70, 258P242.
1150–73 17F(2d)255, 258 [citCJ]; 213 Ala655, 106S138; 203 Iowa68, 212NW 326, 327 [citCJ]; 124Kan657, 261P851; 120Kan3, 242P472, 474 [citCJ]; 210Ky 445, 276SW154; 80Mont70, 258P242; 129Misc408, 221NYS563; 128Misc428, 219NYS233; 130 Okl 76, 265P635; 115 Okl 280, 242P565; 159Tenn1, 15SW(2d) 737(2dcase).
1150–74 97Fla440, 121S459(2dcase); 203 Iowa68, 212NW326, 327 [citCJ]; 210Ky445, 276SW154; 166Minn173, 207 NW497; 74Mont326, 239P1035; 115 Nebr251, 212NW435, 50ALR1410; 121 Okl 241, 249P145, 49ALR253; 141SC51, 139SE189; 36 OklACR613. [a] 80Mont 70, 258P242.
1150–76 80Mont70, 258P242; 73Mont 253, 235P757; 74Mont326, 239P1035; 130 Okl 76, 265P635; 125 Or316, 266P 252, 254 [citCJ].
1150–76½–New. , and that an approbrious meaning. 80Mont70, 258P242.
1150–76½–New. In order for a publication to be libelous per se, it must show on its face that it refers to plaintiff. 74 Mont326, 239P1035.
1150–78 17F(2d)255, 258 [citCJ].
1151–82 17F(2d)255, 258 [citCJ]; 73 Mont253, 235P757.
1151–83 17F(2d)255, 258 [citCJ]; 73 Mont253, 235P757.
1151–84 17F(2d)255, 258 [citCJ]; 203 Iowa1095, 212NW557; 164La529, 114S 122; 122 Or408, 259P307; 125 Or316, 266P252; 91PaSuper117; TexCivA 5 SW(2d)170.
1151–88 210Ky445, 276SW154.
1151–90 210Ky445, 276SW154; 315Mo 1214, 289SW639, 642 [citCJ], 50ALR 268; 125 Or316, 266P252.
1151–91 41GaA102, 152SE131 (action properly limited to recovery of special damages); 148Md569, 129A797, 799 [cit CJ]; NM 289P590.
1151–97 148Md569, 129A797, 799 [quot CJ]; 74Mont326, 239P1035; 121 Okl 241, 249P145, 49ALR253.
1151–98 125Misc403, 211NYS571 [cit CJ] (in determining whether publication is libelous per se, surrounding circumstances must be taken into account, but not innuendo); 21 OhA422, 153NE 213.
1152–99 315Mo 1214, 289SW639, 642 [citCJ], 50ALR268; 125Misc403, 211 NYS571 (words needing innuendo are libelous per quod).
1152–1 115Nebr251, 212NW435, 50ALR 1410; 125Misc403, 211NYS571 (special damages proximately caused by words).
1152–2 148Md569, 129A797, 799 [cit CJ].
1152–4 [a] **Distinction between injury to reputation and to feelings** has been drawn in Louisiana case holding that damage is presumed in former, but not in latter, case. 164La529, 114S122.
1152–5½–New. In determining whether a published article is libelous per se, the court will view it stripped of all innuendo, colloquium, or extrinsic or

explanatory circumstances. 252 IllA 482.

1152-7 123Kan550, 256P153, 154 [quot CJ], 55ALR850.

1152-8 123Kan550, 256P153, 154 [quot CJ], 55ALR850.

1152-9 123Kan550, 256P153, 154 [quot CJ], 55ALR850.

1152-10 123Kan550, 256P153, 154 [quotCJ], 55ALR850. But see 124Kan 657, 261P851.

1152-16 217Ala16, 114S357, 358 [cit CJ], 55ALR171.

1152-17½-New. The distinction is merely in respect of the question as to whether imputed language is actionable per se. 217Ala16, 114S357, 55ALR 171.

1152-18 See also 134SC198, 132SE584, 46ALR558.

1152-20 148Md569, 129A797, 799 [quot CJ].

1152-22 217Ala16, 114S357, 55ALR171.

1153-31 6F(2d)644; 217Ala16, 114S 357, 55ALR171; 130Misc207, 223NYS 750, 761 [citCJ]; 122 Or408, 259P307.

1153-32 217Ala16, 114S357, 55ALR171; 80Mont70, 258P242, 245 [citCJ]; 128 Misc428, 219NYS233; TexCivA 286SW 926. [a] **Fact that letter is anonymous** may indicate that sender meant to attach to words vicious, rather than usual, meaning. 226AppDiv679, 233NYS 511.

1153-33 217Ala16, 114S357, 55ALR171.

1153-34 217Ala16, 114S357, 55ALR171; 121 Okl 241, 249P145, 49ALR253; 138 SC47, 136SE21, 23 [quotCJ].

1154-37 121 Okl 241, 249P145, 49ALR 253; 134SC198, 132SE584, 46ALR558; 45SC196, 143SE31.

1154-38 130Misc207, 223NYS750.

1154-39 121 Okl 241, 249P145, 49ALR 253. But see 80Mont70, 258P242.

1154-43 148Md569, 129A797, 799 [cit CJ].

1154-44 217Ala16, 114S357, 55ALR171.

1154-44½-New. Publication of plaintiff's picture and name in newspaper underneath caption "Held in Death" is held not libelous per se where picture was identified as that of plaintiff and article following applied to another person. TexCivA 286SW926.

1154-48 48Philippine429.

1155-58 252 IllA482.

1155-59 217Ala16, 114S357, 359 [cit CJ], 55ALR171.

1155-61 6F(2d)644; 20F(2d)763; 28 F(2d)701; 217Ala16, 114S357, 359 [cit CJ], 55ALR171; 244 IllA158; 220Ky 576, 295SW890; 229Ky495, 17SW(2d) 399(2dcase); 230Ky786, 20SW(2d)995; 265Mass544, 164NE463; 267Mass166, 166NE550(2dcase); 239Mich676, 215NW 3; 80Mont70, 258P242; Mont 287P633; 118Nebr718, 226NW329; 242NY208, 151NE209; 242NY208, 151NE209; 214 AppDiv230, 212NYS152; 138Misc310, 245NYS662; 194NC146, 138SE616, 53 ALR626; 198NC454, 152SE163; 130 Okl 76, 265P635; 138 Okl 71, 280P419; 115 Okl 280, 242P565; 121 Okl 241, 249P 145, 49ALR253; 36 OklACR613; 122 Or 408, 259P307; 45SC196, 143SE31, 53 [citCyc]; 155SC63, 152SE18; TexCivA 286SW926, 927, 928 [citCJ]; TexCivA 1SW(2d)387, 392 [citCJ]; TexCivA 1 SW(2d)471. [a] **Test as to whether newspaper article is slanderous** is sense in which ordinary reader will understand and construe it. TexCommnA 284 SW913.

1156-62 217Ala16, 114S357, 55ALR171.

1156-64 244 IllA158; 154Miss325, 122 8373; 130Misc207, 223NYS750. Contra 253Mass138, 148NE369.

1157-66 253Mass138, 148NE369. [a] **In absence of defendant's knowledge of meaning attached by others** to certain symbolical letters contrary to printed explanation accompanying their use in every one of its commercial rating books, it is not responsible for misinterpretation of their meaning. 253Mass138, 148 NE369.

1157-67 6F(2d)644; 84Colo 41, 268P 540; 252 IllA482; Mo 31SW(2d)1045; 80Mont70, 258P242; 194NC146, 138SE 616, 53ALR626; TexCivA 286SW926.

1157-68 6F(2d)644; 253Mass138, 148 NE369; 154Miss325, 122S373; MoA 287 SW650; 242NY208, 151NE209; 198NC 454, 152SE163.

1157-70 Or288P192.

1157-71 6F(2d)644; 217Ala16, 114S 357, 55ALR171; 124Kan657, 261P851; 120Kan194, 243P305; 228Ky483, 15SW (2d)306; 230Ky786, 20SW(2d)995; Mo 19SW(2d)650; MoA 287SW650; 80 Mont70, 258P242; 194NC146, 138SE616, 53ALR626; 36 OklACR613; 125 Or316, 266P252; 132 Or82, 284P575; 138SC47, 136SE21; TexCommnA 12SW(2d)165; TexCivA 274SW335; TexCivA 286SW 926, 927, 928 [citCJ]; TexCivA 1SW (2d)471, 473 [citCJ].

1158-72 6F(2d)644; 13F(2d)186; 124 Kan657, 261P851; 118Nebr718, 226NW 329; 128Misc428, 219NYS233; TexCivA 1SW(2d)471, 473 [citCJ]. [a] **Where headlines are libelous and article is** harmless, latter will not negative former. 128Misc428, 219NYS233.

1158-73 124Kan657, 261P851.

1158-73½-New. , nor the occasion for its publication. 118Nebr718, 226NW 329.

1158-74 128Misc428, 219NYS233.

1158-75 See also 5LaA637.

1158-76 [e] **"Threw" in statement** that plaintiff "threw a roulette game." 128Misc225, 218NYS285.

1159-78 CalA 285P418; 252NY266, 169 NE380.

1159-80 20F(2d)763.

1159-81 216Ky660, 288SW297, 298 [quotCJ].

1160-87 35 OhA343, 172NE389.

1160-88 TexCivA 286SW926.

1161-1 See also 40F(2d)451 (when defamatory words reflect on every member any member may sue).

1161-7 Utah 283P1065.

1162-8 MoA 9SW(2d)543; Utah 283P 1065.

1162-9 DC 38F(2d)151; 131Misc919, 229NYS293.

1163-19 217Ala16, 114S357, 55ALR 171; CalA 285P418; CalA 288P680 (words besmirching character generally); 120Kan3, 242P472; Mo 31SW(2d) 1045; 242NY208, 151NE209; 128Misc 428, 219NYS233; 228AppDiv277, 239 NYS411; 194NC146, 138SE616, 53ALR 626; 124 Okl 167, 254P736, 51ALR1066; 124 Okl 202, 254P975; 121 Okl 241, 249 P145, 49ALR253; 36 OklACR613; 122 Or408, 259P307; 132 Or82, 284P575; TexCivA 18SW(2d)471; Va 152SE539. But see 206 Iowa592, 217NW555. [g] **Words held not libelous per se.**–214App Div392, 212NYS219.

1164-20 217Ala16, 114S357, 55ALR171; 203Cal270, 263P812; 84Colo 41, 268P 540; 242 IllA198; 120Kan3, 242P472; 214AppDiv198, 212NYS26; 121 Okl 241, 249P145, 49ALR253 [overr Okl 151P 572]; 148Wash295, 268P893, 897 [cit Cyc].

1164-21 Mo 31SW(2d)1045; 214App Div198, 212NYS26; Okl 249P145, 49 ALR253 [overr 121 Okl 241, 151P572].

1164-25 128Misc428, 219NYS233; 194 NC146, 138SE616, 53ALR626; 36 Okl ACR613; 122 Or408, 259P307, 310 [quot CJ]. [a] (1) 242NY208, 151NE209 (newspaper article that married woman of fair repute was latest ladylove of man other than her husband, and that there was reported match between them); 128Misc428, 219NYS233; 122 Or 408, 259P307; 159Tenn1, 15SW(2d) 737(2dcase); Man [1930] 4DomLR601. (2) "Impossible from any moral point of view." 214AppDiv198, 212NYS26. [b] (1) CalA 285P418; 80Mont70, 258 P242; 252NY266, 169NE380; 162Misc 169, 229NYS662; 36 OklACR613. [d] **Publication tending to disgrace plaintiff** and bring him into ridicule and contempt is libelous per se. 242NY208, 151NE209. [e] **Mere fact that writing might lessen to some degree standing in regard to others** is not sufficient to cause tendency to expose one to public contempt, ridicule, aversion, or disgrace. 127Misc531, 217NYS117.

1165-26 36 OklACR613.

1165-31½-New. Any printed or written publication falsely imputing to another a crime or moral delinquency is actionable per se, without proof of special damages. 106WVa419, 145SE751 (2dcase).

1165-35 [a] **In Nebraska.**–115Nebr251, 212NW435, 50ALR1410.

1165-36 217Ala16, 114S357, 55ALR171.

1165-37 230Ky786, 20SW(2d)995.

1165-39 206 Iowa51, 220NW51, 55 [cit CJ], 58ALR1147.

1165-40 217Ala16, 114S357, 55ALR171; 180Ark695, 22SW(2d)562. [e] **"A half-breed Mexican"** is not slanderous per se. 115Nebr251, 212NW435, 50ALR 1410.

1166-45 [a] **Words held not slanderous per se.**–161La24, 108S112.

1166-50 149Va906, 141SE860. See also 124Kan657, 261P851. [a] 152Miss 158, 119S161. [c] **Construction of statutes.**–149Va906, 141SE860.

1167-62 220Ky363, 295SW138, 53ALR 547; 134SC462, 133SE99, 100, 45ALR 1112 [citCJ].

1167-63 36GaA812, 138SE247; 233Ky 706, 26SW(2d)561; 13LaA448, 128S 182; 54SD608, 224NW230.

1167-65 [d] **Charge that plaintiff** was "eat up with clap" is actionable per se. 220Ky576, 295SW890.

1167-69 59 OntL355, [1926] 4DomLR 202 [app allowed on other grounds 59 OntL590, [1927] 1DomLR163]; 59 OntL 590, [1927] 1DomLR163.

1167-70 121 Okl241, 249P145, 148 [cit CJ], 49ALR253 (evasion of military service).

1167-76 203Cal 270, 263P812; 84Colo 41, 268P540; 214AppDiv198, 212NYS 26 ("biggest crook out of jail"); 128 Misc428, 219NYS233; 150SC459, 148SE 478. See also 6F(2d)644. [d] **Words held to impute dishonesty.**–134SC198, 132SE584, 46ALR558.

1168-80 246 IllA318; 252 IllA61; 131 Misc763, 227NYS729.

1168-81 9PaDist&Co 379.

1168-83½-New. A double-crosser. 122 Or408, 259P307.

1169-92 242 IllA379, 381 [quotCJ]. See also 36GaA117; 135SE765; 193App Div777, 184NYS570 ("crook"). But see 97Fla440, 121S459(2dcase).

1169-96½-New. a crook, 133Misc190, 231NYS849.

1169-3 242 IllA379.

1169-7 17F(2d)255, 258 [citCJ]; 20F (2d)763.

1169-8 20F(2d)763.

1169-9 17F(2d)255; 20F(2d)763.

1169-12 17F(2d)255.

1170-18 217Ala12, 115S88.

1170-22 163La773, 112S716. [a] 10 LaA306, 121S680.

1170-29 121 Okl 241, 249P145, 148, [cit CJ], 49ALR253; 122 Or408, 259P307. [c] **"Leading case** is Jones v. Greeley, 25 Fla629, 6S448." 121 Okl 241, 249P145, 148, 49ALR253.

1170-30 120Kan3, 242P472, 474 [cit Cyc].

1170-31 220Ky363, 295SW138, 53ALR 547.

1170-33 103NJL213, 136A425. [a] 103 NJL213, 136A425.

1171-34 But see Mont 287P633. [b] **Symbolical letters accompanied by explanation** made honestly and in good faith published as rating of plaintiff by mercantile credit agency in its book of commercial ratings held not libelous. 253Mass138, 148NE369.

1171-36 127Misc531, 217NYS117.

1171-38 212Ala670, 103S842, 844 [cit CJ]; Mont 287P633 (refusal to pay debt); 127Misc531, 217NYS117.

1171-39 134SC276, 132SE587.

1171-49 201 Iowa550, 207NW574.

1172-52 139 Okl 262, 281P967, 66ALR 1246.

1172-55 227AppDiv575, 238NYS296 (circulating poison pen letters); 132 Or 82, 284P575; TexCivA 4SW(2d)656, 660 [citCJ].

1172-58 130 Okl 76, 265P635. [a] **As to such man's wife,** such publication not of itself libel. 130 Okl 76, 265P635.

1172-61 See also 191NC749, 133SE92.

1172-63 130Misc207, 223NYS750, 759 [citCJ].

1173-79 130 Okl 76, 265P635.

1173-85 217Ala12, 115S88; 22AlaA231, 115S80; 105Conn533, 136A90; 203 Iowa 1095, 212NW557. [a] 203 Iowa1095, 212 NW557; 178Minn61, 225NW906.

1174-92 13LaA448, 128S182.

1175-9 154Miss325, 122S373.

1175-9½-New. In some jurisdictions spoken words charging a man with gross

immorality are slanderous per se. 115 Okl 280, 242P565 (charging married man with pandering for his wife and another woman at hotel).

1175-11 33GaA620, 127SE790.

1175-13 217Ala16, 114S357, 55ALR 171; 154SC53, 151SE105(1stcase).

1175-22 Mont 285P668.

1176-25 [a] 97Fla440, 121S459(2d case); 203 Iowa1095, 212NW557. [c] 203 Iowa1095, 212NW557.

1177-38 220MoA1283, 290SW1017.

1177-40 88 IndA122, 163NE526; Mont 285P668.

1177-49 154Miss325, 122S373.

1178-67 See also 133Misc853, 233NYS 297.

1179-81 [g] **Statements held insufficient.**–217Ala16, 114S357, 55ALR171.

1180-2 CalA 288P680; 36GaA15, 135SE 110; 36GaA812, 138SE247; 216Ky660, 288SW297; 73Mont253, 235P757; 315 Mo1214, 289SW639, 50ALR268; 251NY 250, 167NE432; 223AppDiv286, 228NYS 194; 128Misc100, 218NYS233; 133Misc 853, 233NYS297; 194NC146, 138SE616, 620, 53ALR626, [citCJ]; 124 Okl 202, 254P975; 6PaDist&Co 73; TexCivA 296 SW616. [b] **Statutory definition.**–49SD 373, 206NW576.

1180-3 244 IllA158; 315Mo 1214, 289 SW639, 50ALR268; MoA 285SW102; 128Misc428, 219NYS233; 194NC146, 138 SE616, 620, 53ALR626, [citCJ]; 57ND 438, 222NW455; 124 Okl 202, 254P975; 6PaDist&Co 73; Utah 283P1065.

1180-4 36GaA15, 135SE110; 36GaA 812, 138SE247; 37GaA650, 141SE328; 229Ky578, 17SW(2d)709, 66ALR1497; 315Mo 1214, 289SW639, 50ALR268; 115 Okl 280, 242P565.

1180-5 22F(2d)520; 38GaA632, 144SE 821; 206 Iowa592, 217NW555, 556 [quot CJ]; 220Ky363, 295SW138, 53ALR547; 228Ky483, 15SW(2d)306; 148Md569, 129A797; 73Mont253, 235P757; 131 Misc919, 229NYS293; 130Misc207, 223 NYS750; 194NC146, 138SE616, 620, 53 ALR626, [citCyc]; 124 Okl 202, 254P 975. [a] TexCivA 18SW(2d)387.

1181-8 315Mo 1214, 289SW639, 50ALR 268; 131Misc312, 226NYS451.

1181-9 194NC146, 138SE616, 620, 53 ALR626, [citCyc].

1181-11 80Mont70, 258P242.

1181-13 80Mont70, 258P242, 245 [cit CJ].

1181-14 124 Okl 202, 254P975.

1181-15 TexCivA 18SW(2d)387. [a] **Rule held inapplicable to member of legislature.** TexCivA 48SW(2d)656.

1182-16 MoA 287SW650; 80Mont70, 258P242, 245 [quotCJ].

1182-18 See also 128Misc428, 219NYS 233.

1182-19 73Mont253, 235P757 (allegations as to road supervisor that "he does not give to the county value received for the money he draws from the public funds, that he does not put in full time, but draws warrants for full time that when working, or pretending to be working, he will have teams standing on the public road but not working at least 50 per cent. of the time" held not libelous per se).

1182-20 194NC146, 138SE616, 620, 53 ALR626, [citCyc].

1182-24 107Conn122, 139A634; 36GaA 15, 135SE110.

1182-26½–New. "Poses as a Mason in good standing" in connection with a candidate for nomination of state senator and a Mason is not libelous per se. 224 IllA569.

1182-26½–New. "Pose" is not synonymous with "imposter" and is not libelous per se. 224 IllA569.

1182-28 194NC146, 138SE616, 620, 53 ALR626 [citCyc].

1183-31 13F(2d)186, 193 [quotCJ].

1183-47 Utah 283P1065.

1184-51 130Misc207, 223NYS750.

1184-59 106Conn127, 137A390; 148SC 8, 145SE541. [a] **Publications held not libelous per se.**–NM 289P590.

1185-71 165La398, 115S633.

1185-73 225Ky638, 9SW(2d)999.

1185-74 165La398, 115S633.

1185-78 194NC146, 138SE616, 620, 53 ALR626 [citCyc].

1185-84½–New. or ignorance, discourtesy, and lack of manners. 194NC146, 138SE616, 53ALR626.

1185-85 194NC146, 138SE616, 53ALR 626.

1186-10 205 Iowa1146, 217NW83 (town marshal); 228Ky483, 15SW(2d)306; TexCommnA 2SW(2d)833.

1186-12 234Ky683, 28SW(2d)991. But see TexCivA 290SW212. [a] **Charges held not libelous.**–246 IllA318.

1186-13 TexCivA 3SW(2d)900.

1186-19½–New. superintendent of a hospital. 36GaA15, 135SE110.

1186-20½–New. town supervisor, 131 Misc919, 229NYS293.

1187-25 [b] **Magazine article** held libelous per se. 214AppDiv437, 212NYS478.

1187-28 118 Or568, 247P815.

1187-30 130Misc18, 223NYS549.

1187-35 124 Okl 202, 254P975, 977 [quotCyc]. [c] **Statements held not libelous.**–206 Iowa592, 217NW555. [d] **Statements held libelous.**–206 Iowa592, 217NW555.

1188-36 124 Okl 202, 254P975, 977 [quotCyc].

1188-49 TexCivA 4SW(2d)656.

1188-52 Mo 19SW(2d)650 (newspaper article held not libelous per se under facts). [a] **Criticizing qualifications for office** not libelous. 89CalA324, 264 P803.

1189-54 107Conn122, 139A634. [a] **Letter held libelous per se.**–126Misc 202, 213NYS135. [b] **That manufacturer of X-ray machines was about to sell business,** about to discontinue business, about to leave field as supplier of X-ray machines, has been held actionable per se. 124Misc898, 210NYS299. (3) Publication by local jeweler criticizing salesmen of competitor by calling them "sharks." 151Va985, 145SE 731.

1189-57 134SC462, 133SE99, 45ALR 1112.

1189-63 127Misc531, 217NYS117.

1189-66 171Ark1085, 287SW391; 36 GaA812, 138SE247; 159La1041, 106S 558.

1189-67 171Ark1085, 287SW391. [b] **Ability of coach** not libelled. 254NY95, 172NE139.

1190-68 170Minn420, 212NW898. [b] **Immorality.**–209Ky710, 273SW529.

1190-84 13F(2d)186; 203Cal 26, 263P 240; 315Mo 1214, 289SW639, 50ALR 268; 223AppDiv286, 228NYS194; 131 Misc919, 229NYS293; 128Misc428, 219 NYS233; 148Wash295, 268P893. See also 6F(2d)644. [d] **Writing of road supervisor** that "he does not put in full time, but draws warrants for full time" is libellous per se. 73Mont253, 235P 757. [e] **Words need not impute commission of crime.**–315Mo 1214, 289SW 639, 50ALR268. [f] **Statement that suit had been brought against plaintiff** for price of goods sold and delivered is not libelous per se. 8PaDist&Co 597.

1190-85 28F(2d)701; 128Misc428, 219 NYS233.

1191-91 77Mont74, 249P664; Tex CommnA 2SW(2d)833. [a] **Charging irregularities.**–Mo 19SW(2d)650.

1191-7 87PaSuper358; 6PaDist&Co 187.

1191-9 252 IllA92.

1192-21 TexCivA 282SW854.

1192-22 206 Iowa51, 220NW51, 53 [cit CJ], 58ALR1147; 229Ky578, 17SW(2d) 709, 66ALR1497; 159La1041, 106S558. [a] See also 206 Iowa51, 220NW51, 53 [quotCJ], 58ALR1147.

1192-22½–New. Tending to disinherit. Words tending to disinherit a person are actionable per se. 220Ky363, 295 SW138, 53ALR547.

1192-26 37GaA684, 141SE423; 245NY 590, 157NE870; 122 Or408, 259P307; 45 SC196, 143SE31; TexCivA 286SW926. [b] TexCivA 290SW212.

1193-27 168La1125, 123S804 (charging that clerk of court caused deputy to destroy records in criminal case).

1193-28 122 Or408, 259P307.

1193-34 97Fla440, 121S459(2dcase).

1193-39 141SC251, 139SE614, 618 [cit CJ], 54ALR1348.

1193-43 206 Iowa51, 220NW51, 53 [cit CJ], 58ALR1147; 141SC251, 139SE614, 618 [citCJ], 54ALR1348.

1193-44 217Ala16, 114S357, 55ALR 171; 141SC251, 139SE614, 618 [citCJ]; 54ALR1348.

1193-47 213Ala655, 106S138; 206 Iowa51, 220NW51, 58ALR1147; 220Ky 363, 295SW138, 53ALR547; 232Ky94, 22SW(2d)421; 131Misc640, 227NYS 641; 91PaSuper117. [a] 203 Iowa68, 212NW326. [b] Contra 230AppDiv 312, 244NYS176 [disappr 193AppDiv 777, 184NYS570]. [c] **"Pimp"** held slanderous and actionable per se. 245 NY590, 157NE870.

1194-53 213Ala655, 106S138, 139 [cit Cyc].

1194-58½–New. The crime charged need not be one embraced in the statute setting out the acts for which a person may be prosecuted criminally for the offense of slander. 217MoA613, 274 SW969.

1194-59 206 Iowa51, 220NW51, 53 [quotCJ], 58ALR1147.

1195-66 206 Iowa51, 220NW51, 53 [quot CJ], 58ALR1147.

1195-67 217MoA613, 274SW969.

1195-70 213Ala655, 106S138; 206 Iowa51, 220NW51, 53 [citCJ], 58ALR 1147 (charge of drunkenness against person as individual not slanderous per se); MoA 22SW(2d)73; 141SC251, 139 SE614, 618 [quotCJ], 54ALR1348.

1195-71 141SC251, 139SE614, 618 [quotCJ], 54ALR1348.

1195-77 See also 218AppDiv514, 219 NYS57.

1196-83 213Ala655, 106S136; 125 Or 316, 266P252.

1196-84 213Ala655, 106S138.

1196-92 TexCivA 4SW(2d)656.

1197-6 214AppDiv230, 212NYS152 (words alleging crime in place of publication).

1197-19 TexCommnA 12SW(2d)165.

1198-20 138 Okl 71, 280P419. [a] **Statement that person has been made defendant** in unnamed criminal action is not actionable per se. 125 Or316, 266P252.

1198-28 Alta [1928] 3DomLR538.

1198-30 124 Okl 167, 254P736, 51ALR 1066.

1198-32 131Misc919, 229NYS293, 295 [citCJ].

1199-45 152Miss128, 118S717; MoA 9 SW(2d)543.

1199-51 MoA 9SW(2d)543.

1199-59 213Ala655, 106S138.

1199-60 122 Or408, 259P307.

1199-61 45Philippine211.

1200-75 84Colo 41, 268P540.

1200-82 233Ky781, 26SW(2d)757.

1201-9 , or changing ballots. Wis 232 NW564.

1201-10 199Wis124, 225NW742, 63 ALR1113. [a] **Words held to charge complicity.**–123NY420, 25NE1048.

1201-12 [a] TexCivA 18SW(2d)387.

1202-18 [a] 41GaA315, 152SE854(2d case) ("short" a certain sum).

1202-19 244 IllA158; 138SC47, 136SE 21, 23 [citCJ].

1202-21 213Ala99, 104S25.

1203-41 217Ala12, 115S88; 22AlaA 231, 115S80.

1203-45½–New. A newspaper article, stating that a certain named person was in the company of another at the time such other person committed a murder, in accordance with a confession secured by officers from a person who claimed to be present at such time, is libelous per se. 106WVa419, 145SE 751(2dcase).

1203-46 115Nebr251, 212NW435, 50 ALR1410.

1204-54 124Kan278, 259P687; 178 Minn61, 225NW906; 129Misc351, 221 NYS429, 431 [quotCyc].

1204-55 [b] **Words held to impute crime.**–214AppDiv230, 212NYS152 (that one indorsed checks, deposited them personally with another with instructions to hold amount pending further instructions, and that latter used such money to reimburse himself in full for money advanced by him).

1204-58 129Misc351, 221NYS429, 431 [quotCyc].

1204-59 129Misc351, 221NYS429, 431 [quotCyc].

1204-60 91PaSuper117.

1206-61 220Ala377, 125S393; 180Ark 695, 22SW(2d)562; MoA 22SW(2d)73.

1206-69 [a] **"Why did you take the children, and pack my strips and slabs,**

and put them in your yard" held not slanderous. 215Ky121, 284SW1012.
1207-83 232Ky94, 22SW(2d)421; 132 SC193, 129SE679 (that money not turned in by insurance collector had been stolen has been held slanderous).
1208-98 MoA 284SW857, 860 [citCJ].
1208-1 230AppDiv461, 245NYS393.
1208-3 10LaA306, 121S680; MoA 22 SW(2d)73.
1209-11 See also 198NC454, 152SE163.
1209-12 TexCommnA 12SW(2d)165.
1209-19 106Conn127, 137A390.
1213-75 But see 252 IllA482.
1213-85 Va 152SE539.
1214-6 [a] **Publishing that plaintiff** was fined for vagrancy held libelous per se. TexCivA 292SW594.
1214-10½-New. or with being a "pimp." 218AppDiv514, 219NYS57.
1214-12½-New. malicious mischief, 217MoA613, 274SW969.
1214-15 115 Okl 280, 242P565.
1214-21½-New. or with blowing up dipping vat in violation of statute, 213 Ala655, 106S138.
1214-23½-New. or a dope fiend, 203 Iowa68, 212NW326.
1214-24 239Mich676, 215NW3. [a] **Scienter is indispensable** in action for making false or malicious statements. 136Misc727, 240NYS417. [b] **Statement held not false.**–136Misc727, 240 NYS417.
1214-30 121 Okl 241, 249P145, 49ALR 253.
1214-32 121 Okl 241, 249P145, 49ALR 253.
1215-34 152Miss128, 118S717.
1215-36 33GaA620, 127SE790; 6LaA 708 (slander); TexCivA 282SW334; 199 Wis124, 225NW742, 63ALR1113.
1215-40 16F(2d)734.
1215-43 16F(2d)734; 18F(2d)912; 33 GaA620, 127SE790; 201 Iowa550, 207 NW574; 203 Iowa1095, 212NW557; 203 Iowa628, 213NW274; 207 Iowa 576, 223NW375; 228Ky483, 15SW (2d)306; 233Ky781, 26SW(2d)757; 159 La1041, 106S558; 13LaA448, 128S182; MoA 284SW857; MoA 285SW102; 315 Mo 1214, 289SW639, 50ALR268; MoA 296SW855; MoA 9SW(2d)543; 117Nebr 813, 223NW4; 103NJL213, 136A425; 123NY420, 25NE1048; 133Misc853, 233 NYS297; 189NC658, 127SE710; 288Pa 78, 134A486, 48ALR567; 159Tenn1, 15 SW(2d)737(2dcase); TexCivA 282SW 334; TexCivA 16SW(2d)931.
1216-44 16F(2d)734; 82Mont30, 264P 937; 87PaSuper358; TexCommnA 2SW (2d)833; 151Va985, 144SE624.
1217-45 Va 152SE539.
1217-49 [a] (1) 106Conn127, 137A390.
1217-50 18F(2d)912, 917 [citCJ].
1217-51 18F(2d)912, 917, [citCJ].
1217-52 18F(2d)912, 917 [citCJ].
1217-56 16F(2d)734; 159La1041, 106S 558.
1217-57 16F(2d)734.
1218-72 16F(2d)734; 87CalA246, 262P 78(3dcase); 90CalA390, 266P320; 237 Mich603, 213NW172; 83NH501, 144A 787; NJSup 131A615; TexCivA 4SW (2d)656.
1218-73 16F(2d)734; 209Ky710, 273 SW529, 530 [citCJ]; 252NY490, 169NE 656 (privilege not applicable); 288Pa 78, 134A486, 48ALR567; 6PaDist&Co 73.
1218-77 NJ 131A615. [a] **Necessity for stating grounds at time of utterance.**–NJ 131A615.
1218-82 93Fla1085, 113S378.
1218-85 233Ky706, 26SW(2d)561.
1218-88 255 IllA503; TexCivA 282SW 334.
1219-90 5F(2d)25; 16F(2d)734; 84 Colo 41, 268P540; 209Ky710, 273SW 529, 530 [citCJ]; 149Md533, 131A762; TexCivA 5SW(2d)170.
1219-92 36GaA15, 135SE110; 149Md 533, 131A762; 235Mich568, 209NW814; NJ 131A615; 6PaDist&Co 73; 143Va 644, 129SE696 (language disproportionate to occasion may raise inference of malice).
1219-93 36GaA15, 135SE110; 255 IllA 503; 149Md533, 131A762; 235Mich568, 209NW814; TexCivA 5SW(2d)170, 174 [citCJ]; 59OntL355, [1926] 4DomLR 202 [app allowed on other grounds 59 OntL590, [1927] 1DomLR163].
1220-94 16F(2d)734; 86Colo483, 283P 48; 106Conn127, 137A390; 33GaA620, 127SE790; 237 IllA236; 209Ky710, 273 SW529; 228Ky483, 15SW(2d)306; 161 La38, 62, 108S117 [citCJ]; 149Md533, 131A762; 154Md604, 141A416; 235Mich 568, 209NW814; 237Mich603, 213NW 172; NJ 131A615; 189NC658, 127SE 710; Or 288P192; 150Va301, 143SE 631.
1221-95 149Md533, 131A762.
1221-96 149Md533, 131A762.
1221-97½-New. In an action for libel based on actual malice alone, question of qualified privilege is not important. TexCommnA 285SW810.
1221-99 5F(2d)25 (qualified privilege); 16F(2d)734; 228Ky483, 15SW(2d)306; 149Md533, 131A762; 6PaDist&Co 73; 159Tenn413, 19SW(2d)255 (shifts burden of showing malice).
1221-2 TexCommnA 24SW(2d)361; 104 WVa168, 139SE650, 54ALR1139.
1222-3 125Kan715, 266P78.
1222-4 87CalA246, 262P78(3dcase); 150Va301, 143SE631. But see 228Ky 677, 15SW(2d)496.
1222-5 TexCivA 282SW854. [a] **Qualifiedly privileged report** of state budget director as to financial standing of highway contract bidders carries presumption of good faith. 233Mich268, 206NW 556.
1222-7 16F(2d)734.
1222-8 16F(2d)734; 84Colo 41, 268P 540; 149Md533, 131A762; 154Md604, 141A416; 318Mo112, 298SW837; Mo 23SW(2d)45; 21 OhA454, 153NE248; Or 288P192; 145SC53, 142SE828, 837 [citCyc per Cothran, J, dis op]; Tex CivA 282SW334; TexCivA 282SW854; TexCivA 12SW(2d)680; TexCivA 16SW (2d)380; 150Va301, 143SE631; 151Va 985, 145SE731; 104WVa168, 139SE650, 54ALR1139; 197Wis432, 222NW451.
1223-13 104WVa168, 139SE650, 54ALR 1139.
1223-14 241NY327, 150NE132, 43ALR 880.
1223-17 TexCivA 282SW334.
1223-23 209Ky710, 273SW529.
1223-32 126Misc202, 213NYS135 (dictum).
1223-34 Ala 129S267; 203Cal 26, 263 P240; 33GaA620, 127SE790; 161La24, 108S112; 134SC198, 132SE584, 46ALR 558; 159Tenn413, 19SW(2d)255. [c] **In Alabama.**–129S267 (understatute).
1224-41 Va 152SE539.
1224-44 Ala 129S267; 203Cal 26, 263 P240; 124Kan278, 259P687; 134SC198, 132SE584, 46ALR558.
1224-47½-New. Ordinary relation of attorney and client does not make client liable for libelous newspaper article written by reporter and based on information obtained in part from attorney where unknown and unauthorized by client. 124Kan278, 259P687.
1224-49 139 Okl 262, 281P967, 66ALR 1246.
1224-50 161La24, 108S112.
1224-53 Ala 129S267; 118Nebr125, 223 NW649(2dcase); 189NC658, 127SE710.
1225-54 150Va301, 143SE631.
1225-55 Ala 129S267.
1225-65½-New. Communication to plaintiff's attorney in reply to letter from attorney does not constitute publication. 126Misc202, 213NYS135.
1225-65½-New. Dictating letter to amanuensis without requesting that it be confidential constitutes libel. 163 La505, 112S397.
1225-67 137Misc457, 244NYS28; 230 AppDiv461, 245NYS393; BC [1929] 4 DomLR420.
1225-72 Contra 245NY204, 156NE666.
1225-74 159Tenn413, 19SW(2d)255.
1226-80 130 Or119, 279P267, 65ALR 1042 (reading by blind man's wife of letter written to him).
1226-83 See also 126Misc202, 213NYS 135 (communication of wife to husband).
1227-9 84Colo 41, 268P540.
1227-10 217Mo 613, 274SW969, 973 [citCyc].
1227-12 118Nebr125, 223NW649(2d case); TexCivA 16SW(2d)931.
1228-19 [b] **Testimony of defendant** that she referred to plaintiff in letter in which plaintiff's name was not mentioned is not publication. 21 OhA454, 153NE248.
1228-20 Minn 232NW625.
1228-24½-New. A letter written to, and opened and read by, an attorney for the party libeled in response to a demand and in the course of an explanatory reply is not a publication. 159 Tenn413, 19SW(2d)255.
1230-63 Ala 129S267; Ala 129S574; Tex CivA 8SW(2d)809; 104WVa168, 139SE 650, 54ALR1139.
1230-64 104WVa168, 139SE650, 54 ALR1139.
1230-65 104WVa168, 139SE650, 54 ALR1139.
1231-80½-New. The second reading by a blind man's wife of a letter received by him is not a publication of libel by the husband. 130 Or119, 279P267, 65 ALR1042.
1231-82 104WVa168, 139SE650, 54 ALR1139.
1231-91 36GaA812, 138SE247; 38GaA 632, 144SE821; 206 Iowa51, 220NW51, 53ALR1147; 168La1125, 123S804; Tex CivA 8SW(2d)809.
1231-1 Va 152SE539.
1232-5 215Ala126, 110S143; 203Cal 26, 263P240; 87CalA246, 262P78(3d case); 160Ga461, 128SE672; 33GaA 620, 127SE790; 203 Iowa628, 213NW 274; 221Ky765, 299SW967, 55ALR964; 158La54, 103S440; 165La398, 115S633; 1LaA420; 151Md285, 134A214; 239 Mich676, 215NW3; 151Miss852, 119S 827; 138Misc310, 245NYS662; 189NC 658, 127SE710; 31 OhA340, 167NE469; TexCivA 18SW(2d)387; TexCivA 16SW (2d)380; TexCivA 28SW(2d)269. [b] **Defamatory charge unjustified** when it exceeds truth. 241NY327, 150NE132, 43ALR880.
1232-6 TexCivA 3SW(2d)900.
1232-10 Mo 19SW(2d)650.
1232-13 158La54, 103S440.
1233-17 152Miss128, 118S717.
1233-20 [a] **Defamatory charge held unjustified.**–241NY327, 150NE132, 43 ALR880.
1233-25 Va 152SE539.
1233-29 130Misc207, 223NYS750; 45 SC196, 143SE31, 54 [citCJ]; TexCivA 3SW(2d)900. [a] (2) Defendant must show that charge as whole was true to be relieved of liability. 241NY327, 150NE132. [c] **Defamatory charge** which exceeds truth is not justified. 241NY327, 150NE132.
1234-30 Sask [1928] 4DomLR4.
1234-31 226AppDiv535, 235NYS340.
1234-35½-New. Defamatory article is not justified where justification failed to substantiate imputation of hypocrisy and corruption. 130Misc207, 223NYS 750.
1234-37 Mo 19SW(2d)472; Sask [1928] 4DomLR4.
1234-43 33GaA620, 127SE790; 103 NJL213, 136A425.
1235-48 33GaA620, 127SE790. [a] **Source of information** admissible in mitigation. 222AppDiv213, 225NYS564.
1235-52 222AppDiv213, 225NYS564.
1236-63½-New. Self-defense does not excuse libel not on its face a retort and which makes no reference to any occasion or need of self-defense. 130Misc 207, 223NYS750.
1236-64 45Philippine211. [a] **Previous conviction of crime no defense.**–45 Philippine211.
1236-65½-New. Opposition to two particular public measures is no justification for charge that plantiff was an "unprincipled character." 241NY327, 150NE132.
1237-75 [a] **Insufficient plea** is to be considered on malice only where unsupported by evidence. 153Va762, 151 SE149.
1238-80 36GaA812, 138SE247 (dictum); 87PaSuper358; 6PaDist&Co 73; 145SC53, 142SE828, 837 [citCycper Cothran,J,dis op]; TexCivA 296SW616; Va 155SE683.
1238-81 Mo 279SW415, 425 [quotCJ].
1238-85 33GaA620, 127SE790; 233 Mich268, 206NW556.
1238-86 33GaA620, 127SE790; 233 Mich268, 206NW556.
1238-94 Can [1928] 2DomLR97.
1239-95 120 Or197, 251P719, 720 [quot CJ entire paragraph].

1239-93 120 Or197, 251P719, 720 [quot CJ].
1239-1 120 Or197, 251P719, 720 [quot CJ].
1239-1½-New. To make the defense of privilege complete, good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons must concur. 37GaA684, 141SE 423.
1239-2 13F(2d)186.
1239-3 13F(2d)186. [a] **No communication made without truth and fairness** can be privileged, fully or qualifiedly. TexCivA 16SW(2d)931.
1239-9½-New. Attachment defendant's letter to sheriff containing scandalous accusations as to professional conduct of attorneys obtaining writ held not privileged. 163La505, 112S397.
1239-12 29PortoRico 933.
1240-17 233Mich268, 206NW556.
1240-18 233Mich268, 206NW556; 129 Misc408, 221NYS563; TexCivA 296SW 616.
1240-19 255 IllA503; 233Mich268, 206 NW556, 557 [quotCJ]. See also 255 IllA409; 214Ky802, 284SW88.
1241-20 233Mich268, 206NW556, 557 [quotCJ].
1241-22 233Mich268, 206NW556, 557 [quotCJ].
1241-23 233Mich268, 206NW556, 557 [quotCJ].
1241-24 233Mich268, 206NW556, 557 [quotCJ].
1241-25 233Mich268, 206NW556, 557 [quotCJ].
1241-28 36GaA15, 135SE110; 104WVa 168, 139SE650, 651, 54ALR1139, [cit CJ].
1241-30 287Pa78, 134A486, 48ALR567.
1241-35-36 Mo 279SW415, 425 [quot CJ]; Or 288P192; 145SC53, 142SE828, 837 [citCycperCothran,J,dis op].
1241-37 16F(2d)734; 98Fed222, 231, 39CCA19; 207Fed222, 230, 124CCA492; 252Fed961, 963, 164CCA469; 276Fed 288, 289; 160Cal143, 116P530; 16Del 166, 42A454, 457; 36GaA812, 138SE 247; 237 IllA236; 124 Iowa707, 100NW 867, 872; 190Ky751, 756, 228SW673; 233Mich268, 206NW556; 162Minn226, 203NW974, 975; 135Miss777, 100S673; 251Mo 390, 158SW656, 664; 117Nebr 813, 223NW4, 6; 49NJL417, 9A705, 707, 60AmR622; NJSup 131A615; 46 NY427, 7AmR360; 138NY517, 529, 34 NE342, 20LRA440; 10AbbPrNY1, 4, 18 HowPr550; 180NC187, 189, 104SE360; 36 Okl 603, 129P714, 715; 42 Okl 314, 140P1079, 1081; 62 Okl 39, 161P815, 817; 111Pa404, 2A513, 56AmR274 [quot 42SD394, 175NW878, 880]; 139 Pa334, 21A154, 156, 22AmSR188, 11 LRA725; 287Pa78, 83, 134A486, 48ALR 567; 36SD459, 155NW783, 788; Tex CivA 282SW334; TexCivA 3SW(2d) 900; 18TexCivA296, 44SW580, 586; TexCivA 193SW463, 466; TexCivA 263 SW943, 944; 104WVa168, 139SE650, 651, [citCJ] 54ALR1139. [b] (4) Statements made at meeting of "Parents-Teachers' Association" concerning morals of teacher. 209Ky710, 273SW 529. [c] (1) 87CalA246, 262P78(3d case).
1242-41 33GaA620, 127SE790.
1242-42 145SC53, 142SE828, 834 [cit CJ].
1242-43 36GaA812, 138SE247; Can [1928] 2DomLR97.
1242-45 36GaA812, 138SE247.
1242-46 151Va985, 144SE624.
1242-49 36GaA812, 138SE247.
1242-55 149Md533, 131A762.
1242-59 209Ky710, 273SW529, 530 [cit CJ].
1242-64 16F(2d)734; 33GaA620, 127 SE790; 149Md533, 131A762; MoA 284 SW857; TexCivA 16SW(2d)931; Tex CivA 282SW334; 152Va312, 147SE275. [a] **Statements of agent of gas company, on being furnished with information that meter had been tampered with,** held prima facie privileged. TexCivA 282 SW334.
1243-65 16F(2d)734; 36GaA812, 138 SE247; 149Md533, 131A762; 315Mo 1214, 289SW639, 50ALR268; MoA 284 SW857; 104WVa168, 139SE650, 54ALR 1139.
1243-66 103NJL213, 136A425; 59 OntL 355, [1926] 4DomLR202 [app allowed on other grounds 59 OntL590, [1927] 1 DomLR163].
1243-67 209Ky710, 273SW529, 530 [cit CJ]; 233Ky706, 26SW(2d)561.
1243-68 209Ky710, 273SW529, 530 [cit CJ].
1243-69 16F(2d)734.
1244-76 209Ky710, 273SW529, 530 [cit CJ]; 161La38, 62, 108S117 [citCJ]; 151 Va985, 145SE731. [a] **Communications held qualifiedly privileged.**-161La38, 108 S117. [b] **Communications held not qualifiedly privileged.**-161La38, 108S 117.
1244-77 209Ky710, 273SW529, 530 [cit CJ].
1244-78 209Ky710, 273SW529, 530 [cit CJ].
1244-79 16F(2d)734; 209Ky723, 273 SW529, 530 [citCJ].
1244-80 209Ky723, 273SW529, 530 [cit CJ].
1244-81 209Ky723, 273SW529, 530 [cit CJ].
1244-82 16F(2d)734; 209Ky710, 273 SW529, 530 [citCJ]; TexCivA 12 SW(2d)680.
1244-83 16F(2d)734; 209Ky710, 273 SW529, 530 [citCJ].
1244-86 16F(2d)734.
1245-88 16F(2d)734; 149Md533, 131A 762; TexCivA 296SW616; TexCivA 12SW(2d)680.
1245-92 161La24, 108S112.
1245-3 16F(2d)734; 33GaA620, 127SE 790; 209Ky710, 273SW529, 530 [citCJ]; 228Ky677, 15SW(2d)496; 149Md533, 131A762; TexCivA 12SW(2d)680; 20 SaskL449, [1926] 3DomLR68, [1926] 2 WestWkly268. [b] **Church trustee** inquiring of member of school board respecting conduct of teacher involving pastor of church has interest in subject of inquiry. 127Kan464, 274P251.
1245-4 33GaA620, 127SE790.
1245-6½-New. Accidental communication of privileged matter to third person held immaterial. 16F(2d)734.
1246-17 16F(2d)734; 127Kan464, 274 P251; 145SC53, 142SE828, 837 [citCyc perCothran,J,disop].
1246-18 [b] **Member of school board** rests under duty to answer inquiries as to teacher made by one having interest in information. 127Kan464, 274P251.
1246-20 Mo 279SW415, 425 [quotCJ].
1246-24 237Mich603, 213NW172; Miss 130S493; 139 Okl 262, 281P967, 66ALR 1246.
1246-26 139 Okl 262, 281P967, 66ALR 1246.
1246-28 237Mich603, 213NW172; Miss 130S493.
1247-40 127Kan464, 274P251.
1247-43 But see 139 Okl 262, 281P967, 66ALR1246.
1247-45 16F(2d)734.
1247-46 16F(2d)734; 197Wis432, 222 NW451.
1248-63 143Va644, 129SE696 (uttering words from actual malice).
1248-66 118 Or568, 247P815; 145SC 53, 142SE828, 834 [quotCJ]; 150Va301, 143SE631.
1248-66½-New. Privilege ends where defamation begins. 122 Or408, 259P 307.
1248-67 22F(2d)520; 217Ala12, 115S 88; 118 Or568, 247P815; TexCivA 282 SW334; 143Va644, 129SE696 (beyond exigency of occasion). [b] **Privileges held exceeded.**-161La38, 108S117.
1248-73 TexCivA 282SW334.
1249-74 TexCommnA 25SW(2d)310.
1249-75 16F(2d)734.
1249-76 But see 233NYS298.
1249-86 151Va985, 144SE624.
1250-93 84Colo 57, 267P1066, 1067 [cit CJ]; 255 IllA503 (affidavit to naturalization bureau); 210Ky445, 276SW154; 233Mich268, 206NW556; MoA 27 SW(2d)467; 156Tenn82, 299SW779 [cit CJ]; 149Va618, 140SE664. See also [1930] 1DomLR1009.
1250-8 125Kan715, 266P78; 156Tenn 82, 299SW779; 62 OntL351, [1928] 3 DomLR776. [b] 93Fla1085, 113S378.
1251-10 149Va618, 140SE664; Ont [1930] 4DomLR22.
1251-13 22AlaA231, 115S80; 214Ky 802, 284SW88; 59 OntL355, [1926] 4 DomLR202 [app allowed on other grounds 59OntL590, [1927] 1DomLR 163].
1251-16 84Colo 547, 272P625 (recording notice of affidavit for investigation for purpose of canceling plaintiff's patent to certain land as obtained by fraud is not judicial proceeding).
1251-20 148Miss346, 114S621.
1251-25 148Miss346, 114S621.
1251-26 148Miss346, 114S621.
1251-30 93Fla1085, 113S378; 148Miss 346, 114S621, 624 [citCJ]; MoA 27 SW(2d)467; 103WVa504, 138SE112; 188Wis121, 205NW808, 42ALR873. See also 123NY420, 25NE1048.
1252-31 103WVa504, 138SE112, 113 [citCJ].
1252-35½-New. Where there are several distinct charges, some privileged and some not privileged, those not privileged are not justified by those that are. 123NY420, 25NE1048.
1252-36 20 OhA243, 153NE124.
1252-39 20 OhA243, 153NE124.
1252-40 20 OhA243, 153NE124.
1252-42 20 OhA243, 153NE124.
1252-43 214Ky802, 284SW88; 123NY 420, 25NE1048; 20 OhA243, 153NE124. [a] **Strict legal relevancy or materiality is not required.**-84Colo 57, 267P1066.
1252-44 84Colo 57, 267P1066; 20 OhA 243, 153NE124.
1252-45 48Philippine475, 492 [quotCJ]; 149Va618, 140SE664; 188Wis121, 205 NW808, 42ALR873.
1253-56 18F(2d)807; 84Colo 57, 267P 1066, 1067 [citCJ].
1253-57 18F(2d)807, 809 [citCJ].
1253-60 18F(2d)807 (allegation in petition for divorce concerning husband's former wife); 99CalA719, 279P226; 40 GaA557, 150SE566; 161La11, 108S107; 148Miss346, 114S621; 116Nebr474, 217 NW947, 59ALR1056; 123NY420, 25NE 1048; 134Misc150, 234NYS676; 134 Misc244, 234NYS698; Oh 171NE97; 156Tenn82, 299SW779; TexCivA 300 SW118; 149Va618, 140SE664; 188Wis 121, 205NW808, 42ALR873. But see TexCivA 300SW118.
1253-61 148Miss346, 114S621; 97Pa Super538; TexCivA 300SW118; 188 Wis121, 205NW808, 42LRA873.
1254-65 148Miss346, 114S621; 188Wis 121, 205NW808, 42ALR873.
1254-68 18F(2d)807; 148Miss346, 114 S621; 188Wis121, 205NW808, 42ALR 873.
1254-69 148Miss346, 114S621.
1254-71 102CalA110, 282P810.
1254-78½-New. In an action charging attorney with fraud and conspiracy, part of petition purporting to set forth beginning of alleged conspiracy to defraud held relevant to the main charge and not libelous. 161La11, 108S107.
1254-78¾-New. Expression of conclusion in pleading as to lawfulness or unlawfulness of act where facts are stated from which a conclusion is drawn is not libel or slander of person. 161La11, 108 S107.
1254-78¼-New. Allegation that attorney engaged in an unlawful private venture held mere conclusion of pleading on facts stated. 161La11, 108S107.
1254-78⅛-New. Petition charging attorney on stated facts with violating barratry statute held conclusive of pleader on stated facts. 161La11, 108 S107.
1254-79 84Colo 57, 267P1066.
1255-81 125Kan715, 266P78.
1255-88 128 Okl 162, 261P545.
1255-89 128 Okl 162, 261P545.
1257-12 230Ky85, 18SW(2d)872.
1258-25 51Nev306, 274P809.
1259-32 103WVa504, 138SE112, 113 [citCJ].
1259-33 103WVa504, 138SE112, 113 [citCJ].
1259-40 59 OntL355, [1926] 4DomLR 202 [app allowed on other grounds 59 OntL590, [1927] 1DomLR163].
1259-48 TexCivA 286SW894, 897 [cit CJ].
1260-57 133Misc190, 231NYS49.
1260-65 233Mich268, 206NW556; 20 OhA243, 153NE124. [a] **Board of county commissioners** is legislative body. 20 OhA243, 153NE124.
1260-66 20 OhA243, 153NE124 (board of county commissioners in adopting

resolution for public improvements is legislative body).
1260–68 BC [1928] 3DomLR187.
1260–69 42F(2d)783; 20 OhA243, 153 NE124.
1261–76 29PortoRico 933. [b] **Words "pertinent" and "relevant,"** as applied to legislative resolutions, should be given broad and liberal construction. 20 OhA243, 153NE124.
1261–80 [b] **Communications by military and naval officers** are absolutely privileged. 233Mich268, 206NW556.
1261–82 CalA 278P1046 (letter by clerk in United States engineer's office to proper superior concerning superior clerk).
1261–88½–New. Statements by superior officer of veterans' bureau in preferring charges for removal of subordinate and in communications with other officials of bureau held absolutely privileged. 255 IllA409.
1261–89 237 IllA236, 242 [quotCyc].
1261–90 16F(2d)734; TexCommnA 25 SW(2d)310; 150Va301, 143SE631.
1261–92 Alta [1929] 4DomLR501.
1261–98 153Va762, 151SE149.
1261–2 16F(2d)734 (doctor's report to his employer).
1262–5 237 IllA236, 242 [quotCyc]; 124Kan566, 261P828, 830 [quotCJ]; TexCommnA 25SW(2d)310; TexCivA 292SW944; 150Va301, 143SE631.
1262–6 33GaA620, 127SE790; 237 IllA 236; 124Kan566, 261P828, 830 [citCJ].
1262–7 124Kan566, 261P828, 830 [cit CJ].
1262–14 237 IllA236; 216Ky660, 288 SW297; 120 Or197, 251P719.
1262–16 216Ky660, 288SW297. [a] **Communications of state budget director,** in investigating and reporting financial standing of bidders on state highway contracts, as required by administrative board, of which he was not a member, have been held only qualifiedly privileged. 233Mich268, 206NW556.
1263–21 255 IllA503; 250Mich126, 229 NW606; 227AppDiv130, 237NYS123. See also 317Mo 1061, 297SW968, 54ALR 644. [d] **Publication is prima facie qualifiedly privileged** where circumstances give moral or social right or duty to communicate to others what, of right, they ought to know. 318Mo 112, 298SW837(2dcase).
1264–30 217Ala12, 115S88, 89 [quot CJ]; 208Cal 694, 284P441; 82Mont30, 264P937; 288Pa405, 136A234; 48Philippine919.
1264–31 217Ala12, 115S88, 89 [quot CJ].
1264–35 73Mont253, 235P757; Tex CommnA 28W(2d)833.
1264–38 86Colo 483, 283P48.
1264–42 130Misc716, 224NYS329; 21 OhA454, 153NE248; 60 OntL76, [1927] 1DomLR1152. See also 133Misc190, 231 NYS49. [a] **It is immaterial** whether maker of statement had reasonable grounds for making charge. 21 OhA454, 153NE248.
1265–45 21 OhA454, 153NE248.
1265–52 143Va644, 129SE696, 700 [cit CJ].
1265–61 16F(2d)734; Ala 129S267; 124Kan566, 261P828; 247Mich248, 225 NW636; 189NC658, 127SE710; 195NC 304, 142SE7.
1266–64 TexCivA 283SW880; 150Va 301, 143SE631.
1266–66 See also 5F(2d) 25.
1266–70 [c] **Refining company's auditor's charges** that local agent had taken oil and gasoline and burned plant held abuse of privilege. TexCivA 283SW880.
1266–72 16F(2d)734.
1266–76 87PaSuper358.
1266–77 149Md533, 131A762.
1267–81 267Mass166, 166NE550(2d case).
1267–83 87PaSuper358; 6PaDist&Co 187, 191 [quotCJ].
1267–84 87PaSuper358; 6PaDist&Co 187, 191 [quotCJ].
1267–86 131SC483, 127SE606; 45SC 196, 143SE31, 66 [quotCJperCothran,J, disop].
1268–90 See also 194NC753, 140SE724.
1268–91 117Nebr813, 223NW4.
1268–94 NJ 131A615.
1268–95 But see 203Cal 26, 263P240.

[a] **That false charge of dishonesty against former employer was made in response to inquiry** does not render it privileged where inquiry was provoked in order to afford opportunity for making libelous statement. 203Cal 26, 263P 240.
1268–1 MoA 296SW855.
1269–20 120 Or197, 251P719.
1269–21 120 Or197, 251P719.
1269–27 235Mich568, 209NW814; NJ 131A615. [g] **Bar association.–Mo** 23 SW(2d)45.
1270–28 TexCivA 281SW1090.
1270–33 [c] **Privilege of church members to discuss qualifications of pastor** is not limited to committee meetings or parish gatherings. 83NH501, 144A787.
1270–36 235Mich568, 209NW814.
1271–47 127Kan464, 274P251.
1271–50 154Md604, 141A416.
1272–51 6F(2d)644; 6F(2d)712; 87 CalA246, 262P78(3dcase); 116Nebr474, 217NW947, 59ALR1056; 121 Okl 241, 249P145, 49ALR253; Or 288P192; Tex CivA 274SW335; Va 152SE539.
1272–52 136Misc833, 241NYS29 (cartoon held not libelous, in absence of special damages).
1272–55 13F(2d)186; 116Nebr474, 217 NW947, 948 [citCJ], 59ALR1056; Tex CivA 1SW(2d)471; Va 152SE539.
1273–60 239Mich676, 215NW3; Tex CivA 290SW212. [a] **Newspaper assumes risk** that information published is correct. Va 152SE539.
1273–61 TexCivA 290SW212; TexCivA 3SW(2d)900, 907 [quotCJ]; Va 152SE 539.
1273–65 154Md604, 141A416, 419 [quot CJ]; TexCivA 274SW335.
1273–76 102Conn448, 129A41; 148Va 850, 139SE505.
1274–79 [a] (2) 116Nebr474, 217NW 947, 59ALR1056.
1274–83½–New. It is no defense that publication refers to matters of public interest occurring at a time when plaintiff was acting as an agency or instrumentality of government in the construction and operation of public enterprise. 13F(2d) 186.
1274–84 148Va850, 139SE505.
1274–85 203Cal 270, 263P812; 203 Iowa1095, 212NW557; 124 Okl 202, 254 P975; TexCivA 1SW(2d)471; 148Va 850, 139SE505.
1274–87 120Kan194, 243P305.
1274–88 120Kan194, 243P305.
1274–89 125Kan715, 719, 266P78 [quot CJ]; 239Mich676, 215NW3.
1275–97½–New. Statement must be truthful or based on facts deemed to be the probable cause for justification. Tex CommnA 285SW810.
1275–100 22AlaA231, 115S80; 148Va 850, 139SE505, 507 [quotCJ].
1275–101 148Va850, 139SE505, 507 [quotCJ].
1275–102 148Va850, 139SE505, 507 [quotCJ].
1275–103 148Va850, 139SE505, 507 [quotCJ].
1275–5 41GaA102, 152SE131; 203 Iowa 1095, 212NW557; 154Md604, 141A416; 130Misc18, 223NYS549; TexCommnA 284SW913; TexCommnA 12SW(2d)165; 62 OntL351, [1928] 3DomLR776. But see TexCivA 274SW335.
1276–11½–New. Headlines of a privileged newspaper article relating to judicial proceedings are not privileged unless a fair index thereof. 245NY320, 157NE153.
1276–19 [b] **Newspaper may publish matter contained in indictment** as it is privileged. Va 152SE539.
1276–20 116Nebr474, 217NW947, 59 ALR1056; 148Va850, 139SE505.
1276–20½–New. Filing of a pleading is a "judicial proceeding," and a true report thereof is privileged whether or not judicially acted on, a summons being a "mandate of court." 245NY320, 157 NE153.
1276–21 148Va850, 139SE505.
1276–22 148Va850, 139SE505.
1276–23 148Va850, 139SE505.
1276–24 219AppDiv169, 218NYS446.
1277–29 125Kan715, 266P78; Or 288P 192; 148Va850, 139SE505, 507 [quot CJ].
1277–37 TexCivA 1SW(2d)387.

1278–50½–New. A newspaper article based on a report of certified public accountants employed by the city to audit books, the report being addressed to the mayor and city council, is a matter of public concern, and may be published if it fairly and in good faith substantially quotes or epitomizes the contents and meaning. Mo 19SW(2d)650.
1278–56½–New. Publications which are sensational and made chiefly for political purposes are not privileged. 6 PaDist&Co 73.
1278–64 138Misc310, 245NYS662.
1279–83½–New. Assertion of positive facts does not constitute fair comment and criticism. 214AppDiv437, 212NYS 479.
1279–84 131Misc552, 228NYS220; 48 Philippine429.
1279–85 214AppDiv437, 212NYS479 (fair comment and criticism is not libel, but mere expression of opinion); Tex CivA 3SW(2d)900.
1280–93 214AppDiv437, 212NYS479 (statements held not privileged as fair comment and criticism).
1280–3 246 IllA318; 49Philippine171; TexCommnA 284SW913; TexCivA 3SW (2d)900, 906 [quotCyc].
1281–4 222Ky350, 300SW907; Tex CommnA 284SW913.
1281–5 226AppDiv535, 235NYS340.
1281–7 227AppDiv130, 237NYS123.
1281–8 89CalA324, 264P803, 805 [cit CJ].
1282–15 87CalA246, 262P78(3dcase). [a] **Though newspapers are in privileged class** and freedom of press is recognized, "that does not give any newspaper the legal right to publish an article which is libelous per se about any person." 45 Philippine211, 214.
1282–19 131Misc552, 228NYS220.
1282–25 205 Iowa1146, 217NW83; 214 AppDiv437, 212NYS479 (attacks on individual, his conduct and motives are not fair comment); 131Misc552, 228NYS 220.
1282–25½–New. In such case the attacks can only be justified by truth. 214 AppDiv437, 212NYS479.
1282–29 130Misc207, 223NYS750.
1282–31 116Nebr474, 217NW947, 59 ALR1056; 57ND438, 222NW455.
1282–32 226AppDiv535, 235NYS340.
1282–39 254NY95, 172NE139; 122 Or 408, 259P307; 6PaDist&Co 73; 151Va 985, 145SE731.
1282–40 254NY95, 172NE139.
1283–44 226AppDiv535, 235NYS340.
1283–48 237 IllA349; 254NY95, 172NE 139; 227AppDiv130, 237NYS123; 152 Va312, 147SE275.
1283–49 318Mo 112, 298SW837; Tex CivA 4SW(2d)656.
1283–53 318Mo 112, 298SW837(2d case); TexCivA 3SW(2d)900, 906 [quot Cyc].
1283–58 318Mo 112, 298SW837; MoA 29SW(2d)201.
1283–63 123Kan550, 256P153, 154, 55 ALR850; 124 Okl 202, 254P975; Tex CivA 1SW(2d)387; TexCivA 3SW(2d) 900.
1284–76 254NY95, 172NE139.
1284–77 318Mo 112, 298SW837(2dcase).
1284–85 87CalA246, 262P78(3dcase); 89CalA324, 264P803; 239 IllA49; 228 Ky677, 15SW(2d)496; 318Mo 112, 298 SW837; TexCivA 290SW212; TexCivA 4SW(2d)656. [a] **Attorney appointed to act in place of disqualified state's attorney** is properly subject of criticism, though he is not public officer. 252 IllA 61.
1285–86 87CalA246, 262P78(3dcase); 227AppDiv130, 237NYS123.
1285–89 160Ga461, 128SE672; Tex CivA 1SW(2d)387.
1285–90 160Ga461, 128SE672; Or 288P 192 (article relating to arrest of school principal on charge of burglary held not to indicate actual malice).
1285–92 160Ga461, 128SE672.
1285–95 87CalA246, 262P78(3dcase).
1285–96 227AppDiv130, 237NYS123.
1285–97 89CalA324, 264P803; 38GaA 632, 144SE821; 318Mo 112, 298SW837 (2dcase); 130Misc207, 223NYS750; Tex CivA 1SW(2d)471; TexCivA 3SW(2d) 900. [e] **Where criticism or charge states ground for removal,** truth is only defense. TexCivA 3SW(2d)900.
1286–99 TexCivA 4SW(2d)656.

1286-3 TexCivA 3SW(2d)900.
1286-3½-New. Malice is not necessarily involved, and plaintiff may recover without a showing of actual malice. 237 Mich603, 213NW172.
1286-6 89CalA324, 264P803; 237 IllA 349; 239 IllA49; 234Ky683, 28SW(2d) 991; TexCivA 3SW(2d)900; TexCivA 4SW(2d)656; TexCivA 16SW(2d)380; 198Wis605, 225NW172.
1287-10 TexCivA 4SW(2d)656.
1287-11 But see TexCivA 4SW(2d)656.
1287-12 TexCivA 3SW(2d)900.
1288-19 198Wis605, 225NW172.
1289-27½-New. Political advertising directed to the candidacy of a mayor and referring to deficient work supervised by an engineer employed by the candidate is not actionable libel as to the engineer. 118Nebr718, 226NW329.
1289-28 237 IllA349.
37 C. J.—11-46 But see 126Kan336, 268 P106 (right of stockholder of bank against which libel published).
11-50 223AppDiv849, 228NYS544; 137 Misc575, 244NYS430.
11-51 17F(2d)255; 20F(2d)763; 244 IllA158.
11-53 13F(2d)186; 20F(2d)763.
11-54 17F(2d)255; 20F(2d)763.
11-55 13F(2d)186; 17F(2d)255; 129 Misc408, 221NYS563. [b] **Membership corporations,** not being permitted to engage in business, cannot maintain action for slander. 214AppDiv712, 210NYS 127.
12-56 13F(2d)186.
12-59 TexCivA 300SW118.
12-61½-New. A corporation cannot be damaged by charges of fraud or mismanagement in a business which has ceased. 13F(2d)186.
12-61¾-New. Publication charging fraud against a corporation in a contract with the United States is libelous, notwithstanding termination of the contract before publication. 13F(2d)186.
12-62½-New. Municipal corporation cannot recover damages for libel against a citizen publishing a pamphlet charging the city with bankruptcy in opposing the issuance of bonds. 99CalA651, 279 P213.
12-72 **Erratum.**–First cross reference should read "2848" instead of "2348."
12-77 149SC303, 147SE333. [d] **If parent, in effort to break off engagement of child,** stoops to libel or slander, aggrieved party would have remedy for tort thus committed. NJ 143A512.
12-78 149Va618, 140SE664.
13-84 203Cal 26, 263P240.
13-87 201 Iowa550, 207NW574, 575 [citCJ].
13-92 216AppDiv118, 214NYS662.
13-96 252 IllA92.
13-97 203Cal 26, 263P240.
13-99 Ala 129S267. [b] **In absence of proof** that director who wrote libelous statement on institute's letter head was acting with consent of responsible officer, or within scope of duties, institute is not liable. 216AppDiv118, 214NYS 662.
13-1½-New. Master may be liable for slander uttered by servant in discharge of duties entrusted to him in reference to particular matter in hand and acting within scope of employment, regardless of ratification. 132SC193, 129SE79.
14-4 124Kan278, 259P687, 690 [citCJ].
16-39 247Mich248, 225NW636.
16-54 [a] **Statutory action for insulting words** is assimilated to common-law action for libel or slander for words actionable per se. 149Va906, 141SE860. [b] **Actions for libel** are personal and transitory. Va 152SE539.
16-56 127Misc671, 217NYS354, 355 [quotCJ].
16-59½-New. "Libel suit" is governed by usual court proceedings, subject to all statutory requirements, and is not a special proceeding. 118Tex433, 16SW (2d)516.
16-59¾-New. In Texas claims for slander are recognized under a rule of the common law although the civil code contains no definition of "slander." TexCivA 16SW(2d)931.
16-59¼-New. Damages arising from defamation of character are recoverable just as damages to person or property are recoverable. TexCivA 16SW(2d) 931.
16-61 Ala 129S267.
17-73 But see 163La257, 111S697.
17-74 TexCivA 288SW558. [a] 128Me 181, 146A437.
17-77 But see 161La38, 108S117.
17-86 160La652, 107S478.
18-11½-New. Unlawful arrest is no bar to an action for slander. 102NJL624, 133A417.
18-24 45Philippine211.
18-25 45Philippine211.
18-26 28F(2d)701; 45Philippine211.
19-35 But see 118Tex433, 16SW(2d) 516.
19-39 TexCivA 25SW(2d)211; TexCivA 32SW(2d)390(2dcase). [b] **In Texas** action may be brought where plaintiff resides. CivA 8SW(2d)809. [c] **Construction of statute.**–TexCivA 9SW(2d)443.
19-39½-New. The rule of strict construction does not apply to a venue statute, and one claiming he comes within exception has the burden to establish that fact. 118Tex433, 13SW(2d)358.
19-41 97Fla440, 121S459(2dcase).
19-42 [d] (1) 129 Okl 210, 264P154.
19-44 Ala 129S267.
19-47 152Md587, 137A273, 275, 52ALR 908 [citCJ].
19-50 171Ark1085, 287SW391.
19-51 But see 171Ark1085, 287SW391.
20-55 27 OhNPNS279 (conspiracy).
20-56 82Mont30, 264P937.
20-57 171Ark1085, 287SW391.
20-63 84Colo 41, 268P540; 152Md587, 137A273, 52ALR908.
20-72 [a] Utah 283P1065.
20-73 TexCivA 281SW1090; TexCivA 5SW(2d)195. [a] (1) 208Cal 694, 284P 441; 102CalA110, 282P810; 38GaA632, 144SE821; 30Hawaii610; 230Ky786, 20 SW(2d)995; 230Ky789, 20SW(2d)996; 161La38, 108S117; MoA 29SW(2d)201; 131Misc312, 226NYS451; 130Misc207, 223NYS750; 133Misc853, 233NYS297; 227AppDiv130, 237NYS123; 121 Okl 241, 249P145, 49ALR253; 132 Or82, 284 P575; 141SC364, 139SE781; 154SC53, 151SE105(1stcase). (2) Complaint showing libelous letter commenced with words "replying to your letter" and referring to plaintiff as "your client" held prima facie to show letter was to plaintiff's attorney in reply to letter regarding transaction therein referred to. 126Misc202, 213NYS135. [b] 99CalA 651, 279P213; 102CalA110, 283P370(1st case); 41GaA102, 152SE131; 223App Div68, 227NYS610; 128Misc225, 218NYS 285; 21 OhA422, 153NE213; TexCivA 5SW(2d)195.
21-77 217Ala12, 115S88, 89 [quotCyc]; 80Mont70, 258P242.
21-79½-New. Plaintiff's statement that he believes himself libeled is insufficient to state a cause of action without allegations of fact which would make defendant's statements libelous in law. 21 OhA422, 153NE213.
21-98 217Ala12, 115S88, 89 [quotCyc].
22-9 206 Iowa51, 220NW51, 58ALR 1147.
22-12 See also 118 Or568, 247P815.
22-14½-New. The averment as to inducement 125Misc403, 211NYS571.
22-14¾-New. and colloquium must be considered in determining whether words are libelous per se. 125Misc403, 211NYS571.
22-15 17F(2d)255, 258 [citCJ]; 120 Kan3, 242P472.
22-16 17F(2d)255, 258 [citCJ]; 242 IllA379; 120Kan3, 242P472 (averments held sufficient); 158Md358, 148A546; 166Minn173, 207NW497; 178Minn61, 225NW906; 217MoA613, 274SW969 (pleading held sufficient); 73Mont253, 235P757; 138 Okl 71, 280P419; 134SC 276, 132SE587; 45SC196, 143SE31, 65 [quotCJperCothran,J, dis op]; 148SC 249, 146SE8.
22-17 17F(2d)255, 258 [citCJ]; 242 IllA379; 138 Okl 71, 280P419.
23-18 [b] **Matters held pleaded by way of inducement only.**–138Misc310, 245NYS 662.
23-19 130Misc632, 224NYS520.
23-20 45SC196, 143SE31, 65 [quotCJ perCothran,J, dis op].
23-22 156SC69, 152SE823.
23-24 166Minn173, 207NW497.
23-25 213Ala99, 104S25; 217Ala16, 114 S357, 55ALR171; 217Ala12, 115S88; 120Kan3, 242P472; 73Mont253, 235P 757; 80Mont70, 258P242; 125Misc403, 211NYS571 [citCJ] (in determining whether publication is libelous per se, innuendo should not be considered); 131 Misc640, 227NYS641; 128Misc428, 219 NYS233; 129Misc351, 221NYS429.
23-26 217Ala16, 114S357, 55ALR171; 130Misc207, 223NYS750, 758 [citCJ]; 137Misc457, 244NYS28; Sask [1928] 4 DomLR4.
24-27 217Ala16, 114S357, 55ALR171; 86CalA119, 260P322; CalA 285P418; 148Md569, 129A797, 799 [citCJ]; 217 MoA613, 274SW969; 131Misc640, 227 NYS641; 128Misc428, 219NYS233; 130 Misc207, 223NYS750; 21 OhA422, 153NE 213. [c] **Complaint by innuendo** charging slander by imputing violation of criminal statute held sufficient as against general demurrer. TexCivA 282SW334.
24-29 28F(2d)701; 217Ala16, 114S357, 55ALR171; CalA 285P418; 250 IllA130; 252 IllA482; 203 Iowa68, 212NW326; 206 Iowa592, 217NW555; 229Ky495, 17 SW(2d)399(2dcase); 158Md358, 148A 546; 170Minn420, 212NW898; 254NY 95, 172NE139; 130Misc18, 223NYS549; 131Misc763, 227NYS729; 128Misc428, 219NYS233; 130Misc207, 223NYS750; 122 Or408, 259P307; 298Pa329, 148A 474; TexCivA 290SW212. [d] **Statement that plaintiff was dope fiend** does not justify innuendo that he violated state and federal laws. 203 Iowa68, 212 NW326.
25-30 22AlaA231, 115S80.
25-31 22AlaA231, 115S80; CalA 285P 418; 252 IllA482; 73Mont253, 235P757; 80Mont70, 258P242; 252NY266, 169NE 380; 130Misc207, 223NYS750; 122 Or 408, 259P307.
25-31½-New. Innuendo alone is not sufficient to make certain the identity of the person libelled. 5F(2d)25.
25-32 206Iowa592, 217NW555; 73Mont 253, 235P757; 128Misc225, 218NYS285; 21 OhA422, 153NE213; 138 Okl 71, 280 P419. See also 218AppDiv591, 218NYS 641.
25-33 15F(2d)595; 213Ala99, 104S25; 217Ala12, 115S88 [citCJ]; 148Md569, 129A797; 131Misc312, 226NYS451; 128 Misc428, 219NYS233; 130Misc207, 223 NYS750, 759 [citCJ]; 122 Or408, 259P 307.
26-34 217Ala12, 115S88, 89 [citCJ]; 128Misc428, 219NYS233.
26-35 148Md569, 129A797; 128Misc 428, 219NYS233.
26-38 87CalA246, 262P78(3dcase).
26-39 Can [1928] 3DomLR97.
26-48 130Misc632, 224NYS520; 129 Misc351, 221NYS429; 12PaDist&Co 718; TexCivA 5SW(2d)196. [a] 171 Ark1085, 287SW391.
26-49 22AlaA231, 115S80; 130Misc632, 224NYS520; 129Misc351, 221NYS429. [f] (3) TexCivA 5SW(2d)195.
27-50½-New. Petition held not based on statements made in petition in suit for rescission of contract. TexCivA 300 SW118.
27-52 3LaA464.
28-66 217Ala12, 115S88 [quotCJ]; TexCivA 1SW(2d)471.
28-78 MoA 284SW857.
30-9 252 IllA61 (allegations held insufficient to show that plaintiff was practicing attorney licensed to practice in state or that he was practicing in city where libel was published). [c] 216Ky660, 288SW297.
30-11 138SC381, 136SE637, 53ALR798.
30-14½-New. Declaration by a corporation must allege that at the date of publication the corporation was engaged in business. 13F(2d)186.
30-14¾-New. Declaration in the form provided by statute (Shannon Code (Tenn.) §§ 4618, 4660 subd 21) held sufficient. 13F(2d)186.
30-21 252 IllA61 (allegations held insufficient to show that plaintiff was public officer).
30-24 217Ala16, 114S357, 55ALR171.
31-25 115 Okl 280, 242P565.
31-36 35 OhA343, 172NE389. [a] 163 La1027, 113S363; 35 OhA343, 172NE 389. [b] **Allegations held sufficient.**–Mont 285P668.

31-39 242NY208, 151NE209; 223App Div286, 228NYS194. [a] MoA 29SW (2d)201; 242NY208, 151NE209; 223 AppDiv286, 228NYS194.
32-41 20F(2d)763; 252NY266, 169NE 380.
32-43 Mont 285P668 (extrinsic facts of plaintiff's presence and understanding of third persons that plaintiff was meant not required to be alleged).
32-48 212Ala670, 103S842; 84Colo 41, 268P540 (sufficient). [e] **When not actionable per se,** allegation is necessary. 220Ky363, 295SW138, 53ALR547.
32-50 84Colo 41, 268P540.
33-54 218AppDiv591, 218NYS641; 29 PortoRico 933; 49SD293, 207NW105.
33-55 See also 29PortoRico 933.
33-56 Utah 283P1065. [b] 86Colo 483, 283P48.
33-63 102CalA110, 282P810; 218App Div591, 218NYS641.
33-64 See also 218AppDiv591, 218NYS 641. [a] **Finality of order** striking as irrelevant alleged libelous matter must be alleged. 102CalA110, 282P810.
33-65 212Ala670, 103S842; 120Kan 194, 243P305; 134SC276, 132SE587. [a] (2) 120Kan194, 243P305.
33-70 [c] **In Montana.**–73Mont253, 235 P757. [d] **In New York.**–131Misc312, 226NYS451.
33-78 139 Okl 262, 281P967. 66ALR 1246; BC [1929] 4DomLR420.
34-81 [a] BC [1930] 3DomLR644. [b] 134SC198, 132SE584, 46ALR558.
34-82 [a] **Allegation of manner and form required.**–159Tenn413, 19SW(2d) 255 (that letter was dictated to stenographer).
34-87 But see 126Kan336, 268P106.
34-89½-New. An allegation that defendant "publicly stated" the alleged slanderous matter imports an uttering of the words in the presence and hearing of others. 218AppDiv780, 218NYS 489.
34-91 203 Iowa68, 212NW326; MoA 284SW857.
34-92 120Kan3, 5, 242P472 [citCJ].
34-93 120Kan3, 5, 242P472 [citCJ] (averments held sufficient).
35-3 188Wis121, 205NW808, 42ALR 873. [a] Utah 283P1065.
35-9 126Kan336, 268P106. [c] Ala 129S267.
35-10 Ala 129S267.
35-11 TexCivA 5SW(2d)195.
35-14 224 IllA569; 203 Iowa68, 212 NW326; 148Md569, 129A797; 80Mont 70, 258P242; 130Misc207, 223NYS750; 122 Or408, 259P307, 310 [citCJ].
35-18 45Philippine211.
35-19 13F(2d)186; 208Cal 694, 284P 441; 37GaA650, 141SE328; 203 Iowa68, 212NW326; 123Kan550, 256P153, 154, 55ALR850; 148Md569, 129A797; 251 NY250, 167NE432; 131Misc640, 227NYS 641; 218AppDiv514, 219NYS57; 129 Misc351, 221NYS429; 121 Okl 241, 249 P145; 49ALR253; 124 Okl 202, 254P 975; 122 Or408, 259P307; 45Philippine 211.
36-21 129Misc351, 221NYS429, 431 [cit Cyc].
36-26 17F(2d)255, 258 [citCJ]; 212 Ala670, 103S842; 217Ala16, 114S357, 55 ALR171; 252 IllA61; 203 Iowa68, 212 NW326; 123Kan550, 256P153, 154 [quot CJ], 55ALR850; 124Kan657, 261P851; 220Ky363, 295SW138, 53ALR547; 158 Md358, 148A546; 315Mo1214, 289SW 639, 642 [citCJ], 50ALR268; 73Mont 253, 235P757; 74Mont326, 239P1035; Mont 287P633; 115Nebr251, 212NW 435, 50ALR1410; NM 289P590; 125 Misc403, 211NYS571; 131Misc312, 226 NYS451; 214AppDiv392, 212NYS219; 133Misc190, 231NYS49; 136Misc833, 241 NYS29; 230AppDiv312, 244NYS176; 191NC749, 133SE92; 138 Okl 71, 280P 419; 36 OklACR613; 134SC276, 132SE 587; 148SC249, 146SE8; Wis 232NW 564. [a] 252 IllA61; 220Ky363, 295SW 138, 53ALR547; 230Ky786, 20SW(2d) 995; 214AppDiv392, 212NYS219.
37-27 123Kan550, 256P153, 154 [quot CJ], 55ALR850.
37-28 131Misc312, 226NYS451.
37-29 123Kan550, 256P153, 154 [quot CJ], 55ALR850.
38-34 244 IllA158; TexCivA 300SW 118.
38-35 17F(2d)255, 258 [citCJ].
38-38 212Ala670, 103S842.
38-39½-New. A claim of special damages for expenses incurred must be supported by a specific statement of facts sufficient to show why they were incurred and that they were necessary. 37GaA684, 141SE423.
38-42 33GaA791, 128SE696; 227App Div130, 237NYS123; 6PaDist&Co 73.
38-43 17F(2d)255; 106Conn127, 137A 390. [a] **Allegation held sufficient** where loss suffered on sale of libeled shipment alleged. 49SD373, 206NW576.
38-44 224 IllA569; 138 Okl 71, 280P 419. [b] 212Ala670, 103S842. [c] 17F (2d)255; 8PaDist&Co 597.
38-45 17F(2d)255, 258 [quotCJ].
38-45½-New. An allegation that on account of the libelous publication plaintiff's ability to obtain employment and earn money in any employment was seriously impaired is improper as a basis for a claim of general damages. 37GaA684, 141SE423.
38-45½-New. In the absence of motion or special demurrer, an allegation that plaintiff was injured in his business is sufficient to admit proof of injury sustained. Utah 283P1065.
38-56 214AppDiv437, 212NYS479. [b] **Allegations held insufficient as defense.**–133Misc686, 233NYS273.
39-59½-New. Allegation of an answer that no complaint was made of the publication, and defendant was not informed that information therein contained was erroneous, held demurrable. 140 SC21, 138SE520.
40-99 117 Okl 4, 245P46.
41-21 [a] 127Misc762, 217NYS407.
41-22½-New. Where suit is on libel qualifiedly privileged, defendant need only plead that publication was made without malice. 90CalA390, 266P320.
41-23 139 Okl 262, 281P967, 66ALR 1246.
41-28 Mo 279SW415.
42-35 132Misc876, 230NYS717; 189NC 658, 127SE710; 148Wash295, 268P893.
42-38 117 Okl 4, 245P46. [a] **Allegations held insufficient.**–133Misc686, 233 NYS273.
42-39 Mo 279SW415, 426 [citCyc]; 117 Okl 4, 245P46. [a] **Plea of justification** held insufficient. 241NY327, 150NE 132, 43ALR880.
43-43 133Misc686, 233NYS273. [a] 49 SD293, 207NW105. [b] 239Mich676, 215NW3.
43-46 160Ga461, 128SE672. [a] 160Ga 461, 128SE672.
43-55 140SC21, 138SE520.
43-55½-New. Affidavit required by statute and in compliance therewith is sufficient. 6PaDist&Co 318.
44-56 160Ga461, 128SE672; 151Md285, 134A214, 216 [citCJ]; Va 155SE683.
44-59 160Ga461, 128SE672; 151Md285, 134A214, 216 [citCJ]; 239Mich676, 215 NW3.
44-60 226AppDiv535, 235NYS340.
45-66 84Mont310, 276P950.
45-67 298Pa329, 148A474.
45-67½-New. A plea of justification placing an interpretation on the alleged libel which the jury might reasonably place thereon is sufficient although it does not meet all inuendoes pleaded in the complaint and plaintiff's briefs. 226 AppDiv535, 235NYS340.
46-7 36GaA812, 138SE247; 240NYS 734. [e] 160Ga461, 128SE672; 237 IllA 349. [f] Sask [1928] 3DomLR907.
47-9 Mo 279SW415, 425 [citCyc].
47-12 Cal 263P812.
47-16 Mo 279SW415.
47-22 118 Or568, 247P815 (under statute); 49SD293, 207NW105 (defendant may allege both truth and mitigating circumstances).
47-27 [c] 160Ga461, 128SE672; 226 AppDiv535, 235NYS340. [e] **On motion to strike out,** court should be satisfied that plaintiff will be prejudiced by allegations, it being general rule to allow them to stand till trial when plaintiff may again raise question. 127Misc762, 217NYS407.
47-28 130Misc207, 223NYS750.
47-32 [a] 133Misc686, 233NYS273.
48-35 [b] **Allegation held sufficient.**–133Misc686, 233NYS273.
48-58 [c] **Particulars as to plea of justification** held not required. Man [1930] 1DomLR813.
48-59 Man [1927] 1DomLR282.
49-67 [a] Alta [1929] 2DomLR370.
49-69 But see Alta [1929] 2DomLR370 (names of all persons are not required).
50-87 13F(2d)186; 124 Okl 167, 254P 736, 51ALR1066.
50-93½-New. Where facts pleaded are not plainly embarrassing, a plea will not be stricken out but will be left for the decision of the trial judge on the question of admissibility of evidence. Ont [1927] 2DomLR60.
50-99 80Mont70, 258P242.
50-1 130 Okl 76, 265P635.
50-5 13F(2d)186; 171Ark1085, 287SW 391; 158Md358, 148A546; 141SC364, 139SE781.
51-6 99CalA719, 279P226; 102CalA110, 282P810.
51-6½-New. In order that privilege may be taken advantage of by demurrer, all facts essential to establish the defense must affirmatively appear in plaintiff's petition. 37GaA684, 141SE423 (petition held not demurrable).
51-7 84Colo 41, 268P540.
51-16 6PaDist&Co 73; 141SC364, 139 SE781.
51-20½-New. knowledge of the falsity, 6PaDist&Co 73.
52-31 28F(2d)701; 86CalA119, 260P 322; 170Minn420, 212NW898, 899 [quot CJ].
52-44 Mo 31SW(2d)1045; 86PaSuper 27.
53-51 12PaDist&Co 718.
53-52 5PaDist&Co 641.
53-58½-New. The mere fact that parts of the abandoned petition were introduced in evidence did not make such parts a part of the petition on which the cause was tried. Mo 9SW(2d)156.
53-63½-New. Where the petition leaves it uncertain whether the defamatory words were written or spoken, but describes the cause of action as a slander, it may be amended so as to substitute the word "libel" for "slander." 37GaA 684, 141SE423.
54-65 [c] **Amendment properly refused.**–Not relating to alleged libel. 203 Cal 270, 263P812.
54-68 Mo 23SW(2d)45 (justification and plea of privilege).
55-11 235 IllA359.
55-13 203Cal 270, 263P812. [a] **Evidence held admissible.**–244 IllA158.
55-15 Erratum.–In § 416 text 15 the word "impartial" should read "partial."
56-20½-New. Where no special damages are alleged, plaintiff must establish that words used were libelous per se. 242NY208, 151NE209.
56-20¼-New. Proof of direct publication, under an averment of indirect publication, has been held a fatal variance. 235 IllA359.
56-20¼-New. In the absence of a plea of special damages, plaintiff must prove that the article complained of was libelous per se. 242NY208, 151NE209.
56-20½-New. Where plaintiff's bill of particulars, alleging publication by defendant of common-law libel and for insulting words, stated the names of three persons as the persons to whom the libel had been exhibited, testimony was limited thereby. 152Va312, 147SE275.
56-35 190NC113, 129SE151, 153 [quot CJ].
56-36 190NC113, 129SE151, 153 [quot CJ].
56-37 190NC113, 129SE151, 153 [quot CJ]. [a] **Where punitive damages are not asked** malice in fact need not be shown. Va 152SE539.
56-37½-New. or by an allegation that the article was maliciously composed. Utah 283P1065.
56-38 127Misc762, 217NYS407; 190NC 113, 129SE151, 153 [quotCJ].
56-39 190NC113, 129SE151, 153 [quot CJ].
56-40 190NC153, 129SE151, 153 [quot CJ].
56-40½-New. When not actionable per se, malice must be proved. 220Ky363, 295SW138, 53ALR547.
57-47 160Ga461, 128SE672 (evidence

admissible); 130Misc207, 223NYS750.
57-49 117 Okl 4, 245P46.
57-50 152Va312, 147SE275.
58-56 228Ky483, 15SW(2d)306.
58-62 217Ala12, 115S88; 220Ala377, 125S393; 203Cal 270, 263P812; 208Cal 694, 284P441; 87CalA246, 262P78(3d case); 84Colo 41, 268P540; MoA 284SW 857; 254NY95, 172NE139; 131Misc552, 228NYS220; 133Misc190, 231NYS49; 141SC364, 139SE781.
58-65½-New. Plea of privilege is unnecessary if there has been no publication. 245NY204, 156NE666.
58-66 87CalA246, 262P78(3dcase). [a] In California.-99CalA719, 279P226.
58-67 87CalA246, 262P78(3dcase).
58-68 99CalA719, 279P226.
59-69 Miss 130S493.
59-72 91PaSuper117.
59-82 220MoA1283, 290SW1017.
60-92 214Ala339, 108S29.
61-22½-New. Where not actionable per se, damages must be proved. 220Ky363, 295SW138, 53ALR547.
61-24 131Misc312, 226NYS451.
61-28½-New. Allegation of general damage precludes proof of special injury. 17F(2d)255.
61-28⅓-New. Evidence of special damages, such as doctor's bills, board, and loss of wages, which are not pleaded, is inadmissible. 222AppDiv766, 226NYS 161.
62-29 217AppDiv325, 216NYS670; 127 Misc762, 217NYS407.
62-32 217AppDiv325, 216NYS670; 214 AppDiv198, 212NYS26 (evidence in mitigation of damages not admissible because not pleaded); 140SC21, 138SE 520.
62-39 118 Or568, 247P815.
64-64½-New. Where defendant proceeds with defense of justification notwithstanding plaintiff's failure to prove publication, defendant will be assumed to have admitted publication. BC [1930] 4DomLR489.
65-73 Contra BC [1930] 2DomLR776.
65-86 152Miss254, 119S182; 217MoA 613, 274SW969; 12PaDist&Co 718.
66-92 217Ala12, 115S88; 230Ky205, 18 SW(2d)970; 232Ky94, 22SW(2d)421. [d] 22AlaA231, 115S80; 99CalA66, 277 P902.
67-9 [a] (6) Other instances of material variance. 152Miss254, 119S182.
68-35 TexCivA 296SW616.
69-38 TexCivA 292SW594. [a] 18 F(2d)912; 203Cal 26, 263P240; 154Md 604, 141A416; Mo 279SW415; 84Mont 510, 276P950; 145SC53, 142SE828; Tex CivA 16SW(2d)380; Va 155SE683. [b] 16F(2d)734; 27F(2d)833; 22AlaA231, 115S80; 154Md604, 141A416; TexCivA 286SW926; TexCivA 5SW(2d)195; 151 Va985, 145SE731; Va 155SE683.
69-39 16F(2d)734; 215Ala126, 110S 143; CalA 288P680; 21 OhA454, 153 NE248 (testimony as to contents of defamatory letters held inadmissible in absence of showing of defendant's connection with them). [a] Evidence of truth is inadmissible as irrelevant where truth is not in issue. 241NY327, 150NE 132.
69-40 16F(2d)734.
69-46 [a] (1) 36GaA812, 138SE247; 163La773, 112S716; Mo 279SW415; 118 Or568, 247P815. (3) 31 OhA340, 167 NE469. [b] (1) 235 IllA359; 124 Kan566, 261P828; 124Kan657, 261P 851; 230Ky205, 18SW(2d)970; 163La 821, 112S798; 163La1083, 113S463; Mass 166NE550(2dcase); 318Mo 112, 298SW837(2dcase); 115Nebr251, 212NW 435, 50ALR1410; 138Misc310, 245NYS 662. (2) 82CalA605, 255P864. (4) To take question to jury. Tex 285SW638. [c] Verdict held not against evidence.-233Ky781, 26SW(2d)757.
70-49 Mont 287P633.
70-52 MoA 22SW(2d)73.
70-65 118 Or568, 247P815.
70-68 See also 215Ky121, 284SW1012.
70-68½-New. , and were so understood. Sask [1928] 1DomLR91.
70-68⅓-New. Where the words complained of were not actionable per se, it is necessary for plaintiff to prove that they were understood by hearers in a sense rendering them actionable. 217 MoA613, 274SW969.
70-73½-New. The language of a newspaper article is the best evidence of its meaning. 203Cal 270, 263P812.
71-83 252 IllA92.
71-84 166Minn173, 207NW497; MoA 287SW650.
71-85 MoA 284SW857.
72-86 [a] Expert evidence inadmissible.-253Mass138, 148NE369 (as to meaning of symbolical letters in defendant's books of commercial ratings where printed explanation accompanied publication).
72-92 203Cal 270, 263P812; 203 Iowa 1095, 212NW557.
72-95 TexCivA 292SW594.
72-97 180Ark695, 22SW(2d)562 (matters occurring over year before making of statements).
72-5 253Mass138, 148NE369; MoA 284 SW857; 45SC196, 143SE31. [a] (2) To prove enough of exact words charged to make out precise slander charged. MoA 284SW857. [b] Evidence held insufficient.-Mont 287P633.
72-11 215Ala126, 110S143; 139 Okl 262, 281P967, 66ALR1246.
72-12 215Ala126, 110S143; 161La24, 108S112, 114 [citCJ].
73-17½-New. In an action against a newspaper publishing information of a criminal proceeding from sources other than the record, the burden is on the publisher to show that information as published was the same as disclosed by the record. 148Va850, 139SE505.
73-18 [d] (1) SC 148SE478. [e] 82Mont 30, 264P937.
73-19 MoA 22SW(2d)73.
73-22½-New. The rule is otherwise where there is no evidence that defendant uttered the words complained of or that the rumors were attributable to him. 115Nebr251, 212NW435, 50ALR 1410.
73-24 17F(2d)766, 767 [citCJ].
73-27 But see TexCivA 16SW(2d)380.
73-34 [b] Communications held best evidence.-203Cal 26, 263P240.
74-41 [b] (1) 203Cal 26, 263P240. (8) Recognition and adoption of libel. 201 Iowa550, 207NW574. (9) Plaintiff's invitation by challenge to defendant to publish libel. 237Mich603, 213NW172. (10) Ratification by corporation of slander by agents. 252 IllA92. [c] (1) 161 La24, 108S112, 115Nebr251, 212NW435, 50ALR1410. (2) Ala 129S267; 150Va 301, 143SE631. (3) 118Nebr125, 223NW 649(2dcase). (4) Ala 129S267; TexCivA 300SW256. (6) Authorizing writing and sendipg of letters. 5F(2d)25. (7) That defendant ratified libelous writings. TexCivA 300SW256.
74-46 CalA 285P418.
74-47 Mont 285P668.
74-51 20F(2d)763; 151Va985, 144SE 624.
75-59 Mo 9SW(2d)156.
75-62 203Cal 26, 263P240; Miss 130 S493. Contra 215Ala126, 110S143.
75-66 151Md285, 134A214.
76-67 [a] Common reports that plaintiff mistreated father is not competent evidence to impeach reputation of plaintiff, where charge was based on plaintiff's opposition to certain public measures. 241NY327, 150NE132.
76-68 241NY327, 150NE132, 43ALR 880; (common report of specific wrongdoing not competent as evidence of general bad reputation).
77-80½-New. Generally plaintiff cannot offer evidence of good reputation except in rebuttal of evidence of bad reputation. 203Cal 26, 263P240.
77-80⅓-New. Evidence of plaintiff's good reputation is admissible where the injury alleged is to him in his business or professional capacity. 203Cal 26, 263 P240.
77-84 117Nebr813, 223NW4; TexCivA 296SW616.
77-87 117Nebr813, 223NW4.
77-88½-New. Where defendant overcomes a presumption of malice from actionable words per se by proof, or by showing that the publication was under a qualified privilege, the burden of establishing malice is cast upon plaintiff. 228Ky483, 15SW(2d)306.
77-88⅓-New. Where defendant pleads that the publication was made without malice, he assumes the burden of proving such fact. 90CalA390, 266P320.
77-95½-New. , irrespective of when ill will was manifested. 214AppDiv198, 212 NYS26.
77-2 TexCivA 282SW854. [a] 214Ala 339, 108S29; 152Va312, 147SE275. [b] 88CalA627, 264P564; 82Mont30, 264 P937; 194NC753, 140SE724; TexCivA 12SW(2d)680.
77-3 145SC53, 142SE828; TexCivA 282 SW854.
77-4 145SC53, 142SE828.
78-8 106Conn128, 137A390; 6PaDist& Co 73.
78-12 33GaA620, 127SE790; 242 IllA 198.
78-22 288Pa405, 136A234.
79-25½-New. A letter from plaintiff's attorney to defendants in a libel action was admissible only in so far as it demanded retraction. 222AppDiv213, 225 NYS564.
79-30 230Ky85, 18SW(2d)872.
79-32 122 Or408, 259P307, 310 [citCJ].
80-34 122 Or408, 259P307.
80-43 220Ky576, 295SW890; 151Va 985, 144SE624.
81-54 [a] Remarks made four or five months after publication held not too remote to be inadmissible to show actual malice. 214AppDiv198, 212NYS26.
82-56 MoA 287SW650.
82-60 MoA 27SW(2d)467.
82-70 203 Iowa1095, 212NW557. [b] 84Mont510, 276P950.
82-73 203 Iowa1095, 212NW557; 240 NYS734.
82-76 But see 241NY327, 150NE132, 43 ALR880.
82-78½-New. Common reports if properly pleaded in mitigation are admissible only to rebut inference of actual malice. 241NY327, 150NE132, 43ALR880.
82-80 203 Iowa1095, 212NW557; Tex CivA 1SW(2d)471.
82-84 203 Iowa1095, 212NW557.
83-88 [a] 106Conn127, 137A390; 189 NC658, 127SE710; TexCivA 282SW854. [b] 5F(2d)25; 90CalA390, 266P320; 163 La773, 112S716; 233Mich268, 206NW 556; TexCivA 300SW256.
83-89 TexCivA 282SW854.
83-90 195NC102, 141SE474; 59 OntL 355, [1926] 4DomLR202 [app allowed on other grounds 59 OntL590, [1927] 1 DomLR163]. [a] Where facts are as consistent with good faith as with bad faith, dishonesty of purpose may not be lightly inferred. 233Mich268, 206NW 556.
83-92 [a] Evidence insufficient to show reckless disregard of consequences. Tex CivA 300SW256.
83-99 [a] Refusal to abandon or give evidence in support of plea of justification is evidence of malice. 33GaA620, 127SE790.
83-6 250Mich126, 229NW606; TexCivA 290SW212.
83-7 149Md533, 131A762; TexCommnA 24SW(2d)361; 143Va644, 129SE696, 700 [citCJ].
83-7½-New. To overcome presumption of good faith, evidence must show that defendant was actuated by bad motive. 233Mich268, 206NW556.
84-9 90CalA390, 266P320.
84-12 TexCivA 12SW(2d)680; 151Va 985, 145SE731. [a] Evidence held insufficient to show malice.-197Wis432, 222 NW451.
84-14 209Ky710, 273SW529.
84-15 But see 209Ky710, 273SW529; 228Ky483, 15SW(2d)306.
84-23 150Va301, 143SE631.
84-27 [a] Evidence held not to show good faith in publication of libel. 241 NY327, 150NE132, 43ALR880.
85-28 [a] (2) To show good faith. 241 NY327, 150NE132, 43ALR880. [b] Evidence held insufficient to show malice. TexCivA 296SW616.
85-30 215Ala126, 110S143; 133Misc853, 233NYS297; 148SC8, 145SE541; 159 Tenn1, 15SW(2d)737(2dcase). [a] Presumption of falsity does not arise till plaintiff proves that words were spoken by defendant of plaintiff. 215Ala126, 110S143.
85-32 203Cal 26, 263P240; NB [1925] 3DomLR189.
85-33 215Ala126, 110S143; 151Md285, 134A214.

85-34 215Ala126, 110S143.
85-36 Va 152SE539.
85-38½-New. Where defendant pleads the truth of the charge, he is required to prove only that he honestly and in good faith believed it to be true. 90CalA 390, 266P320.
85-42 203Cal 26, 263P240. [a] 151Md 285, 134A214; 83NH501, 144A787; 229 AppDiv220, 241NYS676 (investigation before publication); 148SC8, 145SE541. [b] 154Md604, 141A416; 151Miss852, 119S827; 152Va312, 147SE275. See also 148SC8, 145SE541.
86-43 TexCommnA 27SW(2d)153 (subsequent acts held admissible).
86-43½-New. Where truth is relied on, evidence of the motive and purpose of the publication is immaterial. 84Mont 510, 276P950.
86-47 203Cal 26, 263P240; Mo 31SW (2d)1045; 148SC8, 145SE541.
86-49 220MoA1283, 290SW1017; 241 NY327, 150NE132, 43ALR880. [a] **Evidence supplementing common report** held inadmissible where defendant did not plead truth as defense. 241NY327, 150NE132, 43ALR880.
86-50½-New. **Evidence supplementing common report** that plaintiff was unprincipled person because of bad treatment of father is irrelevant where such was not pleaded as justification. 241NY327, 150NE132 (in action for charge that plaintiff was unprincipled person in opposing certain public measures).
86-51 84Mont510, 276P950.
86-58 203Cal 26, 263P240; 220MoA 1283, 290SW1017; 84Mont510, 276P 950.
87-60 214Ala339, 108S29.
87-65 203Cal 26, 263P240. [a] 203Cal 26, 263P240; 154Md604, 141A416; Mo 31SW(2d)1045; SC 148SE478.
87-69 203Cal 26, 263P240. [a] 90CalA 390, 266P320; 165La398, 115S633; Mo 23SW(2d)45; TexCommnA 12SW(2d) 125; Utah 267P188. [b] 203Cal 26, 263P240. [e] **Evidence of suspicious circumstances** is insufficient. TexCivA 1SW(2d)387.
87-70 165La398, 115S633, 636 [citCJ].
88-76 57ND438, 222NW455; TexCivA 1SW(2d)387; TexCivA 3SW(2d)900.
89-85 Sask [1929] 4DomLR771.
89-86 242 IllA198; Sask [1929] 4Dom LR771.
89-96 Sask [1929] 4DomLR771.
89-3 148Wash295, 268P893.
90-16 36GaA812, 138SE247; 287Pa78, 48ALR567; 87PaSuper358; 145SC53, 142SE828; 104WVa168, 139SE650, 54 ALR1139. [b] **Evidence sufficient** to put defendant to proof of facts to support his claim of privilege. 6PaDist& Co 73.
90-20½-New. Where defamatory statements were qualifiedly privileged, the burden was on plaintiff to prove the falsity of such statements. 228Ky677, 15SW(2d)496.
90-24 [a] 102Conn448, 129A41; 36 GaA812, 138SE247. [b] **Evidence held sufficient.**-(1) 128Kan3, 275P1090; Tex CommnA 284SW913.
90-26 160Ga461, 128SE672. [a] (2) Plaintiff's mere concession that automobile was stolen from defendant's garage held not to destroy prima facie case. 132Misc54, 228NYS614. [c] 84 Mont510, 276P950.
91-32 203 Iowa1095, 212NW557; 91 PaSuper117; 45Philippine211; 45SC 196, 143SE31, 58 [quotCJ]; TexCivA 5 SW(2d)170.
91-35 105Conn533, 136A90; 97Fla440, 121S459(2dcase); 244 IllA158; 201 Iowa550, 207NW574; 203 Iowa628, 213 NW274; 159La1041, 106S558; 114S 122; 315Mo 1214, 289SW639, 642 [cit CJ], 50ALR268; 73Mont253, 235P757; 131Misc919, 229NYS293; 129Misc351, 221NYS429; 133Misc853, 233NYS297; 121 Okl 241, 249P145, 49ALR253; 124 Okl 202, 254P975; 122 Or408, 259P307; 159Tenn1, 15SW(2d)737(2dcase); Tex CivA 4SW(2d)656; 148Va850, 139SE 505; 150Va101, 142SE387; Va 152SE 539; 102WVa491, 135SE578. [c] **The presumption of damage does not obtain after proof** that the communication was qualifiedly privileged. 233Ky706, 26SW(2d)561.
92-41 217Ala16, 114S357, 55ALR171; 315Mo 1214, 289SW639, 642 [citCJ], 50 ALR268; 115Nebr251, 212NW435, 50 ALR1410; 132Misc169, 229NYS662; 298Pa329, 148A474; TexCivA 5SW(2d) 170. [a] **In Louisiana.**-164La529, 114S 122.
92-49 288Pa405, 136A234.
92-62 88 IndA122, 163NE526.
93-67 106Conn127, 137A390, 393 [cit CJ].
93-70 Sask [1930] 3DomLR159(2d case).
94-91½-New. Common reports that plaintiff mistreated his father is incompetent to deprive plaintiff of reasonable damages for injury to reputation. 241NY327, 150NE132.
95-3 Mo 279SW415, 427 [citCyc].
95-7 Mo 279SW415, 427 [citCyc].
96-24 Okl 274P1082, 1084 [quotCyc].
96-30 Sask [1930] 3DomLR159(2d case) (holding repetitions of slander admissible for aggravation of damages). [a] **Subsequent malicious statement made by defendant** as he is served with summons is admissible to allow recovery of punitive damages. 214AppDiv 198, 212NYS26.
96-30½-New. , irrespective of when ill will was manifested. 214AppDiv198, 212NYS26.
96-39 154Miss325, 122S373; Mo 279 SW415.
97-44 Contra Mo 279SW415.
97-45 But see 241NY327, 150NE132.
97-50 [a] 242 IllA198; 118 Or568, 247 P815; 148Va850, 139SE505.
97-52 TexCivA 1SW(2d)471; 148Va 850, 139SE505.
97-58 [b] **In Iowa.**-203 Iowa1095, 212 NW557.
98-63 105NJL117, 143A354.
99-86 [a] 102WVa491, 135SE578.
99-89½-New. Evidence insufficient to warrant recovery of exemplary damages. TexCivA 296SW616.
99-90 124Kan657, 261P851.
100-17 [a] 41GaA102, 152SE131.
100-18 15F(2d)595; 92Fla526, 109S 452; 205 Iowa1146, 217NW83; 240NY 314, 148NE534; 115 Okl 280, 242P565; 145SC53, 142SE828; TexCivA 1SW(2d) 387. See also 134SC470, 133SE100. [a] 215Ala126, 110S143; MoA 296SW 855.
100-19 TexCivA 11SW(2d)586.
100-20 92Fla526, 109S452; 228Ky677, 15SW(2d)496; 253Mass138, 148NE369; 125 Or316, 266P252; SD 230NW226 (action for slander). [c] 215Ky121, 284 SW1012. [d] **Court without power to direct verdict for plaintiff.**-Mo 23SW (2d)45.
101-21 164La529, 114S122; 155SC63, 152SE18.
101-23 164La529, 114S122.
101-29 124Kan657, 261P851; 122 Or 408, 259P307.
101-30 84Colo 41, 268P540; 146Va637, 131SE787.
101-32 124Kan657, 261P851.
101-33 6F(2d)644; 15F(2d)595; 20 F(2d)763; 203Cal 270, 263P812; 252 IllA482; 228Ky483, 15SW(2d)306; 315 Mo 1214, 289SW639, 50ALR268; 194 NC146, 138SE616, 53ALR626; 198NC 454, 152SE163; 115 Okl 280, 242P565; 122 Or408, 259P307; Or 288P192; Tex CivA 8SW(2d)809.
102-34 6F(2d)644; TexCivA 286SW 926, 927, 928 [quotCJ]; TexCivA 292 SW594.
102-35 TexCivA 286SW926, 927, 928 [quotCJ].
102-36 6F(2d)644; 13F(2d)186; 15 F(2d)595; 18F(2d)912; 28F(2d)701; CalA 285P418; 203Cal 270, 263P812; Colo 268P540; 33GaA791, 128SE696; 243 IllA251; 73Mont253, 235P757; 240 NY314, 148NE534; 130Misc632, 224NYS 520; 128Misc225, 218NYS285; 224App Div588, 231NYS500; 228AppDiv277, 239NYS411; 194NC146, 138SE616, 53 ALR626; 198NC454, 152SE163; 125 Or316, 266P252; 298Pa329, 148A474; 9PaDist&Co 379; 138SC47, 136SE21; 45SC196, 143SE31; SC 148SE478; 155 SC63, 152SE18; TexCivA 286SW926, 927, 928 [quotCJ]; 151Va985, 144SE 624; 104WVa168, 139SE650, 54ALR 1139. See also 128Misc428, 219NYS 233. [a] (12) 154Miss325, 122S373. (14) Worse than "cocotte." 240NY 314, 148NE534. [d] **Plea of qualified privilege** cannot defeat right to go to jury. 198NC454, 152SE163.
103-37 124 Okl 167, 254P736, 51ALR 1066; TexCivA 286SW926, 927, 928 [quotCJ].
103-38 203Cal 270, 263P812; 86CalA 119, 260P322; 203 Iowa68, 212NW326; 170Minn420, 212NW898; 154Miss325, 122S373; 124 Okl 167, 254P736, 51ALR 1066.
103-39 105Conn533, 136A90; 206 Iowa 592, 217NW555; 154Miss325, 122S373; 73Mont253, 235P757 (jury may disregard advice of court as to whether or not words are defamatory); 254NY95, 172NE139; 133Misc853, 233NYS297; 124 Okl 167, 254P736, 51ALR1066; 45 SC196, 143SE31; TexCivA 286SW926, 927, 928 [quotCJ]; TexCivA 28SW(2d) 269.
104-40 86CalA119, 260P322; CalA 285 P418.
104-40½-New. It is for the jury to decide whether defendants authorized the writing of an alleged slanderous letter in their name. 5F(2d)25.
104-43 298Pa329, 148A474.
105-75 106WVa419, 145SE751(2dcase).
105-77 20F(2d)763; 151Va985, 144SE 624.
105-82 18F(2d)912; 233Mich268, 206 NW556; 122 Or408, 259P307; SC 148 SE478; TexCommnA 24SW(2d)361; Tex CivA 282SW334; 150Va301, 143SE631; 104WVa168, 139SE650, 54ALR1139. [a] **Evidence sufficient to go to jury.**-5F(2d) 25 (in respect to one defendant not appearing in action).
106-87 233Mich268, 206NW556; 82 Mont30, 264P937; 150Va301, 143SE631. [a] MoA 285SW102; TexCivA 282SW 854. [b] **Evidence insufficient** to go to jury. 233Mich268, 206NW556; Tex CivA 12SW(2d)680.
106-87½-New. Where evidence is insufficient to outweigh presumption of good faith, question is for the court. 233Mich268, 206NW556.
106-87¾-New. Mere scintilla of evidence of malice does not warrant submission to jury. 233Mich268, 206NW 556.
106-89 [c] 220Ala377, 125S393; MoA 22SW(2d)73. [d] **Proof that actionable words** were spoken justifies refusal of defendant's request for person's peremptory instruction. 220Ky576, 295SW 890.
106-90 [a] 149SC303, 147SE333.
106-91 [a] **Evidence held insufficient to go to jury** whether employer was responsible for remark by employee. Tex CivA 11SW(2d)377.
106-95 217Ala140, 115S28; 203Cal 26, 263P240; 228Ky483, 15SW(2d)306; 134 SC470, 133SE100; 145SC53, 142SE828; TexCommnA 12SW(2d)125; TexCivA 1 SW(2d)387. [d] **Embezzlement.**-Mo 19 SW(2d)472.
106-95½-New. , or whether the facts were sufficient to justify the publication. 160Ga461, 128SE672.
106-96 [a] 239Mich676, 215NW3.
106-97 TexCivA 28SW(2d)269.
106-98 Mo 23SW(2d)45; Or 288P192; 153Va762, 151SE149; 104WVa168, 139 SE650, 54ALR1139.
106-1 87CalA246, 262P78(3dcase); 255 IllA409; 149Md533, 131A762; Mo 279 SW415; 122 Or408, 259P307; 87Pa Super358; 45SC196, 143SE31; TexCivA 286SW894; TexCivA 292SW944; Tex CivA 28SW(2d)269; 143Va644, 129SE 696; 152Va312, 147SE275; 103WVa 504, 138SE112.
107-2 143Va644, 129SE696.
107-3 MoA 287SW650; MoA 296SW 855; 122 Or408, 259P307; 143Va644, 129SE696.
107-4 178Ark235, 10SW(2d)362; 160 Ga461, 128SE672; 36GaA812, 138SE247; 288Pa405, 136A234; TexCivA 282SW 334; TexCivA 16SW(2d)931; 152Va 312, 147SE275.
107-5 145SC53, 142SE828; 152Va312, 147SE275.
107-6 5F(2d)25; 149Md533, 131A762; 45SC196, 143SE31; TexCivA 28SW(2d) 269; 143Va644, 129SE696; 150Va301, 143SE631; 151Va985, 145SE731; 152Va 312, 147SE275. [b] **Evidence held sufficient** to take question of malice to jury. 149Md533, 131A762.
107-6½-New. Whether defendant was justified in using language implying a

charge of larceny is for the jury. 143 Va644, 129SE696.

108-8 150Va301, 143SE631.

108-10 18F(2d)807; 125Kan715, 266P 78; 148Miss346, 114S621; 188Wis121, 205NW808, 42ALR873.

108-13 57ND438, 222NW455.

108-14 57ND438, 222NW455.

108-15 131Misc552, 228NYS220; 226 AppDiv535, 235NYS340; 227AppDiv 130, 237NYS123; 57ND438, 222NW455; TexCivA 3SW(2d)900.

108-16 154Md604, 141A416; 245NY 320, 157NE153.

108-16½-New. Whether headlines are fair index of privileged article relating to judicial proceedings is for jury. 245 NY320, 157NE153.

109-19 160Ga461, 128SE672.

109-27 Mo 279SW415, 428 [quotCyc].

109-30 [a] 22AlaA231, 115S80; 151Md 285, 134A214; 45SC196, 143SE31; Tex CommnA 27SW(2d)153. [b] 16F(2d) 734; 22AlaA231, 115S80; MoA 287SW 650.

109-31 242 IllA198; 217MoA613, 274 SW969; 122 Or408, 259P307 (privilege); TexCivA 290SW806.

109-32 215Ala126, 110S143; 151Md 285, 134A214; 315Mo 1214, 289SW639, 50ALR268; 45SC196, 143SE31.

109-33 [a] 215Ala126, 110S143; 45SC 196, 143SE31. [b] 237Mich603, 213NW 172.

109-34 315Mo 1214, 289SW639, 50ALR 268; TexCivA 16SW(2d)380.

109-35 215Ala126, 110S143; 215Ky121, 284SW1012; 154Md604, 141A416. [a] (1) Mo 279SW415; Mo 23SW(2d)45. (3) Repetition of information. 33GaA 620, 127SE790. (4) Charge of debasing act which would exclude from society. 33GaA620, 127SE790. (5) Plaintiff's invitation to publish libelous matter. 237 Mich603, 213NW172. (6) Where no issue is raised as to what defendant meant by language used and alleged that words were true. 215Ky121, 284 SW1012. [c] 203Cal 270, 263P812; 154 Miss325, 122S373; Mo 23SW(2d)45 (justification); 45SC196, 143SE31.

109-36 215Ala126, 110S143; 152Miss 254, 119S182; 145SC53, 142SE828. [a] Requested charge held not comment on evidence.-217MoA613, 274SW969.

109-37 151Md285, 134A214.

110-38 150Va301, 143SE631.

110-40 [a] 215Ala126, 110S143; 88 IndA122, 163NE526; 122 Or408, 259P 307; 152Va312, 147SE275. [b] 215Ky 121, 284SW1012. [d] Instructions properly refused.-Mo 31SW(2d)1045.

110-41 [a] MoA 287SW650; 91PaSuper 117; TexCivA 286SW926; TexCivA 1 SW(2d)471; TexCivA 5SW(2d)1025. [b] 105Conn533, 136A90.

110-42 TexCivA 4SW(2d)656.

110-43 315Mo 1214, 289SW639, 50ALR 268; MoA 296SW855.

110-44 33GaA620, 127SE790; 118 Or 568, 247P815. [a] Charge authorizing jury to consider pleadings on question of mitigation of damages held not error. 33GaA620, 127SE790.

110-45 252 IllA92; 233Ky781, 26SW (2d)757. [c] 227AppDiv575, 238NYS 296. [d] 46 Ida792, 272P703; 154Miss 325, 122S373; Mo 279SW415; MoA 296 SW855.

110-47 88 IndA122, 163NE526.

110-48 [a] MoA 22SW(2d)73. [b] Instructions held proper or erroneously refused.-122 Or408, 259P307.

111-49 90CalA390, 266P320; 151Va 985, 144SE624.

111-50 122 Or408, 259P307. [a] 16 F(2d)734; 237Mich603, 213NW172; MoA 287SW650; 117Nebr813, 223NW4; NJ 131A615; TexCivA 3SW(2d)900. [b] 127Kan464, 274P251.

111-51 122 Or408, 259P307.

111-52 6F(2d)712; 151Md285, 134A 214. [b] Instructions held erroneous or properly refused.-90CalA390, 266P 320.

111-54 213Ala99, 104S25; 215Ala126, 110S143; 151Md285, 134A214. [b] Mo 279SW415; 151Va985, 144SE624.

111-55 18F(2d)912.

111-56 18F(2d)912; 90CalA390, 266P 320.

111-60 229AppDiv220, 241NYS676.

111-60½-New. The court should clearly differentiate between the purpose and effect of evidence tending to show a good-faith belief in the truth of the charges in question and evidence tending to show the actual truth of such charges. 203 Iowa628, 213NW274.

111-61 122 Or408, 259P307, 310 [cit CJ]; 152Va312, 147SE275.

111-64 [e] 195NC304, 142SE7. [j] Finding held immaterial.-TexCivA 25SW (2d)279. [k] Findings entitling plaintiff to judgment.-TexCivA 25SW(2d) 279.

112-75 See also 82Mont30, 264P937 (in libel action against defendants jointly verdict must be joint).

112-78½-New. Verdict against defendant, without evidence to suggest malice, cannot be sustained. 143Va644, 129SE 696.

112-78¼-New. Notwithstanding publication was libelous per se, jury must find it was libel in order to entitle plaintiff to recover. Mo 31SW(2d)1045.

112-82 [b] Verdict for defendant.-127 Misc671, 217NYS354.

112-86 127Misc671, 217NYS354, 355 [quotCJ].

112-89 127Misc671, 217NYS354.

113-98 [b] Verdict for plaintiff for nominal damages is conclusive on appeal that defendant failed to justify publication by establishing its truth. 241NY 327, 150NE132. [c] Matters not necessary to decision on review.-246 IllA318.

113-1 22AlaA231, 115S80. Erratum.-"Irregularity" in second line of text should be "regularity."

113-2 161La24, 108S112; 164La529, 114S122. [a] MoA 284SW857. [b] (2) 205 Iowa1146, 217NW83; Mo 279SW 415.

113-4 [a] (2) Miss 130S493; TexCivA 274SW335. (3) 237Mich603, 213NW 172; 239Mich676, 215NW3; 315Mo 1214, 289SW639, 50ALR268; MoA 287SW650.

114-6 [b] General appearance need not be filed by defendant to entitle him to attorney's fees. 96CalA520, 274P388. [c] Defendant need not move for dismissal for plaintiff's failing to file bond to entitle him to attorney's fees. 96CalA 520, 274P388.

114-8 96CalA520, 274P388. [a] (5) In single plaintiff action, each defendant is entitled to attorney's fee of one hundred dollars. 102CalA110, 282P810. [b] CalA 291P451. [d] In California.-CalA 291P451.

114-14 203Cal 270, 263P812; 220Ky 576, 295SW890; 233Ky781, 26SW(2d) 757; 152Miss569, 120S444(2dcase); Mo 279SW415, 427 [citCyc]; 127Misc671, 217NYS354; TexCivA 5SW(2d)1025; 146Va637, 131SE787; 148Va850, 139SE 505.

115-16 Mo 279SW415.

115-16½-New. The interjecting of a charge of moral delinquency may not increase damages to plaintiff for libel charging him with being unprincipled person in opposing certain public measures. 241NY327, 150NE132.

115-16¼-New. nor may damages to which plaintiff is otherwise entitled be mitigated thereby. 241NY327, 150NE 132.

115-17 Mo 279SW415.

115-20 TexCivA 282SW854; TexCivA 3SW(2d)900; TexCivA 5SW(2d)1025.

115-21 102WVa491, 135SE578, 581 [cit CJ].

115-22 91PaSuper117; 102WVa491, 135SE578.

115-23 102WVa491, 135SE578.

115-27 10LaA306, 121S680.

116-29½-New. Substantial compensatory damages may be denied where it appears that reputation was not affected by charge made under circumstances depriving it of serious weight. 241NY 327, 150NE132, 43ALR880.

116-32 TexCivA 282SW854.

116-34 207 Iowa576, 223NW375; 45SC 196, 143SE31, 83 [quotCJperCothran,J, dis op].

116-42 161La38, 108S117; 154Md604, 141A416; 45SC196, 143SE31. [a] Partnership can recover only for damages to partnership business. 152Md587, 137A 273, 52ALR908.

116-43 TexCivA 1SW(2d)471.

116-45 Va 152SE539.

116-45½-New. Right to compensatory damages as matter of law does not necessarily imply right to substantial damages. 241NY327, 150NE132, 43ALR880.

116-45¼-New. Substantial compensatory damages must be founded on finding of substantial injury. 241NY327, 150NE132, 43ALR880.

117-46 217MoA613, 274SW969; MoA 284SW857; 45Philippine211; TexCivA 4SW(2d)656; TexCivA 11SW(2d)586. [b] Damages not allowed where no injury to reputation was shown. 241NY 327, 150NE132, 43ALR880.

117-49 17F(2d)255; 205 Iowa1146, 217 NW83.

117-53½-New. Special damages from discharge from employment are not recoverable where the discharge did not result from the libel complained of but was a simultaneous wrong. 37GaA684, 141SE423.

117-56 164La529, 114S122; 103NJL 213, 136A425; 45Philippine211 (Libel L. § 11); SC 148SE478.

118-58 91PaSuper117.

118-60 TexCivA 1SW(2d)387.

118-60½-New. There is no rule by which damages for mental anguish and humiliation may be measured. 217MoA 613, 274SW969.

119-72 But see 205 Iowa1146, 217NW 83.

119-81 [b] Damages not aggravated by interjection of charge of moral delinquency. 241NY327, 150NE132, 43ALR 880.

119-85 133Misc686, 233NYS273.

119-86 [e] (2) Under statutes in some jurisdictions defendant may prove other recoveries by plaintiff for same or similar libels for consideration in assessing damages. 219AppDiv169, 218NYS446.

120-89 133Misc686, 233NYS273.

121-11 152Miss128, 118S717; NJSup 146A677(1stcase).

121-16 33GaA620, 127SE790; 203 Iowa 628, 213NW274; 217AppDiv325, 216 NYS670; 229AppDiv220, 241NYS676; 148Va850, 139SE505, 507 [citCJ].

121-17 217AppDiv325, 216NYS670.

121-21 217AppDiv325, 216NYS670; 148 Va850, 139SE505, 507 [citCJ].

122-30 48Philippine429.

122-31 241NY327, 150NE132, 43ALR 880.

122-41 203 Iowa628, 213NW274; 206 Iowa51, 220NW51, 58ALR1147; 45 Philippine211.

123-55 [a] Statute limiting recovery to nominal damages upon retraction held constitutional. 194NC146, 138SE 616, 53ALR626. [b] Retraction is admissible to reduce punitive but not compensatory damages. 229AppDiv220, 241NYS676.

124-68 201 Iowa550, 207NW574; 154 Md604, 141A416; 194NC146, 138SE616, 53ALR626 (in absence of statutory retraction); 45Philippine211.

124-73 Mo 31SW(2d)1045; 227AppDiv 575, 238NYS296.

125-75 [a] Penalty assessed should be adequate to punish defendant and deter others. Mo 31SW(2d)1045.

125-76½-New. A receiver of a bank who has been substituted for the bank in an action against the bank and an officer cannot be required to pay punitive damages. 130 Or119, 279P267, 65ALR 1042.

125-78 228Ky483, 15SW(2d)306; 91Pa Super117; 45SC196, 143SE31; TexCivA 300SW118. [b] Jury are not obliged to award exemplary damages even in case of express malice. 21 OhA454, 153NE 248.

125-79 TexCivA 5SW(2d)1025.

126-81 252 IllA92; 201 Iowa550, 207 NW574; MoA 285SW102; MoA 9SW (2d)543; 189NC658, 127SE710.

126-84 207 Iowa576, 223NW375; 168 La1125, 123S804 (exemplary damages disallowed in view of absence of evil motive and of retraction); 195NC102, 141SE474; TexCommnA 2SW(2d)833; TexCivA 5SW(2d)1025; TexCivA 300 SW256.

128-10 152Miss128, 118S717; 145SC53, 142SE828.

128-13 233Ky781, 26SW(2d)757 ($500 verdict held not to indicate passion or prejudice in slander of felony); 146Va 637, 131SE787.

128-15 [e] $375.-164La529, 114S122.

128-16 229Ky578, 17SW(2d)709, 66 ALR1497; MoA 284SW857; 146Va637, 131SE787. [g] Va 152SE539 (charging robbery); 102WVa491, 135SE578. [h] (1) Conn 135A90; 220Ky576, 295SW 890; 103NJL213, 136A425. (2) Humiliation and ridicule. 163La505, 112 S397. [k] $1,250.–TexCivA 292SW594. [l] $999.–146Va637, 131SE787. [m] $20,000 actual, and $10,000 punitive, damages.–Mo 279SW415. [n] $600.–Mich 233NW420.

128-17 159La1041, 106S558; 229App Div220, 241NYS676.

128-18 TexCivA 290SW806; TexCivA 300SW256. [a] 201 Iowa550, 207NW 574 (reduced conditionally to one thousand dollars). [f] $40,000.–203 Iowa 628, 213NW274. [g] $100,000 compensatory and $100,000 punitive.–Mo 318W (2d)1045 (held excessive as to compensatory damages by $75,000).

128-19 203Cal 270, 263P812. [f] 102 Conn448, 129A41. [g] 103NJL213, 136 A425. [i] 164La529, 114S122.

128-19½-New. or sufficient. 130 Or119, 279P267, 65ALR1042 ($4,000 for accusing plaintiff of dishonesties and unfair dealings).

129-20 [a] (2) $50. 168La1125, 123S 804.

129-21 [b] Held excessive.–Miss 130S 493 ($7500 reduced to $3500).

129-22 [b] Held excessive.–46 Ida792, 272P703.

129-25 [a] (2) $1,000 actual, $600 special, and $400 exemplary, damages. 205 Iowa1146, 217NW83.

129-26 [a] 203 Iowa628, 213NW274. [b] (2) $3,000. 315Mo 1214, 289SW639, 50ALR268.

129-27 3LaA624.

129-28 149Va906, 141SE860. [a] 73 CalA189, 238P719. [f] $100,000.–252 IllA92.

129-31 [a] (5) $375, reduced to $250 where injury was to feelings, not reputation. 164La529, 114S122. [b] (5) 152Miss569, 120S444(2dcase). (8) $1,500 actual, and $1,500 punitive, damages. MoA 296SW855.

129-32 [a] (3) $25,000. 154Miss325, 122S373. (4) $15,000. CalA 290P1051 (1stcase).

129-36 219Ala697, 123S223.

129-39 57ND785, 224NW202.

130-42 49SD373, 206NW576.

130-45 178Minn27, 226NW191.

130-48 17F(2d)255, 258 [citCJ]; TexCivA 5SW(2d)170.

130-55 TexCivA 5SW(2d)170.

130-58 206Cal 22, 272P1045; 3LaA 224. [a] Cal 268P626 (recording of judgment creating lien). But see 57 ND785, 224NW202.

130-58½-New. A statement of a person claiming interest in land being sold at judicial sale relative to title does not constitute slander of title. 136 Okl 162, 276P735.

130-63 219Ala75, 121S57.

131-69 But see 4LaA640.

131-71 219Ala75, 121S57; 248Mich8, 226NW669; 57ND785, 224NW202; TexCivA 5SW(2d)170.

131-76 219Ala75, 121S57; 90CalA41, 265P844; 92Fla278, 109S623, 626 [cit CJ]; 124Kan79, 257P937; 7LaA93; 57 ND785, 224NW202; TexCommnA 280 SW557, 560 [citCyc]; TexCivA 5SW (2d)170; TexCivA 27SW(2d)558. [c] Malice must be with intent to injure plaintiff.–124Kan79, 257P937.

131-77 124Kan79, 257P937; TexCommnA 280SW557, 560 [citCyc].

131-78 124Kan566, 261P828; 248Mich 8, 226NW669; 57ND785, 224NW202. [a] 163La382, 111S794. [b] Bona fide assertion of claim under lease. 214Ky 193, 282SW1102.

131-79 124Kan566, 261P828; 234Mich 672, 209NW82.

131-81 206Cal 22, 272P1045; TexCivA 5SW(2d)170.

131-82 219Ala75, 121S57; 49SD373, 206NW576. [b] Telegram sent by one agent of defendant to another of his agents has been held publication. 49 SD373, 206NW576.

132-85 Cal 268P626. [a] Telegram.–49SD373, 206NW576.

132-87 213Ala311, 104S651; 219Ala75, 121S57; 92Fla278, 109S623, 626 [cit CJ]; TexCivA 5SW(2d)170.

132-89 57ND785, 224NW202.

132-91 213Ala311, 104S651; NJ 141A 314 [citCyc&CJ].

132-97 [a] Communication between carrier's agents as to condition of shipment held privileged. 49SD373, 206NW 576.

132-98½-New. But where unnecessary false statement is included, communication is not privileged. 49SD373, 206 NW576.

133-13½-New. However, assignor of option for oil lease cannot be sued for alleged slander of title by assignees occurring after assignment. 124Kan79, 257P937.

133-14½-New. Petition showing that attack on title to plaintiff's land was made more than four years prior to filing of action is demurrable. 35GaA 427, 133SE302.

133-15½-New. The owner of slandered title may bring action in the county where the real property is situated. 206 Cal 22, 272P1045.

133-16 213Ala311, 104S651. See also 168La914, 123S618. [b] Complaint held sufficient.–219Ala75, 121S57; Cal 268P 626; 206Cal 22, 272P1045.

133-22 10LaA646, 121S786.

134-26 17F(2d)255, 258 [citCJ]; 213 Ala311, 104S651; 206 Iowa911, 221NW 540; 124Kan79, 257P937. [c] Allegations held sufficient.–TexCivA 5SW(2d) 170. [d] Amount of loss in each of particulars of special damages claimed need not be stated. 219Ala75, 121S57.

134-27 124Kan79, 257P937.

134-28 17F(2d)255; 213Ala311, 104S 651 (loss in each particular need not be stated).

134-29 213Ala311, 104S651.

134-30 17F(2d)255; 213Ala311, 104S 651.

134-31 213Ala311, 104S651.

134-32 TexCivA 5SW(2d)170, 174 [cit CJ].

134-39½-New. Matter merely in contradiction need not be specially pleaded. 213Ala311, 104S651.

134-39¼-New. Failure of complaint to show existence of a contract of sale did not subject it to demurrer. 213Ala311, 104S651.

134-45 17F(2d)766. [a] Plaintiff must prove defendant is responsible for publication. 17F(2d)766.

135-47 57ND785, 224NW202.

135-49 10LaA646, 121S786.

135-56½-New. Statement by recipient of libelous telegram as to what it contained is admissible. 49SD373, 206NW 576.

135-56⅓-New. Evidence showing motive or cause for writing a slanderous letter is admissible on the question of malice. TexCommnA 280SW557.

135-56¼-New. Any competent evidence is admissible. 17F(2d)766.

135-56⅙-New. Evidence that defamatory newspaper articles were sent to defendant by news gathering association is admissible. TexCivA 5SW(2d) 170.

135-56⅛-New. Mortgagee's testimony as to disposition of proceeds from sale of mortgaged land may be admissible on issue of malice in action by mortgagor against mortgagee. TexCivA 27SW (2d)558.

135-59 234Ky757, 29SW(2d)26; 248 Mich8, 226NW669 (denial of damages held justified). [a] (1) 206 Iowa911, 221NW540. [b] Evidence sufficient to show publication. 49SD373, 206NW576. [c] Evidence held to sustain findings for defendant.–124Kan79, 257P937.

135-60 [a] Evidence sufficient to prove falsity of communication. 49SD373, 206 NW576.

135-62 57ND785, 224NW202.

135-65 [a] Evidence held insufficient.–57ND785, 224NW202.

135-68 17F(2d)766.

135-75 133Misc871, 234NYS185.

135-76 TexCivA 27SW(2d)558.

135-78 17F(2d)766.

135-78½-New. Whether alleged slanderous remarks had reference to plaintiff may be held for the jury. 132SC193, 129SE79.

135-80½-New. Weight of an admission is for the jury. 17F(2d)766.

136-87 10LaA646, 121S786.

136-88 10LaA646, 121S786.

136-90 10LaA646, 121S786.

136-90½-New. Damages recoverable for diminution in market value of goods slandered are not limited to failure to consummate pending sale. TexCivA 5 SW(2d)170.

136-90¼-New. Diminution in market value held not too remote or speculative to be recovered. TexCivA 5SW(2d)170.

136-93 TexCivA 5SW(2d)170, 175 [cit CJ].

137-40 254Mass424, 150NE190.

137-41 [b] Statute held not invalid.–292Pa277, 141A50. [c] Statute not repealed.–90PaSuper473; 90PaSuper485.

138-45 Conn 151A349; 99Fla362, 126S 292; 318 Ill 482, 149NE466; 254Mass 424, 150NE190; 37Wyo 372, 262P24.

137-49 318 Ill 482, 149NE466; OklCr 275P382.

137-51 89 IndA256, 166NE155; OklCr 275P382; 37Wyo 372, 262P24, 28 [cit CJ]. [a] 77Mont74, 249P664. [b] 254 Mass424, 150NE190. [c] In Oklahoma.–Cr 277P286.

139-55 318 Ill 482, 149NE466; 77Mont 74, 249P664; 32PortoRico 788. [a] 254 Mass424, 150NE190.

139-56 89 IndA256, 166NE155; 77Mont 74, 249P664; 32PortoRico 788 (imputations not charging crime but tending to discredit another in connection with award of municipal contract). [a] Sentence in publication held not to allege dishonesty. 254Mass424, 150NE190.

139-57 77Mont74, 249P664.

139-58 Iowa 227NW616.

139-62 [b] Sentence in publication held not to allege moral turpitude. 254Mass 424, 150NE190.

139-63 Iowa 227NW616.

139-64 318 Ill 482, 149NE466.

139-67 318 Ill 482, 149NE466.

139-73 Mass 168NE790.

139-79 108TexCr228, 300SW86. [b] Imputation held not libelous as charging immorality. 254Mass424, 150NE 190. [c] Statutes denouncing slander.–108TexCr228, 300SW86

139-82 32PortoRico 788.

139-83 222Ky350, 300SW907. [b] Sentence in publication held not to import misconduct. 254Mass424, 150NE 190. [c] Words held not libelous.–89 IndA256, 166NE155.

139-84 49Philippine930.

139-84½-New. False charges that judge abandoned office and assumed role of prosecutor, that persons accused of crime were to be swiftly convicted and hanged and that judge was conducting farcical trial, are libelous. 222 Ky350, 300SW907.

140-87 35PortoRico 826.

140-89½-New. In a statute, making it a misdemeanor to use any words "intended to bring a person of good repute into public contempt, or to subject such person to ridicule, injury or damage," the clause quoted is merely descriptive of the words used, "intended" meaning calculated. 158La352, 104 S112, 113.

140-97 318 Ill 482, 149NE466; 77Mont 74, 249P664.

140-98 318 Ill 482, 149NE466.

140-99 318 Ill 482, 149NE466.

140-3 11F(2d)860.

140-6 222Ky350, 300SW907.

141-10 11F(2d)860.

141-18½-New. Some statutes do not confine the crime to merely printing the libel but make any person liable to prosecution who in any manner communicates it. 37Wyo 372, 263 P623 ("publishing" construed in broad sense of making known).

141-18¼-New. A publisher of a newspaper who causes the paper, after being printed, to be circulated in the ordinary manner, publishes the libel. 37 Wyo 372, 263P623.

141-20 94Fla1071, 114S856, 858 [cit CJ]; 292Pa277, 141A50.

141-21 292Pa277, 141A50.
141-24½-New. Under some statutes slanderous words are deemed maliciously spoken where no justification therefor is shown. 192Wis379, 212NW879.
141-24¾-New. Where the law presumes malice from the mere speaking, the question of malice is immaterial. 192Wis379, 212NW879.
142-43½-New. Negligence in writing and publishing a libel does not constitute a defense. 201 Iowa550, 207NW574 (failure to read complaint charging insanity).
142-43¾-New. Advice of counsel is no defense to an action for libel where the person making the charge did not act in good faith. 201 Iowa550, 207NW574.
142-47 [c] 318 Ill 482, 149NE466.
142-48 318 Ill 482, 149NE466.
142-59 292Pa277, 141A50.
143-61 11F(2d)860.
143-65 98Fla538, 123S916(2dcase). [b] **Persons protected.**-98Fla538, 123S916(2dcase). [c] **Proceedings included.**-98Fla538, 123S916(2dcase).
143-66 [b] **Necessity of malice.**-98Fla538, 123S916(2dcase).
143-67 32PortoRico 303. [c] **Governor.**-32PortoRico 303.
143-68 32PortoRico 303.
143-72 11F(2d)860.
143-78 [b] 90PaSuper473; 90PaSuper485.
144-79 94Fla1071, 114S856.
144-82 94Fla1071, 114S856.
144-83 94Fla1071, 114S856.
144-89½-New. Class or group may be libeled. 318 Ill 482, 149NE466.
145-10 OklCr 273P369; 292Pa277, 141A50.
145-16 But see 89 IndA256, 166NE155.
146-30 37Wyo 372, 262P24, 26 [citCJ].
146-35 37Wyo 372, 262P24.
146-44 91Fla1044, 109S94. [c] 39GaA559, 147SE714; 318 Ill 482, 149NE466; 158La352, 104S112; 146Wash579, 264P3.
146-50 158La352, 104S112; 108TexCr228, 300SW86.
147-65 NJ 141A165, 166 [citCJ].
147-69 318 Ill 482, 149NE466; 254Mass424, 150NE190.
147-70 OklCr 277P286; 13PaDist&Co327. [a] **Where publication does not name grand jury charged to have been defamed or any of its members** inducement and colloquium are necessary. 13PaDist&Co 327.
147-71 318 Ill 482, 149NE466; 13PaDist&Co 327.
147-73 318 Ill 482, 149NE466; 254Mass424, 150NE190.
147-80 318 Ill 482, 149NE466.
148-83 13PaDist&Co 327; 103TexCr90, 280SW214.
148-89½-New. Where language used is susceptible of any interpretation rendering it libelous, such interpretation should be set out by way of innuendo. 13PaDist&Co 327.
148-94 [e] 109TexCr202, 4SW(2d)73.
149-2 179Ark3, 13SW(2d)828.
149-10 [a] 318 Ill 482, 149NE466. [b] TexCr 26SW(2d)280.
149-19 But see 99Fla362, 126S292.
149-20 [a] 37Wyo 372, 263P623.
149-21 233 IllA331.
149-23 Contra 233 IllA331.
149-25 158La352, 104S112.
150-32 94Fla1071, 114S856.
151-65 [b] 109TexCr202, 4SW(2d)73.
151-66 98Fla538, 123S916(2dcase).
151-67 109TexCr202, 4SW(2d)73.
151-69 98Fla538, 123S916(2dcase).
151-86 259Mass152, 156NE65.
151-88 90PaSuper485. [a] 40GaA15, 148SE622. [b] 40GaA15, 148SE622; 90PaSuper473.
152-92 [a] 40GaA15, 148SE622; OklCr 273P369; OklCr 275P382; 37Wyo 372, 262P24. [b] 89 IndA256, 166NE155.
152-2 40GaA15, 148SE622.
152-3 Mass 168NE790.
152-9 [a] (4) Whether alleged libel was ever published in another state. 40GaA15, 148SE622. [b] Iowa 227NW616.
153-25 [a] 108TexCr228, 300SW86. [b] Iowa 227NW616.
154-47 90PaSuper473; 90PaSuper485; 192Wis379, 212NW879.
155-61½-New. Where the law presumes malice from the speaking of slanderous words, where justification therefor is not shown, evidence of other publications is inadmissible to show malice where the defense is a denial of the publication and not justification. 192Wis379, 212NW879.
155-70 OklCr 277P286.
155-75 94Fla1071, 114S856.
155-83 Conn 151A349.
156-99 OklCr 282P1113.
156-2 146Wash579, 264P3.
156-3 77Mont74, 249P664.
156-5 287Pa78, 134A486, 48ALR567.
156-6 287Pa78, 134A486, 48ALR567.
156-7 166Minn279, 207NW648.
156-8 166Minn279, 207NW648.
156-11 166Minn279, 207NW648.
156-13 166Minn279, 207NW648.
156-14 166Minn279, 207NW648.
157-17 [a] Iowa 227NW616. [b] **Instructions held erroneous.**-OklCr 277P286. [c] **Instruction held not to submit matters in information.** Conn 151A349.
157-22½-New. Instructions assuming adultery as penal offense held error. 108TexCr228, 300SW86.
157-30 [a] **Instruction on burden of proving privilege held not misleading.** Conn 151A349.
157-44½-New. , or by fine or imprisonment, 77Mont74, 249P664.
157-44¾-New. under which latter provision the court may impose a fine with a provision for imprisonment in default of payment. 77Mont74, 249P664.

LIBERTY

159-47 325 Ill 511, 156NE778.
159-51 325 Ill 511, 156NE778; 187Wis463, 204NW595.

LICENSE

161-17 [a] (7) Leave to do thing which licensor could prevent. 42F(2d)116.
161-27 [a] 310Mo 184, 274SW827. [d] **Similar definitions.**-310Mo 184, 274SW827.

LICENSES

167-4 85Colo 125, 274P831; 29Hawaii 422, 428 [citCJ]; 20OhA236, 153NE135; 47RI 258, 131A641.
167-5 13F(2d)500; 92Fla515, 109S442, 445 [quotCJ]; 8PaDist&Co 450, 454 [quotCJ]; 47RI 258, 131A641.
167-6 8PaDist&Co 450, 454 [quotCJ]; 116Tex82, 286SW458.
167-6½-New. So the words "license" and "leave" are synonymous. 116Tex82, 286SW458.
167-7 8PaDist&Co 450, 454 [quotCJ].
167-7½-New. A license is merely a privilege, and not a property right. 47RI 258, 131A641.
167-8 134Misc698, 236NYS614.
167-11 47RI 258, 131A641; 156Tenn1, 299SW792, 56ALR496.
168-16 83Mont380, 272P684; 103NJL281, 135A677. [b] **Denomination as license fee** does not preclude act from being declared revenue measure. 38F(2d)652. [c] **Tax on gasoline** is tax upon privilege of using motor vehicle fuel. 34OhA267, 171NE111.
168-18 13F(2d)227; 17F(2d)394; Minn 232NW35.
168-19 Mo 23SW(2d)95. See also 34NM161, 279P69.
168-20 92Fla515, 109S442, 445 [quot CJ].
168-21 13F(2d)500; 16F(2d)256, 257 [quotCJ]; 92Fla515, 109S442, 445 [quotCJ]; 204 Iowa798, 215NW957, 55ALR430; 163La418, 112S31, 32 [citCJ]; 184Wash641, 236P566.
168-22 16F(2d)256, 257 [quotCJ]; 92Fla515, 109S442, 445 [citCJ]; 163La418, 112S31, 32 [citCJ]; 261Mass269, 159NE41. But see 134Wash641, 236P566.
168-23 92Fla515, 109S442, 445 [citCJ]; 163La418, 112S31 [citCJ]; 104NJL312, 140A440, 442 [citCJ].
168-25 16F(2d)256, 257 [quotCJ].
169-30 13F(2d)500; Fla 130S699 (regulation or revenue or both); 334 Ill 431, 166NE115; 122 Or684, 260P220.
169-31 13F(2d)500; 334 Ill 431, 166NE115.
169-32 [a] **Law enacted in exercise of police power** is not invalid for imposing tax for revenue. 7F(2d)715.
169-33 334 Ill 431, 166NE115. [a] **Where object of statute is for public protection,** statute will be construed as forbidding conduct of business without license. Ida 289P85. [b] **Statement in legislative enactment that particular business may be fraudulently conducted** does not give legislature power to prohibit that business. NH 150A551 (2dcase).
169-34½-New. Power to revoke a license to conduct boxing and wrestling contests is not necessarily evidence that the ordinance providing for licenses was a regulatory measure. 91CalA257, 266P1015.
169-34¾-New. The title of an ordinance is not conclusive that the ordinance was a regulatory measure. 91CalA257, 266P1015.
169-40 Iowa 232NW477.
169-43 222MoA831, 118SW(2d)81; 113Oh57, 148NE470.
170-44 7F(2d)715; 169Ark473, 275SW741; 180Ark815, 23SW(2d)259; 222MoA831, 11SW(2d)81; 149Wash545, 271P826. [b] (8) Tax on each discharge standard used by operator of gasoline filling station held tax on occupation. 147Va157, 136SE588. (9) Other instances. 228Ky453, 15SW(2d)280; 168La547, 122S845; 105NJL51, 143A859; 149Wash545, 271P826.
170-46½-New. If a license tax is only sufficient to pay expense that may reasonably be presumed to arise in supervision and regulation of business, its disposition cannot convert it into a tax. 247Mich572, 226NW248.
170-47 7F(2d)715; 247Mich572, 226NW248; 222MoA831, 11SW(2d)81; 113Oh57, 148NE470; 20OhA236, 153NE135; 50SD324, 210NW186. [a] (5) Statute providing for licensing of operators of motor vehicles for hire on highways and requiring payment of stated percentage of gross receipts imposes tax for revenue purposes. 199Cal21, 248P235. (6) License fee for carrying on slaughtering business. 85Ariz194, 276P1. (7) Fee of one dollar per day on business of peddling goods in street by nonresidents. 134Misc711, 236NYS129. [c] 20OhA236, 153NE135 (architects).
171-49 134Misc711, 236NYS129; Utah 285P1001.
171-50 177Ark821, 9SW(2d)75.
171-53 17F(2d)394.
171-54 222MoA831, 11SW(2d)81.
171-57 6F(2d)523; 17F(2d)394; 32Ariz30, 255P485; 169Ark473, 275SW741; 147Miss663, 112S584; 154Tenn412, 285SW570, 47ALR971; Utah 270P142. [a] (1) 122Kan390, 251P1091; 165Minn215, 206NW166; 113 OhSt590, 148NE470. (8) 112 OhSt590, 148NE95 (gallon tax on gasoline used for certain purposes). (9) Tax on gasoline dealers measured by amount sold. 147Miss663, 112S584. (10) Tax on business of selling water. 156Tenn1, 299SW792, 56ALR496. (11) Statute imposing taxes on dealers in soft drinks and on theaters, has been held to impose license taxes on occupation or business, and not property tax; "license tax" implying burden on that which is not property, but which results from its enjoyment, or conduct of business or calling, or on civil right or privilege. 147SC116, 144SE846. (12) Annual tax on domestic corporations computed on paid up capital stock. Nebr 227NW926. (13) Tax on gross receipts imposed on public service corporation on privilege of carrying on intrastate business. 43F(2d)170. [b] **Tax levied upon occupation** and paid by person, association, etc., engaged in occupation is a tax not upon the privilege of being but upon the privilege of engaging in an occupation. 112 OhSt166, 147NE302.
172-63½-New. A tax on the privilege of engaging in an occupation constitutes an excise tax. 85Ariz194, 276P1.
172-63¾-New. Excise tax on use of all gasoline for any purpose whatever is

not a special privilege or use tax laid on persons using public roads of state. 34NM643, 287P699.

172-64 175Minn253, 221NW5.

172-65 122Kan390, 251P1091; 34NM 643, 287P699 (held excise and not property tax). See 225Ky303, 8SW(2d)383.

172-66 Iowa 232NW477; 122Kan390, 251P1091. [a] **Excise tax.**–113 Oh57, 148NE470.

172-68 17F(2d)394. [a] (3) Tax on gross products of all mining claims is property tax. 38Wyo 505, 269P43. [b] But see 6F(2d)523.

172-69 6F(2d)523; 17F(2d)394; 218 Ala115, 117S673; 3Del 577, 140A691; 122Kan390, 251P1091.

172-70 218Ala115, 117S673.

173-72 [a] **Distinguishing feature between poll tax and every other variety of tax** is that poll tax is sum levied upon persons without regard to property, occupation, or ability to pay and is level assessment against all persons; whereas all other forms of taxation are based upon some process of computation such as occupation or earnings. 112 OhSt166, 147NE302.

173-73 118 Okl 268, 248P340, 52ALR 528.

173-75 [a] **Authority to regulate implies** power to collect fees to pay administrative and other expenses. 220Ky 116, 294SW1080.

173-87 165Ga897, 142SE459.

173-92 [a] **Under Leasing Act of Febr. 25, 1920** states may impose annual license tax on producers of petroleum, who are lessees of United States land. 268US 45, 45SCt440, 69L ed841.

174-93 [a] **In Utah.**–285P1001.

174-94 85PaSuper149; TexCivA 286 SW489. [a] **Tax held not interference with federal government.**–Occupation tax on gasoline sold is not, as to sales made to federal government, a tax on it or any agency or instrumentality thereof. TexCivA 286SW489.

174-95 220Ala231, 124S523; 216Ala 391, 113S254; 32Ariz30, 255P485; 167 Ark557, 271SW720 (where constitution grants power to tax certain occupations by necessary implication, it precludes from taxing other occupations); 95Fla 345, 116S81 (state has wide discretionary power); 164Ga185, 138SE54; 214 Ky339, 283SW119; 159La1001, 106S 544; 147Miss663, 112S584; 156Miss306, 126S2; 48Nev120, 227P1020; Oh 172 NE148; 154Tenn412, 285SW570, 47ALR 971; 157Tenn157, 7SW(2d)47; 149Wash 545, 271P826. [b] **Occupation or property on lands of United States.**–144Va 618, 131SE236, 46ALR219. [c] **Imposition of occupation tax on counties** is within power of legislature. 169Ga354, 150SE262.

175-96 164Ga185, 138SE54.

175-97 [a] **It is only on those "doing business"** that legislature has right to impose license tax. 42 Ida169, 244P149.

175-1½-New. Construction of statutes. Provisions in an earlier act adopted in a later statute are to be given full force and effect so far as consistent. 134SC 251, 131SE421.

175-1½-New. The expressed intention of the legislature in adopting an earlier act to make the inconsistent provisions of the later statute prevail does not render inapplicable the rules that the various provisions of an act should be read so as to be given effect if possible. 134SC251, 131SE421.

175-1¼-New. The legislature has a wide discretion in determining whether a business or occupation shall be barred to the dishonest or incompetent. 243NY 51, 152NE461.

175-1½-New. The legislature may exact two or more privilege taxes from the same person. 155Tenn524, 296SW 10.

175-1¾-New. Wide discretion is vested in legislature to determine whether business or occupation should be barred to the dishonest or incompetent. 136 Misc307, 240NYS784.

175-3 32Ariz30, 255P485. [b] **In Montana.**–73Mont147, 237P528. [c] **Statutes held not violative of limitation.**–Statute imposing tax on distributors of motor fuels does not violate constitutional prohibition against delegation to counties of right to levy tax except for specified purposes. 169Ga354, 150SE 262.

175-10 99Fla1, 126S308.

175-10½-New. In construing statute relative to license tax rule of strict construction of penal laws is subordinate to the rule of reasonable construction. 134 SC251, 131SE421.

175-11 32Ariz30, 255P485; 33NM569, 274P46.

176-23 317Mo 736, 296SW415; 112 Oh 166, 147NE302.

176-25 316 Ill 519, 147NE384, 38ALR 1533 (act did not authorize city to license factories and workshops before amendment of 1919 and such amendment has been declared void).

176-26 163Ga502, 136SE446; TexCivA 31SW(2d)882.

176-27 32Ariz30, 255P485; 92Fla267, 109S446; 326 Ill 58, 156NE791; 316 Ill 519, 147NE384, 38ALR1533; 334 Ill 431, 166NE115; 48Nev120, 227P1020; 116 OhSt166, 147NE302.

177-31½-New. Authority given to cities held not to extend to incorporated towns. 173Ark833, 293SW740.

177-31½-New. A city or village possesses no inherent power to license. 332 Ill 586, 164NE199.

177-33 173Ark833, 293SW740; 75CalA 591, 243P55; 316 Ill 519, 147NE384, 38 ALR1533 (ordinance not unchanged under police power); 34NM161, 279P69.

177-34 139 Okl 162, 282P128; 140 Okl 194, 282P353. But see 332 Ill 586, 164 NE199.

177-35 229Ky722, 17SW(2d)1017; 34 NM239, 280P260.

177-36 34NM161, 279P69.

178-39½-New. A municipality cannot pass or enforce a revenue-producing ordinance under the guise of a license fee. 156Md244, 144A357.

178-43 316 Ill 519, 147NE384, 38ALR 1533; Mo 32SW(2d)281; 291Pa478, 140 A520; 49Philippine917; TexCommnA 6 SW(2d)80.

178-44½-New. Where grant of power to license is followed by denial of power to exact license tax, the incident of power to tax, ordinarily appurtenant to power to license, is taken away. Tex CivA 289SW425.

178-45 TexCivA 288SW1113.

178-46 169Ga112, 149SE882; 316 Ill 519, 147NE384, 38ALR1533 (ordinance void); Ill 172NE171. See also 34NM 161, 279P69.

179-52½-New. Authority to supervise streets does not give implied power to require automobile license tax. 173Ark 833, 293SW740.

179-53 316 Ill 519, 147NE384, 38ALR 1533 (power to license factories and workshops not granted).

179-54 324 Ill 566, 155NE356.

179-55 324 Ill 566, 155NE356; 321 Ill 259, 151NE902.

179-58 34NM239, 280P260; TexCivA 288SW1113.

179-59 48Nev120, 227P1020.

179-60 48Nev120, 227P1020; 20 OhA 236, 153NE135; 138 Okl 266, 280P797; 49Philippine917.

180-61 140 Okl 194, 282P353.

180-70 29Hawaii422; 322 Ill 586, 164 NE199.

180-73½-New. Laws regulating collection of taxes or licenses are sui juris and general provisions of civil code have little application. 162La121, 110S110.

181-74 35PortoRico 744 (no tax on shows). [a] **State in granting privilege** cannot impose as condition relinquishment of constitutional rights. 271 US583, 46SCt605, 70L ed1101, 47ALR 457.

181-84 Mo 32SW(2d)281; 48Nev120, 227P1020 (power to exact quarterly license fee from person vending from freight car included); 34NM161, 279P 69. [a] **Municipalities may require both occupation tax and license fee from same business.**–TexCivA 31SW (2d)882.

181-85 149Miss843, 116S92; 48Nev120, 227P1020.

181-86 321 Ill 259, 151NE902.

181-87½-New. Where a statute declares that municipal corporations shall not have power to impose a license tax on any business unless specially named as taxable in the charter or unless such power is conferred by statute, the doctrine of ejusdem generis cannot be invoked to authorize a tax on callings not so named. Mo 18SW(2d)896.

181-87¼-New. Such statute applies to all municipal corporations. Mo 18SW (2d)896.

181-87¼-New. Under such statute a municipality cannot impose a license tax on a calling not so named although the charter provides that the enumeration of taxable businesses shall not impair the general power of the municipality to impose license taxes. Mo 18 SW(2d)896.

181-91 216Ala108, 112S532. But see 216Ala364, 113S257.

182-4 321 Ill 259, 151NE902; 255 IllA 350.

182-5 321 Ill 259, 151NE902; 317Mo 736, 296SW415; 222MoA831, 11SW(2d) 81; Wis 231NW261. [a] **Statute applicable to all municipal corporations,** whether under general or special charter. 317Mo 736, 296SW415.

182-7 330 Ill 320, 161NE479.

182-18 89Fla334, 103S625.

182-18½-New. Some statutes forbid imposition of tax by municipality on occupations taxed by state. TexCivA 291SW661.

184-36 330 Ill 320, 161NE479.

184-45 14PaDist&Co 258. See also 200 Wis434, 228NW502.

184-47 122Kan390, 251P1091; Tex CommnA 6SW(2d)80; TexCivA 288SW 1113. [a] 112 OhSt493, 147NE806. [b] **In Mississippi.**–155Miss641, 125S112.

184-48 TexCivA 288SW1113.

184-49 113 Oh57, 148NE470; 124 Or 175, 264P347; TexCivA 288SW1113.

184-62 97Fla710, 122S225; 81Mont 423, 263P687 (gasoline distributors and dealers license tax law, providing for distribution of the proceeds in stated proportions between the general fund of the state, state highway fund, and general road fund of various counties held to impose tax for public purpose). [b] **Invalidity of order of county commissioners' court fixing penalty** does not affect validity of act providing for license tax. 220Ala231, 124S523. [c] **Statute held not invalid as authorizing property or privilege tax in alternative.**–220Ala231, 124S523. [d] **Statute authorizing secretary of state to fix amount and terms of bond required for license** is invalid as delegation of legislative power. 336 Ill 472, 168NE401.

184-63 Wash 292P112; 198Wis411, 224NW106.

184-64 296Pa299, 145A858.

184-65 334 Ill 431, 166NE115.

185-66½-New. Validity of regulation does not depend upon ability of applicant to comply. 172Ark90, 287SW763.

185-66½-New. Ordinance imposing fee for inspection is not invalid because inspection made or money expended for another purpose. 173Ark785, 293SW 711.

185-66¼-New. In determining validity, whether a tax must be passed on to a consumer is not a material inquiry. 219Ala73, 121S64.

185-68 TexCivA 31SW(2d)882.

185-73 156Md244, 144A357; 105NJL 51, 143A859; TexCommnA 6SW(2d)80; 198Wis411, 224NW106. [b] **Act requiring license for operation of motor vehicle** not invalid against municipalities owning such vehicles because they were public property and exempt under general laws. 160Ga251, 127SE856.

185-75 32Ariz30, 255P485; 321 Ill 259, 151NE902; 34 OhA239, 170NE578; Tex CivA 28W(2d)1001; Vt 151A650; Wash 290P1010. [a] **Failure of state to regulate and inspect game farms** does not deprive legislature of power to provide for regulation and exact fee therefor. 149Wash545, 271P826.

185-76 321 Ill 259, 151NE902; 332 Ill 586, 164NE199; 198Wis411, 224NW 106. [a] (3) Ordinance requiring license and bond of persons operating milk gathering stations intended, not to prevent fraud, but to compel payment for merchandise. 134Misc652, 236 NYS293.

185-77 38F(2d)652; 321 Ill 259, 151NE 902.
185-78 177Ark821, 9SW(2d)75; 321 Ill 259, 151NE902. [b] **Ordinance imposing tax of $1.00** for automobile operator's license held not misuse of police power to raise revenue. 138SC329, 136 SE314.
186-81 Nebr 228NW256.
186-83 168Ga808, 149SE211. [a] (2) Ordinance imposing tax or license on persons coming into city and taking subscriptions to magazines or newspapers without having fixed place of business. 169Ga112, 149SE882. [b] 168Ga 808, 149SE211 (persons engaged in certain business in or near cities of stated population).
186-95 147Miss105, 113S214, 215 [cit CJ]. [a] **Statutes held not unreasonable.**-36F(2d)397. [b] **Statutes held valid.**-132 Or223, 283P753.
186-96 324 Ill 566, 155NE356; Vt 151 A650. [a] (6) Ordinance imposing license for conducting business within police jurisdiction, but outside city limits. 214Ala409, 108S231. (7) Declaring ice business properly subject to governmental regulation. 180Ark770, 22 SW(2d)993, 68ALR1018. (8) Ordinance imposing tax or license on persons coming into city and taking subscriptions for magazines or newspapers without having fixed place of business. 169Ga 112, 149SE882. (9) Requiring applicant for restaurant license to furnish references as to character and reputation. NJSup 147A570. (10) Other instances.-Md 144A357; Wis 230NW59 (2dcase). [b] **Automobile driver,** admitting driving in streets, cannot contend ordinance was void for unreasonableness as regulating driving within city limits instead of being confined to driving on public highways. 138SC329, 136SE314.
187-97 30F(2d)839; 42F(2d)913; 321 Ill 259, 151NE902; 324 Ill 566, 155NE 356; 339 Ill 132, 171NE154; 147Miss 105, 113S214, 215 [citCJ]; 134Misc652, 236NYS293 (statute requiring license and bond of persons operating milk gathering stations and providing for forfeiture in case of failure to pay bills contracted); Vt 151A650; 147Wash86, 265P167, 172 [quotCJ]. [a] (2) Law requiring bond of licensee to buy and sell foreign exchange held not unreasonable as to terms of bond. 323 Ill 427, 154NE198. (6) Requiring junk dealer to consent to inspection and search of premises as prerequisite to license. 235Ky265, 30SW(2d)968. [b] **Where reliability of applicant is made main test for issuance of license** and there is no provision for inspection or regulation, license tax is unreasonable and void. 321 Ill 259, 151NE902.
187-1 214Ala409, 108S231; TexCivA 318SW(2d)882.
187-4 [b] **Motor vehicles.**-251Mass617, 147NE680.
187-5 164Ga235, 138SE234; 34 OhA 239, 170NE578.
188-12 [a] **License fee held not objectionable** as being merely occupation tax. TexCivA 318SW(2d)882.
188-17½-New. Ordinance requiring motor bus operator commencing business in latter part of year to pay full yearly license fee held not invalid. 215 Ky514, 285SW241.
189-22 281US146, 50SCt310, 74Led775. [c] **Where license held graduated on amount of business done,** separate license for each place operated held not necessary. 288Pa43, 135A610.
189-23½-New. It is no objection to the validity of an occupation tax that the amount of the tax is measured by the value of the thing produced. 228Ky453, 15SW(2d)280.
189-26 163La1005, 113S355.
189-29 16F(2d)256, 257 [quotCJ]; 155 Tenn524, 296SW10.
190-32 16F(2d)256, 257 [quotCJ]. [a] **License tax held retroactive.**-16F(2d) 256.
190-35 321 Ill 259, 151NE902; 122Kan 390, 251P1091; 147Miss105, 113S214, 215 [citCJ]; Nebr 228NW256. [b] 173 Ark785, 293SW711. (2) Others. 168La 547, 122S845.
190-37 48Nev120, 227P1020.
190-40 29F(2d)401 (tax was not invalid because not according to value); 173Ark785, 293SW711; 321 Ill 259, 151 NE902; Ill 172NE171; Iowa 232NW 477; 237Mich464, 212NW78; 247Mich 572, 226NW248; 32 OhA472, 168NE227; 124 Okl 60, 253P999; 124 Or175, 264P 347. [a] (18) For other cases in which fee held not unreasonable see 215Ky 514, 285SW241; 217Ky205, 289SW204; 237Mich464, 212NW78; 147Wash630, 267P506. (19) Other instances. 219 Ala73, 121S64; 170Ga418, 153SE1; 333 Ill 190, 164NE218; 198NC551, 152SE 693; 112TexCr152, 15SW(2d)650.
191-41 321 Ill 259, 151NE902; 122Kan 390, 251P1091; 161La320, 108S552, 553 [quotCyc]; 237Mich464, 212NW78; 247 Mich572, 226NW248; 124 Okl 60, 253 P999; 124 Or175, 264P347. [a] (8) License fee on apparel shops ranging from two dollars to two hundred dollars, depending on number of employees. 324 Ill 566, 155NE356. (9) One hundred and twenty dollars a year for use of streets by "wholesale trade vehicles." 124 Or175, 264P347. (10) Ten dollar fee for each bakery delivery vehicle. Ill 172NE171. [b] **License fee based on number of employees in factories** is void as bearing no reasonable relation to additional burden of investigations imposed on municipality. 321 Ill 259, 151NE 902.
192-42 Iowa 232NW477.
192-44 247Mich572, 226NW248.
192-48 118Nebr331, 224NW692.
192-51 122Kan390, 251P1091; 147Misc 105, 113S214, 215 [citCJ]; Nebr 228 NW256. [a] (11) Twenty-five dollars per day license fee imposed on transient merchants. 180Minn352, 230NW830(1st case). [b] (4) License tax on persons vending from freight cars approximating ten per cent of gross returns of licensee. 48Nev120, 227P1020. (5) One hundred and fifty dollars per annum on nonresidents of city who sell bread or bakery products. 121Kan72, 250P1056. (6) Act giving city discretionary range of twenty five to one hundred dollars is not void as prohibitive on small enterprises. 163Ga374, 136SE207. (7) One cent per gallon on sales of motor fuels. 219Ala73, 121S64. (8) Twenty per cent of sales price on cigarette dealers. 319Mo 810, 5SW(2d)22. 62ALR95. (9) Other instances. Fla 130S699.
193-52 147Miss105, 113S214, 215 [cit CJ].
193-58 92Fla267, 109S446; 247Mich 572, 226NW248; 73Mont147, 237P528; 103NJL281, 135A677.
193-59 92Fla267, 109S446; 118Nebr 331, 224NW692; 32 OhA472, 168NE227. See also 177Ark821, 9SW(2d)75.
193-60 92Fla267, 109S446; 121Kan72, 250P1056; 73Mont147, 237P528.
194-61 34F(2d)682.
194-67 [a] **Occupation tax for emigrant agents** may not be declared unreasonable where number of such agents paid tax. 39F(2d)198.
194-68 Ark 32SW(2d)634; 220Ky804, 295SW1041; 225Ky129, 7SW(2d)832; 235Ky822, 32SW(2d)410.
194-74½-New. In determining validity of ordinance imposing license for transacting business, for police and fire protection, the question of the adequacy of service is immaterial. 214Ala409, 108S231.
195-76 214Ala409, 108S231; 121Kan 72, 74, 250P1056 [citCJ]; 247Mich572, 226NW248; 73Mont147, 237P528; 75 Mont240, 243P1073; 34NM161, 279P 69.
195-87½-New. ; nor because enforcement board adopts unreasonable rules in enforcement thereof. 135Wash32, 236 P790.
195-88 138 Okl 266, 280P797 (manner of enforcement not shown to have been discriminatory and arbitrary).
196-91 273US407, 47SCt393, 71Led 709; 327 Ill 387, 158NE703, 55ALR303; 212Ky152, 278SW593. [b] **Act apparently intended to prevent false advertising** held void as to those doing dyeing and dry cleaning business by giving work to others. 212Ky152, 278SW593.
196-92 20 OhA236, 153NE135; 198Wis 411, 224NW106.
196-95 [a] (3) Other instances. Mo 32 SW(2d)281. [b] (2) Ordinance of city of Seattle, empowering chief of police by summary method to refuse dance hall permit, or to cancel such permit, if procured by fraud or on applicant's failure to comply with ordinance, or for any reason which in opinion of chief of police will be detrimental to public peace, health, or welfare, subject to review by city council. 148Wash485, 269 P1043, 60ALR166.
196-96 161La320, 108S552; TexCivA 10SW(2d)770.
196-98 219Ala73, 121S64 (validity of tax depends on whether there is reasonable basis of classification, discrimination between members of class, or confiscatory and oppressive levies taken as whole); 163La1005, 113S355. [a] (3) Statute regulating employment agencies, which requires that no agency shall be operated without license, is not unconstitutional. 178Ark170, 10SW(2d)9. (4) Other statutes held not unconstitutional. NH 150A551(2dcase); Mo 5SW (2d)22; 78Mont1, 252P301. (5) Blue Sky Laws held valid. NC 153SE855. (6) Other instances. 140 Okl194, 282P353.
196-99 273US407, 47SCt393, 71Led 709; 162La956, 111S341; Utah 285P 1001. [b] **Tax provisions in constitution** held applicable only to ad valorem or property taxes. 162La956, 111S341. [c] **License tax held not new scheme of taxation** forbidden by constitution of state. 162La956, 111S341.
196-99½-New. Statute requiring license tax of one operating prohibited gaming device is invalid as against public policy. 104WVa76, 138SE579.
196-99½-New. That an abattoir was not operated at a loss would not make the ordinance authorizing it invalid as providing a revenue measure. 177Ark 821, 9SW(2d)75.
196-4 23AlaA5, 120S140; 20 OhA236, 153NE135. [a] (3) Statute prohibiting one individual from employing another to purchase, sell, or negotiate sale of property or procure loan thereon or to handle single transaction in such property without obtaining license therefor is not unconstitutional because license is required for single transaction. 196 Cal 236, 237P38, 59ALR1493. (4) Ordinance providing for licensing master electricians. 105NJL51, 143A859. [c] **Tax on gasoline discharge standards** at filling stations held not unconstitutional for inclusion of stations on private property. 147Va157, 136SE588.
197-5 327 Ill 387, 158NE703, 55ALR 303; 332 Ill 586, 164NE199. [a] 136 Misc353, 239NYS706.
197-6 15F(2d)831.
197-15 34Ariz201, 269P501; 35Ariz 194, 276P1; 169Ark473, 275SW741; 99 Fla1, 126S308; Fla 130S699; 169Ga340, 152SE61; 155La1001, 106S544; 33NM 553, 273P928, 62ALR296; 153Va935, 151SE293.
198-16 83Mont380, 272P684.
198-17 Vt 151A650.
198-18 169Ark473, 275SW741; 147Miss 105, 113S214, 215 [citCJ]; 128 Or274, 274P308.
198-19 NC 154SE838.
198-19½-New. License tax is not void for inequality because applying to intra-state commerce only. TexCommnA 292SW869.
198-21 99Fla1, 126S308.
198-21½-New. License tax on the sale of gasoline does not violate uniformity provision of constitution although competing articles are not taxed. 290Pa 539, 139A156.
198-21½-New. Occupation taxes which are not uniform are invalid as inconsistent with natural justice. 197NC604, 150SE190.
198-21¼-New. Excise on storage of gasoline imported into state has been held not an invalid discrimination based solely on origin. Fla 130S710.
198-21⅝-New. Excise on storage of gasoline has been held not arbitrary discrimination based purely on origin. Fla 130S699.
198-24 34F(2d)47; 38F(2d)652; 212 Ala566, 103S656; 163Ga502, 136SE446; 169Ga354, 150SE262; 326 Ill 58, 156 NE791; 211Ky677, 278SW98, 43ALR 590; 162La956, 111S341; Mo 32SW (2d)281; NC 154SE838; 116 Or581, 242 P621; 288Pa280, 136A213; 153Tenn53,

281SW777; 153Va935, 151SE293; 146 Wash210, 262P965. [c] **Legislative discretion.**–199Cal 42, 248P244.

199–25 147Va157, 136SE588; 146 Wash210, 262P965. [b] **Itinerent vendors of drugs.**–Statute imposing license tax on itinerant vendors of drugs is not discriminatory or lacking in uniformity. 89CalA390, 265P325.

199–26 34F(2d)682; 212Ala566, 103S656; 168Ga723, 149SE37; Mo 18SW(2d)896; 82Mont98, 265P6; 288Pa280, 136A213. [d] **Requiring license for those soliciting charitable, religious, and like donations** is not violative of equal protection clause. 296Pa299, 145A858. [e] **Cigarettes.**–319Mo 810, 5SW(2d)22, 62ALR95. [f] **Statutes held unconstitutional.**–40F(2d)846.

200–27 82Mont98, 265P6; 147SC116, 144SE846; 147Va157, 136SE588. See also 28F(2d)441. [a] **Classification according to population.**–Or 285P1105.

200–30 211Ky677, 278SW98, 43ALR590; 147Miss105, 113S214, 215 [cit CJ]; 82NH561, 138A284; 116 Or581, 242P621; 48SD482, 205NW72. [a] (1) Fla 130S699. (5) Ordinance imposing license tax on gasoline filling stations different from that imposed on merchants. 147Va157, 136SE588.

200–31 Vt 151A650.

200–31½–New. Collection and enforcement. An act providing that all taxes and public accounts settled against a corporation shall be first lien on its property and franchise is unreasonable and unconstitutional classification, where it is not also a lien on property of individual. 284Pa189, 130A413.

200–32 23AlaA111, 121S458; Tex CommnA 292SW869.

200–33 40F(2d)846; 169Ark473, 275SW741; 174Ark486, 295SW708; 204Cal 297, 268P352; 204Cal 301, 268P353; CalA 291P233; 211Ky677, 278SW98, 43ALR590; 147Miss105, 113S214, 215 [citCJ]; 82Mont98, 265P6; Nebr 228NW256; 82NH561, 138A284; 103NJEq307, 143A438; 116 Oh166, 147NE302; 288Pa280, 136A213; 48SD482, 205NW72; 147Va157, 136SE588. [a] (11) Classifying grocery stores and taxing each class differently. 211Ky677, 278SW98, 43ALR590. (12) Requiring license tax for privilege of grazing animals brought into state to graze for any length of time whatever. 82Mont98, 265P6. (13) Statute requiring persons or corporations operating six or more chain stores within state to pay license tax on each store. 196NC145, 144SE701. (14) Imposing license tax for making wholesale deliveries by truck for sofe drink manufacturers. 23AlaA111, 121S458. (15) Imposing tax of two hundred and fifty dollars a day for conducting auction sale, but two hundred dollars for thirty days in case of person continuously in business. 97Fla468, 121S567. (16) Act imposing graduated license fees on certain business dependent on number of stores owned. 38F(2d)652. (17) Exempting from tax those whose receipts averaged between $5,000 and $6,000 while taxing all others in same business. 170La76, 127S370. (18) Other instances. 38F(2d)652. [b] **Ordinances held not valid for discrimination.**–Imposing same fee on both wiener stands and restaurants. 173Ark785, 293SW711. [c] **Acts or ordinances held valid.**–Requiring bond to obtain license to operate commercial gin. 112TexCr152, 15SW(2d)650. [d] **Ordinance imposing tax held not invalid** because sought to be collected from one and not from others. 181Ark377, 26SW(2d)70.

201–34 Ala 129S477.

201–35 38F(2d)652; 211Ky677, '278SW98, 43ALR590.

201–40 34F(2d)47 (act providing for definite tax on each barrel of oil produced and defining classes of oil taxable at different rates); 34F(2d)808; 35F(2d)421; 23AlaA5, 120S140; Ala 129S477; 22AlaA537, 118S253; 174Ark486, 295SW708; 163Ga502, 136SE446; Ga 154SE436; 162La956, 111S341; 175Minn305, 221NW13; 73Mont147, 237P528; 81Mont423, 263P687; 82Mont98, 265P6; 83Mont353, 272P534; 83Mont380, 272P684; 82NH561, 138A284; 105NJL51, 143A859; 198NC551, 152SE693; 140 Okl 194, 282P353; 147SC116, 144SE846; 152SC455, 150SE269; 154Tenn412, 285SW570, 47ALR971. See also 218Ala115, 117S673. [a] (4) Statute imposing license tax on gasoline distributors and dealers has been held not violative of constitutional provision that taxes shall be uniform upon same class of subjects. 81Mont423, 263P687. (5) Imposing license tax on sale of cigars and cigarettes based on wholesale price. 218Ala115, 117S673. (6) Act licensing oyster packers. 279US392, 49SCt372, 73L ed754. [b] **That occupational tax is different** on one business than on another does not render it objectionable. Ga 154SE436.

202–41 281US146, 50SCt310, 74L ed775; 28F(2d)441; Ga 155SE338; 235Ky822, 32SW(2d)410; 196NC145, 144SE701; 197NC604, 150SE190; 198NC551, 152SE693 (different localities); TexCivA 48W(2d)592; 147Va157, 136SE588. [a] (16) Cigarette dealers. 319Mo 810, 5SW(2d)22, 62ALR95. (17) New public utilities and subdividing such classes into those taking over old public utilities and those which do not. 218Ala125, 117S656. (18) Classification into regularly established and nonregularly established businesses. 31F(2d)466. (19) Detailed classification of vehicles. 333 Ill 190, 164NE218. (20) Other instances. 279US392, 49SCt372, 73L ed754. (21) Dealers in oleomargerine and dealers in butter. 34F(2d)682. (22) Plumbers and master plumbers. 168La742, 123S310. (23) Retail merchants operating distributing house and those merely operating retail store. 153Va935, 151SE293. (24) Wholesale grocers operating cold storage warehouse and those not operating such warehouse. NC 155SE557. (25) Real estate brokers and salesmen. Ga 154SE436. [e] **Exemption of imports from other states** does not render gasoline dealers' license tax discriminatory against dealers in gasoline distilled within state. 78Mont1, 252P301. [f] **That statute permits importation of gasoline** for consumption without payment of tax does not render statute imposing license tax on gasoline distributors and dealers invalid as denial of equal protection of laws. 81Mont423, 263P687 (foreign corporations not granted preferential rights).

203–43 Ill 173NE364.

203–44 Fla 128S864. [b] **Ordinance wholly exempting** from tax nonresident wholesale merchants shipping goods to city by any method other than by personal delivery on vehicles and imposing tax on nonresident wholesale merchants such means of delivery held invalid as discriminatory. 198Cal 230, 244P357.

203–45 168La761, 123S317, 69ALR574.

203–47 212Ala566, 103S656; 165Minn215, 206NW166.

203–50 But see 85Colo 125, 274P831. [b] (4) Statute requiring uniform taxation is not violated by another statute allowing disabled soldiers to carry on certain businesses without license. 167Ga150, 145SE57. (5) Exemption does not cover state tax on cigars and cigarettes. 39GaA541, 147SE899.

204–52 116 OhSt166, 147NE302 (particular unit of measurement which shall be used in levying of excise tax is not justifiable question beyond question whether it has some reasonable relationship to the basis upon which the classification was made).

204–53 [a] **License tax ordinance** held not discriminatory for failing expressly to provide tax on business of more than fifty thousand dollars investment. 174Ark486, 295SW708.

204–54 147SC116, 144SE846 (act imposing license taxes on theaters, based on tickets sold).

204–55 235Ky822, 32SW(2d)410; 34NM161, 279P69. [a] (6) On fish canneries graduated according to number of cases. 269US269, 46SCt110, 70L ed270. (7) Chain stores according to number of stores in excess of one. NC 154SE838. [b] **Classifications held invalid.**–170La76, 127S370.

204–56 6F(2d)523; 21F(2d)521.

204–58 162La956, 111S341; 147Va157, 136SE588. [a] (2) Ordinance imposing arbitrary license tax on wholesales with place of business outside city limits held not discriminatory because tax on local merchants is computed on sales. 198Cal 230, 244P357.

204–60½–New. A law imposing a yearly license tax upon foreign corporations is unconstitutional where the tax is computed according to the proportion of the authorized capital stock represented by its property owned and used within the state. 108WVa118, 150SE378.

205–62 153Tenn53, 281SW777 (federal census of five years back may be made basis); 153Tenn498, 284SW61; Tex CivA 23SW(2d)778. [b] **Occupation tax** on all persons engaged in business is not invalid for failure to take into consideration location. 147Va157, 136SE588.

205–64 Fla 128S864.

205–66 31F(2d)466; Ark 30SW(2d)220; 121Kan72, 74, 250P1056 [citCJ]; 164La42, 113S757; 124Misc711, 236NYS129. [b] **License tax for sale of bread or bakery products of firm or corporation in city,** limited to nonresidents, is invalid. 121Kan72, 250P1056.

205–67 68CalA744, 230P175; 121Kan72, 74, 250P1056 [citCJ].

206–68 121Kan72, 250P1056.

206–72½–New. An ordinance prohibiting nonresidents of a village from peddling goods in streets without a license violates a statute providing that municipal regulations for carrying on lawful business not applying to citizens of all parts of the state alike shall be void. 134Misc711, 236NYS129.

206–77 279US421, 49SCt377, 73L ed776, 65ALR1341; 159La1001, 106S544; 249NY369, 164NE253; 108WVa118, 150SE378.

207–80 26F(2d)713; 29F(2d)789; 35F(2d)21; 200Cal 667, 254P551. [a] **Statutes held not to be discriminatory.**–326 Ill 18, 156NE81. [b] **Tax on authorized capital stock of foreign corporation** held burdensome on interstate commerce. 200Cal 667, 254P551.

207–81 249NY369, 164NE253.

207–84 138SC329, 136SE314.

207–85½–New. Corporate Securities Act excepting corporations organized under Code of Laws for District of Columbia or in territories under general laws, from necessity of securing permit would be unconstitutional as substantial discrimination. 81CalA128, 252P1057.

207–85¼–New. A statute providing for a gasoline tax based on sales of gasoline is not invalid because it does not include gasoline shipped from other states and consumed after status in interstate commerce has ended. 278US499, 49SCt188, 73L ed475.

207–85¼–New. Charging fifty per cent greater fee to nonmembers than to members of a nonresident, unofficial association, for making tests required by ordinance before granting licenses for the sale and installation of gas appliances, has been held a valid discrimination in favor of dues payers. 156Md244, 144A357.

207–87 273US407, 47SCt393, 71L ed709; 17F(2d)394; 31F(2d)448; 34F(2d)682; 163Ga502, 136SE446; 168Ga723, 149SE37 (licensing business of making small loans); 150Md641, 135A136; 243NY423, 154NE298; 191NC643, 132SE792; 137SC288, 135SE153; 152SC455, 150SE269; 154Tenn412, 285SW570, 47ALR971; 157Tenn157, 7SW(2d)47. See also 167Ga150, 145SE57. [a] (6) 152SC455, 150SE269. (11) Occupation of foundry. 116 OhSt166, 147NE302. (12) Giving city discretionary range of twenty-five dollars to one hundred dollars in taxing businesses. 163Ga374, 136SE207. (13) Permit and license to operate motor vehicles for public transportation of merchandise. 150Md641, 135A136 (dairy company transporting milk to own plant). (14) Exaction made as condition of license to pack oysters. 155Md252, 141A714. (15) Tax on theaters based on admissions. 147SC116, 144SE846. (16) On soft drink retailers. 147SC116, 144SE846. (17) On gasoline distributors. 83Mont380, 272P684. (18) Bas-

ing license tax on chain stores on number of stores operated. **NC** 154SE838.
208-88 19F(2d)159; 29F(2d)789; 326 Ill 18, 156NE814. [a] (3) Refunding to consumer of two cents a gallon on motor fuel used for purpose other than motor vehicles. 329 Ill 120, 160NE163.
208-89 [a] **Statute authorizing securities commissioner** to reject or revoke license on ground that business of security issuer is not based on sound business principles held not to confer arbitrary power in view of right of appeal. 220Ky603, 295SW904.
208-89½-New. Requirement that licensee to buy and sell foreign exchange pay expense of investigation of his business held invalid. 323 Ill 427, 154NE198.
209-10 169Ark473, 275SW741; 165 Minn215, 206NW166; 154Tenn412, 285 SW570, 47ALR971.
209-11 6F(2d)523.
209-13½-New. Under some constitutions expressly authorizing specific taxes on oil severed from the soil, the specific tax must bear some relation to value. 34F(2d)47.
209-16 319Mo 810, 5SW(2d)22, 62ALR 95; 147Va157, 136SE588.
210-17 157Tenn54, 6SW(2d)322.
210-18 273US407, 47SCt393, 71L ed 709; 51Philippine583.
210-19 85Colo 289, 275P896; 155Miss 522, 124S434.
210-20 [b] **On filling stations.**-219Ala 73, 121S64.
210-21 139 Okl 162, 282P128 (moving picture shows).
211-27 Mo 32SW(2d)281; 147SC116, 144SE846.
211-33 273US407, 47SCt393, 71L ed 709; 32Ariz30, 255P485; 220Ky116, 294SW1080; 162La956, 111S341; 140 Okl 194, 282P353. [a] (7) Mercantile license tax on gross receipts from sale of electrical appliances and gross receipts tax for revenue purposes. 284 Pa175, 130A412. (8) **Tax on apparatus** of gasoline filling stations held not unconstitutional as double taxation or dividing taxable privilege. 147Va157, 136 SE588. (9) Corporation tax and gasoline tax on consumption. 225Ky303, 8 SW(2d)383. [c] **Occupational and Labor Ordinance** provides for tax of one hundred dollars and in addition tax of two dollars for each person employed, ordinance declaring that number of employees is used solely as unit of measurement to determine amount of tax so levied. 116 OhSt166, 147NE302. [d] **License tax on tobacco dealers.**-162La 956, 111S341.
212-37 [a] **Tax upon any element that is necessary part of business cannot be imposed** by municipality in addition to license tax. 35PortoRico 327 (railroad transportation).
212-43 173Minn72, 216NW542. [a] (8) Provision does not give counties and municipalities any vested right to levy privilege and license taxes. 218Ala115, 117S673. (9) Provision subjects legislature to permit either counties or municipalities to levy tax on same occupation, but it cannot deny right to both of them. 218Ala115, 117S673. (10) Constitutional provision relates to license by counties. 218Ala115, 117S673. [d] **In Kentucky.**-17F(2d)394. [e] **In Minnesota.**-173Minn72, 216NW542.
212-46 135Wash32, 236P790 ("incorporated town," as used in statute requiring license for barber in incorporated town, includes cities).
212-49 [a] **Amendment to include cities** under operation of Gasoline Tax Act indicates noninclusion under prior act. 84Colo 576, 272P629.
212-50 Ala 130S72; 23AlaA74, 121S 693(3dcase); 31Ariz485, 254P1060, 53 ALR258; 81CalA128, 252P1057; 170 Ga624, 154SE145; Ga 155SE765; Mo 32SW(2d)281; 241NY157, 149NE336; 124 Okl 60, 253P999; 122 Or684, 260P 220; 142Wash329, 253P448, 59ALR539; 146Wash210, 262P965. See also 225Ky 303, 8SW(2d)383. [a] (6) Statute imposing license tax on corporation held intended to operate prospectively only. 209Ky427, 273SW28. (7) Minnesota L. (1921) c 223, imposing tax on persons engaged in mining iron ore is not retroactive. 164Minn273, 204NW932. (8) Statute imposing privilege tax on dealers in gasoline does not impose tax upon stock of gasoline on hand at time it was enacted. 154Miss565, 122S393. (9) Act, amending license act so as to require fee on fish caught, applies where license had issued prior to passage. 29 F(2d)401. [b] **Intent of legislature** in Act May 2, 1899, (P. L. p 184) was to levy mercantile tax on each retail dealer including electric light company selling appliances bought for resale, even though it is duplicate tax. 284Pa175, 130A412. [c] **Ordinance of city of New York, prohibiting soliciting contributions in streets and public places without license.**-242NY467, 152NE264 (construction). [d] **Statute construed.**-10 PaDist&Co 92 (opinion of attorney-general).
213-51 156Tenn265, 300SW564.
213-52 140Miss592, 105S480 (Mississippi L. (1922) c 120 held not to give bottling establishments right to maintain depots, without paying for privilege, in cities and towns other than ones in which the bottling establishments are located); 116Nebr61, 215NW798; 5Pa Dist&Co 454; 156Tenn265, 300SW564. [a] **Direct reference to classes of persons liable under prior act** may have same effect as if enumerated in later statute. 157Tenn29, 3SW(2d)657.
213-53 147Miss279, 112S9. [a] (2) Legislature in imposing privilege on lumberyards is presumed to have adopted common understanding of lumberyard. 147Miss279, 112S9. [c] **General words** which taken literally would result in unconstitutionality will be restricted and held not to enlarge or modify more specific and constitutional provisions. 112 OhSt590, 148NE95.
213-55 38F(2d)652; 122 Or684, 260P 220; TexCommnA 292SW869.
213-55½-New. Ordinance imposing restriction on chicken abattoir not theretofore licensed does not affect right to license of applicant whose application had theretofore been conditionally granted. NJSup 131A638.
213-55¼-New. The class created by specific enactment of a legislative body is not subject to modification so as to enlarge or reduce it. 168Ga808, 149SE 211.
213-56 23AlaA111, 121S458; 21AlaA85, 105S437; AlaA 129S792; Ga 155SE765; 120La337, 127S743; 147Miss279, 112S9; 154Miss565, 122S393; 34NM632, 286P 979; 88PaSuper602; 156Tenn19, 300SW 574; 144Wash88, 256P1030.
213-57 224Ky136, 5SW(2d)910; 144 Wash88, 256P1030.
213-58 85Colo 289, 275P896; 150Md294, 133A62; 49RI 491, 144A159.
213-58½-New. Blue Sky Law should not be construed so as to exclude ordinary meaning of term in favor of narrower meaning tending to defeat salutary purposes. 34NM632, 286P979.
213-61 142Miss611, 107S760; Wis 231 NW261.
213-62 147Miss105, 113S214; 150SC 385, 148SE224.
213-64 218Ala243, 118S281; 157Tenn 29, 3SW(2d)657.
213-65 173Ark1004, 293SW1021; 318 Ill 131, 149NE18; 164La225, 113S825; Mo 32SW(2d)281; 161Tenn203, 30SW (2d)240. But see 200Cal 598, 254P951. [a] (1) 155Tenn524, 296SW10.
214-66 98Fla486, 123S834; 152Tenn 306, 278SW59.
214-67½-New. Statute which radically changes nature of former occupation tax to that of property tax will not be held to be mere amendment because it is described as "amendment and reënactment." 17F(2d)394.
214-69½-New. Where an existing law remained in force until the amendment took effect, it was held there was no hiatus in the operation of the statute. 78CalA223, 248P716.
214-72 142Miss611, 107S760 (tax on slot machine); 104NJL312, 140A440, 442 [citCJ]; TexCommnA 292SW869. But see 247Mich255, 225NW605.
214-73 318 Ill 131, 149NE18; 143Miss 861, 108S296; TexCivA 273SW615, 617 [quotCyc].
214-75 219Ala178, 121S550.
214-82 163La547, 112S412; 83Mont353, 272P534.
215-85½-New. Power to tax occupation is not dependent upon ability to earn profit. 218Ala125, 117S656.
215-87 82Colo 574, 261P858 (dance hall).
216-99 42 Ida169, 244P149.
216-4 191NC809, 133SE391. But see 267Mass496, 166NE855.
216-6 145Va459, 134SE583.
216-6½-New. Separate elements of business cannot be taxed. 170Ga624, 154SE145.
216-9 38F(2d)897. [c] **Action of United States in entering field of so-called private business** is a public act, when effectuating granted power, and not taxable. 38F(2d)897. [d] **Right to buy and sell** cannot be limited, diminished or qualified by state taxation. 38F(2d) 897. [e] **Same principle, as to purchase of property** applies to sale thereof, with respect to taxation. 38F(2d)897.
217-12 180Ark815, 23SW(2d)259.
217-12½-New. Crown employee held not liable to business tax under by-law passed under statute not mentioning crown, NB [1926] 4DomLR894.
217-13 149Wash545, 271P826. [a] **Farming of foxes brought into state in captivity** is proper subject for license. 149Wash545, 271P826.
217-19 157Tenn157, 7SW(2d)47. But see 229AppDiv241, 240NYS737.
217-21 157Tenn261, 7SW(2d)994.
217-21½-New. dealings in securities, 243NY423, 154NE298.
217-36½-New. public billiard rooms; 164Ga185, 138SE54.
217-36¼-New. business of dealing in and selling securities; 243NY423, 154 NE298.
217-37½-New. Municipality had authority to require persons engaged in selling merchandise on installment plan to secure a permit. 30F(2d)416.
218-42 36F(2d)397; 198NC551, 152SE 693; 135Wash32, 236P790. [a] Contra 142Wash329, 253P448, 59ALR539. (2) Licensed cosmetologist cutting hair of lady customer of beauty parlor held not barber. Nebr 232NW96. (3) Licensed barber performing services under license in portion of shop separated from "Beauty Shop" need not have cosmetologist license. Kan 292P763. [b] **Statute applies to proprietor barbering.** 198NC551, 152SE693. [c] **Need not also have license as cosmetologist** to give permanent waves. Kan 292P763.
218-42½-New. breeder, purchaser, or seller of foxes, 149Wash545, 271P826.
218-63 [a] **Pool tables** are included under statute requiring license for billiard tables. 27Hawaii587.
218-66 181Ark377, 26SW(2d)70; 164 Ga672, 139SE343. [a] (3) Persons engaged in selling patent medicines in usual course of business. 181Ark377, 26 SW(2d)70. [d] **In Missouri.**-311Mo 1, 276SW32. [e] **License tax for "operating sawmill"** applies to manufacture of rough dimension lumber into finished standard lumber as well as manufacture of logs. 215Ala613, 110S797(4th case). [f] **Person mixing herb compound** for treatment of diseases has been held a manufacturer. 181Ark377, 26SW (2d)70. [g] **Of liquid malt.**-Mich 233 NW380.
219-71 34GaA210, 129SE570; 38GaA 614, 144SE819. [a] (2) Oh 172NE148.
219-76½-New. printers; BC [1930] 2 DomLR762 (not same as manufacturer).
219-79 [a] **Public accountants** auditing books did not practice in state where only act done inside state in connection with work was preparation of rough draft of audit. 191NC809, 133SE391. [b] **Statute prohibiting uncertified accountants from holding themselves out as professional or expert accountants** or auditors for compensation, or engaging in practice of that profession, is in conflict with spirit and express provision of constitution, and void. 134 Okl 164, 272P461.
219-80½-New. every individual buying real estate for profit; 194NC19, 138SE 348.
220-98 See also 36GaA87, 135SE514.
220-2 277US350, 48SCt545, 72L ed913,

56ALR1327. [e] **Industrial commission's order** revoking license of employment agency is held not reviewable. 169 Minn417. 211NW824.

220-5 166Minn440, 208NW642 (installation of oil burning devices). [b] **"Plumbers, gas fitters or steam fitters"** includes business of roofing, stone work, brick work, and iron and steel work. 157Tenn29, 3SW(2d)657. (4) Interior decorator held not within statute relating to painters and other mechanics. 156Tenn19, 300SW574. [c] **Gas fitter,** within Privilege Tax Law, is workman who installs gas pipes and fixtures. 151 Miss503, 118S606(2dcase). [d] **Steam fitter,** within privilege tax law, is workman who installs steam pipes and their fittings. 151Miss503, 118S606(2dcase). [e] **Correlation to, and affiliation with, main activity** does not change character of incidental work as occupation subject to license. 32 OhA428, 168NE146.

220-7 See also 146SC185, 143SE808.

220-9 [c] **Persons or corporations engaged in general contracting business** of constructing buildings do not include those engaged in occupations involving contracts for less than an entire structure. 157Tenn29, 3SW(2d)657 (statute includes all contracting to do entire construction).

220-10 105NJL51, 143A859.

220-11 330 Ill 97, 161NE133. [d] **Establishment which performs all functions of laundry except to wash clothes,** allowing wet wash laundry to do that, is nevertheless public laundry, subject to license. 49RI 491, 144A159.

222-31 151Miss503, 118S606(2dcase). [b] **Plumbing business.**–151Miss503, 118S606(2dcase).

222-34½-New. The registration of the members and not the holding of a certificate is a condition precedent to conduct of the business by a copartnership. 126Misc184, 212NYS614.

222-39 31F(2d)466. [a] (3) Plumber furnishing labor and material for particular undertakings. 284Pa184, 130A 410. (4) Plumber jobbing and repairing. 284Pa184, 130A410. [d] (4) Merchants or others outside city limits delivering goods in city required to take out dray license for each wagon so used. 35GaA583, 134SE191. [g] **Plumber selling to public generally from his stock of plumbing materials** is engaged in keeping store within meaning of privilege tax statute. 151Miss503, 118S606 (2dcase).

223-40 215Ala613, 110S797; 284Pa175, 130A412. See also Mo 32SW(2d)281. [b] **Persons held merchants.**–51Philippine629. [c] **In Philippines.**–51Philippine178.

223-41 [b] **Wholesale dealer, shipping merchandise by common carrier,** is held not within such statute. 214Ala532, 108 S355.

223-52½-New. selling from freight cars; 48Nev120, 227P1020.

223-52½-New. Selling distilled, mineral, or spring water. 156Tenn1, 299SW 792, 56ALR496.

223-53½-New. sale of material by plumber on which he expends no labor 284Pa184, 130A410.

224-55 215Ala613, 110S797; TexCivA 17SW(2d)160. [b] (2) Statute held inapplicable to gasoline storage tank used in connection with retail business of gasoline filling station. 156Tenn96, 299 SW807.

224-60 219Ala73, 121S64; 21AlaA613, 110S797; 196NC791, 147SE289.

224-60½-New. A wholesale dealer is not a manufacturer within the meaning of a statute requiring manufacturers to pay a tax on gasoline. 170Ark587, 280 SW632.

224-67 CalA 291P233; 101NJL503, 129 A701.

224-68 218Ala243, 118S281; 85Colo 289, 275P896; 225Ky45, 7SW(2d)506; 329 Ill 120, 160NE163; 147Miss475, 112 S674; 116Nebr61, 215NW798; 48SD 482, 205NW72 (statute construed as taxing users of gasoline through agency of dealer's tax); 156Tenn96, 299SW807; TexCommnA 3SW(2d)427; 147Va157, 136SE588, 591 [citCJ]. [a] (4) Statute imposing tax of three cents per gallon, of gasoline through agency of tax on dealers, is constitutional. 48SD482, 205 NW72. (5) Gasoline used on closed highway, subject to tax. CalA 285P 1067. [b] (2) Statute imposing taxes on person maintaining oil depot held inapplicable in case of storage tank used as part of retail business of gasoline filling station. 156Tenn96, 299SW807. [c] (3) Under some statutes county purchasing from foreign corporation gasoline in original packages imported by such corporation and using it in its motor vehicles on state highways is retail dealer. Utah 270P142. [d] (2) Original wholesale seller of gasoline is "dealer" who must account to state for tax. 31 Ariz485, 254P1060, 53ALR258. (3) Wholesale dealer is not such as to gasoline bought from local manufacturers and held in storage at time statute imposing tax went into effect. 170Ark587, 280SW632. (4) Corporation producing and selling gasoline is "wholesaler" within statute. TexCommnA 3SW(2d) 427. (5) Not taxable for selling on telephone orders to retailers in another town. 170Ga605, 154SE140. [e] **Occupations included.**–154Tenn412, 285SW 570, 47ALR971. [f] **Cities as seller or user** are not impliedly included in excise tax statute. 84Colo 576, 272P629. [g] **Seller of gasoline for use by government agencies** has been held not subject to tax. DC 39F(2d)510. [h] **Nature of storage tax.**–Fla 130S699 (supplementary to sale tax).

224-68½-New. coal and coke; 153Tenn 53, 281SW777.

224-68½-New. Statute imposing occupation tax on wholesale dealer in oil includes retail dealers. TexCommnA 292 SW869.

225-73 [e] **Operator of packing house** is manufacturer and not dealer within statute imposing tax on wholesale meat dealers. 156Tenn294, 300SW5. [f] **Manufacturer is not constituted dealer** within statute imposing tax on wholesale meat dealers because he occasionally purchases meat from other manufacturers when out of stock and sells it to customers. 156Tenn294, 300SW5.

225-74 134Misc542, 236NYS70.

226-81 339 Ill 55, 170NE766. [a] Ordinance held applicable to retail sandwich dealer occasionally selling near beer. 339 Ill 55, 170NE766.

226-83 215Ala613, 110S797.

226-86 [a] (1) 158Tenn456, 2SW(2d) 412.

226-91 326 Ill 58, 156NE791; Ill 173 NE364. [b] (3) Buyer of rags in large quantities, sorting them and selling them to factories, usually in carload lots. 337 Ill 194, 168NE884.

227-92 326 Ill 58, 156NE791. [b] (1) 326 Ill 58, 156NE791.

227-93½-New. In New York junk boat license may be issued to one not licensed as junk dealer. 241NY157, 149NE336.

227-94 [c] **Ordinance regulating sale of secondhand goods** is held applicable to dealer whose business is alleged to be only five per cent of total business. 142 Wash37, 252P137.

227-97 See also 192NC386, 135SE 131. [c] (4) Corporation temporarily occupying other premises in city in which it has its head office. Man [1925] 3DomLR570. (5) Person selling bankrupt stock purchased in usual course of business and paying regularly levied taxes is not subject to license tax. NC 158SE152.

228-9 38F(2d)1003; 333 Ill 190, 164NE 218; 150Md641, 135A136.

229-12½-New. Proposed compulsory motor vehicle act not unconstitutional by excluding from its benefits such employees of owner as are entitled to benefits under Workmen's Compensation Act. 251Mass569, 147NE681.

229-12½-New. Proposed act not unconstitutional by not providing security for personal injuries occurring on private property. 251Mass569, 147NE681.

229-12¼-New. Apparent inequality insufficient to render act unconstitutional. 251Mass569, 147NE681.

229-12½-New. That proposed act applied indifferently to all classes of motor vehicles did not render it unconstitutional. 251Mass569, 147NE681.

226-12¼-New. Under statute legislature may give motor vehicle owner option to furnish cash, securities, surety bond, or insurance policy in compliance with Compulsory Motor Vehicle Insurance Act. 251Mass569, 147NE681.

229-12½-New. Under constitution it is not unreasonable to require security for discharge of liability for personal injuries or death before allowing owner to register motor vehicle. 251Mass569, 147 NE681.

229-20½-New. Exemption. Municipalities not within statutory exemptions. 160Ga251, 127SE856.

229-24 150Md641, 135A136; 34NM289, 280P260.

230-25 [a] (3) Where property owner hires team and wagon and causes day laborer employed by him for general work to use same to transport brick owned by him from one part of city to another, such laborer is not within municipal ordinance requiring license to operate vehicle for pay. 54ND1, 208NW 400.

230-26 261Mass269, 159NE41. [a] 15 OhA475. [d] **Taxicabs.**–210Ky324, 275 SW795. [e] **Railroad operating own sleeping cars** is liable for tax imposed on sleeping car companies. 157Miss69, 127S690.

230-27 73Mont147, 237P528.

230-28 54ND1, 208NW400.

230-30½-New. A dairy company, transporting milk bought f. o. b. its own plant, and deducting cost of transportation from purchase price, is subject to license. 150Md641, 135A136.

231-42 54ND1, 208NW400.

232-53½-New. In Oklahoma foreign vehicle using highways while moving in interstate commerce and not remaining in state longer than sixty days is not subject to license tax. 118 Okl 268, 248P340, 52ALR528.

233-60 [b] **Use of gasoline.**–Fla 126S 308; 198NC357, 151SE880, 67ALR1304; Utah 270P142.

233-63 32 OhA472, 168NE227 (billboards naming commodities sold in store in front of which they were placed held within ordinance).

233-68½-New. In Prince Edwards Island radio receiving set is radiotelegraph within statute requiring license to operate radiotelegraph apparatus. PrEdw Isl [1930] 2DomLR323.

234-83 43F(2d)170; 198Cal 609, 246P 807 (state tax is revenue measure for privilege of carrying on business); 246 Mich179, 224NW655; 82NH561, 138A 284; TexCivA 26SW(2d)715 (exemptions). [a] 198Cal 609, 246P807. [d] **Doing business in state as requisite.**–170Ga640, 153SE758; NH 150A551(2d case).

234-84 82NH561, 138A284.

234-86 246Mich179, 224NW655.

234-90½-New. By statute, the capital stock of a subsidiary corporation whose whole business is conducted within the state is properly excluded for excise tax purposes. 256Mass419, 152NE916.

235-92 [c] **Capital stock of subsidiary corporation** doing business within state properly included in determining excess employed within state. 277US413, 48 SCt534, 72Led935. [c] **"Paid up capital,"** as used in statute, means amount of authorized capital stock employed in business. 117Nebr832, 223NW126.

235-93 43F(2d)170. [a] **License tax on businesses whose gross annual receipts were same as gross earnings** did not apply to company dealing in stocks and notes, where such business was not specifically mentioned by statutes, but was sought to be included under omnibus clause. 163La43, 111S490(1stcase).

235-96½-New. Bare right to be a corporation, considered as property, can be taxed only upon an ad valorem basis. 82NH561, 138A284.

235-96½-New. The valuation would necessarily be confined to an appraisal of the worth of power to be corporation as distinguished from power to do certain business. 82NH561, 138A284.

235-96¼-New. Under statute, giving the state commissioner of finance and taxation authority to ascertain profits subject to excise tax, the commissioner may exercise reasonable discretion in

ascertaining the net income derived from business done by a corporation within the state, as distinguished from earnings arising from interstate commerce. 158Tenn458, 148SW(2d)734.

235-96½-New. Excise tax on right to engage in intrastate public utility business may be measured by income produced in part from nontaxable property. 43F(2d)170.

235-98 117Nebr832, 223NW126; 136Wash285, 239P840.

235-99 136Wash285, 239P840. [c] (2) Without showing that company does interstate business, such fee is franchise tax even if based on amount of authorized capital stock. 136Wash285, 239P840.

235-6 181Ark750, 27SW(2d)505; 170Ga258, 152SE232; 41GaA432, 153SE230; 75Mont240, 243P1073. [b] **Rollers and tractors used in construction or repair of highway closed to public** is not operated upon public highways, and therefore within tax exemption. Cal 291P579.

235-7 [c] **Exemption of transactions regulated by state and federal statutes** does not invalidate ordinance as to others. TexCivA 138SW(2d)401.

235-8 75Mont240, 243P1073; 76Mont472, 248P186, 47ALR969 (exemption of imported gasoline and distillate void); 153Tenn53, 281SW777.

235-9½-New. City is not exempt from license tax. 233Ky828, 27SW(2d)377.

235-12 Cla 1308710.

237-17 150Md91, 132A430. [a] (5) Corporation making and creosoting telegraph poles held "manufacturer." 163La547, 1128412. (6) "Manufacturer" is one working raw materials into useful wares. 163La547, 1128412. (7) One who extracts and refines cotton seed oil into edible oil is held manufacturer exempt from tax. 164La225, 1138825. (8) One who extracts and refines cotton seed oil into edible oil held manufacturer exempt from tax. 164La225, 1138825. (9) Business of manufacturing dissolved acetylene is not covered by Act (1924) No. 205, and needs no license. 9LaA351, 1208487. [f] **"Manufactured" products** held not to include pickled and smoked meats and hides. 292Pa447, 141A148.

237-18 [d] **Master electricians** are liable to taxation. 166La689, 1178775.

237-19 [b] (2) Mineral water drawn and bottled from well not farm product within meaning of Civ. Code § 1851. 35GaA583, 138SE191. [c] **Particular exemptions.**-169La1179, 1268914 (manufacturers).

237-19½-New. hucksters and peddlers; 153Tenn53, 281SW777.

237-19½-New. soldiers; 167Ga150, 145SE357.

237-20½-New. Under some statutes disabled or indigent soldiers of the World War are exempted from license or occupation taxes for peddling or conducting business with certain exceptions. 162Ga386, 134SE651.

237-20½-New. Under some statutes, a purchase of gasoline for levee work by a United States district engineer from the fund contributed by the United States and state levee districts is within the exemption of purchases by the state, county, municipality, or taxing district for public improvements. 148Miss511, 1148326.

237-20¼-New. Under the Philippine statute, a vender of food products is exempt from sales tax if he is a retailer. 50Philippine875. [a] **Test as to whether seller is wholesaler or retailer** is whether sales are for resale. 50Philippine875.

237-21 279US211, 49SCt308, 73LEd665; 204Cal286, 268P347; 204Cal297, 268P352; 204Cal301, 268P353; 87CalA636, 262P465; CalA 285P1067. [d] **Exemption of blind persons by county from paying license of business** does not exempt such persons from payment of tax under Tobacco Sales Tax Law. 154Tenn13, 285SW589. [e] **As to counties.**-Utah 270P142. [f] **Motor fuel containing kerosene.**-86CalA558, 261P1080. [g] **Statute exempting merchants selling oil in regular course of business** held not to exempt one selling it in same way as **filling station.** 157Miss124, 1268903. [h] **Unauthorized ex parte statement of secretary of state** purporting to exempt corporations from Blue Sky Law does not work such exemption. TexCommnA 298SW(2d)991.

238-23 23AlaA282, 125SE208(2dcase).

238-27 87CalA636, 262P465, 169Ga112, 149SE882 (exemption of traveling salesmen taking orders without delivering goods held inapplicable to persons traveling from town to town soliciting subscriptions to magazines).

238-27½-New. Presumed that legislature used word "dealer" in ordinary and nontechnical sense. 169La1179, 1268914.

238-28½-New. Failure to enact amendment excusing government agencies from paying gasoline tax showed legislative construction of Constitution exempting public property. 233Ky828, 27SW(2d)377.

238-34 92CalA113, 267P895; NJSup 131A638.

238-36 SC 155SE830.

238-37 [a] **License is not bound to conform to invalid regulations.**-39F(2d)851.

238-42 164Ga235, 138SE234; NJSup 131A638. [a] **Granting license for pool room** by county court is not res judicata of questions involved in determining whether city shall grant license. 218MoA155, 263SW853.

239-35 173Minn47, 216NW323; 241NY157, 149NE336; 200Wis276, 229NW53 (requiring bond held unauthorized where statute did not require it). [a] (2) Under ordinance junk boat license may be issued to one irrespective of whether he is already duly licensed as junk dealer. 241NY157, 149NE336 (where ordinance does not contemplate that only junk dealer should be entitled to such license).

239-46 173Minn47, 216NW323; 241NY157, 149NE336. [a] **Limitations not contained in statute** cannot be imposed arbitrarily on person fit and proper to engage in licensed business. 241NY157, 149NE336.

239-46½-New. When inspection of merchandise is required before a license or permit to do business is granted to applicant or dealer, the cost of such inspection may be exacted. 156Md244, 144A357.

239-49 164La42, 1138757. [a] (1) 108WVa111, 150SE382.

239-52 [a] **Conviction of violation of prohibition laws,** within statute making person convicted of such violation ineligible, refers to prohibition laws of state. OkiCr 282P1110.

239-54 [c] **New York certified public accountant** cannot be registered in District of Columbia without examination. 6F(2d)94. [d] **Failure to make passing grade** renders applicant ineligible for license. LaA 1298427.

239-55 [b] **Method of determining grade in examination** is discretionary with examining board. LaA 1298427.

239-56 [a] **Statutes regulating practice** of public accountants should not be so administered as to exclude capable and deserving applicants. 6F(2d)94.

239-60 35GaA681, 138SE632; 36GaA467, 137SE124; 191NC643, 132SE792. See **also TexCivA** 108SW(2d)770. [a] **Transactions within statute.** 91CalA198, 271P555. [b] **Pleadings.**-91CalA198, 271P555. [c] **Evidence.**-205Cal34, 269P638. [d] **Transactions within statute.**-CalA 287P462. [e] **Statute construed.**-13LaA153, 1268703.

239-60½-New. Plaintiff damaged by failure of duly licensed plumber to perform work in workmanlike manner is entitled to sue on bond required of plumber by city ordinance. 215Ala521, 111815.

240-61 204Cal197, 267P540; 79CalA726, 251P241; 99CalA360, 278P907. [b] **Statute construed.**-198Wis114, 223NW568.

240-63 95CalA1, 272P313; 95CalA394, 273P72; 96CalA523, 274P563; CalA 274P995; 36GaA157, 137SE121; 165Ga134, 141SE66, 141LaA101, 1208727; 133Misc364, 231NYS674. [a] **Due care is no defense** where bond is unconditional. 36GaA157, 137SE124. [b] **Liabilities covered by bond.**-48Ida714, 284P1032. [c] **Misrepresentations by seller of securities** need not be fraudulently made or known to be false in order to authorize recovery on bond. 32OhA482, 168NE384. [d] **Sureties on separate bonds of real estate brokers separately liable** for fraud are liable to amount of bond given by each under Idaho statute. 48Ida714, 284P1032.

240-64 TexCivA 108W(2d)770. See also 165Ga434, 141SE66.

240-66 But see 165Ga434, 141SE66.

240-67½-New. Action on bond. Action to recover on bond is held properly instituted by state on relation of defrauded party. 191NC643, 132SE792.

240-67½-New. Sureties on a bond are discharged from liability after completion of work in compliance with the code, irrespective of subsequent damages. TexCivA 108W(2d)770.

240-68 [a] **In Missouri.**-218MoA155, 263SW853.

240-69 219Ala632, 123S833; 168Ga719, 149SE335(2dcase); 40GaA199, 149SE176 (superintendent of banks held authorized to issue license required for business of making small loans). [c] **Statute authorizing license to deal in nonintoxicating beverages** prohibits board from considering anything except whether applicant was proper person. 200Wis576, 229NW53.

240-70 5PaDist&Co 397.

240-76 164Ga235, 138SE234.

240-77 173Minn47, 216NW323; 122Or684, 260P220.

240-78 216Ala206, 112S823; 75CalA591, 243P55; 75CalA623, 243P473; 121Kan141, 245P1047, 1050 [cit CJ]; 164La42, 1138757; 101NJL503, 129A701; NJSup 131A638; NJSup 133A870; 213App Div276, 210NYS492; 122Or684, 260P220; 102WVa94, 134SE467, 53ALR146; 103WVa723, 138SE397. [d] **City is not bound to issue license for pool room** because county court has issued a license. 218MoA155, 263SW853. [e] **Successive applications.**-Township board may lawfully deny application for license to conduct dance hall made within year from date of prior application which was denied. 238Mich533, 213NW680.

241-79 75CalA591, 243P55; 55AppDC346, 6F(2d)94; 121Kan141, 245P1047, 1050 [cit CJ]; 164La42, 1138757; 233Mich659, 207NW834 (finding that refusal to grant permit for gasoline filling station was arbitrary and upon whim and caprice held without justification); 238Mich533, 213NW680; 173Minn47, 216NW323; 178Minn623, 228NW1621 (st case (refusal held not arbitrary or unreasonable), 241NY157, 149NE336; 102WVa94, 134SE467, 53ALR146; 103WVa723, 138SE397. [a] **City may refuse to issue license for pool room to particular applicants for reasonable cause.** 218MoA155, 263SW853. [b] **Limiting number of junk boat licenses is arbitrary and abuse of discretion.**-241NY157, 149NE336.

241-80 321Ill259, 151NE902.

241-81 [a] **In some jurisdictions statutes empower commission or board to ascertain existence of facts** on the finding of which may depend right to continue practice of profession or regulated business. 73CalA83, 238P160.

241-82 But see 173Minn47, 216NW323.

241-83 75CalA623, 243P473; 213App Div276, 210NYS492; 103WVa723, 138SE397. [a] (2) 103WVa723, 138SE397. [c] **Reasons for refusal** held insufficient. 5PaDist&Co 397.

241-83½-New. After board exercises its discretion in favor of granting license on compliance with certain condition, it cannot, after due compliance, revoke its decision. NJSup 131A638.

241-83½-New. Publication of evidence held prohibited by statute. 5PaDist&Co 397.

242-87 [b] **In California.**-196Cal468, 238P703.

242-88 See also Fla 1298339(2dcase). [c] **Applicant for registration** as public accountant is entitled to be heard in answer to evidence considered by board. 6F(2d)94.

242-90 [c] **Time for making application.**-Where statute could not become effective till day on which it required

barbers to have certificate, barbers had reasonable time thereafter in which to make application. 53SD92, 220NW455 (application held made within reasonable time).

242-91 75CalA591, 243P55.

242-93 73CalA83, 238P160.

242-95½-New. In some jurisdictions the statute does not expressly provide for nor apparently contemplate any written notice to the applicant of the investigation to be made by the commissioner of the good reputation of the applicant. 73CalA83, 238P160.

242-95⅓-New. but permits such further investigation of the applicant by the commissioner as he shall deem advisable. 73CalA83, 238P160.

242-95¼-New. In such jurisdictions a "citation," to petitioner notifying him of the intention of the corporation commissioner to make such investigation, is insufficient to direct his attention to the scope of the inquiry to be made. 73CalA 83, 238P160.

242-95½-New. although such citation contained no direct charge or complaint against petitioner. 73CalA83, 238P160.

242-96½-New. Provision that applicant must state that he will observe ordinances is held not to require him to waive constitutional rights. 326Ill58, 156NE791.

242-1 216Ala206, 112S823; 238Mich533, 213NW680; 174Minn200, 219NW81; TexCivA 15SW(2d)99. [b] **In reviewing decision of state securities commission,** on application for permission to sell securities under Blue Sky Law some weight is to be given to special qualifications and experience of members of commission. 238Mich606, 214NW311.

242-2 73CalA83, 238P160. [b] **Evidence held to show enterprise involving** sale of bonds was not based on sound business principles. 220Ky603, 295SW 904. [c] **If record on certiorari contains evidence tending to support conclusion of securities commission,** that sale of investment bonds by plaintiff would operate as fraud or imposition on public, or proposed terms of sale would amount to constructive fraud, order denying permission to sell will not be disturbed in absence of overwhelmingly convincing evidence to contrary. 238Mich606, 214 NW311.

242-3 102WVa94, 134SE467, 53ALR 146.

242-3½-New. Board may avail itself of grounds set forth in stipulated facts and not precluded by reason on statement to applicant since it is the status of the parties' rights as they appear in the pleadings that control. 101NJL503, 129A701.

243-18 [a] **License to conduct public boxing exhibitions, qualifiedly given,** must be accepted subject to terms of permissive statute. 85Colo 125, 274P 831.

243-20 39F(2d)851.

243-22½-New. When some right asserted under a license becomes the subject of actual controversy, excess of jurisdiction is a necessary ground for judicial review. 249NY495, 164NE558 [certiorari granted 49SCt348(2dcase)].

243-23 [a] **In West Virginia.**-100WVa 240, 130SE468. [b] **Order enjoining defendants** from operating over routes designated on plaintiff's permit held not vague or indefinite. 100WVa240, 130SE 468.

243-30 126Me532, 140A194; 261Mass 269, 159NE41.

244-44 219Ala280, 121S908; 82NH480, 136A132.

244-47 155Miss522, 124S434.

244-48 51Philippine583. [a] **Telegraphs and telephones.**-Under Mississippi statute company paying privilege tax for each pole line operated as tax on telegraph business must also pay privilege tax on long distance telephone business conducted over same wires. 155 Miss522, 124S434.

244-49 215Ala613, 110S797.

244-52 121Tenn25, 113SW381, 130Am SR748, 16AnnCas1028.

245-67 [a] (1) 86CalA142, 260P305.

246-76 6PaDist&Co 653. [a] **Executors or administrators** cannot continue business under license of deceased. 6 PaDist&Co 653.

246-78½-New. Modification of broadcasting license. Requisites of application. DC 41F(2d)422.

246-78⅓-New. Modification of broadcasting license. DC 41F(2d)422 (application properly refused).

246-83 92Fla515, 109S442; 163La418, 112S31, 32 [citCJ]; Mass 171NE826; Can [1930] 4DomLR241. [d] **That injury was caused plaintiff without serving public convenience** by suspension of licenses for violation of conditions held not provable. 261Mass269, 159NE41.

246-85 8F(2d)155; 92Fla515, 109S 442; 261Mass269, 159NE41; 5PaDist &Co 281. See also 128Misc84, 218NYS 57.

247-86 163La418, 112S31; 261Mass 269, 159NE41; 5PaDist&Co 281.

247-87 164Ga235, 138SE234; 163La 418, 112S31.

247-88 164Ga235, 138SE234.

247-89½-New. It has been held that, where an accountant's certificate has been canceled for unprofessional conduct, the board of accountancy cannot reinstate, the only remedy being by application as provided by statute. 219 Ala632, 123S33.

247-90 164Ga235, 138SE234, 238 [quot CJ]; 261Mass269, 159NE41.

247-91 164Ga235, 138SE234, 238 [quot CJ].

247-97 Wis 230NW59(2dcase).

247-99 259Mass145, 156NE28; 261 Mass269, 159NE41.

247-1 5PaDist&Co 281.

247-3½-New. An ordinance providing for the revocation of business licenses for violations of law is invalid unless the violations have relation to the business licensed. 76CalA621, 245P447.

247-4 92Fla515, 109S442, 445 [citCJ]; 261Mass269, 159NE41. See also 148 Wash485, 269P1043, 60ALR166. [c] **Mere act of policeman** in taking possession of certificate is held not revocation. 164Ga235, 138SE234.

248-7 164Ga235, 138SE234.

248-12 212Ala660, 103S835. [a] **Members of state board of accounting** contributing funds for prosecution of charges, they were called on to hear held disqualified to hear petition for revocation of license. 212Ala660, 103 S835.

248-15 163La418, 112S31.

248-18 76CalA621, 245P447; 163La 418, 112S31; 35PortoRico 681.

248-20 [b] 5PaDist&Co 281.

248-22½-New. Where statute is silent as to notice and hearing, legislative intent must be determined from language of statute itself. 163La418, 112 S31.

249-28 Iowa 229NW214(2dcase) (tax imposed on gasoline may not be imposed on importation of benzol only); 85Mont329, 278P514; 150SC385, 148SE 224; 153Tenn498, 284SW61 (exception in statute levying tax on sellers of electric apparatus makes all except the excepted classes subject to tax). [b] **Lumberyard** is held liable for privilege tax assessed against lumberyard only and not that assessed against store. 147Miss279, 112S9. [c] **In Louisiana.**-162La747, 111S82.

249-20½-New. Liability for tax which has accrued is not affected by repeal of the statute authorizing its imposition. TexCommnA 292SW869.

249-30⅓-New. Tax on sale of liquid fuels usable in internal combustion engines applies to sale of gasoline used for manufacturing purposes. 290Pa 539, 139A156.

249-30¼-New. Sale of gasoline for use in manufacturing preparation for use on highways is not sale for purpose of resale so as to exempt seller from tax. 290Pa539, 139A156.

249-34 169Ark473, 275SW741; 156 Miss306, 126S2 (city subject to privilege tax); 153Tenn498, 284SW61 (merchant exercising special privilege held liable for special privilege tax as well as merchant's privilege tax). [b] **Business of severing resources from soil for sale or commercial purposes.**-169Ark473, 275SW741.

249-37 174Ark94, 294SW3; 41GaA 306, 152SE604(2dcase); 198NC357, 151 SE880, 67ALR1304; 153Tenn498, 284 SW61 (artisan or manufacturer selling goods need not pay merchant's privilege tax unless expressly required). [a] **Domestic corporation dealing in horses** and having fixed place of business and being bona fide resident of state and having paid tax under General Tax Act is not liable to occupation tax. 161Ga669, 131SE358.

249-38 DC 39F(2d)510; 155Miss202, 124S343 (agency).

249-42½-New. Owner of two businesses of same kind must pay tax on each one. 164Ga672, 139SE343.

249-42⅓-New. Subagencies appointed by dealer selling automobiles at separate places of business other than state headquarters are required to pay license tax under Revenue Act of North Carolina. 192NC384, 135SE131.

249-42¼-New. Under statute, levying a tax on cigarettes on delivery to the consumer and providing for destruction of the stamp prior to consumption, the tax must be paid and the stamp affixed before cigarettes may be disposed of to the consumer and not on sale by a wholesaler of cigarettes in quantities to another wholesaler or to a jobber or retailer. 207Iowa621, 223NW512.

249-45 See also 1LaA586.

249-50 22AltaL261, [1926] 3DomLR 196, [1926] 2WestWkly389.

250-56 53SD92, 220NW455. See also 34NM161, 279P69. [b] (2) Provision that population shall be determined by last federal census in determining amount of license tax is inapplicable in case of city nonexistent at time of last census. 23AlaA239, 124S119. [c] **Oil dealer** is liable for one tax imposed on tanks or containers where total storage capacity is one hundred gallons or less. 147Miss475, 112S674. [d] **Commercial detective agencies,** held classed under professional occupation, are liable for half license. 9LaA100, 119S73(3dcase).

250-62 118Or629, 247P775.

250-64½-New. Coal dealer conducting business by keeping yards and offices in different places is liable only to pay for one license. 21AlaA85, 105S437.

250-64⅓-New. Located automobile agency, posting duplicate license, is protected from paying any other tax, and protection extends to all employees acting to advance interests of particular located business. 192NC384, 135SE 131.

250-64¼-New. Traveling automobile agent to be protected from paying an additional license must have with him ten dollar duplicate license issued him at request of holder of five hundred dollar dealer's license issued under Revenue Act of North Carolina. 192NC 384, 135SE131.

250-64⅕-New. Dealers in charge of state distribution of automobiles must pay five hundred dollar license tax, which includes all their employees not working as traveling agents, under Revenue Act of North Carolina. 192NC 384, 135SE131.

250-64⅙-New. Under an ordinance providing for imposition of a license tax on persons engaged in trade or business, dependent as to the amount on the volume of business done, an operator of chain stores is not taxable on each store. 88PaSuper602.

250-64⅐-New. License taxes required of collecting agencies are based on gross annual commissions, not collections. 10 LaA243, 119S766.

250-64⅛-New. License tax on business of contractor depending on gross receipts for profits is based on gross receipts, not gross earnings. 170La847, 129S367.

250-68 166Minn230, 207NW727. [a] **Quasi-judicial function.**-166Minn230, 207NW727. [b] **Presumption** is that determination of value is expression of honest judgment of assessor. 166Minn 230, 207NW727. [d] **Computation of tax on malt extract or malt syrup.**-Mich 233NW380.

250-69 176Minn125, 222NW649. [a] **Mines.**-166Minn230, 207NW727. (2) Purchaser of mining lease is entitled to deduction as advance royalty from valuation of ore produced of amount

paid for lease whether by way of additional rent or by lump sum payment. 172Minn235, 215NW74. [b] Evidence insufficient to show right to deduction for royalty paid in advance by mining company. 166Minn243, 207NW732.

250–73½–New. Where taxable and nontaxable gasoline are mixed, gasoline tax is properly assessed on all sales pro rata. 131SC466, 128SE8.

250–73⅓–New. On review of tax imposed by tax commission, court only inquires whether evidence furnished reasonable basis for determination and whether commission acted arbitrarily or erroneously or exceeded its jurisdiction. 166Minn230, 207NW727.

250–73¼–New. Territorial taxing unit for county taxes is county. 99Fla1, 126S308.

251–79 85Colo 61, 273P883.

251–81 [a] **Statute held not retroactive.**–Lien, created by Gross Sales Act of 1921 for gross sales taxes assessed against former owner for years following enactment of statute, is inoperative as against present owner's title acquired subsequent to such years under trustee's sale pursuant to deed of trust executed by such former owner prior to enactment of statute. 106WVa687, 146SE825.

251–83½–New. In Pennsylvania the collection of gasoline tax by the vendor is a "public account" within the statute making it a lien on the property of the corporation. 284Pa189, 130A413.

251–83⅓–New. A lien in favor of state for taxes collected by corporation is not prior to a purchase-money mortgage given by corporation to another. 284Pa189, 130A413 (where statute is unconstitutional).

251–85 85Colo 289, 275P896. [g] **Payment by stamps.**–134SC251, 131SE421. [h] **It rests solely in discretion of legislature** as to how gasoline tax shall be collected and by whom, whether directly by last dealer or indirectly by first, though tax in the end is paid by ultimate consumer. 31Ariz485, 254P1060, 53ALR258. [i] **In Arkansas,** section of statute requiring sheriff to collect motor vehicle license taxes must be read with preceding sections to determine whether county collector must collect them. 174Ark1062, 298SW335. [j] Statute requiring sheriff, as "ex officio collector," to collect, imposes such duty on sheriff, though no longer ex officio collector. 174Ark1062, 298SW335. [k] Claim filed against city for refund of taxes paid under protest, as required by law, before suit is brought, is not evidence of payment in fact of tax. 219Ala73, 121S64.

252–6½–New. Requirement that occupation or sales tax shall be paid by affixing stamps is a reasonable provision to prevent evasion of payment. 21F(2d)521.

252–20½–New. The tax on the use of gasoline, imposed by statute requiring the dealer in gasoline to collect from the buyer and pay to the state, when so collected by him, is held in trust for the state. 28F(2d)53.

252–26 [c] **Tax can be collected only in court of competent jurisdiction** as regards taxpayer's defense of involuntary payment. 34OhA267, 171NE111.

252–27 13F(2d)227.

253–34 152Tenn306, 278SW59 (state may recover unpaid license fees in suit for injunction).

253–37½–New. Where defendant was conducting an occupation for which licenses were claimed in a parish in which his property was seized for want of a peddling license, the claim of the state and parish for a license is properly instituted in the parish where the property was seized, in the absence of evidence showing that defendant was also carrying on an occupation in the parish of his domicile, or that he had paid the license in such parish. 9LaA505, 121S261.

253–37⅓–New. A corporation operating a ferry on a river between two parishes is engaged in business in both parishes and may be sued in either under statute providing that licenses shall be paid in the parish in which the business is conducted. 6LaA154.

253–40 164La225, 113S825.

253–44 9La505, 121S261.

253–46 127Kan859, 275P209.

253–46½–New. The receiver of a corporation is a proper party defendant in a suit by the state to recover a license tax unpaid by the corporation. 219Ala178, 121S550.

253–49 1LaA481.

253–50 Oh 171NE33. [b] (4) Other instances. 34OhA267, 171NE111. [d] **Voluntary payment of excise tax partly illegal,** cannot be set off against claim by state for subsequent valid assessment. Oh 171NE33.

254–57 [c] **Findings.**–Utah 270P142.

254–62½–New. A particular sheriff who has been relieved by statute of the tax collecting duty is not obliged to enforce executions, permitted by statutes, to collect delinquent license taxes. 154SC55, 151SE218.

255–67 19ObA358.

255–68½–New. An ordinance, providing that persons failing to pay license tax before commencing business shall be prosecuted in the police court and be subject to fine and imprisonment on conviction, does not provide any penalty by fine or imprisonment or by seizure of property for failure to pay the tax. 36GaA526, 137SE123.

255–70 99Fla1, 126S308 (arbitrary apportionment).

255–71 50SD324, 210NW186.

255–75 50SD324, 210NW186.

255–76 99Fla1, 126S308 (apportionment of county taxes among counties).

255–81½–New. Rule requiring collector to pay over taxes collected to municipality for which he acts regardless of validity of tax is not applicable to oil company advancing price of gasoline by amount of invalid tax imposed under statute amended to entitle state to recover amount thereof. 76Mont472, 248P186, 47ALR969.

255–81⅓–New. the company not being officer or agent of state to collect the taxes. 76Mont472, 248P186, 47ALR969.

255–81¼–New. Statute allocating part of money to board of education is not void as discriminatory, 163Ga374, 136SE207.

255–81⅙–New. nor as an unlawful diversion. 163Ga374, 136SE207.

255–81⅛–New. It is immaterial to taxpayer to what purposes proceeds of excise tax are devoted. 34NM643, 287P699.

255–82½–New. Under a statute allowing to collecting attorneys a commission on amount of license taxes and penalties paid by delinquent tax debtors, filing of suit is not necessary to entitle an attorney to commission where demand was made before payment. 10LaA234, 119S723.

255–84 254IllA590 (though ordinance subsequently held invalid).

255–85½–New. Civ. Code arts 2301–2303 do not apply to reconventional demand by corporation for recovery of license tax being regulatory of rights of private parties. 162La121, 110S110.

255–85⅓–New. Certificate of a probate judge, addressed to the state auditor for issuance of a warrant for refund of a license tax, showing on its face that it was based on the probate judge's opinion that the law under which the license was paid was unconstitutional, was not conclusive on the state auditor, and, on appeal from judgment in mandamus proceeding, the court of appeals should have proceeded with consideration of merits of cause. 218Ala1, 118S257.

255–85¼–New. Statutes, imposing a tax on gasoline sold for use on state highways and for a refund of the tax on gasoline sold for other purposes, are construed to create a trust fund of the amount collected on gas not used on highways to be refunded on timely application. 128Or347, 274P314 (2dcase) (requirements of affidavit for refund).

255–92½–New. Bus operator, seeking recovery of unused license fees, must apply to department to recommend refund and then ask legislature to appropriate it. 153Md607, 139A291.

256–95 22F(2d)678; Ill 172NE39; 251IllA532; 162La121, 110S110; Oh 171NE33; 6PaDist&Co 348 [quotCyc]. [a] **Oil company collecting tax from customers** in addition to price of fuel sold, and remitting to department of finance amount received, cannot recover amount on ground of unconstitutionality of statute for purpose of retaining amount for itself. 337Ill353, 169NE236.

256–96 34OhA267, 171NE111.

256–99 337Ill353, 169NE236.

256–1½–New. Payment is voluntary though made to avoid additional penalty. Oh 171NE33.

256–5 173Minn98, 216NW541. [d] **Where gasoline tax payment has been deposited** in registry of court pending trial, which determined act as invalid, public administrator cannot recover it after refund without showing that company exacted it from unknown purchasers as additional charge. 167La831, 120S383.

257–9 218Ala125, 117S656. 254IllA590; 143Miss861, 108S296; 46Philippine159. [d] **Payment held not made under duress.**–254IllA590.

257–11 156Tenn96, 299SW807.

257–19 But see 35F(2d)21.

258–24 337Ill122, 168NE886. [b] (2) Petition not showing that there was any penalty by arrest, fine, or imprisonment or seizure of property for failure to pay tax does not show urgent necessity for payment to prevent immediate seizure of person or property. 36GaA526, 137SE123. (3) Allegation that plaintiff would be prosecuted in police court unless tax was paid shows no immediate duress necessitating payment. 36GaA526, 137SE123. [d] **Unnecessary to allege tax was paid under protest** when alleged that it "was paid involuntarily and under duress and compulsion." 143Miss861, 108S296. [e] **Allegation that ordinance provided penalty for failure to pay tax** will be disregarded where not sustained by contents of ordinance. 36GaA526, 137SE123.

258–26 155Tenn560, 296SW7.

258–29½–New. Whether payment was made under duress is one of fact. 254IllA590.

258–31 [b] **One challenging validity of occupation tax ordinance** permitting remission of tax must specifically allege acts complained of. 174Ark486, 295SW708.

258–34 85Colo 287, 275P902; 170Ga258, 152SE232; 192NC500, 135SE328; 104WVa76, 138SE579.

258–35 [a] **Relief properly denied on** failure to prove intention to enforce ordinance. 170Ga346, 152SE902(1stcase).

258–37 211Ky677, 278SW98, 43ALR590. See also 167Ga219, 145SE55.

259–40 170Ga624, 154SE145. [b] **Evidence.**–170Ga624, 154SE145.

259–41½–New. A court may be prohibited by statute from restraining collection of license fees. 31F(2d)946(1st case).

259–49 16F(2d)933; Cal 289P828; 92CalA292, 268P449; 83NH350, 143A516 (2dcase); 20OhA51, 153NE144; Wash 292P112. See also 132Misc454, 230NYS145.

259–50 77CalA399, 246P1069; 48Ida 261, 281P370; 191NC809, 133SE391.

259–51 191NC809, 133SE391.

259–52 But see 98CalA415, 277P190.

260–53½–New. Owner's failure to file information with secretary of state before selling stock received for property did not render the purchase-money note void. 86IndA224, 156NE520.

260–53⅓–New. A seller sued for breach of contract may show breaches of such contract by plaintiff to defeat or mitigate the amount of recovery, the contract, if void, being void as to both parties. 142Wash134, 252P523.

260–53¼–New. Contract to carry high explosives is admissible in action between contractee and third party to show contractor was independent contractor, although contractor had not received municipal license. 21F(2d)406.

260–56 34GaA210, 129SE570 [citCJ&Cyc] (money lenders); 13LaA350, 127S467; TexCivA 300SW112. [a] **Law re-**

quiring architect, if unlicensed, so to inform employer, is merely for benefit of owner in determining employment. **CalA** 288P1107.

260–58 Ala 127S841; **20 OhA**236, 153NE135.

260–59 20 **OhA**236, 153NE135.

260–63 [b] **Disqualification of members of licensing board** to act upon revocation enables licensee to continue practice. 212Ala660, 103S835.

261–69 77CalA399, 246P1069; 42 **Ida** 770, 248P473, 476 [quotCyc]; 191NC 809, 133SE391.

261–75 20 **OhA**236, 153NE135.

261–77 191NC809, 133SE391.

261–84 77CalA399, 246P1069; 41GaA 77, 152SE300; 42 **Ida**770, 248P473.

261–85 77CalA399, 246P1069; 41GaA 166, 152SE282. [a] **Answer did not show** that sale of stock was isolated transaction. 41GaA166, 152SE282.

262–86 41GaA77, 152SE300.

262–87½–New. In an action to recover the balance of the purchase price of real property, the contention that plaintiff corporation acquiring a contract of sale from the original vendor did not come into court with clean hands because it acquired a contract contrary to the permit from the corporation commissioner by paying stock and not cash therefor could not be sustained, where findings to contrary were supported by the evidence. 94CalA530, 271P554.

262–88 258Mass481, 155NE659; 259 Mass20, 155NE660.

262–91½–New. That plaintiff was an unlicensed carrier for hire did not preclude recovery for a collision. 260Mass 193, 156NE863.

262–91⅓–New. An unregistered automobile is an outlaw on the highway without protection except from willful or wanton injury. 260Mass193, 156NE 863.

262–91¼–New. If a buyer of stock, sold in violation of the Blue Sky Law, is not in pari delicto with the seller, the general rule is that the buyer may, within a reasonable time, recover the money by tendering back the stock received. 177 Ark832, 9SW(2d)310.

262–93 252 IllA1.

262–95 164Ga235, 138SE234. [a] **Petition for injunction** held to state cause of action. 164Ga235, 138SE234.

262–98 85Colo 289, 275P896. See also 1LaA85.

262–8 224Ky136, 5SW(2d)910.

263–14 Utah 270P142.

263–19 [b] **County purchasing gasoline outside state for use within state** is retail dealer liable to penalty. **Utah** 270 P142.

263–32 [a] **Jurisdiction.**–9LaA505, 121 S261.

264–41½–New. The court, under certain circumstances, can refuse to exact double amount of tax, provided by statute, as a penalty for nonpayment of the tax. 85 Colo 289, 275P896.

264–55 [c] (2) 9PaDist&Co 107. [d] **Georgia Securities Law.**–34GaA4, 128SE 228. [e] **Failure to register and procure license for horse-drawn delivery wagon** is not offense under Louisiana statute requiring registration and license of motor vehicles. 169La144, 124S673. [f] **Dealers in motor vehicle fuel.–Kan** 291 P737. [g] **Violation of statute regulating sale of deciduous fruit,** if crime, is committed only when willful refusal to pay occurs. **CalA** 291P233. [h] **Conviction erroneous under statute not in force when indictment found.**–161Tenn341, 31 SW(2d)969.

265–58½–New. Engaging in licensed business implies undertaking to obey laws affecting business thereunder. 94 Fla809, 114S448.

265–58⅓–New. In determining whether or not defendant violated the criminal statute, requiring payment of a cigarette tax on sale to the consumer, the fact that state officers required the payment on the sale of cigarettes by one wholesaler to another wholesaler, jobber, or retailer, and that such practice was acquiesced in, is not controlling. 207 **Iowa**621, 223 NW512.

265–60 [b] **Ordinance prohibiting keeping of public dance house without permit** cannot be evaded by appearing to carry on as mere subterfuge some other business. 221MoA547, 282SW1032.

265–62 Mass 169NE418.

265–63 34GaA138, 128SE704 (selling cigarettes at retail).

266–71 [a] **Land surveyor accepting office of city engineer is guilty of no crime** unless he practices or offers to practice professional engineering under statute requiring registration of land surveyors. 40Wyo 404, 278P563.

266–72½–New. Registration of false statements is punishable under Securities Law. 326 **Ill** 379, 158NE103.

266–75 172ArkS74, 290SW589.

266–76 94Fla809, 114S448.

266–78½–New. The sale by a wholesaler or jobber to a retailer of cigarettes in quantities without having affixed to the cigarettes the stamp denoting a tax is not a sale to a "consumer," under Code (1924) §§ 1570, 1571, providing for payment of a tax on sale to a consumer and for affixing of the stamp before consumption. 207 **Iowa**621, 223NW512.

266–78⅓–New. A promoter is bound by the signature to a subscription contract signed by another in his presence and at his express direction. 102CalA29, 282P813.

266–79 [c] **Delivery of goods to neighboring town by truck belonging to defendant's principal** has been held to constitute doing business in such town without license. 214Ala532, 108S355.

266–80 214Ala532, 108S355.

266–82 SD 232NW29.

267–90½–New. But it is a good defense that defendant obtained a license for carrying on a business which includes the occupation for which he is prosecuted. 215Ala613, 110S797 (manufacturing license as including sales).

267–90⅓–New. It is no defense that city authorities acquiesced in payment of less sum than ordinance required. 181Ark 377, 26SW(2d)70.

267–97 [a] **In Montana.**–73Mont147, 237 P528.

267–6 [a] (2) Indictment for giving concerts, shows, and exhibitions for which admission was charged without first paying special tax held sufficient. 37GaA334, 140SE513. (3) Indictment charging retail dealer with selling cigars and cigarettes without paying sales price tax, and with exhibiting cigars and cigarettes not bearing stamps, charges crime. 39GaA541, 147SE899 (demurrer properly overruled). (4) Other instances. **MoA** 293SW445. [b] (1) **MoA** 287SW809; **NH** 150A551(2dcase).

267–7 157Tenn347, 8SW(2d)361.

268–8 [a] **Statute invalid.**–161Ga103, 129SE766.

268–14½–New. name of buyer in sale without license; **OklCr** 292P573.

268–15½–New. An indictment should expressly allege the relationship which defendants bore to the corporation, stock of which was alleged to have been issued and sold, and the proceeds misapplied, in violation of the Corporate Securities Act. 93CalA42, 269P630(1st case).

268–16 [a] (5) Complaint in prosecution for selling goods at retail from freight car without license which charges defendant with peddling from box car is sufficient without allegation that defendant was selling at retail. 48Nev 120, 227P1020. (6) Such complaint is sufficient without allegation that box car was not fixed place of business. 48Nev 120, 227P1020. (7) Such complaint is sufficient notwithstanding use of words "box car" instead of "freight car" as used in ordinance imposing license tax. 48Nev120, 227P1020.

268–22 150Md91, 132A430.

268–24 [c] **Variance held not fatal.**–132 Or223, 283P753.

269–29 [a] (1) 106TexCr626, 294SW 559. [b] (6) Testimony as to intent in committing violation. 106TexCr626, 294 SW559. (7) Other instances. **Kan** 291 P737.

269–30 [a] (1) 214Ala532, 108S355; 93 CalA529, 269P769; 36GaA97, 135SE517; 176Minn86, 222NW575; **NJSup** 147A 774(2dcase); 106TexCr626, 294SW559. (5) To justify finding that portion of work in execution of order was to be done within state, making transaction mixed one rather than business to be handled through interstate commerce. 30F(2d)416. [b] (1) 36GaA87, 135SE 514; 176Minn86, 222NW575; 179Minn 282, 228NW925(1stcase). (4) To show that license fee was collected for purpose of general revenue and not for regulation and supervision. 73Mont147, 237P528. (5) To support conviction of selling cigarettes at retail without paying tax required. 34GaA138, 128SE704.

269–33 30F(2d)416.

269–34 MoA 16SW(2d)656; 91PaSuper 110.

269–36 [a] (4) Other instances. 161 Tenn341, 31SW(2d)969.

269–37 106TexCr626, 294SW559. [a] (4) Whether company for whom defendant acted was within purview of Blue Sky Law. **MoA** 293SW445. (5) Other instances. 161Tenn341, 31SW(2d)969.

270–40 79CalA726, 251P241; 234 IllA 547; 235Mich656, 209NW832; **Miss** 111 S670; 191NC643, 132SE792.

270–44 319 Ill 372, 150NE330; 121Kan 233, 247P114; 172Minn277, 215NW177, 54ALR490. [c] **When right to do business commences.**–47 Ida473, 276P318. [d] **Statute does not limit registration** to calendar year in which application is filed. **Pa** 151A702.

270–46 [a] (3) Issuer and seller of stock held not synonymous, and it is unnecessary that either shall be the other. 254 IllA428.

271–49 98CalA415, 277P190; 121Kan 233, 247P114; **Miss** 111S670; 135Misc 138, 238NYS38; 192NC620, 135SE616; [b] (2) To remove transaction, outside state, from operation of statute. 32 F(2d)725. [c] **Statute held not applicable.**–195NC420, 142SE578. [d] **Corporation can take no legal subscriptions of stock** after date set forth in permit issued by corporation commissioner. 206Cal 98, 272P1042. [e] **Repealing statutes.–Utah** 272P946.

271–49½–New. Blue Sky Law held not to permit licensed dealer to traffic in his own securities without restriction. 22 OhA330, 154NE527.

271–49⅓–New. Courts should give effect to intention of legislature in enacting corporate securities statutes to prevent issuance without permit of corporate securities in the state by foreign corporations organized in any other state or territory or the District of Columbia. 81CalA128, 252P1057.

271–49¼–New. Allegation of compliance with Securities Act is not necessary in suit on a note, containing an unconditional promise to pay, and also statement that it was given in accordance with provisions of subscription to stock in payee corporation. 39GaA262, 146SE798.

271–50 79CalA726, 251P241; 81CalA 128, 252P1057; 326 Ill 379, 158NE103; 232Mich29, 204NW747; 172Minn277, 215NW177, 54ALR490; 244NY33, 154 NE655 [aff 216AppDiv250, 214NYS670]; 216AppDiv250, 214NYS670 (to protect public from being cheated); 230App Div268, 243NYS446; 191NC643, 132SE 792; 7PaDist&Co 781. [b] **In Georgia.**–36GaA450, 136SE798. [c] **Applicability of statutes is not affected by fact** that no fraud was committed in securing subscription, or that stock has no characteristics of "blue sky" stock. 192NC620, 135SE616. [d] **Statute liberally construed to effect purpose.**–230 AppDiv268, 243NYS446.

271–51 121Kan233, 247P114.

271–52½–New. Primary purpose of law is remedial in character. 244NY33, 154NE655.

271–52⅓–New. The statute is confined solely to sales of worthless securities and has no application to transactions between brokers and their clients generally. 79CalA726, 251P241.

271–52¼–New. The statutes are aimed at the seller and not the purchaser of unapproved securities. 241Mich356, 217NW60.

271–53 78CalA223, 248P716; 238Mich 606, 214NW311; 169Minn214, 210NW 1001; 172Minn277, 215NW177, 54ALR

490; 128Misc84, 218NYS57; 127Misc 683, 217NYS565.

271-53½-New. and are not invalid as limiting freedom of contract; 172Minn 277, 215NW177, 54ALR490.

271-55 73CalA83, 238P160; 78CalA 223, 248P716; 121Kan233, 247P114; 238Mich606, 214NW311; 169Minn214, 210NW1001; 172Minn277, 215NW177, 54ALR490; 128Misc84, 218NYS57; 129 Misc708, 222NYS552; 127Misc683, 217 NYS565; 124 Or525, 265P422; 187Wis 463, 204NW595; 196Wis1, 220NW201.

271-58½-New. That such a law goes further, in interfering with business transactions, than any prior statute, is not grounds for judicial condemnation. 187Wis463, 204NW595.

271-58½-New. In Canada a provincial statute interfering with dominion status of a dominion company is ultra vires. Can [1929] 1DomLR369.

271-60 79CalA726, 251P241; 191NC 643, 132SE792. See also 243Mich338, 220NW752. [b] **Suit for fraud in sale of stock** may be brought against surety alone where principal is a nonresident. 213Ala377, 104S821. [c] **Constitutionality.**-191NC643, 132SE792. [d] **Construction.**-160Tenn603, 28SW(2d)346. [e] **Bill to recover on bond held not to show breach.**-160Tenn603, 28SW(2d) 346. [f] **Persons protected by bond.**-Mich 233NW428.

271-60½-New. In construction of the bond the doctrine of strictissimi juris applies. 79CalA726, 251P241.

271-60½-New. and as a strictly statutory bond liability thereon does not extend beyond the terms of the act. 79 CalA726, 251P241.

271-60¼-New. The bond required under such statutes is not intended to be a contract of credit insurance. 79CalA 726, 251P241.

271-60⅓-New. The law affords an ample remedy for breach of contract or for any illegal act with reference to sales of legitimate securities, but the remedy is not in an action against the bond. 79CalA726, 251P241.

271-60½-New. and does not apply to a broker's mere breach of contract for the sale of securities. 79CalA726, 251P241.

271-60½-New. Where a broker breaches his contract for the purchase of securities and thus may have breached substantive law, but no fraud is claimed in the sale of any security, good or otherwise, there is no violation of the law for which the bond prescribed by statute was given. 79CalA726, 251P241.

271-60¼-New. A broker's bond given pursuant to the California statute of 1917 prior to the amendment of 1925 does not cover a case of conversion or misappropriation. 100CalA515, 280P 539.

271-60½-New. Where the bond was given pursuant to such statute before amendment, and was drawn and worded accordingly, that a cause of action arises after the amendment does not bring the action under the amendment. 100CalA515, 280P539.

272-61 73CalA83, 238P160; 75CalA 623, 243P473; 243 IllA244. [a] **Securities commission is not regulator of business.**-298Pa263, 148A107.

272-62 195Cal158, 232P140 (discretion of commissioner of corporation in refusing to ratify illegal subscriptions held not to have been abused).

272-62½-New. But in arriving at a decision denying permission, the commission need not necessarily find promotion of project guilty of intentional dishonesty or active fraud. 238Mich606, 214 NW311.

272-64 73CalA83, 238P160. [b] **Commissioner of corporations** is not required to assume that allegations in petition asking for permit to issue stock are true, or to hold hearing thereon, but may examine records of his office relating to transaction. 195Cal158, 232 P140. [c] **In New York.**-127Misc683, 217NYS565.

272-65 195Cal158, 232P140; 174Minn 200, 219NW81. [a] **To determine whether to issue permit** for sale of securities, feasibility of successful execution of contracts made for corporation upon which discretion of commissioner should be exercised. 195Cal158, 232P 140.

272-65½-New. but an official has no power to determine how much securities should promise investors; 318 Ill 548, 149NE530.

272-65½-New. nor to determine the wisdom of entering into an annuity contract in the absence of fraud; 318 Ill 548, 149NE530.

272-66 80CalA147, 251P322. [b] (2) Commissioner may order corporation who had violated condition of permit, to bring about surrender and cancellation of stock illegally issued, as condition precedent to granting permit to make further sales. 80CalA147, 251P322. (3) Question whether stock illegally sold and not surrendered was issued for valid consideration cannot be determined in certiorari to review such order to which holders of the stock were not parties. 80CalA147, 251P322. (4) It is within discretion of commissioner under statute to require corporation to clear up question of liability to holders of illegally issued stock before permit for further sales shall become effective. 80CalA147, 251P322. (5) Commissioner has power to impose condition that copy of permit shall be exhibited and delivered to each prospective subscriber. 82CalA83, 254P942. [d] **Courts will not interfere** with discretion of officer in issuing permits for sale of securities in absence of grave reasons showing fraud, corruption, improper motives, or influences, plain disregard of duty, gross abuse of power, or violation of law. 195Cal158, 232P140; 80CalA147, 251P322.

272-67 97CalA12, 275P253; 172Minn 328, 215NW186; 174Minn200, 219NW 81; 116 Or352, 241P72. But see 298Pa 263, 148A107. [c] **Notice of suspension.**-NH 146A527.

272-68 [b] **Cancellation not justified** on ground of unfairness of annuity of contract. 318 Ill 548, 149NE530. [c] **On certiorari** to review cancellation of license, question of power of secretary of state to prohibit sale of contract for annuity for fraud of agents of seller held not presented. 318 Ill 548, 149NE 530.

272-69 [b] (2) Notice to employer of refusal to register its agent is sufficient. 13PaDist&Co 511. [d] **Attorney-general's power to subpœna witnesses** under Gen. Bus. L. § 352 is limited to attendance preliminary to commencement of action. 129Misc698, 223NYS851. [e] **In New York.**-129Misc708, 222NYS552.

272-69½-New. Statute empowering investigation of dealers in securities held not compulsory disclosure of trade secrets and confidential dealings, as disclosure of information so obtained is made misdemeanor by statute. 128 Misc84, 218NYS57.

272-69⅓-New. A dealer during an investigation is entitled to counsel, although the statute does not specifically so provide. 128Misc84, 218NYS57.

272-69¼-New. The statute empowers the commission, in connection with any registration outstanding, to call for any information deemed necessary to determine whether such registration should remain in force. 172Minn328, 215NW 186.

272-69⅛-New. Certiorari or writ of review will not lie to review an incorrect conclusion of the commissioner amounting to mere error and not in excess of his jurisdiction. 75CalA623, 243P473.

272-69⅛-New. Dealer may appeal to court upon suspension of license without awaiting final determination of question of revocation by commissioner. 9PaDist&Co 11.

273-70 [a] **Issuance of certificate** to corporation permitting it to sell its stock and securities is not guaranty to public that it could, with impunity, engage in their purchase. 234Mich436, 208NW701.

273-70½-New. In New York, suits to enjoin persons and corporations from engaging in fraudulent practices contemplated by the statute are authorized. 244NY33, 154NE655.

273-71 [a] **In Kansas.**-121Kan233, 247 P114. [b] **In California.**-75CalA471, 242P1078. [c] **National banking associations and other corporations** created by act of congress, excepted by some statutes, include under rule of ejusdem generis same class of corporation as national banking associations. 81CalA 128, 252P1057.

273-72 [d] **Unorganized company or association.**-It is immaterial that at time of transaction company or association had not been organized. 118 Or 656, 247P1077. [e] **Corporation organized to engage in building and real estate business** is not investment company. 159Tenn337, 17SW(2d)1.

273-73 88CalA372, 263P564. [a] (3) Coöperative associations for pecuniary profit held included. 319 Ill 372, 150 NE330.

273-74 93CalA770, 270P235; 159Tenn 337, 19SW(2d)273. [b] **Financial service** furnishing medium for unloading issues of worthless stock is fraudulent enterprise within Blue Sky Law. NJ Ch 150A835.

273-75 82CalA109, 255P225.

273-76½-New. In some jurisdictions a bank selling a security in any capacity is exempt from the provisions of the statute. 253 IllA396.

273-78 Cal 293P26; MoA 277SW354.

274-80 239Mich295, 214NW110, 55 ALR1157.

274-81 239Mich295, 214NW110, 55 ALR1157.

274-81½-New. Where a foreign corporation does not issue or intend to issue securities within meaning of act, the commissioner has been held not authorized to issue a permit sought. 97CalA 12, 275P253.

274-84 [a] **Where corporation has license.**-135Misc138, 238NYS38.

274-85 98CalA415, 277P190.

274-86½-New. Brokers offering stock of holding company for sale must make definitely clear to prospective purchasers distinction between stock of holding and operating corporation. 137 Misc400, 242NYS41.

274-89 289Pa22, 136A862; 289Pa27, 136A863.

274-92 Cal 293P26; 21 OhA475, 153 NE250 (dealer is one who makes successive sales as business); 289Pa22, 136A862; 289Pa27, 136A863. [a] (2) Officer of foreign corporation selling its stock for its benefit held not dealer within Securities Act. 289Pa22, 136A 862; 289Pa27, 136A863.

274-95 202Cal748, 262P322; 89PaSuper439. [a] (2) Solicitor, obtaining subscription to capital stock of corporation to be organized under laws of state, is not salesman governed by provisions of Michigan Pub. Acts (1923) No. 220, § 5. 245Mich37, 222NW162. [b] **In Illinois.**-233 IllA13. [c] **Statute is applicable** to corporation employed to sell stock, and whose activities were not confined to campaign to raise funds. 192NC620, 135SE616.

274-99½-New. Sale of bonds by an unlicensed agent of a licensed corporation is not a violation of the statute as an unlicensed sale. 69Utah250, 253P900.

274-99⅓-New. Persons who procure contracts of subscription to stock of a proposed corporation are not issuers of such stock within meaning of securities act. 165Ga598, 141SE793.

274-3 249 IllA242. See also 243 IllA 323; 244 IllA107.

275-10 118 Or656, 247P1077 [quotCJ]. [a] **Mortgage notes,** though each is secured by lot, are "evidences of indebtedness." CalA 290P131.

275-11 IndA 169NE865 (issuance of profit-sharing certificate held not to require license). [b] **In California.**-A 290 P131.

275-13 78CalA223, 248P716; 102CalA 29, 282P813; 171Minn191, 213NW904, 54ALR495; 172Minn277, 215NW177, 54 ALR490. [b] **Certificate of ownership of units in syndicate** organized as common law trust entitling holder to share in profits earned by syndicate from oil and gas leases held by it is security within statute. 124 Or423, 263P920; 124 Or 440, 263P924; 124 Or436, 263P925. [c]

"Units" into which capital contributed by members of association of individuals operating under declaration of trust is divided constitute securities. 88CalA 372, 263P564; 102CalA29, 282P813.

275-14 [b] **Corporate stock is security.** 241Mich356, 217NW60. [c] **Option privilege to subscribe for corporate stock is security.** 241Mich356, 217NW60.

275-15 256 IllA331; 164Minn455, 205 NW370; 118 Or656, 247P1077, 1079 [quotCJ]. [a] 172Minn277, 215NW177, 54ALR490.

275-16 170Minn360, 212NW806; 171 Minn191, 213NW904, 54ALR495; 118 Or656, 247P1077. [a] (4) Other instances. 256 IllA331.

275-17 230AppDiv268, 243NYS446.

276-18 118 Or656, 247P1077.

276-20 118 Or656, 247P1077 [quotCJ].

276-22 234 IllA392; 251 IllA119 (classification not changed by amendment of statute); 251 IllA506; 228Ky420, 15SW (2d)249; 246Mich235, 224NW443; 246 Mich249, 224NW447(3dcase); 151Wash 315, 275P720. See also 243 IllA244. [a] **Sale of less than fifty per cent** by one purchasing entire bond issue held not within statutory exemption in statute requiring dealers in "securities" to be licensed. 21 OhA475, 153NE250. [b] **Evidence.**–246Mich235, 224NW443; 246 Mich249, 224NW447(3dcase).

276-23 98CalA415, 277P190; 160Ga 331, 127SE352 (commercial paper); 239 Mich101, 214NW142. [a] **Subscriptions to stock of railroad companies** are not void because, when taken, stock had not been approved by railroad commission. 239Mich101, 214NW142. [b] **Securities issued by bank** are those which are lien or charge on bank or its property or assets. 251 IllA188. [c] **Declaration of trust in form of deed of trust** by bank to which property had been conveyed in trust for benefit of holders of units in property is not security issued by bank. 251 IllA188.

276-24½-New. Some statutes provide for exemption of stock and securities of solvent concerns which have been solvent and going concerns for two years. TexCivA 19SW(2d)829.

276-25 130Kan785, 288P749; 135Misc 138, 238NYS38 (statute relative to sale of securities of foreign insurance companies held to include all sales, whether in connection with formation of company or later). [a] **Similar definitions.**–NC 153SE855.

276-26 41GaA166, 152SE282. [a] **In West Virginia.**–102WVa181, 135SE235.

276-27 81CalA276, 253P336; CalA 291 P422.

276-27½-New. or in a corporation prior to organization. CalA 291P422. [a] **Subscription is subject to reasonable application for permit to issue stock.**–CalA 291P422.

276-28 102CalA29, 282P813; 124 Or 525, 265P422. Compare Alta [1926] 4 DomLR248, [1926] 3WestWkly486. [a] **Unauthorized sale of "unit" in land syndicate** held violation of Blue Sky Law irrespective of fraud. 22 OhA330, 154 NE527.

276-29 101CalA94, 281P396. [b] **Exchange of stock for purpose of operating companies** under common management but as separate entities is not within Blue Sky Law and no license or approval required. 187Wis528, 205 NW492.

276-30 [a] 170Minn38, 211NW961. [b] **Transactions within statute.**–101CalA94, 281P396; 248Mich460, 227NW757.

276-31½-New. The statute applies to sales by the owner of securities as well as to sales thereof by his representatives. 171Minn191, 213NW904, 54ALR 495.

276-32 32F(2d)725; 97Fla403, 121S473 [reh den 97Fla409, 122S274(2dcase)].

276-33½-New. That subscription for stock sold in violation of the Blue Sky Law was signed in foreign state is not conclusive that sale was made there. 235Mich656, 209NW832.

276-33½-New. In view of the severe penalties, a particular transaction will not be held a violation of the statute unless it clearly and satisfactorily appears to contravene the spirit and letter of the law. 69Utah250, 253P900.

276-33¼-New. A sale of bonds in violation of a representation or promise made to secure the license is not an unlicensed sale, 69Utah250, 253P900.

276-33½-New. although it may be ground for revocation of an existing license. 69Utah250, 253P900.

276-33⅓-New. A sale of corporate stock to one delivering a check and note therefor to a bank cashier within the state who forwarded them to the president of the corporation in another state with a request to forward the stock to the maker is consummated in the latter state and is not a violation of the Blue Sky Law of the state where the check and note were made. 192Wis124, 212 NW280 (evidence held not to show that bank cashier was agent of corporation).

276-33½-New. Solicitation of a sale of a security not approved by the securities commission is unlawful under some statutes. 241Mich356, 217NW60.

276-33⅝-New. A request and advice by an officer of a brokerage corporation to an acquaintance to buy stock of a certain corporation constitutes a solicitation within such statute, although the brokerage corporation was not at the time employed to sell such stock. 241 Mich356, 217NW60.

276-33⅞-New. A person making such unlawful solicitation cannot avoid its effect by a claim of agency for the purchaser. 241Mich356, 217NW60.

276-33 1/10-New. Sellers of securities to dealers, registered or unregistered, are not penalized by the act. NH 146A527.

276-33 1/11-New. Giving of certificate of participation in assets and profits of trust in consideration of conveyance of minerals and mineral rights constitutes sale. 34NM632, 286P979.

276-33 1/12-New. Georgia Blue Sky Law has no application to a contract for the purchase of lots executed in another state. 153Va554, 149SE519.

276-33 1/13-New. Transaction held an investment contract under statute although application for the purchase of securities recited an agreement that it should not be so construed by the court. 251 IllA220.

276-33 1/14-New. Contract held not "investment contract" within Blue Sky Law. NC 153SE355.

276-33 1/15-New. Contract held not "certificate of interest in profit-sharing agreement" within Blue Sky Law. NC 153SE855.

276-35 202Cal 748, 262P322.

276-38 CalA 290P131. [a] **Public offerings of stock in newspapers** without permit and personal solicitations held illegal without proof that actual sales were influenced. 212Ala621, 103S576.

276-39 [b] **In Kansas.**–121Kan233, 247 P114. [c] **In West Virginia.**–102WVa 181, 135SE235.

276-39½-New. Other statutes apply to private sales by persons not exempted from the operation of the act. 121Kan 233, 247P114.

277-40 Cal 289P616; 238Mich443, 213 NW866; 172Minn277, 215NW177, 54 ALR490; 187Wis528, 205NW492; Man [1930] 1DomLR138. [a] **Exception of isolated sales by owners of stock** applies to issued stocks or other securities in possession of bona fide owners and not dealers in nor underwriters thereof. 89 PaSuper439.

277-43 Cal 293P26; 81CalA276, 253P 336; 82CalA83, 254P942; 82CalA109, 255P225; CalA 268P1095; CalA 279P 1011; 101CalA94, 281P396; CalA 288P 29; CalA 291P422; 36GaA450, 136SE 798 (dictum); 165Ga598, 141SE793; 319 Ill 372, 150NE330; 326 Ill 502, 158 NE159; 244 IllA314; 130Kan785, 288 P749; 248Mich460, 227NW757 (sale held not void but only voidable at election of purchaser); Miss 111S670; 135 Misc138, 238NYS38; 192NC620, 135SE 616; 124 Or423, 263P920; 124 Or440, 263P924; 124 Or436, 263P925. [b] **Contract in violation of Blue Sky Law** is unenforceable at law or equity. 100W Va547, 131SE857. [c] **Statute making sales of stock void applied** to sales made before statute was amended to make every sale of stock voidable at election of purchaser, though action not begun till after amendment. 319 Ill 372, 150 NE330. [d] **Ratification.**–82CalA109, 255P225. [e] **Purchaser of shares of association issued without permit** acquires no interest in association. 82CalA109, 255P225. [f] **That transfer of portion of stock did not violate statute** does not render contract only partially illegal. 88CalA34, 263P285. [g] **In California.**–101CalA94, 281P396. [h] **Void sale cannot be ratified.**–CalA 291P422. [i] **Where part of stock involved in transaction is illegal,** agreement is illegal in entirety. CalA 291P422.

277-44 319 Ill 372, 150NE330. [b] **Executory contract** for sale of stock is void under such statute, where no proper application for permit to issue stock is made. 72CalA409, 237P784. [c] **In Indiana.**–86 IndA224, 156NE520 (statute construed).

277-45 85Mont170, 278P126, 67ALR 690.

277-45½-New. Promoters should make reasonable investigation before issuing prospectus, and to extent of failure to do so, lack of personal knowledge will not relieve them of liability. 244NY33, 154NE655.

277-45⅓-New. Promoters cannot, as matter of law, exempt themselves from duty of reasonable investigation by issue of printed matter in which they state that the information was from reliable sources not guaranteed by them. 244NY33, 154NE655.

277-45¼-New. Attorney General is entitled to subpœna and injunction on showing of sale or intended sale in violation of law. 102NJEq186, 140A26.

277-45⅕-New. A sale in violation of the Blue Sky Law cannot be ratified. 124 Or440, 263P924.

277-45⅙-New. An agreement for payment of commission on sale of securities by a broker without the certificate of authority required by statute is void. 98CalA415, 277P190.

277-45⅐-New. Directors of a corporation who issued corporate stock in payment for formula worth par value of the stock are estopped after recipients become officers and vote the stock to seek cancellation on the ground that the transaction was contrary to the Blue Sky Law. 30 OhA161, 164NE641.

277-45⅛-New. Failure of brokers offering stock of holding corporation for sale to distinguish between stock warranted injunctive order. 137Misc400, 242NYS41.

277-46 CalA 291P422. [b] **No fraud.**–206Cal 609, 275P418. [c] **Issuance of certificates** amounts to representation that certificates are regular and valid. 100CalA736, 281P106. [d] **Purchasers are not chargeable with lack of diligence in failure to discover fraud** where there were no facts which would have aroused suspicion. 100CalA736, 281P 106.

277-47 82CalA109, 255P225. See also 27 OhNPNS529. [a] (2) Evidence held sufficient to show reliance on validity and genuineness of certificate. 82CalA 109, 255P225. [b] **Evidence held insufficient:** (1) To show fraud or violation of Blue Sky Law. 69Utah250, 253 P900. (2) To sustain finding of fraud. CalA 286P165(4thcase). [c] **Who liable.**–82CalA109, 255P225. [d] **Defenses.**–82CalA109, 255P225. [e] **Liability to subsequent purchasers.**–82CalA109, 255P225. [f] **Interest.**–82CalA109, 255 P225. [g] **Questions for jury.**–318Mo 139, 1SW(2d)127. [h] **In Michigan.**–248Mich460, 227NW757 (statutory remedy in assumpsit held exclusive). [i] **Proper or necessary parties** in action on dealer's bond. 27 OhNPNS 544. [j] **Pleadings.**–27 OhNPNS544. [k] **Amount of recovery** in action on bonds of dealer and agent. 27 OhNPNS 544.

277-48 130Kan139, 286P635. [b] (4) That purchaser's counsel wrote secretary of corporation, asking for purchaser's original application for stock, and later for permission to look at the books, does not estop purchaser. 246 Mich235, 224NW443; 246Mich249, 224 NW447(3dcase). (5) That purchaser knew that transaction was in violation of law does not constitute defense in action to recover price paid for stock of

unlicensed foreign insurance company not authorized to sell securities. 135 Misc138, 238NYS38. [c] **Purchaser not in pari delicto.**–Cal 293P26.

277–49 82CalA83, 254P942; 88CalA34, 263P285; 88CalA372, 263P564; CalA 291P422; 41GaA166, 152SE282; 326 Ill 502, 158NE159; 251 IllA119 (right not waived); 254 IllA428; 235Mich656, 209 NW832; Minn 232NW523. See also Cal 293P26; 250 IllA492. [b] (3) Complaint held insufficient. 135Misc138, 238NYS38. (4) Complaint held sufficient. 135Misc138, 238NYS38. (5) Defense alleging that there was no public market for sale of stock and that sale was made at private sale held insufficient. 135Misc138, 238NYS38. (6) Allegations held insufficient. 255 IllA 362. [g] **Questions of law and fact.**–235Mich656, 209NW832. [h] **Participation of defendant in sale.**–235Mich 656, 209NW832. [i] **Provision in repealing statute** for continuance of pending action does not prevent recovery of money paid for stock sold prior to repeal in violation of law. 236Mich34, 209 NW829. [j] **Repeal of Blue Sky Law statute** before action to recover money paid for stock sold in violation of law does not permit recovery. 236Mich34, 209NW829. [k] **Burden of proof.**–237 IllA117; 254 IllA428 (burden is on defendant to show compliance with act); NH 146A527. [l] **Admissibility of evidence.**–319 Ill 372, 150NE330; 234 IllA 547; 240 IllA100. [m] **Sufficiency of evidence.**–82CalA83, 254P942; 88CalA34, 263P285; 88CalA372, 263P564; 234 IllA 547; 237 IllA117; 240 IllA100. [n] **Attorney's fees,** in action to recover payment for stock, held recoverable under statute. 319 Ill 372, 150NE330. [o] **Notice of rescission.**–82CalA83, 254P942. [p] **Parties liable.**–228Ky420, 15SW(2d) 249; 247Mich255, 225NW605. [q] **Seller as well as agent or broker** who knowingly participates in void sale may, within twelve months, be held liable to purchaser for purchase price of stock. 41 GaA166, 152SE282. [r] **Recovery against officers of corporation.**–Kan 292 P771.

278–50 319 Ill 372, 150NE330; 235 IllA 132, 143. But see CalA 286P165(4th case). [a]; (2) Tender of stock held to comply with requirements of statute. 319 Ill 372, 150NE330. (3) Lender of shares given in exchange for original shares held sufficient. 234 IllA547. (4) Where application for stock did not create contract until accepted by corporation, and purchaser's original subscription for two thousand shares asked that one thousand be issued to his wife, which she paid for personally, and corporation accepted subscription by issuing separate certificates to purchaser and wife for one thousand shares each, purchaser's tender back of one thousand shares with accretions is sufficient. 246 Mich235, 224NW448; 246Mich249, 224 NW447(3dcase). (5) Where purchaser of stock tendered back equivalent of all he had received, corporation cannot defend claim for rescission on ground that shares tendered were not identical shares sold purchaser. 246Mich247, 224NW447 (2dcase); 246Mich249, 224NW447(3d case).

278–51 124 Or436, 263P925.

278–51½–New. Where a corporation sells stock for the buyer's notes in violation of the securities commission's authorization to sell for cash, collection of the notes cannot be enforced by the corporation's receiver. 179Minn582, 228 NW757(1stcase).

278–52 See also 130Kan785, 288P749.

278–54 41 Ida160, 238P314. But see Ark 13SW(2d)600. [b] **Purchase through unregistered agent.**–159Tenn 655, 21SW(2d)392.

278–55 41 Ida160, 238P314; 41 Ida679, 241P609. [b] **Burden is on holder** to prove himself bona fide holder for value. 41 Ida160, 238P314.

278–56 170Ga467, 153SE26; 33GaA802, 127SE810. [a] **In Ohio.**–114 Oh126, 151NE51. [b] **Subscriber cannot be estopped** where stock was sold in violation of securities law. 170Ga467, 153 SE26.

278–57½–New. Defendants may show plaintiffs' failure to exercise option to buy or restore consideration and their ratification of contract, in suit to set aside contract. CalA 286P165(4thcase).

278–57⅓–New. Purchaser can show that purchase was in good faith in a suit to cancel sale of stock, where conditions in permit were not complied with. CalA 286P165(4thcase).

278–57¼–New. Tender back of consideration should be alleged in suit to cancel contract for sale of stock. CalA 286 P165(4thcase).

278–58 206Cal 609, 275P418; CalA 268 P1095 [rev on other grounds 206Cal 609, 275P418].

278–59½–New. Equity will not enforce a contract which is in violation of the Blue Sky Law. 238Mich443, 213NW866.

278–59⅓–New. In some jurisdictions a purchaser of an investment contract sold in violation of law is not in pari delicto with the seller and may recover the money paid therein. 170Minn360, 212NW 806.

278–59¼–New. Under some statutes a stockholder of an insolvent corporation is liable to a purchaser for money paid on an illegal sale of an investment contract. 170Minn360, 212NW806.

278–59⅕–New. In such case no tender is necessary. 241Mich356, 217NW60.

278–59⅙–New. Notice by a purchaser with his plea in an action for the price that he will defend specially on the ground that the transaction was in violation of the blue sky law is effectual to accomplish a rescission where the security had not been delivered to him. 241Mich356, 217NW60.

278–59⅐–New. A purchaser of securities sold in violation of the blue sky law may sue in equity to rescind the contract and recover the amount paid by him. 124 Or440, 263P924.

278–59⅛–New. That a prosecution for violation of the blue sky law is barred by the statute of limitations does not affect the right of a purchaser to rescission and a recovery of the amount paid. 124 Or436, 263P925.

278–59⅛–New. Good faith or advice of counsel does not constitute a defense to an action by a purchaser to rescind a sale in violation of the blue sky law and recover the amount paid. 124 Or436, 263 P925.

278–59 1/10–New. An action to enforce a stockholder's liability to creditors will not lie against a person who entered into an agreement to purchase stock of the debtor corporation, when the corporation had not obtained a permit to sell or disposed of its capital stock. 81CalA276, 253P336.

278–59 1/11–New. Where a statute makes a sale of stock of a corporation which has not complied with its terms void at the election of a purchaser and declares such sale to constitute a misdemeanor, a broker making such sale cannot recover commissions. 85Mont170, 278P126, 67ALR690.

278–59 1/12–New. In such case it is immaterial that the purchasers are not complaining. 85Mont170, 278P126, 67 ALR690.

278–59 1/13–New. Cancellation of a purchaser's conveyance of mineral rights may be justified by the mutual mistake of a foreign corporation and the purchasers of stock therein in issuing stock without a permit. CalA 268P1095 (notice of cancellation of stock held sufficiently prompt).

278–59 1/14–New. A buyer is not deemed in pari delicto with the seller where the contract was induced by the seller's fraud and the buyer withdrew while the contract was still executory. 88CalA34, 263P285.

278–59 1/15–New. A buyer of stock issued in violation of statute is entitled to cancellation of the contract, stock certificates, and notes given for the price. 88 CalA34, 263P285.

278–59 1/16–New. The presumption, in absence of proof, is that a transfer of stock was made under permit, and was legal and valid. The burden of proving invalidity is upon the parties asserting it as a defense. 98CalA748, 277P1075.

278–59 1/17–New. An active participant in the sale of unapproved stocks is not excused from liability because a purchaser signed the subscription for stock before organization of the corporation. 247Mich255, 225NW605.

278–59 1/18–New. The seller of securities failing to procure a statutory permit is estopped to set up illegality of the purchase in an action by the purchaser for rescission or damages. 101CalA94, 281 P396.

278–59 1/19–New. Where a corporation, having no permit to issue common stock, issued such stock in part payment for a business agreeing to issue preferred stock in exchange for part of such common stock, seller can maintain action for the corporation's breach of contract to issue such preferred stock. 101CalA 94, 281P396 (evidence of value of stock held sufficient).

278–59 1/20–New. Pledgee of stock is necessary party in suit to cancel sale of stock. CalA 286P165(4thcase).

278–59 1/21–New. In action to mineral conveyance given in consideration of certificate of participation in assets and profits of trust estate, answer has been held insufficient on demurrer. 34NM632, 286P979.

278–59 1/22–New. Neither laches nor affirmative acts in recognition of interest in corporation will render stockholder liable upon statutory liability if stock was illegally issued. CalA 291P422.

278–61 But see 84CalA635, 258P670.

278–61½–New. Under a statute prohibiting violation of law which has, or would have, operated as fraud upon an investor, a complaint alleging that defendants are putting forth untrue and misleading advertisements, with intent to sell securities, held sufficient. 244NY 33, 154NE655.

278–61⅓–New. Where the intent of defendants, in engaging in practices complained of, is to sell securities in fact worthless, or worth substantially less than the asking price, intentional misstatements need not be alleged. 244NY 33, 154NE655.

278–61¼–New. Allegations of material misrepresentations made to influence an investor are enough. 244NY33, 154NE 655.

278–61⅕–New. In some jurisdictions, where a contract to pay a commission on stock sales was in violation of law, a corporation cannot recover on bond for repayment of commissions withheld by a sales agent in accordance with such contract. 145Miss342, 110S670.

278–61⅙–New. Surety on bond of a licensed dealer held not absolved from liability because of the dealer's personal interest in securities he sells. 22 OhA 330, 154NE527.

278–61⅐–New. Where a company's issue was lawful, a solicitor may recover commissions although he failed to secure the required license. 36GaA450, 136SE798.

278–64 243 IllA41; 121Kan233, 247P 114; 169La626, 125S737. [c] **In New York.**–244NY33, 154NE655. [d] **Inconsistency in provisions of statute not shown.**–169La626, 125S737. [e] **Defendant being controlling influence** in corporation can be held liable as principal, though corporation is distinct. CalA 290P131.

278–65 243 IllA41. [a] **Different punishments for issuing and selling.**–73 CalA485, 238P1044.

278–66 169La626, 125S737 (agent of issuer included within statute). [a] **"Solicitor"** includes anyone who offers to sell or sells securities. 85Mont170, 278P126, 67ALR690.

278–67 232Mich29, 204NW747.

278–68 232Mich29, 204NW747.

278–68½–New. A statutory provision against negotiation for sale of stock in the state, without compliance with statute, applies to negotiation in the state for sale of stock, although sale is made outside the state, or no sale is consummated. 232Mich29, 204NW747.

278–69 118 Or656, 247P1077.

278–69½–New. or regardless of whether he knew he was violating the law; 78CalA223, 248P716.

279–70½–New. In determining liability, the cost of a furnace has been held not deductible from operating expenses

in determining the falsity of a statement for issue of mining securities. 75 CalA499, 243P478.

279-70½-New. Fraudulent, fictitious sale and purchase of securities in another state will not enable accused to avoid penalties of act on subsequent unlicensed sales. 78CalA223, 248P716.

279-70¼-New. Evasion of the law in and of itself is not a crime, but may be considered in determining whether the acts and conduct of defendants were intended to and did violate the act. 78 CalA223, 248P716.

279-70½-New. As to what constitutes a false paper under the Blue Sky Law the rules relative to false pretenses are persuasive. 318Mo 1068, 2SW(2d)589.

279-70½-New. To be liable a false statement must be material to the granting of a permit. 318Mo 1068, 2SW(2d) 589 (false statement immaterial).

279-71 75CalA471, 242P1078; 233 IllA 13; 243 IllA41; 178Minn492, 227NW 652 (sufficient); 124 Or525, 265P422. [a] 108WVa525, 151SE852. [d] **Information that defendant** "did unlawfully sell and offer for sale securities" held sufficient under statute. 233 IllA13. [e] **Information held sufficient** where defendant was informed of offense under Blue Sky Law. 233 IllA13; 169 Minn214, 210NW1001. [f] **Duplicity,** not involved in information charging unlawful offer for sale and sale under statute. 233 IllA13. [g] **Negativing exceptions.**–75CalA471, 242P1078. [h] **Indictment held sufficient.**–78CalA223, 248P716. [i] **Information held defective.**–318Mo 1068, 2SW(2d)589.

279-72 98CalA206, 276P578; 102CalA 29, 282P813; 251 IllA506. [a] (5) Evidence is admissible which shows that defendant was dealing with securities and offering them for sale to general public. 118 Or656, 247P1077. (6) Evidence, tending to establish course of dealing in securities, is not inadmissible because it shows visionary character of defendant's business. 118 Or656, 247P 1077. (7) Sheriff's deed to mine held erroneously admitted on issue of corporate earnings. 75CalA499, 243P478. (8) Evidence as to transfer of proceeds from sale of securities to accounts of defendants held admissible. 78CalA223, 248P716. (9) Character of certificate given in payment for certain stock held immaterial where indictment related to other securities. 78CalA223, 248P716.

279-73 98CalA206, 276P578; 243 IllA 41; 124 Or525, 265P422. [a] (1) 121 Or57, 254P198. (2) 98CalA206, 276P 578; 102CalA29, 282P813; MoA 277SW 354. (4) To warrant finding on preliminary hearing of probable cause that offense had been committed. 187Wis 463, 204NW595. (5) To establish violation of Corporate Securities Act. 78 CalA223, 248P716. (6) To show venue as to allegations of sales of corporate stock. 78CalA223, 248P716. [b] **Evidence held insufficient:** (1) To show falsity of statements. 75CalA499, 243P 478. (2) To show that company, securities of which were sold, was corporation. 75CalA471, 242P1078.

279-74 172Minn277, 215NW177, 54 ALR490. [a] (3) Evidence held to make case for jury on issue of corporate earnings. 75CalA499, 243P478. (4) Question whether sale of securities to defendant in another state was valid is for jury. 78CalA223, 248P716. (5) Evidence not requiring submission to jury whether transaction was within exception of statute. 89PaSuper439. (6) Whether defendant was dealer or agent, or both, is question of fact. 169La626, 125S737. [b] **Remedial and procedural legislation; retroaction.**–187Wis463, 204 NW595. [c] **Burden of proof; power of legislature.**–CalA 242P1078; 187Wis 463, 204NW595. [d] **Instructions.**–203 Cal 510, 265P184; 78CalA223, 248P 716; 232Mich29, 204NW747 (inaccurate instruction as to meaning of word "negotiate," as used in statute).

279-74½-New. In a prosecution against an individual for sales violative of the Blue Sky Law, it is immaterial that the company whose stock he sold had complied with the law. 169La626, 125S737.

279-74¼-New. On appeal from the conviction of one indicted as both dealer and agent, it will be presumed he was found guilty as both. 169La626, 125S 737.

279-76 164Ga371, 138SE892, 894 [cit Cyc]; 118 Or55, 245P727, 728 [citCJ]; 121 Or591, 256P186; 114Tex452, 270 SW1014; TexCivA 280SW908. [a] (3) 68CalA554, 229P1002. (5) Authority to do particular act or series of acts upon another's land, which would amount to trespass without such permission. 217 AppDiv541, 217NYS256.

280-77 68CalA554, 229P1002; 219Ky 757, 294SW483.

280-79 251Mich11, 231NW103.

280-88 See also 126Misc807, 215NYS 101. [a] **Term applied by parties** does not necessarily determine nature of grant. 126Misc807, 215NYS101.

280-89 126Misc807, 215NYS101 (instrument yielding exclusive possession against world, including owner).

281-90 92Fla375, 109S648. [a] (3) Instrument whereby owner of land "grants the privilege" of roadway along boundary of his land to another "his heirs or assigns" grants easement. 68CalA554, 229P1002. (4) Agreement giving right to connect sprinkler system with tank. 219Ky757, 294SW483. (5) Contract under seal entitled "Permit for advertising" granting three-year right to use lot for display advertising at specified annual rent is grant of easement as between parties though not attested or acknowledged as required by statute. 130Misc676, 224NYS711. [c] **That privilege of roadway is to terminate when street is extended past land** does not militate against construction of instrument as easement where grant is to grantee and his heirs or assigns. 68 CalA554, 229P1002. [d] **Agreement held license and not easement.**–92Fla 375, 109S648.

281-91 Ark 32SW(2d)630.

281-92 170Ga279, 152SE575.

281-93 118 Or55, 245P727. [a] (1) 247Mich563, 226NW242. (10) Permission to enter land and dig for, and remove, gravel. TexCivA 280SW908.

281-95 118 Or55, 245P727.

282-1 68CalA554, 229P1002.

282-2 92Fla375, 109S648; 126Kan497, 268P794 (contract signed by only one grantee).

282-3 68CalA554, 229P1002; 92Fla375, 109S648; 219Ky757, 294SW483; Mass 170NE416.

284-25 Or 291P1009.

284-25½-New. An agreement permitting removal of timber, invalid under the statute of frauds, may operate as a license. 26 OhNPNS328.

284-28 Del 143A491.

284-31 Mo 281SW715.

284-32 Mo 281SW715.

284-36 197NC505, 149SE733 (where agent competitor of railroad).

284-47 234Mich361, 208NW457, 458 [citCJ].

285-49½-New. and does not create the relation of landlord and tenant; 259 Mass103, 156NE17.

285-50½-New. License to go upon premises for certain purpose is not exclusive of owner. 234Mich361, 208NW 457.

285-53½-New. Subtenant having a license to use a heater owes no legal duty to the owner to notify it of vacation before termination of tenancy, and failure to do so does not show negligence. 259Mass103, 156NE17.

285-58½-New. or would otherwise constitute a trespass. 290Pa322, 138A860.

286-64 58NS430, [1926] 2DomLR611.

286-64½-New. Situation of a licensee who has expended money in development of property is not changed by an attempted sale of his interest, if no sale has been consummated. 49SD370, 207 NW163.

287-78 164Ga371, 138SE892, 894 [cit Cyc].

287-92 68CalA554, 229P1002; 126Kan 497, 268P794; 219Ky757, 294SW483; TexCivA 288SW490.

288-95 68CalA554, 229P1002.

288-1 8PaDist&Co 450, 454 [quotCJ].

288-2 8PaDist&Co 450, 454 [quotCJ].

288-4 8PaDist&Co 450, 454 [quotCJ].

289-18½-New. A license may be terminated by act of law where rules adopted pursuant to statute prohibit display signs in certain areas, whereat a lease of space for advertising purposes made subsequent to enactment of the statute, although prior to adoption of prohibiting rules, becomes illegal. 31F(2d)711.

289-21 68CalA554, 229P1002; 164Ga 371, 138SE892, 894 [citCyc] (dictum).

290-36 25 OhA96, 157NE806; Pa 151A 690.

290-37 219Ky757, 294SW483; MoA 300SW1041; 74Mont91, 238P884; 83 Mont244, 271P455; 25 OhA96, 157NE 806; 121 Or591, 256P186; 8PaDist&Co 450; 9PaDist&Co 23; 47RI 258, 131A 641.

291-38 But see 9PaDist&Co 23.

291-48 [a] 34PortoRico 90.

291-49 9PaDist&Co 23.

291-50 123Kan122, 254P316, 317 [quot CJ].

292-51 123Kan122, 254P316, 317 [quot CJ].

292-55 170Ga279, 152SE575; 123Kan 122, 254P316, 317 [quotCJ].

292-56 123Kan122, 254P316, 317 [quot CJ].

292-57 165Ga408, 140SE844; 123Kan 122, 254P316, 317 [quotCJ]; 118 Or55, 245P727; 121 Or591, 256P186; 49SD 370, 207NW163.

293-60 165Ga408, 140SE844.

293-62 118 Or55, 245P727; 121 Or591, 256P186; 34PortoRico 90.

293-65 266Mass442, 165NE428.

294-68 121 Or591, 256P186.

294-71 206 Iowa1084, 221NW825; 152 Md126, 136A618, 56ALR1103.

295-80 15 OhA475.

295-84 [a] (2) On licensor's revocation of license to use bridge, defendant is entitled to compensation for work on bridge and reasonable time for building another crossing. 152Md126, 136A 618, 56ALR1103.

296-86 165Ga408, 140SE844; MoA 300 SW1041. [a] **Failure to pay rent in advance** is not ground for revocation in absence of requirement in contract. 126 Kan497, 268P794.

296-90 MoA 5SW(2d)699. See also 224 AppDiv435, 231NYS315. [a] (2) Tenant's written agreement to allow one contracting to purchase from lessor to build on property, based on consideration, is binding irrevocable contract. MoA 5SW(2d)699 (agreement held supported by consideration).

296-92 MoA 300SW1041; MoA 5SW (2d)699. [a] **Lessee's agreement to permit purchaser from lessor to build on part of property,** based on consideration, is not naked license, but grants interest in property or at least license coupled with interest. MoA 5SW(2d) 699.

297-1 Mo 10SW(2d)663.

297-6 Mass 170NE416.

297-8½-New. Death revokes license not coupled with interest. 25 OhA96, 157 NE806.

298-10 239Mich491, 214NW406; 118 Or55, 245P727.

298-15 118 Or55, 245P727 (not revoked by individual owner's conveyance to corporation in which he owned all of stock except two shares).

299-21 But see 58 OntL627, [1926] 3 DomLR76.

299-31 Ida 288P641.

299-32½-New. Where lumber company having temporary easement for right of way for railroad purposes failed to remove tracks on termination of right, owner held entitled to damages without removal. Ida 288P641.

300-38 49SD370, 207NW163. [d] **Evidence.**–49SD370, 207NW163.

300-39½-New. Where a lease of space on a roof for advertising purposes made after enactment of a statute relative to outdoor advertising becomes illegal under rules subsequently adopted under such statute, the licensee is entitled to recover moneys paid and to release from its obligations. 31F(2d)711.

300-43½-New. Equity will aid licensor in revocation of license. 152Md126, 136 A618, 56ALR1103.

LIENS

306-8 200Cal 654, 254P567.
306-9 103WVa449, 137SE889, 52ALR 689.
306-10 50Philippine61.
307-21 31Ariz8, 250P248; 3Del 519, 140A154; 90Fla407, 106S127, 43ALR 1409; 4LaA648; 141Wash14, 250P452.
307-23 [a] (2) Under Civ. Code art 3185, privileges are stricti juris, are not created by covenant, and can be allowed only in cases where they are expressly granted by statute or code. La 121S 323. (3) Privileges are stricti juris and cannot be granted unless by some specific law. 11LaA652, 124S593.
308-39 See also 331 Ill 602, 163NE391.
308-40 90Fla407, 106S127, 43ALR 1409; 94Fla11, 113S565, 55ALR662; MoA 7SW(2d)726.
308-42 90Fla407, 106S127, 43ALR1409 (nature of lien).
308-46 90Fla407, 106S127, 43ALR1409.
308-48 90Fla407, 106S127, 43ALR1409.
309-61½-New. Every lien statute carries implied term as to priority of tax liens. 274US630, 47SCt692, 71Led1243.
310-68 3Del 519, 140A154.
310-75 144Va56, 131SE437. [a] **Other distinctions.**-144Va56, 131SE437.
310-76½-New. , and a claim may embrace both a personal liability and a lien on property. 144Va56, 131SE437.
310-83 213Ala635, 105S897 (lien is not title or ownership); 232Ky622, 24SW (2d)265.
311-92 31Ariz8, 250P248; 153Tenn11, 282SW201.
311-93 153Tenn11, 282SW201 [citCJ].
311-97 Colo 291P1036 (lien is not dependent on will of subsequent purchaser).
312-14 [a] See also 85Mont310, 278P 1002.
312-32 200 Iowa1051, 205NW983.
312-33 127Kan443, 273P474; TexCivA 274SW292.
313-34 127Kan443, 273P474.
313-36 TexCivA 274SW292.
313-37 7LaA465.
313-38 161Ga629, 131SE505. See also 4LaA425.
313-33½-New. It is competent for the parties to agree that one of them shall have a lien on the property of the other as between themselves, but that there shall be no lien as against any conveyance or encumbrance thereafter given. 171Minn499, 214NW477.
313-43 81Mont375, 263P415, 417 [cit CJ].
314-56 20F(2d)74, 76 [citCJ].
315-66 90Fla407, 106S127, 129, 43ALR 1409 [citCyc]; 143Wash297, 255P117. [a] **Parties held entitled to equitable liens.**-27F(2d)354 [aff 27F(2d)360].
315-67 90Fla407, 106S127, 129, 43ALR 1409 [citCyc]; 259Mass585, 156NE871.
315-68 28F(2d)485; 52ND146, 202NW 645. See also 202 Iowa764, 211NW257.
315-70 238Mich248, 213NW100, 101 [quotCJ]; 116Nebr366, 217NW580, 582 [citCJ]; 57ND224, 221NW1.
315-72½-New. In Louisiana equitable liens are unknown. 21F(2d)434.
315-72¼-New. A statute declaring that every transfer of property otherwise than in trust or as pledge, solely as security for performance of another act, shall be deemed a mortgage, does not impliedly deny validity of equitable liens, encumbrances or mortgages on personal property. SD 225NW661.
315-72¼-New. Privileges do not arise as a matter of equity but only as a matter of law. 2LaA427.
315-74 20F(2d)48.
315-75 20F(2d)48; 143Wash297, 255P 117.
315-76 20F(2d)48.
315-77 20F(2d)48; 143Wash297, 255 P117.
316-78 18F(2d)617; 20F(2d)48; 79 CalA685, 250P705; 90Fla407, 106S127, 129, 43ALR1409 [citCyc]; 337 Ill 520, 169NE324; 123Kan24, 254P386; 153 Md50, 137A509; 50ND857, 198NW472 (deed securing promise to support grantor).
316-79 20F(2d)48; 79CalA685, 250P 705; 123Kan24, 254P386; 54ND322, 209 NW379.
317-80 75CalA685, 250P705; IndA 162 NE418; 123Kan24, 254P386; 52ND146, 202NW645; 153Tenn11, 282SW201; 143 Wash297, 255P117. [a] **By stipulation in action.**-231NYS635.
317-81 231NYS635; 52ND146, 202NW 645; 54ND322, 209NW379.
317-82 26F(2d)893; 28F(2d)107; 79 CalA685, 250P705; 90Fla407, 106S127, 129, 43ALR1409 [citCyc]; 48Nev373, 233P41; 143Wash297, 255P117.
317-85 51ND106, 199NW193; 52ND 146, 202NW645. [a] **Intention sufficiently shown** under contract for purchase and sale of land in crop payment plan. 51ND106, 199NW193.
317-86 38F(2d)566; 238Mich248, 213 NW100, 101 [quotCJ]; 32NM537, 260P 673, 674 [citCJ].
317-87 15F(2d)993; 90Fla407, 106S 127, 129, 43ALR1409 [citCyc]; 32NM 537, 260P673, 674 [citCJ]. [g] **It must appear** that property was actually set aside and appropriated as security for a particular debt. 26F(2d)893. [h] **Subsequent transfer** must be actual and complete. 28F(2d)402.
318-88 15F(2d)993.
318-92 35Ariz130, 274P1043; 44 Ida 484, 258P371; 164Minn422, 205NW268; 48Nev373, 233P41; 32NM537, 260P673, 674 [citCJ]; 219AppDiv604, 220NYS 423. [a] (5) Agreement with attorney to pay him "in cash" twenty-five per cent of amount realized from property, though client may receive something beside money, is inconsistent with intent to give attorney equitable lien on property or its proceeds. 245NY575, 157NE 863. [c] **Mere expectation or agreement** that debt will be paid out of some particular fund when fund arises will not establish equitable lien on fund. 28 F(2d)107.
319-94 22F(2d)757; 26F(2d)893.
319-95 51ND106, 199NW193.
319-97 22F(2d)611, 613 [citCJ]; 28 F(2d)107; 100NJEq437, 135A516, 517 [quotCJ].
319-4 90Fla407, 106S127, 129, 43ALR 1409 [citCyc]; 161Ga629, 131SE505 (special lien on specific property may be decreed under rules of equity); Mass 169NE897(2dcase); 108WVa458, 151SE 429. [e] **Lien implied by law** will be excluded by contract inconsistent with it. 20F(2d)74.
320-8 TexCommnA 23SW(2d)704.
320-11½-New. Equitable liens exist independently of any express contract. 90 Fla407, 106S127, 43ALR1409.
320-13 232Ky622, 24SW(2d)265; 138 Misc76, 244NYS332. [a] (4) Party defrauded in exchange of property held to have lien for damages on property which he exchanged. TexCivA 297SW 588. (5) Other instances. 138Misc76, 244NYS332.
320-14 TexCivA 292SW917.
321-17 205Cal 496, 271P898; 90Fla 407, 106S127, 43ALR1409; 25 OhNPNS 574. [a] **Acceptance of benefits performed by plaintiff under assigned contract** impresses lien on funds for payment. Ala 128S379.
321-19 [b] **Establishment of mechanic's lien.**-MoA 290SW641.
321-21 217Ala374, 115S877. [b] **Junior mortgagee paying interest on senior mortgage to avoid foreclosure** is not entitled to equitable lien on rents and profits where his mortgage covered lands only, but his remedy, if any, is by subrogation. 141Miss739, 105S736.
321-23½-New. A surety completing work on contractor's default has an equitable lien on the fund required by the contract to be retained from payments to the extent necessary for reimbursement. 15F(2d)993.
321-25 18F(2d)617; 154Wash369, 282 P209; 108WVa458, 151SE429. [a] (5) One paying for stock which could not be delivered because buyer was not member of cooperative marketing association held to have lien on stock for amount paid. 221Ky67, 297SW695.
322-27 17F(2d)294; 24F(2d)644.
322-29 17F(2d)294; 87 IndA544, 150 NE378; 213Ky317, 280SW1090; 167 Minn489, 209NW636; 38Wyo 400, 267 P514, 517, 60ALR1233 [citCJ].
322-35 147Wash86, 265P167. [a] **Later statutes, changing statutory or common-law liens,** determine power of court as to construction and operation of lien. 170Ark139, 278SW961.
323-38 134Misc721, 236NYS28 (lien by levy or attachment of property sold under conditional sales contract held, purely statutory); 112 Okl 17, 239P585; TexCommnA 3SW(2d)416. [a] (1) 163 La720, 112S662. [c] **In Georgia.**-36GaA 708, 137SE914.
323-40½-New. In Georgia the statute creates a lien for all who enhance the value of personalty by labor and material. 36GaA708, 137SE914.
323-42 [b] (2) Lease giving landlord lien on chattels of lessee brought on premises, but filed as lease and not as chattel mortgage or lien, in Ohio, is invalid as against lessee's creditors. 21 F(2d)251. [d] **Priority of record.**-NC 155SE570.
323-44 [a] **In North Carolina.**-NC 155 SE570.
323-48 Mont 292P714.
324-67 235Ky784, 32SW(2d)340.
324-69 15F(2d)198; Ariz 292P1025.
325-72 15F(2d)360; 124 Okl 77, 254P 29.
325-73 124 Okl 77, 254P29.
325-76 90Fla407, 106S127, 43ALR1409; 122 Or424, 251P900, 902 [citCJ].
326-79 TexCivA 274SW323 (lien on realty).
326-84 22AlaA265, 114S673.
326-90 90Fla407, 106S127, 43ALR1409.
326-91 90Fla407, 106S127, 43ALR1409; MoA 285SW750, 752 [citCJ].
327-1 IndA 170NE332; 156Miss597, 126S388 (cause of action for damages is insufficient to base lien on).
327-3 145Wash430, 260P669.
327-5 32NM314; 255P634.
327-8 145Wash430, 260P669.
327-11½-New. A power company is not entitled to a lien on landlord's property for future power to be supplied a tenant under a contract which the tenant is unable to carry out because of the landlord's re'ntry for breach of the lease. Ont [1927] 2DomLR93.
327-14 [d] **Contract to supply power.**-Ont [1927] 2DomLR168 (where power not supplied).
328-22 NJCh 151A499 (date of acquisition).
333-18½-New. The statute allowing recovery of penalty for failure to satisfy a lien on payment embraces all various charges on land or personalty for security of debts. 220Ala297, 124S870, 65ALR1313.
327-19 154Tenn631, 288SW725, 726 [citCJ].
327-19½-New. , except that an artisan's lien is inferior to the lien of a prior chattel mortgage on retained title of which he had notice. 154Tenn631, 288 SW725.
328-20½-New. A lien on debtor's property takes priority over a simple contract debtor in absence of statute. 17F (2d)503.
328-20¼-New. That participating operation certificates in a business are under seal does not place their holders' rights on any better footing with reference to subsequent mortgagees. 267 Mass122, 166NE563.
328-22 274US630, 47SCt692, 71Led 1243; Del 141A315; 90Fla654, 107S358; 153Md50, 137A509; 101NJEq134, 136A 749; 136Wash508, 240P916.
328-23 274US630, 47SCt692, 71Led 1243; 28F(2d)485.
328-24 153Md50, 137A509.
328-28 259Mass585, 156NE871.
329-35 15 OhA495. [a] **Lien for public aid in purchasing live stock.**-In Alberta, lien given by statute to province for guaranteeing loan for purchase of live stock takes priority over all other charges subsequent to passage of statute, even though loan was made prior thereto. Alta [1925] 3DomLR377.
329-36 53SD544, 221NW263.
329-37 90Fla582, 107S354, 358 [citCJ]; 222Ky521, 1SW(2d)990; TexCivA 4SW (2d)213.
329-38 200Cal 494, 254P262; 90Fla582, 107S354, 358 [citCJ]; 222Ky521, 1SW (2d)990.
329-40 246 IllA368 [citCJ].
329-47 TexCivA 2SW(2d)911, 914 [cit CJ].
330-51½-New. Merger of rights of person as lienee and as assignee of judg-

ment is governed by his election. 118 Kan717, 236P841.

330-53 28F(2d)485; 225Ky12, 7SW(2d)492.

330-70½-New. One disposing of property upon which another has a lien is not liable unless he had actual knowledge of the lien. 34GaA288, 129SE288.

332-85 56ND133, 216NW338.

332-4 25F(2d)378, 380 [citCJ].

333-18 See also 4LaA290.

333-18½-New. No right of action for damages exists at common law for failure to discharge a lien. 29F(2d)78.

333-18¾-New. Equity will keep incumbrance alive or consider it extinguished as will best serve purpose of justice and just intentions of parties. Fla 130S577.

333-19 42 Ida134, 243P825. [a] **Agreements not affecting waiver or abandonment of lien.**-51ND173, 199NW585.

333-23 51ND173, 199NW585.

333-28 [b] **Secret liens** are repugnant to law. 37F(2d)326.

334-30½-New. **Merger.** A lien is not merged in a deed held by the same party unless the parties so intended, or merger was not against the interest of the grantee. 208 Iowa564, 226NW110, 66ALR 59.

334-33 99NJEq748, 133A780; 140 Okl 201, 282P452; 106WVa142, 145SE160.

334-35 202Cal 75, 259P81; 99NJEq748, 133A780.

334-35½-New. Plaintiff, paying balance of price due by defendant, secured by lien on the land of both, may, under agreement with defendant for the latter to execute a note therefor, retain a lien against defendant's land. TexCivA 7SW(2d)1103.

335-39 TexCivA 272SW317 (lien canceled for wrongful refusal of tender).

335-40 140 Okl 201, 282P452; 145 Wash430, 260P669.

335-46 CalA 291P458.

335-49 See also 202 Iowa764, 211NW 257.

335-50 TexCivA 5SW(2d)545.

336-59 43 Ida93, 251P167; 141Wash 14, 250P452, 453 [quotCJ]; 145Wash 430, 260P669. [c] **Alleged mortgagee** is not entitled to lien on property exchanged for property on which lien existed. 177Ark1004, 8SW(2d)460.

337-60 141Wash14, 250P452, 453 [quot CJ]; 145Wash430, 260P669.

337-62 81CalA317, 253P757, 761 [quot CJ]; 43 Ida93, 251P167.

337-65 43 Ida93, 251P167, 171 [quot CJ].

337-68 31NM469, 247P1066. [a] **In New Mexico.**-31NM469, 247P1066.

337-69 43 Ida93, 251P167, 171 [quot CJ].

338-79 90Fla582, 107S354, 357 [citCJ& Cyc].

338-90 But see 105WVa191, 141SE784.

339-2½-New. Under agreement providing that release would be given covering property securing debt upon payment of part of debt, the property is released upon payment of that part of debt. 42 Ida134, 243P825.

339-2¼-New. A creditor cannot be held to have released security by receipt of money for another purpose. 142Va209, 128SE521.

339-2¼-New. Whether lien debt has been paid by deposit by money with creditor by debtor depends upon intent, which is a question of fact to be determined from evidence. 142Va209, 128SE 521.

340-18 145Wash430, 260P669.

340-32 137Misc514, 243NYS748.

340-33 81CalA317, 253P757, 762 [quot CJ].

340-37½-New. An unauthorized conversion of property owned by another gives rise to an action in trover, but not in case for the destruction of a lien. 213Ala635, 105S897.

340-37½-New. Where plaintiff shows legal title to property converted, there is a total failure of proof to sustain a count for destruction of lien thereon. 213Ala 635, 105S897.

340-39 [a] **Where complainant's remedy by attachment is adequate,** demurrer to bill to impress equitable lien on property will be sustained. 48RI 120, 136A 249.

341-40 MoA 25SW(2d)566.

341-42 204 Iowa756, 215NW962 [cit CJ]. [b] **Foreclosure and sale is exclusive method** of enforcing lien through court. TexCivA 19SW(2d)109.

341-44 91Fla709, 109S677; Mich 233 NW213; MoA 285SW750, 752 [citCJ].

341-46 [c] **Until judgment or decree** subjecting property to payment of claim, lien is merely floating and ineffective equity. MoA 7SW(2d)726.

341-53 12PortoRicoFed132.

341-54 Fla 129S597.

342-56 178Ark518, 12SW(2d)870.

342-57 Miss 128S733.

342-59 MoA 26SW(2d)859(2dcase) (action at law).

342-60 174Ark945, 298SW217.

342-62 99Fla1151, 128S801(2dcase); 173Minn580, 218NW110; 78Mont477, 254P427. [a] **Foreclosure of lien is proper,** whether property is retained or surrendered and lien recorded, under statute giving choice as to method for perfection. 36GaA708, 137SE914.

342-63 333 Ill 158, 164NE173, 61ALR 649; MoA 26SW(2d)859(2dcase).

342-64 203Cal 438, 264P1098.

342-68 See also 90Fla282, 105S823.

342-69½-New. Under some statutes, in addition to special statutory methods, liens may be enforced by bill in equity or action at law. 90Fla282, 105S823.

342-69¼-New. Under some statutes one method is by retention of the property on which lien is held for a period not exceeding three months. 90Fla282, 105S823.

342-71 31NM469, 247P1066, 1069 [cit CJ] (rule is otherwise in New Mexico).

343-75 90Fla282, 105S823 (may attach in same manner provided for attachment in aid of foreclosure of mortgages). [c] **In Florida.**-90Fla282, 105S823.

343-76 But see 90Fla282, 105S823.

343-76½-New. Statutory remedy by attachment given holder of perfected lien is not dependent upon seeking enforcement of lien in chancery. 90Fla282, 105 S823.

343-77½-New. Order of court dissolving attachment in aid of enforcement of perfected lien by statutory method does not discharge the sureties on forthcoming bond given upon redelivery of the property. 90Fla282, 105S823.

343-77¼-New. Sureties upon forthcoming bond given upon redelivery of property held under statutory chancery writ are liable to obligee upon condition of bond, to have property forthcoming to abide final order, being broken. 90Fla 282, 105S823.

343-87½-New. On special chancery writ obtained by holder of perfected lien to keep property in jurisdiction, in aid of special statutory proceedings to enforce the liens, the final order in the proceeding is that which directs judgment for plaintiff and execution or dismisses the cause. 90Fla282, 105S823.

343-89 [b] **Required time of notice of application for warrant of seizure** must be given to defendants by service in manner required for personal service of summons. 131Misc39, 226NYS198.

343-96 [a] (6) Lien other than chattel mortgage may be foreclosed, and execution based on affidavit may be issued in county where property is situated. 37 GaA581, 140SE910. [d] **In California.**-195Cal 37, 231P730.

344-4½-New. Only defensive matter to foreclosure of lien on personalty is required in counter-affidavit. 34GaA281, 129SE303.

344-4½-New. Counter-affidavit by defendant's agent need not contain sworn averment that affiant is such agent. 34 GaA281, 129SE303.

344-4¼-New. Counter-affidavit is sufficient if in fact made by defendant's duly authorized agent. 34GaA281, 129SE303.

344-4½-New. Where counter-affidavit purports on face to be executed by defendant's agent, agency is presumed and affidavit is prima facie valid. 34GaA 281, 129SE303.

344-4¼-New. A counter-affidavit which recites appearance of defendant company by affiant, its president, and which is signed by company, per affiant, as president, is the personal affidavit of affiant, who is presumably president of the company, presumably a corporation, and who is therefore authorized to make the affidavit. 34GaA281, 129SE303.

344-11 IndA 169NE86. But see 206 Iowa680, 218NW575.

344-14½-New. An accommodation indorser of a note to enable the maker to make a purchase cannot enforce an equitable lien upon hogs in the insolvent maker's possession without showing that such purchased property was a part of the property for which the note was given. 331 Ill 602, 163NE391.

345-20½-New. In a case where a creditor holds a lien as collateral security for payment of a debt, a creditor has the option of either suing on the obligation, foreclosing pursuant to the terms of the instrument securing the lien, or pursuing both remedies concurrently, until the debt is fully satisfied. 151Va481, 145SE302.

345-24 TexCivA 283SW548. [a] (3) One having possession of oiler and asphalt spreader, under contract permitting him to use it, has such interest therein as to make him proper defendant in suit to foreclose lien thereon. TexCivA 283SW548.

345-25½-New. **In suit to set aside sale** under foreclosure of lien, assignee of judgment which was basis for lien need not be made party where the personal judgment is not sought to be set aside. TexCivA 6SW(2d)129.

345-25¼-New. An absolute stranger to a lien not acting as agent for the owner has no authority to foreclose it. 222 MoA984, 6SW(2d)661.

345-25¼-New. Lienholders named as defendants and filing answers praying that they may be made cross petitioners against the owner may carry the action to conclusion after abandonment by the original plaintiff. 230Ky365, 19SW(2d) 983.

345-27 116Nebr366, 217NW580; TexCivA 300SW247. [c] **Bill held sufficient.**-Ala 128S379.

345-29 [b] **Necessity of ascertaining correct amount.**-NJCh 151A110.

346-41½-New. **Evidence held sufficient** to sustain finding of equitable lien. 337 Ill 520, 169NE324.

346-43 See also 23F(2d)757.

346-53 [b] **Sale subject to senior liens** may be ordered where debts secured are not due. 230Ky365, 19SW(2d)983. [c] **Sale as entirety is proper** where land could not be so readily sold if divided. 230Ky365, 19SW(2d)983 (allegations that lands could not be divided without depreciation undenied). [d] **That lienholders constituted most of bidders** does not invalidate sale. 230Ky365, 19SW (2d)983. [e] **Confirmation of sale held proper** against objection of inadequacy of price. 230Ky365, 19SW(2d)983.

346-57 But see 226AppDiv280, 235NYS 220.

346-60 [c] **In Florida.**-91Fla709, 109S 677.

347-62½-New. **Costs and attorney's fees.** In some jurisdictions statutes permit a party for whom a judgment is rendered in an action to enforce any lien to recover reasonable attorney's fees to be fixed by the court which shall be taxed as costs in the action. 91Fla709, 109S677.

LIEU

347-1 49Nev313, 244P1010.

LIFE INSURANCE

359-2 [a] (9) "A contract whereby one party insures a person against loss by the death of another." 126Me555, 140A 366, 367.

361-26 [a] 126Me7, 135A357.

363-50½-New. In Texas the statutes relating to table of loan values and options, extended insurance, and reinstatement, do not apply to term insurance. 116Tex43, 285SW807.

364-62 126Me7, 135A357.

364-74 50RI 158, 146A401.

365-76 [a] (2) Where New York corporation drafted and approved at its home office endowment policy which was

issued to Russian subject in Russia, guaranteed by assets deposited there and subject to its laws, held contract assented to in New York. 244NY482, 155NE749.

365-82 131Misc158, 226NYS92. [a] **Where policy is not in terms performable in foreign state** where branch of domestic insurance company issued policy, action to recover cash surrender value is governed by law of company's domicile. 131Misc158, 226NYS92.

365-83½-New. Distribution of a life insurance policy's proceeds is governed by the law of insured's domicile. 97Fla916, 123S668(2dcase).

365-83¾-New. That insured died outside of his state domicile does not prevent distribution according to the law of that state. 97Fla916, 123S668(2d case).

365-84½-New. Where a contract for insurance, naming a resident as beneficiary, is taken over by a foreign insurance company which assumes and agrees to carry out the provisions of the policy, the fact that insured thereafter causes such foreign insurance company to change the beneficiary to another person, a resident of the state, by indorsement on the original policy at the office of the foreign company outside of the state, does not change the contract from one of the state where it was made. 135 Okl 40, 273P1007.

365-86 220Ala344, 125S217 (assignor's domicile).

365-90 See also 41F(2d)12.

366-98 [b] **Exemption of injury resulting from service or flight in aircraft** may be authorized by insurance commissioner. 13PaDist&Co 578.

367-6½-New. In Texas the statute requires the commissioner of insurance to see that laws relating to standard form of policy are complied with. 116Tex43, 285SW807.

367-23½-New. Statutory definition of life insurance company is exclusive. Tex CivA 3SW(2d)472.

368-36 25 OhNPNS409.

368-41 25 OhNPNS409.

368-48½-New. Reserve must be in securities approved by the state. 25 Oh NPNS409.

368-48¾-New. Reserve of a life insurance company is not the same as that of a fire insurance company. 25 OhNPNS 409.

370-73½-New. Beneficiary, during lifetime of insured, has been held not entitled to dividends. 136Misc703, 240NYS 834.

371-87 306Mo 295, 267SW876 (slip attached to policy construed not part of it and not guaranty of dividends therein stated as illustration of what privileges of assured might be).

371-89½-New. Dividends belonging entirely to insured may be applied by judgment-creditor on judgment against insured. 136Misc703, 240NYS834.

376-92 208Ky630, 271SW673.

376-94 [c] **Distinction.**-208Ky630, 271 SW673.

377-96 208Ky630, 271SW673.

378-12 TexCivA 288SW271, 273 [cit CJ].

378-16 [a] **Error in recording answers.** -Negligence of medical examiner in erroneously recording answers made by applicant for insurance by reason whereof no policy was issued is not attributable to insurance company in action against it to recover damages on account of such negligence. 122Kan264, 252P 266.

378-25 9LaA74, 119S79.

378-27 97Fla916, 123S668(2dcase).

378-31 241Mich255, 217NW29, 57ALR 692; 156Miss16, 125S409.

378-32 36GaA325, 136SE535.

378-33 164La741, 114S637; 241Mich 255, 217NW29, 57ALR692; 69Utah172, 253P200.

378-36 154Miss89, 121S487.

379-57 177Ark927, 9SW(2d)26.

379-58 177Ark927, 9SW(2d)26 (agent). See also 156Md88, 143A651 (insurer).

379-59 MoA 23SW(2d)198.

379-59½-New. An insurance company may be estopped to assert that a policy is not such as its agents represented it would be. 177Ark927, 9SW(2d)26.

380-74 [b] **Court construing agent's receipt** must look to four corners of instrument. MoA 23SW(2d)198.

380-80 [a] (3) Other instances. 256 IllA506.

380-80½-New. "Binding receipt" or "binding slip" protects applicant against sickness between date and delivery of policy. 25F(2d)555.

380-83 See also 256 IllA506. [c] **Error in recording answers causing delay as negligence.**-122Kan264, 252P266.

380-85½-New. No contract exists prior to approval of the application by insurer, where the application provides that insurance shall not take effect until such approval, notwithstanding a provision that the policy shall bear the same date and that the time covered by the premium shall be measured from that date. 172Minn511, 216NW225.

380-89½-New. Insured is bound by terms of application in absence of fraud or mistake. 69Utah172, 253P200.

380-89¾-New. Effect of exaction of premium in advance prior to issuance and delivery of policy. 115Nebr357, 213 NW349.

380-89¾-New. That insurance companies are granted a franchise to do business in the state does not impose a duty upon them to consider promptly all who offer to them the risk of insuring their lives. 154Miss89, 121S487.

380-89¾-New. Where an application was obtained for the purpose of being presented to the insurance department as one of the applications required by statute to enable the company to obtain a charter to do business, it was held, under the facts, that there was a valid contract conditional upon issuance of a charter. 172Minn482, 215NW836, 837 [citCJ].

381-97 36GaA325, 136SE535.

381-99 TexCivA 295SW628.

381-6½-New. Where a report of the medical examiner was mailed to, but never received by, insurer, it is not guilty of negligence, although the application was not sent promptly by the soliciting agent. 128Kan510, 278P733.

381-7½-New. But it may contain reasonable conditions, limitations, and restrictions. 225Ky238, 8SW(2d)412.

382-17 But see 170La128, 127S388. [a] **Donation mortis causa** does not result from naming concubine as beneficiary in life policy. 170La128, 127S388.

382-29½-New. Failure to procure license. The fact that a newspaper selling an insurance company's policies had no license from the insurance commissioner does not invalidate the policy and is no defense in an action thereon. 96 CalA295, 273P1093.

383-59½-New. Provision limiting liability to return of premiums where death is caused by apoplexy within one year is valid. NC 155SE566.

384-82 [a] **Death benefit is not proratable** under accident policy against death, specified injuries, loss of time, surgeon's fees, etc., which contains clause that if insured without written notice carries other insurance, insurer "shall be liable only for such portion as the indemnity bears to the total amount of like indemnity in all policies covering such loss." 201 Iowa1355, 207 NW395, 50ALR1374. [b] **Accident policies** issued to same insured do not cover "same loss" within meaning of attempted prorating clause concerning death benefit when the beneficiaries under each policy are different from those under any other policy. 201 Iowa1355, 207NW395, 50ALR1374.

384-83½-New. Under Ontario Insurance Act a designation of insurance in favor of a future wife whose marriage subsequently takes place is valid. 60 OntL323, [1927] 2DomLR1161.

385-91 217Ala153, 115S94, 96 [citCJ], 55ALR1231; TexCivA 288SW487; Utah 290P979. [a] **Insurer may assume risk of changes** in insured's health. 277US 311, 48SCt512, 72L ed895.

385-93 MoA 278SW780. See also MoA 275SW60.

385-1 85PaSuper365; 135SC89, 133SE 215, 217, 45ALR1172 [quotCJ].

385-2 18F(2d)903; 135SC89, 133SE215, 217, 45ALR1172 [quotCJ].

386-3 18F(2d)903; 135SC89, 133SE215, 45ALR1172.

386-4 MoA 284SW198.

386-5 157Miss163, 127S268; TexCivA 16SW(2d)922.

386-13½-New. Though person intended as beneficiary had no insurable interest, policy is not void and unenforceable where she was not one who took out policy. MoA 23SW(2d)1075 (woman with whom insured was living).

387-15 180Ark170, 21SW(2d)414.

387-17½-New. Beneficiary need have no insurable interest where insured procured policy and paid premiums. 232 Ky469, 23SW(2d)922.

387-21 231Ky5, 20SW(2d)1029.

387-23 39F(2d)528.

387-24 180Ark170, 21SW(2d)414; 124 Kan159, 257P727.

388-29 277US346, 48SCt532, 72L ed 911; 39F(2d)528; 179Ark412, 16SW (2d)469; 201 Iowa555, 207NW583; 128 Or567, 275P612.

389-30 124Kan159, 257P727; 85Pa Super365. But see TexCivA 30SW(2d) 539.

389-34 85PaSuper365.

389-35 123Kan554, 255P980, 981 [quot CJ].

390-39 123Kan554, 255P980, 981 [quot CJ]; 220MoA837, 272SW75; 85PaSuper 365; TexCivA 294SW923.

390-40 39F(2d)528; 123Kan554, 255P 980, 981 [quotCJ].

390-41 AlaA 129S799; 179Ark412, 16 SW(2d)469; 167Ga237, 145SE78, 60ALR 969; 201 Iowa555, 207NW583; 123Kan 554, 255P980, 981 [quotCJ]; 234Ky608, 28SW(2d)955; 85PaSuper365; 150SC 326, 148SE179; TexCivA 9SW(2d)498.

390-42 220Ala314, 124S886; 123Kan 554, 255P980, 981 [quotCJ]; 85PaSuper 365.

390-43 220Ala314, 124S886 (question held not to arise); 201 Iowa555, 207NW 583; 123Kan554, 255P980, 981 [quot CJ]; 85PaSuper365.

390-44 123Kan554, 255P980, 981 [quot CJ].

390-45 TexCivA 16SW(2d)922.

390-47 11LaA276, 123S379.

391-48 220MoA837, 272SW75.

391-63 157Miss163, 127S268; TexCivA 16SW(2d)922.

392-66 See also 318Mo 969, 2SW(2d) 733.

392-76 40GaA811, 151SE529.

393-83 18F(2d)903.

393-86 [a] (2) Other instances. 300Pa 341, 150A629.

393-91 249 IllA74.

393-92 MoA 8SW(2d)1018; TexCivA 295SW638.

393-98 178Ark304, 10SW(2d)882, 61 ALR914; 299Pa452, 149A705 (joint policy of brothers payable to survivor); 135SC89, 133SE215, 45ALR1172.

394-4 MoA 284SW198.

394-6 232Ky469, 23SW(2d)922; 9Pa Dist&Co 323. But see 179Ark621, 17SW (2d)312.

394-7 12LaA84, 124S533.

394-8 39F(2d)528.

395-15 157Miss163, 127S268.

395-16 TexCivA 288SW842.

395-20 167Ga237, 145SE78, 60ALR969; 131 Or537, 283P739 (existence of relationship held to constitute good consideration for designation).

395-23 18F(2d)903; 40GaA811, 151SE 529; 201 Iowa555, 207NW583; MoA 22 SW(2d)206; ND 232NW894; TexCivA 9SW(2d)498.

395-29 But see 318Mo 969, 2SW(2d) 733.

396-35 18F(2d)903.

396-36 TexCivA 9SW(2d)498.

396-37 18F(2d)903.

396-38 18F(2d)903.

396-41½-New. An insurer's liability on a policy taken out on a debtor's life by a creditor for an amount greater than the debt is limited to the creditor's insurable interest at the time when the policy was issued. 18F(2d)903.

396-41¾-New. The foregoing rule applies as to an assignee of the policy under an assignment securing an indebtedness equal to the face of the policy. 18F(2d)903.

396-43 207 Iowa954, 222NW442.
396-45 29F(2d)886; 201 Iowa555, 207 NW583; 318Mo 969, 2SW(2d)733; 149 Wash393, 270P1041. [d] **That company's business could exist after officer's death** held not to preclude company's having insurable interest. 300Pa341, 150A629. [e] **Executrix precluded from recovering from beneficiary company** where it had an insurable interest. 300Pa341, 150A629.
396-46 218Ala362, 118S745, 62ALR 131.
397-48 [a] **Employer held to have insurable interest.**-223AppDiv254, 228 NYS139.
397-53 NJCh 152A249.
397-59½-New. Parties jointly and severally bound on obligations incurred in a joint venture are held beneficially interested in continuation of lives of each other. 17F(2d)42.
397-64 201 Iowa555, 207NW583.
397-66 29F(2d)886.
397-68 201 Iowa555, 207NW583; 318 Mo 969, 2SW(2d)733.
398-72 234Ky227, 27SW(2d)940. [c] **Divorced wife living with husband at his death** held not entitled to benefits of insurance. 234Ky227, 27SW(2d)940.
398-80½-New. Insurer receiving premiums cannot escape liability for lack of insurable interest unless the contract is pernicious and against public policy. 135SC89, 133SE215, 45ALR 1172.
398-87 [a] 266Mass121, 165NE25.
399-11 [a] **In Alabama.**-(1) 214Ala 387, 107S846.
399-15 [b] **In North Dakota.**-54ND 600, 210NW177, 53ALR910.
399-17 See also 243 IllA109.
399-18½-New. A statement in an amendment certifying that no other application was pending, and that requirement must not be changed or modified, is not infringed by beneficiary paying the premium signing insured's name thereto nor does such act render the policy ineffective. 156Md88, 143A 651.
400-29½-New. Insured may be estopped to claim that the policy does not express the terms of the contract where he does not object within a reasonable time. 177Ark927, 9SW(2d)26.
400-31 TexCivA 272SW262.
400-33 215Ala349, 110S571; 202 Iowa 1165, 211NW858; 232Ky44, 22SW(2d) 435; MoA 256SW108; TexCivA 4SW (2d)595.
400-34 23AlaA561, 129S300; TexCivA 11SW(2d)364 (defeats action if supported by evidence).
400-35 8F(2d)285; TexCivA 4SW(2d) 595.
400-36 32F(2d)459; 237 IllA95; Tex CivA 295SW628.
400-37 16F(2d)245; 237 IllA95; 179 Minn545, 229NW879; 229AppDiv211, 241NYS441; 195NC34, 141SE280; Tex CivA 272SW262; TexCivA 293SW271.
400-38 16F(2d)245; 204 Iowa1266, 213NW765; TexCivA 272SW262.
400-41 [a] (1) AlaA 130S520 (provision construed with entire contract).
400-42 [a] (4) Under Missouri statute insurer cannot deny liability because insured was not in good health at the time of delivery of the policy unless poor health at such time contributes to the cause of death. MoA 20SW(2d)950.
400-43 258Mass249, 154NE757.
401-46 36GaA325, 136SE535; 47 Ida 425, 276P303; 202 Iowa1165, 211NW 858; 179Minn545, 229NW879; TexCivA 30SW(2d)1114.
401-49 8F(2d)285. But see MoA 288 SW944.
401-55 217Ky160, 289SW219.
401-56 217Ky160, 289SW219.
401-56½-New. Delivery to a member of the family held sufficient. 237 IllA 95.
401-58 MoA 16SW(2d)712.
402-65 7F(2d)31.
402-66 7F(2d)31; 85CalA419, 259P 496. [a] **Recovery on policy allowed** when mailed to agent for unconditional delivery though insured died before actual delivery. 7F(2d)31.
402-68 81Colo 518, 256P317; MoA 256 SW108.
402-70 81Colo 518, 256P317.
402-71½-New. However, manual delivery to insured before decease is not essential. 153Md179, 138A16, 53ALR 487.
402-75 34GaA242, 129SE113; 232Ky 44, 22SW(2d)435 (where there was no medical examination or inspection).
402-76 34GaA242, 129SE113.
402-77 MoA 281SW67.
402-79 228Ky399, 15SW(2d)242(2d case). See also 35F(2d)945. [a] **Not so limited** if there has been no medical examination. 219Ky549, 293SW1061.
403-80 219Ky549, 293SW1061; 154 Miss196, 122S382.
403-92 38F(2d)393; 35Wyo 59, 246P 246 (evidence insufficient to show payment of first premium).
403-93 IndA 171NE14; 35Wyo 59, 246 P246 [quotCJ].
403-5 69Utah172, 253P200.
403-6 13F(2d)824; 124KanS04, 262P 571; 177Minn273, 225NW81; 195NC 34, 141SE280; 118 Okl 55, 246P383; 69 Utah172, 253P200 (medical treatment).
403-7 38F(2d)557; 118 Okl 55, 246P 383.
403-8 103NJL643, 137A414; 118 Okl 55, 246P383; 69Utah172, 253P200.
404-12 25F(2d)77.
404-13 103NJL643, 137A414; 69Utah 172, 253P200.
404-23 69Utah172, 253P200.
404-35 164La741, 114S637.
404-38 209Ky771, 273SW469; 230Ky 222, 18SW(2d)982 (application of sound health rule covers period arising between application and delivery of policy).
404-41 TexCivA 29SW(2d)795(2dcase).
404-41½-New. But existence of incipient disease unknown to applicant and which has not manifested itself will not relieve company from liability. 35GaA 1, 132SE120.
404-42 MoA 6SW(2d)72.
405-43 TexCivA 295SW628.
405-44 TexCivA 295SW628.
405-45 TexCivA 295SW628. [b] (2) Insured afflicted with tuberculosis of throat held not in "sound health." 35 GaA32, 132SE142.
405-45½-New. or grave impairment or serious disease, 35GaA1, 132SE120.
405-46 220Ala314, 124S886; 35GaA1, 132SE120; TexCivA 295SW628; Tex CivA 29SW(2d)795(2dcase).
405-47 TexCivA 295SW628.
405-47½-New. "Sound health" means such health and strength as to justify reasonable belief that insured is free from derangement of organic functions. 35GaA1, 132SE120.
405-47⅓-New. Or free from symptoms calculated to cause reasonable apprehension of derangement of organic functions. 35GaA1, 132SE120.
405-51 TexCivA 8SW(2d)291.
405-53 See also 41F(2d)392.
405-59 SC 155SE577.
405-67½-New. A beneficiary may not attack the validity of a policy on the ground that it was not a creditor as stated in the application. 318Mo 969, 2SW(2d)733.
405-67⅓-New. Whether insured waived conditions must be determined from surrounding facts and circumstances. 42F(2d)399.
405-68 228AppDiv837, 239NYS12. See also 181Ark1, 24SW(2d)878. [a] **If agent has no power to waive conditions** of policy, notice to him on delivery thereof of sickly condition of insured does not bind insurer. 35GaA32, 132 SE142.
406-71 AlaA 130S520; MoA 20SW(2d) 950.
406-73 LaA 130S839.
406-75 [a] **Agent** with authority to solicit insurance, collect premiums, and deliver policies may receive notice of breach of condition at the time of delivery of the policy as to bind insurer by waiver of condition. MoA 20SW(2d) 950.
406-79 8F(2d)285.
406-90½-New. Limitations on authority of insurance agents to deliver policies, unless insured is in sound health at the date of the policy, are not contrary to public policy. 164La741, 114S 637.
406-90⅓-New. Where insured knew that the agent was delivering the policy without authority and contrary to instructions not to deliver the policy unless insured was in sound health at the date of the policy, he was not deceived by misrepresentations of the agent. 164La741, 114S637.
406-91 204 Iowa1266, 213NW765. [a] **Contrary proviso in policy ineffective.**-204 Iowa1266, 213NW765.
406-92 204 Iowa1266, 213NW765.
407-95 157SC469, 154SE855.
407-96 13F(2d)824; 154SC469, 154SE 855; 145Wash489, 261P106.
407-97 13F(2d)824; 85CalA419, 259P 496.
407-98 13F(2d)824; 241Mich675, 217 NW908; 145Wash489, 261P106.
407-3 13F(2d)824. [a] (1) **Erratum.**-Citation "121 Cal. 458, 53 P 918, 66 AmSR49, 41LRA467," should read "121 Cal. 451, 53 P 922." [b] (1) 13F(2d)824; 118 Okl 55, 246P383. Contra 154Miss890, 124S62(3dcase). (2) 215Ala100, 109S755. (4) Notwithstanding authority of agent to accept note in payment of premium, he may not waive taking of note and accept oral promise to pay so as to constitute waiver. 13F(2d)824.
407-17½-New. The court cannot, in the absence of fraud, remake a contract to meet views of the beneficiary named therein. 215Ala142, 110S275.
408-37 24F(2d)714, 718 [citCJ]; 32 F(2d)7; 213Ala588, 105S672; 214Ala 585, 108S524; 202 Iowa43, 209NW406; 221Ky582, 299SW186, 189 [quotCJ]; 229Ky634, 17SW(2d)745, 67ALR175; 9 LaA371, 119S281; 117Nebr265, 220NW 285; 251NY44, 166NE798. [a] **Death resulting from injuries inflicted by insane person** is not included in clause barring double indemnity "in case death results from bodily injury inflicted by another person." TexCommnA 284SW 216.
408-38½-New. Rights of parties are dependent on contract and legal principles. 126Me7, 135A357.
408-38⅓-New. Where a life insurance policy did not provide that insurer agreed to send an agent to collect premiums, such agreement cannot be implied. 257Mass538, 154NE90.
408-42½-New. Disability clause. Insured afflicted with incurable disease requiring constant care and treatment held totally and permanently disabled, within disability provision of life policy. 125Misc422, 210NYS720.
408-42⅓-New. Ambiguity has been construed to prevent forfeiture under policy providing that if claim arose from insanity insurer should not be liable unless disability resulted after policy was in force ninety days and that then benefits should be paid only for first forty days. 202 Iowa43, 209 NW406.
408-42¼-New. Where first and principal clause in provision for waiver of premiums is repugnant to subsequent limitations first clause is controlling. 160Tenn551, 26SW(2d)135, 68ALR1380.
408-43 229Ky634, 17SW(2d)745, 67 ALR175.
408-49 NJ 151A627.
409-60 221MoA1007, 300SW550.
409-61½-New. or making the policy incontestible after two years from its date, 18F(2d)903.
409-63½-New. Where it was the custom of a life insurance company to give its policyholders notice of the due dates of premium notes, a policyholder is entitled to the benefit of such custom, regardless of a provision in the notes in which the maker waived notice. 147SC 333, 145SE196.
409-66½-New. Statutory provision requiring attachment of application to policy is not affected by provision in same article making foregoing articles inapplicable to certain policies. Tex CivA 31SW(2d)854.
410-82½-New. Where a company issues one policy to husband and wife upon separate applications by each, it is not a joint policy, but one on the life of each, depending upon different contingencies as to change of beneficiary. 128Kan65, 275P1084.
410-84 288Pa468, 136A785.

410-86 MoA 23SW(2d)1075.
410-93 MoA 23SW(2d)1075.
411-8 215Ala542, 112S110.
411-24½-New. [§ 90a] 6½. **Commencement of Risk; Group Insurance.** Under a particular group insurance policy, it is necessary, as a condition precedent to the employee's right to receive additional insurance, that he be actively at work on the effective date of the new policy or subsequent thereto, 124 Kan584, 261P603.
411-24⅓-New. [§ 90a] 6½. and where employment lapses before delivery and the effective date of additional insurance, the employee is not entitled thereto, 124Kan584, 261P603.
411-24¼-New. [§ 90a] 6½. even though the policy is issued and delivered, where the company is ignorant of cessation of employment, and returns premiums received, and cancels the policy on learning the facts. 124Kan 584, 261P603.
411-24½-New. Group policy may limit duration of risk to term of employment. Mass 170NE407.
412-35½-New. Under some contracts a member of the colored division is entitled to death benefits equal to the amount of assessments of one dollar on each member of the colored division only, notwithstanding statutory provisions for combination of groups or circles in certain cases. 175Ark1045, 1SW (2d)74.
412-37 37 OklACR205 (under statute).
412-39 [d] (3) Beneficiary by joining in loan agreement assents to substitute insurer for her. 252NY148, 169NE120. (4) Such loan held advance on policy not creating debtor-creditor relation. 252NY148, 169NE120. [f] (2) 252NY 148, 169NE120. (3) 86PaSuper80. [g] **Loan agreement between insurer and insured** has been held not void as to wife in so far as company's right to cancel policy is concerned. 22AlaA7, 112S99.
412-43 But see 10LaA259, 120S714.
413-48 120 Okl 24, 250P113.
413-49½-New. An agreement to cancel a policy whenever indebtedness shall exceed surrender value held valid, regardless whether the policy was in the "paid-up" class. 216Ala437, 113S314, 54ALR1068.
413-53½-New. "Deposit and assignment" of a policy to insurer as "collateral security" held equivalent to "assignment and transfer" for "security." 216Ala437, 113S314, 54ALR1068.
413-53⅓-New. A policy may be canceled on default of payment of a loan despite statute for noncancellation after certain premiums are paid. MoA 275 SW353.
413-53¼-New. Additional insurance, purchased with accumulated surplus, is part of the original policy. MoA 275 SW353.
413-53⅕-New. Cancellation for nonpayment extinguishes all interest of insured and the beneficiary. MoA 275SW 353.
413-53⅙-New. Where a policy issued to husband and wife upon separate applications is not a joint policy, either one may make a valid loan agreement and assignment of the policy without consent of the other. 128Kan65, 275P 1084.
413-53⅐-New. In an action on a policy based on the presumption of death where a period of absence terminated after foreclosure of the policy, a lien for a loan affords no basis for relief. 204Cal 180, 267P538.
413-65 25 OhNPNS187.
414-69½-New. Consideration for a stated period quarterly, semiannually, or annually. 25 OhNPNS187.
419-70 54ND466, 209NW965, 47ALR 446.
414-73 [b] **"Level premium plan" defined.**-35F(2d)360.
416-18 30F(2d)42; 85PaSuper63. But see MoA 21SW(2d)926.
416-19 26F(2d)580; 85PaSuper63; TexCivA 271SW217 (anniversary of policy date of its delivery).
417-31 32F(2d)784; 85PaSuper63 (specific dates of payment).
417-38 [b] **Burden of proof** is on administrator to show extension of time for payment of first premium in action for damages for failure to act on application within reasonable time. 35 Wyo 59, 246P246.
417-42 25 OhNPNS187. [f] **Grace period runs from date when premiums are payable** and not from date of policy. 33F(2d)899(2dcase).
418-44 [a] (2) Under Ohio statute, where intention of policy is to provide for quarterly premiums and premium for first quarter is paid, such payment constitutes payment of first premium and insured is entitled to grace of one month within which to pay premiums for all subsequent quarters. 25 OhNP NS187.
413-56 [c] **Agreement by husband to pay premium** on wife's policy and he to be sole beneficiary is valid. 83NH547, 145A269.
419-71 224AppDiv295, 229NYS641.
421-14½-New. Mandatory injunction requiring assessment to be made held proper. TexCivA 289SW93.
422-52 15F(2d)303; 176Ark1149, 6SW (2d)28; 198Cal 91, 243P431; 81CalA 546, 254P306.
422-55 151Md241, 134A210, 47ALR730.
423-64½-New. The validity of assignments of life insurance policy is governed by law of place where assignment is made. 216AppDiv1, 214NYS528.
423-64⅓-New. Since assignment becomes effective at time and place of mailing, law of place of mailing governs validity thereof. 216AppDiv100, 214NYS528.
423-66 [b] **Right of insured to borrow** on policy within cash surrender values is exclusive property right, where policy does not require consent of beneficiary. 117 Okl 148, 245P567.
423-69 222Ky211, 300SW599. [b] **Disposition of proceeds of group policy by minor** by will is not effective as assignment where policy prohibits assignment. 222Ky211, 300SW599.
423-71 83 IndA244, 148NE159 (payable to "estate").
423-76 131Misc806, 229NYS113.
424-77 [c] **Statute exempting proceeds of policies payable to personal representatives of insured,** his heirs, or estate, from payment of debts of insured except by special contract does not repeal statute permitting transfer of proceeds of policies by will or assignment. 54ND19, 208NW549.
424-93½-New. Oklahoma, 38 OklACR 405.
425-98 246NY133, 158NE48.
425-8 216AppDiv100, 214NYS528. [b] **In spite of assignment by wife** on death of husband wife may recover insurance money falling due. 216AppDiv100, 214 NYS528. [c] **Assignment by wife** during life of husband can be avoided only by wife and no other. 216AppDiv100, 214NYS528. [d] **On assignment by wife** her creditors cannot have it set aside so as to get at insurance money after death of husband. 216AppDiv100, 214 NYS528 (assignment not absolutely void).
425-13 [d] **Provisions of policy.**-75 Mont460, 243P1061 (assignment held valid though not made on company's blank).
425-14 176Ark1149, 6SW(2d)28; 101 NJEq90, 137A785; 135Misc436, 237 NYS663 (assignee entitled to proceeds under evidence).
426-15 215Ala179, 110S291, 293 [quot CJ]; 263Mass274, 160NE827.
426-16 151Md241, 134A210, 47ALR 730; TexCr 28SW(2d)541.
426-19½-New. A policy payable to insured's estate may be assigned without change of beneficiary. 127Kan456, 274P132.
426-22 [b] **Mere indorsement** of change of beneficiary does not of itself constitute an assignment. 298Pa322, 148 A471.
426-23 127Kan456, 274P132; MoA 23 SW(2d)205. But see 332 Ill 603, 164NE 192 (rider authorizing payment). [g] **Agreement to keep up policy** for benefit of wife, as part of separation agreement providing for support, held no assignment. 324 Ill 588, 155NE767.
427-29 198Cal 91, 243P431.
428-47 Kan 291P755; Mass 173NE 530 (holding assignment by conservator to protect estate from loss of money previously loaned valid).
428-49 246NY133, 158NE48.
429-64 101NJEq90, 137A785.
429-66 215Ala179, 110S291, 293 [quot CJ].
429-74 246NY133, 158NE48.
430-80 246NY133, 158NE48. See also 216AppDiv1, 214NYS528.
430-80½-New. Assignment becomes effective at time, 216AppDiv100, 214NYS 528.
430-80⅓-New. and place of mailing. 216AppDiv100, 214NYS528.
430-80¼-New. But see 246NY133, 158 NE48 (assignment, mailed in North Dakota to brother in New York, held transfer effected in New York).
430-80⅕-New. But delivery without acceptance does not divest title, 246NY 133, 158NE48.
430-80⅙-New. and, in the absence of benefit to the assignee, there is no presumption of acceptance. 246NY133, 158NE48.
430-82 MoA 24SW(2d)211.
431-84 [c] **Held not notice.**-103Conn 341, 130A379.
431-87 103Conn341, 130A379; 131SC 441, 128SE414, 416 [citCyperMarion,J].
431-88 103Conn341, 130A379. [a] (2) 103Conn341, 130A379.
431-89 248 IllA401.
432-90 103Conn341, 130A379 (clause does not inure to benefit of creditors); 151Md558, 136A61.
432-95 220Ala344, 125S217 (assignment held void); 117 Okl 148, 245P567 (holding that, where consent to assignment by beneficiary is required, and policy is hypothecated for benefit of insured with beneficiary's consent, latter becomes surety and can recover from insured's estate amount of loan deducted from policy by insurer); 33Porto Rico 470; PrEdwIsl [1926] 4DomLR 1136. [f] (3) Assent in writing required. 220Ala344, 125S217.
434-7 248 IllA401 [citCJ]; Kan 291P 755.
434-10 LaA 130S270.
435-21 81CalA546, 254P306; Or 284P 179.
435-24 Mass 168NE737.
435-30½-New. **Parol assignment** accompanied by delivery of policy vests equitable title to proceeds in assignee. 103Conn341, 130A379.
436-32 176Ark1149, 6SW(2d)28.
436-36 180Ark170, 21SW(2d)414; 246 NY133, 158NE48. See also Tex 12SW (2d)651.
436-37 178Ark466, 10SW(2d)910; Mass 173NE530.
436-38 246NY133, 158NE48.
436-40 Mass 173NE530 (provision for present and future loans construed); 246NY133, 158NE48.
436-42 [a] **Where loan exceeding amount of face of policy** is unpaid, proceeds of policy goes to assignee. Mass 173NE530.
436-42½-New. Where insured transfers policies to a bank as collateral security for a debt, on the death of insured, title to the policies and proceeds having vested in the wife and become her separate property subject only to rights of the bank, such policies occupy the position of surety for payment to the bank of the amount of the debts. Tex 12SW(2d)651.
436-42⅓-New. A creditor cannot recover the proceeds of an insurance policy as a pledge in the absence of showing that the policy was deposited with him as collateral. 222MoA1228, 3SW (2d)1046.
437-75 Tex 12SW(2d)651. [d] **Where insured transferred policies to bank as collateral security for debt of partnership, also secured by other collateral,** and also for personal debt, insured's wife, the beneficiary, had right to have partnership collateral held by bank applied to partnership indebtedness before applying any part of proceeds of policies, her separate property. Tex 12SW(2d)651.

439-99 33**PortoRico** 470, 471 [citCyc].
439-8 36**F(2d)**171 (failure to return loan certificate after cancellation of policy does not authorize recovery thereon).
439-11 33**Ariz**303, 264**P**474.
439-16½-New. After the death of insured, a policy cannot be canceled for fraud in procuring it. 313**Mo** 384, 282 **SW**46.
441-58 [a] **In Oklahoma** pledgee cannot surrender policy without demand, notice, and sale, as required by statute. 19**F(2d)**781.
441-59½-New. Beneficiary may be estopped to sue on a policy after insurer has paid the surrender value to assignee without knowledge that the assignment was a pledge and not sale. 19**F(2d)**781.
441-61 313**Mo** 384, 282**SW**46; 127 **Misc**66, 215**NYS**276.
441-61½-New. and a cross bill for cancellation in a suit on a policy will be stricken out on motion, 313**Mo** 384, 282**SW**46.
441-62 219**MoA**609, 282**SW**494; 127 **Misc**66, 215**NYS**276. [b] **False representations** as to prior state of health warrant cancellation. 5**F(2d)**183.
441-63 18**F(2d)**599; 127**Misc**66, 215 **NYS**276. Contra 254 **IllA**82.
441-64 127**Misc**68, 215**NYS**277.
442-65 219**MoA**609, 282**SW**494; 34 **PortoRico** 267 (suit within period not laches).
442-69½-New. Proofs of death, in nature of admission, are ordinarily competent evidence of facts stated therein, subject to explanation by beneficiary. 232**Mich**36, 204**NW**771.
442-69¼-New. If notice indorsed on policy states that employment of attorney is not necessary to collect insurance on policy, evidence otherwise incompetent does not become admissible against beneficiary, because company has included it in document and beneficiary has signed document without reading it. 232**Mich**36, 204**NW**771.
442-69¼-New. Proof of material misrepresentations, avoiding insurance contract, must be made by insurer suing to rescind the policy. 218**AppDiv** 431, 218**NYS**490.
442-70 [a] (5) Where applicant, stating that he had had no medical or surgical attention in last five years, had in fact a dozen treatments and had been given digitalis for heart, and there was no rebuttal or explanation of false statement given in cancellation suit. 246 **NY**63, 158**NE**21.
442-71 15**F(2d)**646; 35**F(2d)**945. [a] (2) Suit based on misrepresentation as to existence of bodily or mental disease. 218**AppDiv**431, 218**NYS**490. (3) Evidence held to sustain finding of want of fraud and that assignee was good faith holder. **ND** 232**NW**894. [c] **Falsity of representations** held not shown, as to applicant's handling of explosives. 25**F(2d)**555.
442-76 36**F(2d)**171.
442-79½-New. Insured is not required to accept insurer's proposal to reinstate policies, after suit is commenced for damages for cancellation. 180**Ark**339, 21**SW(2d)**405.
443-92½-New. Where an option for a cash surrender of a policy is mistakenly exercisable at the end of ten, instead of twenty, years, so as to enable insured to receive more than he paid in and more than double the amount printed in the table of cash surrender values for ten years, the option fails to express the intention of the parties and cannot be enforced. 192**Wis**315, 212 **NW**779.
443-93 216**Ala**562, 114**S**132; 41**GaA** 200, 152**SE**307. [b] **Where contract nor statute** provides for cash surrender value, neither insured nor assignee could as matter of right collect cash surrender value. 41**GaA**200, 152**SE**307.
443-94 **Mass** 168**NE**737.
443-97 [a] **Time of election; waiver.**–216**Ala**562, 114**S**132. [b] **Effect of election.**–216**Ala**562, 114**S**132.
443-1½-New. The right of insured to demand and receive the cash surrender value is an option in the nature of an irrevocable offer made by insurer, but not binding upon it until acceptance by notice and surrender of the policy. 241**Mich**255, 217**NW**29, 57**ALR**692.
444-9½-New. A premium bond, providing for minimum payments and giving a lien upon the policy for unpaid premiums, defeats recovery of the surrender value. **IndA** 152**NE**844.
444-11 241**Mich**255, 217**NW**29, 57**ALR** 692.
444-12 33**PortoRico** 470.
444-14 241**Mich**255, 217**NW**29, 57**ALR** 692.
444-15 [a] **Surrender of policy required.**–Clause requiring surrender of policy held binding on creditor of absconding insured, where special master had assigned policy to creditor. **Mass** 168**NE**737.
446-58 41**GaA**200, 152**SE**307.
446-67½-New. Statutory provision for extended insurance has no application to policy with no reserve value. 116 **Tex**43, 273**SW**825.
446-67½-New. Where at time of default policy had no value, statutory provision that value of policy be applied to purchase of other insurance had no application. 116**Tex**43, 273**SW** 825.
446-67¼-New. Where policy contains provisions for extended insurance substantially as favorable to insured as the statute, such statute will determine rights of parties whether policy is a Massachusetts or Indiana contract. 83 **IndA**209, 147**NE**816.
446-67½-New. In computing extended insurance, statute does not authorize deduction of unpaid premium or other existing indebtedness. 83 **IndA**209, 147 **NE**816.
447-69½-New. The law demands mutuality of good faith in dealings between insurer and insured. 16**F(2d)**214.
447-74 11**F(2d)**838. See also 133**Misc** 106, 231**NYS**161. [b] (2) 192**Wis**102, 212**NW**269.
447-75 See also 11**PaDist&Co** 201.
447-78½-New. For untrue statements to defeat recovery, they must be made with fraudulent intent. **TexCivA** 289 **SW**93.
447-85 15**F(2d)**946 (dictum).
448-86 15**F(2d)**946 (dictum).
448-87 277**US**311, 48**SCt**512, 72**L ed** 895.
448-88 277**US**311, 48**SCt**512, 72**L ed** 895.
448-91 212**Ky**763, 280**SW**123; 51 **Philippine**725. See also 93**Fla**276, 112**S**53. [b] **Insurer is entitled to know, and it is applicant's duty to disclose, every fact bearing** on insurability of life. 218**AppDiv**695, 219**NYS**64.
448-92 211**Ky**12, 276**SW**981.
448-93 93**PaSuper**314.
448-94 **TexCivA** 297**SW**1083.
448-95 277**US**311, 48**SCt**512, 72**L ed** 895; 36**F(2d)**634; 134**Misc**357, 235**NYS** 726; **Vt** 148**A**484.
449-96 [a] **Rule held applicable only** where unsoundness of health arises after application and medical examination. 215**Ky**379, 285**SW**252.
449-98 See also 277**US**311, 48**SCt**512, 72**L ed**895.
449-3 134**Misc**357, 235**NYS**726 (where insurer failed to have insured reaffirm answers on delivery of policy).
449-9½-New. An applicant should exercise toward insurer the same good faith which may rightly be demanded of it. 241**Mich**659, 217**NW**790.
449-9½-New. Conditions expressed in a policy must be complied with before there can be a recovery. 28 **OhA**497, 162**NE**822.
449-16 15**F(2d)**646; 22**AlaA**54, 112**S** 179; 211**Ky**12, 276**SW**981; 192**Wis**102, 212**NW**269. [b] (1) 22**AlaA**54, 112**S** 179; 133 **Okl** 256, 271**P**1037. (2) Misrepresentations intentionally made to induce issue of policy are not made "in absence of fraud." **TexCivA** 275**SW**248. [c] **MoA** 6**SW(2d)**72. (2) Statute applicable equally to warranties and representations. **MoA** 30**SW(2d)**190. [f] **Statute further provides that if policy contains two year incontestible clause** (1) section requiring misrepresentation to be material to make policy void does apply. **TexCivA** 275**SW**248. (2) In view of other statutes this provision does not apply to policies issued after certain date in some jurisdictions. **Tex CivA** 275**SW**248. [g] **Statute not applicable** to fraternal benefit society. 219**AppDiv**413, 219**NYS**345. [h] **In Wisconsin.**–192**Wis**102, 212**NW**269.
450-17 **MoA** 27**SW(2d)**476; 192**Wis** 102, 212**NW**269. [a] (2) 219**MoA**609, 282**SW**494. (4) It does not preclude equitable proceeding after death of insured within contestable period to cancel policy. 219**MoA**609, 282**SW**494. [a] (5) Statute does not condone fraud perpetrated by applicant in making false representations inducing acceptance of risk. 241**Mich**396, 217**NW**62.
450-20 249**Mich**317, 228**NW**770.
451-27 101**NJEq**527, 139**A**520.
451-28 287**Pa**128, 134**A**474.
451-31 10**PaDist&Co** 250.
452-53 [a] (3) Other instances. **NJSup** 130**A**544.
453-65 241**Mich**396, 217**NW**62.
453-67 **LaA** 122**S**147.
453-68 [c] **Applicant's answer "No" to question as to extent of use of intoxicants** should not be construed as more than affirmation that he did not use, and had not habitually used intoxicants. **LaA** 122**S**147.
454-73½-New. Applicant's answer "No" to question as to use of intoxicants held not responsive to question and therefore should be considered unanswered. **LaA** 122**S**147.
454-77 219**Ala**197, 121**S**714; 109**Conn** 67, 145**A**565; 130**Kan**117, 285**P**580 ("sound health" in policy same as "good health" in application); 152**Va** 38, 146**SE**353.
454-78 16**F(2d)**214; 36**F(2d)**634; 41 **F(2d)**392; 42**F(2d)**646; 176**Ark**361, 3 **SW(2d)**46; 237 **IllA**220; 215**Ky**379, 285**SW**252; 7**LaA**226; 310**Mo** 378, 276 **SW**877; **MoA** 284**SW**198; **MoA** 22**SW (2d)**88; 101**NJEq**527, 139**A**520; 196 **NC**333, 145**SE**609; 284**Pa**299, 131**A**186; 105**WVa**42, 142**SE**447; **Can** [1928] 4 **DomLR**529. [a] (1) 247 **IllA**283.
455-79 215**Ky**379, 285**SW**252.
455-82 284**Pa**299, 131**A**186; **TexCivA** 275**SW**248.
455-86 313**Mo** 384, 282**SW**46; 284**Pa** 299, 131**A**186; 34**PortoRico** 267; **Tex CivA** 275**SW**248; 192**Wis**102, 212**NW** 269.
455-87 313**Mo** 384, 282**SW**46; **MoA** 6 **SW(2d)**72; **MoA** 30**SW(2d)**190; 192 **Wis**102, 212**NW**269. [a] (3) Failure to state that insured had consulted physician who told her that she had exophthalmic goiter held material misrepresentation under statute. 316**Mo** 1292, 295**SW**571.
455-88 237 **IllA**220; 28 **OhA**497, 162 **NE**822.
455-89 35**F(2d)**337; 171**Ark**135, 284 **SW**4; **MoA** 292**SW**1064.
456-90 **LaA** 122**S**147.
456-91 15**F(2d)**646; 171**Ark**135, 284 **SW**4; 101**CalA**625, 281**P**1054; 35**GaA**1, 132**SE**120; **NJSup** 130**A**544; 120 **Or**694, 252**P**559; 287**Pa**128, 134**A**474. [c] (1) 205 **Iowa**653, 216**NW**50.
456-92 27**F(2d)**915; 134**Misc**640, 236 **NYS**300.
457-93 192**Wis**102, 212**NW**269.
457-94 **TexCivA** 275**SW**248. [a] (1) 27 **F(2d)**915; 95**PaSuper**1.
457-94½-New. A claim that insurer did not rely on false statements in the application, but relied only on the physical examination, cannot be sustained. 192 **Wis**102, 212**NW**269.
457-95 171**Ark**135, 284**SW**4; 287**Pa** 128, 134**A**474.
458-97 168**La**271, 121**S**863; 2**LaA**275.
458-6 **Ala** 129**S**466; 246**NY**63, 158**NE** 21; 228**AppDiv**501, 240**NYS**358; 90**Pa Super**35. [a] (3) Misrepresentation that insured had not had tuberculosis prevents recovery. 105**WVa**240, 141**SE**878. [x] **Cancer.**–105**WVa**215, 141**SE**880. [y] **Diabetes.**–**MoA** 282**SW**454. [z] **Ulcerated stomach.**–**AlaA** 130**S**520.
460-7 104**NJL**364, 140**A**307, 309 [cit CJ].
460-8 15**F(2d)**646; 246**NY**63, 158**NE** 21. [a] 5) **Ala** 129**S**466.
460-9 15**F(2d)**646.
461-11 15**F(2d)**646.
462-12 [a] (1) 246**NY**63, 158**NE**21.

462-13 But see 212Ky763, 280SW123.
462-15 16F(2d)660; 22F(2d)241; 27F(2d)915; 41F(2d)219; 41F(2d)392; 42F(2d)646; 109Conn67, 145A565; 219Ky549, 293NW1061; 3LaA462; Mass 170NE62; Mich 233NW370; 245NY644, 157NE892; 218AppDiv695, 219NYS64; 219AppDiv413, 219NYS345; 135Misc855, 239NYS698; 136Misc394, 240NYS56; 98PaSuper353; 200Wis94, 227NW251.
462-16 Mich 233NW390(2dcase).
462-17 16F(2d)660; 137Misc542, 242NYS715; 26ObA287, 159NE486.
463-19 22F(2d)241; 86IndA326, 157NE448; 221AppDiv380, 223NYS143. See also 128Misc703, 219NYS756. [c] MoA 282SW454.
463-20 22F(2d)241.
463-24 16F(2d)660; 27F(2d)915; 42F(2d)651; 246NY63, 158NE21; 218AppDiv695, 219NYS64; 219AppDiv413, 219NYS345; 120Or694, 252P559; 287Pa128, 134A474; 96PaSuper325; TexCivA 275SW248. [c] (4) Failure to mention X-ray treatments received at intervals of from eight months or a year apart does not constitute false statement in answer to question as to whether he had had any disease or received medical or surgical advice or attention. TexCivA 10SW(2d)267.
464-25 37GaA704, 141SE498; 120Or694, 252P559.
464-26 37GaA678, 141SE500; 234Mich424, 208NW427; MoA 27SW(2d)476.
464-27½-New. Condition avoiding policy if insured before its date has been attended by physician for any special disease, being unlimited in time, held unreasonable and invalid. 215Ky379, 285SW252.
464-29 See also MoA 27SW(2d)476.
464-32 28F(2d)665. [d] **That physician might have been honestly mistaken in diagnosis** and treatment does not prevent concealment of consultation from vitiating policy. 42F(2d)208.
464-33 246NY63, 158NE21.
464-34 [a] (2) Term means such attention as might deter company from giving policy. 246NY63, 158NE21.
464-36½-New. An osteopath is a practitioner within the meaning of a question calling for disclosure of names of physicians or practitioners who treated, prescribed for, or were consulted for an ailment. 241Mich659, 217NW790.
464-38 33F(2d)72, 74 [citCJ]; 36F(2d)176; 218AppDiv431, 218NYS490; 226AppDiv123, 234NYS426; 134Misc640, 236NYS300.
465-39 241Mich659, 217NW790.
465-40 218AppDiv431, 218NYS490.
465-42 252NY465, 169NE647. [b] **"Medical or surgical attention."**-246NY63, 158NE21.
465-44 30F(2d)328; 129Misc821, 222NYS60.
465-54 218AppDiv695, 219NYS64. [b] **"Clinic" was included** within provisions as to treatment in hospital, asylum, or sanitarium. MoA 27SW(2d)476.
467-62 169Minn106, 210NW846, 848 [quotCJ].
467-66 93Fla276, 112S53; 89PaSuper109.
467-67 93Fla276, 112S53; 287Pa128, 134A474. [a] **Answer to question whether life company ever rejected application is not material** to assumption of risk in accident and health policy. 32F(2d)995.
467-69 11F(2d)838; 89PaSuper109.
468-79 [a] (1) 32F(2d)995. [b] (1) 11F(2d)838. (2) Signed application, doctor's examination, and unfavorable report, and destruction of application by applicant or company agent, constitute proof of falsity of representation as to prior application. 93Fla276, 112S53.
469-97 40GaA678, 150SE856; 129Kan250, 282P584.
469-10 CalA 266P307. [a] **Statement in woman's application for life insurance policy that male beneficiary, who was only friend, was her brother,** held not mere mistake, but made "with intent to deceive," within preceding agreement that recovery would be barred if any of following statements were false. 206Cal273, 274P57.
469-11 206Cal273, 274P57; CalA 266P307.
469-13 [a] **In woman's application for life policy, naming man as beneficiary,** words "Relationship Brother," first of which was printed and second typewritten, held a "statement" within preceding agreement that recovery would be barred "if any one of the following statements * * * is false and made with intent to deceive." 206Cal273, 274P57.
471-40 25F(2d)555, 559 [quotCJ].
473-73 239 IllA427, 434 [quotCJ].
473-74 239 IllA427, 435 [quotCJ]; 193NC344, 137SE137.
473-75 147SC333, 145SE196.
473-82 [a] **Policy providing for payment of premiums under paymaster's order,** making paymaster's deduction from wages at insured's risk, lapsed where full wages were paid insured. 229Ky634, 17SW(2d)745, 67ALR175.
473-90 218MoA550, 280SW58; MoA 17SW(2d)646(2dcase).
474-14 See also 26F(2d)580.
475-21 221MoA1007, 300SW550. [b] (2) Provision that payment of quarterly premium shall not maintain policy in force beyond date of next payment is not affected by clause "except as hereinafter provided." MoA 17SW(2d)646(2dcase). [c] **Clause in quarterly premium for payment of full fifteen years' premiums** held not to operate to avoid lapse of policy for default in payment of quarterly premiums. MoA 17SW(2d)646(2dcase).
477-54 29F(2d)963; 221MoA1007, 300SW550. [b] **Insurer giving notices of premium dates and forfeiture of policies** for nonpayment of premiums in substantial compliance with statute is not liable thereon after period of grace. 32F(2d)784. [c] **Where default continues over six months** notice is not required. 130Kan600, 287P591. [d] **Statute requiring notice held inapplicable** to life policies. 41F(2d)12.
477-55 130Kan600, 287P591 (insurer held not liable for failure to notify insured of participation clause credit).
477-58 32F(2d)784.
478-76½-New. Where beneficiary and insured both resided in New Jersey, and insurer was Massachusetts corporation, New York statute was inapplicable. 134Misc274, 235NYS195.
479-87 29F(2d)963.
479-90½-New. Statute, if applicable to life policies, held not to require notice of expiration of extension period. 41F(2d)12.
479-91 216Ala562, 114S132, 134 [cit CJ].
479-92 216Ala562, 114S132, 134 [cit CJ].
479-98 TexCivA 271SW217 (erroneous notice of default).
479-4½-New. Notice by mail has been held not to give reasonable time for payment. 87IndA388, 156NE173.
479-6 [a] 130Kan600, 287P591. [b] **Sufficiency of notice is immaterial** where insured after receiving three notices of premium dates and intent to forfeit, made no effort to pay or tender payment. 32F(2d)784.
480-18 [b] **Under life policy including insurance against permanent disability and accident** notice of cancellation for nonpayment of premiums is sufficient where amount stated is that charged for policy as whole. 120Kan252, 245P272. [c] **Misstatement of amount due** was not fatal to insurer's right to claim forfeiture. 32F(2d)784.
480-18½-New. A notice of forfeiture naming the premium stated in the policy has been held a sufficient compliance with a statute requiring the notice to state the amount of the premium due. 120Kan252, 243P272.
481-24 [a] (3) **Notice of intent to forfeit after thirty days** sufficient. 32F(2d)784.
482-43 130Kan600, 287P591 (notice mailed during grace period unauthorized and void and attempted forfeiture thereunder improper).
482-49 But see 120Kan252, 243P272.
482-50 [a] (4) Beneficiary not entitled to notice of default to suspend right of election between options under nonforfeiture provisions under policy requiring notice to holder only. 32F(2d)611.
483-67½-New. [a] **Evidence held insufficient.**-Sufficiency or insufficiency of the evidence has been considered in cases cited. 147SC333, 145SE196.
483-76 [b] **Construction of clause relating to disability preventing payment of premiums.**-299Pa11, 148A855.
484-77 224Ky405, 6SW(2d)447; 233Ky88, 25SW(2d)69 (permanent disability); TexCivA 32SW(2d)701 (holding clause waiving premium on anniversary also waived it on postponed date). [b] (2) Clause in policy waiving premiums during total disability should be construed to effectuate intention of preserving insurance in case of inability to pay premiums. 138SC253, 136SE304. (3) Other instances. 160Tenn551, 26SW(2d)135, 68ALR1380. [e] **Permanent disability during grace period** requires waiver of payment though proof made after. 29F(2d)977 [certiorari den 279US851, 49SCt347(6thcase), 73Led994].
484-79 217Ala307, 116S151; TexCivA 10SW(2d)267. [a] **Insured held presumably entitled** to benefit of clause waiving premium during disability, where such disability rendered him incapable of furnishing proof thereof. 138SC253, 136SE304. [b] **Disability may excuse default** in furnishing proof thereof. TexCivA 32SW(2d)701.
484-79½-New. Impossibility of furnishing notice of disability, arising from the nature of the situation and not due to negligence of insured or beneficiary, is a sufficient legal excuse for delay in payment. TexCivA 10SW(2d)267.
484-80 See also 31F(2d)862. But see 160Tenn551, 26SW(2d)135, 68ALR1380. [b] **Insured held permanently incapacitated.**-160Tenn551, 26SW(2d)135, 68ALR1380.
484-80½-New. Under such provision, partial disability or disability to a limited degree will not excuse nonpayment. 203Iowa741, 211NW222, 51ALR1035.
484-81 [c] **Notice of disability and indorsement of waiver of premiums** during insured's lifetime are conditions precedent to recovery of specified benefits. 136Misc748, 240NYS666.
484-82 TexCivA 10SW(2d)267.
484-84 See also 160Tenn551, 26SW(2d)135, 68ALR1380. [a] (3) Beneficiary's offer to make proof of disability under provision of life insurance policy for waiver of premiums in such case made on June 17, following death of insured on June 6, held to have been made within reasonable time. TexCivA 10SW(2d)267.
484-85 217Ala307, 116S151. See also ObA 172NE849.
484-85½-New. or by some next friend. 217Ala307, 116S151.
484-86½-New. If provision for nonpayment of premium is waived because of total and permanent disability, provision for forfeiture based on nonpayment is also waived and is unenforceable. 160Tenn551, 26SW(2d)135, 68ALR1380.
484-86⅓-New. Where agreement for extension of time to pay premiums is entered into after expiration of usual grace period premium payable on or before expiration of extension agreement is future premium waived if insured becomes totally and permanently disabled. 160Tenn551, 26SW(2d)135, 68ALR1380.
484-88 247 IllA345, 346 [citCJ].
485-5 See also Ont [1927] 3DomLR50.
485-6 87IndA388, 156NE173.
485-7 MoA 7SW(2d)1015.
486-16 174Ark783, 297SW847, 54ALR600. [b] **Insured's refusal of tender of benefits under life, sick and accident benefit policy** does not relieve insurer of duty of applying same to payment of premium of life policy. 151Miss387, 118S195.
486-19½-New. Special fund to be divided annually held not available for credit on single quarterly installment of annual premium. 130Kan600, 287P591.
486-21 But see 146Va312, 131SE806.
486-27½-New. Dividends cannot be anticipated to pay premium. 146Va312, 131SE806.
486-29 Contra 146Va312, 131SE806.
486-30 214Ala585, 108S524. Contra 146Va312, 131SE806. [d] 214Ala585, 108

8524. [k] **Where insured had borrowed to full extent of loan value,** it was held that nonpayment of premium lapsed policy. 214Ala585, 108S524.

487–31 Contra 146Va312, 131SE806.

487–32 214Ala585, 108S524.

487–47 [a] **Where insured has left sufficient sum with paymaster for payment of premiums,** made payable from installments to be deducted from insured's wages by paymaster under paymaster's order, insured may rely on that official's making proper deductions and remittances. 229Ky634, 17SW(2d)745, 67 ALR175.

487–47½–New. Neither employee nor beneficiary acquires any rights because the insurance company retains premiums after discovering that employer paid them by mistake. 223Ky505, 3SW (2d)1093.

487–47½–New. The entire payment made by insured to a mutual company at the time of application held applicable as payment of the premium. TexCivA 20 SW(2d)1093.

488–57 31F(2d)862; 85PaSuper63.

488–64 [a] **Custom or insurer's conduct** may excuse nonpayment at time or in manner stated in policy. 54ND466, 209 NW965, 47ALR446.

489–73 [a] TexCommnA 284SW216.

489–78 85PaSuper63.

489–79 85PaSuper63.

490–82 85PaSuper63.

490–86 41F(2d)12.

490–89 41F(2d)12 (provisions of extension agreement).

491–90 [b] 254 IllA206.

491–91½–New. Fees paid for extension of time were not part payment of premium. 29F(2d)963.

491–3 39GaA197, 146SE506(2dcase); TexCivA 218W(2d)45; 152Va715, 148 SE811. [c] **Where payment not made prior to expiration of period of grace** policy lapses. 179Ark398, 16SW(2d)6.

492–11 [a] **Provision in agreement extending time** for termination of policy as of premium due date if not paid on extension date held valid unless payment of premium waived. 160Tenn551, 26SW(2d)135, 68ALR1380.

492–18 But see 29F(2d)963; 31F(2d) 862.

492–20½–New. In action on policy plaintiff did not waive right to assert that note was without consideration to the extent of a premium previously paid by cash, by reason of a conditional offer that had been rejected by insurer. TexCivA 272SW346.

493–33½–New. Extension beyond period of grace. Where insured accepts agreement extending time for payment of premium to period beyond usual period of grace he is held to waive no rights secured by original contract of insurance. 160Tenn551, 26SW(2d)135, 68ALR1380.

493–35 31F(2d)859.

494–48 190NC757, 130SE612 (acceptance of check conditional payment of note and constituted no payment when returned unpaid). 146Va312, 131SE806.

494–53½–New. Where notes given to insurer impose no personal obligation on insured to pay them, the policy is not extended. 146Va312, 131SE806.

494–57 208Ky741, 271SW1062.

495–75 135SC48, 133SE227.

495–77 See also 147SC333, 145SE196.

495–81 32F(2d)61; 41F(2d)956.

495–83 37 OklACR115, 137 (after automatic continuance as term insurance).

495–84 249Mich317, 228NW770.

495–86½–New. Conditional acceptance of past due premiums after lapse of contract of insurance does not have effect of reinstating policy. 35GaA565, 134SE341.

495–86½–New. Right to reinstatement is substantial property right. NC 154 SE743.

496–96½–New. Where a policy did not provide for reinstatement, and the application recited that reinstatement should not take effect until approved by the home office, it was held that a local agency had no authority to reinstate the policy. 171Ark218, 283SW357.

496–97 Alta [1930] 3DomLR526.

496–4 TexCivA 29SW(2d)813 (right is personal to insured).

496–12 [b] **Insured held "in arrears" only for grace period** of four weeks during which premiums were not paid, and not for period between end of grace and date of revival. MoA 17SW(2d)570. [c] **Award of additional wages to employee after his death** was not subject to deductions for payment of premiums, so as to prevent lapse of policy before insured's death, under provisions of paymaster's order given by employee to employer permitting reinstatement by subsequent payment of premiums. 229Ky 634, 17SW(2d)745, 67ALR175.

496–13 36GaA703, 137SE848. [a] **Payment of premiums alone is insufficient** where provisions of application for reinstatement provide for its acceptance at home office, approval by medical director, and issuance of certificate, before reinstatement should be effective. 31Ariz122, 250P882.

496–15 147SC333, 145SE196.

497–19 40F(2d)687 (death of insured during negotiations); 31Ariz122, 250P 882; 135SC48, 133SE227; 50SD140, 208 NW787. [a] (1) 31Ariz122, 250P882. (3) Approval in writing. 41F(2d)600. [b] See also 31Ariz122, 250P882.

497–19½–New. , and an insurance company may impose any condition as to reinstatement. 171Ark218, 283SW357.

497–21½–New. Insurer may reject application after death of insured if it would have been entitled to reject it when made. 50SD140, 208NW787.

497–22 36GaA703, 137SE848. [a] (1) 171Ark77, 284SW12.

498–30 31Ariz122, 250P882; 36GaA703, 137SE848; 117 Oh13, 158NE179; 146Va 312, 131SE806. [b] (3) Provision for reinstatement, conditioned on evidence of insurability satisfactory to company, and payment of overdue premium and all indebtedness with interest, is to be construed so that evidence of insurability is not to be extended beyond date of such payments. 120 Okl 24, 250P113.

498–31 147SC333, 145SE196.

498–33 241Mich600, 217NW796. [a] **Person ill with pneumonia,** from which he dies two days later, is not in good health within meaning of policy. 241 Mich600, 217NW796.

498–35½–New. False statements in application will present revival or reinstatement. 50SD140, 208NW787.

498–40½–New. Illness, pending a company's action in an application for reinstatement, has been held not to affect the policy. 36GaA703, 137SE848.

499–41 NC 154SE743. [b] **Court cannot control discretion** in absence of bad faith or dishonesty. 40F(2d)687.

499–48½–New. Insurer has right to pass on question of insurability and evidence thereof submitted by insured. NC 154SE743.

499–50 213Ala588, 105S672, 674 [cit CJ]; TexCivA 21SW(2d)45. See also 213Ala588, 105S672.

499–52 38F(2d)972.

499–55 217Ala114, 115S8, 11 [citCJ].

499–56 120 Okl 24, 250P113.

499–58 213Ala588, 105S672, 674 [quot CJ].

499–59 213Ala588, 105S672, 674 [quot CJ].

499–60 213Ala588, 105S672, 674 [quot CJ]. [a] **Application** may be made to agent on behalf of company. 213Ala588, 105S672 (for revival of policy).

500–62 213Ala588, 105S672, 674 [cit CJ]; NC 154SE743.

500–63 213Ala588, 105S672, 674 [cit CJ].

500–73½–New. Insurance company, whose agent reinstated policy after being informed insured was sick, is chargeable with agent's knowledge. 38 F(2d)972.

500–76½–New. Making of application complying with terms revives policy without acceptance by insurer where required statement of facts as to health, etc., are true. 50SD140, 208NW787.

500–80 40F(2d)687 (implied acceptance).

501–82 NC 154SE743.

501–89½–New. Policy held reinstated where insurer, knowing material facts, approves application without full payment of past-due premium. 180Minn 346, 230NW790.

501–95 41F(2d)956 (notwithstanding incontestable clause in original policy); 40GaA811, 151SE529 (reinstatement cannot be considered void as matter of law).

501–96 146Va312, 131SE806; NS [1925] 3DomLR832.

501–97 249Mich317, 228NW770; 146 Va312, 131SE806; NS [1925] 3DomLR 832.

501–98 137Misc280, 242NYS181; 146 Va312, 131SE806; NS [1925] 3DomLR 832.

501–4 NS [1925] 3DomLR832.

501–5 Wash 292P445.

502–7 168La953, 123S638.

502–10 [a] **Signing application** has been held positive representations as to matters contained therein. 41F(2d)12.

502–11 168La953, 123S638.

502–16 40GaA811, 151SE529.

502–20½–New. Where intention of both parties is that truth of answers form basis and become part of contract of reinstatement, statements made are warranties, although term warranty is not used. NS [1925] 3DomLR832.

502–24½–New. Application for reinstatement is made in negotiation of contract of insurance within statute providing only misrepresentation with intent to deceive shall avoid policy. Wash 292P445.

502–30 41F(2d)956; 36GaA703, 137SE 848; 139 Okl 130, 281P561; 50SD140, 208NW787. [a] **Where insurer declined to revive rider,** and thereafter premiums were paid regularly on policy, but not on rider, both were in force at insured's death, where amount misapplied by insurer to premiums subsequent to expiration of grace period when policy lapsed and before it was revived was more than sufficient to pay premiums on rider to insured's death.

503–33 22F(2d)952; NS [1925] 3DomLR832 (respecting misrepresentation inducing reinstatement).

503–35 75CalA199, 242P501.

503–48½–New. A provision that a defaulted premium should be charged against a life policy as a loan has been held not to apply until the policy has a loan value. 14F(2d)162.

504–55 MoA 218W(2d)926.

504–59½–New. A provision that time for electing options on lapse shall run from extended date of premiums does not require affirmative act of selection where two of three options allow a certain number of days for election and the third is automatically allowed by the policy. 24F(2d)714.

505–77½–New. Statute giving insured right to three options after lapse of policies is continuing binding provision. 253NY114, 170NE514.

507–3 See also 132SC10, 129SE84.

507–5 213Ala248, 104S425; 83 IndA 209, 147NE816 (provisions of statute for extended insurance for benefit of policy holders); 37 OklACR115, 137. [c] **Fifteen-year term policy** in standard statutory form does not give privilege of extended insurance or automatic insurance in case of default in payment of premiums. 54ND466, 209NW965, 47 ALR446.

508–10½–New. Under a life insurance policy providing for thirty-one days grace in payment of premiums and for thirty-one days of continued insurance after the first year for which premium is paid, the period of grace and of extended insurance run concurrently. Tex CommnA 276SW227.

508–10⅓–New. That such policy carries a nonforfeitable value for thirty-one days beyond the due date of the second premium does not create an ambiguity justifying a different construction where other parts of the policy show that the periods run concurrently. TexCommnA 276SW227.

508–10¼–New. Construction of provision in a policy for automatic continuance or term insurance. 120 Okl 24, 250 P113.

508–15½–New. If policy contains statutory provisions in substance, their form may be varied and additional provisions inserted beneficial to insured, provided statutory requirements are

satisfied. 83 **IndA**209, 147**NE**816.
508-18 221**Ky**582, 299**SW**186.
508-20½-New. An automatic extension provision in a policy is not abrogated by the execution of a premium note containing an agreement for forfeiture on nonpayment, where there is no consideration for such agreement in the note. 170**Ark**478, 280**SW**15.
508-25½-New. An insured has been held not deprived of the right to demand extended insurance because of an outstanding policy issued prior to the policy in question. 159**Tenn**328, 17**SW(2d)**923.
508-28 213**Ala**248, 104**S**425.
509-34 37 **OklACR**115, 137.
509-36 204 **Iowa**804, 213**NW**757.
509-38 204 **Iowa**804, 213**NW**757.
509-45 37 **OklACR**137.
510-51 See also 75**CalA**199, 242**P**501.
510-55 But see 159**Tenn**328, 17**SW(2d)**923.
510-61 But see 234**Ky**118, 27**SW(2d)**670. [a] **Provision that time for electing any option to avoid forfeiture shall run from extended date of premium** applies to right granted to apply cash surrender value to purchase of extended insurance, though right is automatically secured by policy in case of default. 24 **F(2d)**714.
510-64 See also 234**Ky**118, 27**SW(2d)**670.
511-79½-New. Under a policy giving insured three months after default in payment of premium to elect between options as to how cash surrender value shall be applied, death of insurer within three months without making election automatically extends policy in force for full amount thereof for such period as cash surrender value of policy would purchase. 37 **OklACR**205.
511-85 [a] **Evidence sufficient** to show sufficient reserve to cover six month additional extended insurance. **TexCivA** 272**SW**346.
511-88 37 **OklACR**205 (under statute).
512-93 116**Tex**43, 285**SW**807.
512-94½-New. In Texas the value of a policy after default must be fixed in accordance with the statute relating to standard form policy. 116**Tex**43, 285 **SW**807.
512-95 5**F(2d)**481.
512-96 217**Ala**307, 116**S**151.
512-1½-New. Cash received on a policy loan is not constructively in the possession of insurer without notice of insanity of insured. 217**Ala**307, 116**S**151.
512-5 35**F(2d)**122 (premium reduction coupons). [a] **Dividend paid insured** without beneficiary's consent, under policy giving right to change beneficiary, held not to be applied to extend insurance on default. 144**Miss**541, 110**S**432.
513-13 37 **OklACR**115, 137; 135**SC**303, 133**SE**547.
513-14 159**Tenn**328, 17**SW(2d)**923. [d] **Under policy providing for continuance for term purchasable by reserve,** with deduction for money borrowed, deduction is from reserve and not from face of policy. 144**Miss**541, 110**S**432.
514-19 227**Ky**293, 12**SW(2d)**692; 221 **MoA**519, 290**SW**109.
514-27 144**Miss**541, 110**S**432.
514-32 See also 31**F(2d)**862.
514-34½-New. Under statute providing that existing indebtedness shall reduce amount or term of extended insurance, reduction for indebtedness cannot legally be made from both the amount and the term. 83 **IndA**209, 147**NE**816.
514-35 170**Ark**478, 280**SW**15; 134**Misc** 205, 234**NYS**287.
515-43 [a] 30**F(2d)**327. [b] **Effect of extension of time for payment of premium.**–24**F(2d)**714.
515-46 **MoA** 21**SW(2d)**926.
516-55 54**ND**600, 210**NW**177, 53**ALR** 910. See also 86**PaSuper**80.
516-57 54**ND**600, 210**NW**177, 53**ALR** 910.
516-60 [b] **Election held made.**–253**NY** 116, 170**NE**514.
516-64½-New. A policy in other than statutory standard form is governed by statutes relating to such policies, entitling the owner of a policy to an option, and upon failure to exercise the option, by further continuing insurance as participating and paid up for reduced amount, notwithstanding automatic provision extending insurance in prescribed standard form. 54**ND**600, 210**NW**177, 53**ALR**910.
517-79 132**SC**10, 129**SE**84.
517-80 132**SC**10, 129**SE**84.
518-83 [a] **Demand made in 1925 for paid up policy as of 1918 held not too late.**–126**Misc**109, 212**NYS**722.
519-5 See also **MoA** 7**SW(2d)**1015.
520-22 Contra 259**Mass**573, 156**NE**721.
522-61 216**Ala**562, 114**S**132.
522-65 204 **Iowa**804, 213**NW**757.
523-82 36**F(2d)**171. See also 32**F(2d)** 97.
524-7½-New. Equity can grant relief against forfeiture on the ground that provision is condition subsequent. 147 **SC**333, 145**SE**196.
524-7¼-New. Time for payment cannot be extended by the court without consent of insurer. 26**F(2d)** 580.
524-7¼-New. Equity should relieve against forfeiture of a life insurance policy incurred as the result of unavoidable accident, fraud, surprise, or by ignorance, not willful, where result of such a forfeiture works a substantial injustice to insured. 147**SC**333, 145**SE** 196.
524-27½-New. That insured sues, under policy to be performed abroad, for a paid up policy instead of for value of such policy does not affect the character of the cause of action, 126**Misc**109, 212**NYS**722.
524-27¼-New. nor is there required an allegation of the foreign law since all matters of remedy are determined by law of the forum. 126**Misc**109, 212**NYS** 722.
525-29 [a] (2) To show case of equitable relief. 147**SC**333, 145**SE**196.
525-31 [b] **Questions held for jury.**–**TexCommnA** 24**SW(2d)**22.
525-2 6**F(2d)**300 (letter construed to be sufficient notice of dishonor of check given for installment of premium); 19 **F(2d)**280; **TexCivA** 8**SW(2d)**291.
525-7½-New. Return of premiums held unnecessary where insurer seeks to cancel the policy for fraud. 234 **IllA**250.
526-11 138**Misc**182, 244**NYS**426.
526-23 See also 124**Kan**804, 262**P**571.
527-30 172**Ark**958, 291**SW**82.
527-31 86 **IndA**326, 157**NE**448.
527-38 172**Ark**958, 291**SW**82. See also 69**Utah**172, 253**P**200.
523-43½-New. Waiver of the right to declare a forfeiture of the policy may be established by express agreement, conduct, course of dealing, or ratification. 196**NC**139, 144**SE**689.
528-58 175**Ark**482, 300**SW**927; **MoA** 6 **SW(2d)**72.
528-61 See also 38**GaA**590, 144**SE**682.
528-62½-New. Knowledge of insurer of a previous ailment does not operate as estoppel as respects other false representations by insured. 35**F(2d)**337.
529-66 128**Me**184, 146**A**341.
529-67 See also 225**Ky**472, 9**SW(2d)** 206.
529-76 172**Ark**958, 291**SW**82; 174**Ark** 372, 295**SW**715; **LaA** 129**S**238; **MoA** 6 **SW(2d)**72; **NH** 151**A**481; 194**NC**649, 140**SE**302; 198**NC**303, 151**SE**628; **NC** 154**SE**313(2dcase); **OhA** 166**NE**906(2d case); 148 **Okl** 156, 247**P**356; 139 **Okl** 248, 281**P**774; 135**SC**89, 133**SE**215, 45 **ALR**1172; 150**SC**326, 148**SE**179. [h] 11 **F(2d)**838.
530-77 33**F(2d)**827; 23**AlaA**561, 129**S** 300.
530-79 158**Md**73, 148**A**267.
530-81 See also **MoA** 284**SW**198.
530-82½-New. A statute applicable only to policies issued without medical examination, which provides that knowledge of the agent as to the true condition of applicant's health is notice to insurer, is not applicable to policies issued after medical examination. 164**La** 741, 114**S**637.
530-83 41**GaA**243, 152**SE**850; **MoA** 6 **SW(2d)**72; 152**Va**38, 146**SE**353. [a] **Knowledge not constituting waiver.**–41 **GaA**243, 152**SE**850.
530-84 34**GaA**301, 129**SE**307.
530-86 171**Ark**135, 284**SW**4.
531-93 34**PortoRico** 267.
531-96 5**F(2d)**183; 8**F(2d)**285.
531-97 See also 38**GaA**590, 144**SE**682.
531-98 5**F(2d)**183.
531-5 **MoA** 27**SW(2d)**476.
531-7 8**F(2d)**285.
532-12 See also 196**NC**139, 144**SE**689; 94**PaSuper**159.
532-18 See also 196**NC**139, 144**SE**689.
532-19½-New. Acceptance of a physician's report on applicant and issuance of a policy thereon may amount to ratification of act of physician in making the examination for insurer. 34**GaA**301, 129**SE**307.
532-19½-New. It is not requisite to such ratification that insurer who accepted report and issued policy should have actual knowledge of all information given physician by applicant. 34 **GaA**301, 129**SE**307.
532-21 See also 69**Utah**172, 253**P**200.
532-23½-New. Agent cannot waive provision for good health of insured at time of payment of first premium. 124**Kan** 804, 262**P**571.
532-25 **NH** 151**A**481.
532-27 But see 219**Ky**335, 292**SW**774.
533-36 179**Ark**930, 19**SW(2d)**1031 (pregnancy of applicant); 181**Ark**213, 25**SW(2d)**10; **IndA** 171**NE**212.
533-42 175**Ark**359, 299**SW**366; 34**GaA** 301, 129**SE**307 (and insured is under no duty afterward to examine policy in this respect); 297**Pa**418, 147**A**76. But see 37**GaA**678, 141**SE**500. [b] 34**GaA** 301, 129**SE**307 (where answers not recorded by physician company cannot defend on ground of withholding information by applicant).
534-44 148**SC**355, 146**SE**147.
534-45 254**NY**333, 173**NE**4. [a] **False answers as to medical advice and hospital treatment** contained in written application attached to policy will defeat recovery as matter of law notwithstanding true oral answers. 254**NY**333, 173 **NE**4.
534-48 158**Md**73, 148**A**267; **MoA** 22 **SW(2d)**88.
534-52 34**F(2d)**215.
534-56 **Vt** 148**A**484.
535-64 **MoA** 277**SW**973. [d] (3) Other instances. 41**GaA**741, 154**SE**469.
535-65 [b] (3) 156**Miss**16, 125**S**409. (4) Letter written by insurer seeking to induce continuance of policy when there was no default. **TexCivA** 17**SW(2d)** 1088.
535-65½-New. Under some statutes the failure of a company to make a medical examination of insured before issuing the policy raises a presumption of waiver of all questions of health of insured and precludes it from defending upon that issue. 9**LaA**83, 118**S**846.
535-65½-New. Issuance of a policy without a medical examination raises a presumption of waiver of all questions of health, habits, or occupation of insured. 6**LaA**95.
535-67 **TexCivA** 292**SW**569.
535-70 35**F(2d)**763; 97**Fla**512, 121**S** 799; 40**GaA**131, 149**SE**68; 158**Md**73, 148**A**267 (agent's knowledge of applicant's unsound health). See also 150**Va** 548, 143**SE**705.
536-73 See also 168**La**271, 121**S**863.
536-74½-New. Insurer, issuing a policy to a person whom it knew to be an infant, is presumed to know that the infant was not bound by the warranties, and cannot escape liability on the infant's death. 50**RI** 158, 146**A**401.
536-79 35**GaA**565, 134**SE**341; 37**GaA** 22, 138**SE**589; 40**GaA**15, 148**SE**628(1st case). **Erratum.**–Strike out "13 App. Div. 984."
536-82 See also 217**Ky**547, 290**SW**317.
536-83½-New. A stipulation requiring payment of premiums in advance is not waived by a course of dealing consisting of taking notes from time to time in payment of premiums or installments thereof and in extending such notes from time to time in effecting collection. 54**ND**600, 210**NW**177, 53**ALR**910.
537-89 247**Mich**172, 225**NW**515.
537-92 **IndA** 171**NE**212; 139 **Okl** 248, 281**P**774; **TexCivA** 3**SW(2d)**514; **Tex CivA** 4**SW(2d)**595. But see **TexCivA** 11 **SW(2d)**364.
537-93 246**NY**63, 158**NE**21 (but not to mere temporary retention of premium paid to agent); 218**AppDiv**431, 218**NYS** 490.

537-96 40GaA678, 150SE856.
537-97 [a] (1) MoA 282SW745.
537-1½-New. Retention of a dividend less than the amount of the premium installment due for several days after grace period, during which period insured asked to have the dividend applied in reduction of the premium and the balance extended, does not show waiver. 54ND600, 210NW177, 53ALR910.
537-1¼-New. An agent, with authority to collect premiums on an insurance policy, has authority to bind the company in accepting payment of premiums on the policy which had lapsed for nonpayment. 225Ky472, 9SW(2d)206.
537-6 29F(2d)963; 204 Iowa804, 213 NW757, 758 [citCJ]; Mo 281SW407.
537-7 Mo 281SW407.
538-8 221MoA1007, 300SW550. See also 225Ky472, 9SW(2d)206.
538-12 221MoA1007, 300SW550.
539-28 IndA 148NE501; Vt 148A484.
539-32 But see 31F(2d)862.
539-48 14F(2d)27; Ala 130S402; 28 Hawaii99; 254 IllA82; 219MoA609, 282 SW494; NJCh 150A564; 191NC32, 131 SE395, 45ALR1360 (policy could not be contested); 88PaSuper326. [d] **Origin and purpose of incontestable clauses.**-28 Hawaii99. [e] **More onerous incontestable clause than that provided by statute** cannot be inserted in policy. Tex CivA 3SW(2d)946.
540-50½-New. Statute requiring incontestable provision does not apply to policy for one year term renewable from year to year. 43F(2d)517.
540-52 Ala 130S402; 127Misc674, 216 NYS643.
540-53 14F(2d)27; 18F(2d)599; Ala 130S402; 127Misc674, 216NYS643. But see 28Hawaii99.
540-55½-New. A rider providing that death as the result of flight in aircraft except as a fare-paying passenger is not a risk covered by the policy is not inconsistent with the incontestable clause. 226AppDiv408, 235NYS501.
540-56 18F(2d)599; 35F(2d)92; 127 Misc66, 215NYS276, 277 [citCJ]; 129 Misc493, 221NYS610. But see 28Hawaii99.
540-57 15F(2d)303; 18F(2d)599; 251 NY44, 166NE798; 127Misc66, 215NYS 276, 277 [citCJ]; 88PaSuper326. Contra 28Hawaii99.
540-57½-New. Securing release is not contesting. 129Misc493, 221NYS610.
541-58 41F(2d)12. But see 134Misc 238, 234NYS278. [b] **Statute providing attempt to commence action is equivalent to actual commencement** thereof has been held applicable to action to cancel policy incontestable after two years. 135Misc594, 238NYS684.
541-60 19F(2d)280; 117Nebr265, 220 NW285. [a] (6) 22F(2d)241; 254 IllA 82; NJCh 150A564. (8) Clause omitting statutory clause "during lifetime of insured" held to preclude contest for two years after policy date despite his prior death. 127Misc674, 216NYS643. (9) "During" lifetime of insured means "in the time of." 338 Ill 177, 169NE218.
541-60½-New. Where rider subsequently attached is by agreement made effective as of the date of the policy, the application of the incontestable clause to the rider is from the date of policy. 191NC32, 131SE395, 45ALR1360.
541-60¼-New. Court's finding of fraud in procuring a life policy does not relate back to the date insurer notified insured of rescission before expiration of contestable period. 19F(2d)280.
541-60¼-New. Insurer's notice of rescission for fraud and tender of premium paid held not "contest" within clause providing for contestable period. 19 F(2d)280.
541-62 223AppDiv339, 228NYS78.
541-65 20F(2d)394.
541-72 [a] **Contest** within contestable period defined. 19F(2d)280.
541-73 19F(2d)280; 28Hawaii99. See also 234 IllA250.
542-76 14F(2d)27; 39F(2d)848 (effect of acceptance of premium refund); 43 F(2d)517; 234 IllA250; 129Misc493, 221 NYS610; NC 154SE400; 90PaSuper 426; TexCommnA 22SW(2d)1063; Tex CivA 275SW248. See also 26F(2d)666. [a] Ala 130S402; TexCivA 3SW(2d) 946. [d] **Any condition existing when policy was issued** is within incontestable clause. TexCivA 3SW(2d)946.
542-77 35F(2d)571 (reformation of policy to correct clerical error); 180Ark 170, 21SW(2d)414 (wager contract). [d] **Where exceptions are stated in policy**, incontestable clause has been construed to operate to exclude all defenses not within exception. 117Nebr685, 222 NW332. [e] **Provision providing risk should not be assumed** for death resulting from travel in air craft has been held not inconsistent with statute providing for incontestability. 252NY449, 169NE642.
542-81 234 IllA250; 88PaSuper326.
542-82 6F(2d)940; 234 IllA250. [a] **Where defendant's pleas were filed after period**, though action was begun during period, held clause is operative. 234 IllA250.
542-82½-New. The incontestable clause does not exclude the defense of failure to furnish proof of loss under the total disability clause of a life policy. 169 Ark230, 275SW519, 41ALR379.
542-82¼-New. Incontestable provision held not to preclude insurer from asserting insured's death was not within coverage of policy. 43F(2d)517.
543-84 14F(2d)27; 117Nebr265, 220 NW285; 103NJEq403, 143A529; NJCh 150A564; 251NY44, 166NE798; 251NY 336, 167NE462; 223AppDiv339, 228NYS 78; 127Misc674, 216NYS643; 129Misc 493, 221NYS610; 130Misc362, 224NYS 63; TexCivA 3SW(2d)946. See 132 Misc892, 230NYS725. [c] **Insurer must take affirmative action** to contest policy before expiration of period during which it is contestable. 223AppDiv339, 228NYS78.
543-85 127Misc674, 216NYS643. [a] **"In force"** means contract is in force between parties till abrogated or rescinded voluntarily or in judicial proceeding. 127Misc674, 216NYS643.
543-87 31F(2d)971; 135Misc855, 239 NYS698.
543-88 18F(2d)599.
543-89 251NY336, 167NE462 (seven years' delay).
543-90½-New. Answer in incontestable policy action held not to relate to time of complaint. 14F(2d)27.
543-92 42F(2d)910 (execution for murder).
543-97 18F(2d)599; 19F(2d)142; 180 Ark536, 22SW(2d)401, 67ALR1358.
544-98½-New. Express provisions, not assuming risk of suicide within certain period, preclude operation of incontestability clause. 25F(2d)514.
544-2 124Kan191, 257P933; 155Tenn 412, 295SW58, 55ALR537.
544-2½-New. Where a policy provides that it shall be incontestable after one year from date of issue if premiums have been duly paid, and further provides that liability shall be limited to the amount of the premium actually paid in case of suicide of insured within two years from the date of the policy, the latter provision controls in case of suicide within such period. 124Kan191, 257P933.
544-3 18F(2d)903; 117Nebr685, 222 NW332 (one year reasonable); 88Pa Super326; TexCivA 8SW(2d)291. See also 117Nebr685, 222NW332. [c] 223 AppDiv339, 228NYS78.
544-4 251 IllA272; TexCivA 275SW 248.
544-7½-New. An insurance company is not deprived of the defense set up in a suit to cancel a policy filed within the contestable period because the defense might be made by answer within the period in an action on the policy. 35 F(2d)92.
544-7¼-New. Policy incontestable except for actual and intended fraud excludes fraud arising by presumption of law. Ala 130S402.
544-9 259Mass573, 156NE721.
545-16 127Misc66, 215NYS276; 129 Misc493, 221NYS610.
545-20 [b] **Proviso referring to health insurance** excepting diseases not common to both sexes will not defeat recovery of death benefit. Miss 130S756.
545-22 40GaA30, 148SE666; MoA 272 SW1052. [a] **Death held not referable to paralysis** within clause limiting liability in case of death in a year, if cerebral hemorrhage, apoplexy, and resultant paralysis were caused by shock. 214 Ala373, 108S5. [b] **Statute barring defense to policy issued without medical examination, for misrepresentation as to physical condition** is inapplicable to limitation of liability where death is caused by apoplexy within year. NC 155SE566.
545-24 34PortoRico 386. [a] **Construction.**-214Ala373, 108S5.
546-42 MoA 282SW745.
546-51 See also Man [1930] 2DomLR 770.
548-74 13F(2d)579 (Indiana contract).
548-78 256 IllA438 (unless not necessary to preserve life).
549-84 152Tenn578, 280SW30. [d] **Abortion performed on self** by insured does not violate provision. MoA 274 SW868.
549-95 152Tenn578, 280SW30.
550-10 [a] See also 6LaA390.
551-23 160La854, 107S599, 603 [citCJ].
551-24 125Misc670, 211NYS755.
551-24½-New. unless the policy is payable to a beneficiary who has vested rights; 125Misc670, 211NYS755.
552-29 129Misc365, 221NYS357 (construction).
552-37 17F(2d)963.
553-42 35GaA770, 134SE639.
553-43 35GaA770, 134SE639; TexCivA 29SW(2d)940 (intent and motive distinguished). [d] **Where policy clause against suicide reads "if insured die by his own hand," only voluntary suicide is included**, and accidental death at insured's own hand does not avoid policy. 35GaA770, 134SE639.
553-46 17F(2d)963.
553-49½-New. Suicide within a year has been held to preclude recovery on an insurance contract having an incontestable clause and providing that the company should not be liable where suicide occurred within one year. Tex CivA 289SW114.
553-50 35F(2d)611; 148Miss173, 114S 262, 56ALR681 (dictum).
554-57 148Miss173, 114S262, 56ALR 681.
554-62 226Ky597, 11SW(2d)417.
554-67 8F(2d)202; CalA 287P107.
554-68 117Nebr265, 220NW285.
555-74 215Ala142, 110S275.
555-74½-New. Provision does not require that a claim of nonliability should be made within the prescribed time from the date of the policy, but only that suicide occurred within that time to relieve insurer from liability. 8 F(2d)202.
555-78 [a] (4) Statute is not applicable to contract consummated outside state. MoA 278SW(2d)452.
556-91 17F(2d)370.
556-92 [d] **Participating in aëronautic activity.**-17F(2d)370; 175Ark565, 299 SW995, 57ALR622. [e] **Handling explosives or blasting.**-25F(2d)555.
556-93 25F(2d)555, 559 [quotCJ].
556-95 223AppDiv461, 228NYS354; 132Misc487, 230NYS432; 219AppDiv 246, 219NYS152. [b] **Provision is valid.**-223AppDiv461, 228NYS354.
556-97 MoA 3SW(2d)269.
556-3 34GaA301, 129SE307.
556-3½-New. Where beneficiary is estate of insured, it is immaterial that proof of death is furnished by husband as sole heir. 34GaA301, 129SE307.
557-9 24F(2d)694; MoA 3SW(2d)269.
557-14½-New. The beneficiary need not present proof of the disappearance of insured, until the expiration of the seven-year period when the presumption of death arises. 117Tex229, 1SW (2d)256, 61ALR682.
557-21 [a] 250Mich185, 229NW509.
557-26 233Ky840, 27SW(2d)422.
558-32 MoA 3SW(2d)269.
558-48½-New. Party presenting certificate of death to insurance company is entitled to its return on demand at any time before it is tendered and accepted as proof of death under policy. 21AlaA5, 105S161.
558-48¼-New. Failure of a physician to answer whether insured was a good risk is not equivalent to a negative answer. 176Ark666, 4SW(2d)25.

558-52 85 **IndA**450, 150NE31; 122**Kan** 778, 253P559.
559-56 **MoA** 38SW(2d)269.
559-58 See also 252NY459, 169NE645.
559-59 213**Ala**286, 104S643.
559-60 See also 233**Ky**840, 27SW(2d) 422
559-61 **IndA** 148NE505; 85 **IndA**450, 150NE31; SC 155SE747. See also 232 **Ky**834, 24SW(2d)906. [a] (2) 85 **IndA** 450, 150NE31.
559-63½-New. Rejection of claim subsequently retracted, not misleading plaintiff, does not constitute waiver. 132**Misc**487, 230NYS432.
560-68 [b] **Receiving premiums** for many years after decree presuming insured's death and treating him as alive. 9**PaSuper**31.
560-71 33**GaA**634, 127SE798.
560-80 216**Ala**537, 113S615; 232**Mich** 101, 205NW116; 228**AppDiv**299, 228 NYS354.
560-81 216**Ala**537, 113S615, 617 [cit CJ]; 217**Ala**110, 115S12; **MoA** 68W (2d)72; 228**AppDiv**299, 228NYS354.
560-82 232**Mich**101, 205NW116; **MoA** 68W(2d)72; 90**PaSuper**332.
561-84 213**Ala**286, 104S643.
561-85 213**Ala**286, 104S643.
561-89 216**Ala**537, 113S615, 617 [cit CJ].
561-93 **CalA** 291P436; 251NY208, 167 NE337(2dcase). [a] **Statement of insured's attending physician** that insured had tuberculosis is not binding on beneficiary, who made no statement in proof of claim, that insured had tuberculosis when policy was issued, and who repudiated statement of physician. 159**Tenn**130, 16SW(2d)13.
562-4 228**AppDiv**449, 240NYS118. [c] **In case of suicide,** acceptance of amount of premiums paid, as authorized by policy, discharges liability of company. 223**AppDiv**272, 227NYS699.
562-5 [c] **Bill for cancellation of release for fraud** does not show ratification by delay where it does not show when falsity of statements was ascertained. 153**Miss**874, 121S844. [d] **While ignorance of the law excuses no one,** nevertheless, insurance agent of experience and ability, who takes advantage of ignorance and misfortune of beneficiary and by playing on her fears and emotions procures her release of valid insurance claim for inadequate consideration, cannot uphold such release on theory that his misrepresentations were merely as to matters of opinion or law. **TexCivA** 15SW(2d)704.
562-5½-New. or mental incapacity of insured. 224**Ky**405, 6SW(2d)447 (evidence held sufficient).
562-6 [a] (1) 153**Miss**874, 121S844.
563-11 [a] **Contingency must occur in future.**-132 **Okl** 165, 269P1065.
563-12 90**PaSuper**426. [c] (5) Anniversary payments not required after death. 206 **Iowa**1237, 219NW487. (6) Disability benefit not apportionable on death before anniversary on which otherwise payable. 206 **Iowa**1237, 219NW 487.
563-15 [a] **Construction of letter** as to amount payable. 229**AppDiv**670, 243 NYS579.
563-26½-New. Liability of insurer under disability clause. Insured held not wholly disabled so as to be permanently and continually prevented from engaging in any occupation for remuneration or profit within disability clause. 214**Ala**166, 106S689.
563-26¼-New. Double liability for "accidental death" is not incurred where insured met death in exchange of shots during quarrel. 22F(2d)956.
563-26¼-New. Insurer erroneously computing amount due and inserting wrong sum in letters to beneficiaries is not bound thereby. **MoA** 282SW745.
563-26½-New. Where insured defaulted in payment of premiums, double indemnity is not recoverable for insured's accidental death where the policy so provided. 35F(2d)122.
564-31 224**AppDiv**634, 232NYS147 (right of beneficiary wife to reimbursement from insured's estate).
564-32 [a] 160**Tenn**551, 26SW(2d)135, 65ALR1380.
564-44 [a] **Contract of life insurance, does not become debt until after death of insured,** and hence is not collectible in right of insured. 39**GaA**373, 147SE 157.
565-61½-New. Insured may designate either wife or brother, or both, as beneficiaries. 289**Pa**351, 137A621.
565-65 200 **Iowa**1070, 205NW870.
565-66 39**GaA**373, 147SE157.
565-67 **MoA** 22SW(2d)206.
565-68 220**MoA**913, 296SW209. [a] (3) Mother of insured. 220**MoA**913, 296SW209.
566-77 12**LaA**608, 125S776 (mother as beneficiary though wife and children of insured are living). [b] **Where beneficiary is without insurable interest** he holds for benefit of those entitled to proceeds. **TexCivA** 16SW(2d)922. [c] **Where proceeds were to be divided among surviving brothers and sisters** and, after insured's death, while payments were being made to beneficiary under policy, he died, his children were not entitled to benefits, which then inured to brothers and sisters designated. 166**La**829, 118S35.
566-77½-New. Where insured did not die, beneficiary cannot recover sick benefits. SC 148SE656.
566-79 **TexCommnA** 276SW643.
566-80 26F(2d)369; 220**Ala**537, 126S 108; **Ill** 173NE465; 166**La**829, 118S35; 10**PaDist&Co** 65; **TexCommnA** 276SW 643.
566-86½-New. Where life insurer did not by an overt act exercise an option under the facility of payment clause to make payment to any relative of insured, it was not incumbent upon it to do so until the policy matured. 332 **Ill** 603, 164NE192.
566-86¼-New. Under the facility of payment clause authorizing insurer to make payment of life insurance or grant any nonforfeiture provision provided for in the policy to any relative by blood or connection by marriage of insured, insurer had the right to make insured's niece beneficiary. 332 **Ill** 603, 164NE192.
567-16 167**Ga**237, 145SE78, 60**ALR**969.
567-17 **MoA** 23SW(2d)1075.
567-18 **MoA** 23SW(2d)1075.
567-19 167**Ga**237, 145SE78, 60**ALR**969.
567-20 **MoA** 23SW(2d)1075.
568-30 241**Mich**132, 216NW369; 135 **Okl** 40, 273P1007. [a] **That divorce decree failed to make provision for wife in lieu of dower and in satisfaction of claims in husband's property,** as required by statute, does not affect rule where there was previous property settlement as effective as though statute had been followed. 241**Mich**132, 216 NW369.
568-32 9**LaA**74, 119S79.
568-35½-New. Husband may make wife beneficiary to exclusion of children. **Iowa** 230NW545.
568-35¼-New. Children's interest in proceeds of policy payable to widow of insured inures to them as her heirs. **Iowa** 230NW545.
568-56 **Ont** [1927] 1**DomLR**805. See also 318**Mo** 969, 38SW(2d)1003.
569-61 318**Mo** 969, 28W(2d)733; 318 **Mo** 969, 38W(2d)1003.
569-62 318**Mo** 969, 38W(2d)1003.
569-64 232**Ky**469, 23SW(2d)922.
569-74 [b] **In Florida.**-97**Fla**916, 123 S668(2dcase). [c] **In Louisiana.**-168**La** 887, 123S668.
570-75 38 **OklACR**405.
570-77 38 **OklACR**405.
570-80 38 **OklACR**405.
570-82 51**ND**78, 199NW181; 51**ND**140, 199NW183 (father not heir under state where gross value of estate does not exceed four thousand five hundred dollars of intestate leaving widow, but no lineal descendants); 53**ND**188, 205NW14 (proceeds belong to beneficiaries named in policy or to heirs of decedent as case may be); 54**ND**19, 208NW549; 57**ND** 63, 222NW464. [a] **Heirs take by contract under policy and not by descent** and proceeds of policy is payable to them without being subject to terms of will. 51**ND**78, 199NW181; 54**ND**19, 208NW549. [b] **Proceeds of judgment obtained by administratrix** in suit against company on account of its negligent delay where applicant died shortly after making application and policy was not delivered prior to his death are avails of insurance under statute. 53**ND** 188, 205NW14.
571-91 See also 245NY556, 157NE855.
571-7 13F(2d)579; 127**Kan**456, 274P 132.
571-10 29 **OhA**226, 163NE215.
572-13 30F(2d)715.
572-13½-New. Where an assignment of a policy as security for a preexisting debt with insurer's approval and with the consent of prior assignees is valid, insurer cannot defend on the ground that insured assignor had a good defense to the assignee's claim. 18F(2d) 903.
572-13½-New. Company has no concern with disposition of proceeds due to the assignee, and it is no defense that the assignee has obligated itself to make payments therefrom to the assignor and others. 165**La**166, 115S446.
572-18½-New. Parol assignment. Insured husband who agrees with putative wife who paid premiums that she receive proceeds if husband survive maturity has only a bare legal title in such proceeds, in trust for the wife. 103**Conn** 341, 130A379.
572-18½-New. who holds complete beneficial interest therein. 103**Conn**341, 130A379.
572-19 246NY133, 158NE48 (without restriction).
572-22½-New. , and the assignee takes subject to the rights of creditors. 246 NY133, 158NE48.
573-43 See also 199**Wis**131, 225NW733.
573-46 **TexCivA** 20SW(2d)836.
574-58 **MoA** 22SW(2d)206 ("legal representatives" of insured refer to executor or administrator).
575-71½-New. A provision of association that the amount due under a disability clause should be paid only to a disabled member and in no instance to his estate or heirs held contrary to statutes of state. **TexCivA** 20SW(2d)836.
575-73 **MoA** 295SW811.
576-90 133**Misc**106, 231NYS161; 155SC 323, 152SE506.
576-95 See also 133**Misc**106, 231NYS 161.
576-96 133**Misc**106, 231NYS161. But see 179**Ark**952, 18SW(2d)909; 225**App Div**642, 234NYS250. [a] **Where beneficiary commits suicide after murder of insured,** proceeds are payable to next of kin of insured to exclusion of heirs of beneficiary. **Ill** 173NE465.
576-98 106**WVa**424, 145SE743(2dcase).
576-2½-New. A company is not absolved from liability because the beneficiary murders insured. 8F(2d)706.
576-2¼-New. unless the beneficiary obtained the insurance with intent to murder insured and thus defraud insurer. 8F(2d)706.
577-4 13F(2d)579; 126**Me**7, 135A357; 69**Utah**172, 253P200.
577-5 24F(2d)459.
577-6 24F(2d)459.
577-17 14F(2d)308; 217**Ala**153, 115S 94, 55**ALR**1231; **CalA** 290P640; 101 **NJEq**90, 137A785; 138**Misc**182, 244**NYS** 426; 86**PaSuper**80. But see 10**PaDist &Co** 119. [b] (4) That mere issuance of policy would not establish in beneficiary rights paramount to those of insured is rule of old line policies and fraternal benefit societies. 214**Ala**387, 107S846.
578-18 **TexCivA** 20SW(2d)836. But see **TexCivA** 12SW(2d)651.
578-19 220**Ala**344, 125S217; 131**Misc** 806, 229NYS113.
578-24 But see 32F(2d)611.
579-37 224**AppDiv**634, 232NYS147.
579-48 7**PaDist&Co** 558.
579-51 13F(2d)579; 220**Ala**372, 125S 335; **AlaA** 129S799; 68**CalA**732, 230P 188; 198**Cal** 91, 243P431; 81**CalA**546, 254P306; **CalA** 290P640; 85 **IndA**450, 151NE682; 155SC323, 152SE506; 65 **Utah**581, 238P648.
580-52 **Ill** 173NE465; 85 **IndA**450, 151 NE682; 164**La**1077, 115S275, 276 [quot CJ]; 237**Mich**303, 211NW648, 649 [cit CJ]; 142**Miss**522, 107S420, 45**ALR**618; 219**MoA**397, 271SW844; 57**ND**63, 222 NW464.
580-53 128**Kan**65, 275P1084; 231**Ky**5,

20SW(2d)1029; LaA 130S270; 65Utah 531, 238P648. [c] **On death of beneficiary** at same time as insured, heirs of insured take proceeds of policy, where right to change beneficiary is reserved. Miss 108S420.

580-54 215Ala179, 110S291; 237Mich 303, 211NW648; 241Mich608, 217NW 919.

580-55 218Ala420, 118S912; 237Mich 303, 211NW648. [c] (1) 65Utah581, 238 P648. (2) But see 50RI 323, 147A618. (5) Where insurance on life of principal stockholder and officer of firm was acquired at expense of, and for benefit of, firm, such firm was owner of policy and beneficiary of its provisions, including one as to changing beneficiary, and whatever rights insured had he held in trust for firm from which consideration proceeded. 29F(2d)886. (6) Beneficiary may recover premiums paid, plus interest, where beneficiary is changed, 50RI 323, 147A618.

580-56 215Ala179, 110S291, 293 [quot CJ].

580-58 [b] **Interest of beneficiaries** under policy reserving right to change is contingent and never vested where beneficiary and insured died at same time. 142Miss522, 107S420, 45ALR618.

580-59 262Mass174, 159NE520.

580-63 198Cal 91, 243P431; 237Mich 303, 211NW648; 65Utah581, 238P648.

581-65 198Cal 91, 243P431; 12LaA608, 125S776; 126Me7, 135A357; 156Md270, 144A221; 262Mass174, 159NE520.

581-66 126Me7, 135A357.

581-67 126Me7, 135A357.

581-81 101NJEq90, 137A785.

582-92 29F(2d)886; 86CalA493, 261P 322; 96Fla1, 117S899; 131Misc806, 229 NYS113; 48Philippine53; 33PortoRico 470, 471 [citCyc]. [e] **Group insurance policy,** naming children of insured as preferred class of beneficiaries, held not subject to change. 220Ky43, 294SW767.

582-93 153SC478, 151SE60.

582-97 14F(2d)308; 101NJEq90, 137A 785.

582-98 101NJEq90, 137A785.

582-4½-New. First beneficiary acquires vested right to proceeds where change of beneficiary was not indorsed on the policy. 126Me7, 135A357.

582-4½-New. Insurer cannot destroy first beneficiary's vested rights by waiving requirement of indorsement. 126 Me7, 135A357.

583-11 207 Iowa954, 222NW442; 237 Mich303, 211NW648.

583-13 86CalA493, 261P322; 237Mich 303, 211NW648.

583-16 [b] **Effect of assignment as security.**-241Mich608, 217NW919.

583-17 207 Iowa954, 222NW442.

583-17½-New. , agreeing not to change the beneficiary, 125Kan305, 264P37 (agreement between minor son and mother that he would not change beneficiary in policy in which she was named as beneficiary held valid).

583-19 215Ala179, 110S291, 293 [quot CJ].

583-22 Sask [1929] 3DomLR796 (mentally incompetent).

584-31½-New. The changing of the beneficiary in accordance with the terms of the contract has been held not to constitute a new contract. 135 Okl 40, 273 P1007.

584-36 81CalA546, 254P306; 200 Iowa 1070, 205NW870; 123Kan554, 255P980, 981; 222Ky211, 300SW599; 126Me7, 135A357; 262Mass174, 159NE520; 116 Nebr33, 215NW559; 101NJEq90, 137A 785; 133Misc810, 234NYS389; 114 Oh 109, 150NE748; Pa 127A621, 622 [quot CJ]; 88PaSuper239; 131SC441, 128SE 414; 153Tenn362, 284SW72, 73 [quot CJ]; 65Utah581, 238P648. But see 298 Pa322, 148A471. [c] (1) 123Kan554, 255P980, 981; 126Me7, 135A357; 102NJ Eq281, 140A445; 135Misc830, 238NYS 531; 289Pa351, 137A621; 131SC441, 128SE414. (14) Insured's written statement insufficient where written consent of superintendent was required. 156Md 270, 144A221. [f] **Where notice of change does not reach insurer before death of insured,** it is binding where terms in policy are merely ministerial. 116Nebr33, 215NW559.

584-37 231Ky5, 20SW(2d)1029; 114 Oh109, 150NE748 (any written notice designating different beneficiary and accompanied by policy is sufficient); 289 Pa351, 137A621, 622 [quotCJ]. [a] **Rider** approved by company and attached to policy is sufficient compliance. 11LaA 276, 123S379.

584-38 289Pa351, 137A621, 622 [quot CJ].

584-39 289Pa351, 137A621; 153Tenn 362, 284SW72. [a] 132Misc162, 229NYS 228.

585-40 LaA 130S270; 289Pa351, 137A 621.

585-41 169Ga324, 150SE152; 114 Oh 109, 150NE748. [a] TexCommnA 1SW (2d)583. [c] (1) 91PaSuper466. (2) 231 Ky5, 20SW(2d)1029. (3) 91PaSuper466. [d] (2) Agent's authority held too narrow to make his knowledge and conduct regarding change of beneficiary knowledge of company. TexCommnA 1SW (2d)583. [f] **Issuance of new policy** naming new beneficiary waived all conditions for change of beneficiary. 169Ga 324, 150SE152.

585-43 126Me7, 135A357; 156Md270, 144A221; 153Tenn362, 284SW72. But see 131 Or537, 283P739. [a] (1) 131 Or 537, 283P739. (3) 156Md270, 144A221.

585-45 70CalA175, 233P343; 8LaA 228; 262Mass174, 159NE520; 237Mich 303, 211NW648, 649 [citCJ]; 250Mich 88, 229NW413; 28SPa468, 136A785; 289Pa351, 137A621; 88PaSuper239, 243 [citCJ]; 91PaSuper466; 153Tenn362, 284SW72; 65Utah581, 238P648; 108 WVa594, 152SE321. [a] **Policies issued by ordinary life insurance companies and those issued by fraternal societies** are equally within rule. 70CalA175, 233 P343.

585-46 237Mich303, 211NW648, 649 [citCJ]; 88PaSuper239, 243 [citCJ]. [a] **Where beneficiary had vested interest under assignment as security for debt,** and refused to surrender policy, change of beneficiary as to interest in excess of such vested interest will be deemed made where insured did all that he could to make change. 241Mich608, 217NW919.

585-47 135Misc436, 237NYS663.

585-48 196Cal 497, 238P1034; 70CalA 175, 233P343; 6LaA661; 237Mich303, 211NW648, 649 [citCJ].

585-49 231Ky5, 20SW(2d)1029. [a] **Indorsement prevented by original beneficiary.**-70CalA175, 233P343.

585-50 IndA 169NE593 (death after sending request for change but before indorsement thereof); 132Misc162, 229 NYS228; 65Utah581, 238P648; 108 WVa594, 152SE321.

585-51 231Ky5, 20SW(2d)1029 (original beneficiary cannot complain of such failure); 132Misc162, 229NYS228; 65 Utah581, 238P648; 108WVa594, 152SE 321.

586-52½-New. On death of insured, beneficiary's rights become fixed, even under policy provision authorizing change of beneficiary. 221AppDiv81, 223NYS16.

586-53 126Me7, 135A357; 221AppDiv 81, 223NYS16.

586-57 [a] **In action at law on policy,** indorsement in policy of change of beneficiary is not mere ministerial act to be treated as done where insured did all he could. 126Me7, 135A357.

586-58 156Md270, 144A221.

586-59 114 Oh109, 150NE748.

586-59½-New. Where policy provides that a change of beneficiary shall relate back to the date on which insured signed notice of change, new beneficiary may enforce indorsement of change on the policy of the death of the insured. 70 CalA175, 233P343.

586-59¼-New. The original beneficiary cannot by his own fraud prevent the indorsement of a substitution and prevail against the person whose substitution was attempted where the indorsement on the policy is a mere ministerial act. 70CalA175, 233P343.

586-59¼-New. The indorsement of a change of beneficiary on the policy is a mere ministerial act where the policy provides that after indorsement the change shall relate back to the date insured signed the notice of change whether he is living at the time of the indorsement or not. 70CalA175, 233P343.

586-59½-New. Although the name of a new beneficiary was not indorsed on the policy a judgment awarding the proceeds of the policy to such beneficiary will not be reversed on that ground where indorsement could be enforced after the death of the insured. 70CalA 175, 233P343.

586-59⅙-New. Parol gift of a policy to an intended beneficiary has been held valid. 101NJEq90, 137A785.

586-59½-New. Under an original group policy, authorizing change of beneficiary, and subsequent policies, requiring approval of employer to change of beneficiary, it has been held that insured may, by will, change original beneficiaries without notice to his employer. 133Misc810, 234NYS389.

586-59⅛-New. A husband's designation of his wife as beneficiary was subsequently revoked by making the policy payable to a trustee. NJCh 145A735.

586-59⅕-New. A provision in a group life policy that the beneficiary may be changed at any time subject to approval of employer is for the protection of the employer, and did not limit insured in disposing of his interest as he desired. 133Misc810, 234NYS389.

586-59⅒-New. Letters of insured to a beneficiary to whom the policies were delivered as security for a debt, disclosing his intention that his wife was to be the beneficiary so far as the proceeds should not be required to pay debts, held effective as to those other than insurer to accomplish the intended result. 30F (2d)597 [certiorari den 279US856, 49 SCt351(7thcase), 73Led997].

586-59⅑-New. Presence of insured when letter requesting change of beneficiary was written, and direction by him of manner of writing, showed letter was direct act of insured. 180Ark895, 23SW(2d)251.

586-60 See also 8PaDist&Co 29.

586-61 81CalA546, 254P306.

586-65 88PaSuper239.

586-65½-New. An agreement to give a home, subsequently performed, is a sufficient consideration for an agreement to make the promisor the beneficiary of the policy, MoA 23SW(2d)205.

586-65⅛-New. although insured did not live long thereafter. MoA 23SW(2d) 205.

586-65¼-New. That the new beneficiary paid premiums after the change is a sufficient consideration to support the contract as against a secret assignee although insured died shortly after the change. MoA 23SW(2d)205.

586-71 [d] **Right to change** is subject to rules and regulations of company, under some statutes. 214Ala387, 107S 846.

587-78 Ont [1926] 4DomLR1083.

587-80 Ont [1926] 4DomLR1083.

587-84 170La828, 129S361; 57ND412, 222NW459; 57ND63, 222NW464. [b] **Bequest of proceeds of insurance** payable to estate of insured is not a "change of beneficiaries." 200 Iowa1070, 205NW 870, 872. [c] **Terms of will must be clear.**-57ND412, 222NW459; 57ND63, 222NW464.

587-86 222Ky211, 300SW599.

587-91½-New. Where a statute provides that the avails of a policy payable to the personal representatives of a deceased, his heirs, or estate, shall not be subject to the debts of decedent but shall be inventoried and distributed to his heirs, a will disposing of the "estate" or "property" of insured does not affect the proceeds of such policy, but such proceeds belong to the heirs. 54 ND19, 208NW549.

587-94 Ont [1925] 2DomLR840 (illegitimate children are not members of preferred class of beneficiaries under Insurance Act).

587-96½-New. A beneficiary who acquires a vested interest in a life policy need only notify the insurance company of the fact before payment is made to another. 50RI 323, 147A618.

588-4 See also 202Cal 312, 260P545.

588-6 136Misc703, 240NYS834; 50RI 323, 147A618 (indorsement of note of

insured by first beneficiary after change of beneficiary).

588-7 See also **MoA** 228**NW(2d)**206.

588-10 246**NY**133, 158**NE**48; 216**App Div**100, 214**NYS**528 (in absence of statute); 221**AppDiv**532, 224**NYS**638 (under statute).

588-10½-New. provided the estate of insured is insolvent, 221**AppDiv**532, 224 **NYS**638. [a] **Widow is not obliged as beneficiary under policy** to apply part of proceeds thereof to payment of her husband's debts unless assets are insufficient to pay creditors. 221**AppDiv**532, 224**NYS**638.

588-10½-New. which creditor, suing on behalf of self and other creditors, must allege and prove. 221**AppDiv**532, 224 **NYS**638. [a] **Allegations of insolvency of estate are insufficient** which state only that proceeds of sale of personalty are not sufficient to pay all claims, where decedent left real estate subject to payment of debts. 221**AppDiv**532, 224**NYS** 638.

588-16 141**F(2d)**308; 17**F(2d)**112.

589-19 [a] **Where policy is payable to surety on insured's note,** insured's wife, paying premium to prevent lapse with knowledge of facts, cannot have herself substituted as beneficiary. 207**Iowa**954, 222**NW**112.

589-27 156**Tenn**306, 300**SW**567.

589-28 [c] **Affidavit of defense held sufficient.**-88**PaSuper**239.

589-30 [a] (1) 296**Pa**474, 146**A**107. (2) 116**Nebr**33, 215**NW**559. (6) Wife claiming vested interest in husband's policy, preventing change of beneficiary, has burden of proof. 237**Mich**303, 211**NW** 648.

589-32 [a] (1) 91**PaSuper**466. (7) Support finding that insured was in such mental condition that he was unable to understand and realize consequences of acts. **TexCivA** 118**SW(2d)**347. [b] (4) To show that wife was named as beneficiary in consideration of her promise to marry. 237**Mich**303, 211**NW**648.

590-41½-New. Beneficiary's acceptance, after insured's suicide within two years, of the amount of premiums paid, and surrender of the policy, have been held to discharge insurer's liability. 129**Misc** 365, 221**NYS**357.

590-41¼-New. Release of claim by the beneficiary for the principal sum of the policy by acceptance of a check for the premium is without consideration, although insured committed suicide. **TexCivA** 218**SW(2d)**1086.

590-47 But see 155**SC**323, 152**SE**506.

590-49 [b] **Affidavit of death and of indebtedness to bank** was sufficient showing to warrant payment to bank. 177**Ark**737, 7**SW(2d)**778.

591-56 [a] **Beneficiary's letter to insurer** stating that, if assignee's claim under assignment covering amount insured owed him at her death was in excess of three hundred dollars, it was bogus, and stating in postscript, "if of a nature unreasonable to cancel the claim and pay as per will, except what the company holds the policy for," did not authorize insurer to pay seven hundred fifty-eight dollars and four cents due on policy to assignee, where his claim exceeded such amount. 178**Ark** 466, 10**SW(2d)**910.

591-63½-New. Release by widow is not binding on minor children named as beneficiaries. 251**NY**44, 166**NE**798.

591-66 See also 225**Ky**238, 8**SW(2d)** 412; 103**NJEq**279, 143**A**318.

591-68 7**LaA**645.

591-72 [f] **Sister of insured has no right** as against insurer under such provision. 252**NY**459, 169**NE**645. [g] **Insurer cannot escape liability for balance due on policy** by payment to sister of insured under facility of payment clause. 252**NY**459, 169**NE**645.

592-82 129**Misc**493, 221**NYS**610. [b] **Petition held insufficient** for want of allegations showing that payment was **not** voluntary. 40**GaA**573, 150**SE**596.

593-97 83**NH**482, 145**A**14[illegible].

593-17 [a] **Reinsurer having taken over liabilities of assessment company** could not make issuance of new policy dependent on insured's express warranty of health. 180**Ark**1048, 24**SW(2d)**966.

593-18 [e] **Reinsurer's liability is dependent** on insured's contract with assessment company irregardless whether new policy is valid or not. 180**Ark**1048, 24**SW(2d)**966.

594-19 But see 180**Ark**1048, 24**SW(2d)** 966.

595-45 [d] **In Alabama.**-219**Ala**24, 121 830.

595-57½-New. A statute providing for a motion to recover on a life policy is available to any person entitled to maintain an action at law. 152**Va**715, 148 **SE**811.

596-59 26 **OhA**287, 159**NE**486.

596-63 219**AppDiv**246, 219**NYS**152; 224 **AppDiv**301, 230**NYS**131.

597-85½-New. Beneficiary must tender back to insurer the amount received in a settlement agreement before seeking recovery under the original policy, notwithstanding that the action was in form for fraud and deceit. 245 **Mich**100, 222**NW**88.

597-92 See also 215**Ala**542, 112**S**110.

597-95 95**PaSuper**56.

597-99 152**Wash**272, 277**P**999(2dcase).

598-5 122**Kan**778, 253**P**559.

598-8 98**Misc**456, 163**NYS**56.

598-18 **TexCivA** 286**SW**330.

598-18½-New. Right of action accrues when inference of death becomes conclusive, 108**Conn**271, 142**A**891.

598-18¼-New. unless insurer acknowledges its liability to pay within six years before action. 108**Conn**271, 142 **A**891.

598-18¼-New. In some jurisdictions where presumption of death from unexplained absence is relied on, statute does not begin to run until expiration of seven year period. 250**Mich**185, 229 **NW**509.

598-18⅛-New. In some jurisdictions limitation does not begin to run until the expiration of the period which raises the presumption of death from absence. **TexCivA** 198**W(2d)**359 (where beneficiary made claim shortly after insured's disappearance but death was not shown with reasonable certainty).

600-44½-New. No cause of action accrues until proof of death can be made. 117**Tex**229, 18**W(2d)**256, 61**ALR**682.

600-46 117**Tex**229, 18**W(2d)**256, 61 **ALR**682; **TexCivA** 286**SW**330, 332 [quot CJ].

600-46½-New. That the jury find that insured died shortly after his disappearance does not affect the rule. 117 **Tex**229, 18**W(2d)**256, 61**ALR**682.

602-81½-New. It is no defense to an action on a policy, made and to be performed in Russia, that Russian decree prohibited transfer of rubles from Russia, 131**Misc**158, 226**NYS**92.

602-81½-New. or that insured never demanded payment in Russia, 131**Misc** 158, 226**NYS**92.

602-81¼-New. or that superior force intervened and prohibited insurer from performing in Russia. 131**Misc**158, 226 **NYS**92.

602-92 But see 39**GaA**373, 147**SE**157.

602-99 But see **Sask** [1928] 4**DomLR** 529.

603-1 165**WVa**215, 141**SE**880.

603-9 **MoA** 273**SW**201; 220**MoA**913, 296**SW**209.

603-18 [a] (3) One paying premiums expecting to receive benefit of insurance not entitled to sue, though rider authorizes payment to such person. 332 **Ill** 603, 164**NE**192. (4) Mother of deceased, not qualifying as administratrix, could sue, notwithstanding facility of payment clause, she being specifically named in rider. **MoA** 16**SW(2d)**712.

604-20 203 **Iowa**224, 212**NW**481; 38 **OklACR**405; **TexCivA** 28**W(2d)**500.

604-31 10**LaA**97, 120**S**537 (group policy); 24 **OhNPNS**849.

604-33 332 **Ill** 603, 164**NE**192.

604-35 [a] (2) Widow has no vested interest entitling her to enforce payment of policy. 24 **OhNPNS**849.

605-57 [a] **Where beneficiary has consented to hypothecation** of policy by insured for latter's benefit and died before insured right of action to recover from insured's estate, amount for which policy was hypothecated and which was deducted from amount payable under policy is on the heirs and not the personal representative of beneficiary. 117 **Okl** 148, 245**P**567.

606-71 218**Ala**616, 119**S**635.

607-89 [a] (1) 22 **OhA**129, 153**NE**345. (4) Complaint following code form is sufficient. 217**Ala**110, 115**S**12. (5) In form prescribed by statute. 220**Ala**314, 124**S**886. (6) Other instances. **TexCivA** 24**SW(2d)**774. [b] (2) Failure to allege policies contained provisions permitting insured to change beneficiary. 153**SC** 478, 151**SE**60. [d] **Complaint held not demurrable.**-219**Ala**79, 121**S**88 (under Code). [e] **Complaint is not subject to general demurrer** because it showed that no beneficiary was named in policy declared on and that plaintiff was neither executor nor administrator of decedent's estate. 37**GaA**22, 138**SE**589 (action by husband on policy issued to wife). [f] **Complaint, declaration, or petition held insufficient.**-38**GaA**501, 144**SE**326(1st case). [g] **Failure to plead facts** from which new contract to pay in event of insured's death could be inferred does not give use to waiver or estoppel on part of insurer. **MoA** 24**SW(2d)**1086.

607-90 [c] (3) Allegation that amount claimed is "due on policy," giving date of death, is not objectionable as not showing death within life of policy. 215 **Ala**542, 112**S**110; 217**Ala**431, 116**S**163. [d] **Motion** to recover on life policy is sufficient though no copy of policy is filed, where no request for bill of particulars is made. 152**Va**715, 148**SE**811.

607-95½-New. Where life policy was attached to complaint, it was unnecessary to plead incontestable clause. 14 **F(2d)**27.

608-97 130 **Okl** 118, 265**P**642; **TexCivA** 158**W(2d)**97. See also 157**SC**469, 154**SE** 855.

608-3½-New. In an action on a policy issued under contract of group insurance covering the lives of employees, a petition need not negative the giving by the employer of notice to terminate the insurance. 37**GaA**500, 140**SE**784.

608-4 22 **OhA**129, 153**NE**345.

608-5 215**Ala**179, 110**S**291.

608-8 12**LaA**84, 124**S**533.

608-9 22 **OhA**129, 153**NE**345.

608-10 122**Kan**778, 253**P**559.

609-17 [b] **Ratification of unauthorized delivery.** 33**GaA**642, 127**SE**892.

609-20 24**F(2d)**694.

609-24 31**F(2d)**715.

610-35 [c] **Construction of allegation.**-"Applied for at instance of" held equivalent to "procured by." 225**AppDiv**642, 234**NYS**250.

610-37 [c] **Specific denials.**-Where complaint alleged that insured fulfilled all conditions of policy, insurer's answer properly made specific denial thereof limiting by implication more general terms of general denial. 108**Conn**163, 142**A**808.

610-38½-New. An allegation in a petition of payment of premiums is not put in issue without an allegation that the policy has lapsed. 117**Nebr**685, 222 **NW**332.

610-40 [a] 216**Ala**537, 113**S**615. (2) Other instances. **AlaA** 130**S**520. [b] **Plea held sufficient.**-219**Ky**549, 293**SW** 1061.

610-41 243 **Ill**A109. [a] (2) Failure to aver intent to deceive or increased risk of loss. 220**Ala**314, 124**S**886. (3) Plea not alleging fraud as required by incontestable clause insufficient. **Ala** 130**S** 402. [c] **Answer alleging false statements** as to health, but not using word "fraud" held sufficient. 310**Mo** 378, 276 **SW**877. [d] **Answer alleging that policy was induced by false statements in application** held to state valid defense though application was not part of policy. 219**Ky**549, 293**SW**1061. [e] **Sufficiency of plea.**-219**Ala**197, 121**S**714; **MoA** 282**SW**454

610-42 [a] (2) Defense that policy had lapsed and became automatically paid up for reduced amount for failure to pay premiums and exercise option after default is sufficiently pleaded by allegation of noncompliance with conditions as to payment of premiums. 132**SC**10, 129 **SE**84.

610-42½-New. that beneficiary was estopped from asserting that assignment was pledge; 14**F(2d)**362.

610-48 213**Ala**286, 104**S**643.

611-49 [a] **Plea that plaintiff, in proof of loss, falsely represented that she had**

no deceased brother, held without merit. 214Ala447, 108S40.

611-49½-New. Insurer's defense of accord and satisfaction held sufficient. 129 Misc365, 221NYS357.

611-49½-New. Plea of surrender of a policy for cash value held demurrable where consent of beneficiary therein was not alleged. 92Fla237, 109S421.

611-49¼-New. Sustaining demurrer to a plea of failure to present a health certificate on renewal of a policy, has been held error. 219Ala600, 122S807.

611-49½-New. To plead fraud in procurement of the policy, insurer must allege that false statements were made with intent to defraud, that they related to matters material to the risk, and that insurer relied on them. 23AlaA205, 123S94(2dcase).

611-49½-New. A plea that the policy sued on was a wagering contract held insufficient for failure to negative plaintiff's insurable interest in the life of insured. 220Ala314, 124S886.

611-51 81Colo 66, 255P452; 225App Div642, 234NYS250; TexCivA 68SW(2d) 195, 197 [citCJ].

611-52 81Colo 66, 255P452.

611-54 TexCivA 68SW(2d)195.

611-60 225AppDiv642, 234NYS250. See also 133Misc106, 231NYS161.

611-60½-New. Insurer denying liability for death resulting from abortion need not deny that abortion was necessary within exception of constitution and by-laws. 81Colo 66, 255P452.

611-65 [a] (2) Allegation that company waived proof of death because agent said company would not pay held insufficient, on demurrer, for failure to allege also that agent was acting within scope of his authority. 216Ala554, 114S45. (3) Allegation of waiver of proof of death by failure to furnish blanks therefor "within reasonable time" held insufficient as conclusion. 216Ala 554, 114S45. (4) Replication to pleas, alleging lapse of life policy through nonpayment of premiums, which failed to allege reinstatement is subject to demurrer. Ala 127S840. [b] **Replication held sufficient.**-Replication that agreements or false statements alleged in defendant's pleas were not incorporated in policy sued on held good. 214Ala 447, 108S40.

611-66 [b] (2) Allegation that company waived proof of loss for failure to furnish banks therefor held insufficient, on demurrer, for failure to plead duty to do so as provided in policy. 216Ala 554, 114S45. (3) Other instances. 156 Md684, 145A182. [c] **Replication necessary.-TexCivA** 281SW233.

611-68 Ala 129S466.

611-68½-New. Insurer, being bound by the findings in a death action, plaintiff cannot make denials in replication inconsistent with such findings. 156Md 684, 145A182.

611-70 [b] (2) Issue as to death by suicide is not raised where pleadings expressly concede such fact but raise issue as to existence of facts in avoidance of defense. 214Ky754, 284SW403.

612-78 [a] (3) Delivery of policy. 237 IllA95.

612-84 259Mass573, 156NE721. [a] (2) Other evidence admissible. 214Ala 447, 108S40; 173Ark424, 292SW380. [b] (5) Other instances. 256 IllA345.

613-92½-New. Under plea of nonpayment of premiums, defendant is entitled to invoke and apply express provisions of policy, not working forfeiture, that policy shall become automatically paid up for reduced amount upon failure to exercise option after default. 132 SC10, 129SE84.

613-92½-New. Where there is a general allegation of performance of the conditions of the insurance contract, proof of waiver of conditions may be made. IndA 148NE505.

613-92¼-New. Where suit is defended on the ground of breach of warranty by insured of sound health and freedom from consumption, plaintiff may show under a general denial that insured was not afflicted with consumption. Tex CivA 281SW233.

613-97½-New. Plaintiff testifying that he was insured's grandson did not defeat his right of action as beneficiary on a life policy which recited that the beneficiary was insured's nephew, where insurer's answer admitted that plaintiff was the beneficiary, and insurer treated him throughout as the beneficiary, and did not show by evidence that there were two persons by the same name. 178Ark466, 10SW(2d)910.

613-5½-New. In an action by the administrator of insured on a policy making the proceeds payable to a creditor of insured to the extent of the indebtedness and the balance to insured's representatives or assigns, the burden was on the administrator to prove absence of the indebtedness. 177Ark737, 7SW (2d)778.

613-6 298Pa322, 148A471. [a] (3) Burden is on party claiming as substituted beneficiary to establish valid change of beneficiaries under terms of policy during insured's life. 262Mass174, 159NE 520.

613-12 216Ala562, 114S132, 134 [citCJ]. [a] (3) Defendant has burden of proving insured's election to withdraw accumulated dividends or authoritative waiver by it of terms essential for such election. 216Ala562, 114S132. (4) Other illustrations. 173Ark903, 294SW 14. [b] **In action on employees' group policy** burden is on defendant to prove that insured employee had been discharged. 155Md210, 141A547.

614-28 220Ala314, 124S886.

615-29 237 IllA95.

615-32 181Ark1, 24SW(2d)878.

615-37½-New. Policy in evidence is presumed executed by insurer in absence of sworn plea of non est factum. 215Ala349, 110S571.

615-40 15F(2d)646. [c] **Collusion presumed** between local examiner and applicant where examiner writes out applicant's false answer to question, knowing falsity, and forward application to insurer. 316Mo1292, 295SW571.

615-42 175Ark359, 299SW366; 133 Okl 256, 271P1037; 287Pa128, 134A474.

615-43 243 IllA109; 21 OhA308, 153NE 131; 93PaSuper314; TexCivA 8SW(2d) 291; 192Wis102, 212NW269. See also 134Misc357, 235NYS726. [a] (1) 171 Ark135, 284SW4. (3) Company has burden of showing material change in health of applicant between date of application and issuance of policy. 8F(2d) 285. (4) That sickness when making application contributed to death. MoA 30SW(2d)190.

615-44 214Ala373, 108S5.

615-46 101CalA625, 281P1054; 21 OhA 308, 153NE131.

615-49 21 OhA308, 153NE131.

615-50 89CalA653, 265P357; 21 OhA 308, 153NE131.

615-52 MoA 22SW(2d)88.

615-52½-New. Implication is that there is no intention on part of insurer to waive personal fraud of insured and provision waiving fraud is invalid. 36F (2d)634.

616-61 [a] (4) Burden is on plaintiff to show waiver of express provision in policy that all renewal premiums were due at company's home office. IndA 148NE 505. (5) Binding effect of binder receipt. 26F(2d)499.

616-62 [a] (3) Insurer has burden of proving facts avoiding binding receipt for first premium. 26F(2d)499.

616-67 8F(2d)285; Ala 129S466; 176 Ark666, 4SW(2d)25; TexCivA 31SW (2d)865.

617-69 241 IllA55.

617-70 150Va548, 143SE705.

617-72½-New. While under the pleadings the duty of specific proof that insured was not in sound health at the date of the policies rested on defendant insurer, plaintiff must so rebut and overbalance defendant's evidence as to establish by preponderance of evidence that insured was in sound health. 108 Conn163, 142A808.

617-72½-New. Failure to make a medical examination raises a presumption of waiver of the provision as to health. 7LaA626.

617-76 IndA 148NE505. [a] (3) Policy and proof of death make prima facie case. MoA 276SW87.

617-79½-New. A beneficiary claiming that insured was wholly and permanently disabled so as to be excused from payment of premium under the policy has the burden of proving such fact. 203 Iowa741, 211NW222, 51ALR1035.

617-83 215Ala349, 110S571.

617-88 215Ala349, 110S571; 203 Iowa 555, 213NW247; MoA 22SW(2d)178(2d case); 134SC435, 132SE828. See also TexCivA 21SW(2d)45.

617-90 17F(2d)889; 42F(2d)399; 42F (2d)997; 160La854, 107S599.

618-93 160La854, 107S599; TexCivA 295SW628. [b] **Death certificate** made prima facie evidence of cause of death does not relieve insurer of burden of showing that death resulted from excepted cause. MoA 28SW(2d)125.

618-95 9LaA371, 119S281. [c] **Burden after proof.**-31F(2d)280.

618-4 But see MoA 22SW(2d)178(2d case).

618-4½-New. A provision of a policy that absence for any length of time shall not be sufficient evidence of death is unenforceable as in conflict with the statutory presumption. 117Tex229, 1 SW(2d)256, 61ALR682.

618-4½-New. In Connecticut a statute providing that any person absent and unheard of for seven years shall be presumed dead for the purpose of administration of his estate does not apply in determining the death of insured who disappeared. 108Conn271, 142A891.

618-4¼-New. Determination of presumption of death of insured disappearing is governed by a rule of the common law. 108Conn271, 142A891.

618-6 8F(2d)680; 13F(2d)765; 13F (2d)820; 16F(2d)243; 17F(2d)42; 17F (2d)889; 22F(2d)528; 42F(2d)399; Ala 128S383; 23AlaA205, 123S94(2dcase); Ariz 286P817; 175Ark1094, 2SW(2d)80; 178Ark543, 11SW(2d)453; 203 Iowa960, 211NW238; 160La529, 107S395; 160La 854, 863, 107S599 [citCJ]; 129 Okl 292, 264P827; 5PaDist&Co 25; TexCommnA 29SW(2d)944; TexCivA 283SW910; Tex CivA 29SW(2d)940; 62 OntL83, [1928] 2DomLR449. See also 261Mass121, 158 NE350.

619-7 13F(2d)765; 13F(2d)820; 17F (2d)42; 22F(2d)99; 32F(2d)567; 39F (2d)376; Ariz 286P817; 175Ark1094, 2 SW(2d)80; 176Ark879, 4SW(2d)536; 203 Iowa960, 211NW238; 208 Iowa246, 225NW242; 226Ky724, 11SW(2d)913; 160La529, 107S395; 160La854, 863, 107 S599 [citCJ]; 261Mass121, 158NE350; 129 Okl 292, 264P827; 5PaDist&Co 25; 134SC435, 132SE828; TexCivA 283SW 910; TexCivA 29SW(2d)940. See also 178Ark543, 11SW(2d)453.

619-8 251 IllA1, 24 [citCJ]; 129 Okl 292, 264P827.

619-8½-New. Presumption against suicide exists even if circumstances point with certainty to death by deceased's own hand. 160La854, 107S599.

619-8⅓-New. If deceased has some strong motive for suicide, inference is that he killed himself intentionally. 160 La854, 107S599.

619-10 17F(2d)889; 22F(2d)99; 160 La854, 107S599; 129 Okl 292, 264P827; Can [1929] 1DomLR328.

619-11 8F(2d)680; 16F(2d)243.

619-16 129 Okl 292, 264P827.

620-28 40GaA30, 148SE666; 131 Okl 258, 268P729.

620-37 [a] (4) Other evidence admissible. 134SC435, 132SE828; TexCivA 288 SW271. (5) Testimony bearing on waiver of forfeiture of policy. MoA 277SW973. (6) Other illustrations. 157SC469, 154 SE855. [b] (6) Statements of defendant's district deputy head consul that insured could recover if killed in prohibited occupation, if he paid dues and was not expelled after changing to prohibited occupation. 218MoA10, 260SW552. (7) Testimony of insurer's medical examiner as to exercising more care in passing on application for type of insurance carried by deceased. TexCivA 297SW 1083. (8) Testimony in reference to previous policy. 159Tenn328, 17SW(2d) 923. (9) To show office to which first application was made was distinct from office where second application was made. MoA 6SW(2d)72. (10) As to method of changing beneficiary. 11LaA 276, 123S379. (11) Other evidence in-

admissible. [illegible] Mass127, 154NE668; 218 Mass369, 28NE(2d)733; 124NE435, 127NE 828. (12) Statements made by insured's relatives other than beneficiary regarding insured's epileptic condition. [illegible] Minn205, 231NW824. (13) Other instances. 41F(2d)800; 41F(2d)[illegible]

621 38 [a] (3) In general. Ala. 1[illegible] 246. [b] (1) [illegible] Mo 9[illegible] 8SW(2d)[illegible]

621 39 [a] (1) 178Ark434, 292SW330.

621 42 [a] (2) Other evidence admissible. 178Ark434, 292SW330.

621 44 [illegible] 41F(2d)207.

621 46 [a] (3) Where application was not signed by insured, it was not error to exclude it as evidence of misrepresentations. 38F(2d)741.

621 50 [a] Permitting medical examiner to state that, though he did not know what general practice was, that he did know that he himself in such case would follow up disclosures and report results to insurance company, was not error. [illegible]

621 50½-New. Evidence as to the fee of an examining physician is not relevant to prove that he did not make full medical examination. 258Mass249, 154NE[illegible]

621 52 [illegible] 139Ohl139, 23[illegible]

622 52 240Mich317, 228NW770.

622 61 [a] (1) Hospital record. [illegible] 110A[illegible] (2) Application though not made part of contract. Ala. [illegible] [d] Misrepresentation regarding health other than written application is inadmissible. IaA 1[illegible]561.

622 64 [a] (4) Testimony that agents for insurer collected insurance held admissible to rebut defense of misrepresentation. TexCivA [illegible]

622 68 [illegible] [a] (5) That insured worked in blacksmith shop till shortly before death, to rebut contention of unsound health when policy was delivered. 217Ala110, 115SE[illegible]. [b] (1) 211Ala447, 108SE40; 212Ky768, 280SW 123. (4) Testimony regarding insured's health and reason why she worked out of doors. Vt 143A484.

624 72 [b] Evidence that insured falsely denied pregnancy is inadmissible where application was not attached to policy. TexCivA 218SW(2d)854.

624 77½-New. Under some statutes insured's statement to the medical examiner cannot be offered in evidence to bar recovery on the policy until insurer shows they were false and fraudulent. 21OhA308, 153NE131.

624 77½-New. Evidence of insured's good character may be relevant on the defense of fraud in obtaining the policy. 200Ga609, 147SE[illegible].

624 78 178Ark233, 28SW(2d)16 (agent).

625 66 TexCivA 202SW200.

625 90½-New. Where beneficiary claimed insurer would have issued policy notwithstanding misrepresentations, chief medical examiner of insurer may testify that in passing on answers of insured showing the actual facts he would have rejected the application. TexCivA [illegible] 8SW248.

625 94½-New. Insured's medical director, where insurer defends on the ground that insured had a disease of the urinary organs, may testify as to whether insurer, in issuing the policy, relied on the statements in the applications that insured had not had such diseases, or similar answers. 220Ky621, 11 8SW(2d)434.

625 [illegible]-New. Testimony of a physician attending insured prior to her death, as to insured's condition and as to whether she was infected with a disease of her urinary organs is admissible where insurer pleads such facts in defense. [illegible] Ky621, 11SW(2d)434.

625 2 [illegible] 11SW(2d)434. TexCivA 11SW(2d)[illegible]

625 [illegible] Ala. [illegible]

626 11 [illegible] Ark313, 28SW(2d)[illegible] [illegible] Pa[illegible] 131A[illegible]

626 13 [illegible] Pa115, 115A[illegible]

627 24½ New. The validity of a representation by insured in procuring the policy may be proved by admissions of the beneficiary suing on the policy. [illegible] Mich396, 217NW[illegible]

627 24½ New. Statements in a wife's sworn bill for divorce as to her husband's intemperance are admissible in an action by her on a policy of insurance on his life to show falsity of statements made in the application. 241 Mich306, 217NW[illegible].

627 27 [b] In Kentucky. [illegible] Ky549, 293SW1061. (3) 224Ky405, 6SW(2d) 447. [c] In Missouri. 220MoA[illegible], 296 SW209.

627 28½-New. [illegible] or to show policy was fraudulently procured. 85GaA1, 188 [illegible]

628 38 MoA 282SW454.

628 38 OhLA 2[illegible]207.

628 37½-New. General custom to issue policies to applicants in good health regardless of having received medical treatment within five years is properly excluded where facts proved showed no relation of insured's condition to the purported custom. TexCivA 275SW [illegible]

628 43 [d] Evidence that insured was habitual drunkard, where sole issue was whether he was drunk at time of death. 211Ky[illegible]50, 282SW1079.

629 44 [a] Other instances. NC 154 [illegible]

629 49 [illegible]GaA1, [illegible]

630 58½-New. Evidence of notices sent by insurer covering February premium is admissible to prove payment of preceding October premium. [illegible] [illegible]SW[illegible]

630 52½-New. Testimony of agents' custom to take notes for premiums is inadmissible. 80GaA490, 147SE[illegible]

630 54 [b] (8) Where company admits fact of death, all evidence thereof be comes irrelevant. IdaA[illegible] 1[illegible]

630 55 [illegible]F(2d)[illegible]

630 56 [a] (3) Other instances. TexCivA 278SW(2d)[illegible]. (4) As to whether death was result from emphysema. TexCivA 8[illegible]SW(2d)[illegible]

630 60 [illegible] Appellant. [illegible] TexCivA 8SW(2d)[illegible]. But see 103 Conn[illegible]. [illegible] But see 243 IllA109.

630 68 290Ky[illegible]; 1[illegible]SW(2d)[illegible]; 160 IaN[illegible]; 8[illegible]; 107SW[illegible]. [quoted] Tex CivA 2[illegible]SW(2d)[illegible]. [a] 178Ark[illegible]; 4 8SW(2d)[illegible]; 90Fl[illegible]; 107SW[illegible]; 160IaN 520, 107SW[illegible]. [b] 103Conn[illegible]; 1[illegible] 370, 43ALR1450. [g] Evidence held admissible. 90Fl[illegible]; 107SW[illegible]; 160IaN[illegible]; 107SW[illegible]; 160IaN[illegible]; 107SW[illegible]

631 69 Ala 1[illegible]; 90Fl[illegible]; 107SW[illegible]; 85GaA770; 184SE[illegible]. [a] (3) That policy was issued only after considerable solicitation and insistence on part of company's representative. TexCivA 218SW(2d)[illegible]

631 70 [illegible] (2d)[illegible]; 27OhLA110, 262F 380; 90Fl[illegible]; 107SW[illegible]; 203IowaN[illegible]; 211NW[illegible]; 160IaN[illegible]; 107SW[illegible]. [a] (7) Other evidence held admissible. 160IaN[illegible]; 107SW[illegible]. [b] (1) 160IaN[illegible]; 107SW[illegible]. (3) Where defendant introduces evidence of large indebtedness, plaintiff may, in rebuttal thereof, introduce letters showing indebtedness not due or pressing. 189F(2d)[illegible]. [c] Evidence admissible to show absence of motive for suicide. 90Fl[illegible]; 107SW[illegible]; 160IaN[illegible]; 107SW[illegible]. [d] Motive or lack of motive held jury's question of suicide. 160IaN[illegible]; 107SW[illegible].

631 73 85GaA770; 184SE[illegible]; 160IaN [illegible]; 107SW[illegible].

632 82 2[illegible]F(2d)[illegible]; 218Ala[illegible]; 104S [illegible]; 218Ala[illegible]; 118SE[illegible]; 617 [illegible] [illegible]; 220Ky[illegible]; 11SW(2d)[illegible]

632 87½-New. Testimony as to source of hearsay statements not proposed to be traced to beneficiary is properly excluded. 180Minn[illegible]; 230NW[illegible].

632 88 218Ala[illegible]; 118SE[illegible]; 617 [illegible] [illegible]; 85GaA770; 184SE[illegible].

632 89 218Ala[illegible]; 118SE[illegible]; 617 [illegible] [illegible]; 81Cola[illegible]; 200P[illegible]; MoA 274SW [illegible]. [a] 180Minn[illegible]; 231NW[illegible].

632 90 81Cola[illegible]; 200P[illegible].

632 94 But see 85GaA770; 184SE[illegible].

632 97 218Ala[illegible]; 118SE[illegible]; 617 [illegible] [illegible]. [b] Facts stated on hearsay are not to be considered proof of such facts. 180Minn[illegible]; 230NW[illegible].

632 98 120OhS[illegible]; 2[illegible]; 80Pa Superior[illegible].

633 6 160IaN[illegible] 203 [illegible] 107SW[illegible] [quoted] [illegible]

633 7 85GaA770, 184SE[illegible]. 203IowaN [illegible] 211NW[illegible]; 8[illegible] [illegible]. 160IaN [illegible] 107SW[illegible]. [quoted] [illegible]; TexCivA 8SW [illegible]. 107 [illegible]

634 8 150IaN770, 184SE[illegible]; 160IaN [illegible] 107SW[illegible]. But see 28F(2d)[illegible].

634 11 [e] Certified copy of coroner's certificate, under statute, is admissible to show cause of death. 28F(2d)[illegible].

634 13 160IaN[illegible]. [illegible] 107SW[illegible]. [illegible]

634 15 IndA 1[illegible]N[illegible]; [a] (1) 174 Ark[illegible]; 70SW[illegible]; 84ALR[illegible]; 40GaA 30, 11[illegible]; Mass 1[illegible]; 130Mo 165, 13[illegible]. (6) That general agents were authorized to accept notes for first life insurance premium. [illegible] 257 SW[illegible]. (7) To support finding that insured's attempted change of beneficiary was void for want of mental capacity. 178Ark181, 2[illegible]SW1[illegible]. (8) To sustain finding that policies were unconditionally delivered. [illegible]Ala110, 2[illegible] 136. (9) To show plaintiff was widow of insured. 160Ark[illegible]; 2[illegible]SW(2d)[illegible]. (10) To support finding that deceased employee at time of death was not employed by employer taking out policy. TexCivA 2[illegible]SW(2d)[illegible]. (11) Other findings. 150Ark[illegible]; 218SW(2d)[illegible]. [b] (1) [illegible]Mich[illegible]; 205NW[illegible]. (6) To show that payment made by company was part payment, and that company promised to pay balance. [illegible]Mich[illegible]; 205NW[illegible]. (8) To show that insured was required to sign application for instalment without consideration. [illegible] Mass[illegible]; 1[illegible]N[illegible]. (7) To show total disability of employee. TexCivA [illegible] SW(2d)[illegible]. (8) Other findings. Mass 1[illegible]N[illegible]. [d] To show that policy on life of officer of corporation was taken out for general benefit and use of corporation. 201IowaN[illegible]; 207NW[illegible]

635 16 [d] Evidence held insufficient to show that beneficiary had no insurable interest. 111aA[illegible]; 1[illegible]

635 17 111aA[illegible]; 1[illegible]. [a] (1) TexCommnA 18SW(2d)[illegible]. (6) To show that insured did not have sufficient mental capacity to change beneficiary. 150Ark[illegible]; 5SW(2d)[illegible]. [b] (1) 262 Mass[illegible]; 150NE[illegible]. (3) To show policy on life covered services only on lifting beneficiary to entire proceeds. [illegible]Mo 9[illegible]; 2SW(2d)[illegible].

635 18 [a] (1) 178Ark[illegible]; 6SW(2d) [illegible]. (3) To sustain finding that assignment to sister was in consideration of money previously borrowed from her. 190Cal497, 2[illegible]. (7) Change of beneficiary from wife to sister to whom he was indebted and delivery of policy so changed to sister held effectual transfer. 186Cal497, 2[illegible]. [b] (6) To show one in possession of policy is assignee thereof. 20[illegible]; 11aA [illegible]. [c] (1) [illegible]; 150Ark[illegible].

635 19 [a] (3) Other instances. 181 Ark[illegible]; 2[illegible]SW(2d)[illegible]. [c] Evidence held insufficient. 160IaN[illegible]; 107SW[illegible]; 11[illegible]; 1[illegible].

635 21 MoA [illegible]SW201; MoA 2[illegible]SW [illegible]. [a] (6) Other instances. 243 IllA109.

635 24 [a] (1) 256GaA360, 123SE[illegible]. (6) To show designation of beneficiary was procured by undue influence. [illegible] Minn231, 205NW[illegible]. (7) To show that application was physically attached to policy. 2[illegible]AlaA[illegible]; 1[illegible] (2dcase). (8) To show that policy was wagering contract where assigned to one having no insurable interest several months after issuance. 150Ark170, 2[illegible]SW(2d) 414. (9) Other instances. NJCh [illegible] 664. [d] Intention of insurer to modify provision held not shown by agent's conversation with insured's wife. Utah 200P[illegible].

636 25 [a] (1) 150Ark[illegible], 18SW(2d) [illegible]; 256GaA[illegible], 123SE111, 256GaA[illegible], 1[illegible]; 2[illegible]. [b] (1) 181 (2d) [illegible]. [d] Cancel. shown by proof of operation held conclusive of its existence for several months. 181 (2d) [illegible]

636 27 [illegible] (2d)214. [a] (1) 218Ala [illegible]; (2) To prevent recovery after policy lapsed for failure to pay premiums. 2[illegible]AppDiv[illegible]; 211NY[illegible]. (3) To show material misrepresentation authorizing rescission and cancellation of policy. 136Misc[illegible]; 240NY[illegible]. [b]

(5) Where, in application for reinstatement of lapsed policy, statement as to not being treated by doctor since date of application has been held to mean application for new policy and not original policy. 17F(2d)450. (6) To require finding that insured made false answers with intent to defraud. 172 Minn341, 215NW429. (7) Other instances. 181Ark213, 258W(2d)10.

636-28 [a] (1) 40F(2d)687; 212Ky 763, 280SW123; TexCivA 29SW(2d) 795(2dcase); 192Wis102, 212NW269. (2) 217Ala431, 116S163; 101CalA625, 281P1054; 34GaA242, 129SE113; IndA 148NE501. (5) To show that false statements in application were made with actual intent to deceive. 192Wis 102, 212NW269. (6) To show that false statements in application increased risk and contributed to loss. 192Wis102, 212NW269. (7) To show good health at time policy was delivered. 176Ark361, 3SW(2d)46. (8) To show that misrepresentations were not material to risk. TexCivA 297SW1083. (9) To sustain finding that insured at time of application and delivery of policy was in good health. SC 148SE179; TexCivA 10SW(2d)267. (10) To show materiality of matters concealed. 33 F(2d)827. (11) To show insured was in sound health when application was made and policy delivered. IndA 171 NE212. (12) To sustain findings insured was in good health when application signed and in sound health when policy delivered. 130Kan117, 285P580. (13) To justify finding that insured was not suffering from angina pectoris at time of application for reinstatement of policy. 33F(2d)72. (14) To establish prima facie case as to good health of insured. 11LaA276, 123S379. [b] (1) 15F(2d)646; Ala 129S466; 170Ark 1193, 282SW999; 176Ark361, 3SW(2d) 46; 34GaA301, 129SE307 (withholding information); 93PaSuper314; TexCivA 293SW250. See also AlaA 130S520. (2) TexCivA 297SW1083. (3) To support finding that statements in application were true. TexCivA 281SW891. (4) To require finding that at time of application insured had cancer. 172Minn341, 215NW429. (5) To support finding that insurer relied on false representations in application. 91CalA222, 266P 996. [f] (2) Proof of examining physician's discovery of goiter would not necessarily show that he knew that it was exophthalmic so as conclusively to prove that failure to report it was collusion with applicant who knew and concealed its character. 316Mo 1292, 295SW571. (3) Evidence sufficient to show conspiracy between insured and insurer's local examining physician. 316Mo 1292, 295SW571.

637-29 [b] (3) To rebut plaintiff's proof as to insured's age. 11LaA276, 123S379.

637-33 [a] (1) 42F(2d)651; 37GaA 678, 141SE500; 37GaA704, 141SE498; 96PaSuper415; 200Wis94, 227NW251. (6) Evidence held sufficient to show unusual answers as to previous health were made knowingly false with intent to deceive. 214Ala4, 106S335. (7) Other instances. 136Misc394, 240NYS56. [b] (1) 172Minn341, 215NW429; 134 Misc357, 235NYS726. (3) Evidence merely of undisclosed treatment for influenza, without proof of resulting lung affection, held not sufficient to show material concealment. 128Misc 703, 219NYS756. (4) To show fraudulent concealment as to past illness. 175Ark359, 299SW366. (5) To show false representation in application in reference to previous illness. Iowa 232 NW140. [c] **Proof of loss** is only prima facie evidence of intentional false answers. 297Pa418, 147A76. [f] **Testimony that deceased had enlarged prostate** and heart does not show treatment for "disease" or "heart trouble." 138Misc293, 245NYS354.

638-37½-New. Unimpeached evidence of fraud should not be discarded merely because of evidence of insured's previous good character. 39GaA609, 147SE901.

638-37½-New. In a suit defended on the ground that insured made false representations as to his health, proofs submitted by plaintiff are competent evidence against him. 134Misc640, 236 NYS300.

638-39 [a] (3) To show that illness of insured did not begin till after delivery of policy and did not prevent risk from attaching. 220Ala314, 124S886. [b] (3) As to consultation with physician. 86IndA326, 157NE448.

638-40 [a] (1) 224AppDiv301, 230 NYS131. (6) To sustain finding that insured was in sound health at date of policies. 108Conn163, 142A808. [b] (2) To show termination of employment of decedent under group insurance policy. 40GaA740, 151SE540.

638-41 36F(2d)171 (facts and circumstances should all point one way and be inconsistent with any reasonable hypothesis other than payment). [a] (1) TexCivA 272SW346. (2) Evidence held to justify jury in finding that premium was not paid. 165Minn186, 206NW162. (3) That assessment was called by authority of board of directors. 170Ark 745, 281SW354. (4) Evidence held to support finding of jury that premium was paid. 241Mich396, 217NW62. (5) To show payment generally. MoA 276 SW87. [b] (4) To sustain finding that last assessment was paid. 170Ark745, 281SW354. (5) To show payment of premiums sufficient in number to extend insurance beyond date of insured's death. 231Ky591, 21SW(2d)985, 66 ALR1526.

638-42 [b] **Evidence held insufficient.**-203 Iowa741, 211NW222, 51ALR1035.

639-44½-New. or whether conditions to reinstatement of a lapsed policy, mailed after receiving a past-due premium, were communicated to, or accepted by, insured. [a] **Evidence held sufficient.**-225Ky472, 9SW(2d)206.

639-45 [c] **Evidence held insufficient** to show proof of notice of death. 180 Ark877, 23SW(2d)268.

639-46 [a] (3) Testimony that examining doctor reported applicant as good risk shows that doctor waived his poor physical condition. 150SC326, 148SE 179. (4) To sustain finding of waiver of delinquency clause. MoA 290SW88. [b] (3) To show knowledge of insurer. MoA 68SW(2d)72. [c] **Circumstances indicating election by insured to waive forfeitures** will be liberally construed. 196NC139, 144SE689.

639-47 [a] (1) IndA 171NE212. (6) To show any false statements in application for policy were inserted by insurer's agent. IndA 171NE212. [b] (3) To show waiver of condition against other policies or knowledge by company officers. 38GaA590, 144SE682.

639-48 [a] (6) To show waiver of right to have policy regarded as effective for want of timely payment of first premium. 145Wash489, 261P106. [b] (4) Other illustrations of insufficient evidence. 49ND619, 193NW48. (5) Insurer's notice as to premiums held not evidence of ratification of transaction by agent for payment of premium by crediting his account. 193NC481, 137 SE422. (6) To show waiver of requirement as to payment of first premium before policy becomes effective. 13F(2d) 824. (7) To show waiver of condition requiring delivery of policy and payment of first premium during lifetime of insured. 177Minn273, 225NW81. (8) To constitute evidence of waiver of subsequent right to claim forfeiture for nonpayment of premium note. 26 F(2d)580.

639-48½-New. Conduct of insured not a waiver of right to insist company estopped to claim cancellation, being no evidence insured knew of such right. 131SC403, 127SE836.

639-49 [a] (3) To justify inference of waiver of furnishing proof of death. MoA 3SW(2d)269. [b] **Evidence held insufficient** that insured gave notice within ten days of commencement of disability. 176Ark233, 3SW(2d)16.

639-52 [b] (1) Ont [1927] 3DomLR 412. (5) Production of insured at trial rebuts presumption of death after seven years. 22F(2d)717. [d] **Time of death.**-37GaA206, 139SE363.

639-53 [a] (6) Cancer dating from period before date of policy. TexCivA 11 SW(2d)364. (7) "External, violent and accidental means." TexCivA 19SW(2d) 434. [c] **Mere proof insured was shot** has been held insufficient to show accidental death. 42F(2d)399.

640-56 [a] (1) 12LaA159, 125S152(1st case). [b] (1) 9LaA371, 119S281. (3) To show that insured's death was caused by constitutional disease. 40 GaA30, 148SE666. (4) To show death caused by syphilis antedating issuing policy. TexCivA 295SW628.

640-60 [a] (1) TexCivA 15SW(2d)97.

640-60½-New. In suit on policy containing double indemnity claim in case of death by accident excluding specified event beneficiary is not entitled to double indemnity where evidence is equally consistent with theory that death was caused by such specified event. Sask [1925] 3DomLR720.

640-62 [a] (3) To comply with requirement for proof of death, though insured's body has not been discovered. 31ObA216, 167NE471. (4) To show that death was effected exclusively and wholly by "external, violent and accidental means." TexCivA 19SW(2d) 434.

640-63 217Ala110, 115S12.

640-65 16F(2d)243; 23AlaA205, 123S 94(2dcase); 176Ark879, 48W(2d)536; 87CalA440, 262P380, 387 [quotCJ]; 251 IllA1, 24 [citCJ]; TexCivA 288SW270; TexCivA 28SW(2d)902 [quotCJ]; Ont [1927] 3DomLR89. [a] (1) 17F(2d) 42; 29F(2d)966 [certiorari den 279US 854, 49SCt350(11thcase), 73Led996]; 39F(2d)376; 90Fla1, 107S441; 203 Iowa960, 211NW238; TexCivA 283SW 910; TexCivA 21SW(2d)1071. (2) 203 Iowa960, 211NW238; 160La629, 107S 395. (3) Other evidence held insufficient. 160La854, 107S599. [d] **Evidence held sufficient.**-(1) 175Ark1094, 2SW(2d)80; 160La854, 107S599.

641-67 16F(2d)243; 23AlaA205, 123S 94(2dcase); 160La854, 107S559. [a] 251 IllA1, 24 [citCJ]; 62OntLR83, [1928] 2DomLR449. [b] **Burden of proof is not sustained** by proof of motive with circumstances probably indicating suicide if there is equal probability that death was accidental. 17 F(2d)42.

641-68 17F(2d)42; 22F(2d)99; 35 F(2d)705; 23AlaA205, 123S94(2dcase); Ariz 286P817; 175Ark523, 299SW743; 87CalA440, 262P380; 35GaA770, 134SE 639; 203Iowa960, 211NW238; 160La 529, 107S395; 160La854, 107S599 [cit CJ]; 281Mass121, 158NE350. But see TexCivA 28SW(2d)902.

641-68½-New. All the circumstances should be considered. 160La529, 107S 395.

641-69½-New. Declaration of intent to take life and previous attempts at suicide must be established unequivocally and with reasonable certainty. 160La 854, 107S599.

641-70 [a] (1) 23AlaA205, 123S94(2d case). [b] (1) 16F(2d)243. [c] **Verdict negativing suicide must be based on reasonable theory** deducible from evidence. Ariz 286P817.

642-87 41F(2d)600 (construction of policy).

642-89 [a] (3) What constitutes total disability within meaning of policy. 214Ala166, 106S689. (4) Whether employer paid premium by mistake after employee left employment or with intent to continue insurance. 223Ky505, 3SW(2d)1093.

642-91 209Ky771, 273SW469; 221Ky 821, 299SW964; NC 154SE743; 157SC 469, 154SE855. [a] (5) 239Mich92, 214NW308. (14) Whether insured met death while engaged in violation of law. 214Ky156, 282SW1072. (15) Whether constitution contained provision limiting liability at time certificate issued. TexCivA 289SW93. (16) As to change of beneficiary. TexCommnA 18SW(2d) 583; TexCivA 294SW923. (17) As to nature of applicant's disease at time of application. MoA 276SW87. (18) Whether employee insured under group policy had been discharged. 165Md210, 141A547. [b] (1) 231Ky275, 21SW(2d) 289. (3) Whether employee became disabled during employment held for jury. 223Ky505, 3SW(2d)1093.

643-92 180Ark877, 23SW(2d)268 (di-

rected verdict properly refused); 227 Ky431, 13SW(2d)279; 156Md88, 143A 651; 117Nebr265, 220NW285. [a] (4) Where evidence as to freedom of insured from tuberculosis, disease with which he died, at time of taking out policy is not undisputed, it is error to instruct for plaintiff. 209Ky771, 273 SW469. (5) In general. 40GaA740, 151SE540.

643-93 157SC469, 154SE855. [a] 296 Pa313, 145A820. [b] (5) Where evidence showing falsity of warranties was undisputed. 175Ark482, 300SW927. [c] **Reinstatement, of lapsed policy.**–Evidence held insufficient to warrant submission of question to jury. 31Ariz 122, 250P882. [f] **Overruling defendant's demurrer to evidence** held error. 220MoA913, 296SW209. [g] **Judgment held properly entered** where company's failure to pay amount due insured under policy within thirty days after demand was not controverted. TexCivA 10SW(2d)178. [h] **Evidence insufficient to require submission** whether agent had authority to make particular agreement. MoA 23SW(2d)198.

643-94 215Ala349, 110S571. [a] (2) Where evidence showed insured was inflicted with cancer when application was made, but fact was unknown to insured, insurer, and beneficiary, directed verdict for premiums paid and interest held proper. 153SC280, 150SE793.

643-96 217Ala110, 115S12; 181Ark213, 25SW(2d)10; 37GaA791, 141SE916; 241 IllA55; MoA 281SW67; MoA 30SW(2d) 190; 89PaSuper167; 90PaSuper392; TexCommnA 24SW(2d)347; TexCivA 22SW(2d)704; TexCivA 31SW(2d)865. [a] (4) Other instances. MoA 30SW(2d) 190.

643-96½-New. the date of delivery of the policy, MoA 16SW(2d)712.

644-97 154Miss890, 124S62(3dcase).

644-98 177Ark1194, 291SW441. [a] **Question of law for court.**–241Mich600, 217NW796.

644-98½-New. Whether after reinstatement there was lapse for delay in payment of balance of premium; 180Minn 346, 230NW790.

644-5 MoA 281SW67; MoA 6SW(2d) 72; TexCivA 38SW(2d)539.

644-5½-New. Where the assignment of a life insurance policy covered the amount due from insured to the assignee at the time of insured's death, and a letter from the beneficiary to insurer authorized insurer to pay the assignee not over three hundred dollars, the only issue for the jury is what amount was justly due the assignee at the time of insured's death. 178Ark466, 10SW(2d) 910.

644-5¼-New. In an action for breach of contract, evidence of defendant's acceptance of plaintiff's application as written by him is insufficient for the jury. TexCivA 11SW(2d)231.

644-5¼-New. Whether one of two brothers had as insurable interest in the life of the other is a question of law for the court. 178Ark304, 10SW(2d) 882, 61ALR914.

645-11 24F(2d)1; 216Ala529, 113S540; 89CalA653, 265P357; 109Conn67, 145A 565; 38GaA328, 144SE29; 212Ky763, 280SW123; 157Md551, 146A755; 261 Mass121, 158NE350; MoA 6SW(2d)72; 133 Okl256, 271P1037; 135SC89, 133SE 215, 45ALR1172; 14PaDist&Co 21. [c] **Symptom of disease** will not be held as matter of law to have increased risk of loss. 180Minn205, 230NW648.

645-12 43F(2d)499; 22AlaA54, 112S 179; 219Ala79, 121S88; 219Ala197, 121 S714; 219Ala490, 122S621; 226Ky621, 11SW(2d)434; 232Ky44, 22SW(2d)435; 241Mich396, 217NW62; MoA 275SW60; 21 OhA308, 153NE131; 133 Okl256, 271 P1037; 287Pa128, 134A474; 297Pa418, 147A76; TexCivA 8SW(2d)291; Tex CivA 19SW(2d)853; TexCivA 28SW(2d) 220. [a] (5) Whether insured had pleurisy or tuberculosis, contrary to representations. 22AlaA54, 112S179. (6) Whether insured was suffering from tuberculosis when policy was delivered. 216Ala529, 113S540. (7) Whether misrepresentations as to previous attendance of physicians or previous condition of insured's health were made with actual intent to deceive or increased risk of loss. 23AlaA205, 123S94(2dcase). [c] 93PaSuper314.

645-13 28F(2d)665; 36F(2d)176; 39 F(2d)528; 35GaA84, 132SE122; 212Ky 763, 280SW123; 220Ky626, 295SW900; 225Ky688, 9SW(2d)1013; 228Ky399, 15 SW(2d)242(2dcase); 258Mass127, 154 NE563; 180Minn205, 230NW648; 21 OhA308, 153NE131; 297Pa418, 147A76; 90PaSuper35; 14PaDist&Co 21; 135SC 89, 133SE215, 45ALR1172.

646-14 24F(2d)1; 212Ky763, 280SW 123; 228Ky399, 15SW(2d)242(2dcase); 134Misc640, 236NYS300; 297Pa418, 147 A76; 90PaSuper35; 135SC89, 133SE 215, 45ALR1172. [d] **Fake statement that applicant has not been treated by physician** does not avoid policy in all cases as matter of law. 220Ky626, 295 SW900.

646-15 258Mass127, 154NE563. [b] **Where evidence tends to show** incorrect diagnosis by physician of insured, blood pressure question is for jury. 220Ky 626, 295SW900.

646-16 174Ark372, 295SW715; 179Ark 621, 178SW(2d)312.

646-18 MoA 6SW(2d)72.

646-19 MoA 275SW60.

647-20 31F(2d)571.

647-21 228Ky669, 15SW(2d)499.

647-22½-New. ; or whether insured was in good health when the policy was taken out. 22AlaA602, 118S495(2dcase).

647-22¼-New. Whether the beneficiary participated in the making of false and fraudulent statements to the medical examiner as to the health of insured is a question for the jury where the evidence permits of different inferences. 21 OhA 308, 153NE131.

647-22¼-New. Whether insured contemplated assignment to first cousin at time policy became effective is a question for jury. 39F(2d)528.

647-22½-New. Whether insured made false statements in application for reinstatement with intent to deceive held question of fact under evidence. Wash 292P445.

647-23 37GaA704, 141SE498; 241Mich 396, 217NW62.

647-24 175Ark1170, 300SW415; 235 IllA257; 134Misc640, 236NYS300; 152 Va38, 146SE353. [a] (1) 219Ala189, 121 S708.

647-25 32F(2d)174; 177Ark865, 8SW (2d)446; 42F(2d)208; 220Ky626, 295 SW900; 152Va38, 146SE353. [a] (4) It was error to submit to jury question of legibility of written application where photographic copy attached to policy was clearly legible. 234Mich424, 208 NW427. (5) Where premiums are shown not paid when due but paid in connection with reinstatement and misrepresentations in application for reinstatement are shown. 224AppDiv599, 231NYS540. (6) Other instances. 256 IllA345. [b] (1) 32F(2d)174; 39GaA 609, 147SE901.

648-32 [a] (2) Whether insured was insane and wholly disabled and prevented from continuing to pay premiums. 33 F(2d)386. [b] (2) For nonpayment of first premium. 218Ala505, 119S11.

648-34 172Ark958, 291SW82; MoA 288 SW944. [a] (2) Whether insured's state of health at time of delivery of policy was contributing factor to death. MoA 20SW(2d)950.

648-35 177Ark1193, 8SW(2d)1097; 178 Ark304, 10SW(2d)882, 61ALR914; 226 Ky621, 11SW(2d)434; MoA 16SW(2d) 712. [a] (1) But see 41F(2d)600. (4) 173Ark1181, 291SW419. (5) Other questions for jury. 208Ky741, 271SW1062. (6) Evidence of mailing note and check for premium and circumstances rebutting presumption of receipt. 138SC208, 36SE230.

648-40 153Va468, 143SE625.

649-42 [a] **Reasonableness of notice** by beneficiary of insured's disability, where policy provided for waiver of premiums during total disability, held for jury. 138SC253, 136SE304.

649-43 See also MoA 30SW(2d)190 (evidence conflicting with admissions).

649-46 22AlaA573, 117S912; 157SC 469, 154SE855. [a] (1) 23AlaA205, 123 S94(2dcase). (6) Whether insurer, by accepting money for additional paid up insurance, waives requirement of loan certificate. 135SC48, 133SE227. (7) Whether agent's knowledge of removal of bump from insured's face constituted waiver by insurer. 135SC89, 133SE215, 45ALR1172. (8) Whether forfeiture was waived by insurer's receipt of part premium after lapse and insured's mailing note for balance with application for reinstatement. 173Ark263, 292SW102. (9) Waiver of insurable interest. 150SC 326, 148SE179. (10) Waiver of physical disability. 150SC326, 148SE179. (11) Waiver of provision that policy would not be effective till delivered while insured was in good health. MoA 20SW (2d)950. (12) Accuracy and good faith of insurer's agent in writing down in application insured's answer relative to former treatment. 297Pa418, 147A76.

649-47 180Minn346, 230NW790; 49ND 798, 193NW471; 134SC532, 133SE440. [a] (5) Whether estopped to declare forfeiture on date extension note became due. 131SC403, 127SE836. (6) Authority of agent. 173Ark1181, 291SW419. (7) Insured's disability excusing payment of premiums and inability to furnish proof thereof. 138SC253, 136SE304. (8) Waiver of requirement of election within specified period after default in payment. 150SC93, 147SE742(2dcase). (9) Authority of insurer's agent to waive extension provisions for payment of premium notes. 35F(2d)132. (10) Other instances. MoA 277SW973; 145Wash 489, 261P106.

649-48 90PaSuper1.

649-50 [a] (3) Question relating to waiver as affecting revival of policy. 213 Ala588, 105S672 (under the evidence).

649-51 158Md73, 148A267.

649-53 42F(2d)399; 248 IllA176.

649-54 38F(2d)741; 203 Iowa555, 213 NW247; 261Mass121, 158NE350; 250 Mich185, 229NW509; 31 OhA216, 167 NE471; 150SC326, 148SE179; 198Wis 140, 223NW571, 64ALR1284 (2dcase). [a] (2) Whether body found in locomotive fire box was that of insured is question for jury. 261Mass121, 158NE350.

649-55 13F(2d)820; 160La854, 107S 599; 261Mass121, 158NE350; 218MoA 10, 260SW552; MoA 6SW(2d)72; 134 SC435, 132SE828.

650-56 17F(2d)889.

650-60 8F(2d)706.

650-61 117Nebr265, 220NW285.

650-62 13F(2d)765; 13F(2d)820; 22 F(2d)952; 25F(2d)705; 31F(2d)35; 39 F(2d)376; 40F(2d)817; 213Ala286, 104 S643; 23AlaA205, 123S94(2dcase); Ariz 286P817; 178Ark543, 11SW(2d)453; 203 Iowa960, 211NW238; 208 Iowa246, 225 NW242; 160La854, 107S599; 261Mass 121, 158NE350; 129 Okl292, 264P827; 134SC435, 132SE828; TexCivA 21SW (2d)352; TexCivA 29SW(2d)940. [a] (2) 176Ark879, 4SW(2d)536. [b] (3) Newspaper clippings attached to proof of loss. 32F(2d)7. (4) Other evidence held sufficient. Ariz 286P817; TexCivA 28 SW(2d)902. (5) In general. 134SC435, 132SE828. [e] **Directed verdict for defendant held properly refused.**–13F(2d) 820 (evidence insufficient to establish suicide as matter of law). [f] **Undisputed facts** are for jury where reasonable men might come to different conclusions on question of suicide. 178Ark543, 11 SW(2d)453.

650-63 214Ky754, 284SW403; 226Ky 597, 11SW(2d)417.

650-64 13F(2d)765; 32F(2d)567. [a] (1) 8F(2d)680; 226Ky724, 11SW(2d) 913.

651-66 13F(2d)765; 203 Iowa960, 211 NW238; TexCivA 21SW(2d)352 (any evidence tending toward another hypothesis presents jury question). See also 5PaDist&Co 25.

651-66½-New. And in some states it is a question for the jury whether circumstances exclude every other reasonable hypothesis. 261Mass121, 158NE 350.

651-67 [a] (5) Generally. 37GaA472, 140SE780. (6) Other instances. 219 Ala24, 121S30. [b] (2) Other instructions erroneous or properly refused. 14 F(2d)362; 258Mass127, 154NE563; 135SC89, 133SE215, 45ALR1172. (3) That beneficiary was estopped from

claiming that assignment was pledge. 14F(2d)362.

651-68 155Md210, 141A547; Mass 170 NE62; Vt 148A484.

651-70 [a] (3) Charge leaving to jury what would constitute revival and sufficient tender, unaided by definition or explanation is erroneous. 213Ala583, 105S672.

651-71 35GaA1, 132SE120; MoA 6SW(2d)72. [b] (4) As to denial of use of habit-forming drugs. 32F(2d)174. [c] (7) As to statements in application on information of others. 35GaA723, 134SE804. (8) Where issue was falsity of representations and whether sarcoma, if present at time of issuance of policy, increased risk, instructions involving statements is proof of loss were not proper. 258Mass127, 154NE563. (9) As to payment of premiums. 219Ala24, 121S30. (10) As to insured's purpose in obtaining physical possession of policy. 85CalA419, 259P496. [d] **Instruction held not supported by pleadings.**–Submitting question of falsity of answers to numerous questions where defense was based on falsity of only one answer. 212Ky763, 280SW123.

652-72 [b] **Instructions held not erroneous as submitting inconsistent theories.**–MoA 20SW(2d)950.

652-73 [a] (4) In action on employee's group life policy. 155Md210, 141A547. (5) Other instances. AlaA 130S520; MoA 6SW(2d)975.

652-75 35GaA1, 132SE120. [a] **Instruction held improper.**–213Ala588, 105S672.

652-76 133 Okl 256, 271P1037.

652-77 [a] (1) 135SC89, 133SE215, 45 ALR1172. (4) That notice to collecting agent was sufficient. 152Va715, 148SE811. (5) Other instances. 157SC469, 154SE855. [d] **Instructions held erroneous.**–38F(2d)557; 215Ala100, 109S755; GaA 134SE804; 39GaA429, 147SE768.

652-78 [b] (1) **Instruction held properly refused.**–213Ala588, 105S672.

653-81 [c] **Instructions held proper.**–172Ark958, 291SW82.

653-83 [a] (1) 219Ala189, 121S708; 236 IllA257; 226Ky621, 11SW(2d)434; 313Mo 384, 282SW46; 21 OhA308, 153 NE131. (3) 241Mich396, 217NW62. (7) Instruction submitting issue whether questions asked applicant were really asked and understood by him. NJSup 130A544. (8) Instruction that policy is not avoided for false statement as to applicant's age, where application was no part of policy and there was no fraud. 35GaA723, 134SE804. (9) Instruction, quoting code, that false information in application, stated on representations made by others, does not avoid policy is not harmful where sole defense is fraud. 35GaA723, 134SE804. (10) As to fraud, materiality, and falsity. 21 OhA308, 153NE131. [b] (1) 32 F(2d)173; AlaA 130S520; 181Ark1127, 29SW(2d)680; 35GaA1, 132SE120; 212 Ky763, 280SW123; MoA 275SW60. (7) Submitting to jury question of materiality of false representation that insured was not addicted to excessive use of stimulants. 241Mich396, 217NW62. (8) Misrepresentation as to age. 177Ark865, 8SW(2d)446. (9) As to warranty of correctness of statements in application. 157Md551, 146A755.

654-92 [a] (4) In absence of timely request, refusal to charge on nature of circumstantial evidence is not error. 35 GaA770, 134SE639. (5) Charge that when insurer introduced certificate showing insured committed suicide burden was cast on plaintiff to show otherwise held not prejudicially erroneous. Ala 130S327. (6) Other instances. 87CalA440, 262P380. [b] (3) Where court's charge on suicide as defense to policy left inference that policy could be avoided where death at insured's own hand was not voluntary. 35 GaA770, 134SE639.

654-97 [c] **There must be some substantial evidence** of insanity. 129 Okl 292, 264P827.

655-2 [c] **Findings by jury as to insured's health held immaterial,** where insured, an infant, was not bound by warranties. 50RI 158, 146A401.

655-4 [b] (3) Special finding as to consultation with physician not mentioned in application for reinstatement held not inconsistent with general verdict for beneficiary. Wash 292P445.

656-12 [a] (2) Where promise to pay one dollar for each member in good standing was unconditional, judgment for fixed sum against association was proper. TexCivA 289SW93. [c] **Bond.**–Provision of judgment requiring execution of bond indemnifying insurer against loss if insured is in fact living is unauthorized. 196NC408, 145SE787, 61ALR821.

656-21 219Ala79, 121S88; 37GaA704, 141SE498.

656-31 Kan 289P431(1stcase); MoA 7 SW(2d)1015.

657-32 216Ala562, 114S132. [b] **Amount paid to insured under invalid compromise agreement** held properly deducted from judgment. 229Ky660, 17 SW(2d)743.

657-36½-New. Remittitur. Verdict set aside unless plaintiff files remittitur for amount in excess of premiums paid. 102Conn481, 129A379, 42ALR1450.

657-37 157Miss759, 128S750.

657-49 247 IllA547.

658-53 SC 155SE747.

658-54 176Ark361, 3SW(2d)46; 176 Ark666, 8SW(2d)25. [b] (3) Allowance of five thousand dollars for attorney's fees in action on ten thousand dollar policy is excessive. TexCommnA 5SW (2d)767. (4) Five thousand dollars in suit on ten thousand dollar policy held sustained by evidence. TexCivA 297SW 1083. (5) Judgment for five thousand dollars attorney's fees against life insurance company, failing to pay ten thousand dollar policy sued on within time specified in statute, is excessive by three thousand dollars, two thousand dollars being reasonable fee. TexCivA 9SW(2d)752. (6) Allowance of six hundred dollars attorney's fees in action on policy of three thousand dollars is reasonable. TexCivA 21SW(2d)1086. [d] **Court of equity** will allow recovery of statutory damages and attorney's fees in addition to principal sum. 171Ark 135, 284SW4.

658-56 35F(2d)763 (dismissal of suit to cancel policy on ground that insurer waived its rights); MoA 273SW201.

658-57 [a] 178Ark466, 10SW(2d)910.

LIGHTNING INSURANCE

661-8 [b] **Evidence held sufficient** to show collapse of building caused by lightning. 229Ky293, 16SW(2d)1046.

662-33-New. V. ACTIONS ON POLICIES [§ 5] **Pleading.** A petition under a policy covering loss by lightning, alleging that a building was insured against direct loss by lightning and that lightning struck and totally destroyed it, is sufficient to allege direct loss by lightning. A defect in this respect is cured by verdict after instructions requiring a finding that the loss was directly caused by lightning to authorize recovery. 229Ky293, 16SW(2d) 1046.

LIKE

663-29 [b] 288Pa164, 135A742.

663-33½-New. "like immunity," Tex CivA 283SW285.

LIMITATION

665-28 151Md477, 135A245.

LIMITATIONS OF ACTIONS

684-3 87Colo 103, 285P762; Tex CommnA 288SW156. [a] 198NC397, 151SE857, 68ALR210.

684-4 TexCivA 283SW624.

684-5 30F(2d)202; 192NC48, 133SE 174; TexCivA 285SW340.

684-6 81Colo 191, 254P444. [b] **Limitations of remedy are treated as limitations of right** where right and remedy are created by same statute. 99Fla1151, 128S801(2dcase).

684-7 [a] But see 143 Okl 106, 288P 338. [b] (1) 322Mo 1209, 18SW(2d) 428; 192NC48, 133SE174. (2) Court of equity will not quiet title as against unpaid lien, though its enforcement is barred by statute of limitations. 47 Ida 439, 276P313.

684-9 TexCivA 285SW340.

684-10 327 Ill 538, 158NE694. [c] **Distinction between laches and statutes of limitations,** see 38F(2d)946.

684-11 196Cal 260, 237P542 (doctrine has no application in case of voluntary trusts); 199Cal 625, 250P669, 48ALR 1308; 101CalA20, 281P518(2dcase); 207 Iowa239, 222NW413; 122Kan563, 253P 426; 234Mich391, 208NW613, 614 [quot CJ]; 248Mich64, 226NW836(2dcase); TexCivA 285SW340.

685-12 84CalA577, 258P991, 999 [quot CJ]; 234Mich391, 208NW613, 614 [quot CJ]; TexCivA 285SW340.

685-14 122Kan563, 253P426.

685-15 [a] **Statute of limitations is generally construed as purely legal** as distinguished from equitable defense. 39F(2d)793.

685-25 287Pa105, 134A468, 472 [cit CJ]; TexCommnA 291SW529; TexCivA 285SW340, 343 [quotCJ].

685-26 TexCommnA 291SW529; TexCivA 285SW340, 343 [quotCJ]. But see TexCommnA 278SW180.

686-37 5LaA389; TexCivA 10SW(2d) 201.

686-38 [c] **Conditions under which limitations statute may operate** can be fixed only by legislature. CalA 292P 699. [d] **Circumstances necessary to suspend running of statute** can only be fixed by legislature. CalA 292P699.

687-44½-New. Most statutes of limitation in essential features were enacted before present methods of pleading and practice were adopted and were designed to apply to actions at common law. 103 Conn716, 131A558.

687-47 12LaA62, 125S473; 169Minn57, 210NW622, 49ALR1260; 142Miss859, 108S148. See also 4LaA337.

687-64½-New. Constitutional provision against releasing any part of indebtedness to county or state extends to statute having such effect, although made to operate as statute of limitation. Tex CivA 4SW(2d)111.

687-67 [u] **Application to other statutes.**–115 Oh326, 154NE317. [v] **Change in phraseology** of statutes of limitations after adoption of practice act was not intended to change their scope in any way. 103Conn716, 131A558.

687-67½-New. Defense of the statute of limitations is not unconscionable, but is entitled to the same consideration as any other defense. 149Wash578, 271P 882.

688-69 23F(2d)668; 38F(2d)179; Mass 167NE652.

688-77 MoA 18SW(2d)526.

689-78½-New. Provision creating conclusive presumption of payment is surplusage, not affecting operation of act as statute of limitations. TexCivA 4SW (2d)111.

689-85 273US346, 47SCt389, 71Led 676; 274US640, 47SCt714, 71Led1270; 34F(2d)795; 216AppDiv767, 214NYS 673 (is beneficial statute); 226AppDiv 416, 235NYS655; 35PortoRico 237. [b] 199Cal 625, 250P669, 48ALR1308.

690-86 199Cal 625, 250P669, 48ALR 1308.

690-87 199Cal 625, 250P669, 48ALR 1308. [e] 131 Or694, 284P280.

690-88 [a] (1) 215Ala591, 112S200, 201 [quotCyc]; 47 Ida439, 276P313; 219MoA645, 284SW834; TexCivA 6SW (2d)375. [f] (1) 274US640, 47SCt714, 71Led1270; 38F(2d)425. (2) 273US 346, 47SCt389, 71Led676. (3) Of exceptions in statutes of limitations in favor of persons laboring under disabilities. RI 151A5.

690-89 274US640, 47SCt714, 71Led 1270; 214Ala628, 108S756, 758 [quot Cyc]; 215Ala591, 112S200, 201 [quot Cyc]; 248Mich64, 226NW836(2dcase). See also 28 OhA413, 162NE762. [d] **Reasonableness of result of particular interpretation** and practical effect of adoption of different interpretation may be considered by courts. 147Miss673, 112S692.

691-92 273US346, 47SCt389, 71Led 676; 33F(2d)589; 199Cal 625, 250P669, 48ALR1308; 98CalA523, 277P354; 47

Ida439, 276P313; Mo 23SW(2d)149. But see 153Va603, 151SE138. [b] 105 WVa29, 141SE444. [c] **Statute limiting time of actions for damages sustained by reason of railway** or works of company was construed so as to exclude actions against railway on contract or negligence. Eng [1926]AC466, [1926] 2 DomLR865, [1926] 1WestWkly786. [d] **Exceptions in statutes are to be strictly construed.**–105WVa29, 141SE444. [e] **Carey Act water contracts** are not excepted from operation of general statute of limitations by statute relative to lien for purchase price. 47 Ida439, 276P313.

691-94 273US346, 47SCt389, 71L ed 676; 32Ariz342, 258P304; Mo 29SW(2d) 1096; 35PortoRico 237.

691-95 38F(2d)608; 32Ariz342, 258P 304; 322 Ill 133, 152NE572; 12LaA549, 126S261; Mo 29SW(2d)1096; 129 Okl 15, 263P140.

691-96½-New. Right of action favored by law rather than right of limitation. Mo 31SW(2d)766.

691-98 87Colo 103, 285P762; 203 Iowa 1395, 214NW585; 2LaA1; MoA 26SW (2d)841; 245NY415, 157NE515; OhA 172NE679; TexCivA 11SW(2d)329. See also 321Mo 724, 12SW(2d)920. [b] **Statute tolling statute of limitations as** to persons out of state during absence does not affect limitations as to cause of action accruing before enactment. 87 Colo 103, 285P762.

692-99 265Mass108, 163NE883; 169 Minn57, 210NW622, 49ALR1260.

692-4 169Minn57, 210NW622, 49ALR 1260. [a] (2) Ida. 290P397.

693-6 265Mass108, 163NE883.

694-23 169Minn57, 210NW622, 49ALR 1260.

695-27 145Miss887, 111S444.

695-28 145Miss887, 111S444 [quotCJ]; OhA 168NE394.

695-29 169Minn57, 210NW622, 49ALR 1260; Oh 170NE637.

695-30 21F(2d)538.

696-39 [a] (3) to statute exempting demands of poor districts for maintenance against real or personal estate or property rights of pauper. 13PaDist& Co 211.

696-40 LaA 124S535.

697-51 22AlaA281, 115S152.

697-52 169Ga251, 150SE78, 67ALR287.

697-52½-New. Repeal of statute of limitation does not impair bar perfected before the repeal. 215Ala93, 109S745.

697-56 22AlaA281, 115S152, 153 [cit CJ].

697-57 169Minn57, 210NW622, 49ALR 1260. [a] **In New York.**–245NY415, 157 NE515.

697-58 169Minn57, 210NW622, 49ALR 1260.

698-71 IndA 155NE831; TexCivA 285SW340.

698-72 [a] See also 45 Ida159, 261P 239. [d] **Statute runs regardless of intention.**–43F(2d)653.

698-73 168La794, 123S328. See also TexCommnA 278SW180.

698-74 77Mont399, 251P524. [b] 145 Miss87, 110S218, 49ALR565.

699-75 27F(2d)782; 28F(2d)30; 32 F(2d)283; 42F(2d)309; 214Ala628, 108 S756; 105Conn11, 134A252; 264Mass 481, 163NE62; 322Mo 1209, 18SW(2d) 428; 84Mont38, 274P296; 134Misc518, 235NYS492; TexCivA 22SW(2d)765. See also 126Misc642, 214NYS418.

699-76 159La509, 105S602.

699-78 [c] **Sale of thing belonging to another; nullity.**–Though statute provides that sale of thing belonging to another is null, nullity is not absolute in sense that owner may not lose claim by prescription. 159La509, 105S602. [d] **Prescription liberandi, not acquirendi, causa.**–In lessor's suit for royalties as to which adverse claims were prescribed, fact that prescription was not acquirendi causa but liberandi causa did not affect liability of lessee to make payment withheld because of such claims. 159 La509, 105S602.

699-78½-New. Where a suit to recover damages for wrongfully cutting and removing timber is barred, a claim for the cost of the survey to ascertain boundaries falls with the main demand. 164 La787, 114S654.

699-78¾-New. The doctrine that acquiescence cannot confirm title is not applicable to statutes of limitation or kindred statutory provisions in regard to abandonment or release of rights, legal or equitable. 195NC498, 142SE776.

699-78¼-New. Where a statute permits a landowner to quiet title against a mortgage action, enforcement of which has become barred, he cannot quiet title against one who became a mortgagee in possession before his action to foreclose was barred. 128Kan270, 277P49.

699-79 181Ark216, 26SW(2d)57 (equitable relief).

700-81 103Conn716, 131A558; 229App Div227, 241NYS529; Va 153SE722. [a] (4) Fact that action against physician for malpractice resting on alleged negligence in treatment is barred does not bar cause of action resting on implied contract to use proper skill and care. 103Conn716, 131A558.

700-84½-New. Where the legislature has provided a statutory remedy which supplants in whole or in part a corresponding common-law remedy and has appended thereto a statute of limitations different from that which governs the common-law remedy, the limitations provided by the statute must prevail. 195Cal 249, 232P457, 36ALR1435.

700-84¾-New. An action by an owner of bonds and coupons against the trustee of a trust deed securing them for his destruction of security by satisfaction of the deed without payment of the bonds is not barred because an action on the debt secured is barred. 134Misc 417, 236NYS37.

700-88 47 Ida712, 278P214(2dcase); TexCivA 2SW(2d)961; TexCivA 23 SW(2d)449.

701-89 220Ky418, 295SW412; 124 Okl 177, 254P746; TexCivA 290SW184.

701-90 [a] (1) Cal 273P822. (3) Where payee of notes, after expiration of time for bringing action on notes had expired, caused shares of stock in corporation given as security to be sold, but prior thereto and within time instituted action on notes, lien of pledge was kept alive by commencement of prior action on notes, so as not to make applicable Civ. Code § 2911, providing that lien is extinguished by lapse of time within which action can be brought on principal obligation. 94CalA407, 271P367.

701-96 [b] (3) Cal 286P1017; 95 CalA633, 273P119.

701-97 134Misc417, 236NYS37; 290Pa 348, 139A114; 300Pa280, 150A599; Tex CivA 287SW1105; TexCivA 2SW(2d) 961; TexCivA 22SW(2d)765. [b] **Action on note** against indorser, though barred by limitations, does not release property pledged to secure payment of note. 125Misc778, 211NYS509.

701-98 134Misc417, 236NYS37.

702-7½-New. Recovery on collateral cannot exceed amount of debt barred. TexCivA 2SW(2d)961.

702-10 27F(2d)902; 30F(2d)202.

702-11 98CalA457, 277P185.

702-12 See also 105Conn11, 134A252.

703-18 81Mont120, 262P164; 157Tenn 667, 11SW(2d)906.

703-19 [a] (1) 166Ga143, 142SE687.

704-22 154Tenn444, 289SW496.

704-32 181Ark950, 28SW(2d)1059; Tex CivA 282SW612; TexCivA 297SW281.

705-34 181Ark4, 24SW(2d)852; 203 Iowa540, 211NW482; 124 Okl 177, 254 P746.

705-37 203 Iowa540, 211NW482.

705-45 43 Ida24, 248P868. [b] **Mortgage given by surety.**–213Ky684, 281 SW809.

706-47 43 Ida24, 248P868.

706-51 144 Okl 150, 289P721.

706-55 [c] (10) Vendor's lien, being incident to security for debt, would continue as long as debt is not barred; lien follows debt as incident thereto and can be foreclosed. TexCivA 285SW897.

707-58 10LaA531, 119S570.

707-61 124Kan261, 259P788, 789 [cit CJ].

707-62 77CalA535, 247P261; 124Kan 261, 259P788, 789 [citCJ]; 214Ky267, 283SW111.

708-63 222Ky846, 2SW(2d)1042.

708-64 77CalA535, 247P261. [e] **Grantor's creditors without interest cannot plead statute.** 77CalA535, 247P261.

708-68 77CalA535, 247P261; TexCivA 282SW612. [e] **Where petition for money demand and foreclosure of lien fails to show** that defendant was purchaser, it was error to dismiss petition on ground that it was barred by statute of limitations. TexCivA 282SW612.

709-78½-New. Plaintiffs joining in action may recover as in separate actions, although other plaintiffs were barred by statute. Mo 282SW53.

709-87 TexCivA 10SW(2d)594.

710-97 [a] (5) 180Minn160, 230NW 484. (14) Arkansas. 171Ark492, 286 SW867. (15) 68Utah472, 251P11. (16) Montana. Mont 286P133. [f] **In Minnesota.**–180Minn160, 230NW484.

711-3 83Colo 131, 262P517, 518 [cit CJ].

711-4 6F(2d)752; 12F(2d)961; 14 F(2d)147; 19F(2d)1009; 22F(2d)113; 24F(2d)646; 26F(2d)505; 28F(2d)846; 35F(2d)765; 172Ark417, 288SW912; 93 CalA532, 269P934; 121Kan346, 246P 516; 127Kan72, 272P106; 2LaA665; Mo 3SW(2d)1008; Mo 26SW(2d)976; 33NM340, 267P72; 247NY211, 160NE 13; 217NYS545; 196NC284, 145SE563 (state park commission); 56ND41, 216 NW212, 215 [citCJ]; 116 Or250, 241P 58; 159Tenn619, 21SW(2d)628; Tex CivA 287SW301; 193Wis295, 214NW 447. [g] **Porto Rican statutes of limitations** are not bar to action by United States government. 12F(2d)961. [r] **Immunity does not apply** where remedy sought is enforcement of right for benefit of private party. 19F(2d)1009. [s] **Statute runs against United States** only when they assent and upon conditions prescribed. 281US245, 50SCt297, 74 L ed829, 67ALR1350.

713-5 193NC444, 137SE328.

713-13 137 Okl 67, 277P1029. [b] **State statutes of limitation** are not binding on United States in suit to protect interest of Indians. 270US181, 46SCt 298, 70L ed539.

713-16½-New. United States Shipping Board Emergency Fleet Corporation is a separate entity and bound by six-year statute of limitations. 220AppDiv692, 222NYS391.

713-16¾-New. Private corporation owned by United States, as Emergency Fleet Corporation, is subject to statute. 247NY211, 160NE13.

713-17 201 Iowa1163, 208NW721 (mandamus to compel erection of bridge on public highway where it is crossed by public drain is not barred by lapse of time); 116 Or250, 241P58.

714-21 24F(2d)636, 637 [quotCJ]; 43 F(2d)873; CalA 285P753.

714-30½-New. A county has been held not entitled to assert the defense of a limitation against a school claim. 155 Tenn212, 292SW462.

715-35 163La865, 113S127.

715-44 171Ark492, 286SW867.

715-45 [a] (1) 45 Ida193, 261P338. (2) Statute providing that limitations prescribed by statute shall apply to actions brought in name, or in behalf, of state in same manner as to actions by private persons includes actions brought in name of agency of state. 68Utah472, 251P11. (3) Such statute applies to action by county. 68Utah472, 251P11.

715-48 TexCivA 5SW(2d)620. [a] **Assessment for paving streets and alleys** is not "tax" within provision preventing running of limitations against municipal corporation. TexCivA 8SW (2d)311.

715-50 43F(2d)873; 45 Ida485, 263P 40, 43 [citCJ], 56ALR822; 56ND41, 216 NW212, 215 [citCJ]; TexCivA 287SW 301. [a] (1) 208Ky661, 271SW1066.

716-51 84CalA577, 258P991.

716-52 Tenn 10Lea643; TexCivA 283 SW188.

716-54 208Ky661, 271SW1066.

716-59 45 Ida193, 261P338; 56ND41, 216NW212; 19 OhA36.

718-63 47 Ida712, 278P214(2dcase).

718-64 56ND41, 216NW212. But see TexCivA 22SW(2d)475(2dcase).

718-65 167La801, 120S373.

718-66 169La565, 125S619.

718-69 129Kan351, 282P737 (holder of sheriff's deed on execution sale); Tex

CivA 293SW228; **TexCivA** 23SW(2d) 421.

718-70 193NC227, 136SE633; 114 **Okl** 21, 242P1027 [citCyc]. See also 215 **Ala**93, 109S745.

718-72 168**La**794, 123S328.

718-73½-New. Limitations as to recovery back of federal income and profits taxes paid are applicable against the state commissioner of finance acting as the liquidating agent of an insolvent bank. 27**F(2d)**882.

719-75½-New. Purchaser at execution sale of mortgaged personal property has right to plead statute against mortgagee in suit for conversion. **TexCivA** 293SW228.

719-86½-New. One who took title as trustee holding mere naked legal title cannot in mechanics' lien foreclosure suit raise question of statute of limitations. 36**F(2d)**661.

719-89 162**Ga**804, 134SE779; 237**Pa** 105, 134A468, 471 [citCJ].

720-9 223**AppDiv**70, 227**NYS**580.

721-16 199**Cal** 625, 250P669, 48**ALR** 1308; 72**CalA**539, 237P775; 77**CalA** 535, 247P261; 126**Kan**571, 576, 268P 837 [citCJ]; 191**NC**636, 132SE800; 13 **PaDist&Co** 400; **TexCommnA** 278SW 180; **TexCivA** 11SW(2d)263. But see 28**F(2d)**917. [b] **Legislature not presumed to have intended to** deprive citizens of capacity to waive statutory bar. **TexCommnA** 278SW180.

721-29 **TexCivA** 291SW276.

722-30 126**Kan**571, 576, 268P837 [cit CJ].

722-36 101**CalA**20, 281P518(2dcase); 125**Kan**533, 264P730.

722-38½-New. Defendant brought in by amendment charging parties may waive point and set up statute. 214**Ala** 32, 106S182.

722-38½-New. A provision in a note that drawers and indorsers guarantee payment any time after maturity does not constitute waiver. **SD** 226NW754.

722-39 267**Mass**350, 166NE831.

722-40 **CalA** 290P52.

723-44 [a] (2) One cannot be deprived of prescription period in absence of clear intention to waive. 162**La**562, 110 S756.

723-45 34**Ariz**519, 273P6(2dcase).

723-48 196**Cal** 534, 238P714.

723-49 138 **Okl** 238, 280P817. **[a] (1)** 79**CalA**403, 249P544.

724-50 79**CalA**708, 250P1117.

724-57 But see 38**F(2d)**425. [b] **Father's agreement to waive** defense of limitation in contract to support deaf and dumb minor daughter held not gratuitous act. 196**Cal** 534, 238P714.

725-72 169**Ark**1162, 278SW22; 87**Colo** 486, 288P1051; 202 **Iowa**201, 209NW 439; 10**LaA**531, 119S570; 131 **Okl** 183, 268P218; 131 **Okl** 183, 268P220; 52**SD** 433, 218NW17 [citCJ]. [h] 25**F(2d)** 576; 206 **Iowa**1025, 219NW411; **Tex CivA** 29SW(2d)489.

726-73 169**Ark**1162, 278SW22; 138 **Okl** 238, 280P817; **TexCivA** 281SW626.

726-74 169**Ark**1162, 278SW22; **Utah** 286P936.

726-75 226**Ky**561, 10SW(2d)1064.

726-76 128**Misc**853, 220NYS312. [a] (4) Makers securing extension of time to pay note under oral promises to pay held estopped to plead limitations. **TexCivA** 24SW(2d)485.

726-78 **TexCivA** 295SW281.

727-83 169**Ark**1162, 278SW22. See also 218**AppDiv**313, 218NYS139.

727-83 [c] (9) Fact that maker of notes became surety on bond of payee's administrator and of guardian of payee's child does not estop him from pleading statute. 224**Ky**431, 6SW(2d) 451. [d] 169**Ark**1162, 278SW22; **Iowa** 229NW839; **Miss** 130S298; **RI** 151A5.

727-84 172**Ark**1165, 291SW832.

727-89 **SD** 227NW576.

727-93½-New. A person claiming estoppel against the effect of statutes of limitation must have exercised due care. **TexCommnA** 280SW748.

728-96 52**SD**433, 218NW17.

728-2 123**Kan**214, 254P1034.

728-4 [d] (1) 22**F(2d)**881. (2) Statute means that plaintiff must be given at least two years after cause of action accrues in which to file suit. 22**F(2d)** 881. (3) State may refuse to enforce provisions for shorter limitation in contracts entered into within its jurisdiction or sought to be enforced there. **TexCivA** 8SW(2d)354. [e] (3) Provisions of bond, limiting period to less than that provided by statute and declaring that commencement of suit after such period shall be conclusive evidence of invalidity of claim, are rendered invalid by statute. 22**F(2d)**881. [f] **In Kansas.**-123**Kan**214, 254P1034. [g] **In Iowa.**-216NW957. [h] **In North Dakota.**-56**ND**14, 215NW875. [i] **Statute is not applicable to contracts made** or performable outside state. 281**US** 397, 50**SCt**338, 74**L ed**926.

728-6 202 **Iowa**1002, 210NW129; 204 **Iowa**655, 215NW749; 165**Minn**313, 206 NW450. See also **Iowa** 216NW957; 171 **Minn**202, 214NW24. [d] **In Kentucky.**-213**Ky**305, 280SW1106.

728-7 202 **Iowa**1002, 210NW129. [a] (4) See also 202 **Iowa**1002, 210NW129. (5) Provision in contract for construction of school building and in contractor's bond requiring suit to be instituted within ninety days after completion of contract is unreasonable where statute requires notice of claim to be served within ninety days after completion of contract and suit to be brought within one year thereafter. 165**Minn**313, 206 NW450. [b] **Provision of depositary's bond prohibiting bringing of action** earlier than sixty days or later than ninety days after loss is unreasonable. **Iowa** 216NW957.

729-8½-New. Where such stipulation is unreasonable and therefore unenforceable, the general statute applies. 202 **Iowa**1002, 210NW129.

729-8½-New. Bills of lading providing for judging according to French law are insufficient to incorporate French law of prescription. 47**F(2d)** 941.

729-13 43**F(2d)**941; 172**Ark**647, 291 SW90; **CalA** 261P510; 161**Ga**884, 132 SE70, 44**ALR**795; **IndA** 155NE831; 207 **Iowa**239, 222NW413; **La** 129S811; 131**Misc**154, 226NYS238; 137**Misc**396, 241**NYS**76; 198**NC**397, 151SE857, 68 **ALR**210; **Man** [1928] 1**DomLR**791. See also 152**Va**800, 148SE831. [a] **Mo** 23SW(2d)100 (as to necessity of pleading statute).

729-14 172**Ark**647, 291SW90; 199 **Ind** 733, 160NE450, 451 [citCJ].

729-17 129 **Okl** 281, 285, 264P623, 627; 41 **OklACR**118. [a] **Causes of action which accrued in Indian Territory prior to statehood** are controlled by statutes of limitation as they appear in Mansfield Dig. St. of Arkansas. 41 **Okl ACR**118.

730-21 322**Mo** 121, 14SW(2d)576; 217 **AppDiv**159, 216NYS384; 220**AppDiv** 160, 221**NYS**11; 227**AppDiv**82, 237**NYS** 94; 135**Misc**194, 237**NYS**378; 52**SD** 245, 217NW200; **TexCommnA** 15SW (2d)1028(2dcase); **TexCivA** 8SW(2d) 354; **TexCivA** 11SW(2d)352; **Man** [1927] 3**DomLR**360. But see 35**F(2d)** 822; 155**SC**436, 152SE658. [f] **Where contrary to public policy of forum,** limitation period prescribed in contract need not be enforced, though valid under law of place of making. **TexCivA** 8SW(2d)354. [g] **Statutory provision as to minimum period.**-**TexCivA** 8SW (2d)354.

731-22 **TexCivA** 8SW(2d)354.

731-23 [a] (1) **TexCivA** 8SW(2d)354.

731-26½-New. An action on a promissory note executed and delivered in the state and not shown to have been executed and delivered elsewhere is not barred merely because the action thereon could not be maintained in another state to which the maker had moved. 202 **Iowa**681, 210NW952.

731-26½-New. Where plaintiff suing on a Mexican insurance contract removed from Mexico a few days after insurance loss occurred and has lived in Texas ever since, a prescriptive statute of Mexico would be no defense in Texas. **TexCommnA** 15SW(2d)1028(2d case).

731-28 [a] (5) Note executed in Arizona delivered to agent for Massachusetts bank by maker receiving cash credit in Massachusetts through drafts is Arizona note for purpose of limitations. 27**F(2d)**224. (6) Note executed in blank in Arizona under agreement that payee in Massachusetts fill in amount of freight to be advanced by bank in Massachusetts is treated as executed in Arizona at time of signing and delivery in Arizona. 27**F(2d)**224.

731-29 **TexCommnA** 15SW(2d)102§(2d case).

731-33 127**Misc**776, 216NYS381.

732-36 131**Misc**700, 228NYS94. See also 157**Md**15, 145A184.

732-40 215**Ky**216, 284SW1049; **MoA** 25SW(2d)529; 24 **OhA**113, 156NE230 [citCJ]; 152**Va**800, 148SE831, 833 [quotCJ].

733-41 See also 83**NH**383, 142A707.

734-50 199 **Ind**733, 160NE450; 205 **Iowa**209, 217NW818; 129**Kan**253, 282P 570; 3**LaA**8; **LaA** 129S815; 124 **Okl** 177, 254P746, 747 [citCJ]. [f] **Where debt is secured by lien on real property within state of forum,** action to foreclose lien is barred where action on debt is barred by foreign statute and local statute provides that lien is extinguished by lapse of time within which action can be brought upon principal obligation. 124 **Okl** 177, 254P746. [m] (5) Policy of Civ. Pract. Act §§ 13, 55 is not to lengthen term of New York statute, but to provide additional limitations. 131**Misc**154, 226NYS238. (6) Under § 13, where cause of action arises outside state, action cannot be brought in state if barred under law of outside state. 131**Misc**154, 226NYS238. (7) Under § 55 nonresident plaintiffs are not entitled to take advantage of foreign period of limitations where it is longer than period of limitations allowed by New York Law. 131**Misc**154, 226NYS238. (8) Action arising in Quebec on notarial deed of sale and "hypothec," executed there, cannot be maintained in state after expiration of Quebec period of limitations (131**Misc**154, 226NYS238), (9) or, although not barred under Quebec period of limitations, after expiration of shorter New York period of limitations (131**Misc** 154, 226NYS238).

735-51 [g] (2) In action between nonresidents of Kansas on note executed by defendants, who reside in Texas, and payable in Missouri, domicile of payee, and sued on in Kansas upon attachment and publication service governing statute of limitations is that of Missouri, and not that of Texas, where note was executed. 127**Kan**148, 272P 170. [h] 218**Ky**626, 291SW1021. [i] (3) Action between residents of another state on cause of action arising there is barred in Minnesota if barred in such other state. 180**Minn**560, 231NW 239. [m] (1) 216**AppDiv**368, 214NYS 353; 131**Misc**700, 228NYS94. (5) Six-year limitation applies to action on oral contract made in foreign state in view of Civ. Pract. Act § 13. 216**App Div**368, 214NYS353. (6) Civ. Pract. Act § 13 is inapplicable where statutes of foreign jurisdictions involved are not shown. 222**AppDiv**498, 227NYS78. (7) Under Civ. Pract. Act § 13 action for conversion of remainders is governed by New Jersey statute of limitations where cause of action accrued there and plaintiff's residence at time of accrual is not shown. 131**Misc**129, 226NYS162. (8) Cause of action arising outside of state cannot be brought after expiration of time limited by laws of state where cause of action arose. 229 **AppDiv**660, 242NYS676. (9) Note made in California, but payable in Pennsylvania is subject to six year limitation under Pennsylvania law and can be sued on within six years in New York. 137**Misc**203, 242NYS598. **[r] In Louisiana.**-**La** 129S811.

737-70 215**Ky**216, 284SW1049. [a] (3) Seaman's action in state court under Merchant Marine Act is controlled by limitation in Employers' Liability Act. 271**US**33, 46**SCt**410, 70**L ed**813. (4) Under Transportation Act of Febr. 28, 1920, providing for suit "within the periods of limitation now prescribed by state or federal statutes, but not later

than two years from the date of the passage of this act," the two-year limitation governs. 215Ky216, 218, 284SW1049.

737-74 [a] 103Conn716, 131A558.

737-75 100CalA736, 281P106.

737-76 10LaA134, 120S894.

737-77 8F(2d)321; 86Mont478, 284P525; 134Misc393, 235NYS756. [d] **Defense of statute of limitations** applies to particular action to which it is pleaded. 213Ala377, 104S821.

739-81 [c] **Action held to sound in contract.**–13LaA646, 127S445.

739-84½-New. Change in form of remedy does not alone affect application of statute of limitations. Mass 172NE614.

739-87 [a] **Test of whether proceeding is action to recover real property** is whether petition seeks adjudication of right to, title in, or possession of, realty. 205 Iowa1285, 217NW852.

739-88 44Philippine885.

739-89 23F(2d)457; 205Cal639, 271P1050; 93CalA512, 269P767; 161La378, 108S777; La 129S651; 123 Okl 26, 252P1093; 124 Okl 170, 254P1; 125 Okl 254, 257P372; 129 Okl 281, 285, 264P623, 627; 130 Okl 83, 265P124; Tex CommnA 299SW231; 149Wash138, 270P309. [f] (5) Ejectment action brought fourteen years after land was taken is barred under revised statute of 1919, regardless of whether five- or ten-year provision applies. 319Mo 302, 3SW(2d)381.

740-2 Mo 28SW(2d)1030 (implied trust); 129 Okl 281, 285, 264P623, 627.

741-6 219Ala645, 123S838.

741-7 Mo 282SW392; 125 Okl 254, 257P372. [i] TexCivA 27SW644. [k] **In Oklahoma.**–126 Okl 165, 258P1041.

742-18 132 Okl 139, 269P1080.

742-19 TexCivA 18SW(2d)267.

742-23 68CalA235, 228P711; 78Mont170, 253P313; 136 Okl 118, 276P718. [c] **In California.**–73CalA421, 238P1096.

742-25 195Cal 132, 231P987.

743-31 121 Ind164, 22NE725; 205 Iowa1285, 217NW852.

743-32 105La456, 29S949.

743-36½-New. One cotenant cannot set up the bar of the statute of limitations against his cotenant in the absence of disseizin. 144Cal19, 77P712; 198 Ill 66, 64NE741; 264 Ill 219, 106NE763; 62 Ind441; 119 Ind93, 21NE458; 134 Ind494, 34NE7, 39AmSR276; 109 Iowa695, 81NW175; 136 Iowa291, 111NW451; 44Kan193, 24P76; 76Miss923, 25S359; 253Mo447, 161SW829; 39Misc358, 79NYS924 [aff 87AppDiv632, 84NYS1124]; 34PaS12, 75AmD634; 93TexL58, 54SW377, 55SW149, 56SW330; 61WVa659, 30SE746.

743-36¼-New. Statute relating to contest of will controls in Illinois where a complainant claimed to be a cotenant on the ground that a will giving the land to defendant was obtained by fraud and undue influence. 178 Ill 103, 52NE946.

743-36¼-New. Limitations do not run against the right of the children to have the homestead partitioned during the surviving wife's occupancy. Tex CivA 71SW670.

743-36⅛-New. When, as authorized by the laws of California, an action of partition is brought for the benefit of all persons interested in the estate, all are actors from its commencement, and limitations do not run as to any of them thereafter. Cal 69P228.

743-38 168La931, 123S625.

743-40 214Ala691, 108S737; 101NJEq809, 139A170; 100NJEq434, 135A502.

744-41 Vt 146A77.

744-44 130Misc556, 224NYS844; 195NC768, 142SE10.

744-47 [b] **In North Carolina.**–192NC679, 135SE784. [c] **Stipulation in defeasance clause of mortgage** reciting that mortgagee may remain in possession until paid and receive usual notice to quit does not stop running of ten-year limitation. 192NC679, 135SE784. [d] **Ten years' actual possession by mortgagee** required by statute is not adverse but mortgagee enters and holds under mortgage. 192NC679, 135SE784.

744-53 48Philippine437.

745-54 [a] (2) **Limitation against recovery of land claimed under patent prior to 1820 from one claiming by possession under "title of record"** applies only where defendant holds under patent. 223Ky517, 38W(2d)1095. (3) One required by statute to base claim to land on "title of record" must trace title to valid patent. 223Ky517, 38W(2d)1095. (4) Persons claiming under Kentucky patent of 1846 had no "title of record" precluding action against them to recover land held under Virginia patent of 1787. 223Ky517, 38W(2d)1095. [d] **In New York.**–126Misc642, 214NYS418.

745-56 84 IndA555, 151NE740; 11LaA32, 120S804; 124 Okl 170, 254P1. [a] (6) In Texas suit to recover land banquet at tax sale is one for recovery of real estate and four-year statute does not apply. TexCivA 285SW651. [b] (2) Nonresident absentee as to whom there was no service of process. 160La1089, 108S100. (3) Prescription of five years held not applicable to sheriff's sales affected by radical nullity. 160La1089, 108S100.

745-64 177 Okl 292, 246P419; 124 Okl 170, 254P1; Okl 292P362. [c] **In Oklahoma.**–117 Okl 292, 246P419; Okl 292P362.

746-69 Okl 292P362.

746-72 118Kan595, 236P640; 164La787, 114S654; 146Miss900, 112S593; 77Mont554, 252P377; TexCivA 11SW(2d)329. [b] (2) Park Civ. Code § 4496(a), relating to limitations of actions to recover possession of personal property, is held inapplicable to facts of case. 160Ga647, 128SE898.

746-73 215Ala93, 109S745.

746-75½-New. Fiduciary relation between husband and wife exists until decree of divorce is in fact entered, until which time wife had right to return home and resume possession of personal effects. 77Mont554, 252P377.

747-83 [g] **In Philippines.**–44Philippine4. [h] **No limitation** when suit for mortgage debt evidenced by acceptance of deed poll, by which grantee assumes mortgage. 93Fla223, 111S731, 51ALR976. [i] **Action against possessor of land in bad faith for rents and profits** is not within statute providing limitation in actions for rent. 165La536, 115S742.

747-84 244Mich695, 222NW145; NJ 145A112.

747-85 37GaA171, 139SE111; 215App Div225, 213NYS555 (rights under contract for sale of street railroad franchise not asserted for over twenty-three years are barred by statute); 216App Div554, 215NYS442; 222AppDiv422, 226NYS491. See also Alta [1928] 1DomLR465. [b] **Six-year period** is held to apply to action to recover money collected by assignee of agent who was appointed guardian of plaintiff's property. 216AppDiv554, 215NYS442.

747-86 81CalA192, 253P172.

748-2½-New. In Porto Rico, under Code of Commerce arts 336, 942, action by buyer for defect in quantity or quality of merchandise must be brought within four days following receipt. 32 PortoRico 51.

748-7 But see 176Minn554, 223NW926.

748-8 [a] **Findings of probate court,** in discharging administrator, that certain sum was due estate held not judgment as regards statute of limitations. TexCivA 32SW(2d)948.

748-12 39F(2d)551 (cause of action for maintenance and cure after personal injuries). [a] **Salesman's action for commissions barred** where not commenced within statutory period after delay induced by employer. 138 Okl 238, 280P817.

749-15 But see 12LaA549, 126S261.

749-17 169La412, 125S289.

749-19 30F(2d)776.

749-21 14F(2d)145; 219Ky528, 293SW1091; 128Misc238, 218NYS287. See also 2LaA150. [a] See also 6LaA123.

749-23 See also 3LaA498.

749-33 144Wash33, 256P74.

750-41 290Pa348, 139A114.

750-42½-New. In some jurisdictions, where the original indebtedness for goods sold is secured by a note and written mortgage, the four-year statute of limitations is applicable and not the two-year statute. TexCivA 274SW210.

750-43 [e] **In New York.**–241NY221, 149NE838.

750-44 164Ga155, 138SE62; 101NJEq5, 137A215; 242NY475, 152NE266; 116Oh576, 157NE321.

751-48 291Pa64, 139A590.

751-51 254Mass294, 150NE87.

751-58 See also Alta [1928] 4DomLR784.

751-59 Contra 242NY475, 152NE266. [d] **Instrument bearing notarial seal** regarded as specialty in foreign jurisdiction, and not bearing seal of party, is not sealed instrument. 131Misc700, 228NYS894.

751-59½-New. Recovery against city for item in contract under seal is barred after twenty years. 222AppDiv422, 226NYS491.

751-59¼-New. Contract containing seal of one party only is not sealed instrument of other party. 222AppDiv422, 226NYS491.

752-68 [a] (2) Suit to foreclose it is governed by six-year statute of limitations governing unsealed instruments. 242NY475, 152NE266.

752-69 166Ga143, 142SE687.

752-72½-New. In Manitoba an action on the covenant of a mortgage, whether the land mortgaged is within or without the province, is barred in ten years. Man [1928] 1DomLR791.

752-72¼-New. In Alberta the statute limiting the time to sue to recover money secured by mortgage applies to the statutory liability for the mortgage debt of a transferee by unsealed agreement of land subject to mortgage. Can [1929] 3DomLR883.

752-73 110Conn413, 148A367.

752-74 [a] (1) 41GaA34, 151SE821. [c] **Signature must be followed by seal or representation thereof.**–41GaA34, 151SE821.

752-76 [a] (1) 41GaA34, 151SE821. (2) 41GaA34, 151SE821.

752-79½-New. Unsealed agreement for stock purchase and for giving of note is not merged in note subsequently given under seal as affects limitation against action on agreement. 290Pa348, 139A114.

753-82 178Ark888, 12SW(2d)780; 10LaA179, 120S96; 101NJEq5, 137A215; 117 Oh512, 159NE559; TexCivA 14SW(2d)88. See also 132SC45, 128SE40. But see TexCivA 10SW(2d)272. [e] **In Minnesota.**–169Minn240, 211NW7. [f] **Suit on contractor's bond** is barred by one year statute. TexCommnA 29SW(2d)1009.

753-83 31F(2d)547; 101NJEq5, 137A215. [b] (2) County's suit on tax collector's official bond for excess delinquent tax fees due it under Rev. St. (1911) arts 3889, 3896, is barred in respect of claims for fees payable over four years before suit was brought. TexCommnA 11SW(2d)163.

753-84 158La885, 104S914 (action against surety on indemnity bond as contracts subject to prescription of ten years covering personal actions not enumerated).

753-85 38 OklACR698.

753-90 [f] **In Texas.**–CivA 19SW(2d)913.

754-99 [a] 103NJL175, 143A618.

754-4 215Ala212, 110S308; 115Nebr789, 215NW111, 61ALR1.

755-15 39GaA724, 148SE345(3dcase); Va 153SE818 (five years); 141Wash560, 252P133.

755-16 CalA 260P372; 219MoA645, 284SW834.

755-17 203 Iowa880, 210NW566. See also 8LaA226.

755-21½-New. Where a petitioner, in an action to recover the balance due on a contract, does not allege whether the contract was oral or written, and a written contract between the parties is thereafter introduced in evidence without objection, the two-year statute of limitations is not applicable. TexCivA 10SW(2d)394.

755-24½-New. Wage agreement is held to constitute written contract to which

four-year statute applies. **TexCivA** 288 **SW**504.

756-25 [a] **In action to recover money** for failure to invest as directed two-years statute of limitations for actions founded on tort is held not to apply. 122**Kan**1, 252**P**242.

756-35 142**Wash**580, 253**P**1083.

756-46 24**F(2d)**981; **CalA** 290**P**434. [e] See also **MoA** 298**SW**1059. [g] **In Missouri.**-219**MoA**645, 284**SW**834. [h] **Action against physician for malpractice** arising from breach of written contract is governed by statute limiting actions on contract in writing. 103**Conn** 716, 131**A**558.

757-47 **MoA** 289**SW**667, 669 [quotCJ]. [e] (4) **MoA** 289**SW**667. (5) Where contract is purely evidential in action for damages, action is not on written contract. **MoA** 289**SW**667.

757-48 73**CalA**769, 239**P**358; 77**CalA** 137, 246**P**150; 143 **Okl** 112, 287**P**1033; **TexCommnA** 25**SW(2d)**822 (fidelity bond); **TexCivA** 283**SW**537; **TexCivA** 286**SW**339; **TexCivA** 294**SW**657; **Tex CivA** 1**SW(2d)**455; **TexCivA** 5**SW(2d)** 598; **TexCivA** 20**SW(2d)**803. [e] (5) Action for installment of rent. 243 **IllA** 24. [k] **TexCivA** 276**SW**947. [o] (5) Action by assignee of materialman on contractor's bond conditioned upon payment of claims is held not within Texas statute. 17**F(2d)**87. [p] **Instrument to which seal is affixed** without authority is simple contract and subject to statute applicable to such contracts. 20 **AlaA**561, 103**S**719.

758-49 **CalA** 290**P**434. [g] **Correspondent of bank** forwarding depositor's check for collection is depositor's agent. **TexCivA** 296**SW**674.

759-55 219**MoA**645, 284**SW**834.

759-57½-New. Subscription contract signed by one orally authorized to do so is the written contract of the principal. 130**Kan**622, 287**P**242.

759-60 But see 156**Miss**288, 125**S**825.

760-70 174**Ark**437, 295**SW**710; 178 **Ark**635, 12**SW(2d)**18.

760-71½-New. or to enforce a purchaser's implied lien for repayment of the purchase money paid on the vendor's default. 32**Ariz**342, 258**P**304.

760-73 291**Pa**64, 139**A**590.

760-76 87**Colo** 183, 285**P**1099 (six years); 158**La**66, 103**S**445; 1**LaA**726; **TexCivA** 13**SW(2d)**123; **TexCivA** 27**SW (2d)**305(1stcase); **Va** 153**SE**818 (five years). [a] 72**CalA**757, 238**P**143; 81 **CalA**210, 253**P**749. [d] (4) Municipal certificates of indebtedness are held to be negotiable notes and governed by the five-year statute of prescription. 158**La**342, 104**S**67. [i] **In Kentucky.**-233**Ky**540, 26**SW(2d)**32. [j] **In North Carolina.**-198**NC**89, 150**SE**676(2dcase) (action brought five years after maturity held barred).

760-77 [a] (3) 218**Ky**47, 290**SW**1050. (6) Where surety on note paid it and received note after maturity, fifteen-year limitation applies in action by surety against principal. 225**Ky**142, 7 **SW(2d)**842.

760-77½-New. Purchaser of note on due date is held "holder in due course" within limitation statute. 220**Ky**418, 295**SW**412.

761-79 8**LaA**334.

762-88 **TexCivA** 288**SW**1090.

762-88½-New. An action begun over nine years from the date checks on a foreign bank were issued is barred. 265**Mass**182, 163**NE**740, 62**ALR**506.

762-91 252 **IllA**17; 143**Miss**33, 108**S**283 (sufficient writing to satisfy six-year statute).

762-2 **TexCivA** 283**SW**555.

762-3 [a] **TexCivA** 270**SW**1095.

762-6 131**Misc**154, 226**NYS**238. See also 143**Wash**210, 255**P**96.

763-10 254**Mass**294, 150**NE**87.

763-11 **DC** 32**F(2d)**954; **TexCivA** 13 **SW(2d)**472.

763-15 77**CalA**584, 247**P**211; 103**Conn** 716, 131**A**558; **TexCivA** 283**SW**537; 68 **Utah**472, 251**P**11; **Wash** 289**P**22. See also **TexCivA** 7**SW(2d)**878. [a] (8) Verbal assumption of a debt. **TexCivA** 283**SW**537. (9) In grantor's claim in general assumpsit on parol contract to recover amount of judgment recovered against grantor on mortgage, applicable statute of limitations was three-year provision. 155**Md**410, 142**A**598.

763-16 254**Mass**294, 150**NE**87.

764-18 [a] (3) Buyer's rights, arising from seller's verbal promises to repair and warranty of repair, are subject to limitation applicable to parol agreements. 174**Ark**437, 295**SW**710.

764-21 **MoA** 289**SW**667.

764-23½-New. Limitations on contracts not in writing do not apply to double liability of stockholders in state banks which, although contractual in nature, are created by law and governed by special statutes relating to that kind of obligation. 78**Mont**301, 254 **P**419.

764-26 123**Kan**304, 255**P**68; 287**Pa** 105, 134**A**468; **Wash** 288**P**265 (malpractice actions against attorneys). But see 177**Ark**1085, 9**SW(2d)**569; **Ark** 32**SW (2d)**315. [a] (2) See also 135**Wash**569, 238**P**615. (4) Implied promise to pay for labor and materials in drilling oil well is within statute. 99**CalA**769, 279 **P**481. [h] (2) 90**CalA**83, 265**P**835; 161 **La**378, 108**S**777. (5) 136**Misc**581, 240 **NYS**380. (12) 103**Conn**716, 131**A**558. See also 24 **OhA**219, 157**NE**405. (29) Action to recover usury paid. 147**Miss** 401, 113**S**209. (30) Claim by county for expenditures for insane person. 50 **SD**499, 210**NW**738. (31) Suit against bank for balance due on war stamps. **TexCivA** 295**SW**256. (32) Action against county for gravel taken without condemnation. 127**Kan**547, 274**P**249. (33) Action to recover taxes paid under protest. **TexCivA** 21**SW(2d)**355. (34) Action to recover money paid on warrants. 154**Wash**140, 281**P**332. [j] But see 24 **OhA**219, 157**NE**405. [k] **Action to recover value of personal property borrowed without express authority and not returned** is not governed by statute limiting actions for conversion. **TexCivA** 286**SW**249.

766-27 148**Md**140, 129**A**7. [f] (1) 120 **Kan**555, 245**P**161. [i] **Suit by seaman for double wages** is suit on implied contract for compensation with two-year limitation and not for penalty within five-year limitation. 5**F(2d)**545.

766-28 [e] **In Arkansas.**-175**Ark**112, 298**SW**879.

766-30 163**La**86, 111**S**608.

766-33 **CalA** 259**P**502. [a] (1) 171**Ark** 828, 286**SW**969; 50**Nev**383, 263**P**774. (2) **TexCivA** 3**SW(2d)**937. (5) Action by coöwner of ship for proportionate share of expense of repair. 204**Cal** 231, 267**P**1081.

767-39 156**Miss**893, 127**S**570, 69**ALR** 1068. [a] **Governed by two-year statute** where action is against depositary's agent for negligence in collecting rate. **TexCivA** 296**SW**674. [b] **To take case out of three year statute,** writing evidencing indebtedness must be such as to render supplementary evidence unnecessary. 156**Miss**893, 127**S**570, 69 **ALR**1068.

767-43½-New. The statute of limitations applicable to actions on implied contracts applies to an action to enforce a surety's right to subrogation on payment of the debt of his principal. 120 **Kan**555, 245**P**161.

767-44½-New. **A claim of a road commissioner for salary fixed by statute** is not one on an implied contract. 161**Ga** 893, 131**SE**881.

767-46 141**Wash**642, 252**P**143.

767-47 141**Wash**642, 252**P**143; 144 **Wash**263, 257**P**637.

767-61 5**LaA**578; 148**Miss**368, 114**S** 628; **TexCivA** 10**SW(2d)**1016. See also 6**LaA**528. [b] **In New York.**-241**NY**189, 149**NE**828.

768-62 11**LaA**246, 122**S**505.

768-63 34**GaA**143, 128**SE**702; 36**GaA** 394, 136**SE**826; 143**Miss**33, 108**S**283. See also 2**LaA**317. [i] **Claim of road commissioner for salary fixed by statute** is not one on open account. 161**Ga** 893, 131**SE**881.

768-66 **CalA** 285**P**1076.

768-66½-New. A debt evidenced by promissory notes is not within the statute applicable to actions on accounts, although the creditor kept book accounts against the debtor. 170**Ark**1193, 280**SW**996.

769-70 24**F(2d)**297. [c] (2) Open account not shown so as to make four year statute applicable. **CalA** 285**P** 1076. [j] (7) Widow's application for year's support. 37**GaA**171, 139**SE**111.

769-71 [b] (4) Account consisting of charges on one side and payments on other is not mutual. 194**NC**346, 139**SE** 696.

771-2 [b] **In Washington.**-143**Wash**665, 255**P**1033.

771-5 **CalA** 289**P**920.

771-7 121 **Or**133, 253**P**525, 527 [citCJ].

771-9 [b] **In Louisiana.**-Claim against consignee of coal for deliberate damage to cars is based on tort and prescribed by one-year statute. 6**LaA**123.

771-10 [d] **In Connecticut.**-103**Conn** 716, 131**A**558. [e] **Action by administratrix against attorney for negligent prosecution of action for death of deceased** is not barred by two-year statute of limitations applicable to malpractice actions, since "malpractice" does not include injuries to property caused by unskillful professional management. 30**F(2d)**776.

771-11 [a] (1) 202 **Iowa**1396, 212**NW** 142. (3) Actions for damages for breach of promise of marriage are governed by this statute. 202 **Iowa**1396, 212**NW**142. (4) Action for damages for wrongful conduct consisting of confining plaintiff to room, whether deemed assault or false imprisonment is founded on injuries to person or reputation within statute. 202 **Iowa**1396, 212**NW**142. [b] **In Ohio.**-120 **Oh**443, 166**NE**372(1stcase).

772-13½-New. A limitation section of a statute dealing with personal actions bars the remedy, not the right. 60 **OnfL** 269, [1927] 2**DomLR**945.

772-18 213**AppDiv**147, 210**NYS**114; 117 **Okl** 245, 246**P**426. [a] **Action held ex contractu.**-33**Ariz**220, 263**P**626.

772-21 **Ont** [1930] 2**DomLR**286.

772-29 [a] 164**La**787, 114**S**654; 170**La** 805, 129**S**209(2dcase); **LaA** 128**S**694.

773-32 [a] (5) 12**LaA**541, 124**S**783 (action held not prescribed). (15) Action for damages for cutting and removing timber, asking for judgment for stated amount of timber or its value, but not for specific timber, is within statute. 164**La**787, 114**S**654. [b] 164**La**787, 114 **S**654.

773-35 **LaA** 125**S**144(2dcase).

773-36 **La** 124**S**827.

773-37 [b] (2) Obligation of possessor of land in bad faith to restore land and revenues resulting therefrom. 165**La** 536, 115**S**742.

774-57 14**F(2d)**954; 100**CalA**201, 280 **P**163 (wife's action for mutilation of body of deceased husband); 37**GaA**439, 140**SE**386; 202 **Iowa**1396, 212**NW**142; 13**PaDist&Co** 129 (action against physician for malpractice); **TexCivA** 274**SW** 172. [b] (4) Action for conspiracy in defeating plaintiff for renomination and reëlection to office. **TexCivA** 4**SW(2d)** 574. [d] **In California.**-100**CalA**201, 280 **P**163.

774-59 99**CalA**352, 278**P**889. [a] (1) See also 24 **OhA**219, 157**NE**405. (8) Action against railroad maintaining hospital for injured employees where it was alleged that railroad in violation of contract refused to use X-ray whereby surgical treatment was valueless. 8**F(2d)** 480. (9) Action against sheriff and surety for negligent wounding by deputy. 156**Miss**288, 125**S**825. [b] 8**F(2d)** 480.

774-61 223**AppDiv**547, 229**NYS**60; 227 **AppDiv**66, 236**NYS**641 (injury caused by neglect of nurse held not "malpractice"). [b] **Action for malpractice** covered by two-year statute, rather than action for fraud, is held alleged in complaint for dentist's negligence in permitting extracted tooth to go down patient's throat and concealment thereof. 218 **AppDiv**313, 218**NYS**139.

775-62 14**F(2d)**954; 100**CalA**201, 280 **P**163; 202 **Iowa**1396, 212**NW**142; 131 **Misc**236, 227**NYS**218. [a] 131**Misc**236, 227**NYS**218.

775-64 30**F(2d)**776. See also 103**Conn** 716, 131**A**558.

775-65 [a] 103**Conn**716, 131**A**558.

775-66 [d] **In New York.**-218**AppDiv**

158, 217NYS881. [e] **In Tennessee.**–156 Tenn353, 2SW(2d)100, 62ALR1410.

775–68 213AppDiv147, 210NYS114.

775–69 [a] **In Quebec.–Can** [1930] 2 DomLR353.

775–70½–New. An action for damages for trespass on plaintiff's right to possession and control of her husband's dead body is not an action for injuries to the person. 154Tenn295, 294SW1097, 52ALR1442.

776–72 13PaDist&Co 129; 155Tenn639, 299SW785, 55ALR932. [e] **In Ohio.**–38F(2d)179.

776–74 Mo 28SW(2d)84(2dcase).

776–77 38GaA586, 144SE825.

776–86 See also 218AppDiv743, 218NYS 21.

776–91 24 OhA136, 156NE609. [c] **In Michigan.**–248Mich598, 227NW756.

776–92 158Md60, 148A124; 150Miss90, 116S438.

777–96 126 Okl 283, 259P260.

777–97 [h] (7) Action for damages for negligence of county treasurer in registering false and forged school warrants. 126 Okl 283, 259P260. [k] (2) Action against railroad company for damages by erosion, overflows, and alkalization of land as result of change in creek channel by construction of embankment and seepage from reservoir is within four-year statute. 30F(2d)803.

778–18 TexCivA 273SW908; TexCivA 275SW90; TexCivA 278SW90; TexCivA 26SW(2d)732.

778–20½–New. Statutory period is two years. TexCivA 295SW323.

778–23 La 129S651. See also 7LaA511.

778–26 24F(2d)370. [e] **In Arkansas.**–175Ark112, 298SW879.

779–33 37GaA439, 140SE386; 162La 941, 111S336; 152Md371, 136A825. [a] (5) 33F(2d)589. (6) Action for damages for taking land for telephone lines. 319Mo 302, 3SW(2d)381. (7) Action for damages by destruction of oil well because of negligence in placing control head on casing. TexCivA 7SW(2d)878. (8) Action for damages to property from change of grade of street. 177Minn565, 225NW816. (9) Action by receiver of bank against directors for acts and negligence resulting in loss. 33F(2d)589. [d] (4) Any actionable act other than personal injury or breach of contract, whereby owner of personal property is deprived of benefit of it or property is destroyed, is injury to personal property. 120 Or600, 253P542, 543 [citCJ]. (5) Action for damage to personal property caused by opening gates of dam which resulted in river overflowing its banks is within statute limiting time for commencement of actions for injury to personal property. 120 Or600, 253P542. [e] **In Louisiana.**–A 124S550.

779–34 103Conn716, 131A558.

779–48 102WVa475, 135SE597, 599 [quotCJ].

779–49 102WVa475, 135SE597, 599 [quotCJ].

779–50 99WVa341, 128SE740; 102WVa 475, 135SE597, 599 [quotCJ].

779–51 102WVa475, 135SE597, 599 [quotCJ].

779–53 [a] (3) Petition construed as action in trespass for flooding land held not barred where, after dam was broken and pond released, it was not used for several years before suit, and entire time in which water was ponded by dam did not amount to four years. 169Ga 187, 149SE910. [b] **Suit for water-soaking** plaintiff's land is held based on negligence, rather than trespass upon real property. 43 Ida198, 252P865, 866 [cit Cyc].

780–58 152Md371, 136A825.

780–59½–New. , as one-year statute. 216Ala237, 113S50.

780–53½–New. In Oklahoma injury to crops from flow of waste oil and salt water is governed by two-year statute of limitations. 131 Okl 183, 268P218; 131 Okl 183, 268P220.

780–62 181Ark1079, 28SW(2d)701 (trespass on lands); 35GaA427, 133SE 302.

780–65 159La1057, 106S564.

781–81 [b] **In action to recover damages for settlement of church caused by excavation in constructing subway,** acts of defendants did not constitute taking of property right in easement of lateral support within 20-year statute of limitations. 134Misc29, 234NYS281.

782–87 228Ky541, 15SW(2d)481; Tex CivA 297SW864.

782–90 178Minn174, 226NW405 (involving negligence). [d] (3) County depositary is not public officer within statute. 44F(2d)11. [m] **Actions against individuals for acts done in assisting public officials** are within application of statutes applicable to actions against such officials. 178Minn174, 226 NW405.

783–95 38GaA382, 144SE151. [a] 200 Cal 210, 252P605; CalA 286P482; CalA 290P434; 45 Ida193, 261P338; 127Kan 544, 274P265; 127Kan793, 275P188; 208Ky661, 271SW1066; 214Ky385, 283 SW389; 27 OhNPNS582; 123 Okl 61, 251P1001.

783–96 86Mont478, 284P525. [n] **Action for rescission under Blue Sky Law.**–Utah 272P946. [o] **Statutory liability of president of corporation** for failure to file annual statement must be enforced within three years. 181Ark994, 28SW (2d)1067.

784–97 Mont 284P525.

784–98 86Mont478, 284P525.

785–5 47 Ida712, 278P214(2dcase).

785–12½–New. An action by state to collect from county reformatory maintenance charges; 208Ky661, 271SW 1066.

785–20 58ND581, 226NW586(2dcase).

786–25 Ida 291P1067. [c] 80Mont395, 260P725.

786–26 74CalA77, 239P355; 10LaA653, 121S189; 80Mont395, 260P725.

787–41 78Mont301, 254P419. [b] **In South Dakota.**–49SD543, 207NW536. [c] **Liability of directors.**–77Mont399, 251P 524.

787–43 170Ga265, 152SE229.

787–47½–New. Liability of stockholder in insolvent national bank is governed by state limitations in absence of federal law. 16F(2d)997.

787–47⅓–New. Under some statutes, liability is considered "debt not evidenced by contract in writing." Tex CivA 291SW702, 703.

787–50 [a] (5) Right of abutting owner to recover consequential damages caused by raising established street grade. 123 Okl 61, 251P1001 (damage held inflicted within statutory period).

788–53 219NYS401; TexCivA 286SW 680.

788–54 [h] **In Oklahoma.**–39 OklACR 310. [i] **Action to recover excess indebtedness** is not one to recover "statute penalty." 34F(2d)884.

789–58 [a] MoA 16SW(2d)739.

789–60 TexCivA 286SW680.

789–61 86Mont478, 284P525; 217App Div336, 216NYS727. [i] **Statute permitting recovery of horse race wagers held to give remedial cause of action for money had and received,** and not penalty. 217AppDiv336, 216NYS727.

789–62 [a] 86Mont478, 284P525.

790–63 [b] **Action for cancellation of record of oil and gas lease after declaration of forfeiture** is not action upon statute for forfeiture. 86Mont478, 284P 525. [c] **Claim for usurious interest paid** is not barred by one-year statutes for statutory penalties or forfeitures. CalA 288P36.

790–66 86Mont478, 284P525; 131 Or57, 279P534.

790–70 [a] (3) Demand as condition precedent to suit by taxpayer to recover from public officers penalty for unauthorized payments must be made before suit by municipality is barred. 39 Okl ACR310.

790–78 216AppDiv554, 215NYS442.

790–79 216AppDiv554, 215NYS442; TexCivA 3SW(2d)937.

790–80 [a] TexCivA 273SW900.

791–81 242 IllA69.

791–82 242Mich603, 219NW606; 134 Misc518, 235NYS492.

791–86½–New. Action to construe deed and to remove cloud on title is not subject to four-year limitation since declaratory of continuing right. TexCivA 27 SW(2d)591.

791–89 241NY189, 149NE828 (where legal and equitable remedy exist as to same subject matter); 216AppDiv554, 215NYS442.

791–90 216AppDiv554, 215NYS442; TexCivA 3SW(2d)937, 941 [citCJ].

792–92 [a] 225Ky394, 9SW(2d)55.

792–94 222Ky472, 1SW(2d)772; Tex CivA 273SW908.

792–95 200 Iowa1, 201NW787 (record held to show no reason why full statutory period should not be allowed). [b] **In Kansas.**–122Kan477, 252P212.

792–96 [a] 316Mo 1023, 292SW1023; ND 228NW839; 125 Okl 254, 257P372.

792–97 TexCivA 289SW1050. [l] **Action to cancel release of mortgage for fraud** is within statute. 128Kan377, 277 P1017.

792–98 24F(2d)417; 126Kan435, 268P 821; 125 Okl 254, 257P372; TexCivA 27SW(2d)857 (four years). [c] **Three-year limitation statute** held applicable to have deed declared mortgage for fraud or mistake. 193NC227, 136SE633.

792–1 Ariz 289P512; TexCivA 16SW (2d)1064.

793–3 207 Iowa1049, 221NW914.

793–6 38F(2d)275; Ariz 287P292; 89 CalA176, 250P289; 136Wash184, 239P 388. [a] (1) 136Wash184, 239P388.

793–7 144Wash263, 257P637.

793–9 MoA 26SW(2d)841.

794–10 CalA 275P529. [c] (1) 136 Wash184, 239P388.

794–13 167La451, 119S423.

794–13½–New. An action, based on constructive fraud against plaintiff's stock in hands of transferee of trustee for an accounting and recovery of the stock is not barred by ordinary six-year period. 215AppDiv336, 213NYS 389.

794–20 16F(2d)45 (South Dakota); 201 Iowa488, 207NW606.

794–28 128Misc827, 219NYS580.

794–33 164Ga155, 138SE62.

795–34 203 Iowa880, 210NW566, 567 [quotCJ]. [a] (2) Action to recover trust funds as preferred claim against insolvent bank is not within statute. Ariz 287P292.

795–35 203 Iowa880, 210NW566, 567 [quotCJ].

795–38 [a] But see 169Ga240, 150SE206 (2dcase).

795–40 319Mo 602, 4SW(2d)816.

795–42 [a] (2) 152Wash336, 277P849. [b] 161Ga403, 131SE75; 168Minn131, 209NW864.

795–43 149Wash409, 271P85.

795–44 [a] **In Minnesota.**–168Minn131, 209NW864. [b] **Claim against trustee's estate held barred.**–CalA 290P52.

795–50½–New. In Saskatchewan action for breach of trust in selling land for inadequate price is barred, unless cestui proves actual dishonesty, retention of property or proceeds, or conversion of property by trustee. Sask [1925] 3Dom LR1117.

796–55 132Misc916, 231NYS213.

796–61 225Ky735, 9SW(2d)1083; Tex CivA 19SW(2d)1111. [b] **Grantor's reservation of life estate in deed,** alleged to constitute mortgage, held not to prevent statute, limiting time on which actions for fraud might be brought, from running against her. 193NC227, 136SE 633.

796–64 29PortoRico 817 (Civ. Code § 1268). [a] (2) Plea of prescription on theory that action was revocatory held not available where plaintiff alleged that transaction was simulation. 165La1019, 116S493. [b] **In Porto Rico.**–33Porto Rico 176. [c] **Period of limitation is** computed from date of consummation of contract and not from date of its record in registry of property. 33PortoRico 176.

796–65 29PortoRico 817.

796–66 165La57, 115S366; 29Porto Rico 817 (rule applied to sale under foreclosure proceedings authorized by court without jurisdiction).

796–68 31F(2d)721. [a] **In suit against agent for concealed fraud,** statute is not applicable. 41F(2d)914.

796–70½–New. In an action for cancellation of a note and redemption of a note pledged as collateral defendant is not entitled to set up the statute of limitations against a claim for conversion of cotton which plaintiff claims should be

credited on the note secured. **TexCivA** 280SW604.

796–70½–New. Suit to recover money paid on land contract which became impossible of performance is barred by ten-year statute. 13**LaA**390, 128S310.

797–85 [b] (2) An action against stockbrokers alleged to have received money of client in fiduciary capacity to invest and praying for accounting of principal and profits is equitable action barred ten years after demand and not action on account barred in six years. 213**AppDiv**760, 210**NYS**406. (3) Action to recover money paid by plaintiff's attorney, no claim being made of express trust, barred. 244**NY**1, 154**NE**645.

797–88 235**Mich**282, 209**NW**179.

797–88½–New. In Ohio a proceeding for accounting and nullification of a deed is in equity, and, within the ten-year limitation period, timely. 29 **OhA** 81, 163**NE**60.

797–88½–New. An action to recover moneys collected by an agent is governed by limitations applicable to an action for an accounting between partners. 102 **CalA**541, 283**P**829.

797–90 29**PortoRico** 817 (action to annul sale under foreclosure proceedings). [b] (3) Proceeding under Gen. Code § 10,673 to recover property belonging to decedent's estate is not civil action within four-year limitation for such actions provided by code. 21 **OhA**396, 153 **NE**285. (4) Four-year limitation provided for civil actions has no application to special proceedings. 21 **OhA**396, 153**NE**285.

798–91 136**Misc**84, 240**NYS**440.

798–2 **CalA** 259**P**502.

798–4 [a] 120 **Or**600, 253**P**542.

798–5 171**Ark**492, 286**SW**867.

798–6 154**Tenn**602, 290**SW**402; 152**Va** 868, 148**SE**785; 144**Wash**263, 257**P**637. [a] (4) Action by city to foreclose paving lien is barred by four-year statute as to children of deceased defendant and first wife. **TexCivA** 22**SW(2d)**969.

799–7 204**Cal** 231, 267**P**1081.

799–8 **TexCivA** 19**SW(2d)**601; **TexCivA** 26**SW(2d)**732.

799–11 **La** 129**S**651; 126**Misc**820, 215 **NYS**607.

799–13 90**CalA**616, 266**P**613; 126**Misc** 820, 215**NYS**607; 154**Tenn**602, 290**SW** 402.

799–20 **La** 129**S**651; **TexCivA** 22**SW** **(2d)**688.

800–29 242 **IllA**574.

800–36½–New. to an action to recover a deposit required by a public service company from a consumer as security; 168**La**794, 123**S**328.

800–36½–New. to a proceeding to recover a workmen's compensation award; 248**Mich**64, 226**NW**836(2dcase).

800–37 134**Misc**393, 235**NYS**756.

800–39 [a] (3) Action to surcharge and correct account. 171**Ark**492, 286 **SW**867. [e] (2) Action to recover deposit made in bank for plaintiff. 45 **Ida** 451, 262**P**1057. [h] (3) Rights created by statute. **Iowa** 233**NW**49 (action for refund of sheriff's fees). [k] (1) 165**La**536, 115**S**742; 168**La**37, 121**S**183. (19) Action against possessor of land in bad faith to recover rents and profits. 165**La**536, 115**S**742. (20) Right of action of vendor under contract authorizing recovery of land on railroad's failure to construct station pursuant to agreement to that effect has been held personal action and barred by prescription liberandi causa of ten years. 166 **LaA**822, 118**S**33. (21) Other instances. 13**LaA**34, 127**S**114. [m] (6) Action for alienation of affections. 149 **Miss**5, 115**S**36. (7) Claim of county clerk for balance due as salary. 150 **Miss**432, 116**S**738. [o] (16) Action for separation on ground of cruel and inhuman treatment. 127**Misc**745, 217**NYS** 1. (17) Action by wife against her attorney in divorce action to recover share retained by him of lump sum recovered in lieu of future alimony. 133 **Misc**807, 234**NYS**274. (18) Cause of action in equity for fraud depriving plaintiff of remedy at law through bar of statute of limitations. 134**Misc**518, 235 **NYS**492. (19) Equitable cause of action for fraud. 229**AppDiv**273, 241**NYS** 584. [p] (6) Action to enforce charge on land is barred by ten-year statute. **NC** 153**SE**863. [w] (14) **TexCivA** 27 **SW(2d)**286. (24) Trespass to try title. **TexCivA** 289**SW**79. [x] (3) Claims by state and county against irrigation district for salaries and clerical work and similar items, though regarded as specialities, are barred by statute when not presented within statutory time after last services were rendered and after organization of district. 68**Utah**472, 251**P**11. [z] (1) 141**Wash**642, 252**P** 143. [ad] **In Arizona.**–32**Ariz**342, 258**P** 304. [ae] **In Minnesota.**–176**Minn**554, 223**NW**926.

802–40 [a] (1) 80**CalA**363, 252**P**656. (2) Limitation does not apply to action for separate maintenance. 80**CalA** 363, 252**P**656. [b] (2) Assumption by oil company of all accounts, obligations, and contracts of company with which it consolidated does not constitute new obligation, prescriptible only by ten years, as to claims for royalties. 167**La**801, 120**S**373.

803–44 [b] (7) Suit attacking judgment on tax deed is held not one for real estate and comes within express terms of statute. **TexCivA** 285**SW**651.

803–55 219**Ala**437, 122**S**656; **Ariz** 283**P** 273; 178**Ark**37, 9**SW(2d)**781; 76**CalA** 278, 244**P**916; 45 **Ida**28, 260**P**426; 46 **Ida**583, 269**P**991; 9**LaA**674, 119**S**781; **LaA** 129**S**257; **TexCivA** 271**SW**256; **TexCivA** 278**SW**333; **TexCivA** 280**SW** 604, 607 [citCJ]; **TexCivA** 13**SW(2d)** 133; 145**Wash**548, 260**P**1075. [f] 33 **Ariz**506, 266**P**16; 76**CalA**278, 244**P**916; **TexCivA** 278**SW**333; 137**Wash**311, 242 **P**11; 145**Wash**548, 260**P**1075.

804–59 **TexCivA** 295**SW**323.

804–60 **TexCivA** 280**SW**604, 607 [cit CJ]. [a] (2) **Ida** 292**P**243.

805–64 33**Ariz**101, 261**P**969, 57**ALR** 107; 249**Mich**469, 229**NW**484; 137 **Wash**311, 242**P**11. [e] **Where one of notes sue on is barred,** amount thereof must be deducted from damages proved by defendant by way of recoupment. 249**Mich**469, 229**NW**484.

805–67 249**Mich**469, 229**NW**484.

805–68 207 **Iowa**239, 222**NW**413; 137 **Wash**311, 242**P**11.

805–70 178**Ark**37, 9**SW(2d)**781; 247 **Mich**457, 226**NW**240.

805–71 48 **Ida**369, 282**P**82; 221**AppDiv** 609, 225**NYS**27; 13**PaDist&Co** 129; **Tex CivA** 280**SW**604. [c] **Under New York Civ. Pract. Act § 61,** statute of limitations is available against counterclaim for malpractice in action for medical services. 225**AppDiv**772, 232**NYS**390. [d] **Cause of action barred by limitation** cannot be interposed as counterclaim. 180**Ark**695, 22**SW(2d)**562.

806–73 201 **Iowa**148, 205**NW**833; 128 **Kan**681, 280**P**782; 129**Kan**253, 282**P** 570; **LaA** 129**S**257; **TexCivA** 29**SW(2d)** 489; 145**Wash**548, 260**P**1075.

806–73½–New. provided the debtor owned the claim when it became barred, 201 **Iowa**148, 205**NW**833.

806–74 48 **Ida**369, 282**P**82; 201 **Iowa** 148, 205**NW**833; **La** 129**S**811; **LaA** 129 **S**815.

806–77 44 **Ida**500, 258**P**1078; **TexCivA** 295**SW**323. [a] (2) Counterclaim in action on note for damages from breach of warranty is barred where fraud alleged was discovered more than period of limitations before filing counterclaim. 44 **Ida**500, 258**P**1078.

806–79½–New. Counterclaim is held not barred by limitation, although independent action is barred. 129**Misc**388, 221 **NYS**379.

806–79½–New. The statute preventing bar of counterclaim until plaintiff's claim is barred does not apply to a suit by the owner of realty in possession to quiet title thereto. 140 **Okl** 292, 283**P** 563(2dcase).

807–83 145**Miss**87, 110**S**218, 49**ALR**565.

807–91 223**AppDiv**547, 229**NYS**60.

807–92 See also 125**Kan**745, 262**P**1025.

807–95½–New. An action on a purchase-money note for goods sold, secured by a chattel mortgage, is not barred by limitation where that part of the original debt sued on was not due within the period of limitation applicable to an action on a written contract and plaintiff declared in the alternative on the original indebtedness. **TexCivA** 274**SW**210.

807–95½–New. Where plaintiff declares on two causes of action involving title to real estate, one based upon cancellation of a deed for fraud and the other based upon legal grounds in the nature of ejectment, the two-year statute is applicable to the equitable cause of action and the fifteen-year statute is applicable to the legal cause of action. 125 **Okl** 254, 257**P**372.

807–95¼–New. Where complaint states several statutory causes of action, fact that one is barred by limitations does not prevent entry of judgment on causes not barred. 86**Mont**478, 284**P**525.

807–96 174**Ark**437, 295**SW**710; 168**La** 37, 121**S**183.

807–98 21**F(2d)**562; 173**Ark**862, 293 **SW**746; **CalA** 292**P**279; 45 **Ida**485, 263 **P**40, 56**ALR**322; **Ida** 291**P**1067; 122 **Kan**347, 251**P**1085; **MoA** 6**SW(2d)**961; 77**Mont**554, 252**P**377; 253**NY**295, 171**NE** 61; 136**Misc**403, 243**NYS**215; 300**Pa** 242, 150**A**480; **TexCivA** 4**SW(2d)**289, 293 [citCJ]; 153**Va**603, 151**SE**138; 105 **WVa**130, 141**SE**626, 627 [citCJ].

809–99 **Ariz** 288**P**3; 250 **IllA**77; 76 **Mont**38, 245**P**257; 220**AppDiv**201, 221 **NYS**154; 70**Utah**189, 259**P**313.

810–7 18**F(2d)**908, 911 [citCJ]; 24 **F(2d)**981, 985 [citCJ]; 122**Kan**347, 251 **P**1085; 213**Ky**231, 280**SW**965, 966 [quot CJ]; **TexCivA** 295**SW**679, 686 [quot Cyc].

810–8 18**F(2d)**908, 911 [citCJ]; 22 **F(2d)**881; 24**F(2d)**981; **Ariz** 288**P**3; 248 **IllA**12; 213**Ky**231, 280**SW**965, 966 [quotCJ]; 231**Ky**229, 21**SW(2d)**246; **MoA** 25**SW(2d)**529; 126 **Okl** 283, 259**P** 260; 131 **Okl** 112, 267**P**838; **TexCivA** 295**SW**679, 686 [quotCyc]; **TexCivA** 29 **SW(2d)**416.

810–9 18**F(2d)**908, 911 [citCJ]; 213**Ky** 231, 280**SW**965, 966 [quotCJ]; 322**Mo** 435, 16**SW(2d)**46, 69**ALR**1 (cause of action to determine heirship arises on denial of right of succession).

811–10 **TexCivA** 295**SW**679.

811–12 [a] **To determine whether statute of limitations** has own nature of action as shown by allegations of complaint must be ascertained, and, in measure, character, of relief sought and necessarily incident to purpose and final determination of action. 195**Cal** 132, 231 **P**987. [b] **Where bank induced plaintiff to extend time** for performance of contract to transmit money to Russia and deliver pass book to plaintiff for periods aggregating nearly four years, when he elected to rescind, cause of action did not begin to run until such rescission. 127**Misc**447, 216**NYS**362.

811–15½–New. In determining whether an action contesting the validity of annexation proceedings is barred by a statute requiring such action to be brought within three months after completion of annexation, a claim that exercise of a franchise by the municipality over the territory annexed is a continuous offense and that each day a new cause of action arises is without merit. 93**CalA**532, 269**P**934.

811–18 123 **Okl** 196, 252**P**825; **RI** 129 **A**501.

812–27 123 **Okl** 196, 252**P**825.

812–28 **TexCivA** 22**SW(2d)**764(1st case).

812–30 18**F(2d)**908; 124**Kan**763, 766, 262**P**595 [citCJ].

812–31 18**F(2d)**908; 33**F(2d)**539; 124 **Kan**763, 766, 262**P**595 [citCJ]; **Mass** 170**NE**451. [b] **Statute does not run** till appointment of administrator with will annexed, where claim is against former executor. 124**Kan**763, 262**P**595.

813–35 33**F(2d)**589.

813–42 279**US**300, 49**SCt**306, 73**L ed** 700; 215**Ky**92, 284**SW**413, 46**ALR**1424; **Mo** 5**SW(2d)**405 [a] **Under Mansfield Dig. of Arkansas § 4471,** requiring action at law or in equity for lands, tenements, or hereditaments to be brought within seven years after title or cause of action accrued, title accrues simultaneously with acquisition of title by purchase or inheritance. 129 **Okl** 281, 285, 264**P**623, 627. [b] **Necessity of existence of elements of adverse possession.**–88**CalA**441, 263**P**870.

813-47 161La84, 108S133; 220AppDiv 201, 221NYS154; 224AppDiv401, 231 NYS291.

813-48 18F(2d)908; 35GaA749, 134SE 846, 847 [cit CJ]; 11LaA246, 122S505; 171Minn202, 214NW24; 220AppDiv201, 221NYS154; 129Misc305; 221NYS298; 284Pa384, 131A378; TexCommnA 272 SW1105; Wis 232NW774. [f] (6) Duty to return money, paid under contract which defendant totally fails to perform, cannot arise until breach. 220App Div201, 221NYS154. [g] **Contract not enforceable under statute of frauds.**–Tex CivA 284SW1057. [h] **Extension of time for performance.**–220AppDiv201, 221NYS154. [i] **Period of limitation applicable to action by depositor against bank for payment of forged or raised check commences to run from date depositor receives canceled check.** 98CalA 523, 277P354. [j] **Cause of action because of false certificate to abstract of title accrues when abstract was certified to and delivered.** 156Miss266, 125S724. **Erratum.**–"Fla.–1 Fla 387" should be "431."

814-49 15F(2d)791; 35GaA749, 134SE 846; 176Minn324, 223NW612; Wis 232 NW535(2dcase). [g] (11) Where one contracted to pay premiums on a life insurance policy, which were to be repaid to payor when policy was collected, cause of action for repayment did not arise till amount due on policy was collected, from which time statute began to run as against contention that cause of action arose when and as premiums were paid. TexCivA 275SW200. (12) Other instances. Iowa 228NW667.

815-51 TexCommnA 272SW1105.

815-57 156Miss266, 125S724.

816-71 See also TexCivA 78W(2d)878.

816-72 143Nebr721, 204NW786.

816-76–18F(2d)908; CalA 261P510; 233Ky603, 48W(2d)388; 225AppDiv 218, 232NYS498; 113Pa449, 6A100; Tex CivA 288SW855. [a] (2) Breach of contract of bank to transmit money to Russian bank and return pass book to depositor in about two months starts statute running after two months and not when plaintiff learned of breach. 214AppDiv673, 212NYS733. [b] (3) "Reasonable time" for performance, as extended by agreement, not shown to have expired. 23F(2d)593.

817-77 [a] Iowa 232NW725.

817-79 18F(2d)908; 125Misc443, 211 NYS283; 111 Okl 269, 239P640; 140 Okl 210, 282P287; Wash 291P711.

817-81 18F(2d)908.

817-82 125Misc443, 211NYS283; 111 Okl 269 239P640

818-91 77CalA367, 246P819; Iowa 232 NW725; 146Misc498, 1128390; 140 Okl 24, 282P147(2dcase).

818-92 140 Okl 24, 282P147(2dcase).

818-94 153Wash689, 280P346. [d] **Note payable on demand, or, if no demand is made, on stated date** is not demand note, and, in absence of demand, no cause of action accrues on it till stated date. 140 Okl 24, 282P147(2dcase).

818-95 TexCivA 283SW1085. But see 205Cal147, 270P190. [g] (10) Where condition upon which trust company agreed to establish credit never happened, no breach of contract to establish foreign credit incurred, and hence action for recovery of money, which defendant failed to remit to Germany by wireless, is not barred. 27F(2d)674.

820-99 [a] (2) Cause of action for services rendered and materials furnished to irrigation district by state and county are general obligations not payable out of particular fund. 68Utah472, 261P11.

820-4 TexCivA 284SW621.

820-7 130Misc229, 221NYS275. [g] **Agreement to carry life insurance payable to wife is broken on death of husband without policy in force, at which time statute begins to run.** 284Pa384, 131A378.

821-8 231Ky308, 21SW(2d)459; 145 Miss652, 110S211; 130Misc229, 224NYS 275; 192Wis555, 213NW282.

821-14 41GaA673, 151SE379, 130Misc 229, 224NYS275; 132Misc916, 231NYS 213; 124 Or547, 265P425. [c] 203 Iowa 1183, 212NW343.

822-16 156Miss597, 126S388.

822-20 259Mass412, 156NE541; 134 Misc902, 236NYS720; 151Va295, 144SE 471.

822-22 98CalA278, 276P1081.

822-23 201Cal 155, 255P825.

823-26 [c] 68Utah472, 251P11.

823-33 MoA 297SW425.

824-41 46 Idu165, 267P232, 233 [cit CJ]. [c] (3) Where consideration for services was to provide for employee on death of employer, statute does not begin to run until employer's death. Ont. [1927] 2DomLR340.

825-44 174Ark282, 295SW713; 201Cal 155, 255P825; 197NC22, 146SE72; 197 NC125, 147SE731(1stcase).

825-48 201Cal 155, 255P825; 231Ky 308, 21SW(2d)459.

826-60 225AppDiv218, 232NYS498.

826-66 35GaA749, 134SE846.

827-72 18F(2d)908.

828-79 39GaA160, 147SE126.

828-80 247 IllA466.

828-82 See also 218Ala97, 117S653.

828-84 136Misc84, 240NYS440.

829-93 CalA 290P916.

830-4 But see 84CalA519, 258P683. [a] 39GaA724, 148SE345(3dcase). [e] **In Ohio.**–19 OhA416.

831-9 91Fla1, 109S448.

831-11 91Fla1, 109S448.

831-12 91Fla1, 109S448.

831-14 91Fla1, 109S448.

834-38 [b] **Seller's promise that damage to rice, caused by defective condition of granary sold, would not occur in future** is held not to toll statute as to buyer's right to sue for damages to rice. 174 Ark437, 295SW710.

834-44 [c] **Limitation of actions for nullity of contract of sale with agreement of repurchase.** 33PortoRico 176.

835-54½-New. Where defendant manufacturer induced plaintiff to purchase its product by representing that the product would destroy insects and stimulate productiveness of tomato plants, and thereafter, a purchaser from plaintiff recovered judgment against plaintiff for damages resulting from destruction of his tomato crop by use of such product, plaintiff's cause of action against defendant for damages resulting accrued on its purchase of the product, and not when judgment was recovered against it by the purchaser from it, as respects the six-year statute of limitations. 105NJL 109, 143A332.

835-58 167La183, 118S881.

836-88 [a] (3) Action for breach of warranty on sale of personal property accrues at date of delivery. 174Ark437, 295SW710.

837-92 43F(2d)72; 160La597, 107S 459. [a] (3) Thus buyer's action for damage to rice, caused by sale of defective granary, is held to have accrued when damage was discovered. 174Ark 437, 295SW710.

837-96 [a] **In buyer's action for breach of warranty** as sale of defective granary statute is tolled pending seller's attempt to make repairs. 174Ark437, 295 SW710.

837-3 [a] **Failure to sue guarantor for several months** is no bar where creditor notified him of inability to collect from debtor immediately on entry of judgment against latter without procuring issuance of execution. 126Misc606, 214 NYS381. [b] **When principal debtor becomes liable and fails to pay.**–126Misc 606, 214NYS381.

837-5 225AppDiv70, 232NYS278. [a] (2) 37GaA554, 140SE913. (5) 58ND345, 226NW523 (period of limitation not extended by renewal). (11) Limitation of action against guarantor on notes of principal debtor runs concurrently with action against debtor and begins to run on date of notes and not date of guaranty. TexCivA 283SW249. (12) Action for breach of guaranty that collection of indebtedness will not be enforced for three years accrued when propery was sold on foreclosure. Ariz 288P3.

838-11 97CalA492, 275P878; 124Kan 776, 262P1037; 224AppDiv634, 232NYS 147; 38 OklACR372. [d] **Upon incorporation of indebtedness of official** in statement of account. 25F(2d)500. [e] **Subsequent statement of account held** immaterial where statute is deemed to begin to run on official's bond upon statement of account. 25F(2d)500.

838-13 38 OklACR372.

839-20½-New. Where defendant to whom plaintiff loaned money promises to pay a third party from whom plaintiff borrowed and gave his note for the money loaned defendant, plaintiff's cause of action does not accrue until defendant's breach of agreement, although plaintiff's note was renewed. 101WVa186, 132SE 369.

839-20¼-New. Defendant's contract is breached in such case by his failure and refusal to pay interest on plaintiff's note. 101WVa186, 132SE369.

839-20¼-New. Cause of action on contractor's bond accrued when work is complete and is barred in three years. 191NC703, 133SE21.

839-24 29F(2d)193; Okl 293P197.

840-27 142Va391, 128SE568, 569 [quot Cyc]; 193Wis63, 213NW667, 668 [quot CJ].

840-28 210NYS406, 410 [citCyc]; 142 Va391, 128SE568, 569 [quotCyc]; 193 Wis63, 213NW667, 668 [quotCJ].

840-29 142Va391, 128SE568, 569 [quot Cyc]; 193Wis63, 213NW667, 668 [quot CJ].

840-30 142Va391, 128SE568, 569 [quot Cyc]; 193Wis63, 213NW667, 668 [quot CJ].

840-31 142Va391, 128SE568, 569 [quot Cyc] (refusal of executrix of bailee and conversion by legatee); 193Wis63, 213 NW667, 668 [quotCJ].

840-32 76Mont38, 245P257; 142Va391, 128SE568, 569 [quotCyc]; 193Wis63, 213NW667.

841-40 1LaA360.

841-42 See also 129Misc305, 221NYS 298.

841-53 221MoA683, 285SW161, 164 [quotCJ]; 213AppDiv760, 210NYS406.

842-62 45 Ida451, 262P1057, 1058 [cit CJ].

843-67 45 Idaho 451, 262P1057.

844-73 77CalA367, 246P819.

844-74 [a] **Action for contribution** against cosurety as a note accrues from date of payment of note by other sureties. 191NC340, 132SE21. [b] **Where new notes taken for originals** on which defendant was cosurety, action accrues on payment of new notes. 191NC340, 132SE21.

844-76 TexCommnA 5SW(2d)972; Va 153SE818.

844-77 TexCivA 286SW315. [c] (1) 180Minn1, 230NW260 (renewal note). [e] **Provision for renewal.**–170CalA448, 233P412. [f] **In Arkansas.**–175Ark883, 300SW453.

844-78 123Kan214, 254P1034; 241 Mich652, 217NW787; MoA 273SW118; 20 OhA515, 152NE736. [c] (2) Where payee by oral contract extended time of payment of note before it was barred, statute does not begin to run until date fixed for payment. TexCivA 24SW(2d) 485.

845-86½-New. A claim is not barred under an agreement that one bank should be reimbursed for the surrender of notes to another bank when the latter recovered in a certain receivership proceeding. Iowa 228NW670.

845-90 47 Ida179, 276P315; 201 Iowa 499, 207NW570. [d] (2) Same rule as to nonnegotiable instruments. 126Misc 634, 214NYS378. [f] **Contra** where note contains different provisions for interest before and after maturity. 141Miss 38, 106S209, 44ALR393.

846-3 192NC665, 135SE774.

846-4 192NC665, 135SE774.

847-14 76Mont396, 247P326.

847-17 213Ky231, 280SW965. But see TexCivA 10SW(2d)272. [b] (4) Statute begins to run on administrator's bond from date of order settling final account. TexCivA 22SW(2d)948. [m] **City treasurer's bond.**–Ida 291P1067.

848-18 213Ky231, 280SW965.

848-29 22F(2d)881.

848-33 99NJEq251, 132A77; 122 Okl 277, 254P748.

849-38½-New. A cause of action on coupons attached to bonds cannot be barred if the right to sue for relief has never accrued. 134Misc417, 236NYS37.

849-39 122 Okl 277, 254P748.

849-40 68Utah472, 251P11. See also 45 Ida485, 263P40, 56ALR822. [e] (2) Maintenance fund for payment of irrigation district warrants held, under statute, not special fund. 45 Ida435, 263P40, 56ALR822. [g] 45 Ida485, 263 P40, 56ALR822. [i] In Oklahoma.–134 Okl 253, 273P274.

850-44 170Ga179, 152SE214; 68Utah 472, 251P11.

850-48 195NC398, 142SE487.

852-54 CalA 289P689; 243NY473, 154 NE314; 124 Or547, 265P425; 127 Or 320, 272P273; TexCivA 288SW855; 150 Wash192, 272P722. [a] (6) Where note provides that if not paid at maturity it is hereby renewed from year to year at option of holders, till paid, action brought within eight years of original maturity is not barred by four-year statute. 70CalA448, 233P412. (7) Action for work commenced in July, 1916, and ending in July, 1923, interest from August, 1923, being demanded, is held not barred. 243NY473, 154NE314. [d] Where deceased sister had agreed to pay plaintiff remaining at home one half of her earnings from outside employment, statute of limitations began to run from date each dollar earned. 150 Wash192, 272P722.

852-55 [a] Implied warranty of authority of corporate president to contract for services is continuing one. 251NY 420, 167NE572.

852-59 41GaA189, 152SE141.

853-67 53SD447, 221NW47.

853-70 95CalA228, 272P810.

854-78 [b] Action on continuing guaranty held not barred by statute, but recovery limited to period of six years immediately preceding action. Wash 286P48.

854-80 TexCivA 288SW552. See also 99NJEq251, 132A77. But see 170Minn 175, 212NW408.

854-82 243 IllA24; 206 Iowa1075, 221 NW837; Mass 170NE621; 134Misc70, 235NYS209; TexCivA 286SW906; Tex CivA 20SW(2d)403.

854-83 Mich 233NW184; 130Misc191, 223NYS672; TexCivA 23SW(2d)890. But see 170Minn175, 212NW408. [f] Vendor's lien notes.–TexCivA 3SW(2d) 928.

855-87 But see 83CalA87, 256P479.

855-87½-New. A note payable in monthly installments, when construed together with a lien contract, has been held to provide for a contract of payment whereby a monthly installment was to be paid on interest and principal, both inclusive. TexCivA 8SW(2d) 566.

855-89 224AppDiv401, 231NYS291; 198NC66, 150SE619.

855-90 69CalA291, 231P563; 251NY 420, 167NE572 (cause of action on implied warranty of authority of president of corporation to enter into contract for services held not to have accrued till repudiation of agreement).

855-91 30F(2d)476 [certiorari granted 279US829, 49SCt265(8thcase), 73Led 930]; 246Mich434, 224NW399; 224App Div401, 231NYS291; TexCivA 11SW (2d)825; 151Wash525, 276P876. [b] (1) 99CalA671, 279P168; CalA 279P481. (3) In case oral contract was made for conveyance of land on death of owner, in consideration of services to be rendered, statute of limitations does not begin to run against claim, based on quantum meruit for services, till death of owner. 69CalA291, 231P563. (4) Cause of action on implied contract for reasonable compensation for services rendered and care bestowed upon aged person in furnishing her with room, board, care, and attention accrues at her death. Kan 274P284. [e] (2) Action to recover excess water tax payments, commenced by service of summons over six years after payments were made, is barred by six-year statute of limitations. 132Misc426, 229NYS628. [f] Materials furnished.–CalA 279P481.

856-95 244NY1, 154NE645.

856-96 47 Ida542, 277P554(2dcase).

857-4 CalA 288P36 (recovery of usurious interest); 133Misc807, 234NYS274.

857-16 [a] Recovery of rentals in action to set aside foreclosure judgment is not barred till judgment is set aside. TexCivA 286SW680.

859-26 But see TexCommnA 288SW 168.

859-29 267Mass355, 166NE837; 56ND 41, 216NW212, 215 [citCJ].

860-41 22F(2d)192; 231Ky229, 21SW (2d)246; TexCivA 280SW604; 144Wash 358, 258P10. But see 22F(2d)192 (vessel's claim for towage).

860-44 [b] Payment of life insurance premiums not due till policy collected. TexCivA 275SW200.

860-47 119Kan760, 241P259.

862-62 171Ark828, 286SW969; 50Nev 383, 263P774.

863-68 Ark 32SW(2d)315.

863-73 156Tenn366, 2SW(2d)104, 105 [citCJ]. [c] (1) 78CalA104, 248P288. (2) 24OhA219, 157NE405 [foll 67 Oh 106, 65NE865]. (6) Ruling in 67 Oh 106, 65NE865, applied to action for malpractice in failing to remove kidney. 24 OhA219, 157NE405.

865-88½-New. Where alleged security is invalid as such, limitation of debt, not of security, applies. TexCivA 4SW(2d) 572.

865-90 245Mich146, 222NW160.

865-92 90CalA220, 265P833; 99CalA 347, 278P498.

865-95 194NC346, 139SE696.

865-96 [a] (2) "Such a principle does not apply to a case of opposing but unrelated demands between the parties, nor to an ordinary store account, though open and continued, where the credit is all on one side and the only items of discharge consist in payments on account. In this last case unless there has been a payment within the statutory period or some binding recognition of the account within such time, the statute runs from the date of each item." 194NC346, 139SE696, 697 [quot 176NC 631, 97SE626].

866-97 See also 169Ark1162, 278SW 22.

866-1 49Philippine61, 69 [quotCJ].

866-3 169Ark1162, 278SW22; 180Ark 576, 21SW(2d)972; 205Cal 141, 270P 183; 46 Ida165, 267P232, 233 [citCJ]; Iowa 232NW830; 130Kan379, 286P214; 143Miss33, 108S283; Mo 19SW(2d)668; 194NC346, 139SE696; 159Tenn175, 17 SW(2d)17. [j] Limitation as to account due partnership begins to run on death of one partner, despite subsequent mutual transactions between debtor and surviving partner. 198NC214, 151SE192.

867-7 49Philippine61, 69 [quotCJ].

868-11 150Miss827, 117S257.

868-13 49Philippine61, 69 [quotCJ].

868-15 [b] Items of rent due held not to constitute open account within statute. 32Ariz80, 255P996, 57ALR196.

868-17 49ND119, 190NW269.

870-29 180Ark576, 21SW(2d)972 (evidence held to show mutual accounts). [c] "Mutual account" is one in which each party has claim against other. 174Ark282, 295SW713.

870-32 49Philippine61, 69 [quotCJ].

870-35 [b] 40GaA632, 150SE868.

871-38 212AppDiv766, 210NYS370.

872-47 172Ark87, 287SW1007; 136Misc 363, 239NYS665.

873-58 Iowa 232NW830.

874-66 143Wash665, 255P1033.

874-67 143Wash665, 255P1033. [a] (3) Caretaker's minor purchase during closed cannery season is held not to toll statute between cannery and oil company. 143Wash665, 255P1033.

876-96 148Miss368, 114S628.

877-4 155Wash417, 284P749(2dcase).

879-28 49Philippine61, 69 [quotCJ].

880-32 Erratum.–Cross reference: "Taking property for public use" should be to "Eminent Domain § 544." 287Pa 370, 135A127.

880-35 213Ala323, 104S799; 174Ark 177, 294SW709; 178Ark943, 12SW(2d) 916; 89CalA107, 264P776; 199 Ind660, 161NE251; LaA 125S144(2dcase); Tex CivA 285SW895; TexCivA 26SW(2d) 732; Can [1928] 2DomLR273. [d] (5) Where sale of unexpired lease is restrained, statute commences to run against claim for damages from injunction when injunction is dissolved and not when lease expired. 170La805, 129 S209(2dcase).

881-37 174Ark177, 294SW709; 90CalA 453, 265P1025; 119Kan626, 240P584; 266Mass578, 165NE653; TexCivA 12SW (2d)1069. [f] (4) Other statements. 133 Okl 245, 271P422. [i] Action against city for interference with ingress and egress to and from property by improvement is not barred till expiration of statutory period after improvement, as accepted by city, was completed. Iowa 228NW316. [j] Malpractice action for leaving forceps in plaintiff's abdomen after operation commences to run from time of operation, not from time malpractice was discovered. 229AppDiv 227, 241NYS529.

881-38 266Mass578, 165NE653. [c] Ida 286P923.

882-44 24F(2d)370. [a] (6) Cross action filed more than four years after last act in relation to property held barred. TexCivA 295SW289.

883-57 127 Okl 40, 259P650; 128 Okl 42, 261P140.

883-59 174Ark177, 294SW709; 178Ark 943, 12SW(2d)916; 199 Ind660, 161NE 251; 177Minn565, 225NW816; Minn 232NW708; 127 Okl 40, 259P650; 128 Okl 42, 261P140; TexCivA 5SW(2d)575; 155Wash526, 285P446. [b] (9) Averment of complaint that "plaintiff, by using the water from said well on or about January 1, 1923, and thereafter, as a direct consequence of using the said gassed water, became, was, and still is diseased," does not bring case within statute of limitations, since injuries continued. NJSup 142A756.

884-60 127 Okl 40, 259P650; 128 Okl 42, 261P140.

884-63 177Minn565, 225NW816.

884-63½-New. The fact that it had inception prior to the period fixed by statute does not bar recovery for injuries, resulting from a continued act, which are within the statutory limit. NJSup 142A756.

885-65 174Ark177, 294SW709.

885-66½-New. Where at the time of construction of a plant, the nature and extent of damages cannot be reasonably known, or fairly estimated, an action for damages is not barred after three years from the time of construction of the plant, but limitation commences only when injury occurs. 178Ark943, 12SW (2d)916.

885-67 127 Okl 40, 259P650.

885-72 Ont [1929] 1DomLR600.

886-75 154Md588, 141A337, 339 [cit CJ].

886-79 177Ark1064, 9SW(2d)325; 178 Ark943, 12SW(2d)916; TexCommnA 298SW399; TexCivA 274SW172. [a] (1) 205Cal639, 271P1050.

887-81 See also TexCivA 290SW892 [quotCJ].

887-82 118 Okl 132, 247P50; TexCivA 274SW172. [b] In Oklahoma.–130 Okl 21, 264P877.

888-93 38GaA767, 145SE464(2dcase); 127 Okl 40, 259P650; 128 Okl 42, 261P 140; TexCivA 290SW892.

889-95 [a] (2) Successive recoveries are authorized for damages accruing from time to time because of failure of municipal corporation to keep sewage disposal plant in repair and to operate it in proper manner, and statute begins to run when each successive injury occurs. 128 Okl 42, 261P140.

890-2 245 IllA113.

891-18 Nebr 231NW685(2dcase); 130 Okl 213, 266P775; TexCivA 290SW569, 571 [citCyc]; TexCivA 31SW(2d)457; 37Wyo 419, 263P703.

893-20 TexCivA 290SW569, 571 [cit Cyc]; 37Wyo 419, 263P703.

893-24 216Ala237, 113S50; MoA 284 SW521; TexCivA 290SW569, 571 [cit Cyc].

894-30 234Ky511, 28SW(2d)765.

895-33 33NM240, 264P960.

895-35 151Va165, 144SE456.

895-36 [b] That culvert failed to carry off rainwater on particular occasion does not justify holding that it was permanent nuisance. 149Va809, 141SE834.

896-37 But see 149Va809, 141SE834.

896-39 198NC417, 151SE864.

896-45 See also 152Md371, 136A825.

897-50 78CalA104, 248P288; 11LaA 657, 124S625; TexCivA 274SW172; Utah 278P60.

897-52 [a] (5) Limitations do not run against malpractice in treating fracture till treatment ends. 178Minn82, 226NW196.

897-54 78CalA104, 248P288. [a] 178 Minn482, 227NW432.

898-55 TexCivA 274SW172.

898-67 See also 218AppDiv743, 218NYS21.

898-74 CalA 285P891. [b] (5) Filing of tax collector's final report starts running of statute in suit to recover excess fees, commissions, and other funds. TexCivA 297SW864. (6) Other illustrations. CalA 285P891. [c] Cause of action against sheriff for not paying over proceeds of attached property does not accrue until final judgment in attachment suit establishing right to fund. 45 Ida 156, 264P233.

899-78 46CalA843, 151SE650.

899-79½-New. Limitation against county officers for excess fee retained by him will not begin to run until end of year. TexCivA 288SW518.

899-81 CalA 285P891; 219NYS402.

900-84 [b] Statutory penalties for usury which accrued more than two years before plea of usury is filed are barred. TexCivA 226SW636.

900-91½-New. A cause of action against bank directors for accepting a deposit with knowledge of the bank's insolvency does not accrue until damage is sustained and capable of ascertainment. MoA 16SW(2d)739.

900-91¼-New. The statute of limitations begins to run against such cause of action from the date when it is discovered or made known to the public that the directors have accepted a deposit when the bank was in failing condition. MoA 16SW(2d)739.

900-91¼-New. Such cause of action accrues on the date when the bank is closed by reason of insolvency and its affairs are taken over by the state finance department for liquidation. MoA 16SW(2d)739.

900-93 205Cal 147, 270P190; 146Wash 305, 262P977. [b] (1) Iowa 233NW49.

901-94 MoA 38SW(2d)277. [a] (12) In Ohio six-year period does not run against lien for amount paid at delinquent tax sale until decree declaring sale to be invalid. 21 OhA507, 153NE759. (13) Other instances. 235Ky490, 31SW(2d)737.

901-98½-New. When the statute imposes the duty, specifies the time of performance, and gives a remedy for nonperformance, limitation begins on failure to discharge the required duty. 131 Or57, 279P524.

901-8 98CalA465, 277P177.

901-9 98CalA469, 277P177; CalA 293 P120; 229Ky178, 16SW(2d)1020.

901-10 [a] (9) Where insolvent bank transfers all of its assets to another bank on certain date under agreement by latter bank assuming its liabilities, creditor's right of action accrues as of that date. 78Mont301, 254P419. (10) Under Rev. Codes (1921) § 9061 action by depositor to enforce stockholder's liability must be commenced within three years after liability was created by law without reference to when plaintiff discovered facts. 78Mont301, 254P419. (11) Query, whether stockholder's liability is "created" at time creditor made deposit in question or at time corporation was shown to be without assets. 78Mont301, 254P419. (12) Statute of limitations does not begin to run against cause of action to enforce double liability of stockholders till deficit is determined and amount due from stockholders is judicially determined. 118Nebr776, 226NW446. [b] (8) CalA 279P188. (31) Under Pennsylvania statute stockholder's liability on account of unpaid stock becomes absolute when deficiency in assets becomes apparent. 270US560, 46SCt413, 70LEd733. (32) Under Louisiana statute right of creditors to recover loss sustained where directors issued stock to themselves for property at overvaluation is barred at expiration of five years from time directors received property for stock. 165La593, 115S791. (33) Statute runs from organization of bank, not closing, in action to enforce liability to make good minimum capital. 38GaA382, 144SE151. (34) Personal liability of president of corporation for failure to file annual statement becomes fixed when operations of corporation cease. 181Ark994, 28SW(2d)1067. (35) Right of creditor against directors for creation of excess corporate indebtedness cannot accrue till claims of creditors become due. CalA 291P670.

903-17 Ariz 287P292; 91Fla1, 1098 448; 214Ky278, 283SW83; 163La880, 118S133; 319Mo 602, 4SW(2d)816; 221 AppDiv317, 223NYS164; 134 Okl 89, 272 P408, 409 [citCyc]; 50Philippine810; TexCivA 294SW633; 141Wash676, 252P 91, 93 [citCyc], 50ALR207. Contra Sask [1925] 3DomLR1117.

903-18 50Philippine888.

903-20 104Conn169, 132A902.

903-21 243Mich434, 220NW658(1st case).

903-22 37F(2d)332; 43F(2d)27; 196 Cal 260, 237P542; Cal 286P1017; 73 CalA504, 239P51; 96CalA269, 274P415; 91Fla1, 1098448; 45 Ida280, 261P769; 205 Iowa1194, 249NW311; Iowa 229NW 147; 266Mass462, 165NE485; 319Mo 602, 4SW(2d)816; Mo 208SW(2d)502; 83Mont68, 271P695; 118Nebr96, 223NW 651; 222AppDiv17, 225NYS263; 224App Div139, 229NYS706; 198NC460, 152SE 157; 118 Okl 167, 247P692; 50Philippine888; TexCivA 294SW633; TexCivA 26SW(2d)463; TexCivA 29SW(2d)438; Utah 278P529; 141Wash676, 252P91, 93 [citCyc], 50ALR207; Wash 287P41; 107WVa394, 148SE378; 108WVa194, 151 SE700; 40Wyo 524, 281P190. [d] (6) Action against water company for deposit to guarantee it against loss in operation of new water system till system should become paying investment held not barred by lapse of fifteen years, where two years previously plaintiff learned that water system was paying investment, and made demand for return of money deposited, which was refused, since defendant was trustee. 96CalA269, 274P415.

905-24½-New. In Saskatchewan, where statute of limitations has been made applicable to trustees, an action for breach of trust in selling property for inadequate price accrues on date of agreement to sell, not on date of conveyance. Sask [1925] 3DomLR1117.

903-51 101WVa522, 133SE154.

908-52 216Ala64, 112S333, 334 [citCJ]; 137Misc795, 243NYS418; 101WVa522, 133SE154.

908-53 MoA 6SW(2d)961; 98NJEq274, 130A816. [c] Recording of deed is not notice of misappropriation of wife's funds held in trust. MoA 6SW(2d)961.

909-54 81CalA678, 254P644; 98NJEq 274, 130A816.

909-55 Mo 28SW(2d)1030. [a] (2) Statute applies only where plaintiff fails to take possession within five years after accrual of right of entry. 292Pa 532, 141A446.

909-58 56ND41, 216NW212, 218 [cit CJ]; 154Tenn602, 290SW402.

909-59 Mo 28SW(2d)1030.

909-60 But see TexCivA 27SW(2d)649.

909-61 214Ala234, 107S76; 74CalA714, 241P905; 213Ky709, 281SW812; 287Pa 105, 134A468, 471 [citCJ]; 154Tenn602, 290SW402. [i] Trust arising from mother's suit for herself and children under Death Act. 154Tenn602, 290SW402.

910-62 287Pa105, 134A468.

910-64 287Pa105, 134A468.

910-65 TexCivA 284SW598, 599 [quot Cyc].

910-66 74CalA714, 241P905; 213Ky709, 281SW812; TexCivA 284SW598.

910-67 168Minn131, 209NW864; 5Pa Dist&Co 387; TexCivA 284SW598, 599 [quotCyc].

910-68 44F(2d)11; TexCivA 284SW 598.

910-69 TexCivA 284SW598, 599 [quot Cyc].

910-70 TexCivA 284SW598, 599 [quot Cyc].

911-72 TexCivA 283SW1085; TexCivA 284SW598.

911-73 79CalA55, 248P1065.

911-74 116 Ohl44, 156NE193, 52ALR 761; TexCivA 284SW598, 599 [quotCyc].

912-76 TexCivA 284SW598, 599 [quot Cyc].

912-77 TexCivA 284SW598, 599 [quot Cyc].

912-78 TexCivA 284SW598, 599 [quot Cyc].

912-79 TexCivA 283SW1085.

913-94 18F(2d)908; Miss 113S576.

913-95 244NY1, 154NE645.

914-5 But see 203 Iowa540, 211NW482.

915-19½-New. Statute does not run against trustee until sale of land assigned for benefit of creditors. TexCivA 288SW609.

917-38 56ND41, 216NW212, 218 [cit CJ].

917-39 56ND41, 216NW212, 218 [cit CJ].

917-40 171Ark492, 286SW867.

917-48 [a] (2) Parol agreement in consideration of conveyance by father that grantee will hold in trust for father and after father's death will sell and divide proceeds among plaintiffs is not barred by limitation. 214Ky278, 283SW83.

918-53 141Wash676, 252P91, 50ALR 207.

918-57 Ariz 287P292. See also Mo 20 SW(2d)502. [a] (3) Bank knowingly receiving deposit of trust funds. Ariz 287P292.

919-64 319Mo 602, 4SW(2d)816.

920-71 209Ky375, 272SW897, 899 [cit Cyc].

921-97 203Cal 335, 264P242; TexCivA 4SW(2d)262; TexCivA 24SW(2d)531.

922-12 5PaDist&Co 719.

923-27 TexCivA 16SW(2d)136.

923-30½-New. Where a contract under which a trust is claimed to have arisen by implication has been treated by the heirs, devisees, and legatees of the original parties as continuing and binding upon them, notwithstanding the death of the original parties, the statute of limitations will not be considered as having begun running upon the death of either of such parties. 168Minn131, 209 NW864.

923-34 Ala 128S604; 196Cal 260, 237P 542; 200Cal 681, 254P557; 95CalA633, 273P119; 96CalA269, 274P415; Mass 168NE87; 230AppDiv577, 245NYS389; 287Pa105, 134A468; TexCivA 19SW(2d) 193.

923-36 209Ky375, 272SW897.

924-37 37F(2d)332; 216Ala40, 112S 328; 200Cal 681, 254P557; 255Mass587, 152NE623, 47ALR1; 262Mass509, 160 NE337; 195NC498, 142SE776; TexCivA 58SW(2d)831.

924-38 96CalA269, 274P415; 100CalA 746, 281P504; 118 Okl 167, 247P692; 291Pa574, 140A552.

924-39 201 Iowa902, 208NW290; 195 NC498, 142SE776.

924-45 CalA 290P52.

925-56 123Kan538, 256P159.

925-57 45 Ida280, 261P769; 123Kan 538, 256P159; 134Misc393, 235NYS756; TexCommnA 14SW(2d)1009; TexCivA 15SW(2d)86.

926-64 196Cal 260, 237P542.

926-66 196Cal 260, 237P542; Cal 286P 1017.

926-67 [a] (3) In action by trustee in bankruptcy to establish title to stock pledged to defendant and sold to pledgee under agreement that pledgee was to hold stock in trust for bankrupt, repudiation of trust first took place when pledgee filed answer denying allegations of complaint and alleging limitations. 95CalA633, 273P119.

926-72½-New. , or whether such possession is held singly or jointly with the trustee. 209Ky375, 272SW897.

928-73 147Wash246, 265P479. [a] (8) Administratrix's action to recover personalty of deceased husband from executors of surviving wife who died twelve years after husband held barred by statute. 98CalA349, 276P1069(2dcase).

927-76 196Cal 260, 237P542; 40Wyo 524, 281P190.

928-79 123Kan538, 256P159.

928-83½-New. Merely mortgaging property held in trust does not constitute repudiation where cestui que trust consents thereto. 176Ark1203, 6SW(2d) 8.

929-99 MoA 6SW(2d)961.

929-1 16F(2d)45; 31F(2d)547; 33F (2d)491; 33F(2d)589; 41F(2d)914;

171Ark492, 286SW867; 178Ark1184, 13 SW(2d)826; 83CalA445, 257P117; CalA 289P895; CalA 292P699; Ida 287P949; 318 Ill 500, 149NE495; 124Kan323, 259 P684; 125Kan245, 263P1077; 130Kan 539, 287P605; 228Ky541, 15SW(2d)481; 176Minn274, 223NW294; 81Mont552, 264P673; 117Nebr132, 219NW797; 132 Misc493, 230NYS139; 134Misc459, 234 NYS643; 134Misc518, 235NYS492; 229 AppDiv273, 241NYS584; 230AppDiv288, 243NYS663; 115 Ohl1, 152NE14; 115 Okl 155, 243P758; 132 Okl 139, 269P 1080; 137 Okl 82, 277P1026; 10Pa Dist&Co 403; TexCivA 275SW90; Tex CivA 282SW651; TexCivA 284SW598; TexCivA 289SW88; TexCivA 289SW 1050; TexCivA 26SW(2d)732; TexCivA 29SW(2d)805; Utah 283P729; 141Wash 560, 252P133. [f] **Rule held not to be statutory** but one of judicial construction. TexCivA 289SW88. [g] **That same phases of fraud were accomplished through successful litigation of defendant** does not bar right to relief. 134 Misc518, 235NYS492.

930-2 Ala 130S178.

930-3 120Kan38, 242P478.

931-6 83Colo 180, 263P725, 57ALR127; 120Kan38, 242P478.

932-15 134Misc518, 235NYS492.

932-17 16F(2d)45 (South Dakota); 201 Iowa488, 207NW606. [c] (4) Where plaintiff, through fraudulent acts of defendant's testatrix, was led to believe he was dealing with her, as executrix, till action against her individually was barred by limitations, he is entitled to equitable relief though he only sought money judgment. 134Misc518, 235NYS 492.

933-24 123Kan538, 256P159.

933-25 40F(2d)899; 204Cal 381, 268P 624; 230AppDiv288, 243NYS663; TexCivA 24SW(2d)742.

933-31 16F(2d)45 (South Dakota); 318 Ill 500, 149NE495.

934-38 16F(2d)45.

934-45 219MoA645, 284SW834; TexCivA 281SW244.

935-54 TexCivA 295SW323.

935-55 101CalA94, 281P396. [a] **In Alabama.**–213Ala377, 104S821.

936-62 251NY420, 167NE572.

936-64 [b] (4) Where plaintiff was fraudulently prevented from enforcing legal rights by defendant's testatrix till barred by limitations, he could pursue equitable remedy within statutory period from discovery of fraud though he sought only money judgment. 134Misc 518, 235NYS492.

937-72 [b] **Fraud incidentally involved in action of ejectment and to quiet title.**–115 Okl 56, 241P750.

937-76 [e] **In Montana.**–80Mont395, 260P725.

938-78 TexCivA 20SW(2d)142.

938-88 Utah 269P132.

939-2 36F(2d)935; 218Ala49, 117S477; 100CalA736, 281P106; 208 Iowa698, 223 NW756(2dcase); 226Ky290, 10SW(2d) 1101; 167La870, 120S580; 316Mo 1023, 292SW1023; 81Mont552, 264P673; 230 AppDiv288, 243NYS663; 51ND634, 200 NW818; ND 228NW839; 122 Okl 51, 250P522; 116 Orl, 239P196, 200 [cit CJ]; TexCommnA 288SW156; TexCivA 275SW90; TexCivA 284SW598; Tex CivA 289SW88; TexCivA 28W(2d)352; TexCivA 19SW(2d)113; TexCivA 20SW (2d)142; 151Va28, 144SE629; 141Wash 560, 252P133; 142Wash155, 252P531; 147Wash365, 265P1080. [d] **Circumstances of each case must be examined** to determine whether reasonable person should have sooner discovered fraud. CalA 292P699.

941-3 51ND634, 200NW818; Tex CommnA 288SW156. [b] 208Cal 697, 284P906; 208 Iowa698, 223NW756(2d case); 122 Okl 51, 250P522. [c] (3) Not convertible with "knowledge." 51ND 634, 200NW818.

941-4 36F(2d)942; 122 Okl 51, 250P 522; TexCommnA 288SW156.

941-8 TexCivA 289SW88. [c] TexCivA 275SW90.

943-24 [a] But see TexCivA 22SW(2d) 933(2dcase).

943-28 93CalA654, 269P1115.

943-29½-New. Mere opinion of an attorney without any statement of facts or reasons therefor has been held not to amount to knowledge or notice of fraud. 217Ala62, 114S796.

943-30 69CalA447, 231P604.

943-33 122Kan131, 251P416; ND 228 NW839; TexCivA 275SW90; 142Wash 155, 252P531.

944-34 225Ky735, 9SW(2d)1083; 226 Ky290, 10SW(2d)1101; TexCivA 275 SW90.

944-42 132 Okl 139, 269P1080.

945-44 216Ky51, 287SW226; 116 Okl 155, 243P758.

945-48 316Mo 1023, 292SW1023.

945-53 But see Utah 269P132.

945-61½-New. As against existing creditors, knowledge of directors disqualified by interest to ratify deed executed by president will not put statute of limitations in operation. TexCivA 24SW (2d)742.

946-62 Where party to exchange of lands showed other lands which did not belong to him and which were located within pasture of third person, possession of such third person is not sufficient to put person viewing lands on notice as to his title and start statute running in view of custom in use of grazing lands. TexCivA 275SW682.

946-69 218Ala49, 117S477; TexCivA 275SW90 (lease of land through agent by grantee claiming fraud by conveyance of other land than contracted for does not charge him with knowledge of location of land).

947-70 298Pa588, 148A864; TexCivA 30SW(2d)397.

947-75 84CalA519, 258P683. [b] 316 Mo 1023, 292SW1023; 116 Orl, 239P196.

948-77 See also 197Cal 765, 242P918.

948-78 46 Ida614, 269P586; 216Ky51, 287SW226; 141Wash86, 250P947.

948-83 208Cal 697, 284P996.

948-89 [b] **Suit by purchaser against surety** for fraud by principal in sale of stock is not barred till statute has run after discovery of facts constituting fraud. 213Ala377, 104S821.

949-3 But see 33Ariz101, 261P969, 57 ALR107. [b] (3) Counterclaim for payments made on contract of sale of land held barred under facts showing knowledge that railway terminus would not be located near property as represented. 145Wash245, 259P710.

949-7 318 Ill 500, 149NE495.

950-20 [a] (2) 157Tenn332, 8SW(2d) 481.

950-21 205 Iowa633, 216NW719; 168 La37, 121S183; 154Md456, 140A834; 117 Nebr132, 219NW797; TexCivA 283SW 696; TexCivA 11SW(2d)380; TexCivA 27SW(2d)591. [a] (1) 233Ky719, 26SW (2d)747. (5) Attack for mistake on sheriff's settlement as to revenues must be made within five years after discovery, but in no event after ten years from date of final approval. 228Ky541, 15SW (2d)481.

950-22 TexCivA 11SW(2d)380; 151Va 28, 144SE629.

951-27 168La37, 121S183; TexCommnA 286SW173; TexCivA 283SW696.

952-34 129 Okl 265, 264P628.

953-37 166La822, 118S33.

953-39 23F(2d)870, 871 [citCJ].

953-40 23F(2d)870, 871 [quotCJ]; GaA 155SE782.

953-43 23F(2d)870, 871 [quotCJ]; 24 F(2d)636, 638 [quotCJ].

954-44 208 Iowa295, 225NW378.

954-48 144Wash33, 256P74; 196Wis 25, 219NW373. [g] **Compliance with bid at judicial sale.**–151SC114, 148SE704, 63 ALR965.

954-51 205Cal 284, 270P958.

954-52 131 Or57, 279P534 (action for damages for failure to record satisfaction of mortgage after payment and request).

955-57 136Misc403, 243NYS215; Tex CivA 3SW(2d)883; TexCivA 16SW(2d) 338.

956-61 118Nebr96, 223NW651; Tex CivA 7SW(2d)949. [i] **Recovery of land where deed obtained by fraud.**–Cause of action does not accrue till cancellation of deed. TexCivA 2SW(2d)352.

957-73 200Cal 681, 254P557.

957-74 165La536, 115S742.

957-75 77Mont554, 252P377. [c] (2) 35GaA315, 132SE914 (general deposit not evidenced by written instrument fixing time of payment).

957-75½-New. Right of warehouse receipt holder to demand goods is continuing right against which no statute of limitations runs. 128Misc566, 220 NYS124.

958-77 18F(2d)908; 45 Ida193, 261P 338; 136Misc84, 240NYS440.

958-78 43F(2d)867; 48 Ida42, 280P 324; 266Mass462, 165NE485; 77Mont 554, 252P377; 116 Okl 287, 245P562, 47 ALR171; TexCommnA 293SW563; Tex CivA 3SW(2d)1113. [c] (1) OhA 173 NE19. (6) Notice of dissolution of corporation did not convert claim for deposit from demand to time deposit, as regards limitations. 134Misc245, 235 NYS28.

958-79 17F(2d)926; CalA 285P868; 37GaA267, 139SE909; 153Miss81, 118S 429; 77Mont554, 252P377; TexCivA 3SW(2d)1113; TexCivA 27SW(2d)279. But see 253NY295, 171NE61. [a] (3) Time to sue to enforce purchaser's lien for payments because of vendor's default commences to run from date of demand of repayment and not from vendor's default. 32Ariz342; 258P304.

959-80 128Misc566, 220NYS124.

959-81 76Mont38, 245P257.

959-86 225AppDiv218, 232NYS498.

960-96 See also 93CalA155, 269P186. But see 167Ga181, 145SE47. [k] **Partial allowance.**–CalA 290P648.

961-3 195NC460, 142SE579.

961-4 DC 40F(2d)812; 77CalA367, 246 P819; Iowa 232NW725; 256Mass125, 152NE328; 170Minn175, 212NW408 (dictum); Miss 113S576. But see 35 GaA315, 132SE914. [d] **Undelivered war stamps** held subject to same sale. TexCivA 295SW256. [e] **In Porto Rico.**–33 PortoRico 986.

962-9 SC 147SE676(2dcase).

962-10 35GaA415, 133SE278.

962-13 SC 147SE676(2dcase).

963-32 17F(2d)926.

964-33 130Kan20, 285P558.

964-45 48 Ida42, 280P324.

964-46 17F(2d)926; 17F(2d)930; 24F (2d)981; 48 Ida42, 280P324; 321 Ill 124, 151NE487; 170Minn175, 212NW408 (dictum).

965-47 17F(2d)926; 17F(2d)930; 200 Cal 681, 254P557; 48 Ida42, 280P324; 321 Ill 124, 151NE487. [a] (3) Other instances. 321 Ill 124, 151NE487.

965-50 48 Ida42, 280P324; 170Minn175, 212NW408; TexCivA 283SW555.

965-55 17F(2d)926.

966-63 [b] (2) Utah 283P729.

967-64 170Minn175, 212NW408.

967-65 48 Ida42, 280P324.

967-68 CalA 285P868.

968-75 178Ark1178, 13SW(2d)813.

968-77 TexCivA 27SW(2d)279.

968-78 9LaA674, 119S781; TexCommnA 14SW(2d)834; TexCivA 294SW657.

968-79 TexCivA 294SW657.

968-81 230Ky538, 20SW(2d)173 (action on warehouse receipts).

968-83 28F(2d)917.

969-84 But see 205Cal 284, 270P958.

969-86 [a] (1) 253NY295, 171NE61.

969-92 33F(2d)589 (unskillfulness and neglect of agent); 181Ark1079, 28SW (2d)701; CalA 285P891; 88 IndA665, 165NE341; 119Kan760, 241P259, 263 [citCJ]; 213Ky696, 281SW832, 834 [cit CJ]; 77Mont399, 251P524; 290Pa348, 139A114; RI 151A5; 156Tenn366, 2 SW(2d)104; TexCommnA 14SW(2d) 834; TexCommnA 15SW(2d)600. See also TexCommnA 10SW(2d)381.

970-94 181Ark216, 26SW(2d)57; 244 Mich456, 221NW614; TexCommnA 296 SW871.

970-96 TexCivA 299SW917.

970-77 [a] (7) Statute will not bar recovery of assessment for water protection district, where improvements contemplated are abandoned and recovery is sought within reasonable time after knowledge of abandonment. 96CalA76, 273P839. (8) Suit by heirs to interpret, reform, or annul judgment placing widow and heirs in possession of intestate's property was not subject to prescription where it was brought within one year after discovery of error of law in judgment. 168Lal, 121S171(5thcase). (9) Other illustrations. TexCivA 283SW 1082. [b] (2) Where excuses for nonpayment satisfied plaintiff and there was nothing to charge him with notice com-

plaint filed beyond statutory period was timely. 155Wash107, 283P1087.
971-2 [a] (1) 165La299, 115S495.
972-6 33F(2d)589; 215Ala200, 110S 286; 178Ark168, 108SW(2d)19; 178Ark 1184, 13SW(2d)826; 43 Ida730, 254P 523; 201 Iowa1179, 207NW235; 204 Iowa916, 216NW264; 152Md371, 136A 825; 113Nebr801, 205NW288; 224App Div401, 231NYS291; 141 Okl 1, 283P 571, 67ALR1059; 293Pa577, 143A202; Wis 230NW83.
972-9 198Wis97, 223NW430.
972-11 241 IllA537; 267Mass355, 166 NE837; 133 Okl 98, 271P230.
972-13 241 IllA537.
973-16 CalA 288P78; 198Wis97, 223 NW430.
975-32 181Ark1079, 28SW(2d)701; 204 Iowa916, 216NW264; 51ND634, 200NW 818; TexCommnA 280SW748. [d] Plaintiff cannot ignore contrary information and rely on statement of debtor. 130Kan20, 285P558.
975-39 [a] 266Mass578, 165NE653.
975-40 152Md371, 136A825.
975-41 147Miss808, 112S591, 593 [cit CJ].
975-41½-New. Fraud must be actual moral fraud, not merely constructive. 33F(2d)589.
976-48 TexCivA 275SW90; TexCivA 284SW598, 600 [citCyc].
976-49 84CalA519, 258P683; 259Mass 32, 155NE657; 156Miss893, 127S570, 69 ALR1068; TexCivA 284SW598, 600 [cit Cyc].
976-50 84CalA519, 258P683.
977-56 TexCivA 284SW598, 600 [cit Cyc].
977-57 146Va553, 131SE835, 840 [quot CJ].
977-59 146Va553, 131SE835, 840 [quot CJ].
977-60 TexCommnA 158SW(2d)600.
977-62 51ND634, 200NW818, 822 [cit Cyc]; 156Tenn353, 28SW(2d)100, 62ALR 1410.
977-63 204 Iowa916, 216NW264; 229 AppDiv227, 241NYS529; RI 151A5; TexCivA 78SW(2d)107, 108 [citCJ]. [e] See also 51ND634, 200NW818.
978-66 147Miss808, 112S591, 593 [cit CJ].
979-71 147Miss808, 112S591, 593 [cit CJ].
980-75 But see TexCommnA 18SW(2d) 271, 272 [citCJ] (vendor's representations to purchaser that original representations were true tolls statute).
980-76 181Ark1079, 28SW(2d)701.
980-80 84CalA519, 258P683.
980-84 [b] On county treasurer's bond, cause of action for misapplying public funds arose when commissioners learned of wrongful act. 31F(2d)547.
982-92 [a] (5) Concealment by corporation manager of debt owed to corporation. 113Nebr801, 205NW288.
982-95 TexCivA 284SW598.
982-97 TexCivA 284SW598.
983-3 TexCivA 271SW143.
984-5 [b] (2) "Improper act" within Rev. St. (1919) § 1334 must be one in nature of fraud. MoA 25SW(2d)529.
985-11½-New. Ignorance of the whereabouts of property, not caused by the other party, does not extend the time to sue for its recovery. Mo 128W(2d)509.
985-14 96Fla35, 117S708.
985-15 NJCir 149A814. See also 96 Fla35, 117S708. [b] (2) Right, provided by statute, of one laboring under legal disability is personal and does not extend to his or her assignees or grantees. 37 OklACR577 [reh pending].
986-19 31F(2d)624.
986-22½-New. Disability to arrest running of statute must exist when cause of action accrues and subsequently arising disability will not suspend statute unless statute so provides. Okl 292P362.
988-50 222AppDiv498, 227NYS78; Tex CivA 284SW598.
988-53 55ND445, 214NW249.
989-65 TexCivA 284SW598.
990-71 120Kan575, 244P1063; 247 Mich71, 225NW571; 55ND445, 214NW 249.
992-89 35GaA462, 133SE295; 130 Okl 111, 265P133. [b] (2) Maxim held inapplicable where property was acquired after leaving state. 9LaA(Orleans)78, 119S81.
994-3 155Miss829, 125S408.
994-8 43 Ida24, 248P868.
995-15 319Mo602, 4SW(2d)816.
995-16 319Mo602, 4SW(2d)816.
995-22 105Conn564, 136A102.
996-26 255 IllA489; 137Misc396, 241 NYS76; TexCivA 28SW(2d)1109.
997-32 Kan 293P385; NJSup 151A375. [a] 144 Okl 264, 291P124.
997-34 105Conn564, 136A102; 155 Miss829, 125S408; 217AppDiv159, 216 NYS384; 127Misc776, 216NYS381; 52 SD245, 217NW200.
998-38 242NY413, 152NE246. [e] Statute providing that, where cause of action accrues against person while he is without state, it may be commenced within time limited after his return held applicable to defendant who was nonresident and without state at time cause of action accrued. 242NY413, 152NE 246. [f] Statute limiting action when debtor is nonresident and statute relating to limitations when causes of action arise out of state are held to relate to two different situations, and a nonresident who is entitled to benefits of first statute is not deprived thereof because cause of action also accrued outside of state. 242NY413, 152NE246.
998-45½-New. In Wyoming the five-year period for commencement of action on a foreign claim or contract after the debtor has established his residence within the state does not commence to run until after the cause of action has accrued. 40Wyo 57, 274P10.
999-53 [e] (7) In Virginia.-152Va800, 148SE831.
1000-62 [f] (3) That agent designated by foreign corporation for service of summons moves within state has no effect on operation of statute. CalA 292 P699. [i] In Utah.-269P147, 151, 152 [citCJ].
1003-81 CalA 261P510.
1004-83 Ida 286P364.
1004-86 [b] 165Ga112, 139SE801. [e] In Iowa.-201 Iowa748, 206NW609.
1004-87 MoA 13SW(2d)1110.
1004-89½-New. A son's claim on an implied contract against his stepfather's estate for necessaries furnished his mother during the period of the stepfather's absence is barred by statute of limitations, where the stepfather returned some eight years before the date of his death. 149Wash578, 271P 882.
1004-90 36GaA394, 136SE826.
1005-91 105Conn564, 136A102.
1005-92 36GaA394, 136SE826.
1005-95 36GaA394, 136SE826.
1005-97 [d] In Iowa.-226NW103.
1006-5 [a] (3) 249NY356, 164NE248.
1007-12 TexCivA 11SW(2d)329.
1009-26 [a] 105Conn564, 136A102.
1010-40 Ida 286P364.
1011-47 215Ky57, 284SW410; 221Ky 780, 299SW965; MoA 276SW89; Tex CommnA 299SW231; TexCivA 293SW 327. [e] TexCivA 272SW245.
1011-51 [c] (1) 198NC411, 151SE884.
1015-86 214Ky833, 284SW84.
1015-89 41 OklACR118 (construing Mansfield Dig. St. of Ark. § 4471).
1015-90 41 OklACR118 (construing Mansfield Dig. St. of Ark. § 4471).
1015-91½-New. Missouri statute prescribing limitation against actions which had accrued to a married woman respecting real estate applies to all actions. Mo 23SW(2d)149.
1015-91⅓-New. Such statute bars an action to cancel a deed relinquishing dower in which a wife was induced to join by her husband's fraud regardless of when the fraud was discovered. Mo 23SW(2d)149.
1016-95 TexCivA 273SW634.
1016-10 217Ky192, 289SW262.
1016-10½-New. Statute of limitation does not begin to run against wife under disability until her death. 217Ky 258, 289SW275.
1018-32 118 Okl 76, 246P844.
1019-36 161Ga403, 131SE75; 218Ky 321, 291SW379; 222Ky846, 2SW(2d) 1042; 189NC502, 127SE553; Tex CommnA 299SW231; TexCivA 11SW (2d)329.
1020-40 215Ala555, 112S117; 218App Div300, 218NYS215; 154Tenn602, 290 SW402. [b] (5) 218AppDiv300, 218 NYS215.
1022-50 215Ky216, 284SW1049.
1022-51 99NJEq243, 132A291.
1022-52 169Ga294, 150SE164; LaA 124Sb535; 146Wash421, 263P741. [a] (2) Under Code (1923) § 8960, suit in ejectment by children of former owner, more than twenty years after cause of action accrued, is barred. 218Ala424, 118S636. [f] In Louisiana.-158La1026, 105S52.
1022-54 92Fla360, 109S458; 158La1026, 105S52; 124 Okl 170, 254P1; 130 Okl 83, 265P124; 37 OklACR577. See also 96Fla35, 117S708.
1023-56 TexCivA 284SW977; 146 Wash421, 263P741.
1023-57 Ariz 287P292.
1023-59 [a] In Louisiana.-161La413, 108S790.
1023-60 93Fla143, 112S378.
1024-67 96Fla35, 117S708. [c] Effect of discharge on bail.-23F(2d)993.
1025-70 215Ala436, 111S17; 96Fla35, 117S708; Ga 155SE8; 204 Iowa1394, 213NW225; 209Ky243, 272SW732; 218 Ky321, 291SW379; 230AppDiv288, 243 NYS663; 54ND548, 210NW21. [d] (1) 209Ky243, 272SW732 (as long as such unsoundness exists).
1025-72 247Mich301, 225NW607. [f] Loss of power of articulate speech is not sufficient to show condition of mind contemplated by statute. 115 OhSt326, 154NE317.
1025-73 209Ky243, 272SW732.
1025-74 96Fla35, 117S708; 144SC252, 142SE498.
1026-75½-New. The disability must have existed at the time at which the cause of action accrued. 146Miss565, 111S571.
1026-76 [a] (2) Action by guardian of incompetent to set aside judgment entered seventeen months previously is timely where ward is still alive and incompetent. 204 Iowa1394, 213NW225.
1026-77 146Miss565, 111S571.
1026-78 125Kan533, 264P730.
1026-81 36GaA394, 136SE826, 827 [cit CJ].
1027-82 36GaA394, 136SE826.
1027-83 15DelCh314, 137A83; 96Fla 35, 117S708; 36GaA394, 136SE826; 250 NY250, 165NE282 [motion for rearg den 166NE344(4thcase)]; 222AppDiv389, 226NYS459. [c] (3) 232Ky741, 24SW (2d)560.
1028-89 15DelCh314, 137A83.
1028-90 168Ark637, 271SW32; 15Del Ch314, 137A83; 49Philippine263; Tex CivA 292SW947.
1031-7 15DelCh314, 137A83; 96Fla35, 117S708.
1032-18 46Philippine757.
1033-21 [b] (2) Where right of entry descends to heirs who are all under disability, statute does not run against any till disability is removed from all. 213 Ky696, 281SW832.
1033-22 [d] (1) 213Ky696, 281SW832.
1034-24 [a] In Oklahoma.-37 OklACR 577.
1034-30 224AppDiv350, 231NYS124.
1035-32 [a] On action on insurance policy statute begins to run only from appointment of administratrix. 252NY 459, 169NE645.
1035-34 Iowa 232NW725; 128Kan699, 280P916; 224Ky431, 6SW(2d)451. [b] One year limitation statute after death does not disregard unexpired portion of period of limitation at date of death. 339 Ill 426, 171NE514. [c] Minor heirs. -Iowa 232NW725.
1035-35 [a] 68CalA235, 228P714. [c] (1) 218Ala170, 118S173; 224Ky431, 6 SW(2d)451. (8) In North Carolina. 191NC101, 131SE383. (9) But statute cited in last case does not apply if creditor died after bar of statute of limitations is complete. 191NC101, 131SE383.
1036-37 127Kan301, 273P432. [d] (2) TexCivA 19SW(2d)354.
1037-44 NJCir 149A814 [quotCJ]; 126 Okl 34, 258P871; 53ALR1298; 49Philippine263, 266 [citCJ].
1037-45 126 Okl 34, 258P871; 53ALR 1298; 144 Okl 204, 291P91; TexCivA 293SW690.
1037-48 96Fla35, 117S708.
1037-50 214Ky267, 283SW111.
1037-53 35 OhA374, 172NE537.
1038-54 32F(2d)954; Cal 285P309; 229AppDiv273, 241NYS584. [e] (3) Statute allowing suit within two years

after letters issued is not applicable where six-year statute extends beyond two-year period. 248Mich393, 227NW752 (claim held barred under six-year statute). [g] (3) Suit specifically to enforce contract to cancel notes in consideration of maker caring for decedent's household till his death held not barred by statute of limitations. 222MoA268, 296SW205.

1038-54 [m] **In North Carolina.**–191NC101, 131SE383. [n] **In South Carolina** statute does not apply to actions in tort. 149SC417, 147SE439; [o] **In Kansas.**–127Kan593, 274P284. [p] **In California.–Cal** 285P309.

1038-55 **TexCivA** 15SW(2d)68.

1047-56 **TexCivA** 30SW(2d)437. [b] (2) Suit to set aside foreclosure judgment filed within limitation period is not barred by limitation as against executors of defendant who died pending action in absence of delay in reviving suit. **TexCivA** 286SW680.

1039-61 But see **TexCivA** 15SW(2d)68.

1039-64 161La84, 108S133; 153Va603, 151SE138.

1040-65 29Hawaii579.

1040-66 161La84, 108S133.

1040-70 47Ida712, 278P214(2dcase); 159La576, 105S626 (holding that suit to cancel judgment does not interrupt prescription thereof since; though it might have prevented execution, it did not prevent statutory procedure to revive it). [b] 172Ark442, 289SW326; 47Ida712, 278P214(2dcase); Ida 287P949; 127Kan811, 275P216; 159La576, 105S626; 153Va603, 151SE138. [c] **Substantial identity of causes of action** must exist before pending action may be available to suspend statute. 153Va603, 151SE138.

1041-71 **TexCommnA** 4SW(2d)32.

1041-73½-New. Libeling a ship in the admiralty court interrupted prescription against a suit in the state court for damages to a wharf. 163La865, 113S127.

1041-79 Contra 159La576, 105S626.

1042-81 **TexCivA** 271SW139; **TexCivA** 288SW609. Contra 159La576, 105S626 (holding prescription not suspended by taking appeal or during delays allowed for same).

1042-84 **TexCivA** 218SW(2d)355. But see **TexCommnA** 29SW(2d)958.

1042-84½-New. or until mandate of appellate court is spread upon record of trial court. 113Okl280, 241P752.

1042-88 159La576, 105S626.

1043-91½-New. Prescription of judgment is not suspended during delays allowed for application for rehearing or during pendency of such application. 159La576, 105S626.

1044-15 [a] **Judgment creditor** held entitled to share in proceeds of estate after period of limitations expired, where proceeds were available for distribution prior thereto. 5F(2d)75.

1044-18 159La576, 105S626 (where there existed statutory revival procedure).

1045-21 8F(2d)532.

1045-25 82NH170, 131A441.

1046-35 [a] **TexCivA** 271SW139; **TexCivA** 218SW(2d)355. But see 35F(2d)736. [b] (5) Though suit might have been maintained elsewhere than in county named as forum. **TexCivA** 295SW281.

1046-37 **TexCivA** 295SW281; 153Va603, 151SE138.

1047-63 120Okl145, 250P887.

1047-66 6LaA130. See also **DelCh** 152A216.

1048-91 37F(2d)564; 84IndA373, 150NE391; 129Misc464, 222NYS413; 89PaSuper208; 96PaSuper118. But see 250NY250, 165NE282 [motion for rearg den 166NE344(4thcase)] (running of limitations against alien enemy's action accruing before existence of state of war was not suspended during war period). [b] (6) The two-year limitation for filing claim was, as respects Austro-Hungarian subjects, suspended till ratification of peace treaty between United States, Austria, and Hungary. 84IndA373, 150NE391.

1049-94 37F(2d)564; 89PaSuper208. [b] **War with Austria.**–37F(2d)564. [c] **Proclamation of peace** as of date prior to that fixed by treaty as effective date cannot vary terms of treaty as regards limitations of actions. 37F(2d)564. [d] **Treaty of peace and not proclamation of federal war trade board** revives operation of statute of limitations. 96PaSuper118.

1049-94½-New. **In New York** the provisions of the Civil Practice Act suspending the running of limitations against an alien enemy's cause of action has been held not to apply to a cause of action which accrued before the war commenced. 222AppDiv389, 226NYS459.

1049-94¾-New. Commencement of limitation on shipper's rights to recover reparation payments. 300Pa242, 150A480.

1052-37 17F(2d)924; 161Ga579, 131SE514; 167La169, 118S876; 147Miss401, 113S209; 150Miss105, 116S441; 318Mo1, 298SW762, 764 [citCJ]; 13PaDist&Co400. [o] (3) Prescription of one year, applicable to actions for board and lodging, is interrupted by judicial demand, even though plaintiff be nonsuited on merits or court be without jurisdiction. 9LaA732, 120S256. (4) Interruption of prescription by judicial demand works suspension of prescription during pendency of suit, and full time for prescription must be reckoned from cessation of interruption. 9LaA732, 120S256.

1053-45 But see 34Ariz519, 273P6(2dcase).

1053-46 · 34Ariz519, 273P6(2dcase); **TexCivA** 24SW(2d)527.

1053-50 165La536, 115S742; 36Okl ACR354; **TexCommnA** 286SW173.

1053-51 [d] **Mandamus for issuance of tax bills,** commenced within statutory period, preserves right of action on tax bills. 318Mo192, 300SW1088.

1054-54 150Miss105, 116S441; 142Va173, 128SE541 (filing of bill before expiration of statutory period suspended period of limitation till entry of decree).

1054-57 318Mo192, 300SW1088.

1054-58 237IllA456.

1054-59 **Ont** [1929] 4DomLR232.

1054-62 32PortoRico749.

1055-65 **TexCivA** 291SW702.

1055-66 42F(2d)646; 173Ark273, 292SW109; 177Ark145, 5SW(2d)941; 262Mass393, 160NE431; 153Tenn240, 280SW1019 (issuance of warrant by justice of peace in suit on note is commencement of action); **Sask** [1929] 2DomLR205(2dcase).

1055-67 12PaDist&Co765.

1055-69 12PaDist&Co765.

1055-76 16F(2d)998; 201Iowa499, 207NW570; 225AppDiv594, 234NYS15.

1056-80 42F(2d)646; 141Miss515, 106S775 (filing of bill for redemption of property from tax sale); **MoA** 21SW(2d)640; **TexCommnA** 272SW1105; **TexCivA** 275SW423; **TexCivA** 14SW(2d)116; 147Wash602, 266P1053. [a] 146Wash148, 262P232. [k] **In New York.**–219AppDiv471, 220NYS44.

1057-82 21F(2d)562; **TexCivA** 291SW702; **TexCivA** 28SW(2d)1109. [d] 166Ga143, 142SE687; 34GaA143, 128SE702.

1057-85 166Ga143, 142SE687; 230Ky323, 19SW(2d)997; **TexCivA** 28SW(2d)1109 (filing suit and service of process eleven years apart).

1058-88½-New. Delay in service of citation at defendant's request for negotiation and settlement where he was notified of suit does not raise bar effected by filing of petition under applicable statute. **TexCommnA** 272SW1105.

1058-92 123Kan214, 254P1034; 219Ky695, 294SW156; 13LaA194, 127S133(2dcase); 116Nebr740, 219NW1; 23OhA40, 155NE158. [i] 158La66, 103S445. [m] **In Kansas.**–123Kan214, 254P1034. [n] **In Texas.–TexCivA** 28SW(2d)1109.

1058-93½-New. Plaintiff's attorney is not excused from continuance of an effort to serve process by the impression that defendant had moved. **TexCivA** 291SW702.

1058-93⅓-New. Issuance of original citation in due time and exercise of diligence to obtain service do not toll limitations in the absence of a continuing bona fide intent and due diligence to obtain service. **TexCivA** 291SW702.

1058-93¾-New. Suit against, and service on, a minor son will not interrupt prescription of an action against his father although residing with the son and having personal knowledge of the suit. 6LaA121.

1058-95 13LaA194, 127S133(2dcase) (joint tort); **Mass** 170NE621. [c] (4) Persons driving motor vehicles which collided, resulting in death of passenger in one of vehicles, were not united in interest, under Gen. Code §§ 11230, 11256. 28OhA70, 162NE455.

1059-97 9LaA609, 121S671.

1059-6 [f] **In New Jersey,** under statute, issuance of new summons where error is made in issuing or service of original summons is in nature of amendment as regards defense of limitations. 105NJL199, 143A363.

1060-9 [i] (2) Where there is break in continuity of action during which limitations have become effective, cause of action cannot be revived by issuance of alias summons notwithstanding Cir. Ct. Rules, rule 18 § 2. 242Mich214, 218NW759.

1060-11 41F(2d)292; 116Oh490, 157NE391. [f] **Defective service before lapse of limitation period** followed by proper service of alias summons within sixty days thereafter constitutes timely "commencement of action." 116Oh490, 157NE391.

1061-12 139Okl167, 281P777.

1061-19 100NJEq181, 135A74.

1061-21 100NJEq181, 135A74.

1061-25 9La732, 120S256; 32PortoRico749. [b] (2) Statutory provision for transfer between law and equity courts held to interrupt running of statute. 220Ala332, 124S884. [c] **In Porto Rico.**–32PortoRico749.

1062-34½-New. No action stopping the running of the statute of limitations is commenced by the real parties in interest on a note payable to two jointly where the action thereon is commenced by only one of them. 193NC660, 137SE865.

1062-36 158La412, 107S190.

1062-37 201Iowa499, 207NW570 (unsigned notice).

1063-42 7LaA379. [a] (9) Citation directed to railroad through its receivers, instead of to receivers, is sufficient. 158La412, 107S190. (10) Service on chief clerk of receivers in their absence has been held sufficient. 158La412, 104S190.

1063-50 17F(2d)924; 158La412, 107S190; **Tex** 12SW(2d)601; **TexCommnA** 288SW168; **TexCivA** 284SW1057; **TexCivA** 293SW194; **TexCivA** 10SW(2d)786; **TexCivA** 14SW(2d)116. [c] **Failure to obtain court order** to file supplemental petition setting up existence of receivership will not prevent interruption of prescription. 158La412, 104S190. [d] **Original and supplemental petition** against railroad receivers held to convey sufficient knowledge of claim to interrupt prescription. 158La412, 104S190.

1063-52½-New. In some jurisdictions if suit is begun by filing petition insufficient as against general demurrer but identifying transaction on which suit is based, coupled with allegations of denial by defendant of right claimed by plaintiff, running of statute is interrupted. **TexCivA** 282SW835.

1063-52⅓-New. Where cross claim is so defective as not to amount to bringing of suit it does not interrupt running of statute. 99Fla1183, 128S642.

1063-54 92Fla796, 110S354; 3LaA796; 5PaDist&Co403.

1064-59 129Kan470, 283P644.

1064-62 252IllA567; 147Va522, 137SE614.

1065-64 **TexCivA** 1SW(2d)369; **TexCivA** 2SW(2d)961; **TexCivA** 5SW(2d)849; **TexCivA** 29SW(2d)479.

1065-68 216AppDiv230, 214NYS765; **TexCivA** 2SW(2d)961.

1065-69 154Tenn167, 289SW513; **TexCivA** 21SW(2d)355.

1065-70 [c] But see 317Mo148, 295SW118. [d] (3) Where action on note was commenced by one of two joint payees,

amendment of complaint by allowing other payee to be made party plaintiff constitutes new cause of action. 193 NC660, 137SE865.

1066–73 214Ala32, 106S182; Ala 130S 547; 208Cal 633, 284P212; 89CalA167, 264P784; 216AppDiv230, 214NYS765; 48RI 485, 139A308; TexCivA 289SW 461; 105WVa29, 141SE444.

1067–80 TexCommnA 291SW850. But see 20 OhA79, 153NE191. [a] **Addition of new defendant,** not enlarging liability of original defendant, does not set up new cause of action against original defendant. TexCommnA 291SW850.

1067–81 247 IllA406; 146Miss837, 112 S465; NH 146A395(2dcase); 105NJL 188, 143A454; 19 OhA399. [b] (2) TexCommnA 14SW(2d)1020. (4) Where widow sued individually for death of railroad employee, under Winslow and Transportation Acts, her substitution as administratrix did not affect tolling statute. 118Tex303, 16SW(2d)117.

1067–82 130Misc755, 225NYS211. But see 19 OhA399.

1068–87 170Ark552, 280SW364; Mass 172NE85; 166Minn126, 207NW23. [c] **Substitution of agent of president** in action pending at termination of federal control is commencement of new action. 166Minn126, 207NW23.

1068–88 275US460, 48SCt150, 72Led 372; 75CalA309, 242P895; 102CalA126, 282P512.

1068–89½–New. Failure of plaintiff to make successor to defendant a party within the limitation period requires dismissal of the action. 196NC161, 144 SE698(1stcase).

1069–91 215Ala212, 110S308; 21AlaA 130, 106S214; 33Ariz250, 263P939; 108Conn436, 143A568; 232 IllA193; 338 Ill 82, 170NE8; 232 IllA246; 237 IllA 614; 200 Ind589, 163NE99; 120Kan602, 245P107; 126Mc409, 139A227; 261Mass 426, 158NE891; Minn 232NW708; MoA 14SW(2d)467; 82NH170, 131A441; 113 Ok546, 149NE876; 128 Okl 23, 261 P174; 124 Or569, 265P1117; 128 Or172, 273P953; TexCommnA 280SW517; TexCivA 275SW70; TexCivA 281SW267; TexCivA 282SW835; TexCivA 293SW 224; TexCivA 294SW953; TexCivA 7 SW(2d)644; TexCivA 7SW(2d)1103; TexCivA 10SW(2d)400; TexCivA 12SW (2d)1078; TexCivA 27SW(2d)258; 147 Va522, 137SE614; Ont [1929] 1DomLR 597. See also 1LaA180. [a] 166Minn1, 206NW945. [b] TexCivA 275SW397. [g] (6) Amendment of petition for conspiracy to charge that defendants "acted together and aided and abetted each other." 202 Iowa378, 210NW452. (7) Action is detinue, where count for conversion of same property was added. 24AlaA635, 111S275. (8) Amended petition in conversion based on same evidence as original petition in contract did not state different cause of action. TexCivA 16SW(2d)413. (9) Amended declaration seeking to hold company as lessee, instead of successor, of another such company. 40F(2d)586. (10) Other applications. 205Cal 128, 270P188; 95CalA400, 273P74; TexCivA 8SW(2d) 569; TexCivA 8SW(2d)815; TexCivA 17SW(2d)84. (11) Amended petition seeking reformation is incidental, in suit to set aside cancellation of fire policy. Iowa 233NW153. [i] **Why or how defendant held accountable for negligence.**–In suit alleging defendant's negligence, amendment alleging receiver's negligence for which defendant is answerable is proper since statement as to why or how defendant is answerable is mere detail of claim of accountability. 82NH170, 131A441.

1070–92 21AlaA130, 106S214.

1070–95 40F(2d)586; 30Ariz245, 246P 543. [c] **It is sufficient** that pleadings are substantially alike. TexCivA 12SW (2d)1078.

1070–96 213AppDiv374, 211NYS184.

1070–97 Sask [1927] 3DomLR332.

1071–1 218Ala613, 119S640; 94PaSuper 299.

1071–10 TexCivA 294SW953; TexCivA 20SW(2d)101.

1071–11 TexCivA 294SW953.

1071–12 132 Okl 169, 270P17; 35Porto Rico 606; TexCivA 295SW665; Tex CivA 3SW(2d)527. [a] (2) TexCivA 12 SW(2d)1078. (5) Amendment to show defendants accepted drafts did not set up new cause of action, where original petition charged that defendants made, executed, and delivered drafts. Tex 12 SW(2d)601.

1072–17 17F(2d)468.

1072–18 16F(2d)948; 17F(2d)468; 23 F(2d)369; 37F(2d)508; 34F(2d)396; 90CalA675, 266P817; 338 Ill 82, 170NE 8; 237 IllA614; 253 IllA190; 235Ky 204, 30SW(2d)900; 11LaA604, 123S349; NJ 147A468; 138 Okl 182, 280P234; 139 Okl 1, 281P234; 139 Okl 176, 281P766; 142 Okl 246, 286P797; 43 OklACR190; 43 OklACR213; TexCivA 1SW(2d)369; TexCivA 25SW(2d)956; TexCivA 29SW (2d)479 (describing plaintiffs as partnership instead of corporation). [c] (3) In action against city for injuries to pedestrian from defective sidewalk, amendment supplying omission as to filing notice of injury with city did not set up new cause of action. 152Va74, 146SE303.

1073–22 29F(2d)555; 21AlaA130, 106S 214; 35Ariz357, 278P375; 237 IllA 614; 251 IllA169; Iowa 228NW83; 12 LaA531, 126S531; 135 Okl 47, 273P889; TexCivA 280SW604; TexCivA 282SW 835; TexCivA 293SW194; TexCivA 294 SW681; TexCivA 294SW953; TexCivA 295SW702; TexCivA 15SW(2d)207. [b] 251 IllA169; 166Minn1, 206NW945.

1074–23 TexCivA 294SW953.

1074–24 TexCivA 294SW953.

1074–25 Va 131SE441 (where amendment was not necessary but appropriate).

1074–28 213AppDiv374, 211NYS184.

1074–30 31F(2d)107; 41F(2d)369; 214Ala32, 106S182; 33Ariz250, 263P 939; 181Ark994, 28SW(2d)1067; 88 CalA60, 262P822; 48 Ida369, 282P82; 235 IllA322; 247 IllA496; Iowa 228 NW83; 124Kan23, 257P979; 256Mass 337, 152NE373; 166Minn1, 206NW945, 947 [citCJperQuinn,J]; 317Mo 148, 295 SW118; Mo 19SW(2d)668; 117Nebr 132, 219NW797; 117Nebr418, 220NW 685; 221AppDiv581, 224NYS491; 13 PaDist&Co 723; 123 Or193, 261P422; 155SC370, 152SE512 (amendment before expiration of statutory period); 51SD146, 212NW917; TexCommnA 23 SW(2d)706; TexCivA 284SW676; TexCivA 290SW875; TexCivA 7SW(2d) 878; TexCivA 26SW(2d)732; TexCivA 29SW(2d)479; TexCivA 29SW(2d)520. See also 17F(2d)468. [d] (1) TexCivA 12SW(2d)808; TexCivA 17SW(2d)136. [h] (5) See also 87PaSuper6. (16) Amendment setting up contract made by two defendants where original complaint set up contract made by only one of them. TexCivA 284SW676. (17) Amendment alleging contract originally declared upon by corporation was that of partnership taken over by corporation. 275US431, 48SCt144, 72 Led354. (18) Amended complaint on account stated and original complaint on open account. 33Ariz250, 263P939. (19) Amendment setting up cause of action of filiation. 33PortoRico 424. (20) Other instances. 255 IllA239; Iowa 228NW83; TexCivA 26SW(2d) 732. (21) Other applications of rule. 141 Okl 22, 283P561. [i] **Where both causes of action refer to same transaction** in action for goods sold and delivered amendment adding cause of action on account stated may be allowed. Mont 287P169.

1076–31 235 IllA322.

1076–37½–New. A slight variance in the name of a partnership as given in an amended complaint from that given in the original complaint is insufficient to characterize the amended complaint as a separate and distinct suit. 174 Ark1161, 298SW494.

1076–40 165Ga844, 142SE283. Contra TexCivA 6SW(2d)375 (runs only till filing of original suit).

1076–47 43 OklACR190; TexCivA 282 SW267; TexCivA 284SW676. [a] ND 224NW668; TexCivA 282SW267.

1076–48 43 OklACR190; TexCivA 284 SW676. [c] 253 IllA190; 123 Or193, 261P422. [d] 48 Ida369, 282P82.

1077–49 43 OklACR190; TexCivA 284 SW676.

1077–50 48 Ida369, 282P82.

1077–53 31F(2d)107. [c] **That different law or principles** support cause of action in amended declaration, does not show it is different cause. 40F(2d)586.

1077–54 CalA 288P834. But see LaA 129S190.

1077–56 30F(2d)718.

1077–62 280US491, 50SCt182, 74Led 566; 256Mass337, 152NE373; 166Minn 1, 206NW945, 947 [citCJperQuinn,J].

1078–65 31F(2d)107.

1078–67 TexCommnA 271SW890.

1078–67½–New. , and vice versa. 124 Or569, 265P1117.

1078–68 TexCivA 5SW(2d)780; Tex CivA 20SW(2d)361.

1078–71 14F(2d)353. [a] (1) 43 Okl ACR190; 43 OklACR213.

1078–72 235 IllA322; 248 IllA488; 39 OklACR186, 188 [quotCJ]; 39 OklACR 240. [b] But see 152Va74, 146SE303.

1079–75 Nebr 252NW762; Tex CommnA 276SW660; 147Va522, 137SE 614.

1079–76 30Hawaii17.

1079–76 214Ky822, 284SW104; 218Ky 600, 291SW1027. [c] **In proceeding by notice of motion for judgment,** amended notice merely increasing damages is not new cause of action barred by limitations. 153Va691, 151SE126.

1079–81½–New. Claim for attorney's fees first set up in amendment to petition is not new cause of action barred by statute. 16F(2d)130.

1080–82 Nebr 232NW762; TexCivA 14SW(2d)116. [a] (4) Amendment to action brought for rescission of contract induced by fraud, praying for damages consequent on fraud, does not introduce new cause of action. 201 Iowa1186, 207NW247.

1080–83 147Va522, 137SE614.

1080–84 117Nebr132, 219NW797; 221 AppDiv581, 224NYS491; TexCivA 290 SW875; 151Wash538, 276P880.

1081–96½–New. The right of a joint owner of a note is not barred, although his interest was first shown in reply filed after bar of statute. MoA 289SW 977.

1081–99 TexCivA 23SW(2d)421.

1082–13 167La183, 118S881; TexCivA 285SW838; TexCivA 10SW(2d)786. See also Sask [1928] 4DomLR72.

1082–17 [a] **New matter in reply to counterclaim** is not barred till counterclaim is barred. 132 Okl 159, 269P 1091.

1083–35 164La787, 114S654; 119 Oh 226, 162NE799; 101WVa457, 132SE 882, 884 [citCyc].

1083–37 124Kan810, 262P567; 25 OhA 44, 158NE551; 119 Okl 9, 247P379. [c] **Where action was dismissed without prejudice to him,** party cannot deduct period consumed by pending of action from period of statute of limitations. 54ND753, 210NW525.

1083–43 124Kan810, 262P567; 143 Miss597, 109S8.

1084–49 15F(2d)843.

1084–50 124Kan810, 262P567.

1084–53 37GaA102, 139SE97. See also 205 Iowa256, 215NW744.

1084–61 224AppDiv523, 231NYS520 [rev on other grounds 250NY628, 166 NE350 (1stcase)].

1084–69 204 Iowa655, 215NW749.

1084–70 [a] (6) Limitations in bill of lading. 208 Iowa1396, 227NW407. (7) Proceeding under Workmen's Compensation Law. 252NY1, 168NE442.

1085–71½–New. Some statutes apply although the original proceeding was brought in a court without jurisdiction. 23F(2d)668.

1085–85 10LaA382, 120S907.

1086–94 39GaA225, 146SE856. [a] (2) Plaintiff, suing on note in which he had no interest, cannot sue on note after acquiring title, and after statutory period had run, but within one year after dismissal of first action. 29F(2d) 555.

1086–95 37GaA102, 139SE97.

1087–99 39GaA225, 146SE856.

1087–3 [a] (2) Renewal suit, failing to contain allegations that it is substantially same cause of action as for-

mer suit, is subject to demurrer, where brought beyond period of statute of limitations. 39GaA225, 146SE856.

1087-9 [e] **Petition in second suit** held not notice of abandonment of first. 221MoA609, 283SW723.

1087-10 22F(2d)642; 220MoA 367, 286SW445; 23 OhA311, 155NE249. [i] (2) Filing of complaint within one year of dismissal for want of prosecution but issuance of summons after such period does not prevent bar. 177Ark 145, 5SW(2d)941. (3) Statute is inapplicable to suit to contest improvement district. 180Ark709, 22SW(2d)559. [j] **On failure of action in state court,** second action permitted by statute within one year may be brought in federal court. 22F(2d)642. [k] **Dismissal for failure to prosecute suit** is nonsuit within statute. Mo 28SW(2d) 84(2dcase).

1088-16 221MoA609, 283SW723. [c] **Suit held pending** when new action commenced. 221MoA609, 283SW723.

1089-18 220MoA32, 285SW775.

1089-24 TexCivA 10SW(2d)129.

1089-27 But see 196NC695, 146SE801 (1stcase).

1089-28 196NC695, 146SE801(1stcase); 23 OhA40, 155NE158.

1089-29 166La101, 116S714.

1090-33 47RI 240, 132A610.

1090-34 142 Okl 138, 285P845.

1091-41 173Ark273, 292SW109.

1091-42 29F(2d)555.

1091-49½-New. Issuance of new summons after discontinuance for failure of service and expiration of the period of limitation prescribed does not comply with death statute. 190NC806, 131SE 274.

1091-52 253NY166, 170NE532.

1091-53 205 Iowa256, 215NW744; 39 OklACR240.

1091-55 101WVa457, 132SE882.

1092-60 204 Iowa655, 215NW749.

1092-68 225AppDiv634, 234NYS177.

1092-70 205 Iowa256, 215NW744; 101 WVa457, 132SE882.

1093-71½-New. where the first suit was by the assignee and the second suit by the assignor for the use of the assignee, 101WVa457, 132SE882.

1093-74½-New. where second suit is by compensation insurance carrier, joint plaintiff with widow previously; 93CalA 196, 269P685.

1093-78 109Conn460, 146A847. But see 205 Iowa256, 215NW744.

1093-87 [b] 98Fla365, 123S755(2d case). [c] **Statute not applicable in absence of judgment.-Ida** 287P949.

1094-99 318Mo 1, 298SW762, 765 [quot CJ]. [g] **Presentation of claim to attorney-general** held not commencement of action. 77CalA367, 246P819.

1095-4½-New. The government's filing of verified claims for additional income taxes with the receiver of a corporation constitutes commencement of proceedings for collection. 34F(2d)155.

1095-9 119Kan626, 240P584; 126Kan 740, 741, 271P286.

1095-15½-New. No excuse that executor would have held money in trust after collecting it. 287Pa105, 134A468.

1096-23 [a] Or 250P525, 527 [citCJ]. [b] 83CalA386, 256P823; 47 Ida179, 276 P315; Mass 170NE621.

1096-24 49RI 151, 141A307, 308 [cit CJ].

1096-25 49RI 151, 141A307, 308 [cit CJ].

1096-26 49RI 151, 141A307, 308 [cit CJ].

1096-28 [b] **No statute will be construed as abridging right** to bind oneself to pay debt morally, though not legally, payable. TexCivA 17SW(2d)167 (2dcase).

1096-30½-New. Determination whether sufficient acknowledgment has been made to remove bar depends on proof that defendant has, by express or implied recognition of debt, voluntarily renounced protection of statute. 108 Conn271, 142A891.

1096-30½-New. An action apparently barred by statute can be maintained only if the statute has been tolled in a legal manner. Iowa 227NW644.

1096-31 93CalA654, 269P1115; 123Kan 728, 255P682.

1097-40½-New. A debtor may take the debt itself out of prescription or prevent or interrupt prescription by acknowledging or promising to pay it, even though the judgment therefor be allowed to prescribe. 159La576, 105S 626.

1097-42 [a] (3) **Parol acknowledgment** or promise to pay, although insufficient to take judgment out of prescription or to revive the same, may have such effect on debt itself. 159La576, 105S626. (4) Where creditor allows his judgment to prescribe by failing to revive it in statutory manner, his only remedy is to sue on debt as evidenced by acknowledgment or promise. 159La576, 105S626. (5) Written acknowledgment or promise, short of statutory compliance, does not revive judgment though it may revive the debt. 159La576, 105S626. [e] **In Texas.-19SW(2d)**795.

1097-44 123Kan728, 255P682.

1097-45 123Kan728, 730, 255P682 [cit CJ]; 174Minn264, 219NW155.

1098-48 174Minn264, 219NW155, 156 [citCJ].

1098-50 Iowa 227NW644; 159La576, 105S626 (debtor may take debt out of prescription by acknowledgment or promise, though judgment thereon is allowed to prescribe); 239Mich473, 214 NW415. [a] 86CalA484, 260P933. [d] **Promise after bar not limited by subsequent letter.-87CalA590,** 262P337.

1098-55 128Misc853, 220NYS312.

1099-73 42F(2d)309 [quotCJ]; Ariz 283P273; 87CalA590, 262P337; 87 IndA 42, 155NE528; 121 Or133, 253P525, 527 [citCJ]; TexCivA 4SW(2d)274; Tex CivA 17SW(2d)167(2dcase); TexCivA 19SW(2d)795; TexCivA 22SW(2d)765. [a] TexCivA 16SW(2d)954. [e] **Insufficiency of consideration.-Performance of** condition is optional with creditor. Tex CivA 275SW229.

1099-77½-New. New promise to pay existing indebtedness in consideration for extension of further credit is sufficient to revive statute of limitations. OhA 173NE39.

1099-79 86PaSuper208.

1100-80 181Ark4, 248SW(2d)852.

1100-83 239Mich473, 214NW415.

1100-84 239Mich473, 214NW415, 416 [quotCJ].

1100-86 239Mich473, 214NW415, 416 [quotCJ].

1100-88 239Mich473, 214NW415.

1101-89 181Ark4, 248SW(2d)852.

1101-91 86PaSuper208. [d] (3) Letter acknowledging indebtedness and promising to make every effort to pay is sufficient to reowe outlawed note in absence of evidence of existence of any other indebtedness. 239Mich473, 214NW415.

1102-99 239Mich473, 214NW415.

1102-3 155Md243, 141A706.

1102-4 TexCivA 284SW598.

1103-13 226Ky301, 10SW(2d)1095; 159 La576, 105S626 (written promise to pay debt); 291Pa282, 139A853. Tex CommnA 278SW180. [b] **No statute abridges right of competent** party to revive just debts. TexCommnA 278SW 180.

1103-14 [d] **Promise to make every effort to pay** is sufficient. 239Mich473, 214NW415.

1103-16 87 IndA42, 155NE528; Tex CommnA 286SW165.

1104-18 Mo 275SW936.

1104-19 TexCivA 6SW(2d)375. But see TexCivA 8SW(2d)687. Contra 254 IllA 92.

1104-20 86CalA484, 260P933.

1104-21 [c] 168La383, 122S118.

1104-25 108Conn271, 142A891; 221Ky 498, 299SW207; 159La576, 105S626 (holding written acknowledgment interrupts prescription of debt); 3LaA 372; NH 148A25; 137Misc396, 241NYS 76; 12PaDist&Co 579; TexCommnA 278 SW180; 118Tex16, 6SW(2d)352; Tex CivA 4SW(2d)274; Utah 286P936. But see 47 Ida179, 276P315. Contra 53SD 485, 221NW90. [d] **Nature of debt remains unchanged by bar or presumption of payment.-TexCommnA** 278SW180.

1105-26 47 Ida179, 276P315; Tex CommnA 286SW165.

1106-36 NH 150A114; TexCivA 13SW (2d)898. [b] 125Misc111, 210NYS245.

1107-39 But see TexCivA 6SW(2d)375 (express acknowledgment is essential).

1107-43 83CalA386, 256P823.

1107-49 See also NH 150A114. But see NH 148A25.

1107-52 [c] **To extend a lien,** statute requiring acknowledgment and recording of agreement extending date of maturity of debts is not applicable between original parties. TexCivA 4SW (2d)274.

1108-53 81CalA210, 253P749; 86CalA 484, 260P933; 98CalA563, 277P367; DC 41F(2d)107; 155Md243, 141A706. [a] (3) Statement in chattel trust deed, executed by husband, that former deeds of trust and notes given by him or by him and wife remain in full force and effect is unreserved promise to pay and to keep alive all notes and accounts which husband owns. 151Miss893, 119 S823. [d] 9LaA231, 120S101(1stcase). [f] **Drawing check** for benefits is acknowledgment by insurer. NJCir 143 A77.

1108-55 But see 198Wis613, 225NW 326.

1108-56 [b] **In Texas.-CivA** 8SW(2d) 687.

1108-59 199Cal 625, 250P669, 48ALR 1308; 202Cal 598, 261P999; 98CalA563, 277P367; Mass 170NE621; NM 289P 71; 86PaSuper208; 9PaDist&Co 670; TexCivA 275SW229; TexCivA 6SW(2d) 375.

1109-60 Md 151A240; NM 289P71.

1109-62 202Cal 598, 261P999; Md 151 A240; TexCivA 8SW(2d)687.

1110-63 Md 151A240.

1110-64½-New. General acknowledgment may be inferred from acquiescence as well as from silence, as where the existence of debt has been asserted in the debtor's presence and he did not contradict the assertion. 108Conn271, 142A891.

1110-64½-New. The method of determining whether an agreement after limitations had run was an acknowledgment of and continued a Carey Act water contract or whether a new obligation was created, is to inquire whether, in an action to enforce the obligation, the new contract or the old one as extended would be pleaded as a foundation of plaintiff's claim. 47 Ida439, 276P313.

1110-71 202Cal 598, 261P999; 160La 407, 107S286; 155Md243, 141A706; Md 151A240; TexCivA 275SW229; Tex CivA 284SW598; TexCivA 8SW(2d)687. [g] **In Texas.-CivA** 275SW229.

1110-72 199Cal 625, 250P669, 48ALR 1308.

1110-74 [a] TexCivA 275SW229. [b] TexCivA 275SW229.

1111-75 TexCivA 275SW229.

1111-81½-New. Insured's silence and failure to repudiate liability on demand is evidence of the existence of debt. 108 Conn271, 142A891.

1111-85 155Md243, 141A706.

1111-86 155Md243, 141A706.

1111-88 NM 289P71; 217AppDiv159, 216NYS384.

1111-90 TexCivA 6SW(2d)375.

1111-92 Kan 289P957.

1112-1 [a] (2) Cross complaint, alleging payments, not credited, and that payment of balance had been offered and refused, held not valid acknowledgment. 98CalA563, 277P367.

1113-29 See also TexCommnA 286SW 165.

1114-41 Contra 118Tex16, 6SW(2d) 352.

1114-42 118Tex16, 6SW(2d)352.

1114-43 12PaDist&Co 579; TexCivA 13SW(2d)234. [a] **Instrument in nature of deed of trust** assigning interest in oil lease for benefit of assignor's creditors is sufficient renewal of notes held by creditors and prevents limitation. TexCivA 23SW(2d)421.

1114-47 [b] **Invalid oral antichresis** giving possession of real property as security for note does not interrupt prescription against note. 169La844, 126S 212.

1114-50 TexCivA 282SW631. [b] **Giving of mortgage** revives debt and four-year statute applies. TexCivA 282SW 631. [c] **No express promise necessary** for mortgage to revive debt. TexCivA 282SW631.

1114–61 118Tex16, 6SW(2d)352.
1114–64 Sask [1928] 4DomLR72.
1115–70 See also 235 IllA228.
1115–73 See also 169La412, 125S289.
1115–74 [a] **Checks for interest held** not promise to pay principal. Va 153 SE818.
1116–97 159La576, 105S626 (acknowledgment held insufficient). [a] (3) Defendants' cross complaint, alleging that they had paid certain sums, which codefendant had refused to credit, and offering to pay balance if proper credit was allowed, which offer was refused, is not valid acknowledgment. 98 CalA563, 277P367.
1116–6 291Pa282, 139A853.
1116–6½–New. Stipulation expressly reciting defendant's indebtedness to plaintiff has been held to preclude defendant from pleading limitations. 179 Ark403, 16SW(2d)463(2dcase).
1116–10½–New. Acknowledgment is sufficient, although made in deposition taken for use in case other than case between same parties on same subject. 31NM336, 244P889.
1117–15½–New. Suing to cancel, or declare paid, the judgment. Where judgment is recovered against two defendants with right of one to seek indemnity against the other, actions of former and its receiver in suing to cancel the judgment and to declare it paid and canceled do not constitute an acknowledgment of the debt evidenced by the judgment. 159La576, 105S626.
1118–42 108Conn271, 142A891; Tex CivA 13SW(2d)472.
1118–43 49RI151, 141A307; Tex CommnA 286SW165; TexCivA 16SW (2d)938.
1118–59 TexCivA 8SW(2d)687.
1119–65 TexCivA 275SW229.
1119–73½–New. Request of debtor as one of the parties to pending suit in letter to creditor that all parties agree to compromise cross action is not condition precedent to payment of debt acknowleuged in the letter so as to prevent removal of bar of statute. Tex CivA 275SW229 (creditor having no authority to bind other parties).
1119–73¾–New. It is only where there are mutual obligations on both parties at the same time that there may be a valid conditional agreement to pay the debt removing bar of statute. TexCivA 275SW229.
1119–73¾–New. Hence where performance by the creditor of the debtor's conditional proposition is optional, there is no consideration for the promise. Tex CivA 275SW229.
1119–74 TexCivA 275SW229.
1119–75 81CalA210, 253P749; 108Conn 271, 142A891; TexCommnA 286SW165; TexCivA 275SW229; Man [1926] 4DomLR590.
1119–77 108Conn271, 142A891; Tex CivA 13SW(2d)472. [b] (3) Condition requiring proof of death is complied with by sending of questionnaire to insurer, sent to plaintiff, coupled with failure of further requirement. 108 Conn271, 142A891.
1120–78 108Conn271, 142A891.
1120–79 TexCivA 13SW(2d)472.
1120–80 TexCivA 275SW229.
1120–87 Man [1926] 4DomLR590.
1121–7 226Ky301, 10SW(2d)1095; 160 La407, 107S286; 2LaA343; 2LaA376; 5LaA302; 6LaA419; 6LaA521. [a] **Parol acknowledgment held not to shift three-year period to one of ten years.–** 160La407, 107S286.
1121–10 TexCommnA 286SW165.
1121–11 248 IllA12; Iowa 227NW644; Iowa 229NW839; 255Mass587, 152NE 623, 47ALR1; TexCivA 284SW598; TexCivA 6SW(2d)375; Utah 286P936. [c] (2) Statute relates to kind of evidence by which promise shall be proved, and not to character of promise or acknowledgment. 87CalA590, 262P337.
1124–45½–New. to a promise to pay a judgment, Ida 289P610.
1125–50 Utah 286P936. [b] In Oregon.–121 Or133, 253P525.
1125–52 121 Or133, 253P525, 527 [cit CJ]; Ont [1925] 3DomLR535.
1125–53 118Tex58, 298SW530; Tex CommnA 15SW(2d)604.
1125–54 [d] TexCivA 13SW(2d)234.
1125–56 Mass 170NE621 (sufficient).
1125–61 [a] TexCivA 275SW229.
1126–65 Ont [1925] 3DomLR535.
1126–66 TexCommnA 15SW(2d)604. [e] 127Kan524, 274P276. [h] (3) But acknowledgment of debt in minutes of church vestry meetings held sufficient as written acknowledgment. 168La383, 122S118. [i] **Memorandum construed as insufficient acknowledgment.–**Where, by construing memorandum as acknowledgment of debt, it is untrue, but by another construction it correctly states facts, it is not sufficient acknowledgment. Ont [1925] 3DomLR535.
1126–66½–New. Guaranty of debts which might have been contracted during certain period but were not is not acknowledgment under previous guaranties to stay running of statute. 256 Mass125, 152NE328.
1127–70 TexCivA 275SW229.
1127–78 79CalA294, 249P222.
1127–84½–New. Since acknowledgment and recording of instruments affecting real estate are necessary only as to subsequent purchasers without notice, renewal contract of note and deed of trust is effectual to extend time as between parties, although not acknowledged and recorded. TexCommnA 285SW1050.
1127–87 DC 41F(2d)107; TexCivA 275 SW229 (request in letter not construed as condition precedent to payment as promised therein preventing removal of statutory bar).
1127–87½–New. A letter of plaintiff's attorney to insurer, stating that an insurance agent had informed plaintiff that defendant would pay the policy since insured had not been heard of for over seven years, and requesting proofs to be filed by plaintiff to obtain payment on the policy, was held a demand for payment of the policy and the request for proofs of loss forms. 108 Conn271, 142A891 (action claimed barred by limitations).
1127–92 118Tex58, 298SW530.
1123–95 86CalA484, 260P933; CalA 273P1070; DC 41F(2d)107; Tex CommnA 15SW(2d)604; TexCivA 275 SW229; TexCivA 290SW264; TexCivA 294SW320; TexCivA 13SW(2d)472; TexCivA 16SW(2d)938; TexCivA 29SW (2d)529; TexCivA 29SW(2d)811 (letter does not itself become sufficient cause of action); TexCivA 31SW(2d)461.
1128–96 97CalA710, 276P148; 217App Div159, 216NYS384; TexCivA 8SW(2d) 687; Sask [1929] 1DomLR124.
1129–11 199Cal625, 250P669, 48ALR 1308; 47Ida439, 276P313; 28OhA413, 162NE762; TexCivA 4SW(2d)274.
1130–17 125Misc405, 211NYS371 (notes executed by agent without authority not sufficient to take original debt out of statute); TexCivA 282SW 631; Man [1930] 3DomLR635. [c] **Vice president and director of corporation,** not shown ever to have represented it in any business transaction or to have had either express or implied authority to act for it, cannot bind it by letter claimed to constitute acknowledgment or promise preventing bar of limitations. Utah 273P507. [d] **Officer of corporate debtor, interested in corporate creditor,** cannot avoid bar of limitations by acknowledgment or promise. Utah 273P507. [e] **General manager of corporation** authorized by articles to direct, manage, and carry on corporation's business, subject to control of directors, and make and execute contracts pertaining to ordinary business, is not authorized without special authority to bind corporation by letter claimed to constitute acknowledgment or promise preventing bar of limitations. Utah 273 P507.
1131–37½–New. Any authority of an insurance company to make payment to the assignee of the policy as collateral security for insured's debt did not imply authority in insurer to bind insured by a new promise to pay the debt. 28 OhA413, 162NE762.
1131–37¾–New. By statute, administrator's acknowledgment of claim and promise to pay does not take case out of statute of limitations. Miss 130S298.
1131–37¼–New. Court's oral approval of administrator's promise cannot add anything thereto. Miss 130S298.
1131–41 See also 234 IllA296.
1131–61 [b] Statute embodying rule is inapplicable to partnership. Mass 169 NE154.
1132–62 Ala 127S550 (notwithstanding agreement permitting extension of time).
1133–3 But see 151Miss893, 119S823.
1134–5½–New. Husband's agreement with mortgagee and payment of interest thereunder may bar operation of statute as to debt on community property. 43 Ida433, 251P957.
1134–11 TexCommnA 285SW1050. [f] In Texas.–CivA 287SW134. [g] In Vermont.–146A77.
1134–19 167La243, 119S35.
1134–25 118Tex58, 298SW530.
1135–48 TexCivA 297SW491.
1135–49½–New. An owner of land who has executed a mortgage could not, after the bar of the statute of limitations has become complete as to rights under a Carey Act water contract, create a new lien or revive an old one as to such payments, to the prejudice of the holder of the mortgage. 47 Ida439, 276 P313.
1136–65 195NC107, 141SE358.
1137–79 168La383, 122S118. But see NH 150A114.
1137–85 77CalA367, 246P819; 120Kan 502, 243P1029, 1030 [citCJ]; NH 148 A25; 9PaDist&Co 670.
1138–88 Utah 286P936.
1138–89 But see 168La383, 122S118.
1139–13 235 IllA228; 205 Iowa956, 218 NW941; 221Ky498, 299SW207; 6LaA 55. [a] 28 OhA413, 162NE762.
1140–19 98CalA563, 277P367; 128Misc 853. 220NYS312. [a] 9LaA231, 120S101 (1stcase).
1140–21 [c] (2) Letter acknowledging and impliedly promising to pay open account, written within two years of accrual, transformed open account into promise in writing and preserved debt for four years from date of writing. TexCivA 10SW(2d)1037.
1140–23 254Mass294, 150NE87.
1140–26 118Tex58, 10SW(2d)539; Tex CommnA 10SW(2d)698; TexCivA 10SW (2d)594.
1140–29 TexCivA 10SW(2d)594.
1140–30½–New. Land lien is renewed in cases not covered by the statute requiring recording and acknowledging by a new promise extending the principle debt. TexCivA 4SW(2d)274.
1140–37 81CalA210, 253P749; 98CalA 563, 277P367; 89Fla283, 103S612; 130 Kan360, 286P269; Mass 172NE82; Tex CommnA 286SW165; TexCivA 16SW (2d) 938; TexCivA 29SW(2d)811. See also 108Conn271, 142A891.
1141–40 [d] In Louisiana.–159La576, 105S626.
1141–41 77CalA681, 247P516.
1141–43 77CalA681, 247P516.
1141–43½–New. unless promise was intended to take place of original liability, in which case action must be on new promise, and period of limitation to action will be determined by character of evidence of promise, 214Ky221, 282SW 1081.
1142–44 [c] (3) TexCivA 10SW(2d) 1037.
1142–51½–New. The renewal of a barred note does not review, revive, or continue a mortgage securing payment of the notes. 199Cal625, 250P669, 48 ALR1308.
1143–62 104Conn311, 132A898; 234 IllA296; 7LaA590; 8LaA243; Mass 172 NE246; NJSup 136A428; 39Wyo107, 270P174. [a] (1) 176Ark328, 2SW(2d) 1089, 1091 [citCJ], 59ALR899.
1144–64 28 OhA413, 162NE762.
1144–65 39Wyo107, 270P174. [c] (1) 109Conn507, 147A33. [e] **Question of intent.–**109Conn507, 147A33.
1144–69 175Ark633, 300SW408; 109 Conn507, 147A33.
1145–73 Ark 31SW(2d)745; Ida 290P 397; 233Ky540, 26SW(2d)32; 76Mont 396, 247P326.
1145–75 121 Or173, 254P815.
1145–76 153Wash689, 280P346.
1145–78 [a] (1) 172Ark87, 287SW1007.
1146–85 MoA 29SW(2d)212; 192NC 665, 135SE774; 149Wash578, 271P882.
1146–86 Mich 233NW343.

1147-87 90PaSuper183.
1148-93 192NC665, 135SE774; 131 Or 694, 284P280; 149Wash578, 271P882; 198Wis613, 225NW326.
1148-98 Vt 146A6.
1149-99 Sask [1930] 2DomLR272.
1149-13½-New. Stockholders not held barred after five years from maturity, notwithstanding payments after maturity by corporation for whose benefit it was given. 163La957, 113S161.
1149-15 234 IllA296; 163La1039, 113S367; 125Me108, 131A138; 76Mont396, 247P326; 190NC225, 129SE598; 53SD 485, 221NW90; TexCivA 294SW343; 134Wash168, 235P26. But see Va 153 SE818. [e] **Payment of interest** revives debt of both as to principal and sureties. 191NC340, 132SE23.
1149-17 221MoA683, 285SW161; 101 NJEq809, 139A170.
1150-19 [a] **In Oregon.**-116 Or250, 241 P58.
1150-27 85Mont241, 278P512.
1151-38 TexCivA 29SW(2d)489.
1151-41 Utah 283P1055.
1151-46 Man [1929] 4DomLR705.
1151-50 170Ark660, 281SW1; 307Mo 234, 270SW658; 116 Or25, 240P227; TexCivA 11SW(2d)352.
1151-51 307Mo 234, 270SW658; 116 Or 25, 240P227.
1152-54 MoA 29SW(2d)212.
1152-55 176Ark328, 2SW(2d)1089, 59 ALR899; MoA 5SW(2d)644, 645 [cit CJ].
1152-56 Vt 146A6.
1153-57 233Ky540, 26SW(2d)32.
1153-58 Vt 146A6.
1153-62 39Wyo 107, 270P174.
1153-63 Ark 31SW(2d)745.
1154-68 307Mo 234, 270SW658.
1154-83 307Mo 234, 270SW658.
1154-89½-New. A statute requiring payments on the mortgage debt to be indorsed on the margin of the record in order to fix a new date from which the statute of limitations runs does not apply as between the mortgagor and the mortgagee. 170Ark660, 281SW1.
1154-89¼-New. Widow and heirs of a mortgagor are not third persons within such statute. 170Ark660, 281SW1.
1154-89¼-New. Who are third persons, under statute, who may complain of absence of proper marginal notation. 181 Ark597, 27SW(2d)88.
1154-91 Ark 31SW(2d)745.
1155-92 [a] (2) Payment by referee in foreclosure from proceeds of sale does not revive debt as against liability of guarantor of bond. 225AppDiv70, 232 NYS278.
1155-95 137 Okl 283, 279P332. [f] **Principal obligation already barred is** revived by application of collateral security. Mass 169NE154.
1155-97 195NC239, 141SE569.
1155-98 123 Or119, 261P63, 65 [citCJ], 55ALR269.
1156-8½-New. Application by the seller of the net proceeds realized from the sale of personal property, sold under a contract of conditional sale pursuant to authority contained in the conditional sale contract, does not interrupt the running of the statute against a note for the price. 123 Or119, 261P630, 55ALR 269.
1156-8¼-New. Debt is not revived by an insurance company's payment on an endowment policy assigned as collateral security where the debtor had not authorized the company to act as his agent, nor given his written consent to payment as required by the policy. 28 OhA413, 162NE762.
1156-11 176Ark328, 2SW(2d)1089, 59 ALR899.
1156-16 168La383, 122S118.
1157-29½-New. The amount credited on a note consisting of the borrower's part of a partnership fund in the hands of the holder of the note is sufficient to toll the statute. 138 Okl 138, 280P589.
1157-33 [c] **In Saskatchewan.**-[1929] 2 DomLR552.
1157-47 231Ky308, 21SW(2d)459.
1159-67½-New. It is not mere right to credit payment on a note but the exercise thereof by application thereof that tolls the statute. 116 Or25, 240P227.
1159-70 Ala 130S547; 12LaA75, 125S 300 (as to part payment, note cannot be paid unless maker consents); 20 OhA 515, 152NE736; NS [1928] 1DomLR409.
1160-76 163La1039, 113S367; 121 Or 173, 254P815.
1160-82 168La383, 122S118.
1160-83½-New. Payment must be made by some one authorized to consent to the continuance of the original obligation. 123 Or119, 261P63, 55ALR269.
1160-87 **Erratum.**-In text substitute "but" for "or."
1161-9 146Wash530, 264P4.
1162-17½-New. Payment by a wife as administratrix of her deceased husband's estate on account of a debt for which she and her husband were jointly liable does not toll the statute as to her individual liability. 153Wash163, 279 P583.
1162-30 163La957, 113S161, 164 [cit CJ].
1162-31 [c] **Payment by general manager of syndicate to purchase lands and sell them at profit** tolls statute as to all members of syndicate. 199Wis482, 227NW14.
1163-53 89Fla283, 103S612; 47 Ida179, 276P315; 85Mont241, 278P512; ND 230 NW211(2dcase); 20 OhA515, 152NE 736; 142SC353, 140SE700; 146Wash 332, 262P981; 153Wash163, 279P583. [e] **Payment by joint adventurer.**-199 Wis482, 227NW14.
1163-54 146Wash332, 262P981. [b] **Partners are not contemplated.**-Mass 169 NE154.
1163-55 SD 226NW754.
1163-55½-New. Payment of interest by maker will not start statute afresh as to guaranty without knowledge thereof. 28Hawaii275.
1164-60 ND 225NW811.
1164-61 ND 225NW811.
1164-70 163La1039, 113S367.
1165-80 [a] **Payment by one of several interested in equity of redemption** keeps alive right of entry against all. Vt 146 A77.
1166-95 163La1039, 113S367; 61 OntL 490, [1928] 1DomLR549.
1166-97 134Wash168, 235P26.
1166-5 85Mont241, 278P512; 242NY 475, 152NE266.
1166-12½-New. Under the Oregon statute payment of interest on the mortgage debt tolls the statute both as to the mortgage and the debt secured, as against a purchaser who assumed payment of the mortgage debt and whose title attached prior to the expiration of the ten-year period from the maturity of the debt secured. 116 Or250, 241P 58.
1166-12⅓-New. Where transferee took property with knowledge, sold part of it, and used proceeds to make payment to mortgage within limitation period, the chattel mortgage was held not barred by limitations as against him. 242NY475, 152NE266.
1167-43½-New. Payments by partner on notes signed individually by three partners toll statute as to him. 235 Mich282, 209NW179.
1168-54 190NC225, 129SE598.
1168-55 [f] **In Kentucky.**-227Ky594, 13SW(2d)759.
1169-57 Ala 127S550; Ala 130S547; 76Mont396, 247P326; 142SC353, 140SE 700; 146Wash332, 262P981; 195Wis 120, 217NW746, 56ALR915; 59 OntL 449, [1926] 4DomLR755. [c] (2) See also 76Mont396, 247P326.
1169-58 Vt 146A77; 146Wash332, 262 P981.
1169-60 But see 227Ky594, 13SW(2d) 759.
1169-69 234 IllA296; 146Wash332, 262P981. See also 190NC225, 129SE 598.
1171-2 90PaSuper183; Vt 146A6. [a] **Application.**-131Misc490, 227NYS690.
1171-3 176Ark328, 2SW(2d)1089, 59 ALR899; 131 Or694, 284P280. See also 149Wash578, 271P882. [c] **Refund of alien's passage money,** thereby recognizing invalidity of penalties imposed on carrier, held to revive claim for penalties. 39F(2d)654.
1172-22 197NC22, 146SE72; 197NC 125, 147SE731(1stcase). [a] **Estate entitled to credit for amount of payment.**-197NC22, 146SE72.
1172-28 181Ark620, 27SW(2d)83; 43 Ida433, 251P957; 81Mont120, 262P164; 52ND892, 204NW856, 41ALR814.
1172-30 TexCommnA 278SW180. [b] **Express revival of lien,** made with express revival of debt, given effect against parties. TexCommnA 278SW 180. [c] **Promise reviving debt and lien** held validly embodied in trust deed. TexCommnA 278SW180. [d] **Revived lien held enforceable over intervening homestead claims.**-TexCommnA 278SW 180.
1172-31 TexCivA 17SW(2d)167(2d case).
1173-35 [a] (1) See also 175Ark417, 299SW753. (7) Indorsement held to be compliance with statute. 181Ark679, 27SW(2d)784.
1200-3 169La101, 124S186.
1200-10 99Fla1151, 128S801(2dcase); 249 IllA368.
1200-12 16F(2d)45. [a] 214Ala234, 107S77. [c] **Bill to recover church property** not without bar of statute. 214Ala234, 107S77.
1200-15 151Miss111, 117S514; 191NC 636, 132SE800.
1201-16 217Ky192, 289SW262; 193NC 800, 138SE165. [b] **Rule applied to married women.**-217Ky192, 289SW262.
1201-18 18F(2d)908 (stating Ohio rule); 43F(2d)72; CalA 261P510; 37 GaA554, 140SE913; 43 Ida64, 249P254; 201 Iowa488, 207NW606; 223Ky221, 3 SW(2d)640; TexCivA 13SW(2d)472.
1201-19 18F(2d)908; 37GaA554, 140 SE913; 201 Iowa488, 207NW606; 8LaA 647.
1201-20 [a] See also 216AppDiv554, 215NYS442.
1201-24 214Ala234, 107S77; 195Cal 132, 231P987; 126Kan127, 266P935; TexCivA 275SW90; TexCivA 8SW(2d) 206; Utah 269P132, 135 [citCJ]. [a] 219Ala645, 123S38; 100CalA482, 280P 383; 153Wash102, 279P402.
1202-26 [a] **In suit by remaindermen** to quiet title and remove cloud caused by fraud of life tenant, running of the statute is not dependent on discovery of fraud, but on termination of life estate and laches must be determined by evidence adduced at trial. 195Cal 132, 231P987.
1202-27 [c] **Allegations held sufficient.**-Cal 290P456.
1202-28 Cal 290P456; TexCivA 8SW (2d)206. [b] (3) 39F(2d)900.
1203-29 36F(2d)942; 36F(2d)943. [b] **Allegations held insufficient.**-171 Ark492, 286SW867.
1203-30½-New. In an action by a husband for a dentist's negligent failure properly to extract his wife's teeth, a declaration failing to show that concealment of the cause of the wife's illness was fraudulent on the part of the dentist does not justify assumption of fraud preventing the running of the statute. 156Tenn366, 2SW(2d)104.
1203-32 TexCivA 29SW(2d)811.
1203-36 TexCivA 19SW(2d)795; TexCivA 23SW(2d)421.
1203-39 TexCivA 19SW(2d)113; TexCivA 19SW(2d)795.
1203-47 233 IllA373.
1203-48 43 Ida64, 249P254; MoA 298 SW1059. [a] (1) 174Ark293, 295SW19; 83CalA386, 256P823; 83CalA638, 257P 137; 36GaA396, 137SE85; 43 Ida64, 249P254; 233 IllA373; MoA 298SW 1059. [b] (1) TexCivA 29SW(2d)811 (petition declaring on new promise).
1204-49 [a] (3) Other allegations held insufficient. CalA 261P510.
1204-54 15F(2d)405; 215Ala398, 110S 822; 218Ala613, 119S640; 174Ark177, 294SW709; Del 143A544; 92Fla396, 109S471; 163Ga698, 137SE50; 213Ky 274, 280SW1102; TexCivA 288SW581. [a] (1) 24F(2d)103; 255 IllA409. (3) 234 IllA213. [b] (1) 24F(2d)119.
1205-55 92Fla396, 109S471; TexCivA 288SW581.
1205-58 213Ala95, 104S237; Ala 128S 604; 96Fla35, 117S708; 170Ga509, 153 SE214 (not barred); 320 Ill 423, 151 NE258; 267Mass301, 166NE833.

1205-59 39F(2d)900; 96Fla35, 117S 708.

1205-64 174Ark412, 295SW375.

1205-65 16F(2d)760; 18F(2d)908 (stating Ohio rule); 36F(2d)942; Ala 130S178; 174Ark177, 294SW709; 196 Cal534, 238P714; CalA 286P482; 34 GaA143, 128SE702, 34GaA224, 129SE 5; 37GaA554, 140SE613; 40GaA132, 148SE922; 41GaA318, 152SE846; 47 Ida542, 277P542 (2d dense). 48 Ida369, 282P82, 174Minn354, 219NW266, MoA 298SW1049; 83Mont581, 273P 1055; 25OhA44, 158NE551; 120Okl11, 249P916; 132Okl237, 270P28; TexCivA 298SW1[illegible].

1206-66 175Ark626, 18SW(2d)48; 37 GaA[illegible], 110S[illegible]913.

1206-68 16F(2d)760; 174Ark177, 294 SW709.

1207-69 [a] (1) 209Ky243, 272SW732; 213Ky274, 280SW1102; 221Ky685, 299 SW[illegible]

1207-74 Ala 130S547; 49ND221, 190 NW1009; 49ND46, 206NW471; 54SD [illegible], 228SW242; 54SD239, 223NW214.

1207-75 25F(2d)326.

1207-76 254 IllA323.

1208-82 23F(2d)593; 25F(2d)326; 204 Cal159, 267P314; 161Ga403, 131SE675; Iowa 232NW830; Mo 208SW(2d)50; MoA 282SW739; TexCivA 294SW681; TexCivA 258SW(2d)923; 144Wash358, 258P 10. [a] **Bar of statute sufficiently shown**—16GaA647, 151SE533 (dense). [b] **Petition held not to show bar.**—TexCivA 278SW(2d)[illegible]

1208-83 172Ark454, 289SW455, 174Ark 294, 275SW19, 172Ark316, 178SW(2d) 402; 177Ark338, 178SW(2d)730, 161Ga 403, 131SE75, 201Iowa916, 216NW 264; 267Mass301, 166NE333; OhA 173 NE519; 114Okl21, 242P1027; TexCivA 294SW681; 144Wash358, 258P10. [a] (3) Where petition states when debt was contracted but not when it became payable, bar by statute does not appear on face of pleading. 32OhA419, 168NE 217.

1209-92½-New. The rule is otherwise where the complaint contains an allegation that the fraud was not discovered until within the statutory period. 114 Okl21, 242P1027.

1210-97 113Miss841, 107SS559; 50SD 553, 210NW988.

1210-98 36F(2d)907(2dense); 36F(2d) 937, 16F(2d)511, 39GaA710, 143SE75 (2dense); MoA 258SW(2d)551; 114 Okl 5, 242P766; 50SD553, 210NW988; TexCivA 118SW(2d)263. But see TexCivA 128SW(2d)1078.

1211-9 37GaA554, 140SE913.

1211-11½-New. In passing on a demurrer to a cross complaint, the court may not refer to other pleadings to determine when the action was commenced. 48 Ida369, 282P82.

1211-15 220MoA760, 277SW67.

1211-18 131Or591, 284P289.

1211-22 CalA 289P295. [c] **In Oklahoma** 120Okl11, 249P916.

1212-29 117Nebr201, 220NW293.

1212-29½-New. The objection that the equity of one seeking to establish a trust in land is barred may be taken by motion to dismiss the action. 195NC498, 142SE776.

1212-31 49ND221, 190NW1009.

1212-36 TexCivA 291SW276, TexCivA 300SW985, TexCivA 158SW(2d)938.

1212-38 TexCivA 286SW339.

1213-42 TexCivA 286SW339.

1213-42½-New. Failure to call exception to the attention of the court and obtain a ruling thereon constitutes a waiver of the defense. TexCivA 291SW 276.

1213-50 71CalA359, 236P653 (court cannot of its own motion apply defense of statute of limitations); 213Ky274, 280SW1102; 214Ky267, 283SW111; Mo 5SW(2d)405; MoA 14SW(2d)467; 77 Mont390, 251P524; 194NC674, 140SE 442; 135Okl101, 274P478. [a] **Where statute is not pleaded,** trial court erred in disallowing portion of amount claimed on ground that statute had run against it. 71CalA359, 236P653. [b] **Statute pleaded by another party cannot be invoked in favor of party failing to set up the statute as a bar.** 214Ky267, 283SW 111.

1213-52 44F(2d)11; 215Ala398, 110S 322, 218Ala140, 117S647; 196Cal534, 238P714, 71CalA335, 235P653; Del 143 A544. DelCh 152A216, 92Fla396, 109S 471; 163Ga693, 137SE650; 163Ga368, 137SE353; 202Iowa866, 211NW410; 208Iowa698, 223NW756; 124Kan261, 259P788; 213Ky274, 280SW1102; 214Ky 267, 283SW111; 231Ky376, 328SW(2d) 43; 168SW145, 25KyL598; 169La101, 124S[illegible]; 264Mass481, 163NE662; 264 Mass414, 163NE563; 247Mich255, 225NW 605; MoA 178SW(2d)378, MoA 298SW (2d)551, 95Mont241, 273P512; 130Misc 165, 223NYS401, 19OhA64; 114Okl5, 242P766; 111Okl276, 240P623, 130 Okl83, 265P124; 39OklAC276; 158 Tenn[illegible]2, 148SW(2d)714; TexCommnA 288SW397; TexCivA 283SW883; TexCivA 278SW581; TexCivA 290SW307; 52NS112, [1926] 1DomLR1006.

1215-53 71CalA389, 235P653; 92Fla 1151, 128S801(2dense); 163Ga368, 137 SE353; 202Iowa866, 211NW410; 208 Iowa722, 217NW239, 264Mass481, 163 NE662, 264Mass414, 163NE563; 84Mont 38, 274P296, TexCommnA 48SW(2d) 961, TexCivA 283SW883; 37Wyo419, 263P703, 705 [citCJ] Contra 12PaDist &Co 269.

1215-56 Ala 130S547.

1216-60 163Ga698, 137SE650; 130 Okl 83, 265P650; 130Okl83, 265P124; 39 OklACR276.

1216-66 19F(2d)880; TexCivA 298SW (2d)511.

1216-67 172Ark316, 128SW(2d)402; 204 Iowa916, 216NW264; MoA 282SW739; 85Mont56, 277P631; 49ND221, 190NW 1009; 49ND46, 206NW471; 144Wash 358, 258P10. [a] (3) The defense cannot be proved under general denial. 130 Misc168, 223NYS401.

1216-68 172Ark454, 289SW455; 47 Ida 139, 276P313; Iowa 232NW830; 37 Okl ACR272. 144Wash358, 258P10.

1217-77 83Colo131, 262P517.

1217-83 83Colo131, 262P517; Mo 23 SW(2d)100.

1217-84 83Colo131, 262P517.

1218-97 202Iowa866, 211NW410; Utah 259P94. [a] (2) During taking of testimony 202Iowa866, 211NW410.

1218-99 But see 77CalA367, 246P819.

1219-4 32F(2d)281.

1219-16 77CalA367, 246P819; 204Iowa 916, 216NW264.

1219-19 204Iowa916, 216NW264; 208 Iowa698, 223NW756(2dense); 225Ky142, 7SW(2d)842; MoA 298SW1059.

1220-22 [a] (4) Answer averring barring of action on note by law of defendant's state but not of cause arising out of state, held sufficient. IndA 156NE 334. (5) Other instances of insufficient pleading. Mo 5SW(2d)405.

1220-25 204Iowa916, 216NW264.

1220-26 Me 151A390.

1220-29 7LaA353.

1221-30½-New. **Defendant in trespass action need not plead limitations,** defense being available under general issue. 290Pa21, 137A867.

1223-56 [b] (3) Allegation that more than ten years have elapsed since rendition of judgment sued on, if not being alleged that more than ten years had elapsed before petition was filed. MoA 178SW(2d)378.

1223-58 93Fla223, 111S731, 51ALR976.

1223-64 97Fla396, 109S471; 236IllA 570.

1223-65 92Fla396, 109S471; 236IllA 570.

1224-71 93Fla223, 111S731, 51ALR976.

1226-87 172Ark637, 291SW90; 204 Iowa916, 216NW264.

1226-88 52NS112, [1926] 1DomLR1006.

1226-89 172Ark611, 291SW90.

1226-93 97CalA166, 275P178; 52NS 112, [1926] 1DomLR1006.

1226-95½-New. The right to amend an answer to interpose the Maryland statute of limitations held governed by the New York and not by the Maryland law. 131Misc40, 225NYS658.

1229-50 32Ariz80, 255P996, 57ALR196. [c] **Acts amounting to waiver.**—Ida 292P 243.

1229-51 32Ariz80, 255P996, 57ALR196. [a] (2) 32Ariz80, 255P996, 57ALR196.

1229-53 32Ariz80, 255P996, 57ALR196.

1230-76 See also 202Iowa866, 211NW 410.

1230-83 49Kl83, 140A355.

1230-84 221Ky786, 299SW965.

1230-85 116Or25, 240P227. [b] **Where plaintiff anticipates plea of limitations,** denied by answer, no reply to limitation plea is necessary. 234Ky448, 28 SW(2d)494.

1231-92 Del 143A544.

1232-12½-New. The court should permit amendment of pleading to avoid defense where delay in moving was not prejudicial. 204Cal159, 267P314.

1232-19 209Ky243, 272SW732; TexCivA 295SW236; TexCivA 278SW(2d) 857.

1232-20 202Iowa866, 211NW410; 209 Ky243, 272SW732; TexCivA 18SW(2d) 708; Utah 269P147.

1233-24 36F(2d)942; 40F(2d)928; 100 CalA736, 281P106.

1233-25 Sask [1929] 1DomLR124.

1233-34 3Tex273. [c] **Complaint sufficient,** either on theory of arrangement to collect and hold for plaintiff or theory of discovery of detention of money by fiduciary. 244NY1, 154NE645. [d] **Allegations held insufficient.**—146Va553, 131SE[illegible]35.

1234-39½-New. Amended pleading setting up identical contract of original pleading defeats plea of limitation. TexCivA 275SW397.

1234-39½-New. Trial amendments setting up inception of plaintiff's right in contract is not a new cause of action subject to statute. TexCivA 275SW397.

1234-51 204Cal159, 267P314; Utah 269P147.

1235-60 152Md371, 136A825.

1235-61 218Ala49, 117S477; 204Iowa 916, 216NW264; 316Mo1028, 292SW 1023.

1235-62 152Md371, 136A825; 316Mo 1023, 292SW1023; Utah 269P132, 135 [citCJ]. [b] 201Iowa488, 207NW606; 152Md371, 136A825.

1236-64 215Ala200, 110S286; 69CalA 447, 231P604; 176Minn274, 223NW294; 51ND634, 200NW818.

1236-65 69CalA447, 231P604; 51ND 634, 200NW818; TexCivA 289SW1050; TexCivA 27SW(2d)857 (facts insufficient).

1236-76 202Cal598, 261P999.

1237-86 195Wis120, 217NW746, 56ALR 916.

1238-11 44Mo596, 100AmD328; 270Mo 238, 192SW1018; 8MoA85 [aff 76Mo 454].

1240-29 [b] (3) Where amendment to defendant's plea of account was properly stricken, on ground that items were barred by statute of limitations, court did not err in rejecting evidence offered to prove item of indebtedness so stricken. 166Ga707, 144SE265. (4) Where plaintiff alleged no exception suspending running of statute of limitations, evidence tending to show that statute had been suspended is inadmissible over objection. TexCivA 198SW(2d)113.

1240-34½-New. Where plaintiff declares on original promise and also alleges a new promise, he has the right to prove such new promise. 229Ky823, 18 SW(2d)288.

1240-36 135Okl101, 274P478.

1240-38 225Ky735, 9SW(2d)1083.

1240-43 81CalA210, 253P749.

1240-49 TexCivA 198SW(2d)113.

1241-7 TexCommnA 296SW871.

1242-26 141Okl1, 283P571, 67ALR 1059 (fraud secret in its nature).

1242-32 131Misc490, 227NYS690.

1242-46½-New. It must be presumed, in the absence of showing to the contrary, that substantial and regular payments of interest on notes, relied on to toll statute of limitations, were made by persons who were obligated to make them. 227Ky594, 13SW(2d)759.

1243-58 187NC125, 147SE731 (1dense); NC 149SE[illegible]. NC 153SE815.

1243-59 48Ida42, 280P324; 202Iowa 866, 211NW410; 204Iowa916, 216NW 264; 124Kan261, 259P788; 148Minn

352, 182NW442; 170Minn175, 212NW408; 320Mo57, 6SW(2d)576, 580 [quot CJ]. 67ALR489; Mont 251P254; 85Mont56, 277P631; 137Okl283, 279P332; 43OklACR247 [reh pending]; 118Tex58, 298SW530; TexCivA 271SW139; TexCivA 288SW609; 70Utah189, 259P313. [b] (16) When defendant relies on demand not made in reasonable time. 170Minn175, 212NW408. (17) Must show flowage of water continuous and permanent in action for flood damages. 254 IllA289. Erratum.–Strike out "O'Neil v. O'Neil, 148 Minn. 381, 182 NW 438."

1244-63 12LaA75, 125S300; LaA 128S536.

1244-64 202 Iowa866, 211NW410; 124Kan261, 259P788.

1244-66½–New. Stipulation showing action was barred places burden on plaintiff to prove facts avoiding statute. 202 Iowa866, 211NW410.

1244-67 87Colo183, 285P1099 (extension of time); 38GaA767, 145SE464(2d case); Iowa 232NW725; 5LaA449; 7LaA75; 7LaA393; Mass 172NE246; Mo 28SW(2d)84(2dcase); 115Oh326, 154NE317; 124Okl177, 254P746; 129Okl281, 285, 264P623, 627; 118Tex58, 10SW(2d)539; 151Va165, 144SE456.

1245-68 209Ky243, 272SW732.

1245-70 115Oh326, 154NE317. [a] (3) Unsoundness of mind. 115Oh326, 154NE317.

1245-71 191NC340, 132SE21.

1245-75 208 Iowa1396, 227NW407.

1245-76½–New. The party relying on the statute, in an action to foreclose a mortgage securing notes, has the burden of proving that the action was barred by limitations notwithstanding the death of the maker of the notes. 118Tex58, 298SW530.

1245-83 163La191, 111S673; 164La787, 114S654.

1245-84 43 Ida730, 254P523.

1246-86 43 Ida730, 254P523; RI 151A5; TexCivA 18SW(2d)708.

1246-87 81Mont552, 264P673.

1246-88 43 Ida730, 254P523; 81Mont552, 264P673.

1246-98 99CalA769, 279P481; 78Colo371, 242P51 [citCJ]; 125Kan431, 265P1036. [a] MoA 5SW(2d)644; Wis 230NW137. [b] Ark 31SW(2d)745.

1247-4 MoA 29SW(2d)212.

1247-10 239Mich473, 214NW415, 416 [quotCJ].

1247-12 239Mich473, 214NW415, 416 [quotCJ].

1247-13 239Mich473, 214NW415, 416 [quotCJ]; TexCivA 13SW(2d)472.

1247-20 Mass 170NE451. [f] Evidence in support of defense of limitation under inapplicable statute is held properly excluded. 73CalA421, 238P1096.

1248-24 [a] (5) In action of ejectment testimony as to when plaintiff learned that deed had been executed conveying title to her. 163Ga250, 135SE845. (6) Testimony showing when knowledge of mortgage on corporate property was acquired. 220Ala194, 124S423.

1248-24½–New. Evidence in support of an allegation is not barred by the statute of limitations. NS [1929] 1DomLR566.

1248-26 Ida 292P220; 235 IllA228.

1248-41 87CalA590, 262P337.

1248-47 Mich 233NW343; MoA 29SW(2d)212. [a] (4) Conversations between parties relative to payment are admissible. Ida 292P220. [c] But see 248 IllA12.

1249-49 39Wyo107, 270P174.

1249-61 195NC483, 142SE589.

1249-62 See also 83CalA386, 256P823.

1249-66 202Cal598, 261P999.

1249-70 202Cal598, 261P999.

1250-75 161La84, 108S133.

1250-83 [b] 97CalA339, 275P824; 99CalA769, 279P481; 202 Iowa866, 211NW410; 159La1057, 106S564; 1LaA461; 265Mass295, 164NE85; 133Misc691, 234NYS52; TexCivA 294SW657. [i] 177Ark145, 5SW(2d)941; 98CalA278, 276P1081; CalA 286P510; 160Ga865, 129SE528; 120Kan575, 244P1063; 128Kan270, 277P49; 129Kan766, 284P427; 219Ky695, 294SW156; 161La84, 108S133; 76Mont396, 247P326; 134Misc518, 235NYS492; 196NC260, 145SE243; 33 OhA165, 168NE771; TexCivA 278SW247; TexCivA 26SW(2d)403; 192Wis555, 213NW282. [n] Suspension of statute by disability.–Evidence insufficient to show unsoundness of mind. 115 OhSt326, 154NE317.

1251-87 [b] 36GaA394, 136SE826; 202 Iowa866, 211NW410.

1251-88½–New. That plaintiff leased his land through an agent did not constitute notice or charge him with knowledge of where his land was actually located. TexCivA 275SW90. [a] Evidence insufficient to show as matter of law defendant negligent in discovering fraud so as to set statute running before he actually discovered it. TexCivA 275SW90.

1251-89 [c] (1) 181Ark1079, 28SW(2d)701; 43 Ida730, 254P523; 204 Iowa916, 216NW264; 152Md371, 136A825; 134Misc459, 234NYS643; 24 OhA113, 156NE230; RI 151A5.

1251-91 87CalA559, 262P392. [b] (1) 36F(2d)950; 81Mont552, 264P673; Mont 289P1028. (2) 208Cal697, 284P906. (3) CalA 292P699. (5) 51ND634, 200NW818. [c] (1) 132 Okl139, 269P1080; TexCivA 293SW632. (2) 120Kan452, 243P1052; 122Kan695, 253P233.

1251-92 [b] Evidence held insufficient to show that suit was brought within one year after receiving knowledge of damage. 164La787, 114S654.

1252-97 [b] Evidence held sufficient to support finding of repudiation and knowledge thereof by trustor. CalA 290P52.

1252-99 [e] 181Ark620, 27SW(2d)83; 86PaSuper208; 118Tex58, 298SW530. [f] (1) 99Fla1295, 128S853(1stcase); 254 IllA92; Iowa 232NW725; 120Kan502, 243P1029; 255Mass587, 152NE623, 47ALR1; TexCivA 16SW(2d)831. (3) Revival of mortgage thirty seven years old. 100NJEq434, 135A502. (4) Acknowledgment of debt. 175Ark633, 300SW408.

1252-6 [c] 100NJEq434, 135A502.

1252-9 [b] (1) 135Misc442, 240NYS215; 136Misc363, 239NYS665. (2) Evidence held sufficient to support finding that last payment on note was made before bar of statute by application on note of rental of room in defendant's hotel. 116 Or25, 240P227. [c] 172Ark647, 291SW90; Ida 292P220; 168La383, 122S118; Mich 233NW343; 307Mo234, 270SW658; 85Mont241, 278P512; 53SD485, 221NW90; Vt 146A77; Wis 230NW137. [d] 181Ark478, 26SW(2d)896; LaA 128S536; Me 150A491; 198Wis613, 225NW326; Can [1928] 3Dom LR784. [e] Absence of credit indorsements is not conclusive that no payments were made. 181Ark620, 27SW(2d)83.

1253-10 [b] (2) That payments were to be applied on account fifteen years old held proper decision under evidence. 200Wis36, 227NW253. [c] 12LaA75, 125S300.

1253-11 [a] (2) 39Wyo107, 270P174. (3) Payment indorsed on note was not intended as payment thereon. 181Ark4, 24SW(2d)852. [b] Evidence held insufficient.–149Wash578, 271P882.

1253-12 [a] (1) 233Ky540, 26SW(2d)32; 76Mont396, 247P326.

1253-23 25F(2d)326.

1253-24 17F(2d)930; 87CalA684, 263P353.

1253-25 195NC483, 142SE589.

1254-27 39F(2d)900 (negligence); 178Ark943, 12SW(2d)916; 87CalA684, 263P353; 152Md371, 136A825; 265Mass413, 164NE609, 62ALR525; Minn 233NW317; 146Miss565, 111S571; 115Nebr789, 215NW111, 61ALR1; 198NC309, 151SE641; 118 Or111, 244P71; TexCommnA 296SW871; TexCommnA 10SW(2d)381; TexCivA 17SW(2d)89. [b] Facts and circumstances sufficient to take case to jury. TexCivA 275SW90.

1254-32½–New. Whether plaintiff was of unsound mind at the time the action accrued so as to suspend limitations is held for jury. 115 Oh326, 154NE317.

1254-32½–New. Whether an action was begun within one year from removal of claimed disability is held for jury. 115Oh326, 154NE317.

1254-33 125Misc443, 211NYS283.

1254-34 41F(2d)398.

1254-35 39GaA724, 148SE345(3dcase).

1254-42 35GaA315, 132SE914; 199 Ind660, 161NE251; 198NC66, 150SE619; 24OhA219, 157NE405; 151Va165, 144SE456. [a] (7) When alienation of wife from husband became complete and separation final. 118 Or111, 244P71. (8) When relationship of surgeon and patient terminated. 25 OhA89, 157NE402.

1255-43 87CalA684, 263P353; 290Pa21, 137A867.

1255-45 140 Okl210, 282P287 (what is reasonable time).

1255-54 178Ark168, 10SW(2d)19; 205Iowa417, 216NW68; 116 Or1, 239P196, 199 [citCJ]. [a] Evidence held insufficient to go to jury.–152Md371, 136A825.

1255-55 Nebr 229NW337; 137 Okl82, 277P1026; 43 OklACR247 [reh pending]; 116 Or1, 239P196, 199 [citCJ]; TexCivA 293SW632.

1255-58 36F(2d)943; 218Ala49, 117S477; 223Ky221, 3SW(2d)640; Nebr 229NW337; 197NC458, 149SE552; 137 Okl82, 277P1026; 116 Or1, 239P196, 199 [citCJ]; TexCivA 257SW90; TexCivA 24SW(2d)742.

1255-59 TexCivA 275SW90.

1255-61 81Mont552, 264P673; 116 Or1, 239P196 (where facts uncontroverted).

1256-69 49RI151, 141A307.

1256-75 174Ark194, 295SW38; 49RI83, 140A355. [a] 155Md243, 141A706.

1256-78 TexCivA 31SW(2d)461.

1257-87 MoA 31SW(2d)98; NJSup 136A428.

1257-88 142Wash699, 253P636.

1257-90 [a] MoA 5SW(2d)644.

1257-96 152Md371, 136A825.

1257-99 30F(2d)803; 84CalA519, 258P683; 175Minn411, 221NW526; TexCivA 282SW302. See also 124Kan23, 257P979.

1257-3 81Mont552, 264P673.

1257-4½–New. to grant a dismissal, 116 Or25, 240P227.

1257-6 TexCivA 275SW70 (where original petition was not barred, and amendment did not introduce new cause, not error to refuse to submit question to jury).

1257-7 127 Or320, 272P273.

1258-12 [g] 210Ky38, 275SW7; BC [1928] 1DomLR244. [h] 95CalA228, 272P810; DC 33F(2d)370; 219Ky695, 294SW156; 152Md371, 136A825; 115Nebr789, 215NW111, 61ALR1.

1258-13 TexCivA 275SW70 (request properly refused).

1258-14 38GaA596, 144SE673.

1258-18 [a] 160Ga865, 129SE528; 163Ga250, 135SE845; 205 Iowa16, 212NW138; MoA 25SW1088. [c] Instructions properly refused.–218Ala97, 117S653.

1258-19 [d] Charge that account stated is not barred does not limit rule that such account is not absolutely conclusive, but may be impeached for fraud or mistake. 215Ala548, 112S120.

1259-33½–New. Where one defendant offers plea of statute of limitations, it is error to dismiss suit against all defendants. TexCivA 282SW612.

1259-34 [d] Findings as to application of part payment on note held sufficiently specific.–116 Or25, 240P227.

1259-36 122Kan563, 253P426.

1260-40½–New. Judgment entry must show that the trial court overruled an exception of limitations to make it available on appeal. TexCivA 300SW985.

1260-43 58NS412, [1926] 1DomLR1006.

1260-44 43 OklACR247 [reh pending].

1260-45 114 Okl276, 246P628.

1260-54 But see TexCivA 273SW938; TexCivA 18SW(2d)703.

1260-56½–New. The appellate court must assume the truth of the evidence held by the lower court to be insufficient to remove bar of the statute. 155Md243, 141A706.

1260-64 Me 151A890.

LINE

1261-41½–New. "line deck," 229Ky685, 17SW(2d)753.

LINOLEUM

1263-18 [a] "Plain linoleum," "painted linoleum," and "inlaid linoleum."–27F(2d)644.

LIQUEUR

1263-24 See also 11CustA60.

LIQUIDATE

1263-39 94Fla1023, 114S760.
1263-41 253 IllA51.
1263-42 253 IllA51.
1264-54½-New. ; undisputed. 172Ark 841, 291SW417.
1264-56 [a] See also 167Ga231, 145SE 68.
1264-57 [a] 86Mont169, 282P852.
1264-58 [a] TexCivA 4SW(2d)651, 653 [citCJ]. [c] 147Va758, 133SE783. [e] TexCivA 282SW894.
1264-60 129Ga133, 58SE874; 126Misc 292, 213NYS81; TexCivA 282SW894, 897 [citCJ]; TexCivA 3SW(2d)864, 871 [citCJ]; 20Wis91.
1264-61 21WallUS105, 22Led481; 20 Conn559; 43Conn455; 61Conn553, 23A 924; 15Ga321; 129Ga133, 58SE874; 47 Nebr875, 66NW834; 20Wis91.
1264-62 TexCivA 282SW894, 897 [cit CJ].
1264-63 TexCivA 282SW894, 897 [cit CJ].

LIQUIDATION

1265-80 76Mont248, 245P947.
1265-83 94Fla1023, 114S760; 76Mont 248, 245P947 [quotCyc].

LIS PENDENS

38 C. J.—4-2 90Fla77, 105S148; 93Fla 101, 111S531; 338 Ill 533, 170NE664; Ont [1925] 3DomLR875.
4-10 213Ala591, 105S538; 93Fla101, 111S531; 164Ga694, 139SE346; 318 Ill 494, 149NE478; 126Me49, 136A121; 236 Mich643, 211NW65; 99NJEq847, 132A 657; 25 OhA382, 158NE275; 108WVa 618, 152S209.
5-11 164Ga694, 139SE346.
6-12 [a] **Doctrine of lis pendens is defined** as jurisdiction, power, or control, which courts acquire over property involved in suit, pending continuance of action and till final judgment therein. 90Fla77, 105S148.
6-13 32PortoRico 392.
6-14 32PortoRico 392.
6-17 But see 90Fla77, 105S148.
6-20 [c] 90Fla77, 105S148.
6-22 90Fla77, 105S148.
6-22½-New. Chancellor Kent's opinion in 1 Johns Ch (NY) 566 decided in 1815 is the foundation of the doctrine of lis pendens in this country. 90Fla77, 105S148.
6-23 99NJEq847, 132A657, 658 [citCJ].
7-26 108WVa618, 152SE209.
9-42 Mo 20SW(2d)896. [g] **Proceeding in rem is notice to world.** 5F(2d) 971.
10-55 90Fla77, 105S148; 93Fla101, 111 S531; 33PortoRico 105; TexCivA 274 SW323; TexCivA 283SW653.
11-61 173Ark533, 294SW25; TexCivA 274SW323; TexCivA 283SW653.
11-63 TexCivA 274SW323; TexCivA 283SW653. See also 90Fla77, 105S148 (except as to notice, statute in no way affects common-law method of enforcing doctrine of lis pendens).
12-69 95Fla748, 116S637, 638 [citCJ]. [a] **Filing notice of lis pendens** cannot deprive bona fide purchasers of property previously purchased. 173Ark533, 294 SW25.
12-71 197Cal364, 240P1015.
12-73 [a] **Failure to record.**—173Ark 533, 294SW25.
12-76 [a] **In Porto Rico.**—33PortoRico 105.
13-89 170Ga906, 154SE445.
13-90 125Kan386, 265P46.
15-11 [a] **In Porto Rico.**—32PortoRico 694.
15-12 221AppDiv586, 224NYS532.
15-14 MoA 256SW114.
17-32 TexCivA 274SW184.
17-36 189NC820, 128SE321, 323 [quot Cyc]; 25 OhA382, 158NE275. [h] **Auctioneer's claim for commissions** for selling real estate is not enforceable by lis pendens. 189NC820, 128SE321.
17-39 126Misc37, 212NYS405 (in suit for partnership accounting).
17-39 263Mass212, 160NE795; 189NC 820, 128SE321, 323 [quotCyc].
18-41 228AppDiv510, 240NYS232; 189 NC820, 128SE321, 323 [quotCyc].
18-42 197NC679, 150SE342. [a] **In North Carolina.**—189NC820, 128SE321.
18-45 189NC820, 128SE321, 323 [quot Cyc].
18-46 189NC820, 128SE321, 323 [quot Cyc].
18-47 138Misc346, 244NYS699; 189NC 820, 128SE321, 323 [quotCyc].
18-52 189NC820, 128SE321, 323 [quot Cyc].
19-58 211Ky847, 278SW154; 108WVa 618, 152SE209.
19-59 189NC820, 128SE321, 323 [quot Cyc].
19-61 320 Ill 11, 150NE339.
20-62 146Miss225, 110S709; 117 Okl 195, 246P472; 318 Ill 494, 149NE478; 320 Ill 11, 150NE339; Iowa 229NW714; 25 OhA382, 158NE275; 120 Okl 299, 251 P609.
20-64 218Ala182, 118S338; 233Mich 608, 208NW152; 128Misc800, 221NYS 80.
20-67½-New. or to enforce a lien of tax bills for a sewer tax, Mo 20SW(2d) 896.
21-73 170Ga906, 154SE445. But see 198NC186, 151SE99.
21-74 170Ga906, 154SE445.
22-77 164Ga694, 139SE346; 84 IndA 77, 149NE358; 189NC820, 128SE321, 323 [quotCyc].
22-78 189NC820, 128SE321, 323 [quot Cyc].
22-85 119Kan411, 239P961; 99NJEq 859, 133A208; 189NC820, 128SE321, 323 [quotCyc].
22-87 15F(2d)909.
22-87½-New. Where rights adjudicated in partition suit are not in any way affected by mortgages executed by one of parties between decree of sale and order of confirmation, purchaser is not bound by order of confirmation. 15F (2d)909.
23-89 189NC820, 128SE321, 323 [quot Cyc].
23-93 [d] **Parties to divorce suit must act promptly** in protection of their rights as against bank holding fund in joint account subject to payment on demand. 333 Ill 442, 164NE836.
23-94 129Kan735, 284P394.
24-1 189NC820, 128SE321, 323 [quot Cyc].
24-6 189NC820, 128SE321, 323 [quot Cyc].
25-22 But see 123Kan447, 256P167.
25-24 189NC820, 128SE321, 323 [quot Cyc].
27-45 90Fla77, 105S148 (immediately suit was commenced).
27-47 146Miss225, 110S709; 133 Okl 267, 271P1035; 158Tenn53, 12SW(2d) 711.
28-67 170Ga906, 154SE445.
29-83 164Ga694, 139SE346.
29-86 Mo 20SW(2d)896 (filing of petition in proceedings for collection of special tax bills); 120 Okl 111, 250P788.
29-87 [a] **By statute,** in some jurisdictions, summons must be served or first publication of notice made within sixty days after filing of petition. 120 Okl 111, 250P788.
30-4 [a] **Notice and not bill** constitutes notice to persons having no actual notice. 143Miss672, 109S671.
30-6 Ida. 292P232; 33PortoRico 105; TexCivA 276SW308.
31-7 100NJEq236, 135A57.
31-8 239Mich593, 215NW57.
31-16 See also 33PortoRico 105.
32-22 197Cal733, 242P718; 229App Div369, 241NYS717. But see 90Fla77, 105S148. [f] (2) Articles 46 and 52 are applicable to legacies of goods or money. 34PortoRico 8.
32-23 [b] **Notice of pendency of stockholder's representative action for waste of corporation's assets** is improper. 229 AppDiv369, 241NYS717.
33-29 108WVa618, 152SE209.
33-37½-New. Statute requiring filing of lis pendens in actions to subject real estate to payment of debts does not apply to actions to recover real property. 108WVa618, 152SE209.
33-44 [a] **Intervener must file lis pendens on order** to give constructive notice where he was not named in any of lis pendens filed. 239Mich593, 215NW57.
34-56 128 Okl 87, 261P228.
34-59 See also 163Ga276, 136SE62.
35-84 163Ga276, 136SE62.
35-89 101NJEq723, 139A178.
36-5 [b] **Sufficiency of notice of suit to enforce special tax bills.**—Mo 20SW(2d) 896.
36-6 90Fla77, 105S148.
36-7 90Fla77, 105S148.
36-7½-New. the time of instituting the suit, 90Fla77, 105S148.
36-8 90Fla77, 105S148 (relief sought).
36-9 90Fla77, 105S148; 68Utah524, 251P29. [d] **Notice misdescribing property.**—143Miss672, 109S671.
37-18½-New. Sufficiency of notice is immaterial as to party having actual notice. 100NJEq236, 135A57.
37-23 90Fla77, 105S148. [e] **Filing of so-called caveat in land office** is of no effect. 108Conn37, 142A407. [f] **Statute relating to filing must be followed.**—95Fla748, 116S637.
38-32 150Va534, 143SE716.
38-32½-New. Lis pendens filed simultaneously with deed held not proper notice to filer of deed. 98NJEq104, 130A 470.
38-32¼-New. Under the Porto Rico code of civil procedure security cannot be required for annotation of a complaint. 33PortoRico 263.
38-32¼-New. Filing of complaint. Under statutes filing of lis pendens with the register is not constructive notice unless the complaint is filed in the clerk's office. 58ND881, 228NW217.
38-33 146Miss225, 110S709.
38-34 146Miss225, 110S709; Mo 20SW (2d)896 (proceedings for collection of special tax bills held continuously pending till final judgment).
38-35 46Philippine362.
38-38 34PortoRico 8; 155Tenn169, 290 SW973.
39-45 155Tenn169, 290SW973. [c] **Delay not satisfactorily explained.**—155 Tenn169, 290SW973.
40-49 125Kan386, 390, 265P46 [quot CJ]. [c] **Amendments made to complaint** in order to conform to ruling, which is not final, do not amount to abandonment or waiver of rights asserted in matter stricken out. 32Porto Rico 32.
40-50 125Kan386, 390, 265P46 [quot CJ]; TexCivA 283SW653.
40-55½-New. Abstract showing lis pendens reciting facts showing record owner held property as his trustee is held sufficient to charge creditor of trustee taking trust deed with knowledge of facts which reasonable investigation would have disclosed notwithstanding suit had been dismissed. TexCivA 283 SW653.
40-57 TexCivA 283SW653.
40-59 155Tenn313, 292SW459.
41-65 318 Ill 494, 149NE478; 320 Ill 11, 150NE339; 32PortoRico 32.
41-66 320 Ill 11, 150NE339.
42-73 32PortoRico 32.
43-80 323 Ill 585, 154NE414. [a] **Purchaser relying upon decree affecting title to property** will be protected notwithstanding decree is afterward reversed or set aside. 323 Ill 585, 154NE414.
43-87 TexCivA 21SW(2d)707.
43-94 149Va597, 140SE810.
43-96 [a] **A purchaser after decree but before appeal** has been held to be a pendente lite purchaser, 149Va597, 140SE 810.
44-2 333 Ill 267, 164NE685.
44-10 318 Ill 494, 149NE478; 119Kan 411, 239P961; 119Kan415, 239P967.
44-11 119Kan411, 239P961; 119Kan 415, 239P967. [a] 119Kan415, 239P967.
44-12 But see 119Kan411, 239P961; 119Kan415, 239P967.
45-21 214AppDiv792, 210NYS465; 32 PortoRico 32. [b] **In Porto Rico.**—32 PortoRico 32.
45-22 214AppDiv792, 210NYS465.
45-28 164La1041, 115S139.
46-35 Alta [1926] 3DomLR445, [1926] 2WestWkly465 [app allowed on other grounds [1926] 4DomLR958, [1926] 3 WestWkly481]. [c] **Lis pendens held not authorized** in suit for specific performance. 99NJEq859, 133A208.
47-53 [a] **In New York.**—215AppDiv 106, 213NYS608.
47-53½-New. But before service of summons and complaint the notice cannot be canceled because of neglect to

proceed. 215AppDiv106, 213NYS608.

47-61 [b] Person not party to suit in which lis pendens filed may sue to discharge lis pendens. Mich 233NW222.

47-62 [b] (2) Order of discontinuance and cancellation of lis pendens in action to register title obtained by purchaser from plaintiff in that action, who was not a party thereto, is unauthorized under statute. 224AppDiv756, 230NYS 293.

47-68 99NJEq859, 133A208.

48-77½-New. Lis pendens improperly filed may be canceled before expiration of 60 day period for serving summons. 138Misc346, 244NYS699.

48-78 [a] **Pleadings not authorizing relief.**-Mich 233NW222.

48-79 [a] **Sufficiency of garnishee's title** cannot be raised in proceeding to cancel lis pendens. 158La183, 103S733.

48-80 128Misc800, 221NYS80.

48-81 128Misc800, 221NYS80; 138Misc 346, 244NYS699.

48-84 138Misc346, 244NYS699.

48-87½-New. Order to vacate lis pendens held not sufficiently specific. Mich 233NW222.

48-88 137Misc285, 243NYS204 (ejectment to obtain possession of property); 138Misc346, 244NYS699.

48-90 137Misc285, 243NYS204.

48-93 227AppDiv313, 237NYS491; 228 AppDiv723, 239NYS435.

48-95 227AppDiv313, 237NYS491.

48-96 225AppDiv534, 233NYS630.

49-15 170Ark703, 281SW14; 104Conn 285, 132A459; 239Mich593, 215NW57.

49-19 55ND475, 214NW461.

49-20½-New. Where statute does not define scope of notice of lis pendens, its scope and effect are to be determined by the common-law rules. 90Fla77, 105S 148.

49-25 90Fla77, 105S148 (litigation must result in judgment or decree affecting property described).

50-33 108WVa618, 152SE209 (judgment held final judgment).

51-47 8F(2d)810; 38F(2d)25 (bill of foreclosure); 38F(2d)470 (implied issues); 87Colo 265, 286P861; 90Fla77, 105S148; 236Mich643, 211NW65; 238 Mich312, 213NW88; 121 Okl 108, 247P 996; TexCivA 283SW653.

51-48 90Fla77, 105S148.

51-50 90Fla77, 105S148.

51-51 90Fla77, 105S148; 145Miss543, 111S577.

52-54 90Fla77, 105S148 (its operation of notice does not extend beyond prayer for relief).

52-55 [a] **Deed of trust on undivided interest given pending action for partition** is superior to cotenant's lien for use and occupation subsequently impressed on land by decree. 145Miss543, 111S 577.

52-57½-New. Notice of lis pendens in partition suit gives notice only of relief sought as to property described and facts in the record of suit at time instituted for purposes thereof and for benefit of parties thereto. 90Fla77, 105S 148.

52-58 90Fla77, 105S148.

53-68 144 Okl 192, 291P15.

53-79 90Fla77, 105S148.

54-81½-New. But vendee's suit to establish title to land as against vendor is notice of ownership of crops on land. 120Kan725, 244P861.

54-87 320 Ill 11, 150NE339; 236Mich 643, 211NW65; Okl 292P73(2dcase).

54-93 197Cal 733, 242P718 (actual or constructive notice held sufficient); 318 Ill 494, 149NE478.

54-96½-New. Agisters taking possession of cattle with consent of mortgagee pending foreclosure and failing to intervene are not bound by judgment. 48 Ida643, 284P559.

55-99 101WVa205, 133SE323.

55-1 97Fla517, 121S562.

55-2 217Ala271, 116S124; 164Ga694, 139SE346; 170Ga75, 152SE85; 170Ga 906, 154SE445; 320 Ill 11, 150NE339; 338 Ill 583, 170NE664; 205 Iowa1385, 219NW537; 217Ky354, 289SW283; 238 Mich312, 213NW88; Mo 20SW(2d)896; 195NC394, 142SE317; 120 Okl 111, 250P 788; TexCommnA 294SW519; TexCivA 274SW323. [e] **Purchaser pendente lite makes himself party to suit.** 320 Ill 11, 150NE339.

55-3 263Mass212, 160NE795; Tex CommnA 290SW734. [b] **Insurer taking security deed** pending action against grantors to subject land to implied trust takes subject to final decree. 170Ga906, 154SE445.

55-4 338 Ill 583, 170NE664; TexCivA 9SW(2d)452. [c] **Actual payment of valuable consideration** before filing of lis pendens is necessary to make a bona fide purchaser. 173Ark533, 294SW25.

55-5 TexCommnA 10SW(2d)692. But see 220Ala629, 127S224.

56-7 CalA 290P1077. [a] (2) Deed of trust executed and filed pending suit to enforce vendor's lien is inferior to it. 180Ark63, 20SW(2d)307.

56-9 217Ky354, 289SW283.

56-10 Fla 130S608; 100WVa247, 130 SE435. [b] **Pendente lite purchaser** is purchaser with knowledge of subject matter and litigants' claims. 234Ky 160, 27SW(2d)692.

56-11 41 Ida35, 238P288.

56-12 164Ga694, 139SE346; 320 Ill 11, 150NE339; 158La183, 103S733; 233 Mich608, 208NW152; Mich 233NW223; Mo 286SW95; NJ 147A628; 120 Okl 111, 250P788; 128 Okl 87, 261P228; Tex CivA 274SW184. See also TexCivA 11 SW(2d)611. [a] **Purchasers of distribution shares** of distributees also named as executors under will, are not affected by pendency of suit against distributees for waste, mismanagement, and accounting. 162Ga362, 133SE859.

57-15½-New. Where a third person purchases from a defendant in a pending action, without actual notice to plaintiff, an interest in the subject matter of such action, plaintiff may settle with defendant grantor without incurring any liability to such purchaser. 120 Okl 111, 250P788.

57-16 223Ky493, 4SW(2d)401, 403 [citCJ]; 226Ky211, 10SW(2d)816; 112 Okl 183, 240P708; TexCivA 276SW308. Ont [1925] 3DomLR875 (lis pendens has no effect on preceding and executed transactions).

57-16½-New. A lis pendens filed by a husband in connection with a crossbill to set aside an assignment by him to his wife of a contract for the purchase of land does not impair the rights of the vendor under a reassignment by the wife prior to filing of the lis pendens. 241 Mich416, 217NW42.

58-18 197Cal 364, 240P1015.

58-19 173Ark533, 294SW25; 197Cal 364, 240P1015.

58-19½-New. And a deed of trust of one tenant in common given to secure an indebtedness after suit and filing of lis pendens in partition suit is superior to title of purchaser at execution sale. Miss 110S789.

58-20 229Ky728, 17SW(2d)1022; 234 Ky160, 27SW(2d)692.

58-32 55ND475, 214NW461, 465 [citCJ].

59-33 6F(2d)10; 196Cal 380, 238P81; 217Ky644, 290SW501; 117 Okl 195, 246 P472. Contra 55ND475, 214NW461.

59-34 [d] **Nonstatutory assignment for benefit of creditors** purporting to "grant, bargain, sell, assign and transfer unto" assignee all of the property of assignor, both real and personal, not exempt from execution, is conveyance within statute. 196Cal 380, 238P81.

59-35 55ND475, 214NW461, 465 [citCJ].

59-37 55ND475, 214NW461.

59-37½-New. Under some statutes a purchaser for a valuable consideration who takes possession of land prior to perfecting of lien by attaching antecedent creditor is entitled to priority, although his deed is not recorded until after attachment and lis pendens is filed. 218Ky11, 290SW1042.

60-47½-New. In some jurisdictions a statute voiding prior unrecorded deeds as against subsequent bona fide purchasers first recording their deeds further provide that every conveyance is void as against any judgment affecting the title unless such conveyance shall have been duly recorded prior to record of notice of action. 196Cal 380, 238 P81.

60-47½-New. Such provision is unrelated to subsequent purchasers or questions of bona fides. 196Cal 380, 238P 81.

60-47¼-New. The purpose of such provision is to prevent fraud through the withholding of notice of transactions affecting titles to the detriment of subsequent bona fide purchasers and those seeking to confirm claims to real property by judgments affecting the title. 196 Cal 380, 238P81.

60-49 Ala 130S323.

60-51 38F(2d)25; 215Ala584, 112S229.

61-56 CalA 290P1077.

61-66 123Kan447, 256P167.

61-67 317 Ill 126, 147NE793; 25 OhA 382, 158NE275.

61-68½-New. Judgment creditor having actual notice of complainant's claim of vendor's lien is not bona fide purchaser within statute. 100NJEq236, 135 A57.

61-69 212Ala667, 103S874; 223Ky493, 4SW(2d)401; 112 Okl 183, 240P708.

62-73 TexCommnA 16SW(2d)254.

62-74 TexCivA 7SW(2d)634.

62-77½-New. Doctrine is inapplicable to mortgagees taking mortgages from purchaser at judicial sale in partition suit where rights adjudicated in suit are not affected by mortgages. 15F(2d)909.

62-77¼-New. Thus, where decree of confirmation of second sale provides for levy to enforce deficiency, mortgagees of party between sale and confirmation do not take subject thereto since their title relates back to time of sale. 15 F(2d)909.

63-87 236Mich643, 211NW65, 66 [quotCJ]; 244Mich582, 222NW209; TexCivA 283SW653; TexCivA 10SW(2d) 779; TexCivA 17SW(2d)89.

64-94 236Mich643, 211NW65.

64-95½-New. Purchasers pendente lite may intervene in suit. 318 Ill 494, 149 NE478.

64-98½-New. A purchaser pendente lite may appear and defend his interests in the name of his vendor. 320 Ill 11, 150NE339.

64-98¼-New. A purchaser pendente lite cannot on his own motion be made a party to record, but he must do so by filing supplementary bill. 320 Ill 11, 150NE339.

64-98¼-New. A corporation's rights as assignee of an agreement cannot rise above those of defendant through whom it derived its title and thus defeat rights acquired by plaintiff in the then pending suit. NJ 147A628.

64-4½-New. Remote transferee of defendant claiming by prescription acquires no better title than defendant had at first transfer subsequent to filing of petitory action. 163La529, 112S405.

64-4¼-New. Ten-year prescription could not be relied on by remote transferee of defendant not acquiring possession in legal good faith, although petitory action was brought directly against transferee. 163La529, 112S 405.

65-13 213Ala591, 105S588 (where decree fixed lien on property, it may be enforced against purchaser pendente lite in nature of supplemental bill). [c] **Enforcement of lien awarded in prior suit** will lie as against purchasers not parties to original suit where lis pendens in such suit was regularly filed and recorded, and purchasers had notice of lien. 213Ala591, 105S588.

65-14 Mo 286SW95.

65-17 But see 236Mich643, 211NW65.

66-31½-New. Where lis pendens in former suit was regularly filed, a bill alleging that purchasers pending suit had notice of lien is not subject to demurrer. 213Ala591, 105S588.

66-34 146Miss225, 110S709.

LIVE

70-12 2LaA680, 684 [quotCyc].

LIVERY-STABLE AND GARAGE KEEPERS

73-2 [a] (1) 158La1014, 105S47 (place for housing automobiles). (3) 158La

1914, 165847; TexCommmA 148W(2d) [illegible] Private garage. TexCommmA 148W(2d) [illegible]

73-8 But see 126Misc289, 212NY8659.

73-10 [a] **Fact that discretionary power is vested by ordinance in city council to grant or refuse permit does not make it invalid.** 196Cal169, 236P921.

74-11 196Cal169, 236P921; 97Fla154, [illegible]

73-15 [illegible] AppDiv[illegible] 215NY8[illegible]

73-16 NJSup [illegible] NJSup 129A290. [b] **In Buffalo,**–126Misc289, 212NY8659 (and failure to enact zoning [illegible]

74-20 NJSup 129A291 [illegible] NJSup 129A297.

74-22 NJSup 127A429. [a] **Construction within radius of designated distance from public building and not nearest point of curtilage.** NJSup 127A429.

74-24 [b] **Athletic club is not "place for public entertainment" within meaning of prohibition of garages within two hundred feet of "place of public enter[illegible]** [illegible]

74-25 [illegible] NJSup 127A429.

74-26 [d] (2) 125Misc28, 210NY846. [illegible] (4) **Decision to allow garage in restricted district held not abuse of discretion.** 125Misc526, 211NY8470. (5) **Building zone resolution permitting board of estimate and apportionment to prohibit garages near schools is to be construed in connection with, and not in derogation of, New York City charter rule of practical difficulty and unnecessary hardship.** 125Misc28, 210NY846. (7) **Mere fact that garage exists on adjoining property is not sufficient to supply basis for departure from zoning map in residence district on the ground of unnecessary** [illegible] NJSup [illegible] (8) **Where locality was almost entirely devoted to garages and filling stations, applicant has been held entitled to variation of use of district to permit garage with showroom on ground of unnecessary hardship and practical difficulties.** 226AppDiv441, 235NY8254. [f] **Board of appeal may act of its own knowledge, without any witnesses, in specific case to vary provisions of ordinance.** [illegible]

74-26½-New. **Erection of several one car garages on a single plot is in violation of a zoning law which restricts garages in that zone to a capacity of five vehicles.** 212AppDiv155, 210NY8178.

75-28 NJSup 128A297.

75-33½-New. **In New Jersey board of adjustment is without power to compel building superintendent to issue permit for commercial garage within two hundred feet of church.** NJSup 136A201.

75-30 [a] **Ordinance requiring stable owner to obtain permit from board without prescribing rules governing issuance is unconstitutional delegation of power.** 213Ill367, 73NE[illegible]W[illegible] 14ALR1[illegible]

75-34 [b] NJSup 129A290. [c] **Construction of ordinance.**–317Ill264, 148NE87. [f] **Filing consent of owners of 80 per cent of frontage** immediately of footed is necessary to permit erection of garage in business or residential section. 225AppDiv[illegible] 231NY8[illegible] ("**Frontage**" in building zone means frontage on public street or place).

75-36 215NY[illegible] 1[illegible]8[illegible]

75-42 [a] **Where, in addition to requirement of permit from city council to conduct or maintain public garage building permit is required, neither permit is sufficient without the other.** 196Cal169, 236P921.

75-44½-New. **The word "owner" in a section of a statute, requiring application for a permit by the owner, was construed to include all tenants in common, in view of judicial construction of the word in another section of the statute.** 252Mass331, 147NE866.

75-44½-New. **Application by only one of tenants in common of property on which a garage is to be erected is insufficient under Massachusetts statute, and the defect deprives street commissioners of jurisdiction.** 252Mass331, 147NE866.

75-44½-New. **Functions reposed in board of street commissioners by Massachusetts statute are quasi judicial and not merely executive or administrative.** 252Mass331, 147NE866.

75-45 252Mass331, 147NE866.

75-46 222AppDiv447, 226NY8477.

76-48½-New. **Insufficient grounds of refusal.** Contemplated zoning ordinance. NJSup 129A290.

76-48½-New. **That granting permit would result in the granting of other permits.** NJSup 129A290.

76-48½-New. **Applicant held not to have enough consents on file at first hearing of application for garage permit.** 245NY208, 156NE668.

76-48½-New. **Assignment of a permit to construct a public garage conveys nothing.** 261Mass178, 158NE527.

76-48½-New. **A building under a single roof within four outer walls may contain more than a single garage within the ordinance restricting garages.** 262Mass165, 159NE624.

76-48½-New. **A resolution granting a permit constitutes the board's action and cannot be disturbed by reference to oral statements of those concurring therein.** 245NY208, 156NE668.

76-48½-New. **A board of supervisors is without power to refuse a permit to continue a stable without showing that it was unsanitary, and failure to remove objection.** 91CalA136, 266P821.

76-48½-New. **Payment of a repair bill in full by the owner raises the presumption that the owner waived the statute requiring authority to repair to be in writing.** 110Conn255, 147A841(2dcase).

76-48½-New. **Necessity of showing the practical difficulties and unnecessary hardships in New York.** 135Misc719, 239NY8[illegible]

76-51 77Colo572, 238P40.

76-58 54NM161, 279P69.

76-59 [b] **Right to require license for private garage.**–111NE484.

77-65 [c] **Evidence insufficient.**–219AppDiv329, 219NY8671.

77-68 28Ariz402, 237P186 (owner held liable); 219AppDiv329, 219NY8671. [b] (2) **Where lien is claimed on automobiles bought by several persons from one conditional vendor, for supplies, evidence is insufficient which does not show amount furnished to each car.** 219AppDiv329, 219NY8671.

77-72½-New. **Penal statute requiring written authority for repairs to a motor vehicle in excess of a specified sum precludes recovery for repairs made without compliance therewith.** 103Conn21, 130A81.

77-72½-New. **The purchaser from the bailor having no interest in the car on account of the bailee's prior purchase is not personally liable for a debt incurred by the bailee for storage.** Tex CivA 58W(2d)160.

77-72½-New. **In an action by a garage keeper against the owner of a car to recover for storage after completion of repairs, it was immaterial whether an insurance company was acting for the other driver when arrangements were made with the garage to repair the automobile after an accident.** MoA 98W(2d)863.

77-74 See also Md 151A240.

77-77 200Iowa1051, 205NW983 (no lien in absence of express or implied contract).

77-78½-New. **A garage keeper, asserting a lien against a taxicab, has special property therein.** 223AppDiv44, 227NY8315.

77-78½-New. **The right of a garage keeper asserted in chattel mortgagee's replevin action is not affected by a prior judgment for foreclosure of its lien.** 223AppDiv44, 227NY8315.

78-82 33Ariz342, 265P90. 219Ky517, 293SW1061.

78-86½-New. **To create lien, plaintiff must conduct business of selling, repairing, or furnishing accessories for motor vehicles.** 219Ky517, 293SW1081.

78-1½-New. **One repairing two trailers and one tractor at the same time under one contract for the same reputed owner may have one lien on all of them although the trailers and the tractor were separately owned by two different corporations.** 130Or159, 279P264(2dcase).

78-1½-New. **One repairing part of a tractor is entitled to a lien on the entire tractor although only the part was brought to him for repair.** 130Or159, 279P264(2dcase).

79-9 See also Alta [1925] 2DomLR922.

79-11 27OhNPNS416; 197Wis363, 222NW310.

79-12 158Tenn258, 128W(2d)705. [a] **Right to lien for automobile storage and materials is purely statutory.** 137Misc514, 243NY8748.

79-15½-New. **Under statute, garage keeper has no lien for expense of hauling car to garage unless it is mere incident to storing.** 103NJLJ1, 135A92.

79-15½-New. **A garage keeper, not complying with a statute by posting a sign outside his premises, cannot claim a lien thereunder for storage.** 197Wis262, 222NW310, 62ALR1483.

80-17 158Tenn258, 128W(2d)705.

80-19 [a] **Automobile may be detained only as against person who ordered accessories or repairs.** 222Ky521, 18W(2d)990.

80-21 5PaDist&Co520. [a] **Under statute, where no notice is given owner before services rendered,** defendants' claims are valid to extent of one hundred dollars though combined claims amount to over one hundred dollars. 100CalA682, 280P1016(2dcase).

80-22 33Ariz342, 265P90. 168Ark245, 269NW573; 128Or353, 273P329.

80-23½-New. **Under a statute a garage keeper has been held not entitled to a lien for repairs to an automobile which became attached thereto.** 197Wis363, 222NW310, 62ALR1483.

80-27 NJ 147A861(1stcase).

80-28 200Iowa1051, 205NW983; 27OhA80, 160NE728. [a] 103NJLJ1, 135A92.

80-33 137Misc514, 243NY8748.

81-34 33Ariz342, 265P90; 103NJLJ1, 135A92. Utah 284P998 (no lien as against conditional seller's assignee).

81-36 [b] **Specific lien.**–219AppDiv329, 219NY8671.

81-39½-New. **A statutory lien for materials put on an automobile does not supplant a lien of the conditional seller of the automobile, who had no knowledge of the transaction.** 158Tenn258, 128W(2d)705.

81-42½-New. **Mortgagor storing automobile gives garage keeper lien for storage.** 86IndA62, 155NE836.

81-45½-New. **Where mechanic, acting for tort feasor, authorizes repairs, garage, after accepting tort-feasor as responsible therefor, cannot hold owner liable where he never agreed to pay for repairs.** LaA 130S627.

81-51 173Ark144, 293SW46. [a] **In Indiana,** 87IndA252, 161NE298.

81-51½-New. **One furnishing labor and material for the repair of a car in the possession of a conditional vendee has a lien prior to the right of the conditional vendor.** 177Minn217, 225NW15.

81-51½-New. **A statutory lien of a garage keeper for storage is inferior to the rights of a conditional sales vendor under a contract recorded in a foreign state who did not consent to removal of the automobile from the state.** Iowa 226NW168.

81-51¼-New. **A repairman, without actual notice of unrecorded conditional sale, may resell a truck after purchasing at execution sale.** 23AlaA290, 124S395.

81-54 NJDistCt 136A923.

82-60 158Tenn258, 128W(2d)705.

82-63 See also 177Minn217, 225NW15.

82-64 NC 155SE573. [a] **Lien is not lost as against prior mortgage** when mechanic is induced to relinquish possession by owner's fraud. NC 155SE573.

82-65 [a] **As against prior conditional seller** under duly recorded contract, garage keeper who permits car to leave his possession, after thirty days following acquisition of lien, loses lien except for thirty days preceding loss of possession under laws of 1926. 224AppDiv769, 230NY8194.

82-67 See also 211P(2d)587.

82-71 [c] **Evidence held insufficient** to show defendants were bona fide purchasers. **NC** 155**SE**573.

82-78½-New. Lienor allowing vehicle to leave his actual possession loses lien although subsequently reacquiring possession. 137**Misc**744, 244**NYS**337.

83-84½-New. Tender, by the holder of a conditional sales contract on an automobile, of the amount actually due a garage discharges a lien. 134**Misc**501, 235**NYS**163.

83-84½-New. A lien may be lost by delivering a motor vehicle to a conditional purchaser. 23**AlaA**290, 124**S**395.

83-86 137**Misc**514, 243**NYS**748.

83-92 [a] (3) Lien held not invalid because of innocent mistake in fixing dates when work was done. 127 **Or**481, 272**P** 674. (4) Notice held not required to allege that lien notice was filed within sixty days after truck was delivered to owner. 127 **Or**481, 272**P**674. (5) Description of trailers and tractor held sufficient. 130 **Or**159, 279**P**204(2dcase). [c] **Notice of lien.**–128 **Or**353, 273**P**329 (sufficiency, construction, and matters considered).

83-93 [a] **Statement of amount owing** without demand for payment or notice of detention of car insufficient to give lien. **NJ** 148**A**647.

83-98 137**Misc**514, 243**NYS**748. [a] **Right to possession may be lost** by discharge or destruction of lien. 137**Misc** 514, 243**NYS**748.

83-98½-New. Judgment for a garage keeper, asserting a lien, should give plaintiff in replevin a choice between returning the automobile and paying the lien. 221**AppDiv**644, 224**NYS**505.

83-99 [a] **Proceeding is special and statutory,** reviewable by certiorari. **NJ Sup** 147**A**444(2dcase).

84-1½-New. Garage keeper is not entitled to personal judgment for services against chattel mortgagee of automobile. 220**AppDiv**118, 220**NYS**612.

84-1½-New. To be entitled to lien, garage keeper must allocate items to each car. 220**AppDiv**118, 220**NYS**612.

84-4 87 **IndA**252, 161**NE**298. [a] **Proof.**–127 **Or**481, 272**P**674.

84-7½-New. Evidence held sufficient to sustain finding that work of installing brakes on automobile was not requested by conditional seller or his assignee suing to recover automobile. **Utah** 284 **P**998.

84-8½-New. Whether services were authorized by owner is upon conflicting evidence a question of fact. 219**AppDiv** 329, 219**NYS**671.

84-17½-New. A garage keeper, not in possession of a truck subject to a lien, must demand payment before exercising the right of seizure against subsequent vendee. 104**NJL**303, 140**A**301.

84-17¼-New. Storing of a car by the owner in defendant's garage creates the relation of bailor and bailee and does not operate to revive a common-law lien for a tire sold the owner by defendant. 158**Tenn**258, 12**SW(2d)**705.

84-19 [a] (1) **NJ** 148**A**647.

84-19½-New. **In New York** failure to give notice is a conversion. 125**Misc**887, 213**NYS**48.

84-19¼-New. Purchaser of garage business is subject to all liabilities of the vendor so that sale by such purchaser of automobile for lien without notice is conversion for which he is liable. 125**Misc**887, 213**NYS**48.

84-21 [a] **Sale gives only title of person** who ordered accessories. 222**Ky**521, 18**SW(2d)**990.

85-28 198**NC**777, 153**SE**397.

85-29 109**Conn**365, 146**A**614, 65**ALR** 427; 209**Ky**105, 272**SW**398.

85-31 But see 209**Ky**105, 272**SW**398.

85-33½-New. Where owner of automobile has failed to pay charges for repairs, a failure to deliver the car to the owner within the time demanded does not constitute conversion. 168**Ark**245, 269**SW**573.

85-33¼-New. Where an automobile is left with an unidentified person in a garage, there is a presumption that he was an agent authorized to accept the car for storage. 125**Misc**887, 213**NYS** 48.

85-33¼-New. The bailee is under obligation to deliver an automobile stored in a garage to a person entitled to possession on demand. 134**Misc**501, 235 **NYS**163.

85-33½-New. A garage keeper is bound to deliver an automobile to the holder of a conditional sales contract on demand and tender of amount due for storage and offer of indemnity. 134 **Misc**501, 235**NYS**163.

85-33¼-New. In such case he cannot demand that the holder of such bill get an order from the bailor or litigate the claim. 134**Misc**501, 235**NYS**163.

85-38 See also 28 **OhA**427, 162**NE**753; 117**Tex**130, 298**SW**536; **TexCivA** 293**SW** 673.

85-40 See also 1**LaA**188.

85-40½-New. A stipulation exempting a garage keeper repairing an automobile from the necessity of exercising ordinary care to prevent theft, if permissible at all, must be clear and unambiguous. 117**Tex**130, 298**SW**536.

85-40½-New. Such stipulation must be strictly construed. 117**Tex**130, 298**SW** 536.

85-40¼-New. Where a car is left in a garage to be washed, a receipt providing that all property is left at the owner's risk does not relieve the garage owner from liability for damage to a car taken from the garage by an employee without authority. 109**Conn**365, 146**A**614, 65**ALR**427.

85-40½-New. A contract for storage of an automobile at the owner's risk will be sustained where he assumed the risk in consideration of a lower rate and the garage keeper used the same care as he used for his own cars. 6 **LaA**67.

86-49 6**F(2d)**711; 209**Ky**105, 272**SW** 398, 399 [citCyc]; 6**LaA**420, 423 [cit CJ].

86-50 6**F(2d)**711; 209**Ky**105, 272**SW** 398; 6**LaA**93; 130**Misc**221, 223**NYS**654.

86-51 6**F(2d)**711; 223**Ky**482, 38**W(2d)** 1092; 5**LaA**128.

86-51½-New. Ordinarily bailee of car for repairs is under no duty to deliver it to owner either at his residence or place of business. **MoA** 238**SW(2d)**1066.

86-55 253**Mass**467, 149**NE**202.

86-59½-New. In British Columbia, by statute, garage keeper is not liable for loss by fire which started accidentally. **BC** [1929] 4**DomLR**1064(1stcase).

86-62 209**Ky**105, 272**SW**398.

87-64 109**Conn**365, 146**A**614, 65**ALR** 427; 85 **IndA**674, 155**NE**533.

87-64½-New. Garage keeper is chargeable only with ordinary care in employment of trustworthy servants. 6**F(2d)** 711.

87-68 86**PaSuper**106.

87-77 6**F(2d)**711; 209**Ky**105, 272**SW** 398; 12**LaA**495, 126**S**458 (construction of bailment); 138**Misc**183, 244**NYS**409; **TexCivA** 293**SW**673. See also 10**LaA**65, 120**S**533(2dcase); 28 **OhA**427, 162**NE** 753.

87-78½-New. Extra tires and tubes attached to car are within contract of bailment. 253**Mass**467, 149**NE**202.

88-82 [b] **In absence of negligence** garage keeper is not liable. **BC** [1930] 1**DomLR**815.

88-87 [a] **Wreck while speeding from police** does not break causative force of garage company's negligence. 138**Misc** 183, 244**NYS**409.

88-98 253**Mass**467, 149**NE**202. [b] **Owner, knowing automobile stored in garage was to be placed outside,** does not assume risk of loss of baggage in automobile. **CalA** 291**P**624.

89-5 [c] (4) Negligence in failing to protect automobile from being taken at night. 33**GaA**795, 127**SE**797. (5) Unlawful taking of automobile by employee of garage. 85 **IndA**674, 155**NE** 533. (6) Cause of action for breach of contract of bailment rather than for conversion. 28 **OhA**427, 162**NE**753. [d] **Allegation of theft.**–85 **IndA**674, 155**NE** 533.

89-10 6**F(2d)**711; **NJSup** 136**A**413; 130 **Misc**221, 223**NYS**654. [a] (4) Taken out by defendant's employee and damaged. 6**F(2d)**711.

89-11 28 **OhA**427, 162**NE**753.

89-15 85 **IndA**674, 155**NE**533.

89-17 243 **IllA**60; 28 **OhA**427, 162**NE** 753. See also 85 **IndA**674, 155**NE**533.

89-18 85 **IndA**674, 155**NE**533; 165 **Minn**248, 206**NW**168.

90-22 117**Tex**130, 298**SW**536. See also **TexCivA** 293**SW**673.

90-23 243 **IllA**60.

90-24½-New. , or that garage keeper, from whose garage car was stolen, failed to comply with statute requiring record kept of cars entering and leaving. 253 **Mass**467, 149**NE**202.

90-26 [a] (12) Evidence sufficient to show negligence. 209**Ky**105, 272**SW**398. (13) Negligence in leaving garage in care of irresponsible employee. 85 **IndA** 674, 155**NE**533. [d] (13) That automobile was lost by theft through negligence of defendant. 177**Minn**10, 224**NW** 271. (14) That plaintiff stored auto in the garage of defendant under arrangement whereby defendant was to sell it and plaintiff was to purchase different car, and that title did not pass to defendant. 177**Minn**10, 224**NW**271. (15) That automobile had been intrusted to defendant company to repair rather than to service manager as individual. 33**GaA**795, 127**SE**797. (16) Fire started accidentally. **BC** [1929] 4**DomLR**1064 (1stcase). [f] **Evidence held sufficient to support court's finding** that defendant agreed to store automobile until called for. **CalA** 289**P**217.

90-29 253**Mass**467, 149**NE**202; 130 **Misc**221, 223**NYS**654. [b] (2) By garage keeper's son. 265**Mass**8, 163**NE** 170. [c] (3) 165**Minn**248, 206**NW**168; **NJSup** 136**A**413; **TexCivA** 288**SW(2d)** 899. (5) Negligence as to fire which destroyed automobile. 223**Ky**482, 38**W** **(2d)**1092.

91-33 223**Ky**482, 38**W(2d)**1092.

91-36½-New. In action of conversion of car in which defendant counterclaimed for repairs, instruction on, and submission of, question of conversion is properly refused where defendant had a lien for repairs. 168**Ark**245, 269**SW** 573.

91-38½-New. An instruction, in an action for loss of car due to wrongful taking by, employee of garage, directing jury to bring verdict for defendant if it failed to find that employee stole car, is erroneous. 85 **IndA**674, 155**NE**533.

92-45 132 **Or**479, 285**P**201.

92-48½-New. Relationship between corporation renting automobiles for hire and person taking possession of automobiles is that of bailor and bailee. 132 **Or**479, 285**P**201.

92-48¼-New. Relationship between lessee and lessor of automobile is that of bailee and bailor. **LaA** 129**S**565.

92-48¼-New. , nor in failing to warn mourner of danger of injury if doors were closed by others. **MoA** 318**W(2d)** 563.

92-48½-New. An undertaker is not negligent in failing to assist a mourner from automobile furnished to carry mourners to cemetery. **MoA** 318**W(2d)** 563.

92-50 152**Md**694, 137**A**514.

92-52 152**Md**694, 137**A**514, 516 [citCJ].

94-73 [b] **Evidence held to show that driver went as member of party** and not as agent of owner. 197**Wis**68, 221**NW** 374.

94-78½-New. There is no privity between bailor and third person injured through bailee's operation of car so as to render bailor liable to third person for breach of contract of bailment. 132 **Or**479, 285**P**201.

94-79 215**Ky**267, 284**SW**1088, 1094 [quotCJ]. But see 108**Conn**333, 143**A** 163, 61**ALR**846. Contra 205**Iowa**261, 215**NW**724, 61**ALR**851. [a] (2) Not liable where no evidence bailee was intoxicated or incompetent driver. 132 **Or**479, 285**P**201.

94-79½-New. The driver of a rented automobile running into another car refusing to give his name is immaterial in an action by the driver of the damaged car against him. 215**Ky**267, 284 **SW**1088.

94-79½-New. One who hires out a car is not an insurer of the competency of

the driver. 215Ky267, 284SW1088.
94-80 But see 129Misc772, 222NYS 579.
95-85½-New. Automobile lessor held not liable to a person injured by negligence of the driver to whom lessee intrusted the car in violation of agreement. 131Misc52, 225NYS661.
95-85½-New. The hirer of an automobile is responsible for its theft under a contract that his failure to lock the steering wheel would make him responsible in the case of theft, although it could not be locked because of a broken key. 128Kan753, 280P759.
95-86 132 Or479, 285P201.
95-3 132 Or479, 285P201.
96-7½-New. Evidence held as matter of law insufficient to make issue for jury of negligence of bailor in letting automobile with defective brakes. 132 Or479, 285P201.
98-45½-New. Evidence held improperly rejected in a prosecution for conducting a garage within a prohibited area. **NJSup** 147A737.

LIVE-STOCK INSURANCE

102-51 **TexCivA** 16SW(2d)297(2dcase).
103-57 Man [1930] 2DomLR805 (failure to disclose material fact of animal's sickness).
107-17 **IndA** 169NE473.
110-79 [a] (8) Other evidence held sufficient. 165La777, 116S182.
112-1½-New. Where a policy provided for delivery during the good health of an animal, there could be no recovery on a policy delivered after the animal's death. 190NC549, 130SE186.

LIVING

112-7 [b] 129Misc447, 221NYS714.

LLOYD'S INSURANCE

115-8 [a] **Reciprocal or interinsurance exchange.**–36F(2d)371.
116-22 See also 247 IllA475.
124-82 [b] **Evidence held to show** that Lloyd's was not suable on insurance binder as treasurer of unincorporated underwriting syndicates. 27F(2d)340 [aff 27F(2d)347].

LOAN

126-47 **Erratum.–"Deposit" distinguished** see Banks and Banking § 641 note 99 [a] should be "p 641." Matter of Nellis, 126 Misc. 638, 214 NYS 378.
126-50 **SD** 227NW371. [b] **Similar definition.**–96Fla247, 117S900, 65ALR1398.
126-51 321 Ill 612, 152NE539, 47ALR 891; 118Nebr383, 225NW46; 126Misc 638, 214NYS378.
127-93½-New. The mere use of the word "loan" does not in itself necessarily carry the implication that the master surrendered all control over the servant during the period for which he had been loaned. 148Md417, 129A 672. 42ALR1437.

LOCAL

130-58 [a] **Local freight train** is one which stops at any siding where there is freight to load and unload as differentiated from one which takes and leaves freight only at certain stops and generally called "through train." 29 Ariz446, 242P870.

LOCATE

131-35 101Vt41, 140A156.
132-42 125Me255, 132A745.
132-46 15F(2d)518.

LOCOMOTIVE

135-30 [b] (2) Electric motor, in its common sense, is not locomotive engine. 39 OklaCR110.

LOGS AND LOGGING

144-5 164Ga317, 138SE666. [a] (4) Only live trees at time of grant, and not dead and fallen trees. 164Ga317, 138SE666.
144-7 [a] (7) Growing trees and logs. 191NC624, 132SE661.
144-12 191NC624, 132SE661.
146-50 165Ga366, 140SE761; 238Mich 373, 213NW106; 102NJL206, 130A835, 837 [quotCJ]. But see 7LaA333.
146-51 102NJL206, 130A835, 837 [quot CJ].
147-58 191NC624, 132SE661.
147-62 **TexCivA** 298SW645. [i] **False representations of seller,** made prior to purchase of timberland, cannot be set up as ground for damage where buyer, before purchasing, obtained from assessor and others information as to true value thereof. 150Wash142, 272P78. [j] **One acquiring land through purchaser at mortgage foreclosure** occupies same position toward original owner as purchaser of land from owner. 169La 240, 124S841.
148-63 215Ala104, 109S756; 159La270, 105S340, 42ALR635; 125Me114, 131A 204; 150Miss615, 116S103.
148-69 **TexCivA** 298SW645. [a] **Reservation of right of reverter in timber.**–150Miss446, 116S736.
148-70 162La635, 110S886.
148-76 39GaA280, 147SE142.
149-80 [b] **Failure to state time** for removal does not affect validity. 162La 635, 110S886.
149-86 [a] **Particular deeds construed.**–163Ga236, 135SE719.
149-87 **TexCommnA** 12SW(2d)169.
149-88½-New. Where the vendor reserved a right to timber for a certain period in a deed, execution and delivery of a purchase-money mortgage containing no reference to the timber reserved in the deed could not have the effect of enlarging the right of the vendor or his interest in the timber. 196 NC168, 145SE9.
149-89 168Ark595, 271SW6. See also **TexCivA** 298SW645 (conveyance "exclusive of timber").
149-93 162La635, 110S886.
149-4 126Me427, 139A230.
150-16 [a] (3) Generally. 164Ga317, 138SE666.
150-17 213Ala66, 104S5 (restrictions construed in contract for sale of timber construed to be covenants and not condition subsequent).
151-30 [b] 168Ark595, 271SW6.
151-36 [a] **Right of removal** remains indefinitely in grantor. 162La635, 110 S886.
152-48 [a] **Purchaser of land from grantor reserving title to timber** for certain period acquired title to all timber reserved by grantor at expiration of reservation contained in deed. 196NC 168, 145SE9.
152-56 **TexCommnA** 284SW918. But see 151Miss329, 118S179. [a] **Sale of land "free from all encumbrances"** excepting timber previously sold by vendor and to be removed by buyer within specified time does not entitle vendees to timber not removed by buyer within such time. 159La270, 105S340, 42ALR635.
152-56½-New. Where the grantor of timber land conveyed the fee to another within the period in which the grantee of timber had to remove it, it was held that the latter was without right to cut and remove timber under an extension agreement of grantor after expiration of the period. **TexCommnA** 284SW918.
152-56½-New. The grantor of timber land is liable to successors in interest of fee as reversionary owners thereof for timber removed after expiration of the time limit for removal. **TexCommnA** 284SW918.
152-57 159La270, 105S340, 42ALR635; 12LaA293, 123S486; 150Miss446, 116S 736; Miss 117S332; **TexCivA** 274SW 181. [a] **Sale of other land to vendees** without excepting timber does not show intent to exclude timber previously sold and not removed by buyer within specified time. 159La270, 105S340, 42ALR 635.
152-60½-New. A conveyance of land "excepting and subject to any and all outstanding timber contracts and conveyances" has been held under the circumstances to convey all the interest the grantor had in the land and timber, subject only to the rights of a third person in the timber under a timber deed, "outstanding" referring to timber contracts and conveyances held by strangers, independent of title held by the grantor. **TexCommnA** 12SW(2d)169.
153-68 168Ga382, 148SE98; 238Mich 373, 213NW106; **TexCivA** 298SW645.
153-69 **TexCivA** 298SW645.
153-75½-New. After mortgagor of timber land has conveyed the land subject to the mortgage, his deed of standing timber to mortgagees is a nullity and gives mortgagee no additional rights or new relationships. 125Me114, 131A204.
153-77 169Ark201, 275SW709; 170Ark 1146, 282SW995 (mortgage); 15DelCh 100, 141A619 [citCJ]; 219Ky615, 294 SW183; 104NJL140, 139A1; 102NJL 206, 130A835, 837 [quotCJ]; 191NC624, 132SE661. [a] 102NJL206, 130A835, 837 [quotCJ]. [c] **Timber recently cut,** mortgaged with standing timber constituting greater part of all, is mere incident, so that mortgage will be regarded as of realty. 170Ark1146, 282 SW995.
154-78 102NJL206, 130A835, 837 [quot CJ].
154-79 102NJL206, 130A835.
154-80 102NJL206, 130A835.
154-81 102NJL206, 130A835.
154-83 235Ky724, 32SW(2d)49.
154-86 **NS** [1930] 1DomLR667 (under statute).
154-87 234Ky558, 28SW(2d)737; 235 Ky724, 32SW(2d)49; 11PaDist&Co 649. [e] **If immediate cutting is contemplated or the then condition of timber is what is sold** and reasonable time for removal is agreed upon or implied, deal relates to personalty; but if right to let it grow till land is wanted for agricultural purposes and notice to remove is given are contemplated, conveyance deals with rights in realty. 232Mich 458, 205NW225.
155-88 **TexCivA** 283SW862.
155-88½-New. Value of cut timber may be recovered on refusal of permit purchaser to remove it after expiration of time for removal. 104NJL140, 139 A1.
155-90 169Ark201, 275SW709; 168Ga 382, 148SE98; 238Mich373, 213NW106. [a] (5) Timber deed in consideration of one thousand dollars cash and certain fixed price cut according to grade is not void for lack of mutuality as containing potestative condition. 166La 724, 117S808. [f] **Mutuality is sufficient** despite absence in extension contract. 215Ala68, 109S148. [g] **Offer to buy timber if title is satisfactory** does not prevent refusal to consummate sale where abstract and survey is furnished and title is unsatisfactory. 13LaA253, 126S534(2dcase). [h] **Instrument held to contract to sell timber.**–GaA 155SE 787(2dcase).
155-1½-New. Oral agreement implied from conduct of parties after execution of written contract held to create no greater rights. 132 Or453, 285P244 (only right of free undisturbed access and not estate in timber).
156-8 [a] (2) Contract or deed from grantees, granting all title of makers in "timber deed or contract" made by grantor "and all of the timber described in said contract." 218Ala523, 119S214. (3) Where timber lease conveyed pine timber located on two tracts described as "home place" and "Daily place" of lessor, and also conveyed poplar timber lying in branch on Daily place, lease was not so indefinite in its description as to render poplar timber incapable of identification. 38GaA409, 144SE129(2d case).
157-25 212Ala557, 103S578 (instrument construed to be conveyance in fee in land and timber on condition subsequent); 218Ala523, 119S214; 162La 535, 110S746; **TexCivA** 9SW(2d)452. [k] **Under contract requiring defendant to cut all parts of trees that would make all grades of lumber,** he had alternative of manufacturing for grade or to saw so as to get greatest amount of lumber of all grades and right to adopt method most advantageous to himself. 158 La951, 104S24. [l] **Covenant to pay taxes not condition.**–168Ark923, 271SW 969. [m] **Deed silent as to alleged condition.**–168Ark923, 271SW969. [n] **Where contest for sale of standing timber** is not witnessed or acknowledged, rights under contract are equitable. 214 Ala230, 107S67. [o] **Sale in gross.**–145

Va536, 134SE670. [p] **Waiver.**–Plaintiff, having exclusive right to cut timber on certain land has been held not to have waived its right to cut on part of such land, on which owner had permitted another to operate, by continuing to operate on another part. 127Me442, 144A207. [q] **Grantee under quitclaim deed,** having actual knowledge of execution and delivery of timber contracts, acquired no interest in timber by virtue of such quitclaim deed. TexCivA 9SW(2d)452. [r] **Estate in fee.**–218Ala175, 118S174. [s] **Retaining ownership until payments due have been made in full.**–Word "due" held not to mean immediately payable. 128Me472, 148A687 (2dcase). [t] **Forfeiture.**–154Wash282, 282P65.

157–26 232Mich458, 205NW225 (intention of parties determines in sale of standing timber whether there is license or grant attaching to realty).

157–27 7F(2d)689.

157–29 12LaA464, 125S307.

157–30 213Ala66, 104S5 (court will consider changed conditions and respective interests of parties in construing contract to cart and remove timber).

157–32 [a] **Facts not showing practical construction by parties.**–132 Or453, 285P244.

157–33 196NC168, 145SE9.

158–44 [a] 150Md18, 132A258.

158–45 28F(2d)720. [a] **Where vendor agreed to sell timber on designated tracts,** estimated two hundred acres, and conveyed by deed containing similar description, held that purchasers could not recover on ground of mutual mistake. 145Va536, 134SE670.

158–46 [a] **Provision in contract** that if buyer cuts more than certain amount of timber he is to pay at so much per thousand is not warranty as to amount of timber on land. 34GaA380, 129SE795.

158–46½–New. Provision in habendum clause of deed construed a covenant to pay the taxes on land and not a condition upon which the timber might be cut and removed. 168Ark923, 271SW969.

159–56½–New. Covenant prohibiting purchaser from cutting timber from land once cut over held not one running with the land, but intended to preserve to grantor future growth of timber. 213Ala66, 104S5.

159–58½–New. Covenant against encumbrances. Unmatured installments of drainage assessments do not constitute encumbrances on timber growing on land so as warrant the purchaser of standing timber, under contract to convey free of encumbrances, to refuse to accept deed. 195NC176, 141SE583.

159–62 169Ga464, 150SE557 ("timber" included all trees and timber suitable for manufacture of lumber); 39GaA280, 147SE142. [c] (1) 164Ga317, 138SE666. (2) Deed conveying all merchantable timber eighteen inches and up in diameter, measured at stump, that is standing and being on certain land, does not include timber that is down upon land. 143Miss661, 109S670. [g] 128 Or359, 274P116(2dcase). [i] **Sale of timber on bounded tract** containing "approximately 100 acres for timber" held sale of timber in gross. 33GaA676, 127SE663. [j] **"Timber"** (1) as used generally in deed held not limited to trees of certain sizes. 7F(2d)689; 146Miss360, 111S841. [k] **"Wood" as used in deed** held to embrace dead wood without limitation. 146Miss360, 111S841. [l] **Line trees.**–Purchaser of timber may cut line trees not reserved in deed though such acts are forbidden by criminal code. 136SC423, 134SE390. [m] **"All sweet red gum timber"** includes all trees standing on land suitable at time of grant for use in manufacture of lumber or building material. 164Ga23, 137SE390.

160–64 But see 211Ala361, 100S549.

160–65 159La860, 106S331.

161–80 [a] **Only existing timber passes** unless prospective words show contrary intention. 7F(2d)689.

161–81 7F(2d)689; 162La535, 110S746.

161–84 149Miss327, 115S585.

162–90 5F(2d)559 (contract construed not to grant right to cut over land second time); 164Ga23, 137SE390.

162–1 164Ga23, 137SE390.

162–2 142SC477, 141SE15. [a] (1) 11LaA132, 119S741; 145Miss456, 110S865; 132 Or453, 285P244. (5) Time within which buyers must cut and remove timber held not to run during pendency of appeal by subsequent purchasers of land. 159La270, 105S340, 42ALR635. (6) If logging contract does not make time of essence demand by licensor to commence performance by certain date will make it so. 132 Or453, 285P244 (whether time reasonable immaterial where licensee ignored notice).

162–3 218Ala175, 118S174.

163–5 15DelCh100, 141A619 [quotCJ].

163–6½–New. Where a contract specified the time for cutting but not the time for removal, the purchaser had reasonable time to remove the timber after completing the cutting. 130 Or385, 280P497.

163–13 145Miss456, 110S865. [b] **Ten-year period** begins only when actual cutting starts. 145Miss456, 110S865.

163–17½–New. Term of contract imposing absolute duty to log certain quantity of logs annually after delivery of first quantity expired when land would have been cleared if promise had been carried out. 132 Or453, 285P244.

163–18 169Ark201, 275SW709; 223Ky452, 3SW(2d)1074; 235Ky185, 30SW(2d)881; 169La240, 124S841; 8LaA588; 150Miss446, 116S736; 191NC624, 132SE661; TexCivA 274SW181; TexCommnA 284SW918; TexCivA 298SW645; Tex CivA 14SW(2d)926; 146Wash543, 264P705.

164–19 169Ark201, 275SW709; 223Ky452, 3SW(2d)1074.

164–25 149Miss327, 115S585; 151Miss329, 118S179.

164–28 169La759, 126S52; Miss 117S332; 151Miss329, 118S179; 191NC624, 132SE661.

165–30 169La759, 126S52. [a] **Expression "all other rights held therein by said vendor"** in deed of timber lands conveys grantor's reversionary interest in timber conveyed by prior deed. 169La759, 126S52.

165–31 124 Or515, 264P850, 852 [cit CJ].

165–31½–New. nor can the purchaser of standing timber sue in conversion for timber uncut at expiration of the time limited for cutting, 102NJL206, 130A835.

165–35 But see 218Ala546, 119S663.

166–55 146Wash543, 264P705.

167–74 191NC624, 132SE661.

167–75 [a] (2) When contract provided that purchaser should operate saw mill on land, privilege of removal of completed product was implied. 191NC624, 132SE661.

167–77 219Ala644, 123S15. [a] (2) Omissions of clause providing for reentry are to be considered in determining whether conditions subsequent or covenant to remove is intended. 213Ala66, 104S5.

168–85 235Ky724, 32SW(2d)49.

168–90 [b] (4) Other instances. 106WVa221, 145SE279.

169–92 31F(2d)328; 169Ark201, 275SW709; 181Ark144, 25SW(2d)13; 181Ark696, 27SW(2d)1005; 210Ky30, 274SW1118; 235Ky724, 32SW(2d)49; 11LaA132, 119S741; 173Minn452, 217NW501; 144Wash558, 258P488; 150Wash249, 272P714; 104WVa513, 140SE480 [citCJ]; 106WVa221, 145SE279.

169–6 104WVa513, 140SE480 [citCJ].

170–16 181Ark144, 25SW(2d)13; 39GaA280, 147SE142. [b] **Discretion of trial court.**–31F(2d)828.

170–18 104WVa513, 140SE480 [citCJ].

170–19 181Ark144, 25SW(2d)13. [d] 181Ark696, 27SW(2d)1005; 150Wash249, 272P714. [l] **Two years.**–210Ky30, 274SW1118. [m] **Twenty-five years.**–104WVa513, 140SE480 [citCJ]. [n] **Fifteen months.**–31F(2d)828.

170–20 [e] **Seventeen years.**–232Mich458, 205NW225 (timber conveyed with power to vendor to require removal on notice of one winter's time when required for clearing). [f] **Fourteen and ten years.**–173Ark852, 295SW56.

171–21 210Ky30, 274SW1118; 106WVa221, 145SE279. See also Mo 10SW(2d)663.

171–24 158La557, 104S367.

171–25 158La557, 104S367.

171–29 158La557, 104S367.

171–29½–New. In fixing the time within which standing timber sold must be cut and removed, the date should be fixed to run from the date judgment becomes final. 169La240, 124S841.

172–33 173Minn452, 217NW501. [a] (4) Advance payment of money not due. 217MoA567, 272SW1014. (5) Consideration held adequate. 141SC387, 139SE850.

172–38½–New. Where one of three grantors, under an agreement giving the grantee the right to extension of time, executes an individual deed for removal within the fixed time, the grantee is not entitled to extension as to this grantor. 159La604, 105S728 (different as to other grantors).

172–39 193NC757, 138SE125 [citCJ]; 141SC387, 139SE850. [a] 193NC757, 138SE125.

172–41½–New. Payment made to mortgagor has been held to make the extension granted valid. 193NC757, 138SE125.

172–43½–New. Purchaser of timber is put on inquiry as to which of two recorded deeds to his vendor, differing in time for removal, is the real deed between the parties. 159La604, 105S728.

172–45 173Minn452, 217NW501; 141SC387, 139SE850. [c] (5) Held for one year only under circumstances. 132Or453, 285P244. [e] **Whether clause covenant or condition precedent.**–215Ala412, 111S427.

172–46 215Ala412, 111S427. But see 175Ark240, 298SW1010.

173–48 215Ala412, 111S427.

173–50 215Ala412, 111S427. But see 221Ky573, 299SW193.

173–54 [a] 136SC40, 134SE147.

173–59 215Ala412, 111S427; TexCivA 14SW(2d)926. [a] **Right must be exercised before expiration of period originally limited.**–218Ala546, 119S663 (death of grantor and failure to appoint administrator held not excuse); 219Ala170, 121S532(2dcase) (absence of grantor from state held not excuse).

173–62 136SC40, 134SE147.

173–64 136SC40, 134SE147. [c] (4) Contract providing for extension of five-year period "by payment of fifty cents per acre per year" for time of extension requires tender of performance by purchaser before expiration of five-year period. 215Ala412, 111S427. (5) Where contract provided for three-year extension on payment of fifty cents per acre per year, tender of fifty cents per acre at beginning of each of three years is sufficient. 215Ala412, 111S427 (tender of one dollar and fifty cents per acre not required). [f] **Where tender made impossible by act of grantor,** tender is excused. 136SC40, 134SE147.

173–65 [b] **Reasonable time** depends on extreme circumstances. 215Ala68, 109S148.

174–67 193NC757, 138SE125.

174–77 223Ky452, 3SW(2d)1074.

174–81 132Or453, 285P244.

175–89 72CalA433, 237P758; 123 Or28, 260P1100. [a] (3) Implied right of entry. Man [1930] 1DomLR547.

175–92 123 Or28, 260P1100. [a] **United States government rules** may be considered in determining proper manner of operations. 72CalA433, 237P758.

175–93 See also 211Ala361, 100S549.

175–2 123 Or28, 260P1100.

176–5 136SC423, 134SE390. [a] **Whether "skidders" are embraced within term "machinery"** as used in contract depends on whether they were known and used for logging operations at time deed was made, and were reasonably convenient, suitable, and adapted for such use, having due regard to rights of landowner. 136SC423, 134SE390.

176–8 123 Or28, 260P1100; 136SC423, 134SE390.

176–9 123 Or28, 260P1100.

176–10 72CalA433, 237P758.

176–11 72CalA433, 237P758. [a] **Fires.**–136SC423, 134SE391.

176–12 [a] **Small timber for railroads.**–136SC423, 134SE390. [b] **Recovery**

can be had for wasteful cutting of timber only when it is made to appear that damages complained of resulted within one year preceding demand therefor. 166La724, 117S808. [c] **Damage to timber remaining on property** has been held improperly allowed under reconventional demand failing to demand damage to such timber, where testimony offered to establish such damage was admitted over objection. 166La724, 117S808.

176-19 175Ark240, 298SW1010. [a] **Sellers of timber,** who received only part payment, held not liable for cutting of another's timber by buyer. Ark 292SW 383.

176-20 [a] 10LaA597, 122S88. [g] **Installment payments** held not advance payment for certain stumpage. 128Me 472, 148A687(2dcase).

176-24 [d] **Overpayment.**-128Misc246, 218NYS346. [e] **Cost of building houses for laborers.**-172Ark471, 288SW916.

177-34½-New. In an action against a purchaser of lumber on which the vendor had a lien for the purchase price of timber from which sawed, it has been held that proper basis of fixing value was express provision for stumpage rate of certain amount until entire purchase price was paid. 134Wash692, 236P277.

177-35 82NH111, 129A878.

177-40 [f] **Lien does not prevent purchaser from selling timber** without having made full payment, purchase price being satisfied by payments as timber was cut and sold. 82NH111, 129A878.

178-42 10LaA237, 120S783.

178-43 [a] **While at mill.**-134Wash692, 236P277.

178-46½-New. nor by timber owner's contract with mill sawing timber, providing for sale of lumber by it before stumpage becomes payable, in absence of authority of mill to sell and collect sale price. 134Wash692, 236P277.

178-46½-New. nor by termination by timber owner of contract with mill sawing it for failure to pay overdue stumpage as to timber which had been cut and sawed into lumber as to which property contract was not terminated, 134 Wash 692, 236P277.

178-53½-New. Receipts given the grantee purporting to cover railroad ties only does not release the grantor's right in rift. 128Me472, 148A687(2dcase).

178-55 172Ark471, 288SW916.

178-60½-New. that the seller shall assist in building houses for buyer's employees, 172Ark471, 288SW916.

178-64 [b] **Deed giving grantee two years after first cutting to remove timber** held not to restrict ten-year grant. 195NC14, 141SE337.

179-78 [b] **Acts held not breach justifying rescission.**-172Ark471, 288SW916.

179-79 99CalA180, 277P1063. [e] **Where time not made of essence of contract,** vendor is not entitled to forfeiture for purchaser's failure to make payments when due. 99CalA524, 279P177.

179-83 BC [1928] 3DomLR44.

180-94½-New. Payment of taxes when timber not removed within time limited. Where provision in deed is construed to be covenant by grantee to pay taxes after certain time if timber is not removed within such time, and not condition upon which timber might be cut and removed, failure to pay taxes is not a forfeiture revesting title in grantor. 168 Ark923, 271SW969.

180-7 150Wash249, 272P714.

181-26 127Me442, 144A207. [a] **Tex CivA** 271SW158.

182-27 MoA 24SW(2d)699. [d] **Evidence held justifying.**-159La860, 106S 331. [e] **Purchaser's breach of contract to pay for portion of timber cut** does not entitle seller to recover whole amount due under contract for sale of standing timber in absence of fraud. MoA 24SW (2d)699.

182-28 172Ark471, 288SW916.

182-29 [b] (1) 227Ky677, 13SW(2d) 1014. (3) Defense seeking to apportion alleged deficiency in number of feet of timber conveyed in bulk and payable in two installments must show grantor's actual fraud. 37GaA99, 139SE119. (4) Alleged overpayments may not be offset where certain amount was to be paid monthly irrespective of quantity of timber cut. 165La294, 115S493.

182-30 [b] **Subvendees are not liable to owner of land,** selling timber under unrecorded deed, reserving no lien for price. 198NC759, 153SE337(1stcase).

182-32 [c] **Burden of showing profit** is on plaintiff vendor where purchase price was payable from profits of lumber. 197 NC539, 149SE686(2dcase).

182-33 GaA 155SE787(2dcase). [c] **Quantity cut** may be shown by any legal evidence tending to establish amount with reasonable certainty, where purchaser keeps no checking as required by contract. 34GaA166, 128SE779. [d] **Measurement scale which can be used independently of its rule book** is admissible without being accompanied by book. 34GaA166, 128SE779.

182-34 174Ark398, 295SW961. [a] **Evidence held sufficient.**-12LaA612, 125 S781.

182-35 13LaA468, 126S733 (damages).

182-36 37GaA99, 139SE119. [b] **Misrepresentations as to boundaries.**-227Ky 677, 13SW(2d)1014.

182-37 227Ky677, 13SW(2d)1014 (as to counterclaim for misrepresentation as to boundaries).

183-38 [c] **Amount of judgment.**-99 CalA524, 279P177. [d] **Measure of damages.**-197NC539, 149SE686(2dcase).

183-38½-New. Exclusion of evidence of number of trees of specified dimensions required to produce one thousand feet of lumber is not ground for new trial in absence of proof of dimensions of trees in question. 34GaA166, 128SE779.

183-39 216Ala97, 112S454. [a] (1) **TexCivA** 271SW158.

183-40 220Ky454, 295SW455; 132 Or 453, 285P244. [a] (5) Burden is on seller, sued for breach of contract to construct houses for purchaser, to show waiver of breach. 172Ark471, 288SW916. (6) The burden is on plaintiff to show substantial performance on his part or readiness, willingness, and ability to perform. 197NC326, 148SE430. (7) In action for value of plaintiff's undivided half interest in timber, cut by defendants under second of two contracts, burden was on plaintiff to show that second contract was independent of first contract, and for additional consideration. 10LaA442, 121S328. (8) Landowner must prove oral agreement by which he claims that plaintiff, having exclusive right to cut timber, consented to owners permitting another to do so also. 127Me442, 144A207. (9) Purchaser seeking to have value of timber left standing deducted from balance due seller has burden of proving value. MoA 24SW(2d)699. [b] (2) Number and market value of trees cut after expiration of contract admissible. 215 Ala68, 109S148. (3) Evidence effecting modification of contract held inadmissible. 132 Or453, 285P244. [c] (4) To show breach of contract. 212Ky 273, 278SW578. (5) To show removing of more timber than contract called for. 159La860, 106S331. (6) To show sale was in gross or by boundary. 145Va 536, 134SE670. (7) To justify finding of fraud in execution of contract for removal and manufacture of timber. 158La951, 104S24. (8) To show that timber cut under second contract was included in prior contract. 10LaA442, 121S328. (9) To show that plaintiff never intended to waive performance of contract. 132 Or453, 285P244. (10) To show that grantee did not abandon option to purchase so as to relieve obligation to pay taxes. Or 293P420. [e] **In action for spitefully cutting timber,** which purchaser knew it could not remove in time allowed by deed, defendant may show in defense that it left standing timber also to negative allegations of willfulness and intent. 136NC423, 134SE390. [f] **Presumption** is that payment for extension be made in reasonable time. 215Ala68, 109S148. [g] **Evidence held insufficient:** (1) To show that plaintiff, having exclusive right to cut lumber, orally consented to landowner permitting another to cut timber on land. 127Me442, 144A207. (2) To show justification for abandoning premises and suing for breach of contract. 151Wash83, 274P1055. (3) To show plaintiff not estopped to assert time for performance had expired. 132 Or453, 285P244.

183-41 215Ala68, 109S148; **TexCivA** 298SW649. [a] (1) 38GaA409, 144SE 129(2dcase). (3) Question of fraud in misrepresenting average. 152Md13, 136 A48. (4) Whether seller of standing timber agreed to dress lumber for buyer. 216Ala97, 112S454. (5) Whether purchaser of timber rights paid sum for privilege of extension of time for removal of timber as provided in deed is for jury. 196NC168, 145SE9. [b] **Instructions.**-38GaA409, 144SE129(2d case); 197NC326, 148SE430.

183-42 [a] **Action not suit for rescission.**-99CalA524, 279P177.

183-45 [d] (6) 197NC38, 147SE623. (7) To prove fraud on part of grantee. 175Ark73, 298SW495. (8) To support judgment for defendant, 10LaA597, 122 S88. [e] **Purchaser of land** or timber of uncertain acreage to obtain abatement of price must show deficiency in acreage justifying suspicion of fraud. 33GaA676, 127SE663. [f] **Pleading.**-33 GaA676, 127SE663. [g] **Purchaser of timber** may recover for misrepresentation as to quantity though he knew boundaries of land. 33GaA676, 127SE 663.

183-46 [d] (2) To show that defendant complied with contract to cut and remove all merchantable timber. 162La 535, 110S746.

184-49 164Ga23, 137SE390. [b] **Tex CivA** 271SW158. [c] **Petition held to contain averments of title** sufficient to make prima facie case. 164Ga387, 138 SE775. [d] **Instructions.**-164Ga387, 138 SE775.

184-50½-New. But while cutting and removal not in accordance with judgment fixing rights may be enjoined, injunction is improper which causes forfeiture of all right in timber under deed and judgment. 72CalA433, 237P758.

184-52 [b] **Evidence held to sustain finding** that seller of standing timber did not interfere with buyer's right of removal. 69CalA653, 231P1005.

184-53½-New. In suit to restrain cutting of timber and for damages, evidence has been held insufficient to show title either in plaintiffs claiming as grantees of the original owner, or in interveners claiming as heirs of grantee of original owner. **TexCivA** 283SW 212.

184-53½-New. Equity will not enjoin the enforcement of an unambiguous contract for the sale of all sweet red gum timber on a described tract of land on the ground that the sale of timber was for a specific purpose not mentioned in the contract and that the purchaser is removing it for another purpose, without first reforming the instrument. 164 Ga23, 137SE390.

184-56 **TexCivA** 9SW(2d)452.

184-60 170Ark1146, 282SW995.

184-62 232Mich458, 205NW225.

185-69 176Ark906, 4SW(2d)928. [b] 215Ala412, 111S427.

185-70 215Ala412, 111S427.

185-71 215Ala412, 111S427.

185-75 217MoA567, 272SW1014 (oral extension). But see 244Mich403, 221 NW322.

185-77 132 Or453, 285P244; Wash 258 P77. [b] **Contract for removal of standing timber with no promise to sever or pay for timber** constitutes mere license. 144Wash558, 258P488.

185-79 232Mich458, 205NW225 (conveyance construed to vest title in grantee and not as conditional sale or license).

185-81 [b] (2) Bill of sale of timber given to grantor by grantee at time land was conveyed is something more than license revocable by lapse of time, in action by grantor or deed by grantee. 232Mich458, 205NW225.

186-87½-New. A license to cut timber is only an annual license, therefore a renewal of a license takes effect only from its date. Can [1927] 2DomLR 1139.

186-90 [b] **Exclusive license.**-127Me 442, 144A207. [c] **Right of owner to cut timber.**-127Me442, 144A207.

186-92½-New. Whatever rights li-

censee acquired after time for performance of logging had expired arose from payments made and not out of expired contract. 132 Or453, 285P244.

186–97 127Me442, 144A207.

187–5 BC [1930] 1DomLR397.

187–9½–New. One entering on land under an oral sale of growing timber and cutting and appropriating the timber is liable for the actual value of the timber cut and appropriated. 153Miss700, 121 S820.

187–16 144Wash558, 258P488.

187–17 127Me442, 144A207.

188–34½–New. An assignment of a license to cut timber does not render the licensee liable for a trespass committed by his assignee after notice to quit has been given by the owner of the land. 217MoA567, 272SW1014.

188–38 7F(2d)422.

188–45 218Ala645, 119S851; CalA 288 P694; 226Ky823, 11SW(2d)940; MoA 17SW(2d)597.

189–47 43 Ida111, 249P773.

189–55 [a] (2) Provision of contract providing for full performance by certain date must be given effect. 43 Ida 111, 249P773.

190–57 7F(2d)422; 80CalA402, 251P 838. [j] **Provision for negotiation for change in contract in case of radical changes in cost of operation** has been held to require negotiations at time radical changes occurred and not to warrant claim thereafter. 190NC776, 130SE845.

190–58 [d] **Plaintiff's knowledge** of violation of provision that contractee should personally market lumber cut, and failure to insist on it, held waiver of provision. 7F(2d)422. [e] **Owner held to have waived provision** requiring payment of stumpage price before delivery to market. 7F(2d)422.

190–59 [a] **Extension of contract for cutting timber** on payment within time specified after expiration of contract. 170Ga576, 153SE426.

191–72 [b] **Plaintiff cannot demand performance** where he prevented performance. TexCivA 300SW142.

191–74 [d] **Sale of lumber** to defendant pursuant to agreement with plaintiff owner is not conversion. 7F(2d)422. [e] **Petitions held insufficient.**–22AlaA 603, 118S495(1stcase).

191–74½–New. reconvention, 167La785, 120S295(2dcase).

191–75 [a] (2) Pursuant to pleading of due performance under statute, contractor has burden of showing he rushed work as fast as possible and performed it in reasonably satisfactory manner. 43 Ida111, 249P773. [b] (1) 218Ala645, 119S851; 122 Or511, 259P890. (5) Expert testimony as to proper methods of logging. 43 Ida111, 249P773. [c] (3) Other illustrations of evidence held inadmissible. 122 Or511, 259P890. [d] 155Miss849, 124S476; 122 Or511, 259P 890; BC [1929] 4DomLR327. [e] (1) 36GaA546, 137SE294. (9) Defendant's marketing lumber for plaintiff's contractor and retaining proceeds to reimburse advances held liable for stumpage price. 7F(2d)422. (10) To show defendant knew terms of contract between plaintiff and logging contractor. 7F(2d) 422. (11) To show owner agreed with one employed to cut and market lumber that stumpage to be paid before shipment to market should be paid out of proceeds of sales. 7F(2d)422. (12) To show abandonment of contract precluding recovery by defendant on its demand in reconvention for breach thereof. 167La785, 120S295(2dcase). [f] (3) To show provisions omitted from logging contract through fraud. 190NC 776, 130SE845. (4) To support verdict for plaintiff logging contractor. 43 Ida 111, 249P773.

191–76 CalA 288P694; 147Wash140, 265P468. [a] (6) Deductions for logs mingled. 82NH462, 136A370. (7) Compensation for extra work. 82NH462, 136A370. (8) Whether careless workmanship was shown. 226Ky823, 11SW (2d)940. [b] (4) On question whether contractors, prevented from cutting timber could have made certain profit per thousand feet. 226Ky823, 11SW(2d) 940.

191–77 [b] 147Wash140, 265P468; 105 WVa138, 141SE639. [c] **Instructions held proper.**–36GaA546, 137SE294. [d] **Instructions not confusing or misleading.**–40GaA754, 151SE533.

191–81 [b] **Contract to cut, log, and haul lumber is not one for personal services.**–218Ky158, 291SW10.

192–84 BC [1930] 1DomLR760 (time not of essence).

193–95 218Ky158, 291SW10; BC [1930] 1DomLR760.

193–96 218Ky158, 291SW10.

193–98½–New. On the question of the measure of damages in an action for breach of a contract whereby plaintiff was to cut, log, and haul lumber, it is immaterial whether plaintiff could have obtained employment elsewhere. 218Ky 158, 291SW10.

193–98½–New. A collateral parol agreement by defendant to furnish additional timber, if admissible, held too indefinite of enforcement. 40GaA680, 150SE865 (2dcase).

193–3 218Ky158, 291SW10.

193–4 [b] **Right to extra compensation.**–180CalA402, 251P838.

193–5 [a] (1) 35GaA132, 132SE244; 218Ky158, 291SW10. (4) To show contract. 35GaA132, 132SE244. (5) To take case to jury in action for breach of contract for cutting, logging, and hauling lumber. 218Ky158, 291SW10. (6) To sustain verdict for amount of damages awarded. 218Ky158, 291SW 10. [b] (3) To show omission of provision from contract by mistake. 218Ky 158, 291SW10. (4) To show existence of condition entitling plaintiff to extra compensation. 80CalA402, 251P838. (5) To show valid subsequent parol agreement to furnish additional timber to aggregate two million feet. 40GaA 680, 150SE865(2dcase).

193–6½–New. Questions for jury. MoA 27SW(2d)1033.

194–10 219Ala644, 123S15; 1LaA796.

195–30 [1926] CanSC194, [1926] 1DomLR1142; Alta [1930] 3DomLR406; Man [1930] 1DomLR652 (title held to have passed). [i] **Sale held consummated** on payment. 5PaDist&Co 461.

196–51 [f] (2) Evidence of fraud of seller as to misclassification. 136Wash 534, 240P902.

197–53 127Me406, 144A1.

197–57 [a] (5) See also 1LaA367.

198–71½–New. Where defendants refused to proceed with appraisement after discharge of their appraiser, plaintiff's appraiser may complete a cruise of the land. 149Wash328, 270P1032.

199–77 [a] **Facts not constituting waiver.**–127Me406, 144A1.

199–81 82NH462, 136A370.

199–82 BC [1928] 1DomLR93.

199–88 Mont 292P714.

199–97 BC [1928] 1DomLR93.

199–99½–New. In Ontario, where a contract calls for scaling of logs and provides that scaling shall be binding on the parties, a scale in which only twenty per cent of the logs are actually measured is not a proper scale, and evidence of a scale of nearly seventy per cent of the logs is admissible. NB [1928] 2Dom LR513.

201–20½–New. Discrepancy between scales held not to indicate fraud in measurement. 82NH462, 136A370.

201–30 83NH370, 142A700.

202–61 83NH370, 142A700. [a] (2) To sustain finding of lack of fraud. 149 Wash328, 270P1032. [b] (1) 83NH370, 142A700.

202–61½–New. or waiver, 82NH462, 136A370.

203–82 164Ala337, 51S23, 27LRANS 670; 21Fla264; 14 Ida561, 95P499, 24 LRANS1240 [overr on other grounds 25 Ida1, 136P108]; 14 Ida598, 95P513; 19 Ida30, 113P92, 35LRANS824; 20 Ida 695, 119P1098, 38LRANS114; 130Ky 153, 113SW56, 17AnnCas786 [reh den 114SW338]; 8KyOp539; 121Me287, 116 A734; 27Mich533; 237Mich38, 211NW 115; 201MoA92, 208SW149; 58NH104, 42AmR584; 8BarbNY239; 115NC590, 20SE707, 847; 154NC34, 69SE688; 37 Or9, 60P384; 53 Or219, 97P548, 99P880, 22LRANS545; 90 Or13, 175P437; 100 Or731, 190P349; 15Pa9; 33Pa301, 75 AmD598; 59TexCivA562, 126SW604; TexCivA 149SW358; TexCivA 164SW 878; 24Wash636, 64P840, 54LRA199; 60Wash193, 110P1017; 79Wash89, 139P 754; 104Wash493, 177P326; 42Wis203; 47Wis314, 2NW546; 56Wis73, 13NW 697; 87Wis134, 58NW257; 100Wis86, 76NW273, 42LRA305; 128Wis297, 107 NW974; 140Wis245, 122NW801; 6NB 326; 3NB50. [b] (2) River is as much highway for floating of timber as it is for floating of vessels. 25NB580. [c] (2) Navigation may be with rafts or logs. 23Minn430; 11BC499, 10CanExch 29. [g] **"Rafts are included in the general term 'vessels.'**–Navigable streams are as much dedicated to their use as to the use of other vessels." 58Fed765, 766; 123Fed609, 612.

204–85 [b] **Seasonal uses.**–103Me37, 68 A527, 14LRANS1083.

204–86 124Tenn293, 137SW760, 35LRA NS407, AnnCas1912B1086.

205–93½–New. A stream may be used to recover logs where there is no trespass nor injury to banks. 152Mich645, 116NW614, 20LRANS984.

205–93½–New. **The recovery of sunken logs from the bed of a stream** is a proper and lawful use incidental to the business of navigation, and when done without injury to the banks or unlawful trespass thereon is not an infringment of the rights of a riparian owner. 152 Mich645, 116NW614, 20LRANS984.

205–94 103Me37, 68A527, 14LRANS 1083. [a] **Both riparian owner and one using river** for floating of timber have rights thereon. 25NB580.

205–95 57Fla101, 48S634.

205–97 25NB580.

205–97½–New. , and this is true although the piers are owned by one having the ownership of the bed of the stream. 25NB580.

205–3 11BC499, 10CanExch29.

205–9½–New. However, where damage is caused, the owner of the land may recover regardless of negligence in maintenance of the dam. 54Wash289, 103P 11.

205–10½–New. One operating a splash dam is liable for overflowing the lands of a riparian owner outside the bed of the stream regardless of the question of negligence. 123Minn476, 144NW154.

205–10½–New. Maintenance of splash dams is authorized where not infringed. 100 Or731, 190P349.

205–10¼–New. The maintenance of a splash dam will be enjoined where the banks of the stream are washed to the injury of riparian owners. 55 Or372, 106P642.

205–10½–New. or where the operation of the dam causes flooding or erosion to lower riparian lands. 54Wash510, 103 P814, 132AmSR1127.

205–10½–New. It is no defense that a riparian owner failed to object to the construction of such dam where protest would have been unavailing. 55 Or 372, 106P642.

205–10½–New. Nor is it a defense that the floating of logs by means of a dam will be less injurious than floating them without it. 55 Or372, 106P642.

207–33 153Wash261, 279P1109 (boom company is not entitled to occupy location in navigable stream except by state's consent, under statute).

207–42 [b] **Escaping duties.**–153Wash 261, 279P1109.

207–42½–New. **Prescriptive rights.** An adverse claim against riparian owners is not initiated by a log driving company's filing the plat and notice required by a state statute, such act merely giving claimant a prior right of location on the stream for driving and booming purposes. 116Wash56, 198P 374.

207–42½–New. Where a company, not specifically chartered for that purpose, appropriates a location and builds and operates a boom, only by sufferance from the state, it is liable as a public service boom company. 153Wash261, 279P 1109.

208–54 70WVa602, 74SE870. [c] **Storing logs for unreasonable time** in boom so as to obstruct navigation by another logger gives rise to liability for damage. TexCivA 113SW563.

208–55 Contra 54Wash289, 103P11.

211-24 46 **Ida**497, 269**P**94.

211-28 [f] **Private carrier may make agreement for compensation** regardless of rates established for common carriers. 275**US**207, 48**SCt**41, 72**Led**241.

212-40 46 **Ida**497, 269**P**94.

212-41 [a] 46 **Ida**497, 269**P**94.

215-94 82**NH**561, 138**A**284.

216-15 8**KyOp**539; 104**Wash**493, 177**P**326; 131**Wash**670, 231**P**10; 142**Wash**591, 253**P**1072; 3**Man**25. [c] (2) Injuries by escaping logs are not actionable unless company was negligent. 70 **WVa**602, 74**SE**870. [d] **Railroad company which builds its grade and track along navigable stream** is chargeable with notice of its navigability for floating logs and must take precautions to protect its roadbed against erosion liable to be caused by such lawful navigation. 20 **Ida**695, 119**P**1098, 38**LRANS**114.

216-15½-New. , or unless defendant has unreasonably and with the intention of injuring plaintiff obstructed the river to the damage of plaintiff. 3**Man**25.

216-16 94**Ark**370, 127**SW**459, 28**LRANS**144; 19 **Ida**30, 113**P**92, 35**LRANS**824; 20 **Ida**695, 119**P**1098, 38**LRANS**114; 23 **Ida**608, 131**P**654; 187**MoA**386, 173**SW**15; **MoA** 193**SW**612; 50 **Or**9, 91**P**448, 126**AmSR**698, 11**LRANS**290; 89**Vt**80, 94 **A**108, **AnnCas**1918**A**726; 79**Wash**679, 141**P**63. [b] **In Minnesota.**–108**Minn**497, 122**NW**376. [c] **Extraordinary precautions,** such as building embankments to protect riparian lands, need not be taken by one driving logs. 89**Vt**80, 94 **A**108, **AnnCas**1918**A**726. [d] **What is negligence.**–79**Wash**679, 141**P**63. [e] **Persons having equal rights in stream for navigation with steamboats** and for floating of logs should each exercise their rights with reasonable regard for rights of other. 3**Man**25.

216-17 190**Ky**532, 227**SW**994; 23**Minn** 430; 36**NB**113. [a] **It is negligence to operate raft** in such manner as to place it beyond operator's control. 23**Minn** 430.

216-17½-New. Dams or embankments may not be constructed in or along a floatable stream to the extent of injuring a riparian proprietor by retarding the flow of water. 50 **Or**9, 126**AmSR** 698, 11**LRANS**290; 53 **Or**219, 97**P**548, 99**P**880, 22**LRANS**545.

216-17½-New. or sending it down in increased volume to his injury by causing flooding or erosion or the depositing of debris. 53 **Or**219, 97**P**548, 99**P** 880, 22**LRANS**545.

216-17¼-New. or at times when the stream would not be otherwise navigable. 50 **Or**9, 91**P**448, 126**AmSR**698, 11 **LRANS**290.

216-17½-New. Splash dams which injure a lower riparian owner by interfering with the operation of his mill and by depositing dirt and debris will be enjoined. 53 **Or**219, 97**P**548, 99**P**880, 22**LRANS**545.

216-20½-New. However, one driving logs in a navigable stream is liable for the damages produced by erosion, flooding, and causing logs and debris to lodge on riparian land. 35**Wash**191, 77**P**34.

216-20½-New. The owner of a boom causing flooding of the opposite shore is liable. 51**Wash**196, 98**P**655.

216-20¼-New. A conditional offer by the one maintaining the boom to remove property of the opposite owner to a place of safety or assist in doing so is not enough to relieve liability for its destruction. 51**Wash**196, 98**P**655. [a] **Greater value of property to its owner** in location selected by him must be taken into account. 51**Wash**196, 98**P** 655.

216-21 106**Va**176, 55**SE**580, 9**LRANS** 894.

216-23 See also 134**Wash**133, 235**P**23.

217-24 165**Ky**827, 178**SW**1096; 185**Ky** 135, 214**SW**885; 177**Mich**222, 143**NW** 63; 123**Minn**476, 144**NW**154; 79**Wash** 520, 140**P**577; 79**Wash**679, 141**P**63. [d] **Recovery is not precluded** because of refusal of riparian owner to permit removal of towhead which was a natural formation in stream and obstructed floatage to limited extent. 185**Ky**135, –177**Mich**222, 143**NW**63.

217-30 89**Vt**80, 94**A**108, **AnnCas**1918**A** 726.

217-30½-New. Negligence of unlawful drifting of logs in a floatable stream, whereby the water is diverted and irreparable injury is done to crops on adjoining land, will be enjoined. 77 **WVa**563, 88**SE**1020.

217-30½-New. Right of action is not precluded by the fact that damages are merely nominal. 4 **OntWN**1106, 24 **OntWR**433, 11**DomLR**45, 30 **OntL**209, 5 **OntWN**577, 18**DomLR**604.

217-31½-New. In an action for damages to land, caused by the negligent floating of logs, a counterclaim for plaintiffs' failure to cut down trees on the banks of the river, whereby the jam was caused, was without merit, as plaintiffs were under no duty to remove such trees. 165**Ky**827, 178**SW**1096.

217-31½-New. Where dry land is flooded or washed away by a log jam, the fact that the boom and other works were properly constructed is no defense. 108**Minn**497, 122**NW**376.

217-31¼-New. Who is liable. Where the logs of several different owners form a jam and cause injury to riparian land, an owner of only a small number of the logs would not be liable for the whole injury. 79**Wash**520, 140**P**577.

217-33 [a] (3) Declaration must allege facts constituting negligence and not merely that defendant carelessly and negligently permitted logs to become piled up or jammed. 106**Va**176, 55**SE** 580, 9**LRANS**894. (4) Allegations as to ownership of bed of stream by riparian owner must be clear and unambiguous. 89**Vt**80, 94**A**108, **AnnCas**1918**A**726. (5) Where there is abuse of right of navigation in foregoing respects, it is not necessary to plead that acts were negligent. 35**Wash**191, 77**P**34.

217-34 [a] (2) Dike owner seeking damages for injuries caused by log jam must prove negligence. 142**Wash**591, 253**P**1072. (3) Owners of dike, injured by logs in stream, must prove negligence. 142**Wash**591, 253**P**1072.

217-36 [a] (3) To show conditions before, during, and subsequent to flood is admissible. 123**Minn**476, 144**NW**154. [c] (4) Record of prior action by another party for damages from operation of same dam is inadmissible. 123 **Minn**476, 144**NW**154. [g] **Rules of war department** regulating driving of logs in certain rivers are immaterial in action for injuries to lands of riparian owner resulting from log jam. 79**Wash**520, 140**P**577.

218-37 [b] (3) To show negligence in permitting logs to jam and damage dike. 142**Wash**591, 253**P**1072. (4) To show, as matter of law, that plaintiff, in action for failure to catch logs, failed to furnish defendant rafting boom sticks. 153**Wash**261, 279**P**1109.

218-39 [a] (4) Whether sufficient number of drivers were used and care exercised to avoid jam. 23 **Ida**608, 131**P** 654; **MoA** 193**SW**612. (5) Whether injury was due to act of God. 54**Wash** 289, 103**P**11. [b] **Dismissal sustained,** there being no evidence to support recovery in action against boom company for selling plaintiff's logs for his account at less than market value. 153 **Wash**261, 279**P**1109.

218-45 233**Ky**682, 26**SW(2d)**519.

219-55½-New. Where ownership of land is in dispute between two parties, the one having knowledge of the dispute who cuts timber thereon cannot have woodman's lien, if dispute as to ownership is decided against claimant for whom he cut the timber. **NS** [1929] 1**DomLR**535.

219-61 129 **Or**190, 276**P**1110.

219-64 129 **Or**190, 276**P**1110.

220-66½-New. Under some statutes the lien extends to franchises, gross earnings, and property of the corporation. 151**Va**426, 145**SE**352.

220-72 [e] **Necessity for notice to debtor.**–By construction of statutes it has been held that notice to debtor of assignment is not required. **NS** [1925] 3 **DomLR**65.

220-81 35**GaA**172, 132**SE**236.

221-90½-New. In Nova Scotia a person hauling lumber from the place of storage to the place of shipment is not entitled to a lien. **NS** [1928] 2 **DomLR**731.

221-90½-New. Statute held not applicable to a party loading pole pilings when they were shipped out. 11**LaA** 652, 124**S**593.

221-92½-New. By statute, labor lien cannot be had except for services. 173 **Ark**823, 293**SW**709.

223-47 [e] **Seller of logs not entitled to lien** for services of others, paid for by him. 173**Ark**823, 293**SW**709. [f] **Assisting in manufacturing.**–**Mont** 292**P** 714.

223-50 178**Ark**389, 12**SW(2d)**11. [b] **In British Columbia.**–[1928] 2**DomLR** 928.

223-52½-New. or to one who merely furnishes teams for hauling to the owner of logs who himself does the loading, driving, and unloading; 143**Miss** 222, 108**S**505 (not employee or laborer within statute).

223-59 229**Ky**738, 17**SW(2d)**1024. [b] (1) But see 129 **Or**190, 276**P**1110.

224-60½-New. Under the Ontario Woodman's Lien for Wages Act, a subcontractor cannot obtain a contractor's lien. **Can** [1928] 2**DomLR**849.

224-61 37**GaA**60, 139**SE**127.

224-62 155**Wash**265, 283**P**1079. [b] **Recovery for eloignment** cannot be had as to logs used in structure. 155**Wash** 265, 283**P**1079.

224-64 37**GaA**60, 139**SE**127.

224-72 [c] (2) One employed by general contractor held to have lien without notifying owner. 155**Wash**265, 283**P** 1079.

226-98 See also 129 **Or**190, 276**P**1110.

226-6½-New. In British Columbia, a county court judge has no power to amend a lien so as to include logs other than those in the place mentioned in the lien. **BC** [1928] 2**DomLR**37.

227-24 35**GaA**172, 132**SE**236; 37**GaA**76, 139**SE**84.

227-24½-New. Circumstances affecting the amount of a statutory stumpage lien have been considered. 147**Wash**475, 266 **P**684.

227-26 151**Va**426, 145**SE**352.

227-27 [b] **Materialman furnishing supplies to defendant manufacturing cross ties** has been held entitled to lien on ties that had become commingled with defendant's other ties. 13**LaA**177, 126**S**583.

227-28 13**LaA**177, 126**S**583.

228-57 [c] **Lien of employees of saw mill** is superior to that of lessor of mill for rent. 143**Miss**655, 109**S**672.

228-60½-New. A person advancing money to another as lessee of lands has been held to have a privilege on ties under statute concurrent with the landlord's privilege for price of stumpage. 10**LaA**237, 120**S**783.

229-63 171**Ark**323, 284**SW**23; 177**Ark** 683, 7**SW(2d)**800.

229-69 147**Wash**475, 266**P**684; 153 **Wash**647, 280**P**82. [b] (2) Person in charge of operations under logging contract who sells logs which are subject to stumpage lien to persons who manufacture them into lumber and shingles is liable to lienor for eloignment. 147 **Wash**475, 266**P**684.

229-71 [a] (2) In action, under same statute, fact that defendant had eloigned large portion of logs before some lien claimants commenced work was immaterial where all lien claims had been assigned to plaintiff. 153**Wash**647, 280 **P**82.

231-7 8**LaA**697.

231-21 171**Ark**323, 284**SW**23.

232-23 Contra 171**Ark**323, 284**SW**23.

233-58½-New. Where a seller to whom warehouse receipts for logs is made defendant, the buyer may intervene and set up his claim against the seller to recover the amount paid. 142**Wash**1, 251**P**861.

233-76 21**AlaA**571, 110**S**65.

234-80½-New. Under statute, it has been held unnecessary to file a bond before a writ can issue. 21**AlaA**571, 110 **S**65.

235-25½-New. Rules applicable to pleadings in general apply to the suffi-

ciency of complaints, to foreclose a logging lien. 10LaA237, 120S783.
236-48 Mont 292P714.
236-49 129 Or190, 276P1110.
236-50 [d] (3) To support judgment for lien. 178Ark389, 12SW(2d)11. (4) That plaintiff exercised such control over lumber as to make recording of lien unnecessary. 39GaA63, 145SE912(1st case). [e] (2) To support judgment for lien. 178Ark389, 12SW(2d)11. [f] **Testimony on behalf of plaintiff not conflicting** where he testified that he agreed to perform service of hauling and was therefore employee of owner, and his witness testified that he merely furnished teams for hauling and that owner of logs did loading, driving, and unloading. 143Miss222, 108S505.
236-54½-New. It is a question of fact whether a coworker was jointly interested with plaintiff in wages due. 216 Ala298, 113S32.
236-54¾-New. Whether purchaser of lumber covered by labor liens was an innocent purchaser is a question of fact. 173Ark823, 293SW709.
236-54¼-New. Whether materialman's lien is lost because ownership of ties has passed from defendant has been held question of fact. 13LaA177, 126 S533.
236-57 171Ark323, 284SW23.
237-87 35GaA807, 134SE799. [a] **Property of third party held not subject to lien.**-35GaA807, 134SE799.
238-96 [e] **Allowance incidental to foreclosure only.**-126 Or1, 267P1035.
238-4 [c] (4) Trover maintainable by one not in possession of land from which timber is taken as against one unlawfully converting same. 213Ala494, 106 S150. (5) Constructive possession by plaintiff following title to freehold is sufficient to maintain trover for severance of timber from it, unless defendant had actual adverse possession. 219 Ala27, 121S19.
238-6 [b] **Burden of proof is on defendant to show** what portion of timber wrongfully cut belonged to him. 39GaA 280, 147SE142.
238-7 219Ala374, 122S630, 65ALR1473. [c] (3) In suit by purchaser of timber from grantor in security deed, reserving title to timber in grantor for wrongful cutting of timber by defendants, claiming title under grantee in security deed purchasing property at foreclosure, evidence of record in foreclosure proceedings under security deed and tax fi. fas. redeemed by defendant's grantor and sheriff's deed held erroneously admitted as irrelevant. 39GaA280, 147 SE142.
238-8 [a] (5) 164La301, 113S855. [b] (3) To authorize direction of verdict for defendant. 39GaA280, 147SE142. [d] **Plaintiff entitled to affirmative charge** upon proof of constructive possession. 216Ala416, 113S35.
238-8½-New. , and questions for the jury. 136SC423, 134SE390.
239-10 [b] **What constitutes defense.**-219Ala27, 121S19.
239-17 [f] (2) To show that act was done under idea of verbal permission to cut. 144Miss769, 109S851. [i] **Statutes not retroactive** so as to apply to transaction occurring before enactment. 144 Miss769, 109S851. [j] **Party is not subject to penalty** under statute if he cuts timber by verbal permission. 144Miss 769, 109S851. [k] **Trespass must be willful and without right** to bring it within statute. 144Miss769, 109S851. [l] **Evidence held insufficient** to show trespass was willful and without right. 144Miss769, 109S851. [m] **Questions of law and fact.**-144Miss769, 109S851.
240-20 35GaA686, 134SE790.
240-21½-New. Where a deed reserves to the grantor only a life estate in timber, his lease of timber for turpentine purposes is inoperative after his death. 163Ga236, 135SE719.
240-21¼-New. In such case the remainderman is entitled to enjoin the lessee from turpentining timber after the grantor's death. 163Ga236, 135SE719.
240-36½-New. Where lessee sells timber in conformity to his rights under lease, the purchaser acquires perfect title thereto good as against the lessor who seeks to retake the same on default of lessee on subsequent payments. 35GaA686, 134SE790.
240-36¼-New. Lessee takes subject to consequences of divestiture of lessor's title by sheriff's sale of land. 165Ga 472, 141SE207.

LOOFAH

242-55½-New. The fibrous substance of the plant luffa ægypteaca. US 11CustA 163.

LOOK

242-59 12PaDist&Co 647 ("sharp lookout" defined).

LOSS

244-17 222AppDiv302, 226NYS243.
244-17½-New. As understood in business, a loss to a person is either a decrease in value of his resources or an increase in his liabilities. MoA 3SW (2d)272.
244-18 25 OhNPNS572. [a] **"Damage" distinguished** in that "loss" means total, rather than partial, loss. 222App Div322, 226NYS243.
244-31½-New. , difference between combined cost and operating expenses and total receipts, where returns are less than investment. TexCivA 286SW 513.
245-61 [a] See to same effect TexCivA 291SW658.

LOST INSTRUMENTS

249-5 But see 85Colo 544, 277P298.
249-15 Mont 290P259.
249-16½-New. Lessor owes lessee no duty to supply second copy of lost lease on lessee's request. Cal 286P1010.
251-40 99Fla1309, 128S827(1stcase).
251-53 [f] NJSup 129A817. [y] 122 Kan813, 252P901 [citCJ]. [ac] 120 Or 96, 251P715.
252-61 [b] **Statute permitting enforcement of lost instruments** has been construed to allow establishment of same before maturity. 163La78, 111S503. [c] **Right independent of statute.**-134 Misc417, 236NYS37.
252-73 Cal 286P1010 (proceeding to have document judicially restored).
253-86 216Ala411, 113S500.
253-7 214Ala675, 108S594, 595 [citCJ].
254-16 90Fla16, 104S860.
254-22 214Ala675, 108S594, 595 [cit CJ].
255-35 214Ala675, 108S594.
256-46 214Ala675, 108S594, 595 [cit CJ]. But see 163La78, 111S503 [citCJ].
256-51½-New. Equity may require the execution of a new deed although the complaining grantee is not in possession or entitled to immediate possession. 214Ala675, 108S594.
257-70 214Ala675, 108S594.
257-71½-New. A bill to compel reëxecution of a quitclaim deed to replace a lost one executed by mortgagor to mortgagee, which fails to show that the mortgagee had paid full value, is insufficient. 214Ala675, 108S594.
258-81 214Ala675, 108S594.
258-92 330 Ill 48, 161NE68.
258-93 172Ark952, 291SW69; 4LaA 394; TexCommnA 15SW(2d)1011, 67 ALR1324.
258-95 219Ala422, 122S663.
258-98 TexCommnA 15SW(2d)1011, 67 ALR1324.
259-14 TexCivA 296SW939.
259-16 216Ala411, 113S500. [b] **Necessity of copy.**-168Ga755, 149SE136.
259-24 Ariz 288P1027; 172Ark952, 291SW69; 79CalA69, 248P1039; 240 Mich151, 215NW400; Minn 231NW414; TexCommnA 15SW(2d)1011, 67ALR 1324. [a] **In absence of proof of execution and delivery of lost deed,** testimony that deed was left with attorney, and circumstances thereof, was of no evidentiary effect in establishing deed. 133Misc382, 232NYS248.
259-26 [c] **Evidence held sufficient.**-249 Mich269, 228NW698.
260-28 133Misc382, 232NYS248.
260-30 Ariz 288P1027 (where original possession is adverse, smaller degree of proof is necessary).
260-31 TexCivA 296SW939.
260-35 79CalA69, 248P1039; 240Mich 151, 215NW400; TexCommnA 15SW (2d)1011, 67ALR1324.
260-36 100CalA152, 280P144.
260-38 [b] **Evidence insufficient to establish delivery.**-330 Ill 48, 161NE68.
260-39 [a] 79CalA69, 248P1039; 240 Mich151, 215NW400.
260-42 172Ark952, 291SW69; 330 Ill 48, 161NE68; 133Misc382, 232NYS248; 139 Okl 95, 281P259 (lost letter releasing assignee of lease from liability). [b] 172Ark952, 291SW69; 330 Ill 48, 161NE68.
260-46 107TexCr521, 298SW290, 292 [citCyc].
261-51 TexCivA 296SW939.
261-54 [c] **Necessity of decree.**-134Misc 417, 236NYS37.
261-74 See also 243 IllA505; MoA 298 SW269.
263-94 But see 330 Ill 589, 162NE209.
264-11½-New. That a note, after it became the property of plaintiff by assignment, was lost or stolen, did not bar a suit on the note. 85Colo 544, 277 P298.
265-20 243NY45, 152NE460.
266-39 NJCh 147A374 (where certified check was lost, bank held entitled to indemnity before paying it).
266-46 134Misc417, 236NYS37.
267-54 NJCh 147A374.
267-55 213AppDiv265, 210NYS149.
267-55½-New. Conversely the owner of a lost negotiable instrument is ordinarily entitled to payment upon tendering sufficient indemnity. IndA 168NE46.
267-57 IndA 168NE46 (rule applied to destroyed bonds).
269-76 85Colo 544, 277P298.
271-22 12PaDist&Co 469.
271-27 122Kan813, 252P901; TexCivA 31SW(2d)362.
272-31 222Ky708, 2SW(2d)401.
273-54 131Misc790, 228NYS162.
275-31½-New. A variance between an established copy sued on and the lost original cannot affect the rights of the parties where the established copy and the original are substantially the same. 36GaA358, 137SE99.
276-51 TexCommnA 15SW(2d)1011, 67 ALR1324.
276-59 169Ark183, 274SW2, 5 [citCyc]; 174Ark1180, 298SW219.
276-61 169Ark183, 274SW2, 5 [citCyc]; 174Ark1180, 298SW219.
276-63 169Ark183, 274SW2, 5 [citCyc]; 174Ark1180, 298SW219.
276-67 MoA 296SW269.
277-73 196NC654, 146SE705.
278-93 330 Ill 48, 161NE68.
279-5 220Ala397, 125S665; 169Ark183, 274SW2, 5 [citCyc]; 170Ark272, 280 SW374; 174Ark1180, 298SW219; 176 Ark946, 4SW(2d)933; 88CalA322, 263 P371; Mont 290P259. [d] **Identity of lost instrument as one sued on** must be shown. 88CalA322, 263P371 (evidence held insufficient).
279-9 TexCommnA 15SW(2d)1011, 67 ALR1324. [a] 170Ark272, 280SW374; 88CalA322, 263P371.
279-10 [a] 176Ark946, 4SW(2d)933. [b] 169Ark183, 274SW2; 88CalA322, 263P371.
280-19 169Ark183, 274SW2.
280-25 [a] **Sufficiency of proof of search** is within court's discretion. CalA 290P110.
281-29 [a] 176Ark946, 4SW(2d)933. [b] 88CalA322, 263P371.
281-42 181Ark1145, 28SW(2d)699 (whether alleged surety signed lost note is for jury); Mont 290P259. [b] **Nonpayment** of lost note is for jury. 181 Ark1145, 28SW(2d)699.
281-45 MoA 296SW269.
281-45½-New. In an action on bonds shown to have been destroyed, a finding that defendants failed to demand any indemnity is unnecessary and can be treated as surplusage. IndA 168NE 46.

LOTTERIES

287-6 170Minn239, 212NW169; 147 Miss649, 112S579, 580 [citCJ], 57ALR 421; 44Philippine233; 44Philippine278; 140Wash546, 250P37, 48ALR1109.
287-7 257Mass431, 154NE264; 170 Minn239, 212NW169; 147Miss649, 112 S579, 580 [citCJ], 57ALR421; 44

Philippine233; 44Philippine278; 140 Wash546, 250P37, 48ALR1109.
287-8 170Minn239, 212NW169; 147 Miss649, 112S579, 580 [citCJ], 57ALR 421; 44Philippine233; 44Philippine278; 140Wash546, 250P37, 48ALR1109.
288-9 44Philippine233. [a] (2) 116 Or 352, 241P72, 41ALR1481; 98PaSuper 432.
289-23 238Mich216, 213NW107, 52ALR 77; 147Miss649, 112S579, 580 [citCJ], 57ALR421; 318Mo 633, 1SW(2d)109; 116 Or352, 241P72; 147Wash190, 265 P459.
289-24 44Philippine233; 44Philippine 278; 151Wash297, 275P563.
289-25 44Philippine233; 44Philippine 278.
289-26 44Philippine233; 44Philippine 278.
289-27 44Philippine233.
290-29 132 Or622, 287P220.
290-31 116 Or352, 241P72 (element of chance not eliminated by selection of prize winners by vote of persons eligible to win prizes). [a] **Conventional drawing** is unnecessary. 318Mo 633, 1SW (2d)109.
290-32 44Philippine233; 44Philippine 278.
290-36 151Wash297, 275P563.
291-37 132Misc597, 230NYS360.
291-39 See also 44Philippine278.
291-42 Ont [1930] 2DomLR855.
291-49 147Miss649, 112S579, 57ALR 421; 44Philippine278; TexCivA 10SW (2d)124.
291-50 44Philippine278.
292-54 [a] TexCivA 10SW(2d)124.
293-72 118Nebr851, 226NW705 (gambling and betting in form and substance of lottery). [i] **Chinese lottery** held to have element of chance in state. 147 Wash190, 265P459. [j] **Plan for selling furniture**, whereby contracts are sold on one dollar weekly installments until stipulated amount is paid, with reservation of right to discount one or more contracts each week by charging off deferred payments and delivering stipulated amount of furniture without further payments, constitutes lottery. 318Mo 633, 1SW(2d)109.
293-74 116 Or352, 241P72; 140Wash 546, 250P37, 48ALR1109.
293-75 44Philippine233. [a] **Any bond scheme** which contains elements of chance and prize will be condemned as lottery. 44Philippine233. [b] **Refusal by Philippine treasurer** to grant permit for sale of hotel lottery bonds held not abuse of discretion under Act No. 2581. 44Philippine233 (Blue Sky Law).
293-76 44Philippine233. [a] 44Philippine233.
294-81 116 Or352, 241P72.
295-87½-New. A scheme for the sale of thrift tickets or contracts whereby stated sums are to be distributed to ticket holders who receive the greatest number of votes at an election at which all ticket holders are entitled to vote and whereby some ticket holders will receive their money back, some will receive more and some will receive nothing, is a lottery. 116 Or352, 241P72.
296-10 [a] (2) 189NC720, 128SE341, 39 ALR1032.
296-12 189NC720, 128SE341, 39ALR 1032; Utah 266P1037.
296-16 238Mich216, 213NW107, 52ALR 77. [b] (5) Plan whereby merchants give tickets to customers upon purchase of merchandise, and afterward drawing is had and cash and other prizes are awarded to ticket holders, is lottery. 170Minn239, 212NW169. [c] 24 OhNPNS186.
297-17½-New. A voting contest whereby purchasers of merchandise and of coupon books had the right to cast votes proportionate to the amount of purchase for any contestant for prizes does not constitute a lottery. 176Minn 598, 224NW158.
297-18 [a] (5) Selling one article at regular price and another such article at one cent is not within statute. 189 NC720, 128SE341, 39ALR1032.
298-24 44Philippine278. [a] (5) Device to evade law. 44Philippine278.
298-25 173Minn337, 217NW345.
298-28 222AppDiv451, 227NYS225.
299-39 [b] **Keeping worthless slot machines** in home held not to be establishing lottery. 106TexCr657, 294 SW216.
299-43½-New. Coin used to operate gambling device need not be current money to bring the device within the class of prohibited lotteries. 108TexCr 661, 2SW(2d)440.
300-49 44Philippine278.
300-50 44Philippine278. [b] (4) Votes cast for carnival queen. 44Philippine 278.
301-71 44Philippine233.
302-82 [a] **Punch board in which skill is dominating element** presenting checker problem to be solved alone by player is not violation of statute. Utah 266P1037.
302-83 But see 132 Or622, 287P220.
302-88 118Nebr851, 226NW705.
303-91 118Nebr851, 226NW705. [a] **Statutes held not violative of prohibition.**-Permitting betting on horse races by pari mutuel system. 68Utah251, 249 P1016.
303-94 Ark 13SW(2d)600; 44Philippine 233 (Act No. 1757); 140Wash546, 250P 37, 48ALR1109.
303-95 Alta [1929] 1DomLR240.
305-40 151Wash297, 275P563.
305-42 116 Or352, 241P72; 98PaSuper 432; 44Philippine 233, 242 (where court said: "While ingenuity is continually at work to evolve some scheme which is within the mischief but not quite within the letter of the law. . . we propose to go beyond the shell to the substance and to condemn the same"); 44Philippine278.
306-52 [a] **Transfer of shares or interests in lottery tickets.**-Utah 276P 292.
307-59 Utah 276P292.
310-30 124Kan20, 257P925. [b] (2) As to certainty in promoting lottery. 123 Or595, 263P60.
311-37 318Mo 633, 1SW(2d)109; 123 Or595, 263P60. [a] (2) 127Kan15, 272 P148.
311-38 191NC700, 132SE795.
312-54 124Kan20, 257P925.
312-61 123 Or595, 263P60.
314-86 123 Or595, 601, 263P60 [cit CJ].
315-25 123 Or595, 263P60. [e] 123 Or 595, 263P60.
316-37 124Kan20, 257P925. [a] (2) 124Kan20, 257P925; 126Kan371, 267P 997; 126Kan374, 267P998; 318Mo 633, 1SW(2d)109. (3) To take case to jury on question of consideration. 140Wash 546, 250P37, 48ALR1109. [b] 147Wash 194, 265P460.
316-38 98PaSuper432.
316-51 147Wash190, 265P459. [c] **Instruction properly refused.**-124Kan20, 257P925; 106TexCr657, 294SW216.
318-84 [b] **State, under forfeiture statute**, may be entitled to recover proceeds of prize. 198Wis201, 229NW48 (2dcase).
319-6 170Minn239, 212NW169 [citCJ]. [b] **In action to enjoin and abate lottery**, provision directing sheriff to seize and destroy tickets is erroneous where no search warrant was issued and no seizure was made and tickets had property value and were not shown to be harmful except as used in connection with prize drawing. 170Minn239, 212NW169.
321-77½-New. A person intrusted by another with a ticket, entitling the holder to participate in a drawing for an automobile which is won on such ticket, cannot defeat such other's right to the automobile by showing that it was obtained by lottery contrary to law. 192 Wis212, 212NW261, 50ALR291.

LOW, LOWER, AND LOWEST

325-17 102WVa519, 135SE589. [a] (2) Low-watermark on great lakes is where water usually stands when free from disturbing causes. 6PaDist&Co 493.
325-25 [a] 285Pa153, 131A707.

LUFFA

326-68½-New. A genus of the Old World tropical herbs of the family of cucurbitaceæ, with the male flowers in racemes and the female solitary. 11 CustA163.

LYNCH LAW

328-24 237 IllA464.
328-25 237 IllA464.

LYSOL

328-27 235Mich623, 209NW835.
328-27½-New. It is an escharotic, and used as an antiseptic and not as an anesthetic. 235Mich623, 209NW835.

MACADAMIZE

328-50 [a] (2) "Macadamize" may include "pave." 50Cal 68, 70; 33Minn164, 22NW295.

MAIM

333-27 4AlaA139, 58S973.
333-28 4AlaA139, 58S973.
334-38 25GaA194, 102SE907.

MAINTAIN

335-64 197 Ind498, 150NE413; 125Kan 70, 262P536.
335-65 197 Ind498, 150NE413; 125Kan 70, 262P536.
335-67 197 Ind498, 150NE413.
335-68 197 Ind498, 150NE413.
335-71 125Kan70, 262P536.
335-73 197 Ind498, 150NE413.
335-77 197 Ind498, 150NE413; 125Kan 70, 262P536.
335-78 125Kan70, 262P536.
336-1 125Kan70, 262P536.

MAJORITY

339-17 326 Ill 310, 157NE177.

MAKE

342-56 [d] 309Mo 498, 274SW734. [k] **Does not mean "governed."**- 104Conn 559, 133A673. [l] **As meaning "signed and delivered."**-104Conn559, 133A673.

MALCONDUCT

343-5 77CalA605, 247P252.

MALFEASANCE

344-23 28Hawaii733. [a] 75Mont116, 241P1075 (active participation by officer in commission of crime is malfeasance in office).
344-24 28Hawaii733.
344-25 [a] (1) 8PaDist&Co 730. (2) 8PaDist&Co 730.
344-26 28Hawaii733; 232Ky115, 22SW (2d)440.
344-27 28Hawaii733.
344-28 8PaDist&Co 730.

MALICE

346-79 149Md533, 131A762.
346-83 149Md533, 131A762.
346-94 149Md533, 131A762.
347-19 149Md533, 131A762.
348-58 149Md533, 131A762; MoA 271 SW1005; MoA 28SW(2d)687.
349-63 TexCivA 282SW334.
349-64 See also 124 Or547, 265P428 (as defined by statute).
349-66 TexCivA 282SW334.
349-68 MoA 271SW1005; TexCivA 282SW334.
349-72 207 Iowa1094, 224NW95; 149 Md533, 131A762.
350-74 TexCivA 282SW334.
350-75 149Md533, 131A762.
350-76 78Colo 310, 241P539; 149Md 533, 131A762.
350-78 149Md533, 131A762.
352-47 213Ala284, 104S548.
352-48 213Ala284, 104S548.

MALICIOUS

352-65 92Fla648, 109S805.

MALICIOUSLY

355-44 See also 245 IllA542.
355-45 199 Ind146, 155NE819.
355-55 23F(2d)38.

MALICIOUS MISCHIEF

357-8 [b] (2) 202 Iowa958, 211NW230.
358-17 32PortoRico 70.
360-45 257Mass379, 154NE76.
360-51 202 Iowa958, 211NW230; 257 Mass379, 154NE76.
360-52 202 Iowa958, 211NW230.
360-54 32PortoRico 70, 71 (applying

penal code definition of malice: "The words 'malice' and 'maliciously' import the doing of a wrongful act, intentionally, without just cause or excuse, a conscious violation of the law to the prejudice of another").

360-55 202 **Iowa**958, 211NW230. See also 92**Fla**648, 109S805.

361-65 92**Fla**648, 109S805.

361-68 202 **Iowa**958, 211NW230.

361-70 202 **Iowa**958, 211NW230.

362-83 [g] (3) A schoolhouse is a "building used or designed for human occupancy," within statute punishing persons for destroying property or inflicting injury to persons by means of explosives. 333 **Ill** 397, 164**NE**847.

363-3 [a] (2) Smearing property with yellow paint is sufficient. 217**MoA**613, 274SW969.

363-5 [a] **Mo** 9SW(2d)156.

364-7 [f] **Some injury essential.**–**Mo** 9 SW(2d)156.

364-8 **NJSup** 146A190(1stcase).

367-51 55**ND**774, 215NW270.

367-62 [b] (1) 151**Wash**512, 276P539.

369-84 32**PortoRico** 70 (prescription of prosecution).

370-4 92**Fla**648, 109S805.

372-42 23**AlaA**464, 127S256.

373-52 23**AlaA**464, 127S256.

373-61 [d] **Malice may be inferred** from carelessness or failure to take precautions. 32**PortoRico** 570 (prosecution for killing horse, defense being that accused shot it at night believing it to be ghost).

374-68 35**PortoRico** 251.

374-76 333 **Ill** 397, 164**NE**847.

375-93 [a] (1) **Nebr** 227NW446 (2dcase); 151**Wash**512, 276P539. [b] (1) 318 **Ill** 114, 149**NE**3; 333 **Ill** 397, 164 **NE**847; 257**Mass**379, 154**NE**76; 55**ND** 774, 215NW270; 33**PortoRico** 336. [c] **Ill** 173NE104.

375-94 [b] 47 **Ida**1, 272P495.

375-95 [a] (1) 202 **Iowa**958, 211NW 230.

376-18 [c] **Accessory before fact.**–Instructions not to find defendant guilty as accessory before fact unless truck driver causing injury acted in accordance with orders from defendant held not error. 257**Mass**379, 154**NE**76.

376-22 [a] 257**Mass**379, 154**NE**76.

MALICIOUS PROSECUTION

383-1 92**Fla**278, 109S623.

383-2 92**Fla**278, 109S623.

383-3 92**Fla**278, 109S623, 626 [citCJ]; 86 **IndA**462, 158**NE**583. [a] (2) 81**CalA** 278, 253P344. [c] **Action for vexatious suit** is action for malicious prosecution of civil suit. 110**Conn**528, 148A330.

383-4 92**Fla**278, 109S623, 626 [citCJ].

383-5 92**Fla**278, 109S623.

383-6 92**Fla**278, 109S623.

383-6½–**New.** An action may have as a primary basis a written statement, under oath or otherwise. 93**Fla**1085, 113S378.

383-7 92**Fla**278, 109S623, 626. [citCJ]; 86 **IndA**462, 158**NE**583.

384-37 110**Conn**528, 148A330; 37**GaA** 291, 139SE915.

385-41 246**NY**249, 158**NE**510.

385-52 **NJSup** 135A659.

385-55 35**GaA**49, 132SE139; 218**Ky**384, 386, 291SW412 [quotCJ]; 149**Md**689, 132A265; 259**Mass**238, 156**NE**55; 124 **Or** 547, 265P428; 147**Wash**264, 266P162; **TexCivA** 28SW(2d)274.

385-56 83**Mont**252, 272P245.

386-57 218**Ky**384, 386, 291SW412 [quotCJ]; 152**Md**553, 137A339; 83**Mont** 252, 272P245.

386-68 234**Ky**751, 29SW(2d)17.

387-70 **AlaA** 130S768; 105**Conn**177, 134 A810; 108**Conn**40, 142A391; 92**Fla**278, 109S623, 626 [citCJ]; 93**Fla**1085, 113S 378; 35**GaA**49, 132SE139; 170**La**552, 128 S513; 149**Md**689, 132A265; 254**Mass**441, 150**NE**184; **Mass** 167**NE**748; 246**Mich**347, 224NW345; 251**Mich**642, 232NW399; 246**NY**249, 158**NE**510; 216**AppDiv**634, 215**NYS**735; 124 **Or**547, 265P428; 54**SD** 596, 223NW819; **TexCivA** 15SW(2d) 678; 146**Va**822, 132SE683.

387-71 92**Fla**278, 109S623, 626 [citCJ]; 254**Mass**441, 150**NE**184.

387-72 81**CalA**278, 253P344, 345 [citCJ]; 86 **IndA**462, 158**NE**583. [c] **Hearing on application for real estate broker's license.**–Real estate commissioner's hearing on misconduct of applicant for real estate broker's license after defendant filed sworn information charging dishonesty is not judicial proceeding. 81**CalA**278, 253P344.

387-73 86 **IndA**462, 158**NE**583; 146**Va** 822, 132SE683.

387-76 15**F(2d)**405.

387-77 [a] 246**NY**249, 158**NE**510. [f] 124 **Or**547, 265P428.

388-81 218**Ky**384, 291SW421.

389-94 147**Va**263, 137SE465, 467 [quotCJ].

389-95 147**Va**263, 137SE465, 467 [quotCJ].

389-96 147**Va**263, 137SE465, 467 [quotCJ].

389-97 147**Va**263, 137SE465, 467 [quotCJ].

389-98 76**Mont**105, 245P523, 524 [quotCJ]; 147**Va**263, 137SE465, 467 [quotCJ].

389-99 92**Fla**964, 111S110; 76**Mont**105, 245P523, 524 [quotCJ]; 147**Va**263, 137 SE465, 467 [quotCJ].

389-1 76**Mont**105, 245P523, 524 [quotCJ]; 147**Va**263, 137SE465, 467 [quotCJ].

389-2 128**Misc**263, 219**NYS**295; 76 **Mont** 105, 245P523, 524 [quotCJ]; 147**Va**263, 137SE465.

389-3 76**Mont**105, 245P523, 524 [quotCJ].

389-5 90**PaSuper**305.

390-6 87**CalA**418, 262P431(2dcase).

390-7 **Mass** 167**NE**251.

390-8 90**PaSuper**305.

390-12 232**Ky**825, 24SW(2d)588.

391-26 216**AppDiv**634, 215**NYS**735.

391-28 **MoA** 297SW169.

391-31½–**New.** Action for malicious prosecution will not lie for unlawful arrest under void capias. 86 **IndA**462, 158**NE**583.

391-31½–**New.** An action for malicious prosecution may be based on the prosecution of a civil action. 129**Kan**82, 281P 857.

391-31¼–**New.** Premature commencement of a civil action may be made the foundation of an action for malicious prosecution. 129**Kan**82, 281P857.

391-33 216**Ky**251, 287SW719 [citCJ]; 216**AppDiv**634, 215**NYS**735. [a] **Levy of attachment on homestead** cannot furnish basis for action for damages. **TexCivA** 3SW(2d)941.

391-38 79**CalA**190, 249P39, 41 [quotCJ].

391-39 79**CalA**190, 249P39, 41 [quotCJ].

391-42 216**Ky**251, 287SW719; **TexCivA** 3SW(2d)941.

392-50 93**Fla**1085, 113S378; 49**ND**47, 189NW684; **TexCivA** 27SW(2d)263; 69 **Utah**123, 252P677.

392-57 216**AppDiv**634, 215**NYS**735.

392-58 216**AppDiv**634, 215**NYS**735.

392-59 216**AppDiv**634, 215**NYS**737.

393-70 163**La**624, 112S508; 149**Md**689, 132A265; 132**Misc**643, 229**NYS**778; **TexCivA** 286SW894; **TexCivA** 18SW(2d) 253; **TexCivA** 3SW(2d)941; 154**Wash** 654, 283P460. [c] **Proceedings against homestead.**–**TexCivA** 3SW(2d)941.

394-79 110**Conn**528, 148A330 (recognizing rule, but holding case governed by New York law); 49**ND**47, 189NW684.

394-80 49**ND**47, 189NW684.

395-83 **TexCivA** 286SW894, 897 [citCJ].

395-84 **TexCivA** 286SW894, 897 [citCJ].

395-85 **TexCivA** 286SW894, 897 [citCJ].

395-86 **TexCivA** 286SW894, 897 [citCJ].

395-87 100**CalA**61, 279P668; 212**Ky**140, 278SW551; 212**Ky**259, 278SW552; **TexCivA** 286SW894, 897 [citCJ]. [a] (1) **NJSup** 132A501. (6) Where defendant did nothing to instigate prosecution. 212**Ky**140, 278SW551. (7) One making statement causing prosecution held liable though he did not make complaint himself or communicate matter to one who did. **TexCivA** 286SW894.

395-89 30**Hawaii**520, 524 [quotCJ]. See also 208 **Iowa**1, 221NW820.

395-90 30**Hawaii**520, 525 [citCJ]; 150 **Va**122, 142SE358.

396-92 208 **Iowa**1, 221NW820.

396-99 227**Ky**686, 13SW(2d)1016. [d] **Participation after commencement of proceedings.**–108**Conn**40, 142A391, 392 [citCJ].

396-2 124 **Or**547, 265P428.

397-10 219**Ala**225, 121S526.

397-14 76**Mont**105, 245P523, 525 [quotCJ].

397-15 217**Ala**244, 115S176; **IndA** 156 **NE**182.

397-16 **IndA** 156NE182.

397-17 **Mont** 275P753; 249**NY**296, 164 **NE**104.

397-20 76**Mont**105, 245P523, 525 [quotCJ].

397-21 See also **Ala** 127S188.

397-21½–**New.** Coöperative design between employer and employee's surety to bring all facts before the prosecuting attorney through witnesses, to be presented to the grand jury for independent action, is not conspiracy to instigate malicious prosecution. 217**Ala**244, 115S 176.

397-22 **Ala** 127S188; 22**AlaA**448, 116S 915; 146**Va**822, 132SE683.

398-26 21**AlaA**591, 111S200; 23**AlaA** 485, 127S263(2dcase); 70**CalA**381, 233 P346; 92**CalA**35, 267P721; 110**Conn**528, 148A330; 35**GaA**49, 132SE139; 218**Ky** 384, 291SW412; 233**Ky**118, 25SW(2d) 35; 234**Ky**751, 29SW(2d)17; 164**La**1108, 115S287, 288 [citCJ]; 165**La**326, 115S 579; 5**LaA**561; 152**Md**553, 137A339; 157 **Miss**77, 127S718; 316**Mo** 384, 289SW332; 320**Mo** 980, 8SW(2d)961; 322**Mo** 746, 18 SW(2d)500; 83**Mont**252, 272P245; **NM** 290P319; 240**NY**137, 147NE613; 216 **AppDiv**634, 215**NYS**735; 55**ND**628, 215 NW78; 58**ND**761, 227NW550(4thcase); 19 **OhA**239; 147**Va**395, 137SE471.

400-28 316**Mo** 384, 289SW332.

400-29 107**Conn**294, 140A483; 40**GaA** 801, 151SE535(1stcase); 152**Md**553, 137 A339; 254**Mass**198, 150NE164; 246**Mich** 347, 224NW345; 83**Mont**252, 272P245; 154**Wash**642, 282P925; **NS** [1925] 3 **DomLR**101 (civil arrest of debtor).

400-30 215**Ala**368, 110S700; 149**Md**689, 132A265; 58**ND**465, 226NW507.

400-36 15**F(2d)**405; 217**Ala**120, 115S 16; 171**Ark**350, 284SW42; 87**CalA**418, 262P431(2dcase); 110**Conn**528, 148A 330; 92**Fla**278, 109S623, 626 [citCJ]; 41**GaA**51, 152SE148; 212**Ky**140, 278SW 551; 222**Ky**725, 2SW(2d)391; 125**Me**460, 134A628; 149**Md**689, 132A265; 152**Md** 553, 137A339; 316**Mo** 384, 289SW332; 321**Mo** 1202, 14SW(2d)561(2dCase); 198**NC**23, 150SE492; 55**ND**628, 215NW 78; 149**Va**882, 141SE829.

401-37 92**Fla**278, 109S623, 626 [cit CJ]; 212**Ky**140, 278SW551.

401-38 107**Conn**294, 140A483; 212**Ky** 140, 278SW551; 125**Me**460, 134A628; 230 **AppDiv**465, 245**NYS**278; 55**ND**628, 215 NW78.

402-39 212**Ky**140, 278SW551; 125**Me** 460, 134A628; 35 **OhA**68, 171NE608.

402-40 92**Fla**278, 109S623; 262**Mass**427, 160NE255.

402-41 93**Cal** 745, 270P374; 110**Conn** 528, 148A330; 92**Fla**278, 109S623, 626 [citCJ]; 262**Mass**427, 160NE255; 154 **Miss**406, 122S531(2dcase); 58**ND**465, 226NW507; 149**Va**882, 141SE829; 155 **Wash**578, 285P430.

403-42 92**Fla**278, 109S623, 626 [cit CJ].

403-43 92**Fla**278, 109S623, 626 [cit CJ].

403-44 246**Mich**347, 224NW345.

403-46 121 **Or**492, 256P197; **BC** [1929] 4**DomLR**410.

403-51 216**Ala**85, 112S418; 166**La**52, 116S591; 2**LaA**213, 216 [quotCyc]; 152 **Md**553, 137A339; 316**Mo** 384, 289SW332; 321**Mo** 1202, 14SW(2d)561; 83**Mont**252, 272P245; 121 **Or**492, 256P197; 88**PaSuper**404; 92**PaSuper**318; 8**PaDist&Co** 185; 146**Va**64, 135SE683; 147**Va**395, 137 SE471; **BC** [1929] 4**DomLR**410. [a] (5) 2**LaA**213, 216 [quotCyc]. (8) Consists of such facts and circumstances as would lead reasonably prudent man in like circumstances to believe plaintiff guilty of intent to violate law. 240NY137, 147NE 613.

404-53 **CalA** 289P940; 105**Conn**177, 134 A810; 222**AppDiv**350, 225**NYS**722; 147 **Va**395, 137SE471.

405-78 10**LaA**492, 120S115. [a] (1) 170**La**392, 127S879. (6) "Probable cause in criminal prosecution is not de-

pendent upon facts acted upon being true." 146Va574, 131SE841. (7) Whether there was apparently unlawful conduct justifying arrest. 170La392, 127S879.

405-79 212Ala585, 103S860; 152Md553, 137A339; 83Mont252, 272P245; 88 PaSuper404; 146Va574, 131SE841.

405-83 CalA 289P940; 233Ky97, 25 SW(2d)65.

406-85 105Conn177, 134A810.

406-87 10LaA492, 120S115.

407-7 241Mich349, 217NW18, 20 [cit CJ]; 321Mo 1202, 14SW(2d)561(2d case). But see 322Mo 746, 18SW(2d) 500.

408-13 216Ala85, 112S418; 93CalA745, 270P374; CalA 289P940; 121 Or492, 256 P197; 146Va574, 131SE841.

408-14 216Ala85, 112S418; CalA 289P 940; 146Va574, 131SE841; 107WVa186, 148SE105, 65ALR221.

409-16 322Mo 746, 18SW(2d)500. [b] **Knowledge of agent chargeable to defendant.**–322Mo 746, 18SW(2d)500.

409-19 121 Or492, 256P197. See also 217Ala274, 116S156.

409-20 121 Or492, 256P197.

409-21 49SD563, 207NW539 [quotCyc perDillon,J].

409-22 MoA 15SW(2d)868(2dcase); 49 SD563, 207NW539 [quotCycperDillon,J].

409-23 49SD563, 207NW539 [quotCyc perDillon,J].

409-25 121 Or492, 256P197; 146Va574, 131SE841.

410-26 121 Or492, 256P197.

410-32 241Mich349, 217NW18.

410-34 220Ala227, 124S512; 147Va263, 137SE465; 86PaSuper430.

410-36 217Ala274, 116S156.

411-38½-New. Introduction of search warrant and proof of failure to find any of defendant's goods on premises prima facie establishes want of probable cause. 146Va574, 131SE841.

411-39 212Ky140, 278SW551; 170La 392, 127S879; TexCivA 27SW(2d)263.

411-41 BC [1930] 3DomLR854.

411-42 218Ala468, 118S794; 230AppDiv 465, 245NYS278.

411-43 35GaA213, 132SE251.

412-48 221MoA858, 287SW842, 845 [quotCJ].

412-50 218Ala468, 118S794; 249NY296, 164NE104; 190NC406, 130SE32.

412-51 219Ala225, 121S526.

412-55 217Ala274, 116S156.

413-66 221MoA858, 287SW842.

413-69 125Me460, 134A628; 247 IllA 161; 222AppDiv350, 225NYS722.

413-74 217Ala274, 116S156.

413-75 218Ala468, 118S794; 152Md553, 137A339.

414-82 254Mass198, 150NE164; 125 Or 269, 265P1117.

414-83 254Mass202, 150NE166; 250 Mich110, 229NW454; TexCivA 288SW 1100.

414-84 203Cal 201, 263P225.

415-88 254Mass198, 150NE164; 254 Mass202, 150NE166.

415-92 254Mass198, 150NE164; 254 Mass202, 150NE166; 259Mass238, 156NE 55. See also NM 290P319. But see 322 Mo 746, 18SW(2d)500. [b] (5) Rule of text followed upon vacation of order of arrest on appeal. 130Misc578, 224NYS 643.

416-93½-New. Prima facie showing established by conviction is not overcome by reversal on construction of contract or statute respecting which there is room for difference of opinion. NM 290P319.

417-10 223AppDiv741, 227NYS678.

417-23 NJSup 135A670.

417-23½-New. Nolle prosequi by court justified the conclusion that the complaint was false. NJ 146A54.

417-28 171Ark350, 284SW42; 149Md 689, 132A265; 69Utah123, 252P677. [b] 165La636, 115S807.

418-29 [a] **Time of acquiring knowledge.**–Existence of probable cause for prosecution of civil action depends upon facts within knowledge of defendant at time he instituted prosecution, and not upon subsequent events, nor upon matters then unknown to him. 54SD596, 223NW819.

418-29½-New. Whether defendant had probable cause in bringing involuntary bankruptcy proceedings may depend on plaintiff's insolvency or acts of bankruptcy. 41GaA51, 152SE148.

418-33 See also BC [1928] 4DomLR27.

418-35 217Ala120, 115S16.

418-44 316Mo 384, 289SW332.

419-54 [a] **Where default judgment in original suit** adjudging allegations of fact to be true has not been set aside or reversed there is probable cause as matter of law. 233Ky148, 25SW (2d)35.

419-56 221Ky442, 298SW1091; 222Ky 725, 2SW(2d)391; 320Mo 980, 8SW(2d) 961.

419-60 149Md689, 132A265; 320Mo 980, 8SW(2d)961. But see 217Ala120, 115 S16, 18 [citCJ].

419-64 217Ala120, 115S16, 18 [citCJ]; 46 Ida294, 267P828, 830 [citCJ]; 164La 1108, 115S287. But see 89PaSuper512.

420-65 But see 217Ala120, 115S16.

420-67 21AlaA591, 111S200; 23AlaA 485, 127S263(2dcase); AlaA 130S768; 70CalA381, 233P346; 92CalA35, 267P 721; 35GaA49, 132SE139; 128Kan213, 276P824; 218Ky384, 291SW412; 161La 461, 109S31; 165La326, 115S579; 170La 638, 128S661; 266Mass189, 165NE26; 157Miss77, 127S718; 316Mo 384, 289SW 332; 322Mo 746, 18SW(2d)500; 49ND 47, 189NW684; 58ND761, 227NW550 (4thcase); 19 OhA239; 147Va395, 137 SE471; Man [1927] 3DomLR374; NS [1925] 3DomLR101; Sask [1929] 4 DomLR658(2dcase).

421-71 Man [1927] 3DomLR374.

421-72 122Kan810, 811, 253P544 [cit CJ].

421-73 122Kan810, 811, 253P544 [cit CJ].

422-77 171Ark350, 284SW42; 70CalA 381, 233P346; 118 Okl 82, 246P839, 842 [citCJ].

422-81 [a] **Acts showing enmity.**–158La 874, 104S747.

422-85 220Ala227, 124S512; 122Kan 810, 811, 253P544 [citCJ].

422-87 122Kan810, 811, 253P544 [cit CJ].

423-89 70CalA381, 233P346; 87CalA 418, 262P431(2dcase); 146Va64, 135SE 683.

423-90 122Kan810, 811, 253P544 [cit CJ]; 170La638, 128S661; 321Mo 1202, 14SW(2d)561(2dcase).

423-92 221MoA858, 287SW842.

423-93 122Kan810, 811, 253P544 [cit CJ]; TexCivA 286SW894, 897 [citCJ].

424-96 161La461, 109S31.

424-97 241Mich349, 217NW18; 146Va 64, 135SE683; Alta [1927] 3DomLR 716.

424-98 107Conn294, 140A483; 241Mich 249, 217NW18; BC [1928] 2DomLR943.

424-99 241Mich349, 217NW18.

425-6 70CalA381, 233P346.

425-9 93CalA745, 270P374; 70CalA381, 233P346; CalA 289P940; CalA 284P 1056; 105Conn177, 134A810; 107Conn 294, 140A483; 92Fla278, 109S623; Ida 286P616; 129Kan82, 281P857; 212Ky 140, 278SW551; 218Ky384, 291SW412; 223Ky812, 4SW(2d)741; 228Ky658, 15 SW(2d)470; 170La552, 128S513; 170La 638, 128S661; 149Md689, 132A265; 316 Mo 384, 289SW332; 318Mo 318, 300SW 283; 321Mo 1202, 14SW(2d)561(2dcase); 322Mo 746, 18SW(2d)500; 221MoA858, 287SW842; 222MoA296, 297SW163; MoA 15SW(2d)868(2dcase); 76Mont105, 245P523; 78Mont551, 254P866; 83Mont 252, 272P245; NJSup 135A670; NJSup 146A589; 58ND465, 226NW507; 58ND 761, 227NW550(4thcase); 19 OhA239; 149Va882, 141SE829; BC [1927] 3Dom LR728; BC [1930] 1DomLR1001. But see Alta [1929] 1DomLR198.

426-10 92Fla278, 109S623, 626 [citCJ].

426-11 Ala 130S213; 70CalA381, 233P 346; 92Fla278, 109S623, 626 [citCJ]; 316Mo 384, 289SW332; 322Mo 746, 18 SW(2d)500; 19 OhA239.

427-12 92Fla278, 109S623, 626 [citCJ]; 248 IllA196.

427-14 212Ky140, 278SW551.

427-20 266Mass189, 165NE26.

427-23 12PaDist&Co 393.

427-24 TexCivA 27SW(2d)263.

427-32½ 220Ala227, 124S512.

428-38 203 Iowa127, 208NW497 [cit CJ]; 210Ky674, 276SW567, 569 [quot CJ].

428-40 24F(2d)676; 107Conn294, 140A 483, 485 [citCJ]; 92Fla526, 109S452; 36GaA259, 136SE101; 37GaA288, 139SE 831; 245 IllA607; 248 IllA196; 203 Iowa 127, 208NW497; 208 Iowa1, 221NW820; Iowa 229NW177; 210Ky674, 276SW567, 569 [quotCJ]; 221Ky442, 298SW1091; 125Me460, 134A628; 167Minn67, 208NW 530; NJ 146A219; 58ND465, 226NW507 (advice of state's attorney); Okl 292 P1113; 39 OklACR334; 40 OklACR20 [reh den]; 10PaDist&Co 429; 88PaSuper 404; 66Utah208, 241P309; 146Va822, 132SE683; 147Va395, 137SE471; 148Va 1, 138SE496; 149Va882, 141SE829.

429-41 37GaA288, 139SE831; 210Ky 674, 276SW567, 569 [quotCJ]; 39 OklACR334; 148Va1, 138SE496.

429-42 36GaA259, 136SE101; 210Ky 674, 276SW567; 40 OklACR20 [reh den].

429-42½-New. , and he has complete defense where attorney knew all facts known to defendant in malicious prosecution action. 167Minn67, 208NW530.

429-43 85CalA18, 258P725; 39 OklACR 334; 146Va64, 135SE683.

430-45 216Ala85, 112S418; 170La392, 127S879; 40 OklACR20 [reh den].

430-51 Alta [1927] 3DomLR716.

430-62 49SD563, 207NW539 [quotCyc perDillon,J].

430-63 107Conn294, 140A483; 35 OhA 68, 171NE608; 49SD563, 207NW539 [quotCycperDillon,J].

431-64 49SD563, 207NW539 [quotCyc per Dillon,J].

431-65 49SD563, 207NW539 [quotCyc perDillon,J]; 66Utah208, 241P309.

431-66 49SD563, 207NW539 [quotCyc perDillon,J].

431-67 49SD563, 207NW539 [quotCyc perDillon,J]; 148Va1, 138SE496.

431-69 36GaA259, 136SE101.

431-70 83Colo 156, 262P1021; 107Conn 294, 140A483; 92Fla526, 109S452; 210 Ky674, 276SW567; 39 OklACR334; 148 Va1, 138SE496. [d] **Where prosecution initiated by district attorney himself,** no liability on person laying evidence before him. 163La180, 111S669.

431-71½-New. A prosecuting officer is not disqualified to give advice because his compensation depends upon the outcome of the prosecution. 210Ky674, 276 SW567.

431-75 15 OhA491 (police officer); 49 SD563, 207NW539.

431-76 94PaSuper110.

432-80 Ida 286P616.

432-83 220Ky12, 294SW812.

432-87 37GaA288, 139SE831; 213Ky 603, 281SW533; 220Ky12, 294SW812; 220MoA251, 284SW167.

432-88 Cal 292P467; CalA 289P940; 83 Colo 156, 262P1021; 105Conn177, 134A 810; 92Fla526, 109S452; 36GaA259, 136SE101; 37GaA288, 139SE831; 213 Ky603, 281SW533; 220Ky12, 294SW 812; 161La461, 109S31; 4LaA469; 78 Mont551, 254P866; 38 OklACR193; 66 Utah208, 241P309; 146Va64, 135SE683; 147Va395, 137SE471; 148Va1, 138SE 496; 155Wash578, 285P430; Ont [1929] 4DomLR363.

433-89 Cal 292P467; 37GaA288, 139SE 831; 78Mont551, 254P866.

433-90 213Ky603, 281SW533; 170La 638, 128S661; 78Mont551, 254P866; 105 NJL359, 144A601; NJ 146A219; NJ 150 A397; 66Utah208, 241P309.

433-93 210Ky1, 273SW719; 170La638, 128S661.

433-94 220Ky12, 294SW812; 10LaA 492, 120S115.

433-95 CalA 284P1056.

433-96 220Ky12, 294SW812; 58ND761, 227NW550(4thcase).

433-98 146Va64, 135SE683.

433-3 49SD563, 207NW539 [quotCyc perDillon,J].

433-5 92Fla526, 109S452; 36GaA259, 136SE101; 213Ky603, 281SW533; 38 OklACR193; 66Utah208, 241P309; 147 Va395, 137SE471.

434-6 58ND465, 226NW507.

434-8 92Fla526, 109S452; 19 OhA1; 38 OklACR193; 147Va395, 137SE471.

434-9 129 Okl 269, 264P138.

435-16 66Utah208, 241P309.

435-21 216Ala85, 112S418; 36GaA259, 136SE101; 166La111, 116S718; 241Mich 349, 217NW18; 147Va395, 137SE471.

435-22 216Ala85, 112S418.

435-28 92Fla526, 109S452; 247 IllA 161; 161La461, 109S31; 10LaA492, 120 S115; 66Utah208, 241P309; 148Val, 138 SE496. [a] 241Mich349, 217NW18.

435-29 12PaDist&Co 393.

436-47 171Ark350, 284SW42.

437-52½-New. Advice of counsel is no defense unless given on a question of law. MoA 297SW169 (garnishment knowing debt paid).

437-56 218Ky384, 291SW412; 262Mass 427, 160NE255; NJ 129A424 [citCyc]; 216AppDiv634, 215NYS735; 128Misc263, 219NYS295; 220AppDiv212, 221NYS 323; 195NC772, 143SE868; 289Pa272, 137A266.

438-57 110Conn528, 148A330; NJ 129 A424 [citCyc].

438-58 NJ 129A424 [citCyc].

438-61 15F(2d)405; 203Cal 201, 263P 225; Cal 291P411; 35GaA49, 132SE139; 87 IndA53, 158NE596; 250Mich110, 229 NW454; 220MoA251, 284SW167; 216 AppDiv634, 215NYS735; 128Misc263, 219NYS295; 19 OhA239; 35 OhA68, 171 NE608; 147Wash264, 266P162.

439-66 [c] **Record itself must disclose want of notice** in order that defendant in prosecution avail himself of exception. 87 IndA53, 158NE596.

439-67½-New. Victim of malicious institution of lunacy inquisition may sue, although result was commitment. 93 Fla1085, 113S378.

440-86 158La874, 104S747, 750 [quot Cyc]; 216AppDiv634, 215NYS735; 128 Misc263, 219NYS295. [e] **Dismissal of extradition proceeding** upon refusal by governor to issue warrant held basis for action, though not involving guilt or innocence of alleged fugitive under laws of sister state. 246NY249, 158NE510.

441-87 158La874, 104S747, 750 [quot Cyc] (offense had been prescribed by statute); 128Misc263, 219NYS295; 117 Or558, 245P318, 45ALR600 (abandonment). See also 129Kan82, 281P857.

441-88½-New. Inactivity of defendant after plaintiff has been held for the grand jury does not constitute termination of the proceeding. 35GaA213, 132 SE251.

441-88¼-New. Governor's dismissal of extradition proceedings held no basis for action for malicious prosecution. 220 AppDiv212, 221NYS323.

441-88¼-New. Mere release of a prisoner by the deputy sheriff is not such abandonment of prosecution as will enable the prisoner to maintain an action. 164 La1081, 115S277.

442-98 128Misc263, 219NYS295; 223 AppDiv741, 227NYS678; 220AppDiv212, 221NYS323. [a] (1) 220AppDiv212, 221 NYS323.

443-3 128Misc263, 219NYS295, 298 [quotCyc].

443-5½-New. In jurisdictions where the police judge is without authority to dismiss a prosecution, defendant cannot rely on such dismissal as a defense, 220 MoA251, 284SW167.

443-5¼-New. in the absence of any efforts to secure further action in the matter as provided by statute. 220MoA251, 284SW167.

443-6 35GaA213, 132SE251; 128Misc 263, 219NYS295, 298 [quotCyc].

443-12 220AppDiv212, 221NYS323.

444-13 218Ky384, 386, 291SW412 [cit CJ]; 179Minn53, 228NW437; 216 AppDiv634, 215NYS735; 128Misc263, 219NYS295; 220AppDiv212, 221NYS 323. [e] **Discontinuance of temporary injunction by stipulation** after vacation thereof, and denial of permanent order, held not termination by compromise. 216AppDiv634, 215NYS735.

444-16 [a] (1) 262Mass427, 160NE255; Mass 167NE251; Mass 167NE748.

444-17 220MoA251, 284SW167.

445-26 35GaA49, 132SE139; TexCivA 284SW643; TexCivA 296SW635.

445-27 TexCivA 296SW635.

445-28 214Ky272, 283SW96; Oh 15 OhA491 (damages include those that naturally flow from acts).

446-30 217Ala244, 115S176; 214Ky272, 283SW96. [c] (2) Arresting officer's mistreatment is not matter of aggravation unless participated in by defendant. 21AlaA591, 111S200.

446-32 214Ky272, 283SW96, 98 [quot CJ].

446-33 198Cal 15, 247P894, 896 [quot CJ]; 214Ky272, 283SW96, 98 [quotCJ]; 251Mich642, 232NW399; 150Miss854, 117S258. [a] 15 OhA491.

446-34 198Cal 15, 247P894, 896 [quot CJ]; 214Ky272, 283SW96, 98 [quotCJ]; 158La874, 104S747.

446-35 214Ky272, 283SW96, 98 [quot CJ].

446-39 198Cal 15, 247P894, 896 [quot CJ]; 214Ky272, 283SW96, 98 [quotCJ]; 223Ky812, 4SW(2d741; 254Mass599, 150NE874; 251Mich642, 232NW399; 79 Mont226, 255P730.

447-40 198Cal 15, 247P894, 896 [quot CJ]; 207 Iowa137, 222NW436.

447-41 214Ky272, 283SW96, 98 [quot CJ].

447-42 198Cal 15, 247P894, 896 [quot CJ]; 218Ala158, 117S668; 122Kan810, 253P544; 223Ky812, 4SW(2d)741; 254 Mass599, 150NE874; 79Mont226, 255P 730. [b] (1) 214Ala435, 108S250; 251 Mich642, 232NW399. [d] 251Mich642, 232NW399.

447-43 198Cal 15, 247P894, 896 [quot CJ]; 254Mass599, 150NE874.

447-44 198Cal 15, 247P894, 896 [quot CJ]; 214Ky272, 283SW96, 98 [quotCJ]; 254Mass599, 150NE874. [a] 145Wash95, 258P1032, 54ALR448.

447-45 214Ky272, 283SW96, 98 [quot CJ]. But see 165La636, 115S807.

447-46 217Ala120, 115S16; 254Mass 599, 150NE874.

447-47 214Ky272, 283SW96, 98 [quot CJ].

447-48½-New. , deprivation of society of wife and children. Ala 130S213.

447-49 16F(2d)880; 198Cal 15, 247P 894, 896 [quotCJ]; 214Ky272, 283SW 96, 98 [quotCJ]; 254Mass599, 150NE 874. [d] **Measure of damages for malicious institution of bankruptcy proceedings** is not difference between value of business at time of institution of proceedings and amount of indebtedness at time. 125Kan760, 266P73. [e] **Loss of profits.**–129 Or186, 276P1112.

447-50 214Ky272, 283SW96, 98 [quot CJ].

447-51 150Miss854, 117S258. See also 251Mich642, 232NW399.

448-54 150Miss854, 117S258; 30NM 331, 233P520; 24 OhA15, 156NE155; 15 OhA491; Okl 292P1113; 129 Or186, 276P1112.

448-55 But see 30NM331, 233P520. [e] (3) One hundred dollars held proper. CalA 284P1056.

448-57½-New. Counsel fees incurred in prosecution action for malicious prosecution are not allowable. 30NM331, 233P520.

449-61 223Ky812, 4SW(2d)741; 24 OhA15, 156NE155; 150Miss854, 117S 258; 86PaSuper430.

449-63 248 IllA196.

449-64 218Ala158, 117S668; 222MoA 296, 297SW163; TexCivA 16SW(2d)932. But see 321Mo 1202, 14SW(2d)561 (2dcase).

449-65 149Va882, 41SE829.

449-66 AlaA 130S768; Okl 292P1113.

450-71 MoA 297SW169.

450-75 AlaA 130S768. [a] **Matters constituting ratification.**–149Va882, 141 SE829.

450-77 79Mont226, 255P730.

450-78 But see 158La874, 104S747.

450-79 227Ky686, 13SW(2d)1016; 79 Mont226, 255P730; 223Ky812, 4SW(2d) 741.

450-80 214Ky272, 283SW96; 79Mont 226, 255P730.

450-82 223Ky812, 4SW(2d)741, 744 [citCJ]; 79Mont226, 255P730.

450-82½-New. In awarding damages for malicious prosecution properly upon a criminal prosecution, the court may properly consider the punishment which plaintiff would have received had he been found guilty of the charge made against him. 71CalA112, 234P869.

450-83 [p] MoA 297SW169. [q] **$250.**–163La575, 112S491. [r] **$5,800.**–19 OhA1 (reduced to $4,000). [s] **$12,500.**–223Ky 812, 4SW(2d)741. [t] **$1,275.**–247 IllA66. [u] **$1,012.50.**–10LaA492, 120S115. [v] **$26,025.**–111Conn575, 150A692.

451-84 [a] (1) 158La874, 104S747 (plaintiff in jail eight or ten hours; amount awarded by appellate court). [b] 49ND47, 189NW684. [h] CalA 284 P1056. [j] 25 OhA197, 158NE282. [l] 79Mont226, 255P730. [o] 21 OhA486, 153NE223; 214Ky272, 283SW96. [r] 212Ala585, 103S860. [u] 207 Iowa137, 222NW436. [w] 210Ky1, 273SW719. [y] 92CalA35, 267P721; 228Ky658, 15 SW(2d)470; 78Mont551, 254P866; 86 Mont314, 283P427 (exemplary damages where only $100 actual damages); 58 ND761, 227NW550(4thcase). [aa] 92 PaSuper318. [ac] 222MoA296, 297SW 163. [ad] 125Me460, 134A628. [ae] CalA 284P1056 (exemplary damages); 251Mich642, 232NW399; 69Utah123, 252 P677. [ah] 214Ala435, 108S250. [ai] 166La111, 116S718. [an] **$1,836.**–See also 122Kan810, 253P544. [ao] **$1,750.**–227 Ky686, 13SW(2d)1016. [ap] **$906 actual damages and $1,100 punitive damages.** MoA 15SW(2d)868(2dcase). [aq] **$250 actual and $1,000 punitive damages.** MoA 16SW(2d)643. [ar] **$20,000.**–318 Mo 318, 300SW283; 321Mo 1202, 14SW (2d)561(2dcase). [as] **$1,250** actual damages, $500 exemplary and $350 attorneys fees for malicious prosecution for perjury. CalA 289P940. [at] **$1,066.**–232Ky825, 24SW(2d)588.

452-88 216AppDiv634, 215NYS737. [e] **Corporation may sue when injunction compelled school board and all agents and employees to stop work on contract** (1) and corporation was injured, though contractor was not specifically named. 216AppDiv634, 215NYS735. (2) Naming of largest stockholder of such corporation in injunction proceedings held immaterial. 216AppDiv634, 215NYS735. (3) Naming of such corporation as party by stipulation at hearing held sufficient. 216AppDiv634, 215NYS737.

452-92 Sask [1929] 2DomLR201.

452-96 [b] **Exemption from prosecution for defamation** in course of judicial proceeding does not deprive one of redress by action for malicious prosecution. 98Fla538, 123S916(2dcase).

452-97 IndA 170NE614 (one concurring in carrying on original prosecution). [e] **Employment as manager of laundry** does not of itself create implied authority to bring criminal charge against former employee. MoA 15SW(2d)868(2dcase).

453-2 152Tenn691, 280SW403.

453-4 36F(2d)460; 232Mich169, 205 NW138 (presumption that person in charge of office of defendant, at place where he instituted prosecution, was acting within his authority); 251Mich 642, 232NW399; 12PaDist&Co 390; 152 Tenn691, 280SW403; 146Va64, 135SE 683.

453-5 152Tenn691, 280SW403.

453-6 12PaDist&Co 390. [a] (2) Duty of superintendence or fact of agency does not carry duty to arrest or prosecute. 12PaDist&Co 390.

453-7 166La111, 116S718; ND 229NW 368.

453-8 219Ala33, 121S42; 23AlaA485, 127S263(2dcase).

454-13 220Ala227, 124S512 (showing corporate act held unnecessary); 218Ky 412, 291SW405; 232Mich169, 205NW 138; NJSup 140A8.

454-16 See also 251Mich642, 232NW 399.

454-18 AlaA 130S768; 247 IllA161; 218Ky412, 291SW405. [a] (4) Not within scope of authority of state agent of insurance company, having power to appoint and supervise company's agents and collect premiums, to institute criminal proceedings binding on company. 152Tenn691, 280SW403. (5) Other instances. Ida 286P616.

455-19 247 IllA161. [b] **Where agents pointed out offenders** and testified at trial, it is not proof that company instigated prosecution. 212Ky259, 278SW 552.

455-20 NJ 150A397.

455-22 116 Oh408, 156NE502.

455-24½-New. Whether or not defendant, hiring a public officer, is liable depends on whether the officer acted within public duties when causing arrest, or outside of office and under authority of

his employer. 116 Oh408, 156NE502.
455-25 12PaDist&Co 390.
455-29 121Kan777, 250P303; 316Mo 384, 289SW332 (institution of bankruptcy proceedings). [b] (1) 121Kan 777, 782, 250P303 [quotCyc]; 316Mo 384, 289SW332. (2) 121Kan777, 250P 303.
456-37 121Kan777, 250P303.
456-38 121Kan777, 250P303.
456-42 [a] 56ND227, 216NW898, 56 ALR1217.
456-44½-New. Special assistant to attorney general of United States authorized and directed as part of his official duties to find indictment for alleged conspiracy against plaintiff is immune from civil suit for malicious prosecution. 8 F(2d)161.
457-53 105Conn177, 134A810.
457-55 117 Or558, 245P318, 45ALR600.
457-56 [a] Advising another to prosecute.-158La874 104S747. [b] Parties participating after commencement of proceedings.-108Conn40, 142A391.
457-57 117 Or558, 245P318, 45ALR600.
457-59 108Conn40, 142A391; 117 Or 558, 245P318, 45ALR600.
458-71 8F(2d)352.
458-73 35GaA213, 132SE251.
459-77 [a] (2) False testimony under subpoena. CalA 284P1056.
459-81 [b] Privilege.-100CalA61, 279 P668.
459-89 147Va263, 137SE465.
459-91 247Mich141, 225NW625; 24 OhA15, 156NE155.
460-95 254Mass202, 150NE166. [e] Declaration held demurrable.-254Mass 198, 150NE164. [f] Complaint alleging malicious prosecution of injunction against corporation to its damage held not to allege cause of action for owner of ninety-eight per cent of its stock. 216 AppDiv634, 215NYS735. [g] Declaration held insufficient to show that conviction in original proceeding was caused by wrongful conduct of defendant. 254 Mass202, 150NE166. [h] Held not to state cause of action.-132Misc643, 229 NYS778.
460-97 IndA 156NE182.
460-99 196NC71, 144SE530(1stcase); 124 Or547, 265P428. [a] AlaA 130S768; IndA 156NE182; 316Mo 384, 289SW 332; 321Mo 1202, 14SW(2d)561(2dcase). [b] (1) 219Ala33, 121S42; 93Fla 1085, 113S378; 41GaA709, 154SE654; Mass 167NE251; 125 Or269, 265P1117; 12PortoRicoFed9. (3) 196NC71, 144SE 530(1stcase). (6) 254Mass198, 150NE 164. (8) Counterclaim not alleging interference with person or property by injunction. 236NYS18.
460-4 [d] Declaration held to show single prosecution.-254Mass198, 150NE164.
461-10 [a] (3) Other averments held sufficient. Utah 273P298.
462-16 90PaSuper305.
462-25 93Fla1085, 113S378; 220 AppDiv212, 221NYS323. [a] (3) Other instances. 86Mont314, 283P427. [c] (3) 40GaA848, 151SE692. [d] (5) Complaint alleging institution of prosecution by cashier of defendant bank held sufficient. 218Ky412, 291SW405.
463-32 216Ky251, 287SW719; 164La 1108, 115S287; 216AppDiv634, 215NYS 737; 220AppDiv212, 221NYS323; 55 ND628, 215NW78. [a] 216Ky251, 287 SW719.
464-33 93Fla1085, 113S378; 239 IllA 392; 55ND628, 215NW78; TexCivA 3 SW(2d)941.
464-39 [b] That complaint discloses that plaintiff waived preliminary hearing does not justify judgment on pleadings. 221MoA858, 287SW842.
464-40 55ND628, 215NW78.
464-41 55ND628, 215NW78. See also 218Ala158, 117S668.
465-42 232Ky825, 24SW(2d)588; 254 Mass198, 150NE164. [a] 128Misc263, 219NYS295. [b] (1) 55ND628, 215NW 78. (21) 216Ky251, 287SW719; 254 Mass198, 150NE164; 254Mass202, 150 NE166.
465-44 212Ky259, 276SW552; 55ND 628, 215NW78, 80 [citCJ].
465-45 212Ky259, 278SW552; 55ND 628, 215NW78.
466-47 21AlaA591, 111S200; 216App Div634, 215NYS737; 220AppDiv212, 221 NYS323.
466-48 124 Or547, 265P428 (allegations held sufficient on demurrer); TexCivA 3SW(2d)941.
467-57 35GaA49, 132SE139; 216App Div634, 215NYS737; 220AppDiv212, 221 NYS323; 289Pa272, 137A266, 267 [cit CJ]. [a] (1) 128Misc263, 219NYS295. [c] TexCivA 28SW(2d)274.
467-59 239 IllA392.
467-60 35GaA49, 132SE139; 35GaA 421, 133SE304; 87 IndA53, 158NE596; 220AppDiv212, 221NYS323; TexCivA 28SW(2d)274. [a] (3) 164La1081, 115 S277 (acquittal or abandonment of prosecution in manner required by law). [d] (5) Mere allegation of discharge without showing at least in general terms that prosecution had been terminated does not meet requirements of rule. 35GaA49, 132SE139.
468-64 259Mass238, 156NE55.
469-68½-New. But it is not sufficient merely to allege want of notice. 87 IndA53, 158NE596.
469-68½-New. It must be alleged further that such facts are shown by the record. 87 IndA53, 158NE596.
469-81 204Cal 386, 268P643; 216App Div634, 215NYS737. [a] (3) General allegations of loss of credit sufficient in absence of motion to make more definite and certain. 129 Or186, 276P1112. [b] 164La1108, 115S287 (averment of facts necessary showing proximate cause).
469-83 92CalA35, 267P721.
470-85 [g] Statutory form.-214Ala435, 108S250.
472-12 15 OhA276.
474-72 122Kan810, 253P544. [c] 125 Kan760, 266P73.
475-84 93CalA745, 270P374; 92Fla 278, 109S623; 121Kan777, 250P303.
476-89 147Va395, 137SE471.
476-91 IndA 156NE182.
476-91½-New. In an action against an attorney, where his client acted with malice and without probable cause, it is still necessary as against the attorney to show that he knew of his client's evil intent and that the claim made was groundless. 121Kan777, 250P303.
476-92 76Mont105, 245P523; 146Va 574, 131SE841.
476-94 24F(2d)676; 215Ala368, 110S 700; Cal 292P467; 70CalA381, 233P 346; 87CalA418, 262P431(2dcase); Ida 286P616; 247 IllA66; 200 Iowa176, 204 NW416; 121Kan777, 250P303; 170La 392, 127S879; 262Mass427, 160NE255; 170Minn266, 212NW456; 316Mo 384, 289SW332; 322Mo 746, 18SW(2d)500; 79Mont226, 255P730; 83Mont252, 272 P245; NM 290P319; 222AppDiv350, 225NYS722; 58ND465, 226NW507; 12 PaDist&Co 393; 54SD519, 223NW819; 146Va574, 131SE841; 147Va395, 137SE 471; 149Va882, 141SE829; PrEdwIsl [1926] 3DomLR480.
477-97 86PaSuper430. [a] When plaintiff proves prosecution, termination and identity of prosecutor burden is shifted to defendant to show probable cause. 170La552, 128S513.
477-2 152Md553, 137A339.
477-4 12PaDist&Co 393.
478-10½-New. Burden of proving pendency of appeal from judgment complained of in a suit for malicious prosecution is on defendant. 16F(2d)880.
478-16 24F(2d)676; 215Ala368, 110S 700; Cal 292P467; 70CalA381, 233P 346; 87CalA418, 262P431(2dcase); Ida 286P616; 121Kan777, 250P303; 122 Kan810, 811, 253P544 [citCJ]; 170La 392, 127S879; 316Mo 384, 289SW332; 83Mont252, 272P245; 147Va395, 137SE 471; 149Va882, 141SE829; Man [1927] 3DomLR374. [a] Malice or willfulness cannot be inferred from mere mistake. 266Mass189, 165NE26. [b] Malice may be proved by direct evidence or inferred from circumstances. CalA 289P940.
479-17 122Kan810, 253P544.
479-18 205Cal402, 271P198, 62ALR 235.
479-23 CalA 289P940; 92Fla278, 109 S623, 626 [citCJ]; 40GaA801, 151SE 535(1stcase); 121Kan777, 250P303; 10 LaA492, 120S115; 316Mo 384, 289SW 332; 83Mont252, 272P245; 58ND465, 226NW507.
479-23½-New. Defendant has the burden of overcoming the inference of want of probable cause and malice. NJ 146 A54.
480-30 147Va395, 137SE471.
480-31 215Ala368, 110S700; 87 IndA 53, 158NE596; 147Va395, 137SE471.
480-32 TexCivA 28SW(2d)274.
481-47 [f] Protection of property.-70 CalA381, 233P346.
481-48½-New. Dismissal or acquittal makes prima facie case of want of probable cause. 19 OhA1.
481-48½-New. Proof of discharge, after hearing of witnesses, makes prima facie case of want of probable cause. 19 OhA239.
481-48¼-New. Court may assume attorney's advice on which defendant acted was honestly given. 170La552, 128 S513.
481-50 217Ala244, 115S176.
481-53 CalA 284P1056.
481-54 79CalA190, 249P39.
482-56 Minn 231NW615; MoA 158W (2d)868(2dcase) (acts of agent); NJSup 146A589.
482-59 149Va882, 141SE829. [a] (3) Acquittal of defendant in trespass suit following which he accused plaintiff of perjury held irrelevant in action for malicious prosecution for perjury in trespass suit. 21AlaA591, 111S200. (4) Evidence in suit for malicious prosecution for falsely swearing in trespass case that plaintiff forbade defendant to take possession of certain mule that defendant had mortgage on held irrelevant. 21AlaA591, 111S200. [d] All surrounding circumstances are relevant. 21AlaA591, 111S200. [e] Evidence held admissible.-251Mich642, 232 NW399.
482-60 Ala 130S213.
482-61 214Ky272, 283SW96 (rebuttal).
482-64 247 IllA66; 129Kan627, 284P 438; 254Mass441, 150NE184; 321Mo 1202, 148SW(2d)561(2dcase); NJSup 140 A8; 143Va71, 129SE244 (dictum). See also 122 Or24, 256P770. [c] Evidence held admissible.-254Mass441, 150NE 184.
483-69 79Mont226, 255P730, 731 [cit CJ].
483-71 22AlaA438, 116S509.
484-80 216Ala85, 112S418.
484-91 217Ala399, 116S420.
484-93 [a] Indorsement of warrant is properly identified where affidavit and warrant are identified. Ala 130S213.
484-94 214Ala435, 108S250.
484-97 214Ala435, 108S250.
485-98 318Mo 318, 300SW283.
485-98½-New. , also that he did not initiate the proceedings. 94PaSuper110.
485-99½-New. The exclusion of evidence that the cashier of defendant rural bank had no specific authority to institute a prosecution was not error, since he had implied authority. 218Ky 412, 291SW405.
485-99½-New. The cashier could testify that he acted in his individual capacity, not as agent or servant of the bank. 218Ky412, 291SW405.
485-1 215Ala368, 110S700; Ala 127S 188; 79CalA190, 249P39; 240NY137, 147NE613; TexCivA 27SW(2d)263. [j] (2) It is relevant also to question of malice and resulting injury to plaintiff. 215Ala368, 110S700.
485-2 [a] (2) What occurred after case against plaintiff was disposed of showing some one else committed crime has been held inadmissible. Ala 127S188.
485-3 240NY137, 147NE613.
486-4 105Conn177, 134A810.
486-5 CalA 284P1056; TexCivA 16SW (2d)932. [a] (4) Advice concerning civil or equitable rights can have no bearing on criminal prosecution of plaintiff and evidence of such advice is properly excluded. 71CalA112, 234P869.
486-11 CalA 284P1056.
487-16 146Va574, 131SE841.
487-19 128Misc263, 219NYS295.
488-29½-New. Refusal to admit the opinion of the appellate court reversing judgment on appeal of a former damage suit is not erroneous. 320Mo 980, 8SW(2d)961.
488-29½-New. Evidence is admissible to show the manner in which a verdict of acquittal was brought about in order to rebut the presumption of want of probable cause. 94PaSuper110.

489-50 121 Or492, 256P197; 147Va263, 137SE465.
489-51 121 Or492, 256P197.
489-53 218Ky412, 291SW405.
489-55 Iowa 229NW177; 121 Or492, 256P197; 122 Or24, 256P770. But see Ala 130S213. [c] As part of such testimony plaintiff could show that his previous reputation was such as to render it unlikely that he would commit crime of nature charged. 122 Or24, 256 P770.
489-58 254Mass441, 150NE184. [a] Testimony held admissible.–254Mass441, 150NE184.
489-60 Cal 292P467; 105Conn177, 134 A810; 245 IllA607; 19 OhA1; TexCivA 284SW643.
489-61 76Mont105, 245P523.
490-64½-New. In an action based on prosecution for perjury in a previous suit, a voluntary statement of the court to counsel or other third person of his impressions of truthfulness of the testimony cannot be admitted under defense of advice of counsel. 19 OhA1.
490-68½-New. [§ 177a] 9½. Advice of Layman. Evidence of advice of layman as to probable cause is not admissible. 146Va574, 131SE841.
490-69 Ala 130S213.
490-71 [c] Malice of agent inadmissible to show malice in defendant when not participated in by defendant. 219 Ala33, 121S42.
490-74 Ala 130S213; CalA 284P1056; 49ND47, 189NW684.
490-76 49ND47, 189NW684.
491-86 Ala 130S213; 316Mo 384, 289 SW332.
492-88 49ND47, 189NW684, 686 [quot Cyc].
492-89 CalA 284P1056; 49ND47, 189 NW684, 686 [quotCyc].
492-90 CalA 284P1056; Iowa 227NW 580; MoA 15SW(2d)868(2dcase) (threats by agent); 49ND47, 189NW 684, 686 [quotCyc].
492-94 CalA 284P1056; TexCivA 16 SW(2d)932. [a] (4) Zeal and activity in pushing prosecution are admissible to show malice. 102WVa8, 135SE225, 227, 49ALR261 [citCJ].
492-95 CalA 284P1056; 78Mont551, 254P866, 867 [citCJ].
493-98 TexCivA 16SW(2d)932.
493-1 [a] (12) Falsity of positive, derogatory, and unnecessary statement in criminal complaint. 79Mont226, 255P 730. [c] See also 193NC583, 137SE724. [f] Withdrawal of appeal from judgment dismissing criminal action and payment of costs by prosecutor, where court finds prosecution frivolous and malicious, is competent. 193NC583, 137SE724.
493-3 TexCivA 27SW(2d)263. But see 129Kan627, 284P438.
494-5 19 OhA1.
494-6 217Ala120, 115S16 (inadmissible where substance of discussion not shown); 102WVa8, 135SE225, 227, 49 ALR261 [citCJ].
494-7 76Mont105, 245P523.
494-10 146Va574, 131SE841.
494-11 [c] Where the record is ambiguous, oral testimony is admissible to show the termination of the action in plaintiff's favor. 15 OhA276.
495-13 193NC583, 137SE724.
495-25 214Ala435, 108S250.
495-29 217Ala244, 115S176 (refusal of officer to take off handcuffs in dining room); 214Ky272, 283SW96; 129 Or 186, 276P1112. [e] 214Ala435, 108S 250. [g] (1) 214Ala435, 108S250. (4) Presence of family at time of arrest may be shown. Iowa 229NW177. [j] Mental suffering.–214Ky272, 283SW 96. [k] Evidence of conduct of officer in arresting plaintiff is not objectionable where his acts were not shown to be in excess of his authority. 220MoA 251, 284SW167. [l] Loss of profits.–129 Or186, 276P1112.
495-30 228Ky658, 15SW(2d)470.
496-35 229AppDiv217, 241NYS605; 53 SD392, 220NW860.
496-36 22AlaA438, 116S509.
497-56 92Fla278, 109S623, 626 [citCJ]; 320Mo 980, 8SW(2d)961; 146Va574, 131 SE841. See also 218Ky384, 291SW412. [a] (1) 146Va574, 131SE841. [b] Evidence held insufficient to prove want of consent of accused to dismissal of proceeding. 262Mass427, 160NE255.
497-57 54SD596, 223NW819.
497-59 129Kan627, 284P438; MoA 16 SW(2d)643; 214AppDiv259, 212NYS189 (on question of corporation's liability for acts of cashier).
497-60 91CalA440, 267P158; 108Conn 40, 142A391; 247 IllA66; 247 IllA161; IndA 170NE614; 166La111, 116S718; 170 La392, 127S879; 173Minn595, 218NW 562; 175Minn184, 220NW604; 78Mont 551, 254P866; 30NM331, 233P520; 191 NC419, 132SE5; 89PaSuper383; TexCivA 286SW894; 146Va64, 135SE683; 145 Wash455, 260P995; 199Wis290, 226NW 285; BC [1930] 1DomLR1001.
497-61 IndA 156NE182; 212Ky259, 278SW552; 146Va822, 132SE683.
497-64 166La111, 116S718.
497-66 147Wash264, 266P162.
497-67½-New. Facts may be established by circumstantial evidence. 222MoA 296, 297SW163.
497-68 128Misc263, 219NYS295.
497-69 212Ky259, 278SW552; TexCivA 15SW(2d)678; 148Va1, 138SE496.
498-71 322Mo 746, 18SW(2d)500.
498-72 MoA 15SW(2d)868(2dcase); 152Tenn691, 280SW403; TexCivA 32 SW(2d)379; TexCivA 32SW(2d)379; 66Utah208, 241P309.
498-73 212Ky259, 278SW552; MoA 15 SW(2d)868(2dcase).
498-74 212Ala561, 103S651; 22AlaA 448, 116S915; 93CalA745, 270P374; 107 Conn294, 140A483; 40GaA801, 151SE 535(1stcase); 218Ky384, 291SW412; 166La52, 116S591; 170La552, 128S513; 152Md553, 137A339; 262Mass427, 160 NE255; 246Mich347, 224NW345; 170 Minn266, 212NW456; 249NY296, 164 NE104; 88PaSuper404; TexCivA 15SW (2d)678; TexCivA 32SW(2d)379; 147 Va395, 137SE471; 148Va1, 138SE496. [f] Submission to reputable attorney of all facts is sufficient to show probable cause. 218Ky384, 291SW412.
499-75 71CalA112, 234P869; 35GaA221, 132SE414; 179Minn53, 228NW437; 149 Va882, 141SE829; Can [1928] 3DomLR 494. See also Cal 292P467.
499-76 236Mich214, 210NW326; 214 AppDiv259, 212NYS189; 69Utah123, 252 P677.
499-77 54SD596, 223NW819.
499-78 CalA 284P1056; CalA 289P940; 163La575, 112S491; 170La638, 128S 661; 322Mo 746, 18SW(2d)500; MoA 15SW(2d)868(2dcase); 76Mont105, 245 P523; 78Mont551, 254P866; 79Mont 226, 255P730; NJ 150A397; 58ND761, 227NW550(4thcase).
500-79 110Conn528, 148A330; 316Mo 384, 289SW332; 322Mo 746, 18SW(2d) 500.
500-80 212Ala585, 103S860 (proof that plaintiff lied in accounting for possession of goods is not conclusive evidence of larceny); 220Ala227, 124S512; 322Mo 746, 18SW(2d)500; 222AppDiv 350, 225NYS722.
500-81 320Mo 980, 8SW(2d)961; 222 AppDiv350, 225NYS722; 155Wash578, 285P430.
500-81½-New. Slight evidence is sufficient to prove want of probable cause since it involves proof of a negative. 76Mont105, 245P523.
500-82 CalA 284P1056; CalA 289P940; 122Kan810, 253P544; 128Kan354, 278P 19; 10LaA492, 120S115; 170La638, 128 S661; 322Mo 746, 18SW(2d)500; 79 Mont226, 255P730; NJ 146A54; TexCivA 15SW(2d)678; Can [1928] 3DomLR494.
500-83 70CalA381, 233P346; Ida 286 P616; 121Kan777, 250P303.
500-84 220Ala227, 124S512; 222App Div350, 225NYS722.
500-86 168La331, 122S56.
500-87 70CalA381, 233P346; 210Ky 674, 276SW567; 163La180, 111S669.
500-88 Cal 292P467; 25 OhA197, 158 NE282.
500-89 [a] 37GaA288, 139SE831.
500-90 70CalA381, 233P346; 121Kan 777, 250P303; 86Mont579, 284P545. [a] Bad faith held shown.–170La638, 128 S661.
500-92 259Mass238, 156NE55.
501-93 128Misc263, 219NYS295.
501-95 129 Or186, 276P1112.
501-96 79Mont226, 255P730.
501-3 [i] In Ontario.–[1929] 4DomLR 363.
501-8 128Misc263, 219NYS295.
501-8 78Mont551, 254P866; 247NY137, 147NE613; 146Va574, 131SE841.
501-9 NJSup 140A8; 146Va574, 131SE 841.
501-10 322Mo 746, 18SW(2d)500; 78 Mont551, 254P866; 146Va574, 131SE 841.
501-11 322Mo 746, 18SW(2d)500.
501-12 92Fla526, 109S452; 35GaA221, 132SE414.
501-13 155Wash578, 285P430.
501-14 217Ala274, 116S156; 218Ky 412, 291SW405; 175Minn184, 220NW 604; 321Mo 1202, 14SW(2d)561(2d case); 322Mo 746, 18SW(2d)500; NJ Sup 132A501. [a] (3) Whether policeman, appointed on railroad's application, acted as state official in making arrest, or outside office and under railroad's authority, is question for jury. 116 Oh408, 156NE502.
501-15 318Mo 318, 300SW283.
501-16 247 IllA161; 116 Oh408, 156NE 502.
502-17 22AlaA448, 116S915; 91CalA 440, 267P158; 152Md553, 137A339; 146 Va574, 131SE841. See also Ont [1928] 4DomLR932.
502-18 24F(2d)676; 70CalA381, 233P 346; 94Fla165, 115S505; 241Mich349, 217NW18; 170Minn266, 212NW456; 322Mo 746, 18SW(2d)500; 122 Or24, 256 P770; 146Va574, 131SE841; 102WVa 8, 135SE225, 49ALR261.
502-19 24F(2d)676; 219Ala225, 121S 526; 21AlaA591, 111S200; 70CalA381, 233P346; 247 IllA161; Iowa 229NW 177; 223Ky812, 4SW(2d)741 (evidence sufficient to submit issue); 228Ky658, 15SW(2d)470; 232Ky825, 24SW(2d) 588; 125Me460, 134A628; 247Mich248, 225NW636; 170Minn266, 212NW456; 318Mo 318, 300SW283; 221MoA858, 287 SW842; 78Mont551, 254P866; 79Mont 226, 255P730; NJ 146A219; 240NY137, 147NE613; 49ND47, 189NW684; 122 Or24, 256P770; 89PaSuper383; 66Utah 208, 241P309; 146Va574, 131SE841; 146Va64, 135SE683; 147Va263, 137SE 465; 154Wash642, 282P925.
503-20 24F(2d)676; 212Ala561, 103S 651; 70CalA381, 233P346; 121Kan777, 250P303; 126Kan291, 267P998; 233 Mich452, 206NW982; 170Minn266, 212 NW456; 83Mont252, 272P245; 122 Or 24, 256P770; 89PaSuper383; 12PaDist &Co 393; 54SD596, 223NW819; PrEdw Isl [1926] 3DomLR480.
504-21 CalA 289P940; 76Mont105, 245 P523.
504-25 171Ark350, 284SW42; 35GaA 221, 132SE414; 218Ky384, 291SW412; 227Ky686, 13SW(2d)1016; 152Md553, 137A339; 262Mass427, 160NE255; 251 Mich642, 232NW399; 154Miss406, 122 S531(2dcase); 316Mo 384, 289SW332; 222MoA296, 297SW163; 83Mont252, 272 P245; NM 290P319; 214AppDiv259, 212 NYS189; 39 OklACR334; 122 Or24, 256 P770; 88PaSuper404; 8PaDist&Co 185; 10PaDist&Co 429; TexCivA 292SW944; 69Utah123, 252P677; 146Va574, 131SE 841; 148Va1, 138SE496; BC [1929] 4 DomLR751. [a] 8PaDist&Co 185.
505-26 154Miss406, 122S531(2dcase).
505-27 87CalA418, 262P431(2dcase).
505-29 92PaSuper318.
505-31 35GaA525, 133SE880 (knowledge of defendant that prosecuting witness, whom he procured to swear out warrant, knew nothing of crime charged requires submission to jury); 236Mich 214, 210NW326; 122 Or24, 256P770; 88PaSuper404.
505-32 16F(2d)880; 212Ala585, 103S 860; 94Fla1165, 115S505; 36GaA259, 136SE101; 125Kan760, 266P73; 126 Kan291, 267P998; 127Kan125, 272P 162; 218Ky384, 291SW412; 152Md553, 137A339; 236Mich214, 210NW326; 251 Mich642, 232NW399; 322Mo 746, 18SW (2d)500; 222MoA296, 297SW163; 78 Mont551, 254P866; 105NJL359, 144A 601; NJ 146A219; NJ 150A397; 122 Or24, 256P770; 86PaSuper430; 88Pa Super404; 54SD596, 223NW819; 146 Va574, 131SE841; 155Wash147, 283P 691; BC [1929] 4DomLR751. [a] 127 Kan125, 272P162; 146Va574, 131SE 841. [b] That isolated undisputed facts, standing alone, present question

[illegible]

[illegible] 121P528; 223Ky [illegible]

[illegible] MoA 277 [illegible] 142Wash [illegible]

[illegible] Where evidence failed to connect defendant with prosecution.—212Ky144, 224SW551; 212Ky253, 273 SW332

544-47 212Ala541, 142So451; 219Ala32, [illegible]

544-71 242 Iowa1, 221NW226

544-72 (b) Charging there is probable cause as matter of law held error, where plaintiff took property openly under claim of title, with advice of counsel and after consulting with police authorities. 215Appliv242, 212NW452.

544-77 [illegible] 12Kan177, 236P[illegible]

544-82 [illegible]

544-83 [illegible]

544-92 Ala 129So192.

544-93 [illegible] 12Kan627, [illegible] 212Ky 412, 291SW555; 8D 223NW288; 148 So[illegible]

544-94 202 Iowa127, [illegible] 24 [illegible]

544-95 [illegible]

512-4 15 OhA229; 45ND542, 207NW [illegible]

512-5 [illegible] 74Mont 251, 239P[illegible].

512-10 150Va122, 142SE[illegible]

512-12 24P(2d)474

512-16 [illegible] 247 IIIA [illegible]

512-17 [illegible]

512-19 164Ala321, 222P246; MoA 15 [illegible] 11Ga [illegible]

512-22 72Mont351, 234P246.

512-24 24P(2d)474; 122 Or24, 256P [illegible]

512-27½-New. Charge on presumption of unlawful act of railroad policeman causing arrest and proof necessary to overcome presumption entitling recovery by plaintiff held proper. 116Ohio492, 156NE [illegible]

512-27½-New. An instruction requiring that agent causing arrest of plaintiff was acting on the business of defendant has been held sufficient. MoA 13SW(2d)283(2case).

512-27¼-New. Charge that if agent [illegible] manager of defendant's business and defendant owned stolen property defendant would be liable is erroneous. 8D 223NW288.

512-29 [illegible] 112Ark12; 24 OhA 509, 158NE[illegible]; (b) 214Ala425, 108 So 250; Iowa 223NW177. 121Or492, 256 P127; 146Va64, 135SE682. (c) (1) 82 Kan252, 272P245. (3) 221MoA358, 237 SW342. (5) Instructions held erroneous.—Iowa 227NW320 (placing burden on defendant in conflict with other instruction).

512-32 [illegible] 122 Or [illegible]

512-40 [illegible] 146Va[illegible] 121Ark251, 245 (quoted PerMcLemore, J). See also MoA 13SW(2d)283(2case).

514-44 224Appliv255, 230NY761; 15 OhA431.

514-45 [illegible]

514-47 [illegible]

514-50 8Ala 125A670.

514-55½-New. It is the duty of the defendant, and not of the court, to compile the facts and circumstances claimed to constitute probable cause and to present such compilation to the court in the form of a request to charge. 241 Mich249, 217NW[illegible].

515-53 (a) (1) 146Va64, 135SE682. (b) (1) 8D 266NW328.

515-54 (a) Instruction held erroneous.—15 OhA432, 171NE862.

515-57 25 OhA197, 158NE232.

515-61 [illegible]

515-62 [illegible] 22Mont314, [illegible] "malice in fact" and "malice in law"). (a) Contra—MoA 277NW669. (d) Definition sufficient without defining "wilfully." MoA 13SW(2d)282(2cases).

515-65 24P(2d)476; 76CalA231, 232P 244 (instruction correct). (a) Instructions held not erroneous.—218Mo 218, 300 SW222.

515-66 (b) 15 OhA276.

515-67½-New. An instruction in an action based on the institution of a criminal prosecution is not erroneous because it requires a finding that defendant acted maliciously where there is no evidence tending to show defendant's motive. 76CalA231, 232P245.

515-67½-New. An instruction placing the burden on defendant to show want of malice in conflict with another instruction, placing the burden on plaintiff to prove the elements of the case is erroneous. Iowa 227NW580.

515-69 [illegible] TexCivA [illegible]

516-71 24P(2d)476.

516-77 MoA 277NW669 (erroneous instruction).

516-81 TexCivA 28SW(2d)341. (a) (1) 146Va64, 135SE682.

516-82 Iowa 223NW177; 221MoA252, 237SW242.

516-84 150Mass254, 117N238; 221MoA 252 237SW242.

517-85 [illegible]

517-87 217Ala120, 115N16. (a) 86 [illegible]

517-90½-New. A requested instruction that under no circumstances can the jury allow plaintiff anything on account of the alleged condition of the jail in which he was confined, as shown by the evidence is properly refused. 221Mo 1262, 14SW(2d)561(2cases).

517-1 (b) Conformity to theory on which case was tried.—125Kan760, 266 P72.

517-5 125Kan760, 266P72 (special answers held not to show reliance on advice of counsel). (f) Verdict assessing punitive damages against one defendant alone held proper. 25 OhA197, 158NE 232, 237. (g) Answers to special questions held not inconsistent.—125Kan627, [illegible]

517-7½-New. Damages may not be divided into two or more causes of action and different sums found for each. TexCivA 28SW612.

517-7½-New. Judgment is properly entered for defendant upon his demurrer and affidavit of defense, which show with admission in complaint that judgment in civil action in defendant's favor remains in force unappealed from and unreversed. 23PaSuper512.

518-21½-New. $1,000 damages held excessive, and reduced to $500. 161La 461, 109So21.

518-27 [illegible] 247 IIIA 66, 218Mo 212, 266SW282.

518-32 (a) Verdict held not excessive. 17PaSuper292.

518-32 [illegible] Iowa237 202NW497; 238 Mich214, 210NW326.

MALPRACTICE

519-19 92Fla5, 1128289, 293 [citCJ]; 140SC48, 138SE527, 529 [quotCJ]. (a) [illegible]

519-20 92Fla5, 1128289, 293 [citCJ]; [illegible]

519-21 140SC48, 138SE527, 529 [quot [illegible]

519-22 92Fla5, 1128289, 293 [citCJ]; 140SC48, 138SE527, 529 [quotCJ].

519-23 92Fla5, 1128289, 293 [citCJ].

519-26 92Fla5, 1128289, 293 [citCJ].

520-27 [illegible]

520-28 [illegible]

520-29 92Fla5, 1128289, 293 [citCJ].

520-30 92Fla5, 1128289, 293 [citCJ]; 140SC48, 138SE527, 529 [quotCJ].

MALUM

520-46 122 Or444, 259P893.

MANAGE

522-5 (a) 251Mich556, 232NW256.

522-12 131 Okl 282, 268P1100, 1102 [quotCJ].

522-23 [illegible] Iowa1242 212NW24, 27 [illegible].

MANAGEMENT

524-43 135Kan655, 261P[illegible].

524-57 136Kan650, 287P708.

524-63 135Kan656, 261P[illegible].

MANAGER

527-79 190NC406, 130SE32.

526-80 190NC406, 130SE32.

525-60½-New. Implies the exercise of judgment and skill. 190NC406, 130SE 32.

MANDAMUS

541-1 26P(2d)444.

541-6 26P(2d)444.

541-7 26P(2d)444.

541-9 26P(2d)444.

541-10 26P(2d)444; 59WVa472, 129 SE[illegible].

541-11 (a) (1) 121Kan14, 246P178 (statutory definition); 221MoA253 252 SW82; 115 Ohio55, 152NE646; 23 OhA [illegible], 155NE[illegible]. (16) Writ issues where duty sought to be enforced is precise definite act, with relation to which respondent has no discretion, and when right of applicant is clear and he is without adequate remedy. 103Conn607, 132A30. (17) Summary writ commanding officer to perform duty, which relator is entitled to have performed. 326 Ill 142, 157NE185.

542-20 81CalA427, 254P606.

542-27 23 OhA150, 154NE140.

542-30 121 Ohio519, 159NE561.

542-32 [illegible]

542-34 [illegible]

542-36 143Miss290, 108So[illegible].

543-33 221 Ill 510, 152NE557, 46ALR 960; 245Mich537, 222NW705; 123 Or 226, 262P220.

543-39 116Nebr373, 217NW607, 610 [citCJ].

543-40 216Ala422, 113So209; MoA 26 SW(2d)1011; TexCivA 275SW262, 269 [illegible]; 199Wis523, 227NW[illegible].

543-43 TexCivA 275SW268, 269 [illegible]

543-44 (b) Mandamus is authorized by statute in certain instances. 165Ark592, 265SW604.

544-45 165Ark592, 265SW604; 312 Ill 356, 143NE[illegible]; 326 Ill 382, 159NE755; 74Mont42, 242P421. Nebr 225NW118. [illegible] Ohio5, 152NE646; 247 [citCJ]; OhA 17NE449; 43 OklAC[illegible]. 538D471, 22NW24; 101Vt332, 143A302. See also 155La519, 118So[illegible].

544-46 81CalA427, 254P606; 202 Iowa 444 202NW920. 172Minn424, 227NW 455. MoA 178W(2d)572. (b) Writ of mandamus is legal or equitable proceedings [illegible] Tex91, 118W(2d)436.

544-47 14P(2d)503. Ark 218W(2d) 427. 81CalA427, 254P606. 326 Ill 142, 157NE185. 237 Ill 62, 152NE424; 198 Ind651, 154NE492; 253Mass590, 149NE 622. 147Miss99, 112So154. 74Mont428, 241P246. 122 Okl 4, 250P81; 139 Okl

204, 281P803; 43 OklACR131; 119 Or 44, 247P155; 52SD572, 219NW258. See also 221AppDiv506, 224NYS684 (a "drastic remedy").

545-51 28Hawaii68; 78Mont435, 254P 414.

545-60 [a] **Alternative writ held proper.-NJSup** 150A669(1stcase); **NJSup** 150A680; **NJSup** 150A773.

545-67 121Kan14, 246P178, 179 [quot CJ]; **OhA** 173NE449.

545-68 121Kan14, 246P178, 179 [quot CJ].

545-69 121Kan14, 246P178, 179 [quot CJ].

545-70 121Kan14, 246P178.

546-71 121Kan14, 246P178.

546-72 236 IllA281; **OhA** 173NE449.

546-76 See also 34Wyo 288, 243P123, 126 [citCJ].

547-85 20F(2d)793; 214Ala620, 108S 588; 170Ark298, 280SW389; 179Ark 772, 18SW(2d)334; 81CalA427, 254P 606; 84Colo 240, 269P15; Colo 291P 1024; 240 IllA208; 216Ky521, 287SW 981; 253Mass590, 149NE622; 256Mass 584, 152NE743; 257Mass91, 153NE322; 260Mass476, 157NE529; 232Mich384, 205NW88; 173Minn350, 217NW371, 372 [citCJ]; 146Miss870, 112S386; 78Mont 435, 254P414; 119 Or44, 247P155; 132 Or561, 286P590.

547-86 214Ala620, 108S588; 170Ark 298, 280SW389; 81CalA427, 254P606; CalA 290P140; 84Colo 240, 269P15; Colo 291P1024; Ida 288P424; 236 IllA 135; 240 IllA208; 198 Ind661, 154NE 492; 120Kan356, 243P539; 121Kan360, 246P521; 123Kan495, 256P149; 125 Kan92, 262P579; 127Mel, 140A606; Md 149A449; 253Mass590, 149NE622; 261Mass58, 158NE538; 237Mich390, 211 Mo665; 249Mich558, 229NW481; 251 Mich396, 232NW235; 146Miss870, 112 S386; 310Mo 526, 275SW927; 313Mo 160, 282SW34; 316Mo 1169, 293SW 391; 321Mo 863, 12SW(2d)462; 217 MoA362, 278SW416; 221MoA9, 297SW 419; 78Mont435, 254P414, 415 [citCyc]; 116Nebr373, 217NW607; NJ 143A738; 104NJL18, 139A517; NJSup 142A423; NJSup 142A429; NJSup 142A439; NJSup 144A589; NJSup 145A870; NJSup 147A570; NJSup 148A152; NJSup 148A206(1stcase); 241NY580, 150NE563; 243NY417, 153NE854; 219 AppDiv233, 219NYS189; 137Misc190, 242NYS78; 114 Oh122, 150NE431; 119 Or44, 247P155; 121 Or366, 254P825; SD 226NW750; TexCivA 13SW(2d) 133; Wis 230NW60; Wyo 292P897.

548-87 149Wash143, 270P297.

549-90 MoA 26SW(2d)1011.

549-91 20F(2d)793; 109Conn249, 146 A382.

549-92 78Mont435, 254P414, 415 [cit CJ].

549-93 198 Ind661, 154NE492; 121 Or 366, 254P825. [a] 237Mich390, 211NW 665.

549-94 212Ala496, 103S558; 170Ark 298, 280SW389; 195Cal 743, 235P986; 69CalA533, 232P480; 121 Or366, 254P 825; 53SD471, 221NW84. See also 94 CalA382, 271P568.

549-95 See also Wis 230NW60.

549-97 125Kan92, 262P579; 121 Or 366, 254P825. See also 123 Or301, 261 P81.

549-98 236 IllA135; 78Mont435, 254 P414, 415 [citCJ]. But see 121 Or366, 254P825. [a] (3) Relator must show clear legal right to demand performance of specific duty and imperative duty of respondent to perform act required. 212Ala496, 103S558.

560-5½-New. , it is undoubtedly the law of Maryland that if the writ issue at all, it must be issued as prayed. 148Md649, 129A905.

550-6 125Kan92, 262P579; 78Mont 435, 254P414; 117 Or498, 244P540, 541 [citCJ]; 132 Or561, 286P590 (writ granted).

550-7 81CalA427, 254P606, 609 [cit CJ]; 137Misc190, 242NYS78; 105WVa 235, 141SE874. See also 94CalA382, 271P568.

550-11½-New. Difficult legal question does not present peremptory mandamus where facts show clear legal right. 130 Misc896, 225NYS176.

550-12 32F(2d)415. See also 219Ala 632, 123S33.

550-13 19F(2d)697; 20AlaA567, 104S 53; 170Ark298, 280SW389; 72CalA 212, 236P933 (pendency of similar application); 81CalA427, 254P606, 609 [cit CJ]; Ida 288P424; Ill 157NE187; 236 IllA135; 320Mo 1122, 9SW(2d)600; 78 Mont435, 254P414; NJ 133A702; NJSup 130A638; 131Misc780, 228NYS272; 116 Oh390, 156NE455; 295Pa253, 145A133; 70Utah517, 261P453, 455 [quotCJ]. [c] **Mandamus held not doubtful remedy** to compel city to pass ordinance regulating sewers and plumbing in accordance with mandatory statute. TexCivA 293SW659.

550-14 214Ala620, 108S588; NJ 143A 738; NJSup 144A818.

551-15 70Utah517, 261P453, 455 [quot CJ].

551-16 90Fla721, 106S576; 122Kan 850, 253P406; 78Mont435, 254P414; 241NY580, 150NE563; 11PaDist&Co 583. [a] (5) Mandamus may be withheld where enforcement of strict legal right would work unnecessary hardship. 241 NY580, 150NE563. [b] **Payment of jack rabbit bounty** held not to be compelled by mandamus till special tax for that purpose is authorized and levied. 122 Kan850, 253P406.

551-17 254 IllA535.

551-18 199Cal 51, 248P244; 202Cal 650, 262P1092; Cal 290P444; 79CalA 1, 248P1049; 85CalA525, 260P386; CalA 285P732; 86Colo 377, 281P742; 91Fla927, 108S671; 162Ga159, 132SE 891; 166Ga168, 142SE671; 246 IllA563; 31LaA766; 148Md649, 129A905; 236 Mich383, 210NW338; 173Minn350, 217 NW371; 127Misc477, 217NYS265; 49 ND151, 190NW549; 24 OhA288, 156NE 911; 53SD471, 221NW84; SD 226NW 750; 118Tex42, 9SW(2d)1028; 105WVa 235, 141SE874; 107WVa362, 148SE320.

552-19 109Conn249, 146A382; 44 Ida 777, 260P162; 164LaI24, 113S789; NJ 141A670; 24OhA288, 156NE911; Tex CommnA 29SW(2d)314; TexCivA 5SW (2d)1003; 144Wash332, 258P6.

552-20 15F(2d)760; 197Cal 591, 241 P849; 173Minn350, 217NW371, 372 [cit CJ]; 118Tex42, 9SW(2d)1028; 144 Wash332, 258P6.

553-21 127Misc477, 217NYS265; RI 151A1 (so indefinite as to be unavailing).

553-22 21F(2d)910; 204Cal 667, 269P 524; 95Fla438, 116S41, 43 [citCyc]; 336 Ill 630, 168NE671; 339 Ill 28, 170 NE728; 161La981, 109S784; RI 151A1; TexCivA 58SW(2d)1003.

553-23 332 Ill 18, 163NE479.

553-24 MoA 20SW(2d)1.

553-25 220Ala638, 127S226.

553-26½-New. Rights of parties as respects relief by mandamus are fixed as of date of filing petition. 216Ala272, 113S240.

553-26½-New. Power of the supreme court under petition for mandamus to require the trial court to vacate an order is not affected by subsequent entry of nonsuit, 216Ala272, 113S240.

553-26¼-New. and such action improperly taken does not render the question moot. 216Ala272, 113S240.

553-28 2LaA417; Mo 19SW(2d)676; 121 Oh352, 168NE841(2dcase); 120 Oh 617, 169NE296(2dcase); 106WVa243, 145SE387, 388 [quotCJ].

554-31 81CalA427, 254P606, 609 [cit CJ]; 216Ky521, 287SW981; 151Md553, 135A367, 49ALR1303; 116Tex312, 290 SW154; 118Tex227, 118SW(2d)298; TexCivA 300SW968, 970 [citCJ]; 100 WVa11, 129SE712. [a] (2) Where sheriff said he would take prisoner into custody if he knew he had authority, and where new sheriff is in office, question of writ need not be considered. 151Md 553, 135A367, 49ALR1303. [b] **Parties need not compel** county clerk to transmit papers to district court in absence of proof that he does not intend to do so. TexCommnA 291SW886.

554-34 165Ga374, 141SE295; 320Mo 1087, 9SW(2d)153; Mo 28SW(2d)83.

555-35 Ill 173NE124; Nebr 226NW911. See also 103Conn607, 132A30. [a] (2) Where county commissioners fail to perform statutory duty of changing boundaries of commissioner districts till after time fixed for performance, mandamus will lie. SD 227NW572.

555-36 103Conn607, 132A30.

555-39 219Ala156, 121S532(1stcase); 144Va286, 132SE187.

555-41 247 IllA215; 198 Ind661, 154 NE492; 200 Ind319, 163NE263; 22OhA 282, 153NE897; TexCivA 283SW681. See also 151Md553, 135A367, 49ALR 1303. [a] (9) Where board of election did not adopt voting machines due to manufacturer's refusal to enter into a contract with city. 213AppDiv561, 210 NYS193.

556-43 Ill 173NE124.

556-54 212Ala604, 103S476; 161Ga855, 132SE60; 165Ga374, 141SE295; 160La 360, 107S139; 237Mich390, 211NW665, 666 [citCJ]; 49ND151, 190NW549; 117 Tex288, 18SW(2d)1088; 102WVa88, 134 SE465; 105WVa235, 141SE874.

557-56 74Mont488, 241P240 (where issuance would be abuse of process); 119 Or44, 247P155.

557-57 116Nebr261, 216NW818.

557-59 109Conn249, 146A382; 197 Ind 669, 151NE613; 320Mo 1087, 9SW(2d) 153; 107WVa619, 149SE828.

558-67 312Mo 230, 279SW689; 78 Mont435, 254P414.

558-68 312Mo 230, 279SW689.

558-70 153SC106, 149SE760.

558-74 12F(2d)660; 14F(2d)903; 18 F(2d)829; 20F(2d)444; 20F(2d)793; 30F(2d)636; 212Ala496, 103S558; 216 Ala674, 114S57; 20AlaA567, 104S53; 21AlaA446, 109S184; 170Ark298, 280 SW389; Cal 287P979; 69CalA600, 232 P154; 196Cal 278, 237P548; 76CalA 434, 244P932; 77CalA339, 246P817; 81 CalA427, 254P606; 91CalA312, 266P 993; 84Colo 240, 269P15; 103Conn607, 132A30; DC 26F(2d)1000; DC 37F(2d) 822; 169Ga368, 150SE261; 196 Ind436, 148NE481; 198 Ind661, 154NE492; 199 Ind210, 156NE465; 200 Ind319, 163NE 263; 203 Iowa1240, 212NW716; 123Kan 495, 256P149; 166La817, 118S30; 154Md 40, 139A551; 252Mass407, 147NE901; 253Mass193, 148NE458; 253Mass400, 149 NE317; 253Mass590, 149NE622; 260 Mass476, 157NE529; 265Mass353, 164 NE91; 147Miss99, 113S194; 313Mo 369, 281SW396; Mo 8SW(2d)623; 217MoA 416, 278SW416; MoA 24SW(2d)667; 74Mont488, 241P240; 78Mont435, 254 P414; 84Mont285, 275P743; 118Nebr400, 225NW28; NJSup 135A789; NJSup 135 A790; NJSup 135A798; 213AppDiv561, 210NYS193; 130Misc158, 223NYS638; 121 Oh504, 169NE568; 128 Okl 104, 261 P553; 116 Or694, 242P847 (so provided by statute); 117 Or498, 244P540; 13 PaDist&Co 768; 116Tex1, 285SW1063; 117Tex546, 8SW(2d)664; 36Wyo 302, 254P491. See also 94CalA318, 271P121.

560-78 98Fla885, 124S459.

560-79 8F(2d)910; 77CalA339, 246P 817; 98Fla885, 124S459; 252Mass407, 147NE901; 78Mont435, 254P414; 130 Misc158, 223NYS638.

560-80 217Ala369, 116S514; NJSup 149A534; 295Pa82, 144A897; TexCivA 276SW728 (mandamus granted in absence of right of appeal).

560-80½-New. That the state had power to pass a statute having a desired result is no defense to mandamus to compel the city to pass an ordinance required by mandatory statute. Tex CivA 293SW659.

561-81 91CalA312, 266P993; 103Conn 607, 132A30; 104Conn542, 133A683; 28 Hawaii538; 339 Ill 146, 171NE122; 130 Kan248, 285P541; 221MoA9, 297SW419; Oh 171NE589; 117 Or498, 244P540; 123 Or326, 262P220; 116Tex1, 285SW1063, 1068 [citCJ]; 115Tex537, 285SW296; 101Vt24, 140A157, 57ALR156. [b] **Question of speed and adequacy of legal remedy** is matter determinable by court to which application is made. 94 CalA382, 271P568.

561-83 179Ark772, 18SW(2d)334; 103 Conn607, 132A30; 104Conn542, 133A 683; Mo 8SW(2d)623; 116Tex1, 285 SW1063, 1068 [citCJ]; 106WVa170, 145 SE184; 199Wis523, 227NW35.

561-84 CalA 288P808; 103Conn607, 132 A30; 104Conn542, 133A683; 156Md40, 143A666; 129 Or85, 276P278; 116Tex 1, 285SW1063, 1068 [citCJ].

561-85 103Conn607, 132A30; 104Conn 542, 133A683; Fla 129S752; 99WVa 473, 129SE465.

562-86 104Conn542, 133A683.

562-91 75CalA724, 243P466; 28Hawaii

538; 162La362, 110S559. 133 Or596, 202P220.

562 96 DC 26F(2d)1000.

562 97 Oh 171N6589 (holding mandamus petition demurrable as seeking injunctive relief obtainable in court of general jurisdiction).

563 98 27AbstlAGo 226.

563 99 73Mont125, 234P414, 415 [cit CJ].

564 2 222Mich380, 205NW127. 24 OhA 288, 156NE911.

564 5 See also 86Mont118 284P772

564 9 215AppDiv311, 215NY845; Tex CivA 288SW695, 697 [cit CJ].

564 10 91CalA157, 270P779

564 13 See also 93CalA735, 270P286

564 15 [a] (5) Mandamus is proper remedy to compel sheriff to levy execution on property of judgment debtor. 83Colo222, 263P411, 412 [cit CJ], 57 AJR834.

565 20 140Okl118, 282P868.

565 21 202Cal165, 259P948; 81CalA108, 257P547; 90WVa478, 139SE465, 467 [cit Cyc]. See also 101Vt124, 140A 15, 57AJR156.

565 24 270U80, 468C418b, 70Led449; 8F(2d)869; 8F(2d)901; 13F(2d)462; 14F(2d)903; 18F(2d)829; 21F(2d)64; 30F(2d)566; 54F(2d)585; 37F(2d)243; 38F(2d)476(listense); 38F(2d)476(2d case); 217Ala369, 116S514; 217Ala381, 116S119, 193Cal1-3, 211P[illegible] (where appeal is not available writ will lie). 26Kcal153, 98P[illegible]; 76CalA484, 244P332; 80CalA133, 241P[illegible]; 7CalA[illegible], 255P548; 34CalA75, 166P603; 22CalA 200, 203P347; 92CalA454, 268P442; CalA 26[illegible]; 87CalA[illegible], 271P110, 56 CalA161, 27[illegible]; 101CalA19, [illegible] 105; 104Conn607, 132A30, 55AppDc 289, 6F(2d)692; DC 37F(2d)829; DC 19F(2d)[illegible]; DC 11F(2d)119, 57Fla 1032, 1258[illegible]; 162Ga[illegible], 132SE[illegible]; 198Ind661, 154NE492; 210Ky708, 276 SW[illegible]; [illegible]R, 296 [illegible]; 8 LoA[illegible]; 10CMd10, 111A555, [illegible]Mich 1, 229NW493; [illegible] (listense); [illegible] 290NW[illegible]; Miss 180S287; 213Mo369, 281SW[illegible]; [illegible] 108W(2d)524; 221Mo[illegible], 278SW[illegible]; 74Mont188, 241P240; 11[illegible] Neb100, 225NW[illegible]; 130Mis[illegible], [illegible] NY8638; 130Misc1, 230NY8642; 114 Oh 655, 151NE740; 122 Okl241, 254P[illegible]; 128 Okl104, 261P553; 131 Or382, 288 P12, 458D458, 205SW35, 116Tex1, [illegible] SW1068; 117Tex546, 8SW(2d)6[illegible]; 114 Tex161, [illegible]SW1006 116Tex[illegible] [illegible] SW1095, TexCivA 23[illegible]W[illegible], Utah 267 P779; 144Wash351, 258P27; 140Wash 614, 271P1005; 150Wash299, 272P[illegible]; 157Wash[illegible] 5[illegible]; Wis 203NW801; 36Wyo 302, 254P491. But see 140Wash 439, 249P[illegible]. [a] (4) Where statutory appeal exists from ruling of board of land commissioners, mandamus does not lie. 36Wyo 302, 254P491. (5) Mandamus will not lie to compel district judge to determine application for suspension of sentence under Probation Law, since right of review may be had by appeal. 13F(2d)462. (6) Where court enters decree in equity in cause which should have been tried at law, such error does not warrant mandamus. 14F(2d)903 [b] **Mandamus cannot be made substitute for appeal and error.**—36Wyo 302, 254P491.

567 25 220Ala400, 125S638; 208Cal 306, 266P246; **NJSup** 135A508 (even though appeal not taken through ignorance of petitioner as to proper remedy).

567 27 Tex 288SW(2d)903

567 28 209Ky[illegible]; 114Ky[illegible].

567 29 [a] (3) Where trial court failed to enter decree in conformity with supreme court mandate on reversal. 216 Ala674, 114S57.

567-31 34F(2d)585; 218Ala21, 117S 464; 170Ark975, 283SW(2d)1020(2d case); 81CalA742, 254P[illegible]; 92CalA[illegible] 262P[illegible]; 91CalA[illegible] 265P[illegible]; 91CalA 315, 271P[illegible]; CalA [illegible]; CalA [illegible] 1305, 101Conn606, 132A30, 101Conn 542, 133A683; MnA 208SW(2d)1030; 59 SD572, 242NW[illegible]; SD [illegible]NW[illegible]. 116 Tex1, 285SW1063; **TexCommnA** 288SW (2d)1087.

567 38 76CalA134, 241P931, 36Wyo 202, 254P491.

567-94½-New. Where relief, if adequate, cannot be said to be speedy. 70 Utah384, 259P93X.

567 97 102NJL157, 130A587.

567 98½-New. Where action complained of is based on a void ordinance, complainant need not resort to remedy by appeal, as a prerequisite to right to mandamus. **NJSup** 131A114 (refusal of building permit based on void zoning ordinance).

567 99½-New. Mandamus not denied where appeal is not mandatory. **NJ** 133A161.

567 99¼-New. Mandamus lies from an order granting a new trial after expiration of statutory period, regardless of whether or not a right of appeal exists; such an order constitutes an act without and in excess of jurisdiction of trial court. 97CalA136, 274P1037.

568-41 102Ga159, 129SE[illegible]; 208 Iowa 1240, 212NW716, 718 [cit CJ]; 158La 675, 104S872; 104NJL228, 141A4; **NJ Sup** 135A687; **NJSup** 145A870(listense); **NJSup** 134A337; 130Misc158, 228NYS 353.

568-44 NJSup 131A114; **NJSup** 133A 107; **NJSup** 132A108; **NJSup** 135A80. See also 223AppDiv369, 228NY836.

568-45 53S1579, 210NW958.

568-47 12F(2d)999; 196Cal378, 237P 548; CalA 266P1080; 256Mass198, 148 NE458; TexCivA 128SW(2d)1044; 150 Va174, 142SE416; 150Va54, 142SE428.

568 50 256Mass198, 148NE458.

568-51½-New. Mandamus to compel institution of libel proceedings is the proper remedy to obtain the return of property unlawfully seized. 14F(2d) 677.

568 52 CalA 268P[illegible]; 84Colo240, 269 P[illegible]; 99Fla1097, 128S489(listense); 253 Mass107, 147NE901, 260Mass[illegible], 157 NE[illegible]; 213Mo369, 231SW[illegible]; 71Mont 408, 241P240; **NJSup** 135A789; **NJSup** 136A700; **NJSup** 135A708; **NJSup** 138 A106; **NO** 156S[illegible]; 101PDistACo607; 54SD[illegible], 228NW[illegible]; 159Va209, 140SE 106; **Wis** 231NW[illegible]. [a] (4) Mandamus does not lie to compel reinstatement of civil service employees who failed to demand hearing provided by statute. 260Mass529, 157NE[illegible]. (6) Where board of adjustment exists, mandamus will not lie to issue building permit within restricted area of city. **NJSup** 135A798. (6) Since act March 1, 1924 (USCA tit 26 § 156) authorizes payment of income tax with right to sue to recover it back, mandamus will not lie to correct proceedings of board of tax appeals. 26F(2d)1006.

568 56 219Mo131, 127S[illegible]; 78CalA 700, 24P[illegible]; 101Conn542, 131A654; [illegible]Mass[illegible], 151NE119, 31Mont[illegible], 273 P1011, 200W[illegible]; 225NW157.

570 57 101Conn[illegible], 133A[illegible].

570 61 95Fla[illegible], 115S[illegible].

570 62 101Conn[illegible], 133A[illegible].

570-68½-New. Remedy by statute does not apply to proceedings had before its enactment. **NJSup** 135A80.

570 68½-New. On exclusion of a child from a public school by reason of color, resort to mandamus may be had at once, regardless of procedure provided by a school law. 103NJL547, 137A847.

570 83 20Ariz504, 248P407.

570 85 81CalA427, 254P606. [c] **In New Jersey.**—130A866. [d] **Decision of supreme court on certiorari,** affirming city board of adjustment's refusal to issue building permit, was a bar to prosecution of mandamus proceedings to compel issuance of permit. **NJ** 142 A555.

570 86 Ala 128S868.

570 78 219Ala406, 103S[illegible]; 220Ala182, 125S612; 71CalA64, 234P[illegible]; 50CalA 483, 261P[illegible]; 101CalA300, 237P[illegible] case); 55AppDc[illegible], 8F(2d)[illegible]. 1 to Mis204, 223NY8740; 120 Oh[illegible], 165NE 843; 122 Okl[illegible], 250P[illegible].

571 73 [illegible]; [illegible]F(2d)[illegible]; 20F (2d)798; 20F(2d)[illegible]; 30F(2d)479 [cor Tucker] den 279U[illegible]; 40MCMb[illegible] case); 73LcaD[illegible]; 30F(2d)581 [illegible] 566; 74CalA[illegible]; 241P108; 70CalA[illegible] 2[illegible]; 7CalA[illegible]; 50CalA[illegible] 200P[illegible]; 55AppDc[illegible]; 8F(2d)[illegible]; DC 35F(2d)[illegible]; [illegible]; 11,S.[illegible] 221 MnA[illegible], 278SW[illegible]; 195Pa[illegible], 114A[illegible].

48ND189, 205NW35; **TexCommnA** 280 SW1062; 127Wis[illegible]; 204NW[illegible].

571 75 55AppDc[illegible], 6F(2d)692 70 CalA[illegible], 242P[illegible]; 42ND[illegible] 205NW[illegible].

572 77 216Ala[illegible]; 113S[illegible]. **Ala** 129S 7[illegible] 20AlaA511, 101S[illegible]. [a] (1) 215 Ala280, 110S[illegible]; 21AlaA[illegible] 115S226 (2) 215Ala[illegible], 105S[illegible]; 215Ala[illegible], 110 S146. [b] **Mandamus will be liberally employed** to correct errors in rulings of lower courts where injury has resulted, and there is no right of appeal or other adequate means of redress. 20AlaA581, 104S899.

572 79 312Mo[illegible], 279SW689.

572 80 128Okl104, 261P553.

572 84 220Ala178, 124S815(listense); Cal 270P[illegible]; CalA 277P[illegible]; TexCivA 288SW(2d)826.

573 89 See also 29Hawaii508. [a] (3) Where builder was denied order of certiorari against village board, based upon refusal of building permits, and village appealed, he was not stayed from seeking mandamus order to compel issuance of permits. 127Misc805, 217NYS 353. (3) Other instances. 170Ga361, 153 S[illegible].

573 95 But see 209Cal148, 273P737.

573 96½-New. The fact that an intermediate appellate court has acted by mandamus on the subject matter of the litigation does not preclude the highest appellate court from exercising its power by mandamus. 116Tex1, 286SW 1063 (requiring trial court to proceed by trial).

573 98½-New. Outstanding mandamuses generally are no bar to relief. 16Ga[illegible]; 119S[illegible]46.

573 1 71CalA[illegible]; 241P108; 318Mo290, 2[illegible]; 116Tex1, 285SW1063. But see 118Oh395, 158NE804.

574 2 24OhA[illegible], 156NE911.

574 3 Ala 170S262(3cases).

574 10 202Iowa114, 203NW929 [cit CJ].

574 11 218Ala[illegible], 11,S.[illegible]; 81CalA 19, 2[illegible]P608, 609 [quote CJ], 119 Or14, 2[illegible]P155.

575 14 218Ala120, 117S757. [a] (1) Mandamus will not lie to compel issuance of license for practice of medicine to one who has persistently practiced without license. 120Kan29, 242 P197.

575 17 169Ark1212, 275SW332 [c] **Matters not constituting negligence.** 107 WVa109, 147SE484.

575 20 21F(2d)267; 206Cal366, 270P 882; 91Fla927, 108S671; 197Ind669, 151 NE618, 83IndA294, 140NE[illegible]; 58IndA 465, 164NE687(listense); TexCivA 280 SW[illegible]; 207 [cit CJ]. **TexCivA** 300SW 968, 970 [cit CJ]. [a] (3) Legal title, and not absolute ownership of property is necessary to apply for mandamus to compel issuance of building certificate. 102NJL157, 130A587. [ii] **No appeal to board of appeals in zoning case is necessary** as prerequisite to mandamus where zoning ordinance is ineffective. 102NJL170, 130A685; 102NJL433, 134 A888; 102NJL718, 131A889; **NJSup** 134 A806. [iii] **Giving bond for prosecution held superfluous.**—103Conn607, 132A30. [k] **No application to township committee to amend zoning ordinance to relieve property from prohibition thereto is condition precedent where modification is discretionary with committee. NJSup** 135A668.

576 23 270U8117, 468C215, 70Led 191 [cit CJ]; 219Ala[illegible], 101S162, 81CalA[illegible], 261P[illegible]; 101CalA300 [illegible] 8F(2d)[illegible] (listense); 249 IlA574; 114 Oh501, 151 NE755 (application to attorney general to commence action for distribution of insurance fund); 208Pa19, 11,A[illegible] (listense); 32PortoRico 811; 31PortoRico687; Tex 288SW(2d)903; 102WVa 669, 136SE183, 184 [cit CJ]. See also 21F(2d)267. But see 89CalA736, 2[illegible] 403. [c] **Demand made on behalf of relator** by board of trustees employing him held sufficient in petition seeking payment of salary by auditor. 32PortoRico 841.

577 25 See also 77Mont214, 250P609. But see 32PortoRico 833.

577 26 103Conn607, 132A30, 101Conn[illegible], 138S[illegible]; 2[illegible]; 170 Ga361, 153S[illegible]; 32PortoRico 657.

578 30 103Conn607, 132A30.

578–32 220**AppDiv**293, 222**NYS**11.
578–33 170**Ga**361, 153**SE**34; 164**La**628, 114**S**492; 221**MoA**784, 288**SW**85; 32 **OhA** 241, 167**NE**901.
578–34 102**WVa**659, 136**SE**182, 184 [citCJ]. [b] (5) Demand made by parties other than petitioner. 32**Porto Rico** 841.
579–35 **CalA** 290**P**480. [a] **In Ohio.**–32 **OhA**241, 167**NE**901.
579–39 128**Misc**102, 218**NYS**12.
579–44 **Tex** 26**SW(2d)**903 (timely motion to certify question).
579–47 85**CalA**525, 260**P**386; 127**Misc** 477, 217**NYS**265; **Tex** 26**SW(2d)**903.
580–49 [a] 85**CalA**525, 260**P**386.
580–51 85**CalA**525, 260**P**386.
580–54 170**Ga**361, 153**SE**34.
580–56 218**MoA**155, 263**SW**853 (application held premature).
581–63 **Cal** 290**P**451; 127**Misc**477, 217 **NYS**265; **SD** 227**NW**572; **TexCommnA** 291**SW**886. But see 153**Wash**399, 280**P** 31, 67**ALR**668.
581–68 257**Mass**82, 153**NE**319.
582–70 179**Ark**772, 18**SW(2d)**334; **NC** 155**SE**562; 8**PaDist&Co** 450; 118**Tex** 395, 15**SW(2d)**1027.
582–71 32**F(2d)**415; 77**CalA**339, 246**P** 817; **CalA** 277**P**352; 103**Conn**607, 132 **A**30; 95**Fla**438, 116**S**31; 98**Fla**885, 124 **S**459; 40 **Ida**432, 233**P**514 [citCyc]; **Ida** 288**P**424; 325 **Ill** 53, 155**NE**765; 326 **Ill** 142, 157**NE**185; 326 **Ill** 589, 158**NE**396; 327 **Ill** 62, 158**NE**424; 332 **Ill** 18, 163**NE** 479; 235 **IllA**552; 236 **IllA**135; 243 **IllA** 206; 247 **IllA**489; 248 **IllA**339; 252 **IllA** 10; 196 **Ind**436, 148**NE**481; 196 **Ind**600, 149**NE**170; 198 **Ind**661, 154**NE**492; 199 **Ind**210, 156**NE**465; 200 **Ind**319, 163**NE** 263; 203 **Iowa**643, 213**NW**257; 234 **Mich**428, 208**NW**460; 250**Mich**633, 230 **NW**936; 177**Minn**372, 225**NW**296; 316 **Mo** 1169, 293**SW**391; **Mo** 32**SW(2d)**59; 217**MoA**416, 278**SW**416; 48**Nev**299, 231 **P**384; **NJSup** 135**A**669; **NJSup** 136**A** 593; **NJSup** 144**A**589; 31**NM**402, 246 **P**907; 221**AppDiv**506, 224**NYS**684; 219 **AppDiv**233, 219**NYS**189; 219**AppDiv**141, 219**NYS**259; 225**AppDiv**875, 232**NYS** 640; 226**AppDiv**395, 235**NYS**520; 227 **AppDiv**560, 238**NYS**424; 192**NC**139, 134 **SE**409; 192**NC**456, 135**SE**347; 57**ND** 700, 223**NW**928; 112 **OhSt**553, 148**NE** 100; 114 **Oh**270, 151**NE**125; 116 **Oh**390, 156**NE**455; **Oh** 171**NE**404; 114 **Okl** 214, 245**P**647 (right to pardon); 118 **Okl** 15, 246**P**453; 122 **Okl** 4, 250**P**81; 121 **Or** 366, 254**P**825; 283**Pa**582, 129**A**635; 295 **Pa**82, 144**A**897; 8**PaDist&Co** 450; 11 **PaDist&Co** 195; 12**PortoRicoFed**417; 34 **PortoRico** 130; **TexCivA** 26**SW(2d)**670; **TexCivA** 27**SW(2d)**340; 101**Vt**24, 140**A** 157, 57**ALR**156; 100**WVa**11, 129**SE**712; 102**WVa**88, 134**SE**465; 102**WVa**629, 135 **SE**899; 105**WVa**487, 143**SE**153; 108 **WVa**166, 150**SE**512; 108**WVa**41, 151**SE** 319; 108**WVa**477, 151**SE**706; 37**Wyo** 124, 259**P**812. [b] **In election proceedings,** plaintiff has no clear legal right to have his name placed on ballot till he proves certain statutory requirements. 192**NC**139, 134**SE**409.
584–72½–New. If any reasonable doubt exists as to the question of any discretion or want of discretion, the court will hesitate to interfere, preferring to extend benefit of the doubt in favor of the officer. 324 **Ill** 113, 154**NE**707.
584–74 [a] **Possibility that constitutional inhibition** against sheriff serving more than two consecutive terms might be removed at coming election is too remote to entitle him to mandamus to compel county clerk to place his name on primary ballot as candidate for third term. 234**Mich**428, 208**NW**460.
585–77 117**Tex**166, 299**SW**227. [f] **Existence of issue to be tried** prevents peremptory mandamus. 137**Misc**827, 245 **NYS**65.
585–78 325 **Ill** 53, 155**NE**765.
585–80 235 **IllA**552; 236 **IllA**135; **Mo** 8**SW(2d)**623; **Mo** 32**SW(2d)**59; 104 **NJL**464, 141**A**569; **NJSup** 145**A**870(1st case); **NJ** 143**A**738; 8**PaDist&Co** 450; 108**WVa**41, 151**SE**319.
586–82 91**Fla**927, 108**S**671, 675 [cit Cyc].
586–83 **TexCivA** 280**SW**295, 297 [cit CJ].
586–84 **TexCivA** 280**SW**295, 297 [cit CJ].

586–91 109**Conn**249, 146**A**382; **TexCivA** 5**SW(2d)**1003.
587–95 203 **Iowa**643, 213**NW**257.
587–96 **NJSup** 135**A**691; 217**AppDiv** 399, 216**NYS**737. [d] **Where irregularity of lodge member's expulsion** was cured by regular expulsion, held mandamus must be denied. 217**AppDiv**399, 216**NYS**737.
587–97 252**Mass**323, 147**NE**841.
587–98 219**Ala**156, 121**S**532(1stcase); 219**Ala**492, 122**S**641; 217**AppDiv**399, 216 **NYS**737; **TexCommnA** 17**SW(2d)**780. See also 244 **IllA**66.
588–2 322 **Ill** 33, 152**NE**549.
588–4 98**CalA**230, 276**P**636.
588–5 163**La**78, 111**S**503; 167**La**342, 119**S**71; 10**LaA**795, 123**S**181(2dcase); 46**Philippine**337; 49**Philippine**853; **Wis** 229**NW**40; **Ont** [1928] 4**DomLR**951. But see **Oh** 171**NE**399.
589–10 [b] **Specific performance as test.–Oh** 171**NE**404.
589–15½–New. Ordinance fixing salary of justice of peace may be unenforceable by mandamus. **Oh** 171**NE**404.
589–25 98**CalA**665, 277**P**349; **NJSup** 134**A**610.
590–36 12**F(2d)**660; 78**CalA**84, 248**P** 286; 81**CalA**427, 254**P**606; 103**Conn**607, 132**A**30; 321 **Ill** 510, 152**NE**557, 46**ALR** 960; 199 **Ind**210, 156**NE**465; 203 **Iowa** 1240, 212**NW**716; 161**La**406, 108**S**787; 31**NM**402, 246**P**907; 135**Misc**874, 240 **NYS**2; 192**NC**139, 134**SE**409; 119 **Oh** 585, 165**NE**96; 121 **Or**366, 254**P**825. [a] (1) 168**La**688, 123**S**125.
590–37 78**CalA**84, 248**P**286; 82**CalA**379, 255**P**773; 88**CalA**170, 263**P**323; 103 **Conn**607, 132**A**30; 55**AppDC**391, 6**F(2d)** 694; 199 **Ind**210, 156**NE**465; 203 **Iowa** 1240, 212**NW**716; 123**Kan**495, 256**P**149; 143**Miss**42, 108**S**284, 45**ALR**824; 310 **Mo** 267, 275**SW**534; 126**Misc**524, 214**NYS** 113 (mandamus will issue only to compel performance of legal or official duty purely ministerial); 189**NC**650, 127**SE** 692; **NC** 155**SE**250; 52**ND**641, 204**NW** 202; 121 **Or**366, 254**P**825; 8**PaDist&Co** 450; 156**Tenn**131, 299**SW**805; **TexCivA** 275**SW**271; 102**WVa**633, 135**SE**837.
592–38 8**PaDist&Co** 450.
592–39 321 **Ill** 510, 152**NE**557, 46**ALR** 960; 256**Mass**238, 152**NE**63; 101**Vt**343, 143**A**302.
592–42 310**Mo** 267, 275**SW**534.
592–43 310**Mo** 267, 275**SW**534.
592–45 221**MoA**9, 297**SW**419, 420 [cit CJ].
593–48 **Fla** 129**S**752; 339 **Ill** 146, 171 **NE**122; 44**Philippine**30.
593–49 267**US**175, 45**SCt**252, 69**L ed**566; 21**F(2d)**355; 69**CalA**634, 229**P**996; 103 **Conn**607, 132**A**30; 104**Conn**542, 133**A** 683; 164**Ga**271, 138**SE**226; 164**Ga**382, 138**SE**765; 235 **IllA**552; 236 **IllA**135, 147 [citCyc]; 246 **IllA**241; 203 **Iowa** 1240, 212**NW**716; 147**Miss**99, 113**S**194; **Miss** 130**S**287; 316**Mo** 1169, 293**SW**391, 396 [quotCJ]; **MoA** 21**SW(2d)**645; 82 **Mont**126, 266**P**387; 104**NJL**18, 139**A** 517; **NJSup** 136**A**593; 31**NM**402, 246**P** 907; 130**Misc**181, 224**NYS**201; 219**App Div**233, 219**NYS**189; 189**NC**650, 127**SE** 692; **NC** 155**SE**562; 52**ND**641, 204**NW** 202; 118 **Okl** 15, 246**P**453; 122 **Or**684, 260**P**220; 8**PaDist&Co** 450; 12**PaDist&** Co 239; 44**Philippine**30; 48**Philippine** 370; 35**PortoRico** 350; 158**Tenn**518, 14 **SW(2d)**732; **TexCivA** 18**W(2d)**373; **TexCivA** 31**SW(2d)**1099; 104**WVa**41, 138**SE**577; 37**Wyo** 124, 259**P**812; **BC** [1928] 1**DomLR**830.
594–50 104**Conn**542, 133**A**683; **Ga** 138 **SE**626 (dictum); 164**Ga**382, 138**SE**765; 236 **IllA**135, 147 [citCyc]; 130**Misc**181, 224**NYS**201; 219**AppDiv**233, 219**NYS** 189; 52**ND**641, 204**NW**202; **BC** [1928] 1**DomLR**830.
594–51 104**Conn**542, 133**A**683.
594–55 200**Cal** 1, 251**P**784, 795 [citCJ]; 104**Conn**542, 133**A**683; 164**Ga**382, 138 **SE**765; 1**LaA**618; 143**Miss**42, 108**S**284, 286 [citCyc], 45**ALR**824; 147**Miss**99, 113**S**194; 189**NC**650, 127**SE**692; **Tex CivA** 18**W(2d)**373, 376 [citCyc].
597–56 267**US**175, 45**SCt**252, 69**L ed** 566; 21**F(2d)**355; 195**Cal** 743, 235**P**986; 200**Cal** 1, 251**P**784; 69**CalA**634, 229**P** 996; 45 **Ida**193, 261**P**338, 341 [citCJ]; **Ida** 288**P**424; **NJSup** 147**A**570; 128 **Misc**784, 220**NYS**209; 192**NC**139, 134**SE** 409; 122 **Okl** 241, 254**P**61; 102**WVa** 633, 135**SE**837.

598–64 77**CalA**744, 247**P**519; 164**Ga** 271, 138**SE**226; 86**Mont**100, 282**P**1045.
598–65 90**CalA**270, 265**P**965; 118 **Okl** 15, 246**P**453; 118**Tex**268, 12**SW(2d)**127. [a] **Complicated questions of fact** will not be decided on application for mandamus. 126**Misc**524, 241**NYS**113.
598–66 218**Ala**120, 117**S**757.
598–67 267**US**175, 45**SCt**252, 69**L ed** 566. Contra 196**Wis**464, 220**NW**373.
599–69 104**Conn**542, 133**A**683; 121**Kan** 141, 245**P**1047, 1050 [quotCJ]; **MoA** 294 **SW**107, 109 [citCyc]; 130**Misc**181, 224 **NYS**201; 219**AppDiv**233, 219**NYS**189.
599–70 104**Conn**542, 133**A**683.
599–71 104**Conn**542, 133**A**683; 219**App Div**233, 219**NYS**189; 52**ND**641, 204**NW** 202 (no arbitrariness or capriciousness shown); 131 **Okl** 41, 267**P**860.
599–73 219**AppDiv**233, 219**NYS**189 (in bad faith).
599–79 104**Conn**542, 133**A**683.
600–84 274**US**106, 47**SCt**499, 71**L ed**949; 7**F(2d)**796; 19**F(2d)**462; 19**F(2d)**697; 69**CalA**660, 232**P**154; 92**Fla**1123, 111**S** 242; 164**Ga**271, 138**SE**226; 40 **Ida**432, 233**P**514; **Ida** 288**P**424; 325 **Ill** 53, 155 **NE**765; 326 **Ill** 589, 158**NE**396; 235 **IllA** 552; 196 **Ind**600, 149**NE**170; 198 **Ind** 661, 154**NE**492; 199 **Ind**210, 156**NE**465; 200 **Ind**319, 163**NE**263; 203 **Iowa**1240, 212**NW**716; 164**La**1006, 115**S**63; 250 **Mich**633, 230**NW**936; 82**Mont**126, 266 **P**387; **NJ** 133**A**702; **NJSup** 133**A**534; **NJSup** 144**A**589; **NJSup** 147**A**570; 126 **Misc**524, 214**NYS**113; 128**Misc**784, 220 **NYS**209; 118 **Okl** 15, 246**P**453; 128 **Okl** 104, 261**P**553; 43 **OklACR**131; 122 **Or** 684, 260**P**220; **RI** 151**A**1; 118**Tex**395, 15**SW(2d)**1027; **TexCivA** 275**SW**271; 69 **Utah**204, 253**P**680; 108**WVa**166, 150**SE** 512; 108**WVa**41, 151**SE**319; 108**WVa** 477, 151**SE**706; 194**Wis**193, 215**NW**887; 199**Wis**13, 225**NW**170. [a] **Ordinance is law within rule.** 85**CalA**493, 259**P**768.
601–85 274**US**106, 47**SCt**499, 71**L ed**949; 77**CalA**404, 247**P**527; 235 **IllA**552; **NJ** 133**A**702; **NC** 155**SE**562; 43 **OklACR** 131.
601–86 164**Ga**271, 138**SE**226; 178**Minn** 442, 227**NW**891; **NJSup** 133**A**534; 128 **Okl** 104, 261**P**553; 122 **Or**684, 260**P**220; 69**Utah**204, 253**P**680.
602–87 122 **Or**684, 260**P**220.
602–88 122 **Or**684, 260**P**220.
602–91 7**F(2d)**796; 115 **Oh**333, 154**NE** 742.
603–97 161**Ga**855, 132**SE**60.
603–98 218**Ala**15, 117**S**462; 81**Colo** 163, 255**P**447, 448 [citCJ].
603–1 218**Ala**12, 117**S**460; 149**Wash**570, 271**P**829.
603–4 81**Colo** 163, 255**P**447, 448 [citCJ].
603–8 324 **Ill** 113, 154**NE**707, 711 [quot Cyc]; 326 **Ill** 589, 158**NE**396; 234 **IllA** 111, 124 [citCycperHeardJ].
603–10 171**Ark**427, 285**SW**20; 325 **Ill** 53, 155**NE**765.
604–13 171**Ark**427, 285**SW**20.
604–14 171**Ark**427, 285**SW**20.
604–15 317**Mo** 1216, 298**SW**747, 55**ALR** 773.
604–20 123 **Or**326, 262**P**220.
604–21 150**Wash**217, 272**P**720.
604–24 128**Misc**102, 218**NYS**12.
605–26 32**PortoRico** 761.
605–29 See also 128**Misc**102, 218**NYS**12.
606–47 287**Pa**150, 134**A**478.
606–48 196 **Ind**436, 148**NE**481.
606–52 [a] **Statute held not to enlarge scope of writ.**–206**Cal** 758, 276**P**998.
606–54 7**F(2d)**796; 8**F(2d)**901; 12**F (2d)**660; 215**Ala**610, 112**S**202; 219**Ala** 369, 122**S**608; 21**AlaA**446, 109**S**184; 168 **Ark**523, 271**SW**4; 168**Ark**751, 271**SW** 336; 79**CalA**41, 248**P**1007; 80**CalA**433, 251**P**935; 94**CalA**433, 271**P**363; **CalA** 285**P**908; 103**Conn**607, 132**A**30; 96**Fla** 74, 117**S**696; 197 **Ind**345, 151**NE**5; 203 **Iowa**1240, 212**NW**716; 44**Philippine**30; 51**Philippine**796; 116**Tex**409, 292**SW** 877; **Utah** 267**P**779; 65**Wash**619, 238**P** 1114, 41**ALR**433; 150**Wash**13, 272**P**60; **Wash** 292**P**741. See also 161**La**981, 109 **S**784. [b] 168**Ark**763, 271**SW**714. [d] **Decision of motion.**–86**Mont**442, 284**P**772.
607–55 71**CalA**64, 234**P**420; 196 **Ind** 281, 148**NE**198; 86**Mont**442, 284**P**772.
607–56 79**CalA**41, 248**P**1007; 194**Wis** 193, 215**NW**887.
607–58 12**F(2d)**660; 12**F(2d)**667; 217 **Ala**369, 116**S**514; 168**Ark**751, 271**SW** 336; 72**CalA**241, 236**P**938; 74**CalA**132,

239P427; 79CalA41, 248P1007; 96Fla 74, 117S696; 118Nebr400, 225NW28; 116Tex1, 285SW1063; Utah 267P779.

608–59 12F(2d)660; 102CalA178, 283 P331; 96Fla74, 117S696; 38Wyo 382, 267P424. [a] (1) 20AlaA567, 104S53; 197 Ind345, 151NE5.

608–60 CalA 290P626; Ida 286P918 (whether taxes and assessments are liens); 197 Ind345, 151NE5; 319Mo 705, 7SW(2d)357, 59ALR95.

609–63 Fla 129S752; 198 Ind574, 154 NE384.

609–64 179Ark975, 18SW(2d)1020(2d case); 117Tex152, 299SW397.

609–67 215Ala321, 110S469; 219Ala523, 122S835; 94CalA433, 271P363; CalA 285P908.

609–69 TexCivA 16SW(2d)858.

609–70 195Cal 111, 231P726; 116Tex1, 285SW1063; TexCivA 31SW(2d)887 (election contest held not "cause"). [a] **Party litigant** cannot compel case to be heard by any particular judge. 195Cal 111, 231P726. [b] **Refusal to convene federal statutory court** of three judges to pass on constitutional question is reviewable by mandamus. 34F(2d)808.

609–76½–New. Mandamus will not lie to compel the trial court to proceed to judgment when it would necessarily have the effect of vacating an order made by another court of coördinate jurisdiction. 115Tex519, 285SW1075.

609–77 277US267, 48SCt523, 72L ed 877; 102CalA178, 283P331; CalA 285 P908; DC 35F(2d)1012; 339 Ill 146, 171 NE122; 203 Iowa1240, 212NW716; 208 Ky661, 271SW1066; 65Wash619, 238P 1114, 41ALR433. [a] (16) Duty of district judge to approve account of fees of public officer. TexCommnA 280SW 1062. (17) Duty to cause to be published fiscal financial statement of county. WVa 152SE784.

610–79 14F(2d)418; 203Cal 384, 264P 488; 76CalA434, 244P932; 158La742, 104S637 (denial of right to summary trial of ejectment suit); 123 Or326, 262 P220, 222 [citCJ]; TexCommnA 29SW (2d)1067; 108TexCr121, 299SW433. [a] (5) Refusal of court to hear motion to vacate divorce decree because movant in contempt for failure to pay maintenance ordered. 81CalA742, 254P939.

611–82 BC [1925] 3DomLR376.

611–84 Wash 292P741.

612–87 BC [1925] 3DomLR376.

612–88 93Fla366, 112S64.

612–89 Mich 233NW402.

612–90 50SD48, 208NW224; 187Wis1, 203NW923.

613–96 216Ky521, 287SW981.

613–97 277US565, 48SCt585, 72L ed990; 21AlaA446, 109S184; 195Cal 111, 231P 726; 122 Okl 76, 251P52.

613–98 195Cal 111, 231P726 (statutory disqualifications justifies refusal of judge to act); 159La698, 106S118; 116 Tex1, 285SW1063.

613–99 18F(2d)254; 195Cal 111, 231P 726; 85CalA499, 259P765; 40 Ida432, 233P514.

613–1 187Wis1, 203NW923.

613–3 116Tex1, 285SW1063.

613–4 [c] **Where suit was abated by another action pending,** judge no longer has jurisdiction, and he may not be compelled by mandamus to proceed with trial. 116Tex1, 285SW1063.

614–9 8F(2d)901; 12F(2d)660; 21 AlaA427, 109S177; 198Cal 183, 244P343 (where order is not appealable, writ will lie); 76CalA434, 244P932; 80CalA433, 251P935; 166La645, 117S748; 321Mo 230, 10SW(2d)519; 46Philippine59; 116 Tex172, 287SW1093; TexCivA 12SW (2d)1044; 187Wis1, 203NW923 (appeal held not adequate). [a] **Refusal of justice to accept jurisdiction.–Wash** 292P 741.

614–11 91Fla927, 108S671, 675 [citCJ]; 119 Oh546, 164NE760; Utah 279P609.

614–13 Ala 129S48.

614–15 [c] **Belief** that application to court respondent would avail relatrix nothing does not excuse failure to make application. 83 IndA524, 149NE373.

615–23 [a] 194Wis193, 215NW887.

615–25 195Cal 111, 231P726.

615–31 MoA 26SW(2d)834; Man [1930] 2DomLR177.

616–49½–New. to bear and pass upon petition for distribution of estate, 102 CalA178, 283P331.

616–55 MoA 17SW(2d)629; MoA 26 SW(2d)834; Man [1930] 2DomLR177. [a] (9) To compel appointment of applicant as administrator. Man [1930] 2DomLR177.

617–61 219Ala350, 122S458.

617–64 7PaDist&Co 687; 32PortoRico 822 (municipal judge).

618–84 234Mich166, 207NW875.

618–84½–New. To return weapon to acquitted defendant, whose ownership proved in criminal proceedings brought against him for carrying it. 32Porto Rico 822.

618–85½–New. to remove from docket entires made subsequent to rendition of judgment; 234Mich166, 207NW875.

619–90 250Mich565, 230NW947 (return on appeal).

619–90½–New. , or to prepare and file a transcript as required by statute, 200 Ind235, 162NE444.

619–13½–New. A circuit court judge is an officer subject to mandamus, under statutes in some jurisdictions. 123 Or 326, 262P220.

620–22 122 Okl 76, 251P52; 130 Okl 89, 265P139.

620–23 23AlaA46, 121S429 [certiorari den 219Ala139, 121S432(1st case)]; 142 Okl 115, 285P951; 142 Okl 150, 286P 321.

620–29 122 Okl 76, 251P52.

621–41 TexCivA 280SW295.

621–51 242Mich225, 218NW757.

622–70 TexCommnA 291SW886.

622–73½–New. to appoint inheritance tax appraisers as required by statute, 156Tenn131, 299SW805.

623–92 78CalA84, 248P286.

623–93 78CalA84, 248P286.

623–9 78CalA84, 248P286.

623–14 118 Okl 15, 246P453.

623–16 118 Okl 15, 246P453.

623–18 [a] 8LaA803.

623–22 [a] **Cause reversed,** where only part of names on jury roll were placed in jury box, to allow circuit court to require jury box to be filled as required by statute. 213Ala160, 104S336. [b] **Mandamus held not proper remedy** to have venire drawn from jury box and indictment returned by grand jury declared void. 213Ala160, 104S336.

623–22½–New. Mandamus will lie to compel a board of county supervisors to perform their duty in respect to compiling a jury list as required by statute. 29Ariz247, 240P863.

624–24 21AlaA427, 109S177. [a] (1) Contra. 216Ala581, 113S447, 59ALR348 (holding interlocutory orders fixing temporary allowance for wife are reviewable by mandamus).

624–26½–New. Mandamus will not lie to compel a judge to sign an ex parte order permitting withdrawal of power of attorney, it being a matter within his discretion. 159La808, 106S312.

624–28 [a] (1) 303Mo 123, 272SW72. (2) Order continuing case and taxing plaintiff with accrued costs for failure to comply with rule requiring pleading in short by consent is subject to review by mandamus. 216Ala660, 114S40.

624–32 Ala 129S69.

624–36 198 Ind661, 154NE492; 130Kan 808, 288P563; Utah 289P1102.

625–38 141Wash651, 252P103.

625–45 198 Ind661, 154NE492; 141 Wash651, 252P103.

625–47 198 Ind661, 154NE492, 494 [cit CJ].

625–49 70Utah284, 259P928.

625–52½–New. Where court has announced that it would grant motion for change of venue, it may be compelled by mandamus to hear and determine the case before it. 70Utah284, 259P928.

626–55 14F(2d)903; 320Mo 230, 10SW (2d)519. [a] **Right to compel disqualified judge** to transfer proceedings on motion for new trial is not affected by pendency of appeal from judgment. 199 Cal 408, 249P1084, 48ALR610. [b] **United States supreme court** exercises sound judicial discretion in granting or withholding writ to compel remand of state prosecution transferred to federal court. 270US9, 46SCt185, 70L ed449.

626–57 [a] **Further adjudication** by state court after removal may be controlled and interdicted by mandamus. Ala 129S262(3dcase).

626–57½–New. Mandamus lies to correct error in refusing to retransfer cause. 214Ala197, 107S448.

626–60½–New. Delay in applying to court for joinder of another party defendant has been held to justify refusal to interfere with denial of application. 194Wis193, 215NW887.

626–63 26F(2d)153.

626–64 250Mich1, 229NW493.

626–64½–New. Mandamus will not lie to compel a superior court to enter an order substituting the trustee in bankruptcy of a defendant in his place where it does not appear that the remedy by intervention is not plain, speedy, and adequate. 196Cal 278, 237P548.

626–66 218Ala12, 117S460; 94Fla1, 113S667.

626–68 97Fla1032, 122S794.

626–72 Mich 233NW402.

626–79 But see 51Philippine786.

626–81½–New. Peremptory writ of mandamus will not issue to compel circuit court to require defendant to plead. MoA 23SW(2d)1092.

627–94 CalA 287P560.

627–95 44Philippine30.

627–97 217Ala143, 115S155.

627–2 [a] **Special commissioner's order** continuing proceedings for taking depositions is discretionary and not reviewable by mandamus. MoA 29SW(2d) 199.

628–7 81CalA471, 254P287.

628–9 44Philippine30.

628–10 65Utah619, 238P1114, 40ALR 433.

628–11 65Utah619, 238P1114, 40ALR 433.

628–20 69CalA629, 232P153; BC [1925] 3DomLR376 (dismissal for want of jurisdiction).

628–23 202Cal 15, 258P1094; 91CalA 356, 267P169.

629–25 207Cal 617, 279P650; 145Wash 258, 259P718; Wyo 292P897.

629–36 30F(2d)393; 242Mich548, 219 NW661; 122 Okl 76, 251P52.

629–38 122 Okl 76, 251P52.

629–42 309Mo 625, 274SW362.

630–47 168Ark523, 271SW4. See also 216Ala353, 113S513.

630–55 12F(2d)667.

630–60 116Tex1, 285SW1063; 70Utah 534, 262P266, 55ALR1032.

631–69 70Utah534, 262P266, 55ALR 1032.

631–76½–New. Where a chancery court has exercised its discretion in requiring security for compensation of the master, mandamus will not lie to correct the ruling and require trial without security. 170Ark298, 280SW389.

631–76½–New. If the trial court refuses to proceed with the trial, mandamus is the proper remedy. 176Minn 636, 222NW931(2dcase).

631–82 126Kan385, 267P1098.

631–84 14F(2d)903; 84CalA498, 258P 416.

631–88½–New. Mandamus will not lie to compel the court to allow a jury trial where there is a remedy by appeal. 85 CalA353, 259P452.

632–95 69CalA276, 231P349.

632–1 176Minn636, 222NW931(2dcase).

632–5 [a] **Lost notes.–TexCivA** 272SW 219.

632–13 126 Or245, 269P230.

633–17 255Mass611, 152NE220.

633–18 85CalA353, 268P918.

633–19 156Tenn327, 5SW(2d)471.

633–20 156Tenn327, 5SW(2d)471. See also 116Tex29, 285SW1079, 48ALR355.

633–24 234Mich554, 208NW681.

634–39 Tex 26SW(2d)905.

634–41 Ala 129S12.

634–43 85 IndA600, 154NE504.

634–45 48 Ida248, 282P379; 116Tex1, 285SW1063; 115Tex537, 285SW296; 116Tex412, 292SW875. [a] 196Cal 222, 237P42, 40ALR1110. [c] **Judgment nunc pro tunc.–115Tex537, 285SW296.** [d] **Placing order of record.–Wyo** 292P 897.

635–46 But see 218Ala379, 118S549.

635–47 115Tex537, 285SW296. [a] 115 Tex537, 285SW296.

635–49½–New. or upon stipulation, 187 Wis1, 203NW923.

635–51 CalA 285P860; 126Mich377, 85 NW959 (compelling order directing sale

under foreclosure decree). [a] 114Tex 461, 270SW1006.

635-52 114Tex461, 270SW1006.

635-53 114Tex461, 270SW1006.

635-56 150Wash13, 272P60.

636-63 MoA 271SW544.

636-64 69CalA660, 232P154 (entry of divorce decree on motion of deceased party's execution).

636-65 101Vt343, 143A302.

636-71 Ala 129S72; 205Cal 163, 270P 192. [c] **Mandamus lies to compel trial court to strike from docket**, judgment entry purporting to modify void judgment nunc pro tunc. 20AlaA641, 104S 688.

636-73 CalA 268P918; 94CalA433, 271 P363. But see TexCommnA 24SW(2d) 394.

636-77 117Tex288, 18SW(2d)1088.

636-78½-New. Where judgment entered by the trial court conforms to decisions of the supreme court on prior appeals, a temporary writ of mandate to compel the trial court to strike part of the judgment will be quashed. 48 Ida 248, 282P379.

636-79 232Mich384, 205NW88; Tex CivA 9SW(2d)483.

637-80 232Mich384, 205NW88 (order enjoining exercise by lodge association of rights and privileges long enjoyed by another).

637-82 118Nebr400, 225NW28.

637-85 29F(2d)832.

637-86 118Tex601, 17SW(2d)763.

637-88 277US565, 48SCt585, 72L ed 990; 215Ala569, 112S147; 216Ala272, 113S240; 218Ala21, 117S464. [d] (2) 334 Ill 241, 165NE693.

638-89 216Ala169, 112S646; 219Ala 404, 122S620.

638-90 218Ala268, 118S282.

638-92½-New. Mandamus will lie to expunge a void order vacating a judgment. 330 Ill 643, 162NE205.

638-98 213Ala339, 105S171 (mandamus and not appeal is proper remedy); 215 Ala321, 110S469. [a] (2) Refusal to set aside default judgment because defendant's counsel was in bad health is not abuse of discretion. 213Ala339, 105S 171.

638-99 20AlaA531, 104S898 (mandamus proper remedy where court has abused discretion in refusing to set aside default); 247Mich67, 225NW618.

638-3 179Ark381, 16SW(2d)12; 80 Colo 425, 252P357; 163Ga825, 137SE 244; 9LaA65, 118S843; TexCivA 299 SW699. [e] **Adverse party to replevin suit** has no recognizable interest which will prevent relief by mandamus to compel issuance of execution on judgment unsatisfied of record. 80Colo 425, 252P 357.

639-12 43 OklACR160.

639-28 [a] **Payment of proceeds of sale** may be compelled by mandamus. 126 Kan516, 268P823.

640-38 [c] **Mandamus to compel officer** to enforce execution will not lie after time of return. 53ND460, 206NW777.

641-65 See also 204Cal 667, 269P524; 44Philippine74.

641-70 233Mich523, 207NW14 (mandamus will not lie to compel trial court to incorporate in bill of exceptions exception to findings of court which were not filed within statutory time).

641-72 See also 167La63, 118S693.

641-73½-New. Where an order extending time to perfect an appeal has been made but, through inadvertence, has not been entered, mandamus will lie directing the judge to enter an order nunc pro tunc extending the time. 232Mich 690, 206NW343.

641-73⅓-New. Testimony and exhibits in a proceeding, resulting in a decree which became final, being immaterial on appeal, mandamus will not issue to require the trial court to incorporate them in the record. 246Mich511, 224NW358.

642-76 44Philippine74 (appeal from order of court of first instance denying petition for review). See also 3LaA317.

642-78 202Cal 445, 261P474.

642-79½-New. The district court of appeal has jurisdiction to issue a writ of mandate to the superior court to set aside an order dismissing an appeal from a recorder's court. 84CalA303, 257 P909.

642-79⅓-New. Party aggrieved by delay in determining appeal from town supervisor's decision should resort to mandamus. 229AppDiv397, 242NYS93.

642-81 20F(2d)793.

642-82 34F(2d)585; 216Ala674, 114S 57; 98CalA106, 276P628; 99Fla1264, 128S837; 77Mont594, 251P1061; 121 Okl 75, 247P695; TexCivA 276SW728; TexCivA 9SW(2d)442.

642-84 TexCivA 276SW728. [a] **That judge does not agree** as to effect of evidence is no defense to mandamus to compel compliance with mandate. 99 Fla1264, 128S837.

642-85 279US781, 49SCt492, 73L ed 954; 99Fla1264, 128S837; 77Mont594, 251P1061, 1064 [cit CJ]; 130 Okl 293, 267P258; 138 Okl 89, 280P433.

642-86 [a] **Order, invalidity of which is apparent of record**, is nullity and may be impeached in direct or collateral action. 77Mont594, 251P1061.

642-87 143 Okl 71, 287P719.

642-88 216Ala674, 114S57.

643-89 [a] **Mandamus to review sustaining of demurrer to petition for writ of review** of proceedings upon which order of revocation by board of medical examiners was based, will not lie, where there is no record showing determination was erroneous. 84CalA103, 257P 547.

643-93 192Wis358, 212NW655.

643-6 But see 242Mich247, 218NW766.

643-7 20AlaA567, 104S53; 170La423, 127S889.

643-8 20AlaA567, 104S53; TexCivA 8 SW(2d)524.

643-16 230Ky776, 20SW(2d)753.

643-17 86CalA443, 260P845(2dcase); 320Mo 1122, 9SW(2d)600.

644-26 241Mich318, 216NW926.

644-31½-New. Mandamus is the proper remedy to determine what items of costs shall be allowed or disallowed after a judgment for costs has been rendered. 241Mich318, 216NW926.

645-41 [a] **Mandamus is more liberally used** in removal of state prosecutions than in civil cases. 270US9, 46SCt185, 70L ed449.

645-42 162Ga653, 134SE479; 196Wis 113, 219NW380.

645-43 43F(2d)290.

645-46 208Cal 622, 283P931.

645-48 75CalA148, 242P81.

645-55 17F(2d)339 (dictum). [c] **Mandamus will lie** to compel federal district judge to remand indictment of prohibition agents to state court after transfer under statute. 270US9, 46SCt 185, 70L ed449.

646-56 34 OhA354, 171NE259.

646-59 Man [1930] 4DomLR299.

646-60½-New. Mandamus will lie to compel the trial court to receive and enter a verdict which is in proper form and represents the final agreement of the jury. 103WVa658, 138SE316.

646-66½-New. Where a bond, proper in form and with sufficient sureties, is tendered, mandamus and not habeas corpus is the proper remedy to compel approval of the bond. 114 Okl 228, 245 P999.

646-66⅓-New. Where the court has granted bail, fixed the amount, and directed the recognizance to be taken and executed before the clerk of the court, mandamus will lie to compel the clerk to accept sureties who are properly qualified. 105WVa8, 141SE403, 56 ALR1094.

647-84 203Cal 731, 265P947, 58ALR 1500.

647-88½-New. In a proper case, mandamus will lie to compel vacating of order of dismissal. 237Mich413, 212NW 69.

647-88⅓-New. Writ directing dismissal will be denied where court is without jurisdiction of prosecution because no information has been filed. CalA 291P857(1stcase).

647-91 323 Ill 28, 153NE597, 49ALR 490.

647-95 See also 247NY493, 161NE157.

647-95½-New. Mandamus will lie to compel the trial court to take action to carry out a sentence of death as originally pronounced after affirmance of the judgment on appeal. 106WVa32, 144 SE574.

647-8 [a] **Mandamus held not to lie to** compel trial judge to certify bill of exceptions to his refusal to entertain second motion for new trial on ground of newly discovered evidence of insanity. 168Ga118, 135SE926.

647-10½-New. to enforce constitutional right to a speedy trial; 236Mich689, 211 NW35.

647-10⅓-New. to give effect to an executive pardon; 223Ky285, 3SW(2d) 641.

647-10¼-New. or to terminate prosecution of misdemeanor charge for delay in bringing accused to trial; Cal 285P 699.

648-22½-New. Mandamus will not lie to compel a police judge to order the return to defendant in a criminal proceeding before him of property alleged to have been seized by officers on unlawful search where it is not shown that the judge has any control of the property. 70CalA677, 234P117.

648-22⅓-New. Mandamus will lie to compel a judge who presided at a trial in which defendant was convicted of a capital offense to order the clerk and stenographer to perform their duties in reference to preparation of the transcript to enable defendant to appeal, notwithstanding leave to appeal at the expense of the state is denied. Mo 285 SW509.

648-22¼-New. Under insolvency statute, one imprisoned for sixty days for nonpayment of fine may have mandamus to compel discharge, if insolvent. 24 OhA272, 156NE510.

648-22½-New. Mandamus will not lie to compel a judge to change his ruling denying in part a petition for leave to prosecute an appeal as a poor person and for bail. 18F(2d)689.

648-22⅓-New. Mandamus will be granted to require a judge to grant supersedeas to stay execution until after the case has been disposed of by the supreme court. 168Ga378, 148SE100 (1stcase).

648-22½-New. Refusal, by court abusing discretion, to permit defendant to apply for probation is subject to correction by writ of mandate. CalA 289 P909.

648-25 130Misc748, 226NYS98.

648-34 197 Ind345, 151NE5. [a] **Circuit court cannot be mandamused to place name of attorney admitted to practice before another court on roll of attorneys**, in absence of finding of moral character of applicant. 197 Ind345, 151 NE5.

648-36 But see 122 Okl 76, 251P52.

649-59 CalA 285P908.

650-74 TexCivA 276SW728.

651-95 161La721, 109S400.

651-97 94CalA664, 271P783.

651-99 214Ala573, 108S375, 45ALR935. [a] (1) 216Ala581, 113S447, 59ALR348; 217Ala258, 115S300; 220Ala409, 125S 669. (2) 216Ala581, 113S447, 59ALR 348. (5) Writ denied where decree inert until register had examined parties and reported. 217Ala258, 115S300.

651-99½-New. Mandamus will lie to compel an allowance of suit money to a wife in an action by her for divorce from the bonds of matrimony where allowance has been refused on the ground that no provision was made therefor in a decree of divorce from bed and board. 108WVa154, 150SE377.

653-58 But see 82CalA202, 255P275.

653-59 249Mich558, 229NW481.

654-60 232Mich384, 205NW88.

654-62 128 Okl 104, 261P553.

654-64 128 Okl 104, 261P553.

654-64½-New. or where issues of law so arise; 158La784, 104S715.

654-65 242Mich247, 218NW766.

654-68 116Tex1, 285SW1063.

655-70 249Mich558, 229NW481.

655-80 12F(2d)660.

656-92 83CalA25, 256P603.

656-92½-New. **Mandamus lies to obtain relief against mandamus issued by a lower court in excess of its jurisdiction.** 116Tex1, 285SW1063.

656-92⅓-New. Judge of circuit refusing alternative writ may be compelled to grant writ by mandamus issued by appellate court. MoA 26SW(2d)1011.

656-95 26F(2d)153.

656-4½-New. Where court attempts to

vest receiver with judicial power, mandamus is proper to restrain receiver. 116Tex220, 288SW417.

656-14½-New. Court refusing to act on motion for reference in divorce proceeding can be mandamused to act. **Ala** 130S677.

657-25 212Ala660, 103S835 (mandamus lies to compel members of state board of accountancy to refuse to act on petition for revocation of license of public accountant because of their disqualification on ground of bias).

658-31 273US299, 47SCt413, 71L ed651; 281US206, 50SCt320, 74L ed809; 21 F(2d)355; 30F(2d)561; 77CalA744, 247 P519; DC 40F(2d)808; 164Ga382, 138 SE765; 167Ga594, 146SE467; 203 Iowa 1240, 212NW716; 179Minn337, 229NW 313; 86Mont200, 283P202, 67ALR1020; 136Misc1, 239NYS642; 112 OhSt356; 147NE501; RI 151A1 (holding mandamus is most often used to compel performance of ministerial duty); 153SC 106, 149SE760; 48SD417, 204NW901; TexCivA 13SW(2d)391. [a] (10) Duty of superintendent of banks in applying guaranty fund to pay depositors and holders of exchange in good faith. 48 SD417, 204NW901. (11) State road commission in issuing requisition on auditor to contractors for labor performed under contract. 102WVa633, 135SE837. (12) Duty of state board of administration and state highway commission in respect of auditing and vouchering for payment of claim under contract. 218Ala120, 117S757. (13) Duty of highway department to approve claim for price of goods bought and delivered. 218Ala120, 117S757 (amount fixed or determinable by terms of contract). [d] **After board has found all facts** pursuant to its duty under statute to find, its duties thereafter are purely ministerial. 196Wis464, 220NW373.

659-32 14F(2d)749. See also 196Wis 464, 220NW373.

659-38 281US206, 50SCt320, 74L ed 809; 281US206, 50SCt320, 74L ed809; 8F(2d)901; 21F(2d)355; 30F(2d)479 [certiorari den 279US856, 49SCt351 (8thcase), 73L ed997]; 30F(2d)561; 37 F(2d)442; 38F(2d)389; 218Ala120, 117 S757; 104Conn542, 133A683; DC 38 F(2d)942; DC 40F(2d)808; 164Ga382, 138SE765; 324 Ill 113, 154NE707; 196 Ind157, 147NE622; 203 Iowa1240, 212 NW716; 153Md607, 139A291; 262Mass 70, 159NE739; 321Mo 275, 10SW(2d) 524; 55ND163, 212NW822; 55ND178, 212NW828; 22 OhA282, 153NE897; 46 Philippine190; 35PortoRico 1; SD 225 NW54; 118Tex91, 11SW(2d)496; 196 Wis464, 220NW373. [a] (13) Department of public works in determining highway route. 324 Ill 113, 154NE707. (14) Federal prohibition director. 12 PortoRicoFed417. [b] **Director of United States Veterans' Bureau** in awarding compensation to discharged soldier. 23F(2d)979. [c] **Decision of director of United States veterans' bureau relative to extent of disability** arising from mental condition within meaning of World War Veterans' Act is not subject to control by mandamus, unless wholly unsupported by evidence, or dependent on question of law, or clearly arbitrary or capricious. DC 26F(2d)997.

660-39 104Conn542, 133A683.

660-42 218Ala120, 117S757; 104Conn 542, 133A683; DC 38F(2d)942.

660-44 104Conn542, 133A683.

660-46 281US206, 50SCt320, 74L ed809 (mandamus inapplicable where duty depends on statute, construction or application of which is doubtful); 320 Mo 1087, 9SW(2d)153; 33PortoRico 656; 118Tex91, 11SW(2d)496; 118Tex 395, 15SW(2d)1027.

661-48 274US106, 47SCt499, 71L ed 949; 206Cal 242, 273P1064; 227AppDiv 11, 236NYS477 (to repair bridge abandoned by state for new one); 120 Oh 269, 166NE198; 121 Oh504, 169NE568.

661-50 274US106, 47SCt499, 71L ed949; 35PortoRico 1.

661-51 274US106, 47SCt499, 71L ed 949.

661-52 See also 170Ark1126, 282SW 963.

661-55 22 OhA282, 153NE897; 33Porto Rico 656.

661-57 DC 26F(2d)1000; 121 Oh472, 169NE572. [a] **Mandamus will not lie** to compel hearing of case where all judges of county are disqualified, remedy being to apply to governor to designate a judge from another county. 195Cal 111, 231P726.

661-58 DC 37F(2d)822; 46Philippine 19.

661-60 22 OhA282, 153NE897; 46 Philippine19.

662-61 218Ala120, 117S757.

662-69 257Mass386, 154NE72; 179 Minn337, 229NW313; 151Va21, 144SE 469. [a] (6) To require governor to submit to council petition for respite on ground of convict's insanity, since it is his duty to make initial determination. 257Mass386, 154NE72. (7) To appoint candidates recommended by two principal political parties on board of elections under statutes. 35PortoRico 1. (8) To appoint member of board of elections. 35PortoRico 171.

662-72 29Ariz504, 243P407. [c] (14) Countersigning warrant for claim approved by auditor. 29Ariz504, 243P 407. [d] **In Ohio** petition to compel Governor to recognize his signature on lease is not act enjoined by statute as duty resulting from office. Oh 171NE 399. [e] **Duties held not purely ministerial.**-179Minn337, 229NW313 (statutory duty for removal of enumerated officials for cause).

663-75 [b] (10) Compelling exercise of discretion in passing on compensation to be paid by commission to employee. Ariz 292P1099.

664-81 Okl 292P562.

666-36½-New. to receive filing fee and fill sworn statement and receipt for committee assessment. 95Fla438, 116S41.

666-53 119 Or101, 248P146.

666-54½-New. Mandamus lies to compel advertising of proposed constitutional amendment; 284Pa235, 130A407.

666-54½-New. even if, because of delay, it is necessary to hold election at time later than that fixed by the legislature. 284Pa235, 130A407.

667-59 249Mich199, 228NW773.

667-71 200Cal 667, 254P551.

667-72½-New. But he will not be required to comply with statute no longer in force, where no contract or vested right is involved. 90Fla264, 105S446.

667-75½-New. Filing of evidence of extension of corporate existence without exacting franchise fee may be compelled by mandamus. 241Mich457, 217NW334

667-84 199Cal 668, 251P207.

668-96 199Cal 668, 251P207; 117Tex 166, 299SW227.

669-3 [c] **Legality of organization of consolidated school district** can be questioned by auditor in mandamus to compel him to register its bonds. Mo 30 SW(2d)603.

671-35 316Mo 1169, 293SW391.

671-40 199 Ind436, 157NE723; 32 PortoRico 841 (university professor).

672-51 21AlaA273, 107S326.

672-58½-New. or for sums appropriated and available for redemption of drainage district bonds, 199Cal 668, 251P207.

672-65 199Cal 668, 251P207. [a] (2) Comptroller cannot be compelled by mandamus to pay interest on transfer tax fund not deposited by predecessor where interest would be earned. 245 NY88, 156NE625.

672-66 275US1, 48SCt12, 72L ed131; 199Cal 668, 251P207.

673-69½-New. A successor comptroller may not be compelled to pay interest upon a fund not placed with a depositary where interest could be earned. 245 NY88, 156NE625.

673-72 See also Ont [1925] 3DomLR 301.

673-77 329 Ill 65, 160NE175.

673-81 [a] **Mandamus will issue to require attorney-general to approve bonds** of water improvement district where his refusal to do so was based solely on erroneous decision of court of civil appeals in another case that statute was void. 118Tex138, 12SW(2d)137.

673-83 See also Ont [1925] 3DomLR 301.

673-89 111Conn634, 151A171 (to file complaint for removal of commissioner); 327 Ill 106, 158NE451.

673-91½-New. Mandamus will not lie to compel the attorney-general to try a civil action in which the state is plaintiff, at the next term of court. 178Minn 442, 227NW891.

674-94 265Mass23, 163NE648.

674-95 129Kan663, 284P397.

675-22 74CalA104, 239P410.

676-27 [a] (2) Where issuance of license would be in violation of lawfully adopted rules of board. 120Kan29, 242 P127.

676-36½-New. He may be required to perform ministerial act required by law. 114Tex561, 273SW789.

676-36½-New. Where the superintendent of instruction has omitted to place the name of plaintiff on a requisition blank for school books, mandamus will lie. 115Tex365, 282SW568.

678-79 219Ala638, 123S71; 169Ga82, 149SE703 (mandamus will not lie to compel bank superintendent to deliver assets of defunct bank purchased at sale ordered by court).

679-82½-New. Supreme court can compel banking commissioner to perform ministerial duty. TexCivA 288SW590.

679-82½-New. District court cannot compel commissioner to sue to set aside preference. TexCivA 288SW590.

679-87 [a] (5) To permit attorney to see and consult with client who is prisoner. 84Mont14, 273P1044.

679-88 [b] **Parole is privilege to be granted** in discretion of board of parole. 250NY239, 165NE277. [c] **Commutation of sentence** cannot be subject of mandamus. 134Misc46, 234NYS489.

679-99 Wash 287P663.

680-19 83Colo 521, 267P198.

680-25½-New. Where the industrial commission refuses to proceed to a decision, mandamus will lie to compel it to do so. 66Utah173, 240P440.

680-25½-New. An order refusing compensation will not be set aside in a proceeding to compel payment of a former award. 107WVa272, 148SE75.

680-25¼-New. Mandamus may not be employed to control the discretion of the industrial commission in classifying occupations or industries for the purpose of fixing premium rates. 119 Oh205, 162 NE800.

680-25½-New. Mandamus commanding the industrial commission to accept premium rates lower than those established by the commission is properly denied. 119 Oh205, 162NE800.

680-25½-New. Mandamus is proper remedy to compel board to act where it denies jurisdiction of workmen's compensation case and thus raises preliminary question of law. Mont 286P408.

680-25½-New. Where workmen's compensation commission refuses to act in a proceeding commenced by petitioner there is no other remedy than mandamus. 35PortoRico 933.

680-25½-New. Mandamus does not lie to Industrial Commission to require application of award to alimony awarded employee's wife. 121 Oh611, 172NE373.

681-35 [c] **Land office commissioners other than governor** may be compelled by mandamus to perform ministerial acts. Okl 292P562.

681-38 97CalA740, 276P137; 117Tex 142, 299SW213.

682-59 117Tex73, 297SW219; TexCivA 13SW(2d)152.

682-69 118Tex331, 15SW(2d)541.

682-72½-New. to compel reclamation commissioner to cancel Carey Act reclamation contract; Ida 288P424.

683-80 96Fla860, 119S134(2dcase).

683-82 TexCommnA 291SW1102.

683-94 140Wash433, 249P996.

684-8½-New. Farms and markets department. In a mandamus proceeding to compel the commissioner of farms and markets to award for diseased animal salvage value has been held immaterial. 128Misc784, 220NYS209.

684-8½-New. Letter from farms and markets department refusing to accept registry association's certificate is no basis for mandamus. 128Misc784, 220 NYS209.

684-11 [a] **Submission of constitutional amendments** agreed to by majority of members of both houses of legislature may be compelled although time fixed

by constitution has passed. Okl 292P 365.

684–18 See also 22F(2d)577.

684–22 DC 40F(2d)808.

684–27½–New. Mandamus does not lie to control the discretion of the federal reserve board in rejecting the organization certificate of a foreign banking corporation. DC 33F(2d)805.

685–34 44Philippine489.

685–38 30F(2d)871.

685–40 280US306, 50SCt103, 74L ed 445; 18F(2d)820; 55AppDC391, 6F(2d) 694.

685–41 [c] Secretary of interior may be compelled by mandamus to issue permit to minor to prospect for oil and gas after denial of application merely on ground that applicant was not of legal age. 30F(2d)739.

686–49 281US206, 50SCt320, 74L ed 809; 18F(2d)822; DC 26F(2d)1002. 46 Philippine190. [a] (12) To compel allowance of claims for losses sustained in preparing to produce manganese for war purposes. 267US175, 45SCt252, 69 L ed566. (13) To compel determination whether interest paid on borrowed capital should be considered in part of net losses in preparing for and producing pyrites under Dent Act. 267US185, 45 SCt256, 69L ed566. (14) Decision construing contract of public lands is not reviewable by mandamus. 30F(2d)737.

686–50 18F(2d)822. [a] (4) Ruling denying one not enrolled as member of Fond du Lac band of Chippewa Indians in Wisconsin right to participate in annuities payable to Chippewa Indians in Minnesota. 18F(2d)822(1stcase). (5) Ruling denying one not enrolled as member of any tribe right to participate in annuities payable under Act of Congress of Jan. 14, 1889, though she was able to prove that she was quarter blood Chippewa Indian of Minnesota. 18F(2d)822(2dcase).

686–56 30F(2d)742.

686–57 23F(2d)136.

687–61 [d] Declaration of interference.–Mandamus does lie to compel commissioner of patents to declare interference. 6F(2d)714.

687–65 18F(2d)829.

688–79 273US299, 47SCt413, 71L ed 651.

688–80 273US299, 47SCt413, 71L ed651.

688–81 30F(2d)479 [certiorari den 279 US856, 49SCt351(5thcase), 73L ed997]; DC 35F(2d)1012.

688–83 19F(2d)591.

688–87 RI 151A1. [a] 46Philippine83.

689–96 16F(2d)337; 172Ark1009, 291 SW420, 51ALR559; 200Cal 1, 251P784; 87CalA594, 262P477, 480 [quotCJ](3d case); 163La518, 112S402; 177Minn 372, 225NW296; NJSup 133A785; 130 Misc181, 224NYS201; TexCivA 293SW 659.

689–97 25F(2d)544; 172Ark1009, 291 SW420, 51ALR559; 179Ark772, 18SW (2d)334; CalA 290P646; 104Conn542, 133A683; DC 42F(2d)347; 164Ga271, 138SE226; 236 IllA135; 248 IllA339; Ind 172NE908; 220Ky297, 295SW146; 6LaA48; 7LaA212; 13LaA173, 127S 659; 175Minn34, 220NW166; Mo 32SW (2d)59; MoA 28SW(2d)1040; 86Mont 100, 282P1045; NJSup 135A683; 242NY330, 151NE637; 130Misc181, 224 NYS201; 219AppDiv233, 219NYS189; 192NC395, 135SE151; NC 155SE562; 52ND641, 204NW202; 117 Oh78, 157NE 792; 142 Okl 128, 286P796; 122 Or684, 260P220; 155Tenn322, 292SW451; Tex CivA 1SW(2d)373; TexCivA 31SW(2d) 1099; 104WVa614, 140SE680; 196Wis 464, 220NW373. [b] Mistake in law does not justify court in interfering by mandamus with exercise of fair and honest judgment. 108Conn246, 142A 800.

690–98 104Conn542, 133A683; 219App Div233, 219NYS189; 52ND641, 204NW 202; 196Wis464, 220NW373; 100WVa 531, 131SE7 (power of state road commission expressly made discretionary by statute).

690–99 196Wis464, 220NW373.

690–1 Cal 290P885; 87CalA594, 262P 477, 480 [quotCJ] (3dcase); CalA 269 P764; 94CalA431, 271P381; 104Conn 542, 133A683; 164Ga271, 138SE226 (dictum); 164Ga402, 138SE777 (dictum); 236 IllA135; 164La42, 113S757; 175Minn34, 220NW166; 177Minn372, 225NW296; 219AppDiv233, 219NYS 189; RI 151A1; TexCivA 1SW(2d)373, 376 [citCyc]. [b] Action must be without supporting facts.–TexCivA 1SW(2d) 373.

690–5 176Ark822, 4SW(2d)510; 196Cal 211; 237P538, 40ALR782; 82Colo 311, 259P514; 164Ga271, 138SE226; 28Hawaii538; 198 Ind574, 154NE384; Ind 166NE270; 101Vt24, 140A157, 57ALR 156; 136Wash403, 240P560; 197Wis 442, 222NW244 (orders of railroad commission). [a] Duties commanded by statute, requiring city to pass ordinance regulating sewers and plumbing, held "ministerial." TexCivA 293SW659; 163La518, 112S402; 255Mass84, 150NE 886; 132Misc283, 230NYS206; 137Misc 278, 242NYS517 (board of standards and appeals); 192NC395, 135SE151; 52ND 641, 204NW202; 116 Oh650, 157NE330; 142 Okl 128, 286P796; 7PaDist&Co 179; 49SD499, 207NW459; 155Tenn322, 292 SW451; 158Tenn518, 14SW(2d)732; 114Tex561, 273SW789; TexCivA 293SW 659. [b] Ministerial duties.–196Wis 464, 220NW373. [c] Where defect of legal justice will ensue from failure to perform duty mandamus will lie. Ga 155SE489.

690–5½–New. That performance of a ministerial act required by law results in performance of a contract is no reason why it will not issue. 114Tex561, 273SW789.

691–7 170Minn141, 212NW170; 227App Div560, 238NYS424; 113 Okl 236, 241 P197.

691–7½–New. Mandamus order should specify with precision the acts to be done. General direction to comply with the provision of a certain statute is insufficient. 213AppDiv561, 210NYS 193.

691–9 76CalA445, 244P946; 109Conn 249, 146A382; 169Ga368, 150SE261; 30Hawaii526; Ill 172NE761; 251Mich 396, 232NW235; 76Mont218, 246P167; 49ND151, 190NW549 (mandamus will not be where it will violate constitutional requirement); 5PaDist&Co 733; 35 OhA271, 172NE391. [a] 112 Oh559, 148NE342 (misapplication or misuse of public funds). See also 6LaA374.

692–10 177Ark474, 7SW(2d)13; 78CalA 84, 248P286; 94CalA431, 271P381; 124 Kan89, 257P945, 948 (perHopkins,J); 166La810, 118S28; 232Mich380, 205 NW127; 222MoA396, 5SW(2d)653; 222 MoA396, 5SW(2d)653; Mont 285P191; 23 OhA150, 155NE160; 8PaDist&Co 305.

692–11 NJ 133A702.

692–13 195Cal672, 235P448; 227App Div560, 238NYS424 (enforcement impracticable). [d] Mandamus will not issue where result would be mere academic direction, meaningless and unenforceable. 213AppDiv561, 210NYS 193; 49ND151, 190NW549.

692–15 81CalA427, 254P606; 123Kan 495, 256P149; 171Minn177, 213NW545, 52ALR916; 213AppDiv561, 210NYS193; 140 Okl 118, 282P668 (cannot compel county attorney to verify information or complaint); 199Wis13, 225NW170; 36Wyo 302, 254P491. [a] Statute giving creditor right to sue reclamation district reduced his former remedy by mandamus to ordinary action of mandamus, under the code providing for writ to issue where remedy at law is inadequate. 81CalA427, 254P606.

693–18 104Conn542, 133A683.

693–19 104Conn542, 133A683; 28Hawaii538.

693–21 SC 155SE830. See also 160Ga 816, 129SE73.

693–21½–New. Mandamus is never granted in anticipation of error of conduct or supposed omission of duty. 6 PaDist&Co 733.

693–24 265Mass338, 164NE69; 24 OhA 166, 156NE221.

694–29 NJ 143A738; 130Misc448, 224 NYS41.

694–31 164Ga402, 138SE777, 782 [cit CJperHines,J]. [a] Thus, where application to city council is prerequisite for issuance of permit by mayor, on refusal by city council, demand on mayor is not necessary. 126Misc289, 213NYS659.

694–33 164Ga402, 138SE777, 782 [cit CJperHines,J].

694–41½–New. where its issuance would constitute an interference with the exercise of executive powers; 132Misc283, 230NYS206.

694–42 116Nebr261, 216NW818.

695–50½–New. Writ will not issue to compel a board of officials to commence an action in their official capacity against themselves individually to recover funds unlawfully expended. 123 Kan495, 256P149.

695–50½–New. Board of adjustment, having duty to investigate facts and to exercise discretion of judicial nature, has at least quasi-judicial power. 192 NC395, 135SE151.

695–50¼–New. Quasi-judicial functions exercised according to uniform rule prescribed by statute or ordinance are subject to judicial control by mandamus only in cases which are arbitrary, oppressive, or attended with manifest abuse. 192NC395, 135SE151.

695–50½–New. Mandamus will not lie to compel a municipality to accept payment by a third party of an alleged debt of its secretary treasurer where the debt was not established or agency of the third party to pay it proved. Can [1929] 1DomLR197.

695–53 201Cal 769, 255P1118; 90CalA 242, 265P864.

695–55 Ind 172NE908.

695–58 201Cal 769, 255P1118.

695–59 90CalA242, 265P864; RI 151 A1.

695–62½–New. Mandamus lies to compel borough council to seat duly elected member who has qualified by presentation of certificate and filing of oath. 12PaDist&Co 262 (removal from ward after election not considered).

696–63½–New. County board of review may be compelled by mandamus to publish rules. Ill 157NE187.

696–67 200 Iowa143, 202NW379; 206 Iowa1358, 222NW406; 147Miss99, 113S 194.

696–68 147Miss99, 113S194.

697–77 122Kan213, 251P631.

697–80 96Fla524, 118S305(1stcase). [b] State veterinarian may be compelled to eradicate tick from animals. 162Ga 340, 133SE871.

697–85½–New. Mandamus will not issue to compel appointment of parish board of health. 158La706, 104S624.

697–87 168Ga370, 147SE762.

697–93 73Mont165, 235P337 (county attorney).

697–93½–New. The right to require the district attorney or attorney-general to bring suit against one usurping, intruding into, or unlawfully holding office, may be enforced by mandamus. 166 La847, 118S42.

697–95 242 IllA472; 125Kan92, 262P 579. [a] (3) 195Cal 743, 235P986.

698–97 236 IllA135.

698–99½–New. Mandamus will not be issued to compel the city clerk to furnish a copy of the poll list used in an election, where he is under no duty to do so. 219Ala349, 122S457.

698–11 149Wash570, 271P829.

698–12 127Misc747, 217NYS400.

700–45 170Ga846, 154SE454; Mo 25 SW(2d)456.

700–49 [a] Approval of appointment.–235Ky240, 30SW(2d)945.

702–71 23 OhA21, 155NE147.

702–78 250 IllA307; 253Mass590, 149 NE622.

703–4 167Minn240, 208NW1005.

704–21 172Ark1009, 291SW420, 51ALR 559; 200 Ind129, 154NE490.

704–22 See also 190NC336, 130SE25.

704–29 94CalA431, 271P381; Nev 285 P511.

704–32 [b] (3) But mandamus will not issue to require defendant to surrender office, where petitioner claims under invalid certificate of election. 152 Va139, 146SE287. (4) Mandamus is proper remedy to compel members of board of selectmen to recognize claimant as member and stopping third person from pretending to be such member. Mass 167NE329. [e] In West Virginia.–105WVa487, 143SE153.

705–34 77CalA716, 247P523; 81Colo 338, 255P461; 327 Ill 433, 158NE743;

220MoA708, 293SW471; NJSup 134A 610; 32NM20, 250P729; 142 Okl 36, 284 P1115(2dcase).

705-35 77CalA716, 247P523; 81Colo 338, 255P461; 327 Ill 433, 158NE743; 319Mo 705, 7SW(2d)357, 59ALR95; 32 NM20, 250P729. [b] **Quo warranto held applicable** where plaintiff surrendered office. 81Colo 338, 255P461.

706-36 319Mo 705, 7SW(2d)357, 59ALR 95.

706-40 32NM20, 250P729; 106WVa170, 145SE184.

706-41 32NM20, 250P729.

706-42 11PaDist&Co 319, 321 [citCyc].

707-43 [a] (4) Where claimant is in eligible. 105WVa487, 143SE153.

707-43½-New. Under statute declaring office vacant, if person elected does not qualify within month after time when he is required to qualify, proceeding begun after expiration of the month by person who has not qualified is properly dismissed. 48SD408, 204 NW898.

707-43½-New. Mandamus lies "to admit to office" one who shows a clear legal right thereto. 107WVa109, 147 SE184.

707-45 77CalA716, 247P523; 319Mo 705, 7SW(2d)357, 59ALR95; 319Mo 1078, 8SW(2d)620; NJ 151A116; 142 Okl 36, 284P1115(2dcase).

707-46 3Del 554, 140A642, 646 [citCJ].

703-56 97Fla501, 121S788.

703-57 98Fla1082, 125S371; 32NM20, 250P729; 5PaDist&Co 90.

709-62 32NM20, 250P729, 732 [quot CJ]. See also 214Ala353, 107S854.

709-63 32NM20, 250P729.

709-64 32NM20, 250P729, 732 [citCJ].

709-64½-New. but a mere intruder, 32 NM20, 250P729.

710-75 160Ga433, 128SE181; 316Mo 524, 296SW90, 95 [citCyc]; 317Mo 1208, 298SW833; NJSup 136A420; 229App Div787, 242NYS57; 114 Ohl22, 150NE 431; OhA 173NE309; 33PortoRico 720. [b] **Mandamus will not lie to compel reinstatement of fire department member as illegally removed** without notice required, where such member was legally suspended and civil service commissioner refuses to consent to reinstatement. 266Mass513, 165NE681.

710-77 34PortoRico 194.

710-79 NJSup 136A420.

710-80 MoA 208SW(2d)1 (removal of clerk in city treasurer's office within classified service).

710-93 But see 231Ky128, 21SW(2d) 144.

710-90½-New. chairman of highway board. 160Ga433, 128SE181.

711-97 See also MoA 98SW(2d)649.

711-98 34PortoRico 194 (removal on weight of evidence).

711-99 [a] **Where board has no power to appoint** certain employee, mandamus will not lie to compel restoration. 98Fla81, 123S545.

711-2 32NM20, 250P729.

711-7 252 IllA10.

711-8 252 IllA10.

713-27 32NM20, 250P729. [a] 32NM 20, 250P729.

713-36 243 IllA100; 253Mass400, 149 NE317; 313Mo 352, 281SW426; 220App Div347, 221NYS559; 131Misc577, 226 NYS663; 23 OhA62, 155NE250. But see 121 Ohl511, 169NE599.

714-38 253Mass400, 149NE317.

714-44 [c] **Where abolition of position** is cause for dismissal, presumption is that it was in interest of retrenchment and economy. 160La261, 106S 845.

715-60 160Ga816, 129SE73. See also 125Misc435, 211NYS714.

715-61 244 IllA66.

715-71 212Ala604, 103S476 (attorney general not compelled to certify as to services of special assistant).

715-73 [a] 254Mass100, 149NE601.

716-74 214Ala114, 106S601; 77CalA 716, 247P523; 245NY8, 156NE78; OhA 173NE309; 33PortoRico 418; TexCivA 328SW(2d)485(2dcase).

716-75 CalA 287P136.

716-76 23 OhA62, 155NE250; 33Porto Rico 418.

716-77 77CalA716, 247P523; 316Mo 524, 296SW90; 33PortoRico 418; 153 SC106, 149SE760.

716-80 299Pa276, 149A176.

717-89 240 IllA351.

717-94 77CalA716, 247P523.

717-96 77CalA716, 247P523.

717-97 214Ala114, 106S604.

717-99 214Ala114, 106S604.

718-6 MoA 98SW(2d)649.

718-7 313Mo 352, 281SW426.

718-20 But see 260Mass476, 157NE 529 (pensioner may sue in contract for pension legally granted).

718-21 But see 260Mass476, 157NE529.

719-23 295Pa82, 144A897.

719-24 212AppDiv760, 210NYS419. [b] **Teacher's Retirement Board** may be compelled by mandamus to act. 215 AppDiv220, 213NYS738.

719-25 203 Iowa1240, 212NW716; 212 AppDiv760, 210NYS419; 295Pa82, 144 A897.

719-38 251Mich286, 232NW387; 254 NY344, 173NE7; 131Misc820, 227NYS 430; 189NC650, 127SE692; 25 OhA278, 158NE94; 152Tenn59, 274SW551 [cit Cyc]. But see NJSup 147A494(1stcase). [a] (3) to direct city clerk to prepare proposition for submission to voters. 135Misc874, 240NYS82.

720-40 5LaA712. [c] **Petition held not premature.** Tex 28SW(2d)526.

720-41 [b] **The discretion of officers in charge of prosecuting under Corrupt Practice Act** cannot be controlled by mandamus. Wis 231NW590.

720-45 213Ky116, 280SW488.

720-45½-New. or unless the party demanding relief comes into court with clean hands, TexCivA 8SW(2d)813.

720-47½-New. A citizen and elector has an interest entitling him to maintain proceedings for mandamus to compel a city board of election to omit from ballot a proposition submitting on referendum a local law adopted by the municipal assembly. 243NY401, 153 NE319.

720-47⅓-New. Mandamus will not be granted to compel adoption of void ordinance. CalA 291P892.

720-47¼-New. Writ of mandate will lie to determine eligibility of one to hold public office before election. Cal 290P884.

720-49 225Ky534, 9SW(2d)298.

721-52 219Ala236, 122S26.

721-55 321Mo 275, 10SW(2d)524.

721-58 125 Or92, 266P230.

721-60 9PaDist&Co 9.

721-65½-New. Mandamus will issue where city officials refuse to fix a day for registration of voters as required by statute. 313Mo 160, 282SW34.

721-65⅓-New. Adjudication declaring primary election registration to be void cannot be made by mandamus. 197NC 675, 150SE332.

721-72 75CalA724, 243P466; 77CalA 744, 247P519; 96CalA705, 274P1015; 97CalA564, 276P120; 327 Ill 433, 158NE 743; 329 Ill 135, 160NE137; 208 Iowa 36, 222NW882; 84Mont539, 276P954; 245NY537, 157NE848, 152Tenn59, 274 SW551 [citCyc]; 115Tex205, 281SW 837, 840 [citCJ&Cyc]; TexCommnA 12 SW(2d)142; TexCivA 274SW196, 198 [quotCyc]. [a] 157SC290, 154SE164. [b] (3) Where clerk's duty is to call election, when majority of seats of city council are vacant such vacancy must first be determined before writ will issue directing call, where acting majority is made up, in part, of vacancy appointee. 70CalA119, 232P760. [f] 119 Or138, 248P169 (county clerk required to receive and file petition for election to change county seat). [g] **It is duty of court to issue writ compelling** board to act on petition to call election if petition is valid. 71CalA421, 236 P377.

722-73 TexCivA 274SW196, 198 [quot Cyc]; 115Tex205, 281SW837, 840 [cit CJ&Cyc].

722-74½-New. Mandamus will lie to compel calling of referendum election although the date of election asked to be designated in the referendum petition has passed. 170Ark464, 280SW 369.

722-77½-New. Delay of five days by the mayor after petition for the initiation of proceedings for an electric franchise may be so unreasonable under the circumstances as to authorize the issuance of a writ of mandamus to compel the calling of a special election. 208 Iowa36, 222NW882.

722-78 147Miss99, 113S194; NJSup 133A785.

722-79 192Wis378, 212NW796.

722-83 [a] **Mandamus will not lie to** compel calling of election, where court has "found" each candidate received equal number of votes, but it did not appear that final judgment had been entered thereon. 70CalA61, 232P720.

722-83½-New. But court having jurisdiction to compel calling of municipal election has power to determine whether necessary preliminary steps making such call obligatory have been taken. 71CalA421, 236P377.

722-87½-New. Where city officials superseded a judgment in mandamus proceedings requiring them to call an election on the date prescribed by charter, mandamus will lie to compel them to hold the election on a later date, although the date prescribed by charter has passed. TexCivA 274SW196.

723-88 Ala 129S33.

723-90 213Ky116, 280SW488; 37 Okl ACR413.

723-92½-New. where a party convention has declared another nominated, 102WVa192, 135SE611.

723-93 217MoA362, 278SW416; 102 WVa192, 135SE611.

723-95½-New. Mandamus lies to require the secretary of state to recognize the legality of a nomination made by a county convention. 206 Iowa725, 221 NW220.

723-98 337 Ill477, 169NE233; 196 Ind472, 149NE69; 213Ky116, 280SW 488; Nebr 233NW1 (under special statutory proceeding in nature of civil action); 29 OhA117, 162NE687.

723-3 126Kan576, 269P500; 33Porto Rico 656.

723-4 146Miss870, 112S386.

723-5 146Miss870, 112S386.

724-19 113 OhSt386, 149NE192.

724-22 98Fla785, 124S273; RI 135A 33; 150Va174, 142SE415; 150Va54, 142 SE423; [b] **Absent voter's ballots, not cast,** are not disputed ballots, and board having no power to count them cannot be mandamused to do so. 35 OhA271, 172NE391.

725-32½-New. Where an election is held pursuant to law, and it is duly made to appear that the election ballots were not correctly and accurately counted, tallied, tabulated, canvassed, or returned, mandamus is an appropriate remedy. 97Fla159, 120S310.

725-32⅓-New. Mandamus is proper remedy to compel recount by board. 34 PortoRico 612.

725-32¼-New. Other particular circumstances held to require denial of mandamus. Cal 292P270.

725-35 201Cal 327, 257P40; 25 OhA 278, 158NE94; WVa 155SE462.

726-39 51ND520, 200NW782, 783 [cit Cyc].

727-54 115Nebr230, 212NW437.

728-55 [b] **In Nebraska.**-115Nebr230, 212NW437.

728-59 48Nev299, 231P384 (evidence held insufficient to overcome presumption of correctness of return).

728-70½-New. The court will not, by mandamus, compel a canvassing board to reconvene and recount ballots alleged to have been irregularly indorsed in the absence of evidence presented to, and acted upon by, the canvassers. 102WVa 703, 136SE772.

728-71 160Ga217, 127SW862; RI 135 A33; 102WVa696, 136SE266; 107WVa 109, 147SE484.

729-75 25 OhA278, 158NE94; 102WVa 116, 134SE594. [a] (3) Objection by incumbent, not candidate for reélection, that there was no vacancy in office is no defense to mandamus to compel issue of certificate. 102WVa116, 134SE 594.

730-97 [b] (2) Contest over election of mayor is to be heard by ordinary of county where contest arises. 162Ga360, 133SE921. (3) **In Georgia.**-162Ga360, 133SE921.

730-98½-New. Mandamus should not issue requiring executive committee to open ballot boxes in designated pre-

cincts and count ballots cast at primary election where it is matter of discretion. **TexCivA** 31**SW(2d)**1099.

730–5 160**Ga**752, 128**SE**887; 164**Ga**271, 138**SE**226; **Ind** 168**NE**16; 82**Mont**126, 266**P**387, 393 [citCJ].

731–8 164**Ga**271, 138**SE**226; 147**Miss** 121, 112**S**865; 147**Miss**99, 113**S**194; **MoA** 28**SW(2d)**1040; **NC** 155**SE**562; 13**Pa Dist&Co** 768; 104**WVa**41, 138**SE**577. [g] **Cannot be compelled to accept lowest bid** after having made different selection under statute requiring contract for transportation of pupils to be let to lowest responsible bidder. 143**Miss** 108, 108**S**273. [h] **Method of teaching.**–200 **Iowa**860, 205**NW**506.

731–9 **MoA** 28**SW(2d)**1040.

731–11 137**Misc**820, 244**NYS**569 (appeal to commissioner of education).

731–13 29**PortoRico** 971 (payment of scholarship; petition not showing party demanding payment is one of class of students entitled to scholarship).

731–17 160**La**360, 107**S**731; **Oh** 171**NE** 241(2dcase).

731–21½–New. Mandamus is the proper remedy to compel a removed school treasurer to turn over funds to successors. 286**Pa**233, 133**A**226.

731–21⅓–New. Where examining board's act is void retirement board's confirmation of it is subject to mandamus. 135**Misc**271, 238**NYS**642.

732–25 23 **OhA**329, 155**NE**505.

732–28½–New. Mandamus will not lie to compel a superintendent of public instruction to recite a void contract. 171**Ark**427, 285**SW**20.

732–28⅓–New. Issuance of a writ to require the assessor of a county to include in a union school district the portion sought to be withdrawn by creation of a new school district, without compliance with the statute, is not error. 102**CalA**266, 282**P**1021.

732–31 234 **IllA**313; 198 **Ind**323, 152 **NE**822; 164**Minn**134, 204**NW**925; 55 **ND**767, 215**NW**267; **TexCivA** 297**SW** 1100.

732–32 212**Ala**493, 103**S**471; 234 **IllA** 313.

732–33 **MoA** 28**SW(2d)**1040.

732–34 **Mo** 32**SW(2d)**59; **MoA** 28**SW** **(2d)**1040.

732–36 158**La**251, 103**S**757.

732–41 **MoA** 21**SW(2d)**645.

732–42½–New. Refusal of writ to compel cancellation of contract held not abuse of discretion. 78**Mont**435, 254**P** 414.

732–43 13**PaDist&Co** 768.

732–44 164**Ga**271, 138**SE**226. [a] **Transportation of pupils and teachers to schools** held purely discretionary with school officers. 164**Ga**271, 138**SE**226.

733–48 164**Ga**271, 138**SE**226.

733–61 113 **OhSt**658, 150**NE**36.

734–71½–New. Mandamus is proper to require superintendent of education to contract with qualified teacher who has been regularly selected by trustees of district. 141**Miss**585, 106**S**820.

734–73 219**Ky**573, 293**SW**1058.

734–74 165**La**552, 115**S**747; **Miss** 130**S** 754.

734–80 206**Cal** 758, 276**P**998; 99**CalA** 736, 279**P**493.

734–90 160**Ga**752, 128**SE**887.

735–92 130**Misc**181, 224**NYS**201.

736–2 See also 84**Colo** 240, 269**P**15.

736–8 153**Tenn**30, 281**SW**925 (mandamus refused where law requiring purchase of free text books did not become operative in time to permit prescribed procedure in current year).

736–10½–New. State board of education's discretion as to changes in school books cannot be controlled by mandamus. 104**WVa**41, 138**SE**577.

736–15 124**Kan**89, 257**P**945. See also 221**MoA**9, 297**SW**419.

736–18½–New. Mandamus will lie to compel principal and board of directors of incorporated school district to issue graduation certificate to pupil who has met every lawful requirement, 221 **MoA**9, 297**SW**419.

736–18⅓–New. and to compel them to release for credit at another high school credits of such pupil. 221**MoA**9, 297**SW** 419.

736–19 **SD** 226**NW**348 (mandamus issued to permit Roman Catholic children to absent themselves during reading of King James version of Bible).

736–25 114 **Oh**602, 151**NE**669.

737–26 265**Mass**353, 164**NE**91.

737–30 35**PortoRico** 350.

737–38½–New. or where it would tend to introduce confusion or disorder in schools already in operation; 214**Ala**620, 108**S**588.

738–44 131 **Okl** 230, 268**P**713.

738–45 170**Ga**509, 153**SE**214; 242 **IllA** 488; 213**Ky**343, 280**SW**1098; **WVa** 154 **SE**765.

738–49 35 **OhA**29, 171**NE**610.

738–50 35 **OhA**29, 171**NE**610 (after discharge); 43 **OklACR**131.

738–56 **CalA** 289**P**689.

738–60 153**SC**106, 149**SE**760.

738–61½–New. Mandamus is the proper remedy to compel a board to adopt new salary schedules fixing compensation for female teachers at a level paid male teachers. 127**Misc**477, 217**NYS**265.

739–66½–New. , or that there was no money in the treasury to pay them. 127 **Misc**477, 217**NYS**265.

739–71 164**Ga**117, 137**SE**776. But see 34 **OhA**387, 171**NE**38.

739–73 **Mo** 23**SW(2d)**167 (though no memorandum of meeting was kept).

739–77 169**Ga**705, 151**SE**652; 150**Wash** 289, 272**P**968.

739–80 9**PaDist&Co** 661.

739–81 168**La**15, 121**S**176; 1**LaA**598; 3**LaA**479; 12**LaA**62, 125**S**473.

740–82 104**NJL**229, 140**A**679.

740–85½–New. Mandamus is proper remedy to compel recorder of mortgage to cancel affidavit claiming lien. 165 **La**334, 115**S**582.

740–85⅓–New. Change of record of pavement liens to correspond with plan of property as subsequently subdivided and sold, not being ministerial or legal duty, will not be compelled. 164**La** 1006, 115**S**63.

740–86 **Ill** 173**NE**124; 118 **Or**105, 244**P** 868.

741–99 [b] **Where board would be compelled to make invalid contract** because of illegal agreement or combination between newspapers of county, writ will not be granted. 178**Minn**484, 227 **NW**499.

741–2 145**Wash**25, 258**P**836.

741–19 236 **IllA**135; **NJSup** 135**A**683; 104**NJL**18, 139**A**517; **NJSup** 147**A**570; 215**AppDiv**355, 213**NYS**345 (dance hall license); 117 **Oh**576, 159**NE**829. [d] (2) **Refusal** after impartial examination will not be disturbed. 104**WVa**614, 140 **SE**680. [f] **Refusal of license for birth control clinic** is held within discretion of health commissioner and is not reviewable by mandamus. 236 **IllA**135.

742–21 323 **Ill** 427, 154**NE**198; 238 **Mich**533, 213**NW**680; 104**NJL**18, 139**A** 517; 241**NY**157, 149**NE**336 (imposing conditions not fixed by ordinance); 251 **NY**343, 167**NE**464; **SC** 155**SE**830.

742–22 241**NY**157, 149**NE**336.

742–23 241**NY**157, 149**NE**336.

742–25 86**Colo** 185, 279**P**40; 165**Ga**434, 141**SE**66; 237 **IllA**65; **Nebr** 233**NW**4; 27 **OhNPNS**77; 118 **Or**629, 247**P**775. See also **NJSup** 131**A**638.

742–28 **NJSup** 135**A**683; **NJSup** 136**A** 601. [b] **In Alberta.**–[1928] 2**DomLR** 822.

743–30 109**Conn**249, 146**A**382; **Wis** 230 **NW**60. [d] **Mandamus for issuance of license** to operate billiard tables should be denied where applicant had been operating without license contrary to ordinance. 89**Fla**74, 104**S**857.

743–37½–New. Where the board has exercised discretion in applicant's favor by definitely granting a license on condition subsequent, the applicant may compel the issuance of a license by mandamus after compliance with conditions at great expense. **NJSup** 131**A** 638.

743–41 150**Md**294, 133**A**62.

743–44 323 **Ill** 427, 154**NE**198.

743–45 150**Md**294, 133**A**62.

743–47 128**Misc**280, 219**NYS**143.

743–51 [a] **Where city censorship ordinance is valid,** mandamus is proper remedy to compel issuance of permit to exhibit motion picture. 236 **IllA**281.

743–52 22**F(2d)**577; 200**Cal** 1, 251**P** 784; **CalA** 290**P**519(2dcase).

743–53 34**F(2d)**721 (to amend alcohol permit); **Iowa** 228**NW**874;

743–53 100**WVa**531, 131**SE**7; 103**WVa** 723, 138**SE**397. [b] **Where refusal to grant permit involved determination of issue of fact** discretion of board cannot be controlled by mandamus. **Tex CivA** 18**SW(2d)**373.

743–53½–New. Refusal of bank superintendent to permit opening of branch bank based on untenable ground will not preclude him from setting up legal ground for refusal. 200**Cal** 1, 251**P**784.

743–54 [a] **Refusal to grant permit** held arbitrary as matter of law. 242 **NY**330, 151**NE**637.

743–55 87**CalA**594, 262**P**477(3dcase); 121**Kan**141, 245**P**1047 (construction of dam); 242**NY**330, 151**NE**637; **SD** 230 **NW**848 (permit for moving building along street).

743–56 339 **Ill** 595, 171**NE**742; 167 **Minn**410, 209**NW**6.

743–56½–New. After the board has exercised discretion in favor of issuance, it may be compelled by mandamus to issue a permit after compliance with conditions. **NJSup** 131**A**638.

743–56⅓–New. Mandamus may issue to compel revocation of illegal consent to the appearance of a child in a theatrical performance. 132**Misc**283, 230**NYS** 206.

744–58 339 **Ill** 595, 171**NE**742; 259 **Mass**329, 156**NE**852; **NJ** 130**A**365 (to issue permit for erection of two family houses); **NJ** 135**A**553; **NJ** 140**A**788; **NJSup** 132**A**339; **NJSup** 132**A**513; **NJ Sup** 133**A**413; **NJSup** 134**A**840; **NJSup** 135**A**811; 138**Misc**232, 244**NYS**531; 113 **OhSt**662, 150**NE**42. [a] **Compelling building inspector to approve plans** for apartment house is properly done by mandamus. 137**Misc**22, 242**NYS**86.

744–59 224**Ky**257, 6**SW(2d)**243; 103 **NJL**355, 137**A**545; **NJ** 140**A**788; **NJ** 141 **A**563; **NJL** 142**A**556; **NJSup** 131**A**906; **NJSup** 132**A**197; **NJSup** 132**A**198; **NJ Sup** 132**A**334; **NJSup** 135**A**80; **NJSup** 135**A**658; **NJSup** 140**A**780; **NJSup** 140**A** 923; **NJSup** 142**A**355; **NJSup** 143**A**425; 127**Misc**895, 217**NYS**353; 132**Misc**816, 230**NYS**457; 113 **OhSt**662, 150**NE**42; **WVa** 154**SE**876. [c] **Applicant need not wait for legislation on zoning constitutional amendments** to be enacted before being entitled to mandamus to compel issuance of permit. **NJ** 140**A**788. [d] **If relator was entitled to permit at time of instituting action,** his right could not be defeated by subsequent ordinance. 120 **Oh**352, 166**NE**228.

744–60 **Miss** 130**S**287; **NJSup** 133**A**534; **NJSup** 142**A**440; **NJSup** 148**A**152.

744–61 [b] **NJ** 130**A**361 (where purpose of erecting building is not injurious to health, safety, or general welfare of public); **NJ** 130**A**362; **NJ** 130**A**364 (to issue permit to convert garage into stores).

744–62 **NJ** 143**A**753; **NJ** 143**A**867 (2d case); **NJ** 151**A**61; **NJSup** 133**A**534; **Man** [1930] 4**DomLR**205. [a] **Writ of mandamus could not issue to compel building inspector** to issue building permit if acts providing for issuance of permits are unconstitutional. 156**Md** 408, 144**A**640.

744–63 **Man** [1930] 4**DomLR**205.

744–64 **NJSup** 133**A**534.

744–65 156**Md**408, 144**A**640.

744–66 **NJ** 147**A**461 (2d case) (writ would be unavailing); **NJSup** 134**A**122; **NJSup** 134**A**839; **NJSup** 136**A**407; **NJSup** 142**A**423; **NJSup** 142**A**429; **NJSup** 147**A**649 (1st case); **NJSup** 150**A** 237; 241**NY**288, 150**NE**120, 43**ALR**651 (in absence of showing that each of three regulations was so unreasonable so as to be invalid, in case where one of regulations might survive though others might not). 119 **Oh**585, 165**NE**96. See also **NJSup** 143**A**73. Contra **NJSup** 135 **A**811. [a] **Where any permissible interpretation of ordinance** will uphold its validity, peremptory mandamus will not issue. 241**NY**288, 150**NE**120. [b] **Zoning ordinance** must be clearly shown unreasonable to entitle relator to mandamus. **NJSup** 136**A**803. [c] **Fact that permit was inadvertently issued to another in violation of ordinance** is no ground for issuing mandamus to compel

issuance of like permit to relator. NJ 213A417.

744-67 NJSup 142A429; NJSup 142A 439.

744-67½-New. Before mandamus will issue, a municipality is entitled to an opportunity to adopt proper legislation under a constitutional amendment. NJSup 142A459

744-69½-New. Mandamus will not issue where ordinance requiring issuance of permit is invalid. 126Misc289, 213 NYS659.

744-69¾-New. Conclusions of the board of adjustment, under a zoning ordinance, as to whether proposed buildings would be noxious, offensive, or detrimental to public safety and exercise of discretion thereon are quasi-judicial acts. 192NC 395, 135SE151.

744-69¼-New. That condemnation proceedings are contemplated has been held no bar to awarding writ. NJSup 133A 400

744-69½-New. Failure to pay fees required is not a bar to relief by mandamus. NJ 136A164.

744-69¾-New. Mandamus will be refused where, subsequent to application, a building code ordinance is amended making the proposed building illegal. 107NJL173, 153A465.

744-69¾-New. Where, on review by certiorari, the proceedings and findings of the adjustment board on appeal had been set aside, the writ of mandamus was denied. NJSup 136A736.

744-69¾-New. Mandamus is not a proper mode of reviewing refusal of the board of appeals to grant a building permit. NJSup 142A440.

745-74 130Misc545, 224NYS56. Contra NJSup 137A332.

745-89 195Cal743, 235P986; 201Cal 299, 257P60; 125Kan92, 262P579; 137 Misc376, 241NYS675 (affixing signature to lease). [c] **Where city council adopted resolution directing execution of contract to one who submitted lowest bid,** petitioner is entitled to alternative mandamus order, at least as matter of discretion, directing commissioner to execute contract. 216AppDiv311, 215 NYS15.

745-90 102WVa88, 134SE465.

745-94 336Ill630, 168NE671.

746-95 155Miss220, 124SE319.

746-98 See also 29Hawaii18.

746-99 145Wash25, 258P836.

747-86 102WVa88, 134SE465.

747-87 102WVa88, 134SE465.

749-61 199Ind210, 156NE465.

749-62 Ga 154SE886 (2d case). 166 Misc67, 148830.

749-66½-New. A town board cannot be required by mandamus to expend private funds offered by a relator in public improvements. 177Minn372, 225NW296.

750-84 214Ky263, 283SW95; 310Mo 526, 275SW927 (construing Rev. St. [1919] § 4580).

750-85 200Iowa143, 202NW379.

750-92 But see 174Ark659, 298SW489.

750-93½-New. But county officials will not be compelled to construct a sewer system benefiting largely state property where an unjust burden of expense would be imposed on a district less than the whole state. 119Ob93, 162NE393.

750-94 See also 127Kan283, 273P425.

750-98½-New. Under statutes of some states mandamus will lie to compel treasurer of drainage district to pay warrant issued by drainage district board, unless there was fraud, or possibly mistake, in actual procurement of warrant. 310Mo 526, 275SW927.

750-98½-New. or drainage board's acts were not within its lawful powers. 310 Mo 526, 275SW927.

750-98¼-New. Where landowners in a drainage district have petitioned the board of supervisors for a new survey and location as to a certain lateral and the petition has been acted upon as one for a new improvement and denied on the ground that the expense would exceed benefits, the landowners are not entitled to mandamus to compel the board to construct the improvement. 208 Iowa 285, 225NW375.

750-3 108WVa404, 151SE315.

751-7 82Mont382, 267P499.

751-10 324Ill113, 154NE707; 221MoA 399, 278SW88. [a] (2) Mandamus will not lie against department of public works, empowered under L. (1917) p 696 to determine routes of state highways subject to approval of governor, so as to require location on route originally selected. 324Ill113, 154NE707.

751-14 [a] (4) Mandamus will not lie to compel board of commissioners to set aside judgment establishing road in preference to one previously petitioned for. 196Ind281, 148NE198.

751-18 120Kan356, 243P539 (mandamus will lie to compel board of county commissioners to proceed with construction of federal aid benefit district highway); 124Kan141, 257P716; 221MoA 399, 278SW88.

751-19 221MoA399, 278SW88. [b] **County court cannot question its finding of essential facts** necessary to declare strip between counties to be public highway. 221MoA399, 278SW88.

752-33 195NC107, 141SE358. [a] **Discretion of county commissioners to protest against change in state highway is not subject to control.** 195NC783, 143 SE871.

752-40 125Kan741, 265P1101.

752-43 But see 175Minn34, 220NW166.

753-49 245NY610, 157NE878.

753-59 199Ind210, 156NE465; 219Ky 275, 292SW797, 798 [citCJ]. [c] **Correction of assessment roll** in proceedings to widen street will be compelled by mandamus. 199Ind210, 156NE465. [d] **Where occupancy of relator's land was by independent contractor** who constructed land, mandamus to compel highway commission to pay for occupancy was denied. NJSup 149A534.

754-81 [a] **Sale of franchise ordered.** 220Ky297, 295SW146.

754-82 [a] **Terms of sale** not controlled by mandamus. 220Ky297, 295SW146.

755-92 177Minn372, 225NW296.

755-93 241IllA91; 254IllA109; 175 Minn34, 220NW166. [d] **Mandamus requiring removal of gasoline pumps** obstructing sidewalks is not undertaking to supervise general course of conduct. 135Wash442, 237P1004.

755-1½-New. Mandamus to compel a borough president to serve notice on the owner of a building to remove certain street encroachments is not appropriate to protect individual interests of the petitioner. 249NY88, 162NE593.

756-7 175Minn34, 220NW166.

756-8 179Minn463, 229NW577; 138 Misc607, 245NYS534.

756-10 179Minn463, 229NW577.

756-11 137Misc190, 242NYS78.

756-19 164Ga402, 138SE777, 782 [cit CJperiltinesJ].

756-20 164Ga402, 138SE777, 782 [cit CJperiltinesJ].

756-24 164Ga402, 138SE777; 166Ga 612, 144SE21.

756-25 164Ga402, 138SE777.

756-28½-New. Mandamus will not issue to compel city commissioners to rent city auditorium for public meeting where no showing of bad faith in refusal is shown. 52ND641, 204NW202.

756-28¾-New. In absence of showing that refusal of city commissioners to rent city auditorium was unreasonable or arbitrary, mandamus refused. 52ND 641, 204NW202.

757-42 143Miss42, 108S284, 45ALR824.

757-44½-New. Under statutes, it is a matter of discretion whether the municipal authorities shall supply water from municipal tanks to one outside the municipal limits. 8PaDist&Co 450.

757-55½-New. Mandamus to prevent use of piers for storage held unauthorized where goods are held during implied continuance of transportation. 227AppDiv560, 238NYS424.

758-64 31NM402, 246P907.

758-65 31NM402, 246P907.

758-79 222AppDiv416, 225NYS495.

758-80 169Ga368, 150SE261.

759-91½-New. The right of a city fireman to maintain mandamus to compel the board of estimate and apportionment to have a statement and appropriation bill with his monthly salary correctly stated, submitted, and recommended may be enforced by mandamus although he may not have a lawful right to remain in the employ of the city during the first year after the appropriation becomes effective. 315Mo 41, 285SW504.

759-91¼-New. Where the board of county commissioners had previously appropriated a sum for a county agricultural agent, mandamus will not issue to compel further appropriation under a statute authorizing such action on failure of the board to act. 116Oh428, 156 NE457.

759-91¼-New. Agreement under West Virginia statute appropriating funds for salary of county agent and demonstration agent is enforcible by mandamus against county court. WVa 153SE506.

759-97 [a] **Where depositary has failed to give statutory security,** mandamus will not lie. 30NM537, 239P740.

759-3 200Ind319, 163NE263; 30NM 454, 236P743; 113ObSt443, 149NE326 (executive agencies of city voting issue of bonds may be compelled to advertise, sell, execute, and deliver such bonds); SC 155SE266. [a] (2) 129Kan834, 284 P618.

760-4 94CalA652, 271P788; 106WVa 325, 145SE602.

760-6 174Ark298, 296SW729; Mo 32 SW(2d)59. But see 222Ky292, 300SW 921.

760-7 18F(2d)898; 121Oh109, 167NE 360.

760-18 Mo 300SW267. [a] **If county budget item failed to include amount authorized** under order of state tax commission, remedy of creditor was not to compel treasurer to pay warrant not covered by budget, but to compel supervisors to budget item properly. 35Ariz 403, 279P257.

761-19 [a] (1) 208Ky661, 271SW1066. (2) Claim of state against county for payment of state tax on railroad grant lands under federal statute. 125Or197, 266P1075.

761-19½-New. Where title to act "authorizing" city to provide by ordinance for payment for public works or improvements does not give notice of mandatory character of enactment, mandamus will not lie to compel town council to enact appropriate ordinance. 85Pa Super228.

761-21 94CalA382, 271P568; 158Tenn 518, 14SW(2d)732.

761-22 But see 94CalA382, 271P568.

761-23 245NY505, 157NE836(1stcase); 245NY506, 157NE836.

761-27 170Ark1168, 282SW990.

761-30 See also 132Or561, 286P590.

762-35 252IllA601; 82Mont126, 266P 387, 393 [citCJ]. [a] (2) 240Mich12, 215NW18; 311Mo32, 276SW872. (3) TexCivA 282SW642. (8) School district. MoA 218W(2d)930. [i] **Award in condemnation proceedings.**-240Mich12, 215 NW18. [j] **Where village levies tax which will in reasonable time satisfy judgment** mandamus to compel payment is properly denied. 121Oh631, 172NE 376(1stcase).

762-39 311Mo32, 276SW872 (return of execution unsatisfied basis of writ).

762-46 [a] (2) Police jury cannot be compelled to budget judgment against possible surplus of revenues which does not exist. 161La406, 108S787.

763-49½-New. Mandamus will be awarded to compel a city to take steps to pay a judgment for property condemned for a local improvement only in a clear case of unreasonable delay or negligence. 252IllA601.

763-49¼-New. Where a petition for a writ for such purpose is filed pending referendum on the bond issue, the fact that the bond issue is defeated on referendum does not entitle the petitioner at once to a writ ordering the appropriation of money or the levy of tax to pay the judgment without the showing of unreasonable delay or negligence. 252 IllA601.

763-56 NJSup 142A428.

763-60 200Cal661, 254P564.

763-60½-New. Mandamus is held not to lie to judge to direct approval of bills of special prosecutor. NJSup 135A280.

763-63 77CalA404, 247P527.

764-69 199Wis523, 227NW35.

764–73 23F(2d)371.
765–89 85CalA507, 259P970; 88CalA 16, 263P253; NJSup 135A280; NJSup 136A197; 136Wash403, 240P506; 196 Wis464, 220NW373. [a] **Mandamus to audit claims not county charges** will not be issued against board of supervisors. 251NY156, 167NE204.
765–89 136Wash403, 240P560.
765–92 54ND820, 211NW592.
765–97 NJSup 135A280; 55ND163, 212 NW822; 55ND178, 212NW828; 108 WVa41, 151SE319.
766–98 153Wash399, 280P31, 67ALR 668 (though fact question is involved); 196Wis464, 220NW373.
766–98½–New. , and quasi-judicial decision may be reviewed by mandamus. 49SD558, 207NW979.
766–12 MoA 282SW147; NJSup 135A 280; 123 Or301, 261P81. [a] (2) Where county was not liable. 283Pa582, 129A 635.
766–13 272US640, 47SCt229, 71L ed 454; 274US410, 47SCt704, 71L ed1127; 153SC106, 149SE760; 136Wash403, 240 P560.
767–14 272US640, 47SCt229, 71L ed 454.
767–16 272US640, 47SCt229, 71L ed 454.
767–17 272US640, 47SCt229, 71L ed 454.
767–18 272US640, 47SCt229, 71L ed 454.
767–19 272US640, 47SCt229, 71L ed 454.
767–24 222MoA531, 293SW93, 97 [quot Cyc].
767–26 179Ark772, 18SW(2d)334; 70 CalA738, 234P845; 81CalA427, 254P606; 99Fla358, 127S319; 316Mo 1041, 293SW 98, 101; 222MoA531, 293SW93; 198 NC325, 151SE718; TexCivA 5SW(2d) 257.
767–27 123 Or301, 261P81; 155Tenn 322, 292SW451.
767–28 168Ga697, 148SE740 (road and revenue commissioners are not bound by contracts of boards of education, hence mandamus will not lie to compel them to pay boards' obligations).
768–30 314Mo 33, 282SW1007.
768–31 245NY506, 157NE836(2dcase); 245NY505, 157NE836; 54SD285, 223NW 54.
768–36 MoA 17SW(2d)572.
768–41½–New. Mandamus lies to compel the county clerk to deliver a warrant to the payee where it was refused because not properly countersigned and it was in fact countersigned by the deputy of the county treasurer and in his name. 251 IllA357.
768–42 148Md649, 129A905 [citCyc].
768–43 314Mo 33, 282SW1007.
768–45 170Ga13, 152SE91.
769–49 Ala 129S266; 95CalA151, 272 P336; 164Ga879, 139SE546; 169Ga70, 149SE776; 125Kan744, 745, 266P106 [citCJ]; 218Ky52, 290SW1032; 161LaI, 108S104; 319Mo 386, 4SW(2d)427; NJ Sup 136A197; 133Misc388, 232NYS235; 117 Oh59, 158NE169; 9PaDist&Co 281; 198Wis93, 223NW573. [b] **Necessary expenses.**–161LaI, 108S104.
769–50 219Ala378, 122S333; Ala 129S 57; 232Ky328, 23SW(2d)606; 50SD126, 208NW584 (depositors' guaranty fund).
769–55 123 Or301, 261P81; 108WVa 545, 151SE853. See also 319Mo 705, 7 SW(2d)357, 59ALR95.
769–56 221AppDiv506, 224NYS684; 123 Or301, 261P81; 102WVa629, 135SE899; 108WVa41, 151SE319. See also 249NY 16, 162NE570. [a] **Payment of salary.**–102WVa629, 135SE899.
769–57 Ark 31SW(2d)427 (amount and validity of claim); 155Wash422, 284P 796 (whether population of city was over 8,000, to justify increase in salaries).
770–59 134Misc612, 235NYS640.
770–60 102WVa629, 135SE899. [b] **Repayment** by county of money fraudulently borrowed by school superintendent cannot be compelled by mandamus. 170Ga654, 153SE768.
770–63 [a] **Bad faith of bank in failing to present warrants till after its failure** held no ground for refusing warrants. 178Ark436, 10SW(2d)875.
770–65½–New. Mandamus will not lie to compel a state compensation commissioner to pay claimant a greater sum than that awarded him by the commission. 107WVa619, 149SE828.
770–68 Oh 170NE644.
770–74 316Mo 1041, 293SW98, 100 [cit Cyc].
770–75 222MoA531, 293SW93, 97 [cit Cyc].
770–76 [a] (1) 95CalA598, 273P125.
770–81 See also 77CalA367, 246P819.
771–82 216Ala423, 113S309; Mo 300 SW267; 86Mont100, 282P1045; 105 WVa235, 141SE874; 199Wis82, 225NW 830. [d] **Funds becoming available.**–Mandamus refused under statute as to order of payment where there were or might be other outstanding warrants indorsed "not paid for want of funds." 131 Or428, 283P29.
771–83 245Mich523, 222NW747.
771–83½–New. or where officer has power to procure funds and is under duty to do so, 216Ala423, 113S309.
771–85 105WVa235, 141SE874.
772–96 103Conn607, 132A30; 91Fla871, 108S836, 47ALR118; 98Fla516, 124S12 (1stcase); 329 Ill 189, 160NE351; 203 Iowa643, 213NW257; La 129S658; 318 Mo 910, 1SW(2d)1021; MoA 32SW(2d) 96; 116 Or694, 242P847, 850 [citCJ].
772–97 116 Or694, 242P847.
772–1 318Mo 870, 2SW(2d)713, 727 [cit CJ].
772–2 103Conn607, 132A30; 104Conn 542, 133A683.
773–3 51Nev336, 275P369. [b] 104 Conn542, 133A683.
773–5 [a] **Mandamus to compel correction of tax list** applies only for clerical errors and not errors of jurisdiction. 119 Oh504, 164NE755.
773–6 36F(2d)904.
773–14 320Mo 1164, 9SW(2d)603.
773–21 24 OhA288, 156NE911. [a] (2) That assessors had completed tax list and appeal was taken is not defense to mandamus to compel assessors to list property. 108Conn246, 142A800. [e] (2) Remedy by appeal and statutory remedy by mandamus is held not adequate so as to preclude state from resorting to mandamus to compel board to assess property at true and actual value. 104Conn542, 133A683.
773–22 200Cal 384, 253P700; 24 OhA 288, 156NE911; 69Utah204, 253P680.
774–23 202Cal 18, 258P937.
774–27 98CalA585, 277P500; 24 OhA 288, 156NE911.
774–28 132 Or561, 286P590.
774–30½–New. The fact that property covered by a long-term lease had formerly been taxed to the lessees, and that hardship would result from requiring the owner to pay the tax and collect it from the various lessees, has been held not to constitute a defense to mandamus to require the board of relief to place the land on the tax list as omitted property. 108Conn246, 142 A800.
774–30⅓–New. Nor is listing of the property by the assessors before mandamus a defense. 108Conn246, 142A800.
774–30¼–New. Mandamus will not issue to compel the board to place the land on the tax list where the board had decided that under the law the property was exempt from taxation, even though the decision was an erroneous one. 108Conn246, 142A800.
774–34 175Ark678, 300SW382.
775–40 37F(2d)442; 103Conn607, 132A 30; 104Conn542, 133A683; 111Conn427, 150A308.
775–42 16F(2d)337.
775–43 170Ark168, 282SW990.
775–44 104Conn542, 133A683; 26 Oh NPNS33.
776–59½–New. Mandamus has been held a proper remedy to compel a county board of equalization to adjust tax books to conform to the state board's order. 321Mo 345, 11SW(2d)38.
776–60 20F(2d)621; 175Ark678, 300 SW382; 77CalA367, 246P819; 99CalA 169, 277P1064; 167Ga695, 146SE551; 323 Ill 493, 154NE193; 119Kan314, 239 P959; 125Kan744, 745, 266P106 [cit CJ]; 245Mich411, 222NW763; 320Mo 451, 8SW(2d)73; NJSup 150A194; 53 ND356, 205NW990; 121 Oh109, 167NE 360; 141 Okl 233, 285P1; 156SC369, 152 SE288. See also 84Colo 450, 271P185. [a] (2) That subpurchaser of part of bond had sought payment in federal court is no defense. 175Ark678, 300SW 382. [g] **Where funds provided for payment have been diverted to other purposes,** mandamus will lie to compel board of education to provide funds second time for payment. 106WVa214, 145 SE388(2dcase). [h] **Claims filed with city for amounts due from city's judgment creditor** has been held no defense to creditor's mandamus suit to require city to raise funds by taxation. NJSup 150A194.
778–65 53ND346, 205NW995. But see 130Kan290, 286P206.
778–67 199Wis82, 225NW830.
779–73 252 IllA601.
779–74 70Utah517, 261P453.
779–78 [a] (2) Demand to levy assessments to pay irrigation bonds held sufficient. 116 Or694, 242P847.
779–83 [a] **County court may be compelled to make** levy for taxes to carry out drainage project. 172Ark1059, 291 SW810.
779–85 318Mo 910, 1SW(2d)1021.
780–92 [a] (3) Mandamus and not action for apportionment of funds held proper to procure levy of tax for district located within two counties. 82 Colo 438, 261P457.
780–95 158Tenn255, 12SW(2d)715.
780–96 165Ga526, 141SE811.
780–98 MoA 32SW(2d)96.
780–1 225Ky9, 7SW(2d)490.
781–4 202Cal 650, 262P1092; 79CalA1, 248P1049.
781–13 229Ky508, 17SW(2d)431.
781–17 218Ky259, 291SW32, 51ALR 281; 48SD448, 205NW28.
782–19 [b] **Remedies held inapplicable.**–Statute requiring payment of illegal taxes under protest and suit to recover same is inapplicable where tax has been adjudged to be illegal. 48SD448, 205 NW28.
782–26 207Cal 473, 279P447 (where amount tendered is sufficient to pay tax legally due, issuance of receipt in full is obtainable by mandamus); 218Ky 259, 291SW32, 51ALR281.
782–31 [b] **Where part of taxes is illegal and void and illegal part is separable** mandamus lies to compel collector to issue receipt in full on tender of tax legally due. 88CalA170, 263P323.
782–31½–New. or where payment is by draft not paid because of failure of bank on which drawn. 49SD609, 207NW981, 44ALR1231.
782–34 245Mich411, 222NW763; 117 Or498, 244P540.
783–40 53ND423, 206NW228.
783–40½–New. Mandamus will issue in a proper case to compel sheriff to collect taxes due under Income Tax Law. 119 Or141, 248P358.
783–40⅓–New. Mandamus will lie to compel a county treasurer to issue alias tax warrants and deliver them to the sheriff of his county. 137 Okl 59, 277 P918.
783–49 318Mo 910, 1SW(2d)1021; MoA 32SW(2d)96. [b] **That city revenues are needed for other purposes** is no defense to mandamus proceeding to compel city to set aside from levy for municipal purposes amount required by statute to be levied for zoological park. 318Mo 910, 1SW(2d)1021.
783–51 127Kan202, 272P124 (illegal tax); 131Misc424, 226NYS245.
784–53 78Mont156, 252P805.
784–56 274US410, 47SCt704, 71L ed 1127; 104NJL280, 140A683. [b] **City may compel county treasurer to pay to it taxes collected by him** pursuant to levies made by its authority for special purposes. 119Kan652, 240P589. [c] **Defenses.**–119Kan652, 240P589. [d] **Matters constituting no defense.**–199Wis 523, 227NW35.
784–58 235 IllA509.
784–59 235 IllA509.
784–60 But see 199Wis523, 227NW35.
784–63 225AppDiv782, 232NYS70. [a] (4) Mandamus will lie to compel county commissioners to comply with order of tax commission to cancel uncollected and

refund collected taxes. 119Kan609, 240 P957.

784-66 [a] **County commissioners may show that order of tax commission to cancel** uncollected and refund collected taxes is erroneous as a matter of law. 119Kan609, 240P957.

784-69 119 Oh504, 164NE755.

784-72½-New. Mandamus lies to compel allowance of additional interest on refund of excessive income taxes paid where insufficient interest was allowed. 55AppDC376, 6F(2d)679.

784-72½-New. Mandamus does not lie against motor vehicle commissioner to collect unused license fees already paid into state treasury. 153Md607, 139A 291.

785-82 [a] **Mandamus will not lie** where rights to redeem are not clear. NJSup 136A593.

785-83 41 Ida126, 238P305; 54ND184, 208NW966. [a] **Duty of county treasurer to compute and apportion tax** against land sought to be redeemed is properly compelled by mandamus. 86 Mont58, 282P32.

785-84 170Minn141, 212NW170.

785-90 [a] (2) Where drain is situated in two counties, treasurer of county in which portion of it is situated may be required by mandamus to file pursuant to his statutory duty certified copy of assessment list presented by board of commissioners of other county. 49 SD499, 207NW459 (assessment to meet expense of cleaning out and keeping open ditch).

786-23½-New. Officers and directors who have abandoned management and stand in inconsistent position with remaining officers cannot be compelled to act. 35PortoRico 718.

788-25 98CalA230, 276P636.

788-28 167La342, 119S71; 295Pa253, 145A133; 35PortoRico 718 (by petition for appointment of receiver).

789-43 Minn 232NW797.

790-50 103NJL615, 139A11; NJSup 130A662; NJSup 139A341; 220AppDiv 293, 222NYS11.

791-54 NJ 145A630(2dcase); TexCivA 289SW456.

792-58½-New. **The right to bring mandamus is held not waived** by submitting question to association's board of managers. 220AppDiv293, 222NYS11.

792-74 87Colo 23, 284P778.

793-80 CalA 292P135(1stcase).

793-81 81CalA494, 254P278.

793-83 200 Ind535, 165NE323; 284Pa 126, 130A313; Wash 290P427.

793-86 284Pa126, 130A313.

794-83 87Colo 23, 284P778.

794-91 But see TexCivA 13SW(2d)133.

794-98 [a] (2) Stockholder may employ assistance of an expert accountant. 28Hawaii68.

794-1 220Ala404, 125S667; 15DelCh 144, 132A687; 28Hawaii68; 208 Iowa 1217, 227NW101; 168La120, 122S884 (3dcase); 249Mich609, 229NW434; 80 Mont328, 260P722; Nebr 229NW118; NJSup 136A317; 119 Or44, 247P155; TexCivA 16SW(2d)319.

795-8 [c] **Stockholder of corporation which had bought stock of another corporation** held not entitled to mandamus to compel inspection of books of latter corporation. 96CalA264, 273P1103.

796-11 196 Ind600, 149NE170. See also Del 143A257.

796-15 Colo 291P1024; 196 Ind600, 149NE170; 127Mel, 140A606; 249Mich 609, 229NW434; 101NJL470, 129A425; 102NJL564, 134A92; 119 Or44, 247P 155.

796-18 200 Iowa931, 205NW735; 249 Mich609, 229NW434; 136Misc136, 239 NYS41; 119 Or44, 247P155.

796-19 119 Or44, 247P155.

797-27 119 Or44, 247P155.

797-28 119 Or44, 247P155.

797-28½-New. , or to permit administratrix to determine value of stock for inheritance tax purposes where fixing of such value is duty of public officer. 196 Ind600, 149NE170.

797-31 119 Or44, 247P155. [a] (3) Holder of two-thirds of stock is entitled to mandamus in view of corporation's failure to pay dividends, issuance of founder's stock without consideration, and failure to recite consideration received for stock. 126Misc457, 214NYS 55.

797-37 102NJL564, 134A92.

797-38 102NJL564, 134A92.

798-55 TexCivA 15SW(2d)719(2dcase).

799-58 128Kan654, 278P751.

799-59 [a] (2) Mandamus will lie to compel election judges at stockholders' meeting to receive and tabulate contested proxie. 213AppDiv774, 211NYS 61.

799-68 90Fla595, 106S473, 476 [citCJ].

799-70 90Fla595, 106S473, 476 [citCJ].

800-75 [a] (7) There was nothing in corporation's by-laws or facts averred to take case out of general rule that directors may remove officers selected by them without assigning cause. 295 Pa253, 145A133.

800-76½-New. Mandamus will not lie where there is no actual ouster. 295Pa 253, 145A133.

800-80 Cal 270P392; 208Cal 537, 282P 954; 93CalA738, 270P286; CalA 277P 352.

801-86 [b] (4) Or to compel change of beneficiary on mere demand of insured. 167La342, 119S71.

803-8-9 115Nebr306, 212NW535.

803-12 115Nebr306, 212NW535.

808-63 115Nebr306, 212NW535.

809-88½-New. Mandamus lies to compel road to provide statutory train crew, but not larger crew than law requires. 115Nebr306, 212NW535.

810-96 [f] **Mandamus will not lie to require railroad to make crossing** on highway within certain period. NJSup 144A589.

810-2 157Miss213, 127S770.

810-3 53SD471, 221NW84.

810-4 53SD471, 221NW84.

812-28 46 Ida256, 267P439.

814-51 125Kan586, 264P1056.

814-57 157SC1, 153SE537.

816-78½-New. County is not entitled to mandamus against street railway company to compel it to repair bridge in compliance with decree. 298Pa347, 148A504.

816-79 [a] **Mandamus to enforce regulations of railroad commission** does not lie where burden on company outweighs benefit to public. 90Fla721, 106S576.

816-86 157SC320, 154SE217. [b] (2) Application to compel telephone company to make physical connection with another line or restore physical connection theretofore existing has been denied. 196Wis228, 218NW717.

818-15½-New. Where a company failed to show that it had a valid franchise, mandamus will lie to compel the removal of electrical equipment from the streets. 222Ky288, 300SW898.

818-16 287Pa30, 134A380, 382 [quot CJ].

819-27 287Pa30, 134A380, 382 [quot CJ].

819-28 287Pa30, 134A380, 382 [quot CJ].

819-29 287Pa30, 134A380, 382 [quot CJ].

819-35½-New. Mandamus is a proper remedy where water company attempts to impose unreasonable rates on consumers. 126Misc382, 212NYS639 (dictum).

821-64 162Ga488, 134SE310.

821-65 162Ga488, 134SE310.

821-66 162Ga488, 134SE310.

822-91 [a] 261Mass462, 159NE453.

822-92 [b] (2) In other cases text rule is applied. NJSup 142A428.

824-36 But see 223AppDiv158, 227NYS 704.

824-38 284Pa126, 130A313. [a] **Where mandamus will lie.**-213AppDiv774, 211 NYS61.

824-39½-New. Where default in failing to procure license is that of defendants, they cannot set it up as defense. 223AppDiv158, 227NYS704.

824-42 But see 223AppDiv158, 227NYS 704.

824-43 But see 284Pa126, 130A313.

824-44½-New. It has been held to lie to compel delivery over of books and papers by outgoing corporate officers. 223AppDiv158, 227NYS704.

824-51 498SD96, 206NW236.

825-54 498SD96, 206NW236.

825-58 NJSup 140A424.

825-68 [f] **Newspaper publisher** is not subject to mandamus to compel publication of city council's proceedings in compliance with contract. Wis 229 NW40.

827-92 33F(2d)1006 (to review refusal to act by internal revenue commissioner).

827-95 30F(2d)625.

827-98 [a] **Writ of mandamus may be issued by any court,** except justice's or police court, to inferior tribunal, corporation, board, or person to compel performance of act which is specially enjoined by law as official duty. CalA 276P416.

827-1 TexCivA 58SW(2d)1003.

827-2 See also 310Mo 526, 275SW927.

827-4 [a] **If appellate court has assumed jurisdiction without objection,** it will ordinarily retain its jurisdiction, though case could have been tried by circuit court. 310Mo 526, 275SW927.

827-7 206Cal 148, 273P797.

828-12 159Tenn593, 21SW(2d)623.

828-20 [e] (3) Circuit court of county other than that in which bank has its domicile has no jurisdiction to issue writ to compel superintendent of banks to certify alleged deposit to depositors' guaranty fund commission. 50SD264, 209NW542. (4) Circuit court of county other than insolvent bank's domicile cannot grant mandamus to compel superintendent of banks to certify name of unsecured depositor to guaranty fund commission. 50SD482, 210NW725. (5) In Iowa. 229NW711.

829-23 208Ky661, 271SW1066.

829-26 [a] **In Missouri.**-MoA 26SW (2d)1011.

829-29 Nebr 233NW1.

829-29½-New. , or place fixed by law for performance of the duty sought to be enforced. 94Fla91, 113S702.

829-35 MoA 26SW(2d)1011.

829-36½-New. Change of venue provision in statute dealing with drainage districts does not apply in mandamus proceedings against supervisors of district. MoA 26SW(2d)1011.

829-36½-New. Prior to issuance of alternative writ court has no jurisdiction to grant change of venue. MoA 26SW (2d)1011.

829-36¼-New. Application for change of venue may be made after grant of alternative writ. MoA 26SW(2d)1011.

829-38 MoA 26SW(2d)1011; 50SD264, 209NW542.

830-44 [b] **Power to grant writ is in court, not judge.**-216Ala423, 113S309.

830-50 [a] **Application for writ held not premature** where relator could assume that failure to produce contracts called for in subpœna duces tecum was rejection of demands. 159La169, 105S 278.

831-54 81CalA427, 254P606.

831-55½-New. Mandamus to compel election judges to receive and count contested proxies before election results were announced held not premature. 213AppDiv774, 211NYS61.

831-57 98CalA6, 276P377.

831-58 36F(2d)1015; 215Ala216, 110S 131; 74CalA77, 239P355; 250 IllA276; NJ 151A463(1stcase); 194Wis193, 215 NW887, 888 [citCJ].

832-61 320Mo 353, 8SW(2d)66.

832-63 146Wash449, 263P735; 153 Wash399, 280P31, 67ALR668.

832-67 12F(2d)667; 49RI 458, 144A 54.

832-68 146Wash449, 263P735.

833-70 167Ga594, 146SE467; 498D 360, 207NW164.

833-71 [a] (5) 98CalA729, 277P757; 173Minn350, 217NW371, 373 [citCJ]; 82Mont15, 264P683; NJ 151A463(1st case); NJSup 150A237; 131Misc852, 228NYS411; 133Misc349, 232NYS89. (6) Delay of more than two years in bringing action for reinstatement in office and for salary accruing in interval has been held unreasonable. 114 Oh 122, 150NE431. [b] (5) 206Cal 148, 273P797; 98CalA6, 276P377; 253Mass 590, 149NE622; 178Minn484, 227NW 499; 127Misc477, 217NYS265; 49RI 458, 144A54; SD 227NW572.

833-74 253Mass590, 149NE622 (petition for reinstatement as ox driver not barred by sale of oxen by city during period of delay); 114 Oh122, 150NE431 [citCJ].

833-76 [i] **Unavoidable congestion of courts.**–115Tex537, 285SW296. [j] **Right to assume compliance with statute.**–127Misc477, 217NYS265.

834-77 [a] **Naval officer,** also disbursing officer, may bring mandamus against himself as disbursing officer and comptroller general to compel payment of his salary as naval officer. 5 F(2d)964.

834-78 [d] **Interest in subject matter.** –200 Iowa931, 205NW735.

834-80½-New. Person suing out writ is customarily called the petitioner. 125Me144, 131A862.

834-81 115Tex205, 281SW837.

834-82 95Fla14, 116S48; 125Kan81, 262P556.

834-87 105WVa487, 143SE153.

834-88 Ind 166NE281.

835-95 216Ala423, 113S309; 95Fla14, 116S48; 28Hawaii68.

836-99 See also 28Hawaii68.

836-2 [a] (11) By city constituting separate road district to compel levy of road tax. 119 Or264, 240P233.

836-5 146Wash449, 263P735.

836-9 [f] (2) Railroad Commission may be made parties relators under some statutes. 95Fla14, 116S48. [g] **One examining accounts of officers of county for state auditor** may sue county court to compel issuance of warrant for payment of his expense account. MoA 17SW(2d)572.

837-12 254 IllA39 (state's attorney); 125Kan81, 262P556; 116 Oh428, 156 NE457; 157SC1. 153NE537; 115Tex 205, 281SW837, 843 [citCJ]; 140Wash 433, 249P996.

838-20 [a] (11) Trustees of county court law library are proper parties in mandamus against board charged with making up annual budget, to compel inclusion of item therein for salaries of library staff. Members of staff are not proper parties in such proceeding. 125 Misc739, 210NYS28. (12) Judges of county court are proper parties in mandamus against board charged with making up annual budget to compel inclusion of item therein for salaries of court attendants at amounts fixed by law. Attendants themselves are not proper parties. 213AppDiv519, 210NYS 30. (13) County commissioners may bring mandamus in own name to compel railway to bridge road. 170Ga584, 153SE359(1stcase).

838-24 129Misc120, 220NYS671. [a] (9) To compel city officers to call election. 115Tex205, 281SW837. (10) To compel county judge to complete commitment of convicted person. 129Misc 120, 220NYS671.

839-32 32F(2d)415; 125Kan81, 262P 556; 158La706, 104S624; 115Tex205, 281SW837.

840-33 176Ark822, 4SW(2d)510; 95Fla 14. 116S48; 254 IllA535; 198 Ind323, 152NE822; 171Minn177, 213NW545, 52 ALR916; 31NM576, 249P242; 219App Div233, 219NYS189; 135Misc874, 240 NYS2; SD 227NW572; 152Tenn59, 274 SW551. See also 246 IllA241. [c] (4) Citizen whose rights are in common with public may bring mandamus to compel referendum. 31NM576, 249P 242.

841-35 125Kan81, 262P556.

841-36 257Mass82, 153NE319; 257 Mass91, 153NE322; 31NM576, 249P 242; 210AppDiv233, 219NYS189.

841-41 77CalA339, 246P817.

842-44 29Hawaii48, 61 [quotCyc]; 329 Ill 65, 160NE175; 203 Iowa643, 213 NW257; 33PortoRico 337. [b] **Induction into office.**–105WVa487, 143SE153.

842-47 252Mass323, 147NE841.

842-53 [a] 329 Ill 65, 160NE175; 125 Kan81, 262P556. [d] 329 Ill 65, 160NE 175. [r] **Interest of public employees.**– 199 Ind78, 155NE198, 200 [citCJ].

844-56 [b] (5) Person entitled to sign petition for referendum on ordinance has sufficient interest to apply for mandamus to compel calling of election. 53SD191, 220NW613. (6) Fact that relator was candidate in primary not ground for refusing mandamus to compel new election. 157SC290, 154SE164. [e] (1) 313Mo 160, 282SW34. [g] **Action concerning elections not involving taxation or unlawful expenditure** of public moneys cannot be maintained by one whose only interest is that of public generally. 115Tex205, 281SW837.

845-62 [a] (13) Pupil entitled to attend public colored high school in another county or district cannot compel by mandamus, payment of his tuition by his own district or county. 311Mo 167, 277SW934. [b] (4) Grandfather in whose home grandchildren are supported by him gratis may mandamus authorities to admit them to school. 8Pa Dist&Co 498.

846-63 [f] **Creditor of drainage district** cannot sue to compel district to complete project where he owned no property therein. 127Kan283, 273P 425.

846-64 [a] 203 Iowa643. 213NW257.

847-65 220Ala94, 124S225; 252Mass 323, 147NE841; 259Mass329, 156NE 852; 171Minn177, 213NW545, 52ALR 916.

847-66 261Mass462, 159NE453. [a] (2) Where right of free transportation to pupils exists, father of children has such private right in subject matter as to enable him to maintain writ in his own name. 8PaDist&Co 220. [b] **Petitioners for writ of mandate to require delivery of corporate records** can prevail only on strength of their own title. CalA 277P352.

847-68 [a] (6) Owner and lessee of lands held properly joined in action to compel payment for lands appropriated for public use. 133Misc388, 232NYS 235. [e] **Joinder of public employees.**– 199 Ind78. 155NE198.

847-71 170Ga23, 152SE58; 148Miss278, 114S482.

848-72 148Miss278. 114S482.

848-74 [a] **Where statute allows mileage to sheriff** for self and guards, the guards are not necessary parties. 234 Ky691, 28SW(2d)980.

848-79½-New. Board of Education cannot recover by mandamus proceeds of school bonds sold for school house against district treasurer and bank in which funds were deposited where school trustees were not made parties. Ga 155 SE489.

848-81 29Ariz481, 242P1003 (town treasurer held proper party to mandamus to compel payment of judgment); CalA 287P560 (vacating of position by judge has been held immaterial); 111 Conn147, 149A410; 329 Ill 166, 160NE 169; 164La624, 114S491; Mo 23SW(2d) 167; 103WVa695, 138SE312, 313 [citCJ]. [a] (2) 205Cal 366, 270P682. (3) Statute providing for removal by director of streets of obstruction created by abutting owner is inapplicable to news stand erected by third person; therefore city is necessary party in suit by abutting owner to compel director to remove same. NJ 133A702. (4) Workmen's compensation commission is only necessary party in proceeding to compel it to certify its records. Mo 27SW(2d) 1026. [b] (1) 103WVa695, 138SE312. (6) In bondholder's suit to require town to levy and collect tax on statutory basis, tax assessors are held not necessary parties. 17F(2d)1. [c] 70CalA732, 234 P409. [d] (3) In mandamus to compel foreign corporation and director to permit stockholders to examine corporate books, resident director of corporation was proper party defendant under General Corporation Act. 332 Ill 18, 163NE 479.

849-82 CalA 286P482; 111Conn147, 149 A410; 93Fla104, 111S391; 329 Ill 166, 160NE169; 196 Ind436, 148NE481; 116 Oh294, 156NE134; 20 OhA1, 151NE784. [d] (3) County board of education, county auditor, and township board of education may be joined with state director of education to compel opening of schools in township school district which under facts of petition was entitled to state aid. 20 OhA1, 151NE784.

850-83 93Fla104, 111S391; 116 Oh294, 156NE134.

850-84 115 Oh510, 154NE526; 20 OhA 1, 151NE784. [a] (9) In mandamus to compel village to pay judgment against it, clerk of village and treasurer are necessary parties. 115 Oh510, 154NE 526. [b] (1) Mo 23SW(2d)83.

851-87 82Colo 438, 261P457.

851-91 DC 39F(2d)517; Fla 129S752; 254 IllA535; 219Ky275, 292SW797; NJ Sup 132A197; NJSup 132A198; 117Tex 537, 8SW(2d)662. [b] (17) Person unlawfully appointed to fill vacancy is not necessary party to mandamus proceeding to require county clerk to call election. 327 Ill 433, 158NE743. (18) Where city auditor is person to whom referendum petition is required to be presented and who is required to call election, members of common council are not necessary parties to proceeding to compel calling of election under petition for referendum on ordinance. 53SD 191, 220NW613. (19) Officer whose duty it is to make water connection and city commission are not necessary parties to action to require city to furnish water. TexCivA 27SW(2d)866. [d] (1) 28Hawaii68.

852-92 29Ariz481, 242P1003 (town tax collector held not proper party in proceeding to compel levy and collection of tax to pay judgment against town).

852-93½-New. All officers necessary to carry out purpose, although acting separately, may be joined in application for mandamus. 116 Oh294, 156NE134.

853-1 7Alaska616, 622 [quotCJ].

853-10 See also 246 IllA563. [a] (3) Individual owners of gasoline pumps are proper, but not necessary, parties in suit to compel municipality to remove such pumps as sidewalk obstructions. 135Wash442, 237P1004.

853-13 48 Ida745, 285P470; 241 IllA 91; 116Tex398, 292SW854; TexCivA 282SW625. [a] (7) Constitutionality of statute upon which validity of bonds depends will not be determined in mandamus proceeding, unless bondholders are made parties or have their day in court. 100WVa11, 129SE712. (8) Where plaintiff seeks mandamus to compel corporation to issue stock, third person who claims adverse interest in stock must be joined as respondent. TexCivA 282SW625. (9) On plaintiff's motion for mandamus to require clerk of court to issue execution, or in alternative to require judge to render judgment nunc pro tunc, defendant is necessary party. 116 Tex29, 285SW1079, 48ALR355. [e] **City is necessary party** in suit to compel director of streets to remove obstruction on street not created by abutting owner. NJ 133A702.

854-15 90Fla721, 106S576. [a] (5) Corporation is not necessary party to suit to compel president and secretary to call meeting for purpose of electing directors. TexCivA 15SW(2d)719(2dcase).

854-16 [a] (6) Property owners adjacent and in neighborhood of property on which building was sought to be erected cannot be joined as parties in proceeding to compel issuance of permit. NJSup 135A662.

854-18 80Colo 408, 252P351. See also 103Conn607, 132A30.

854-19 [l] (3) Peremptory mandamus compelling president of borough to notify owner of building to remove certain street encroachments cannot be sustained without presence of owner in court. 249NY88, 162NE593. [o] **Owner of property sought to be removed** is necessary party to proceeding seeking removal of property claimed to have been erected in violation of law. 226AppDiv 693, 233NYS540.

855-20 TexCivA 275SW257. [a] (1) 221Ky201, 298SW671.

856-22 237 IllA363. [d] **In mandamus to compel recognition of right to office,** similar officers are held not directly interested and not necessary parties. 237 IllA363.

856-25 261Mass462, 159NE453.

856-27 80Mont111, 258P250.

856-28½-New. Where plaintiff's petition is demurrable because of failure to join a necessary party as defendant, plaintiff should be permitted to make such person a party. 221Ky201, 298SW 671.

856-32 247 IllA215; 259Mass329, 156

NE852; 262Mass127, 159NE539 (by attorney-general).

857-36 198 Ind516, 154NE284. [a] (4) Board of commissioners is held not party in interest in mandamus proceedings to compel performance of its judgment sufficient to warrant setting aside judgment for fraud. 198 Ind516, 154NE284. [b] **To authorize intervention,** intervener's interest must be direct and not consequential. 195Cal 739, 235P999.

857-41½ [a] (3) Complaint of irrigation district intervening in action of contractor to compel payment of warrants issued against construction fund held insufficient to show facts warranting intervention. 75Mont132, 242P431. [b] **Conflicting claims to subject matter of suit** cannot be tried in mandamus proceeding. 87Colo 23, 284P778.

858-79 48 Ida572, 285P456.

859-87 115 Okl 151, 241P151.

859-90 170Ark366, 280SW641; 80Mont 111, 258P250; 199Wis523, 227NW35 (successors duly notified of appeal pending). See also 128Misc102, 218NYS12. [e] **Death or retirement pending appeal.**–Where one defendant officer died and other retired from office after trial of mandamus, writ may issue against successors. 199Wis523, 227NW35.

860-93 287Pa150, 134A478, 481 [citCJ]. But see 85CalA525, 260P386.

860-94 See also 128Misc102, 218NYS12.

860-9 [a] **Alternative writ issued** will be dismissed. 90Fla264, 105S446, 448 [citCyc].

861-18 318 Ill 356, 149NE283; 329 Ill 388, 160NE755; 243 IllA374; 246 IllA 241; 148Md649, 129A905 (statute does not obviate necessity of precision or remove strictness which courts have dealt with pleadings in these cases); 23 OhA 150, 155NE160; 101Vt343, 143A302.

861-21½-New. **In New York** under Civ. Pract. Act § 111 the appellate division may grant appropriate order of mandamus, even though petitioner brings certiorari. 215AppDiv220, 213NYS738.

861-24½-New. Where a writ of mandamus would not issue on hearing because useless or unavailing, filing of a petition therefor will not be permitted. 118Tex 42, 9SW(2d)1028.

861-25 [a] **In Maine.**–125Me144, 131A 862.

861-31 Nev 285P511. [a] 20AlaA531, 104S899 (application for mandamus to compel trial court to vacate order refusing to set aside default judgment properly made on motion docket on notice where cause pending in reviewing tribunal). [b] 215Ala680, 112S205; 200 Cal 661, 254P564; 69CalA393, 233P80 (complaint insufficient); TexCivA 271 SW172.

862-32 [a] (1) 20AlaA531, 104S899 (verification or affidavits not necessary in such case).

862-33 31NM576, 249P242; 103WVa 695, 138SE312. [c] **In federal courts,** it is said, orderly course of presenting petition for mandamus is to present petition to court for leave to file petition for mandamus. 21F(2d)64.

862-39 320Mo 353, 8SW(2d)66; 218 MoA155, 263SW853; MoA 26SW(2d) 1011; 31NM576, 249P242.

862-40 [a] **When alternative writ is granted,** application becomes functus officio. 31NM576, 249P242.

862-42 28Hawaii68.

863-48 See also 124Kan511, 260P985.

863-51 320Mo 353, 8SW(2d)66. [a] **Allegations held properly stricken on demurrer.**–167Ga594, 146SE467. [b] **Allegation held sufficient.**–Utah 290P776.

863-58½-New. Mandamus to compel village to pay judgment must allege that judgment was certified to council by village clerk. 115 Oh510, 154NE526.

863-60 216Ala353, 113S513; 234 IllA 111, 124 [citCycperHeard,J]; Ind 172 NE908. See also 216AppDiv311, 215NYS 45.

863-64 214Ala620, 108S588; 215Ala 680, 112S205; 70CalA677, 234P117; 83 IndA524, 149NE373; 29PortoRico 971; 117Tex73, 297SW219. [a] (28) That property is held by prosecutor and chief of police. 69CalA677, 234P117. (29) That proposal to be filed with secretary of state was signed by elected, qualified and acting state proposalmen is mere conclusion. 49SD153, 207NW 79. (30) That land sought to be surveyed is part of unsurveyed public school land. 117Tex73, 297SW219. [b] (3) 29Hawaii48; 121Kan141, 245P1047. [d] **Petition held not to state conclusions.**–329 Ill 166, 160NE169.

864-66 320Mo 353, 8SW(2d)66; 216 AppDiv311, 215NYS45 (evidence by which material facts alleged are to be proved need not be set forth).

865-76 TexCivA 282SW625.

865-77 31NM576, 249P242, 246 [cit CJ].

865-78 214Ala620, 108S588; 234 IllA 111, 124 [citCycperHeard,J]. [b] **Allegations sufficient.**–121Kan141, 245P 1047. [c] **Allegations insufficient.**–121 Kan148, 245P1051.

865-82 234 IllA111, 124 [citCycper Heard,J].

866-88 31NM576, 249P242, 247 [cit CJ]; TexCivA 289SW425.

866-90 31NM576, 249P242; TexCivA 291SW1112. [b] **Where city charter provided for referendum** and such fact was clearly alleged, it was not necessary specifically to aver statute giving such power, in mandamus to compel referendum. 31NM576, 249P242.

867-99 31NM576, 249P242.

867-1 31NM576, 249P242.

867-12 40 Ida432, 233P514. [a] (3) In application for mandamus to compel enforcement of Building Zone Law by compelling removal of structure erected in violation of law, allegations charging owner or lessee of grounds with maintenance of nuisance in manner in which dog racing was conducted are wholly immaterial. 226AppDiv693, 233 NYS540.

867-13 40 Ida432, 233P514.

867-18½-New. Where allegations are not improper and may serve useful purpose, they will not be stricken out. 104 Conn542, 133A683 (adverse effect of erroneous assessment on adjoining owners through proceeding brought by state in public interest).

867-20 TexCivA 282SW625. [h] **In Texas** verification which states "that the material allegations are true" is insufficient; facts have to be stated. TexCivA 282SW625. [i] **Affidavit held to raise question of fact.**–226AppDiv165, 235NYS250.

868-21 TexCivA 282SW625. [c] (3) Verification by administratrix of stockholder is held sufficient. 196 Ind600, 149NE170. [g] **Public officer applying for mandamus** need make no verification. 103Conn607, 132A30.

868-25½-New. Petitioner's affidavit is deemed true only so far as admitted by defendants. 227AppDiv560, 238NYS 424.

868-27 [d] (9) 167Ga695, 146SE551. (15) Public service commission to approve plans and specifications for dam across navigable river. 121Kan141, 245 P1047. (16) To require superintendent of banks to allow establishment of branch bank, where petition amended. 200Cal 1, 251P784. (17) Payment of judgment entered against city. 198 Ind608, 154NE378. (18) Filing of report. 329 Ill 166, 160NE169. (19) To compel certification of election of justice of peace. 200 Ind506, 165NE239. (20) Superintendent of public works to agree on or select location for drilling wells as required by lease and law. Oh 171NE399. (21) City to furnish water. TexCivA 27SW(2d)866. (22) Town board to open public highway. 200Wis350, 228NW487. (23) Secretary of state to receive and file chattel mortgage. 48 Ida357, 283P527. (24) Judge to disqualify himself. 139 Okl 204, 281 P803. (25) Other instances. 218Ala 120, 117S757; 167Ga594, 146SE467; 248 IllA371; 247Mich237, 225NW554; 320Mo 353, 8SW(2d)66 (petition held sufficient); 120 Oh432, 166NE377; Tex CivA 158SW(2d)719(2dcase). [e] (1) 23 AlaA46, 121S429 [certiorari den 219Ala 139, 121S432(1stcase)]; 77CalA404, 247 P527; 168Ga370, 147SE762; 127Kan 437, 273P403. (3) To compel board of trustees of school district to pay indebtedness claimed by plaintiff as having been incurred by preceding board. 161Ga855, 132SE60. (4) To require superintendent of banks to allow establishment of branch bank. 200Cal 1, 251P784. (5) To require secretary of state to file initiative petition. ND 232NW303. [f] **Petition sufficient** on demurrer to show money was borrowed. 170Ga509, 153SE214.

869-31 200Cal 1, 251P784; 170Ga60, 152SE64; 43 Ida519, 253P128; 246 IllA 241; 123 Or301, 261P81. [a] (3) That complaint will stand test by demurrer for want of facts. 196 Ind436, 148NE 481. [c] **Good cause of action stated against superintendent of public works is not demurrable,** though no cause stated against Governor, other defendant. Oh 171NE399.

869-38 170Ga361, 153SE34 (need not show relator's legal or special interest in result); 123 Or301, 261P81; Tex CivA 275SW271.

869-44 142 Okl 128, 286P796.

869-44½-New. On petition for writ to compel dismissal of an action the record on which the court acted in refusing to dismiss should be presented. 79CalA 41, 248P1007.

869-46 326 Ill 124, 157NE186; 234 IllA 111, 124 [citCycperHeard,J]; Ind 172 NE911; MoA 21SW(2d)645; 142 Okl 128, 286P796; 116 Or694, 242P847; 125 Or197, 266P1075. [a] **That if mandamus against school trustee** is granted it would require larger school building than trustee has at his command is immaterial. 196 Ind436, 148NE481. [b] **Complaint held sufficient.**–198 Ind 608, 154NE378; 164Ga382, 138SE765; 198 Ind574, 154NE384; 161Lal, 108S 104.

870-47 216Ala423, 113S309; 208Cal 353, 281P394 (allegations held insufficient); 104Conn542, 133A683; 166Ga 700, 144SE251; Ind 172NE911; 219Ky 275, 292SW797; 173Minn198, 217NW 119; 31NM576, 249P242; 131Misc780, 228NYS272; 131Misc784, 228NYS277; 142 Okl 128, 286P796; 156Tenn411, 1 SW(2d)1011; TexCivA 5SW(2d)1003. [a] (1) MoA 26SW(2d)1011 (allegations held insufficient). [i] **Allegations held sufficient.**–31NM576, 249P 242. [j] **Election and incumbency of attorney-general** need not be stated. 116 Oh428, 156NE457. [k] **Inspection of corporate books by stockholder.**–28 Hawaii68. [l] **Owner is not required to allege that he is resident** of city in mandamus to require city to furnish water. TexCivA 27SW(2d)866.

871-49 196 Ind436, 148NE481; 216Ky 332, 287SW892; 165La552, 115S747; 8 LaA213.

871-50 215Ala680, 112S205, 206 [cit CJ]; 216Ala423, 113S309.

871-51 215Ala680, 112S205; 216Ala 423, 113S309; 69CalA677, 234P117; 196 Ind436, 148NE481; 177Minn372, 225NW296.

871-52 164Ga382, 138SE765.

872-57½-New. Exceptions, not in enacting clause of statute, need not be negatived by relator. 103NJL547, 137 A847.

872-61 196Cal 289, 237P742 (petition held insufficient to show right to disposition of money in hands of receiver and discharge of receiver in advance of hearing on merits on final settlement of receiver's accounts); Fla 129S752; 234 IllA111; 234 IllA451; 196 Ind436, 148NE481; 153Md607, 139A291; 155 Miss424, 124S490(1stcase); 31NM576, 249P242; 23 OhA21, 155NE147; 118 Or533, 247P812; 125 Or197, 266P1075; 131 Or428, 283P29; 49Philippine79; 29 PortoRico 971; 156Tenn411, 1SW(2d) 1011; 117Tex73, 297SW219; TexCivA 291SW1112. [b] (2) Other instances. Wash 290P427. [c] 80Colo 425, 252P 357; 123 Or508, 262P943. [d] **Petition to compel municipal auditor to issue warrant** for payment of a scholarship created by municipal ordinance under authority of act, specifying classes of students to be favored, held insufficient, petitioner failing to show that he belonged to one of such classes. 29Porto Rico 971. [e] **Alternative writ commanding sheriff to levy execution on particular property** need not allege that such property is only property of judgment

debtor. 83Colo 222, 263P411, 57ALR834. [f] **Petition held insufficient.**–227Ky59, 11SW(2d)1004. [g] **Petition sufficient** to show contract with state. Oh 171NE 399. [h] **Writ held defective.**–131 Or 428, 283P29 (failing to allege nature of plaintiff's claims). [i] **Facts alleged held insufficient.**–131 Or428, 283P29 (as to availability of funds).

872–63 131 Or428, 283P29; TexCivA 291SW1112; TexCivA 5SW(2d)1003.

872–65 95Fla14, 116S48, 54 [citCJ]. [a] (5) Invalidity of act of counsel directing execution of contract is matter of defense. 216AppDiv311, 215NYS45, 47 [citCJ].

873–66–67 123 Or301, 261P81; 131 Or 428, 283P29; 49SD153, 207NW79. [m] **Petition sufficient** to show law complied with. 170Ga509, 153SE214.

873–70 123 Or301, 261P81.

873–72 [d] (5) Complaint to compel county auditor to accept and approve bond has been held demurrable. 200 Ind319, 163NE263. [l] **Claims against fire department relief association.**–83 Mont445, 272P677.

874–74 [e] **Inference of duty** is held clear from facts averred. 234 IllA111.

874–75 243 IllA374; 197 Ind669, 151 NE613. [g] **Compelling election under recall law.**–75CalA724, 243P466. [h] **Inspection of returns.**–8PaDist&Co 531 (primary election returns). [i] **Recall.**–93CalA365, 269P757.

875–76 [a] (1) 327 Ill 62, 158NE424. (2) 327 Ill 62, 158NE424; 252 IllA168. (3) 327 Ill 62, 158NE424. [b] (1) 327 Ill 62, 158NE424.

875–76½–New. or recognition of right of chairman of highway board appointed by governor, to recognition by the board and to perform the duties of his office for its term, after governor's order removing him, 160Ga433, 128SE181.

876–78 251 IllA599 (dance hall or road house license); 121Kan141, 245P1047; 127Misc747, 217NYS400. [e] **Dental license.**–118 Oh642, 163NE300(1stcase).

876–79 [b] (8) In mandamus to compel audit of claim issuance of voucher for payment for goods sold and delivered to highway department, allegation of "delivery" implied acceptance by purchaser, hence petition did not show outstanding discretion in respondents to accept or reject goods. 218Ala120, 117S 757. [d] (1) 234 IllA451. (7) 168Ga 697, 148SE740. (9) Allegation that prison commission had sufficient funds to pay bill of solicitor general held to mean that fund was penitentiary fund and chargeable with account. 162Ga 221, 133SE468. (10) Application held sufficient. 94CalA382, 271P568. [e] (6) Petition for mandamus to compel payment of warrant against emergency fund alleging that governor declared emergency to exist because state property had been damaged or destroyed "by acts of God, to wit, rain" is insufficient because not showing damage by act of God. 33Ariz197, 263P589. (7) Petition to compel levy of tax to pay warrant held sufficient. 165Ga153, 140SE351. (8) Petition must show facts from which it could be said that county was legally indebted to plaintiff in amount of warrant. 35Ariz403, 279P257.

877–81 46 Ida256, 267P439; 105WVa 429, 143SE111.

877–82 [m] **Payment of teacher.**–161Ga 637, 131SE358. [n] **Payment of scholarship.**–29PortoRico 971. [o] **Indorsement of teacher's certificate.**–MoA 26SW(2d) 830.

878–83 [c] (10) Petition for mandamus to compel village to pay judgment is not demurrable for failure to allege that clerk certified to council amount of tax necessary when prayer for relief asks that clerk be required to certify amount. 116 Oh294, 156NE134. [k] **Levy of irrigation district assessment.**–116 Or694, 242P847. [l] **Negativing exemption of ecclesiastical property is proper.**–104 Conn542, 133A683. [m] **Adverse effect of erroneous assessment on adjoining owners** is not improper allegation, though suit is brought by state in public interest. 104Conn542, 133A683.

878–84 200Cal 661, 254P564; 251Mich 286, 232NW387; 127Misc747, 217NYS 400 [f] **Allegations of abuse of discretion held sufficient.**–164Ga402, 138SE 777.

879–85 82CalA11, 254P913; 94CalA382, 271P568; 164La624, 114S491; Oh 171 NE589. [a] (8) Allegation that town board refused to open and repair highway is sufficient allegation of demand. 200Wis350, 228NW487.

880–88 94CalA382, 271P568; CalA 287 P560.

880–91 94CalA382, 271P568; 99CalA 58, 277P886(2dcase); 170Ga361, 153SE 34; 33PortoRico 337.

880–92 170Ga361, 153SE34. [b] 53SD 191, 220NW613.

880–97 CalA 268P399; 142 Okl 128, 286 P796.

881–1 81CalA427, 254P606.

881–3 29Ariz481, 242P1003; 33Porto Rico 337; 35PortoRico 933.

881–8 [b] (2) **Prayer** that municipality pay award made in condemnation proceedings or levy tax sufficient to make payments is proper. 240Mich12, 215NW18.

881–10 197Cal 470, 241P560; 152Va 139, 146SE287.

881–12 70Utah284, 259P928; 197Wis 518, 222NW786.

883–31 111Conn214, 149A677; 12Pa Dist&Co 340.

883–32 125Me144, 131A862.

883–40 125Me144, 131A862; 320Mo 353, 8SW(2d)66

883–42 111Conn214, 149A677; 125Me 144, 131A862; 320Mo 353, 8SW(2d)66; 218MoA155, 263SW853; 69Utah204, 253 P680 (answer held sufficient).

884–46 329 Ill 388, 160NE755.

884–47½–New. Allegation in answer that judgment for contractor sought to be enforced against city was rendered on consolidated appeals of property owners is held not to show lack of jurisdiction. 198 Ind608, 154NE378.

885–60 [d] **In North Carolina.**–191NC 112, 131SE309. [e] **In Illinois.**–251 IllA 76.

885–64 TexCivA 289SW425.

885–67 [d] **In Montana.**–81Mont200, 263P433.

886–77 212Ala496, 103S558; 125Me144, 131A862.

886–78 82Colo 311, 259P514; 125Me 144, 131A862; 144Wash157, 257P402. [b] **Answer held insufficient.**–92Fla61, 109S656.

886–80 83CalA25, 256P603. [a] **Defendant may file as many pleas setting up separate and distinct** defenses as he may choose. 329 Ill 388, 160NE755.

886–88 Oh 172NE284. [b] **Answer insufficient.**–148Md649, 129A905. [c] **Facts averred held too meager.**–92Fla 1139, 111S735. [d] **Defense held insufficient** because not stating sufficient facts. 229Ky508, 17SW(2d)431.

886–89 NJ 146A324. [b] **Return held frivolous.**–164La624, 114S491.

886–89½–New. Respondent's answer, to the extent to which it goes, is accepted as true and further than that the court looks to undisputed allegations of petition. 215Ala449, 111S28.

886–89¼–New. Denial that anything was due the state on account of claims alleged raised a question of law alone, in the face of an admission that nothing was paid and failure to deny any ultimate circumstances specified in the statute under which claims are made valid charges against the county. 94CalA382, 271P568.

886–91 125Me144, 131A862.

886–92 75CalA705, 243P451; 92Fla61, 109S656, 663 [citCJ]; 164Ga879, 139SE 546; TexCivA 26SW(2d)670. See also 94CalA382, 271P568. [a] (2) Allegation held not traverse. 206Cal 148, 273P797. (3) Allegation that stockholder was told that he could inspect books if he informed corporation's officers what information he desired does not deny refusal of inspection. Utah 285P1011. [b] (4) 44 Ida143, 255P408. [c] **Answer not containing unequivocal denial** has effect of pleading party out of court. 206Cal 148, 273P797. [d] **Positive and unequivocal return** is conclusive on facts. 246Mich316, 224NW324(1stcase). [e] **General denial held insufficient to raise issue.**–97CalA564, 276P120.

887–96 [b] **General denial may be qualified or explained** by positive averments of answer. 97Fla816, 122S256.

887–99 75CalA705, 243P451; 125Me 144, 131A862. See also 220MoA708, 293 SW471.

887–1 125Me144, 131A862. [a] (4) Legal grounds for refusal to grant permit may be set up, though untenable grounds were given for refusal. 200Cal 1, 251P784. [m] **No defense** in mandamus proceedings to require application of interstate rates to aver in answer that certain courts and commissions have held similar transportation to be interstate. 92Fla61, 109S656.

888–2 92Fla61, 109S656; 97Fla816, 122 S256.

888–3 But see 92Fla1139, 111S735.

888–5 329 Ill 388, 160NE755; 83 IndA 524, 149NE373; 232Mich690, 206NM343; Mo 23SW(2d)167; 101Vt343, 143A302.

888–6 232Mich690, 206NW343.

889–11 92Fla61, 109S656; 318 Ill 356, 149NE283; 234 IllA313; 119 Or44, 247 P155.

889–12 92Fla1139, 111S735; 318 Ill 356, 149NE283; 234 IllA313; 119 Or 44, 247P155. [a] (19) That contract of employment was wholly void and illegal. 84CalA312, 257P917. (20) That contract of employment of superintendent of schools was void because at time of execution he was serving as such under valid, subsisting, and unrevoked contract. 84CalA312, 257P917.

889–13 92Fla61, 109S656. [b] **Allegations held mere legal conclusions,** not raising issue of fact to prevent granting of peremptory order. 126Misc524, 214NYS113 (allegations that action of village trustees is "arbitrary, unreasonable, unwarranted, tyrannical, capricious, and confiscatory").

889–16 See also 94CalA382, 271P568. [d] **Affirmative allegations** must be made positively or on information and belief. 70CalA656, 234P125.

890–17 See also 223AppDiv158, 227NYS 704.

890–20 70CalA656, 234P125.

890–21 92Fla1139, 111S735; 148Md649, 129A905 [citCyc]. [a] (9) Denial that finding based on preponderance of evidence and averment that facilities adequate held insufficient. 92Fla1139, 111S 735.

891–24 97Fla816, 122S256.

891–26 148Md649, 129A905 [citCyc].

891–29 92Fla1139, 111S735.

892–35 160Ga433, 128SE181 (in proceeding for recognition by officer after removal by governor answer alleging cause for removal held irrelevant).

892–47 [a] (3) Affidavit of court stenographer setting out willingness to furnish transcript on order of court and conversations with counsel for defendant is improperly attached to return of judge to petition in mandamus to compel him to order stenographer to transcribe notes of trial in murder prosecution to enable defendant to appeal as poor person. Mo 285SW509. (4) Affidavit held improperly attached. 315 Mo 68, 292SW707.

892–48 104WVa614, 140SE680, 681 [citCJ]. See also 217AppDiv399, 216 NYS737. [a] (3) On application to compel award for slaughtered bull, defense was good which set up issue pendente lite of a certificate awarding indemnity. 218AppDiv352, 218NYS329.

894–75 But see 178Minn442, 227NW 891.

895–90 [a] (1) 236Mich383, 210NW 338. (4) Circuit judge's return cannot be traversed by supreme court where it states reasons for denial and record supports findings of facts as to denial of extension of time to settle case on appeal. 243Mich530, 220NW888.

895–92 125Me144, 131A862; 240Mich 12, 215NW18.

895–93 Wash 290P427. See also 205 Cal 525, 271P906.

895–94 240Mich12, 215NW18.

896–4 [a] **In Alabama.**–217Ala176, 115 S226.

896–13½–New. A petition for mandamus will not be dismissed without prejudice on the relator's motion. 118 Tex73, 10SW(2d)713; 118Tex73, 10SW (2d)714; 118Tex73, 10SW(2d)716.

896–13¼–New. A motion to dismiss the original mandamus may, and should be, dismissed where justice so demands. 118Tex73, 10SW(2d)714.

896-13¼-New. Unless probable cause appears on the face of the petition, the petition will be dismissed. 118Tex82, 10SW(2d)710.

896-15 212Ala496, 103S558; 111Conn214, 149A677; 49SD153, 207NW79; 103WVa695, 138SE312. But see Fla 129S782. [c] **Upon granting motion, proper procedure** is to order action dismissed and render judgment in accordance with order and for costs. 82Mont126, 266P387 (order of dismissal is not judgment).

897-17 103Conn607, 132A30; 104Conn542, 133A683; 311Mo167, 277SW934; 82Mont126, 266P387; 54SD285, 223NW54.

897-20 103Conn607, 132A30; 104Conn542, 133A683; 311Mo167, 277SW934; 82Mont126, 266P387; 107WVa272, 148SE75; 200Wis350, 228NW487. [a] **Motion to quash held erroneously granted.**-103Conn607, 132A30.

897-25½-New. , or before judgment is actually entered. 12PaDist&Co340.

897-27 103Conn607, 132A30. [a] **Matters not in application or alternative writ not considered** on motion to quash. 103Conn607, 132A30.

897-33 [d] **Writ held sufficient on motion to quash.**-90Fla721, 106S576.

898-37½-New. that it is improperly or insufficiently directed; 103WVa695, 138SE312.

898-40 Fla 129S782.

898-52 [a] **Attempt and failure of plaintiff to show fraud and deception** by defendant in use of trade name has bearing on action for unfair competition. 204Iowa619, 215NW668.

898-56 NJSup 135A676.

898-61 Okl 292P1113 (wrongful attachment on theory of nonexistence of debt).

899-62½-New. Relator's motion for judgment on pleadings admits facts set forth in return to petition and raises only questions of law. MoA 23SW(2d)1107.

899-62⅓-New. If a motion to strike out a return to an alternative writ of mandamus fails as to any of the defenses, it fails altogether. NJ 147A590(1st case).

899-63 89Fla419, 104S602, 39ALR1362; 91Fla927, 108S671, 675 [citCJ]; 92Fla61, 109S656.

899-64 91Fla927, 108S671, 675 [citCJ]; 124Kan518, 260P983; 156Tenn131, 299SW805. [a] **Truth of well pleaded facts only** is admitted. 92Fla61, 109S656. [b] **Orders entered on th's writ** are essentially different in character from those entered on demurrer. 92Fla61, 109S656.

899-65 91Fla927, 108S671, 675 [cit CJ]; 92Fla61, 109S656; 69Utah204, 253P680. See also 318Mo698, 300SW1066.

899-66 91Fla927, 108S671, 675 [citCJ].

899-67 89Fla419, 104S602, 39ALR1362.

899-67½-New. Motion for peremptory writ notwithstanding the answer contemplates a final order either granting the alternative or granting the peremptory writ. 92Fla61, 109S656.

899-69 See also 83CalA25, 256P603.

899-73 See also 311Mo32, 276SW872.

899-79½-New. On a motion to strike a petition in mandamus on the ground that the court had no jurisdiction, the truth of the facts alleged must be assumed. 114Oh655, 151NE749.

899-79⅓-New. A motion to strike is not the proper method of assault, either on petition for the alternative writ or on the alternative writ. 97Fla647, 122S12 (1stcase).

899-80 212Ala496, 103S558; 215Ala680, 112S205; CalA 286P482; 243IllA100; 154Md40, 139A551; 34OhA335, 171NE319; 49SD153, 207NW79; 156Tenn411, 18W(2d)1011; TexCivA 27SW(2d)340; 107WVa272, 148SE75 (averments of petition considered true). [g] (1) See also 244IllA137. [k] **Irregularities not appearing on face of complaint** are not ground of demurrer. 84CalA312, 257P917.

900-81 12PaDist&Co340; 102WVa116, 134SE594, 595 [citCJ]. See also 103WVa695, 138SE312. [b] **Petition is not pleading,** therefore ruling on demurrer to it is not considered on appeal. 102WVa116, 134SE594, 595 [citCJ].

900-82 [a] (1) 315Mo84, 285SW501, 502 [citCJ]. (2) In such case petition stands in lieu of alternative writ. MoA 26SW(2d)1011.

900-89 99WVa473, 129SE465.

901-91 90Fla328, 105S821.

901-99½-New. In New Mexico, answer raises question of legal sufficiency of alternative writ. 31NM576, 249P242.

901-1 125Mel44, 131A862. But see 316Mo272, 289SW338. [e] (2) Motion for peremptory writ, notwithstanding return, is equivalent to demurrer to return, and admits facts well pleaded therein. 92Fla1139, 111S281. [g] **Where return raises substantial issues of fact,** demurrer must be overruled. NJSup 135A676.

901-3 92Fla61, 109S656; 149Md286, 131A459.

901-4 NJ 147A590(1stcase).

901-6 [a] **Demurrer to return may be treated as motion for judgment on pleadings** where return admits all material facts alleged in petition. 315Mo817, 287SW37.

901-10½-New. Demurrer to return advances issued as if raised by traverse. 125Mel44, 131A862.

901-15 51SD591, 215NW878.

902-18 315Mo817, 287SW37.

902-18½-New. If petitioner does not maintain issues raised by his demurrer to return, his cause falls. 125Mel44, 131A862.

902-24 CalA 286P482.

902-30 163Ga707, 137SE626 (demurrer held properly overruled); 165Ga153, 140SE351.

902-34½-New. Only real issue raised by demurrer to petition is as to sufficiency of petition to entitle petitioner to relief prayed for. 75CalA705, 243P451.

902-34⅓-New. On the hearing of a demurrer to a petition, the court will not determine questions not raised by the demurrer. 315Mo92, 285SW972.

902-34¼-New. A court, on demurrer to petitions for mandamus, must assume that the ground on which respondents rely is stated in demurrers. 265Mass23, 163NE648.

902-34⅕-New. The petition for mandamus not stating a cause of action, the court did not abuse sound discretion in permitting the defendant to interpose a general demurrer on the day the last-amended petition was filed. 227Ky59, 11SW(2d)1004.

903-36 200Cal637, 254P570; 205Cal366, 270P682; 82Colo447, 261P461; 97Fla631, 121S803; Fla 129S752; 165Ga153, 140SE351; 326Ill124, 157NE186; 329Ill388, 160NE755; Ill 173NE90; 242IllA488; 265Mass23, 163NE648; 315Mo92, 285SW972; 29OhA117, 162NE687; TexCivA 289SW425. [a] (1) 314Mo33, 282SW1007. (2) Motion admits well pleaded facts in return and leaves for consideration only issues of law. 314Mo33, 282SW1007.

903-37 200Cal637, 254P570.

903-38 160Ga189, 127SE612; 318Ill356, 149NE283; 326Ill124, 157NE186; Ill 173NE90; 315Mo92, 285SW972.

903-41 See also TexCivA 30SW(2d)722.

903-43 83CalA25, 256P603. [c] **In California.**-83CalA25, 256P603.

904-46½-New. It is error to hear evidence in support of petition after defendant elects to stand by pleas to which demurrer has been sustained. 318Ill356, 149NE283.

904-48 7Alaska616, 621 [citCJ]; 31NM576, 249P242; TexCivA 5SW(2d)257.

904-51 200Cal1, 251P784; 160Ga816, 129SE73; 262Mass127, 159NE539; 261Mass462, 159NE453. [b] (1) 94CalA382, 271P568.

905-55 311Mo32, 276SW872; Mo 28SW(2d)105; 31NM576, 249P242; 103WVa695, 138SE312.

905-56 92Fla61, 109S656; 217AppDiv399, 216NYS737. [c] **Supplemental answer.**-80Mont111, 258P250. [d] **Amendment striking allegation that answer is made on information and belief** and making allegations positive may be permitted. 81Mont200, 263P433.

905-61½-New. Answer, amounting to demurrer, is no cause for dismissal, if sustained, as leave to amend should be given. 31NM576, 249P242.

905-64 198Cal183, 244P343.

906-65 34PortoRico612 (failure to demand greater specification).

906-91 [a] **Rule applied,** where answer treated allegations in petition as part of writ. 31NM576, 249P242.

906-93 31NM576, 249P242; 34Porto Rico612.

907-3 240Mich12, 215NW18.

907-4 216Ala353, 113S513; 240Mich12, 215NW18; 157SC496, 154SE756.

907-5 216Ala353, 113S513; 320Mo353, 8SW(2d)66.

907-6½-New. Under allegation that assessors proposed to list land otherwise than by parcels, facts may be shown establishing plain breach of duty controllable by mandamus. 104Conn542, 133A683.

907-6⅓-New. In mandamus to compel action on petition for disannexation of land from city, proof of allegations of petition for disannexation is held unnecessary. 198Ind574, 154NE384.

907-8 TexCivA 5SW(2d)1003.

907-11 MoA 26SW(2d)1011.

907-13 [a] (1) Contra 160La839, 107S593.

908-17 116Tex1, 285SW1063, 1073 [cit CJ].

908-21 NJSup 148A152.

908-25½-New. Failure to give notice of application for rule nisi held not ground for dismissal. 160La430, 107S294.

908-36½-New. Summons is sufficient, although it does not show cause why the writ should not issue. 251IllA76.

908-37 See also 149Wash478, 271P823. [g] **Service of alternative writ** directed to sheriff may be served by any person not party where court does not order service by officer. 53ND460, 206NW777.

908-37½-New. Where several other officers are properly joined with state director of education as respondents in mandamus to open schools of a township school district entitled to state aid, and service is made on one or more of respondents in county where action brought, process may lawfully issue to another county for remaining respondents and service made on them therein. 20OhA1, 151NE784.

909-39 But see 190NC336, 130SE25.

909-42 [b] **Rule cannot be made absolute** where facts are not settled on ex parte affidavits. NJ 134A559.

909-47½-New. Where the return of a judge to an order to show cause states that he is unable to say whether a declaration was presented with an affidavit for a writ of capias ad respondendum as required by statute, the court is unable to determine such question. 236Mich601, 211NW31.

909-50 43F(2d)290; 125Mel44, 131A862.

909-51 111Conn214, 149A677 (respondent may comply with terms or contest its issuance); 125Mel44, 131A862.

909-52 125Mel44, 131A862.

909-56 MoA 26SW(2d)1011.

909-58 111Conn214, 149A677; 31NM576, 249P242.

909-59½-New. Facts alleged in relator's petition for mandamus are assumed to be true on motion to quash alternative writ. Wis 229NW40.

909-65 200Cal661, 254P564; NJ 142A558; NJSup 130A809; 136Misc294, 240NYS634. [h] **Court should issue alternative writ on application for mandamus without considering matters,** not admitted by respondent, set forth informally in affidavit. NJ 146A300.

910-80 103WVa695, 138SE312.

910-81 103WVa695, 138SE312. [a] See also 103WVa695, 138SE312.

911-90 31NM576, 249P242.

911-91 31NM576, 249P242.

911-92 318Mo870, 2SW(2d)713.

911-96 320Mo451, 8SW(2d)73.

911-97½-New. Where alternative writ is considered first pleading it must contain all matter to be considered by court as part of pleadings. MoA 26SW(2d)1011.

912-13 121Oh519, 169NE701.

912-19½-New. Until alternative writ is properly served, court has no jurisdiction to do anything save deny ap-

plication for writ. MoA 26SW(2d) 1011.

912-32 93Fla929, 112S616 [citCJ].

913-39 311Mo 32, 276SW872.

913-42 See also 124Kan511, 260P985.

913-43½-New. The answer provided by statute does not provide the exclusive means of raising objections to plaintiff's application. 51SD202, 212 NW919.

913-43¾-New. Such objections may be raised by motion to quash the writ. 51SD202, 212NW919.

913-45 80CalA433, 251P935; 11LaA 43, 123S344(2dcase); NJSup 150A194. [a] (4) That inference of condonation from findings will support order denying final decree of divorce, though there is no finding of ultimate fact of condonation. 74CalA350, 240P294. [d] (4) , or municipal authorities (NJSup 147 A570). [i] (6) Where trial judge, in answer to petition for mandamus to compel him to try case, takes erroneous position that he was right in refusing to try till a certain rule was complied with, it cannot be presumed that, irrespective of rule, he will proceed to try it at time to which it was continued. TexCivA 16SW(2d)858. (7) It is not assumed that committee of political party intends to disregard duty. Tex 28SW(2d)515. (8) Other instances. 85CalA525, 260P386. [j] **On application for mandamus** to compel issuance of permit to issue additional stock, where petition fails to show what commissioner's records showed as basis for his requirements on previous application it must be assumed that they were fully justified entirely reasonable. 195Cal 158, 232P140. [k] **Suspension of officer.**–70CalA424, 233P807. [l] **purposes of stockholder in demanding inspection of books of corporation** are presumed to be proper. 28Hawaii68. [m] **Right to peremptory order must be determined** on assumption that averment of opposing affidavits is true. 219 AppDiv141, 219NYS259.

914-47 83Colo 89, 262P526; 11LaA43, 123S344(2dcase); 192NC139, 134SE 409; TexCivA 5SW(2d)1003; TexCivA 30SW(2d)722; 69Utah204, 253P680.

914-48 215Ala280, 110S409; 195Cal 426, 233P965; 83Colo 89, 262P526; 197 Ind278, 149NE369, 150NE766; 323Mo 248, 19SW(2d)714; 242NY330, 151NE 637; 131Misc852, 228NYS411; 112 Oh 553, 148NE100; 298Pa347, 148A504; 49SD153, 207NW79; TexCivA 10SW (2d)170; TexCivA 26SW(2d)670; 101 Vt24, 140A157, 57ALR156; 104WVa 41, 138SE577.

914-49 Wyo 292P897.

914-50 CalA 290P519(2dcase); 323Mo 248, 19SW(2d)714; 113 Okl 236, 241P 197; 8PaDist&Co 305; TexCivA 1SW (2d)373. [i] **In proceeding to compel certification of nomination** relator must show that complete canvass of votes legally cast has been made, and that his nomination is clearly shown by result thereof. 217MoA362, 278SW416.

914-51 122 Or684, 260P220; 8PaDist &Co 305; TexCivA 1SW(2d)373; 69 Utah204, 253P680.

915-52 149SC449, 147SE438.

915-53 8PaDist&Co 305.

915-55½-New. that he has some beneficial interest in the thing he seeks to have done; 311Mo 167, 277SW934.

915-57 81Colo 181, 254P440.

915-59 220Ala404, 125S667. [b] (2) Burden of proof is upon officials charged with governmental duty to show they cannot perform. 173Minn350, 217NW 371. [c] (2) Burden is on party alleging stockholder's improper purpose in demanding inspection of books to prove it. 28Hawaii68. [g] 53SD471, 221NW 84.

915-64 220Ala404, 125S667; 252 IllA 10; 86Mont58, 282P32 (in mandamus to compel computation and apportionment of taxes on lands sought to be redeemed); TexCivA 8SW(2d)813. [d] (3) Record of board of county commissioners, showing appointment of township trustee to fill vacancy, was competent evidence in mandamus proceedings to compel auditor to accept and approve bond tendered by relator after appointment. 200 Ind319, 163NE263. [j] **Exhibits attached to bill** may be considered. 152Tenn217, 276SW867. [k] **Tax levy.**–225Ky9, 7SW(2d)490. [l] **Evidence that petitioners were not registered** at time of signing petition for consolidation of municipalities was admissible. CalA 276P416.

916-65 83CalA25, 256P603; SD 230 NW848.

916-66 220Ala404, 125S667; 127Mel, 140A606; 80Mont111, 258P250; Utah 263P83. [a] (7) On mandamus to compel canvassing board to reconvene and recount ballots, ex parte affidavits tending to show that ballots were irregularly indorsed will not be considered when not presented to canvassers. 102 WVa703, 136SE772. (8) In mandamus to compel reinstatement of policeman, evidence that before hearing individual members of the public safety board had expressed belief of policeman's guilt of the charges is not pertinent. 198 Ind 30, 152NE174.

916-68 208Cal 537, 282P954; 84CalA 312, 257P917; Mo 23SW(2d)167. [a] (1) 87CalA594, 262P477(3dcase); 94 CalA382, 271P568; 168Ga370, 147SE 762; 332 Ill 18, 163NE479; 246 IllA 563; 198 Ind608, 154NE378; 10LaA 676, 120S893; 11LaA43, 123S344(2d case); MoA 294SW107; TexCivA 27 SW(2d)866. (4) To warrant granting rule nisi. 216Ala169, 112S646. (5) To support judgment. CalA 290P900. [b] (1) 200Cal 1, 251P784; 202Cal 15, 258 P1094; 165Ga374, 141SE295; 44 Ida 143, 255P408; 252 IllA212; Kan 289 P436; Md 151A660; 250Mich633, 230 NW936; 148Miss462, 114S332; 316Mo 1169, 293SW391; MoA 26SW(2d)834; 116Nebr373, 217NW607; 254NY341, 173NE6; 112 Oh553, 148NE100 (in proceedings to require allowance to alien dependents of deceased employee under Workmen's Compensation Act); 113 Okl 236, 241P197; 128 Okl 104, 261 P553; 122 Or684, 260P220; 146SC496, 144SE233; TexCivA 8SW(2d)813; Tex CivA 13SW(2d)152; 108WVa166, 150 SE512. See NJL 142A558. [h] **Prima facie case to compel levy of tax** is made by introduction of warrant with entry thereon by treasurer of county of no funds with which to pay warrant. 169Ga279, 150SE151. [i] **Cogent proof required.**–108WVa404, 151SE315 (to compel county court to open and grade road). [j] **Evidence held insufficient to show** examining board acted arbitrarily. LaA 129S427. [k] **Evidence held to require** that separate corporations be treated as one. 157SC1, 153SE537.

916-68½-New. By preponderance of evidence rule governing jury trials in civil cases is not applicable on mandamus to compel administrative officer to act. 200Cal 1, 251P784.

916-68¾-New. and in such case the writ will be denied if there is any substantial evidence supporting administrative officer's refusal to act. 200Cal 1, 251P784.

917-73 164Minn134, 204NW925; 80 Mont102, 258P246.

917-73½-New. that refusal was justified: 80Mont102, 258P246.

917-74 33PortoRico 418; TexCivA 10 SW(2d)229.

917-85 163Ga707, 137SE626; 240Mich 12, 215NW18. [j] **Receipt of affidavit after conclusion of hearing** is not improper where it was offered pursuant to agreement of parties that either could submit further evidence after conclusion of hearing and before decision. 161Ga287, 130SE580. [k] **Continuance.**–191NC112, 131SE309. [l] **Mandamus actions are tried in equity.**–206 Iowa840, 221NW517.

918-89 163Ga707, 137SE626.

918-92 [b] **In Maine.**–125Me144, 131A 862.

918-95 [a] **In Michigan.**–237Mich200, 211NW738.

918-96 [b] **In South Dakota.**–51SD127, 212NW491.

918-2½-New. A proceeding by nominees of an unauthorized convention to compel the county clerk and the county election board to put their names on an official ballot is not a "contest" for nomination to office so as to make applicable procedure prescribed by statute. TexCivA 10SW(2d)170.

918-11 [a] **Where legal sufficiency of alternative writ** is raised by answer which is sustained, writ may be dismissed in absence of request to amend. 31NM576, 249P242.

918-14 OklCr 282P181.

918-15 See also 321Mo 863, 12SW(2d) 462.

918-15½-New. or, on court's own motion where writ shows on its face that it was improperly awarded; 311Mo 167, 277SW934.

919-26 MoA 21SW(2d)645 (condition at time of issuance of peremptory writ). [a] 109Conn249, 146A382. [i] (7) Reason for refusing writ will be considered by appellate court, though not mentioned in defendant's brief. 196Cal 468, 238P703. (8) Vagueness of allegation as to location of poolroom may be considered. 218MoA155, 263SW853. [j] 70CalA424, 233P807. [k] **Legality of claim against city** when resisted by auditor respondent in mandamus to compel issuance of warrant by him after approval of claim by city council subsequent to his rejection of claim will be determined. 70CalA424, 233P 807. [l] **Calling election.**–71CalA421, 236P377. [m] **Certification of nomination.**–217MoA416, 278SW416. [n] **Failure of petition** to allege facts justifying issuance of mandate will be considered, though particular insufficiency was not called to attention on oral argument. 49SD153, 207NW79. [o] **Allegations of fact in answering affidavits** must be taken as true in application for peremptory order. 126Misc524, 214NYS 113. [p] **Court cannot decline to determine** whether there is unsurveyed land, in suit to compel survey of school land. TexCivA 13SW(2d)152. [q] **Court must determine truth of charges preferred against permanent teacher,** in proceeding to compel her reinstatement, irrespective of evidence heard by board of education. 206Cal 758, 276P998. [r] **Trial de novo** is authorized under some statutes. 206 Cal 758, 276P998. [s] **In proceedings against judge,** he may raise question not raised by him when making ruling. MoA 26SW(2d)1011.

919-27 91CalA356, 267P169; Minn 233 NW9; 131Misc852, 228NYS411; Tex 25SW(2d)150. [j] (4) Where city charter does not require notice and hearing before suspension of subordinate, court is not concerned with sufficiency of cause of suspension. 70CalA 424, 233P807. [t] (2) Upon application for order requiring circuit judge to vacate his order refusing extension of time to perfect appeal in chancery suit, merits of case will not be considered. 234Mich581, 208NW697. [v] (3) In mandamus to compel compliance with default judgment in which validity of judgment is attacked, court need determine only whether judgment was void. 203Cal 306, 265P246. [y] (2) On mandamus by dismissed policeman to compel reinstatement on ground of denial of public hearing, court cannot consider correctness of conclusion of board in sustaining charges against him. 198 Ind30, 152NE174. [z] **Complainant in divorce action** must be treated as bona fide litigant in state court, where domicilliary status has not yet been adjudicated. 213Ala573, 105S647. [aa] **Certification of nomination.**–217MoA416, 278 SW416. [bb] **Issue of general damages** is not triable in mandamus proceeding. 75Mont132, 242P431. [cc] **On application for mandamus municipality limited** to objections made at time of application. NJSup 129A390. [dd] **Authority of board of school trustees** to expend public funds for given purpose will be considered in suit between them and clerk whose duty it is to issue warrants. 145Miss747, 110S775. [ee] **Amount of bond** will not be disturbed. 163La125, 111S622. [ff] **Points not urged in briefs** will not be considered, though urged in points and authorities accompanying petition for writ. 196 Cal 655, 238P934. [gg] **Matters occurring after filing of petition do not neces-**

sarily restrict issue. 163Ga707, 137SE 626. [hh] **In mandamus to compel issuance of building permit refused under zoning ordinance,** only questions open to inquiry are power of city to adopt classification of its zoning ordinance and whether proposed building belonged to class authorized in district. 144Wash74, 256P781. [ii] **Judgment denying final decree in divorce suit** will not be reviewed by mandamus judgment setting aside interlocutory decree not shown to be invalid. 74CalA350, 240P 294. [jj] **In proceeding to compel officers of school board** to sign teacher's contract, validity of board's action in closing school cannot be inquired into. 206 Iowa1139, 221NW833. [kk] **Sufficiency of complaint** in personal injury action to compel trial of which mandamus is sought will not be determined in mandamus proceeding. 123 Or326, 262 P220. [ll] **Validity of verification of petition designating candidate for member of state committee.**–131Misc744, 229 NYS53. [mm] **Real question of law, not briefed.**–316Mo 272, 289SW338. [nn] **Right of governor to make appointment** cannot be determined in suit to compel district attorney to bring suit. 166La 847, 118S42. [oo] **Question attempted to be raised by plea to return** cannot be considered by court. 246Mich487, 224 NW610. [pp] **Court cannot determine conflict of interests between adverse claimants** impleaded in case. **TexCivA** 13SW(2d)152. [qq] **Whether one can take as residuary legatee** is not matter to be decided on issue as to whether executor of deceased teacher is entitled to balance of her retirement allowance. 227AppDiv75, 237NYS61. [rr] **Motives of officials.**–MoA 21SW(2d)645. [ss] **In proceeding to compel removal of obstruction in street** width, grade and location of street will not be considered. 254 IllA109. [tt] **Reason assigned** by industrial commission for rejection of claim is unimportant in mandamus proceeding. 121 Oh504, 169NE568. [uu] **Ex parte statements** in counsel's briefs cannot be considered to supplement incomplete record. 248Mich101, 226NW 822. [vv] **Error at law in form of judgment** cannot be considered. CalA 292 P499.

920–28 See also 78Mont435, 254P414.

920–29 205Cal 426, 271P487; 83NH 426, 143A687; NJSup 129A390; Oh 171 NE241(2dcase); TexCivA 10SW(2d)170. See also 81CalA742, 254P939. [c] **Though availability of writ is not raised** by counsel, if it is manifest that issuance would be abuse of process, court will, of own motion, pass upon it. 74 Mont488, 241P240.

920–29½–New. Where the petition and answer are submitted without evidence the answer must be taken as true. 79 CalA41, 248P1007.

920–29⅓–New. Whether interlocutory order setting aside dismissal at previous term was effective is immaterial, on mandamus hearing, where court could grant equitable relief. 117Tex214, 299 SW888.

920–29¼–New. Mandamus to compel city common council to adopt without alteration admittedly altered does not involve question of fact. 222AppDiv 416, 225NYS495.

920–29⅓–New. Existence of immaterial matters in dispute does not raise issue of fact in mandamus proceeding. 222 AppDiv416, 225NYS495.

920–29⅙–New. Where the result must be the same in any event against petitioners for mandamus, the court may treat on their merits issues raised without considering questions of practice, procedure, or form of remedy. 264Mass 460, 163NE82.

922–39 135SC348, 132SE673.

922–45 See also 135SC348, 132SE673.

923–48 316Mo 524, 296SW90.

923–49 204Cal 207, 267P696; 87CalA 594, 262P477(3dcase); 93Fla104, 111S 391; TexCommnA 291SW1102. [a] (3) Whether any legal cause justifying denial of permit is for trial court. 87CalA 594, 262P477(3dcase). [c] **Where abuse of discretion is charged** inquiry is limited to question whether there was any controversy over facts or conditions on which officer or board acted, or which could have been considered. TexCivA 18SW(2d)373.

923–51 87Colo 605, 290P288; 118Tex 485, 17SW(2d)765.

923–52 87Colo 23, 284P778 (conflicting claims cannot be tried in mandamus proceeding).

923–53 170Ark1126, 282SW963; 119 Oh585, 165NE96; 118Tex268, 12SW(2d) 127.

923–55 CalA 290P900; 242 IllA1; 215 AppDiv311, 215NYS45 (petitioner entitled to have issues of fact tried); 194 NC159, 138SE601. [a] (3) Issue of fact not presented by pleadings. 190NC336, 130SE25. (4) Legal status of defendant logging railroad company as common carrier. 46 Ida256, 267P439. (5) Whether directors of school district abused discretion is question of law. MoA 28SW(2d)1040. [b] (3) Duty of court on motion to continue action until issues of fact can be determined by jury. 190NC336, 130SE25. [c] **Damages** may be submitted to jury or referee, or awarded by court. 81Colo181, 254P440.

924–56 160Ga752, 128SE913; 163Ga 707, 137SE626.

924–57 161Ga557, 131SE363.

924–61 194NC818, 140SE742. [a] 94 CalA720, 271P795. [b] **Findings held not to prevent issuance of writ.**–206Cal 758, 276P998.

924–62½–New. Failure to find on issues wherein relator has failed to sustain his burden of proof is a finding against him on such issues. 197 Ind278, 149NE369, 150NE766.

924–62⅓–New. Implied findings may be sufficient to support conclusions of law. 197 Ind278, 149NE369, 150NE766.

924–63 [a] (3) Verdict improperly directed for defendants in proceeding to compel removal of obstruction in street. 254 IllA109.

924–67½–New. Where a referee is appointed to take testimony and make findings, the supreme court will accept his findings as true if reasonably supported by the evidence and will not weigh the evidence. 30Ariz120, 245P 282.

929–68 [a] **In Florida.**–129S752.

924–71 51SD127, 212NW491; 146Wash 679, 264P988. [a] **Time for motion.**–51SD127, 212NW491.

924–78 But see 85CalA493, 259P768.

924–79 194NC818, 140SE742. But see 79CalA632, 250P583. [a] **In New York.**–132Misc817, 230NYS460.

925–83 254 IllA39.

925–93 [a] **Formal error in judgment** in mandamus suit commanding mayor to countersign warrant for payment of plaintiff as assistant city engineer, whereas statute required that warrant should be drawn by mayor and countersigned by clerk, has been held not to excuse mayor from execution of warrant in form effective to provide payment of plaintiff. 228Ky15, 14SW(2d)153.

925–94½–New. An order in mandamus proceedings granting relief appropriate to a decree in equity cannot be sustained as such under the pleadings without stipulation changing the issues or agreement to abide by the order of the court. 49SD96, 206NW236 (order insufficient as judgment for writ of mandamus).

925–94⅓–New. While mandamus proceeding is pending, court may, in exercise of discretion, before issuing writ, entertain application for modification. ND 231NW722.

925–96 161Ga287, 130SE580 (judgment construed as requiring county commissioner to levy annual tax sufficient to pay one fourth of amounts due on certain warrants including interest as well as principal).

925–96½–New. Court of appeals, having decided that school building contract is entitled to voucher, comptroller cannot assert that audit by school board is necessary. 129Misc671, 222NYS355.

925–96⅓–New. Where an action to compel the survey of school land is successfully maintained, it impresses the land as against the adverse claimants with the status of unsurveyed land belonging to the public free school fund, and as against the parties to the suit such feature of the judgment operates in rem. TexCivA 13SW(2d)152.

925–96¼–New. If an action to compel the survey of school lands determines that the land is not unsurveyed land belonging to the public free school fund, plaintiff's case fails as to all the adverse claimants and the judgment in such respect is indivisible and quasi in rem. TexCivA 13SW(2d)152.

926–8 [b] **Second judgment** to same effect on first is beyond jurisdiction of court and void. 69CalA533, 232P480. [c] **Final judgment.**–TexCivA 289SW 425.

926–9½–New. A statute, which provides for the entry of a judgment on the whole record where the jury have disagreed, applies to mandamus proceedings. 295 Pa82, 144A897.

926–11 219Ala523, 122S835; 245Mich 537, 222NW705; 199Wis523, 227NW35 (prayer for penalty may be disregarded). See also 146SC496, 144SE233. But see CalA 288P808. [b] (2) In mandamus to compel foreign corporation and resident director to permit stockholders to examine corporate books removed from state, prayer in petition to permit relators to examine books of corporation fully warranted judgment requiring corporation to make books available for examination, whether books were kept in state or outside state. 332 Ill 18, 163NE479. [d] **Statutory penalties** may not be enforced in mandamus to compel city treasurer to pay county moneys to county treasurer. 199Wis 523, 227NW35. [e] **Court, in issuing mandamus to open discontinued public highway,** will not attempt to control discretion of board as to character of repairs to be made. 200Wis350, 228NW 487.

926–12 83Colo 259, 264P660; TexCivA 282SW642. [a] (2) In mandamus to compel sheriff to release of record, attachment, to which plaintiff in attachment suit is not a party, court is without power to dissolve or discharge attachment. 78CalA84, 248P286.

926–18½–New. Provisions of judgments in mandamus proceedings have been held valid as against objection that they were not warranted by the pleadings. 161Ga287, 130SE580.

926–18⅓–New. The court may grant partial relief. 326 Ill 124, 157NE186.

926–18¼–New. Other orders to effectuate writ. 127Misc477, 217NYS265; Tex 285SW1063; TexCivA 282SW642; 69 Utah204, 253P680.

926–19 See also 128Kan453, 279P10.

926–21 Contra 159La723, 106S252.

926–21½–New. In mandamus to compel a compliance with the orders of the commission, court cannot reverse such orders. 197Wis442, 222NW244.

926–22 But see 116Tex1, 285SW1063.

927–24 81Colo 181, 254P440; 83Mont 445, 272P677. [b] **In Colorado.**–81Colo 181, 254P440.

927–28 75Mont122, 242P421 (not allowable after final judgment entered).

927–29 75Mont122, 242P421.

927–29½–New. , and judgment therein is conclusive of relator's rights to damages, although decree recites that it is given without prejudice to recover damages. 75Mont122, 242P421.

927–30 144Wash246, 257P849. [b] (3) value of lands taken for public use and resultant damages may be fixed by court in mandamus proceeding, or owners may elect to have amount payable to them for land taken fixed by commissioners. 133Misc388, 232NYS235.

927–31½–New. Damages are recoverable whether case is tried by court or by jury. 82Colo 77, 257P259.

927–31⅓–New. In proceeding against municipality to compel removal of obstruction in street as purpresture, question of damages cannot be considered. 254 IllA109.

927–38½–New. In Montana, under statute, applicant must allege damages in application, or file bill of particulars before conclusion of hearing, and submit proof, otherwise they are waived 75Mont122, 242P421.

928–39 86Mont100, 282P1045 (interest not recoverable as damages). [c] **Expenditures caused by operation of busi-**

ness elsewhere held not recoverable in mandamus to compel issuance of permit. 81**Colo** 181, 254**P**440. [d] **Time lost** is not recoverable. 81**Colo** 181, 254**P**440.

928-39½-New. , or as can be reasonably anticipated. 75**Mont**122, 242**P**421.

928-43 81**Colo** 181, 254**P**440.

928-44 81**Colo** 181, 254**P**440; 82**Colo** 77, 257**P**259.

928-45 82**Colo** 77, 257**P**259, 260 [citCJ] (dictum); 83**Mont**445, 272**P**677; 86 **Mont**100, 282**P**1045.

928-46 Contra 82**Colo**77, 257**P**259.

928-55 [a] **In Montana.**-86**Mont**100, 282**P**1045.

928-57 70**CalA**61, 232**P**720.

929-65 50**ND**693, 197**NW**769; 116**Tex** 1, 285**SW**1063, 1073 [citCJ]. [a] **Notice on coparty** is not sufficient notice. 116 **Tex**1, 285**SW**1063.

929-68 212**Ala**496, 103**S**558; 111**Conn** 214, 149**A**677; 50**ND**693, 197**NW**769.

929-69 249**NY**16, 162**NE**570; 127**Misc** 538, 217**NYS**217.

929-72 **NJSup** 133**A**755; 130**Misc**545, 224**NYS**56.

930-73 **NJ** 146**A**300; **NJSup** 132**A**250; **NJSup** 133**A**193; **NJSup** 133**A**755; **NJ Sup** 136**A**602; 218**AppDiv**780, 218**NYS** 556. [a] **Peremptory writ denied** where constitutionality of zoning ordinance was involved. 241**NY**288, 150**NE**120, 43 **ALR**651. [b] **Application for peremptory writ held to justify issuance of alternative writ.**-**NJSup** 133**A**193.

930-75 See also **TexCivA** 5**SW(2d)**1003. But see 85**CalA**493, 259**P**768.

930-76 249**NY**16, 162**NE**570; 135**Misc** 916, 240**NYS**335.

931-81 28**Hawaii**68; 130**Misc**158, 223 **NYS**638; 131**Misc**780, 228**NYS**272; 219 **AppDiv**141, 219**NYS**259; 136**Misc**136, 239**NYS**41.

931-82 97**Fla**816, 122**S**256.

931-84 223**AppDiv**862, 229**NYS**20; 131 **Misc**383, 226**NYS**744; 135**Misc**916, 240 **NYS**335. [b] **Defendant's allegation on information and belief** cannot avail against positive sworn statements to contrary. 131**Misc**780, 228**NYS**272.

931-87½-New. A motion for a peremptory writ of mandamus, notwithstanding the answer, contemplates a final order quashing or dismissing the alternative writ or granting a peremptory writ. 97**Fla**816, 122**S**256.

931-89 318**Mo**870, 2**SW(2d)**713; 213 **AppDiv**774, 211**NYS**61; 146**Wash**679, 264**P**988.

932-92 **NJ** 151**A**861.

932-94 217**MoA**362, 278**SW**416; **Mo** 23 **SW(2d)**83 (cannot go beyond alternative writ); **MoA** 294**SW**107; **MoA** 21**SW(2d)** 645; 102**WVa**703, 136**SE**772, 774 [cit CJ]; 106**WVa**243, 145**SE**387, 388 [cit CJ].

932-95 217**MoA**362, 278**SW**416.

932-99½-New. Where the exigencies of a case require, the peremptory writ, provided it does not enlarge upon the alternative writ, may vary from it. 106**WVa** 317, 145**SE**641.

932-1 106**WVa**317, 145**SE**641.

932-3 49**SD**96, 206**NW**236 (order held insufficient as writ).

933-8 82**Colo** 438, 261**P**457; 320**Mo** 451, 8**SW(2d)**73.

933-9 [a] **Mandamus has been held not erroneous** for failure to designate person to be appointed and salary to be paid or term of office. 170**Ga**361, 153**SE** 34 (failure to require giving of bond).

933-14½-New. Under statutes in some jurisdictions the writ is required to contain a copy of the petition and verification and a copy of order of allowance. 20 **OhA**1, 151**NE**784.

933-14⅓-New. Peremptory writ of mandamus not following alternative writ cannot be sustained. **Mo** 32**SW(2d)** 59.

933-17 **Mo** 23**SW(2d)**167.

934-20 79**CalA**1, 248**P**1049.

934-33 **Fla** 129**S**752.

934-33½-New. Where mandamus is brought commanding county commissioners individually to perform official acts, the writ must be served on commissioners severally. 93**Fla**929, 112**S** 616.

934-40½-New. Statutes relating to service are jurisdictional and must be strictly construed. 20 **OhA**1, 151**NE**784.

935-65½-New. A peremptory mandate may be recalled on an uncontested motion for correction to limit its application to individuals mentioned in the petition. 99**CalA**217, 278**P**240(2dcase).

935-68½-New. Alias peremptory writs of mandamus may issue in proper cases. 81**Colo** 163, 255**P**447.

935-72½-New. Peremptory writ of mandamus is res judicata of right of parties at time issued. 81**Colo** 163, 255 **P**447.

935-72⅓-New. A writ directing the judge to try a certain case has been held not to exclude any other judge of the county from trying it. 126 **Or**585, 270**P** 486(1stcase).

935-72¼-New. An order of mandamus requiring the board of supervisors to audit the expenses incurred by the relator in proceedings to remove a county officer was an adjudication that the expenses constituted a charge against the county, if they were reasonable. 251**NY** 156, 167**NE**204.

935-72⅕-New. A writ is in the nature of an execution and is binding on the parties, and cannot be disregarded unless and until set aside or withdrawn by legal proceedings. **NJSup** 147**A**653(1st case).

935-74 161**Ga**287, 130**SE**580; **NJ** 151**A** 861.

935-75 161**Ga**287, 130**SE**580.

935-76 161**Ga**287, 130**SE**580; 317**Mo** 1320, 298**SW**750; 287**Pa**150, 134**A**478.

935-77 161**Ga**287, 130**SE**580, 298**Pa** 347, 148**A**504.

936-86 [a] (3) Where papers ordered to be returned to proper court were returned by person other than officer. 163 **Ga**119, 135**SE**500.

936-88 104**WVa**127, 139**SE**468. [a] (3) Entering nunc pro tunc order sentencing prisoners is substantial compliance with writ requiring judge to sentence prisoners although notice was not given to prisoners and they were not present. 104**WVa**127, 139**SE**468.

937-2½-New. Successors of city officials, required by mandamus to furnish water to property owners, should be permitted to establish meritorious defense arising subsequent to original judgment. 81**Colo** 163, 255**P**447.

937-11 287**Pa**150, 134**A**478, 480 [quot CJ].

937-13 30**Hawaii**630; **Wash** 286**P**648.

937-14 287**Pa**150, 134**A**478.

938-15 287**Pa**150, 134**A**478.

938-16½-New. Fact that state highway engineer, who was directed to deliver to state highway committee all books and papers in his possession, cannot determine whether some belong to his own office or that of committee's, does not excuse failure to deliver those which are records of the committee. 145**Wash**327, 260**P**253.

938-16⅓-New. Ignorance of combination of safe containing such records and papers is insufficient to absolve him from contempt for disobedience of writ. 145**Wash**327, 260**P**253.

938-16¼-New. Nor is he excused from delivering said records by the fact that he was ordered by the state director of efficiency not to permit the records to leave the engineer's office. 145**Wash**327, 260**P**253.

939-37 170**Ark**366, 280**SW**641.

939-38 170**Ark**366, 280**SW**641; 287**Pa** 150, 134**A**478.

939-49 317**Mo** 1320, 298**SW**750; 145 **Wash**327, 260**P**253.

939-50 [g] (2) Validity of writ cannot be attacked nor defenses in mandamus suit considered. 317**Mo** 1320, 298**SW** 750. [l] **Answer to contempt proceeding** held uncertain and evasive. 287**Pa** 150, 134**A**478. [m] **Delay of seven years in asking for attachment for contempt** in failing to comply with writ held not to waive contempt or abate the writ. 287**Pa**150, 134**A**478. [n] **Defendants held to have had notice and hearing on complaint.**-317**Mo** 1320, 298**SW** 750. [o] **Defendants properly ordered committed to jail** until they complied with writ to make tax levy and apply proceeds to judgment against the city. 317**Mo** 1320, 298**SW**750. [p] **Obedience to mandamus upon citation for contempt** may justify discharge of citation. **Cal** 290**P**569(1stcase).

940-61 51**SD**127, 212**NW**491. [c] **In Texas.**-**TexCommnA** 291**SW**886. [d] **Waiver.**-197**Wis**284, 221**NW**860.

941-67 96**Fla**347, 117**S**898.

941-71 51**SD**127, 212**NW**491. [e] **In California.**-**CalA** 290**P**890.

942-74 But see 116**Tex**1, 285**SW**1063.

942-74½-New. Appeals and writs of error in mandamus are to be prosecuted as in other civil cases. 328 **Ill** 343, 159 **NE**787.

942-76 51**SD**202, 212**NW**919. [b] **Survey of land and issuance of patent to plaintiff,** after judgment for plaintiff to compel survey of school land, did not render judgment unappealable. **Tex CivA** 73**SW(2d)**152.

942-77 125**Me**144, 131**A**862; 197**Wis** 284, 221**NW**860.

942-79 58**ND**904, 228**NW**416.

943-80 125**Me**144, 131**A**862.

943-81 125**Me**144, 131**A**862.

943-82 [b] **Whether issuable on agreed facts.**-125**Me**144, 131**A**862.

943-87½-New. An order denying a motion to quash an alternative writ is appealable. 51**SD**202, 212**NW**919.

943-87⅓-New. Such order is not within the application of the statute providing that final orders made in special proceedings which affect substantial rights are appealable. 51**SD**202, 212**NW** 919.

943-90 See also 105**NJL**234, 143**A**447.

944-93½-New. Court of appeals can review denial of mandamus only if undisputed facts permit but one inference so as to raise a question of law. 243**NY** 417, 153**NE**854.

945-17 86**Colo** 125, 278**P**593; 287**Pa**28, 134**A**529. [c] **Appeal held timely.**-**Pa** 151**A**816.

945-22 328 **Ill** 122, 159**NE**205.

945-23 125**Me**144, 131**A**862.

945-26 176**Ark**822, 4**SW(2d)**510.

945-28 **Ind** 172**NE**908; 164**La**624, 114 **S**491; 265**Mass**353, 164**NE**91; 220**MoA** 708, 293**SW**471; 228**AppDiv**596, 240 **NYS**766; 286**Pa**233, 133**A**226; 197**Wis** 573, 223**NW**83. [a] (8) That relator had adequate remedy at law. 217**MoA** 480, 268**SW**665; 286**Pa**233, 133**A**226. (9) That mandamus was not proper remedy. **Iowa** 229**NW**677.

946-30½-New. Justice hearing petition for mandamus may reserve questions of law for full court, 125**Me**144, 131**A**862.

946-30⅓-New. but only after a peremptory writ is ordered. 125**Me**144, 131 **A**862.

946-32 **Cal** 290**P**38; **Ind** 172**NE**908; 247**Mich**237, 225**NW**554; **MoA** 21**SW** **(2d)**930.

946-33 **CalA** 285**P**361. [a] **Where lower court merely certifies testimony,** but makes no findings, motion for dismissal should be granted. 237**Mich**200, 211**NW** 738.

946-39 162**Ga**221, 133**SE**468 (assignment that orders sustaining demurrer and denying mandamus were contrary to law held sufficient); 162**Ga**340, 133 **SE**871 (assignment that judgment denying mandamus was contrary to law held sufficiently specific).

946-40 311**Mo** 32, 276**SW**872.

947-46 But see 9**PaDist&Co** 610. [d] **Supersedeas to stay mandate compelling permission to examine corporate records** should be granted on furnishing adequate bond where appeal would otherwise be useless. 90**CalA**510, 265**P**1031. [e] **Petition for supersedeas held insufficient** where no facts are set forth to show intent to injure. 101**CalA**547, 281 **P**676.

948-53 125**Me**144, 131**A**862; 137**Misc** 827, 245**NYS**65. [a] (7) Verdict of jury not conclusive on appellate court. 242 **Ill**A1. (8) Where result reached on appeal must be same in any event, court will consider only merits of case. 267 **Mass**438, 166**NE**850.

948-54 80 **Mont**102, 258**P**246.

948-55 175**Ark**860, 3**SW(2d)**1; 169**La** 717, 125**S**865 (absence of return to petition); 249**Mich**609, 229**NW**434; 213**App Div**774, 211**NYS**61; 136**Misc**136, 239 **NYS**41.

948-56 219**Ky**275, 292**SW**797.

948-57 See also 125**Me**144, 131**A**862.

948-57½-New. The court may consider a point raised by facts stated in an alternative writ on writ of error from judgment dismissing action where no objection to argument thereon is made by defendant in error. 81**Colo** 276, 255**P**610.
948-57½-New. The proper practice is to try disputed matters of fact at nisi prius where the record consists of an alternative writ of mandamus, return, new matter, and traverse thereof. **NJSup** 148**A**204.
948-58 80**Mont**102, 258**P**246. [a] 151 **OhA**784.
948-59 80**Mont**102, 258**P**246.
948-60 169**Ark**1212, 275**SW**332.
948-61½-New. Where the trial court acting without jury, made no findings of facts involved in the controversy, the appellate court cannot consider questions of law in a mandamus proceeding. 194**NC**818, 140**SE**742.
949-68 94**CalA**405, 271**P**351; 101**CalA** 638, 281**P**1077; **Fla** 129**S**752; 13**LaA** 173, 127**S**659; **LaA** 127**S**750; 32 **OhA** 394, 168**NE**151; **TexCivA** 9**SW(2d)**442. [a] (4) On review of order sustaining demurrer to petition averments of petitioner are considered admitted. 212**Ala**660, 103**S**835.
949-69 87**CalA**594, 262**P**477(3dcase); **Mass** 171**NE**434.
949-71 253**Mass**590, 149**NE**622; 78 **Mont**435, 254**P**414; 119 **Or**44, 247**P**155. [c] **Duty of trial court** to issue writ is determined on return of rule to show cause as on pleadings on application for writ. 7**F(2d)**796.
950-72 253**Mass**590, 149**NE**622; 320**Mo** 1122, 9**SW(2d)**600. [b] **Submission of issues to jury** not reversible error, as verdict is only advising. 51**SD**127, 212 **NW**491.
950-73 125**Me**144, 131**A**862; 256**Mass** 584, 152**NE**743; **MoA** 294**SW**107, 109 [cit Cyc]; 119 **Or**44, 247**P**155; 53**SD**471, 221**NW**84.
950-73½-New. Nor will the appellate court interfere with the lower court's exercise of discretion in contempt proceeding for the alleged failure to comply with the writ, in the absence of an abuse of discretion. 166**Ga**640, 144**SE**25.
950-75 29**Ariz**481, 242**P**1003; 111**Conn** 427, 150**A**308; **TexCivA** 1**SW(2d)**373; **Wash** 288**P**913. [a] (5) Refusal to strike answer made to petition instead of to alternative writ held not prejudicial, where writ contained no material allegations not found in petition. 33 **Ariz**1, 261**P**629.
950-76 [a] **Supreme court cannot award peremptory writ** on record consisting of alternative writ of mandamus, return, new matter, and traverse thereof. **NJSup** 148**A**204.
950-80 49**SD**558, 207**NW**979 (on appeal of mandamus proceedings to require payment of claim against insolvent bank, supreme court may require payment from guaranty fund).
950-81 See also 200 **Iowa**931, 205**NW** 735.
950-84 [a] **On appeal from judgment ordering school superintendent to sign contract employing high school principal,** showing that resolution of majority of school board for employment was repealed by resolution of minority of board, does not authorize remand for further evidence. 165**La**552, 115**S**747.
950-86 See also **Mass** 169**NE**894.
950-87 [b] **Mandamus decree may be amended** on appeal so as to give plaintiff's judgment to which they were clearly entitled. 158**La**324, 104**S**60.
951-94½-New. Judgment granting writ will not be affirmed where complaint is in two paragraphs and demurrer to first paragraph is well taken and judgment was not shown to rest entirely on second paragraph. 196 **Ind**436, 148**NE**481.
951-94½-New. Where a judgment of mandamus is affirmed, its mandates are as binding as they were before appeal, and if supersedeas has prevented their enforcement at the time designated in the judgment they are enforcible after affirmance in the same manner as before except as to the time designated and the trial court has the authority to issue the same writs for their enforcement as if no appeal had been taken. **TexCivA** 274 **SW**196.
951-94¼-New. Where a mandamus action was prematurely brought, a judgment of the district court quashing an alternative writ of mandamus and dismissing the action must be affirmed, although the alternative writ may have been quashed for a wrong reason. 84 **Colo** 240, 269**P**15.
951-94½-New. Where, pending appeal, the personnel of city officers has changed, the court of appeals, in disposing of the case on the merits, properly directs substitution of the present officers and the issuance of a writ against them. 322**Mo** 360, 20**SW(2d)**17; **MoA** 20**SW(2d)**7.
951-1 **MoA** 20**SW(2d)**11(2dcase); **MoA** 20**SW(2d)**13; **MoA** 20**SW(2d)**15; **MoA** 20**SW(2d)**16(2dcase) (all four cases holding that where city officers were changed pending appeal, appellate court may substitute new officers).
951-3 111**Conn**427, 150**A**308.
951-6 81**Colo** 181, 254**P**440; 111**Conn** 427, 150**A**308.
952-8 75**Mont**122, 242**P**421.
952-15 197 **Ind**278, 149**NE**369, 150**NE** 766.
952-16 **Wis** 230**NW**70.
953-18 12**LaA**240, 125**S**188(2dcase) (relator must pay costs).
953-19 81**Colo** 276, 255**P**610.
953-20 10**LaA**676, 120**S**893; 10**PaDist&Co** 172; **Utah** 290**P**358(2dcase).
953-23 [a] (2) In mandamus to compel respondent as judge to hear and determine demurrer to amended answer and cross-complaint, propriety of orders allowing certain parties to intervene will not be inquired into. 195**Cal** 111, 231**P**726.
953-25 146**Wash**679, 264**P**988.
953-33½-New. Where a motion to amend a pleading was unnecessarily delayed until the case was on call, no costs will be allowed on granting mandamus to compel allowance of the amendment on the ground that it was necessary in the interest of justice. 234**Mich**341, 207 **NW**903.
953-34 **Utah** 290**P**358(2dcase); 142 **Wash**300, 252**P**932. [d] **Costs allowed.**–**TexCivA** 272**SW**219 (evasion).
954-35 **Utah** 290**P**358(2dcase).
954-39 81**Colo** 181, 254**P**440; 86**Mont** 100, 282**P**1045. [f] **In Utah.**–290**P**358 (2dcase).
954-40 81**Colo** 181, 254**P**440.
954-42 96**CalA**292, 273**P**1101; 86**Mont** 100, 282**P**1045 (under statute).
954-43½-New. Where public officer's refusal to pay interest was in good faith, no costs will be allowed to winning party. 128**Misc**63, 217**NYS**626.
954-44 **Utah** 290**P**358(2dcase).
954-47 **Wis** 230**NW**70. [i] **Costs taxed in district court** must be included in judgment of mandamus compelling issuance of permit to operate dry cleaning business. 81**Colo** 181, 254**P**440.
955-51 **Utah** 290**P**358(2dcase); **Wis** 230**NW**70.
955-52½-New. Costs on appeal are governed by the supreme court rules and not by statutes as to cost in mandamus generally. 81**Colo** 181, 254**P**440.
955-52¼-New. Costs in the supreme court are not taxed against public officers acting in good faith. 81**Colo** 181, 254**P**440.
955-60 [a] (1) 75**Mont**122, 242**P**421.

MANDATARY or MANDATORY

956-9 199 **Ind**217, 156**NE**513.

MANIFESTLY

958-89 See also 4**HawaiiFed**16.

MANNER

958-14½-New. But does not necessarily include "form" in the fullest sense. 187**Wis**180, 204**NW**803.
959-26 125 **Or**92, 266**P**230.
959-41 187**Wis**180, 204**NW**803 [quot 133 **Ind**580, 33**NE**418].

MANUFACTURES

965-2 11**CustA**186.
966-33 11**CustA**186.
966-36 40**Wyo** 64, 275**P**110.
966-38 175**Ark**1170, 1**SW(2d)**46, 47 [citCyc].
966-41 150 **Md**91, 132**A**430.
966-47 See also 11**CustA**186.
966-49 198 **Ind**679, 154**NE**489.
966-55 [a] (2) To create a new identity. 6**PaDist&Co** 53.
966-57 253**Mass**458, 149**NE**140.
966-59 222**Ky**606, 1**SW(2d)**1050; 253 **Mass**458, 149**NE**140.
966-61 253**Mass**458, 149**NE**140.
967-88 292**Pa**447, 141**A**148 [quotCyc].
968-8 163**La**547, 112**S**412. [a] **Similar definitions.**–**BC** [1930] 4**DomLR**183.
968-10 163**La**547, 112**S**412; 164**La**225, 113**S**825.
968-18½-New. As defined by statute in some jurisdictions, every person, company, or corporation who shall hold or purchase personal property for purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials is held to be manufacturer. 311**Mo** 1, 276 **SW**32.
969-23½-New. printer, **BC** [1930] 2 **DomLR**762.
969-46 46**Philippine**492.
970-58 [a] (1) **TexCivA** 293**SW**306.
971-72 [j] **Sask** [1928] 3**DomLR**532. [k] **Gas holder not manufactory.**–217**App Div**263, 216**NYS**677.
971-82 20**F(2d)**275.
977-29 10**CustA**124.
979-47 262**Mass**439, 160**NE**419.
979-51 11**CustA**186.
979-53 [b] **Mere cleansing** does not constitute partial manufacture. 11**Cust A**199. [c] **Cleansing process** is not manufacture. 12**CustA**293.
980-69 11**CustA**186.
980-73 11**CustA**186.
982-4 5**LaA**365.
985-58 See also 94**PaSuper**321.
988-11 [k] **Making locomotives and car springs** is manufacture. 262**Mass**439, 160**NE**419.

MANURE

990-11 See also 14**CustA**222.

MARBLE

991-36 14**CustA**7.

MARINE INSURANCE

1005-2 133**Misc**193, 231**NYS**67.
1005-3 [c] **Fact that policy covered perils of sea, including loss or destruction by fire,** did not make it "fire insurance policy" within statute relating to cancellation. 150**Wash**626, 274**P**704.
1007-34 246**NY**396, 159**NE**183.
1007-35 224**AppDiv**531, 231**NYS**503.
1008-47½-New. Receiver of steamship line has no insurable interest in ships. 37**F(2d)**23.
1008-58 43**F(2d)**427.
1010-92 30**F(2d)**782.
1011-16 224**AppDiv**531, 231**NYS**503.
1014-94½-New. Where freight is payable to a carrier notwithstanding the loss of shipment, the carrier has no insurable interest in its charges. 26 **F(2d)**967.
1018-57 [d] **Certificate held not complete contract of insurance.**–37**F(2d)**461.
1019-87 [c] **Valued policy statute** applies only to property immovable by destination. 162**La**1090, 111**S**466.
1019-90 166**Minn**273, 207**NW**625, 627 [citCyc].
1020-1 [a] (6) Policy limiting insurer's liability for any loss to proportion amount of policy bore to named sum termed "expressed valuation," held not a "valid policy." 162**La**1090, 111**S**466. [b] (6) Insured, specifying that steamer shall be "fully insured," will be assumed to intend, by the use of such term, meaning ordinarily used in marine insurance. 108**Conn**349, 143**A**165.
1026-10 [a] (1) 17**F(2d)**658; 162**La** 1090, 111**S**466. (9) Words "to pay average irrespective of percentage" stamped on policy applies only to memorandum clause and is not repugnant to warranty which must therefore be given effect. 127**Misc**9, 214**NYS**548. [c] **Written or stamped interlineations** take precedent over printed provisions only if repugnant thereto. 127**Misc**9, 214**NYS**548. [d] **Clauses in pari materia** should be read together. 127**Misc**9, 214**NYS**548.
1027-21 35**PortoRico** 365 (subsequent purchaser). [e] **Rider on policy stating insurance was "for account of whom**

It may concern" intended to eliminate provision in policy prohibiting change of interest without insurer's consent. 133Misc193, 231NYS67.

1028-22 [a] (1) 26F(2d)967. (3) Shipper liable for freight charges regardless of loss of shipment, is not entitled, in action for such charges, to set off benefit of insurance collected by carrier. 26F(2d)967.

1028-23 26F(2d)967. [a] **Statement of person obtaining policy** is not admissible as evidence to show person whom he had in mind. 26F(2d)967.

1030-64 [a] **Effect of striking out "body, tackle, apparel, etc."**-42F(2d) 565.

1031-17 [f] **Policy covering "unpaid and/or collect freight"** does not cover obligation to pay freight, unless terms of policy clearly show intention to insure risk of loss of interest in cargo representing additional value measured by amount of freight. 26F(2d)967.

1038-51 108Conn349, 143A165.

1039-56 See also 108Conn349, 143A165.

1039-61½-New. Insurer's tender of a policy and demand for premium is entirely consistent with the claim of no liability for the sinking of a ship, which had never commenced voyage as was required by the terms of the policy. 108Conn349, 143A165.

1044-74 See also 27F(2d)956.

1045-1 16F(2d)707.

1046-10 59 OntL235, [1926] 4DomLR 477.

1046-17½-New. Levy of assessment, if in compliance with by-laws, is valid. 16F(2d)707.

1046-17½-New. Discretion of directors in determining amount of assessment is not reviewable. 16F(2d)707.

1046-19 246NY396, 159NE183.

1050-94 MoA 24SW(2d)211 (assent of insurer is not necessary).

1051-16 [a] (2) Marine policy, providing for cancellation on five days' written notice being given insured in event of nonpayment of premium, refers to notice after failure to pay premium. 224 AppDiv531, 231NYS503.

1051-34 219AppDiv636, 220NYS514.

1052-37 15F(2d)946.

1055-18½-New. Insurer cannot avoid policy for overloading where insured had no knowledge of this fact. BC [1927] 2DomLR590.

1056-28 But see 277US66, 48SCt459, 72L ed787.

1058-77 246NY396, 159NE183.

1058-80 5F(2d)358.

1060-23 5F(2d)570.

1061-53 5F(2d)570.

1062-65 [a] (2) Representation that vessel had value above market value because of favorable charter is material. 5F(2d)570.

1063-98 288Pa325, 135A614.

1064-8 NJCir 143A90.

1065-26 [a] (2) 37F(2d)23 (statement held not promissory warranty).

1065-30½-New. A clause in war risk policy warranting freedom from any claim arising from seizure, arrest, or restraints, preëmption, or detainments by British government or allies, relieves insurer of liability for loss of ships torpedoed by Germans during time of capture or detention by British warships. 241NY197, 149NE830.

1067-84½-New. Interpretation of provision requiring approval of trips of barges by named person. 252NY75, 168 NE834.

1070-32 NJCir 143A90.

1071-58 15F(2d)946; 19F(2d)493; 116 Or102, 239P812.

1073-68 5F(2d)358 (under policy insuring against liability for "loss or damage to any goods which may arise from any cause whatever" there is no implied warranty of seaworthiness).

1073-69 175Minn398, 221NW529, 530 [citCJ].

1073-75 32F(2d)353.

1073-80 157Md205, 145A501.

1074-85 19F(2d)493; 116 Or102, 239P 812.

1074-87 277US66, 48SCt459, 72L ed 787.

1074-88½-New. There are degrees of seaworthiness but no degree of sea perils corresponding thereto and a ship must be seaworthy, although less able than another ship to withstand sea perils. 19 F(2d)493.

1075-15 32F(2d)271.

1078-61 But see 20F(2d)640.

1078-76 [a] (5) "A 'deviation' as term is applied in marine insurance, means that ship has made a departure from stated route not contemplated by the parties to contract, and not rendered necessary to save the ship or cargo." 241NY197, 149NE830, 832.

1084-22 157Md205, 145A501.

1085-37 30F(2d)782.

1087-48 [b] **War risk policy.**-241NY 197, 149NE830.

1094-28½-New. A rider on the policy has the same effect. 133Misc193, 231 NYS67.

1095-58½-New. Acceptance of notice of shipment indorsed "warranted with" is not a waiver of a provision requiring notice within seventy two hours. 130Misc396, 223NYS559.

1095-62 19F(2d)493.

1097-86½-New. Theft of tug moored to pier is not loss by risk of harbor. 138Misc38, 244NYS720.

1097-94 172Minn13, 214NW473, 474 [quotCJ], 55ALR938.

1097-2 175Minn398, 221NW529. [a] **Clause insuring against damage through latent defects** does not cover defects themselves. 14F(2d)997.

1098-18 15F(2d)937; 138Misc38, 244 NYS720. But see 218AppDiv564, 218 NYS658. [a] (8) Truly accidental occurrence peculiar to sea is peril of sea. 218AppDiv564, 218NYS658. [c] **In broadest sense** "perils of the seas" includes all dangers arising upon seas. 127Misc9, 214NYS548. [d] **In restricted sense** it includes only such dangers as are marine in character or peculiar to sea. 127Misc9, 214NYS548.

1098-19 15F(2d)937. [b] **To constitute sea peril** cause must be fortuitous accident or casualty of sea. 127Misc9, 214 NYS548. [c] **In more restricted sense** term confines its meaning to such extraordinary, irresistible, or inevitable occurrence on sea which cannot be guarded against by ordinary exercise of human skill and prudence. 127Misc 9, 214NYS548.

1098-20 127Misc9, 214NYS548.

1098-21 15F(2d)937.

1099-28 15F(2d)937 (dictum); 43F F(2d)361.

1099-32 8F(2d)356.

1099-37 218AppDiv564, 218NYS658.

1100-46 [d] (2) Sinking caused by stone drawn into suction pipe. 31F(2d) 149. [i] 277US66, 48SCt459, 72L ed787.

1100-46½-New. Implied warranty of seaworthiness applies to vessel being towed on open sea. 14F(2d)197.

1100-46½-New. Rough sea and waves held to be extraordinary condition contemplated by warranty. 14F(2d)197.

1100-46¼-New. Sinking of vessel being towed on open sea held to be due to "extraordinary condition of weather and sea" and covered by policy. 14 F(2d)196.

1100-49½-New. theft, 138Misc38, 244 NYS720.

1100-51 But see 15F(2d)937.

1100-56¼-New. wetting by sea without showing it was caused by extraordinary peril, 15F(2d)937.

1100-59 19F(2d)493.

1100-63 5F(2d)522 (loss by capsizing in calm sea due to improper loading is not loss caused by peril of seas).

1101-72 [a] (2) Current in Detroit River causing injury to rudder and blade. 2F(2d)767.

1102-88 6F(2d)736.

1102-94 6F(2d)736.

1102-97 35PortoRico 365.

1102-2½-New. Collision between vessels in tow within insurance policy includes "bumping" or "pounding" in view of insured's warranty to properly fasten vessels with fenders or other appliances. 216AppDiv202, 214NYS637.

1104-49½-New. A policy has been held not to cover fire caused to lighter moored alongside of ship. 250NY322, 165NE 463.

1104-58½-New. Assured, warranting ship free from arrest by civil authority, cannot recover damages due to delay because of such arrest. 245NY329, 157 NE156.

1106-5 [a] (7) Loss due to peril of sea after vessel had been seized and was navigated by naval officer. 267US76, 45SCt211, 69L ed519.

1109-69½-New. Theft of tug moored to pier does not constitute act of piracy. 138Misc38, 244NYS720.

1109-74½-New. But there must be a fortuitous event to give rise to any liability. 14F(2d)997.

1109-84 15F(2d)937; 127Misc9, 11, 214 NYS548 [citCJ].

1110-2½-New. Perils clause of policy insuring generally against damage from other "causes of whatsoever nature" covers all "risks." 14F(2d)997.

1110-2½-New. Bursting of steamship boiler during test required by law held covered by terms of marine policy. 14 F(2d)997.

1110-4 31F(2d)149 (elbow pipe of dredge has been held not "machinery"). [a] **Policy insuring against perils of the sea** "and all other perils, losses, and misfortunes" does not cover loss due to improper loading. 5F(2d)522.

1110-5½-New. Perils clause of policy insuring generally against damage from "other causes of whatsoever nature" does not cover such certainties as wear and tear or depreciation. 14F(2d)997.

1110-5½-New. Fractures developed in steamship boiler held not covered by terms of marine policy. 14F(2d)997.

1110-5¼-New. Mere wetting by sea water without showing that it was caused by extraordinary peril is not covered. 15F(2d)937.

1110-8 20F(2d)640.

1111-10 12F(2d)733.

1111-11 [a] **Theft of tug moored at pier** held not covered by provision against loss through negligence of master, mariners, engineers, or pilots. 138 Misc38, 244NYS720.

1111-12 [b] **Fraud or willful exposure,** defeating insurance policy, held not to necessarily exist in privity and knowledge of unseaworthiness, defeating limitation of liability. 20F(2d)640.

1111-18½-New. That vessel was overloaded by charterers held no defense to action by owner where such overloading was without his knowledge or privity. BC [1926] 4DomLR963.

1111-20 218AppDiv564, 218NYS658.

1112-21 218AppDiv564, 218NYS658.

1112-25 218AppDiv564, 218NYS658.

1112-26 218AppDiv564, 218NYS658.

1112-27 218AppDiv564, 218NYS658.

1114-53½-New. injury to cargo by rain driven by the wind; 8F(2d)356.

1115-92½-New. Policy excepting risk in printed form and including risk in rider construed. 24F(2d)600.

1117-57½-New. injury or breakage of machinery, 37F(2d)29.

1118-76 [c] **Underwriters should pay charges** incident to collecting commissions by reason of general average. 32 F(2d)555.

1119-77 32F(2d)555.

1123-52 279US708, 49SCt439, 73L ed 914. [b] **But insured cannot be required to compensate loss sustained with value of undamaged portion of property** insured, under statutes. 162La1090, 111S466.

1123-53 162La1090, 111S466; 166Minn 273, 207NW625, 627 [citCyc]. [a] **Maritime insurance "on liens p. p. i. and f. i. a."** was valued insurance, which concluded insurers as to damages payable. 27F(2d)657. [b] **Clause "full interest admitted,"** if constituting honest attempt to value interest insured, is valid. 37F(2d)23.

1125-78 [a] **Where partial loss exceeds expressed valuation,** insurer must pay par value of policy. 162La1090, 111S 466. [b] **General average contributions.** -27F(2d)678.

1129-67 279US708, 49SCt439, 73L ed 914.

1130-86½-New. Where a vessel was stranded, necessitating jettison of a large part of its cargo, consisting of iron ore, thereafter took on a new cargo of cork, it has been held that the value of the ship during the time lost, made necessary by procuring the cork, was not a proper deduction from the freight on the cork. 32F(2d)310.

1133-37 127Misc9, 214NYS548.

1133–39 [a] **No recovery for partial loss** unless ship is stranded, sunk, or burnt. 127**Misc**9, 214**NYS**548.
1136–26 [d] **Under policy containing sister ship provision** liability of underwriters held not limited to amount to be paid by insured ship in limited liability proceedings. 5**F(2d)**773.
1141–88 **BC** [1926] 4**DomLR**638, [1926] 3**WestWkly**362.
1147–78 12**F(2d)**733.
1149–12 **BC** [1926] 4**DomLR**638, [1926] 3**WestWkly**362.
1152–47 12**F(2d)**733.
1155–92½–New. It is duty of a surveyor, appointed by the underwriters, to act promptly to meet emergencies arising upon the sinking of a vessel, and it will not be presumed that he had authority to accept an abandonment. 12 **F(2d)**733.
1156–4 **BC** [1926] 4**DomLR**638, [1926] 3**WestWkly**362.
1158–27 12**F(2d)**733.
1160–60 [b] **Policy covering legal liability of carrier,** and excluding merchandise specifically insured, held only to limit recovery in case of specific insurance to carrier's legal liability. 20 **F(2d)**640.
1161–82 220**AppDiv**434, 221**NYS**574.
1162–24 5**F(2d)**773 (insurers of barge sunk by ship of common owner held by participation of their counsel in arbitration under enter ship provision to have become bound by award).
1162–34½–New. Word "repairs" in charter, requiring charterer to make repairs and giving it benefit of insurance on payments for repairs, included total loss of vessel. 43**F(2d)**427.
1163–35½–New. Where the carrier's receiver, in order not to violate hull insurance policies on vessels, took out valued policies for the full amount of lien claims against vessels for the benefit of lien claimants, although the order appointing him directed him to keep the vessels insured in the customary manner, where maritime lien claims are asserted against them, the receiver's disobedience of the court's order did not inure to the benefit of lien claimants, so as to entitle them to the proceeds of insurance in excess of their actual liens. 27**F(2d)**657 (such excess belongs to estate, regardless of receiver's intent).
1163–40 [b] **Agency held not to exist.**–127**Misc**403, 216**NYS**346. [c] **Attempt to recover** proceeds of policies from person to whom they were wrongfully paid held not ratification of such payment by insurer. 127**Misc**403, 216**NYS**346.
1164–60 See also 28**F(2d)**540.
1164–67 37**F(2d)**474 (insured cannot release claimant of ship upon payment being made for part of lost cargo).
1164–70 38**F(2d)**501.
1164–71 16**F(2d)**1003; 39**F(2d)**436; 42**F(2d)**565. [a] 5**F(2d)**773. [b] **Insurer of increased value** of cargo at destination over shipping value is not entitled to share in distribution of fund at time of shipping. 28**F(2d)**540.
1164–76½–New. Where a shipper had been paid by its cargo underwriters, it had no authority to settle the claim against a ship, so as to constitute an accord and satisfaction, as respects the underwriter's right of subrogation. 27 **F(2d)**1010.
1164–76¼–New. Insurer paying part of loss for which another insurer was liable has been held mere volunteer and not entitled, as against latter, to subrogation for such amount. 39**F(2d)**436.
1164–76¼–New. Under insurance policies covering cargo of wheat, first insurer may be entitled to be subrogated in full and second insurer to balance. 39**F(2d)**436.
1165–86 [a] **Shipper, receiving specific insurance,** may sue carrier to enforce liability, though recovery is for insurer. 20**F(2d)**640.
1166–8 [c] **TexCivA** 8**SW(2d)**354.
1167–16 219**AppDiv**636, 220**NYS**514.
1167–17 [b] **Reinsurer is not estopped to deny liability** where its consent to settlement of damage claim was obtained by material misrepresentations. 219 **AppDiv**636, 220**NYS**514.
1169–70½–New. **Provision limiting jurisdiction** to particular court is invalid. 42**F**235.
1170–87 252**NY**69, 168**NE**832.
1170–96 127**Misc**403, 216**NYS**346.
1170–99½–New. Defense of insurer issuing insurance for benefit of lienors, as against claim of receiver to surplus, if good, was so only as respected surplus in that policy. 37**F(2d)**23.
1171–20 20**F(2d)**640.
1172–23 But see 12**PortoRicoFed**392.
1172–32 12**PortoRicoFed**388.
1172–33½–New. Named insured and others interested may join. 133**Misc**193, 231**NYS**67.
1172–46 [b] **Complaint held sufficient.**–128**Misc**575, 218**NYS**667. [c] **Complaint held insufficient.**–37**GaA**208, 139 **SE**367.
1172–48½–New. A libel should allege whether the policy was issued against general average losses, particular average losses, or total loss, of the ship and cargo. 12**PortoRicoFed**388 (verification by a stranger has been held defective).
1172–48⅓–New. Where a policy is issued by an insurance company's general agents covering cargoes carried in vessels not listed with them by the company, libel must allege authority to issue such policy. 12**PortoRicoFed**392.
1173–65 37**GaA**208, 139**SE**367, 368 [cit CJ].
1173–66 15**F(2d)**937; 37**GaA**208, 139 **SE**367, 368 [citCJ].
1173–67 37**GaA**208, 139**SE**367, 368 [cit CJ].
1173–68 37**GaA**208, 139**SE**367, 368 [cit CJ].
1174–2½–New. Plaintiff must prove that loss resulted from one of perils insured against. 15**F(2d)**937.
1176–32½–New. The burden is on insured that he has complied with the terms and conditions of the policy. 26 **F(2d)**824.
1176–34 175**Minn**398, 221**NW**529; 116 **Or**102, 239**P**812; 35**PortoRico** 365.
1176–36 32**F(2d)**271.
1177–44 19**F(2d)**493; 20**F(2d)**619; 26 **F(2d)**824; 43**F(2d)**361; 175**Minn**398, 221**NW**529; 127**Misc**9, 214**NYS**548.
1177–44½–New. The pleading of separate defenses does not shift the burden of proof. 26**F(2d)**824.
1177–45 175**Minn**398, 221**NW**529. [b] **Burden of showing loss** does not require jury to be satisfied as to which of several causes was actual cause. 20**F(2d)** 619.
1178–53 **BC** [1926] 4**DomLR**963.
1178–55 **BC** [1926] 4**DomLR**963.
1181–21½–New. A protest filed before a foreign consul at the first available port after the ship went down, stating circumstances of weather causing foundering, is admissible to show that the vessel was lost through peril of sea. 224 **AppDiv**531, 231**NYS**503.
1183–85 [a] (4) To show cancellation of policy. 224**AppDiv**531, 231**NYS**503. (5) To show increase of risk. 37**F(2d)** 23.
1183–86 [a] (1) 30**F(2d)**720.
1184–3 [b] (1) 32**F(2d)**271; 35**F(2d)** 862. (4) 130**Misc**396, 223**NYS**559. (5) 31**F(2d)**403.
1184–13 [e] (1) 175**Minn**398, 221**NW** 529; 224**AppDiv**531, 231**NYS**503. [f] (1) 15**F(2d)**937; 31**F(2d)**403 (conflicting testimony); 43**F(2d)**361; 116 **Or** 102, 239**P**812. [g] **Mere presence of rain or sea water** in ship's hold is insufficient to show presence due to sea peril. 127**Misc**9, 214**NYS**548 (in absence of proof of storm, stress of wind, or other cause). [h] **Condition of cargo on landing** does not raise inference that damage resulted from sea peril. 127 **Misc**9, 214**NYS**548. [i] **Evidence, admission, and findings stipulated as facts of case** held to show pounding caused leak which brought about loss by sinking. 216**AppDiv**202, 214**NYS**637. [j] **If seaworthiness at inception of risk and beginning of voyage is established** and loss occurs, inference may be drawn that loss was caused by peril of navigation or latent defect within policy. 175**Minn**398, 221**NW**529.
1185–14 [a] (3) Finding of total loss sustained by evidence. **TexCivA** 8**SW (2d)**354. [c] (4) To show intent to abandon. 12**F(2d)**733. (5) To show probability of constructive total loss. 12**F(2d)**733. (6) To sustain judgment on policy. 226**AppDiv**178, 234**NYS** 685.
1187–64 157**Md**205, 145**A**501.
1188–77 [b] 157**Md**205, 145**A**501.
1189–97 [d] 175**Minn**398, 221**NW**529.
1190–27 **BC** [1926] 4**DomLR**963. [b] **Interest held properly allowed** against government on amount recovered on marine war risk policy. 267**US**76, 45 **SCt**211, 69**L ed**519.

MARITAL

1191–23 [a] **Distinguished from marital relations.**–**CalA** 286**P**747.

MARITIME

1192–35 148**Fed**290.
1192–36 129**Fed**814.
1192–37 84 **IndA**155, 150**NE**615. [b] (5) 11**WallUS**1, 20**L ed**90; 142**Fed**439, 73**CCA**555. (9) 129**Fed**808, 810. (13) Storage contract incidental to transportation. 145**Fed**841. [c] (6) 249**US**119, 39**SCt**221, 63**L ed**510; 73**Fed**496; 84 **Ind A**155, 150**NE**615; 94**Wash**477, 162**P**590. (7) Agreement by steamship company to issue proper bills of lading for other carrier. 19**F(2d)**155. (8) Bond given by charterer to secure full performance. 151**Fed**440, 80**CCA**670.
1192–44½–New. Loading a boat considered maritime service. 219**AppDiv**438, 220**NYS**95.
1193–47 See also 20**F(2d)**465.

MARITIME LIENS

1197–2 27**F(2d)**886.
1198–12 274**US**466, 47**SCt**666, 71**L ed** 1156; 8**F(2d)**426.
1198–12½–New. Debt may be treated in admiralty as res. 274**US**466, 47**SCt**666, 71**L ed**1156.
1198–15 26**F(2d)**279.
1198–17 274**US**466, 47**SCt**666, 71**L ed** 1156; 8**F(2d)**426.
1199–23 277**US**151, 48**SCt**457, 72**L ed** 827.
1199–24 279**US**564, 49**SCt**420, 73**L ed** 846.
1200–46 17**F(2d)**308.
1200–47 17**F(2d)**308.
1200–49 [1926]**CanSC**680, [1926] 4 **DomLR**801.
1200–51 17**F(2d)**308, 309 [quotCJ].
1202–73 8**F(2d)**103.
1202–75 8**F(2d)**103.
1202–78 8**F(2d)**103.
1202–84 27**F(2d)**324 [certiorari den 278 **US**632, 49**SCt**31(4thcase), 73**L ed**550 (reh den 278**US**570, 49**SCt**92(8thcase), 73 **L ed**512)].
1202–86 [a] **Stevedore.**–42**F(2d)**935. [b] **Longshoremen's lien** on freight and proceeds. 42**F(2d)**935.
1203–93 21**F(2d)**231.
1203–93½–New. **Vessel under arrest.** No maritime lien can arise against such vessel after her arrest, unless arrest is colorable. 25**F(2d)**1002.
1203–95 17**F(2d)**446.
1203–96 17**F(2d)**446; 21**F(2d)**231.
1203–98½–New. **A houseboat** not permanently attached to shore, although without motive power, is a vessel. 17 **F(2d)**446.
1203–99 21**F(2d)**231. But see 32**F(2d)** 605.
1203–3 5**La**190, 191 [quotCyc].
1204–9 27**F(2d)**324 [certiorari den 278 **US**632, 49**SCt**31(4thcase), 73**L ed**550 (reh den 278**US**570, 49**SCt**92(8thcase), 73 **L ed**512)].
1204–16 [d] **Wireless apparatus installed** on ship as equipment is part of ship. 15**F(2d)**387.
1205–32 37**BC**24, [1926] 1**DomLR**1193, [1926] 1**WestWkly**632.
1205–33 4**HawaiiFed**407, 414 [citCyc].
1205–33½–New. Grant of right to sue in admiralty does not confer maritime lien, and injured seaman acquires no lien under the Jones Act. 16**F(2d)**984.
1205–33⅓–New. A maritime lien is a secret one, operating to the prejudice of general creditors and purchasers in good faith, and hence will not be extended by implication, analogy, or construction. 27**F(2d)**886.
1205–36 21**F(2d)**862.
1205–40 17**F(2d)**308. [o] **Hauling sails**

for a vessel overland is not maritime service. 21F(2d)862. [p] **Insurance contract** gives no lien for premiums. 24F(2d)604.
1206-43 21F(2d)862.
1206-44 37BC24, [1926] 1DomLR1193, [1926] 1WestWkly632.
1206-47 22F(2d)584; 24F(2d)438; 27F(2d)886.
1206-50 12PortoRicoFed430.
1207-55 249US119, 39SCt221, 63Led510; 73Fed496, 499; 24F(2d)604.
1208-64 4HawaiiFed418, 421 [citCyc]. [e] **Lighterage** is within term. 17F(2d)308. [f] **Tarpaulin** is "necessary." 17F(2d)308. [g] **Towage** held within meaning of "necessaries." 17F(2d)308.
1209-71 17F(2d)423.
1209-80 17F(2d)446; 21F(2d)862; 42F(2d)288; 66Miss339, 6S211.
1210-86 191US17, 24SCt8, 48Led73.
1212-10 [a] **Failure to make inquiry** prevents lien for repairs or supplies where agreement for sale prohibits purchaser from contracting on credit of vessel. 6F(2d)25.
1212-12½-New. Conditional vendee in possession of vessel cannot create lien for supplies and repairs in face of clause in agreement denying such liability. 22F(2d)448.
1212-12⅓-New. Lien, under this statute, must not be given broad legal interpretation nor can it be extended by construction. 25F(2d)648.
1212-12¼-New. That some supplies were furnished vessel in hands of conditional vendee prior to recordation of conditional sales agreement does not alter duty to ascertain vendee's authority. 22F(2d)448.
1212-21 42F(2d)288.
1212-24 [b] **Rule applied to same provision in Merchant Marine Act, 1920.**-25F(2d)648.
1212-25 25F(2d)648.
1216-70½-New. To warrant lien, vessel in home port must be shown to have had crew on board. 25F(2d)503.
1217-89 7F(2d)505. [c] **Fact that record owner did not authorize repairs** may not preclude repairmen from asserting lien. 43F(2d)547.
1217-90 13F(2d)808.
1217-91 13F(2d)808.
1217-92 17F(2d)446. But see 41F(2d)377.
1218-93 17F(2d)446. See also 6F(2d)516.
1218-1 42F(2d)288.
1220-21 6F(2d)516; 7F(2d)626; 17F(2d)118. See also 17F(2d)446.
1221-29½-New. Vessel is bound by lien of one dealing with charterer only where charter authorizes him to bind vessel. 42F(2d)897.
1221-30 30F(2d)890.
1221-31 See also 17F(2d)118.
1221-32 13F(2d)808. [a] **What lien intended.**-13F(2d)808.
1221-34 13F(2d)808; 14F(2d)698; 30F(2d)890; 34F(2d)130.
1221-37 7F(2d)501.
1221-39 14F(2d)698; 25F(2d)908.
1222-53 41F(2d)377. [b] **Purchaser is in "possession"** where, though ship is still in seller's dock during repairs, it is manned by purchaser's captain and crew who are equipping and supplying her for service. 17F(2d)423. [c] **Contract of sale construed** not to withhold right to incur liens. 41F(2d)377.
1222-56 13F(2d)808.
1223-57 13F(2d)808. [a] (1) 5F(2d)585. (2) Where exercise of reasonable diligence by examination of ship's papers would have disclosed want of authority of purchaser to impose lien, furnishers of supplies are charged with notice and have no lien. 13F(2d)808.
1223-57½-New. Reconditioner of vessel, belonging to United States and under charter to a steamship company which, as intending purchaser, had contracted with the government to pay for reconditioning, cannot enforce payment against United States and is not entitled to a lien where it had knowledge or opportunity of knowing facts. 18F(2d)778.
1223-57⅓-New. Persons furnishing supplies to vessel in possession of owner, under conditional contract with Shipping Board, held not to have right of action against United States in personam. 20F(2d)926.
1223-58 17F(2d)423.
1226-5 14F(2d)201.
1227-19 8F(2d)62; 8F(2d)151.
1227-21 8F(2d)151.
1227-22 See also 8F(2d)151.
1227-25 8F(2d)151.
1227-27 15F(2d)25.
1228-29 8F(2d)59; 30F(2d)293.
1228-35½-New. Where coal is furnished for two vessels without separating coal for one from coal for the other, the lien against each cannot exceed one half of the value of coal used by both. 30F(2d)293.
1228-35⅓-New. In such case the person furnishing the coal is entitled to a lien against one of the vessels for the amount of coal used by it not exceeding one half of the total. 30F(2d)293.
1228-35¼-New. In such case the failure to segregate coal delivered to a particular vessel is not a bar to assertion of a lien on the vessel. 30F(2d)293.
1228-37 [a] **Money advanced to pay off liens** creates a lien. 21F(2d)991. [b] **Money advanced to pay crew** creates a lien. 21F(2d)991.
1229-51 8F(2d)151.
1229-52 7F(2d)379; 8F(2d)151.
1230-68 31F(2d)620.
1230-69 30F(2d)890.
1231-82 [c] **Services as engineer** moving partly constructed vessel from one port to another for completion give right to lien. 24F(2d)604.
1231-89 But see 42F(2d)897.
1231-90½-New. Under the Ship Mortgage Act a maritime lien against a vessel may be allowed for stevedoring services. 31F(2d)620.
1231-90⅓-New. Stevedore knowing of charter but not ascertaining terms has no redress against vessel unless charterer was authorized to impose lien. 42F(2d)897.
1231-99 5F(2d)1008.
1232-8 But see 38F(2d)946.
1235-5 41F(2d)812. [c] **Claim of United States,** under statute providing for forfeiture, held inferior to that for labor and services. 33F(2d)763.
1235-9 15F(2d)387; 23F(2d)843; 31F(2d)620; 10HeiskTenn503.
1235-10 271US552, 46SCt589, 70Led1082; 17F(2d)423. [a] **Waiver.**-17F(2d)423.
1235-16½-New. Whether services of stevedore not employed directly by owner give rise to maritime lien or not, such lien is subordinate to lien of preferred mortgage executed to seller of ship. 17F(2d)423.
1235-18 [b] **Ship mortgage is not entitled to priority** over other maritime liens where recorded at port other than where ship was enrolled and documented. 7F(2d)379.
1236-21 8F(2d)62. [b] **Mortgage not preferred.**-43F(2d)547.
1237-37 21F(2d)862.
1237-43½-New. Maritime lien on vessel for repairs made after taxes became due for which government gave no notice of claim is superior to government's lien after levy, although tax lien related back to time when taxes became due. 8F(2d)426.
1237-49 15F(2d)727; 21F(2d)862; 28F(2d)920.
1237-52 28F(2d)920.
1238-60½-New. Lien for repairs held by a stranger to the title is superior to lien held by intervenors who are part owners and as such liable for the debt underlying such lien. 3F(2d)664.
1238-62 21F(2d)991.
1238-63 7F(2d)379; 8F(2d)151; 21F(2d)862; LR 1A&E379; LR 4A&E123. [a] **Reason for rule.**-21F(2d)862.
1238-70½-New. Captain's lien is not superior to other contract liens under General Maritime Law. 8F(2d)103.
1238-71 24F(2d)438.
1238-74 21F(2d)862. [a] **Reason for rule.**-21F(2d)862.
1238-77 21F(2d)862.
1239-79 8F(2d)103.
1239-79½-New. , and also claims of pilotage and wharfmen. 8F(2d)103.
1239-84 21F(2d)862.
1239-86 8F(2d)151; 21F(2d)862 (reason for rule); 30F(2d)191; 31F(2d)620; 41F(2d)812. [d] **Principle is contrary to what is common** in other branches of the law. 21F(2d)862.
1239-88½-New. Liens of same class accruing in a single year have priority over lien claims accruing in following year. 24F(2d)438.
1239-90 6F(2d)968.
1239-92 30F(2d)191; 31F(2d)620.
1240-93½-New. Where from the evidence it is virtually impossible to tell what part of a claim against a vessel arose in one year and what part arose in the succeeding year, but it appears that part became due in each year, it is proper that entire sum be allocated to the succeeding year. 31F(2d)620.
1241-12 17F(2d)121.
1242-19 279US564, 49SCt420, 73Led846.
1242-21 279US564, 49SCt420, 73Led846; 41F(2d)812. [a] (4) Director of company cannot claim lien for wages as against mortgagee, where he did not disclose intention to claim lien when mortgage was authorized. 34F(2d)45. [g] **Filing claim in receivership proceedings** and being otherwise active in connection therewith, does not of itself amount to waiver of lien. 24F(2d)443.
1242-23½-New. Right of preferred mortgagee to prove entire claim, or only proportionate part against barge depends on whether prior liens on other barges would have prevented recovery in prior suits. 22F(2d)329.
1242-23⅓-New. Longshoremen's lien is not changed by contract between shipper and receiver for ship's owners compromising claims. 42F(2d)935.
1242-24 See also 44F(2d)106.
1242-32 [b] **Agreement that wages paid by contractor** to crew of dredge belonging to subcontractor shall be repaid from earnings of dredge is not waiver of contractor's lien. 5F(2d)227.
1242-36 7F(2d)384; 16F(2d)1005.
1243-38 25F(2d)503.
1243-42 25F(2d)648.
1244-50 [c] **Where claimant made repairs for an innocent purchaser** amounting to one thousand dollars and did not disclose lien for repairs made fifteen months before, he was guilty of laches. 15F(2d)70.
1244-57½-New. Statute relating to waiver of liens does not apply to preferred mortgages not known at the time the statute was enacted. 22F(2d)329.
1244-58 14F(2d)696. [b] **Must proceed within reasonable time.**-34F(2d)45.
1244-59 18F(2d)587; 29F(2d)629.
1244-60 14F(2d)696. [a] (3) 15F(2d)70. (5) 18F(2d)587.
1245-69 34F(2d)45.
1245-73 32F(2d)876.
1246-85 279US564, 49SCt420, 73Led846; 7F(2d)384.
1246-86 31F(2d)620.
1246-88 16F(2d)1005.
1247-94 30F(2d)293.
1247-3 26F(2d)279.
1247-4½-New. Delay of six months in seizure does not bar lien as against forfeiture. 26F(2d)279.
1247-4⅓-New. Delay of eighteen months in prosecution of claim of lien is not fatal as to forfeited vessel. 26F(2d)279.
1248-25 15F(2d)575.
1249-31 32F(2d)876. [a] **Rights of mortgagee.**-32F(2d)876.
1250-42 But see 24F(2d)604.
1250-49 274US466, 47SCt666, 71Led1156; CalA 259P502. [b] **Admiralty court has jurisdiction to pass on priority between claimants.**-43F(2d)547.
1250-51 100Fed104, 40CCA301 [rev 88Fed902].
1250-53½-New. Mere denial of debt cannot deprive admiralty court of jurisdiction to enforce lien. 274US466, 47SCt666, 71Led1156.
1250-53⅓-New. Enforcement of lien in admiralty given by code is in personam. 10HeiskTenn503.
1251-57 [a] **Laches may not be set up** by one lien claimant to determine priority over another where both liens are established. 6F(2d)968. [b] **Mortgage lien claimant** as holder of nonmaritime lien may assert that certain maritime

lien is barred by laches. 32F(2d)876.
1251-57½-New. Plea of laches held without merit as against general creditors. 15F(2d)25.
1251-57½-New. Lien on vessel will not be enforced against purchaser without notice if there was earlier opportunity to enforce it. 19F(2d)1009.
1251-61 274US466, 47SCt666, 71Led 1156. [c] (3) Allegations as to credit held sufficient. 17F(2d)311. [h] **Allegations must include averment as to who requested furnishing of supplies.**-17F(2d)308. [i] **Allegations held sufficient.**-17F(2d)308. [j] **Authority of one ordering services and supplies must be definitely alleged.**-17F(2d)311.
1251-67½-New. Owner of vessel when repairs were made is properly brought in by claimant's suit to enforce lien under Admiralty Rules, rule 56. 15F(2d)70.
1252-87 17F(2d)121. [a] **Liens are conclusively established** by admission of truth of libel. 6F(2d)968.
1252-99 [c] **To maintain defense of laches** against lien claimant one asserting defense should intervene and answer. 6F(2d)968.
1253-7 [c] (1) 44F(2d)106.
1253-12½-New. One advancing money to pay crew is presumed to have relied on vessel's credit. 21F(2d)991.
1253-14 [a] **Attachment lien on vessels** is transferred to proceeds after sale, subject to maritime liens. 40F(2d)942.
1254-21½-New. Innocent persons, claiming lien from proceeds of government sale after forfeiture, are entitled to interest. 26F(2d)280.
1254-30 137Fed534, 70CCA118; 34CalA210, 167P171; 23LaAnn39, 8AmR585; 73NJEq192, 67A1016.
1254-31 11WallUS185, 20Led74; 133Wis318, 113NW686, 126AmSR963.
1256-72½-New. Maintenance of attachment of the vessel and possession of the court not properly challenged. 3F(2d)664.
1257-91 [a] (2) To show coal was not furnished to vessel so as to entitle seller to lien on her. 14F(2d)1006. (3) Other instances. 38F(2d)946.
1257-92½-New. Evidence that captains of towboats had told railroad employees that coal furnished was to be charged to charterers is properly excluded where they were not shown to be seller's agents and seller had notified owner it would not recognize charterers. 6F(2d)516.
1257-92½-New. Where libelant furnished coal for two dredges, without separating the coal for one from that for the other, any doubt with respect to the accuracy of estimates of coal received by the dredge against which libelant seeks a lien must be resolved against the libelant. 30F(2d)293.
1257-3½-New. Shipper is required to pay freight due notwithstanding compromise agreement with owner of vessel. 42F(2d)935.

MARKET

1259-64 217NYS545.
1260-63 217NYS545. [a] **Other definitions.**-152Wash315, 278P161.
1260-82 52SD603, 219NW559, 560 [quotCJ].
1260-87 32F(2d)646.
1261-96 **TexCivA** 282SW894, 896 [quot CJ].
1261-97 **TexCivA** 282SW894, 896 [quot CJ].
1261-98 **TexCivA** 282SW894, 896 [quot CJ].
1261-99 **TexCivA** 282SW894, 896 [quot CJ]. [c] **"Posted marked price."-TexCivA** 282SW894.
1261-8½-New. the exchange value is determined by the demand for it in relation to the supply. 32NM518, 260P411, 55ALR261.
1262-35 20F(2d)10; NC 146SE570; 7PaDist&Co 393; **TexCivA** 48W(2d)641.
1262-36 23F(2d)611; 106Conn551, 138A479, 53ALR1042; **TexCivA** 284SW680.
1262-37 106Conn551, 138A479, 53ALR1042.
1262-38 MoA 273SW135.
1262-39 MoA 273SW135.
1262-43 MoA 273SW135; 192NC159, 134SE412; 143Va332, 130SE421.
1262-45 192NC159, 134SE412.
1262-52 **TexCivA** 296SW697, 702 [quot CJ].
1263-58 **TexCivA** 296SW697, 702 [quot CJ].
1263-59 **TexCivA** 300SW159, 165 [quot CJ].
1263-64 123Or286, 261P893, 57ALR1155; **TexCivA** 296SW697, 702 [quot CJ].
1263-66 123Or286, 261P893, 57ALR1155. [e] 123Or286, 261P893, 57ALR1155.
1264-68 **TexCivA** 296SW697, 702 [quot CJ].
1264-70 118Or166, 246P707.
1264-72 [a] (4) Other instances. 300Pa555, 151A285(2dcase).
1266-91 123Or286, 261P893, 57ALR1155.

MARKETABLE

1267-23 102NJL368, 131A888; 100NJEq470, 135A550.

MARRIAGE

1272-1 [a] (7) Marriage implies merely state of being married. 102Conn503, 129A382. (8) Contract originating in law of nature. 25OhA120, 157NE308.
1272-4 319Ill426, 150NE270; 323Ill323, 154NE146; Me 149A572; 237Mich383, 211NW735; 250NY313, 165NE460; 129Misc159, 220NYS372. [a] **Three parties to contract.**-Husband, wife, and state. 323Ill323, 154NE146.
1273-6 289Pa542, 137A802, 52ALR1251.
1273-7 323Ill323, 154NE146; 289Pa542, 137A802, 52ALR1251; 13PaDist&Co712; **TexCommnA** 292SW211.
1273-8 92Fla818, 110S539; 94Fla516, 114S371.
1274-9 94Fla516, 114S371; 319Ill426, 150NE270; 322Mo218, 14SW(2d)590, 62ALR835; 129Misc159, 220NYS372; 289Pa542, 137A802, 52ALR1251; 97Pa Super303; **TexCommnA** 292SW211. See also 243Mich406, 220NW812.
1274-11 21F(2d)801, 802 [quotCJ].
1275-13 214Ala391, 108S11; 92Fla818, 110S539; 243Mich406, 220NW812.
1275-13½-New. , or by the death of one or both parties. 243Mich406, 220NW812.
1275-17 12F(2d)927; 203Cal61, 263P200; 152Miss836, 119S304; 132Misc670, 230NYS395. [a] **Authority of state to regulate marriage** is preferred to police power of government. 214Ala391, 108S11. [b] **Particular statutes construed.**-229AppDiv534, 242NYS534.
1275-20 12F(2d)927. [a] **Marriage by proxy.**-12F(2d)927.
1276-21 12F(2d)927.
1276-24 12F(2d)927; 21F(2d)801, 802 [quotCJ]; 36F(2d)481; 43F(2d)983; 169La450, 125S445; 239Mich455, 214NW428; 170Minn317, 213NW32, 33 [citCJ], 51ALR1408; 78Mont570, 254P179; 219AppDiv495, 220NYS420; 21OhA74, 152NE784; 21OhA74, 152NE784; 8PaDist&Co645; 8PaDist&Co534; Vt 147A700; 106WVa374, 145SE753; Can [1930] 1DomLR849; Ont [1929] 4DomLR1060(1stcase). [b] **Whether remarriage in good faith on mistaken belief that first husband is dead** is void ab initio or merely voidable and valid for same purposes is determined by law of state where it was entered into. 215AppDiv254, 213NYS28.
1277-25 156Tenn634, 4SW(2d)341.
1277-27 239Mich455, 214NW428; 170Minn317, 213NW32, 51ALR1408 (Illinois statute); 8PaDist&Co534. [a] 242IllA414; 170Minn317, 213NW32, 51ALR1408 (Illinois statute). [c] **Marriage between first cousins** is not contrary to law of nature within exception. 239Mich455, 214NW428. [d] **Statute providing punishment for persons within prohibited degree of consanguinity** who marry does not affect validity of marriages solemnized in another state. 239Mich455, 214NW428.
1277-29 12F(2d)927; 21F(2d)801, 802 [quotCJ]; 121Kan501, 247P863; 239Mich455, 214NW428. [b] **Marriage by proxy is held not invalid** as contrary to general views of christendom and if valid where contracted will be upheld even in state where such marriage is invalid if contracted therein. 12F(2d)927.
1278-30 236IllA336.
1278-31 264Mass166, 162NE300. [a] **In Illinois.**-236IllA336.
1278-36 133Okl40, 270P1096; 136Okl206, 277P213; 38OklACR684.
1279-44 **Can** [1930] 1DomLR849 (civil effects of invalid marriage under Quebec statute).
1279-46½-New. A marriage contract entered into within bounds of state is impressed with laws of the state as they exist at the time of the contract, and is subject to all amendments which are purely remedial or procedural in character. 132Misc670, 230NYS395.
1279-47 101NJEq664, 139A33.
1280-49 145Wash509, 261P403.
1280-51 52SD252, 217NW192.
1281-52 140SC62, 134SE873.
1281-53 140SC62, 134SE873.
1281-54 164Ga738, 139SE543 (under South Carolina statute); 140SC62, 134SE873; 145Wash509, 261P403.
1281-55 229AppDiv534, 242NYS534; 140SC62, 134SE873; 145Wash509, 261P403.
1281-56 140SC62, 134SE873.
1281-57 40F(2d)14.
1283-90½-New. One in jail under indictment for rape may marry injured girl in absence of statute to contrary. TexCivA 282SW289.
1283-96½-New. The eligibility of a person to contract a marriage must be determined from the conditions existing on the date of the solemnization of the marriage, and not from that which may happen afterward. 97CalA558, 275P987.
1283-98 8PaDist&Co645, 647 [citCyc]; 140SC62, 134SE873.
1283-99 8PaDist&Co645, 647 [citCyc]; 13PaDist&Co712; 140SC62, 134SE873.
1283-1 8PaDist&Co645; 13PaDist&Co712; 140SC62, 134SE873.
1283-2 140SC62, 134SE873.
1283-3 156Miss522, 126S197; 140SC62, 134SE873, 874 [quotCJperCothran,J].
1283-4 140SC62, 134SE873, 874 [quot CJperCothran,J].
1283-5 25OhNPNS167; 140SC62, 134SE873, 874 [quotCJperCothran,J].
1283-6 25OhNPNS167; 140SC62, 134SE873, 874 [quotCJperCothran,J].
1283-6½-New. Fact that the woman is under age does not affect the validity of a common-law marriage. 8PaDist&Co645.
1284-7 140SC62, 134SE873.
1284-8 [b] (2) 236Mich109, 210NW305. (3) 55ND310, 213NW26.
1284-9 26OhNPNS343.
1284-10 236IllA336.
1284-11 180Ark1152, 24SW(2d)867; 236IllA336; 129Misc503, 221NYS672; 132Misc386, 230NYS317; 196NC697, 146SE864; 25OhNPNS167; 27OhNPNS46; 140SC62, 134SE873. [b] **In New York.**-131Misc106, 226NYS80.
1284-12 25OhNPNS167.
1284-13 8PaDist&Co645.
1284-14 129Misc503, 221NYS672; 25OhNPNS167; 140SC62, 134SE873. [a] **Courts are loath to declare marriage duly solemnized void** because parties thereto were not expressly authorized by statute to marry at time marriage was solemnized, but could have married at subsequent date. 196NC697, 146SE864.
1285-16 180Ark1152, 24SW(2d)867. But see 129Misc503, 221NYS672.
1285-21 236IllA336; 55ND310, 213NW26.
1285-24½-New. Under a statute providing for annulment of marriage when the party seeking annulment was under the age of legal consent at the time of the marriage, the "age of legal consent" refers to the age over which, by statute, a person is declared capable of consenting and not the age under which consent of parents is required. 55ND310, 213NW26.
1285-24½-New. A statute raising the age at which an unmarried female may lawfully marry from fourteen to sixteen, but providing that she may marry, although between fourteen and sixteen years of age, provided a special license is procured, must be construed in connection with a statute declaring that a marriage of a female under fourteen

years of age is void. 196NC697, 146SE 864.

1285-25 180Ark1152, 24SW(2d)867; 26 OhNPNS343; 8PaDist&Co 645.

1285-27 236Mich109, 210NW305.

1285-30 12F(2d)936, 937 [citCJ]; 83 Colo 180, 263P725, 57ALR127; 25 Oh NPNS123; 140SC62, 134SE873; Tex CivA 18W(2d)358. [a] **Prospective operation of statutes.**–224AppDiv529, 231NYS538.

1286-31 12F(2d)936; 25 OhNPNS123.

1286-32 25 OhNPNS123; TexCivA 7 SW(2d)683.

1286-34 TexCivA 18W(2d)358; Alta [1929] 3DomLR339.

1286-36 154Miss897, 124S64 (marriage not subject to collateral attack by heirs of insane party); 244NY424, 155NE728; 145Wash509, 261P403. [d] **In Oregon.**–119 Or550, 249P1097.

1286-41½-New. A statute, prohibiting the marriage of inmates of insane asylums except on certain conditions, does not affect the legality of forbidden marriages. NJCh 146A420.

1287-57 131 Or23, 281P825 (each case dependent on particular facts).

1287-66 131 Or23, 281P825.

1287-67 131 Or23, 281P825.

1288-73 140SC62, 134SE873.

1288-77 229AppDiv460, 242NYS589.

1289-8 12LaA224, 125S761.

1289-10 See also 5La126.

1290-18 164La193, 113S814; 12LaA 224, 125S761.

1291-34½-New. , or a person of one-fourth negro blood and a full-blood Creek Indian. 141 Okl 41, 284P19 (in Indian Territory in 1903).

1291-35 141 Okl 41, 284P19 (white persons do not include Indians).

1291-38 [a] **Such statutes are declaration of public policy** of state to protect society against serious social evils. 141 Okl 41, 284P19.

1292-60 140SC62, 134SE873.

1292-69 8PaDist&Co 534.

1292-73 6PaDist&Co 669.

1292-74 Alta [1929] 4DomLR478.

1292-75 8PaDist&Co 534.

1293-80 242 IllA414; 159La5, 105S80. [c] (2) 11PaDist&Co 610. [e] **In Michigan.**–239Mich455, 214NW428.

1293-84 140SC62, 134SE873.

1294-15 145Miss1, 110S851; 78Mont 370, 254P179; 98NJEq493, 131A215.

1294-16 165Ga198, 140SE501; 169Ga 712, 151SE340; 40GaA483, 150SE110 (2dcase); 252 IllA490; 165La710, 115 S911; 250Mich460, 231NW40; 312Mo 84, 278SW679; 98NJEq493, 131A215; 254NY238, 172NE483; 215AppDiv254, 213NYS28 (at common law remarriage of one having spouse living is void ab initio); 219AppDiv495, 220NYS420; 128Misc778, 220NYS262. See also 129 Misc159, 220NYS372.

1295-17 167La861, 120S479.

1295-18 169Ga741, 151SE495; 165La 710, 115S911; 312Mo 84, 278SW679.

1295-20 81Mont185, 262P887.

1295-21 219AppDiv495, 220NYS420. Contra 161La975, 109S782.

1295-22 219AppDiv495, 220NYS420. [a] (2) English woman, deserted by American husband, who married British subject in mistaken belief of first husband's death, held surviving wife of first husband. 219AppDiv495, 220NYS 420.

1295-24½-New. Courts are reluctant to hold a marriage bigamous, unless the statute under which the marriage is claimed to be bigamous clearly and unequivocally manifests legislative intent to that end. 316Mo 1310, 293SW414.

1295-32 127Misc595, 217NYS590.

1295-34 128Misc1, 217NYS675.

1295-37 16F(2d)509.

1296-40½-New. Irrespective of validity of foreign decree of divorce permitting remarriage, subsequent marriage of husband, who lived openly with second wife as husband and wife, is valid as common-law marriage. 214AppDiv363, 212NYS210 (giving second wife right to share in husband's estate).

1296-41 145Miss1, 110S851.

1296-43 222AppDiv700, 225NYS217; 10PaDist&Co 43. See also 132Misc670, 230NYS395.

1296-47 131Misc266, 227NYS543; 229 AppDiv534, 242NYS534. But see 223 AppDiv471, 228NYS618. [a] **Statute making previously voidable marriage void** held not retroactive. 131Misc266, 227NYS543.

1296-48 218Ala16, 117S472.

1296-49 131Misc266, 227NYS543; 229 AppDiv534, 242NYS534.

1297-52 131Misc266, 227NYS543.

1297-57 131Misc266, 227NYS543; 135 Misc644, 238NYS666 (sufficient showing).

1297-62 83Colo 295, 264P658, 659 [quot CJ]; 161Ga739, 132SE83; 117 Oh136, 157NE385, 387 [citCJ]. But see 264 Mass453, 162NE894. [b] **Change of character of cohabitation commenced unlawfully and agreement to become husband and wife** are sufficiently shown by subsequent death of first wife and continued cohabitation by man and second woman as husband and wife. 161 Ga739, 132SE83.

1297-64 86 155SE285.

1298-68 28Hawaii581; 224AppDiv257, 229NYS745.

1298-74 28Hawaii581.

1299-81 133Misc109, 231NYS221.

1299-87 99Fla328, 126S789 (to cohabit as man and wife means to live together); 145Miss1, 110S851; 78Mont370, 254P179; 85Mont114, 278P110; 95Pa Super261.

1299-88 85Mont114, 278P110. [n] **Evidence rebutted** by woman leaving man not divorced. 145Miss1, 110S851.

1300-92 Me 149A606.

1300-94 Me 149A606.

1300-95 Me 149A606.

1300-4 171Minn340, 214NW650; 251 NY366, 167NE501.

1300-5 237Mich383, 211NW735; 224 AppDiv257, 229NYS745.

1301-6 214Ala391, 107S11; 207Cal 685, 279P783; 333 Ill 478, 165NE231; 237 Mich383, 211NW735; 170Minn305, 212 NW808, 811 [citCycperWilson,CJ], 58 ALR321. [a] **Cruelty after marriage** is not fraud justifying annulment. NJCh 147A781.

1301-7 221AppDiv70, 222NYS688.

1301-12½-New. But consummation without knowledge of the alleged fraud does not prevent avoidance on discovery thereof where cohabitation is thereafter discontinued. 98NJEq1, 131A101.

1301-12½-New. Before consummation, marriage may be dissolved for any kind of fraud which would render a contract voidable. NJ 146A649(2dcase).

1301-13 333 Ill 478, 165NE231; MoA 17SW(2d)381. [a] **Misrepresentation must be as to some existing fact,** such as legal or physical impediment to marriage and not promise as to future conduct. 333 Ill 478, 165NE231.

1301-14 214Ala391, 107S11; 170Minn 305, 212NW808, 58ALR321; NJ 146A 649(2dcase) (where annulment might place upon child stigma of bastardy).

1301-17 221AppDiv70, 222NYS688. But see 132Misc493, 230NYS139. [a] **Any fraud or deception authorizing cancellation of any contract** is sufficient to authorize annulment of marriage. 221AppDiv70, 222NYS689. [b] **Breach of promise to enter religious ceremony.**–221AppDiv70, 222NYS688.

1301-17½-New. Rule of caveat emptor has some application to parties contracting marriage. 130Misc900, 226 NYS152.

1302-18 207Cal 685, 279P783.

1302-19 207Cal 685, 279P783 (employment); 333 Ill 478, 165NE231; 264Mass 28, 161NE603.

1302-22 207Cal 685, 279P783.

1302-23 170Minn305, 212NW808, 58 ALR321. **Erratum.**–Strike out "Minner v. Minner, 237 N. Y. 529, 144 NE 781."

1302-24 238NY529, 144NE781. See also Sask [1928] 1DomLR419.

1302-25 [a] But see 98NJEq1, 131A101. [b] See also NJCh 146A420.

1302-26 228NYS711.

1303-30 98NJEq1, 131A101; 251NY 366, 167NE501 (marriage in lucid interval).

1303-30½-New. Lunacy. Fraudulent representation of adjudged lunatic that he is of sound mind and body is no ground for annulment since he is incapable of intent to defraud. 130Misc900. 226NYS152.

1303-31 See also 126Me503, 140A182.

1303-32 170Minn305, 212NW808, 58 ALR321.

1303-35 246 IllA294; 126Me503, 140A 182. But see 225AppDiv822, 232NYS 541. Contra 237Mich383, 211NW735.

1303-37 265Mass282, 163NE861.

1304-40 [b] (3) Other instances. 222 AppDiv479, 226NYS611.

1304-41 207Cal 685, 279P783; 132Misc 121, 228NYS657.

1304-44 Sask [1927] 3DomLR493. [b] **Cruelty after marriage** is not duress justifying annulment. NJCh 147A781.

1304-46 Sask [1927] 3DomLR493.

1304-47 Contra 176Ark636, 38W(2d) 672.

1305-50 220Ala426, 125S666; 180Ark 1152, 24SW(2d)867. See also 151Miss 644, 118S619.

1305-53 78CalA745, 248P762, 763 [quot CJ].

1305-54 78CalA745, 248P762, 763 [quot CJ]; 236 IllA336; 27 OhNPNS46. [c] **Lack of consent coupled with other circumstances.**–Ont [1925] 3DomLR317. [d] **In Ohio.**–25 OhNPNS167.

1305-54½-New. The marriage is not void but voidable only. 78CalA745, 248 P762.

1305-56 [a] **In California.**–78CalA745, 248P762.

1306-78 164Ga738, 139SE543; Sask [1930] 1DomLR747. See also 27F(2d) 582 [certiorari den 49SCt33(1stcase)].

1307-81 137Misc360, 242NYS8. [b] **City clerk cannot inquire into efficacy of foreign divorce decree** to determine whether legal impediment exists. 137 Misc360, 242NYS8. [c] **Required statement that no legal impediment exists** includes merely marriages proscribed by statute, which can be determined from applicants' answers. 137Misc360, 242 NYS8.

1307-82 137Misc360, 242NYS8.

1307-87 TexCivA 7SW(2d)683. [a] **False statement as to age.**–Ont [1925] 3DomLR317.

1309-23 33 OhA281, 168NE478; Sask [1930] 1DomLR747.

1310-26 43F(2d)983; 149Md322, 131A 454. But see 99Fla328, 126S789. [a] **In Maryland.**–149Md263, 131A329.

1310-33 Alta [1926] 4DomLR1185.

1310-35 149Md263, 131A329.

1310-36 See also 149Md263, 131A329.

1310-36½-New. Marriage of parties by the captain of a vessel on the high seas beyond the three-mile limit is valid in the absence of any law condemning such marriage. 250NY313, 165NE460.

1314-84 250NY313, 165NE460.

1315-99 8F(2d)779 (New York); 22 AlaA243, 114S892; 217Ala4, 114S898, 56 ALR1264; 99Fla328, 126S789; 41 GaA 394, 153SE203(2dcase); 205 Iowa313, 217NW860; 212Ky833, 280SW145; 159 La535, 105S611 (holding common-law marriages are recognized in Mississippi); 236Mich443, 210NW482; 237Mich 417, 212NW95; 127Misc595, 217NYS 590; 128Misc1, 217NYS675; 214AppDiv 363, 212NYS210; 254NY238, 172NE483; 20 OhA298, 151NE818; 28 OhA297, 162 NE675 (Ohio); 47RI 337, 133A243; 47RI 480, 133A801. [a] **Congress recognized consensual marriages** by enactment of law requiring entry in vessel's log of marriages taking place on board. 250 NY313, 165NE460.

1316-3 125 Or428, 259P299; 106WVa 615, 146SE625.

1316-3½-New. Statutes with reference to void and voidable marriages do not apply to common-law marriages where such marriages are considered legal. 80 IndA556, 148NE643.

1316-7 41GaA394, 153SE203(2dcase); IndA 171NE241(1stcase); 127Misc595, 217NYS590; 180Minn463, 231NW199. [a] **Evidence of good faith.**–TexCivA 28 SW(2d)309.

1316-9 IndA 171NE241(1stcase); Tex CivA 32SW(2d)656.

1316-10 41GaA394, 153SE203.

1316-10½-New. Court will scrutinize parties' relations closely when rights based on common-law marriage are alleged. TexCivA 286SW647.

1316-10½-New. The courts closely scrutinize such marriage contracts when asserted. TexCivA 286SW749.

1316-12 159La535, 105S611; 283Pa420, 129A449; Sask [1930] 3DomLR1001.

1316-13 22AlaA243, 114S892; 283Pa 420, 129A449.

1317-14 180Minn463, 231NW199.

1317-15 81Mont185, 262P887; 85Mont 114, 278P110; TexCivA 294SW639.

1317-17 298Pa384, 148A498; TexCivA 294SW639; TexCivA 28SW(2d)963; TexCivA 6SW(2d)408, 409 [citCJ].

1317-18 8F(2d)779; 85Mont114, 278P 110.

1317-21 219MoA8, 267SW950; 127Misc 595, 217NYS590; 10PaDist&Co 43; 47 KI 480, 133A801.

1318-22 219MoA8, 267SW950 (contract must bind parties for full term of natural lives).

1318-24 236Mich443, 210NW482; 78 Mont370, 254P179; 81Mont185, 262P 887; 98NJEq493, 131A215; TexCivA 294 SW639. [a] 236Mich443, 210NW482.

1318-25 219MoA8, 267SW950.

1318-27 127Misc595, 217NYS590; 128 Misc1, 217NYS675; TexCivA 286SW749; TexCivA 294SW639; TexCivA 6SW(2d) 408, 409 [citCJ].

1318-28 159La535, 105S611; 249Mich 539, 229NW424; 219MoA8, 267SW950 (in absence of evidence of contract); 98 NJEq493, 131A215; 127Misc595, 217 NYS590; 128Misc1, 217NYS675; Tex CivA 294SW639; TexCivA 28SW(2d)963.

1318-29 159La535, 105S611; 219MoA8, 267SW950 (in absence of evidence of contract); 127Misc595, 217NYS590.

1318-30 159La535, 105S611; 219MoA 8, 267SW950 (in absence of evidence of contract); 98NJEq493, 131A215; 128 Misc1, 217NYS675; 129Misc159, 220NYS 372; Sask [1930] 3DomLR1001. [b] **More than mere word between parties having meretricious relations is required.**–135Misc540, 240NY865.

1318-35 5F(2d)596; 84Colo 250, 269P 22; 243Mich505, 220NW720; MoA 299 SW127, 128 [citCJ]; 250NY313, 165 NE140; 127Misc595, 217NYS590; 135 Misc644, 238NY666; 20 OhA298, 151 NE818; 21 OhA74, 152NE784; 26 OhA 502, 160NE480; 28 OhA297, 162NE675; 8PaDist&Co 645; TexCivA 286SW749. [b] **Construction of contract.**–219MoA 8, 267SW950.

1319-39 161Ga867, 132SE85; 127Misc 595, 217NYS590; 20 OhA298, 151NE818.

1319-39½-New. The efficacy of the agreement does not depend upon both parties giving consent in express terms. 21 OhA74, 152NE784.

1319-40 236Mich443, 210NW482; 98 NJEq493, 131A215; 21 OhA74, 152NE 784; 28 OhA297, 162NE675; 283Pa420, 129A449.

1319-43 84Colo 250, 269P22; 236Mich 443, 210NW482; 28 OhA297, 162NE675; 135 Okl 204, 275P315; 296Pa20, 145A 676; 92PaSuper275; 95PaSuper261; Tex CivA 28SW(2d)963. See also 243Mich505, 220NW720.

1320-46 223AppDiv19, 227NYS345.

1320-49 16F(2d)509, 511 [quotCJper Robb,J]; 218Ala16, 117S472; 166Ga 153, 142SE684; 249Mich539, 229NW424; Mich 233NW394; NJSup 140A429; NJCh 148A167; 127Misc595, 217NYS590; 128 Misc1, 247NYS675; 254NY238, 172NE 483; 8PaDist&Co 645; TexCivA 300 SW981. [a] (3) Marriage in New Jersey by divorced man before entry of final decree in New York and continued cohabitation in New York is held to constitute valid common-law marriage. 127 Misc595, 217NYS590.

1321-50 16F(2d)509, 511 [quotCJper Robb,J]; 98PaSuper328. [b] **Persons living together as husband and wife with knowledge of another husband living,** continuing to live together after impediment is removed does not make wife widow of decedent entitling her to compensation on his death. 215AppDiv847, 213NYS256. [c] **Living together after ceremony,** void for invalidity of prior divorce, is held not establishment of relationship sufficient to base common-law marriage. 16F(2d)509.

1321-51 30 OhA336, 164NE790.

1321-53 CalA 289P647; 164La15, 113S 748; 147Miss509, 112S871; 78Mont370, 254P179; TexCivA 32SW(2d)656.

1321-54 79CalA560, 250P411; CalA 289P647; 98NJEq493, 131A215; 81 Mont185, 262P887; 118 Or231, 246P 359; TexCommnA 288SW413; 35Wyo 300, 249P81, 82 [citCJ]. [a] **Party attacking second marriage** must prove parties of alleged former marriage were eligible to consummate same. 119 Or 556, 249P632. [b] **Presumption of validity of second marriage prevails** unless evidence shows that prior marriage could not possibly have been dissolved. TexCommnA 288SW413.

1321-55 78Mont370, 254P179.

1322-57 77CalA509, 247P227; 99Fla 328, 126S789; 165Ga191, 140SE350; 212Ky833, 280SW145; 161La1085, 109 S909; 149Md322, 131A454; 255Mass 611, 152NE220; 180Minn463, 231NW 199 (mere cohabitation is evidence of common law marriage); 219MoA8, 267 SW950; 98NJEq493, 131A215; 136 Misc863, 242NYS464; 21 OhA74, 152NE 784; 117 Ohi36, 157NE385; 97PaSuper 193; 47RI 337, 133A243; [1926]CanSC 599, [1926] 3DomLR664. But see 22 AlaA243, 114S892. [b] **Cohabitation following engagement** is prima facie evidence of marriage. 47RI 337, 133A 243. [c] **Where parties cohabit as man and wife,** but who are incapable of marrying, presumption of marriage is raised when obstacle is removed. 47RI 337, 133A243.

1323-59 180Minn463, 231NW199; 47 RI 337, 133A243.

1323-61 98NJEq493, 131A215; Tex CivA 28SW(2d)963.

1324-64 98NJEq493, 131A215. [a] **Cohabitation alone without reputation** does not raise presumption of marriage. 98NJEq493, 131A215.

1324-65 98NJEq493, 131A215.

1324-66 164La15, 113S748; 125 Or428, 266P875, 891 [citCJperCoshowJdisop].

1325-67 125 Or428, 266P875, 891 [cit CJperCoshowJdisop].

1325-67½-New. Presumption is that parties residing together as husband and wife indulge in sexual intercourse. 101NJEq664, 139A33.

1325-70 23F(2d)802; Ark 31SW(2d) 134; 203Cal 61, 263P200; 79CalA560, 250P411; CalA 289P647; 161Ga739, 132SE83; 330 Ill 74, 161NE97; 234Ky 587, 28SW(2d)782; 165La625, 115S803; 149Md322, 131A454; 152Md380, 136A 900, 904 [quotCJ]; 243Mich668, 220 NW730; Mich 233NW211; 147Miss822, 112S785; 152Miss836, 119S304; 78Mont 370, 254P179; 250NY313, 165NE460; 138Misc136, 245NYS600; 118 Or70, 245 P1072, 45ALR922; 118 Or231, 246P 359; Wash 291P1089; 35Wyo 300, 249 P81. [a] 118 Or231, 246P359. [b] **Presumption of marriage is one of strongest known in law.**–78Mont370, 254 P179.

1326-71 218Ala16, 117S472; Ark 31 SW(2d)134; 79CalA560, 250P411; 99 Fla328, 126S789; 255Mass611, 152NE 220; 147Miss822, 112S785; 316Mo 1310, 293SW414; 136Misc863, 242NYS464 (de facto marriage); 118 Or231, 246P359. [a] **Since regulations restrictive of common right of marriage by mere consent or imposing conditions on it are exceptional** and dependent on local statutes, one claiming that case falls within such exception has burden of proof. 250NY 313, 165NE460.

1326-72 79CalA560, 250P411; 147Miss 822, 112S785; 118 Or231, 246P359. [a] 147Miss822, 112S785.

1326-73 22AlaA243, 114S892; 147Miss 822, 112S785.

1326-74 161Ga739, 132SE83; 147Miss 822, 112S785.

1327-79 [a] **Evidence of foreign law.**–255Mass611, 152NE220.

1327-80 255Mass611, 152NE220.

1328-84 152Md380, 136A900, 904 [cit CJ]; Mich 233NW211; 77Mont554, 252 P377; 78Mont370, 254P179; 19 OhA 187. But see 79CalA560, 250P411.

1328-84½-New. Presumption of wife's innocence of crime overcomes presumption of continuance of life of former husband although seven years had not elapsed. 101NJEq664, 139A33.

1328-85 21F(2d)801, 802 [quotCJ]; 164La15, 113S748, 752 [quotCJ]; 148 Miss688, 114S750; 135Misc540, 240NYS 65; 78Mont370, 254P179; 81Mont185, 262P887; 226AppDiv358, 235NYS380; 20 OhA298, 151NE818; 283Pa420, 129A 449; 5PaDist&Co 527. [a] 84 IndA90, 147NE630.

1328-85½-New. It has been held that every presumption in favor of the validity of a marriage is invoked with primary object of legitimizing children born out of wedlock. 125Misc376, 211 NYS629.

1328-86 218Ala16, 117S472; 175Ark 1037, 18SW(2d)67; 178Ark720, 12SW (2d)875; 79CalA560, 250P411; 44 Ida 299, 256P535; 170La411, 127S885; 152 Md380, 136A900; 236Mich109, 210NW 305; 242Mich274, 218NW663; Mich 233NW211; 147Miss822, 112S785; 78 Mont370, 254P179, 182 [citCJ]; 81 Mont185, 262P887; NJCh 148A10; 127 Okl 1, 259P543, 544 [quotCJ]; 118 Or 70, 245P1072, 45ALR922; 118 Or231, 246P359; TexCivA 283SW271; Tex CivA 290SW818, 822 [quotCJ]; Tex CivA 294SW601. Contra 48Philippine 292. [d] **Proof of former subsisting marriage** must be so conclusive as fairly to preclude any other result. 119 Or 556, 249P632. [e] **Presumption held not rebutted.**–147Miss822, 112S785; 175 Ark1037, 18SW(2d)67.

1329-87 79CalA560, 250P411; 147Miss 822, 112S785; 78Mont370, 254P179; 101NJEq664, 139A33; 127 Okl 1, 259P 543, 544 [quotCJ]; 118 Or70, 245P1072, 45ALR922; 118 Or231, 246P359; 119 Or556, 249P632; TexCivA 290SW818, 822 [quotCJ]; TexCivA 294SW601, 602 [quotCJ]; 35Wyo 300, 249P81, 82 [cit CJ]. [a] **Party attacking second marriage** must allege that husband by former marriage was living at the time. 119 Or556, 249P632.

1329-88 203Cal 61, 263P200; 29Hawaii 716, 719 [citCJ]; 44 Ida299, 256P535; 236Mich109, 210NW305; 147Miss822, 112S785; MoA 25SW(2d)144; 78Mont 370, 254P179; 33NM479, 270P791; 31 OhA482, 166NE423; 127 Okl 1, 259P543, 544 [quotCJ]; 118 Or231, 246P359; Tex CivA 290SW818, 822 [quotCJ]; Tex CivA 294SW601, 602 [quotCJ]; Tex CivA 13SW(2d)909; 35Wyo 300, 249P 81, 82 [citCJ]. But see 19 OhA187.

1329-89 44 Ida299, 256P535; 147Miss 822, 112S785; 78Mont370, 254P179; 101 NJEq664, 139A33; 127 Okl 1, 259P543, 544 [quotCJ]; 119 Or556, 249P632; TexCivA 283SW271; TexCivA 290SW 818, 822 [quotCJ]; TexCivA 294SW601, 602 [quotCJ]; TexCivA 28SW(2d)173. [c] **Presumption of validity of second marriage held not overcome** without evidence showing that there was no divorce prior thereto. 44 Ida299, 256P 535. [d] **Presumption held not rebutted.**–147Miss822, 112S785. [e] **Presumption of validity of decedent's second and third marriages as against first marriage is not overcome by presumption in favor of continuance of first** marriage and first wife's testimony that she had not obtained divorce and that decedent had not obtained divorce in any of counties of his residence, since he might have obtained divorce in other counties of various states in which he had resided. 178Ark720, 12SW(2d)875.

1329-89½-New. Presumption that wife's former marriage was dissolved by divorce at suit of former husband will prevail in view of her remarriage. 101 NJEq664, 139A33.

1330-90 44 Ida299, 256P535; 145Miss 1, 110S851; 78Mont370, 254P179; 101 NJEq664, 139A33; 127 Okl 1, 259P543, 544 [quotCJ]; 119 Or556, 249P632; 93 PaSuper472; TexCivA 294SW601, 602 [quotCJ].

1330-91 69CalA685, 231P765 (proof that no divorce was granted from prior marriage held sufficient to rebut presumption of validity of second marriage); 147Miss822, 112S785; 316Mo 1310, 293SW414; MoA 25SW(2d)144 (burden of proof); 78Mont370, 254P 179; 101NJEq664, 139A33; 127 Okl 1, 259P543, 544 [quotCJ]; 118 Or70, 245 P1072, 45ALR922; 118 Or231, 246P 359; TexCivA 294SW601, 602 [quotCJ]; 35Wyo 300, 249P81, 82 [citCJ].

1330-91½-New. Requirement that one asserting illegality of marriage must

prove it will be enforced although involving proof of negative. 101NJEq 664, 139A33.

1330-92 78Mont370, 254P179. But see TexCivA 32SW(2d)656.

1330-93 78Mont370, 254P179.

1330-96 203Cal 61, 263P200; 164La15, 113S748; 152Md380, 136A900; 255Mass611, 152NE220; MoA 299SW127; 254NY238, 172NE483; 252NY422, 169NE632; 298Pa384, 148A498; TexCivA 28W(2d)963. [a] (1) 255Mass611, 152NE220.

1330-97 136Misc424, 243NYS225. [a] 5F(2d)596; 320 Ill 308, 150NE913; IndA 171NE241(1stcase); 125Kan26, 262P598; 234Ky587, 28SW(2d)782; 161La1045, 109S832; 161La1085, 109S909; 164La15, 113S748; 170La411, 127S885; 149Md322, 131A454; 156Md610, 145A204; 255Mass611, 152NE220; Mich 233NW394; 180Minn463, 231NW199; 145Miss1, 110S851; NJErr&App 148A787; 226AppDiv358, 235NYS380; 135Misc644, 238NYS666; 137Misc455, 244NYS141; 138Misc136, 245NYS600; 26 OhNPNS81; 296Pa20, 145A676; 298Pa384, 148A498; 299Pa264, 149A317; TexCommnA 292SW157; TexCommnA 288SW413; TexCivA 282SW819; TexCivA 294SW639. [b] 26F(2d)71; 74CalA646, 241P581; 330 Ill 74, 161NE97; 245 IllA423; 205 Iowa313, 217NW860; 234Ky227, 27SW(2d)940 (remarriage); 159La535, 105S611; 164La15, 113S748; 1LaA577; 264Mass112, 162NE225; 243Mich505, 220NW720; 249Mich539, 229NW424; 175Minn533, 221NW911(2dcase); 321Mo 758, 12SW(2d)459; MoA 299SW127; 85Mont114, 278P110; 98NJEq493, 131A215; 215AppDiv254, 213NYS28 (after death of wife's former spouse); 135 Okl 204, 275P315; 283Pa420, 129A449; 140SC101, 138SE625; TexCivA 16SW(2d)160. [c] **Legal marriage** may be proved by preponderance of evidence. 174Ark669, 297SW1008. [d] **Evidence held sufficient** to sustain probate decree finding that testatrix was married to beneficiary prior to date of execution of will presented for probate. 265Mass420, 164NE608. [e] **Clear and satisfactory proof of parties' intent,** manifested by all elements of statutory marriage, except license and public ceremony, to consummate such relation, is required to establish common-law marriage. TexCivA 16SW(2d)160. [f] **Evidence held sufficient** to show intent. 254NY238, 172NE483.

1332-98 99Fla328, 126S789.

1332-10 [b] **Marriage, however, entered into must be evidenced to public** by same conduct and manner of living. TexCivA 16SW(2d)160.

1333-11½-New. Failure of a minister to recollect performing the marriage ceremony does not overcome direct testimony of one of the parties to the fact of the marriage corroborated by another witness. 212Ky833, 280SW145.

1333-11½-New. To prove common-law marriage, evidence must be clear and convincing. 47RI 337, 133A243.

1333-20½-New. Where a religious ceremony is essential to validity of marriage, such fact may not be proved by general reputation where a ceremony at a particular time and place is asserted. 149Md322, 131A454.

1333-20½-New. Where there is no such particular specification of former ceremony, fact that it occurred may be proved and inferred from general reputation, habit, and repute, conduct, and declarations of the parties, even where direct evidence of fact is available. 149Md322, 131A454.

1333-22 34PortoRico 743 (certificate of parish record); 35PortoRico 224 (certificate of marriage purporting to be complete copy of registry).

1334-23 156Tenn614, 3SW(2d)1061; TexCivA 283SW271.

1334-24 NJSup 136A717. [c] **Marriage certificate** standing alone held not admissible as direct and original evidence of marriage referred to in it. 3Del 78, 130A495.

1334-25 [b] **Though certificate of registrar established prima facie case of marriage,** when such case is met by other evidence to contrary, evidence is to be considered as whole, and truth ascertained as in other cases of contradictory evidence. 265Mass420, 164NE608.

1334-27 245 IllA423.

1334-28 245 IllA423. [a] **Photostatic copy** of marriage license properly admitted. 152Md380, 136A900.

1334-29 [a] 156Tenn614, 3SW(2d)1061.

1334-30½-New. Marriage certificate not admissible on evidence of marriage when procured long after parties had separated. 3Del 78, 130A495.

1334-30½-New. On the issue of the validity of a common-law marriage, where a prior marriage is alleged to have been terminated, a certified copy of the divorce judgment is admissible although a discrepancy in christian names exists. TexCivA 283SW271.

1335-35 165Ga379, 140SE759; 212Ky833, 280SW145; 163La601, 112S500; 234Ky587, 28SW(2d)782; TexCivA 282SW819. [a] **Testimony held sufficient proof of marriage.**-9LaA129, 119S494.

1335-39 165Ga379, 140SE759; NJSup 136A717. [a] 3Del 78, 130A495. [b] **Courts look with suspicion on validity of common-law marriage,** when it is sought to be established by testimony of one of parties after death of other, and when one of them has subsequently contracted ceremonial marriage. 226AppDiv358, 235NYS380.

1336-41 41GaA394, 153SE203(2dcase); 152Md380, 136A900, 904 [quotCJ]; 21OhA74, 152NE784 (statement by parties that they were married by an official not inconsistent with informal marriage in fact); 35Wyo 300, 249P81, 82 [citCJ]. [b] 165La710, 115S911; 219MoA8, 267SW950. [c] **Hearsay statement** that witness had heard party say that he and another were married was insufficient, of itself, as proof of marriage. 97CalA628, 276P122. [d] **Admissions and declarations held sufficient** to establish a marriage. 98PaSuper7.

1336-41½-New. as may also admission of adverse party. 255Mass611, 152NE220.

1336-43 85Mont114, 278P110; 136Misc863, 242NYS464; TexCivA 286SW749; TexCivA 28W(2d)963. [b] 135Misc644, 238NYS666. [d] **Declarations against interest.**-85Mont114, 278P110. [e] **As characterizing cohabitation.**-85Mont114, 278P110.

1337-46½-New. A statement by one since deceased, not related to the parties and after the controversy began, that two certain persons were married at a certain period, is not objectionable. TexCivA 282SW819.

1337-48 Md 136A901, 904 [citCJ].

1337-53 35Wyo 300, 249P81, 82 [citCJ].

1337-54 164La15, 113S748.

1337-55½-New. Father's recognition of sons and provisions for them in his will is not necessarily sufficient to establish a common-law marriage with their mother. 26F(2d)71.

1337-55½-New. Wife's admission of prior marriage held insufficient to obviate necessity of petitioner for annulment making affirmative proof. 101NJEq664, 139A33.

1337-58 8F(2d)779; 22AlaA243, 114S892; 99Fla328, 126S789 (proof of general repute cannot be supported by hearsay); 4HawaiiFed426; 320 Ill 308, 150NE913; 212Ky833, 280SW145; 149Md322, 131A454; 255Mass611, 152NE220; 78Mont370, 254P179; NJ 148A787; 219AppDiv344, 220NYS242; 129Misc760, 223NYS701; 135Misc644, 238NYS666; 138Misc136, 245NYS600; 21OhA74, 152NE784; 143 Okl 91, 287P721; 97PaSuper193; 12PaDist&Co 757; 47RI 337, 133A243; TexCivA 6SW(2d)408; TexCivA 28SW(2d)309; TexCr 31SW(2d)646. [a] **Evidence held insufficient to show** (1) agreement to enter into common-law marriage. 159La535, 105S611. (2) Such cohabitation or matrimonial relations or incidents essential to common-law marriage. 159La535, 105S611. [b] **Evidence of alleged wife held incredible** and insufficient to prove common-law marriage. 159La535, 105S611. [c] **Under allegation of common-law marriage on certain date,** proof of marriage fifteen years later held inadmissible. 78Mont370, 254P179. [d] **Evidence held admissible.**-21OhA74, 152NE784. [e] **Evidence held sufficient to prove public notice of marital relation,** as well as cohabitation. 296Pa20, 145A676. [f] **Evidence held insufficient** to show common law marriage. 130Kan186, 285P627. [g] **Fact that deceased assumed and was known by alleged wife's surname** has been held not to bar her claim to common-law marriage relationship. 136Misc424, 243NYS225.

1338-59 264Mass112, 162NE225; 175Minn51, 220NW401; 140SC101, 138SE625. [a] **Evidence held to show** that woman living with man before his death not his wife. 216AppDiv124, 214NYS604 (entitled to administration of his property). [b] **Mere cohabitation and birth of children** held insufficient to establish common-law marriage. 78Mont370, 254P179.

1339-60 264Mass112, 162NE225; 219MoA8, 267SW950; 226AppDiv358, 235NYS380; Oh 152NE784 (delay of woman to assert marriage after death of man not conclusive against her); 283Pa420, 129A449; 5PaDist&Co 527.

1339-61 85Mont114, 278P110; 125 Or428, 266P875, 891 [quotCJperCoshow,J dis op].

1339-62 16F(2d)509, 510 [citCyc]; 283Pa420, 129A449. [a] (2) Alleged affidavit made by claimant of war risk insurance charged with illicit cohabitation held insufficient. 8F(2d)779.

1339-63 16F(2d)509, 510 [citCyc]; 26OhA502, 160NE480.

1340-64 203Cal 569, 265P241. [a] (2) Continued cohabitation of parties to marriage which was void because contracted while party previously divorced was prohibited to marry does not raise presumption of marriage. WVa 153SE293.

1340-67 245 IllA423; 264Mass112, 162NE225.

1340-69 164La15, 113S748, 752 [quotCJ].

1340-70 164La15, 113S748, 752 [quotCJ].

1340-72½-New. Failure promptly to assert marriage after the death of the husband and concealment of the precise nature of the marriage held not conclusive against the surviving spouse. 21OhA74, 152NE784.

1340-73 21OhA74, 152NE784.

1341-76 264Mass112, 162NE225; 140SC101, 138SE625.

1341-77 NJSup 136S717. [c] (3) Other instances. 135Misc540, 240NYS65.

1342-78 47RI 480, 133A801.

1342-80 [a] (36) Ceremonial marriage three months before husband obtained divorce from first wife, followed by three years' cohabitation, held to create "common-law marriage." 129Misc159, 220NYS372. [b] (7) TexCivA 272SW536. (8) 175Minn51, 220NW401.

1343-81 79CalA560, 250P411; 236Mich109, 210NW305, 307 [quotCJ]; 101NJEq664, 139A33. [a] 165Ga379, 140SE759; 165La710, 115S911; 81Mont185, 262P887. [b] 98NJEq493, 131A215; 101NJEq664, 139A33; 118 Or231, 246P359. [c] **Evidence held insufficient to show** alleged first marriage had not been dissolved. 79CalA560, 250P411.

1343-82 35Wyo 300, 249P81.

1343-83 165Ga379, 140SE759; 81Mont185, 262P887; 35Wyo 300, 249P81.

1343-85 85Mont114, 278P110; TexCivA 283SW271; TexCivA 290SW818. But see 78Mont370, 254P179. [a] 236Mich109, 210NW305; 127 Okl 1, 259P543; TexCivA 294SW601, 602 [citCJ].

1344-86 137Misc391, 243NYS538; TexCivA 283SW271. [b] **Evidence held not sufficient** to show absence of divorce from prior marriage. 79CalA560, 250P411. [c] **Evidence, standing alone, sufficient to negative dissolution,** sufficiently establishes that marriage was not dissolved. TexCivA 13SW(2d)909.

1344-87 129 Okl 155, 265P1064. [a] **Evidence held not to sustain finding that divorce was procured by fraud** because of nonresidence. 316Mo 1310, 293SW414.

1344-95 Mich 233NW211; 35Wyo 300, 249P81.

1344-96 33NM479, 270P791; 118 Or

70, 245P1072, 45ALR922; 35Wyo 300, 249P31. [a] 79CalA560, 250P411; Wash 291P1089. [b] 26F(2d)481; 203 Cal 61, 262P260; 21 OhA74, 152NE784 (man's later adulterous career with another woman). [c] **Evidence presenting issue of whether applicant's marriage was invalid by reason of prior undissolved marriage authorized verdict for applicant.** 296aA50, 146SE29.

1345-87 [illegible] 264Mass 112, 162NE225; 321Mo 758, 128W(2d) 459; 223AppDiv534, 242NYS534; 35 Wyo 200, 245P31.

1345-1 See also 219MoA8, 267SW950. [illegible] Whether signature on marriage [illegible] application was that of decedent. [illegible] Other in- [illegible] TexCivA [illegible] W(2d)173.

1345-5 TexCivA 128W(2d)909.

1345-8 [illegible] (2dcase). [c] (5) Other instances of inapplicable charges. 41GaA394, 152SE202(2dcase). [d] **Instruction as to agreement to marry in future held proper.** TexCivA 2 SW(2d)962.

1346-9 129Misc503, 221NYS672.

1347-12 35Ariz191, 274P772; Me 149A 606 (public policy is superior to mere sympathy for party). [b] **Policy of law is to uphold marital status, and it should not be lightly set aside.** 121 Or [illegible]

1347-12½-New. Dissolution of marriage is not favored. 101NJEq664, 139 A33.

1347-13 Me 149A606; 126Misc634, 244 NYS123; 21 OhA74, 152NE784.

1347-16½-New. The dissolution of the marriage relation is a proceeding that the law does not favor. 103NJEq529, 14[illegible]

1347-19 CalA 291P266; 130Misc900, 226NYS152; NJCh 147A225.

1347-22 101NJEq15, 137A787; 137 Misc341, 243NYS[illegible]

1347-23 19F(2d)690; 220Ala420, 1258 [illegible] Erratum: Strike out "Palmer v. Matthews, 162 N. Y. 100, 56 NE 501."

1348-24 But see Me 149A572. Erratum: Strike out of text "and later, under common law, in the chancery courts."

1348-29 102NJEq141, 140A10.

1348-30 156Miss522, 126S197; 145 Wash509, 261P402.

1348-31½-New. An action for annulment, based on the existence of facts at the time of marriage rendering the marriage either void or voidable, is not analogous to an action to dissolve marriage, under the Domestic Relations Law § 7-a, which presupposes valid marriage. 132Misc670, 230NYS395.

1348-32 196NC697, 146SE864; Tex CivA 168SW(2d)304. [a] **In Kansas** district court has jurisdiction. 121Kan 501, 247P863. (2) District court has jurisdiction to determine whether marriage contracted in another state within six months after entry of divorce decree in violation of Kansas statute is valid or void between parties properly before it in annulment suit. 121Kan 501, 247P863. [b] **Supreme court of Ontario without jurisdiction.**-Ont [illegible] 2DomLR77.

1348-33 102NJEq141, 140A10.

1348-36 220Ala426, 125S666.

1348-37 82Colo180, 262P725, 57ALR 127; 216AppDiv291, 215NYS843 (supreme court). [a] **Guardian ad litem.**-262Mass142, 160NE448.

1348-39 87PaSuper42.

1349-42 132Misc670, 230NYS395; 223 AppDiv471, 228NYS618, 9PaDist&Co 58; Ont [1929] 4DomLR1060(1stcase).

1349-43½-New. In Saskatchewan court of kings bench has jurisdiction to declare nullity of marriage celebrated in province although husband was not domiciled therein when action was brought. Sask [1929] 4DomLR311.

1349-44 [a] 131Misc106, 226NYS80.

1349-48 206NY341, 99NE845. [c] **In Kansas.**-121Kan501, 247P863. [d] **In New York.**-132Misc670, 230NYS395. [e] **Wife could bring res of matrimonial status into state and have marriage dissolved in state.** 229AppDiv534, 242 NYS534.

1349-49 219Ala552, 122S648; NJCh 150A826; 206NY341, 99NE845; 132 Misc670, 230NYS395. But see Man [1930] 4DomLR673; Ont [1929] 4DomLR1060(2dcase).

1350-51 Contra 35Ariz101, 274P772. [a] 35Ariz257, 278P375.

1350-51½-New. The general rule requires residence of the parties, or at least one of them, within the state. 128Misc778, 220NYS262.

1350-52 132Misc670, 230NYS395; 137 Misc523, 242NYS628 (holding substituted service ineffective).

1350-53 223AppDiv471, 228NYS618.

1350-56½-New. General statutory rule that general appearance is equivalent to service of summons applies in suit to annul marriage. 121Kan501, 247P 863.

1350-56½-New. An order for publication of notice of petition for dissolution must designate the newspapers, published in the city where the parties resided. 131Misc1, 225NYS505.

1350-58¼-New. A statute authorizing an order of dissolution of a marriage must be strictly followed in respect of obtaining jurisdiction of defendant. 131Misc1, 225NYS505.

1350-61 25 OhNPNS123.

1350-63 246 IllA294. [a] (1) 254 IllA 519; 13PaDist&Co 712. [a] (1) But see Ont [1925] 3DomLR317. (5) 254 NY73, 171NE911. (7) Unintentional concealment of insane attack twenty years before marriage. NJCh 146A 420. (8) Entering into marriage inadvisedly and lightly. 207Cal685, 279P 783. (9) Inability to bear children. 254NY73, 171NE911. [b] **Not every kind or degree of fraud which will be sufficient to annul ordinary contract** will annul marriage. Me 149A572.

1350-64 254NY73, 171NE911.

1350-64½-New. That petitioner tired of his bargain is insufficient ground for annulment. 101NJEq664, 139A33.

1350-69½-New. Where a license is procured by false oath as to wife's age, and parent's consent was not obtained and there was no intercourse before cohabitation after the marriage, marriage will be annulled at instance of wife. Ont [1925] 3DomLR317; 129 Misc503, 221NYS672.

1350-69½-New. Where a husband in good faith contracted a second marriage five years after being informed of his first wife's death, such marriage may, under statutes, be annulled at suit of the husband, where the first wife was in fact alive. 127Misc162, 215NYS 326.

1350-69¾-New. **In dissolution of marriage on absence of spouse** for five years, "then last past" refers to the date of the petition. 132Misc670, 230 NYS395.

1350-69½-New. Where the departure of the wife was due to no fault of the husband, and the husband made a continuous and diligent effort to find the wife without result, and was justified in the belief that the wife was dead, the court, if having jurisdiction, would be warranted in granting an application to dissolve the marriage, under the Domestic Relations Law § 7-a. 132 Misc670, 230NYS395.

1350-69½-New. Under L. (1922) c 279, enacting the Domestic Relations Law § 7-a, the court is authorized to make an order dissolving marriage, where the abandoned spouse is unable to prove that the absent spouse is actually dead, and where circumstances exist which form the basis for the belief that the absent spouse is dead, and the order of dissolution is effective, even if it subsequently appears that the absent spouse was at the time alive. 132Misc 670, 230NYS395.

1350-69½-New. **In New York,** under statute, if a wife was incurably insane, her husband was entitled to annulment, if he gave a bond for suitable care and maintenance of his wife. 134Misc594, 236NYS316.

1350-69¾-New. In some jurisdictions marriages can be annulled only for causes specified in statute. Ark 318SW(2d) 134.

1350-70 128Misc1, 217NYS675, 676 [citCJ]; 129Misc503, 221NYS672.

1351-72 101NJEq369, 139A241; 128 Misc1, 217NYS675, 676 [citCJ].

1351-73 19F(2d)690; 252 IllA490 (cohabitation with knowledge of prior subsisting marriage of spouse).

1351-76 214Ala391, 107S11; Me 149A 572 (husband cohabiting after discovering fraud); 101NJEq15, 137A787; 128Misc1, 217NYS675, 676 [citCJ].

1351-77 101NJEq369, 139A241. [a] 128Misc1, 217NYS675.

1351-82½-New. If a wife was presumed to know the law and chargeable with fraud in obtaining a divorce decree, the presumption applies equally to petitioner. 101NJEq664, 139A33.

1352-85 [a] (3) Where plaintiff fixed marriage to legitimatize child, and intending to annul if unsatisfactory, court will not annul. 129Misc503, 221NYS 672.

1352-85½-New. Plaintiff's knowledge that defendant's divorce decree was only interlocutory held to bar annulment. 5PaDist&Co 579.

1352-85½-New. Husband's continued indulgence in sexual intercourse after filing suit for annulment is reprehensible in view of allegations of wife's fraud in procuring marriage. 101NJEq664, 139A33.

1352-90 132Misc493, 230NYS139.

1352-91 152Miss836, 119S304; 25 Oh NPNS123.

1352-93 136Misc377, 240NYS868 (action five years after marriage not barred). [a] **Delay of two years** after arriving at age of consent, in filing annulment petition does not indicate confirmation of marriage. NJCh 150A826.

1352-94 [a] (3) Cohabitation for nine years after knowing of affliction held bar to annulment action. 241 IllA359.

1352-94½-New. **In Quebec** an action for annulment on the ground of impotency must be brought within three years of marriage. [1927] 1DomLR 1190.

1353-95 [a] (3) Contra 244NY424, 155 NE728. [b] **Marriage between adult woman and boy** under twenty one and over eighteen, without written consent of parents or guardian, is voidable only by the boy, under statutes in some jurisdictions. 78CalA745, 248P762.

1353-96 [b] **Neither parent nor register of deeds who issued license** which is prohibited by statute can maintain action to have marriage duly solemnized on face of such license declared void. 196NC697, 146SE864.

1353-1 [a] **In Arkansas** infant must sue by guardian or next friend. 180 Ark152, 24SW(2d)867 (suit by natural guardian).

1353-3 Kan 289P446.

1353-4 TexCivA 18SW(2d)358.

1353-6½-New. Under some statutes both the minor and his parent are proper parties plaintiff in an action to annul a marriage because a party thereto was under the age of consent. 85 CalA607, 259P976.

1354-13 223AppDiv466, 228NYS420.

1354-14 214Ala391, 107S11; 207Cal 685, 279P783; CalA 291P266. [a] 214 Ala391, 107S11; 85CalA607, 259P976; 165Ga198, 140SE501; 152Miss836, 119 S304; 223AppDiv466, 228NYS420; 224 AppDiv257, 229NYS745. [b] 170Ga743, 154SE239; NJCh 146A649(2dcase).

1354-14½-New. The case may be considered where the parties are sufficiently identified, although not properly entitled. 102NJEq141, 140A10.

1354-16 214Ala391, 107S11.

1354-19½-New. Petition requires verification. 101NJEq15, 137A787.

1354-19¾-New. Oath to petition commits plaintiff to causes alleged. 101 NJEq15, 137A787.

1354-19¼-New. **Summons need not be indorsed** with a statement that the action is for annulment where complaint is served with the summons. 130Misc 900, 226NYS152.

1354-19½-New. An affidavit setting out the jurisdictional facts required for an action for divorce, under statute, is **not required in an action to annul a**

marriage on statutory grounds. 196 NC697, 146SE564.

1354–19½–New. On demurrer to petition filed by minor over common law age of consent alleging marriage after such age court will assume marriage was consummated by cohabitation. 27 OhNPNS46.

1354–25 Alta [1929] 1DomLR980.

1354–27 29Hawaii716; Me 149A606 (answer does not lighten burden of proof); Mass 171NE431; 49Nev90, 237 P534 (intoxication causing inability to give rational assent); 101NJEq664, 139A33; 103NJEq400, 143A558; 103 NJEq529, 143A805; NJCh 145A482; Man [1930] 1DomLR137.

1355–29 237Mich383, 211NW735; 101 NJEq664, 139A33. [b] (2) 181Ark528, 27SW(2d)85. (3) 176Ark636, 38W(2d) 672. (4) 131Misc106, 226NYS80. (9) NJCh 145A482. (11) Intoxication. 49 Nev90, 237P534. (12) Subsisting pregnancy. 237Mich383, 211NW735. [c] (2) 207Cal 685, 279P783; 333 Ill 478, 165NE231; 245NY510, 157NE838. See also NJ 151A734. (3) 219Ala552, 122 S648; Ark 318W(2d)134; NJCh 147 A781. (5) 229AppDiv460, 242NYS589. (6) Kan 289P446; Alta [1929] 3DomLR339. (8) 218Ala16, 117S472; 128 Misc1, 217NYS675; 103NJEq529, 143 A805. (9) Affliction of syphilis at time of marriage. 241 IlA359. (10) No license. 164Ga738, 139SE543. [d] **Evidence held to show absence of fraudulent intent** at time of marriage not to consummate marriage by marital intercourse. 207Cal 685, 279P783. [e] **Admissibility of evidence.**–181Ark528, 27 SW(2d)85. [f] **Evidence held insufficient to justify finding** that wife fraudulently concealed epilepsy and was incapable of entering marriage state. 254NY73, 171NE911.

1355–29½–New. Access, in the sense of sexual intercourse, is presumed upon marriage with a pregnant woman, 237 Mich383, 211NW735.

1355–29¾–New. because the husband thereby accepts responsibility for the woman's condition. 237Mich383, 211 NW735.

1355–29¼–New. But this presumption, although strong, gives way to evidence establishing no antenuptial access at the time of conception. 237 Mich383, 211NW735.

1355–29½–New. Antenuptial nonaccess at the time of conception may be proved by the fact that the parties were then unacquainted. 237Mich383, 211NW735.

1355–29¾–New. If the legitimacy of a child born in lawful wedlock is involved, the husband and wife are barred from testifying to access or nonaccess of the husband, whether antenuptial or postnuptial. 237Mich383, 211NW735.

1355–29⅞–New. Guardianship and lunacy decree is prima facie evidence of incapacity. 25 OhNPNS123.

1355–39 CalA 289P647.

1357–38½–New. A physical examination will be allowed on condition that defendant waive her statutory privilege relative to testimony of physician who had examined her. 125Misc755, 211 NYS840.

1357–43 128Misc1, 217NYS675, 676 [cit CJ].

1357–44 Kan 289P446.

1358–50½–New. Discretion of court. In some jurisdictions mere nonage is not of itself sufficient to warrant annulment as matter of right, but annulment in such case rests in the sound discretion of the court. 131Misc106, 226NYS 80.

1358–57 127Misc162, 215NYS326; 132 Misc576, 230NYS278.

1358–58½–New. Although a decree nisi may not be entered nunc pro tunc, a final decree may, in a proper case, be so entered. 98NJEq421, 131A125.

1358–58¼–New. Under some statutes the court may decree, concerning the property of either or both parties acquired during marriage, as it may deem expedient, including equitable division thereof. 106WVa105, 144SE 875.

1358–58¾–New. Under such statutes the power of the court is not limited to estates of dower and curtesy. 106WVa 105, 144SE875.

1358–59 Cal 292P622 (statute held applicable); CalA 291P266. [b] **Discretion of court** in adjudicating custody and support of children is practically limitless. CalA 291P266.

1358–63½–New. Minor is liable for support of child in some cases. 180 Ark1152, 24SW(2d)867.

1358–64 52ND252, 217NW192.

1358–65 22AlaL261, [1926] 3DomLR 196, [1926] 2WestWkly389.

1358–66 132Misc386, 230NYS317 (counsel fees).

1359–68 134Misc88, 234NYS44. See also 159La796, 106S308. [a] **Matter rests in discretion of court.**–81Mont442, 264P108.

1359–73 See also 49Philippine271, 275 [cit CJ].

1360–76½–New. Jurisdiction of the court in matters of alimony is purely statutory. NJCh 145A639.

1360–76½–New. Alimony should be sufficient to cover special care of a child in need of medical treatment. 134Misc 88, 234NYS44.

1360–76¼–New. In New York, under a statute granting annulment for a wife's incurable insanity, the amount of the bond to be given by the husband may be determined by affidavits. 134Misc 594, 236NYS340.

1360–77 See also 52ND252, 217NW192.

1360–78 TexCivA 18W(2d)358, 362 [quotCJ]. But see CalA 291P266.

1360–79 [a] (2) Husband's right, after annulment to recover property conveyed to wife in consideration of marriage, is governed by equitable principles. 251NY1, 166NE783.

1360–81 229AppDiv534, 242NYS534. But see 224AppDiv529, 231NYS538.

1360–82 220Ala420, 125S662. [a] **Rule as to opening defaults is not to be applied so rigorously** in matrimonial actions. 228AppDiv796, 240NYS829.

1360–83 35Ariz357, 278P375. [b] 121 Kan501, 247P863. [d] **Showing of meritorious defense not essential.**–35Ariz 357, 278P375. [e] **Complaint for relief against decree held not appearance** authorizing court to refuse to set aside decree obtained by fraud. 35Ariz357, 278P375. [f] **Laches barring suit to vacate.**–107WVa655, 150SE225.

1360–83½–New. A judgment annulling A divorced wife's remarriage because of a second husband's fraudulent concealment of insanity, rendered before insanity was a ground for annulment is void; and the remedy of the wife, seeking to recover from the first husband alimony payable until remarriage, is to move for relief from such void judgment and begin a new annulment action. 224AppDiv529, 231NYS538.

1360–84 [a] (1) But see 225AppDiv 137, 232NYS94.

1360–85 91CalA735, 267P547; 132Misc 386, 230NYS317; 225AppDiv137, 232 NYS94. But see 251NY366, 167NE501; 148Wash31, 267P777. [b] **Marriage annulled is void from inception.**–215App Div91, 213NYS460. [c] **Effect on children illegitimate before marriage.**–245NY607, 157NE877 [foll 235NY390, 139NE550].

1360–85¼–New. The retroactive effect of an annulment is not without limits where rights and duties of strangers are concerned. 251NY366, 167NE501.

1361–86½–New. Annulment, although not effective under some statutes until expiration of the time for appeal, still is valid as to validate the marriage of the unsuccessful party before expiration of the time for appeal, since such marriage terminates the right to appeal. 25 F(2d)531.

1361–86¾–New. In wife's alimony suit, prior decree dismissing husband's annulment suit was conclusive on parties, absent appeal. Md 150A451.

1361–86¼–New. Interlocutory decree in husband's favor has been held not to affect provision for temporary alimony in wife's separate action. 137Misc419, 242NYS279.

1361–87 Md 150A451.

1361–89 55AppDC269, 4F(2d)936; 55 AppDC271, 4F(2d)938.

1361–91 81Mont442, 264P108.

1361–91½–New. Where a husband dies after judgment in his favor, in an action brought by him for annulment, the appellate court is without jurisdiction to award alimony and counsel fees. 170 Minn30o, 212NW808, 48ALR371.

1361–91¾–New. A wife waives the right to appeal from an annulment decree if she remarries within the time to perfect the appeal. 25F(2d)531.

MARSHALING ASSETS AND SECURITIES

1365–13 13F(2d)887; 40F(2d)841; 159La24, 105887, 89 [quotCyc]; 218 AppDiv160, 218NYS48; 190NC512, 130 SE323; 53ND797, 208NW82. 53ND 797, 208NW82; 134SC207, 132SE620; TexCommnA 32SW(2d)645; TexCivA 275SW152; TexCivA 28SW(2d)193; 151Va446, 145SE432; 102WVa339, 135 SE179. [c] **Doctrine applied subject to limitations,** so that both may escape without loss. 218AppDiv160, 218NYS 48.

1366–22 190NC512, 130SE323, 325, 326 [quotCJ whole section]; TexCivA 275 SW152.

1367–26 159La24, 105887 (recognized in Louisiana).

1367–31 212Ky680, 280SW97.

1367–42 DC 41F(2d)103; 52ND133, 216NW876, 878 [citCJ].

1367–45 Fla 129S690; Iowa 231NW 309; 118Or665, 248P137; 187Wis60, 203NW921. See also 190NC512, 130SE 323.

1367–48 TexCommnA 32SW(2d)645.

1368–68 28F(2d)554; CalA 292P665; 108Conn26, 142A395; 54ND686, 210NW 657.

1368–69 13F(2d)887; 230Ky460, 20 SW(2d)72, 190NC512, 130SE323 (never done to prejudice of party entitled to go upon both funds); 155SC462, 152 SE729; 145Wash515, 261P102, 103 [cit CJ].

1369–71 NJCh 149A820(1st case).

1369–73 13F(2d)887.

1369–76 TexCivA 38W(2d)552, 554 [citCJ].

1369–81½–New. An execution creditor has the same right to object to the marshaling of assets to his prejudice as a mortgagee would have. 212Ky 680, 280SW97.

1369–92 28F(2d)554.

1370–93 248 IlA321; 212Ky680, 280 SW97; TexCivA 276SW308.

1370–94 TexCivA 276SW308; TexCommnA 285SW260.

1370–95 TexCivA 276SW308; TexCommnA 285SW260.

1370–2 28F(2d)554; 54ND686, 210NW 657; 119Oh299, 164NE118; 32OhA 352, 168NE57.

1371–6 151Va446, 145SE432.

1371–6½–New. Determination of mortgagor's equities or between mortgagee and junior lien holder. Iowa 231NW 309.

1371–13 190NC512, 130SE323, 325, 326 [quotCJ].

1371–14 190NC512, 130SE323, 325, 326 [quotCJ]. [b] 8PaDistRCo 176.

1372–15 190NC512, 130SE323, 325, 326 [quotCJ].

1372–21 85Colo462, 277P786; 190NC 512, 130SE323, 325, 326 [quotCJ]. See also 27F(2d)201 [certiorari granted 278 US593, 49SCt37(2dcase), 73LEd525].

1372–22 190NC512, 130SE323, 325, 326 [quotCJ].

1372–24 190NC512, 130SE323, 325, 326 [quotCJ].

1373–40 190NC512, 130SE323, 325, 326 [quotCJ]; 85Colo462, 277P786; Va 154SE587; 145Wash515, 261P102, 104 [citCJ].

1375–58 52ND53, 216NW589; TexCivA 275SW152, 155 [citCyc].

1375–59 29Ariz567, 243P415, 44ALR 754.

1375–60 29Ariz567, 243P415, 417 [cit CJ], 44ALR754; 220Ala367, 125S212 (2dcase); Iowa 228NW295; 54ND686, 210NW657; TexCommnA 248W(2d) 354; TexCivA 275SW152.

1376-70½-New. Land, not a homestead, mortgaged by a wife after her husband's death and held under a sheriff's deed, on foreclosure of such mortgage, is subject to sale before the homestead on foreclosure of a prior mortgage covering such land and the homestead. 52SD53, 216NW589.

1376-76 DC 41F(2d)103

1376-79 NJCh 149A820(1stcase).

1377-89½-New. A mortgagee who returns to mortgagor insurance money received for distinction of doubly charged property, with knowledge of junior lien thereon, is liable to junior lienor to extent that security is thereby impaired. 187Wis60, 203NW921.

1377-89¼-New. Where the holder of a security deed reduced it to judgment, obtaining a special lien on the land and a general lien on all of defendant's property, and sells the land and brings the fund into court, the holder of a general senior judgment against the maker of the security deed which was a lien on the land in the deed and other encumbered property need not pursue the latter property before resorting to the fund in court. 165Ga558, 142SE127.

1377-91 116Nebr713, 218NW744, 746 [quotCyc].

1378-93 DC 41F(2d)103.

1378-8 180Ark68, 208SW(2d)645; 165 Ga558, 142SE127; 315Mo1155, 289SW 571.

1378-13 TexCivA 275SW152.

1379-14 NJCh 147A774(1stcase); 134 SC207, 132SE620; TexCivA 276SW308. [b] **Failure by mortgagee to require holder of paramount lien** to resort to other security violates no duty to mortgagors. 156Miss93, 125S537(4thcase).

1379-15 187Wis60, 203NW921.

1379-21½-New. In proceedings to foreclose a first mortgage, a second mortgagee of a portion of the land covered by the first mortgage, who purchased the land on foreclosure of his mortgage, is an owner and not a creditor within the rule as to marshaling of assets. 52 SD53, 216NW589.

1379-23 190NC512, 130SE323.

1379-24 190NC512, 130SE323; TexCivA 28SW(2d)193. See also 159La24, 105S87.

1379-25 See also 156Miss93, 125S537 (4thcase).

1380-28 94US518, 24Led167; 7Fed 674; 40F(2d)841; 21FCasNo12,219, 1 Ben461.

1380-29 190NC343, 130SE36.

1380-36 But see TexCivA 19SW(2d) 802.

1380-46 But see 40F(2d)841.

1381-56½-New. Where neither pleadings nor proof went on the theory of marshaling, evidence of other securities appearing merely incidentally, a request for marshaling is properly denied after both parties have rested and the court has announced a decision upholding plaintiff's title. 145Wash515, 261P102.

1382-77 175Ark1073, 1SW(2d)549, 550 [citCJ]; 222Ky437, 1SW(2d)536.

1382-87 118 Or665, 248P137.

1382-90 220Ala367, 125S212(2dcase).

1382-94 168Ga171, 147SE383; TexCivA 271SW196.

1383-4 [a] 83Colo193, 265P682.

1383-5 145Wash515, 261P102, 103 [cit CJ].

MASH

1383-17 116 Or416, 241P390.

MASTER

1385-67 [a] (4) Defined by city ordinance. 118 Or693, 247P809.

MASTER AND SERVANT

39 C. J.—33-8 [a] (20) Any one subject to orders of master. 219Ala520, 122 S816.

34-10 26F(2d)383.

34-15 26F(2d)383; 213AppDiv735, 211 NYS411, 412 [citCyc] (only through contract); 222AppDiv402, 226NYS317; 129 Okl32, 263P440; TexCivA 274SW 309; TexCivA 4SW(2d)140; 146Va91, 135SE890, 49ALR1427; 197Wis349, 222 NW249.

34-16 95CalA299, 272P770; 244 IllA 540; 257Mass455, 154NE94; 259Mass 560, 156NE720, 54ALR849; MoA 297SW 87; 129 Okl32, 263P440.

35-22½-New. Relation of master and servant may exist between corporations as between individuals. 213Ala627, 105 S869.

35-23 197Cal164, 239P1072; 77Colo 414, 236P1006; 73Mont407, 236P1069; 102NJL203, 130A526 [quotCyc]; 221 AppDiv167, 222NYS641; 222AppDiv 402, 226NYS317; 189NC748, 128SE337; 33 OhA306, 169NE309; 117 Or188, 243P 96, 99, 45ALR812 [citCJ]; 32PortoRico 58; TexCommnA 284SW942. [a] 29 Ariz452, 242P866.

36-24 77Colo414, 236P1006.

36-25 77Colo414, 236P1006.

36-26 154Tenn260, 290SW33, 34 [cit CJ], 51ALR193.

36-27 154Tenn260, 290SW33, 34 [cit CJ], 51ALR193.

36-29 89CalA602, 265P374, 377 [cit CJ]; 89CalA721, 265P541; 129 Okl32, 34, 263P440 [quotCJ].

36-30 129 Okl32, 34, 263P440 [quot CJ].

36-31 129 Okl32, 34, 263P440 [quot CJ].

36-32 245NY66, 156NE98; 129 Okl32, 34, 263P440 [quotCJ]. [a] **For hirer to become master of servant of another,** hirer must have complete control and direction, with no control in general master, and exclusive right to discharge and replace, or assign servant to other work, mere control not being sufficient. 34GaA156, 128SE777.

36-33 250 IllA450; 129 Okl32, 34, 263 P440 [quotCJ].

36-36 34GaA156, 128SE777 (dictum); TexCommnA 284SW942. But see 77 Colo414, 236P1006.

36-37½-New. Who pays compensation is an element to be considered but not a determining factor, at least in workmen's compensation cases. 286Pa278, 133A504.

37-41 135Misc365, 238NYS91.

37-45 But see 77Colo414, 236P1006.

37-52 LaA 130S851; 73Mont321, 236P 550, 551 [citCyc]; 128Misc501, 219NYS 83; 190NC632, 130SE739 (one for whom work is done by independent contractor is not master); Can [1929] 3DomLR568.

38-53 245NY66, 156NE98; 190NC632, 130SE739. [b] **No master and servant relation between landowner and convict labor** is controlled by state. 173Ark 868, 293SW1007.

38-53½-New. The relation of master and servant does not exist between contractor and subcontractor when the latter is an independent contractor. 190 NC632, 130SE739.

38-54 90CalA776, 266P594; 124 Okl 228, 255P582; TexCivA 32SW(2d)699. [a] **That employer had inspector supervising work** to secure conformity to contract does not conclusively negative independence of contract. TexCivA 32SW (2d)699.

38-58 157Tenn606, 12SW(2d)529.

39-64 256 IllA531; IndA 151NE7; 249 NY593, 164NE596(3dcase); 222AppDiv 402, 226NYS317; 230AppDiv156, 243 NYS396; 136 Okl170, 276P705; 100 WVa331, 130SE447. [d] **Consideration.** –104NJL209, 141A14.

39-68½-New. Valuable consideration is necessary to support contract for personal services. 21AlaA161, 106S58.

39-68¼-New. An employee accepting a bonus granted by a resolution which he failed to read, has been held to have ratified the contract tendered, and cannot recover for discharge authorized. NJSup 136A427.

39-68¼-New. Natural act enjoining on employee full knowledge of terms of contract is not necessary. 25 OhA100, 157NE393.

40-69 223Ky688, 48W(2d)732; 135 Misc889, 238NYS688.

40-69½-New. , as is contract whereby employee is not obligated to enter employ of employer. 21AlaA161, 106S58.

40-72 329 Ill42, 160NE127. [a] **Where agreement for year provides** that contract should be void if employee leaves service without employer's consent, it is not void for mutuality. 236 IllA494.

40-73 197 Ind386, 151NE134.

40-73½-New. Mutual intent or meeting of minds is required. Ala 130S411.

40-75 But see TexCivA 27SW(2d)351.

40-78½-New. Where employee induces third party to make false statement rule that railroad making independent investigation cannot complain is inapplicable. TexCivA 27SW(2d)351.

40-79 214Ala599, 108S449; 197 Ind 386, 151NE134. [b] **Contract at monthly salary without specifying period** held void for uncertainty. 22AlaA45, 111S 895.

40-85 Mass 167NE289.

41-91 38F(2d)35; MoA 297SW87. [a] (8) Contract of employment whereby employee agrees not to join labor union is not unlawful. 125Misc680, 212NYS 113. [b] **Electric railway company may determine for itself condition of employment** which in its opinion will best assure its own and public interest. 247 NY65, 159NE863.

41-92 IndA 151NE7.

41-93 IndA 151NE7.

41-95 169Ark532, 275SW912 (contract to employ one for life in consideration of release from liability for injuries is enforceable). [a] **Recovery on contract of release.**–169Ark532, 275SW912.

41-98 Mass 167NE289.

41-1 IndA 151NE7.

41-4½-New. The assignment to a projected corporation of a coal lease was held sufficient consideration for an agreement to employ the assignor for life and to permit him to purchase stock. IndA 151NE7.

41-6 [a] 73CalA748, 239P373.

42-9 Ala 130S411; 225AppDiv102, 232 NYS224. [e] **Statement in letter accepting offer of employment** held not to render acceptance qualified or conditional. 258Mass331, 155NE18.

42-10 Ala 130S411.

42-12 223AppDiv254, 228NYS139.

42-13 See also 87 IndA609, 161NE577.

42-13½-New. Stipulation that contract should be interpreted and enforced in accordance with laws of another state, made in good faith, is valid and governs employer's right to discharge employee. 103Conn553, 131A426.

42-13¼-New. Employment contract should be construed as valid, if possible. 220AppDiv148, 221NYS174.

42-15 223AppDiv254, 228NYS139.

43-16 See also 41F(2d)490.

43-22 157Tenn461, 9SW(2d)692. But see Man [1930] 3DomLR352.

43-25 See also 222AppDiv543, 226NYS 562.

43-25½-New. Wage agreement between division of union and employer cannot be invoked by nonmember in action against employer for reinstatement after dismissal. Man [1929] 4DomLR452.

43-25¼-New. Rules and regulations of such agreement cannot be considered as custom or usage to be read into contract of nonmember who was ignorant thereof. Man [1929] 4DomLR452.

43-35 85CalA140, 259P63; 127Misc508, 217NYS39; 47RI395, 133A621; TexCommnA 208SW(2d)759. [d] Mass 169 NE499. [e] **Correspondence held not to show agreement** for definite term of five years. 127Misc508, 217NYS39. [f] **"Sixteen consecutive weeks."**–30Hawaii 230.

44-36 See also 258Mass331, 155NE18.

44-38 See also 73CalA748, 239P373.

44-38½-New. Where a servant employed on a monthly basis reported for work on the fifteenth of the month, payment on the first of the succeeding month makes the new month run from such date. TexCivA 280SW849.

44-39½-New. A contract of employment from month to month is for a definite term. TexCivA 280SW849.

44-39 16F(2d)658; Ala 130S411; 96 CalA512, 274P584; 223Ky688, 48W(2d) 732; 127Misc508, 217NYS39; 25 OhA 100, 157NE393; 295Pa219, 145A80; 298 Pa31, 147A837(1stcase); TexCivA 25 SW(2d)902.

45-41 285Pa16, 131A482; 47RI395, 133A621; TexCivA 25SW(2d)902. [c] 148Va762, 139SE483.

45-42 Ala 130S411; 162La9, 110S810; 285Pa16, 131A482; 295Pa219, 145A80; 298Pa31, 147A837(1stcase); Alta [1926] 3DomLR284, [1926] 2WestWkly529. See also 5LaA268.

46-43 TexCivA 258SW(2d)902.

46-44½-New. Hiring for so much "per annum" does not create a contract from

year to year. 285Pa16, 131A482.

46-44½-New. but raises the presumption that indefinite hiring was intended. 285Pa16, 131A482.

46-46 25 OhA100, 157NE393 (month to month).

46-48 Alta [1926] 3DomLR284, [1926] 2WestWkly529; Man [1925] 3DomLR 314; 59 OntL566, [1927] 1DomLR284.

47-55 Man [1927] 3DomLR146.

48-62 See also 168La635, 122S889; 1 LaA204.

48-63 168La635, 122S889; 229AppDiv 784, 242NYS159. [b] **Executory contract** could be modified without any consideration other than mutual consent. 22AlaA45, 111S895.

48-69½-New. The performance of additional work within the fair scope of the existing contract, for increased compensation, does not create a new contract for such work. 103Conn101, 130 A70.

48-70 258Mass331, 155NE18.

48-74 298Pa31, 147A837(1stcase).

48-77 [b] **Where employee accepted condition of physical examination,** he cannot recover upon rejection after examination. 22AlaA45, 111S895.

49-81 222AppDiv197, 225NYS593; 100 NJEq110, 135A673. But see 162La9, 110 S70.

50-92½-New. A new contract of employment at will not put into legal form was held to excuse performance of original contract under seal where it was acted on by both parties. 242NY99, 151 NE144.

50-99½-New. Although contract at will is not put into legal form but is acted upon by both parties, performance under old contract under seal is excused. 242NY99, 151NE144.

51-18½-New. Recovery for breach of contract to employ plaintiff as travelling salesman denied where he continued work in another position with defendant knowing he would not be sent on road. Man [1930] 2DomLR999(1stcase).

51-26½-New. Complaint must allege facts showing mutuality. 21AlaA161, 106S58 (complaint demurrable).

51-26½-New. Employer's remedy for a deceased employee's breach of contract when sued by the widow is by way of set-off or counterclaim. 223AppDiv254, 228NYS139.

51-27 TexCivA 4SW(2d)1058.

52-34 [a] 127Misc508, 217NYS39. [b] (5) To warrant recovery by plaintiff. 126 Or218, 269P228. (6) To show consideration for new contract. 180Ark 1167, 21SW(2d)161.

52-35 Man [1930] 1DomLR544.

52-40 See 77Colo 414, 236P1006.

52-41 Iowa 228NW26.

52-44 [d] **Parol evidence tending to prove terms of parol employment** is admissible. CalA 287P562.

53-70 [a] (1) 207 Iowa1161, 224NW 562; Iowa 228NW26; 165Minn366, 206 NW442; 154Tenn260, 290SW33, 51ALR 193. (3) 164La1066, 115S271; 148Va 762, 139SE483(year). [b] (1) 29Ariz 313, 241P510; 89CalA427, 264P799; 161 La1117, 109S921; 147Miss639, 112S21; 222AppDiv402, 226NYS317. (5) To sustain verdict for plaintiff. TexCivA 4SW (2d)1058. (6) To establish express contract of any kind. 158Md292, 148A536.

54-72 29Ariz452, 242P866.

54-73 [e] 148Va762, 139SE483.

55-77 76CalA347, 244P940; 224Ky390, 6SW(2d)460; 267Mass607, 166NE401.

55-78 76CalA347, 244P940.

56-79 76CalA347, 244P940.

56-80 118 Or693, 247P809. But see 128Misc382, 219NYS131.

56-81½-New. The state cannot, by legislation, invalidate an employment contract including the purchase of the employer's capital stock by the employee as a consideration for the employer's acceptance of the contract. 267Mass607, 166NE401.

56-81½-New. Statute requiring bond to furnish return transportation to unemployed inhabitants of Texas taken outside of state violates liberty to contract. 39F(2d)198.

56-84½-New. Matters considered in prosecution for failure to provide suitable toilet facilities for female employees. 235Ky173, 30SW(2d)879.

57-90 57ND310, 221NW883. [a] (7) Working hours of pharmacist's apprentice held controlled by Health Law and not by Labor Law, making conviction of employer for permitting Sunday work under latter act improper. 218AppDiv 297, 218NYS21. (8) Restaurant not "mercantile establishment" within statute requiring posting of schedule. 230 AppDiv75, 243NYS618. (9) Failure to exempt all not included held not to include those not so exempted. 230App Div75, 243NYS618. [c] (2) Statute authorizing railroad and public utilities commission to require location of depots and freight and passenger buildings does not authorize it to fix hours of duty of employees thereat. 159Tenn43, 15SW (2d)751. (3) Railway company is not estopped to challenge reasonableness of order of commission fixing hours of service of employees by submission to jurisdiction of commission in numerous proceedings wherein it treated statute and rules of commission as valid. 159Tenn 43, 15SW(2d)751. [h] **Statute construed.**-227AppDiv356, 238NYS81.

58-99 226AppDiv35, 234NYS157. But see 189NY131, 81NE778, 121AmSR854, 12LRANS1130, 12AnnCas798 [dist 214 NY395, 108NE639, LRA1918A1124, AnnCas1916D1059]. [m] **Fact that women are engaged and paid by month** does not affect application of statute. 33 OklCr198, 243P260. [n] **Where number of hours per day and number of hours per week** are both fixed by statute, such statute is violated by breach of provision as to day or provision as to week. 33 OklCr198, 243P260. [o] **Women employed in banks** are within operation of Oklahoma statute. 33 OklCr198, 243P 260. [p] **Reasonable regulations.**-57ND 310, 221NW883.

60-7 157Md576, 146A797.

61-17½-New. A statutory limitation as to the number of hours which shall constitute a day's work or a week's work does not apply to the operation of a waterworks plant by a municipal corporation. 25 OhNPNS69.

61-29½-New. Actual handling of train orders is not necessary for its violation by employees of a terminal company, cooperating with train dispatchers and delivering train orders to outbound trains. 30F(2d)109. [a] **Words "in any 24 hour period,"** as used in act, mean any twenty-four consecutive hours during which employee was on duty more than permitted time, and includes twenty-four-hour period immediately preceding and including any questioned service. 30F(2d)109.

62-41 [a] 269US266, 46SCt109, 70L ed 268.

62-47 307Mo 595, 271SW358. See also 237Mich530, 213NW179.

66-1 [c] (2) Statute not applicable to elevator operators. 248Mich579, 227NW 696(1stcase). [i] **Commerce commission's findings held insufficient.**-339 Ill 201, 171NE148.

66-3 339 Ill 201, 171NE148 (held invalid for indefiniteness).

67-11 321Mo 92, 11SW(2d)48. [e] **Validity and reasonableness of rules of industrial board** may be determined by court under some statutes. 135Misc199, 237NYS263 (order held unreasonable).

68-14 277US350, 48SCt545, 72L ed913, 56ALR1327; 39F(2d)198. [d] **Law attempting to fix prices which employment agent** may charge has been held unconstitutional. 277US350, 48SCt545, 72L ed 913, 56ALR1327.

68-15 39F(2d)198 (denying right to collect fees). [d] (2) Act, regulating employment agencies, in so far as it attempts to limit fee which agency may charge for services rendered applicant in obtaining position, is arbitrary interference with right to contract. 178 Ark170, 10SW(2d)9.

68-15½-New. Proposed employers' organization held to be employers association within statute and expressly exempted from restricting fee to five per cent of first month's wages. Iowa 229 NW677.

69-19½-New. Statute making acts in inducing others to quit employment criminal held valid. 272US306, 47SCt 86, 71L ed248.

69-19½-New. Evidence held insufficient to sustain a conviction of a corporation's foreman for coercing an employee to purchase lunches from a certain person, under pain of discharge. Ariz 282P277.

69-19¼-New. A statute prohibiting employers from requiring employee to trade at a company store held not intended to protect those merchants who are in competition with the employer for the trade of the employees. 230Ky362, 19SW(2d) 989.

69-24 [a] **Adamson Act does not deprive** employees and employers of right to agree among themselves as to hours of service, or wages. 37F(2d)874.

69-25½-New. Railroad Labor Act providing for designation of representatives by railroads and employees for the purpose of settling disputes is valid. 24 F(2d)426.

69-25½-New. and should be liberally construed. 24F(2d)426.

69-25¼-New. The ruling of a board of arbitration of an action under the Federal Railway Labor Act as to the authority of the board, under the submission to make certain changes in rules as to hours, has been regarded as distinct from decision and award. 28F(2d)26.

69-25½-New. Such a ruling has been construed as not constituting a decision that the board had no authority to make a change in the rule as to hours. 28 F(2d)26.

69-25¾-New. In such case an award of the arbitration board changing the rules as to hours, after consideration of the evidence, is conclusive. 28F(2d)26.

69-27 159La258, 105S310. [b] **Public opinion** is what is intended to enforce labor board's decisions. 159La258, 105 S310. [c] **Moral constraint** arising from right of board to publish its opinion is only one imposed on parties to do what board decides. 159La258, 105S310.

69-27½-New. But where carrier elects to accept decision of board, employee has cause of action for amount due under decision of the board. 159La258, 105S310.

69-27½-New. Where carrier notifies discharged employee of its desire to comply with decision of the board, and employee was misled to his detriment to forego exercise of right of publication of board's decision, the carrier is estopped from contesting the award. 159La258, 105S310 (on failure of carrier to comply therewith).

69-27¼-New. That employee refused to return to work on named date is no defense to demand for compensation up to such date, in action to enforce labor board decision. 159La258, 105S310.

69-27½-New. Employee's reservation of right to interpret reinstatement by carrier under labor board decision is not refusal to accept it. 159La258, 105S310.

69-27¼-New. In an action by an employee to enforce the decision of the labor board, an offer of compromise by carrier after reinstatement is valueless as defense. 159La258, 105S310 (where action is to recover wages up to time of reinstatement).

70-43 159La258, 105S310.

70-43½-New. Where both carrier and employee have assented to decision of the labor board, the discharged employee is within his rights in refusing to return to work during strike in which his labor union was engaged. 159La258, 105S310.

70-43½-New. Federal Railway Labor Act providing for representatives to settle disputes between railroads and employees is constitutional. 25F(2d)873.

70-43¼-New. A railroad violates the federal Railway Labor Act, providing for selection by parties to labor disputes of representatives without interference, influence, or coercion, by promoting the organization of an employees' association hostile to organized labor unions and recognizing it as representative to employees. 25F(2d)876.

70-43½-New. Under Railway Labor Act, an award by the majority of the arbitrators is valid, notwithstanding a refusal of the minority to participate therein. 26F(2d)413.

70-43½-New. Railway Labor Act, providing that representatives for arbitration shall be designated without influence or coercion, may be enforced. 281 U8548, 50S Ct427, 74L ed1034.
71-46 TexCivA 280SW849.
71-48 191NC182, 131SE633, 43ALR 1072.
71-49 [a] **In Manitoba.**–[1925] 3Dom LR314.
71-51 209Ky226, 272SW736 (dictum).
71-55 145Miss471, 110S840; 145Miss 18, 110S841.
71-57 16F(2d)658; 96CalA512, 274P 584; CalA 277P1099; 26GaA42, 135SE 314; 233 IllA536; 244 IllA540; 197 Ind 326, 151NE134; 222Ky415, 300SW906; 162La9, 116S870; 259Mass424, 156NE 524; Mass 169NE499; 220MoA95, 278 SW1060; MoA 297SW87; 245NY260, 157NE130; 135Misc426, 237NYS601; 191NC182, 131SE633, 43ALR1072; 25 OhA100, 157NE393; 45Philippine235; TexCivA 271SW247; TexCivA 28 SW(2d)202. [a] **Contract providing for monthly salary** is contract from month to month and may be terminated at end of each month without notice. 25 OhA 100, 157NE393. [b] **Where employment agreement between mining company and employees does not obligate miners to continue to work,** company is not bound continuously to employ miners for period of contract. 157Tenn461, 9SW(2d) 692. [c] **Terminable at end of unit period** by which rate of compensation agreed to be paid. Ala 130S411.
71-57½-New. , without notice. 36GaA 42, 135SE314.
72-59 249NY438, 164NE342. But see Mass 167NE289.
72-61 170La155, 127S585 (discharge held final). [d] (2) Where contract authorizes cancellation if employee fails to increase business during following year, increase is to be measured on yearly, not monthly, basis. 217AppDiv92, 216NYS 298. (3) And employer may not cancel contract for failure of employee to maintain proportion of increase stipulated, for single month. 217AppDiv92, 216 NYS298. [f] (3) Other instances. 229 AppDiv241, 240NYS737. [g] (5) Right to terminate held subject to provision to recover salary to be computed from purchases. 181Ark148, 25SW(2d)449. [h] **Agreement authorizing discharge** of conductor was not contrary to public policy. 170La155, 127S585.
73-65 96Fla151, 117S853.
73-73½-New. Where parties treat contract as subject to regulations in agreement between union and employer, provisions therein for investigation before discharge and for appeal from result are binding on parties. Can [1925] 3Dom LR841.
73-74 Sask [1929] 3DomLR49. [f] Iowa 228NW664. [h] **Injunction.**–Sufficient notice. TexCivA 271SW247.
74-76 See also 11PaDist&Co 271.
74-81 [a] **Employee, by accepting two weeks wages in advance, at time of discharge,** thereby waived provision in contract, requiring two weeks notice before termination of contract. 85Colo 247, 274 P931.
74-84 237 IllA493; 214AppDiv221, 212 NY867.
75-86 TexCivA 271SW247 (if services are satisfactory contract will be given from certain date, in absence of affirmative agreement of such acts services are at will and so terminable).
75-89 41GaA30, 152SE151 (services must be in fact unsatisfactory); 237 IllA493; 214AppDiv221, 212NYS67 (discharge must not be mere whim); 136 Misc257, 242NYS679; TexCivA 271SW 247 (master liable for unjustified eviction by injunction). [a] **Where discharge is shown for refusal** to take new contract, and not for dissatisfaction, it is not in good faith. 237 IllA493.
75-92 237 IllA493.
76-2 212Ky696, 280SW91; 10LaA268, 120S686. [a] **Presumption is, under allegation of termination by mutual consent,** that parties intended to discharge each other only from unperformed obligations. 252NY468, 169NE648.
76-3 134Misc801, 236NYS306.
76-11½-New. Employee relying on contract terminated by mutual consent cannot recover commissions to be paid thereafter. 252NY468, 169NE648.
76-12 77CalA664, 247P621; 44 Ida554, 258P528 [citCJ]. [a] **Party agreeing not to disable himself from continuing employment for stipulated time** is liable for breach by sale of business. 77CalA 664, 247P621.
76-16 89CalA442, 264P798, 799 [citCJ].
77-19 See also 209Ky226, 272SW736.
77-20 See also 209Ky226, 272SW736.
77-21½-New. Where a contract contains no express agreement that the hirer would not sell the business, any claim for damages must be grounded on the theory of implied undertaking. 77 CalA664, 247P621.
77-21¼-New. Under a contract of employment for a specified time as business warranted, a hirer is not liable for breach on sale of the business before expiration of the period. 77CalA664, 247 P621.
77-21¼-New. The fact that defendant received consideration for his business did not conclusively evidence the intention that defendant was not to sell his business during the term of employment. 77CalA664, 247P621.
77-21½-New. Plaintiff's expectations that defendant would carry on the business are immaterial where the contract did not obligate defendant not to sell. 77CalA664, 247P621.
77-38 But see 225AppDiv492, 233NYS 621.
78-48 230AppDiv156, 243NYS396. [a] **Illness permitting return to employment within reasonable time** not breach of contract. 230AppDiv156, 243NYS396. [b] **Waiver of right to terminate for illness.**–230AppDiv156, 243NYS396.
79-54 209Ky226, 272SW736 (relation may end by resignation); MoA 297SW 87, 90 [quotCJ]; 245NY260, 157NE130.
79-55½-New. Workers may leave employment separately or in combination and demand new terms of employment to be fixed by collective bargaining unless they surrendered such right by agreement under which they were employed. 247NY65, 159NE863.
79-56 [a] (10) Temporary financial embarrassment of employer. 218Ky543, 291SW773. (11) Request to sign false financial statement. 218Ky543, 291SW 773. (12) Taking away superintendence of construction project in view of time being engaged in other projects and failure to object. 218Ky543, 291SW 773.
79-57 [p] **Requiring illegal or dishonorable services.**–218Ky543, 291SW773.
80-69-78 209Ky226, 272SW736 (relation may end by discharge). [b] (2) Temporary suspension as a disciplinary measure with intent to continue employee in his work does not constitute discharge so as to make his return to work employment under new contract. 103Conn101, 130A70. [f] Iowa 228NW 664; 1LaA406. [g] **Suspension of mining operations due to unfavorable market conditions** does not constitute breach of miner's employment contract stating conditions under which closing of mine should confer rights on employees. 157Tenn461, 9SW(2d)692.
80-85½-New. Abandonment of contract by employer, with third person, is equivalent to discharge of employee specially employed to perform certain work thereunder. 118 Or542, 247P804.
80-89 96CalA512, 274P584; 208 Iowa 912, 223NW894. [f] 255Mass469, 152 NE62, 47ALR256. [j] **That employee is not bound to continue in employment** does not render enforceable agreement to refrain from discharging him unjustly. 157Tenn461, 9SW(2d)692. [k] **Holding office in union.**–157Tenn461, 9 SW(2d)692. [l] **Activities of miner in inducing others to refuse to work under wage scale, reduced in violation of contract,** does not justify refusal to take him back to work on resumption of operations after suspension. 157Tenn461, 9SW(2d)692. [m] **Conclusiveness of arbitration award.**–Contracts have been construed as obligating mining company to accept award of arbitration board that miner has been unjustifiably discharged. 157Tenn461, 9SW(2d)692. [n] **That another person was coming into agency and his department was showing a loss** were not serious grounds for complaint. 168La461, 122S581. [o] **That employee was receiving too much pay** is not ground for discharge without notice. 108WVa615, 152SE200.
81-90 122 Or360, 257P685, 690 [quot CJ]. [e] **Enticing employees** to leave. 216Ala303, 113S74.
81-93½-New. Dismissal for cause may be justified by a series of acts any one of which alone is not sufficient to justify dismissal. Man [1927] 2DomLR461.
81-94 147Va1047, 133SE570. [i] 220 Ala190, 124S418.
82-95 258Mass331, 155NE18.
83-3 216Ala303, 113S74.
83-6 216Ala303, 113S74.
83-8 214Ky244, 283SW428; 266Mass 255, 165NE476.
83-9 214Ky244, 283SW428.
84-12½-New. An employer is not liable for the discharge of a bookkeeper whose incompetency is such as to occasion danger of repeated losses and injury to business standing. 214Ky244, 283SW 428.
84-23 170Ark976, 281SW899, 900 [cit Cyc].
84-24 178Ark736, 118W(2d)473; 22 Alta225, [1926] 3DomLR362, [1926] 2 WestWkly456; Alta [1928] 4DomLR 526. [b] (1) 248 IllA313; 216AppDiv 408, 215NYS515. (5) 216AppDiv408, 215NYS515. [d] (15) 216AppDiv408, 215NYS515. (20) Arrest of employee on suspicion of larceny. 163La180, 111 S669. (21) Other instances. 204Cal 63, 266P541, 57ALR1066. [e] 48RI 244, 137A2.
86-33 170Ark976, 281SW899, 900 [cit Cyc]; 147Va1047, 133SE570, 575 [quot CJ].
86-34 170Ark976, 281SW899, 900 [cit Cyc]; 147Va1047, 133SE570, 575 [quot CJ]. [a] **Manner of giving order.**–170 Ark976, 281SW899.
86-35 170Ark976, 281SW899, 900 [cit Cyc]; 72CalA214, 237P55 (violation of specific instructions must have been intentional); 103Conn553, 131A426 (New York rule); Mass 169NE499; 216App Div408, 215NYS515; 116 Oh373, 156NE 136; 147Va1047, 133SE570, 575 [quot CJ].
87-39 72CalA214, 237P55 (to justify dismissal without contract notice there must have been willful violation of some rule or instruction). [a] See also 103 Conn553, 131A426. [b] **Rule requiring conductors to account for fares** is not opposed to public policy. 170La155, 127S585.
88-58 22AlaA267, 115S73; 100WVa 490, 130SE650, 44ALR526 (conceding general rule).
88-61½-New. Nor does payment of wages to time of discharge amount to waiver or condonation. 100WVa490, 130SE 650, 44ALR526.
88-62 79Mont327, 256P497; 147Va1047, 133SE570, 575 [citCJ]; 100WVa490, 130SE650, 44ALR526.
88-62½-New. Condonation is always with implied condition of future good conduct in compliance with terms of contract. 100WVa490, 130SE650, 44 ALR526.
89-63 79Mont327, 256P497.
89-64 79Mont327, 256P497; 147Va 1047, 133SE570, 575 [citCJ].
89-65 205 Iowa279, 218NW54; 79Mont 327, 256P497; 100WVa490, 130SE650, 44ALR526.
89-69 147Va1047, 133SE570.
89-70 147Va1047, 133SE570.
90-86 128 Or121, 270P772.
90-88 [a] **Estoppel to assert request made to wrong person.**–220MoA497, 274 SW517. [b] **In Missouri.**–220MoA497, 274SW517.
90-90 204Cal 63, 266P541, 57ALR1066.
91-92½-New. Some statutes requiring the giving of a service letter on termination of employment are mandatory. 220 MoA497, 274SW517.
91-92⅓-New. Under such statutes it is immaterial that a service letter would have been of no value to an employee. 220MoA497, 274SW517.
91-92¼-New. Under some statutes an employee can recover only nominal damages for employer's refusal to issue a service letter where it does not appear

that such refusal had anything to do with his failure to secure employment. 220MoA497, 274SW517.

91-99½-New. Under statutes in some jurisdictions wages earned become due when employee is discharged. 118 Or 542, 247P804.

91-6 236 IllA494; 163La180, 111S669.

91-10 37GaA744, 141SE819. [a] **Pending disposition of appeal, employer's right to discharge employee is not in abeyance** where trial under agreement was concluded adversely to employee and agreement contained no provision as to supersedeas in case of trial and adverse conclusion. 37GaA744, 141SE 819.

91-11½-New. Where contract provides for investigation before dismissal, and investigation is had pursuant to regulations and employee attends and does not object, result is binding on parties, Can [1925] 3DomLR841.

91-11⅓-New. and if employee is dismissed as result of such investigation and does not appeal therefrom in manner provided, he has no right of action for wrongful discharge. Can [1925] 3 DomLR841.

91-12 73CalA748, 239P373. [b] **Application to arbitration board.**-157Tenn461, 9SW(2d)692.

91-13 73CalA748, 239P373. [a] (2) Employee may seek employment elsewhere during unexpired term of contract. 168La461, 122S581.

92-16½-New. Discharge by employer and his express repudiation of agreement is breach of contract rendering tender unnecessary. 73CalA748, 239P 373.

92-21 TexCivA 300SW963.

92-22 162CalA160, 282P981; 96Fla151, 117S853.

93-30 TexCivA 21SW(2d)372(2dcase). [a] **That finding of United States labor board on issue of justness of discharge is conclusive** does not make action for compensation lost one to enforce board's award. TexCivA 5SW(2d)856.

93-36 163La180, 111S669; 4LaA636.

94-40½-New. In Alabama where employee is discharged without fault under contract for services to be performed, he may recover on common counts. 213 Ala129, 106S60 (if he holds himself in readiness to perform).

95-49 84 IndA313, 151NE227.

96-59 147Va1047, 133SE570.

96-66 212Ky696, 280SW91.

96-70½-New. It is a good defense that employee has failed to follow procedure contracted for respecting appeal from adverse decision of investigation body. Can [1925] 3DomLR841.

97-73½-New. or in employment of a different character than that called for by his contract; 207 Iowa1161, 224NW 562.

97-79 But see Can [1925] 3DomLR841.

97-83½-New. That employee remained in employment during the thirty-day period of notice of discharge is no defense as an acquiescence in his discharge. 168La461, 122S581.

97-83⅓-New. Payment of compensation, credited to employee's salary, did not preclude employee's recovery of salary. TexCivA 28SW(2d)839.

97-86 [c] 9LaA432, 121S240 (tender of services); MoA 28SW(2d)687 (on theory of breach of contract between defendant and labor union of which plaintiff was member); 136Misc257, 242NYS679. [c] 80CalA1, 251P830; 44 Ida554, 258P 528; 197 Ind386, 151NE134; 223Ky688, 48W(2d)732; TexCivA 16SW(2d)347. [f] **Discharge or repudiation of contract** or tender and refusal of performance must be averred. 218AppDiv746, 218 NYS40. [g] **In action against successor of original employer,** plaintiff must show contract, express or implied, with such successor. 44 Ida554, 258P528. [h] **Complaint held to state cause of action ex contractu.**-Ala 130S772.

98-91½-New. Complaint held to show mutuality of consideration. 216Ala303, 113S74.

98-94 218AppDiv746, 218NYS40. [a] (1) 102CalA160, 282P981. (2) An allegation that defendants had, without provocation on plaintiff's part, breached contract by discharging plaintiff, is not sufficient, where contract gave defendant right to discharge plaintiff under certain circumstances. 96Fla151, 117S853.

98-95 [a] **Grounds of discharge need not be alleged,** but only that services were satisfactory and employer fraudulently claimed otherwise. 41GaA30, 152 SE151.

98-3½-New. Plaintiff need not allege tender of performance where defendant had already breached contract by discharge of plaintiff and repudiation of contract. 73CalA748, 239P373.

98-8 TexCivA 300SW145.

99-23 48RI 244, 137A2.

99-31½-New. Plea held bad as failing to show justification. 216Ala303, 113S 74.

100-40 MoA 5SW(2d)687, 689 [citCJ]; TexCivA 300SW145.

100-52½-New. Matters disclosed on examination of plaintiff before trial may be shown in reduction of damages without affirmative plea. 215NYS857.

100-52⅓-New. Ruling as to effect of contract of employment with third party held properly denied as raising defense not pleaded. 258Mass331, 155NE 18.

100-52¼-New. The ultimate issue in a breach of contract case was whether business would have produced a profit under the employee's management over the annual period. TexCivA 17SW(2d) 182.

100-52⅕-New. Failure to seek other employment may be proved, although not specially pleaded. 252NY347, 169 NE605.

100-53 TexCivA 16SW(2d)901. [c] **Evidence properly excluded under pleading.**-181Ark148, 25SW(2d)449.

101-59 MoA 295SW477.

101-60 124 Or197, 264P362; 48RI 244, 137A2.

101-61 MoA 288SW1004; 295Pa219, 145A80.

101-62 124 Or197, 264P362.

101-64½-New. There is no presumption that one suffers loss by changing his place of residence from New York to Los Angeles. 80CalA1, 251P830.

101-66 329 Ill 42, 160NE127; MoA 294 SW747; 124 Or197, 264P362. But see 48RI 244, 137A2.

101-67 MoA 294SW747.

102-69 41F(2d)490; 169Ark532, 275 SW912; 180Ark860, 23SW(2d)249; 73 CalA748, 239P373; Mich 233NW362; MoA 5SW(2d)687; 252NY347, 169NE 605; 215NYS857. But see TexCivA 16 SW(2d)901.

102-72 IndA 151NE7; MoA 294SW747; 291Pa470, 140A339; 148Va762, 139SE 483.

103-73 [a] 258Mass331, 155NE18; 54 SD201, 222NW950.

104-88 258Mass331, 155NE18. [b] **Evidence tending to show good faith of offer from another employer,** which plaintiff was induced to refuse, held admissible. 258Mass331, 155NE18.

104-96 TexCivA 287SW130. [a] (3) 102 CalA160, 282P981; 164La1066, 115S 271; 148Va762, 139SE483. (4) 168La 818, 123S336; 147Va1047, 133SE570. (5) 72CalA214, 237P55; 85CalA140, 259 P63; 83 IndA541, 149NE184; MoA 6 SW(2d)981; NJSup 135A668; 104WVa 409, 140SE143. (16) To show plaintiff entitled to notice provided for in contract. 72CalA214, 237P55. (17) To show contract of employment. 236 IllA 494. (18) To support finding adopting jury's special verdict finding that contract of employment had not been canceled. 170Minn53, 212NW9. (19) To show employment by month and from month to month. TexCivA 280SW849. (20) That plaintiff did not threaten employer with revolver and thus justify his discharge. 10LaA729, 121S780. (21) to show renewal of contract. 298Pa31, 147A837(1stcase). (22) Other instances. TexCivA 25SW(2d)902. [b] (3) 252NY 347, 169NE605. (15) Where employee had received congratulatory letter two months before discharge. 236 IllA494. (16) To show waiver or estoppel of employer as to breach. 79Mont327, 256 P497. (17) To sustain finding of agreement by employer to purchase house of reasonable value to become employee's sole property. 80CalA1, 251P830. (18) To permit recovery of wages for unexpired term. 54SD201, 222NW950. (19) To sustain burden on plaintiff of proving that employment was by year, instead of by month. 9LaA254, 119S273. (20) Other instances. 41GaA194, 152SE 309. [c] **Erroneous computation of damages** held not to render verdict contrary to law and evidence. Ark 294SW 707. [d] **Finding held authorized by evidence.**-TexCivA 28SW(2d)839.

105-98 MoA 288SW1004.

105-99 41F(2d)490; MoA 285SW546; MoA 295SW477; TexCivA 25SW(2d)902 (month to month contract); TexCivA 28 SW(2d)839 (witnesses' contradictory testimony). [a] 41F(2d)490. [b] 142 SC386, 140SE702; 148Va762, 139SE483. [e] 230AppDiv156, 243NYS396. [f] 136 Misc257, 242NYS679. [g] 207 Iowa1161, 224NW562; 228AppDiv176, 239NYS 619(2dcase); 229AppDiv241, 240NYS 737. [i] **Whether plaintiff was employed by month or only so long as his services should be satisfactory to defendant is for jury when evidence is conflicting.** 145Miss18, 110S841. [j] **Terms of contract are for jury.** 145Miss18, 110S841. [k] **Whether servant is entitled to notice held for jury.** NJ 138A704. [l] **Whether contract was yearly contract or whether employment was at will is for jury.** 295Pa219, 145A80. [m] **Whether employee was wrongfully discharged in violation of agreement between employer and union held question for jury under evidence.** MoA 28 SW(2d)687. [n] **Refusal of service letter.**-MoA 28SW(2d)687. [o] **Duties of employee is for jury.**-TexCivA 28SW(2d) 839.

105-1 237 IllA493. [a] **Direction of verdict held erroneous.**-237 IllA493.

105-2 204Cal 63, 266P541, 57ALR1066; 122 Or360, 257P685, 690 [quotCJ]; 48 RI 244, 137A2; 147Va1047, 133SE570, 575 [quotCJ].

106-3 122 Or360, 257P685, 690 [quot CJ]; 147Va1047, 133SE570, 575 [quot CJ]; 148Va762, 139SE483, 485 [citCJ].

106-4 170Ark976, 281SW899; 230App Div156, 243NYS396; 147Va1047, 133SE 570, 575 [quotCJ]; 148Va762, 139SE 483; 100WVa490, 130SE650, 44ALR 526. But see TexCivA 5SW(2d)856.

106-5 100WVa490, 130SE650, 44ALR 526.

106-7 237 IllA493.

106-8 79Mont327, 256P497.

107-11 [a] **Instructions held proper.**-41F(2d)490.

107-12 100WVa490, 130SE650, 44ALR 526. [a] (4) Requested ruling that plaintiff could not avail himself of oral conversation to modify offer of employment held erroneous. 258Mass331, 155 NE18. [b] (5) Ruling that contract began to run on plaintiff's acceptance of offer held proper. 258Mass331, 155NE 18. (6) Placing burden of proof on defendant to show plaintiff's lack of skill and ability. 124 Or197, 264P362.

107-13 MoA 5SW(2d)687; 100WVa490, 130SE650, 44ALR526.

108-18 103Conn553, 131A426; 100WVa 490, 130SE650, 44ALR526. [a] (2) Instructions which are confusing and misleading. 21AlaA161, 106S58.

108-22 See also 54SD201, 222NW950.

108-22½-New. An instruction on substantial performance is objectionable where it fails to define substantial performance and to limit the doctrine to defects in performance not willful or voluntary; 103Conn553, 131A426.

108-22⅓-New. especially where the contract is to be governed by the law of another state where stricter compliance is required than in law of forum. 103Conn553, 131A426.

108-29½-New. Where the petition alleged an agreement to pay plaintiff a salary and a percentage of the profits, an instruction authorizing a verdict for the percentage of net sales is erroneous. MoA 285SW546.

108-29⅓-New. Instruction authorizing discharged servant to recover damages for unexpired term after trial held erroneous. 180Ark860, 23SW(2d)249.

109-40 220Ala190, 124S418; 73CalA 748, 239P373; 102CalA160, 282P981;

103Conn553, 131A426; 96Fla151, 117S 853; 83IndA541, 149NE184; MoA 295 SW477; 130Or282, 279P279; TexCivA 280SW849; TexCivA 178SW(2d)182. [a] TexCivA 300SW963.

109-41 37GaA744, 141SE819; 10LaA 268, 120S686; 145Miss18, 110S841; 25 OhA233, 157NE823. [g] **Damages actually suffered held to exclude** those which servant acting reasonably would have diminished or avoided. 252NY347, 169NE605.

110-42 [b] **Date of discharge or repudiation** is ordinarily date on which damages should be computed. 246NY158, 158NE658.

110-43 228AppDiv176, 239NYS619 (2d case) (measure is value of contract to plaintiff, gross receipts less expenses).

110-45 See also 4UF(2d)490.

110-46 164La1066, 115S271. [b] **Damages for salesmnn are salary or advancements** for remainder of term, subject to proof at trial. 41GaA30, 152SE151.

111-54 TexCivA 271SW247; Sask [1929] 3DomLR49.

111-64 9LaA432, 121S240.

112-66 39Wyo 442, 273P675.

112-68 Ala 130S772; 96Fla151, 117S 853; 39Wyo 442, 273P675.

112-69 [b] **Loss of homestead** for failure to pay mortgage is too remote to be recoverable. 223Ky688, 48SW(2d)732.

112-69½-New. Remote and speculative matters do not constitute proper element of damages. 37GaA744, 141SE 819.

112-74 130Or282, 279P279.

112-78¼-New. Interest not allowed from date of discharge. 236 IllA494.

112-78½-New. One contracting to give up his law practice as part of consideration for his employment as a ranch manager cannot recover compensation for loss of such practice as damages. 130Or282, 279P279.

112-78¼-New. One agreeing to purchase an automobile as part of consideration for his employment cannot recover the amount paid therefor less the amount received on sale following discharge. 130Or282, 279P279.

112-79 250Mich298, 230NW154 (recovery not allowed without evidence); MoA 6SW(2d)981. See also TexCivA 178SW(2d)182.

113-80 25OhA233, 157NE823.

113-85½-New. Profits on exchange of stock in which employee was to share are determinable by conditions existing when contract was breached. 246NY 629, 159NE679.

114-90 [a] **Actual malice need not be shown**, malice in law being sufficient. MoA 288SW(2d)687.

114-97 180Ark860, 238SW(2d)249.

114-99 180Ark860, 238SW(2d)249. Compare TexCivA 300SW963 (holding that damages are waived for period following trial).

114-1 102CalA160, 282P981; 130Or 282, 279P279. But see TexCivA 218SW (2d)372(2dcase).

115-2 180Ark860, 238SW(2d)249; MoA 295SW477; 148Va762, 139SE483.

115-3 [d] **Prima facie measure of damages** for wrongful discharge is wage payable for remainder of term. 252NY 347, 169NE605.

115-4 [b] **Evidence held sufficient** to warrant recovery for breach of contract for commissions on completed sales made by sales organization. 177Minn 383, 225NW275.

115-5 37GaA744, 141SE819. [a] **Calculation by employer** of commission due, after discharge, is presumably correct. 228AppDiv176, 239NYS619(2dcase).

115-11½-New. In suit for breach of contract to employ plaintiff in consideration of assignment by plaintiff of valuable coal lease, evidence as to value of lease, condition and market value of mine, including good will and number of tons of coal per acre, was held admissible on issue of plaintiff's damages. IndA 151NE7.

115-11½-New. Evidence of general damages is admissible under a general allegation of damages at the end of the declaration. 130Or282, 279P279 (matters held general and not special damages).

115-11¼-New. In the absence of an averment that plaintiff employed as a ranch manager kept a cow or sow or raised any fruit, vegetables, or poultry, or contemplated doing so, he could not recover damages for failure to furnish pasturage and feed and allow him to raise and sell such articles as agreed. 130Or282, 279P279.

115-12 73CalA748, 239P373; 230Ky 151, 18SW(2d)1000; Mich 233NW362; MoA 294SW747; 252NY347, 169NE605.

115-13 214Ala553, 108S452; 103Conn 553, 131A426; 83IndA541, 149NE184; 230Ky151, 18SW(2d)1000; 228AppDiv 176, 239NYS619(2dcase). See also 128 Misc454, 219NYS137.

116-16 But see 164La112, 113S785.

116-17 130Or282, 279P279 (amount earned by ranch manager in practice of law permitted under contract of employment).

117-26 73CalA748, 239P373; 103Conn 553, 131A426; TexCivA 300SW963.

117-27 214Ala553, 108S452; 73CalA 748, 239P373.

118-36 Mich 233NW362.

119-46 226AppDiv125, 234NYS439.

120-66 83IndA541, 149NE184.

120-68 104NJL209, 141A14.

120-70 CalA 277P1105. [d] (4) Where writing relates to compensation alone, business and duties may be considered. 208Cal 447, 281P604, 65ALR989.

122-99 83IndA541, 149NE184.

122-10 129Misc666, 222NYS420.

122-13 227AppDiv210, 237NYS372.

123-15 34GaA355, 129SE557 (tree surgeons); 80Mont214, 260P711, 717 [cit CJ].

124-28 91CalA101, 266P833 (1st case).

124-29 [d] **Employee held not to have violated contract to devote entire time to employer's business.**-165La471, 115S 660.

125-39½-New. Restriction on employee's competition by diverting employer's customers during employment and for six months "after leaving" same for "whatsoever cause" is a negative covenant applying solely to the employee. 25OhA100, 157NE393.

125-39½-New. In such contract the term "after leaving" refers to involuntary, as well as voluntary, termination of employment. 25OhA100, 157NE393.

126-48 200Iowa458, 204NW413.

126-50 263Mass401, 160NE804. See also 25OhA100, 157NE393.

126-51 87CalA282, 262P43; 237IllA 550.

126-51½-New. Where employment is of a confidential nature, there is an implied contract on the servant's part that he will not use trade secrets, learned in the course of the employment, to the master's detriment. 174Ark104, 294SW 393.

127-52 263Mass401, 160NE804; Mass 167NE301. See also 300Pa542, 151A15. [a] 174Ark104, 294SW393; Mass 172 NE220. [b] **Employee is bound not to disclose or use** confidential matter gained in former employment, whether he memorized or copied such matter. 237 IllA550. [c] **After expiration of services** employee may compete with former master but may not use secrets acquired in course of his employment. 99Fla456, 126S794.

127-55 [a] **Lease on premises that are of peculiar value to business of employer** cannot be taken by employee, and, on his so doing, he will be held as trustee for employer. 267Mass256, 166NE 640.

127-62 25OhA100, 157NE393.

128-79 14F(2d)776; 23F(2d)386; 26 F(2d)394; 39F(2d)943; 255Mass194, 151NE71, 44ALR589; Mass 168NE94; TexCommnA 288SW146; TexCivA 281 SW608. But see 22F(2d)353; 29Ont WN473, [1926] 1DomLR1101.

128-80 23F(2d)386; 31F(2d)188; 255 Mass194, 151NE71, 44ALR589; TexCivA 28SW(2d)980.

128-82 255Mass194, 151NE71, 44ALR 589.

128-84 16F(2d)739; 20F(2d)434; 19F (2d)231. [e] **Invention** held property of United States. 20F(2d)435.

129-85 16F(2d)739; 20F(2d)435; 39F (2d)943 (holding no express agreement in contract).

129-86 16F(2d)739; 17F(2d)122; 21F (2d)885; 23F(2d)386; 26F(2d)394; 39 F(2d)943 (holding sales manager's interest not warranting presumption of contract to transfer patents to employer); Mass 168NE94; TexCommnA 288 SW146.

129-87 [b] **Contract to apply for patent** for employee's invention must be prosecuted within reasonable time. 229App Div241, 240NYS737.

129-88 16F(2d)739; 29F(2d)1006; 36 F(2d)306.

129-89 16F(2d)739; 22F(2d)962; Tex CivA 28SW(2d)980.

129-90 26F(2d)394; 29F(2d)1006; Tex CommnA 288SW146. [a] (2) Employer has been held not to have implied license or shop right where employment had nothing to do with invention and employee did not use time or property of employer or assent to use of invention. 31F(2d)463. [c] **Petition held to raise issue as to shop right.**-TexCommnA 13 SW(2d)59.

129-90½-New. An implied license from an inventor to his employer for shop rights will avail against the purchaser of the patent with knowledge of the employer's right. 29F(2d)1006.

129-90⅛-New. The implied license to the employer is not limited to the use of the first machine, but extends to as many more improved machines constructed by it and embodying the invention as are reasonably required for its business. 29F(2d)1006.

129-90¼-New. Delay in filing a bill to restrain an employee's sale of patents and to compel him to assign them to his employer, where induced by the conduct of the employee, held not to constitute laches. Mass 168NE94.

130-95 136Misc178, 239NYS425 (assignment of patent to corporation not admission of duty to do so).

130-96 136Misc178, 239NYS425; Tex CivA 28SW(2d)980.

130-98 [a] **Contract need not be in writing.**-16F(2d)739.

130-3 16F(2d)739.

130-4 16F(2d)739.

130-11 16F(2d)739; 21F(2d)885; 23 F(2d)386; Mass 168NE94. [c] **Approval of government's employee's application** does not deprive United States of ownership of invention. 23F(2d)386. [d] **Patents taken out in employee's name** for purposes of protection are property of employer where employee was engaged for his knowledge to improve processes. Mass 168NE94.

131-13 [a] **Evidence held to show,** in action for fraudulent concealment by chemists employed by plaintiff of results of experiments culminating in patent, that process was discovered in investigations independent of employment. 7F (2d)903.

131-16 18F(2d)483.

131-17 Contra 242NY99, 151NE144 [aff 212AppDiv343, 209NYS40 (rev 122Misc 233, 202NYS691)]. [a] (1) Contra 242 NY99, 151NE144 [aff 212AppDiv343, 209 NYS40 (rev 122Misc233, 202NYS691)]. (2) But see 242NY99, 151NE144. (3) To be entitled to relief sought plaintiff was bound fairly to establish that original contract was still in force and binding. 242NY99, 151NE144. (4) Where such contract is not renewed on termination and employee continued at will and executed assignment of inventions made or to be made while in employ, inference is permissible that parties intended end of definite term and that employer relinquished claim for invention made after employee left employ. 242NY99, 151NE144. [b] **Evidence held to support** finding that employee was released from contract reserving to employer inventions made within year after leaving employ. 242NY99, 151NE144. [c] **Inference held permissible from contract** that employer released claim against employee for inventions made after leaving employment. 242NY99, 151NE144. [d] **Finding employee was released from contract reserving invention to employer** held supported by evidence. 242NY99, 151NE144.

131-19½-New. **Shop right** conferred on employer may be continued to be used although an employee perfects the product and has a patent issued after

leaving the employment. 22F(2d)962.
131-23 TexCivA 281SW608.
133-54 [c] **Discharge for cause under contract at will** gives employer right to counterclaim for damages to action by employee. 126Misc370, 213NYS433.
134-82 [g] 103NJEq240, 143A145. [h] **Pleadings have been held sufficient.**–Ala 130S63. [i] **Pleadings have been held not demurrable.**–Ala 130S63.
135-83 200 Iowa458, 204NW413. [b] **Damage must result to employer.**–200 Iowa458, 204NW413.
135-85 [d] **General allegation of negligence held sufficient.** 300Pa347, 150A 618.
135-86½-New. In action against beauty parlor operator for injury to hair, cause has been held properly submitted on issue of negligence. Ala 130S63.
135-93 [a] **Burden of proof, when slight, may be supplied** by affirmative proof that accident would not have happened had instrumentalities been reasonably cared for. 300Pa347, 150A618.
135-95 Ala 130S63.
136-98 Ala 130S63. [b] **Evidence held sufficient to make jury question** of attendant's negligence. 300Pa347, 150A 618. [c] **Very slight proof** of negligence is sufficient to take case to jury where defendant controlled instrumentalities. 300Pa347, 150A618.
136-4½-New. Computation of damages resulting from wrongful use of trade secrets see 103NJEq240, 143A145.
138-30 Mo 30SW(2d)44.
138-31 39GaA151, 146SE336(2dcase).
138-32 [c] (1) 37GaA20, 138SE671. (2) 37GaA20, 138SE671. (10) Contract held insufficient where time of beginning of contract and wages to be paid are indefinite. 37GaA20, 138SE671.
139-34 39GaA534, 147SE792(2dcase).
139-37 37GaA153, 139SE90.
141-82 37GaA153, 139SE90; 39GaA534, 147SE792(2dcase).
141-91 [b] 37GaA153, 139SE90. [c] **State must show that there was no good reason why contract was not performed** or why accused did not return money advanced to him; otherwise case is incomplete as failing to create evidentiary presumption to rebut presumption of innocence. 39GaA555, 147SE780(1stcase).
143-34 36GaA272, 136SE466.
143-35 39GaA555, 147SE780(1stcase).
143-46 39GaA554, 147SE792(1stcase). [a] **Evidence held insufficient** to authorize conviction. 34GaA220, 129SE110.
143-53 40GaA538, 150SE452(3dcase) (charge approved).
143-57 Alta [1925] 3DomLR948. See also 3LaA125. [b] **Employee not holding self out as ready to render services** after employer's adjudication as bankrupt cannot recover salary for unexpired term. Mass 171NE712.
143-58 Alta [1925] 3DomLR948. [b] **Company's contract to pay salesman prize,** where they ratified it and received benefits, was binding. NJ 150A330.
144-61 Iowa 228NW664 (contract must be read as whole); 229AppDiv241, 240 NYS737.
144-67 [b] **Under implied contract,** where employer received, or, if acting prudently, might have received, benefit, and there is clear intention that servant should receive compensation, he is entitled thereto. Alta [1925] 3DomLR948.
145-71 [c] **Employees of independent contractor** must look to him for compensation. 29Ariz452, 242P866. [d] **Employment by employee.**–Employer is liable for services of persons employed by his employees with his knowledge and consent. 29Ariz452, 242P866. [e] **Wages of workmen on oil development.**–90CalA36, 265P351.
149-38 116 Oh373, 156NE136; Sask [1926] 4DomLR1111.
150-53½-New. Contract at will. An employee discharged for cause under contract at will gives the employee cause of action. 126Misc370, 213NYS433.
150-54 Man [1925] 3DomLR314.
150-61 [a] **Employee cannot recover for wages for last half of month** if he is discharged in middle of month. 220 MoA95, 278SW1060.
150-64 [b] **That employee did not complete transaction** does not defeat his right to commission for sale where all elements of sale were met. 221MoA1066, 295SW838. [c] **Where salesman is to receive one-half commissions paid on property sold by him,** he is entitled to his share of commission paid, though client refused to complete sale. 10LaA 8, 120S68.
151-77 [e] 252NY468, 169NE648. [f] **Salesman** is entitled to commissions only on orders personally secured by him. 241NY598, 150NE570. [g] **That salesman negotiated with buyers** procured their good will, and brought them to employer does not entitle him to commissions on entire account solely because of these facts. 241NY598, 150NE 570. [h] **Till credits were passed on.**–258Mass93, 154NE848.
151-79 [d] **Right to commissions is not lost** because employer turned over negotiations to be completed by another salesman. 219MoA211, 269SW665.
152-83 TexCommnA 284SW542.
152-86 136Misc492, 240NYS148.
152-93 31F(2d)809.
153-98½-New. The term "sales" has been held to mean accepted orders. 258 Mass93, 154NE848.
153-1 137Misc398, 241NYS194.
153-4½-New. Expenses for entertaining customers is not within the commonly accepted meaning of "weekly drawings." 126Misc683, 214NYS476.
153-8 126Misc683, 214NYS476 (absolute promise to pay regardless of amount actually earned). [a] (2) Amount paid as drawing account against commissions is unconditional payment. 41GaA30, 152SE151.
153-11 175Minn624, 221NW719, 720(2d case) [quotCJ]; 126Misc683, 214NYS476.
153-12 126Misc683, 214NYS476. [c] **Drawing account held not loan** chargeable against commissions when earned under terms of particular contract. Iowa 223NW882.
154-14 103NJL553, 137A211; 126Misc 683, 214NYS476; 137Misc398, 241NYS 194; 105WVa221, 141SE376 [citCJ], 57 ALR31; 199Wis489, 227NW1. [b] **Where employer reduced drawing account** and breached agreement, held he is not entitled to credit for excess payment. 103NJL553, 137A211. [c] **Statement of employee admitting excess** held no admission of liability therefor. 103 NJL553, 137A211.
154-19 Iowa 223NW882.
154-21 See also CalA 277P1105. [a] **Where salesman voluntarily terminates employment, he is not entitled to commission on undelivered automobiles** where contract provides for delivery and payment in full. 39F(2d)292.
155-31 [c] **Promise to pay appropriate percentage** of benefits accruing through employee's efforts for unearthing graft in certain corporation, in excess of per diem stipend, is too ambiguous. 249NY 60, 162NE584.
155-32 174Ark282, 295SW713.
155-33 224AppDiv583, 231NYS457. [b] **Employee has no vested interest** in profit sharing fund where rules provided for forfeiture on decision of committee. 220 NYS135.
155-40 252Mass279, 147NE821 (though sale was not actually completed till after termination of employment).
155-45 [c] **Property in payment.**–252 Mass279, 147NE821. [d] **Employee** is bound to exercise of utmost good faith to his employer. 99Fla456, 126S794.
155-48 329 Ill 253, 160NE552. [a] **Interest on proceeds of goods sold on termination of agreement.**–Where contract provided for sale and division of stock on hand at termination of contract, without providing method of sale, party assuming to sell and completing sale within one hundred days is not chargeable with interest during such period but is chargeable with interest during subsequent period during which he refused to account. 329 Ill 253, 160 NE552.
156-56 174Ark282, 295SW713.
157-65 300Pa496, 150A899 (agreement conditional on employee "making good").
157-70 7PaDist&Co 505.
157-77 229AppDiv388, 241NYS609.
158-89 259Mass424, 156NE534.
159-91 MoA 19SW(2d)516. [e] **What constitutes definite promise.**–15F(2d) 672.
159-92 217Ala153, 115S94, 55ALR 1231; 50SD21, 208NW175; 52SD113, 216NW867.
159-95 [a] See also 50SD21, 208NW 175.
159-96 [c] **Promise of bonus in addition to fixed salary** for each stated period, in case of service for specified time, is valid. 31Ariz33, 250P354, 49 ALR1311.
159-98 134Misc279, 235NYS179; 52SD 113, 216NW867.
160-99 [a] (3) Where contract of employment of salesman provides for payment of bonus based on amount of monthly sales and payable at stated period after expiration of month in which sales were made defines bonus as gratuity, and provides that no bonus shall be paid in case of discharge, employee cannot recover bonus where he is discharged before it becomes payable. 78Colo 250, 241P542.
160-2½-New. Where conditions have been complied with by employee so far as possible, it is immaterial if officers of employer company have not authorized payment. 15F(2d)672.
160-4 15F(2d)672.
161-25 135Misc760, 240NYS680.
161-29 See also 229AppDiv388, 241 NYS609.
161-30 [f] **Expense of laborers in attempting to enforce lien** against third person's property is not chargeable against employer. 151Wash550, 276P 855.
162-33 10LaA268, 120S686.
162-34 [a] **In absence of promise,** railroad is not liable for strike breakers' hotel bill. TexCivA 285SW685.
162-38½-New. Expenses of entertaining customers is not within the accepted meaning of "traveling expenses." 126 Misc683, 214NYS476.
162-45 259Mass242, 156NE73.
162-47 23F(2d)100 (derrick barge held liable for injury to ship).
162-52 Iowa 228NW664.
168-27 [a] **Employer not liable for labor not conforming to specifications** unless he receives benefit. WVa 155SE 540.
168-30 TexCivA 10SW(2d)597.
170-60½-New. [§ 232a] j½. **Criminal Liability.** CalA 288P22.
170-62 31Ariz65, 250P364.
170-69 [e] **Facts not sufficient to constitute estoppel.**–TexCivA 284SW225.
171-75½-New. Employment contract providing for profit sharing cannot be avoided by employee's discharge. 259 Mass424, 156NE534.
171-79 201Cal155, 255P825; 77Colo 603, 237P1113; TexCivA 5SW(2d)816; Alta [1925] 3DomLR948.
171-81 225AppDiv577, 233NYS16.
171-83½-New. Where a contract was too ambiguous as to compensation above the per diem stipend, it was held that the employee was entitled to the reasonable worth of services above payments made. 249NY60, 162NE584.
172-90 See also 6LaA512.
173-94 29Hawaii204; 87IndA609, 161 NE577; 227AppDiv585, 238NYS419; 104WVa458, 140SE323. [d] **Particular contracts construed.**–15DelCh198, 134A 97.
173-6½-New. Employment by month entitles employee to full month's wages on discharge unless notified before the beginning of the month that services will not be needed. 21AlaA161, 106S58 (instruction held proper).
174-18 [d] **Employment by month.**–21 AlaA161, 106S58.
174-18½-New. Where an employer and employee have for a long period acted on the assumption that services were of a certain classification, such construction by the parties will prevail. 218 Ky279, 291SW371.
175-29 95CalA532, 272P1087 (agreement for commission in lieu of salary and commission).
175-30½-New. Where a contract providing salary to "be adjusted not less than every two years from date," re-

quires an adjustment within two years and within each similar period thereafter, it does not mean there is to be no adjustment until after two years. 285Pa16, 131A482.

175-32 TexCivA 284SW225; 104WVa 458, 140SE323.

175-33 30F(2d)569.

176-56 [a] **Salesman held entitled to commissions** only on orders which he procured. 241NY598, 150NE570. [b] **Salesman suing for compensation under canceled contract** has been held not entitled to pro rata share of prospective commissions. Iowa 223NW882. [c] **Amount due is determinable from employer's books** rather than from employee's testimony. 251Mich478, 232 NW355(2dcase).

176-57 Iowa 228NW664.

176-59 [c] **Commission fixed on contract price** may be recovered though employer received less than due him. 13LaA186, 126S527.

177-61 208Cal 447, 281P604, 65ALR 989.

177-62 [e] **Employee may be liable for excess of advances over commissions** on implied promise or for disabling himself from earning commissions. 220 AppDiv189, 221NYS179.

177-62½-New. An employee given under contract a monthly share of commissions as actually collected is not entitled to uncollected commissions. 165 La471, 115S660.

177-62⅓-New. Where taxes deducted from the sales price were refunded to the employer, a salesman is entitled to recover a commission thereon, under a contract for commission on the full sales price. 104NJL145, 138A888.

177-62¼-New. A salesman is entitled to commissions on orders accepted by the employer, although the original employment contract was canceled. 194 NC729, 140SE722.

177-62½-New. Where a corporate manager died before expiration of his contract of employment, providing for an annual commission on the net earnings of the corporation, the commissions recoverable for the portion of year preceding his death are to be calculated on the basis of the entire year's profits, proportioned to the portion of the year deceased served the corporation. 295 Pa179. 144A915.

177-65 177Ark1046, 9SW(2d)305; 95 CalA299, 272P770. [e] **"Should," used in telegrams as to bonus,** held to be expression of opinion and not promise to pay. 220MoA95, 278SW1060. [f] **Employer's reservation of power to substitute new profit sharing plan** held reasonable. 129Misc309, 221NYS292. [g] **Substitute profit sharing plan held to rescind original plan** so far as inconsistent. 129Misc309, 221NYS292. [h] **Share of profits from sale of corporate stock.**-246NY158, 158NE58.

177-67 86CalA753, 261P520; 45Philippine235.

178-70 131Misc353, 225NYS700; 45 Philippine235; Can [1930] 3DomLR 719.

179-80 See also 246NY158, 158NE58.

179-80½-New. Where profits are figured on cost, cash trade discounts of employer are deductible to ascertain precise cost. 211Ky791, 278SW124.

179-80⅓-New. Trade discounts not taken advantage of are not deductible to ascertain cost. 211Ky791, 278SW 124.

179-81½-New. Accounting. An employee is not entitled to an accounting because his compensation is to be measured by percentage of the profits. 214 AppDiv530, 212NYS464.

179-82 246NY158, 158NE58.

179-86 [a] **Losses in general.**-316 Ill 397, 147NE369.

179-87 316 Ill 397, 147NE369.

179-88 [a] **"Net cost of manufacturing"** clothing includes wages for designers, foreman, machinists, and engineers, and rent for manufacturing space. 249NY100, 162NE598.

179-92 30 OhA167, 164NE436.

179-92½-New. Invested capital should be deducted in estimating net profits. 316 Ill 397, 147NE369.

180-97 45Philippine235.

180-99½-New. 316 Ill 397, 147NE369 (depreciation and depletion of capital stock).

180-1 316 Ill 397, 147NE369.

180-8 TexCivA 4SW(2d)1029.

180-11½-New. Where an agreement provides for an allowance of depreciation, a percentage of excess valuation may be charged off. 165La874, 116S 218.

181-24½-New. An employer is not entitled to deduct interest on invested capital wrongfully withheld from an employee. 259Mass242, 156NE73.

181-32 165La874, 116S218.

181-36 See also 165La874, 116S218.

181-38 316 Ill 397, 147NE369; 165La 874, 116S218.

181-39 165La874, 116S218.

182-50 259Mass242, 156NE73.

182-52 260Mass1, 156NE705.

183-64 188Wis45, 205NW393.

184-72½-New. Where a contract for bonus provided for determination by accountants of bonus percentage, their finding was held conclusive where made in good faith. 260Mass1, 156NE705.

184-77½-New. An employee who resigns without required consent cannot participate in profit sharing fund. 129 Misc309, 221NYS292.

184-79 79Mont220, 255P346.

184-83 16F(2d)658.

185-88 Man [1925] 3DomLR314.

185-89 [c] **Weight of coal car.**-104WVa 458, 140SE323.

186-97 See also 300Pa496, 150A899.

186-98 Mo 281SW686.

186-5 [a] **This rule applies,** though employee is promised, at hiring, increased salary if he proves satisfactory, for the next season. 214Ala599, 108S449.

187-22 [a] **Time of payment of percentage of profits under supplemental agreement** is that specified in original agreement. Me 149A574.

187-24 15F(2d)672. But see Ida 290P 377.

188-35 201Cal 155, 255P825; Man [1927] 2DomLR713. [a] **Failure to pay** is repudiation of contract. Man [1927] 2DomLR713.

188-43½-New. Firm money belongs solely to the owner of the business until transferred to the employee or set apart for his benefit although the employee's earnings may have been measured by the percentage of gross sales or net profits of the business. 292Pa 532, 141A446.

189-47½-New. An agreement to receive corporate stock in payment of wages is converted into money demand by failure to deliver stock. 202 Iowa646, 210NW793.

189-47⅓-New. An employee is justified in refusing to receive the stock at a time when, without his consent, the corporation has become heavily encumbered by mortgage. 202 Iowa646, 210 NW793.

189-60 284Pa410, 131A360 (payment).

189-62 284Pa410, 131A360.

190-75½-New. Recovery on common counts may be had where employee is discharged without cause. 213Ala129, 106S60 (and holds himself ready to perform in full).

190-93 [a] **Where plaintiff, employed as bookkeeper by month, after he was discharged** to take effect January 1, in order to balance his books, returned and worked on books till January 7, allowing him to recover for the additional period on quantum meruit which, though not claimed in pleadings, was proved without objection, was not error. 9LaA254, 119S273.

191-6 TexCivA 272SW517. See also 202 Iowa646, 210NW793.

191-10 [a] **Cause of action accrues** when employer is adjudged incompetent. Cal 285P309.

191-11 220Ala190, 124S418.

191-25 Iowa 228NW281 (payment on void assignment).

192-39 208 Iowa458, 223NW521; 211 Ky791, 278SW124.

192-48 [a] (1) TexCivA 3SW(2d)503. (2) 79Mont220, 255P346. [b] 34GaA 278, 129SE441; TexCivA 280SW856. (8) Obligation of one of defendants. 225Ky119, 7SW(2d)851. (4) To alleged contract for forty dollars per week with additional promise to pay ten dollars a week. 34GaA278, 129SE441.

193-55½-New. An employee's petition in terms declaring for damages for breach of contract, but specifying the measure of his damages as the value of his services, amounted to a claim on quantum meruit. 208 Iowa912, 223NW 894.

193-61 TexCivA 10SW(2d)422.

193-62 [c] **In action on severable insurance provision of contract,** performance need not be alleged. 223AppDiv 254, 228NYS139.

194-77 [a] **Set-off allowed held unsupported** by pleading or proof. 211Ky 791, 278SW124.

194-84½-New. although there is authority to the contrary, 48RI 244, 137 A2.

194-93 105NJL560, 143A347. [b] (15) Other instances. 40F(2d)359. [d] **In action to recover net profits on business secured** by plaintiff, proof of profits on total business is at variance with pleadings. 258Mass534, 155NE417.

195-94 203 Iowa676, 213NW431; Tex CivA 282SW669.

196-1 92CalA613, 268P675. [b] **Presumption exists that use of servants' automobile,** demonstrating master's product, was gratuitous, in absence of contrary provision. 229AppDiv388, 241 NYS609.

196-18 [a] **Presumption is rebutted** by evidence showing express agreement inconsistent therewith. 81CalA629, 254P 622.

196-21½-New. Employment by month presumed at will. 233 IllA536.

196-21⅓-New. It is presumed that performance of the service is a condition precedent to payment. 252NY468, 169 NE648.

197-29 233 IllA536; 203 Iowa676, 213 NW431; 2LaA639.

197-32 Iowa 213NW442; 225AppDiv 577, 233NYS16; 48RI 244, 137A2.

197-32½-New. faithfully and according to his best skill and judgment; 48 RI244, 137A2.

197-36 48RI 244, 137A2 (breach). [a] (4) Employee seeking to recover share of profits, including profits from sublease, has burden of showing agreement to treat lease as merchandise. 86CalA 753, 261P520.

197-39½-New. Burden of overcoming presumption of payment arising from rendition of domestic service is on claimant of compensation. 284Pa410, 131A 360.

197-39⅓-New. Where evidence is evenly balanced, an employee does not sustain the burden of proof. 48RI 244, 137 A2.

197-40 233 IllA536.

198-52 48RI 244, 137A2, 5 [citCJ].

198-53 [a] 48RI 244, 137A2, 5 [citCJ].

198-54 238Mich390, 213NW453.

198-58 13LaA186, 126S527 (settlement).

198-59 But see 48RI 244, 137A2.

198-60 But see 48RI 244, 137A2.

198-61 10LaA89, 120S270.

198-68½-New. , or failure of plaintiff to exercise care and skill. 34GaA355, 129SE557 (tree surgeon).

198-68⅓-New. Rule that burden of sustaining plea of plaintiff's failure to exercise care and skill is on defendant apparently applies to implied duties of plaintiff whether defense is based on tort for negligent performance of contractual duties or on alleged breach of the contract itself. 34GaA355, 129SE 557.

198-68¼-New. Employer pleading recoupment in tort must show that plaintiff has negligently performed contract and that injury resulted as direct and natural consequence. 34GaA355, 129SE 557.

199-72 [a] (6) To show that employer agreed to allow commissions for orders taken outside of territory originally allotted. 258Mass93, 154NE848. [d] (12) Employee may show employer's statements prior to employee's engagement as circumstances bearing on probability of truth of owner's defense that

he was not to be individually liable but that salary was to come only from proceeds of business. **TexCivA** 275SW171. [e] (8) Contract between manufacturer and employer. 221**MoA**1066, 295SW838. (9) Method of evidence of compensation not in accordance with terms of contract held inadmissible. 294**Pa**69, 143A482. [g] **Evidence that plaintiff had never been employed by defendant** is admissible. 174**Minn**573, 219NW913.

199–74 [f] **Employment agreement of fellow employee** held admissible under plaintiff's testimony that his salary was to be the same. 174**Ark**282, 295SW713. [g] **Evidence held inadmissible.**–142 **Okl** 184, 286P304.

200–76 [d] (6) General knowledge of salary reduction not known to plaintiff. 39**GaA**291, 147SE118. [e] **Reduction held erroneous without evidence** of error in employer's audit. 211**Ky** 791, 278SW124.

200–78 [a] (6) Salaries paid former employees. 208 **Iowa**767, 226NW174.

200–91 [b] (3) Slips purporting to show total business done during plaintiff's employment excluded as not showing amount of business secured by plaintiff; "secure" means to obtain, to give, to produce, or to get possession of; gain. 258**Mass**534, 155NE417. (4) Plaintiff's testimony as to net profits on all business is inadmissible when commissions were to be paid only on business secured by plaintiff. 258**Mass** 534, 155NE417.

201–94 [g] **Prior losses admissible as** circumstance bearing on probability of truth of owner's defense that plaintiff's salary was contingent on profits of losing business. **TexCivA** 275SW171.

201–1½–New. Evidence of custom is admissible to show expenses of entertaining customers is included in "weekly drawings" or "traveling expenses." 126**Misc**683, 214**NYS**476.

201–3 [a] (7) Time book kept by employer's manager. 96**CalA**304, 273P 1091(1stcase).

202–5½–New. Where plaintiff income tax expert was not seeking compensation for having appeared before certain tribunals before which he was not qualified to represent defendant, a copy of the regulations governing admission of representatives before such tribunals is properly excluded. 140 **Wash**663, 250P64.

202–6 174**Minn**573, 219NW913.

202–15½–New. Employee suing on an express contract is restricted to wages agreed upon. 48**RI** 478, 139A302.

202–18½–New. , or profit sharing agreement to show improbability of claim. 104**Conn**464, 133A579.

202–18½–New. Evidence of payment is admissible in salesman's action for bonus. **NJ** 150A330.

202–23½–New. Evidence that sum charged as advances was made for specific purpose of entertaining customers is admissible to explain such advance. 126**Misc**683, 214**NYS**476 (in motion for advances for weekly drawings and traveling expenses).

202–23¼–New. It is error to exclude evidence of payment. 213**Ala**551, 106S 136.

202–23¼–New. In suit for commissions and prize, a salesman has been held entitled to show that the prize had not been paid. 220**Ala**190, 124S418.

202–25 [a] 175**Ark**1170, 1**SW(2d)**54; 204 **Iowa**426, 213NW230; 126**Kan**468, 268P826; 11**LaA**113, 123S154; 175 **Minn**197, 220NW602. [b] 214**Ala**599, 108S449; 165**La**750, 116S173; 221**App Div**6, 222**NYS**384; 223**AppDiv**312, 228 **NYS**113; 131**Misc**524, 227**NYS**155. [c] **In establishing right to commissions,** plaintiff is not limited to proof of custom where evidence established oral contract. 219**MoA**211, 269SW665.

203–26 31**Ariz**65, 250P364; 259**Mass** 424, 156NE534.

203–27 [a] (1) 37**F(2d)**874 (agreement on hours and compensation); 170**Ark** 1192, 280SW662; 131**Misc**353, 225**NYS** 700 (employee is entitled to percentage of profits without deduction for bad accounts); 87**PaSuper**195. (2) 13**LaA** 186, 126S527. (3) **TexCivA** 294SW252. (4) 10**LaA**134, 120S894; 118 **Or**421, 247 **P**139; 101**WVa**341, 132SE751. (5) 83 **CalA**128, 256P493. (6) 199**Wis**489, 227 **NW**1. (8) 81**CalA**629, 254P622; 12 **LaA**190, 125S184. (10) 204 **Iowa**426, 213NW230. (12) Fixed salary in addition to commissions, and not mere advancements on commissions earned. 95**CalA**532, 272P1087. [b] (10) 169 **Minn**512, 210NW895. (17) 213**Ky**87, 280SW475. (18) 86**CalA**753, 261P520. (23) Right to compensation for services rendered after termination of employment. 86**CalA**753, 261P520. (24) To show any contract obligation by employer to continue protection of employee under group insurance plan after termination of employment. 266 **Mass**255, 165NE476. (25) Other instances. 170**La**240, 127S614. [c] **Evidence authorizing inference of per diem basis,** and showing some payment authorized denial of further recovery. 41 **GaA**513, 153SE437(1stcase).

203–28 174**Minn**297, 219NW180.

204–29 76**CalA**326, 244P632. [a] 29 **Ariz**452, 242P866; **Cal** 290P39; 133 **Okl** 212, 271P1009.

204–31 [b] **IndA** 155NE715. [c] **Verdict as to whether salesman agreed that service charge of customer be divided among employer and employee** held against weight of evidence warranting setting aside. 215**AppDiv**333, 213**NYS**342. [d] **Evidence held to sustain finding** of new oral agreement to change commission rates. **CalA** 290P 613.

204–32 89**CalA**442, 264P798; **CalA** 290 **P**613 (holding conduct of parties to support conclusion of abandonment).

204–36 [a] 170**Ark**1192, 280SW662; **CalA** 285P907 (labor in oil drilling); 246**Mich**113, 224NW416(3dcase); 177 **Minn**259, 225NW111(1stcase); 138 **Okl** 141, 280P591. [b] 34**GaA**355, 129SE 557 (to sustain employee's plea of recoupment for negligent performance); 144**Wash**185, 257P624.

204–37 [a] 40**F(2d)**359 (stock allotment and time of determination); **Man** 22**DomLR**8, 31**WestLR**654. [b] 15 **F(2d)**672; 52**SD**113, 216NW867.

205–40 89**PaSuper**179.

205–43 103**NJL**553, 137A211.

205–45 [a] 31**Ariz**65, 250P364; 79**CalA** 485, 249P1092; 81**CalA**629, 254P622; **Ida** 286P914 (item for additional mileage on automobile used by plaintiff); **IndA** 155NE715; 204 **Iowa**426, 213NW 230; 161**La**76, 108S130; 11**LaA**629, 124 S564(1stcase); 7**LaA**68; 242**Mich**360, 218NW707; **NJSup** 136A424; 128 **Misc**382, 219NYS131; 131**Misc**353, 225 **NYS**700; 118 **Or**421, 247P139; **Tex CivA** 10SW(2d)238 (profits). [b] 76 **CalA**326, 244P632; 10**LaA**268, 120S 686; **TexCivA** 10SW(2d)143. [c] **To support payment in full.**–94**CalA**218, 270 **P**1003. [d] **Salaries of executive officers** as measure of recovery held inadmissible. 294**Pa**69, 143A482.

205–48 [a] 161**La**76, 108S130; 9**LaA** 400, 120S730(1stcase).

206–51 See also 79**Mont**220, 255P346.

206–55 203 **Iowa**676, 213NW431; **Iowa** 224NW64; 219**MoA**211, 269SW665; **MoA** 17SW(2d)562; 220**AppDiv**263, 221 **NYS**420; 225**AppDiv**684, 231NYS341.

206–56 97**Fla**533, 121S802; 203 **Iowa** 676, 213NW431; 245**Mich**593, 223NW 228; 38 **OklACR**368; **TexCivA** 30SW (2d)362; 155**Wash**600, 285P663; **Wash** 288P275 (question of fact for trial court).

206–59 [a] (1) 85**PaSuper**164. (5) Whether plaintiff was employed by both defendants. **MoA** 1SW(2d)205. (6) Other instances. 128 **Or**632, 275P676.

206–61 180**Minn**514, 231NW204; **NJ Sup** 133A174. [a] (2) Evidence of individual liability of president of corporation held not to warrant submission to jury. **NJSup** 133A174.

206–61½–New. Whether proof adduced to establish oral contract to pay for domestic services rendered is primarily a question for jury. 284**Pa**410, 131A 360.

206–62 19**F(2d)**989.

206–66 245**Mich**593, 223NW228; **MoA** 298SW1067.

206–67 48**RI** 478, 139A302; **SD** 230NW 226.

206–69 208 **Iowa**458, 223NW521.

207–72 206 **Iowa**198, 220NW62; 258 **Mass**93, 154NE848; **TexCivA** 30SW(2d) 362. [c] **Whether personal service of salesman** procured orders on which commissions are claimed is for jury. 241**NY**598, 150NE570.

207–77½–New. or whether the sum charged as advances was given to a salesman to entertain customers; 126 **Misc**683, 214**NYS**476.

207–79½–New. Question as to existence of custom affecting compensation is for jury. 126**Misc**683, 214**NYS**476.

208–84 220**AppDiv**263, 221**NYS**420.

208–89 33 **OhA**306, 169NE309.

208–91 **Iowa** 213NW442.

208–92 241**NY**598, 150NE570.

209–99 48**RI** 244, 137A2.

209–7 242**Mich**360, 218NW707; 249 **Mich**228, 228NW707(1stcase); **TexCivA** 294SW252.

209–9 144**Wash**185, 257P624.

210–16 208 **Iowa**767, 226NW174 (failure to submit defense of fraud and collision held error); 174**Minn**297, 219NW 180. [f] **Refusal to define phrase** held proper. 126**Kan**470, 268P809.

210–17 170**Ark**1192, 280SW662. [c] **Instructions properly refused as misleading.**–21**AlaA**161, 106S58 (under evidence).

210–18 168**Ark**943, 272SW663 (granting prayer for instruction predicated on issue raised held not error); 208 **Iowa**458, 223NW521.

210–19 **Iowa** 213NW442.

210–20 [f] **Instructions properly refused as confusing and misleading.**–21 **AlaA**161, 106S58. [g] **Reference in charge to plaintiff's claim as for loss of profits instead of for services rendered** held not misleading where all evidence directed to services. 249**Mich** 228, 228NW707(1stcase).

211–26 219**MoA**211, 269SW665 (instructions held proper).

211–34 **Iowa** 213NW442.

211–35 [a] 208 **Iowa**458, 223NW521.

212–39 [b] **Directing verdict for amount due stipulated** in action by employee under contract at will discharged for cause is proper where employer concedes that he is not entitled to money damages for employee's breach. 126 **Misc**370, 213**NYS**433.

212–43 48**RI** 478, 139A302.

212–45½–New. An instruction submitting a single issue of reasonable value of services should not fail to tell the jury what they should take into consideration. 140**Wash**663, 250P64.

213–54 [f] (2) Findings on special issues held to support judgment. **Tex CivA** 10SW(2d)422.

214–71 246**Mich**113, 224NW416(3d case).

214–74 175**Minn**197, 220NW602.

214–75½–New. Judgment for labor and expenses should indicate what portion of recovery is for labor and what portion for expenses. **TexCivA** 23SW(2d) 875.

214–79 118 **Or**542, 247P804 (in action against surety on bond for payment of wages); 119 **Or**478, 249P1099.

214–80 [a] (8) Fees not allowed where employee has willfully violated his contract. 119 **Or**478, 249P1099. (9) In case employee voluntarily quits employment, he must have given not less than three days' notice of his intention to quit. 119 **Or**478, 249P1099. (10) But such notice is of course not required where employee remains on job till its completion. 119 **Or**478, 249P 1099.

214–80½–New. , and in some jurisdictions unless the employee has willfully violated his contract. 119 **Or**478, 249P 1099.

214–84 120**Kan**444, 243P1051; 85**Pa Super**164.

214–85 126**Kan**470, 268P809.

215–87 [a] **Evidence held insufficient** to show manager's liability from account statements. 13**LaA**639, 127S400.

215–88 [b] **Manager of store held bound to account** only for his administration, not his employer's. 13**LaA**639, 127S400.

215–90 [a] **Questions of fact.**–200 **Iowa** 458, 204NW413.

215–95 135**Misc**365, 238**NYS**91.

215–97½–New. Laches. Where percentage of profits was not to be paid until expiration of contractual period of serv-

ice, which was extended by verbal agreement, and suit is brought within two months after expiration of extended period, defense of laches is not sustainable. 149Md148, 131A147.

215–97½–New. Evidence held to support finding of employment of salesman under oral contract to pay him one third of profits, without deducting salary of president. 259Mass242, 156NE73.

215–97¼–New. Letter from employer to salesman is competent to prove terms of contract as to compensation. 259 Mass242, 156NE73.

215–97½–New. Evidence held insufficient to establish a case for plaintiff in a suit in equity for an accounting. 157 Md675, 147A530.

215–4 151Va426, 145SE352.

215–5 [a] **Purpose of statutes** is to protect toilers. 205 Iowa508, 218NW 298. [b] **In Kansas.**–124Kan486, 260 P972.

215–6 [a] **Statute held sufficiently definite** as to officer authorized to issue attachment. 138SC478, 137SE141.

215–7 90Fla582, 107S354; 213Ky55, 280SW462.

216–8 [b] **Preference of clerk, secretary, etc.,** in property of employer is not conditional on insolvency or cession of property. 13LaA302, 126S591.

216–9 10LaA60, 120S482.

216–10½–New. Nor are such statutes given an extraterritorial effect, and, therefore, no lien arises out of a contract for labor made and performed in another state. 39GaA155, 146SE514.

216–13½–New. Laborers' liens have been held not subject to recording acts. 203 Iowa608, 213NW213.

216–17 153SC459, 151SE87 (additional compensation held not "bonus").

216–19 5LaA168.

217–42 [i] (5) General manager is entitled, under statute, to lien for every workman, laborer, or other person who performs any work or labor for any incorporated company. 107WVa66, 146 SE890(2dcase). [o] (4) Is not entitled where he acted as superintendent of grounds and caretaker of golf course. 98CalA668, 277P497(1stcase). [s] **Woods rider** for private turpentine operator held not entitled to lien as employee of merchant, on turpentine and resin, though employer ran small commissary in connection with business. 90Fla582, 107S354. [t] **Overseer** for turpentine operator held to have been for services on personal property in production of which services were performed. 90Fla582, 107S354. [u] **Commissary operator** held not entitled to lien for compensation. 220Ky15, 294 SW822. [v] **Liquidating or collecting agent** is not employee within statute. TexCivA 6SW(2d)139.

218–49½–New. Employee working on commission held not entitled to lien against product manufactured by employer. 138SC478, 137SE141.

218–49½–New. An employee of an independent contractor is not entitled to a lien on contractee's property. 37GaA 60, 139SE127.

218–49¼–New. This rule applies despite supervision of work by the owner. 37 GaA60, 139SE127.

218–51 229Ky738, 17SW(2d)1024.

218–55 [b] **Common laborer.**–TexCivA 32SW(2d)671.

218–61 La 121S323.

219–87 142Miss50, 107S275.

219–88 142Miss50, 107S275 (persons agreeing with saw mill owner to haul lumber to railroad at so much per thousand feet are employees and entitled to lien). [a] **Employees not limited to "laborers."**–153SC459, 151SE87.

219–98 13LaA380, 128S314.

219–1 10LaA60, 120S482.

219–9 205 Iowa508, 218NW298. [a] **Execution issued at instance of labor claimant.**–205 Iowa508, 218NW298.

220–14½–New. **In Texas,** under statute, the time for filing accounts to secure a lien is from the maturity date of the amount owing as fixed in the original contract. CivA 19SW(2d)71.

220–14½–New. Where a contract provides for payment at the date of sale of crop, a laborer, under statute, had thirty days after such sale to fix and preserve his lien. TexCivA 19SW(2d) 71.

220–15 35GaA172, 132SE236; 37GaA 60, 139SE127; 13LaA380, 128S314 (clerk's lien held on all property of employer).

220–16 37GaA60, 139SE127.

220–24½–New. Lien for services held not to attach to scrape or turpentine gum on trees. 90Fla582, 107S354.

220–24¼–New. Lien attaching to crude or dip turpentine held not destroyed by change in distilling to form of spirits of turpentine or resin. 90Fla582, 107S354.

220–26½–New. Under some statutes the lien extends only to articles made or repaired by the employee and not to articles only used by him. TexCivA 275 SW850.

220–31 143Wash691, 254P457.

221–43 But see 13LaA380, 128S314.

221–48 13LaA302, 126S591 (judgment of secretary for wages).

221–50 But see 40GaA447, 150SE201.

221–57 But see 213Ky55, 280SW462.

221–59 13LaA380, 128S314.

221–67 90Fla654, 107S358.

221–69 TexCivA 19SW(2d)71.

222–77 But see 151Va426, 145SE352.

222–78 TexCivA 275SW850 (account held insufficient to establish lien on articles repaired).

223–85 169La884, 126S225 (intervener must prove ownership).

223–88½–New. Under some statutes no record of an account is necessary to make effective a lien as against the debtor. TexCivA 275SW850.

223–8½–New. Evidence held insufficient to show right to lien. 37GaA60, 139SE127.

223–8½–New. **Estoppel.** Plaintiff filing replevy bond and going to trial was estopped in subsequent action to claim employer was not employee under statute. 156SC356, 153SE280.

223–8¼–New. Claimant's undisputed testimony as to duties establish his status as clerk entitled to preference. 95PaSuper36.

224–11½–New. Employer has been held estopped to move to dissolve attachment to enforce a lien claimed by an employee. 138SC478, 137SE141.

224–11½–New. A portion of an affidavit by employee, on employer's motion to dissolve attachment, seeking to bring the employee within the statute authorizing a lien, has been held incompetent. 138SC478, 137SE141.

224–11¼–New. Where claim was against partnership claimant's petition is properly refused in absence of proof that property sold under execution was that of partnership. 95PaSuper36.

224–14½–New. Where, upon the foreclosure of a laborer's general lien as provided by statute, the property seized is not replevied, no general judgment thereon can be rendered, even though a counter-affidavit disputing the correctness of plaintiff's claim is filed by defendant. 39GaA155, 146SE514.

224–27½–New. Waiver by employee bars recovery by assignee. 143Wash 691, 254P457.

224–35 [a] **In Washington** Minimum Wage Law does not apply to employee rendering intermittent service. 141 Wash417, 251P583.

225–45 141Wash417, 251P583.

225–47½–New. Under the Minimum Wage Act, the board of adjustment may fix a minimum wage for all persons engaged in a particular industry. **BC** [1927] 2DomLR494.

225–48 157Md576, 146A797; 127Misc 307, 216NYS141; 128Misc317, 218NYS 571. [a] **Not within constitutional inhibitions against depriving city** of property without due process of law, abridging its privileges and immunities or denying it equal protection of laws. 127 Misc307, 216NYS141.

225–49 218NYS581.

225–50 See also 164Ga560, 139SE148.

226–56 Can [1928] 4DomLR972; **BC** [1928] 3DomLR18. [a] **In British Columbia.**–[1930] 4DomLR386; [1929] 4 DomLR1034.

229–95 [a] **Notice to employer essential to criminal prosecution.**–Under New Jersey statute, employer cannot be convicted of violation unless statutory notice of violation has been given by commissioner of labor. NJ 141A561.

231–16 [c] **Statute providing that, on nonpayment by railway company** of wages of employee, wages shall continue from date of discharge or refusal to further employ is penal and must be strictly construed. 173Ark398, 292SW 375, 51ALR1206.

231–18½–New. A statute requiring payment of wages immediately upon discharge of a laborer forms a part of the contract of employment, 132SC454, 129 SE203, 41ALR439.

231–18½–New. A laborer's statutory right to immediate payment of wages upon discharge may not be waived by contract, express or implied. 132SC454, 129SE203, 41ALR439.

231–18¼–New. A custom that a laborer must vacate his house before he will be entitled to pay is no defense to his claim under a statute requiring the payment of wages immediately upon discharge. 132SC454, 129SE203, 41ALR 439.

231–19 9LaA47, 118S856. But see MoA 296SW198.

231–21 MoA 296SW198.

231–22 9LaA47, 118S856. [b] **Equitable defense to penalty** may be asserted by employer. 160La213, 106S831.

232–33 [b] **Emergency employee** held not entitled to recover penalty for nonpayment of wages. 173Ark398, 292SW 375, 51ALR1206.

233–56 9LaA47; 118S856.

233–65 168Ark955, 272SW650. [a] **Complaint held insufficient.**–50Nev99, 256P1058.

233–66 168Ark955, 272SW650.

233–67 [a] (6) To show compliance with statute by plaintiffs and failure of defendant to pay wages at time and place required thereby subjecting itself to penalty prescribed. 168Ark955, 272 SW650. (7) To justify award against railroad company for failure to pay wages to discharged employee. 170Ark1193, 280SW626.

234–76 102WVa147, 134SE736. [b] **Scrip is violative of statute** where it purports to be payable in cash on pay days when due, and otherwise to be redeemable in merchandise. 102WVa147, 134SE736.

235–92 215Ky18, 284SW100.

236–95 But see 105WVa287, 142SE259.

236–97 215Ky18, 284SW100.

236–2½–New. Where scrip was issued "for labor performed or labor to be performed," under statute permitting scrip for labor to be performed to be redeemed in merchandise, defendant has burden of showing amount issued for such purpose. 102WVa147, 134SE736.

236–2½–New. Joinder of trader and employer is a misjoinder since liability is not joint. 215Ky18, 284SW100.

236–2¼–New. A purchaser is entitled to sue for the full amount of scrip, where he has paid par in merchandise for it to a person from whom he bought it. 228Ky76, 14SW(2d)400.

236–2½–New. Possession of scrip makes prima facie case for redemption where defendants do not deny plaintiff merchants were entitled thereto. 234 Ky249, 27SW(2d)965 (pleading and proof).

237–24 [b] **In Oklahoma.**–269US385, 46SCt126, 70Led322.

237–25½–New. **Determination of prevailing rate of wages** is one of fact depending upon the actual circumstances guided by the rules of law. 218NYS578 (rate of wages in subway contract).

238–32½–New. The Adamson Act, providing for an eight-hour day as a standard of fixing compensation for employees actually engaged in the operation of trains, must be construed as merely fixing hours of labor of trainmen actually operating trains as members of crews, who were striking at the time of the enactment. 21F(2d)123.

240–55½–New. [§ 347a] i. **Crimes and Misdemeanors.** A statute making it a misdemeanor for an employer to refuse, when able, to pay laborer wages due when demanded or falsely to deny the amount or validity thereof, or that the same is due, with fraudulent intent, and providing a penalty for violation,

is constitutional. 76CalA347, 244P940.
240-59 TexCivA 291SW281.
240-61 TexCivA 291SW281. See also TexCivA 278SW272.
240-62 TexCivA 291SW281.
240-63 TexCivA 291SW281.
240-64 TexCivA 291SW281.
241-66 [c] **Selection of hospital.**–120 Okl 182, 250P926. [d] **Assumption of care by next of kin.**–120 Okl 182, 250P926.
241-67 TexCivA 278SW272.
241-69½-New. A physician employed to treat an injured employee is not a servant of the master. 73Mont407, 236P1069.
241-69¾-New. If a physician engaged by the employer had charge of the treatment of the employee's injuries, the acts, knowledge, and conduct of the physician in relation to the injuries were those of the employer. 323Mo531, 19SW(2d)679.
241-78 213Ala412, 104S841.
241-79 213Ala412, 104S841; 73Mont407, 236P1069 (no breach shown); TexCivA 289SW1027.
242-85 213Ala412, 104S841 (contract to furnish medical attendance implies continuance of benefits during sickness).
242-94 [a] **It is immaterial** that employer received no benefit from fund collected. 213Ala412, 104S841.
242-1½-New. , nor is he required to send the employee to a hospital maintained by the employer. 73Mont407, 236P1069.
242-2 [a] Under contract to furnish medical attention by deducting one dollar monthly from wages, employee has till end of month to make payment. 213Ala412, 104S841.
243-4 73CalA605, 238P1087. [b] **Investigation by employer.**–73CalA605, 238P1087.
243-5 73Mont407, 236P1069 (duty to secure aid elsewhere).
243-9 218Ky497, 291SW737.
243-9½-New. Employee may recover for additional pain and suffering caused by refusal to furnish medical aid. 73Mont407, 236P1069.
243-10 But see 103WVa402, 137SE535.
243-11 73Mont407, 236P1069 (complaint held sufficient). [a] (1) 73Mont407, 236P1069. (2) Evidence insufficient to sustain burden of proof. 73Mont407, 236P1069. [f] **Motion for nonsuit** properly denied. 73Mont407, 236P1069. [g] **Malpractice.**–73Mont407, 236P1069.
243-11½-New. In absence of privity of contract between employee and physician rendering service, physician should not be joined in action against master for breach of contract to furnish medical service where no relation of master and servant existed between physician and master. 73Mont407, 236P1069.
244-14 [b] **Employer's breach of contract** to furnish competent physician is for jury. 218Ky497, 291SW737.
244-14½-New. Instructions held incorrect. See 73Mont407, 236P1069.
244-14¾-New. In an action by an employee to recover damages for failure of his employer to furnish medical and surgical necessities by reason whereof it is alleged that plaintiff contracted a disease, an instruction that, if the jury believe that plaintiff contracted such disease by reason of his own gross negligence, he is not entitled to recover is proper. 73CalA605, 238P1087.
244-15 82NH268, 133A4, 46ALR380; 136SC95, 134SE247, 250, 251 [quotCJ]; TexCivA 291SW281.
244-16 136SC95, 134SE247, 250, 251 [quotCJ]; TexCivA 278SW272. See also 232Ky237, 22SW(2d)602 (telegraph company).
244-18½-New. An employee seventeen years of age is of sufficient intelligence to appreciate the consequences of vaccination by his employer, and his consent thereto, demanded as a condition to retaining his job, is not duress. 155Miss1, 119S501, 62ALR191.
244-21 232Ky237, 22SW(2d)602 (knowledge of competency); TexCivA 278SW272.
244-22 136SC95, 134SE247, 250, 251 [quotCJ].
244-23 87IndA101, 166NE666(1st case); 232Ky237, 22SW(2d)602; 136SC95, 134SE247, 250, 251 [quotCJ]. [a] 232Ky237, 22SW(2d)602.
245-24 136SC95, 134SE247, 250, 251 [quotCJ].
245-25 136SC95, 134SE247, 250, 251 [quotCJ].
245-27 136SC95, 134SE247, 250, 251 [quotCJ].
245-28 136SC95, 134SE247, 250, 251 [quotCJ]. [a] **Premature discharge.**–MoA 20SW(2d)952.
245-29 136SC95, 134SE247, 250, 251 [quotCJ].
245-30 73Mont407, 236P1069.
245-31 Ont [1929] 2DomLR842.
245-32 73Mont407, 236P1069.
245-33 73Mont407, 236P1069.
245-34 218Ky497, 291SW737, 738 [cit CJ]; 153Miss776, 121S819; 73Mont407, 236P1069; Ont [1929] 2DomLR842. [a] (3) Employer is regarded as merely administrator of charity or trust fund. 73Mont407, 236P1069.
246-41 23F(2d)902.
246-51 [a] (2) Railroad company furnishing hospital accommodations and medical attendance for employees who make monthly contribution is not liable for injury to employee who fell out of bed after operation through negligence of doctors and nurses where company used ordinary care in selection of doctors and attendants. 23F(2d)902. [b] **Failure to equip hospital with portable X-ray machine** does not constitute failure to furnish necessary hospital equipment where such machine was available. 23F(2d)902.
247-54½-New. An employee, alleging negligence of the employer in supplying the proper equipment and help, has the burden of proof. 153Miss776, 121S819.
248-77 See also 330Ill11, 161NE150. [a] **Continuance of pension fund.**–330Ill11, 161NE150.
248-85 [a] **Statement in application as to previous injury** is not fraudulent misrepresentation where injury did not disable employee till long after the accident. 32F(2d)559.
249-2 [b] **Disposition of contributions made by discharged employees.**–330Ill11, 161NE150.
249-4 24F(2d)33.
249-7 330Ill11, 161NE150.
250-10 242IllA548.
250-17 [c] **Divorced wife.**–104WVa464, 140SE335, 59ALR167. [d] **Status of beneficiary at time of death governs.**–104WVa464, 140SE335, 59ALR167.
251-19 But see 104WVa464, 140SE335, 59ALR167.
253-51½-New. In an action for disability and death benefits against employees' mutual relief association and employer, which guaranteed payment of such benefits, a telephone conversation between deceased employee's wife and employer is admissible on the question whether the required notice was given under a by-law of the association requiring every member abstaining from work on account of physical disability immediately to inform his timekeeper or other person designated to receive such report. 133Misc610, 233NYS5.
259-30 180Ark1056, 24SW(2d)340; 220MoA640, 291SW139; 151Va815, 144SE863.
260-36 8F(2d)332; 213Ky776, 281SW1020; 217Ky1, 288SW1060; 224Ky211, 5SW(2d)1064; 125Me96, 131A5; 241Mich370, 217NW51; 220MoA640, 291SW139; 190NC632, 130SE739; 191NC90, 131SE387 (employer liable only when injury is caused by his failure to perform duty prescribed by law and arising out of relationship); 285Pa27, 131A477.
260-37 8F(2d)332; 128Me314, 146A903; 241Mich370, 217NW51; 220MoA640, 291SW139; MoA 7SW(2d)1032; 190NC632, 130SE739; 191NC90, 131SE387; Or 293P414.
261-40 217Ky1, 288SW1060; 224Ky211, 5SW(2d)1064; 241Mich370, 217NW51; 190NC632, 130SE739. [a] Ala 129S60.
261-41 217Ky1, 288SW1060.
261-52 172Ark508, 290SW74; 191NC75, 131SE390.
262-55 191NC75, 131SE390.
262-59½-New. Whether evidence is sufficient to show defect under Boiler Inspection Act is determined by federal view of proof. 83NH10, 138A315.
263-83 [a] (4) Code (1904) § 1294K, as amended, enlarging rights of railroad employees, was repealed by the Code of 1919 which omitted it. 144Va65, 131SE334. (5) Kansas Mining Law, requiring mines to be supplied with sufficient prop timber, was not abrogated by the Workmen's Compensation Law. 322Mo158, 16SW(2d)190.
263-85 82NH236, 133A9; 194NC227, 139SE242.
264-88 [d] (1) Or 284P586 (includes municipal corporations).
264-89 217Ky1, 288SW1060.
264-90 32Ariz463, 259P1049.
264-91 200Cal265, 252P1045. [a] (7) Both employer and employee must be engaged in commerce at time of injury to authorize recovery under statute. 217Ky1, 288SW1060. [g] **Injury to one performing nonhazardous work** is not within statute where hazardous feature of work did not cause injury. 98Fla1158, 125S872.
265-92 [b] **Employee of company icing cars of railroad** held employee of independent contractor and not under terms of state compensation act. 143Wash271, 255P110. [c] **Whether person is employee or officer** within statute depends on duty he is required to perform and not on name he is called by or on fact he is required to take oath of office. Or 284P586 (lineman held employee and not officer in city fire department).
265-95 32Ariz463, 259P1049.
265-98 [a] **Negligence must be proximate cause of injury.**–OhA 153NE870.
265-99½-New. "Defect in condition of machinery," refers to safety of employees and not to capacity of machine, when used in Employers' Liability Act. 253Mass99, 148NE463.
265-99¼-New. When Employers' Liability Act speaks of remedying a defect, it means to end its dangerous condition. 253Mass99, 148NE463.
265-99¾-New. Defect in condition of machinery within Employers' Liability Act may be want of safety device. 253Mass99, 148NE463.
265-3 240Mich655, 216NW467. [d] **Act is broad enough** to include municipalities operating railroads. 32F(2d)913.
265-5 See also 32F(2d)913.
265-6 37F(2d)828; 42F(2d)387; 250NY345, 165NE805; 287Pa302, 135A209. [a] 220MoA1229, 298SW1069.
265-8 TexCivA 297SW1063.
266-17 23AlaA490, 127S679.
266-21 281US635, 50SCt440, 74Led1082; Mo 292SW732; MoA 274SW871. [a] **Act may be construed in contrast with statutes making employers liable,** in absence of tort. 281US635, 50SCt440, 74Led1082.
266-23 [a] **Engaging in commerce necessary.**–Both employer and employee must be engaged in commerce at time of injury in order that employee recover under act. 217Ky1, 288SW1060. [b] **Injuries held to arise out of and in course of employment.**–SC 155SE428.
266-24 271US472, 46SCt564, 70Led1041; 275US426, 48SCt177, 72Led351; 276US165, 48SCt215, 72Led513; 32F(2d)561; 232IllA346; 217Ky1, 288SW1060; 125Me96, 131A5; Mo 30SW(2d)735; 191NC153, 131SE670; NC 154SE682; 293Pa343, 143A5; TexCivA 291SW281; Va 153SE874. [b] **Negligence must be proximate cause of injury.** OhA 153NE870. [c] **Negligence under federal Employer's Liability Act** is determined from common law and rulings of federal courts as to what is negligence at common law. 174Ark1083, 298SW849.
266-25 [b] **Word "works"** includes station platform in case of station agent. 275US426, 48SCt177, 72Led351. [c] **Deposit platform** is within statutory classification of "works or other equipment." Nebr 231NW812.
266-26 281US635, 50SCt440, 74Led1082 (defining negligence); 217Ky1, 288SW1060; 229Ky685, 17SW(2d)753.
266-27 136SC95, 134SE247, 250, 251 [quotCJ]. See also 26F(2d)317.
266-29 IndA 163NE618; 176Minn104, 222NW641; Mo 30SW(2d)735; 189NC813, 128SE345; 191NC153, 131SE670; 192NC522, 135SE522; Okl 293P250

(measure of damages). See also MoA 7SW(2d)740. [a] **Rule of federal courts relating to necessary evidence to establish negligence governs** in cases brought under Federal Employers' Liability Act rather than scintilla rule adhered to by state court. 228Ky500, 15SW(2d)300.

266–31 Ind 163NE618; 192NC522, 135 SE522.

267–39 324 Ill 74, 154NE433; 118Nebr 690, 226NW421.

267–42 225Ky465, 9SW(2d)217.

267–43½–New. In some states the federal and state acts are substantially alike, and the question whether plaintiff was injured while engaged in interstate or in intra-state commerce is unimportant. 179Minn67, 228NW546.

267–44 324 Ill 74, 154NE433; 229Ky 365, 17SW(2d)224; 125Me96, 131A5; 197NC17, 147SE698.

267–55 249 IllA567. [a] **Pulmonary tuberculosis.**–249 IllA1.

267–55½–New. At common law, no recovery can be had for injury to, or death of, employee due to occupational disease. 29 OhA396, 163NE577(2dcase).

268–57 42F(2d)357; LaA 130S851; 190 NC632, 130SE739; TexCivA 283SW895; TexCivA 295SW945. [a] (2) Matters determinative or conclusive. 42F(2d)357. [f] **Direct contract not essential** to establish relation of master and servant within meaning of rule requiring reasonable care by master. 85 IndA591, 155NE179. [g] **Student fireman working under orders of company** has been held employee though drawing no pay. 315Mo 409, 286SW45. [h] **Municipality being master** of injured person is not exempt from liability for negligence or torts. TexCivA 27SW(2d)281.

268–60 30F(2d)50.

269–65½–New. That the servant made false statements as to termination of former employment and his physical condition will not prevent recovery for injuries which were not caused thereby. 218Ky197, 291SW401.

269–67 126Me5, 135A249; 218AppDiv 195, 218NYS123; 31 OhA446, 167NE482; Vt 147A281. [b] **Servant may be volunteer** in performing service without scope of employment contemplated by master. 168Ark1074, 272SW688.

269–68 124 Or237, 264P459.

269–70 173Ark43, 291SW982; 211Ky 750, 278SW111; 126Me5, 135A249; 218 AppDiv195, 218NYS123; 285Pa72, 131A 592; 21SaskL465, [1927] 2DomLR941, [1927] 1WestWkly949.

269–71 77CalA462, 247P236; 31 OhA 446, 167NE482; 285Pa72, 131A592. [a] 31 OhA446, 167NE482; 285Pa72, 131A 592. [b] **Liability of master depends on facts of each case** determined from existence of emergency, location of work, interest of volunteer, age of volunteer, and other details of each situation. 218 AppDiv195, 218NYS123.

270–72 98CalA568, 277P529(2dcase); 152Md427, 137A30, 34 [quotCJ]; 238 Mich289, 213NW169, 172 [citCJper Clark,J] (dictum); Vt 147A281. See also 218AppDiv195, 218NYS123; 133 Misc486, 232NYS332.

270–72½–New. One assisting servants of another to facilitate his own business or that of one to whom he sustains a contractual relation, mutually beneficial, is not a volunteer. 37GaA130, 138 SE633.

270–73 211Ky750, 278SW111; 218App Div195, 218NYS123.

270–74 211Ky750, 278SW111. [a] **Acquiescence by employer in illegal employment of minor** by invitation of servant constitutes ratification of illegal act of servant. 142Va542, 129SE 222. [b] **Illegal employment of minor by servant** without knowledge of his employer is beyond scope of his employment and is not binding on employer. 142Va542, 129SE222.

270–75½–New. Minor, employed in violation of Child Labor Law, is not for that reason a trespasser or licensee to whom no duty is owed except to refrain from willful injury. 152Tenn614, 279 SW1043.

270–77 276US28, 48SCt241, 72L ed453.

271–78 See also 153Miss72, 117S881.

271–88½–New. A switching crew of a railroad company leasing terminal facilities to another are employees of the lessee in switching and coupling a diner to one of the lessee's trains unless they are under the exclusive direction and control of the lessor. 213Ky336, 281 SW170.

272–2½–New. Right of railroad company to permit use of tracks and engine by industrial company. 42F(2d)357.

272–4 5F(2d)462. [a] **Assistance by master** does not terminate relation. 128 Me374, 147A701.

272–6 But see 197Cal 126, 239P1069.

273–11 197Cal 126, 239P1069.

273–12 170Ark815, 281SW374; 220 MoA362, 286SW715; 251NY297, 167NE 449; 131 Okl 272, 268P270; 146Wash 469, 263P592, 593 [citCJ]. [e] 108Conn 628, 144A304.

273–13 89 IndA100, 163NE534.

273–17 But see TexCivA 20SW(2d)342 (2dcase).

274–18 217Ky1, 288SW1060. But see 251NY327, 167NE458; TexCivA 20SW (2d)342(2dcase).

274–20 217Ky1, 288SW1060; 102NJL 271, 131A628; 251NY327, 167NE458.

274–21 217Ky1, 288SW1060.

274–21½–New. The master is not liable for a minor's death while riding from work by invitation of an independent contractor's driver. 194NC 717, 140SE716.

274–24½–New. Employer must not injure discharged employee, on the premises as licensee, by affirmative acts of negligence. 22F(2d)939.

274–26 217Ky1, 288SW1060.

275–30 See also 217Ky1, 288SW1060.

275–32 161Ga949, 132SE210 (relation of master and servant of sailor on steamship, suspended while on shore leave, held revived on his returning to entrance gate and demanding admission).

275–33 237Mich530, 213NW179; 105 NJL544, 146A59.

275–36 BC [1928] 1DomLR853.

275–39 209Ky226, 272SW736 (relation presumed to continue for reasonable time); 225AppDiv129, 232NYS103. [a] **Burden of showing knowledge is on master.**–209Ky226, 272SW736.

276–41 [a] **In such case** servant may be licensee to do work for third person, and entitled to recover as such from third person for injuries resulting from its negligence. 34GaA156, 128 SE777.

276–44½–New. A caddy transferred from general service of a golf club to the service of a golf player becomes the servant of the player. 220MoA542, 287 SW865.

276–45 247 IllA600 [certiorari granted 278US593, 49SCt36(10thcase), 73L ed 525]. [a] **Under Federal Employers' Liability Act** fraud in securing employment is no defense for wrongful death. 234Ky504, 28SW(2d)733.

276–46 279US410, 49SCt363, 73L ed 766. But see 247 IllA600 [certiorari granted 278US593, 49SCt36(10thcase), 73L ed525].

276–48 168Ark1074, 272SW688; 197 Cal 126, 239P1069; 39GaA350, 147SE 135; 41GaA509, 153SE575; 124Kan327, 259P695; 213Ky776, 281SW1020; 232 Ky675, 24SW(2d)578; 190NC382, 130 SE1; 152Wash122, 277P398. See also 232Ky237, 22SW(2d)602.

277–49 34GaA409, 129SE799(2dcase); 144Miss510, 110S247; Mo 29SW(2d)97; MoA 293SW456; 51Nev390, 277P609.

278–51 41GaA509, 153SE575; 126 Or 487, 266P634, 637 [quotCJ].

278–54 89CalA602, 265P374; Mo 31 SW(2d)1010; 51Nev390, 277P609. [b] **Test of scope of employment.**–174Ark 463, 295SW727.

279–55 126 Or487, 266P634, 637 [quot CJ].

279–60 155Miss271, 124S336 (peril created by master's negligence); 82NH 476, 136A264, 50ALR367; 133 Okl 277, 272P368.

279–61 133 Okl 277, 272P368.

280–62 133 Okl 277, 272P368.

280–66 11F(2d)924.

281–75 232 IllA346; 220MoA640, 291 SW139.

281–77 170Ark815, 281SW374; 232 IllA346; MoA 272SW1076; 51ND745, 200NW1013.

281–78 Mo 30SW(2d)1077; 192NC736, 136SE1.

281–82 51ND745, 200NW1013; 197 Wis241, 221NW762.

282–86 3Del 564, 140A659; 128 Or224, 274P302.

282–87 84 IndA542, 149NE361. [b] **Master using explosives** must exercise highest degree of care not only in conduct of business, but in method of carrying it on, so as to safeguard servants. 145Miss172, 110S244.

282–88½–New. A master's duty to an invited servant is no greater than to his own. 244NY111, 155NE67.

282–93 NH 149A77.

282–94½–New. In the absence of knowledge of any fact indicating that the employee is of inferior mental capacity or in the absence of any circumstances sufficient to put the master on inquiry, he is entitled to presume that the employee is of sufficient mental capacity. 101WVa582, 133SE325.

282–94⅓–New. Where an employee is an epileptic, the employer's knowledge of his disease is a circumstance affecting the employer's duty as to a place for work; 82NH175, 131A440.

282–94¼–New. but the employer owes him no duty of special protection except as related to an attack; 82NH 175, 131A440.

282–94⅕–New. and in absence of an attack, breach of duty to guard against it cannot be made a ground of liability, since causal connection between such breach and injury is missing. 82NH 175, 131A440.

282–96 217Ala382, 115S869, 873 [quot CJ]. See also MoA 293SW456.

282–98 But see 40GaA841, 151SE688.

283–3 322Mo 137, 14SW(2d)652.

283–4½–New. As to authorized invitees of employee, the master owes the duty of ordinary care. 77CalA462, 247P236.

283–4⅓–New. "Actual notice" of existing conditions, knowledge of which imposes duty on master to refrain from willfully or wantonly injuring a servant not acting within the scope of his employment, often means knowledge of facts and circumstances sufficiently pertinent to enable a reasonably cautious and prudent person to investigate and ascertain the ultimate fact. 322Mo 137, 14SW(2d)652.

283–6 204Cal 446, 268P620.

283–8 51ND745, 200NW1013.

283–11 51ND745, 200NW1013.

283–12 84 IndA542, 149NE361; 51ND 745, 200NW1013.

284–13 216Ala248, 112S737.

285–25 219AppDiv438, 220NYS95.

286–26 MoA 290SW649; 219AppDiv 438, 220NYS95; TexCivA 293SW865, 867 [citCJ].

286–30 20F(2d)545; 25F(2d)283; 26 F(2d)204; 168Ark798, 271SW945; 35 GaA733, 134SE827; 213Ky776, 281SW 1020; 236Ky36, 32SW(2d)544; 258 Mass303, 154NE853; 310Mo 367, 276SW 869; Mo 276SW23; 318Mo 123, 300SW 787; 192NC736, 136SE1; 133 Okl 277, 272P368; 141SC359, 139SE779; Tex CivA 278SW272; 148Va148, 138SE658; 35Wyo 188, 247P1071. [a] (2) Receiver of road is liable for death of employee from smallpox, where negligent treatment is shown. TexCivA 278SW 272.

287–33 35GaA733, 134SE827; 148Va 148, 138SE658.

287–35 16F(2d)550; 35GaA733, 134SE 827.

287–37 16F(2d)550; 214Ala23, 106S 242; Mo 32SW(2d)288; 137SC47, 134 SE660; TexCommnA 285SW1053. [a] **Injury received while attempting to avoid danger.**–TexCommnA 285SW1053.

288–42 172Ark498, 289SW474; 174 Ark1180, 295SW969; NC 154SE311(1st case); TexCivA 278SW954. [d] **Injury when fellow workman accidentally slipped** held not due to negligence. TexCivA 278SW954.

289–43 26F(2d)204; 241Mich370, 217 NW51; 142Miss476, 107S517; 82NH 268, 133A4, 46ALR380; 82NH476, 136 A264, 50ALR367; 191NC90, 131SE337 (accidental injury from act of fellow servant); 196NC307, 145SE560; NC 154SE311(1stcase). [b] **Employer has**

no duty to avoid frightening employee, unless injury might reasonably have been anticipated: NH 150A540.

290–44 313Mo 492, 285SW965; 82NH 268, 133A4, 46ALR380. [b] **If thoughtful employer would conclude there was likelihood of injury to employee** through fright failure to so conclude is failure to anticipate injury. NH 150A 540.

290–45 142Miss476, 107S517; NH 150 A540; 195NC849, 141SE580; 148Va 148, 138SE658.

290–46 142Miss476, 107S517; 82NH 268, 133A4, 46ALR380.

290–51 196NC307, 145SE560.

291–52 35Wyo 188, 247P1071.

291–53 310Mo 1, 274SW1079; 53SD 166, 220NW459; 148Va148, 138SE658; 35Wyo 188, 247P1071.

291–54 310Mo 1, 274SW1079; 35Wyo 188, 247P1071.

291–56 37F(2d)256; 193NC438, 137SE 311; Or 293P414; TexCivA 285SW685; TexCivA 24SW(2d)783. [c] **Railroad bound only to provide safe means for** strike breaker to get to and from work or while engaged in work. TexCivA 285 SW685.

294–81 284Pa277, 131A241; 285Pa27, 131A477 (dictum). [b] **Though minor's general employment is not forbidden by statute,** employer is liable for death of employee caused by doing forbidden work directed or permitted by employer. 284Pa277, 131A241.

294–82 224Ky211, 5SW(2d)1064; 285 Pa27, 131A477 (dictum).

296–92 See also 318Mo 1243, 3SW(2d) 226.

297–12 142Va542, 129SE222. [m] **Whether employment is extrahazardous in violation of law** depends on facts of each particular case. 329 Ill 308, 160 NE588.

297–14 218Ala607, 119S638; 337 Ill 70, 168NE895; 242Mich442, 219NW617; 243Mich209, 220NW301; 149Miss465, 115S586, 588 [quotCJ]; 221MoA345, 273 SW176; 221MoA345, 273SW176; 148 Va829, 139SE513. [h] But see 337 Ill 70, 168NE895. [l] **Statute making it misdemeanor to "permit or suffer"** minor under fourteen to be employed imposes no duty on employer except where he permits child of prohibited age to remain in his service after acquiring knowledge. 142Va542, 129SE222. [m] **Whether employment of child is in occupation specially hazardous to life and limb** depends on whether considering certain matters affecting the child, the employment renders occupation dangerous. 142 Okl 208, 286P7.

298–16 But see 279US587, 49SCt442, 73 L ed861.

298–19 NJ 147A480 (statute held not to prevent recovery); 148Va829, 139SE 513. [a] **No liability to mother of minor** unlawfully employed. 12LaA453, 125 S322(1stcase).

298–25 19F(2d)221. See also 220MoA 542, 287SW865.

298–27 [a] (2) 148Va829, 139SE513. [j] **Assisting in operation of steam machinery.**–142 Okl 208, 286P7 (low pressure steam press). [k] **"Messenger service"** held not to contemplate boy delivering milk. TexCivA 21SW(2d)314.

300–28 218Ala607, 119S638; 230Ky53, 18SW(2d)864; 148Va829, 139SE513.

300–32 337 Ill 70, 168NE895. But see 117Nebr701, 222NW630, 60ALR830.

301–35 See also 27F(2d)197.

301–37 But see 231Ky772, 22SW(2d) 300.

302–38 [c] **Burden is on infant** to show that thing imposed was within scope of employment. 231Ky772, 22SW(2d)300.

302–40 TexCivA 21SW(2d)314 (employer held to have operated "dairy"). [b] **Where minor was employed as helper on delivery truck,** employment certificate held required. 337 Ill 70, 168NE 895.

302–45 Contra 155Miss1, 119S501, 62 ALR191.

303–49 152Tenn614, 279SW1043, 1048 [citCJ].

303–50 148Va829, 139SE513.

303–53 But see 151Miss820, 119S313.

304–54 221MoA345, 273SW176.

304–59½–New. The physical qualification of a child to do work has been held no defense. 337 Ill 70, 168NE895.

304–61 But see 43F(2d)406.

305–71 176Ark705, 3SW(2d)988. [a] **Contract with infant.**–Sask [1925] 3DomLR251.

306–74 15F(2d)28.

306–81½–New. Employer may contract to assume risks which employee would ordinarily assume under the law. 206 Iowa809, 221NW460, 62ALR1006.

308–13 8F(2d)332; 8F(2d)728; 16F (2d)517; 16F(2d)552; 19F(2d)871; 25 F(2d)526; 181Ark487, 26SW(2d)118; 3Del 564, 140A659; IndA 163NE283; 122Kan250, 252P221; 123Kan620, 256P 1019; 128Kan26, 276P81; 213Ky368, 280SW1093; 214Ky21, 282SW550; 235 Mich373, 209NW53; 238Mich493, 213 NW703; 154Miss113, 122S365; 315Mo 1068, 287SW474, 480 [quotCJ]; 316Mo 1303, 295SW102; 317Mo 86, 296SW764; 323Mo 1058, 21SW(2d)772; Mo 30SW (2d)1018; 218MoA698, 268SW102; MoA 271SW540; MoA 289SW987; MoA 297 SW174; MoA 299SW136; 82NH175, 131 A440; 135Misc467, 238NYS719; 191NC 153, 131SE670; 191NC549, 132SE598; 194NC98, 138SE424; 194NC227, 139SE 242; 196NC178, 145SE11; 196NC262, 145SE283; 196NC330, 145SE570; 196 NC359, 145SE684; 198NC736, 153SE 324; NC 154SE667; 120 Okl 182, 250P 926; 126 Or85, 268P985; Or 293P414; 97PaSuper240; 135SC163, 133SE550; 150SC130, 147SE834; SD 225NW223; TexCivA 293SW901; TexCivA 20SW(2d) 342(2dcase); TexCivA 31SW(2d)675; 151Va740, 145SE342; 104WVa344, 140 SE1; 108WVa173, 150SE515; Can [1927] 2DomLR682. [g] MoA 16SW(2d)1005.

312–14 173Ark322, 292SW359; 90Fla 632, 106S462; 315Mo 1068, 287SW474, 480 [quotCJ]; 317Mo 86, 296SW764, 770 [citCJ]; 317Mo 919, 298SW789; 318Mo 421, 1SW(2d)791; 319Mo 1196, 8SW(2d)846, 60ALR448; 323Mo 1089, 20SW(2d)494; MoA 282SW181; MoA 285SW170; MoA 291SW180; MoA 300 SW1048; 221MoA1169, 300SW1062; 198NC742, 153SE406; 101WVa546, 133 SE142.

312–15 216Ky42, 287SW219; 127Me 228, 142A776; 315Mo 1068, 287SW474, 480 [quotCJ]. [h] **Duty to provide safe place** to work does not apply to ordinary everyday conditions where situation is observable and injury not obvious. NC 153SE608.

313–16 315Mo1068, 287SW474, 480 [quotCJ]; 317Mo 86, 296SW764, 770 [citCJ].

313–21 275US426, 48SCt177, 72L ed 351; 8F(2d)332; 18F(2d)513; 29F(2d) 746; 174Ark146, 294SW395; 177Ark 271, 6SW(2d)15; 142Miss476, 107S517; 313Mo 527, 282SW425; 315Mo 1068, 287 SW474, 480 [citCJ]; 220MoA640, 291 SW139; 221MoA1089, 295SW501; MoA 14SW(2d)533; Nebr 223NW 21(2dcase); 189NC840, 128SE329; 190NC256, 129SE595; 190NC844, 130SE 713; 191NC90, 131SE387 (is not bound to furnish absolutely safe place to work); 191NC153, 131SE670; 191NC 549, 132SE598; 191NC685, 132SE787; 192NC236, 134SE647; 194NC227, 139SE 242; 196NC262, 145SE283; 196NC359, 145SE684; NC 154SE682; 289Pa393, 137A623; 134SC31, 131SE777; Tex CivA 285SW685; 144Va65, 131SE334; 101WVa440, 133SE114.

314–22 275US426, 48SCt177, 72L ed 351; 280US491, 50SCt182, 74L ed566; 5 F(2d)23; 16F(2d)517; 17F(2d)345; 21 F(2d)912; 32F(2d)974; 42F(2d)950; 23AlaA490, 127S679; 168Ark976, 272 SW357; 172Ark753, 290SW580; 173Ark 322, 292SW359; 174Ark146, 294SW395; 175Ark223, 298SW1016; 177Ark271, 6 SW(2d)15; 177Ark986, 8SW(2d)456; 178Ark1007, 13SW(2d)14; 178Ark1046, 13SW(2d)306; 179Ark321, 15SW(2d) 994; 180Ark1104, 24SW(2d)330; 180 Ark1056, 24SW(2d)340; 129Kan781, 284P417; 227Ky91, 11SW(2d)985; 228 Ky379, 15SW(2d)236; 233Ky129, 25SW (2d)38; 5LaA410, 411 [citCyc]; 6LaA 27; 156Md639, 144A775; 238Mich493, 213NW703; 246Mich670, 225NW575; 154Miss291, 122S492, 313Mo 527, 282SW 425; 315Mo 1068, 287SW474; Mo 293 SW367; 317Mo 919, 298SW789; 318Mo 79, 1SW(2d)172; Mo 9SW(2d)155; Mo 31SW(2d)1007; MoA 273SW1078; MoA 282SW1045; 221MoA773, 287SW885; MoA 291SW180; MoA 293SW428; MoA 293SW456; MoA 294SW114; MoA 294 SW762; 221MoA1089, 295SW501; MoA 296SW187; 221MoA1116, 298SW131; MoA 15SW(2d)853; MoA 30SW(2d)641; Nebr 227NW931; 189NC840, 128SE329; 190NC256, 129SE595; 190NC874, 130SE 164; 190NC844, 130SE713; 191NC90, 131SE387 (simply required to use reasonable care and prudence); 191NC685, 132SE787; 192NC236, 134SE647; 192 NC790, 136SE117; 194NC98, 138SE424; 196NC330, 145SE570; 196NC359, 145SE 684; 196NC391, 145SE769; NC 154SE 58; NC 154SE682; 51ND158, 199NW 480; OhA 153NE870; 129 Or169, 276P 1094; 289Pa393, 137A623; 134SC31, 131SE777; 150SC130, 147SE834; Tex CivA 285SW685; TexCivA 293SW688; TexCivA 293SW901; TexCivA 14SW (2d)97; 144Va65, 131SE334; 151Va740, 145SE342; 148Wash155, 268P177; 101 WVa440, 133SE114. See also 125Me96, 131A5. See also 82NH175, 131A440. [f] 151Va815, 145SE255.

320–23 8F(2d)332; 214Ky21, 282SW 550; 318Mo 79, 1SW(2d)172; 216App Div246, 214NYS672, 673 [citCJ]; 191 NC90, 131SE387 (it is culpable negligence which makes employer liable); NC 153SE608; 289Pa393, 137A623; 151 Va815, 145SE255.

320–23½–New. The employer's obligation to provide a reasonably safe place for work does not, however, impose on him the duty of keeping the place safe for every moment of work so far as its safety depends upon due performance of their duties by fellow servants. 5 F(2d)23.

320–24 37GaA570, 140SE905; 199Wis 310, 226NW301(2dcase) (positive duty to furnish safe place). [b] **Provision that employer provide "safe employment"** requires more than place of employment safe in physical sense. Wis 230NW702.

320–25 279US7, 49SCt202, 73L ed578; 31F(2d)769; 127Me24, 140A827; 194 Wis337, 216NW485. [d] 120 Or122, 250 P622.

321–27 Mo 12SW(2d)433.

321–28 42F(2d)950.

321–29 197NC17, 147SE698.

322–33 16F(2d)552; 41F(2d)578; 181 Ark299, 25SW(2d)760; 123Kan620, 256 P1019; 227Ky91, 11SW(2d)985; 253 Mass99, 148NE463; 143Miss890, 108S 503; Miss 115S125; 154Miss113, 122S 365; 155Miss75, 124S74; 310Mo 488, 276SW405; 312Mo 173, 279SW89; Mo 287SW434; Mo 287SW628; 318Mo 50, 298SW827; 318Mo 274, 300SW1064; 318Mo 421, 1SW(2d)791; 319Mo 1196, 8 SW(2d)846, 60ALR448; 322Mo 147, 14 SW(2d)603; 322Mo 901, 18SW(2d)408; Mo 26SW(2d)957; MoA 279SW212; 220 MoA362, 286SW715; 221MoA773, 287 SW885; MoA 292SW1073; MoA 294 SW114; MoA 295SW841; Nebr 223NW 21(2dcase); 246NY300, 158NE876; 190 NC874, 130SE164; 191NC153, 131SE 670; 197NC17, 147SE698; 104WVa344, 140SE1. [g] **To absolve master from liability** there must be proof of employment of others to perform duty, and that such others did perform. MoA 3 SW(2d)254.

324–36 16F(2d)552; 253Mass99, 148 NE463; 312Mo 173, 279SW89 (place of work); MoA 6SW(2d)1015; MoA 23SW (2d)1073; 190NC382, 130SE1; 196NC 262, 145SE283(2dcase); 151Va740, 145 SE342; 149Wash1, 270P113.

324–37 155Miss674, 125S93. See also MoA 296SW187.

325–39 144Va65, 131SE334. [b] **Where car repairer exercised own judgment in line of his employment in repairing hose connection of blow torch he was employed to operate,** railroad is not liable for his death resulting from repair. 144 Va65, 131SE334.

325–40 120 Okl 182, 250P926.

325–41 120 Okl 182, 250P926.

325–44 But see 122Kan250, 252P221.

326–45 12LaA350, 125SE469.

326–47 Mo 294SW80; 191NC549, 132 SE598; 192NC14, 133SE188; 192NC 236, 134SE647; 196NC810, 145SE237; 120 Or122, 250P622; 194Wis159, 215 NW829; Can [1929] 3DomLR469.

327–49 127Me228, 142A776.

322-53½-New. To constitute actionable negligence, condition of tools or appliances furnished must be such as to suggest to an ordinarily careful person that it would be dangerous to use them. 51ND155, 192SW420.

322-54 16F(2d)517; 27F(2d)560; 40 GaA751, 151SE544; 322Mo1058, 218SW (2d)772; MoA 158SW(2d)376; 223Pa 292, 137A622; 101WVa440, 132SE114.

322-55 [illegible]

322-56 Iowa 222NW657 (power hoist for loading); Nebr 227NW931.

322-57½-New. Master using care in selecting tool is not liable for secret defect therein but is responsible for his own negligence. 82NH350, 134A574.

322-58 12F(2d)513; 19F(2d)371; 32 F(2d)[illegible]; [illegible] 2 LaA[illegible]; [illegible] 21 [illegible] Mo 74; [illegible] 322Mo 1058, 218SW(2d)772; MoA 158SW(2d) 276; MoA 208SW(2d)1094; 196NC291, [illegible] 121A477; 142Wash580, 254P1082; Can [illegible] 2DomLR[illegible].

322-59 MoA 78W(2d)448.

322-60 [illegible] 121A477.

322-62 [illegible] 121A24.

322-63 [illegible] 224Pa 277, 121A24.

322-64 19F(2d)371; 21LaA270, 272 [cit Cyc]; 246Mich670, 225NW575; Miss 128SE582(2dcase) (though other equipment might be safer); MoA 158W(2d) 223; MoA 208W(2d)1094. [a] Custom must be uniform.–MoA 208W(2d)1094.

322-65 192NC726, 136SE1. [b] Mere usage of machinery in common use is no defense where its installation is not proper. 252Miss59, 148SE462.

322-66 23F(2d)746.

322-67 [illegible] 131A24 (incorporated minor); 145Va720, 141SE823.

322-72 [illegible] 216Ky 721, 294SW154; Mo 256SW819; NC [illegible] TexCivA 205SW(2d)342(2d case). [a] (4) Employer held not liable for injuries to employee stepping [illegible] hole in car while unloading [illegible] 216Ky 721; 254SW174.

322-73 [illegible] 20, 141SE492. [k] Turning off electric current. MoA [illegible] 196.

322-74 [illegible] 254SW174.

324-74½-New. Master cannot rely on independent contractor constructing or owning work placed, nor on those permitting him to use their premises. 82 NH[illegible] 134A574.

325-77 [illegible] 174.

326-82 Wis [illegible]

327-91½-New. Railroad rule prohibiting moving of cars exceeding clearance dimensions or improperly loaded does not enlarge legal duty of railroad. 125 Mo279, 122A[illegible].

327-92 [illegible] Mo 1266, 2968SW105.

327-93 LaA 12[illegible]724.

327-94 [illegible] 26F(2d)217. [a] Licensee's agent is agent of licensor as to injuries caused by his acts within scope of his authority. 26F(2d)217.

328-97½-New. Railroad may not rely on continuance of protection from surface waters afforded by highway, and must investigate changed conditions. 82NH350, 134A574.

328-97¼-New. A railroad company is under nondelegable duty to be reasonably informed as to effect on its road of a change in a highway which has protected it from surface waters. 82 NH350, 134A574.

328-97¼-New. Railroad depending on a town to reconstruct a highway so as to afford protection from surface waters is bound to use reasonable care to see that work is done. 82NH350, 134A 574.

328-97½-New. Railroad is not liable for defective construction of roadbed built by predecessor unless discoverable by reasonable inspection. 82NH350, 134 A574.

328-98 But see MoA 208W(2d)584.

328-1 [illegible] 162, 1338E550

328-2 3Del564, 140A659; 317Mo919, [illegible] 318Mo 56 [illegible] MoA 298SW216, 221MoA1163, 300SW1062, Can [1929] 3DomLR469.

329-6 30F(2d)316.

329-7 106Conn72, 136A874.

329-8 [illegible] 159SE20.

341-10 [c] Failure to prevent explosion of steam gauge is negligence if careful employer would have taken precaution, considering chance of employee's being frightened. NH 150A 540.

341-17 Ind 162NE283; NC 154SE667; 125SC162, 123SE550, 551 [quotCJ]. [e] Where employee had no duty near suction fan, master will not be liable to employee for injury therefrom. 228Ky 279, 158W(2d)226. [f] Master must know that his employees are likely to suffer injury if appliances are permitted to become defective. Wash 288P [illegible]

342-18½-New. The mere fact that a servant's knowledge of a complicated machine is equal to that of the master does not relieve the latter from furnishing the servant with a safe instrumentality. 155Miss75, 124874.

342-20 [illegible] 154Ark149, 254SW 295; 175Ark222, 292SW1016; 227Ky 91, 118W(2d)385 ("chicken ladder" held not simple tool); 152Miss72, 117888[1]; MoA 168W(2d)1005; Nebr 227NW931; 150Va249, 143SE729. But see MoA 11 8W(2d)972; NC 154SE682. [d] Simple tool doctrine merely comes into play in connection with question of contributory negligence. MoA 148W(2d)972. [e] Hammer and chisel constitute "simple tools" within simple tool doctrine. 230Ky246, 18SW(2d)[illegible]. [f] Employer's selection of one simple tool instead of another does not constitute negligence. Nebr 227NW931 (selection of pick instead of tongs for handling railroad ties).

342-21 192NC726, 136SE1. See also 155Miss75, 124874.

343-24 216Ala176, 112SE820; 35GaA 243, 132SE318; Mo 293SW367; Mo 29 8W(2d)76. [a] (4) Doctrine not applicable to negligent failure to furnish necessary light for servant's performance of his work. 36GaA58, 135SE760.

343-26 NH 147A753.

343-28 319Mo1196, 8SW(2d)846, 60 ALR448; MoA 285SW149; MoA 168W (2d)690. [b] (4) Motor vehicle. 192 NC226, 134SE647. [c] Fact that wagon is standing in street does not make it any less employee's place of work. MoA 288SW941.

344-30 SD 225NW223. [c] Furnishing automobile without skid chains for servant's use not want of ordinary care. MoA 158W(2d)276.

344-34 [a] Master must have known of servant's danger.–142Miss476, 107S 517.

344-34½-New. Transportation furnished to laborers must be reasonably safe. 190NC286, 129SE816.

344-34¼-New. The mere keeping of a vicious mule in a place where employees in discharge of their duties are endangered by it is a breach of the employer's duty to furnish a reasonably safe place to work. 316Mo418, 289SW835.

344-36 MoA 78W(2d)448; 82NH350, 134A574; 151Va815, 144SE863; Can [1927] 2DomLR651. [o] Railroad operating roundhouse liable to employee injured by snake bite.–Nebr 223NW21 (2dcase). [p] Necessity of spraying floor with disinfectant does not relieve duty to exercise ordinary care in furnishing safe place for work. MoA 292 8W443.

346-37 129Kan781, 284P417; 127Me 228, 142A776; 143Miss890, 108S503; 144SC10, 141SE685; TexCivA 293SW 193; TexCivA 198W(2d)326; 151Va 815, 144SE863. [d] Rule held inapplicable. MoA 272SW927.

348-40 Mo 318W(2d)770.

348-42 TexCivA 198W(2d)326.

348-42½-New. Master is not liable where servant could have avoided the injury. Can [1927] 2DomLR651.

348-43 220MoA362, 286SW715.

349-45 42F(2d)950.

349-45½-New. and to all places known, or which by ordinary care might be known, by master to be used by servant. 220MoA362, 286SW715.

349-46 6LaA468 (residence of employee's wife on employer's premises).

349-48 25F(2d)339; 319Mo958, 68W (2d)582; MoA 228SW982; 220MoA 1142, 297SW420; 192NC599, 135SE335; 150Va249, 143SE729. [h] (11) Railroad is liable under Federal Employers' Liability Act for defect in platform used by station agent as being part of "works." 313Mo492, 285SW965. [j] 220Ala245, 124S907.

350-50 [a] Duty of employer to refrain from wanton or willful injury.–225AppDiv687, 231NY8375.

350-51 221MoA1169, 300SW1062. [b] TexCivA 283SW627.

351-52 Wis 232NW595.

351-55 156Md639, 144A775. [c] Rule that obligation to provide safe place does not extend to changing of conditions in construction of building is not applicable where plaintiff's work, clearing away rubbish, had nothing to do with changing condition causing injury. 308Mo597, 274SW416. [d] Rule was held not applicable where injuries were due to negligent failure of other employees to nail planks previously laid. 5F(2d)935.

351-56 245Mich565, 222NW191; 244 Mich568, 222NW192; 246Mich670, 225 NW575. [b] This rule will not be said to apply as matter of law.–173Ark1182, 293SW742.

352-58 Cal 287P974; CalA 276P1060.

352-61 Cal 287P974 (holding that, when two stories are erected, it is necessary to lay temporary floors required by statute). [i] Statute requiring spaces between girders or floor beams in steel framed buildings to be filled or covered before adding story does not require laying of temporary flooring in course of construction where plans do not require laying of permanent floor. 120 Okl182, 250P926. [j] Contractor is bound by statute to lay plank flooring at second story though building has not yet exceeded that height. Cal 284 P451(2dcase).

353-77 168Ark973, 272SW647; Mo 32 8W(2d)288; MoA 198W(2d)758; MoA 228W(2d)461; 102NJL697, 133A194; 192NC14, 133SE183; 101Va250, 143A 290; 61 OntL618, [1928] 1DomLR 1053; Sask [1926] 4DomLR1017.

355-79 168Ark973, 272SW647.

355-80 168Ark973, 272SW647; 136 Wash522, 240P309.

356-81 192NC14, 133SE188.

356-86 [a] Criminal liability.–32Porto Rico 69.

357-90 See also Mo 328SW(2d)288.

358-94 319Mo1137, 68W(2d)886; 127 Or246, 271P730; Or 291P380.

358-1 [d] One washing ceilings is not employed in "the erection, repairing or taking down" of a building. Mo 292 8W17.

359-4 Mo 328W(2d)288. [h] "Erection of building."–Mo 328W(2d)288.

359-6 Mo 268W(2d)942. [b] Duty of employer knowing elevator being repaired was dangerous was to select any means sufficient to prevent accident. Mo 268W(2d)942.

361-14½-New. Elevator statute held applicable to cases of falling into shafts and inapplicable to case of injury due to unknown cause on elevator. 220MoA 640, 291SW189.

361-16 172Ark753, 290SW580; MoA 148W(2d)969 (right to rely on information furnished by injured servant); 198NC427, 152SE32 (safe place and appliances). [a] 213Ky776, 281SW1020; 235Ky618, 32SW(2d)14.

364-26 172Ark753, 290SW580; 226Ky 847, 118W(2d)971; 101WVa546, 133 SE142. [i] Mere fact that miner was working under rock at time it fell, causing death, did not necessarily constitute place of injury his "working place." 320Mo1130, 98W(2d)596. [j] "Narrow work" places.–MoA 297SW171.

365-27 172Ark753, 290SW580.

365-27½-New. Operator is not responsible for the condition of a room where a miner is mining, unless after notification he failed to correct dangerous conditions. MoA 297SW171.

368-44 233Ky129, 25SW(2d)38; 101 WVa546, 133SE142. [b] Master has duty of placing props in position and timbering place when ordinary props have been deemed insufficient protec-

tion. 101WVa546, 133SE142.

370-64 MoA 287SW852. [c] **In Arkansas.**–31SW(2d)753.

371-75 210Ky600, 276SW515; MoA 3 SW(2d)740; 194NC98, 138SE424, 427 [quotCJ].

373-86 [e] **Where master furnished materials to brace up sewer excavation, some of which materials are suitable for such purpose,** he is not liable for "cave in." MoA 14SW(2d)969.

374-96 323Mo 1058, 21SW(2d)772.

375-4 [j] 25F(2d)728.

376-5 193NC223, 136SE711. [f] **Work on steel frame** supporting electric transmission line held work in construction of "pole lines" within Employers' Liability Law. 31Ariz302, 252P1012.

377-8 27F(2d)960; 246NY300, 158NE876; 224AppDiv562, 231NYS489. [g] 247NY187, 159NE906.

378-16 156Miss463, 125S819; 289Pa393, 137A623.

378-17 26F(2d)317; IndA 163NE283; MoA 277SW583; 83NH10, 138A315; 115Oh226, 152NE664; 289Pa393, 137A623. [g] (2) Railroad is not liable to station agent for injuries due to accumulation of snow and ice on station platform. 275US426, 48SCt177, 72L ed 351. [k] **What is reasonably safe place** depends upon circumstances of each particular case. 144Va443, 132SE191. [l] **Safe place to work** has reference only to construction, equipment, and physical condition of place. Tex CommnA 29SW(2d)323.

379-18 [b] 53SD166, 220NW459.

379-19 125Me272, 133A92; 289Pa393, 137A623.

379-20 127Me190, 142A585; 191NC 153, 131SE670; 289Pa393, 137A623.

379-21 232 IllA120.

379-22 125Me272, 133A92; 127Me190, 142A585; 191NC153, 131SE670; SC 155SE438; Va 153SE874. [a] (2) Carrier owes duty to employees to use reasonable care to keep depot platform in reasonably safe condition. 180Minn 534, 231NW236. [b] **Unforeseen dangers.**–127Me190, 142A585.

380-23 37GaA570, 140SE905.

380-26 36F(2d)716. [a] (1) 172Ark 508, 290SW74.

381-30 [b] **Facts held not to show violation of statute.**–285Pa27, 131A477 (bolts on outside).

381-32 189NC813, 128SE345.

381-33½-New. Boiler Inspection Act must be read in connection with Safety Appliance Act and Federal Employers' Liability Act. 285Pa27, 131A477.

381-33⅓-New. Absence of gangway chains on a locomotive with a loose apron, although not actionable, has been held material in deciding fault in maintaining a loose apron. 83NH10, 138A 315.

381-34 36F(2d)716; 41GaA263, 153 SE96(2dcase); 220MoA720, 293SW468; 213AppDiv374, 211NYS184; 189NC813, 128SE345. [a] (2) Railroad is liable whether it had any knowledge of existence of defect or not. NH 146A865. [e] 285Pa27, 131A477. [f] **Violation of act is negligence per se.**–220MoA720, 293SW468.

381-35 176Minn67, 222NW519; 310 Mo 1, 274SW1079; 189NC813, 128SE 345.

381-36 [d] **Defective throttle and grate shaker** held to render railroad company liable for injury proximately caused thereby. 310Mo 1, 274SW1079. [e] **Tank-sill, draw-bar, and draw-bar pin** held appurtenances to tender of engine within Boiler Inspection Act. 41GaA 263, 153SE96(2dcase).

381-36½-New. and is to be construed in connection with Federal Employers' Liability Act, 189NC813, 128SE345.

381-39½-New. Federal interpretation of Boiler Inspection Act does not lessen common-law liability. 83NH10, 138A 315.

381-39¾-New. Defect must be within the act in order to impose liability on the employer. 83NH10, 138A315.

381-40 41GaA263, 153SE96(2dcase); 308Mo 31, 271SW997. [h] (2) Ash pan equipment which can be operated two feet from rails when employee is not under any part of locomotive except projection of floor of cab a few inches and eighteen inches above his head complies with statute. TexCommnA 272 SW764. (3) Ash can equipment which can be operated from cab of locomotive complies with statute. TexCommnA 272SW764. (4) Requirement of ash can equipment is to be construed "in view of practical railroad operations." TexCommnA 272SW764. [i] **Facts held not to show violation of statute.**–285Pa 27, 131A477 (bolts on outside). [j] **Railroad engaged in interstate commerce** is liable under act though employee at time of injury was not engaged in interstate commerce. 13 F(2d)352.

381-40½-New. No action for negligence can be based on compliance with duty imposed by interstate commerce commission pursuant to safety appliance acts. 285Pa27, 131A477.

382-43 321Mo 798, 12SW(2d)476. [o] (2) Operating interurban car at night without lights is negligence under Federal Employers' Liability Act. 253 IllA 450. [u] 319Mo 308, 5SW(2d)19. [v] **Inspection.**–238Mich289, 213NW169. [w] **Safety of brakes for intended use.**–213Ky432, 281SW519.

384-45 216Ky42, 287SW219.

384-48 242Mich433, 219NW685.

384-50 TexCivA 98SW(2d)182. [e] (1) TexCivA 275SW415. (3) Hauling of defective car and injury to employee are not sufficient to impose liability in absence of negligence. 319Mo 308, 5 SW(2d)19. [i] **In Ohio.**–13F(2d)389.

384-50½-New. A statute requiring street car companies to equip cars with vestibules so as to protect employees from inclement weather does not apply so as to make a street car company liable where a cinder from a railroad engine enters a motorman's eye. 154Miss 182, 122S371.

385-52 16F(2d)550; 214Ala23, 106S 242; 36GaA70, 135SE439; 36GaA163, 136SE178; 37GaA570, 140SE905; 166 Minn87, 207NW194; 176Minn575, 224 NW241; 307Mo 595, 271SW358; Mo 25SW(2d)791; 83NH383, 142A707; 54 ND351, 209NW786; TexCivA 28SW(2d) 611. [c] 16F(2d)550. [d] 29F(2d)1. [g] **Requirement of efficient hand brakes** is mandatory. 6F(2d)784. [h] **Failure of couplers to work as required** by act renders employer liable. 214 Ala23, 106S242. [i] **Failure to maintain cars as required by interstate commerce commission rule** pursuant to authority conferred by Safety Appliance Act amounts to violation of rule and statute. 39GaA596, 147SE919. [j] **Enactment of Federal Employers' Liability Act** did not affect rights under Safety Appliance Act. 83NH383, 142A 707. [k] **Failure of coupler to work at any time is negligence** and it is no defense that car was moved without knowledge of defect. Mo 25SW(2d)791.

386-53 16F(2d)550; 214Ala23, 106S 242; 37GaA570, 140SE905. [a] **Operative condition.**–307Mo 595, 271SW 358.

386-54 NJSup 138A206.

386-55 214Ala23, 106S242; 36GaA70, 135SE439; 37GaA570, 140SE905; 165 Minn223, 206NW436; Mo 25SW(2d)791; TexCivA 25SW(2d)969.

386-56 165Minn223, 206NW436; 166 Minn87, 207NW194. But see 232 IllA 120.

386-57 140Miss375, 105S770. See also 232 IllA120. [g] **Protection of act extends** to employee in discharge of his duties though not engaged in coupling. 307Mo 595, 271SW358.

387-58 165Minn223, 206NW436; 180 Minn519, 231NW189.

387-59 [k] **Car, which broke apart** because of defective coupling and which brakeman was trying to repair so that it could proceed, is held to be "in use" at time of injury, though motionless. 269US406, 46SCt129, 70L ed335. [l] **Testimony of brakeman** injured while attempting to repair coupling after train had broken apart that he was engaged in repairing car is held not to transform status of act from that of coupling to that of repairing car. 269US406, 46SCt 129, 70L ed335. [m] **Where car had been placed on ladder track in general yard,** cut from train and reported as having defective hand brake, under Federal Safety Appliance Act, to car inspector, whose duty it was to make repairs or order car to repair shop, car being temporarily withdrawn from use, car inspector, injured while operating such brake solely for purpose of inspection, could not recover under Federal Safety Appliance Act. 30F(2d)487.

387-60 30F(2d)487; 232 IllA120. [a] **Automatic couplers.**–319Mo 608, 5SW (2d)368.

388-61 NJSup 138A206. [a] **Brakeman injured through incidental use** of defective hand brake is held entitled to recover. 6F(2d)784.

389-69 276US165, 48SCt215, 72L ed 513; 26F(2d)317; 315Mo 409, 286SW 45; MoA 274SW871. [p] Mo 31SW(2d) 1007. [q] **No particular standard** is imposed by rule. 276US165, 48SCt215, 72 L ed513.

391-71 279US7, 49SCt202, 73L ed578.

391-72 222AppDiv315, 226NYS302.

391-73 TexCivA 293SW901.

391-78 8F(2d)332; 9LaA477, 121S241.

396-5 151Va815, 145SE255; Va 153SE 874.

396-8 236Mich577, 211NW111; 178 Minn110, 226NW209 (permitting excavation under bridge).

397-11 176Ark705, 3SW(2d)988; 88 IndA532, 164NE705; 319Mo 1015, 5SW (2d)59; 151SC164, 148SE889. See also Mo 30SW(2d)1077. [e] IndA 169NE 358.

398-15 176Minn104, 222NW641.

399-20 102WVa40, 135SE262, 48ALR 806. [c] TexCivA 23SW(2d)461. [e] **Mail crane platform.**–7F(2d)269.

401-31 241NY212, 149NE835.

401-32 TexCivA 288SW532.

401-33 TexCivA 288SW532.

401-37½-New. A railroad maintaining telltales at appropriate points is not negligent just because overhead bridges were low. 241NY212, 149NE835 (under Federal Employers' Liability Act).

401-37¼-New. The railroad's duty is discharged upon proper warning of overhead bridges, 241NY212, 149NE835.

401-37¾-New. unless there are defects of construction exaggerating the peril. 241NY212, 149NE835.

401-39 [n] **Failure to provide screen to protect sawyer** does not constitute negligence. Miss 128S898(2dcase).

402-40 16F(2d)574; 177Ark986, 8SW (2d)456; 4LaA687. [a] TexCivA 289 SW1027. [j] **Absence of barriers or railings on canal lock wall** where operator was required to walk held to constitute "dangerous situation." 135Misc467, 238NYS719.

403-42 82NH110, 130A28 (failure to guard portion of circular saw extending into dark pit without notice to inexperienced employee held negligence).

404-44 43F(2d)406 (regulatory measure). [a] **Superintendent has been held** not person in charge liable for failure to guard pump. 43F(2d)406.

404-45 320Mo 1005, 8SW(2d)964; 323 Mo 1179, 20SW(2d)676; MoA 24SW(2d) 682 (that machine is like sewing machine is immaterial).

406-46 16F(2d)574; 149Va720, 141SE 838.

406-47 106WVa99, 144SE881, 60ALR 570. [a] 106WVa99, 144SE881, 60ALR 570.

408-61 Mo 2SW(2d)785; MoA 2SW (2d)199; 222MoA370, 3SW(2d)256. [c] **In Missouri.**–219MoA234, 271SW1023.

408-64 125Kan59, 262P498. [b] **Master not liable for failure to furnish light over machine** under Factory Act. 125 Kan59, 262P498.

410-71 [a] **Bucksaw operated on farm by mechanical power** is not within Kansas Factory Act. 124Kan206, 257P735.

410-73 Mo 2SW(2d)785; 222MoA370, 3SW(2d)256. [g] **Machines requiring guard under statute.**–219MoA234, 271 SW1023. [h] **Statute was enacted to protect those** who, in performance of their duties, were not required to place their fingers within danger zone, but also those who might become momentarily engrossed in their work or from lapse of memory or inattention place themselves in position to be injured. 219 MoA234, 271SW1023. [i] **If statute is**

not needed for protection of careful and will not be enforced for benefit of negligent, it is wholly vain and useless. 219 MoA234, 271SW1023. [j] **Statute intended to cover all appliances** and machinery in manufacturing plants and to extend protection to persons working at and with machines, and also those who are engaged in duties which necessitate their working in, around, and about machinery while it is in operation. 219MoA234, 271SW1023. [k] **Term "guard"** is of general significance and its application is to be determined from character of machine and nature of peril to be avoided. 219MoA234, 271 SW1023.

410–74 But see 222MoA370, 3SW(2d) 256.

410–77 43F(2d)406.

411–81 MoA 275SW555.

411–83 MoA 2SW(2d)199.

411–84 320Mo 1005, 8SW(2d)964.

411–85 320Mo 1005, 8SW(2d)964. [a] **Statute as to guarding machinery** held to be for protection of employees momentarily engrossed in their work. 219 MoA234, 271SW1023.

412–90 16F(2d)574; MoA 275SW555. [a] 220MoA1152, 299SW90. [m] **Guards not necessary** after board leaves edger. MoA 275SW555. [n] **Wood-working machine primarily designed and used for edging** need not be guarded so as to render it safe for surfacing wide boards. Mo 289SW591.

412–91 16F(2d)574.

412–94 But see 149Va720, 141SE838.

413–95½–New. Contributory negligence or that of a fellow servant precludes recovery under the statute as to guards. MoA 275SW555.

413–96 MoA 30SW(2d)1094; 227App Div303, 237NYS479.

414–3 220MoA640, 291SW139.

415–15 16F(2d)552; 170Ark815, 281 SW374; 180Ark1056, 24SW(2d)340; 181Ark1037, 28SW(2d)1073; 3Del 564, 140A659; 244 IllA1; 234Ky427, 28SW (2d)479; 245Mich58, 222NW163; Mo 294SW80; 317Mo 86, 296SW764, 770 [citCJ]; MoA 279SW212; 221MoA773, 287SW885; MoA 16SW(2d)1005; 198 NC742, 153SE406; 151Va740, 145SE 342. [j] (1) Mo 26SW(2d)770. [o] **Mines.**–101WVa546, 133SE142. [p] **Inspection necessary** to discover expected defects resulting from passing of time. TexCivA 293SW901. [q] **Not required to inspect floor of car** filled with wheat. NJ 151A122.

419–16 291Pa526, 140A541, 542 [quot CJ]; 298Pa174, 148A67, 68ALR 600; 144Va65, 131SE334 (failure to inspect is not actionable unless it would have disclosed defect causing injury).

419–19 38F(2d)89; IndA 170NE554; 213Ky368, 280SW1093; 245Mich58, 222 NW163. See also NC 154SE682. [a] (2) Depends on use to which it is to be put by employee, his age, capacity to appreciate danger, nature of employment, familiarity with work to be done, and not only simplicity of construction, but also whether tool is subjected to any other stress than muscular effort of person using it. 245Mich58, 222NW163. [e] But see 245Mich58, 222NW163. [k] **Tie tongs** used to grip railroad ties are within simple tool rule. 213Ky368, 280 SW1092.

420–20 38F(2d)89.

420–23½–New. , nor need the master inspect appliances installed by competent persons. 25F(2d)516 [aff 25F(2d) 518].

421–29 193NC223, 136SE711.

421–32 127Or246, 271P730.

423–56 238Mich289, 213NW169. [d] **Proximate cause of injury** is held to be due to acceptance of defective car by railroad without reinspection. 238Mich 289, 213NW169.

423–59 27F(2d)960; 215AppDiv595, 241NYS221.

424–60 MoA 275SW772, [c] **Purchase from reputable dealer** of appliances made by reputable manufacturer is sufficient. MoA 275SW772. [d] **Test not necessary** where tool is of standard make. MoA 275SW772. [e] **Employer may not assume** that tool will remain fit after long use. MoA 29SW(2d)215.

424–62 221MoA773, 287SW885.

424–63 180Ark1056, 24SW(2d)340 (if defect was discoverable, master is negligent in failing properly to inspect); 318Mo 50, 298SW827; MoA 285SW170; TexCivA 298SW149.

425–64 317Mo 786, 296SW764; MoA 275SW772; 291Pa526, 140A541; 144 Va65, 131SE334 (railroad company is not required to make laboratory test with microscope of rubber hose attached to blow torch); 148Wash155, 268P177.

425–66 311Mo 369, 279SW43. [d] Tex CivA 293SW901.

427–71 NJSup 130A225, 227 [quotCyc]. But see MoA 16SW(2d)730; 151Va 740, 145SE342.

427–72 But see NC 154SE682.

430–89 42F(2d)18.

430–92 180Ark1056, 24SW(2d)340; 95 Fla5, 117S714; 251 IllA585; 84 IndA 542, 149NE361; 214Ky431, 283SW416 [quotCJ]; 253Mass99, 148NE463; 143 Miss890, 108S503; 219MoA405, 271SW 880; MoA 291SW180; MoA 2SW(2d) 169; MoA 16SW(2d)1005; MoA 20SW (2d)584; 82NH350, 134A574; 246NY 300, 158NE876; 192NC14, 133SE188; 196NC359, 145SE684; NC 154SE682; 31 OhA507, 166NE694; 97PaSuper240; 149SC284, 147SE327; 151Va740, 145SE 342; Wis 232NW595. [d] **Anticipating danger.**–81NH543, 130A156.

432–93 13F(2d)389; 40GaA239, 149SE 424; 213Ky432, 281SW519; 214Ky431, 283SW416 [quotCJ]; 217Ky1, 288SW 1060; 143Miss890, 108S503; Mo 256SW 819; 319Mo 308, 5SW(2d)19; MoA 20 SW(2d)584; 196NC330, 145SE570; Tex CivA 285SW913.

433–94 217Ky1, 288SW1060. But see 41GaA263, 153SE96(2dcase).

434–96 292Pa106, 140A622.

434–98 180Ark1056, 24SW(2d)340; 313 Mo 492, 285SW965, 967 [quotCyc]; MoA 8SW(2d)1035; MoA 15SW(2d)853.

434–99 122Kan250, 252P221.

435–4 142Miss476, 107S517.

435–6 180Ark1056, 24SW(2d)340; 253 Mass446, 149NE150; 319Mo 308, 5 SW(2d)19; 291Pa526, 140A541, 542 [quotCJ].

436–7 17F(2d)345; 29F(2d)746; 253 Mass99, 148NE463; MoA 273SW165; MoA 273SW209; 193NC223, 136SE711; NC 154SE682; 144SC395, 142SE615; 155SC202, 152SE439. [f] NH 157A753. [g] **Facts held to show constructive knowledge.**–TexCivA 293SW901.

437–8 TexCivA 275SW463; 197Wis 552, 222NW781 (conditions which may be produced by negligent acts of employees).

438–12 315Mo 1181, 289SW913; 317 Mo 1255, 298SW69; 319Mo 1137, 6 SW(2d)886; 219MoA405, 271SW880; MoA 296SW216.

440–24 144Va65, 131SE334.

441–25 Mo 293SW367, 369 [citCJ]; 50 ND894, 198NW685. [a] **Under Employers' Liability Act,** general safe place rule is not applicable where servant is making dangerous place safe. Mo 293 SW367.

441–28 172Ark508, 290SW74; 95Fla 5, 117S714; 213Ky432, 281SW519; 40 Wyo 324, 277P703. [c] **Rule applied to** use under Federal Boiler Inspection Act. 40Wyo 324, 277P703.

442–29 95Fla5, 117S714; 40Wyo 324, 277P703.

442–30 95Fla5, 117S714; 315Mo 1068, 287SW474.

442–32 280US486, 50SCt198, 74L ed562; 281US351, 50SCt281, 74L ed896; 16 F(2d)550; 25F(2d)728; 26F(2d)204; 171Ark647, 286SW815; 36GaA452, 136 SE921; 84 IndA542, 149NE361; 208Ky 488, 271SW583; 13LaA684, 128S685; 265Mass527, 164NE446; 147Miss794, 114S25; 311Mo 369, 279SW43; 318Mo 1243, 3SW(2d)226; MoA 7SW(2d)448; MoA 15SW(2d)853; 191NC153, 131SE 670; 196NC36, 144SE364; 196NC262, 145SE283(2dcase); 196NC359, 145SE 684; NC 154SE682; 101WVa546, 133SE 142; 35Wyo 188, 247P1071. See also MoA 296SW212. [i] 53SD166, 220NW 459.

445–33 16F(2d)550; 36GaA452, 136SE 921.

445–34 16F(2d)550; 144Va65, 131SE 334. [e] **Detachment of rubber hose from blow torch tank by car repairer and its attempted repair held proximate** cause of injury when it was blown off connection at tank throwing spray of oil over repairer which ignited and burned him. 144Va65, 131SE334. [f] **Causes merely incidental to, or instruments of, controlling agency** are not proximate causes though nearer in time. 144Va65, 131SE334. [g] **It is only where causes are independent** of each other that nearest is of course to be charged with disaster. 144Va65, 131SE334. [h] **If injury would not have occurred but for defendant's negligence** which intervened proximately causing injury, defendant is liable. MoA 19SW(2d)758.

446–35 [b] **That car repairer was required to ride on top of coal car in freight train** was not proximate cause of injuries caused by his being thrown from train by hoboes or strikers. 121 Kan610, 249P615.

446–35½–New. In action for death, where certain acts of negligence were found proximate causes, it is immaterial whether they alone were sufficient to cause death. TexCivA 291SW667.

446–36 214Ala23, 106S242.

446–36½–New. Proximate cause is to be determined by conditions as they were at time of injury, and not as they might or ought to have been. 144Va65, 131SE334.

446–36½–New. The proximate cause remains the same regardless of who set it in motion. 144Va65, 131SE334.

446–37 MoA 282SW107.

446–39 40GaA751, 151SE544; 223Ky 417, 3SW(2d)1070; 310Mo 367, 276SW 869; 192NC236, 134SE647; 35Wyo 188, 247P1071. [c] 317Mo 1255, 298SW69; MoA 300SW993; 190NC308, 130SE29.

447–40 315Mo 331, 289SW908. [a] **Command of fellow servant could not as matter of law** be considered as intervening agency breaking chain of causation. 40GaA751, 151SE544.

447–41 38GaA518, 144SE386.

447–42 25F(2d)726. [b] **Facts held to show employee's violation of statute** and not defective roadbed caused injury. 314Mo 352, 284SW499.

448–44 26F(2d)317; 249Mich440, 229 NW488.

448–45½–New. Injury to trainman by overhead bridge while riding on train at such grade that construction of bridge can be classed as negligent, resulting in unknown risk, is not actionable where it does not appear that trainman was struck at one end rather than at the other. 241NY212, 149NE835.

448–46 36GaA452, 136SE921; TexCivA 275SW463.

448–48 26F(2d)361; 93Fla1046, 113S 671.

448–49 [b] **Facts held to show that defects were not proximate cause of injury.**–Rusty threads on boiler plug. Tex CivA 286SW281.

448–50 265Mass527, 164NE446; 82NH 476, 136A264, 50ALR367; TexCivA 31 SW(2d)146. [a] 26 OhA292, 159NE861.

448–51 167Ga841, 146SE843; TexCivA 275SW415. [a] **Facts showing proximate cause.**–8F(2d)350.

448–52 16F(2d)550; 42F(2d)111; 214 Ala23, 106S242; 39GaA596, 147SE919; 41GaA263, 153SE96(2dcase); 165Minn 223, 206NW436; 318Mo 453, 300SW758. [a] 269US406, 46SCt129, 70L ed335; 16 F(2d)550; 28F(2d)952; 214Ala23, 106 S242; 176Minn575, 224NW241; Mo 25 SW(2d)791. [b] **Violation of statute held not proximate cause.**–323Mo 450, 19 SW(2d)470.

449–53 101WVa546, 133SE142. [b] MoA 3SW(2d)740.

450–57 16F(2d)517; Mo 9SW(2d)155. [k] **Employer could assume** experienced servant would exercise ordinary care. 198NC457, 152SE153(2dcase).

451–58 Mo 276SW23.

451–59 16F(2d)517; 128Me314, 146A 903; 323Mo 826, 20SW(2d)906; 219MoA 19, 267SW964; 317Mo 492, 297SW353; 190NC742, 130SE705 (may be responsible for methods used whereby employee is injured); 196NC122, 144SE557.

453–60 3Del 564, 140A659.

453–66 OhA 153NE870. [k] (12) "Kicking" cars for switching purposes unattended by brakemen. 10LaA100,

119S750. [l] **"Spotting car"** is placing it either to be loaded or unloaded. 174 Ark1083, 298SW849. [m] **Railroad held negligent** where car repairer was injured in eye by flying bits of steel. 89 IndA 634, 166NE778.

454-67 197NC17, 147SE698.

454-69 33F(2d)866.

455-77 IndA 163NE283.

455-81 DC 26F(2d)989.

455-86 220Ky217, 294SW1050. [c] **Jerk must have been dangerous to one in such reasonably safe position as was available** to justify recovery by injured switchman. Ala 128S228.

456-88½-New. The operator of a railway motor car carrying section hands from work must maintain lookout when approaching a public crossing. 170Ark 815, 281SW374.

456-88½-New. The care required in such case depends on the nature of the crossing and the surrounding circumstances. 170Ark815, 281SW374.

456-90 [g] **Motor car operated on schedule under direction of train dispatcher** becomes a train, and rules as to motor cars do not apply. 215Ky525, 286SW784.

456-97 20F(2d)53; 87 IndA27, 154NE 41; 141Miss346, 106S281 (blasting near workmen); 309Mo 560, 274SW703. [i] 309Mo 560, 274SW703. [k] **Failure to furnish system of communication to employee** working in ash pit in which ashes were dumped by steam is held negligence. 87 IndA27, 154NE41.

458-98 20F(2d)53; 152Miss450, 120S 177.

458-99½-New. Oregon statute does not require an employer to supervise every detail of the employee's work. 17F(2d) 568.

458-1 179Ark799, 18SW(2d)331; 249 IllA446; 322Mo 813, 18SW(2d)467; 309 Mo 560, 274SW703; Mo 30SW(2d)1069.

458-2 219Ala238, 121S722; Ala 129S 60.

458-3 [a] **Due care should be observed to see no one is in danger** if there is reasonable apprehension some one is likely to be. Ala 129S60.

458-4 220AppDiv491, 222NYS38.

458-6½-New. It is the duty of a section foreman in charge of a motor car to send a flagman ahead to flag around a curve where it is impracticable to get information as to the movement of trains. 212Ky738, 280SW93.

458-7 312Mo 342, 278SW1000. [c] **Where foreman had reason to believe car repairman would work overtime,** it was his duty to keep switch locked and signal up to prevent engine from coming on track. 312Mo 342, 278SW1000.

459-9 29F(2d)18; 9LaA714, 119S759.

459-13 33F(2d)866; 37F(2d)522; 129 Kan341, 283P53(2dcase); 215Ky682, 286SW1078; 229Ky16, 16SW(2d)472; 192Ky724, 234SW455; 256Mass337, 152 NE373; Mo 30SW(2d)22; 105NJL431, 144A590; 128 Okl 176, 261P960; 35Wyo 188, 247P1071. See also 276US165, 48 SCt215, 72L ed513; 32F(2d)561; MoA 297SW146. [d] **Car checker.**-129Kan 341, 283P53(2dcase). [e] **Member of weed cutting gang** posted as flagman, has no rights superior to trespasser when asleep on track. Mo 30SW(2d)22.

460-14 197NC399, 149SE393(2dcase).

460-16 LaA 128S724; Mo 285SW482; 294Pa585, 144A765. [h] **Where there is custom to give warning on dangerous curve,** and also by rule of company, violation of custom and rule causing collision between motor cars on curve, injuring employee, will render company liable in action under Federal Employers' Liability Act. 309Mo 560, 274SW703. [i] **Sending man ahead to look for clear track.**-Where employee is injured by collision between motor cars on dangerous railroad curve, if ordinary care by foreman of crew of car required sending man ahead to see if track was clear, and he failed to do so, his negligence entitles plaintiff to recover. 309Mo 560, 274 SW703. [j] It may be duty to warn of motor car not running on schedule time on dangerous curve, which collides with car carrying plaintiff injuring him. 309 Mo 560, 274SW703.

460-17 215Ky401, 285SW245.

460-18 223Ky262, 3SW(2d)649.

461-20 255 IllA541; 129Kan341, 283P 53(2dcase); 309Mo 560, 274SW703 (have right to expect clear track); 35Wyo 188, 247P1071. [b] **Where engineer had no actual knowledge that object on track was human being** railroad is not liable. Mo 30SW(2d)22.

461-21 215Ky401, 285SW245. [b] (2) Engineer or other operative owes no duty to employee who lies down upon track till engineer actually discovers that human being is upon track in perilous position. MoA 7SW(2d)740. [d] **Railroad owes no duty to employees to sound bell or whistle** on switch engines in yard except under rule or custom. Mo 26SW(2d)929.

461-23 178Minn395, 227NW212 (negligence not shown).

461-23½-New. A railroad company is liable for an injury to a strike guard by an engine, operated without a headlight, although he was seated on the track. 215Ky401, 285SW245.

461-23⅓-New. A railroad company is under no duty to use reasonable diligence to discover peril of an employee, where its business is conducted in a reasonable manner. 128 Okl 176, 261P960.

461-23¼-New. A railroad company must exercise reasonable care to avoid injury to an employee after his peril is discovered. 128 Okl 176, 261P960.

461-24 20F(2d)53; 24F(2d)23; 29F (2d)689; Mo 30SW(2d)481; Mo 30SW (2d)735; Mo 30SW(2d)989; 148Va148, 138SE658.

462-28 [b] **Running locomotive backward** is not per se negligence. 240NY 241, 148NE333.

462-30 213Ky336, 281SW170; 148Va 148, 138SE658; MoA 2SW(2d)195. [c] **In suit under federal Employers' Liability Act,** lack of congressional law requiring warning is of no importance. 174Ark1083, 298SW849.

462-31 GaA 155SE346; 249 IllA446; Mo 285SW482. [c] **Railroad may not assume** that employees will protect themselves. 148Va148, 138SE658.

463-32 87IndA11, 158NE636. [b] **Under existing custom** switching engineer could anticipate that switchman disappearing would go between cars. Mo 30SW(2d)1069. [c] **Railroad owes switchman duty** of seeing that switch-engine is not moved except in compliance with switchman's signals. Mo 30 SW(2d)1069.

463-33 213Ky336, 281SW170. [b] **No defense that coaling crane** was not equipped with whistle, nor justification for its movement without warning to assistant operator. NJSup 134A892.

463-33½-New. Railroad is not negligent for failure to use safeguards not used by other roads. 20F(2d)53.

463-38 146Va813, 132SE692.

463-38½-New. In an action by an employee for injuries from inhaling poisonous fumes, based on the employer's violation of statute, requiring employers to provide adequate protective devices, the employer cannot be heard to complain of the indefiniteness of the statute where it had no devices, means, or methods for carrying off fumes or for provention of inhaling of same by its employees. 321Mo 92, 11SW(2d)48.

464-43 245 IllA440.

464-44 310Mo 1, 274SW1079.

464-45 226Ky561, 10SW(2d)1064.

464-46 174Ark1083, 298SW849.

464-54½-New. Employee working about machinery in motion is engaged in work "involving risk or danger." Or 293P417.

465-57 MoA 30SW(2d)641; 245NY91, 156NE625. [g] 31F(2d)939. [h] **Master using explosives** must exercise highest degree of care in method or plan of carrying on business. 145Miss172, 110 S244. [i] **Railroad may assume that** chemical supplied by experienced manufacturer for specified use can be safely used. 156Miss463, 125S819.

466-65 41F(2d)578; 179Ark631, 17SW (2d)889; TexCivA 291SW590.

466-66 16F(2d)924; 25F(2d)612; MoA 272SW1076.

467-67 196NC178, 145SE11.

467-68 179Ark631, 17SW(2d)889.

468-71 Mo 30SW(2d)481; MoA 31SW (2d)575. [c] **Injured employee may recover** on proof of custom and injury caused by violation thereof. Mo 30SW (2d)735.

469-73 120 Or122, 250P622.

469-76 157Miss607, 128S766. But see 221MoA1089, 295SW501; 148Va148, 138 SE658. [d] **Knowledge of precise injury** which would result is not necessary. 323Mo 531, 19SW(2d)679. [e] **Knowledge of employee's physical ability to do work directed to be done.**-323Mo 531, 19SW(2d)679.

469-77 245NY91, 156NE625.

469-79½-New. The master's liability is measured by his own knowledge of actual facts and not by his knowledge of the servant's ignorance of facts. 323 Mo 531, 19SW(2d)679.

469-80 279US787, 49SCt490, 73L ed 957; 25F(2d)726; 23AlaA490, 127S679; 179Ark799, 18SW(2d)331; 152Miss450, 120S177; 51Nev390, 277P609; 82NH 236, 133A9; 197NC319, 148SE446; 22 OhA216, 153NE299; TexCivA 278SW 490; 35Wyo 188, 247P1071. See also IndA 168NE42. [a] 311Mo 77, 277SW 566; 323Mo 531, 19SW(2d)679; Tex CommnA 285SW1053. [b] **Negligence, if any, held not to be proximate cause** of employee's death. TexCivA 28SW (2d)301.

470-81 5F(2d)23; 16F(2d)517; 22 F(2d)359; 173Ark323, 288SW399; 172 Ark753, 290SW580; 3Del 564, 140A659; IndA 163NE283; 309Mo 560, 274SW 703 (protection of railroad section men); 323Mo 9, 18SW(2d)478; Mo 30 SW(2d)1069.

471-82 144Va443, 132SE191.

472-85½-New. Master claiming to have rule, which was proved not to have been communicated to plaintiff, is held admission that rule was reasonably required. 82NH488, 136A260.

472-86 [d] **Railroad is not negligent in not prescribing rules** for operation of engines handling gravel cars on spur tracks, where engineer knew it was his duty to sound whistle. TexCivA 283 SW895.

473-89 125 Or634, 268P51.

473-2 Mo 30SW(2d)1069.

474-5 95Fla5, 117S714.

476-8 [b] **In Georgia.**-Ga 155SE675.

475-9 [c] (31) Rule requiring conductor of inferior train to look out for train with superior rights is reasonable as to flagman injured by train passing way station. 35Wyo 188, 247P1071.

476-11 MoA 295SW127.

476-15 [b] **Rules prohibiting employee from doing unsafe thing** or work jeopardizing safety are too general for enforcement. Ga 154SE793.

476-18 172Ark753, 290SW580. [a] (2) Where notice not required by rules or necessary to safety, such notice is dispensed with. 172Ark323, 288SW399.

476-19 127Me24, 140A827.

477-28 31F(2d)239.

478-32 [b] **Railroad rule requiring whistling at curves where view is obstructed** cannot be changed by custom not to whistle for particular curve. 321 Mo 960, 15SW(2d)794.

479-34 [a] (12) Rule that inferior class trains on main track must move within yard limits, prepared to stop unless track is seen or known to be clear, it was duty of engineer to operate engine around curve on such track at rate of speed which would enable him to stop, if necessary within distance covered by his vision. TexCivA 12SW (2d)1050. (13) Rule prohibiting employees from going between cars applies when cars are coupled. Ga 154SE 793. [b] (6) Rule requiring whistling at curves where view is obscured applies to curve where engineer cannot see through from one end of curve to other, though section foreman struck by train could have seen train for five hundred feet. 321Mo 960, 15SW(2d) 794. [n] **Motor car operated on schedule under direction of train dispatcher** becomes train and rules as to motor cars do not apply. 215Ky525, 286SW 784.

480-35 [a] **Liberal construction in favor of employee.**–Ga 154SE793.
480-36 322Mo 937, 18SW(2d)510. [a] **Where agreement between railroad and Brotherhood of Carmen conflicted** with prior rules, the agreement prevails, as it expressly superseded previous understandings. 155SC304, 152SE522.
480-37 322Mo 937, 18SW(2d)510.
480-45 42F(2d)164.
480-45½-New. Agreement by tower switchman not to send any cars down track until advised has been held not equivalent to agreement to lock switch during repairs within safety rule. 43 F(2d)908 (federal Employer's Liability Act).
481-50 125Me272, 133A92.
481-51 141SC359, 139SE779.
481-52 155SC304, 152SE522 (employee not bound by superseded rule).
481-54 172Ark753, 290SW580.
481-54½-New. A railroad is presumed to know the rules it promulgated. MoA 2SW(2d)195.
481-54¼-New. Where a rule requiring that fixed signals when obscured must be approached under control is not applicable to a line of road operated under the block system, recovery for the death of an employee on such line may not be had for failure to comply with such rule. 158Tenn75, 12SW(2d)381.
482-57 MoA 27SW(2d)765 (sub foreman).
482-59 MoA 27SW(2d)765.
483-65 315Mo 331, 289SW908; Mo 274 SW673; 322Mo 592, 17SW(2d)945; 323 Mo 307, 19SW(2d)865(2dcase); MoA 20 SW(2d)584; 190NC742, 130SE705; 192 NC14, 133SE188; 193NC805, 138SE173; TexCivA 1SW(2d)938. [j] **Negligence depends on whether he had reasonable grounds to believe that orders could be carried out safely.** MoA 9SW(2d)89.
484-66 217Ala382, 115S869; 196 Ind 238, 147NE776 (giving of order is not itself actionable negligence); MoA 19 SW(2d)528. [g] **Switch foreman ordering cars coupled** after plaintiff's arm was caught, thus incurring injuries, has been held not negligent because in emergency he did not choose another method. TexCivA 275SW415. [h] **Giving order to walk railroad tracks in snow storm** was not negligence. 249NY35, 162NE576.
485-69 MoA 19SW(2d)528.
485-70 149Va338, 141SE121.
485-73 217Ala382, 115S869; 196NC72, 144SE537, 59ALR1084. [a] **Implied notice.**–322Mo 592, 17SW(2d)945.
485-76 195NC18, 141SE282. [d] 318 Mo 28, 298SW817, 823 [citCJ].
486-82 177Ark271, 6SW(2d)15; 3Del 412, 138A645; 214Ky392, 283SW395; 260Mass399, 157NE364; 322Mo 787, 16 SW(2d)85; MoA 273SW754; MoA 282 SW110; MoA 293SW456; MoA 293SW 481; NC 154SE58; NC 155SE861; 50 ND894, 198NW685; 129 Okl 1, 263P 113; 133 Okl 277, 272P368; 292Pa106, 140A622, 625 [quotCJ]; 151Va173, 144 SE485; Wis 227NW933. [a] (1) 151 Va173 144SE485. [b] **Servant instructed as to use and warned as to danger** of machine properly guarded may not hold master for common-law liability. 216AppDiv246, 214NYS672. [i] **Hidden dangers.**–318Mo 50, 298SW 827. [j] **Duty to warn exists independently of statute.**–Wis 227NW933. [k] **Failure to warn does not constitute "unsafe place to work"** within statute. Wis 227NW933.
488-83 CalA 290P643; 260Mass399, 157NE364; 82NH110, 130A28; 50ND 894, 198NW685; 292Pa106, 140A622, 625 [quotCJ].
488-84 292Pa106, 140A622, 625 [quot CJ]; Can [1929] 3DomLR469.
489-90½-New. Whether there is a duty on the part of the master to warn a servant of danger must be determined in the light of the capacity of the servant and the knowledge of, or notice to, the master of the servant's incapacity. 51ND745, 200NW1013.
489-92 260Mass399, 157NE364.
489-1 NH 146A815(2dcase).
489-4 150Miss882, 117S339; 322Mo 787, 16SW(2d)85; MoA 18SW(2d)238; MoA 7SW(2d)716; 147Wash672, 267P 433.
490-7 MoA 7SW(2d)716.
490-19 280US102, 50SCt42, 74L ed207; 8F(2d)30; 3Del 564, 140A659; 318Mo 1243, 3SW(2d)226; 133 Okl 277, 272P 368. [d] **Instruction as to employer's duty to warn employees of dangers known to employer** is erroneous under statute requiring warning when reasonably necessary to life, health or safety of employees. Wis 230NW702.
491-24 3Del 412, 138A645; 260Mass 399, 157NE364; 244Mich565, 222NW 191; 150Miss882, 117S339; Mo 26SW (2d)942.
491-26 3Del 412, 138A645; 155SC202, 152SE439.
492-28 317Mo 1255, 298SW69.
492-29 317Mo 1255, 298SW69.
492-37 318Mo 1243, 3SW(2d)226, 228 [citCJ].
492-41 35F(2d)298; 35GaA136, 132SE 250.
492-46 Wis 230NW702.
494-55 [a] 190NC256, 129SE595.
495-62 [b] (17) Other instances. NC 154SE58.
496-77 Ark 31SW(2d)531; 234 IllA 173; 197NC586, 150SE20.
497-86 MoA 265SW1005.
497-90 TexCivA 283SW627.
497-92 Mo 23SW(2d)142. [c] (26) Running trains against traffic. 227App Div269, 237NYS297.
498-96 MoA 274SW842.
498-98 5F(2d)935 (failure of other employees to nail planks causing injury to one constructing roof on oil tank).
499-3 275US426, 48SCt177, 72L ed351; 8F(2d)30; 247 IllA156; 82NH523, 132 A614; 148Wash501, 269P831. [a] MoA 293SW456. [f] (5) 149Miss116, 115S191. (29) Danger from contact with electric wires. MoA 265SW1005.
500-5 275US426, 48SCt177, 72L ed351.
503-35 175Ark1170, 298SW1014; 181 Ark759, 27SW(2d)1000; 84 IndA651, 151NE836; 256Mass14, 152NE43; 258 Mass82, 154NE518; 259Mass394, 156 NE836; Mass 169NE782; 244Mich568, 222NW192; 168Minn491, 210NW390; 292Pa106, 140A622; 144SC10, 141SE 685; BC [1929] 4DomLR359.
503-36 21F(2d)912; 175Ark1170, 298 SW1014; 84 IndA651, 151NE836.
504-38 3Del 564, 140A659.
504-40 258Mass82, 154NE518; 148 Wash501, 269P831.
504-41 258Mass82, 154NE518.
504-48 258Mass82, 154NE518.
505-59 84 IndA651, 151NE836.
505-74 144Va443, 132SE191.
505-79 [a] 168Ark561, 271SW1.
506-84 TexCivA 283SW627.
506-85 82NH497, 136A133.
507-86 217Ala382, 115S869, 873 [quot CJ].
507-89 Mass 169NE782 (holding that general directions require no warning of incidental dangers); MoA 273SW754.
507-92 217Ala382, 115S869, 873 [quot CJ].
507-93 217Ala382, 115S869, 873 [quot CJ].
508-94 292Pa106, 140A622.
508-95 151Va173, 144SE485.
510-12 TexCivA 23SW(2d)461.
512-27 [a] (6) Opening in floor at top of stairway. 260Mass399, 157NE364.
512-29½-New. , or where a caddy was in position where he might reasonably be expected to be struck if ball were driven inaccurately. 220MoA542, 287 SW865.
512-32 TexCivA 283SW627.
512-34 8F(2d)30; 204 Iowa1063, 216 NW677; 225Ky447, 9SW(2d)212; Mass 169NE782; TexCivA 283SW627; 144 Va65, 131SE334. [b] (2) No duty to warn experienced and intelligent minor against dangers from cogs and set screws covered with iron hood. 177Ark 986, 8SW(2d)456.
514-38 51ND745, 200NW1013.
514-39 3Del 412, 138A645; MoA 273 SW749; 51ND745, 200NW1013. [c] (2) Where it does not appear that coal miner under eighteen years of age failed to meet requirements of statute as to qualification as practical miner, or that employer employed him without proper examination, employer owed no duty in reference to instructions, merely on account of age. 323Mo 1058, 21SW(2d) 772.
515-40 177Ark986, 8SW(2d)456; Ark 31SW(2d)531; 3Del 412, 138A645; 3 Del 564, 140A659; 41Ga509, 153SE575; 214Ky392, 283SW395; 83NH196, 140A 172; 51ND745, 200NW1013; 129 Okl 1, 263P113. [i] **Age, experience, and capacity to observe and appreciate danger** must be considered when youthful employees are involved. 192NC14, 133SE 188.
517-48 3Del 412, 138A645.
517-49 [a] **Minor over fourteen.**–There is no presumption that minor over fourteen is aware of danger and needs no instruction. 35GaA136, 132SE250.
518-59 191NC549, 132SE598.
518-61 179Ark915, 18SW(2d)904; 127 Me228, 142A776; 258Mass303, 154NE 853. [a] (22) That it is dangerous for strike breaker to get out on streets where strikers were congregated. Tex CivA 285SW685.
519-63 MoA 282SW110.
519-63½-New. Where telegraph company sent messenger boy fifteen years of age to deliver message to passenger on train, it was not negligence to fail to warn him not to leap from moving train. 258Mass303, 154NE853.
520-67 83NH196, 140A172.
521-80 214Ky392, 283SW395.
522-87 [e] 168Ark561, 271SW1.
522-88 168Ark561, 271SW1.
522-89 168Ark561, 271SW1.
523-98 Mo 30SW(2d)1018; MoA 275 SW586; 198NC736, 153SE324.
524-99 190NC742, 130SE705; TexCivA 284SW268.
524-1 190NC742, 130SE705.
524-2 190NC742, 130SE705.
524-6 MoA 3SW(2d)282.
524-8 NC 154SE58.
524-11 [a] (4) Sufficiency of force already used. 151Va409, 145SE372.
525-13 194NC687, 140SE602.
525-24 See also MoA 294SW444.
525-25 MoA 279SW177.
525-28 194NC687, 140SE602.
525-29½-New. Failure to employ properly certified mine foreman is not ground for recovery for injuries sustained where such failure did not contribute to the injury. 213Ky776, 281 SW1020.
526-31 16F(2d)517; 155Miss754, 124S 798; 220MoA902, 296SW228; 198NC27, 150SE499.
527-35 220Ala661, 127S230; MoA 282 SW170.
527-37 MoA 275SW555; MoA 282SW 484.
528-38 5F(2d)23 (reasonable diligence); 16F(2d)517.
530-49 [b] (3) MoA 282SW484. (5) Mere employment of foreigners unable to understand English is not negligence. MoA 282SW484.
530-53 MoA 275SW555.
531-65 MoA 275SW555.
533-84 155Miss754, 124S798; 220MoA 902, 296SW228; MoA 282SW170.
533-87 MoA 282SW170; 220MoA175, 282SW515; 220MoA902, 296SW228.
534-88 155Miss754, 124S798; 220MoA 902, 296SW228.
535-89 220MoA175, 282SW515.
535-94 98Fla1158, 125S372; 220MoA 175, 282SW515; 220MoA902, 296SW 228.
536-95 MoA 282SW484.
536-98 [c] **Master liable for foreman's failure to promulgate reasonably necessary rules to avoid injury to workman.** 219AppDiv438, 220NYS895.
537-12 16F(2d)517; 16F(2d)552; 32 F(2d)410; 32F(2d)436; 98Fla1158, 125 S372; 99Fla371, 126S759; 37GaA72, 139 SE361; 4HawaiiFed447; 220Ky37, 294 SW781; 230Ky240, 18SW(2d)986; 150 Miss458, 117S117; 311Mo 77, 277SW 566; 323Mo 9, 18SW(2d)478; Mo 30 SW(2d)35; MoA 284SW855; 83NH43, 138A302; 126Misc858, 215NYS584; 189 NC653, 127SE834; 198NC27, 150SE499; 143Wash271, 255P110; Ont [1928] 4 DomLR991. See also 191NC90, 131SE 387. [a] **Injury to helper of machine operator** due to negligence of latter in giving directions. 216AppDiv246, 214 NYS672.
540-13 295Pa551, 145A602.
540-24 [a] (2) 35PortoRico 606.
540-25 16F(2d)517; 169Ark235, 275 SW329; 319Mo 1137, 6SW(2d)886, 891 [quotCJ].
541-26 16F(2d)517.

542-27 126Misc858, 215NYS584.
542-32½-New. The fellow servant rule is an exception to the ordinary rule of agency. 126Misc858, 215NYS584.
542-34 125Me272, 133A92; 126Misc858, 215NYS584.
543-36 232 IllA346; 83NH575, 145A664.
543-37 318Mo 274, 300SW1064; Tex CivA 281SW654.
544-38 [a] **To render master liable** it is not necessary that fellow servant should have anticipated that injury would result from his act, but only that there was reasonable possibility of such act producing any injury to servant. MoA 20SW(2d)301.
544-39 143Miss390, 108S503. [e] **Liability of master may be either primary,** as arising from injuries caused by breach of duty which master owes, and cannot delegate, or secondary. 190NC 1, 128SE471.
544-40 232 IllA346; 126Misc858, 215NYS584. [a] (4) Rule not extended to excuse master whose servant while actually in service negligently damages property of another servant. 126Misc858, 215NYS584. (5) Where property of fellow servant is being used in service of master as convenience to fellow servant, his property is treated as that of a stranger to whom master would be liable for negligent act of servant. 126Misc858, 215NYS584. (6) Fact that driver of wagon and plaintiff were fellow servants engaged in fellow service at time of collision does not relieve defendant from liability for damage to plaintiff's property due to negligent act of driver. 126Misc858, 215NYS584.
544-41 126Misc858, 215NYS584.
544-42 126Misc858, 215NYS584.
545-48½-New. In an action under the Federal Employers' Liability Act, the defense of assumption of risk is inapplicable where the injury arises from a single act of negligence of a fellow employee, creating an emergency without warning to plaintiff or opportunity to judge of the resulting danger. 105WVa 555, 144SE100.
545-48¾-New. Doctrine of assumption of risk has no application when unforseeable negligence of fellow servant causes injury. Mo 26SW(2d)929.
545-48¼-New. Fellow servant rule applies only between master and servant and not between two servants. Mo 30 SW(2d)35.
545-49 83NH383, 142A707.
545-55 196NC614, 146SE597, 62ALR 1430.
545-57 219AppDiv416, 219NYS351.
545-60 [b] **Not negligence for an employee assigned to a particular job to** assist another employee in doing something else for his employer's benefit. BC [1927] 2DomLR327.
546-63 Mo 31SW(2d)785 (ratification not shown).
546-70 16F(2d)517; 220MoA902, 296 SW228.
546-71 22F(2d)359; 175Ark777, 300 SW400; 178Ark283, 10SW(2d)364; 180 Ark1056, 24SW(2d)340; 87Colo 311, 287 P648; 200 Ind589, 163NE99; 232Ky734, 24SW(2d)585; 312Mo 342, 278SW1000; TexCivA 6SW(2d)410; TexCivA 29SW (2d)835. See also 235 IllA431.
546-72 TexCommnA 288SW154.
547-73 Wash 291P336.
547-74 178Ark283, 10SW(2d)364; Tex CivA 12SW(2d)1050; 142Wash642, 253 P1088.
548-88 129Kan285, 282P719.
548-90 161Ga949, 132SE210.
548-91 But see 251NY218, 167NE422.
548-93 35F(2d)717; 149Miss595, 115S 713.
549-6 337 Ill 70, 168NE895; 152Tenn 614, 279SW1043.
549-11 [b] Contra 228AppDiv115, 239 NYS323.
549-13 213AppDiv590, 211NYS80.
550-25 16F(2d)517; 177Ark1165, 9SW (2d)563; 90Fla632, 106S462.
550-26 16F(2d)517. [a] (8) Foreman and members of gang under his direction and control. 251NY218, 167NE422.
550-27 16F(2d)517.
550-28 16F(2d)517.
550-29 16F(2d)517.
550-30 16F(2d)517.
550-31 16F(2d)517.
551-33 16F(2d)517.
551-34 16F(2d)517.
551-35 16F(2d)517.
551-42 MoA 282SW1045; MoA 284SW 513.
552-55 32F(2d)436; MoA 16SW(2d) 730.
552-61 219Ala193, 121S710(2dcase); 90 Fla632, 106S462; 155Miss754, 124S798.
554-72 173Ark43, 291SW982; 152Miss 681, 120S812(2dcase).
554-75 173Ark43, 291SW982, 983 [cit CJ].
554-81 133Misc486, 232NYS332.
556-99 155Miss754, 124S798; 82NH 268, 133A4, 46ALR380.
557-1 But see 82NH268, 133A4, 46ALR 380.
557-2 201Cal 610, 258P88, 90 [quotCJ].
558-3 285Pa489, 132A575.
558-4 201Cal 610, 258P88, 90 [quotCJ].
560-12 83NH276, 141A470; 285Pa489, 132A575.
561-18 16F(2d)517; 311Mo 77, 277SW 566.
562-20 [c] (20) Workmen removing forms in concrete pit. Mo 278SW373.
562-24½-New. Where, in the very nature of the business of loading, hauling, and unloading goods for shipment, there is necessarily an empty handed return, the relation of fellow servants between the truck driver and a servant employed to load and unload the goods does not alternate with the fact of hauling and returning. 125Kan192, 264P31.
562-26 16F(2d)517.
563-32 88 IndA661, 165NE325; WVa 103SE919.
567-89 [a] (9) Watchman at gate to control entrance and exit of employees and sailor returning from shore leave. 161Ga949, 132SE210.
567-97 252 IllA238.
569-2 [a] (6) Cement finishers and employee cleaning rubbish. MoA 272SW 987.
569-3 [a] (9) Clerk in charge of stockroom and employer working in finishing department. MoA 292SW1073.
569-4 [a] (5) Employee unloading trucks and employee pushing trucks into building. MoA 18SW(2d)238.
569-5 126Misc858, 215NYS584. [a] (34) Driver of truck and laborer loading and unloading it and riding back and forth on it. 125Kan192, 264P31.
573-34 123Kan522, 256P123, 124 [quot CJ]; 149Md425, 131A754.
573-35 123Kan522, 256P123, 124 [quot CJ].
573-36 123Kan522, 256P123, 124 [quot CJ].
573-37 123Kan522, 256P123, 124 [quot CJ].
573-46 Mo 30SW(2d)35; MoA 291SW 505; MoA 296SW1028.
573-46½-New. But where he enters into the work performing manual labor connected with the work, he thereby becomes a colaborer and fellow servant with plaintiff. 123Kan522, 256P123 (negligence in driving team).
574-54 232Ky734, 24SW(2d)585; 154 Md204, 140A48. [c] (1) Mo 274SW778; 318Mo 421, 18W(2d)791; 321Mo 1024, 14SW(2d)1; MoA 273SW749.
576-56 232Ky734, 24SW(2d)585; Miss 129S597; 319Mo 1137, 6SW(2d)886; 296Pa529, 146A130.
578-81 232Ky734, 24SW(2d)585.
579-7 Contra 16F(2d)552.
579-12 16F(2d)517; 123Kan522, 256P 123, 124 [quotCJ]; 320Mo 408, 7SW(2d) 1006. See also Miss 129S597.
579-13 322Mo 813, 18SW(2d)467; 16 F(2d)517.
585-49 16F(2d)517.
586-50 16F(2d)517; 251 IllA585; MoA 287SW810; 193NC805, 138SE173.
587-63 16F(2d)517.
590-3 310Mo 488, 276SW405; MoA 3 SW(2d)282. [b] (1) MoA 274SW842; MoA 13SW(2d)553. (2) MoA 3SW(2d) 282; MoA 13SW(2d)553.
591-4 220Ala661, 127S230.
591-9 MoA 291SW505.
592-16 [a] Miss 129S597.
593-25 See also MoA 296SW187.
593-27 WVa 153SE919. See also MoA 295SW841.
594-33 149Md425, 131A754. [f] **Controlling question** is whether authority exercised by foreman has relation to duty which employer is primarily and absolutely obliged to have performed. 149Md425, 131A754.
596-40 149Md425, 131A754.
597-41 149Md425, 131A754.
602-79 16F(2d)517; 253Mass99, 148NE 463; 310Mo 488, 276SW405; 319Mo 958, 6SW(2d)568; 322Mo 147, 14SW(2d) 603; Mo 26SW(2d)957; MoA 273SW 749; MoA 273SW761; MoA 299SW842; MoA 284SW513; MoA 291SW505; MoA 294SW732; 221MoA1169, 300SW1062.
604-80 321Mo 1024, 14SW(2d)1; MoA 272SW987; MoA 294SW732; MoA 296 SW1028.
606-87 127Me228, 142A776; 213AppDiv 590, 211NYS80.
608-92 310Mo 488, 276SW405 (master held liable for injury to servant working inside trailer, due to negligence of driver in detaching tractor from trailer without putting brace in proper position).
611-24 [a] (3) Cutting down large tree and leaving it standing with cut concealed in undergrowth. 151SC280, 148 SE870.
611-31 MoA 296SW187.
612-35 83NH383, 142A707.
612-39 WVa 153SE919.
615-67 220MoA38, 285SW757.
616-75 220MoA38, 285SW757.
617-83 172Ark753, 290SW580.
618-87 151Va740, 145SE342.
618-88 16F(2d)517; 16F(2d)552; 227 Ky91, 11SW(2d)985; Mo 294SW80; 319 Mo 1196, 8SW(2d)846, 60ALR448; MoA 299SW842.
619-89 MoA 274SW842.
620-92 16F(2d)552.
621-95½-New. A shipping clerk who selects servants from other departments to assist in loading a vehicle at the factory and unloading it at another point, but does not select the means of transportation, is not a vice principal as to a servant selected by him to do the work. 125Kan192, 264P31 (especially while returning to factory).
622-5 5F(2d)464; 168Ark973, 272 SW647.
622-6 319Mo 1137, 6SW(2d)886.
623-7 16F(2d)552.
623-8 122Kan250, 252P221.
624-14 41F(2d)738.
625-31 16F(2d)552, Mo 4SW(2d)802. But see 27F(2d)890.
630-63 30F(2d)784; 320Mo 791, 9SW (2d)972; MoA 296SW437.
631-66 311Mo 77, 277SW566.
631-68½-New. An act within the scope of superintendence and merely incidental thereto renders the master liable for injury to a servant caused thereby if negligent. 311Mo 77, 277SW566.
631-70 315Mo 1181, 289SW913.
631-75 149Md425, 131A754; MoA 6SW (2d)1023; 83NH196, 140A172.
633-81 5F(2d)23 (where employer used reasonable diligence in prescribing regulations for safety of employees); 220Ky 37, 294SW781; 323Mo 9, 18SW(2d)478.
633-85 323Mo 9, 18SW(2d)478. See also 149Md425, 131A754.
634-86 MoA 18SW(2d)238.
634-88 322Mo 787, 16SW(2d)85; 133 Okl 277, 272P368.
634-88½-New. Fellow servant need not warn co-employee until he knows or has reason to believe latter is oblivious to situation. Va 153SE574.
634-89 321Mo 1024, 14SW(2d)1; MoA 13SW(2d)562.
635-94 223Ky262, 3SW(2d)649.
635-2 See also MoA 293SW451.
635-9 16F(2d)517.
636-11 322Mo 137, 14SW(2d)652.
636-13 31 OhA446, 167NE482.
636-14 41GaA509, 153SE575; 321Mo 1024, 14SW(2d)1; 322Mo 592, 17SW (2d)945; 323Mo 307, 19SW(2d)865(2d case); MoA 284SW855. See also MoA 293SW428.
637-19 [b] **Servant injured by negligent command of fellow servant not performing nonassignable duties of master** cannot recover against master. 41 GaA509, 153SE575.
637-22 51Nev390, 277P609.
639-37 See also 149Md425, 131A754.
639-38 MoA 284SW855.

640-48 149Mi425, 131A754, 150NC 712, 130SE705.

640-49 168Minn491, 210NW896.

640-54 1/R1 221, 132A384

640-55 [d] Except for statute master is not liable for injuries caused by fellow servant. 41GaA569, 15SE575.

641-59 Ark 299SW(2d)1935, 125 Or 634, 268P51.

641-59 173Ark729, 293SW9.

642-61 173Ark79, 293SW9.

642-71 169Ark216, 275SW329.

643-74½ New. Florida Hazardous Occupation Act applies to employees of railroad although employment in which he was engaged at the time of the accident was not railroading. 111(2d)921

644-86 320Mo781, 30W(2d)891, 61ALR 5.. TexCivA 278SW490. TexCivA 9 SW(2d)281 [a] Negligence of fellow servant who shouted warning is held proximate cause of injury to plaintiff who was hurt in effort to avoid supposed danger. TexCivA 278SW190.

644-90 166GaA751, 151SE544 (made direct).

645-97 [a] (12) Carpenter injured by falling from scaffold held not person in charge of work so as to preclude liability. 137Or216, 271P736.

645-98 164(2d)517, 520 [quotCJ], 17 L(2d)62.

646-4 149Mi281, 147SE127

654-41 [a] Under this statute, providing that negligence of fellow servant shall not be defense where injury was caused or contributed to by negligent act of fellow servant done in obedience to immediate or peremptory instructions given by employer or person who has authority to direct doing of act employee's instructions to fit empty wagon with chain to load wagon which plaintiff was driving is "peremptory." 114 Oh 152, 151NE15.

654-49 120Ark567, 228SW(2d)173; 1 LaA10. NJBap 1911A592, Or 293P417, 292P406, 149A624

654-51 172Minn231, 214NW290. [e] Nova Scotia Workmen's Compensation Act abrogates doctrine of common employment in all industries excluded from scope of part one thereof whether by act itself or by regulation of board. NS 1922 [Dom] 7Dom R796

655-56 159NC664, 72SE344

655-60 161(2d)517, 129NC653, 127SE 531. [e] Statutes relate only to companies engaged in commerce. 161(2d) 517.

658-66 191NC250, 130SE369, 193NC 475, 135SE169

664-67 17 (2d)164

667-10 171Ark9, 237SW197

672-83 151Va72, 144SE146

674-19 281U8638, 508CC110, 74L ed 1011. 31F(2d)1001, Ala 128S228 (employee in charge of locomotive). DC 26 F(2d)989, 232 IIA156, 252 IIA128, 229Ky365, 15W(2d)221, 125Me96, 141 A6, 28Mich293, 209NW184, 41Mo 124, 248SW116, 93NH197, 152A695, 192NC527, 135SE522, 55ND554, 211NW 311, 79Pa421, 111A115, 80 155SE 438. TexCommA 278SW193. Va 154 SE574, 105WVa67, 141SE250. But see 232Ky734, 7SW(2d)580

676-20 151(2d)641, 214Ala317, 107S 156, 217Mo751, 115S163, Ala 128S228, 13Ark729, 290SW942, 232 IIA316, 200Ind589, 163NE93, IndA 168NE281, 235Mich293, 209NW184, 103Nj 501, 116A57, 55ND553, 211NW311, 28 OhA 421, 162NE720, 79Pa342, 115A293, 135SE241, 105SE231

676-21 202Iowa129, 211NW775, Iowa 211NW65, 125Me90, 111A6, 215Mich 293, 209NW184, 176Minn615, 221NW 211, 311Mo173, 278SW1161, Mo 298SW (2d)112, 55ND563, 213NW811. [a] In case of single act of fellow employee's negligence creating sudden emergency, employee does not assume risk. 215 Mich293, 209NW184

676-21½ New. Defense is inapplicable when the injury arises from a single act of negligence of a fellow employee creating a sudden emergency without warning to the plaintiff or opportunity to judge of the resulting danger. 105 WVa555, 143SE160

676-22 32F(2d)641, 12F(2d)403, 217 Ala264, 115S168; Iowa 213NW657, 235 Mich293, 209NW184; Va 153SE874, 117Wash260, 205P1085.

676-23 232 IIA346; 105WVa572, 144 SE255

676-23½ New. Employee may assume that fellow employee will not be negligent. 235Mich293, 209NW184

676-24½ New. Nor need an employee anticipate negligence of fellow employees and quit employment because thereof in order to relieve him of assumption of risk thereof. 235Mich293, 209NW184

676-25 229Ky365, 17SW(2d)224; 114 Neb219, 206NW737

676-26 MoA 291SW156

676-28 Mo 274SW173 MoA 284SW 847 MoA 300SW1018 MoA 38W(2d) 232 MoA 248W(2d)166 126 Or85, 268 P385 TexCivA 288SW(2d)320

676-34 [d] Foreman's gross negligence held proximate cause.-TexCivA 288SW (2d)320.

679-46 MoA 282SW170

679-46 [a] MoA 38W(2d)232

679-46 See also 190NC1, 128SE171.

679-52 MoA 296SW1028.

679-2 90Ia632, 1068162

679-2 171Ark953 227SW197, 232 IIA 316 295Pa77, 111A477, TexCivA 290 SW905 See also MoA 296SW470.

679-3 35GaA518, 141SE135

679-9 34 IndA651, 151NE336

679-14 173Ark762, 293SW1002, 316Mo 1266, 290SW106.

679-15 173Ark762, 293SW1002, 82NH 236, 124A9 TexCommnA 288SW154.

679-16½ New. Negligence of an employee is immaterial on the question of his assumption of risk. Utah 274P945.

679-19 173Ark762, 293SW1002, 34 IndA651, 151NE336 [a] (1) 90Ia632, 1068162.

679-20 173Ark762, 293SW1002

679-22 173Ark762, 293SW1002.

679-24 22F(2d)22.

679-26 173Ark762, 293SW1002.

679-28 173Ark762, 293SW1002

679-29 170Mo701, 98W(2d)972

679-44 173Ark762, 293SW1002 MoA 296SW170, TexCivA 328SW(2d)264.

679-46 34 IndA651, 151NE336, 220 MoA12, 278SW865

679-50 235Mich293, 209NW184

679-54 173Ark762, 293SW1002.

679-61 173Ark762, 293SW1002, 211Ky 256 258SW416, 217AppDiv316, 217 NY1173, 285Pa27, 131A477.

679-70 Ark 298SW(2d)1085.

679-73 181Ark674, 278SW(2d)516, 225 Ky447, 98W(2d)212.

679-74 276U8105, 488CC215, 72L ed 511, 217Ala251, 115S168, 176Ark651, 38W(2d)675, 198Cal733, 247P911, 49 ALR1110, 243 IIA537, 251 IIA586, 35 IndA135 148NE143, IndA 168NE342, 215Ky11, 281SW79, 225Ky447, 9SW (2d)212, 125Me96, 131A6, 125Me272, 133A92, 233Mich318, 206NW485, 235 Mich293, 209NW184, 230Mich577, 211 NW111, 156Miss206, 125S123, 310Mo 1, 274SW1079, Mo 308SW(2d)151, MoA 296SW148, NC 155SE759, NC 151SE 652, Or 288P1003, 295Pa343, 143A6, 291Pa520, 111A705, TexCommnA 272 SW764 TexCommnA 58W(2d)56, TexCivA 295SW250 TexCivA 68W(2d)110, 119Va31b, 111SE121, 111Wash647, 251 P550 119Wash1, 270P113, 102WVa10, 135SE262, 48ALR1006, 105WVa672, 144 SE259

680-75 252 IIA128, 34 IndA354, 148 NE139 200 Ind550, 161NE609; 214Ky 591, 281SW953, 229Ky365, 17SW(2d) 224 177Mo24, 140A897; 315Mo1199, 278SW1047, Mo 268SW(2d)791 160NJ 65137, 140A659, 216NY100, 145NE516; 159NC813, 128SE346; TexCivA 297SW 321, 324 [quotCJ] Erratum In 1929 Annotations "216NY100, 145NE876" should be "216NY100, 145NE876"

680-76 34 IndA354, 148NE139

680-77 25F(2d)726, 232Ky734, 248SW (2d)658 (where action not brought under employers' liability act). TexCivA 295SW250 Utah 274P945

680-78 230Ky210 18SW(2d)986; TexCommnA 272SW764

680-79½ New. Doctrine of assumption of risk has no application when negligence of fellow servant causing injury could not have been expected or foreseen. 190NC144, 130SE116

680-81 220MoA1229, 298SW1069.

680-82 244 IIA1; 245 IIA440; 310Mo 1, 274SW1079; 315Mo1199, 287SW 1047.

680-83 310Mo1, 274SW1079; 315Mo 1199, 287SW1047.

681-85 16F(2d)574, 32Ariz463, 259P 1049 [a] (1) 200Cal265, 252P1045.

681-86 95Fla960, 117S333

681-87 8F(2d)332; 93Fla1046, 1138 671; 225Ky147, 98W(2d)212; 230Ky 210, 138W(2d)986, 253Mass499, 149NE 208, 221MoA679, 283SW738 (decided under Arkansas statute); 82NH236, 133 A9, TexCivA 275SW505. [a] (2) Under the New Hampshire Act defense is not available to employer who has not accepted act. 82NH476, 136A261, 50 ALR467.

681-88 93Fla520, 1128558; 321Mo378, 11SW(2d)263, 82NH236, 133A9, Or 283P1003, Or 293P147; TexCivA 297 SW1063.

681-91 8C 155SE438.

681-92 8C 155SE438.

681-93 50ND394, 198NW685, 149SC 89, 146SE663, TexCivA 295SW250, 251 [quotCJ].

681-94 279U87, 498CC202, 73L ed578, MoA 297SW174, MoA 228SW(2d)881; 50ND394, 198NW685, 285Pa27, 131A 477, 149SC89, 146SE663.

682-97 23AlaA490, 127S679; 170Ark 493, 230SW12, 106Conn72, 136A874; 3 Del564, 140A659, 232 IIA346, Iowa 241NW321, 217Ky738, 280SW93, Mo 293SW732, 320Mo791, 98W(2d)972, NJSup 118A172, 195NC150, 150SE 834, 50ND594, 198NW685, 285Pa27, 131A477, 292Pa321, 111A157; 149SC 89, 146SE663, SC 155SE438; TexCivA 295SW250, Utah 280P1053. But see 171Ark983, 287SW197.

682-99 236Mich577, 211NW111; 197 NC17, 147SE698, 162WVa40, 135SE 262, 48ALR506 [a] Section foreman did not assume all risk of injury from negligent operation of defendant's train. LaA128S721.

682-2 8F(2d)30; 219MoA234, 271SW 1023. TexCivA 290SW905.

682-3 210Ky600, 276SW615; 289Pa 393, 137A623

682-6 8F(2d)30; 23F(2d)282; 35 F(2d)602, 218Ala384, 118S665, 169 Ark235, 275SW329; 171Ark968, 287 SW173, 171Ark983, 287SW197, 173 Ark702, 293SW1002, 176Ark705, 38W (2d)968, 180Ark667, 228W(2d)373 (unless obvious and patent), 180Ark1056, 248W(2d)340; 181Ark487, 268W(2d) 115 Ark 318SW(2d)762, 106Conn72, 136A874, 90Fla632, 1068462; 93Fla 520, 1128558 232 IIA346, 210Ky600, 276SW615, 212Ky738, 280SW93; 213 Ky136, 281SW170, 216Ky42, 287SW 219, 232Ky734, 248SW(2d)585; 125Me 272, 133A92, 126Me347, 133A911; 128 Me374, 147A701 (but proof may show such risk assumed); 146Miss172, 1108 244, 154Miss713, 122S365, Mo 256SW 222, Mo 274SW692, 310Mo1, 274SW 1079, 315Mo1068, 287SW174, 315Mo 331, 289SW908, 317Mo86, 296SW764; 319Mo1196, 88W(2d)846, 60ALR148, 320Mo791, 98W(2d)972, Mo 128W(2d) 498, 323Mo363, 19SW(2d)476, 319Mo A19, 267SW961, 219MoA234, 271SW 1023; MoA 272SW987, MoA 294SW 111, MoA 296SW470, MoA 300SW993; MoA 16SW(2d)853, 191NC90, 131SE 387, 198NC742, 153SE106, NC 154SE 847; 131 Or108, 280P337; 285Pa27, 131A477; 289Pa393, 137A623, Tex CivA 271SW205; TexCivA 282SW309; TexCivA 290SW905, TexCivA 68W(2d) 110, Utah 280P1053; 148Va148, 138SE 668, 149Va318, 141SE228, 149Wash1, 270P113, 101WVa110, 133SE114.

684-7 IndA 163NE283

684-10 279U87, 498CC202, 73L ed578; 178Ark283, 10SW(2d)364, 149SC89, 146 SE663

685-16 196NC126, 144SE552.

685-17 TexCivA 291SW667

685-19 316Mo1068, 287SW474; Mo 2 SW(2d)785; Mo 318SW(2d)14, 219MoA 234, 271SW1023, MoA 282SW110, 231 MoA773 287SW885, MoA 292SW143; MoA 293SW428 MoA 68W(2d)1016; MoA 298W(2d)301 "Of late years, etc." 318Mo50, 298SW827

685-20 Mo 318W(2d)14

685-22 [b] Risks assumed.-319MoA234,

271SW1023. [c] **Violation of statute.**–219MoA234, 271SW1023.

696–33 232 IllA346; 118Kan701, 236P660; 122Kan250, 252P221; Mo 274SW692; 313Mo 492, 285SW965; 83NH575, 145A664.

697–34 122Kan250, 252P221; MoA 20SW(2d)601.

697–35 BC [1930] 3DomLR951.

697–37 147Wash672, 267P433.

697–38 [a] **Evidence held to raise issue for jury** as to railroad's failure to furnish employee reasonably safe place to work. TexCivA 284SW268.

697–41 95Fla960, 117S383; 128Kan26, 276P81; 90Fla632, 106S462; 154Miss113, 122S365; 315Mo 1068, 287SW474; Mo 294SW80; 319Mo 1196, 8SW(2d)846, 60ALR448; SD 225NW223.

697–44 192NC236, 134SE647.

697–47 Mo 4SW(2d)802. [a] (4) Doctrine of assumption of risk does not apply to injuries from explosives used in blasting stumps because of master's failure to exercise proper degree of care. 145Miss172, 110S244.

697–51 TexCivA 290SW905.

698–53 88 IndA532, 164NE705.

698–54 IndA 165NE82(3dcase); 236Mich577, 211NW111; MoA 7SW(2d)740.

698–57 236Mich577, 211NW111.

698–59 316Mo 1266, 296SW105.

699–61 322Mo 980, 18SW(2d)62.

699–62 36F(2d)480; 215Ala285, 110S312; 146Miss130, 110S234; Mo 26SW(2d)988; TexCivA 272SW594. [b] (1) 322Mo 813, 18SW(2d)467.

700–70 155Miss75, 124S74.

700–71 265Mass89, 163NE764. But see MoA 18SW(2d)131.

700–74 269US406, 46SCt129, 70Led335; 30F(2d)487; 93Fla1046, 113S671; 228Ky500, 15SW(2d)300; 315Mo 1199, 287SW1047; 220MoA720, 293SW468; NJ Sup 135A659; Mont 292P909. See also 285Pa27, 131A477.

701–75 [a] (1) 189NC813, 128SE345; 285Pa27, 131A477; 40Wyo 324, 277P703. (2) Matters not violative of statute. 27F(2d)98. [b] 165Minn223, 206NW436; 176Minn575, 224NW241; 307Mo 595, 271SW358; 285Pa27, 131A477.

701–76 165Minn223, 206NW436; 307Mo 595, 271SW358; 318Mo 453, 300SW758; 220MoA720, 293SW468; 83NH383, 142A707; 285Pa27, 131A477.

701–77 151Wash430, 276P89.

701–82 219MoA234, 271SW1023; Or 291P380; 285Pa27, 131A477; 151Va740, 145SE342.

703–90½–New. Where the act complained of is not a violation of the statute, negligence must be established, and the risk shown not an ordinary one assumed by employee, in order that he may recover. 285Pa27, 131A477.

703–5 Mo 2SW(2d)785; 149Va720, 141SE838.

704–8 151Va278, 144SE436. [b] **Former cases overruled.**–180Minn21, 230NW125.

704–14 SC 155SE438; Wash 291P336. See also 125Me96, 131A5.

705–15 148Wash93, 268P145.

705–16 149SC89, 146SE663.

705–21 8F(2d)30; 14F(2d)899; 41F(2d)617; 21F(2d)912; 38F(2d)599; 41F(2d)651; 168Ark976, 272SW357; 170Ark1193, 281SW907; 171Ark968, 237SW173; 173Ark762, 293SW1002; 178Ark283, 10SW(2d)364; 180Ark1056, 24SW(2d)340; 181Ark946, 28SW(2d)728; Ark 31SW(2d)762; CalA 287P538; 87Colo311, 287P648; 3Del 564, 140A659; 95Fla5, 117S714; 35GaA733, 134SE827; 232 IllA346; 251 IllA585; 200 Ind589, 163NE99; 88 IndA532, 164NE705; 84IndA651, 151NE836; Iowa 231NW321; Iowa 232NW657; 118Kan713, 236P821; 210Ky600, 276SW515; 220Ky64, 294SW809; 225Ky243, 8SW(2d)418; 226Ky472, 11SW(2d)131; 229Ky365, 17SW(2d)224; 230Ky240, 18SW(2d)986; 127Me24, 140A827; 253Mass99, 148NE463; 174Minn466, 219NW755; Minn 231NW829; 151Miss240, 117S593; 310Mo 248, 274SW1028; 315Mo 1068, 287SW474; 316Mo1303, 295SW102; 317Mo 86, 296SW764; Mo 294SW80; MoA 15SW(2d)923; MoA275SW586; MoA 20SW(2d)301; 220App Div491, 222NYS38; 191NC90, 131SE387 (with certain statutory exceptions); 198NC742, 153SE406; 51ND745, 200NW1013; 128 Okl 176, 261P960; 126 Or85, 268P985; Or 293P414; 285Pa27, 131A477; 289Pa393, 137A623; 292Pa321, 141A157; 138SC241, 136SE234; 53SD166, 220NW459; TexCivA 295SW250; Tex CivA 68W(2d)410; TexCivA 24SW(2d)783 (employee of independent contractor); Utah 280P1053; Wash 291P336; 146Va366, 131SE815; 151Va173, 144SE485; 151Va815, 145SE255; Va 153SE874; 148Wash93, 268P145; 149Wash1, 270P113; 101WVa440, 133SE114. But see 206 Iowa809, 221NW460, 62ALR1006. [d] **Electrical current.**–253Mass99, 148NE463. [e] **Risk assumed by employer is not measured by degree of risk.**–Wash 291P336.

708–22 40F(2d)790; 310Mo 248, 274SW1028; 191NC90, 131SE387 (injury resulting from ordinary risk is damnum absque injuria).

708–24 181Ark946, 28SW(2d)728; 126Kan277, 281, 268P86 [quotCJ].

709–27 217Ala251, 115S168; 229Ky365, 17SW(2d)224; 125Me272, 133A92; MoA 19SW(2d)528.

710–28 MoA 19SW(2d)528.

710–30 253Mass99, 148NE463; 151Va409, 145SE372.

710–36 MoA 294SW444; NH 149A77.

710–39 276US165, 48SCt215, 72Led513; IndA 168NE42; 235Mich293, 309NW184; 242Mich433, 219NW685; 146Miss130, 110S234; Mo 30SW(2d)735; 220MoA1229, 298SW1069; MoA 286SW148; MoA 20SW(2d)601; TexCivA 19SW(2d)930.

710–41 TexCivA 20SW(2d)342(2dcase).

710–41½–New. Constitutional provisions do not abolish the common-law doctrine of assumption of risk except as therein specified. 144Va65, 131SE334.

710–41⅓–New. Employee assumes all ordinary risks incident to the service, except those abolished by the constitution including the manner in which he knew, or in exercise of ordinary care ought to have known, employer conducted his business. 144Va65, 131SE334.

710–41¼–New. Constitutional provision abolishing doctrine of assumption of risk to extent specified does not apply to a servant employed for the purpose of rendering safe an unsafe appliance. 144Va65, 131SE334.

710–43 8F(2d)30; 129Kan781, 284P417; 143Miss890, 108S503; TexCivA 293SW193.

711–50 129Kan781, 284P417. [e] (4) Other instances. MoA 30SW(2d)1032.

712–54 Minn 231NW829; TexCivA 289SW448.

714–74 253Mass99, 148NE463.

714–77 25F(2d)526; 84 IndA651, 151NE836; 126Kan277, 268P86; 214Ky21, 282SW550.

714–78½–New. Risk of being bitten by a snake is not an incident to repairing engines in a railway roundhouse, nor one common to all mankind. Nebr 223NW21(2dcase).

714–80 213Ky368, 280SW1093; 215Ky11, 284SW79; Miss 128S98(2dcase) (sawmill); 221MoA679, 283SW738; 216AppDiv246, 214NYS672 (finger cut off by machine properly guarded after instructions as to use).

714–81 323Mo 1058, 21SW(2d)772.

714–84 129Kan443, 283P501.

715–93 148Wash501, 269P831.

716–96 25F(2d)726; 31F(2d)939; 42F(2d)164; 220Ky64, 294SW809; 125Me347, 133A911; Mo 23SW(2d)142; 53SD166, 220NW459; 151Va815, 144SE863; 105WVa572, 144SE289. But see 229Ky365, 17SW(2d)224.

717–97 158Tenn75, 12SW(2d)381. But see 89 IndA634, 166NE778.

717–99 118Kan713, 236P821; 220Ky64, 294SW809; 125Me347, 133A911; Utah 280P1053.

717–1 271US218, 46SCt495, 70Led914; 212Ky738, 280SW93.

717–2 217Ala251, 115S168; 118Kan713, 236P821; 125Me272, 133A92; Minn231NW404; 155SC531, 152SE717.

717–5 176Minn575, 224NW241; NC 155SE459. [b] **Switchman does not assume risk of being thrown from top of car by roof of shed near tracks.** 211Ky830, 278SW143.

718–10 See also Utah 280P1053.

718–10½–New. jumping from the engine while the train is in motion, 179Minn138, 228NW556.

718–12 But see 179Minn127, 228NW552. Contra TexCivA 295SW250.

718–13 [e] 37F(2d)666.

718–16 127Me24, 140A827.

719–17 180Minn519, 231NW189.

719–19 23F(2d)588; 265Mass89, 163NE764; Mo 30SW(2d)481; 50ND894, 198NW685; Va 153SE874; 141Wash587, 251P880. [c] **Where no negligence shown on part of railway.**–TexCivA 293SW879.

720–22 105NJL590, 147A472(2dcase); NJSup 149A125.

720–23 105NJL590, 147A472(2dcase); 293Pa343, 143A5; 158Tenn75, 12SW(2d)381. See also 178Minn395, 227NW212. [b] **Car inspector** assumes risk of being struck by switching engine. Mo 30SW(2d)735.

720–25 Mo 26SW(2d)929.

720–31 210Ky25, 275SW367.

721–44½–New. A section hand assumes the risk of a switch engine being operated backwards without a lookout on the tender. 141Wash587, 251P880.

721–44⅓–New. Railroad employee engaged in paving street crossing and not in bettering tracks on crossing does not assume risk of injury. TexCivA 6SW(2d)192.

721–54 30F(2d)594; 122Kan250, 252P221; 249Mich440, 229NW488; 322Mo469, 17SW(2d)337; Mo 30SW(2d)481; Mo 31SW(2d)1010; 82NH497, 136A133; 51ND745, 200NW1013; 126 Or85, 268P985; 292Pa106, 140A622; 152SC178, 149SE753; TexCivA 275SW505; TexCivA 280SW864; TexCivA 288SW532; TexCivA 291SW343; Utah 274P945; Utah 280P1053; 151Va409, 145SE372. [a] (1) TexCivA 25SW(2d)969.

721–56 169Ark235, 275SW329; 171Ark983, 287SW197; 200 Ind589, 163NE99; 127Me24, 140A827. But see 41GaA509, 153SE575.

721–60 38F(2d)599; 175Ark702, 300SW405; Minn 231NW829; Mo 1SW(2d)181, 188 [quotCJ]; Mo 23SW(2d)142; 149Wash1, 270P113. [a] Iowa 227NW646.

722–63 14F(2d)899; 169Ark235, 275SW329; 171Ark983, 287SW197; 176Ark705, 3SW(2d)988; 95Fla5, 117S714; 39GaA173, 146SE561; 85 IndA435, 148NE433; 196NC178, 145SE11; 28 OhA421, 162NE720; TexCivA 12SW(2d)1050; 151Va815, 144SE863. [a] (3) Other instances. 36F(2d)480.

723–68 16F(2d)309; 17F(2d)2; 39F(2d)385; 218Ala481, 119S212; 173Ark322, 292SW359; 176Ark705, 3SW(2d)988; 180Ark1056, 24SW(2d)340; 90Fla632, 106S462; 88 IndA532, 164NE705; 86 IndA297, 157NE106; Iowa 231NW321; 124Kan305, 259P799; 213Ky336, 281SW170; 228Ky500, 15SW(2d)300; 125Me96, 131A5; 125Me272, 133A92; 193NC805, 138SE173, 176 [citCyc]; 292Pa321, 141A157; TexCivA 12SW(2d)1050; 151Va740, 145SE342.

724–69 Mo 6SW(2d)843; Mo 26SW(2d)988.

725–81 180Ark1056, 24SW(2d)340; 200 Ind589, 163NE99; 124Kan305, 259P799; TexCivA 293SW901.

726–3 7F(2d)269; 8F(2d)30; 21F(2d)912; 37F(2d)522; 38F(2d)599; 168Ark976, 272SW357; 173Ark762, 293SW1002; 178Ark283, 10SW(2d)364; 179Ark321, 15SW(2d)994; 180Ark1056, 24SW(2d)340; 181Ark299, 25SW(2d)760; 181Ark487, 26SW(2d)118; 3Del 412, 138A645, 649 [citCJ]; 3Del 564, 140A659; 232 IllA346; 84 IndA651, 151NE836; IndA 164NE288; 88 IndA661, 165NE325; IndA 170NE554; 126Kan153, 267P7; 213Ky69, 280SW482; 125Me96, 131A5; 125Me272, 133A92; 127Me228, 142A776; 253Mass446, 149NE150; 258Mass82, 154NE518; 256Mass14, 152NE43; 310Mo 1, 274SW1079; Mo 1SW(2d)181, 188 [quotCJ]; Mo 6SW(2d)843; MoA 15SW(2d)360; 114Nebr219, 206NW737; 82NH497, 136A133; 83NH43, 138A302; 217AppDiv316, 217NYS173; 130Misc389, 223NYS686; 144SC10, 141SE685; 149SC89, 146SE663; 115Tex455, 283SW475; TexCommnA 272SW764; TexCivA 280SW619; TexCivA 282SW309; TexCivA 285SW685; TexCivA 289SW1027; TexCivA 25SW(2d)969; 146Va366, 131SE815; 151Va815, 144SE863; 151Va815, 145SE255; 151Va740,

145SE342; Va 153SE874; 148Wash93, 268P145. See also MoA 296SW222.

733-10 276US165, 48SCt215, 72L ed 513; 244 IllA1; 245 IllA440; 86 IndA 297, 157NE106; 213Ky69, 280SW482; 235Mich293, 209NW184 (rule applies to extraordinary risks as well as ordinary); 315Mo 1199, 287SW1047; Mo 30 SW(2d)735; NJSup 134A892; TexCivA 280SW619; TexCivA 284SW664.

734-12 151Va409, 145SE372.

734-13 315Mo 1199, 287SW1047; 220 MoA1229, 298SW1069; MoA 286SW148; Va 153SE874.

734-14 Ind 163NE283; 315Mo 1199, 287SW1047; 319Mo 948, 6SW(2d)587; Mo 26SW(2d)929. [a] **Railroad employee does not assume risk from failure to sound warning** under rule or custom in switching movements unless hazard was obvious or known and appreciated. Mo 26SW(2d)929.

735-41 [a] (6) Servant never assumes risk of master's negligence. MoA 9SW (2d)644.

735-43 41F(2d)617; 41F(2d)651; 181 Ark487, 26SW(2d)118; 181Ark946, 28 SW(2d)728; CalA 287P538; 210Ky600, 276SW515; 228Ky500, 15SW(2d)300; Mo 6SW(2d)843; Mo 23SW(2d)142; MoA 274SW871; 150SC130, 147SE834; 115Tex455, 283SW475; TexCivA 6SW (2d)410.

736-46 200 Ind589, 163NE99.

736-49 42F(2d)403; Utah 274P945.

736-53 [a] **Proper balance** between risk to employee and property of employer determines justification. 37F(2d) 67.

736-59 Mo 26SW(2d)929; 217AppDiv 316, 217NYS173; 196NC122, 144SE557; TexCivA 293SW193; BC [1929] 4Dom LR359. See 95Fla5, 117S714. [b] (2) Other statements of test. Va 153SE874. [i] **It is common knowledge that working in damp, drafty, unventilated, and unsanitary cellar** is deleterious to health, and servant is chargeable with such knowledge. 217AppDiv316, 217NYS173.

737-60 217AppDiv316, 217NYS173.

737-61 217AppDiv316, 217NYS173.

737-68 125Me272, 133A92; 26 OhA292, 159NE861; TexCivA 293SW901; 149 Va338, 141SE121; 152Va105, 146SE268.

738-73 7F(2d)269; 36F(2d)210; 41 F(2d)578; 170Ark193, 281SW907; 181Ark299, 25SW(2d)760 (intelligent consent necessary); 95Fla5, 117S714; 39GaA350, 147SE135; 200 Ind589, 163 NE99; 6LaA468; 318Mo 79, 1SW(2d) 172; Mo 1SW(2d)181; Mo 6SW(2d) 843; 84Mont84, 274P293; Nebr 223NW 21(2dcase); 51ND745, 200NW1013; 148Wash93, 268P145.

739-74 87Colo 311, 287P648; ND 200 NW1014.

740-76 NH 149A872.

740-77 37F(2d)828.

741-86 TexCivA 297SW1063.

742-99 276US165, 48SCt215, 72L ed 513; 38GaA518, 144SE386; Iowa 232 NW657; TexCommnA 288SW154.

743-6 218Ala481, 119S212 [certiorari granted 279US830, 49SCt349(4thcase), 73L ed980].

744-8 [g] **Safety belt.**–Experienced lineman assumes risk in absence of request for safety belt where he knew of hazards. 225Ky243, 8SW(2d)418.

744-12 TexCivA 295SW250, 251 [cit CJ].

745-13 [a] **Rule applied.**–219AppDiv 242, 219NYS689.

746-26 315Mo 1199, 287SW1047.

746-30 177Ark271, 6SW(2d)15; CalA 285P369; 217AppDiv316, 217NYS173; TexCivA 18SW(2d)751. [j] **Unsanitary working conditions.**–217AppDiv316, 217 NYS173. [k] **Lack of hooks on building for safety belt** when known to window cleaner is assumed risk. 244NY 111, 155NE67.

748-35 95Fla5, 117S714; 122Kan250, 252P221; Minn 231NW829.

748-36 280US486, 50SCt198, 74L ed562 (on notice to servant of unsafe condition, requirement of master's care ceases); 95Fla5, 117S714.

748-37 40GaA821, 151SE667(1stcase).

748-39 [d] (1) That trapdoor in floor, which was kept closed except occasionally for short periods, could be easily seen by employee, did not create contractual assumption of risk of injury from door being left open by employer, when he should have known employee was about to move backward toward it. 264Mass312, 162NE344.

749-48 256Mass14, 152NE43.

750-56 MoA 272SW987.

751-73 246NY300, 158NE876.

752-77 9LaA477, 121S241; 127Me24, 140A827; 222AppDiv315, 226NYS302.

752-82 MoA 281SW456.

753-95 TexCivA 2SW(2d)958.

753-4 276US429, 48SCt336, 72L ed638; 241NY212, 149NE835 (obvious risks); 289Pa393, 137A623; 115Tex455, 283 SW475.

754-20 15F(2d)283.

754-32 289Pa393, 137A623.

754-34½–New. **In Indiana** it is held that railroad yardman is not bound to know track in part of yard did not provide durance. 86 IndA297, 157NE 106.

754-36 37F(2d)828.

755-41 208Ky772, 271SW1088; 210Ky 600, 276SW515.

755-57 229Ky388, 17SW(2d)215(1st case); 198NC427, 152SE32.

756-62 173Ark762, 293SW1002; 177 Ark271, 6SW(2d)15; 180Ark366, 21SW (2d)861 (so obviously dangerous that reasonably prudent person would not use it at all); 258Mass82, 154NE518; 221MoA679, 283SW738 (decided under Arkansas statute); 34 OhA490, 171NE 409; 142SC358, 140SE695.

758-82 114Nebr69, 205NW999.

759-1 244 IllA1, 5 [quotCJ].

759-4 95Fla5, 117S714.

759-6 95Fla5, 117S714.

760-15 173Ark762, 293SW1002.

760-18 173Ark762, 293SW1002.

761-29 168Ark561, 271SW1.

761-39 15F(2d)739; 221Ky748, 299 SW725; 26 OhA292, 159NE861; Wash 288P931 (ten foot stepladder is not simple tool within rule).

762-54½–New. ice tongs, 129Kan727, 284P596.

762-63 IndA 170NE554.

763-75 37F(2d)42; 125Me272, 133A92.

763-76 36F(2d)716.

763-88 36F(2d)716.

764-21 LaA 130S851. [d] (2) Evidence held to show insufficient guy ropes, base, and hoisting line. 90Fla632, 106 S462.

765-37 32F(2d)410; CalA 290P643.

766-46 Mo 31SW(2d)971; 84Mont84, 274P293; Mont 292P908; 151Va409, 145SE372. [b] (3) Where locomotive inspector was injured as result of wrench slipping off boiler plug when plug broke, it was held he could not recover, though railroad was negligent. TexCivA 286SW281, 282 [citCJ]. (4) Other instances. Mont 292P908.

766-47 TexCivA 286SW281, 282 [quot CJ].

766-48 276US165, 48SCt215, 72L ed 513.

768-67 84 IndA651, 151NE836; 232Ky 734, 24SW(2d)585; Mo 26SW(2d)929.

769-69 177Ark1165, 9SW(2d)563.

769-74 36GaA227, 136SE285; 82NH 497, 136A133.

771-77 MoA 289SW987.

771-85½–New. The comparative knowledge doctrine has no application where injuries to the servant resulted in whole or in part from the master's negligence, where the statute abolishes assumption of risk in such cases. 155Miss75, 124 S475.

772-92 Mo 31SW(2d)14; NJSup 147A 654 (risks created by third persons); 115 Oh226, 152NE664; TexCivA 298SW 149.

774-95 32F(2d)974; 178Ark283, 10SW (2d)364; 312Mo 173, 279SW89; MoA 7 SW(2d)370; 295Pa402, 145A576(2d case); 151Va173, 144SE485; 151Va815, 145SE255; 149Wash1, 270P113. See also 32F(2d)976.

775-16 312Mo 173, 279SW89; MoA 16 SW(2d)730. [i] **Rule stated conversely.**–312Mo 173, 279SW89.

777-44 15F(2d)283.

777-49 Mo 6SW(2d)843.

778-54 210Ky600, 276SW515 (bad air). [c] (2) Employee does not assume risk where he is without knowledge of dangerous condition of tunnel roof. 33F (2d)23.

778-61 253Mass99, 148NE463.

779-74 253Mass99, 148NE463.

780-91 177Ark271, 6SW(2d)15; 90Fla632, 106S462; 243 IllA537; IndA 165 NE82(3dcase); IndA 163NE618; 316Mo 1303, 295SW102; 217AppDiv316, 217 NYS173; 118 Okl 124, 247P92; Utah 274 P945. But see Sask [1925] 3DomLR 251.

783-99 197NC339, 148SE443.

783-1 217AppDiv316, 217NYS173; 197 NC339, 148SE443. [d] **Unsanitary working conditions.**–217AppDiv316, 217NYS 173.

783-3 118 Okl 124, 247P92.

784-12 212Ky738, 280SW93, 96 [citCJ].

784-13 118 Okl 124, 247P92.

784-14 MoA 286SW745; MoA 291SW 180.

784-18 200 Ind589, 163NE99.

785-30 118 Okl 124, 247P92. See also 83NH383, 142A707.

786-35 156Miss463, 125S819; Sask [1925] 3DomLR251 (where servant complained to master's agent who made suggestion as to what protection should be).

786-37 See also Sask [1925] 3DomLR 251.

786-39 170Ark1193, 281SW907; 244 IllA1; 125Kan38, 262P494; 316Mo 1303, 295SW102; Mo 1SW(2d)181, 190 [quotCJ]; 322Mo 299, 15SW(2d)825, 65 ALR599; 220MoA728, 293SW521; MoA 281SW456; MoA 286SW745; 192NC236, 134SE647; 118 Okl 124, 247P92; Okl 293P182.

789-53 170Ark1193, 281SW907; 125 Kan38, 262P494; 316Mo 1303, 295SW 102; 192NC236, 134SE647; 118 Okl 124, 247P92.

789-63 MoA 294SW444.

790-68 See also IndA 170NE554.

790-69 IndA 170NE554; 215Ky11, 284 SW79. [a] (7) Harness lines. 28 OhA 464, 162NE705.

792-85 Mo 1SW(2d)181, 190 [quotCJ].

792-87 220MoA728, 293SW521; 246NY 300, 158NE876.

793-91 220MoA728, 293SW521.

793-94 36GaA58, 135SE760.

794-96 180Ark366, 21SW(2d)861.

794-7 30F(2d)594; 41F(2d)617; Mo 31SW(2d)14 (insufficiency of number of assistants for injured employee); 221 MoA1089, 295SW501; 196NC435, 146SE 70; 114 Oh155, 151NE48.

796-10 114 Oh155, 151NE48.

796-17 118Kan701, 236P660.

797-21 172Ark671, 290SW953.

797-22 172Ark671, 290SW953.

797-25 172Ark671, 290SW953.

797-26 172Ark671, 290SW953.

797-30 118Kan701, 236P660.

798-41 Ark 31SW(2d)762; 35GaA90, 132SE128; 40GaA66, 148SE628(2dcase); 243 IllA537; Mo 31SW(2d)971. Contra 26 OhA520, 160NE523.

799-47 35GaA90, 132SE128.

800-59 But see MoA 22SW(2d)881 (master liable where foreman's command after complaint by servant).

801-71 218MoA698, 268SW102; Ill 173 NE372; 193NC805, 138SE173, 176 [cit Cyc]; 192NC736, 136SE1. [f] See also 148Wash93, 268P145 (bull).

802-73 192NC236, 134SE647.

802-79 234Ky454, 28SW(2d)497.

803-83 234Ky454, 28SW(2d)497.

803-89 MoA 22SW(2d)881.

803-93 251 IllA560. But see 29F(2d) 746.

805-97 125Kan192, 197, 264P31 [quot CJ]; 151Va173, 144SE485.

805-3 125Kan192, 264P31.

806-12 29F(2d)18; 37F(2d)42; 176Ark 651, 3SW(2d)678; 214Ky256, 283SW 415; 9PaDist&Co 794; 151Va409, 145SE 372. [l] But see 106Conn72, 136A874.

807-17 120 Or122, 250P622. See also 35GaA733, 134SE827.

807-19 215Ky128, 284SW91.

807-23 83NH196, 140A172.

808-33 Ark 31SW(2d)531; 125Kan252, 264P59; 84Mont84, 274P293. [m] **Overtaxing muscular capacity.**–Mont 292P 908.

809-36 84Mont84, 274P293.

811-45 147Miss421, 111S451, 52ALR 901.

812-56 337 Ill 70, 168NE895; 242Mich 352, 218NW773; 114Nebr142, 206NW 752; 152Tenn614, 279SW1043.

813-2 [a] (2) TexCivA 289SW1027. [c] **Employer has no duty to take better**

care of employee than latter should take of himself. 198NC795, 153SE413.

813-3 22F(2d)22; 90Fla632, 106S462.

813-7 173Ark762, 293SW1002.

813-10 32F(2d)410; 32Ariz463, 259P1049; 3Del 564, 140A659; 99Fla911, 127S862; 213Ky776, 281SW1020; 220Ky64, 294SW809; 127Me370, 143A462, 61ALR898; MoA 297SW174; OhA 153NE870; 120 Okl 182, 250P926; TexCivA 32SW(2d)220.

815-14 33F(2d)866; Mo 285SW482; 322Mo 137, 14SW(2d)652; Sask [1930] 2 DomLR142. See also 146Va22, 135SE677.

816-19 106WVa437, 146SE525.

816-19½-New. Last clear chance doctrine had no application to injury of brakeman by engine engaged in yard movement, where under facts of case, if there was no initial negligence by train crew, there was no liability. 29F(2d)689.

816-20 [a] **Doctrine of last clear chance is inapplicable** in absence of evidence showing that those in charge of engine discovered his peril. 229Ky16, 16SW(2d)472.

816-21 See MoA 7SW(2d)740.

816-23 MoA 7SW(2d)740.

816-25 20AlaA635, 104S682; 101Vt261, 143A308.

817-30 174Ark1083, 298SW849.

818-43 93Fla1046, 113S671; 225Ky447, 9SW(2d)212; 217AppDiv301, 216NYS656; 218AppDiv5, 217NYS705.

818-44 232Ky734, 24SW(2d)585 (where action not brought under employers' liability act); 82NH236, 133A9; 105WVa572, 144SE289. [d] **In Oregon.**–Or 293P417.

819-43 198NC475, 152SE169.

819-48½-New. To defeat action under Employers' Liability Act, negligence of employee must be superimposed upon conditions of his occupation by some positive act of his but for which he would not have been injured. 32Ariz463, 259P1049.

819-48¾-New. Under some statutes contributory negligence is no defense. 32Ariz463, 259P1049.

819-48¼-New. And negligence of plaintiff which will defeat right of recovery must be sole negligence. 32Ariz463, 259P1049.

819-48½-New. In an action for accidental injury due to conditions of occupation, whether good or bad, plaintiff may recover, although not free from negligence in exposing himself to bad conditions. 32Ariz463, 259P1049.

819-48¾-New. and although he knew of such bad or dangerous conditions. 32Ariz463, 259P1049.

819-51 253Mass499, 149NE208; 47RI 221, 132A384.

820-54 47RI 221, 132A384.

820-59 LaA 128S724; 264Mass312, 162NE344; 307Mo 595, 271SW358.

820-60 8F(2d)350; 16F(2d)550; Ala 128S228 (Federal Employers Liability Act); 36GaA70, 135SE439; 41GaA263, 153SE96(2dcase); 244 IllA441; 202 Iowa1229, 211NW875; 233Mich318, 206NW485; 249Mich440, 229NW488; 165 Minn223, 206NW436; 307Mo 595, 271SW358; 308Mo 31, 271SW997; 310Mo 1, 274SW1079; 318Mo 453, 300SW758; Mo 25SW(2d)791; 220MoA720, 293SW468; MoA 297SW146; 217AppDiv301, 216NYS656; TexCivA 28SW(2d)611; 149Wash1, 270P113; 35Wyo188, 247P1071. See also 137SC47, 134SE660; 26F(2d)361. [a] (3) 176Minn575, 224NW241. [b] (2) Railroad properly equipping locomotive with guard chains, negligence in operation without chains being put in place is not violation of Boiler Inspection Act, precluding defense of contributory negligence. 27F(2d)98. [c] **Matters not violative of federal Boiler Inspection Act.**–27F(2d)98.

820-60½-New. This is also the effect of Boiler Inspection Act taken in conjunction with Federal Employers' Liability Act. 189NC813, 128SE345.

820-61 16F(2d)550; 36GaA70, 135SE439; 165Minn223, 206NW436.

821-62 16F(2d)550; 36GaA70, 135SE439; 35Wyo188, 247P1071. But see 318Mo 444, 300SW1102; 83NH383, 142A707.

821-63 16F(2d)550; 200Ind589, 163NE99; MoA 30SW(2d)784; TexCivA 25SW(2d)969.

821-64 233Mich318, 206NW485. But see 217AppDiv301, 216NYS656. Contra 220MoA720, 293SW468.

821-66 174Ark463, 295SW727; 321Mo 378, 11SW(2d)268.

821-71 42F(2d)164.

821-73 267Mass5, 165NE698.

822-74½-New. Automobile owner sued by his chauffeur for injuries from defective brakes cannot rely on statute requiring adequate brakes, imposing duty only on owner. MoA 284SW850.

822-80 218Ala384, 118S565; 219Ala 238, 121S722; 253 IllA450; 200 Ind589, 163NE99; 192NC522, 135SE522; 141 Wash587, 251P880.

822-84 8F(2d)350; 214Ala23, 106S242; 215Ala285, 110S312; 215Ala600, 111S753; 218Ala384, 118S565; 172Ark729, 290SW942; 176Ark651, 3SW(2d)678; 176Ark705, 3SW(2d)988; 36GaA70, 135SE439; 37GaA737, 141SE917; 244 IllA441; 247 IllA600 [certiorari granted 278US593, 49SCt36(10thcase), 73Led525]; 253 IllA450; 225Ky447, 9SW(2d)212; 235Mich293, 209NW184; 310Mo 1, 274SW1079; 246NY365, 159NE172; 135 Misc639, 239NYS157; 194NC227, 139SE242; 114 Ohl57, 150NE739; 292Pa106, 140A622; SC 155SC438; TexCivA 281SW652; 141Wash587, 251P880.

823-86 172Ark729, 290SW942; 36Ga70, 135SE439; 194NC227, 139SE242; 114 Ohl57, 150NE739. [c] **Illustration.**–114 Ohl57, 150NE739.

823-87 37F(2d)843 (engineer's disobedience held sole cause, precluding recovery); 215Ky102, 284SW429; 218Ky 337, 291SW395; 225AppDiv687, 231NYS 375; 114 Ohl57, 150NE739. [a] 35F(2d)602.

823-88 218Ala384, 118S565; 176Ark 651, 3SW(2d)678; 215Ky102, 284SW 429; 294Pa585, 144A765.

828-89 281US345, 50SCt294(2dcase), 74 Led892; 37GaA737, 141SE917; 232Ky 702, 23SW(2d)564; 246NY365, 159NE 172.

823-90 37GaA737, 141SE917.

823-91 37GaA737, 141SE917; 253 IllA 450.

823-92 253 IllA450.

824-99 200Cal 265, 252P1045.

824-1 200Cal 265, 252P1045.

824-4 See also 29 OhA54, 163NE42.

824-9 [a] **Word "may"** in statute means must. Or 288P1003.

824-16 172Ark508, 290SW74.

824-24 43F(2d)908; 170Ark815, 281 SW374; 3Del 564, 140A659; 312Mo 173, 279SW89; MoA 290SW649. [a] **Same rule of care** which defendant is bound to observe applies equally to plaintiff. 191NC727, 133SE7.

826-27 82NH236, 133A9.

826-33 3Del 564, 140A659; 197Wis241, 221NW762.

826-36 176Ark705, 3SW(2d)988.

827-44 42F(2d)18; 249 IllA446; 124 Kan305, 259P799; 218Ky197, 291SW 401; Minn 231NW829; Mo 274SW692; 312Mo 173, 279SW89; 220MoA38, 285 SW757; MoA 16SW(2d)730; NH 149A 872; 249NY35, 162NE576; 144SC395, 142SE615; 148Va148, 138SE658.

828-46 318Mo 50, 298SW827, 831 [quot CJ].

828-47 318Mo 50, 298SW827, 830 [cit CJ].

828-49 Mo 26SW(2d)969; MoA 288 SW941; MoA 7SW(2d)442; MoA 27SW (2d)52.

829-58 312Mo 173, 279SW89.

829-62 148Va148, 138SE658.

829-74 323Mo 826, 20SW(2d)906.

829-75 220MoA38, 285SW757.

829-76 148Va148, 138SE658.

830-79 321Mo 960, 15SW(2d)794.

830-84 33F(2d)23; 220Ky431, 295SW 422, 53ALR386; 317Mo 1255, 298SW69, 80 [quotCJ]; 319Mo 644, 5SW(2d)413; 196NC670, 146SE706; 295Pa342, 145A 293. [c] (2) 219MoA471, 275SW775 (assurance of safety of wobbly stool).

831-88 319Mo 644, 5SW(2d)413.

831-92 MoA 15SW(2d)923.

831-96 See also 41F(2d)342.

831-98 [a] **Statement held not assurance of safety.**–235Ky618, 32SW(2d)14.

832-1 322Mo 592, 17SW(2d)945; MoA 300SW993; MoA 12SW(2d)930.

832-4 180Ark1056, 24SW(2d)340. See also SC 155SE438.

832-5 See also 220MoA175, 282SW515.

832-6 MoA 282SW1045. See also 220 MoA175, 282SW515. [a] **Servant assumes negligence** of fellow servants when he knows of it. TexCommnA 24 SW(2d)32.

832-8 284Pa112, 130A309. See also MoA 294SW114; 191NC549, 132SE598.

833-10 47RI 221, 132A384.

833-10½-New. No recovery can be had from master for injury resulting to a mature and experienced servant from deliberate and careless exposure of himself to a seen and known danger. 210 Ky600, 276SW515.

833-25 [a] **Failure of one trimming trees** to see highly charged wire before climbing tree is contributory negligence. MoA 265NW1005.

833-27 TexCivA 291SW667.

834-29 124Kan305, 259P799; MoA 297 SW174; NJ 133A83. [g] **Employee is not bound to discover extraordinary dangers arising through negligence.**–SC 155SE438.

834-30 322Mo 886, 18SW(2d)40 (danger must be so glaring as to threaten immediate injury).

835-32 181Ark759, 27SW(2d)1000; Mo 294SW80; 318Mo 50, 298SW827; MoA 293SW492.

835-33 Mo 294SW80.

835-38 Iowa 220NW45(2dcase); 224 Ky211, 5SW(2d)1064; 197NC339, 148 SE443. See also 319Mo 1196, 8SW(2d) 846, 60ALR448.

836-39 242Mich442, 219NW617.

836-40 251 IllA585; MoA 292SW443; 221MoA1231, 300SW531; MoA 300SW 993; MoA 7SW(2d)304.

836-42 323Mo 307, 19SW(2d)865(2d case).

836-46 127Me370, 143A462, 61ALR898.

836-49 196NC810, 145SE237.

837-56 127Me370, 143A462, 61ALR898.

837-59 [a] **Servant cannot rely on promise after time has elapsed** which would preclude all reasonable expectation that it would be kept. MoA 15SW (2d)923.

838-64 322Mo 901, 18SW(2d)408; 323 Mo 363, 19SW(2d)476.

838-70 [a] (4) Other instances. MoA 29SW(2d)215.

839-82 242Mich352, 218NW773.

840-4 2LaA739; 147Miss794, 114S25. [b] (5) Other instances. MoA 282SW 181.

842-16 170Ga208, 152SE474; MoA 30 SW(2d)1032.

843-17 39GaA246, 146SE776.

843-18 223Ky417, 3SW(2d)1070. [d] But see 322Mo 901, 18SW(2d)408.

843-20 284Pa112, 130A309.

843-22 42F(2d)950; MoA 14SW(2d) 533; 152Va105, 146SE268.

844-23 [c] **Plaintiff held not prevented from recovering** by failure to use rubber finger stalls to prevent bronze powder from ink tablets used in mapping from being absorbed by abrased thumb, where this defense was not pleaded and impossibility of working with finger stalls was testified to. 218MoA253, 267 SW431.

844-24 279US34, 49SCt210, 73Led601; 144Miss375, 109S861; TexCivA 14SW (2d)97. See also MoA 275SW586.

844-25 MoA 275SW555.

844-27 278US139, 49SCt91, 73Led224; 232 IllA120; 215Ky102, 284SW429; MoA 16SW(2d)1005 (effect of practice not to perform duty). [f] **Relieving engineer's failure to observe rules** requiring him to obtain special orders from engineer relieved was proximate and sole cause of his death. 40GaA166, 149 SE155.

845-29 232 IllA120.

845-31 178Minn395, 227NW212; MoA 19SW(2d)518.

845-37 32F(2d)284; 3Del 564, 140A 659; 198NC687, 153SE161.

846-41 MoA 31SW(2d)279.

847-45 284Pa112, 130A309; 215Ky 102, 284SW429.

847-46 173Ark956, 293SW1015; MoA 29SW(2d)215; NH 149A872. [a] (2) Employer is liable, though workman was injured after choosing more hazardous of two ways. 173Ark956, 293SW 1015.

847-47 173Ark956, 293SW1015; **MoA** 29SW(2d)215.
847-50 35GaA733, 134SE827.
848-63 42F(2d)950; 192NC599, 135SE 535.
849-69 5F(2d)464; 23F(2d)36.
850-75 175Ark702, 300SW405. [k] **Falling from ladder.**-284Pa112, 130A 309.
852-87 144Va443, 132SE191.
852-91 311Mo 369, 279SW43.
852-92 Mo 281SW441; Can [1928] 4 DomLR979.
853-93 172Ark508, 290SW74; 36GaA 227, 136SE285; **MoA** 290SW649; **MoA** 29SW(2d)215; 148Wash694, 269P1038. [d] **Loose bolt securing tongue of step-ladder** may not be obvious defect. Wash 288P931.
853-97 181Ark1145, 27SW(2d)520; 181Ark946, 28SW(2d)728; 312Mo 173, 279SW89; 318Mo 50, 298SW827; Mo 26SW(2d)770; 220MoA728, 293SW521; **MoA** 14SW(2d)674; 81NH543, 130A 156; **TexCivA** 289SW1027. [b] **Rule stated conversely.**-312Mo 173, 279SW89.
855-2½-New. Under Federal Employers' Liability Act a servant is not obliged to exercise care to discover danger resulting from employer's negligence. 253 IllA450.
855-11 312Mo 173, 279SW89.
855-19 220MoA728, 293SW521.
855-25 24F(2d)153.
855-26 Mo 30SW(2d)1077.
855-40½-New. tractors, 315Mo 1068, 287SW474.
856-44 32F(2d)410; 41F(2d)479; Mo 287SW628. [p] **Inequality exists if defect in tool could have been discovered by master's inspection, and not by servant's inspection. MoA** 29SW(2d) 215.
857-47 Minn 231NW829.
857-51½-New. Whether it is the duty of the master or of the servant to make the place safe in which to do the work depends upon the situation of the parties at the time, the nature of the services to be performed and the circumstances pertaining to the particular case. 120 Okl 182, 250P926.
857-52 Mo 4SW(2d)802.
858-57 WVa 153SE919.
858-61 198NC742, 153SE406.
858-65 313Mo 527, 282SW425.
858-66 221MoA1231, 300SW531.
858-68 322Mo 901, 18SW(2d)408.
859-80 MoA 15SW(2d)853.
859-82 279US787, 49SCt490, 73Led 957; Mo 30SW(2d)989.
861-86 26F(2d)204; 30 Ariz204, 245P 673; 151Miss711, 118S441; 322Mo 830, 16SW(2d)38; 198NC457, 152SE153(2d case); **TexCommnA** 272SW764 (master not liable if servant selects unsafe method when safe one is at hand).
862-87 MoA 15SW(2d)360.
862-88 168Ark561, 271SW1.
862-96 20AlaA635, 104S682.
862-97 20AlaA635, 104S682.
862-98 20 AlaA635, 104S682; Mo 256 SW222; 196NC510, 146SE129.
863-1½-New. Rule is not applicable unless it appears that alleged dangerous method is one which under all circumstances a reasonably prudent man would not use. 30Ariz204, 245P673.
863-2 173Ark956, 293SW1015; **MoA** 23 SW(2d)1073.
863-4 MoA 288SW941.
863-12 197NC339, 148SE443; NC 154 SE58. See also **MoA** 294SW444.
864-14 Mo 30SW(2d)1077.
864-16 51Nev390, 277P609.
864-21 [a] See also 323Mo 840, 20SW (2d)684, 66ALR263.
865-23 220Ky64, 294SW809; 51Nev 390, 277P609.
865-30½-New. There is a joint duty on an engineer and a fireman to keep in place guard chains for use between a locomotive and tender. 27F(2d)98.
867-49 213Ala191, 104S397.
869-81 198NC795, 153SE413.
869-82 14F(2d)899; 130Kan494, 287P 238; 225Ky447, 9SW(2d)212; **MoA** 14 SW(2d)533.
870-83 MoA 14SW(2d)969.
871-89 220MoA38, 285SW757.
875-31½-New. Where section hand is being transported by hand car from one place of work to another, the rule that he must look out for his own safety by avoiding approaching trains is not applicable. 309Mo 560, 274SW703.
876-40 215Ky401, 285SW245; Mo 30 SW(2d)735. See also Mo 30SW(2d)989.
878-49 309Mo 560, 274SW703.
878-50 309Mo 560, 274SW703; 101Vt 261, 143A308.
878-53 309Mo 560, 274SW703.
879-65 Mo 30SW(2d)22.
879-73 [a] (4) Simply because track is place of danger brakeman is not under absolute duty to stop, look and listen. 190NC231, 129SE580.
881-88½-New. A driller in a mine is entitled to rely on the performance by the master's employees of their duty to discover and fire missed shots of dynamite set by them and to warn him of unfired shots. 220MoA38, 285SW757.
881-95 43F(2d)908 (under Federal Employers' Liability Act); 169Ark192, 273 SW1028; 232 IllA120; 144Miss510, 110 S247. [e] **Violation of rule** must be proximate cause of injury. 232 IllA120.
884-23 MoA 15SW(2d)360.
884-28 228Ky5, 14SW(2d)216.
884-30 But see Mo 26SW(2d)942.
884-36 218Ala384, 118S565.
884-37 Mo 26SW(2d)942.
885-40 106WVa437, 146SE525.
885-41 106WVa437, 146SE525.
886-48 176Ark651, 3SW(2d)678; **MoA** 29SW(2d)215; 152Va105, 146SE268; 106WVa437, 146SE525.
886-53 31F(2d)239.
896-55 173Ark956, 293SW1015.
897-57 166Minn87, 207NW194 (that conductor was also negligent in permitting engineer to violate order does not relieve engineer from effect of such violation).
887-64 [a] 106WVa437, 146SE525.
897-67 [b] **Employee may assume that he will not be subjected to unnecessary peril** by master. 128Me374, 147A701.
887-68 232 IllA120. [g] **Under Federal Safety Appliance Act** violation of rule as to method of coupling cars will not bar recovery. 308Mo 31, 271SW997.
888-81 133SC219, 130SE880 (boarding moving log train).
891-14 141SC359, 139SE779.
893-39 [g] **Evidence held sufficient to sustain finding that driver was not negligent.**-267Mass178, 166NE557.
894-48 42F(2d)18; Ark 31SW(2d)962; 125Kan38, 262P494; 219MoA19, 267SW 964; **MoA** 274SW493; **MoA** 274SW849; 196NC262, 145SE283(2dcase); 128 Or 286, 274P505(2dcase).
896-50 MoA 288SW941. [a] (2) Order to employee to continue working after latter's report of defective condition was tantamount to assurance of reasonable safety. **MoA** 12SW(2d)938.
896-53 125Kan38, 262P494; Or 293P 417.
896-54 Ark 31SW(2d)962.
896-59 Ark 31SW(2d)962.
897-70 3Del 564, 140A659.
899-91 MoA 280SW60.
899-96 155Miss271, 124S336.
900-97 30F(2d)784; 146Miss130, 110S 234; 190NC256, 129SE595; **TexCommnA** 285SW1053 (warning of danger by coemployee held to justify attempt to escape).
901-99 118Kan713, 236P821.
901-7 118Kan713, 236P821.
902-16 214Ala317, 107S456; 217Ala 251, 115S168; Utah 280P1053. [c] **Proximate cause of injury** is negligence which caused peril to lives of others. 214Ala317, 107S456.
902-17 214Ala317, 107S456.
902-22 But see 320Mo 884, 8SW(2d) 891, 61ALR572.
902-23 320Mo 884, 8SW(2d)891, 61ALR 572.
903-31 215Ky128, 284SW91.
903-33 41GaA509, 153SE575; 127Me 370, 143A462, 61ALR898; **MoA** 282SW 110.
904-47 MoA 282SW110.
904-48 MoA 26SW(2d)52; **MoA** 29SW (2d)215.
905-56 205Cal 78, 269P928, 61ALR448.
906-67 232 IllA430; 215Ky128, 284 SW91.
906-71 337 Ill 70, 168NE895; 329 Ill 308, 160NE588; 232 IllA430; 149Miss 465, 115S586, 590 [quotCJ]; 221MoA 345, 273SW176; 114Nebr142, 206NW 752.
907-76 243Mich209, 220NW301.
907-78 242Mich352, 218NW773; 221 MoA345, 273SW176.
907-83 [g] **In Florida.**-98Fla1158, 125 S372.
908-91½-New. An action for injuries sustained in another state by employer's alleged negligence is an action at common law in view of a statute continuing the common law in force where not abrogated or inconsistent with form of government. 191NC75, 131SE390.
908-93 242 IllA428; 240Mich655, 216 NW467; 197NC399, 149SE393(2dcase); Or 288P1003; **TexCivA** 23SW(2d)461; **TexCivA** 19SW(2d)930.
908-94 But see 153Wash300, 279P1115.
908-95 178Minn395, 227NW212; 197 NC399, 149SE393(2dcase).
908-96 Ark 31SW(2d)963; **IndA** 170 NE554; Mo 279SW148; 218AppDiv 748, 218NYS171; SC 155SE438.
908-97 56ND891, 219NW788.
908-1½-New. The gist of a servant's action against his master is negligence on the part of the master, or negligence of a fellow servant while acting within the course of his employment, notwithstanding the common-law fellow servant rule is abrogated by the Federal Employers' Liability Act. 30F(2d)723.
908-6 30Ariz347, 247P122.
910-25 [f] (7) 253Mass499, 149NE208.
914-57 [a] (1) 18F(2d)584; 24F(2d) 299. (3) 18F(2d)584. (4) 18F(2d) 584. (5) 18F(2d)584. (6) Action may be brought either at residence of defendant's designated agent or at place where injury occurred. 18F(2d)677. (7) Carrier and not owner of article being transported is the one who must be engaged in interstate commerce at time of injury in order to entitle employee to invoke jurisdiction of state courts under terms of act. 199Cal 126, 248P501, 49ALR1323. (8) Where action is brought in state court, question of venue is decided by rules in state court and not by federal rules. 218 AppDiv748, 218NYS171. (9) State court has discretion to refuse to entertain jurisdiction of action brought under the act by nonresident against foreign corporation for injuries sustained outside state. 246NY244, 158NE508.
914-59 198NC78, 150SE672(1stcase). [c] **Street railway is not "common carrier by railroad"** within Federal Employers' Liability Act; hence action is barred in one instead of two years. 39 F(2d)286 (traction company held to be "street railway" within statute).
914-60 111Conn196, 149A682.
914-62 17F(2d)15.
915-83 [a] 140 Okl 185, 282P345.
915-84 316Mo 651, 291SW466; 73Mont 407, 236P1069; 193NC77, 136SE238.
916-11 224Ky83, 5SW(2d)482.
916-15 38GaA518, 144SE386; 214Ky 431, 283SW416; 224Ky83, 5SW(2d) 482; **TexCivA** 31SW(2d)146. [a] 15 F(2d)467; 44F(2d)40; 215Ala285, 110 S312; 219Ala238, 121S722; 36GaA513, 137SE404; 249Mich685, 229NW479; Mo 274SW673; **MoA** 273SW749; **MoA** 274SW871; 221MoA679, 283SW738 (decided under Arkansas law); 221MoA 1014, 298SW246; **MoA** 19SW(2d)510; **MoA** 21SW(2d)943; 133Misc616, 232 NYS557; SC 155SE438 (Federal Employers' Liability Act); **TexCivA** 27 SW(2d)281; 106WVa394, 145SE637. [b] 15F(2d)540; 36GaA452, 136SE921; 39GaA585, 147SE800; **MoA** 299SW51. [c] **Amendment** is allowable for injured child alleging she was under sixteen, to conform to proof she was under fourteen, within child labor statute. **MoA** 28SW(2d)391.
919-25 118 Or15, 245P732, 45ALR821. [a] (8) **MoA** 22SW(2d)872.
919-27 [a] **Statement under Federal Act** must show employee was engaged in interstate transportation at time of injury. 288Pa250, 135A648.
919-29 152SC386, 150SE128, 66ALR 416.
920-30 [a] 221MoA679, 283SW738.
920-30½-New. Counts under the state law and federal act may be joined, that recovery may be had as the jury shall find. 125Me96, 131A5.
920-30½-New. Facts, not pleadings,

determine whether the right to recover is under state or federal law. 125Me 96, 131A5.

920-41 15F(2d)739.

920-42½-New. Actions founded on common-law duty to furnish safe tools are presumed to come within Workmen's Compensation Act, and facts taking case outside statute should be alleged. 217Ala413, 116S112.

920-45½-New. A complaint alleging a cause of action under a statute of another state need not allege that plaintiff had elected not to accept the provisions of the Workmen's Compensation Law of such state. 322Mo158, 16SW(2d)190.

920-45¾-New. Where petition shows on its face that the case comes within the Compensation Act, plaintiff must allege facts taking the case out of the statute. MoA 21SW(2d)922 (petition stating that plaintiff was waitress).

920-46 Contra 35PortoRico380.

920-48 [a] TexCivA 275SW214; 151Va815, 144SE863.

922-58 150Md525, 133A593; TexCivA 19SW(2d)336.

922-60 Ala 129S60; 323Mo531, 19SW(2d)679; MoA 288SW982; 106WVa437, 146SE525. [e] 41GaA509, 153SE575; 219MoA590, 282SW141; MoA 22SW(2d)872.

923-62 36GaA513, 137SE404.

923-64 211Ky830, 278SW143; 311Mo369, 279SW43. [e] (1) 216Ala248, 112S737; TexCivA 295SW250. (11) 214Ala427, 108S564; 311Mo369, 279SW43; 315Mo331, 289SW908; 319Mo1196, 8SW(2d)846, 60ALR448; MoA 291SW506; MoA 297SW124; MoA 318SW(2d)596; MoA 280SW60; 139Okl123, 281P586; 135SC163, 133SE550. [f] (6) 232Ky675, 24SW(2d)578; MoA 295SW841; MoA 299SW51; TexCivA 18SW(2d)740.

926-66 See also 34OhA490, 171NE409.

926-72 218Ky526, 291SW728.

926-73 211Ky830, 278SW143; 214Ky431, 283SW416. [d] (3) 211Ky830, 278SW143. [e] (3) 214Ky431, 283SW416.

926-73½-New. and that defendant knew that plaintiff was employed at such work, 3Del412, 138A645.

927-75 [c] (6) 317Mo1255, 298SW69.

928-76 122Kan250, 252P221.

928-77 321Mo378, 11SW(2d)268.

929-93 [a] (1) 215Ala285, 110S312. (5) 215Ala285, 110S312; 37GaA6, 138SE858; GaA 155SE346; IndA 168NE204 (derailment of car operated at excessive speed); 315Mo331, 289SW908; 323Mo531, 19SW(2d)679; Mont292P909; TexCivA 8SW(2d)318. [b] (1) Ala 129S60 (complaint charging negligence to some other employees did not show breach of duty to switchman).

930-96 [a] **Allegation of knowledge** not necessary. 215Ky283, 284SW1068.

931-9 [a] 311Mo369, 279SW43; 221MoA530, 289SW30(2dcase). [b] (5) In employee's action against employer for injuries from falling of one of ice boxes which plaintiff was piling, allegation that box was suddenly jerked and thrown by defendant acting through its foreman has been held not tantamount to allegation that box was jerked and thrown without warning of danger, notwithstanding "sudden" is defined "without warning or preparation." MoA 13SW(2d)553.

931-15 MoA 13SW(2d)553.

932-23 98Fla1158, 125S372; MoA 293SW228. Contra 35PortoRico606. [b] (4) 220MoA902, 296SW228.

933-35 84Mont84, 274P293; TexCivA 295SW250.

933-43 314Mo123, 282SW416; TexCivA 295SW250.

933-44 TexCivA 275SW214.

933-48 35GaA416, 133SE286.

934-53 35GaA733, 134SE827; 165Minn223, 206NW436; 311Mo369, 279SW43; 220MoA902, 296SW228. [c] (2) 83CalA776, 257P79; 35GaA733, 134SE827.

935-59 118Or15, 245P732, 45ALR821. [c] 242Mich217, 218NW803. [e] (1) TexCivA 275SW505. (3) Ark 31SW(2d)753. (7) 126Or487, 266P634. [f] (1) 216Ala176, 112S830.

937-79 37GaA570, 140SE905; IndA 163NE618. [a] Nebr 229NW888; 129Or169, 276P1094. [c] 37GaA570, 140SE905; 122Kan414, 251P1095. [d] IndA 163NE618.

938-80 11F(2d)993; 217Ala382, 115S869. [a] 217Ala382, 115S869; 91PaSuper307. [b] (1) TexCivA 275SW505. (4) 217Ala382, 115S869.

938-81 37GaA570, 140SE905; NJ 135A659.

939-84 But see TexCivA 275SW505.

939-88 38GaA460, 144SE686(1stcase); TexCivA 16SW(2d)976. [b] **Employee injured by fellow servant** in hazardous occupation must allege employer's negligence. 99Fla371, 126S759.

939-89 93Fla520, 112S558.

939-91 35GaA416, 133SE286.

940-95½-New. Where an action is under statute relaxing the common-law rule, the petition must aver negligence in the fellow servant, or no good case is averred against the master. 35GaA733, 134SE827.

940-95½-New. In order for an injured employee to recover under the "dual capacity" doctrine, the petition must embody the necessary allegations of negligence in support thereof. MoA 13SW(2d)553.

940-99 11F(2d)924.

943-17 Okl 293P182.

943-18 35GaA733, 134SE827.

944-21 211Ky830, 278SW143. [b] (3) IndA 168NE204; 51ND745, 200NW1013.

945-24 35GaA733, 134SE827; 142SC358, 140SE695. [a] (4) 142SC358, 140SE695.

945-25 133Misc629, 233NYS9.

945-27 38GaA518, 144SE386; IndA 163NE618; 211Ky830, 278SW143. [a] (2) Generally. 211Ky830, 278SW143.

947-40 [c] (4) 36GaA58, 135SE760.

948-50 323Mo531, 19SW(2d)679; MoA 288SW982. [a] **Plaintiff need not allege** ignorance of his own physical condition in action for injuries from causing latent tuberculosis to become active. 323Mo531, 19SW(2d)679.

948-52 38GaA518, 144SE386.

949-54 86Mont228, 283P226. [b] (3) 35GaA681, 134SE621; TexCivA 27SW(2d)281.

950-56 But see 86Mont228, 283P226.

951-75½-New. , or under Florida statute that he was not performing work jointly with employees whose negligence caused injury. 11F(2d)924.

951-79 [b] 321Ill168, 151NE573.

952-93½-New. In an action under the Federal Employers' Liability Act, an answer alleging that the injury was caused by deceased's negligence in failing to keep a lookout for his safety admits that deceased was oblivious of danger. MoA 297SW146.

952-94½-New. Allegation that death of deceased, if killed at time and place mentioned in petition, was caused by ordinary risks of employment assumed by deceased estopped defendant from denying that injury was within scope of his employment. 321Mo1190, 18SW(2d)433.

952-99 126Or85, 268P985, 986 [citCJ].

952-5 226Ky561, 10SW(2d)1064; 260Mass399, 157NE364; 320Mo791, 9SW(2d)972; 322Mo980, 18SW(2d)62; 25OhA124, 158NE496; 131Okl272, 268P270; 126Or85, 268P985, 986 [citCJ]; 133SC256, 130SE893 [perPurdy,J].

953-6 Iowa 231NW321; 126Or85, 268P985, 986 [citCJ].

953-8 Iowa 231NW321; MoA 9SW(2d)644. [b] (2) 319Mo1137, 6SW(2d)886.

954-13 126Or85, 268P985. [g] (2) Iowa 227NW646. [h] (4) 213Ala191, 104S397 (under Federal Employers' Liability Act purporting to set up assumption of risk but in fact pleading only contributory negligence); TexCommnA 6SW(2d)86.

954-18 131Okl272, 268P270. But see MoA 7SW(2d)370.

955-22 Ala 129S60.

955-23 Mo 26SW(2d)929.

955-24 218Ky337, 291SW395. [a] **It is not encroachment on exclusive right of federal courts** to construe statute for state court to require pleading of contributory negligence as partial defense. 218Ky337, 291SW395.

955-26 See also 191NC75, 131SE390.

955-29 [g] (6) 220Ky682, 295SW981.

957-42 [b] 234IllA15.

957-47 [a] **Employee relying on Workmen's Compensation Act** against plea of contributory negligence must allege its applicability. 220Ky674, 295SW979.

957-47½-New. Plea of indemnity contract with another is not available as relief from liability. TexCivA 293SW865.

957-50 [b] (3) Action under Federal Employers' Liability Act may be amended to raise issues under state law. OhA 153NE870. (4) Amendment to defendant's answer was properly allowed, and court did not err in overruling demurrer and motion to strike amendment. 39GaA422, 147SE530.

958-57 321Mo697, 12SW(2d)735.

958-59 215Ala395, 110S312.

958-63 [a] **Action erroneously brought** under Employers' Liability Act may be amended to proceeding under Workmen's Compensation Act, though barred by limitation as original proceeding. 215Ala395, 111S219.

958-65. Ala 128S228; 233Ky656, 26SW(2d)523 (to recover for injuries of trainman on outside of moving car it must be shown that tracks were not properly spaced); 198NC603, 152SE796; 140Okl277, 282P1091. [c] 165Minn223, 206NW436.

959-66 [b] Iowa 231NW321.

959-67 Ala 128S228; 265Mass89, 163NE764; 219MoA471, 275SW775.

959-69 But see 219MoA590, 282SW141.

959-70 323Mo826, 20SW(2d)906; MoA 292SW443; MoA 294SW762; MoA 31SW(2d)596. See also 316Ill357, 147NE258.

960-82 172Ark498, 289SW474; 85IndA510, 154NE508; 211Ky830, 278SW143; 214Ky431, 283SW416; 217Ky11, 288SW1022; 227Ky91, 11SW(2d)985; MoA 30SW(2d)1032; TexCivA 284SW664. [a] (4) Evidence that employer knew of unsafe condition of working place held incompetent in absence of averment of such fact. 214Ky431, 283SW416. [d] **Issues on foreman's duty to inspect** were not required by complaint based on negligence in furnishing defective tool. TexCivA 28SW(2d)288.

961-83 85IndA510, 154NE508; TexCivA 284SW664. [b] See also MoA 19SW(2d)510.

962-86 17F(2d)2; 177Ark1146, 9SW(2d)580; 217Ky11, 288SW1022; Mo 274SW692; 317Mo1255, 298SW69; 323Mo307, 19SW(2d)865(2dcase); MoA 285SW529; MoA 297SW124; NJSup 138A206; Okl 293P182. [a] (5) Where defendant's liability for death of miner is based on failure to provide safe place whether employment of mine foreman was required under statute is immaterial. 101WVa546, 133SE142. (6) Under allegation that fellow servant negligently knocked trestle against plaintiff, evidence that he negligently raised his end before plaintiff is admissible. 217Ky11, 288SW1022. [k] **In Maine.**-125Me96, 131A5. [l] **Petition for injuries by master's failure to furnish safe tools authorizes issues** on furnishing defective hammer, and failure to supply another after report. TexCivA 28SW(2d)288.

963-87 TexCivA 284SW664.

964-88 See also 211Ky830, 278SW143.

964-89 217Ky11, 288SW1022; 219MoA19, 267SW964. Contra 224Ky83, 5SW(2d)482.

964-92 315Mo1181, 289SW913; Mo 23SW(2d)142. See also MoA 28SW(2d)195. [a] (5) Custom of field switchman to notify plaintiff yard clerk of intended movement before kicking car on track while he was making inspection. 316Mo1196, 295SW98.

965-93 206Iowa1093, 221NW771; Mo 30SW(2d)735.

965-98 [a] (2) Mo 256SW819. (4) That injury was caused by negligent act of fellow servant. 221MoA1169, 300SW1062. (5) Unavoidable accident. TexCivA 28SW(2d)288. (6) Other matters. 320Mo884, 8SW(2d)891, 61ALR572. [d] (1) 323Mo1089, 20SW(2d)494. **Erratum.**-After word "injured" insert words "was an independent contractor."

966-2 42F(2d)164. [c] **Allegation that**

superintendent intrusted car to incompetent driver was not sustained by proof he drove it himself. 220Ala661, 127S 230.

967–21 3Del 564, 140A659; 217Ky11, 288SW1022; 217Ky43, 288SW1020; 222Ky736, 2SW(2d)374; 189NC813, 128 SE345; 106WVa437, 146SE525.

967–22 [c] (4) 213Ky432, 281SW519; TexCivA 275SW310.

968–23 217Ky43, 288SW1020; Miss 120S191(3dcase). [a] (6) In suit under Federal Employers' Liability Act, alleging negligence in that switch stand was unlighted, recovery cannot be had on proof of negligence in that switch stand was dangerously near track. 217 Ky43, 288SW1020.

968–25 24F(2d)153.

968–29 252 IllA428; Mo 6SW(2d)843; Mo 271SW531; MoA 273SW165; MoA 275SW599; TexCivA 271SW424. [d] (6) 13F(2d)352; 311Mo 77, 277SW566; Mo 271SW531; TexCivA 5SW(2d)582.

970–31 TexCivA 296SW948.

970–40 101WVa546, 133SE142.

970–48 242Mich217, 218NW803; 156 SC1, 152SE753.

971–56 [a] **Without allegation** that automobile furnished by master was being used in master's business, it is not so presumed. 232Ky675, 24SW(2d)578. [b] **Car repairer killed when car fell on him** presumed engaged in railroad's work. Mo 31SW(2d)4.

971–67 But see 322Mo 299, 15SW(2d) 825, 65ALR599; 287Pa302, 135A209. [b] **Presumption** is that sidings appurtenant to trunk line railroad are needed in interstate commerce. 162La841, 111 S184.

971–68 199Cal 126, 248P501, 49ALR 1323; TexCivA 297SW1063.

971–73 18F(2d)513; 19F(2d)122; 313 Mo 527, 282SW425. [d] **In absence of evidence of master's negligence** it is assumed injury was caused through contributory negligence or assumption of risk. 211Ky830, 278SW143.

971–74 18F(2d)513; 236Mich577, 211 NW111; 220MoA640, 291SW139.

972–75½–New. Where employee alleges only specific acts of negligence, doctrine of res ipsa loquitur is not applicable. 85 IndA510, 154NE508.

972–75½–New. Where violation of provisions of statutes appears, negligence is presumed. 285Pa27, 131A477 (holding, however, no violation).

972–80½–New. Switching engineer is bound to anticipate that movements of cars without signal from switchman were likely to injure him. Mo 30SW(2d) 1069.

972–82½–New. Presumption is that coemployees' awkward shovel stroke is due to quick movements in packing gravel. TexCivA 29SW(2d)835.

972–87 19F(2d)871; Mo 12SW(2d)433; 220MoA640, 291SW139; 143Va875, 129 SE339.

972–88 19F(2d)871; 265Mass527, 164 NE446; 236Mich577, 211NW111; 144 Miss510, 110S247; 315Mo 1068, 287SW 474, 480 [citCJ]; 316Mo 317, 289SW 597, 604 [citCJ], 49ALR1034; 313Mo 527, 282SW425; MoA 285SW109; 220 MoA640, 291SW139; 221MoA1014, 298 SW246; 191NC90, 131SE387 (fact that employee injured raises no presumption of negligence); 197NC319, 148SE446; TexCivA 293SW219. But see MoA 32 SW(2d)118. [f] (17) 144Miss510, 110S 247. (27) Falling of stack of freight. 114Nebr219, 206NW737. (28) Injury to stonemason by overhead beam which turned and fell when carpenter fell and struck it. 191NC90, 131SE387.

974–92 39GaA513, 147SE795.

975–97 168Ark479, 271SW321; 313Mo 527, 282SW425; 220MoA640, 291SW 139; TexCivA 293SW219; TexCivA 32 SW(2d)220. [d] **Under Safety Appliance Act principle of res ipsa loquitur** applies in cases involving defective railroad equipment. 39F(2d)798.

975–98 134SC31, 131SE777. [a] But see 36GaA133, 135SE762.

975–99 36GaA133, 135SE762.

975–1 36GaA133, 135SE762; 168Minn 287, 210NW32; MoA 274SW857; 196 NC359, 145SE684; NC 154SE667; TexCivA 48W(2d)320. See also MoA 295 SW127. [g] **Under Minnesota Railway Liability Act** doctrine of res ipsa loquitur is applicable. 168Minn287, 210NW 32.

976–2 84 IndA354, 148NE489.

976–6 36GaA133, 135SE762; 318Mo 350, 300SW515.

976–7 18F(2d)405; Mo 26SW(2d)770.

976–8 18F(2d)405; 30F(2d)316; 36 GaA133, 135SE762; 223Ky39, 2SW(2d) 1063; 313Mo 527, 282SW425; MoA 22 SW(2d)897. [a] 18F(2d)405; 36GaA 133, 135SE762; 39GaA350, 147SE135; 219MoA590, 282SW141; 227AppDiv303, 237NYS479. [b] 231Ky24, 20SW(2d) 1020; TexCivA 281SW654.

977–10 18F(2d)405; 36GaA133, 135SE 762; MoA 274SW857; 318Mo 350, 300 SW515; MoA 285SW109; MoA 14SW (2d)497. [b] (1) MoA 285SW165. [d] (1) Mo 26SW(2d)770. [e] (1) Mo 26 SW(2d)946. [g] (1) 25F(2d)516 [aff 25F(2d)518]; 168Ark479, 271SW321; 36GaA133, 135SE762; 318Mo 350, 300 SW515. (26) Where automatic elevator doors opened while elevator was between floors and employee stepped inside and fell down shaft, doctrine of res ipsa loquitur was applied. 168Minn287, 210NW32.

980–11 168Minn287, 210NW32; MoA 14SW(2d)497.

980–14 [c] (1) 317Mo 86, 296SW764. (9) Other instances. Mo 30SW(2d) 1000.

980–16 313Mo 527, 282SW425. [a] **Res ipsa loquitur** does not apply where servant had opportunity to know of defect. 313Mo 527, 282SW425.

980–17 315Mo 1068, 287SW474; MoA 274SW531.

980–17½–New. Res ipsa loquitur is not inapplicable merely because there is nothing to show whether the defect was latent or patent. 36GaA133, 135SE762.

981–18 168Minn287, 210NW32.

981–19 168Minn287, 210NW32.

981–20 168Minn287, 210NW32.

981–21 220MoA640, 291SW139. [b] **Where fellow employees having knowledge of conditions surrounding accident** might have been easily obtained as witnesses, doctrine is inapplicable. 313Mo 527, 282SW425.

981–22½–New. The doctrine, when applicable, permits an inference of negligence from the happening of an accident. 168Minn287, 210NW32.

981–22½–New. The doctrine does not require such inference. 168Minn287, 210 NW32.

981–22¼–New. An employee who was injured by inhaling gas in a gas producer is not precluded from invoking the doctrine of res ipsa loquitur because of an unsuccessful attempt to show specific negligence on the part of defendant. 219MoA590, 282SW141.

981–22½–New. Where servant has charge of instrumentality causing accident with duty to inspect, res ipsa loquitur does not apply. 222Ky736, 2 SW(2d)374.

981–26 217Ala382, 115S869; 208Ky 811, 271SW1103; 223Ky39, 2SW(2d) 1063.

981–28 36GaA133, 135SE762.

981–30 31F(2d)769; 42F(2d)111.

982–32 31F(2d)769. [a] (4) Injury caused by derailment of locomotive held proper case for application of rule of res ipsa loquitur. 84 IndA354, 148NE 489.

982–36 31F(2d)769; 84 IndA354, 148 NE489.

982–38 313Mo 527, 282SW425. [a] **Under Safety Appliance Act**, assuming proper setting of hand brake, fact it failed to hold demonstrates its inefficiency. 39F(2d)798.

982–39 313Mo 527, 282SW425. [c] **Employee's knowledge of simple tools** is presumed equal to master's. 38F(2d) 89.

983–49 TexCommnA 272SW764.

983–52 [b] **It is not presumed** that no warning sound was made by approach of train. 281US351, 50SCt281, 74L ed 896.

983–53 172Ark323, 288SW399.

983–54 15F(2d)467; 322Mo 813, 18SW (2d)467; Mo 26SW(2d)929.

984–65 193NC775, 138SE129; 198NC 27, 150SE499.

984–71 200 Ind589, 163NE99.

985–74 41F(2d)479; 200 Ind589, 163 NE99.

985–76 [b] **In Texas.–CivA** 297SW 1063.

985–85 27F(2d)98; 30Ariz491, 249P 66; 315Mo 409, 286SW45; TexCivA 2 SW(2d)958; 148Wash694, 269P1038.

986–86 315Mo 409, 286SW45; 148 Wash694, 269P1038.

987–96 281US351, 50SCt281, 74L ed 896; 198Cal 733, 247P911, 49ALR1330.

987–98½–New. There is a presumption that the injured employee was possessed of normal hearing, TexCivA 282 SW309.

987–98½–New. and normal sight. TexCivA 282SW309.

987–2 315Mo 1068, 287SW474, 480 [cit CJ]; MoA 300SW993; MoA 21SW(2d) 943.

988–3 287Pa590, 135A728.

988–8½–New. Where plaintiff in an action for the death of a railroad brakeman furnishes prima facie evidence in support of allegations of negligence, burden is cast on defendant to prove the exercise of ordinary care and diligence. 18F(2d)405 (construing Florida law).

988–11 IndA 165NE82(3dcase); 127Me 466, 144A212; 250NY345, 165NE805. [a] **Burden of showing that instrument causing injury was engaged in interstate commerce** rests on brakeman suing for injuries. Nebr 231NW812.

988–13 24F(2d)201.

988–14 36F(2d)705; 199Cal 126, 248P 501, 49ALR1323; 91CalA770, 267P591; 242 IllA428; 246 IllA31; 246Mich399, 224NW429; TexCommnA 6SW(2d)86. [c] **Plaintiff is required to show that one or more units in train**, including empty privately owned cars which defendant was moving along its tracks at time of injury, had been definitely accepted and designated by defendant for interstate uses and were moving at such time along the line of its or their destiny. 199Cal 126, 248P501, 49ALR 1323.

988–15½–New. Under Workmen's Compensation Law the master has the burden of pleading and proving that he is a subscriber under the act. TexCivA 271SW424.

988–17 173Ark43, 291SW982; 220Ky 719, 295SW1014; LaA 130S851; 118 Or 15, 245P732, 45ALR721.

988–19 220Ky719, 295SW1014; 118 Or15, 245P732, 45ALR821.

989–20½–New. On workman's proof of injury by machinery owned by defendant, burden is on defendant to show that plaintiff was employed by independent contractor. 194NC250, 139SE 369.

989–22 219Ala441, 122S429.

989–29 8F(2d)332; 19F(2d)871; 172 Ark508, 290SW74; 35GaA243, 132SE 918; 41GaA317, 152SE847; 206 Iowa 1093, 221NW771; 236Mich577, 211NW 111; 241Mich370, 217NW51; 242Mich 336, 218NW655; 313Mo 527, 282SW 425; 220MoA640, 291SW139; MoA 279 SW202; MoA 19SW(2d)518; 192NC 736, 136SE1; 197NC319, 148SE446; 54ND897, 212NW51; 38 OklACR715; 285Pa27, 131A477; TexCivA 19SW(2d) 336; 101WVa582, 133SE325; 101WVa 546, 133SE142.

991–30 241Mich370, 217NW51; 220 MoA640, 291SW139.

991–32 29F(2d)382; 32F(2d)974; 227 Ky91, 11SW(2d)985; 228Ky379, 15 SW(2d)236.

991–33 8F(2d)332; 175Ark223, 298SW 1016; 233Ky656, 26SW(2d)523; 220 MoA640, 291SW139; 220MoA902, 296 SW228; 54ND897, 212NW51; 285Pa27, 131A477. [b] 313Mo 527, 282SW425.

992–34 86Colo 159, 279P49; 222Ky 736, 2SW(2d)374; 285Pa27, 131A477.

993–38 271US344, 46SCt520, 70L ed 979; 6F(2d)185; 30F(2d)784; Ariz 283P719; 170Ark842, 281SW910; 179 Ark1015, 19SW(2d)1102; 125Me272, 133A92; 156Miss463, 125S819; 319Mo 890, 5SW(2d)15; Mo 30SW(2d)735; 197NC17, 147SE698; NC 154SE682; 120 Or122, 250P622; 284Pa555, 131A 470; TexCivA 286SW483; 149Va338, 141SE121; Wis 232NW550. [d] (2) Negligence must be established either by direct evidence of it or such circum-

stances which in themselves are equivalent thereto or take the place thereof. 284Pa555, 131A470.

993-38½-New. by a preponderance of the evidence. **TexCivA** 286SW483.

994-39 279US7, 49SCt202, 73L ed578; 280US486, 50SCt198, 74L ed562; 179Ark1015, 19SW(2d)1102; 118Kan713, 236P821; 319Mo890, 5SW(2d)15; Mo 30SW(2d)735; **TexCivA** 286SW483; **TexCivA** 21SW(2d)686.

994-40 125Me272, 133A92.

994-43½-New. One suing under Federal Employers' Liability Act has burden of showing that he was employed in interstate commerce, and using the instrumentalitics thereof. 11F(2d)993.

994-45 170Ark286, 280SW990; 179Ark321, 15SW(2d)994; 86Colo159, 279P49; 3Del564, 140A659; 118Kan713, 236P821; 210Ky600, 276SW515; 236Mich577, 211NW111; 220MoA640, 291SW139; MoA 279SW177.

994-46 33F(2d)966; 170Ark286, 280SW990; 310Mo367, 276SW869.

994-48 38 OklACR715.

994-53 Iowa 227NW646 (must show adequate cause for accident).

994-53½-New. But plaintiff has burden of proving that railroad's negligence caused injury. **TexCivA** 286SW483.

995-56 3Del564, 140A659.

995-59 27F(2d)960.

995-60 319Mo1137, 6SW(2d)886; MoA 285SW109; 102NJL697, 133A194; **Tex CivA** 286SW483. [a] (1) 180Ark1056, 24SW(2d)340; 102NJL697, 133A194.

996-62 279US7, 49SCt202, 73L ed578. [a] 168Ark479, 271SW321; MoA 274SW531.

996-63 311Mo369, 279SW43; MoA 285SW109. [a] 168Ark479, 271SW321.

996-64 150SC130, 147SE834.

997-66 TexCivA 286SW483.

997-68 311Mo369, 279SW43. [a] 168Ark479, 271SW321.

997-74 [a] **Recovery may be had without showing negligence,** where injuries were due to failure of company to comply with act. 36F(2d)716.

997-84 Wis 232NW550. [a] **In action under Safety Appliance Act,** negligence of defendant need not be proved by plaintiff. 83NH383, 142A707.

997-91½-New. Plaintiff has burden of proving that rod, chain, and handhold of coal spout used to fill locomotive tender with coal were not of proper length. **TexCivA** 286SW483.

997-91½-New. and that railroad's negligence in furnishing such instrumentalities was the cause of the injuries. **Tex CivA** 286SW483.

998-95 86IndA209, 156NE522; 220MoA902, 296SW228.

998-97 86IndA209, 156NE522; 220MoA902, 296SW228.

998-98 4HawaiiFed447; 220MoA902, 296SW228; 193NC775, 138SE129. [b] **Employer who fails to inquire as to competency** has burden of proving competency. 5F(2d)464.

998-1 220MoA902, 296SW228.

998-3 319Mo1137, 6SW(2d)886.

999-13 128Me314, 146A903.

999-20½-New. To establish a local custom in conflict with an ordinary rule, it must be shown to be actually known to all employees dealing with it. 293Pa343, 143A5.

999-24 23F(2d)794; 39F(2d)385; 173Ark729, 293SW9; 178Ark1046, 13SW(2d)306; 39GaA246, 146SE776; 260Mass399, 157NE364; 196NC435, 146SE70; 197NC399, 149SE393(2dcase); 25OhA124, 158NE496; 295Pa342, 145A293; 151Va815, 145SE255.

1000-26 MoA 10SW(2d)962(2dcase); 82NH497, 136A133; 83NH43, 138A302; NH 149A77.

1000-27 125Me272, 133A92; 127Me24, 140A827; 135SC163, 133SE550.

1000-34 8F(2d)843; 198Cal733, 247P911, 49ALR1330; 170Ga208, 152SE474; Ill 173NE372; 244IllA441; 251IllA585; 180Minn534, 231NW236; Mo 26SW(2d)988; MoA 20SW(2d)601; 83NH397, 142A695; 292Pa321, 141A157.

1001-44 318Mo79, 1SW(2d)172.

1001-47 35GaA243, 132SE918; 41GaA317, 152SE847.

1001-55 Mo 26SW(2d)929.

1001-59 Ga 154SE793; 86IndA209, 156NE522; 242Mich336, 218NW655. [b] 31Ariz302, 252P1012. [c] 35GaA243, 132SE918. [e] (2) 203Iowa1012, 213NW565.

1002-63 178Ark1046, 13SW(2d)306; 12LaA350, 125S469; MoA 275SW592; MoA 300SW993; MoA 15SW(2d)853; 82NH236, 133A9; 83NH196, 140A172; 135Misc467, 238NYS719; 192NC736, 136SE1; 196NC435, 146SE70; TexCivA 5SW(2d)582; 147Va542, 137SE493; 194Wis159, 215NW829.

1003-64 147Va542, 137SE493.

1004-68½-New. Proof of negligence of fellow servant may raise presumption of law that plaintiff was without fault. Ga 154SE793.

1004-72 Ill 173NE372; 247IllA600 [certiorari granted 27US593, 49SCt36 (10th case), 73L ed525]; 317Mo647, 296SW1017.

1004-74½-New. In an action brought under the Safety Appliance Act, the burden is on the railroad. 83NH383, 142A707.

1005-85½-New. The burden of proving the employer's failure adequately to instruct a scrubber held to be on the employee injured by slipping on the floor. NH 147A753.

1005-92 [d] (5) It is error to charge that proof of injury raises presumption of negligence placing burden on defendant to prove due case. (6) Other instances. 98Fla1021, 124S757. [e] (11) Under Civ. Code § 2782 presumption of negligence arises against employer from death of railroad employee. 8F(2d)725. (12) Under Civ. Code (1910) § 2780 proof of injury to servant of railroad company gives rise to presumption not only that company was negligent but that its negligence was cause of injury. 36GaA516, 137SE407. [h] (4) Under some circumstances statute is not applicable, and plaintiff must then show freedom from contributory negligence. 203Iowa1012, 213NW565 (voluntary service). [n] (3) In action by employee for injuries from inhaling poisonous fumes, based on employer's violation of statute requiring employers to provide adequate protective devices, burden was not on employee to offer evidence that devices required by statutes were practical, feasible, or possible, and that employer had them at hand or could have them by reasonable expense. 321Mo92, 11SW(2d)48.

1009-4 226Ky847, 11SW(2d)971; 154Md204, 140A48; 312Mo173, 279SW89; 322Mo158, 16SW(2d)190; Mo 32SW(2d)288; 225AppDiv109, 232NYS363. See also 144Va65, 131SE334. [c] (13) In action under Federal Employers' Liability Act evidence as to loading cars with freight for interstate shipment held inadmissible. 198Cal733, 247P911, 49ALR1330. [d] **Relevant and competent evidence** cannot be excluded on ground that it may tend to prejudice jury. 312Mo173, 279SW89. [e] **Evidence held admissible.**-318Mo28, 298SW817.

1011-6 TexCivA 295SW945.

1011-7 31Ariz302, 252P1012.

1011-7½-New. In an action against a railroad company under a state statute, forbidding the employment of males under eighteen years of age in a hazardous employment, evidence that at the time of the injury both employer and employee were engaged in interstate commerce is admissible. 240Mich655, 216NW467.

1011-11½-New. An employee bitten by a snake may testify that he reported the occurrence to the foreman a few minutes thereafter. Nebr 223NW21(2dcase).

1011-12 30Ariz204, 245P673. [a] (2) But where defendant relies upon a statement signed by, though not written by, plaintiff, and places him on stand to identify document, rule does not exclude examination by plaintiff's attorney as to person preparing statement. 30Ariz204, 245P673.

1011-13 MoA 20SW(2d)561(2dcase).

1011-17 [a] 31Ariz302, 252P1012; 85IndA591, 155NE179; 153Miss72, 117S881, 883 [citCyc]; MoA 20SW(2d)561(2dcase); 225AppDiv129, 232NYS103.

1011-18 [a] 153Miss72, 117S881, 883 [citCyc].

1011-20 223Ky821, 4SW(2d)757.

1011-23 31Ariz302, 252P1012.

1011-25 318Mo28, 298SW817.

1012-29½-New. Evidence is admissible on question whether servant was acting within scope of employment. 154Md204, 140A48.

1012-31 [a] 165Ark273, 262SW681. [b] 220Ky674, 295SW979.

1012-32 82NH236, 133A9. [a] 125Kan38, 262P494. [c] **Evidence of employer's failure to secure employment certificate** under statute is material only to sustain minor employee's right to bring action at common law and not to show proximate cause of injury. 117Nebr701, 222NW630, 60ALR830.

1012-41½-New. Evidence is admissible as to the willingness of plaintiff to submit to examination by physicians to be appointed by the court. **TexCivA** 284SW983.

1012-42 153Miss72, 117S881, 883 [cit Cyc].

1013-44 82NH236, 133A9.

1013-47 [e] **Fact that factory inspector made no criticism** is admissible. MoA 256SW1076.

1015-71 Mo 287SW434.

1016-80 [a] (10) Quarry. 317Mo86, 296SW764.

1016-84 168Ark961, 272SW657 (evidence of condition of mine entry before and after injury as tending to show continuing act of negligence); Mo 287SW434. [a] (26) Five years after. 255Mass526, 152NE335. [b] **Time held too remote.**-169Ga246, 149SE876; **TexCivA** 32SW(2d)220 (two years).

1016-84½-New. Exclusion of testimony is within discretion of the court. 255Mass526, 152NE335.

1018-93½-New. Evidence as to how far from the place of the accident the engineer could see the track laborer is immaterial. NJ 133A83.

1018-95 Nebr 233NW450; 23OhA323, 155NE564; 136SC337, 134SE385. [c] (12) Nebr 231NW812.

1020-97 219MoA590, 282SW141.

1020-3 136SC337, 134SE385.

1020-8 219MoA590, 282SW141.

1021-20 128Kan32, 276P63. But see 16F(2d)240.

1021-24 [a] (24) Oil press. 144SC395, 142SE615.

1022-34 16F(2d)240; MoA 279SW160.

1023-36 MoA 291SW180.

1023-36½-New. Negligence in not furnishing a reasonably safe place to work cannot be established by comparison with other places furnished. MoA 279SW160.

1023-38 42F(2d)111; 196NC359, 145SE634; 198NC742, 153SE406.

1023-40 8F(2d)5; 319Mo644, 5SW(2d)413.

1023-41 218MoA253, 267SW431.

1023-46 16F(2d)240; 177Ark1146, 9SW(2d)580; Mo 256SW222.

1024-49 [a] (6) Duty to look after mine entry tops. MoA 277SW964.

1024-50 [a] (40) Lights on machinery. MoA 279SW160.

1024-51 82NH236, 133A9.

1024-53 [d] (7) Mo 31SW(2d)770. (16) Safety ground wire and transformer to reduce voltage. 253Mass99, 148NE463. (17) Testimony of brakeman, in action under Federal Employers' Liability Act for switchman struck while tending switch by engine, that switch could have been placed at safer location, held properly excluded. 294Pa585, 144A765. (18) Use of rubber mat on slippery floor. MoA 295SW826.

1025-54 [b] (5) Condition of air line at time of next shift after gas explosion. MoA 3SW(2d)740.

1025-55 131Or501, 281P120 (under statute).

1025-56 Mo 289SW591.

1025-58 16F(2d)240.

1025-58½-New. or to the liability of defendant. **TexCivA** 293SW865.

1026-61 177Ark271, 6SW(2d)15; 319Mo102, 3SW(2d)384; 319Mo644, 5SW(2d)413; 323Mo1058, 21SW(2d)772; 218MoA698, 268SW102; 144SC395, 142SE615.

1026-66 285Pa27, 131A477. [a] **Evidence held inadmissible where not offered to show general custom:** (1) That bolt protruding from locomotive might have been reversed so as to project in-

wardly. 285Pa27, 131A477. (2) That witness had not observed bolts protruding on other locomotives, and projecting bolt not attempted to be shown dangerous. 285Pa27, 131A477.

1027–75 319Mo 102, 3SW(2d)384.

1027–78 NJSup 138A206; TexCivA 288 SW532; 40Wyo 324, 277P703.

1027–79 200Cal 265, 252P1045; 83NH 10, 138A315.

1028–87 319Mo 644, 5SW(2d)413.

1028–91 [b] **Only such reports** as have bearing on issue are admissible. 216 Ala296, 113S54.

1030–17 196NC359, 145SE684.

1030–19 Ark 31SW(2d)753.

1030–20 219MoA405, 271SW880.

1030–22 169Ark192, 273SW1028.

1030–24 Mo 26SW(2d)942; 219MoA 405, 271SW880; 196NC810, 145SE237.

1030–29 Mo 23SW(2d)142.

1031–38 320Mo 791, 9SW(2d)972.

1031–43 220Ky719, 295SW1014; Mo 274SW673.

1031–45 191NC42, 131SE380.

1031–47 MoA 272SW1076; 196NC810, 145SE237.

1031–51 228Ky500, 15SW(2d)300.

1032–60 157Miss607, 128S766; 196NC 810, 145SE237.

1032–63 196NC391, 145SE769.

1032–64 MoA 294SW732; TexCivA 290 SW292.

1032–65 178Minn347, 227NW352 (customary meaning of certain words when used under specified circumstances).

1032–69 [a] (5) Chains wrapping around brake staff, preventing braking. 318Mo 28, 298SW817. (6) Rules railroad had or should have had relative to warning of approaching trains. 249NY 35, 162NE576.

1032–70 [a] (9) As to car repairers being required to go between rails to pick up tools. 312Mo 342, 278SW1000. (10) Alighting from moving engines by trainmen in performance of work. 322Mo 886, 18SW(2d)40.

1033–72 [a] (11) Operation of track cars. 206Iowa1093, 221NW771. [b] (10) Rule forbidding employees to kick drawbars in action under Federal Safety Appliance Act. 308Mo 31, 271SW 997. (11) Rules of other railroads. 249 IllA164.

1033–75 294Pa585, 144A765.

1033–86 196NC810, 145SE237.

1034–87 223Ky262, 3SW(2d)649.

1034–91 196NC810, 145SE237.

1034–92 265Mass89, 163NE764.

1034–5 193NC775, 138SE129.

1035–15 220MoA902, 296SW228.

1035–16 220MoA902, 296SW228.

1035–17 [a] (9) Testimony as to wages paid employees. 193NC775, 138SE129.

1035–32 193NC775, 138SE129.

1036–34 193NC775, 138SE129.

1037–60 191NC153, 131SE670.

1037–64 MoA 3SW(2d)740.

1038–70 82NH110, 130A28.

1039–79½–New. Changing the conditions of the work is not admissible to prove assumption of risk of the employee. 153Wash300, 279P1115.

1040–4 214Ala23, 106S242; 308Mo 31, 271SW997.

1040–6½–New. Evidence to rebut a charge of contributory negligence is admissible. Mo 2SW(2d)785.

1040–7 82NH236, 133A9.

1040–13 170Ark1193, 281SW907.

1041–18 MoA 294SW732.

1041–20 318Mo 444, 300SW1102; 82NH 110, 130A28.

1042–56 26F(2d)361.

1043–85 222MoA578, 292SW1075; 138 SC241, 136SE234. [c] **Evidence of railroad's custom** to give verbal notice to car repairer before kicking cars held competent. 138SC241, 136SE234.

1043–99½–New. It is proper to permit plaintiff to testify as to custom with respect to passing from caboose to locomotive moving at certain speed. 180 Minn310, 230NW826.

1043–99½–New. Where such evidence is received, defendant is entitled to introduce testimony to contradict it. 180 Minn310, 230NW826.

1044–4 316 Ill 357, 147NE258. [a] 169 Ark192, 273SW1028; 172Ark729, 290 SW942; 95Fla5, 117S714; 232 IllA430; 123Kan620, 256P1019; 167Minn502, 210 NW62; 38 OklACR715. [b] **Evidence sufficient to sustain judgment**–Wash 288P931. [c] **Evidence held to show harmful effect of gas,** within statute. 38 F(2d)599.

1044–5½–New. Evidence to show that the employee was not engaged in "interstate commerce" when repairing an intra-state train. 319Mo 285, 4SW(2d) 1065.

1044–6 35Wyo 188, 247P1071.

1044–7½–New. In actions under the Federal Employers' Liability act, the kind and amount of evidence necessary to establish proof of a fact is controlled by rules laid down by the United States supreme court. 127Me466, 144A212.

1044–8 246 IllA31; Mo 26SW(2d)988 (scintilla of proof insufficient); Tex CommnA 6SW(2d)86. [a] (13) Brakeman on empty privately owned cars being moved to yard for inspection, after which they were to be used in interstate shipment. 199Cal 126, 248P501, 49ALR 1323. (14) Nature of employment at time of injury not shown. 11LaA119, 119S706. (15) Other instances. 43F(2d) 692; 91CalA770, 267P591; 176Minn592, 224NW247.

1044–9 [a] (21) To show that at least one car in train was at time of injuries committed to interstate commerce. 198 Cal 733, 247P911, 49ALR1330. (22) Engine hostler hauling engine from roundhouse. 172Ark729, 290SW942. (23) Repairing and enlarging turntable. 91Pa Super307. (24) Conductor in charge of work train. 322Mo813, 18SW(2d)467. (25) Switchman. 29F(2d)1; 319Mo 619, 5SW(2d)447. (26) Car inspector repairing defective car. 178Minn261, 226NW 934. (27) Other instances. 251 IllA585. [b] **Evidence held not to show** that railroad was engaged in interstate commerce at time of injury. TexCivA 297 SW1063.

1045–10 219Ala129, 121S410; Va 153 SE711. [a] (38) Mining company and substitute watchman. 170Ark498, 280 SW12. (39) Mining company's consent to employment of helper by employee. 223Ky821, 4SW(2d)757. (40) Plaintiff and other members of wrecking crew, loaned to defendant railroad. 219Ala 441, 122S429. (41) Mining company and workman engaged in construction of transmission and telephone lines from government power plant to mines. 35 Ariz285, 276P846. (42) Iron works and person employed by chauffeur to reload iron beam on truck from which it had fallen. MoA 5SW(2d)709. [b] (25) Testimony of plaintiff that he worked for "railroad company here for ten years" has been held insufficient, where there were other railroad companies. TexCivA 17SW(2d)848. (26) Other instances. 157Miss535, 128S505.

1046–11 [b] **Relation shown.**–32F(2d) 436.

1047–13 151Miss240, 117S593. [a] (1) 23F(2d)588. (46) Death of foreman riding on locomotive. 118Kan713, 236P 821. (47) Watchman shot by his own revolver. 146Va813, 132SE692. (48) Employee falling in water and drowning. 25F(2d)283. (49) Death of engineer in motor boat. 33F(2d)966 (not shown to be from monoxide gas poisoning). (50) Other instances. 175Minn1, 220NW159.

1047–14 276US303, 48SCt308, 72Led 583; 209Ky148, 272SW418; 177Minn 303, 225NW160; 221MoA773, 287SW 885; MoA 30SW(2d)1032; 54ND897, 212NW51; 129 Okl 1, 263P113; 150SC 130, 147SE834. [a] (53) Release of hand brakes and failure to warn brakeman that cars were moving down grade. TexCivA 283SW273. (54) Defective lug holding drawbar of freight car. MoA 277SW936. (55) Failure of engineer, killed in collision with another train, to blow whistle at crossing passed some time before has been held not proximate cause of collision. TexCivA 12SW(2d) 1050. (56) Alleged negligent premature signal to kick caboose on main line, and death of brakeman by being run over after uncoupling caboose. 179Ark 1015, 19SW(2d)1102. (57) Other instances. Or 293P414; TexCivA 21SW (2d)686.

1049–15 235 IllA431; Mo 287SW434; 319Mo 890, 5SW(2d)15; MoA 274SW 911; MoA 275SW599; 83NH10, 138A 315. [b] (67) death of brakeman falling **from train upon sudden stopping.** Tex CivA 272SW594. (68) Defective construction of rock bin held proximate cause of shoveler's injury. 218MoA698, 268SW102. (69) Breach of primary duty to establish rules, orders, and signals for operation of logging railroad. 190NC1, 128SE471. (70) Death of minor from strangulated hernia from lifting. 316 Ill 357, 147NE258. (71) Eye permanently injured as result of fall due to condition of employment and arising out of it. 30Ariz491, 249P66. (72) Death of car inspector due to being struck by sleeper moved by switching crew. 213Ky336, 281SW170. (73) Fall while attempting to tighten pipe. 173Ark956, 293SW1015. (74) Loose apron between locomotive cab and tender. 83NH10, 138A315. (75) Explosion of gas in tunnel. 222MoA872, 6SW (2d)56. (76) Leaving of rail where it was apt to be encountered by switchman in alighting from train in performance of his duties. 118Tex303, 16SW (2d)117. (77) Derailment of motor car due to hump in track and excessive speed. 319Mo 890, 5SW(2d)15. (78) Creosote poisoning and burning in handling railroad ties. 322Mo 396, 18 SW82. (79) Use of steel tamper in preparing blast in mine. 323Mo 1058, 21 SW(2d)772. (80) North-bound train running on south-bound track. NC 155 SE259. (81) Injury caused by failure of employer properly to instruct young and inexperienced employee. Ark 31 SW(2d)531. (82) Other instances. 150 Miss882, 117S339; 323Mo 892, 20SW (2d)31 (electrical burns from highly charged trolley wire); 323Mo 601, 20 SW(2d)509; MoA 274SW911; MoA 26 SW(2d)52; 245NY543, 157NE850; 292 Pa106, 140A622; TexCivA 297SW1063; TexCivA 28SW(2d)958; TexCivA 25SW (2d)969; TexCivA 28SW(2d)611; Tex CivA 29SW(2d)835. (82) Other instances. NH 149A872.

1050–16 165Minn223, 206NW436; MoA 19SW(2d)758. [a] **Evidence held to show** circumstances of accident. Tex CivA 28SW(2d)611.

1051–17 170Ark286, 280SW990; 165 Minn223, 206NW436; MoA 285SW170; 54ND897, 212NW51. [a] (20) 216NY 598, 111NE242. (37) Violation of Federal Safety Appliance Act by use of defective uncoupling device. 165Minn 223, 206NW436. (38) Fall of lineman from pole as result of electric shock. 170 Ark286, 280SW990. (39) Violation of Safety Appliance Act as cause of injury to switchman struck by automobile. 54ND351, 209NW786. (40) Other instances. IndA 169NE358; 322Mo 830, 16SW(2d)38; 56ND690, 219NW 209; 154SC113, 151SE229; TexCivA 21SW(2d)686. [b] **Causal connection shown.**–318Mo 123, 300SW787 (evidence showing that brakeman was struck by bridge and not by waterspout).

1051–18 18F(2d)513; 236Mich577, 211 NW111; 319Mo 890, 5SW(2d)15. [a] (50) Fall of pile of stoves. 236Mich577, 211NW111; Mo 282SW425. (51) Other instances. Ala 129S60.

1052–19 323Mo 601, 20SW(2d)509; 221 MoA1014, 298SW246. [a] **Proof that violation of Safety Appliance Act** was proximate cause is sufficient without proof of other negligence. TexCivA 28 SW(2d)611.

1052–20 82NH236, 133A9. [a] (11) That plaintiff member of switching crew was struck by open door of passing train. 36GaA133, 135SE762. (12) Car repairman injured by dropped spring. TexCivA 278SW490. (13) Injury by power speeder. 235 IllA431. (14) Injuries sustained while attempting to tighten oil discharge pipe connection. 173Ark956, 293SW1015. (15) Defective condition of brake appliances on freight car, and their dragging along under car, was proximate cause of death. Tex CivA 16SW(2d)132(2dcase).

1053–21 178Ark461, 11SW(2d)769.

1053–23 [a] (29) Employee injured while on way to work. TexCivA 20SW (2d)342(2dcase).

1053–24 [a] (64) Salesman inviting friend to ride in car. 77CalA462, 247P 236. (65) Auto salesman killed on one of two roads from place of employment

to home, having in his pocket paper with names of persons on such road, possibly prospective customers. 245NY 542, 157NE850. (66) Mill employee assisting in clearing roadway of empty cars. 126 Or487, 266P634. (67) Other instances. 190NC382, 130SE1. [b] **Evidence held not to show** that plaintiff's intestate was in portion of plant where he had no duty to perform. 190NC760, 130SE617.

1054-25 315Mo 1068, 287SW474, 480 [quotCJ].

1054-26 220Ala245, 124S907; 315Mo 1068, 287SW474, 480 [quotCJ]; Sask [1930] 2DomLR142. [a] 8F(2d)310; 18F(2d)513; 174Ark1180, 295SW969; 181Ark759, 27SW(2d)1000; 255Mass 526, 152NE335; 168Minn122, 209NW 892; 157Miss351, 128S81; 114Nebr219, 206NW737; NC 154SE740; TexCivA 291SW281; TexCivA 17SW(2d)848; 146Va22, 135SE677; 149Va338, 141SE 121; 152Va105, 146SE268; 105WVa513, 144SE225.

1055-27 39GaA513, 147SE795; 315Mo 1068, 287SW474, 480 [quotCJ]. [a] 253 IllA450; 89 IndA100, 163NE534; 315 Mo 1068, 287SW474.

1056-28 315Mo1068, 287SW474, 480 [quotCJ].

1056-29 151Miss820, 119S313.

1056-32 315Mo 1068, 287SW474.

1058-34 166Minn87, 207NW194.

1058-38 84 IndA354, 148NE489; 253 Mass99, 148NE463. [a] (3) MoA 282 SW1045.

1058-39 149Wash1, 270P113. [a] (1) 204 Iowa1063, 216NW677. (4) 200Cal 265, 252P1045. (51) Giving away of instrumentality furnished by master. 149Wash1, 270P113. (52) Defective stepladder. 97PaSuper240. (53) Defective blocks and jack. Or 288P1003. (54) Other instances. 317Mo 1255, 298 SW69; MoA 6SW(2d)1015; Okl 293P 182. [b] (1) NH 149A872. (10) 200Cal 265, 252P1045. (15) Failure to prevent shooting by special officer. 191NC153, 131SE670. (16) Slippery condition of plates used to roll car wheels. MoA 285 SW529. (17) Other instances. 317Mo 1255, 298SW69.

1061-40 MoA 285SW109. [a] (27) Defective gangplank. 205Cal 44, 269P637. (28) Alleged custom of having holes in sheet of metal. MoA 3SW(2d)282. (29) Failure to furnish adequate appliances to move barge. 227AppDiv43, 236NYS 648. (30) Other instances. 157Miss351, 128S81 (mule). [b] (1) 156Miss693, 126 S650 (narrowness and steepness of stairs); 311Mo 369, 279SW43; MoA 274 SW911. (2) 99CalA127, 277P882. (8) 313Mo 527, 282SW425 (fall of pile of staves); MoA 274SW531. (10) 18F(2d) 411. (11) Icy station platform. 275US 426, 48SCt177, 72L ed351. (12) Elevated track, platform, and guard rails equipped for unloading gravel from cars. 104WVa344, 140SE1. (13) Presence of snakes. 118Nebr503, 225NW 474. (14) Woodshed. BC [1929] 4Dom LR359. (15) Walkway. 140 Okl 277, 282P1091. (16) Other instances. 280 US486, 50SCt198, 74L ed562. [c] **Verdict supported by substantial sworn testimony.**–156Miss693, 126S650 (narrowness and steepness of stairs).

1064-48 181Ark1037, 28SW(2d)1073. [a] (2) 224Ky322, 6SW(2d)252. (7) NH 149A872. [b] (4) 51ND158, 199NW480. (14) Splitting tool. 217AppDiv433, 217 NYS35. (15) Steel tamper for preparing blast. 323Mo 1058, 21SW(2d)772.

1064-49 [a] (157) 117Nebr154, 219NW 896. (174) Not discovering dangerous condition of machine and making it safe. 253Mass99, 148NE463. (175) Defective sawmill machinery. 174Ark258, 295SW 27. (176) Where walking beam had excessive sidewise movement. 30F(2d) 903. (177) Defective cotton gin. MoA 286SW428. (178) Failure to sharpen and tighten blades in shearing machine. MoA 20SW(2d)587. (179) Defective fiber softening machine. MoA 20SW(2d) 592.

1066-50 [a] (70) Bursting of fly wheel. 18F(2d)513. (71) Loose wires at end of cable used in diving apparatus. 219 AppDiv242, 219NYS689. (72) Loose bolt flying from machinery. 174Ark905, 298SW342. (73) Other instances. 36 F(2d)716; 231Ky365, 21SW(2d)488.

1066-50½-New. Evidence held to show the machine in the same condition when examined by an expert as at the time of the accident. MoA 20SW(2d)592.

1067-51 [a] (1) 82NH236, 133A9; 151 Va740, 145SE342. (6) 253Mass99, 148 NE463. (16) Feed wires touching machinery. 190NC760, 130SE617.

1067-53 [a] (17) Insufficient guys, short and insecure base, and defective hoist line. 90Fla632, 106S462.

1068-54 [b] (9) **In general.**–220MoA 640, 291SW139.

1068-55 [a] (7) 16F(2d)552.

1069-57 [a] (2) Collapse of staging. 101Vt250, 143A290. [b] 319Mo 1137, 6 SW(2d)886. [c] **Evidence held insufficient** on demurrer to establish prima facie case. Mo 292SW17.

1069-58 [a] 227Ky91, 11SW(2d)985 (defective "chicken ladder").

1070-61 [b] (7) Lineman on falling from electric light pole. 311Mo 369, 279 SW43.

1070-62 [a] (35) Loose apron. 83NH 10, 138A315. (36) Derailment of locomotive. 84 IndA354, 148NE489. (37) Sanding engine flues on curve. TexCivA 6SW(2d)410. (38) Other instances. TexCivA 275SW463. [b] (1) 98Fla1021, 124S757. (9) 36GaA452, 136SE921. (10) Defective condition of step of tender. 149Va338, 141SE121.

1071-63 [a] (9) 37GaA570, 140SE905. (30) Dropped springs. TexCivA 278 SW490. [b] (21) Object protruding from car in passing train. TexCivA 285 SW913. (22) Improper loading. 125 Me272, 133A92. (23) Where car had been delivered to company using same when injury occurred. 238Mich289, 213 NW169. (24) Other instances. 155SC 531, 152SE717.

1072-64 [a] 176Minn575, 224NW241.

1072-65 [a] 36GaA70, 135SE439; 37 GaA570, 140SE905; TexCivA 9SW(2d) 182; TexCivA 25SW(2d)969 (injuries should have been anticipated by railroad from defect). [b] 166Minn87, 207NW 194; 167Minn379, 209NW265; Minn 231 NW797; Wis 232NW550. [c] **Evidence must render conclusion of defective brakes more reasonable than any other** consistent with their being adequate. 166Minn87, 207NW194. [d] **Inefficiency of hand brake is shown** by establishing the defect, or showing failure to function when properly operated. 39F(2d) 798.

1072-66 [a] 15F(2d)28.

1073-67 [a] 218Ala384, 118S565; 37 GaA771, 142SE185; 38GaA556, 144SE 506; Mo 31SW(2d)1010. [b] 271US472, 46SCt564, 70L ed1041; Mo 31SW(2d) 1007. [c] **Open switch.**–218Ala384, 118 S565.

1073-68 [b] 144Va443, 132SE191.

1074-69 [a] 151Va815, 144SE863. [b] 236Mich577, 211NW111.

1074-73 [a] (1) 149SC89, 146SE663; TexCivA 15SW(2d)200.

1074-73½-New. Negligence not shown in attempt to release switchman caught between defective couplings. TexCivA 275SW415.

1075-74 [a] (6) Presence of combustible gas in tunnel and defective electric light insulation. MoA 3SW(2d)740.

1075-77 [a] 172Ark753, 290SW580; MoA 297SW171.

1076-82 [a] MoA 274SW849.

1076-83 [a] 253Mass499, 149NE208.

1076-86 216Ky362, 287SW918.

1077-89 [a] (25) Machine for cutting metal strips. MoA 5SW(2d)665.

1077-92 [a] 177Ark271, 6SW(2d)15; 149Va720, 141SE838.

1078-95 [a] 216Ala248, 112S737.

1078-2 [a] RI 142A541.

1079-7 [a] (11) Failure to provide bumper at end of tracks. 177Ark1146, 9SW(2d)580. (12) Other instances. 180 Ark1104, 24SW(2d)330; 135Misc467, 238NYS719. [b] (3) Failure to provide light on stairway. 196NC330, 145SE 570.

1079-8 [b] **Evidence held insufficient** to show master stevedore charged with notice of defect in winch, causing injury to longshoreman while loading ship. 215AppDiv595, 241NYS221. [c] **Evidence held sufficient to show that reasonable person would have anticipated accident** and guarded against it. MoA 20SW(2d)592.

1079-9 [a] (32) Danger from use of steel tamper in preparing blast. 323 Mo 1058, 21SW(2d)772.

1080-11 [a] (10) Counterbore. 253 Mass446, 149NE150.

1080-12 [a] (13) Floor opening at top of stairway. 260Mass399, 157NE364. (14) Bent bars of clamshell bucket. 83 NH407, 143A469.

1080-13 [c] (17) Insecure derrick. 90 Fla632, 106S462. (18) Presence of looped wire between railroad tracks. Mo 31SW(2d)1010.

1081-14 [a] 317Mo 1255, 298SW69.

1082-17 [a] (3) Minn 231NW922 (other instances). (5) 179Ark799, 18SW (2d)331. (13) MoA 282SW125; TexCivA 20SW(2d)342(2dcase) (discharging exhaust from steam pump across railroad track, obstructing view of approaching train). [b] (7) 32F(2d)561; Ariz 283P719; 129Kan341, 283P53(2d case); Mo 25SW(2d)791 (moving of cars in switching operation).

1084-18 [b] **Evidence sufficient to show establishment of rule.**–Mo 26SW (2d)929.

1084-19 [a] (47) Ordering employees to go into boiler room near burning building. Ark 31SW(2d)962. (48) Other instances. 323Mo 307, 19SW(2d)865 (2dcase); Mo 32SW(2d)576; NH 149A 872; Or 293P417. [c] **Order not shown to be given.**–TexCivA 20SW(2d)369.

1084-20 [a] (1) 323Mo 826, 20SW(2d) 906. (12) 170Ark815, 281SW374. (13) Starting electric towing truck without warning. MoA 6SW(2d)1023. [a] (14) Section car. TexCivA 9SW(2d)146. [b] (5) 196NC330, 145SE570. (6) Release of hand brakes and failure to warn brakeman that cars were moving down grade. TexCivA 283SW273. (7) Failing to foresee and prevent willful injury to employee. 275US64, 48SCt25, 72L ed157.

1086-21 149Wash1, 270P113.

1087-23 [a] (58) Breach of primary duty to have and promulgate rules, orders, and signals for proper movement of trains on logging railroad. 190NC 1, 128SE471. (59) Other instances. CalA 287P538; 128Kan87, 277P57. [b] (15) Stopping train prematurely. 220 AppDiv491, 222NYS38. (16) Collision between backing train and motor car. 128 Okl 176, 261P960. (17) Starting engine while plaintiff was washing it. Minn 232NW341. (18) Other instances. 281US351, 50SCt281, 74L ed896.

1088-24 [a] Mo 26SW(2d)988; TexCivA 9SW(2d)146.

1088-26 [b] 35Wyo 188, 247P1071.

1089-28 [b] TexCivA 283SW273.

1089-29 [a] Mo 30SW(2d)1069.

1089-30 [a] (1) Ala 128S228. (2) Okl 291P111.

1090-32 [a] (3) Prevailing custom not followed in switching cars. TexCivA 19SW(2d)930. [b] **Negligence not shown.**–TexCivA 283SW273.

1092-40 Mo 30SW(2d)1018. [a] (21) Two men to unload heavy ties. TexCivA 295SW250.

1092-42 [a] (14) That master failed to have adequate help at hand to assist plaintiff in moving package safely 168Minn491, 210NW390. (15) Where employer had sufficient men, but employee undertook task without calling upon sufficient help. 194NC687, 140SE 602. (16) Four men to load rails. 151 Va409, 145SE372. (17) Failure to furnish helper to assist in moving cylinders. 179Ark321, 15SW(2d)994. (18) Men to carry timber. 140 Okl 277, 282 P1091. (19) Other instances. MoA 30 SW(2d)1032.

1092-43 11F(2d)924; 129 Okl 1, 263P 113. [a] (2) 168Ark1167, 271SW12. (7) 168Ark879, 271SW979 (operation of cut-off saw); 321Mo 1024, 14SW (2d)1. (11) Mo 285SW482. (12) Other instances. 317Mo 1255, 298SW69; NH 149A872. [c] **Negligence not shown.**–50ND894, 198NW685.

1093-45 [a] (1) Ark 31SW(2d)531.

1094-48 [a] Alta [1929] 3DomLR848.

1094-49 [a] 140 Okl 277, 282P1091.

1094-50 [a] 255 IllA541.

1094-51 [a] (2) 175Ark618, 299SW

1016; Sask [1930] 2DomLR142. [b] 322 Ill 250, 153NE355. [c] **Proof need not be of such fullness** as would make custom rule of common law. Mo 26SW (2d)929.

1094-52 [a] 232 IllA346. [b] Mo 30 SW(2d)735; 293Pa343, 143A5.

1095-54 [b] **Custom not proved.**-220 AppDiv491, 222NYS38.

1095-56 [a] 232 IllA346; Mo 26SW (2d)988. [b] 256Mass337, 152NE373. [c] **Evidence held to establish custom** to warn of approach in switching. Tex CivA 25SW(2d)969.

1095-57 [c] **Existence of custom not shown.**-Blowing whistle before backing train. 293Pa343, 143A5.

1095-59 [a] 319Mo 1137, 6SW(2d)886; Mo 30SW(2d)35. [b] 31F(2d)662; MoA 5SW(2d)709. [c] **Evidence held to show that fellow servant was vice principal.**-MoA 282SW170.

1096-60 [a] 15F(2d)258; 232 IllA346; 172Minn284, 214NW890; Minn 231NW 710; 145Miss304, 110S676; 319Mo 619, 5SW(2d)447; MoA 273SW761; 91Pa Super307; TexCommnA 294SW193; TexCivA 278SW490; TexCivA 295SW 250. [b] MoA 274SW849; 191NC153, 131SE670. [c] **Evidence held insufficient.**-TexCivA 281SW654. [d] **Gross negligence not shown.** 151Va409, 145SE 372. [e] **Evidence held not to show negligence of fellow servant.**-Iowa 229 NW759; Iowa 232NW657; 265Mass 527, 164NE446; 105NJL431, 144A590; NJ 150A344(2dcase); 140 Okl 277, 282 P1091; WVa 153SE919. [f] **Evidence held to sustain finding of gross negligence** of foreman. TexCivA 28SW(2d) 320.

1097-63 [b] (8) Dangers incident to operation of railroad. 39GaA246, 146SE 776. [c] **Evidence held to support finding** that injury was incidental to employment. TexCivA 26SW(2d)672.

1097-65 [a] (2) Other instances. Ark 32SW(2d)438. [b] (8) Dangers incident to oil on driveway of filling station. 126 Kan277, 268P86.

1097-66 [a] (10) Riding unshod horse on icy road. Iowa 231NW321.

1098-68 126 Or85, 268SW985. [a] (6) 90Fla632, 106S462.

1098-69 [a] Ark 31SW(2d)962.

1099-72 [a] (7) 180Ark366, 21SW(2d) 861.

1099-73 [a] (2) 315Mo 1199, 287SW 1047. (8) Dangers incident to duties of crossing watchman. NC 155SE259. (9) Other instances. Mo 30SW(2d)481; MoA 19SW(2d)518.

1100-74 39GaA173, 146SE561. [a] (1) 215Ala600, 111S753. (2) 232 IllA346. (7) Fall from block of wood on which employee was standing. 32 OhA232, 167 NE403. (8) Other instances. 170Ga 208, 152SE474.

1100-76 [a] 39GaA302, 146SE916(1st case).

1100-77 [a] TexCivA 19SW(2d)930.

1101-80 [a] 123Kan346, 255P70; 141 Wash374, 250P287.

1101-84 Sask [1930] 2DomLR142. [a] 99CalA127, 277P882. [b] 168Ark1167, 271SW12; MoA 31SW(2d)596; Tex CivA 278SW490. [c] **Recklessness in attempting to save life not shown.**-170Ark 498, 280SW12.

1102-86 317Mo 647, 296SW1017; 196 NC262, 145SE283(2dcase).

1102-89 [b] (1) 12LaA350, 125S469 (scaffold); Wash 288P931.

1103-90 [a] (1) 170Ark1193, 281SW 907. (5) Using foot to keep belt from slipping off pulley. Alta [1929] 3Dom LR848.

1104-91 [a] (1) MoA 256SW1076. (5) Other instances. 155Miss271, 124S336.

1104-93 [a] 323Mo 601, 20SW(2d)509.

1104-94 [a] (1) 293Pa343, 143A5. (2) Mo 30SW(2d)989. (3) 144Va443, 132SE 191.

1105-95 Mo 26SW(2d)988. [a] (4) Tex CivA 12SW(2d)1050. (11) Employee going from caboose to restaurant. Tex CivA 295SW945.

1106-97 [a] MoA 274SW849.

1106-98 181Ark759, 27SW(2d)1000.

1107-2 125 Or634, 268P51.

1107-4 Contra 312Mo 173, 279SW89.

1107-5 156Tenn479, 3SW(2d)1053, 1054 [quotCJ].

1107-8 MoA 296SW437; 196NC799, 144SE923 (nonsuit proper under evidence); 120 Okl 182, 250P926; 47RI 221, 132A384; 156Tenn479, 3SW(2d) 1053, 1054 [quotCJ]; 108WVa173, 150 SE515. [b] **Where complaint set up cause of action under state law and Federal Employers' Liability Act,** court had right to submit both phases of liability to jury. 155SC304, 152SE522.

1107-9 35GaA136, 132SE250; 242Mich 217, 218NW803; Miss 112S607; 195NC 849, 141SE580.

1107-10 MoA 31SW(2d)279.

1107-11 170Ark842, 281SW910; Miss 112S607; 120 Okl 182, 250P926; 134 SC31, 131SE777; 138SC241, 136SE234.

1107-12 [c] **Whether defendant railroad company owed plaintiff** duty of sending man forward for protection of section crew when motor car on which plaintiff was riding collided with another at curve injuring him is purely legal question. 309Mo 560, 274SW703. [d] **Extent and validity of employee's election not to accept provisions of foreign workmen's compensation law** is question for court. 322Mo 158, 16SW (2d)190.

1107-12½-New. In the federal courts, contested issues need not be submitted to the jury, where there is only scintilla of evidence. 197NC17, 147SE698.

1107-12½-New. Scintilla rule held inapplicable in determining whether issue is made for jury under Federal Liability Act. Ala 128S228.

1108-22 178Ark461, 11SW(2d)769; 226 Ky561, 10SW(2d)1064; 127Me370, 143 A462, 61ALR898; 257Mass455, 154NE 94; 258Mass527, 155NE433; 153Miss72, 117S881; 155Miss754, 124S798; Mo 26 SW(2d)969; 220MoA38, 285SW757; MoA 22SW(2d)84; NJSup 144A327; 194NC250, 139SE369; 198NC475, 152 SE169; 129 Okl 32, 263P440; 150Wash 514, 273P732. [c] **Plaintiff assisting defendant's servant in moving mother's furniture held** not defendant's servant as matter of law. 257Mass455, 154NE 94.

1108-23 [b] (1) 100WVa263, 130SE492, 43ALR330.

1108-24 171Ark51, 283SW7.

1108-26 [a] (2) 233 IllA337.

1109-29 22F(2d)939.

1109-31 [a] (5) Existence of emergency authorizing employee to procure assistance. 173Ark43, 291SW982.

1109-33 155Miss674, 125S93; 220MoA 38, 285SW757; 124 Okl 228, 255P582.

1109-34 [c] (5) Temporary assumption of relationship of master and servant. 257Mass455, 154NE94.

1109-35 42F(2d)357; 89CalA602, 265P 374; 318Mo 421, 1SW(2d)791; 323Mo 1089, 20SW(2d)494; MoA 296SW470; 216AppDiv416, 215NYS382; 225AppDiv 129, 232NYS103; 129 Okl 32, 263P440; TexCivA 32SW(2d)699. See also MoA 8SW(2d)1035. [a] (4) 203Cal 224, 263 P799. [b] **Evidence held insufficient to take to jury** question whether alleged independent contractor was really employee of defendant so as to render defendant liable to plaintiff as employee. 171Ark51, 283SW7.

1110-38 220Ky719, 295SW1014; 239 Mich266, 214NW206.

1110-39 36F(2d)886; 168Ark1074, 272 SW688; 154Md204, 140A48; Mo 281 SW441; 322Mo 137, 148W(2d)652; 82 NH236, 133A9; 126 Or487, 266P634; 135SC163, 133SE550; 150SC130, 147SE 834. See also 29 OhA54, 163NE42.

1111-42 105WVa572, 144SE289.

1111-43 44F(2d)150; 219Ala238, 121S 722; 319 Ill 326, 150NE242; 324 Ill 479, 155NE287; 234 IllA28; 242 IllA428; 245 IllA440; 252 IllA428; 226Ky561, 10 SW(2d)1064; 170Minn482, 212NW944; 176Minn575, 224NW241; 316Mo 835, 293SW379; 321Mo 1190, 18SW(2d)433; 322Mo 813, 18SW(2d)467; 322Mo 937, 18SW(2d)510; Mo 26SW(2d)988; 105 NJL466, 144A635; 115 Oh91, 152NE 753; 115 OhSt91, 152NE753; OhA 153 NE870; 91PaSuper307; Utah 280P1053. [a] (24) Placing car engaged in interstate commerce in yards temporarily. 319 Ill 326, 150NE242. (25) Disconnecting old rails taken from track of railroad engaged in interstate commerce. MoA 18SW(2d)126.

1112-44 [b] **Jurisdictional question of diverse citizenship** should be submitted to jury in action in federal court, though Federal Employers' Liability Act does not apply. 24F(2d)201.

1112-45 [a] (5) Sufficiency of notice of injury. 253Mass499, 149SE208.

1112-46 [b] **Statutory presumption of employer's negligence** from death of railroad employee is not conclusive, and if rebutted by uncontradicted and unimpeached evidence court should direct verdict for defendant. 8F(2d)725.

1112-47 213Ky336, 281SW170. [b] **Verdict for defendant** should have been directed. 208Ky772, 271SW1088. [c] **Where employee causing injury was either plaintiff's fellow servant or servant of corporation** not joined in suit, verdict was properly directed for defendant. 128Me458, 148A673.

1112-48 125Kan38, 262P494; 150Miss 458, 117S117; MoA 274SW911; 118 Or 15, 245P732, 45ALR821. [a] (5) 118 Or15, 245P732, 45ALR821. [b] (9) Other instances. 168Ark798, 271SW945; 39F(2d)869; 231Ky24, 20SW(2d)1020. [c] **Under Federal Employers' Liability Act,** where evidence is insufficient to sustain finding of railroad's negligence, it is entitled to peremptory instruction. 156Miss463, 125S819.

1113-49 8F(2d)5; 20F(2d)545; 22F (2d)359; 24F(2d)153; 27F(2d)197; 38F(2d)599; 41F(2d)342; 214Ala23, 106S242; 39GaA513, 147SE795; 234 IllA173; 235 IllA431; 252 IllA428; 220 Ky217, 294SW1050; 310Mo 1, 274SW 1079; Mo 289SW583; 320Mo 916, 9SW (2d)912; 321Mo 960, 158W(2d)794; Mo 30SW(2d)1077; MoA 274SW493; MoA 24SW(2d)166; 84Mont84, 274P293; 114 Nebr142, 206NW752; 192NC736, 136SE 1; 198NC816, 151SE97; TexCivA 284 SW664; TexCivA 286SW483; TexCivA 20SW(2d)342 (2dcase); 148Va148, 138 SE658; 151Wash430, 276P89; 106WVa 394, 145SE637. [a] 14F(2d)899. [d] MoA 300SW1048. [e] 82NH236, 133A 9. [h] 284Pa277, 131A241. [j] (4) 218Ala607, 119S638. (24) Injury was proximately caused by defendant's negligence. 318Mo 28, 298SW817. (25) Whether pterygium on eye was from injuries received in wreck. 319Mo139, 3SW(2d)374. (26) Gasoline explosion was caused by flames from other lighted stoves in tight inclosure. MoA 12SW (2d)930. (27) Employer's negligence in not marking gasoline containers was proximate cause of injury. MoA 12SW (2d)930.

1114-52 271US344, 46SCt520, 70Led 979; 281US351, 50SCt281, 74Led896; IndA 168NE42; 145Miss768, 111S146. [c] (3) Other instances. Va 153SE 874.

1115-55 320Mo 916, 9SW(2d)912; MoA 281SW71. [a] (2) Whether bronze powder on design upon ink tablets, used by plaintiff in mapping, and absorbed in abrased thumb was cause of injury. 218 MoA253, 267SW431.

1116-57 82NH236, 133A9.

1116-59 NH 150A540.

1116-60 222Ky736, 28W(2d)374; 141 SC355, 139SE778; 143Va875, 129SE339. [a] (7) Mere breaking of rope. 141SC 355, 139SE778.

1116-61 36GaA133, 135SE762; 222Ky 736, 28W(2d)374; MoA 285SW165; MoA 291SW506; 221MoA1014, 298SW 246; NH 146A865 (whether accident happened when engine left curve). [b] TexCivA 271SW205. [c] (9) Mo 26 SW(2d)946. (15) Sudden jumping and vibrating of automatic air hammer containing chisel. 220MoA525, 259SW811.

1117-62 181Ark1037, 28SW(2d)1073; MoA 288SW982; TexCivA 29SW(2d) 835.

1117-64 26F(2d)204. [b] (1) 195NC 404, 142SE220.

1117-69 17F(2d)568; 251 IllA585; MoA 15SW(2d)923; MoA 271SW540; MoA 292SW1073; MoA 28W(2d)169; MoA 11SW(2d)1060; 196NC275, 145SE 611; NC 154SE682; 150SC130, 147SE 834; 151SC1, 148SE633. [b] (5) 219 MoA234, 271SW1023. (8) Allowing minor to clean machine while it was in motion. 284Pa277, 131A241. (9) Failure to equip elevator with safety appliances. 323Mo 601, 20SW(2d)509. [c] (8) Stone fell in quarry. 317Mo 86, 296

SW764. [d] (11) Failure to furnish apron equipment on feeder of silo filler. 194Wis159, 215NW829. (12) Narrowness of scaffold causing fall. MoA 19 SW(2d)758. (13) Other instances. 322Mo 901, 18SW(2d)408. [e] (7) Mo 256SW1031. (28) 194Wis159, 215NW829. (29) 219MoA234, 271SW1023. (58) 316Mo 1303, 295SW102. (59) As to failure of master to furnish safe appliances. 191NC836, 133SE163. (60) Failure to have contractor on welding machine. 318Mo 79, 1SW(2d)172. (61) Fall of timber from scaffold. 321Mo 1015, 13SW(2d)1056. (62) Defective condition of hook and eye on chain used to lift car coupler. MoA 14SW(2d)674. (63) Location of kettle of hot liquid. 221MoA1116, 298SW131. (64) Scaffold slipping causing painter to fall. 179Ark 690, 18SW(2d)321. (65) Defective condition of drilling machinery. Tex CivA 18SW(2d)740. [g] (12) Improper manufacturing and preparation of nitroglycerin as cause. 30F(2d)516. [h] (22) Overflowing coal was proximately caused by defective coal spout. TexCivA 286SW483. (23) Foreign body injuring plaintiff's eye came from wrench struck with hammer. MoA 285SW170. [i] (5) Whether injury actually occurred on employer's premises. 234 IllA 502. (6) What constituted working place of miner. MoA 277SW964. (7) Whether certain work is hazardous. 128 Or224, 274P302. (8) If fall was caused by obstructed vision. 156Miss693, 126 S650.

1119–70 [b] (13) MoA 289SW987. (17) Other instances. 168Ark798, 271 SW945. [c] **Issue of defendant's negligence when not probable cause** of injury should not be submitted to jury. 168Ark798, 271SW945.

1119–71 MoA 300SW1028.

1120–74 149SC89, 146SE663; TexCivA 284SW268. [a] (1) 316Mo 1246, 295 SW89. (11) Mo 258W(2d)791. (25) Want of safe place for flagman to signal for movements of train. 150SC130, 147SE834. (26) Whether switchman was knocked from car by shed roof. 211 Ky830, 278SW143. (27) Insufficient condition of hand brakes. NJSup 138A 206. (28) Whether injury resulted from negligence in switching cars. 148 Va148, 138SE658. (29) Other instances. TexCivA 275SW505. [b] (6) Negligent moving of car which collided with that on which switchman was riding when crushed by collision between two trains on dark rainy night. 213Ala191, 104S397. (7) Bar falling from railroad car and knocking employee from car. 320Mo 791, 9SW(2d)972. [d] (24) Defective drifting throttle and grate shaker. 310Mo 1, 274SW1079. (25) Failure of coupling to work. 307Mo 595, 271SW358. (26) Failure of coupler to work when necessary. 214Ala 23, 106S242; 240 IllA512. (27) Switchman knocked from moving car. 149SC 89, 146SE663. (28) Derailment due to defective track from rotten ties or to third person's displacement of rails. 180Ark19, 20SW(2d)614. [e] (7) If injuries should have been foreseen because of defective brakes. Tex CivA 25SW(2d)969.

1120–75 42F(2d)111. [a] (10) Other instances. 307Mo 595, 271SW358.

1121–76 [a] (7) Defendant's negligence was proximate cause of death of deceased. 70Utah72, 257P1066. (8) Fire from hot box caused engineer to jump in front of another train. 127 Me466, 144A212. (9) Injury caused by defective hand brake. 33F(2d)579.

1121–78 Ark 31SW(2d)750; Ark 31SW (2d)753. (11) Unguarded gear. 198 NC207, 151SE246. [c] (7) 321Mo 378, 11SW(2d)268. (9) Other matters. 222 MoA1089, 11SW(2d)1057.

1121–80 234 IllA173.

1122–83 181Ark1037, 28SW(2d)1073; 12LaA350, 125S469; Or 293P417. [b] (22) Excessive speed of train. 310Mo 1, 274SW1079. (23) Kicking car in railroad yard. 215Ala291, 110S44. (24) Negligent method of mining. 219Ky 839, 294SW472. (25) Insufficient help and overexertion. MoA 275SW586. (26) Negligence in operating well drill near hole in which employee was tamping dynamite. 317Mo 919, 298SW789. (27) Other instances. 323Mo 531, 19 Nebr701, 222NW630, 60ALR830. (28) Negligence of coemployee in suddenly releasing tension on lifting iron. MoA 31SW(2d)575.

1122–84 [a] (11) Engineer killed by train on adjoining track. 310Mo 1, 274 SW1079. (12) Servant boarding train. MoA 6SW(2d)1004. (13) Brakeman killed while locking and unlocking switches. 151SC164, 148SE889. (14) Other instances. 37F(2d)666. [b] (2) 33F(2d)866. (17) 156Miss206, 125S423. (24) Sudden stopping of work train. 125Me347, 133A911. (25) Negligence in failure to procure prompt medical attention. TexCivA 291SW281. (26) Fellow employee throwing his end of railroad tie without warning. 179Ark799, 18SW(2d)331. (27) Other instances. 232Ky734, 24SW(2d)585; 317Mo 492, 297SW353.

1122–85 [b] (3) 217Ala382, 115S869. (4) Failure to drill holes of proper size for insertion of dynamite. 29F(2d)382. (5) Other instances. Mass 169NE782.

1123–88 17F(2d)568. [b] (10) 129 Okl 1, 263P113. (15) Injury to section hand on railroad track. 235 IllA431. (16) As to object falling down elevator shaft. MoA 274SW849.

1123–89 114Nebr142, 206NW752. [a] **Whether street railroad should have anticipated collision** (1) of car with truck backing across street in which motorman was injured is for jury. TexCivA 290SW905. (2) Whether railroad should have anticipated injury from truck striking parts of vestibule above bumper on street car is for jury. TexCivA 290SW 905.

1123–94 [d] (8) Servant falling when pick slipped from crosstie which he was removing. Nebr 227NW931.

1124–95 271US344, 46SCt520, 70Led 979; 8F(2d)725; 125Kan131, 263P791; 211Ky830, 278SW143; 229Ky16, 16 SW(2d)472; 235Ky687, 32SW(2d)23; Mo 30SW(2d)481; Nebr 229NW888; 194NC354, 139SE611; 197NC17, 147SE 698; 22 OhA216, 153NE299; 130 Okl 46, 265P130; 293Pa343, 143A5; 101WVa 582, 133SE325.

1124–96 17F(2d)345; 213Ky336, 281 SW170; Mo 278SW373.

1124–99 8F(2d)5; 16F(2d)461; 17 F(2d)345; 35F(2d)270; 170Ark576, 280 SW363; 177Ark1165, 9SW(2d)563; 234 IllA502; 240 IllA512; 220Ky431, 295 SW422, 53ALR386; 233Mich318, 206 NW485 (refusal to direct verdict for defendant held proper); Mo 256SW222; 315Mo 1068, 287SW474; MoA 275SW 592; 82NH236, 133A9; NH 150A540; NJSup 134A892; 198NC816, 151SE97; 38 OklACR172; TexCivA 286SW483; 146 Va22, 135SE677; 101WVa440, 133SE114 (where substantial conflict). [b] 145 Miss172, 110S244. [h] (2) It is not necessary that all grounds of negligence alleged be sustained by evidence to justify refusal of instruction in nature of demurrer to evidence. 323Mo 826, 20 SW(2d)906. [j] (2) 240Mich536, 215 NW317. (18) Negligence as to minor tong hooker struck by log rolling off car. 173Ark135, 292SW386. (19) Loading coal tender of locomotive. TexCivA 286SW483.

1126–5 179Minn325, 229NW136; 314 Mo123, 282SW416; 321Mo92, 11 SW(2d)48; NJSup 135A659; 125Or634, 268P51.

1126–6 125 Or634, 268P51.

1126–7 37F(2d)42 (evidence held insufficient for submission).

1126–16 MoA 273SW749; 195NC870, 142SE480.

1127–17 168Ark798, 271SW945 (evidence insufficient to take case to jury).

1127–18 329 Ill 308, 160NE588; 221 MoA345, 273SW176; MoA 28SW(2d)391 (holding directed verdict for employer properly refused); 284Pa277, 131A241.

1128–21 136SC95, 134SE247.

1128–24 17F(2d)568. [b] **Evidence insufficient to make issue of fact** for jury as to custom of supplying appliance. Miss 128S98(2dcase).

1128–25 169Ark235, 275SW329.

1128–26 MoA 5SW(2d)709; MoA 30 SW(2d)1094.

1129–31 16F(2d)461; 17F(2d)345; 23 F(2d)36; 170Ark644, 280SW652; 180 Ark1056, 24SW(2d)340; 89CalA602, 265 P374; 240 IllA512; 125Kan38, 262P 494; MoA 272SW1042; MoA 273SW 1078; MoA 281SW71; MoA 28W(2d) 169; 191NC153, 131SE670; NC 154SE 682; 120 Okl 182, 250P926; TexCivA 286SW483; TexCivA 5SW(2d)183; 101 WVa440, 133SE114.

1132–32 MoA 281SW113; 221MoA530, 289SW30(2dcase); 194NC469, 139SE 839.

1132–35 17F(2d)345; 41F(2d)578; 168 Ark479, 271SW321; 181Ark946, 28 SW(2d)728; 234 IllA502; 238Mich493, 213NW703; 239Mich266, 214NW206; 180Minn534, 231NW236; 219MoA19, 267 SW964; Mo 274SW692; 318Mo 50, 298 SW827; Mo 12SW(2d)498; 322Mo 147, 14SW(2d)603; MoA 273SW761; MoA 280SW73; MoA 282SW181; MoA 282 SW484; 221MoA837, 286SW125; MoA 287SW810; MoA 288SW941; MoA 288 SW982; MoA 293SW428; MoA 294SW 1021; MoA 296SW470; MoA 299SW 121; 221MoA1231, 300SW531; NJSup 139A245; 191NC153, 131SE670; 196NC 36, 144SE364; 198NC227, 151SE191(3d case); 151SC1, 148SE633; 54SD639, 224NW185; 106WVa394, 145SE637; 108 WVa173, 150SE515. [c] (2) Whether direction of servant by master to perform task includes implied obligation of servant to make place safe beforehand in which to do work or whether it is duty of master to prepare place for servant to do work is question for jury according to facts of particular case. 120 Okl 182, 250P926. [e] (7) Unloading logs from cars with stakes removed. 173Ark135, 292SW386. (8) Icy lumber pile. MoA 296SW216. [f] (15) Unsafe rollers for moving beams. MoA 282SW522. (16) Placing kettle of hot liquid six feet from open manhole. 221MoA1116, 298SW131. (17) Other instances. MoA 294SW762; MoA 300SW 1028.

1133–37 221MoA1169, 300SW1062. [b] 26F(2d)204; 83NH43, 138A302.

1134–38 MoA 299SW51.

1134–39 Mo 282SW434; 192NC599, 135 SE535. [d] (10) Falling of curbstone. 195NC866, 142SE325. (11) Sluffing off of timber on wooden bridge. Mo 293SW 367. (12) Blasting operation. 225Ky 447, 9SW(2d)212. (13) Other instances. 198NC43, 150SE630; 138 Okl 77, 280P 449.

1134–42 153Miss362, 121S111; 220MoA 1152, 299SW90; Mo 32SW(2d)576; MoA 14SW(2d)674; 190NC742, 130SE705; 192NC736, 136SE1; 198NC736, 153SE 324; 198NC742, 153SE406; 135SC163, 133SE550; TexCivA 284SW664; Tex CivA 286SW483; 104WVa344, 140SE1. [c] **Chisel and sledge hammer.**–315Mo 331, 289SW908.

1134–43 MoA 281SW71; 147Va1, 136 SE570. [d] (31) 105NJL504, 146A52. (50) MoA 285SW155; MoA 300SW1048. [d] (57) Rod, chain, and handhold of coal spout used to fill locomotive tender. TexCivA 286SW483. (58) Air hammer. MoA 300SW993. (59) Iron pipe for raising car wheels. MoA 14SW(2d)972. (60) Claw bar. MoA 18SW(2d)541. (61) Wrench for tightening bolts on railroad rails. Mo 294SW80.

1135–44 208Ky488, 271SW583; 315Mo 331, 289SW908; MoA 279SW212.

1136–45 MoA 18SW(2d)541.

1136–49 225Ky447, 9SW(2d)212; 197 NC17, 147SE698; 198NC86, 150SE711; 138 Okl 77, 280P449. [b] **Evidence held insufficient to make issue for jury.**–NJ 150A333.

1136–56 23F(2d)282; 171Ark51, 283 SW7; 171Ark968, 287SW173; 173Ark 77, 292SW115; 142Miss60, 107S199; Mo 28W(2d)760; MoA 274SW857; MoA 281SW71. [c] (3) 323Mo 1179, 20SW (2d)676. (19) 171Ark51, 283SW7. (20) MoA 18SW(2d)131. (21) Oil press. 144SC395, 142SE615. (22) Punch press. MoA 295SW127. [f] (7) Die of punch press descending in unusual manner without pressing foot pedal. 323Mo 1179, 20SW(2d)676.

1137–57 MoA 297SW124.

1137-62 32F(2d)976; 155Miss271, 124 S336.

1137-64 149Miss116, 115S191; MoA 279SW160.

1138-65 231Ky24, 20SW(2d)1020 (mere surmise of defects); TexCivA 14 SW(2d)97. [b] **Proximate cause.**–168 Ark798, 271SW945.

1138-71 [a] 319Mo 1196, 8SW(2d)846, 60ALR448; 219MoA405, 271SW880; MoA 285SW149. [b] 204 Iowa1063, 216 NW677. [c] **Whether rope was placed** behind horse in stall to prevent him from kicking or backing held question for jury. 219MoA405, 271SW880.

1138-72 [a] (4) Failure to place rope across stall to keep horse from kicking. 219MoA405, 271SW880.

1138-73 MoA 284SW837; 220MoA876, 295SW492. [a] 220MoA876, 295SW492. [c] **Employee caught in rope used for towing truck.**–220MoA362, 286SW715.

1138-74 [a] (1) MoA 7SW(2d)370. (3) 221MoA773, 287SW885. (5) Master's truck transporting employees struck by train at railway crossing. 190NC366, 129SE816. (6) Absence of springs, seats, and railings on truck. 118 Okl 42, 246P615. (7) Tractor too small and light to turn and haul heavy water tank wagon. 315Mo 1068, 287SW474. [c] **Evidence held sufficient to take to jury.**–164 Ark299, 25SW(2d)760.

1138-75½-New. Whether an employer, transporting an employee to place of work in former's automobile, negligently caused car to start forward after stopping, thereby precipitating the employee to the ground while alighting, is held for jury. 108Conn628, 144A304.

1138-76 19F(2d)67; 83NH10, 138A 315; 190NC444, 130SE116. [c] (2) 318 Mo 444, 300SW1102. (11) 220MoA1229, 298SW1069. (16) 318Mo 444, 300SW 1102.

1139-77 217Ky460, 289SW1089; 156 Miss463, 125S819; 83NH10, 138A315. [a] (3) Where bolt on which plaintiff's coat caught was not fastened to footboards in unusual way, and defect complained of was obvious to all, compulsory nonsuit is proper. 285Pa27, 131A 477. (4) Whether gangway chain should have been provided on locomotive with loose apron held not for jury. 83NH10, 138A315.

1139-80 180Minn310, 230NW826; 150 Miss621, 116S287.

1139-82 18F(2d)105; MoA 14SW(2d) 488; NJSup 130A225; NJSup 138A206; TexCivA 258SW(2d)969.

1139-83 312Mo 342, 278SW1000; 217 AppDiv301, 216NYS656; 149SC89, 146 SE663; TexCivA 278SW270; TexCivA 283SW273; TexCivA 291SW590. [a] (9) Whether coupler was lawful under statute. TexCivA 278SW270.

1140-87 226Ky472, 118SW(2d)131.

1140-88 307Mo 595, 271SW358; 308Mo 31, 271SW997; 321Mo 1080, 15SW(2d) 762; 321Mo 1190, 18SW(2d)433; Mo 25 SW(2d)791; 217AppDiv301, 216NYS 656; TexCivA 283SW273. [b] **Violation of Federal Safety Appliance Act.**–165Minn223, 206NW136.

1140-91 17F(2d)371. [b] **Negligence of employer,** required to repair freight car, after requesting help, is held for jury. 192NC728, 136SE65. [c] **Evidence held to warrant directed verdict.**–234Ky 276, 27SW(2d)980.

1141-92 170Ark842, 281SW910; Minn 231NW829; 316Mo 1266, 296SW105; MoA 274SW871; MoA 281SW456; 134 SC631, 131SE777. [a] (17) Failure to keep electric bell at dangerous crossing in order. 226Ky561, 10SW(2d)1064. (18) Insufficient clearance. 37F(2d) 828. (19) Other instances. NJ 147A 544.

1141-93 NJSup 148A172.

1141-94 Mo 308SW(2d)1077.

1141-96 42F(2d)216(increase); 128Kan 87, 277P57; NH 146A865.

1141-97 170Ark842, 281SW910.

1141-98 82NH350, 131A573.

1141-99 151Va815, 145SE255.

1141-1 279U87, 49SCt202, 73Led578; 8F(2d)332; 197NC17, 147SE698. [a] (5) Lump of coal concealed in pile of ashes. 8F(2d)332. [b] **Evidence held insufficient.**–270US165, 48SCt215, 72Led513; TexCivA 293SW879.

1142-2 251NY297, 167NE449.

1142-5 [c] (16) Mo 6SW(2d)843. (20) 318Mo 123, 300SW787. (21) 36F(2d) 210; 168Ark976, 272SW357; 319Mo 1015, 5SW(2d)59; 129 Or169, 276P1094; 136SC337, 134SE385; 151SC164, 148 SE889; TexCivA 289SW1027. (22) Semaphore. 149SC89, 146SE663.

1142-6 [a] (5) Maintaining standard switchstand three and one half feet from track. 227Ky816, 14SW(2d)138. (6) Semaphore; where warned not to use side ladders while switching cars. 128 Me264, 147A149. (7) Other instances. 233Ky656, 26SW(2d)523; 176Minn104, 222NW641.

1142-8 322Mo 980, 18SW(2d)62 (car on sidetrack).

1143-15 276US165, 48SCt215, 72Led 513; 144Va443, 132SE191.

1143-20 239Mich266, 214NW206; MoA 16SW(2d)730. [a] (9) Mo 287SW434; MoA 6SW(2d)988. (11) Permitting condition in roundhouse inviting invasion of snakes. Nebr 223NW21(2dcase).

1143-21 151SC83, 148SE703.

1143-22 MoA 292SW443; MoA 295SW 826; MoA 3SW(2d)254; MoA 16SW(2d) 633; 32 OhA232, 167NE403 (greasy floor); Or 286P144 (evidence insufficient for jury).

1143-23 Mo 318SW(2d)770; MoA 297 SW174; 56ND690, 219NW209.

1144-26 MoA 294SW114. [a] **Evidence held insufficient.**–Mo 293SW367.

1144-27 323Mo 363, 19SW(2d)476. [a] 17F(2d)345; 179Ark690, 18SW(2d)321; 219MoA471, 275SW775 (wobbly stool); MoA 7SW(2d)448; 127 Or246, 271P730. [d] (11) Timber falling from scaffold. 321Mo 1015, 13SW(2d)1056. [e] MoA 284SW513; 102NJL697, 133A194.

1144-28 24F(2d)153.

1144-29 MoA 15SW(2d)923; 224AppDiv 562, 231NYS489; 194NC227, 139SE242. [b] Mo 293SW367.

1145-30 23F(2d)36. [a] (11) Parting of pipe supporting platform. 17F(2d) 345.

1145-32 Mo 32SW(2d)288.

1145-33 136Wash522, 240P909.

1145-34 Okl 293P235.

1146-36 84Colo 67, 268P538; TexCivA 4SW(2d)320.

1146-37 [c] (5) Failure to conform to common usage in attaching chain of hoist to tank. 319Mo 102, 3SW(2d)384.

1146-39 TexCivA 286SW483.

1146-41 MoA 274SW849.

1146-42 220MoA640, 291SW139.

1146-45 See also 319Mo 102, 3SW(2d) 384.

1146-47 236Ky36, 32SW(2d)544; MoA 273SW244; MoA 12SW(2d)520; 198NC 150, 150SE884. [d] (1) 168Ark961, 272 SW657 (débris causing harness of mule to drag down overhead timbers on miner riding in mine car). (6) 216Ky362, 287 SW918.

1147-48 223Ky821, 4SW(2d)757; 233 Ky129, 25SW(2d)38; 234Ky427, 28SW (2d)479; 196NC178, 145SE11; 196NC 499, 146SE85; 101WVa546, 133SE142.

1148-50 MoA 296SW161.

1148-51 Ark 318SW(2d)753; 196NC531, 146SE144(2dcase).

1148-54 MoA 277SW964; MoA 297SW 171.

1149-56 101WVa546, 133SE142.

1149-57 MoA 7SW(2d)716. [a] (5) Construction of rock bin. 218MoA698, 268SW102. (6) Operating well drill near hole in which employee was tamping dynamite. 317Mo 919, 298SW789.

1149-58 198NC427, 152SE32; 150Wash 514, 273P732. [a] (2) 173Ark322, 292 SW359.

1149-59 222MoA872, 6SW(2d)56.

1149-60 30F(2d)903; 165Ark273, 262 SW681.

1149-62 15F(2d)972; 172Ark498, 289 SW474; Mo 274SW673; 323Mo 892, 20 SW(2d)31; Mo 26SW(2d)770; MoA 22 SW(2d)897; 193NC223, 136SE711. [d] (4) Failure to investigate after notice of danger. 15F(2d)972.

1150-63 [b] **Evidence of negligence held insufficient for jury,** where lineman fell from pole. 225Ky243, 8SW(2d)418.

1150-64 [c] **Evidence held sufficient** to take question to jury of officer's negligence in ordering seaman to point draft members on stem of ship in harbor from slippery raft. 240NY474, 148NE650.

1150-65 [a] (9) Ordering seaman to paint stern from slippery raft. 240NY 474, 148NE650. (10) Float not properly manned. 23F(2d)794. (11) Defective sling. 149Wash1, 270P113.

1151-67 16F(2d)574; MoA 287SW801; 56ND891, 219NW788.

1151-69 219MoA234, 271SW1023; MoA 296SW212; MoA 24SW(2d)682; MoA 30SW(2d)1094.

1151-70 16F(2d)574.

1151-71 16F(2d)574; 219MoA234, 271 SW1023; 222MoA370, 3SW(2d)256; 127 Or246, 271P730; 149Va720, 141SE838.

1151-72 Mo 289SW591; 318Mo 280, 300 SW265; Mo 2SW(2d)785 (whether employee under protection of statute); 222 MoA370, 3SW(2d)256. [b] (11) Cutter machine. 220MoA1152, 299SW90. (12) Metal shearing machine. MoA 20SW(2d) 587. (13) Bread cutting machine. MoA 19SW(2d)510.

1151-73 16F(2d)574; 32F(2d)974; 177 Ark271, 6SW(2d)15; 149Miss116, 115S 191; 222MoA907, 6SW(2d)630; 198NC 75, 150SE699(1stcase). [d] **Existence of usage** in regard to guarding ripsaws is question for jury on conflicting evidence. 149Va720, 141SE838.

1152-77 191NC549, 132SE598.

1153-88 MoA 279SW202.

1153-95 244 IllA441; 238Mich493, 213 NW703; Miss 101S153; 312Mo 342, 278 SW1000; 317Mo 86, 296SW764; 320Mo 1130, 9SW(2d)596; 320Mo 916, 9SW(2d) 912; MoA 279SW212; MoA 22SW(2d) 897; 82NH350, 134A574; NJ 151A122; NJSup 130A225; 193NC223, 136SE711; 194NC6, 138SE343; 127 Or246, 271P730. [g] (4) MoA 7SW(2d)370. (22) 8F(2d) 728. (47) Roof of tunnel. 33F(2d)23.

1155-4 41F(2d)617; MoA 7SW(2d)370. But see 144Va65, 131SE334.

1155-10 181Ark1037, 28SW(2d)1073; 311Mo 369, 279SW43.

1155-11 311Mo 369, 279SW43; 316Mo 1266, 296SW105.

1155-13 148Wash155, 268P177.

1155-14 181Ark1037, 28SW(2d)1073; 244 IllA441; 200 Ind589, 163NE99; 260 Miss399, 157NE364; 142Miss476, 107 S517; Mo 282SW38; Mo 294SW80; 316 Mo 1266, 296SW105; Mo 12SW(2d)498; MoA 272SW987; MoA 281SW71; MoA 299SW51; MoA 299SW121; 221MoA1231, 300SW531; NH 150A540; NJSup 130 A225; 196NC359, 145SE684. [d] (1) MoA 24SW(2d)1069. (12) Automobile upsetting hot liquid on employee in manhole. 221MoA1116, 298SW131. [e] (21) Dangerous proximity of truck to track. MoA 20SW(2d)584. [f] (8) Whether engineer knew that object on track was human being. MoA 7SW(2d)740. (9) Whether master's knowledge of latent physical condition of servant was superior to servant's. 323Mo 531, 19SW (2d)679. (10) Switch foreman's knowledge that car inspector was employed about cars on track when other cars were kicked thereon. Mo 23SW(2d)142.

1157-15 143Miss890, 108S503; MoA 300SW559; 192NC804, 136SE113; Or 286P144.

1157-15½-New. Instruction that master was negligent as matter of law is properly refused where there is question of fact whether it was known that anyone was in place of danger. Mo 256SW 819.

1157-17 225Ky447, 9SW(2d)212; 235 Ky833, 32SW(2d)414; MoA 271SW540; MoA 7SW(2d)438; TexCivA 296SW948. [a] (11) Burning grass on right of way. 128Me314, 146A903.

1157-18 24F(2d)153; Ark 32SW(2d) 422; 219Ky839, 294SW472; 232Ky734, 24SW(2d)585 (gross negligence); 311 Mo 77, 277SW566; 323Mo 531, 19SW (2d)679; 219MoA19, 267SW964; MoA 282SW484; MoA 299SW136; MoA 3SW (2d)282; MoA 20SW(2d)301; 245NY91, 156NE625; 196NC435, 146SE70; NC 154SE626; NC 154SE847; 295Pa342, 145A293; 141Wash374, 250P287. [c] (1) 145Miss172, 110S244. (6) 30F(2d) 316. (36) NC 155SE448(2dcase). (38) MoA 282SW125. (41) Throwing end of railroad tie without warning. 179Ark799, 18SW(2d)331; 222MoA740, 9SW(2d)824. (42) Oil well drilling. 179Ark631, 17SW(2d)889. (43) Loading rails by hand on incline car. 197NC 396, 148SE457. (44) Placing sack of wheat on stevedore's shoulder. 152Wash

332, 277P992. (45) Cutting iron bar. MoA 296SW446. (46) Driving rivets. 323Mo 531, 19SW(2d)679. (47) Shutting off electricity from trolley wire. 323 Mo 892, 20SW(2d)31. (48) Other instances. 323Mo 1089, 20SW(2d)494; 198 NC145, 151SE92. [c] Facts from which different inferences may be drawn as to proper care to be used in blasting stumps raises issue for jury. 145Miss172, 110 S244.

1159–20 245NY91, 156NE625.

1159–21 128Me374, 147A701 (rotating saw); TexCivA 4SW(2d)320.

1159–26 141Miss346, 106S281.

1159–28 23F(2d)777; MoA 23SW(2d) 1073; 196NCS21, 146SE87(1stcase); 196 NC820, 146SE87(2dcase).

1159–30 MoA 296SW437.

1160–31 190NC742, 130SE705.

1160–32 86Colo 159, 279P49 (sudden stop); 244 IllA441; 310Mo1, 274SW 1079; Mo 279SW148; 323Mo 450, 19SW (2d)470; MoA 288SW91; 103NJL4, 135 A77; NJSup 138A206; 190NC231, 129 SE580; 38 OklACR172; 151SC164, 148 SE889 (where deceased's view was obstructed). [a] (18) Suddenness of brake application. 42F(2d)111.

1160–33 30F(2d)784; Ala 128S228; 172Ark353, 289SW6; 86Colo 159, 279P 49; 128Kan32, 276P63; 146Miss130, 110S234; TexCivA 280SW864. [a] (1) 172Ark353, 289SW6. (18) Kicking car into siding. 217Ala251, 115S168.

1160–36 321Mo 697, 12SW(2d)735; MoA 28SW(2d)372 (evidence held sufficient to go to jury); 105NJL466, 144 A635. [a] (9) Unloading rails from hand car. 202 Iowa1229, 211NW875. [b] (5) Acquiescence in servant's use of unsafe place. 150SC130, 147SE834. (6) Operating car with defective brakes. TexCivA 25SW(2d)969.

1161–37 18F(2d)950; 28F(2d)952; 218 Ala481, 119S212 [certiorari granted 279 US830, 49SCt349 (4thcase), 73L ed980]; 172Ark353, 289SW6; 87 IndA11, 158NE 636; 157Miss432, 128S325; 315Mo 1181, 289SW913; Mo 292SW732; 151SC164, 148SE889; TexCivA 25SW(2d)969. See also 178Minn347, 227NW352. [d] (5) 218Ala481, 119S212. (11) Leaving jack block in switch yard. 179Minn67, 228 NW546.

1161–38 14F(2d)899; 33F(2d)866; Ala 129S60; 215Ky401, 285SW245; 322 Mo 813, 18SW(2d)467; 103NJL4, 135A 77; 197NC399, 149SE393(2dcase); 93 PaSuper512; TexCommnA 288SW823; TexCivA 271SW205; TexCivA 281SW 652; TexCivA 19SW(2d)930. [a] (14) Entering roundhouse before laborer completely opened door. 103NJL4, 135A77. (15) Log falling while rerailing car. 197NC391, 148SE436. (16) Other instances. Mo 31SW(2d)4.

1162–39 215Ala285, 110S312; 215Ala 600, 111S753; MoA 14SW(2d)488; 143 Okl 249, 289P343; 137SC47, 134SE660. [a] (19) Maintaining green block signal while another train standing within block. 322Mo 937, 18SW(2d)510. [b] (1) 215Ala285 110S312.

1163–41 14F(2d)899; 310Mo 1, 274SW 1079.

1163–42 36F(2d)886; 174Ark1083, 298 SW849; 87 IndA11, 158NE636; 215Ky 401, 285SW245; 310Mo 1, 274SW1079; MoA 28SW(2d)195; 138SC241, 136SE 234; TexCivA 281SW652; Sask [1929] 2DomLR422. [c] (3) Custom of ringing engine bell after stopping and before again moving engine has been held for jury. 322Mo 813, 18SW(2d) 467. [h] (8) Switchman struck by train passing through yard. 190NC231, 129SE580. (9) Whether rule and custom of railroad requiring ringing of bell when starting engine was observed. 322Mo 813, 18SW(2d)467.

1164–43 215Ala285, 110S312; 245 IllA 440; 310Mo 1, 274SW1079; 317Mo 647, 296SW1017; 35Wyo 188, 247P1071.

1164–44 172Ark353, 289SW6; Tex CivA 280SW864.

1164–45 26F(2d)242; 37F(2d)42; 37 F(2d)522; 203 Iowa974, 213NW569; 168Minn122, 209NW892; Mo 30SW(2d) 22; MoA 297SW146; 197NC319, 148SE 446; 22 OhA216, 153NE299; 128 Okl 176, 261P960; 141SC359, 139SE779.

[b] (23) Failure to give crossing signals. 206 Iowa1093, 221NW771. (24) Other instances. TexCivA 23SW(2d) 516.

1165–51 87 IndA11, 158NE636; 82NH 488, 136A260; 219AppDiv438, 220NYS 95.

1165–52 219AppDiv438, 220NYS95. [a] (4) 287Pa332, 135A203.

1166–53 225Ky447, 9SW(2d)212.

1166–56 249NY35, 162NE576.

1166–57 215Ala600, 111S753.

1166–59 43F(2d)998; 321Mo 960, 15 SW(2d)794.

1166–61½–New. What defendant by its rules recognizes as duty to servant the court will also recognize as a duty in determining a question of law as to whether or not defendant owed plaintiff the particular duty under a particular state of facts. 309Mo 560, 274 SW703.

1167–71 228Ky5, 14SW(2d)216; 315 Mo 1068, 287SW474; 323Mo 307, 19SW (2d)865(2dcase) (order of vice principal); 220MoA1142, 297SW430; MoA 299SW70; TexCivA 5SW(2d)582.

1167–72 37GaA6, 138SE858; 321Mo 697, 12SW(2d)735; 323Mo 307, 19SW (2d)865(2dcase) (order of vice principal); 219MoA19, 267SW964; MoA 280 SW60; MoA 285SW127; MoA 293SW 451; 220MoA1142, 297SW430; 220MoA 1152, 299SW90; 193NCS05, 138SE173. [b] (28) Directing servant with cut finger to rub powder into putrid meat to make it salable causing blood poisoning. 235Mich373, 209NW53. (29) To do work in unsafe and dangerous way. 315Mo 331, 289SW908. (30) Standing on trestle. MoA 293SW428. (31) Failure to brace skids. 222MoA740, 9SW (2d)824. [d] MoA 296SW214; 195NC 18, 141SE282.

1168–73 195NC795, 143SE833.

1168–74 220MoA1142, 297SW430; 193 NC805, 138SE173.

1168–78 281US345, 50SCt294(2dcase), 74L ed892; 169Ark1054, 278SW31; 177 Ark271, 6SW(2d)15; 35GaA136, 132SE 250; 260Mass399, 157NE364; 312Mo 342, 278SW1000; Mo 7SW(2d)438; 321 Mo 697, 12SW(2d)735; 322Mo 787, 16 SW(2d)85; MoA 272SW1042; MoA 274 SW849; MoA 277SW583; MoA 284SW 855; MoA 287SW810; 220MoA542, 287 SW865; 221MoA530, 289SW30(2dcase); MoA 293SW481; 220MoA876, 295SW 492; 220MoA1152, 299SW90; MoA 7 SW(2d)370; MoA 7SW(2d)716; MoA 13SW(2d)562; MoA 30SW(2d)626; NC 155SE861; Okl 293P235; 147Va542, 137SE493; 148Wash93, 268P145; Wis 227NW933. [c] (9) Changing direction of train movement on particular track. 227AppDiv269, 237NYS297. [d] (23) 35F(2d)298. (35) Existence of duty to warn as to using lye. 169Ark1054, 278 SW31. [e] Whether warning actually given held for jury. 87Colo 311, 287P 648.

1170–79 23AlaA490, 127S679; 171Ark 51, 283SW7; 173Ark1182, 293SW742; Ark 31SW(2d)531; 214Ky392, 283SW 395; 318Mo 28, 298SW817; 320Mo 819, 8SW(2d)884; MoA 282SW110; 83NH 196, 140A172; 198NC267, 151SE251; 129 Okl 1, 263P113; TexCivA 6SW(2d) 192. [e] (19) Caddy on golf course. 220MoA542, 287SW865.

1170–80 171Ark51, 283SW7.

1171–81½–New. Where the employers' evidence shows that fellow servants had been instructed to give warnings and signals to other employees and there is no evidence to show that the employer was negligent in this respect, the employer is entitled to a directed verdict on this issue. 5F(2d)23.

1171–82 265Mass89, 163NE764.

1171–83 [a] (6) Danger of spike shoes slipping on iron. NH 146A815(2dcase).

1171–84 Mo 26SW(2d)942; Sask [1929] 2DomLR422. [c] (5) Telling young inexperienced lineman's helper that wire was "hot." 168Ark1074, 272 SW688.

1171–86 [a] 191NC75, 131SE390.

1171–87 [a] 23F(2d)794; 84Mont84, 274P293.

1171–88 Mo 30SW(2d)1018; MoA 272 SW1080; MoA 3SW(2d)282; 222MoA 740, 9SW(2d)824; Mo 31SW(2d)14; 190NC742, 130SE705 (failure of foreman to furnish sufficient number of helpers equipped with suitable tools); 198NC475, 152SE169; TexCivA 281SW 234; TexCivA 284SW268.

1172–89 198NC736, 153SE324. [a] MoA 3SW(2d)282; TexCivA 281SW234.

1172–91 [a] MoA 279SW177.

1172–92 5F(2d)464; 155Miss754, 124S 798; 118 Okl 42, 246P615.

1172–93 191NC75, 131SE390; 198NC 27, 150SE499.

1172–94 220MoA175, 282SW515.

1173–95 [a] 168Ark798, 271SW945 (whether fellow servant inexperienced). [b] 168Ark798, 271SW945 (in employing alleged inexperienced fellow servant); 206 Iowa1213, 220NW45(2dcase); 194NC800, 139SE773; 143Va875, 129SE 339.

1173–96 MoA 7SW(2d)438; 151SC280, 148SE870.

1173–97 17F(2d)568; 252 IllA238; MoA 273SW749; MoA 293SW428.

1174–2 149Miss595, 115S713; 320Mo 408, 7SW(2d)1006.

1174–3 Mo 287SW628.

1175–7 MoA 296SW1028.

1175–10 224Ky322, 6SW(2d)252.

1175–14 319Mo 1010, 5SW(2d)1; MoA 7SW(2d)438.

1176–22 [a] (1) 169Ark748, 276SW 599; 173Ark956, 293SW1015; 180Ark 567, 22SW(2d)373; MoA 297SW124; 91PaSuper307; TexCivA 298SW642; TexCivA 30SW(2d)661. (23) Releasing hold on pipe. 173Ark956, 293SW1015. (24) Other instances. 198NC475, 152 SE169. [b] (1) 276US165, 48SCt215, 72 L ed513; Ark 32SW(2d)440; 265Mass 89, 163NE764; 144SC10, 141SE685; TexCivA 283SW895. (10) Wilfulness of fellow servant. 233Mich318, 206NW 485. [c] Restricting issues to evidence. –168Ark798, 271SW945. [d] Evidence held insufficient to make issue of negligence of fellow employees of train crew. NJ 150A344(2dcase).

1176–23 35F(2d)634; 176Ark1204, 3 SW(2d)41; Ark 29SW(2d)1085; 149 Md425, 131A754; 267Mass5, 165NE698; 319Mo 1010, 5SW(2d)1; 320Mo 408, 7 SW(2d)1006; 320Mo 916, 9SW(2d)912; 322Mo 271, 18SW(2d)494; 219MoA405, 271SW880; MoA 275SW555; MoA 296 SW1028; MoA 7SW(2d)438; 55ND353, 213NW841; 127 Or246, 271P730; Tex CivA 282SW309; TexCivA 29SW(2d) 835.

1176–24 322Mo 592, 17SW(2d)945; MoA 282SW484; MoA 295SW841; 219 AppDiv438, 220NYS95.

1176–25 168Ark798, 271SW945 (worn belt).

1176–28 219Ala238, 121S722; 318Mo 28, 298SW817; 322Mo 137, 14SW(2d) 652; 192NC666, 135SE770.

1176–29 TexCivA 282SW309.

1177–30 219MoA405, 271SW880.

1177–37 267Mass5, 165NE698; 249 Mich440, 229NW488; Mont 292P909.

1177–44 115 Oh226, 152NE664; SC 155 SE397.

1177–49 [a] Evidence held insufficient. –275US455, 48SCt151, 72L ed370.

1177–50 318Mo 28, 298SW817.

1177–52 See also SC 155SE438.

1177–52½–New. , or the failure to slow a train for the flagman to board. DC 26F(2d)989.

1177–55 34Ariz230, 270P629. [a] Whether negligence that of vice principal or fellow servant.–149Md425, 131A 754.

1177–56 41F(2d)738.

1177–59 MoA 7SW(2d)1032.

1178–61 149Md425, 131A754.

1178–63 149Md425, 131A754; MoA 7 SW(2d)1032.

1178–65 320Mo 408, 7SW(2d)1006; MoA 271SW540; MoA 296SW187; MoA 296SW1028; 191NC549, 132SE598; 136 Wash522, 240P909.

1178–69 Mo 274SW373.

1178–70 169Ark235, 275SW329.

1179–75 8F(2d)5; 12F(2d)995; 218 Ala481, 119S212 [certiorari granted 279 US830, 49SCt349(4thcase), 73L ed980]; 172Ark498, 289SW474; 172Ark671, 290 SW953; 176Ark1204, 3SW(2d)41; Ark 31SW(2d)762; Ark 32SW(2d)422; 198 Cal 733, 247P911, 49ALR1330; 89CalA

607 265P374; 29GaA246, 146SE776, 232 IllA216, 215 IllA446, 251 IllA585; 206 Ind589, 163NE599; 87 IndA11, 158 NE626, 124Mo56, 131A5, 266Mass299, 157SE261; 172Minn274; 211SW550; Minn 241NW10; 310Mo1, 274SW 1079; 215MoA19, 267SW964; MoA 4 SW(2d)1100; MoA 58W(2d)769, MoA 78W(2d)442 (complaint to master); 24 Mont64, 274P293; 82NH488, 136A269, 220AppDiv191, 222NYS35, 196NC122, 111SE77; 11 Okl124, 217P37; 129 Okl1, 264P112, 265P312, 145A238, 146SE163, 152SE556, 159NC294, 147SE 37, 148SE1; 148SE633; 155NC202, 152SE121; TexCivA 275SW505; Tex CivA 228SW551; TexCivA 207SW1101; TexCivA 58W(2d)188; TexCivA 238W (2d)858; 146Va366, 131SE815; 151Va 175, 143SE155; [c] (1) Ark 298SW(2d) 1054.

1182-76 23F(2d)791; 192Cal723, 247 P311, 49ALR1330; Iowa 231NW321; 172Mo272, 133A92; 265Mass29, 162SE 561; Mo 318SW(2d)971; 24Mont84, 274 P293; Mont 202P908; 82SH1407, 143A 169, 25Pa115, 114A293, 119Va338, 111SE121, 117Wash612, 251P1038.

1182-77 [b] 220MoA512, 275SW505.

1182-77½-New. Where there is no evidence to sustain affirmative of issue, an instruction to find the issue of assumption of risk in plaintiff's favor is proper. 190NC769, 130SE617.

1182-77½-New. In an action against a railroad for the death of a switchman, the evidence is sufficient to take to the jury the question whether deceased's assumption of risk was the intervening proximate cause of his death. Ala 119 SE12 (rehearing granted 270SE530, 49 SC349(4 liens), 74L.ed950).

1182-78 29Ariz521, 244P405.

1183-85 [a] 3 F(2d)243; Minn 231NW 922, 223Pa312, 145A4.

1183-89 [a] 36F(2d)256, 247 IllA600 (rehearing granted 27SE553, 49SC336 (4 liens), 74L.ed254), 130Minn510, 330NW826; 149Miss766, 115SE97; Mo 308SW(2d)988; 118 Okl124, 247P92; Tex CommnA 248SW(2d)32; TexCivA 258SW (2d)669; 117Wash260, 205P1085; 147 Wash672, 267P433. See 82NH397, 142 A697.

1183-87 57F(2d)963; 23F(2d)794; 168 Ark636, 272SW357, 173Ark77, 279SW 115; Ark 308SW(2d)1085; 86IndA297, 157NE106, 260Mass199, 157NE261; 174 Minn466, 219NW787, 317Mo36, 296SW 754; Mo 318SW(2d)1010; MoA 28SW(2d) 169; NC 154SE682; 56NDB01, 219NW 788; 195NC169, 138SE550; 151Va815, 144SE863; 151Va815, 145SE255; Sask [1925] 3DomLR251. [b] (6) MoA 283 SW181. [c] (1) Defective bell on engine. 32F(2d)976. [d] (3) Risk of being shot by robbers in freight yard. 151 SC01, 148SE633. (6) Girder of bridge. 118Mo50, 22SSW377.

1184-86 NH 149A872; 136SC163, 133 SE550.

1185-91 193NC223, 136SE711.

1185-92 221AppDiv562, 231NYS489.

1185-93 29F(2d)185, 169Ark718, 276 SW599; 150Minn541, 231NW236; 151 SC417, 149SE162.

1185-94 MoA 308SW(2d)801.

1185-95 195Mo66, 131A5; Sask [1925] 3DomLR251.

1185-97 11F(2d)617.

1186-98 37F(2d)328 (negligent location of switch lever). IndA537, 16NE 702, 193Mich110, 279SW185; Minn 241 NW429, 216Mo1266, 226SW105, 252 NY127, 163NE112.

1186-99 TexCivA 238SW(2d)461.

1186-1 119SC79, 140SE663.

1186-2 1 Ark339, 29SSW359, 198NC 437, 152SE832.

1186-4 50ND600, 218NW209.

1186-5 172Ark358, 289SW6; 237 IllA 316, 138Kan43, 270P63; 212Ky744, 280 SW98; MoA 273SW209; 219MoA590, 252SW111; MoA 300SW70; 196NC132, 141SE407; NC 154SE847; 149SC164, 148SE889; 146Va366, 131SE815. [c] Evidence insufficient to go to jury.-88F (2d)590.

1187-10 218Ala481, 119SE212; 172Ark 364, 289SW6; OklA 287P588; 237 IllA 346; 210Mo1, 274SW1079; Mo 208W (2d)939 (evidence insufficient to go to jury); NJ 147A544; 140Va318, 141SE 228.

1187-11 205Ky422, 271SW583; 287Pa 332, 135A203; SC 155SE438.

1187-12 23F(2d)777.

1187-13 Mont 292P908.

1187-13½-New. The question will be taken from the jury where, as matter of law, the servant must be held to have assumed the risk as against a contention that he acted in imminent peril or emergency. Utah 280P1053.

1188-14 7F(2d)269; 14F(2d)899; 30F (2d)903; 35F(2d)298; 168Ark961, 272 SW657 (conflicting evidence of knowledge of danger); 171Ark122, 287SW 396; 176Ark705, 38W(2d)988; 89OklA 602, 265P374; 200 Ind589, 163NE99; 124 Kan305, 259P799; 310Mo1, 274SW1079; 317Mo492, 297SW353; 318Mo79, 18W (2d)172; 320Mo791, 98W(2d)972; Mo 318W(2d)1010; MoA 273SW754; MoA 283SW313, 197NC359, 149SE353(2d case); 114 Okl554, 151NE665; 129 Or 169, 276P1094; 135SC163, 133SE550; 152SC178, 149SE753; 151Va173, 144SE 486; 148Wash93, 268P145; 102WVa40, 135SE262, 48ALR806; 105WVa335, 142 SE434. See also 83NH397, 142A695. [a] 32F(2d)974.

1188-15 39GaA302, 146SE916(1st case); 200 Ind589, 163NE99; 151Va409, 145SE 372. [a] 36F(2d)527; Iowa 231NW321; 289Pa393, 137A623. [c] Evidence held not to show assumption of risk as matter of law.-33F(2d)18.

1189-16 41F(2d)578; Ark 298SW(2d) 1085; 200 Ind589, 163NE99; 310Mo1, 274SW1079; 316Mo1266, 296SW105; 318Mo50, 298SW827; 320Mo791, 98W (2d)972; 198NC145, 151SE92; 129 Or 169, 276P1094; 295Pa342, 145A293; 148Wash93, 268P145; 149Wash1, 270P 113. [a] (5) Mo 08W(2d)843.

1190-18 177Ark1146, 98W(2d)580; 178 Ark233, 108W(2d)364; MoA 273SW754; 83NH190, 140A172; 149SC284, 147SE 327.

1190-19 169Ark748, 276SW599; 174Ark 463, 295SW727, 177Ark1146, 98W(2d) 580; 181Ark299, 25SW(2d)760; MoA 273SW754, 81Mont84, 271P293.

1191-20 192NC14, 133SE138.

1191-21 90Fla632, 106S462; 200 Ind 589, 163NE99; 198NC742, 153SE406; 26OhA520, 160NE523; 151SC1, 148SE 683; Sask [1925] 3DomLR251.

1191-22 36F(2d)210; 214Ala427, 108S 564; 321Mo697, 128W(2d)735; 218MoA 698, 258SW102, 97PaSuper240; 148Va 148, 138SE658; 148Wash93, 268P145. But see MoA 286SW745.

1192-23 244 IllA1; 322Mo299, 15SW (2d)835, 65ALR599; MoA 286SW745; 182NC236, 134SE647. [a] 322Mo299, 15 SW(2d)835, 65ALR599.

1192-24 240Mich440, 220NW488; MoA 273SW450.

1193-26 172Ark671, 290SW963; MoA 299SW70; 153Wash300, 279P1115.

1193-29 181Ark674, 27SW(2d)516; 170 Go703, 152SE171, 232 IllA316; 212Ky 735, 280SW93, 220MoA33, 235SW767; 192NC529, 136SE522, 198NC21, 150SE 499, 151SC250, 148SE370, TexCommnA 288SW823; TexCivA 98W(2d)146; Tex CivA 208SW(2d)835.

1194-35 170Ark576, 280SW363; 172 Ark729, 290SW942; Ark 328SW(2d)422; 200Ind265, 252P1045; 106Conn72, 136A 3.1, 102Conn628, 111A301, 232 IllA 346; 234 IllA503; 231Ky141, 218W(2d) 236; 149Md425, 131A754; 311Mo77, 277 SW566; 311Mo869, 279SW13; Mo 256 SW222; 317Mo86, 206SW764; Mo 287 SW484; Mo 48W(2d)802; Mo 268W(2d) 669; 219MoA19, 267SW964; 219MoA 596, 282SW141; 220MoA175, 282SW515; 220MoA362, 286SW715; MoA 272SW 987; MoA 273SW105; MoA 273SW761; MoA 275SW592; MoA 299SW61, MoA 299SW121, 221MoA346, 226SW176, 221 MoA837, 286SW195; MoA 294SW114; MoA 296SW470; MoA 299SW61; MoA 48W(2d)1100; MoA 58W(2d)709, MoA 158W(2d)853; MoA 168SW(2d)690, 82 NH336 133A9, 220AppDiv191, 222NYS 19, 192NC236, 133SE617, 193NC223, 136SE111, 195NC349, 111SE680, 129 Okl4, 263P115, TexCommnA 291SW 528; TexCivA 282SW309; TexCivA 297 SW1101; 146Va366, 131SE815; 194Wis 159, 215NW829; Sask [1925] 3DomLR 251.

1196-36 206Iowa809, 221NW460; 214 Ky256, 283SW415; 127Mo370, 143A462, 61ALR898; 242Mich336, 218NW655; NH 143A469. See also MoA 293SW492.

1196-37 20AlaA635, 104S682.

1196-38½-New. Where there is no evidence to sustain affirmative of issue, an instruction to find issue of contributory negligence in plaintiff's favor is proper. 190NC760, 130SE617.

1196-38½-New. Where the answer did not plead contributory negligence and plaintiff's evidence did not show it, contributory negligence was not in issue. 323Mo531, 198W(2d)679.

1198-40 37GaA737, 141SE317; 82NH 236, 133A9.

1199-41 [b] In Arizona.-29Ariz554, 243P405.

1199-42½-New. Negligence last clear chance doctrine has been held for the jury. 33F(2d)866.

1199-43 30F(2d)784; Ala 123S228; 181Ark1037, 28SW(2d)1073; 106Conn 72, 136A874; 232 IllA346; 172Minn284, 214NW890; 310Mo1, 274SW1079; 315 Mo409, 286SW4o; 322Mo935, 18SW (2d)510; TexCommnA 24SW(2d)32 (whether negligence was sole cause); 146Va366, 131SE815.

1199-44 43F(2d)950; 20AlaA635, 104 S682.

1199-46 174Ark463, 295SW727; 149SC 89, 146SE663.

1199-48 242Mich352, 218NW773, 774 [cit CJ]; 135Misc467, 238NYS719; Tex CivA 282SW309.

1200-50 214Ala317, 107S456; 217Ala 351, 115S168; 155Miss271, 124S336.

1200-51 174Ark1083, 298SW849; Mo 285SW482; 316Mo1196, 295SW98.

1200-53 But see Ark 318W(2d)407.

1200-54 TexCivA 271SW205 (evidence insufficient to raise issue).

1200-55 [b] Defendant's admission that deceased was oblivious of danger is not alone sufficient to make defendant's negligence issue for jury. MoA 297SW146.

1200-56 315Mo409, 286SW45.

1200-57 IndA 168NE468; 322Mo937, 18SW(2d)510; TexCivA 12SW(2d)1050.

1201-58 176Ark1204, 3SW(2d)41; 106 Conn72, 136A874; 317Mo647, 296SW 1017; MoA 18W(2d)852.

1201-59 141SC359, 139SE779.

1201-60 Mo 274SW673; 315Mo331, 289SW908; MoA 15SW(2d)923; 322Mo 592, 17SW(2d)945; MoA 299SW70; MoA 285SW127; MoA 288SW941; MoA 295SW484; MoA 296SW161; MoA 28W (2d)169; MoA 12SW(2d)938; MoA 22 SW(2d)881; MoA 29SW(2d)215; 114 Okl55, 151NE48.

1201-62 Mo 256SW1031; Mo 287SW 625, MoA 15SW(2d)923.

1201-63 155Miss271, 124S336; Mo 31 SW(2d)770. [a] (3) Whether brakeman struck by train at obscure crossing approached rapidly or slowly declared question for jury. 190NC231, 129SE 580.

1201-64 318Mo50, 298SW827; MoA 271SW540; MoA 274SW911; TexCivA 289SW1027.

1202-65 168Ark798, 271SW945; 169 Ark192, 273SW1028; MoA 271SW540; MoA 275SW586; MoA 299SW70; MoA 108W(2d)962; 82NH236, 133A9; 224 AppDiv562, 231NYS489; 197NC396, 148 SE167.

1202-66 234 IllA502. [a] 168Ark798, 271SW945.

1202-66½-New. Sufficiency of evidence to authorize submission to jury is governed by general rules of practice. Tex CivA 291SW590.

1202-67 174Ark1083, 298SW849; 317 Mo1255, 298SW69; Mo 294SW80; MoA 273SW754; MoA 271SW849; MoA 282 SW181; MoA 18W(2d)238; MoA 18W (2d)952; 196NC262, 145SE283(2d case); 136Wash622, 240P909.

1202-68 218Ala481, 119SE212; 89OklA 602, 265P374; 124Kan305, 259P799; 315Mo409, 286SW45; 318Mo444, 300 SW1102; 322Mo901, 18SW(2d)408; 323Mo307, 198W(2d)805(2d case); Mo 278SW(2d)1034; 218MoA253, 267SW431; MoA 277SW964; MoA 284SW813; MoA 292SW443; 220MoA728, 293SW521;

MoA 297SW174; MoA 299SW121; 221 MoA1231, 300SW531; MoA 7SW(2d) 304; 151Va815, 144SE863; 148Wash93, 268P145. See also Mo 12SW(2d)498.

1203-69 315Mo 1068, 287SW474; 315 Mo 331, 289SW908; Mo 294SW80; 317 Mo 86, 296SW764; MoA 287SW810; MoA 22SW(2d)881; 198NC145, 151SE 92.

1203-70 221MoA1231, 300SW531.

1203-71 169Ark192, 273SW1028; 311 Mo 369, 279SW43; Mo 287SW628; 318 Mo 50, 298SW827; MoA 277SW964.

1203-71½-New. Whether an infirm and mentally deficient servant had the ability and mental capacity to comprehend and appreciate the danger incident to what he was doing at the master's direction is a question for the jury. 51 ND745, 200NW1013.

1203-72 242Mich442, 219NW617; 221 MoA345, 273SW176; MoA 273SW754; MoA 282SW110; MoA 27SW(2d)52; MoA 30SW(2d)1094; 195NC870, 142SE 480; TexCivA 5SW(2d)582.

1204-73 181Ark299, 25SW(2d)760; MoA 282SW110; MoA 12SW(2d)933; MoA 24SW(2d)682; 84Mont84, 274P 293; 191NC549, 132SE598; 198NC75, 150SE699(1stcase).

1204-74 317Mo 1255, 298SW69; MoA 15SW(2d)923; MoA 273SW754; MoA 1 SW(2d)238; MoA 3SW(2d)254.

1204-76 220MoA175, 282SW515; MoA 284SW850; MoA 286SW745; MoA 291 SW180; 222MoA578, 292SW1075. [b] **Peremptory instruction for defendant** held improperly refused under evidence. 224Ky211, 5SW(2d)1064.

1204-77 214Ala427, 108S564; 317Mo 1255, 298SW69; 319Mo 644, 5SW(2d) 413; 219MoA471, 275SW775; 221MoA 773, 287SW885; MoA 300SW993; MoA 12SW(2d)930; MoA 23SW(2d)1073 (evidence held to present jury issue of negligent assurance of safety by foreman).

1205-78 36GaA58, 135SE760; MoA 13 SW(2d)564.

1205-82 [m] **Ladder.**-220MoA728, 293 SW521. [n] **Wagon.**-SD 225NW223.

1205-84 83NH196, 140A172. [aa] 323 Mo 1179, 20SW(2d)676; MoA 295SW 127. [cc] 168Ark798, 271SW945 (voluntary placing of hand near saw to adjust machinery). [ff] 173Ark77, 292 SW115. [kk] **Boiler.**-170Ark1193, 281 SW907. [ll] **Bar-cutting machine.**-MoA 296SW446. [mm] **Boring machine.**-MoA 296SW212; 196NC122, 144SE557. [nn] **Shearing machine.**-MoA 7SW(2d) 438.

1206-85 [a] 155Miss271, 124S336 (stopping engine after belt came off). [f] 152Wash122, 277P398. [m] MoA 24 SW(2d)1069. [n] **Punch press.**-219 MoA234, 271SW1023. [o] **Punch press for cutting dies.**-219MoA234, 271SW 1023.

1207-87 [d] MoA 277SW356; MoA 293 SW500.

1208-89 MoA 20SW(2d)592.

1208-91 [e] **Orders to incompetent and careless inferior servant.**-MoA 296SW 187.

1208-92 [a] (2) 213Ala346, 104S653, 39ALR1263.

1208-93 [d] MoA 14SW(2d)674. [g] **Steam winch.**-149Md425, 131A754. [h] **Crane.**-84Colo 67, 268P538.

1209-96 172Ark498, 289SW474; 82NH 236, 133A9.

1209-99 214Ky256, 283SW415.

1209-2 12LaA350, 125S469; MoA 7SW (2d)448. [a] **Failing to test scaffold after moving it.**-323Mo 363, 19SW(2d) 476.

1210-5 MoA 292SW1073.

1210-10 [e] MoA 282SW117.

1211-14 323Mo 601, 20SW(2d)509.

1211-15 [j] **Runway.**-151SC417, 149SE 162.

1211-18 232Ky702, 23SW(2d)564; 55 ND353, 213NW841. [a] **Climbing over car.**-249 IllA446.

1211-19 [b] **Broken cylinder locks.**-220MoA720, 293SW468. [i] **Icy steps of engine.**-322Mo 886, 18SW(2d)40.

1211-20 [b] (4) Part of frame. Tex CivA 22SW(2d)550. [f] **Giving away of caboose door handle.**-180Minn310, 230 NW826.

1211-23 215Ala600, 111S753. [c] 322 Mo 937, 18SW(2d)510. [d] IndA 154NE 885. [i] **Failing to give stop signal.**-MoA 1SW(2d)852.

1212-24 TexCivA 275SW505. [f] (6) Improper loading. 249Mich440, 229NW 488.

1212-25 316Mo 1246, 295SW89.

1213-26 218Ala481, 119S212 [certiorari granted 279US830, 49SCt349(4thcase), 73L ed980]; 232 IllA346; 310Mo 1, 274 SW1079; 315Mo 409, 286SW45; 322Mo 469, 17SW(2d)337; 227AppDiv269, 237 NYS297; 190NC231, 129SE580; 192NC 522, 135SE522; 146Va366, 131SE815; 148Va148, 138SE658; 149Va318, 141SE 228.

1213-27 218MoA253, 267SW431.

1215-31 TexCivA 23SW(2d)461.

1215-32 172Ark729, 290SW942. [b] **Motorman injured in collision between his car and car standing in darkness** after unsuccessfully applying brakes held not contributorily negligent as matter of law. MoA 14SW(2d)488.

1216-33 Minn 231NW829; 55ND353, 213NW841.

1216-34 MoA 2SW(2d)195.

1216-35 [f] (1) 141SC359, 139SE779.

1217-40 [a] (5) Laying brick footings in unbraced excavation. 173Ark322, 292 SW359.

1217-41 320Mo 1130, 9SW(2d)596; MoA 277SW964; MoA 287SW852.

1217-45 198NC427, 152SE32.

1218-48 198NC475, 152SE169 (loading logs). [a] (2) Evidence held sufficient, as against motion for nonsuit, to warrant finding that man engaged in sliding log down mountain side was unexperienced. 199NC742, 130SE705.

1218-50 [a] 323Mo 1058, 21SW(2d)772. [b] 220MoA38, 285SW757.

1218-51 Mo 30SW(2d)984; MoA 297 SW124.

1218-52 NC 155SE448.

1218-53 NC 154SE847.

1218-54 MoA 288SW941; MoA 296SW 216; TexCivA 289SW1027.

1219-55 321Mo 92, 11SW(2d)48; MoA 14SW(2d)972. [a] Mo 274SW692. [t] **Water tank wagon.**-315Mo 1068, 287SW 474.

1219-56 [b] **Chisel.**-MoA 282SW125.

1219-60 [a] 173Ark322, 292SW359; 39 GaA246, 146SE776; Nebr 223NW21(2d case); 118 Okl 42, 246P615. [b] 319Mo 1137, 6SW(2d)886; NH 150A540.

1219-61 [b] **"Acting within scope of his employment"** need not be defined in absence of request. 220MoA38, 285SW 757. [c] **Instruction not defining terms used** held not objectionable. Mo 26SW (2d)957.

1219-64 [a] 38GaA556, 144SE506.

1219-65 319Mo 948, 6SW(2d)587; 322 Mo 787, 16SW(2d)85; MoA 274SW911. [a] 171Ark1122, 287SW396; 319Mo 1015, 5SW(2d)59; 323Mo 363, 19SW (2d)476; MoA 14SW(2d)972; OhA 153 NE870. [b] 39GaA246, 146SE776; MoA 15SW(2d)923; 322Mo 592, 17SW(2d) 945; 322Mo 901, 18SW(2d)408; 323Mo 531, 19SW(2d)679; Mo 23SW(2d)142; Mo 30SW(2d)1018; MoA 274SW507; MoA 13SW(2d)562; MoA 31SW(2d)279.

1220-67 200Cal 265, 252P1045; 260 Mass399, 157NE364; 310Mo 1, 274SW 1079; 322Mo 592, 17SW(2d)945; 196NC 359, 145SE684; 125 Or634, 268P51; Or 288P1003; 149SC89, 146SE663; 150SC 130, 147SE834. [a] 37Ga771, 142SE185; 221MoA1089, 295SW501; MoA 297SW 124.

1220-68 [a] MoA 7SW(2d)370; 189NC 840, 128SE329.

1220-69 174Ark146, 294SW395.

1220-69½-New. Jury should be properly instructed relative to contradictory statements. 284Pa555, 131A470.

1220-71 219Ala238, 121S722; 213Ky 432, 231SW519; 217Ky43, 288SW1020; 145Miss172, 110S244; 311Mo 369, 279 SW43; 317Mo 647, 296SW1017; 319Mo 1137, 6SW(2d)886; 220MoA728, 293SW 521; 221MoA837, 286SW125; NJSup 130A225; 131 Okl 272, 268P270. [a] 171Ark647, 286SW815; 180Ark19, 20 SW(2d)614; 86Colo 159, 279P49; 36 GaA513, 137SE404; 89 IndA100, 163NE 534; 155Miss271, 124S336; Mo 256SW 819; Mo 274SW778; Mo 274SW369; 316Mo 1266, 296SW105; 317Mo 86, 296 SW764; Mo 12SW(2d)433; 322Mo 737, 15SW(2d)775; 322Mo 592, 17SW(2d) 945; 323Mo 531, 19SW(2d)679; 323Mo 307, 19SW(2d)865(2dcase); 323Mo 1179, 20SW(2d)676; 323Mo 826, 20SW (2d)906; MoA 256SW1076; 218MoA 253, 267SW431; MoA 273SW165; MoA 273SW244; MoA 279SW212; MoA 281 SW71; MoA 284SW855; MoA 285SW 165; MoA 299SW121; MoA 1SW(2d) 238; MoA 2SW(2d)169; MoA 20SW(2d) 587; MoA 20SW(2d)592; MoA 27SW (2d)52; MoA 28SW(2d)372. [b] 24F (2d)53; 181Ark299, 25SW(2d)760; 219 Ky839, 294SW472; 220Ky674, 295SW 979; 172Minn284, 214NW890; 142Miss 476, 107S517; 153Miss350, 120S734; 157Miss607, 128S766; 308Mo 31, 271SW 997; 311Mo 369, 279SW43; 319Mo 1015, 5SW(2d)59; 319Mo 644, 5SW(2d) 413; 323Mo 1179, 20SW(2d)676; Mo 23SW(2d)44; Mo 26SW(2d)942; MoA 273SW782; MoA 274SW963; MoA 286 SW745; MoA 299SW842; MoA 8SW (2d)1023; 104NJL122, 139A58; 118 Okl 42, 246P615; Or 288P1003; Or 291P 380.

1221-72 217Ky11, 288SW1022; 233 Mich318, 206NW485; 146Miss440, 111 S562. [a] **Requested instruction refused.**-219MoA234, 271SW1023. [b] **Instructions held not erroneous.**-316Mo 1246, 295SW89.

1221-75 217Ky43, 288SW1020. [a] **Instructions held not violative of rule.**-MoA 279SW212.

1222-77 See also 323Mo 601, 20SW(2d) 509.

1222-79½-New. Where there is no claim in the pleadings or at the trial that plaintiff was engaged in interstate commerce, failure to refer to the Federal Employers' Liability Act is not error in the absence of request, although there is evidence tending to show that plaintiff was engaged in interstate commerce. 168Minn287, 210NW32.

1222-81 136SC337, 134SE385.

1222-85 32Ariz463, 259P1049; 169 Ark192, 273SW1028; 172Ark448, 289 SW474; 174Ark146, 294SW395; 253 IllA437; 308Mo 31, 271SW997; 319Mo 890, 5SW(2d)15; Mo 23SW(2d)142; Mo 26SW(2d)969 (refusal to withdraw allegation held not erroneous); MoA 299SW70; MoA 5SW(2d)709; MoA 7 SW(2d)370. [a] **Cases under federal Safety Appliance Act held especially fitted for submission of written questions to jury.** 217AppDiv301, 216NYS 656. [b] **Instructions held not violative of rule.**-Mo 30SW(2d)1077.

1222-87 219Ky839, 294SW472; 146 Miss440, 111S562; 319Mo 948, 6SW(2d) 587. [a] 29F(2d)689; 228Ky500, 15 SW(2d)300; 221MoA1089, 295SW501; 220MoA1152, 299SW90; MoA 7SW(2d) 370; TexCivA 286SW483; 104WVa344, 140SE1. [b] 179Ark690, 18SW(2d)321; 36GaA513, 137SE404; 310Mo 1, 274SW 1079; 315Mo 409, 286SW45; 316Mo 1246, 295SW89; 317Mo 86, 296SW764; MoA 15SW(2d)923; MoA 279SW212.

1222-88 219Ky839, 294SW472; 311Mo 369, 279SW43. [a] MoA 24SW(2d) 1069.

1222-90 36F(2d)716.

1223-91 308Mo 31, 271SW997.

1223-97 310Mo 1, 274SW1079.

1223-99 37GaA771, 142SE185; Mo 256 SW319.

1223-2 17F(2d)2; 173Ark729, 293SW 9; 37GaA771, 142SE185; Mo 292SW 732; MoA 299SW136; 118 Okl 42, 246 P615; 125 Or634, 268P51; 149SC89, 146SE663.

1223-3 178Ark1046, 13SW(2d)306. [a] (3) Mo 274SW692. [b] 169Ark235, 275 SW329.

1224-5 Ga 154SE793; TexCivA 283SW 285, 287 [citCJ]. [a] 170Ga208, 152SE 474; 39GaA596, 147SE919; Mo 281SW 441; 323Mo 1089, 20SW(2d)494. [b] 318Mo 280, 300SW265; MoA 271SW 540; 227AppDiv303, 237NYS479.

1224-6 [a] 36GaA516, 137SE407.

1224-7 [a] (1) 36GaA516, 137SE407; 138SC241, 136SE234. (4) MoA 295SW 127; 197NC639, 150SE122. [b] (1) 85 IndA510, 154NE508; 151Miss711, 118S 441.

1224-8 [a] (1) TexCivA 284SW268.

1224-9 [a] 30Ariz491, 249P66; 147Va 542, 137SE493.

1225-10 [a] 170Ga208, 152SE474.

1225-12 MoA 14SW(2d)497.

1225-19 [a] 36GaA513, 137SE404.

1225-20 [b] **Defining "prep erance of evidence"** in language of Georgia code held not error in suit under Employers' Liability Act. 170Ga208, 152 SE474.

1225-21 [a] **Instruction as to employment in interstate commerce held sufficient.**–319Mo 619, 5SW(2d)447.

1225-22 See also 105WVa572, 144SE 289.

1225-24 39GaA111, 146SE518(2dcase). [a] **Instruction held not erroneous.**–150 SC130, 147SE834.

1225-25 [b] 31Ariz302, 252P1012.

1226-26 [a] 150SC130, 147SE834.

1226-27 [a] 150Wash514, 273P732.

1226-31 [a] 152Wash122, 277P398.

1226-32 [a] 220MoA38, 285SW757.

1226-36 [a] 318Mo 453, 300SW758; 322Mo 901, 18SW(2d)408; 323Mo 531, 19SW(2d)679; Mo 32SW(2d)288; MoA 287SW852; MoA 2SW(2d)169; MoA 7 SW(2d)304; NH 146A865. [b] 316 Ill 357, 147NE258.

1227-37 [b] 171Ark1122, 287SW396; 217Ky43, 288SW1020; Mo 289SW583.

1227-38 [a] 172Ark498, 289SW474; 123 Or647, 263P881. [d] **Definition of proximate cause held erroneous.**–Tex CivA 23SW(2d)489.

1227-39 [a] 238Mich493, 213NW703; MoA 279SW212. [b] MoA 275SW586.

1227-40 [a] **Instruction not subject to criticism** that recovery could be had on two separate acts of negligence. Mo 271SW531.

1227-43 Mo 271SW531.

1227-45 [a] 323Mo 363, 19SW(2d)476; 220MoA542, 287SW865; 220MoA728, 293SW521; MoA 282SW181.

1227-46 [a] Mo 256SW819; 317Mo 492, 297SW353. [c] 220MoA728, 293 SW521; MoA 3SW(2d)740. [d] 37 GaA780, 141SE922.

1228-51 [a] 313Mo 492, 285SW965 [cit CJ]; MoA 285SW529. [b] 171Ark1122, 287SW396.

1228-52 284Pa555, 131A470. [b] **Charge defining "negligence"** as failure to exercise ordinary care; that degree of care ordinarily prudent person would exercise in like circumstances declared correct and sufficient. TexCivA 275SW 463.

1228-53 [a] 37GaA780, 141SE922; 253 Mass99, 148NE463; 238Mich493, 213 NW703; Mo 26SW(2d)929; Mo 271SW 531; MoA 273SW137; MoA 275SW586; 191NC727, 133SE7; 146Va22, 135SE 677. [b] 319Mo 1015, 5SW(2d)59; MoA 273SW761; OhA 153NE870. [c] 214Ala23, 106S242.

1230-54 [b] 38Ga556, 144SE506.

1230-55 174Ark146, 294SW395; 37GaA 780, 141SE922; 145Miss172, 110S244; Mo 280SW412; MoA 8SW(2d)940; 190 NC844, 130SE713. [a] 174Ark146, 294 SW395; Okl 247P92. [c] 174Ark146, 294SW395.

1230-56 200Cal 265, 252P1045; 312Mo 173, 279SW89; 104NJL122, 139A58; 147SC58, 144SE579. [a] 200Cal 265, 252 P1045; 312Mo 173, 279SW89.

1231-58 See also 191NC685, 132SE787.

1231-60 217Ky43, 288SW1020; Mo 6 SW(2d)843; MoA 277SW593. [e] **Under allegation of negligence in leaving switch stand unlighted,** instruction submitting issue of negligence in that switch stand was dangerously near track is erroneous. 217Ky43, 288SW1020.

1231-61 [a] **Instruction declared to authorize finding only upon all facts hypothesized** in instruction. Mo 271SW531. [b] **Instruction** not erroneous in not hypothesizing essential facts. Mo 271 SW531.

1231-62 217Ky11, 288SW1022.

1231-66½-New. Plaintiff's instruction on the whole case need not submit all acts of negligence charged, where those submitted are within pleadings and evidence, and are of such character that liability can be predicated thereon. 318 Mo 421, 18SW(2d)791.

1231-66½-New. An instruction allowing the jury to determine whether hypothesized acts constituted negligence, without defining "negligence," is not erroneous. 323Mo 307, 19SW(2d)865(2d case).

1231-68 [a] 38F(2d)599; 39GaA596, 147SE919; 316Mo 1246, 295SW89.

1232-73 [a] 178Ark461, 11SW(2d)769; Mo 256SW819; 312Mo 173, 279SW89; 316Mo 418, 289SW835; 322Mo 901, 18 SW(2d)408; Nebr 223NW21(2dcase); 190NC256, 129SE595; 39 OklACR114; 150SC130, 147SE834. [b] (1) 178Ark 1007, 13SW(2d)14; 179Ark321, 15SW (2d)994; 189NC840, 128SE329. (2) 174 Ark146, 294SW395. [c] MoA 292SW 443; MoA 16SW(2d)730. [j] **Instruction omitting word "reasonably"** before word "safe," requiring master to provide safe place to work, though erroneous, is not reversible. 41GaA263, 153SE 96(2dcase).

1233-74 NH 150A540. [a] 170Ark644, 280SW652; 181Ark1145, 27SW(2d)520; 181Ark1037, 28SW(2d)1073; 318Mo 79, 1SW(2d)172; 320Mo 655, 8SW(2d)918; MoA 273SW227; MoA 274SW507; 219 MoA471, 275SW775; MoA 281SW71; MoA 14SW(2d)674; MoA 20SW(2d)592; NC 154SE667. [b] Mo 294SW80; 323Mo 1179, 20SW(2d)676; Mo 26SW(2d)942; MoA 294SW758; 189NC840, 128SE329. [d] MoA 14SW(2d)674.

1234-76 [a] 227Ky91, 11SW(2d)985.

1234-77 [b] 253Mass99, 148NE463.

1234-79 [a] 41F(2d)578; 154Miss291, 122S492; Mo 289SW591; MoA 275SW 586; MoA 5SW(2d)665; 196NC810, 145 SE237. [b] 220MoA1152, 299SW90; MoA 19SW(2d)510. [d] 134 Okl 266, 274P1085. [e] 23 OhA323, 155NE564.

1234-80 [a] 170Ark644, 280SW652. [b] 320Mo 916, 9SW(2d)912.

1235-81 [a] Mo 30SW(2d)1018; 219 MoA471, 275SW775; MoA 281SW71; MoA 2SW(2d)169. [b] 320Mo 916, 9 SW(2d)912. [d] MoA 3SW(2d)740.

1235-82 [a] GaA 155SE346; 323Mo 531, 19SW(2d)679. [b] 145Miss172, 110S244; 323Mo 1089, 20SW(2d)494; MoA 30SW(2d)641; 189NC840, 128SE 329. [c] MoA 18SW(2d)520.

1235-83 [a] Mo 274SW692. [b] MoA 9 SW(2d)89.

1235-84 [a] 147SC58, 144SE579. [b] 178Minn261, 226NW934. [d] 134 Okl 266, 274P1085.

1236-85 [a] 312Mo 173, 279SW89; 150 SC130, 147SE834. [c] 312Mo 173, 279 SW89.

1236-86 [b] 155Miss674, 125S93.

1236-87 [a] MoA 282SW170.

1236-89 [a] 315Mo 1068, 287SW474; 316Mo 418, 289SW835.

1236-91 [a] 147SC58, 144SE579.

1237-93 [a] Ark 31SW(2d)753; 322Mo 737, 15SW(2d)775.

1237-94 [a] 227AppDiv303, 237NYS 479.

1237-95 [a] 28F(2d)952; 219Ala238, 121S722; Mo 292SW732. [b] 276US165, 48SCt215, 72Led513.

1238-96 [a] (1) Minn 231NW829; 155 Miss75, 124S74; 310Mo 1, 274SW1079; 312Mo 342, 278SW1000; NH 146A865. (2) 308Mo 31, 271SW997. (3) Under Federal Employers' Liability Act and Boiler Inspection Act. 189NC813, 128SE 345. [b] 142Miss60, 107S199; 152SC 265, 149SE742; 40Wyo 324, 277P703. [c] 189NC813, 128SE345. [d] 308Mo 31, 271SW997.

1238-97 [b] 129 Or169, 276P1094.

1238-4 [a] MoA 294SW732.

1238-5 [c] Ariz 283P719; 323Mo 826, 20SW(2d)906.

1239-6 [a] **Instructions held sufficient.**–5F(2d)23.

1239-8 Miss 129S597. [a] MoA 24SW (2d)166; 198NC247, 151SE242.

1239-10 [a] 235Mich293, 209NW184. [b] MoA 20SW(2d)600.

1240-13 [a] MoA 275SW555.

1240-17 [b] 233Mich318, 206NW485.

1240-24 [a] 172Ark671, 290SW953; 233 Mich318, 206NW485; 320Mo 655, 8SW (2d)918; Nebr 223NW21(2dcase); Tex CivA 280SW864. [b] 35F(2d)634; 234 IllA28; 172Minn284, 214NW890; 155 Miss674, 125S93; 222MoA370, 3SW(2d) 256; TexCivA 291SW590.

1241-25 211Ky830, 278SW143 (where there is no evidence of negligence of master, court should instruct as to presumption of assumed risk). [a] 102WVa 40, 135SE262, 48ALR806. [c] 170Ark 498, 280SW12.

1241-26 225Ky447, 9SW(2d)212. [a] 172Ark498, 289SW474; 179Ark690, 18 SW(2d)321; CalA 287P538; 36GaA 513, 137SE404; 316Mo 1266, 296 SW105; Mo 289SW591; 320Mo 791, 9 SW(2d)972; MoA 273SW209; MoA 7 SW(2d)448; 118 Okl 124, 247P92; 292 Pa321, 141A157. [b] 233Mich318, 206 NW485; MoA 299SW842. [c] MoA 273 SW209; MoA 18SW(2d)131; TexCivA 6SW(2d)410. [f] (2) Instruction that plaintiff assumed risks and dangers necessarily incident to employment held not erroneous. 320Mo 655, 8SW(2d) 918. [g] **Instructions held proper under the evidence.**–152Wash332, 277P 992.

1242-28 178Ark461, 11SW(2d)769; 88 IndA532, 164NE705; 149SC89, 146SE 663.

1242-37 314Mo 123, 282SW416.

1243-45 [a] (1) 165Ark273, 262SW 681.

1243-47 171Ark1074, 287SW583.

1243-48 [a] 17F(2d)2; 171Ark1074, 287SW583; 212Ky738, 280SW93; Tex CivA 293SW901; 136Wash522, 240P 909. [b] 178Ark1046, 13SW(2d)306; 146Miss130, 110S234; 114 Oh554, 151 NE665.

1244-49 [a] 150Wash514, 273P732; 152Wash122, 277P398.

1244-50 178Ark283, 10SW(2d)364; Mo 6SW(2d)843. [a] 180Ark1056, 24SW (2d)340. [b] 168Ark479, 271SW321.

1244-54 [a] Okl 247P92.

1244-57 [a] Mo 256SW819.

1245-60 [a] TexCivA 19SW(2d)930.

1245-64 [b] Mo 31SW(2d)14.

1245-65 [b] 171Ark1122, 287SW396.

1245-68 [a] Mo 292SW732. [d] 225 Ky447, 9SW(2d)212.

1245-69 [b] 233Ky129, 25SW(2d)38.

1245-71 211Ky830, 278SW143. [a] 315Mo 409, 286SW45; TexCivA 2SW (2d)312. [b] 218Ky197, 291SW401; Mo 2SW(2d)760.

1246-72 [a] 121Kan663, 249P582; 312 Mo 173, 279SW89; 316Mo 1266, 296SW 105; 317Mo 86, 296SW764; 320Mo 791, 9SW(2d)972; 191NC727, 133SE7. [b] 88 IndA532, 164NE705. [c] 214Ala317, 107S456; TexCivA 291SW590. [f] **Instruction that same definition applies to contributory negligence** as to negligence held proper. 191NC727, 133SE7. [g] **Instruction that employee should exercise such care as reasonably prudent** "cautious" man held proper. 191NC 727, 133SE7.

1247-73 [a] 316Mo 1246, 295SW89.

1247-74 [a] Mo 26SW(2d)929; 133SC 256, 130SE893 [per Purdy,A.A.J.] (instructions on contributory negligence submitted case on issues raised). [b] 322Mo 765, 18SW(2d)42.

1247-75 37GaA737, 141SE917. [a] 213 Ala191, 104S397 (improperly refused as to duty of railroad employee); 317Mo 647, 296SW1017. [b] 213Ala191, 104S 397 (properly refused as to duty of railroad employee); 173Ark729, 293SW9; 172Minn284, 214NW890.

1247-76 312Mo 173, 279SW89; MoA 291SW180; 134 Okl 266, 274P1085.

1247-77 35GaA292, 133SE63. [b] **Instruction properly refused.**–155SC356, 152SE646.

1247-78 [b] 322Mo 886, 18SW(2d)40.

1248-79 [a] MoA 2SW(2d)195.

1248-80 [a] Mo 26SW(2d)988.

1249-86 [a] 35GaA292, 133SE63; 36 GaA70, 135SE439. [b] 214Ala23, 106S 242; 173Ark729, 293SW9; 29 OhA54, 163NE42.

1249-88 214Ala23, 106S242; Or 291P 380. [a] **In action under Federal Employers' Liability Act** charge on willfulness, wantonness, and recklessness held inapplicable. 138SC241, 136SE234.

1249-91 217AppDiv301, 216NYS656.

1249-92 [a] 174Ark1083, 298SW849; 37GaA737, 141SE917; 38GaA556, 144 SE506; Mo 6SW(2d)843; 217AppDiv 301, 216NYS656. [b] 89 IndA100, 163 NE534; 217AppDiv301, 216NYS656; 114 Ohl57, 150NE739; Or 288P1003.

1250-98 MoA 30SW(2d)1094.

1250-4 [a] Mo 289SW591. [b] 318Mo 50, 298SW827. [c] TexCivA 298SW 149.

1250-5 171Ark1122, 287SW396.

1251-9 [a] 171Ark647, 286SW815. [b] 151Miss711, 118S441; MoA 272SW1042; MoA 273SW244; 221MoA1089, 295SW 501.

1251-10 26F(2d)361.

1251–11 [c] 218Ala384, 118S565; 316 Mo 1246, 295SW89.
1251–18 [b] (1) 221MoA1089, 295SW 501.
1252–19 [a] TexCivA 271SW205.
1252–20 [a] 190NC256, 129SE595.
1252–24 [a] 315Mo 1181, 289SW913; 146Va22, 135SE677.
1252–29 [a] (4) Request for finding, on assumption of risk, properly refused as not applicable to facts in action under Federal Employee's Liability Act. 194 NC446, 140SE20.
1253–37½–New. Where master and coservant are sued jointly for negligence of coservants, and master's liability arises solely under doctrine of respondeat superior, a verdict against master acquitting coservants is error. 190NC 1, 128SE471.
1253–37½–New. Where master and coservant are sued jointly for negligence of coservant's and master's breach of nondelegable duty, a finding, acquitting coservants and against master, does not exonerate master. 190NC1, 128SE471.
1253–40 208Ky811, 271SW1103 (verdict not flagrantly against evidence).
1253–42 TexCivA 19SW(2d)930.
1255–57½–New. Where the jury found that an order of the vice principal was negligence causing the injury, the question of assumption of risk is eliminated. 323Mo307, 19SW(2d)865(2dcase).
1255–58 121Kan739, 250P323; Tex CivA 5SW(2d)782.
1255–61 [a] (1) 85 IndA435, 148NE 433; TexCivA 275SW463. (2) TexCivA 16SW(2d)132(2dcase). (5) That employee acted within scope of employment in closing door covering gears. 81 NH543, 130A156. (6) That employer was charged with knowledge of employee's custom to close doors covering gears, in view of evidence as to continued practice of employees. 81NH 543, 130A156. (7) That working out of bolt causing door to fall on employee was not assumed risk. 81NH543, 130A 156. (8) That reasonable man in defendant's place would have provided for frequent inspections. 81NH543, 130A 156. (9) That injured was engaged in interstate commerce. 85 IndA435, 148 NE433. (10) As to manner of injury. 149SC89, 146SE663. (11) Discovery of danger by defendant's servant. Tex CivA 15SW(2d)200. [b] (3) Failure to furnish good air in room in mine. 210 Ky600, 276SW515. (4) Of master's negligence. 279US7, 49SCt202, 73L ed 578. (5) Negligence under last clear chance doctrine. 9LaA477, 121S241. (6) As to negligence. 9LaA477, 121S 241.
1256–66 118Kan713, 236P821.
1256–72 294Pa585, 144A765. [c] **Findings held sufficient to support judgment for defendant.**–TexCivA 5SW(2d)782.
1256–77 [a] **Verdicts held not inconsistent.**–35F(2d)298.
1256–80 [d] 319 Ill 344, 150NE276; TexCivA 271SW205; TexCivA 281SW 234.
1258–82 319 Ill 344, 150NE276.
1258–83 [a] 121Kan739, 250P323; 115 Tex537, 285SW296; TexCivA 275SW 214; TexCivA 290SW905; TexCivA 5 SW(2d)782.
1259–94 176Minn575, 224NW241.
1259–2 231Ky141, 21SW(2d)236; 129 Okl 1, 263P113; 125 Or634, 268P51; TexCivA 284SW268; Sask [1925] 3DomLR251.
1260–5 [c] 251 IllA513 (verdict for plaintiff held against weight of evidence).
1260–6 MoA 6SW(2d)1015; TexCivA 284SW268.
1260–9 Sask [1925] 3DomLR251.
1261–10 218AppDiv442, 218NYS315; Sask [1925] 3DomLR251.
1261–12 94PaSuper360 (action under Federal Employers' Liability Act); Tex CivA 284SW268.
1261–13 TexCivA 284SW268.
1261–15 TexCivA 284SW268.
1261–17 37GaA771, 142SE185; Mo 6 SW(2d)843; MoA 299SW121.
1262–20 Mo 289SW591; 222MoA578, 292SW1075.
1262–21 Mo 289SW591.
1262–22 MoA 15SW(2d)853; 150SC 130, 147SE834. [a] 218MoA253, 267SW 431.
1262–23 Mo 289SW591.
1263–24 Mo 6SW(2d)843. [a] 222 MoA578, 292SW1075.
1263–28 [b] Mo 12SW(2d)433.
1263–33 [a] (2) IndA 154NE885. [a] (4) Act allows set-off only of any sum paid employee and not counterclaim for which separate judgment may be based. 309Mo 560, 274SW703. (5) In action for death of switchman, brought under Federal Employers' Liability Act, question of proper measure of damages must be settled according to principles of law as administered in federal courts. 149SC 89, 146SE663.
1263–33½–New. A new compensation law must be considered in determining proper compensation under earlier laws, governing the action, but superseded by the later enactment. 30Ariz204, 245P 673.
1263–33½–New. A difference of over seven thousand five hundred dollars, between damages awarded and those which would be given for similar injury under a new compensation law, shows that jury must have acted under misapprehension of proper standard for measuring damages. 30Ariz204, 245P673.
1264–36 [b] **In Maine.**–125Me96, 131A5.
1264–38½–New. False representation by servant as to age, in case of employment in violation of Child Labor Law, should not be considered in mitigation of damages. 152Tenn614, 279SW1043.
1264–42 3Del 564, 140A659.
1265–6 244Mich54, 221NW143.
1265–8 129Misc578, 222NYS115; Va 153SE664 (holding master not liable without breach of duty he owes another). But see Vt 147A698.
1265–9½–New. The liability of one for acts of another is not dependent on strict relation of master and servant, 241 NY177, 149NE343; 221AppDiv102, 222 NYS602.
1265–9½–New. but on relation of similar nature, where driver of automobile owned by another, acts for the owner on his request, express 241NY177, 149NE 343; 221AppDiv102, 222NYS602.
1265–9¼–New. or implied, 241NY177, 149NE343.
1265–9½–New. for his benefit, 241NY 177, 149NE343.
1265–9½–New. or under his direction. 241NY177, 149NE343.
1265–9½–New. Where one acts for another at his request, expressed 241NY 177, 149NE343; 221AppDiv102, 222NYS 602.
1265–9½–New. or implied, 241NY177, 149NE343; 221AppDiv102, 222NYS602.
1265–9½–New. for his benefit and under his direction, 241NY177, 149NE343; 221AppDiv102, 222NYS602.
1265–9 1/10–New. the negligence of the agent is the negligence of the master or principal. 241NY177, 149NE343; 221 AppDiv102, 222NYS602.
1265–9 1/11–New. That which a man does through another he does himself. MoA 19SW(2d)559.
1265–10 164Ga594, 139SE52; 127 Or 276, 263P907; 135SC123, 133SE205.
1266–16 92CalA740, 268P934; 217App Div487, 217NYS65.
1266–22 [a] TexCivA 7SW(2d)627.
1266–23 129Kan398, 282P742; 153Miss 451, 121S141; TexCivA 7SW(2d)627.
1267–25 92CalA740, 268P934. But see 132SC193, 129SE79.
1267–28 214Ala47, 106S175; 82Colo 150, 257P1079. [b] (2) Statute prohibiting one under sixteen years to drive motor vehicle held to render such person conclusively incompetent to drive motor vehicle. 214Ala47, 106S175. [h] **Degree of competency.**–307Mo 607, 271 SW788. [i] **Statute imputing contributory negligence of driver of motor vehicle to occupant held not to affect liability of automobile owner for injury resulting from incompetence of driver.** 214Ala47, 106S175. [j] **Minor driver of automobile is required to be accompanied by adult person exercising jurisdiction over him.** 214Ala47, 106S175.
1268–41 124Me407, 130A212.
1268–43 210Ky432, 276SW129; 167 Minn84, 208NW546; 83NH334, 142A 483; 129Misc578, 222NYS115; 32Porto Rico 58.
1268–43½–New. The relation of master and servant does not exist between the owner of a car and one driving such car as favor to owner. 213AppDiv735, 211 NYS411; 221AppDiv102, 222NYS602.
1268–45 37F(2d)52; 37F(2d)714; 181 Ark907, 28SW(2d)712; 202Cal 577, 262 P317; 86CalA627, 261P334, 335 [quot Cyc]; 99CalA372, 278P928; CalA 291 P591; 247 IllA301; 252 IllA194; 86 IndA107, 156NE413; 86 IndA699, 159 NE763; 121Kan793, 250P286; 228Ky 239, 14SW(2d)775; 262Mass315, 159NE 751; 265Mass236, 164NE77(2dcase), 60 ALR1159; 102NJL203, 130A526 [cit Cyc]; 103NJL372, 137A555, 54ALR 623; 213AppDiv735, 211NYS411; 194 NC750, 140SE718; 197NC720, 150SE 501; 127 Or276, 263P907; 126 Or64, 268P746; 291Pa485, 140A544; Tex CommnA 24SW(2d)28; Eng 33TLR 119. [b] **Owner of car driven by another as favor to owner is not liable for** injury to passenger being carried as favor. 213AppDiv735, 211NYS411. [c] **Public officer** may, for certain purposes, be servant of private corporation. Tex CivA 286SW766. [d] **Owner of car driven by another with owner's consent** is not liable for injury to passenger carried as favor without direction of owner. 221AppDiv102, 222NYS602.
1268–45½–New. Liability under rule rests on fact of agency and not appearance thereof. 26F(2d)164.
1269–46½–New. "By statute" in some jurisdictions, the owner of an automobile is liable for the death or injury resulting from negligence in the operation thereof in business of owner or otherwise by one legally using or operating the automobile with the permission, express or implied, of such owner. 221 AppDiv102, 222NYS602.
1269–46¼–New. Purpose of such statute is to impose liability on the owner in favor of a stranger traveling on the highway only, 221AppDiv102, 222NYS 602.
1269–46¼–New. and it does not apply to voluntary passenger for whose benefit one not a servant of the owner operates a car with the owner's permission but not under his direction. 221AppDiv 102, 222NYS602.
1269–47 TexCommnA 293SW811.
1269–49½–New. Relation of master and servant may exist between corporations as between individuals. 213Ala627, 105 S869.
1269–50 201Cal 610, 258P88; 121Kan 793, 250P286; 126Kan627, 630, 270P 599 [quotCJ]; 153Md333, 138A227, 58 ALR1051; 155Md400, 142A491; 32 PortoRico 58.
1269–52 37F(2d)52; 75CalA266, 242P 736; 86CalA277, 261P328; 82Colo 150, 257P1079; 203 Iowa306, 210NW923; 121Kan793, 250P286; 126Kan627, 270P 599; 153Md333, 138A227, 58ALR1051; 155Md400, 142A491; 253Mass574, 149 NE541; 167Minn132, 208NW541, 542 [quotCyc]; MoA 19SW(2d)559; MoA 31SW(2d)246; 120 Ohl77, 165NE721; 290Pa341, 138A855, 58ALR1463; 32 PortoRico 58; TexCivA 289SW134; TexCivA 27SW(2d)299. [f] **Corporation and chiropodist.**–86CalA277, 261P 328.
1270–53 167Minn132, 208NW541, 542 [quotCyc]; 102NJL203, 130A526.
1270–55 153Md333, 138A227, 58ALR 1051. [a] TexCivA 271SW133.
1270–56 201Cal 610, 258P88; 252 IllA 194; 126Kan627, 630, 270P599 [quot CJ]; 155Md400, 142A491; TexCommnA 293SW811. See also 318 Ill 616, 149NE 591, 42ALR1406.
1270–57 [a] **Employer cannot claim immunity** because law regarding employment was not complied with. CalA 288P1099.
1270–59 111Conn377, 150A107.
1270–61 205 Iowa343, 218NW69.
1270–62 MoA 293SW791.
1270–63 290Pa341, 138A855, 58ALR 1463. [a] **Though state ranger's compensation is paid by company, he is not its employee.** TexCivA 286SW766.
1270–64 290Pa341, 138A855, 58ALR 1463.
1270–65 241NY177, 149NE343; Tex

CivA 294SW298, 300 [citCJ]. [c] **Automobile owner** may be liable for negligence of driver receiving no compensation. 241NY177, 149NE343.

1270-65½-New. Whether or not one is to receive compensation is merely evidence as to the existence of the relation. 241NY177, 149NE343.

1271-73 241 IllA410; 153Md264, 138A 1; 32 OhA100, 167NE613; 132 Okl 167, 269P1076, 1077, 61ALR218 [citCJ]; Tex CivA 208SW(2d)349. See also 218Ala 105, 117S640.

1271-74 TexCivA 208SW(2d)349.

1271-75 TexCivA 208SW(2d)349.

1271-76 203Cal216, 259P965.

1271-78½-New. A master is liable to a stranger for the negligence of a person employed by a servant in the prosecution of the master's business, provided the negligent act was within the scope of the employment and the servant had authority to employ labor, although the master had forbidden him to employ such person. 106WVa471, 146SE383.

1271-80 180Ark253, 21SW(2d)411 (ratifying or acquiescing); 241 IllA410.

1272-83 26F(2d)164; 215Ala504, 111S 216, 217 [quotCJ]; 211Ky750, 278SW 111, 21LaA315; 259Mass260, 156NE720, 54ALR849; 126 Or64, 268P746. [c] Intoppel 26F(2d)164

1272-89 215Ala504, 111S216, 217 [cit CJ].

1272-91 102CalA669, 283P845(2dcase). [b] **Truck driver and helper** held not "servant" while driving contrary to master's specific directions. 215Ala504, 111S216.

1272-98½-New. , and the master is not liable for the acts of a volunteer assistant to the servant against the wishes of the servant who is not authorized to delegate his duties. TexCivA 272SW814. [a] **Liability of master does not depend upon question of want of care and diligence** of servant in regaining control of truck from volunteer where servant did not consent or put volunteer in control and it was not within his duty to do so. TexCivA 272SW811.

1272-99½-New. Owner is not liable for negligence of intruder permitted by servant to drive a truck, even though the servant was on the driver's seat. 259 Mass260, 156NE720, 54ALR849.

1272-98½-New. and the owner is not responsible for such negligence because of intrusting the truck to the employee as driver. 259Mass260, 156NE720, 54 ALR849.

1272-99 215Ala504, 111S216, 217 [quot CJ]; 153Md264, 138A1. But see 259 Mass260, 156NE720, 54ALR849. [a] (2) Master held liable where truck driver, contrary to instructions, placed truck in hands of helper who negligently injured another. 215Ala504, 111S216. [d] **Automobile owner** is liable for negligent driving thereof by friend of owner's son to whom car had been intrusted. 210Ky838, 276SW971. [e] **Negligence of friend of son** of owner of car while driving with permission of son intrusted by owner with car is negligence of son. 210Ky838, 276SW971.

1272-99½-New. An employer is not relieved from liability for the truck driver's negligence in permitting a substitute driver to operate a truck because the act was unauthorized. 245NY158, 156NE650.

1272-99½-New. but is liable for negligence of an incompetent substitute selected by the driver. 245NY158, 156NE 650.

1272-99½-New. That negligence may have been sudden and unexpected does not relieve the master. 245NY158, 156 NE650.

1273-90 See also 245NY158, 156NE650.

1273-91 126 Or64, 268P746. See also 259Mass560, 156NE720, 54ALR849.

1273-94 CalA 287P982; 164Ga594, 139 SE652. [d] **Employer is not liable** where homicide during arrest was outside premises, even under warrant signed by defendant manager. 164Ga594, 139SE 52.

1273-96 164Ga594, 139SE52; 364mA 608, 137SE800, 126Me469, 139A671. [e] **Police officer** may undertake to act as civil agent and later assume official character. 126Me469, 139A671. [f] **Special officer** employed in theater was police officer. 126Me469, 139A671.

1274-99 [a] **In Porto Rico.**—33Porto Rico 201.

1274-1 164Ga594, 139SE52.

1274-4 201Cal 610, 258P88; CalA 289 P673; 318 Ill 616, 149NE591, 42ALR 1406; IndA 173NE238; 126Kan627, 630, 270P599 [citCJ]; 227Ky599, 138SW (2d)755; 152Md694, 137A514; 156Md 346, 144A510, 62ALR1497 (by agreement); MoA 19SW(2d)559; 290Pa225, 138A826; 290Pa341, 138A855, 58ALR 1463; TexCivA 300SW185 [citCJ]; 149Va906, 141SE860; Wash 290P839; Wis 232NW543. [c] **Undertaker** cannot avoid liability by hiring servant. 152 Md694, 137A514. **Erratum.**—Strike out "Colo.—Frerker v. Nicholson, 41 Colo. 12, 92 P 224, 13 LRANS 1122, 14 Ann Cas 730."

1274-5 38F(2d)731; 318 Ill 616, 149NE 591, 42ALR1406; IndA 173NE238; 126 Kan627, 270P599; 152Md694, 137A514, 516 [citCJ]; 113 OhSt613, 150NE41; 290Pa225, 138A826. See also Wash 290 P839.

1275-6 98CalA373, 277P156.

1275-7 201Cal 610, 258P88, 90 [quot CJ]; 98CalA373, 277P156; CalA 289P 673; 150AppDiv278, 134NYS702. But see 152Md694, 137A514.

1275-9 318 Ill 616, 149NE591, 42ALR 1406; 228AppDiv659, 238NYS206.

1275-11 201Cal 610, 258P88, 90 [quot CJ]; 98CalA373, 277P156; CalA 289P 673; 318 Ill 616, 149NE591, 42ALR 1406.

1275-13 23F(2d)100; 220Ala298, 124S 878; 98CalA373, 277P156; DC 37F(2d) 1004; 130Misc389, 223NYS686; 113 Oh St613, 150NE41; 290Pa225, 138A826; 290Pa341, 138A855, 58ALR1463; 291Pa 485, 140A544; 294Pa238, 144A100.

1276-14 152Md694, 137A514.

1276-16 318 Ill 616, 149NE591, 42ALR 1406; MoA 273SW780; NJSup 138A 383.

1276-17½-New. Right to direct manner of doing work is insufficient to make the borrower liable for borrowed servant's negligence. 152Md694, 137A514.

1276-17½-New. A borrower authorized to direct when, where, and how a borrowed servant's work shall be done is responsible for the servant's negligence. 152Md694, 137A514.

1277-21 175Minn438, 221NW716, 717 [citCJ]; 103NJL651, 137A538.

1277-22 83Colo 480, 266P225; 152Md 694, 137A514; 103NJL651, 137A538.

1277-23 83Colo 480, 266P225.

1278-32 222Ky268, 300SW604, 605 [cit CJ]; 170Minn1, 211NW950, 951 [cit CJ]; 175Minn438, 221NW716, 717 [cit CJ].

1278-34 CalA 288P1099.

1279-37 Mo 285SW482.

1279-38 315Mo 619, 286SW368; 105 NJL386, 144A815.

1279-40 Ark 31SW(2d)302.

1279-41 244Mich54, 221NW143.

1279-46½-New. In view of Domestic Relations Law, giving a married woman a right of action for injury to her person as if unmarried, an employee's wife, injured through the negligent operation of an automobile by an employee, who was her husband, can recover of an employer therefor, although the husband is not liable. 249NY634, 164NE42.

1279-46½-New. Master is liable to child of employee whose negligence while in employer's service caused injury. 111Conn377, 150A107.

1279-47 38F(2d)731; 96CalA427, 274 P392; 164Ga594, 139SE52; Ill 173NE 394; 245 IllA248; 89 IndA59, 165NE 766; 217Ky211, 289SW263; 13LaA151, 1278438; 7LaA684; 126Me469, 139A 671; 255Mass603, 152NE550; 311Mo77, 277SW566; MoA 29SW(2d)186; 82NH 556, 131A352, 103NJL372, 137A555, 54 ALR623; 126Misc858, 215NYS584; 129 Misc917, 222NYS757; 113 OhSt613, 150 NE41; 24 OhA314, 157NE804; 127 Or 326, 266P254; 294Pa238, 144A100; 297 PaS6, 146A455; 97PaSuper474; RI 137 A778; 135NC128, 138SE205; 157SC392, 154SE431; TexCommnA 293SW811; TexCivA 283SW285; TexCivA 286SW 766, 770 [citCJ]; TexCivA 293SW851; TexCivA 294SW665; TexCivA 118W (2d)377; 99Vt280, 131A788; 145Va189, 134SE576; BC [1927] 2DomLR641. See also MoA 38W(2d)1033. But see 40GaA 397, 149SE814.

1280-43 124Kan751, 262P496; Tex CivA 286SW766; 142Va454, 129SE224; Wis 232NW527; BC [1927] 2DomLR 641. [a] **Master does not insure customers** against torts of servants outside employment. 310Mo 144, 274SW678, 40 ALR1209.

1280-49 24F(2d)271; 30F(2d)723; 213Ala232, 104S406; 202Cal 577, 262P 317; CalA 261P1023; 46 Ida334, 268P 19; Ill 173NE394; 121Kan610, 249P 615; 124Kan751, 262P496; 210Ky47, 275SW15; 211Ky750, 278SW111; 235 Ky252, 30SW(2d)952; 162LaA209, 110 S324; 153Md264, 138A1, 3 [citCJ]; 259 Mass360, 156NE737; 262Mass315, 159 NE751; MoA 293SW456, 459 [citCJ]; 103NJL372, 137A555, 54ALR623; 217 AppDiv487, 217NYS865; 223AppDiv858, 228NYS485; 129Misc384, 221NYS476; 197NC222, 148SE41; 24 OhA314, 157 NE804; 299Pa211, 149A168; TexCivA 274SW295; TexCivA 285SW939; Tex CivA 295SW223; TexCivA 25SW(2d) 966; 142Va454, 129SE224; Wis 232NW 543; 20SaskL582, [1926] 3DomLR992, [1926] 2WestWkly588.

1281-50 262Mass315, 159NE751; 217 AppDiv487, 217NYS865; 225AppDiv380, 233NYS249.

1282-53 But see MoA 24SW(2d)1072.

1282-56 124Kan751, 262P496; 239Mich 421, 214NW413, 414 [citCJ].

1282-62 Ark 31SW(2d)302.

1282-64 [a] **If act of employee is lawful** and one he is justified in doing, master is not liable therefor. 167Minn84, 208NW546.

1282-68 82NH268, 133A4, 46ALR330.

1282-68½-New. The doctrine of respondent superior is not founded in abstract or natural justice but on public policy. 126Misc858, 215NYS584.

1282-68½-New. Public policy is basis of respondeat superior doctrine making master liable for servant's acts. 111 Conn377, 150A107.

1282-69 24F(2d)271; 219Ala627, 123S 12; 99CalA372, 278P928; CalA 292P 979; 164Ga594, 139SE52; 245 IllA465; 122Kan86, 251P394; 124Kan751, 262P 496; 239Mich421, 214NW413, 414 [citCJ]; NJSup 133A523; 252NY202, 169 NE277; 194NC172, 138SE595; 197NC 709, 150SE505; 32 OhA527, 168NE517; 99Vt280, 131A788. See also 29F(2d)582.

1283-70 94CalA703, 271P789; 129Misc 384, 221NYS476, 479 [citCyc].

1283-71 129Misc384, 221NYS476, 479 [citCyc]. [a] **Whether act was in scope of authority depends on time of act, and place,** which, if unauthorized, may be mere incidental deviation, but, if substantial, a complete departure. 110 Conn604, 149A400, 68ALR1044.

1283-72 75CalA266, 242P736; 107Conn 393, 140A760, 56ALR1127; 122Kan86, 251P394; 124Kan751, 262P496; 12LaA 249, 124S589; 156Md36, 143A589; Mo 274SW726, 730 [quotCyc]; 129Misc384, 221NYS476, 479 [citCyc]; 194NC172, 138SE595; RI 137A778; 99Vt280, 131A 788. [a] **If master is interested directly or indirectly** in business in which servant is engaged, he is liable. CalA 288P 1099. [b] **Theater manager throwing** eggs at musicians advertising other theaters was not acting in scope of authority. TexCivA 25SW(2d)966.

1283-73 267Mass501, 167NE235; 129 Misc384, 221NYS476, 479 [citCyc]; 99 Vt280, 131A788.

1283-73½-New. The court should not be astute to discover reasons for withholding application of principle of implied permission or implied authority where facts fairly warrant application thereof. 129Misc384, 221NYS476.

1283-75 181Ark907, 28SW(2d)712; 239 Mich421, 214NW413, 414 [citCJ]; 108 NJL372, 137A555, 54ALR623; 21App Div63, 222NYS629; 192NC760, 135SE 852; TexCivA 293SW851; 99Vt280, 131 A788. [a] **"Scope of employment" of servant, as regards question of master's liability for acts done by servant,** is determined by what the servant is employed to perform, and what he actually does perform with the knowledge and approval of his master. 30F(2d)723. [b] **Stating reasons for employee's dis-**

charge on inquiry by employee is within scope of authority of road master authorized to employ and discharge men. Miss 130S493.

1283-76 MoA 24SW(2d)1072.

1283-77 219Ala627, 123S12.

1283-78 99Vt280, 131A788.

1283-79 208Cal 200, 280P945; 208Cal 216, 280P965; 94CalA703, 271P789; NJ Sup 133A523; 99Vt280, 131A788. [a] **Acts in aid of servant held not in furtherance of master's business.** 211Ky 750, 278SW111. [b] **Master not liable for death of infant riding with driver,** although latter had paid him small sums for his aid. 211Ky750, 278SW111.

1283-80 107Conn393, 140A760, 56ALR 1127.

1283-81 156Md36, 143A589; NJSup 133A523; 221AppDiv63, 222NYS629; 129Misc384, 221NYS476; 99Vt280, 131 A788.

1283-82 MoA 24SW(2d)1072; 129Misc 384, 221NYS476.

1283-85 [b] **Act done partly to serve agent's purposes** may be in "scope of employment." 157Miss770, 128S507.

1283-88 217AppDiv487, 217NYS65.

1284-92½-New. If the act complained of would be unlawful if done by the master, the agent cannot be said to be acting within the scope of his agency. 103WVa627, 138SE331.

1284-94 145Va489, 134SE576, 579 [cit CJ].

1284-95 145Va489, 134SE576, 579 [cit CJ].

1284-96 [a] **Master must have actual knowledge that servant permits boy under statutory age** to aid him, as alleged. 211Ky750, 278SW111. [b] **Knowledge of benefits received** by employee's permission of boy under age to aid him held not imputable to master. 211Ky750, 278SW111.

1284-97 SD 227NW66(2dcase). But see 99CalA81, 277P878(2dcase).

1284-98 82Colo 150, 257P1079.

1284-1 238Mich669, 214NW236. [d] **Though servant combines his business with that of his master,** latter is liable for injuries to third person. CalA 288 P1099.

1284-3 46 Ida334, 268P19; 50RI 481, 149A376; TexCivA 286SW766.

1284-3½-New. Motive of act is less important than whose act it was and whose business and purposes were being promoted. MoA 24SW(2d)1072.

1285-10 5LaA367, 370 [citCJ]; 149 Miss595, 115S713, 714 [citCJ]; 221App Div63, 222NYS629; TexCivA 293SW851.

1285-11 218Ala242, 118S674; 221App Div63, 222NYS629; 103WVa627, 138SE 331.

1285-12 219Ala627, 123S812; 180Ark 476, 218SW(2d)857; CalA 291P591; 106 Conn396, 138A127, 128 [citCJ]; 255 IllA 494; 207 Iowa990, 222NW1; 124Me407, 130A212; 259Mass360, 156NE737; 267 Mass501, 167NE235; 238Mich669, 214 NW236; MoA 286SW738; 195NC113, 141SE340; 128 Or28, 273P707; 285Pa 378, 132A178, 43LRA862; 300Pa397, 150A663; TexCommnA 293SW811; Tex CivA 293SW851; TexCivA 294SW665.

1286-13 238Mich669, 214NW236.

1286-14 216Ala4, 112S433, 435 [quot CJ].

1286-15 180Ark476, 218SW(2d)857.

1287-17 195NC113, 141SE340.

1287-18 But see 36F(2d)199.

1287-19 238Mich669, 214NW236.

1287-21 238Mich669, 214NW236.

1287-22 TexCommnA 293SW811; Tex CivA 22SW(2d)714.

1287-23 129Misc384, 221NYS476.

1287-33 36GaA698, 137SE850.

1288-39 219Ala627, 123S12; 234Mich 629, 209NW60 (revolver); TexCivA 294 SW309.

1288-41 234Mich629, 209NW60.

1288-44 [a] (4) Revolver carried by railroad patrolman. 234Mich629, 209 NW60. [b] **Instrumentalities held not inherently dangerous.**-288Pa463, 136A 787.

1289-52½-New. An agent cannot be said to be acting within the scope of his agency if the act complained of would be unlawful if done by the master. 103WVa627, 138SE331.

1289-54 6F(2d)116; 213Ala627, 105S 869; 18LaA101, 126S573; 82NH556, 131A352; 192NC377, 135SE115; 31 OhA 99, 166NE205; 49RI 146, 141A331; 154 Tenn260, 290SW33, 51ALR193; Tex CommnA 284SW942; 152Va305, 147SE 194; 105WVa463, 143SE160, 161 [cit CJ]. [b] (3) **Workman repairing building** did not assume risk of injury by act of owner's employee in dyeing business. 13LaA101, 126S573. [c] **Permitting other to drive with owner.**-168Ark836, 271SW705.

1290-55 240NY486, 148NE654; 127 Or 276, 263P907.

1291-58 5F(2d)575; 46 Ida334, 268P 19; 260Mass417, 157NE527; 105NJL 577, 146A185; Wis 232NW527.

1291-60 105WVa463, 143SE160, 161 [quotCJ]. [a] **Though employee is not liable to his wife for injury** to her by his negligence, employer is liable therefor. 223AppDiv502, 228NYS604.

1291-62 105WVa463, 143SE160, 161 [quotCJ].

1291-64 196NC794, 147SE296.

1292-70 31 OhA340, 167NE469 (exemplary or punitive damages).

1292-72 17F(2d)468; 213Ala627, 105S 869; 37GaA295, 139SE917; 122Kan 86, 251P394; 217Ky211, 289SW263; 222MoA758, 7SW(2d)734(2dcase); 240 NY486, 148NE654; 220AppDiv63, 222 NYS629; 193NC614, 137SE871; 142SC 125, 140SE443; TexCivA 283SW285; 146Wash163, 262P119, 121 [quotCyc], 55ALR1218. But see TexCivA 22SW (2d)757.

1293-74 TexCivA 283SW285.

1293-77 146Wash163, 262P119, 121 [quotCJ], 55ALR1218.

1293-80 245 IllA248; 124Kan751, 262 P496; 8LaA644; 153Miss451, 121S141; 217AppDiv487, 217NYS65; 97PaSuper 474; TexCivA 25SW(2d)966. [b] **Retaining in service servant with unsavory character** will not make master liable for act outside scope of employment. TexCivA 286SW766.

1294-82 [b] **Master bound not only to give proper instructions** in connection with errand involving him in liability, but also to see that instructions are obeyed. 33PortoRico 201.

1294-85 17F(2d)468; 210Ky432, 276 SW129, 130 [citCyc]; 134Misc349, 235 NYS551. But see TexCivA 22SW(2d) 757.

1294-86 210Ky432, 276SW129, 130 [cit Cyc]; 128Misc144, 218NYS494; 300Pa 144, 148A862.

1294-87 DC 42F(2d)605.

1295-89½-New. operation of a vehicle on a public highway while intoxicated. 210Ky432, 276SW129.

1295-90½-New. Master was not liable under Highway Law § 282-E, where servant's use of car was unauthorized and against command of master, such use being a crime under Pen. L. § 1293-a. 244NY393, 155NE683.

1295-91 17F(2d)468; 21F(2d)883, 884 [citCJ]; 173Ark885, 293SW1017; 233 IllA458; 121Kan610, 249P615; 235Ky 252, 30SW(2d)952; LaA 129S390; 125 Me334, 133A905; 310Mo 144, 274SW 678, 40ALR1209; MoA 286SW738; 223 AppDiv665, 238NYS298; 197NC720, 150 SE501; 120 Okl 179, 181, 250P906 [cit CJ]; 300Pa144, 148A862; TexCivA 7 SW(2d)627; 99Vt280, 131A788; 142Va 454, 129SE224; Wash 287P36.

1295-93 181Ark907, 28SW(2d)712; 233 IllA458; 151Md417, 135A180; 120 Okl 179, 181, 250P906 [citCJ]; 142Va 454, 129SE224.

1295-94 Wis 232NW527.

1296-95 125Me334, 133A905; 151Md 417, 135A180; 227AppDiv43, 236NYS 648; 120 Okl 179, 181, 250P906 [cit CJ].

1296-96 106WVa380, 145SE644.

1296-97 [c] **Only during period not unreasonably disconnected** from authorized period is servant's conduct within scope of employment. 157Miss 770, 128S507.

1296-98 142Va454, 129SE224 (having left place of employment, being entirely free from orders, and performing act of courtesy for third person's accommodation). But see TexCivA 294SW273.

1296-99 192NC760, 135SE852.

1296-3 36F(2d)199; 233 IllA458. [a] 210Ky47, 275SW15.

1296-4 [a] **Parent is not liable for negligence** of son in operating family automobile, though it was permissively used, where not operated on behalf of owner and in furtherance of his business or that of family. 288Pa463, 136A787.

1297-10 243 IllA1; 238Mich669, 214 NW236.

1297-12 Ark 31SW(2d)302; 228Ky 164, 14SW(2d)408; 219MoA162, 272 SW108. [a] (5) Canvasser after finishing day's work and taking his automobile with company's goods to private garage at time of injury is acting within scope of employment, though intending to stop and have tire repaired. 219MoA162, 272SW108.

1297-13 81CalA86, 253P178, 181 [cit CJ]; 228Ky164, 14SW(2d)408; 103 NJL217, 135A821.

1297-14 24F(2d)271, 272 [citCJ]; 173 Ark885, 293SW1017; 233 IllA458; 210 Ky47, 275SW15; 156Md542, 144A693; 103NJL217, 135A821; Wis 232NW527.

1297-15 213Ky110, 280SW496, 498 [quotCJ].

1298-16 212Ala325, 104S808; 208Cal 200, 280P945; 81CalA86, 253P178, 181 [citCJ]; CalA 292P979; 107Conn393, 140A760, 56ALR1127; 213Ky110, 280 SW496, 498 [quotCJ]; 238Mich669, 214 NW236; Mo 274SW726; 104NJL333, 140A327; 228AppDiv69, 238NYS571; 128 Or172, 273P953; 33PortoRico 201.

1298-17 CalA 291P591; Ida 287P944; 201 Iowa1344, 207NW365.

1299-36-37½-New. , negligence of nurse in public hospital. [1927]CanSC 226, [1927] 1DomLR969.

1299-46 Alta [1930] 2DomLR873 (exemption provision in lease is not available to prevent liability).

1300-51 99CalA81, 277P878(2dcase); Can [1929] 1DomLR913. [b] 99CalA81, 277P878(2dcase).

1301-55 31F(2d)225; 245 IllA465. [a] **Invitation to ride in employees' elevator.**-169Minn268, 210NW1000.

1301-63 233 IllA458; 221Ky430, 298 SW1084; 166Minn501, 207NW724; 241 NY460, 150NE516; 194NC172, 138SE 595; RI 137A778.

1301-64 82NH556, 131A352; 241NY 460, 150NE516 [j] **Relation of master and servant continues** while master's automobile is used for transporting servant to and from work. 103NJL427, 135A886. [k] **Insurance company held liable for injury to plaintiff by agent** driving his own car to meeting of agents, where use of car was reasonably warranted and agent was under master's control. 75CalA266, 242P736.

1302-70 241NY460, 150NE516. [b] 145Va489, 134SE576, 580 [citCJ].

1303-72 145Va489, 134SE576, 580 [cit CJ].

1303-73 145Va489, 134SE576, 580 [cit CJ].

1303-74 24F(2d)271; 233 IllA458; 241 NY460, 150NE516; 120 Okl 179, 181, 250P906 [citCJ].

1303-76 24 OhA395, 157NE719.

1303-77 233 IllA458.

1304-81 213Ky96, 280SW479; 169 Minn268, 210NW1000; 194NC172, 138 SE595.

1304-83 122Kan86, 251P394. [b] **Where driver, returning from delivery, saw child on running board of truck** and ordered him off, and child later jumped on again, driver continuing to operate truck after he saw child, employer held not liable for injury to child, which fell off, on account of failure of driver to stop truck at once. 122 Kan86, 251P394.

1304-87 122Kan86, 251P394.

1305-88 107Conn393, 140A760, 56ALR 1127; TexCivA 293SW851. [c] **Master allowing servant to combine own business with that of master is liable for servant's negligence** in use of vehicle. 72CalA57, 236P319.

1306-2 153Miss9, 120S200.

1306-10 17F(2d)468; 178Ark917, 13 SW(2d)26; 124Kan375, 260P635; 153 Miss559, 121S153; 221MoA1173, 300SW 997; 245NY595, 157NE872; TexCivA 283SW285.

1307-13 153Miss559, 121S153.

1307-15 213Ala284, 104S548; 36GaA 782, 138SE266; 164Ga594, 139SE52; 38

GaA457, 144SE241(2dcase); 124Kan275, 255P635; 125Miss441, 128SE41; 316Mo144, 274SW678, 40ALR1209; MoA 293SW(2d)136. 21(AppDiv4)27, 217SW65; 224AppDiv741, 229NY8520; 226AppDiv67, 234NY8425; 33Pamper527; 12PaDist&Co 425, TexCivA 78SW(2d)627.

1307-15½-New. If assault by servant is justified, as in self defense, master is also justified under doctrine of "like immunity" TexCivA 283SW286.

1308-17 123Kan476, 255P1195; Tex CivA 283SW285.

1309-26 See also TexCivA 88SW(2d)288.

1309-27 125Kan292, 262P742; 217App Div437, 217NY865.

1310-26 15PaDist&Co 799.

1311-48 154Conn[illegible]; MoA 277 SW[illegible]; MoA 178SW(2d)651; 237App Div 7[illegible] 232NY[illegible].

1311-49 [a] Each of two fellow servants is liable for his own negligence but not for negligence of other. 104NJL558, 140A421 (where one is superior of other).

1311-50 MoA 277SW356; MoA 178SW (2d)651; 35PorRico 122. [b] Servant's omission to do something not within his duties as servant does not render him liable to third persons. MoA 178SW(2d)651.

1311-51 [illegible](2d)724.

1312-53 316GaA657, 154SE251; 56ND 630, 218NW641, 643 [cit CJ]; 144 Okl 246, 291P59; Or 292P52. [d] Manager of building is not liable for injury to elevator passenger caused by negligence of operator and superintendent. 252NY 404, 171NE622.

1312-55 26Mont4, 16NE132.

1312-56½-New. The right of one injured by a servant's negligence to sue the master is primary, independent, and unaffected by inability to sue the servant. Vt 147A658.

1312-57½-New. Superintendent of corporation who employed infant and directed his work held liable under statute regulating employment of infants. NJ Sup 136A667.

1312-60 296Pa529, 146A130; Wis 229 NW81.

1312-61. See also 296Pa529, 146A130.

1314-77 116Nebr189, 216NW297, 56 ALR[illegible] (dicta).

1314-85 5P(2d)236; 161P(2d)79, 82 [cit CJ]; 246 IlA165, 179, 177 [cit CJ&Cyc]; 247 IlA239. [c] (2) 34P(2d)927.

1314-86 161P(2d)79, 82 [cit CJ]; 28P (2d)784; 356GaA804, 134SE324; 251 IlA 481; 255 IlA189; 220Ky768, 295SW 1026; 152MdA284, 136A622; 73Mont407, 236P1069; 198SE277, 145SE[illegible] (dicta), 142SeCt2r, 146A442, 165Wis 579, 144SE252 [cit CJ]. [a] (1) See also 26GaA[illegible].

1315-87½-New. Where the servant who caused the injury is free from liability therefor, liability cannot attach to the master. 221MoA205, 290SW830.

1315-1 Ala 130SE545; 77CalA462, 247 P236; 90CalA776, 266P504; 94CalA 763, 271P755, 394CalA372, 278P928; 99 CalA769, 279P485; CalA 290P643; 36 GaA248, 136SE173; 37GaA395, 139SE 917; 153MdA333, 138A227, 58ALR1051, 244Mich208, 221NW314; 142Miss50, 107 SE25; 154Missl, 122SE151, 312Mo150, 278SW979, 321[illegible]; 215MoA162, 272SW165, 112 [cit Cyc]; MoA 291SW 187, 289 [cit CJ]; MoA 198SW(2d)559; 224Mont467, 267P[illegible]; 85Mont302, 278 P826; 221AppDiv187, 222NY8641; 219 AppDiv181, 219NY8148; 189NC748, 128 SE337; 22OhA318, 154NE751; 31OhA 470, 167NE493; 143Okl 126, 287P379; 165Tenn580, 297SW199; TexCommA 25[illegible]; TexCivA 298SW(2d)484(2d case) (contractor); 192Wis224, 213NW 329; Can [1929] 3DomLR601. [a] (2) 80ND597, 197NW140, 141 [cit Cyc]. (3) Person who is employed to do piece of work without restriction as to means to be employed, and who employs his own labor and undertakes to do work according to his own ideas, or in accordance with plans furnished by the person for whom work is done, to whom owner looks only for results. 142Va690, 128 SE259. [c] Members of hospital staff are individuals acting in independent capacity, relation of master and servant as to third persons not being assumed by appointment to staff. 132Misc466, 228NY8519.

1316-2 32P(2d)436; 94CalA763, 271P 765, 2LaA334, 391 [quot Cyc], 3LaA 85, 87 [quot Cyc]; MoA 291SW187; 190 NC632, 130SE739. See also 330 Ill 27, 161NE113. [a] Relation must be determined, not alone by written words of contract, but by actions and intent of parties in carrying out purposes of relationship. Iowa 228NW41. [b] That miner's employees signed mine owner's workmen's compensation register is not controlling on question whether miner was independent contractor. 235Ky 252, 30SW(2d)952.

1316-3 330 Ill 27, 161NE113; Mo 48SW (2d)802; MoA 238SW(2d)1066. See also 99CalA776, 265P[illegible]54.

1316-3½-New. On the issue whether the relationship is that of independent contractor or master and servant, the existence of the right of the employer to control the manner of doing the work must be determined by reasonable inferences drawn from the circumstances, in the absence of an express stipulation. 99CalA769, 279P485.

1316-3½-New. The term "independent contractor" presupposes the existence of a binding contract between the parties for breach of which a cause of action arises. 21OhA470, 167NE493.

1316-7 7P(2d)586; 219AlaI29, 121S 410; 219AlaI92, 121S710(2dcase); 172 Ark753, 290SW580; 205Cal200, 280P 545, 77CalA467, 247P226; 26CalA713, 2[illegible]P7[illegible], 59CalA705, 279P485; CalA 288P1099; CalA 290P643; 81Colo 69, 255P449; 106Conn284, 137A755; Conn 152A148; 94Fla664, 114SE503, 505 [cit CJ]; 36GaA248, 136SE173; 36GaA551, 137SE105; 37GaA130, 138SE633; 37 GaA286, 139SE852; 330 Ill 27, 161NE 113, 253 IlA150; 262Iowa566, 210NW 93; 125Kan32, 262P577; 215Ky461, 2[illegible]SW151, 217Ky572, 290SW344, 225 Ky245, 168SW(2d)1043; 61LaA223; 260 Miss225, 157NE347; 244Mich208, 221 NW314; Minn 232NW43; 147Miss639, 112S21; 312Mo150, 278SW979; Mo 26 SW(2d)569; 219MoA162, 272SW108, 112 [cit Cyc]; MoA 291SW187; MoA 198SW (2d)559; MoA 198SW(2d)758; MoA 23 SW(2d)1066; MoA 278SW(2d)52; 104 NJL26, 138A699; 245NY66, 156NE 98; 219AppDiv663, 220NY8462; 219 AppDiv181, 219NY8148; 194NC566, 140SE289; 118OhS612, 162NE793 (where control not retained, employer is not liable); 132Okl 167, 269P1076, 1077, 61ALR218 [cit CJ]; 288Pa207, 135A613, 614 [cit Cyc]; 295Pa162, 145A71; 155 Tenn580, 297SW199; TexCommA 284 SW942; TexCommA 24SW(2d)28; TexCivA 278SW485; 195Wis468, 218NW 716.

1317-8 219AlaI445, 122S411(2dcase); 80 CalA713, 252P775; 81Colo 69, 255P449; 106Conn324, 137A755, 330 Ill 27, 161NE 113; 131LaA424, 127S81(2dcase); 265 Mass236, 164NE677(2dcase), 60ALR1159; 171Minn15, 213NW40, 219MoA162, 272 SW109, 112 [cit Cyc], MoA 291SW187, 189NC748, 128SE337, 165Tenn580, 297 SW199; TexCommA 23SW942.

1317-9 219AppDiv181, 219NY8148; 189 NC748, 128SE337; 165Tenn580, 297SW 199; TexCommA 284SW942.

1317-10 81Colo 69, 255P449; 36GaA 248, 136SE173; 312Mo150, 278SW979; 104NJL424, 140A305. [a] Defendant's foreman, conveying employees to work in his automobile, for extra pay, not independent contractor. 312Mo150, 278 SW979.

1317-11 94Fla664, 114SE503, 364GaA551, 137SE105; 41GaA209, 152SE280 (pointing out where work was to be performed); 203Iowa306, 210NW928; 125 Kan33, 262P577; 221Ky794, 299SW963; 219MoA162, 272SW108, 112 [cit Cyc]; MoA 278SW(2d)52; 189NC748, 128SE 337, 290Pa315, 138A263, TexCivA 272 SW807 (where alleged employee contracted to haul definite amount of hay using employer's truck making deliveries as directed by purchaser); TexCivA 278 SW125, 195WVa253, 130SE152, 43ALR 540; Can [1929] 3DomLR601; Sask [1929] 4DomLR1066(intense).

1317-12 75CalA266, 242P736; 86CalA 277, 261P328; CalA 283P1099; 94Fla 664, 114SE503; 253 IlA150; 203Iowa 306, 210NW923; 125Kan33, 262P577; 2LaA384, 391 [quot Cyc], 265Mass236, 164NE677(2dcase), 60ALR1159; 219MoA 162, 272SW108, 112 [cit Cyc]; 189NC 748, 128SE337; 31OhA470, 167NE493; 290Pa315, 138A263, 12PaDist&Co 693; 155Tenn580, 297SW195. [f] In Texas,-CommA 289SW942.

1318-14 125Kan33, 262P577.

1318-16 106Conn284, 137A755; MoA 293SW432; 219AppDiv181, 219NY8148.

1318-17 215Ky461, 285SW191; TexCivA 278SW485; TexCivA 289SW1030.

1318-20 51LaA259; TexCivA 198SW(2d) 850.

1319-21 283Pa207, 135A613.

1319-24 217Ky572, 290SW334.

1319-29 7P(2d)586.

1319-30 106Conn284, 137A755; 36GaA 551, 137SE105.

1319-33 22OhA318, 154NE751.

1319-40 36GaA248, 136SE173.

1319-43 41GaA209, 152SE280 (well drillers).

1319-46½-New. A window washer conducting his own business and furnishing his own tools and material; 206 Iowa1361, 222NW386, 61ALR1351.

1319-46½-New. oil well drillers; 143 Okl 126, 287P379.

1319-47½-New. , repairman who agreed with owner to sell it, demonstrating automobile in his charge to prospective buyer. 153Md333, 138A227, 58ALR 1051.

1319-47½-New. In British Columbia bailiff employed to take possession of motor vehicle under conditional sale agreement has been held independent contractor. BC [1930] 3DomLR296.

1319-48½-New. A construction contract which contemplates payment of costs, plus percentage, held not inconsistent with the relation. 35P(2d)142.

1319-52 154Missl, 122S191; 323Mo 1089, 20SW(2d)494; MoA 279SW157; 104NJL424, 140A305, 306 [cit CJ]; NJ 148A758 (reservations of owner held inconsequential to those of inspector or architect, not destroying relation of independent contractor); 250NY426, 165NE835; 219AppDiv181, 219NY8148; 137Miss530, 242NY8608; 155Tenn580, 297SW199; 142Va690, 128SE259 (reservations of privilege of inspections, supervision and change of plans); 194Wis40, 215NW 578. [c] (1) 142Va690, 128SE259 (supervision of highway contractor by state engineer).

1321-54 291Pa485, 140A544, 545 [cit CJ].

1321-56 MoA 293SW432.

1321-58½-New. , or right to designate and examine repairs. 118OhS612, 162 NE793.

1321-62 CalA 288P1099 (holding that to make master liable he must have power of supervision over conduct of servant).

1321-67 36GaA551, 137SE105; 192NC 377, 135SE115; 291Pa485, 140A544, 545 [cit CJ]; TexCommA 284SW942.

1321-68 81Colo 69, 255P449; 36GaA 248, 136SE173; 330 Ill 27, 161NE 113; 320Mo 95, 6SW(2d)617; 219MoA162 272 SW108, 112 [cit Cyc]; MoA 293SW132; 192NC377, 135SE115; TexCommA 284 SW942. [a] (1) 103NJL427, 135A556.

1322-71 36GaA248, 136SE173; 37GaA 286, 139SE852; 125Kan33, 262P577.

1322 76½-New. Fact that workman is to receive no compensation until satisfactory termination of employment does not classify him as independent contractor. 192NC377, 135SE115.

1322-79 31OhA470, 167NE493; 219Pa 315, 138A263.

1322-82 219MoA162, 272SW108.

1322-83 36GaA248, 136SE173; 36GaA 551, 137SE105; TexCivA 272SW807.

1322-84 13LaA424, 127S81(2dcase); MoA 293SW432, 434 [cit CJ] (not decisive test). [a] Employee using own implements held independent contractor. 262Mass425, 160NE248.

1322-85½-New. Where defendant furnished appliances, the principle of master and servant was applicable in so far as those in the employ of independent contractor are concerned in the op-

eration of the appliance. 190NC308, 130SE29.
1322-86 90CalA776, 266P594; 94CalA703, 271P789; 36GaA248, 136SE173 [cit CJ]; 290Pa315, 138A863.
1323-88 36GaA248, 136SE173 [citCJ]; MoA 293SW432, 434 [citCJ].
1323-91 290Pa315, 138A863.
1323-95 290Pa315, 138A863.
1323-1 CalA 290P643; 215Ky461, 285SW191.
1323-2 19F(2d)32; Mo 30SW(2d)984.
1324-9 48RI 453, 138A52.
1324-11 32F(2d)436; 220Ala96, 124S222; 29Ariz313, 241P510; 83Colo480, 266P225; 94Fla664, 114S503; 36GaA248, 136SE173; 37GaA130, 138SE633; 37GaA295, 138SE917; 41GaA204, 152SE266; 86IndA699, 159NE763; 229Ky245, 16SW(2d)1043; 235Ky252, 30SW(2d)952; 13LaA444, 127S761; 1LaA738, 741 [citCyc]; 150Md494, 133A453; 152Md284, 136A622; Mass 169NE138; 172Minn536, 216NW247; 147Miss639, 112S21; 317Mo572, 296SW389; 323Mo1089, 20SW(2d)494; MoA 291SW187; MoA 299SW66; MoA 16SW(2d)637; MoA 31SW(2d)570; 82Mont467, 267P805, 809 [citCJ]; 83NH29, 137A445; 83NH64, 139A86; 102NJL179, 130A525; 254NY346, 173NE217; 219AppDiv653, 220NYS462; 125Misc864, 212NYS323; 128Misc501, 219NYS883; 219AppDiv741, 220NYS162; 190NC632, 130SE739; 194NC6, 138SE343; 194NC566, 140SE289; 22OhA318, 154NE751; NC 155SE867; 143Okl120, 287P379; 288Pa207, 135A613; 48RI 453, 138A52; 139SC163, 137SE444; 54SD540, 223NW734; Tex CommnA 292SW187; TexCivA 290SW210; TexCivA 24SW(2d)783; 148Va60, 138SE503, 54ALR1485; 193Wis370, 214NW374, 53ALR771; 194Wis40, 215NW578; BC [1930] 3DomLR296.
1326-18 250NY426, 165NE835; 253NY491, 171NE754.
1326-19 NJ 148A758.
1326-21 TexCivA 289SW1030.
1327-29 150Md494, 133A458.
1327-32 TexCivA 271SW133.
1327-33½-New. contractors for building wagon roads, 29Ariz313, 241P510 (to mine).
1327-36 94Fla664, 114S503; 83NH29, 137A445.
1328-42 [a] **Corporation holding itself out as owner of shop** apparently part of its store liable for negligence of operator. OhA 172NE702.
1328-44 32F(2d)145; 150Md494, 133A458.
1328-49 229Ky245, 16SW(2d)1043.
1328-51 175Ark988, 18SW(2d)77; 82Mont467, 267P805; 115Nebr579, 213NW966, 52ALR1393; 48RI 453, 138A52, 53 [citCJ]. [i] **Liability for contractor's negligence.**–Where natural and probable consequence of contractor's cutting timber is to obstruct creek and flood plaintiff's lands, contractee is liable for all damages including those caused by contractor's negligence. 175Ark988, 18SW(2d)77.
1329-53 CalA 290P489; 41GaA209, 152SE280.
1329-56 221Ky794, 299SW963; NJ 148A758.
1329-59 86IndA699, 159NE763.
1330-60 221Ky794, 299SW963.
1330-61 86IndA699, 159NE763. [b] 80CalA271, 251P697.
1330-63 NJ 147A445.
1331-66 13LaA444, 127S761.
1331-68 Ala 129S274.
1331-70 86IndA699, 159NE763.
1331-71 168La73, 121S578; 234Mich112, 207NW892; 235Mich240, 209NW124; 320Mo95, 6SW(2d)617, 625 [quot CJ]; 190NC632, 130SE739; NC 155SE867; 48RI 453, 138A52; TexCivA 276SW770; Wash 291P1103; 198Wis527, 224NW743; NB [1925] 3DomLR815. [c] **Rock blasting.**–86IndA699, 159NE763.
1332-72 48RI 453, 138A52, 53 [citCJ]; Alta [1930] 3DomLR149.
1332-73 190NC632, 130SE739.
1332-79 TexCivA 276SW770.
1332-80 TexCivA 276SW770.
1333-85 320Mo95, 6SW(2d)617, 625 [quotCJ].
1333-90 48RI 453, 138A52; TexCivA 29SW(2d)484(2dcase) (holding moving of large tank not inherently dangerous).
1333-99 190NC632, 130SE739 (use of dynamite in highway construction).
1334-22½-New. Piling lumber on public dock. 150Md494, 133A458; 194Wis40, 215NW578.
1334-26 Alta [1930] 3DomLR149.
1334-27 13LaA444, 127S761 (contractee held not to have authorized fire).
1335-32 80CalA271, 251P697; 234Mich112, 207NW892.
1335-39 80CalA271, 251P697; TexCivA 299SW297.
1336-39 80CalA271, 251P697.
1336-43 231Ky433, 21SW(2d)790; 320Mo95, 6SW(2d)617.
1336-46 218Ala369, 118S749(2dcase); 86IndA699, 159NE763; 244Mich208, 221NW314; 24OhA374, 157NE708; 140Okl45, 282P157; 48RI 453, 138A52, 53 [citCJ]; TexCivA 299SW297; 194Wis40, 215NW578. [c] (3) Landowner's duty to furnish lateral support for natural soil of adjoining land cannot be delegated. 194Wis559, 217NW307. [h] **Express company** cannot avoid liability as common carrier by employing owner of truck to haul and deliver goods. 219MoA294, 269SW654.
1337-47 194Wis40, 215NW578.
1337-49 48RI 453, 138A52, 53 [citCJ]; 194Wis40, 215NW578. [f] **Duty of keeping electric sign over sidewalk in safe condition** held nondelegable. 48RI 453, 138A52.
1338-55 24OhA374, 157NE708.
1339-61 152Md694, 137A514.
1339-63 152Md694, 137A514; 323Mo1089, 20SW(2d)494 (liable to employees of contractor).
1340-66 192NC377, 135SE115. [b] (2) Merely being present and making suggestions. 194Wis40, 215NW578.
1340-70 37GaA295, 139SE917.
1340-73 129Misc421, 221NYS457.
1340-74 TexCommnA 292SW187.
1341-77 150Md494, 133A458.
1341-83 194Wis40, 215NW578.
1341-86 [a] **Servant's nominal employment** by independent contractor will not relieve master of liability where servant is in fact in his employ. 13LaA424, 127S81(2dcase).
1341-87 [b] **Parties cannot avoid investigation of their actual relation** by executing a contract disguising true situation, where third person is injured. 13LaA424, 127S81(2dcase).
1341-90 217Ky572, 290SW344; 154Miss1, 122S191; 190NC632, 130SE739; 193NC844, 137SE925; 196NC125, 144SE552; 198NC380, 151SE728; TexCommnA 276SW170; TexCivA 24SW(2d)783. [h] **Owner does not owe to employees of independent contractor** same duties which master owes to his servant. 190NC632, 130SE739.
1342-91 190NC632, 130SE739.
1342-94½-New. The rule does not necessarily exempt the contractee from liability to servant of independent contractor who is injured while engaged in work for ultimate benefit of contractee. 190NC632, 130SE739.
1343-99 83NH334, 142A483.
1343-2 137Misc290, 241NYS689.
1343-6½-New. Liability to servant of independent contractor may be greater than liability to a stranger where the work requires the use of an inherently dangerous instrumentality. 190NC632, 130SE739.
1343-7-8½-New. **Insolvency of contractor.** That owner of mine leased property to insolvent contractor held not to render him liable where he acted in good faith. 217Ky572, 290SW344.
1343-10 16F(2d)309; 217AppDiv532, 216NYS629; TexCommnA 276SW170; Sask [1925] 3DomLR251.
1343-11 16F(2d)309.
1343-12 TexCommnA 276SW170.
1344-27 [b] **In Wisconsin.**–193Wis1, 212NW660.
1345-29 16F(2d)309; 320Mo95, 6SW(2d)617; 217AppDiv532, 216NYS629; Sask [1925] 3DomLR251. See also TexCivA 289SW1030.
1345-31 16F(2d)309.
1346-40 MoA 16SW(2d)637.
1346-43 196NC125, 144SE552.
1346-45 16F(2d)309; 196NC125, 144SE552.
1348-65 80CalA271, 251P697; 217AppDiv532, 216NYS629.
1348-66 80CalA271, 251P697; 217AppDiv532, 216NYS629.
1349-72 6LaA27 (owner held not liable for failure to furnish safe place to work and to warn of dangers where independent contractor was injured by breaking of corroded bolt not visible to naked eye); 50Philippine871 (injuries from defect in hand car furnished by contractee of which contractor had knowledge).
1349-73 [b] **Workmen's Compensation Act** does not preclude defendant sued by independent contractor from setting up common law defenses. 100WVa263, 130SE492, 43ALR330.
1349-76 215Ky461, 285SW191; MoA 28SW(2d)674; 190NC632, 130SE739.
1349-77 MoA 28SW(2d)674. [d] **Nondelegable duties.**–MoA 28SW(2d)674.
1350-80 [a] **General direction to unload and signing of delivery slip** by foreman held not to make general contractor liable in action for death resulting from negligence in placing building material in street. 241IllA58.
1350-83 310Mo469, 276SW607; 149Wash368, 271P65.
1350-84 CalA 290P643.
1350-85 CalA 290P643 (contractor must owe duty to plaintiff); 288Pa443, 136A223. [f] **Contractor** does not owe to servant of independent subcontractor the same duties which a master owes to his servant. 190NC632, 130SE739. [g] **Where danger is obvious** general contractor is not obliged to warn independent subcontractor's employees. CalA 290P643.
1350-85½-New. , or where the work requires the use of an inherently dangerous instrumentality. 190NC632, 130SE739 (use of dynamite in highway construction).
1351-2 254IllA511.
1352-14½-New. That servant was justified in committing assault in self-defense is defense available to master. TexCivA 283SW285.
1352-23 38GaA497, 144SE351(2dcase); MoA 31SW(2d)242. [a] (1) 214Ala47, 106S175; 216Ala421, 113S396; 164Ga594, 139SE52. (2) 9PaDist&Co 460; SD 227NW66(2dcase); 106WVa502, 146SE61. [b] 164Ga594, 139SE52 (as to liability of employer); Wash 287P36. [c] **"Incompetence" as term in pleading** held sufficiently definite for imposition of liability. 214Ala47, 106S175.
1352-25½-New. If promise to repair damages caused by independent contractor is relied on in action against master, such promise must be pleaded. 125Misc864, 212NYS323.
1352-25½-New. There can be no recovery on such theory under a mere averment of negligence. 125Misc864, 212NYS323.
1352-26 240IllA165, 174 [quotCJ]; 249IllA501; 221Ky114, 298SW182; 27OhA219, 160NE878.
1352-27 240IllA165, 174 [quotCJ]. [a] (1) 215Ala607, 111S642.
1352-28 240IllA165, 174 [quotCJ].
1352-29 240IllA165, 174 [quotCJ].
1352-30 35GaA620, 134SE190 (allegations held sufficient as against oral motion in nature of general demurrer).
1352-32 [b] **Count held to sufficiently allege claim** against both employer and superintendent. 220Ala661, 127S230.
1353-34 40GaA196, 149SE88 (names of employees guilty of negligence need not be alleged); 215Ky11, 284SW79.
1353-35 41GaA209, 152SE280 (master's interference not alleged, nor act of his proximately contributing to injury).
1353-43 215Ala494, 111S237; 218Ala223, 118S406; 3LaA575. [a] 218Ala223, 118S406; 92CalA740, 268P934; 29Hawaii604; 30Hawaii452. [b] **Petition held insufficient.**–31F(2d)977.
1353-44 218Ala223, 118S406.
1353-45 [c] TexCommnA 18SW(2d)602.
1354-51 SD 228NW407 (answer held to state defense under issue as to existence of relation of master and servant).
1354-54 TexCivA 283SW285, 287 [cit CJ]. [a] **Variance not shown.**–218Ala105, 117S640.
1354-55 142SC125, 140SE443.
1354-60 218Ala507, 119S218.
1354-63 213Ala222, 104S526.
1354-66½-New. Proof of one act of negligence charged is sufficient. Tex

CommnA 276SW170.

1355–74 216Ala577, 114S185.

1355–75 TexCivA 283SW285, 287 [cit CJ].

1355–78½–New. Driving motor truck does not raise inference that driver was servant of owner. 86 IndA556, 156 NE519.

1355–78¾–New. Cab driver, having general control of car without instructions, is presumed to have authority to do things he considered essential. 129Misc384, 221NYS476.

1355–79 233 IllA458; 197NC720, 150 SE501.

1355–82 216Ala577, 114S185; 219Ala 380, 122S338; 86CalA277, 261P328; 233 IllA458; 228Ky239, 14SW(2d)775; 261Mass238, 158NE671; 265Mass245, 163NE863; 219MoA162, 272SW108; 54 ND710, 210NW643, 50ALR1437; 31 OhA161, 165NE305; 297Pa105, 146A 445; 300Pa397, 150A663; 99Vt280, 131 A788.

1355–83 CalA 288P1099; 233 IllA458; 54ND710, 210NW643, 50ALR1437.

1355–84 12LaA373, 125S495 (that servant was authorized to catch fowl not belonging to master); 54ND710, 210NW643, 50ALR1437.

1355–85 216Ala434, 113S299; 219Ala 380, 122S338; 233 IllA458; 6LaA514; 8LaA103; 126Me469, 139A671; 156Md 542, 144A693; 261Mass238, 158NE671; 262Mass310, 159NE622; MoA 274SW 97; 54ND710, 210NW643, 50ALR1437; 58ND685, 227NW226; TexCivA 16SW (2d)333; TexCivA 22SW(2d)714; 99Vt 280, 131A788; 141Wash287, 251P572. Contra 150Md24, 132A278.

1355–85½–New. and that master ratified unauthorized acts. 129 Okl 7, 263P 121.

1356–86 35GaA694, 134SE822; 153Md 264, 138A1; 116Nebr18, 215NW556; 151SC391, 149SE111; 193Wis224, 213 NW329. [a] **Presumption of agency of driver for owner of car** held overcome by uncontradicted evidence. 153Md264, 138A1.

1356–87 107Conn393, 140A760, 56ALR 1127; 35GaA694, 134SE822; 116Nebr 18, 215NW556; 103NJL217, 135A821; 300Pa397, 150A663; TexCivA 297SW 327; 193Wis224, 213NW329. [a] **Use of vehicle in possession of servant** is presumed to be rightful. 166Minn501, 207NW724. [b] **Under Pennsylvania rule**, the fact that messenger wore plaintiff's uniform, and name on bicycle, raised presumption of act within employment. 37F(2d)480. [c] **Doubt as to whether servant acted within scope of authority** is resolved against master. 198NC776, 153SE394.

1356–89 35GaA694, 134SE822; 145Va 489, 134SE576.

1356–94 See also CalA 290P489.

1356–95 24F(2d)411; 13LaA424, 127S 81(2dcase); 4LaA326. See also 219 AppDiv181, 219NYS148. But see 217 Ky572, 290SW344.

1357–99 [b] (1) 3Del 245, 138A277; 238Mich669, 214NW236; TexCivA 297 SW267. (3) Conversation with assistant manager at time is admissible. MoA 298SW254. [e] **Evidence held inadmissible.**–259Mass360, 156NE737.

1357–6½–New. Evidence that employer procured lawyer and paid fine of watchman driving automobile without authority is inadmissible to establish liability of employer. 259Mass360, 156 NE737.

1357–8 260Mass225, 157NE347; 157 Miss822, 126S480; MoA 23SW(2d) 1066; 155Tenn580, 297SW199. [c] **Evidence held admissible.**–Manner of payment. 192NC377, 135SE115. [f] **Acts of parties** may be considered in determining whether negligent person was servant or independent contractor. MoA 22SW(2d)892.

1357–9½–New. Automobile dealer is not precluded from showing that relationship between himself and driver of car was other than that of employer and employee by the fact that the dealer violated the statute by allowing the driver to use his license plates. 193 Wis224, 213NW329.

1358–17 154Md63, 139A564.

1358–29½–New. Evidence as to the employee's directions to plaintiff is inadmissible in showing authority or that they were within the scope of employment. Utah 282P1030.

1358–30 267Mass501, 167NE235; 246 NY388, 159NE180; 99Vt280, 131A788. [b] **Circumstantial evidence may be sufficient.**–99Vt280, 131A788.

1359–47 255 IllA494 (evidence sufficient to show non violation of orders); MoA 198SW(2d)758.

1359–50 175Ark988, 18SW(2d)77; 75 CalA266, 242P736; 93Fla1128, 114S 425; 35GaA694, 134SE822; 36GaA698, 137SE850; MoA 298SW254; 86Pa Super266.

1359–51 Iowa 229NW847; 124Kan375, 260P635.

1359–53 162La209, 110S324; 259Mass 568, 156NE711; TexCivA 290SW210.

1359–54 201Cal 610, 258P88; 75CalA 266, 242P736; 77CalA462, 247P236; 89 CalA721, 265P541; 98CalA568, 277P529 (2dcase); 103Conn667, 131A392; 126 Kan627; 220Ky708, 295SW1020; MoA 19SW(2d)758; NJSup 138A104; Tex CommnA 284SW942; TexCivA 297SW 267; TexCivA 8SW(2d)288. [a] 75 CalA266, 242P736; 77CalA462, 247P 236; 152Md284, 136A622.

1359–55 216Ala577, 114S185; 107Conn 171, 139A506; CalA 290P510; 3Del 245, 138A277; 318 Ill 616, 149NE591, 42ALR1406 (evidence insufficient to show that original master surrendered manner in which automobile should be driven wholly to control and direction of defendant); 233 IllA458; 234 IllA 596; 259Mass568, 156NE711; 119 Oh9, 162NE41; 24 OhA395, 157NE719; 127 Or276, 263P907; TexCivA 272SW814 (evidence held to show driver of truck was volunteer against wishes of servant in charge and not servant); Tex CivA 299SW342; 142Wash348, 253P 458; 193Wis224, 213NW329.

1359–56 228AppDiv63, 238NYS512; 145Va489, 134SE576. [b] **Whether chauffeur servant of automobile owner's mother at time of injury is for jury** under evidence. 214AppDiv291, 212 NYS316.

1359–56½–New. that evidence was sufficient to show that relationship of master and servant did not exist, 221 AppDiv102, 222NYS602.

1359–56¾–New. or that it was insufficient to go to the jury on such question: 86CalA277, 261P328.

1359–57 26F(2d)164; 35GaA694, 134 SE822; 155Tenn580, 297SW199.

1359–58 201Cal 610, 258P88; 72CalA57, 236P319; 75CalA266, 242P736; 81CalA 86, 253P178; 35GaA694, 134SE822; 242 IllA205; 84 IndA243, 149NE454; IndA 172NE576; 261Mass238, 158NE671; 262 Mass310, 159NE622; 267Mass501, 167 NE235; 234Mich629, 209NW60; MoA 273SW221; MoA 291SW525; 222MoA 758, 7SW(2d)734(2dcase); NJSup 133A 523.

1359–59 CalA 261P1023; 233 IllA458; 252Mass47, 147NE564; TexCivA 16SW (2d)333.

1360–60 73CalA293, 238P739; 120Kan 119, 242P449; MoA 287SW827; 221MoA 1110, 298SW121; 145Va489, 134SE576.

1360–60½–New. or that the evidence was insufficient to go to the jury on this question; 256Mass317, 152NE326.

1360–61 90Fla145, 106S879; 171Minn 105, 213NW541; 23 OhA458, 155NE252; 129 Okl 7, 263P121. [a] **Use for another of property producing injury** does not prove one so using was acting in scope of employment. 300Pa397, 150A663. [b] **Evidence held insufficient** to show defendant, paying special policeman's salary, directed him in making arrest. CalA 287P982.

1360–62 See also 75CalA266, 242P736.

1360–62½–New. that evidence was sufficient to show that alleged servant was not acting under directions of owner of instrumentality causing injury; 221App Div102, 222NYS602.

1360–63 75CalA266, 242P736; 98CalA 568, 277P529(2dcase); MoA 273SW730; 214AppDiv291, 212NYS316; 127 Or276, 263P907.

1360–64 13LaA357, 127S420.

1360–65½–New. that the evidence was insufficient to show the employer's negligence for failure to warn against smoking; 99CalA81, 277P878(2dcase).

1360–66 31 OhA99, 166NE205; 127 Or 276, 263P907; Utah 282P1030 (unauthorized act of servant).

1360–67 110Conn166, 147A561.

1360–68 10LaA106, 119S746.

1360–69 IndA 172NE576; MoA 30SW (2d)167.

1360–70 [a] **Proximate cause of injury** held, under evidence, to be contributory negligence. 12LaA373, 125S495.

1360–71½–New. that the evidence was insufficient to show contributory negligence; 98CalA568, 277P529(2dcase).

1360–73 72LaA373, 125S495 (wantonness).

1360–74 234 IllA596; 232Ky20, 22SW (2d)279; 254Mass501, 150NE326; 155 Tenn580, 297SW199; TexCivA 29SW (2d)484(2dcase).

1360–75 13LaA424, 127S81(2dcase); MoA 274SW849.

1360–77 193Wis224, 213NW329.

1360–78 208Cal 200, 280P945; 81Colo 69, 255P449; 125Kan33, 262P577.

1360–79 Ida 286P603; 241 IllA410.

1360–80 31F(2d)977.

1360–81 240NY486, 148NE654.

1360–82 240NY486, 148NE654 (to make out cause of action).

1360–84 232Ky20, 22SW(2d)279.

1360–91 MoA 19SW(2d)758.

1360–92 [a] **Evidence held insufficient.**–232Ky20, 22SW(2d)279.

1360–93½–New. , that evidence was sufficient to show plaintiff was not a trespasser on the premises. 240NY486, 148 NE654.

1360–93¾–New. that the evidence was sufficient to show that defendant's wife acted as his agent in directing employee to a dangerous place; 254Mass501, 150 NE326.

1360–93¼–New. , that the evidence was sufficient to sustain verdict of the jury. TexCivA 293SW851.

1360–93½–New. ; that the evidence was sufficient to show that a negligent servant was transferred by the general employer to the service of an independent contractor. 146Wash340, 262P633.

1360–94 MoA 19SW(2d)559. [c] **That workmen were servants of defendant.**–228AppDiv63, 238NYS512 (unrebutted).

1361–96 Mo 23SW(2d)1049.

1361–98 35GaA694, 134SE822; Tex CommnA 284SW942; 141Wash287, 251 P572. Contra 99Vt280, 131A788.

1361–99 141Wash287, 251P572.

1361–3 149Wash368, 271P65.

1361–4 221Ky517, 299SW166; 151Md 417, 135A180; MoA 274SW97; TexCivA 11SW(2d)377.

1361–5 75CalA266, 242P736; 150Miss 90, 116S438; 82NH268, 133A4, 46ALR 380; 26 OhA225, 158NE558. [a] **Injuries from revolving door.**–94PaSuper599.

1361–6 152Md694, 137A514.

1361–7 MoA 31SW(2d)242.

1361–11 MoA 19SW(2d)758.

1361–15 180Ark253, 21SW(2d)411 (acquiesced in and ratified).

1362–17½–New. Court having right to apply principle of respondeat superior in one case can deny it in another. 135 SC123, 133SE205.

1362–18 216Ala577, 114S185; 175Ark 43, 295SW13; 180Ark253, 21SW(2d)411 (whether employee or independent contractor); 75CalA266, 242P736; CalA 289P673; 152Md694, 137A514; 260Mass 225, 157NE347; 235Mich240, 209NW 124; 157Miss822, 126S480; 219MoA182, 272SW108; NJ 130A369; 102NJL203, 130A526; NJ 135A91; NJCir 137A 845; 241NY177, 149NE343; 219AppDiv 181, 219NYS148; 129Misc384, 221NYS 476; 26 OhA225, 158NE558; 94PaSuper 599; TexCivA 297SW327; TexCivA 27 SW(2d)299 (whether one causing injury was agent or servant); 149Wash368, 271P65. [a] 86CalA627, 261P334. [e] **Whether chauffeur was servant of automobile owner's mother** at time of injury is for jury. 214AppDiv291, 212NYS316.

1362–19 216Ala577, 114S185; 318 Ill 616, 149NE591, 42ALR1406; 86 IndA 556, 156NE519; 103NJL372, 137A555, 54ALR623; NJSup 139A99; 219AppDiv 181, 219NYS148; 31 OhA161, 165NE305; 193Wis224, 213NW329. [a] **Evidence held sufficient to go to jury** on question whether servant of hirer had control of operation of truck by owner's chauffeur. 103NJL651, 137A538.

1362-20 MoA 22SW(2d)892.
1362-21 90Fla145, 106S879.
1362-22 37F(2d)480; 216Ala421, 113S 396; 216Ala577, 114S185; 218Ala105, 117S640; 73CalA293, 238P739; 75CalA 266, 242P736; 92CalA740, 268P934; 94 CalA703, 271P789; CalA 292P979; 106 Conn396, 138A127; 107Conn393, 140A 760, 56ALR1127; 110Conn604, 149A400, 68ALR1044; 46 Ida334, 268P19; 242 IllA205; 82 IndA678, 147NE284; 126Me 469, 139A671; 150Md24, 132A278; 156 Md36, 143A589; 234Mich629, 209NW60; 238Mich669, 214NW236; 241Mich624, 217NW898; MoA 273SW780; MoA 277 SW362; MoA 29SW(2d)186; 116Nebr 18, 215NW556; 83NH276, 141A470; 102 NJL621, 133A393; 104NJL361, 140A 324; 104NJL84, 140A327; NJSup 131A 685; NJSup 135A773; 241NY177, 149 NE343; 241NY460, 150NE516; 222App Div179, 225NYS486; 225AppDiv380, 233 NYS249; 198NC776, 153SE394; 24 OhA 314, 157NE804; 32 OhA100, 167NE613; 120 Okl 179, 181, 250P906 [quotCJ]; 300 Pa397, 150A663; 94PaSuper541; 97Pa Super474; RI 136A245; 50RI 481, 149 A376; TexCivA 293SW851; 145Va489, 134SE576. [g] **Under evidence** question of whether chauffeur was driving car within scope of employment at time of collision was held for jury. 241NY460, 150NE516.

1362-22½-New. Whether employee had implied authority to do particular act is question for jury. 106Conn396, 138A 127.

1362-22¾-New. An employee's authority to invite one into the premises to remove wood is for the jury. 108Conn 226, 142A739.

1363-23 216Ala421, 113S396; 29Hawaii 604; 242 IllA205; 156Md542, 144A693; MoA 274SW97; MoA 29SW(2d)186; 103NJL372, 137A555, 54ALR623; 103 NJL217, 135A821; 225AppDiv846, 232 NYS622; 120 Okl 179, 181, 250P906 [quotCJ]; 50RI 481, 149A376; TexCivA 299SW295; 99Vt280, 131A788; 142Va 454, 129SE224; 145Va489, 134SE576; 141Wash287, 251P572; 193Wis224, 213 NW329.

1363-24 22AlaA615, 118S504; 81CalA 86, 253P178.

1363-25 22AlaA615, 118S504; Cal 292 P966; 102NJL621, 133A393; 103NJL 217, 135A821.

1363-26 218Ala105, 117S640; 81CalA 86, 253P178; 96CalA564, 274P392; CalA 291P591; 107Conn393, 140A760, 56ALR 1127; 82 IndA678, 147NE284; 228Ky 164, 14SW(2d)408.

1363-27 CalA 289P673; DC 42F(2d) 605; 149Md189, 131A343; Mass 171NE 452 (holding directed verdict for defendant erroneous, where finding of negligence of defendant's servant was warranted); 238Mich669, 214NW236; 82 NH268, 133A4, 46ALR380; NJSup 135 A773; 245NY158, 156NE650; 31 OhA 99, 166NE205; 48 RI 453, 138A52; 49 RI 146, 141A331.

1363-28 24F(2d)411; 30Ariz204, 245P 673 (contributory negligence not shown as matter of law, where plaintiff's acts were like those of his superiors); 238 Mich669, 214NW236; 83NH276, 141A 470; 146Wash340, 262P633. [b] (2) Plaintiff shot by watchman who claimed plaintiff was about to steal certain property. 227Ky479, 13SW(2d)493.

1364-30 244Mich208, 221NW314; 192 NC377, 135SE115; 292Pa237, 140A903.

1364-31 213Ala627, 105S869 (refusal of affirmative charge on theory of independent contractor held not error); 104NJL424, 140A305; 219AppDiv181, 219NYS148; 22 OhA318, 154NE751; 291Pa485, 140A544; TexCivA 8SW(2d) 288; TexCivA 198SW(2d)850.

1364-32 32F(2d)145; 75CalA266, 242P 736; 94CalA703, 271P789; CalA 288P 1099 (question of assumption of control of means of work is for jury); 321 Ill 168, 151NE573; 260Mass225, 157NE 347; 235Mich240, 209NW124; 244Mich 208, 221NW314; 312Mo 150, 278SW979; 320Mo 95, 6SW(2d)617; 219MoA162, 272SW108; MoA 279SW157; MoA 284 SW171, 173 [citCyc]; MoA 291SW187; MoA 293SW432, 434 [citCJ]; MoA 299 SW66; MoA 19SW(2d)758; MoA 23SW (2d)1066 (whether right of control existed in master); MoA 27SW(2d)52; 83 NH29, 137A445; 219AppDiv181, 219 NYS148; 291Pa485, 140A544; 155Tenn 580, 297SW199; TexCivA 294SW625. See also MoA 31SW(2d)570. [a] (3) Whether distributor of gasoline was servant or independent contractor held for jury. 155Tenn580, 297SW199.

1364-35 320Mo 95, 6SW(2d)617; 48RI 453, 138A52.

1364-36 24F(2d)411; MoA 19SW(2d) 758 (admission of responsibility). [b] **Evidence held insufficient.**-228AppDiv 83, 239NYS629. [c] **Defendant is entitled to directed** verdict where plaintiff, struck by brick did not show where brick came from or defendant's control over it. 137Misc290, 241NYS689.

1364-36½-New. Evidence has been held insufficient, in view of written contract, to submit to jury question whether alleged independent contractor was really employee of corporation so as to render corporation liable for injuries to plaintiff. 171Ark51, 283SW7.

1365-39 214Ala317, 107S456; 252Mass 47, 147NE564; NJ 130A4.

1365-41 91Fla260, 107S406.

1365-41½-New. Judgment notwithstanding verdict held properly directed in favor of defendant under evidence. 171Minn105, 213NW541.

1365-42 But see MoA 277SW356.

1365-42½-New. Where customer sued both manager and corporation for malicious prosecution, court on jury's finding against corporation, properly instructed verdict against both defendants. 251Mich642, 232NW399.

1365-44 [a] (4) Instructions that hotel was not liable for injury to guest by falling elevator if contractor was not negligent in installing cables is proper where defective installation was only negligence charged. 68Utah85, 249P 437. [c] (7) Instruction not open to objection as placing burden on defendant that at time of accident their negligent employee was not engaged in defendant's business. 120Kan119, 242P 449. (8) Instruction excluding question of whether employee used truck on personal matter is erroneous. 90Fla145, 106S879. (9) Instructions failing to give milk route owner benefit of rule prohibiting drivers from permitting infants about wagon held error. 195NC 113, 141SE340. (10) Instruction that foreman must have been in performance of his duties is proper charge as to scope of authority. MoA 287SW827. [e] (2) Where evidence does not authorize inference of separate liability by master or servant, failure to charge thereon is not error. 35GaA804, 134SE 824. [f] **Instructions held sufficient.**-36GaA698, 137SE550.

1366-45 NJSup 140A8; 221AppDiv102, 222NYS602.

1366-46 212Ala325, 104S808. [a] **Held not avoidance of issue.** 175Ark43, 295 SW13.

1366-47 212Ala325, 104S808 (instruction not incorrect in failing to specify time and place of accident); 35GaA694, 134SE822; 36GaA698, 137SE850; 150 Md494, 133A458; 190NC449, 130SE171.

1366-48 [b] **Instruction in suit for injuries** from automobile driver by defendant's daughter as to effect of relationship held proper. 212Ala325, 104S 808.

1366-49 212Ala325, 104S808 (held not misleading); CalA 291P599; 150Md 494, 133A458; NC 155SE867. [b] **Instruction on issue of agency** in driving car held misleading in employing word "instance" instead of "command." 212 Ala325, 104S808.

1366-50 194NC172, 138SE595. [b] 320 Mo 95, 6SW(2d)617; TexCommnA 276 SW170.

1366-51 235 IllA440.

1366-53 235 IllA440. [b] **Instructions as to ownership of car** in suit for injuries from collision held not to invade province of jury. 212Ala325, 104S808.

1366-55 219Ala546, 122S677; 72CalA 57, 236P319; 120Kan119, 242P449.

1366-58 212Ala325, 104S808; Ala 130 S557. [b] **Modified requested charge** held not erroneous. 152Md694, 137A514.

1366-59 120Kan119, 242P449; 222MoA 758, 7SW(2d)734(2dcase).

1366-60 46 Ida334, 268P19; 229Ky245, 16SW(2d)1043; 323Mo 1089, 20SW(2d) 494; 227AppDiv62, 236NYS669.

1367-62 215Ala436, 111S17; 175Ark 988, 1SW(2d)77; MoA 27SW(2d)52.

1367-64 212Ala325, 104S808.

1367-65 212Ala325, 104S808.

1367-66 212Ala325, 104S808.

1367-67 212Ala325, 104S808; 46 Ida 334, 268P19; MoA 27SW(2d)52.

1367-68 175Ark988, 1SW(2d)77.

1367-72 [f] **Verdict held against weight of evidence.**-NJSup 138A104. [g] **Finding that plaintiff was negligent** in not asking for help was not inconsistent with verdict for plaintiff. 98 CalA568, 277P529(2dcase). [h] **Verdict finding for servant and against master,** where master's liability rests on servant is capricious or based on misapprehension of law and should be set aside. Va 153SE711. [i] **Refusal to enter judgment** for both defendants on ground implied finding for servant exonerated master is not error. Va 153 SE711.

1367-73 [b] **Judgment in favor of master** in suit for negligence of servant is defense to action by same plaintiff against servant on same cause. 27 Oh NPNS561.

1367-74 [b] 103NJL427, 135A886. [c] **As to servant,** upon rendition of such verdict, case stands as if it had never been tried. 103NJL427, 135A886.

1367-75 Ala 130S557; 71CalA439, 235 P651; 39GaA645, 148SE171(1stcase); 84 IndA480, 151NE625; 240Mich306, 215NW422; 167Minn84, 208NW546; 221 MoA205, 299SW830; 37 OklACR438 (dictum); 142SC125, 140SE443; 156SC 158, 153SE119.

1368-77 Ala 130S557; 214Ala492, 108 S388.

1368-77¼-New. But in such case denial of motion to direct verdict for both defendants is proper. 71CalA439, 235P 651.

1368-80 118Nebr705, 226NW318(2d case); 194NC98, 138SE424, 427 [quot CJ]; 37 OklACR433.

1368-81 194NC98, 138SE424, 427 [quot CJ]; 37 OklACR389; 156SC158, 153SE 119.

1368-82 194NC98, 138SE424, 427 [quot CJ].

1368-83 167Minn84, 208NW546 (rule recognized); 194NC98, 138SE424, 427 [quotCJ]; 139 Okl 123, 281P586; 140 SC123, 138SE675; 104WVa12, 138SE 749.

1369-84 194NC98, 138SE424, 427 [quot CJ].

1369-89 [a] 243 IllA1. [c] **Harmless remarks by court.**-244 IllA1. [d] **Bill of exceptions.**-30Hawaii337.

1369-89½-New. [§ 1603a] 13. **Damages.** A master is not relieved from exemplary or punitive damages by failure to authorize or ratify the act of the servant. MoA 298SW254.

1369-98 21F(2d)313.

1370-14 [g] (5) Inducing breach of contract of employment for definite term is illegal, such contract being property right of value to employer. 125Misc 689, 212NYS113. (6) Inducing breach of a contract of employment for indefinite term is not illegal, because either employee or employer may terminate contract at will. 125Misc689, 212NYS113. (7) Threats to induce employee to break unexpired contract of employment are illegal. 125Misc689, 212NYS113.

1371-27 But see 31F(2d)932.

1372-49½-New. Such statutes must be construed strictly in favor of liberty of action, liberty of contract, and liberty of person. 147Miss1, 112S597.

1372-51 147Miss1, 112S597.

1372-52 151Miss353, 117S512.

1373-60 151Miss353, 117S512 (date of expiration of contract is implied as that necessary to making and harvesting crop).

1373-61 171Ark1189, 287SW1014.

1373-63 147Miss1, 112S597.

1373-78 [b] 171Ark1189, 287SW1014.

1374-86 33NM411, 268P1026. [a] **Rights of mining company.**-287Pa171, 134A430, 47ALR745.

1375-99 [c] Iowa 228NW281 (though acknowledgment to assignment was defective).

1376-4 [a] **Actual fraud or fraudulent misrepresentations not necessary.** 126 Miss215, 213NYS705.

1376-17½-New. Act done with knowledge of employee's rights and with intent to interfere therewith is "malicious" within action for maliciously inducing breach of employment contract. 126Miss215, 213NYS705.

1376-19 [b] **Complaint held insufficient** as failing to show wrongful act. 156 Tenn273, 300SW563.

1377-24 See also 319Mo250, 38W(2d) 3b(2d case).

1377-26 [e] **Letters of plaintiff's employer to plaintiff held admissible.** 253 Mass433, 149NE142. [f] **Evidence of mental suffering of plaintiff held admissible.** 253Mass433, 149NE142.

1377-27 [b] (2) **BC** [1930] 1DomLR 930. (4) To warrant submission to jury whether defendants directly or indirectly demanded plaintiff's discharge or caused such discharge. 319Mo250, 38W(2d)3b2(2dcase). [c] **Evidence held** sufficient that discharge was solely on separate charge and investigation by employer and for failure to report after leave of absence. 319Mo250, 38W(2d) 3b2(2dcase).

1377-31 [c] **Whether defendant's statement caused plaintiff's loss of employment** held for jury. 253Mass433, 149NE142. [d] **Whether defendant authorized writing of letter** alleged to have caused plaintiff's loss of employment held for jury. 253Mass433, 149NE142. [e] **Whether defendant's silence** concerning certain statements showed him responsible for plaintiff's discharge held for jury. 253Mass433, 149NE142.

1378-43 See also Act No. 38 [1926] c 62, 164La405, 114876, 55ALR309 (where statute prohibits entering in nighttime citizen's premises without owner's consent, and moving or assisting in moving (casual or laborer).

1378-48 164La405, 114876, 55ALR309.

1378-49 164La405, 114876, 55ALR309.

1378-50 164La405, 114876, 55ALR309.

1378-57 143Miss709, 109SS37.

1378-65 154Miss646, 123S771.

1380-20 See also 272US306, 47SCt86, 71LEd248.

MASTERS' AND EMPLOYERS' ASSOCIATIONS

1382-9 244 IllA540.

1382-12 244 IllA540.

MATERIAL

1385-10 79Mont111, 255P722; **TexCivA** 29SW641.

1385-10 [a] **A furnace is clearly outside classification of building material.** [1930] 1DomLR996.

1386-23 79Mont111, 255P722.

1387-86 49Nev70, 236P559.

1387-86½-New. A material allegation is an allegation which plaintiff must prove in the trial in order to maintain his action. 49Nev70, 236P559.

1388-14 250Ky476, 295SW440.

MATTER

1390-81 130Misc588, 224NYS340.

1390-81½-New. "fact or facts." 130 Misc588, 224NYS340. [a] **Constituting whole or part of cause of action or defense.** 130Misc588, 224NYS340.

1390-82½-New. "Matter" is not synonymous with "evidence." 104WVa231, 139SE742.

1391-92½-New. "matters upon which person or persons are to be examined." 130Misc588, 224NYS340.

MATURE

1391-39 **TexCommA** 285SW1041.

1391-92½-New. "to become presently due." **TexCommA** 285SW1041.

MATURITY

1391-43½-New. Age of maturity may mean maturity in mind, character, and judgment, and not necessarily legal majority. 146Miss652, 112S691.

MAUSOLEUM

1392-50-99½-New. "A magnificent tomb or stately sepulchral monument." 10PaDist&Co465.

MAXIMUM

1392-13½-New. "maximum of federal aid." 169Ark52, 272SW852.

MAY

1392-53 154Tenn88, 290SW20, 21 [quot CJ].

1392-56 116Nebr61, 215NW798; 154 Tenn88, 290SW20, 21 [quotCJ].

1392-57 116Nebr61, 215NW798.

1392-61 154Tenn88, 290SW20, 21 [quot CJ].

1392-62 154Tenn88, 290SW20, 21 [quot CJ].

1392-64 256Mass600, 153NE619.

1393-65 154Tenn88, 290SW20, 21 [quot CJ].

1393-67 159La712, 106S123; 113 OhSt618, 150NE81; 122 Or684, 260P220, 221 [citCJ]; 289Pa437, 137A635; 154Tenn 88, 290SW20, 21 [quotCJ]; 36Wyo 460, 256P1039; Can [1928] 4DomLR190. [a] 318Mo444, 300SW1102. [e] **In statute relating to discretionary power of judge.** 159La712, 106S123.

1393-68 122 Or684, 260P220, 221 [cit CJ]; 154Tenn88, 290SW20, 21 [quot CJ].

1393-69 289Pa437, 137A635; 154Tenn 88, 290SW20, 21 [quotCJ]; 36Wyo 460, 256P1039.

1393-70 113 OhSt618, 150NE81; 284Pa 421, 131A253.

1393-71 246 IllA241; 284Pa421, 131A 253; 193Wis295, 214NW447.

1393-72 159La712, 106S123; 315Mo 681, 286SW363; 154Tenn88, 290SW20, 21 [quotCJ].

1393-73 75Mont240, 243P1073; 190NO 806, 131SE274.

1394-74 159La712, 106S123; 154Tenn 88, 290SW20, 21 [quotCJ].

1394-75 154Tenn88, 290SW20, 21 [quot CJ]; 193Wis295, 214NW447.

1394-76 159La712, 106S123.

1394-77 122 Or684, 260P220; 154Tenn 88, 290SW20, 21 [quotCJ]; **TexCivA** 288 SW518; 193Wis295, 214NW447.

1394-78 154Tenn88, 290SW20, 21 [quot CJ].

1394-79 122 Or684, 260P220; 154Tenn 88, 290SW20, 21 [quotCJ].

1394-84 256Mass600, 153NE619.

1395-92 116Nebr61, 215NW798.

1395-93 116Nebr61, 215NW798.

1396-21 [b] (1) 213Ala313, 1048762 (indebtedness that "may be" due, as used in mortgage).

1396-29½-New. "may furnish," 36 Wyo460, 256P1039.

MAYHEM

40 C. J.—2-1 32NM48, 250P842; 105 WVa398, 142SE254.

2-3 [a] (6) Other definitions. 116 Nebr582, 218NW386, 58ALR1322.

4-51 33PortoRico160.

4-55 32NM48, 250P842.

7-2 See also 105WVa298, 142SE254, 257 [citCJ].

7-13 105WVa298, 142SE254, 256, 257 [citCJ&Cyc].

8-17 32NM48, 250P842.

8-30 [a] Mo 256SW745.

9-45 148Va725, 138SE483.

12-39 See also 33PortoRico160 (mutilation resulting from attack with canecutting knife).

12-40 See also 33PortoRico160.

13-73 [a] 327 Ill68, 158NE362; 116 Nebr582, 218NW386, 58ALR1322; 36 OhA321, 172NE434; OklCr 287P804; 149Va457, 141SE115. (2) To support conviction for malicious maiming in prosecution for malicious wounding. 153Va877, 149SE481. [b] (3) To support conviction for wounding. 150Va 580, 142SE354.

13-75 [b] **Not necessary to prove intent,** it being sufficient that mutilation is result of battery. 33PortoRico160.

15-2 See also 32PortoRico816.

15-6 32PortoRico816.

16-30 293Pa322, 142A317.

MAYORAZGO

17-5 [a] **Distinguished from, and compared with, "fideicomiso."** 50Philippine 888.

MEANS

19-73 [a] (1) 6PaDist&Co785, 788 [quotCyc]. (2) 6PaDist&Co785, 788 [quotCyc].

MEASURE

19-88 [d] **"Measure," in constitutional amendment** relating to initiative, means only constitutional amendment or law. 262Mass603, 160NE439.

MEAT

19-99 See also 13CustA542.

MECHANICS' LIENS

40-2 CalA 290P673; CalA 290P620(2d case).

40-10 [a] **Mechanic's lien does not become an encumbrance against real estate** till set forth in document, verified and filed in conformity with statute. 314Mo151, 282SW698.

40-15 219Ala303, 122S173. [a] (1) 116Oh725, 157NE376.

40-16 TexCivA 297SW234.

42-60 91CalA268, 266P1025. [b] **In Texas.**—CivA 18SW(2d)339.

42-61 176Ark300, 28SW(2d)1093; 98 Fla475, 124S38; 98Fla1055, 125S21; 99Fla947, 127S896; 99Fla1151, 128S 801(2dcase); Fla 129S766; Fla 130S 577; 121Kan155, 246P999; 239Mich 593, 215NW57; 247Mich279, 225NW 556; 57ND224, 221NW1; 30 OhA84, 163NE921; 104WVa211, 139SE708.

43-63 121Kan155, 246P999. [c] **Equitable estoppel cannot be made basis** of mechanic's lien. 121Kan155, 246P 999.

43-64 121Kan155, 246P999; 239Mich 593, 215NW57.

44-67 170Ga164, 152SE441.

44-68 170Ga164, 152SE441.

44-70 98Fla1055, 125S21.

44-76 121Kan155, 246P999.

44-84 [a] **Acts (1916) No. 229 held to have no application** where contract is let to independent contractor. 162La 335, 110S495.

45-86 Fla 130S25; 243NY482, 154NE 531.

45-93 [a] **Actual improvement** is not necessary to establish lien. 170Minn24, 211NW957.

45-94 88PaSuper390.

45-96 121Kan155, 246P999.

46-97 Mo 295SW558.

46-1½-New. Statutes providing for mechanic's liens do not create new substantive right, but are remedial in character providing new means of enforcing payment of debt. 116 Oh725, 157NE 376.

46-1¾-New. The effect of the law is to make a building collateral security for work done and materials furnished, and to authorize a sale for the payment of a debt. 295Pa425, 145A525.

46-6 [a] (12) Requiring bond to protect materialmen and laborers. 147 Miss335, 112S469, 53ALR88. (13) Allowing reasonable attorney's fees as part of costs. 51Nev315, 274P921.

48-17½-New. Statute requiring lien claimants, as matter of substantive right, to file claims within thirty days cannot have retroactive effect. TexCivA 298SW(2d)493.

48-21 29F(2d)361.

49-37 247 IllA515.

49-38 45 Ida611, 264P665. [a] (3) Acts (1916) Nos. 229 and 262 held not in conflict. 161La1095, 109S913.

49-39 111Conn132, 149A225; 123 Or 354, 260P214.

49-44½-New. In order to take advantage of the mechanics' lien statute, its material jurisdictional provisions must be complied with. DelSuper 143A460.

49-44¾-New. Lien Law does not affect law of contracts or create any new contractual liability. 136Misc500, 241NYS 202.

50-51 91Fla354, 107S679; 99Fla947, 127S896; 233 IllA256; 163La132, 111S 651; 9LaA725, 120S420(?statcase); 6LaA 633; 11LaA291, 123S458; 11LaA703, 124S697; 13LaA141, 127S456(2dcase); 47RI 203, 132A4.

50-52 233 IllA256.

51-56 170La1083, 129S644.

51-59 8F(2d)125.

51-60 8F(2d)125; 33Ariz451, 265P 606, 607 [citCJ]; 178Ark977, 128SW (2d)911; 202Cal601, 262P29; 202Cal 606, 262P31; 90CalA71, 265P572; 48 Ida271, 281P1111; 326 Ill633, 158NE

428; 253 IllA520; 225Ky501, 9SW(2d) 229; 221MoA17, 297SW470; MoA 284 SW525; MoA 287SW824; MoA 288SW 979; 222MoA1029, 9SW(2d)808(2d case); MoA 12SW(2d)512(2dcase); 120 Or163, 251P268; 299Pa1, 148A904. [b] (2) 108Conn232, 142A847.

52-61 94CalA119, 270P751; 45 Ida611, 264P665; 47 Ida747, 278P775; 102NJL 363, 132A606; 120 Okl 164, 251P97.

52-62 120 Okl 164, 251P97; 120 Or 163, 251P268.

52-66 202Cal 706, 262P320; 91CalA 268, 266P1025.

53-74 251Mich57, 231NW112; 155Tenn 597, 296SW11.

53-80 7Alaska638; DC 39F(2d)504; 326 Ill 633, 158NE428; 239Mich50, 214 NW107; 155Tenn597, 296SW11. [c] **Claimant must bring himself within terms of statute.**–181Ark700, 27SW(2d) 1011.

53-82 DC 39F(2d)504; 103WVa1, 136 SE399; 103WVa318, 137SE356.

54-84 251Mich57, 231NW112.

54-85 103WVa1, 136SE399.

54-86 103WVa1, 136SE399.

54-91 TexCivA 29SW(2d)493.

56-12 [b] (8) Other instances. 11LaA 377, 122S290.

56-29 220AppDiv3, 220NYS455.

56-31 220AppDiv3, 220NYS455; 227 AppDiv745, 236NYS638; 137Misc622, 244NYS312.

56-32 See also 42 Ida391, 246P962.

57-43 125Kan744, 266P106. [a] (2) Neither statute requiring public officers to exact from contractors mechanic's lien bond nor failure of officers to exact bond can affect rights under lien statute. 125Kan744, 266P106.

57-44 15F(2d)317, (West Virginia statute); 27F(2d)421 (stating North Carolina law); 46 Ida403, 268P26, 27 [cit CJ]; 153Miss635, 120S738; 14PaDist& Co 93; TexCivA 278SW527; 144Va56, 131SE437; 107WVa482, 148SE850.

58-46 TexCivA 278SW527.

58-47 46 Ida403, 268P26.

59-58 TexCivA 278SW527. [a] (3) 191 NC253, 131SE659. (5) Sewer system. 191NC253, 131SE659. (6) Municipal auditorium. TexCivA 278SW527.

59-66 152SC305, 149SE243.

59-67 46 Ida403, 268P26; 218Ky688, 291SW1062; MoA 9SW(2d)103.

60-83 [b] **Rolling stock.**–118 Or502, 247P780.

60-88 172Ark1152, 291SW977.

61-2 [b] **Where value of homestead exceeds five thousand dollars** (1) mechanic's lien can attack under South Dakota statute, though value of property is insufficient to pay incumbrances after deducting such amount. 51SD197, 212NW 876. (2) In such case lienor may pay owner five thousand dollars, pay off encumbrances, and apply balance of excess to his lien. 51SD197, 212NW876.

61-3 228Ky554, 15SW(2d)492; TexCivA 18SW(2d)796. [a] **Liens for improvements are not limited to improvements** on dwelling house. TexCivA 291 SW294. [b] **Property affected.**–TexCivA 291SW294. [c] **Materialman selling material to contractor for improvement of homestead** acquires no different rights than he would have had if material had been furnished for improvements on other real estate of owner. 136 Okl 233, 277 P242, 65ALR1186.

61-13 See also Alta [1928] 4DomLR 861. But see Alta [1928] 3DomLR266.

61-14 Alta [1928] 3DomLR266.

61-16 123 Or354, 260P214, 217 [citCJ].

61-17 123 Or354, 260P214, 217 [citCJ].

62-21 244Mich309, 221NW338.

62-23 123 Or354, 260P214, 217 [citCJ].

62-25 98Fla405, 123S820(2dcase).

62-28 Sask [1926] 3DomLR734, [1926] 2WestWkly689. See also 202 Iowa833, 211NW407.

62-32½-New. A person who takes possession of land and builds on it with the expectation to purchase has no such interest as will support a lien. Sask [1928] 1DomLR726.

62-37 174Ark362, 295SW370; 30Hawaii882. [c] **Abandoned equitable estate.**–Mechanic's lien cannot attach to abandoned estate of purchaser, where agreement gives vendor land and improvements on such breach. 202 Iowa 833, 211NW407. [d] **That materialman holds legal title to lots as security for** balance of purchase money does not defeat his lien for materials against purchaser's estate as equitable owner. 172 Ark870, 290SW597.

62-38 174Ark362, 295SW370; 132Misc 428, 230NYS91 (under oral contract); 123 Or354, 260P214, 217; 188Wis215, 205NW812. [a] **Rule applied** where contract of sale was executed after forfeiture of lessee's option of purchase had been waived. 188Wis215, 205NW812.

63-40 [g] **Tenant without leasehold interest** in premises occupied by him has no interest to which lien can attach. 85 IndA140, 151NE354.

63-44 [a] **After lessee's abandonment of property on default in rent,** materialman's lien against lessee for building is not enforceable against land or building where lease gives buildings to lessor at end of term. 145Wash584, 261P101. [b] **Court may order removal of building subject to lien** (1) where land is not subject to lien under statutes in some jurisdictions. 145Wash584, 261P101. (2) Building erected by lessee who defaulted in payment of rent is not removable where lease provides that buildings erected by lessee shall belong to lessor at end of term. 145Wash584, 261P101.

64-54 79CalA770, 251P331.

64-56 99Fla1151, 128S801(2dcase); Fla 129S597; 233 IllA256; 121Kan155, 246P999; 121Kan199, 246P1009.

64-59 CalA 290P673; 46 Ida595, 269P 591, 592 [citCJ]; 122Kan48, 251P196. [a] **Conversely there is no lien** where there is no improvement which becomes part of realty. 122Kan48, 251P196.

64-60 See also 164La521, 114S119.

65-80 79CalA770, 251P331. [a] **Power line** constitutes property appurtenant to land and is within definition of structure erected thereon. 79CalA770, 251P331.

65-89½-New. In California improvement must be permanent. 198Cal 151, 244P332.

65-91½-New. A power line built upon or along a public highway comes within the term "improvement," 79CalA770, 251P331.

65-91½-New. and is subject to a lien in favor of a materialman irrespective of ownership of fee to soil in which poles are erected. 79CalA770, 251P331.

66-7 106WVa74, 145SE599.

66-13 79CalA770, 251P331.

68-67 141 Okl 240, 284P889.

68-68 [a] 86PaSuper169.

69-89 [a] (5) Construction of rooms on front and second floor of building, without changing lateral frontage, does not constitute "addition." NJ 144A110.

70-97 152Wash604, 278P679, 63ALR 1246.

70-17 84CalA701, 258P612; 237 IllA 246.

70-18 237 IllA246. [b] (4) Tanks and kettles used in dye works are fixtures under lien laws. 237 IllA246.

70-19 33F(2d)162 (telephone company is not entitled to lien for installing switchboard and stations in hotel where they remained property of telephone company); 248 IllA104.

71-21 [b] **Dye tanks and kettles used in chemical plant** held not trade fixtures. 237 IllA246.

71-22 51Nev291, 274P196.

71-24 51Nev291, 274P196. [a] (2) 222 MoA1029, 9SW(2d)808.

71-41 See also 10LaA409, 121S372. But see 202 Iowa833, 211NW407. [b] 247Mich580, 226NW225; 222MoA1029, 9 SW(2d)808(2dcase).

74-73 248 IllA104, 107 [quotCyc].

75-93 198Cal 151, 244P332.

75-94 250 IllA468.

75-99 See also 118Tex534, 18SW(2d) 1063.

75-1 155Tenn597, 296SW11.

75-9 48 Ida271, 281P1111 (sewer).

77-35 CalA 290P673. [a] **Indebtedness must be created by furnishing of labor and materials** and not by subsequent act. CalA 290P673 (liability created by permitting owner to terminate lease on sale insufficient).

77-38 CalA 290P673. [c] **Tenant's payment for water, taxes, and interest** under lease providing for improvement cannot be made foundation for mechanic's lien. CalA 290P673.

77-40 174Ark492, 295SW966, 968 [cit CJ].

77-47 254 IllA377; 164La759, 114S 644; 12LaA597, 126S714; TexCivA 4 SW(2d)169.

77-48½-New. A contractor voluntarily advancing money to pay claims against the owner for labor and material which the contractor was not obligated to pay acquires no lien. 91CalA268, 266P1025.

78-60 [d] **One supplying insurance on building and bond to contractor** is not entitled to stop notice lien. 101NJEq45, 136A920.

78-63 [j] **Services not lienable.**–254 IllA 377.

79-71 124 Or661, 265P797, 799 [citCJ].

79-80 246Mich571, 225NW4.

81-93 Del 143A23; 90Fla582, 107S354, 358 [citCyc]; 246Mich571, 225NW4; MoA 282SW135; MoA 12SW(2d)512(2d case); 252NY336, 169NE405.

81-94 TexCivA 289SW461.

81-98 121Kan299, 246P503 (freight charges held properly included as entering into price of materials); 7LaA118; 216AppDiv395, 215NYS288; 21SaskL 25, [1926] 4DomLR619, [1926] 3West Wkly404.

81-98½-New. Nonremoval from premises of materials furnished after sale under mortgage foreclosure held not abandonment thereof by materialman. 243 NY482, 154NE531.

82-4 216AppDiv288, 215NYS288. [f] **Food furnished contractor** for use during construction is not material entitling him to lien. 92CalA227, 267P932.

82-21 242 IllA184; TexCivA 299SW 714. [b] **Time of furnishing.**–TexCivA 19SW(2d)368.

82-24 8LaA565.

83-43 173Ark1024, 296SW27; 120 Or 633, 253P520; 181Ark700, 27SW(2d) 1011; Ill 173NE67; TexCivA 2SW(2d) 911; 103WVa1, 136SE399; 103WVa318, 137SE356.

84-47 [b] **Material delivered after completion of building** does not entitle materialman to lien. 154Wash219, 281P 733.

84-48 216AppDiv395, 215NYS288; 135 Wash322, 237P735; 103WVa318, 137SE 356.

84-52 170Minn130, 212NW22.

85-55 103WVa318, 137SE356.

85-61 97CalA752, 276P146.

85-64 See also 35Wyo 15, 246P30, 32 [citCyc], 46ALR496.

86-70 118 Or502, 247P780.

86-78 216AppDiv395, 215NYS288.

87-90 94PaSuper90.

87-91 235 IllA417; 254 IllA377.

87-3 100NJEq181, 135A74; Oh 172NE 152. [b] **Transportation part of way.**–100NJEq181, 135A74.

88-4 100NJEq181, 135A74.

88-5 MoA 282SW135.

88-6 See also 127Me516, 145A134.

88-15 163La1, 111S470.

88-16 127Me516, 145A134; 47RI 203, 132A4; 50RI 375, 147A891. [a] **Materialman's method of bookkeeping** is not conclusive on question whether material was furnished for particular job. 50RI 375, 147A891.

89-21 47RI 203, 132A4.

89-24 See also 47RI 203, 132A4, 5 [cit Cyc].

90-29 217Ala23, 114S406; 206 Iowa 1280, 221NW930; Iowa 227NW606; 121 Kan155, 246P999; 127Me516, 145A134; 102NJL15, 131A131; NC 154SE628(2d case); 122 Okl 208, 253P485; 40 Okl ACR58; 6PaDist&Co 736; 103WVa449, 137SE889, 891 [citCJ], 52ALR689.

90-30 219Ala303, 122S178.

90-31 44 Ida68, 255P307.

91-33 219Ala303, 122S178; 170Ga164, 152SE441; 167Minn90, 208NW545; 243 NY482, 154NE531; NJCirCt 148A645; 227AppDiv630, 236NYS67; 6PaDist&Co 736. See also 207Cal 167, 277P327; 127 Me516, 145A134; MoA 16SW(2d)667. [a] **Consent of owner is proper basis** for mechanic's lien. 241NY435, 150NE 507. [b] **Conduct amounting to consent.**–217AppDiv224, 216NYS571.

91-34 217Ala23, 114S406; 169Ga641, 151SE368; 121Kan155, 246P999; 132 Okl 257, 270P322; 141 Okl 44, 283P985; 124 Or661, 265P797; 103WVa449, 137 SE889, 891 [citCJ], 52ALR689.

91-39 170Ga164, 152SE441.

91-40 141NC72, 139SE183.
91-44½-New. Consent to an improvement authorizes a lien for work done and materials furnished, although the contract is not completed because of default of the party contracting for the improvement. 242 IIIA184.
91-44½-New. A decree giving a lien for labor and materials furnished under contract of a third person with consent of the owner does not deprive the owner of the property without due process of law. 242 IIIA184.
92-45 86PaSuper169.
92-53 164La521, 114S119; 252NY336, 169NE105.
92-58 164La521, 114S119.
93-60 36P(2d)661.
93-78 172Ark70, 290SW697.
94-82 219Ala303, 122S178.
94-84 242 IIIA516.
94-95 DC 39F(2d)504; 181Ark700, 27SW(2d)1011; 136Misc810, 241NYS197.
94-96½-New. Father, lessor to son, held not the owner under statute. 204 Iowa613, 215NW637.
95-96 42 Ida245, 245P92, 45ALR575.
95-96 42 Ida245, 245P92, 45ALR575.
95-7 42 Ida245, 245P92, 45ALR575.
95-11 177Ark39, 58W(2d)724. [a] **Where purchaser is in possession** under sales contract which he later defaults, plaintiff furnishing materials has no lien on building repaired. 175Ark672, 300SW375, 58ALR907. [b] **Unpaid vendor** is not estopped where he did nothing to induce lien claimant to advance credit to purchaser. 175Ark672, 300SW375, 58ALR907.
95-18 123Kan632, 256P989, 192NC377, 135SE115; 122 Okl 208, 253P485; 40 OklACR58. [c] (1) 192NC377, 135SE115. [d] 192NC377, 135SE115. [e] 125 Or379, 265P793. (2) Builder being independent contractor himself, cannot bind owner as his agent in employment of another independent contractor. 14 PaDist&Co 141.
96-20 85 IndA140, 151NE354; 125 Or 379, 265P793, 795 [citCJ]. [b] (1) 145 Wash54, 261P101.
96-22 125 Or149, 265P793.
97-30 [a] (4) Other acts held to constitute ratification. 118Nebr129, 223NW670.
98-45 See also 202 Iowa833, 211NW407. But see 53ND858, 208NW383.
98-50½-New. Power of executors and trustees under a will to render the estate liable to a mechanic's lien while the state is in process of administration is subject to the control of the probate court. 53ND858, 208NW383.
98-56 98Fla171, 123S697. See also 266 Mass29, 164NE10.
98-57 94Ala141, 123S697, 98Fla175, 124S838; 241Mich331, 217NW909; 243 Mich445, 220NW836, 251Mich57, 231 NW112; MoA 258SW(2d)130.
98-58 MoA 288SW104.
98-60 193Wis482, 213NW283, 285 [citCJ].
98-67 [c] **In Texas.**–CivA 290SW784.
98-70 TexCivA 290SW784.
98-70½-New. **Defense of ignorance by wife** that legal effect of instruments she signed was the creation of a lien, held not available against an innocent purchaser. TexCivA 284SW234.
99-77 See also 217Ala23, 114S406.
99-79 217Ala23, 114S406; 176Ark818, 48SW(2d)29.
100-80 217Ala23, 114S406 (dictum); MoA 284SW525; 138 Okl69, 280P437.
100-94 MoA 30SW(2d)154.
101-98 217Ala23, 114S406; MoA 148W(2d)9.
101-1 217Ala23, 114S406.
101-4 104NJE309, 140A311.
101-5 254 IIIA569.
101-6 Man [1929] 4DomLR1061(2d cine.
101-9½-New. Acquiescence by a wife of making of an improvement is not shown by the fact that she subsequently joined with her husband in a deed of trust on property which was held by them by entireties. MoA 148W(2d)9.
102-14 217AppDiv224, 216NYS671.
102-30 MoA 288SW979.
103-32 86CalA572, 261P737; 146GaA239, 152SE602; MoA 168W(2d)667; MoA 258W(2d)130; 122 Okl 208, 253P485; 132 Okl 257, 270P322. [b] Iowa 227NW606. Erratum.–Strike out "Harlan v. Stufflebeem, 87 Cal. 508, 25 P686."
103-33 MoA 168W(2d)667; 122 Okl 208, 253P485.
104-38 122 Okl 208, 253P485.
104-43 Ark 318W(2d)401.
104-52 87Cal 508, 25P686.
104-55 [b] 222AppDiv441, 226NYS220.
104-58 141 Okl 44, 283P985.
105-60 204 Iowa613, 215NW637, 638 [quotCJ].
105-61 204 Iowa613, 215NW637, 638 [quotCJ].
105-62 204 Iowa613, 215NW637, 638 [quotCJ].
105-63 204 Iowa613, 215NW637, 638 [quotCJ].
105-64 237 IIIA596; 243 IIIA473; Tex CivA 278SW522. [a] **Where son of lessor** (1) was her general agent, and brought complainant and lessee together, she is deemed to have "knowingly permitted" work under statute. 237 IIIA596. (2) Notice of work done to general agent of complainant that tenant will pay for work. 237 IIIA596.
105-65 TexCivA 278SW522.
105-66 TexCivA 278SW522.
105-67 243 IIIA473; TexCivA 278SW522. [a] **Farm owner bound to give notice,** on learning of commencement of unauthorized improvements on day after they were begun. TexCivA 278SW522.
105-67½-New. Where remodeling of building by lessee was well under way before owner had knowledge thereof, materialman is not entitled to lien on realty. LaA 130S569.
105-72 204 Iowa613, 215NW637; 136 Misc386, 240NYS47; 120 Or163, 251P268. But see Wash 286P43.
106-75 47 Ida747, 278P775; 120 Or163, 251P268; Wash 286P43.
106-77 Ark 318W(2d)401; 218Ky493, 291SW715.
106-78 MoA 290SW641.
107-86 [a] **Rule applied even where removal could not be without damage to premises.** 204 Iowa613, 215NW637.
107-88 204 Iowa613, 215NW637.
107-90 125 Or379, 265P793.
107-92 [c] **Owner is estopped to assert that lessee has less interest** in property than that represented by him to claimant. MoA 290SW641.
108-3 Iowa 229NW266. [a] **Lessor does not waive provision against liability of property for improvements** by agreement with one of signers that latter shall furnish stated sum for improvements. Iowa 229NW266.
108-12 42 Ida245, 245P92, 45ALR575.
108-13 42 Ida245, 245P92, 45ALR575.
108-19 203 Iowa748, 211NW225.
109-31 202 Iowa833, 211NW407.
109-32 202 Iowa833, 211NW407. [a] **Where tenant in common prescribes conditions upon which improvement may be made by cotenant in possession,** but such conditions are not brought to knowledge of person doing work and claiming lien, though tenant out of possession knows work is in progress, such tenant is presumed to have consented to furnishing of labor. 53ND858, 208NW383.
110-59 104Conn653, 134A71, 47ALR259.
110-62 MoA 178W(2d)581; 53ND858, 208NW383.
110-63 Ind 171NE321; 202 Iowa833, 211NW407.
111-70 177Ark81, 58W(2d)726; 44 Ida68, 255P307. [a] **In Oklahoma.**–139 Okl 54, 281P221.
111-72 48 Ida271, 281P1111; MoA 285SW104.
111-74½-New. Purchaser under oral contract cannot charge land with lien until sale is consummated. 181Ark700, 278W(2d)1011.
111-74½-New. Subsequent acquisition of title by such purchaser does not relate back to date of oral contract. 181Ark700, 278W(2d)1011.
111-77 Ala 128S893; 110Conn392, 148A328; 32NM5, 250P21; NM 290P797; TexCivA 238SW(2d)879. [a] (1) 128Kan370, 278P12. [d] **Purchaser taking possession under oral contract** may subject land to mechanic's lien. 110Conn392, 148A328.
111-82 44 Ida68, 255P307; 83 IndA 508, 149NE92; NJCir 147A499; 32NM 5, 250P21; 27 OhNPNS103; 125 Or379, 265P793; 137Wash343, 242P375. But see 30F(2d)372.
112-83 Ind 171NE321; 137Wash343, 242P375. [c] IndA 169NE84. [d] NJ Cir 147A499.
112-85 237 IIIA246.
112-86 170Ga164, 152SE441.
113-97 44 Ida68, 255P307, 309 [citCJ].
113-98 132Misc428, 230NYS891. [a] **Vendor is not required to forfeit contract** immediately on default to prevent attachment of liens. 137Wash343, 242P375.
113-1 44 Ida68, 255P307, 309 [citCJ].
113-4 45 Ida611, 264P665, 667 [citCJ& quotCyc]; 237 IIIA246; Ont [1929] 4 DomLR32 (where contract provides for reconveyance on completion of improvement).
113-5 202 Iowa833, 211NW407; 137 Wash343, 242P375. [a] **Contract authorizing installation of bathroom fixtures** held not to contemplate installation of furnace. 202 Iowa833, 211NW407.
114-7 45 Ida611, 264P665, 667 [citCJ]. [a] **Vendee is not necessarily vendor's agent** (1) under statute providing that builder shall be held to be agent of owner. 32NM5, 250P21. (2) Owner under such statute has reference to person causing building to be constructed in view of other provisions of statute. 32 NM5, 250P21. (3) So that, under executory contract, vendee is builder only in sense that he causes improvement to be made. 32NM5, 250P21.
114-17 250Mich203, 229NW437. But see 139 Okl 54, 281P221.
114-23½-New. Materialman furnishing materials to person holding option to buy land has no lien on land purchased from owner by transferee of option. 41 GaA818, 155SE92.
115-28 40 OklACR58.
115-29 [e] **Contract made on Sunday.**–Sask [1929] 4DomLR289.
115-35 40 OklACR58.
115-37 40 OklACR58.
115-42 11LaA291, 123S458 (contract of employment made by contractor).
116-56 167Minn90, 208NW545.
116-57 167Minn90, 208NW545; 243NY 482, 154NE531. [b] 41GaA758, 154SE 914; 53ND858, 208NW383. [c] 83 IndA 508, 149NE92.
116-60 241NY435, 150NE507; 30 OhA 435, 165NE55. [d] **Actual or express consent** is necessary, not mere acquiescence, under Lien L. § 3. 132Misc428, 230NYS891.
116-61 170Ga550, 153SE361; 241NY 435, 150NE507.
116-62 83 IndA508, 149NE92.
116-63 241NY435, 150NE507. But see 53ND858, 208NW383.
117-64 241NY435, 150NE507.
117-66 241NY435, 150NE507.
117-67½-New. Title of purchaser at mortgage foreclosure sale may be subject to a lien of one who furnished materials to the former owner if the purchaser subsequently improves property therewith. 243NY482, 154NE531.
117-67½-New. Purchaser who annexed to realty materials furnished to the former owner could not deny consent to the furnishing of such materials. 243 NY482, 154NE531.
117-73 53ND858, 208NW383.
117-77 But see 44 Ida68, 255P307.
117-83 32F(2d)157 (one in privity with owner has lien).
117-89 9LaA373, 120S522; 122Okl 208, 253P485; 40 OklACR58.
118-90 257Mass453, 154NE184. [b] 257Mass453, 154NE184.
119-99 TexCivA 30SW(2d)518.
119-19 See also 266Mass29, 164NE810.
121-34 35F(2d)251 (statute providing for application of proceeds of sale or mortgage held not to indicate intention to repeal or modify homestead exemption statute); TexCommnA 12SW(2d) 991.
121-35 TexCivA 290SW784; TexCivA 28W(2d)911. [c] **Acknowledgment.**–TexCivA 3SW(2d)576.
121-36 TexCivA 290SW784.
121-41 205Cal 685, 272P577; 162La 335, 110S495; 108NJL8, 134A865; 105

NJL283, 145A465; 137Wash343, 242P 375.

122-45 [b] (6) Though contract is not recorded, there is lien if recorded within forty-five days of completion of work. 9LaA373, 120S522. (7) Statute providing for creation and preservation of liens by recording written contract is not exclusive method of preserving privilege. LaA 128S702.

122-53½-New. [§ 128a] a½. **Notice of Filing.** Under some statutes actual notice of filing notice of a subcontract must be given by the subcontractor to the owner, 261Mass417, 158NE785.

122-53½-New. and constructive notice from filing alone is insufficient. 261 Mass417, 158NE785.

122-55 102NJL15, 131A131.

122-59 102NJL15, 131A131.

123-70½-New. Under statute requiring surety bond to be attached to and record with contract recording of contract and not recording of bond protects liens. 170La1083, 129S644.

123-71 85Colo 262, 275P12.

124-31 102NJL15, 131A131; 99NJEq 42, 133A430; 105NJL5, 143A803. [b] **Lien claimants have no remedy by filing lien claims** but remedy is by notice to owner where furnishing labor and materials after filing of contract. 39 F(2d)341.

124-32 102NJL15, 131A131. [b] (1) But see 102NJL15, 131A131. (3) Where part of materials are furnished to contractor before he has obtained contract, materialman is not entitled to lien thereon merely because contractor thereafter procures contract and actually uses such material. 102NJL15, 131 A131. [c] **Lien claimants cannot object to validity of contract** under which they furnished labor and materials. 39F(2d)341.

124-86 [a] **Partial delivery before filing of, but not pursuant to, contract.**–102NJL15, 131A131.

124-88 But see LaA 124S700.

124-89 See also 85Colo 262, 275P12; Ind 165NE550. [b] **In Louisiana.**–162 La335, 110S495.

125-94½-New. Surety has been held liable for material furnished a subcontractor, although the contract was not recorded. 162La335, 110S495.

125-94½-New. Failure of the owner to file a complete contract prevents him from claiming estoppel to assert liens because of failure to give personal notice to owner of claims against principal contractor. 85Colo 262, 275P12.

125-96 [a] **Building contract recorded with contractor's bond and subsequent unrecorded contract** for additional story has been held not separate and distinct contract. 169La731, 125S871.

125-3 213Ala646, 106S42; CalA 290P 620(2dcase); 32NM5, 250P21; 123 Or 354, 260P214; 124 Or249, 264P428; 124 Or661, 265P797; Or 286P520. [b] **In Alabama.**–213Ala646, 106S42.

125-4 120 Or163, 251P268; 123 Or354, 260P214.

125-8 85CalA1, 258P690; 124 Or249, 264P428.

126-14 124 Or661, 265P797.

126-16 83Colo 335, 264P1087.

126-23 [b] 84CalA701, 258P612.

127-40 83Colo 335, 264P1087.

127-43 86CalA572, 261P737; 124 Or 661, 265P797.

127-49 124 Or249, 264P428.

127-51 124 Or249, 264P428.

127-55½-New. The statute has reference to the particular contract or scheme of improvement in progress or contemplation at the time, 32NM5, 250 P21.

127-55½-New. and that knowledge that a vendee intended to erect or was erecting one kind of a structure on the premises would not impute knowledge of intention to erect or erection of an entirely different kind on the same premises under a different contract. 32 NM5, 250P21.

127-56 But see 85CalA1, 258P690 (knowledge of broker who leased premises or of one calling to collect rent is insufficient to bind owner).

127-62 CalA 290P620(2dcase); 123 Or 354, 260P214, 217 [quotCJ].

127-63 123 Or354, 260P214. [c] **Reference to particular structure.**–CalA 290 P620(2dcase).

127-64 123 Or354, 260P214, 217 [quot CJ].

127-65 123 Or354, 260P214, 217 [quot CJ].

128-71 See also 204Cal 351, 268P331.

129-99½-New. Materialman participating in advertising project as one of group of coöperators held not entitled to lien. 130Kan45, 285P516.

129-20 141 Okl 240, 284P889 (mechanics or skilled laborers).

129-32 42 Ida391, 246P962.

129-32½-New. A laborer under a subcontractor has no right to file a lien under statutes in some jurisdictions. 8PaDist&Co 583.

130-36½-New. A materialman who paid for labor to one whose claim was not assigned to him is not entitled to a lien for money so paid, 172Ark870, 290 SW597.

130-36½-New. although he is entitled to personal judgment against the owner for the amount so paid at his request. 172Ark870, 290SW597.

130-42 158Md615, 149A438 (compliance with statute); 121 Or285, 254P 803. See also 9LaA698, 119S765.

130-44 115 Oh555, 155NE131.

130-48 115 Oh555, 155NE131.

131-55 12LaA680, 127S843.

131-56 [a] **One buying materials** and furnishing them to contractor by delivery from original seller may have materialman's lien. 174Ark35, 294SW 62.

132-79 [a] (2) Corporation furnishing material and labor to install heating plant. 42 Ida391, 246P962. (3) Corporation installing inside wiring of residence. 42 Ida391, 246P962.

132-93 179Ark132, 14SW(2d)549; NM 290P797 (materialman as original contractor).

133-94 [a] (3) "One who furnishes both labor and material for the erection of any building, house, or structure." Del 143A23, 60ALR1252. [d] **Superintendent.**–214Ala145, 106S857.

133-97 CalA 290P673.

133-3 TexCommnA. 300SW30. [a] **Contractors on cost plus basis** held within lien provision of constitution as regards services personally performed. TexCommnA 300SW30.

134-5½-New. That a sum of money equivalent to the amount due for labor is paid during the course of the work does not establish that a person seeking to enforce a lien was a materialman where the contract shows otherwise. 101CalA605, 281P1034.

134-17½-New. A statute establishing a building lien in favor of contractors and others does not include a subcontractor. 7LaA683.

134-20 120 Or163, 251P268. See also 42 Ida391, 246P962, 965 [quotCyc].

134-21 See also 42 Ida391, 246P962, 965 [quotCyc].

134-22 120 Or163, 251P268. See also 42 Ida391, 246P962, 965 [quotCyc].

135-40½-New. Contract giving lien and other instruments referred to therein construed together. TexCivA 30SW (2d)393.

135-43 TexCivA 287SW144.

135-44 253 IllA520. [a] But see Ind 164NE721.

135-45 223AppDiv220, 227NYS698.

137-68 123Kan632, 256P989.

138-79 [a] (4) Refusal of contractor to furnish statement of subcontractors' claims justifies owner's refusal to make payments and contractor's subsequent abandonment of work defeats lien. 253 IllA520.

139-89 42 Ida391, 246P962.

139-93 Ark 31SW(2d)401.

139-2 42 Ida391, 246P962.

140-12 8PaDist&Co 651.

140-16 85Colo 5, 273P19.

141-17 115 Oh555, 155NE131.

141-20 115 Oh555, 155NE131.

142-40 14PaDist&Co 141.

142-45 Ariz 285P1037 (contractor agent of owner under statute); 72CalA 1, 236P357; 247 IllA515; 169La731, 125S871 (where materials are used confusedly); 169Minn485, 211NW834. [c] **In Alabama.**–213Ala646, 106S42.

143-47 TexCivA 16SW(2d)848.

143-48 162La255, 110S413; 8LaA115; 94PaSuper90.

145-67 11LaA291, 123S458.

145-68 TexCivA 20SW(2d)358 (no lien for materialman where owners owed contractor nothing); Ont [1929] 3DomLR379.

145-75 156Tenn19, 300SW574.

145-77 But see 241Mich534, 217NW 909.

146-81 31NM334, 245P252.

147-90 101NJEq45, 136A920; 156 Tenn19, 300SW574.

147-92 101NJEq45, 136A920; Tex CivA 283SW596.

147-94 [a] (6) Claim for installation of ventilators actually used is lienable, though ventilators were not specified in contract. 169La319, 125S258.

148-97 11LaA291, 123S458. But see Ark 7SW(2d)791.

148-98 But see 156Tenn19, 300SW574.

148-99 TexCivA 283SW596.

148-8 179Ark132, 14SW(2d)549; 31NM 334, 245P252.

148-10 IndA 149NE79.

149-13 242 IllA37; IndA 152NE177; Ind 165NE550; 88PaSuper586.

149-17 295Pa425, 145A525.

149-22 [b] (7) Description of property held sufficient to give subcontractor notice. Ind 165NE550.

150-24 88PaSuper586.

150-38 [a] 295Pa425, 145A525.

150-43 169La319, 125S258.

151-44 MoA 289SW359, 362 [quotCJ].

151-45 169La319, 125S258.

151-52 Ont [1929] 4DomLR32.

151-55 88PaSuper270.

152-61 197NC495, 149SE858.

152-69 See also 105NJL370, 145A323.

153-79 91Fla354, 107S679.

153-80 [a] **Work completed by owner held covered by contract.**–170La10, 127 S347(2dcase).

153-81 91Fla354, 107S679.

153-84 [b] **Thus subcontractor is not** entitled to lien on difference between balance unpaid and cost of completion by owner. 216AppDiv313, 214NYS768 (contract did not provide for completion of work in abandonment).

153-84½-New. Under some statutes the owner may supply any deficiency in performance independently of contract stipulation and deduct cost from unpaid portion of contract price. 143Va451, 130 SE396.

153-84½-New. Owner can use amount unpaid in completing job, where contractor fails to do so, and claim priority therefor over mechanic lienholders. Ala 129S285.

153-86½-New. **On completion through another's agency** after filing of lien, it attaches only to payment earned under contract. 216AppDiv313, 214NYS768.

153-86½-New. Completion of construction prior to notice by owner of contractor's default cannot be set up by claimants whose claims were timely recorded. La 127S347(2dcase).

153-87 91Fla354, 107S679. But see 167 La712, 120S61.

155-16 29F(2d)452 [certiorari den 278 US657, 49SCt185(4thcase), 73LEd565]; Ala 129S285; 102NJL15, 131A131; 101 NJEq45, 136A920; TexCommnA 27SW (2d)135; TexCivA 283SW596; TexCivA 15SW(2d)725; [f] (4) Right of subcontractor under his lien could not be prejudiced by owner giving to his contractor book credits for purpose of reducing contractor's indebtedness. 111Conn132, 149A225.

155-17 219Ala328, 122S343; 102NJL601, 133A200; 102NJL15, 131A131; 101NJ Eq45, 136A920. [a] (1) 102NJL601, 133 A200.

155-19 102NJL601, 133A200; 102NJL 15, 131A131; 101NJEq45, 136A920; 104 NJL223, 141A4; TexCivA 295SW308. [c] **Honest error** in amount of stop notice claim does not destroy its validity. 101NJEq45, 136A920.

156-20 246Mich700, 225NW521.

156-21 105NJL537, 147A198 (even where owner had paid contractor in advance of contract, he is not liable if nothing was due contractor when stop

notice was served); TexCivA 18SW(2d) 224.
156-22 102NJL601, 133A200; TexCivA 15SW(2d)725.
156-26 102NJL601, 133A200; 99NJEq 70, 132A507.
156-33 102NJL15, 131A131.
156-38 105NJL370, 145A323.
157-43 TexCivA 283SW596.
157-51 101NJEq45, 136A920.
157-52 154Miss587, 122S544. [d] (1) But see 102NJL15, 131A131. (2) Describing property as on "avenue" instead of "road" is sufficient and not misleading where remainder of description fully and accurately identified property. 102NJL15, 131A131. [g] NJCh 144A319.
158-54 [a] (4) Under New Jersey statute, where last payment under contract is to be made sixty days after completion of building, service after completion, but before expiration of such time, is sufficient. 102NJL15, 131A131. (5) In North Carolina, materialman acquires no lien on owner's property by notice to him after he pays contractors in full. 192NC377, 135SE115. (6) But this rule does not apply where contractor is owner's agent. 192NC377, 135SE115. (7) In North Carolina notice must be given before owner settles in full with contractor. 192NC407, 135SE136. [b] **Notice held timely.**–CalA 279P491(1stcase).
158-56 [b] (3) Where contractor has died, absconded, or cannot be found, service upon him is not required. 102NJL15, 131A131. [f] **Husband, agent for wife.**–102NJL15, 131A131. [g] **Owner not such when contract made.**–102NJL 15, 131A131.
158-58 99NJEq70, 132A507.
159-79½-New. Under some statutes, payment by the owner to a contractor in full before due is no bar to a materialman's right of recovery against the owner. 102NJL15, 131A131.
160-83 216Ala164, 112S826.
160-84 121Kan199, 246P1009.
160-85 88CalA777, 264P311; 253 IllA 520; 121Kan155, 246P999; 121Kan199, 246P1009; 217Ky195, 289SW282; 263 Mass27, 160NE287; 239Mich593, 215 NW57; MoA 24SW(2d)673; Oh 172NE 283; 104WVa211, 139SE708.
161-87 Fla 130S611; 57ND224, 221NW 1; 144 Okl 21, 288P935; 118Tex534, 18 SW(2d)1063.
161-88 NJCh 151A397.
161-89 120 Okl 164, 251P97; 101WVa 567, 133SE135; 102WVa470, 135SE575; 103WVa1, 136SE399; 104WVa211, 139 SE708.
161-99 98Fla1055, 125S21.
161-1 216Ala164, 112S826.
162-2 202Cal 706, 262P320.
162-4 93Fla587. 112S560.
162-5 245 IllA330; 115 Oh555, 155NE 131; 10PaDist&Co 217; 104WVa211, 139 SE708; 197Wis562, 222NW818.
162-6 176Ark818, 4SW(2d)29; 104Conn 653, 134A71, 47ALR259; 9LaA725, 120S 420(1stcase); 5LaA338; 241Mich647, 217NW922; 120 Or163, 251P268; 121 Or 285, 254P803; 123 Or354, 260P214; 123 Or651, 262P263; 125 Or595, 268P55; 145Wash561, 261P86; 147Wash445, 266 P701. Contra 115 Oh555, 155NE131. [a] (6) Notice is required when purchase is made by statutory agent but not when made by nonstatutory agent. 145Wash561, 261P86.
163-7 214Ala8, 106S49 (pleading and proof unnecessary); 173Ark445, 292SW 695; 120 Or163, 251P268; 125 Or89, 265 P792; 124 Or661, 265P797; 125 Or256, 266P633; 145Wash561, 261P86; 102WVa 470, 135SE575. [d] **Persons in privity with owner.**–98Fla1055, 125S21. [e] **Where purchaser took possession and proceeded with construction** notice need not be given to vendor. Or 286P982.
163-8 102WVa470, 135SE575.
163-8½-New. , or with a general contractor of corporation owner, 102WVa 470, 135SE575.
163-8½-New. or its subcontractor, 102 WVa470, 135SE575.
163-9 Mich 233NW390(1stcase).
164-17 326 Ill 633, 158NE428.
164-23½-New. **In Colorado** provisions of the statute are permissive, hence materialmen do not waive liens by failing to give notice. 85Colo 262, 275P12.
164-26 176Ark818, 4SW(2d)29; 98Fla 1055, 125S21. [a] 98Fla1055, 125S21.
164-34½-New. The owner will be estopped to dispute a materialman's lien for failure to give notice where such failure was due to the owner's statement, on delivery of the material, that the estimate would be allowed and payment would be made to the contractor sufficient to pay therefor. 147Wash445, 266P701.
164-34½-New. Where owner accepted contractor's order in favor of materialman before materials were furnished materialman need not give notice of extent thereof. Ala 129S285.
164-36 91Fla354, 107S679; 295Pa425, 145A525; 104WVa211, 139SE708.
164-37 123 Or651, 262P263.
165-41 124 Or661, 265P797.
165-43 326 Ill 633, 158NE428; 126 Or 76, 268P989.
165-49 91Fla354, 107S679.
165-51 [f] But see 33F(2d)162.
166-64 Wis 232NW857. See also 178 Ark977, 12SW(2d)911.
166-67 125 Or595, 268P55.
166-68 123 Or354, 260P214.
167-84 88PaSuper586.
167-88 120 Or163, 251P268; 123 Or 354, 260P214. [b] 123 Or651, 262P263; 147Wash369, 266P167.
167-89 101WVa567, 133SE135; 104 WVa211, 139SE708.
167-96 26 OhNPNS257.
167-3 237 IllA544. [a] **Subcontractor** (1) who gave notice within sixty days of delivery of last portion of material gave notice in time. 237 IllA544. (2) Subcontractor held not required to give separate notices though there were twenty-one orders, under Lien Law. 237 IllA544.
168-18 219Ala328, 122S343; 98Fla 1055, 125S21; 235 IllA291; 104WVa 211, 139SE708, 709 [quotCJ]. [a] 235 IllA191. [b] **Notice need not be addressed to anyone.** Wis 232NW857.
168-19 10PaDist&Co 13; 104WVa211, 139SE708, 709 [quotCJ].
168-20 104WVa211, 139SE708, 709 [quotCJ].
168-21 [a] 104WVa211, 139SE708.
168-23 202Cal 706, 262P320.
168-24 103WVa1, 136SE399, 400 [cit CJ].
169-25 103WVa1, 136SE399, 400, 401 [citCJ].
169-34 98Fla1055, 125S21.
169-43 125 Or595, 268P55; 104WVa 211, 139SE708.
170-52 [b] **Notwithstanding amendment to New York Statute of 1916** (Lien L. (L. [1916] c 507) notice of lien must contain agreed price on value of labor performed or materials furnished. 218 AppDiv548, 218NYS612.
170-54 96PaSuper544; 104WVa211, 139SE708. [b] (4) Statement of excessive amount held cured by amendment. 143Wash266, 255P107.
170-57 104WVa211, 139SE708.
170-57½-New. the nature of the subcontract; 104WVa211, 139SE708.
170-59 [b] **List of all persons furnishing material** must be furnished by contractor. 34 OhA447, 171NE247.
170-60 198NC273, 151SE631 (if contract is for gross sum those requirements are unnecessary). [c] **Nature of labor furnished.**–96PaSuper535 (statement insufficient).
170-61 96PaSuper535; 96PaSuper544 (dates when furnished). [d] 96PaSuper535 (dates not given).
171-73 90PaSuper197.
171-74 90PaSuper197.
171-82 See also 30F(2d)372.
171-83 98Fla1055, 125S21; 125 Or595, 268P55.
172-86 241Mich235, 217NW9. [a] (3) MoA 285SW104.
172-87 MoA 285SW104; 129 Or102, 275P677.
172-90 123 Or651, 262P263; 96PaSuper535; 104WVa211, 139SE708.
172-92 237 IllA544.
172-93 98Fla403, 123S820(2dcase) (notice describing lot where lien is claimed on only part of lot); 236 IllA447; 237 IllA544. [a] **Description held insufficient** (1) being in alternative, to identify premises. 237 IllA416. (2) Where notice gives street and number, leaving alternative description, notice remains insufficient. 237 IllA416.
172-94 143Wash266. 255P107. See also 150Wash170, 272P514.
172-95 237 IllA416.
172-96 123 Or651, 262P263.
172-97 123 Or651, 262P263.
172-6 94PaSuper269.
172-7½-New. A lien will not be invalidated by failure of a notary before whom the notice was sworn to in another state to affix his seal to the jurat, where the defect is cured by amendment after the expiration of the time allowed for giving notice. 103WVa1, 136SE399.
172-9 101WVa567, 133SE135.
172-10 MoA 14SW(2d)9; 101WVa567, 133SE135.
172-14 120 Or163, 251P268.
173-16 MoA 285SW104; MoA 14SW (2d)9.
173-16½-New. or with an architect, 235 IllA191.
173-17 98Fla1055, 125S21. [a] **Cautionary notice** of intention to furnish materials to contractor must be served on owner or his agent. 99Fla947, 127S 896.
173-18 98Fla1055, 125S21.
173-30 33F(2d)162 (under Illinois statute).
173-32 239Mich593, 215NW57; 247 Mich279, 225NW556; MoA 296SW448. [b] **Sufficiency of service of statement.**–241Mich235, 217NW9. [c] **Segregation of extras unnecessary.**–241Mich235, 217 NW9.
173-34 [a] **On whom demand served.**–239Mich190, 214NW191. [b] **Sufficiency of demand.**–239Mich190, 214NW191.
173-43½-New. One furnishing and installing linoleum, shades, ozite, and curtain rods in a building is a contractor rather than a materialman within a statute requiring contractors, but not materialmen, to furnish statements although the labor constitutes only ten per cent. of the cost. 239Mich593, 215 NW57.
174-45 [b] **Sufficiency of statement.**–Where owner makes written demand for statement of materials furnished, response that on stated date letter had been sent explaining entire situation does not satisfy requirement of written statement of materials furnished and not paid for. 239Mich191, 214NW191.
174-52 121Kan199, 246P1009; 3LaA 351; 4LaA674; 6LaA730; 136Misc500, 241NYS202; 102WVa470, 135SE575.
175-55 164La388, 113S886.
175-56 121Kan199, 246P1009; 102 WVaA470, 135SE575.
175-67 [a] **Commencement of cross action** to establish lien within ninety days after delivery of last materials perfected lien, regardless of lien statement. 173Ark1024, 296SW27.
175-76 57ND224, 221NW1.
175-78 See also Can [1928] 4DomLR1.
175-79½-New. One whose contract is such as to make him a contractor, not a laborer, must furnish a statement. 26 OhNPNS257.
175-80 26 OhNPNS257.
176-81 1LaA309; 21SaskL25, [1926] 4DomLR619, [1926] 3WestWkly404.
176-84½-New. An adverse lienor may assert the invalidity of a lien because of failure to file a statutory statement. 26 OhNPNS257.
176-86 136 Okl 233, 277P242, 65ALR 1186; 137 Okl 52, 278P336.
176-94½-New. That laborers and materialmen are paid does not excuse a contractor from filing a statement. 26 OhNPNS257.
176-99 94CalA119, 270P751.
178-23 249Mich455, 229NW310.
178-29 26 OhNPNS257. [a] **Requirement of one general contract** (1) applies as well to contracts for improvements in buildings as to contracts for construction of buildings. 26 OhNPNS 257. (2) Where material was furnished upon information that three buildings were to be erected upon partial orders with expectation that further material would be ordered, which was done, all was under one general contract. 26 OhNPNS257.
179-35 192Wis482, 213NW283.
179-37 26 OhNPNS257.
181-71 102WVa470, 135SE575.

182-81 102WVa470, 135SE575; 101 WVa567, 133SE135, 139 [citCyc].
183-93 4LaA66; 101WVa567, 133SE 135; 102WVa470, 135SE575. [a] **Claimant is not required to mandamus clerk** or otherwise by court process compel him to record notice of claim. 101WVa567, 133SE135.
183-94 101WVa567, 133SE135, 139 [cit Cyc]; 102WVa470, 135SE575; 103WVa 318, 137SE356.
184-18 [a] 130Kan543, 287P618 (forty days delay held not unreasonable).
185-21 OhA 172NE700.
185-30 249Mich455, 229NW810.
186-43 178Ark18, 9SW(2d)785. [a] **Filing held timely.**-86PaSuper169.
186-45 29F(2d)452 [certiorari den 278 US657, 49SCt185(4thcase), 73Led565]; 7Alaska349; 205Cal354, 270P965; Del Super 144A830; 42 Ida48, 246P12, 17 [citCyc]; 168La1067, 123S715; 1LaA 228; 5LaA358; 130Misc680, 225NYS 417; 126 Okl 293, 259P236, 54ALR976; 38 OklACR561; 53SD236, 220NW498; 194Wis631, 217NW312.
187-49½-New. Formal acceptance by an owner erecting his own building has been held immaterial in determining the time for filing materialmen's liens. 160 La88, 106S704.
187-49½-New. In Louisiana the statute was held not to allow parties furnishing materials to the owner erecting a building without a contract one year to record privileges, 164La388, 113S886.
187-49¼-New. but such privileges must be recorded within thirty days from completion of the building. 164 La388, 113S886.
187-53 CalA 290P673.
188-57½-New. Under a statute requiring notice of intention to file a lien to be served at least one month before the claim is filed, a lien filed in the month succeeding that in which the notice was served and on the corresponding day of the month is not premature. 88PaSuper 586.
188-58 LaA 128S702.
188-73 [a] In Alabama.-213Ala646, 106 S42.
188-74 217Ala441, 116S528. [a] **Contract with owner's husband.**-MoA 17SW (2d)581.
189-86 213Ala646, 106S42 (claim filed too late is not good unless status of original contractor is sustained); 118 Tex534, 18SW(2d)1063.
190-97½-New. Receivership of an owner corporation does not necessarily start running of the period for filing a statement. 26 OhNPNS257.
190-99 NS [1930] 1DomLR826 (registered lien effective where amount payable by installments in future).
190-1 89CalA756, 265P506; CalA 293 P175; 85Colo 5, 273P19; DelSuper 144 A830; 120 Or163, 251P268; 129 Orl, 276P257. [d] **Word "within"** means "not beyond." 89CalA756, 265P506. [c] **Where contract provides for payment at date subsequent to completion of building,** filing of mechanic's lien by original contractor after completion of building is not premature though it is before date fixed for payment. 89CalA 756, 265P506.
190-2 202Cal606, 262P31.
191-7 124 Or170, 264P348.
191-19 DelSuper 144A830.
191-21 126Kan90, 267P12.
191-22 [a] (6) Incomplete electrical work is not trivial imperfection where cost of completion is about two thirds of contract price of work. 202Cal601, 262 P29; Cal 262P31. (7) Provision should be given liberal construction in favor of lien claimants with view to effect its purpose. 202Cal606, 262P31. (8) Test of trivial imperfections in work is whether imperfections are so trivial in character as to permit contractor to recover for substantial performance. 202Cal 606, 262P31.
192-24 202Cal606, 262P31.
192-27 29F(2d)452 [certiorari den 278 US657, 49SCt185(4thcase), 73Led565]. [b] **Permanent abandonment.**-129 Or 281, 277P110, 64ALR271.
192-29 DelSuper 144A830.
192-33 84CalA220, 257P898; CalA 291 P867.
192-35 202Cal606, 262P31.
192-39 5LaA97.
192-40 [e] **As against subcontractor.**-27 OhNPNS57.
193-44 205Cal354, 270P965. [c] **Where notice is filed within statutory time,** time for filing mechanic's lien commences to run from time of filing notice of completion of building. CalA 265P511. [d] **Notice filed after expiration of statutory time** is nullity and does not give lien claimant statutory time thereafter for filing lien. CalA 265P511.
193-46 CalA 259P363. [a] (2) Under California statute materialman's lien filed on March 20 is too late where notice of completion of building was recorded on January 22. CalA 259P363.
193-50 168La645, 122S893; 250Mich 686, 230NW910; 120 Or163, 251P268.
193-51 120 Or163, 251P268; 101WVa 567, 133SE135.
194-52 170Ark712, 280SW999; 173Ark 1024, 296SW27; 177Ark39, 5SW(2d) 724; 181Ark700, 27SW(2d)1011; CalA 290P673; 168La1067, 123S715; 167 Minn111, 208NW548; 76Mont359, 246P 771; NJCh 147A784; NJCh 151A397; OhA 172NE845; 38 OklACR561; 126 Okl 293, 259P236, 54ALR979; 49RI 441, 143A777; 53SD236, 220NW498; 141 Wash381, 250P107; 198Wis600, 225NW 168 (cash payment for last materials furnished does not take such lien out of statute of limitations); Ont [1929] 3DomLR709.
194-54½-New. Under some circumstances the time begins to run from the test of the work and material. 84 IndA 506, 151NE629.
195-68½-New. Date of last item contemplated by original plan of structure which was bona fide and not used as subterfuge for securing lien determines time for filing lien. 76Mont359, 246P 771.
195-68⅓-New. Where a materialman agreed to furnish materials to repair a gin plant, a change of plans for the plant so as to require an oil engine and house instead of an electric engine does not change the contract for materials so as to bar the materialman's lien for materials not barred as to materials furnished before the change was planned. 170Ark 712, 280SW999.
195-68¼-New. There is no last delivery of material until after inspection and approval required by ordinance. 9LaA 224, 120S126.
195-69 164La759, 114S644; 220App Div482, 222NYS19.
195-69½-New. , or termination, 27 Oh NPNS69.
195-73 [d] **Facts constituting abandonment,** equivalent to completion of house, requiring subcontractors and materialmen to file notices of liens under statute, within thirty days thereafter, must include conclusion of participants to cease operations permanently, or at least for indefinite period, mere cessation of work being insufficient. 129 Orl, 276P 257.
196-80½-New. Where contractors suspend work and the owner contracts with another to continue the work, there is no intention to abandon the building so as to start the time for filing a lien. 130 Or225, 279P848.
196-81 220AppDiv482, 222NYS19.
197-93 See also 242 IllA516.
197-7 Okl 292P332.
197-13 169La731, 125S871. See also 9 LaA224, 120S126.
197-17 208Cal246, 280P962 (filing of notice of completion is constructive notice to materialman).
197-18 72CalA1, 236P357; 161La1095, 109S913.
198-22 See also DelSuper 144A830.
198-30 9LaA224, 120S126; MoA 296 SW448; 128 Okl300, 263P119. But see 49RI 441, 143A777. [a] (2) Mere lapse of time between last items and those preceding is not conclusive, all not furnished under one contract, though circumstance of importance. 76Mont359, 246P771. [b] (1) LaA 128S702. [g] **Lien not filed within statutory period after last delivery** held too late. 160La 88, 106S704.
199-31 174Ark35, 294SW62; 76Mont 359, 246P771.
199-32 76Mont359, 246P771. [f] **Fact that statements of account were rendered at various times** does not change situation. 76Mont359, 246P771.
200-33 76Mont359, 246P771.
200-38 But see 144 Okl 21, 288P935.
201-45 53SD236, 220NW498.
202-52 44 Ida359, 256P949.
202-68 Del 143A23; 94Fla474, 113S 680, 685 [citCJ]; Okl 292P332; 147 Wash158, 265P155. [a] (7) Making repairs after statutory period under independent guaranty of contractor. 136 Misc810, 241NYS197.
203-69 IndA 168NE582; 170Minn509, 213NW41.
203-71 170Minn509, 213NW41.
203-75 [a] (1) 168La1067, 123S715.
203-76 53SD236, 220NW498. [a] **Furnishing asphalt paint to repair leaks in roof** does not extend time for filing lien. Okl 292P332.
203-77½-New. , or if performance has been considered and treated by parties as final and complete. Del 143A23.
203-78 181Ark700, 27SW(2d)1011; OhA 172NE852 (repairs); 194Wis631, 217NW312.
203-79 181Ark700, 27SW(2d)1011; OhA 172NE852; 126 Okl 293, 259P236, 54ALR979; 50SD652, 211NW688.
204-81 34 OhA458, 171NE342.
204-83½-New. Lien is not timely when materials were delivered more than four months prior to filing, under an agreement to pay as delivered. TexCommnA 285SW611.
204-85 126Kan90, 93, 267P12 [quot CJ]; LaA 128S702; 250Mich686, 230 NW910. See also OhA 172NE852. [c] **Work held not in performance of contract** so as to extend time. 27 OhNPNS69.
204-86 250Mich686, 230NW910.
204-87 250Mich686, 230NW910. See also 170Minn509, 213NW41. [c] **Repairs for owner by subcontractor** cannot be made basis of lien for original work. OhA 172NE852.
204-91 154Wash436, 282P917.
204-92 170Minn509, 213NW41; 147 Wash158, 265P155, 157 [citCyc].
204-94 126Kan90, 93, 267P12 [quotCJ].
205-95 126Kan90, 93, 267P12 [quotCJ].
205-97 170Minn509, 213NW41.
205-97½-New. A grantee of the owner who becomes such after the filing of the lien is also subject to such estoppel. 170Minn509, 213NW41.
205-98 202Cal601, 262P29; 202Cal606, 262P31.
205-1 194Wis631, 217NW312.
205-7 88CalA777, 264P311. [b] **Question of fact.**-100NJEq181, 135A74.
205-8 245NY294, 157NE144.
205-9 42 Ida48, 246P12, 17 [citCyc].
206-13 10PaDist&Co 813.
206-20 42 Ida48, 246P12, 17 [citCyc]; 106WVa74, 145SE599.
206-22 6PaDist&Co 581. [c] **Omission to state materials furnished** is not excused by statute relating to mistake or error. 88CalA777, 264P311.
207-26 239Mich50, 214NW107.
208-42 130Misc680, 225NYS417.
208-45 90CalA71, 265P572; 197NC93, 147SE701.
208-49 245NY294, 157NE144.
208-52½-New. The same rules of construction apply in determining the validity of a claim of a materialman dealing with the contractor as would be applied in case of the claim of the original contractor. 90CalA71, 265P572.
208-57 Cal 246P45; 84CalA220, 257P 898; 94CalA119, 270P751; 253 IllA274; 130Misc680, 225NYS417.
209-60 198Cal520, 246P45. [a] (3) Where name of owner in notice of contract and in statement of claim was not same, claimant could not enforce mechanic's lien for labor and materials. 263Mass27, 160NE287.
209-66½-New. A claim referring to a bill of particulars averred to be annexed thereto as part thereof showing kinds and prices of materials furnished

is bad if the bill is not annexed. 8Pa Dist&Co 794.

209-66½ New. Although the bill had been attached to the notice of intention to file a claim which had been personally served on the owner 8PaDist&Co 794.

209-68 239Mich50, 214NW107.

209-72 178Ark18, 98W(2d)785.

210-88½ New. Where lienor was misled by officer of company into believing he had contracted with individual, company is estopped to take advantage of lienor's mistake. 249Mich230, 228 NW777.

211-13 Fla 129S738.

211-17 245NY294, 157NE144.

212-30½-New. Failure to show that amount claimed is due above all legal set-offs may not be supplied by evidence. Oh 172NE283.

212-41 Fla 129S738; 99NJEq351, 131 A913. [a] **Purpose of statute.**-99NJEq 351, 131A913.

213-45 99NJEq351, 131A913.

213-47 99NJEq351, 131A913.

213-51 See also 99NJEq351, 131A913.

213-64½-New. Sworn testimony by each materialman's lien claimant apportioning liens amongst various buildings erected, in hearing to determine priority, is not compliance with a statute requiring apportionment. 99NJEq 351, 131A913.

214-66 252NY336, 169NE405; 51SD 39, 211NW801.

214-70 100NJEq181, 135A74; 253NY 326, 169NE405, 124Or360, 253P6; 126 Or63, 263P163. See also 149Wash424, 271P73. [b] (5) Including item for materials furnished as freight. 100NJEq 181, 135A74. [e] **Inclusion of item for casualty insurance** does not render total charge unreasonable where it was otherwise reasonable. Or 286P983.

215-74 87Colo97, 293P912, 235Mich 110, 209NW52; 136Misc700, 240NYS 542.

216-90 44Ida520, 256P529, 531 [cit CJ], 8PaDist&Co 92. [e] (2) Where notice states that claimant is foreign corporation and record shows that it was corporation neither de jure nor de facto, lien is not valid. 227AppDiv128, 237NYS152.

216-1 44Ida520, 256P529, 531 [cit CJ]. [f] (2) MoA 26SW(2d)130. [g] **Incorrect statement of capacity.**-44Ida520, 256P529, 531 [cit CJ].

217-8 10PaDist&Co 816.

217-9 239Mich50, 214NW107; NJCir 145A6.

217-16 26OhPNS257; TexCivA 88W (2d)326.

218-19 42Ida48, 246P12, 17 [quotCyc].

218-19 42Ida48, 246P12.

218-26 [b] 130Misc680, 225NYS417.

218-35 46Ida95, 269P591, 592 [cit CJ].

219-36 178Ark18, 98W(2d)785.

219-39 169Minn162, 211NW836.

220-41 MoA 287SW824.

220-47 178Ark18, 98W(2d)785; 170 Minn24, 211NW967, 149Wash424, 271 P73. [d] **Sufficient that person of ordinary understanding can identify property.** 181Ark606, 268W(2d)1114.

221-57 177Ark39, 58W(2d)724; 101 CalA683, 282P114, 169Minn162, 211NW 836. See also 150Wash170, 272P544.

221-66 MoA 287SW824.

222-75 177Ark39, 58W(2d)724.

222-78 177Ark39, 58W(2d)724, 725 [quotCJ&citCyc], 181Ark606, 268W (2d)1114, 134Misc428, 230NYS891.

225-41 44Ida95, 256P539.

226-47 239Mich50, 214NW107; 244 Mich309, 221NW338; 8PaDist&Co 92; 8 PaDist&Co 651.

227-55 47Ida447, 276P778.

228-76 Or 286P983. MoA 118SW(2d)9.

228-88 244Mich309, 221NW338.

228-94 244Mich309, 221NW338.

228-95 244Mich309, 221NW338.

228-97 But see 251Mich376, 232NW 254.

229-98 136Misc810, 241NYS197.

230-20 Wis 232NW85.

230-21 102WVa470, 135SE575, 577 [quotCJ].

230-23 102WVa470, 135SE575, 577 [quotCJ].

230-31 102WVa470, 135SE575, 577 [cit CJ].

231-48 See also 57ND224, 221NW1.

231-49 127Or34, 270P907, 910 [cit CJ]; 141SC72, 139SE183.

231-51½-New. A statement, regarding a written building contract between the contractor and the husband, representing himself and the wife, as owners, did not prevent the contractor from securing a lien upon the interest of the husband. 266Mass29, 164NE810.

232-59 [d] **Date of completion.**-257 Mass453, 154NE184.

233-74½-New. A claim is not invalid because it does not contain an exact or correct statement of the agreed terms of payment, where it was not made with intent to defraud and no innocent third person was misled. 198Cal520, 246P 45.

234-87 [b] **Statements held sufficient.**-129Or102, 275P677.

234-88 [a] (2) 245NY294, 157NE144. (9) Lien not stating amount due for work and materials furnished, as required by Lien Law, but merely stating lump sum or amount unpaid for labor performed and to be performed and for material furnished and to be furnished, was invalid. 224AppDiv471, 231NYS 110.

234-91 122Kan48, 251P196, 197 [cit CJ]; 8PaDist&Co 92; 8PaDist&Co 651.

235-92 122Kan48, 251P196, 197 [cit CJ]; 8PaDist&Co 651.

235-2 122Kan48, 251P196.

235-4 221AppDiv527, 225NYS118.

236-14 137Misc245, 242NYS671.

236-17 249Mich45b, 229NW810.

237-25 See also 97CalA752, 276P146.

237-26 42Ida48, 246P12, 17 [citCyc].

237-30 [a] 96CalA71, 265P572; 154 Wash436, 282P917.

238-49 243NY482, 154NE531; 87Pa Super15. [a] (3) Other instances. MoA 285SW101. [b] **Statement held insufficient.**-243NY482, 154NE531.

238-53 215Ala33, 109S164.

239-60 Or 286P983.

239-63 42Ida48, 246P12, 17 [cit Cyc].

240-81 See also 134Misc303, 235NYS 182.

240-85 See also 42Ida48, 246P12, 17 [cit Cyc].

241-93 But see MoA 128SW(2d)512(2d case).

241-96 215Ala33, 109S164; 173Ark 1021, 296SW27.

242-3 Or 286P983.

242-4 129Or102, 275P677.

242-8 [a] MoA 128SW(2d)512(2dcase); 197NC93, 147SE701; 151Va845, 145SE 321. [b] 118Tex534, 18SW(2d)1063.

242-14 See also MoA 128SW(2d)512(2d case).

242-27 129Or102, 275P677.

244-47 287Pa425, 135A220.

246-83 [a] (2) Inclusion of nonlienable items does not invalidate lien filed where statement shows cash payments in excess of such items. 53ND858, 208 NW383.

246-86 84CalA220, 257P898; 143NYS 609. Or 286P983.

247-94 121Or285, 254P803; 122 Or 661, 260P210; 127Or481, 272P674.

248-15 167Minn111, 208NW548.

248-16 42Ida48, 246P12, 17 [cit Cyc]; 249Mich230, 228NW777; 167Minn111, 208NW548. But see CalA 289P927. [a] **Where materialman commences suit within time allowed for notice of claim,** he is entitled to lien notwithstanding failure to verify account. 180Ark517, 218W(2d)973.

250-50 222AppDiv837, 226NYS740; 197NC93, 147SE701.

251-82 12LaA680, 127S843.

251-83 215Ala33, 109S164.

251-84 [a] BC [1928] 2DomLR875.

252-88 26OhPNS257. But see 249 NY538, 164NE573.

252-90 [a] (3) Affidavit verifying account of lien claimant signed "Mrs. R. B. A. For W. T. M.," A being claimant's bookkeeper, has been held sufficient 178Ark18, 98W(2d)785. (4) Affidavit of corporation signed "C. Lumber Company, Inc. by W. L. D." 12LaA 680, 127S843.

252-1 But see 150Wash370, 273P185.

252-11½ New. Claim of corporation is not void because jurat commenced in name of its president and was signed in name of corporation followed by president's name. Or 286P983.

252-20 [a] **In Pennsylvania.**-8PaDist& Co 92.

253-25 122Kan48, 251P196; 99NJEq 351, 131A913; 11PaDist&Co 287. [b] **Amendments are within discretion of trial court.**-122Kan48, 251P196.

253-30 NJ 133A76; 8PaDist&Co 794.

253-31 141Okl 44, 283P985; 291Pa 531, 140A522; 10PaDist&Co 813. But see 8PaDist&Co 794.

253-32 [a] **Where amendments are within court's discretion,** 14 months after decision of case is too late to amend. 122Kan48, 251P196.

254-46 8PaDist&Co 794.

254-57 50RI 375, 147A891.

254-61 10PaDist&Co 813.

254-62 181Ark700, 27SW(2d)1011.

255-64 [a] (1) 10PaDist&Co 13. (3) Amendment substituting wholly different defendant may be filed before time for filing lien has expired. 89PaSuper 422.

255-68 10PaDist&Co 813.

255-74 89PaSuper422.

256-87½-New. In New Jersey amendment cannot be made except by a justice of the supreme court or a judge of the circuit court after notice to all parties interested, 99NJEq351, 131A 913.

256-87½-New. and a master in a hearing to determine priority of liens is justified in refusing to amend lien claims to conform to proof to show appointment omitted from claim. 99NJEq351, 131A913.

256-92 [d] **Pleading held to present question** whether homesteaders were estopped to deny invalidity of lien. Tex CivA 238SW(2d)436.

256-95 94PaSuper90; 96PaSuper535; 96PaSuper544.

256-98 [e] (2) Resulting damage to plaintiff from abandonment of work by defendant being greater than balance due, defendant's reconventional demand dismissed. 12LaA690, 127S110. [m] **Contract against liens** not ground for striking off lien. 12PaDist&Co 485.

257-99 Contra 7PaDist&Co 610.

257-99½-New. [§ 314½] 12½. **Effect of Filing Claim or Statement.** Filing a lien for materials does not of itself convert materials into realty. 243NY 482, 154NE531.

257-99¼-New. Notice of lien does not transfer title to unannexed materials on premises. 243NY482, 154NE531.

257-99¼-New. Statutory recordation of statement of mechanics' lien is constructive notice to the purchaser, but only for six months after maturity of the indebtedness. 218Ala182, 118S338.

257-2 See also 27OhA378, 161NE349.

257-5 149Wash424, 271P73.

257-13 220Ky422, 295SW414; 141Okl 44, 83P985.

257-15 MoA 9SW(2d)103.

258-20 MoA 9SW(2d)103.

258-36 [a] **Statute limiting amount of lien to amount of original contract** is inapplicable where claim is for additional material furnished to subcontractor and contractor files bond to release lien. 242Mich126, 218NW760.

258-38 88PaSuper390.

259-42 216Ky298, 288SW334; Oh 172 NE665; 156Tenn19, 300SW574.

259-43 216Ky298, 288SW334.

259-55 216Ala164, 112S826. [a] **"Unpaid balance"** is amount contractor has earned as of date of notice of lien given to owner. Ala 128S451.

261-80 TexCivA 78W(2d)130, 131 [cit CJ]; TexCivA 19SW(2d)355 (entire reconstruction not implied).

261-85 136Misc386, 240NYS47 (items properly included).

261-86 See also Ind 164NE721.

261-91 91Fla354, 107S679.

262-97 91Fla354, 107S679.

263-99 Ont [1929] 4DomLR32.

263-3 51Nev315, 274P921; Sask [1925] 3DomLR40.

263-14 205Cal667, 272P289.

264-21½-New. So, also, where there is no legal rate, a bona fide contract entered into respecting the rate will govern. Can [1925] 3DomLR40.

264-22½-New. Where there is no legal rate, it should be fixed in court's discretion at what court thinks just. **Can** [1925] **3DomLR**40.
264-31 **CalA** 259P363; 21SaskL25, [1926] **4DomLR**619, [1926] **3WestWkly** 404.
264-38 96**Fla**343, 118S21; **Fla** 129S 892.
264-39 164**La**388, 113S886; 164**La** 759, 114S644.
265-40 111**Conn**132, 149A225; 164**La** 759, 114S644; **TexClvA** 16SW(2d)848.
265-42 170**Ark**712, 280SW999; 111 **Conn**132, 149A225.
265-49 **Fla** 123S837(2dcase).
265-55 **TexClvA** 20SW(2d)358 (same rule applies to assignments of mechanics' liens). But see 118**Tex**534, 18SW (2d)1063.
266-58 216**Ala**164, 112S826; 217**Ala** 159, 115S90; 220**Ala**140, 124S388; 72 **CalA**1, 236P357; **NJCh** 136A335; **Or** 286P520. [d] (1) 72**CalA**1, 236P357. (4) 72**CalA**1, 236P357. (5) As regards commencement of materialman's lien there is no general contract where building was constructed by owner under trade-name. **Cal** 289P809. (6) Where materials are furnished on labor performed under general contract, liens relate back to commencement of work by general contractor. **CalA** 289P885.
267-59 216**Ala**164, 112S826.
267-63 22 **OhA**487, 153NE909.
267-68 22 **OhA**487, 153NE909.
267-77 22 **OhA**487, 153NE909.
267-78 22 **OhA**487, 153NE909.
267-80 22 **OhA**487, 153NE909.
267-81 22 **OhA**487, 153NE909.
268-90 99**Fla**1151, 128S801(2dcase).
268-91 99**Fla**1151, 128S801(2dcase).
268-96 111**Conn**132, 149A225; 166**Ga** 42, 142SE270; **MoA** 288SW979; **MoA** 178SW(2d)581; **TexClvA** 23SW(2d)879; 103**WVa**449, 137SE889, 891 [citCJ], 52 **ALR**689. [b] **NH** 148A28(2dcase). [c] 108**Conn**232, 142A847; **NH** 148A28(2d case). [f] (4) Where building was constructed by owner under separate contracts, materialman's lien dates from time he commenced to deliver. **Cal** 289 P809. (5) Where owner builds without general contractor, materialman's lien dates from furnishing of materials. **CalA** 289P885. (6) In such case where two deliveries were made under separate contracts, second lien does not relate back to first delivery. **CalA** 289P 885. [h] **Work and labor must be such that effect is apparent** in order to constitute notice under statute. 72**CalA**1, 236P357. [i] **Lien for materials cannot attach before commencement of delivery.**–166**Ga**42, 142SE270.
270-15 226**AppDiv**674, 233**NYS**194.
270-16 137**Misc**622, 244**NYS**312.
270-19 226**AppDiv**674, 233**NYS**194; 137**Misc**622, 244**NYS**312.
271-38½-New. Lien may be enforced against improvement or both improvement and land as facts warrant. **Ala** 128S893.
272-43 134 **Okl** 50, 270P1107.
272-44 46 **Ida**595, 269P591, 592 [cit CJ]. [a] **MoA** 287SW824.
272-45 233 **IllA**256; 154**Wash**541, 282 P847; **Can** [1930] **3DomLR**185.
272-46 149**Wash**424, 271P73.
272-47½-New. A contractor taking a lien on a homestead to secure payment for paving an abutting street has been held not to have a separate lien on the pavement where the pavement was constructed pursuant to an agreement with the city in a street over which the city had exclusive control. **TexCommnA** 282SW214.
272-47⅓-New. Materialmen's lien on a garage does not extend to land. 174 **Ark**362, 295SW370.
273-51 123 **Or**354, 260P214; **TexClvA** 4SW(2d)169.
273-56 92**CalA**189, 267P903; **Can** [1929] **4DomLR**1035.
274-76½-New. Under Ontario Mechanics' Lien Act a lien may be registered against the whole or any part of the land in respect of which a lien may be claimed. **Ont** [1929] **2DomLR**32.
276-96 204 **Iowa**613, 215NW637; 250 **Mich**203, 229NW437; 126 **Or**76, 268P 989.
276-98 204 **Iowa**613, 215NW637; 122 **Okl** 208, 253P485.
276-99 176**Ark**520, 3SW(2d)293.
277-1 **Or** 286P520.
277-3 **MoA** 25SW(2d)130.
277-3½-New. who has forfeited his lease. 76**Mont**359, 246P771.
277-4 250**Mich**203, 229NW437.
277-14 76**Mont**359, 246P771 (heating plant installed by another).
278-32 See also 236 **IllA**447.
278-40 21**SaskL**459, [1927] **2DomLR** 987, [1927] **1WestWkly**975. But see 164**La**759, 114S644. [b] (2) Mortgagee before making loan has right to look to written contract to determine materialman's right and value of security. **Fla** 130S611. [c] **As dependent on contract.**–**Fla** 130S611.
279-41 21**SaskL**459, [1927] **2DomLR** 987, [1927] **1WestWkly**975.
279-42 248NY390, 162NE292.
279-43½-New. Owner, by conduct, may ratify materialman's deviation so as to be estopped to deny materialman's right to claim joint lien on buildings constructed under separate contracts. **Fla** 130S611.
279-44 136**Wash**98, 238P980.
279-51 8F(2d)125; 123 **Or**354, 260P 214; 141SC72, 139SE183. [a] **Labor or material held furnished under single contract.**–8F(2d)125.
279-52 **Fla** 130S611; 76**Mont**359, 246 P771.
279-58 219**Ala**328, 122S343; **Can** [1929] **4DomLR**1035.
280-62 44 **Ida**377, 258P169, 171 [cit CJ].
280-63 [a] 44 **Ida**377, 258P169, 171 [citCJ].
280-68 See also 181**Ark**700, 27SW(2d) 1011.
280-69 44 **Ida**377, 258P169, 171 [cit CJ].
280-70 44 **Ida**377, 258P169, 171 [cit CJ].
280-70½-New. A person furnishing materials and services in construction of buildings on different lots at instance of prospective purchaser cannot charge one lien for total amount against all lots owned by different persons without proportionate segregation. 101**CalA** 77, 281P412.
280-70⅓-New. In such case a lien cannot be maintained against the property of one owner for total amount embracing improvements on properties of others. 101**CalA**77, 281P412.
280-72 217**Ky**329, 289SW292; **Oh** 172 **NE**665; 123 **Or**354, 260P214; **Or** 286P 520. [a] **Lien attaches to legal or equitable title.**–181**Ark**700, 27SW(2d)1011.
280-73 130**Kan**543, 287P618 (including improvements removable by tenant).
280-74 207 **Iowa**1303, 224NW514; 218 **Ky**493, 291SW715; 141 **Okl** 227, 284P 898 (vendee in possession under executory contract of sale); 123 **Or**354, 260 P214.
281-75 169**Ga**641, 151SE368; 233 **IllA** 256; 205 **Iowa**483, 218NW325. [a] (1) 141 **Okl** 44, 283P985.
281-75½-New. A lien is not enforceable as to property on land not owned by defendant. 233 **IllA**256.
281-78½-New. Mechanic's lien creditors have right to rely on record title of owner. 160**Tenn**689, 28SW(2d)344.
281-84 160**Tenn**689, 28SW(2d)344.
281-85 104**Conn**653, 134A71, 47**ALR** 259; 98**Fla**405, 123S820(2dcase); 249 **Mich**455, 229NW810; **Or** 286P983.
281-87 **Or** 286P520 (liens not attaching till delivery of deed).
282-90 98**Fla**405, 123S820(2dcase).
282-91 103**WVa**449, 137SE889, 52**ALR** 689.
282-92 103**WVa**449, 137SE889, 52**ALR** 689.
282-94 103**WVa**449, 137SE889, 52**ALR** 689.
282-96 103**WVa**449, 137SE889, 52**ALR** 689.
282-96½-New. Under statutes lien against land relates back only to time when building owner acquired lienable interest in land on delivery of deed. **Or** 286P520.
282-2½-New. Statutes forbid priority of lien against a bona fide encumbrancer without notice of an existing lien. 176**Minn**1, 222NW507.
282-3 216**Ala**164, 112S826; 111**Conn** 132, 149A225; 164**Ga**600, 139SE72; **NJCh** 136A335; 25 **OhA**84, 158NE548; 128 **Okl** 300, 263P119.
282-4 125**Kan**738, 739, 264P144 [quot CJ]; 216**Ky**298, 288SW334; 128 **Okl** 300, 263P119.
283-5 216**Ala**164, 112S826; 180**Ark**517, 21SW(2d)973.
283-10 216**Ala**164, 112S826; 108**Conn** 232, 142A847.
283-15 [b] **Lien for labor performed without contract** is inferior to lien of materialman who has furnished material under contract. 39 **OklACR**47.
283-15½-New. A lien of a materialman furnishing materials for a number of houses under a single contract and liens of laborers performing labor on houses separately are of equal dignity. 180**Ark** 517, 21SW(2d)973.
283-24 91**Fla**354, 107S679; 164**Ga**600, 139SE72; 101**NJEq**699, 139A526. [b] **Under New York statute providing for subordination of liens to subsequent mortgage and destruction of priority between liens,** mere formal compliance with statute without thereafter doing work on mortgaged buildings, or advancing money, furnishing materials, or issuing certificates, does not destroy priority of lien first filed. 227**AppDiv** 439, 238**NYS**127.
284-28 [c] **In Arkansas.**–174**Ark**492, 295SW966.
284-29 216**Ky**298, 288SW334; 99**NJEq** 70, 132A507.
284-34 122 **Okl** 208, 253P485; 134 **Okl** 50, 270P1107.
284-35 [b] (2) **Claimant bringing proceeding within time fixed for enforcing laborer's lien is not precluded from enforcing right to priority for labor done because of filing lien under mechanics' and materialmen's lien statutes.** 134 **Okl** 50, 270P1107. [c] **"Laborer" distinguished from "subcontractor."**–134 **Okl** 50, 270P1107.
284-38 42 **Ida**391, 246P962.
284-42 103**NJEq**78, 142A312, 314 [cit CJ].
285-47 101**NJEq**45, 136A920.
285-50 216**Ala**164, 112S826.
285-53½-New. As between stop notice claimants of retained fund, by statute, labor claims take precedence over materialmen's claims. 101**NJEq**45, 136A 920.
285-54½-New. A lien against two buildings, cut off as to one, remains a lien on the other to the value of the material put into that building. 221**App Div**527, 225**NYS**118.
285-54⅓-New. A lien law giving conflicting liens priority on a building where labor was performed is not confined to lienors claiming under general contractors. 221**AppDiv**527, 225**NYS**118.
285-56 **TexClvA** 23SW(2d)879.
285-57 216**Ala**164, 112S826; **Ala** 129S 285; 123 **Or**354, 260P214; **Or** 286P520 (under statute liberally construed). [a] **Right of owner to pay contractor till statutory notice is given** does not render nugatory provision giving potential lien dating back to commencement of work. 216**Ala**164, 112S826.
285-58 217**Ky**329, 289SW292; 158**Md** 615, 149A438; 123 **Or**354, 260P214.
285-61 134 **Okl** 50, 270P1107.
285-62 37F(2d)499; 217**Ky**329, 289SW 292; **TexClvA** 5SW(2d)1015.
285-63 **NJCh** 134A286; 100**NJEq**511, 136A331.
286-63½-New. One who furnished materials to the owner has been held not to have a lien therefor against a purchaser of the premises at mortgage foreclosure sale. 243NY482, 154NE531.
286-63⅓-New. A purchaser at a mortgage foreclosure sale has been held not liable for materials furnished under a contract with a former owner of the premises. 243NY482, 154NE531.
286-63¼-New. The words "without notice," in a statute providing that, as against a bona fide purchaser or encumbrancer without notice, no lien shall attach prior to the visible beginning of the improvement on the ground, mean without notice of an existing lien. 171 **Minn**445, 214NW503, 53**ALR**573.

286-68½-New. Laborers' liens have been held not prior to materialmen's liens. **LaA** 1308631.

286-76 But see **216Ala**164, 1128826; 236 **IllA**447. [b] **But under some statutes** subcontractor is entitled to priority. **108Conn**232, 142A847.

286-79 216**Ala**164, 1128826.

286-83 291**Pa**531, 140A522.

287-94 170**Ark**755, 281SW3; 202 **Iowa** 833, 211NW407; 219**Ky**827, 294SW792; 25 **OhA**84, 158NE548; 158**Tenn**53, 12 SW(2d)711; **TexCommnA** 282SW214; **TexCommnA** 293SW160. But see 168**La** 645, 122S893. [c] **Lien is not enforceable against vendor's heirs.**–202 **Iowa**833, 211NW407. [d] **Rights of purchaser of vendor's lien.**–**TexCivA** 18SW(2d)339.

287-95 202 **Iowa**833, 211NW407 (dictum).

287-96 170**Ark**755, 281SW3; 39 **OkiACR** 47.

287-97½-New. A mechanic's lien claimant has a lien on a leasehold and improvements thereon, superior to the title of the assignor of the lease, under an assignment retaining title until full payment of notes, where the assignment obligated the assignees to make improvements for which the lien was claimed. 178**Ark**977, 128SW(2d)911.

288-99 168**La**369, 122S68.

288-11½-New. Materialman's lien on garage constructed by defaulting purchaser under land contract held superior to vendor's purchase-money lien. 174 **Ark**362, 295SW370.

288-12 150**Md**298, 133A59.

288-13 150**Md**298, 133A59.

288-14 See also 123**Kan**632, 256P989.

288-16 217**Ala**159, 115S90; 164**Ga**600, 139SE72; **Ga** 155SE318; 123**Kan**632, 256P989 (rule applied despite alleged failure to observe city plumbing ordinance).

289-17 **CalA** 259P363; 216**Ky**298, 299 SW334; **MoA** 308W(2d)160; 150**Va**365, 143SE710.

289-18 [a] (4) Mortgage which was subordinated to complainant's mortgage is entitled to priority over mechanic's lien executed subsequent to subordinated mortgage. **NJCh** 147A113.

289-19 214**Ala**506, 108S515; 217**Ala**159, 115S90. 173**Ark**1034, 138W(2d)366(2d case); 96**Fla**343, 118S21; **Fla** 120S841; 164**Ga**600, 139SE672; 160**La**88, 106S704; 168**La**1057, 123S711; 144**Miss**717, 111S97; **MoA** 298W(2d)736; **NJCh** 147A 113; 134 **Okl**50, 270P1107; 141 **Okl**240, 284P889; 127**Wash**342, 277P984; **Can** [1930] 3**DomLR**185. See also 242**Mich** 695, 219NW686, 687 [citCJ]. [b] (1) 144**Miss**717, 111S97; 53**ND**871, 208NW 111.

290-23 141 **Okl**240, 284P889. See also 168**La**369, 122S68.

291-29 **MoA** 308W(2d)160.

292-44 220**Ala**140, 124S388; 174**Ark** 493, 295SW966; 181**Ark**600, 278W (2d) 1011; **ND** 229NW805; 140 **Okl**300, 284 P30; 40 **OkiACR**113. [b] **Sole test of superiority of mortgage executed before improvements** are made over mechanic's lien is purpose for which money is raised, not use made of it. 181**Ark**700, 278W(2d)1011.

292-45 217**Ala**159, 115S90; 96**Fla**671, 119S104; 123**Kan**101, 278P53; **NH** 148 A28(2dcase); **NJCh** 147A811; 26 **OhNPNS**257; 40 **OkiACR**113; 124 **Ori**70, 264P348; **Or** 289P489; 12**PaDist&Co** 412. But see 30 **OhA**340, 165NE108. [a] (3) Where materialman's lien was recorded, but contract was not, lien held prior to mortgage recorded before recording of lien but after construction commenced, though no notice given to owner. 11**LaA**703, 124S607. [b] **Trust deed** is lien or encumbrance within statute declaring rule. 203**Cal**657, 265P810.

293-47 217**Ala**159, 115S90, 92 [citCJ]; 26 **OhNPNS**263; 40 **OkiACR**113. [a] But see 176**Minn**1, 222NW507.

293-52½-New. Where a building consists of two or more distinct units or parts, such as basement, upper stories, and added rooms, each unit is considered as a distinct building in determining the commencement of the building or any of its distinct units and the priorities of a mortgage and mechanics' liens, where it appears that the different units were constructed at different times and under different contracts and plans. 40 **OkiACR**113.

293-52½-New. Mechanic's lien held to prevail over mortgage despite immaterial modifications in plan. 123**Kan**632, 256P989.

293-52¼-New. A materialman, to avail himself of priority, must file an affidavit of intention to furnish material with the county recorder. 30 **OhA**340, 165NE 108.

293-53 32**F(2d)**157; 173**Ark**983, 293 SW1012; **CalA** 289P55; 96**Fla**671, 119 S104; 98**Fla**54, 123S918, 156**Ga**600, 139SE72. [b] **Mortgage recorded at time material was furnished** is prior to materialman's lien. 44 **Ida**178, 255P903.

293-53½-New. That prior mortgages were paid with money received from the mortgagee on the loan does not entitle the mortgagee to priority as against a mechanic's lien for materials furnished at the time the loan was made, where the mortgagee was a volunteer, not required to make the loan to protect his interests, and who paid the money over without requiring discharge of prior encumbrances. 51**ND**197, 212 NW876.

293-53¼-New. In such case the mortgagee is not entitled to equitable protection against the holder of a mechanic's lien for work done before making of the loan. 51**ND**197, 212NW876.

293-53¾-New. In such case the mortgagee is chargeable with notice that building material was delivered on the premises. 51**ND**197, 212NW876.

293-54 **Fla** 123S837(2dcase); 164**Ga** 600, 139SE672; 217**Ky**329, 289SW292; **LaA** 128S702; **NJCh** 147A811; 25 **Oh NPNS**263; 123 **Ori**354, 260P214; 160 **Tenn**689, 288SW(2d)314; **Wash** 286P 105. [b] **Commencement of building** takes place with digging and walling of cellar. 25 **OhNPNS**270. [c] **Assignment of mortgage** pending construction of parties does not give assignee superior right. **Fla** 123S837(2dcase). [d] **That owner paid for material delivered before recording of mortgage** does not give mortgagee priority over materialman for materials subsequently delivered under continuing contract. 34NM 562, 287P64.

293-55 164**Ga**600, 139SE672; 153**Wash** 41, 279P108; **Wash** 286P105 (absence of knowledge by mortgagee immaterial).

293-56 102**CalA**457, 283P126; 168**Ga** 42, 142SE270; 154**Wash**445, 282P842. [a] **Laborer's lien** is inferior to title acquired by person who acquired lien under trust deed existing when labor was performed and who thereafter acquired title by foreclosure of lien. **TexCivA** 1 SW(2d)339. [b] **Mortgagee's intention** not to be subjected to lien is indicated by filing mortgage before materials were furnished. 154**Wash**445, 282P842.

293-58 140 **Okl**300, 284P30. But see 82**NH**313, 133A448.

293-59 But see 82**NH**313, 133A448.

294-61 39**F(2d)**341; 44 **Ida**178, 255P 903; 160**Tenn**689, 288SW(2d)344.

294-62 181**Ark**700, 278SW(2d)1011.

294-65 [a] **"Creation" of mortgage.**–39 **F(2d)**341.

294-70 But see 242**Mich**695, 219NW 686, 687.

294-74 [a] **In Georgia.**–162**Ga**508, 133 SE822. [b] **Mortgage to secure price for release of particular lot from blanket mortgage** is for valid consideration and has preference over mechanic's lien for materials subsequently furnished. 82 **NH**313, 133A448. [c] **Particular mortgages held valid.**–168**La**1057, 123S711.

294-75 158**Md**638, 149A459.

294-87 102**CalA**457, 283P126 (as to building); 168**La**1057, 123S711 (construing such statute to include any bona fide mortgage); **NJ** 150A829; **NJCh** 136 A335; 26 **OhNPNS**257. [a] **Withholding funds by mortgagee** to complete improvement, under some statutes, is authorized at any time, but required only when laborers or materialmen have filed notices with him. 26 **OhNPNS**257. [b] **Where building contract is filed,** mortgage is prior to claims of lien claimants. 39**F(2d)**341.

295-92 102**CalA**457, 283P126; **NJCh** 147A809; **NJCh** 147A811. [a] **NJCh** 147A809. [c] **Manner of payment** must be as prescribed by statute. 26 **OhNP NS**257. [d] **Mortgage money used to repay money borrowed** and used in construction is not entitled to priority over mechanic's lien. **NJCh** 147A809.

295-94 128**Kan**401, 278P53; 118**Nebr** 17, 223NW467.

295-1 **CalA** 259P84. But see 203**Cal** 657, 265P810.

295-2 203**Cal** 657, 265P810.

295-2½-New. Under some statutes a mortgage on unimproved land in an amount in excess of its value made for the purpose of improvement carries a lien to the entire proceeds of sale as against a mechanic's lien claimant with notice. 203 **Iowa**748, 211NW225.

295-2½-New. Mortgages pursuant to building loan contract. Mortgage held not one for building loan and therefor not subject to subsequent mechanics' liens. 226**AppDiv**846, 235**NYS**873.

295-2¼-New. A broker's agreement to sell a bond issue was not a building loan agreement. 133**Misc**376, 232**NYS**381.

295-2⅛-New. Mortgages recorded prior to liens were superior, although the contract was insufficient as a building loan contract. 133**Misc**334, 234**NYS**68.

295-4 26 **OhNPNS**257.

296-10 207 **Iowa**1303, 224NW514; 128 **Kan**370, 278P12; **Or** 286P520; **Or** 289P 489.

296-13 60 **OntL**60, [1927] 1**DomLR** 1073.

297-40 157**Miss**479, 128S76; 22 **OhA** 487, 153NE909.

297-43 [b] **Mortgage procured with assistance of claimant** for purpose of paying for labor and materials furnished by claimant. 97**Fla**530, 121S800.

297-44 28 **OhA**60, 161NE295. [a] **Facts showing waiver.**–28 **OhA**60, 161NE295.

298-53½-New. Materialmen are estopped from setting up superiority of mechanics' liens over a trust mortgage when all the evidence of the commencement of improvements were removed prior to recording the mortgage. 22 **OhA** 487, 153NE909.

298-53¼-New. To entitle one claiming a mechanic's lien to priority over a mortgage recorded subsequent to the commencement of improvements, the construction must be founded on a contractual relation in good faith and not on fact made false for financial purpose. 22 **OhA**487, 153NE909.

298-57 32**F(2d)**157.

298-58 168**La**1067, 123S715; 38 **Okl ACR**561 (even though property removed from county and mortgage not refiled).

298-59 [a] (4) Failure to set forth name of every person furnishing material. 34 **OhA**147, 171NE247.

298-67 **CalA** 281P466; 164**Ga**600, 139 SE672; 101**NJEq**142, 136A803; **Sask** [1930] 4**DomLR**454.

299-68 164**Ga**600, 139SE672. But see **Sask** [1930] 4**DomLR**454. [a] (1) 32 **F(2d)**157; 96**Fla**671, 119S104; 94**Fla** 474, 113S680. (3) 213**Ky**741, 281SW 988. (5) Under Kentucky statute materialman not filing statement is not entitled to preference over mortgage executed and recorded without actual or constructive notice of materialman's claim, though mortgagee knew that material was being furnished and money was being borrowed to pay therefor. 213**Ky**741, 281SW988.

299-85 214**Ala**506, 108S515 (dictum); **Sask** [1930] 4**DomLR**283. [a] (7) Where mortgagee participated in changing plans which increased costs, mortgage was not superior to lien of contractor for additional labor and material. 153**Wash**342, 277P981.

300-86 **NJCh** 147A113.

301-2 86**Colo** 493, 283P1042; 48 **Ida** 271, 281P1111; 168**La**1049, 123S709; 160**Tenn**689, 288SW(2d)344.

301-9 But see 237**AppDiv**630, 236**NYS** 67.

301-11 207**Cal** 590, 279P431.

302-38 90**Fla**654, 107S368, 360 [cit Cyc].

302-39 39**F(2d)**341; 26 **OhNPNS**257.

302-43 **DelCh** 152A130; 164**Ga**600, 139 SE672.

302-44 203**Cal** 657, 265P810; 98**Fla** 683, 124S42 (mortgage securing building loan payable as work progressed);

Ga 137SE72; 171Minn445, 214NW503, 53ALR573.

302-45 CalA 259P84; DelCh 152A130; 47 Ida485, 276P971; 171Minn445, 214 NW503, 53ALR573. [b] **Performance of conditions precedent by mortgagor.**–171Minn445, 214NW503, 53ALR573. [c] **Breach of contract by mortgagor** does not render advances thereafter made optional. 171Minn445, 214NW503, 53 ALR573. [d] **In California.**–203Cal 657, 265P810.

303-46 176Ark300, 2SW(2d)1093, 1094 [citCJ&Cyc]; 203Cal 657, 265P810; CalA 259P84.

303-50 DelCh 152A130.

304-72 176Ark520, 3SW(2d)293.

304-80 221MoA1227, 300SW850.

304-81 221MoA1227, 300SW850; MoA 29SW(2d)736.

304-83 MoA 29SW(2d)736.

304-85½-New. Priority of subcontractors' and materialmen's liens, over mortgage is not limited to a building and interest of the purchasers of a lot under a conditional sale contract at the time of contracting for the construction of the building, where proper notices of intention to claim a lien were given to the vendors and purchasers. 129 Or 1, 276P257.

305-90 Ont [1929] 1DomLR906.

305-92 141 Okl 240, 284P889.

305-3 178Ark1034, 13SW(2d)586(2d case).

306-10 203 Iowa1149, 212NW480.

306-28 99Fla887, 128S622; 126Kan 90, 267P12. [c] **Statute requiring bond as condition of assignment** of proceeds of contract is not unconstitutional. 155 Miss31, 119S366.

306-31 See also 99CalA390, 278P507.

307-32 CalA 291P629.

307-39 [a] **Statute does not apply** to payments by notes for work done or to be done. 216AppDiv313, 214NYS768.

308-53-54 [a] **Statute making assignments by contractors subject to mechanics "liens"** will not be construed to cover "claims" because of a similar earlier statute which referred to "claims." 144Va56, 131SE437.

308-61½-New. A lien is superior to court costs and funeral expenses. Tex CivA 16SW(2d)848.

309-75 103NJEq262, 143A316; 150Va 365, 143SE710.

309-78 176Ark300, 2SW(2d)1093; 91 CalA268, 266P1025.

310-84 TexCivA 20SW(2d)358 (entire amount due or to become due passes on assignment of owner's note and lien security).

311-17 127 Or34, 270P907.

312-29½-New. Assignment of retained fund under building contract prior to attachment takes precedence over attachment. 101NJEq45, 136A920.

312-29¼-New. A mechanic's lien is not rendered nonassignable by execution of undertaking provided for by statute providing for discharge of lien on filing of undertaking conditioned for payment of any judgment. 136Misc204, 239NYS 326.

312-36 216Ala164, 112S826; 231Ky40, 20SW(2d)1009; 127 Or34, 270P907; TexCivA 29SW(2d)843(2dcase). [c] **As against one furnishing materials to subcontractor without perfecting lien,** subcontractor's assignee is entitled to moneys due assignor from contractor, notwithstanding provision in contract between contractor and subcontractor, entitling latter to retain sufficient money for indemnity against liens. 231Ky40, 20SW(2d)1009.

312-37 216Ala164, 112S826.

312-39 86Colo 493, 283P1042.

313-46 103NJEq262, 143A316.

313-48½-New. The maker of a mechanic's lien note, given for building a house, is liable thereon to the contractor's assignee for the full amount less expenditures for completing the building after the contractor's default. Tex CivA 5SW(2d)162.

313-48¼-New. The assignee of a mechanic's lien note is not required to complete the building on the contractor's default. TexCivA 5SW(2d)162.

313-48¼-New. Duties. The assignee of a note and a mechanics' lien contract does not assume the contract or duty to complete a building. TexCivA 18SW (2d)796.

313-48½-New. Assignment by contractor to lumber company for the purpose of securing contract price of improvements, he reserving right to fulfill contract, has been held as a matter of law not to render assignee liable to subcontractor. TexCommnA 23SW(2d) 677 (as to representation by lumber company to subcontractor).

313-48¼-New. A materialman's acceptance of a mechanic's lien contract and mechanic's lien notes as further security for debt does not assume the contract with the owner. TexCivA 20SW(2d) 1076.

313-51 CalA 259P363; 20 OhA508, 152 NE727.

313-64 217Ky195, 289SW282; 28 OhA 60, 161NE295.

313-66 38F(2d)10.

313-67 217Ky195, 289SW282; TexCivA 23SW(2d)871.

313-69 44 Ida554, 258P528.

314-70 44 Ida554, 258P528; TexCivA 17SW(2d)167(2dcase). [b] **Intention must be shown** by affirmative act. Tex CivA 295SW308.

314-72 44 Ida554, 258P528.

314-83 [a] (11) Filing of second claim covering same contract and service. 44 Ida554, 258P528.

314-85½-New. By not giving notice required by statute within the prescribed time after the first delivery of material, claimant waives his lien for all material so furnished until within such prescribed period of time when notice was given. 120 Or163, 251P268.

315-87 38F(2d)10 (bondholders' right to rely on subcontractor's express waiver); CalA 259P363, 366 [citCJ]; IndA 152NE177; 158Tenn53, 12SW(2d)711.

315-90 IndA 149NE79; IndA 152NE 177.

315-91 [c] **Facts held to show agreement to waive lien.**–IndA 152NE177.

315-93 [a] (1) See also 246 IllA86.

315-98 IndA 149NE79; IndA 152NE 177; Mo 24SW(2d)1001.

315-99 168La578, 122S856.

316-4 38F(2d)10. [a] IndA 152NE177. [b] **Agent of bondholders has been held not negligent** in considering waivers of liens as receipt for amount of cash stated therein. 38F(2d)10.

316-10 LaA 128S534.

316-10½-New. Form of the main contract attached to a subcontract, but not made a part thereof, has no effect on a provision of the subcontract waiving lien right. IndA 152NE177.

317-26 47RI 203, 132A4. [a] 47RI 203, 132A4.

317-29 102NJL363, 132A606.

317-30 Iowa 227NW606.

318-34 18F(2d)360; 83CalA758, 257P 161. Contra 22F(2d)791.

318-41½-New. In New Jersey a building contractor may waive a mechanic's lien at trial and rely on the common-law right to recover. 102NJL322, 134 A86.

318-41¼-New. Lien of a stop notice claimant is not waived by filing a claim with a trustee in bankruptcy. 101NJEq 45, 136A920.

318-43 20F(2d)190; 107Conn425, 140 A754; 94Fla950, 114S780; 213Ky473, 281SW467; MoA 296SW448; 101NJEq 45, 136A920; 226AppDiv674, 233NYS 194.

319-44 226AppDiv674, 233NYS194.

319-45 110Conn670, 149A214.

319-48 107Conn425, 140A754.

319-52 34GaA348, 129SE575.

322-5½-New. Withholding cautionary notice from the record on the owner's promise to pay trade acceptance will not prevent enforcement of a mechanic's lien. 95Fla958, 117S379.

322-7 See also 205Cal 685, 272P577.

323-15 227AppDiv630, 236NYS67 (where agreement was conditioned on retention of lien).

323-18½-New. On the contractor's default in paying for material, the obligation of the guarantor is, in effect, payment taking precedence over a subsequent lien. 222AppDiv693, 224NYS721.

323-19 110Conn670, 149A214; 103NJ Eq78, 142A312, 314 [citCJ]. See also 37 F(2d)93(3dcase). But see 161La759, 114S644.

324-41½-New. Mechanic's lien is not waived by execution of a trust deed as additional security for a person performing work on lots, and materialmen, in the absence of showing consent to be bound by or to limit any rights by reason of a declaration of trust or express waiver of rights as lienholders. 93CalA 228, 269P566.

325-53 Fla 129S738; 20 OhA508, 152 NE727.

325-55 Ark 32SW(2d)427. [a] (4) Subcontractor's knowledge of, and acquiescence in, owner's refusal to pay for materials does not defeat subcontractor's right to lien. 31NM334, 245P252. (5) That subcontractor made no demand on owner and received payments from time to time from contractor does not defeat his right to lien. 31NM334, 245P 252.

325-56 Fla 129S738.

325-67 194Wis504, 217NW313.

326-72 20 OhA508, 152NE727.

326-73 20OhA508, 152NE727.

326-76 But see 125Kan299, 264P17.

326-78 125Kan299, 302, 264P17 [quot CJ].

326-84 163La384, 111S794.

326-87 86Colo 493, 283P1042.

328-11 126Misc873, 215NYS173; 224 AppDiv844, 230NYS760.

328-12 126Misc873, 215NYS173. [b] **Courts have no inherent power** to cancel or discharge mechanics' liens. 224App Div844, 230NYS760.

328-23 [d] **Liability, if no bond posted,** is equal to amount of bond. 163La 132, 111S651.

329-36 [b] **Where owner did not require bond,** materialman could proceed against owner and property. LaA 128S 534.

329-37 124Kan737, 262P538.

329-41 145Miss643, 112S482.

329-42 145Miss643, 112S482.

330-53 But see 163La132, 111S651.

330-55 CalA 284P477.

330-60 [d] **Bond filed, but not noted by clerk** till some later time, held valid. 124Kan737, 262P538.

330-67 124Kan737, 262P538, 540 [cit CJ]. But see CalA 284P477 (where bondsmen are not good and sufficient sureties).

330-68 99Fla309, 126S151. [b] **Discharge is complete** where bond is given and lien is not continued in favor of surety after recovery is had on bond. 98Fla242, 123S759.

330-69 99Fla309, 126S151; 124Kan 737, 262P538, 540 [citCJ]; 164La521, 114S119.

330-70 136Misc204, 239NYS326.

330-71 But see 39F(2d)295.

331-74 164La521, 114S119.

331-75 99Fla309, 126S151.

331-78 See also 136Misc204, 239NYS 326.

331-79½-New. A bond given by a licnee differs essentially from a forthcoming bond in attachment, replevin or on execution upon which judgment may be entered against sureties in the principal suit. 99Fla309, 126S151.

331-80 200Cal 688, 254P1097. [c] **Provision that principal obligor will pay any final judgment in action to enforce lien** refers to suit to enforce claimed lien which had not gone to final judgment when bond was executed. 263 Mass295, 160NE889.

331-82 243Mich175, 220NW717. But see 200Cal 688, 254P1097.

331-95½-New. Surety is not entitled to lien upon satisfaction of claims under bond. 124Kan737, 262P538.

331-95¼-New. Rights of surety to indemnity depend upon the terms of the bond. 124Kan737, 262P538.

331-95¼-New. Subjecting cash deposited by the vendor to indemnify one lending to the purchaser against a lien claim where the vendor was not liable for the debt held error. 175Ark672, 300 SW375, 58ALR907.

332-6 99Fla309, 126S151.

332-9 99Fla309, 126S151.

332-10 But see 263Mass295, 160NE889.

332-17½-New. In some jurisdictions an action at law on the bond is available

although an equitable proceeding is also available. 241Mich647, 217NW922.

333-24 But see 200Cal688, 254P1097.

333-24½-New. Defenses available in an equitable proceeding to enforce a lien are available in an action at law on the bond. 241Mich647, 217NW922.

333-28½-New. Where a suit to enforce a mechanic's lien must fail because of the invalidity of the lien, an action on the bond must likewise fail. 241Mich647, 217NW922.

333-35 [c] **Presumptions.—Parties** to bond held presumed to know statutory obligation to pay bond. 145Miss642, 112843Z. [d] **Evidence held insufficient** to show release of surety. 200Cal688, 254P1097.

334-44 NS [1920] 2DomLR127. But see NS [1929] 4DomLR638.

335-76½-New. A lien is not affected by the owner's paying off a mortgage. NJ 143A255.

335-77 [b] **In West Virginia.**—101WVa367, 132SE125.

335-84 [b] **Where building was demolished because of noncompliance with building laws, materialmen are entitled** to lien on land. Cal 292P566.

336-2 217Ala159, 115S90, 93 [citCJ]; MoA 285SW164.

337-14 217Ala159, 115S90, 93 [citCJ].

338-21 123Or651, 262P263.

338-21 174Wash535, 25P295.

339-42½-New. Under Ontario Mechanics' Lien Act a sale, under a power of sale in a mortgage, does not affect the rights of lienholders, and a purchaser with notice takes subject to their rights including the right to sale in the lien proceedings. Ont [1929] 2DomLR22.

339-57 145Wash584, 261P101. See also TexCivA 238SW(2d)22.

339-58 145Wash584, 261P101.

340-63 202 Iowa822, 211NW467.

340-75 [a] **Release held valid.—Release** executed by general manager of corporate lien claimant. 194Wis504, 217NW813.

340-79 6PaDist&Co666. [a] (3) Checks, funds to pay which were to be secured by deed of trust on property subject to liens, constitute sufficient consideration for release of liens. CalA 259P363.

340-81 6PaDist&Co666.

340-85½-New. Giving of release of lien by one employed in erection of nonlienable building is nullity. 14PaDist&Co93.

341-90 48 Ida176, 279P629.

341-92 [a] (1) 177Minn132, 224NW847.

341-94 FL 125S738.

341-1 NH 148A328(2dcase).

342-10 237 IllA596. [b] **Payment by** lessee in part leaves lessor's interest liable under lien for balance. 237 IllA596.

342-15 [1] **Accepting deed as payment** for debt extinguishes mechanic's lien. 111Conn266 149A627(2dcase).

342-15½-New. Payment made with the understanding that it was to apply on a particular obligation so as to decrease the lien binds the parties. 99CalA462, 278P935.

342-17 158ID197, 212NW876.

342-19 158ID197, 212NW876; TexCivA 238SW(2d)22.

343-21 237 IllA596; MoA 256SW448, 258SW(2d)1, 212SW76.

343-26 56RI377, 147A391. See also 138 Okl11, 280P281.

343-29 107Conn425, 140A754; 243 IllA473.

343-37 40 OklAC145.

343-39½-New. Where payment is made on account of a lienable obligation, the owners are "third parties" whose rights are injuriously affected by subsequent appropriation of payment to another obligation. 99CalA462, 278P935.

343-39½-New. Subcontractor receiving check of owner or owner's mortgagee must account for rightful application of proceeds. Or 286P981.

343-39½-New. Owner's check to subcontractor is in itself notice of source of fund and direction as to how payment shall be applied. Or 286P981.

343-39½-New. Subcontractor receiving payment directly from loan company out of building fund must apply payment to reduction of lien. Or 286P981.

344-44 Ariz 285P1037; 231Ky544, 21SW(2d)832.

344-45 59Kla525, 126S643; 202 Iowa1215, 211NW849; 231Ky544, 218SW(2d)832; 12LaA491, 126S453.

344-58 See also 202 Iowa1215, 211NW849.

345-63 31NM334, 245P252.

345-67 53Kla527, 112S560; 202 Iowa1215, 211NW849; NC 152SE629(2dcase); 143 Okl16, 289P264; TexCivA 128SW(2d)224; TexCivA 208W(2d)358 (constitutional lien subject to statutory notice to owner before he pays contractor).

346-73 [a] (9) **Book entry crediting** contractor with sum charged to owner does not defeat claim of materialman. 95Kla521, 126S792.

346-76 [a] (2) 216AppDiv213, 214NYS768 (at maturity); TexCivA 208W(2d)358 (where materialman had constructive notice of assignment). (8) Ala 129S285. (11) Lien does not attach to amount of note given to contractor by owner and transferred to third party. 216AppDiv213, 214NYS768. (12) Owner's acceptance of contractor's order to architect reciting that receipt of amount constitutes payment held to constitute payment. Ala 129S285 (acceptance held conditional).

347-30 102NJL15, 131A131; 59NJEq42, 133A430; NJCh 144A319. [b] **Payment at time contract signed** is at owner's risk so far as subcontractor's duly filed lien is concerned. 128Kan529, 278P745(2dcase).

347-31 Contra 102NJL15, 131A131.

347-35 216AppDiv213, 214NYS762.

347-38 216AppDiv213, 214NYS768 (lienor must show payment made to avoid statute).

348-98 105NJL537, 147A198.

348-7 246Mich700, 225NW521.

348-10 NC 155SE723.

350-22½-New. But payment of note given to contractor in good faith before filing of lien is not fraudulent payment out of fund to which lien attaches. 216 AppDiv213, 214NYS768 (even if note be paid after filing of lien).

350-23 143 Okl297, 288P949.

350-33 253 IllA520.

350-34 326 Ill633, 158NE428; 253 IllA520.

351-45 331 Ill38, 162NE157.

352-79 [a] (3) Owner who guarantees amount of lumber bill used by contractor is entitled to credit for its amount as against mechanics' liens subsequently filed. 143Va451, 130SE396.

353-87½-New. Under some statutes the owner is under no obligation to give notice to subcontractor of guaranty of materialman's bill. 143Va451, 130SE396.

353-90 4LaA216.

353-92 [a] 178Ark533, 128SW(2d)884.

353-96 72CalA601, 238P101; 1LaA27; 2LaA649; 4LaA624.

353-97 10LaA349, 120S726; 9LaA566, 119S296; 11LaA371, 123S268; 8LaA469.

353-97½-New. Under some statutes no rights accrue to materialmen or laborers by reason of failure of the owner to exact the bond provided for. 155Miss779, 125S249.

353-1 CalA 285P490; TexCivA 283SW845. See also 91CalA746, 267P738.

354-4 72CalA601, 238P101.

354-4½-New. A bond is not invalid because plans of a contract were changed before execution of bond so as to substitute brick for stucco where the contract empowered alteration without abrogating the contract and a recital in the bond referred to a brick veneer building. IndA 165NE664.

354-6 167La712, 120S61. But see 91CalA746, 267P738.

354-8 72CalA601, 238P101.

354-9 [a] See also 154Miss587, 122S544.

354-15½-New. That a surety's name did not appear in recitals of a building contractor's bond, given under statute, did not affect its validity or his liability thereunder, where the bond was otherwise properly executed and signed by him and the bond and the circumstances clearly showed an intention to charge him. 205Cal354, 270P965.

354-15½-New. An inadvertent insertion of a building owner's name in the body of a building contractor's bond, given under statute, did not serve to relieve the surety of liability thereunder. 205Cal354, 270P965.

354-15½-New. That another than the surety is named in the bond as surety does not affect the validity of the bond where it is signed by the surety and the intention clearly appears. CalA 265P511.

354-17 See also IndA 165NE664.

354-21 147Wash133, 265P457, 458 [cit CJ].

354-25 180Ark1, 208W(2d)180. [a] **Bond which limits its liability to bondholders** and makes no provision for lienholders creates no obligation for liens. 27 OhA65, 160NE720.

355-35½-New. Estimate of cost of building is not necessary, it being sufficient that bond be for more than fifty per cent of contract price. 170La10, 127S247(2dcase).

355-39½-New. Failure of a building contractor to sign a bond, given under Code Civ. Proc. § 1183, as principal, did not affect the liability of the surety thereon. 205Cal354, 270P965.

355-40 176Ark1035, 58W(2d)294; 162La335, 110S495.

355-41 162La335, 110S495.

355-44 162La335, 110S495; 170La1083, 129S644.

355-47 162La335, 110S495.

355-48 162La335, 110S495.

355-49½-New. Failure of the owner to record the contract and bond makes the contractor his agent, and his property is liable for perfected liens for materials furnished. 103WVa318, 137SE356.

355-49½-New. The validity of a bond is not affected by the fact that it is signed by the surety only where it is attached to, and made part of, the original contract signed by the contractor. CalA 265P511.

355-51 91CalA746, 267P738. [b] **What law governs.**—179Ark361, 168SW(2d)7.

355-54½-New. In construing a contractor's bond, a paid surety is not entitled to the benefit of the rule of construction which favors volunteer sureties. 109Conn256, 146A293.

355-56 [b] **Bond construed strongly against surety.**—180Ark1, 208W(2d)180.

356-63½-New. **Agreement to give such bond** is construed to be an agreement not to file a lien; 6PaDist&Co666.

356-63½-New. but such agreement is not tantamount to an agreement not to file a lien. 6PaDist&Co666.

356-63½-New. Filing of a bond, after timely commencement of suit to enforce lien, will not displace the lien which became fixed by bringing suit. 178Ark533, 128W(2d)884.

356-63½-New. That bond taken by owner from contractor did not protect materialman's claim does not render owner liable for payment thereof. Wash 288P910.

356-63½-New. A materialman's right to apply payments by the contractor to the oldest obligation is not affected by the fact that money was received from an owner for the erection of a building under a contract on which there was a surety. 208Cal371, 281P500.

356-65 91CalA746, 267P738.

356-66 17F(2d)444; 178Ark533, 128W(2d)884; 91CalA746, 267P738; 13LaA359, 126S718; 155Miss31, 119S366. [a] **Surety of general contractor** is not liable for lumber sold subcontractor for repairs to subcontractor's equipment damaged by negligence. LaA 129S189 (laccase).

356-67 15F(2d)317; 167La712, 120S61; 4LaA66; 155Miss31, 119S366.

356-72 See also 167La712, 120S61.

356-73½-New. Statute and bond given thereunder should be liberally construed. 17F(2d)444.

356-73½-New. Where the contractor gives a bond in accordance with the statute, funds due him are released from equity or trust in favor of materialmen and laborers and go into his hands untrammeled. 150Miss864, 117S245.

356-73½-New. A bond becomes part of

the contract to which the surety becomes a party. 91CalA746, 267P738.

356-73½-New. Materialman is entitled to lien on property irrespective of contract price where bond does not meet requirements of mechanics' lien statute. CalA 286P490.

356-76 CalA 286P490; 35 OhA476, 172 NE566; Wash 293P284. [b] **Plaintiff's reliance on bond** when furnishing material held not to enlarge obligations or purposes for which bond was given. 7F(2d)91.

356-77 [a] **Intent of parties.**-15F(2d) 253.

356-78 17F(2d)444; 176Ark1035, 5SW (2d)294; 180Ark1, 20SW(2d)180; Cal 285P1045 [superseding CalA 283P341]; 91CalA746, 267P738; 169La731, 125S 871; 8LaA91; 35 OhA476, 172NE566.

357-80 IndA 158NE910; TexCivA 19 SW(2d)618.

357-84 180Ark1, 20SW(2d)180 (surety's liability not limited to payment of claims which constitute liens).

357-90½-New. So where bond is made for benefit of all persons "who may establish a lien against owner" materialman may sue without first procuring lien since words used mean person entitled to lien not necessarily one who has established lien. 168Ark185, 269SW369.

357-91 Wash 290P866.

357-94 179Ark361, 16SW(2d)7.

358-1 156Tenn19, 300SW574; Wash 290P866.

358-1½-New. To establish pecuniary loss from valid liens, owner must show loss incurred or paid because of liens fastened on building for which he was liable. 40F(2d)606.

358-4½-New. Surety, suffering no loss at time of filing intervention in action by materialman against contractor finishing contract by defaulting subcontractor, has been held without right or remedy. 160La392, 107S236.

358-4⅛-New. Under some statutes the contractor's bond does not cover liability to any subcontractor or materialman beyond the first who deals with and furnishes materials directly to the principal contractor. 146Miss414, 111S573.

358-4¼-New. A bond given by a contractor to a mortgagee to protect his security against liens is broken by entry of judgment perfecting liens and subjecting property to sale not appealed from or superseded. 172Minn320, 215NW67.

358-4⅓-New. The surety is bound by an action of the owner in fixing an erroneous date of completion of the building, causing the lien notice to be given prematurely, where any existing defense was not thereby waived. 156Tenn 19, 300SW574.

358-4⅙-New. A contractor's assignee on a mechanic's lien note could not recover on an indemnity bond against the contractor's default the amount it was adjudged to pay the owner because of the contractor's default. TexCivA 5SW (2d)162(2dcase).

358-4½-New. The makers of a mechanic's lien note held not entitled to reimbursement under the contractor's indemnity bond for attorney's fees in suit on the note. TexCivA 5SW(2d)162.

358-4⅔-New. Surety on the contractor's indemnity bond held liable to the owner for liquidated damages for the contractor's default, notwithstanding the contractor's agreement as to default. Tex CivA 5SW(2d)169.

358-4⅚-New. As between lien claimants and a contractor's surety notified of his default, loss from removal of material from premises between default and the surety's request that the owner complete the building must fall on the surety. 168La443, 122S285.

358-4$\frac{1}{10}$-New. Statute limiting the surety's defenses to those the contractor could make may be dispensed with by a materialman guaranteeing to the surety that no lien would be recorded for his claim. 168La578, 122S856.

358-4$\frac{1}{11}$-New. Surety is not liable to penalty where materialman demanded attorney's fees for which surety was not liable and for which it refused to pay. 13LaA359, 126S718.

358-4$\frac{1}{12}$-New. Lumber used for forms to hold concrete and removed by contractor does not become part of structure covered by bond insuring payment for material. Oh 172NE152.

358-4$\frac{1}{13}$-New. Cost of hauling materials entering into structure held covered by such bond. Oh 172NE152.

358-4$\frac{1}{14}$-New. Neither owner's failure timely to record building contract and bond, nor failure of materialmen to preserve their liens, can deprive him of right of action against surety. 169La731, 125 S871 (whether liens were validly recorded is of no concern to contractor or surety).

358-8½-New. or material furnished. 168La578, 122S856.

358-10 72CalA601, 238P101. [a] **Payment of liens by owner** at request of sureties precludes any question as to their validity or reasonableness. 72Cal A601, 238P101.

358-10½-New. A surety cannot complain of the cost of items where there were no plans, specifications, or cost limits. 166La749, 117S817.

358-10⅓-New. A surety, completing a building, is not liable for claims not filed as liens because of the homestead character of the building. TexCivA 15 SW(2d)729.

358-10¼-New. Surety completing construction of homestead after abandonment by contractor is liable for nonlienable claims of materialmen under bond indemnifying owner against loss. TexCommnA 29SW(2d)1004.

358-11 91CalA746, 267P738.

358-13 Wash 290P866.

358-16 13LaA359, 126S718; 154Miss 587, 122S544; TexCommnA 29SW(2d) 1052. But see 169La731, 125S871.

358-17 156Tenn19, 300SW574.

358-18 178Minn388, 227NW205. [b] (2) Contract providing for reasonable attorney's fees and for attorney's fees of not less than ten per cent of amount involved provides for allowance of reasonable fees not exceeding ten per cent of amount involved. 165La548, 115S746. (3) "Amount involved," within such contract, is bona fide difference between parties to litigation measured by amount of money which would be required to adjust that difference. 165La 548, 115S746.

358-19 IndA 158NE910.

358-20 13LaA359, 126S718.

359-26½-New. Although the cost of mortgage foreclosure, paving liens, taxes, and insurance are not chargeable against the surety, they are legally payable out of price of adjudication. 166La749, 117 S817.

359-26⅓-New. But no such credit is allowed as against the holder of a note where such holder sustains full loss. 166La756, 117S819.

359-26¼-New. Surety is entitled to credit for discount at which liens were purchased by the obligee on the bond. 166La749, 117S817.

359-26⅙-New. The owner can only recover from the surety for default of the contractor. 118Tex180, 128SW(2d)973 (cannot recover for loss, occasioned by embezzlement by clerk, of money deposited without order of court).

359-31½-New. Addition of cancellation clause to a building contract after the building is partly completed; 94CalA 370, 271P356.

359-32 But see CalA 278P261.

359-35 IndA 158NE910.

359-36 [a] **Requirement of notice of default by registered mail** is waived by acting on personal notice. 39Wyo 195, 271P19.

359-39½-New. Refusal by the mortgagee of the surety's offer to purchase property for an amount sufficient to satisfy all liens does not release the surety. 166La749, 117S817.

359-39⅓-New. Considerable difference between bids of contractor and next lowest bidder does not indicate fraud so as to release surety. 170La10, 127S 347(2dcase).

359-39¼-New. Failure of owner to record plans and specifications as well as contract does not release surety from liability to owner. 170La10, 127S347 (2dcase).

359-46½-New. Surety is not released until claim is paid or becomes prescribed. 170La1083, 129S644.

359-46⅓-New. Sureties' obligation to materialmen on statutory bond held enforcible notwithstanding materialmen's specific waiver of lien before execution of bond. CalA 290P45.

359-51 178Ark1073, 13SW(2d)291. [d] (3) Recorded transfer to contractor, and trust deed to secure payment, held not notice to lien claimants. 94 CalA370, 271P356. [e] **Supplemental contract not attached to bond** does not release surety where only provision thereof, not contemplated by original contract, was not carried out. 39Wyo 195, 271P19. [f] **Taking of ninety-day note** by materialman is not extension of time so as to release sureties on contractor's bond. Cal 285P851. [g] **Agreement held not to affect contract.**-TexCivA 19SW(2d)618.

360-52 CalA 280P158 (execution and acceptance of note).

360-53 2LaA129.

360-54 [b] **Payment in excess of stipulated cost.**-39Wyo 195, 271P19. [c] **Agreement to withhold amount.**-TexCivA 19SW(2d)618.

360-56 But see 102CalA192, 282P974.

360-60 [f] **Payments made after owner takes charge on contractor's default.**-167La712, 120S61. [g] **Building material on premises when contract was executed** and used in erection of building is not within provision for retention of percentage of architect's estimate of cost of work. 39Wyo 195, 271 P19.

361-63½-New. Sureties on bond protecting mortgagee have no equity in mortgage proceeds and are not relieved by their application in payment of other than lienable claims. 176Minn281, 223NW139.

361-63⅓-New. Agreement by materialman permitting owner to withhold fund to pay materialman does not violate contract not specifying terms for purchase of materials so as to release surety. TexCommnA 29SW(2d)1052.

361-63¼-New. Execution and acceptance of note as account stated does not release sureties on contractor's bond. Cal 285P851.

361-72½-New. **Second mortgagee may** sue on an indemnity bond protecting him against mechanics' liens, without redeeming from foreclosure of the first mortgage. 176Minn26, 222NW512.

361-72⅓-New. Where the owner canceled a contract when the contractors were not in default, he was not entitled to cancel liens in favor of the contractors for work done. 167La689, 120 S52.

361-74 150Md40, 132A261. [a] **Bond must be construed as executed for direct benefit of materialmen** in order that suit may be maintained by them or for their use. 220Ala262, 125S55.

361-75 [a] **General policy of promoting industry by putting bond behind obligations of contractor** may be considered in determining intent. 220Ala 262, 125S55.

361-78 121Kan299, 246P503, 504 [citCyc]; 150Md40, 132A261.

361-79 15F(2d)317; 220Ala262 125S 55; 180Ark1, 20SW(2d)180; 109Conn 256, 146A293; Fla 130S440; 121Kan 299, 246P503, 504 [citCyc]; 150Md40, 132A261; 169Minn485, 211NW834, 835 [citCJ]; 193NC769, 138SE143; 107W Va482, 148SE850 (bond merely guaranteeing performance of contract). [b] **Procuring lien against property is not condition precedent** to right of materialman to sue on contractor's bond which is made for benefit of persons "who may establish a lien against" owner. 168Ark185, 269SW369.

362-81 7F(2d)91; 26F(2d)557; Wash 293P284.

362-82 CalA 286P490; 45SC177, 143 SE21.

362-87 [a] (5) Where interest of parties was to secure to owner completion of building at contract price and its delivery free from liens. 15F(2d)253.

362-87½-New. A bond has been held not to give a right of action to those furnishing labor and material to a contractor having no claim against the

property owner. 91Fla354, 107S679.

362-87½-New. Assignee of claims of laborers and materialmen may maintain an action on a bond given for their benefit. 191NC672, 132SE806.

362-87¼-New. A materialman need not file sworn statements of account with the owner as a condition precedent of the right of action against the contractor and surety. 165La1065, 116S559.

362-87½-New. A materialman may sue on a bond given by the owner to a mortgage company, making a loan for construction of a building, where such bond was conditioned on indemnifying the obligee against any loss by failure to complete the building and agreeing to pay claims of laborers and materialmen in full. 99CalA456. 278P913.

362-88 17F(2d)444; 91CalA746, 267P738; 163La1, 111S471; 167La601, 120S21; 150Md40, 132A261.

362-88½-New. Where a bond under statute was conditioned for the payment of any judgment which may be rendered against the property for enforcement of a lien, lienor must continue with his cross action against the owner for that relief in order to obtain judgment against property for foreclosure of the lien. 130Misc894, 224NYS626.

362-93 But see TexCivA 22SW(2d)717.

362-94 [a] **Recording claim of lien is not prerequisite** to suit on contractor's bond. CalA 286P490.

362-95 96CalA615, 274P617; 166La1066, 118S141; 167La399, 119S405; 167La601, 120S21; 170La1083, 129S644; 3LaA525.

362-96 See also, 158La1052, 105S63.

363-2 But see 170La879, 129S515.

363-2½-New. A surety on a contractor's bond is not liable for money lent by a materialman to a contractor partly to pay workmen and partly for use generally. 169La319, 125S258.

363-6 [a] (2) Where, though it was not prerequisite to suing on bond that materialmen establish lien, he brought suit after expiration of time during which he could establish lien, action was barred. 168Ark185, 269SW369. [c] **Statutory period for enforcing mechanics' liens** is inapplicable to suit on bond. CalA 286P490.

363-7 [a] (2) Bond, building contract, and facts of particular case must be considered in determining reasonableness of limitation of time for action. 39Wyo195, 271P19. (3) Where building contract provides for completion not later than stated date, provision of bond for action not later than stated date thereafter will be construed as meaning that suit must be brought within such time if work is completed within time fixed by contract. 39Wyo195, 271P19. (4) Limitation provided by such provision of bond does not apply where surety was instrumental in keeping contractor on job after failure to complete building within time fixed by contract and after admission of liability on bond by surety. 39Wyo195, 271P19. [b] IndA 158NE910; 178Minn388, 227NW205.

363-9½-New. A mortgage note holder may sue in her own name on a bond given by the mortgagor to the mortgagee as obligee and also in favor of any holder of mortgage notes. 166La756, 117S819.

363-11 163La1, 111S471; 11LaA62, 120S723; 10LaA326, 121S201. See also 158La1052, 105S63.

363-14½-New. Materialman can sue surety without joining contractor. 13LaA477, 127S424.

363-15 [a] MoA 9SW(2d)103. [b] (2) In suit on bond not necessitating prior establishment of lien, complaint must, nevertheless, allege that plaintiff was entitled to establish lien at time suit was commenced and failing so to allege, it states no cause of action. 168Ark185, 269SW369.

363-16 [a] 168Ark185, 269SW369 (failing to state cause of action). [b] 72CalA601, 238P101.

364-24 99Fla525, 126S643.

364-26½-New. Defense of false representations held insufficiently pleaded. 170La879, 129S515.

364-29½-New. General denial to allegations of execution of surety bond is insufficient to raise issue of fraud in procurement of bond. 86Colo493, 283P1042.

364-31 [b] (2) Notices of liens held inadmissible as evidence of damages in absence of evidence that liens were perfected or paid by owner. 40F(2d)606. (3) Membership franchise between materialman and contractor. 13LaA477, 127S424. (4) Other instances. 10LaA308, 121S370.

364-32 [a] (7) Establish materialman's account against contractor and surety for materials. 165La1065, 116S559. (8) Hold surety. 5LaA370. (9) Support claimant's lien claim. 168La443, 122S285. (10) Sustain finding that note and securities were delivered, extending time. CalA 278P261. (11) Support judgment for plaintiff materialman. 166La1066, 118S141. (12) Sustain findings of damages. 176Minn26, 222NW512. (13) Show authority of surety's representative to authorize release of retained percentages. 39Wyo195, 271P19. (14) Show knowledge and acquiescence of surety in owner's undertaking to complete building. 167La712, 120S61. (15) Support finding that owner did not falsely represent that contract with contractor for exchange of land was no longer in effect. 102CalA192, 282P974. (16) Other illustrations of evidence held sufficient. 102CalA192, 282P974. [c] **Evidence held insufficient:** (1) To show bond was executed solely on compulsion of void statute. TexCivA 283SW645. (2) To sustain defense that materialman's acceptance of note from contractor constituted novation. 10LaA308, 121S370. (3) To authorize recovery by materialman. 170La1083, 129S644.

364-34 13LaA577, 128S50. [b] **Burden on surety** to prove contractor's lawful bond was executed solely on compulsion of void statute to avoid it on such ground. TexCivA 283SW645. [c] **Burden of showing failure to retain stipulated percentages of architect's estimates** rests on surety. 39Wyo195, 271P19. [d] **Showing where material was used.**–168La841, 123S593.

365-37 169La731, 125S871.

365-42½-New. Attorney's fees are not recoverable where part of claim is disallowed. 13LaA577, 128S50.

365-42½-New. Recovery of attorney's fees precluded under facts. 170La879, 129S515.

365-48 [b] **Waiver of provision.**–155Miss779, 125S249.

365-49 CalA 259P84.

365-52½-New. Such provision has been held not broad enough to cover counsel fees in resisting a lien of subcontractors. 290Pa437, 138A913.

365-52½-New. In an action by a contractor for the balance due under a contract providing for waiver of a lien and retention of an amount sufficient to indemnify the owner against claims chargeable to the contractor, evidence of the subcontractor's lien as offset is admissible. 290Pa437, 138A913.

365-52¼-New. subject to elimination by the court of items embraced not covered by the principal contract. 290Pa437, 138A913.

365-55 DelSuper 143A460. [a] (2) Where lien was not authorized by statute because filed against public school building, statutory provisions were inapplicable. 152SC305, 149SE243.

366-57 Fla 129S738.

367-76 NJ 151A843.

367-83 129Misc478, 221NYS382. [a] **Construction of statute.**–129Misc478, 221NYS382.

368-86 99CalA686, 279P163; 243NY482, 154NE531; 228AppDiv65, 239NYS76; TexCivA 30SW(2d)393. [a] (3) Materialman held entitled to recover value of materials furnished to former owner from purchaser at foreclosure sale who annexed material to realty. 243NY482, 154NE531. [d] **Garnishee proceedings** as incident to common-law action are proper after foreclosure of lien. 243Mich483, 220NW746.

369-97 18F(2d)360.

369-2 34F(2d)163.

369-4 22OhA73, 153NE232.

370-13 315Mo276, 286SW3. See 99NJEq70, 132A507.

370-16 315Mo276, 286SW3.

370-17 [d] (5) Suit to foreclose one mechanic's lien against property otherwise encumbered has been held to be in equity to extent that priority of liens must be determined. 315Mo276, 286SW3.

370-18 134SC284, 132SE581.

371-32 147Wash369, 266P167.

372-44½-New. A contractor's assignee of a mechanic's lien note held entitled to foreclosure, notwithstanding the contractor's default. TexCivA 5SW(2d)162.

372-44½-New. Personal judgment against owner is not prerequisite to foreclosure of mechanics' liens. 86Colo493, 283P1042.

373-53 [a] **Materialman is not bound by provision for arbitration in contract between contractor and subcontractor** where there is no such provision in his contract with subcontractor. 242Mich126, 218NW760.

373-55 [a] (2) Contractor, by going to trial in materialman's action without demanding arbitration, waives right. 242Mich126, 218NW760.

373-66 [b] **In Oklahoma.**–136Okl233, 277P242, 65ALR1186.

376-4 222MoA211, 297SW99; MoA 13SW(2d)659.

376-10 See also 96Fla671, 119S104.

377-14 180Ark517, 21SW(2d)973.

377-16 191Wis628, 211NW775.

377-18 192Wis482, 213NW283.

377-24 219Ala318, 122S337.

380-67 [e] (5) Owner is not estopped to deny completion of building as alleged in invalid notice filed after expiration of time allowed therefor by statute. CalA 265P511.

380-70½-New. Owner who receives material charged for by materialman is estopped from setting up that latter had not substantially complied with contract. 162Ga300, 133SE236.

380-71 [a] (1) 198Cal520, 246P45. (3) Owner cannot recover sum he failed to pay on contract price, nor reasonable value of eliminated work. TexCivA 293SW835. [b] But see 198Cal520, 246P45.

382-83½-New. Subcontractor is properly charged with payments received by him from contractor with knowledge that they came from owner and which he wrongfully applied by crediting them on an antecedent debt of contractor. 203Iowa172, 210NW430.

382-84 TexCivA 5SW(2d)162.

383-94½-New. In a suit by the contractor's assignee on a mechanic's lien note, liquidated damages for the contractor's default should not be deducted. TexCivA 5SW(2d)162.

383-96 246Mich700, 225NW521; 120Okl164, 251P97.

383-97 250Mich203, 229NW437; 143Okl16, 289P264. [a] 143Okl297, 288P949.

384-2 11LaA298, 123S472. But see 245NY553, 157NE854.

384-8½-New. Where a material man who has furnished materials to a contractor takes an assignment of the contractor's filed claim, against the owner, and sues to foreclose his own and the contractor's liens, setting up the contractor's lien as a separate cause of action, the owner may set up damages because of faulty workmanship against the assigned claim, 120Okl164, 251P97.

384-8½-New. but not against the original claim of the materialman. 120Okl164, 251P97.

385-10 But see NS [1930] 1DomLR826.

385-16 [b] 254IllA569 (defense not averred in answer).

385-21 96Fla671, 119S104; Fla 123S837(2dcase); 99Fla1183, 128S642; 99Fla1151, 128S801(2dcase); Fla 129S346; Fla 130S577; 246IllA132; 170Minn130, 212NW22. But see 1LaA591. [e] **Estoppel of owner to assert limitation.**–239Mich477, 214NW417.

386-24 99Fla1151, 128S801(2dcase). But see 89CalA253, 264P562.

386-26 99Fla1151, 128S801(2dcase).

387-35 99Fla1183, 128S642 (service of cross claim on owner).

388-40 36F(2d)661.

388-42 219Ala303, 122S178; Fla 123S837(2dcase) (failure to bring in assignee

of mortgage, assigned during construction work, as party, within statutory period, held immaterial).

388-47 [c] **Mere filing of appearance not within statute.**-Fla 129S597.

389-50 191Wis628, 211NW775.

389-56½-New. Mere filing of appearance by materialman in suit brought by another lienor does not satisfy statute requiring suit to be brought within limited time. Fla 130S577.

389-63 [a] (2) That materialman performed work on material before delivery does not make contract one for work and labor so as to start limitations running from time labor was performed. 50RI 375, 147A891.

389-64 DelSuper 143A460; 99Fla1183, 128S642; Fla 129S597.

390-69 Ill 173NE179; 250 IllA373.

390-70 [b] (4) Filing amended bill within twelve months after due date of note for materials prevents running of statute requiring proceedings for enforcement within twelve months after maturity of debt. 145Miss482, 111S141.

390-74 208 Iowa531, 222NW19.

390-76 172Ark1152, 291SW977; 96Fla 671, 119S104; Fla 123S837(2dcase); 99Fla1183, 128S642; Fla 129S766.

391-78 Fla 129S597.

391-79 104NJL424, 140A305.

391-81 119 Or308, 248P1095 (time held to run from completion of installation of new furnace in place of one removed as in violation of building code).

391-95 See also 170Minn130, 212NW22.

392-3 98Fla1081, 124S813; Fla 129S 597; Fla 130S577.

392-4 MoA 284SW525.

393-12 [b] NJ 150A326. [c] (1) NJL 142A665. [e] **Lack of diligence illustrated** where plaintiff's counsel took chance that case would not be reached with result that it was marked off. NJL 142A665.

394-16 33F(2d)162.

394-18 35F(2d)638.

395-27 But see 96Fla671, 119S104.

395-29½-New. Assignee of a mechanic's lien note may enforce payment by judgment and foreclosure. TexCivA 5 SW(2d)162(2dcase).

395-31 291Pa531, 140A522.

395-36 235 IllA417.

395-37 86Colo 493, 283P1042 (mortgagee may object to invalid liens without procuring consent of surety).

395-39½-New. Failure of assignees of lien claims to object to allowance of certain lien claims estops them from thereafter questioning their validity. 86Colo 493, 283P1042.

396-43 MoA 248SW(2d)673 (assignee of contract is not real party in interest). See also 198NC273, 151SE631. [c] **Action by subcontractor.**-198NC273, 151SE 631.

396-58 84Mont178, 274P834.

397-65 79CalA770, 251P331.

397-72 CalA 284P477 (though not good and sufficient sureties).

397-72½-New. Court may render personal decree against surety on contractor's bond for payment of labor and materials where he was made party defendant to suit to enforce lien. 235Mich 140, 209NW52.

398-76 217Ala441, 116S528.

398-87 TexCivA 290SW784.

399-5 130Misc894, 224NYS626; Tex CivA 18SW(2d)224.

401-29 152Miss894, 120S463.

401-31 219Ala303, 122S178.

401-33½-New. The trustee in bankruptcy of a mortgagor is not a necessary party where the mortgage had been foreclosed and the mortgagor's equity of redemption had expired before the mortgagor was adjudicated a bankrupt. 239Mich593, 215NW57.

402-44 219Ala328, 122S343; 249Mich 230, 228NW777.

402-46 151Va845, 145SE321.

403-60 86Colo 493, 283P1042; 101 NJEq636, 139A338.

404-62 38F(2d)10.

404-64½-New. or is not a necessary party. 53ND871, 208NW111.

405-80 154Miss363, 122S387.

405-87 See also 96Fla671, 119S104.

405-99 TexCivA 15SW(2d)725.

406-1 172Ark1152, 291SW977; 136 Okl 233, 277P242, 65ALR1186.

407-5 118 Or502, 247P780, 781 [citCJ].

409-36 [h] **Fire insurance companies may be brought in as defendants** on destruction of building by fire by service of supplemental summons and complaint asking for lien on insurance funds. 223AppDiv356, 228NYS156.

409-38 Fla 123S837(2dcase) (though brought in by amendment after expiration of statutory limitation, where institution of suit was timely).

410-51 [b] **Right of purchaser pendente lite to intervene** is for discretion of trial court. 86Colo 493, 283P1042.

411-71 198NC273, 151SE631.

412-77 143 Okl 297, 288P949.

412-86 [c] **Amendable irregularities.**-169Minn504, 212NW194.

413-97 133 Okl 267, 271P1035.

415-23 12PaDist&Co 485 (contract against liens available as defense).

415-25 94PaSuper90; 96PaSuper543.

416-36 SD 226NW343.

416-48 127Misc158, 215NYS335.

417-62 219Ala318, 122S337.

417-63 CalA 288P792; TexCivA 23 SW(2d)871.

418-64 219Ala328, 122S343; 92Fla 1052, 111S254; 251 IllA215; Ind 164 NE721; MoA 296SW176; TexCivA 1 SW(2d)661. [c] 33F(2d)162.

418-69½-New. The petition is to be liberally construed. 141SC72, 139SE 183.

419-82 5PaDist&Co 283.

420-95 152SC305, 149SE243.

420-4½-New. Affidavit by a corporation manager verifying an account without stating official title has been deemed amended by proof offered without objection. 173Ark445, 292SW695.

421-13 219Ala328, 122S343; 221MoA 1227, 300SW850; 121 Or360, 253P6 (sufficient). [d] **Description held sufficient.**-237 IllA544.

421-16 217Ala159, 115S90.

421-17 [a] (4) In general. Ala 130S 329.

422-27 94Fla549, 114S232. [b] 233 IllA256. [i] 251Mich376, 232NW254; 141 Okl 44, 283P985.

424-45 141SC72, 139SE183.

424-47 [a] 198Cal 520, 246P45.

424-49 198Cal 520, 246P45. [a] 198Cal 520, 246P45. [b] 198Cal 520, 246P45.

424-51 94Fla549, 114S232; 97Fla283, 120SE335(1stcase); 170Ga550, 153SE 361; OhA 172NE700; TexCivA 23 SW(2d)883 (petition as whole infers that material was furnished to owner of leasehold). [d] **Allegations held insufficient.**-Ala 128S137.

425-54½-New. A bill to enforce a lien against an estate by entireties is demurrable where it fails to allege knowledge or assent of husband and wife or a written contract with them. 98Fla475, 124 S38.

425-56 217Ala159, 115S90. [e] (2) Allegation that items were furnished "under one arrangement and constituted one continuous running account" states a cause of action under Rev. St. (1919) § 7216. MoA 296SW448, 449.

426-63 See also 219Ala417, 122S408.

426-69 [b] **Complaint held sufficient** against demurrer. 214Ala8, 106S49 (where materialman claims under personal contract with owner).

426-75 250 IllA468.

427-81 [c] (3) Averment that owner suffered petitioner to improve property is insufficient. 170Ga550, 153SE361.

428-92½-New. Joint contract. An allegation of delivery of materials under a joint contract with persons owning separate lots is sufficient as a basis for a lien on both lots. 96Fla178, 117S794.

428-95 99Fla1151, 128S801(2dcase).

428-2 [a] (3) Other instances. 129 Or 102, 275P677.

430-15 170Ga550, 153SE361. [d] **Allegation that each item was agreed price or reasonable value of materials** is sufficient compliance with statute in absence of demurrer. CalA 289P927.

430-30 99Fla1336, 128S858.

432-58 173Ark1024, 296SW27. See also 219Ala328, 122S343.

432-60 104NJL424, 140A305.

432-63 TexCivA 23SW(2d)879.

432-64 170Minn24, 211NW957.

432-66 See also 30 OhA84, 163NE921. [g] 136Wash98, 238P980.

433-77½-New. A bill is demurrable because it shows a claim based on an entire contract including separable nonlienable items apparent on the face of the bill. 251 IllA215.

434-81 93Fla587, 112S560; 99Fla1336, 128S858; 237 IllA416; 121Kan199, 246 P1009 (service of notice); 10LaA409, 121S372; 121 Or285, 254P803. [a] (3) Bill is demurrable as to trustee and encumbrancer where amended notice was filed too late as to them under statute. 237 IllA416. (4) Bill is not demurrable as to owner where amended notice is sufficient and is filed in time under statute. 237 IllA416.

434-82 10LaA409, 121S372.

434-84 Ala 128S893.

434-86 [a] (2) In general. Ala 128S 137.

435-88 CalA 288P863. [a] 88CalA777, 264P311; CalA 288P792. [d] **Allegations do not supply defects in lien statements,** as failure to name contractor. 122Kan48, 251P196.

435-91 But see Ala 128S893.

435-94 251 IllA215 (not subject to general demurrer). [f] (5) Pleadings, as whole, held to show timely filing. 215Ala33, 109S164. (6) Other instances. 219Ala328, 122S343.

435-94½-New. In a suit by a subcontractor against the owner of property for work done in installing heating, where it is alleged that no contract was recorded, there is a presumption that no acceptance of contract was recorded. 10LaA409, 121S372.

437-17 [b] **Filing before judgment for want thereof.**-85PaSuper385.

438-32 [a] (5) Argumentative denial of lienable interest of occupant of premises. 85 IndA140, 151NE354. (6) Other instances. CalA 284P703.

438-38 121 Or360, 253P6.

438-39 [b] See also 121 Or360, 253P6.

439-42 103WVa318, 137SE356.

439-47 TexCivA 297SW234.

439-48 [a] **In Oklahoma.**-39 OklACR 356.

439-55½-New. Where there is a specific allegation of a material fact in the bill, an answer constituting a general denial but not specifically denying all the allegations of the bill is sufficient to put plaintiff to proof of such allegation in the absence of exceptions. 103 WVa318, 137SE356.

439-55½-New. Answer not raising issue as to any particular item held bad. 220Ky422, 295SW414.

440-74 But see TexCivA 18SW(2d)796.

441-94 103WVa318, 137SE356, 358 [cit CJ].

441-96 103WVa318, 137SE356, 358 [cit CJ].

441-2½-New. An agreement to waive the lien must be pleaded. 128Kan529, 278P746(2dcase).

442-8 See also 33F(2d)162.

442-13½-New. Where the owner by cross bill brings in the contractor's surety and asks for accounting between itself and the contractor as to amounts due lien claimants, the surety, answering, is entitled to an accounting without asking for affirmative relief. 239 Mich477, 214NW417.

445-59½-New. Failure to file replication acts as an admission. 5PaDist&Co 283.

447-16 287Pa425, 135A220.

448-38 239Mich593, 215NW57.

448-41 170Minn130, 212NW22; 154 Wash436, 282P917.

448-47 88CalA777, 264P311.

449-54 44 Ida520, 258P529.

449-55 44 Ida520, 258P529.

449-67 158Md615, 149A438.

450-82 250Mich686, 230NW910.

450-83 Fla 129S738. [a] (2) Mistake as to building owner's name in charging for materials and correction thereof is immaterial where there is no question as to identity. 214Ala8, 106S49. (3) Where claim is by original contractor, question of notice to owners that materials would be furnished is immaterial. 214Ala8, 106S49.

451-85 87CalA231, 261P1027.

451-86½-New. Strict compliance with every requirement of statute must be alleged and proved. 99Fla947, 127S 896.

451-97½-New. Where the mortgagee

is not a party to a suit to foreclose a lien on three buildings erected on one lot under three contracts, it is immaterial that, as between the mortgagors and the mortgagee, there was a division of property and separate mortgages made upon two parts of a lot. 192 Wis482, 213NW283.

451-99 [a] (2) Failure to prove that notice was given to the then owner, alleged in complaint to have been named person, is fatal. 123 Or651, 262P263.

451-2 [a] (3) Other matters not constituting fatal variance. 124 Or19, 263 P918. (4) Other instances. Cal 293P 25; 254 IllA569.

452-4 128 Or236, 273P719.

452-6 124 Or19, 263P918.

452-11 [b] **In actions based on quantum meruit** defendant under general denial may prove special contract to furnish materials and labor for certain amount. 219MoA383, 271SW1003.

452-12 124 Or461, 263P916.

452-13 98Fla475, 124S38.

453-17½-New. A bill to enforce a lien on an estate by the entireties, alleging an agreement by both husband and wife, is not supported by proof of an agreement signed by the husband alone with knowledge and consent of the wife. 98Fla475, 124S38.

453-22 211Ky809, 278SW105.

453-24 211Ky809, 278SW105; 216Ky 760, 288SW685.

453-25 123 Or651, 262P263.

453-26 118 Or511, 247P315.

454-34 NJ 143A741(18tcase); 118 Or 511, 247P315 [citCyc].

454-39 129 Or1, 276P257.

455-44½-New. No variance results from failure to prove all items as embraced in statement of claim. Ala 130S 329.

455-50 213Ala646, 106S42; 130Misc 680, 225NYS417.

455-51 175Ark672, 300SW375, 58ALR 907; 83Colo 143, 263P16; 86Colo 493, 283P1042 (valid assignment of claim). [a] (2) Merely showing compliance with alleged contract is not sufficient to relieve materialman plaintiff from burden of making out case. TexCivA 19 SW(2d)368. [b] **Burden on plaintiff to prove insufficiency of sureties on contractor's bond.**–CalA 284P477.

456-59½-New. No act necessary to the acquiring of a mechanics' lien can be presumed. 91Fla354, 107S679.

456-59½-New. Burden of proof on issues raised by counterclaim is on defendant. CalA 288P792.

456-59¼-New. An owner has the burden of establishing damages claimed by way of set-off by reason of loss of rentals because of defective work. 154Wash 436, 282P917.

457-71 But see 98Fla405, 123S820(2d case).

457-72 MoA 11SW(2d)61.

457-88 213Ala646, 106S42; 46 Ida403, 268P26, 28 [citCJperWmELee,CJ]; 40 OklACR45.

457-91 126 Or69, 268P763.

457-92 131LaA153, 127S452(2dcase); 126 Or69, 268P763.

458-3 See also 213Ala646, 106S42.

458-7½-New. Court must presume that lien claimants dealt with contractor in absence of evidence of direct negotiations with owner. 39F(2d)341.

458-15 124 Or249, 264P428.

458-20½-New. That prior to delivery of material plaintiff notified defendant in writing that he would look to him for payment of price, 213Ala646, 106S 42.

458-20½-New. and that defendant acknowledged same and agreed to assume payment of purchase price. 213Ala646, 106S42.

458-23 TexCivA 19SW(2d)368.

459-25 [a] **Burden is on defendant** to show that work was negligently performed. 219Ala417, 122S408.

459-31 Ala 128S893.

459-33 168La1067, 123S715; 128 Or 236, 273P719; 147Wash158, 265P155.

459-39 7Alaska117; 147Wash158, 265 P155; 154Wash219, 281P733.

460-49½-New. Sale of building in unfinished state held not to show completion. 82Colo 81, 257P260.

460-49½-New. Defendant claiming that material was furnished on separate contracts and the lien was not filed in time has the burden of showing plaintiff's notice thereof. 44 Ida 359, 256P949.

460-50 TexCivA 19SW(2d)355.

460-59 TexCivA 19SW(2d)355.

461-69 87 IndA171, 158NE229.

461-77 [a] (2) Owner has burden of proving payment of contract price, except retained percentage, to lienholders. 156Tenn19, 300SW574.

461-82 244Mich93, 221NW159. [a] **Fraud cannot be presumed** where company executed contract with its president for construction of buildings. 39 F(2d)341.

461-87 295Pa425, 145A525.

462-94 220Ala140, 124S388 (where some work done before and some after execution of mortgage).

462-2 253 IllA274.

462-7 [a] (3) Average wages of bricklayer in action to show loss suffered by plaintiff prevented from finishing work. NJSup 138A305.

462-8 217Ala23, 114S406; 198NC273, 151SE631; TexCivA 5SW(2d)162. [c] **On question of owner's personal liability,** mistake as to building owner's name in charging for material and later correction thereof is immaterial. 214 Ala8, 106S49. [d] **Verified statement of account** is admissible, despite discrepancy between proof and bill of particulars as to year of sale and delivery. 214Ala8, 106S49 (where no dispute as to time date of delivery). [e] **Ledger sheets showing debits and credits against building owners** are admissible on issue of owner's personal liability. 214Ala8, 106S49 (relevant).

463-18 MoA 12SW(2d)512(2dcase).

463-27 Ala 130S329.

463-36 [b] **Sending of dray tickets by materialman** admissible. 214Ala8, 106S 49.

463-39½-New. The best evidence of the furnishing and delivery of materials for the construction or repair of buildings on the lands of the owner is that of one who was actually present and saw such materials so delivered. 120 Okl164, 251 P97.

463-42 [c] **Testimony as to conversation and contract** with owner is admissible. 214Ala8, 106S49. [f] **Other written contracts held properly excluded.**–97CalA64, 275P262.

464-48½-New. Ledger sheets showing debits and credits of account against owner defendant are admissible, 214Ala 8, 106S49.

464-48½-New. as is sending of dray ticket with each load of building material furnished. 214Ala8, 106S49.

464-48¼-New. Verified statements of account are admissible. 214Ala8, 106 S49 (notwithstanding discrepancies in date between such statements and bill of particulars, where time of delivery not in issue).

464-53½-New. Exclusion of lessor's evidence that he did not consent or know of alterations is error. 222App Div441, 226NYS220.

465-64 TexCivA 19SW(2d)355.

465-70 But see 7PaDist&Co 684.

466-84½-New. , or to cure a defect therein. 245NY294, 157NE144.

466-90 But see 26 OhNPNS257.

468-26½ 143 Okl16, 289P264; Tex CivA 19SW(2d)368.

469-44 [c] **Evidence held sufficient** to show good faith of contractor in making contract and ownership of contract. 170 LaT06, 129S137.

469-45 228Ky369, 15SW(2d)292. [a] **Evidence held sufficient** to support finding that bondsmen on contractor's bond were not good and sufficient sureties. CalA 284P477.

469-46 181Ark180, 25SW(2d)15. [a] Ariz 285P1037; Ind 168NE873; 12LaA 196, 125S175; 247Mich642, 226NW659; 142 Okl194, 286P1; 124 Or461, 263P 916; 126 Or69, 268P763; TexCivA 293 SW835; TexCivA 17SW(2d)167(2dcase). [b] 91CalA757, 267P547; 42 Ida245, 245 P92, 45ALR575; 206 Iowa1280, 221NW 930; 207 Iowa39, 222NW377; 129Kan 143, 281P931(2dcase); 130Kan45, 285P 516 (finding that claimant participated in project as one of group of coöperators sustained); 217Ky368, 289SW314; MoA 24SW(2d)673 (to show mechanic's lien account was assigned subsequent to filing of lien); 224AppDiv44, 229NYS185; 118Tex534, 18SW(2d)1063; TexCivA 19 SW(2d)368; Wash 286P43.

470-50 [a] 173Ark445, 292SW695.

470-55 [a] MoA 288SW979. [b] MoA 11SW(2d)61.

470-61 MoA 16SW(2d)667.

470-63 Ill 173NE67. [a] (1) 169Minn 120, 210NW637; 126 Or69, 268P763. (3) MoA 296SW448. (4) 205Cal174, 270 P214. (5) 138 Okl11, 280P281. (10) That material was not furnished within statutory time before filing of lien statement. 167Minn111, 208NW548. [b] (2) 202Cal624, 262P715.

471-65 Ill 173NE67.

471-71 [a] 158Md615, 149A438; 147 Wash445, 266P701. [b] Iowa 229NW 266; 217Ky195, 289SW282; 158Md615, 149A438.

471-72 [a] 242 IllA184; TexCivA 30 SW(2d)518. [b] 42 Ida245, 245P92, 45 ALR575; 11LaA291, 123S458.

471-75 [b] 224AppDiv471, 231NYS110.

472-77 [f] **Evidence held sufficient** to show land leased, vacant, and unimproved, under statute authorizing lien for material furnished lessee without owner's consent. 141 Okl44, 283P985.

472-78 151Wash550, 276P855. [a] 205 Cal784, 272P1051; 90CalA776, 266P594; MoA 284SW525. [b] 42 Ida245, 245P 92, 45ALR575; 151Wash550, 276P855.

472-79 [b] 42 Ida245, 245P92, 45ALR 575.

472-81 [b] 138 Okl69, 280P437.

472-83 [a] 197NC93, 147SE701.

472-89 [b] (3) By mortgagee. 93CalA 228, 269P566. [c] 124 Or249, 264P428 (knowledge of construction of canal). [e] (2) CalA 290P620(2dcase); 179Minn 280, 228NW934. [f] **Evidence held sufficient** to sustain finding that owner had no notice of work through agent. 85 CalA1, 258P690 (alleged agent's knowledge held not binding on owner). [g] **Evidence held to sustain finding of absence of knowledge.**–90CalA429, 265P 1021.

473-93 [a] (1) 82Colo 81, 257P260; 85 Colo 5, 273P19; 121 Or360, 253P6. (3) Oil heater held to meet requirements of contract of sale and installation. 235 Mich75, 209NW187.

473-95 [a] 84CalA220, 257P898; 82 Colo 81, 257P260; 121 Or360, 253P6; 124 Or19, 263P918; 127 Or34, 270P907. [b] CalA 284P694.

473-97 84CalA220, 257P898.

473-98 [a] (1) 121 Or360, 253P6. (9) Furnishing plans and specifications to defendant. 170Minn24, 211NW957.

473-1 [b] 124 Or19, 263P918.

473-2 [a] CalA 284Pa694; 124 Or19, 263P918.

473-3 236Mich651, 211NW58.

473-8 123 Or651, 262P263. [a] (1) 173 Ark445, 292SW695. (10) Filing was not too late. 174Ark362, 295SW370. (11) Sufficient description of premises. 236 IllA447. (12) That inclusion of cost of uncompleted work was inadvertent. 84 CalA220, 257P898. (13) That contractor was properly designated in statements of lien. 250Mich203, 229NW437. [b] (1) MoA 24SW(2d)673 (filing of just and true account). (4) Delivery of cautionary notice to owners. 91Fla354, 107 S679. (5) That assignee of contractor had right to rely on mechanic's lien account filed by contractor. MoA 24SW (2d)673.

474-9 [c] TexCivA 295SW308. [h] **Waiver of notice not shown.**–Wash 288 P910.

474-13 170Minn130, 212NW22; 130 Misc680, 225NYS417; 120 Or163, 251P 268; 128 Or236, 273P719 (insufficient). [a] **Evidence held sufficient** to show that notice was filed within time required by statute. 98Fla405, 123S820(2dcase).

474-17 [a] 35F(2d)638; 164La759, 114 S644; 239Mich593, 215NW57; 170Minn 130, 212NW22. [b] 35F(2d)638.

474-18 211Ky809, 278SW105. [a] (6) 192Wis482, 213NW283. (7) 35F(2d) 638; 174Ark35, 294SW62. (11) Date of furnishing last item of labor. 170Minn 24, 211NW957. (12) That delay in completion of work was not for purpose of enabling contractor to file lien. 239 Mich593, 215NW57. (13) That subcontractor's contract was regarded as com-

pleted more than sixty days before lien was filed. 207 **Iowa**288, 222**NW**856. (14) No work or material furnished after acceptance of house as completed. **OhA** 172**NE**845. [b] (1) 236 **IllA**245; **NJCh** 151**A**397. (3) 211**Ky**809, 278**SW** 105; 154**Wash**219, 281**P**733. (7) That certain work done within time for filing lien was necessary to complete contract. 194**Wis**631, 217**NW**312. (8) That house was substantially completed when owner moved furniture in and began living there over thirty days before filing of notice of lien. 129 **Or**1, 276**P**257. (9) Abandonment of work over thirty days before filing lien notices. 129 **Or**1, 276 **P**257.

475–19 [b] (4) That materials were furnished in time so as to be included in lien claim. 211**Ky**809, 278**SW**105.

475–20 [b] (2) To fix enhancement in value of property by mere showing of cost of repairs. 11**LaA**291, 123**S**458.

475–22 [d] **Evidence held insufficient.**–198**Cal** 520, 246**P**45.

475–23 [a] (4) To show contract for specified amount. 118 **Or**511, 247**P**315. (5) To sustain finding that contractor agreed that cost would not exceed stated sum. 213**Ky**66, 280**SW**464.

475–24 [a] 87 **IndA**171, 158**NE**229.

475–28 [b] (2) To establish claim to set-off on ground of loss of rentals due to defective heating plant. 154**Wash** 436, 282**P**917.

476–32 [a] (3) To support judgment denying recovery by architect. 329 **Ill** 629, 161**NE**104. (4) To support finding that owner agreed to pay contractor five hundred dollars more than bid. 331 **Ill** 38, 162**NE**157. (5) To present question of fact for jury and to justify refusal of directed verdict. 105**NJL**537, 147**A**198. [b] **Evidence held insufficient.**–**Ala** 128**S** 451; **CalA** 262**P**470.

476–38 [a] 96**CalA**615, 274**P**617 (no fund in hands of owner available for payment of lien claimants).

476–44 58**ND**532, 226**NW**640.

476–45 207 **Iowa**39, 222**NW**377.

476–47 [a] (4) To show payment to owner of amount of contract. 118 **Or** 511, 247**P**315.

476–48 [a] (1) 110**Conn**670, 149**A**214 (acceptance of note and mortgage). (2) To sustain judgment for owner defendant who paid bills of materialmen and laborers for bankrupt contractor to protect building from threatened liens. 100 **CalA**289, 279**P**842. [b] **TexCivA** 23 **SW(2d)**879.

476–49 156**Tenn**19, 300**SW**574.

476–50 [a] (1) 135**Wash**322, 237**P**735. (2) 135**Wash**322, 237**P**735. (4) 107 **Conn**425, 140**A**754.

476–55 [a] 235**Mich**140, 209**NW**52 (unintentional overcharge). [b] 121 **Or**360, 253**P**6. [c] (2) Intentional exaggeration of amount of lien shown. 136**Misc** 700, 240**NYS**542.

477–59 111**Conn**132, 149**A**225; 147 **Wash**158, 265**P**155.

477–60½–New. in making false statements in claim of lien, 90**CalA**429, 265 **P**1021.

477–62 [a] (11) Waiver of materialman's lien rights as against subsequent mortgagee. 177**Minn**111, 224**NW**849(2d case). (12) That lien was waived. **CalA** 259**P**363.

477–64 [b] (2) To show estoppel by payments made pursuant to authorization by lienor. 125**Kan**299, 264**P**17. [b] (3) To estop defendant from denying that work was done under cost plus contract. 205**Cal** 667, 272**P**289. (4) To establish estoppel of materialman to assert lien. **CalA** 287**P**573.

477–65 [a] (3) 72**CalA**1, 236**P**357. [b] (2) To sustain finding that priority of lien claims over mortgage was not waived. 169**Minn**504, 212**NW**194. (3) To sustain finding that trust deed was recorded before mechanics' liens attached. 171**Minn**445, 214**NW**503, 53 **ALR**573. (4) To sustain finding that lien claimants were not estopped to assert priority. 169**Minn**504, 212**NW**194. [c] (3) That mortgagee had constructive notice of plaintiff's lien. 32**F(2d)** 157.

477–66 134**Misc**308, 235**NYS**184. See also 171**AppDiv**399, 157**NYS**372.

477–71 **Iowa** 227**NW**521.

478–85 [a] **Motion to dismiss made on complaint, notice, and stipulated facts.**–218**AppDiv**548, 218**NYS**612.

478–87½–New. A cross bill founded on a claim not existing in favor of defendant against plaintiff at the time suit was filed survives dismissal of petition in the main action, under a statute requiring adjudication of rights of all parties in a single suit. **MoA** 13**SW(2d)**659.

480–42 142**SC**475, 141**SE**107.

480–44 [c] **Failure to refer** to master commissioner, as required by statute, does not affect jurisdiction or validity of proceedings. 220**Ky**830, 295**SW**1027.

481–60½–New. Where an owner, by exceptions to order of reference to state account and to the referee's report, tendered appropriate issue and demanded a jury trial thereon, it is error to confirm the report without submitting such issue to a jury. 197**NC**738, 150**SE**355 (1stcase).

481–60⅓–New. An exception to a report of liens must be filed at the time of the report and cannot be filed by one offering an upset bid, after judicial sale. 153**Va**429, 150**SE**255.

481–69 217**Ala**23, 114**S**406; 150**Md**619, 133**A**721; **MoA** 27**SW(2d)**501 (compliance with contract); 85**PaSuper**70.

481–70 217**Ala**23, 114**S**406; 127**Me**516, 145**A**134; 226**AppDiv**674, 233**NYS**194. [a] (2) Other instances. **MoA** 284**SW** 525.

481–71 **TexCivA** 4**SW(2d)**180.

481–72 110**Conn**670, 149**A**214; **NJ** 136 **A**910.

481–76½–New. Defense of set-off is properly submitted to jury where it is treated by court and counsel as recoupment. 135**SC**131, 133**SE**208.

482–77 222**MoA**1029, 9**SW(2d)**808(2d case).

482–78 135**SC**131, 133**SE**208.

482–83 127**Me**516, 145**A**134.

482–86 **Can** [1930] 3**DomLR**185.

482–89 85**PaSuper**70 (whether ordered by contractor).

482–90 **MoA** 289**SW**359.

482–91 217**Ala**23, 114**S**406; 138 **Okl** 69, 280**P**437.

482–95½–New. whether materials furnished were comprehended within original contract, or sold and delivered under independent contract; 85**PaSuper** 70.

482–98½–New. Materialman's contention that contractors were agents of the owners under a written contract, making the owners liable for material, and giving a lien to a materialman, held to raise a question of law for the court. 192**NC**377, 135**SE**115.

482–99 82**Colo** 81, 257**P**260; **Del** 143**A** 23; 125 **Or**561, 267**P**1119.

482–2 84**CalA**220, 257**P**898.

482–8½–New. Directed verdict for plaintiff held proper under evidence showing completion of work by lienor within four months' period. **NJ** 148**A**607.

483–13 76**Mont**359, 246**P**771.

483–17½–New. Whether statutory requirements for creation of a valid lien have been met is a question of fact. 100 **NJEq**181, 135**A**74.

483–28 **TexCivA** 20**SW(2d)**1076.

483–29 **CalA** 293**P**175.

483–32 244**Mich**93, 221**NW**159.

484–42 [a] (6) Generally. 217**Ala**23, 114**S**406.

484–44 [b] 38**GaA**291, 143**SE**784(1st case); **MoA** 289**SW**359.

484–45 [a] **MoA** 289**SW**358.

484–46 [c] **Instructions properly refused.**–**Ala** 130**S**329.

484–51 **TexCivA** 293**SW**835.

484–53 [a] **Thus** instruction placing burden of proof on defendant to show materials were not used in his building held erroneous. 213**Ala**646, 106**S**42 (in view of evidence). [b] **Placing burden on defendant** to show materials were not used in buildings is erroneous. 213**Ala** 646, 106**S**42 (in view of evidence that large part of materials were not used in building and that contractor had no authority to purchase materials on defendant's account).

485–65 101**CalA**605, 281**P**1034 (express finding that plaintiff was original contractor held unnecessary). [c] (4) Other instances. **CalA** 284**P**703.

486–78½–New. A finding that no notice of completion of plaintiff's contract was recorded is unnecessary where plaintiff filed his lien within the statutory time after completing his contract. 101**CalA** 605, 281**P**1034.

486–84 **CalA** 284**P**703.

486–90 [c] (2) Nor by finding that lien was limited to particular forty acres of three hundred and twenty acre farm described in lien. 170**Minn**130, 212**NW**22.

487–1 [a] (4) General finding that allegations of complaint are true, some of which alleged completion of building on one date and some on another, is not contradictory of finding that notice of completion was recorded on stated date. **CalA** 259**P**363. [b] **Findings held conflicting.**–202**Cal** 601, 262**P**29.

487–4½–New. Where the court found that the vendee was the builder, but not in the sense of the word used in a statute providing that the builder shall be held to be the owner's agent, refusal to find further that the vendee was the agent of the vendor in contracting for materials is not error. 32**NM**5, 250**P**21.

487–6 [a] (5) Finding that subcontractor agreed to hold contractor and owner harmless from liens, equivalent to finding of waiver of lien rights. **IndA** 152 **NE**177. (6) Finding that owners on certain date notified contractor that they accepted building, cannot be accepted as finding that building was actually completed on such date, where findings show that contractors did in fact thereafter complete building. 202**Cal** 606, 262**P**31.

488–9 295**P**425, 145**A**525.

488–13½–New. In an action on a contractor's bond, a finding that the subcontractor purchased from plaintiff material costing a certain sum, which was not paid by the subcontractor or any one else, was not a finding that the material was for use in a building constructed under the contract. **TexCivA** 10**SW(2d)**218.

488–14½–New. A finding of consent by owner must be assumed to imply the ultimate fact of consent which the law requires. 241**NY**435, 150**NE**507.

489–33 **DelSuper** 143**A**460. [f] **Service of owner's notice.**–167**Minn**90, 208**NW** 545.

489–48½–New. Where work and materials were furnished at instance of tenant, judgment against landlord alone is defective. **MoA** 24**SW(2d)**673.

489–49 **LaA** 128**S**534.

490–63 242 **IllA**37.

490–67 101**CalA**77, 281**P**412; 156**Tenn** 19, 300**SW**574; **TexCivA** 23**SW(2d)**871. But see 178**Ark**533, 12**SW(2d)**884.

491–75 [b] 135 **Okl** 134, 276**P**185.

491–89 192**Wis**482, 213**NW**283.

492–1 [b] **Form.**–223**AppDiv**806, 228 **NYS**403.

492–6½–New. Directing payment of a subcontractor's claim out of a fund secured by the original contractor's lien is proper where a sufficient amount in such fund remained inappropriated. **TexCivA** 8**SW(2d)**226.

492–8 [a] **Judgment held not excessive.**–87 **IndA**171, 158**NE**229.

492–12½–New. Plaintiff, under proper pleadings and proofs, may recover at contract price, including overhead expenses and profits, for part actually performed, where he was prevented from completely performing by default of defendant. 236**Mich**651, 211**NW**58.

492–12⅓–New. But where evidence does not show value of work done and materials furnished in proportion to contract price for whole, plaintiff suing on quantum meruit work and material to time of defendant's breach cannot recover overhead expenses and prospective profits although included in contract price. 236**Mich**651, 211**NW**58.

492–12¼–New. It is not error to allow interest on the encumbrance on the property and solicitor's fees to the legal holders of such encumbrance. 242 **IllA** 37.

492–12½–New. Under some statutes amounts due subcontractors must be considered in determining amount of recovery of contractor not furnishing

receipts and waivers of claims for liens. **Iowa** 230NW322.

492–16 242 **IllA**37; **TexCivA** 294SW 899.

494–46 99**CalA**686, 279P163; 34**GaA** 348, 129SE575; 222**Ky**678, 28**W(2d)**403. [a] (3) Materialman, selling materials to owner's husband at time first item of building was delivered and filing lien statement within six months after account was closed is entitled to personal judgment against husband and against wife as undisclosed principal. **MoA** 17 SW(2d)581.

495–48 99**CalA**686, 279P163 (complaint sufficient to authorize personal judgment).

495–53 **Sask** [1929] 2**DomLR**353.

495–56½–New. Where a lumber company agreed with the surety not to file a lien if the surety furnished the contractor's bond, which it did, and was required to complete work on the contractor's default, the lumber company was entitled to personal judgment against the contractor for lumber furnished to him. 168**La**578, 122S856.

495–62 217**Ala**441, 116S528; **LaA** 130S 569; 167**Minn**111, 208NW548; 170**Minn** 130, 212NW22; 137**Misc**539, 242**NYS** 712; 128 **Or**236, 273P719. See also 121 **Or**285, 254P803. [a] (1) 241**NY**435, 150NE507. (10) Contractual liability must be established. 241**NY**435, 150NE 507. (11) Materialman furnishing materials to tenant held not entitled to personal judgment against landlord. 241 **NY**435, 150NE507. [b] 152**SC**305, 149 **SE**243 (it is error to dismiss petition). [g] **Plaintiff may waive lien** and take personal judgment. 82**Mont**434, 268P 512.

496–63 13**LaA**153, 127S452(2dcase).

497–68 137**Misc**539, 242**NYS**712 (evidence insufficient to establish contractual relationship with owner).

497–73 220**AppDiv**482, 222**NYS**19.

498–81 **CalA** 286P481; 167**Minn**111, 208NW548.

498–83 241**NY**435, 150NE507. [e] **If corporation employing laborer is agent of owner,** owner is personally liable. **CalA** 286P481.

499–84 205**Cal** 174, 270P214; 241**NY** 435, 150NE507; 27 **OhNPNS**103; 123 **Or**354, 260P214, 217 [citCJ]; 147**Wash** 369, 266P167, 168 [citCyc]; 101**WVa** 567, 133SE135. [e] **Consent of and benefit to owner** of themselves do not create agency or import contractual liability as between landlord and those furnishing material on tenant's credit. 241**NY**435, 150NE507.

500–98 125 **Or**256, 266P633, 634 [cit CJ].

501–26 [c] **Judgment against property owners only** in action by subcontractor against general contractor and owners may be vacated at any time, where general contractor was not served with process and statute provides that no judgment shall be rendered before both owner and contractor are brought before court by process, and that any judgment shall be against both jointly. 252 **IllA**140.

502–41 36**F(2d)**661; 46 **Ida**595, 269P 591. But see 226**AppDiv**280, 235**NYS** 220; 121 **Or**285, 254P803.

502–44 But see 53**ND**871, 208NW111.

503–49½–New. A decree in equity denying a lien because of nonperformance of contract does not preclude action at law on quantum meruit. 253 **IllA**520.

503–54 46 **Ida**595, 269P591; 53**ND**871, 208NW111; 51**SD**513, 215NW494.

503–55 **Ida** 288P416 (complaint and service of summons held sufficient to confer jurisdiction as against collateral attack).

504–74 118 **Okl** 279, 248P601.

504–84½–New. Affidavit to foreclose a lien may be made before the clerk of the court having jurisdiction, who may issue execution thereon. 37**GaA**536, 140 SE920.

504–84⅓–New. Formal defects in an execution may be corrected upon amendment. 37**GaA**536, 140SE920.

504–87 213**Ky**473, 281SW467.

504–90 [d] **Order directing sale by receiver instead of sheriff is unauthorized** where original judgment directed sale by sheriff and power of court to modify decree has expired with end of term. 322**Mo** 281, 15**SW(2d)**809.

505–13 242 **IllA**37.

506–18 [a] (5) **Furnace.** 202 **Iowa**833, 211NW407.

506–22 176**Ark**520, 3**SW(2d)**293; **Iowa** 232NW824 (where building can be removed without substantial damage). [e] **Discretion of court,** under statute, in matter of sale and removal of building erected on mortgaged premises must be exercised in light of statute and circumstances. **Iowa** 232NW824.

506–27 **TexCivA** 18SW(2d)1102.

507–31 154**Miss**363, 122S387.

507–36½–New. Enforcement of a judgment of foreclosure cannot be enjoined where there is an adequate remedy by appeal. 126 **Okl** 290, 259P247.

507–43½–New. Objection to length of notice of sale on foreclosure of mechanic's lien can only be made by defendant in foreclosure action, who must proceed without unnecessary delay. 315**Mo** 276, 286SW3.

507–49 [a] (1) 98**Fla**451, 123S918. (3) That land originally sold at auction to highest bidder brought substantially larger sum on resale does not conclusively show that price at first sale was inadequate. 153**Va**429, 150SE255. [d] **Fraud.–NJCh** 136A335. [e] **Resale on filing upset bid.–**153**Va**429, 150SE255.

508–58 204 **Iowa**665, 215NW705; **NJCh** 136A335. [c] **Such right of purchaser is necessarily transmitted to his grantee** (1) and to all others claiming title from such source. 204 **Iowa**665, 215NW705. (2) Hence mechanics lien claimant, who delays filing his lien against same owner until after sale, has no standing though his filing was prior to issuance of foreclosure deed. 204 **Iowa**665, 215 NW705.

508–59 [b] **Purchaser as successor of lessee under oil lease.–**(1) Purchaser at foreclosure of mechanic's lien for drilling oil well, as successor of lessee, must assume burdens of lease along with its benefits, and must so use his rights as not to infringe upon rights of another. 84**Mont**178, 274P834.

503–69 110**Conn**4, 147**A1** (purchaser can attack validity of prior mortgage).

508–78½–New. Purchaser cannot defend against a lien claim thereafter, since sale discharged the lien. **NJCirCt** 137A834.

508–78⅓–New. Purchaser at foreclosure sale under building lien has been held not entitled to claim building erected with owner's permission and purchaser's knowledge. **TexCivA** 27SW(2d)871.

509–84 315**Mo** 276, 286SW3.

509–90 84**Mont**571, 276P944.

509–3 110**Conn**4, 147**A1**; 126 **Or**76, 268 P989.

509–5 110**Conn**4, 147**A1**.

510–14 204 **Iowa**594, 215NW639.

510–16 See also 123 **Or**651, 262P263 (intervener purchasing property held to have right to redeem).

511–33½–New. Overstatement of amount is fatal to claimant. 204 **Iowa**594, 215 NW639.

511–33⅓–New. Amount of tender cannot be withdrawn by purchaser who has intervened and tendered amount in court thus admitting amount due plaintiff. 123 **Or**651, 262P263.

511–36 213**Ky**473, 281SW467.

511–38 [a] **That lien had been on file three months, with no caveat filed thereto,** does not affect right to attack lien. **NJCirCt** 137A834.

512–46 126 **Okl** 290, 259P247.

513–72 123**Kan**632, 256P989.

514–86 [a] (4) Admission of evidence to which no objection taken. 214**Ala**8, 106S49.

515–1 But see 168**La**443, 122S285.

515–24 213**Ky**66, 280SW464.

515–25 213**Ky**66, 280SW464.

515–26 206**Cal** 421, 274P522; 125 **Or** 561, 267P1119; 125 **Or**595, 268P55; 134 **SC**284, 132SE581; **TexCivA** 284SW234.

516–33 213**Ky**66, 280SW464.

516–37 [a] (5) Refusal of requested instructions is not ground for reversal where no function for them to perform is shown. 125**Kan**299, 264P17.

518–49 134**Misc**67, 234**NYS**535. [h] **Items not taxable.–**Fee for serving notice of mechanic's lien. 134**Misc**67, 234 **NYS**535.

518–50½–New. Owner is not entitled to recover from contractor costs and attorney's fees taxed as result of unnecessary resistance to foreclosures. 146 **Wash**61, 261P785.

518–52 213**Ky**66, 280SW464.

519–55 102**CalA**192, 282P974.

519–61½–New. An award of costs to subcontractors not suing the surety or seeking recovery on a bond does not deprive the surety of substantial justice where actions of the subcontractors to enforce liens were, at the surety's instance, consolidated with the owner's action against the surety on the bond. 102**CalA**192, 282P974.

519–61⅓–New. Failure of claimant to furnish statement of claim to party purchasing property after commencement of suit does not defeat right to costs and disbursements and attorney's fees. **Or** 286P983.

520–95 134 **Okl** 50, 270P1107.

520–96 **Fla** 113S713 [foll 86**Fla**470, 98 S349; 84**Fla**662, 95S122]; 94**Fla**208, 113S714 [foll 94**Fla**205, 113S713]; 94 **Fla**549, 114S232.

521–623–5 98**Fla**683, 124S42; **TexCivA** 30SW(2d)518; **Wash** 286P43.

521–623–6 22 **OhA**73, 153NE232.

521–623–10 115 **Oh**555, 155NE131.

521–623–11½–New. Contractor's assignee, suing on mechanic's lien note, is entitled to attorney's fee provided for in note. **TexCivA** 5SW(2d)162.

521–623–11⅓–New. In a suit by a contractor's assignee on a mechanic's lien note, refusal to charge against plaintiff attorney fee expended by defendants in defending suit is not error. **TexCivA** 5 SW(2d)162.

521–623–12 115 **Oh**555, 155NE131; 124 **Or**661, 265P797. [a] (2) 136**Wash**98, 238P980.

624–13 118 **Or**502, 247P780.

624–15 119 **Okl** 236, 249P412; 135 **Okl** 242, 275P333. [d] **Court cannot ignore evidence** because it thinks fee as proved exorbitant; nor can it refuse to allow any fee or arbitrarily fix amount irrespective of evidence. **Ind** 166NE886.

624–18½–New. Under some statutes, fee is payable only out of fund for claimants. 115 **Oh**555, 155NE131.

624–25 [a] **Attorney's fees not debt so** as to subject one to payment who is secondarily liable for debts of defendant. 118 **Okl** 279, 248P601.

624–27 156**Tenn**19, 300SW574.

MEMORY

631–26 243**NY**7, 152NE448.

MENTAL

633–70½–New. "Mental distress" includes sorrow and grief. **TexCivA** 291 SW681.

MERCANTILE

634–11 **Sask** [1929] 2**DomLR**507, 512 [citCJ].

MERCHANDISE

641–22 33**Ariz**349, 264P1081, 1082 [quot CJ].

641–23 217**AppDiv**137, 215**NYS**669.

641–24 217**AppDiv**137, 215**NYS**669.

641–25 217**AppDiv**137, 215**NYS**669.

642–36 14**CustA**332; 157**Tenn**54, 6SW (2d)322.

642–50 243**Mich**417, 220NW724.

642–51 243**Mich**417, 220NW724.

643–57 243**Mich**417, 220NW724.

643–63 217**AppDiv**137, 215**NYS**669.

643–83½–New. Whisky has been held to be merchandise under a smuggling statute. 14**F(2d)**109.

643–92 125**Kan**425, 427, 264P1077 [cit CJ].

MERCHANT

646–88 157**Tenn**54, 6SW(2d)322 [cit CJ].

647–17 [b] (4) As used in Naturalization Act. 18**F(2d)**425.

MERE

649–83½–New. „pure. 21**AlaA**176, 106 S394.

649–94½–New. „"mere accident." 21 **AlaA**176, 106S394.

MERGER

649-13 198 Ind372, 153NE776.
650-20 237 IllA166. [b] **Merger cannot take place except by intention of parties** or needs of equity. 237 IllA166.
650-23 45 Ida229, 261P673, 676 [citCJ].

MERIT

651-48 19F(2d)922.
651-60 201 Iowa912, 208NW505.

MESSENGER

653-99 253 IllA185.

MIDWIFERY

657-25 167Minn266, 208NW993.

MILEAGE

658-51 142Wash450, 253P805.
658-51½-New. Computation based on shortest manner of public travel. 326 Ill 535, 158NE116, 54ALR777.

MILITIA

669-43 30Ariz357, 247P126.
670-47 30Ariz357, 247P126.
671-83½-New. The governor, as commander in chief of the state National Guard, has discretionary authority to create a detached officers' list therefor. 178Ark1001, 13SW(2d)33.
672-4½-New. Assignment of adjutant general to duty need not be entered in executive journal. 82Colo 228, 257P 1085.
672-6½-New. Adjutant general is not responsible for omission of duty to governor. 82Colo 228, 257P1085.
676-77 [e] **Transfer to detached officers' list.**-178Ark1001, 13SW(2d)33 (general orders, relieving colonel as commanding officer of regiment and transferring him to detached officers' list, held not to deprive him of his office and commission).
678-24½-New. Appointment by governor is an assignment to duty as regards right to salary without specific order. 82Colo 228, 257P1085.
678-24¼-New. Governor's failure to enter adjutant general's assignment to duty in executive journal does not affect his right to recover salary. 82 Colo 228, 257P1085.
681-58 But see 174Minn82, 218NW542.
687-78 [b] (4) Duty of adjutant general to enter into lease. Nebr 226NW 911.
687-79 [c] (4) Plan for armory and office building held lawful under statute. 220Ky201, 294SW1057.
687-85½-New. Where a corporation formed under the North Dakota statute causes title to armory property to be conveyed to the state, the title to such property cannot be reconveyed to such corporation by deed signed by the governor. 58ND66, 224NW661.
693-98 [d] (2) Where war emergency exists, determined by declaration of state and city officers, limitations as to signatures are inapplicable, open market order being properly signed by assistant city engineer for materials used in protecting city waterworks, and mere fact that five months were necessary to fill the order does not show that emergency was not created. 132 Misc64, 229NYS598. [f] **Compensation while under orders on duty.**-30Ariz357, 247P126. [g] **In North Dakota.**-58ND 66, 224NW661.
695-26½-New. Open market order for labor and materials to erect a garage for the use of motor trucks of the National Guard patrolling the city waterworks during war emergency is not within contracts covered by the Greater New York Charter. 132Misc64, 229NYS 598.
695-29 30Ariz357, 247P126.
696-36 132Misc64, 229NYS598. [c] (1) But see Can [1930] 4DomLR82. [d] **Law governing.**-251NY198, 167NE220. [e] **Determination of when and how expense shall be incurred** rests with military authorities, and not city officers. 251NY198, 167NE220. [f] **Necessity, form, and sufficiency of voucher.**-251NY 198, 167NE220. [g] **Recognition of claim.**-Establishment by finance department of city on books of account of fund for payment of items arising out of guarding of city water supply is recognition by city that expenses incurred in guarding waterworks, under Military Law, should be paid as provided for by statute, requiring city to pay for labor and material furnished in erecting garage for motor trucks of state troops patrolling waterworks. 132Misc64, 229 NYS598.
697-40½-New. Under Military Code par 3954, power of state to use its funds to pay national guard is limited to service for local or state purposes. 30 Ariz357, 247P126.
699-8 [a] **Jurisdiction not lost** by refraining from taking further action pending habeas corpus proceedings. 174Minn82, 218NW542.
699-11 174Minn82, 218NW542.
708-8 214Ala2, 106S617, 618 [citCyc].
708-9 [a] **Where act clearly shows illegality** and want of authority on face, order of superior officer is no defense. 214Ala2, 106S617.
703-21½-New. Personal representative of deceased pensioner who had elected to commute pension has been held entitled to receive payment of lump sum. Can [1926] 4DomLR1086.

MILLS

712-37 See also Eng 16CBNS604, 111 ECL604, 143Reprint1264.

MIND

716-20 243NY7, 152NE448.
716-20½-New. the power that conceives, reasons, and judges; 115 OhSt 326, 154NE317.

MINES AND MINERALS

733-6 Alta [1927] 2DomLR271.
734-15 [c] **Capability of yielding profit.**-86Mont427, 284P145.
735-33 86Mont427, 284P145.
735-38 234 IllA173.
736-48 Alta [1927] 2DomLR271.
736-50 Alta [1927] 2DomLR271.
737-59 Alta [1927] 2DomLR271.
737-60 103WVa567, 137SE895.
737-65½-New. calcite, 17F(2d)351.
738-89 25F(2d)824; 31 OhA259, 165 NE742; TexCivA 292SW290; TexCivA 293SW318; TexCivA 18SW(2d)195; Alta [1927] 2DomLR271.
739-90 25F(2d)824; TexCivA 18SW (2d)195; Alta [1927] 2DomLR271.
739-92 TexCommnA 276SW669 (oil).
740-25½-New. [§ 16a] 2½. **Areal Geology.** That branch of geology which pertains to the distribution, position, and form of the areas of the earth's surface occupied by different sorts of rock or different geologic formations, and the making of geologic maps. 49Nev 366, 246P695.
740-25⅓-New. Baume. Sixteen degree Baume is an oil resembling asphalt that does not flow at ordinary temperature through pipes but must be heated for such purpose. 159La471, 105S556.
741-34 TexCommnA 29SW(2d)1019 (well defined distinction exists in law between gas from gas well and casing head gas).
741-56½-New. [§ 24a] 10½. **"Cut off."** Copper content in ore classed as merchantable. 44F(2d)192.
746-58 23F(2d)811.
748-15 17F(2d)351.
749-16 17F(2d)351.
749-17 [a] 17F(2d)351. [c] **Mineral character of land is established** when shown to have such substance as is recognized as mineral according to chemical composition by standard authorities on subject. 17F(2d)351.
749-21 17F(2d)351.
753-17 168Ark682, 272SW367 (lawfully leased to be opened).
753-22 See also 11CustA3.
754-56½-New. Screening is an art of segregating or separating and not of producing. Iowa 210NW440.
755-73 See also 11CustA3.
755-86 104WVa368, 140SE57, 56ALR 303.
756-91½-New. [§ 107a] 81½. **Tower.** "Tower," as used in oil well driller's contract, has been held to mean the same as "shift." 232Ky519, 23SW(2d) 917.
756-97½-New. A well is a hole or shaft sunk into the earth to obtain oil, brine, or natural gas from a subterranean supply. 17F(2d)394 [quot Standard D.].
756-97⅓-New. "Waste" means a waste of natural resources and not of "drilling money." TexCivA 25SW(2d)936.
757-61 Can [1929] 1DomLR625.
757-66½-New. The right to precious metals in land can only pass by express grant in the patent from the crown. [1927]CanSC458, [1927] 2DomLR897.
758-72 TexCivA 25SW(2d)706.
758-73 17F(2d)351. [b] **Constitutional provision declaring conservation of natural resources** has been held not to conserve minerals in or underneath beds of navigable stream. TexCivA 25 SW(2d)706.
758-77½-New. Minerals covered by tidal and submerged lands belong to the state in its sovereign right. 206Cal 148, 273P797.
758-77⅓-New. Development of mineral resources should not be hampered by the courts, except for the most practical and substantial grounds. 206Cal 148, 273P797.
758-79 117Tex189, 300SW24; TexCivA 25SW(2d)989 (mineral and dry grazing classification); TexCivA 28SW (2d)885 (purchaser has no title to minerals reserved). See also Alta [1927] 3 DomLR428. [b] **Receiver of lessor's estate has no title** to oil and gas where state reserved title to minerals. TexCivA 25SW(2d)989. [c] **Mere statutory reservation of minerals to school fund** absent specific reservation in conveyance will not suffice as against validation or confirmation act. TexCivA 25 SW(2d)706.
758-80 See also 117Tex516, 8SW(2d) 655.
758-81 [a] (2) Rev. St. (1925) arts 5367-5382, giving purchaser of state school lands right to lease and sell oil and gas reserved to state, applies to lands sold both before and after its enactment. 117Tex546, 8SW664. (3) Act authorizing owner to sell mineral rights reserved to state held not invalid delegation of power over school lands. 117 Tex516, 8SW(2d)655. (4) Under Rev. St. (1911) art 5433, one purchasing school lands, but with full payment lacking, is entitled to sell and lease oil and gas as owner of soil. 117Tex537, 8 SW(2d)662.
758-84½-New. Mineral estate in public lands can be separated from the remainder of the land and separately sold by the state. 117Tex547, 8SW(2d)666. [a] **Discretion as to granting.**-Statute being mandatory, commissioner must make sales at time required after receipt of requests therefor. 117Tex489, 8SW(2d)646.
759-87 [a] **In Texas.**-CivA 15SW(2d) 1075.
759-89½-New. Where state in selling land reserved minerals, purchaser executing mineral conveyance cannot recover minerals. TexCivA 28SW(2d)885.
762-51 [c] **In Texas.**-TexCivA 3SW (2d)114.
763-60 22F(2d)690.
764-69 [a] (3) State and its permittees are entitled to judgment for title to repossession of bed of Clear Fork of Brazos river for development of petroleum and natural gas. 116Tex615, 297 SW213, 53ALR1181. (4) Statute relative to discovery and production of minerals in channels of navigable rivers held not void because of repugnancy to older statutes. 116Tex615, 297SW213, 53ALR1181. (5) Permittees of state, developing oil and gas in river beds, are not entitled to easement across lands surrounding such river beds, where right of way was not definitely described. 116Tex615, 297SW213, 53ALR 1181.
764-85 24F(2d)108.
768-52 17F(2d)351; 55AppDC372, 6 F(2d)675. [a] **Test of whether land is "known mineral land"** is not that there be known mines thereon, but whether situation discloses that that land con-

tains minerals sufficient in quantity and quality to make extraction profitable. 17F(2d)351.
768-53½-New. or prior to approval of the survey of the land granted; 55App DC372, 6F(2d)675.
768-54 17F(2d)351.
769-73½-New. Where statute provides that land claimed to contain minerals shall be withheld from sale until judicial determination, it is the duty of the surveyor-general to withhold such sale where satisfied from a claimant's affidavit that the land contains minerals. 98 CalA284, 276P1083 (statute held not repealed as to rights claimed thereunder).
769-86 [b] **One obtaining homestead patent by false representations** takes title to mine impressed with trust in locator's favor. SD 228NW185.
771-11 [b] **Paroled convict** may make valid location, retroactive as to title, in absence of intervening claims, upon full release or pardon. 22F(2d)753.
774-72 See also 7Alaska225.
775-98 [b] **Trespasser in moral good faith** is entitled to credit for prior losses in accounting for profits pendente lite. 269US125, 46SCt52, 70L ed195.
776-18 7Alaska171.
777-58 30Ariz535, 249P551.
777-58½-New. or one claiming under the government, 30Ariz535, 249P551.
779-71½-New. Where a mining claim has been held void for want of discovery, the decision leaves the locator in possession free to make further explorations, and such possession may be maintained against every one except the United States and persons claiming by legal or equitable title under it. 30Ariz 535, 249P551.
779-80 67Utah590, 248P819.
780-84 67Utah590, 248P819.
780-87½-New. In applying the statute, all facts and circumstances showing showing good faith of the parties are to be considered. 67Utah590, 248P819.
780-90 45 Ida1, 261P667.
780-96 45 Ida1, 261P667.
780-2 [a] **Validity as against adverse claimant.**-Ont [1925] 3DomLR289.
782-56 55AppDC373, 6F(2d)676.
782-57 55AppDC373, 6F(2d)676.
783-62 31Ariz24, 250P254; 68Utah182, 249P472.
783-67 31Ariz24, 250P254.
783-75 CalA 290P530. [c] **Purpose of requirement of discovery** is to prevent fraud on government. Utah 267P184.
784-85 Utah 267P184, 186 [citCJ].
784-87 Utah 267P184.
785-94 Utah 267P184, 186 [citCJ].
786-11 49Nev420, 248P833.
786-14 Utah 267P184, 186 [citCJ].
786-15 49Nev420, 248P833.
787-19 Utah 267P184.
787-27½-New. The fact that the discovery point is not in the center of the claim does not invalidate the claim. 42 Ida645, 247P1069.
787-27½-New. A statute requiring discovery within the limits of the claim should receive a liberal construction as between conflicting claimants. 42 Ida 645, 247P1069.
788-44 49Nev420, 248P833.
788-45 49Nev420, 248P833.
788-54 CalA 290P530.
789-70 51Nev40, 268P41.
794-52 140Wash511, 249P990.
794-62 43 Ida532, 257P833.
794-63 43 Ida532, 257P833. [b] **Posting held insufficient.**-43 Ida532, 257P 833.
796-84 140Wash511, 249P990.
796-86 140Wash511, 249P990.
797-96 [c] **In Washington.**-140Wash 511, 249P990.
797-1 [a] **Sufficiency of amended location notice.**-Wash 287P872.
797-10 81CalA643, 254P668; 68Utah 182, 249P472.
798-25 81CalA643, 254P668.
800-47 [h] **Where plan differs from location, location governs.** Man [1928] 1 DomLR119.
803-95 34NM323, 281P22 (failure to record location notice).
805-35 45 Ida1, 261P667.
806-36 22F(2d)753.
807-61 45 Ida1, 261P667.
807-62 45 Ida1, 261P667.
807-64 45 Ida1, 261P667.
809-7 123 Or137, 260P231.
809-8 123 Or137, 260P231.
810-19 123 Or137, 260P231 (performance of location work).
811-49 [b] **In Ontario.**-Ont [1925] 3 DomLR289.
812-57 [a] CalA 290P530.
813-70 67Utah590, 248P819. [c] **One who makes location with actual knowledge that ground had been claimed by another** cannot assert priority on ground that such other's location notices were defective. 48 Ida116, 279P617.
813-77 [d] **As between two mineral claimants,** rule as to sufficiency of discovery is more liberal than in controversy between mineral claimant and government or between him and agricultural claimant. Utah 267P184.
813-81 [b] **Entry in violation of hoof and mouth disease quarantine** does not invalidate title of locator as against senior claimant who had not taken possession or complied with statutory requirements as to location. 81CalA643, 254P668.
814-86 280US306, 50SCt103, 74L ed 445; 17F(2d)351. [a] 24F(2d)108.
814-87 24F(2d)108.
814-89 17F(2d)351; 24F(2d)108.
814-90 [a] 24F(2d)108.
814-93 24F(2d)108.
815-2 280US306, 50SCt103, 74L ed445.
815-7 280US306, 50SCt103, 74L ed445.
815-10 23F(2d)317.
816-11 30F(2d)742.
816-17 20F(2d)1008.
817-28 [e] **Repealing acts not affecting existing rights.**-127 Or686, 273P389.
819-61 [b] **Right inapplicable to lands acquired under agricultural patents.**-127 Or686, 273P389.
820-62 127 Or686, 273P389.
827-96 17F(2d)71.
827-12 [a] (3) Object of requirement is to furnish evidence to parties seeking to imitate title. 49Nev366, 246P695.
828-27 [a] **Where claims comprise group,** amount of work on group must be equal to one hundred dollars on each claim. 49Nev366, 246P695.
829-39 [e] **Cost of official survey of mining claim,** may, under Alaska statute, be allowed as credit on assessment work. 24F(2d)179.
829-45 [a] (8) Gathering surface ore. 43 Ida532, 257P833. [d] **Areal geology** does not constitute work under statute. 49Nev366, 246P695.
830-50½-New. , nor making of geologic map. 49Nev366, 246P695.
831-81 But see Ida 290P552.
832-87 123 Or137, 260P231.
832-88 31Ariz24, 250P254; 123 Or137, 260P231; Utah 274P950; 153Wash225, 279P728.
833-94 31Ariz24, 250P254.
835-36 [b] **In Oregon.**-123 Or137, 260 P231.
836-56 22F(2d)690.
836-57 Ariz 286P186.
837-91 42F(2d)927.
837-92 Ariz 286P186.
838-10 47 Ida682, 278P219.
838-17 280US306, 50SCt103, 74L ed445 (notwithstanding Leasing Act of 1920 § 37, withdrawing certain mineral deposits from private acquisition); 123 Or137, 260P231.
839-22 123 Or137, 260P231.
839-24 SD 228NW185.
842-83 But see Ariz 286P186.
844-17 Wash 287P872 (assessment work).
845-18 280US306, 50SCt103, 74L ed 445; 30F(2d)742. [b] **Effect of Leasing Act.**-30F(2d)742.
845-19 45 Ida1, 261P667.
845-29 7Alaska492.
845-31 47 Ida682, 278P219; 49Nev366, 246P695.
845-34 49Nev366, 246P695.
846-54 123 Or137, 260P231.
847-57 280US306, 50SCt103, 74L ed445.
848-80 17F(2d)71. [a] 48 Ida116, 279 P617 (relocation to make lines conform to vein).
849-92½-New. Land made subject to relocation by failure to perform annual labor cannot be located by one part owner to exclusion of others. Ariz 286 P186.
849-92½-New. In such case coöwner relocating claim acts for coöwners as well as for himself regardless of intention. Ariz 286P186.
850-14 [b] 153Wash225, 279P728. [d] **Mere fact that nearby property bears evidence of former workings** does not make it necessary to describe property as relocations. 140Wash511, 249P990.
850-15 [b] **Amended notice does not relate back** to date of defective notice so as to cut off intervening rights of original locators doing work sufficient to hold claims. 153Wash225, 279P728.
850-19½-New. Relocation of claim does not inure to benefit of former holders. 49Nev366, 246P695.
857-76 55AppDC373, 6F(2d)676.
858-77 55AppDC373, 6F(2d)676.
871-42 [c] **Patentee owns soil from surface to center of earth** within vertical lines of his boundaries save for such reservations as may be made. 82Mont 502, 267P1113.
872-64 68Utah182, 249P472.
873-77 118Tex485, 17SW(2d)765; Tex CivA 21SW(2d)700.
873-88 68Utah182, 249P472. [a] **As against conflicting claim of title** arising before application for patent, patent is not evidence of valid location earlier than conflicting claim. 68Utah 182, 249P472.
877-54 [b] **Amendment of adverse claim by leave of land office register** does not enlarge time for commencing suit. 48 Ida740, 284P1029.
877-55½-New. Where adverse claimant fails to institute action within statutory time, court is without jurisdiction. 48 Ida740, 284P1029.
878-66 86Mont10, 281P548.
878-68 [a] 86Mont10, 281P548.
879-95 19F(2d)666.
880-11 **Erratum.**-"Ducie v. Ford, 8 Mont. 233, 19 P 414 [aff 156 U. S. 470, 15 SCt 440, 39 L. ed. 497]" should read "[aff 138 U. S. 593, 11 SCt 417, 34 L. ed. 1091]."
883-79 20F(2d)1008.
883-80 23F(2d)811; TexCivA 10SW (2d)791.
884-81 20F(2d)1008.
884-84 23F(2d)811.
884-86 43 Ida532, 257P833.
884-87 43 Ida532, 257P833.
885-94 19F(2d)666.
885-9 [b] 20F(2d)1008.
885-11 [a] (6) To sustain finding that location was posted. 49Nev420, 248P 833. (7) To sustain finding that location work was done outside exterior boundaries of claim staked. 49Nev420, 248P833. (8) To sustain finding that location notices were not posted on discovery posts. 43 Ida532, 257P833. (9) To sustain finding that ore within defendant's vertical boundaries was not part of vein apexing within claims of plaintiff. 23F(2d)811. (10) To sustain finding that plaintiff's extralateral rights extended to segment of defendant's claim having its apex within boundaries of plaintiff's claim. 23F(2d)811. [b] (3) To sustain finding that defendants had done sufficient development work. 43 Ida532, 257P833. [d] (2) Evidence sufficient to show location monument established. 49Nev420, 248P 833.
887-39½-New. Where the court is without jurisdiction of subject matter and no curative facts can be pleaded, dismissal on court's motion is proper. 48 Ida740, 284P1029.
889-79½-New. Statutes authorizing appeals by aggrieved persons only does not prevent contest on appeal of validity of conflicting claims by person whose claim has been held invalid. 49Nev420, 248P833.
889-79½-New. Supreme Court upon affirmance of invalidity of appellant's claim is required to determine validity of appellee's conflicting claim in view of federal statutes. 49Nev420, 248P833.
889-84 276US560, 48SCt363, 72L ed700.
889-86 38Wyo 361, 267P85. [a] **Conspiracy in suit to annul oil contracts** and leases is sufficient if greater probability favors conspiracy. 6F(2d)43. [b] **Construction of Act.**-37Wyo 448, 263P960. [c] **Homesteader's preference**

right to prospect permits.–37Wyo 448, 263P960.

889–88 [a] **Condition in permit that it shall not be assigned without express consent** in writing of secretary of interior (1) is within authority given him, by statute, to prescribe all necessary and proper rules and regulations and do all things necessary to carry out and accomplish purposes of act. 51Nev 344, 276P11. (2) Regulation by secretary of interior that permit to prospect for sodium on public lands be unassignable without his consent, has force and effect of statute. 51Nev344, 276P 11.

889–89 38Wyo 361, 267P85.

889–89½–New. Purchaser of oil from operator on land leased from government cannot repudiate specific obligations of lease while claiming benefit of other terms. 40F(2d)787.

890–90 [a] **Where applicant for permit qualifies as citizen of United States,** secretary of interior is powerless to refuse permit. 30F(2d)739. [b] **Minor may apply for permit** under Leasing Act, after qualifying as citizen. 30F (2d)739.

890–90½–New. Act Congr. Febr. 25, 1920 § 27, prohibiting more than one lease to one person on the same producing structure, does not preclude a permittee or lessee of homestead lands from holding a lease or leases covering all lands covered by his prospecting permit, notwithstanding provisions for lesser royalty on production of the first one hundred and sixty acres than on the remainder of the permit area. 40 Wyo 393, 277P807.

890–93 19F(2d)666.

890–93½–New. Provisions of Casing Act § 2 apply only to contesting applicants for lease. 19F(2d)666.

890–96½–New. A prior purchaser of a locators' interest has no interest in an oil lease granted to another purchaser from locators who went into open, exclusive, continuous, and adverse possession for thirty years. 23F(2d)317.

890–7 143 Okl 220, 289P315.

890–13½–New. Laches. Suit to establish interest in oil lease is barred by laches where delayed for many years. 23F(2d)317.

890–14 [a] **Fixing prices for sale of oil.**–40F(2d)787.

890–17½–New. Plaintiff must definitely allege facts showing fiduciary relationship as to claim that placer claimant acted for cotenant's heir in securing lease. 274US15, 47SCt502, 71L ed901, 54 ALR869.

890–17¼–New. A bill failing to allege assertion of rights during placer claimant's fifteen years' hostile possession is held insufficient to show interest in oil lease. 274US15, 47SCt502, 71L ed901, 54 ALR869.

891–19 273US456, 47SCt416, 71L ed734. [b] **Executive order of May 31, 1921,** did not remove the administration and control from secretary of navy so as to violate act of June 4, 1920. 14F(2d)705.

891–20 273US456, 47SCt416, 71L ed734.

891–21½–New. Lease of naval reserve oil lands by secretary of the interior sustained, in the absence of fraud or bad faith, in view of knowledge and acquiescence of congress and Navy Department. 13F(2d)562.

891–21¼–New. A lease is held not subject to attack for failure to advertise for proposal in view of public exigency requiring immediate action to prevent loss and waste of oil caused by drilling on adjacent lands. 13F(2d)562.

891–23 [a] **Any or all of methods** suggested may be employed. 14F(2d)705. [b] **Right of congress to appropriate funds** for naval use is not invaded by the act. 14F(2d)705.

891–24 273US456, 47SCt416, 71L ed734.

891–25 [a] **Purpose** was to preserve oil for benefit of government by placing the matter almost exclusively in hand of secretary of navy. 14F(2d)705.

891–26½–New. This statute was complete in itself and did not depend nor was it dependent on other acts with relation to public lands. 14F(2d)705.

891–27 Contra 275US13, 48SCt1, 72L ed 137 [rev 5F(2d)330].

891–28 Contra 275US13, 48SCt1, 72L ed 137 [rev 5F(2d)330].

891–29 Contra 275US13, 48SCt1, 72L ed 137 [rev 5F(2d)330].

891–29½–New. He may also contract for an exchange of crude oil for storage tanks. 14F(2d)705.

891–29¼–New. The use of royalty oil certificates in payment for storage tanks is not improper if permitted by statute. 14F(2d)705.

891–30 Contra 275US13, 48SCt1, 72L ed 137 [rev 5F(2d)330].

891–31 273US456, 47SCt416, 71L ed734.

891–32 273US456, 47SCt416, 71L ed734.

892–33 273US456, 47SCt416, 71L ed 734; 14F(2d)705. [a] 273US456, 47SCt 416, 71L ed734.

892–34 273US456, 47SCt416, 71L ed734.

892–35 Contra 275US13, 48SCt1, 72L ed 137 [rev 5F(2d)330].

892–36 275US13, 48SCt1, 72L ed137.

892–37 Contra 273US456, 47SCt416, 71 L ed734; 24F(2d)206.

892–37½–New. On cancellation of such leases and contracts, the government is entitled to interest on its oil and other property unlawfully converted at a rate established in the state where the property converted was located at the time of the conversion. 24F(2d)206.

892–37¼–New. Government waives right to interest, however, on oil it permits defendant to take after appointment of receivers. 24F(2d)206.

892–38 275US13, 48SCt1, 72L ed137 [rev on other grounds 5F(2d)330].

892–39 Contra 275US13, 48SCt1, 72L ed 137 [rev 5F(2d)330]. [a] (1) 273US456, 47SCt416, 71L ed734. (2) 273US456, 47 SCt416, 71L ed734.

892–41 [a] **Purpose of statute relative to prospecting on submerged lands stated.**–206Cal 148, 273P797.

892–42 206Cal 148, 273P797 (leasing of mineral rights in tidal and submerged land). [c] **In California.**–206Cal 148, 273 P797. [d] **In Texas.**–117Tex489, 8SW (2d)646. [e] **Act authorizing permits to prospect** on tidal lands is valid exercise of state's sovereign power. Cal 290P885.

892–43 [a] But see 97CalA17, 275P255. [b] (2) Repeal of amendatory provision held not to revive original provision providing for surrender and reissue of leases. 34NM650, 287P696. [c] **Surveyor General's defining boundary** of oil field as including land petitioner applied for is proper basis for denial of application. Cal 290P885.

893–46 TexCivA 299SW522. [a] (3) Field notes of county surveyor do not require assurance of permit for prospecting on school lands. TexCommnA 291SW1102. (4) State may recover land, erroneously held by land commissioner to be school lands, and issue permits. TexCommnA 291SW1102. (5) Requests insufficient to render university lands "in demand." Tex 30SW(2d)292.

893–50 [a] (2) In New Mexico. 34NM 520, 284P762. (3) Commissioner without power to postpone sales fixed for certain date. Tex 30SW(2d)292.

893–50½–New. Such a statute has been held to apply to lands sold both before and after its enactment. 117Tex541, 8 SW(2d)664.

893–50¼–New. Moneys deposited by lessees under such agreement constitute trust deposit withdrawable from official depository for refund. Okl 292P562.

893–50¼–New. In some jurisdictions land office commissioners may contract to return moneys deposited by lessees if it is determined that state has no title to land leased. Okl 292P562.

893–52 206Cal 148, 273P797. [b] **Notice to littoral owners not required** under statute requiring applicant merely to post notice on land and record it. 206Cal 148, 273P797.

893–55½–New. A contract of county commissioners leasing oil and gas in school lands for consideration of cash notes, and one-eighth of all oil produced from the land delivered to the county is not invalid, under constitution, permitting the sale of lands given the county for educational purposes, because providing for a consideration other than money, or as amounting to a diversion of minerals, in a suit on notes given the county for the right to develop lands for oil and gas. 117Tex547, 8SW(2d)666.

893–55¼–New. Contract effected in compliance with statute is not affected by repealing act. Tex 30SW(2d)292.

893–56 117Tex516, 8SW(2d)655 (royalty to landowner in lieu of damages).

894–59 117Tex489, 8SW(2d)646. But see TexCommnA 26SW(2d)627.

894–60 [b] **Effect of wrongful refusal.**–38Wyo 427, 267P1060.

894–61 TexCivA 299SW522. [b] (2) Other instances. 117Tex512, 8SW(2d) 653.

894–62 [a] (2) Application not accompanied by required fees and rental as required by rule is nullity. 38Wyo 103, 265P29 (rule held reasonable and subsequent payment ineffective). [b] **Appeal from decision of board of land commissioners.**–38Wyo 103, 265P29.

894–75½–New. Where lease has been wrongfully returned to applicant who complied with law and fees and rental deposited by him have been returned, he is not prejudiced by such wrongful acts so as to be precluded from contesting the claim of another. 38Wyo 427, 267P1060.

894–75¼–New. In such case, where the district court, on appeal, orders a lease to be issued to applicant but does not fix the time for paying fees and rental, applicant has a reasonable time to pay the same. 38Wyo 427, 267P1060 (payment one day after lease to another stood canceled held sufficient).

894–75¼–New. In such case no contest proceeding exists. 38Wyo 427, 267P 1060.

894–75½–New. Under California statute the littoral owner, filing application for a permit to prospect for minerals on tidal and submerged lands over six months after another's prior application, has no right as against the prior applicant. 206Cal 148, 273P797.

894–76 37Wyo 344, 262P238. [c] **Statutes authorizing application for new lease prior to expiration of old lease.**–34 NM520, 284P762 (held inapplicable).

894–77½–New. Statutes provide that surrender of oil lease issued prior to certain date entitles holder to new lease for term of five years. 34NM650, 287P696 (construed not to require new lease to be for unexpired portion of original term).

894–79 But see 117Tex547, 8SW(2d) 666.

895–86 TexCivA 299SW522.

895–88½–New. Persons taking under Relinquishment Act cannot deny its effectiveness. TexCivA 21SW(2d)376.

895–88½–New. In Texas, where school lands with mineral classification were sold with reservation of minerals prior to the Relinquishment Act, neither a subsequent purchaser nor his lessee who executed an oil and gas lease pursuant to such act can contend that the lands were improperly classified as "mineral lands." TexCivA 21SW(2d)376.

895–88¼–New. Such act has been held to entitle the state to one half of any bonus or rental in excess of ten cents per acre where the owner executes an oil and gas lease of land. TexCivA 21SW(2d) 376.

895–88½–New. Under such act the state is entitled to recover from the owner of the land and his lessee, under an oil and gas lease jointly and severally, the bonus and rental due the state. TexCivA 21 SW(2d)376.

895–88¼–New. Payment of the state's share of such bonus and rentals by the lessee to the lessor as agent for the state does not constitute payment to the state. TexCivA 21SW(2d)376.

895–88¼–New. Where such payment to the lessor is made by mistake, the lessee can recover the same from the lessor on warranty of title in lease and as for money had and received, TexCivA 21SW (2d)376 (mistake as to lessor's title held mistake of fact).

895–88½–New. but the lessee is not entitled to a lien on the lessor's interest in the oil and gas estate by reason of subrogation to the state's rights on being required to pay the state's share. Tex CivA 21SW(2d)376.

895–88½–New. Application for mineral permit does not prevent vendee of land-

owner whose purchase had been forfeited, from reinstating purchase. **Tex CommnA** 26SW(2d)627.

895-96½-New. A purchaser, not trying to repurchase forfeited public land or obtain reinstatement before issuance of mineral permit, is not entitled to cancellation of permit. 118Tex82, 10SW(2d)710.

895-97 [b] **Acts working forfeiture.-Wash** 28SP1060.

895-1½-New. On abandonment of property for purposes of a lease, oil and gas revert to the lessor. 117Tex516, 8SW(2d)655.

895-1¾-New. A purchaser, making no effort to repurchase forfeited public land, or to obtain reinstatement until after issuance of a mineral permit to another, is not entitled to cancellation of the permit and rescission of forfeiture or reinstatement on payment of past-due interest, fees, and penalties. 118Tex82, 10SW(2d)710.

895-1¼-New. That a mineral permit, issued after forfeiture of purchase of public land, expired by operation of law pending a mandamus suit to cancel a permit and rescind forfeiture or reinstate the land, has been held not to warrant deprivation of the permittee's rights on the theory that there remained no intervening right preventing reinstatement, the permittee not being obliged to prosecute mining operations pending litigation. 118Tex82, 10SW(2d)710.

896-3 [a] **Notice held sufficient.-32NM** 382, 257P998.

896-3½-New. Giving of notice of the land commissioner by wide publicity and general information as to forfeiture of purchase of public grazing land for nonpayment of interest and terms of resale, has been held not prerequisite to forfeiture or essential to validity of intervening rights of mineral permittee. 118Tex82, 10SW(2d)710.

896-8 40Wyo 393, 277P807. See also 41F(2d)612. [b] **Federal oil permit.-Mont** 286P140.

896-10 [a] **Contract held operating agreement and not assignment.-Mont** 286P140.

896-10½-New. Under a federal statute providing for assignment of permits to prospect for oil and gas on a public domain on consent of the secretary of the interior, assignments of interest in oil in such land before the award of a permit by the secretary of the interior are invalid. 100CalA66, 279P831.

896-13½-New. Facts held not to show failure of consideration for unpaid check given for assignment of lease. 34NM 549, 286P160.

896-16 [a] **Action to cancel notes.-100CalA66,** 279P831 (construction of complaint as to allegations referring to invalid assignments).

896-20½-New. Grouping of vendor's prospecting permit with other permits under assignment does not render vendor's title or reassignment defective. **TexCivA** 2SW(2d)485.

896-20¾-New. Company, receiving by reassignment all permits assigned for purposes of grouping, has no interest in other permits. **TexCivA** 2SW(2d)485.

896-20¼-New. Reassignment of part only of permit assigned for grouping purposes is no defense to purchaser of part reassigned, in suit for specific performance of agreement executed prior to statute regulating transfer of public land leases. **TexCivA** 2SW(2d)485.

896-20⅓-New. Assignor of federal lease of coal lands without interest in property after valid assignment. 41F(2d)612.

899-85 Ont [1925] 3**DomLR**289.

901-33 [c] (2) **Where certificate of record is granted licensee,** it is conclusive as against adverse claimants, even though obtained by fraud, and dispute cannot be filed against claim, adverse claimant must proceed under other applicable provisions of the Mining Act. **Ont** [1925] 3**DomLR**289.

903-65 78Mont122, 252P796.

903-73 86Colo 418, 282P260; 219Ky 143, 292SW743; 148Miss649, 114S739; 78Mont122, 252P796; 116Tex453, 294SW835; **TexCivA** 285SW894; **TexCivA** 291SW650; **TexCivA** 299SW710; **TexCivA** 3SW(2d)114; **TexCivA** 3SW(2d)524.

904-74 332Ill253, 163NE702; 116Tex453, 294SW835; **TexCivA** 10SW(2d)165.

904-80 17F(2d)36; 41F(2d)4 (under Kentucky law); 172Ark804, 290SW929; 249Mich190, 228NW782; 31OhA259, 165NE742; 294Pa203, 143A913; 116Tex453, 294SW835; 115Tex332, 281SW192; **TexCommnA** 291SW532; **TexCommnA** 276SW678; **TexCivA** 278SW873; **TexCivA** 290SW548; **TexCivA** 292SW290; **TexCivA** 294SW259; **TexCivA** 2SW(2d)288; 102WVa508, 135SE1.

904-81 13F(2d)510; 25F(2d)824; 81Mont604, 264P388; 116Tex453, 294SW835; **TexCivA** 290SW548; **TexCivA** 292SW290.

904-82 24F(2d)541.

904-83 24F(2d)541; 214Ky838, 284SW95; **TexCivA** 3SW(2d)114.

904-84 29F(2d)884; 168Ark213, 269SW585; 116Tex453, 294SW835; 115Tex332, 281SW192; **TexCivA** 18SW(2d)195. [a] 168Ark213, 269SW585. [b] **Oil from leased property is potentially personal property subject to sale.-CalA** 288P721.

904-86 172Ark804, 290SW929.

905-92 24F(2d)541.

905-93 [a] **Ordinances regulating drilling in town lots,** protecting public from waste and assuring owners economical removal of oil, are valid. 24F(2d)541.

905-98 24F(2d)541; 25F(2d)824.

905-2 25F(2d)824.

905-4 230Ky275, 18SW(2d)1110 (owner of gas well may not waste product so as to injure neighbor's well but may use without stint natural flow for legitimate purpose); **TexCommnA** 276SW669.

905-5 230Ky275, 18SW(2d)1110.

905-5½-New. There is no presumption as matter of law that part of oil from well on one tract is being drained from adjoining tract. **TexCommnA** 276SW669.

905-6½-New. Fugitive oils, being abandoned property, belong to first taker reducing it to possession, and law gives no one a prior right as to such property. **TexCivA** 286SW652.

905-9 167La1067, 120S859; 169La1137, 126S684; 45Utah85, 142P1119. [b] **Period of limitation.-**Mineral rights, reserved in deed, are subject to prescription for statutory period, notwithstanding longer period stipulated in deed. 167La1067, 120S859.

906-10 145Va731, 134SE696.

906-18 [d] **Possession by owner of surface,** under parol gift, under then existing law, is held notice to subsequent grantee of mineral rights. 145Va731, 134SE696. [e] **Lease of land, excepting one acre previously conveyed,** is held to show lessor was not claiming land by adverse possession. 173Ark429, 292SW405. [f] **Drilling operations for production of mineral other than gas** by grantee of cotenant is not notice of adverse claim to gas. **TexCivA** 14SW(2d)348.

907-21 108WVa618, 152SE209.

907-23 180Ark678, 22SW(2d)390, 67ALR1436.

907-26 See also 45Utah85, 142P1119.

907-28 180Ark678, 22SW(2d)390, 67ALR1436; 221Pa349, 70A838.

907-35 180Ark678, 22SW(2d)390, 67ALR1436; 108WVa618, 152SE209.

907-36½-New. Acts of possession need not be performed on the entire tract leased, in order to charge a subsequent lessee with notice of the adverse claim. 119Oh271, 163NE911.

907-36⅓-New. Actual and open possession to validate a defective lease means possession which is actual and open by the person occupying the premises. 119Oh271, 163NE911.

908-38 221Pa349, 70A838.

908-39 44F(2d)119; 180Ark678, 22SW(2d)390, 67ALR1436; 202Iowa1251, 211NW898; 216Ky434, 287SW698; 234Ky18, 27SW(2d)399; 221Pa349, 70A838; **TexCivA** 3SW(2d)114.

908-42½-New. Possession of mineral owner, claiming through surface owner, is not adverse if latter does not claim and hold to well-defined boundary. 216Ky434, 287SW698.

908-42⅓-New. Mineral owner's holding, not made adverse by deed from surface owner, is not holding to well-defined or well-marked boundary. 216Ky434, 287SW698.

908-42¼-New. Adverse possession of owner of surface inures to benefit of owners of mineral under surface. 217Ky192, 289SW262.

908-43 44F(2d)119; **TexCivA** 14SW(2d)348.

908-49 219Ky143, 292SW743.

909-53 [b] **Grantees of owners reserving mineral rights,** granting such rights to corporation's predecessor in title at specified royalty, cannot obtain either royalties or damages for trespass where corporation enters under contract, with grantor's heirs. 151Va28, 144SE629.

909-64 [a] **No action lies by owner of right to explore for and remove oil** for mere surface trespasses without injury to such right. 36Wyo166, 255P3, 52ALR91.

910-67 170Ark426, 280SW383; 176Ark108, 2SW(2d)58. [b] **That as action was taken during lessor's life** does not bar action by reason of laches. 176Ark108, 2SW(2d)58.

910-70½-New. Where plaintiff claimed damages because plug put in oil well by defendant failed to keep water from oil land, it is immaterial that well was not plugged as provided by statute if plugging was such as not to injure plaintiff's rights. 36Wyo166, 253P862.

910-78 [b] **Entry under lease which has been terminated** gives nonconsenting owner right to damages, though lessee might have entered under authority of coöwner if rights of nonconsenting owner had not been denied. **Tex CommnA** 291SW538.

911-80 225Ky365, 8SW(2d)626.

911-81 223Ky221, 3SW(2d)640.

911-92½-New. An original lessor of mineral rights may be held liable for subsequent acts of trespass committed by lessees or sublessees. 170Ark426, 280SW383.

911-92⅓-New. That stockholders of a mining company, as original lessees of mineral rights to coal, transferred their rights to the corporation, does not render them liable for wrongful removal of coal by the corporation under the lease where they did not participate in the removal. 170Ark426, 280SW383.

911-93 170Ark426, 280SW383.

912-1 292Pa440, 141A257; **TexCivA** 3SW(2d)114.

912-17 [a] (3) Other allegations held sufficient. 223Ky230, 3SW(2d)623. [c] (2) For failure to state facts showing that damage would result. 29F(2d)665.

913-19 36Wyo166, 255P3, 52ALR91.

913-37½-New. A pleading of cross action in trespass to try title has been held sufficient to invoke jurisdiction of the court to require an accounting. **Tex CivA** 20SW(2d)849.

914-38 223Ky221, 3SW(2d)640.

914-39 [b] (2) Sublessee of mining privileges can recover for ore removed by sublessor without proving that he had exhausted all other ore, where contract was lease and not license. 42Ida 458, 246P304. [c] **In controversy over title** coming from common grantor plaintiff need not trace title beyond common source. 218Ky459, 291SW730.

914-47 176Ark108, 2SW(2d)58. [a] (4) 91PaSuper364. (7) To go to jury as to whether lessee's oil well was located on plaintiff's land. 286Pa251, 133A262. (8) Other instances. 294Pa47, 143A474. [b] (4) To show intentional and willful trespass in extracting coal under mineral lease. 170Ark426, 280SW383. (5) Other instances. 294Pa47, 143A474. [f] **Evidence of offers** of specific amounts for interest in leasehold is not necessary to proof of damages. **TexCommnA** 291SW538.

914-50 [b] **In action against owner of surface rights,** where declaration by owner of mineral rights, fails to show whether there were any limitations in deeds creating separate estates in mineral and surface rights, nonexistence of such limitations cannot be presumed in support of plaintiff's claim for damages resulting from impounding water. 29F(2d)665.

915-70 217Ky620, 290SW468; **TexCivA** 21SW(2d)700. [a] (2) Evidence held

inadmissible that cost of mining coal taken by innocent trespasser exceeded market price. 218Ky459, 291SW730. (3) Other instances. 232Ky498, 23SW(2d)916. [d] **Facts that ores were wrongfully extracted** by sublessee and value thereby and removal within life of lease may be considered in connection with sublessee's testimony that he could, and would, have removed ore had he been permitted to do so. 42 Ida458, 246 P304.

915-68 See also 176Ark108, 2SW(2d) 58.

916-78 [a] **Nonsuit.**-300Pa234, 150A 632.

916-80 36Wyo 166, 253P862. [a] (1) 231Ky673, 22SW(2d)104. (4) Location of disputed reservation from which coal was charged to have been taken by defendant. 217Ky620, 290SW468. (5) Amount of coal taken from mine. 218 Ky459, 291SW730. (6) Title by adverse possession. 225Ky365, 8SW(2d)626. [b] **Refusal to direct verdict** for defendant for failure of plaintiff to show title in himself is held on evidence not error. 218Ky459, 291SW730.

916-81 232Ky805, 24SW(2d)614 (measure of damages same as in condemnation proceedings). [a] (4) Damages to be measured by considering quantity and quality of ore which could have been removed and smelter returns with cost of removal and royalties. 42 Ida 458, 246P304. [e] **Instruction permitting jury** to consider smelter settlements received for ore in action for wrongful removal held proper. 42 Ida458, 246 P304. [f] **As to value of coal.**-232Ky 498, 23SW(2d)916.

916-87 TexCommnA 291SW538. [a] (3) Costs of plugging well is held not recoverable from alleged trespasser who left well open. 36Wyo 166, 255P3, 52 ALR91. (4) Statute as to costs in action involving recovery of realty is held not to apply to trespass on gas rights. 36Wyo 166, 255P3, 52ALR91. (5) Damages for destruction of market value of oil and gas lease by temporary injury is held recoverable only by proving loss of particular sales. TexCommnA 292 SW200. [c] **Injured feelings** held not matter for compensation in action for trespass to mining rights. 36Wyo 166, 255P3, 52ALR91.

917-88 36Wyo 166, 253P862.

917-89 22 OhA21, 153NE240.

917-91 22 OhA21, 153NE240. [d] **Making dump hole on lands of grantor.**-232 Ky805, 24SW(2d)614.

917-92½-New. Plaintiff cannot recover damages for effect on sale price of oil rights in land of digging unsuccessful well. 36Wyo 166, 253P862.

917-92½-New. Judgment awarding and apportioning damages for trespasses by lessees of a mineral lease in transporting coal from adjoining land over leased land and dumping refuse thereon is erroneous where the acts constituted trespasses against particular portions of the land owned by each lessor. 232Ky 133, 22SW(2d)572.

917-94 218Ky459, 291SW730.

917-99 168Ark853, 272SW353. [a] (1) 168Ark853, 272SW353. (2) Lessee mining on another's land is included in lease where land titles in community are badly confused. 225Ky346, 8SW (2d)425.

918-2 170Ark426, 280SW383; 168Ark 853, 272SW353; 176Ark108, 2SW(2d) 58; 223Ky230, 3SW(2d)623; 231Ky 673, 22SW(2d)104; 115 Oh67, 152NE 188; 22 OhA21, 153NE240; 287Pa489, 135A234. [c] **Submitting as measure of damages** profit on sale over cost of production has been held error. 218Ky459, 291SW730.

918-6 [b] (3) In trespass, where oil removed, trespasser who acted in good faith may deduct expenses from value of mineral taken. 36Wyo 166, 253P862. [d] **Elements determinative of value** are position and circumstances of mine, quality of ore, cost of mining and preparing for market, proximity to market, and facilities for transportation. 168 Ark853, 272SW353.

919-7 217Ky620, 290SW468; 218Ky 459, 291SW730.

919-11 [b] **Removal of coal** from another's land creates presumption of willfulness. 22 OhA21, 153NE240. [c] **One continuing operations after knowledge of facts** is willful trespasser, though beginning production and removal in good faith. TexCivA 3SW(2d)592.

919-12 223Ky230, 3SW(2d)623; 232Ky 755, 24SW(2d)607; TexCivA 3SW(2d) 592; 36Wyo 166, 253P862.

919-13 170Ark426, 280SW383; 168Ark 853, 272SW353; 176Ark108, 2SW(2d) 58; 231Ky673, 22SW(2d)104; 115 Oh 67, 152NE188.

920-26 [a] 22 OhA21, 153NE240.

920-28 36Wyo 166, 253P862.

920-30 22 OhA21, 153NE240; 292Pa 440, 141A257. [a] **Owner suing for conversion** of mined coal removed from land must waive trespass on his real estate. 22 OhA21, 153NE240.

921-32½-New. Where, under a mining lease, the lessee became the owner of all minable coal, subject to the payment of royalties, the lessee could not be charged with converting coal deposited in a culm bank, which was seemingly its own property. 132Misc590, 230NYS 372.

921-43 170Ark426, 280SW383.

922-53 168Ark853, 272SW353. [a] 168 Ark853, 272SW353.

922-55 [a] (2) Evidence held to authorize finding that defendant took all coal from coal-bearing area. 234Ky307, 28SW(2d)6.

922-55 [c] **Evidence held sufficient.**-168 Ark853, 272SW353. [d] **Evidence held insufficient** to establish wrongful conversion of gas. 168La313, 122S49. [e] **Evidence held insufficient** to support finding that well produced gas in paying quantities within contemplation of terms of lease. TexCommnA 24SW (2d)5.

922-59 Charge, that knowledge of defendant's mine superintendent, that taking of coal was willful, was knowledge of defendant, was erroneous, when taken in connection with correct charge as to measure of damages. 115 Oh298, 152 NE641.

923-66 168Ark853, 272SW353; 115 Oh 298, 152NE641; 125 Or144, 265P1096; TexCommnA 15SW(2d)230. [c] 22 OhA 21, 153NE240.

923-68 168Ark853, 272SW353; 115 Oh 298, 152NE641; 22 OhA21, 153NE240.

923-70 168Ark853, 272SW353.

923-70½-New. Where coal was knowingly and willfully removed, recovery is not confined to royalty value. 234Ky 307, 28SW(2d)6.

923-71 168Ark853, 272SW353; Tex CommnA 15SW(2d)230.

926-23½-New. It is no defense that location notice was defective where defendant had notice of the claim. 140 Wash511, 249P990.

926-27½-New. Plea of prevention from doing assessment work or making improvements by locator of placer mining claim is held insufficient as not alleging offer or attempt to perform. 17F(2d)71.

926-35 84Colo 295, 269P899.

928-61 68Utah182, 249P472. [a] **Where no patent has been issued** right to possession can be shown only by proof of actual pedis possessio as against mere wrongdoer or by showing compliance with requirements of law. 81CalA643, 254P668.

929-77 [b] (2) Insufficient to establish valid discovery of mineral essential for valid location of mineral claim. 68Utah 182, 249P472. (3) Fraud or misrepresentation. Ida 290P552. (4) Other instances. 44F(2d)119.

929-78 81CalA643, 254P668; 45 Idal, 261P667.

929-84 44F(2d)119.

930-93 [b] **Finding of entry of defendant in violation of hoof and mouth disease quarantine** (1) cannot supply plaintiff's failure to mark boundaries of his claim on ground. 81CalA643, 254P668. (2) Such finding does not entitle plaintiff to judgment in absence of findings that defendant was not in district when quarantine was proclaimed and did not afterwards enter it lawfully without knowledge of quarantine. 81CalA643, 254P668.

930-5 34F(2d)470. [d] **Parties.**-48 Ida 116, 279P617. [e] **Joint action by owners of adjoining tracts** may be had under court rules against defendants claiming both tracts under same location notices. 153Wash225, 279P728.

930-14 231Ky761, 22SW(2d)252.

931-15 TexCivA 292SW255.

932-37½-New. In suit to quiet title to land defendants counterclaiming as owners of minerals under surface must recover on strength of their own title and not on weakness of plaintiff's title. 217 Ky789, 290SW713.

932-45 [c] 164Ga371, 138SE892. [d] **Allegations held sufficient.**-164Ga371, 138SE892.

933-65 Utah 274P950.

934-75 80CalA411, 251P938; Ga 154 SE891.

934-80 153Wash225, 279P728.

934-83 [a] (4) Amended location notices. Wash 287P872. (5) Other evidence held admissible. Ga 154SE891. [b] (2) Other evidence held inadmissible. Ga 154SE891. [e] **Grub stake agreement** is admissible in action concerning property acquired pursuant thereto. 42 Ida645, 247P1069.

935-90 [a] (9) To sustain finding of performance of statutory requirement as to development work of mining claims. 42 Ida645, 247P1069; Utah 267P184. (10) Other matters. 231Ky761, 22SW (2d)252; Wash 287P872. [b] (2) CalA 290P530. (7) To show equity in bill. 80CalA411, 251P938.

935-94½-New. Where plaintiff claims superiority for its mining claims over defendant's prior unpatented claims, on the ground of forfeiture for nonperformance of annual labor, clear and convincing proof of the failure to do the required work is necessary. Utah 274P 950.

936-97 TexCivA 299SW499.

936-99 42 Ida645, 247P1069 (findings held sufficient to show compliance with state and federal law as to location of mining claims).

937-12 42 Ida645, 247P1069.

937-20½-New. Judgment, quieting title to surface but not to minerals beneath surface, and finding that counterclaims did not establish right to either surface or minerals and dismissing them, grants sufficient relief. 217Ky789, 290 SW713.

937-20½-New. A decree restraining defendants from entering on mining claims and from disturbing plaintiff's possession is proper. 153Wash225, 279P728.

937-26 [b] **Injunction granted though action for damages would lie.**-Kan 292P 757 (where lessee violating conditions of unexpired lease).

937-29 44F(2d)192.

938-32 But see 295Pa40, 144A740.

938-41 232Ky133, 22SW(2d)572.

939-54 232Ky133, 22SW(2d)572.

939-64½-New. , and to insure maintenance of mine owners' rights upon their exercise. 286Pa445, 133A549.

939-64½-New. A coal company has the right to ask for injunctive relief to require a water company to furnish additional support, as agreed. 295Pa40, 144 A740.

939-68½-New. to enjoin drilling for oil and gas where plaintiff has clear title and defendant no title thereto; 104WVa 279, 139SE856.

939-70½-New. Owner of gas lease may enjoin owner of oil lease from using gas well accidentally brought in without paying for oil well. TexCivA 3SW(2d) 592.

940-73 85PaSuper515; 104WVa44, 138 SE737. [a] (4) Homestead owner cannot enjoin operation of oil wells where she permitted drilling and great injury would result. 218Ky557, 291SW757. (5) Grantee of upper coal seam may not enjoin removal of lower seam by prior grantee, exempted from liability for damages from removal. 104WVa44, 138 SE737. (6) Other instances. 230Ky 273, 18SW(2d)1107.

940-81½-New. Surface owner may not enjoin use of tramway built with his

full knowledge and without objection. 103WVa240, 137SE7.

940-81½-New. Where plaintiff's title to oil and gas in a place is disputed, he cannot maintain injunction against a stranger from drilling a well. 107WVa 255, 148SE76.

942-8 TexCivA 299SW499; 104WVa 314, 140SE9. [a] (2) Lessors of oil and gas wells are not necessary parties to enjoin unreasonable waste of gas by lessees. 208Cal 667, 284P445.

942-20½-New. A federal court has jurisdiction in a suit by the United States to enjoin occupation of public lands under a void mining location, and plaintiff is not required to proceed in the land department. 31F(2d)764.

943-28 [a] (3) In a suit by oil and gas lessee to enjoin lessee of surface from interference with rights of former. Tex CivA 299SW499.

943-29 82Colo 264, 259P1033.

943-36 But see TexCommnA 29SW(2d) 1041.

943-39 TexCommnA 16SW(2d)527.

944-53 180Ark678, 22SW(2d)390, 67 ALR1436.

944-54 207Cal 648, 279P771.

944-55 [a] (5) To sustain finding that lessor's dam to trap waste oil would impair effective operation of lease. 176 Ark861, 4SW(2d)526. (6) To sustain finding covenants of lease not modified or abrogated. Kan 292P757.

944-56 85PaSuper515.

950-78 [a] (4) Contract construed as option to purchase with right to develop. 40F(2d)317.

951-99 [b] **Several instruments are construed together.**-TexCivA 293SW671.

952-3 Alta [1930] 2DomLR21.

952-9½-New. Purchaser's right to oil and gas lease, made subject to vendor's contract with another to execute lease on same land, is held defeated where lease to such other was executed within stipulated time. TexCivA 283SW676.

953-12½-New. Option to purchase mining property is generally accompanied with privilege to optionee of possession and right to development. 40F(2d)317.

953-25 143 Okl 187, 287P1006 (oil lands).

953-27 43 OklACR173 [reh pending].

954-28 43 OklACR173 [reh pending].

955-38 172Ark1096, 291SW807.

958-94½-New. An answer in a vendor's action against the purchaser to foreclose the vendor's lien and deed of trust liens has been held to present the defense of partial failure of consideration. Tex CivA 21SW(2d)741.

958-94½-New. In such action the defense of partial failure of consideration is shown by proof of the state's ownership of oil rights in lands in which oil and mineral rights were purported to be conveyed. TexCivA 21SW(2d)741.

958-94¼-New. A vendor, undertaking to convey surface rights and fractional interest in oil and mineral rights in land in which mineral rights were retained by the state, can recover only such part of the consideration as was represented by the value of the surface rights. Tex CivA 21SW(2d)741.

959-99 [b] **Measure of damages.**-202 Iowa1251, 211NW898. [c] **Evidence.**-(1) 202 Iowa1251, 211NW898.

959-15½-New. Conveyance of mineral lands is not affected by lease entered into by grantor which was forfeited prior to conveyance and grantor cannot waive forfeiture by accepting rent after conveying his interest. 171Ark844, 286SW 961.

960-29 TexCivA 291SW650; TexCivA 296SW987.

960-37 [a] (3) In case payment of royalties to grantor is material consideration inducing conveyance of land, there is implied covenant to develop land in good faith and with reasonable diligence. TexCivA 276SW448. (4) Regardless of whether provisions for installment of unit test plant prevents application of rule of implied covenant to continue to develop land with reasonable diligence, if additional plants are constructed by grantee, it may not entirely cease operations for an unreasonable length of time to damage of grantor. TexCivA 276SW448. (5) Contract providing that sale should be void if purchase price was not paid within six months is held conditional sale and agreement granting option. 216Ky599, 288SW326. (6) Rule that intention of the parties as gathered from whole instrument must control is applied to deed conveying oil and gas rights. 216Ky114, 287SW360.

961-38 86 IndA597, 158NE913; Tex CivA 6SW(2d)156.

961-38½-New. Where mineral is not shown to have been excluded from exceptions in a deed alleged to pass title to minerals by general description, such title is not established. TexCivA 10SW(2d)791.

961-43½-New. Deed and contract are construed together to determine intention and agreement of parties. Tex CivA 276SW448.

961-56 216Ky114, 287SW360; 230Ky 769, 20SW(2d)1002; Alta [1928] 1 DomLR24.

962-60 210Ky761, 276SW826.

962-61 116 Oh188, 156NE119; Tex CivA 284SW246; TexCivA 6SW(2d) 156.

963-78 32F(2d)841.

964-94 [b] (2) Contract for sale of oil land held to make payments limited and conditional on earnings. 181Ark 994, 28SW(2d)1067. (3) Grantors under such contract held entitled only to profits realized where property could no longer be operated at profit. 181Ark 994, 28SW(2d)1067.

964-3 44F(2d)119.

964-4 See also 51Nev226, 273P657.

964-13½-New. Right of action accruing to copromisees on breach of a contract to convey manganese properties must be judged from the acts of the parties at the time the promise was made. 81Mont68, 261P609.

965-17 104WVa200, 139SE714. [a] **Measure of recovery.**-104WVa200, 139 SE714.

965-27 [c] (1) 168La394, 122S122.

966-33 See 3Del 259, 138A392.

967-41 [b] 161La607, 109S83.

967-49 [a] (2) Cancellation of aged and ignorant negro's grant of mineral rights for grossly inadequate consideration held justified on ground of fraud. Okl 291P800.

968-52½-New. Evidence held sufficient to enable jury to fix with reasonable certainty amount of damages resulting from breach of implied covenant to develop mine. TexCivA 276SW448.

968-52½-New. Evidence held sufficient to sustain finding that grantor brought suit, relying on representations of grantee that only defense would be that it was under no obligation to develop mine. TexCivA 276SW448.

968-52¼-New. Questions of fact. If ordinary minds might reach different conclusions on the question, it is for jury to determine whether there has been a breach of implied covenant to develop mines in good faith and with reasonable diligence. TexCivA 276SW 448.

968-52½-New. Damages for breach of implied covenant to develop mine with reasonable diligence are measured by amount grantor would have received in royalties, if mine had been operated during time operation was unreasonably suspended, with interest thereon. Tex CivA 276SW448.

968-55 141 Okl 288, 285P10 (deed held not in fact mortgage); TexCommnA 18SW(2d)602; TexCivA 3SW(2d)507.

968-56 [a] **Waste.**-126 Okl 225, 259P 227. [b] **Rights of mortgagee are not jeopardized** by failure to object to mortgagor's sale of part of oil lease and making of operating agreement with buyer. TexCommnA 18SW(2d)602. [c] **Delay of almost three years after foreclosure of first mortgage** constitutes laches, barring redemption. 43 F(2d)306.

968-57 [e] **Order directing foreclosure sale without right of redemption** was proper under circumstances. 39F(2d) 859.

968-59 170La898, 129S522 (oil lease). [a] **Mortgage on annulled oil lease not** effective against machinery not covered by mortgage. 170La898, 129S522.

968-60 [a] (2) Mortgage on oil lease, leasehold estate, and appurtenances entitles mortgagee to lien on money owing by pipe line companies for oil from leased premises. 223Ky348, 3SW(2d) 786.

968-61 158La941, 105S21.

968-62 158La941, 105S21. [a] 11LaA 640, 124S621 (pumping rig subsequently placed on property).

968-66 [a] (3) Mechanics' liens held superior under facts. 129Kan749, 284 P606. [b] **Notice of beneficial ownership in another.**-223Ky348, 3SW(2d) 786. [c] **Loss of lien.**-223Ky386, 3SW (2d)786. [d] **Superiority of mortgage over oil and gas lease.**-126 Okl 225, 259 P227. [e] **Chattel mortgages.**-11LaA 640, 124S621.

969-67 TexCommnA 18SW(2d)602. But see 31 OhA266, 167NE166.

969-70½-New. Sales. Neither sheriff nor bidder at mortgage foreclosure sale of oil leases has the right to change or alter the terms of the writ, 158La941, 105S21.

969-70½-New. and whatever is bid at the sale is bid for what the sheriff is authorized and directed to sell. 158La 941, 105S21.

969-74 148Miss649, 114S739; 116Tex 453, 294SW835.

969-75 44F(2d)119; Ark 31SW(2d) 293; 116Tex453, 294SW835; Tex CommnA 10SW(2d)707; TexCivA 3 SW(2d)114; TexCivA 3SW(2d)524.

969-76 164Ga371, 138SE892; 159La 810, 106S313; 116Tex453, 294SW835.

969-76½-New. Right to mine for minerals and to reduce them to possession are lawful subjects of barter and sale. 159La810, 106S313.

969-79 [a] **Mining partnership owning mineral estate** may develop it free from any right of surface estate. 115Tex 469, 283SW754.

969-80 25F(2d)824; 41F(2d)4 (under Kentucky law); 43F(2d)494; 116Tex 453, 294SW835; 115Tex332, 281SW192; TexCivA 281SW607.

970-83 116Tex453, 294SW835; Tex CivA 281SW607. [a] (3) Stipulation in mortgage of land reserving underlying coal constitutes severance of coal from surface. 300Pa234, 150A632.

970-84 116Tex453, 294SW835.

970-85 116Tex453, 294SW835. See also 124Kan637, 261P587.

971-98 210Ky761, 276SW826. [b] (2) Stipulation of grantor's right to sand bank, per deed, is held to be reservation. 164Ga371, 138SE892.

971-99 164Ga371, 138SE892; 300Pa 234, 150A632 (reservation of coal in mortgage).

971-4 [c] **Written instrument properly executed and delivered** is required to convey mineral right in land. TexCivA 13SW(2d)130.

972-7 101Vt319, 143A283.

973-31 28F(2d)159; 181Ark1079, 28 SW(2d)701 (agreement in conveyance of sand and gravel to pay taxes held not to impose duty to prevent trespass); 202 Iowa1251, 211NW898; LaA 128S 304(2dcase) (nonliability for taxes); 34 OhA38, 170NE379; 118Tex196, 13 SW(2d)340; 102WVa308, 135SE1.

974-32 TexCivA 8SW(2d)723; Tex CivA 23SW(2d)752.

974-33 179Ark376, 16SW(2d)15; Tex CivA 18SW(2d)195; 148Va522, 139SE 245. [a] (2) Deed conveying fee to realty, subject to mineral rights "being conveyed" to another, has been held to vest latter with title to minerals. 229 Ky767, 17SW(2d)1014. [g] **Whether conveyance or lease.**-TexCivA 283SW 288.

975-34 [d] **Owner conveying subject to lease and reserving mineral rights** may make supplemental lease to operate during life of original lease. Ark 31SW(2d)293.

975-34½-New. A correction of a deed conveying property so as to change a reservation therein of oil rights does not affect a subsequent deed executed before the correction was made, and the second grantee is not bound thereby. TexCivA 21SW(2d)532.

975-34½-New. Title to underlying coal by virtue of reservation in mortgage is not destroyed by clause requiring consent of owner to removal. 300Pa234, 150A632.
975-35 TexCivA 18SW(2d)195; 148Va 522, 139SE245; 103WVa567, 137SE895.
975-38 103WVa567, 137SE895. See also TexCivA 283SW288.
975-39 168La394, 122S122; 103WVa 567, 137SE895. [a] **Grantee's conduct** bears only on construction not changing effect of deed. 151Va28, 144SE629.
975-40 232Ky805, 24SW(2d)614.
975-41 168La394, 122S122.
975-49 40F(2d)333; 232IllA596; 210 Ky700, 276SW573; TexCommnA 11SW (2d)778; TexCivA 21SW(2d)532. [c] **What law governs.**-25F(2d)824.
976-50 25F(2d)824; 179Ark421, 16SW (2d)457; TexCivA 21SW(2d)532.
976-50½-New. A lease clearly showing an intent to convey minerals in place vests title thereto in the lessee, and there is no difference in interests conveyed, whether the conveyance is in the form of a grant of exclusive right to mine and appropriate minerals or demise of land for the sole purpose of mining, or constitutes a grant of minerals with an exclusive right to mine. TexCivA 10SW (2d)165.
976-51 164Ga371, 138SE892; 235Ky 301, 31SW(2d)367; TexCivA 9SW(2d) 287; TexCivA 9SW(2d)365. See also 332 Ill 253, 163NE702. [a] (7) Phrase in mineral deed that grantor is to have benefit of oil and gas lease reserved to grantor rents and royalties as long as lease existed. 38F(2d)37.
976-52 [b] (2) Conveyances and reconveyances have been construed as creating life estate in one half of gravel and clay on land. TexCivA 14SW(2d)906. [c] (2) Right obtained by lessee under lease of tract for sole purpose of mining and operating for oil and gas, laying pipe lines, building tanks, etc., is determinable fee. TexCivA 10SW(2d)165. [d] **Future estate.**-TexCommnA 10SW (2d)707.
976-53 177Ark170, 6SW(2d)36; 180 Ark901, 23SW(2d)257 (subject to right in one-sixteenth of oil and gas for ten years). [d] **Right under common law** of sovereign to mine lands in no way affected fee simple title of owner of surface. 197Cal 263, 240P19.
977-56 38Wyo 442, 268P185.
977-58 85PaSuper515. [d] (1) 167La 901, 120S591. (5) Reservation in deed conveying several distinct tracts of right to exploit for minerals retains as many servitudes as there are tracts of land. 167La901, 120S591. [e] **In Texas.**-CivA 14SW(2d)348.
977-60 164Ga371, 138SE892 (dictum).
978-64 104WVa317, 140SE10.
978-69 85PaSuper515. [a] (2) Sale of only large stones restricted to removal only by channeling process and reserving right in owner to remove small stones is not exclusive sale of all stone on land. 85PaSuper515.
978-70 See also 85PaSuper515.
978-70½-New. One taking title to land with knowledge of a reservation of right to mine coal in a deed to his remote grantor acquires only the surface of the land subject to the rights of the owner of the underlying coal. 86Colo 418, 282 P260.
978-73 [c] (3) Severance of oil and gas rights from surface estate creates separate mineral estate in land and is subject to assignment and inheritance. 115 Tex469, 283SW754. (4) Oil and gas lease, granting, conveying, and leasing certain tracts of land for sole purpose of mining for oil and gas, to remain in force for five years, and as long thereafter as oil or gas is produced from land by lessees, is grant of determinable fee to oil and gas in place on land described. TexCommnA 11SW(2d)778. (5) Under oil and gas lease, requiring lessee to pay lessor for gas produced from any oil well and used off premises, did not fix title to gas from oil well in lessee as grant of gas. TexCommnA 11SW(2d) 778. (6) Transfer of interest in oil and gas does not necessarily convey fee simple or determinable fee estate, but may be mere license, option, estate for life, or for years. TexCivA 18SW(2d)256.
978-74 LaA 128S304(2dcase) (lease); Mont 290P244.
978-75 25F(2d)824. But see 41F(2d)4.
978-77 [a] **Sale of gas at well mouth.**-33F(2d)248.
978-79 [a] (3) Where grantee took by deed one-eighth interest in oil under land, subject to valid lease while remaining in force, with whole of royalty under such lease, upon lapse and surrender of lease his royalty right ceased and he merely owned undivided one-eighth interest in fee in oil under the land. 214Ky49, 282SW1061.
979-80½-New. Deed reserving interest in rentals and royalties from oil leases held to refer only to existing leases. 40 F(2d)333.
979-80⅓-New. Instrument conveying title to oil for nominal cash consideration and agreement to pay royalty is lease requiring development within reasonable time. 234Ky217, 27SW(2d)937.
979-81 LaA 130S629; 86Mont463, 284 P553; 103WVa567, 137SE895. See also TexCivA 10SW(2d)149. [g] **Black merchantable stone coal.**-287Pa489, 135A 234. [h] **Incorporation by reference.**-TexCivA 11SW(2d)662.
979-82 151Va28, 144SE629.
979-88 151Va28, 144SE629. [a] (4) Deed excepting "all the metals and minerals of every kind and character" and right to enter on land for purpose of mining and removing metals and minerals does not reserve limestone, in view of fact that land was in limestone country and that reservation of limestone would reserve practically everything and grant nothing. 151Va28, 144 SE629.
979-91½-New. Calls in deed control over quantity designated. 291Pa145, 139A731.
979-91⅓-New. Permission by owners of surface to mine underneath whole tract construed as in deed as including all coal underneath land. 291Pa145, 139 A731.
980-98½-New. Word marble should be given meaning intended by parties rather than technical meaning. Ga 154SE 891.
980-3 103WVa567, 137SE895.
980-6 TexCommnA 11SW(2d)778; Tex CivA 15SW(2d)72.
980-7 TexCivA 19SW(2d)1111. [e] **Evidence held to show** that oil and gas were not included in conveyance of all minerals and mineral products. 232Ky 195, 22SW(2d)580.
981-16½-New. In oil and gas lease, requiring the lessee to deliver for account of the lessor one eighth of all oil produced, provides for exception of one-eighth part of the oil, and the oil thus excepted does not constitute a part of the grant. TexCommnA 11SW(2d)778.
981-17 29F(2d)665.
982-27½-New. A sale of minerals follows the land into the hands of whoever may become the owner. 12LaA285, 125 S494.
982-31 See also 25F(2d)404.
982-33 159La810, 106S313; 104WVa 44, 138SE737.
982-34 See also TexCivA 9SW(2d)287.
982-36 TexCivA 276SW448.
982-39½-New. Payment of part of consideration does not negative implication that mine is to be developed with reasonable diligence. TexCivA 276SW448.
983-48 210Ky700, 276SW573; 219Ky 819, 294SW467. [e] **Grant of easement to mining company to dump ore, rock, earth, and other material** (1) on surface of others' mining claims with right to remove dump at any time authorizes removal of water carrying minerals of commercial value in solution before leaving dump and percolating through soil. 69Utah423, 255P672. (2) Mining company's action to condemn right of way for tunnel to divert such waters from its dump will not prevent defendants from asserting right to waters seeping and percolating through soil of ground not conveyed to mining company after leaving dump. 69Utah423, 255P672. (3) In such action to condemn right of way for tunnel which implies that mining company had right to follow waters after leaving dump and seeping through soil on defendant's claims not conveyed to company is erroneous. 69Utah423, 255P672.
983-48 [f] **Extent of surface rights.**-226Ky728, 11SW(2d)920.
983-54 232 IllA596.
983-55 232 IllA596.
984-59 TexCivA 10SW(2d)165.
984-61 206 Iowa166, 220NW123; 217 Ky144, 289SW207; 232Ky805, 24SW (2d)614; 226Ky93, 10SW(2d)617.
984-62 [b] **Holder of lease from federal government** granting right to explore for and remove oil and gas on land, patent to which reserved minerals to government, may construct and maintain on surface structures necessary to full enjoyment of right granted. 81 Mont527, 264P122.
984-64½-New. There is no implied severance of right to vertical support in a grant of coal and mineral rights. 202 Iowa1251, 211NW898.
984-65 218Ala296, 118S513.
985-73½-New. Grantor of minerals may not complain of removal of support in the mine, if deed gives this right to grantee. 210Ky700, 276SW573.
985-75 TexCommnA 10SW(2d)707. [b] **Timber.**-(1) 214Ala419, 108S247.
985-76 210Ky700, 276SW573. See also 232Ky805, 24SW(2d)614.
985-81 See also 232Ky805, 24SW(2d) 614.
985-82 222Ky652, 1SW(2d)1059.
985-85½-New. If there are no limitations in a deed separating surface and mineral rights, certain limitations on right to use are presumed. 29F(2d)665.
985-85⅓-New. Where limitations on use are expressed in the deed, other hostile limitations are not to be presumed. 29F(2d)665.
985-87 [c] **Débris from adjoining land** (1) subsequently acquired by lessee may be dumped on lessor's land, near surface of mine, under lease granting lessee right to remove over lessor's land all coal mined from lands acquired by lessee. 218Ala296, 118S513. (2) Under such lease lessee may reasonably discharge water and débris at mouth of tunnel necessary for marketing of the mineral. 218Ala296, 118S513.
986-92 Ark 31SW(2d)293.
986-95 210Ky700, 276SW573.
987-11 TexCivA 6SW(2d)173.
987-17 168La657, 123S114.
987-18 [a] **Reservation to remove all of sand bank** is held to be reservation for reasonable time, divested at end of such time. 164Ga371, 138SE892. [b] **What is reasonable time** to remove sand bank under reservation is held pure question of fact. 164Ga371, 138SE892.
987-19½-New. Mineral rights reserved in a deed of the fee do not pass by a release of the vendor's lien. TexCivA 281SW607.
987-19⅓-New. An oil and gas lease is a contractual right against land forfeited to the state under a statute providing that such rights existing at the time of forfeiture shall remain unimpaired by repurchase of the land thereunder. TexCivA 10SW(2d)165.
987-20 164Ga371, 138SE892.
987-21 164Ga371, 138SE892 (dictum).
987-26 168Ga202, 147SE364.
988-31½-New. Surface owner to whom owner of mineral rights contracted to execute quitclaim deed therefor is not entitled to surrender of separate rights under lease executed by surface owner's trustee. 202 Iowa1251, 211NW898.
988-33 [b] **In Louisiana.**-167La901, 120S591.
988-34 [a] (3) Parties to deed, by covenant reserving to grantor for term of fifteen years right to remove gas, oil, and minerals in and under land, cannot consent that such right shall not be subject to prescription by nonuser for ten years, since, under statute, obligor cannot renounce benefit of prescription liberandi causa before it is acquired. 167La847, 120S389.
988-35½-New. The right of the assignee of a grantee of iron ore is not forfeited by failure to remove the ore from the land within a reasonable time where the deed, in consideration of one

dollar, sold and conveyed the iron ore, notwithstanding a subsequent provision requiring the grantee to pay two and one half cents per ton on iron ore removed as payment for damages for occupation of the land. **TexCivA** 9**SW(2d)**287.

988–36 [a] (3) Transaction whereby aged negro gave mineral deed held to show fraud on its face casting on grantee burden of showing fairness and absence of inequitable conduct. 35**F(2d)** 77. [c] (2) To support decree for defendants. 37**F(2d)**633. (3) To show fraud in procuring mineral deed from aged negro. 35**F(2d)**77. [f] **Pleading.**–Complaint to cancel conveyance of oil and gas interest in land as cloud on title, alleging that conveyance was fraudulently procured, and that defendant paid no consideration therefor, has been held to state cause of action for cancellation for fraud. 178**Ark**816, 12 **SW(2d)**408.

988–37 292**Pa**412, 141**A**237.

989–41½–New. Grantor does not repudiate or rescind a conveyance of interest in minerals by a subsequent lease to a third party, where the grantee continues payments and receives a share of royalties under the lease. **TexCivA** 6 **SW(2d)**173.

989–41½–New. Purchaser from state under conveyance reserving mineral rights cannot have conveyance by him of mineral rights canceled because of mutual mistake that he owned mineral rights. **TexCivA** 28**SW(2d)**885.

989–43 **TexCivA** 18**SW(2d)**195.

989–48 106**W'Va**339, 146**SE**385.

989–54½–New. Owner of land is not entitled to recover for gaps in fences which were made by grantee of minerals for the purpose of hauling before the owner purchased the land. 210**Ky**700, 276**SW**573.

989–54½–New. A jury viewing the premises damaged may form its own opinions, independent of testimony, as to the amount of damage. 219**Ky**819, 294**SW**467.

989–54¼–New. A verdict for considerably less than the amount of damage testified to by defendant's witnesses cannot be held excessive. 219**Ky**819, 294**SW**467.

989–54½–New. All of purchasers' rights under a mining company's executory contract of sale of its mining properties having been forfeited for nonperformance, they are not entitled to reimbursement for expenditures made by them under the contract. 94**CalA**21, 270 **P**456.

989–54½–New. One not a party to lease contracts cannot sue for negligent breach thereof. **TexCivA** 8**SW(2d)**723.

989–54½–New. A party who agreed to sell gravel on land for a certain price per cubic yard has been held estopped to claim or recover from buyers more than the stipulated price on one half of the total gravel removed, where another had a life interest therein. **TexCivA** 14 **SW(2d)**906.

989–54½–New. In an action to recover oil and mineral rights previously conveyed by plaintiff to defendant, evidence relative to mutual mistake in failing to reserve mineral rights in the deed of conveyance has been held sufficient for submission to the jury. **TexCivA** 11 **SW(2d)**380.

989–54½–New. Petition in action for breach of contract to take gas from plaintiff's well held sufficient. 129**Kan** 573, 283**P**628.

989–54½–New. Evidence in action to determine extent of oil reserved by grantors of individed interest held not to show mutual mistake in deed. **Tex CivA** 21**SW(2d)**532.

990–68 145**Wash**295, 259**P**1079.

990–69 145**Wash**295, 259**P**1079.

991–75 178**Minn**254, 226**NW**843; 34 **PortoRico** 696 (quarry). [a] **Gravel pit lease** is lease with right to remove gravel. 218**AppDiv**502, 219**NYS**14.

991–77 215**Ky**153, 284**SW**1023; 223**Ky** 751, 4**SW(2d)**717; **TexCivA** 5**SW(2d)** 1019.

991–81 178**Minn**254, 226**NW**843.

991–82 But see 273**US**113, 47**SCt**271, 71**L ed**566.

991–87 86 **IndA**597, 158**NE**913.

991–88 218**AppDiv**502, 219**NYS**14.

991–89 [a] 81**Mont**604, 264**P**388.

991–95 164**Ga**371, 138**SE**892, 894 [cit Cyc]. [a] **Gas lease governed by code provisions as to leases,** though more like a license than ordinary lease. 163 **La**90, 111**S**610.

991–96 164**Ga**371, 138**SE**892, 894 [cit Cyc].

991–97 164**Ga**371, 138**SE**892, 894 [cit Cyc].

992–99 42 **Ida**458, 246**P**304 [citCyc]; 13**PaDist&Co** 616; 145**Wash**295, 259**P** 1079.

992–3 30**F(2d)**369 [certiorari granted 279**US**831, 49**SCt**352(3dcase), 73**L ed** 981]; 223**Ky**589, 4**SW(2d)**392.

992–4 34**PortoRico** 696.

992–5 223**Ky**589, 4**SW(2d)**392; 34 **PortoRico** 696

992–7 25**F(2d)**824; 29**F(2d)**353; 224 **AppDiv**173, 230**NYS**19. [a] (2) Contract granting right to strip coal on designated land for certain period is lease and not sale of coal in place. 294 **Pa**300, 144**A**280.

993–15 [b] (2) Written contract to execute and deliver mineral lease has been held unenforceable for lack of agreement on terms of lease or averments definitely construing ambiguous portions of contract or contract as whole. 118**Tex**111, 12**SW(2d)**111. (3) Contract not specifying amount of royalties, time for commencing drilling, rent due for delay, or other terms of completed lease is unenforcible. 40**F(2d)**497.

994–16 163**La**1011, 113**S**357; **Tex** 12 **SW(2d)**620.

994–20 26**F(2d)**698.

994–21 See also 26**F(2d)**698.

995–35 [a] (2) Title to oil land is held not merchantable where oil and gas lease was outstanding and litigation pending. 15**F(2d)**323. [e] **Waiver.**–15 **F(2d)**323. [f] **Defective title in one of several lessors.**–**Tex** 12**SW(2d)**620.

995–36 30**F(2d)**497; 163**La**1011, 113**S** 357. But see **Tex** 12**SW(2d)**620.

995–43½–New. Lessee by his acts may waive his right to have his attorney approve lessor's title as evidenced by abstract, and thus indicate his intention to use the lease as given him. **TexCivA** 276**SW**779.

996–53 **MoA** 284**SW**191.

996–55 **MoA** 284**SW**191.

996–58 79**Mont**550, 257**P**1016. [a] (3) Withdrawal of written offer of lease from bank in which it had been deposited and notice of such fact by bank to offeree constitutes revocation. 79 **Mont**550, 257**P**1016.

996–62 [a] **Option feature of contract is not defeated** by optionee operating mines, making deposits under contract, and buying interest of part of seller's assignees. **MoA** 284**SW**191.

996–63½–New. Options for oil leases generally are held valid. 124**Kan**79, 257 **P**937.

997–71½–New. As between lessor and lessee, right to remove improvements erected by latter on leased premises may be determined in advance by agreement. 315**Mo** 276, 286**SW**3.

997–71½–New. Possession of land for three years and payment of royalties established relation of landlord and tenant. 175**Ark**1146, 1**SW(2d)**812.

997–72 158**La**1003, 105**S**43. But see **CalA** 285**P**724. [e] **Escrow instructions given by lessors held unconditional acceptance** of offer in lessee's instructions. **CalA** 283**P**960.

997–76 [a] (3) 152**Miss**772, 118**S**713. (4) **TexCivA** 31**SW(2d)**160. (7) Annual rent of one dollar and eighteen cents per acre. **TexCivA** 276**SW**936. (8) Agreement to begin well within specified time. 230**Ky**154, 18**SW(2d)**973. (9) Other instances. **TexCommnA** 11 **SW(2d)**158.

998–80 [a] (6) Oil and gas leases and option to purchase concurrently executed as parts of same transaction constitute contract between parties. **Tex CivA** 285**SW**874.

998–86 See also 158**La**1003, 105**S**43.

998–88 [c] **Requisites of acceptance.**–90**CalA**136, 265**P**501. [d] **Request for modification made after acceptance of offer to make oil lease** does not affect contract made by acceptance. 90**CalA** 136, 265**P**501.

999–94 7**Alaska**437. [a] **TexCivA** 291 **SW**922.

999–97 [b] **Facts not constituting fraud.**–**TexCivA** 289**SW**173. [c] **Proof of fraud.**–**TexCivA** 289**SW**173. [d] **Sufficiency of evidence.**–**TexCivA** 289**SW** 173. [e] **Inability to understand English was immaterial** where no claim was made that lease differed from understanding between parties. 137**Misc** 637, 244**NYS**231. [f] **Falsity of representations cannot be established** by what occurred thereafter. 137**Misc**637, 244 **NYS**231. [g] **Fraud has been held not established.**–137**Misc**637, 244**NYS**231.

999–2½–New. A provision of a lease contract to test land for oil and other minerals, and authorizing the lessee's selection of certain acreage whereby the lessee's rights under the contract were to be wholly unaffected by a deed executed by the lessor to a thirty party until written notice thereof from both the grantor and grantee in such deed was delivered to lessee, is not violative of a statute relative to record of deeds as notice. 29**F(2d)**980.

999–8 34**PortoRico** 696 (election of remedies). [c] **Indispensable parties.**–31**F(2d)**484.

1000–9 [c] (2) Lessees agreeing to take risk of annulling prior oil lease, in which they were unsuccessful, could not recover consideration paid. 166**La**28, 116**S**582.

1000–14 See also 218**AppDiv**502, 219 **NYS**14.

1000–15½–New. Condition of internal affairs of lessee corporation is no ground for canceling lease, so long as obligations of lease are being performed. **TexCivA** 289**SW**173.

1000–20 [a] **Illustration.**–**TexCivA** 289 **SW**173.

1000–22 [f] **Finding that lessee under oil lease had no intention of paying consideration,** consisting of drilling of well to four thousand feet, when making agreement, is tantamount to finding of fraud which would authorize cancellation of lease. **TexCivA** 12**SW** (2d)846. [g] **Evidence held sufficient to show fraud.**–143 **Okl** 38, 287**P**390.

1001–23 **TexCivA** 289**SW**173.

1001–24 [a] (2) Lessee put in notice of previous conveyance of one acre specifically excepted from lease is held not defrauded, though part of acre was fenced on land not conveyed. 173**Ark** 429, 292**SW**405.

1001–26 [a] (2) Promise not freely to assign lease to persons financially unable to develop lease is held not material representation in procuring lease. **TexCivA** 289**SW**173.

1001–38 **TexCivA** 3**SW(2d)**462. [c] **Consent of signers of lease as lessors who had no interest in property** is not required. 294**Pa**212, 144**A**93.

1002–54 164**La**1090, 115**S**280. [c] **Arbitration agreement** may work waiver of right to declare forfeiture. **NJ** 152 **A**73.

1003–55 42 **Ida**458, 246**P**304.

1003–57 42 **Ida**458, 246**P**304 (lessee in action by sublessee for damages in removal of ore cannot question validity of original lease where lessor does not question its validity).

1003–65 28**F(2d)**472 [certiorari den 279**US**839, 49**SCt**253(2dcase), 73**L ed** 986]; 93**PaSuper**562; 106**WVa**429, 145 **SE**744. [a] **Word "premises"** refers to entire lot of land in which lessees were given right to excavate. **Mass** 170 **NE**44. [b] **Lease of mineral rights in land in** legal effect constitutes sale of interest in land. **TexCivA** 23**SW(2d)** 392.

1003–67½–New. Provisions requiring work to be done by lessee are construed more favorably to lessee than similar provisions in leases of city, and similar, property. 82**Colo** 577, 262**P**519.

1003–71½–New. Purchaser of lease with notice of pending action for cancellation acquires no greater interest than assignor. 15**F(2d)**565.

1003–71½–New. **Reservation authorizing** lessor to sell property at any time during his life is personal covenant not extending to his heirs. 145Wash295, 259P1079.

1003–71¼–New. Reservation to lessor of right to mine coal at any time is not personal right dying with lessor but extends to heirs without words of inheritance. 145Wash295, 259P1079.

1003–71⅓–New. **Determination of true lease.** Evidence held to authorize finding of true lease as between parties contesting point. 218Ala296, 118S513.

1003–73 214Ala139, 106S855; 212Ky825, 280SW151; 103NJL635, 137A423; Pa 138A94; 106WVa429, 145SE744; WVa 152SE785. [b] **Facts held insufficient to show construction at variance with express terms of lease.**–214Ala139, 106S 855.

1004–74 226Ky492, 11SW(2d)114.

1004–80 19F(2d)56.

1004–89½–New. Lease of coal land for a period of years under statute may not extend for a longer period when not shown by exhibit to have been within the amendment providing for a longer time, if acknowledged as required by law for conveyance of realty and recorded. 218Ala296, 118S513.

1004–92 169La973, 126S442.

1005–98½–New. Supplemental agreement suspending terms of lease held to change date in covenant to install machinery. 82Colo 577, 262P519.

1005–4 15F(2d)565.

1005–7 230Ky553, 20SW(2d)286.

1005–10½–New. Merger of estates in respect to mineral leases is controlled by statute in some jurisdictions. 144 Okl 133, 289P763.

1005–19 19F(2d)264.

1005–20 [a] **Lessor's forfeiture of land to state** does not suspend condition for determination of oil lease where by statute owner has preference of repurchase. TexCivA 292SW255.

1006–22 Mass 170NE44; 106WVa429, 145SE744.

1006–35 [a] (2) Where lessee exercised right to terminate lease three days after postponed date of lease, lessor could not recover for failure to install machinery, under provision for installation within reasonable time. 82Colo 577, 262 P519. [b] **Performance of conditions by lessee** is condition precedent to right to have lease canceled and demand surrender of property. 230Ky683, 208SW (2d)724.

1007–38½–New. Acceptance of royalties from receiver after expiration of period to declare forfeiture was treatment of lease as still in force. 19F(2d)264.

1007–52 [b] (3) Absence of further operation after defendants abandoned well. TexCivA 294SW243.

1008–54 [b] **Where facts and inferences** therefrom are not in dispute, abandonment is question of law. 72 CalA314, 237P58.

1008–55 [b] (1) 140 Okl 256, 283P231. [c] **Facts held insufficient** to show abandonment. 72CalA314, 237P58.

1008–56 [a] **Petition held to state cause of action to cancel lease and quiet title and for injunction.**–140 Okl 256, 283P 231.

1008–65 [b] **Pleading held insufficient** for failure to point out defect in title. TexCivA 15SW(2d)194.

1009–67 [a] (2) Burden rests on assignee relying on Mexican government's refusal of permit as evidence of assignor's lack of title, to show documents which government of Mexico called for to prove rights of interested parties, and that documents could not be produced for information required by government. TexCivA 15SW(2d)194.

1009–68 TexCivA 15SW(2d)194.

1010–79½–New. Mining lease may create in lessee interest in real estate and not mere incorporeal right. 315Mo 276, 286SW3.

1010–79⅓–New. A lessee, continuing to mine and remove coal as authorized by lease after a dispute regarding the quantity of merchantable coal acreage, is not chargeable with waste. DelCh 142A368.

1010–88 235Ky767, 32SW(2d)325; 93 PaSuper562.

1010–90 [f] **Reservation to sublessor of privilege of raising to certain level** places no limitation on sublessee's right above level. 42 Ida458, 246P304.

1011–94 Mass 170NE44.

1011–2 223Ky452, 3SW(2d)1074.

1012–11 215Ky71, 284SW415, 417 [quotCJ].

1012–12 215Ky71, 284SW415, 417 [quotCJ] (not deciding question).

1012–13 215Ky71, 284SW415, 417 [quotCJ].

1012–14 215Ky71, 284SW415, 417 [quotCJ].

1012–15 215Ky71, 284SW415, 417 [quotCJ].

1013–16 215Ky71, 284SW415, 417 [quotCJ]; 232Ky133, 22SW(2d)572.

[a] **Lessor is not estopped to deny right of lessee's assignee to transport coal from adjoining lands over premises** because lease named adjoining owners. 232Ky133, 22SW(2d)572.

1013–17 215Ky71, 284SW415, 417 [quotCJ].

1013–18 215Ky71, 284SW415, 417 [quotCJ].

1013–24 [a] (2) That miners working on adjoining land live on leased land is not ground of complaint where lessee is operating mines under lease. 232Ky 133, 22SW(2d)572.

1013–28 232Ky133, 22SW(2d)572.

1013–33 44 Ida484, 258P371, 372 [cit CJ].

1014–35 Ark 31SW(2d)293. But see TexCivA 285SW894.

1014–36 36GaA544, 137SE111; Tex CivA 15SW(2d)698. [d] **Investigation and report of authorities** (1) as to lack of commercial value of product is held not establishment of fact under lease. 36GaA544, 137SE111. (2) Such reports are held of evidentiary value. 36GaA 544, 137SE111. [e] **To entitle lessee to refund under lease** held to need actual proof of lack of commercial value of product. 36GaA544, 137SE111. [f] **Test of commercial value** is held not to require every possible test, but only tests as to value for commercial use. 36GaA544, 137SE111.

1014–37 See also TexCivA 15SW(2d) 698.

1016–74 175Minn305, 221NW13. [c] **Royalty tax.**–Lessee covenanting to pay all taxes and assessments, ordinary and extraordinary, general and specific, must pay royalty tax. 172Minn263, 215 NW71.

1016–75 [b] **Lessee cannot deduct** from agreed consideration payable to lessor out of first oil production severance tax paid thereon. 174Ark94, 294SW3.

1016–78½–New. Where lessee covenants to pay all taxes and assessments ordinary and extraordinary, general and specific, he must pay royalty tax. 172 Minn273, 215NW181.

1016–78⅓–New. Where a lease is silent as to an obligation to pay taxes, the obligation ordinarily rests on the lessor. 38Wyo 505, 269P43.

1016–78¼–New. Where a tax on the products of a mining claim is assessed entirely against the operating company in lieu of taxes on the mining claim and taxes on the lessor's royalty interest, the tax ought to be borne by the lessor and lessee in proportion to their respective interests in the absence of a contract to the contrary. 38Wyo 505, 269P43.

1016–78⅓–New. Under a lease of lands for drilling oil not making specific mention of taxes and entitling the lessors to a percentage of the "net" returns from sales of oil, the lessee is entitled to deduct from the lessor's interest his proportionate share of taxes on products of the claim. 38Wyo 505, 269P43.

1018–98 225Ky77, 7SW(2d)853. See also 132Misc590, 230NYS372.

1018–1 [d] (3) Transformers rented from third persons and removed by owners. 82Colo 577, 262P519.

1019–21 Mass 170NE44. [d] **Complaint held sufficiently to state** cause of action for loss of royalties by reason of lessee's negligent operation causing permanent loss of coal. 132Misc590, 230 NYS372.

1019–22 81Mont527, 264P122; 96Pa Super180 (injunction denied because of adequate remedy at law).

1019–23 [b] **Lease provision that lessees should pay for all damages** resulting from lease includes liability for surface and crop damages and restoration of condition of property. MoA 296 SW262.

1019–25 117Tex439, 6SW(2d)1039, 60 ALR890.

1020–27½–New. Loss of royalties due to delay and failure to resume normal operations is not permanent, and royalties for deficiency in quantity may not be recovered, loss being limited to interest on royalties which should have been paid. 132Misc590, 230NYS372.

1020–31½–New. **Where a lease is declared invalid** the measure of damages as against the lessee is the value of the mineral taken out less the cost of production. 132 Okl 141, 269P1067.

1020–38 TexCommnA 296SW491.

1020–40 Mass 170NE44; TexCivA 276 SW448. [a] (2) Lease construed to require lessee and his assignee should take from premises all gravel disposed of by them during life of lease, if it could reasonably and profitably be taken therefrom and markets therefor were reasonably accessible. 167Minn399, 209 NW259. (3) Terms of lease construed to constitute continuing contract with provision for performance of part each year, to be measured by quantity of gravel which could reasonably be taken with profit during year. 167Minn399, 209NW259. (4) Gravel lease for specified term with option given to lessee to renew from time to time did not obligate lessee to exhaust pit. 167Minn399, 209 NW259.

1020–42½–New. Obligation to lessee to exploit leased premises for oil if found in paying quantities is held not potestative condition. 161La437, 108S875.

1020–42⅓–New. Mineral contract is held not option. 161La437, 108S875.

1020–42¼–New. Where lessor gave right to explore for gas and reserved one eighth of oil interest, it was held that development of oil was not main object. 161La437, 108S875.

1020–42⅕–New. Lessee by setting forth production of lump coal and prepared coal in statement of operations acknowledged obligation to produce certain quantity of lump coal. 290Pa495, 139A 140.

1021–45 191NC630, 132SE671; TexCivA 276SW448.

1021–45½–New. The fact that contract is in form a deed does not alter obligation to develop mine with reasonable diligence. TexCivA 276SW448.

1021–47½–New. The lessee is not vested with absolute discretion as to extent of development and diligence in operation. TexCivA 276SW448.

1022–62 253NY502, 171NE758. [d] **Reasonable construction.**–253NY502, 171 NE758. [e] **Opportunity to lessor to measure gravel removed** (1) is necessarily implied in lease providing for removal, measurement and minimum rental. 253NY502, 171NE758. (2) Removal by vessel cannot be required although lease provides for measurement in vessels. 253NY502, 171NE758.

1023–69½–New. Requirement that lessees protect boundaries by development required such development as a prudent oil operator would reasonably have made. TexCivA 18SW(2d)917.

1023–75 22F(2d)360.

1024–88 191NC630, 132SE671; 133 Okl 286, 272P401; 289Pa519, 137A670. [a] (3) Under lease contemplating prospecting for various minerals and providing for royalties on each, mining of coal alone will not prevent forfeiture where royalty on coal mined is inadequate as such and development for all minerals named was principal purpose of lease. 133 Okl 286, 272P401. (4) Mining lease, implied from terms of conveyance, will be ipso facto terminated where lessee, and those holding under him, fail to carry out original purpose of parties. TexCivA 18SW(2d)195.

1024–90 289Pa519, 137A670.

1025–98½–New. If lessee in bad faith tries to take advantage of clause permitting cessation of mining when market is poor court will grant lessor relief. 145Wash295, 259P1079.

1025–98⅓–New. As it will also do where lessee is inefficient and slothful in

operating the mine. 145Wash295, 259P 1079.

1025-98¼-New. Rights of parties under mining lease, in view of a declaration of forfeiture, are unaffected by subsequent option to lessee to buy, not acted on. 289Pa519, 137A670.

1025-99 [b] **Requirement to mine coal "as quickly as practicable"** does not require lessee to mine continuously at material loss on penalty of forfeiture. WVa 152SE785.

1025-1½-New. or unfavorable mining conditions and markets. WVa 152SE785.

1025-9½-New. Possibility of lessee's defeating his obligation to develop premises by purchasing surrounding land can not be asserted as present cause of action for annulling oil and gas lease. 161 La437, 108S875.

1025-9½-New. Lessee's nonpayment of agreed charges for transporting coal from other lands over leased premises is no ground for forfeiture of coal lease. WVa 152SE785.

1025-12 22F(2d)360.

1026-18 72CalA314, 237P58. [b] **Notice by lessor** that he wanted lessee to resume or quit held insufficient. 72CalA 314, 237P58.

1026-25 289Pa519, 137A670.

1026-26 [a] (2) Mere indulgence without more. 289Pa519, 137A670.

1027-37 [a] **Liability on warranty of title.**-(1) 229Ky203, 16SW(2d)1020.

1027-38½-New. Obligation to pay royalties held to apply only to oil produced. 174Ark61, 295SW386.

1027-41 227Ky607, 13SW(2d)772, 64 ALR630; 229Ky826, 18SW(2d)279. See also 223Ky589, 4SW(2d)392.

1027-43 81Mont604, 264P388. [b] **Royalties on share of oil produced** held major consideration for conveyance of oil land gas under lease. TexCivA 292 SW290.

1027-47 218Ala296, 118S513; 212Ky 825, 280SW151; 103NJL635, 137A423. [a] (3) Lease reserving equal one-eighth part of all oil, gas, and gasoline produced, manufactured, and saved from premises, is held construed to mean one eighth of manufactured products. Tex CivA 283SW578. [b] **Right to disregard** lessor's right to refer to railroad weights to ascertain royalties, as provided in lease, is not contained in provision for operation of mine in workmanlike manner. 218Ala296, 118S513.

1027-49 290Pa87, 138A94.

1027-52 227Ky801, 14SW(2d)155.

1028-54 [a] (3) Under terms of lease, quarterly settlement of two dollars per car of gravel was to be measured not by quantity actually removed, but by quantity which could reasonably be taken from premises with profit. 167Minn399, 209NW259.

1029-72½-New. Under lease defining pea coal for royalty purposes as coal passing through three quarters inch mesh, all such coal is pea coal although known in the market by other names. 290Pa495, 139A140.

1029-74 But see 290Pa495, 139A140.

1030-82 144 Okl 58, 289P716 (provision held not limited to production period). [b] (3) Clause providing for forfeiture for failure to pay royalties, not due to strikes, does not limit contract to pay minimum royalty whether mines are or are not in operation. 214Ala139, 106S 855.

1030-83½-New. A mining lease has been construed to require twenty-five per cent additional royalty on excess of prepared coal over sixty per cent of total. 290Pa495, 139A140.

1030-83¼-New. Lessors have been held not to have acquiesced in the failure of lessee to produce lump coal in the proportion specified in the lease. 290Pa 495, 139A140.

1030-83¼-New. Lessee is liable for additional royalty provided for failure to produce lump coal although there was no market for such coal. 290Pa495, 139 A140.

1030-83⅛-New. Amount of yearly minimum rental over royalty is not applicable to payment of excess royalty imposed as penalty for failure to produce lump coal as provided in the lease. 290Pa495, 139A140.

1030-83¼-New. Lease providing minimum rental royalties on pea coal provided by lease held not additional to minimum rental. 290Pa495, 139A140.

1030-83⅛-New. Under a contract requiring the lessee to pay for all coal mined the sum of thirty five cents per net ton, the lessee mining coal in excess of the specified minimum tonnage is not entitled to interest on excess payments from the date thereof until the date when the coal would be exhausted if the minimum amount had been taken. 294Pa 419, 144A415.

1031-91½-New. Under some leases fixed annual payment is stopped only when both commencement and continuance of mining produces royalty equal to the fixed annual payment. 94PaSuper 75.

1031-94 214Ala139, 106S855.

1031-96½-New. In coal lease providing minimum royalty, but that lessee could, where minimum exceeded ton royalty, reimburse itself from excess in following year, "year" cannot be construed as "years." 222Ky345, 300SW864.

1031-96⅛-New. A coal mining lease, covering two distinct tracts of coal lands, containing covenants of payment of minimum rental on each tract of land, is divisible. 226Ky492, 118SW(2d)114.

1032-7½-New. Acceptance of the minimum royalty and acquiescence in the lessee's failure to mine as provided in the lease by the lessor and assignee precludes recovery for loss of royalties. 132 Misc590, 230NYS372.

1032-16 Minn 232NW40.

1033-32½-New. Joint warrantors of title are suable jointly, on failure of title, to recover advance royalty paid. 229Ky 203, 16SW(2d)1020.

1033-34 29F(2d)353. [b] **When mined and removed.**-178Minn254, 226NW843 (acts not constituting removal). [c] **Other particular constructions.**-NJ 152 A73.

1033-46 [c] **Provision that lessor's failure to enforce forfeiture** within six months after default constituted waiver, is held not to affect right to collect royalties. 220Ky621, 295SW1073.

1034-50½-New. Coal lease provision for royalty cessation on delay in mining beyond lessee's control does not include selling troubles. 222Ky345, 300SW864.

1034-53½-New. Where a lease and option agreement provides for a certain minimum rental to be applied against the purchase price if the option ripens into a conveyance, the rental becomes an absolute obligation on its day of payment and cannot be defeated by surrender of the premises. 32F(2d)855.

1034-58 [b] (2) Under coal mining lease providing that there should be no abatement of royalties unless prompt written notice was given, lessor could recover minimum royalties accruing between date of last payment and date when notice was given. .230Ky553, 20SW(2d) 286.

1035-61 30F(2d)686.

1035-64 [a] **During preparations to work mine.**-Where there was no workable seam of marketable coal in mine when defendant acquired mining lease, he is not responsible for minimum royalty during time he was engaged in making preparations to work mine. 226 Ky728, 118SW(2d)920.

1035-65 229Ky826, 18SW(2d)279; 230 Ky553, 20SW(2d)286.

1036-72 106WVa376, 145SE633.

1036-77 284Pa272, 131A235.

1037-78 [c] **Burden of proof** in action between lessor's grantee and lessees, to show waiver of forfeiture, is upon lessee. 171Ark844, 286SW961.

1037-82½-New. Under a lease providing that lessees' rights shall automatically cease on default for given time, their right to continue mining will be suspended, after such default, until they pay up all arrearages. 284Pa272, 131A 235.

1037-82¼-New. But such provision does not deprive lessor of right to recover minimum royalties accruing during such period, unless, under authority given by lease, he retakes possession of property. 284Pa272, 131A235.

1037-82¼-New. By statute nonpayment of rent is a peremptory cause for cancellation of gas lease. 163La90, 111S 610.

1037-82⅛-New. Where evidence showed that the cause of asserted forfeiture of a coal mining lease was nonpayment of royalties, and that there were subsequent payments and receipts on account of royalties by the lessor or to his account, such acceptances were a waiver of any forfeiture for nonpayment of royalties within time, and payments are only to be taken as credits on accounting. 218 Ala296, 118S513.

1037-82¼-New. Right of forfeiture once accrued is not lost by subsequent tender of past due rents. 180Ark16, 20SW(2d) 609.

1037-92½-New. Right to retake possession on default in payment of royalties is for benefit of lessor who alone can take advantage of it. 284Pa272, 131A235.

1037-92¼-New. Lessees cannot avail themselves of own wrong or set up own default to work a forfeiture of their contract. 284Pa272, 131A235.

1037-92¼-New. Where a contract relating to the privilege of extracting stone constitutes a lease, unlawful detainer is the lessor's proper remedy to repossess himself of the property. 29F(2d) 353.

1037-94 29F(2d)353. But see 180Ark 16, 20SW(2d)609.

1038-1 WVa 152SE785.

1038-6 [d] **Construction.**-230Ky683, 20 SW(2d)724. [e] **Statute creating lien for one year's rent** does not prevent parties from contracting for further lien. 230Ky683, 20SW(2d)724.

1038-7 221MoA17, 297SW470.

1039-14 Minn 232NW40.

1039-19 17F(2d)733; 23F(2d)154; 84 Colo 325, 270P650; 163La90, 111S610.

1040-21 294Pa300, 144A280.

1040-22 [a] (4) Denial of plaintiff's allegations puts on him burden of proving obligation to pay royalty sued for. 220 Ky769, 295SW1039. [b] (5) In action for royalties, burden is on lessees to prove that lessor retook possession of property. 284Pa272, 131A235.

1040-24 292Pa412, 141A237.

1041-28½-New. Judgment awarding and apportioning back royalties to individual owners jointly leasing lands for transporting coal from adjoining land over leased land held improper. 232Ky133, 22SW(2d)572.

1041-29 218Ala296, 118S513.

1041-41 CalA 285P392.

1041-43 [b] (1) 43 OklACR173 [reh pending]. [c] **Evidence held to show termination of contract.**-161La641, 109 S341. [d] **"Agreement to assign"** oil lease is not "assignment" or "lease." 23 F(2d)154.

1041-44 Nev 284P307 (held assignment and not sublease).

1042-48 204 Iowa746, 216NW78, 82 [quotCJ].

1042-49 204 Iowa746, 216NW78, 82 [quotCJ].

1042-50 204 Iowa746, 216NW78, 82 [quotCJ].

1042-56 180Ark885, 23SW(2d)986 (impossibility of assignment); 7LaA1; Tex CommnA 24SW(2d)14 (contract to sell drill stem has been held not to give equitable assignment of oil lease). [a] **Assignee of lease can assert claim,** though assignee's wife failed to join in execution. TexCivA 291SW922. [b] **All of contracts and leases must be taken into consideration** as well as all circumstances in determining whether owner of drilling rig was entitled under contract to assignment of oil lease. 180 Ark885, 23SW(2d)986.

1042-57½-New. Oil buyer's liability under agreement with assignee of lease to pay assignor is held unaffected by invalidity of lease when ratified. 163La 907, 113S142.

1042-57½-New. Liability unaffected by assignee's attempts to annul assignment. 163La907, 113S142.

1042-57½-New. Whether lease was assignable becomes immaterial where assignee has reassigned his rights by assignment to assignor who was the original lessee. TexCivA 285SW874.

1042–57½–New. Lessee is not prevented from exercising an option to purchase leased premises by an assignment of lease where the assignee has reassigned to lessee. **TexCivA** 285SW874.

1042–57¼–New. An oil buyer cannot defeat liability for payment to assignor of a lease not stipulated in an agreement when signed by assignee where the latter knew it would be inserted. 163La 907, 113S142.

1042–57½–New. Assignment in lease made by son under defective power of attorney of mother, which was not repudiated, has been construed to entitle son to one half of funds received from sale. **TexCivA** 296SW987.

1042–59½–New. Lien for purchase price of grantor of interest in lease subject to provisions of original lease is not superior to lien for royalties under lease. 230Ky683, 20SW(2d)724.

1042–62 174Ark61, 295SW386; 230Ky 683, 20SW(2d)724 (grantee of interest in coal lease held bound by provision of original lease as to lien for royalties).

1043–64 [d] **Grantee held to take no title** from grantor having only right to mine coal which he had long since ceased to do. 219Ky74, 292SW480.

1043–65 Nev 284P307; **Nev** 289P805. [a] **Intention.–In** construing mining lease as between lessor's successors in title and one who acquired lease from trustee in bankruptcy of lessee's assignee, rights of parties must be measured and determined by intention as expressed in original lease. 226Ky728, 11SW(2d)920.

1043–74½–New. Where not apparent that lease and option were made a part of the agreement between the lessee and the assignee for a particular purpose, it must be assumed that such was not the intention of the parties. **Nev** 284P307.

1043–78 172Ark198, 288SW4; 174Minn 139, 218NW553. [f] **Under contract to reconvey lease on return of price within sixty days,** purchaser's title becomes absolute on failure to return price within time set. 24F(2d)776.

1044–85½–New. Buyer of oil lease, failing to point out defects in title with sufficient particularity cannot complain because seller did not correct them. **Tex CivA** 289SW128.

1044–85½–New. Assignment of a lease requiring payment of consideration out of first oil does not bind assignee to drill. **TexCommnA** 2SW(2d)421.

1044–86 [a] (1) Privity between plaintiff who assigned oil lease and defendant who bought half interest from assignee held not to exist. 23F(2d)154. (2) Privity between plaintiff agreeing to assign lease to another and defendant assignee of such other held not to exist. 23F(2d)154.

1045–95 137 **Okl** 30, 277P661.

1046–15 168Ark853, 272SW353; 232 Ky755, 24SW(2d)607.

1046–16 168Ark853, 272SW353. [b] **Lessor innocently including another's land** in lease is liable for trespass of lessee. 225Ky346, 8SW(2d)425.

1047–30 [a] **Oil and gas lease is interest in realty.–TexCivA** 28SW(2d)569. [b] **Lease creates interest in realty.–**235Ky 767, 32SW(2d)325.

1047–32½–New. The ordinary form of oil lease is in effect a sale of a portion of the land. 115Tex332, 281SW192.

1047–32½–New. Oil and gas lease duly executed constitutes contract. 35 **OhA** 107, 172NE288.

1047–40 But see **TexCivA** 2SW(2d)288 (ordinary form of oil lease is, in effect, sale of portion of land).

1047–40½–New. An oil lease creates severance of estate in surface from estate in oil and minerals which may be owned in their entirety by different parties. **TexCivA** 2SW(2d)288.

1047–41 168Ark213, 269SW585; 136 **Okl** 127, 276P709. [b] (2) Lease not rendered invalid by surrender clause. 137 **Misc**637, 244NYS231. [e] **Subsequent rescission by lessor and his vendor** cannot affect rights of lessee or his assigns. 168Ark213, 269SW585.

1048–44 161La607, 109S83.

1048–48 [a] **Lease not void** where it does not restrict lessee to any particular spot. 161La437, 108S875.

1049–61 161La437, 108S875; 246Mich 62, 224NW398. [e] **Cash consideration** and reservation of one-eighth interest in oil produced has been held not uncertain. 161La437, 108S875.

1049–62 [c] **Agreement to drill.**–Where lessees were not required to drill wells because well on adjoining land did not pay, they were not required to do so by subsequent agreement not supported by consideration. 29F(2d)670.

1049–65 219Ky143, 292SW743; 137 **Misc**637, 244NYS231; 156Tenn54, 299 SW782; **TexCivA** 297SW1045.

1050–69 [a] **Oil and gas lease under seal** creates presumption of consideration. 137**Misc**637, 244NYS231.

1050–75 156Tenn54, 299SW782.

1050–84 161La607, 109S83.

1051–85 76Mont332, 247P166.

1051–86 76Mont332, 247P166.

1052–91 TexCommnA 291SW532.

1052–95 [c] **Unrecorded lease** is valid between parties and subsequent purchasers, not purchasers for value. **Tex CivA** 291SW922.

1052–3 31F(2d)667; 38F(2d)37; 237 IllA156; 218Ky310, 291SW386; 225Ky 676, 9SW(2d)1004(1stcase); 247Mich 674, 226NW653 (purpose of clauses considered); **Mich** 233NW329; 294Pa212, 144A93; **TexCommnA** 14SW(2d)819(2d case); **TexCivA** 280SW842; **TexCivA** 3SW(2d)462; 117Tex439, 6SW(2d)1039, 60ALR890. [a] 78Mont134, 252P800; 115Tex469, 283SW754. [b] (3) Contract, draft, and lease held all part of one transaction and to be construed together. 15F(2d)323. [c] (3) In determining meaning of terms employed in lease, conduct of parties in relation thereto may be considered. 106WVa37, 145SE 572. (4) Where practical construction by lessee and assignee was induced by court's erroneous construction, assignee is not estopped from enforcing true intention. **TexCivA** 31SW(2d)154. [f] **Lease in unusual form construed** as "unless" lease, expiring on failure of lessee to begin exploration within stated period. 78Mont134, 252P800. [g] **Lease not construed strictly against lessee.–**237 IllA156. [h] **Contracts construed.–**237 IllA156. [i] **Particular leases construed.–**80Mont239, 260P119. [j] **What law governs.–**25F(2d)824. [k] **Lease must be construed as whole.–**84Mont178, 274P834. [l] **Reasonable construction presumed intended rather than unreasonable.–TexCivA** 19SW(2d)1115.

1053–4 38F(2d)37; 248Mich230, 226 NW857; 76Mont254, 246P168. [d] **Leases construed** to place title to gas in lessee with complete authority to dispose of it. **TexCivA** 19SW(2d)178.

1053–5 76Mont254, 246P168.

1053–5½–New. No relation of special trust and confidence exists between lessor and lessee of oil and gas lease. 318 Ill 374, 149NE253.

1053–5½–New. The act of making a gas and oil lease does not show fiduciary relation between parties. 318 Ill 374, 149NE253.

1053–6 [a] **Ex parte oil field construction** cannot control construction of lease. **TexCivA** 276SW331.

1053–8 TexCivA 276SW936.

1053–7 31F(2d)822. See also 127Kan 290, 273P172(2dcase).

1053–8 228Ky326, 14SW(2d)1089; **Tex CivA** 283SW288. See also 28F(2d)168. [b] **Ambiguous exception in lease** has been construed to exclude only railroad right of way on tract, not oil and gas therein. 28F(2d)168.

1053–8½–New. So-called oil and gas leases constitute, from time of their execution or present conveyance of, and effect the passing of entire title to, the designated minerals existing in the land. **TexCivA** 283SW288 (holding interest of life estate also included).

1053–8¼–New. An oil and gas lease in the usual form conveys an interest in lands in the state of Texas. **TexCivA** 8 SW(2d)719.

1053–9 76Mont254, 246P168.

1053–10 25F(2d)824 (under laws of Oklahoma); 84Colo 129, 268P521; 218 Ky310, 291SW386; 228Ky349, 14SW (2d)1098; 76Mont254, 246P168; 78Mont 134, 252P800; 139 **Okl** 42, 280P1093.

1053–14 132 **Okl** 236, 270P1.

1053–15 175Ark1118, 1SW(2d)823.

1053–15½–New. There is an implied covenant that the lessee will do nothing to impair the value of the lease to the lessor. 26F(2d)882.

1053–15½–New. As used with reference to oil and gas leases, the word "operation" is ordinarily understood to include sale by the operator of oil or gas produced. 29F(2d)323 [certiorari den 279US853, 49SCt348(8thcase), 73L ed 995].

1053–16 25F(2d)824 (under Oklahoma laws); 31F(2d)822; **CalA** 285P351; 1 **LaA**654; 247Mich674, 226NW653; 248 Mich247, 226NW860; 78Mont134, 252P 800; 156Tenn54, 299SW782, 783 [cit CJ]; **TexCivA** 289SW158; 101WVa721, 133SE626. But see **TexCivA** 5SW(2d) 1019; **TexCivA** 28SW(2d)914. Contra 237 IllA156. [b] **Forfeitures are favored** in oil and gas leases. 78Mont134, 252P800.

1053–18 248Mich247, 226NW860.

1053–19 TexCivA 276SW936.

1054–20 76Mont254, 246P168 (liberally construed in favor of lessor).

1054–20½–New. Rule of strict construction, however, is subordinate to primary rule of reasonable construction. **Tex CivA** 5SW(2d)1019.

1054–20¼–New. Where there is no ambiguity, rule does not apply. **TexCivA** 5SW(2d)1019.

1054–24 118Tex546, 19SW(2d)32; **Tex CivA** 283SW288; **TexCivA** 19SW(2d) 1115. [a] **TexCivA** 283SW288.

1054–26½–New. A drilling agreement modifying the original lease by requiring the lessee to begin drilling three wells each year has been held not as a matter of law, terminable at will merely because of the absence of time limit for such drilling. **TexCivA** 18SW(2d)256.

1054–32 [a] **Failure to comply with terms of extension** gives lessor right to recover lands. **TexCommnA** 293SW805.

1054–34 78Mont134, 252P800.

1054–35 161La139, 108S314; **TexCivA** 283SW288.

1054–36½–New. Failure of parties to lease on printed form to fill in essential blanks in "unless clause" leaves fixed term absolute. **TexCivA** 20SW(2d) 1099.

1054–37 216AppDiv665, 215NYS657, 664 [quotCyc]; **TexCivA** 276SW331; **TexCivA** 282SW909; **TexCivA** 283SW 288.

1054–38 161La139, 108S314; 223Ky359, 3SW(2d)758; 247Mich674, 226NW653; 216AppDiv665, 215NYS657, 664 [quot Cyc]; **TexCivA** 282SW909; **TexCivA** 4SW(2d)992. [b] Time consumed by lessors in attempted forfeitures of lease will be deducted from year added to length of lease under provision for continuance. **TexCivA** 4SW(2d)992. [c] **Burden rests on lessee** to show production of oil or gas within term in sufficient quantities to extend lease providing for extension if oil or gas should be found. 223Ky363, 3SW(2d)760. [d] **Drilling of well from which small quantities of gas were produced but not marketed,** does not show production extending lease under provision for extension if oil or gas should be found. 223Ky363, 3SW(2d)760. [e] **Lessee has no right to complete well** after expiration of fixed period. 247Mich674, 226NW653.

1055–39 216AppDiv665, 215NYS657, 664 [quotCyc]; 144 **Okl** 133, 289P763. [b] **Lease is subject to forfeiture** if at end of fixed period gas is not produced in paying quantities, though annual rentals had been paid or tendered. 122Kan 287, 251P1110.

1055–40 216AppDiv665, 215NYS657, 664 [quotCyc].

1055–42 80Mont239, 260P119; 23 **OhA** 343, 155NE510; 143 **Okl** 206, 288P964; **TexCivA** 283SW288; **TexCivA** 4 SW(2d)992; 102WVa345, 135SE238. [b] **Where lease provides for joint ownership,** grantee becomes tenant in common with grantor as to gas in place, with determinable fee title to any mineral discovered in paying quantities. **TexCivA** 14SW(2d)348.

1055–43½–New. Where paying well is

drilled within stipulated period, lessor need not take possession at end thereof in order to sue for failure to market gas. 231Ky284, 218W(2d)445.

1055–43½–New. Lessee may not continue exploration after expiration of initial term and exhaustion of oil or gas discovered. 143 Okl 206, 288P964.

1055–45 [a] **Commencement of well** and discovery of gas held to prevent termination of lease unless lessee failed to prosecute with reasonable diligence. 6F(2d)866.

1055–47 161La139, 108S314. [a] (2) Rights and interests of both parties must be considered in determining whether well was producing oil within meaning of lease. 161La139, 108S314. [b] (1) **TexCommnA** 12SW(2d)196.

1056–49 **TexCivA** 282SW909.

1056–50 **TexCivA** 1SW(2d)353. [b] **Production held insufficient.**–161La139, 108S314; **TexCivA** 5SW(2d)1019.

1056–56 152Miss772, 118S713.

1056–61 [a] **Lessor not estopped to deny execution of lease extension agreement** where lessee knew facts. **CalA** 286P487.

1056–62 **TexCivA** 294SW660. [c] (2) Correspondence held not to show extension. **TexCivA** 5SW(2d)624.

1057–63 **WVa** 153SE303. [f] **Application for and written extension construed together.**–82CalA281, 255P532. [g] **Particular agreements construed.**–82CalA281, 255P532. [h] **Agreement extending time for completion of well** abrogates part of lease requiring completion or payment of rental every three months. 138 Okl 186, 280P839.

1057–69½–New. Rule in regard to holding over operating as continuance of lease applies to oil and gas lease. 12Pa Dist&Co 371.

1057–69¼–New. Necessity for delivery of extension agreement. **CalA** 286P487.

1057–76½–New. Under a lease for a stated term and as much longer as gas or oil shall be produced in paying quantities, providing that if gas only is produced a stated sum per year shall be paid as long as gas is sold, the payment and acceptance of such stipulated sum does not itself, apart from production of gas, extend the lease for a year. **Tex CivA** 276SW331.

1057–76¼–New. A deposit to the joint account of the lessor and his wife will not extend the option on community property vested by law exclusively in the husband, where the agreement required the deposit to the account of the lessor's credit. 12LaA15, 123S430.

1058–89 See also 84Colo 129, 268P521.

1058–92½–New. Failure to explore within fixed time terminates lease. 78 Mont134, 252P800.

1058–92¼–New. Assignment of leasehold to owner in fee of part of premises by purchase from lessor subsequent to making of lease extinguishes lease as to part of premises owned by assignee. 144 Okl 133, 289P763.

1059–9 172Ark1096, 291SW807; 227 Ky607, 13SW(2d)772, 64ALR630; 122 Okl 288, 254P729, 52ALR126; **TexCivA** 19SW(2d)178.

1059–12 149Miss435, 115S563; 104 WVa286, 140SE4 (chattel real). But see 122 Okl 288, 254P729, 52ALR126. [s] **Oil lease, terminating on failure to commence** well or pay rent, is held to grant determinable fee. **TexCivA** 292SW255.

1059–15 17F(2d)394; 82CalA594, 256 P232; **Mont** 290P244; 104WVa286, 140SE4. But see 118Tex509, 19SW(2d) 27.

1059–16 170Ark729, 281SW360; 82 CalA594, 256P232; 81Mont604, 264P 388; 86Mont463, 284P553; 156Tenn54, 299SW782. But see 17F(2d)394; 40 F(2d)67. [d] **Owners may submerge lands** with water in absence of notice from holder of privilege of exploring for oil and gas of intention to exercise right or assign privilege. **TexCommnA** 294SW197. [e] **Lease granting primary term and deferring commencement of well on payment of stipulated sum** vests in lessee determinable fee. **TexCivA** 31 SW(2d)160.

1060–17 82CalA594, 256P232; **TexCivA** 31SW(2d)160.

1060–18 172Ark804, 290SW929; 81 Mont604, 264P388; 156Tenn54, 299SW 782, 783 [quotCJ].

1060–18½–New. Oil lawfully produced by a lessee is not abandoned although it escaped from the wells of its origin where it was conducted through the lessee's own devices and impounded in receptacles prepared for it. **TexCivA** 276 SW342.

1060–18¼–New. Title conferred by an oil and gas lease is inchoate until oil or gas is found. 104WVa286, 140SE4.

1060–20 [a] (2) Lessees under lease, specifically excepting acre previously conveyed, acquired tract minus acre, regardless of whether lessor subsequently reacquired acre. 173Ark429, 292SW405. [g] **Petition to recover for deficiency in acreage** held sufficient. 235Ky767, 32SW(2d)325.

1061–26½–New. Whether separate and disconnected tracts of land included in a gas and oil lease are merged or remain separate entities depends upon the intention of the parties as disclosed by the terms of the lease itself. 106WVa37, 145SE572.

1061–29 See also 81Mont604, 264P388.

1061–32 **TexCivA** 286SW652; **TexCivA** 299SW499. [a] **Use held in conflict with lessee's rights.**–**TexCivA** 286SW652. [b] **Holder of lease held not entitled to damages** for owner's temporarily submerging land where no oil or gas existed under surface. **TexCommnA** 292SW200.

1061–33 **TexCommnA** 16SW(2d)527; **TexCivA** 299SW499. [d] **Breach of warranty.**–12LaA285, 125S494.

1061–34 172Ark405, 288SW929; 81 Mont527, 264P122; 137Misc637, 244 NYS231; **TexCivA** 276SW342; **TexCivA** 286SW652; **TexCivA** 299SW499. [c] **TexCivA** 299SW499. [d] **Receptacles to impound waste oil** may be maintained. **TexCivA** 276SW342. [e] **Owners of land, submerging same, must remove water** on notice from holder of privilege of exploring for gas and oil of his intention to exercise such privilege. **Tex CommnA** 294SW197. [f] **Implied right of access** (1) must be exercised in manner least injurious to lessor. 180Ark321, 21SW(2d)428. (2) Means of ingress existing at time of lease and still available must be used although not most convenient. 180Ark321, 21SW(2d)428. (3) Lessee cannot use lessor's private gravel road if another way is available. 180Ark321, 21SW(2d)428. (4) Lessee has right to use lessor's private way where it is only means of reaching leased premises. 180Ark321, 21SW(2d) 428.

1062–37½–New. A lessor of land for production and conservation of oil has no right subsequently to convey any interest in conflict with the interest of his lessee. 170Ark729, 281SW360.

1062–37¼–New. Such lessor may subsequently grant surface rights to another lessee on terms not repugnant to the prior lease. 170Ark729, 281SW360.

1062–37¼–New. Lease requiring lessee to restore premises to original condition does not require lessee to replace buildings. **CalA** 288P437.

1062–46 [a] (2) Lessee impliedly can bring up gas necessary in drilling for oil. **TexCommnA** 16SW(2d)527. (3) Owners of oil lease, upon failure of well for oil, had no right to take gas therefrom where gas belonged to prior gas lessee. **TexCommnA** 16SW(2d)527.

1062–49 **TexCivA** 276SW342.

1062–58 25F(2d)824. [c] **Duty to test and develop** will be implied unless matter is expressly covered by contract. 38 **OklACR**615. [d] **Financial return not considered** where implied covenant is to drill initial well. 38 **OklACR**615. [e] **Drilling new wells** and not merely operation of existing wells is contemplated by lease for purpose of operating for oil and gas. **TexCivA** 20SW(2d)1099.

1063–59 **CalA** 285P1077; 169La955, 126S429; **TexCivA** 288SW264; **Tex CivA** 289SW1052; **TexCivA** 5SW(2d) 1019. [a] (7) Lease requiring that each producing well should hold two thousand acres in square around it means that lessee might hold entire tract for full term by drilling to production one well on each two thousand acres. **Tex CivA** 276SW936. (8) Stipulation in oil lease prohibiting lessee from plugging well held to refer only to wells drilled by lessee. 165La370, 115S623. [e] **Duty of assignee of oil lease** to drill is held to be determined only by bond to plaintiff, where neither assignment nor lease referred to drilling contract between plaintiff and original lessee. **Tex CivA** 283SW887. [f] **Termination of pooling agreement** providing for suspension of drilling obligations under lease reinstated obligations of lease contract. **TexCommnA** 27SW(2d)122(2dcase). [g] **Failure to pay annual rent to postpone drilling** requires lessee to make bona fide effort to drill on lease. **TexCivA** 26 SW(2d)299.

1063–61½–New. Under oil and gas lease separation of casing-head gas and gasoline from natural gas devolves on lessee. **TexCivA** 288SW264.

1063–63 [b] **Purchaser under contract providing** for development and royalties of oil if found must continue development within reasonable time after having drilled dry hole. **TexCivA** 294SW 259.

1063–64 216Ky494, 288SW350, 351 [quotCJ].

1063–64½–New. Oil lease is held to be contract giving renewable option to drill within stipulated time. **TexCivA** 289SW141.

1064–67 **TexCommnA** 24SW(2d)5. [b] **Test as to what constitutes "commercially productive" gas well** is whether it was reasonably possible to market or use gas producible at date of completion of well and immediately thereafter with some pecuniary profit, excluding from consideration expenses and liabilities incurred in bringing well to completion. **TexCommnA** 12SW(2d)196.

1064–71 26F(2d)631.

1064–72 25F(2d)824; 180Ark802, 22 SW(2d)1015; 216Ky494, 288SW350, 351 [quotCJ]; 23 OhA343, 155NE510; **Tex CivA** 1SW(2d)649; 101WVa748, 133SE 699.

1065–79½–New. Where lease provides there shall be no implied covenant to drill or protect lines none can be implied. 35 OhA107, 172NE288.

1065–80 **TexCivA** 276SW331; 101WVa 748, 133SE699. [a] **TexCivA** 18SW(2d) 681. [d] **Bond "diligently to complete"** oil well requires drilling depth reasonably necessary to discover oil in paying quantities. **TexCivA** 283SW887.

1065–81 38 **OklACR**615.

1065–82 38 **OklACR**615.

1065–83½–New. Provision for payment of stated portion of gas produced each quarter in which gas is sold requires lessee to market gas within reasonable time. 231Ky284, 218W(2d)445.

1065–85 23 OhA343, 155NE510; 118Tex 509, 19SW(2d)27; **TexCivA** 7SW(2d) 878. [d] **Lessor cannot require drilling of wells** to prejudice of other lessors in same gas field. 219Ky640, 294SW 176. [e] **Where negligence of lessee** prevents sufficient production to pay drilling expense, obligation attaches after discovery of paying quantities if further drilling would have produced paying quantities. **TexCivA** 7SW(2d)878.

1066–86 176Ark1052, 4SW(2d)942; 23 OhA343, 155NE510.

1066–87 **TexCivA** 18SW(2d)681.

1066–89 218Ky310, 291SW386; 223Ky 397, 3SW(2d)777, 778 [quotCJ].

1066–93 180Ark802, 22SW(2d)1015; 218Ky310, 291SW386; 223Ky397, 3SW (2d)777, 778 [citCJ]; 38 **OklACR**615; 101WVa748, 133SE699.

1066–94 180Ark802, 22SW(2d)1015 (absence in lease of express provisions as to number of wells); 223Ky397, 3 SW(2d)777.

1066–95 219Ky640, 294SW176 (lessee held not required to drill more than two producing gas wells on tract containing eighty one and eight tenths acres); 223 Ky397, 3SW(2d)777. [a] **Lessors can require** only such additional gas wells to be drilled as will reasonably supply demand and remove all gas within reasonable times. 219Ky640, 294SW176. [b] **In determining whether** there has been reasonable development of gas land, court must consider development of other land, cost, fair returns on money, and whether all gas is being pro-

duced that will yield fair return. 219Ky 640, 294SW176.

1066-96 219Ky640, 294SW176; 223Ky 397, 3SW(2d)777. [b] **Rights of all lessors or property owners,** within a gas field must be considered as affecting lessor's right to drilling of additional wells and fair degree of equality should be maintained. 219Ky640, 294S176.

1066-97 223Ky397, 3SW(2d)777.

1067-8 117Tex439, 6SW(2d)1039, 60 ALR890.

1067-12½-New. Breach of implied covenant will not authorize cancellation of lease, where lessor prevented waste. TexCommnA 293SW805.

1067-14 TexCommnA 7SW(2d)872.

1067-19 But see TexCommnA 7SW(2d) 872. [a] **In Texas.**-CommnA 7SW(2d) 872.

1067-21 [b] **What average man would do** is standard and not lessee's judgment. TexCommnA 7SW(2d)872.

1068-24 76Mont254, 246P168; 78Mont 134, 252P800; TexCivA 5SW(2d)1019; 101WVa721, 133SE626.

1068-25 76Mont254, 246P168. [a] (3) "Shall commence to drill well." 130 Okl 135, 265P647.

1068-26 [a] (4) Under covenant that, if oil or gas is discovered on neighboring land, lessee will within ninety days from such discovery begin drilling well on leased land, abandonment of well on leased land obligates lessee to drill on leased land. TexCivA 284SW621.

1068-31 TexCivA 5SW(2d)1019.

1068-32 But see TexCivA 291SW538.

1069-35½-New. Implied covenants for further exploration and development after discovery of oil or gas are operative within the fixed term as well as when lease is held thereafter under production clause. 38 OklACR615.

1069-38 130 Okl 135, 265P647. [a] (3) Other instances. 132 Okl 13, 268P1109.

1069-39 131 Okl 49, 267P855.

1069-40 131 Okl 49, 267P855.

1069-44 24F(2d)26; 248Mich247, 226 NW860; 139 Okl 42, 280P1093.

1069-47 24F(2d)26.

1070-57 130 Okl 135, 265P647.

1070-62 TexCivA 291SW692.

1071-72 180Ark901, 23SW(2d)257 grantee entitled to rental rather than grantors reserving interest); TexCivA 283SW288. [a] (2) Statute voiding lease where payment or tender is not made by fixed date and validating lease where such payment on tender is made is valid after effective date of statute. 27F(2d) 433. (3) Lease is void under statute where no well is completed or payment in tender is made by date fixed. 27F(2d) 433. (4) St. (1922) §§ 3766b1c, 3766h2c requires literal enforcement of both "or" and "unless" leases, subject to forfeiture provision. 27F(2d)433.

1071-73 8F(2d)261; 156Tenn54, 299 SW782; TexCivA 31SW(2d)160. [a] (2) Lease, providing that lessee "agrees to commence a well . . . within one year," obligates lessee to complete well within year. 27F(2d)433. [d] **Discovery of oil in paying quantities within specified time** is not required in order to effect extension, where oil is discovered and drilling commenced within such period. TexCivA 5SW(2d)1019.

1071-74 8F(2d)261; 156Tenn54, 299 SW782. [a] (2) Lease providing that lessee "agrees to commence a well within year" or pay rental for each additional month completion is delayed obligates completion within year or payment on or before each year thereafter till completed. 27F(2d)433. [f] **Payment of half of rental to grantee of undivided interest** of lessor held insufficient. 22F(2d)733. [g] **Payments made are only compensation for delay** in commencement of operations and not rentals where lessee is not in possession or entitled to possession till operations to sink well are begun. 248Mich230, 226NW857. [h] **Where payment is made by telegraphic money order** telegraph company is lessee's agent. 86Mont478, 284P525.

1072-78 156Tenn54, 299SW782, 783 [quotCJ].

1072-80 86Mont478, 284P525.

1072-81 248Mich247, 226NW860 (lease not extended by payment without development within fixed term). [a] **Where lease expressly provides that in absence of drilling operations within certain period** lease could not be kept in force by periodical payments beyond such period, lessee cannot prolong term by paying rentals. TexCivA 19SW(2d) 1115.

1072-84 156Tenn54, 299SW782, 783 [citCJ].

1072-85 221Ky786, 299SW954; 86 Mont478, 284P525. [a] (2) Assumption that lessor was satisfied with payment in place of development. 137Misc693, 244 NYS300.

1073-88 86Mont478, 284P525.

1073-89 248Mich230, 226NW857. But see 137Misc693, 244NYS300.

1073-98 86Mont478, 284P525.

1073-3 37F(2d)868 (failure to pay rental on time); 130 Okl 204, 266P442. [b] **"At expiration of"** in provision requiring payment of delay rental at expiration of time for commencing well, means within reasonable time before last moment. 86Mont478, 284P525. [c] **That time expires at midnight** does not extend time to following day. 86Mont 478, 284P525.

1074-4 248Mich230, 226NW857.

1074-8½-New. Lessor is under no obligation to advise lessee as to when payment is required to be made where lease fixes time. 86Mont478, 284P525.

1075-23 TexCivA 289SW98.

1075-23½-New. or by assumption that land involved is probably unproductive; TexCivA 289SW98.

1075-27 37F(2d)868; 247Mich674, 226 NW653 (late start or miscalculation of difficulties or time); 248Mich247, 226 NW860 (execution of second lease unknown to first lessee and not recorded till termination of his term).

1075-31 TexCivA 290SW302.

1075-33 29F(2d)733; TexCivA 282SW 831; TexCivA 31SW(2d)160.

1076-40½-New. Equitable owner of oil lease, who did not drill or get extension of stipulated time, is held to have no cause of action against lessor. TexCivA 289SW141.

1076-47 76Mont254, 246P168; 78Mont 134, 252P800; TexCivA 5SW(2d)1019.

1076-48 TexCivA 289SW158.

1076-51 137 Okl 116, 278P294.

1076-53 294Pa212, 144A93.

1076-56 TexCivA 297SW1045; TexCivA 17SW(2d)839(1stcase).

1077-60 82CalA594, 256P232; 76Mont 254, 246P168; 76Mont332, 247P166; 86 Mont478, 284P525. But see 227Ky132, 12SW(2d)310.

1077-62 76Mont254, 246P168; 76Mont 332, 247P166; TexCivA 289SW158.

1077-63 76Mont254, 246P168.

1077-65 TexCivA 290SW302; TexCivA 5SW(2d)1019.

1077-66½-New. In Kentucky, under statute a lease must provide for drilling or payment of a fixed rental by a fixed date, and failure to pay rental by such date must appear before there can be forfeiture. 27F(2d)433.

1077-66½-New. No canon of construction can overcome unambiguous provision that forfeiture will follow failure to pay in advance at expiration of time for commencing well. 86Mont478, 284P525.

1078-77½-New. Where lessee sublets retaining reversionary interest in lease requiring payment of rental to prevent termination of lease for not drilling, sublessor may enforce right of forfeiture against sublessee or his assignee. 76Mont332, 247P166.

1078-79 22F(2d)733; 31F(2d)822; 82 CalA594, 256P232; 86CalA382, 260P 898; 164La1090, 115S280; 169La17, 124S131; 78Mont134, 252P800; 132 Okl 81, 269P306; TexCommnA 27SW (2d)122(2dcase); TexCivA 282SW909; TexCivA 289SW1052; TexCivA 5SW (2d)240; TexCivA 26SW(2d)299; 101 WVa721, 133SE626. [a] (4) Where there was no development for eight months and only mere showing of presence of oil and gas. TexCivA 282SW 909. (5) Where lessee breached promise to begin drilling within sixty days and to complete within reasonable time. 31F(2d)822. (6) Where lessee did nothing after termination of pooling agreement for drilling operations. TexCivA 14SW(2d)911. (7) Other instances. 247Mich674, 226NW653. [c] See also 76Mont254, 246P168.

1078-82 22F(2d)733; 37F(2d)868. But see 137Misc693, 244NYS300.

1078-83½-New. Abandonment of lease by failure to market gas from well is ground for forfeiture. 231Ky284, 21 SW(2d)445.

1079-84 165La370, 115S623; 80Mont 239, 260P119; TexCommnA 23SW(2d) 289; TexCivA 290SW302; TexCivA 14 SW(2d)364; TexCivA 17SW(2d)839 (1stcase); 102WVa345, 135SE238. [a] (5) Finding of chancellor, in partition suit, that lease was not forfeited, was proper where evidence preponderantly showed that lessee tendered rent. 179 Ark391, 16SW(2d)17.

1079-86 29F(2d)733.

1079-86½-New. , or because there is no profitable market for gas produced. 80Mont239, 260P119.

1079-87½-New. An oil and gas lease is not subject to forfeiture for the lessee's abandonment where the lessee was unable to sell the gas from a producing well because of lack of market. 29F(2d)733.

1079-88½-New. Oil lease held not subject to cancellation for breach by lessee of clause guaranteeing performance of lease by its assigns. TexCivA 289SW 173.

1079-88⅓-New. Where a lessor prematurely demands of his lessee that he release the lease of record as forfeited, he cannot complain that thereafter the lessee did not continue exploration. 80 Mont239, 260P119.

1079-92 25F(2d)824; 234Ky217, 27SW (2d)937 (delay for more than thirty years); 133 Okl 61, 271P155; 139 Okl 42, 280P1093; TexCommnA 284SW921; TexCivA 18SW(2d)195. [d] **Discretion of court.**-133 Okl 61, 271P155. [e] **Facts and circumstances of particular case** determine granting of relief. 133 Okl 61, 271P155. [f] **Where only part of premises were developed,** lease may be cancelled as to developed portion. Okl 293P211. [g] **Breach of implied covenant to continue development after drilling producing well during primary period** is not ground for forfeiture unless abandonment is shown. TexCivA 31SW(2d)160. [h] **Where lessee holds determinable fee** and drills producing wells during primary period, lease cannot be forfeited for breach of implied covenant to continue development. TexCivA 31SW(2d)160.

1079-93 Okl 293P211. [b] **Forfeiture not automatic.**-TexCivA 11SW(2d)621.

1079-96 6LaA325; 118Tex509, 19SW (2d)27 (implied covenant for further reasonable development after drilling paying wells); TexCivA 276SW936; 106WVa339, 146SE385.

1080-2 TexCivA 276SW936.

1080-4 137Misc693, 244NYS300; 137 Okl 116, 278P294.

1080-8 22F(2d)733; 86Mont478, 284P 525 (rule applies at law and in equity).

1080-12½-New. Provision for forfeiture for nonpayment of rent does not inure to lessee's benefit. TexCivA 1SW (2d)649.

1080-12½-New. An "unless" oil and gas lease automatically expires on the lessee's becoming in default in payment of delay rental. 85Mont106, 277 P612.

1080-12¼-New. The lessor holding a check for delay rental until after the date the rental was due and not notifying the lessee of dishonoring of the check cannot put the lessee in default. 85Mont106, 277P612.

1080-12⅕-New. Where an oil and gas lease provides for delaying drilling by paying rental for each additional year after the first year, rent is due at the end of each year beginning with the second year, and the lease is voided by nonpayment, under statute providing therefor. 228Ky349, 14SW(2d)1098.

1081-15 294Pa212, 144A93.

1081-19 179Ark128, 14SW(2d)243.

1081-21 168Ark213, 269SW585.

1081-25 TexCivA 290SW302. See also 118Tex509, 19SW(2d)27. [b] **Neglect to drill well on one of two tracts** leased for several years, after oil was produced on other tract by sublessee and admission he had no intention of doing

so, authorized forfeiture. 168La799, 123S330.

1081–29 TexCivA 289SW158. [a] **Effect of good faith.**–TexCivA 289SW158.

1081–29½–New. After a lessee receives notice that the lessor's assignee, who was the pumper of a well, would cease to pump the well at the expiration of a certain term, he cannot assume that the pumper will continue pumping thereafter. 227Ky132, 12SW(2d)310.

1081–30 TexCivA 4SW(2d)992.

1081–31 133 Okl 61, 271P155; 143 Okl 206, 288P964; TexCivA 276SW331; TexCivA 4SW(2d)992.

1082–35½–New. Where only ground of forfeiture provided is failure seasonably to commence first well, breach of any implied covenant to do more drilling after producing well was seasonably commenced and brought in is not ground for forfeiture. TexCivA 282SW 831.

1082–35½–New. Title of the grantee to one-half of gas by virtue of a lease providing for joint ownership of gas, petroleum, or minerals discovered by the grantee, and providing for continuation of the lease so long as the product could be produced in paying quantities, is not terminated by reason of abandonment of all operations after discovery of gas in paying quantities. TexCivA 14SW(2d)348.

1082–37 218Ky310, 291SW386.

1082–38 TexCivA 18SW(2d)256.

1082–42½–New. Petition to forfeit held not to state a cause of action. 165La 370, 115S623.

1082–42½–New. Under the provisions of a lease it may be terminated ipso facto on failure to commence the drilling of a well on or before a certain date. 118Tex509, 19SW(2d)27.

1082–44 144 Okl 225, 291P100.

1082–49 But see TexCivA 18SW(2d) 256.

1082–56 11PaDist&Co 94.

1082–57 173Ark210, 293SW25; 227Ky 132, 12SW(2d)310; 137Misc693, 244 NYS300; 118 Okl 152, 247P362 (notice held insufficient); TexCivA 11SW(2d) 621. [i] **Failure to join one of purchasers of lot from lessor in notice of forfeiture** does not invalidate notice where such purchaser refused to join for purpose of hindering lessor. 90CalA 126, 265P566. [j] **Where lease authorized lessee to enter into leases with owners of other lots and lessor agreed to share royalties,** parties to subsequent leases need not join with lessor in notice of breach of original lease. 90 CalA122, 265P564.

1083–58 [a] **Notice held sufficient.**–40 OklACR479 [reh pending] (notice by attorneys for lessor in letter to attorneys for lessee).

1083–60 TexCivA 11SW(2d)621.

1084–64½–New. If notice of forfeiture by lessor is necessary under terms of lease, an oral notice is sufficient, 76Mont 254, 246P168.

1084–64½–New. and a demand by lessor to return lease, made immediately upon default, is sufficient. 76Mont254, 246P168.

1084–64¼–New. A lessee's failure to perform the obligations of the lease constitutes a continuing breach and each failure will support an additional notice. 90CalA126, 265P566.

1084–64½–New. The lessee may waive defects in, or failure of, demand or notice of forfeiture. 207Cal 648, 279P771.

1084–64½–New. Strict compliance with the statute permitting an action for unlawful detainer is not required as to the sufficiency of a notice to terminate a lease. 207Cal 648, 279P771.

1084–64½–New. Where the lessee did not make an advance payment to secure an extension of time to commence operations, his right became terminated when the lessor notified him that payment would not be accepted because not made in time. 248Mich230, 226NW857.

1084–66 22F(2d)733; 144 Okl 225, 291 P100; TexCivA 283SW288.

1084–68½–New. Where neither the law nor the lease requires written notice of intention to declare forfeiture, none need be given in order to entitle lessor to recover in statutory action for damages for failure to clear record of forfeiture lease. 76Mont254, 246P168.

1084–68½–New. Lessor need not give notice of intention to forfeit lease terminated by discontinuance of drilling. TexCivA 289SW158.

1084–71 80Mont239, 260P119.

1084–72 173Ark210, 293SW25. [b] See also Kan 291P774.

1084–73 6F(2d)866; 173Ark210, 293 SW25.

1085–75 168Ark682, 272SW367. [d] **Where rentals deposited to lessor's credit** in designated depositary after date when due are withdrawn and used by lessor without knowledge of deposit having been made, lessor cannot declare forfeiture without promptly tendering return upon learning facts. 130 Okl 245, 266P768 (delay of five months held to constitute waiver).

1085–75½–New. So also the lessor may waive forfeiture for failure of lessee to pay stipulated rentals at the place designated in the lease by accepting such rentals in a different place. 168Ark682, 272SW367.

1085–77 TexCivA 289SW1052.

1085–79½–New. Failure of lessor to object to drilling second and third test well on another's land is held not waiver. 78Mont134, 252P800.

1085–79½–New. Where the lessee under a so-called "unless lease" fails to pay rentals when due but thereafter deposits the amount in the lessor's bank account and the lessor checks out the amount without knowledge of the deposit, the lease is not extended or kept in force. 130 Okl 245, 266P768.

1085–83 6F(2d)866; 232Ky274, 22SW (2d)1029; 161La139, 108S314; 76Mont 254, 246P168; TexCivA 289SW173; TexCivA 4SW(2d)992; TexCivA 18SW(2d) 938. [a] (3) Lessor, failing to complain of lessee's delay in drilling well within prescribed time, and permitting drilling to continue, is estopped to complain of breach to commence within prescribed time. TexCivA 289SW173. (4) Lessor held estopped to assert forfeiture of oil lease because well was not actually commenced before expiration of time stipulated where he had full knowledge of drilling operations and made no objection or protest, but acquiesced therein. 161La139, 108S314.

1086–84 76Mont254, 246P168. [a] (3) Where bank, instructed by lessor to refuse rental payments, held remittances from lessee in its own account for whoever might be entitled thereto, there was no estoppel affecting lessor's right to forfeit lease for breach in failing to drill well. 31F(2d)822.

1086–89 82Mont222, 266P406; TexCivA 6SW(2d)156.

1086–91 TexCivA 276SW331.

1086–94 TexCivA 298SW656.

1086–99 [a] **Statute is remedial.**–80 Mont239, 260P119. [b] **Construction of statute.**–80Mont239, 260P119. [c] **In Montana.**–86Mont478, 284P525.

1086–1 [a] **"Forfeiture,"** as used in statute, means deprivation or destruction of right in consequence of nonperformance of some obligation or condition. 80Mont239, 260P119. [b] **Where lease has terminated by its terms within sixty days after forfeiture,** lessor is entitled to remedy under statute. 80Mont 239, 260P119.

1086–2 [b] **Time for demand.**–80Mont 239, 260P119. [c] **Where owner conveys premises after making demand** demand by grantee is not necessary to entitle him to sue to cancel record where owner joins. 86Mont478, 284P525.

1086–3 122Kan287, 251P1110; 76Mont 254, 246P168; 80Mont239, 260P119. [a] (2) If lease provides for forfeiture under certain conditions, assignee must at his peril ascertain whether or not there has been forfeiture. 76Mont254, 246P168. [b] **In Montana.**–86Mont478, 284P525.

1087–4 76Mont254, 246P168. [a] 76 Mont254, 246P168 (allegations of special damages, held sufficient); 80Mont239, 260P119. [b] (2) 76Mont254, 246P168. (3) Testimony of dealer in oil and gas leases as to market value of leases at time defendant should have released of record and year thereafter may be admissible though meager. 76Mont254, 246P168. (4) Fact that on cross-examination of expert witness as to value of lease he admits no leases were taken in particular field during period covered by his testimony goes to weight and not to admissibility of his evidence. 76Mont 254, 246P168. (5) Evidence has been held to show that gas well produced, or was capable of producing, gas in marketable quantities. 80Mont239, 260P 119. (6) Proof that lessee forfeited lease is requisite to judgment canceling record. 86Mont478, 284P525. [f] **Failure of lessee to release record is not excused** by fact that after forfeiture declared and demand made for return of release lessee commenced drilling. 76 Mont254, 246P168. [g] **Action is tortious** in its nature. 76Mont254, 246P 168. [h] **Evidence held to sustain verdict** of jury for damages. 122Kan287, 251P1110. [i] **Time for suit.**–80Mont 239, 260P119. [j] **Parties.**–86Mont478, 284P525.

1087–6½–New. Some leases impose duty on lessee of releasing lease from record after forfeiture independently of statute. 86Mont478, 284P525.

1087–10 230Ky154, 18SW(2d)973 (right not lost by delay).

1087–14½–New. , or where in a suit to cancel a sublease relief sought was clearing of record or paper title of apparent cloud of instrument valid on face. 76 Mont332, 247P166.

1087–17½–New. A lessee under a lease forfeited for alleged delinquent delay rentals, seeking restoration of his rights, must allege willingness and ability to pay rental and offer to deposit it in court. 85Mont106, 277P612.

1087–20 TexCivA 276SW936. [c] (3) To support finding that negotiations with third party were not consummated within prescribed thirty-day period. TexCivA 284SW228. [d] **Evidence insufficient** to justify decree requiring drilling of certain number of wells. TexCivA 276SW936.

1088–29 [b] (3) Under oil and gas lease, giving possession for development purposes, injunction, restraining lessee from diverting fugitive waters and oils coming from other lands from lessee's pick-up station on leased land, is improper interference with lessee's prior rights (TexCivA 286SW652), (4) and such injunction should be refused notwithstanding lessor's contention that location of well in area covered by backwaters of pick-up was not made in good faith (TexCivA 286SW652). [d] (2) To show lessee breached contract relating to steaming oil. 318 Ill 374, 149NE 253. (3) To show relation of confidence and trust between parties in making contract. 318 Ill 374, 149NE253. [f] **Evidence held sufficient** to establish that lessee was not violating terms of lease. 237 IllA156.

1088–30 230Ky154, 18SW(2d)973 (against subsequent lessees). [e] **Evidence held sufficient.**–TexCivA 299SW 499.

1089–36 TexCivA 32SW(2d)212 (questions to be submitted). [b] **Defense of contract granting right to prospect, develop, and drill for oil and gas** has been held insufficient because not specifically enforceable. CalA 292P175.

1089–39 CalA 292P175; 78Mont134, 252P800; 38 OklACR615; 101WVa721, 133SE626.

1089–40 78Mont134, 252P800.

1089–41 [a] **Right exists independent of statute.**–86Mont478, 284P525.

1089–42 See also 207Cal 648, 279P771.

1089–48 TexCivA 11SW(2d)621.

1089–53 122Kan786, 253P563; 161La 139, 108S314; 38 OklACR615 (without regard to whether lease contains forfeiture clause).

1089–54 38 OklACR615.

1090–57½–New. Demand to cancel is essential. 162La941, 111S336.

1090–57⅓–New. A lessor must elect between rescission and affirmance of the due date of rental in lieu of drilling. TexCommnA 7SW(2d)872.

1090–61 [c] **Acceptance of rentals in lieu of drilling** is evidence of affirmance, but binds only as to election between inconsistent rights. TexCommnA 7SW (2d)872.

1090–67 176Ark1052, 4SW(2d)942; 122 Kan786, 253P563; 42 OklACR279 [reh pending]; TexCivA 12SW(2d)846; Tex CivA 13SW(2d)211. [g] **Implied covenants are also implied conditions** for violation of which equity may decree cancellation in whole or in part. 38 OklACR615. [h] **Where lease was for definite term and as much longer as mineral could be produced in paying quantities,** and lessee had drilled one producing well and one dry hole at expiration of definite term, court will therefore cancel lease except as to sufficient tract to operate producing well. 121Kan189, 246P500. [i] **Where lease is subject to contract for sale of all oil and gas produced** which lessor is entitled to cancel under provision therefor in case of inability of purchaser to take stipulated amount, lessor cannot cancel lease for nonuse due to inability of purchaser to take gas and oil without first cancelling contract. 124Kan320, 259P 686.

1091–71 180Ark802, 22SW(2d)1015; 11LaA216, 123S501; 38 OklACR615.

1091–73 [a] **Transfer of interest by lessor.**–227Ky801, 14SW(2d)155.

1091–76 TexCivA 290SW815.

1091–77 122Kan786, 253P563.

1091–78 170La887, 129S518; TexCivA 4SW(2d)153. [b] (3) Failure of certain owners of royalty interest to join in action does not prevent action by other owner. 128Kan556, 278P770. [d] **Parties acquiring interests pendente lite** held not necessary parties to action to cancel lease. TexCivA 31SW(2d)154.

1091–79 [b] (1) TexCivA 21SW(2d)58. [d] (1) 168La183, 121S737; 170La887, 129S518.

1092–82 90CalA126, 265P566; 133 Okl 61, 271P155. [a] (5) To make prima facie showing of written instrument outstanding and of record, apparently valid on its face but in fact invalid, which if not canceled will injuriously affect plaintiff. 76Mont332, 247P166.

1092–84 230Ky154, 18SW(2d)973. [a] (1) 118 Okl 242, 247P391; TexCivA 289 SW1052. (2) 133 Okl 61, 271P155; 118 Tex546, 19SW(2d)32. (5) See also 122 Kan786, 253P563. (6) To show lease not abandoned. TexCivA 276SW936. (7) To show lessor suffered no damage by time consumed in drilling well. Tex CivA 283SW887. (8) To show abandonment. TexCivA 289SW1052. (9) To support finding that lease for so long as oil or gas should be produced in paying quantities had expired. TexCivA 289 SW1052. (10) To sustain finding that no well was commenced in good faith prior to date specified. TexCivA 26SW (2d)299. (11) Other evidence held sufficient to sustain findings. Kan 291P 774. [b] (1) 38 OklACR615.

1093–86 [a] (5) 180Ark802, 22SW(2d) 1015. (6) Whether oil well was drilled to depth reasonably necessary to determine existence of oil within reasonable time. TexCivA 283SW887. (7) Whether particular work constituted "commencement of well." TexCivA 26SW (2d)299. (8) Whether there has been reasonable development since bringing in of discovery well. TexCivA 31SW (2d)154.

1093–90 8F(2d)261; 121Kan189, 246P 500; 38 OklACR615. [b] **Effect of cancellation in part.**–120 Okl 13, 250P117.

1093–92½–New. Equity may decree cancellation of a lease as to part of the property found abandoned. TexCivA 18 SW(2d)681.

1094–95 [a] **Evidence insufficient to justify award.**–TexCivA 31SW(2d)154.

1094–98½–New. In accounting for oil taken after expiration of lessee's rights, lessee is not entitled to set off the cost of a well against gas taken therefrom in the absence of special circumstances. 18F(2d)471.

1094–8 231Ky284, 21SW(2d)445 (failure to market gas); Tex 30SW(2d)298; TexCivA 294SW243. [d] (2) Averments as to abandonment of well held not to show final abandonment of lease so as to start running of limitations. TexCivA 291SW692. [e] (2) Failure to show possibility of profitable oil production or defendant's negligence warrants withdrawal of case from jury. TexCivA 8SW(2d)723. [f] (2) Testimony before jury, without objection, in action for failure to drill offset wells, that oil well was drilled either during last days of November or first of December, and that witness worked on oil tract for two months while certain well was being drilled, is probative of what is reasonable time for drilling a well. TexCommnA 10SW(2d)537. [g] **Answer held sufficient to show oral extension of time for execution of release.**–TexCivA 278SW873. [h] **Under prayer for general relief and for damages,** court, in suit against purchaser of oil rights who failed to drill, should hear testimony and grant appropriate relief. TexCivA 294SW259. [i] **Questions of fact.**–TexCivA 294SW917. [j] **Questions for jury.**–Kan 288P541; TexCivA 291SW692. [k] **Weight and sufficiency of evidence.**–TexCommnA 10SW(2d)537; TexCivA 291SW692. [l] **Difficulty in determining damages from failure to market gas from paying well** does not prevent suit by lessor for such damages. 231Ky284, 21SW(2d)445. [m] **That grant of oil and gas was absolute** does not bar recovery by lessor of damages from failure to market gas from paying well. 231Ky284, 21SW(2d)445. [n] **Complaint may be amended** where there was difficulty of measuring damages for noncompletion of oil well, causing property to be drained by surrounding wells. CalA 292P168.

1094–10½–New. Royalty owner cannot recover against lessee for failure to drill offset well without proof that adjacent well was paying investment within lease. TexCommnA 29SW(2d)1019.

1095–12 117Tex439, 6SW(2d)1039, 60ALR890.

1095–13 117Tex418, 6SW(2d)1031, 1037, [quotCJ], 60ALR936; 118Tex 509, 19SW(2d)27; 118Tex546, 19SW (2d)32; TexCivA 276SW936; TexCivA 18SW(2d)681; TexCivA 21SW(2d)58. [c] (2) Petition for damages held sufficient. 117Tex439, 6SW(2d)1039, 60 ALR890. (3) Pleading oral contract to develop does not preclude reliance on implied obligation under written law. TexCivA 7SW(2d)878. (4) Petition held to state cause of action for failure to market gas. 231Ky284, 21SW(2d) 445. [d] (4) Burden is on lessor to show damages from failure to market gas from producing well. 231Ky284, 21 SW(2d)445. [g] **Question for jury.**–TexCommnA 7SW(2d)872. [h] **Limitation of four years applies since such obligation is part of written lease.** Tex CivA 7SW(2d)878.

1095–18 22F(2d)360, 362 [citCJ].

1095–22½–New. Expenses of sinking well under terms of lease is no defense to action for rental. TexCivA 278SW 873.

1095–24 117Tex439, 6SW(2d)1039, 60 ALR890. [a] (5) On termination of lease for failure to produce gas in paying quantities, lessor may recover damages from failure of lessee to clear record of forfeited lease. 122Kan287, 251 P1110. (6) Measure of damages for failure fully to develop land under gas lease is what would have been recovered if fully developed. 219Ky640, 294 SW176. (7) Purchaser of oil breaking agreement to pay royalties in oil by failing to drill held liable for money vendors would have received in oil. TexCivA 294SW259. (8) Where lease provides for payment of five thousand dollars from first oil and gas produced, lessee's failure to develop diligently entitles lessor to recover damages in that amount. TexCivA 18SW(2d)681. (9) Lessor, under royalty lease with requirement for drilling three wells each year, held not, as matter of law, precluded from claiming as damages for defendant's breach, reasonable cost of drilling required wells. TexCivA 18 SW(2d)256. [d] **For failure to market gas** measure of damages is value of royalty lessor would have received had production been marketed. 231Ky284, 21SW(2d)445.

1096–25 [a] **Evidence held sufficient to sustain award for failure to market gas.** 231Ky284, 21SW(2d)445.

1096–26 [a] **Purchasers of interest in land** subject to oil leases under contract authorizing partial payment on oil, held liable for purchase of mine, though production of oil has ceased. 116Tex 356, 291SW860. [b] **Purchaser of interest in land** subject to oil lease, with partial payment of oil, held liable for balance of purchase price whether oil was produced or not. 116Tex356, 291 SW860.

1096–28 [a] (2) In action for lessee's failure to drill second well, after first well had proved to be dry, lessor's petition, not alleging existence of oil, stated cause of action for only nominal damages. 228Ky326, 14SW(2d)1089. [c] **In absence of evidence that oil or gas would have been discovered in paying quantities,** lessor cannot recover for lessee's failure to drill well. Tex CommnA 14SW(2d)265.

1096–33½–New. , or for damages caused by failure of lessee to release the lease of record after forfeiture and demand. 76Mont254, 246P168. [a] **Measure of damages** recoverable is difference between fair market value of such lease at time when record should have been clear and its market value at time of trial. 76Mont254, 246P168.

1096–36½–New. In suit for wrongful forfeiture parties entitled to substantial interest in subject of action must be joined as plaintiffs. TexCommnA 29 SW(2d)975.

1096–39 TexCivA 1SW(2d)649.

1097–50½–New. Where a lease contains a surrender clause, it may be surrendered by the lessee or his assignee by compliance therewith, 43 OklACR91 [reh pending].

1097–50¼–New. but not otherwise. 43 OklACR91 [reh pending].

1097–50¼–New. Lessor obtaining cancellation of lease for failure to market gas is precluded from claiming damages because of gas drained thereafter. 231 Ky284, 21SW(2d)445.

1097–50½–New. Some leases require lessor on surrender to execute release acquitting lessee of further responsibility. 231Ky284, 21SW(2d)445.

1097–51 43 OklACR91 [reh pending].

1097–52 43 OklACR91 [reh pending].

1097–53 26F(2d)631.

1098–67½–New. Under the law making casing in an oil well personal property and a lease for an oil well real estate, personal property placed on a lease after it was subleased did not go with the lease on reassignment. 26F(2d)631.

1098–67½–New. Surrender of nonproductive area under pooling agreement does not terminate the entire lease. 91 CalA705, 267P548.

1098–71 TexCivA 289SW103.

1098–72 See also 27F(2d)433.

1098–74 174Ark757, 296SW735; Tex CivA 276SW936.

1098–75 15F(2d)565; TexCivA 276SW 936; 102WVa345, 135SE238. But see 38 OklACR615 [crit 81 Okl 45, 196P 688].

1098–76 43 OklACR173 [reh pending]; 101WVa721, 133SE626. [d] **Burden of proving intention to abandon is on lessor.**–TexCivA 278SW457.

1098–77 15F(2d)565; 82CalA594, 256P 232; 127Kan551, 274P277; 139 Okl 42, 280P1093; 38 OklACR615. [b] 82CalA 594, 256P232.

1098–78 227Ky132, 12SW(2d)310.

1099–80 72CalA314, 237P58; IndA 166 NE881(2dcase); TexCivA 4SW(2d)992.

1099–81 [a] (2) Abandonment of lease cannot be predicated on lessee's failure to comply with obligations during period that lessors were by suit maintaining position that rights had been forfeited. 29F(2d)733.

1099–82 82CalA594, 256P232.

1099–83 101WVa721, 133SE626.

1099–85½–New. Title cannot be divested by declaration of abandonment, hence lessee's fixing of boundaries in a manner to exclude land covered by lease does not constitute abandonment thereof. TexCivA 2SW(2d)288.

1099–86 174Ark757, 296SW735; 43 OklACR173 [reh pending]; TexCivA 278SW457; TexCivA 286SW936.

1099-87 27F(2d)433.
1100-92 38OkiACR615; 118Tex509, 19SW(2d)27.
1100-93 82CalA594, 256P232.
1100-98 But see 174Ark757, 296SW 735.
1101-12 **TexCommnA** 16SW(2d)527. See also **IndA** 166NE881(2dcase).
1101-15 84Mont178, 274P834.
1101-18 84Mont178, 274P834. [b] **Moving party must show that his rights would be injured by removal.**–84Mont 178, 274P834. [c] **Test for determining whether well is "commercial producer"** so as to entitle person having interest in lease to enjoin removal of casing is whether it will pay profit to lessee over operating expenses. 84Mont178, 274P 834 (evidence held to sustain finding that wells were producing oil in paying quantities). [d] **Court is not bound by lessee's opinion that well is not commercial producer** as affects his right to remove casing. 84Mont178, 274P834.
1102-24 178Ark209, 10SW(2d)2; **CalA** 285P351; 123Kan310, 255P52; 132 **Oki** 236, 270P1; **TexCivA** 48SW(2d)577; **Tex CivA** 58W(2d)529. [b] (2) Rents and royalties under oil and gas leases, being profits issuing from land, are part of lessor's estate till accrued. 86**Colo** 59, 278P804. [c] **Whether bonus is for conveyance of title to oil or for rent** must be determined from entire transaction viewed in light of surrounding circumstances and nature of business. **TexCivA** 283SW288. [f] **"Royalty" defined.**–123Kan310, 255P52. [g] **Lessee has right to sell gas** under royalty provision. **TexCivA** 8SW(2d)206. [h] **Lessee held owner of gas as against royalty owner.**–**TexCommnA** 29SW(2d) 1019. [i] **"Royalty"** under oil and gas lease consists of share in oil and gas produced. 43F(2d)494 (held not to include perpetual interest therein). [j] **Telegrams held to constitute sale of gas royalty.** **TexCivA** 32SW(2d)212.
1102-25 232Ky298, 22SW(2d)912.
1102-29½-New. Where lessor by contract permits lessee to withhold payments of oil royalties because of adverse claim of ownership, he is entitled to recover such part thereof finally adjudged barred by prescription but not the part involved in pending appeal. 159**La**509, 105S602.
1102-29⅓-New. In such case, also, lessor is entitled to collect price of property retained by lessee when there is no reason to fear necessity of payment to someone else. 159**La**509, 105S602.
1102-29¼-New. Lessee of oil and gas lease, representing facts to lessor in procuring contract as to steaming oil, has been held not to have occupied fiduciary relation to lessor so as to be liable to account for royalties. 318 **Ill** 374, 149NE253.
1102-29½-New. "Casing-head gas" from which casing-head gasoline is produced held not synonymous with gasoline. **TexCivA** 289SW152.
1102-29⅔-New. Where no royalty was provided for casing-head gas, except when used or sold off premises, it applied when such gas was used for fuel only. **TexCivA** 289SW152.
1102-29½-New. Royalty for casing-head gas when used off premises held not to relieve defendant from obligation to pay for gasoline extracted from casing-head gas. **TexCivA** 289SW152.
1102-29¼-New. Royalty interest of lessor under oil lease is "estate in land." **TexCivA** 28W(2d)288.
1102-29½-New. Grantees take no interest or royalties from tract retained by grantor and not mentioned in deed. 233Ky476, 26SW(2d)26.
1102-35 24F(2d)692; 203**Cal** 583, 265 P218; 218AppDiv502, 219NYS14; **Tex CommnA** 288SW431; **TexCommnA** 11 SW(2d)778. [c] **Patent ambiguity** in contract permits evidence of construction placed on contract by parties. **Tex CivA** 8SW(2d)206.
1103-36 81Mont604, 264P388. [b] **Expense of operating,** when used in lease providing for payment from first oil and gas produced after deducting "expense of operating," means expense after production in paying quantity and not cost of equipping and maintaining. **Tex CivA** 18SW(2d)681.
1103-37 205**Cal** 221, 270P668; **TexCivA** 38W(2d)462.
1103-38 **TexCommnA** 11SW(2d)778.
1103-47½-New. Open flow test is not a sufficient basis for determining mathematically actual production of oil well under routine operating conditions. **Tex CivA** 288SW264.
1103-49 **TexCommnA** 11SW(2d)158; **TexCommnA** 11SW(2d)778; **TexCivA** 288SW264. [a] (2) Lease construed as not entitling lessee to recover value of one eighth of gasoline manufactured from casinghead gas. **TexCivA** 28SW (2d)914. [b] **Casinghead gasoline.**–**Tex CivA** 19SW(2d)178.
1103-51 [a] **Where a lease contains specific provision for royalties on oil products** from oil wells, and provides that the lessor is to have sufficient gas for domestic purposes, free of charge, and the remainder with all of the gas from oil wells shall go to the lessee, the lessor has no rights in casinghead gas coming from oil wells. 119 **Oki** 256, 250P90.
1103-51½-New. Under a lease granting the lessee the right to use free of cost the gas, oil, and water produced on the land for its operation, and providing for royalties on casing gasoline, the lessors are not entitled to payment for casinghead gas used by the lessees in drilling operation, where a sufficient amount was not produced to justify saving or an attempt to utilize it in the manufacture of gasoline. 226Ky612, 11 SW(2d)428.
1103-51⅓-New. Under a lease providing for specific payments for oil, gas, and casinghead gas, the lessor cannot recover one eighth of the gasoline produced from casing head gas under the theory that it is neither gas nor oil, but is a mineral within a provision of the lease requiring the lessee to pay one-eighth royalty for all other minerals. **TexCommnA** 11SW(2d)158.
1104-56 [c] Lessees under lease requiring payment of advance monthly royalties were, on notice of termination, liable to lessor for all unpaid advance royalties. 98**CalA**482, 277P152.
1104-65½-New. Lessor who, on renewal of five-year lease under which delay rentals were payable quarterly, accepts former amount as renewal rental for four years cannot then take advantage of higher amount in renewal lease inserted by him prior to its delivery and without lessee's knowledge. 104**WVa** 517, 140SE529.
1104-67 [a] **Payment need not be made from proceeds of product of well** under oil lease, providing for payment of rental for product of each well, but not intimating that rentals must be paid from product of lease. **TexCivA** 12SW(2d) 847.
1104-70½-New. The operator of an oil lease is authorized under statutes to withhold proceeds of royalty sufficient to pay taxes due from the royalty owner before actual payment of the tax. 85 **Mont**329, 278P514.
1104-70⅓-New. The owner of a royalty interest under an oil lease is not subject to an oil producer's license tax provided by statute, and the amount thereof may not be withheld by the operator under statute. 85**Mont**329, 278 P514.
1104-71 81Mont604, 264P388; **Tex CivA** 38W(2d)462.
1105-84 227Ky801, 14SW(2d)155. [a] **After death of lessor** rent may be deposited in designated depository to credit of lease and payable to those showing title. 118 **Oki** 152, 247P362 (effect of subsequent order relinquishing supervision of departmental oil and gas lease).
1106-91½-New. Subsequent owners of leasehold assume obligation to pay additional rentals to owners till certain number of wells are drilled. 232Ky298, 22SW(2d)912.
1106-4 170**La**898, 129S522; **Tex CommnA** 12SW(2d)193; **TexCivA** 21 SW(2d)707 (failure of lessor's title held to deprive purchasers of part of royalty interest of right to recover).
1107-11 [a] **Advance payments.**–98**CalA** 482, 277P152.
1107-12½-New. Surrender of unproductive area under pooling agreement does not defeat right to royalties. 91 **CalA**705, 267P548.
1107-16 167**La**801, 120S373.
1107-17 [c] **Parties in action by lessor for purchase price.**–178**Ark**885, 13SW (2d)22.
1107-18 [d] **Complaint held to show patent ambiguity** in contract and to set up practical construction consistent with plaintiff's theory of meaning. **TexCivA** 8SW(2d)206. [e] **Pleading.**–**TexCommnA** 20SW(2d)758(2dcase).
1107-19½-New. the admissibility of evidence, **MoA** 14SW(2d)669.
1107-19⅓-New. burden of proof, **Tex CommnA** 29SW(2d)1019.
1108-20 177Ark1194, 9SW(2d)13; 178 Ark209, 10SW(2d)2; 205**Cal** 733, 272P 740; 11**LaA**450, 123S474; **LaA** 126S 235; **TexCommnA** 12SW(2d)193.
1108-25½-New. In suit to recover ground rentals after lessee's attempted cancellation, admitting portions of decree from subsequent purchaser showing he was not entitled to ground rentals is not error. **TexCivA** 1SW(2d)649.
1108-25⅓-New. Attorney's testimony that plaintiff consulted him relevant to a claim for ground rentals under a mining lease a year before filing suit is admissible. **TexCivA** 1SW(2d)649.
1108-25¼-New. Evidence in an action for ground rents held not to show, as matter of law, that lessor accepted an attempted cancellation of a mineral lease. **TexCivA** 1SW(2d)649.
1108-25⅕-New. Lessors are not entitled to recover from the lessee's assignee damages by reason of foreclosure of mortgages, and otherwise, resulting from his refusal to pay agreed rent or to release the oil and gas lease. 29F(2d) 78.
1108-26 [b] **Petition to recover delay rentals held insufficient.**–235Ky767, 32 SW(2d)325.
1108-28½-New. In an action by the lessee and assignees to recover duplicate rental paid by mistake, it has been held that assignees could have payment adjudged to inure to benefit of lessee in order to adjust equities. 172 **Ark**1176, 290SW44.
1108-28⅓-New. In such action direction of verdict for defendant was held error where receipt for rental and evidence tended to support claims of plaintiffs. 172**Ark**1176, 290SW44.
1108-28¼-New. Provision in oil lease held not to authorize recovery of rentals for deficiency in acreage. 235**Ky**767, 32 SW(2d)325.
1108-32 168**Ark**213, 269SW585; **Tex CivA** 12SW(2d)847.
1108-33 168**Ark**213, 269SW585.
1108-33½-New. A stipulation for assignment to a particular assignee without provision against reassignment leaves the lessor without protection against subsequent assignments notwithstanding a general covenant against assignment. 90**CalA**136, 265P501.
1108-33⅓-New. **Right of way for pipe lines granted** as incident to an oil and gas lease pertains solely to the development of land leased and is not assignable separately from the lease. 223**Ky** 315, 3SW(2d)654.
1108-33¼-New. In a suit to recover interest in a lease, the law of the state wherein the parties reside and where the contract was made governs. 166**La** 704, 117S781.
1108-34 [b] **Instruments constituting subleases.**–84**Mont**178, 274P834.
1108-35 76**Mont**332, 247P166.
1109-39 **TexCivA** 15SW(2d)1056. [b] (3) Instrument held to be sublease and not assignment. 76**Mont**332, 247P166. (4) Assignment of royalty conveying interest in oil and gas and providing that on termination or cancellation of existing lease certain interests should be owned jointly by parties to assignment conveys no further interest than stated interest in gas and oil because of absence of operative words of conveyance. 82**Mont**222, 266P406. (5) Other instances. 168**La**799, 123S330. [c] (2)

Facts showing that assignor intended to and did pass title in praesenti and relinquished control of instrument. 33 NM55, 263P758. (3) Evidence held to show lack of mutual assent. **TexCivA** 15SW(2d)1056. [e] **Instrument held sublease and not assignment.**–85Mont 106, 277P612.

1109–40 [c] **Sufficiency of consideration.–TexCivA** 281SW587. [d] **Evidence held sufficient** to show failure of recited consideration. **TexCivA** 281SW587. [e] **Petition in action for cancellation of assignment for failure of consideration** is demurrable in so far as it sets up executory and contractual consideration not expressed in assignment without allegation that such consideration was omitted from instrument through fraud, accident, or mistake. **TexCivA** 281SW 587. [f] **Failure of consideration.**–11 LaA439, 123S456.

1109–42 229Ky574, 17SW(2d)717; 138 Okl 67, 280P427(2dcase) (acceptance held insufficient); **TexCivA** 8SW(2d) 217.

1109–44 [b] **Filing with department of interior not necessary.–Alta** [1930] 3 DomLR776.

1109–46½–New. A contract for the purchase of an oil lease is not void as having been executed under mutual mistake of fact because a sale of the property by a receiver to one of the parties was set aside by order of court, where the parties proceeded under the contract thereafter in purchasing at a receiver's sale. 172Ark851, 291SW77.

1109–46¾–New. The sale of interest in a lease by one who does not own any interest is null and void. 11LaA439, 123S456.

1109–49 [a] (1) 133MiscZ29, 231NYS 544. (5) Check, given for assignment of gas lease which stated that lease had been executed by guardian for infants, was not procured by fraud for misrepresenting lease as "regular" lease from owner of land. 229Ky574, 17SW(2d) 717. [e] **Misrepresentations.**–216AppDiv 665, 215NYS657. [f] **Evidence.**–229Ky 574, 17SW(2d)717.

1110–50 216AppDiv665, 215NYS657; 133Misc229, 231NYS544; **TexCivA** 29SW (2d)877. [f] **Defenses.–TexCivA** 29SW (2d)877. [g] **Evidence held sufficient** to show material shortage in acreage. **Tex CivA** 29SW(2d)877.

1111–59 179Ark138, 15SW(2d)979; 133 Misc229, 231NYS544.

1111–63 42F(2d)942. [a] **Extensions or renewals.**–179Ark138, 15SW(2d)979. [b] **Reference to property as royalty interest** may be disregarded where granting clause expressly describes it as percentage of oil and gas produced. **CalA** 288P721. [c] **Assignment conflicting with contract.**–43F(2d)51.

1111–66½–New. Right running with land during term is created in vendee by contract with lessee to lay pipe lines and build compressor stations. 25F(2d) 742.

1111–66¾–New. Easement. Contract by lessee for sale of gas, with agreement as to laying of pipes and building stations, creates easement for term of lease and is binding on assignee of leasehold. 25F (2d)742.

1111–66¼–New. A contract, assigning an oil lease, expressly binding the grantee to reassign to the grantors, their heirs or assigns, and made to the grantee, his heirs and assigns, creates privity of contract between a remote assignee of the grantee and the assignor of the grantor. **TexCivA** 12SW(2d)847.

1112–72½–New. Original lessee's performance of oil lease inures to benefits of partial assignees who are not required to perform until assignor defaults. **TexCivA** 289SW173.

1112–72⅓–New. Assignee of lease held not bound by clause whereby the lessee guaranteed performance by his assignees. **TexCivA** 289SW173.

1112–72¼–New. An assignee of an oil lease is not entitled to damages against the lessor because of actions to quiet title brought by the lessor against the assignee's predecessors in title in good faith, in the belief that the assignor had not complied with the terms of the lease and that the assignee had no legal right because the assignment was without the lessor's consent. 75CalA157, 241P910.

1112–72⅙–New. The refusal of the lessor to serve summons in such action on such assignee, although the latter offered to accept service and waive technical defenses, does not show such bad faith as to entitle him to damages. 75 CalA157, 241P910.

1112–72¼–New. Such refusal caused no injury to such assignee since he could have intervened in the action. 75CalA 157, 241P910.

1112–72⅐–New. An assignee's rights in leased premises cannot be divested by any subsequent leases. 179Ark138, 15 SW(2d)979.

1112–79 25 OhNPNS197.

1112–80 173Ark880, 293SW1005; 178 Ark885, 13SW(2d)22; **TexCivA** 300SW 116. [a] **Reasonable diligence** to develop property and protect it from drainage must be exercised by assignee. 26 F(2d)882. [b] **Under oil and gas lease calling for lessee's deposit in bank of** proceeds of sale of portion of oil till purchase price was paid, duty of making deposits rests on lessee and his assignee, and not on purchaser of oil. 178 Ark885, 13SW(2d)22.

1112–85 203Cal583, 265P218; 43 Okl ACR91 [reh pending]. [g] **Assignee is chargeable with rents** though he has not taken actual possession. 25 OhNPNS 197. [h] **Assignee is not liable as trespasser** for gross value of lessor's share of gasoline recovered without deduction of cost of recovery merely because he claimed right in gas under circumstances which challenged best thought of all courts as to rights. **TexCommnA** 14SW (2d)819(2dcase).

1113–87 173Ark880, 293SW1005. [b] **Questions for jury.**–Issue of breach of implied obligation to develop property and protect it from drainage. 26F(2d) 882.

1113–88 179Ark138, 15SW(2d)979. See also 82CalA594, 256P232.

1113–88½–New. Purchaser of driller's interest in oil lease, failing to drill, should be charged with cost of well, less amount he was to receive for drilling. 173Ark880, 293SW1005.

1113–88⅓–New. Assignee is under duty to use reasonable care to protect property from damage. 26F(2d)882.

1113–89 24F(2d)494.

1113–93 217Ky292, 289SW247.

1113–93½–New. Cost of standardization should not be charged against purchaser of driller's interest where parties to drilling contract waived requirement as to standardization. 173Ark880, 293SW 1005.

1113–95 178Ark885, 13SW(2d)22; **Tex CivA** 8SW(2d)206. [b] **Under option** by lessee to purchase lease, containing lessee's agreement diligently to carry on drilling, lessee must bear expense of completing well. 225Ky30, 7SW(2d) 509.

1113–98½–New. Oil lease granting either party privilege of assigning oil lease in whole or in part held to give lessee unrestricted privilege of assigning lease as he chose to divide it, and to whomsoever he chose. **TexCivA** 289 SW173.

1113–98⅓–New. A written contract expressly granting the right to assign a lease in whole or in part merged a prior oral promise as to assignment. **Tex CivA** 289SW173.

1113–98¼–New. An oil lease giving the lessee unrestricted privilege of an assignment held affirmed by the lessor, requiring the lessee to guarantee performance by its assigns. **TexCivA** 289 SW173.

1113–3 89CalA142, 264P335.

1113–4 But see **TexCivA** 27SW(2d)639. [c] **Evidence** held not to show misrepresentation as concealment of acreage. 175Ark1118, 1SW(2d)823.

1114–5 95CalA793, 273P628; 216App Div665, 215NYS657. [b] **Findings.**–95 CalA793, 273P628. [c] **Evidence.**–95 CalA793, 273P628.

1114–6 141 Okl 181, 284P290. See also 216AppDiv665, 215NYS657.

1114–6½–New. Where the assignor waived strict performance of payment of installment, his agreement to accept payment thereof, providing additional payment be made, was without consideration. 216Ky22, 287SW25.

1114–6⅓–New. Lessees may take new leases from the owners of land after they have assigned old ones. 179Ark 138, 15SW(2d)979.

1114–11½–New. Where an assignee's possession of leasehold property is not interfered with until mineral leases to the land have expired, he is not entitled to damages for wrongful withholding of the property. 179Ark138, 15SW (2d)979.

1114–12 See also 216AppDiv665, 215 NYS657.

1114–19 164La463, 114S98; **TexCivA** 27SW(2d)306.

1114–21 164La463, 114S98.

1114–23½–New. Assignee may refuse to accept title where a defect is not corrected in time. 164La463, 114S98.

1114–23⅓–New. But where the assignor, after judgment declaring persons other than the original grantors the owners of the land on which a lease was granted, immediately secured confirmation and ratification of the lease, and the assignee was at no time actually disturbed in the operation of the lease, the assignee could not thereafter rescind the sale. 166La799, 118S24.

1115–31 13F(2d)584; **TexCivA** 218W (2d)52 (liability of purchaser of interest in lease for supplies used in repairing casing).

1115–32 43 OklACR91 [reh pending].

1115–33 TexCivA 188W(2d)681. [b] **Requirement that assignee drill all necessary offset wells not exceeding eight** entitles assignor to as many as eight wells, irrespective of distances between them, if necessary to prevent substantial loss. 171Ark61, 283SW4. [c] **Assignee held not liable for failure to pay debts** of assignor where there is no showing that failure to pay was due to his fault. 228Ky176, 14SW(2d)421.

1115–34 81Mont604, 264P388. [b] **Assignor must plead and prove that assignee's lack of care** caused failure to produce oil enough to pay for assignment, under contract, before he can recover. **TexCivA** 278SW326. [c] **New lease obtained by assignee without surrender of premises to his assignor,** constitutes renewal of original lease within meaning of assignment and is charged with royalty interest of assignor. 143 Okl 11, 286P875 (relation of parties one of trust).

1115–36 24F(2d)26. [a] (2) Assignee of oil lease under assignment providing for partial payment from oil marketed from lease held obligated to drill for oil. **TexCivA** 289SW98. (3) And he may not postpone drilling under terms of original lease. **TexCivA** 289SW98. [b] **Excuse for failure.–TexCivA** 14SW (2d)364 (held sufficient excuse).

1115–37 24F(2d)26; 30F(2d)481; 171 Ark61, 283SW4; 138 Okl 8, 280P286 (for failure to drill well). [d] **Measure of damages.–TexCivA** 289SW98. [e] **Evidence.–TexCivA** 289SW98.

1116–38 138 Okl 8, 280P286.

1116–40 179Ark138, 15SW(2d)979. [b] **No forfeiture on substantial performance; damages.**–Equity will not forfeit and cancel assignment of oil lease for failure to drill wells, where lessees substantially developed property, but will remit lessor to claim for damages. 171 Ark61, 283SW4.

1116–41 [a] **Rescission does not lie at law or in equity** for failure of grantee to perform promise constituting whole or part of consideration. **TexCivA** 8SW (2d)217.

1116–43½–New. Declaration and foreclosure of lien for unpaid purchase price of assignment of leasehold will not be decreed for failure to drill offset wells, in absence of evidence of inability to collect same out of oil produced, or attempted fraud. 171Ark61, 283SW4.

1116–43⅓–New. An assignee is not answerable to his assignor for a subsequent assignment, where the latter's rights are in nowise affected. 32F(2d) 1003.

1116-43¼-New. Where the assignor and assignee join in the sale of oil from the premises severally in certain proportions for receipt of which the buyer is to pay each his proportionate share, the assignor cannot sue the assignee for his proportionate share of oil delivered to the buyer. 139 **Okl** 119, 281P591.

1116-47 173**Ark**533, 294**SW**25. [a] (2) Assignee of lessee's interests in oil lease acquires no interest superior to driller's interest under his contract with lessee in first oil produced or to that of driller's assignee where he took assignment with notice. **TexCivA** 15**SW(2d)**93.

1116-48 25**F(2d)**742; **TexCommnA** 18 **SW(2d)**602; **TexCivA** 3**SW(2d)**507; **Tex CivA** 15**SW(2d)**93. [a] (2) Purchaser of oil and gas in place is protected against purchaser of lease with notice. 41**F(2d)**4. (3) Lessee's contract for sale of gas at well mouth, with easement to vendee to enter and maintain equipment, gave vendee equitable rights, and assignee of lease with notice was bound thereby. 33**F(2d)**248. [c] **Burden is on assignee** of lessee's interest in lease to show that amount produced from well before assignment was insufficient to discharge full amount of seller's claim. **TexCivA** 15**SW(2d)**93.

1116-50½-New. A recorded contract to drill an oil well has been held sufficiently to fix the rights of the parties as to third persons. **TexCivA** 15**SW(2d)** 93.

1116-50¼-New. A bank to which an oil lease had been assigned to secure indebtedness of the assignor has been held not liable for purchases of supplies and equipment by the assignor on the theory of implied authority, especially where the evidence failed to show that the merchandise purchased after assignment consisted of material for developing the lease. 10**LaA**484, 119**S**709.

1116-50¼-New. An assignee claiming rights against a subsequent lessee who procured a release from his assignor has the burden of showing that such lessee had notice of the first lease or that there was no release of his rights. 127**Kan** 551, 274**P**277.

1116-52 76**Mont**332, 247**P**166.

1117-56 76**Mont**332, 247**P**166; **Alta** [1930] 1**DomLR**557 (head lease part of sublease by reference).

1117-57 [c] **Provision requiring verified monthly reports may be substantially complied with** by frequent letters giving absolute status of well and progress in detail of its development and results. 179**Ark**128, 14**SW(2d)**243.

1117-60½-New. Statutes providing that remedies of lessor against lessee may be enforced against lessee's assignee do not apply as between lessor and assignee of sublease. 76**Mont**332, 247**P** 166.

1117-61 [c] **Entire or severable contracts.**-95**CalA**793, 273**P**628.

1118-65 43 **OklACR**173 [reh pending]. [c] **Where time of performance not stated.**-140 **Okl** 248, 282**P**1101.

1118-67 [a] **Burden of proof** rests on plaintiff suing for breach of contract to convey interest in oil leases. **Tex CivA** 280**SW**320. [b] **Evidence as to damages.-TexCivA** 280**SW**320 (plaintiff held to have failed to sustain burden of proof as to measure of damages on any theory). [c] **Evidence held insufficient** to show that seller of interest in oil lease wrongfully prevented purchaser from performing his contract. **TexCivA** 280**SW**320.

1118-69 Alta [1929] 4**DomLR**107. [b] **Purpose of exercising right immaterial.-TexCivA** 280**SW**320. [c] **Permitting driller to file laborer's lien on leasehold** constitutes breach of contract to keep leasehold clear of such lien. **TexCivA** 280**SW**320.

1119-75½-New. One in possession of oil and gas leases in good faith under an agreement for conveyance to him is entitled to offset the cost of development against the gross profit arising from production where title fails and he is dispossessed. 136 **Okl** 269, 277**P** 589.

1119-80 164**La**463, 114**S**98. [c] **Where defect is not corrected in agreed time,** assignee is not required to accept title. 164**La**463, 114**S**98.

1119-84 See also **TexCivA** 282**SW**940.

1119-84½-New. An agreement to procure releases of outstanding leases within a reasonable time has been construed as requiring releases to be procured within the next few days. 175 **Ark**1020, 1**SW(2d)**79.

1119-84½-New. The buyer does not waive the requirement that such releases shall be procured within a reasonable time by allowing the seller an additional week to procure them where they are not furnished within such week. 175**Ark**1020, 1**SW(2d)**79.

1119-85 43 **OklACR**173 [reh pending]. [b] **Waiver.-Tex** 12**SW(2d)**589.

1120-90 86**Mont**463, 284**P**553. [a] (1) 86**Mont**463, 284**P**553. (2) Possibility of reverter is alienable. 38**F(2d)**37.

1120-91 43**F(2d)**27; 43**F(2d)**494; 105 **WVa**69, 141**SE**521. [c] **Contracts for sale of royalty interests construed.-Tex** 12**SW(2d)**595.

1120-92 [a] (2) Notice held not to be "written notice" as required by contract. 29**F(2d)**980. (3) That lessee tendered lessor's grantee certain amounts to secure extension of agreements does not constitute waiver of such provision. 29 **F(2d)**980.

1120-93 179**Ark**1001, 18**SW(2d)**1025 (contract not void for uncertainty). [a] (2) Evidence sufficient to show that grantor did not rely on representations. 120 **Okl** 274, 251**P**1042. [d] **Correspondence held not to constitute binding agreement.-TexCommnA** 29**SW(2d)**1015.

1120-94 81**Mont**604, 264**P**388; **TexCivA** 4**SW(2d)**124.

1120-98½-New. Instrument relating to payment of royalties held to convey no title. 43**F(2d)**27.

1120-99 86**Mont**463, 284**P**553. [b] **Particular assignments construed.-Mont** 290**P**244.

1121-2 172**Ark**405, 288**SW**929. [a] (1) 172**Ark**405, 288**SW**929. (3) It is only where prior lessee negligently injures grantee in operation of lease that he is liable. 172**Ark**405, 288**SW**929.

1121-4 TexCommnA 276**SW**669. [b] **Evidence held sufficient** to support findings that right to royalties passed to grantee. **TexCivA** 284**SW**246. [c] **Grantor's claim that right to royalties did not pass** because such right is personalty held untenable where deed expressly conveyed this right. **TexCivA** 284**SW**246.

1121-10 [d] **Interest.**-227**Ky**801, 14**SW (2d)**155.

1122-13 33**F(2d)**248 (duty of assignee to make inquiry). [b] 33**F(2d)**248 (evidence sufficient to support finding that assignee had notice).

1122-17 172**Ark**405, 288**SW**929. [b] **Liability for injuries** to subsequent purchaser exists only where prior lessee is negligent in operation of lease. 172**Ark** 405, 288**SW**929. [c] **Possession as notice.**-179**Ark**138, 15**SW(2d)**979.

1122-22 168**Ark**213, 269**SW**585.

1122-22½-New. The grantee of an easement to use a landowner's premises for the purpose of capturing waste oil flowing thereon will, in the absence of a conflicting easement, have title to all waste oil abandoned by the original owner and thereafter captured by such grantee on the demised premises. **TexCivA** 276**SW** 342.

1122-22½-New. Second lessor may be estopped by untimely assertion of rights. 220**Ky**271, 295**SW**172.

1122-22¼-New. A pipe line company purchasing oil from a lessee is charged with notice of the lessor's reserved title to a stated percentage of oil, notwithstanding a division order confined to only part of the land leased. 172**Ark** 804, 290**SW**929.

1122-22½-New. Such order does not estop the lessor from asserting title to royalty oil converted by such company. 172**Ark**804, 290**SW**929.

1122-22½-New. Waste crude oil not voluntarily released and oil escaping from a pipe line may be recovered by the lessee producing it where he can identify it. 170**Ark**729, 281**SW**360.

1122-22½-New. A corporation purchasing raw gas from lessee did not assume lessee's obligations to lessor. **TexCommnA** 288**SW**431.

1122-22½-New. In the absence of an agreement, the purchaser of gas from a lessee authorized to sell by the royalty owner may not be sued. **TexCivA** 8**SW (2d)**206.

1122-22½-New. Lessee assigning percentage of oil and gas produced is not necessary party plaintiff in assignee's action for price of oil previously sold by lessee. **CalA** 288**P**721.

1123-35½-New. Grantees of right to operate for oil and gas have no cause of action against holder of option to purchase for resort to seismographs in exploration. **TexCivA** 29**SW(2d)**809.

1124-41 [b] **Oil lessee, whose well failed for oil but produced gas,** cannot hold prior gas lessee liable for cost of well either on implied contract or estoppel. **TexCommnA** 16**SW(2d)**527.

1124-42 [f] **Injunction to restrain further work not appropriation of work already done.-TexCommnA** 16**SW(2d)**527.

1124-45 159**La**403, 105**S**411 (second lessee may assert forfeiture of prior lease).

1124-47 159**La**403, 105**S**411.

1124-48½-New. Second lessee, however, may not sue to avoid a prior lease without making the owner a party to the suit. 159**La**403, 105**S**411 (where plaintiff's lease is of undivided fourth in whole tract covered by defendant's lease).

1124-48½-New. Owners of an oil lease, acquired after a valid gas lease to another lessee, have no right, after the well has failed for oil, to use it for extracting gas belonging to the gas lessee. **TexCommnA** 16**SW(2d)**527.

1124-48¼-New. Appointment of a receiver on petition of the holder of an oil lease in suit of the gas lessee against a subsequent oil lessee, seeking injunction and appointment of a receiver, will not support an equitable claim by an oil lessee to compensation for a well which failed for oil but produced gas. **Tex CommnA** 16**SW(2d)**527.

1124-48½-New. Oil lessees on abandoning drilling for failure of the well for oil, although it produced gas, may remove casing and equipment but are required to plug the well to avoid waste of a gas lessee's gas and to avoid the danger of an open hole. **TexCommnA** 16**SW(2d)**527.

1125-55 TexCivA 276**SW**342.

1125-57½-New. A lessee of premises to mine and operate for oil which has located its pits in pursuance of his rights under the terms of his lease so that abandoned product from other proprietors came naturally to rest therein becomes the first taker and obtains title to such oil. **TexCivA** 276**SW**342.

1125-57½-New. A lease of premises for mining oil with a provision imposing on the lessee the duty of preventing the waste of oil from his lease is inconsistent with a grant from the owner of the surface of the exclusive right to go on the premises and impound waste oil from other premises and the lease must prevail over such grant. **TexCivA** 276**SW** 342.

1125-57¼-New. A lessee for the purpose of mining for oil has the right to operate a pick-up station at the most advantageous place and to retake his own escaped oil and to retain other fugitive oil captured against all but the true owner, notwithstanding a subsequent surface lease giving another the right to operate a pick-up station. 170 **Ark**729, 281**SW**360.

1125-57½-New. A lessee for the purpose of mining for oil, who fails to exercise his right to operate a pick-up station, is entitled to recover only his own escaped oil from a subsequent surface lessee operating a pick-up station. 170 **Ark**729, 281**SW**360.

1125-57½-New. As between a lessee for the purpose of mining for oil and a subsequent lessee of surface rights, the question of priority of right to use a particular site for a pick-up station is determined by whether or not it is essential to the first lessee in preserving his own oil. 170**Ark**729, 281**SW**360.

1125–57½–New. A lease for the purpose of mining for oil and a subsequent lease of the surface for the purpose of operating a pick-up station are not in conflict. 170**Ark**729, 281**SW**360.

1125–57⅛–New. As to fugitive gas. Owners of an oil lease accidentally bringing in a gas well and using gas belonging to a prior gas lessee with knowledge thereof may not offset against the value of the gas used the expense of producing the same. **Tex CivA** 38**SW(2d)**592.

1125–64½–New. Evidence held insufficient to support judgment against defendant for difference between value of ore as shown by returns and reports of defendant. 36**F(2d)**553.

1126–75 [a] **Form.**–101**Vt**367, 143**A**639.

1126–76 [d] **Construction of license.**–101**Vt**367, 143**A**639.

1126–77½–New. Agreement for the seller's storing for the buyer's credit a portion of oil due did not necessarily arise from the buyer's failure to protest. **Tex CivA** 296**SW**697.

1126–77⅛–New. Seller accepting its portion of oil produced without agreement as to price or storage was required to credit the buyer with the market value. **TexCivA** 296**SW**697.

1126–86 **TexCommnA** 18**SW(2d)**602.

1126–87 79**CalA**222, 249**P**30; 130**Kan** 9, 285**P**589 (not void for uncertainty or indefiniteness). [a] (2) Correspondence and telegrams held not to show completion of enforceable contract. 86**Colo** 59, 278**P**804. [f] **Not void for want of consideration.**–173**Ark**880, 293**SW**1005.

1127–88 [b] (2) Contractor's conduct after discovery of falsity of representations as to sufficiency of water for drilling purposes has been held sufficient to show intention to affirm contract. **TexCommnA** 298**SW**520. [c] **Election to rescind or affirm.**–**TexCommnA** 298 **SW**520.

1127–90 **LaA** 130**S**875. [a] (3) Time was of the essence where defendant contracted to deliver to plaintiff an oil lease, if negotiations with third party were not consummated within thirty days. **TexCivA** 284**SW**228. [b] (2) Other instances. 83**Colo** 419, 266**P**201.

1127–91 43**F(2d)**1; 44**F(2d)**192; 93 **CalA**370; 269**P**710; 128**Kan**79, 276**P**53; **TexCivA** 282**SW**940. [a] (2) Oil well drilling contract for specified depth for gross price in installments held entire. **CalA** 288**P**814. [f] **Intention of parties** to contract for drilling oil well may be ascertained from language used, subject matter, statutes applicable thereto or inferred therein, and surrounding circumstances. **TexCivA** 282**SW**617. [g] **Contract to drill for oil held not one to permit defendant to abandon work at** any time. **TexCivA** 282**SW**617. [h] **Vesting of title.**–**TexCivA** 293**SW**313. [i] **One contracting to drill well** for interest in land and production of oil and gas without sharing expenses does not acquire rights of royalty owner. 118**Tex** 498, 18**SW(2d)**1052. [j] **Legal title to oil and right to sell it** held vested in oil company under contract for development. 43**F(2d)**1. [k] **Basis of accounting for oil sold.**–43**F(2d)**1.

1128–93 44**F(2d)**192; **Cal** 292**P**463 ("rock" or "rock formations" held to include "shale"). [a] (2) Under provision requiring driller to furnish all materials and labor, driller is bound to furnish casing to keep out water. 180**Ark**729, 22**SW(2d)**1007. [b] (4) In determining whether defendant impliedly agreed to drill well to depth of three thousand five hundred feet, text, context, and extrinsic circumstances may be considered to ascertain intention of parties. **TexCivA** 13**SW(2d)**950. (5) Contract held not to contain implied obligation to drill well to depth of three thousand five hundred feet unless oil or gas was found at a less depth. **TexCivA** 13**SW(2d)**950. (6) Contract completed when lime found at less depth than contract specified. 141 **Okl** 9, 283**P**556.

1128–95½–New. Whether oil or gas is found in paying quantities is determinable by good faith and honest judgment of operator. **TexCivA** 283**SW**608.

1128–95⅛–New. Surety on contractor's bond is not liable for rent to be paid by a contractor for drilling a rig, under provisions for payment of labor and for material used and return of the rig in good condition. **TexCivA** 291**SW**587.

1128–95¼–New. Contract for drilling oil and gas well was held not void for want of sufficient description of leases and land conveyed. **TexCommnA** 2**SW (2d)**426.

1128–95½–New. Evidence held to sustain recovery under agreement for contribution of dry hole money in drilling well for oil and gas. 143 **Okl** 112, 287 **P**1033.

1128–96 44**F(2d)**192; **TexCivA** 20**SW (2d)**108 (not contractor's duty to point out defects in abstracts furnished by owner, in absence of contractual provision therefor); **TexCivA** 26**SW(2d)**426 (right to abandon contract). [b] **Impossibility of performance.**–227**Ky**219, 12**SW(2d)**283.

1128–97 218**Ala**296, 118**S**513; 83**Colo** 419, 266**P**201; 80**Mont**214, 260**P**711; 131 **Okl** 49, 267**P**855; 101**WVa**748, 133 **SE**699. [b] **Contractor shooting oil** wells is not insurer of success of its work, but is bound to use ordinary care to explode nitro-glycerin and discover whether it has in fact exploded. 30 **F(2d)**811. [c] **Delay.**–43**F(2d)**1.

1128–98 **TexCivA** 284**SW**632.

1129–1 **Cal** 292**P**463; **TexCivA** 28**SW (2d)**569 (tender of invalid leases held to deprive owner of right to recover for drilling contractor's breach). [b] **Independent contract.**–**IndA** 154**NE**780. [c] **Where contract provides for reasonable notice for operator's withdrawal,** contract remains in force till such notice is given. 212**Ky**103, 278**SW**560. [d] **Compliance with implied obligation.**–227**Ky**219, 12**SW(2d)**283. [e] **Where contract requires owner to furnish abstracts** as quickly as possible to leasehold, interest to be conveyed in part payment of services in drilling well, no definite time is fixed for such delivery. **TexCivA** 20**SW(2d)**108. [f] **Partial compliance insufficient.**–**TexCivA** 20**SW (2d)**108 (furnishing of abstracts).

1129–1½–New. Election to treat repudiation of contract as breach relieves parties of duty of thereafter tendering performance. 40**F(2d)**488.

1129–1⅛–New. Oil lease holder on failure of drilling contractor to answer telegram relative to repudiation of contract may treat repudiation as breach. 40 **F(2d)**488.

1129–1¼–New. Contractor empowered to sell oil is bound to exercise good faith and due diligence to obtain reasonable value. 43**F(2d)**1 (sale below market price held improper).

1129–2 130 **Okl** 111, 265**P**133. [d] 103 **WVa**590, 138**SE**201. [e] (2) In action by owner for breach of contract, burden is on defendant to show value to owner of work done. **IndA** 154**NE**780. (3) In action for breach of contract, plaintiffs had burden to show making of contract, terms thereof, defendant's breach, and plaintiffs' loss of profits resulting therefrom. 226**Ky**166, 10**SW(2d)**628. (4) Evidence held admissible. 226**Ky** 166, 10**SW(2d)**628. [f] (2) Evidence insufficient to show interference by owner with operations of drilling contractor. 123**Kan**688, 256**P**1023. (3) Evidence held sufficient to support finding that defective casing had not been furnished. **TexCivA** 289**SW**169. [g] (2) Other questions for jury. 226**Ky**166, 10**SW(2d)** 628; **Ky** 14**SW(2d)**1082. [h] **Burden of proof.**–**TexCivA** 289**SW**169. [i] **Instructions held erroneous.**–180**Ark**729, 22**SW (2d)**1007.

1129–5 But see 226**Ky**166, 10**SW(2d)** 628.

1130–9 [a] (3) In action for breach of contract to permit plaintiffs to mine coal from defendant's mine, measure of recovery cannot include wages for services of plaintiffs in performing contract. 228**Ky**317, 14**SW(2d)**1082.

1130–13½–New. Owner is entitled to damages for breach of contract to drill well by contractor equal to the additional cost of finishing the well less certain credits due the contractor for payments beneficial to the owner. 159**La** 615, 105**S**790.

1130–14 [b] (2) Other instances. **Tex CivA** 8**SW(2d)**815. [c] **Oil producer contracting to drill well** in consideration of release from over-riding royalty is not obliged to accept defective title or one different from that agreed. 86**Colo**59, 278**P**804.

1130–15 180**Ark**918, 25**SW(2d)**452; 80 **Mont**214, 260**P**711; **TexCivA** 20**SW(2d)** 108 (contract ambiguous, requiring construction as such). [e] **Time when rights in product attach.**–**TexCivA** 15 **SW(2d)**93. [f] **Delivery of oil leases as condition precedent held waived.**–40 **F(2d)**488. [g] **Where title to leases tendered in payment are encumbered by mortgage,** leases are not "valid" within contract provision. **TexCivA** 28**SW(2d)** 569.

1131–16 80**Mont**214, 260**P**711.

1131–17 See also **TexCivA** 26**SW(2d)**426 (idle time due to absence of owner).

1131–18 208**Cal** 114, 280**P**535 (under terms of contract).

1131–21 **CalA** 288**P**814. [a] **Agreement to complete well for production of petroleum** is not undertaking to produce petroleum. **CalA** 288**P**814. [b] **Provision for payment ten days after well is put on production** does not make payment conditional on striking oil. **CalA** 288**P**814. [c] **Definition of "paying quantities"** in contract for drilling well to specified depth unless oil in paying quantities is found at lesser depth is not guaranty of production. **CalA** 288 **P**814.

1131–24½–New. Customary charge for transporting oil to place of sale held proper measure of compensation therefor where actual cost was not shown. 43**F(2d)**1.

1131–25 [e] (3) As against demurrer in action for contract price for drilling oil well. 121**Kan**745, 250**P**328. (4) To show plaintiff entitled to verdict in some amount as against motion for nonsuit. 80**Mont**214, 260**P**711. (5) To authorize implied finding that defendant relied on statements of one defendant as to payment and did not rely wholly on expectation that corporation would raise money from subscriptions of stock. **Tex CivA** 13**SW(2d)**130. (6) To raise question for jury as to completion of well. **TexCivA** 16**SW(2d)**901. (7) To sustain finding that contractor complied with all covenants in drilling oil well. **CalA** 288**P**814. (8) Other instances. 93**CalA** 370, 269**P**710; **TexCivA** 10**SW(2d)**597. [f] (4) To warrant submission to jury on claim for extra compensation. 80**Mont** 214, 260**P**711. (5) Other instances. 93 **CalA**370, 269**P**710. [h] (2) Damage to owners on account of loss of oil by reason of delay in completion of oil well held too remote and speculative to justify recovery thereof. 93**CalA**370, 269**P** 710. [j] **Amendment of pleadings.**–284 **Pa**476, 131**A**275. [k] **Nonsuit.**–284**Pa** 476, 131**A**275. [l] **Questions for jury.**–In action to recover on oil well drilling contract, evidence relative to driller's negligence in landing oil string has been held for jury under evidence. 93**CalA** 370, 269**P**710.

1132–32 [c] **Allowing damages for destruction of well** is improper where included in greater sum awarded is total value of royalties lost by failure to drill well. **TexCivA** 7**SW(2d)**878.

1132–33 [a] (5) To sustain finding of court that contractee had not waived beginning of drilling oil well by contractor at stipulated time. **TexCivA** 282**SW**940. (6) To support jury's finding that defendant did not orally agree with plaintiff to drill oil well to depth of three thousand five hundred feet, unless oil or gas in paying quantities should be found at less depth. **TexCivA** 13**SW(2d)**950. (7) To sustain finding that drillers, by refusing to complete well and remove machinery, breached contract. 232**Ky** 519, 23**SW(2d)**917. (8) To show that wells were not drained by other wells. 43**F(2d)**1. [b] (2) To support finding that acreage paid for services and reverting to plaintiff on breach had no value that could be realized on. **TexCivA** 20**SW(2d)**108. (3) Evidence held not to show right to damages for failure to develop lease and protect it against dam-

age. 43F(2d)1. [c] (3) **Evidence insufficient to take issue to jury.** TexCivA 26SW(2d)426. (4) Other instances. TexCivA 20SW(2d)108. [d] **Peremptory instruction for defendant held improperly refused** under evidence showing that further drilling was practicable though not profitable. TexCivA 6SW(2d)380. [e] **Belief in good faith that paying quantities of oil and gas would not have resulted** does not absolve defendant from paying cost of drilling well. TexCivA 7SW(2d)878. [f] **Instructions.**–TexCivA 7SW(2d)878.

1133–34 TexCivA 282SW940.

1133–35 IndA 154NE780; TexCivA 7SW(2d)878. But see 34F(2d)589. [a] 131 Okl 49, 267P855. [b] **For failure to drill well,** measure of damages is reasonable cost of drilling it. 137 Okl 90, 278P281. [c] **Pleading and proving** that total amount realized would be less than cost of drilling makes latter measure of damages. TexCivA 7SW(2d)878.

1133–38 [a] **Special damages.**–IndA 154NE780.

1133–39½–New. Where contract to shoot well is performed in such a negligent manner as to damage or destroy the well, the owner may recover in an action of tort. 117 Okl 245, 246P426.

1133–39½–New. Questions of fact are submitted to jury as in actions generally. TexCivA 291SW587.

1133–39¼–New. The owners of an oil well can recover the reasonable value of the well destroyed by negligence of the employees of a contractor shooting the well. 30F(2d)811.

1133–39½–New. Negligence in shooting an oil well, to entitle the owner to damages, must have been the proximate cause of the damage. 30F(2d)811.

1133–39½–New. Lost royalties are not an element of damages. TexCivA 7SW(2d)878.

1133–39½–New. Measure of damages where completion is impossible. 232Ky519, 23SW(2d)917.

1133–42 [a] (5) Other contracts. 40 Wyo 393, 277P807.

1134–51 [c] **Actions.**–212Ky146, 278SW570.

1134–52 18F(2d)873; 29F(2d)323 [certiorari den 279US853, 49SCt348(8th case), 73L ed995] (practical construction not shown); 101CalA694, 282P429; 318 Ill 374, 149NE253; 124Kan155, 257P926. [a] (5) Other contracts. 29F(2d)323 [certiorari den 279US853, 49SCt348(8thcase), 73L ed995]. [c] **Contract as to right of lessee to steam oil** must be construed as whole in relation to intention of parties. 318 Ill 374, 149NE253.

1134–53 133 Okl 122, 271P651 (modification of contract). [a] (6) In contract for sale of gas at well mouth, phrase "in the usual conduct of its business" can be interpreted in light of evidence. 33F(2d)248. (7) Construed not to convey interest in realty. 34NM664, 287P289. (8) Other contracts construed. 124 Okl 150, 254P84.

1135–3 See also 129 Okl 288, 264P824.

1135–4 [a] **Act held not to place additional restrictions on wells drilled before its passage.**–162La165, 110S188.

1135–7 32F(2d)134; Okl 292P841; TexCivA 38SW(2d)462. See also 16F(2d)639.

1136–16 22F(2d)597. [b] **Constitutional presumption of reasonableness of orders of corporation commission** cannot be disregarded by supreme court unless contrary appears. 133 Okl 213, 271P1020.

1137–59 128Kan715, 280P773 (salt water, oil, or refuse).

1138–60 128Kan715, 280P773.

1138–70 [d] **Statute intended to afford protection to public** generally, and is not merely conservation measure. 141 Okl 175, 284P297(2dcase).

1138–74 [a] (3) Evidence has been held sufficient to warrant finding of abandonment and justifying order of corporation commission to plug well. 133 Okl 213, 271P1020. (4) Surrender of commercially valueless gas wells to lessor desiring to use them to heat and light dwellings on premises, does not constitute abandonment. 229Ky68, 16SW(2d)492(2dcase).

1140–6 [c] (4) Mine inspectors, under Oklahoma statutes, have complete authority and control over mine during time of their presence and inspection thereof. 138 Okl 147, 280P622.

1140–14 162La165, 110S188; Okl 292P841. [d] **In absence of showing of overproduction,** gas company held not subject to conviction. 162La200, 110S200; 162La781, 111S162. [e] **Provision that prosecution of corporation** for using excessive gas might be by serving copy of reformation held valid. 162La781, 111S162. [f] **Plea, in prosecuting for taking excess of gas,** that minimum was allowed held immaterial where amount taken exceeded minimum. 162La781, 111S162. [g] **Taking more gas from well than twenty per cent** of open flow held offense under later of two statutes. 162La781, 111S162. [h] **In prosecution for taking excess gas** from well, information need not show acreage of land on which well was located. 162La781, 111S162.

1141–15 162La781, 111S162.

1141–30½–New. Statute requiring filing of maps is for benefit of owners of surface adjoining lands, as well as for benefit of employees. 17F(2d)981.

1141–35 [a] **Oil license tax** is applicable to operators only and not to owners receiving royalties from operators. 83 Mont353, 272P534.

1142–50 [a] (1) 22F(2d)597; TexCivA 10SW(2d)586. (2) Right to drill offset oil or gas wells. TexCivA 10SW(2d)586. (3) Test of reasonableness of order limiting right to drill offset wells is whether, considering area and outline of land, its general location and relative distances to common property line of authorized wells, property owner would have equal opportunity with adjoining well owners of developing and realizing for his leasehold. TexCivA 10SW(2d)586. (4) It is duty of commission to act upon application, for permit to drill oil within short distance to property line, within reasonable time. TexCivA 25SW(2d)936 (statute construed). [b] (7) Penalty will not be imposed where alleged violation of statute was through acting on location fixed by defendant and acquiesced in by plaintiff for many years. 105WVa570, 144SE409.

1142–56½–New. Statute forbidding drilling of oil well less than one hundred fifty feet from any property line without special authority held valid. 16F(2d)639.

1142–56⅓–New. A statute providing that natural gas may be used in the manufacture of carbon black under conditions imposed by an act and giving an official certain powers of regulation does not include the power to refuse a permit to new concerns or persons able and willing to comply with the statutory requirements. 278US92, 49SCt40, 73L ed198.

1142–57 [a] 198 Ind216, 152NE833.

1143–68½–New. In prosecution for wasting gas, refusal to charge that defendants were entitled to certain exemptions on wells dug before passage of statute held erroneous. 162La165, 110S188.

1143–80 22F(2d)657, 660 [quotCJ]. [a] (2) Persons leasing drilling rig and drilling wells are not commercial partners. LaA 126S235. [c] **Mining partnership is result of agreement** between two or more parties jointly to conduct proposed partnership business, with further agreement that each shall share in expenses, losses, and profits of enterprise. 39 OklACR263; 43 OklACR23 [reh pending].

1144–81 18F(2d)697; 51Nev226, 273P657; 130 Okl 62, 264P814; TexCommnA 6SW(2d)94.

1144–82 130 Okl 62, 264P814.

1144–83½–New. The owner of an unrecorded assignment of a fractional interest in oil leases, who practically abandoned his interest for many years without communicating with the owners, is not entitled, after successful development by them, to his fractional share of actual profits, but only to share of customary owner's royalty. 18F(2d)697.

1144–83⅓–New. Joint tenancy in land merely is not sufficient to establish partnership relation. 286Pa457, 133A638.

1144–83¼–New. The ignorance of such owner of development operations or his refusal to join therein does not affect the foregoing rule. 18F(2d)697.

1144–84 124Kan396, 260P612; 130 Okl 182, 266P439.

1144–84½–New. Person suing to establish interest in oil lease must rely on contract alleged. 14F(2d)65.

1144–85 79Mont1, 254P863; 130 Okl 62, 264P814.

1144–88 126 Okl 164, 259P246; 137 Okl 58, 278P330; 43 OklACR23 [reh pending]. [a] 43 OklACR23 [reh pending].

1144–89 137 Okl 58, 278P330.

1144–90 286Pa457, 133A638.

1145–93½–New. Partnership by estoppel presupposes nonpartnership, for if relation exists estoppel is inapplicable. TexCommnA 6SW(2d)94.

1145–94 22F(2d)657, 660 [quotCJ]; 79 Mont1, 254P863.

1145–95 124Kan396, 260P612; MoA 282SW1048. See also TexCivA 9SW(2d)501. [a] **Though one of partners is designated trustee,** partnership may still exist. 220Ky253, 294SW1067.

1145–99 202 Iowa646, 210NW793; Kan 289P421; 286Pa457, 133A638.

1145–1 126 Okl 164, 259P246; 43 Okl ACR23 [reh pending]; 115Tex469, 283SW754. [a] (2) Agreement by parties to furnish material and machinery for digging well and by leaseholder to dig well and assign outside leases does not establish partnership or joint venture. 35Wyo 224, 248P353.

1145–2 137 Okl 58, 278P330; 138 Okl 128, 280P593 (each agreeing to pay his part of expenses and share in profits and losses); 39 OklACR263; 43 OklACR23 [reh pending]. [b] 130 Okl 182, 266P439.

1145–3 90CalA552, 266P293; 124 Okl 298, 256P23; 127 Okl 65, 259P869; 130 Okl 62, 264P814; 132 Okl 270, 270P29; 115Tex469, 283SW754; 118Tex498, 18SW(2d)1052; TexCivA 27SW(2d)637 (common enterprise to share profits); 104WVa221, 139SE706. [b] 115Tex469, 283SW754.

1145–5 79Mont1, 254P863.

1146–6 TexCivA 293SW587.

1146–8 115Tex469, 283SW754.

1146–10 22F(2d)657; 286Pa457, 133A638. See also TexCivA 27SW(2d)637.

1146–11 TexCivA 16SW(2d)947. [a] 29F(2d)323 [certiorari den 279US853, 49SCt348(8thcase), 73L ed995]. [c] **Mining partnerships are applicable to oil and gas ventures.**–115Tex469, 283SW754.

1146–12 MoA 2SW(2d)154; 39 OklA CR263. [b] **Oil company acquiring interest in lease entitling it to share in profits** has been held not liable, as partner, for oil furnished another owner of interest. TexCivA 16SW(2d)947. [c] **If in addition to agreement owner does acts** indicating he is active in developing, he will at least be estopped to deny existence of mining partnership. 138 Okl 128, 280P593.

1146–13 223Ky79, 28SW(2d)1067.

1146–15 Nev 287P274.

1146–19½–New. An agreement between two persons having a common interest in the division of the profits is a mining partnership. 120 Okl 246, 249P910.

1146–19¼–New. Assignment of oil and gas lease providing for certain services by assignor and sharing of profits held not to create partnership. 22F(2d)360.

1146–19¼–New. Partnership is not created by contract of one to drill well on oil leasehold of another. Ark 30SW(2d)827.

1146–20 21F(2d)602. [c] (2) Partnership formed to purchase oil leases and resell them with drilling test as incident is ordinary commercial partnership and not mining partnership. 21F(2d)602.

1147–21 223Ky79, 28SW(2d)1067.

1147–21½–New. Where terms of proposed agreement fails, no partnership is created. TexCivA 294SW928.

1147–21⅓–New. Evidence held not to show that person employing others was mining partner as trustee with author

ity to bind cestuis que trust. 48 Ida 771, 284P1030.

1147-22 286Pa457, 133A638. [b] 124 Okl 298, 256P23. [d] TexCommnA 6 SW(2d)94. [g] (I) 8F(2d)241; 172Ark 554, 289SW775; 118Tex498, 18SW(2d) 1052. (2) To sustain findings that alleged agreement to divide profits from sale of mines was made. 150Wash349, 272P966. [h] 130Kan177, 285P577; 130Kan9, 285P589; 160La465, 107S 307; 39 OklACR263; TexCommnA 6 SW(2d)94. [i] **Question whether transaction was entire or separable into distinct transactions** is for jury, where purchaser of interest in three oil leases and contracts for drilling delivered single check for full purchase price and simultaneously received three separate assignments. 40 OklACR83. [j] **Finding of no holding out as partnership** held sustained by evidence. MoA 2SW (2d)154.

1147-24 21F(2d)602; 124Kan396, 260 P612, 614 [citCJ]; 220Ky253, 294SW 1067, 1068 [citCJ]; 130 Okl 62, 264P 814. [f] **Lack of power of mining partner to bind copartners** distinguishes mining partnership from general partnership. 120 Okl 246, 249P910.

1147-25 104WVa221, 139SE706.

1147-26 104WVa221, 139SE706.

1147-28. 21F(2d)602; 124Kan396, 260 P612, 614 [citCJ]; 124 Okl 298, 256P23.

1148-30 104WVa221, 139SE706.

1148-31 104WVa221, 139SE706.

1148-32 Contra TexCivA 283SW261. [b] **Persons employed by one partner** to work for him in operation of mine cannot recover from partnership. 85 IndA 115, 152NE835.

1148-39 21F(2d)602.

1148-40 TexCivA 9SW(2d)501.

1148-41 104WVa221, 139SE706.

1148-47 104WVa221, 139SE706.

1149-55 79Montl, 254P863.

1149-57½-New. The decisions upholding right of majority in conduct of business of partnership give such right ample scope. 79Montl, 254P863.

1149-59 But see 227Ky311, 12SW(2d) 858.

1149-61 TexCivA 286SW307.

1149-62 TexCivA 286SW307.

1149-63 LaA 126S235.

1149-65½-New. Upon dissolution of a partnership, mining partners, illegally continuing the business, are liable to plaintiff partner for interest on the amount due him, but withheld from the date of dissolution. 151Va117, 144 SE458.

1149-66 MoA 282SW1048; 85Mont56, 277P631; 124 Okl 131, 254P4. [d] **Instructions** held applicable to facts in action between partners. 124 Okl 131, 254P4.

1149-67 219Ky180, 292SW794; 223Ky 79, 2SW(2d)1067; 151Va117, 144SE 458.

1149-68 [b] **Burden of showing circumstances** warranting compensation is on partner claiming same. 223Ky79, 2SW (2d)1067.

1149-68½-New. , and where there is an express agreement therefor, the partner is entitled to compensation. 223Ky 79, 2SW(2d)1067. [a] **Evidence held insufficient** to show express, unconditional agreement for compensation. 223 Ky79, 2SW(2d)1067.

1149-69 [i] **Purchase money advanced by one joint purchaser to another** may be recovered. 171Ark1101, 287SW393.

1150-70½-New. A partnership agreement may be such as not to preclude partners from purchasing leases for themselves with their own funds, 223 Ky79, 2SW(2d)1067.

1150-70⅓-New. in which case other partners have no interest in leases so purchased. 223Ky79, 2SW(2d)1067.

1150-73 208Cal1, 279P996 (tract on which oil is produced is not included in agreement for removing gravel); 150 Wash349, 272P966. But see 286Pa457, 133A638.

1150-75 223Ky79, 2SW(2d)1067; 286 Pa457, 133A638; BC [1929] 4DomLR 178. [c] (2) Of market value of oil lease held admissible. TexCivA 286SW 307. [l] **Evidence.**-TexCivA 286SW307. [m] **Where joint purchasers of lease mean to share profits and loss on resale,** party making resale must account to other for latter's share of profits. 171Ark1101, 287SW393.

1150-78 223Ky79, 2SW(2d)1067.

1150-81 130 Okl 62, 264P814.

1151-82 130 Okl 62, 264P814.

1151-83 130 Okl 62, 264P814.

1151-92 22F(2d)657, 662 [citCJ]; 220 Ky253, 294SW1067, 1068 [quotCJ]; 127 Okl 53, 259P642; 130 Okl 62, 264P814. [b] **Receiver of assignee** of missing partner is entitled to foreclose on equitable lien for advances. 22F(2d)657.

1152-96 220Ky253, 294SW1067, 1068 [quotCJ].

1152-98½-New. Trustee's assessment against member of partnership held superior to lien of mortgage previously recorded. 220Ky253, 294SW1067.

1152-99 128 Okl 247, 262P654.

1152-1 249Mich35, 227NW732.

1152-6½-New. In an action to recover shares of mining company stock due one partner under an agreement to divide the profits from the sale of the mines, it is not error to render judgment against a codefendant to whom the shares had been transferred without consideration. 150Wash349, 272P966.

1153-18 115Tex469, 283SW754.

1153-21 151Va117, 144SE458.

1153-22 TexCivA 286SW307; TexCivA 294SW928. [b] **Upon dissolution of mining partnership,** property becomes individual property of partners according to their interests subject only to partnership debts. 115Tex469, 283SW 754.

1153-22½-New. Where an oil lease has been developed under a mining partnership, part of the joint owners cannot effect a dissolution by sale of the lease where the grounds for dissolution provided for in the articles of partnership do not exist. 218Ky15, 290SW1031.

1153-28 115Tex469, 283SW754.

1153-29 115Tex469, 283SW754.

1153-30 115Tex469, 283SW754, 759 [cit Cyc]. [b] **Death of partner does not give surviving partner** exclusive right to possession of partnership property and to settle its business. 85Mont56, 277P631. [c] **Complaint in action by administrator of deceased partner** against survivor held to state cause of action to fix lien for advances by deceased. 85Mont56, 277P631.

1154-34 [a] **Dissolution of mining partnership** does not operate as forfeiture of interest of any partner in mineral estate. 115Tex469, 283SW754.

1154-41½-New. Where persons agree to locate mining property, furnish means, and locate claims, object is consummated as regards contention that there was only unexecuted partnership agreement. Nev 290P1023(2dcase).

1154-42 BC [1930] 2DomLR117 (evidence held sufficient to show agreement). [b] **Finding in action for accounting** that coadventurers agreed that plaintiff was included held to support judgment in his favor. Nev 290P1023(2dcase).

1155-52 See also 21F(2d)602 [citCyc].

1155-54 249Mich35, 227NW732. [a] **Duty to account.**-249Mich35, 227NW 732.

1155-58 BC [1929] 4DomLR261.

1155-63 Nev 287P274.

1155-65 See also 172Ark554, 289SW 775.

1155-65½-New. Evidence in suit to dissolve oil and gas syndicate held not to show that trustees agreed to put into syndicate leases not designated. 40 F(2d)241.

1156-70½-New. Where trust is sued for damages for failure to transfer "shares" as agreed, on completion of contract to drill wells, measure of damages is as of date of completion of contract. Tex CivA 278SW321.

1156-70⅓-New. Contract to convey half of trust stock has been held not to entitle vendee to half interest in oil lease on breach. TexCivA 278SW321.

1156-70¼-New. Trustees of oil and gas syndicate who personally retain proceeds of lease substituted for lease assigned to syndicate are bound to account to shareholders. 40F(2d)241.

1156-70½-New. Trustee of syndicate who with another personally retains proceeds of such lease is liable to account for entire proceeds. 40F(2d)241.

1156-72 8F(2d)241. [a] **Evidence held insufficient** to show joint adventure between speculators in oil leases. 160La 465, 107S307.

1156-77½-New. Where some of the members of association provided means whereby lease was purchased and title was taken in name of one member, such title inured to benefit of other members. TexCivA 23SW(2d)875.

1156-78 TexCivA 23SW(2d)875 (death or withdrawal of one or more members).

1156-80½-New. Stock of association could be bought and sold without affecting integrity of association. TexCivA 23SW(2d)875.

1156-80⅓-New. Where lease of oil drilling association was purchased by some of stockholders at vendor's lien foreclosure sale, original association was not dissolved. TexCivA 23SW(2d)875.

1156-87 85Mont78, 277P622, 64ALR 772. [k] **Mining corporation cannot recover on demand notes payable out of profits of subsidiary** where no profits had been realized. 127Misc470, 216NYS 481. [l] **Corporation may borrow money on its notes and pledge its bonds** for payment thereof in connection with lease and trial operation of oil refinery which it contemplated purchasing. 8F(2d) 338. [m] **Action to rescind contract to incorporate.**-Judgment modified to accord with finding that plaintiff desired to retain control of corporation where sustained by evidence. 48 Ida329, 282P91.

1157-91 [b] **Purchase of stock of other corporations** is unauthorized under some statutes except on written consent of all stockholders. IndA 169NE91.

1159-29 TexCivA 19SW(2d)605.

1159-30½-New. , or make any contract or take steps for the amendment of the charter to increase capital stock. Tex CivA 19SW(2d)605.

1159-31½-New. Release of a corporation's oil lease, signed by the vice president and attested by the assistant secretary, sealed and acknowledged, held sufficient. TexCivA 289SW128.

1159-31⅓-New. Authority to execute a conveyance is conclusively presumed where certificates of the secretary delivered to a purchaser showed resolutions of the executive committee and directors authorizing the sale. 24F(2d) 776.

1159-44 85Mont78, 277P622, 64ALR 772.

1159-46 But see 127Misc470, 216NYS 481.

1159-48 [c] **Question of superintendent's authority to contract** for mine props held for jury. 212Ky146, 278SW 570.

1160-49 76CalA767, 246P74 (company not bound by superintendent's oral promise to pay extra compensation for erection of flume). [d] **Corporation owning oil lease which third party** was developing under contract held not liable for equipment for which manager agreed to pay, where seller dealt solely with such third person. TexCivA 294SW 270. [e] **General manager held without authority** to agree to pay for equipment of third person developing lease under contract. TexCivA 294SW270.

1160-50 226Ky93, 10SW(2d)617; TexCivA 25SW(2d)678.

1160-57 40F(2d)67.

1160-58½-New. Managing officer of corporation selling lease belonging to it is bound to sell for corporation's best advantage. 40F(2d)67.

1160-58⅓-New. Managing officer of corporation to which oil lease was assigned cannot plead his wrong in changing name of assignee as defense to action for proceeds of sale. 40F(2d)67.

1160-58¼-New. Evidence held to sustain finding that corporation was in actual possession of mining claims when director and general manager unlawfully entered. Ida 290P390.

1160-66 [a] **Unitholders in oil well** owned and drilled by corporation may

have receiver appointed upon violation of trust in which they are principal beneficiaries. 72CalA18, 236P570.

1160–66½–New. Stockholder may prevent violation of agreement under which subsidiary company was organized. 127Misc470, 216NYS481.

1160–66¼–New. Stockholder cannot secretly, at the expense of the corporation, take a lease. 15F(2d)523.

1160–66¼–New. Where a stockholder secretly takes a lease to his own benefit, held not to inure to corporation where only two stockholders. 15F(2d) 523.

1161–82½–New. Oil lease cannot be canceled because lessee corporation has become defunct and forfeited charter since institution of suit. TexCivA 289 SW173.

1161–82½–New. Under some statutes the charter of a mining corporation owning nonproductive mines is subject to forfeiture for nonpayment of an annual license tax where it fails to file an annual statement in order to secure exemption. 47 Ida595, 277P567.

1161–82¼–New. Where a mining corporation's charter has been forfeited for nonpayment of a license tax the probate court is without jurisdiction to render judgment against it in a subsequent action in which summons is attempted to be served upon it after forfeiture. 47 Ida595, 277P567.

1161–82½–New. In an action under such judgment trustees of the corporation can attack the judgment as void. 47 Ida595, 277P567.

1161–86½–New. Lessor of oil lease cannot complain of lessee corporation's failure to comply with laws of state of its creation. TexCivA 289SW173.

1163–5 174Ark1040, 298SW487.

1163–7 174Ark1040, 298SW487.

1163–7½–New. An oil well driller may fill a materialman's lien although he agreed to turn over the property free of liens. TexCivA 284SW632.

1163–7½–New. Substantial compliance with the statute is sufficient to create a lien. 84Mont263, 275P273.

1163–14 168Ark1079, 272SW662. [a] 168Ark1079, 272SW662.

1163–16 Contra 128 Okl 201, 264P591.

1164–19 33Ariz451, 265P606.

1164–19½–New. A statute providing a cumulative remedy was held not to repeal a former remedial provision. 173 Ark837, 293SW738.

1164–19½–New. A statute giving liens on gas and other wells, materials, and equipment is not repealed by an act giving liens on oil wells only. 84Colo 279, 269P894.

1164–20 118Tex498, 18SW(2d)1052.

1164–20½–New. Persons entitled to liens under statutes dealing with liens of materialmen and laborers engaged in the oil industry are not entitled to liens under other statutes. 118Tex534, 18SW(2d)1063.

1164–21 [b] (2) Lien not allowed for time not expended on drilling oil well unless owner is at fault. 123Kan735, 257P229. [k] **Person performing labor in drilling** oil or gas well may have lien. 118 Okl 228, 246P1090. But see 128 Okl 201, 264P591 [overr 119 Okl 77, 249P717]. [l] **One who rents "fishing tools"** is not entitled to lien for rental value. 39 OklACR175. [m] **Plugging oil well on abandonment.–TexCivA** 17 SW(2d)170. [n] **Lien of drilling subcontractor's employees** on interest of lessee's assignee, which contracted for drilling of well, has been held properly sustained. 84Colo 279, 269P894. [o] **Repair of structure.–34NM540, 286P157.**

1165–26 [e] **Hauling oil well casing.–** 123 Okl 186, 252P37.

1165–27 33NM78, 260P1086; 55ND284, 213NW23.

1165–28 33Ariz451, 265P606; 33NM 78, 260P1086. [n] **One hauling equipment** to oil and gas leasehold is entitled to lien. 39 OklACR175, 179 [citCyc]. [o] **Drilling oil well.–84Mont178, 274P** 834.

1166–35 55ND284, 213NW23.

1167–38 [c] Contra 33Ariz349, 264P 1081. [g] **What constitutes materials or supplies.–173Ark983, 293SW1012;** 123 Okl 120, 252P9. [h] **Commodities furnished for hire.–128 Okl 201, 264P591.** [i] **Merchandise not intended to be installed as part of fixtures of completed well,** though designed for use as part of drilling equipment to be removed and used elsewhere, does not constitute basis for materialman's lien. 127Kan378, 273 P442. [j] **In Ontario.–**[1929] 3DomLR 709.

1167–42½–New. Under some statutes a lien cannot be established against the owner of an oil lease for materials furnished to a contractor building an oil derrick thereon until judgment has been recovered against the contractor. 174 Ark90, 294SW361.

1167–42½–New. Law implies defendant's contract to pay for materials ordered by him and charged to coöwner's account, but used on his own oil lease. 175Ark741, 300SW398.

1167–42¼–New. Under some statutes a person furnishing to the owner of an oil or gas lease materials, machinery, or supplies used in digging, operating, or repairing a well is entitled to a lien whether such commodities become a part of leasehold by consumption in use or annexation or retain individuality and are capable of further use. 128 Okl 201, 264P591.

1167–42½–New. Furnishing appliances for fishing for lost tools in oil well, not designed for permanent annexation to realty, does not give mechanic's lien. 34NM540, 286P157.

1167–47 173Ark983, 293SW1012. [e] **Where owner of oil lease made connection with line of gas company and used gas in drilling oil wells,** there was implied contract to pay for gas. 173Ark 983, 293SW1012. [f] **Word "owner,"** as used in statute providing for lien for drilling oil well and furnishing supplies, means one who has estate in property which may be assigned, transferred, or conveyed. 84Mont263, 275P273. [g] **Conditional vendee of oil and gas leasehold** will not, as general rule, be held agent of owner so as to give lien on owner's interest for material furnished and labor performed in development. 137 Okl 24, 278P269.

1169–54 43 OklACR23 [reh pending].

1169–55½–New. The owner's knowledge that one operating a mine under an agreement to purchase was using materials therein does not charge the land with a mechanic's lien therefor. 87 IndA 655, 156NE586.

1169–55½–New. Judgment against holder of lease has been held not void although plaintiff knew real owner. Okl 293P255.

1169–57 33NM78, 260P1086.

1169–59 84Colo 279, 269P894.

1169–69 [d] **Statute providing lien on equipment** held to apply irrespective of ownership. 173Ark837, 293SW738.

1170–72 [b] See also 34NM540, 286P 157.

1170–73 [b] **Oil well and casing** are subject to mechanic's lien for labor performed and material furnished in drilling it. 84Mont178, 274P834.

1170–74 83Colo 419, 266P201; 202 Iowa646, 210NW793.

1170–76 [d] (3) Oil well casing loaned by purchaser of oil and gas lease to case well to agreed depth is subject to lien of laborers and materialmen. 39 OklACR 175. (4) Derrick and drilling rig, with their stationary parts, are portion of structure or improvement and of well itself as to liens for labor performed. 84Colo 279, 269P894. (5) Oil well, including casing cemented in place, is "article" or "thing," within meaning of constitution giving lien on building and articles. 29F(2d)361. [e] See also 140 Okl 221, 282P598. [g] **In Oklahoma.–** 39 OklACR73.

1170–77 [b] (2) Under Oklahoma statute, person performing labor in drilling has lien upon tools, machinery, and appliances used in drilling well. 118 Okl 228, 246P1090. [d] (1) See also 118 Tex498, 18SW(2d)1052. (2) Oil well casing is machinery within meaning of term as used in Oklahoma statute giving lien for labor performed. 123 Okl 186, 252P37. (3) Iron casing sold to one does not confer lien on oil drilling rig. TexCivA 26SW(2d)389. [e] **Movable drilling outfit** not designed to be permanently affixed to land is not subject of mechanic's lien. 34NM540, 286P157.

1171–78 TexCivA 3SW(2d)829.

1171–82½–New. Where the owner of an oil and gas lease contracts for the drilling of a well, agreeing to give them a certain compensation including a half interest in the lease from the time he should spud in a well, and the contractor drills a dry hole, the lien of a materialman whose statement, filed too late to be valid if his sale was to the contractor but in time if his sale was to the owner, purporting to cover only appliances then on the lease, does not extend to casing subsequently loaned by the owner to the contractor. 121Kan458, 247P849.

1171–87 84Colo 279, 269P894; 87 IndA 655, 156NE586; 33NM78, 260P1086; 57ND109, 220NW641, 59ALR543. [h] (3) As affects lien, lessee in oil and gas lease is not, by virtue of that relationship alone, lessor's statutory agent for making of improvements. 84Colo 279, 269P894.

1172–89 202 Iowa646, 210NW793. [a] (2) Right to lien is not affected by fact that work was done under agreement to receive part payment in corporate stock which was never delivered. 202 Iowa646, 210NW793.

1172–89½–New. But in California the owner's interest in property is liable. 72CalA148, 236P970.

1172–90 29F(2d)361; 84Colo 279, 269P 894; 126 Okl 108, 258P866; 132 Okl 270, 270P29. [e] (2) Statutory laborers and materialmen's lien attaches not only to leasehold estate, but to casing, fixtures, and equipment used in drilling operations. 126 Okl 108, 258P866. [g] **Material and casing not owned by lessee.–** 129Kan210, 282P710.

1172–92 173Ark983, 293SW1012; 147 Wash86, 265P167. [c] **Lien against all oil wells drilled.–173Ark983, 293SW1012.**

1172–93½–New. Liens for labor and materials in drilling oil wells for a firm which contracted to buy a leasehold but which defaulted in making deferred payments cannot affect the interest of the seller of the leasehold. 84Mont263, 275 P273.

1172–93⅓–New. In such case the party in default is not the "owner" of the leasehold. 84Mont263, 275P273.

1173–94 87 IndA655, 156NE586. See also 87 IndA655, 156NE586.

1173–97½–New. The owner is not liable for labor or material where the mine is worked by a company under an agreement to purchase and the owner is not concerned with the operations and receives no proceeds. 87 IndA655, 156NE 586.

1173–2½–New. A lien on property used in drilling an oil well for repairs made on the drilling rig does not attach to property sold on conditional sale and unpaid for, where the sale was made before the passage of the statute giving the lien. 170Ark813, 281SW373.

1173–4 Okl 261P962.

1173–5½–New. A provision of a statute that a materialman's statement or laborer's lien shall be filed and recorded as provided in the preceding chapter has been held not to limit the amount of acreage on which a lien may be fixed. TexCivA 8SW(2d)726.

1173–5⅓–New. When formalities required in fixing materialman's lien are complied with, it relates back to inception of lien. TexCivA 26SW(2d)389.

1173–7 [a] **Persons furnishing materials to contractor** who was to receive as payment from leaseholder for furnishing machinery and materials for digging oil well certain leases which were duly assigned have been held to have no statutory lien. 35Wyo 224, 248P353.

1173–10 130 Okl 298, 267P462. [c] **In Texas.–29F(2d)361.**

1174–14 178Ark643, 12SW(2d)6.

1174–15½–New. Under some statutes a contractor building a derrick on an oil lease need not give notice and file an affidavit for a lien when he brings suit within the statutory time. 174Ark90, 294SW361.

1174–15⅓–New. Under some statutes

the commencement of an action within the time allowed by statute for filing a claim cures a failure to file a claim. 174**Ark**1040, 298**SW**487.

1174–16 [a] **In North Dakota.**–55**ND** 284, 213**NW**23.

1174–23½–New. Failure of the clerk to record a lien does not invalidate the lien where a proper statement was duly filed. 55**ND**284, 213**NW**23.

1175–28 174**Ark**1040, 298**SW**487; 121 **Kan**458, 247**P**849; 128**Kan**220, 277**P**45; 132 **Okl** 270, 270**P**29.

1175–29 174**Ark**1040, 298**SW**487.

1175–31 174**Ark**1040, 298**SW**487.

1175–34½–New. Notice of intention to file a lien is not required within ninety days after accrual of the lien. 175**Ark** 741, 300**SW**398.

1175–37 [a] **Where contracts are between same parties** for laying separate sections of pipe line on which work was continuous, lien filed within statutory period after completion of whole line is timely. 140 **Okl** 221, 282**P**598.

1175–38½–New. Where material is furnished at different times to be used for the same general purpose, although ordered at different times, and the separate parts form an entire whole and are so connected as to show that the parties regarded the items as part of an entire account, the material will be deemed to have been furnished under a single contract. 127 **Okl** 273, 260**P**753.

1175–42 128 **Okl** 201, 264**P**591.

1175–42½–New. An account constituted of connected series of items of materials furnished or labor performed on separate orders within short intervals, relating to the development and operation of oil and gas leases situated generally in a certain locality, with irregular payments thereon, constitutes a continuous running or open account dating from the first item and is a single contract. 128 **Okl** 201, 264**P**591.

1175–42⅓–New. In such case a lien statement filed within the statutory period of the last purchase date will sustain a lien for the entire period of the account. 128 **Okl** 201, 264**P**591.

1175–42¼–New. In such case the acceptance of the debtor's note during the period of the account for existing liabilities, without intention to accept it in payment, does not constitute payment as as to render subsequent items independent transactions. 128 **Okl** 201, 264**P**591.

1176–48 84**Mont**263, 275**P**273.

1177–61½–New. Notice of a lien for labor and materials in drilling an oil well under a contract with the owner of equitable interest in the leasehold is not defective in naming the owner of the equitable interest as the owner of the leasehold and in not naming the record owner of the leasehold. 84**Mont** 263, 275**P**273.

1178–93½–New. Laborers and materialmen's lien is not discharged by removal from an oil and gas lease of the personal property upon which the lien fastens, 126 **Okl** 108, 258**P**866.

1178–93⅓–New. and the purchaser of material takes the same subject to such liens. 126 **Okl** 108, 258**P**866.

1178–93¼–New. Acceptance of notes for the purchase price of oil well casing and material does not constitute a waiver of a constitutional lien in the absence of an express showing that the notes were taken in payment of a debt. **Tex CivA** 10**SW(2d)**1023.

1178–94½–New. Where a contract provided for payment of wages in the stock of a corporation to be organized, with a lien until stock delivered, acceptance of part of wages in cash did not waive liens where reliance was on a lien under both contract and statute. 202 **Iowa**646, 210**NW**793.

1178–94⅓–New. Lessor's repossession of premises abandoned by lessee under oil and gas lease does not destroy lien on fixtures and appliances not removed. **Okl** 292**P**73(2dcase).

1178–3½–New. Mortgagee of a mining lease who had knowledge of an existing employment contract between lessee and miners cannot assert estoppel against miners claiming liens on the ground of failure to file liens. 202 **Iowa**646, 210 **NW**793.

1178–3⅓–New. The seller of oil well casing and material, in the absence of fraud or waiver of a lien, is not estopped from asserting its right to recover against a subsequent purchaser with notice of nonpayment therefor. **TexCivA** 10**SW(2d)**1023.

1178–4 204**Cal** 337, 268**P**332.

1179–14 130 **Okl** 298, 267**P**462. But see 29**F(2d)**361. [b] **First lien is acquired by company furnishing pipe, casing, tanks, etc., to owners** of oil and gas lease and taking necessary steps to fix materialman's lien, under statute. 118**Tex** 498, 18**SW(2d)**1052 (lien effective when goods delivered).

1179–20 72**CalA**148, 236**P**970; 128 **Okl** 201, 264**P**591. But see 134 **Okl** 40, 272**P** 879.

1179–22½–New. Under some statutes a lessor is entitled to priority in the proceeds of a sale of improvements by lessee, as against a mechanic's lien, for royalties due under license contract. 221 **MoA**17, 297**SW**470.

1179–22⅓–New. Where the relation established by one contracting to complete the drilling of an oil well for the owners is that of a partner, his lien, under statute, is inferior to that of a company furnishing pipe and casing on material supplied or not supplied by it. 118**Tex**498, 18**SW(2d)**1052.

1179–25½–New. The lien of a miner on land for work in opening a mine is superior to a mortgage given within lienable period on leasehold interest to one who had full knowledge of work already performed. 202 **Iowa**646, 210 **NW**793.

1179–25⅓–New. Statements of the owner or agent to the purchaser that there were no liens cannot bind materialman's lien claimant of whom no inquiry was made. 175**Ark**741, 300**SW**398.

1179–27 128 **Okl** 201, 264**P**591. [c] See also 123**Kan**735, 257**P**229.

1179–28 33**Ariz**451, 265**P**606; 123**Kan** 735, 257**P**229; 128 **Okl** 201, 264**P**591; 39 **OklACR**175. [d] **Chattel mortgage given before commencement of labor** but not filed till after first labor performed is not entitled to priority. 118 **Okl** 228, 246**P**1090.

1180–30½–New. Purchasers of an oil lease within the period for filing a lien held not innocent purchasers. 175**Ark** 741, 300**SW**398.

1180–32½–New. Attachments on an oil lease and wells are inferior to liens for supplies previously furnished, although not filed until after levy of the attachments. 218**Ky**248, 291**SW**49.

1180–33 [d] **Liens of oil and gas lease for labor and material furnished in erection of single drilling rig** are to be paid in proportion to amounts due when proceeds of sale on foreclosure are insufficient to pay all claims. 125**Kan**738, 264**P**144.

1180–34 174**Ark**1040, 298**SW**487.

1180–36 173**Ark**837, 293**SW**738; 218**Ky** 248, 291**SW**49.

1180–36½–New. The court may, in a proper case, order that land and improvements be sold and the proceeds prorated between a mechanic's lienholder and other lienholders. **TexCivA** 8 **SW(2d)**726.

1180–36⅓–New. In Ontario, where representative capacity in which defendant is sued is set forth in statement of claim, failure to show such capacity in title of cause is not a fatal defect. **Ont** [1929] 3**DomLR**709.

1180–40 32**F(2d)**233.

1180–41½–New. A person furnishing material to a contractor building a derrick on an oil lease cannot maintain suit against the owner after the expiration of the statutory time, where no affidavit for a lien was filed by him or the contractor. 174**Ark**90, 294**SW**361.

1180–43 175**Ark**741, 300**SW**398.

1180–46 173**Ark**837, 293**SW**738.

1180–48½–New. The original contractor is a necessary party to an action by a materialman to establish a lien against an oil lease. 174**Ark**90, 294**SW**361.

1180–48⅓–New. In an action by laborers and materialmen against the owner of a leasehold, the contractor is a necessary party where agreements were made with him rather than with the owner. 174**Ark**1040, 298**SW**487.

1180–48¼–New. As to the mortgagee of an Alaska mining claim, a lien is null and void for failure to make such mortgagee a party to an action for lien foreclosure until after the statutory period has expired. 32**F(2d)**233.

1180–48⅕–New. Rights in an oil lease of one not made a party to foreclosure proceeding cannot be jeopardized by any action taken under foreclosure judgment. 84**Mont**178, 274**P**834.

1181–63 [b] 147**Wash**86, 265**P**167.

1182–77½–New. An answer expressly alleging that defendant is the owner of the leasehold is not a disclaimer of interest in and to oil wells, casing, fixtures, appliances, and other equipment used in operating the premises for oil and gas purposes, which claimant seeks to impress with a lien for labor and materials in drilling an oil well. 84 **Mont**263, 275**P**273.

1182–82½–New. It is not inconsistent for lessor to take the position that disclaimer provisions of lien laws did not apply to mining claims and also that they were complied with. 33**NM**78, 260 **P**1086.

1183–89½–New. The burden of proof is on claimant to show the value of property converted by a purchaser at foreclosure sale. 178**Ark**643, 12**SW(2d)**6.

1183–97 [a] (11) To warrant inference that well driller elected to decide that wells contained gas in paying quantities so as to render him liable to landowner for stipulated sum. **TexCivA** 283**SW** 608. (12) To show that labor was performed on mine on which lien was claimed. 55**ND**284, 213**NW**23. (13) To show materials became part of property. 175 **Ark**741, 300**SW**398. (14) To make issue for jury on defendant's motion for nonsuit. 204**Cal** 337, 268**P**332.

1184–5 221**Ky**630, 299**SW**550.

1184–19½–New. Under some statutes a personal judgment against the owner cannot be rendered in an action by laborers and materialmen where notice of intention to bring the action was not given. 174**Ark**1040, 298**SW**487.

1184–21 72**CalA**148, 236**P**970.

1185–22 See also 7**Alaska**361.

1185–23½–New. Entry of judgment against corporate transferee of property after commencement of action to which it was not made party is error. 202 **Iowa**646, 210**NW**793.

1185–25 [b] **Amount.**–128 **Okl** 201, 264 **P**591.

1186–44 228**Ky**281, 14**SW(2d)**1063. [c] **Relationship of master and servant** is not inconsistent with duty owing by master as mine owner to employee as invitee in some particular part of owner's premises. **TexCivA** 10**SW(2d)**441.

1186–45½–New. However, the operator of machinery to drill oil wells, contractually bound to inspect the same for defects therein, assumes the risk of defects. 26**F(2d)**442.

1187–57 [d] **Failure to plug oil well.**–141 **Okl** 175, 284**P**297(2dcase).

1187–61 138 **Okl** 147, 280**P**622 (mining company held not liable for death of inspector leaving mine by way of mantrip where manway was available).

1187–63 217**Ky**572, 290**SW**344.

1187–69½–New. Burden of proof. In an action by a miner for injury sustained as an invitee the mining company has the burden of proving that the miner was contributorily negligent. **TexCivA** 10**SW(2d)**441.

1187–71½–New. Evidence that a mine foreman told plaintiff's brother-in-law to tell plaintiff to come to the mine is admissible on the issue whether plaintiff was an invitee, at the time he was injured there. 228**Ky**281, 14**SW(2d)** 1063.

1187–72 [a] (2) To take case to jury and uphold verdict for plaintiff. 228**Ky** 281, 14**SW(2d)**1063.

1188–75 234 **IllA**173; 228**Ky**281, 14**SW** **(2d)**1063.

1188–76 **TexCivA** 10**SW(2d)**441.

1188–76½–New. Whether one, injured in a collision while riding to the entrance of a mine, was an invitee is for the jury. 228**Ky**281, 14**SW(2d)**1063.

1188–78½–New. The amount necessary

to compensate for physical discomforts suffered by reason of eviction from a residence must be left to the sound judgment, experience, and discretion of the court, in view of the facts of the particular case. 205**Cal** 328, 270**P**952, 60 **ALR**475.

1188–87 205**Cal** 328, 270**P**952, 60**ALR** 475.

1189–91 81**Mont**527, 264**P**122.

1189–6 219**Ky**783, 294**SW**478; 104**WVa** 368, 140**SE**57, 56**ALR**303.

1189–7 219**Ky**783, 294**SW**478; 148**Va** 437, 139**SE**308, 55**ALR**1376; 104**WVa** 368, 140**SE**57, 56**ALR**303.

1190–11 218**Ala**582, 119**S**606.

1190–13 289**Pa**492, 137**A**672. [d] **Mine owner extending operations over line** does not excuse adjoining owner for running water into mine several years later. 289**Pa**492, 137**A**672.

1190–19½–New. Recovery cannot be predicated on lessee's negligence in locating a salt water pit at a place designated by lessor. **TexCivA** 289**SW**152.

1191–26½–New. Injury from storage of salt water, not caused by defendant's negligence, is damnum absque injuria. **TexCivA** 289**SW**152.

1191–28 218**Ala**582, 119**S**606.

1191–31½–New. In an action for damages for flooding coal mines, a verdict of twenty-five thousand dollars for plaintiff, although based on conflicting evidence, is erroneous, where it appears that plaintiff could have prevented injury at low cost. 218**Ala**582, 119**S**606.

1191–32 218**Ala**582, 119**S**606 (defendant sued for flooding of coal mine during rains, is not entitled to affirmative charge for plaintiff's failure to prove date of rains where he fails to call court's attention to such omission); **Tex CivA** 289**SW**152.

1191–33 218**Ala**582, 119**S**606. [a] **Whether damage was permanent** held for jury. **TexCivA** 289**SW**152. [b] **Question of proximate cause** held for jury. **TexCivA** 289**SW**152.

1191–35 [c] **Damages held not recoverable,** for loss of market value of oil and gas lease by temporarily submerging land without permanent injury. **Tex CommnA** 292**SW**200.

1191–38½–New. Damages for temporary injury held not recoverable under petition claiming permanent injury. **TexCivA** 289**SW**152.

1191–41½–New. Owner of land cannot recover where it is clear that the greater part of damage to his land was done by washings from other and larger coal mines nearer than defendant's. 213**Ala** 630, 105**S**896.

1193–65½–New. The extent to which the use of surface by a mineral owner was necessary is for the jury. 206 **Iowa** 166, 220**NW**123.

1193–67 206 **Iowa**166, 220**NW**123.

1193–75 249 **IllA**551; **Pa** 144**A**730.

1193–76 **Pa** 144**A**730.

1193–78½–New. Where the right to lateral support has been released or surrendered, the obligation to furnish it is terminated unless such burden is thereafter voluntarily assumed. 295**Pa** 40, 144**A**740.

1193–78½–New. Waiver of the common-law right to lateral support of land may be implied from grant of release of damages. 295**Pa**40, 144**A**740.

1193–78¼–New. Person asserting waiver of a common-law right to lateral support of land has the burden of proving it. 295**Pa**40, 144**A**740.

1194–79 219**Ky**783, 294**SW**478, 479 [citCJ].

1194–80 219**Ky**783, 294**SW**478.

1195–98 225**Ky**365, 8**SW(2d)**626; 295 **Pa**40, 144**A**740; 148**Va**437, 139**SE**308, 312, 55**ALR**1376 [citCyc]; 104**WVa**368, 140**SE**57, 59 [citCJ], 56**ALR**303. [f] 148**Va**437, 139**SE**308, 55**ALR**1376.

1196–2 218**Ala**369, 118**S**749(2dcase); 219**Ky**783, 294**SW**478; 104**WVa**368, 140 **SE**57, 59 [citCJ], 56**ALR**303.

1196–3 215**Ala**170, 110**S**151 [citCJ]; 219 **Ky**783, 294**SW**478.

1196–7 148**Va**437, 139**SE**308, 312, 55 **ALR**1376 [citCyc].

1196–9 148**Va**437, 139**SE**308, 312, 55 **ALR**1376 [citCyc]; 104**WVa**368, 140**SE** 57, 59 [citCJ], 56**ALR**303.

1197–10 34 **OhA**38, 170**NE**379.

1197–11½–New. A company, operating a lower mine, making no timely complaint of blasting operations in the upper mine, held not entitled to damages therefrom. 217**Ky**141, 289**SW**211.

1197–11½–New. The rule of absolute support applies only to the surface in its natural state. 104**WVa**368, 140**SE**57, 56 **ALR**303.

1197–13 218**Ala**369, 118**S**749(2dcase).

1197–14 215**Ala**170, 110**S**151. [a] 218 **Ala**369, 118**S**749(2dcase).

1197–15 See also 215**Ala**170, 110**S**151.

1197–15½–New. Both the lessor and the lessee may, under some circumstances, be liable for subsidence. 218**Ala**369, 118 **S**749(2dcase).

1197–18 34 **OhA**38, 170**NE**379.

1197–23 34 **OhA**38, 170**NE**379; 295**Pa** 40, 144**A**740. [a] **Verbal understanding** is sufficient when established by proper proofs. 295**Pa**40, 144**A**740.

1200–58 [a] **In Colorado.**–86**Colo** 418, 282**P**260.

1200–68½–New. Additional bond may be required where bond given becomes insufficient because of changed conditions. 86**Colo** 418, 282**P**260.

1200–68½–New. Where sufficient bond is tendered court may, in reasonable exercise of discretion, permit further mining operations. 86**Colo** 418, 282**P** 260.

1202–6½–New. Complaint failing to allege breach of some duty in permitting lessee to mine under plaintiff's land has been held demurrable, in a suit against lessor for injuries by cave-in. 215**Ala**170, 110**S**151.

1202–6½–New. Count held not subject to defendant's grounds of demurrer. 215**Ala**170, 110**S**151.

1203–16 104**WVa**368, 140**SE**57, 58 [cit CJ], 56**ALR**303.

1203–19½–New. A mine owner has the burden to show underground conditions where there is evidence of removal of any subsequent support without other proof. 17**F(2d)**981.

1203–36 [a] (6) Other evidence held sufficient. 232 **IllA**169; 217**Ky**141, 289 **SW**211.

1204–54 232 **IllA**169.

1205–61½–New. Careless mining. Petition for damages held sufficient. 217 **Ky**292, 289**SW**247.

1205–61½–New. Evidence held sufficient to show that loss occurred during the time defendant's predecessors operated the mine. 217**Ky**292, 289**SW**247.

1205–61¼–New. Evidence held sufficient to take to jury the question of the amount lost in specific area. 217**Ky** 292, 289**SW**247.

1205–61½–New. Verdict for damages held excessive. 217**Ky**292, 289**SW**247.

1205–66 4**LaA**20. [a] **Liability irrespective of negligence.**–122 **Okl** 253, 254**P**20.

1205–68 [a] **Damage to farm caused by release of salt water from abandoned well.**–126**Kan**699, 271**P**319.

1205–68½–New. The prohibition of the Oklahoma statute against allowing salt water to flow over the surface of land was enacted for the benefit of all persons who may suffer injury by its violation. 124 **Okl** 71, 254**P**14 (cattle owners included).

1205–68½–New. Under such statute negligence does not constitute an element of the offense of allowing salt water to flow over the surface of the land. 124 **Okl** 71, 254**P**14.

1205–68¼–New. Under such statute it is negligence per se for one engaged in oil mining operations to permit salt water to escape and flow over the surface of land and into a stream used by another for watering stock. 124 **Okl** 71, 254**P**14.

1205–70 [a] (2) Driller assumes obligation to use at least ordinary care in selecting amount of nitroglycerin to be used. **TexCommnA** 298**SW**554. (3) Owner has no absolute right to decide on amount of formation to be shattered at one charge of explosive. **TexCommnA** 298**SW**554. (4) Due care in selecting quantity of nitroglycerin to be used involves good faith observance of all relevant facts including what was known and what was consciously unknown about qualities of explosive and area in which its force was to be exerted. **Tex CommnA** 298**SW**554. (5) Supposed custom making size of nitroglycerin shot dependent on thickness of formation which owner desires to exploit is not defense to action for injuries to well on adjoining land. **TexCommnA** 298**SW** 554.

1206–80½–New. One drilling an oil well owes a duty to avoid altogether physical invasion of an adjoining tract or area of lateral support. **TexCommnA** 298**SW**554.

1206–80½–New. Such driller is bound to avoid disturbance of possession and enjoyment of an adjoining tract except so far as is reasonably essential to proprietorship by prudent choice of implements. **TexCommnA** 298**SW**554.

1207–99 [a] (2) Complaint in action by owner of patented land against lessee under oil and gas lease from federal government alleging damage to land from unnecessary construction of reservoir thereon, from which polluted water escaped destroying grass and damaging water supply, states cause of action. 81 **Mont**527, 264**P**122. [b] **Laches.**–214**Ky** 838, 284**SW**95. [c] **Action by holder of right to explore** for oil and gas against legal owners for submerging land is not "fact." **TexCommnA** 294**SW**197. [d] **Burden of proof.**–81**Mont**527, 264**P**122.

1207–1½–New. Plaintiff suing for injuries to crops from the overflow of crude oil has the burden of showing by a preponderance of competent testimony, not only that his crops were damaged, but also the extent of such damage. **Tex CivA** 8**SW(2d)**694.

1207–5 [a] (2) **TexCommnA** 298**SW**554. (5) To warrant finding that water causing damage to plaintiff's wells came from abandoned wells. 214**Ky**838, 284**SW**95. (6) To warrant finding of negligence in misreading log of oil well or in ignoring data therein when firing shot of nitroglycerin. **TexCommnA** 298**SW**554. (7) To warrant finding that explosion of nitroglycerin opened passageway in direction of plaintiff's well. **Tex CommnA** 298**SW**554. (8) To show that nitroglycerin shot proximately caused damage in well on adjoining tract. **Tex CommnA** 298**SW**554. (9) To show that quantity of nitroglycerin used in shooting oil well was not ordinary and customary. **TexCommnA** 298**SW**554.

1207–5½–New. Evidence of a greater run of oil from plaintiff's well after alleged damage by an explosion of nitroglycerin in defendant's well is not conclusive against plaintiff where a large part of the oil was produced and stored before the explosion. **TexCommnA** 298 **SW**554.

1207–9 **TexCommnA** 298**SW**554.

1207–10½–New. Use of a large quantity of nitroglycerin in shooting a well is sometimes negligence as matter of law. **TexCommnA** 298**SW**554.

1207–14 [a] **Destruction of grass** is damage to land within allegation of damage by reason of destruction of surface of land. 81**Mont**527, 264**P**122.

1207–15 See also 205**Cal** 328, 270**P**952, 60**ALR**475; 225**Ky**365, 8**SW(2d)**626.

1207–16½–New. Measure of damages, where large quantities of salt water, crude oil, and bottom sediment escape from oil and gas wells into a fresh water creek and are deposited therefrom on farming lands. 119 **Okl** 285, 250**P**93.

1207–16½–New. Particular awards which have been held not excessive are listed in the footnote. [a] **Held not excessive.**–$2,500. 205**Cal** 328, 270**P**952, 60 **ALR**475 (for eviction from residence covered with mud and oil).

MINISTERIAL

1208–46 103**Conn**607, 132**A**30.

1208–48 129**Misc**82, 220**NYS**696.

1209–80 20**F(2d)**233; 103**Conn**607, 132 **A**30; 192**NC**395, 135**SE**151. [e] (16) Addition of omitted property to tax list by board of relief. 103**Conn**607, 132 **A**30.

1210–86 220**AppDiv**212, 221**NYS**323.

MISBEHAVIOR

1214–87½–New. "professional misbehavior." 26 **OhA**478, 160**NE**93.

MISCARRIAGE

1214-91 [a] (1) **CalA** 284P1086.

MISCEGENATION

1215-1 [b] **Other definitions.**–23AlaA 555, 129S306.
1216-10 22AlaA469, 116S893. [b] But see 22AlaA469, 116S893.
1216-19 [a] **Validity of marriage.**–23 AlaA365, 125S690.
1217-37 23AlaA555, 129S306 (both equally guilty or equally innocent).
1218-69 22AlaA469, 116S893.
1218-83 22AlaA469, 116S893.
1218-88 22AlaA469, 116S893.
1218-93½-New. The state may make a project of defendant's father and uncle on the issue of the degree in which defendant stood to a negro of whole blood. 22AlaA469, 116S893.
1218-96 22AlaA469, 116S893.
1218-98½-New. A description of defendant's grandfather, whether white or colored, has been held proper. 22AlaA 469, 116S893.
1219-13 [b] (2) Other instances. 23 AlaA555, 129S306.
1219-15 22AlaA469, 116S893.
1219-16 178Ark1200, 13SW(2d)24.
1220-46 [a] **Instructions held not erroneous.**–23AlaA365, 125S690.

MISCONDUCT

1221-29 82Mont264, 266P640.

MISFEASANCE

1222-58 28Hawaii733; 8PaDist&Co 730.
1222-59 18GaA544, 90SE94; 116 Oh 586, 157NE325, 53ALR36.
1223-62 82Mont264, 266P640, 643 [cit CJ].
1223-66 8PaDist&Co 730.

MISPLEADING

1224-3½-New. Pleading incorrectly, or omitting anything in pleading which is essential to the support or defense of an action. 315Mo 166, 285SW729.

MISPRISION

1225-7 146Wash114, 261P775.

MISSION

1225-29 [a] **Mission settlements** were purely ecclesiastical foundations made or to be made in Alta, California, by monks or padres of Franciscan Order. **Cal** 287P475.

MISTAKE

1227-55½-New. "Mistake" is doing an act under an erroneous connection, which, but for such connection, would not have been done. 99NJEq213, 132A 511.
1228-80½-New. As used in a statute, it means "honest mistake." 105Conn366, 135A391.
1228-83 194Wis322, 216NW507.
1228-85 194Wis322, 216NW507.
1228-88 137Misc136, 241NYS490 [cit CJ].

MISTRIAL

1229-3 118 **Okl** 101, 246P832 [quot Cyc].
1229-4 118 **Okl** 101, 246P832 [quot Cyc]. [d] 55ND194, 212NW857.
1229-4½-New. A trial wherein a proper decision would have completed the trial. 78CalA561, 248P990.

MITTIMUS

1230-25 16F(2d)566.
1230-27 16F(2d)566.

MIX

1231-46 115Nebr306, 212NW535.

MIXTURE

1231-77 6F(2d)643.
1231-78 6F(2d)643.
1231-79½-New. In medicine, a kind of liquid medicine made up of many ingredients. 6F(2d)643 [quot Webster D.].
1231-79⅓-New. In chemistry, a composition of several ingredients in which they remain unaltered in their properties although thoroughly commingled. 6F(2d)643 [quot Webster D.].

MOB

1231-82 123Kan362, 255P57, 58 [quot CJ].
1231-84 123Kan362, 255P57, 58 [quot CJ].
1231-85 123Kan362, 255P57, 58 [quot CJ].
1231-86 123Kan362, 255P57, 58 [quot CJ].
1232-89 123Kan362, 255P57, 58 [quot CJ].
1232-97 123Kan362, 255P57, 58 [quot CJ].
1232-98 123Kan362, 255P57, 58 [quot CJ].
1232-1 123Kan362, 255P57, 58 [quot CJ].
1232-3 123Kan362, 255P57, 58 [quot CJ].
1232-4 123Kan362, 255P57, 58 [quot CJ].
1232-5 123Kan362, 255P57, 58 [quot CJ].

MODERN CIVIL LAW

1255-6 [a] **Civil code of Spain and Porto Rico** is divided into four books relating to persons, property, and ownership, methods of acquiring ownership, and obligations and contracts. 12Porto RicoFed39.
1262-13 49Philippine509.
1266-79 [a] (9) 46Philippine753. (12) See also 48Philippine288; 48Philippine 406. (15) Other cases construing statute. 48Philippine759. (16) In default of conjugal property, spouses are jointly liable for obligations contracted during marriage, unless they expressly bound themselves solidarily. 46Philippine370.
1280-61 35PortoRico 642.
1281-83 [c] **Proof of acknowledgment.**–35PortoRico 642. [d] **In record of birth.**–35PortoRico 811 (acts insufficient to show legal acknowledgment).
1282-97 See also 33PortoRico 31.
1283-11 35PortoRico 642.
1284-34 32PortoRico 860.
1284-39 32PortoRico 860.
1285-41 [a] **In Porto Rico.**–32Porto Rico 860 (Civ. Code § 211).
1285-47 32PortoRico 860 (Civ. Code § 209). [a] **Death of adopting parent before approval** does not deprive court of jurisdiction to grant it. 32PortoRico 860.
1286-68 See also 32PortoRico 860.
1292-54 [a] (1) 158La745, 104S701 (undertutor). (8) Undertutor may not defend partition suit when tutrix and minor are both absentees, curator ad hoc must be appointed. 158La745, 104S 701.
1293-63 [a] (4) In partition proceedings where tutrix and minor are both absentees, despite fact that undertutor is present. 158La745, 104S701.
1304-27 [d] **In Porto Rico.**–33Porto Rico 31.
1304-28 [a] **In Philippines.**–45Philippine142 (Code of Com. arts 122(2), 146, 148).
1307-50 33PortoRico 31.
1307-51 [a] **Administration of partnership property** under attachment statute in Porto Rico see 33PortoRico 31.
1309-81 [b] **In Porto Rico.**–33Porto Rico 31.
1310-98 [a] 7LaA37.
1312-12½-New. Mere acceptance of a number of mortgages aggregating more than indebtedness secured does not of necessity render each or all of such individual mortgages null and void. 35 PortoRico 83.
1317-50 45Philippine107.
1318-54 45Philippine107. [b] (2) Under Civ. Code arts. 1137, 1138, where there is concurrence of two or more simple debtors, each is liable only for his aliquot part of obligation. 45Philippine107. (3) Rule of pro rata obligation applied to cosureties when liability in solidum is not expressly stipulated. 45 Philippine107 [quot Civ. Code art 1837].
1318-55 [c] **In Philippines.**–45Philippine107.
1319-67 [a] **Consideration or cause presumed to exist** in all contracts. 44 Philippine326.
1320-76 44Philippine98. "Deprivation of an opportunity for making money, which might have proved beneficial or might have been ruinous, is of too uncertain character to be weighed in the even balances of the law." 44Philippine98.
1321-85 [b] (2) Claim for damages for breach of contract to sell realty, consisting in expenses in examining title and money expended for dirt filling, is not subject to one-year prescription as claim in tort, but demand flows from relation of negotiorum gestor. 11LaA 594, 123S366.
1323-97 See also 46Philippine327.
1327-12 [b] But see 158La853, 104S 740. [f] But see 158La853, 104S740. [g] But see 158La853, 104S740.
1328-15 [m] (6) Error not to allow compensation for incapacity to continue profession as marine engineer after loss of foot. 44Philippine165. [o] **Profits lost,** element of damage under Civ. Code art 1902. 44Philippine165.
1356-30 [c] **Power of sale without judicial intervention** held valid. 45 Philippine178. [d] **In Porto Rico.**–32 PortoRico 781.
1356-31 [c] **Stipulation in contract for vesting of title of property pledged in pledgee** in event of nonpayment held void. 45Philippine286. [d] **Foreclosure in Porto Rico** under Civ. Code § 1773. 32PortoRico 781.
1357-35 [g] **Condominiums** may be mortgaged in Porto Rico under Civ. Code § 406, as amended by Act (1916) No. 15, but mortgage affects only share which may be allotted to mortgagor upon partition. 33PortoRico 144.
1360-41 [c] **In Philippines.**–45Philippine178.
1362-56 46Philippine162; 51Philippine339.
1363-65½-New. The creditor is entitled to be reimbursed for expenses for machinery and other improvements and land tax paid by him. 51Philippine 894.
1364-67 33PortoRico 176; 44Philippine94 (contract held not loan secured by mortgage). [d] (3) Contract providing for sale with right to repurchase and containing no provision for application of fruits to interest and principal of credit is not antichresis. 51Philippine339. [j] (4) 50Philippine558. [l] **In Philippines.**–45Philippine178, 185. [m] **In Porto Rico.**–33PortoRico 176. [n] **Instruments held to be pacto de retro.**–50Philippine558.
1366-69 [a] 50Philippine558. [g] **Intent.**–50Philippine558.
1367-75 [a] (6) Under stipulation giving right to repurchase till vendor or his heirs has means, right to repurchase must be exercised within ten years. 51 Philippine339. (7) Attempted modification of contract providing for repurchase within ten years so as to provide that right shall not be exercised till after fourteen years is invalid. 51Philippine 343. (8) Nullity of stipulation for repurchase on account of period fixed for exercise does not affect validity of sale. 51Philippine339.
1367-77 [a] (1) 44Philippine1. (4) Stipulation for repurchase when vendor has established certain business does not express period and right must be exercised within four years. 51Philippine 367.
1368-85 [a] **In Philippines.**–44Philippine1.
1368-86 45Philippine178. [b] **Vesting of title in vendee may be accelerated** by failure of seller to comply with some collateral stipulation, as for payment of rent by seller during period allowed for repurchase. 45Philippine178. [c] **Action to annul prescribes in four years,** counting from date of expiration of grantor's right to repurchase, and not from time grantee recorded sale in registry. 33PortoRico 176.
1376-24 32PortoRico 836.
1377-27 [a] 32PortoRico 836 [quot Manresa Spanish Civ. Code pp 133, 134]. [h] **"The language of the law is not complied with** if the symbolic formula of the execution of the deed does not respond to the positive fact that the vendor is in actual possession of the property sold." 32PortoRico 836, 839.
1381-49 33PortoRico 94. [f] (4) Provision is no protection against fore-

closure of mortgage for purchase money. 33PortoRico 94.
1386-73 32PortoRico 836 (remedy available to vendee never put in possession by vendor notwithstanding vendee's suit against occupant to gain possession). [d] **Deficiency in quantity** as ground for rescission. 45Philippine 296.
1428-36 [b] 34PortoRico 226 (redemption).
1434-16 34PortoRico 170.
1434-19 34PortoRico 767.
1434-21 34PortoRico 767.
1438-62 44Philippine186. [a] **Transmission is gratuitous or by gratuitous title** when recipient does not give anything in return. 44Philippine186.
1438-63 46Philippine213.
1439-73 [d] **Ratification** by public document executed by sole heir of donor based upon desire to give effect to donation by father held to operate as quitclaim deed. 46Philippine213.
1444-36 [e] **Opening by former owner of both properties** constitutes apparent signs of servitude under statute. 35 PortoRico 793.
1445-38 34PortoRico 74.
1446-46 [b] **In Philippines.**-51Philippine15.
1447-59 35PortoRico 793 (servitude held not to have prescribed).
1447-60 [b] (2) In Philippines first-born possessor of mayorazgo, given possession and enjoyment of property subject to ownership of descendants of founder in indefinite succession, but forbidden to alienate or encumber property, is mere usufructuary. 50Philippine888.
1459-75 [b] **In Porto Rico.**-32Porto Rico 793.
1466-46 **Whether adopted child is included** depends on intention of testator ascertained from circumstances when executed. 111Conn683, 151A265.
1466-48 [e] **In Philippines.**-45Philippine216, 220.
1469-97 [c] **Reservable estate** under civil code. 44Philippine186.
1469-99 46Philippine317.
1469-1 44Philippine186.
1469-2 44Philippine186.
1470-16 [d] 35PortoRico 811.
1470-16½-New. Under Philippine code, an acknowledged natural child is entitled only to one half the portion pertaining to each legitimate child not bettered. 46Philippine557.
1477-19½-New. In Philippines heirs may intervene in action involving part of hereditas jacens when they believe that acts of judicial administrator are prejudicial to their interests. 51Philippine396.
1479-57 See also 46Philippine317.
1480-68½-New. In intestate succession after declaration of heirship, capacity of administrator is limited to acts of mere administration. 35PortoRico 303.
1480-68⅓-New. After declaration of heirship administrator is without capacity to bring action of revendication in name of heirs. 35PortoRico 303.
1481-95 See also 44Philippine76.
1482-15 34PortoRico 733.

MODIFY

1487-9 13F(2d)527.
1487-12 13F(2d)527.

MONEY

1490-98 128Misc123, 217NYS833.
1490-3 128Misc123, 217NYS833.
1491-31 224Ky136, 58SW(2d)910, 911 [citCyc].
1492-59 75CalA421, 243P39.
1492-63 205 Iowa114, 213NW414.
1493-18 [e] **Real estate mortgage foreclosure proceeding** is in part other than "money decree." 93Fla269, 111S626.

MONEY LENT

41 C. J.—2-16 Mass 171NE724 (when loan does not exist). [f] **There can be no loan** where money is not to be paid back in all events, but only on certain conditions. 220MoA791, 277SW58.
3-21 290Pa67, 138A85 [citCJ].
3-22 208 Iowa939, 226NW99, 64ALR 1292 (facts not warranting implied request); 290Pa67, 138A85, 87 [citCJ].
3-22½-New. Where money is advanced on a written promise to repay it, the promisee at his pleasure may sue the promisor on the original promise and use the writing as evidence thereof, or he may sue on the writing itself. 84Colo 234, 269P19.
3-41 37Wyo 50, 259P181, 183 [quotCJ].
3-42 37Wyo 50, 259P181, 183 [quotCJ].
3-43 37Wyo 50, 259P181, 183 [quotCJ]. [a] **Note and guaranty of payment should be delivered up** before entry of judgment at least to avoid danger of suit by third party thereon. 37Wyo 50, 259P181.
3-44 37Wyo 50, 259P181, 183 [quotCJ].
3-45 37Wyo 50, 259P181, 183 [quotCJ].
4-77 174Ark412, 295SW375.
5-97½-New. Complaint held to state cause of action as against contention that action was on note given as evidence of loan. IndA 156NE161.
5-9 86PaSuper605.
6-22 Mo 23SW(2d)1053.
6-22½-New. ; or to negative the making or existence of the loan; 84Colo 234, 269P19.
6-27 208 Iowa939, 226NW99, 64ALR 1292 (previous request); Iowa 229NW 237.
6-33 170Ark827, 281SW388; 126Misc 342, 215NYS170.
7-40 217Ky716, 290SW718, 719 [quot CJ entire section].
7-55 261Mass35, 158NE273.
8-60 [d] **Articles claimed to have been bought at plaintiff's request** not admitted in action for money claimed to have been loaned to pay taxes. NJSup 135A499.
8-68 [a] 78CalA64, 247P1114; IndA 156NE161; 220Ky713, 295SW1066; 172 Minn365, 215NW514. [b] (1) 51Nev279, 274P193. (2) To support counterclaims. 172Minn365, 215NW514.
9-92 170Ark827, 281SW388; LaA 129S 177(2dcase); 260Mass41, 156NE681; 220 MoA791, 277SW58.
9-94 220MoA791, 277SW58.
9-94½-New. A request for a directed verdict on each of three notes on the ground that there is no evidence legally entitling plaintiff to recover thereon has been properly refused where the action is not on the notes, but for money advanced. 150Md571, 133A470 (failure to give notice of dishonor is not a complete defense in view of the evidence).
10-1 150Md571, 133A470.

MONEY PAID

12-17 MoA 283SW714.
12-20 215Ala474, 111S7. [a] **When request implied.**-82CalA116, 255P257.
12-21 [a] **Privity of contract** is not necessary. TexCivA 32SW(2d)660.
13-25 8LaA742; 128Me240, 147A151; 9PaDist&Co 251.
13-27 128Me240, 147A151; 184Mont 549, 276P948; 118Nebr425, 225NW32; 131Misc891, 228NYS508; 299Pa91, 149A 110; Sask [1929] 1DomLR48. But see 128Me240, 147A151.
13-31 128Me240, 147A151.
13-32½-New. In an action to recover money paid without request, the payment must have been made by the payor with the expectation of being recompensed therefor. 128Me240, 147A151.
13-32½-New. In case of individuals, recovery may be had for money paid under a mistake of fact, but not under a mistake of law, but, in case of public officials, payments of public money may be recovered when made under a mistake of law. 128Me240, 147A151.
13-32¼-New. Where a municipal corporation pays money to discharge a debt of an individual on a mistake of law, it may recover in an action for money paid. 128Me240, 147A151.
13-32⅓-New. In an action of assumpsit for money paid, the payor must not have made the payment officiously. 128Me 240, 147A151.
13-37 82CalA116, 255P257.
13-38 82CalA116, 255P257, 259 [quot CJ]; 129Misc466, 222NYS701. [a] **Request to pay and promise to repay** are implied. 82CalA116, 255P257.
13-48½-New. Money paid under legal liability imposed because of mistake of fact may be recovered from the party subsequently adjudged to be solely liable. 129Misc466, 222NYS701.
14-62 See also 161La789, 109S492.
15-79½-New. Indebtedness, incurred by one party voluntarily for the benefit of another, does not create a debtor-creditor relationship. 32F(2d)825.
15-79½-New. **Money, voluntarily paid** in ignorance of the law making another liable, cannot be recovered from such other. 9PaDist&Co 41.
15-80 82CalA116, 255P257; 99Fla179, 126S362; 128Me240, 147A151; RI 152 A257; TexCivA 32SW(2d)660.
16-97 248 IllA498.
17-11 MoA 293SW476, 479 [citCJ].
18-33 127Kan151, 272P178.
18-54½-New. One of several beneficiaries of policy on paying premium to keep it alive may compel contribution on death of insured. 299Pa452, 149A 705.
19-64½-New. Assumpsit for money paid is maintainable when plaintiff paid money to third person at express or implied request of defendant. 99Fla179, 126S362.
19-65 128Me240, 147A151; 137SC337, 135SE357. See also 93CalA97, 269P 468.
20-91 128Me240, 147A151; MoA 283 SW714. [a] **Obligation is not contractual** or based on implied contract, but is based on implication of law. 128Me 240, 147A151.
20-95½-New. Actions on money counts should be encouraged when law affords no other remedy and equity would compel defendant to repay. 99Fla179, 126 S362.
21-18½-New. That plaintiff subscribed for stock and accepted certificate in own name and was director does not preclude recovery from person for whose benefit he purchased. Utah 287 P320(2dcase).
22-28 MoA 283SW714; Utah 287P320 (2dcase) (complaint construed as one for money paid and not one for money had and received).
22-38 [a] **Petition held sufficient.**-MoA 283SW714.
22-45 **Erratum.**-Strike out "16 Iowa 41, 85 AmD 502," and insert "25 Minn. 337."
23-60½-New. Proof of payment to third person instead of to defendant as alleged is not material variance. Utah 287P320(2dcase).
23-74 Iowa 224NW49; 126Misc342, 215 NYS170.
23-77 82CalA116, 255P257; RI 152A 257.
24-96 13F(2d)747; 126Me607, 139A 499. [a] (4) Evidence held sufficient to establish that payment by city of premium on contractor's bond was voluntary. 128Me240, 147A151.
24-97 [a] **Evidence held insufficient** to sustain defense of consideration or accord and satisfaction. 128Me240, 147A 151.
24-4½-New. or, on the other hand, sufficient to establish payment for use or benefit of defendant, and at defendant's instance and request. 13F(2d) 747.
24-12½-New. Whether a stockholder's widow was induced by misrepresentations to pay corporate debts is a jury question in her suit to recover such payments. 153SC73, 150SE351.
25-14 [b] (2) In action for money paid, evidence failing to show any authorization to pay or promise, express or implied, to repay held to require directed verdict for defendant. 214Ala384, 108S53. [c] **Instructions held proper.**-Iowa 224NW49 (under pleading and proof).
25-21½-New. **Finding** held sufficient to authorize recovery. Utah 287P320(2d case).
25-23 118Nebr792, 226NW444.

MONEY RECEIVED

28-4 97Fla848, 122S513; 48RI 296, 137 A776, 53ALR365.
28-5 25F(2d)684; CalA 292P189; 80 CalA122, 251P657; 333 Ill 588, 165NE 199; 127Me304, 143A100; 128Me412, 148A143; Me 150A378; Me 150A382; 239Mich569, 215NW11; 317Mo 951, 298 SW39, 45 [citCJ]; MoA 108SW(2d)971; MoA 29SW(2d)230; 251NY1, 166NE

783; 121 Or215, 253P1046; 48RI 296, 137A776, 53ALR365.

29-6 124Kan763, 262P595.

29-7 25F(2d)684; 30F(2d)665; 40 F(2d)67; Ala 127S524; 22AlaA305, 115 S147; 171Ark912, 287SW373; Ark 292 SW383; 75CalA44, 242P109; 80CalA 122, 251P657; 81CalA763, 254P662; CalA 274P377; 101CalA728, 282P416; CalA 284P226; CalA 292P189; 105Conn 539, 136A85; Fla 129S587; Ga 155SE 32; 333 Ill 588, 165NE199; 243 IllA 263; 253 IllA380; 255 IllA514; 89 IndA 157, 165NE914; 125Kan53, 262P1022; 127Me304, 143A100; 128Me287, 147A 208; Mass 167NE765; 317Mo 951, 298 SW39, 45 [citCJ]; 50Nev359, 261P655; 112 Okl 75, 239P601; 48RI 296, 137A 776, 53ALR365; 146Wash615, 264P413, 56ALR1117. [e] **Regardless of rights as for fraud.**-101CalA728, 282P416. [f] **In Arkansas.**-32SW(2d)177.

31-9½-New. An action for money had and received is based on quasi contract or implied contract. 141Wash28, 251P 103.

31-9⅓-New. An action for money had and received is not one for breach of contract. 22AlaA305, 115S147.

31-11 MoA 9SW(2d)248; 49RI 358, 142 A375.

31-12 89 IndA157, 165NE914; 121 Or 215, 253P1046.

32-17 256Mass187, 152NE305.

33-28 6F(2d)502 (Alabama rule); Cal 293P26.

33-31 21AlaA572, 110S156; 80CalA122, 251P657; 333 Ill 588, 165NE199; 48RI 296, 137A776, 53ALR365. [i] **Money taken by police officers** when plaintiff was arrested may be recovered by action for money had and received after discharge of plaintiff. MoA 14SW(2d) 536.

34-32 CalA 291P445; 204 Iowa1216, 216NW728; MoA 9SW(2d)248.

34-32½-New. Imposition of promise to pay is not made where unjust to defendant. 25F(2d)684.

35-37 202Cal754, 262P713; 81CalA 686, 254P578; 125Kan53, 262P1022; 51Nev134, 271P465; NJSup 146A61; 137Misc384, 244NYS2; 33 OhA371, 169 NE315; Wash 290P813. [o] **Fraud is immaterial.**-125Kan53, 262P1022. [p] **Rescission of executory contract.**-97Fla 848, 122S513.

38-50 204 Iowa758, 216NW54.

38-52 87CalA165, 261P739.

38-54 83Colo 464, 266P209.

39-55 7F(2d)422 (that defendant had no contractual relations with plaintiff and was acting for another does not relieve him from liability); Cal 293P26; 164La998, 115S60; 144Miss877, 110S 686; 316Mo 354, 289SW796; 50Nev359, 261P655; 120 Okl 194, 250P1018; 93Pa Super9.

40-58 7F(2d)422; 144Miss877, 110S 686; 155Wash107, 283P1087. [a] (2) Where joint owner received money, deposited it, and withdrew his half, he is liable for money had and received. 100 Vt117, 135A497.

41-60 TexCivA 13SW(2d)146.

42-67 221AppDiv1, 222NYS291.

42-69 130Ark528, 21SW(2d)968.

42-70 28F(2d)373; 84 IndA646, 151NE 37.

43-71 177Minn381, 225NW145(1st case). [j] **Money given by plaintiff to his daughter** for use and benefit of defendant. 199Wis171, 225NW696.

44-79 98Ala608, 13S507; 113La350, 36 S992; 74Minn344, 77NW234; 137NC35, 49SE55; 8 OntPr77.

44-85 124Kan763, 262P595; 219App Div398, 219NYS625.

45-86 Ala 127S524. [a] (2) Action for money had and received is proper remedy for recovery by consignee of freight paid at destination in excess of amount allowed therefor by consignor deducting estimated amount from draft. 22 AlaA613, 118S502.

45-87 101CalA728, 282P416; CalA 285 P1086(2dcase); CalA 287P552; IndA 169NE869; NJCh 148A155.

45-88 CalA 291P867; 84 IndA646, 151 NE37; TexCivA 296SW981. [d] **Admission fee paid to home for aged by probationary inmate dying before expiration of probation held recoverable by his executor with reasonable deduction.** 253 IllA380.

46-89 [d] (4) Other instances. 38 Wyo 285, 267P92.

46-90 Ala 130S554; 207Cal 427, 279P 156; 80CalA122, 251P657; 100CalA736, 281P106; CalA 284P226; 38GaA676, 145SE465; 333 Ill 588, 165NE199; 321 Ill 572, 152NE523; 221Ky481, 298SW 1100; 128Me412, 148A143; 252NY360, 169NE610; 221AppDiv1, 222NYS291; 220AppDiv269, 221NYS387; TexCivA 27SW(2d)649. [n] 8F(2d)360.

48-91 181Ark91, 24SW(2d)952; 85 CalA746, 259P1115; CalA 278P923; NJ 141A575; 248NY54, 161NE417; 120 Okl 194, 195, 250P1018 [quotCJ]; 298Pa 322, 148A471. [f] (3) Plaintiffs could not recover rents from one collecting them for another, even if real owners of premises, since payment thereof to defendant did not discharge tenants' obligation to pay plaintiffs, who had their remedy against tenants for rents due. TexCivA 8SW(2d)312.

49-96 Utah 287P320(2dcase).

50-8 80CalA122, 251P657; 250Mich81, 229NW595(1stcase); 221MoA414, 279 SW736. [b] **Defendant need not have contributed to mistake.**-221MoA414, 279 SW736. [c] **Mistake need not have been mutual.**-221MoA414, 279SW736.

52-26 [e] **Deposit as security** from lessee to lessor cannot be recovered by lessee under count for money had and received. IndA 168NE717(2dcase).

52-29 77CalA562, 247P264; 87CalA 165, 261P739.

52-31 1CalNY47. See also 81CalA686, 254P578.

53-33½-New. An action for money had and received may be had by a client against an attorney although the client owed the attorney fees under contract. 34NM383, 281P463.

54-46 [a] **Right of probationary inmate of home for aged to recover admission fee less proper deductions** held exercisable by his executor on death during probation. 253 IllA380.

54-55 91CalA195, 266P985, 987 [cit CJ]; 157SC221, 154SE167.

54-59 CalA 274P377.

56-80 MoA 24SW(2d)238.

56-82 MoA 24SW(2d)238.

56-83 MoA 24SW(2d)238.

56-85 221MoA683, 285SW161. [b] **Where evidence is conflicting as to value of property** plaintiff is not excused from tendering return on ground property was worthless. MoA 24SW(2d)238. [c] **Insolvency of maker of note** does not excuse failure to return note. MoA 24SW(2d)238.

56-90½-New. Plaintiff is not required to tender return of chattel mortgage which is no longer in existence because canceled by agreement of parties. MoA 24SW(2d)238.

57-96 216AppDiv554, 215NYS442.

57-97 77CalA562, 247P264.

59-32 22AlaA305, 115S147; 129 Okl 195, 264P151, 153 [citCyc].

60-34 146Wash615, 264P413, 417, 56 ALR1117, [quotCJ].

60-36 93CalA209, 269P731.

60-42½-New. Defendant may plead facts showing that plaintiff is indebted to defendant in a greater sum than claimed by plaintiff if indebtedness arose out of the same transaction. 22 AlaA305, 115S147.

60-42⅓-New. Defendant is entitled to urge that his codefendants and not he have all money, except specified sum. CalA 284P226.

62-73 CalA 285P1086(2dcase); 55App DC381, 6F(2d)684.

63-81 See also 127Me304, 143A100. [a] 36Wyo 430, 256P664. [b] MoA 289 SW655; 221MoA1101, 297SW119; 36 Wyo 430, 256P664, 665 [citCJ]. [d] **Complaint held sufficient** to state cause of action. Wash 287P41.

63-82 [c] **Complaint in common count** need not plead facts, circumstances, and time of discovery of fraud and mistake. 100CalA736, 281P106.

63-83 MoA 289SW655, 657 [citCyc].

63-84 Ala 130S554; 81CalA624, 254P 615; 253 IllA380 (action by executor of deceased probationary inmate of home for aged to recover admission charge because of early death of inmate); 221Ky481, 298SW1100; 239 Mich569, 215NW11; Wis 233NW98. [a] (1) 203Cal776, 265P946; 80CalA 122, 251P657. (2) Reason for rule is that common count pleads every material issue in general terms, and if there is any uncertainty as to particular items, defendant's remedy is to demand bill of particulars. 80CalA122, 251P657. (3) Such count is not subject to special demurrer. 203Cal776, 265P946. (4) Common count for money had and received is all embracing. CalA 291P445.

64-86 96CalA674, 274P766; Minn 232 NW336; 221MoA683, 285SW161, 164 [quotCJ]. [a] (4) A complaint alleging that defendant became indebted to plaintiff in sum of seven hundred dollars which was paid to defendant upon consideration which has wholly failed was sufficient. 84 IndA646, 151NE37. [b] (7) Other instances. Iowa 232NW 483.

64-87 221MoA683, 285SW161, 164 [quotCJ].

64-88 239Mich569, 215NW11.

64-90 221MoA683, 285SW161, 164 [quotCJ].

64-91 221MoA683, 285SW161, 164 [quotCJ].

64-91½-New. nor that defendant had money in question at the beginning of the action. 84 IndA646, 151NE37.

64-93 See also 221MoA683, 285SW161, 164 [quotCJ].

64-94 221MoA683, 285SW161, 164 [quotCJ].

64-95 221MoA683, 285SW161, 164 [quotCJ].

64-97 See also 221MoA683, 285SW161, 164 [quotCJ].

64-98 221MoA683, 285SW161, 164 [quotCJ].

65-2 221MoA683, 285SW161, 164 [quot CJ].

65-17 221MoA683, 285SW161, 164 [quotCJ].

66-23½-New. Defendant may plead facts showing that plaintiff is indebted to him in a greater sum than that claimed by plaintiff. 22AlaA305, 115S 147.

66-23⅓-New. In action to recover money paid on stock with privilege of withdrawal, plea that money was paid for membership not withdrawable held good plea to common count. Ala 130S 554.

66-33 See also 221MoA683, 285SW161.

66-47 [a] **Proof that defendants had use and benefit of money advanced** raised obligation to pay without proof of actual receipt of money by defendant. CalA 285P1086(2dcase).

66-49 80CalA122, 251P657. See also 127Me304, 143A100.

67-50 239Mich569, 215NW11. [a] (3) Fraud may not be shown under common counts. 239Mich569, 215NW11.

68-65 MoA 16SW(2d)702.

68-80 MoA 29SW(2d)230.

69-88½-New. Plaintiff must prove either restoration or tender of consideration or actual damages. 223AppDiv400, 228NYS380.

69-88⅓-New. Where plaintiffs alleged that gravel was taken from a pit belonging to their land and sold by defendant, they had the burden to prove that the pit was on their property. 130 Or 687, 280P340(2dcase).

69-90 Me 150A378.

69-96 105Conn539, 136A85; 333 Ill 588, 165NE199; 221MoA414, 279SW 736; MoA 10SW(2d)971; NJSup 135A 342; 223AppDiv400, 228NYS380; Wis 233NW76. [a] (13) Testimony as to wherein defendant's letter acknowledging receipt of money as compensation was incorrect. 148Va194, 138SE721. (14) Testimony that defendant did not state that money was compensation. 148 Va194, 138SE721. (15) In action to recover money paid under mistake as to purchase price of land. 221MoA414, 279SW736.

70-98 79CalA222, 249P30; 81CalA295, 253P328; 3LaA56; 317Mo 951, 298SW 39; 223AppDiv400, 228NYS380. [a] (1) 79CalA222, 249P30; 85CalA746, 259 P1115; CalA 292P279; 105Conn631, 136A479; 125Kan53, 262P1022; 221Ky 481, 298SW1100; Me 150A378 (facts

entitling plaintiff to decree for money in equity are sufficient); 122 Or346, 255 P470; 129 Or32, 275P913(2dcase); 148 Va194, 138SE721; 144Wash195, 257P 395. (11) To sustain finding, in carrier's action for recovery of money paid in settlement of consignee's claim for damages, that affidavit on which carrier paid claim was not false. 192Wis 139, 212NW279. (12) To sustain finding that minds of parties did not meet. 148Va194, 138SE721. (13) To show that defendant received pay for first two cars in amounts as found by trial court. 333 Ill 588, 165NE199. (14) To show that tenant who had paid rent to defendant occupied plaintiff's land. 11 LaA666, 1248576. [b] (1) 93CalA209, 269P731; CalA 289P656; 326 Ill 502, 158NE159; 204 Iowa1216, 216NW728; 212Ky844, 280SW148. (6) To establish credits for defendant against plaintiff in garnishment proceeding. 13LaA657, 1278101.

72-6 Cal 293P26; Me 150A538(2dcase).

73-20 208 Iowa512, 226NW130.

73-28 261Mass336, 158NE768; 221 MoA414, 278SW736; 49Ri 53, 139A916. [a] (9) Whether property received by plaintiff had any value. MoA 248W(2d) 238. [b] IndA 168NE483; MoA 289 SW655.

74-33 NJSup 135A342. [a] 148Va194, 138SE721.

MONOPOLIES

82-8 180Ark770, 22SW(2d)993, 68ALR 1018.

86-8 [a] **Statute forbidding watering of animals on public grange under certain conditions** held not to create monopoly for owners of rights in specified watering places. 50Nev125, 253P671.

87-59 [b] **Legislature may not create private or quasi private corporation having monopoly** in field of competitive business. Mass 171NE294.

87-64 141 Okl 100, 284P12; 141 Okl 82, 284P38; 141 Okl 80, 284P40; 141 Okl 98, 284P70.

87-64½-New. Statute authorizing utilities to surrender municipal franchises and receive in exchange state permit revocable only by legislature is violative of constitutional provision against monopolies. 143 Okl 32, 287P1029; 143 Okl 32, 287P1030; 143 Okl 33, 287 P1032.

88-77 Ill 172NE757.

88-79 TexCivA 48W(2d)614.

89-64 See also 118Tex154, 12SW(2d) 546.

90-98 TexCivA 283SW870.

90-99 163Ga372, 136SE139.

91-33 33NM641, 275P371.

93-76 159La909, 106S377, 380 [quot Cyc].

93-76½-New. Under common law public utility had no right to monopoly. 192Wis464, 213NW469.

93-76¼-New. The limited monopoly given by statute is not absolute. 192 Wis464, 213NW469.

93-76¼-New. and may be regulated by railroad commission. 192Wis464, 213 NW469.

93-81½-New. , or by the constitution. 140 Okl 88, 282P640.

94-89 159La909, 106S377, 380 [quot Cyc].

94-5 159La909, 106S377, 380 [quot Cyc].

95-16 159La909, 106S377, 380 [quot Cyc].

95-16½-New. Statute prohibiting issuance of certificate for manufacture, sale and delivery of ice where facilities existing are sufficient violates constitutional provision prohibiting monopolies. 180Ark770, 22SW(2d)993, 68ALR1018.

95-20 TexCommA 12SW(2d)160.

95-24 159La909, 106S377, 380 [quot Cyc].

96-35 159La909, 106S377, 380 [quot Cyc].

96-43 159La909, 106S377, 380 [quot Cyc].

96-51 [a] **Ordinance regulating operation of taxicabs,** providing that minimum fare shall not be charged without written consent of mayor, held not void: As in restraint of trade. 169Ga 51, 149SE638, 65ALR1361. [b] **Ordinance regulating operation of busses,** fixing schedule and routes and maximum fares, is not void: (1) As preventing competition. 169Ga51, 149SE638, 65 ALR1361.

97-56 159La909, 106S377, 380 [quot Cyc].

97-56½-New. Franchise or contract authorizing entry on streets and alleys of a city to construct and maintain telephone lines for twenty years is not invalid as a monopoly. TexCivA 282 SW912.

97-59 159La909, 106S377, 380 [quot Cyc].

97-64 159La909, 106S377, 380 [quot Cyc].

97-69 159La909, 106S377, 380 [quot Cyc].

100-16 220AppDiv624, 222NYS294.

100-17 220AppDiv624, 222NYS294.

101-21 260Mass45, 157NE82, 52ALR 1125.

101-27 41F(2d)148; NJ 138A513.

101-35 41F(2d)148; 150Miss1, 115S 598; 220AppDiv624, 222NYS294.

101-36 195NC271, 141SE752.

101-37 220AppDiv624, 222NYS294.

102-44 272US554, 47SCt175, 71L ed405.

102-45 272US554, 47SCt175, 71L ed405.

102-46 282US30, 51SCt42.

102-50 [a] (4) Commercial groups may voluntarily adopt standard forms of agreement so long as they do not impose their will on others by coercive combinations. 34F(2d)984.

104-82 43F(2d)991; 15F(2d)274; 34F (2d)984; 40F(2d)49.

104-86 43F(2d)991.

104-94 [a] **Agreements between ocean carriers are made lawful by Shipping Act** although they would violate Sherman Act if made by others. 39F(2d) 204.

105-3 273US359, 47SCt400, 71L ed684; TexCivA 294SW967. [c] **Defendants need not be engaged in interstate commerce** to violate statute relating to restraint thereof. 40F(2d)49. [d] **Test of interference.**-44F(2d)58.

105-7 273US359, 47SCt400, 71L ed684.

105-11 273US392, 47SCt377, 71L ed700, 50ALR989.

106-22 274US37, 47SCt522, 71L ed916, 54ALR791.

106-23 41F(2d)148.

106-26 43F(2d)991.

106-28 274US37, 47SCt522, 71L ed916, 54ALR791.

106-30 274US37, 47SCt522, 71L ed916, 54ALR791.

106-32 272US359, 47SCt125, 71L ed298; 274US37, 47SCt522, 74L ed916, 54ALR 791.

106-32½-New. Merely following competitor's prices is not unlawful. 274US 693, 47SCt748, 71L ed1302.

107-36 282US30, 51SCt42.

107-40 7F(2d)1. [a] **Distribution to members of association** of lists of nonpaying customers held not illegal. 7F (2d)944.

107-43 273US392, 47SCt377, 71L ed700, 50ALR989. But see 274US693, 47SCt 748, 71L ed1302.

107-47 274US37, 47SCt522, 71L ed916, 54ALR791; 8F(2d)898.

108-51 7F(2d)944; 35F(2d)34; 39F F(2d)149 (cutting price of sugar and boosting price of sugar beets to prevent manufacture by rivals).

108-51½-New. A conspiracy is in violation of the Sherman Act, where there exists an intent to restrain trade and commerce and a scheme appropriate for that purpose, although it does not act directly on the instruments of commerce. 18F(2d)839.

108-55 [a] (5) General order of union directing members not to work on certain stone. 274US37, 47SCt522, 71L ed 916, 54ALR791. (6) Indirect interference with interstate commerce, by attempt to coerce employment of union labor in local work of installation and maintenance of pipe organs, though impeding sale of organs within territory affected, has been held not within prohibition of Sherman Act. 29F(2d)679. (7) Other instances. 282US30, 51SCt 42. [c] **Attempt by combined wholesale dealers** to induce manufacturers not to sell direct to retailers held violation of Anti-Trust Act. 7F(2d)944.

109-58 282US30, 51SCt42. [a] **Creation of monopoly in fuel oil and oil-burning equipment business in New England states** is within act. 28F(2d) 91

109-60 See also 274US37, 47SCt522, 71 L ed916, 54ALR791.

109-64 33F(2d)617 (actual production rather than capacity).

110-73 [a] **Combination of dealers to** regulate prices is not necessarily unreasonable or illegal. 7F(2d)944.

111-78 See also 282US30, 51SCt42.

111-91 [a] **Owner of patent** may not enter into agreements violating Sherman Anti-Trust Law. 33F(2d)617.

111-93½-New. The Anti-Trust Law was intended to cover a combination of persons having a definite organization, with officers and directors, although unincorporated. 30F(2d)939.

111-95 44F(2d)58.

112-12 272US476, 47SCt192, 71L ed 362; 274US693, 47SCt748, 71L ed1302; 18F(2d)839; 84 IndA51, 150NE106.

112-13 272US476, 47SCt192, 71L ed362.

112-14 See also 272US476; 47SCt192, 71 L ed362; 274US693, 47SCt748, 71L ed 1302. [b] **Overt act is essential.**-274US 693, 47SCt748, 71L ed1302.

112-16 272US476, 47SCt192, 71L ed362.

112-17 272US476, 47SCt192, 71L ed362.

113-24 272US359, 47SCt125, 71L ed298; 274US37, 47SCt522, 71L ed916, 54ALR 791; 34F(2d)984.

114-4 272US554, 47SCt175, 71L ed405; 13F(2d)673.

114-6 272US554, 47SCt175, 71L ed405; 13F(2d)673; 15F(2d)274; 23F(2d)41. [a] **Commission does not exercise judicial powers,** but is administrative body with only duties and powers granted by statute expressly or by fair implication. 13F(2d)673.

114-13½-New. Orders of commission are purely remedial and preventative. 13F(2d)673.

114-13¼-New. Interference with the production and manufacture of sugar beets into sugar is not restrainable by the federal trade commission. 22F(2d) 122.

114-14 18F(2d)866.

114-16 18F(2d)866.

114-17 18F(2d)866.

115-20 13F(2d)673.

115-24 272US554, 47SCt175, 71L ed405.

115-33 [a] (2) Commission was justified in ordering use of word "English" in connection with soap to be stopped, unless soap was manufactured in England. 31F(2d)569(1stcase). [c] (2) For similar scheme held within "unfair method of competition" see 23F(2d) 41. (3) Combination may be implied from course of dealing or other circumstances. 23F(2d)41. [e] **Interfering with and boycott of competing exchange.**-Chamber of commerce conducting grain market will be ordered to desist from publishing misleading information relative to competing exchange, instituting unfounded suits, abstracting its business, and engaging in conspiracy to boycott it. 13F(2d)673.

116-36 18F(2d)866.

116-37 13F(2d)673. [a] **Service on thirteen of five hundred and ninety members of exchange constituting class** is sufficient to confer jurisdiction on larger number, by analogy to Equity Rules, rule 38. 13F(2d)673.

116-41½-New. The commissioner may participate in the hearing and decision of the commission although he took evidence and made a report without recommendation. 23F(2d)41.

116-43 [a] **Jurisdiction of equity to set aside orders of commission.**-23F(2d) 968.

116-49 [a] **Cease and desist order held not too indefinite** for purposes of obedience to its command. 23F(2d)41.

117-52 [a] (2) Before commission is warranted in entering espionage order, it is necessary that it find on substantial evidence that information obtained regarding facilities, capacities, and extent of operations of competitor was unlawfully used to hinder or stifle competition. 29F(2d)49. [b] (2) Order of federal trade commission, directing shoe manufacturer to divest itself of stock of another shoe manufacturer, is held proper, under Clayton Act, 29F(2d)518

[certiorari den 279US849, 49SCt346(6th case), 73L ed993].
117-53 18F(2d)866.
117-55½-New. Order may be that offending combination divest itself of unlawfully holding stock and property of competing corporation. 272US554, 47 SCt175, 71L ed405.
117-55⅓-New. However, commission cannot order restoration of prior conditions. 272US554, 47SCt175, 71L ed405.
117-55¼-New. Commission is powerless to order company to desist from operating physical properties of competing companies. 272US554, 47SCt175, 71L ed405.
117-55½-New. Orders have been held sufficiently definite and certain. 18F (2d)866.
117-56½-New. Definiteness. Order of commission preventing interference with or boycott of competing exchange to injury of interstate commerce has been held not invalid as being indefinite. 13 F(2d)673.
117-60 13F(2d)673.
117-61 13F(2d)673.
117-62 13F(2d)673.
117-72½-New. Proceedings in court of appeals on review of order of commission are of an equitable nature. 13F(2d) 673.
117-72⅓-New. The jurisdiction of the circuit court of appeals to review order of federal trade commission is limited to grounds prescribed in the statute. 29 F(2d)518 [certiorari den 279US849, 49 SCt346(6thcase), 73L ed993].
118-45 TexCommnA 12SW(2d)154; Can [1929] 3DomLR331.
118-48 [a] Statutes are substantially modification of common law.-220AppDiv 624, 222NYS294.
118-50 220AppDiv624, 222NYS294.
118-73 13F(2d)673; 18F(2d)866; 29F (2d)518 [certiorari den 279US849, 49SCt 346(6thcase), 73L ed993]. [a] 13F(2d) 673. [b] 29F(2d)49.
118-75 But see 29F(2d)49.
118-75½-New. Where the findings of the federal trade commission are supported by any competent evidence, error assigned because of incompetency of evidence received at hearings will not be considered. 18F(2d)866.
118-78-44½-New. The circuit court of appeals will not enjoin the federal trade commission from reopening an order dismissing the proceeding for an unfair competition to taking additional evidence, where a legal remedy is adequate. DC 32F(2d)966.
119-56 156Miss99, 125S710.
120-62 274US445, 47SCt681, 71L ed 1146.
120-65 274US445, 47SCt681, 71L ed 1146.
124-25 TexCivA 280SW323. [b] Tex CivA 18SW(2d)510.
124-30 TexCommnA 17SW(2d)455.
124-35 [a] Combination to monopolize is not per se indictable since repeal of statute. NJOyer&T 138A513.
125-46 [a] If monopoly be created or attempts made with such intent and purpose the statute is violated and coercion is unnecessary. Wis 230NW692.
125-59 220AppDiv624, 222 NYS294.
126-65 Wis 230NW692 (closing or materially narrowing trade outlets to competitors).
126-66 220AppDiv624, 222NYS294.
126-69 220AppDiv624, 222NYS294.
127-78 [a] Combination cannot exist between one and his employees or agents.-46 Ida441, 268P15.
128-11 [g] Electricity.-118Nebr756, 226 NW427.
129-20 See also 315Mo 507, 286SW38.
130-37 TexCivA 3SW(2d)845.
130-39 33F(2d)617.
131-55 41F(2d)148.
131-61 41F(2d)148.
132-76 29F(2d)518 [certiorari den, 279 US849, 49SCt346(6thcase) 73L ed993].
133-80 15F(2d)678.
133-83 8F(2d)595.
133-85½ But see 280US291, 50SCt89, 74L ed431.
133-86 280US291, 50SCt89, 74L ed431.
134-7 TexCivA 294SW967.
134-9 35F(2d)962.
134-10 TexCivA 294SW967.
135-13 TexCivA 294SW967.
135-14 15F(2d)715.
135-15 15F(2d)715.
135-19 But see 33F(2d)617.
135-22 33F(2d)617.
135-24 [b] Valid as defense.-227 AppDiv837, 237NYS301.
136-31½-New. A contract for the sale of goods is within the Clayton Act although embodied as a condition or covenant in a license to manufacture and sell patented goods. 24F(2d)565.
136-33 28F(2d)257.
136-39 Acts not within statute.-230 AppDiv499, 245NYS523.
138-64 12F(2d)730; 132Misc726, 230 NYS538.
138-65 315Mo 507, 286SW38; 132Misc 726, 230NYS538.
139-69 15F(2d)274.
139-73 12F(2d)730.
139-76 [a] Statute relative to discrimination between different sections by corporation held not to contemplate lowering prices at different points in same city. 136SC200, 134SE211.
139-78 278US245, 49SCt112, 60ALR 1060. [b] Discrimination in price by tobacco manufacturer, whereby its product was sold cheaper in Porto Rico than in United States, substantially lessening competition of manufacturer engaged in business of selling tobacco in Porto Rico, was in violation of Clayton Act, 30F(2d) 234 [certiorari den 279US858, 49SCt353 (1stcase), 73L ed999].
140-81 273US52, 47SCt255, 71L ed534; 273US392, 47SCt377, 71L ed700, 50ALR 989.
140-82 272US476, 47SCt192, 71L ed362; 273US52, 47SCt255, 71L ed534; 273US 392,47SCt377, 71L ed700, 50ALR989; 12 F(2d)730.
140-83 272US476, 47SCt192, 71L ed 362; 273US52, 47SCt255, 71L ed534; 273 US392, 47SCt377, 71L ed700, 50ALR989; 23F(2d)41.
140-84 TexCivA 290SW798; TexCivA 290SW775; TexCivA 290SW870; Tex CivA 11SW(2d)222.
141-92 273US392, 47SCt377, 71L ed700, 50ALR989; TexCivA 299SW710.
142-15 12F(2d)730.
142-16 273US392, 47SCt377, 71L ed700, 50ALR989.
143-25 273US52, 47SCt255, 71L ed534.
143-28 273US52, 47SCt255, 71L ed534; 273US392, 47SCt377, 71L ed700, 50ALR 989.
143-31 NC 154SE11. [a] Purchaser may buy goods from one seller without violating statute. NC 154SE11.
144-37½-New. A dealer's refusal to sell oil to an oil burner manufacturer under an arrangement with a competitor held not conspiracy in restraint of trade. 22 F(2d)434.
144-37⅓-New. Defendants obtaining control of the sole source of oil, to cause it to break a contract with plaintiff's subsidiary, held not guilty of conspiracy to restrain trade. 22F(2d)434.
144-38 154Wash514, 283P462 (constitutional provision).
144-41 TexCivA 294SW934.
144-42 TexCivA 30SW(2d)388.
144-48 24F(2d)565.
145-51 NC 154SE11; TexCivA 290SW 798. But see TexCivA 22SW(2d)463.
145-54½-New. That licensor holding a patent might prevent the use of the patent entirely does not avoid violation of the Anti-Trust Act in a contract preventing purchase from other than licensor. 24F(2d)565.
145-57 28F(2d)257.
145-58 TexCommnA 12SW(2d)154; TexCivA 280SW323. [a] (3) TexCivA 1 SW(2d)510.
146-62 TexCivA 290SW775; TexCivA 290SW798; TexCivA 290SW870; Tex CivA 7SW(2d)892; TexCivA 9SW (2d)268; TexCivA 32SW(2d)678 (2dcase). [a] Actual contract necessary.-TexCivA 290SW798.
146-67 TexCommnA 17SW(2d)455; TexCivA 290SW775; TexCivA 7SW(2d) 892.
147-71 30F(2d)234 [certiorari den 279 US858, 49SCt353(1stcase), 73L ed999]. [b] Schemes held not combinations in restraint of trade.-Scheme whereby merchants give tickets to customers entitling them to chance on prize offered by chamber of commerce. 147Miss649, 112S579, 57ALR421. [c] One who deals in commodity has same right to competition among buyers as buyer has to competition among sellers. 220Ala605, 127S178.
147-72 272US476, 47SCt192, 71L ed362; 273US392, 47SCt377, 71L ed700, 50ALR 989; 28F(2d)91.
147-73 220Ala605, 127S178 (combination of buyers to stifle competition and fix prices); TexCivA 299SW710; 152Va 471, 147SE214.
148-74 Can [1929] 3DomLR331.
150-23 282US30, 51SCt42. But see 34 F(2d)815.
151-33 [d] Coöperative association.-Concerted refusal to buy live stock from or sell to coöperative association, amounting to boycott against lawful trading, may be restrained by secretary of agriculture as public wrong under Packers and Stockyards Act. 28F(2d) 63.
152-34 [a] Rule held inapplicable to coöperative agricultural association.-220 AppDiv624, 222NYS294.
160-55 96Fla591, 118S731, 60ALR1072.
161-69½-New. One monopolizing or attempting to monopolize any part of trade or commerce in electricity within the state or entering into a contract, combination, or conspiracy to drive out competitors, or who sells the product for less than its fair value for such purpose, is within the prohibition of some statutes. 118Nebr756, 226NW427.
162-84½-New. Under statute insurance companies may compete as to commissions of agents. TexCivA 18SW(2d)929.
162-84½-New. Whether a contract tends to fix the cost of insurance is a test to be applied in determining whether the contract is in violation of the Anti-Trust Law. TexCivA 18SW(2d) 929.
162-84¼-New. A contract between insurers held invalid as in violation of a statute prohibiting agreements between insurers fixing the cost of insurance. TexCivA 18SW(2d)929.
163-97½-New. Controversy relative to membership in exchange conducting "contract market" under Grain Futures Act may not be interfered with by federal trade commission. 13F(2d)673.
163-3½-New. Refusal to furnish quotations to competing exchange formed to destroy and replace chamber issuing quotations, or to association organizing such exchange, is not unwarranted. 13 F(2d)673.
163-5½-New. or federal. 13F(2d)673.
164-22½-New. Refusal of members of exchange to deal with members of another exchange and a competing association is unlawful boycott when carried on by concerted action to hinder interstate commerce, 13F(2d)673.
164-22⅓-New. and such boycott, being violation of the Federal Trade Commission Act, may be properly forbidden by order of the commission. 13F(2d)673.
166-41 220AppDiv624, 222NYS294.
166-42 220AppDiv624, 222NYS294.
166-44 220AppDiv624, 222NYS294.
166-48 220AppDiv624, 222NYS294. [a] Packers and Stockyards Act (USCA tit 7 § 181 et seq) protects coöperative market agencies only when acting within powers derived from their charter. 28F(2d)63.
166-49 [a] 220AppDiv624, 222NYS294.
166-54 220AppDiv624, 222NYS294.
166-58 84 IndA51, 150NE106; 123Kan 169, 254P326; 220AppDiv624, 222NYS 294.
166-59 123Kan169, 254P326.
167-60 220AppDiv624, 222NYS294.
167-64 88 IndA469, 150NE384; 220 AppDiv624, 222NYS294.
167-66 220AppDiv624, 222NYS294; 25 OhNPNS1.
167-67 84 IndA51, 150NE106; 220App Div624, 222NYS294.
167-68 84 IndA51, 150NE106; 220App Div624, 222NYS294.
167-69 84 IndA51, 150NE106; 124Kan 179, 180, 257P975 [quotCJ entire paragraph].
167-71 220AppDiv624, 222NYS294.
167-72 220AppDiv624, 222NYS294.
167-74 220AppDiv624, 222NYS294.
168-76 199Cal168, 248P658, 47ALR 904; 93Fla214, 111S722; 84 IndA51, 150 NE106; 124Kan179, 257P975; 220App

Div624, 222NYS294.

168-77 84 IndA51, 150NE106.

168-78 84 IndA51, 150NE106; 135SC 19, 133SE542.

168-79 84 IndA51, 150NE106; 33NM 136, 262P185; 220AppDiv624, 222NYS 294; 135SC19, 133SE542. [a] **Agreement held against state anti-trust laws.**–TexCivA 278SW262.

168-84 160La294, 107S115.

168-88 See also TexCivA 278SW262.

169-95 23F(2d)743.

169-95½-New. A union is not illegal merely because of its numerical size or preponderant position in the labor market. 260Mass45, 157NE82, 52ALR 1125.

169-97 18F(2d)333; 18F(2d)839; 40F (2d)189.

169-99 40F(2d)189 (applicable to both point of origin and termination).

169-4 260Mass45, 157NE82, 52ALR 1125.

169-7 40F(2d)189.

170-13½-New. But it has been held otherwise where acts have no direct and immediate effect on interstate commerce. 260Mass45, 157NE82, 52ALR1125.

170-18 18F(2d)333; 40F(2d)189 (secondary boycotts).

171-26 **Erratum.**–Word "employees" second line of text should read "employers."

171-28½-New. Agreement of employer to furnish employees only union-made materials could not affect existing contract for purchase of nonunion materials. 260Mass45, 157NE82, 52ALR1125.

174-75 [b] **Contract held consignment** and not in violation of anti-trust laws. TexCivA 228SW(2d)504.

174-77 272US476, 478Ct192, 71L ed 362.

174-79 272US476, 478Ct192, 71L ed362.

174-80 15F(2d)715.

174-84 272US476, 478Ct192, 71L ed362.

175-88 272US476, 478Ct192, 71L ed362.

175-89 272US476, 478Ct192, 71L ed362; 15F(2d)715.

175-90 272US476, 478Ct192, 71L ed362.

175-94 See also TexCivA 278SW262.

175-94½-New. Selling directly to consumer. That manufacturers' system is adequate in size to market product directly does not constitute violation of Sherman Anti-Trust Act. 15F(2d)715.

178-33 [a] (5) Restrictive covenant prohibiting use of property for general merchandise business. 155Md19, 141A 710. (6) Contracts which do not limit production or control or fix price of commodities embraced in it, and which are reasonable in terms, and limited as to time, space, and extent of trade, will not be declared void as being in restraint of trade. 96Ch275, 1188424. (7) Other corporations have been held not trusts or monopolies. 244Mich119, 221NW122. (8) Other instances. 39F(2d)149; 46 Ida441, 268P15; 150Mass81, 118S598. (9) Other agreements. 195NC271, 141 SE752. [aa] **Regulation of lodge maintaining cemetery,** which required that interment be in vaults and that charge of five dollars be made for setting any vault not furnished by lodge, was held not to create monopoly. 88IndA507, 164 NE718. [bb] **Law prohibiting sales of eyeglasses, spectacles, and lenses at retail,** unless duly licensed physician or optometrist was in charge, has been held not invalid as tending to establish monopoly. 279US337, 498Ct336, 73L ed 722. [cc] **Combination of individuals to procure passage and enforcement of otherwise valid ordinance** does not render it invalid by reason of purpose to eliminate competitors and increase own profits. 1644Ga529, 139SE46, 53ALR933.

180-35 TexCivA 18SW(2d)510; TexCivA 98SW(2d)268; TexCivA 98SW(2d)405; TexCivA 318SW(2d)461.

182-46 [a] **Answer alleging that account sued on was based on contract** which obligated defendants to resell merchandise at prices fixed by plaintiffs as sellers and in restricted territory to certain persons only has been held sufficient. TexCivA 118SW(2d)222.

182-58 [a] (2) Purchaser and his sureties defending on ground of violation of state anti-trust act must show contract of sale repugnant to statute. TexCivA 280SW323. (3) In action on contract for goods sold burden is on defendant to show that contract was in violation of anti-trust law. TexCivA 290SW798. [b] **Where contract on its face is not in restraint of trade,** member has burden of proving illegality in order to avoid contract. 160La294, 107S 115.

183-60 [b] **Evidence held insufficient** to show agreement to sell in designated territory only. TexCivA 290SW798.

183-69 TexCivA 294SW967. [a] **Anti-trust act** held not to bar collateral suit in state courts. TexCivA 294SW967. [b] **Subsidiary agreements must directly promote unlawful purposes** in order to be tainted with illegality. TexCivA 294SW967.

184-71½-New. Licensee of patented processes cannot refuse payment of royalties because of licensor's connection with illegal combination. TexCivA 294 SW967.

184-71¼-New. Nor can licensee impose forfeitures on licensor for latter's connection with an unlawful combination. TexCivA 294SW967.

184-71¼-New. That such exhibitor was compelled to make purchase from illegal combination of distributors does not make payments involuntary. 42F(2d) 873.

184-71½-New. Bill to recover amount due for motion pictures refused held not demurrable on ground that contract with distributor was illegal as conspiracy in restraint of trade. 42F(2d)873.

184-71¾-New. Illegal arbitration clause in contract for rent of photoplays is immaterial unless distributor suing for rent must rely thereon. 42F(2d) 873.

184-71¾-New. Exhibitor of motion pictures signing contract for purchase of pictures at stated price within certain time is bound by contract notwithstanding motives actuating parties. 42F(2d) 873.

184-82 TexCivA 299SW710.

184-84 16F(2d)190.

186-12 23F(2d)426; 42F(2d)152. [b] **Members of general conspiracy in restraint of trade may be held liable** although not having contract with person aggrieved. 43F(2d)991

186-14 But see 36F(2d)974.

186-15 [b] **Loss of corporate office and salary** or injuries to credit and reputation are not "injuries to business or property" within statute. 36F(2d)959.

186-19½-New. Plaintiff in action at law under Federal Anti-Trust Act is not entitled to maintain bill of discovery. 15F(2d)103.

187-26 315Mo507, 286SW38.

187-29 315Mo507, 286SW38.

187-30 315Mo507, 286SW38; NC 154 SE11

187-30½-New. Act denouncing as criminal and providing penalties for acts in restraint of trade creates no right of action for damages. 162La671, 111855.

187-38½-New. Act authorizing civil action for damages by restraint of trade sanctions legal principle that any injury to lawful business is actionable. 162 La671, 111855.

188-45 273US359, 478Ct400, 71L ed684; 14F(2d)864. [a] **Action may be in district of sale,** though service was had in district of defendant's residence. 273 US359, 478Ct400, 71L ed684.

188-46 14F(2d)864.

188-49 [c] **Creditor of corporation** cannot institute action under statute for impairment of corporation's ability to pay debt. 36F(2d)959. [f] **Stockholder** cannot institute action under statute for impairment of value of stock. 36F(2d) 959.

188-51 41F(2d)148. [a] 28F(2d)91; 40F(2d)620 (defendant wrongfully refused to sell to plaintiff, or wrongfully discriminated against him). [b] (2) Other instances. 40F(2d)620. [c] **Right of plaintiff to sue on assignments of claims.**–12F(2d)895. [d] **Complaint held insufficient.** 36F(2d)959; 36F(2d)974.

189-53 15F(2d)678.

189-54 15F(2d)678; 128Kan481, 278P 730; 220AppDiv302, 222NYS7. [a] **Complaint held sufficiently particular.**–43F(2d)991.

189-55 8F(2d)898.

189-56 40F(2d)620 (unnecessary to allege creation of monopoly); 220AppDiv 302, 222NYS7.

189-59½-New. It is not necessary to allege manner in which or when or where agreement or combination was made. 315Mo507, 286SW38.

189-59¾-New. Special defenses held insufficient. 43F(2d)991.

189-61 36F(2d)959; 41F(2d)148; 162 La671, 111855. [b] **Specific act of conspiracy** charged cannot, on demurrer, be separated from general plan. 28 F(2d)91.

189-62 15F(2d)678.

189-64 315Mo507, 286SW38.

189-65 15F(2d)678.

189-67½-New. The general rule relating to demurrers, followed by federal courts in equity cases, is applicable to an action at law for treble damages under the Anti-Trust Act, based on alleged conspiracy in restraint of trade. 28F(2d)91.

190-73 8F(2d)898; 42F(2d)152.

190-75 15F(2d)678. [a] **Alleged loss of profits on contracts because of improper influence** does not authorize recovery in absence of showing that act was done in carrying out combination or conspiracy. 15F(2d)678. [b] **Matters necessary to be proved.**–28F(2d) 91.

190-76 15F(2d)678; 37F(2d)537; NC 154SE11.

190-79 42F(2d)152.

190-79½-New. Evidence that the seller, suing for price, charged the public more than certain contractors is admissible to show intent to injure a competitor. TexCivA 299SW710.

190-79¾-New. Evidence that the president of a corporation denied a railroad the right of way across his land is admissible to show conspiracy to monopolize a product. TexCivA 299SW 710.

190-81 46Ida441, 268P15. [a] **Preponderance of evidence** determines issues. 315Mo507, 286SW38. [b] **Evidence held sufficient** to go to jury. 315Mo507, 286SW38.

190-82 42F(2d)152. [c] (3) To go to jury on question whether international union or its president participated in conspiracy to restrain interstate commerce. 28F(2d)851. [d] (1) 15F(2d) 678.

191-83 42F(2d)152. [b] (2) Whether acts were in furtherance of monopoly held for jury. 273US359, 478Ct400, 71 L ed684. (3) Issue of concerted action by defendants to fix prices to prevent plaintiff from acquiring any part of trade is for jury. 37F(2d)537. [e] **Damages are jury question.**–273US359, 478Ct400, 71L ed684. [d] **Evidence insufficient to submit to jury.**–31F(2d) 53. [e] **Whether injury complained of was caused by violation of statute.**–NC 154SE11.

191-84 [a] 273US359, 478Ct400, 71L ed 684. [c] **Instructed verdict for defendants held proper.**–37F(2d)537.

191-86 42F(2d)152. [d] (2) Loss of profits must be reasonably certain and not dependent on speculation or conjecture. 37F(2d)537. [g] **Net profits lost may be computed** by deducting estimated expense of doing business from gross profits of earlier period. 273 US359, 478Ct400, 71L ed684. [h] **Difference between prices at which plaintiff sold product and current prices at time** is not correct measure of damages. 37F(2d)537.

191-90 273US359, 478Ct400, 71L ed 684; 42F(2d)152.

191-91 273US359, 478Ct400, 71L ed 684.

192-93 28F(2d)222.

192-97½-New. Damages to a contractor charged more for asphalt than another contractor is the amount of overcharge. TexCivA 299SW710.

192-98 42F(2d)152. [b] **Suit for injunction and damages.**–23F(2d)426.

192-10½-New. One-year limitation prescribed has been held inapplicable to a proceeding for punishment of criminal contempts in violating an injunction granted in a suit to enforce the

Sherman Anti-Trust Act. 277US229, 48 SCt486, 72L ed862.
192–17 [a] 7F(2d)734.
193–19 19F(2d)21. [a] **Information held insufficient** to charge offense. 39 F(2d)152.
194–43 [a] **General allegation of continuous conspiracy is limited** by specific means by which it is to be effected. 39 F(2d)149.
195–70 272US549. 47SCt169, 71L ed 403. [a] (2) Evidence of combination in Chicago to restrain trade in Wisconsin held not at variance with indictment. 272US549, 47SCt169, 71L ed 403.
195–71 [b] (2) Essential to show violation of anti-trust statute. 8F(2d)898.
198–13 274US268, 47SCt592, 71L ed 1042.
198–16½–New. A coöperative association organized for the purpose of dealing in live stock, under a statute which prohibits the handling of agricultural products of nonmembers, has been held not entitled to restrain a concerted action of market agencies in refusing to deal with it in connection with the purchase and sale of live stock at stockyards, under the Packers and Stockyards Act. 28F(2d)63.
199–23 274US37, 47SCt522, 71L ed916, 54ALR791; 260Mass45, 157NE82, 52 ALR1125.
199–27 274US37, 47SCt522, 71L ed916, 54ALR791; 30F(2d)234 [certiorari den 279US858, 49SCt353(1stcase), 73L ed 999] (price discrimination); 35F(2d) 203.
199–27½–New. The fact that employer was compelled to pay fine to union, even if wrongful, is no ground for relief. 260Mass45, 157NE82, 52ALR1125.
199–27½–New. A refusal of union workers to work on a building with nonunion men installing organs, not involving interference with interstate commerce, is not subject to an injunction under the Sherman Act. 27F(2d) 560.
199–35½–New. Bill charging ocean carriers with monopoly under Shipping Act must be brought before Shipping Board first. 39F(2d)204.
200–44 16F(2d)378.
200–46 16F(2d)378.
200–46½–New. Where acts complained of have no direct effect on interstate commerce, party is not entitled to relief under Federal Anti-Trust Act. 260 Mass45, 157NE82, 52ALR1125.
201–48 272US359, 47SCt125, 71L ed 298; 274US37, 47SCt522, 71L ed916, 54 ALR791; 16F(2d)378; 29F(2d)679; 39 F(2d)204 (plaintiff entitled to injunction); 220Ala605, 127S178 (inadequacy of legal remedy). [a] **Clayton Act gives no right** to sue for dissolution of prior completed combination. 16F(2d)378. [b] **Acts complained of must be immediately and directly against interstate commerce** for private individual to maintain suit. 220Ala605, 127S178.
201–49 274US37, 47SCt522, 71L ed916, 54ALR791; 14F(2d)957.
201–50 23F(2d)822.
201–51 274US37, 47SCt522, 71L ed916, 54ALR791; 16F(2d)378.
201–52 16F(2d)378.
201–66½–New. 11F(2d)874.
201–66⅓–New. That defendants have not been employed by manufacturer for several years is no defense to conspiracy to injure his interstate business. 39 F(2d)228.
201–68 39F(2d)162 (transferees of respondent corporation's assets). [a] **Dealers not parties to combination could maintain suit** to restrain consumers from carrying out agreement to fix dealers' profits. 220Ala605, 127S178.
201–69 28F(2d)257.
201–70½–New. Numerous nonunion coal mine operators in a state may be joined as plaintiffs in a suit against a union and others to enjoin interference with a complainant's business in violation of the Sherman Act. 18F(2d)839.
202–78 220Ala605, 127S178 (bill not demurrable).
202–79 [a] **Ocean carriers charged with monopolizing carriage have burden of** pleading and proving agreement within exception of statute. 39F(2d)204. [b] **Failure to state definitely percentage of trade controlled** does not render complaint insufficient. **Wis** 230NW692.
202–81 272US359, 47SCt125, 71L ed 298. [b] 272US359, 47SCt125, 71L ed 298. [c] **Failure to allege intent of combination** held immaterial where such purpose was necessary result of conduct. 272US359, 47SCt125, 71L ed298. [d] **Bill insufficient to show violation of the Federal Anti-Trust Act as amended by the Clayton Act.**–8F(2d)898. [e] **Bills charging violation of Shipping Act.**–39F(2d)204. [f] **Complaints held sufficient.–Wis** 230NW692.
202–83½–New. Court will not pass on merits of case on demurrer if it is doubtful whether facts alleged constitute unlawful monopoly. **Wis** 230NW 692.
202–89 [b] **Intent to restrain interstate trade is presumed** where necessary result of things done pursuant to or contemplated by conspiracy is to restrain trade between states. 18F(2d) 839.
202–90 28F(2d)63. [a] (2) Essential to show violation of anti-trust statute. 8F(2d)898.
202–91 [d] **Report of federal trade commission** held inadmissible. 274US 693, 47SCt748, 71L ed1302. [e] **In suit against owners of patents,** court may inquire into prior art to ascertain scope of various patents. 33F(2d)617.
203–92 46 Ida441, 268P15; 149Miss 874, 116S98; 118Nebr756, 226NW427. [a] (5) Establishment of competitive trade conditions. 274US693, 47SCt748, 71LEd1302. (6) That defendants had engaged in actual combination in restraint of interstate trade. 18F(2d)839. (7) Circumstantial evidence of conspiracy to refuse to buy or sell live stock to coöperative association. 28F(2d)63. (8) Conspiracy to damage manufacturer's business. 39F(2d)228. (9) Other instances. 44F(2d)58. [b] **Evidence held insufficient:** (1) **US** 49SCt425; 27 F(2d)163; 31F(2d)539; 33F(2d)25; 33 F(2d)390.
203–92½–New. The findings of the secretary of agrjculture in proceedings under the Packers and Stockyards Act, to restrain discriminatory practices in connection with the buying and selling of live stock, are prima facie correct, and inquiry for court with regard to the findings is whether they are based on substantial evidence. 28F(2d)63.
203–99 34F(2d)182.
203–2 149Miss874, 116S98.
203–4 See also 274US268, 47SCt592, 71 LEd1042; 274US693, 47SCt748, 71LEd 1302.
203–4½–New. Attorney-general may agree to entry of consent decree. 276 US311, 48SCt311, 72LEd587.
203–4½–New. Effect of an agreement to entry of consent decree see 276US311, 48SCt311, 72L ed587.
204–18 [a] **Dissolution of corporation does not deprive federal court of jurisdiction** to nullify and enjoin contracts violating Clayton Act. 39F(2d)162.
205–36 [a] (3) Any doubt of legality of selling plan of manufacturer, under which it had operated for over ten years after submission to attorney-general, should be resolved in favor of manufacturer. 15F(2d)715.
206–61 See also 33F(2d)824.
206–66½–New. Where a corporation for nearly two years had tried in good faith to divest itself of stock as ordered, it had a lawful right to sell the property on execution sale to collect a bona fide debt. 33F(2d)824.
207–79½–New. Where the state, in an action brought on relation of a prosecuting attorney, seizes property and procures the appointment of a receiver who sells the property in a case in which the court is without jurisdiction, the state is responsible for all losses sustained. 25 OhNPNS307.
210–30½–New. On review of order of Federal Trade Commission court may examine entire record. 280US291, 50 SCt89, 74LEd431.

MOONSHINE

211–31 150Md278, 132A624; 193Wis 476, 214NW365. [a] (1) Contra 312 Mo 99, 279SW144 [mod definition in 304Mo 78, 81, 262SW710] (holding terms not synonymous). (2) Both "moonshine" and "hootch" include "corn whisky," but are broader terms and are names applied to other liquors as well. 312Mo 99, 279SW144.
211–32 193Wis476, 214NW365.
211–36 150Md278, 132A624.
211–37 193Wis476, 214NW365; 37Wyo 478, 263P616.

MOOT CASE

211–47½–New. Case is moot even if, pending appeal, event occurs making decision unnecessary or placing matters in shape that no actual relief can be afforded. 218Ky402, 291SW362.

MORAL

212–63 213Ala655, 106S138; **ND** 230 NW735; 125 Or316, 266P252.
212–64 9PaDist&Co 202 [citCJ].
212–66 215Ala619, 112S157.
212–70 Cal 291P583.

MORATORIUM

213–5 133 Okl 173, 271P833.

MORE

214–13 [a] (1) 91CalA664, 267P578. (2) Construction of "more or less" in contracts depends upon whether parties intended number as estimate of particular class or as warranty. 50Nev340, 259 P415.
215–14 73CalA527, 238P1077; 91CalA 664, 267P578, 581 [citCJ]; 144 Okl 25, 288P942.
215–15 82NH342, 134A520.
215–15½–New. "More or less" means "about," substantially "approximately." 214Ala187, 106S815.

MORPHINE

215–56 20F(2d)329.
215–57 20F(2d)328.

MORTAL

216–61½–New. Destructive to life, causing or occasioning death; terminating life; exposing to or deserving death; deadly. Webster D. [quot 122Kan552, 253P221].

MORTGAGES

273–3 198NC466, 152SE161 (mortgagor owns land until conveyed); 193Wis503, 215NW571.
273–4 170Ark895, 282SW9. See also 141SC290, 139SE633 (mortgage is conventional instrument).
274–5 176Ark64, 38W(2d)30, 57ALR 444; 192NC679, 135SE784; 198NC466, 152SE161; 193Wis503, 215NW571. [b] **Mortgagor in possession** is possessed of legal title as against all world, but not as to mortgagee. 220Ala35, 123S229.
275–13 170Ark895, 282SW9; 106Conn 436, 138A433; 205 Iowa1194, 219NW 311; 101NJEq569, 139A389.
276–14 [a] (3) 216Ala106, 112S528. (4) Mortgage is instrument evidencing security for debt to be void on discharge of debt or obligation. 170Ark895, 282 SW9. [b] (4) Mortgagor holds property only for purposes of security. 193 NC757, 138SE125. (5) Mortgagor is true owner of property as to all persons except mortgagee. 193NC757, 138 SE125. [e] (1) 193NC757, 138SE125. (3) 336 Ill 450, 168NE266. [f] (1) 125Me114, 131A204. (2) 125Me114, 131 A204. (5) Mortgagee may take possession any time either before or after breach in absence of contrary stipulation. 125Me114, 131A204. [i] (2) MoA 10SW(2d)64. [j] (4) Mortgage immediately upon its execution vests in mortgagee seisin as well as title of estate. NH 150A114. [n] (1) 13PaDist&Co 73. (4) 13PaDist&Co 579. (10) Theories as yielding to intent of parties. 13PaDist &Co 579.
279–19 39F(2d)489; 43F(2d)366; 32 Ariz130, 256P365; Cal 289P815; 97 CalA485, 275P875; 162Ga735, 134SE 771; 156Md313, 144A479; 204 Iowa 401, 213NW769; 173Minn18, 216NW 329; 82Mont280, 267P214; 34NM602, 287P702; 216AppDiv380, 215NYS200; 229AppDiv345, 242NYS369; 119 Oh369,

164NE347; 123 Okl 53, 251P1017; 132 Okl 289, 270P565, 566 [citCJ]; 147SC 259, 145SE113; TexCivA 118SW(2d) 668; SC 155SE591; TexCivA 168SW(2d)894; 142Wash145, 254P834; 196Wis387, 220 NW181; 59 OntL374, [1926] 4DomLR 717. [a] (2) In Iowa. 202 Iowa498, 210NW559. [d] **Not grant, assignment, transfer,** devise, or bequest. 216AppDiv 330, 215NYS200.

280-20 90Fla787, 108S211; 95Fla498, 116S498; 99Fla987, 128S241. [b] **Mortgage is mere incident** of mortgage debt. Fla 130S725.

280-21 36F(2d)221; TexCivA 286SW 552; TexCivA 288SW276.

281-35 90Fla787, 108S211.

281-36 Eng [1914] 1 Ir23.

282-44 55AppDC383, 6F(2d)686, 688 [citCyc]; 92Fla983, 113S117. [g] **Grantor surety for bond issue.**–256 IllA 305.

283-45 315Mo 811, 288SW774.

283-46 Mo 288SW(2d)1001.

283-47½-New. The relation between the beneficiary of a trust deed and the maker thereof is not fiduciary. 80CalA 301, 251P841.

284-50 207Cal 630, 280P161.

284-52 201Cal 438, 257P521; 130Misc 728, 225NYS152.

284-53 But see 55AppDC383, 6F(2d) 686.

284-55½-New. Method of removal of trustee provided for in deed of trust must be followed. 37F(2d)572.

284-60½-New. Trustee is primarily agent of person secured and acts in his place in enforcing obligations secured. 55AppDC383, 6F(2d)686.

285-76 219Ala273, 122S16, 65ALR110; 90Fla787, 108S211; 133Misc894, 234 NYS68; 133 Okl 183, 271P938. [i] **Purchase by debtor in name of creditor in application on indebtedness does not create mortgage.** Ida 292P590.

286-81 102CalA230, 282P819 (assignment of interest in trust property as security).

286-82 170Ark1193, 280SW685; 208 Iowa658, 226NW93; 98NJEq523, 131 A524; TexCivA 299SW655. See also 86 Colo 77, 278P800. [c] **Other distinctions.**–Mortgage leaves title to property in grantor and gives grantee lien on it; but conditional sale puts title in grantee and gives grantor right to repurchase. TexCommnA 168SW(2d)262.

286-82½-New. Conditional sale passes title subject to conditions annexed. Tex CommnA 288SW817.

286-82½-New. Text of conditional sale is that it must be specific as to terms and conditions on which reconveyance is to be made. TexCommnA 288SW817.

287-33 SD 229NW376.

287-84 170Ark1193, 280SW685; 88 IndA549, 165NE260; TexCivA 299SW 655; TexCivA 8SW(2d)759.

287-91 SD 229NW376 (finding of conditional sale justified); WVa 153SE905; Alta [1929] 3DomLR209.

288-92 170Ark660, 281SW1; 84Colo 535, 271P1118; 90Fla787, 108S211; Tex CommnA 288SW817.

288-95 Alta [1929] 3DomLR209.

288-99 247Mich283, 225NW518; SD 229NW376. But see 88 IndA549, 165NE 260.

288-98 41LaAnn224, 68126; TexCivA 280SW303.

289-2 91Fla322, 107S684, 687 [citCyc].

289-3 96Fla547, 118S917. See also 90 Fla787, 108S211.

289-7 219Ala273, 122S16, 65ALR110; 127Me452, 144A383(2dcase). But see SD 229NW376.

290-22 See also 258Mass585, 155NE589. But see 207Cal 414, 278P1038.

291-25 225Ky399, 98W(2d)123; 151 Md102, 133A893. [e] **That deed was made by third person** did not alone make it resulting trust instead of mortgage. 207Cal 414, 278P1038.

292-29 106Conn683, 138A804; 153Miss 198, 121S127; 295Pa276, 145A301.

292-31 106Conn683, 138A804; BC [1929] 3DomLR79.

292-33 [a] (1) 153Miss198, 121S127.

293-38 [c] **Right to deficiency judgment.**–132 Or422, 285P208.

293-39 132 Or422, 285P208 (controlled by laws of state where mortgage executed and land located).

293-40 Ala 130S222. [c] **Facts held not to show equitable mortgage.**–CalA 292P1000.

294-46 218Ala637, 119S844(2dcase).

294-47½-New. Under a statute, a purchaser's assignment of interest in land before completion of payments, although intended as security for a loan, impresses a lien on everything that would have passed by grant of property. 205Cal 715, 272P1063.

294-49 CalA 290P501.

297-58 219Ala273, 122S16, 65ALR110; 219Ala419, 122S645.

298-60 219Ala273, 122S16, 65ALR110.

299-73 125Kan395, 399, 264P1071 [cit CJ].

301-86 TexCivA 198SW(2d)193.

302-88 [b] **Letters written** indicating intention to pay indebtedness from income of oil well do not constitute mortgage. 230Ky99, 18SW(2d)968.

302-92 Nebr 232NW581.

302-94 But see 237NY69, 142NE355, 30 ALR400 [dist 144NY104, 38NE1000; 125NY224, 26NE259] (holding payment insufficient performance).

303-98 22F(2d)268.

303-6 [d] **Execution of mortgage to third person in violation of agreement** constitutes diminution of creditor's security which, under statutes, effects acceleration of maturity of debt giving creditor right to treat debt as due. 48 Philippine163.

304-11 33Ariz117, 262P612.

305-17 Iowa 231NW470.

306-18 Sask [1927] 3DomLR713.

308-32½-New. In British Columbia an equitable mortgage cannot be created by the deposit of a deed in blank and an insurance policy payable to the owner. BC [1928] 2DomLR1003.

308-33 See also BC [1928] 4DomLR 668.

310-64 172Ark870, 290SW597; 173Ark 561, 293SW705; 202Cal 394, 260P878; 81CalA763, 254P662; 96CalA682, 274P 755; 81Colo 393, 255P987; 90Fla787, 108S211; 94Fla717, 115S828; 99Fla 833, 127S855; Fla 130S457; 46 Ida526, 269P98; 321 Ill 436, 152NE217; Iowa 216NW649; 208 Iowa982, 221NW472; Iowa 224NW530; 123Kan538, 256P159; 128Kan323, 278P48; 130Kan679, 288P 555; 235Ky705, 32SW(2d)54; 127Me 452, 144A383(2dcase); 240Mich612, 216 NW422; 247Mich283, 225NW518; 317 Mo 442, 297SW39; Mo 148SW(2d)441; 78Mont395, 255P1049; NJ 144A602; 55 ND717, 215NW146; 56ND811, 219NW 569; 132 Okl 289, 270P565; 138 Okl 43, 280P284; 139 Okl 110, 281P243; Tex CivA 280SW303, 306 [citCyc]. [e] **Ratification.**–Institution of suit against grantee for breach of contract to reconvey is not ratification of transaction as sale. TexCivA 16SW(2d)969.

313-66 173Ark561, 293SW705; 180 Ark355, 22SW(2d)12; 102CalA10, 282 P522; 94Fla717, 115S828; 96Fla547, 118S917; 162Ga523, 134SE308; 231Ky 215, 21SW(2d)252; 244Mich403, 221 NW322; 123 Or82, 260P241; 127 Or 673, 273P332; Can [1930] 2DomLR433.

314-67 240Mich612, 216NW422. [d] 60 Okl 90, 159P362.

315-68 133 Okl 183, 271P938.

315-69 [a] (3) Provision for redemption must be shown to have been omitted because of ignorance, mistake, fraud, or undue advantage. 195NC268, 142 SE610.

315-73 238Mich245, 213NW119, 120 [citCJ]; 251Mich96, 231NW59; 317Mo 442, 297SW39.

316-77 247Mich283, 225NW518. [a] (2) Where purchaser did not elect within sixty days to terminate agreement and sue for return of deposit, agreement was deed and not mortgage. 97CalA 462, 276P141.

316-82 247Mich283, 225NW518.

317-86 285Pa353, 132A171.

317-91 94Fla717, 115S828.

317-92 **Erratum.**–Change "See infra XXIII" in note to read "§ 1015 text and notes 15, 16."

318-97 1LaA325. See also 250 IllA293; 103WVa165, 136SE851. [b] But see 163Ga71, 135SE423.

320-10 167Ga712, 146SE479; Ida 290 P205. See also 90Fla787, 108S211. [a] **Whether consideration is antecedent debt or present consideration is immaterial.** Ida 290P205.

320-11 214Ala681, 108S742, 46ALR 1084; 127Kan732, 275P196.

320-12 But see TexCommnA 168SW(2d) 262.

320-20 208 Iowa739, 224NW489, 63 ALR1051; 149Md662, 132A148. [e] (3) Defeasance must be in writing. 285Pa 353, 132A171.

321-24 208 Iowa982, 221NW472; 43 OklACR221.

321-26 162La804, 111S170. [a] **Purchaser held entitled** to rents of property conveyed with right of redemption from time he took possession. 162La804, 111S170.

323-49 93CalA695, 270P394; 320 Ill 308, 150NE913; 244Mich309, 221NW 338; 250Mich31, 229NW433(2dcase); 176Minn267, 223NW288. [f] **Contract of grantee of warranty deed to reconvey** to husband held fraudulent as to wife to whom property actually belonged. 320 Ill 308, 150NE913.

326-68 90Fla787, 108S211, 218 [quot Cyc].

326-71 42Cal 75; 319 Ill 392, 150NE 272; 331 Ill 230, 162NE829; 2 Ind582; 204 Iowa1283, 213NW617; 123 Or82, 260 P241; 127 Or673, 273P332; Alta [1927] 3DomLR775. But see 207Cal 414, 278 P1038; 247Mich498, 226NW256. [b] (3) Held to be mortgage where given as security for debt. 38Wyo 120, 264P1013.

327-73½-New. The grantor in a deed intended to be absolute with merely an option to repurchase prior to a certain date has no rights after the expiration of such period. 170Ark610, 280SW663.

327-74 123 Or82, 260P241.

327-75 TexCivA 3SW(2d)507, 511 [quot CJ].

328-80 182AppDiv556, 169NYS501.

328-82 25 OhA32, 158NE499; 133 Okl 183, 271P938. See also 3LaA673.

329-86 141Wash229, 251P283.

329-87 240Mich612, 216NW422.

329-89 34F(2d)714; 111Conn266, 149A 637(2dcase); 90Fla787, 108S211; 94Fla 717, 115S828.

330-95½-New. The fact that the grantor agreed to pay recording fees does not of itself indicate that the transaction was intended as a loan. 141Wash 204, 251P112.

330-95¼-New. The rule that an absolute deed may be regarded as having been given for security is not applicable where the party executing the conveyance has made a highly advantageous disposition of his interest. 58ND820, 227NW556.

330-96 127Me452, 144A383(2dcase).

331-97 96Fla547, 118S917.

331-3 34F(2d)714; CalA 292P1000; 90 Fla787, 108S211, 218 [citCyc]; 94Fla 885, 114S527; 96Fla547, 118S917; 169 Ga495, 150SE828 (despite strong contrary language); Ida 290P205; 321 Ill 423, 152NE137; 208 Iowa982, 221NW 472; 5LaA550; 133 Okl 183, 271P938; 123 Or82, 260P241; 127 Or673, 273P 332; 46Philippine757; TexCivA 280SW 303, 306 [citCyc]; TexCivA 258SW(2d) 685; 141Wash229, 251P283; 142Wash 213, 252P699; Alta [1927] 3DomLR775.

332-5 90Fla787, 108S211; 319 Ill 392, 150NE272.

332-6 202Cal 394, 260P878, 879 [quot CJ]; 94Fla717, 115S828; TexCivA 16SW (2d)557.

332-8 34F(2d)714; 202Cal 394, 260P 878; 153Va165, 149SE467.

332-9 TexCivA 280SW303, 306 [cit Cyc].

333-11 TexCivA 280SW303, 306 [cit Cyc].

333-12 218Ala637, 119S844(2dcase); 90 Fla787, 108S211, 218 [citCyc]; 122Kan 423, 251P1080.

333-13 34F(2d)714; Ala 128S790; CalA 292P1000; 90Fla787, 108S211, 218 [cit Cyc]; 319 Ill 392, 150NE272; 331 Ill 230, 162NE829; 235 IllA180; 208 Iowa982, 221NW472; 221MoA127, 294SW111; 153 Va165, 149SE467; 38Wyo 120, 264P1013.

334-14 TexCivA 280SW303, 306 [cit Cyc].

335-28 215Ala270, 110S380; 88CalA515, 263P1033; 90Fla787, 108S211; TexCivA 280SW303, 306 [citCyc].

335-29 90Fla787, 108S211, 218 [quot

Cyc]; TexCivA 284SW237.

336-30 214Ala680, 108S742, 744, 46 ALR1084 [citCyc]; 84CalA560, 258P702; 128Kan357, 278P41; TexCivA 280SW303, 306 [citCyc]; 141Wash229, 251P283.

337-42½-New. The failure of the grantee to inspect the interior of residences purchased does not necessarily show that the transaction was a loan. 141Wash204, 251P112.

338-43 127Me452, 144A383(2case); TexCivA 280SW303, 306 [citCyc]; 142Wash213, 252P699, 702 [quotCyc].

338-44 CalA 292P1000; 197Ind393, 150NE368; 240Mich612, 216NW422; 141Wash229, 251P283; 142Wash213, 252P699, 702 [quotCyc].

339-45 197Ind393, 150NE368; Wash 251P112.

339-46 197Ind393, 150NE368; 141Wash204, 251P112.

340-51 162La804, 111S170; 285Pa353, 132A171; 141Wash229, 251P283.

340-52 128Kan357, 278P41.

340-53 91Fla322, 107S634.

340-54 99NJEq202, 132A497.

340-56 Colo 255P987; TexCivA 280SW303, 306 [citCyc].

341-57 25OhA32, 158NE499.

341-63 84CalA560, 258P702.

342-70 162La804, 111S170.

344-96½-New. A separation agreement between husband and wife cannot convert into an absolute deed their mortgage previously given to secure a debt. 170Ark660, 281SW1.

344-96½-New. An offer by the grantee to restore the property on payment of the money advanced and an additional sum, which was refused, does not necessarily show that the first transaction was a loan. 141Wash204, 251P112.

344-96¼-New. The grantor's acceptance of an option to repurchase is some evidence that a deed is what it purports to be. 240Mich612, 216NW422.

344-96½-New. Such circumstance is not conclusive. 240Mich612, 216NW422.

344-1 133 Okl 183, 271P938.

345-3 202Cal 394, 260P878; 76CalA741, 246P102; 88CalA515, 263P1033; 43 Ida 142, 249P890; 46 Ida526, 269P98; 208 Iowa982, 221NW472; Or 290P747; TexCivA 283SW232; 153Va165, 149SE467; 141Wash229, 251P283. [b] Contra 94 Fla717, 115S828.

345-11 321 Ill 423, 152NE137.

346-13 76CalA741, 246P102; 88CalA515, 263P1033; 94Fla717, 115S828; 319 Ill 392, 150NE272; 321 Ill 436, 152NE217; 25 OhA32, 158NE499; 128 Okl 87, 261P228; 141 Okl 288, 285P10; Or 290P747; TexCivA 283SW232; TexCivA 284SW237; TexCivA 299SW655; TexCivA 16SW(2d)557; TexCivA 298W(2d)799(2dcase); 142Wash213, 252P699; Wis 230NW610; Alta [1927] 3DomLR775; 14BC321, 11WestLR12.

346-14 12LaA369, 126S74.

346-16 TexCivA 8SW(2d)280.

347-20 173Ark561, 293SW705; 90Fla787, 108S211; 94Fla717, 115S828; 321 Ill 423, 152NE137. [k] (2) Testimony of witnesses as to examining property to determine its value with view to purchase it is inadmissible where it did not appear that grantor was present, that trip was with his knowledge or consent, or that he had any connection with it. TexCivA 283SW232. [q] **Self-serving declarations, in will and other memoranda,** are inadmissible on issue of absolute deed being mortgage. 128Misc404, 219NYS31. [r] **Value and general condition of land** for few years prior to conveyance may be shown on issue as to whether it was intended to be mortgage. TexCivA 283SW316. [s] **Making of agreement; testimony of agent.**–It is error to exclude testimony of witness representing grantee as agent that there was no agreement made for execution of deed as mortgage. TexCivA 283SW232. [t] **Conclusion of attorney drawing instrument** as to nature of instrument, is inadmissible in suit between grantor and stranger. TexCivA 284SW237.

348-23 88 IndA549, 165NE260; 221 MoA317, 273SW229. [g] **Letter of defendant grantor** showing nature of conveyance is admissible. TexCivA 29SW(2d)799(2dcase).

349-35 [a] 178NC3, 100SE77.

349-37 [a] (1) 162Ga523, 134SE308; 165Ga728, 142SE90; 166Ga305, 143SE379; 167Ga228, 145SE61. [b] (5) Plaintiff may introduce counter letter and oral testimony of continued possession and inadequacy of price. 131La421, 59S837. [c] (1) 145Miss779, 111S102. (3) Presumption that grantee under warranty deed is in possession must be overcome before parol evidence is admissible. 145Miss779, 111S102.

350-39 173Ark561, 293SW705; 76CalA741, 246P102; 98CalA408, 277P146; 109 Conn521, 147A36; DelCh 149A428; 94 Fla717, 115S828; 321 Ill 436, 152NE217; 203 Iowa685, 213NW229; 208 Iowa658, 226NW93; 123Kan538, 256P159; 128Kan323, 278P48; 130Kan679, 288P555; 231Ky215, 21SW(2d)252; 127Me452, 144A383(2dcase); Mass 168NE777; 240Mich612, 216NW422; 246Mich330, 224NW350; 317Mo 442, 297SW39; 221MoA317, 273SW229; 221MoA127, 294SW111; 139 Okl 110, 281P243; 127 Or673, 273P332; 147SC1, 144SE512; TexCommnA 288SW817; TexCivA 284SW237; TexCivA 3SW(2d)507; TexCivA 25SW(2d)685; 153Va165, 149SE467; Can [1928] 2DomLR858; Alta [1927] 3DomLR775. But see 218Ala637, 119S844(2dcase); TexCivA 11SW(2d)844.

352-40 [b] **Deed given defendant by third party** may be shown to be in fact mortgage to secure debt of plaintiffs, who had purchased property, having conveyance made to defendant grantor as mortgagee. 221MoA127, 294SW111.

353-44 [a] **Allegation of fraud or error** is necessary to show by parol that absolute deed was intended as mortgage. 162La804, 111S170.

353-51 317Mo 442, 297SW39; TexCivA 8SW(2d)280.

354-56 [b] (3) Equitable jurisdiction of county and probate courts does not include power to reform written instrument under seal, so as to vary or qualify language used, or to declare deed absolute to be mortgage. 111 IllA398.

354-57 242Mich198, 218NW761.

354-62 88CalA515, 263P1033; 96Fla371, 118S475; 240Mich612, 216NW422; TexCivA 11SW(2d)844. [a] 186 Ala251, 65S136; 170Ark660, 281SW1; 73CalA379, 238P723; 81CalA763, 254P662; 84CalA142, 257P606; 47AppDC328; 52Fla497, 42S189, 11AnnCas311; 94Fla717, 115S828; 96Fla547, 118S917; 321 Ill 423, 152NE137; 112 IllA 495; 241 IllA109; 246 IllA457; 197 Ind393, 150NE368; 182 Iowa209, 160NW363, 165NW405; Iowa 224NW781; 86Kan666, 121P1098; 119Kan518, 240P947; 126Kan614; Kan 292P918; 216Ky75, 287SW218; 118La322, 42S951; 147Mich348, 110NW1076; 236Mich447, 210NW483; 246Mich330, 224NW350; 247Mich38, 225NW581; 247Mich498, 226NW256; 249Mich506, 229NW419; 251Mich586, 232NW222; 118Minn462, 137NW186; 174Minn53, 218NW166; 176Minn4, 222NW341; 317Mo 442, 297SW39; Mo 14SW(2d)444; NJCh 134A730; 141App Div923, 126NYS4; 128 Okl 87, 261P228; 138 Okl 43, 280P284; 140 Okl 77, 282P619; 52SD590, 219NW557; TexCivA 280SW303; TexCivA 286SW558; TexCivA 3SW(2d)507; TexCivA 25SW(2d)685. [b] 218Ala637, 119S844(2dcase); 26Ariz542, 227P995; 170Ark610, 280SW663; 170Ark1193, 280SW685; 202Cal394, 260P878; 73CalA421, 238P1096; 76CalA741, 246P102; 84CalA560, 258P702; 111Conn266, 149A687(2dcase); 46 Ida526, 269P98; 46 Ida761, 271P423; Ida 290P205; 318 Ill 166, 149NE10; 319 Ill 392, 150NE272; 212 IllA86; 235 IllA180; 206 Iowa680, 218NW575; 208 Iowa982, 221NW472; 208 Iowa658, 226NW93; 122Kan94, 251P397; 122Kan423, 251P1080; 124Kan382, 260P627; 129Kan679, 284P359; 12LaA369, 126S74; 145Miss779, 111S102; 207Mo658, 106SW489; 320Mo474, 7SW(2d)691; NJ 151A58; 128Misc404, 219NYS31; 58ND820, 227NW556; Or 290P747; TexCivA 29SW(2d)799(2dcase); 153Va165, 149SE467; 136Wash13, 238P908; 141Wash204, 251P112; 141Wash229, 251P283; Can [1928] 2DomLR858. [d] **Evidence held sufficient** to support finding that plaintiff was authorized to insert its name as grantee in warranty deed and to hold it as security for debt. 53ND496, 206NW999. [e] **If intent doubtful where all prerequisites shown** for holding instrument to be mortgage it will be construed as such. 208 Iowa982, 221NW472.

356-64 Or 290P747 (in doubtful case).

356-65 193NC227, 136SE633.

356-68 TexCivA 8SW(2d)280.

356-69 127Me452, 144A383(2dcase).

357-70 [i] 81CalA763, 254P662. [j] **Clear and certain.**–TexCommnA 16SW(2d)262.

357-72 218Ala637, 119S844(2dcase); 181Ark339, 26SW(2d)89; 84CalA560, 258P702; CalA 292P1000; 46 Ida526, 269P98; Ida 290P205; 318 Ill 166, 149NE10; 319 Ill 392, 150NE272; 321 Ill 436, 152NE217; 331 Ill 230, 162NE829; 235 IllA180; 124Kan382, 260P627; 127Me452, 144A383(2dcase); 145Miss779, 111S102; 317Mo 442, 297SW39; NM 291P492; 128Misc404, 219NYS31; 55ND717, 215NW146; 25 OhA32, 158NE499; 128 Okl 87, 261P228; 141 Okl 288, 285P10; 147SC1, 144SE512; TexCivA 288SW276; TexCivA 8SW(2d)280; 141Wash204, 251P112; 152Wash101, 277P449. [c] 193 IllA318. [d] (1) 141Wash229, 251P283; 142Wash213, 252P699. [h] 208 Iowa982, 221NW472; 128Misc404, 219NYS31. [i] Can [1928] 2DomLR858; Alta [1927] 3DomLR775. [q] **"Clear, convincing, and conclusive."**–76CalA741, 246P102. [r] **"Clear and certain."**–Parol evidence that instrument was given as security must be clear and certain. TexCivA 8SW(2d)280.

359-73 [a] TexCivA 280SW303.

360-76 94Fla717, 115S828.

360-81 94Fla717, 115S828; 96Fla371, 118S475; 193 IllA318, 321, 326 [citCyc]. See 170Mich517, 136NW472.

361-86 [a] (2) Grantor's uncontradicted admission held sufficient. 180Ark329, 21SW(2d)409.

361-89 127Me452, 144A383(2dcase).

361-93 But see 98CalA408, 277P146.

361-94 165Ga728, 142SE90; TexCivA 17SW(2d)1079.

361-95 CalA 292P1000; 46 Ida526, 269P98; 127Kan708, 275P201; 251Mich586, 232NW222; TexCommnA 16SW(2d)262; TexCivA 25SW(2d)196; 142Wash213, 252P699. [g] **Evidence insufficient to make issue for jury.**–TexCivA 8SW(2d)280.

362-97 165Ga650, 141SE652; TexCivA 284SW237.

362-98 84CalA560, 258P702; TexCivA 289SW79.

362-2 124Kan382, 260P627; 55ND717, 215NW146.

362-3½-New. **Finding that defendant was bona fide purchaser** will not be disturbed when the evidence is insufficient to show notice. TexCivA 284SW234.

362-4 109Conn521, 147A36 (grantor in possession of premises is not regarded as tenant); 125Kan661, 663, 266P42 [citCJ]; 317Mo 442, 297SW39; TexCivA 299SW682. [a] **Relation of debtor and creditor.**–TexCommnA 288SW817.

363-14 123Kan538, 256P159; 25 OhNP NS383.

363-19 40Cal 58; 80Cal 348, 22P200; 149Cal 627, 87P93; 1DayConn139, 2AmD59; 2RootConn196; 2RootConn279, 1AmD70; 94Fla717, 115S828; 113Ga18, 38SE374; 115 Ill 477, 4NE385; 171 Ill 552, 49NE514; 169 Ind537, 81NE71, 82NE1064; 28 IndA548, 63NE574; 96SW860, 29KyL1155; 107SW234, 32KyL851; 46Me297; 88Me32, 33A657; 21Md456; 94Md564, 51A423; HarrMich113; 31Minn94, 16NW539; 187Mo 46, 85SW552; 28Mont99, 72P307; 35NH235; 13NJEq410; 31NY399; 55NY683 [aff 6Lans82]; 78NY543 [rev 16Hun570]; 163NY86, 57NE163; 182AppDiv556, 169NYS501; 77Hun607, 28NYS286; 2CowNY324; 28 OhSt554; 60 Okl 90, 159P362; 52 Or241, 93P246, 94P563, 96P1105; 93 Or257, 183P20; 42Pa339; 215Pa59, 64A324; 78SC178, 58SE804; 78SC499, 59SE534; 21SD461, 113NW623; TexCivA 169SW1104; 19Vt9, 46AmD171; 56Vt405; 43WVa337, 27SE340; 2 OntWR428. [a] **Delivery of deed in escrow.**–87Kan221, 123P733, LRA1915B 492.

363-23 21FCasNo 12,376, 5CranchCC 470; 13 Iowa194; 84SW771, 27KyL

230; 111Me530, 90A387; 104Pa136; 6WVa288. Compare 178C458. [a] (2) Mortgagee is not bound to convert imperfect title received into estate in fee simple. 44 Ill 405. But see 62 Ill 278. [d] **Covenants in reconveyance.**–18Colo 153, 32P70; 36Me115. [e] **Terms of reconveyance fixed by parties.**–71App Div503, 75NYS890. [f] **After death of mortgagor** reconveyance should be to heirs subject to widow's dower. 186 Mass430, 71NE813.

363–24 80Cal 348, 22P200. See also 168 Ga327, 147SE581. But see 141Wis273, 124NW405.

363–25½–New. To affect a proper cancellation, a grantor should present it and an order of the grantee to the clerk who should write "satisfied" across the record. 168Ga327, 147SE581.

363–26 125Kan661, 663, 266P42 [cit CJ].

364–27 112Cal 581, 44P1023; 88 IndA 549, 165NE260; 64 Iowa684, 16NW215, 21NW138; 111 Iowa54, 82NW468; 123 Kan538, 256P159; 265Mass598, 164NE 476; 22PickMass526; 81NY308 [rev 10 Hun451]; 22 Or115, 29P193; TexCivA 283SW232; 13Vt341. See 131La421, 59 S837. [c] **Where grantee has made conveyance as security** to one who had actual notice of agreement between parties to first deed, original grantor, who has remained in possession, may pay or tender amount of debt into court for benefit of person to whom it is due and maintain action against first and second grantee jointly for cancellation of both deeds and to have title decreed to be in him. 162Ga523, 134 SE368.

364–29 169 Ind537, 81NE71, 82NE1064; 358C511, 158E243.

364–30 131La421, 598837; 78Wash636, 139P628.

364–31 See 217 IllA376 [rev on other grounds 297 Ill 33, 130NE375]. [b] **Fraud of mortgagor.**–130 Ind492, 29NE 401.

364–32 But see 18NJEq358.

364–33 219Ala419, 122S645. [a] 249Fed 705, 161CCA615; 214Ala680, 108S742, 46 ALR1084; 162Ga523, 134SE308; 89Kan 51, 130P689; 126Kan614; 201Ky27, 255 SW817. [b] **Allegations held immaterial.**–Ala538819. [c] **Bill held insufficient.**–235 IllA180. [d] **Fraud sufficiently alleged.**–249Fed705, 161CCA615. [e] **Fraud insufficiently alleged.**–195NC268, 142SE10. [f] **Unnecessary allegations.**–100CalA746, 281P504 (filing of claim with executors of grantee).

364–39 130Misc720, 224NYS348.

364–39½–New. [§ 132½] (3½). **Instructions, Verdict, and Findings.** Where an action to redeem from an absolute deed alleged to have been intended as a mortgage is tried by a jury, it is the duty of the court to instruct it explicitly and correctly as to the nature of a mortgage and the facts and circumstances sufficient to fasten that character upon the conveyance in suit; 153Ga75, 111SE 408; 68Tex187, 48SW252; TexCivA 84SW 293; TexCivA 283SW232; 67Wis648, 31 NW303.

364–39½–New. and the jury should be instructed as to the sufficiency and effect of a tender or offer to pay, if that is in evidence, 138Ala399, 35S357, 106 AmSR42.

346–39¼–New. and as to the principles on which it should arrive at a determination of the amount due. 2Cal 387, 56 AmD342; 118NC509, 24SE209.

364–39½–New. The verdict or findings should of course be in such form as to determine the relative rights of the parties. See 111Pa56, 2A56. [a] **Findings held sufficient.**–66CalA745, 226P966.

364–39½–New. The findings of a jury upon a bill to redeem are merely advisory and may be disregarded by the court. 8CalA160, 96P382.

364–41 265Mass598, 164NE476; NJCh 134A730. See also 249 IllA55; 58 Or158, 113P854. [a] See 128Minn126, 150NW 396. [b] **Recovery of rents and profits.**–122Mo 194, 26SW973. [c] **Right to possession.**–30Mont229, 76P211. [d] **Agreement to reduce rate of interest** on loan cannot be specifically enforced. 110 Ill 35. [e] **Accounting.**–249Fed705, 161CCA 615; 201Ky561, 257SW711. [f] **Damages.**–159NC588, 75SE1096.

364–41½–New. In an action **to have a** deed declared a mortgage and for an accounting for rents and profits, plaintiff may not recover the rental value of the lands for oil and gas prospecting purposes where possession was delivered to defendant for agricultural purposes only under an agreement to apply the rents and profits to payment of the indebtedness. 41 OklACR59.

365–41½–New. Decree ordering reconveyance should provide that grantee be saved harmless and indemnified against any liability he assumed on mortgage note. Mass 168NE777.

365–42 See also 115Minn11, 131NW638. [a] **Accounting.**–32Md185; 14NYSt557.

365–45 11AppDiv185, 42NYS611 [aff 161NY663, 57NE1112].

365–48. 182AppDiv556, 169NYS501; 16 ND408, 114NW306; 79Wash537, 140P 696.

365–48½–New. However, upon a bill to have an absolute deed declared a mortgage and to redeem, the ordinary provision is that defendants shall convey to complainant upon payment of the amount found due within the time fixed in the decree, and if such payment is not made then that the bill shall be dismissed and complainant barred of all claim and equity of redemption in the premises. 160 Ill 415, 43NE597; 192 Ill 82, 61 NE530; 175 IllA101. See also 50CalA88, 195P293; 20 Ida80, 117P408 (sale not required); 96SW860, 29KyL1155 (holding failure to fix time of payment not fatal). [a] **Strict foreclosure proper.**–154Minn525, 192NW352.

365–48½–New. Decree in action to redeem generally see infra § 2281.

365–49 See also 207Cal 70, 276P568.

365–50½–New. A decree requiring the payment of an indebtedness and reconveyance is inadequate in not requiring the payment within a fixed time. 207 Cal 70, 276P568.

365–51½–New. Attorney's fees should not be allowed where the contract does not provide therefor. 41 OklACR59.

365–52 See also 207Cal 70, 276P568. [b] **Proof must be clear and conclusive.**–64WVa388, 62SE686, 131AmSR911.

365–53 231Fed304 [aff 238Fed1007, 151 CCA659]; 21 Ida619, 123P484; 230 Ill 243, 82NE592, 120AmSR291; 157 IllA 488; 144 Iowa220, 122NW934, 24LRANS 840; 140Ky583, 131SW510; 1KyOp401; 115Va60, 78SE559. But see 19 Ida796, 116P115. [a] (8) Nineteen years' delay while grantee in possession making improvements and property greatly increased in value. 144 Iowa220, 122NW 934, 24LRANS840. (9) For over twenty years. 52Mont263, 157P181. [b] (4) Other matters constituting laches. 214 Ala680, 108S742, 46ALR1084; 100CalA 746, 281P504; 150Ga613, 104SE497; 294 Ill 70, 128NE295; 86Kan666, 121P1098; 91Kan797, 139P426; 130Ky269, 113SW 123; 136Ky703, 125SW150; 146Ky682, 143SW382; 149Mich434, 112NW1111. [c] **Excuse for delay.**–164Cal 255, 128P 413. [d] **Waiver.**–136Ark391, 206SW 681; 91WVa196, 112SE314. [e] **Who may plead.**–146Ky682, 143SW382. [f] **Necessity for changed situation.**–294 Ill 70, 128NE295.

366–58 [a] (2) Action may be brought within two years after actual discovery of fraudulent renunciation by grantee. 123Kan538, 256P159.

366–58½–New. In some jurisdictions actions to declare a transaction a mortgage and to redeem are regarded as within the operation of particular statutes of limitations. 73Ala105; Ala 78201; 88Ala545, 78657; 143Ala381, 39S198; 8CalA160, 96P382; 11 Ida451, 83P505; 230 Ill 243, 82NE592, 120AmSR291; 224 IllA592; 158 Ind314, 62NE484, 92AmSR 310; 137 Iowa48, 114NW562; 144 Iowa 220, 122NW934, 24LRANS840; 284Mo 465, 224SW828; 47Nebr706, 66NW653; 163NY86, 57NE163; 60Hun337, 14NYS 821; 42NC282; 154NC596, 70SE942. [a] **When statute begins to run.**–19How US289, 15Led644; 171Ala603, 55S120; 136Ark391, 206SW681; 21 Ida619, 123 P484; 193 IllA318, 321, 326 [citCyc]; 89 Iowa278, 56NW449; 165 Iowa508, 146 NW8; 91Kan797, 139P426; 47Nebr706, 66NW653; 97Nebr629, 150NW1001; 9 GrantChOnt550. [b] **Waiver.**–136Ark 391, 206SW681.

366–60 200 Ill 170, 65NE650; 44Minn 127, 46NW324. [a] **Right to redeem not barred** till right to foreclose is barred. 201 Ill 208, 66NE283, 94AmSR160; 28 IllA160 [aff 129 Ill 72, 21NE580, 22NE 246].

366–62 78Mont395, 255P1049.

367–75 163Ga444, 136SE410; 46Philippine488.

367–80½–New. In some jurisdictions a warranty deed by a husband and wife to property owned by the husband and occupied by the husband and wife as a homestead, absolute on its face, conveys the legal title to the grantee although he gave back a writing reciting that title was invested as security for the husband's debt and agreeing to reconvey on payment. 240Mich512, 215NW313.

367–81½–New. A reconveyance by a grantee under a deed absolute on its face but intended as a mortgage reverts to the grantor with the legal title. 78 Mont395, 255P1049.

367–82 168Ga327, 147SE581.

368–91 163Ga444, 136SE410.

368–93 163Ga444, 136SE410.

368–99 201Ky27, 255SW817; 242Mich 198, 218NW761, 763 [citCJ]; 101NJEq 287, 137A440, 442 [quotCyc]; TexCivA 38SW(2d)507; 103WVa165, 136SE851. [b] (2) Recorded trust deed referring to sources of information as to encumbrance held to give notice. 103WVa 165, 136SE851. [e] **Parol notice** is sufficient to charge purchaser with knowledge of character of instrument. 242 Mich198, 218NW761. [f] **Evidence held sufficient to show notice.**–242Mich198, 218NW761.

369–6 32Ariz130, 256P365; 46Philippine897. See also 168Ga327, 147SE581. [e] **Bona fide purchaser from one of several grantors to whom property has been reconveyed individually** takes indefeasible title. TexCivA 284SW237. [f] **In California.**–98CalA408, 277P146.

369–14 214Ala680, 108S742, 744, 46ALR 1084 [citCyc].

370–15 [b] (2) Rule held applicable where right of wife of grantor to avoid mortgage was defeated by conveyance of apparent title to third person. 214Ala 681, 108S742, 46ALR1084.

370–20 But see Or 292P1037.

371–23 See also 38Wyo 120, 264P1013.

371–31½–New. Mortgagee of grantee, securing undelivered deed by fraud, has no right higher than the grantee. 99 NJEq788, 134A363.

372–33 44F(2d)218. [a] **Mortgage on manufactory,** though covering personalty, held real estate mortgage within usury statute. 7F(2d)51.

372–39 220Ala319, 125S28 (widow's interest under will held contingent and not mortgageable); 142SC239, 140SE 596.

372–39 51SD447, 214NW844. [b] **Mortgage dormant during pendency of suit involving title to land,** revives and becomes legally registered mortgage when suit terminates in favor of defendant. 170La363, 127S869.

372–40 Ida 288P419.

372–41 Conn 151A355.

372–44 227AppDiv516, 238NYS222.

372–51 See also 175Ark352, 299SW16.

373–54 207 Iowa882, 223NW888; 259 Mass585, 156NE871.

373–55 33F(2d)512(2dcase); 35F(2d) 508; 96CalA682, 274P755; 122 Okl 277, 254P748.

374–61½–New. Interest of tenant at will having full control of farm on condition of furnishing life tenant board and room is not mortgageable. 130Kan556, 287P266.

374–65 33PortoRico 144

374–67 165Ga470, 141SE203.

374–68 121Kan753, 250P321.

376–98 See also 154Md682, 141A398.

376–8½–New. Mortgage given to deceased, known to be so, is void. 134SC 233, 132SE48.

376–8½–New. Mortgage given to known deceased will not be reformed in equity. 134SC233, 132SE48.

376–12 103Conn657, 131A404; 242Mich 639, 219NW641.

376-13 103Conn657, 131A404. [c] **Fact that mortgagor named is not real creditor** does not invalidate mortgage as to subsequent claimants in absence of fraud. 103Conn657, 131A404.
376-14 103Conn657, 131A404.
378-35 237 IllA289. [a] **Trustee who owns debt, or part,** is agent of both parties. 237 IllA289.
378-49 216AppDiv380, 215NYS200.
378-66½-New. A provision that in case of dissolution, resignation, incapacity or removal of a trustee, a successor may be appointed by the holders of a majority of the bonds secured, is not inconsistent with the provisions of the Banking Act relative to consolidation of banking corporations whereby the new corporation succeeds to properties and rights of the consolidating corporations. 89CalA558, 265P583.
379-70 24F(2d)951; 194NC727, 140SE714; TexCivA 25SW(2d)221.
379-90 [a] **Consolidation of banking corporation which is trustee** with another banking corporation is not dissolution within provision authorizing appointment of successor on dissolution of trustee. 89CalA558, 265P583.
381-18½-New. Written resignation of the trustee of a deed of trust is a "disqualification" authorizing the appointment of another under a trust agreement. 194NC727, 140SE714.
382-40 TexCivA 25SW(2d)221.
382-69½-New. A court has no power to order a substitution of trustees where the proper parties are not before it. 154 Tenn513, 290SW31.
384-12 But see 99Fla277, 126S293.
384-13 But see Sask [1929] 2DomLR 103.
384-14 NJCh 148A392(2dcase).
384-17 128 Okl 222, 262P205.
384-19 128 Okl 222, 262P205; Sask [1929] 2DomLR103.
384-21 215Ala270, 110S380; 90Fla787, 108S211; Fla 130S764; Ont [1929] 4 DomLR721; Sask [1929] 2DomLR103.
385-34 120 Okl 282, 251P43.
385-36 256 IllA386. [e] **Mortgage given for purpose of being sold.**-239Mich 459, 214NW424. [f] **Mortgage held to be good consideration,** where mortgagee was to have had proceeds of second mortgage. 100NJEq493, 135A518.
386-39 155SC47, 151SE920. [b] **Accommodation maker of note and mortgage** is liable to holder for value, taking with notice that paper was accommodation paper. 179Minn77, 228NW 348.
386-40 128 Okl 222, 262P205.
386-44 153Md380, 138A255.
386-45 173Ark341, 292SW683; 145 Wash61, 258P856.
386-48 [c] 249Mich218, 228NW696.
386-53½-New. After execution of note and mortgage in satisfaction of judgment, validity of judgment is immaterial. 233Ky438, 25SW(2d)1020.
386-56½-New. Promissory note secured by mortgage is mere evidence of debt. 80Mont574, 261P356, 60ALR 551.
386-58 179Ark948, 19SW(2d)1026; 103 Conn657, 131A404; 204 Iowa1017, 216 NW726; 232Ky844, 24SW(2d)912; 323 Mo 356, 19SW(2d)1043; TexCivA 286 SW657, 145Wash61, 258P856.
387-59 242 IllA268; 128 Okl 222, 262P 205.
387-64 43 Ida343, 251P1051; 44 Ida 539, 258P540; 204 Iowa1017, 216NW 726; 206 Iowa297, 218NW71; 207 Iowa 1083, 224NW76; 315Mo 1155, 289SW 571; MoA 281SW98; 132 Okl 238, 270 P26; 6PaDist&Co 65; TexCivA 28SW (2d)987.
387-67 180Minn13, 230NW128.
387-71 46Philippine460.
387-72 81Mont434, 263P985.
388-75 175Ark352, 299SW16, 17 [quot CJ]; 206 Iowa297, 218NW71.
388-75½-New. Where a mortgage is given to secure the debt of another without any consideration personal to the mortgagor and with no advantage to the debtor or disadvantage to the creditor, there is no good consideration. 128 Okl 222, 262P205.
388-76 CalA 290P501. [a] (15) Release of lot from blanket mortgage covering several lots, though blanket mortgage still stands against remaining lots for full amount of debt. 82NH313, 133 A448.
388-77 See also Mass 173NE522.
389-89 177Ark656, 7SW(2d)755; 99 Fla277, 126S293; 170Ga230, 152SE108 (2dcase); 51SD138, 213NW11. [b] (3) Breach of agreement for additional improvements based upon oral promises does not constitute total failure of consideration. 99Fla277, 126S293.
389-90 Mass 172NE82; TexCivA 48SW (2d)307. But see CalA 273P1070. [d] **Failure of certain creditors to consent to arrangement for mortgage as security** constitutes failure of consideration as to them but not as to other creditors who consented. 177Minn612, 225NW 908.
389-91 [a] See also 177Minn108, 224 NW697.
389-91½-New. The failure to deliver money for a loan of which a mortgage was given authorized cancellation. 177 Ark656, 7SW(2d)755.
390-96 But see CalA 273P1070.
390-96½-New. Consideration of mortgage to secure defendant, who signed mortgagor's note as surety, does not fail because defendant wrote his name on back of note where, under provisions of note, he waived notice of dishonor and only discharged his legal liability on nonpayment of note by paying it. 210Ky788, 276SW839.
390-96⅓-New. A director of a bank conveying real estate to a trustee to hold for the purpose of guaranteeing the payment of a certain doubtful paper, and to avoid the bank's insolvency, has been held not entitled to have property released after the bank, which accepted the trust, had become insolvent. 28F(2d)765.
390-3 153Miss314, 120S732; NJCh 148 A392(2dcase); TexCivA 28SW(2d)987.
390-4 163La976, 113S167; 81Mont434, 263P985; NJCh 148A392(2dcase); 149 SC1, 146SE610. See also 149SC1, 146 SE610.
391-10½-New. The burden is on the mortgage to show payments of an agreed loan, not shown on statements given the mortgagor. RI 136A841.
391-10⅓-New. It is a presumption of fact that the representation of the debt given in a mortgage by the parties to it is true. 241Mich46, 216NW448.
391-10¼-New. Knowledge of consideration by the grantor of a trust deed will be presumed in the absence of fraud, accident, or mistake. TexCivA 28SW(2d)987.
391-22½-New. The consideration for a note secured by a mortgage may always be inquired into as between the parties. 241Mich46, 216NW448.
391-22⅓-New. Evidence as to failure of consideration is properly excluded where the mortgagor has received full credit on the mortgage on account thereof. TexCivA 48SW(2d)307.
391-22¼-New. Evidence of an agreement between the parties that the mortgage should be void unless the mortgagee furnished certain property is admissible. SD 226NW574.
391-23 164La133, 113S792.
391-24 235Ky283, 30SW(2d)958. [a] 174Minn180, 218NW889; 180Minn13, 230NW128; 57ND117, 220NW645. [b] 216Ky671, 288SW294; 118Nebr390, 224 NW866; 149SC1, 146SE610; 53SD560, 221NW371. [c] MoA 9SW(2d)848; 117 Nebr1, 219NW581. [d] 81Mont434, 263 P985; 54ND665, 210NW172; TexCivA 282SW648. [f] **Evidence held sufficient to show failure of consideration.**-152Md597, 137A276. [g] **Evidence held not to show failure of consideration.**-206 Iowa664, 221NW210. [h] **Evidence held sufficient to show failure of consideration.**-SD 226NW574. [i] **Defense of want of consideration must be sustained by weight of evidence.**-NJCh 148 A392(2dcase).
391-25 241Mich46, 216NW448. [a] (1) 166Ga71, 142SE543; 155Miss554, 125S 79. (10) To show loss sustained by mortgagee for which mortgage was given as indemnity. RI 150A122. [b] (5) To show that amount secured was less than that recited in mortgage. 241 Mich46, 216NW448. [c] **Clear and cogent evidence** is required to contradict representation in mortgage as to amount secured. 241Mich46, 216NW 448.
391-28 235Ky283, 30SW(2d)958.
392-34 17F(2d)503.
392-35 17F(2d)503.
392-36 17F(2d)503, 504 [quotCyc].
392-37 17F(2d)503, 504 [quotCyc].
393-43 [a] (3) Document, complying with statutory form, constitutes mortgage. CalA 284P729.
393-45 [b] **Effect of registration.**-Alta [1930] 3DomLR977.
393-49 CalA 284P729.
393-60 123 Or79, 260P1010 [citCJ].
394-61 123 Or79, 260P1010 [citCJ].
394-68 207Cal 630, 280P101.
394-70 123 Or79, 260P1010 [citCJ]; 155Wash479, 284P751.
395-79 194NC348, 139SE695.
399-56 33Ariz117, 262P612.
399-57 [b] (3) Description of lots by numbers in numbered block of named subdivision in named county but not naming city is void. 149Miss296, 115 S339.
399-58 181Ark739, 28SW(2d)70 (reasonable construction); 122 Okl 277, 254 P748; 157Tenn667, 11SW(2d)906; TexCivA 287SW683. [a] (5) Lifetime interest in twenty acres of land, part of certain estate, and joining lands of two specified persons and others. 191 NC260, 131SE655. (6) Undivided interest in fifteen acres in northeast corner of quarter section described according to government surveys. 179 Ark661, 17SW(2d)877. (7) "Cotton plantation upon which said John Tullis resides." 168La934, 123S625. (8) Other descriptions held sufficient. 170Ga600, 153SE516. [b] **As otherwise stated** land must be described in mortgages with sufficient certainty to identify it; if not, deed must refer to something tangible by which property can be located. 177Ark849, 8SW(2d)440.
400-59½-New. The rule that a conveyance passes title to any interest of grantor in a tract is inapplicable to uphold a mortgage in which the land is insufficiently described. TexCivA 286 SW657.
400-63 TexCivA 29SW(2d)414.
400-66 181Ark739, 28SW(2d)70.
401-72 170Ark660, 281SW1; 157Tenn 667, 11SW(2d)906.
401-74 171Ark1023, 287SW203.
401-74½-New. Whether the civil district, town, county, state, or nation must be included in description depends on whether all or one of these is essential to identify lands. 157Tenn667, 11SW(2d)906.
401-75 178Ark699, 11SW(2d)488.
401-76 181Ark739, 28SW(2d)70.
403-4 194NC398, 139SE837.
403-6 TexCivA 286SW657.
403-8 145Va669, 134SE707.
403-11½-New. A mortgage conveying a certain number of acres out of a tract shown to be larger is not void, where the description is sufficient to permit admission of parol evidence to identify the land conveyed. 191NC260, 131SE 655.
403-15 177Ark849, 8SW(2d)440.
403-19½-New. Failure to give book and page in clerk's office where title was recorded did not invalidate the mortgage. 230Ky61, 18SW(2d)884.
404-29 162Ga395, 134SE72.
405-34 See also 24F(2d)156.
405-35 Wash 290P1005.
405-45 [d] **Description held sufficient to permit admission** of parol evidence to identify land. 191NC260, 131SE655.
406-51 103Conn657, 131A404; 217Ky 71, 288SW1014.
406-54 [a] Ont [1930] 1DomLR701 (statute construed); Ont [1929] 3DomLR845.
406-56 DelCh 152A130.
406-57 103Conn657, 131A404.
407-61½-New. Mortgage by two debtors on their several properties to secure note payable to bearer should distribute responsibility among such properties. 35PortoRico 56.
408-74 217Ky71, 288SW1014.
408-75 [a] (2) Recital of consideration for notes, without stating amount

of notes or consideration, is insufficient. 217Ky71, 288SW1014.

409–90 178Ark699, 11SW(2d)488. [a] (4) Where mortgage misstated rate of interest on notes, reformation of mortgage held unnecessary in foreclosure suit. 175Ark253, 299SW44.

410–2 Mo 31SW(2d)978.

411–12 107Conn229, 140A116; 110Conn 4, 147A1; Md 150A267. [a] **Phrase describing debt,** adding "and for the same amounts in renewal thereof" held sufficient description. 103Conn732, 132 A20. [b] **Description held sufficient.**–110Conn4, 147A1.

411–15 202 Iowa498, 210NW559; 168 La1057, 123S711.

411–16 168La1057, 123S711.

412–34 [a] **Contract giving mortgagee right to purchase,** executed without additional consideration, should be released on discharge of indebtedness by proper tender into court after institution of foreclosure proceedings. 130 Okl 226, 227 [quotCJ], 266P469.

413–39 But see 61 OntL602, [1928] 1 DomLR1125.

413–40 220MoA668, 293SW73, 75 [cit CJ]; 192Wis519, 213NW294.

413–41 34F(2d)308; 220MoA668, 293 SW73, 75 [citCJ]; 115Nebr62, 211NW 165; 115Nebr720, 214NW628; 129 Or 262, 277P85; 192Wis519, 213NW294.

414–42 115Nebr62, 211NW165; 115 Nebr720, 214NW628; 12PaDist&Co 357 (payment of debt not accelerated in absence of stipulation); 192Wis519, 213 NW294.

414–44 Minn 232NW33.

414–45 177Ark770, 9SW(2d)3; 243 Mich376, 220NW658(2dcase); 220MoA 668, 293SW73; 115Nebr720, 214NW628.

414–46 146Wash435, 263P598; 192Wis 519, 213NW294.

414–47 192Wis519, 213NW294, 295 [cit CJ]. See also 177Ark770, 9SW(2d)3.

415–49 259Mass46, 156NE61.

415–51 247Mich524, 226NW233.

415–53 See also 34NM602, 287P702.

415–63 37GaA398, 140SE403; 95 Or 300, 186P552.

416–64 241Mich52, 216NW405. [a] **In Michigan.**–109US665, 3SCt482, 27L ed 1065; 40Mich517, 29AmR553; 45Mich 455, 8NW91; 47Mich251, 10NW358; 49 Mich29, 12NW897; 81Mich233, 45NW 991; 97Mich536, 56NW931; 105Mich 219, 63NW75, 55AmSR437; 127Mich252, 86NW788; 163Mich687, 130NW306; 184Mich148, 150NW847; 241Mich52, 216 NW405.

417–85 [a] (1) 180Ark620, 22SW(2d) 167; Iowa 227NW112.

417–94½–New. Defective execution cured by later statute. 172Ark28, 287SW 755.

418–11 [a] **Evidence held sufficient** to show defendant signed note and mortgage executed by deceased husband. 181Ark1145, 29SW(2d)263.

418–27 [c] **In Arkansas.**–171Ark1023, 287SW203.

418–27½–New. Signature of the mortgagor by mark without an attesting witness is sufficient where the mortgagor acknowledges execution and signature before a notary public. 170Ark 660, 281SW1.

418–27½–New. Where the statute provides a specific method for obtaining the signature of a person unable to write, its terms must be complied with. 43 OklACR149.

418–29 [a] (2) Ostensible mortgagor has burden of proving contention signature is forgery. Iowa 232NW653. (3) Other instances. 231AppDiv761, 245 NYS686. [b] (2) Iowa 232NW649; Iowa 232NW653. [c] **Evidence sufficient to show genuineness of signature.**–206 Iowa664, 221NW210. [d] **Admissibility of evidence.**–231AppDiv761, 245NYS686. [e] **Question for Jury.**–Okl 291P573.

419–31 [b] **Wife's signature genuine.**–57ND117, 220NW645.

419–40 6PaDist&Co 428.

420–60 [b] (3) Where indebtedness was three thousand four hundred fifty-three dollars and seventy-five cents, mortgage for five thousand dollars is not fraudulent, though affidavit was sworn for that amount, where mortgagor really intended to pay five thousand dollars. 156 Md401, 144A486.

421–71 Iowa 232NW649.

421–76 [a] (6) Where acknowledgment is insufficient to make mortgage self-proving, officer's signature with that of witness is sufficient attestation. 220 Ala75, 124S110.

422–90 163Ga718, 137SE53 (dictum).

422–8 See also 48Philippine536.

423–14 27F(2d)328; 98CalA615, 277P 513; 252 IllA115.

423–19 252 IllA115; TexCivA 3SW(2d) 573.

423–23 193NC791, 138SE162.

424–42 163Ga718, 137SE53 (dictum).

424–43 163Ga718, 137SE53 (dictum).

424–44 163Ga718, 137SE53 (dictum); 252 IllA115.

426–85 323Mo 356, 19SW(2d)1043.

428–19 Iowa 227NW508 (delivery held not conditional under facts); 117Nebr 1, 219NW581.

429–48 [b] 24F(2d)156; 204 Iowa328, 213NW417; 323Mo 356, 19SW(2d)1043. [c] 117Nebr1, 219NW581.

429–53 Iowa 232NW498.

430–68 [a] **Payment** of part of notes is acknowledgment of delivery. 212Pa 344, 61A937.

430–73 [b] 206 Iowa664, 221NW210; 196NC712, 146SE804.

430–75½–New. Issue whether or not plaintiffs appeared before notary for the purpose of acknowledging mechanic's lien is to be determined by a preponderance of all the evidence. Tex CommnA 12SW(2d)991.

432–1 [a] (3) Fraud waived. 116Nebr 339, 217NW583.

432–6 246Mich255, 224NW359.

433–20 330 Ill 373, 161NE483; 253 IllA 1; 141SC232, 139SE465; 149Wash561, 271P823(2dcase).

433–22 123 Or661, 263P890.

433–24 NJCh 150A688.

434–26½–New. A mortgagee preparing an application and mortgage on its own blank forms was bound to know that the mortgage contained a provision, not in the application, that the mortgagor agreed to pay the mortgage debt, and, knowing that applicant's wife did not see the mortgage until placed before her for her signature, and did not read it, was bound to inform her of such provision before requesting her to sign. 88 IndA386, 163NE290.

434–26½–New. Ratification. In an order to ratify a mortgage procured by fraud, there must be an unequivocal act, with full knowledge of the fraud, confirming the contract or lien in question. 118Nebr297, 224NW316.

434–27 See also 97Fla392, 121S475.

434–41 122Kan74, 251P175.

435–44 122Kan74, 251P175; 36Wyo 12, 252P790. But see 97Fla392, 121S475.

435–48 156Md167, 143A708.

435–50 192NC798, 136SE118; Alta [1929] 2DomLR262.

436–65 206 Iowa297, 218NW71.

437–68 95Fla889, 116S863.

437–72 163Ga671, 137SE36. [a] **In absence of evidence as to notice,** no evidence of duress against wife is admissible against mortgagee. 163Ga671, 137SE36. [b] **Evidence of wife's remaining in possession after execution of mortgage** held not evidence to mortgagee of duress. 163Ga671, 137SE36.

437–75 144 Okl 157, 290P181(2dcase).

438–1 88 IndA543, 164NE709; 102NJ Eq98, 142A358. [a] **Mother voluntarily giving bond and mortgage** to owner of bonds stolen by son cannot set up defense of duress. NJ 148A605(2dcase).

438–2 103NJEq98, 142A358.

439–9 180Ark201, 20SW(2d)860.

439–16 58ND176, 225NW124. [b] (3) Corporation acting as trustee in contravention of statute does not void mortgage but subjects corporation to penalty provided. 152Wash342, 277P984. [i] **Mortgage to secure mortgagee against loss under bail bond** is contrary to natural justice and will not be enforced though bond is given in respect of prosecution in foreign country where contract is not regarded as illegal. BC [1929] 3DomLR79.

441–24½–New. An agreement that a son loaning his father money for the purchase price of real estate might purchase the real estate by paying a sum equal to the amount the father invested is not illegal as curtailing the right of redemption. 82NH399, 135A25.

441–24½–New. Collateral agreement between mortgagor and mortgagee is not unconscionable and unenforceable unless it results in payment of usurious interest. 82NH399, 135A25.

441–31 128 Okl 222, 262P205.

441–32 NJ 144A598.

441–34 IndA 170NE105.

442–51 85Tex200, 20SW49; Tex CommnA 212SW647; 69Wash1, 124P 118.

443–55 CalA 290P501; 242 IllA122.

443–59 165Ga89, 139SE805. [a] **Creditor not receiving dividends under trust mortgage** is not estopped to deny its validity. 251Mich518, 232NW205.

443–60 46 Ida724, 271P5.

443–62 See also 136Misc292, 240NYS 580.

443–75 23F(2d)391, 394 [citCJ]; 170 Ark895, 282SW9; Fla 130S57; 330 Ill 373, 161NE483; 207 Iowa1083, 224NW 76; 149Md662, 132A148; 242Mich258, 218NW676; 79NY15; 25AppDiv73, 49 NYS270; TexCommnA 24SW(2d)21; 1 OntWN342, 15 OntWR415.

443–76 235 IllA462; Okl 291P573.

443–78 See also TexCivA 283SW1073.

443–79 But see 176Minn55, 222NW581.

443–79½–New. Where the mortgagee was not misled and did not change his position as a result of the acts of the mortgagor, there was no estoppel. 177 Ark656, 7SW(2d)755.

443–80½–New. Payment of installments after discovery of fraud in purchase-money mortgage, in reliance upon a promise to make good the fraudulent misrepresentations, will not estop the mortgagor from setting up the fraud. 99NJEq806, 134A299.

444–85 78 Ind439; 74Miss415, 21S238, 60AmSR512; 25AppDiv73, 49NYS270; 4Man357.

444–91½–New. A wife signing a mortgage cannot complain of the consequences of her act in the absence of fraud or duress. 154Md568, 141A380.

444–93 42F(2d)76; Ala 130S80.

444–94 Mass 173NE522; 242Mich258. 218NW676; 81Mont434, 263P985; NJ 150A424.

444–1 196Mich590, 162NW1006; Mich 233NW223. But see 13PaDist&Co 743.

445–21 TexCommnA 25SW(2d)597.

445–22 172Ark48, 288SW1; 103Conn 657, 131A404; Fla 130S460; IndA 170 NE105; 206 Iowa297, 218NW71; 153 Miss314, 120S732. [a] (1) 81Mont434, 263P985.

446–23 TexCommnA 25SW(2d)597.

446–28 [b] **Circumstances attending conveyance of property** held not to create confidential relationship. 285Pa353, 132A171.

446–30½–New. Confidential relationship may arise between principal and agent. 285Pa353, 132A171 (creation of relation).

446–37 LaA 130S835(2dcase); 56ND 297, 217NW172. [a] (2) Other instances. 170Ga270, 152SE248.

446–38 [b] (3) Parol evidence is admissible to show that mortgage, though for definite sum, is simply one for future advances. 171Ark1023, 287SW203.

447–41 204 Iowa328, 213NW417; 207 Iowa11, 219NW503; 153Miss314, 120S 732.

447–42 172Ark48, 288SW1.

447–46 [a] LaA 124S703; 11LaA672, 124S705; 172Minn444, 216NW243; 147 Miss758, 113S341; 50SD510, 210NW 725; 143Wash696, 255P101. [b] (1) Cal 291P414; 84CalA560, 258P702; 85 IndA320, 154NE20; 206 Iowa297, 218 NW71; 154Md568, 141A380; 156Miss 670, 126S476(2dcase); 144 Okl 157, 290 P181(2dcase). (2) Evidence held insufficient to show ratification of execution of mortgage made under duress. 85 IndA320, 154NE20. [c] 208Cal 82, 280 P368; 204 Iowa328, 213NW417; 206 Iowa664, 221NW210; 213Ky544, 281 SW795; 234Ky580, 28SW(2d)783; 154 Md568, 141A380; 156Md302, 144A254; 237Mich198, 211NW642; 246Mich255, 224NW359; 174Minn261, 219NW93; 153Miss314, 120S732; 316Mo 674, 291 SW109; 81Mont434, 263P985; NJCh

144A454; 226AppDiv126, 234NYS414; 226AppDiv347, 234NYS440; 54ND665, 210NW172; 285Pa353, 132A171; 150 Va515, 143SE741; 36Wyo 12, 252P790. [e] 216Ala265, 113S238; 149Md662, 132 A148; 116Nebr339, 217NW583. [g] 158Md6, 147A713; RI 146A632. [h] 132Misc294, 230NYS226. [i] 147Miss 758, 113S341. [m] **To show mortgage on homestead.**–TexCivA 12SW(2d)269.

448-48 TexCivA 2SW(2d)987; Tex CivA 12SW(2d)625.

448-55 295Pa276, 145A301.

449-58½–New. Intention determines governing law. 5PaDist&Co 439.

449-62 94CalA755, 271P912.

449-65 Iowa 229NW724; Mont 289P 555(3dcase); 128Misc695, 220NYS294.

449-66 222AppDiv40, 225NYS394.

449-66½–New. Terms of a mortgage, under seal, as to placing insurance, supersede those in an application for a loan, not under seal. 99NJEq629, 134 A353.

449-66⅓–New. Court cannot make new contract for parties to mortgage or grant relief from improvident contracts. Mont 289P555(3dcase).

449-68 117Nebr125, 219NW956; 130 Misc738, 225NYS152.

449-70 94CalA755, 271P912; MoA 29 SW(2d)161.

450-75 94CalA755, 271P912.

450-75⅓–New. Where the language is clear and explicit, no occasion for construction arises. 129 Or262, 277P85.

450-77 130Misc738, 225NYS152.

450-78 [a] (3) Provision that mortgage was security for note or renewal thereof held to mean that it was security for renewal if terms of note were same. 256Mass250, 152NE335.

450-80 89CalA29, 264P328.

450-81 181Ark739, 28SW(2d)70.

451-83 But see 136Misc845, 244NYS76.

451-84 [a] **Minor, subordinate, or supplementary provision** at variance with granting provisions cannot destroy security. 42F(2d)886.

451-88 42F(2d)886.

451-93 46Ida157, 268P12; 237IllA 166; 249IllA408; 227Ky573, 13SW (2d)778; Mont 289P555(3dcase). [a] (3) Where mortgage states date of payment, and collateral agreement states different time, recital of purpose in agreement will not control. 6PaDist&Co 65.

452-2 208Cal453, 281P1022; Mass 168 NE405; 320Mo1208, 9SW(2d)925; 115 Nebr720, 214NW628; 128Misc695, 220 NYS294. [c] 241Mich338, 216NW913. [e] **Different date in note and mortgage.**–36HunNY565; 126SC261, 119SE 845. [f] **Bond and mortgage are separate instruments** though one may be collateral to other. 131Misc331, 226NYS 656. [g] **Note and mortgage and contemporaneous contract** modifying terms of note and mortgage as to date of maturity construed together. 52SD100, 216NW862.

452-3 208Cal453, 281P1022; 316Mo 1257, 293SW382; 129 Or262, 277P85.

453-8 86Colo115, 278P798; Iowa 229 NW724; NJCh 147A162; 128Misc695, 220NYS294; 229AppDiv245, 240NYS 597. [a] **Conflict between note and attached interest coupon** should be resolved in favor of coupon. Iowa 229 NW724.

453-12 35NYSuper174; 52SD100, 216 NW862.

453-14 168La262, 121S764.

453-14½ [a] **Where conflict in note and mortgage cannot be reconciled,** acceleration clause in note controls statement in mortgage. CalA 284P729.

453-14⅓–New. In case of conflict between acceleration clauses in note and mortgage, that in note must prevail. Iowa 229NW724.

453-16 17F(2d)503.

454-22 [a] 254Mass282, 150NE293. [c] Minn 231NW790. [d] **Sufficiency of evidence as to property intended to be included.**–Minn 231NW790.

454-22½–New. The burden of proof is on the mortgagee to identify lands insufficiently described in the mortgage. 179Ark661, 17SW(2d)877.

454-22⅓–New. Mortgage indebtedness covering substantially equal separate estates of husband and wife are presumed proportionate to respective titles. ND 231NW550.

454-25 [a] **Written evidence of debt.**–CalA 290P478.

454-33 220Ala499, 125S615; 176Ark 986, 4SW(2d)949.

454-34 134 Okl237, 273P261, 265 [cit CJ].

454-38 [a] (6) 241Mich338, 216NW 913; 247Mich348, 225NW496; 157SC 334, 154SE305. (7) Mortgage assigned to creditor of mortgagor to secure specified debt and other obligations due assignee by mortgage is regarded as securing debt named in mortgage, not such specified debt and other obligations. 103Conn657, 131A404.

455-50 103WVa165, 136SE851.

456-52 103WVa165, 136SE851.

456-53 205Ala674, 89S35.

456-54 49Philippine703.

457-63 31Ariz187, 251P453.

457-67 146Wash283, 263P190, 195 [quotCJ].

458-75½–New. Subsequent assignment of mortgage as collateral security to creditor of mortgagor to secure specified debt and other obligations due assignee by mortgagor does not change amount secured or affect rights of subsequent claimants. 103Conn657, 131A 404.

458-77 134Misc82, 234NYS514. [a] (2) Only as to amount applied on purchase price of lot covered by mortgage. 134 Misc82, 234NYS514. [d] **Instruments held not to be purchase-money mortgage.**–134Misc82, 234NYS514. [e] **To render mortgage purchase-money mortgage,** whole of principal must have been applied toward payment of purchase money. 134Misc82, 234NYS514.

458-78 23F(2d)391, 394 [citCJ].

461-18 3 OhA308.

461-20 94NY104; 163AppDiv72, 148 NYS372.

462-28½–New. Where mortgagors paid second mortgage notes which their grantees had assumed and agreed to pay, they were subrogated to rights of the second mortgagee, and stood in his shoes as against such grantees. 29F (2d)545.

462-30 103Conn732, 132A20; 202 Iowa 498, 210NW559; 124Kan315, 259P681, 682 [citCyc]; Kan 292P748; 168La 1057, 123S711; Nev 279P761; 49Philippine703, 717 [citCyc]; TexCivA 15 SW(2d)68; TexCivA 27SW(2d)554. [c] 254Mass282, 150NE293.

462-31 [a] (5) Under Pub. St. c 139 § 3, mortgage to secure future advances of fixed sums as buildings reach specified stage of construction is valid if event arrives and payment made as agreed. 82NH313, 133A448.

463-51 179Ark12, 13SW(2d)822.

463-52½–New. Where a trust deed was executed by both husband and wife, the lien created in a bank's favor for the entire amount of the debt was not affected by subsequent conveyance of property from the husband to the wife. TexCivA 15SW(2d)155.

464-54 49Philippine703. See also 218 Ala85, 117S678. [d] (5) 15F(2d)694; 220Ala499, 125S615; 110Conn4, 147A1; 170Ga402, 152SE903(2dcase); 205 Iowa 1281, 217NW806; 149Miss214, 115S395. (6) Mortgage covering advances secures all advances, and not only sum advanced at execution of mortgage. 146Wash283, 263P190.

464-55 176Ark986, 4SW(2d)949.

464-56 110Conn4, 147A1.

465-58½–New. The validity of a mortgage is not affected by the fact that future advances are to be made in services instead of money. Nev 279P761.

465-60 110Conn438, 148A388; Mass 168NE777 (mortgagors entitled to reconveyance).

465-64 13F(2d)111.

466-81 92Fla684, 109S582; 153Md380, 138A255; 247Mich217, 225NW578; 253 NY499, 171NE757.

467-87 207 Iowa11, 219NW503.

467-94 206 Iowa680, 218NW575, 578 [citCJ].

468-10 [a] **Assignee of mortgagee** is not entitled to foreclose on mortgagor's unsecured note acquired from third person. Iowa 232NW267.

468-11 180Ark372, 21SW(2d)419(2d case).

468-12 180Ark372, 21SW(2d)419(2d case).

469-27½–New. Payment of bonus to holder of prior mortgage requesting settlement thereof is not justified where not specially authorized by mortgagor and cannot be credited. 116Nebr25, 215 NW462.

470-33 176Ark381, 3SW(2d)34.

470-34 159Tenn337, 17SW(2d)1.

470-37 [b] (3) Provision for payment of fees by reason of litigation with third parties to protect lien held inapplicable in proceedings wherein it was not necessary for mortgagee to appear or answer in order to protect lien. 241 IllA235.

470-46 105US122, 26L ed940; 38Wash 493, 80P777. [a] **Interest** on payments. 74Kan442, 87P184.

471-54 Contra 116Nebr25, 215NW462.

471-58 320Mo1208, 9SW(2d)925.

471-63½–New. Where bonds and mortgages are given as collateral security for a note for the aggregate amount of the mortgages, payment of interest on the note satisfies the obligation as to interest. 226AppDiv601, 236NYS185.

471-63⅓–New. The amount allowed a mortgagor by the mortgagee for work the latter had agreed to do does not bear interest. 208Cal453, 281P1022.

471-63¼–New. Where a grantee receives interest on his disbursements, he is chargeable with interest on his receipts. Mass 168NE777.

472-67 [b] **Upon mortgagee's default in performing** certain work and mortgagor's recovery therefor, interest on principal note is payable though mortgagee had agreed to postpone interest till work was completed. 208Cal453, 281P1022.

472-69 Mass 168NE777 (where evidence shows date of disbursements).

472-71 [a] 263Mass489, 161NE587.

473-87 [c] 254Mass282, 150NE293.

474-3 Eng 5ChD287; Eng 45ChD225; Eng 8Exch620, 155Reprint1500; Eng 16 M&W244, 153Reprint1179. See also 15 Minn416, 2AmR142.

474-10 [c] **Note for payment of interest construed with trust deed** held to obligate makers to pay principal and interest and to entitle payee to foreclose trust deed. TexCivA 283SW651.

474-14 99Fla1092, 127S323. See also 103Conn732, 132A20.

474-19 Mass 172NE72 (right to recover bonus).

475-23 [h] **Intent of general clauses of mortgage must be considered as favorable to mortgagee** where sufficiently comprehensive to include property in dispute. 26F(2d)937. [i] **Rule of ejusdem generis applies.**–34NM562, 287P64.

475-26 [a] (2) Mortgage clause covering "all other real estate belonging to" mortgagor in Orleans parish has been held too general to identify particular property subsequently sold by mortgagor but sufficient to establish plaintiff's allegation as to defendant's intention, in action to avoid sale as simulation. 163La442, 112S40.

476-47 263Mass206, 161NE243; Tex CivA 286SW657; Ont [1928] 4DomLR 390. See also 5LaA630.

477-48 TexCivA 286SW657.

477-50 217Ala188, 115S182.

478-78 82Mont364, 267P299.

478-79 [a] **Where only interest had been foreclosed,** mortgage of interest "now owned by me" held not to cover after-acquired interest. 180Ark68, 20 SW(2d)645.

479-81 82Mont364, 267P299.

480-97 35F(2d)508; 98Fla713, 124S172 (furniture and fixtures subsequently placed in property); 287Pa284, 135A 134.

480-98 33F(2d)512(2dcase).

480-99 34F(2d)649. But see 287Pa284, 135A134.

480-1 [c] **Property to which mortgage held not limited.**–(1) 287Pa284, 135A134.

481-6 [d] **In Porto Rico.**–33PortoRico 144.

481-12 [b] **Mortgage of undivided interest** by tenant attaches only to his share upon partition. 33PortoRico 144. [c] **Partition of property of which un-**

divided interest is mortgaged cannot be attacked by mortgage creditor of tenant except on ground of fraud. 33PortoRico 144.

481-15½-New. In Porto Rico, where a joint owner of several parcels of land mortgages his undivided interests, and the several parcels are later consolidated and divided between the joint owners, the mortgage can be foreclosed only against the parcel allotted to the mortgagor. 33PortoRico 144.

481-17 TexCivA 288SW(2d)833. But see 299Pa325, 149A479.

482-23½-New. Extension of a mortgage to include the sole personal property of one of the mortgagors, pursuant to which such property was written into the mortgage, held valid although not consented to by the other mortgagor. 21AlaA635, 111S275.

482-27 Mont 290P255; 36Wyo 12, 252 P790.

483-39 57ND404, 222NW262. [c] **Light plant purchased under conditional sale agreement.**-57ND404, 222NW262.

483-47 159La814, 106S315; 162La1062, 111S421; NJCh 150A196.

483-49 44F(2d)218. [a] But see Miss 120S447. (2) Refining company's oil tank, tools, engines, and paraphernalia used about plant held "equipment" and included in trust deed. 35F(2d)508.

484-58 See also 162La1062, 111S421.

484-63 90Fla582, 107S354; 315Mo 811, 288SW774 [rev MoA 271SW857]. [b] (2) Gathered crops are not part of realty under statute and not subject to mortgage on "land." 162La1062, 111S421.

484-66 153Md582, 139A283.

484-66½-New. Severance in ownership by chattel mortgage will not relieve either land or crops of lien of prior deed of trust. 315Mo 811, 288SW774.

484-67 165Ga366, 140SE761; 165Ga 503, 141SE405.

485-73 203 Iowa748, 211NW225; NJCh 151A766; ND 229NW805.

485-84 [a] (4) TexCivA 290SW788.

486-93½-New. As against all the world, except the mortgagee and his privies, the mortgagor is the owner in fee. 216 Ala539, 113S617.

486-94 220Ala35, 123S229.

486-95 110Conn374, 148A133; 244Mich 403, 221NW322; 82NH399, 135A25.

486-99 170Ark895, 282SW9; 336 Ill 450, 168NE266; 193Wis503, 215NW571, 55ALR525.

486-2 36F(2d)221 (rule prevails in Texas); 32Ariz130, 256P365; TexCivA 8SW(2d)514.

487-16 162Ga735, 134SE771; TexCivA 9SW(2d)452.

487-17 83Colo 335, 264P1087.

488-18 194NC623, 140SE295.

488-22 83Colo 335, 264P1087.

488-25 162Ga735, 134SE771; TexCivA 16SW(2d)969.

489-26 165Ga115, 139SE810.

489-27 165Ga115, 139SE810; 167Ga 170, 144SE893; 244Mich309, 221NW 338; Wis 230NW54. [a] (4) Grantor retains right of possession and redemption, and has equitable estate in land, which may be assigned or subjected to payment of debts. 167Ga170, 144SE893.

489-32 214Ala691, 108S737; 170Ark 1146, 282SW995; NH 150A114.

490-35 217Ala39, 114S470; NH 150A 114 (possession not adverse).

493-67 67 Ill 170; 111 Ill 161; 152 Ill 190, 38NE762, 43AmSR233.

494-79 Or 292P304.

494-81 166Ga60, 142SE534; 11LaA27, 122S503.

494-84 See also 177Ark652, 9SW(2d) 329.

494-86 See also 177Ark652, 9SW(2d) 329.

494-89 57ND167, 220NW892. See also 178Ark699, 11SW(2d)488.

495-92 179Ark110, 14SW(2d)1104.

495-93 [a] In Nevada.-291P311.

495-97½-New. A grantee in a security deed redeeming property by paying taxes from one who purchased it at tax sale acquired no title to it. 39GaA280, 147 SE142.

495-8 57ND167, 220NW892. [a] **Second mortgagee, on purchase from buyer at tax sale, gained title clear of first mortgage.** 176Ark423, 8SW(2d)59.

496-11 192NC126, 133SE558.

496-15 137Misc674, 244NYS267; 196 NC784, 147SE307; 56ND581, 218NW 644.

496-16 [a] **One assuming payment of mortgage debt** acquires no protection, so far as lien is concerned, by recording instrument of assumption. 220Ky632, 295SW976.

497-19½-New. To operate on title of registered land, a mortgage needs recording. 171Minn182, 213NW736.

497-31 [a] **Contract of extension, signed, acknowledged, and recorded, as prescribed** by statute for extension of lien of trust deeds and mortgages after four years from maturity of indebtedness secured thereby, is not required, where no persons are affected by the extension, except the parties or persons holding under voluntary conveyance from mortgagor in subordination to the lien. 118Tex58, 10SW(2d)539.

497-32 But see 228AppDiv640, 238NYS 87(2dcase).

498-44 43OkiACR221.

498-45 43OkiACR221.

499-55 [a] **Instruments not subject to tax.**-50SD590, 211NW457.

499-58 2LaA586.

499-65 17F(2d)503 (ten days); 165Ga 558, 142SE127.

499-66 17F(2d)503.

499-67 17F(2d)503.

499-68 [b] **In South Carolina.**-17F(2d) 503 (22 St. at L. p 746; 28 St. at L. p 482).

500-71½-New. Ordinarily, a mortgage may be recorded after debt is due. 90 Fla542, 106S402.

501-96½-New. [§ 427a] H. **Extension.** As between mortgagor and mortgagee, an extension affidavit is unnecessary so long as the debt is not barred by statute of limitations. 85Mont241, 278P 512.

501-96⅓-New. **Renewal.** Where principal obligation was not barred, the mortgage is good as against the mortgagors whether or not an affidavit of renewal was sufficient under statute not intended for the benefit of the mortgagor. 85Mont73, 277P803.

501-96¼-New. A purchaser taking property subject to mortgage and making payments on indebtedness within the limitation period is liable whether or not an affidavit of extension was filed. 85Mont241, 278P512.

501-98 93Fla983, 113S117; 128 Or635, 275P663.

501-99 93Fla983, 113S117.

501-1 Nev 279P761.

501-7 92Fla684, 109S582; 150Md304, 133A141; 197NC177, 148SE45.

502-11½-New. The lien of a deed of trust secures payment of attorney's fees provided for by the lien. 148Va686, 139SE257.

502-17½-New. An invalid trust deed has no effect as a lien. 93Fla983, 113S 117.

502-19 17F(2d)503.

503-33 31Ariz187, 251P453; 205 Iowa 1273, 218NW42.

503-42½-New. Under statute a lien is rendered ineffective after eight years from maturity of debt unless an affidavit of renewal is filed. 83Mont343, 272P 532.

504-47 83Mont21, 269P162.

504-51½-New. Where one having two rights under contract, one of which is secured by mortgage, waives such secured right and sues on the other, the mortgage is waived. 31Ariz187, 251P 453.

504-52 110Conn374, 148A133.

504-53 31Ariz187, 251P453; 110Conn 374, 148A133 (by abandoning security); NC 155SE244.

504-57 [d] **Priority of lien is not waived by merely consenting to improvements.**-MoA 308SW(2d)154.

505-70 141SC290, 139SE633.

506-88 [a] **Where house subject to deed of trust is torn down and materials used in building on another site on premises,** lien attaches to new house. MoA 24SW(2d)693.

507-97½-New. Where a trust deed is given to secure a described obligation evidenced by notes with definite maturity and subject to the maker's option to redeem in long term bonds, a change in some of the notes before sale extending their maturity and striking out such option does not deprive the holders of their right to share ratably in the security. 55ND593, 215NW89.

507-97⅓-New. Such change does not invalidate the notes. 55ND593, 215NW 89.

507-97¼-New. A purchaser in due course of bonds pledged with a bank secured by trust deed was entitled to priority over the holder of a bond delivered subsequent to purchase. 151Va 481, 145SE302.

507-1 96Fla568, 120S4; Sask [1930] 2DomLR998.

508-4 96Fla566, 119S146(2dcase); 147 Miss885, 113S552, 555 [citCJ].

508-10 [c] **Rule held not varied.**-98Fla 859, 124S448.

508-11 98Fla859, 124S448.

509-20 Okl 291P550.

509-21½-New. Priority between purchaser of coupon interest notes and holder of note. Okl 293P223; Okl 293P224.

509-24 93Fla983, 113S117; 164Ga852, 139SE557; 51SD197, 212NW876; Utah 268P561; 148Va528, 139SE317. [h] **Advances made by mortgagee to mortgagor** in addition to amount of loan evidenced by mortgage are enforceable liens as regards priority over subsequent mortgage. Ala 127S186.

510-25 227AppDiv98, 237NYS26; 133 Okl 297, 272P427. [a] (2) Where mortgagor, after parting with title, purchased prior mortgage, such mortgage will be held subordinated to later mortgage given by her. NJCh 145A234.

510-41 54SD634, 224NW187.

511-49 235Ky831, 32SW(2d)415; Tex CivA 286SW657.

511-51 174Ark738, 298SW10; TexCivA 286SW657.

511-52 85Mont365, 278P996; Tex CommnA 290SW150.

512-58 CalA 293P149; 205 Iowa962, 218NW916, 917 [quotCJ]; 315Mo 1155, 289SW571; 103NJEq78, 142A312; 150 Va203, 142SE389. See also 170La969, 129S547. [c] (2) Priority of purchase-money mortgage is subordinate to another mortgage but prior to judgment lien thereon. NJCh 151A499. [f] See also NJCh 140A457. [h] (2) Where holder of first mortgage consented to postponement of lien in so far as money advanced under trust mortgage was used in erection of building, trust mortgage had priority only as to amount of loan so used. NJ 146A213. (3) First mortgagee's agreement to subordinate purchase-money mortgage to second mortgage does not entitle second mortgagee to add payments on mechanics' liens to his mortgage and thus obtain priority for them. 154Wash445, 282P842. (4) Subordinating provision held not limited to lots on which buildings were erected. 249Mich89, 227NW674. (5) If first mortgagee subordinates his mortgage to third mortgage, first mortgage becomes subordinate to both second and third mortgages. Ala 128S220. [i] (2) Priority held limited to agreed half cost of lots and half cost of buildings erected thereon. 249Mich89, 227NW674. (3) Subordination clause contemplated only building loan mortgage or permanent first mortgage. 254NY128, 172NE265. [j] **Agreement of creditors holding unrecorded trust deeds held not binding** on debtor's judgment creditors. 150Va 203, 142SE389. [k] **Particular agreements construed.**-251NY340, 167NE463.

513-61 225Ky155, 7SW(2d)1057.

513-63 NJCh 149A340.

513-68½-New. Parol agreement between mortgagees that first mortgage had priority is valid. 175Ark417, 299 SW753.

513-70 110Conn670, 149A214; 127Kan 388, 273P170. [e] (2) Second mortgage for value entitled to priority over previously executed and recorded first mortgage for which consideration was subsequently received. 196Wis387, 220NW 181.

514-75 IndA 168NE711(2dcase) (mortgage for money advanced has priority over one for preexisting debt).

514–77 315Mo 1155, 289SW571. See also 194NC348, 139SE695.

514–87 214Ala608, 108S525, 47ALR506; 205Cal 496, 271P898; 208Cal 329, 281P 381, 65ALR1075 (contract evidencing agent's advances and recorded prior to execution of trust deed); 86Colo 493, 283P1042; 93Fla983, 113S117, 119 [citCJ]; 208 Iowa1107, 225NW943; 267 Mass122, 166NE563; NJCh 149A340; 25 OhA84, 158NE548; 147Va448, 137SE 452; 154Wash445, 282P842. [e] 220Ala 276, 124S858(2dcase). [g] (2) Lien of attorney for services is subordinate to mortgage. 31F(2d)229(1stcase). [i] (2) Even though mortgage is not recorded till after death of mortgagor. 101 NJEq88, 137A717. [j] 28F(2d)393. [n] **Where trustee under deed of trust took title with notice** of equities of vendee by parol conveyance, both being entitled to unidentified portion of tract of land, held that trustee must select in subordination to rights of vendee. 145Va669, 134SE 707. [o] **Easements.**–204 Iowa368, 213 NW253. [p] **Grantee under sheriff's deed** had first lien on property as against owners to whom purchaser agreed to sell. 167Ga484, 145SE884. [q] **Purchase of capital stock** by one, due to false representations, does not give him priority over bondholders. 31F(2d)227. [r] **By adjudication of superiority** of mortgage over other liens in foreclosure action, mortgagee's rights are as though no other liens were claimed. Wash 290 P866.

515–89 [c] 198NC99, 150SE706. [d] (1) 93Fla983, 113S117. (8) Lien for materials used in drilling wells precedes mortgage recorded after materials had begun to be furnished. 173Ark983, 293SW1012. (9) Lien of one furnishing labor and materials after filing of purchase-money mortgage is prior to first mortgage filed subsequent to commencement of work. Wash 286P105. (10) Other instances. 178Ark17, 9SW (2d)773; 178Ark18, 9SW(2d)785; 93 CalA228, 269P566; 96Fla343, 118S21; 158Tenn53, 12SW(2d)711; 150Va365, 143SE710; 151Va845, 145SE321; 151Va 426, 145SE352; 149Wash424, 271P73. [h] **Equity under some circumstances will decree superior lien** in favor of third party or stranger who advances money to protect mortgage security. Tex CommnA 18SW(2d)602.

516–91 17F(2d)503; 93Fla983, 113S 117. [d] **Application to debts of deceased mortgagor.**–27SCEq302.

516–93½–New. Lien of a tenant in common on accrued rents and profits is inferior to a mortgage given by a security deed of a cotenant. 162Ga735, 134SE 771.

516–93½–New. One loaning money to the mortgagor to pay interest on a mortgage does not acquire a lien superior to the mortgage. 150Md304, 133A141.

516–96 25 OhA84, 158NE548.

516–97 164Ga600, 139SE72.

517–4 Iowa 231NW470; 83NH374, 142 A702. See also 151Va252, 144SE417.

517–7 [b] **Waiver of vendor's lien does not waive priority over other liens** against property. Ala 128S220.

517–13½–New. A person acquiring from the mortgagor notes of a prospective purchaser under an unrecorded contract acquires no lien superior to the mortgage where the maker of the notes removed from the premises and forfeited his rights. 174Ark19, 294SW362.

517–15 OhA 172NE698.

518–16 203 Iowa320, 211NW389; OhA 172NE698. [b] **Mortgage of cotenant's interest, apparent of record,** held prior to interest of other tenant who had been in possession and who had orally purchased such mortgagor's interest before execution of mortgage. 203 Iowa320, 211NW389. [c] **Lien of purchaser continues to date of purchaser's knowledge** of vendor's subsequently executed mortgage. OhA 172NE698.

518–26 IndA 169NE693(2dcase); 170 La363, 127S869; 29 OhA287, 163NE35; 161Tenn298, 30SW(2d)253 (effect of new mortgage after release of record of prior mortgage). [a] (7) Prior judgment against vendee takes priority over mortgage to secure future advances. NJCh 151A499. [m] **Holder of mortgage, advancing additional sum** on second mortgage to complete building, has superior lien to lien of judgment creditor. NJCh 146A353. [n] **Rights of assignee of judgment** having notice of unrecorded mortgage. SC 155SE141.

519–29 [b] **Subsequent creditors** obtaining judgment have lien on equity of redemption only and cannot compel enforcement of deed of trust until due and payable. 146Va197, 135SE882.

519–32 [c] **In Connecticut.**–103Conn732, 132A20.

520–33 165Ga558, 142SE127; 12LaA 459, 124S586; 33NM303, 265P454. [a] (3) 202 Iowa498, 210NW559. [g] **In Wisconsin.**–191Wis602, 211NW795. [h] **Mortgagee has right to rely** on judgment docket index revealing no liens. 191Wis 602, 211NW795.

520–41 158Md638, 149A459.

521–43 92PaSuper263.

521–43½–New. A provision in a decree confirming a second sale in partition, for levy to enforce judgment for deficiency, does not give priority of a lien to that of mortgages given by the purchaser after sale and before confirmation. 15F(2d) 909.

521–53 15F(2d)909. See also 164Ga421, 138SE902; Iowa 231NW309; 153Md582, 139A283; TexCivA 289SW116.

521–55 212Ky680, 280SW97.

522–60½–New. Execution delivered to sheriff with instructions to hold until further instructions is inferior to mortgage executed before levy thereunder. 233Ky749, 26SW(2d)1043.

522–65 [a] 125Kan386, 26P46.

523–73 Can [1930] 4DomLR1035 (irrigation rates).

523–75 164Ga364, 138SE794.

523–83½–New. A tenant is not entitled to priority under subrogation for payment of cotenant's share of taxes as against a mortgagee of cotenant's interest, where he permitted a common agent to distribute all income, leaving nothing for payment of taxes. 56AppDC353, 13 F(2d)959.

524–91 Iowa 227NW112; 154Tenn444, 289SW496. But see TexCivA 25SW(2d) 246. [c] **In absence of statute.**–17F(2d) 503.

524–95 94Fla899, 114S441; 259Mass 585, 156NE871; 249Mich465, 229NW 448. [b] **Agreement held not to surrender its priority over subsequent mechanics' liens.**–NJ 146A213.

524–96 127Kan584, 274P214; NJ 146 A213; 248NY137, 161NE447; ND 232 NW749; 299Pa1, 148A904. [b] **Effect of waiver of materialman's lien.**–NJ 141A 586.

525–99 16F(2d)303; 254Mass282, 150 NE293; 82NH313, 133A448; 101NJEq 103, 137A92; 253NY499, 171NE757. [a] (1) TexCivA 15SW(2d)68; TexCivA 15 SW(2d)155. (2) TexCivA 15SW(2d)68.

525–2 But see 158Md638, 149A459.

526–3 16F(2d)303.

526–5 16F(2d)303; 82NH313, 133A448.

526–13 254Mass282, 150NE293.

526–18 205Cal 496, 271P898; 82NH313, 133A448; 101NJEq103, 137A92; 102 NJEq8, 139A602. [c] **Advances under building and loan mortgage** are obligatory. 101NJEq103, 137A92.

527–19 82NH313, 133A448.

527–22 202 Iowa498, 210NW559; Nev 279P761.

527–23 101NJEq103, 137A92.

527–26 176Ark300, 2SW(2d)1093, 1094 [citCJ]; Nev 279P761 (unnecessary advances or services constituting advances); 82NH313, 133A448; 101NJEq 103, 137A92.

528–29 101NJEq103, 137A92.

529–41 214Ala262, 263, 107S741 [cit Cyc]; 173Ark406, 293SW40, 41 [citCJ]; Cal 292P1069; 110Conn392, 148A328; 315Mo 1155, 289SW571; NJCh 151A499; 134MiscS2, 234NYS514; 137 Okl 204, 279 P310 (priority over mortgage by purchaser previously recorded); TexCivA 287SW279; 152Va707, 148SE581; 152 Va693, 148SE695. But see 147SC259, 145SE113. [e] (2) Purchase-money mortgage is superior to materialman's lien as to building on mortgaged land erected half from materials derived from old buildings thereon and half from materials furnished by materialman. 176Ark520, 3SW(2d)293. [h] (2) Mortgage is purchase-money mortgage having priority over mortgagor's dower interest only to extent of amount spent in paying for lot. 134Misc82, 234NYS 514. [j] **Deed of trust executed by ultimate purchaser** held purchase-money mortgage within rule. 315Mo 1155, 289 SW571. [k] **Lien given by holder of option to purchase before exercise of option** is not superior to subsequent purchase-money mortgage given on exercise of option. 85CalA119, 259P52.

530–48 249Mich89, 227NW674 (by express agreement).

530–49 [a] 110Conn392, 148A328 (where oral purchase contract provides that purchaser is to complete house).

530–51 101NJEq561, 139A172.

531–55½–New. Mortgage securing note given for unpaid balance on purchase price of interest in partnership held not purchase-money mortgage. Iowa 232 NW498.

531–57 152Va707, 148SE581. Contra Utah 268P561.

531–61 Ga 154SE785; 134Misc82, 234 NYS514; 196NC24, 144SE365; 53SD 138, 220NW448, 450 [citCJ].

532–63 134Misc82, 234NYS514.

532–65 Or 286P983.

532–72 163Ga551, 136SE528; 203 Iowa 320, 211NW389; 122Kan709, 253P215; 218Ky155, 291SW19; TexCivA 278SW 885. [h] **Future advances.**–82NH313, 133A448.

533–73 22F(2d)886; 203 Iowa320, 211 NW389; 5PaDist&Co 691. See also 214 Ala390, 107S863.

533–74 34 OhA123, 170NE368; Tex CivA 278SW885. [a] (4) Mortgage prevails over prior assigned vendor's lien, unrecorded, of which he has no notice. TexCivA 278SW885.

533–77 163Ga551, 136SE528; 85 IndA 102, 152NE861; 203 Iowa320, 211NW 389; 218Ky155, 291SW19; 84Mont276, 275P278; 132 Okl 125, 269P1054; 5 PaDist&Co 691.

534–80 218Ky155, 291SW19; 149Md 412, 131A780; 152Md464, 136A831; 151 Miss111, 117S514; 159Tenn337, 17SW (2d)1; 159Tenn337, 19SW(2d)273 (mortgagees held entitled to interest and not chargeable with any part of taxes).

535–88 TexCivA 278SW885.

536–92 [b] **Mortgagee can rely on presumptions of honesty and good faith.**–Wash 291P1105.

536–95 176Ark629, 3SW(2d)690; 207 Cal 624, 279P428; 163Ga551, 136SE528 (dictum); 37GaA229, 139SE822; Iowa 228NW63; 232Ky622, 24SW(2d)265; OhA 172NE698; Okl 293P218; 146SC 157, 143SE549. [k] **Mortgagee, taking with notice** of prior title bonds, obtains inferior rights to bond owners where bonds are not proved fraudulent. 225 Ky105, 7SW(2d)855. [l] **Statutory notice.**–37F(2d)265.

537–5 219Ala314, 122S330; 77CalA681, 247P516; 99Fla1151, 128S801(2dcase) (construction work pending on property); 230Ky460, 20SW(2d)72; 226 AppDiv601, 236NYS185; 137Okl 204, 279P310. [a] (7) Record of judgment in name other than that used in mortgage held not to give notice. 99NJEq610, 133 A514. [d] **Constructive notice of fraud does not question good faith.**–Wash 291 P1105.

538–8 Ark 30SW(2d)858.

538–12 137 Okl 204, 279P310 (terms of escrow of deed).

539–24 31F(2d)638; 134Misc96, 234 NYS491; 136 Okl 180, 276P732.

541–42 See also 167Ga170, 144SE893.

541–47 But see Wash 291P1105.

542–49 168Ga426, 148SE86.

542–52 TexCivA 2SW(2d)281.

543–62 36F(2d)667; Ida 290P383; 208 Iowa739, 224NW489, 63ALR1051; 218 Ky155, 291SW19; 83Mont68, 271P695; 226AppDiv601, 236NYS185 (title company's report showing encumbrance held actual notice). [d] (2) Record of assignment of prior mortgage is not necessary to charge subsequent mortgagee with notice of recorded mortgage. Ida 290P383. [i] (8) Recital in deed by corporation organized to engage in building and real estate business, that

property was paid for with capital stock, does not charge mortgagee with notice of corporation's violation of Blue Sky Law. 159Tenn337, 17SW(2d)1.

543-63 CalA 289P179. [d] (4) Recording of lien given by holder of option to purchase before exercise of option is not notice to subsequent purchase-money mortgagee. 85CalA119, 259P52.

544-70 ND 230NW18; 123 Okl 181, 252 P437. [d] **Burden of proving valuable consideration** rests on mortgagee taking mortgage from one who secured title through fraud. 123 Okl 181, 252P437.

545-73 239Mich459, 214NW424.

545-75 Conn 151A355; 44 Ida347, 257 P30; 85 IndA102, 152NE861; 87NY457; 123 Okl 181, 252P437; 155SC414, 152SE 640; TexCivA 278SW473; 143Wash297, 255P117; 145Wash61, 258P856. See also Ga 134SE478 [disting 134Ga161, 67 SE880]. Contra TexCivA 286SW657. [g] **Note and mortgage merging existing obligations** held not taken for value. TexCivA 278SW473.

546-76 162Ga615, 134SE478; TexCivA 278SW473. [a] **Where grantor obtained additional loan** after execution of security deed, grantee became purchaser for value against prior unrecorded deed of grantor and entitled to priority if without notice. 162Ga615, 134SE478. [b] **Future extension of credit held new consideration.**–162Ga615, 134SE478.

546-82 22F(2d)886; 100 Ind229; Miss 130S99; TexCivA 278SW473.

547-86 TexCivA 278SW473.

547-89 208Cal 329, 281P381, 65ALR 1075 (contract evidencing agent's advances recorded prior to execution of trust deed); DelCh 141A271; 164Ga 600, 139SE72; 217Ky71, 288SW1014; 10LaA784, 122S908(2dcase); 13LaA323, 125S774; 103NJEq78, 142A312; 285Pa 498, 132A702; Ont [1927] 3DomLR526. [c] (2) Mortgage, securing loan payable as building work progressed and recorded before labor and materials were commenced to be furnished, has priority, though final installment of loan is paid after work is finished. 98Fla683, 124 S42. [e] **Where materialmen's claim is recorded within statutory time,** recording has retroactive effect against mortgages previously recorded. 168La369, 122S68.

547-92½-New. Bonds which are secured by a trust deed and are sold on the markets as instruments of commerce take priority over all encumbrances arising subsequent to the recording of the trust deed. 171Minn445, 214NW503, 53 ALR573.

547-96 225Ky521, 9SW(2d)528; 78 Mont395, 255P1049.

548-3 22F(2d)886; DelCh 141A271; 167Gal70, 144SE893.

548-4 Mich 233NW404.

549-3 5LaA519.

549-11 [a] **Converse of rule.**–TexCivA 278SW885. [b] **Rights of innocent mortgagee** held superior to lien of previously assigned purchase-money note. 220Ky787, 295SW1052.

549-15 87Colo240, 286P275; 206 Iowa 1198, 221NW791; 239Mich459, 214NW 424; Mich 233NW404; 198NC186, 151 SE99. See also 9PaDist&Co 535.

550-17 Contra 145Wash61, 258P856.

550-27 205 Iowa962, 218NW916, 917 [quotCJ]. [a] **References in deed of trust to prior but subsequently registered deed of trust** is insufficient to make lien of latter superior to that of former. NC 155SE570.

550-29 MoA 13SW(2d)555.

550-29½-New. Agreement to postpone lien of prior mortgage is conveyance within recording statute. ND 232NW 749.

550-29⅓-New. Appellation "second mortgage" appearing in mortgage is insufficient to take place of proper registration of prior mortgage. NC 155SE 256.

551-50 154Tenn345, 289SW536, 50ALR 537.

551-51½-New. , or although they are erroneously entered as received at different times. 154Tenn345, 289SW536, 50ALR537.

551-51⅓New. Under statutes deeds of trust received by register for registration at the same time must be noted in the records as having been received simultaneously. 154Tenn345, 289SW 536, 50ALR537.

552-70 164Ga600, 139SE72; 122Kan82, 250P1079; 223Ky694, 4SW(2d)737; 152 Wash342, 277P984. See also 206 Iowa 134, 220NW80.

554-90 151Miss850, 119S306(1stcase). But see 153Miss302, 120S447.

554-92 164Ga600, 139SE72.

554-94 194NC420, 139SE833.

554-95 194NC420, 139SE833. [c] **Where onerously donated property is mortgaged, mortgagee** is chargeable with notice that donee's title is precarious. 12LaA459, 124S586.

555-8 24F(2d)951, 956 [citCJ]; 122 Okl 277, 254P748.

556-17 177Ark470, 6SW(2d)828; 208 Iowa1379, 227NW414.

556-19½-New. Continued possession of cotenant held no notice of his oral purchase of other tenant's share. 203 Iowa320, 211NW389.

556-20 [f] **Effect of mistake of purchaser's agent** as to amount see 64Nebr 401, 89NW1045.

557-23 [a] **Such recital will charge junior mortgagee** with notice of all material facts which inquiry suggested by recital would have disclosed. 85Mont 365, 278P996.

557-32 202 Iowa498, 210NW559. [a] (2) Actual, not constructive, notice is essential in order that subsequent advance be postponed. 101NJEq103, 137 A92.

557-34½-New. The payee of a note secured by deed of trust, having knowledge of a second deed of trust at the time he made an additional loan, could not make the additional loan prior to the second deed of trust. MoA 13SW (2d)555.

557-40 85Mont365, 278P996 (mortgage is conveyance within meaning of recording acts); 145Wash39, 258P841. [a] (1) 103WVa165, 136SE851. (3) One taking notes secured by registered deed of trust has constructive notice of its provisions. 191NC458, 132SE148. [d] **What records are notice.**–299Pa1, 148A 904.

558-41 219Ala314, 122S330; 172Ark48, 288SW1; 181Ark679, 27SW(2d)784; DelCh 141A271; 164Ga600, 139SE72; 164Ga852, 139SE557; 168Ga235, 147SE 394; IndA 160NE56; 128Misc413, 219 NYS632; 192NC126, 133SE558; 196NC 154, 144SE835; 122 Okl 277, 254P748; SD 230NW243; 145Wash39, 258P841; 152Wash342, 277P984; 103WVa165, 136 SE851. [i] **Mortgage to secure note executed by husband and his wife,** latter being owner of property, indexed in name of husband only, is insufficient to create lien as against subsequent bona fide purchaser of property, though recorded. 196NC475, 146SE146(1st case).

559-49 122Kan709, 253P215.

559-51 See also 36F(2d)747.

559-52 122Kan709, 253P215.

560-59 101NJEq103, 137A92.

560-63 244Mich309, 221NW338.

560-72 220MoA239, 282SW1054.

561-79 [b] **In North Carolina.**–192NC 126, 133SE558.

561-80 68Utah524, 251P29.

562-85 Ala 127S186; 192NC126, 133SE 558; 155SC264, 152SE410; 151Va481, 145SE302. See also 16F(2d)303. [a] (7) Recording of real estate mortgage is constructive notice that it covers real property, but not that it covers personal property. 243Mich570, 220NW 795.

563-88½-New. Notice from records, that prior owner, after parting with title, gave mortgage to third party, does not cast on another later taking the mortgage and giving full consideration the burden of inquiry as to the equities of the prior owner, where the holder of a legal title is in peaceable possession of the land, occupying it as a homestead. 172Minn578, 215NW940.

563-89½-New. The record of a mortgage executed by one purporting to mortgage the interest of a certain person is not constructive notice of the mortgagee's claim to the interest of another person. 68Utah524, 251P29.

563-95 [b] 160 Ind153, 66NE457. [d] **Agreement increasing interest.**–26Wash 456, 67P263, 90AmSR756, 57LRA396.

564-3 181Ark943, 28SW(2d)730.

565-13 174Ark738, 298SW10; 122Kan 709, 253P215; 149Miss296, 115S339; 33 NM303, 265P454; TexCivA 286SW657.

566-20 80Mont593, 261P278; 19Porto Rico 1109. [h] **In Utah.**–Utah 287P188.

566-21 181Ark943, 28SW(2d)730.

566-22 Wis 231NW181 (mortgagees without notice).

566-23 9LaA720, 119S770. [b] **Indexing of trust deed has been held not insufficient** compliance with statute. 198 NC693, 153SE257.

567-24 214Ala146, 107S88.

567-27 [a] **Indorsement as to date, hour, and minute of filing of mortgage** which recorder is required to make under statute, is not equivalent to registry. 9LaA720, 119S770.

567-31 156Tenn321, 300SW588.

568-35 [a] (2) Lien of combined real and chattel mortgage indexed on general cross index of chattel mortgages is junior to subsequent properly indexed real estate mortgage. 193NC625, 137SE 712. (3) Mortgage spread upon registry but not indexed is not superior to lien of duly registered second mortgage. NC 155SE256.

568-36 230AppDiv410, 245NYS71; 129 Okl 78, 262P1071.

568-39 208 Iowa739, 224NW489, 63 ALR1051.

568-40 Utah 287P188.

568-45 See also 16F(2d)303.

569-49 [a] **Statute, providing that grant intended to be defeasible is not defeated or affected** unless instrument of defeasance is recorded, is intended to protect persons dealing with real property in reliance on record title. 98 CalA408, 277P146.

569-50 CalA 289P885; Fla 129S892; 211Ky807, 278SW128; 150Va203, 142 SE389. [i] (2) Mortgage is "defeasible deed" and "conveyance" affecting land within recording statute. 292Pa74, 140 A615. [j] **As against antecedent creditors** who have secured equity in property. 211Ky807, 278SW128. [k] **Recording after creditor's attachment** entitles such mortgage to share equally with creditors. 211Ky807, 278SW128.

569-52 216Ala58, 112S338.

570-57 247Mich38, 225NW581; 85Mont 389, 278P836; 196NC24, 144SE365. [d] (1) 56ND811, 219NW569. (2) Grantee in absolute deed, paying taxes on land conveyed, cannot, as against subsequent foreclosure purchaser, have them decreed lien on land. 56ND811, 219NW569 (though grantor remained in possession).

570-59 292Pa74, 140A615. See also 147 SC259, 145SE113.

570-61 90Fla542, 106S402.

570-62 See also 211Ky807, 278SW128.

571-66 See also 53SD138, 220NW448.

571-81 92Fla758, 110S352; Fla 129S 892; 166Ga727, 144SE278; 38GaA617, 144SE679; 315Mo 1155, 289SW571; NJCh 151A281; 292Pa74, 140A615; 48 Philippine118; Wash 290P1005.

572-82 [a] NJCh 151A281.

573-86 137Misc674, 244NYS267. [e] **Facts not sufficient** to show notice. 5 PaDist&Co 691.

573-88 137Misc674, 244NYS267.

574-96 Fla 129S892; 211Ky807, 278 SW128; 196NC784, 147SE307. [a](2) Under 28 St. at L. p 482, if mortgage is recorded after statutory time it takes priority over all creditors' claims not having effect of lien at date of such recording. 17F(2d)503.

574-98 56ND581, 218NW644. [d] (2) 56ND581, 218NW644.

575-99 In New Mexico. 33NM647, 275 P90.

575-9 149Miss296, 115S339; NJCh 145 A544(1stcase); 33NM303, 265P454.

575-10 33NM303, 265P454 (prior to statute of 1923).

576-16 [c] (3) Notice of a mortgage is not equivalent to registry. 9LaA720, 119S770. [e] (1) 192NC126, 133SE558; 196NC24, 144SE365; NC 155SE256.

577-19 17F(2d)503; DelCh 141A271; Ont [1928] 4DomLR679. See also IndA

163NE236. [c] **One who has knowledge of facts sufficient to put him on inquiry** as to existence of unrecorded mortgage is not purchaser without notice. 219Ala 314, 122S330. [d] **Evidence held insufficient** to show notice. CalA 289P885.

577–21 IndA 160NE56.

577–22 119 Oh369, 164NE347.

577–23 NJCh 145A2(1stcase). See also 17F(2d)503.

578–29 234Ky802, 29SW(2d)552; 130 Misc738, 225NYS152.

578–30 118Tex202, 13SW(2d)346.

579–40½–New. Mistake of holder of note in delivering it to attorney for collection as second mortgage note does not deprive holder of his higher lien under his deed of trust. 154Tenn345, 289SW536, 50ALR537.

579–40⅓–New. where the mistake was corrected before the answer and cross bill were filed, in suit to declare trust deed second lien, by plaintiff who was not induced to change position because of mistake. 154Tenn345, 289SW536, 50 ALR537.

579–40¼–New. Mortgagee, without knowledge of improvements, does not acquiesce therein as bearing on priority of materialman's lien. 44 Ida178, 255 P903.

579–40⅙–New. A junior mortgagee cannot be prejudiced in respect of his security by any agreement of a prior mortgagee with a third party to which he is not a consenting party. 131Misc 446, 226NYS129.

579–40⅙–New. Thus, an agreement between a prior mortgagee and a subsequent lessee, subordinating the lien of a prior mortgage to that of a lease, made without the knowledge or consent of the junior mortgagee, does not affect the priority of the latter's lien to interest of lease, 131Misc446, 226NYS129.

579–40⅐–New. and in foreclosure proceedings of prior mortgage, junior mortgagee may have recourse against leasehold in case of deficiency at a foreclosure sale, 131Misc446, 226NYS129.

579–40⅛–New. since the foreclosure sale, although barring the junior mortgagee from any claim against the owner's reversion, does not destroy his mortgage. 131Misc446, 226NYS129.

579–40⅑–New. Such subordination agreement does not impair the security of the junior mortgagee merely because the lease requires the return of the deposit at the end of the term, where the lease increases the value of the property. 131Misc446, 226NYS129.

579–40⅒–New. Where a second mortgage lien was attached subsequent to the expiration of the ten-year limitation barring the first mortgage, the second mortgage became the first lien entitling the holder to foreclose in preference to the first mortgage. 130 Or396, 280P328.

579–44 See also 194Wis61, 215NW444, 445 [citCyc].

582–90½–New. Where a junior mortgagee pays the interest accruing on a senior mortgage, in the absence of a provision in the junior mortgage relating thereto, any lien for the recovery of payment would be a lien created by the prior mortgage. 116Nebr25, 215 NW462.

582–91 See also 80Mont318, 260P706.

582–96 77CalA681, 247P516; 44 Ida 178, 255P903; 225Ky375, 9SW(2d)113; 38Wyo 211, 266P124, 126 [quotCyc&CJ].

584–13½–New. Montana statute, providing that a mortgage shall be good from the time of record and for eight years after the maturity of the debt secured, and no longer, unless a renewal affidavit is filed within sixty days after the expiration of such period, in which case it shall be good for another eight years, limits the life of a mortgage, unless extended, to eight years after the maturity of the debt. 81Mont120, 262 P164.

584–13⅓–New. Such statute provides a remedy which can be invoked by the mortgagee or his successors only. 81 Mont120, 262P164.

584–13¼–New. The mortgagee or his successors, on complying with the statute, may foreclose at any time within the second eight year period. 81Mont 120, 262P164 (overruling any implication to the contrary in 70Mont146, 225 P123).

584–13½–New. Where a mortgagor and the holder of a mortgage extend the maturity of the debt to a date within the eight year period after maturity and commence action to foreclose within two years of the new maturity date, a defendant who took a subsequent mortgage with knowledge of plaintiff's right is not injured and cannot complain of failure to file a renewal affidavit. 81 Mont120, 262P164.

584–13⅙–New. Under another provision of the Montana statute the parties to a mortgage may renew or extend it by a writing, complying with the formalities required in case of a grant of real property within the eight year period following the maturity of the debt, where the rights of subsequent mortgagees have attached, if such mortgagees are not injured by the renewal or extension. 81Mont120, 262P164.

584–13⅐–New. Renewal as extending debt and lien see 118Tex202, 13SW(2d) 346.

584–19 10LaA593, 120S224; 145Wash 39, 258P841. [d] **Assignee of second mortgage** held to have benefit of release. 145Wash39, 258P841.

584–20 [c] **Deed of trust which was paid could not prevail over claim of one purchasing later deed of trust,** because first deed of trust was of record uncanceled at time. MoA 15SW(2d) 382.

584–21 178Minn50, 226NW189, 63ALR 1516 (mortgage is not subordinated by release of mortgagor from his personal obligation to pay mortgage).

585–22½–New. Release of deed of trust, if canceled as to maker of note secured, should be canceled as to his judgment creditor. TexCivA 289SW116.

585–22⅓–New. Right to set aside release of deed of trust to judgment debtor's land is not subject to registration law. TexCivA 289SW116.

585–30 330 Ill 136, 161NE306; 193NC 456, 137SE324, 327 [quotCJ]; 25 OhA 402, 158NE236. [a] 25 OhA402, 158NE 236.

585–31 193NC456, 137SE324, 327 [quot CJ].

586–32 193NC456, 137SE324, 327 [quot CJ].

586–34 193NC456, 137SE324, 327 [quot CJ].

586–37 15LaAnn4.

586–41 155SC414, 152SE640.

587–42 178Ark518, 12SW(2d)870; 225 Ky375, 9SW(2d)113; 10LaA593, 120S 224; 193NC456, 137SE324, 327 [quot CJ]. [b] **Mortgagee taking mortgage to secure existing debt** is not, as respects priority, injured by satisfaction of prior mortgage mistakenly executed. 155SC 414, 152SE640.

587–52 207Cal 590, 279P431; 40GaA 376, 149SE792; TexCivA 289SW116.

588–56 TexCivA 289SW116.

588–59 225AppDiv152, 232NYS470.

588–64 TexCivA 289SW116, 118 [cit CJ].

588–65 [b] TexCivA 289SW116, 118 [citCJ].

588–67½–New. Where holder of deed of trust executed release in ignorance that third party had acquired judgment lien, original deed of trust should be treated as unaffected by release. Tex CivA 289SW116.

589–75½–New. Failure of grantee in deed of trust to notify grantee of intervening judgment lien in requesting release is held fraud. TexCivA 289SW 116.

589–77 193NC474, 137SE420.

589–83 25 OhA402, 158NE236.

590–11 IndA 160NE56, 58 [quotCJ].

591–12 51SD579, 215NW933.

591–21 IndA 160NE56, 58 [quotCJ]; 116Nebr242, 216NW812.

592–44 [a] **Reinstatement after release.–SD** 230NW233.

593–55 Fla 129S892; 168La369, 122S 68.

593–56 109Conn343, 146A609; 217Ky 71, 288SW1014; 30 OhA49, 164NE126; 149Va168, 140SE272. [d] **There is no estoppel** by refusal of tender where bank holding second mortgage had money in its hands but thereafter turned it over to mortgagee. 134SC207, 132SE620.

593–57 102NJEq8, 139A602.

594–61 176Ark520, 3SW(2d)293.

594–69 [a] (3) Verbal authority by assignee of mortgage to assignor, appearing of record as mortgage, to satisfy record held to estop assignee from asserting priority against subsequent mortgagee. 174Ark921, 298SW6.

594–69½–New. Tenant paying cotenant's share of taxes is estopped to assert priority over mortgagee of cotenant's interest on theory of subrogation where he permitted common agent to distribute all income knowing nothing was left for payment of taxes. 13F(2d)959, 56 AppDC353.

594–69⅓–New. A creditor entitled to invoke estoppel against a mortgagee of his debtor on account of withholding the mortgage from record does not lose such right by permitting the mortgagee to pay taxes and to institute foreclosure proceedings. 56ND581, 218NW644, (mortgagee held entitled to prior lien for taxes paid).

595–76 125Kan85, 262P561; TexCivA 287SW134.

596–81½–New. Where the mortgagees agreed to extend the mortgages, with understanding as to priority, the second mortgagee is estopped from asserting its mortgage had priority. 175Ark417, 299SW753.

596–81⅓–New. A bank director, exchanging mortgages with his bank under an agreement that the mortgage assigned to him shall be superior to a previously executed unrecorded mortgage which the bank also held, is not estopped to assert priority against the bank's receiver. 205 Iowa962, 218NW 916.

596–83 29F(2d)450; DelCh 140A694. [a] (2) If officers of defendant building company falsely told plaintiff mortgagee that its mortgage would be first lien, that deception could not affect validity of prior mortgage to third party, having no knowledge of deception. 156Md401, 144A486. [b] **Vendor who was induced fraudulently to accept second trust** has been held not required to pay first trust to protect his security. 29F(2d)450.

596–88½–New. Owner borrowing from bank and representing that only certain mortgages were superior to those offered by him as security is estopped to assert priority contrary to representation. Iowa 229NW696.

596–90 156Tenn649, 4SW(2d)341.

597–96 217Ky71, 288SW1014.

597–6 168Ga327, 147SE581.

597–8 204 Iowa368, 213NW253.

598–10 [b] **Accounting may be had as** to amount paid out by mortgagee and amount which mortgagee received from mortgagor. CalA 259P363.

598–22½–New. , or in an application for surplus moneys. 101NJEq142, 136A 803.

598–22⅓–New. Third opposition in executory process issued on mortgages for liquidation of indebtedness is not proper remedy. La 129S731.

598–24 168Ga327, 147SE581.

598–31 MoA 30SW(2d)154; TexCivA 8 SW(2d)516. [c] (3) Petition held sufficient to support cause of action for priority of lien by grantee releasing deed of trust against judgment creditor. Tex CivA 289SW116. (4) Bill alleging payment of mortgage to record owner held good. 214Ala146, 107S88. (5) Other instances. 220Ala276, 124S858(2dcase).

599–32 10LaA593, 120S224.

599–38 Okl 293P206. See also 214Ala 390, 107S863.

599–39½–New. Defense held insufficient. 136Misc292, 240NYS580.

599–46½–New. A fraudulent transaction to destroy lien rights is not presumed in the absence of evidence. 102 CalA457, 283P126.

599–46⅓–New. A presumption that the trustees acted properly in executing subordination agreements does not obtain. 227AppDiv98, 237NYS26.

600–48 220Ala140, 124S388 (where part of work was done before, and part after, execution of mortgage); NJCh 147A 811; 227AppDiv98, 237NYS26; 145Wash

39, 258P841. [a] (1) 92Fla758, 110S 352. (7) Other applications of rule. 223 Ky694, 4SW(2d)737. [c] **Payment of valuable consideration.–NJCh** 151A281.

600–49 [a] (6) Defendant claiming to be bona fide mortgagee has burden of proving consideration. 214Ala390, 107S863. (7) Other instances. 137Misc674, 244 NYS267. [b] (1) **Iowa** 232NW498. [d] **Defective probate.**–192NC126, 133SE558. [e] **In Louisiana.**–168La1049, 123S709.

600–53 [a] (4) Where plaintiff left his mortgage with bank to be recorded and bank recorded its mortgage before that of plaintiff, burden was on bank to prove proper execution of trust. 194Wis56, 215NW453.

601–60½–New. Evidence of mortgagee's custom of recording prospective mortgage before closing loan is admissible as bearing on intention in recording new mortgage without releasing original. 44Ida178, 255P903.

601–60½–New. In a suit to foreclose a trust deed in which the grantor's brothers claimed equitable ownership, evidence of what their tenant on the other land would have stated to the grantee in trust deed regarding ownership is inadmissible. **TexCivA** 2SW(2d) 281.

601–60¼–New. Agreement postponing prior vendor's lien notes to the lien sought to be foreclosed, was admissible. **TexCivA** 8SW(2d)516.

601–62 109Conn343, 146A609; 167Ga 170, 144SE893; 177Minn108, 224NW697; **MoA** 30SW(2d)154; **TexCivA** 9SW(2d) 465; 152Va707, 148SE581. [k] **Evidence held to sustain burden of proof** by mortgagee that mortgage was recorded before work was begun. 168La1049, 123 S709. [l] **Finding that mortgage was abandoned** by assignee held justified under evidence. 110Conn374, 148A133. [m] **Proof must be clear and convincing** that mortgage money was used for labor or material, in order to defeat statutory priority of mechanic's lien. **NJCh** 147A809. [n] **Burden of proof held not sustained** on issue of trustee's authority to execute subordination agreement. 227AppDiv98, 237NYS26. [o] **Estoppel of widow to assert trust in property as against mortgagee.**–37F (2d)265 (evidence insufficient). [p] **Defense that mortgage was acquired without notice of prior encumbrance** must be clearly made out. 155SC414, 152SE 640. [q] **Evidence held sufficient** to support finding that mortgage was recorded before delivery of lumber had begun. **Wash** 286P62. [r] **Evidence held insufficient:** (1) To sustain burden on mortgagee of tracing proceeds to laborers and materialmen. **NJCh** 147A 811. (2) To sustain finding that third person, lending money to grantee, knew of trust relationship so as to require subordination of mortgage. 181Ark597, 27SW(2d)88.

601–64 [a] 37F(2d)265; 168Ga129, 147 SE387; **Iowa** 232NW504; 137Misc674, 244NYS267; 137 **Okl** 204, 279P310; **Tex CivA** 2SW(2d)281. [b] 223Kv694, 4SW (2d)737; 173Minn244, 217NW132; 149 Miss523, 115S707; 100NJEq57, 135A 151; 145Wash39, 258P841.

601–65 [a] 167Ga657, 146SE485; **Iowa** 229NW696 (to show representations and reliance thereon). [b] **Evidence insufficient.**–149Md412, 131A780; 55ND421, 214NW36.

601–66 [a] **Wash** 291P1105.

601–66½–New. or to prove that a subsequent mortgagee took the mortgage relying on the prior mortgagee's representations; 207 **Iowa**11, 219NW503.

601–70½–New. To prove that a mortgage executed by the mortgagors in peaceable possession is a first lien as against a prior mortgage executed by the former owner after parting with title to the land; 172Minn578, 215NW 940.

601–70½–New. To prove that the mortgagee was not a mortgagee in possession; 129Kan163, 281P873.

602–74 [b] **Prior filing number** of one of two mortgages filed at same moment is only prima facie evidence of priority. 176Minn559, 223NW925.

602–74½–New. In a suit to foreclose a trust deed and a trust mortgage, evidence has been held to prove that the contractor who cleared and improved the land involved, and the bank which advanced the money therefor, were entitled to equitable liens prior to the mortgages. 35Ariz130, 274P1043.

602–75½–New. Proof entitling purchaser of interest coupon notes to prior lien. **Okl** 291P550.

602–75½–New. That defendant purchased interest coupon notes from plaintiff. **Okl** 293P223; **Okl** 293P224.

602–77 See also 214Ala390, 107S863.

602–79 [a] **Instructions held proper.**–193NC456, 137SE324. [b] **Intention of parties as to priority** between simultaneous mortgages is for jury. **IndA** 168NE711(2dcase).

602–83½–New. In a suit to determine priority, the court should determine the amount due on a senior mortgage, and in so doing the debt is reducible by the value of the equities in lots released. 249Mich89, 227NW674.

602–84 [a] **Award of priority to part of mortgage** cannot be attacked by judgment creditor, where entire mortgage was entitled to priority. 191Wis602, 211NW795.

602–84½–New. In the absence of prayer to foreclose, only matters of priority are determined. 145Wash61, 258P856.

602–86 80CalA301, 251P841.

602–87 179Ark12, 13SW(2d)822. [e] **Provision that mortgagor's contract for purchase of oil** should not be canceled or modified without consent of mortgagee was limited to such changes as affected mortgagee's rights. 34F(2d) 649.

603–91½–New. Mortgagee may hold property agreed to be transferred as security for performance by mortgagors of their obligations. **Wis** 230NW54.

603–98 313Mo 130, 280SW1035, 44ALR 1328. [a] **Action for refusal to return abstract.**–313Mo 130, 280SW1035, 44 ALR1328.

604–3 [b] **Mortgagor not entitled to recover conveyancing fees paid mortgagee.**–**Mass** 172NE72.

604–8 [c] **Mortgagor held entitled to judgment for balance** of loan retained by mortgagor. 143Wash210, 255P96. [d] **Interest.**–143Wash210, 255P96.

604–16 See also 244Mich403, 221NW 322.

605–17 **Md** 150A267.

605–17½–New. A contract between mortgagors in default and mortgagee relating to application of proceeds and payment of share of profits on sale to mortgagee is supported by sufficient consideration where mortgagee agrees not to foreclose or transfer mortgage or to release lots sold from mortgage lien. 127Misc571, 217NYS22.

605–28½–New. Rights of mortgagee on release of liens. 94PaSuper240.

605–30 [b] **In creditor's suit,** court held to have erred in ordering sale under deed of trust for credit instead of cash. 146Va197, 135SE882.

606–37 94CalA755, 271P912; **Mo** 29SW (2d)692; 193NC646, 137SE714.

606–38 153Miss339, 121S123. [d] **Trustee is mere nominal party** through whom rights of real parties may be protected and enforced. 152Wash342, 277 P984. [e] **Mortgagee, as simple trustee for different note holders,** has no duty to mortgagor or mortgagor's creditors. 31OhA266, 167NE166.

606–39 134Misc417, 236NYS37.

606–40 38F(2d)96 (trustee entitled to possession of policy); 149Md689, 132A 265; 134Misc727, 236NYS36; 134Misc 417, 236NYS37 (duty to refrain from destroying security). [b] **Provision of trust deed exempting trustee** from protecting security and recording trust deed is against public policy and void. 134Misc727, 236NYS36.

606–41 [e] **Failure of trustee to foreclose trust deed** does not show abandonment of trust nor interest antagonistic to bondholders. 35Wyo 496, 252P499.

607–44 134Misc417, 236NYS37; **NC** 153 SE848. [e] **Procedure.**–134Misc727, 236 NYS36. [f] **Evidence held insufficient to show negligence in failing to collect rentals.**–131 Or624, 284P175.

607–47 193NC646, 137SE714.

607–51 132Misc124, 228NYS668; 193NC 646, 137SE714.

607–52 130Kan681, 288P587; 134Misc 417, 236NYS37 (liable only if conduct was wrongful, constituting breach of trust). [a] (2) Provision that certificate and affidavit of mortgagor shall be conclusive upon trustee did not authorize trustee to satisfy trust deed solely on mortgagor's statement. 134 Misc417, 236NYS37. (3) Trustee cannot release property on mere statement of mortgagor that all outstanding bonds had been paid. 134Misc417, 236NYS37. (4) Trustee is placed on notice of possibility that absent bonds might be outstanding in hands of persons entitled to enforce them. 134Misc417, 236 NYS37. [b] (3) Statute authorizing issuance of duplicate certificates held not applicable under facts in case. 134Misc 417, 236NYS37. (4) Trustee had no authority to release entire security without requiring presentation of all bonds and coupons or deposit sufficient for redemption. 134Misc417, 236NYS37. (5) Affidavit on information and belief that outstanding bonds were paid held insufficient. 134Misc417, 236NYS37. (6) That coupons secured by trust deed might be outlawed by statute of limitations did not forfeit right of coupon holders to retain mortgaged property till all bonds and coupons had been paid. 134Misc417, 236NYS37. [d] (2) Provision exempting trustee from liability except for own fraud or willful misconduct cannot be given effect to relieve trustee from liability. 134Misc 417, 236NYS37. (3) Satisfaction of trust deed without payment held to come within exception exempting trustee from liability except for "willful misconduct." 134Misc417, 236NYS37. (4) Word "willful" does not imply existence of actual malice. 134Misc417, 236NYS37. [e] **Defenses.**–134Misc417, 236NYS37. [f] **Release of mortgage held unauthorized** where trustee did not secure consent of all bondholders. **IndA** 168NE46. [g] **Damages.**–134Misc417, 236NYS37.

607–52½–New. Trustee under mortgage to secure notes of corporation is not such creditor as is entitled to file claim after appointment of receiver for corporation, 16F(2d)22.

607–52¼–New. where he is not the payee named in the notes nor made such creditor under the terms of the mortgage. 16F(2d)22.

607–52¼–New. A trustee is without power to compel a mortgagor to cure a defect in a mortgage by executing an additional instrument of conveyance and is not liable to bondholders for failure to do so. 223AppDiv12, 227 NYS252.

607–52½–New. A trustee is not liable to bondholders for failure to perform a duty not required by the mortgage. 223AppDiv12, 227NYS252.

607–52¼–New. Mortgagor held to impose no duty on trustee to procure any additional instrument to cure a defect in the mortgage or to enforce the mortgagor's obligations to deliver such instrument. 223AppDiv12, 227NYS252.

607–52½–New. A mortgage provision that the trustee is under no duty to protect the bondholders' lien is valid. 223 AppDiv12, 227NYS252.

607–52½–New. A trust company's negligence in drawing up a mortgage while not acting as trustee does not make it liable to bondholders as trustee. 223 AppDiv12, 227NYS252.

607–52½–New. A trustee cannot exempt itself from liability for failure to file chattel mortgage to protect bondholders' lien where it was the only one who could file it. 223AppDiv12, 227 NYS252.

607–52 1/10–New. A trustee is not liable for failing to file a void chattel mortgage to protect a bondholder's lien. 223AppDiv12, 227NYS252.

607–52 1/11–New. A trustee's certificate that the bond was one of a series described carries no implied warranty that the mortgage was valid as to creditors. 223AppDiv12, 227NYS252.

607-52½-New. Trustees for bondholders are governed by general rules governing trustees in ordinary performance of duties of trust. 296Pa26, 145A682.

607-52½-New. In an action by a bondholder to recover damages against the trustee for wrongful release, a purchaser of the mortgagor assuming obligations could not be held liable in an action against the trustee for breach of trust. 134Misc417, 236NYS37.

607-52¼-New. Duty of trustee to return excess to mortgagor. 136Misc845, 244NYS76.

608-55 247Mich36, 225NW572.

608-57½-New. Trustee for creditors is not entitled to compensation from proceeds of sale. 99NJ523, 133A520.

608-59 216Ala539, 113S617; 220Ala35, 123S229; 125Me114, 131A204. See also 21AlaA130, 106S214. [j] **Presumption of entry in character of mortgagee.**–Regardless of mortgagee's purpose in entering premises and cutting timber, his entry before breach is lawful since law presumes entry to be in character as mortgagee. 125Me114, 131A204.

609-61 216Ala539, 113S617; 321 Ill 283, 151NE880; 249Mich252, 228NW 785; 193Wis503, 213NW304. [a] **Where mortgagor under mortgage assigned contract for purchase of oil,** mortgage gave mortgagee no rights to oil which should have been delivered before entry. 34F(2d)653.

609-72 Cal 286P1012; CalA 282P1003.

609-77 81Colo 393, 255P987. [a] Mont 286P402.

610-78 125Me114, 131A204; 149Md 689, 132A265; 196NC163, 144SE691; 193Wis503, 215NW571, 55ALR525; 194 Wis100, 215NW900; Sask [1926] 4DomLR235, [1926] 2WestWkly663. [e] **Presumption of entry in character of mortgagee.**–125Me114, 131A204.

610-81 193Wis503, 215NW571, 55ALR 525.

610-82½-New. In Alberta a mortgagee who has taken proceedings in court to enforce his security is not precluded from entering into possession. Alta [1929] 2DomLR468.

610-83 125Me114, 131A204; 80Mont 593, 261P278; 82Mont150, 266P869; 155Tenn63, 290SW990, 991 [citCJ]. [a] **Waiver of rights.**–82Mont150, 266P869.

611-96 249Mich252, 228NW785.

612-5 48Philippine666, 669 [quotCyc].

612-6 [c] (2) Mortgagee taking possession under void foreclosure holds as mortgagee in possession. 175Ark50, 297SW1022. [i] 194Wis100, 215NW 900.

613-7 CalA 282P1003 (under agreement with mortgagor); 321 Ill 283, 151 NE880.

613-8 48Philippine666, 669 [quotCyc].

613-11 Cal 286P1012.

613-14½-New. The assignee of a contract for the sale of real estate, holding under a deed of his assignor after an ineffectual attempt to declare forfeiture, is not a mortgagee in possession. 208 Iowa564, 226NW110, 66ALR59.

613-15 TexCivA 6SW(2d)133, 135 [quotCJ].

614-17 See also Man [1928] 1DomLR 570.

614-20 TexCivA 6SW(2d)133, 135 [quotCJ].

615-24 31 OhA266, 167NE166.

615-25 193Wis503, 215NW571, 55ALR 525. (mortgagee must account for rents and profits, as applied to debt).

615-26 197 Ind393, 150NE368. [a] (2) Mortgagee in possession is required to apply net proceeds of operation to debts in order of priority and restore property to mortgagor after payment of own debt. 31 OhA266, 167NE166.

615-28 [b] **Mortgagee in possession, who diverts to own account fund for paying operating expenses** required on foreclosure, pays such expenses from proceeds of sale. 31 OhA266, 167NE 166.

616-36 175Ark50, 297SW1022. [a] **Creditor of mortgagor** held not to acquire title as against mortgagor, under deed following void foreclosure, by taking possession, where no actual notice of adverse claim was given to mortgagor. 175Ark50, 297SW1022.

616-42 [a] **For example,** mortgagee cannot, in absence of some express stipulation to that effect, recover compensation for his labor in caring for mortgaged estate. 153 Iowa199, 132NW 1095; 83 Or311, 163P94; 25RI 657, 57 A928; 7RI 33; 25QBD176.

616-43 TexCivA 6SW(2d)133, 136 [quotCJ]. [b] (5) Mortgagee in possession is entitled to be reimbursed for expenses in gathering crop (153 Iowa 199, 132NW1095), (6) such as wages of laborers (153 Iowa199, 132NW1095) (7) and their board (153 Iowa199, 132 NW1095); (8) he has been allowed reasonable expenditures incurred in handling property (58Nebr364, 78NW639).

616-46 [c] **Where mortgagee has acquired possession of mortgaged premises wrongfully** or in manner not binding on owner of equity of redemption, no bill to redeem is necessary to recover possession, but owner may pursue his legal remedy. 33NYSuper67, 11 AbbPrNS147, 42HowPr33.

616-49½-New. In some jurisdictions the mortgagor cannot maintain ejectment against the mortgagee in possession after the law day or before such day, where his right of possession has not been postponed by the mortgage. 220Ala35, 123S229.

617-60 86Colo 77, 278P800.

617-62 216Ala539, 113S617; 127Me 218, 142A773.

618-83½-New. A provision in a senior mortgage requiring the mortgagor to keep the premises in good condition is no protection against effect of junior mortgage in suit of ejectment by junior mortgagee. 216Ala539, 113S617.

618-88½-New. After foreclosure of first deed of trust holder of third deed of trust who took title through third party and resold to original grantors taking deed of trust to secure purchase money is not necessary party in suit by holder of second deed of trust for possession. 146Miss1, 111S448, 51ALR442.

619-92 127Me218, 142A773.

620-33½-New. One acquiring mortgagor's equity of redemption before or after default by paying senior mortgage debt stands in the mortgagor's shoes. 216Ala539, 113S617.

620-33¼-New. In some jurisdictions one acquiring the mortgagor's title with notice of the mortgage cannot maintain ejectment against the mortgagee in possession after the law day or before such day, if his right of possession has not been postponed by the mortgage. 220 Ala35, 123S229.

620-33¼-New. That a county's lien against a tax collector's lands is superior to a mortgage thereon does not show a superior title in one claiming by subrogation to such lien as to sustain ejectment by him against the mortgagee. 220Ala35, 123S229.

620-33½-New. One becoming vested by subrogation with rights of the county under such lien and rights of a junior mortgagee and the owner of equity of redemption has not sufficient legal title to maintain ejectment. 220Ala35, 123S 229.

620-39 216Ala539, 113S617; 193Wis 503, 213NW304.

621-40 216Ala539, 113S617.

621-41 [a] (4) Mortgagor can make no contract respecting property which could bind mortgagee or prejudice his rights. 170Ark1146, 282SW995.

621-47 170Ark65, 278SW634.

621-48 170Ark65, 278SW634; 205 Iowa 612, 218NW282; 193Wis503, 213NW 304.

622-50 TexCivA 293SW249.

623-69 Mont 286P402.

623-70½-New. Trustee of deed for security may lease. 232 IllA60.

623-70½-New. In Saskatchewan, a written notice by the mortgagor is a condition precedent to entering and leasing mortgaged lands. 20SaskL568, [1926] 3DomLR271, [1926] 2WestWkly 355.

623-70¼-New. In Saskatchewan, a lease by the mortgagee without giving the notice required by statute is void. 21SaskL256, [1927] 1DomLR464, [1927] 1WestWkly35.

623-71 [e] **Consent in cutting.**–170Ark 1146, 282SW995. [f] **Estoppel.**–170Ark 1146, 282SW995. [g] **Where growing timber is sold with limited time for its removal,** and before expiration of such time landowner mortgages the land, landowner may not, without permission of mortgagee, extend the time for removal. 11LaA132, 119S741.

623-74 165Ga366, 140SE761; 165Ga 516, 141SE410 [quotCJperRussell,CJ disop]; 143SC193, 141SE362. [b] **Working timber for turpentine purposes** held permissible to mortgagor. 165Ga 366, 140SE761. [c] **Lessees of mortgagor** may be enjoined from use of timber for turpentine purposes. 165Ga366, 140SE761.

624-77 165Ga366, 140SE761; 165Ga 503, 141SE405.

624-80 176Ark64, 3SW(2d)30, 57ALR 444.

624-81 125Me114, 131A204.

624-82½-New. Mortgagee has no remedy against persons cutting timber on land prior to his entry and possession if mortgagor had no such action. BC [1927] 2DomLR857.

624-86 97Fla996, 122S508.

624-87 176Ark64, 3SW(2d)30, 57ALR 444; 81CalA213, 253P346; 205 Iowa 176, 218NW46; 315Mo 811; 79Mont590, 257P475; 80Mont593, 261P278; 198NC 99, 150SE706; TexCivA 8SW(2d)514; TexCivA 30SW(2d)726. [b] **Duty to account for proceeds.** CalA 292P1000.

625-91 315Mo 811; 79Mont590, 257P 475. [c] (1) But see 53SD414, 220NW 876. (3) Mortgagee's actual and continued possession is essential to creation and maintenance of lien on crops, as further security, as authorized by mortgage. 82Mont150, 266P869. (4) Farm mortgagee, who has taken possession and rented premises before decretal sale in foreclosure, acquires title to crops in existence at time of sale. 82 Mont150, 266P869. (5) Agreement giving mortgagee possession of land held not to give mortgagee lien on crops. 53 SD414, 220NW876. [d] **Notice to tenant of mortgagee's claim to rents** does not give mortgagee interest in crop. Mont 286P402.

625-94 TexCivA 30SW(2d)726.

625-95 82Mont150, 266P869.

625-98½-New. Under a mortgage giving the mortgagee the right to immediate possession with rents, issues, and profits on mortgagor's default, the mortgagee may create a lien on the mortgagor's share of the growing crops as additional security for the payment of the mortgage debt. 80Mont593, 261P 278.

625-98¼-New. But actual and continued possession by the mortgagee is essential to the creation and maintenance of such a lien as against the lien of a chattel mortgage. 80Mont593, 261P278.

626-13 Sask [1926] 4DomLR993.

627-26 34F(2d)649; 36F(2d)221 (declaring law in Texas); 216Ala116, 112 S438; Ala 129S281; 170Ark65, 278SW 634; 99CalA692, 279P170; 321 Ill 283, 151NE880; 239 IllA569; 203 Iowa48, 212NW351; 204 Iowa541, 215NW609; 205 Iowa176, 218NW46; 208 Iowa1107, 225NW943; 12LaA672, 127S106; 150 Md304, 133A141; 173Minn18, 216NW 329; 179Minn571, 229NW874; MoA 289 SW977; MoA 10SW(2d)64; Mont 286 P402; NJ 144A602; 226AppDiv675, 233 NYS221; 136Misc704, 242NYS192; 13 PaDist&Co 73; 155Tenn63, 290SW990; 193Wis503, 213NW304; 193Wis503, 215 NW571, 55ALR525. [f] (2) Receiver in possession of property after sale and during period of redemption paying taxes and insurance not due at time of sale cannot deduct same from rents and profits due mortgage debtor. 115Kan 759, 225P97. (3) Mortgagee of corporation is not entitled to recover from receiver rents collected by receiver during period receiver had possession of mortgaged premises with mortgagee's consent. NJ 144A602. (4) Rents collected which were unpaid on date of receiver's appointment belong to mortgagor. NJCh 149A525. [g] **Mortgagor may lease as owner** as long as in possession. 170Ark65, 278SW634. [h] **Where mortgagor conveys defeasible legal estate subject to lease** upon default mortgagee is entitled to rent. 216Ala

116, 112S438. [i] **Pending foreclosure,** mortgagor is generally entitled to rents. 252 **IllA**281. [j] **Grantee of trustor** receiving conveyance before execution of trust is entitled to possession and rentals from those wrongfully in possession. **CalA** 282P1003. [k] **Grantee of trustor** entitled to reasonable rental value during time defendants wrongfully retained possession. **Cal** 286P1012.

628–27 97**Ark**262, 133**SW**1035; 223 **Ill** 500, 79**NE**161; 246 **IllA**528; 173**Minn** 18, 216**NW**329; 179**Minn**571, 229**NW** 874; **NJCh** 149**A**525. But see 220**Ala** 353, 125S226.

628–28½–New. Generally the mortgagor is not permitted to enjoy proceeds of the land after losing title and right of possession. **MoA** 289**SW**977.

628–28¾–New. Any right which mortgagee may have had to require application of rents and profits to taxes and interest terminates on foreclosure sale. 179**Minn**571, 229**NW**874.

628–30 155**Tenn**63, 290**SW**990.

628–31 129**Misc**170, 220**NYS**665; 193 **Wis**503, 215**NW**571, 55**ALR**525.

628–32 193**Wis**503, 215**NW**571, 55**ALR** 525.

628–38 80**Mont**593, 261P278; 230**App Div**106, 243**NYS**314 (right to collect pending foreclosure); 155**Tenn**63, 290 **SW**990. [a] (1) 205 **Iowa**537, 215**NW** 736, 218**NW**144; 205 **Iowa**176, 218**NW** 46; 205 **Iowa**1013, 219**NW**36; 205 **Iowa** 1216, 219**NW**523. (2) 205 **Iowa**176, 218 **NW**46. (3) 205 **Iowa**1013, 219**NW**36; 205 **Iowa**1216, 219**NW**523. (5) Provision for appointment of receiver to take possession during period of redemption makes rents and profits only secondarily liable for payment, real estate being primary security. 205 **Iowa**1013, 219 **NW**36. [d] **Iowa** 229**NW**663. [f] **Provision for application of net rentals.–** 252 **IllA**281 (mortgagee held to have assented to retention by agent). [g] **Right of antichresis** must be obtained from debtor in order to have lien on rents. 12**LaA**672, 127S106.

629–39 246 **IllA**528; 248 **IllA**321; 255 **IllA**62 (purpose of provision is protection against deficiency on foreclosure); 233**Ky**94, 25**SW(2d)**72. But see 205 **Iowa**1273, 218**NW**42. [a] 155**Tenn**63, 290**SW**990.

629–40 206 **Iowa**746, 221**NW**347; **Mich** 233**NW**216. [a] 178**Minn**150, 226**NW** 406 (assignment of rents for purpose of paying taxes and insurance in case mortgagor or his grantees fail to pay them). [e] **Rights of mortgagee become fixed on commencement of foreclosure action** and prayer for appointment of receiver. 206 **Iowa**746, 221**NW**347. [f] **Where mortgage assigns rents for purpose of paying taxes and insurance,** fact that mortgagee has right to pay taxes and insurance and add payments to mortgage debt does not prevent him from collecting rents assigned to him and thereby repay himself. 178**Minn**150, 226**NW**406. [g] **Assignee of rents may recover them from tenant** of one who acquired title to property subject to assignment. 178**Minn**150, 226**NW**406. [h] **Rents assigned are not part of mortgaged premises.–Mich** 233**NW**216. [i] **Effect and purpose of statute** authorizing assignment. **Mich** 233**NW**216.

629–41 36**F(2d)**221; 99**CalA**692, 279**P** 170. But see 178**Minn**150, 226**NW**406.

629–42 99**Fla**987, 128S241; 336 **Ill** 450, 168**NE**266; 255 **IllA**62; 205 **Iowa**537, 215**NW**736; 205 **Iowa**1273, 218**NW**42; 205 **Iowa**176, 218**NW**46; 205 **Iowa**1203, 219**NW**517; **Iowa** 228**NW**632; **Iowa** 229 **NW**663; **Mont** 286**P**402. [e] **On application for appointment of receiver,** lien under mortgage pledging rents and profits becomes effective. 205 **Iowa**612, 218 **NW**282. [f] **Mortgagor's assignment of his interest in lease before institution of foreclosure proceedings** is superior to mortgagee's rights under pledge of rents. 205 **Iowa**1203, 219**NW**517. [g] **Mortgagee must seek appointment of receiver** to avail himself of right to rents and profits. **Mont** 286**P**402. [h] **Mortgagor or his assignee in bankruptcy** is entitled to rents, issues, and profits where no receiver is appointed and mortgagee is without right of possession. **Mont** 286**P**402. [i] **Mortgagee waives right to rents** by foreclosing mortgage without having receiver appointed to collect them and thus perfect lien. **Mont** 286**P**402. [j] **Court has power to fix reasonable rent of premises** where lease was executed for inadequate rent and in bad faith after commencement of foreclosure action. 230**AppDiv**106, 243 **NYS**314. [k] **Jurisdiction of equity to conserve rents.–Mich** 233**NW**216.

630–43 136**Misc**166, 238**NYS**700.

630–43½–New. Mortgagor in equity cannot assert own violation of agreement pledging rent to mortgagee in event of default to prevent its enforcement. 136**Misc**166, 238**NYS**700.

630–44 **Mich** 233**NW**216.

630–46 220**Ala**353, 125S226; 197 **Ind** 393, 150**NE**368; 149**Md**689, 132**A**265; **Mass** 171**NE**226; 193**Wis**503, 215**NW** 571, 55**ALR**525. [i] (3) Mortgagor's cause of action against mortgagee for rents received is in assumpsit for money had and received not in conversion. 138 **Misc**179, 245**NYS**98. [m] **Transfer of possession is essential** to mortgagee's right. 193**Wis**503, 215**NW**571, 55**ALR** 525.

633–77 But see **Mich** 233**NW**216.

634–80 **Ala** 129S281; 13**PaDist&Co** 579; 14**PaDist&Co** 215. [b] **Sufficiency of notice.–Ala** 129S281.

634–81 248 **IllA**321.

634–88 31 **OhA**151, 166**NE**207.

634–89 But see 132 **Okl** 76, 269P305, 306 [citCJ&Cyc].

634–90 205 **Iowa**537, 215**NW**736.

634–91 321 **Ill** 283, 151**NE**880. [a] (1) 321 **Ill** 283, 151**NE**880. (2) Since possession is not incident to rights of mortgagee, mortgagee in possession holds rents collected, not for own benefit but for benefit of mortgagor and must account therefor to mortgagor or junior lienor who stands in place of mortgagor. 321 **Ill** 283, 151**NE**880.

635–94 321 **Ill** 283, 151**NE**880. [a] (4) Mortgagee in possession under title from mortgagor is not chargeable with rents of mortgaged premises. 321 **Ill** 283, 151**NE**880.

635–95 [c] **Where senior and junior mortgages contain pledge of rents and profits,** junior mortgagee first commencing foreclosure action is entitled, in case of deficiency judgment, to such rents, in preference to senior mortgagee. 205 **Iowa**537, 215**NW**736, 218**NW**144.

635–3 134**Misc**692, 236**NYS**549 (nonresident creditors).

636–17 176**Ark**423, 3**SW(2d)**59; 177 **Ark**652, 9**SW(2d)**329; 98**Fla**565, 124S14 (mortgagor must pay or establish invalidity of tax); 249**Mich**252, 228**NW**785 (failure to pay constitutes waste).

637–19 **NJCh** 148**A**575.

637–21 See also 93**CalA**695, 270P394. [a] **MoA** 20**SW(2d)**294.

637–26 227**Ky**573, 13**SW(2d)**778. [f] (2) Validity of tax determines whether or not mortgagor has breached covenant to pay taxes. 98**Fla**565, 124S14. [h] (2) Under covenant to pay taxes ten days before delinquency, mortgagor is bound to pay them ten days before expiration of extension. 98**Fla**565, 124S14. [j] **In order to obtain benefits of second mortgage,** plaintiff, owner of equity of redemption, is bound to perform all provisions resting on mortgagor, including payment of taxes. 266**Mass**366, 165**NE** 402. [k] **Provision should be given reasonable construction.–Iowa** 229**NW**724.

638–36 45 **Ida**571, 264P229; 12**PaDist &Co** 73.

639–39 **Nebr** 232**NW**586.

639–41½–New. Mortgagee entering satisfaction of mortgage cannot in different action recover taxes paid. **Nebr** 230**NW**838.

639–43 178**Ark**429, 10**SW(2d)**866. [e] **Senior mortgagee paying taxes after judgment foreclosing his mortgage and before sale** has right of legal subrogation as against junior mortgagees irrespective of whether conventional right given by mortgage was extinguished by judgment. 38**Wyo** 515, 269P45, 60**ALR** 418.

640–46 45 **Ida**571, 264P229.

640–49 200**Ala**596, 76S954; 63**Colo** 4, 164P308; 197 **Ind**393, 150**NE**368; 74 **Kan**442, 87P184; 118**La**322, 42S951; 50 **NY**337, 14**AbbPrNS**1 [rev 33**NYSuper**67, 11**AbbPrNS**147, 42**HowPr**33]. See **IndA** 144**NE**564. See also 239**Mass**20, 131**NE** 466.

640–50 70**CalA**336, 233P374.

640–50½–New. But a mortgagee who purchases a term in the premises at the foreclosure of a tax lien may not add this to his mortgage upon redemption as it is not necessary to the protection of the title. 2**CowNY**118.

640–52 202**Ala**121, 79S587. [d] (2) Claim for taxes paid by holders of notes secured not denied for infirmity or invalidity of mortgage on foreclosure. 45 **Ida**571, 264P229. (3) Mortgagors accepting decree cancelling mortgage and note secured must place holders of notes in statu quo by paying amount of taxes paid. 45 **Ida**571, 264P229.

641–61 [a] (2) Where holder of second mortgage acquired title to land, and thereafter received rents sufficient for payment of taxes, it should have paid taxes, and, having done so, was not subrogated as against holder of first mortgage. 178**Ark**764, 12**SW(2d)**394. (3) Where holder of second mortgage had assigned first mortgage, agreeing to look after collection, and had reported to assignee that all taxes were paid, it was not, as against first mortgage, subrogated to tax lien for amounts paid by it. 178**Ark**764, 12**SW(2d)**394.

641–65½–New. Trustee must act in good faith and exercise discretion in proper and open manner. 20**F(2d)**333.

643–83½–New. Where mortgagor takes out sufficient insurance to protect mortgagee's security as required by mortgage, mortgagee has no right to insure property. 171**Ark**1066, 287**SW**587.

643–86 197 **Ind**393, 150**NE**368; 151**Miss** 56, 117S354. [b] **Mortgagee held not entitled to reimbursement for premiums paid by him** where it did not appear that insurance was for benefit of mortgagor. 197 **Ind**393, 150**NE**368.

643–88 32**Ariz**596, 261P48; **NJCh** 148 **A**575.

644–97½–New. Failure of mortgagor to pay premiums constitutes waste. 249 **Mich**252, 228**NW**785.

644–98 See also 40**SD**246, 167**NW**144.

644–5 1 **OntWN**234, 796, 16**OntWR**149.

644–13 133**Misc**233, 231**NYS**513.

645–15 133**Misc**233, 231**NYS**513(2d case).

645–15½–New. Where insurance policy on mortgaged premises is payable both to first and second mortgagees, the first mortgagee cannot turn over insurance money to the owner, in the absence of a provision in the mortgage entitling him to do so. 133**Misc**233, 231**NYS**513.

645–16 [a] **Right of mortgagor to make repairs.–MoA** 29**SW(2d)**161.

645–18 216**Ala**465, 113S489.

645–19 216**Ala**465, 113S489.

645–24 197 **Ind**393, 150**NE**368; **IndA** 144**NE**564; 153 **Iowa**199, 132**NW**1095; 7**NH**392.

645–29½–New. Expenditures by mortgagee in possession under a sale subsequently annulled are not recoverable on redemption. 141**SC**152, 139**SE**405.

646–41 233 **Ill** 531, 84**NE**704; 197 **Ind** 393, 150**NE**368; 109**Pa**330. [f] (5) New heating apparatus, window screens, and receptacles for ashes and garbage. 199 **Mass**164, 85**NE**402.

648–50 **IndA** 144**NE**564.

648–57 191**Ala**104, 67S668; 200**Ala**596, 76S954; 205**Ala**301, 87S823; 205**Ala**334, 87S854. [b] **In Alabama.–**215**Ala**488, 111S229.

648–59 155**Ky**175, 159**SW**675. [a] 33 **SD**142, 144**NW**925.

648–61 176**Ark**64, 3**SW(2d)**30, 57**ALR** 444; 249**Mich**252, 228**NW**785. [d] (3) Amount paid for converted timber with interest at six per cent. 176**Ark**64, 3 **SW(2d)**30, 57**ALR**444. [g] **Mortgagor in possession, cutting timber in misapprehension of rights,** is held not willful trespasser in equitable action. 170**Ark** 1146, 282**SW**995. [h] **Mortgagee barred by laches** from claiming value of timber against purchasers, removed by mortgagors without her knowledge. 176**Ark** 64, 3**SW(2d)**30, 57**ALR**444. [i] **Buyer of mortgagor** must show what amount of proceeds was expended on property in conformity with good husbandry. 176**Ark**64, 3**SW(2d)**30, 57**ALR**444.

649-62 176Ark64, 38SW(2d)30, 57ALR 444.
649-63 195NC255, 141SE595. [b] Defenses.-195NC255, 141SE595.
649-65 176Ark64, 38SW(2d)30, 57ALR 444.
649-69 [a] (2) Estrepement will lie to prevent waste by mortgagor. 5PaDist& Co 691.
649-71 219Ala447, 122S426; 165Ga516, 141SE410; 5PaDist&Co 691.
650-74 Sask [1926] 3DomLR283, [1926] 2WestWkly32.
650-80 125Me114, 131A204. [a] 125Me 114, 131A204. [b] (2) 125Me114, 131 A204.
651-81 125Me114, 131A204. [b] Mortgagee in possession by tenants is liable only for waste, or his own torts. 220 Ala353, 125S226.
652-1 82Mont150, 266P869; 100NJEq 326, 134A769, 48ALR1155; 12PaDist& Co 320; TexCivA 28SW(2d)250 (damages to entire security); BC [1926] 4 DomLR814, [1926] 3WestWkly500; Sask [1926] 4DomLR993. [g] Sufficiency of complaint.-186Misc61, 242NYS73. [h] Burden of proof.-TexCivA 28SW (2d)250. [i] Admissibility of evidence. -TexCivA 28SW(2d)250. [j] Allegation of ownership or right to immediate possession unnecessary.-12PaDist&Co 320. [k] Mortgagee need not demand return of things eloigned.-12PaDist&Co 320. [l] Suit to recover value of timber wrongfully removed from mortgaged premises.-Ala 128S132. [m] Necessity of alleging value of land or depreciation in value. 157Miss737, 128S98(1st case).
652-2 TexCivA 28SW(2d)250. [a] If value of mortgaged property satisfied debt, mortgagee could not recover damages from person buying elevator. TexCivA 28SW(2d)250.
652-7 [b] Action not maintainable simultaneously with foreclosure suit.-227 AppDiv448, 238NYS188.
652-8 See also Sask [1926] 4DomLR 993.
652-8½-New. Creditor of mortgagor who seizes farm implements separately from land in satisfaction of debt must account therefor to mortgagee of land. 162La1062, 111S421.
652-8⅓-New. Upon refusal of such creditor to restore the implements mortgagee may treat act as one of conversion and sue for value of the property removed, 162La1062, 111S421.
652-8¼-New. and need not sue for return of the property which would be inadequate remedy for years after removal. 162La1062, 111S421.
653-9 TexCivA 28SW(2d)250.
653-15 17F(2d)900.
653-16 17F(2d)900.
653-24 SD 225NW225.
654-29 37GaA398, 140SE403.
654-38 37GaA398, 140SE403; Iowa 233 NW126; 222AppDiv40, 225NYS394.
655-39 267Mass361, 166NE879, 143 Wash342, 255P368.
655-41 95Fla928, 117S388; 205 Iowa 1273, 218NW42; 83Mont21, 269P162; TexCivA 38SW(2d)552; 12 Ont98. [a] (2) Other instances. CalA 288P683. [l] Evidence held to sustain finding that no note was given for debt.-SD 225NW225. [m] Parties.-170La680, 129S128.
656-49 47 Ida312, 274P799.
656-51 83Mont501, 272P994.
656-52½-New. In Ontario the fact that the mortgagee acquired title to the mortgaged land by purchase from a purchaser at a tax sale and resold the property does not prevent his suing the mortgagor on his covenant to pay. Ont [1929] 2DomLR633.
656-57 85Mont310, 278P1002 (other statute permitting enforcement of debt without regard to lien is restricted to liens other than mortgage liens); Mont 286P402. [n] Action on notes.-80CalA768, 253P166.
657-58 [g] Statutes requiring proceedings on mortgage before resorting to bond, must be strictly construed. 295 Pa276, 145A301.
57-58¼-New. Notice of proposed judgment on bond secured by mortgage must be filed. NJSup 137A712.
657-59 135Misc341, 238NYS1.
658-66 48 Ida419, 282P862. Erratum.-"7 N. J. L. 335" should be "7 N. J. L. J. 335."
658-68 58 OntL683, [1926] 3DomLR 93.
658-71 See also Ont [1928] 4DomLR 310. [b] (1) 61 OntL490, [1928] 1 DomLR549, (2) 61 OntL490, [1928] 1 DomLR549.
658-74 316Mo 1257, 293SW382.
660-89½-New. The maker of a note secured by trust deed is not entitled to a directed verdict although foreclosure proceedings were void, where plaintiff proved a cause of action on the note without reference to the trust deed. Iowa 228NW646.
660-3 291Pa15, 139A585. See also 169 Ky239, 183SW930.
661-16½-New. By proper stipulation in mortgage, mortgagee may be given right to assign his lien. 126Me397, 138A770.
662-18 But see 147Miss296, 111S874.
662-28 Contra 253 IllA252.
663-33 55ND77, 212NW440.
663-36 102NJEq61, 139A600.
663-37½-New. Becoming party to contract to assign mortgage with purpose to acquire right of action does not bar action thereon. Mass 170NE52.
663-45½-New. Mortgagee may assign note and mortgage to creditor of mortgagor as collateral security for other debts of mortgagor. 103Conn657, 131A 404.
664-57 [b] Purchaser of note and deed of trust from trustee is put on inquiry as to seller's title where instruments disclose that seller is trustee and not payee. 253 IllA320.
666-92 [b] Mistake as to validity.-221 MoA814, 288SW95.
666-97½-New. The seller's indorsement of a secured note without recourse does not bar the purchaser's suit to rescind the purchase of a void deed of trust. 221MoA814, 288SW95.
666-97½-New. A purchaser of a deed of trust, who tenders it back to the seller unimpaired immediately upon discovering its invalidity, does all that is required to place the seller in statu quo. 221MoA814, 288SW95.
666-98 57ND655, 223NW707. [e] Evidence held to show fraud.-57ND655, 223 NW707.
666-99 137Wash418, 242P353.
667-5 Colo 292P87.
667-9 [b] Where mortgagor made note payable to himself, secured by deed of trust of same date, and they were sold for value, consideration was received as present consideration, and note and deed of trust became valid subsisting security and obligation. 178Ark699, 11 SW(2d)488.
667-10 See also Wash 291P1105. [a] 35Ark62; 19Mich142; 72NY575; 107 AppDiv140, 94NYS985; 121AppDiv145, 105NYS642; 8PaDist&Co 3; 99Wis103, 74NW546; 121Wis479, 99NW341, 105 AmSR1032; 13Wyo 473, 81P307, 82P2. [b] (1) 8PaDist&Co 3, 5 [quotCJ]. (2) Reason for rule is that junior mortgagee can have no interest in assignment. 8PaDist&Co 3. (3) But rule does not apply where junior mortgagee is affected by some action of assignor while holding mortgage whereby assignor has estopped himself from claiming priority of his mortgage as against junior mortgagee. 8PaDist&Co 3.
667-12 129 Ill 466, 21NE850, 5LRA276.
668-22 152Md641, 137A367, 368 [cit CJ]. But see Iowa 232NW498.
668-23 242 IllA462.
668-27 135Misc53, 237NYS580, (where written assignment is recorded).
669-38 233 IllA468; 233 IllA531, 233 IllA614; 235 IllA305.
669-40 [a] Mortgagor may deal with mortgagee till receiving notice.-230 AppDiv410, 245NYS71.
669-41½-New. Where notice is given to trustee, mortgagor need not be notified. 233 IllA468.
669-42 202 Iowa942, 211NW563.
669-43 [a] Information by mortgagee that mortgage had been assigned is sufficient to charge mortgagor with all facts discoverable by reasonably diligent investigation. 135Misc53, 237NYS 580.
669-47 233 IllA531.
669-48 152Md609, 137A351; 117Nebr 765, 223NW8.
670-52 164Ga880, 139SE658; 176Minn 18, 222NW509; 117Nebr765, 223NW8. [d] Failure to record assignment leaves subsequent purchasers as takers without notice. 164Ga880, 139SE658. [e] In New York.-288AppDiv640, 238NYS87 (2dcase).
670-53 [a] 157Md107, 145A358; NJCh 148A197(2dcase); 230AppDiv410, 245 NYS71; 127 Okl 152, 260P47. [b] 127 Kan239, 273P477; 230AppDiv410, 245 NYS71; 127 Okl 152, 260P47; 134 Okl 167, 272P432. [c] 230AppDiv410, 245 NYS71. [e] Reinstatement of record is not required in some cases. 230AppDiv 410, 245NYS71.
670-54 [e] ND 232NW749.
671-56 22AlaA634, 118S911(3dcase); 202 Iowa947, 211NW564; 202 Iowa945, 211NW567. See also 202 Iowa942, 211 NW563.
671-57 57ND270, 221NW71.
671-57½-New. As against a junior mortgagee an assignment of A prior mortgage need not be recorded. 206 Iowa1198, 221NW791.
671-58 [c] Omission of register to index assignment properly does not deprive assignee of priority. 230AppDiv 410, 245NYS71.
671-63 [a] (1) 33PortoRico 94. (4) Instrument, public, of assignment must be recorded in registry of property. 33 PortoRico 94.
672-79 98Fla422, 123S833; 99Fla1092, 127S323; Fla 129S597; 163Ga551, 136SE 528; 163Ga629, 137SE19; 164Ga852, 139 SE557; 202 Iowa947, 211NW564; 173 Minn554, 218NW106, 107 [citCJ]; SD 228NW466.
673-85 23F(2d)403; 102CalA230, 282P 819; Fla 130S577; 163Ga551, 136SE528; 163Ga629, 137SE19; 164Ga852, 139SE 557; 168Ga500, 148SE340; 202 Iowa947, 211NW564; 168La262, 121S764; 173 Minn554, 218NW106; MoA 286SW729; 102NJEq61, 139A600; 191NC458, 132SE 148; 58ND236, 225NW788; 135 Okl 117, 274P648; 54SD625, 224NW190; SD 226 NW745; 118Tex202, 13SW(2d)346. But see 323Mo 356, 19SW(2d)1043. [c] Transfer of debt carries equity in premises, enforceable in equity. 163Ga551, 136SE528. [d] In Georgia.-40GaA23, 148SE749. [e] Though legal title does not vest, where secured note is transferred without conveying land, transferee has equity. 40GaA677, 150SE858.
674-86 204 Iowa1178, 216NW625.
674-89 321Mo 576, 11SW(2d)1016.
675-95 126Me397, 138A770.
675-96 180Minn544, 231NW207 (mortgage continues as security for all notes). [a] Assignee of principal note held not entitled to corresponding interest note not assigned. 220Ala56, 124S93.
675-98 191NC447, 132SE157.
675-4 215Ala571, 112S189. [a] 215Ala 571, 112S189.
676-8 215Ala571, 112S189.
676-11 126Me397, 138A770. [b] Mortgagee of real estate, out of possession, has been held to have no power to convey, and conveyance is void. TexCivA 18SW(2d)267.
676-17 95Fla498, 116S498; 326 Ill 285, 157NE243. But see 128Me546, 149A297.
677-18 141SC290, 139SE633.
677-19 [a] Assignor's transfer of note by indorsement held not precluded by assignment of mortgage alone as collateral security. 263Mass462, 161NE601.
677-21 177Ark1080, 9SW(2d)555.
677-23 141SC290, 139SE633.
678-32½-New. A mortgage by a mortgagee on same property covered by a mortgage he holds is not an equitable assignment where the second mortgage recites the original mortgage as an encumbrance. 177Ark1080, 9SW(2d)555.
678-40 9CranchUS456, 3Led791; 6Conn 373; 7Me377; 14Me9; Mass 4Pick505; 7NH73; 8NH429; 14NH61; 34NH90; NY 2Cow246, 14AmD475; 52SD133, 216NW 876, 877 [citCJ]; 20Vt388.
678-41 116Nebr706, 218NW734, 735 [cit CJ].
679-43 7NH73; 10NH215; 13NH247.
679-52 239Mich575, 215NW13.
679-53 [c] Right to release but not to

assignment.–143Md345, 122A318.

680–59 [b] **Express warranty against superior lien** held not violated by lien for drain assessment filed eighteen months after guarantee date. 173Minn 223, 217NW101.

680–60 Conn 151A325; 164Ga880, 139 SE658; 235 IllA305; 33PortoRico 94. [g] **Mortgagor not bound** by assignment contract to any further extent than he was by his own. 33PortoRico 94. [h] **Pledgee of note secured by mortgage** had right to sue to recover full amount, and to pay surplus, if any, to mortgagor and pledgor of note, as against purchaser of property. 167La126, 118S861. [i] **Transfer of note secured by deed of trust** cannot affect lien. NC 155SE606.

681–61 [b] **Second assignment** given to cover subsequently acquired interest is valid contract. 263Mass462, 161NE601.

681–65 206 Iowa1326, 221NW937.

681–66½–New. Where mortgage is assigned to creditor of mortgagor to secure specified debt and other obligations due assigned by mortgagor, it is regarded as securing debt named in mortgage and not such specified debt and other obligations, 103Conn657, 131A404.

681–66⅓–New. the specified debt and obligations being consideration as antecedent indebtedness for the debt named in the mortgage. 103Conn657, 131A404.

681–68 242 IllA462; 101NJEq818, 138 A898.

681–69 12PaDist&Co 761. [i] **Fact that assignee did not know,** at time of assignment, of existence of collateral securities is immaterial. 12PaDist&Co 761.

682–70 12PaDist&Co 761.

682–71½–New. Rights of assignee of mortgage notes are subordinate to rights of one dealing with record holder of mortgage relying on record. 19F(2d) 604.

682–71⅓–New. As between record holder of mortgage and assignee of mortgage notes record, holder holds mortgage in trust for assignee. 19F(2d) 604.

683–78 164Ga880, 139SE658.

683–79 192NC251, 134SE487.

683–84½–New. Words on assigned note "without recourse" amount to mere stipulation of nonwarranty. 9LaA143, 119 S487.

684–87 330 Ill 136, 161NE306.

684–88 164Ga852, 139SE557.

684–89 23F(2d)403; 135Tenn249, 186 SW102, LRA1916F418.

684–1½–New. If the mortgagee estopped himself from claiming priority, his assignee who is not a purchaser for value is in no better position as against junior mortgagee. 8PaDist&Co 3.

684–2 Iowa 232NW498.

684–3 46 Ida271, 267P445, 446 [citCJ]. [a] **Right depends on recording acts.**–46 Ida271, 267P445.

684–6 But see 46 Ida271, 267P445.

685–7 96CalA682, 274P755.

685–9½–New. Assignment of recorded notes and mortgage executed in unconsummated negotiation of loan is ineffective to give assigned lien on land superior to intervening mortgage. 8F(2d) 443.

685–9⅓–New. Second mortgagee's assignee is not estopped, by silence at a sale to the first mortgagee under foreclosure decree, to set up the assignment in the latter's suit to cancel the second mortgage. 102NJEq61, 139A600.

685–11 Iowa 232NW498.

685–17 143Wash24, 254P464.

685–18 170Ark703, 281SW14.

685–20 135Misc53, 237NYS580 (though assignor retained possession of mortgage).

685–21½–New. One to whom fraudulent assignment made held entitled to priority to extent of note over first assignee who merely transmitted mortgage to mortgagee for collection without notifying mortgagor. 157SC157, 154SE112.

686–24 206 Iowa1326, 221NW937. [a] **Pledgee not taking instruments with assignment** has no rights against subsequent pledgee except to receive payment from maker according to proper priority. 206 Iowa1326, 221NW937. [b] **Pledgee's foreclosure is not conversion as to prior assignee for security who** failed to take instruments with assignment. 206 Iowa1326, 221NW937.

686–24½–New. In such case the assignment as collateral has priority over as against the subsequent assignment of the mortgagee's remaining interest. 170 Ark703, 281SW14.

686–25 204 Iowa1178, 216NW625, 626 [citCJ].

687–31 180Minn544, 231NW207.

687–35 See also 96Fla568, 120S4.

687–37½–New. The assignee is entitled to priority of lien as against the mortgagee, with respect to the note transferred. 96Fla568, 120S4.

687–38 127Kan239, 273P477; 130Kan 182, 285P637 (attachment levied after notice of assignment not binding on assignee); 152Md609, 137A351; 57ND270, 221NW71; SD 226NW343. [a] **Assignee of mortgage can rely on public records** disclosing priority of mortgage in absence of actual notice of facts. 87 Colo 240, 286P275.

688–42 [a] 219Ala161, 121S530(2d case); 168Ga108, 147SE113; 176Minn 609, 224NW264; Sask [1928] 2DomLR 72. [b] Ida 290P383 (quitclaim deed by mortgagee to subsequent purchaser after assignment of mortgage); 180Minn 552, 231NW234.

688–44 33F(2d)512(2dcase); 36F(2d) 747.

689–48 33F(2d)512(2dcase); Utah 268 P781.

689–49 [a] 29F(2d)450. [b] 58ND660, 227NW185 (as to purchaser assuming mortgage).

689–50 [a] 180Ark90, 208SW(2d)626; 11Serg&RPa208. [c] **Effect of assumption of debt.**–174Cal 412, 163P351. [d] **Assumption of mortgage debt by grantee** does not prevent operation of rule of intent. 33F(2d)512(2dcase).

689–52 [a] (2) 60 Iowa315, 14NW325; 83 Iowa513, 49NW1001; 41Mich264, 1 NW1049; 1NYSandfCh407; 80Wis150, 49NW749; 13CanLJNS226; Ont 1Ch Chamb117; Ont 5GrantCh359. See also TexCivA 130SW665. [c] **Devolution of title to interest in mortgage to mortgagor holding title to land** constitutes extinguishment of debt to such amount. 146SC157, 143SE549.

689–53 [b] 132Misc58, 228NYS666.

689–56½–New. Title under security deed is not merged in title grantor of security deed acquired under conveyances from third persons for whose benefit grantor had conveyed the land in trust subject to the security deed, where such third persons had no title under security deed. 163Ga478, 136SE517.

689–56⅓–New. A negotiable instrument secured by a mortgage may be reacquired by the makers before maturity and reissued, carrying the lien of mortgage with it. 176Ark146, 3SW(2d)289, 58ALR175.

690–57 179Ark12, 13SW(2d)822; Wash 291P1105 (where assignment subsequent to action to cancel mortgagor's deed for fraud). [c] 179Ark12, 13SW(2d)822.

690–58 102CalA230, 282P819; 235 IllA 305; 205 Iowa7, 215NW732; 191NC 458, 132SE148; 14PaDist&Co324; 33 PortoRico 94; Sask 67DomLR315. See also TexCivA 23SW(2d)835.

691–66 90CalA291, 265P873; 104Conn 696, 134A231; 110Conn438, 148A388; 168Ga231, 147SE111; 336 Ill 178, 168 NE277, 66ALR181 (under assignment as collateral security); 233 IllA468; 233 IllA531; 235 IllA305; 253 IllA1; 152Md 597, 137A276; 152Md641, 137A367, 369 [citCJ]; 153Md380, 138A255; 176Minn 267, 223NW288; NJ 144A110; 99NJEq 614, 133A719; 101NJEq462, 139A1; NJCh 149A47; 133Misc577, 232NYS659; 225AppDiv383, 233NYS172; 226AppDiv 347, 234NYS440; 133SC431, 131SE598; 135SC173, 133SE539; 51SD72, 212NW 512; 51SD579, 215NW938. [b] **Defense that commissions due to mortgagor were sufficient to pay mortgage according to** agreement held not matter of evidence, but substantial defense. 133SC431, 131 SE598.

691–66½–New. Assignee who participated in fraud is entitled to recover only the actual value of the article which was consideration for the mortgages. 135SC87, 133SE538.

691–68 99NJEq614, 133A719. See also 244Mich697, 222NW81.

692–73 Alta [1929] 4DomLR1004.

692–75 143Wash24, 254P464.

692–76 CalA 273P1070; 133SC431, 131 SE598. [a] (2) Where mortgagor who had given mortgage with agreement that commissions, which were to become due from mortgagee, would be applied thereon, had commissions due him of more than amount of mortgage, he is entitled to have mortgage satisfied of record notwithstanding mortgage was assigned. 133SC431, 131SE598.

692–77 TexCivA 290SW266; 239Mich 459, 214NW424.

693–81 104Conn696, 134A231; 239Mich 459, 214NW424, 427 [quotCJ]. [d] **Failure of mortgagee to pay notes which he agreed to pay out of proceeds of sale of mortgage** does not affect rights of assignee where notes were not due at time of assignment and assignee had no notice thereof. 239Mich459, 214NW 424.

693–84 176Ark146, 3SW(2d)289, 58 ALR175; 177Ark243, 6SW(2d)305; 205Cal 390, 270P1116 (evidence held to sustain conclusion based on fact findings that assignee was bona fide purchaser); 47 Ida572, 277P423; Mass 172NE234; 251Mich384, 232NW245; Mich 232NW 741 (payee held not "holder in due course"); 23 OhA127, 155NE245; 41 OklAC189; 51SD579, 215NW933; SD 226NW745. See also 163Ga551, 136SE 528.

693–85 48 Ida538, 283P609 (prior to statute providing that note otherwise negotiable is not affected by fact that it is secured by mortgage); 233 IllA531; 253 IllA252; 253 IllA469; 172Minn571, 216NW231; 176Minn287, 223NW148; 180Minn104, 230NW277. [c] **Rights of holder of part of notes.**–191NC458, 132 SE148.

694–86 206 Iowa45, 218NW40; Iowa 228NW63 (insanity of mortgagor's wife is no defense in foreclosure).

694–87 [c] 205 Iowa1126, 217NW429. [d] **Innocent holder cannot recover on** note and deed of trust where execution was induced by fraud in factum. 192 NC798, 136SE118. [e] **Innocent holder of note and deed of trust induced by** fraud in treaty can recover disbursements. 192NC798, 136SE118.

694–88½–New. A recital in a note that it was secured by deed of trust is sufficient to put transferee upon notice of terms of security. 191NC458, 132SE 148.

694–89 NJ 144A181; 99NJEq42, 133A 430. [a] (1) 96PaSuper497. (7) Assignee taking reasonable precautions in purchasing usurious mortgage and relying upon certificate of no set-off held entitled to benefit of full sum of mortgage. 101NJEq751, 138A897. [d] **Mortgagor held not estopped to set up defense of payment** unless he induced assignee to purchase mortgage by some positive encouragement. 133SC431, 131SE598.

694–90 [a] (2) Does not estop mortgagor from setting up defense against assignee that commissions due him from mortgagee, which were to be applied thereon were sufficient to pay mortgage. 133SC431, 131SE598.

695–91 [b] **Facts held not to show negligence.**–133SC431, 131SE598. [c] **Leaving blanks in mortgage.**–47 Ida572, 277P423. [d] **Mortgagor placing mortgage in hands of attorney for delivery for particular purpose** is not estopped to deny its validity after wrongful diversion. 180Minn104, 230NW277.

695–92½–New. Assignee has burden to notify mortgagor of assignment and to make inquiry as to validity. 133SC431, 131SE598.

695–92⅓–New. A mortgagor is held not estopped from asserting payment of a mortgage. 233NYS172.

695–95 179Ark12, 13SW(2d)822; 206 Iowa45, 218NW40; 101NJEq462, 139A 1; 143Wash24, 254P464. But see 179 Ark132, 14SW(2d)549. [i] **Purchaser of one of two mortgages** of even date who is prior on record takes free of defense of agreement between parties for priority of other mortgage. 143 Wash24, 254P464.

696–97 NJCh 151A735 (preëxisting debt).
696–98 217Ky71, 288SW1014.
696–2½–New. Release of the mortgage by the mortgagee of record is not good as against a prior unrecorded assignment of the mortgage. 57ND270, 221 NW71.
696–3 [a] **Where grantee of mortgagee out of possession was fully informed that mortgagee was only claiming mortgage,** grantee was not innocent purchaser and acquired no title. **TexCivA** 18SW(2d)267.
696–4 163Ga629, 137SE19. [f] **Record not notice** to pledgee of note and mortgage without actual notice of claim of prior assignee to whom instruments were not delivered. 206 **Iowa**1326, 221 NW937.
696–5 91Fla575, 108S170; 330 **Ill** 373, 161NE483; 241Mich46, 216NW448; 96 **PaSuper**497 (assignee not bound to make inquiry where certificate of no defense was executed with building mortgage); 51SD72, 212NW512.
697–6 41 **OklACR**189. But see **Iowa** 228NW63.
697–7 163Ga551, 136SE528.
697–8 152Md641, 137A367; **NJCh** 151 A735; 150Va515, 143SE741.
697–9 217Ky71, 288SW1014; 241Mich 46, 216NW448.
698–11 202 **Iowa**942, 211NW563; 202 **Iowa**947, 211NW564; 202 **Iowa**945, 211 NW567. [e] **As to subsequent assignees.**–135Misc53, 237NYS580.
698–13 207 **Iowa**1139, 222NW373. [a] 176Minn287, 223NW148.
698–14 202 **Iowa**947, 211NW564. [d] 136 **Okl** 57, 276P224.
699–17½–New. Under some statutes the mortgagor's payment of the mortgage debt to the last assignee of the mortgage whose assignment was of record is effectual to extinguish all claims against the mortgagors by reason of such mortgage. 127**Kan**744, 275P148.
699–19 233 **IllA**468; 233 **IllA**531; **NJ Ch** 148A392(2dcase). [c] (1) 139 **Okl** 202, 281P792(2dcase) (not binding on assignee in possession of note and mortgage).
699–20 233 **IllA**531.
699–21 See also 176Minn287, 223NW 148.
699–22 214Ala146, 107S88 (purchaser of property is protected, though without notice where record on margin shows entry of satisfaction and release); 104 **Conn**696, 134A231; 157Md45, 145A222; 157Md107, 145A358; **NJCh** 148A197(2d case); 127 **Okl** 152, 260P47.
699–23 176Minn287, 223NW148.
699–24 202 **Iowa**947, 211NW564; 172 **Minn**433, 215NW842; 202 **Iowa**942. See also 202**Iowa**942, 211NW563; 202 **Iowa** 945, 211NW567.
699–25 132 **Okl** 245, 270P73.
700–26 215Ala242, 110S42; 218Ala352, 118S666; 202 **Iowa**942, 211NW563; 202 **Iowa**947, 211NW564; 202 **Iowa**945, 211 NW567; **Iowa** 221NW791; 207 **Iowa** 1139, 222NW373; 122 **Okl** 216, 253P982; 127 **Okl** 152, 260P47; 136 **Okl** 57, 276P 224; 137 **Okl** 1, 278P1096; 141 **Okl** 207, 284P895. Contra 233 **IllA**531; 253 **IllA** 252. [a] **In Illinois.**–253 **IllA**252.
700–29 198NC602, 152SE775 (title or priority of assignee not affected). [a] **In Illinois.**–253 **IllA**252.
700–33 117**Nebr**765, 223NW8; 230**App Div**410, 245NYS71; 131 **Okl** 9, 267P481; 134 **Okl** 167, 272P432.
701–37 215Ala242, 110S42.
701–40½–New. Mortgagor and purchaser rely at their peril on contract with mortgagee, made after unrecorded assignment, for release of mortgage and acceptance of cash and new mortgage. **Iowa** 229NW744.
701–40⅓–New. Deed to mortgagee of part of property mortgaged released such parcel from mortgage against assignee of mortgage knowing of release. 250Mich382, 230NW150.
702–46 See also 101**Mo** 649, 12SW1045.
702–52 See also **Fla** 129S597.
702–53½–New. The assignee of a half interest in a mortgage is not entitled to a money judgment against his assignor who has foreclosed with the assignee's knowledge and has bid in the property at sale. 178Minn360, 227NW182.
702–55 126Me438, 139A476; 153Md380, 138A255.
703–62 [b] **Holder of mortgage note** may sue indorser after delivery, at law. **Fla** 130S725.
703–67 33**PortoRico** 94.
703–78 See also **Can** [1928] 1**DomLR** 562.
704–86 **NJCh** 151A272. See also **NJCh** 151A272.
705–87½–New. An assignee accepting a mortgage without reading it, on representation that it contained all land specified by agreement, may recover the proceeds of omitted land. 34NM387, 281 P461.
705–88 **Conn** 151A325.
705–93 [a] **Liability under special agreement.**–87**Colo** 31, 285P169.
705–1½–New. An assignee releasing a mortgage is not liable under a contract with the assignor for a sum which the latter had advanced to the mortgagor to pay a note held by a prior mortgagee. 52SD69, 216NW849.
705–1⅓–New. Where the purchase price of a mortgage was mutually understood to be a stated sum, and the purchaser took and retained the mortgage, the law implies a promise to pay although no formal promise was made. **Iowa** 228 NW886.
705–1¼–New. Where the purchase price of a mortgage was mutually understood, the fact that the seller represented that a third person would pay a part thereof does not diminish the purchaser's obligation to pay the full price, **Iowa** 228 NW886.
705–1½–New. nor his obligation to pay interest thereon. **Iowa** 228NW886.
706–7 33**Ariz**13, 261P633, 57**ALR**1015.
706–7½–New. To the extent necessary to protect the assignment. 33**Ariz**13, 261P633, 57**ALR**1015.
706–7⅓–New. And the assignee does not acquire assignor's title by operation of law. 33**Ariz**13, 261P633, 57**ALR** 1015.
706–7¼–New. In assignee's suit to foreclose mortgagee and assignor cannot claim to share in security as purchaser of interest coupon notes indorsed without recourse by him upon assignment of mortgage. 34NM551, 286P159.
706–7⅙–New. By agreement giving him right to rents after foreclosure, assignor held entitled to accrued rents under expired lease as against assignee claiming under sheriff's deed. **Iowa** 232NW 494.
706–11½–New. The mortgagor making payments to the mortgagee after assignment without notice may recover payments not turned over to the assignee. 127**Kan**323, 273P400.
706–19 202 **Iowa**947, 211NW564.
706–20 249Mich400, 228NW765 (fraud in obtaining assignment).
706–21 206 **Iowa**45, 218NW40.
706–24 152Md641, 137A367; **SD** 226 NW343. But see 40**GaA**23, 148SE749.
706–24½–New. In an action to determine the right of possession where plaintiff made a prima facie case, defendant had the burden of proving that the mortgagee from whom he took deed had taken possession or that the debt went with the mortgage. 126Me397, 138A770.
706–24⅓–New. A transferee attempting foreclosure will be presumed a bona fide holder for value. 168Ga500, 148SE340.
706–24¼–New. Loss of bond and mortgage creates no presumption of assignment. **NJCh** 148A392(2dcase).
706–24⅙–New. Burden of proving subsequent purchase for valuable consideration without notice of unrecorded assignment rests on purchaser claiming not to be bound thereby. **Iowa** 229NW 744.
707–26 23**F(2d)**391, 394 [citCJ].
707–29½–New. Evidence held competent to show inconsistency between prior action and present statement. **Mass** 170 NE52.
707–29⅓–New. Several years' delay in filing assignment of mortgage is competent to show the assignee's bad faith. **SD** 226NW343.
707–32½–New. A dishonored check drawn by an assignor is competent to refute the assignor's claim that the purchase price was deposited in a bank, to the assignor's credit, in payment of the mortgage. 56ND87, 215NW921.
707–34 **NJCh** 148A392(2dcase) (assignment must be proved by weight of evidence). [a] (1) **Ark** 13SW(2d)600; 207 **Cal** 779, 279P797 (to support finding that assignee was innocent holder for value); 207**Cal** 798, 279P799; 208 **Iowa** 573, 221NW486; **Iowa** 225NW374; 163 **La**1039, 113S367; 152**Md**609, 137A351; 99**NJEq**42, 133A430; 138 **Okl** 272, 281 P251; 142**Wash**500, 253P802. (2) To sustain finding that plaintiff was bona fide purchaser. 98**CalA**604, 277P538; 98**CalA**796, 277P541. (3) To support verdict for assignee. **TexCivA** 23SW (2d)835. (4) To show assignment was recorded before payments were made to original mortgagee. **Md** 150A807. (5) To show bank did not purchase, but paid note secured by trust deed. **MoA** 26SW(2d)856. [b] **Evidence held insufficient** to show assignment procured by fraud. 249**Mich**400, 228NW765.
707–35 [a] (1) **Ida** 290P383 (to show that assignment of mortgage and note was with intent to convey absolute title to mortgage and debt); 124 **Or**512, 264P854; 191**Wis**550, 211NW771. (2) To establish mortgage holder's agreement to make good deficiency after foreclosure. **TexCivA** 23SW(2d)835. (3) To prove assignee was innocent holder for value. 251**Mich**384, 232NW245.
707–36 [a] **Iowa** 228NW886. [b] 8**F (2d)**443; 152**Md**641, 137A367.
707–36½–New. Evidence held not to show that holder of note secured by mortgage had obtained possession thereof by fraud. 162**La**281, 110S422.
707–36⅓–New. Evidence held to show that transfer of mortgage by mortgagee was for security only and not an absolute sale. 216**Ala**387, 113S308.
707–36¼–New. Evidence has been held insufficient to overcome the presumption that a purchaser of a note secured by a mortgage had notice of infirmity. 241 **Mich**48, 216NW448.
707–36½–New. Evidence of the assignee's bad faith may consist of circumstantial evidence from which fraud may be inferred. **SD** 226NW343.
707–44 170**Ark**65, 278SW634; 175**Ark** 791, 300SW428; 204 **Iowa**995, 216NW 116; 193**Wis**503, 213NW304.
708–45 165**Ga**470, 141SE203.
708–48 196**NC**318, 145SE621.
708–55 [b] **Privilege of sale** at not less than fixed amount is held for benefit of parties, and mortgagee could consent to sale for less amount without consent of subsequent mortgagee. 164**La**103, 113 S782.
709–64 See also 96**Fla**818, 119S330.
709–73 163**La**1039, 113S367.
710–84 173**Ark**291, 292SW664.
710–86 97**CalA**30, 275P448.
710–87 **Minn** 231NW403.
710–96 98**Fla**900, 124S452 (nor does he become his vendor's surety); 47 **Ida**446, 276P309; 130**Misc**652, 225NYS146; 29 **OhA**476, 163NE719; 33**PortoRico** 986; **NS** [1928] 4**DomLR**570.
711–9 170**Ark**65, 278SW634; 83**Colo** 335, 264P1087; 152**Md**641, 137A367; 193**Wis**503, 213NW304. [b] (3) Purchaser of mortgaged property cannot set up defenses which mortgagor could not. 167**La**126, 118S861.
712–12 6**PaDist&Co** 65.
712–16½–New. Purchaser paying nominal sum and assuming mortgage acquires no greater rights as to mortgage than grantor, being neither innocent purchaser nor purchaser for value. 203 **Iowa**104, 212NW380.
712–18 170**Ark**65, 278SW634; **Mo** 276 SW12.
712–19 170**Ark**65, 278SW634; 336 **Ill** 450, 168NE266; 51**Philippine**224; 33 **PortoRico** 431; 154**Tenn**444, 289SW496; 193**Wis**503, 213NW304.
713–20 [b] (1) 152**Md**641, 137A367.
714–44½–New. Upon sale of real estate subject to mortgage, the law prorates rents and interest between parties. 95 **CalA**456, 273P50.
715–59 233 **IllA**511.
716–62 119 **Oh**369, 164NE347.
716–64 120 **Or**626, 253P522, 524 [quot

CJ]; 298Pa431, 148A841; 14PaDist&Co 280.

716-65 255 IllA175; 120 Or626, 253P 522, 524 [quotCJ].

716-66 120 Or626, 253P522, 524 [quot CJ].

716-68 233 IllA511.

716-69 [a] **Grantor in deed,** reciting conveyance subject to first lien of mortgagee, paying first lien notes from mortgage loan, held not estopped to deny that entire loan was first lien. TexCivA 297SW294.

716-70 233 IllA511; 206 Iowa432, 220 NW20; 120 Or626, 253P522; SD 229 NW925; 194Wis123, 215NW937.

716-71 SD 229NW925.

717-77½-New. Property purchased subject to a deed of trust providing for counsel fees in case of nonpayment of the secured note at maturity is liable for the payment of such fees. 148Va 686, 139SE257.

717-79 172Ark230, 288SW8; 76CalA 232, 245P235; CalA 287P575; 47 Ida 446, 276P309; 155Md410, 142A598; 240 Mich333, 215NW381; 323Mo 977, 20SW (2d)63; 244NY159, 155NE84; 130Misc 614, 224NYS321; 229AppDiv245, 240 NYS597; 197NC177, 148SE45; Okl 293 P197; 120 Or626, 253P522; 300Pa501, 150A895; 9PaDist&Co 805; SD 229NW 925; TexCivA 291SW961; TexCivA 28 SW(2d)833. [a] (1) 298Pa431, 148A 841; 8PaDist&Co 176. [b] **Where grantee not assuming debt conveys to another who does assume debt,** second grantee does not become personally liable. 130Misc614, 224NYS321.

718-81 91CalA333, 266P1009.

718-82 [a] (4) Can [1929] 3DomLR 883. [c] (4) Implied covenant of transferee to indemnify transferor is only prima facie, and may be rebutted. Man [1929] 2DomLR305. (5) Where land was purchased by husband under agreement to assume mortgage covering additional land and land was conveyed to husband and wife jointly, wife is not liable on implied covenant to indemnify. Man [1929] 2DomLR305.

718-86 321Mo 47, 9SW(2d)897.

719-94 259Mass46, 156NE61.

719-95½-New. In such case the mortgagor becomes surety for the debt to the extent of the value of the land, and the principal debtor beyond that amount. 130Misc614, 224NYS321.

719-97 But see 86 IndA653, 159NE469.

719-2 170Minn166, 212NW175.

719-4 250 IllA98. [b] **Sufficiency of consideration.**-SD 229NW925.

719-5 240Mich333, 215NW381.

719-7 130Misc614, 224NYS321; 137 Misc537, 242NYS707; SD 229NW925. [c] **Answer not alleging value is insufficient.**-SD 229NW932(1stcase). [d] **What constitutes extension of time of payment.**-137Misc537, 242NYS707.

719-8 SD 229NW925.

721-28 47 Ida446, 276P309.

721-31½-New. The mortgagor takes the promise of his grantee for his own protection and security and not for the direct benefit of the mortgagee. SD 225 NW225.

721-31⅓-New. Executory agreement of grantee to assume mortgage is repudiated by his voluntary bankruptcy. Iowa 229NW716.

721-38 237 IllA122; 151Va655, 144SE 645. But see 9PaDist&Co 805.

721-39 155Md410, 142A598.

721-41 41F(2d)552; 178Ark439, 11SW (2d)767. [c] **Fact that one was not named in deed** would not release him from liability under assumption clause in contract for exchange to which he was party. Iowa 231NW479.

722-45 155Wash479, 284P751 (agrees to assume and pay).

722-59 106Conn683, 138A804; 155Md 410, 142A598.

723-62 155Md410, 142A598; 125 Or135, 266P233.

723-65 47 Ida446, 276P309.

723-66 98CalA338, 276P1033; 323Mo 977, 20SW(2d)63 (may be by circumstances creating estoppel). [b] **Owner of realty, who executed conveyance to her brother** to enable him to procure a loan of money and had him reconvey to her on same date that he executed mortgage to lender, cannot assert that she is surety instead of subsequent purchaser. TexCivA 15SW(2d)68.

723-73 259Mass46, 156NE61.

724-78 220Ala597, 127S164; 233 IllA 511; 124Kan136, 257P941, 943 [quot CJ]; MoA 256NW124, 125 [citCyc].

724-79 47 Ida446, 276P309; 48 Ida419, 282P862; 124Kan136, 257P941, 943 [quotCJ]; 155Md410, 142A598; 238 Mich261, 213NW120.

724-80 323Mo 977, 20SW(2d)63.

724-81 Conn 152A145; 323Mo 977, 20 SW(2d)63.

725-87½-New. Rule of implied assumption from deduction of indebtedness is inapplicable to exchange where no purchase price is named. 130Kan698, 288 P574.

725-88½-New. The fact that the grantor on reconveyance subject to mortgage was paid a sum of money as "profit" or for his "bargain" does not show an intention to impose liability for the mortgage on the grantee. 323Mo 977, 20SW(2d)63.

725-89 171Ark260, 284SW739, 47ALR 332; 93Fla223, 111S731, 51ALR976; 94 Fla1196, 115S546 [citCJ]; 205 Iowa 563, 218NW251; Iowa 231NW436; 124 Kan136, 257P941; NJCh 151A117; 196 NC733, 147SE9. [a] **Deed is ineffective** until accepted by grantee. Conn 152A 145. [b] **Evidence insufficient to show acceptance.**-Conn 152A145.

725-90 Mich 233NW213.

726-94 But see Wis 231NW276.

726-95 [a] **After foreclosure,** grantee cannot rescind assumption covenant on ground of unilateral mistake. NJCh 151A117.

726-98 **Erratum.**-"203 N. Y. 594" should be "203 NW 594."

726-4 130Kan698, 288P574; MoA 27 SW(2d)762.

726-5 124Kan136, 257P941.

726-8 [a] **Husband's recording deed to wife** held not prima facie evidence of his acceptance of assumption clause in her behalf. MoA 27SW(2d)762.

726-9 124Kan136, 257P941.

726-13 But see 10LaA749, 122S880.

727-18 204 Iowa1283, 213NW617; Va 152SE346 (promise of assumption without consideration is unenforceable).

727-20 205 Iowa1329, 219NW329.

727-21 Iowa 220NW88.

727-23½-New. A written clause in a deed assuming and agreeing to pay the mortgage does not import consideration. 204 Iowa1283, 213NW617.

727-25 82Colo 13, 257P247.

727-26 82Colo 13, 257P247.

727-28½-New. Consideration may be found in the fact of a settlement of the mortgagee's contention that grantee had, by modifying the deed, wrongfully obliterated all evidence that the mortgagor had ever had any interest in the land, to the mortgagee's damage. 204 Iowa1283, 213NW617.

727-33 Va 152SE346. [a] **Evidence held sufficient** to show that assumption clause in deed was without consideration. 206 Iowa1270, 221NW925.

727-36 See also SD 228NW811.

728-47 111Conn269, 149A785; 204 Iowa226, 215NW248; TexCivA 9SW (2d)193.

728-48 [a] (3) Where party to contract for exchange of mortgaged lands never agreed to assume payment of mortgage, the insertion of an assumption clause in deed and recording of deed by grantor without his knowledge or consent did not bind him, where he promptly repudiated deed. 204 Iowa226, 215NW248.

729-55 TexCivA 27SW(2d)327.

729-57½-New. Where mortgagee suggested one alternative and purchaser chose another, the latter cannot claim fraud. 82Colo 13, 257P247.

729-57⅓-New. Failure of mortgagee to return money paid under misunderstanding for purpose of reducing debt held not fraudulent where purchaser did not desire its return. 82Colo 13, 257P247.

729-70 [a] **Evidence held sufficient** to sustain finding that grantee did not assume covenant in deed to pay note. MoA 289SW658.

729-71 [a] **Defendants held liable under assumption clause in view of contract and evidence.** Iowa 231NW479.

730-72 95CalA106, 272P307.

730-73 204 Iowa226, 215NW248. [a] 233 IllA511; 130Kan698, 288P574; 232 Ky816, 24SW(2d)601.

730-75 202 Iowa1362, 212NW125, 50 ALR1216; 206 Iowa1270, 221NW925; 115Nebr88, 211NW615. [b] **Evidence held not to show agreement** to assume mortgage though assumption clause was contained in deed. 206 Iowa1270, 221 NW925.

730-75½-New. The burden rests on the grantee, accepting a deed containing an assumption clause, to overcome the presumption arising from the recitals of the deed. 205 Iowa563, 218NW251.

730-75¼-New. The presumption is that one took a lien on both tracts assigned as security where the larger tract was subsequently conveyed to assignee. 168 Ga231, 147SE111.

730-75¼-New. The recording of a deed is insufficient evidence alone from which to find that the grantee assented to an obligation to pay the mortgage debt imposed by the deed. MoA 295SW851.

730-75⅕-New. Evidence held insufficient to show waiver of right to object to assumption clause inserted in mortgage without purchaser's knowledge. 130Kan698, 288P574.

730-76 47 Ida446, 276P309; 155Md 410, 142A598; 177Minn115, 224NW699; 323Mo 977, 20SW(2d)63. [a] **Evidence held sufficient** to sustain finding that purchaser assumed payment of mortgage. 155Md410, 142A598. [b] **Purpose of evidence.**-Evidence showing promise by grantee to pay mortgage debt is received, not to vary terms of deed, but to show consideration for transfer. 47 Ida446, 276P309.

730-77 76CalA232, 245P235; 47 Ida 446, 276P309; 323Mo 977, 20SW(2d) 63; 125 Or135, 266P233. [a] **Sufficiency of evidence.**-76CalA232, 245P235. [b] **Evidence held sufficient.**-177Minn115, 224NW699.

730-81½-New. Evidence has been held insufficient to establish that a party to an exchange of properties assumed payment of a mortgage indebtedness. 207 Iowa142, 222NW354.

730-83 Iowa 231NW436.

731-84 219AppDiv624, 220NYS763.

731-86 323Mo 977, 20SW(2d)63 (where conveyance was subject to mortgage).

731-7½-New. In an action by an indorser of the note secured against a grantee who assumed payment of the mortgage, the question of the agreed price may be for the jury under the evidence. 128Me287, 147A208.

731-8 115Nebr720, 214NW628; 135SC 391, 133SE913, 918, 47ALR1001 [quot Cyc].

732-10 115Nebr720, 214NW628.

732-12½-New. Proceeding to establish nonliability of original mortgagor. MoA 28SW(2d)174 (admissibility and sufficiency of evidence).

733-23 214Ala362, 107S834; 219Ala 161, 121S530(2dcase); Ala 128S132; 177Ark539, 7SW(2d)329; Iowa 222NW 385; Iowa 231NW1; 129Kan447, 283 P491; 163La1039, 113S367; 13LaA369, 127S113; Me 151A138; 262Mass302, 159NE731; 130Misc614, 224NYS321 (mortgagor liable as surety); 196NC 733, 147SE9; 46Philippine1; 49Philippine614.

733-25 216Ky721, 288SW669. [a] **Evidence held not to show release.**-262Mass 302, 159NE731.

734-27½-New. Mortgagee's acceptance of payments of principal or interest from grantee will not discharge mortgagor. Fla 129S577.

734-27⅓-New. Right of mortgagor to compel assignment of deficiency judgment to party assuming mortgage. 138 Misc322, 245NYS341.

734-30 214Ala362, 107S834; 221MoA 211, 299SW1111; NJCh 146A879; 130 Misc705, 225NYS41; SD 229NW925. See also 149SC386, 147SE449.

734-31 132Misc861, 231NYS133; 226 AppDiv211, 234NYS649.

734-38 Fla 129S577; 130Misc614, 224 NYS321. But see 157Md401, 146A229. [c] **Acceptance of smaller payments** than amounts really due is not such varia-

tion as to release mortgagor. 157Md 401, 146A229.

734-38½-New. whether material or not: 130Misc614, 224NYS321.

735-43½-New. Mortgagor not discharged by mortgagee's waiver of election to accelerate mortgage debt. Fla 129S577.

735-50 106Conn339, 138A155; Me 151 A138; 156Md106, 143A715; 179Minn 330, 229NW129; 221MoA211, 299SW 1111; MoA 22SW(2d)174 (extension held to impair mortgagor's right of subrogation); 84Mont322, 276P21; 130 Misc705, 225NYS41; 221AppDiv405, 223NYS99; 130Misc614, 224NYS321; 226AppDiv198, 235NYS34; SD 228NW 466; SD 229NW925. See also 157Md 401, 146A229. But see Minn 232NW33. [a] **Commencement of foreclosure suit,** without service on defendant or election to have whole debt become due, did not operate to discharge mortgagor, where mortgagee subsequently accepted payments under mortgage. 226AppDiv 198, 235NYS34.

735-50½-New. regardless of whether the extension of time actually worked to the mortgagor's detriment. 130Misc614, 224NYS321.

735-51 Iowa 220NW88; Iowa 222NW 385; Iowa 224NW774; Iowa 224NW 781; 208 Iowa402, 226NW12, 13 [cit CJ]; Iowa 231NW1; 36Man536, [1927] 3DomLR220. Contra 251 IllA145.

735-54 130Misc614, 224NYS321.

735-55 MoA 22SW(2d)174 (in suit to establish mortgagor's nonliability evidence held to show consideration). [a] **Agreement to pay increased rate of interest** constitutes sufficient consideration. 84Mont322, 276P21.

736-64½-New. The mortgagor has been held discharged by the mortgagee's release of the grantee, who assumed a mortgage debt, from deficiency judgment obtained against him and the mortgagor. 221AppDiv405, 223NYS99.

736-64½-New. A mortgagor's mere knowledge of an extension of time for the payment of the mortgage to the purchaser does not amount to consent to such extension. 130Misc705, 225NYS 41.

736-64¼-New. Extension granted by first mortgagee to last grantee without knowledge of second mortgagee does not release lien of first mortgage in favor of second mortgagee. 98Fla900, 124S452.

736-64½-New. Rule that extension granted to grantee assuming mortgage releases former grantees and mortgagor does not apply in action against grantees by mortgagor required to pay debt. Nebr 232NW762.

736-65 238Mich261, 213NW120. But see NJ 151A729(1stcase).

736-71 168Ga792, 149SE201 (vendor held not guilty of fraud on intermediate transferees, who assumed encumbrance, by inducing holder of security deed to sell land under power); 169 Minn65, 210NW617, 618 [citCyc]; 80 Mont453, 260P1051, 1053 [citCJ]; Va 152SE346. [b] **Purchaser of equity of redemption** cannot by payment or otherwise secure through assignment or subrogation first deed of trust creditor's rights against mortgagor. Va 152 SE346.

736-72 Va 152SE346.

737-77 214Ala362, 107S834; 219Ala 161, 121S530(2dcase); 76CalA232, 245 P235; CalA 289P685; 106Conn339, 138 A155; 106Conn390, 138A157; 109Conn 33, 144A36; 93Fla223, 111S731, 51ALR 976; 97Fla640, 121S882; Fla 129S577; 204 Iowa1176, 216NW725; 204 Iowa 1220, 216NW953; Iowa 222NW385; Me 151A138; 157Md401, 146A229; 169 Minn65, 210NW617; MoA 286SW729; 221MoA211, 299SW1111; 84Mont322, 276P21; 83NH479, 144A265; NJCh 146 A879; NJCh 151A117; 132Misc861, 231 NYS133; 130Misc614, 224NYS321; 227 AppDiv136, 237NYS444; 138Misc322, 245NYS341; 191NC447, 132SE157; 196 NC318, 145SE621; 198NC256, 151SE 247; 58ND660, 227NW185; 120 Or626, 253P522; 136SC144, 134SE263; 149SC 163, 146SE818; 53SD603, 222NW139; SD 228NW466; SD 229NW925; Tex CivA 26SW(2d)708; Alta [1930] 3Dom LR977. See also Minn 233NW12. [a] **Rule held not applicable** where mortgagor contracts with third party to assume payment of mortgage and retains title unless contract is made with knowledge of mortgagee and accepted by him. 136SC144, 134SE263. [b] **Duty of purchaser.**-155Md410, 142A598. [c] **Mortgagee may treat both as principal debtors.**-Fla 129S577.

738-81½-New. Where a deed from a mortgagor to another created the relation of principal and surety as to a mortgage debt between the parties to a deed, which was a matter of public record, the mortgagee was charged with the knowledge of its contents and of the relation between the parties. 132Misc 861, 231NYS133.

738-81½-New. Where a mortgagee gives an extension agreement to the grantee without knowledge of the mortgagor or intervening grantees, it does not operate to release the mortgagor and intervening grantees who also assumed the mortgage. Iowa 227NW599.

738-87 177Minn115, 224NW699.

738-7 29F(2d)545; 97Fla640, 121S882; 206 Iowa1270, 221NW925; 124Kan33, 257P964; 120 Or626, 253P522; Tex CivA 10SW(2d)193; 142Wash155, 252 P531.

739-8 Okl 293P197.

739-16½-New. In such action, in determining the question of assumption agreement, the contract of sale and the deed may be considered by the jury. Md 142A600.

739-17½-New. In mortgagor's action for reimbursement against successive grantees assuming mortgage, equity is proper forum. Nebr 232NW762.

739-25½-New. Purchaser assuming first mortgage and requiring his grantee to assume first and second mortgage is not entitled to notice of first mortgage foreclosure. 106Conn390, 138A157.

740-29 Ala 214Ala362, 107S834; 221 AppDiv405, 223NYS99; SD 229NW925. [a] **Mortgagor can require mortgagee to transfer** mortgage to third party by statute on payment of mortgage. Alta [1930] 3DomLR977.

740-30½-New. Such is the rule whether the secured note was signed before or after sale. 80Colo 223, 249P1095.

741-45 155Md410, 142A598.

742-59 226AppDiv211, 234NYS649.

742-62½-New. That mortgagee extended time for paying mortgage by last grantee without consent of mortgagor and other grantees is no defense to mortgagor's suit against grantees. Nebr 232 NW762.

742-62½-New. Mortgagee's loss of right against grantee assuming mortgage does not affect mortgagor's rights unless mortgagee bestowed such benefit on him as to make enforcement inequitable. Nebr 232NW762.

742-69 [b] (2) Purchaser's liability to vendor is extinguished where vendor at foreclosure buys property for enough to pay mortgage, interest and expenses. Mass 168NE740.

742-72 155Md410, 142A598.

743-83 181Ark504, 26SW(2d)582. See also Mich 233NW213.

743-84 SD 225NW225.

743-85 16F(2d)223.

743-89½-New. A mortgagee, not being a party to a contract between a vendor and purchaser, had no rights under it as regards the right to recover against the purchaser the amount of the mortgage indebtedness, except what the contract itself gave him. 178Ark439, 11SW (2d)767.

743-89½-New. Right to change situation as regards innocent third person without his consent. Wis 232NW877.

743-90 170Ark952, 281SW902; 171Ark 260, 284SW739, 47ALR332; 76CalA232, 245P235; 164Ga265, 138SE231; 47 Ida 446, 276P309; Iowa231NW1; 125Kan 510, 515, 265P39 [citCJ]; 179Minn77, 228NW348; 220MoA160, 281SW121; 80Mont453, 260P1051; 84Mont322, 276 P21; 115Nebr720, 214NW628; NJCh 146A879; SD 229NW925; TexCivA 28 SW(2d)833; 151Va655, 144SE645; Wis 232NW877. [a] **Erasure of grantee's name in deed and insertion of that of his vendee before deed is recorded** does not affect grantee's liability. 205 Iowa 563, 218NW251.

744-91 202 Iowa1362, 212NW125, 127, 50ALR1216 [citCJ].

744-93 Iowa 224NW781.

744-95 See also 98CalA338, 276P1033.

744-96 170Ark952, 281SW902; 47 Ida 446, 276P309. But see NJCh 145A541.

745-7 169Minn65, 210NW617; 123 Or 377, 260P1002.

745-8 See also 11PaDist&Co 74.

745-12½-New. A purchaser who, in his contract of purchase and in the deed accepted by him, contracted to assume and pay an existing mortgage, thereby becomes the principal debtor as to the holder of the obligation. 204 Iowa1220, 216NW953.

745-13 SD 229NW925.

745-15 [d] **Interest, taxes and assessments.-Ida** 287P954.

745-17 148Va686, 139SE257, 261 [quot Cyc].

745-18 148Va686, 139SE257, 261 [quot Cyc].

746-19 169Minn65, 210NW617, 618 [citCyc].

746-21 168La723, 123S304 (grantee held liable for attorney's fees stipulated for in note though suit was brought before maturity of note, where he marked note paid and had mortgage canceled on obtaining possession of note as collateral). 148Va686, 139SE257, 261 [quotCyc].

746-32 94Fla1196, 115S546 [citCJ]; 237 IllA122. [b] **Grantee assuming debt, who purchased from prior grantee** not assuming debt, is not liable for deficiency since prior grantee is not liable. 130Misc614, 224NYS321.

747-43 Iowa 231NW1.

747-45½-New. In an action to foreclose against a remote grantee of the original mortgagor, a contract made for the benefit of defendant's immediate grantor by defendant's firm, whereby a mortgage payable to plaintiff was assumed, cannot inure to the benefit of the mortgagee, where there was no proof that defendant's immediate grantor assumed the mortgage. 29OhA416, 163 NE719.

747-47 16F(2d)223; 110Conn86, 147A 303; 220MoA160, 281SW121. [a] **Reason for rule.**-220MoA160, 281SW121.

748-48 16F(2d)223 (dictum); Ida 287 P954; 32 OhA237, 167NE907; 134 Okl 243, 273P240, 242 [citCJ]; SD 225NW 225.

748-51½-New. Law of state of contract and of locus of land determines application of rule. 16F(2d)223.

748-59½-New. Extension of time procured by remote grantee does not discharge mortgagor or prior assuming grantee. Iowa 231NW1.

749-60 171Ark260, 284SW739, 47ALR 332; 117 Ohl27, 157NE380, 381 [quot CJ]. [a] (2) Where mortgagee did not consent to reconveyance though having knowledge thereof, purchaser is liable to mortgagee for deficiency. 196NC 733, 147SE9.

749-61 171Ark260, 284SW739, 47ALR 332; 129Misc443, 222NYS370; 196NC 733, 147SE9; Oh 157NE380, 381 [quot CJ].

749-63½-New. A second mortgagee purchasing at a foreclosure sale under his mortgage waives his absolute rights against the grantee under an assumption clause and reduces the agreement to a mere covenant of indemnity. 169 Minn65, 210NW617.

749-63½-New. Where an agreement extending the time of payment of a past-due mortgage, to which a subsequent purchaser of an undivided interest in the property is a party, contains a covenant to pay the debt and an acceleration clause, a notice by the mortgagee, after default, that the extension agreement is void and the whole amount due does not annul the covenant to pay the debt. 170Minn147, 212NW178.

749-66½-New. Where the grantee alleges rescission of assumption agreement, mortgagee has the burden of pleading and proving a prior acceptance or adoption of the agreement, or an action on faith thereof. 117 Oh127, 157NE 380.

749-69 [a] **Avoidance of circuity of action** is basis for permitting recovery by mortgagee in direct action against

mortgagor's grantee. **NJCh** 146A879.

749-69½-New. Right of mortgagee to sue on assumption of mortgage in deed is ordinarily based on principal permitting third party to sue on contract made for his benefit. 106**Conn**683, 138A804.

749-69½-New. In some jurisdictions the right to maintain an action is not given by statute providing that a civil action at law may be maintained in the name of the real party in interest. 106 **Conn**683, 138A804 (Florida statute).

749-69¼-New. Neither does the statute prohibit mortgagee from bringing the action. 106**Conn**683, 138A804 (Florida statute).

749-69⅓-New. A mortgagee stands in no better position in enforcing an assumption clause than the grantor himself, who accepted it from the grantee. 206 **Iowa**1270, 221**NW**925.

750-78 80**Mont**453, 260**P**1051, 1053 [citCJ].

750-79 41**F(2d)**584.

750-80 **Mich** 233**NW**213.

750-82 80**Mont**453, 260**P**1051; 196**NC** 588, 146**SE**233. [a] (4) Mortgagee entitled as third party beneficiary to maintain action against one agreeing to pay mortgage. 111**Conn**269, 149A785. [c] **Complaint must allege** assumption of payment or retention of part of purchase price for payment. 33**PortoRico** 986.

751-85 [a] **Evidence** held insufficient to show that mortgagee agreed to release purchaser upon reconveyance to his grantor. 171**Ark**260, 284**SW**739, 47 **ALR**332. [b] **Burden of proof.**-171**Ark** 260, 284**SW**739, 47**ALR**332.

751-88 171**Ark**260, 284**SW**739, 47**ALR** 332.

751-88½-New. A finding that the wife of a purchaser executed an agreement to purchase land required a conclusion that she was liable with her husband for the payment of the indebtedness. 98 **CalA**338, 276**P**1033.

751-89 106**Conn**390, 138A157; 205 **Iowa** 1329, 219**NW**329; 174**Minn**258, 219**NW** 95. [a] **Verdict held properly directed,** in absence of evidence that note sued on was not same note given with mortgage, and assumed by grantee. 220**MoA** 160, 281**SW**121. [b] **Evidence held to sustain verdict for mortgagee.**-164**Ga** 265, 138**SE**231. [c] **Instructions held sufficient.**-164**Ga**265, 138**SE**231.

752-96 **NJCh** 146A879.

752-10 157**Md**401, 146A229; **NJ** 151A 729(1stcase). [a] **Grantees are liable for deficiency in inverse order of respective titles.**-**NJ** 151A117.

753-22½-New. Where an interlocutory judgment on the foreclosure of mortgaged premises did not provide for a deficiency judgment against the mortgagors' grantees, who had assumed the payment of the mortgage and bond secured thereby, and who were primarily liable, the failure to provide for the deficiency judgment against the grantees amounted to an extinguishment of their debt. 132**Misc**861, 231**NYS**133.

753-24 196**NC**733, 147**SE**9; 33**Porto Rico** 986; 155**Wash**479, 284**P**751. [b] **In Porto Rico.**-33**PortoRico** 986.

753-25 But see 41**F(2d)**584.

754-39 196**NC**733, 147**SE**9.

754-45½-New. Where several grantees assumed and agreed to pay the mortgage debt, each became liable for the whole amount. **Iowa** 227**NW**599.

754-47 29**F(2d)**545. [a] **Voluntary bankruptcy of party to exchange who assumed mortgage on land received** entitles other party to reduction of liability pro tanto on mortgage assumed by him. **Iowa** 229**NW**716.

755-55½-New. That defendant has adequate remedy against associates for fraud does not impair defense to action by mortgagees. 111**Conn**269, 149A 785.

755-55⅓-New. Mortgagee has no rights under assumption clause which are superior to equities of assumer. **Iowa** 229**NW**716.

755-55¼-New. Mortgagee receiving tax title to mortgaged premises need not account for value thereof in satisfaction of mortgage debt where under no duty to pay taxes. 155**Wash**479, 284**P** 751.

755-57½-New. An assignee is bound to know that the assumption clause in a recorded deed is not conclusive but is subject to the explanation and defenses of the grantee against the prior party. 204 **Iowa**226, 215**NW**248.

755-57⅓-New. Purchaser assuming mortgage indebtedness is not entitled to have question of fraudulent representations submitted to jury. **TexCivA** 27**SW(2d)**327.

755-61 See also 170**La**680, 129**S**128.

755-64 **Nebr** 232**NW**762.

756-69½-New. The right of a mortgagor who has been compelled to pay a deficiency judgment to claim the benefit of an assumption clause in a deed from his grantee is not greater than that of such grantee. **Iowa** 228**NW**305.

756-69⅓-New. In mortgagor's suit against successive grantees assuming mortgage grantees become liable in inverse order of alienation. **Nebr** 232**NW** 762.

756-81½-New. Where a bank's officers knew of an arrangement, whereby the bank's grantor agreed to pay sums secured by trust deeds, which he did not do, and acquiesced in such arrangement after the transfers were made, they cannot question the validity of the trust deeds, or the liability of the bank thereon. 331 **Ill** 563, 163**NE**333.

756-81⅓-New. Persons claiming title to conveyance for which purchase money deed of trust was given are estopped to dispute interest of purchaser at foreclosure sale thereunder. **Mo** 24**SW(2d)** 125.

756-82 152**Md**641, 137A367, 369 [cit CJ].

756-83 See also 255 **Ill**A175.

757-96 206 **Iowa**432, 220**NW**20; **Tex CommnA** 281**SW**196.

757-2 199**Cal** 625, 250**P**669, 48**ALR** 1308.

758-8 102**CalA**92, 282**P**412; 166**Ga**71, 142**SE**543; 196**NC**733, 147**SE**9.

759-20 **TexCivA** 18**SW(2d)**1100.

759-25 230**Ky**460, 20**SW(2d)**72; 164**La** 849, 114**S**709.

759-26 233**Ky**588, 26**SW(2d)**481.

759-31½-New. The giving of a mortgage is an alienation pro tanto to the amount of the mortgage. 243**NY**376, 153**NE**559.

759-31⅓-New. A deed by the mortgagor of a part of the mortgaged property to a grantee who agrees to pay the secured debt does not release the land retained from the mortgage. **MoA** 286**SW**729.

759-31¼-New. Where mortgage gave corporation power to sell mining plant free from incumbrances, corporation had power to sell personalty used in connection with plant free from mortgage lien. 233**Ky**588, 26**SW(2d)**481.

759-31⅕-New. A written agreement of the mortgagor to remove the mortgage lien from a part agreed to be sold is binding on the parties and those acquiring rights through either of them with notice. 230**Ky**460, 20**SW(2d)**72.

759-32 215**Ala**172, 110**S**129.

760-38 167**La**243, 119**S**35; 225**AppDiv** 39, 232**NYS**157.

760-47 [a] **Effect of recital of acreage.**-152**Va**747, 148**SE**799.

760-52 103**NJEq**457, 143A616. But see 265**Mass**319, 163**NE**887.

761-54½-New. As a general rule, whether part of mortgaged land is chargeable with the mortgage debt rests wholly in the agreement between the parties. 103**NJEq**457, 143A616.

761-58 164**Mich**429, 129**NW**721.

763-88 259**Mass**315, 156**NE**429; 225 **AppDiv**39, 232**NYS**157; **TexCivA** 2**SW** (2d)909.

764-92 103**NJEq**457, 143A616; **Tex CivA** 2**SW(2d)**909.

764-1½-New. The rule is inapplicable to a separate conveyance of mineral rights in mineral lands, since such rights are inseparably connected with the surface rights retained by the mortgagor. **TexCivA** 2**SW(2d)**909.

764-1⅓-New. One obtaining a judgment lien on part of the mortgaged premises not conveyed cannot require that the part conveyed be sold first nor that the entire tract be sold. 175**Minn** 541, 222**NW**71.

764-8 **DC** 41**F(2d)**103; 259**Mass**315, 156**NE**429; **NJ** 147A862(2dcase); 193 **NC**456, 137**SE**324, 327 [citCJ].

765-13 212**Ky**680, 280**SW**97; 14**SW** 407, 12**KyL**391, 9**LRA**555; 255**Mass** 247, 151**NE**95.

766-24½-New. The rule does not apply where the mortgagee releases part of the mortgaged property. 215**Ala**172, 110**S**129.

766-25 243**NY**376, 153**NE**559.

766-26 12**F(2d)**747.

766-34½-New. The rule may be waived by stipulation and correspondence. 130**Kan**103, 285**P**526.

767-42 243**NY**376, 153**NE**559.

767-45 **NJCh** 151A117.

768-55 259**Mass**315, 156**NE**429; 172 **Minn**529, 215**NW**850.

768-55½-New. Mortgagor's grantees under statutory quitclaim deeds, subject to mortgage, are obligated to contribute to each other for payment of mortgage debt in proportion to value of their portion. 259**Mass**315, 156**NE** 429.

770-4 **NJCh** 151A117 (single suit). [b] **Evidence.**-**Md** 150A850; **Me** 151A138.

771-9 84**Ala**309, 4**S**170; 76**CalA**80, 243 **P**710; 179**Minn**73, 228**NW**340; 82**Mont** 338, 267**P**292, 294 [citCJ]. [a] **Maxim "once a mortgage, always a mortgage"** does not obtain where parties to it treat it differently. 82**Mont**338, 267**P**292.

771-17 [a] **Mortgagee occupies relation of trust** toward mortgagor in canceling equity of redemption. 216**Ala** 632, 114**S**211.

771-24 216**Ala**632, 114**S**211; 84**CalA** 560, 258**P**702. See also 205**Cal** 715, 272 **P**1063.

771-25 214**Ala**675, 108**S**594.

772-27½-New. Subsequent agreement cannot change intended security into absolute conveyance unless made on subsequent consideration. **SC** 155**SE** 627.

772-28 205**Cal** 715, 272**P**1063.

772-31 76**CalA**80, 243**P**710.

774-66 216**Ala**632, 114**S**211; 94**Fla**717, 115**S**828; 82**Mont**338, 267**P**292.

774-73½-New. Where the transaction was otherwise valid, failure to make detailed accounting between the parties is no cause for enjoining transfer. 76 **CalA**80, 243**P**710.

774-73⅓-New. An instrument conveying mortgaged land in settlement of a mortgage note will not be canceled or rescinded, in the absence of fraud, accident, or mistake, or on some other equitable ground. **TexCivA** 8**SW(2d)** 759.

774-74 194**NC**623, 140**SE**295.

774-75 214**Ala**675, 108**S**594; 216**Ala** 632, 114**S**211; 94**Fla**717, 115**S**828.

775-79 31**Ariz**155, 251**P**173, 174 [cit CJ]; 168**Ga**231, 147**SE**111; 77**Mont**580, 252**P**362, 366 [citCyc]; 114**Nebr**809, 210**NW**278; 116**Nebr**242, 216**NW**812, 814 [citCJ]; 101**NJEq**64, 136A806; 120 **Or**626, 253**P**522; **TexCommnA** 238**W** (2d)675; **TexCivA** 282**SW**860. But see 94**Fla**717, 115**S**828.

775-80 179**Ark**421, 16**SW(2d)**457; 10 **LaA**593, 121**S**631.

775-81 179**Ark**421, 16**SW(2d)**457; 205 **Iowa**432, 216**NW**93.

775-82 77**Mont**580, 252**P**362.

776-85 31**Ariz**155, 251**P**173, 174 [cit CJ]; 155**Miss**606, 124**S**793; 77**Mont**580, 252**P**362, 366 [citCyc]; 114**Nebr**809, 210**NW**278; 225**AppDiv**152, 232**NYS** 470; **TexCivA** 4**SW(2d)**581; **Wash** 287 **P**870. [a] **Mortgagor's conveyance to person to whom certificate at foreclosure sale was issued** does not merge estates in grantee who subsequently assigned certificate to another as security. 336 **Ill** 125, 168**NE**1.

776-86 77**Mont**580, 252**P**362.

776-86½-New. Sums expended by a junior lienholder in an attempt to amend his position, with full knowledge of the senior lienholder's rights, cannot be considered in determining the question of merger. 155**Miss**606, 124**S**793.

776-86⅓-New. Purchase at foreclosure sale by junior mortgagee or lienor does not merge subsequent mortgages or liens. 229**AppDiv**345, 242**NYS**369.

776-86¼-New. Whether conveyance of mortgaged property to mortgagee operates as merger, and extinguishes debt,

depends on facts of each case. Wash 287P870.

776-89 215Ala572, 112S141; 46 Ill 214; 126 Ill 341, 18NE552; 125Kan687, 266P47; Mo 14SW(2d)444; 82Mont 338, 267P292.

776-92 120 Or626, 253P522; 14PaDist &Co 280.

776-93 120 Or626, 253P522.

776-97½-New. Where a mortgagee purchasing property at foreclosure sale bids the full amount due him, the mortgage is satisfied and discharged. 40 Wyo 498, 280P98.

776-98 33F(2d)512(2dcase); 31Ariz 155, 251P173, 174 [citCJ]; 33Ariz13, 261P633, 636, 57ALR1015 [citCyc]; 82 Colo 204, 257P1079; 123Kan137, 254P 339; 155Miss606, 124S793; 77Mont580, 252P362; 114Nebr809, 210NW278; 116 Nebr242, 216NW812, 814 [citCyc]; 116 Nebr713, 218NW744; 227AppDiv230, 237NYS180; 135Misc571, 239NYS103; 133 Okl 297, 272P427; 53SD585, 221 NW674, 675(2dcase) [citCJ]; SD 225 NW655; SD 227NW889; Wash 287P 870; 192Wis642, 212NW292, 293 [quot CJ].

777-99 114Nebr809, 210NW278; 192 Wis642, 212NW292, 293 [quotCJ].

777-1 96PaSuper580; 192Wis642, 212 NW292, 293 [quotCJ].

777-2 192Wis642, 212NW292, 293 [quotCJ].

777-4 77Mont580, 252P362.

778-8 [a] Evidence held to show no merger.-114Nebr809, 210NW278.

778-13 See also 77Mont580, 252P362, 366 [citCyc].

778-16 155Miss606, 124S793.

778-18 77Mont580, 252P362.

778-18½-New. or where the agreement between the parties required payment of a higher rate of interest as prerequisite to conveyance; 77Mont580, 252P 362.

778-19 Wash 287P870.

778-22 SD 227NW889.

778-27 105Conn169, 134A787. [a] (2) Mortgagor's mere statement that deed of mortgaged premises between parties would give better security without expense of foreclosure and attorney's advice that recording of such deed would save foreclosure will not affect merger on theory deed was made to avoid foreclosure. 77Mont580, 252P362. [b] 77 Mont580, 252P362.

779-30 123Kan137, 254P339; 77Mont 580, 252P362; 114Nebr809, 210NW278; 120 Or626, 253P522; 53SD585, 221NW 674(2dcase); 192Wis642, 212NW292, 293 [quotCJ].

779-31 31Ariz155, 251P173; 178Minn 50, 226NW189, 63ALR1516; 155Miss 606, 124S793; 114Nebr809, 210NW278; 116Nebr242, 216NW812; 116Nebr713, 218NW744; 33 OhA389, 169NE724; 192 Wis642, 212NW292, 293 [quotCJ].

779-32 116Nebr242, 216NW812; 192 Wis642, 212NW292, 293 [quotCJ].

779-33 192Wis642, 212NW292, 293 [quotCJ].

780-34 120 Or626, 253P522.

780-37 168Ga818, 149SE204; 155Miss 606, 124S793; 77Mont580, 252P362; 114Nebr809, 210NW278; 116Nebr242, 216NW812; 225AppDiv152, 232NYS 470; 33 OhA389, 169NE724; 53SD585, 221NW674(2dcase); 192Wis642, 212 NW292. [b] 192Wis642, 212NW292.

781-38 77Mont580, 252P362; 53SD585, 221NW674(2dcase).

781-44 TexCivA 8SW(2d)759.

781-47 133Misc517, 232NYS529. See also 133 Okl 297, 272P427 [citCJ].

781-47½-New. But as between the parties to mortgage deed to property by mortgagor to mortgagee does not of itself extinguish the lien. 77Mont580, 252P362.

783-76 57ND138, 220NW623; 57ND 128, 220NW625.

783-82 TexCivA 8SW(2d)759.

783-86½-New. A debtor, having conveyed mortgaged land in full settlement of a mortgage note, was not bound to reassume the obligation of the note and accept a deed to land back in accordance with a later oral agreement. Tex CivA 8SW(2d)759.

783-93 TexCivA 8SW(2d)759.

784-95 90Fla787, 108S211.

784-96 TexCivA 8SW(2d)759; 141 Wash229, 251P283; 155Wash558, 285P 453. See also 38Wyo 120, 264P1013.

784-96½-New. Failure of mortgagee to release note and mortgage until after deed with option to repurchase and his sending of statements for interest and premiums does not show mere extension of mortgage. 141Wash229, 251P 283.

784-96⅓-New. Under statute limiting amount of loans a loan company taking deed to property and releasing mortgage thereon is not estopped to claim property is worth less than double amount of loan made two years previous to deed. 141Wash229, 251P283.

784-99½-New. Where a grantee in a deed absolute conveyed to his wife land conveyed by the deed and the wife on payment of money loaned by her husband reconveyed the land to the grantor, the title of the grantor thus acquired would not be affected by the fact that the deed of reconveyance was an absolute conveyance and that the wife put the grantee in possession. 167 Ga228, 145SE61.

784-99⅓-New. Code does not prevent assignee of grantee in deed absolute intended to secure debt from treating it as deed to secure debt and on payment of money secured reconveying land to grantor. 167Ga228, 145SE61.

784-99¼-New. Evidence established that in transaction for release of mortgage debt in exchange for absolute deed, oral option to repurchase was limited to definite date. Wis 230NW 610.

784-7½-New. Under an agreement to apply the proceeds "whenever" the land shall be sold, judgment imposing liability for failure to sell on credit is erroneous. TexCivA 284SW339.

784-7⅓-New. The maximum duty of mortgagee was possibly not fraudulently or arbitrarily to refuse to sell. Tex CivA 284SW339.

784-7¼-New. Liability for failure to sell cannot be imposed if jury finds that prudent man would not have accepted the proposed offer. TexCivA 284SW 339.

784-9 [b] Sale for taxes.-14PaDist& Co 143.

785-16½-New. Statutes in some jurisdictions declare the life of a mortgage at an end at the close of eight years after maturity of the entire debt secured thereby, 80Mont318, 260P706.

785-16⅓-New. unless the mortgagee or his successors or assigns shall within sixty days after expiration of such eight years file an affidavit of renewal prescribed in the statute. 80Mont318, 260 P706.

785-16¼-New. Such statute contemplates action by the mortgagee alone. 80Mont318, 260P706.

785-16⅙-New. After taking the prescribed steps to extend the life of a mortgage, mortgagee may foreclose at his pleasure. 80Mont318, 260P706.

785-16⅛-New. As between the mortgagee and mortgagor, the mortgage is good even after expiration of eight years from maturity of debt. 80Mont318, 260 P706.

785-16⅐-New. In Philippines mortgagee's consent to giving of another mortgage on same property to secure debt to a third person does not cancel mortgage. 51Philippine224.

785-17 31Ariz187, 251P453; 110Conn 374, 148A133 [citCJ]; 163Ga629, 137SE 19, 22 [citCyc]; 2LaA109; 6LaA290; 7LaA309; 196Wis387, 220NW181. But see 168La139, 121S602.

785-23 84CalA142, 257P606; 251Mich 96, 231NW59; TexCivA 283SW324. [a] Quitclaim deed, intended to grant dower rights of mortgagee's wife to mortgages, is not reconveyance in release of mortgagee. 237 IllA166. [b] Reconveyance by mortgagees on payment of mortgage has been held not necessary to reinvest absolute title but to clear record title. 251Mich96, 231NW59.

785-31 109Conn329, 146A724; Conn 151A355; 163Ga629, 137SE19, 22 [cit Cyc] (dictum); 163La1039, 113S367; 83NH167, 139A758; 133Misc93, 231NYS 251; 96PaSuper580. [c] Abstract with all papers concerned with loan should thereupon be delivered to true owner. TexCivA 293SW939.

786-42 [b] Person secured by deed of trust held not estopped from asserting and enforcing trust deed by accepting payment thereon out of proceeds of conveyance of an interest therein. 175Ark 117, 298SW885.

786-45 172Minn571, 216NW231; 96Pa Super580.

787-46 TexCivA 286SW294.

787-51 BC [1930] 4DomLR135. [a] Mortgagor may cause mortgage debt to be paid and by agreement mortgaged premises may be released, or mortgage assigned to parties providing funds, who will hold title in trust for benefit of mortgagor. 127Me393, 143A698.

787-66 50Philippine624.

787-70 But see 137SC337, 135SE357.

788-76 222AppDiv40, 225NYS394; 156 SC203, 152SE878. [a] Payment to one not holder of mortgage does not discharge vendor's obligation on mortgage. 57ND270, 221NW71.

788-77 220MoA1290, 290SW80; 89Pa Super34.

788-78 233 IllA614.

788-80 [a] Note and mortgage held to authorize trustee to accept payment of note and release mortgage security. Conn 152A134.

788-88 7PaDist&Co 515.

788-97 136SC267, 134SE252, 258 [quot Cyc].

789-1 136SC267, 134SE252, 258 [quot Cyc].

789-4½-New. A mortgagee bank which merely threatened to declare debt due and foreclose mortgage if mortgagor's default was not secured by payment of delinquent taxes is held not to have voluntarily matured whole indebtedness so as to permit payment by mortgagor before date of maturity. 143Wash145, 254P834.

789-4⅓-New. A mortgagee bank is entitled to exact, for the privilege of paying the whole mortgage debt before maturity, the payment of the sum less than stipulated for prepayment privilege. 143Wash145, 254P834.

789-6 82Mont280, 267P214.

789-9 173Ark489, 292SW659.

789-11½-New. The payment of a mortgage is to be made in the state where executed, in the absence of a contrary provision. 295Pa276, 145A301.

789-13 [a] Contra 19F(2d)426. [b] Mortgagee must credit mortgagor with money collected as rent by his agent of mortgaged premises. 176Ark381, 3SW (2d)34.

789-14 [a] 166Ga523, 143SE761; 46 Ida157, 268P12.

790-17½-New. Payment of mortgage debt is held to extinguish mortgage notwithstanding mortgage notes were held as collateral for other indebtedness. 160La496, 107S318.

790-17⅓-New. The acquisition of a mortgage by a grantee in a deed given as collateral security with assumption clause does not operate as a payment nor discharge the mortgagors. Iowa 224NW781 (assumption clause void).

790-19 163La1039, 113S367.

790-20 90Fla787, 108S211; Wis 230 NW610. [b] Conveyance of tax title to assignee of mortgage by one purchasing at tax sale does not defeat right of assignee to recover the mortgage debt. 53ND456, 206NW703. [c] Exchange of mortgage for deed will be closely scrutinized to protect mortgagor from overreaching and unconscionable advantage. Wis 230NW610. [d] Conveyance after foreclosure decree to avoid expenses of execution held to extinguish debt. NJ 147A474(1stcase).

790-21 Ida 292P222 (assignment of part interest in judgment).

790-25 196NC502, 146SE86; 197Wis 627, 222NW814.

790-25½-New. Where the grantee in a deed absolute on its face but intended as a mortgage conveys to a purchaser for value without notice of the secret mortgage, the original grantor is entitled to credit on the debt secured to the extent of the value of the land sold by his grantee or of the amount received

by him. 32Ariz130, 256P365.

790-25½-New. The holder of a deed of trust with warranty of title to secure a debt is not precluded from having the deed foreclosed by reason of having procured a quitclaim deed from the grantor, where such deed was not given in full satisfaction of the deed of trust. 149Miss205, 115S336.

790-25¼-New. Where a mortgagor transferred realty, subject to a mortgage lien, to another, who assumed the note but defaulted in payment and surrendered the possession and title to plaintiff holding the note and mortgage, without an agreement that plaintiff should take the property in satisfaction of the debt, and without transferring the property to plaintiff, who did not exercise ownership thereover, the debt was not satisfied, nor was plaintiff estopped to assert a claim for the balance due on the note. **TexCivA** 10SW(2d) 193.

791-30 54Me463; 58ND236, 225NW 788.

791-31 43 Ida639, 252P427, 51ALR 1253.

791-32 MoA 16SW(2d)626.

791-42 134Misc476, 235NYS631.

792-46 [a] **Note secured by mortgage,** obtained from maker for use as collateral, could be issued and reissued for such purposes. 162La281, 110S422.

793-70 23F(2d)391, 394 [citCJ]; 177 Ark1195, 6SW(2d)827; **Fla** 130S577; **Iowa** 220NW88. [b] **Plaintiff claiming under foreclosure making prima facie case of default** need not account for all payments from mortgagor, especially where not pleaded in answer. **Mo** 28SW (2d)1001.

793-71 101CalA762, 282P515.

793-72 Fla 129S597; 170Ga174, 152SE 485(1stcase); 156Miss8, 125S912(2d case); Mo 28SW(2d)1001 (affirmative defense); **NJCh** 149A121.

793-73 Mo 28SW(2d)1001; **NJCh** 138A 373.

793-74 [a] **In action against makers and indorser of notes** secured by deed of trust to recover deficiency upon foreclosure sale, burden was on defendants to offer evidence in support of their defense that holder of notes had agreed to take land in satisfaction of notes. 196 NC502, 146SE86.

793-77½-New. The burden of proving payment on mortgagee interrupting lapse of time which would otherwise raise presumption of payment is on party asserting it. 127Misc636, 217NYS 207.

793-79 [g] **Other presumptions.**-220Ala 499, 125S615.

794-86½-New. Where no receipt is given nor a release or satisfaction of a mortgage, presumption is that a new note and mortgage were not intended to pay an earlier note and mortgage. 119 Oh369, 164NE347.

794-88 NJCh 148A392(2dcase).

794-94 [a] Ida 290P405; **TexCivA** 293 SW939.

795-1½-New. Mortgagor, holding subsequent purchaser's notes, may prove payment of mortgage, although he has sold equity of redemption. 163La1039, 113S367.

795-3 172Ark1176, 290SW939; 122Kan 82, 250P1079; 13LaA184, 126S570; **NJCh** 148A392(2dcase) (must be sustained by weight of evidence). [a] (1) 122Kan82, 250P1079; 86Mont180, 282P 1050 (before assignment); **ND** 230NW 296; **RI** 146A632; 144SC271, 142SE 623; **SD** 226NW763. (10) To show father paying son's note was purchaser entitled to security of mortgage. 220 MoA535, 279SW184. (11) To show mortgage had not been paid. 150SC267, 148SE54. (12) To establish purchase of notes from assignee was fraud and subterfuge as against assignor. **Fla** 129S 499. (13) To show release of liability for deficiency. 180Ark523, 21SW(2d) 956. (14) To sustain finding that mortgagor deeded land to mortgagee in full payment. **Utah** 286P955. [b] (1) 23 F(2d)391; 24F(2d)293; 220Ala54, 124 S92 (notwithstanding maker's possession of note); 177Ark1195, 6SW(2d) 827; 164La133, 113S792; 156Miss8, 125 S912(2dcase); **NJCh** 138A373; **NJCh** 149A121; 134Misc417, 236NYS37; 296 Pa181, 145A808; **RI** 136A7. (8) To show that indebtedness from mortgagee to mortgagor, which was to be applied on mortgage, did not mature until accounting and settlement. 133SC431, 131 SE598. (9) That payment was under assumption clause in deed. **Iowa** 220 NW88; **Iowa** 224NW781. (10) Acceptance of deeds in full settlement. **Iowa** 226NW37. [c] **Prima facie evidence.**-220Ala54, 124S92.

795-4 97Fla329, 120S766(1stcase); **Fla** 129S597.

796-10 [a] (3) To show that interest was only partially paid and balance remained due and unpaid for more than thirty days. 99NJEq171, 131A617. (4) To show note was accepted in payment. 206 Iowa161, 220NW7.

796-11 [a] 48 Ida538, 283P609.

796-12 [a] (5) To show release of deed in settlement of slander claim. **MoA** 278 SW791. (6) To require finding that check was intended as credit on note due on that date and not mortgage due one year previous. 218Ala191, 118S382.

796-17 191Wis557, 211NW791.

797-26 263Mass206, 161NE243; **20 Philippine**394.

797-31 7HunNY522.

797-32 263Mass206, 161NE243.

797-37 CalA 290P70; 7HunNY522; **TexCivA** 282SW645. [b] **Ten days has been held reasonable time** within which mortgagors to avoid foreclosure should pay overdue interest after demand. **NJ** 151A594.

798-38 [a] **Full tender after foreclosure** but before redemption period expires, discharges lien. 248Mich508, 227 NW690.

798-43½-New. Rights of mortgagee and mortgagor are determined by sufficient tender of mortgage debt at time when made. **CalA** 290P70.

798-47 45 Ida541, 263P1002. [a] 90 PaSuper353.

798-52 [a] 98Fla335, 123S733; 90Pa Super353. [b] 45 Ida541, 263P1002.

799-60½-New. A mortgagor tendering payment of the mortgage note at the bank at which it is payable has a right to rely on the assurance of the bank, as agent for both parties, that he will be notified when the note is delivered to the bank. 98Fla335, 123S733.

799-64 221MoA262, 2SW(2d)191.

799-65 219AppDiv587, 220NYS132.

799-68½-New. Under some circumstances condition in tender to assignee requiring it to be released is not improper. **Ida** 286P920.

799-77 246 IllA457; 99NJEq890, 133 A534.

800-80 44NH235.

800-81 [c] **Tender before action** need not include attorney's fee notwithstanding dealings with attorney. **CalA** 290 P70.

800-83½-New. **In Saskatchewan** where defendant in foreclosure action pays into court only part of the amount due, plaintiff is entitled to judgment for the balance. **Sask** [1929] 3DomLR644.

800-93 But see 134SC207, 132SE620.

800-95 134SC207, 132SE620, 622 [cit Cyc].

801-97 [a] (2) **Mont** 292P585.

801-98 But see 208Cal 453, 281P1022; 96Fla337, 118S3. [a] **Uncompleted work.**-208Cal 453, 281P1022.

801-1 [c] **Provision in mortgage rendering release demandable by grantor** or assigns runs with land and grantee has burden to release. **Me** 149A620.

801-2 See also **Sask** [1927] 3DomLR 260. [b] **Agreement held not to discharge mortgage.**-225AppDiv383, 233 NYS172.

801-4 [c] **Mutual assent** is essential for valid agreement. 204 Iowa787, 215 NW944.

801-5½-New. Provision in mortgage for release of portion of mortgaged premises upon specified payment is not covenant running with land. **Me** 149A 620.

801-9 [c] **Transferror of note secured cannot release.**-Fla 129S597.

802-22 [c] **In West Virginia.**-105WVa 191, 141SE784. [d] **Duty to release.**-**TexCivA** 7SW(2d)918.

803-32 But see 215Ala172, 110S129.

804-52 [a] (14) Other consideration held sufficient. 216Ky721, 288SW669; **SC** 135SE646; 146Va670, 132SE698.

805-72 [b] (1) 206 Iowa83, 218NW 480.

805-75 38GaA601, 144SE806. [a] (12) To show mortgagor accepted mortgagee's offer to buy in property at sale under deed of trust and release him from deficiency. 146Va670, 132SE698. (13) To establish that mortgagor's assignment to mortgagee and others was to adjust rights as between assignees. **TexCivA** 29SW(2d)930. [b] (2) **IndA** 170NE544.

806-83 127Kan744, 275P148.

806-87 14F(2d)524.

806-93 77CalA681, 247P516; 103Conn 732, 132A20; **Fla** 129S769; 234Ky802, 29SW(2d)552; 77Mont580, 252P362; 119 Oh369, 164NE347; 135 Okl 260, 275 P314.

807-98 77CalA681, 247P516; **CalA** 291 P440; 103Conn732, 132A20; **Fla** 129S 597; **Fla** 130S577; **IndA** 162NE27; 250Mich672, 230NW921; 77Mont580, 252P362; 81Mont120, 262P164. See also 38GaA591, 144SE815. [d] **Discount of renewal note** does not constitute payment. 150SC267, 148SE54.

807-99 119 Oh369, 164NE347; **SD** 230 NW763.

807-2 151Va481, 145SE302.

808-4½-New. That a debtor did not seek to have a first lienholder comply with a statute providing for the release of a deed of trust lien, when the lienholder accepted new notes for old notes, is a circumstance tending to show that the debtor did not consider that it was the lienholder's intention to surrender the lien. 151Va481, 145SE302.

808-7½-New. But where renewal note contains different terms without recourse mortgage is extinguished. 256Mass250, 152NE335.

808-8 103Conn732, 132A20.

808-13 119 Oh369, 164NE347. [a] **Conduct of parties under oral agreement,** whereby owner of first mortgage note extended time of payment and landowner remained in possession under promise to pay additional interest, operates as abandonment of prior renewal contract. 221MoA1037, 295SW803.

808-19 **Fla** 130S12; 168Ga235, 147SE 394; 234Ky802, 29SW(2d)552 (right of third party to object); 40Wyo 53, 274P 12. [d] **Letter of mortgagee's attorney** informing defendant that mortgagee owned note and did not wish to foreclose, but insisted that interest be paid, and notation on note of payment by another, has been held not to renew note for one year. 167La243, 119S35.

809-21 259Mass46, 156NE61; 263Mass 206, 161NE243.

809-22 80Mont318, 260P706.

809-24 155Miss750, 124S763; 147Wash 408, 266P171.

809-25 234Ky802, 29SW(2d)552; **80 Mont**318, 260P706.

809-26 77Mont580, 252P362.

809-29½-New. A written extension agreement does not supplant the note secured as the primary evidence of debt. 176Minn399, 223NW459.

810-49 32Ariz130, 256P365.

810-52½-New. Intention of parties that quitclaim deed was not to release mortgage theretofore assigned will prevail. **Ida** 290P383 (though assignment does not appear of record).

810-52¼-New. Grantee liable to grantor for value of his equity over indebtedness due grantee and existing liens. 144 Okl 192, 291P15.

811-64 [a] **Possession of notes on payment.**-111 Ill 328.

812-70 127Kan732, 275P196.

812-75 44 Ida178, 255P903.

812-87 See also 7 OhA335, 29 OCA89. But see **Ida** 290P383; 148Va510, 139SE 267.

813-96 [c] **Assignor cannot enter satisfaction of accord** without power of attorney from assignee. 174Ark921, 298 SW6.

813-10 See also 151Va481, 145SE302.

813-14 44 Ida178, 255P903.

814-21 See also 196NC309, 145SE557.

814–27 216Ala515, 113S577.
814–28½–New. Indorsement by attorney of mortgagee on a decree of the chancery court is insufficient. 176Ark 766, 4SW(2d)17.
814–38 IndA 163NE236; 193NC474, 137SE420; ND 232NW749.
814–39 178Minn509, 227NW660; 89Pa Super34.
815–44 243Mich423, 220NW717.
815–45 [a] **Where equitable relief is necessary** equity will determine legal question of damages. 243Mich423, 220 NW717.
815–57 See also 218Ala85, 117S678.
817–80 7PaDist&Co 445. [a] 215Ala 647, 112S220; 215Ala652, 112S224; 320 Ill 308, 150NE913. [b] (1) 163Ga629, 137SE19. (2) To show mortgagor's knowledge of bank's insolvency at time of presentation of its check to bank. 36 Wyo 279, 254P123. [c] **Burden of proof.**–36Wyo 279, 254P123.
817–85 44 Ida178, 255P903.
817–91 22AlaA634, 118S911.
818–99 Ida 286P920; 128 Or635, 275P 663.
818–2 See also 243Mich423, 220NW717 (dictum).
818–3½–New. The statutes fixing penalties apply only to mortgages satisfied by payment or full performance of the conditions of the mortgage, 238Mich 210, 213NW200, 51ALR1225.
818–3¼–New. and an innocent purchaser of a forged mortgage may not therefore be required to pay such penalty. 238Mich210, 213NW200, 51ALR1225.
818–3¼–New. Refusal must be intentional and willful. 51SD619, 216NW361, 56ALR332.
818–3½–New. No right of action for damages exists at common law for failure to satisfy a mortgage against property. 29F(2d)78.
818–6 But see 176Ark766, 4SW(2d)17.
818–12½–New. A vendor who had merely refused to pay the recording fee, which he was required to pay under an agreement contained in the deed of trust, was not liable for either statutory penalty or amount of the fee, since recording became unnecessary, where the court cancelled lien of deed. 178Ark274, 10SW(2d)358.
818–12¼–New. Where facts obviously indicate substantial controversy penalty should not be imposed. Ida 286P920.
818–13 32Ariz552, 261P33. [d] **Presentation of instrument of satisfaction for execution** and tender of clerk's charges for marginal mortgage release is necessary under statute. 128 Or635, 275 P663.
819–14 176Ark766, 4SW(2d)17. [e] 127Kan81, 272P117; 153Miss474, 121S 138(1stcase).
819–16 AlaA 130S170(2dcase); 176Ark 766, 4SW(2d)17.
819–18½–New. Where a purchaser of land, paying a note secured by a trust deed, writes to the cestui que trust requesting cancellation, and the latter replies that, if the clerk will not cancel the mortgage on the presentation of the canceled note, he will do whatever is necessary in order to complete cancellation, he is not in default, in the absence of further request. 153Miss807, 121S485(1stcase).
819–20 247Mich348, 225NW496; 128 Okl 165, 261P913; 51SD619, 216NW361, 362 [citCJ], 56ALR332.
819–21 14PaDist&Co 31. [b] **That former owner of shares warned building and loan association not to satisfy mortgage** does not constitute defense. 14 PaDist&Co 31.
819–27½–New. ; nor that plaintiff intended to sue for penalty when he demanded satisfaction. 176Ark766, 4SW (2d)17.
819–35 22AlaA634, 118S911; 178Ark 274, 10SW(2d)358.
820–47 [a] 216Ala515, 113S577.
820–51 32Ariz552, 261P33.
820–59 [a] Ida 292P243; 232 IllA273. [b] 232 IllA273; 131 Okl 237, 268P192.
820–67 [a] **In Pennsylvania.**–14PaDist &Co 31.
820–68 32Ariz552, 261P33. See also 178Ark274, 10SW(2d)358. [b] **Measure of damages.**–32Ariz552, 261P33. [c] **Attorneys' fees incurred** are recoverable as damages. Ida 292P243.
820–69½–New. Penalties or damages independent of statute for failure to release or satisfy. Independent of statute one deeding property as security has a cause of action for damages for refusal of the grantee to reconvey property held as security under a deed absolute in form after payment of the secured debt. 243Mich423, 220NW717.
820–69¼–New. The measure of damages for the refusal to reconvey is the excess of the sale price the grantor lost as a result of the refusal over the market value. 243Mich423, 220NW717 (three thousand dollars).
820–69¼–New. The evidence is insufficient to show the lack of a bona fide sale in connection with damages. 243 Mich423, 220NW717.
820–69½–New. Damages, properly pleaded and proved, are recoverable against a mortgagee for the wrongful refusal to release the mortgage after the payment of the debt. **TexCivA** 7SW(2d) 918 (loss of sale of lease of land).
820–69¼–New. The failure of a mortgagor to tender to a grantee the expense of procuring an execution of release does not prevent the recovery of damages for grantee's refusal to release the trust deed, where the refusal was not based on the failure to tender the expense of the release, but was refused absolutely until grantor should pay off additional indebtedness. **TexCivA** 7SW (2d)918.
820–69½–New. The grantee's contractual duty to execute the release is sufficiently charged where the petition alleges that, by the terms of the deed of trust, the grantor was legally entitled to the release. **TexCivA** 7SW(2d)918.
821–71 206Cal 143, 273P565; **SD** 233 NW279.
821–72 115Nebr547, 213NW829.
821–74 [b] **Release of vendor's lien** to allow purchaser to procure loan for payment of price. 178Ark518, 12SW(2d) 870.
821–75½–New. Mortgagee accepting past-due installments more than 20 days after default from mortgagor's grantee, who did not assume mortgage, discharged mortgagor from liability on bond. 229AppDiv245, 240NYS597.
821–77 Mich 233NW408. [a] **Offer of refund in open court** is sufficient. Mich 233NW408.
821–78 [a] **Matters not constituting estoppel.**–135Misc837, 240NYS61.
821–81 Iowa 231NW363 (limitations not applicable).
822–86 250Mich375, 230NW175(1st case).
822–89½–New. Old age or ignorance alone are not sufficient grounds for setting aside a mortgage. MoA 278SW791.
822–89½–New. A court of equity has power to strike off satisfaction of a mortgage paid with trust funds and direct return of the misappropriated fund to the cestui que trust. 297Pa406, 147A86.
822–90 Iowa 231NW363.
822–95 86PaSuper437; 89PaSuper34.
822–96 Mich 233NW408; MoA 273SW 118; SD 230NW233.
823–97 173Ark489, 292SW659; CalA 288P684; 135Misc837, 240NYS61; 152 Wash342, 277P984.
823–6 297Pa406, 147A86. [e] **Issue of fact for court.**–Mo 289SW550. [f] **Evidence.**–58ND225, 226NW527 (insufficient to warrant cancellation of satisfaction). [g] **Petition held sufficient.**–Ga 155SE476.
823–9 [b] **Wrongful release will not discharge debt** as to mortgagor irrespective of question of rights of innocent purchaser. 47 Ida106, 273P947.
824–12 43 Ida327, 251P757; 83NH167, 139A758; 153Wash51, 279P105.
824–13 43 Ida327, 251P757. [a] **Evidence.**–43 Ida327, 251P757.
824–13½–New. Mortgagor is personally liable on note without any new promise to pay it where he consents to release of mortgage without consideration. 43 Ida327, 251P757.
824–20½–New. Where mortgagor gave second mortgage on his warehouse and as additional security for loan a mortgage on his home, the release by second mortgagee of his mortgage on warehouse and taking of option from first mortgagee to purchase warehouse did not merge the two mortgage debts nor release mortgage on home. 141Wash 238, 251P286.
824–20¼–New. Release by trustee without payment of debt is inoperative. Ill 233 IllA468.
824–20¼–New. Upon payment of first mortgage, second mortgage becomes first. 163La1039, 113S367.
824–20½–New. Release of mortgage lien by one co-owner of property gives him under statute only the right to recover from other co-owners their proportionate share in obligation paid by him. 35PortoRico 354.
824–22½–New. and seizin of husband is carried back to date of the deed in case of purchase-money mortgage. 215 Ala572, 112S141.
825–35½–New. Release by one joint owner, of mortgage lien on property owned in common, does not give him right of joint ownership for amount of lien. 35PortoRico 354.
826–53 163La868, 113S129.
827–55 160La496, 107S318; 168La139, 121S602.
827–56 160La496, 107S318; 163La868, 113S129; 168La139, 121S602.
827–56½–New. Where an owner of land gives second mortgages thereon, containing replacement clauses giving him the right to renew or give other mortgages for money to pay a first mortgage on the land, and keeping the second mortgages junior to such renewals or new mortgages, the payment of one of the first mortgages by such owner and taking of the usual satisfaction thereof extinguishes the mortgage, and the right to renew or replace the same is thereby lost. 176Minn609, 224NW264.
827–56½–New. In such case where the owner pays to the mortgagees in the first mortgages the amount due them and takes assignments of their mortgages in blank, intending to exercise the privilege of the replacement clause in the second mortgages, and thereafter defaults in the second mortgages, which are foreclosed, and the mortgaged lands are purchased by mortgagee for the full amount of the mortgage indebtedness the second mortgages pass out of existence, and the owner loses his privilege under the replacement clauses. 176Minn609, 224NW264.
827–58 166La1080, 118S225; 170La 714, 129S139(2dcase); Wash 288P227. See also 244Mich403, 221NW322. [f] See also 131 Ill 407, 25NE598. [i] **Mortgagee, refusing partial release** to purchaser because he claimed obligation had expired, cannot complain amount tendered was insufficient. NJCh 148A 206(2dcase).
827–60 Wash 288P227. [a] (1) 125 Kan687, 266P47; 170La714, 129S139 (2dcase); NJCh 148A206(2dcase); 146 Wash435, 263P598. (5) Mortgage provision for release of parcels containing forty acres or any multiple thereof does not mean parcels of exactly forty acres or multiples under government survey but does establish government forty-acre parcels according to description, full or fractional, as unit. 243Mich266, 220NW733.
827–60½–New. The construction should be honest, sensible and possible. 243 Mich266, 220NW733.
828–61 243Mich266, 220NW733; NJCh 150A675.
828–63 108Conn26, 142A395; 255Mass 247, 151NE95; NJCh 150A675.
828–65 206 Iowa848, 218NW488; 244 Mich403, 221NW322.
828–67 [a] **Demand held sufficient.**–170 La714, 129S139(2dcase).
828–70 [a] **Express provision for release of any acre lot** does not give right to select noncontiguous lots making up the acre. 154Md353, 140A494.
828–73 170La714, 129S139(2dcase).
828–74 244Mich403, 221NW322; Wash 288P227.

829-75 NJCh 148A206(2dcase).
829-78 [a] **Right of subsequent mortgagee to require entry.**-98PaSuper409.
829-82 168Ga235. 147SE394; 335 Ill 129, 166NE523; NJ 151A86(2dcase). [e] **Beneficiary under second trust deed** held not affected by first beneficiary's reconveyance of premises covered by first but not second trust deed. CalA 281P1043. [f] **Mortgagee does not waive provision** requiring completion of houses before final payment of advances to mortgagor. Mass 171NE470.
829-89½-New. Ordinarily one acting in good faith is justified in purchasing land from the mortgagor in reliance on a duly executed release. Iowa 229NW714.
829-89½-New. Purchaser of land released from mortgage for purpose of establishing highway cannot rely on such release where neither he nor mortgagor acted in good faith. Iowa 229NW714.
830-1 208 Iowa145, 224NW571.
830-3 221Ky668, 299SW545.
831-12 CalA 289P221; Mich 233NW377(2dcase); 55ND90, 212NW512.
831-39 [a] **Porto Rico Mortgage Foreclosure Law** limiting mortgagor's defenses does not violate federal constitution. 12PortoRicoFed534. [b] **Construction of statutes.**-135Misc391, 239NYS558.
832-42 208 Iowa145, 224NW571.
832-45 34 OhA128, 170NE185.
832-48 127Me218, 142A773.
832-49 CalA 267P750; 45 Ida200, 261P671.
833-63 [a] **Foreclosure under one statute bars remedy under another statute.**-158Md412, 148A816.
833-64 TexCivA 28W(2d)971.
833-65 TexCivA 28W(2d)971.
834-86 108Conn26, 142A395.
834-95 91Fla709, 109S677.
834-20 221Ky668, 299SW545.
835-26 [a] **Effect of reversal of judgment.**-Validity of sale by sheriff under writ of seizure and sale, in executory proceedings of court having jurisdiction, cannot be affected by reversal of judgment or order on devolutive appeal. 167La215, 118S893. [b] **Statute granting clerks of court power to issue orders for executory process** is not invalid as vesting in them power properly belonging to judiciary. 167La1032, 120S767(1stcase). [c] **Executory proceedings operate in rem** and not in personam. 167La1042, 120S770(2dcase).
836-65 [a] **Under Civ. Prac. Act § 1078** consent to institute bankruptcy proceedings against mortgagors will be denied while foreclosure proceedings are pending. 136Misc296, 240NYS587.
839-82 Sask [1927] 3DomLR713.
839-91 173Minn18, 216NW329. See also Iowa 227NW97.
839-92 181Ark511, 27SW(2d)789; 43 Ida789, 255P305; 336 Ill 450, 168NE 266 (remedies are concurrent or successive as mortgagee deems proper); 173 Minn18, 216NW329.
840-94 181Ark511, 27SW(2d)789.
840-98 [a] **Note obligating grantees of mortgaged property to mortgage notes** held not "same debt or matter" precluding action. Wash 292P419.
840-6 37F(2d)907; 227AppDiv448, 238 NYS188 (mortgagee's action for waste against stranger).
841-14 32Ariz130, 256P365.
841-16 See also 38Wyo 120, 264P1013.
842-35 207Cal 414, 278P1038. But see 95CalA403, 273P58.
842-38 94Fla717, 115S828.
843-42 But see 256 IllA305. [b] **Mortgagee must not mislead mortgagor** as to fact of foreclosure. Ala 130S189.
843-51 203 Iowa540, 211NW482.
843-55 12PortoRicoFed420.
843-62½-New. Where real estate is in the possession of a receiver appointed by the federal court, it is the duty of such court to permit a bill of foreclosure to be filed, reserving to itself the right to fix the terms and conditions of the sale. 12 PortoRicoFed420.
844-68 320Mo 1208, 9SW(2d)925.
844-70½-New. , nor under a vague indefinite clause for payment of interest on an old mortgage. 126 Okl 124, 258 P889.
845-76 [a] **Where debt under mortgage becomes due only on voluntary alienation,** property can be subjected to debts until then. 157Miss479, 128S76.
845-85 244 IllA148; 55ND732, 214NW 908.
845-86 [b] **Installments in default.**-33 Porto Rico 19.
846-91 [a] **Mortgage payable at will of debtor does not mature until date fixed by court** in action brought for purpose. 24Philippine309.
846-94 126 Okl 124, 258P889.
847-6 41GaA288, 152SE596(1stcase); 152Wash290, 277P689. [a] 126 Or129, 268P1001, 1002 [citCJ].
847-7 Utah 264P975.
847-11½-New. , or by consideration of the mortgage as a whole. 106Conn683, 138A804.
847-15 152Wash290, 277P689.
848-23½-New. Acceleration may be made to depend on a change in the rate of taxation. 132Misc699, 230NYS150.
848-23½-New. A mortgagee may accelerate the due date of a specified note, on the mortgagor's failure to pay other demand notes on demand. 207 Iowa11, 219NW503.
848-26 219Ala619, 123S17; 96CalA341, 274P379; 43 Ida639, 252P427, 51ALR 1253; 128Misc375, 219NYS29; 195NC 398, 142SE487; 146Wash435, 263P598. But see 98Fla1004, 124S751.
848-27 35Ariz110, 274P775; 43 Ida639, 252P427, 51ALR1253; 99NJEq171, 131 A617; 128Misc375, 219NYS29; Utah 264P975; 192Wis519, 213NW294. [b] **Rule applied despite debt due mortgagor** from mortgagee in excess of interest, in absence of agreement of set-off. 43 Ida639, 252P427, 51ALR1253. [c] **Construction of stipulation maturing debt on default.**-NJCh 149A64(2dcase). [d] **In absence of express stipulation,** default of mortgagor in payment of interest will not accelerate date for payment of principal debt. NJCh 148A575.
848-28 128Misc375, 219NYS29. [a] **Validity of provision.**-254NY1, 171NE884. [b] **Unintentional but negligent delay in making interest payment** is no ground for relief against acceleration clause. 254NY1, 171NE884.
848-29 99NJEq171, 131A617; 128Misc 375, 219NYS29.
849-32 35Ariz110, 274P775; NJCh 148 A577 (failure to produce tax receipts); 192Wis519, 213NW294. But see Iowa 229NW724; NJ 148A649. [a] (2) Under clause, in the usual mortgage bond, giving obligee option to declare principal sum immediately due and payable, if taxes imposed on mortgaged premises "become due and payable and remain unpaid and in arrears for sixty days," failure of mortgagor to pay first half of year's taxes until July 16th of that year gives obligee no right to exercise that option. 103NJEq425, 143A 548. (3) Tax becomes "delinquent," or "in arrears," if not paid till after date on which payment is due. 103NJEq425, 143A548.
849-33 TexCivA 19SW(2d)572. But see NJCh 148A575.
849-37½-New. **In New Jersey** a covenant in the words of statute, as to right to foreclose for mortgagor's default in keeping premises insured for benefit of mortgagee, has been construed to give mortgagee no right to foreclose on such default, the statute depriving such clause of any effect. 98NJEq520, 131A587.
849-42 NJCh 148A575.
849-43 But see 86Colo 529, 283P778. [b] (3) **Provision making right of acceleration for default in payment of interest conditional on continuance of default** for thirty days, separated by word "or" from provision for acceleration on default in payment of installment of principal, does not apply to default in payment of installment of principal. 146 Wash435, 263P598.
850-48 98Fla1004, 124S751 ("immediately due" held not to require immediate election). But see 45 Ida185, 261P 235.
850-50 [a] (2) See also 249 IllA10. (3) Where mortgage requires trustee to declare bonds due for nonpayment of interest coupons on notice from owners of twenty per cent of bonds, bondholder owning required percentage of bonds may sue on trustee's failure to declare default. IndA 168NE46.
851-54 111Conn106, 149A397.
851-58 NJCh 148A575.
851-60 220MoA668, 293SW73, 75 [cit CJ].
851-62 192Wis519, 213NW294.
851-63 192Wis519, 213NW294.
851-64 98Fla1004, 124S751; 220MoA 668, 293SW73, 76 [citCJ]; 218NYS29; 226AppDiv198, 235NYS34.
851-65 205Cal 590, 271P1070; 89CalA 558, 265P583; 34PortoRico 216. But see TexCivA 13SW(2d)174. [d] **Where demand would have been entirely useless,** failure to make it, as required by trust deed, did not destroy right to foreclose. 219Ala50, 121S54.
852-67 205Cal 590, 271P1070; CalA 284 P729; 96Fla719, 119S114; 98Fla1004, 124S751; 45 Ida185, 261P235; 152 Wash290, 277P689; 192Wis519, 213NW 294.
852-70½-New. Rejection of tender after default is not election to deem entire debt due. 218NYS29.
852-72 McA 27SW(2d)489.
853-79 192Wis519, 213NW294.
853-83 98Fla1004, 124S751; MoA 27 SW(2d)489; 128Misc375, 219NYS29; 226AppDiv198, 235NYS34.
853-86 205Cal 590, 271P1070.
854-88 32F(2d)433.
854-93½-New. Refusal of payee to accept tender of full amount of principal on interest date under privilege of debtor to pay one fifth of the principal is not waiver of right to exercise option to declare the whole amount due on failure to pay an installment of interest. 45 Ida 185, 261P235.
854-95½-New. Stipulation for accelerating time for the payment of the whole debt may be waived by mortgagee. 177 Ark770, 9SW(2d)3.
854-2 [d] **Mortgagee must not mislead mortgagor** regarding extension of payment. Ala 130S189.
855-6½-New. A mortgagor's breach of an extension agreement entitles the mortgagee to enforce the mortgage under its original terms. 227AppDiv669, 236NYS116.
855-12 102NJEq1, 139A514.
855-13 See also 9PaDist&Co 255.
855-17 35Ariz110, 274P775; 99NJEq 890, 133A534.
856-20 177Ark846, 7SW(2d)975; 335 Ill 646, 167NE769; 55ND732, 214NW 908; ND 231NW892; 33PortoRico 19. [b] (1) 165La795, 116S189. [c] **In Porto Rico.**-33PortoRico 19.
856-21 129Misc205, 221NYS588.
856-25 See also 147Wash29, 264P983.
856-27 39F(2d)859; 206Cal 575, 275P 408(2dcase); 111Conn106, 149A397; 99 Fla1092, 127S323; 99NJEq890, 133A 534. NJCh 148A575. [c] **Hardship.**-106Conn436, 138A433.
857-28 106Conn436, 138A433.
857-35 See also 172Minn349, 215NW 781.
858-38½-New. Right to foreclose on this ground is waived by accepting mortgage after delinquency in payment. 26F(2d)393.
858-39 101NJEq799, 138A884, 54ALR 1227.
858-42 181Ark409, 26SW(2d)84. [b] **Foreclosure under second mortgage** for default in payments on first mortgage, which allowed foreclosure for sixty days' default held proper, although default under first mortgage had not continued for sixty days. 169Minn474, 211NW681.
859-57 106Conn436, 138A433.
859-58 177Ark770, 9SW(2d)3; 99NJ Eq171, 131A617. [a] (2) Where mortgagor had failed to send half of amount of interest due because of mistake, his default is not excused. 99NJEq171, 131 A617. [c] **That mortgagor signed notes** held not to prevent showing facts excusing ignorance of terms thereof. 106 Conn436, 138A433.
859-59 See also 177Ark770, 9SW(2d)3.
859-60 177Ark770, 9SW(2d)3.
860-69½-New. Equity will relieve against acceleration clause only where default is the result of accident or mistake, or procured by fraud or other in-

equitable conduct of creditor. 177Ark 770, 9SW(2d)3.
860-71 102NJEq1, 139A514.
860-80 98Fla1004, 124S751 [quotCJ].
860-81 195NC398, 142SE487.
861-91½-New. Waiver of provisions of contract as to payment of taxes does not affect right to foreclose. 26F(2d) 393.
861-98½-New. Agreement must be based upon consideration. 101NJEq245, 137A885, 53ALR522.
861-98⅓-New. However, where default is caused by honest mistake due to complainant's acts or words, it is waived. 101NJEq245, 137A885, 53ALR522.
861-99 137Misc537, 242NYS707 (payment before exercise of option to accelerate).
862-8 101NJEq245, 137A885, 886 [cit CJ], 53ALR522.
862-11 NJ 144A798.
862-14 92CalA767, 268P954; 98Fla 1004, 124S751; 101NJEq245, 137A885, 886 [citCJ], 53ALR522.
862-25 98Fla1004, 124S751 [citCJ] (unreasonable delay in electing to foreclose held waiver); 229AppDiv345, 242 NYS369.
863-27 103NJEq383, 143A530.
863-36 166Ga206, 142SE859.
863-38½-New. Vendors after purchaser's default does not waive right to foreclose mortgage by foreclosing separate contract resulting in deficiency. 132 Or 247, 285P228.
864-51½-New. The Ontario Mortgagors and Purchasers Relief Acts of 1915 and 1920 did not apply to mortgages on which interest was in arrears prior to August 4, 1914. Can [1928] 2DomLR 705.
865-81 24F(2d)293.
865-92 [b] **Exception of discussion cannot be opposed** to privileged creditor or to one who has special hypothecation. 164La926, 1148839.
865-94 256 IllA386 (must show damages if fraud urged); 141SC232, 139SE 465.
866-7 256 IllA305; 117Nebr1, 219NW 581. [a] **Evidence held insufficient to sustain defense.**-99Fla277, 126S293.
867-13 See also 251 IllA262.
867-18 [b] **That satisfaction was executed by mistake** may be shown by mortgagee without first bringing action to reform. 155SC414, 152SE640.
868-43 But see 244 IllA148.
868-43½-New. Mortgagor acting under mistaken belief that he has thirty days from due date in which to pay installment of principal will be relieved from effect of acceleration clause where tender made within thirty days. 129Misc205, 221NYS588.
868-45 32 Ont428.
868-49½-New. , or by tender of amount not including full interest. 99NJEq590, 133A534.
868-49⅓-New. Insufficient tender is no bar to foreclosure. 16F(2d)417.
868-49¼-New. Tender of taxes, paid by mortgagee and kept open, precludes foreclosure. 172Minn349, 215NW781.
869-50 32NM108, 252P170.
869-53 Va 153SE843.
869-62 220Ala353, 125S226; 219Ala 150, 121S511; 219Ala447, 122S426; 98 Fla1004, 124S751 [quotCJ]; 292Pa476, 141A302.
869-63½-New. Unconscionable demands are held not to estop enforcement of mortgage terms. 99NJEq890, 133A534.
869-63⅓-New. One who informed a purchaser of land assuming indebtedness that he was merely a collecting agent for a third party who was the owner of a note has been held estopped to claim the right to foreclose a trust deed, where the purchaser of the land, in reliance on such information, admitted his indebtedness to a third party in garnishment proceedings by third party's creditor, resulting in entry of judgment therein against him as garnishee for the amount of the note. Tex CivA 14SW(2d)303.
870-77 16F(2d)657.
870-81½-New. Other statutes held not applicable to bar rights under a prior deed of trust to foreclose a paramount lien. 155Miss554, 125S79.
871-93 45 Ida200, 261P671. See also 244 IllA466.
871-99½-New. Effect of power of sale conferring option only is not to start running of statute upon breach of condition of mortgage. 45 Ida200, 261P 671.
872-5 81Mont120, 262P164.
873-7 See also 79CalA708, 250P1117.
873-10½-New. A statute providing that, where the remedy to enforce a recorded mortgage or deed of trust appears on the face of the record to be barred by limitations, the lien shall cease as to creditors and subsequent bona fide purchasers, does not apply in favor of a person giving a deed of trust or note. 155Miss829, 125S408.
873-11 Ont [1927] 3DomLR658.
873-13 TexCivA 25SW(2d)1108.
873-17 See also TexCivA 9SW(2d)452.
873-19 155Miss829, 125S408.
874-34 203 Iowa540, 211NW482.
875-41 [a] (4) Two years where defendant acquiesced in delay. 233Ky438, 25SW(2d)1020.
875-44 86Colo 115, 278P798; 101NJEq 437, 139A523; NJCh 148A392(2dcase); 41Wyo 198, 283P1100.
875-44½-New. A mortgagee is under no obligation to foreclose immediately upon default. 50RI 305, 146A765.
875-46 132 Or247, 285P228 (contract of purchase held not to require strict foreclosure thereof as condition precedent to mortgage foreclosure); TexCivA 290SW266. See also 95CalA403, 273P 58.
876-54½-New. Foreclosure sale may be directed before ascertainment of liens. 16F(2d)236.
876-54⅓-New. Sale of property under first trust cannot be justified until proper credits were made thereon of amounts received from sale of lots. DC 41F(2d) 103.
876-59 129 Or262, 277P85.
876-68 89CalA29, 264P328; 256 IllA 305.
877-78 [b] **Where trustee's answer denied that there had been any default,** demand on trustee to sell and refusal by him were not conditions precedent to right to sue, as demand would have been unavailing, and it was immaterial that demand was oral when deed provided for written demand. 95CalA403, 273P58.
878-89 CalA 289P221 (notice signed by trustee). [a] (2) Notice of default need not give volume and page in which original notice was recorded. 101CalA 762, 282P515.
878-98 101NJEq53, 137A785.
878-2 101NJEq388, 139A524.
879-13 46 Ida583, 269P991, 992 [cit CJ].
879-15 41F(2d)165; 219Ala526, 122S 841; 101NJEq53, 137A785; 103NJEq 526, 143A832(2dcase); NJCh 146A475 (2dcase); NJCh 151A497; NJCh 152A 10; 227AppDiv632, 236NYS65.
879-16 177Ark170, 6SW(2d)36; 46 Ida 583, 269P991, 992 [citCJ]. [c] **Payment of purchase price is not condition precedent** to purchaser's right to set off damage for breach of warranty. 177 Ark170, 6SW(2d)36.
880-23½-New. In Porto Rico, where a purchaser, who has given a mortgage to secure deferred installments of the purchase price extends the mortgage lien, he waives his right under the Civil Code § 1405 to suspend payment of the price because of having been sued in revendication. 33PortoRico 94.
880-24 101NJEq53, 137A785.
880-26 101NJEq388, 139A524.
881-32 101NJEq279, 137A408.
881-46 MoA 23SW(2d)221 (holders of securities secured by first mortgage lien).
882-57 176Ark986, 4SW(2d)949.
882-62½-New. Foreclosure suit by a trustee under a mortgage is properly upheld, although the bondholder's notice was insufficient where, if the notice is set aside, the trustee could legally start suit. 291Pa188, 139A856.
882-64 218Ala555, 119S665.
883-66 [a] (4) Minority bondholder may maintain foreclosure suit without consent of majority bondholder and without requesting trustee to sue where request to either majority bondholder or trustee would be unavailing. Utah 286P936.
883-72 SD 228NW466.
884-77 13PortoRicoFed11.
884-79 125Kan85, 262P561; 33Porto Rico 94; 12PortoRicoFed420.
884-80 125Kan85, 262P561.
886-4 205 Iowa1194, 219NW311.
887-12 217Ala166, 115S103.
887-25 [e] 83Mont21, 269P162.
888-36 13PortoRicoFed11.
888-44 [c] In Kentucky.-14BMon3.
889-46 33PortoRico 521.
889-46½-New. **Holder of several mortgages by same mortgagor** on different property in same county should foreclose all in the same action, parties plaintiff and defendant being the same. 100NJEq365, 135A337.
889-51½-New. The doctrine of one bill to foreclose two or more mortgages extends to a suit where the second mortgage covers only part of the premises and even when there are other liens upon still other parts. 101NJEq27, 137 A817.
889-51⅓-New. In Porto Rico a mortgagee may foreclose together two matured mortgages created by the same mortgagor on different properties. 33 PortoRico 521.
889-69 Iowa 227NW97. [e] 57CanSC 243, 44DomLR115 [1918] 3WestWkly 529 [dist 15AltaL17, 49DomLR187, (1919) 3WestWkly634].
891-96½-New. A purchaser at a foreclosure sale acquires an equitable interest in the premises which he may convey by quitclaim deed prior to the expiration of the redemption period. 237Mich513, 212NW71.
892-1 **Erratum.**-Strike out citation, "McIntosh," etc.
892-9 [a] **Purchase of portion.**-96Fla 52, 117S850.
892-13 ND 231NW892.
892-14 But see 99Fla1092, 127S323.
892-19½-New. Where a mortgage is foreclosed for an amount due under an unpaid installment without declaring the entire indebtedness due under accelerating clause and the mortgagee purchases at a foreclosure sale, the lien is extinguished in its entirety; otherwise the lien is not extinguished. 177 Ark846, 7SW(2d)975.
892-19⅓-New. But if the mortgagee is not the purchaser, the lien in respect of other installments is not extinguished. 177Ark846, 7SW(2d)975.
892-22 121 Or1, 255P467, 469 [citCJ]. [c] **Rights of senior mortgagee** are not barred unless petition avers facts authorizing judgment barring her right. 218Ky516, 291SW1039.
893-28 See also 229AppDiv345, 242 NYS369.
893-30½-New. **Where debtor and holder of a first lien colluded to cut plaintiff off** from his second lien, and foreclosed the first lien and cut off plaintiff's rights, plaintiff was entitled to judgment against the debtor, not only for the debt, but also to have his lien established and enforced against the land to secure the payment of the debt. Tex CivA 13SW(2d)227.
893-30⅓-New. Where a second mortgagee is made a party defendant to a suit to foreclose the first mortgage, he cannot foreclose his own mortgage in the suit where he does not allege any interest of complainant therein and does not seek relief against complainant. 98 Fla1238, 125S369.
893-35 150NY126, 44NE781.
894-59 See also 147Miss296, 111S874.
894-60 But see 12AllenMass412.
898-87 259Mass523, 156NE683.
907-3½-New. Where the mortgagee bids in property at foreclosure sale, and at the mortgagor's request deeded it to a third person to secure for him the full amount due, it was held that he was not required to account for the amount so bid in a suit to apply mortgagor's real estate to payment of his debt. 255 Mass92, 151NE77.
917-75 [a] **Judgment authorizing application,** after foreclosure sale, of order to pay judgment creditors from surplus

is held not adjudication of their right thereto. 191Wis580, 211NW798.

919-12½-New. Under some statutes an application to enjoin foreclosure by advertisement is addressed to the sound discretion of the court. 54ND69, 208 NW833.

919-12¼-New. Where such injunctional order has been granted, it is within the power of the judge who granted it to modify or dissolve it. 54ND69, 208 NW833.

921-85½-New. Purchaser under a land contract, in default, cannot assert invalidity of foreclosure by advertisement in a suit to set aside foreclosure of a mortgage given by his vendors who are not parties to his suit, 240Mich185, 215 NW408.

921-85¼-New. because, being in default, his right to enforce his contract is an open question determinable only by an adversary proceeding between the parties thereto. **Mich** 215NW408.

922-87 197NC152, 147SE829, 64ALR 1047.

922-88 214Ala636, 108S738.

923-4 173NC47, 91SE526.

924-13 [b] (2) Under Code (1921) § 281, provision of mortgage reserving right to sell has been held void, vendor's remedy on purchaser's default being by action to foreclose mortgage under § 282, instead of to quiet title. 84 Colo 535, 271P1118.

925-15 [b] **Where receiver conveyed property,** subject to incumbrances, and owner and wife joined, thus conveying their equity of redemption, it was no foreclosure of trusts under statute. 197 NC152, 147SE829, 64ALR1047.

925-18½-New. A statute, providing that all mortgage foreclosure sales under powers shall pass all of mortgagor's title applies to all decrees directed by a court of chancery, although no such provision appears in the statute applicable to sales under consent decree. 156 Md313, 144A479.

925-23 203Cal 359, 264P482.

926-37½-New. The power of sale must be construed like any other contract. 191NC476, 132SE145.

926-48 33NM39, 261P814, 56ALR221.

927-57 32NM210, 252P987.

928-71 33NM39, 261P814, 56ALR221.

929-78 216Ala572, 113S1; 216Ala171, 113S11; 218Ala462, 119S2.

929-79 [a] 181Mass49, 62NE984.

929-81 216Ala171, 113S11. But see 220Ala626, 127S219.

929-84 16RI 734, 19A654, 8LRA553.

929-92 24F(2d)293; Cal 286P693.

929-96 TexCivA 29SW(2d)923.

929-97 37GaA398, 140SE403.

930-11½-New. A mortgagee under a trust deed has the option of taking possession in case of default, and paying debts out of the rents and profits or to sell the equity of redemption under a power. 170Ark660, 281SW1.

930-13 170Ga75, 152SE85; 148Miss536, 114S397. [a] (6) 32F(2d)412; 168Ga 231, 147SE111; 168Ga327, 147SE581; 154Md353, 140A494; TexCivA 14SW (2d)303. [b] (5) Right to year's support from interest in property. 167Ga 646, 146SE445. (6) Sale cannot be restrained where principal debt is due regardless of forfeiture of alleged usurious interest. CalA 289P236. (7) Other instances. 168Ga235, 147SE394. [d] **Court had discretion to proceed ex parte** in hearing application for temporary injunction and in granting temporary injunctive relief. TexCivA 14SW(2d)303.

931-27½-New. A cash deposit made on the dissolution of an injunction restraining the foreclosure of a mortgage, to secure plaintiff's claim, based on priority of his liens over the mortgage, has been held to protect plaintiff's rights under petitions to enforce liens for labor furnished and materials used in constructing buildings. 266Mass29, 164NE810.

932-40½-New. In a suit to enjoin the sale of land under a trust deed, the fact that an assignee of the note and trust deed had not been served with process or answered when the hearing was had on application for temporary injunction did not deprive the court of the power to temporarily enjoin the sale. TexCivA 14SW(2d)303.

932-40¼-New. An interlocutory injunction pending determination of the rights of the parties on a trial on the merits has been held proper where an issue was raised as to the power of a corporate mortgagor to execute the mortgage. 169Ga90, 149SE781.

932-41 215Ala429, 110S911; 219Ala 619, 123S17. [a] (2) Where transferee was innocent purchaser, plaintiff could not restrain sale under security deed. 167Ga718, 146SE460. [b] **Power will not be denied, without substantial reasons,** because of attempt to pervert power from its legitimate purpose. 219 Ala412, 122S628.

932-46 MoA 27SW(2d)489; TexCivA 5SW(2d)263.

932-51 96CalA341, 274P379.

933-53 MoA 27SW(2d)489; TexCivA 294SW624, 625 [citCyc]; TexCivA 300 SW953.

933-61½-New. Fact that a sale was proposed to be made for an excessive amount does not warrant injunction where the debtor fails to tender the amount actually due. 24F(2d)293.

933-61¼-New. A cause of action, to recover money paid to secure the release of bonds pledged without authority by a bank holding them as a special deposit, is one for money had and received, available to the owner to enjoin the pledgee's sale of the owner's real property under a deed of trust. 90CalA83, 265P835.

934-71 168Ga407, 148SE11.

934-79½-New. A third mortgagee, suing to restrain the foreclosure of the second mortgage, must do equity by reimbursing defendant for the amount paid by the latter to the first mortgagee in good faith to protect his rights under the second mortgage. Mass 167NE 260.

934-87 [a] See also 154Md353, 140A 494.

935-99 154Md353, 140A494.

935-2 164Ga314, 138SE582; 197NC495, 149SE686(1stcase); TexCivA 294SW624, 625 [citCyc].

935-6½-New. Failure to tender amount including all items due is held to bar injunction. 164Ga314, 138SE582.

935-9 [a] **Purchaser of lots from mortgagor,** under mortgage giving right of partial release of acre lots, cannot restrain sale without allegation of tender of stipulated price. 154Md353, 140A 494.

935-12 [d] 15F(2d)298. [e] Ga 154SE 889; 148Miss536, 114S397.

936-15½-New. In a suit against grantees in a security deed and successive transferees to enjoin a sale on the ground of fraud and duress plaintiff should be allowed to amend the petition so as to allege that the transferees were not bona fide holders for value. 162Ga 560, 134SE166.

936-15¼-New. **Supplemental complaint** may not be filed after hearing where facts alleged therein were known before trial. 24F(2d)293.

936-15¼-New. The equity of plaintiff not having been fully sworn off by the answer, the court did not err in granting the injunction as prayed. 168Ga327, 147SE581.

936-28 [a] (3) One purchasing land subject to encumbrance is entitled to show that, as part of consideration, he agreed to pay off encumbrance and hold his vendors harmless, in his suit to enjoin sale of land. TexCivA 14SW(2d) 303.

936-29 [a] (2) Other evidence held sufficient. 171Minn168, 213NW563; 191 NC176, 131SE587; TexCivA 282SW645. (3) To show that assignee of notes was bona fide purchaser without notice of usury. 148Va479, 139SE295. (4) To show breach of condition of mortgage to furnish board, care, and supplies to mortgagee. RI 146A760. [b] (1) 219 Ala412, 122S628; 168Ga338, 147SE881 (2dcase). See also 166Ga504, 144SE8.

937-37½-New. A judge cannot cancel a stay of mortgage sale proceedings made by a master upon the same material that was before the master. Alta [1927] 2DomLR1046.

937-39½-New. Where a mortgagor seeks to restrain foreclosure of a mortgage, claimed to be usurious, without offering to pay the amount due, and the court finds that there were foreclosure proceedings, it may fix the amount of plaintiff's liability with interest. 241 Mich46, 216NW448.

937-37¼-New. Court may determine priority of mortgages. 249Mich89, 227 NW674.

937-44 196NC803, 144SE541(2dcase).

937-45 157Tenn211, 7SW(2d)812.

938-73 195NC360, 142SE491.

938-81 220Ala86, 124S234(2dcase). [b]**Grantee under security deed** may exercise power of sale where he has assigned note and mortgage as security. 162Ga358, 133SE863. [c] **Assignee of mortgage** can foreclose. 216Ala572, 113 S1.

938-83 TexCivA 285SW1115.

939-92 [c] **In Minnesota.-Minn** 231NW 395.

940-4 TexCivA 285SW1115.

940-10 33NM39, 261P814, 56ALR221.

940-14 220Ala86, 124S234(2dcase); 158Tenn53, 12SW(2d)711.

941-18 204Cal 570, 269P614. [a] 133 Cal 659, 66P7, 204, 85AmSR238; CalA 262P808.

941-27½-New. A foreign bank may exercise power of sale as trustee, although it did not comply with the statute to become a trustee under the mortgage. 22 OhA487, 153NE909.

941-27¼-New. A sale by a new trustee passes title where he was appointed by a beneficiary pursuant to power under trust deed. CalA 262P808.

941-29 But see MoA 295SW851.

941-30 151Miss765, 118S902.

941-31½-New. In an attack on a trustee's sale under a trust deed, which provided that the beneficiary could at any time appoint successors of trustees named in the instrument who should have the same power as the original trustee, and the beneficiary appointed such other trustee who conducted the sale, such sale was good. 204Cal 570, 269P614.

941-33 But see 205Cal 707, 272P571.

941-34½-New. If the trustee's appointment of his legal representative to foreclose was informal, rendering the sale irregular, it was cured by subsequent ratification by the trustee's acceptance of the proceeds and the execution of the deed. 205Cal 707, 272P571.

942-51 201Cal 438, 257P521.

942-52 TexCivA 285SW1115; TexCivA 296SW649.

942-54½-New. So long as no attorney's fees are included as a charge against the mortgagor, and the mortgagee signs the notice of sale, it is not necessary to make and file a power of attorney authorizing an attorney to foreclose the mortgage. 176Minn609, 224NW264.

942-55 TexCivA 285SW1115.

942-65 [a] **Second mortgagee need not pay debt secured by senior security.**-169 Ga400, 150SE647.

943-69 TexCivA 285SW1115; TexCivA 32SW(2d)660. [c] **Party granting power has right to designate manner of** exercise of power of sale in deed of trust or mortgage. TexCivA 285SW1115. [d] **Sale of property for separate debts** secured by separate trust deeds from testator and devisees held void. 175Ark50, 297SW1022.

945-82 TexCivA 31SW(2d)470. [a] (3) Other instances. 318Mo 1, 298SW762.

944-83 222MoA230, 297SW115.

944-87 35Wyo 496, 252P499, 504 [cit CJ].

944-88 32NM210, 252P987, 988 [cit CJ]; 35Wyo 496, 252P499, 504 [citCJ].

945-99 32NM210, 252P987; NC 154SE 18.

946-18 170Ark660, 281SW1; 32NM210, 252P987.

947-35½-New. On filing bond, assignor of mortgage assumed discharge of trust under power of sale therein. 153Md50, 137A509.

947-39½-New. Surety may, by motion to strike out nisi ratification, question correctness of amount stated for distribution, which surety should be compelled to pay. 154Md150, 140A42.

947-39¼-New. Where attorney to make sale reported the sale to his wife, but did not collect the price, and they conveyed the property, the surety is liable

for the full amount. 154Md150, 140A 42.
947-39¼-New. The surety has no interest in distribution of the amount for which it is liable. 154Md150, 140A42.
947-47 See also 102WVa339, 135SE179.
947-50 102WVa339, 135SE179.
948-52½-New. Where a court of equity is properly exercising jurisdiction over the subject matter, the selection of a commissioner to make a sale is largely in the court's discretion. 102WVa339, 135SE179.
948-52½-New. It is not mandatory that the court should appoint the trustee to make the sale, 102WVa339, 135SE179.
948-52¼-New. although the trustee being a proper person and selected by the parties should not be ignored except for some good reason. 102WVa339, 135SE 179.
948-60 TexCivA 18SW(2d)935; Tex CivA 29SW(2d)923.
948-61 172Minn183, 214NW925.
948-68 53ND262, 205NW686.
948-71 [b] 53ND262, 205NW686.
949-72 204Cal 570, 269P614; 170Ga75, 152SE85.
949-73 53ND262, 205NW686.
949-77 145Miss13, 110S769.
950-98 [a] 147Va166, 136SE655.
951-30 150Md107, 132A616; 149Miss 632, 115S714.
952-31 162Ga395, 134SE72.
952-36 162Ga395, 134SE72.
952-40 But see 32NM210, 252P987.
952-46 150Md107, 132A616.
953-49 169Ga400, 150SE647 (debtor may set aside sale for failure to mention senior encumbrance).
953-51 169Ga400, 150SE647.
953-53 171Ark1023, 287SW203.
954-63 [b] (5) Other instances. 204 Cal 570, 269P614.
954-64 CalA 262P808.
955-94 [a] **No other notice need be given than that required by deed of trust** providing only that notice of sale be published in newspaper. 92CalA767, 268 P954.
955-4 Mo 286SW27.
956-5 204Cal 570, 269P614.
956-7 50SD383, 210NW194. [b] (3) Under Crawford & M. Dig. § 6807 notice must be served in all cases on debtor as summons are now served. 176Ark303, 3SW(2d)342.
957-25 126Me397, 138A770. [c] **Required notice by mail held waived.**-NH 147A901.
957-32 But see Minn 218NW466 [dist 101Minn16, 111NW654; 148Minn430, 182NW514] (owners of hunters' cabin).
958-36 [a] **Notice to husband of foreclosure of property owned by him and his wife as joint tenants is sufficient.** 169Minn474, 211NW681.
958-50 240Mich41, 214NW948.
958-51 170Ga75, 152SE85.
958-53 193NC646, 137SE714.
959-65 169Ga400, 150SE647 [quotCJ entire paragraph].
959-74 [a] (2) Publication in county paper sufficient under statute. 87CalA 402, 262P402.
960-81 216Ala428, 113S293, 295 [cit Cyc].
960-94 240Mich41, 214NW948. [c] 52 SD125, 216NW872.
961-96 [c] **In South Dakota.**-52SD125, 216NW872.
961-97 240Mich41, 214NW948; Miss 130S105.
961-2 Mo 24SW(2d)125.
962-13 191NC476, 132SE145.
962-15½-New. Insertion on the last day of publication cannot be counted. Mo 24SW(2d)125.
962-17 [b] 149Miss711, 115S397.
962-18 [a] **In South Dakota.**-52SD125, 216NW872.
963-29 [b] (2) Other instances. Mo 24 SW(2d)125.
963-36 [a] (2) Mortgagee publishing foreclosure notice in newspaper of county, situs of property need not post notice on premises. 248Mich445, 227NW 762. [d] **Evidence held sufficient** to support finding that notice was not posted as required by trust deed. CalA 259P 363.
964-43 203Cal 359, 264P482. [b] (3) Posting must be in three different places. TexCivA 32SW(2d)660.
964-51 TexCivA 98W(2d)419; Tex CommnA 23SW(2d)291.
964-61 170Ga75, 152SE85.
965-76 147Va166, 136SE655.
966-78 204Cal 570, 269P614; 322Mo 401, 17SW(2d)328; 82NH211, 131A598; 145Va589, 134SE554, 555 [quotCyc]. [b] **Where no bidders appear,** mortgagee is required to adjourn sale, he being only person present to bid, unless security of debt is likely to be lessened thereby. 82NH211, 131A598.
966-83 147Va166, 136SE655.
966-86 216Ala428, 113S293, 294 [cit Cyc]; 147Va166, 136SE655, 657 [quot Cyc]. [a] (3) Notice of postponement by posting sign instead of oral announcement does not affect validity. NH 147A901. (4) Where foreclosure sale was enjoined and no postponement was announced, advertisement of later sale after dissolution of injunction has been held sufficient. 248Mich211, 226 NW819.
967-89 216Ala428, 113S293.
967-4 170Ga75, 152SE85. [a] 150Miss 804, 116S824.
968-25 219Ala50, 121S54; Md 148A 416; 82NH211, 131A598; TexCivA 296 SW649.
968-26 170Ga75, 152SE85; 316Mo 891, 292SW702; Mo 29SW(2d)692; 193NC 646, 137SE714.
969-27 204Cal 570, 269P614.
969-29 266Mass381, 165NE492; 322Mo 401, 17SW(2d)328; 193NC646, 137SE 714. [c] 82NH211, 131A598. [d] **Sale in wintertime when purchasers not expected to attend sale** does not show bad faith where requirements of statute and power are complied with. 82NH211, 131 A598. [e] **Mortgagee must not mislead mortgagor** as to time place and manner of sale. Ala 130S189.
969-30 Ala 130S323; Mass 173NE499; 149Miss632, 115S714. [b] **Fact that mortgagee was only concerned in getting amount of its mortgage** did not invalidate sale. 267Mass596, 166NE734.
970-44 Ala 130S323; 204Cal 570, 269P 614; 240Mich333, 215NW381.
970-56 201Cal 438, 257P521.
971-63 See also CalA 262P808.
971-64 204Cal 570, 269P614; CalA 262 P808.
973-97 55ND783, 215NW273.
973-98 55ND783, 215NW273. But see 168Ga231, 147SE111.
973-99 55ND783, 215NW273.
975-34 RI 150A258(1stcase).
971-64 201Cal 438, 257P521.
973-3½-New. Where holder of mortgage covering land and corporate stock exposes both for sale en masse resulting in grossly inadequate price, equity may relieve from sale or loss sustained by mortgagor. 216Ala504, 113S609, 54 ALR1413.
973-5 149Miss632, 115S714.
973-6 55ND783, 215NW273.
974-13 [a] **Sale in parcels** may be provided for. 149Miss632, 115S714.
975-27 55ND783, 215NW273.
975-38½-New. Advertisement of sale to be at public auction to highest bidder is not equivalent to announcement that sale is without reserve. CalA 283P963.
975-40 157Md471, 146A231.
975-44½-New. Where sale is advertised as subject to prior mortgages, in disposing of proceeds, evidence that mortgagee in his bid intended to include prior mortgages is inadmissible. 258Mass 205, 154NE851.
976-49 48RI 155, 136A306.
976-65½-New. The sale is not without consideration because the notes were not taken up by the trustee where not required by the deed of trust. CalA 262P 808.
977-71½-New. When the property is sold to holder of indebtedness, it is not necessary that payment shall be made in gold coin. 201Cal 438, 257P521.
977-73 204Cal 570, 269P614.
978-91 NC 155SE721; TexCivA 4SW (2d)581, 583 [citCJ].
978-2 But see 82NH211, 131A598.
979-7 Mass 172NE226. See also 74CalA 254, 240P298.
980-21 82NH211, 131A598. [b] **Duty of mortgagee.**-SD 228NW397.
981-24 [a] (1) 187Ala181, 65S364. (2) 194Ala460, 69S889.
982-45 But see 198NC221, 151SE193.
982-60 See also 204Cal 570, 269P614.
983-83 See also 246 IllA362. [a] (6) NC 154SE3. (8) During ten-day period before sale is deemed closed, bidder acquires no interest in property itself, but bid is considered only proposal to buy, which court may accept or reject. 195NC233, 141SE594. (9) Highest bidder cannot recover damages from assignee of mortgage and his wife for accepting deed from mortgagors and canceling debt within such statutory ten days. 195NC233, 141SE594. (10) Statute confers no power on clerk to make any orders, unless bid is increased. 196NC278, 145SE395. (11) Successful bidder has no right to specific performance, and acquires no interest in property during ten days following sale. 197NC184, 148SE31. (12) Clerk has no jurisdiction except to order resale where bid has been raised within statutory period, though statement was made at sale that price should be paid in cash on confirmation. 197 NC184, 148SE31. (13) Clerk has no power to order trustee to deed property to highest bidder before expiration of statutory period. 197NC184, 148SE31. (14) Where property is sold to bidder for third time but higher bid is filed within statutory period, resale is necessary though plaintiff was sole bidder and his bid at third sale was same as his upset bid. 197NC184, 148SE31. (15) Third party may purchase notes within statutory period and thereafter enforce security. 197NC617, 150SE120. (16) For advance bid to be forfeitable statute must be strictly complied with. NC 154SE3. (17) Mortgagors deposit of advance bid subject to attachment where highest bidder abandons resale. NC 154SE3. (18) Rights of highest bidder in mortgagor's deposit on advance bid. NC 154SE3. (19) Statute must be liberally construed to protect mortgagor. 197NC534, 149SE689. (20) Where subsequent mortgagee offered to pay clerk increased bid on tenth day, but clerk authorized him to mail check, deposit of check in mail on tenth day and receipt thereof by clerk on next day is sufficient compliance with statute. 197NC534, 149SE689. [b] **In Ontario.**-240Mich333, 215NW381.
984-85 CalA 283P963.
984-90½-New. The auctioneer's information to the buyer that he could purchase the mortgaged property by bidding something more than the offer of the first mortgagee did not render the sale illegal as made in disregard of the rights of the second mortgagee. 267 Mass596, 166NE734.
984-90½-New. Highest bidder cannot compel sale where not alleging trustee publicly announced sale would be without reserve. CalA 283P963.
984-92 See also CalA 262P808.
984-95 55ND783, 215NW273.
984-1 [b] **Under statute providing that sale shall not be closed** if, within ten days after its date, bid is increased, it has been held that increased bid must be paid to clerk of superior court, not to trustee. 193NC244, 136SE610. [c] **Property owner's petition** for leave to intervene and make increased bid held properly denied. 193NC244, 136SE610.
984-1½-New. It is not necessary that a beneficiary's attorney should have written instructions in order to bid at a sale nor that the contract be executed at the time of the sale. CalA 262P808.
984-2 Mass 173NE499.
984-3 [a] **Reasonable time** should be given mortgagor, bidding at sale, to pay bid where mortgagee prevents him from paying. TexCivA 4SW(2d)581.
985-15½-New. Beneficiary purchasing need not actually pay cash to a trustee and receive it back in payment of the debt. CalA 262P808.
985-22 48RI 155, 136A306, 308 [citCJ].
985-23 [h] **Contract is binding** and may not be annulled or modified, except on grounds sufficient for rescission on reformation. NH 147A901.
985-23½-New. Where a wife to whom her husband has given a deed of trust as security for a debt, a large part of which was fictitious and who is cog-

nizant of the fact, bid in the property at a sale on foreclosure pending an appeal from a decree adjudicating the amount of debt in her favor, a subsequent reduction of the amount of her debt by the appellate court does not entitle her to have her bid set aside and the property resold. 147Miss873, 113S212.

985-23½-New. A mortgagee bidding at foreclosure sale may be held to his bid in the absence of fraud. SD 228NW397.

986-35 TexCivA 48W(2d)581, 583 [cit CJ]. [b] **Resale after commencement of suit to set aside former sale**, if authorized is subject to rights established by suit. TexCivA 48W(2d)581.

987-41½-New. **Resale bringing more than at first sale** deposit of bidder cannot be forfeited. 198NC605, 152SE802.

988-57 [g] **Where affidavit was merely cumulative**, contention that there was failure of proof of notice held without merit. 101CalA762, 282P515.

989-68 151Va81, 144SE602.

989-72 153Md50, 137A509.

989-76½-New. , and it is permissible to show unpaid taxes and judgments. 151Va81, 144SE602.

989-76¼-New. A private sale made by the owner of the equity of redemption may not be reported for ratification by attorney authorized to make private sale after public offering. Md 148A416.

989-76¼-New. A proceeding for confirmation, where the vendee resists, is in effect a bill for specific performance. Md 148A416.

989-78 But see 250Mich548, 231NW66. [a] **Sale by owners of equity of redemption**, not being sale by attorney authorized, court cannot confirm it. Md 148A416.

990-82½-New. Court may refuse to confirm sale made in violation of express terms of order. 239Mich575, 215NW13.

990-89 SD 231NW933 (certificate is personal property).

990-91 83Colo 335, 264P1087.

990-92 [a] (2) Fact that certificate of sale erroneously names time impossible for redemption does not affect validity of foreclosure. 46Mich107, 8NW691. [b] **Sale is invalid** where land is bid in by sheriff for mortgagee for unauthorized amount and certificate is not accepted or approved by mortgagee. 55ND125, 212NW770.

991-9 [b] **Rights of grantor of trust deed** held extinguished by sale though trustee's deed was undelivered after more than twenty-five years. 78Colo 464, 242P636.

991-12 153Md50, 137A509; Mass 172NE526(2dcase).

991-16 [b] **In Kentucky.**—226Ky665, 11SW(2d)725.

993-55 150Miss804, 116S824.

994-78 [a] **Construction of particular deeds.**—Va 152SE346.

994-79 TexCivA 287SW279; TexCivA 298W(2d)930 (mortgagor divested of all title therein). See also TexCivA 278SW306.

994-82½-New. Debt and note secured by mortgage are extinguished when holder purchases land. 216Ala504, 113S609, 54ALR1413.

994-82¼-New. A subsequent purchaser of property sold under power of sale in a deed of trust having no actual or constructive notice of such deed of trust is entitled to redeem by paying amount of purchase money still due. TexCivA 287SW279.

994-88 48RI155, 136A306. See also NC 155SE721. [h] **Recital in deed that purchaser assumed first trust deed** does not bind him unless new consideration was given therefor. Va 152SE346.

995-99 90CalA345, 265P860.

996-5 201Cal438, 257P521; 102CalA 92, 282P412; 83Colo 335, 264P1087; 36GaA200, 136SE165; 168Ga792, 149SE 201; 153Md50, 137A509; Mass 172NE 226; TexCivA 218W(2d)17. [d] **Rights of junior mortgagee of part of property purchasing at sale under first mortgage**, after purchasing at sale under his own mortgage stated. SD 230NW243.

996-6 201Cal438, 257P521.

996-9 WVa 153SE309.

996-10 WVa 153SE309.

996-14 165Ga115, 139SE810; 150Va 508, 143SE690. [d] **Lessees of timber rights** under subsequent lease take subject to having lease terminated by sale under security deed. 165Ga115, 139SE 810.

997-20½-New. Purchaser who fails to take covenant of warranty takes subject to rule of caveat emptor. 192NC 152, 134SE422.

997-23 153Md50, 137A509.

997-27 153Md50, 137A509.

997-28 242Mich269, 218NW788. [a] **Purchase by junior mortgagee.**—242Mich 269, 218NW788.

997-38 201Cal438, 257P521; 36GaA 200, 136SE165; 198NC99, 150SE706 (as against tenant under lease after maturity). [a] **Mortgagor's tenant** after foreclosure is not entitled to possession regardless of extent of his right to growing crops. 222MoA1086, 14SW (2d)5.

997-39 See also 246 IllA362.

998-44 MoA 29SW(2d)234.

998-51½-New. A statute relating to rights of mortgagor's tenant does not preclude a purchaser from recovering possession where the lease was made after maturity of the mortgage. 198NC 99, 150SE706.

998-55 But see MoA 29SW(2d)234.

999-64½-New. Claims of defendants, based on conveyances subsequent to trust deed, are in no better position than those of original parties. 201Cal 438, 257P521.

999-70½-New. A judgment in summary proceedings to recover possession is not binding on the mortgagor where he was not made a party to the proceedings, although his vendee in possession was made a party. 240Mich41, 214NW948.

999-76 [a] (3) Assignment of surplus by owner is pertinent as tending to show title and right to possession. Mo 30SW(2d)77.

999-78 MoA 289SW977; 191NC216, 131SE580. [b] **Purchaser not liable for rents or waste.**—220Ala353, 125S226.

999-79 Cal 284P905; Mo 24SW(2d) 125 (until owners of equity elected to redeem); MoA 108SW(2d)64. But see Mich 233NW347. [a] **Only reasonable amount**, not amount reserved and assigned. 145Miss31, 110S857.

999-80 216Ala116, 112S438; MoA 10 SW(2d)64 [quotCJ]. See also Mich 233 NW216. But see 36GaA233, 136SE282.

999-80½-New. only for the rent for a reasonable use and occupancy on and after the date of his deed to the end of the year. 145Miss31, 110S857.

999-81½-New. The transfer of a rent note for a valuable consideration before maturity and before foreclosure of a deed of trust severed rent for year covered by the note which did not pass with the land to a purchaser under foreclosure. MoA 289SW977.

999-82½-New. A landlord is entitled to rents up to the time of foreclosure regardless of time default took place. MoA 289SW977.

999-82¼-New. The rights of an assignee under an unrecorded assignment of rents are no greater than those the lessor would have had in the absence of an assignment. CalA 279P172.

999-82¼-New. Where lessee's interest terminates by sale of property purchaser without privity cannot recover upon lease or sue for use and occupation. CalA 290P309.

1000-84 [b] **In California.**—A 279P172.

1000-85 SD 228NW397. See also 246 IllA362. [c] (2) Rents and profits may be used to prevent waste. 171Minn350, 214NW52. [e] **In South Dakota.**—228 NW397.

1000-87 See also 162Ga395, 134SE72.

1000-88 See also 162Ga395, 134SE72. But see 246 IllA362. [a] **Receiver not appointed** to apply rents on delinquent taxes on mortgage debt. 171Minn350, 214NW52.

1000-90 36Man210, [1927] 1DomLR 458, [1926] 3WestWkly762; 169Minn 468, 211NW680; 198NC99, 150SE706. [a] (2) 36GaA233, 136SE282; GaA 155 SE355. (3) Notwithstanding such act purchaser under power in security deed antedating such act acquires title to crops grown after passage of act if grown and owned by grantor. 36GaA 233, 136SE228. (4) Where grantor in such deed prior to such sale had rented lands to others who raised crops, purchaser does not acquire title thereto, but acquires only interest of grantor. 36 GaA233, 136SE282.

1001-98 36GaA233, 136SE282.

1001-2 [a] MoA 289SW977; 222MoA 1086, 14SW(2d)5.

1001-2½-New. A tenant, permitted by the purchaser to harvest crops after the expiration of the redemption period, is the owner thereof, and the title to the share thereof vests in the mortgagor under rental agreement. 176Minn37, 222 NW292.

1001-4 165Ga115, 139SE810.

1001-11 35PortoRico 504.

1001-20 169Ga400, 150SE647; 48ND 274, 183NW1021; 48RI155, 136A306; SD 230NW243. See also 198NC256, 151SE247.

1002-23 CalA 290P309; 158Tenn53, 12SW(2d)711; TexCivA 278SW306, 309 [citCyc]. [c] TexCivA 11SW(2d) 541. [d] **Operation of exercise of power of sale** is that of strict foreclosure in equity. TexCivA 278SW306.

1003-41 240Mich41, 214NW948.

1004-44 [b] **Purchaser is chargeable with knowledge** that mortgagee sold property for about half its value. Ala 130S323.

1004-46½-New. Purchase at a foreclosure sale set aside and declared null and void in a suit to which purchaser was a party, purchaser not appealing from decree, cannot maintain an action for damages against mortgagee for breach of contract. 258Mass468, 155NE421.

1004-46¼-New. Purchaser at a foreclosure sale set aside and declared null and void in a suit to which the purchaser was a party, the purchaser not appealing from the decree, cannot maintain an action for damages against the mortgagee for breach of contract. 258 Mass468, 155NE421.

1004-46¼-New. Equitable title of grantee was good as against the trustees of a church, who had no right to redeem from sale under a trust deed although a substitute trustee was not authorized in writing to make sale as required by the deed. 177Ark856, 9SW(2d)169.

1006-67 NC 155SE721.

1007-68 DC 41F(2d)115.

1007-70 [b] **Assignment of surplus by owner of mortgaged property** estops him from asserting invalidity of trustee's deed or claiming land. Mo 30SW(2d) 77.

1008-59 TexCivA 2SW(2d)899.

1008-63 NC 155SE721; TexCivA 2 SW(2d)899.

1008-65 NC 155SE721.

1008-81 TexCivA 278SW306, 309 [cit Cyc].

1009-72 [b] See also 322Mo401, 17 SW(2d)328.

1010-1 263Mass206, 161NE243.

1010-2 55ND125, 212NW770.

1010-6 55ND125, 212NW770.

1011-7 55ND125, 212NW770.

1011-8 55ND125, 212NW770.

1011-11 Ala 130S323; Mo 24SW(2d) 125 (charged with notice of defects in sale appearing on face of deed); 197NC 268, 148SE233, 63ALR1357.

1011-12 174Minn520, 219NW914; 147 Miss446, 111S148. But see Mo 24 SW(2d)125; 197NC268, 148SE233, 63 ALR1357.

1011-17½-New. Mortgagor's continued occupation is notice to subsequent purchasers from purchaser at mortgage sale. 145Miss502, 113S550.

1022-25 Mass 173NE499; Mo 30 SW(2d)77. [c] **Admissibility of evidence.**—Mass 173NE499.

1013-33 79CalA458, 250P188; 197NC 460, 149SE682(2dcase) (mortgagee is trustee for purpose of securing payment of debt).

1013-41½-New. Trustee, when sale was made, was bound to inquire for debts made payable out of fund, although inquiry according to description of deed of trust may have been sufficient. 193 NC646, 137SE714.

1014-52 48RI296, 137A776, 53ALR 365.

1014-53 48RI 155, 136A306; 48RI 296, 137A776, 53ALR365; Va 152SE346. [b] **Question of agreement** to pay prior mortgages held for jury. 48RI 296, 137A776, 53ALR365.
1014-56 262Mass302, 159NE731.
1014-65 Mass 172NE226; 48RI 155, 136A306; 48RI 296, 137A776, 53ALR365; SD 228NW397. See also Va 152SE346.
1015-73 101NJEq37, 136A738.
1016-79½-New. Successive mortgagees are not tenants in common of equity of redemption as respects surplus, but their rights are several and separate. 49RI 191, 141A461.
1016-79½-New. Liens of successive mortgagees attach to surplus in the same order as they originally did to the land. 49RI 191, 141A461.
1016-79¼-New. A senior mortgagor, holding the surplus after foreclosure, may admit possession of specific funds and settle with the junior mortgagees without resort to equity. 49RI 191, 141A461.
1016-86 MoA 284SW202.
1016-88 258Mass205, 154NE851.
1016-89 153Md50, 137A509.
1016-91 153Md50, 137A509.
1016-93 153Md50, 137A509.
1016-93½-New. That the mortgagor's grantee assumed payment of the mortgage does not render him liable to a subsequent judgment creditor for surplus on foreclosure sale. 197NC460, 149SE682(2dcase).
1017-4 197NC460, 149SE682(2dcase); Sask [1930] 3DomLR314.
1017-6 MoA 284SW202. [b] **Subsequent judgment creditor.**-197NC460, 149SE682(2dcase).
1017-9 NH 147A901 (absent fraud, mortgagee is not limited to account for reasonable value of premises). [a] **Where mortgagee bid amount claimed due pursuant to agreement not to take deficiency judgment,** mortgagor failing to have amount due adjudicated as authorized by statute is estopped to recover difference between amount actually due and amount claimed due. SD 228NW397.
1017-10 197NC460, 149SE682(2dcase).
1017-13½-New. Mortgagee owes no duty to pay surplus to prior incumbrancers. 48RI 296, 137A776, 53ALR365.
1017-14 [a] **Duty to account.**-49RI 191, 141A461.
1017-22 Sask [1930] 3DomLR314.
1018-27 Mass 172NE226. [a] **Effect of suit.**-Mortgagor suing for surplus affirms validity of sale so far as it concerns him. Mass 172NE226. [b] **Only criterion of value of what was sold** where action is at law is amount bid at foreclosure sale. Mass 172NE226.
1018-28 48RI 155, 136A306; 48RI 296, 137A776, 53ALR365; 49RI 191, 141A461.
1018-29 48RI 296, 137A776, 53ALR365.
1018-34½-New. In some jurisdictions the proper procedure to procure payment of a subsequent judgment out of the surplus is by action and not by motion. 197NC460, 149SE682(2dcase).
1018-35 48RI 155, 136A306.
1018-37 But see 49RI 191, 141A461 (junior mortgagee, suing senior mortgagee under alleged agreement to pay debt secured by his mortgage, need not join prior mortgagees). [d] **Effect of joinder.**-NH 147A901. [e] **Right of action against third person.**-Mass 172NE226.
1018-43½-New. Admissibility of evidence. In an action by a junior mortgagee in assumpsit to recover surplus alleged to be held under an agreement to use it to pay a note secured by his mortgage, evidence as to the amounts due under intervening mortgage is properly excluded. 49RI 191, 141A461.
1018-43¼-New. Sufficiency of evidence. Evidence in an action of assumpsit by a junior mortgagee has been held insufficient to warrant a directed verdict for plaintiff for the full amount alleged to be due. 49RI 191, 141A461.
1018-43¼-New. Presumptions. There is no presumption that a mortgagee received the proceeds of sale after assignment of the mortgage. 197NC460, 149SE682(2dcase).
1018-43½-New. In proceedings commenced more than seven years after sale, it will be presumed that the mortgagee paid any surplus to the mortgagor or owner of the equity of redemption. 197NC460, 149SE682(2dcase).
1018-43½-New. Evidence held insufficient to show surplus so as to authorize recovery by mortgagor. Mass 172NE226.
1018-44 [d] **Senior mortgagee, holding surplus,** may bring bill in equity for determination of respective rights of subsequent mortgagees. 49RI 191, 141A461. [e] **Parties.**-49RI 191, 141A461.
1019-49 262Mass302, 159NE731; 48RI 296, 137A776, 53ALR365.
1019-59 262Mass302, 159NE731.
1020-86½-New. Mortgagor may recover attorney's fee, paid under protest to public trustee, who perpetrated fraud on him by instituting foreclosure suit without authority. 81Colo 525, 256P12.
1020-87 262Mass302, 159NE731.
1020-88 Ala 129S81 (although there is no foreclosure); 37GaA398, 140SE403.
1021-91 170Ga402, 152SE903 (2dcase).
1021-93½-New. An agreement without consideration to extend the date of payment of the mortgage does not estop the mortgagee from incurring attorney's fees without notifying the mortgagor of his intention. 155Miss750, 124S763.
1021-8½-New. Clerk may allow reasonable commission to trustee, compensation not being limited to commission on amount of debt. 194NC222, 139SE169.
1022-15 154Md568, 141A380; 52SD33, 216NW580.
1022-18½-New. The mortgagee, like any other creditor, is entitled to levy an attachment on crops raised on the land during the period of redemption, as against a claim that they are exempt as fruits of possession during such year. 52SD33, 216NW580.
1023-26 See also 154Md568, 141A380.
1023-36 204Cal570, 269P614.
1023-37 CalA 262P808; 196NC278, 145SE395.
1023-38 NC 154SE18.
1023-44½-New. The holder of an equity of redemption who slept on his rights by failing to bid and protect himself is not entitled to relief. 197NC268, 148SE233, 63ALR1357.
1023-46 TexCivA 32SW(2d)660.
1023-49 50SD383, 210NW194. See also 109Mich324, 67NW329, 63AmSR581.
1024-57 212Ala679, 103S848.
1024-59 322Mo401, 17SW(2d)328; Mo 29SW(2d)692; 55ND783, 215NW273.
1024-60 145Va589, 134SE554.
1025-62 162La703, 111S66; Mo 29SW(2d) 692. [b] **Debtor only** can have sale set aside because of agreement to restrict bidding, not subsequent encumbrancer. 205Cal707, 272P571.
1025-64 98CalA604, 277P538; 98CalA796, 277P541; 258Mass431, 155NE455.
1025-67½-New. Where sheriff's deed was executed without owner's knowledge to his tenant who was mortgagee and had begun foreclosure proceeding before he became tenant. 50SD383, 210NW194.
1025-68 But see 157Md471, 146A231.
1025-71 323Mo597, 20SW(2d)529(1st case). [a] (7) Objection that prior mortgagee was not party to foreclosure was not tenable, where prior mortgagee was present at sale and consented to sale free of his mortgage. 157Md471, 146A231. [c] **Ratification** may arise by estoppel from acts leading another to change his position. 216Ala599, 114S198.
1026-76 NC 155SE721.
1026-89½-New. Fraud may not be predicated on the motive or purpose in exercising the power of sale. 170Minn126, 212NW202.
1027-91 216Ala428, 113S293, 295 [cit Cyc]; 74CalA254, 240P298; 92CalA767, 268P954; CalA 289P221; 267Mass596, 166NE734; 312Mo563, 279SW714; 240Mich333, 215NW381; 49RI 423, 143A778.
1027-94 216Ala428, 113S293; Mass 172NE226; 147Miss446, 111S148; 145Miss502, 113S550; TexCivA 28SW(2d)971; 145Va589, 134SE554; WVa 152SE778.
1028-97 49RI 423, 143A778.
1028-97½-New. In determining whether price for which unimproved city land without streets or highways was adequate, possibility of opening streets and highways is not to be considered. 150Md107, 132A616.
1028-98 216Ala428, 113S293; 74CalA254, 240P298; TexCivA 28SW(2d)971.
1028-99 [b] Mo 286SW27; Mo 24SW(2d)1001.
1029-7 74CalA254, 240P298; 87CalA402, 262P402.
1029-12 145Va589, 134SE554.
1029-14 Ala 130S189; DC 41F(2d)115; 51SD25, 211NW971. [b] **Trustee's fees in sale** need not be tendered. TexCivA 28SW(2d)971.
1029-21 147Miss446, 111S148; 145Miss502, 113S550.
1030-26 [c] **Action by mortgagor's heirs,** alleging that trustee in deed of trust exceeded his power in selling timber and land separately instead of selling as a whole, and on that ground asking that sale be set aside and for an accounting, is an action to redeem within meaning of the year period of statute of limitations. 172NC234, 90SE213.
1030-27 189Mass559, 76NE142.
1030-31 TexCivA 28SW(2d)971.
1030-32 187Mass207, 72NE967; Minn 231NW395; 209Mo586, 108SW60; 261Mo192, 168SW965.
1031-42 187Ala244, 65S831; 100CalA373, 280P191.
1031-54 Minn 231NW395 (estoppel).
1031-58½-New. Where the mortgagee's administrator foreclosed the mortgage and bid in the property in his own name as administrator, he is the only necessary party defendant in an action to set aside the foreclosure on the ground that no default had occurred. 171Minn469, 214NW472.
1031-60 [b] (2) 151Miss111, 117S514. Mo 24SW(2d)1001; MoA 14SW(2d)12. [c] (2) 92CalA767, 268P954; 98CalA390, 277P197; 169Ga400, 150SE647 (nature of newspaper); 323Mo597, 20SW(2d)529(1stcase). [d] **Fraud.**-Facts constituting alleged fraud must be set out and general allegation of fraud not supported by facts is insufficient. 170Minn126, 212NW202.
1032-74 243Mich324, 220NW675.
1032-80½-New. There is presumption of regularity of sale under mortgage. 198NC221, 151SE193.
1033-88 TexCivA 290SW266; 151Va81, 144SE602. [b] (1) 171Minn469, 214NW472; 316Mo891, 292SW702; 322Mo401, 17SW(2d)328; 55ND913, 215NW470. (2) MoA 14SW(2d)12. (4) 312Mo563, 279SW714. (12) To show holder of secured note with knowledge of proposed sale failed to use reasonable diligence to protect interest. 312Mo563, 279SW714. (13) To show trustee used best judgment in postponing sale to protect holder of note. 312Mo563, 279SW714. (14) To show that interest in dispute had been paid and that there was no default. 171Minn469, 214NW472. (15) To sustain finding that bank purchasing property collaterally agreed to pay encumbrances. MoA 14SW(2d)12. (16) To show trustee had not wrongfully withheld portion of proceeds paid for care of premises sold. 204Cal570, 269P614. (17) Answer of jury to third question propounded to them is based upon evidence. 166Ga523, 143SE761. (18) To sustain finding that sale was invalid, on ground that premises at time of sale in gross were not occupied as one parcel. 243Mich324, 220NW675. (19) To show that agreement was option to purchase within eighteen months after sale, and not redemption agreement. 100CalA373, 280P191. (20) To show that plaintiff never tendered amount due under agreement for reconveyance. 100CalA373, 280P191. (22) Other instances. 204Cal570, 269P614; CalA 262P808; 168La128, 121S598; 243Mich324, 220NW675; 322Mo401, 17SW(2d)328. [c] (1) 74CalA254, 240P298; 312Mo563, 279SW714. (2) 170Ark660, 281SW1; 171Ark1023, 287SW203; 87CalA402, 262P402; 312Mo563, 279SW714; Mo 286SW27.

1033-89½-New. [§ 1497a] g½. **Trial.** Whether publication containing advertisement is newspaper is for jury. 169 Ga400, 150SE647.

1033-91 145Miss502, 113S550.

1034-93 Ala 129S81 (decree of redemption held appropriate relief under pleading); CalA 266P823.

1034-98½-New. and such purchaser is liable for damages resulting to the premises from his acts or those of his tenant in possession, 220Ala353, 125S226.

1034-99 220Ala353, 125S226.

1034-7½-New. Where the rule is set aside as invalid and reconveyance ordered the decree should provide for payment by the mortgagee of the amount due on the mortgage and cost of improvements, although expenditure was unusual. 258Mass431, 155NE455.

1034-8½-New. Where junior mortgagee had expended money redeeming from tax sales, on setting aside of senior mortgagee's foreclosure sale, former is entitled to reimbursement. 216Ala428, 113S293.

1034-10½-New. Whether a notice of the sale was given in statutory manner is for the determination by a trial court, and the finding will not be disturbed if supported by the evidence. 88CalA761, 264P300.

1035-13½-New. Where, through a patent mistake, part of the property is omitted from the advertisement of sale, the court may vacate the foreclosure and order foreclosure anew by action. 170Minn438, 212NW816.

1035-14½-New. Resale of property not invalid because only two per cent of advance bid was deposited, purchaser having completed sale. 191NC784, 133SE3.

1035-14½-New. Assignee of mortgaged real estate acts as agent of court on resale with no power to exact consideration for postponement of resale. 153Md491, 138A343.

1035-14¾-New. Assignee of mortgaged estate is held to have properly exacted interest from purchase for benefit of mortgagor as consideration for postponement of resale. 153Md491, 138A343.

1036-39½-New. The purchaser has a right of action based upon the erroneous belief of the parties that title to the land was vested in the trustee at the time the deed was executed and at the time of sale by the trustee. 79CalA45, 248P1035.

1036-39½-New. He may sue the grantor and trustee to recover in benefits alleged to have been conferred in reliance upon such erroneous belief. 79CalA45, 248P1035.

1036-39¾-New. The obligation to make restitution, under such circumstances, is not contractual, but one imposed by law. 79CalA45, 248P1035.

1036-39½-New. And the benefit conferred is the measure of the right to relief. 79CalA45, 248P1035.

42 C. J.—17-5 205Iowa1194, 219NW311. [b] **Bondholder must proceed against security in accord with conditions** of trust agreement. Mass 168NE405.

17-7 Ala 128S438; 32OhA43, 167NE601; 41Wyo168, 283P1105.

18-10 Fla 130S57.

18-18 Iowa 227NW97 (statute must be strictly followed).

19-35 197NC152, 147SE829, 64ALR1047; 145SC364, 142SE805.

20-43 [c] See 243Mich451, 220NW728. [h] **In Arizona** suit under statute is one in equity, and not at law. 33Ariz466, 266P8.

21-62 228AppDiv591, 240NYS468.

21-63 [e] (2) Iowa 227NW97.

25-93 [d] (3) Where bond and mortgage contain express provision for sale on scire facias in case of default and waiver of right of inquisition and condemnation in behalf of mortgagor, his executors and assigns, sale on execution without inquisition or waiver by mortgagor's grantee is valid. 297Pa136, 146A548.

26-98 294Pa86, 143A500.

26-98½-New. Recovery by scire facias on a mortgage does not involve personal obligation of the mortgagor. 297Pa406, 147A86.

26-2 334Ill619, 166NE517.

27-24 [a] 167La1032, 120S767(1st case); 4LaA339.

27-32 158Md412, 148A816.

30-75 178Ark760, 12SW(2d)400; Ind 165NE547.

30-80½-New. In Porto Rico a forced sale of property situated in the second judicial district of San Juan by order of the first district court of San Juan in foreclosure proceedings brought in such court is void for want of jurisdiction. 33PortoRico394.

31-92 [a] **Objection made after award of payment of mortgage debt** is too late. Alta [1930] 4DomLR76.

31-95 [a] **Defenses not available.**-24F(2d)48.

31-97 133Misc376, 232NYS381. [a] **Mortgagor has been held entitled to reasonable notice** of subsequent foreclosure where his tender was refused. NJ 151A594.

31-8 96Fla719, 119S114. [a] **Prematurity of simultaneous action against stranger for waste** is not available to mortgagor as defense in foreclosure action. 227AppDiv448, 238NYS188. [b] **Failure to place purchasers in possession before suit** does not make foreclosure premature. 41F(2d)165.

31-11 12PortoRicoFed534.

31-11½-New. Superior outstanding title in third person is no defense in mortgage foreclosure action. TexCivA 5SW(2d)203.

31-11½-New. That the proceeds of a nonnegotiable mortgage note executed by joint adventurers were used for a common benefit other than the purpose agreed on is no defense. 205Iowa1185, 219NW315.

31-11¼-New. Damage caused to property by hurricane or decline in real estate values is no defense to foreclosure of mortgage. 99Fla277, 126S293.

31-11½-New. Defenses held not available. Iowa 231NW309.

32-28 See also 217Ala166, 115S103.

32-32½-New. In scire facias sur mortgage, when the terre tenant is made a party, he is bound to make every defense available which, generally speaking, includes such defenses as the mortgagor might make, except those treated as personal. 294Pa86, 143A500.

32-38 99Fla277, 126S293 (partial failure of consideration may be set up); Ida 293P327; 336Ill178, 168NE277, 66ALR181; 133Misc577, 232NYS659; 137Misc498, 243NYS716; 230AppDiv866, 245NYS140; 231AppDiv11, 245NYS505. But see 41F(2d)165; 244Mich54, 221NW143. [b] (2) See also 336Ill178, 168NE277, 66ALR181. (4) Purchaser and mortgagor of land by exchange could not recoup damages for being kept out of possession in view of agreement of parties. 336Ill178, 168NE277, 66ALR181. (5) Defendants cannot recoup damages for failure to pay mortgages, interest, and taxes on exchanged land where agreement did not require either party to assume mortgages. 336Ill178, 168NE277, 66ALR181. [c] (5) Where, in bill to foreclose purchase-money mortgage, mortgagor asserted as set-off damages by reason of misrepresentations negativing existence of oral grant of right to maintain siding, it was held that claim was untenable, since easement in land could not be granted by parol. 103NJEq167, 142A645. (6) On foreclosure of purchase money mortgage, mortgagor may reduce mortgagee's demand to extent of damages resulting from breach of covenant against encumbrances in his deed. NJ 151A731. [e] (6) 130Or590, 280P511. [j] **In federal courts,** under Equity Rules, rule 30, the right to assert counterclaim arising out of subject of suit applies only to equitable claims. 24F(2d)48.

34-41 NJCh 151A105(2dcase) (action by assignee of mortgage); 137Misc498, 243NYS716. [c] **Affirmative relief affecting property to which action relates** may be claimed under cross complaint seeking damages arising out of trespass or injury to property. 47Ida58, 272P704.

34-44 Ida 293P327.

34-44½-New. As respects counterclaim, defendants in foreclosure, not setting up equities against plaintiff, cannot, before judgment, litigate priorities. 131Misc275, 227NYS141.

34-44¼-New. Sufficiency of reply to counterclaim. 137Misc16, 242NYS125.

34-51 133Misc577, 232NYS659.

35-66 [a] **Statutes permitting revival against heirs.**-Ark 30SW(2d)845.

35-67½-New. A mortgagee may forfeit a claim to a mortgage lien by failing to revive suit against the heirs within a year after the mortgagor's death, under statute. 178Ark784, 12SW(2d)869.

35-69 179Ark846, 18SW(2d)351; 97Fla148, 120S1(1stcase).

36-35 [b] **Second mortgagee should protect himself** where mortgagor is not personally liable. 137Misc136, 241NYS490.

37-12 102NJEq1, 139A514.

38-22 [a] Where damages from breach of covenant against encumbrances exceed amount of purchase money mortgage mortgagor may stay foreclosure until damages are paid or incumbrance removed. NJErr&A 151A731.

39-59 [c] **Counterclaim to restrain foreclosure** held sham and frivolous. 102NJEq320, 140A580.

39-65 [b] 177Minn425, 225NW273.

39-66½-New. Where injunction was obtained without bond, plaintiff is not entitled to prove damages. 165La136, 115S413.

40-74 See also 165La136, 115S413.

40-82 See also 165La136, 115S413.

40-85 247IllA440.

40-87 [a] **Trustees.**-41F(2d)74.

40-91 218Ala480, 119S15(1stcase); Tex CivA 5SW(2d)799.

40-94 [a] (6) Wife of grantee who either became trustee for mortgagors or acquired property as gift. 147Wash214, 265P180.

41-6 83Mont68, 271P695.

41-11 [c] **Allegations held sufficient** to show that all bonds secured by trust deed had been paid except those held by complainant. 218Ala555, 119S665.

42-31 218Ala332, 118S587; Fla 130S445.

43-34 Ala 128S783.

43-36 111Conn106, 149A397 (absolute and conditional assignees).

43-38½-New. In an action to foreclose a mortgage and recover on a note relating to a mortgage indebtedness, it is not error to retain as defendant the original owner of the mortgage who was plaintiff's assignor, notwithstanding no affirmative relief could be obtained against him where judgment against him is demanded and the complaint denies that he has any interest in the bond and mortgage. 148SC133, 145SE692.

44-48 TexCivA 1SW(2d)672. [b] In Utah.-286P936.

44-50 41F(2d)326; 85IndA161, 152NE723.

45-66 18F(2d)379; 46Ida534, 269P82, 83 [citCJ].

45-67 181Ark511, 27SW(2d)789.

45-71 98Fla726, 124S35.

45-75 NJCh 151A501.

46-80 See also 150Va515, 143SE741.

46-97 83Mont68, 271P695. But see 249IllA10.

47-2 80Mont453, 260P1051.

47-4 228AppDiv591, 240NYS468.

47-13 96Fla40, 117S846; 128Kan107, 275P1081, 67ALR966; 80Mont453, 260P1051. [h] **Holder of legal title of property** must be made party to foreclosure proceeding in order that purchaser at sale will obtain his title. 96Fla40, 117S846.

48-17 But see 219Ala50, 121S54.

49-23 96Fla40, 117S846; TexCivA 9SW(2d)452. But see 51Philippine403. [f] (4) 299Pa51, 149A87 (service on wife of deceased owner). (5) Where mortgagor has died, terre tenants are necessary parties. 294Pa86, 143A500.

49-25 179Ark421, 16SW(2d)457.

50-28 196NC733, 147SE9.

50-29 NJCh 151A117. [b] **Omission as parties defendant of intermediate grantees, assuming mortgage,** does not preclude recovery against grantee in subsequent suit for deficiency. NJCh 151A117.

50-31 51Philippine403.

51-63 218Ala332, 118S587; 98Fla1026, 125S237. See also 93CalA695, 270P394.
52-67 TexCivA 1SW(2d)670.
52-68 99Fla1169, 128S420 (proper party).
52-69 [d] **Wife not grantee of deserting owner** is not terre tenant. 299Pa51, 149A87.
53-75½-New. Where husband mortgaging alleged homestead falsely represented himself as unmarried and wife subsequently joined in conveyance, wife is not proper party. Ark 31SW(2d)136.
53-84 219Ala652, 123S18; 178Ark784, 12SW(2d)869; Ark 30SW(2d)845; 84 Colo 544, 272P631.
54-88 [a] (2) 294Pa86, 143A500. (7) It is better practice to name both heirs and executors or administrators as parties. 294Pa86, 143A500. (8) Mere fact that administrator is not made party would not defeat judgment. 294Pa86, 143A500.
54-94½-New. In scire facias sur mortgage, where the mortgagor was dead, the fact that no judgment was procured against the administrator would not save heirs from the effect of foreclosure. 294Pa86, 143A500.
54-94½-New. nor would it render judgment against terre tenants invalid. 294 Pa86, 143A500.
55-4 TexCivA 5SW(2d)799; TexCivA 21SW(2d)72.
55-10 TexCivA 5SW(2d)203.
56-15 217Ala166, 115A103.
56-17 See also Ala 128S132.
56-18 136Misc151, 239NYS269 (to liquidate amount due).
57-21 136Misc151, 239NYS269.
57-23 80Mont453, 260P1051.
57-25 43F(2d)306; 46 Ida724, 271P5, 6 [citCJ]; 197NC617, 150SE120. But see 219Ala652, 123S18.
58-30 Fla 130S725.
58-31 208 Iowa545, 223NW891.
59-44 252 IllA290; 131Misc446, 226 NYS129. But see 227AppDiv390, 236 NYS361; 240NYS197.
59-45 [b] **Defaulting defendants** cannot resist deficiency judgment for failure to make tenants parties where they knew of existence of leases. 227AppDiv 390, 236NYS361.
59-45½-New. Lessee, to whose interest lien of prior mortgage has been subordinated, is not necessary party. 131 Misc446, 226NYS129.
60-57½-New. There is no misjoinder because the right to recover from some defendants is based on allegations in which others were only indirectly interested. 128Kan107, 275P1081, 67ALR 966.
60-59 [c] **Denial of intervention** held not abuse of discretion. 43F(2d)777.
60-60 299Pa51, 149A87. [h] **Persons claiming deed to mortgagor was fraudulently obtained from them** can defend against foreclosure. 227AppDiv516, 238 NYS222. [i] **Petition for intervention will be denied** where petition does not show right to relief obtainable in no other way. 299Pa76, 149A84. [j] **Under common practice**, cestui que trust of equity of redemption could not intervene in mortgage foreclosure suit. NJ Ch 151A501.
62-79 [a] (3) Other instances. Iowa 227NW635.
62-81 99Fla253, 126S356 (purchaser of mortgage). But see 247Mich340, 225NW 594.
62-96 See also 48Philippine367.
62-1½-New. Grantee of land encumbered by deed of trust cannot object to transfer of trust prayed for by certain intervening bondholders, on ground majority of bondholders had not consented thereto. Iowa 229NW691.
63-3 NJCh 151A501.
64-30½-New. Where the fact of the mortgagor's death is discovered after beginning the action, an order may be obtained before any effective step is taken appointing an administrator ad litem. Alta [1929] 1DomLR463.
64-34 Ala 128S783.
66-51 [c] **Notice to defendant by name** appearing in record of mortgage is sufficient. Fla 129S848.
68-1 178Ark1019, 14SW(2d)245(2d case); 80Mont453, 260P1051.
68-2 [g] **In Idaho.**-48 Ida711, 284P 1034.
68-5 [d] (7) Where defendant mortgagor was fugitive from justice, service made by delivering copy of summons with copy of complaint to minor son over fourteen years of age, at plaintiff's usual place of abode, is sufficient. 123 Or237, 261P689.
69-6 80Mont453, 260P1051.
69-17 Ala 128S438; 206Cal 221, 273P 558; 96Fla327, 118S60. [f] **Affidavit for publication held insufficient.**-173Minn 580, 218NW110 (description of property not showing location within state); 222 AppDiv768, 226NYS182 (failure to specify each separate attempt to serve personally). [g] **Service may be had by personal service** outside state. Iowa 233 NW126.
70-18 [b] **Cure of defect.**-222AppDiv 768, 226NYS182.
70-19 96Fla327, 118S60.
71-24 123 Or237, 261P689.
71-27½-New. In Porto Rico failure of an affidavit of service of summons and demand for payment in a summary foreclosure proceeding to state that the person serving it was over eighteen years of age, where such person was not the marshal, is not cured by a statement of the official before whom the affidavit was made that affiant was of age. 33Porto Rico959.
72-43 [c] (2) To foreclose defendant's after-acquired interest. 80Mont453, 260 P1051. (3) Pleadings in action to foreclose mortgage on partnership land held sufficient to give court jurisdiction. Tex CivA 3SW(2d)925. (4) Other instances. 181Ark511, 27SW(2d)789.
75-94 Ala 130S900.
76-3 95CalA403, 273P58.
76-9 [f] **Bill of complaint on mortgage securing note and "any other debts due or advances received"** held not to show right to foreclosure to collect subsequent note. 220Ala499, 125S615 (insufficient allegations as to parties to note sought to be held as sureties).
77-15 249 IllA539.
77-22 32Ariz596, 261P48.
78-24 47 Ida446, 276P309; 80Mont453, 260P1051.
79-33 32Ariz596, 261P48, 49 [citCyc].
80-17 137Misc242, 242NYS576.
80-45 [a] (8) In general. 220Ala689, 127S169.
81-55 Utah 264P975.
81-61 But see 227AppDiv669, 236NYS 116.
82-68 208 Iowa970, 226NW117.
82-71 See also TexCivA 8SW(2d)516.
82-72 Ala 128S783; Fla 129S698. [a] (2) Allegation that defendants "became bound and liable to pay and promise to pay plaintiff sums of money that said notes specified * * * according to the tenor and effect of said notes" is insufficient to supply want of allegations of ownership, execution, and delivery of notes to plaintiff. TexCivA 8SW(2d) 516. [c] **Allegations held insufficient.**-Ala 128S783.
84-88 See also 218Ala555, 119S665.
84-90 96Fla337, 118S3.
85-7 207 Iowa9, 216NW722. [a] 207 Iowa9, 216NW722.
85-9 98Fla576, 124S24 (allegation that mortgagor was owner and in possession held sufficient).
87-26 [a] (2) Junior mortgagee must establish prior liens so that they may be transferred to proceeds of sale. 136 Misc151, 239NYS269.
87-30 101CalA659, 282P23.
88-38 [a] 41Wyo 168, 283P1105.
88-42 80Mont453, 260P1051.
88-42½-New. In Philippines sale may be ordered although not expressly prayed for where allegations show that action is for recovery of mortgage debt. 51Philippine224.
88-47 99Fla451, 127S321.
89-67 [b] **Failure to deny execution of mortgage operates as admission** of its genuineness and due execution. 98CalA 615, 277P513.
89-68 [c] See also 33Ariz374, 265P84 (averments held sufficient).
90-74 123 Or661, 263P890.
90-77½-New. In New Jersey a notice by defendant to have his lien reported upon in a foreclosure suit is a substitution for an answer under the old practice, and is to be treated as such. NJ 144A110.
90-77½-New. Mortgagor suing in conversion for damages to wheat crop on mortgaged land need not plead right to crop in foreclosure action which did not seek to divest him of interest in rents accruing prior to decree. Mont 286P402.
90-78 135 Okl 85, 274P36.
90-85 205Cal 590, 271P1070.
91-1 98Fla565, 124S14.
91-29 95Fla498, 116S498.
92-37 [a] (2) Other instances. 230App Div548, 245NYS256.
92-38 33Ariz506, 266P16; 176Ark1204, 4SW(2d)14.
93-44 [b] 137Misc498, 243NYS716.
93-46 86 IndA653, 159NE469.
93-47½-New. Defense by third mortgagee to foreclosure of second mortgage alleging estoppel held not insufficient because of statute of frauds. 229AppDiv 184, 241NYS290.
93-47½-New. Defense to foreclosure of second mortgage alleging conspiracy to wipe out third mortgage held insufficient. 229AppDiv184, 241NYS290.
93-48 99Fla1056, 128S250.
94-64 [a] (2) Answer setting up defense that default was result of honest mistake is erroneously stricken on motion. NJ 150A576.
95-87 [a] **Great public acclaim** may create presumption of validity. 39F(2d) 769.
96-91 [g] **Shortage in property conveyed** held not good counterclaim in action to foreclose purchase-money mortgage. 103NJEq106, 142A309.
97-1 125Kan617, 265P1106. But see 97Fla386, 120S761.
98-28 But see 125Kan617, 265P1106.
99-37 157Md40, 145A202. [a] (4) Other instances. 47 Ida13, 271P927. (5) Counterclaim for breach of agreement to furnish mortgagor with funds to purchase cotton seed can be interposed. 156 SC103, 152SE876. [c] (3) To state cause of action for reformation of deed. 198 Wis506, 224NW480.
99-38 See also 247 IllA440. [a] (5) Counterclaim is unauthorized under code, where not arising from contract or transaction pleaded in complaint nor connected with subject of action, and not setting off one contract against another. 32Ariz552, 261P33. [d] **Cause of action based on assumption of mortgage by grantee** is directly connected with subject of action in foreclosure of mortgage. 35 OhA429, 172NE445.
101-63 227AppDiv337, 238NYS67 (waiver must be pleaded).
101-72 47 Ida13, 271P927.
102-93 111Conn106, 149A397.
102-97½-New. That a supplemental complaint served on defendant in a foreclosure action was not filed until the day when the findings and judgment were signed is not material error. 93CalA695, 270P394.
104-26 116Nebr305, 216NW944.
104-28 116Nebr305, 216NW944.
104-31½-New. Issue as to whether mortgagee had employed attorney to collect notes held raised by pleadings. CalA 290P70.
104-32½-New. Homestead. An answer to a verified complaint is insufficient to put a homestead in issue where, under statute, the homestead is not pleaded in the answer. 98CalA615, 277P513.
104-32½-New. No issue as to regularity of foreclosure proceedings on first mortgage in action on bond secured by second mortgage extinguished in such proceedings. 136Misc286, 240NYS643.
104-38 116Nebr305, 216NW944.
106-54 [h] **Title of mortgagor.**-207 Iowa9, 216NW722.
107-76 [a] (12) Evidence of waiver of defense by defendant held not admissible under denial in reply. 227AppDiv 337, 238NYS67.
107-80 [a] (2) Where there is assumption clause in deed, plaintiff, under proper pleading, may prove that such agreement was because of consideration passing from himself to grantee. 204 Iowa1283, 213NW617. (3) Unquestioned allegation to effect that such assumption

agreement was "as a part consideration of said conveyance and of said transaction" was sufficient to justify such proof. 204 **Iowa**1283, 213**NW**617.

107–82½–New. Under an allegation that defendant made, executed, and delivered the instrument, ratification or adoption of signatures may be shown. 206 **Iowa** 664, 221**NW**210.

108–91 [a] (2) Allegation that defendants executed and delivered mortgage and notes and proof that mortgage and notes were accommodation paper executed to third person and by him delivered. 253 **IllA**469.

109–17 35**Ariz**130, 274**P**1043.

110–25 177**Ark**656, 7**SW(2d)**755.

110–31 **CalA** 273**P**1070; 133**Misc**14, 231 **NYS**335.

110–36 102**NJEq**1, 139**A**514.

110–38 **Fla** 130**S**274.

111–60 32**Ariz**552, 261**P**33.

111–62 **CalA** 288**P**684; 38**GaA**753, 145 **SE**471; **TexCivA** 5**SW(2d)**255.

111–65 **CalA** 288**P**684.

112–72 **TexCivA** 12**SW(2d)**625.

112–77½–New. A draft by which the mortgagee claims that a loan was paid to the mortgagor is inadmissible where the mortgagor denies indorsement thereon, under provision of statute, and alleges forgery. 177**Ark**656, 7**SW(2d)**755.

112–93 47 **Ida**589, 277**P**548.

113–3 **IndA** 170**NE**544. [i] **Evidence held insufficient to sustain affirmative defenses.**–129 **Or**262, 277**P**85. [j] **Evidence held sufficient** to show that land was worth amount of all liens. **Iowa** 231**NW**309. [k] **Evidence held to establish that mortgagor's deed from his grantor was not fraudulently obtained.**–**Wash** 291**P**1105.

114–21 38**GaA**753, 145**SE**471.

114–24 [b] (2) Conflicting evidence as to indebtedness secured may be sufficient. 179**Ark**661, 17**SW(2d)**877. (3) To justify finding that mortgage was given to secure future as well as existing indebtedness of mortgagor's son. **NJ** 146**A**188.

114–25½–New. Evidence has been held sufficient to show a valid subsisting mortgage. 50**Philippine**501.

114–25½–New. Evidence has been held to sustain a finding of absence of agreement between the assignee of the mortgage and the purchaser of the premises from the mortgagor, releasing the mortgagor from liability on notes. **SD** 228 **NW**466.

114–26 [b] (1) 179**Ark**1199, 15**SW(2d)** 324.

115–27½–New. Defendant cannot recoup damages for breach of agreement of the vendor upon evidence leaving the amount of damages wholly conjectural. 336 **Ill** 178, 168**NE**277, 66**ALR**181.

115–29 177**Ark**770, 9**SW(2d)**3.

116–37 **NJCh** 148**A**392(2dcase).

116–41 156**SC**203, 152**SE**878 (withheld or concealed).

116–48 [a] (1) 178**Ark**699, 11**SW(2d)** 488; 125**Kan**687, 266**P**47; 232**Ky**844, 24**SW(2d)**912. (2) 336 **Ill** 178, 168**NE** 277, 66**ALR**181 (reliance on fraudulent representations); **TexCivA** 13**SW(2d)** 227. [h] **Defects in title.**–**NJCh** 151**A** 497.

117–55 [c] **Evidence as to application of payments** held to sustain finding of default. 143**SC**275, 141**SE**454. [d] **Evidence held sufficient to show that foreclosure was not premature.**–129 **Or**262, 277**P**85.

117–62 116**Nebr**291, 216**NW**831. [b] 45 **Ida**541, 263**P**1002; 52**SD**448, 218**NW** 597. [f] **Discharge.**–58**ND**475, 226**NW** 628. [g] **Evidence held sufficient to show contract for repurchase.**–98**Fla**233, 123**S**740.

118–64 252 **IllA**390 (evidence held sufficient); **IndA** 170**NE**544; **NJCh** 148**A** 392(2dcase).

118–75 **Mont** 288**P**1023.

118–76½–New. Evidence held sufficient to prove signature of indorser of note. **Mont** 288**P**1023.

118–79 [a] **Evidence held sufficient** to show that lease of mortgaged premises for stated monthly rental was paid up by giving mortgagor stock in corporate lessee, which thereby became owner of leasehold. 130 **Or**177, 279**P**550.

118–81 131 **Okl** 9, 267**P**481.

118–81½–New. Evidence in a suit to foreclose a mortgage has been held insufficient to establish that the grantees of the mortgagor were in constructive possession of the premises on the date that the mortgage was executed. 335 **Ill** 129, 166**NE**523.

119–85 99**Fla**987, 128**S**241.

119–91 [a] **In Pennsylvania.**–13**PaDist &Co** 73.

119–94 220**Ala**276, 124**S**858(2dcase).

119–96 205 **Iowa**176, 218**NW**46.

120–99½–New. In Alberta a receiver may be appointed whether or not the mortgagee has the right to go into possession. **Alta** [1929] 2**DomLR**468.

120–5 [a] **In Oklahoma.**–143 **Okl** 162, 288**P**476.

120–8 [a] **Appointment not precluded** by fact that alternative writ of prohibition had issued against order in injunction proceedings restoring property to mortgagors. 38**Wyo** 223, 266**P**128.

120–10 But see 144 **Okl** 105, 289**P**728.

120–12 [a] **In Oklahoma.**–143 **Okl** 162, 288**P**476.

120–15 255 **IllA**45 (compliance with statutory requirements is necessary); 204 **Iowa**328, 213**NW**417; 144 **Okl** 105, 289**P**728. [b] 83**Mont**343, 272**P**532; 144 **Okl** 105, 289**P**728.

120–16 204 **Iowa**328, 213**NW**417; 144 **Okl** 105, 289**P**728.

121–20½–New. Where court is without jurisdiction to foreclose mortgage, it is without authority to appoint receiver. **Ida** 288**P**419.

121–25 204 **Iowa**1220, 216**NW**953; 248 **Mich**76, 226**NW**892 (mortgagor who has conveyed).

121–40 [c] **Injunction refused against interference with land not subject of foreclosure.**–83**Mont**21, 269**P**162.

121–48 204**Cal** 23, 266**P**278; 99**Fla**540, 128**S**12; 99**Fla**987, 128**S**241; 204 **Iowa** 1220, 216**NW**953; 205 **Iowa**48, 217**NW** 428; 207 **Iowa**164, 219**NW**528; 206 **Iowa**746, 221**NW**347.

122–49 46 **Ida**635, 269**P**593.

122–53 204 **Iowa**328, 213**NW**417. But see 26 **OhNPNS**371.

122–56 205 **Iowa**48, 217**NW**428.

122–58 38**Wyo** 223, 266**P**128.

122–67 [a] **Mining property.**–13**Porto RicoFed**436.

122–68 38**F(2d)**850; 249**Mich**252, 228 **NW**785; 173**Minn**18, 216**NW**329 (dictum). [a] **In Pennsylvania.**–13**PaDist &Co** 73.

123–75 204 **Iowa**622, 215**NW**613.

123–77 99**Fla**540, 128**S**12 (danger to right to pledge); 247**Mich**524, 226**NW** 233; 32 **OhA**547, 168**NE**388; 26 **OhNP NS**371; 193**Wis**503, 215**NW**571, 55**ALR** 525. See also 46 **Ida**642, 269**P**595, 596 [citCJ]. [b] **Controversies between tenant who paid in advance and receiver** are governed by equitable principles. 193**Wis**503, 215**NW**571, 55**ALR**525. [c] **Receiver held not entitled to collect rent** from tenant who had advanced money for improvements, to be applied on rent. 193**Wis**503, 215**NW**571, 55**ALR**525.

123–81 205 **Iowa**414, 215**NW**960; 205 **Iowa**1273, 218**NW**42.

123–83½–New. A receiver may be appointed to care for immature crops which are subject to litigation. 206 **Iowa**746, 221**NW**347.

123–87 173**Minn**18, 216**NW**329.

124–91 **Colo** 292**P**1108; 99**Fla**987, 128 **S**241.

124–92 **Iowa** 229**NW**724 (where makers of secured note are insolvent or security is inadequate).

124–97 99**Fla**987, 128**S**241.

124–99 144 **Okl** 105, 289**P**728.

124–2 144 **Okl** 105, 289**P**728.

124–5½–New. Receivership clause is, in effect, pledge of rents and profits. **Iowa** 229**NW**724.

124–6 **Ind** 165**NE**547; 249**Mich**252, 228 **NW**785.

124–7 173**Minn**18, 216**NW**329. [a] **Failure to pay taxes does not constitute waste** authorizing appointment of receiver. 13**PaDist&Co** 73.

124–9 176**Minn**71, 222**NW**516. See also 205 **Iowa**48, 217**NW**428.

125–20 [b] **Right of mortgagee to continue application till after decree and sale.**–205 **Iowa**1273, 218**NW**42.

125–21 [a] **Application for appointment may be continued till after sale on execution.**–205 **Iowa**176, 218**NW**46.

125–27 82**CalA**723, 256**P**285. [c] 82 **CalA**723, 256**P**285.

125–29 205 **Iowa**1273, 218**NW**42.

125–36 [b] (2) Civ. Pract. Act § 975, requiring notice of application for appointment of receiver where mortgage does not provide for it without notice, has been held mandatory, and party is not estopped to move to set aside receivership by mere lapse of time. 226**App Div**809, 234**NYS**428. [d] (5) Second mortgagee not party to third mortgagee's action is not entitled to notice. 137 **Misc**5, 244**NYS**165.

126–40 252 **IllA**417 (interested parties are entitled to be heard).

126–42½–New. The court may appoint a receiver without notice where the mortgagor absents himself. 206 **Iowa** 746, 221**NW**347.

126–44 54**SD**85, 222**NW**596. [a] (1) **Colo** 292**P**1108; 206 **Iowa**746, 221**NW** 347. [b] (3) To show that property was worth less than debt. 54**SD**85, 222**NW** 596. [c] **Prima facie case for appointment of receiver pendente lite** is made by bill to foreclose mortgage pledging rents and profits and authorizing appointment of receiver. 99**Fla**987, 128**S** 241.

126–47 33**F(2d)**496 (appointment of receivers for corporation in suit by president as bondholder held proper as against contention that he owned no bonds).

126–48 [a] **Order of appointing receiver without bond** must contain findings of fact showing compliance with statutory requirements. 255 **IllA**45.

126–49½–New. Order appointing receiver which provides compensation for him on commission basis after sale, whether there was deficiency or not, is erroneous. 255 **IllA**395.

127–63½–New. A court having appointed a receiver for a corporation in a suit by its president as bondholder will not appoint other receivers on intervening bondholders' cross bill recognizing the corporation's insolvency. 33**F(2d)**496.

127–65 255 **IllA**45; 255 **IllA**395. [a] See also 204**Cal** 460, 268**P**907.

127–68 255 **IllA**395 (in court's discretion).

127–69 252 **IllA**417; 255 **IllA**45.

127–71 [b] **Court may summarily fix reasonable rent** which tenant shall be required to pay receiver. 230**AppDiv** 106, 243**NYS**314. [c] **Appointment of receiver presents execution by others against property.**–43**F(2d)**130.

127–73–74½–New. A mortgagor who avoids service of notice of appointment of a receiver may not complain that notice was not served. 206 **Iowa**746, 221 **NW**347.

127–76 [a] (2) Receivership in proceeding to foreclose senior mortgage held to terminate when judgment was satisfied. 204 **Iowa**541, 215**NW**609.

127–83 But see 137**Misc**5, 244**NYS**165.

128–95 130**Misc**695, 224**NYS**636.

128–97 130**Misc**695, 224**NYS**636.

128–99 [a] **Foreclosure defendant conveying premises,** for consideration, to complainant after foreclosure decree to avoid expenses of execution, held entitled to rents collected by receiver. **NJ** 147**A**474(2dcase).

128–1 204 **Iowa**1338, 217**NW**248; 136 **Misc**704, 242**NYS**192; 13**PortoRicoFed** 139. See also **SD** 227**NW**888. But see 137**Misc**377, 244**NYS**26. [e] 131**Misc**385, 226**NYS**649. [h] **As against assignee of lease,** who knew of foreclosure action and did not intervene, receiver is entitled to rents received from tenant remaining in possession under agreement with receiver, especially where assignment was fraudulent and without consideration. **Iowa** 228**NW**632. [i] **Tenant must pay reasonable rent** in excess of that called for in lease or surrender possession. 230 **AppDiv**106, 243**NYS**314.

128–2 336 **Ill** 450, 168**NE**266; 130**Misc** 695, 224**NYS**636; 13**PortoRicoFed**139.

128–4 134**Misc**692, 236**NYS**549.

128–5½–New. Mortgagor's consent to receivership bars his right to rents. 204 **Iowa**603, 215**NW**645.

128–5½–New. An order appointing a receiver and authorizing him to rent the premises is not conclusive on the holder

of an assignment of a lease from the lessor intervening in the foreclosure suit, whose claim was known to the receiver. 205 Iowa1203, 219NW517.

128-5¼-New. Such assignee is entitled to the rents for the current year, notwithstanding the mortgage pledged the rents and profits where the receiver was appointed after the crops matured and it does not appear that he rented the property for the current year. 205 Iowa 1203, 219NW517.

128-5⅓-New. Attachment of rents before appointment of a receiver constitutes such severance as to place them beyond the reach of the receiver. 134 Misc692, 236NYS549.

128-5⅙-New. Whether tenant should be required to pay rental during pendency of foreclosure action rests in discretion of court of equity. 137Misc377, 244NYS26.

128-6 252 IllA281 (receiver held not entitled to rents in hands of renting agent retained to apply on commissions, under provision for application of net rentals on secured note, where mortgagee had acquiesced in retention for several years). But see 136Misc704, 242NYS 192.

128-8 See also 255 IllA62.

129-17½-New. Order directing receiver to collect proceeds of crops already picked at the time of his appointment is void. 81CalA213, 253P346.

129-17⅓-New. and payment, by the seller of the crops, of proceeds to the receiver is a defense to an action by the mortgagor's assignee for money had and received. 81CalA213, 253P346.

129-17¼-New. A crop in the possession of a receiver remains in custodia legis regardless of settlement of foreclosure action, and it is his duty to retain possession till ordered by court to make disposition. Iowa 225NW865.

129-17⅙-New. The manager of premises who had the right to share a portion of the rents and profits and to keep a room therein had such an interest as would justify her in refusing to pay over money to the receiver, appointed without authority. 128 Or684, 274P 1104.

129-17⅛-New. Where a receiver was legally entitled to possession of a crop at the time he took possession thereof, his agent's refusal to surrender possession thereof to the holder of a mortgage thereon prior to making of a report by the receiver or the making of an order in the premises is not a conversion. Iowa 225NW865.

129-17 1/7-New. The fact that a manager of premises recognized the receiver's authority does not estop the manager from refusing to turn over money to receiver having no right thereto on being further advised of her rights. 128 Or 684, 274P1104.

129-31 [a] **Payments court cannot authorize.**-SD 230NW281.

129-36 248NY561, 162NE525.

129-37 136Misc704, 242NYS192.

130-43 133Misc364, 231NYS674.

130-51½-New. Conflict of rights between receiver in suit to foreclose senior mortgage and receiver to foreclose junior mortgage. 138Misc68, 245NYS281.

130-60½-New. Where a stipulation between the parties, pursuant to which foreclosure judgment was entered, contemplated that the receiver should be appointed for the specific purpose of collecting rent then due, and not rent due for the year of redemption, the fact that a foreclosure sale was had and judgment satisfied does not entitle defendant to have the receiver discharged. 207 Iowa236, 222NW363.

130-68½-New. Parties obtaining the appointment of a receiver are not liable for deficiency where he was regularly appointed and the parties received no undue benefit. 102CalA144, 282P960.

130-68⅓-New. Court held to have surcharged in proper amount personal property of mortgagor not retained in receiver's custody when redemption period expired. 179Minn362, 229NW349.

130-68¼-New. Plaintiff held to have in effect applied on delinquent taxes the amount paid by receiver to him as interest on prior mortgages. SD 230NW 282.

130-68⅕-New. Trial court held to have properly refused to surcharge receiver with property bought in by his attorney under conditional sales contract. 179 Minn362, 229NW349.

130-68⅙-New. Owner of equity in mortgaged premises is entitled to accounting for rents and profits from date of appointment of receiver. 339 Ill 304, 171NE267.

131-69 109Conn329, 146A724; 179 Minn362, 229NW349; 54SD131, 222NW 946(2dcase). [a] (3) Defendants held not to have acquiesced in payments by receiver of interest and taxes from rents. SD 230NW282.

131-70 109Conn329, 146A724; 54SD 131, 222NW946(2dcase).

131-71 136Misc704, 242NYS192 [c] **Expenses of general receivers in operating property** and their fees and attorney's fees held not entitled to precedence over those of foreclosure receiver. 179 Minn362, 229NW349.

131-73½-New. Where a receiver's appointment was invalid and the mortgagee purchased the property at the foreclosure sale, a lien should be impressed on the land as an entirety for money which the receiver illegally paid at the mortgagee's request and for his benefit. 116Nebr230, 216NW668.

131-73⅓-New. In such case the mortgagee and not the receiver should be required to reimburse the mortgagor for money expended by the receiver, at the instance of the mortgagee, for taxes subject to which the property was sold. 116Nebr230, 216NW668.

131-73¼-New. The court should order the receiver to pay interest on a senior mortgage. 109Conn329, 146A724.

131-79½-New. Where a receiver's appointment was invalid an allowance of attorney's fees should not be made where the receiver did not apply for the appointment and no showing of necessity is made. 116Nebr230, 216NW668.

131-82½-New. Where the receiver's appointment was invalid and the mortgagee purchased the property at the foreclosure sale, money spent by the receiver for repairs at the request of the mortgagee should be reimbursed by the mortgagee and not by the receiver. 116Nebr 230, 216NW668.

131-83 But see 226AppDiv809, 234NYS 428.

131-84 227AppDiv427, 237NYS468. But see 137Misc5, 244NYS165.

131-89 38F(2d)457.

132-91 IndA 169NE882.

132-92½-New. Owner of fee, occupying portion of premises covered by receiver's foreclosure proceedings, must comply with order requiring him to pay occupation rent. 131Misc385, 226NYS 649.

132-92⅓-New. An order authorizing the receiver of rents and profits to pay prior installments of interest on prior mortgages was permissive, and not mandatory, and authorized him to pay interest only after it had become due and payable by the terms of prior mortgages. 225AppDiv567, 233NYS588.

132-92¼-New. Where the mortgagee procures dismissal of his bill at his own cost, he is not entitled to rents collected by the receiver, although the mortgage gives the mortgagee the right to enter and collect rents on default. 252 IllA473.

132-92⅕-New. Where there is no deficiency, the rents belong to the owner of the equity. 252 IllA473.

132-92⅙-New. Where a sale is postponed to get a better price, rents and income should, in the meantime, be preserved by the receiver for application on a mortgage indebtedness. 153SC1, 150SE310.

132-92 1/7-New. Order in action by third mortgagee authorizing receiver to pay insurance, taxes, and interest on prior mortgages held permissive only. 137 Misc5, 244NYS165.

132-96 136Misc704, 242NYS192; Tex CivA 19SW(2d)1113 (rents held not available to intervening senior mortgagee whose original petition did not comply with statute).

132-97½-New. Where a senior mortgage contains no pledge of rents or receivership clause, senior mortgagee's right to rents is subordinated to junior mortgagee's right under such clauses in his mortgage. 204 Iowa622, 215NW613.

132-97⅓-New. and such right of the junior mortgagee is not affected by the senior mortgagee's showing that the mortgagor is insolvent. 204 Iowa622, 215NW613.

132-97¼-New. A receiver, collecting rent due from a tenant for the current year with knowledge of the claim of an assignee of the lease from the owner, must give notice to the assignee of the contemplated disposition of such rentals. 205 Iowa1203, 219NW517.

132-97⅕-New. In such case an order made without notice to the assignee, directing payment of such rents to the mortgagee, is not binding on the assignee. 205 Iowa1203, 219NW517.

132-97⅙-New. In such case the receiver must account to the assignee for such funds when he promptly intervenes in the receivership proceeding prior to its termination. 205 Iowa1203, 219NW517.

132-97 1/7-New. A senior mortgagee procuring a decree of strict foreclosure during the pendency of a suit by a junior mortgagee, in which a receiver was appointed, is entitled to rents collected during the period prior to the strict foreclosure decree. 109Conn329, 146A 724.

132-99 204 Iowa622, 215NW613. See also SD 226NW341. [a] **Mortgagee's receipt of money is conversion** where court, without jurisdiction to do so, ordered payment to mortgagee. SD 226 NW341.

132-1 175Ark780, 1SW(2d)36.

132-3½-New. Rent-money in the hands of a receiver appointed in a senior mortgage foreclosure, after payment of judgment, is payable to the mortgagor in preference to the junior lienholder, foreclosing on cross petition without obtaining the appointment of a receiver of rents pledged in his mortgage. 204 Iowa541, 215NW609.

133-11 249 IllA10.

134-38 46 Ida157, 268P12.

135-49 [g] **Where court has possession of property,** rule is inapplicable. 43 F(2d)521.

136-57 [b] **In Saskatchewan.**-[1929] 4 DomLR1072(2dcase). [c] **Appointment of auditor held not abuse of discretion.**-170Ga642, 153SE751.

137-59 141SC10, 139SE202.

137-62 102NJEq486, 141A452; NJCh 145A641.

137-66½-New. If any defendant files an answer, reference is not authorized. 101NJEq636, 139A338.

137-66⅓-New. Where a defendant raises the issue of misrepresentation in procuring the mortgage, an order of reference is erroneously granted. 141SC232, 139SE465.

138-84½-New. Where an action to recover a debt secured by trust deeds was referred to a commissioner, who made a report and subsequently in addenda showed unpaid taxes and judgment, assignment of error to addenda on the ground that the information on which it was based was secured without notice is without merit. 151Va81, 144SE602.

138-91½-New. Party having right to except to master's report may challenge its correctness in any particular, whether affecting party or not. 101NJEq636, 139A338.

138-91⅓-New. On exceptions to master's report propriety of reference cannot be reviewed. 101NJEq636, 139A338.

138-91¼-New. Master on reference must fix priorities as stated in bill where decree was entered pro confesso. 101NJEq636, 139A338.

138-91⅕-New. Failure to observe court rules relative to no notice of filing and as to setting the case down for hearing may be waived. 98Fla124, 123S561(2d case).

139-96 40GaA23, 148SE749; TexCivA 18SW(2d)1100.

139-7 47 Ida13, 271P927; 227AppDiv 337, 238NYS67 (findings sufficient to

warrant recovery of damages in counterclaim).

139-8 90**CalA**663, 266**P**568.

140-15 197**NC**66, 147**SE**672.

141-38 170**Ga**642, 153**SE**751 (decree held not contrary to law and equity); 125**Kan**687, 266**P**47; 52**SD**133, 216**NW** 876.

142-41 47 **Ida**13, 271**P**927.

142-46½-New. Restricting mortgage foreclosure to part of premises not embraced in a stipulation as owned by a city for street purposes is erroneous in the absence of evidence that the premises embraced in the stipulation were ever used and occupied as a street. 54 **SD**46, 222**NW**492.

142-48 **CalA** 267**P**750; 206 **Iowa**45, 218 **NW**40; 147**Wash**29, 264**P**983. [a] (5) Mortgagee is entitled to judgment for land embraced in mortgagor's disclaimer. **TexCivA** 5**SW(2d)**203.

142-51½-New. Statement in findings as to lien of receiver is of no force when not in decretal portion of same entry. **Iowa** 231**NW**448.

142-51⅓-New. Statement in findings as to lien of receiver was of no force when unsupported by pleading or stipulation for judgment. **Iowa** 231**NW**448.

143-58 But see 41**Wyo** 168, 283**P**1105.

143-62 96**Fla**52, 117**S**850.

145-76 **Iowa** 225**NW**245.

145-77 316**Mo** 1257, 293**SW**382.

145-79 101**CalA**659, 282**P**23; 249 **IllA** 539; 250 **IllA**440.

145-81 [b] But see 116**Nebr**713, 218 **NW**744. [e] **Charges for searching title.**-101**CalA**659, 282**P**23.

146-84 **CalA** 271**P**755; 101**CalA**659, 282**P**23; 45 **Ida**571, 264**P**229.

146-85 32**Ariz**596, 261**P**48.

146-88 [1] **Where interest is waived** because of failure to make improvements, mortgagor cannot claim loss of rent which he might have received if property had been improved. **CalA** 273 **P**1070.

147-90 [i] **Decree expressly retaining jurisdiction,** for purpose of entertaining petition for entry of decree of foreclosure and sale after accounting cannot be attacked on ground that court refused to allow or decree foreclosure. 29 **F(2d)**481.

147-96 **Can** [1929] 4**DomLR**529; **NS** [1929] 3**DomLR**225.

149-15 18**F(2d)**379.

150-36 249 **IllA**539.

151-41 145**SC**364, 142**SE**805. [b] **Provision requiring deposit from successful bidder is not** essential part of terms of sale. 145**SC**364, 142**SE**805.

152-59 [a] **Decree for possession with all rent** applies only to rents at time decree entered and those thereafter accruing and does not affect crop removed from land prior to decree. **Mont** 286**P** 402.

152-65 [f] **Direct judgment for mortgagor against mortgagee,** promising to pay debts against land in consideration of quit-claim deed, has been held erroneous. **TexCivA** 29**SW(2d)**923.

155-88 **CalA** 267**P**750.

155-91 93**CalA**695, 270**P**394.

155-93 125 **Or**682, 267**P**1033. [c] 205 **Iowa**7, 215**NW**732. [j] **Decree subject to crop mortgagee's prior rights.**-91**CalA** 176, 266**P**849. [k] **Where other mortgage creditors cannot be affected by decree,** question of rank of mortgages cannot be finally determined. **LaA** 129**S** 405.

155-95 See also 125 **Or**102, 266**P**245.

155-95½-New. It is not necessary to reserve a day for infant defendants to show cause after attaining majority. **Ont** [1929] 1**DomLR**55.

156-2 **TexCivA** 11**SW(2d)**668.

156-6 95**Fla**103, 116**S**9.

157-10 [b] **Failure to describe land on which dwelling theretofore removed is situated** held not error. **Ida** 290**P**383.

157-18 [d] **Party consenting of record that decree be taken at once,** cannot complain that foreclosure decree was premature. 181**Ark**644, 27**SW(2d)**510.

158-22 See also 244**Mich**588, 222**NW** 211.

158-22½-New. In order that judgment directing sale may be valid, a debt on account of which the sale is directed to be made must exist. 41**Wyo** 168, 283 **P**1105.

158-25 86**Mont**193, 282**P**1042 (defendant not absolved from appearing by entry of judgment one day too soon).

158-28 86**Mont**193, 282**P**1042.

158-31 See also 204**Cal** 23, 266**P**278.

159-32 53**SD**333, 220**NW**866.

159-34 225**Ky**764, 10**SW(2d)**298.

159-38 But see 132**Misc**861, 231**NYS** 133. [a] **Omitted name of one of defendants personally liable** may be added by amendment where shown by record. **Cal** 290**P**447.

160-53 [a] **Court cannot set aside decree for enforcement of mortgage** without setting aside entire judgment. **Tex CivA** 30**SW(2d)**511.

160-54 **Iowa** 231**NW**440 (holding no abuse of discretion in refusing to set aside judgment); 199**Wis**350, 226**NW** 313.

160-58 133**Misc**128, 231**NYS**275.

161-63 96**Fla**327, 118**S**60. [d] **Irregularity in notice of settlement of decree.**-240**Mich**646, 216**NW**442.

161-64 **NJCh** 151**A**760. [b] 174**Ark** 1163, 299**SW**615.

161-66 But see **TexCivA** 30**SW(2d)**511.

161-69 181**Ark**876, 28**SW(2d)**704 (fraud of attorney).

161-70 225**Ky**521, 9**SW(2d)**528.

162-72 [b] (6) Eighteen months. 206 **Cal** 221, 273**P**558. [c] (1) See also **NJ Ch** 151**A**760.

162-75 [a] **In Porto Rico.**-33**PortoRico** 398.

162-81½-New. In Oklahoma a purchaser at a foreclosure sale of a leasehold automatically becomes a party to proceedings subsequently had in the district court on the part of one of defendants to vacate foreclosure judgment. 29 **F(2d)**712.

163-84 [a] **Sufficiency of notice.**-136 **Okl** 20, 276**P**486(2dcase).

163-86 123 **Or**237, 261**P**689.

163-87 174**Minn**46, 218**NW**170. [a] (1) 123 **Or**237, 261**P**689. (2) 123 **Or**237, 261 **P**689. (4) Excusable neglect of defendant. 123 **Or**237, 261**P**689. [b] **Evidence held sufficient** to show failure to serve process or notice on defendant in foreclosure action. 136 **Okl** 20, 276**P**486(2d case).

163-89½-New. Judgment creditor of mortgagor, not party to foreclosure action, cannot object to vacation of judgment for mortgagee. **IndA** 169**NE**693 (2dcase).

163-90 [a] **Where summary foreclosure is declared void** as to certain joint owners, mortgagee may bring ordinary action to foreclose and join other joint owners as defendants. 34**PortoRico** 298.

163-94 205 **Iowa**176, 218**NW**46; 38**Wyo** 515, 269**P**45, 60**ALR**418. [b] (1) 109 **Conn**329, 146**A**724. (2) Decree merely cuts off outstanding rights of redemption. 109**Conn**329, 146**A**724. (3) Where mortgagee takes possession under decree and value of property exceeds amount of debt, there is appropriation of property in payment of debt. 109**Conn**329, 146**A**724. (4) Act of mortgagee in taking possession under decree does not necessarily discharge debt unless value of property exceeds amount of debt. 109**Conn**329, 146**A**724.

164-1 **TexCivA** 9**SW(2d)**452.

164-1½-New. A decree of foreclosure is a bar to a subsequent action on a contract between the mortgagee and a subsequent purchaser, wherein the subsequent purchaser agreed, in consideration of extension of the mortgage, to pay all taxes and interest on the first mortgage. 207 **Iowa**294, 222**NW**893.

164-1⅓-New. Judgment is final as to personal judgment for debt, but is interlocutory as to an order to sell in a certain manner. 225**Ky**764, 10**SW(2d)** 298.

164-1¼-New. The effect of a mortgage foreclosure proceeding is to divest the mortgagor of title to land by barring his equity of redemption. 196**NC**168, 145**SE**9.

164-1⅓-New. Unless the decree provides otherwise, the effect of foreclosure is to withdraw from the lien of a trust deed matured notes as to which the foreclosure is had, and to make the deed security only for remaining notes. 335 **Ill** 646, 167**NE**769.

164-3 46 **Ida**724, 271**P**5, 6 [citCJ]; 250, **IllA**312; 205 **Iowa**1385, 219**NW**537; **Iowa** 227**NW**635 (trustee of corporation intervening and claiming same interest); **NJCh** 145**A**729; **NJCh** 148**A** 161(2dcase) (nonresidents published against); 254**NY**319, 172**NE**521; 41 **Wyo** 168, 283**P**1105 (owner of equity of redemption who appeared for purpose of objecting to receiver and asking for general equitable relief). [b] 124**Kan** 402, 260**P**650. [h] 247**Mich**38, 225**NW** 581. [i] **Vendor holding second purchase-money mortgage, who was made party to foreclosure of first mortgage assigned by him,** is bound by decree in each capacity in which he may relate himself to subject matter thereof. 205 **Iowa**1385, 219**NW**537. [j] **If mortgage securing note is foreclosed** by good personal service, holder of note cannot thereafter maintain separate action on it. **Iowa** 233**NW**126.

165-9 180**Ark**865, 23**SW(2d)**261; 136 **Misc**704, 242**NYS**192; **TexCivA** 28**SW** **(2d)**250.

165-10 180**Ark**90, 20**SW(2d)**626; 84 **Colo** 544, 272**P**631; 334 **Ill** 619, 166**NE** 517; 102**NJEq**144, 140**A**229; **NJCh** 151 **A**501; **TexCommnA** 4**SW(2d)**32; **Tex CivA** 30**SW(2d)**902. [f] (2) 166**Ga**143, 142**SE**687. [g] 169**Ga**220, 149**SE**866 (where defendant waived filing of petition within statutory time); **Tex CommnA** 12**SW(2d)**140. [h] 135 **Okl** 146, 276**P**197. [m] **Holder of vendor's lien notes acquiring interest after institution of suit** is bound by judgment. **TexCivA** 25**SW(2d)**1108.

167-11 **NJ** 150**A**342.

167-15½-New. Where owners of notes secured by a mortgage, executed to a bank of which they were directors, acquiesced in foreclosure proceedings by the bank and proved their notes in the action, they cannot thereafter maintain an action on the notes. 83**Mont**68, 271 **P**695.

167-15⅓-New. In scire facias sur mortgage, when heirs only are made parties, judgment is good against them and sale can be had thereunder, unless before sale the administrator takes steps to prevent it by showing a meritorious legal defense. 294**Pa**86, 143**A** 500.

167-15¼-New. Plaintiff is not required to give notice to, or proceed against, a lienholder becoming such after the date of the decree. **Iowa** 228**NW**357.

167-16 208 **Iowa**545, 223**NW**891.

167-18 48 **Ida**711, 284**P**1034 (title); **Iowa** 227**NW**334 (priority between written contracts of purchase); **TexCivA** 28 **SW(2d)**250 (foreclosure price as fair market value of property). But see 99 **Fla**1169, 128**S**420.

168-23 177**Ark**1013, 8**SW(2d)**505; 116 **Nebr**305, 216**NW**944. See also 132**Misc** 861, 231**NYS**133.

168-26 294**Pa**86, 143**A**500.

168-27 **Ill** 173**NE**281.

169-28 206 **Iowa**879, 221**NW**497; **Iowa** 227**NW**334 (right to accounting); **SD** 227**NW**469 (right to machinery and equipment as between mortgagor and mortgagee).

169-32 27**F(2d)**748; 109**Conn**329, 146 **A**724; 46 **Ida**724, 271**P**5; 252 **IllA**51; 204 **Iowa**541, 215**NW**609; 82**Mont**280, 267**P**214. [b] See also 128 **Or**39, 273**P** 705.

169-34 33**Ariz**13, 261**P**633, 57**ALR** 1015; **Fla** 129**S**690; 46 **Ida**724, 271**P**5, 6 [citCJ]; **TexCivA** 25**SW(2d)**1108.

170-36 218**Ala**480, 119**S**15(1stcase); 136**Misc**151, 239**NYS**269.

170-37 [d] **Judgment that later mortgage had priority held not res judicata** in suit to reform junior mortgage. 194 **NC**348, 139**SE**695.

171-38 **Iowa** 228**NW**3; **SD** 228**NW**390.

171-39 136**Misc**151, 239**NYS**269.

171-42 See also 132**Misc**639, 230**NYS** 585.

171-46 96**Fla**40, 117**S**846; **TexCivA** 9 **SW(2d)**452.

171-47 135**Misc**391, 239**NYS**558 (partial foreclosure); **Wash** 292**P**419. [c] **Foreclosure on part of land mortgaged**

is bar to foreclosure on remainder. 83 Mont21, 269P162.

172-52½-New. A mortgage provision authorizing foreclosure for past-due installments without impairing a lien for the balance, although unenforceable under statute when executed, becomes operative on amendment of the statute so as to permit it. 34F(2d)308.

172-53 96Fla52, 117S850; 38Wyo 223, 266P128, 132 [citCJ].

172-59 TexCivA 3SW(2d)925. [d] **Misstatement in mortgage as to date of purchase of land** does not render judgment subject to collateral attack. TexCivA 3SW(2d)925. [e] **Matters not open to inquiry on collateral attack.**–TexCivA 3SW(2d)925.

175-91 208 Iowa145, 224NW571.

175-96 208 Iowa145, 224NW571.

176-7 131 Or648, 284P177.

176-10 [c] **Personal judgment for deficiency.**–34NM559, 286P827.

176-19 [h] **Order denying application to confirm and directing resale.**–180 Minn173, 230NW780.

177-28 101CalA659, 282P23.

177-30 124Kan402, 260P650.

178-34½-New. Chancellor in allowing appeal in mortgage foreclosure proceeding has authority to impose reasonable conditions. Vt 148A408(1stcase).

178-34¼-New. Where bond on appeal has not been filed, appeal is not perfected and is required to be dismissed. Vt 148A408(1stcase).

178-36 [h] **On appeal from order confirming sale,** owner of equity of redemption cannot complain of judgment directing sale where he made no objection thereto and permitted sale to proceed. 41Wyo 168, 283P1105.

178-40 38F(2d)396; 98Fla1026, 125S237 (mortgagor who has conveyed but against whom deficiency judgment is sought).

178-42 [a] **Owner of fee.**–98Fla1026, 125S237. [b] **Second mortgagee.**–98Fla 1026, 125S237.

179-46 41Wyo 168, 283P1105.

179-50 Kan 292P748.

180-56 251Mich161, 231NW131(2dcase); 53SD76, 220NW143.

180-56½-New. **Presumptions.** It is presumed that sheriff performed legal obligation and joined wife in possession, as party to writ of scire facias. 299Pa51, 149A87.

180-56¼-New. Appellate court must assume that officers performed duty at sale and that court entering order of confirmation found on evidence duly submitted that necessary acts had in fact been done. 41Wyo 168, 285P788.

180-58 339 Ill 304, 171NE267; 125 Or 362, 267P520.

180-60 Fla 130S713(1stcase).

181-63 181Ark644, 27SW(2d)510; 125 Kan687, 266P47.

181-64½-New. Appellate court has no power to review decision of court as to bondholders not made parties to proceedings on appeal. 37F(2d)572.

181-68 151Va81, 144SE602.

181-77 See also 224AppDiv390, 231NYS 158; 294Pa86, 143A500.

182-84 [c] **Time for issuance of order.**–135 Okl 85, 274P36.

183-2 194NC797, 139SE691.

184-18 152SC325, 150SE313 (stay refused where statute provides for filing of undertaking to stay sale and delivery of possession pending appeal).

184-20½-New. Appellant's undertaking to stay the sale applies only to a particular appeal and not to a second decree also appealed from. 152SC325, 150 SE313.

184-29½-New. , or vendor under adverse title, under some conditions. 194 NC797, 139SE691.

184-30 169La176, 124S772 (petitioner must show that he is owner of either property or note).

184-35½-New. A lessee under a lease, as to whom judgment is void, is entitled to enjoin the sale except subject to the lease. 169Ga220, 149SE866.

185-59 98Fla124, 123S561(2dcase) (mortgagors held not in default under agreement).

187-88 9LaA583, 121S655.

187-90½-New. Court will not restrain sale under writ of levari facias unless sufficient controlling facts appear in record or by undisputed writings or are admitted. 96PaSuper356.

187-3 Contra 116Nebr627, 218NW423.

188-9 133 Okl 173, 271P833.

188-15 133 Okl 173, 271P833 (dictum); 138 Okl 15, 280P301 (language in mortgage held not to constitute waiver).

189-29 [a] **Appraisers are public agents** acting in quasi judicial capacity in performing public duty. 111Conn 490, 150A742.

189-38 But see 107Conn272, 140A204.

189-40 [a] **Three appraisers having failed to agree,** two appraisers cannot thereafter make legal appraisal without notice and opportunity for participation for third. 111Conn490, 150A742.

191-90 224AppDiv597, 231NYS480. See also 133Misc1, 231NYS25.

192-96 133Misc1, 231NYS25 (language of act should not be extended by judicial decision).

192-97 133Misc1, 231NYS25.

193-12 127Kan175, 272P130; 224App Div597, 231NYS480.

193-22 But see 133Misc126, 231NYS263. [d] (2) Where property is situated in town, posting for forty-two days and publication of notice at least once in each of six weeks immediately preceding sale, though mortgage also included property in city, is necessary. 133Misc 1, 231NYS25.

193-26 35PortoRico 726 (irregularity in manner of giving notice).

194-40 133Misc1, 231NYS25.

195-41 294Pa309, 144A136.

195-43½-New. Only the interest of the mortgagor should be advertised for sale and not the mortgaged premises themselves. NS [1929] 3DomLR225.

196-70 See also 133Misc1, 231NYS25.

196-71 [a] But see Okl 292P353.

196-75 NJ 146A198(2dcase).

196-76 13PortoRicoFed20.

196-76½-New. A sheriff properly proceeded with the sale of mortgaged property on the day advertised, although the præcipe on which execution was founded inadvertently named another day. 294Pa309, 144A136.

197-97 35PortoRico 806.

197-7 [a] **Master in equity** conducting sale is officer of court. 145SC364, 142 SE805.

198-16 See also 151Va81, 144SE602.

198-21 CalA 284P1053 (approval by judge).

199-37 250 IllA312; 126 Or129, 268P 1001. See also 221AppDiv512, 224NYS 705, 707 [quotCyc]. [b] **Failure to sell all land ordered to be sold** does not render sale void. TexCivA 3SW(2d)925.

199-38 158Md412, 148A816 (sale under assent to decree). See also 221AppDiv 512, 224NYS705, 707 [quotCyc]. [a] (2) Inclusion of rents, issues, and profits in sale does not affect mortgagor's right of redemption where there were none to sell and bid of judgment creditor to whom property is sold was less than judgment awarded. 131 Or648, 284P 177. [c] **Statute relating to sales on execution** applies where decree is silent as to manner of sale. 45 Ida414, 262P 877.

199-39 221AppDiv512, 224NYS705, 707 [quotCyc].

199-43½-New. Where sale is made by a referee as an officer of the court, the court may direct him to act in accordance with fairness and equity. 251NY 435, 167NE578.

199-45 131 Or648, 284P177.

200-58 133Misc1, 231NYS25. See also SC 155SE591. But see 126 Or129, 268 P1001.

200-59 180Minn173, 230NW780 (rentals for title where sale is in parcels).

200-62 [a] **Contiguous lands farmed as one tract** are not divided into "known lots or parcels" so as to require sale in separate parcels. 45 Ida414, 262P877.

200-67 45 Ida414, 262P877. [a] **Failure to divide all land properly** does not render sale void. TexCivA 3SW(2d)925.

201-70 Mich 233NW216; 126 Or129, 268P1001.

201-75 205 Iowa789, 218NW502.

201-81 164La926, 114S839; NJCh 148 A575; SC 155SE591.

201-84½-New. Owner of second mortgage on larger of two tracts and his pledgee are not necessary parties to rule taken by mortgagor to require that such tract alone be sold on foreclosure of first special mortgage which included another smaller tract. 164La926, 114S 839.

201-84½-New. Sale en masse to satisfy the amount due on two separate mortgages covering the same property is not invalid where the mortgagees are not united in interest. 131 Or648, 284P177.

201-87 [a] **Direction to sell in manner prescribed by law and practice of court** is not direction to sell in particular order. 45 Ida414, 262P877.

202-90 TexCivA 8SW(2d)719.

202-93 TexCivA 8SW(2d)719.

202-93½-New. A defendant in a foreclosure action, who is the assignee of a second mortgage covering part of the property, cannot direct the order in which subdivisions of the mortgaged property shall be sold. 45 Ida414, 262 P877.

202-94 TexCivA 8SW(2d)719.

203-4 But see 224AppDiv621, 232NYS 79.

203-8½-New. A purchaser agreeing to take title subject to the state of facts which an accurate survey would show waives encroachments which would ordinarily constitute objections. 251NY 435, 167NE578.

203-9 [c] (2) Decree thus providing has been held not abuse of discretion. SC 155SE591.

204-17½-New. Directing sale on time is erroneous without showing equities warranting terms. 141SC152, 139SE405.

204-22 145SC364, 142SE805, 808 [cit CJ]. [b] **Amount of deposit required must be reasonable.**–145SC364, 142SE 805. [c] **Deposit is for benefit of lien creditors who are parties to action.**–145SC364, 142SE805.

205-29 226Ky261, 10SW(2d)824.

205-45 205 Iowa1385, 219NW537.

206-62 [b] **Relation of vendor and vendee** between mortgagee and another does not preclude such other from bidding at foreclosure sale. 146SC385, 144 SE82.

206-74½-New. In the absence of a provision in a trust deed, the court cannot authorize a trustee to become the bidder for all bondholders and pay as a portion of the bid a debt secured by the trust deed in place of cash, unless minority bondholders are protected by deposit of sufficient cash. 35F(2d)508.

206-74½-New. An order authorizing any bondholder or group of bondholders to bid at the sale should be made prior to the sale. 35F(2d)513.

206-74¼-New. An order permitting a trustee to bid for bondholders has been held erroneous. 35F(2d)513.

206-77 Iowa 227NW97 (duty to bid in property if interests of bondholders require it).

207-96½-New. A written bid by plaintiff in the foreclosure action made by letter addressed to the sheriff conducting the sale, definitely fixing the amount bid and giving the sheriff no discretion, is valid. 45 Ida414, 262P877.

207-2 [a] **Written bid from plaintiff in foreclosure action.**–45 Ida414, 262P877.

207-9½-New. In Saskatchewan there is no authority for direction of a sale subject to a reserve bid. Sask [1928] 2Dom LR991.

207-16½-New. There is no power in the court to compel a bondholder to participate in a bid for property. 35 F(2d)513.

208-23 145SC364, 142SE805.

209-51½-New. A purchaser will not be required to perform the contract where it would not be just and conscientious in an individual to insist on performance if the sale had been made by him. 251NY435, 167NE578.

209-53 [a] **Mere suspicion of fraud** does not warrant rejection of title. 240 NYS473.

210-58 150SC111, 147SE659. [a] **Encroachments on street** may justify court in relieving purchaser from bid though sale was subject to any state of facts which accurate survey would show. 251 NY435, 167NE578.

210-60 NJCh 148A161(2dcase); 131

Misc363, 226NYS717; 240NYS473 (plaintiff's occupancy of premises at time of proposed closing of title). [c] (3) That wall of building on mortgaged premises was out of plumb and encroached upon adjoining property held not to release bidder. 101NJEq793, 138A882. (4) Objection of purchaser to title held untenable where encroachments were slight. 131Misc363, 226NYS717. (5) Slight encroachment acquiesced in by city and adjoining owners for long period held insufficient. NJ 146A305. [d] **That building on premises had been condemned** and ordered to be torn down held not to release bidder. 101NJEq793, 138A882.

210-61 [a] 131Misc363, 226NYS717.

211-69 103NJEq447, 143A554.

211-71½-New. Bidder will not be relieved from bid because of lack of attention when announcement was made at sale as to defective condition of premises. 101NJEq793, 138A882.

211-73 240NYS473 (prior judgments).

211-77½-New. Violations of city departments against premises held not encumbrances. 131Misc363, 226NYS717.

212-81 222AppDiv100, 225NYS250.

212-84 143SC417, 141SE681. But see NJErr&App 150A778.

212-87 98CalA784, 277P1050. [a] (2) Resale before purchaser has had reasonable time to investigate title is nullity. 145SC364, 142SE805.

212-89½-New. Where the mortgagor purchasing is unable to make payment, the rights of the crop mortgagee and the mortgagor are waived by acquiescence in a second sale. 180Ark479, 21SW(2d)962.

212-95 See also 109Conn23, 145A20(2d case).

212-95½-New. A purchaser, who had notice of an order for resale of premises and notice of resale, was not, by failure to make a motion to reopen judgment until after resale, debarred from objecting to having deficiency charged against it. 109Conn23, 145A20(2dcase).

212-97 [a] **Conditional resale on failure of purchaser to make deposit.**–145SC364, 142SE805.

214-24 But see 109Conn23, 145A20(2d case).

214-28 [a] **Order requiring defendant to complete purchase must be made** and disobedience established before contempt proceedings will lie. 229AppDiv785, 242NYS64.

214-32 222AppDiv100, 225NYS250.

215-38½-New. Plaintiff should have opportunity to show that judgments entered against persons bearing same name as owners of mortgaged premises were in fact not entered against owners. 240NYS473.

215-53 [a] 175Ark356, 299SW28.

216-62½-New. Where the parties to a foreclosure action make no showing in excuse of default at a hearing on exceptions, the discretion of the circuit judge is not moved to hear them on the subject. 248Mich101, 226NW822.

216-79 181Ark644, 27SW(2d)510.

217-81½-New. It is not necessary for the mortgagee to obtain an order of confirmation regardless of whether the report of sale shows surplus or deficiency. 227AppDiv136, 237NYS444.

217-9 128 Okl 231, 262P198.

217-11 NJ 151A86(2dcase).

218-27 41Wyo 168, 283P1105 (service of judgment directing sale on owner of equity of redemption held sufficient).

219-42 124Kan386, 260P632.

219-44½-New. Special term on motion to confirm foreclosure sale cannot summarily determine fact question involving good faith of plaintiff's attorney. 222AppDiv195, 225NYS468.

219-44⅓-New. The court has no power to grant amendment of an order of confirmation which provided the manner in which judgment for deficiency should be collected. 227AppDiv136, 237NYS444.

219-44¼-New. An order of confirmation may be amended under some circumstances. 227AppDiv136, 237NYS444.

219-46 41Wyo 168, 283P1105.

219-53 NJCh 150A579.

220-64 133Misc1, 231NYS25.

220-68 99Fla197, 126S383.

221-88 133Misc1, 231NYS25.

221-1 133Misc1, 231NYS25.

225-52½-New. Court may allow a bidder to increase his bid on the hearing for confirmation, if property owner is not injured. 117Nebr211, 220NW243.

225-55 99Fla197, 126S383. [d] **Fraud.**–146SC385, 144SE82.

225-58 [b] **Evidence insufficient.**–146SC385, 144SE82.

226-65 99Fla197, 126S383. See also 32 OhA156, 163NE642(1stcase).

226-66 SD 228NW390.

226-69 225Ky521, 9SW(2d)528.

226-70 128 Okl 231, 262P198.

226-71½-New. A trustee in allowing ratification of sale to a corporation which defaulted and reselling property at the purchaser's risk, did not substitute the purchaser's obligation for that of the mortgagors. 156Md313, 144A479.

226-71⅓-New. An order of confirmation determines nothing as to the validity of title. SD 228NW390.

227-77 178Ark1019, 14SW(2d)245(2d case).

227-87 La 129S731; 133Misc1, 231NYS25; 41Wyo 168, 283P1105. [a] (8) Purchaser at first mortgage foreclosure sale, who defaulted and was held liable for deficiency at second sale. 108Conn304, 142A838. (9) Minor children inheriting homestead must be served with process. 138 Okl 15, 280P301.

229-6 NJ 151A86(2dcase).

229-8 205 Iowa1103, 216NW109.

230-22 But see 133Misc1, 231NYS25.

230-39 [a] **Illness preventing mortgagor from attending** is insufficient to set aside foreclosure sale. NJCh 150A579.

231-49 [b] (2) Annulment not ordered though plaintiff's claim exceeds mortgage debt if order of sale followed mortgage deed and not complaint. 34Porto Rico 633.

231-57½-New. Absence of mortgage parties at sale is not ground for setting aside sale. 226Ky644, 11SW(2d)696(2d case).

232-59 133 Okl 173, 271P833.

232-60 133 Okl 173, 271P833; 294Pa309, 144A136.

232-62 178Ark1019, 14SW(2d)245(2d case); NJ 151A86(2dcase); TexCivA30SW(2d)511.

233-69 [c] **Facts not constituting constructive fraud.**–235Ky328, 31SW(2d)377(2dcase).

233-73 But see 245Mich124, 222NW118.

233-80 [a] **Unavoidable casualty.**–235Ky328, 31SW(2d)377(2dcase).

234-89 153SC1, 150SE310.

235-6 181Ark644, 27SW(2d)510.

235-7 [a] (1) 129 Okl 164, 264P188.

235-8 176Ark1023, 5SW(2d)330; 45 Ida414, 262P877. [b] 134Misc454, 235NYS14; 228AppDiv591, 240NYS468. [d] (2) Gross inadequacy of price, coupled with failure of sheriff to cry higher written bid made by plaintiff and plaintiff's absence from sale, are grounds for setting aside sale. 45 Ida414, 262P877. [h] 176Ark1023, 5SW(2d)330; 99Fla197, 126S383; 129 Okl164, 264P188.

236-19 142 Okl 221, 286P867 (impervious to attack after term where property, owned by adult and minors in common and proceedings regular on face).

236-20 See also Ark 31SW(2d)307. [a] (5) Void sale may be attacked at any time. 133 Okl 173, 271P833.

237-22 226Ky261, 10SW(2d)824.

237-27 176Ark1023, 5SW(2d)330; 135 Okl 146, 276P197.

237-27½-New. Defendant's motion for extension of time within which to move for a rehearing, made more than four months after decree of foreclosure, is properly denied. 245Mich124, 222NW118.

237-30 86Mont83, 282P268 (on motion).

238-40 167La49, 118S688(2dcase). [b] (4) Other allegations held insufficient. 84Mont98, 274P288.

238-41 [a] See also 56ND768, 219NW471.

238-45 [a] **Where foreclosure proceedings are void for want of jurisdiction,** tender of debt secured is not necessary. 33PortoRico 959.

240-81 [g] (3) 294Pa22, 143A488. [l] **Consideration.**–181Ark644, 27SW(2d)510.

241-94 33PortoRico 959.

241-99½-New. Rights of husband under his former wife's will and of their minor children cannot be determined in the second wife's action against the husband, the mortgagee, and the purchaser of mortgaged property, to set aside sale, such children not being before the court. 225Ky521, 9SW(2d)528.

242-1 [a] **In Porto Rico.**–33PortoRico959.

242-9 [a] **Error held not prejudicial.**–Mich 233NW347.

242-16 180Ark251, 21SW(2d)156(2d case) (resale held proper). See also 140 Okl 140, 282P297(2dcase).

242-18½-New. Proceedings on resale are de novo. 224AppDiv390, 231NYS158.

243-31½-New. If mortgagor wished conditions imposed on resale, he should have appeared and requested imposition thereof, and, if aggrieved by order as entered, his remedy was to appeal. 224AppDiv390, 231NYS158.

243-31⅓-New. Judgment directing resale in one parcel does not authorize separate sale of leases. 180Minn173, 230NW780.

243-39 See also 224AppDiv390, 231NYS158.

245-85 81Mont1, 261P288; 224AppDiv37, 229NYS519.

245-86 Ala 130S222; 33Ariz13, 261P633, 57ALR1015; 165Ga470, 141SE203; 204 Iowa368, 215NW258 [citCyc]; 9 LaA418, 121S237(2dcase); 150Miss766, 117S365; 81Mont1, 261P288; Mont 289P561; NJCh 151A107; 56ND811, 219NW569, 573 [quotCyc]. See also 179Ark421, 16SW(2d)457. [h] **Causes of action.**–34F(2d)649.

246-88 181Ark644, 27SW(2d)510; 46 Ida724, 271P5, 6 [citCJ].

246-89 204 Iowa368, 215NW258; 56ND811, 219NW569, 573 [quotCyc]; Tex CommnA 12SW(2d)140.

246-91 204 Iowa368, 215NW258.

246-97 34F(2d)649; SD 228NW390.

247-99½-New. A mortgagee purchasing mortgaged premises on foreclosure sale has no right to recover on a contract requiring a subsequent purchaser to pay taxes and interest on a prior mortgage in consideration of extension. 207 Iowa294, 222NW893.

247-99⅓-New. Where legal title acquired by the trustee of a deed of trust passes to his judgment creditor under execution sale, a purchaser at foreclosure sale may, under terms of the trust deed, acquire only personal interest of the trustee subject to the trust. 54SD131, 222NW946(2dcase).

247-4 But see 336 Ill 125, 168NE1. [a] **In Arizona.**–34Ariz438, 272P641.

248-14 97Fla996, 122S508.

248-19½-New. Title to things eloigned upon which sheriff could not levy under execution does not vest in purchaser. 12PaDist&Co 320.

248-31½-New. If it cannot be determined that house sold is not one to which record of property refers as recorded in favor of third person, sale of house in execution should not be recorded in favor of purchaser. 35Porto Rico 504.

249-39½-New. Sacks of seed rice held by planting company have been held to be immovable and to pass with the plantation at foreclosure sale. 10LaA744, 121S362.

249-43 151SC152, 148SE722 (evidence held to sustain finding that purchaser took title free from timber deed).

249-45 But see 92PaSuper299.

249-50½-New. A purchaser succeeds to the right of the mortgagor to all timber reserved by his grantor at the expiration of reservation. 196NC168, 145SE9.

250-59 GaA 155SE355; 81Mont1, 261P288.

250-60 MoA 12SW(2d)95.

251-67 [a] **Crop grown and harvested by purchaser and his tenant** during period for redemption, after mortgagor had given up possession, belonged to

them and mortgagor had no interest therein. 48 Ida80, 279P1097.

251-79 [a] See also 206 Iowa550, 221 NW202.

251-79½-New. Where mortgagor remains in possession after delivery of the sheriff's deed and harvests a crop planted during period of redemption, crop belongs to him. ND 229NW365.

252-80 81Mont1, 261P288; Tex CommnA 17SW(2d)768; TexCivA 8SW (2d)514. [a] **Tenant of mortgagor** held not constructive trustee of harvested crops, in absence of fraud. 81Mont1, 261P288.

252-84 TexCivA 30SW(2d)726.

252-86 154Wash110, 281P9, 66ALR 1417 (crops raised during period of redemption).

252-87½-New. Under a statute entitling a mortgagor to retain possession during the period of redemption, he is entitled to crops raised during such period although the land is in the possession of the lessee. 154Wash110, 281 P9, 66ALR1417.

252-90 226AppDiv675, 233NYS221; 225AppDiv567, 233NYS588.

252-92 [b] **Application of rents to taxes, interest, and costs of** action cannot be made by any right of mortgagee purchasing at foreclosure sale for full amount due on his judgment. 53SD635, 222NW141.

253-95 226AppDiv675, 233NYS221; 53 SD635, 222NW141; TexCommnA 17SW (2d)768.

253-97 175Ark791, 300SW428; Cal 284 P905; CalA 279P172; 86Mont406, 284P 140 (time of sale); Mont 289P561; 53 SD635, 222NW141; SD 230NW282. [a] (2) But under some statutes court has no jurisdiction in mortgage foreclosures to determine liability for rents collected, under Comp. L. (1915) §§ 12676-12692. 243Mich451, 220NW728.

253-12 86Mont406, 284P140.

254-21½-New. Holder foreclosing mortgage has no interest in crop grown and harvested during year of redemption. SD 230NW766.

254-22 334 Ill 64, 165NE189; IndA 170 NE345; 204 Iowa401, 213NW769; Iowa 228NW7; SD 230NW282.

254-24 SD 230NW282.

254-24½-New. In such jurisdictions purchaser is not entitled to have rents and profits applied in payment of prior liens. 179Minn571, 229NW874.

254-25 But see 334 Ill 64, 165NE189.

254-30 See also 206 Iowa550, 221NW 202. [b] **Second mortgagee acquires no lien on rents** for redemption period of first mortgage where he served no timely notices in his action and did not apply for receiver. 206 Iowa550, 221NW202. [c] **That mortgagor reserved rents on sale of land** does not deprive foreclosure purchaser of right thereto. Mont 288P 616.

255-41 [a] **Apportionment statute not applicable to sales under trust deeds.-Cal** 284P905.

255-46½-New. Under a statute entitling a purchaser to receive from a tenant in possession the rents from the time of sale until redemption, the mortgagor is entitled to have the rents apportioned on the basis of the amount earned before sale. 34Ariz438, 272P641.

255-46½-New. Rent under a lease made by the grantee of the purchaser at a sale under a junior mortgage is properly apportioned between such grantee and a purchaser at a subsequent sale under a senior mortgage. 86Mont406, 284P140.

255-46¼-New. In some jurisdictions, where land is sold during tenancy year, mortgagor who had sold land reserving rent is entitled to proportional share of rent. Mont 288P616.

255-54 NJ 147A628.

256-56 128 Okl 231, 262P198.

256-62½-New. Bona fide purchaser of defendant's plant after decree restraining its operation is not charged with defendant's derelictions. NJ 151A736.

256-63 48 Ida49, 279P420.

256-73 179Minn571, 229NW874; SD 228NW390.

257-80 131Misc446, 226NYS129.

257-90 338 Ill 28, 169NE819.

257-94 335 Ill 646, 167NE769; 249 IllA 10.

257-95 229AppDiv345, 242NYS369.

258-99 217Ala166, 115S103; 165Ga470, 141SE203; 225AppDiv567, 233NYS588; 52SD563, 219NW246, 247 [citCJ].

258-7 See also 12PaDist&Co 721.

258-17½-New. Purchaser at mortgage foreclosure sale, under decree providing for payment of taxes and assessments, can assume that unmatured assessments would be paid. 141SC60, 139SE171.

259-19 But see 13PaDist&Co 670.

259-27 252 IllA51; 229AppDiv345, 242 NYS369; 128 Okl 231, 262P198.

260-38 131Misc446, 226NYS129.

260-45 204 Iowa368, 213NW253.

260-46 See also 244Mich588, 222NW 211.

261-53½-New. Purchaser need not, as to matter specifically treated by decree, seek behind it for a possible inconsistency with some previous finding. 141 SC60, 139SE171.

261-53½-New. An action to compel a purchaser to execute a deed brought within eighteen months after receiving the deed is not barred by laches. 89 CalA37, 264P544.

261-53¼-New. Evidence in such case is sufficient to show intent to dismiss mortgage foreclosure as to a lot purchased by another from the mortgagor. 89CalA37, 264P544.

261-55 NJCh 151A501.

262-59 321Mo 576, 11SW(2d)1016; Tex CivA 13SW(2d)229.

262-62½-New. Mortgagor is not entitled to recover for use and occupation by purchaser under a void sale. 130 Misc403, 223NYS668.

262-66 335 Ill 646, 167NE769.

262-67 [h] Streets.-297Pa317, 147A51.

263-72½-New. or by notice of an earlier deed of trust containing erroneous description. 321Mo 576, 11SW(2d)1016.

264-90 [b] **Incomplete advertisement of unpaid taxes** in absence of fraud does not subject mortgagee to liability to purchaser. NJSup 150A214(2dcase).

264-95½-New. Discretionary power to relieve a purchaser from a bid does not include authority to allow a purchaser expenses of examination of title. 251 NY435, 167NE578.

264-8 131 Okl 222, 268P279.

265-17 [a] **Mortgagee purchasing at foreclosure sale** is not purchaser within statute. SD 228NW390. [b] **Reversal of judgment decreeing mortgage prior to mechanic's lien** does not affect title of purchaser who takes risk of reversal on such question. SD 228NW390 (statute held inapplicable).

265-19 But see 180Ark68, 20SW(2d) 645. [a] **Mortgagor is entitled to no relief on remand after reversal** where he failed to maintain status quo of property pending appeal. 180Ark68, 20SW (2d)645.

267-54 336 Ill 125, 168NE1; 86Mont 180, 282P1050 (takes title on expiration of redemption period). [b] **Assignment of duplicate certificate** and recording thereof conveys no title though line is drawn through word "duplicate." 336 Ill 125, 168NE1. [c] **Defective assignment** or one not in compliance with statute may be sufficient to vest rights in assignee. 336 Ill 125, 168 NE1. [d] **Purchaser is estopped** to deny validity of his assignment as security or to claim merger of certificate with his deed from mortgagor. 336 Ill 125, 168NE1. [e] **Right to rents from date of sale during redemption period** passes to tenant taking assignment of certificate where original purchaser was entitled thereto. Mont 288P616.

267-59 But see 336 Ill 125, 168NE1.

267-60½-New. An assignee of a certificate takes the assignor's interest subject to prior equities in the certificate. 336 Ill 125, 168NE1.

267-60½-New. The master consenting to a purchaser's assignment of a certificate previously assigned to the master as security for his fees, and reciting the assignment in a deed to the assignee, cannot deny such assignment. 336 Ill 125, 168NE1.

267-66 But see Ark 32SW(2d)621.

268-69½-New. Where a purchaser, bidding in property at a foreclosure sale, promised plaintiff to surrender the bid on compliance by plaintiff with the terms of the bid, plaintiff, failing to do so, may not enforce his alleged rights under the agreement in a claim by him against the purchaser and the transferee of the bid. 146SC385, 144SE82.

268-71 See also Ala 130S680.

268-77 225Ky521, 9SW(2d)528.

269-80 But see 101CalA638, 281P1077

269-86 81Mont1, 261P288; Mont 289 P561; 152SC325, 150SE313 (entitled to possession upon sale pending appeal without stay).

269-94 81Mont1, 261P288.

270-9½-New. A purchaser at a sale under a senior mortgage is entitled to possession as against the purchaser at a prior sale under a junior mortgage. 86Mont406, 284P140.

270-15 204 Iowa401, 213NW769; 208 Iowa564, 226NW110, 66ALR59. [d] **Mortgagor has right to possession** and control during redemption period. 204 Iowa401, 213NW769. [e] **Mortgagor's tenant** can hold land under his contract during period of redemption. Mont 288 P616.

270-17 SD 230NW766.

270-18 81Mont1, 261P288.

270-20 81Mont1, 261P288.

270-25½-New. Under some statutes, foreclosure sale does not, during the period of redemption, affect a tenant's right to occupy the premises. 86Mont 406, 284P140.

270-26 [a] **Statutory right may be withheld, granted on condition, or taken away.**-38Wyo 223, 266P128.

270-28 But see Iowa 228NW7.

270-29 SD 230NW282 (mortgagor is entitled to possession till execution of deed to purchaser).

271-40 267Mass236, 166NE706.

271-41 170La868, 129S374.

272-63 35PortoRico 429 (after expiration of statutory period).

272-66 147Wash574, 266P731.

273-77 Ala 129S37(1stcase).

275-12 [a] **Where stranger to foreclosure becomes party by filing motion to dissolve writ of assistance** theretofore issued, court obtains jurisdiction to decide his claim to possession. 204Cal 370, 268P341.

275-16½-New. Defendants may plead homestead right. 35PortoRico 726.

277-81 [a] **Evidence held to sustain finding** that redemption had been made before sheriff's deed issued. 130Kan 367, 286P258.

278-89½-New. Determination in favor of defendant in ejectment held not inequitable or to result in unjust enrichment of defendant. 130Kan367, 286P 258.

278-93½-New. No right of recovery exists for damages for removal of plaintiff and belongings under execution for possession unless damage was inflicted on personal property set out from buildings by careless, negligent, or unlawful acts of defendants. 264Mass592, 163NE178.

278-6 220Ala553, 126S854; 248 IllA 118; 205 Iowa1273, 218NW42; 208 Iowa15, 221NW537; 208 Iowa1107, 225 NW943; 245Mich571, 222NW736; 53 SD132, 220NW453; 38Wyo 223, 266P 128. [a] (2) Allegations of foreclosure petition made part of application for appointment of receiver will be considered in determining whether sufficient facts existed. 38Wyo 223, 266P128 (allegations held sufficient to warrant appointment). [b] **That pledge of rents and profits is conditional** may be considered in determining whether to appoint receiver. 205 Iowa1013, 219NW 36. [c] **Court is without authority to appoint receiver** to collect rents and profits after sale, but may dispose of those accruing subsequent to sale upon receiver's discharge. 204Cal 23, 266P 278. [d] **Receiver acts as impartial agency** in leasing premises, and rents are for benefit of party entitled thereto as between mortgagor and mortgagee. 208 Iowa15, 221NW537. [e] **Receivership automatically terminates** upon satisfaction of deficiency judgment in favor of mortgagee. 208 Iowa15, 221NW 537.

278-8 [a] **If court is not advised as to fact of possession,** it may refuse to appoint receiver. 38**Wyo** 223, 266**P**128.
278-9 [a] 205 **Iowa**1013, 219**NW**36.
278-10 205 **Iowa**1013, 219**NW**36; 208 **Iowa**1107, 225**NW**943. [d] **Fact of unexpected depression in land values and unanticipated insolvency** of mortgagor does not defeat right of mortgagee to have rents applied on unsatisfied balance of claim. 208 **Iowa**1107, 225**NW** 943.
278-11 **SD** 230**NW**766.
279-16½-New. Receiver in possession during period of redemption and collecting rents is unauthorized to pay interest on prior encumbrances. 338 **Ill** 109, 170**NE**254.
279-16¼-New. **Accounting.** Receiver must account to holder of mortgage on owner's interest in crop for all crop and cash rents collected by him. **SD** 230**NW** 766.
279-18 208 **Iowa**15, 221**NW**537.
279-22 208 **Iowa**15, 221**NW**537; 208 **Iowa**1107, 225**NW**943. [c] **Receiver improperly appointed** is not entitled to compensation out of mortgaged crop proceeds but may be allowed reasonable compensation out of cash rent. **SD** 230 **NW**766.
279-24½-New. **Costs.** Where receiver was improperly appointed, interveners claiming under crop mortgages who opposed appointment are entitled to costs. **SD** 230**NW**766.
279-31 [b] **In Montana.**-81**Mont**281, 264**P**132.
279-33 **SD** 228**NW**390.
279-34 338 **Ill** 28, 169**NE**819.
280-43½-New. A letter, in response to an offer to sell a certificate, is insufficient as a binding contract where it is merely a qualified acceptance of an offer. 57**ND**396, 222**NW**265.
280-50 59**ND**9, 228**NW**231.
280-57 **MoA** 25**SW(2d)**1075 (mortgagee purchaser).
280-58 338 **Ill** 28, 169**NE**819.
281-79½-New. Sheriff offering property at foreclosure sale without mineral rights cannot be compelled to deliver deed including such rights. 164**La**849, 114**S**709.
282-84½-New. That duplicate certificate of redemption from first mortgage was recorded but not filed with register of deeds can only render sheriff's deed on foreclosure voidable. **SD** 231**NW** 897.
283-13½-New. **Deed made after time to redeem has expired** may be valid, although purchaser's fraud or misconduct induced debtor to believe that time would be extended. 45 **Ida**472, 262**P** 1052.
283-29 34**Ariz**438, 272**P**641.
284-41 336 **Ill** 125, 168**NE**1 (deed to assignee of certificate).
285-53 See also 177**Ark**1013, 8**SW(2d)** 505.
285-54 130**Misc**652, 225**NYS**146.
286-58 **NJCh** 145**A**729. See also 156 **Md**313, 144**A**479. [b] **Proceeds of insurance.**-**Iowa** 229**NW**185.
286-64 219**Ala**249, 121**S**720; 95**Fla** 730, 116**S**648.
287-72 [d] **Though mortgage was renewed without one who had signed it joining in application,** he may be charged with deficiency where mortgage provided for extension or renewal on application of any mortgagor. 154**Md** 682, 141**A**398.
287-73 250 **Ill**A369. [b] **Failure to reduce deficiency to judgment** does not release mortgagor of obligation under agreement to pay deficiency. 138**Misc** 160, 245**NYS**102.
287-80½-New. Mortgagors were not relieved from liability for deficiency by a trustee's unsuccessful attempt to compel performance of a contract and resale of property at a purchaser's risk after ratification of the sale. 156**Md** 313, 144**A**479.
287-84 199**Wis**350, 226**NW**313, 315 [cit **CJ**]. See also 154**Md**682, 141**A**398. [b] 96**Fla**91, 117**S**863. [c] 195**Wis**635, 219 **NW**343.
288-87½-New. A statute, authorizing deficiency decrees against other parties than the mortgagor, is strictly construed as in derogation of the common law. 157**Md**401, 146**A**229.
288-87⅓-New. Amount for which property sold on foreclosure does not irrevocably fix value of property as against indorser not party to suit and without notice of sale. **Fla** 130**S**725.
288-88 [a] (4) Grantee assuming debt, who purchases property from prior grantee not assuming debt. 130**Misc** 614, 224**NYS**321. (5) Where renewal notes secured by mortgage were not signed by maker of original notes, judgment against maker of original notes is improper. 83**Mont**68, 271**P**695.
288-94 **NJCh** 145**A**541.
288-95 But see 140 **Okl** 125, 282**P**290.
288-98 52**SD**159, 216**NW**887, 889 [cit Cyc].
290-21 85**Mont**241, 278**P**512. [a] **Can** [1928] 3**DomLR**784.
290-23 195**Wis**635, 219**NW**343.
290-24 [c] (2) Statutes held not applicable to second mortgage not foreclosed to preclude deficiency judgment thereon on foreclosure of first mortgage. **NJ** 146**A**364(1stcase).
290-26 **Fla** 130**S**57; **Fla** 130**S**725; **Tex CivA** 10**SW(2d)**193.
290-28 153**Md**638, 139**A**446. [b] (1) 99**Fla**451, 127**S**321. (2) 95**Fla**730, 116 **S**648; 96**Fla**91, 117**S**863; 98**Fla**954, 124**S**466; 99**Fla**202, 126**S**359; 99**Fla** 451, 127**S**321. (3) Provision of Acts (1919) c 7839 § 2, authorizing deficiency decrees in foreclosure suits, against others than mortgagor, is not mandatory but is directory and permissive and, as so construed, valid, purpose of the legislature being to authorize entry of deficiency decrees against others than makers of mortgage. 96**Fla**91, 117**S** 863. (4) Statute intended to relieve parties from expense and vexation of two suits. **Fla** 130**S**57. [d] (4) 116 **Nebr**305, 216**NW**944. (5) Court order authorizing prosecution is unnecessary under statute as the petition for deficiency judgment was continuation of foreclosure action. **Nebr** 233**NW**255. [e] (2) 132 **Or**422, 280**P**508 (statute held inapplicable to deficiency judgment under mortgage covering premises in another state where such judgments were permissible).
291-29 205 **Iowa**227, 217**NW**626. [h] **In absence of agreement to become personally liable,** second mortgagee is not entitled to deficiency judgment against mortgagor. 137**Misc**136, 241**NYS**490. [i] **Assignee of note secured,** not indorsed by assignor, is required to come into equity to enforce deficiency against assignor. **Fla** 130**S**445.
291-31½-New. Court held without jurisdiction to enter in personam decree for deficiency against persons joining in execution of mortgage as guarantors. 153**Md**638, 139**A**446.
292-35½-New. An agreement consenting to a change in a decree by eliminating a provision for personal judgment constitutes waiver of plaintiff's right to judgment for deficiency, after lands had sold for less than the amount of the mortgage debt. 177**Ark**1013, 8**SW(2d)** 505.
292-35⅓-New. Right to personal judgment on a note is not lost because in the same suit foreclosure of a deed of trust is sought. 85**Colo** 544, 277**P**298.
292-39 153**Miss**314, 120**S**732.
292-53 But see 199**Wis**350, 226**NW**313.
293-68½-New. Although a note given for money actually borrowed from a third party and paid to the vendor may have been given on account of the purchase price, it is not within the statute as having been given for "the balance of the purchase price." 128 **Or**64, 264 **P**439.
293-69 But see 116**Nebr**305, 216**NW** 944.
293-74½-New. That wife, signing mortgage with husband, did not understand that she would be liable for deficiency judgment is no defense. 131 **Misc**511, 227**NYS**137.
293-86½-New. The holder of a note secured by a deed of trust was not estopped, by his expression of purpose, prior to foreclosure sale, to bid the amount due, from maintaining an action to recover the deficiency. 196**NC**502, 146**SE**86.
293-88 93**CalA**695, 270**P**394.
294-91 153**Md**638, 139**A**446; 132**Misc** 861, 231**NYS**133.
294-96½-New. Estate of husband who received proceeds of mortgage signed by husband and wife is first liable for a deficiency judgment against the estate and the wife. 131**Misc**511, 227 **NYS**137.
294-99 249 **Ill**A486; 8**LaA**712; **SD** 226 **NW**341.
296-27½-New. A decree of confirmation is the appropriate place to provide for a deficiency judgment. 96**Fla**756, 119**S**131.
296-37½-New. In a proper case a junior mortgagee may have a deficiency judgment on his cross petition. 32 **OhA** 43, 167**NE**601.
297-52 See also 250 **Ill**A486.
299-74 Contra 204 **Iowa**401, 213**NW** 769.
299-80 See also 135**Misc**454, 238**NYS** 236.
299-81½-New. In a suit to set aside a deficiency judgment on the ground of an agreement not to take such judgment, the complaint not alleging consideration for promise is insufficient. 91**CalA** 37, 266**P**1002.
299-81⅓-New. A contention that plaintiff failed to give notice before suit of election to declare the principal sum due for default in payment of interest cannot be raised on motion to vacate deficiency judgment. 199**Wis**350, 226 **NW**313.
299-81¼-New. Under the Practice Act, a deficiency judgment will not be set aside merely because the mortgagor's subsequent grantees who had assumed the mortgage were not made parties. 135**Misc**454, 238**NYS**236.
299-84 96**Fla**756, 119**S**131.
299-85 206 **Iowa**550, 221**NW**202.
299-88 47 **Ida**106, 273**P**947. [b] **Mortgagor having divested himself of title to premises before execution of mortgage,** chancellor can enter money decree without first offering land for sale. **Fla** 130 **S**57.
300-98 **Fla** 130**S**725.
300-3 109**Conn**329, 146**A**724; **Fla** 130 **S**725; 52**SD**33, 216**NW**580; 39**Wyo** 331, 271**P**217, 69**ALR**840. [h] **In Ohio.**-32 **OhA**43, 167**NE**601. [i] **In Florida.**-130 **S**725.
301-4 98**Fla**259, 123**S**742(3dcase) (action cannot be based on findings of chancellor where he refused to enter deficiency judgment).
302-13 132**Misc**861, 231**NYS**133.
302-25 132**Misc**861, 231**NYS**133.
304-43½-New. A mere offer of the mortgagee to return notes if the mortgagor would return property is no defense to an action for deficiency. 154 **Miss**441, 122**S**488.
304-59 [c] **Chancellor's findings as to balance due** may be admissible in law action for balance due. **Fla** 130**S**725.
304-60 251 **Ill**A145; **MoA** 256**SW**124; 39**Wyo** 331, 271**P**217, 69**ALR**840. [a] 47 **Ida**446, 276**P**309.
305-68 See also 204 **Iowa**401, 213**NW** 769.
305-70 135 **Okl** 159, 274**P**655.
305-86½-New. It is unnecessary to apply for an order of confirmation before issuing execution for deficiency. 227 **AppDiv**136, 237**NYS**444.
306-97 229**AppDiv**345, 242**NYS**369.
306-98 229**AppDiv**345, 242**NYS**369.
306-3½-New. Where mortgages covering personal property and real estate were security for two notes executed at the same time, one of which was retained by the bank effecting the transaction, and the other transferred to another bank, for whom it acted as agent, the net proceeds realized from both mortgages must be applied pro rata on the notes. 54**SD**291, 223**NW**193.
306-3⅓-New. Where a bond mortgage was given to secure funds for the erection of an apartment building, and a contractor's bond was furnished securing completion of the building, the surety is not entitled to a preferred claim to detriment of bondholders without their consent by virtue of an agreement between the insolvent owner, insolvent and defaulting contractor, and the surety. 153**Miss**339, 121**S**123.

306-3¼-New. As a general rule, courts will not decree a preference to be paid ahead of the rights of a mortgagee unless there is proof of equity which will justify such a decree. 334 **Ill** 147, 165**NE** 632.

306-9 See also 93**CalA**695, 270**P**394.

307-10½-New. In **Louisiana** creditors have direct common interest in debtor's property to be rateably distributed except for part included in mortgage or privilege. 21**F(2d)**434.

307-13 206 **Iowa**441, 220**NW**43.

307-14 151**Va**446, 145**SE**432.

307-14½-New. Where bondholders have operated mortgaged property and because of fraudulent conduct accounts remained unpaid, they will be paid out of the corpus of the property. 334 **Ill** 147, 165**NE**632.

307-14¼-New. Lien of one advancing money to agent of owner to redeem property has been held not within provision of deed of trust giving prior liens to bondholders. 39**F(2d)**800.

307-14¾-New. One purchasing judgment entered in mechanic's lien foreclosure suit could not claim priority under deed of trust where court held judgment void. 39**F(2d)**800.

303-28 224**AppDiv**621, 232**NYS**79.

308-32 See also 222**Ky**646, 1**SW(2d)** 1041. [a] 222**Ky**646, 1**SW(2d)**1041. [g] **Mortgagee entitled to reimbursement for payment of taxes.**-222**Ky**646, 1**SW(2d)** 1041.

309-40 [a] **Note, secured by mortgage executed by husband and wife, purchased by wife and assigned to creditor,** cannot be set off against amount due on theory wife still owned it. **NC** 155 **SE**606.

310-50 130 **Or**177, 279**P**550.

310-51 165**La**20, 115**S**353.

310-52 234**Ky**538, 28**SW(2d)**769; 156 **Tenn**637, 7**SW(2d)**38.

311-56½-New. A deed of trust securing the principal note and interest notes and providing for acceleration of maturity on default and for payment of the "principal note or notes" does not include unmatured interest notes as entitled to participate in the proceeds. 86**Colo** 529, 283**P**778.

311-68 132 **Okl** 36, 269**P**309. [b] **Transferee of principal note and one of two series of interest notes** is not entitled to priority over subsequent transferees of other series of interest notes. 86**Colo** 529, 283**P**778 (participation pro rata by innocent transferees not prevented by mortgagee's fraud).

312-70 [a] **Provision of mortgage making all notes become due on default.**-**NC** 155**SE**261.

312-81 242 **IllA**122.

313-87½-New. The owner of an equity of redemption is entitled to rents and profits until the redemption period expires unless the mortgagee takes steps to subject them to payment of deficiency. 242 **IllA**122.

313-87⅓-New. Where mortgage provisions in effect pledge rents and profits, the mortgagee is entitled thereto on foreclosure with judgment for deficiency against the owner of an equity of redemption standing in the mortgagor's shoes. 242 **IllA**122.

313-94 See also 149**Wash**253, 270**P**812. But see 299**Pa**117, 149**A**165.

313-95 155**Md**665, 142**A**525, 58**ALR** 1213. [d] **Taxes paid subsequent to judgment.**-38**Wyo** 515, 269**P**45, 60**ALR** 418.

313-98½-New. The purchaser of a second mortgage note is not entitled to reimbursement for taxes paid by him in performance of an agreement with the owners of land. **MoA** 20**SW(2d)**294.

313-1 229**AppDiv**345, 242**NYS**369.

314-2 [a] **Provision for payment from interest of other defendants.**-175**Ark**352, 299**SW**16.

314-11 [a] (2) Where mortgagor induces taking of larger mortgage without increasing debt and has right to redeem by paying amount actually due, he is not entitled to difference between mortgagee's bill and amount due. 243 **Mich**369, 220**NW**726.

314-13 **NJCh** 151**A**766.

315-14 43**F(2d)**130. [d] **Mortgagor's written directions** as to manner of disposition of proceeds of mortgage may be changed by subsequent oral directions. 180**Minn**544, 231**NW**207.

315-16 [e] **Purchaser's equitable lien** attaches to surplus subject to prior lien. **Wis** 232**NW**877.

315-17 See also 196**NC**318, 145**SE**621. [g] **Assignee of mortgagor** has no greater interest in respect of so-called surplus after foreclosure than had mortgagor. 243**Mich**369, 220**NW**726.

316-18 **NJCh** 151**A**766.

317-23 See also 102**NJEq**367, 140**A**681.

318-43 165**La**20, 115**S**353.

319-53 252 **IllA**51; 228**AppDiv**65, 239 **NYS**76; **SD** 227**NW**889. See also 178 **Ark**1172, 14**SW(2d)**222. [b] **In Porto Rico.**-13**PortoRicoFed**214.

320-61½-New. Where defendant took a second mortgage on a lot with notice that his grantor in purchasing the lot had agreed to pay the mortgage which covered the purchased lot and another lot, on sale of both lots at foreclosure defendant was not entitled to receive any part of the surplus remaining until the owner had been reimbursed for the value of the other lot. 265**Mass**319, 163 **NE**887.

320-68 102**NJEq**460, 141**A**265.

321-75 See also 155**Md**676, 142**A**529.

321-83 101**NJEq**636, 139**A**338. [b] **Distribution is, in effect, equitable partition of land for which money stands.**-**NJCh** 151**A**766.

322-88 [a] (3) Any time after sale and before actual payment into court. **NJCh** 151**A**766.

323-3 228**AppDiv**65, 239**NYS**76.

323-5 [b] **Referee in surplus money proceedings has broad powers** and can pass on rights of all mechanics' lienors. 228**AppDiv**65, 239**NYS**76. [c] **Mechanic's lienor, by failing to answer in foreclosure action, did not waive lien as** Lien Law in reference thereto is not applicable to foreclosure proceedings. 228**App Div**65, 239**NYS**76.

323-19 198**NC**342, 151**SE**869 (judgment debtors claiming no interest in surplus are improper parties).

323-24½-New. As respects the validity of the disposition of proceeds of sale, defendant in a foreclosure action has been held not unduly prejudiced by not being served notice terminating third parties' rights to redeem the property, and by a quitclaim deed made by the mortgagors to plaintiff. 93**CalA**695, 270 **P**394.

324-41½-New. Where there was fraud in the original transaction in which the mortgage creditor participated, a subsequent creditor may except to distribution. 94**PaSuper**21.

324-47 221**AppDiv**527, 225**NYS**118. [a] **Equities of subsequent lienors** are before court and objects of its care. **NJCh** 151**A**766 (all controversies respecting surplus moneys may be settled).

325-59 But see 222**Ky**646, 1**SW(2d)** 1041.

325-72 180**Minn**544, 231**NW**207. [b] **Evidence held insufficient** to support finding that labor was performed or materials furnished within statutory time before filing mechanic's lien. **NJCh** 151 **A**397.

326-77½-New. Encumbrancers who received proceeds of sale of interests not subject to mortgage should be directed to refund such amount into court. **NJCh** 151**A**760.

328-30½-New. A statute providing that, when suit is brought in the name of one person to the use of another, the latter shall be liable for costs, has been held inapplicable to a suit to foreclose a mortgage. 178**Ark**643, 12**SW(2d)**6.

329-30⅓-New. If property does not bring enough to pay the costs of sale and the principal and interest due on a note secured in full, the maker may become liable over for deficiency in some other proceeding. 323**Mo** 681, 20**SW(2d)** 523, 67**ALR**476.

329-36 323**Mo** 681, 20**SW(2d)**523, 67 **ALR**476.

329-39 [a] 222**Ky**646, 1**SW(2d)**1041.

329-50 178**Ark**643, 12**SW(2d)**6.

330-56 [a] (2) 224**AppDiv**621, 232**NYS** 79. (5) Contra 224**AppDiv**621, 232**NYS** 79.

330-63 But see **BC** [1928] 3**DomLR**59.

332-84½-New. Expenses of foreclosure cannot be recovered by mortgagor against grantee who assumed mortgage. 13**LaA**369, 127**S**113.

333-87½-New. Under the New York Civil Practice Act, prior to amendment, a referee in surplus money proceedings was entitled to ten dollars for each day spent in the business of reference, and a greater allowance was unauthorized in the absence of agreement. 251**NY**351, 167**NE**467.

333-97 219**Ala**652, 123**S**18.

333-1 But see 102**NJEq**41, 139**A**801.

333-1½-New. A fee is not taxable against another lienor joined as incidental defendant. 32**F(2d)**740.

333-1⅓-New. Mortgagor's offer of compromise does not justify denial of recovery of reasonable amount as attorney's fees. **Mont** 289**P**555(3dcase).

333-1¼-New. Time for determining whether fee shall be allowed. **Ala** 130**S** 900.

333-3 140 **Okl** 147, 282**P**306. [c] (2) Statute requiring notice for recovery of attorney's fees inapplicable. 170**Ga**642, 153**SE**751.

334-7 [a] (1) 165**La**795, 116**S**189.

334-13 [a] (2) In general. **Va** 153**SE** 843.

335-23 99**Fla**1169, 128**S**420.

335-26½-New. A claim that an expenditure for attorney's fees was covered by insurance has been held no defense to a mortgagor's liability for expenditure expressly agreed to be repaid in the mortgage, where the insurance company was not a party to the action nor to the mortgage. 95**CalA**113, 272**P** 331.

335-26⅓-New. In suit for a mechanic's lien, brought by a contractor against a property owner and mortgagee, an attorney's fee provided for in the mortgage has been held properly charged against the mortgagor rather than the contractor. 331 **Ill** 38, 162**NE**157.

335-26¼-New. Defendant holding a series of interest notes secured by foreclosed deed of trust is entitled to reasonable attorney's fees before payment of principal and interest. 86**Colo** 529, 283**P**778.

336-28 99**Fla**1169, 128**S**420.

337-50 **Ala** 129**S**81.

338-61 220**Ala**367, 125**S**212(2dcase).

338-63 See also 97**Fla**284, 120**S**554. [d] **Services in surplus proceedings.**-251 **NY**351, 167**NE**467.

339-74 95**CalA**113, 272**P**331; 241**Mich** 52, 216**NW**405; 247**Mich**36, 225**NW**572; 151**Va**81, 144**SE**602.

339-76 47 **Ida**287, 274**P**630.

339-77 [a] (8) See also **SD** 226**NW**265. (20) Seven hundred and fifty dollars for foreclosure of ten thousand dollar mortgage. 143**SC**127, 141**SE**278. (21) Allowance of seven and one-half per cent, which was adopted by court, in addition to ten per cent sale commissions fixed by statute, held not abuse of discretion. 151**Va**81, 144**SE**602. (22) Two hundred and fifty dollars for defending. 144 **Okl** 164, 289**P**695.

339-79 See also **CalA** 271**P**735; **Tex CivA** 15**SW(2d)**68.

340-80 241**Mich**52, 216**NW**405. But see 128 **Okl** 165, 261**P**913. [c] (4) Taxation as costs of minimum schedule fees adopted by bar association is improper. 53**SD**635, 222**NW**141.

341-93 241**Mich**52, 216**NW**405; 143**SC** 275, 141**SE**454.

341-93½-New. The burden is on complainant to prove the right to recovery and establish a basis for computation of the amount. 97**Fla**284, 120**S**554.

341-4½-New. Where the amount is definitely fixed in the mortgage and no objection is made to the amount by pleading or evidence, it is the duty of the court to allow the fee provided for. 128 **Okl** 165, 261**P**913.

341-5 **CalA** 271**P**755; 98**Fla**859, 124**S** 448.

341-7 97**Fla**284, 120**S**554.

342-21 204 **Iowa**401, 213**NW**769.

342-27 204 **Iowa**401, 213**NW**769.

343-44 Fla 129S690. See also Alta [1928] 1DomLR720.
344-46 94Fla717, 115S828.
344-58½-New. **Mortgagor's right to redeem may be sold and transferred.**-81 Mont271, 263P93.
345-76 Ark 31SW(2d)540.
345-85 205Cal 715, 272P1063.
346-15 Ala 130S222 (equitable mortgage).
343-37 NC 154SE18 (mortgagors favored in law).
349-39 [a] **Provisions held not violative of statute.**-CalA 290P501.
349-42 219Ala273, 122S16, 65ALR110.
349-45 94Fla717, 115S828.
350-55 94Fla717, 115S828.
351-61 128Me324, 147A415.
352-85 Fla 129S690.
352-88 48Philippine824. [b] **Statute has been held not unconstitutional.**-339 Ill 393, 171NE537.
352-91 82Mont280, 267P214.
352-92 250 IllA184; 204 Iowa401, 213 NW769, 771 [citCJ]; 204 Iowa439, 215 NW716; 205 Iowa789, 218NW502, 506 [citCJ].
352-98 81Mont1, 261P288.
353-17 82Mont280, 267P214.
353-30 204 Iowa401, 213NW769.
354-54 Ala 130S222.
356-79 Ark 31SW(2d)540.
356-3 But see Mich 233NW347.
357-6 Fla 129S690.
357-8 Ill 173NE281; 204 Iowa995, 216 NW116.
358-23 82Mont280, 267P214.
359-53 338 Ill 28, 169NE819; 204 Iowa 995, 216NW116.
359-54 204 Iowa995, 216NW116.
359-59 But see 179Ark421, 16SW(2d) 457.
359-61 See also 225AppDiv39, 232NYS 157.
360-73 338 Ill 28, 169NE819; SD 230 NW766. [b] **Debtor as grantee.**-206 Iowa426, 218NW303.
360-75 206 Iowa426, 218NW303.
360-77 See also 206 Iowa426, 218NW 303.
361-94½-New. A decree does not cut off the right of redemption of one purchasing land from the mortgagor prior to suit who is not made a party thereto. 208 Iowa1404, 227NW347 (right not defeated by fact that deed, pursuant to contract, left name of grantee blank).
361-96 51 SD596, 216NW194.
361-97 180Ark90, 20SW(2d)626.
361-98 180Ark90, 20SW(2d)626. [b] **Redemption by execution purchaser after foreclosure of prior mortgage.**-180 Ark90, 20SW(2d)626.
361-4 129Kan311, 282P712.
361-11 MoA 286SW401. [a] **Purchaser at sale after junior mortgage foreclosure** held to take grantor's equity of redemption. 165Ga470, 141SE203.
362-21 82Mont280, 267P214.
362-29 Ala 129S81 (must redeem all interests and pay entire debt).
362-31 205 Iowa789, 218NW502, 506 [citCJ].
364-69 99Fla1169, 128S420.
365-9 219Ala601, 122S808.
366-19 Ala 130S323; NC 154SE18.
366-21 50Philippine725.
367-63 50Philippine624.
367-68 [a] **Lien for payment of allowance for support of children of divorced parents.**-176Minn393, 223NW609.
368-89 82Mont280, 267P214.
368-98 207 Iowa1303, 224NW514.
368-99 339 Ill 393, 171NE537. [c] **Agreement between creditor and owner of equity of redemption** wherebv creditor was permitted to take confession judgment and redeem from foreclosure sale has been held not invalid. 339 Ill 393, 171NE537. [d] **Judgment creditor's right to redeem, master's deed under junior foreclosure,** and certificate of sale under senior encumbrance foreclosure have been held not merged. 339 Ill 393, 171NE537.
369-1 IndA 169NE693(2dcase) (right to redeem may be cut off by proper proceedings).
370-25 [f] **Mortgagor's conveyance to wife after foreclosure and redemption by her do not affect rights of judgment creditor entitled to priority.** 206 Iowa 426, 218NW303.
373-28 43F(2d)306; 217Ala166, 115S 103.
374-45 Fla 129S690; 141SC152, 139SE 405. See also 178Ark760, 12SW(2d)400.
375-67 33Ariz13, 261P633, 57ALR1015; 205 Iowa1385, 219NW537; 242Mich269, 218NW788.
375-68 174Minn180, 218NW889.
376-82 [a] **Company taking mortgage on land not redeemed by mortgagor** within time limited obtained no interest in equity of redemption. 111Conn504, 150A703.
376-86 SD 231NW897. [a] **Certificate holder accepting redemption money from assignee of second mortgage** consents to redemption by him. SD 231NW897.
376-90 220Ala626, 127S219.
376-92 220Ala626, 127S219.
377-2 82Mont280, 267P214, 219 [quot CJ].
377-4 82Mont280, 267P214, 219 [quot CJ]. [a] **For application of rule.**-82 Mont280, 267P214.
378-45½-New. Grantee of right of redemption is treated as mortgagor as to priority. 204 Iowa995, 216NW116.
380-90 82Mont280, 267P214.
380-92½-New. Upon foreclosure of trust constituting first lien and purchase of property by junior encumbrancee, title acquired is not limited and the debtor has no right of redemption. 80CalA 301, 251P841.
383-40 DelCh 149A428.
383-49½-New. The maxim, "Once a mortgage always a mortgage" does not mean that the right to redeem cannot be lost except under foreclosure. 247Mich 283, 225NW518.
383-55 82Mont280, 267P214; 41Wyo 168, 283P1105.
384-56 87Colo 417, 288P1049; 45 Ida 472, 262P1052; 204 Iowa439, 215NW 716.
384-63 But see 267Mass596, 166NE734.
384-65 [c] (1) 125Kan85, 262P561. (3) Record has been held to sustain adjudication of trial court limiting period of redemption to six months. 127Kan175, 272P130. [e] **Held purchase-money mortgage.**-129Kan159, 281P879.
385-84 [b] (5) Other instances. Mo 24 SW(2d)125. [d] **Where foreclosure sale defective,** equitable considerations determine whether owners of equity of redemption should be allowed to redeem. Mo 24SW(2d)125.
386-95 179Ark421, 16SW(2d)457.
389-38½-New. Where only one of several joint mortgagors redeemed within the period allowed for redemption, rights of others were cut off at the end of the period. Iowa 228NW7.
391-78 82Mont280, 267P214.
391-79 Mich 233NW347.
391-84 [c] 45 Ida472, 262P1052.
391-86 45 Ida472, 262P1052.
392-91½-New. In an action to determine adverse rights between the mortgagor and the mortgagee, thirty days is an unreasonably short time to grant to the mortgagor for redemption where the agreement gives the right to redeem without limit as to time. 57ND779, 224 NW217.
392-94 172Minn422, 215NW839.
392-7 Va 152SE343 (time held not of essence).
393-9 But see SD 227NW883.
393-21 201Cal 754, 258P1099.
394-33 45 Ida472, 262P1052.
394-41½-New. , or where the purchaser and subvendee in possession prior to suit were not made parties in foreclosure. 208 Iowa1404, 227NW347.
394-49 249Mich577, 229NW416.
396-71 Ala 130S222; Ark 31SW(2d) 540.
396-77½-New. The purchasing mortgagee is not entitled to demand unlawful or improper items on redemption. 219 Ala601, 122S808.
396-77¼-New. A purchaser at a sale acting diligently is entitled to an equitable lien on property redeemed to the extent of the amounts paid by him on account of prior mortgages to protect title prior to redemption by an assignee of the mortgagor. 48 Ida49, 279P420.
396-77¼-New. Land purchased from purchaser at sale under second mortgage by one executing third mortgage is not subject to third mortgage for redemption purposes. Ala 130S323.
396-89 220Ala626, 127S219 (deduction of encumbrance on land sold under warranty).
397-94 98Fla1238, 125S369(2dcase).
397-95½-New. A widow of a mortgagor with homestead rights need not tender burial expenses and attorney's fees included in notice to effect redemption. 219Ala601, 122S808.
397-1½-New. Where unsecured items were demanded, forfeiture created by statute did not obtain. 219Ala601, 122S 808.
397-7 [a] **Redeemer need not tender** debt due on subsequent mortgage. 45 Ida472, 262P1052.
398-27 [b] **Higher rate fixed by statute** in some jurisdictions does not govern court of equity in proceeding to redeem after statutory period. 201Cal 754, 258P 1099.
398-50 98Fla1238, 125S369(2dcase) (taxes not paid by complainant or by some one in his behalf should not be included). [a] **Necessity of filing affidavit of payment.**-176Minn393, 223NW 609.
398-55 But see Ala 129S81.
399-56 See also Ala 129S81.
399-59 See also 219Ala601, 122S808.
400-92 Ala 130S222; 205 Iowa789, 218 NW502.
400-2 Fla 129S690.
401-23 Cal 290P447; 205 Iowa789, 218 NW502.
401-27½-New. Mortgagee or purchaser at foreclosure sale may waive right to require junior mortgagee holding mortgage on part of lands to pay entire mortgage debt to redeem. Fla 129S690.
401-27¼-New. Purchaser under foreclosure cannot compel junior mortgagee of part of property, who was omitted as party, to redeem by paying amounts specified in release clause of mortgage. Fla 129S690.
401-34 See also 115Nebr199, 212NW 210.
401-45½-New. Payments by the purchaser at a sale on account of prior mortgages does not constitute a prior lien in the sense referred to in the statute in computing the amount necessary to redeem. 48 Ida49, 279P420.
402-74½-New. Payments by the purchaser at a sale on account of prior mortgages are taxes or assessments, within the statute, in computing the amount necessary to redeem. 48 Ida49, 279P420.
403-80 [a] **In North Dakota.**-57ND610, 223NW345.
403-84 218Ala462, 119S2; 219Ala601, 122S808; 220Ala597, 127S164.
404-98 DC 41F(2d)115.
404-10 [a] **Payment to county clerk under court order** may be effective under statute under some circumstances. 202Cal 513, 261P708.
404-16½-New. Where the statute provides for payment to the purchaser or his assign, payment to the clerk of the court is insufficient. 33NM166, 262P535.
404-16¼-New. In such case a statute relative to keeping a tender good does not authorize a redemption by payment to the clerk of the court. 33NM166, 262 P535.
405-37 [f] **Where property is bid in by third party,** amount required to be paid into court is sum equal to bid with interest thereon at prescribed rate from payment of bid to date of redemption for use and benefit of bidder. 115Nebr199, 212NW210.
405-47 But see 202Cal 643, 262P755.
406-58 83CalA542, 257P140.
407-75 248Mich508, 227NW690 (mortgagor entitled to redeem on payment of debt interest and costs pursuant to tender prior to expiration of redemption period).
407-96 204 Iowa439, 215NW716; 205 Iowa789, 218NW502; 82Mont280, 267P 214.
408-8 [a] **Effect of intention of parties.**-242Mich269, 218NW788.
409-33 82Mont280, 267P214.
411-71 111Conn504, 150A703.
411-73 [a] **Action to compel filing and recording.**-83CalA542, 257P140.
411-75 177Minn563, 225NW815.
411-77½-New. Where a redeeming

owner fails to record the redemption certificate within the statutory period and the holder of the sheriff's certificate accepts from the sheriff money received on redemption by a junior mortgagee, the owner cannot maintain an action for money had and received against the holder of the sheriff's certificate to recover money which he paid to him, 177 Minn563, 225NW815.

411-77½-New. but he may maintain such action to recover the money received from the sheriff. 177Minn563, 225NW815.

411-78 51SD596, 216NW194.

411-82 51SD596, 216NW194.

411-84 51SD596, 216NW194. [a] **Statement of amount of lien of divorced wife to secure payment of allowance for support of children** properly states entire amount covered by it. 176Minn393, 223 NW609.

413-10 See also 218Ala462, 119S2.

415-84 219Ala652, 123S18.

431-9½-New. Foreclosure of the mortgage after filing of bill in a suit by heirs of a deceased mortgagor to exercise equity of redemption does not oust the court of jurisdiction. 219Ala659, 123S 207.

432-43 218Ala462, 119S2.

434-76½-New. A decree entered without joining heirs or legatees in a suit continued by the representative of the mortgagor is erroneous. 219Ala652, 123 S18.

434-81 220Ala597, 127S164.

435-22 [d] (7) To show respondents acquired legal title to property. 220Ala 597, 127S164.

435-23 175Ark1152, 18W(2d)813.

436-30 219Ala601, 122S808.

436-36 See also 219Ala273, 122S16, 65 ALR110.

438-73 See also 219Ala601, 122S808.

438-74 [b] **Failure to aver tender of redemption charges** is excused by alleging lack of knowledge. Ala 128S779(1st case).

439-92½-New. An offer to do equity is sufficient as a prayer for declaration of trust in the nature of an equitable mortgage. 219Ala273, 122S16, 65ALR110.

439-14½-New. On a bill for redemption, the court may decree foreclosure of mortgage without filing of cross bill by the mortgagee, where complainant offers to do equity. 219Ala652, 123S 18.

440-20 Ala 130S222; CalA 285P354 (to show she was person entitled to redeem); 242Mich269, 218NW788. See also 167 La658, 120S42.

441-40 [a] (7) That plaintiff owner acquired assignment of sheriff's certificate of sale under mortgage for purpose of making redemption. 180Minn552, 231 NW234. [b] (6) Other matters. Ala 130S222.

441-41 [b] 242Mich269, 218NW788.

441-45 But see 219Ala659, 123S207.

443-71 207Cal 414, 278P1038 (individual defendants who had conveyed to corporation controlled by them could be required to join in reconveyance).

443-73½-New. Where findings show compliance with a construction loan agreement and that foreclosure was consented to by plaintiff, defendant is not liable under the agreement for plaintiff's loss. 265Mass85, 163NE867.

443-75 202Cal 643, 262P755.

444-81 265Mass598, 164NE476.

444-86 Ala 130S323 (purchaser from foreclosure sale purchaser). [a] **Return of money bid or paid in by purchaser with interest.**-115Nebr199, 212NW210.

445-97½-New. On failure of the mortgagors to redeem within the statutory redemption period, the purchaser becomes entitled to rents and profits thereafter. Iowa 228NW7.

448-44 82Mont280, 267P214.

448-47 338 Ill 28, 169NE819; 82Mont 280, 267P214.

448-51 Ala 130S222; 33Ariz13, 261P 633, 57ALR1015; Fla 129S690; 82Mont 280, 267P214.

448-56 33Ariz13, 261P633, 57ALR1015. [a] **Junior mortgagee, assigning mortgage as security and redeeming from first mortgagee without merger of titles,** became both legal and equitable owner with right of conveyance, and title acquired inured to benefit of assignee to extent only that its mortgage became first mortgage lien. 33Ariz13, 261P633, 57ALR1015.

448-59 88CalA238, 263P362; 205 Iowa 1385, 219NW537.

449-65 82Mont280, 267P214, 219 [cit& quot;CJ].

450-76 127Me393, 143A698.

451-85 48 Ida194, 281P471; 82Mont 280, 267P214.

451-87 252 IllA51; 206 Iowa426, 218 NW303; 205 Iowa1385, 219NW537. See also 48 Ida194, 281P471. But see 338 Ill 28, 169NE819.

451-89 [a] 174Minn180, 218NW889. [b] (2) Land purchased from judgment creditor redeeming from foreclosure sale is not subject to lien in favor of another judgment creditor. 87Colo 417, 288P 1049.

452-11 34Ariz438, 272P641.

453-16 131Misc233, 226NYS371.

453-21 Ala 129S81; Iowa 230NW415.

453-30 205 Iowa789, 218NW502, 506 [citCJ].

MOSAIC

455-17½-New. A kind of tesselated or inlaid work composed of bits, squares, or cubes of stone, glass, enamel, etc., combined so as to form an artistic pattern for wall decoration or pavements, and used also for other purposes. 11 CustA525.

MOTIONS AND ORDERS

464-8 83NM86, 262P175, 176 [quot Cyc].

465-12 206 Iowa1389, 222NW358.

468-74½-New. [§ 13a] 9. **Preliminary Order.** Province is to maintain status quo. Mich 233NW222.

469-79 247 IllA416, 419 [citCyc].

469-89½-New. Motions should be presented in their proper sequence. 131 Or 162, 281P185.

469-96 36F(2d)272.

470-1 52SD466, 218NW630, 631 [cit CJ].

470-2 227AppDiv66, 236NYS641 (issues of fact not disposed of). But see 52SD466, 218NW630, 631 [cit CJ].

471-17 129Kan311, 282P712 (party held not entitled to have motion heard before any particular judge).

471-18 [b] (1) 221AppDiv555, 224NYS 617. (2) Motion to set aside demand for facts is not authorized, and court is without power to make order vacating demand. 221AppDiv555, 224NYS617. (3) Demand should be complied with and answers given so as to shorten trial. 221AppDiv555, 224NYS617. (4) Demand may be ignored if defendant cannot answer. 221AppDiv555, 224NYS617. (5) At trial court may hold and certify, for defendant's protection, that refusal to answer or admit facts was reasonable. 221AppDiv555, 224NYS617.

472-34 But see 127Me493, 144A652.

473-55 173Minn271, 217NW351, 352 [citCJ]. [c] **In New Jersey.-Ch** 149A 369.

475-79 Md 151A21 (no recipiatur).

476-90 201Cal 210, 256P210.

476-91 201Cal 210, 256P210.

477-3 166La512, 117S573.

477-8 253 IllA274.

478-38 146SC225, 143SE796.

479-55 166La512, 117S573.

479-64 But see MoA 13SW(2d)1082.

480-73 Mo 298SW(2d)126.

480-78½-New. Presumption that parties are before court on motion cannot arise after case has been disposed of. Mo 298SW(2d)126.

481-87 [c] **In California.**-203Cal 417, 264P760.

481-4½-New. A person is not chargeable with notice of an order when he did not receive notice of the motion on return of which the order was made. Sask [1929] 2DomLR265.

481-6 Mo 298SW(2d)126.

481-11 Mo 298SW(2d)126.

485-95 34PortoRico 307 (only in meritorious cases under directory statutes).

488-39 234Ky597, 28SW(2d)760.

488-42 21F(2d)480.

489-58 201Cal 210, 256P210. [b] **Granting rule to strike off rule is not** proper practice. 9PaDist&Co 123.

489-61 201Cal 210, 256P210.

489-62 201Cal 210, 256P210.

490-68 Fla 130S608.

490-69½-New. The rule to show cause usually implies a pending suit and requires specific legal authority. 10LaA 357, 120S394.

490-69½-New. That an order to show cause was issued on summons and complaint and affidavit shortly before service of summons and complaint does not affect its validity. 179Minn106, 228NW 351.

491-84½-New. An order to show cause is not required to be attested by the clerk or filed in his office prior to the hearing. SD 224NW957.

493-6½-New. Discharge of rule. The rule may be discharged for want of diligence in prosecuting it. 9PaDist&Co 123.

493-21 [a] (2) Statements of fact in motion are not evidence of facts related therein. 98Fla132, 123S564.

495-45 Fla 129S889.

502-21 MoA 13SW(2d)1082.

503-55 See also 12PortoRicoFed73.

503-58 Mass 172NE85.

505-97 224Ky345, 6SW(2d)278.

505-91 246Mich304, 224NW336.

505-98½-New. In Saskatchewan, where a motion by way of appeal from a local master is returnable on a nonchamber day, the chamber clerk may enter the motion for hearing for the next ensuing chamber day without any adjournment by a kings bench judge. Sask [1929] 3 DomLR625.

506-11 TexCivA 48W(2d)195, 197 [cit CJ].

507-19 [c] **In proceeding under Saskatchewan Married Woman's Property Act between husband and wife,** involving questions as to title and right to possession of property, issue should not be directed but matter should be determined by court where facts are in controversy and cannot be determined on affidavits. Sask [1929] 2DomLR603.

503-35 Ala 129S872.

503-41 [c] (3) Other instances. Ala 129S872.

503-54 [c] **In Alberta.**-[1928] 2DomLR 502.

503-55 See also Alta [1928] 1DomLR 746.

503-76½-New. Ex parte affidavits may be used to obtain rule, but are not competent to support the application. NJ Sup 139A342.

511-23½ New. or pass upon all of the grounds stated in the motion. 145Wash 365, 260P243.

516-16½-New. Overruling a motion before hearing complete statement of counsel is error. 266Mass363, 165NE496.

516-19 223AppDiv644, 229NYS155.

516-34 83Mont37, 269P158.

517-46 176Ark553, 38W(2d)307.

518-57 Alta [1930] 2DomLR134. [b] **In California.**-87CalA108, 261P1100.

518-69½-New. A motion cannot be reviewed without leave. 207Cal 386, 278 P855.

519-76 153Va165, 149SE467.

525-44 174Minn344, 219NW184.

526-70 146Wash684, 264P991.

526-75½-New. The act of the court is the real order, and recording the minutes and signing of the order are only evidence that the order was made. 89CalA 748, 265P389.

526-77 166La512, 117S573.

528-9½-New. A statement in a court's order as to waiver of illegality of payments made by a trustee will be given effect although reference thereto was not made in the transcript or the court's minutes. 35Ariz457, 281P38.

532-75 37GaA776, 142SE173; 154SC 456, 151SE745.

533-88½-New. Resettlement. Court may correct or clarify order by resettlement on matters before it, but cannot change or amplify directions. 131Misc 119, 226NYS211.

533-91 82CalA580, 256P226; 166La512, 117S573; NJ 151A64(2dcase).

533-99 109TexCr218, 38W(2d)816.

534-13 218Ala440, 118S633.

534-22 Ark 82SW(2d)321; 205 Iowa 1180, 219NW326; 231Ky107, 21SW(2d)

14(; 120 Oh621, 169NE295; 131 Okl 1, 267P650, 653 [quotCyc]; 137 Okl 112, 278P278; 123 Or280, 261P55. [b] (2) 123 Or280, 261P55. (3) Function of nunc pro tunc order is to put upon record true memorial of what did indeed occur in litigation of case but about which record of court speaks either imperfectly or incorrectly, or else is silent. 137 Okl 112, 278P278. [f] (2) Power to enter orders nunc pro tunc is inherent in courts of record, but such power must be exercised by court. 230Ky316, 19SW(2d)994.

536-29 118 Oh434, 161NE282.

536-34 118 Oh434, 161NE282; 157Tenn 326, 8SW(2d)367.

536-35 118 Oh434, 161NE282.

536-36 321Mo 282, 10SW(2d)914.

537-37 MoA 3SW(2d)735; 51Philippine 862. [c] See also 179Ark1123, 20SW (2d)622.

537-41 137 Okl 112, 278P278.

539-79 252 IllA560. See also 226Ky412, 11SW(2d)107.

542-20 132Misc861, 231NYS133. [b] **Correction to conform to law and justice.**–35PortoRico 288.

542-29 Ala 129S72.

544-48 34NM636, 287P290(2dcase) (inadvertently consented to by counsel).

544-52 Sask [1930] 1DomLR910 (extension of time contemplated by order).

544-55 244 IllA261.

545-66 33Ariz283, 264P101; Mont 285 P668. [a] **In North Dakota.**–231NW846.

545-72 39F(2d)432 (limitation on power); MoA 280SW57.

547-34 243 IllA358.

547-92 133Misc20, 231NYS83.

548-99 99Fla592, 127S333.

548-1 TexCivA 24SW(2d)99.

549-7 338 Ill 158, 170NE320.

549-9½-New. In proceedings to expunge various orders, clerks of court of different counties, judges of courts of different districts and counties could not properly be joined in a single action. 120 Oh222, 165NE843.

550-22 [d] **In North Dakota.**–231NW 846.

553-64½-New. Failure to have the necessary parties before the court in a proceeding to annul an order affecting them is a fundamental defect which may be noticed at any stage of the case. Tex CivA 7SW(2d)613.

553-74 Ala 129S72 (transcript of proceedings).

553-76½-New. An order will not be vavated on the ground that the proper party was not before the court where other proper parties were not before the court on making of the order and on application for vacation. Can [1928] 3 DomLR553.

553-76⅔-New. On a motion to vacate a previous order, the petition and order sought to be vacated may be assumed to constitute the record corresponding to the judgment roll in a suit at law or equity where they were the only evidence introduced. 39Wyo 163, 270P 1068.

554-77 Mo 5SW(2d)3; 128 Okl 97, 261P 209. [b] **Burden of proof** is on party moving to strike spurious matter from interlocutory orders. Ala 129S72.

554-86 Mont 285P668. [b] **Liberal exercise of statutory discretion required.**–Mont 285P668.

554-88 50Philippine844 (denial of motion, not supported by proof, held not abuse of discretion).

555-97½-New. Under statutes, where court failed to rule on motion to vacate within prescribed time after rendition of order, motion is overruled by operation of law, and order overruling motion made thereafter is void. 33Ariz283, 264 P101.

557-66 ND 231NW846 (order made by judge of district other than that in which action was pending contrary to Comp. L. [1913] § 7353).

558-68 244 IllA261.

558-75 18F(2d)731; 174Minn344, 219 NW184.

559-77 102CalA299, 283P298 (order as defined in statute is binding on court and litigants till set aside); Mo 28SW (2d)662. [d] **Persons bound.**–35F(2d) 189 (not binding on one who had no opportunity to resist making of order).

559-79 141SC152, 139SE405.

560-80 But see 141SC152, 139SE405.

560-88 151Miss676, 118S286(2dcase).

560-90 98Fla627, 125S2; 242Mich225, 218NW757; TexCommnA 15SW(2d)594; Man [1929] 1DomLR909.

MOTIVE

561-4 158Tenn323, 13SW(2d)318.

MOTOR VEHICLES

609-4 [a] (2) Includes airplanes. 43F (2d)273. [d] **Under New York Penal Law prohibiting defacing of motor vehicles or any mechanical device,** and under Highway Law, "motor vehicle" includes only what is commonly known as automobile. 133Misc542, 232NYS647.

609-18 [d] (9) A vehicle used for travel, traffic, transportation, and communication. 124Kan414, 261P30. (10) In general. Ark 31SW(2d)418.

610-22 124Kan414, 261P30.

610-27½-New. The words "a car" are used in ordinary parlance to mean a motor car or automobile. NS [1928] 3 DomLR225.

611-45 [b] **Distinguished from "touring car."**–261Mass228, 158NE771 ("well-recognized difference").

611-50 [c] **"Car" as synonymous term.**–NS [1928] 3DomLR225.

613-75 124 Or644, 264P349.

613-77 Mich 233NW395.

613-81 337 Ill 200, 169NE22, 66ALR 834; Va 154SE579.

614-94 135Misc368, 237NYS689.

614-95 157Miss770, 128S507; 28 OhA 42, 162NE456; 132 Or479, 285P201.

615-98 155Tenn633, 299SW803, 59ALR 685.

615-99 50RI 440, 148A415.

616-2 242Mich95, 219NW69.

616-5 245Mich261, 222NW86. [b] **May be declared nuisance per se,** when used in certain localities. 298Pa475, 148A 695.

616-9½-New. **Motor vehicle in restricted area** in violation of a traffic ordinance may be removed, as a nuisance, by authority of the municipality. 26 OhNP NS137.

616-21 131Misc85, 226NYS263.

616-22 131Misc85, 226NYS263. [a] **Regulation is exercise of police power.**–40F(2d)958.

617-26 20F(2d)87; 108Conn333, 143A 163, 61ALR846; 108Conn371, 143A240, 65ALR943; Mass 171NE294 (compulsory automobile insurance held not justifiable exercise of police power); OklCr 274P684.

617-28 37GaA343, 140SE425.

617-31 20F(2d)87; 78Mont415, 258P 236; 161Tenn211, 30SW(2d)248.

617-32 105NJL286, 144A630.

617-33 MoA 27SW(2d)447; 78Mont415, 258P236. [c] **Cannot prohibit under power to regulate.**–336 Ill 573, 168NE 661; 337 Ill 200, 169NE22, 66ALR834. [d] **Charter provision does not authorize city** to exact security for persons injured by negligent operation. 161Tenn 211, 30SW(2d)248.

618-34 35 OhA361, 172NE533.

618-35 TexCivA 10SW(2d)772.

618-43 202Cal 660, 262P334. [b] (4) Other instances. Mo 23SW(2d)96.

618-47 202Cal 660, 262P334; 255 IllA 106; Ind 163NE489; 226Ky421, 11SW (2d)93; 229Ky186, 16SW(2d)1034; Mo 23SW(2d)96; TexCommnA 23SW(2d) 295; TexCivA 13SW(2d)464; TexCivA 23SW(2d)488; 106TexCr156, 291SW 246; BC [1930] 2DomLR73. [a] (5) Ordinance regulating bus service, as conflicting with authority of public service commission. Ind 163NE489. (6) Ordinance barring jitneys serving public from operating on certain streets and regulating their employment on others. 244Mich480, 221NW622. (7) Other instances. MoA 27SW(2d)447. [c] **Ordinance punishing negligent collision** with motor vehicle not in conflict with statute making negligent collision with person aggravated assault. 106TexCr156, 291SW246.

619-50 92CalA145, 267P887; TexCivA 5SW(2d)824.

619-53 [c] **Public utilities commission.**–83Colo 521, 267P198.

619-56 Mo 285SW449; 9PaDist&Co 248.

620-67 92CalA145, 267P887; 124Kan 414, 261P30; 128Misc127, 245NYS346.

620-77 29F(2d)854; Cal 291P580.

621-80 [d] **Statutes held valid.**–33NM 200, 263P510.

621-81½-New. Automobile guest's right of action for personal injuries is property right which cannot be impaired by subsequent statute. Conn 151A524.

621-83 See also 280US117, 50SCt57, 74 L ed221, 65ALR939. [a] **Statute regulating state's liability** for agent's negligence in automobile accidents is not class legislation. Cal 289P160.

621-84 226Ky580, 11SW(2d)409.

622-90 50RI 394, 148A186.

622-92½-New. A statute, limiting the period for continuances granted to nonresident automobile owners to defend actions against them, has been held void. 27F(2d)364.

622-96 78Mont415, 258P236; 116Tex 446, 294SW829.

622-98 But see Nebr 229NW329.

623-16 Cal 291P580; Cal 293P62; 336 Ill 573, 168NE661; Mass 173NE524; 128 Misc127, 245NYS346; 200Wis267, 227 NW942. [d] **Ordinance limiting speed and requiring alarms at crossings** held traffic ordinance. TexCivA 26SW(2d) 726. [e] **Particular statutes construed.**–Oh 172NE442.

624-19 336 Ill 573, 168NE661.

624-22 41GaA356, 153SE73(2dcase).

624-23 3LaA278.

624-25 Cal 287P343; Cal 293P62; CalA 285P879 (words used in present tense); CalA 287P354; CalA 293P78; 208 Iowa 873, 224NW36; Mass 173NE524. But see Mass 167NE335. [a] **Personal injury actions arising on date statute took effect** are not affected by Vehicle Act. Cal 292P451.

627-59 [a] **Statutes held valid.**–227App Div422, 237NYS436.

627-63½-New. A statute requiring a driver, before turning, to make sure that such movement can be made in safety, is not unconstitutional as creating an impossible standard without regard to the facts in each case, contrary to the due process and equal protection clauses. 31 OhA229, 166NE916.

627-66 50RI 53, 144A888.

627-67 12PaDist&Co 234; 50RI 53, 144 A888.

627-68 336 Ill 573, 168NE661.

627-71½-New. A parking ordinance is only a police regulation and settles the matter only between the automobile owner and the city. 123 Or383, 261P415.

628-86 OklCr 290P197(2dcase).

629-95 37GaA343, 140SE425.

629-99 TexCr 27SW(2d)1098.

631-19 TexCommnA 26SW(2d)199.

631-22 220Ala286, 125S387.

632-32 TexCivA 26SW(2d)726.

633-40 35 OhA361, 172NE533; TexCivA 26SW(2d)726.

633-41 121 OhA80, 167NE158, 64ALR 981; 28 OhA30, 162NE434; 35 OhA361, 172NE533.

633-43 LaA 129S258. [a] (3) Ordinance forbidding parking, obstructing pedestrian crossings at street intersections. 204Cal 107, 266P534.

634-44 10PaDist&Co 154.

634-45 221MoA195, 300SW308.

634-52 121 Oh106, 166NE904; 121 Oh 80, 167NE158, 64ALR981.

634-53 35 OhA361, 172NE533.

635-57 Alta [1929] 1DomLR773.

635-59 [a] **Ordinance requiring motor vehicles to stop at street intersections in obedience to traffic signals** is not inconsistent with statute limiting speed and excepting ambulances. TexCivA 5SW (2d)824.

635-66 116Tex446, 294SW829.

636-68 238Mich146, 213NW79.

636-70 9PaDist&Co 361.

636-74 333 Ill 158, 164NE173, 61ALR 649; 245 IllA233.

637-83 But see Ind 166NE1.

637-89 See also 9PaDist&Co 428.

640-49 227AppDiv320, 237NYS618 (unenforceable); 135Misc368, 237NYS 689 (sufficiency of service); 136Misc 815, 243NYS284 (holding Municipal Court without jurisdiction on substi-

tuted service on secretary of state). [b] **Constitutionality of statute** is not effected by defendant being foreign corporation. 135Misc368, 237NYS689. [c] **In New York.**–135Misc368, 237NYS689.

640–50 158Md685, 149A547.

640–51 252NY400, 169NE624 (statute construed); 134Misc331, 236NYS381 (infancy of driver of vehicle does not invalidate service). [b] **Nonresidents passing through state** are within statute. 40F(2d)727. [c] **Nonresident owner** of vehicle operated by one unassociated by agency is not amendable to process. 137Misc65, 241NYS465.

640–52 Minn 231NW714. But see 134 Misc253, 236NYS96.

640–53 27F(2d)364; 35F(2d)232; 40 F(2d)727; Minn 231NW714; 83NH232, 140A587. But see 158Md685, 149A547. [b] **Necessity for notice to nonresident.**–131Misc85, 226NYS263.

641–54 35F(2d)232; Minn 231NW714.

641–54½–New. Statute does not apply to actions growing out of accidents before statute became effective. 198NC 369, 151SE725.

641–55 [b] **Common carrier railroad company** may be motor transportation company. 121 Oh588, 170NE574. [c] **It is a question of fact** whether company is engaged as a motor transportation company. 121 Oh588, 170NE574. [d] **Public utilities commission** may have jurisdiction to determine whether company is a motor transportation company. 121 Oh588, 170NE574.

641–57 39F(2d)145.

641–59 181Ark522, 27SW(2d)96(2d case) (such act does not regulate general traffic, only those to whom it applies).

641–60 181Ark522, 27SW(2d)96(2d case); 108TexCr533, 28W(2d)445, 447 [citCJ]; 108TexCr619, 28W(2d)449, 450 [citCJ].

641–60½–New. Those who avail themselves of the regulations of motor transportation for hire and observe such regulations must be protected from unfair competition by those who do neither. 229Ky731, 17SW(2d)1012, 66ALR1378.

641–60⅓–New. A competing carrier has no power thereby to waive requirements of the statute for the state. 119 Oh531, 164NE763.

641–65 99Fla1174, 128S632 (statute construed); Iowa 230NW540; 85Mont 11, 277P437; 134Misc664, 236NYS6; TexCivA 27SW(2d)874. [a] (2) That operation of motor carriers for profit tends to impede ordinary traffic and requires additional expense is reason for regulation. Fla 130S587. [e] **In Ohio.**–121 Oh268, 167NE879. [f] **Sources of right to regulate** are drawn from nature of business and use of public highways. 39F(2d)145.

642–68 169Ga51, 149SE638, 65ALR 1361; 105NJL286, 144A630; 137Misc 472, 242NYS316.

642–71 Ind 163NE489. See also 105 NJL286, 144A630.

643–74 11PaDist&Co 385.

643–80 23AlaA65, 120S469; NJSup 149A269. [a] **Legislature, delegating authority to borough presidents to grant franchise for bus operation,** has authority to take such power away and to designate some other person as depositary of power under certain contingencies. 225AppDiv371, 233NYS184. [b] **What constitutes common carrier,** within statute providing for regulation by public utilities commission of business of common carriers on public highways, is question of law, but whether service rendered comes within that meaning is question of fact. 245Mich 297, 222NW718.

643–85 167Ga902, 147SE370.

643–87 245Mich297, 222NW718; 105 NJL28, 143A450.

643–88 198NC317, 151SE648, 66ALR 1197 (separation of white and negro passengers); TexCivA 27SW(2d)874.

643–89 85Mont11, 277P437.

644–94 105NJL28, 143A450.

644–95½–New. Under statute, public service commission cannot declare municipal ordinance invalid which does not relate to the quality or character of service required of a public utility or to the terms and conditions on which such utility is permitted to use streets. Ind 163NE483.

644–96½–New. Power of commission to supervise and regulate is not usurped by exercise of court of common pleas of its jurisdiction to determine controversy between claimants to certificate and property. 121 Oh450, 169NE454.

644–96⅓–New. Under statute permitting commission to revoke, alter, or amend certificate, it has discretion which is not abused by grant of reasonable time to comply with regulations. 121 Oh389, 169NE297(3dcase).

644–97 [b] **Term "between cities or towns"** in statute designates termini of route. 175Ark645, 300SW380.

644–98 121 Oh450, 169NE454.

644–5 175Ark645, 300SW380. [a] **Taxicab operator** going outside city occasionally held not required to secure permit from railroad commission. 175 Ark645, 300SW380.

644–8 121 Oh389, 169NE297(3dcase) (question of convenience and necessity not in issue).

645–12½–New. A statute providing for trial of actions or proceedings against automobile transportation companies in any county through which it operates does not apply to appeals from orders of the commission. 179Minn90, 228NW 444.

645–12⅓–New. Under some statutes, an appeal from an order of the commission will not lie to the district court of a county in which service is not affected by the order. 179Minn90, 228NW444.

645–13 [a] **On collateral attack,** order has all attributes of judgment of court of law. 218Ala669, 120S471.

645–14 See also Ind 163NE483.

645–18 49Philippine774. See also 105 NJL28, 143A450.

645–20 27F(2d)425.

645–22 28F(2d)736; NJSup 142A821. See also 27F(2d)425.

646–36 99Fla1174, 128S632; 245Mich 297, 222NW718.

646–37 See also 137Misc472, 242NYS 316.

647–44 120 Oh1, 165NE355; 11PaDist &Co 684; 11PaDist&Co 744.

647–52 152Va992, 147SE262.

647–54 180Ark96, 21SW(2d)406; 99 Fla1174, 128S632 (provisions held capable of effectuation); 118 Oh95, 160NE 623.

648–61 But see 174Minn248, 219NW 167.

648–67 170Ga873, 154SE439; 85Mont 11, 277P437; 105NJL286, 144A630; 151Wash630, 276P858.

649–68 99Fla1174, 128S632; 137Misc 472, 242NYS316.

649–71 169Ga51, 149SE638.

649–72 152Va992, 147SE262.

650–6½–New. State may require contracts providing for liability insurance to be filed. 277US163, 48SCt502, 72L ed 833, 62ALR45.

650–11 116Tex446, 294SW829.

651–15 116Tex446, 294SW829.

651–18 [b] **Combination of routes** requires approval of public service commission. 225AppDiv313, 233NYS63. [c] **Application for change** to permit running of busses on combined routes must be made to public service commission. 225AppDiv313, 233NYS63.

651–19 Ind 163NE487; Ind 166NE153 (1stcase).

651–29 244Mich480, 221NW622; 146 SC436, 144SE157.

652–30 [b] **Ordinance held unreasonable.**–NJSup 142A821.

652–31 [b] (2) Mere fact that company operating autobusses may not make profit because of regulation prohibiting operation of certain kind of autobusses on certain streets does not show that regulation is discriminatory. NJSup 142A821.

652–43 175Minn386, 221NW423.

653–58 105NJL286, 144A630.

655–85 [a] **Commission may approve abandonment of route** when part of it becomes impassable. 119 Oh318, 164NE 230.

655–87 85Mont11, 277P437. [a] **Board of public utility commissioners was not required to specify services to be furnished,** where it was difficult at outset to determine busses necessary on avenue in question, and where time and operation alone could safely and properly determine question. NJSup 144A 325. [b] **Whether operation of bus line under combination of routes** without transferring passengers subserves public interest is not for courts, but is solely within jurisdiction of public service commission after due consent of municipality. 225AppDiv313, 233NYS 63.

655–88 [a] **Requirements of statute** as to procedure to be followed upon application for increase in equipment are jurisdictional, and increase in equipment permitted without compliance with these requirements is void. 119 Oh531, 164NE763. [b] **Public necessity and convenience** is essential to authority for increased equipment. 121 Oh550, 170 NE360.

655–91 [a] **Application for authority to increase is not affected by adverse adjudication** at prior hearing, having no reference to conditions as existing at least meeting. 120 Oh390, 166NE 359.

655–94 But see 121 Oh571, 170NE364.

655–95 334 Ill 293, 165NE790; 120 Oh 390, 166NE359.

655–98 [a] **Evidence held to show that bus company is not only convenience but necessity** and that street railway did not render bus line unnecessary, warranting grant of extension of bus line. 334 Ill 293, 165NE790.

655–98⅓–New. The board of public utility commissioners had authority to make an order approving consents of municipalities to reroute a portion of busses operated by respondent, although municipal consents did not specify particular busses or specific consents theretofore granted which were subjects of rerouting. NJSup 144A325.

655–98⅔–New. In proceedings by a bus company to obtain additional rights beyond those approved by the public service commission to combine routes, so as to permit a continuous ride on interchangeable routes without physical transfer of passengers, a competitive carrier has a right to be heard. 225 AppDiv313, 233NYS63.

656–8 169Ga51, 149SE638, 65ALR1361. [b] **Proper basis for classification** by municipality in prescribing fares which each may charge for carrying passengers is afforded by difference between operation of motor busses under regular schedules and operation of taxicabs without fixed schedules. 169Ga51, 149 SE638, 65ALR1361.

656–9 230Ky216, 18SW(2d)992; 151 Wash150, 275P80.

656–14 230Ky216, 18SW(2d)992.

657–23 126Kan677, 271P270.

657–25 137Misc472, 242NYS316. [e] **Complaint held insufficient.**–25F(2d) 988; 170Ga505, 153SE42. [f] **Taxicab company suing to enjoin city and its officials** from enforcing ordinance regulating operation of taxicabs is not entitled to assert invalidity of provision not involved in action. 230Ky216, 18 SW(2d)992. [g] **Exemption from ordinance.**–169Ga57, 149SE641.

657–27 See also 128Misc127, 245NYS 346. [a] (2) Discrimination against complainant on schedules not shown. 39F(2d)145.

657–33½–New. Prosecutors, in a certiorari proceeding to review a judgment of public utility commissioners approving consents of municipalities to reroute a portion of busses, could not complain that there was before the commissioners no approval of such rerouting by a certain borough, where the prosecutors were not affected thereby. NJSup 144 A325.

657–37 227AppDiv422, 237NYS436 (treble damages for injury to highway by transportation of heavy loads "or any other act").

658–49 [a] **Action for damages for parking in violation of ordinance.**–132 Misc307, 230NYS187.

658–52 [a] **Sufficiency of evidence.**–227 AppDiv422, 237NYS436 (to make prima facie case in action by town to recover treble damages for injury to highway).

659-69 Iowa 230NW540. See also 254 IllA7.
659-71 See also 173Minn72, 216NW 542.
659-77 329 Ill 501, 160NE839. [a] **Both property and privilege tax.**–180 Minn241, 230NW572.
660-78 99Fla1174, 128S632 (mileage tax held license tax).
660-81 Cal 289P167 (effect of variance between rates fixed by constitution and statute).
660-82 161Tenn211, 30SW(2d)248.
660-83 Ark 32SW(2d)634; Iowa 232 NW477. [d] **Charging annual sum** instead of mileage fee is within discretion of state. 161Tenn56, 29SW(2d)257.
660-87 38F(2d)1003 (regardless of extent or place of use).
661-92 169Ga57, 149SE641 (includes license to conduct business and tax for raising revenues).
661-93 NJSup 151A369.
661-98 MoA 27SW(2d)447 (holding ordinance in conformity with state laws); 161Tenn211, 30SW(2d)248 (means of indemnifying persons injured through negligent operation of motor vehicles). [a] **Camp meeting association is not municipality** authorized to license autobusses. NJSup 151A369.
662-12 206Cal 714, 275P948.
663-22 28F(2d)736. [a] (2) Other instances. 206Cal 714, 275P948.
663-23 Mass 171NE294 (holding that legislature cannot condition use of highway by vehicle owners on contribution to state insurance fund).
663-28 206Cal 714, 275P948.
664-41 329 Ill 501, 160NE839.
664-42 83Colo 105, 262P926. [a] (5) Statute requiring certificate of public convenience and necessity to operate passenger motor vehicles. 262Mass583, 160NE321.
664-43 206Cal 714, 275P948; 229Ky 186, 168SW(2d)1034; 161Tenn56, 29SW (2d)257.
665-46 281US66, 50SCt204, 74Led704, 68ALR194; 38F(2d)1003; Ga 155SE 338; 152SC455, 150SE269. But see 180 Minn268, 230NW815.
665-46½-New. or equal protection of laws. 197NC604, 150SE190.
665-47½-New. Statute subjecting to registration tax vehicles owned by companies taxed on gross earnings has been held invalid as denying equal protection of law. 180Minn268, 230NW815.
665-49 But see 173Minn72, 216NW542.
665-56 329 Ill 501, 160NE839.
666-60½-New. Statute subjecting to registration tax vehicles owned by companies taxed on gross earnings is violative of constitutional provision making such tax in lieu of other taxes. 180 Minn268, 230NW815.
666-65 281US66, 50SCt204, 74Led704, 68ALR194; 207 Iowa461, 221NW364; 118 Oh187, 160NE674. But see 103NJ Eq307, 143A438.
666-66 196Wis410, 220NW390.
666-69 Ga 155SE338.
667-71 39F(2d)145.
667-72 Ill 173NE137; 230Ky216, 18 SW(2d)992.
667-82 196Wis410, 220NW390.
668-85 33NM553, 273P928, 62ALR296.
668-86 But see Ga 155SE338.
668-87½-New. or which subject to registration tax vehicles owned by companies taxed on gross earnings; 180 Minn268, 230NW815.
669-4 254 IllA7 (includes all vehicles whose use would affect highways and travel thereon); 261Mass228, 158NE 771. [d] **Restricting license to particular kind of vehicle** precludes operation under license of any other kind of vehicle. 261Mass228, 158NE771. [e] **Trailers.**–254 IllA7 (statute held to include semi-trailers).
669-10 [a] **New and unused motor vehicles in hands of dealer** for sale and not sold during year or used on highways are not subject to motor vehicle tax. 178Minn300, 227NW43.
669-22½-New. One owning and operating trucks under contract for transportation of mails is entitled to exemption of vehicles from state registration fees. TexCommnA 12SW(2d)989.
670-27 180Ark815, 23SW(2d)259.
670-34 180Minn241, 230NW572.
670-35 107Conn137, 139A637.
670-37 40F(2d)958.
670-37½-New. nor in violation of equal protection, 180Minn241, 230NW572.
670-39½-New. One may be a resident of more than one state for the purpose of registration of motor vehicles. 107 Conn137, 139A637.
670-39½-New. Member of military force stationed within military reservation is subject to state motor vehicle tax on automobile used on state highways. 180Minn241, 230NW572 (reservation is neither "country" nor "state" within meaning of statute).
670-43 161Tenn56, 29SW(2d)257 (interstate transportation).
671-55 [d] **Resident of army post, not being "federal district,"** is not exempt under state registration law. 40F(2d) 958.
672-88 252 IllA156 (taxicab company which purchased taxicabs and entered into leasing agreements with drivers entitling them to bills of sale under stated conditions held owner).
673-6 [a] **Registration in maiden name remains legal after marriage and change of name.**–Mass 171NE484.
674-35 266Mass220, 165NE91.
674-42½-New. Under some statutes separate license fees for motor vehicles produced by different manufacturers must be paid, not for different models by the same manufacturer. 148SC260, 146SE6.
674-44½-New. Dealer's fee payable in lieu of general registration tax is in nature of occupation tax. Okl 291P10.
675-63 337 Ill 200, 169NE22, 66ALR 834 (motorbusses).
675-68 Ill 173NE137; 81Mont472, 268 P982; 108TexCr533, 28W(2d)445. [a] **person has no right to use highways as** common carrier for hire. 229Ky731, 17 SW(2d)1012, 66ALR1378.
676-71 337 Ill 200, 169NE22, 66ALR 834; 229Ky731, 17SW(2d)1012, 66ALR 1378.
676-85 Iowa 230NW540. [c] (4) Notwithstanding repeal of statute before commencement of action, state can collect license fees. Cal 289P167. [d] **Public Utilities Act has been held not to take from cities** previously conferred power to regulate operation of taxicabs. Ill 173NE137.
676-86 225AppDiv313, 233NYS63; TexCivA 27SW(2d)874.
677-91½-New. It will be assumed that requisite permission and approval required by statute was contemporaneous with granting of certificates, under some statutes. 225AppDiv313, 233NYS63.
677-96 Ill 173NE137; 220Ky728, 295 SW1055; NJSup 151A369; 118 Oh187, 160NE674. But see 91PaSuper46.
678-2 337 Ill 200, 169NE22, 66ALR 834.
678-8 [a] (3) Taxicab operator, operating as common carrier between two municipalities under permit from railroad commission, is not required to have license from one of such municipalities though most of his revenue is derived from passengers within its limits. 175Ark650, 18SW(2d)58.
680-39 229Ky722, 17SW(2d)1017.
680-42 83Mont483, 272P987.
680-45 174Minn248, 219NW167; 83 Mont483, 272P987; 85Mont11, 277P 437; 225AppDiv313, 233NYS63; 137 Misc199, 243NYS145; TexCivA 27SW (2d)874. See also NJSup 152A239. [b] **In New York.**–223AppDiv75, 227NYS 510. [c] **Matters not operating as res judicata of claim of immunity from requirement.**–43F(2d)236. [d] **Consolidation of certificates.**–Wash 291P733. [e] **On construction of new highway paralleling old** holder is entitled to amendment authorizing service over new highway. Wash 288P245.
680-46 [a] **A city in Mexico is not a suburb** of Del Rio, Texas, under statute requiring certificate. TexCivA 27SW (2d)874.
681-50½-New. That the railroad commission failed or neglected to act upon an application for a certificate under statute, for the operation of an intrastate bus line, did not justify applicant in operating without a certificate. 83 Mont483, 272P987.
681-52 Fla 130S587.
681-53 Fla 130S587.
681-54 235Ky559, 31SW(2d)917 (statutes are construed in interest of traveling public).
681-58½-New. In ascertaining the meaning of the statute requiring a certificate of convenience and necessity to operate motor vehicles carrying passengers for hire, the purpose of the act as shown by its provisions must be kept in mind. 50RI 37, 144A891.
682-83½-New. Where service by a motor transportation company applying for abandonment of service under all but one of its certificates was continued, but under a single certificate, unifying former service and coördinating operation, service was not thereby abandoned. 121 Oh268, 167NE879.
682-84 118 Oh173, 160NE685.
683-94½-New. Denial of a certificate to an interstate motor bus transportation company to continue intra-state business in which it was engaged before the statute was enacted does not deprive it of property without due process of law by lessening the value of motor vehicles. SD 228NW179.
683-97 [d] **Constitutional right.**–174 Minn248, 219NW167.
683-5½-New. Privilege of securing certificate as of right must be exercised within reasonable time. Fla 130S615.
683-6½-New. One applying for certificate to operate as of right over only part of route and delaying a year before applying for whole route may be deemed to have abandoned privilege. Fla 130S615.
684-20 [a] **Operations in new territory in advance of granting certificate have no bearing on right to certificate.** Wash 289P34.
684-33 130Kan777, 288P755; 225 AppDiv313, 233NYS63.
684-39 Mo 238SW(2d)115; 105WVa90, 141SE524. [a] **Department of Public Works does not have unlimited power to grant certificate.**–Wash 288P246.
684-40 262Mass583, 160NE321.
684-41 43F(2d)236.
684-42 336 Ill 616, 168NE634 (cannot adjudicate contractual rights of parties).
684-45½-New. The public utilities commission has complete authority to substitute, coördinate, and consolidate under a single certificate the same service theretofore given the public under several certificates of convenience and necessity. 121 Oh268, 167NE879.
684-45¼-New. Denying an interstate motor bus transportation company a certificate to do interstate business does not impose on the company the necessity for discrimination. SD 228NW 179.
685-51 [b] **Public service commission held without jurisdiction to issue certificate of public convenience and necessity** to motor bus carrier for operation of busses in city streets without city's consent. 249NY480, 164NE553.
685-54 NJ 143A755; 152Va193, 146 SE292.
685-60 [a] **Grant of certificates to carriers covering different territories** separated by mountains, though between same terminals, is not arbitrary. 148Wash61, 268P138.
685-61 148Wash61, 268P138; Wash 289P34.
685-66 [b] **Holder of certificate** in territory already served is entitled to priority. 151Wash659, 276P566.
685-68 151Wash78, 275P70.
686-70 148Wash61, 268P138.
686-75 120 Oh250, 166NE135(2dcase).
686-81 174Minn248, 219NW167.
686-82 174Minn248, 219NW167.
686-83 174Minn248, 219NW167.
686-84 174Minn248, 219NW167.
687-85 174Minn248, 219NW167.
687-87 Fla 130S587; 336 Ill 51, 167 NE840, 67ALR938; 130Kan777, 288P 755. [c] **Public service is test in granting certificate of convenience and necessity** for operating motor vehicles carrying passengers for hire. 50RI 37, 144A891. [d] **Certificate held jus-**

tified.–152Va193, 146SE292. [c] **Statutory presumption of necessity of motor carrier operating on special date** is not available to subsequent buyer. Mo 31SW(2d)208.

687–89 130Kan777, 288P755; 170La441, 128S39. [c] Fla 130S587.

687–92 336 Ill 51, 167NE840, 67ALR938.

687–94½–New. Cheapness of fare is not determinative of question. Fla 130S587.

687–97 Fla 130S587.

687–98 [a] **Adequacy of transportation facilities** for one kind of service may not be same when applied to different service. 130Kan777, 288P755.

687–2 336 Ill 51, 167NE840, 67ALR938. See also 233Ky482, 26SW(2d)28. [a] **Insufficiency of bond furnished by holders of permit** is not ground for granting additional permit. 233Ky482, 26SW(2d)28.

688–8 152Va193, 146SE292.

688–13 NJ 141A90.

688–15 336 Ill 51, 167NE840, 67ALR938.

689–18 223Ky465, 3SW(2d)1087. [b] **On application for increase of equipment** applicant must show that facilities for increased business are not afforded in territory by any other company. 121 Oh6, 166NE803.

689–23 118 Oh405, 161NE208.

689–25 118 Oh405, 161NE208; Oh 170NE654 (statute held inapplicable to irregular routes). See also 233Ky482, 26SW(2d)28.

689–27 335 Ill 484, 167NE64(2dcase); 225AppDiv371, 233NYS184. [a] **Commission should not require more capital** than amount invested in equipment and necessary to conduct business. 170La441, 128S39.

690–30 336 Ill 51, 167NE840, 67ALR938. [a] **Chairman of board as such has no authority** to grant oral permit under statutes granting right to operate trucks on route served by another holding permit. 85Mont11, 277P437.

690–33 206 Iowa224, 220NW304.

690–36 336 Ill 51, 167NE840, 67ALR938; 337 Ill 109, 168NE646 (company not operating at time of application between points stated in application not entitled to notice). [a] **Right to notice determined at date of application.**–337 Ill 109, 168NE646.

690–40 117 Oh540, 159NE561.

690–44½–New. Public necessity is a question of fact. 117 Oh540, 159NE561.

690–44⅓–New. The railroad commission is not confined to evidence produced at the hearing but may be governed by matters on which applicants or objectors had no opportunity to be heard. 206 Iowa229, 220NW306.

691–48 336 Ill 51, 167NE840, 67ALR938; 117 Oh540, 159NE561; 118 Oh173, 160NE685; 121 Oh421, 169NE445; 121 Oh485, 169NE560; SD 228NW179 (evidence held to sustain finding that community was sufficiently served). [a] **Evidence held sufficient.**–Oh 169NE445; Oh 171NE95. [b] **Facts held not to show territory** served is same as covered by proposed route. Wash 289P34. [c] **Burden of proof.**–Mo 31SW(2d)208. [d] **Evidence held insufficient.**–Fla 130S587.

691–49 170La441, 128S39; 121 Oh428, 169NE449; 153Wash439, 279P752.

691–50 121 Oh441, 169NE440 (evidence sufficient). [a] **Sufficiency of showing.**–Wash 288P245.

691–51 121 Oh485, 169NE560.

691–53½–New. In the absence of a showing that applicant rendered satisfactory service on a certain date, there is no presumption that proposed service is of public convenience and necessity. Mo 23SW(2d)115.

691–54 83Mont483, 272P987.

691–55 [a] **In view of existing facilities,** order granting certificate to operate held erroneous. 335 Ill 484, 167NE64(2dcase).

691–57 [b] **Order, permitting operation of busses,** held not to infringe rights of railroads. NJSup 149A269.

691–58 [a] **Fact that public are accustomed to unauthorized operation** affords no justification for grant of certificate where commission concluded no necessity exists. 121 Oh550, 170NE360.

691–61 [a] **In Pennsylvania.**–88PaSuper306.

691–62½–New. **The public service commission has power** to direct that its order inadvertently omitted from the record be entered nunc pro tunc on proof of the fact of its rendition. 118 OhSt434, 161NE282.

691–62⅓–New. The commission may grant a certificate in whole or in part on terms, conditions, and restrictions and with modifications. 206 Iowa238, 220NW310.

691–62¼–New. Nonaction of the railroad commission on an application for a bus line permit, in the absence of further correspondence with applicant after notifying him not to operate without a permit and return of a fee, has been held not an arbitrary denial of a permit or arbitrary refusal to act. 83 Mont483, 272P987.

691–62⅓–New. The commerce commissioner's finding that public convenience and necessity requires that motor busses be routed in a certain way has been held not to be a finding of fact but merely a conclusion from evidence. 336 Ill 51, 167NE840, 67ALR938.

691–62¼–New. The finding of the commerce commission that public convenience and necessity requires that routing of motor busses as prayed for in the petition be authorized was not definite enough to justify any order based thereon. 336 Ill 51, 167NE840, 67ALR938.

691–62⅓–New. An express finding of fact that public convenience and necessity required the operation of motor busses along certain routes and streets was a condition precedent to the commission's jurisdiction to granting such certificate, and an order not containing any such finding of facts was void. 336 Ill 51, 167NE840, 67ALR938.

691–62⅛–New. Findings held not sufficiently specific to authorize grant of certificate of necessity. Ill 172NE706.

691–69 206 Iowa229, 220NW306. [c] **In Missouri.**–31SW(2d)208.

691–70 151Wash78, 275P70.

692–71 Ill 172NE706.

692–72 But see Mo 23SW(2d)115.

692–73 Fla 130S587; 206 Iowa238, 220NW310; 225AppDiv371, 233NYS184. See also 121 Oh441, 169NE440.

692–74 334 Ill 293, 165NE790; 206 Iowa224, 220NW304; 206 Iowa238, 220NW310; 223Ky465, 3SW(2d)1087; 225AppDiv371, 233NYS184; 117 Oh540, 159NE561; SD 228NW179; 153Wash479, 279P738. [b] **Injurious competition not shown** as matter of law. 225AppDiv371, 233NYS184.

692–75 206 Iowa224, 220NW304; 206 Iowa229, 220NW306; 206 Iowa238, 220NW310; 119 Oh148, 162NE397; Wash 289P34.

692–76 Fla 130S615; 88PaSuper306.

692–77 Mo 23SW(2d)115; 88PaSuper306.

692–77½–New. The order of the commission must be assigned for error if a review is desired. 88PaSuper306.

692–77⅓–New. Commerce counsel has a legal right to appear for the board of railroad commissioners on appeal to the district court from the board's action on application for a certificate of convenience and necessity. 206 Iowa224, 220NW304.

692–77¼–New. Where commission's order is not separable it must stand or fall in entirety. Mo 31SW(2d)208.

692–81 [b] **Public service commission alone has original jurisdiction** to determine whether defendant, alleged to be motor carrier, should be compelled to take out accident insurance, furnish bond, and obtain certificate required by act. 167La683, 120S50.

692–83½–New. State must show defendant is within the act. 43F(2d)236.

693–90½–New. Minnesota railroad commission need not order person to cease violating statute before beginning prosecution. 43F(2d)236.

693–92 96PaSuper174. [a] **Such order has been held not void** as to intrastate traffic because part of traffic was interstate. 121 Oh588, 170NE574.

693–2½–New. Order held to exceed powers of railroad commission. 43F(2d)236.

693–6 85Mont11, 277P437; 93PaSuper416; 93PaSuper421; 93PaSuper430.

694–7 Utah 286P947.

694–9 See also Utah 286P947.

694–10 207Cal529, 279P436; TexCivA 27SW(2d)874.

694–10 151Wash372, 275P726, 155Wash227, 283P1074.

694–12½–New. Whether the status of a freight auto truck operator is that of a common carrier or a private carrier is primarily a question of fact in each case. 207Cal529, 279P436.

694–12⅓–New. Words "transportation company" in statute mean public transportation company or common carrier. 208Cal397, 281P620.

694–24½–New. Taxicab business is not public utility subject to regulation under Public Utilities Act. Ill 173NE137.

695–28 134Misc664, 236NYS6.

695–33 [b] **Bus line operating in cities under franchise and gratuitously outside city limits** are "motor transportation companies" requiring certificate. 35 OhA101, 172NE290.

695–44 174Minn248, 219NW167; 222AppDiv755, 225NYS399; 223AppDiv75, 227NYS510.

695–45 [c] **Right of motor carrier to engage in interstate commerce** cannot be conditioned on state's determination whether public convenience and necessity would be promoted. Iowa 230NW540.

696–47 174Minn248, 219NW167.

697–62 176Ark1071, 5SW(2d)304.

697–64 [a] **Exemption cannot be invoked** to aid one who is operating over route described in permit held by another. 85Mont11, 277P437.

697–65½–New. Defendant operating a motor vehicle on no fixed schedule and not holding himself out to the public as operating from any fixed point at any definite time, but receiving passengers and discharging passengers at various points, both on and off the main highway, and therefore cruising for fares within a certain territory, did not come under the jurisdiction of the public service commission. 23AlaA65, 120S469.

697–71 208Cal397, 281P620.

697–71 174Minn248, 219NW167; 50RI37, 144A891. But see 99Fla1174, 128S632. [a] (4) One transporting oil well equipment for various persons under separate contracts held not common carrier. 40Wyo462, 278P542. [b] **In determining whether transportation company is common carrier,** court cannot assume that separate contracts for transportation made in individual cases were merely for purpose of subterfuge and pretense. 40Wyo462, 278P542.

697–72 See also 40Wyo462, 278P542.

697–73½–New. A dairy company transporting milk to its own plant and deducting the cost of transportation from the purchase price is a common carrier within the statute requiring a permit and license. 150Md641, 135A136.

697–73⅓–New. A carrier operating trucks is not changed from a common to a private carrier by the fact that part of the route was covered by horses and sleighs during the winter. 85Mont11, 277P437.

697–73¼–New. An express company cannot be both a common carrier and a private carrier at same time with same facilities so as to operate without certificate an extension of route operated under certificate. 96PaSuper174.

698–75 [a] **Exemption of hotel and sight-seeing busses** held valid. Cal 291P208.

698–78 174Minn248, 219NW167.

698–79 174Minn248, 219NW167.

698–80 208Cal397, 281P620.

698–84 174Minn248, 219NW167.

698–92 179Ark979, 18SW(2d)1023.

698–93 TexCivA 300SW957.

698–94 174Minn248, 219NW167.

698–94½–New. Privately owned trucks used in transportation of mail are not exempt from the state registration tax as "government instrumentalities." TexCivA 300SW957.

699–6 Iowa 230NW540.

699–6 83Mont483, 272P987; 85Mont11,

277P437. [b] **Evidence held insufficient** to show that defendants were operating trucks under oral permit over route served by holder of permit. 85Mont11, 277P437. [c] **Finding of railroad commission** that operator of truck is common carrier has been held not reviewable in suit to restrain operation. 207 Cal 529, 279P436. [d] **Evidence held sufficient** to sustain judgment that defendant was engaged in business as a common carrier. 34 OhA198, 170NE 184. [e] **Necessary allegations.**–Complaint by utilities commission in suit to enjoin operation of automobile transportation line must allege defendant was operating along "established route." Utah 286P947.

699–15½–New. Motor carrier not applying for license cannot defend injunction suit on ground that illegal requirements might be made where license might be granted without illegal conditions. Iowa 230NW540.

699–15¾–New. In such action it cannot be presumed that statutory liability bond would be required in illegal form. Iowa 230NW540.

700–24 137Misc199, 243NYS145. [b] **Injunction not allowable** unless right to it is plain from undisputed facts. 225AppDiv182, 232NYS536. [c] **Plaintiff has burden of establishing undisputed right to injunction.**–225AppDiv182, 232NYS536. [d] **Truck owners unlawfully operating as common carriers** could be enjoined by common carrier of freight having certificate. 151Wash372, 275P726. [e] **Casual hauling of freight,** upon independent contracts should be excepted from such decree. 151Wash372, 275P726.

701–32 83Mont483, 272P987.

701–32 [c] **Taxicabs not bound to any street** or definite route, but whose service is from point of hiring to point of discharge, including entire city, cannot be said to be operating in competition with street railroad company. 134 Misc664, 236NYS6. [d] **Affidavits** by railroad company seeking to restrain taxicab company from operating, alleging that taxicabs were seen soliciting passengers, but containing nothing specific as to names of such persons, has been held too indefinite to authorize restraining order. 134Misc664, 236NYS6. [e] **Burden of proof.**–In action by street railroad company to enjoin taxicab company from operation in city, burden of establishing undisputed right to injunction is on railroad company. 134 Misc664, 236NYS6. [f] **Street railroad company is not entitled to enjoin taxicab companies** from operating in city unless right is plain from undisputed facts. 134Misc664, 236NYS6.

701–34 35 OhA101, 172NE290 (holding equities of competing railroad should be considered).

702–50 118 Oh561, 162NE34. [a] **Discretion not abused.**–235Ky559, 31SW (2d)917 (appeal held authorized).

702–51 118 Oh234, 160NE701; 118 Oh 561, 162NE34.

702–52 118 Oh561, 162NE34.

702–52 119 Oh324, 164NE356; 119 Oh 481, 164NE523; 120 Oh510, 166NE578.

702–54 [b] **Complaint held to state cause of action** for revocation. 118 Oh 222, 160NE699.

702–55 [b] **Revocation for abandonment of route** (1) is not justified where route is impassable. 119 Oh318, 164NE 230. (2) Abandonment of portion of route without consent of commission is good cause for revocation. 119 Oh318, 164NE230. [c] **Evidence held insufficient to warrant finding** of commerce commission that bus company had substantially exercised authority to operate so as to avoid two-year limitation with respect to route on which service was never installed. 336 Ill 51, 167NE 840, 67ALR938.

702–57 118 Oh43, 160NE458.

702–59½–New. The commission is unauthorized to revoke a certificate granted a bus company rendering adequate service. 328 Ill 455, 159NE788.

702–59½–New. A bus company occupying the field should be given an opportunity to meet changed conditions before the certificate is canceled. 328 Ill 455, 159NE788.

702–59¼–New. Where evidence was sufficient to authorize the commission to revoke an interstate certificate to operate busses, the public utilities commission should revoke an intra-state certificate covering the same route and involving substantially the same violations. 119 Oh481, 164NE523.

702–59⅓–New. Commission is without jurisdiction to annul certificate and issue new one where it would involve determination of questions pending in court. 336 Ill 616, 168NE634.

702–59¾–New. Certificate is not revoked ipso facto by appointment of receiver nor can commission revoke without cause certificate operated by receiver. 121 Oh450, 169NE454.

702–61 [a] **Action to vacate and enjoin enforcement of certificate** requires trial de novo. 130Kan777, 288P755.

702–62 39F(2d)145.

703–71 225AppDiv371, 233NYS184.

703–74½–New. In some jurisdictions the state highway commission may appoint and designate special agents residing in the several counties to assist it in collection of the motor vehicle license tax and issuance of certificates of title to owners. 137 Okl 138, 278P 344.

704–97 244Mich480, 221NW622.

704–8½–New. Public service commission under statutes requiring permit is bound to issue such permit to any one applying if statute complied with. 36 F(2d)260.

705–11 Ill 173NE137.

705–20 Mass 167NE762 (legality of registration).

705–34 [b] **Delay occasioned by application** is not included in time fixed for beginning operation of bus line. NJSup 150A224(2dcase).

706–52 [a] **Utility commission has jurisdiction of application,** where time for beginning operations had not expired. NJSup 150A224(2dcase).

706–54½–New. In New York consent of the board of estimate and apportionment requires twelve valid votes out of the total number of sixteen votes to which members of the board were entitled. 225AppDiv371, 233NYS 184.

706–61 [a] **Evidence held to show order** of utilities commission was unreasonable. NJSup 150A224(2dcase).

706–62 [b] **Collateral attack,** on municipal consents preceding application, for breach of condition, is not allowed. NJ Sup 150A224(2dcase).

706–62½–New. Court cannot presume commission will deny permit to motor bus carrier if application is made in compliance with statute. 36F(2d)260.

706–62⅓–New. Proceeding to review denial of application for certificate to operate bus lines is certiorari to review determination of subordinate tribunal and not original application. 230 AppDiv132, 243NYS486.

706–62¼–New. Court should not in relation to omnibus corporation exercise original jurisdiction applicable only to railroad corporations. 230AppDiv132, 243NYS486.

706–62⅕–New. On certiorari court may only determine whether public service commissions act was unlawful. 230AppDiv132, 243NYS486.

706–65 NJSup 150A224(2dcase).

709–12 But see 199Wis115, 225NW738.

710–36 108TexCr533, 28SW(2d)445, 447 [citCJ].

710–42 33NM553, 273P928, 62ALR296.

710–43 33NM553, 273P928, 62ALR296.

711–50 201Cal672, 258P602.

712–72 [a] **Reason for rule.**–131Misc 541, 227NYS266.

712–75 229Ky722, 17SW(2d)1017; 117 Oh227, 157NE758; 196Wis444, 219NW 954. [b] **City ordinance** requiring that taxicab owner shall file policy of accident insurance has been held to show intention to require insurance against loss resulting from taxicab owner's negligence, as against contention that it was void for uncertainty. 230Ky216, 18SW(2d)992.

712–81 227AppDiv794, 237NYS498.

712–86 229Ky722, 17SW(2d)1017.

713–87 117 Oh227, 157NE758; 160 Tenn294, 23SW(2d)669.

713–90 117 Oh227, 157NE758.

714–10 [a] (2) **Statute requiring liability insurance bond is valid if limited,** in case of interstate carriers, to damages suffered within state by nonpassengers. Iowa 230NW540.

715–22½–New. A fund, deposited by an insurer under an omnibus proprietor's bond, protecting judgment creditors having claims for bodily injuries or death, should include interest at the statutory rate from the date of service of insurer's counterclaim in which prayer was first made for determination of rights and interests of all claimants to the fund. 250NY264, 165NE 286.

715–26 206 Iowa111, 219NW49(2d case).

715–31 206 Iowa111, 219NW49(2d case).

717–67½–New. Under a statute requiring operators for hire to furnish bond for the benefit of persons injured, the state may be assumed to have imposed the requirement for the protection of the public within its jurisdiction. 131 Misc85, 226NYS263.

717–67⅓–New. and liability of surety cannot be extended to persons injured by the negligence of a resident of the state in operating a vehicle in a foreign jurisdiction. 131Misc85, 226NYS 263.

717–67¼–New. Under such statute a nonresident, recovering a foreign judgment for personal injuries from an accident occurring outside the state, cannot claim the benefit of a bond furnished by a resident operator within the state. 131Misc85, 226NYS263.

717–72 Iowa 228NW320.

717–73 Iowa 228NW320.

717–89 40GaA827, 151SE685.

717–91½–New. A liability insurance bond furnished by a motor bus carrier in accordance with statute is a statutory bond and binds insurer in accordance with the provisions of the statute. Iowa 228NW320.

717–91⅓–New. Under some statutes, insurer is obligated only for injuries resulting from negligent operation. Iowa 228NW320.

717–91¼–New. Under some statutes, the operation of the motor carrier must be the proximate cause of the damage or injury. Iowa 228NW320 (injury to passenger in motor bus colliding with automobile held to result from operation of motor carrier).

717–91⅕–New. Statute providing for apportionment of amount of insurance among judgment creditors applies only in case of insolvency of insured. 136 Misc186, 239NYS397.

718–94 See also 158Tenn504, 14SW (2d)724.

718–6 131Misc541, 227NYS266.

718–6½–New. Insurer paying amount of policy into court has been held not entitled to deduct amount paid in settlement of claims not reduced to judgments. 136Misc186, 239NYS397.

719–22 But see 105WVa380, 142SE849.

719–23 [a] **Statute providing for apportionment of liability among motor carrier's judgment creditors** held applicable only in case of bankruptcy or insolvency. 223AppDiv331, 227NYS 633.

719–29 [b] **Where several persons are killed or injured in motor omnibus accident,** one of claimants recovering judgment against insolvent owner of omnibus need not postpone action on owner's bond taken out under statute till rights of other claimants have been barred by limitation. 250NY264, 165 NE286. [c] **Under statute stating liability of indemnitor,** passenger could not maintain action against insurer where owner of jitney bus in which passenger was riding died before action was commenced by passenger. 100CalA384, 280 P213.

719–31 [a] (2) Where, in action on jitney owner's bond for payment of judgments obtained against principal, no allegation is made of final judgment against principal or breach of obligation in bond, declaration is demurrable. 49RI 372, 142A614.

720–33 250NY264, 165NE286.

720–33½–New. Return of a judgment nulla bona is not required as a condition

precedent to recovery on a bond executed by an attorney in fact on behalf of undisclosed indemnitors. 206 Iowa 111, 219NW49(2dcase).

720-33½-New. Persons having unsatisfied judgments should bring equitable action to have insurance money paid into court and divided among them. 136Misc186, 239NYS397 (right to costs).

720-35 94CalA48, 270P704.

720-40½-New. Where several persons were killed or injured as the result of a motor omnibus accident and the owner of the omnibus was insolvent, but filed a bond under the Highway Law, the proper remedy of one of the claimants, after recovery of judgment, was by equitable action in behalf of himself and others similarly situated to administer the proceeds of a bond for ratable protection of all judgment creditors so situated. 250NY264, 165NE286.

721-51½-New. Where a bus operator was granted a license to operate a regular bus line between two points upon a fixed schedule, at a rate of fare common to all, and taxicab operators were granted licenses under the same statute to carry persons by a private agreement at varying prices and at varying distances, the taxicab operators could not interfere with the bus operator's business, although neither had an exclusive franchise to perform particular services authorized by license. 178Ark608, 11SW(2d)468.

721-51½-New. Taxicab operators cannot pick up passengers at points on route over which plaintiff bus companies hold certificates of convenience except at the station of operators of a taxicab or where a prospective passenger has engaged a taxicab in advance to pick him up at some point, in which case the original trip would begin when the taxicab left the station. 226Ky591, 11SW(2d)413.

721-72 134Misc698, 236NYS614. [a] **Contract whereby motor bus company transferred to assignee, subject to approval of public service commission,** all of its rights and privileges under public good certificate, for which assignee was to pay specified amounts weekly during life of contract, is not void for want of consideration running from assignor, where commission approved transfer of certificate and assignor surrendered its privileges thereunder, though certificate is personal in form and revocable by terms of statute. Vt 144A683.

721-72½-New. Plaintiff, who sold part of an auto freight service business, was not precluded from subsequently disposing of the remainder of the business to a third person, in the absence of a contrary provision in the agreement. 150Wash333, 272P711.

721-72½-New. Where plaintiff sold part of an auto freight service business, and agreed to make application to have placed on its certificate limitations excluding such service, failure to have such limitation entered on the certificate has been held immaterial in determining the buyer's liability for price, where the seller, before disposing of the remainder of the business, carried no freight over the buyer's route, since the buyer would have received no more if the limitations had been entered. 150Wash 333, 272P711.

722-93 CalA 293P128; 131Misc85, 226 NYS263. [a] **An order of public utilities commission to desist** from operating equipment authorized by previous order of such public utilities commission, which is void because of noncompliance with jurisdictional statutory requirements, does not constitute alteration, amendment, or revocation of certificate. 119 Oh527, 164NE762.

723-99 Va 154SE579.

723-14 CalA 293P128.

724-28½-New. Commission is not authorized to rescind its original order for operation of motorbus lines where it has not made findings of fact different from those on which original order based. 335 Ill 646, 168NE890.

724-32 [a] **Suspension.**-Motor vehicle commissioner cannot suspend license without notice and opportunity to be heard. 226AppDiv754, 233NYS642.

724-33½-New. Revocation of consent to operate autobusses through the town by a resolution of the town council, without notice, hearing, and approval of the board of public utility commissioners has been held unlawful. NJ 143 A755.

724-39 261Mass228, 158NE771. [a] **Motor bus company operating without permit** may be enjoined by another motor bus company. TexCivA 27SW (2d)874.

724-41½-New. Courts have jurisdiction on relation of the public service commission to restrain the use of a highway by a public service carrier who has failed to obtain a certificate. 207 Iowa 564, 221NW191.

725-47 235Ky60, 29SW(2d)632(2d case); 83NH524, 145A265.

725-48 200Wis26, 227NW282.

725-49 225AppDiv313, 233NYS63. Contra 246NY327, 158NE886.

725-52½-New. In replevin of an automobile, plaintiff cannot claim that the automobile could not be used because not registered as against defendant's claim for damages for detention. 176 Ark684, 3SW(2d)999.

725-52½-New. One operating without certificate over route of another stage line operating under certificate is liable only for net profit. 208Cal 397, 281P 620.

725-54 See also 83NH350, 143A516(2d case).

726-58 See also Mass 170NE462(1st case).

726-59 262Mass387, 160NE326.

726-61 262Mass475, 160NE327; Mass 169NE142 (not properly registered); Mass 169NE272 (statute applicable to one having place of abode in state though domicile elsewhere); Mass 170 NE462(1stcase). [b] **Defendant has burden** of proving that plaintiff's automobile was not properly registered, in action for damages in collision. Mass 169NE805. [c] **Evidence of loss of registration certificate** is not evidence that automobile was not properly registered. Mass 169NE805.

726-65½-New. nor deprive the violator of the defense of contributory negligence. 200Wis26, 227NW282.

726-68 262Mass387, 160NE326. See also 265Mass601, 164NE444. [b] **One not owner or custodian and ignorant of status of vehicle** is not liable for damages from operation. Mass 170NE818. [c] **Failure of owner to report sale and turn in registration certificate** does not make him liable as continuing owner. Mass 170NE818.

726-70 Mass 170NE818 (under statute).

727-75 107Conn137, 139A637; 110 Conn280, 147A870; 110Conn288, 147A 871 (statute held not unreasonable).

727-81½-New. Statute is not applicable where vehicle at time of accident was at private railroad crossing several hundred feet from public highway. 110 Conn147, 147A512.

728-95 219Ala32, 121S35. [b] **Where amount of license fee not fixed** operator is not subject to punishment. 338 Ill 385, 170NE280.

723-97½-New. An owner applying for a license after absence from the state several months during which his car was stored is liable for penalty for failure to apply for a license at a proper earlier date. 154Miss300, 122S494.

728-2½-New. Action in equity to enjoin enforcement of law.-Iowa 232NW 477.

728-12 See also Iowa 232NW477; Mo 238SW(2d)95.

728-12½-New. That a town had granted no permit does not preclude the presumption that a bus was operated with the town's consent, and the town is entitled to a franchise tax. NJ 139A823.

728-12½-New. Defendant, in an action for penalty, has the burden of proving that the operation of a bus was under the statute, relieving him from a franchise tax. NJ 139A823.

728-12¼-New. Registration fees of public vehicles held not to be tolls prohibited by federal law. 281US66, 50SCt 204, 74Led704, 68ALR194.

729-14 39F(2d)145; OklCr 274P684.

729-15 Iowa 232NW477.

729-19 [a] (4) 28F(2d)736. (5) Annual license fee of twelve dollars and fifty cents on taxicabs is not unreasonable or excessive. 225Ky129, 7SW(2d) 832.

729-23 MoA 18SW(2d)580.

730-33½-New. In computing a motor bus fee based on passenger miles and capacity, the space occupied by the driver is not included. 130Or572, 281P125.

731-42½-New. Reasonableness is not measured by its effect upon the individual assailing it, but by what would be its effect upon the whole class engaged in the same occupation. 225Ky129, 7 SW(2d)832.

732-51 Iowa 232NW477; 161Tenn67, 29SW(2d)249. [b] **Tax commission is without right to require license** based on actual carrying capacity where taxing officials adopted practice of issuing licenses to trucks based on manufacturers' ratings as to carrying capacity. 230Ky991, 18SW(2d)991.

732-54 [c] **Automobiles having seating capacity of not more than seven passengers** rented upon specified terms to general public, who were given complete control of cars till their return, without limitation as to roads over which cars were to operate, held not subject to motor bus taxes. TexCivA 11SW(2d)560.

732-55½-New. Under some statutes, motor vehicles are not the subject of ad valorem tax. 30Hawaii260.

733-76 TexCivA 17SW(2d)157.

734-95 [a] **In Mississippi.**-154Miss300, 122S494.

734-8½-New. An owner who is a citizen, resident, and voter in the state must pay the annual tax although the vehicle is out of the state a major portion of the year. 176Minn183, 222NW 918.

734-12 173Minn98, 216NW541; Tex CivA 9SW(2d)373.

735-17½-New. A complaint in an action by a license inspector against a probate judge for failure to collect penalties from delinquent owners must show compliance with the statute. 219 Ala32, 121S35.

737-42½-New. A statute has been construed as entitling a tax collector to only three per cent commission on privilege taxes collected instead of five per cent theretofore allowed. 156Miss46, 125S563(2dcase).

737-48 Fla 130S707.

738-60 85Colo 289, 275P896; 225Ky 45, 7SW(2d)506.

738-61 85Colo 289, 275P896.

738-64 278US499, 49SCt188, 73Led475.

738-70½-New. If proceeds of a gasoline tax are arbitrarily apportioned, the result is a denial of equal protection, although the levy is uniform. 99Fla1, 65, 115, 126S308.

739-87 [b] **Dealer becomes holder of trust fund** for benefit of state. 34 OhA 267, 171NE111.

740-96 Fla 130S707.

741-24 [b] **One who has been refused operator's license within state** cannot operate motor vehicle on highways, though afterward obtaining registration of motor vehicle in another state with which state has reciprocal relations of comity. 50RI 33, 144A772.

741-26½-New. Conflicting provisions of statute relating to license for operating motor vehicle on public highway, must be read in connection with each other, and construction given to each rendering them consistent with each other and with clear intent of statute as a whole. 50RI 33, 144A772.

741-28 281US34, 50SCt165, 74Led633; Va 154SE579.

741-29 33 OhA137, 168NE549; Va 154 SE579. [a] **City officials not vested with judicial power.**-33 OhA137, 168NE 549.

741-30½-New. or by an adjoining city; 225Ky129, 7SW(2d)832.

741-32 [a] **In Ohio.**-33 OhA137, 168 NE549.

742-38½-New. License from state does not relieve motorbus driver from securing license from city under statutes in

same jurisdictions. 33 OhA137, 168NE 549.

743-69 133Misc257, 231NYS591.

745-98 [a] Any source may be used by commissioner to determine qualification of applicant. 107Conn211, 139A 694.

745-12 Nebr 229NW329. [a] Not violation of due process.-Nebr 229NW329.

746-34 234Ky78, 27SW(2d)657 (taxi chauffeurs held not required to pay same fee as drivers of vehicles with fixed termini).

746-47 107Conn211, 139A694.

746-50 [a] Statutes violating due process.-CalA 291P638. [b] Act suspending driver's license for nonpayment of judgment for personal injuries within fifteen days held unconstitutional. CalA 291P638.

746-51½-New. Where defendant's license to operate a motor vehicle was revoked by the secretary of state, on the ground of defendant's conviction for driving while intoxicated, the statute rendered defendant liable to penalty provided by another statute in case of operation of a motor vehicle by one whose license is revoked or suspended. Del 144A867.

746-51⅓-New. Judge passing on application for reinstatement of revoked driver's permit is acting as administrative not judicial officer. Va 154SE579.

746-51¼-New. Ordinance provision authorizing driver's permit reinstatement by municipal judge has been held void. Va 154SE579.

747-72½-New. Power to revoke license pending appeal can be tested only by rule to show cause. 154SC403, 151SE 616.

747-76 [a] Motor-driver held not unlicensed so as to preclude recovery merely because he was under age at time of procuring license. 107Conn211, 139A 694.

748-78 MoA 20SW(2d)918; 35Porto Rico 286.

748-81 PrEdwIsl [1929] 3DomLR173.

748-82 221Ky430, 298SW1084.

748-88 Conn 151A320; NJ 148A741.

749-95 But see Mass 170NE818 (under statute).

749-3 110Conn288, 147A871 (under statute since repealed). [a] Statute not unconstitutional.-110Conn288, 147A871 (as denying equal protection of laws).

750-31 222MoA1165, 13SW(2d)1086. See also Ariz 287P304.

750-35½-New. Evidence has been held to establish that pledgor was the owner of the automobile at the time of the pledge. 11LaA201, 123S194.

750-35½-New. Legal title to a motor vehicle can be established only through the documentary evidence of sale and purchase prescribed by statute. NJ 147A385.

750-35¼-New. That automobile is registered in name of conditional seller as owner charges sheriff levying attachment on behalf of buyer's creditor with notice that seller retained title. Utah 287P175.

751-47 [a] Registration of automobile, under statute permitting registration by "applicant," does not constitute constructive notice to defendant. 127Me 172, 142A580.

751-49½-New. Assignee of conditional sales contract from conditional sales purchaser to another need not inquire as to secret lien where inquiry would not have produced information. 255 IllA 415.

751-53 [a] In Prince Edward's Island.-[1929] 3DomLR123.

751-56 89CalA354, 264P807.

751-58 255 IllA415.

752-85 [c] Defendant, hiring truck is liable for loss thereof although driver was employee of plaintiff since driver became temporary servant of defendant on hiring of truck. Wash 290P839.

754-7½-New. Garageman entrusted with automobile for sale is guilty of conversion where he sells car as his own, appropriates proceeds, and conceals sale from owner. Man [1930] 3 DomLR343.

754-8 174Minn11, 218NW172.

754-11 [b] Evidence held sufficient.-89 CalA499, 264P1102.

754-13½-New. The question of equitable title and estoppel to deny defendant's ownership is premature in an action where plaintiff had lawful possession. 89CalA499, 264P1102.

754-13⅓-New. Where the mortgagor cannot sustain a claim of conversion by the mortgagee, the lessor of building in which a mortgaged automobile was stored cannot sustain such claim, being in no better position than the mortgagor. 146SC257, 143SE820.

754-16 255 IllA415 (judgment for less than market value not excessive); 8LaA 775.

754-21 MoA 4SW(2d)834.

755-29 177Ark1114, 9SW(2d)571.

755-40½-New. Admissibility of evidence. A certificate of title signed, accepted, and delivered, is admissible as some evidence of a right to possession, although the certificate was not returned to the commissioner of motor vehicles for registration. MoA 20SW(2d)936.

755-43 TexCivA 8SW(2d)757.

755-53½-New. Where plaintiff alleges only compensatory damages for detention of a truck, he must prove damages sustained by reason of defendant's detention of the truck, and, in the absence of such proof, only damages which plaintiff can recover are nominal damages. 205Cal 245, 270P447.

756-65 See also TexCivA 21SW(2d) 369.

756-83 155Miss343, 124S430(2dcase).

757-4 11LaA201, 123S194.

758-20½-New. An automobile need not be registered in the name of the person in whom title remains until payment is made in full. 89CalA499, 264P1102.

758-20⅓-New. Failure of conditional seller to furnish certificate of title when delivering possession as required by statute entitles buyer to refuse payment until he receives it. Ariz 287P304.

758-20¼-New. In such case assignee of conditional seller cannot declare forfeiture without furnishing certificate of title. Ariz 287P304.

758-30 [a] Assignees of purchaser cannot maintain suit against seller's assignee of conditional sales contract. CalA 286P1101.

759-48 [a] (4) Other instances. 40 F(2d)321.

759-49 See also 1LaA307. [a] (2) Chattel mortgage containing erroneous factory and motor number is not entitled to priority over subsequently recorded chattel mortgage giving correct numbers though latter mortgage incorrectly described model as "K" instead of "R." 222MoA858, 5SW(2d)1115.

760-66½-New. Conditional vendee, claiming title by virtue of recovery of judgment against him for purchase price by vendor's assignee, is entitled to present his claim for consideration and adjudication, in suit for conversion against subsequent purchaser of the property from the vendor. 149Wash 264, 270P806.

760-66⅓-New. Contract of conditional sale by dealer corporation to one owning nearly all of its stock is not necessarily void. 255 IllA415.

760-80½-New. Voluntary surrender of the property after default by the conditional vendee deprives him of the right to redeem by paying the balance due. 178Ark136, 9SW(2d)1057.

760-81½-New. A purchaser is entitled to possession under contract where she paid sums in excess of monthly installments although not each month. 89 CalA499, 264P1102.

760-81⅓-New. Where the conditional seller waives right of forfeiture, the buyer, tendering full payment, is entitled to repossession of the car. 205Cal 245, 270P447.

761-90 CalA 289P906; 4LaA471.

761-92 197Wis224, 221NW736.

761-95 See also 38GaA665, 145SE111.

762-12 [a] Intent to remove is essential. NJSup 129A396.

762-15½-New. Duty of purchase-money notes to insure is not shown by transactions of a similar character. LaA 122 S139.

762-17 38GaA788, 145SE518.

762-20 38GaA788, 145SE518.

762-22½-New. The owner of an automobile can recover as damages the value of the automobile, although it was purchased under a conditional sales contract, and not all the purchase price was paid. 172Minn10, 224NW271.

762-25½ 256 IllA38.

762-27 Assignee of unrecorded conditional sale contract is entitled to possession as against third person unless latter's possession is under superior claim. Miss 130S153.

762-28½-New. Assignee cannot replevin car where purchaser has paid balance to assignor in good faith before assignee notifies purchaser of the assignment. 254 IllA505.

762-30 [a] California statute.-(1) Under Motor Vehicle Act and prior to Act (1923) p 517, filing of notice of automobile mortgage was not required. 88CalA 308, 263P545. (2) Act (1923) p 517, making mortgagee owner so as to require notice of mortgage to be filed, is inapplicable to mortgage executed before statute became effective. 88CalA 308, 263P545.

763-46 2LaA473.

763-47½-New. Under some statutes requiring a conditional sales contract to be filed in the district to which the goods are removed within ten days after the seller has received notice, where the seller has received no notice and has no knowledge of removal, he need not file the contract in such district. 28F(2d) 620.

763-49 155Miss343, 124S430(2dcase); 196NC154, 144SE835. [a] 90CalA428, 265P954.

764-53½-New. Filing of a conditional sales contract covering an automobile does not constitute constructive notice to one subsequently purchasing the property in good faith and for value from the conditional vendor, in whose possession the vendee permitted the property to remain, where the agreement was filed as a conditional sale and was not recorded. 149Wash264, 270P806.

764-58 Sask [1929] 4DomLR245. See also 255 IllA415 (original vendor's title no better than that of assignee of original purchaser's unrecorded conditional contract of sale to another).

764-59 See also 149Wash123, 270P295.

765-63½-New. Where a distributor delivers an automobile under a bailment lease contract to a dealer for the purpose of sale, a purchaser from the dealer acquires a good title. 92PaSuper425; 92PaSuper433.

765-74½-New. An automobile with a changed engine number is in the nature of contraband to which no title can be transferred, in the absence of a proper explanatory certificate. 208 Iowa512, 226NW130.

765-79½-New. Ordinary rules as to latent defects and equal opportunity to inspect are inapplicable where the sale is of an automobile with a changed engine number, possession of which is forbidden by statute. 208 Iowa512, 226 NW130.

767-4 [b] Evidence of agreement.-Finding that it was not agreed to sell purchaser's old car for at least certain amount held not supported by evidence. 82CalA548, 255P875. [c] Under agreement to sell plaintiff's used car, defendant was not authorized to trade it and engage in series of exchanges to plaintiff's loss. 82CalA548, 255P875. [d] Purchaser cannot be charged with cost of discounting his note with finance company where contract did not authorize it. 82CalA548, 255P875.

769-53 153Va383, 149SE494.

769-54½-New. Certificate of title issued by state authorities under statute is not intended as means of determining ownership. 12PaDist&Co 401.

769-60 [a] Where buyer signed conditional sales contract in duplicate, but later made payment in full and received receipted copy, she was owner of car as against one subsequently taking transfer of copy of contract without investigation, under doctrine of comparative negligence. 152Wash614, 278P697.

769-68½-New. Contract of conditional

sale may provide that parties to note given in payment should be liable for expenses of retaking. 156Miss147, 125 S722 (right to have value of car applied on note).

770-98½-New. , nor that the purchaser failed to request delivery within the required time. 224Ky848, 7SW(2d)493.

770-3½-New. Under a contract providing for return to the purchaser of a cash deposit and a used car given in part payment, or the proceeds thereof if sold, in case the car purchased was not delivered on time, the purchaser cannot recover the cash allowance given for the old car. 127Me365, 143A274.

771-26 Mass 167NE229.

772-34½-New. The seller cannot recover the rental value. 8LaA785.

772-44 29Hawaii160; 35PortoRico 294.

772-45 148Miss157, 114S260.

773-46 See also 148Miss157, 114S260.

773-51 NJ 150A559. [a] **Title remains in seller**, unless assignment of title to, and notice of transfer of, automobile has been executed in accordance with statute. 153Va383, 149SE494.

773-52 117 Oh69, 158NE81 (penal); 153Va383, 149SE494.

773-55 117 Oh69, 158NE81; 86Pa Super414. [a] 120 Oh568, 166NE808, 63 ALR674.

773-58 99CalA762, 279P666. But see 117 Oh69, 158NE81 (filing of bill of sale, which was intended to operate as mortgage, with clerk, under the act, held not notice as against subsequent mortgagee without actual notice who filed mortgage with recorder as required for chattel mortgages).

773-59 But see 117 Oh69, 158NE81.

773-60½-New. Some statutes require person engaged in business of buying and selling used cars to secure assigned certificate when buying car. Ariz 287 P304.

773-66 [a] (2) Other instances. NJ 150A559. [b] **Purchaser from dealer is** not required to satisfy himself that dealer has necessary permit to issue bill of sale. NJ 150A559.

774-74½-New. Under some statutes seller of automobile, on delivery of possession, must furnish certificate of title whether sale is absolute or conditional. Ariz 287P304.

774-76½-New. Under some statutes a certificate of title of an automobile delivered under a contract of exchange need not be delivered until the date fixed by the contract as the time when it shall be enforcible. 13PaDist&Co 6.

774-82½-New. Mere showing that a car bore a license plate of the prior year does not show failure to register in the year of transfer. 79CalA529, 250P405.

774-82¼-New. Automobile registration certificate held sufficient to pass title. MoA 27SW(2d)69.

774-91 79CalA529, 250P405; 245Mich 56, 222NW145; 246Mich578, 225NW1 (1stcase); MoA 291SW138; MoA 299 SW1116; 86PaSuper414.

775-92 88CalA308, 263P545; 90CalA 782, 266P620; MoA 6SW(2d)66; NJ 150A559.

775-93 126Kan27, 267P23.

775-93½ 79CalA529, 250P405.

775-94 79CalA529, 250P405.

775-95 230Ky49, 18SW(2d)873; 82 Mont497, 267P802; 97PaSuper19.

775-96 120 Oh568, 166NE808, 63ALR 674; Okl 292P48 (dealer's sale of used automobile without delivering title certificate); TexCivA 25SW(2d)929 (contract assuming notes held valid notwithstanding noncompliance with statute).

775-97 120 Oh568, 166NE808, 63ALR 674.

775-98 29F(2d)854; 95CalA476, 273 P37; 82Mont497, 267P802; 132 Or92, 284P832. See also IndA 171NE323 (finance company did not require compliance).

775-99 Okl 292P48; 97PaSuper19.

775-3 OhA 173NE447.

775-4 NJ 150A559 (purchase from dealer without notice of claim of original owner).

775-6 207 Iowa567, 221NW514.

775-7 96CalA356, 274P421(2dcase).

775-8 MoA 298SW242. [b] **Transferee need not offer to restore automobile to owner** to defend suit on note, given therefore, for failure of consideration. 99CalA235, 278P494.

776-11 99CalA235, 278P494. See also 89 IndA457, 165NE335.

776-21 79CalA529, 250P405 (replevin action).

776-21½-New. In an action for the price of a used car, plaintiff need not allege or prove compliance with a statute requiring delivery of a description of the vehicle before sale where no such defense is set up by defendant. 88Pa Super231.

776-24 132 Or92, 284P832.

776-28½-New. **Failure to transfer possession to alleged vendee** held, with other facts, sufficient to show fraudulent conveyance. 79CalA529, 250P405.

776-28¾-New. One claiming an automobile, attached as another's property, may show, except as against innocent third parties, that he purchased it from another and that the latter was the true owner, although not holding under a bill of sale from the former owner is required by statute. 230Ky49, 18SW(2d) 873.

776-30 See also 90CalA782, 266P620.

776-32 MoA 291SW138.

777-35 90CalA782, 266P620.

777-36 Contra MoA 15SW(2d)893.

777-37½-New. In an action on a note given for the purchase price of an automobile, the evidence was insufficient to require a finding of estoppel of the buyer to assert the seller's failure to deliver a certificate of ownership as required by the statute. 99CalA235, 278P494.

777-39½-New. The buyer's transfer of an automobile and delivery of the registration certificate constitutes some evidence of authorization to the transferee to indorse the certificate. 90CalA782, 266P620 (indorsement not presumed to have been without authority).

777-49 2LaA191.

778-81 204Cal 342, 268P342, 58ALR 1176.

778-84 204Cal 342, 268P342, 58ALR 1176.

778-90½-New. A buyer purchasing a used truck under a contract that the chassis was sold "as is" may rely on representations as to the model and capacity of the truck. 204Cal 342, 268P 342, 58ALR1176.

778-93 32LaA385. [a] **Where car was traded in as part of price** buyer may rescind and sue in replevin. 13PaDist& Co 16.

779-16 See also 4LaA465.

779-20½-New. Mutual mistake of the parties to a contract for the sale of an automobile, or mistake of the buyer, induced by the seller's fraud or misrepresentations as to the amount allowed the buyer for a secondhand car, is for the jury on conflicting evidence. Tex CivA 9SW(2d)767.

780-42 4LaA49.

780-43 151Miss73, 117S362.

780-48 11PaDist&Co 220.

780-52 6LaA701. See also 3LaA741.

780-54 But see 11LaA541, 123S911 (warranty exists).

781-75 245Mich237, 222NW101.

783-11 37GaA452, 140SE634.

783-17 37GaA452, 140SE634.

783-18 37GaA452, 140SE634.

783-27 But see 3LaA447.

784-29 [a] **Purchaser of car with defaced engine numbers** may recover amount paid without further rescission upon seizure of car by sheriff. 208 Iowa 512, 226NW130.

784-36 13PaDist&Co 16. [a] **Where car was traded in as part of price** buyer is not entitled to replevin it. 13PaDist &Co 16.

784-38 13PaDist&Co 16.

785-60 13PaDist&Co 16.

785-61 But see Mass 167NE229.

785-71½-New. **Evidence.** In a conditional buyer's action to recover the price paid, it is not error to refuse to admit evidence offered by the conditional seller of the price received on the sale of an automobile accepted in part payment where there was no offer to show the circumstances of the sale. Mass 167 NE229.

786-82 [a] **Complaints held sufficient.**- IndA 170NE101.

786-99½-New. Evidence may be insufficient to require submission to the jury. 101Vt240, 143A294.

787-4½-New. Alleged measure of damages represented by agreed value of an automobile taken in part payment of the purchase price is not recoverable as damages for breach of warranty. 38 GaA665, 145SE111.

787-18 86 IndA562, 158NE904.

788-34 [a] **Insurance commissioner should, under compulsory automobile liabilty insurance law, establish classications and rates** (1) on or before September 1 of each succeeding year. 265 Mass23, 163NE648 (provision held directory only). (2) Rates and classifications designated by him apply only for annual period and do not continue till modified. 265Mass23, 163NE648. (3) Rates and classifications fixed by former commissioner under memorandum not yet filed need not be enforced by acting insurance commissioner. 265Mass23, 163NE648. [b] **Proceedings in application for license.**-83NH426, 143A687.

789-50 126Kan27, 267P23. See also 124Kan677, 261P573 (cashier of mortgagee bank who replevied car held without insurable interest for theft policy).

789-52 127Kan271, 273P408; MoA 6 SW(2d)66.

790-73 251 IllA197 (operation "contrary to law as to age"). Ont [1929] 1DomLR 649.

790-74½-New. Violation of condition against encumbrance forfeits policy notwithstanding company's constructive knowledge of chattel mortgage. Man [1930] 2DomLR895.

790-86 89PaSuper281; 160Tenn239, 22 SW(2d)1038 (duty of court to construe particular clause in harmony with other parts). See also Or 291P498.

790-88 Or 291P498.

791-92 160Tenn239, 22SW(2d)1038 (provision held ambiguous and to require construction).

792-20 But see 146Wash484, 263P953 (policy is not void by mere warranty where there is no intent to deceive).

792-24 [a] **Provision requiring insurer's written consent to transfer of title** (1) may be waived by insurer. 242 Mich394, 218NW776. (2) Such provision is not waived by reimbursing agent amount paid by him for repairs of truck sold by insured on conditional sale contract. 242Mich394, 218NW776.

793-44 NS [1929] 1DomLR518.

794-59 TexCivA 5SW(2d)252.

794-65½-New. trees, 29Hawaii101.

795-80½-New. Hail is not an object within the meaning of the term. Tex CivA 5SW(2d)252.

795-83 242 IllA135.

795-85 LaA 130S118(3dcase).

795-4 Fla 130S577.

796-19 93PaSuper310.

798-43 29Hawaii101.

799-66½-New. Intoxication of driver relieves insurer under some statutes. BC [1930] 4DomLR816.

800-86½-New. If the insurance on the operation of a bus covers only its operation on a fixed schedule, such insurance does cover its operation on a special trip. 195NC777, 143SE865.

801-93 But see 230Ky354, 19SW(2d) 955 (condition in policy that automobile was not to be driven by person under sixteen years held not to apply to damages to car of insured).

802-12 [a] **Proper measure where car completely wrecked.**-Or 291P498.

802-13 Or 291P498.

802-14 But see Or 291P498; 160Tenn 239, 22SW(2d)1038.

802-19½-New. That motorist returned to home with damaged car, relying on mechanic's advice, is not negligence precluding recovery on policy. LaA 130S 118(3dcase).

803-45½-New. Where the owner and insurer enter into an agreement after a collision for repair and replacement of broken parts of the car, there is a waiver of the right to have damages or cost of repairs fixed by appraisers. Utah 273P963.

803-45¾-New. Where insurer offers to repair and replace broken and injured parts with like kind and quality, without asking or suggesting appraisement, and insured accepts the offer and delivers the car for such purpose, insurer is in no position thereafter to urge a

want or a failure of an appraisal or an arbitration. **Utah** 273P963.

804-58 227Ky652, 13SW(2d)1005; 132 Misc22, 227NYS746; 197NC100, 147SE 686, 64ALR656. [a] **Where both parties are negligent in collision** insurer is precluded from recovering under subrogation agreement. 9LaA700, 119S764.

804-60 9LaA700, 119S764.

804-60½-New. The mortgagee of insured property protected by a loss payable clause had no right of action against a wrongdoer, and payment by insurer of an amount due the mortgagee under the mortgage would create no right of subrogation against the wrongdoer. 227Ky652, 13SW(2d)1005.

804-60½-New. The fact that an insurance company sees fit, in adjusting loss, to agree with insured on an arbitrary amount not based on actual proof, does not render the party responsible for loss liable for such amount. 10LaA1, 120S261.

804-66½-New. Where insured settles with tort feasor in amount exceeding amount previously paid insured by insurer latter may recover of insured amount of insurance paid to him. 95 PaSuper41.

804-75 253 IllA465. [a] **Statutory provision that proceeding under contractual subrogation provisions shall be brought in name of or for use of subrogee** is inapplicable to action by owner. 253 IllA 465.

804-83½-New. Failure of insured to make the seller and the assignee of a conditional sales contract parties to an action against insurer to recover for damages to an automobile in a collision is not error, in the absence of showing that such parties were real parties in interest. **Utah** 273P963.

805-93½-New. A complaint, alleging an agreement whereby insurer agreed with the owner to make all necessary and proper repairs and replacements on an automobile damaged in a collision, and that insurer, undertook to make such repairs, but failed to do so, sufficiently states a cause of action. **Utah** 273P963.

805-12 [a] (2) Whether plaintiff claimed anything under additional insurance of which he knew nothing till after fire. 227Ky741, 13SW(2d)1040.

806-21 [a] (2) On question of waiver by insurer of right to deny liability for insured's failure to give prompt notice. 154Md360, 140A601.

806-22 146Wash484, 263P953.

806-23 [a] **Verdict directed for plaintiff.-Or** 291P498.

808-64 155Wash113, 283P668 (no recovery if loss caused by beneficiary).

809-91½-New. Data presented to agent with application held to at least put agent on inquiry in respect to registration and certificate of title as affected waiver of warranty. **Ariz** 289P985.

809-1½-New. A policy against theft, robbery, and pilferage does not cover larceny by a conditional buyer by a trick or device of a worthless check. **CalA** 266P853.

809-1½-New. A policy is held not to cover theft by the conditional vendee. 207Cal 355, 278P861.

810-28 [a] (6) To sustain finding that automobile insured was car described in certificate of title introduced to show compliance with law. **Ariz** 289P985.

810-29 [a] (5) Certificate of title issued to conditional seller's vendor. **Ariz** 289P985.

813-5 **Mass** 167NE231.

814-16 8LaA240.

814-21 [a] **But where garageman was liable** for act of employee, it is immaterial whether he used care in selecting employee. 12LaA661, 126S90.

814-22 12LaA661, 126S90.

815-35 6LaA99.

816-51 12LaA495, 126S458.

816-63 [a] (2) To sustain finding of negligence in not replacing cotter key on Ford car. 175Minn216, 220NW565. [b] (3) To take to jury issue of negligence based on unsafe condition of shop by reason of fire hazard where repairman permitted another to paint car. **Mass** 167NE231. [c] (2) Evidence held sufficient to raise issue that mechanic was negligent in driving car and that such negligence was proximate cause of injury to car. **TexCivA** 13SW(2d)899. (3) Evidence that accident was caused by defect in engine of which neither mechanic nor owner knew has been held to raise issue of unavoidable accident. **TexCivA** 13SW(2d)899. (4) Evidence held to raise issue that garage owner's conduct caused plaintiff to believe that owner's employees would repair car. **TexCivA** 13SW(2d)899.

817-67 175Minn216, 220NW565.

817-70½-New. Whether the bailee personally was to paint the car or whether custom permitted detailing the work to another has been held a question for the jury in an action for conversion. **Mass** 167NE231.

817-70½-New. Negligence of defendant's employee while testing plaintiff's automobile and the quantum of damages are questions for the jury. 219Ala291, 122S173.

818-85 But see 8LaA516. [d] (2) Evidence held insufficient to sustain judgment against father for repairs to son's truck. 127Kan518, 274P271(2dcase).

818-89½-New. Where repairs on an automobile contracted for are not made satisfactorily within a reasonable time, the owner may deduct loss in value when paying for repairs. 10LaA761, 123S175.

818-89½-New. Owner is liable for all work and materials furnished, where owner does not limit amount of repairs. 13LaA190, 127S451.

818-92 See also 6LaA818.

819-9 **MoA** 31SW(2d)218.

820-21 23AlaA465, 126S893 (enforcement of lien against mortgagee); 2LaA 185.

820-22 14PaDist&Co 172.

820-23½-New. Conditional vendee is not the owner under a statute permitting a lien for repairs made by direction or consent of the owner. 126Me 392, 138A769.

820-31 197Wis363, 222NW310, 62ALR 1483.

820-32 See also 150Miss861, 117S255 (statute giving lien on any article constructed, manufactured, or repaired does not give lien for tires and tubes replaced without charge for labor).

820-34½-New. **In Philippines** repairman's claim is limited to reasonable and necessary repairs for use and operation of car in ordinary course of business without interest or damages. 51Philippine745.

821-41½-New. Where a mechanic, without notice of an outstanding reserved title, buys a car from the possessor, counting repairs thereon as a part of the purchase price, he does not lose his right or lien for repairs as against the conditional vendor. 152Miss852, 120 S175.

821-49 23AlaA465, 126S893; 51Philippine745.

821-53 82CalA749, 256P213.

822-62 82CalA749, 256P213.

822-65 224AppDiv433, 231NYS365.

823-70 220Ala413, 125S649 (statute inapplicable).

823-71 23AlaA465, 126S893.

823-72 23AlaA465, 126S893.

823-73 219Ala53, 121S47.

823-74 51Philippine745. [a] **Provision in registered chattel mortgage prohibiting incumbrance for repairs without written consent of mortgagee** is not binding on repairman without actual knowledge thereof. 51Philippine745.

823-75 152Miss852, 120S175; 245NY 612, 157NE879 (Lien L. § 184); **Sask** [1928] 4DomLR155.

824-82 But see 219Ala53, 121S47.

825-3 [b] (3) To show reasonable value of car at time of delivery for repairs. 221Ky576, 299SW196.

826-11½-New. In an action to recover possession, where possession was not wrongful, the owner is not entitled to damages for detention of the car. 221 Ky576, 299SW196.

826-29 95CalA192, 272P329.

827-40 But see 32F(2d)18.

827-47½-New. Res ipsa loquitur doctrine is not applicable in case of injury caused by turning over of a tractor where changes were made in the tractor after purchase. 32F(2d)18.

828-49 [a] (2) In absence of evidence of faulty design and construction of tractor having tendency to tip over backward, notice of such tendency is not required. 32F(2d)18. [b] **Res ipsa loquitur doctrine** does not apply to injuries of operator received by tractor turning over, where changes in tractor were made after purchase. 32F(2d)18.

828-61 222MoA808, 10SW(2d)338; 10 PaDist&Co 215. [g] (2) Petition need not allege defendant's knowledge that animals were at large, his reasonable cause to believe so, or that by ordinary care he could have known that animals were likely to go on highway. 222MoA 808, 10SW(2d)338.

830-88 222MoA808, 10SW(2d)338.

831-7 129Kan45, 281P895.

831-18 292Pa366, 141A244.

832-21 See also 129Kan45, 281P895 (violation of speed regulation is not contributory negligence unless it contributes to injury suffered in collision).

832-27 [b] (2) Other instances. 7LaA 348. (3) To show negligence. 292Pa366, 141A244. [c] See also 129Kan45, 281P 895 (evidence sufficient to sustain finding that plaintiff was not guilty of contributory negligence).

832-33 86PaSuper578.

833-34 292Pa366, 141A244; 86PaSuper 578.

833-45 226AppDiv113, 234NYS476.

834-54 [c] (2) Where intercounty highway had been surveyed by state highway department and preliminary steps taken for its improvement, but actual construction work by state had not yet commenced at time of accident, road was, as matter of law, county, and not state, road. 31 OhA224, 167NE404.

834-62 [c] **City is not liable** for independent contractor's act in stretching cable across street, use of which was not contemplated by work contracted for. 85Mont302, 278P826.

834-65 [b] **County commissioners cannot increase or diminish its duty to** avoid injury to public. **Oh** 171NE857.

836-86 133Misc331, 231NYS671.

836-87 135Misc479, 238NYS294.

836-1 111Conn521, 150A520; 253NY 423, 171NE694; 137Misc768, 244NYS 547; TexCommnA 17SW(2d)769.

837-2 83NH524, 145A265; 30 OhA558, 166NE147.

839-32 134Misc848, 236NYS505 (where loose filling of large hole causing dangerous depression was held gross negligence).

839-37 83NH524, 145A265 (depression in fill between piling leading to span of bridge); 149Wash109, 270P422.

840-46 30 OhA558, 166NE147.

840-53 But see 298Pa116, 148A53(1st case).

840-62 [a] 108WVa222, 151SE174 (though unpainted and not equipped with light).

841-76 **Man** [1930] 4DomLR471.

842-87 11LaA306, 123S399(2dcase); **Man** [1930] 4DomLR471.

842-91 3Misc617, 23NYS192.

842-94½-New. An automobile driver cannot recover from a county for injury caused by negligence of its agents repairing a highway in not adequately warning the driver of the dangerous conditions, on the theory of a nuisance. 158Tenn313, 13SW(2d)328.

842-96 117Nebr136, 219NW843; 57ND 524, 223NW32.

842-97 218Ala566, 119S610(2dcase).

843-5 11LaA306, 123S399(2dcase); 117 Nebr136, 219NW843; **NH** 149A81; 57 ND524, 223NW32. [c] **Removal or destruction of barrier.**-One required to warn public of unsafe condition is not liable for injury after removal or destruction of barrier without his knowledge or consent. 118Nebr736, 226NW 324.

844-7 [c] (7) Not negligence in failing to erect railings on elevated causeway made of wood. 149Wash109, 270P422.

844-15 225AppDiv609, 233NYS533.

845-25 3LaA448.

847-62 227Ky690, 13SW(2d)1022.

848-64 36F(2d)47(2dcase); 223Ky446, 3SW(2d)1082.

848-70 157SC144, 154SE97; 52SD36, 216NW577. But see 180Minn407, 231 NW14.

848-71 See also 57ND524, 223NW32.
848-73 57ND524, 223NW32.
848-75 226AppDiv113, 234NYS476.
848-79 202Cal 711, 262P715; 29 OhA 517, 163NE721; TexCivA 12SW(2d)253.
849-80 29 OhA517, 163NE721.
849-81 218Ala566, 119S610(2dcase). [a] (2) Person driving automobile at night need not proceed in manner and observe such caution and keep his car in such control as to enable him to stop within distance within which headlights disclose object ahead. 149Wash 527, 271P582.
849-83 251Mich33, 230NW902.
849-86 85Mont302, 278P826.
850-87 [e] **Driver with knowledge of unsafe condition of bridge cannot recover.** NH 150A809.
850-90 Kan 289P401.
850-92 CalA 290P540.
850-93 See also 90PaSuper139.
850-95 Mo 26SW(2d)592; 200Wis87, 227NW284.
851-2 Mo 26SW(2d)592; Man [1930] 4 DomLR471.
851-4 36F(2d)47(2dcase); Ala 130S 807.
851-9 129Kan772, 284P404; 11LaA 306, 123S399(2dcase) (speed held not proximate cause of injury where city permitted canal to be dug across street and left unguarded).
853-24 But see 206 Iowa1298, 221NW 953.
853-25 [a] **Law defining headlamps** does not relieve driver from duty to drive carefully under conditions of poor visibility. 251Mich33, 230NW902.
853-27 29 OhA517, 163NE721.
853-34 [a] **County's failure to post warning notices after notice of defective conditions of bridge** is relevant fact to determine care used by injured traveler. 41GaA196, 152SE583.
853-37 218Ala566, 119S610(2dcase).
854-50 218Ala566, 119S610(2dcase).
854-54 TexCivA 12SW(2d)253.
854-61 CalA 285P709.
854-63 CalA 285P709.
856-77 218Ala566, 119S610(2dcase).
856-85 32F(2d)238.
856-89½-New. An automobile passenger injured in a collision with railroad switch stand guards on a roadway on railroad premises while thereon for his own benefit, and not in connection with any business of the railroad, is a licensee to whom the railroad company is liable only for wanton negligence. 152Miss 333, 118S181.
856-89½-New. Duty and liability of one acquiring abandoned highway, Md 150A788.
857-91 84Colo 376, 270P656.
857-2 MoA 7SW(2d)410; TexCivA 25 SW(2d)717 (insufficient warning).
858-9 291Pa451, 140A141. See also 321 Mo 71, 10SW(2d)54, 61ALR242. [a] **Consent by municipality** to erection of pole, so as to interfere with safety, 105 NJL501, 142A665.
859-21 Ala 130S807; 202Cal 711, 262P 715; 84Colo 376, 270P656.
860-30 129Kan458, 283P661. [a] **As to wanton and willful acts,** contributory negligence is no defense. 23AlaA346, 125S795(2dcase).
861-46 See also 105NJL501, 142A665.
862-69 MoA 7SW(2d)410. [a] (1) NH 149A508.
863-73 MoA 7SW(2d)410.
864-93 [b] (3) As to capacity in which defendant was being sued. TexCivA 13 SW(2d)990. (4) Other instances. 234 Ky396, 28SW(2d)467. (5) Other instances. Ala 130S896. [h] **Petition not demurrable.**-41GaA196, 152SE583. [i] **Amendment held proper,** although matter added was not set out in notice to town. NH 149A81.
864-95 128Kan95, 276P56.
864-4 218Ala566, 119S610(2dcase); 128 Kan411, 278P2. [a] **Answer sufficient as plea of contributory negligence.**-CalA 283P977.
864-5½-New. Plea of contributory negligence held sufficient. CalA 290P540.
864-9½-New. In an action against a paving contractor and a city for injuries caused by an obstruction, a paving contract not pleaded is admissible to show that the contractor placed the obstruction and that it was the duty of both defendants to remove the obstruction or place warning lights. MoA 17SW(2d) 658.
864-9¼-New. Allegations of an answer have been held sufficient to sustain a finding of contributory negligence. 128 Kan22, 276P84.
864-10 150Wash157, 272P723, 63ALR 200. [a] (2) Insufficient warning. Vt 148A867.
865-11 3Misc617, 23NYS192.
865-18 Vt 148A867. [a] **Presumption of due care** of driver held overcome by physical facts. 251Mich33, 230NW902.
865-19 IndA 173NE330(2dcase).
865-27 [a] (3) Other instances.-Tex CivA 25SW(2d)717.
866-30 129Kan759, 284P407.
866-31 218Ala566, 119S610(2dcase); Ala 130S807; 83NH524, 145A265. [f] **Presence of whisky bottles near overturned car** may be shown. 129Kan759, 284P407.
867-32 156Md680, 145A177.
867-34 CalA 290P540; 200Wis87, 227 NW284. [e] **Intoxication.**-CalA 283P 977. [f] **Evidence that driver of car was intoxicated** is admissible. 129Kan759, 284P407.
867-38 291Pa451, 140A141.
867-39 [a] (8) To show negligence of municipality in maintaining unlighted marker at street intersection. 174Minn 450, 219NW774. (9) To warrant finding that city and paving contractor negligently permitted obstruction to remain in street and failed to place warning light. MoA 17SW(2d)658. (10) To show warning given. Vt 148A867. (11) Failure of state to repair rut in road. 137 Misc840, 244NYS543. [b] (4) To warrant recovery against city. 321Mo 71, 10SW(2d)54, 61ALR242. (5) Where recovery was based on mere surmise as to cause of accident and general theories of negligence. 225AppDiv609, 233NYS 533. (6) In general. Ark 31SW(2d) 403.
867-40 IndA 173NE330(2dcase). [a] (1) 128Kan22, 276P84. (9) Other instances. 3Misc617, 23NYS192; Can [1928] 2DomLR897. (10) To show contributory negligence of driver when car wheels caught in rut and car was thrown into ditch. 137Misc840, 244NYS543. [b] (3) To show negligence in running into unlighted marker at street intersection. 174Minn450, 219NW774. (4) To show that driver of truck that went over embankment was himself free from fault. 225AppDiv609, 233NYS533. (5) Other instances. NH 149A508.
868-41 235Ky800, 32SW(2d)348; 323 Mo 799, 20SW(2d)888. [a] (5) To establish that depression in highway was proximate cause of car's overturning in ditch. 134Misc848, 236NYS505. (6) To show that negligence of road contractor in not maintaining lights was not proximate cause of damage to automobile. 129Kan229, 282P708. (7) Other instances of causal connection. Mo 24SW (2d)143. [b] (2) That death of automobile driver was caused by negligent failure to maintain barriers. 131Misc 909, 228NYS579. (3) To show that failure to erect sufficiently strong barrier was cause of accident. 225AppDiv609, 233NYS533.
868-42 Ala 130S807.
868-45 [c] **Evidence held insufficient.**-321Mo 71, 10SW(2d)54, 61ALR242.
868-46 [a] 200Wis87, 227NW284.
868-47 MoA 11SW(2d)750(2dcase).
868-53 253NY423, 171NE694.
869-64½-New. , whether the person leaving coal in the street was an independent contractor, 323Mo 799, 20SW (2d)888.
869-64¼-New. , whether village was negligent in suffering chains to bar vehicles from streets separating schools and playgrounds, 180Minn407, 231NW14.
869-67 Ala 130S896; 41GaA196, 152SE 583; 128Kan127, 276P74; 128Kan411, 278P2; 174Minn450, 219NW774; Mo 24 SW(2d)143; 323Mo 799, 20SW(2d)888 (leaving coal in street); MoA 7SW(2d) 410; NH 147A411 (whether town should have anticipated weakening of culvert); TexCivA 8SW(2d)271; TexCivA 20SW (2d)409. [b] 137 Okl 74, 278P286. [c] 105NJL501, 142A665. [d] (1) 149Wash 109, 270P422. [h] **Log projecting into road.**-149Wash527, 271P582.
869-68 32F(2d)238; 28 OhA263, 162 NE684.
869-69 218Ala566, 119S610(2dcase).
869-70 218Ala566, 119S610(2dcase); Ala 130S807; 30 OhA558, 166NE147.
869-71 [a] **Precautionary measures.**-Whether danger from defect was such that ordinary men would recognize it and take precautions is for jury. NH 147A411.
869-73 Ala 130S807; 128Kan127, 276P 74; 83NH524, 145A265; NH 149A81. [d] 57ND524, 223NW32. [f] **Evidence insufficient** to take to jury. 149Wash 109, 270P422. [g] **Reasonable time for discovering removal of barriers.**-118Nebr 736, 226NW324, 326 [citCJ].
870-79 227Ky690, 13SW(2d)1022; 158 Md328, 148A439; Mo 24SW(2d)143; 105NJL501, 142A665; SD 230NW225; 197Wis75, 221NW384; 200Wis87, 227 NW284. [d] **Failure to keep close to right side of highway as required by statute.**-MoA 17SW(2d)658.
870-81 [d] MoA 17SW(2d)658. [j] **Hydrant.**-28 OhA263, 162NE684. [k] **Detour sign.**-218Ala566, 119S610(2d case). [l] **Concrete mixer.**-227Ky690, 13SW(2d)1022.
870-82 150Wash459, 273P178.
871-89 Mo 24SW(2d)143.
871-96 218Ala566, 119S610(2dcase); Ala 130S807; MoA 7SW(2d)410.
872-99 NH 149A508.
872-3 Mo 24SW(2d)143; MoA 11SW (2d)750(2dcase); 83NH524, 145A265; NH 149A508; 253NY423, 171NE694; 156SC541, 153SE572; TexCivA 8SW(2d) 271. [c] **Evidence held insufficient,** as matter of law, to show causal connection between injury and defendant's alleged negligence. 178Minn353, 227NW 203.
872-7 41GaA196, 152SE583 (contributory negligence); 323Mo 799, 20SW(2d) 888 (requested instruction withdrawing charge of negligence held properly refused); MoA 17SW(2d)658; 156SC 541, 153SE572. [g] **Instructions held sufficient.**-57ND524, 223NW32 (as to care in maintaining lantern at excavation). [h] **Instructions held improper or properly refused.**-23AlaA346, 125S795 (2dcase). [i] **Instructions erroneous.**-41GaA203, 152SE581(3dcase) (contributory negligence).
872-8 150Wash459, 273P178.
872-9 [c] (2) As assuming that coal occupying more than permissible portion of roadway had causal connection with accident. 323Mo 799, 20SW(2d) 888. (3) As assuming that persons delivering coal were defendant's servants. 323Mo 799, 20SW(2d)888.
873-10 [a] 150Wash459, 273P178.
873-11 [c] **Instruction relative to right of recovery** held to have adequately defined issues. 156Md680, 145A177.
873-12 Ala 130S807. [a] (5) As to road contractor giving warning of barricade. 84Colo 376, 270P656. (6) Other instances. Mo 24SW(2d)143. [b] (9) As making defendant liable in any event. 150Wash459, 273P178. (10) As to duty of those replacing bridge to exercise reasonable care to notify public of danger. 58ND430, 226NW483.
873-13 Ala 130S807; Kan 289P401; MoA 17SW(2d)658; 57ND524, 223NW 32. [d] (2) That county was under duty to close bridge when evidence showed warnings of defects were posted. 41GaA196, 152SE583.
873-14 129Kan772, 284P404.
873-15 323Mo 799, 20SW(2d)888. [a] (2)Instruction directing verdict for seller of coal, in action for injuries caused by automobile striking coal pile in street, held properly refused. 323Mo 799, 20SW(2d)888. [b] **Instructions held proper.**-323Mo 799, 20SW(2d)888.
873-18 [a] (3) Special finding construed as negativing contributory negligence. 129Kan772, 284P404.
877-66 220Ala130, 124S300; 82CalA 369, 255P760; 242 IllA93; NJ 143A619.
877-68 90CalA730, 266P588.
878-71 220Ala130, 124S300; Ala 128S 233; CalA 284P1086; 222Ky551, 18W (2d)985; 234Ky702, 28SW(2d)484; ND 230NW6; 121 Oh437, 169NE456; 123 Or20, 261P428; 132 Or161, 285P219; 49 RI364, 142A621; 146SC178, 143SE648. [h] **Negligence per se of pedestrian in**

crossing street between crosswalks in violation of municipal ordinance held not to relieve operator of motor vehicle from legal responsibility in exercising due care with reference to such pedestrian. 30 OhA7, 164NE55. (i) **Slight want of ordinary care on part of owner party in automobile collision case is such want of care as will constitute** [illegible] 222NW334.

(j) **Action of winds on motor vehicle.–Mass** [1920] 2DomLR512.

275–75 (a) **Business and industry,** in transportation of heavy commodities over highways, should adopt safe vehicles and appliances and operate them with reasonable precaution for safety of persons lawfully on highways. 295Pa 192, 145A327.

275–76 [illegible] 41, 143A242; 222Ky551, 18W(2d)[illegible]; [illegible] 254; 157Miss516, 128S160; 226Mo672, 28W(2d)593; 49KI264, 142A621.

280–88 23P(2d)437(2cases); 208Iowa275, 225NW406; 165La1075, 116S563; 126Me552, 146A268; Me 150A437; 172 Minn[illegible]

280–97 KI 142A559.

280–92 11LaA564, 122S446 (motorists must use such diligence and care as is commensurate with dangerous character of locality); 172Minn31, 216NW254; SC 155SE136.

281–92 218Ala527, 119S667; 82CalA 215, 255P735; 82CalA265, 255P740; 252 IlIA550; 12LaA52, 127S124; 208Pa522, [illegible]

282–7 (a) (5) *On much travelled highway, between intersections, as to left-hand turn.* 28Ariz22, 262P3.

282–20 [illegible]

282–24 [illegible]

282–29 (b) **Statute has been held not retroactive.–CalA** 232P1099.

282–21 (a) (1) MoA 158W(2d)317; 222 Mo 778, 168W(2d)55. (2) Statute applies to violation of humanitarian rule. MoA 293SW25. (3) Present statute requires exercise of highest degree of care. MoA 208W(2d)647. (4) "Highways" includes all highways traveled by public. Mo 208W(2d)1065. (c) (1) MoA 7 SW(2d)270. (2) Statute is applicable to cases involving humanitarian doctrine. MoA 208W(2d)647.

282–30½–New. Violation of a state traffic statute is merely evidentiary of negligence and does not, as matter of law, constitute negligence. 177Ark207, 8SW (2d)426.

282–37 24P(2d)722.

282–38 CalA [illegible]

282–41 97PaSuper241.

282–42 Minn 222NW229.

282–43 [illegible] 225Mich 290, 214NW172; 97PaSuper477; 101Vt 94, 141A594; Vt 142A274. (b) **Driver has right to assume that other drivers will permit drivers using ordinary care to operate their cars without injury to others.** 101CalA503, 282P1012(2dcase).

282–44½–New. An automobile driver may assume that persons using the highway are sufficiently intelligent to know their duty to exercise necessary care for their own safety. 86CalA459, 261P [illegible]

282–48 46CalA[illegible] 185P[illegible]; 226Colo 424, 260P1079; 100Conn508, 122A847; 5LaA441, 265AppDiv457, 209NY[illegible] [app dism 226NY644mem, 142NE318 mem]; 28 OhCirCt[illegible]; 27 OhCirCt 500; 49KI264, 142A621.

282–61½–New. Negligence growing out of the violation of a traffic ordinance is operative only to the extent of, and for the purpose of, the mischief intended to be guarded against by the ordinance, and ceases to be negligence the moment that purpose ceases to operate. La 119 S677.

282–51½–New. Negligence cannot be predicated on a strict mathematical computation in all circumstances. 250Mich 62, 229NW406.

282–61 238 Ill 35, 169NE729.

282–63 Ala 12989; 204CalA374, 268P 269; 86CalA451, 260P932; CalA 291P 175; 102Conn5, 142A[illegible]; 102Conn560, 143A384, 236OnA706, 143NE276, 89 IndA167, 166NE160; 203 Iowa443, 212 NW858; 9LaA229, 119S885; 170La527, 128S465; 11LaA71, 123S352; 11LaA700, 124S716; 12LaA228, 125S140(2dcase); 12LaA167, 125S294; 12LaA321, 125S 504; 12LaA546, 128S530; 126NC461, 143SE66(1stcase); 30 OhA7, 164NE55; 126 Or532, 270P521; Or 276P668; 296 Pa581, 146A141; TexCivA 299SW911; TexCivA 21SW(2d)[illegible]; Utah 272P297; Va 154SE572. (a) (4) Negligence of defendant's employee in permitting parked truck to protrude over traveled portion of highway held proximate cause of collision. TexCivA 48W(2d)1012. (5) Father's placing of automobile in hands of son under sixteen years of age, and hence incompetent to drive car, under statute is proximate cause of injury resulting from son's careless handling of car. Utah 272P207. (6) Other instances. 92CalA145, 267P887. (7) Parking motor truck on dark night on wrong side of road. Va 154SE522. (c) **Speed not proximate cause.–Iowa** 227 NW224.

287–64 Iowa 225NW255. (a) (2) Wife cannot recover where husband's negligence in driving car in which she was passenger was sole effective cause of collision with defendants' car. Ont [illegible] 2DomLR[illegible]

287–65 29Ga[illegible] 145A123

287–66 177Ark35, 58W(2d)723; 197 NC164, 148SE34; 86PaSuper63; Va 154 SE459.

287–67 177Ark35, 58W(2d)723; 83CalA 258, 257P109; Mass 172NE498. (b) See also 207 Iowa1271, 224NW576.

287–68 LaA69; 5LaA140; 80Mont 401, 260P702.

287–69 177Ark35, 58W(2d)723; CalA 287P518; La 119S577; 10LaA313, 120S 420(2dcase); 11LaA164, 121S777; 12 LaA467, 124S[illegible]; Mass 162NE[illegible] (violation of ordinance as to parking); Mass 162NE759; 10JMiss435, 112S252; 194 NC172, 138SE595; 295Pa301, 145A393; 9PaDist&Co 751; Utah 272P207; 41Wyo 101, 282P1061(2dcase); 41Wyo 345, 285 P781; Man [1930] 3DomLR65. But see 6LaA72. (a) **Unlawful speed** is proximate cause of injury where it was due to driver's negligence, and not to condition of street, and prevented driver from controlling vehicle. Iowa 225NW855.

287–73 Mich 232NW178.

287–74 Ala 120S416; 202CalA180, 262P 198; 82CalA655, 257P447; CalA 280P 552; 247 IlIA252; 9LaA294, 120S494; 5 LaA69; 5LaA140; MoA 158W(2d)270; MoA 17SW(2d)639; 225AppDiv25, 232 NY871; 126 Or155, 268P1020; TexCivA 158W(2d)170; 154Wash[illegible], 283P417. (g) **Owners of two colliding automobiles** injuring pedestrian are liable therefor. 207 Iowa1292, 224NW820, 62ALR1419. (h) **Negligence or lack of skill of driver** after accident is concurring cause. Ala 123S333.

287–74½–New. An automobile accident in which a passenger was killed, if due solely to the driver's negligence, could not be due partly to the passenger's negligence. 101Vt285, 142A394.

288–75 178Ark599, 128W(2d)415; 92 CalA495, 268P483; 97CalA311, 275P 526; 100CalA498, 280P377 (provided it is proximate cause of injury); 85Colo 405, 277P299; 9LaA186, 119S496; La 119S577; 9LaA702, 120S75(1stcase); 9 LaA517, 121S216; 12LaA467, 124S559; 246Mich423, 224NW647; 248Mich574, 227NW757; NJSup 145A271; Vt 147A 315.

288–76 248 IlIA480; 11LaA39, 122S727 (2dcase).

288–77 97CalA160, 275P484; 110Conn 184, 147A762, 66ALR1121; 207 Iowa 113, 222NW416, 62ALR1174; 5LaA704; 34 OhA207, 170NE607.

288–78 208 Iowa1157, 225NW346; MoA 228W(2d)877; Utah 272P207.

288–79 92CalA732, 268P951.

289–81 Wis 231NW252. (b) 83CalA 408, 256P870.

289–82 92CalA732, 268P951.

289–83 246 IlIA425; 128Me541, 147A 40.

289–86 88PaSuper361. (a) **Driver of automobile is not insurer of safety of pedestrians on streets,** or guardian of adult person in full possession of faculties. 158Wash75, 279P97.

289–88 94Fla761, 116S849; IndA 168NE 246; 8LaA77; Mo 286SW66; NJSup 147A779; 197NC164, 148SE34; 88Pa Super361; 33PortoRico 993; 34PortoRico 1 [e] (4) Fact that automobile skidded is of itself not even evidence of negligence of driver. 266Mass253, 165 NE117.

290–30 97CalA287, 275P813.

290–92 250Mich180, 229NW433(1st case).

290–93 CalA 289P912; LaA 120S354; 84Mont397, 276P437; 122Or332, 285P 823; 35PortoRico 316. (a) **If driver of defendant's truck was not otherwise negligent in driving on left side of road because of emergency,** negligence could not be predicated on fact that he chose to run into plaintiff's car approaching from opposite direction rather than run into pedestrian, where one collision or other was unavoidable. 178Ark599, 12 SW(2d)415. (b) **No person will be held responsible for his act** where his mind is in state of terror or fright. TexCivA 308W(2d)681.

290–94 26P(2d)443; 11LaA280, 122S 292; 7LaA532; 8LaA238; 8LaA323; 12LaA630, 125S744; LaA 120S138; Md 150A795; Mich 232NW461; 252Pa348, 141A150; TexCivA 30SW(2d)681; 196 Wis614, 220NW203, 61ALR1243. Sask [1920] 1DomLR273. (c) "**Sudden appearance**" defense may be invoked against infant incapable of contributory negligence. 222Ky551, 18W(2d)985.

291–95 82CalA660, 256P457; NC 155 SE247 (recovery by automobile guest); 92PaSuper204.

291–96 222Ky551, 18W(2d)985; LaA 120S129.

291–97 LaA 120S129. (b) **Ordinary care exercised** by driver in veering to left where he was placed in sudden peril by approach of car on wrong side of road. 11LaA532, 121S626.

291–2 178Ark599, 128W(2d)415; 92 CalA52, 267P724, 727 [cit CJ]; 9LaA 312, 120S426(1stcase); 12LaA520, 124 S772; Minn 232NW715; 58ND286, 225 NW791; Wis 229NW57. (b) (2) Other instances. 40GaA606, 150SE852.

292–3 200Wis504, 228NW126.

292–5 (b) **Evidence that car struck large rock immediately after striking loose rock in road** did not call for application of doctrine of subsequent negligence in failing to apply brakes immediately on striking loose rock. 218 Ala670, 119S681.

292–6 256 IlIA461 (lack of alertness at intersection).

292–7 110Conn108, 147A270; 242 IlIA 166; 252 IlIA550; 256 IlIA461.

292–8 110Conn244, 147A678; 12LaA 249, 124S589.

292–9 (d) **That driver did not see pedestrian before automobile collided with him** does not prevent conduct from being willful or wanton negligence. 252 IlIA550.

293–23–41 157Miss236, 127S779; 133 Misc777, 232NYS543; 136Misc443, 240 NYS199; 12PaDist&Co 271. (a) 12Pa Dist&Co 271.

293–44 LaA 125S748.

294–45 (c) **Defective steering gear** which could have been remedied amounts to negligence. Eng 37TLR72.

294–46 Eng [1926] WN16.

294–47 11LaA592, 122S900.

294–51 (a) **Construction.–Or** 289P1073. (b) **Purpose of provisions stated.–Or** 289 P1073.

294–52 81CalA690, 254P671.

294–54 241Mich57, 216NW403. (b) See also 242 IlIA308.

295–59 CalA 287P562; 241Mich57, 216 NW403; 228NY164, 126NE814; 198NC 739, 153SE315; 120 OhA400, 166NE364; Utah 272P207; Can [1929] 1DomLR375. (b) **Knowledge by driver of unlighted tail-light is necessary.–CalA** 291P695.

295–60 254 IlIA387 (one fact to be considered); 117Nebr60, 219NW805; Tex CivA 268W(2d)722.

295–62 22AlaA343, 115S690.

295–63 241Mich57, 216NW403; 247 Mich661, 226NW675.

295–64 205 Iowa573, 218NW278.

296–67½–New. **Attainment of visibility in time to prevent disaster** meets the demands of law. 225AppDiv25, 232NYS 71.

896-68 10LaA760, 123S155.
896-71 Alta [1930] 2DomLR767 (negligence to run with only one front light).
896-75 131 Or612, 282P768.
896-76 78CalA733, 248P727.
896-83 101CalA274, 281P1081; Eng 41 TLR1.
897-84 Nebr 231NW809.
897-87 See also 109Conn654, 145A156. [a] **Statute applies** as long as automobile is on highway, whether stopped or moving. 101Vt111, 141A593, 63ALR 396. [b] **Term "good and sufficient brakes"** means brakes adequate to promptly check speed and bring vehicle to complete stop. Nebr 231NW809.
897-88 9LaA189, 119S453. Contra 101 Vt111, 141A593, 63ALR396.
897-91 261Mass424, 158NE778.
897-95 Eng 25TLR13.
898-5 82CalA660, 256P457.
898-7 Utah 272P207.
898-10 158Md424, 149A4.
899-13 Mass 173NE427.
899-16½ **–New. The law of the road yields to extraordinary junctures.** 128 Me346, 147A423.
899-17 175Ark101, 298SW1023.
899-20 252 IllA550. [f] **In absence of municipal ordinance** police department cannot legally designate what vehicles shall have right of way. 32 OhA512, 168NE386.
899-21 5LaA623; MoA 297SW180; 27 OhA47, 160NE734. Contra Ont [1928] 4DomLR62.
900-23 117Nebr60, 219NW805; 225 AppDiv415, 233NYS388; 228AppDiv 569, 240NYS225. [d] **Action of driver of automobile in moving against current of traffic in violation of city ordinance** establishing one-way street, though circumstance to be considered with other evidence, did not alone establish driver's negligence. 295Pa301, 145A303. [e] **Regulations as to vehicles traveling in same direction.**–Operator's disregard of statutory regulation is evidence of negligence. 264Mass383, 162NE772.
900-25 1LaA155; 2LaA363; 3LaA502; 7LaA526.
900-27 La 119S577; 3LaA521; 157Md 528, 146A851.
901-39 [c] (2) Statute, requiring motor vehicles to travel on right-hand side of center of street, has no application where pedestrian is struck on sidewalk driveway. 208 Iowa275, 225NW406. [h] **Statute regulating speed of motor bus** may be invoked by anyone injured as result of violation thereof. 146Wash 43, 261P782.
901-43 LaA 130S565; 239Mich390, 214 NW172; 126 Or332, 269P491, 492 [cit CJ]; 126 Or363, 270P530, 534 [citCJ]; 131 Or282, 282P1087.
902-47 Eng [1915] SC205.
902-50 TexCivA 5SW(2d)824.
903-53 [b] **Rule enacted to protect pedestrians** as well as vehicles. MoA 26 SW(2d)823.
903-55 107Conn709, 142A397.
903-58 [a] **Where vision is obscured by smoke** (1) driver must get his car completely to right of centre of highway. Sask [1929] 3DomLR295. (2) In such case it is not negligence to fail to get completely clear of traveled portion of centre of highway. Sask [1929] 3DomLR295.
903-62 241Mich57, 216NW403. [e] **Turning from middle portion of road to right side** is not negligence where struck by vehicle following from behind. 157Md528, 146A851.
904-63 241Mich57, 216NW403; 35PortoRico 390.
904-66 146Wash74, 262P136.
906-30 292Pa348, 141A150. [d] **Automobilist approaching curve at thirty-five miles per hour, on wrong side of road,** and striking truck coming from opposite direction, has been held liable for damages to truck. 10LaA747, 122S 901. [e] **Holding out hand.**–5LaA655.
906-34 204Cal 415, 268P644; MoA 6 SW(2d)993. [b] (2) Striking pedestrian after latter crossed center of street. 226AppDiv393, 235NYS532.
907-87 89 IndA139, 164NE859; 208 Iowa275, 225NW406; 295Pa168, 145A 81. [e] **Driver of taxicab is guilty of negligence in leaving slow-moving line of traffic and driving down wrong side** of street at speed of twenty-five miles an hour, in violation of traffic ordinance, when streets in neighborhood were congested with traffic on account of proximity of carnival parade. 10LaA313, 120S420(2dcase).
907-88 TexCivA 13SW(2d)450.
908-90 MoA 19SW(2d)306.
908-92 33Ariz28, 262P5. [a] **Where accident occurred on sidewalk driveway and not on vehicular roadway** and was due to defendant's vehicle being in sidewalk driveway, driving of truck on wrong side of street is not proximate cause of accident. 208 Iowa275, 225NW 406.
908-93 [c] **Error of going on wrong side due to fault of other vehicle** will justify going to wrong side of street. Eng [1914] SC874.
908-95 5LaA462; 106WVa494, 145SE 817, 63ALR271. [b] (2) It is not negligence to turn car to wrong side to avoid colliding with approaching car which was on wrong side. Eng [1915] SC205.
909-12 86CalA459, 261P315; 88CalA 671, 263P1027; CalA 284P1086.
910-13 CalA 284P1086.
910-14 Ark 30SW(2d)840(2dcase); 242 IllA93; 208 Iowa361, 225NW862; 11 LaA446, 123S446; 12LaA236, 125S168 (2dcase); 4LaA17; LaA 130S821; 247 Mich157, 225NW609; Mich 233NW395; 253NY462, 171NE708; 126 Or532, 270P 521; TexCivA 296SW979; Utah 272P 207. [j] **That street stopped at intersection of two streets,** making less likelihood of pedestrians' crossing at that point, will not relieve motorist from duty to keep lookout for pedestrians. 208 Iowa361, 225NW862.
910-16 181Ark1024, 28SW(2d)1052.
911-17 92CalA52, 267P724, 727 [cit CJ].
911-19 NJ 150A334.
911-20 Wis 229NW541.
911-26 80CalA590, 252P739; 108Conn 544, 143A886.
911-27 Va 154SE545. [d] (5) Driver of automobile, operating machine in such manner as not to be able to see pedestrians rightfully crossing intersection, is negligent. 29F(2d)437(2d case).
912-28 207 Iowa1241, 224NW540, 65 ALR187. [a] 294Pa274, 144A74, 62 ALR1337.
912-36 55ND339, 213NW574; 126 Or 363, 270P530, 533 [citCJ].
913-49 146Wash74, 262P136.
913-50 170La527, 128S469 (at speed permitting instantaneous stop).
913-52 Me 150A487.
913-53 CalA 291P695.
914-57 [a] **Defendant automobile driver, approaching street intersection** where plaintiff was waiting in safety zone for street car, was negligent in striking plaintiff, though his view was obstructed by preceding car. NJSup 145A223.
914-61 6LaA335.
915-69 CalA 290P684; 254 IllA387.
915-71 318Mo 486, 18W(2d)113.
915-75 12PaDist&Co 91. [a] 298Pa 522, 148A693.
915-77 11LaA368, 123S338.
915-78 167La335, 119S69.
915-79 234Ky702, 28SW(2d)484; Utah 272P207.
916-81 [b] **Statute requiring sounding of horn** is applicable to accident before repeal, though trial is after repeal. Mass 172NE93.
916-83 148Miss871, 114S807.
916-87 [b] 232Ky98, 22SW(2d)448.
917-91 126 Or532, 270P521; 35Porto Rico 390 (no duty to blow horn continuously). [e] **Driver of automobile proceeding slowly in middle of block** with nothing to suggest danger is not required to give warning. 295Pa301, 145A303. [f] **Vehicles passing in opposite directions not required to signal.**–35PortoRico 316. [g] **Motorist striking jay-walking pedestrian** at night during rainstorm is under no duty to sound horn. CalA 290P924.
917-95 218Ala537, 119S667.
917-99 Md 150A34; Mass 171NE670; 148Miss871, 114S807.
918-2 35PortoRico 390.
918-4 203 Iowa476, 212NW682; 233 Ky763, 26SW(2d)753.
919-11 173Minn138, 216NW605.
919-19 IndA 168NE246; 207 Iowa 1241, 224NW540, 65ALR187.
919-23 MoA 18SW(2d)575.
919-24 228AppDiv569, 240NYS225.
919-26 CalA 260P337; 126 Or532, 270 P521; Alta [1930] 1DomLR361.
919-28 84Mont397, 276P437; Sask [1930] 2DomLR106. [b] **Failure to sound horn held negligence.**–LaA 128S 721(2dcase).
920-30 148Miss871, 114S807; 33Porto Rico 755.
920-33 148Miss871, 114S807; 33Porto Rico 755.
920-41 CalA 286P1057; 4LaA495; MoA 18SW(2d)575; 126 Or532, 270P521. [e] **Motorist's speed** must not be so great as to prevent him from maintaining control, and must be within such bounds as will not endanger others, considering circumstances. TexCivA 19SW(2d) 94. [f] **Reasonable control defined.**–Nebr 232NW767. [g] **Complete control,** such as will prevent collision by anticipating negligence or illegal disregard of traffic rules is not required. Nebr 232NW767.
921-42 Mich 233NW395; Nebr 232NW 767.
921-43 157Miss303, 127S775.
921-45 92CalA20, 267P754; 5LaA105; Mich 233NW203; MoA 18SW(2d)575; 126 Or532, 270P521. [c] **What constitutes excessive speed.**–Pa 151A678 (speed causing inability to avoid visible obstructions is negligent).
921-46 Mich 233NW395.
921-47 Mich 233NW395.
921-49 [f] **Ordinance governing speed held not applicable** where person was not within street limits of incorporated city. LaA 127A663. [g] **Highway running through** unincorporated village with railroad depot and several buildings along highway has been held public highway where territory contiguous thereto is closely built up, within meaning of laws regulating speed. 154Miss 707, 123S871.
922-51 [h] **Statute regulating speed of solid tired trucks** is not solely for protection of roadbed. 89CalA721, 265P 541.
922-52 12LaA630, 125S744; 242Mich 600, 219NW618; 197NC83, 147SE729 (1stcase); 34 OhA207, 170NE607; 127 Or490, 272P670; 144SC437, 142SE722; TexCivA 15SW(2d)170; TexCivA 30SW (2d)423. But see 34 OhA563, 171NE 424.
922-53 136Misc277, 240NYS730 (violation of city ordinance).
923-54 101Vt285, 143A394. [b] 126Me 558, 140A368.
923-57 233Ky329, 25SW(2d)727.
923-62 Ida 288P152; 245 IllA132; Mass 172NE90; 31 OhA273, 167NE407.
924-66 [a] (2) Place along highway having seventeen houses within twelve or fifteen hundred feet is not hamlet within statute limiting speed through hamlets. 195Wis602, 219NW346. [b] (3) Failure to limit speed to statutory rate is negligence though sign is not posted. 81CalA690, 254P671.
924-67 87CalA563, 262P481; CalA 284 P1083; 107Conn201, 139A782; 89 IndA 353, 166NE545(2dcase).
925-68 239Mich37, 214NW170.
925-69 80CalA342, 251P818; 82CalA 660, 256P457; 123 Or293, 261P890.
925-71 12LaA236, 125S168(2dcase); 239Mich37, 214NW170.
925-72 80CalA342, 251P818.
926-75 208 Iowa275, 225NW406; 126 Or532, 270P521.
926-79 81CalA690, 254P671; 13LaA 159, 127S661.
926-80 8LaA472; 85Mont562, 281P 345.
927-88 [e] (3) In congested traffic. LaA 130S237. [f] (1) 108Conn560, 143 A884. (4) On right of way street at night with no traffic in sight. LaA 130 S129. [h] **Thirty-five to forty miles per hour.**–LaA 130S669.
927-89 [e] (6) Turning corner, into narrow street at night. 298Pa522, 148A 693. [f] (3) In known school zone. 158Tenn333, 13SW(2d)322. [g] (8) Coasting and striking pedestrian step-

ping from behind parked car. LaA 129 8401. (9) Other instances. LaA 1298 183.

927-91 35PortoRico 316 (when bars at railroad crossing are raised)

928-94 CalA 289P181; 111LaA71, 1238 352; LaA 1308669 (driver held grossly negligent); Mass 171NE679; MoA 158SW(2d)575; 253NY162, 171NE708; 33PortoRico 755.

923-97 208Iowa361, 225NW862; Mich 233NW395; MoA 188SW(2d)575; 298Pa 522, 148A693.

929-98 208Iowa361, 225NW862; 239 Mich699, 214NW939.

929-99 [d] 298Pa522, 148A693.

929-1 35PortoRico 316.

929-6 126Kan193, 267P956; 239Mich 699, 214NW939; 247Mich157, 225NW 609. [b] 195Wis637, 219NW366.

929-13 12LaA[illegible] (failure to see cars because of blinding lights held no defense); Mich 233NW 395. [a] While looking back a speed of fifteen or twenty miles an hour is dangerous. TexCivA 298SW(2d)883.

929-14 12LaA650, 1[illegible]; 247Mich 88, 222NW155, 62ALR1528; Mich 233 NW224; NJSup 144A322.

929-15 191NC[illegible]; 139SE237

930-16 13LaA434, 127831.

930-20 61LaA18; 117Nebr444, 220NW 572, 58ALR1473; 194NC210, 139SE237. But see 117Oh43, 158NE83; 118Oh307, 160NE898, 58ALR1476. [a] 245Mich88, 222NW155, 62ALR1528. [b] Obstructions within area lighted by headlight.—In Ohio control sufficient to avoid obstructions in lighted area is enough; and "obstructions" means tangible, physical objects, and not hidden dangers of every kind. 117Oh43, 158NE83.

930-21 118Oh307, 160NE898, 58ALR 1476.

931-24 245Mich88, 222NW155, 62ALR 1528.

931-27 157Miss303, 127875.

931-29 4LaA269; Can [1929] 1DomLR 208.

931-31 37GaA634, 141SE222. [a] Police officers are not excepted from requirements of Georgia statute. 37GaA 634, 141SE222.

933-58 222AppDiv310, 226NYS311. [b] Where truck skids, defendant must use reasonable care under circumstances. 222AppDiv310, 226NYS311. [c] Failure of defendant whose truck is skidding instantly to realize significance of automobile lights ahead is not negligence. 222AppDiv310, 226NYS311.

933-59 230Ky750, 20SW(2d)713. [c] (2) Other instances. LaA 1288721(2d case).

933-61 33Ariz28, 262P5; 208Iowa641, 224NW58. 233Ky329, 25SW(2d)727; Miss 1308906; MoA 148SW(2d)483; 292 Pa348, 141A150.

934-62 11PaDist&Co 694.

934-64 Minn 232NW264.

934-66 [a] Leaving rear of truck on paved part of highway at night, after making left turn crossing to turn around at point where there was no crossing, and at time when many cars were passing in both directions, was negligence. 98CalA201, 276P605.

934-67 49Ill32, 139A652, 62ALR967

934-74 89IndA139, 164NE859; 124Or 237, 264P469.

935-77 81LaA304. [d] Where stop light signal on vehicle is not shown to be approved driver is not excused for failure to extend hand. CalA 289P900.

935-87 61LaA787. [d] But see 124Or 237, 264P469.

936-88 [b] Defendant backing automobile without warning into path of plaintiff's car, which was approaching with headlights lighted not more than one hundred feet away, has been held negligent, especially where in so backing he was traveling on left side of road. 108 Conn560, 143A884.

936-90 111Conn363, 149A855(intense); 61LaA30.

936-92 Nebr 228NW528.

936-93 12LaA321, 1258504 (city ordinance); Nebr 228NW528; 124Or237, 264P469; 290Pa1, 137A797. [c] Driver must sound horn repeatedly.—290Pa1, 137A797.

936-99 LaA 1298246.

937-2 87CalA681, 262P370; CalA 290 P62; 252IllA423 (ordinance requiring signal held valid and not in conflict with statute); NJSup 136A708; 148 Wash291, 268P866.

937-3 CalA 290P62.

937-9 97PaSuper407.

938-13 223Ky784, 48SW(2d)703.

938-14½-New. A driver making a left-hand turn must exercise ordinary and reasonable care and act with due regard to the rights of all persons who may reasonably be expected to be in or approaching the path of the automobile. 208Iowa275, 225NW406.

939-30 110Conn151, 147A762, 66ALR 1121; 223Ky784, 48SW(2d)703.

940-38 10LaA486, 1208639.

940-39 [a] Driver crossing from wrong to right side is bound to use particular diligence towards traffic coming in opposite direction. 110Conn220, 147A671 (2d case).

941-44 Alta [1928] 4DomLR962. [a] Driver on right side not bound to take risk of running into ditch to avoid accident caused by driver on wrong side. Ont [1928] 1DomLR151.

941-45 Va [illegible]

941-46 Or 276P668.

941-47 27AppDiv139, 237NYS[illegible].

942-54 151Wash644, 2[illegible]P16 (2d case).

942-64 205Iowa656, 216NW733

943-66 MoA 148SW(2d)502

942-77 [b] One way bridge. 13LaA630, 1228670.

943-80 [a] Plaintiff cannot recover where his automobile was in rut on defendant's side of road and plaintiff did not stop. 228AppDiv43, 239NYS227.

943-84 But see 83Colo211, 263P333.

943-85 [a] Driver of approaching car on his proper side of road is not negligent for failing to avoid collision by taking risk of passing between overtaking and overtaken car, though he might have done so. NS [1929] 1DomLR272.

944-86 265Mass444, 164NE445. [c] Driver first reaching narrow side between parked cars has right to assume driver coming in opposite direction would slow up or stop to permit passing. LaA 1248701.

944-90 82CalA660, 256P457; Va 154 SE545. [b] Automobilist seeing car approaching over one hundred feet away on wrong side of road had right to rely on law of road, of which layman cannot plead ignorance, and expect driver of such car to turn to right side of road, and was not bound to stop his car. 11 LaA532, 1218636

944-91 146Wash74, 262P136.

944-92 10LaA747, 1228901; 13LaA 208, 12782.

944-93 157Miss510, 1288100.

944-95 Va 154SE545.

944-5 13LaA67, 127861

945-7 13LaA120, 1258296; 13LaA208, 12782

945-9 178Ark599, 128SW(2d)415.

945-11 220Ala130, 1248300; 205Iowa 666, 216NW733.

946-20 180Minn163, 230NW580.

946-23 [b] In action for collision between automobiles traveling in opposite directions on highway in which plaintiff turned to left before accident, attempting to avoid defendant who was not driving on right side of road, both parties have been held at fault. 9LaA 446, 1198542.

946-25 41LaA340.

947-26 81LaA344.

947-28 165Md424, 149A4; 146Wash74, 262P136.

947-29 13LaA131, 127831.

947-34 11LaA369

947-40 61LaA537; 7LaA462.

949-66 Conn 152A59.

949-71 12LaA13, 1218346

949-72 [b] Following automobile so that vision is obstructed may be negligence. 13LaA76, 1268720.

949-73 249IllA15; 7LaA315. [a] (2) Ordinarily person operating an automobile, so that it comes into collision with a stationary or moving vehicle in front, is guilty of contributory negligence. 265Mass74, 165NE750. [c] (3) Testimony that she could see half block away shows contributory negligence in colliding with parked truck without light. 157Wash1, 271NW[illegible]76.

950-74 [a] (2) Other instances. Sask [1930] 3DomLR919.

950-79 NC 155SE163 (disregard of statute).

950-88 249IllA15, 86Mont545, 284P 542; 49Ill32, 139A652, 62ALR967. [d] Where a third vehicle preceded plaintiff's car defendant was negligent in trailing so close as not to be able to avoid collision on plaintiff's sudden stop. 12LaA359, 1258481.

951-97 175Ark101, 298SW1023.

951-6 175Ark101, 298SW1023.

951-7 CalA 284P499.

952-18 [a] 9LaA445, 1198566; 10LaA 537, 1298227; 9LaA467, 1198736.

952-23 [a] Where reduction of speed will endanger following vehicles, driver must use care not to jeopardize them. CalA 283P960.

952-28 86Mont545, 284P542.

952-29 MoA 228SW(2d)877; 78Mont 415, 258P236; 86Mont545, 284P542; TexCivA 58SW(2d)1010. [d] If circumstances would deter a prudent driver from passing, such passing would be negligent. 12LaA481, 1268896. [e] Automobilist attempting to pass motorcycle must exercise great care. Pa 151 A814.

953-30 232MoA138, 18SW(2d)1030

953-37 MoA 228SW(2d)877; 146Wash 43, 261P782.

953-40 LaA 1308367.

953-41 [d] Statute inapplicable, if defendant's car, on left side of road, turned toward right and moved across road as plaintiffs were going by to right of middle of road, as vehicles under such circumstances would not be traveling in same direction. 264Mass 353, 162NE772. [e] In Porto Rico. 34 PortoRico 1.

954-42 157Mich28, 146A851 (whether road ahead was clear or obstructed is immaterial)

954-43 138Okl63, 280P409.

955-60 75Mont416, 258P236.

955-63 147Wash50, 2[illegible]P16; 148Wash 291, 268P866. But see 194Wis36, 215 NW594. [e] Truck momentarily halting to permit fineman to alight was "proceeding" under statute requiring signal when passing vehicle proceeding in same direction. Vt 146A812.

955-70 242Mich228, 248NW698.

956-72 242Mich228, 248NW698.

956-74 Ala 1288233.

956-80 232MoA138, 18SW(2d)1030.

956-81 [a] Violation of statute fixing rate of speed at which vehicles may pass other vehicles is negligence per se. TexCivA 58SW(2d)170.

956-84 MoA 228SW(2d)877.

957-87 250IllA222.

957-97 MoA 228SW(2d)877.

958-1 86Mont545, 284P542.

958-9 [a] (2) Statute is inapplicable to unintentional movement because of sudden stop of vehicle passed. 221MoA823, 293SW460. (3) Statute must be given reasonable construction. 221MoA823, 293SW460.

959-18½-New. A statute making it unlawful to pass an overtaken vehicle unless there is a clear view ahead of two hundred yards does not mean that the overtaking vehicle has that distance in which to pass. 146Wash43, 261P782.

959-22 177Ark1174, 9SW(2d)788.

959-26 215Ala678, 1128230; 131Or283, 282P1087; Wis 229NW58 (use of judgment).

960-29 LaA 1298290; 5LaA105; 126 Me558, 140A368; 320Mo672, 8SW(2d) 599. See also 293Pa441, 143A131. [f] Fact that traffic is open will not relieve driver of automobile from duty to exercise high degree of care. 293Pa441, 143 A131.

960-32 5LaA105; 128Me261, 147A29 (driving into intersection from left at slow speed). 1[illegible]Minn41, 216NW[illegible].

960-35 5LaA105, 5[illegible]ND741, 221NW 15. 92PaSuper50.

960-34 292Pa1, 140A555; 298Pa352, 148A227.

961-39 LaA 1308354; Wis 229NW58.

961-40 But see 132Or488, 286P[illegible]25. [b] Extreme care is required. 13LaA52, 127 8124 (driver held not negligent)

962-46 50Kl10, 111A135; TexCivA 26 SW(2d)435

962-48 LaA 1308354; 241Mich83, 216 NW417.

962-49 180Ark1144, 24SW(2d)960; CalA 288P866.
962-50 Mass 171NE662.
962-53 [a] **A much used driveway is** governed by rules of traffic at intersection. LaA 129S388.
962-57 100CalA441, 280P197; LaA 129 S390; 80Mont401, 260P702; 129Misc442, 222NYS339; 131 Or282, 282P1087; 92Pa Super80.
963-58 80Mont401, 260P702; 129Misc 442, 222NYS339; 97PaSuper545; 147 Wash624, 267P40. See also 13LaA52, 127S124. [g] **Motor vehicle driver making unlawful left-hand turn at street intersection by "cutting corner"** is chargeable with duty of seeing any vehicle which would not have been placed in danger had he made lawful turn. 80Mont401, 260P702. [h] **Driver of motor vehicle seeing vehicle making unlawful left-hand turn at street intersection in time to stop or turn** and thus prevent injury is guilty of negligence in failing to do so. 80Mont401, 260P702. [i] **Duty to observe vehicle making unlawful left-hand turn from intersecting street** rests on operator of motor vehicle approaching street intersection. 80Mont 401, 260P702. [j] **That street meets another but** does not cross does not relieve motorist of duty of looking out. 208 Iowa361, 225NW862.
963-60 86CalA244, 260P927; 131 Or282, 282P1087.
963-61 MoA 31SW(2d)590; 97PaSuper 541.
963-63 Wis 228NW741.
963-65 LaA 128S721(2dcase); 3LaA688; 318Mo 486, 1SW(2d)113; 320Mo 725, 8 SW(2d)607; MoA 21SW(2d)195. [g] **Statute, giving pedestrians right of way at street intersections,** puts necessity of continuous observation on driver when approaching intersection. 57ND741, 224 NW167. [h] **Driver of automobile, operating machine in such manner that injury cannot be avoided after seeing pedestrians** rightfully on intersection, is guilty of negligence. 29F(2d)437(2d case).
964-68 13LaA52, 127S124.
964-70 180Minn509, 231NW202; 221 MoA823, 293SW460; 153Wash598, 280 P74.
965-77 11LaA503, 123S346.
965-79 207 Iowa1018, 222NW420; 148 Miss871, 114S807.
965-85 [b] **Failure to comply with statute relative to headlights** is negligence per se. 99CalA557, 279P183.
966-88 MoA 31SW(2d)590; 80Mont401, 260P702.
968-95 291Pa437, 140A133.
966-98 100CalA441, 280P197; 40GaA 257, 149SE290; LaA 129S390; 128Me 261, 147A39; 148Miss871, 114S807; 57 ND741, 224NW167; 292Pa543, 141A 491; 293Pa441, 143A131; 97PaSuper 413; 97PaSuper131; 153Wash598, 280 P74. [b] **At cul-de-sac.**–241Mich83, 216 NW417.
967-97 110Conn271, 147A822; 291Pa 437, 140A133; 97PaSuper541.
967-3 39F(2d)445; 246 IllA487; 3LaA 669; 221MoA823, 293SW460.
967-4 5LaA105. [c] (4) **Taxicab driver's speed of fifteen miles an hour in crossing intersection on "Go" signal and striking pedestrian has been held not excessive.** 11LaA564, 123S446. [f] **When speed was such that driver could not stop or swerve enough to avoid collision with automobile having right of way at intersection, driver was at fault.** 11LaA390, 122S721.
967-5 221MoA823, 293SW460.
968-8 12LaA123, 125S147(1stcase).
968-9 13LaA272, 127S764.
969-16 207Cal279, 277P1045; 11LaA 555, 123S407 (defendant held negligent); 242Mich600, 219NW618.
969-17 83CalA655, 257P447. [a] **Statute prohibiting careless driving** applies regardless of rate of speed permitted by other provisions of statute. 131 Or282, 282P1087.
969-18 [b] **Where plaintiff's car turned over two or three times after collision,** his excessive speed was proximate cause of collision. 11LaA597, 123S372.
969-20 181Ark1024, 28SW(2d)1052; 5 LaA105; 247Mich291, 225NW569; 80 Mont401, 260P702; 147Wash624, 267P 40.
969-21 255 IllA263; MoA 48SW(2d) 875.
969-22 153Wash598, 280P74. [d] **Vehicles proceeding in same direction.**–Wash 292P1014.
970-29 295Pa168, 145A81; 297Pa192, 146A539; 298Pa244, 148A105; 12PaDist &Co 647.
970-29½-New. , in the shortest possible notice, 293Pa441, 143A131.
970-30 11LaA608, 124S611; 200Wis 312, 227NW240.
970-33 247Mich291, 225NW569; 12Pa Dist&Co 647.
970-35 Iowa 233NW23 (where danger of collision not indicated); MoA 13SW (2d)575.
970-36 97PaSuper545. [b] (2) Other instances. 95PaSuper123. [c] **Motorist on byroad, whose view of main highway is obstructed** has duty before entering to pause. LaA 130S354.
971-37 153Wash598, 280P74.
971-39 MoA 31SW(2d)590.
971-41 148Miss871, 114S807. [a] (2) Duty to stop at intersection where blinded by lights of another car. 148 Miss871, 114S807.
971-43 Ala 130S548; 239Mich390, 214 NW172.
971-44 LaA 130S565; 147Wash597, 266P686, 58ALR1194.
971-46 145Wash481, 260P996; Man [1930] 3DomLR215 (holding driver clearly negligent for passing "stop" sign).
971-47 233Ky763, 26SW(2d)753.
971-49 See also 7LaA691.
971-51 178Minn540, 227NW854; Tex CivA 58W(2d)824. [a] **Excuse for violation.**–TexCivA 58W(2d)824. [b] **Less care is exacted** under traffic signals than is required where there are no signals. 11LaA564, 123S446. [c] **Motorist proceeding under proper traffic signal** has right to assume that signals are understood and will be observed by pedestrians. 11LaA564, 123S446.
971-52 265Mass472, 164NE377; 266 Mass192, 165NE20; 25 OhA377, 157NE 910. [a] 25 OhA377, 157NE910. [b] **Driver is bound to observe greater caution** than where traffic is not directed, since policeman's direction of traffic is notice that pedestrians might cross. MoA 17SW(2d)994. [c] **Motorist entering street intersection on "Go" signal** and striking pedestrian who entered intersection on caution signal before signal changed for her to go has been held not negligent. 11LaA564, 123S446.
971-53 297Pa192, 146A539.
971-57 IndA 159NE162; Iowa 231NW 304; 11LaA503, 123S346; 229AppDiv 372, 242NYS11; 126 Or105, 268P982; 293Pa395, 143A110.
972-58 11LaA663, 124S564(2dcase); 244Mich511, 221NW637.
972-59 256 IllA471; Nebr 227NW321; 97PaSuper131.
972-60 92CalA285, 268P430; 244Mich 69, 221NW282; 153Wash598, 280P74.
972-61 13LaA52, 127S124; MoA 31SW (2d)590.
972-64 12LaA630, 125S744.
972-68½-New. A driver who has passed the medial line of an intersecting street may assume that no car would enter the intersection and collide with him. 91CalA129, 266P964.
972-68½-New. , that vehicle on right simultaneously approaching intersection will comply with law when entering intersection. 132 Or500, 286P517.
973-74 293Pa245, 142A324; 153Wash 598, 280P74.
973-81 132 Or161, 285P219 (when right of way rule is applicable).
973-85 88 IndA36, 159NE156; 9LaA 186, 119S496; 13LaA52, 127S124; LaA 130S354.
973-87 180Ark1144, 24SW(2d)960; CalA 291P597; 108Conn602, 143A881; 235Ky637, 32SW(2d)1; 10LaA12, 120S 414; 9LaA397, 120S509; 10LaA376, 120 S652; 7LaA441; 13LaA110, 127S439; 13LaA287, 127S760; 13LaA546, 128S 530; 128Me261, 147A39; 293Pa395, 143 A110; 153Wash598, 280P74. [c] **That automobile was almost past intersection** when struck by another conclusively establishes latter's negligence. 111Conn 722, 150A64.
974-89 235Ky637, 32SW(2d)1. [a] **Reasonable distance** is not of itself test of right of way. 109Conn484, 147A18.
974-91½-New. When two vehicles reach an intersection at the same time, the automobile which was approaching from the right and was traveling on a car track street will have the right of way. 9LaA702, 120S75(1stcase).
974-91½-New. Rule as to right of way at intersections is especially applicable where vehicles reach intersection at approximately same time. LaA 124S678.
974-94 [b] **Such regulations do not confer license to violate other traffic laws.**–NJ 140A438. [c] **Ordinance held meaningless or invalid.**–87Colo 414, 288 P887. [d] **"Right of way" defined.**–33 OhA177, 168NE761.
974-95 154Wash693, 283P444(2dcase).
974-99 Iowa 229NW210; Iowa 231NW 304; NJSup 150A557; 132Misc22, 227 NYS746; 118 Oh375, 161NE44; 30 OhA 211, 164NE773; 125 Or1, 265P439; 292 Pa543, 141A491; 86PaSuper389; 86Pa Super392; 90PaSuper260; 90PaSuper 422; 98PaSuper170; Wash 289P16 (holding statute unambiguous); Ont [1930] 3DomLR67; Sask [1929] 3Dom LR684. [a] (2) MoA 48SW(2d)875. [c] **Test of rule** is position of automobiles as paths cross. 82Colo 150, 257P1079.
975-1 [b] **Failure of driver to give right of way to stage on arterial highway** is contributory negligence as matter of law. 154Wash57, 280P932.
975-4 See also 9LaA740, 120S262.
975-4½-New. Rule does not apply where defendant's car was recklessly operated. 88PaSuper199.
975-4½-New. Rule does not apply where defendant's car was standing still when hit. 88PaSuper199.
975-6 50RI 10, 144A435.
975-8 267Mass238, 166NE726.
975-9 NH 148A461.
976-10 [b] **"Simultaneous approach"** denotes one which appears to be simultaneous after reasonably careful observation. 132 Or500, 286P517.
976-13½-New. Statute needs reasonable, sensible, and practicable construction. 123 Or20, 261P428.
976-13½-New. A vehicle from a disfavored direction need not wait until a far off "favored direction" car shall have passed. 123 Or40, 261P428.
976-13¼-New. A statute, relating to the right of way on approaching intersections, applies only to a situation where the driver of a vehicle knows, or by reason of surrounding circumstances is bound to know, of existence of another highway intersecting his path. 207 Iowa1018, 222NW420.
976-13½-New. A statute, providing that, where two vehicles approach an intersection, the vehicle approaching from the right shall have right of way, is inapplicable, where a collision occurred before plaintiff reached the intersection. 207 Iowa1271, 224NW576.
976-13¼-New. Where both vehicles use excessive speed, neither is entitled to the statutory right of way. 100CalA775, 281P95.
976-13½-New. Statute has been held inapplicable where automobile had not entered intersection. 12LaA537, 126S 565.
976-13½-New. Driver travelling in wrong direction on one-way street is not within statute so as to have right of way at intersection. Mass 168NE799.
976-13½-New. A statutory provision as to right of way at intersections applies regardless of the rate of speed permitted by other provisions of the statute. 131 Or282, 282P1087.
976-13 1/10-New. A statutory provision relative to right of way and a provision of the same statute prohibiting careless driving must be construed together. 131 Or282, 282P1087.
976-16½-New. **Vehicles traveling in same direction.** Statute giving motorist approaching intersection from right

the right of way is inapplicable. 23 OhA 439, 162NE915.

977-12 [a] **Traveler approaching trunk highway must yield to vehicles on that highway.** 250Mich675, 230NW917.

977-12½-New. An ordinance designating a street as an arterial highway does not grant an exclusive privilege to drivers thereon regardless of the duty to [illegible] regulations on all highways. Nebr [illegible]

977-25 NJSup 150A557; NJSup 150A [illegible]; Vt 148A274.

977-27 123 Or46, 261P428; 241Pa456, 140A229; 153Wash598, 280P74 (duty to yield is greater where speed is illegal). [a] **That driver proceeding in favored direction is on left side of road passing another car does not deprive him of right of way over car approaching** [illegible] 167Conn709, 142A297.

977-32 [illegible] 254 IllA482; [illegible] 205 Iowa1294 [illegible] 1208262; 6LaA26; [illegible] NJSup 123A297; 118 Oh [illegible] 242Pa244, 148A165; [illegible] 4PaSuper266 (not required to anticipate [illegible] of ordinary care in driver of [illegible] vehicle); 145Wash292, 259P [illegible] 153Wash192, 279P588; BC [1929] 2DomLR617; Ont [1929] 1DomLR829. [b] **When driver, overtaking bicyclist going in same direction, turned right at intersection,** bicyclist acquired right of way. 155Wash141, 283P767.

977-30 LaA 1208565; 145Wash292, 259P1083. [c] **Driver exercising due care after discovering that other driver does not intend to yield right of way is not guilty of negligence.** BC [1930] 2DomLR625.

978-33 89IndA524, 165NE262; 5LaA 109; 5LaA290; 127Me75, 140A909; 158Md131, 148A426; 173Minn540, 227NW854; Nebr 227NW321 (principles of law applicable to traffic on arterial highways are same as on unfavored streets, with exception of required stop at arterial highways); 126Misc447, 241NYS349; 121 Oh362, 169NE292; 122 Or20, 261P428; 126 Or105, 268P982; [illegible] Or 631, 284P183; 153Wash598, [illegible] 152Wash 598, 280P74.

978-35 122 Or20, 261P428. [a] **Doubts should be resolved for "favored direction" driver.**—122 Or20, 261P428. [b] **"He died contesting the right of way" should be no man's epitaph.** 122 Or20, 261P428, 430.

978-36 122 Or20, 261P428; 292Pa542, 141A491; 154Wash620, 282P194 (making collision probable); Eng [1912] 8C 1276; Eng [1923] 8C297.

978-37 [illegible] 255NYS292.

978-38 [a] **Motorist having right of way is not required to look constantly to left.** 292Pa542, 141A491.

978-40 82CalA655, 257P447; Nebr 227NW321; 118 Oh375, 161NE44; 122 Or 20, 261P428.

979-42 108Conn2, 142A285; 109Conn 484, 147A18 (requiring of conduct); 89IndA524, 165NE262; 10LaA305, 120 8882; 12LaA52, 1278724; 13LaA546, 1288520; 246Mich423, 224NW647; 250 Mich19, 225NW420; 250Mich675, 230 NW917; Mich 233NW254; NH 148A 461; 227AppDiv740, 236NYS622; 228 AppDiv667, 238NYS202; 122 Or20, 261 P428; 131 Or282, 282P1087 (statute prohibiting careless driving held applicable to driver having right of way); 255Pa55, 144A350; Vt 146A674, 4 Wyo 101, 282P1061(2dcase); PrEdwIsl [1929] 3DomLR172. [a] CalA 284P 676.

980-43 205 Iowa265, 218NW31; 11LaA 290, 1228721; 118 Oh375, 161NE44. [b] **It was contributory negligence for motorist to enter intersection without looking to right, even though he had right of way.** 11LaA290, 1228721.

980-44 251 IllA320; 248Mich241, 226 NW864.

980-46 159Conn32, 145A36; 12LaA 620, 1258744; 128Me261, 147A39; 227 AppDiv740, 236NYS622; 8PaDist&Co 629.

981-47 110Conn258, 148A371; Nebr 227NW321; 8PaDist&Co 629; 153Wash 598, 280P74; Eng [1912] 8C 1276; Eng [1922] 8C 397. [a] **Failure to yield right of way to motorist in intersection would be negligence per se.** CalA 286P 1057.

981-48 13LaA287, 1278760; 8PaDist& Co 629. [a] **Inability of driver approaching on right to stop was not negligence if two cars approached intersection at approximately same instant, or car approaching from left increased its speed after entering intersection.** 109 Conn33, 145A36.

981-51 NJSup 147A46.

981-52 205 Iowa265, 218NW31; 5LaA 109; 12LaA123, 1258147(1stcase) (where vehicle entering from left had almost completely crossed); 145Wash597, 261P405.

981-55 6LaA52.

981-59½-New. Where a motorist stops before entering through a street as required by ordinance, he may then move without restriction, under a statute giving the operator the right of way at an intersection over one approaching from the left. Utah 279P893.

982-62 292Pa542, 141A491.

982-63 246 IllA487; Iowa 229NW210.

982-64 145Wash292, 259P1083.

982-65 205 Iowa265, 218NW31.

982-66 82CalA655, 257P447.

982-68½-New. Driver approaching one way street could assume that others would not drive over it in wrong direction. Mass 168NE799.

982-68¾-New. A driver having the right of way at an intersection had a right to assume that the other car would be brought under control, or at least would change to the right side of the roadway where it belonged. 178 Minn619, 227NW50(1stcase).

982-69 123 Or20, 261P428; 132 Or500, 286P517.

982-70 126 Or105, 268P982.

982-72 86CalA244, 260P927; 205 Iowa 265, 218NW31; 173Minn31, 216NW254; 173Minn526, 227NW350; 57PaSuper 241; 8PaDist&Co 629.

982-74 292Pa1, 140A555.

982-76 254 IllA63; NH 148A461; NJ Sup 140A525; 228AppDiv667, 238NYS 202; 118 Oh375, 161NE44; 127 Or490, 272P670; 132 Or500, 286P517; 145Wash 597, 261P405; 107WVa440, 148SE496; Sask [1929] 3DomLR684.

984-77 NH 148A461; Ont [1930] 3Dom LR67 (mere fact that vehicle on left arrives first does not give it right of way). [a] (2) Automobile did not approach intersection at approximately same time, within meaning of statute of right of way, where one was from two to three automobile lengths back of intersecting line when other was at curb. 100CalA53, 279P674.

984-79 251 IllA264 (duty under statute to stop and ascertain that way is clear); 11LaA597, 1238272 (duty to stop before entering intersection); 8PaDist&Co 629; 12PaDist&Co 288.

984-81 97PaSuper229.

985-82 205 Iowa265, 218NW31; Mo 30 SW(2d)1065; 123 Or20, 261P428.

985-83 123 Or20, 261P428.

985-84 100CalA53, 279P674 (right of way statute is applicable only where two automobiles must be approximately like distance away from given point at same time); 106Conn143, 137A725; 109Conn 33, 145A36; 205 Iowa265, 218NW31; 223Ky784, 48W(2d)703; Nebr 227NW 321; NH 148A461; 123 Or20, 261P428; 97PaSuper225; 97PaSuper241; Ont [1923] 3DomLR149.

985-85 100CalA53, 279P674 (crossing at intersection held not to show negligence); CalA 286P1057; 106Conn143, 137A725; 5LaA109; 11LaA555, 1238407; 123 Or20, 261P428.

985-86 106Conn143, 137A725; NH 148 A461; 123 Or20, 261P428.

986-87 106Conn143, 137A725; 145 Wash597, 261P405. [b] **Under such conditions, he may assume that he will be given right of way by motorist approaching on right.** 100CalA53, 279P 674.

986-89 123 Or20, 261P428; 126 Or105, 268P982.

986-90 123 Or20, 261P428.

986-91 123 Or20, 261P428.

986-93 123 Or20, 261P428.

986-94 123 Or20, 261P428; 126 Or105, 268P982; Sask [1929] 3DomLR684.

986-95 NH 148A461 (duty subsists while danger lasts); 153Wash598, 280P 74 (greater duty).

987-96 10LaA12, 1208414; 9LaA397, 1208509; 10LaA189, 1208668; 10LaA 57, 1208791; 13LaA110, 1278439; LaA 1308565; 132 Or540, 285P822; 83Pa Super4.

987-97 11LaA503, 1238249; 131 Or 282, 282P1087; 153Wash192, 279P568 (defendant held negligent). [d] 153 Wash598, 280P74.

987-1 But see MoA 318SW(2d)590.

988-4 153Wash598, 280P74.

988-13 11LaA390, 1228721.

988-14 123 Or20, 261P428.

989-15 173Minn31, 216NW254; 154 Wash57, 280P932.

989-18 293Pa245, 142A324.

989-21 106Conn143, 137A725; 123 Or 20, 261P428; 132 Or500, 286P517 (will proceed in lawful manner); 154Wash 572, 283P184.

989-23 194Wis535, 217NW320.

989-24 123 Or20, 261P428; 131 Or282, 282P1087.

989-25 123 Or20, 261P428.

990-30 See also TexCivA 268SW(2d)373.

990-33 106Conn143, 137A725; 5LaA 109; 8LaA146; 8LaA246; 12LaA475, 1258304 (boy entering street intersection on bicycle before automobile has right of way); 13LaA304, 1268727; LaA 1298233; 178Minn619, 227NW50 (1stcase); 180Minn509, 231NW202; 97 PaSuper131; 147Wash419, 266P169; 41Wyo 101, 282P1061(2dcase). But see 87PaSuper494.

990-35 Wis 229NW58 (car held to have right of way).

990-36 92CalA285, 268P430; 32 OhA 301, 163NE52 (truck, approaching from right of automobile arriving at intersection at or about same time as automobile, would have right of way); 87PaSuper291. But see 30 OhA211, 164 NE773.

990-37 LaA 1298459; NH 148A466; 87PaSuper297. [a] **When crossing is nearly completed by automobile,** which had approached from left and entered intersection first, it is entitled to proceed. 10LaA772, 1238187. [b] **Statute not applicable if one or both are speeding.** 155Wash351, 284P343, 68ALR254.

991-51 Ont [1930] 4DomLR578.

991-51½-New. Driver about to turn left across neutral ground may acquire right of way by stopping and blowing horn. 12LaA605, 1268705(2dcase).

991-54 But see 194Wis36, 215NW591.

991-62 [a] **Where two vehicles are approaching each other from opposite directions,** driver of one vehicle who intends to turn into right of way street across route about to be traversed by other does not have right of way till he has turned into right of way street, and must give other vehicle time to get out of way. 9LaA740, 1208262.

992-64 109Conn484, 147A18; 224Ky 460, 68W(2d)454.

992-66 110Conn271, 147A822; 224Ky 460, 68W(2d)454; 123 Or610, 263P64.

993-77 239Mich390, 214NW172.

993-78 109Conn484, 147A18 (must yield right of way to one on right if collision is possible).

993-78½-New. An automobile is considered "approaching from the right" when coming from such direction before or when the operator reaches the intersection or after turning to the left. 109Conn484, 147A18.

993-80 Wash 289P15 (holding driver contributorily negligent in turning contrary to ordinance); BC [1930] 2DomLR73.

993-83 BC [1930] 2DomLR73.

994-3 5LaA655.

994-8 5LaA655; 92PaSuper476. [c] 176Minn299, 223NW145.

994-9 298Pa522, 148A693.

994-15 7LaA436; 89PaSuper373. But see 194Wis36, 215NW591. [a] Mo 30 SW(2d)1065. [d] (1) 242Mich228, 218 NW698. (2) Not only is signal intended as warning to vehicles in rear, but also to drivers of any vehicles which may be reasonably affected. 99CalA 557, 279P183. [k] **Statute requiring automobile driver turning to give signals**

to vehicles following does not apply to bicyclist approaching intersection from opposite direction. 203 **Iowa**443, 212 **NW**888. [1] **Purpose of statute requiring signal on left turn.–Mo** 30**SW(2d)**1065.

995–17 [a] **No right unlawfully to cut corner** because having right of way. 207 **Iowa**1271, 224**NW**576.

997–33 109**Conn**602, 145**A**61; 208 **Iowa** 275, 225**NW**406; **NJSup** 139**A**317.

997–40 7**LaA**499.

997–41 **Mich** 233**NW**354.

997–44 10**LaA**194, 120**S**663(2dcase).

997–47 9**LaA**740, 120**S**262.

997–48 **Mich** 233**NW**373. [a] **Automobile driver was not required to stop before making left turn** because of approach of bicyclist from opposite direction making right turn. 203 **Iowa** 443, 212**NW**888.

998–52 109**Conn**484, 147**A**18 (giving of signal for left turn is not exclusive means of bringing into operation right of way statute). See also 86**CalA**231, 260**P**600.

998–54 80**Mont**401, 260**P**702; 89**PaSuper**373.

998–56 126 **Or**373, 270**P**488.

999–59 **LaA** 128**S**551; 80**Mont**401, 260 **P**702.

999–60 80**Mont**401, 260**P**702; 295**Pa** 168, 145**A**81.

999–63 80**Mont**401, 260**P**702.

1001–80½–New. Triangular junctions. Traveler who wishes to enter intersecting street from his left may, under certain circumstances, be justified in driving to left of triangular plot. **Mass** 170**NE**51.

1003–90 8**LaA**789.

1004–6 125 **Or**1, 265**P**439.

1005–11 [a] **NS** [1929] **1DomLR**947. But see 292**Pa**1, 140**A**555.

1006–14 **Mich** 233**NW**395; **SD** 230**NW** 754 (tractor).

1006–16 235**Ky**169, 30**SW(2d)**890.

1006–17 6**LaA**18 (stopping on right-hand side of highway to make temporary repairs); **Wis** 230**NW**31. [c] **Owner of car held not liable** where injury occurred because horses shied and driver was unable to control them. **Eng** [1908] **SC**56.

1007–22 41**GaA**120, 152**SE**278 (need not put out guard to give notice of presence); **LaA** 127**S**663 (suddenly starting with another car approaching); **Mich** 233**NW**345; 153**Miss**880, 122**S**189 (2dcase); 152**SC**239, 149**SE**329.

1007–23 **Wis** 230**NW**31 (parking held not unreasonable use of highway). [a] (2) This statute held inapplicable where car was left standing on usable portion of highway while punctured tire was being repaired. 194**Wis**179, 215**NW**892. (3) Statute prohibiting parking of automobiles on main traveled portions of highway is inapplicable to city streets. 235**Ky**169, 30**SW(2d)**890. (4) Statute prohibiting parking on highway held inapplicable to wrecked automobile which owner was proceeding to remove. 200**Wis**485, 227**NW**938. [b] **Public way sixteen feet wide, with concave surface, paved without sidewalks between buildings** with outside steam and drainage pipes and subbasements backing on way, has been held not "street" or "avenue" within ordinance against parking vehicles on certain sides of streets or avenues paved twenty-five feet or less between curbs, but "alley" within ordinance against parking except while actually loading or unloading. 150**Wash** 646, 274**P**713.

1007–24 92**CalA**145, 267**P**887.

1007–30 **SD** 230**NW**754 (leaving tractor on highway to go for gasoline held not parking). [b] (1) 204**Cal** 107, 266 **P**534; 228**Ky**440, 15**SW(2d)**277; 178 **Minn**465, 227**NW**493. (2) 124 **Or**644, 264**P**349.

1008–35 **NH** 147**A**898(2dcase) (statute does not prohibit motorist from parking on left-hand side of nonintersecting points of thoroughfare).

1008–36 [a] **Statute requiring parked vehicles to leave fifteen feet free** for passage of other vehicles refers to tarviated portion of roadway. 180**Minn** 116, 230**NW**270.

1008–37 13**LaA**604, 128**S**54.

1008–38 153**Wash**208, 279**P**588, 67**ALR** 92(2dcase) (violation thereof constituting negligence).

1008–39 99**CalA**357, 278**P**500.

1009–47 **LaA** 130**S**821; 123 **Or**50, 260**P** 1012. [e] **Whether vehicle is so disabled as to prohibit removal** depends upon whether it would be unsafe to move it under conditions existing at time and place. 129 **Or**435, 277**P**291. [f] **Failure to maintain sufficient fuel in gasoline tank.–**101**CalA**274, 281**P**1081.

1009–51 **SD** 230**NW**754 (right of tractor to stop on highway reasonable time for gasoline).

1009–52½–New. Leaving tractor at side of road while procuring gasoline held not obstructing highway within statute. **SD** 230**NW**754.

1010–56 [d] **Gross negligence.–**85**CalA** 332, 259**P**470.

1010–59 85**CalA**332, 259**P**470.

1010–62 85**Cal A**332, 259**P**470.

1010–64 **Eng** 41**TLR**1.

1011–67½–New. The owner is not liable for negligence in leaving a car unlocked by a braking device where negligence is not the proximate cause, 261 **Mass**424, 158**NE**778.

1011–67½–New. as where larceny of the automobile and its use by a thief are intervening, independent, and efficient causes of injury not to be anticipated by the owner. 261**Mass**424, 158 **NE**778.

1011–71 229**AppDiv**366, 241**NYS**673.

1012–84 **CalA** 290**P**684; **LaA** 130**S**821; **MoA** 17**SW(2d)**639; 132 **Okl** 72, 269**P** 350, 61**ALR**218; 200**Wis**485, 227**NW** 938.

1012–88 23**AlaA**322, 125**S**61(2dcase). [a] (1) 124**Kan**414, 261**P**30 (as violation of statute).

1013–89 23**AlaA**322, 125**S**61(2dcase).

1013–92 **LaA** 129**S**234 (holding operator of parked truck not contributorily negligent); 157**Miss**303, 127**S**775; 198 **NC**193, 151**SE**197.

1013–96 157**Miss**303, 127**S**775.

1013–98 120 **Oh**400, 166**NE**364.

1013–99 124**Kan**414, 261**P**30 (truck parked on highway); 131 **Or**612, 282**P** 768.

1013–99½–New. There is no sharp distinction intended by the legislature by choosing the terms "operate" or "operating" for some provisions, and by choosing the phrase "using the highway" for provision relating to front and rear lights. 124**Kan**414, 261**P**30.

1013–99¼–New. Operation of an automobile on the highway and use of the highway by an automobile both refer to automobile traffic on the highway. 124 **Kan**414, 261**P**30.

1014–9 **LaA** 130**S**821. [b] **Defective lights.–**82**CalA**751, 256**P**224. [c] **It is no defense** that unlighted truck is standing in moonlight or in rays of plaintiff's headlights. 23**AlaA**322, 125**S**61(2dcase).

1014–10 8**LaA**498; **LaA** 130**S**821.

1014–11 **CalA** 290**P**684; 254 **IllA**387 (parking at night on wrong side of street); 124**Kan**414, 261**P**30; 6**LaA**18; **LaA** 130**S**234(4thcase). [a] See also **LaA** 129**S**565.

1014–12 124**Kan**414, 261**P**30; **Mich** 233 **NW**345.

1015–14 22**AlaA**343, 115**S**690.

1015–15 6**LaA**18; 32 **OhA**363, 168**NE** 143 (where motorist saw truck two hundred feet ahead of him); **SD** 230**NW** 754.

1015–16 9**PaDist&Co** 751; **BC** [1929] 4 **DomLR**490.

1015–19 **NJ** 148**A**208.

1015–20 196**Wis**54, 219**NW**369. But see **CalA** 290**P**684.

1015–24 133**Misc**260, 231**NYS**342.

1016–34 **NJ** 150**A**334.

1016–39 See also 13**LaA**194, 127**S**133(2dcase).

1016–40 [d] **Risk of collision may be assumed.–**300**Pa**586, 150**A**483.

1017–41 83**CalA**358, 257**P**109.

1017–43 58 **Ind**913, 228**NW**424; **SD** 230**NW**754. [a] (2) Other instances. **LaA** 130**S**659; **SD** 230**NW**754.

1021–78 [b] **Need not wait** till no vehicles are approaching. 34**F(2d)**927. [c] **Unless contrary is apparent, motorist may assume** that oncoming cars will be driven at legal rate of speed and with due regard to others. 34**F(2d)**927.

1021–79 **Wash** 288**P**276; **Alta** [1929] 4 **DomLR**561.

1022–84 **LaA** 130**S**367. [c] 118**Nebr**395, 225**NW**36.

1022–85 92**CalA**732, 268**P**951.

1022–87 [a] **Speed which was from five to seven miles** an hour is not under ordinary circumstances unreasonable or excessive for automobile when driven out of alley across sidewalk. 266**Mass** 279, 165**NE**406.

1022–88 **NB** [1929] 3**DomLR**148. [b] **Automobile driver, making left-hand turn and crossing highway at point other than roadway intersection,** is required to exercise extraordinary care and caution for preservation of his own safety, and to avoid injury to others traveling upon highway. 151**Wash**194, 275**P**692 (2dcase).

1022–90 6**LaA**229.

1022–94 6**LaA**30; 118**Nebr**395, 225**NW** 36 [quotCJ].

1023–5 **Sask** [1930] 3**DomLR**460. [b] **Speed not exceeding thirty five miles per hour** is not negligence per se. 92 **CalA**5, 267**P**585.

1023–8 See also **CalA** 293**P**97.

1023–9 131 **Or**660, 284**P**194 (rule by statute).

1023–10 110**Conn**358, 148**A**371; 30 **OhA** 497, 165**NE**853. See also 92**CalA**732, 268 **P**951.

1023–13 [a] **Where plaintiff, approaching highway from private driveway** when observed by defendant in his automobile, was not within zone of danger, defendant had right to assume that plaintiff would yield him right of way and would permit him to pass before driving out upon highway. 109**Conn**573, 145**A**23.

1024–23 11**LaA**700, 124**S**716 (projection of pipe more than four feet beyond rear of trailer must be shown to recover damages).

1024–24 296**Pa**198, 145**A**827.

1024–25 245**NY**633, 157**NE**888; 296**Pa** 198, 145**A**827; 298**Pa**188, 148**A**70. [g] **Zone of apprehendable danger where truck and trailer travel on highway** includes not only object immediately in front but such objects that may come within swinging or swerving radius of trailer. 296**Pa**198, 145**A**827. [h] **Presumption of danger.–**298**Pa**188, 148**A**70.

1025–29 98**CalA**598, 277**P**365. [f] **Guest visiting plaintiff's home** and who runs over plaintiff's child is not trespasser. 98**CalA**598, 277**P**365.

1026–35 **TexCivA** 5**SW(2d)**824.

1026–39 154**Wash**330, 282**P**213.

1027–53 95**CalA**384, 272**P**1073.

1028–64 79**CalA**234, 249**P**223.

1028–69 79**CalA**234, 249**P**223. [a] **Greater amount of care** is required of police vehicles. 79**CalA**234, 249**P**223.

1029–77 But see 220**Ala**229, 124**SE**510 (2dcase).

1029–79 **TexCivA** 5**SW(2d)**824. [a] **Violation of traffic signals.–TexCivA** 5 **SW(2d)**824.

1029–80 **TexCivA** 22**SW(2d)**544.

1030–89 49**CalA**113, 192**P**875; 55**Utah** 409, 186**P**439.

1030–94½–New. Automobilist owed highest degree of care, in passing street car on left, to boys he saw on bicycles. 13**LaA**70, 126**S**262.

1031–97 **MoA** 15**SW(2d)**917.

1031–1 **ND** 230**NW**6.

1031–6 80**CalA**590, 252**P**739; 82**CalA** 369, 255**P**760; 96**CalA**169, 273**P**866; **CalA** 284**P**1086; **CalA** 287**P**152; **IndA** 168**NE**495; 130**Kan**158, 285**P**571; 8**LaA** 335; 12**LaA**260, 124**S**553; **Mass** 172**NE** 788; **Mich** 232**NW**700; 25 **OhA**377, 157 **NE**910; 27 **OhA**26, 160**NE**737; 27 **OhA** 341, 161**NE**342. [b] 173**Minn**138, 216 **NW**605.

1032–8 80**CalA**590, 252**P**739; 82**CalA** 369, 255**P**760; 97**CalA**311, 275**P**526; 173**Minn**138, 216**NW**605.

1032–9 100**CalA**441, 280**P**197.

1032–10 25 **OhA**377, 157**NE**910.

1032–13 97**CalA**311, 275**P**526; 226**Ky** 580, 11**SW(2d)**409.

1032–17 227**Ky**486, 13**SW(2d)**497; 10 **LaA**42, 120**S**888; **Man** [1929] 4**DomLR** 1072(3dcase).

1032–19 219**Ala**336, 122**S**351; 179**Ark** 225, 15**SW(2d)**391; 78**CalA**733, 248**P** 727; 80**CalA**590, 252**P**739; 130**Kan**158, 285**P**571; 235**Ky**610, 31**SW(2d)**926; **Md**

150A34; 316Mo1235, 293SW142; 32 OhA445, 168NE225 (driver of automobile must drive in such manner that safety of pedestrians is guaranteed and protected); 295Pa214, 145A123; 11Pa Dist&Co 771; Alta [1929] 4DomLR138. [a] (2) Driver of automobile, observing pedestrians walking on highway in front of him, must take extraordinary care to prevent injuring them. 11LaA368, 128S338. [j] (2) Driver cannot wait till pedestrian takes last step into direct path of automobile before acting to avoid injuring him, but should stop or give warning on first appearance of danger. 316Mo1235, 293SW142. [k] **Motorist emerging from behind street car,** striking pedestrian, held negligent. LaA 128S186.

1033–20 [a] **When confusion of pedestrian became apparent,** motorist had duty to stop. LaA 128S186.

1034–32 105NJL402, 144A638.

1035–35 92CalA52, 267P724, 727 [cit CJ]. See also CalA 291P854.

1035–36 [a] **Though skidding automobile is out of control,** such condition is not necessarily negligence. CalA 290P924.

1035–37 86CalA459, 261P315; CalA 291P461; 233Ky59, 24SW(2d)936; 233Ky756, 26SW(2d)1035; Mass 172NE788; 173Minn138, 216NW605.

1035–40 86CalA459, 261P315; 207Iowa1241, 224NW540, 65ALR187; MoA 18SW(2d)575; NJ 145A106(1stcase); 35PortoRico316.

1036–45 [a] **Driver of automobile approaching pedestrian from rear,** who apparently did not notice driver's signals given under statute, was bound to realize hazard of driving automobile so close to pedestrian that deviation of two feet by pedestrian would cause accident. 9LaA57, 118S781.

1036–52 Md 150A34.

1036–53 Md 150A728; 298Pa522, 148A693.

1037–55 104NJL306, 140A422; 123Or293, 261P890; 298Pa522, 148A693.

1037–57 25OhA377, 157NE910.

1037–57½–New. and he is not required to run. 25OhA377, 157NE910.

1037–60 IndA 168NE495; 223Ky731, 4SW(2d)739, 740 [citCJ].

1037–61 Alta [1930] 2DomLR767.

1037–64 88CalA671, 263P1027.

1038–65 126Or532, 270P521.

1038–66 87CalA382, 262P357; 100CalA441, 280P197; 99Fla483, 126S784; 292Pa293, 141A41. [b] **Driver not negligent.**–291Pa32, 139A585.

1038–67 LaA 129S183; 292Pa293, 141A41. [d] **At cul de sac.**–241Mich83, 216NW417.

1038–68 CalA 290P924.

1038–69 CalA 290P924; Me 151A199; Md 151A235.

1038–70 [c] (1) 11LaA485, 124S160.

1039–75½–New. Pedestrian injured while walking on board platform protruding over pavement is not entitled to recover when truck struck platform. 12LaA50, 125S178.

1041–97 290Pa217, 138A755.

1041–98 194Wis179, 215NW892, 61ALR1155. [b] **Plaintiff, injured by truck while in semireclining position, which he assumed to recover nut or screw which** had dropped from his automobile and rolled under it, was not "pedestrian" on street, but was in act of "repairing" his automobile on street, which was forbidden by ordinance. 97Fla544, 121S570 (2dcase).

1041–1 CalA 284P1086.

1042–2½–New. **One who, at the express invitation of a driver of an automobile, gets in behind the car to assist in removing it from a ditch is not a "volunteer,"** and the driver must exercise ordinary care to prevent injury to him. 178Ark250, 11SW(2d)774, 61ALR1348.

1042–15 CalA 287P152.

1043–17 [a] Me 150A487.

1043–19 105NJL405, 144A565.

1043–20 12LaA442, 124S780.

1043–23 [1] **Taxicab company is held liable for injury to pedestrian entering street for purpose of boarding street car** and struck by taxicab while it was moving backward, in that pedestrian was not negligent in waiting at intersection for approaching street car, at place customarily used by intending passengers. 10LaA20, 120S797.

1045–29 32OhA445, 168NE225 (duty to stop car till street car proceeded forward).

1045–31 [a] **When motorist is in doubt as to whether street car has stopped,** he must stop when vision is blinded. Me 150A487.

1045–37 [b] **Decreasing speed some distance before reaching intersection** is not necessarily or usually equivalent of words "about to stop" under statute requiring operator of motor vehicle, approaching street car, which is stopped or about to stop for passengers, to stop at least ten feet behind it. 29F(2d)87.

1045–39 169La272, 125S121.

1046–41 93CalA1, 268P1061.

1047–47 151Wash486, 276P542. [f] (2) Where automobile driver has no intimation that street car is about to stop till he is within minimum distance of rear of car, he must stop as quickly as possible. BC [1930] 2DomLR241. [j] **Automobile, traveling alongside and parallel with street car,** is not "approaching" it within meaning of statute requiring operator of motor vehicle, approaching street car, which is stopped or about to stop for passengers, to stop at least ten feet behind car, such act contemplating motor car coming from behind street car. 29F(2d)87.

1047–48 [b] **City ordinance giving right of way to passengers boarding or leaving street cars** applies only to passengers on right-hand side of street and passing over that portion of street necessary to reach street car, or to passengers leaving street car and passing over that portion of street necessary to reach the curb, and not to intended passengers crossing street from left of street car. 150Wash637, 274P180.

1047–51 [b] **Failure to give warning or signal held not within statute** requiring approaching vehicle to stop. TexCivA 20SW(2d)1070(3dcase).

1047–54 33F(2d)27.

1048–58½–New. or alley, 94PaSuper167.

1048–59 95PaSuper538 (coasting down alley into highway).

1049–72 5LaA362. [a] (1) 127Or406, 271P733, 62ALR574. [b] **Aged and infirm.**–5LaA362. [c] **Rule that motorist must exercise unusual care** where children are concerned applies to adults who, to knowledge of driver, possess some infirmity such as deafness, or impaired sight, or who suffer from some temporary disability, as intoxication. 10LaA42, 120S888.

1049–73 10LaA72, 120S271.

1049–75 5LaA362; NJSup 136A505.

1049–78 125Or251, 266P229.

1049–79 83CalA508, 257P114; 97CalA654, 275P980; 253IllA444; 295Pa548, 145A605; Va 154SE499; 103WVa514, 138SE93.

1050–81 253IllA444; 125Or251, 266P229; 108WVa607, 152SE8.

1050–82 5LaA362; Va 154SE499. [f] (1) 10LaA42, 120S888.

1051–83 218Ala537, 119S667; Va 154SE547.

1051–84 220MoA1294, 290SW1014.

1051–87 12LaA97, 124S572; 290Pa1, 137A797; 298Pa313, 148A300; 103WVa514, 138SE93. See also 299Pa380, 149A662.

1052–89 290Pa1, 137A797.

1052–91 [a] **Automobilist on country highway, having in his view for over half mile children walking along highway,** but failing to sound his horn or check speed on approaching them, has been held negligently liable for death of child who broke away from his older brother and ran across path of automobile. 10LaA42, 120S888.

1052–92 125Or251, 266P229; Va 154SE547. [a] 295Pa548, 145A605.

1052–93 7LaA389; 228AppDiv569, 240NYS225.

1052–95 Va 154SE547.

1052–99 But see Va 154SE547. [a] (1) 10LaA42, 120S888; 292Pa293, 141A41; 35PortoRico390. (3) Motorist could not presume that child near highway would remain in place of safety. Va 154SE499.

1052–1 3LaA727; 5LaA67; 5LaA441; 7LaA523; 12LaA173, 125S160(1stcase); 116Nebr835, 219NW235; 103WVa514, 138SE93. [a] (3) Where motorist drove automobile twelve miles per hour while meeting automobile in space between two parked automobiles, and struck boy who passed in front of parked automobile, defendant held not negligent. NJ 147A384(2dcase). [f] 292Pa293, 141A41.

1052–1½–New. When a child came on board a truck, the duty of the owner was not to permit her to be there if her presence was dangerous. TexCivA 21SW(2d)13.

1053–2½–New. **Child running against car.** Driver is responsible where an infant of tender year runs against his car. 220MoA1294, 290SW1014.

1053–3 10LaA777, 123S127; LaA 127S475 (footway across street).

1053–4 108WVa607, 152SE8.

1053–5 Cal 287P450; 108WVa607, 152SE8.

1053–6 158Tenn323, 13SW(2d)322; 108WVa607, 152SE8.

1053–11 [c] **Coasting from private property.**–179Minn108, 228NW350(2dcase). [d] **Driver of truck has right to assume** that boys would not be coasting down street on sleds in violation of ordinance. Mass 172NE887.

1054–15 [a] (2) **No recovery could be** had for death of boy riding on handle bars of bicycle as against persons operating truck, unless truck was negligent, irrespective of negligence of boy driving bicycle. 34F(2d)723.

1054–17 12LaA475, 125S304.

1054–18 152Va484, 147SE461. [a] **Driver is bound to keep car under proper control,** as respects liability for death of occupant. 297Pa79, 146A443. [b] **Where driver and passenger are joint adventurers,** former may be liable to latter for negligent injury. 300Pa225, 150A477 (what constitutes joint enterprise).

1054–18½–New. "Passenger" means person rightfully taking passage, as distinguished from "operator." Ala 128S233.

1054–19 [b] **Driver must exercise ordinary care** irrespective of whether there is joint enterprise, or whether occupants were guests by sufferance, invited by driver or some one else, or self-invited. 179Ark742, 18SW(2d)345.

1054–29 248IllA287.

1055–30 9LaA636, 119S900.

1055–35 220Ala201, 124S740 (mother's duty to daughter as guest); 80CalA56, 251P235; 207Iowa613, 223NW254; 230AppDiv149, 243NYS630; 107WVa440, 148SE496.

1055–36 218Ala55, 117S634; 34Ariz230, 270P629, 632 [citCJ]; 176Ark690, 3SW(2d)996; Cal 290P438; 80CalA56, 251P235; 250IllA450; 4LaA720; 6LaA165; Me 149A580; Nev 288P601; 195NC517, 142SE761; ND 231NW785; 127Or589, 271P998; Pa 151A678; Tex CivA 21SW(2d)13; Wash 290P710; 108WVa635, 152SE201 (stating Pennsylvania law); WVa 155SE115; 200Wis420, 228NW512 (must exercise care to keep proper lookout for other vehicles); 200Wis321, 228NW599 (as far as lookout and attention, motorist owes same degree of care to guest as he does to others); Wis 229NW57. [b] **Whether trip is for business or pleasure is immaterial.** 292Pa219, 140A905. [c] **Statute depriving guest of right of recovery unconstitutional.**–127Or589, 271P998. [d] **Where motorist carrying guests had warning of approaching danger caused by blinding lights,** she had duty to use more than ordinary care to avoid striking objects on path temporarily hidden. 99CalA357, 278P500. [e] **In Connecticut.**–109Conn517, 147A138. [f] **Driver is not required to be expert in all mechanism of automobile,** as respects his duty to guest. 230AppDiv149, 243NYS630. [g] **Passenger held guest,** not engaged in joint enterprise. LaA 130S669. [h] **Connecticut "guest statute" releasing owners from responsibility for injuries is not retroactive.** 138Misc81, 245NYS81.

1055–37 ND 231NW785; 200Wis504,

228NW126 (except latent defects).

1055–38 198Wis163, 223NW408(2d case); Wis 228NW477. [a] **Where guest was injured while riding in automobile owned and operated by son when it overturned when son fell asleep while driving, because parties had remained in car preceding night,** due to breakdown, guest assumed risk, no actionable negligence of the son being shown. 197Wis588, 222NW784.

1055–39 But see 196Wis614, 220NW 203, 61ALR1243.

1056–40 CalA 280P552 (right to assume ability to pass parked car); 126 Or332, 269P491, 492 [citCJ]; 196Wis 614, 220NW203, 61ALR1243; 198Wis 163, 223NW408(2dcase); 200Wis504, 228NW126.

1056–41 233Ky211, 25SW(2d)363; 230 AppDiv149, 243NYS630; 126 Or332, 269P491, 492 [citCJ]; 196Wis614, 220 NW203, 61ALR1243; 200Wis504, 228 NW126.

1056–42 9LaA394, 120S494.

1056–43 109Conn654, 145A156; Conn 151A526; Nev 288P601; NJ 148A156.

1056–44 34Ariz230, 270P629. See also 177Minn298, 225NW162. But see 109 Conn428, 147A136; 110Conn1, 147A263.

1056–45 34Ariz230, 270P629. But see 111Conn88, 149A233; 40GaA283, 149 SE306(2dcase).

1056–47 7LaA759; BC [1929] 2 DomLR349.

1056–47½–New. A guest having no responsibility for or share in the control of the automobile is not engaged in a joint enterprise with the owner and driver simply because they are making the journey together for a common object. 177Minn249, 225NW98.

1056–47¾–New. The relation between an automobile driver and one invited to ride with him was that of guest and host, and they were not engaged in a joint enterprise. 198Wis172, 223NW 412.

1056–47¾–New. Where the accident is intentional or caused by heedless or reckless disregard of rights of others, the court will not consider whether such conduct is the only form of criminal negligence. 110Conn244, 147A678.

1056–47½–New. Automobile trip wherein defendant was taking sister and companion to sister's cottage has been held not joint venture. Or 289P 491.

1056–47¾–New. Automobile guest law passed after accident does not control determination of appeal. CalA 290P 1049.

1056–50 See also 126 Or332, 269P491, 492 [citCJ].

1056–51 198Wis163, 223NW408(2d case). See also 126 Or332, 269P491, 492 [citCJ].

1056–52 24F(2d)320; Conn 151A318; 41GaA4, 152SE116; 41GaA282, 152SE 601(1stcase); 261Mass147, 158NE348; 265Mass360, 164NE87(1stcase); 266 Mass111, 164NE818; 266Mass253, 165 NE117; 155Wash597, 285P657; Wash 287P656; Wash 287P899. [d] **Rule does not apply** where driver prevents invitee from leaving car after request. 41GaA4, 152SE116. [e] **Statute held not retroactive.**–Cal 290P438.

1057–53 [a] **In determining whether transportation of passenger in automobile by owner or operator was for mutual benefit of both,** and hence not within statute barring recovery for injury to guest, not merely act of transportation, but any contract or relationship between parties, to which it was an incident, must be considered. 108 Conn628, 144A304.

1057–55 108Conn628, 144A304. But see 261Mass147, 158NE348.

1057–56 See also 266Mass111, 164NE 818. But see 198Wis163, 223NW408 (2dcase).

1057–57 NJSup 140A430.

1057–59 176Ark690, 3SW(2d)996; 80 CalA56, 251P235; 11LaA503, 123S346 (contributory negligence of guest does not relieve owner of using ordinary care); 133Misc293, 231NYS657; 199 Wis641, 227NW233 (duty to exercise ordinary care not to increase danger or to create new danger). See also 37 Wyo 275, 260P1089. But see 291Pa588, 140A524.

1057–60 Alta [1929] 3DomLR133; BC [1929] 3DomLR273.

1057–62 200Cal 706, 254P560.

1057–64 [b] **Passenger held trespasser.**–CalA 286P752 (twenty-year-old minor knowing owner's rules).

1058–67 Ala 128S227; CalA 274P587; 152Miss681, 120S812(2dcase). [c] **One boarding motor cycle side car** without driver's consent is trespasser. Ala 128 S227.

1058–69 200Cal 706, 254P560. [a] **Where driver of dairy company's electric truck** had for some time customarily started truck before twelve year old boy assisting him in making deliveries of milk had jumped on step of truck, it has been held that his act in starting truck before boy stepped thereon was not, "willful negligence," nor "wanton negligence," so as to make dairy company, as to whom boy was mere trespasser, liable for injuries to boy. CalA 274P587.

1058–70 200Cal 706, 254P560.

1059–82 200Wis504, 228NW126.

1059–84 109Conn654, 145A156.

1059–85 WVa 155SE115. [c] **Host must warn guest against known dangerous defect,** unless defect is otherwise made known to guest in host's presence. WVa 155SE115.

1059–86 [a] **Absence of nut from steering wheel** held not "trap." CalA 286P 752.

1059–88 254 IllA511 (defective brakes); Wash 287P656. But see 198Wis163, 223 NW408(2dcase). [c] **Owner's knowledge of one defect** does not necessarily imply knowledge of another defect. GaA 155SE88.

1059–88½–New. One loaning an automobile to another gratuitously, without actual knowledge of the defective condition of the steering gear, is not liable to the borrower for injuries sustained by him when the car overturned, due to such defective condition, by virtue of failure to have the car repaired or warn the borrower of condition, although the lender should have known that the defect existed. 84Mont52, 274P145.

1059–88½–New. Owner making gratuitous loan of automobile is not liable for unknown defects which could not reasonably be foreseen. 232Ky675, 24SW (2d)578.

1059–90 [a] **Inexcusable neglect** to guard against danger in sharp curve on rainy night. LaA 129S250.

1060–4½–New. increasing speed to pass cow crossing highway; LaA 130S247.

1060–5½–New. Deflation of tire and overturning of automobile does not require holding driver had no opportunity to exercise judgment as to manner of stopping car. Wash 290P710.

1061–11½–New. Although the bounce of an automobile on a road may be some evidence of negligence when considered with other elements, it is not sufficient, standing alone, to show negligence of the driver as to a guest thrown against top. 266Mass184, 165NE11.

1061–16½–New. Other matters not amounting to gross negligence. NH 148 A466.

1061–17 110Conn244, 147A678; LaA 129S250; 200Wis504, 228NW126.

1061–19 110Conn1, 147A263; 266Mass 253, 165NE117.

1062–33 1LaA35.

1063–39 But see Sask [1930] 2DomLR 991(2dcase).

1063–41 154Wash634, 283P467(2dcase).

1066–65 MoA 15SW(2d)917.

1067–68 MoA 15SW(2d)917 (tarpaulin covered truck).

1067–77 1LaA83.

1068–89 ND 230NW6.

1072–29 167La335, 119S69; 9LaA186, 119S496.

1072–31 245 IllA132.

1072–32 259Mass191, 156NE6; 245NY 635, 157NE889; 49RI 498, 144A443.

1074–45 333 Ill 158, 164NE173, 61ALR 649.

1074–50 165La1075, 116S563.

1074–11 [b] **In Massachusetts.**–24F(2d) 320.

1074–12 NJ 149A756; BC [1930] 2Dom LR978 (brother liable to sister invitee).

1074–14 24F(2d)320.

1075–20 80CalA109, 250P693.

1075–21 80CalA109, 250P693.

1075–24 12LaA236, 125S168(2dcase); 6LaA763; 197NC720, 150SE501.

1076–27 NJ 151A754; 136Misc138, 239 NYS58; 229AppDiv693, 242NYS573.

1076–28 NJ 148A156.

1077–35 80CalA109, 250P693, 697 [cit Cyc]; 132 Okl 17, 269P274; Eng [1924] 1KB488. [e] **Principal riding with agent** is under obligation to warn him of apparent danger. CalA 287P562.

1077–42 LaA 125S748 (gross negligence). [f] **Owner is not liable** where part of mechanism breaks under strain of going up grade where driver was not negligent and brakes were in good condition. 12PaDist&Co 769.

1078–54 10LaA310, 120S515.

1079–55 265Mass408, 164NE374.

1079–56 11LaA515, 124S312; Utah 272 P207.

1079–57 But see 240Mich402, 215NW 290.

1079–58 240Mich402, 215NW290.

1079–59 [a] **Independent contractor.**–180Ark53, 20SW(2d)320.

1079–61½–New. The lender of an automobile may relieve himself from possible subsequent liability for negligence of the borrower by making reasonable investigation as to the competency of the driver or accepting a certificate issued by city authorities. 11LaA515, 124S 312.

1079–61½–New. Where the borrower has borrowed the automobile from defendant on four occasions and has returned it without accident, defendant is not required to make further examination as to whether the borrower is a competent operator. 11LaA515, 124S312.

1079–68 MoA 30SW(2d)647; Utah 272 P207; PrEdwIsl [1929] 3DomLR173.

1080–71½–New. That owner permitted unlicensed person to drive does not make owner liable, in absence of proof that driver was incompetent. NJ 151A754.

1080–76 NC 153SE607. [a] (3) **Proof** that son driving car at time of accident was not acting as agent of father, or engaged in father's business, action against father was properly dismissed. 199Wis59, 225NW401.

1080–81 227Ky735, 13SW(2d)1028.

1081–82 Conn 151A318. [c] **Liability under family purpose doctrine turns on whether defendant owned,** maintained, or provided automobile for his family's use. 227Ky735, 13SW(2d)1028.

1082–83 NH 149A600(2dcase).

1082–91 223Ky784, 4SW(2d)703; 226 Ky275, 10SW(2d)817; 233Ky714, 26SW (2d)563.

1082–92 255 IllA189.

1083–2 TexCivA 23SW(2d)860.

1083–6 233Ky714, 26SW(2d)563.

1083–7 [a] (3) Automobile, driven by owner's nephew who was rooming and boarding part time with owner and paying for his board and room, was not driven by immediate member of owner's family. 247Mich204, 225NW622.

1083–8 MoA 30SW(2d)647. [a] In Maine.–151A10.

1083–9 105WVa416, 143SE95, 64ALR 839. But see 242 IllA405. [b] 105WVa 416, 143SE95, 64ALR839.

1084–11 TexCivA 28SW(2d)871 (immaterial whether wife or husband was driving).

1084–18 NJ 149A756; 196NC213, 145 SE169.

1084–24 [b] But see 223Ky784, 4SW (2d)703.

1085–25 Me 151A10 (holding that, where father loaned car solely for son's pleasure, relation was that of bailor and bailee).

1085–27 But see 89PaSuper99. [c] (4) Use by married members of family. 235 Ky749, 32SW(2d)324(2dcase).

1086–30 [b] **Use of automobile by minor son to go to and from school** is within family purpose doctrine. 221 MoA173, 299SW601.

1087–41 256 IllA425; 205 Iowa343, 218 NW69; Nebr 231NW747; TexCivA 13 SW(2d)203. [g] **Automobile owner's son had no implied authority to use automobile against owner's express prohibition,** so as to make owner liable for his negligent operation thereof under

Highway Law § 282e. 133Misc652, 233 NYS309.

1088-43 11LaA503, 123S346; 262Mass 233, 159NE516; 263Mass244, 160NE818; 249NY191, 163NE557(2dcase); 57ND 559, 223NW190; Utah 272P207; 153Va 675, 151SE282.

1088-50 LaA 130S129; 10PaDist&Co 265; Utah 272P207.

1089-53 202Cal 577, 262P317; 11LaA 485, 124S160.

1090-58 Del 144A46; Me 151A10; NH 149A600(2dcase); NJSup 139A893; 105 NJL540, 147A235; TexCivA 18SW(2d) 242; TexCivA 27SW(2d)549. Contra Man [1929] 4DomLR282.

1090-60 244 IllA264; 133Misc293, 231 NYS657.

1090-61 255 IllA189.

1091-62 [a] (2) By statute son, driving father's car with express permission of father, was agent of father. 133Misc 293, 231NYS657.

1091-71 TexCivA 27SW(2d)549.

1091-72 252NY101, 169NE103; 57ND 559, 223NW190.

1091-74½-New. A father, who with the husband of a daughter jointly owned a car registered in the father's name, was not liable for damages while it was being driven by his daughter, the relationship of servant or agent not being established. 127Me226, 142A867.

1091-78 [a] (3) Where owner authorized his son to use automobile to take young women home, and car is driven in opposite direction for purpose of taking ride, father is not liable for damages by reason of accident. NJSup 147A463.

1092-85 Wash 290P849.

1093-97 155Misc694, 125S102.

1093-98 200Wis394, 228NW473 (ordinary rules as to actual, apparent, or ostensible agency must be applied).

1093-3 10LaA50, 120S886.

1093-4 256 IllA425.

1093-5 200Wis394, 228NW473.

1093-8 235Ky60, 29SW(2d)632(2dcase); 151Miss221, 117S531, 61ALR 1229.

1093-10 266Mass109, 164NE806; BC [1929] 4DomLR1052(1stcase).

1094-16½-New. The wife, who is a conditional vendee, may be liable as owner, under a statute where her husband is operating vehicle. 226AppDiv343, 234 NYS357.

1094-18 9LaA429, 119S886; 155Wash 517, 285P442; Wash 290P710. [a] Community property held not liable, where husband died before action was brought. 155Wash585, 285P425, 67 ALR1152.

1094-18½-New. The record failing to show the husband's participation in negligence, if any, of wife in driving automobile resulting in injuries to plaintiff, judgment should go no further than to hold the husband's interests in the community liable for damage under the statute. TexCivA 17SW(2d)184.

1094-31 34F(2d)927 (hospital); CalA 289P218 (holding doctrine of agency, not master and servant, applicable); 164 La920, 114S836; 11LaA124, 119S446; 11LaA61; 7LaA95; MoA 17SW(2d)639; NC 155SE247; 295Pa163, 145A71; TexCivA 21SW(2d)13 (wrongful ejection into place of danger of trespasser). [d] Liability is imposed by statute in some jurisdictions. 13LaA151, 127S438. [e] Who are employees.-CalA 291P591.

1095-37 [a] Owner's presence held immaterial as to liability for guest's injuries where agency of driver is established. 218Ala55, 117S634.

1095-41 224Ky427, 6SW(2d)481; 13 LaA151, 127S438; Me 152A226; 266 Mass446, 165NE385; 249Mich311, 228 NW709; 126 Or64, 268P746; 130 Or195, 279P539; 50RI 394, 148A186; RI 150A 460 (accident antedating 1928 statute); 149Va140, 141SE836; 200Wis205, 227 NW861.

1096-42 29F(2d)807; 131Misc675, 227 NYS644. [a] (2) Owner of truck, not taking any orders as to manner of gathering up milk and delivering it to dairy company, was not servant of company. 99CalA372, 278P928. [b] Automobile salesman on commission permitted to use employer's cars for demonstration is agent for whose negligence employer is liable. BC [1930] 2DomLR 241.

1096-43 Mich 233NW419.

1096-44 MoA 19SW(2d)559 (fact that driver of truck is paid by owner is circumstance to be considered in determining whose servant driver was). [c] Right to hire and discharge bus drivers has been held not decisive as to existence of relationship. 38F(2d)731.

1096-45 [a] Where owner permitted guest to drive, resulting in injuries to second guest, doctrine of respondeat superior applied. 218Ala55, 117S634.

1096-46 MoA 23SW(2d)1066 (one driving as mere accommodation or favor to owner).

1096-49 124 Or485, 264P846.

1096-50 102CalA669, 283P845(2dcase); 245NY158, 156NE650, 54ALR845.

1097-51 But see 219Ala520, 122S816.

1097-52 But see Ont [1930] 3DomLR 245.

1097-57½-New. City is not liable for injury by its truck while being used by an employee on his own business, with the consent of the foreman, where no authority was shown to permit use outside corporate purpose. 245NY597, 157NE 873.

1097-58 But see 107Conn728, 142A403, 404 [citCJ]. [a] Where car is intrusted to prospective purchaser, owner has been held not liable. Me 152A226.

1097-62 82CalA751, 256P224; 175Minn 438, 221NW716; 120 Oh177, 165NE721; Wis 232NW543. [d] Liability to guests.-NJ 145A632.

1098-67 176Ark780, 4SW(2d)919; 152 Va305, 147SE194. [d] Original master must resign full control of servant for time being, it not being sufficient that servant be partially under control of third person. 155Md400, 142A491. [e] Where one borrows truck and driver to tow his own truck without charge, enterprise is entirely his own. Wis 232NW 543 (driver remains owner's servant only in immediate management of towing truck).

1099-74 See also IndA 173NE238.

1099-78 181Ark907, 28SW(2d)712; Ill 173NE394; 224Ky427, 6SW(2d)481; 6 LaA525; 13LaA151, 127S438; 157Miss 770, 128S507; 94PaSuper440; TexCivA 22SW(2d)757. [c] Liability of owner of automobile for injury occasioned thereby is no longer dependent on use or operation by servant in business of master, but on legal use or operation in business of owner, or otherwise, with his permission or consent under statute. 133Misc293, 231NYS657. [d] Where messenger boy hired automobile to deliver message for his employer, without latter's knowledge or consent, his negligent operation of automobile was without scope of his employment. 219Ala 627, 123S12. [e] In Ontario.-[1930] 3 DomLR245.

1100-79 261Mass91, 158NE335; 94Pa Super440.

1101-83 181Ark907, 28SW(2d)712.

1101-85½-New. Means of furtherance of master's business must have been intrusted to servant, in order to hold master liable. 50RI 481, 149A376.

1101-86 129 Or44, 276P244.

1101-87 264Mass557, 163NE159; 297 Pa86, 146A455.

1101-88 101Vt108, 141A602, 603 [cit CJ]; 107WVa645, 150SE2(2dcase) (not liable in absence of actual notice or where notice would be presumed).

1101-90 167Ga638, 146SE490.

1102-94 317Mo 108, 296SW157; 28 OhA468, 162NE826; 129 Or44, 276P244; 297Pa86, 146A455; 14PaDist&Co 179; 107WVa372, 148SE323.

1102-2½-New. Defendants would not confer authority on their driver to invite plaintiff to assist him in collecting laundry bundles, nor ratify driver's act in doing so, by seeing plaintiff about their premises and saying nothing to him, nor by failing to order that he be kept off their trucks. 264Mass557, 163 NE159.

1102-3 335 Ill 335, 167NE35; 249Mich 311, 228NW709. [a] Operation of truck must be shown to be included in general type of service in which servant was engaged. 50RI 481, 149A376.

1102-4 [a] (1) 110Conn604, 149A400, 68ALR1044. (6) Where employee driver is operating truck for benefit of employer's friend by employer's instructions and is negligent, employer is liable. NJL 142A552. (7) Salesman returning from interview with prospective purchaser was acting in course of employment at time of injury. 208Cal 200, 280P945. (8) Other instances. 232Ky 820, 24SW(2d)595; 174Minn277, 219NW 92. [b] (3) Other instances. 181Ark 907, 28SW(2d)712.

1103-6 30 OhA7, 164NE55.

1103-7 89CalA511, 265P318.

1103-8 But see 50RI 481, 149A376.

1103-9 But see 40GaA397, 149SE814.

1103-13 IndA 171NE18.

1103-14 249Mich311, 228NW709; 132 Misc647, 229NYS609.

1105-29 Ala 128S227; 177Ark963, 9SW(2d)1; CalA 286P752; 12LaA249, 124 S589; Minn 232NW626; Mo 13SW(2d) 552; 246NY388, 159NE180. [c] (1) 291Pa588, 140A524.

1105-30 197NC709, 150SE505; Tex CivA 21SW(2d)13.

1105-31 29 OhA331, 163NE579(2dcase). But see 220Ala101, 123S897; 264Mass 557, 163NE159. [c] Permitting child to ride.-208Cal 216, 280P965.

1106-37 100CalA498, 280P377; CalA 290P311; 89 IndA429, 166NE611(1st case); IndA 171NE18; 12LaA236, 125 S168(2dcase); MoA 7SW(2d)298; RI 142A616; TexCivA 299SW295.

1106-38 218Ala200, 118S387(1stcase).

1107-40 256 IllA19.

1107-41 202Cal 577, 262P317.

1107-42 245NY594, 157NE871.

1107-48 Ala 130S782. [a] (3) Delivery truck owner is liable for damages from collision while driver was towing dead car for accommodation of third person. 175Ark899, 1SW(2d)35. [f] Truck driver starting truck while invitee is boarding acts within scope of employment. 317Mo 108, 296SW157.

1108-51 32 OhA527, 168NE517; Wis 231NW624.

1109-53 Wis 231NW624.

1109-55 13LaA680, 128S670.

1110-59 111Conn335, 149A850; 197NC 720, 150SE501.

1110-64 157Miss770, 128S507.

1111-66 30Hawaii457.

1111-67 22AlaA615, 118S504; 109Conn 441, 146A834. [a] (9) Other instances. 110Conn604, 149A400, 68ALR1044.

1112-74 12LaA97, 124S572.

1113-79 244Mich54, 221NW143.

1113-81 299Pa211, 149A168.

1114-92 GaA 155SE790(1stcase); 9 LaA688, 121S775; 228AppDiv664, 238 NYS219; 295Pa163, 145A71; TexCivA 22SW(2d)525; TexCivA 29SW(2d)484 (2dcase).

1114-94 GaA 155SE790(1stcase); Tex CivA 22SW(2d)525. [f] Relation of independent contractor not shown.-Wash 290P691. [g] Matters not controlling.-Conn 152A148.

1114-95 [a] (2) Garageman's servant driving automobile without charge to garage is not servant of owner. 181 Ark1061, 29SW(2d)284.

1115-97 200Wis485, 227NW938.

1115-4 220Ala101, 123S897; 252 IllA 194; 179Minn60, 228NW445; 157Miss 236, 127S779; NJSup 149A336; 136 Misc443, 240NYS199; 28 OhA382, 162 NE710; RI 150A821; TexCivA 10SW (2d)772; Can [1930] 2DomLR899 (borrower operating car in another province). See also 198NC541, 152SE492. But see 132Misc89, 228NYS671. [e] (1) 224AppDiv691, 228NYS670. [i] Where wife gratuitously lent car to husband, a physician, relation of wife and husband was that of bailor and bailee, and not principal and agent. Mass 167NE 762. [j] Conditional sale manufacturer is not liable for act of conditional purchaser. Mass 172NE70.

1116-5 149Va140, 141SE836; 196Wis 444, 219NW954.

1116-9 See also Md 151A400.

1116-9½-New. One who lets an automobile for use in public must use ordinary care to avoid a defective condition which may injure third persons. 160Tenn197, 22SW(2d)226.

1116-13 146Wash163, 262P119, 55ALR 1218. [c] Infant coöwners.-Utah 272P 207.

1117-14 [a] Joint owners both present.-BC [1929] 3DomLR273.

1117-17½-New. A statute making every owner of a motor vehicle liable for the negligent operation thereof, in the business of such owner or otherwise, by any person legally using or operating it with the owner's permission, express or implied, has been held not to make each joint owner liable for consequences of negligent operation by his coöwner or latter's agent. 225**AppDiv**162, 232**NYS** 454.

1117-18 **CalA** 291P591; 12**LaA**535, 126 S590.

1117-23 **Iowa** 233NW58; 223**AppDiv** 428, 228**NYS**528; 296Pa83, 145A691.

1117-24 **NJSup** 146A665(1stcase). See also 30**Hawaii**44.

1118-46½-New. Highway district is not liable for collision between vehicle on highway and road grader negligently operated by state employees on highway maintained by state. **Ida** 289P996(1st case).

1118-51 265**Mass**408, 164**NE**374; 252 **NY**400, 169**NE**624; 221**AppDiv**497, 224 **NYS**656; 133**Misc**652, 233**NYS**309. [a] **Automobile turned in to dealer in trade for new car,** under agreement by dealer to demonstrate and sell car, held to have been driven with implied permission of owner at time of accident under statute. 131**Misc**764, 228**NYS**734.

1118-52 242**Mich**95, 219**NW**69 (liability of parent for negligence of member of immediate family); 245**NY**557, 157**NE** 856. [c] **In New Jersey.**-136**Misc**443, 240**NYS**199 (construing New Jersey statute).

1119-53 131**Misc**934, 229**NYS**328, 333 [quotCJ].

1120-70 **Man** [1929] 3**DomLR**647. [d] **In Ontario.**-[1928] 2**DomLR**958.

1120-70½-New. In Saskatchewan owner's liability for injuries caused by negligent operation of vehicle by another must be determined independently of Vehicles Act. **Sask** [1929] 4**DomLR**677.

1120-72½-New. Where an automobile actually belongs to an employee, the employer is not to be deemed an owner because the contract of employment binds the employee to hold the employer harmless in the operation of the car. 205 **Iowa**343, 218**NW**69.

1120-73 221**AppDiv**497, 224**NYS**656; 133**Misc**652, 233**NYS**309.

1120-79 **TexCivA** 13**SW(2d)**203; **Wis** 222**NW**779.

1120-80 133**Misc**293, 231**NYS**657.

1120-85 133**Misc**293, 231**NYS**657.

1120-85½-New. An owner is liable for his daughter's use of a car with his consent, causing injury to a guest. 247**NY** 207, 160**NE**12.

1121-90 205 **Iowa**343, 218**NW**69; **Mass** 173**NE**524; 242**Mich**95, 219**NW**69; 50 **RI** 394, 148**A**186 (agency existing has been held not to make operator agent of owner with all incidents of law of principal and agent). [a] 207 **Iowa**1105, 224 **NW**88, 61**ALR**855. [c] 205 **Iowa**343, 218 **NW**69.

1121-95 246**Mich**423, 224**NW**647.

1122-98 50**RI** 394, 148**A**186 (secret restrictions of right to use vehicle).

1122-99 49**RI** 414, 143**A**674; **Man** [1929] 3**DomLR**647.

1122-2 49**RI** 414, 143**A**674.

1122-3½-New. Owner consenting is liable where car is used for driver's own purposes. 247**NY**207, 160**NE**12.

1122-10 246**NY**388, 159**NE**180.

1122-12 219**Ala**193, 121S710(2dcase); **NJSup** 149A67; **Eng** [1912]**AC**844; **Eng** [1912] 3**KB**588; **Eng** 31**TLR**24. See also 219**Ala**193, 121S710(2dcase). But see 224**AppDiv**691, 228**NYS**670.

1122-13 207 **Iowa**567, 221**NW**514; **Alta** [1929] 1**DomLR**577.

1122-15 299**Pa**469, 149A717 (bailor). [b] But see **Utah** 272P207.

1123-16½-New. A person who employs gatemen to control ingress and egress of automobiles between such person's property and a public street owes no duty to vehicular traffic upon the street. 28 **OhA**442, 162**NE**785 (no liability imputable for collision in street).

1123-16¼-New. Persons in whose name an automobile was registered, and their insurer, have been held liable for death resulting from the operation thereof as a public conveyance, where no notice of a change of ownership was given to the county court clerk. 158**Tenn**504, 14**SW(2d)**724.

1123-20 6**LaA**298.

1124-24 **BC** [1930] 2**DomLR**811.

1124-36 33**PortoRico** 755; **TexCivA** 23 **SW(2d)**860.

1124-37 159**Tenn**272, 17**SW(2d)**5.

1124-38 255 **IllA**572. See also **BC** [1930] 2**DomLR**811. [c] **Father selling automobile to son.**-**Utah** 272P207.

1124-41½-New. Under some statutes a father is not relieved from liability for damages caused by his minor child's negligence in driving an automobile because the minor was acting as the employee of another. 33**PortoRico** 755.

1124-41½-New. In an action for damages caused by a minor child's negligence in driving an automobile, the defense that the father used all the diligence of a good father of a family must refer to the acts that caused the damages. 33**PortoRico** 755 (general provision for child's education has been held insufficient).

1124-41¼-New. Under some statutes a father is not relieved from liability for damages caused by his minor child's negligence in driving an automobile by reason of the fact that the minor had been licensed by the government. 33 **PortoRico** 755.

1124-41⅛-New. Under the Canada motor vehicle act, the owner of a motor vehicle is liable for damage caused by its negligent operation by his infant son while using it without his knowledge or consent. **Man** [1929] 2**DomLR**590.

1125-44 41**Wyo** 101, 282P1061(2dcase). See also 244 **IllA**104.

1125-46 109**Conn**730, 144A894(1stcase).

1125-47½-New. Wife held not liable for injuries from husband's use of her automobile against her express denial of permission. **NJSup** 139A391.

1125-47⅛-New. Wife driving guests at husband's request in their jointly owned car is his agent or servant. 254 **IllA** 511.

1125-57 But see 94**CalA**109, 270P696.

1125-58½-New. Under such statutes parents are not liable for their son's negligence in driving a third person's automobile where no license had been issued to him, although they had signed his application for a license. 203**Cal** 167, 263P238.

1125-58¼-New. A father is not liable for his minor son's negligence in driving an automobile against his command, where the father had not signed the son's application for a license. 90**CalA** 481, 266P304.

1125-61 32 **OhA**35, 165**NE**591.

1125-65 11**LaA**380, 122S293; 95**PaSuper**461.

1125-66 **Nebr** 231**NW**747. [a] (2) Minister is not liable where vehicle is furnished by his congregation for his use. 9**PaDist&Co** 549.

1126-67 40**GaA**840, 151**SE**694; 265**Mass** 236, 164**NE**77(2dcase), 60**ALR**1159. [h] **That driver of automobile striking plaintiff was employee of defendant and had no other employment is not decisive that relation of master and servant existed,** since one may be agent or servant as to one part of undertaking and independent contractor as to other parts. 265 **Mass**236, 164**NE**77(2dcase), 60**ALR**1159.

1126-71 [b] **Evidence held not to show** that contractor was negligent in directing driver of hired truck where to park. 13**LaA**64, 127S10.

1126-72 175**Minn**438, 221**NW**716.

1127-74 13**LaA**64, 127S10.

1127-80 130 **Or**195, 279P539.

1128-88 8**LaA**310; 8**LaA**529; 134 **Okl** 145, 272P475. [c] (5) Servant unnecessarily using his own car in employer's business without employer's knowledge. 156**Tenn**666, 4**SW(2d)**354, 57**ALR**733.

1128-93 208**Cal** 200, 280P945; **CalA** 286 P474; 157**Miss**88, 127S727; **Mo** 23**SW (2d)**1049; **TexCivA** 11**SW(2d)**371. [d] **Electric company, not requiring or requesting employee to use his automobile in its business,** but merely agreeing to pay him, in such case, what he would otherwise be required to pay for railroad or street railway fares, was not liable as master for injuries caused by his negligent operation thereof while on way to place where he was to install flood light for company. 265**Mass**236, 164**NE** 77(2dcase), 60**ALR**1159.

1128-94 129**Kan**802, 284P603 (dealer and salesman on commission driving own car); 196**NC**794, 147**SE**296; 32 **OhA** 527, 168**NE**517.

1129-6 [a] (6) Corporation held not liable for negligence of attorney employed to transact specific legal business, where attorney, in exercise of free choice of methods, was operating his own car, accompanied by office attorney of client. 172**Minn**536, 216**NW**247. [b] (6) Corporation, whose superintendent, charged with delivery of coal, selects own truck and driver instead of selecting truck and driver employed by corporation, is liable for negligent operation of truck, though superintendent conducts independent trucking business. 28 **OhA**345, 162**NE**748.

1130-7 129**Kan**802, 284P603.

1130-13 80**CalA**109, 250P698; **CalA** 290 P684; 82**Colo** 150, 257P1079; **LaA** 129 S565; 8**LaA**452; 8**LaA**479; **MoA** 296 **SW**203; 195**NC**517, 142**SE**761; 196**NC** 504, 146**SE**134; 196**NC**774, 147**SE**298; 124 **Or**237, 264P459; 126 **Or**155, 268P 1020; **Va** 154**SE**499. [a] (6) Two boys driving to attend dance held engaged in joint enterprise. 82**Colo** 150, 257P1079. [g] (2) Where defendant delivered car with defective brakes to codefendants for storage without disclosing defective condition, and codefendant's employee injured plaintiff in driving car, defendants were not joint tort-feasors. **TexCivA** 18**SW(2d)**765.

1131-15 **MoA** 17**SW(2d)** 639; 124 **Or** 237, 264P459; **Va** 154**SE**499.

1131-18 24**F(2d)**320; 5**LaA**140.

1131-20 11**LaA**129, 119S748.

1131-20½-New. Where the automobile striking plaintiff is jointly owned by husband and wife and operated by the wife for their common interest, the husband and wife have been held jointly liable. 154**Wash**547, 283P186.

1131-21 **LaA** 130S648; **TexCivA** 5**SW (2d)**1010; 154**Wash**588, 283P447. [a] (1) 11**LaA**384, 123S176.

1131-22 See also 293**Pa**395, 143A110.

1131-22½-New. The mere fact that defendant's car collided with another automobile, and that injury to pedestrian would not have happened but for a collision, does not render defendant guilty of negligence. 293**Pa**395, 143A110.

1131-23 86**CalA**355, 260P894; 83**Colo** 211, 263P933; 12**LaA**567, 125S142; **NJ Sup** 147A644(2dcase); 124 **Or**237, 264 P459; **Utah** 273P515; **Alta** [1930] 4 **DomLR**396. [b] **Drivers of both cars may be liable** if they were negligent and their negligence proximately contributed to injury. 97**CalA**87, 275P456.

1132-33 246 **IllA**118; 2**LaA**403; 5**LaA** 404; 6**LaA**239; 8**LaA**97; 8**LaA**437; **Mass** 172**NE**887; **Mass** 172**NE**895 (intoxication of pedestrian); **NJSup** 149A 337; 121 **Or**552, 255P477; 88**PaSuper** 361; 51**SD**584, 215**NW**885; **TexCivA** 26 **SW(2d)**1091 (holding proximate cause necessary); **Wis** 229**NW**533; **Sask** [1930] 1**DomLR**964.

1133-41 9**LaA**593, 119S291.

1133-42 85**CalA**55, 258P988; 246 **IllA** 69; 205 **Iowa**1394, 219**NW**813; 235**Ky** 637, 32**SW(2d)**1; 11**LaA**164, 121S777; 3**LaA**69; 6**LaA**610, 614 [quotCyc]; 158 **Md**131, 148A426; 261**Mass**442, 158**NE** 893; 129**Misc**340, 221**NYS**418; 57**ND** 741, 224**NW**167; 98**PaSuper**69; **Tex CivA** 30**SW(2d)**423; **Utah** 272P207; 103 **WVa**514, 138**SE**93. [b] (2) Failure of driver to give signal. 33**Ariz**28, 262P5.

1133-44 30**F(2d)**578; 216**Ala**676, 114**S** 137 (reasonable care); 217**Ala**30, 114**S** 412; 87**CalA**563, 262P481; **CalA** 286P 761; 130**Kan**158, 285P571; 128**Me**346, 147A423 (thoughtless inattention of driver is negligence); **Mass** 172**NE**891; 250**Mich**19, 229**NW**430; **MoA** 14**SW(2d)** 483; 85**Mont**562, 281P345; 87**PaSuper** 494; 153**Wash**208, 279P588, 67**ALR**92 (2dcase) (stalling of truck for want of sufficient gasoline supply); 198**Wis**278, 223**NW**843. [c] **Defendant's violation of statute requiring headlights** does not relieve another from duty of exercising ordinary care to avoid accident. 101 **CalA**426, 281P723.

1134–45 216Ala676, 114S137; 217Ala 30, 114S412; 111Conn41, 149A244; 126 Me558, 140A368; 157Miss510, 128S100.
1134–46 216Ala676, 114S137; 80CalA 590, 252P739. [b] **In action for damage to automobile in collision, plaintiff held under no duty to watch car** parked at curb which backed into his path. 108 Conn560, 143A884.
1134–47 216Ala676, 114S137; 82CalA 369, 255P760; 108Conn560, 143A884; 128Me346, 147A423.
1134–51 81CalA747, 254P679; 118 Oh 247, 160NE715.
1135–54 85Colo 384, 276P333(2dcase); 10LaA671, 121S369; 11LaA508, 124S 156; Minn 231NW242; 198NC193, 151 SE197; 299Pa343, 149A477.
1135–55 111Conn219, 149A671; 80Mont 401, 260P702.
1135–56 30F(2d)578; 10LaA204, 120S 648; 9LaA487, 121S304; 4LaA402; 242 Mich693, 219NW594; 227AppDiv740, 236NYS622; TexCivA 32SW(2d)696. See also 50RI 496, 149A612.
1135–57 MoA 17SW(2d)639.
1135–58 109Conn602, 145A61; NJSup 148A208 (unlighted parked truck).
1135–59 128 Or650, 275P666.
1135–60 172Minn386, 215NW520.
1136–61 80Mont401, 260P702; 154 Wash630, 283P194.
1136–64 CalA 287P518 (holding that driver cannot assume that others are superexpert drivers); 13LaA272, 127S 764; 261Mass145, 158NE352; 263Mass 252, 160NE792; 266Mass220, 165NE91; Mass 171NE469; Mass 172NE93; Mass 172NE788; Mass 172NE893; Mass 172 NE895; Mich 233NW321; 172Minn386, 215NW520; 172Minn591, 216NW537; NH 152A275; 83NH29, 137A445; NJ 148A619; NJ 148A745; NJSup 136A 708; 27 OhA26, 160NE737. [a] (1) 92 CalA495, 268P483; MoA 18SW(2d)575. (5) Boy, crossing street in front of school and seeing auto coming one hundred and fifty feet away, may assume driver will slow down on approaching him and exercise proper care. 261Mass 145, 158NE352.
1136–65 91CalA129, 266P964; CalA 292P276; CalA 293P125; 86Colo 265, 280P880; 207 Iowa1271, 224NW576; Iowa 231NW304; 10LaA486, 120S689; LaA 128S551; 126Me558, 140A368; Md 151A235; Mass 172NE895; 80Mont 401, 260P702; 83NH29, 137A445; NJ Sup 137A792; NJSup 147A467; 131 Or 612, 282P768; 298Pa509, 148A711; 101Vt270, 143A401, 63ALR1427; 151 Wash279, 275P713; 193Wis187, 212NW 648.
1137–66 81CalA142, 253P357; CalA 290P48; Iowa 233NW23; 228Ky440, 15SW(2d)277; 11LaA71, 123S352; Mich 233NW381; Or 276P668; 292Pa 543, 141A491.
1137–67 10LaA486, 120S689; 126Me 558, 140A368; 80Mont401, 260P702. See also 38GaA424, 144SE127.
1137–68 LaA 130S821; Md 151A235; TexCivA 32SW(2d)696.
1137–69 157Miss510, 128S100. See also 106Conn499, 138A223.
1137–71 206 Iowa771, 221NW489; 207 Iowa1271, 224NW576; 221MoA823, 293 SW460; 295Pa168, 145A81; 86PaSuper366.
1138–72 CalA 292P276; 11LaA368, 123S338; 13LaA304, 126S727; 13LaA 208, 127S2; LaA 130S234(4thcase); 152Miss719, 120S829; Alta [1929] 4 DomLR561; Sask [1929] 4DomLR119. [a] (3) Turning instead of stopping to avoid collision held not contributory negligence as matter of law. 221MoA 823, 293SW460.
1138–73 78CalA785, 248P1031.
1138–74 80Mont401, 260P702.
1139–75 CalA 291P903; CalA 292P 276; 125Kan648, 266P69; 80Mont401, 260P702; 94PaSuper437.
1139–76 [a] **Doctrine of imminent peril held applicable.**–CalA 291P903.
1139–79 147Wash419, 266P169. See also 39GaA222, 146SE914; 159Tenn511, 19SW(2d)234.
1139–80 100Vt460, 139A252.
1139–81 203Cal 758, 265P805; 241 Mich57, 216NW403; 153Wash208, 279 P588, 67ALR92(2dcase).
1139–82 10LaA765, 123S151; 10LaA 768, 123S182; 12LaA605, 126S705(2d case); 264Mass383, 162NE772; Mass 173NE545; 144SC437, 142SE722. [b] **Acts not constituting violation of ordinance.**–150Wash646, 274P713. [c] **Act not constituting violation of statute.**–198Wis278, 223NW843.
1140–83 78CalA785, 248P1031; CalA 287P152; 45 IdaS3, 260P1027; 158Md 131, 148A426; 264Mass383, 162NE772; 242Mich145, 218NW653; 145Wash597, 261P405; Man [1929] 4DomLR282.
1140–84 Ida 290P724.
1140–85 NM 291P294; 13PaDist&Co 501.
1140–85½–New. Place of accident, not within municipality nor signposted as required by statute is not residence district thereunder, as affecting plaintiff's contributory negligence in driving at prohibited speed. 78CalA785, 248P1031.
1140–90 12LaA467, 124S559; CalA 292 P132; 167La335, 119S69; 10LaA19, 120 S519; 6LaA239; 10LaA768, 123S182; 12LaA104, 124S566; 12LaA630, 125S 744; 13LaA434, 127S31; 13LaA52, 127 S124; LaA 130S821; Me 147A39; 129 Misc442, 222NYS339; 58ND913, 228NW 424; 291Pa456, 140A269; 92PaSuper 80; Va 153SE711; 154Wash693, 283P 444(2dcase); Wis 232NW872.
1140–94 Sask [1930] 4DomLR480.
1141–97 Me 151A443; 222MoA138, 1 SW(2d)1030; MoA 7SW(2d)452; NJ Sup 146A785; 197NC712, 150SE488; 194Wis36, 215NW591. [a] **Motor cyclist held free of contributory negligence.**–LaA 128S551. [b] **That statute relative to lights does not provide for illumination to left** does not excuse motorcyclist from seeing horses to left of motorcycle. Or 289P1073.
1142–18 CalA 286P1091.
1142–21½–New. A boy riding on the handle bars of a bicycle is under the duty to protect himself with means presently available. 34F(2d)723.
1142–23 147Wash269, 266P154.
1142–31 CalA 291P219.
1143–47½–New. Where a mule backed a wagon into defendant's truck on becoming frightened, the driver of the mule is not negligent. 40GaA188, 149SE85.
1143–51 6LaA229.
1144–66 [d] (2) Sask [1930] 1DomLR 913. [e] **Failure to carry light** is not contributory negligence where not contributing cause of collision. SD 231NW 540.
1145–77½–New. A person riding on horseback on a public highway must use ordinary care under the circumstances. 224Ky274, 6SW(2d)264.
1145–77¼–New. A rider of a horse moving at a high speed and colliding at night with an automobile with lights on is guilty of contributory negligence as a matter of law. 177Minn523, 225NW 651.
1145–93 34 OhA183, 170NE604.
1145–97 248Mich574, 227NW767.
1145–99 Mass 172NE788; Mich 232NW 700.
1146–6 109Conn206, 145A890; 127Me 316, 143A178.
1146–7 208Cal 105, 280P522; 78CalA 733, 248P727.
1146–11 78CalA733, 248P727. [b] **Pedestrians contributorily negligence.**–NJL 142A545.
1146–13 127Me316, 143A178.
1146–17 208Cal 105, 280P522 (traveling on gravel portion and off paved portion of highway); 223Ky731, 4SW(2d)739; 9LaA57, 118S781; 172Minn386, 215NW 520.
1147–23 Va 153SE691. [b] **Driver of stalled truck walking in center of road in search of gas** is pedestrian within statute. 153Wash208, 279P588, 67ALR 92(2dcase).
1147–26 223Ky731, 4SW(2d)739.
1147–33 246Mich620, 225NW601; 27 OhA26, 160NE737; 296Pa198, 145A827. [b] **Pedestrian is bound to use ordinary** care with reference to time, place, and circumstances in crossing street. 99 CalA264, 278P442.
1147–34 216Ala676, 114S137; 96CalA 169, 273P866; 81CalA86, 253P178; 81 CalA142, 253P357; 84CalA721, 258P 686; 90CalA730, 266P588; Mich 233NW 225; 253NY462, 171NE708; 27 OhA26, 160NE737.
1147–35 250Mich261, 230NW199; 150 Wash637, 274P180.
1147–36 216Ala676, 114S137; 217Ala 30, 114S412; 27 OhA26, 160NE737.
1148–50 173Minn138, 216NW605; 123 Or293, 261P890; 297Pa192, 146A539.
1148–53 87CalA382, 262P357; 173Minn 138, 216NW605; 123 Or293, 261P890.
1148–59 233Ky763, 26SW(2d)753; 12 LaA260, 124S553; 57ND741, 224NW167.
1149–65 12LaA260, 124S553.
1149–69 86CalA595, 261P481; 248Mich 574, 227NW767 (excessive rate of speed, or on wrong side of highway); 173Minn 138, 216NW605; 298Pa158, 148A90 (forty miles an hour); 91PaSuper478; 149Wash587, 271P894. [a] **Pedestrian crossing street at intersection where there was traffic officer** is justified in assuming that truck driver will not deliberately run him down. 297Pa192, 146 A539.
1149–80 150Wash8, 272P50.
1149–81 102CalA600, 283P295. But see 220AppDiv386, 222NYS157. [a] **Crossing away from crosswalk is merely evidence of negligence,** not proof of it. Me 151A199.
1149–82 Mich 232NW700.
1149–83 150Wash637, 274P180.
1149–84 219Ala112, 121S404. 64ALR 640; 102CalA600, 283P295; LaA 130S 237.
1150–89 OhA 173NE303.
1150–97½–New. A statute requiring a pedestrian to yield the right of way to automobiles between street intersections puts the necessity of continuous observation on a pedestrian crossing the street elsewhere than at a crossing. 57 ND741, 224NW167.
1150–98 216Ala676, 114S137; 217Ala 30, 114S412; 219Ala336, 122S351; 80 CalA109, 250P693; 102CalA600, 283P 295; 126Me558, 140A368.
1151–99 217Ala30, 114S412.
1151–4 205 Iowa573, 218NW278; 12 LaA260, 124S553; Md 151A235; 249 Mich350, 228NW766; 296Pa198, 145A 827; 88PaSuper377; 195Wis646, 218 NW85. [a] (1) CalA 268P445. (4) Pedestrian struck by automobile while crossing street is not under obligation to look both ways at all times. 102CalA 436, 283P317.
1151–7 106WVa361, 145SE756.
1152–16 See also 13LaA76, 126S720 (automobile seen before stepping off curb).
1152–20 CalA 268P445.
1152–21 82CalA215, 255P755.
1152–25 86CalA595, 261P481; 90CalA 730, 266P588.
1153–28 248Mich574, 227NW767.
1153–29 88PaSuper377.
1153–32 172Minn386, 215NW520; 34 OhA183, 170NE604.
1153–35 195Wis646, 218NW85.
1153–36 263Mass252, 160NE792.
1153–41 205 Iowa573, 218NW278.
1153–48 204Cal 329, 267P1079; 206Cal 209, 273P578; 92CalA495, 268P483; 149Va193, 141SE117; 144Wash409, 258 P39. [f] **Failure to run on observing** approach of automobile does not constitute contributory negligence. 100CalA 441, 280P197.
1154–49 144Wash409, 258P39; 149 Wash587, 271P894.
1154–52 204Cal 329, 267P1079; 298Pa 509, 148A711.
1154–54 Iowa 227NW824 (dashing from in front of moving street car into path of automobile traveling along side of car); 231Ky702, 22SW(2d)97; 151Va 636, 144SE711. [b] (3) Crossing in front of auto while carrying umbrella is contributory negligence. 197Wis195, 221NW727.
1154–55 1LaA587; Md 151A235; 131 Misc69, 225NYS744; 298Pa522, 148A 693; RI 148A599; 197Wis195, 221NW 727.
1155–56 92CalA495, 268P483.
1155–57 CalA 268P445.
1155–62 124 Or1, 263P886.
1155–66 102CalA600, 283P295.
1155–67 CalA 268P445; 198Wis1, 223 NW121.
1155–69½–New. In some jurisdictions, it is the duty of a pedestrian crossing

an intersection diagonally to look in all directions. Nebr 229NW12.
1155-81 195Wis646, 218NW85.
1155-82 261Mass442, 158NE893.
1155-83 11LaA5, 123S156; 88PaSuper 377.
1155-84 LaA 129S401; 248Mich153, 226NW852(2dcase).
1156-96 233Ky763, 26SW(2d)753; 11 LaA564, 123S446.
1156-98 91CalA84, 266P616.
1156-1 233Ky763, 26SW(2d)753.
1156-5½-New. Pedestrian may trust to considerable extent on signal of traffic officer. Mass 171NE469.
1157-32 149Va193, 141SE117.
1158-43 11LaA380, 122S293; 153Md 264, 138A1.
1158-53 LaA 130S835(1stcase).
1158-59½-New. Plaintiff's conduct should be measured in view of the fact that he was a motor cycle policeman engaged in performing his duty, and exempt from obligation to obey statutory rules when necessary for performance of duty. 108Conn180, 142A749.
1159-62 221MoA585, 283SW464.
1159-64 50RI 62, 145A12. See also Del 151A822.
1159-65 162Mich654, 127NW691, Ann Cas1912A847.
1159-66 221MoA585, 283SW464.
1160-75½-New. The care required of a worker is not as great as a traveller need show. 290Pa217, 138A755.
1160-76 Iowa 226NW920 (not trespasser).
1160-77 157Miss303, 127S775.
1160-78 [a] (3) Person engaged in chaining disabled car to service car, while rear lights of disabled car were out, held not negligent as matter of law. 172Minn493, 215NW861.
1160-85 32 OhA445, 168NE225.
1161-91 169La272, 125S121.
1161-95 153Wash75, 279P97.
1161-4 169La272, 125S121. But see 11 LaA5, 123S156.
1161-6 [a] **Ordinance prohibiting vehicles from passing standing street car** did not, in view of further provision, create danger zone entitling persons within it to assume no vehicle will enter, and thereby relieve them of all care in crossing behind car after alighting. 11 LaA5, 123S156.
1161-13½-New. An ordinance providing that at an intersection where traffic is regulated a pedestrian shall cross the street only when traffic is released does not require a pedestrian leaving a street car to wait until the traffic is released to get across. 151Wash486, 276P542.
1162-15 32 OhA445, 168NE225. [a] **Safety zones.**-90CalA144, 265P558.
1162-25 121 Oh26, 166NE898.
1162-28 Wash 290P215.
1162-38 DC 32F(2d)957.
1163-39 29F(2d)87.
1163-41 La 119S577.
1164-62 121 Oh26, 166NE898.
1164-71½-New. A person standing in a safety zone waiting for a street car has not the same duties as a pedestrian crossing the street. 90CalA144, 265P 558.
1164-73 267Mass70, 165NE871; 118 Oh 247, 160NE715. But see 101CalA748, 282P392.
1165-74 151Wash486, 276P542.
1166-99 Mass 171NE469.
1166-1 127 Or406, 271P733, 62ALR 574.
1166-2 [a] **Person blind in one eye** must use unusual precautions on street. 10LaA72, 120S271.
1166-15 CalA 284P681.
1166-16 218Ala537, 119S667; 261Mass 442, 158NE893; NJSup 146A430; 228 AppDiv569, 240NYS225; 31 OhA273, 167NE407; TexCivA 20SW(2d)1070(3d case) (minor must prove that he is not of such intelligence and capacity as to appreciate danger); TexCivA 30SW(2d) 697.
1167-17 MoA 299SW85; 126 Or532, 270P521; 148Va812, 139SE500. [a] (5) 298Pa313, 148A300. (6) 295Pa548, 145 A605.
1167-18 5LaA67. [a] (1) See also 230AppDiv394, 245NYS32. (2) 5LaA 67. (14) Sixteen-year-old boy emerging from behind street car without looking. 11LaA5, 123S156.
1168-20 87CalA563, 262P481; 244Mich 319, 221NW318.
1168-21 266Mass279, 165NE406.
1168-21½-New. In an action for injuries to a minor crossing an intersection on roller skates, a ruling that the minor was a pedestrian, although using roller skates, was proper, and a charge that the fact that the minor was on roller skates might be considered with other facts of due care was proper, the statute not classifying roller skates as vehicles. 105NJL402, 144A638.
1169-33 87CalA563, 262P481.
1169-35 29F(2d)807; 38F(2d)1; 218 Ala670, 119S681; 180Ark980, 23SW(2d) 972; Cal 269P657(2dcase); Cal 276P 338; 207Cal 275, 277P1043; 207Cal 279, 277P1045; 107Conn91, 139A639; 254 IllA49; 252 IllA238; 256 IllA471; 126 Kan273, 268P117; 233Ky211, 25SW (2d)363; Mo 9SW(2d)166; MoA 17SW (2d)359; Mont 292P577; ND 231NW 785; 35 OhA361, 172NE533; 96PaSuper 164; Vt 148A283; 108WVa635, 152SE 201 (stating Pennsylvania law); WVa 155SE115. [a] **Comparative degree of care with that of driver.**-9PaDist&Co 709. [b] **Unless guest failed to show enough to warrant reasonable inference of due and personal care,** he may recover. 101Vt270, 143A401, 63ALR1427. [c] **Guest is under no duty to control or manage automobile.**-CalA 291P912.
1170-36 Cal 269P657(2dcase); 222Ky 268, 300SW604; ND 231NW785. But see 109Conn428, 147A136. [b] **That guest asked driver what time it was,** has been held not contributory negligence. Mass 171NE671.
1170-37 35Ariz309, 277P812; 101Vt 285, 143A394.
1170-39 [b] (2) Request to hurry home, made while car was headed away from home and at late hour at night, held not request, as matter of law, to drive at excessive speed. 82Colo 491, 261P657.
1170-40½-New. Approaching railroad crossing at unlawful speed is not prima facie evidence of invited guest's contributory negligence. 254 IllA49.
1170-42 11LaA503, 123S346; 101Vt 285, 143A394; 101Vt270, 143A401, 63 ALR1427; Vt 148A283 (invited guest). [b] **That driver is blind in one eye,** is matter to be considered by jury. CalA 285P879.
1171-46 101Vt285, 143A394.
1171-48 218Ala670, 119S681; Iowa 230 NW387 (guest in front seat); 222Ky 496, 1SW(2d)957; 292Pa1, 140A555. [b] **Guest may rely somewhat on skill of driver** without intrusting herself wholly to his care. Mass 171NE658.
1171-49 38F(2d)8. [c] **Whether guest in automobile exercised ordinary care** depends on circumstances. 222Ky496, 1SW(2d)957.
1172-50 244 IllA458; MoA 285SW1036; 123 Or615, 257P822, 263P59; Or 289P 491; 293Pa245, 142A324; 195Wis565, 217NW290. [b] (3) Guest was not contributorily negligent in failing to warn driver of danger caused by blinding lights. 99CalA357, 278P500. [c] (2) Guest being asleep in car held to have no causal connection with collision with truck. 199Wis567, 227NW17. [e] **Guest not charged with same responsibility as driver** of automobile, with reference to watching road for approaching automobiles. 101Vt270, 143A401, 63ALR1427. [f] **Proper equipment on car.**-CalA 291P695.
1172-51 256 IllA471; 88 IndA36, 159 NE156; 123 Or615, 257P822, 263P59; 195Wis565, 217NW290. [b] **Guest is not held to same degree of care** in keeping lookout, and one in back seat is held to less degree of care than one in front seat. 195Wis565, 217NW290.
1172-52 195Wis565, 217NW290; 198 Wis163, 223NW408(2dcase).
1172-53 12LaA321, 125S504. But see CalA 283P886. [a] **Invited guest may not ignore obvious dangers,** when having opportunity to acquire knowledge of them. 233Ky211, 25SW(2d)363.
1172-54 293Pa245, 142A324.
1173-56 133Misc293, 231NYS657; Tex CommnA 29SW(2d)984.
1173-57 Cal 276P338.
1173-59 123 Or615, 257P822, 263P59.
1173-60 204Cal 679, 269P529(2dcase); CalA 285P879; 233Ky211, 25SW(2d) 363.
1173-61½-New. Guest indicating assent to condition of automobile by failure to warn driver or protest although aware of condition is guilty of contributory negligence. 108WVa635, 152 SE201.
1173-62 109Conn144, 145A662; 251 IllA99; 233Ky211, 25SW(2d)363; 292 Pa1, 140A555; 298Pa101, 147A854; 94 PaSuper548; 108WVa635, 152SE201 (stating Pennsylvania law); 195Wis565, 217NW290. [b] (2) It is unnecessary for occupant to keep remonstrating with or instructing driver. 34 OhA495, 171 NE357. [c] **Whether failure to remonstrate makes passenger negligent** depends on circumstances of particular case. 207Cal 275, 277P1043. [d] **Driver is not exonerated from liability for reckless speed** by failure of guest to complain. LaA 129S250.
1174-63 Cal 276P338; 109Conn144, 145 A662; 12LaA545, 125S309; ND 231NW 785; 198Wis163, 223NW408(2dcase). [d] **Comment of guest** to effect that it was "pretty fast for a new car" relieved him of contributory negligence. 10LaA 733, 122S879.
1174-66 220Ala201, 124S740; 84CalA 180, 257P877; 101Vt285, 143A394; Ont [1930] 4DomLR376.
1174-69 10LaA57, 120S791; 58ND286, 225NW791; 101Vt285, 143A394.
1175-71 82Colo 491, 261P657.
1175-72 [b] **Excessive speed elsewhere was of no consequence,** where occupants gave warning as they approached curve. 297Pa79, 146A443.
1175-74 LaA 130S247.
1175-75 204Cal 228, 267P546; 95CalA 384, 272P1073; 229AppDiv439, 242NYS 361 (riding on rear bumper in violation of ordinance); 297Pa86, 146A455. [a] (1) 11LaA503, 123S346. (3) Of moving automobile. 291Pa30, 139A495, 61ALR 1241. (4) Is contributory negligence as matter of law. 14PaDist&Co 179. [b] 34PortoRico 1. [c] **One voluntarily assuming dangerous position of passenger on fire engine** during test run assumed risk ordinarily incident to such dangerous position, and fire engine company was not liable for injury arising from such risks. 95CalA384, 272P1073.
1175-76 126Kan188, 268P119; 233Ky 493, 26SW(2d)1; 12LaA321, 125S504 (whether riding on running board of moving automobile is negligence is determined from circumstances of particular case); 239Mich37, 214NW172; NH 151A262.
1175-77 292Pa366, 141A244.
1176-78 222Ky268, 300SW604.
1176-82 195Wis565, 217NW290.
1176-83 [a] (2) Sixty-year-old woman was not contributorily negligent in not insisting that car be stopped and alighting therefrom at isolated point on rainy day. 207Cal 275, 277P1043.
1176-84 107Conn91, 139A639; 13LaA 345, 127S129 (knowledge of driver's drinking subjecting him to spells); 199 Wis641, 227NW233 (turning corners at dangerous rate of speed); 200Wis388, 228NW513.
1176-85 [a] **Guest entering automobile assumes dangers** incident to known incompetency, inexperience, and habits of driver. 198Wis163, 223NW408(2d case).
1176-86 96PaSuper164.
1176-87 35Ariz309, 277P812; 107Conn 91, 139A639; 222Ky268, 300SW604; 150 Miss687, 116S609.
1176-89 107Conn91, 139A639; 148 Wash516, 269P825.
1176-91 CalA 291P695. [b] **Passenger is not negligent,** as matter of law, in riding with driver who had been licensed only fifteen days, in five-passenger car containing seven passengers, three of them children. 107Conn86, 139A635.
1177-94 42F(2d)799; 37GaA389, 140SE 632; 4LaA435; 7LaA653; 173Minn 237, 217NW125; MoA 3SW(2d)1044; NJSup 143A153; Oh 171NE860; 31 OhA 77, 166NE427; Utah 273P515; 195Wis 565, 217NW290; Sask [1928] 1DomLR 970.
1178-5 218Ala55, 117S634; 253 IllA

135; Iowa 227NW608; 6LaA575; 16 [illegible] 2Md[illegible]; 1[illegible]A[illegible]; Mo 58W(2d)409; MoA 275SW359; MoA 285SW1036; MoA 98W(2d)96; MoA 25 SW(2d)491 (plaintiff's son's automobile driven by son's wife); Mont 292P577; 22LAppDiv671, 224NY8475; Or 238P 101; 293Pa245, 142A324; 49RI 32, 139 A452, 62ALR367; TexCivA 48W(2d) 211. See also 92CalA145, 267P387. Er-ratum.—Utah.—Montague v. Salt Lake, etc., R. Co., 52 Utah 368, 17 P 871 should read "[illegible]."

1173-8 24[illegible]Mich57, 216NW402; 245 [illegible]

1173-9 [illegible]

1173-10 [illegible]

1173-11 [illegible]

1173-12 [illegible]

1173-13 [illegible]

1173-14 [illegible]

1173-15 [illegible]

1173-16 [illegible]

1173-17 [illegible]

1173-18 [illegible]

1173-19 [illegible]

1173-20 [illegible]

1173-21 [illegible]

1173-22 [illegible]

1173-23 [illegible]

1173-24 [illegible]

1173-25 [illegible]

1173-26 [illegible]

1173-27 [illegible]

1173-28 [illegible]

1195-3 255 IllA465.
1195-7 [b] IndA 169NE60.
1195-8 242 IllA166. [a] 227Ky486, 13 SW(2d)497.
1195-10 195Wis481, 218NW727.
1195-12 37GaA344, 140SE390. [a] Ala 129S9; 99CalA303, 278P448; 127 Kan115, 272P126; MoA 15SW(2d)370; 143 Okl101, 287P1014. [b] Del 151A 822; 37GaA344, 140SE390; 41GaA722, 154SE460.
1195-19 110Conn685, 149A140; 45 Ida 83, 260P1027; 89 IndA173, 166NE12. See also 40GaA73, 149SE52. [b] **In view of extreme youth of child who was struck by motor vehicle, failure to negative contributory negligence** on her part could not be regarded as of itself necessarily affecting her right of recovery. 109Conn58, 145A54. [c] **Speed of plaintiff's automobile** need not be alleged. 40GaA73, 149SE52. [d] **Plaintiff's compliance with laws** need not be alleged. 40GaA73, 149SE52.
1196-20 [c] IndA 159NE162; Oh 172 NE667; SD 226NW947 (complaint showing that plaintiff was jaywalking held not demurrable).
1196-21 But see 252 IllA586.
1196-25 [a] **Petition insufficient to bring case within humanitarian doctrine.** MoA 31SW(2d)580.
1196-27 [a] (6) Other instances. 41 GaA4, 152SE116.
1196-28 110Conn108, 147A370.
1196-33 50RI 424, 148A315 (matters of justification or excuse should be specially pleaded).
1197-35 123 Or50, 260P1012.
1197-37 TexCivA 13SW(2d)966.
1197-38 33Ariz28, 262P5.
1197-39 [d] (5) Causal connection between plaintiff's negligence and injury properly shown. 219Ala692, 123 S215, 218 [citCJ].
1197-44 CalA 292P276.
1197-46 11LaA508, 124S156.
1198-54 94CalA48, 270P704. [a] 22 AlaA215, 114S277.
1198-62 Ark 32SW(2d)167 (issue of negligence in hiring operator of truck held covered by pleadings); 86Colo 435, 282P568; 148SC161, 145SE790; TexCivA 22SW(2d)508. [b] **Invocation of right of way statute** raises issue of reasonably prudent conclusion of one in disfavored position. NH 148A461.
1198-64 85Colo 409, 277P299. [b] (1) 244 IllA264. [d] **Under general denial and defense of contributory negligence,** rule of last clear chance can be invoked by plaintiff. 45 Ida83, 260P1027.
1198-69 86Mont545, 284P542. [c] **Matters which need not be proved.**–CalA 293P78.
1199-73 [c] See also 87PaSuper466.
1199-78½-New. If the jury find plaintiff guilty of contributory negligence, it is immaterial as far as plaintiff's recovery is concerned whether defendant exercised care in the operation of his automobile. MoA 22SW(2d)65.
1199-78¾-New. Where evidence shows no negligence, the question of contributory negligence becomes immaterial. 200Wis299, 227NW278.
1199-80 [b] (2) MoA 20SW(2d)570. (7) Defective condition of brakes in violation of statute. 81CalA142, 253P357.
1199-81 MoA 14SW(2d)529.
1199-81½-New. The practice of traffic officers, in signaling traffic to proceed, etc., has been held inadmissible where practice or custom was not pleaded. 151Wash486, 276P542.
1200-83 85CalA332, 259P470; Md 150 A34; Or 285P565; 298Pa244, 148A105.
1200-85 CalA 290P617(1stcase).
1200-88 Minn 233NW237.
1200-1 LaA 127S663. [b] (12) Other instances. 256 IllA461.
1201-13 85CalA455, 259P455; 244 IllA 264.
1201-22 30Hawaii12; 48 Ida310, 282P 72 (variance not fatal); 249 IllA501. [a] (4) Declaration alleging that defendant so negligently drove its truck that it ran against decedent, operating motor cycle, inflicting fatal injuries, and proof showing that decedent drove his motor cycle against truck, disclosed fatal variance, requiring directed verdict for defendant. 333 Ill 368, 164NE 657. (5) Other instances. 255 IllA106. [b] (12) Allegation that truck struck and fatally injured boy coasting on playground and evidence that sled struck truck. 81Mont79, 261P613. (13) Other instances. MoA 3SW(2d) 1044; MoA 15SW(2d)876; MoA 22SW (2d)884; 87PaSuper294; 89PaSuper 204; 10PaDist&Co 522; 155Wash133, 283P1076.
1201-30 [a] (6) That tire puncture occurs frequently. 194Wis179, 215NW 892, 61ALR1155. (7) That distance between centers of wheels is four feet eight inches. 13LaA194, 127S133(2d case).
1202-47 [a] **Condition of automobile.**–In absence of proof, it must be presumed that automobile was not defective. 28 OhA42, 162NE456. [b] **Motorist is held to have seen what he could have seen had he been looking.**–Mo 30SW(2d)1065. [c] **That stop signal was authoritatively placed at street intersection** will be presumed. Ala 130 S548.
1202-48 Iowa 229NW210; 9LaA680, 121S649; LaA 124S678; LaA 124S701; 12LaA167, 125S294; Mo 295SW751; MoA 23SW(2d)1104; 31 OhA229, 166 NE916.
1202-49 10LaA189, 120S668.
1203-58 Mass 173NE529.
1203-59 96CalA236, 273P1080; 9LaA 429, 119S886; 153Wash538, 280P15. [a] (2) Act of God. 1LaA225; 1LaA 227. [b] **Defendant has burden of proving his demand in reconvention.**–11LaA 40, 122S726.
1203-61 220Ala198, 124S739; 109Conn 58, 145A54; IndA 172NE783; 11LaA 474, 123S900(2dcase); 11LaA286, 123S 411; Md 150A728; 197NC724, 150SE 503; 49RI 364, 142A621. [b] **In showing causal connection** between negligent act and death of boy occurring some months after accident, precise organic changes which took place need not be proved. Mass 168NE154(1stcase).
1203-63 8LaA751.
1203-68 11LaA187, 123S166(2dcase).
1203-69½-New. Driver must prove accident was unavoidable. CalA 257P577.
1203-71 CalA 257P577; 158Md424, 149 A4; Mo 295SW751; 322Mo 318, 18SW (2d)4; 289Pa565, 137A797; 151SC131, 148SE701(2dcase). [a] 222Ky496, 1SW (2d)957.
1203-73 CalA 257P577; CalA 282P 1008; 109Conn58, 145A54; 111Conn219, 149A671; IndA 172NE783; 207 Iowa 567, 221NW514; 228Ky239, 14SW (2d) 775; 4LaA561; 4LaA591; 11LaA40, 122S726; 13LaA421, 127A404; Me 150 A487; 259Mass272, 156NE254; Mass 173NE427; 179Minn332, 229NW341; 248Mich574, 227NW767; Mo 295SW751; 289Pa565, 137A797; 49RI 364, 142A621; TexCommnA 7SW(2d)521; TexCivA 299 SW665; TexCivA 19SW(2d)94 (dangerous rate of speed); 154Wash229, 281P 995(2dcase). [f] (2) Burden of proving owner should have realized defect in his vehicle increased danger is on plaintiff. 230AppDiv149, 243NYS630. [j] **Guest riding in automobile must prove gross negligence** on part of driver. 264Mass235, 162NE307. [k] **In action for death of guest,** necessary to prove only lack of ordinary care. CalA 285P 879.
1204-75 Mich 233NW178.
1204-76 13LaA410, 128S320.
1204-78 Sask [1928] 3DomLR718.
1204-80 230AppDiv149, 243NYS630.
1205-84 10LaA215, 120S391(2dcase); 126Me202, 137A62; 198NC8, 150SE636; 289Pa565, 137A797; 292Pa348, 141A 150; 298Pa522, 148A693; Pa 151A678. [b] (5) Runaway horse. 230AppDiv 197, 243NYS207. [c] (1) 165La1075, 116S563; 197NC240, 148SE251; 148 Wash359, 268P884. [d] (3) Where guest was injured when automobile collided with bus. 322Mo 318, 18SW(2d)4. [f] **Mere fact that an automobile comes in contact with pedestrian or with another vehicle** raises no presumption of negligence against chauffeur. 296Pa 400, 145A909. [g] **Fact of collision not evidence of lack of control.**–MoA 19SW (2d)306.
1205-85 94PaSuper548; 153Wash75, 279P97.
1205-89 CalA 257P577; 84CalA180, 257P877; 84CalA599, 258P616; CalA 290P497; CalA 291P912; 107Conn201, 139A782; 10LaA215, 120S391(2dcase); 12LaA598, 126S241; 13LaA345, 127S 129; LaA 130S648; LaA 130S669; Mass 168NE540; Mass 168NE809; 246 Mich377, 224NW657; Mich 233NW178; NJ 151A477; 29 OhA522, 163NE917; 296Pa198, 145A827; Man [1930] 3DomLR513. [c] (1) 85CalA455, 259P455; 33 PortoRico 925. (2) Truck leaving street and colliding with building. 119 Oh256, 163NE493. [e] **Skidding car.**–CalA 257 P577. [f] **Injury to guest.**–89CalA702, 265P496.
1206-90 220Ala201, 124S740; CalA 257 P577; 125 Or80, 265P801; 297Pa39, 146A261. [a] (2) Doctrine of res ipsa loquitur applies where automobile leaves accustomed place of travel and runs on sidewalk and strikes pedestrian. 85CalA 535, 259P958. (3) Where pedestrian on sidewalk is struck by automobile, inherent nature and character of accident is such as to create inference of negligence. 102CalA221, 282P1009.
1206-91 220Ala220, 124SE516; 84CalA 599, 258P616; 105NJL608, 146A191; 132Misc453, 230NYS196; 28 OhA521, 162NE812.
1206-93 220Ala220, 124S516; 6LaA332; LaA 130S669; 127Me335, 143A261; NJ 151A477; 146Wash74, 262P136; Man [1930] 3DomLR731. [a] (2) Defendant must show condition absolving him from fault for sudden stop and plaintiff need not show absence of such condition. 224AppDiv760, 230NYS472. [b] Can [1929] 4DomLR625.
1206-95 Mich 233NW178. [a] **Evidence held insufficient to overcome prima facie case.**–CalA 291P912.
1206-96 227AppDiv336, 237NYS557; 197NC240, 148SE251.
1206-97 CalA 257P577; CalA 285P399.
1206-98 263Mass215, 160NE797; 131 Or180, 282P236.
1206-99 97CalA387, 275P813; CalA 285 P731; 131 Or180, 282P236 (after skidding); CalA 290P497.
1207-4½-New. The mere fact that an automobile skids is not evidence of negligence. 261Mass238, 158NE671.
1207-7 Ont [1929] 3DomLR841.
1207-8 123Or50, 260P1012 (parked vehicle); Man [1929] 4DomLR1072(3d case). [a] (4) Presumption does not operate in favor of passenger. Can [1928] 4DomLR985.
1207-9 Alta [1929] 4DomLR314; Alta [1929] 4DomLR982; Alta [1930] 2DomLR959; Man [1929] 4DomLR1072(3d case); Man [1930] 3DomLR513; Ont [1929] 3DomLR841. [a] (4) Failure of defendant to satisfy burden renders unnecessary inquiry as to whether plaintiff's negligence or defendant's was causa causans of accident. Sask [1929] 4DomLR670. (5) Determination of case not affected by statute where plaintiff's own negligence sole cause of accident. Sask [1930] 2DomLR1004(2dcase).
1207-19 Alta [1929] 4DomLR982.
1208-22 [a] **Mere proof that owner or driver did not see injured person** does not satisfy burden where circumstances are such that he should have done so. Alta [1929] 4DomLR982. [b] In Saskatchewan.–[1930] 2DomLR106.
1208-24½-New. That guest in automobile exercised ordinary care is statutory presumption and constitutes evidence. Cal 287P343.
1208-28 Iowa 228NW880; 127Me482, 144A395; 128Me346, 147A423.
1208-29 127Me335, 143A261.
1208-31 Sask [1929] 3DomLR684.
1208-33 82Colo 150, 257P1079; 127Me 75, 140A909.
1208-35 LaA 130S237; 148SC161, 145 SE790. [a] **Evidence held insufficient to rebut presumption.**–127Me482, 144A395.
1208-37½-New. Violation of operation permit ordinance is negligence per se. 194NC172, 138SE595.
1208-37¾-New. Violation of law is negligence per se. Mo 293SW449.
1208-37¼-New. MoA 297SW180.
1208-42 198NC640, 152SE894. See also 145Wash597, 261P405.
1208-44 Ida 288P152.
1208-46 181Ark925, 29SW(2d)676.
1208-48½-New. Driving by one under

age is negligence per se. **IndA** 157NE 464.

1203–51 207 **Iowa**567, 221NW514; 197 **NC**724, 150SE503.

1203–52 104**NJL**387, 140A397.

1203–56½–New. Automobile bearing trade-name of defendant will be presumed to be owned by him. 298**Pa**211, 149A883.

1203–57 [c] **Evidence insufficient to overcome presumption.**–298**Pa**211, 149A 883.

1203–70 26**F(2d)**534; **NJ** 151A477. [b] **Retroactive effect of statute providing** that registration shall be prima facie evidence of operation and control by one in whose name registration made. **Mass** 168NE178; **Mass** 168NE180. [c] **Arbitrary or irrational effect of statute.**–Statute making registration prima facie evidence of owner's responsibility for driver's acts has been held not to establish arbitrary or irrational rule of evidence. **Mass** 168NE178.

1203–71 298**Pa**211, 149A883. See also **Mass** 173NE524.

1203–77 **MoA** 23SW(2d)1066 (that garageman in charge of automobile was acting as independent contractor).

1210–82 **Ill** 173NE394; **Mass** 167NE 332.

1210–83 99**CalA**372, 278P928; 261**Mass** 91, 158NE335; 197**NC**724, 150SE503; 57**ND**741, 224NW167; 50**RI** 68, 145A 101; 149**Va**140, 141SE836.

1210–84 197**NC**724, 150SE503.

1210–89 [b] (2) **MoA** 6SW(2d)979.

1210–90 26**F(2d)**534; **Ala** 127S668; 85 **CalA**31, 258P712; 254 **IllA**526; **LaA** 129S459; **Md** 151A400; **MoA** 25SW(2d) 133; 132 **Or**106, 284P579 (prima facie case of liability through negligence of driver); 10**PaDist&Co** 522; 105**WVa** 118, 141SE631.

1210–94 **NJSup** 147A729(2dcase); 229 **AppDiv**693, 242**NYS**573.

1211–99 See also 323**Mo** 388, 19SW(2d) 700, 67ALR157.

1211–7 224**Ky**427, 6SW(2d)481.

1211–8 **Mass** 173NE524.

1211–8½–New. or that the automobile was being used with the owner's consent. **Iowa** 227NW608.

1211–9 198**Wis**315, 224NW102.

1211–10 **Ala** 127S668.

1211–12 85**CalA**31, 258P712.

1211–18 207 **Iowa**567, 221NW514; 104 **NJL**397, 140A419; **ND** 230NW294; 299 **Pa**211, 149A168.

1212–19 **Ala** 130S782; 261**Mass**91, 158 NE335; **Mass** 173NE524; **ND** 230NW 294; **TexCivA** 299SW665; **TexCivA** 1 SW(2d)476.

1212–20 234**Ky**373, 28SW(2d)34; 261 **Mass**91, 158NE335.

1212–21 261**Mass**91, 158NE335; 129 **Or** 44, 276P244; 299**Pa**211, 149A168.

1212–22 219**Ala**520, 122S816; 220**Ala** 101, 123S897; **CalA** 290P510; 164**La** 920, 114S836; 13**LaA**151, 127S438; 105 **NJL**363, 144A593; 134 **Okl** 145, 272P 475; 50**RI** 481, 149A376; **TexCivA** 299 SW665; **TexCivA** 22SW(2d)508; 105 **WVa**118, 141SE631. [a] **Presumption is stronger** where driver is shown to be regular employee of owner than where there is mere proof of ownership. 219 **Ala**520, 122S816. [b] **Evidence rebutting presumption** must be strong, clear, convincing; and undisputed. 219**Ala**520, 122 S816 (evidence held sufficient). [c] **Inference that driver is agent** of owner is warranted from undisputed ownership. **CalA** 289P218.

1212–23 38**GaA**729, 145SE479(2dcase); 130 **Or**195, 279P539; **TexCivA** 28SW (2d)622. [d] **In Massachusetts.**–168NE 178.

1213–28 89**CalA**511, 265P318; **CalA** 291P591; **CalA** 291P599; 234**Ky**373, 28 SW(2d)34; 13**LaA**86, 127S127; **Md** 151 A400; **MoA** 27SW(2d)1039; 104**NJL** 387, 140A397; 57**ND**741, 224NW167; **ND** 230NW294; **OhA** 173NE245; 50**RI** 68, 145A101.

1213–32 218**Ala**200, 118S387(1stcase).

1213–34 **NH** 149A746.

1213–35 22**AlaA**615, 118S504; 38**GaA** 729, 145SE479(2dcase); 228**Ky**164, 14 SW(2d)408; 232**Ky**820, 24SW(2d)595; **LaA** 129S565; **SD** 228NW409.

1214–36 218**Ala**200, 118S387(1stcase); 10**LaA**50, 120S886.

1214–37 **CalA** 290P311.

1214–38 22**AlaA**615, 118S504.

1214–39 248**Mich**241, 226NW880; 50**RI** 481, 149A376.

1215–46 262**Mass**233, 159NE516.

1215–47 1**LaA**758.

1215–49 104**NJL**391, 140A411; 133 **Misc**652, 233**NYS**309. [a] **CalA** 287P 354.

1215–51 242**Mich**95, 219NW69.

1215–64 **CalA** 287P562 (wife's contributory negligence attached to husband).

1216–69 **Wash** 290P849.

1216–73 [a] **Rebuttal of presumption of due care.**–**Mich** 233NW225.

1216–74 38**F(2d)**1; 78**CalA**733, 248P 727; 84**CalA**721, 258P686; 84**CalA**721, 258P686 (law presumes pedestrian acted with due care); 85**CalA**55, 258P988; 88 **CalA**671, 263P1027; **CalA** 285P731; **CalA** 292P132; **CalA** 293P173; 30 **Hawaii**44; 11**LaA**663, 124S564(2dcase); **LaA**125S748; **LaA** 130S247; 126**Me**558, 140A368; 154**Md**63, 139A564; 157**Md** 528, 146A851; 259**Mass**272, 156NE254; **Mass** 172NE90; 179**Minn**332, 229NW 341; **MoA** 297SW180; **MoA** 31SW(2d) 580; **NH** 148A461; **NJSup** 143A153; 35 **OhA**164, 171NE862; 123 **Or**50, 260P 1012; **TexCivA** 7SW(2d)661; **Va** 154SE 522; 144**Wash**409, 258P39. [a] (1) **CalA** 285P879; 126**Me**558, 140A368. [c] (1) 81**CalA**270, 253P776. (2) 46 **Ida**214, 267P222. [g] **Driver approaching intersection with due care** is not presumed to have later cast aside precaution. 11 **LaA**663, 124S564(2dcase).

1216–76 78**CalA**733, 248P727. [b] **Where plaintiff's evidence raises presumption of negligence** he is only required to produce evidence sufficient to counterbalance evidence giving rise to presumption, not to overbalance it. 118 **Oh**307, 160NE898, 58**ALR**1476.

1216–77 **LaA** 130S821.

1216–78 84**CalA**721, 258P686; 85**CalA** 55, 258P988; 292**Pa**293, 141A41; 105 **WVa**579, 144SE292.

1216–80 9**LaA**391, 119S287; 261**Mass** 442, 158NE893; **Mass** 172NE891; **Mass** 172NE895; **Alta** [1929] 4**DomLR**314.

1217–82 **Conn** 151A433; 252 **IllA**238; **IndA** 168NE471(1stcase); 127**Me**316, 143A178; 128**Me**346, 147A423; 248**Mich** 416, 227NW547; 248**Mich**574, 227NW 767; **Va** 153SE691.

1217–86 **TexCivA** 30SW(2d)423.

1217–92 85**Colo** 384, 276P333(2dcase).

1217–97 102**CalA**600, 283P295.

1217–2 227**AppDiv**577, 238**NYS**575; 292 **Pa**293, 141A41.

1218–6 **CalA** 283P886; 320**Mo** 598, 8SW (2d)924; 298**Pa**158, 148A90.

1218–7 [a] 243**Mich**634, 220NW770.

1218–9 243**Mich**634, 220NW770.

1218–10 13**LaA**194, 127S133(2dcase) (facts held insufficient to raise presumption of deceased's negligence).

1218–13 **Mass** 170NE402.

1218–20 219**Ala**108, 121S388; 220**Ala** 130, 124S300 (custom in using street); **CalA** 282P1008; 227**AppDiv**31, 237**NYS** 90; **Utah** 283P160; 200**Wis**504, 228NW 126.

1218–23 40**GaA**188, 149SE85; 207 **Iowa** 113, 222NW416, 62**ALR**1174.

1219–24 90**CalA**764, 266P606; 218**Ky** 535, 291SW785; **Mich** 233NW321.

1219–25 208 **Iowa**1157, 225NW346; 104 **NJL**397, 140A419.

1219–27 40**GaA**328, 149SE713; **Nebr** 232NW616.

1219–34½–New. Excluding the law requiring trains to signal at crossings is not erroneous in a guest's action against the driver of an automobile struck by a train. 177**Minn**298, 225NW162.

1219–34¼–New. In an action against the owner of an automobile to recover because of negligence of the driver, the negligence must be proved by evidence that is admissible against the owner although the driver is also defendant. **Iowa** 228NW880.

1219–37 220**Ala**220, 124S516; 244**Mich** 319, 221NW318.

1219–43 [a] (5) **Auto skidding.** 293**Pa** 524, 143A231.

1220–51 220**Ala**220, 124S516; 206**Cal** 199, 273P560; 99**Fla**483, 126S784; **Mass** 169NE494; 252**NY**330, 169NE403; **Pa** 151A678. [a] (7) Other instances. 256 **IllA**425.

1220–52 107**Conn**91, 139A639; 99**Fla** 483, 126S784; 241 **IllA**530; 88 **IndA**36, 159NE156; **Mass** 168NE791 (evidence of suspension of license after accident held properly excluded); **MoA** 18SW (2d)575; **NJSup** 145A223; **NC** 153SE 607; 155**Wash**133, 283P1076. [a] (5) That plaintiff stopped car twenty-five feet after collision. **MoA** 18SW(2d)575. (6) Parking on left hand side of street before collision occurred. **NH** 147A898 (2dcase).

1220–53 But see 40**GaA**4, 148SE757; **Vt** 147A346.

1220–54 [a] 11**LaA**124, 119S446; 32 **OhA**301, 168NE52.

1220–55 233**Ky**487, 26SW(2d)12.

1220–56 26 **OhA**575, 160NE502.

1220–59 90**CalA**37, 265P514.

1220–61 173**Minn**250, 217NW127; 196 **Wis**614, 220NW203, 61**ALR**1243.

1220–64 151**Miss**436, 118S298; **Tex CommnA** 18SW(2d)575.

1220–66 But see 34**F(2d)**723.

1220–70 **Wash** 290P215.

1220–70½–New. In a joint action by a pedestrian against two automobilists, evidence that one of them intentionally drove his car against plaintiff as a choice of evil is inadmissible where there was no concert of action. **Iowa** 218NW625.

1220–70¼–New. Evidence that an automobilist was unaware of the custom of people to cross a street at a certain point has been held properly excluded. 297**Pa**199, 146A551.

1221–77 [a] **Ark** 30SW(2d)840(2dcase).

1221–82 **IndA** 160NE52. [a] **Evidence held inadmissible** to show lack of ownership in defendant. 265**Mass**33, 163 NE642(2dcase). [b] **Evidence held admissible** to show lack of ownership in third person. 265**Mass**33, 163NE642 (2dcase). [c] **Evidence held inadmissible.**–**NJSup** 149A262.

1221–95 245**Mich**44, 222NW126.

1221–96 80**CalA**109, 250P693.

1222–1 89**CalA**275, 264P580; 265**Mass** 33, 163NE642(2dcase); 222**MoA**346, 300 SW845.

1222–3 109**Conn**417, 146A822 (evidence that defendant's son was seen driving car alone as well as with defendant); 242 **IllA**405. [b] **Defendant owner riding with defendant driver may show** that he had loaned automobile to driver and was riding with him as his guest. 85**CalA**31, 258P712.

1222–4 246**NY**388, 159NE180; 9**PaDist &Co** 70.

1222–5 **IndA** 168NE126.

1222–11 34**Ariz**87, 267P947. But see **MoA** 6SW(2d)995. [a] **Admission of report of cab driver** to vehicle commissioner is reversible error. 111**Conn**407, 150A303.

1222–19 **CalA** 287P562 (conversation between driver and passenger admissible to show passenger was guest). [a] **Arrangement between driver and passenger injured** is admissible to show lack of joint enterprise. **Ala** 128S233.

1223–21 218**Ala**227, 118S283; 89**CalA** 275, 264P580; 25 **OhA**356, 158NE501; 132 **Or**67, 284P276. But see 38**GaA**424, 144SE127.

1223–23 25 **OhA**356, 158NE501; 132 **Or** 67, 284P276.

1223–25 **Miss** 119S824; 132 **Or**67, 284 P276.

1223–26 **IndA** 168NE471(1stcase).

1223–29 262**Mass**22, 159NE449.

1223–31 See also 264**Mass**383, 162NE 772.

1223–33 223**Ky**784, 4SW(2d)703.

1223–40 231**Ky**211, 21SW(2d)272 (character of road); 196**NC**213, 145SE 169; **Wash** 291P714. [a] (1) **CalA** 287 P354. (2) 154**Wash**57, 280P932 (obstructed view). (5) Presence of others in car. 22**AlaA**598, 118S230. (6) Corner well lighted and director of traffic present. **TexCivA** 19SW(2d)94. (7) As to existence and operation of traffic lights. 251 **IllA**320. (8) As to presence of stoplight. **Ala** 130S548.

1223–43½–New. The condition of the left side of a street is properly excluded where impracticability of traveling on the right side is not shown and the driver of a truck could not, in view of the statute, be deemed negligent in not using the left side. 79**CalA**436, 249P 840.

1223–43½–New. That other cars passed a negligently parked car is no excuse for such negligence precluding recovery. 92CalA145, 267P887.

1223–44 207 Iowa113, 222NW416, 62 ALR1174; NJSup 140A894. See also Ala 130S416.

1224–46 206Cal199, 273P560; 204 Iowa1162, 216NW627; 158Md424, 149A 4; 58ND263, 225NW459; 34 OhA207, 170NE607.

1224–48 Mich 233NW225. [a] Whether evidence was too remote, is within discretion of trial judge. Me 149A385.

1224–54½–New. An officer's testimony as to what he did for an injured passenger after the accident is inadmissible. 107Conn91, 139A639.

1224–58 104WVa636, 141SE14.

1224–65 Mass 169NE494; Mass 171NE 658 (not conclusive); 196NC824, 146 SE709.

1224–67 40GaA188, 149SE85; 34 OhA 207, 170NE607; 129 Or435, 277P291.

1225–68 Vt 144A378; 154Wash57, 280 P932 (knowledge of nearness to schoolhouse six hundred feet away).

1225–71 204Cal 387, 268P345.

1225–72 92CalA52, 267P724.

1225–73 204Cal 329, 267P1079; 92CalA 52, 267P724.

1225–77 CalA 287P354; 150Wash278, 272P736.

1225–78 102CalA396, 283P336; 175 Minn449, 221NW715. [a] (1) 207 Iowa 113, 222NW416, 62ALR1174.

1225–79 38GaA619, 144SE827; 220 MoA1294, 290SW1014; 126 Or532, 270 P521; TexCivA 25SW(2d)907(2dcase); Wis 229NW360.

1225–80 [a] 85CalA216, 258P1107; 227 Ky486, 13SW(2d)497; 244Mich319, 221 NW318; Nebr 231NW503. [b] See also 220MoA1294, 290SW1014.

1226–82 See also 316Mo 1143, 295SW 751. But see 37GaA389, 140SE632.

1226–83 SD 228NW409 (opinion based on moving lights).

1226–87½–New. , and although the attention of the witness was not attracted to the motor vehicle before the collision. 37GaA389, 140SE632.

1226–87½–New. An estimate of the speed of a motor vehicle may be admissible although the witness has testified that he made no estimate until after the collision. 37GaA389, 140SE632.

1226–5 Wis 232NW865.

1227–14 90CalA762, 266P352; 158Md 424, 149A4 (conviction of driving while intoxicated). See also 218Ala603, 119S 841.

1227–15 Cal 290P33. [a] That pedestrian was intoxicated when struck is not in itself evidence of his contributory negligence. Cal 290P33.

1227–18 Mass 169NE557.

1227–22½–New. Evidence of plaintiff's use of intoxicants on days remote from date of accident is properly excluded. 180Minn116, 230NW270.

1227–25 177Ark1174, 9SW(2d)788; 197Wis300, 222NW220. [b] Evidence held inadmissible.–158Md424, 149A4.

1227–33 [a] Evidence that defendant staggered around after the accident has been held admissible. 233Ky38, 24SW (2d)915.

1227–35½–New. In an action for injuries caused by a collision with a telephone pole on the driver's failing to make a turn properly, testimony by another, offered to show that the witness' automobile was driven through the intersection at the place of the accident at about the rate of speed at which defendant was driving on the occasion of the accident has been excluded as incompetent. 128 Or409, 272P1027.

1227–39 252 IllA238.

1227–43 Compare MoA 7SW(2d)719.

1228–48 Iowa 228NW880; 261Mass26, 158NE341; MoA 6SW(2d)1017 (that insurance company would take care of matter impliedly admitted negligence and was therefore admissible as admission).

1228–51 172Minn543, 216NW233.

1228–55 157Md528, 146A851. But see 107Conn670, 142A461.

1228–60 Iowa 228NW880.

1228–64 92CalA52, 267P724 (expert testimony as to adjustment of brakes); 92 CalA145, 267P887 (jury may consider kind of vehicle negligently parked causing injury); 251Mich210, 231NW569. [a] (7) Condition of brakes on morning of injury held admissible. 104NJL87, 139A419. (8) As to skid marks and marks of wheels on road. 145Wash383, 260P245. (9) Wrecked condition after accident. 128 Or409, 272P1027. (10) That defendant's car was not equipped with brakes as required by statute. 297 Pa199, 146A551. [c] Expert opinion.–Or 292P1094(2dcase).

1228–65½–New. Testimony as to the position of the spark lever on an automobile two hours after an accident has been held admissible. 179Minn293, 229 NW97.

1229–66 See also NJL 142A642.

1229–67 100Vt455, 138A739.

1229–76 252 IllA423. See also TexCivA 28SW(2d)622.

1229–77 79CalA339, 249P533; 38GaA 431, 144SE218(2dcase); TexCivA 23SW (2d)488.

1229–83 228Ky635, 15SW(2d)497.

1229–85 Or 292P1094(2dcase).

1229–86 126 Or532, 270P521.

1230–94 But see 154Md63, 139A564.

1230–95 154Md63, 139A564.

1231–15 La 124S678; 110Conn271, 147 A822; 10LaA189, 120S668; 11LaA532, 121S636; 9LaA680, 121S649; 4LaA377; 11LaA71, 123S352; LaA 124S701; 12 LaA167, 125S294; LaA 127S663 (place of accident); LaA 130S669; Mo 295SW 751; 31 OhA229, 166NE916. [a] Evidence held sufficient to warrant finding of wanton conduct on part of defendant's driver. 28 OhA468, 162NE826. [b] Contention that passenger controlled driver held without merit.–300Pa225, 150A477. [c] Evidence held sufficient to show speed of defendant's automobile at time of collision was twenty-five miles per hour. LaA 130S129.

1231–17 NJ 145A632; NJSup 140A430; 148Wash165, 268P153. [a] Evidence held sufficient.–NH 148A466. [b] Finding that passenger was not invitee held against weight of evidence. NJSup 150 A59.

1231–18 9LaA680, 121S649. [a] (3) To show that truck struck boy on playground rather than on street. 81Mont 79, 261P613.

1231–19 [b] Evidence sufficient to show accident occurred on south side of intersection. 13LaA110, 127S439.

1231–20 [a] 206Cal199, 273P560; 10 LaA31, 120S798(1stcase); 10LaA777, 123S127; 12LaA236, 125S168(2dcase); LaA 128S199; 265Mass33, 163NE642(2dcase); 136Misc197, 239NYS565; 28 OhA 382, 162NE710; 86PaSuper581; TexCivA 19SW(2d)94; 152Va305, 147SE194. [b] 97Fla435, 121S95(1stcase); Mass 167NE762; TexCivA 299SW342; 197 Wis356, 222NW235. See also Wis 232 NW543.

1231–21 [a] Cal 291P190; 78CalA733, 248P727; 12LaA236, 125S168(2dcase); NJSup 147A729(2dcase); 33PortoRico 128. [b] 13LaA132, 127S473.

1231–22 Minn 232NW790; 151Miss635, 118S450. [a] 38F(2d)731; Ala 127S 668; Ark 31SW(2d)302; 208Cal 216, 280P965; Cal 283P66; 93CalA666, 270 P263; 94CalA703, 271P789; CalA 287 P354; CalA 287P360; CalA 287P562; CalA 289P218; Conn 152A148; Ida 287 P944; IndA 171NE302; 129Kan53, 281 P906; 10LaA777, 123S127; 13LaA86, 127S127; Md 151A400; NJSup 145A232 (1stcase); 50RI 394, 148A186; SD 228 NW409; TexCivA 17SW(2d)858. [b] 219Ala380, 122S338; 83CalA179, 256P 555; 85CalA31, 258P712; 256 IllA170; IndA 171NE18; 228Ky239, 14SW(2d) 775; 230Ky750, 20SW(2d)713; 155Md 400, 142A491; 262Mass233, 159NE516; 263Mass244, 160NE818; Mass 173NE 524; MoA 19SW(2d)559; NJSup 151A 548; NH 149A746; 229AppDiv693, 242 NYS573 (evidence held to establish use of automobile without permission); 149 Va140, 141SE836. [c] 89CalA275, 264P 580; 111Conn407, 150A303. [d] 34Ariz 87, 267P947. [e] Evidence of agency held to sustain judgment. LaA 129S 459.

1232–23 Va 153SE664 (directing operation of automobile). [a] Ala 127S668; 203Cal 430, 264P757; 89CalA511, 265P 318; CalA 284P1062; CalA 291P591; 40GaA397, 149SE814; IndA 163NE515; 129Kan53, 281P906; 228Ky164, 14SW (2d)408; 164La920, 114S836; 12LaA 359, 125S481; LaA 129S565; Minn 232 NW38; MoA 27SW(2d)1039; NJSup 147A375; 55ND375, 213NW847; 86Pa Super581; TexCivA 19SW(2d)94; Tex CivA 19SW(2d)438. [b] 83CalA179, 256 P555; 92CalA266, 267P926; CalA 274P 587; CalA 290P311; 110Conn604, 149 A400, 68ALR1044; Ida 287P944; 12 LaA236, 125S168(2dcase); LaA 129S 390; 264Mass557, 163NE159; 58ND685, 227NW226; 299Pa211, 149A168; TexCivA 11SW(2d)371; TexCivA 22SW(2d) 714. [c] 22AlaA215, 114S277; 13LaA 151, 127S438; Mass 168NE178; Mo 9 SW(2d)918; 28 OhA382, 162NE710; 200Wis205, 227NW861 (prima facie case). [f] Evidence to overcome presumption arising from ownership and general employment must be positive, unequivocal, and unimpeached. MoA 27 SW(2d)1039.

1233–24 [a] 109Conn417, 146A822; IndA 171NE388(1stcase); 11LaA368, 123S338; 151Va363, 144SE477. [b] Conn 151A318; 242 IllA405; 124Kan 381, 260P609; 133Misc652, 233NYS309; 153Va675, 151SE282.

1233–25 [b] Joint enterprise not shown. –85CalA31, 258P712.

1233–26 [a] MoA 6SW(2d)993.

1233–27 79CalA234, 249P223; 12LaA 236, 125S168(2dcase); 316Mo 1143, 295 SW751; MoA 18SW(2d)127; 154Wash 229, 281P995(2dcase) (substantial evidence). [a] (1) 106Conn447, 138A365. (3) 203Cal 167, 263P238; 82CalA215, 255P755; 83CalA508, 257P114; 87CalA 563, 262P481; 100CalA678, 280P989; 253 IllA444; 10LaA777, 123S127; 31 OhA273, 167NE407; Va 154SE502. (4) 109Conn58, 145A54; NJ 143A546. (5) 98CalA598, 277P365. (7) 200Cal 648, 254P256; 200Cal 726, 254P891; 205Cal 89, 269P932; Cal 288P781; Cal 290P 571; 79CalA339, 249P533; 81CalA423, 254P289; 83CalA358, 257P109; 89CalA 103, 264P589; 94CalA463, 271P509; 101 CalA503, 282P10(2dcase); 102CalA477, 283P132; CalA 290P62; 106Conn264, 137A753; 108Conn602, 143A881; Ida 290P724; 243 IllA518; 247 IllA372; IndA 159NE162; Iowa 233NW23; 123 Kan164, 253P1097; 10LaA534, 120S229; 9LaA729, 120S231; 2LaA231; 2LaA 273; 2LaA419; 3LaA292; 3LaA368; 3LaA431; 6LaA864; 7LaA506; 7LaA 708; 9LaA700, 119S764; 10LaA763, 123 S137; 10LaA772, 123S187; 11LaA47, 123S399(1stcase); 11LaA626, 124S531; 11LaA694, 124S680; 12LaA481, 126S 96; 12LaA537, 126S565; 13LaA304, 126 S727; 13LaA439, 127S5(2dcase); 13 LaA74, 127A27; 13LaA680, 128S670; LaA 130S60; LaA 130S129; LaA 130S 565; LaA 130S666; 127Me75, 140A909; 261Mass238, 158NE671; 264Mass383, 162NE772; 240Mich671, 216NW413; 242Mich145, 218NW653; 242Mich228, 218NW698; 246Mich377, 224NW657; 250Mich478, 231NW41; 172Minn591, 216NW537; 174Minn545, 219NW866; 176Minn83, 222NW580; 176Minn410, 223NW456(1stcase); Minn 231NW714; 156Miss236, 125S544; 221MoA823, 293 SW460; 86Mont545, 284P542; 118Nebr 395, 225NW36; NJ 141A166; NJ 144A 190; NJ 149A756; NJ 151A77; NJSup 139A904; NJSup 142A437; NJSup 145 A472(2dcase); NJSup 147A729(1st case); NJSup 147A729(2dcase); NJSup 148A181; NJSup 149A119; NJSup 150 A578; 222AppDiv310, 226NYS31; 132 Misc22, 227NYS746 (right of way); 132 Misc89, 228NYS671; 227AppDiv644, 235 NYS732; 29 OhA101, 163NE206; 138 Okl 53, 280P464 (overtaking vehicle colliding with plaintiff's car); 298Pa244, 148A105; 299Pa91, 149A110; 300Pa 586, 150A483; 87PaSuper291; 87PaSuper294; 9PaDist&Co 709; RI 150A753; TexCivA 4SW(2d)210; TexCivA 25SW (2d)935; Utah 273P515; Vt 144A378; 144Wash205, 257P1118; 147Wash50, 264P716; 147Wash607, 266P733; 149 Wash84, 270P125; 150Wash174, 272P 513; 154Wash330, 282P213; Wis 228 NW509; 41Wyo 101, 282P1061(2dcase). (9) 12LaA475, 125S304; TexCivA 29 SW(2d)883; 155Wash141, 283P707; BC [1930] 2DomLR73. (11) 233Ky38, 24 SW(2d)915; 134 Okl 145, 272P475; 86

PaSuper22; SD 231NW540; Va 152SE 370. (14) 80CalA56, 251P235; 83CalA 655, 257P447; 99CalA357, 278P500; 9 LaA394, 120S494; Minn 232NW344; Nev 288P601; 225AppDiv399, 233NYS 381; 29 OhA522, 163NE917; 148Wash 165, 268P153; 105WVa46, 141SE434; 198Wis82, 223NW414. (15) CalA 284P 681; Me 150A487. (16) 90CalA144, 265 P558. (17) 204Cal 28, 266P280; 206Cal 209, 273P578; Cal 283P66; 80CalA590, 252P739; 86CalA595, 261P481; 88CalA 67, 262P1106; 88CalA671, 263P1027; 89CalA511, 265P318; 97CalA311, 275P 526; 102CalA669, 283P845(2dcase); CalA 283P885; 48 Ida789, 285P676; 19LaA723, 122S912; 12LaA520, 124 S778; Mass 171NE469; Minn 232 NW630; NJSup 139A893; NJSup 145 A224; NJSup 147A469(2dcase); NJ Sup 147A640; 293P441, 143A131; 91 PaSuper478; 11PaDist&Co 771; 152 Va236, 146SE265; 196Wis334, 220NW 375. (20) 12LaA442, 124S780. (21) 207 Cal 362, 278P441; 102CalA221, 282P 1009; 12LaA598, 126S241; 177Minn42, 224NW255; 296Pa400, 145A909; 298Pa 554, 148A860. (22) 45 Ida83, 260P1027; 7LaA534; 7LaA550; NJSup 147A464; 105WVa118, 141SE631. (26) Automobile running into bicycle at intersection. NJSup 139A387. (27) Runaway car. 82CalA542, 255P858. (28) Pedestrian standing on safety platform. 241Mich 361, 217NW32. (29) Truck skidding into building. 165La1075, 116S563. (30) Not stopping when blinded by lights of other cars. 127Me316, 143A 178. (31) Person struck by tractor. 98 CalA373, 277P156. (32) Colliding with one repairing flat tire. NJSup 145A321 (2dcase). (33) Child in playground. 84Mont397, 276P437. (34) Pedestrian on sidewalk. 3LaA221. (35) Collision with motorcycle. Me 151A443. (36) Collision with parked truck. Cal 292P 649; CalA 290P684. (37) Person cranking car injured by reason of driver's advancing spark lever. 179Minn293, 229 NW97. (38) Collision with train. 254 IllA49. (39) Pedestrian standing beside road near automobile. 11LaA485, 124 S160. (40) Standing near parked automobile. 11LaA485, 124S160. (41) That truck backed into automobile. 11LaA 700, 124S716. (42) Person alighting from truck. Minn 231NW242. (43) Other instances. CalA 284P1086; 111 Conn728, 150A507; 13LaA376, 128S47; Mich 233NW321. [b] (1) 5LaA730; 230AppDiv197, 243NYS207. (2) IndA 172NE783; 12LaA373, 125S495; 5LaA 441; Mass 168NE99; 116Nebr835, 219 NW235; 200Wis698, 229NW33. (3) 97 CalA387, 275P813; 100CalA618, 280P 710; 101CalA274, 281P1081; 101CalA 610, 281P1087; CalA 284P470; CalA 291P461; 83Colo 211, 263P933; 108 Conn9, 142A385; 251 IllA99; 233Ky 487, 26SW(2d)12; 11LaA474, 123S900 (2dcase); 11LaA286, 123S411; 11LaA 663, 124S564(2dcase); 12LaA6, 125S74; 12LaA231, 126S882; 12LaA318, 126S 94; 13LaA151, 127S438; 13LaA110, 127 S439; 5LaA730; 6LaA52; 265Mass444, 164NE448; MoA 23SW(2d)1104; NJ 143A555; NJSup 146A683(2dcase); NJ Sup 146A684; 235 OhA164, 171NE862; BC [1929] 3DomLR617. See also Cal 291P830. (4) 196NC739, 147SE8; RI 150A749. (6) 10LaA215, 120S391(2dcase); 12LaA3, 124S848. (7) 179Ark 742, 188W(2d)345; CalA 290P497; 109 Conn144, 145A662; 9LaA636, 119S900; Minn 232NW326; NJ 145A627(1stcase). (8) 97CalA524, 275P1029; 9LaA517, 121 S216; 12LaA260, 124S553; 13LaA76, 126S720; 127Me80, 141A183; 88Pa Super377. (12) Injury to omnibus passenger due to projection from sidewalk. Eng 23TLR616. (13) Collision with animals. 11PaDist&Co 243; 154Wash634, 283P467(2dcase). (14) Pedestrian crossing between intersections. CalA 290P924. (15) To show physical impossibility of complying with ordinance. 255 IllA106. (16) Owner's knowledge of defects. GaA 155SE88. (17) Other instances. 83CalA408, 256P870; Me 149 A383(2dcase); MoA 26SW(2d)807; 245 NY579, 157NE865. [c] **Evidence sufficient to support finding of no negligence.**–177Ark807, 8SW(2d)436; 89CalA 101, 264P588. [d] **Evidence held not to sustain judgment.**–35 OhA16, 171NE352.

1235-28 [a] 203Cal 167, 263P238; LaA 127S475; 13LaA272, 127S764. [b] 34F (2d)723; 80CalA342, 251P818; 233Ky 763, 26SW(2d)753; 233Ky756, 26SW (2d)1035; Va 153SE691; 153Wash598, 280P74.

1235-29 [a] 110Conn108, 147A370; 110 Conn169, 147A568; 242 IllA166; 12LaA 456, 125S316; Mass 169NE557; NJSup 146A62. [b] Mass 172NE887; 129 Or 44, 276P244.

1235-30 111Conn88, 149A233. [a] (1) 111Conn72, 149A231; NH 148A466; 155 Wash597, 285P657. (2) Other instances. Conn 151A318. [b] **Evidence held sufficient to show gross negligence.**–LaA 128 S199; Mass 169NE413; Mass 169NE 559; 148Wash516, 269P825; 155Wash 364, 284P348. [c] **Evidence held to make prima facie case of gross negligence.**–Cal 287P343.

1235-31 [a] 24F(2d)320; 204Cal 329, 267P1079; 89CalA511, 265P318; 91 CalA84, 266P616; CalA 282P388; CalA 284P681; CalA 286P1057; 98Fla720, 124S180; 38GaA619, 144SE827; 233Ky 211, 25SW(2d)363; 10LaA210, 120S65; 10LaA189, 120S668; 12LaA13, 124S846; 13LaA70, 126S262; LaA 127S475; LaA 129S233; LaA 129S390; 172Minn591, 216NW537; 154Miss707, 123S871; NJ 148A156; NJ 149A756; NJSup 145A 232(1stcase); 131 OrA180, 282P236; 91 PaSuper478; 158Tenn333, 13SW(2d) 322; TexCivA 17SW(2d)858; Wash 290 P828; 200Wis353, 228NW745. [b] 97 CalA387, 275P813; 102CalA221, 282P 1009; 226Ky275, 10SW(2d)817; 12LaA 373, 125S495; 12LaA547, 126S538; Tex CivA 19SW(2d)94; Va 152SE370. [c] **Other illustrations of sufficiency of evidence relative to speed.** CalA 292P523.

1235-32 [a] 83CalA655, 257P447; CalA 287P110; 6LaA603; 221MoA823, 293 SW460; NJSup 144A307; 80CalA590, 252P739; 12LaA642, 125S773; LaA 129 S234; LaA 129S390; MoA 19SW(2d) 306; NJSup 147A467; 32 OhA451, 168 NE230; 296Pa198, 145A827. [c] **Evidence held not to warrant finding that** driver could have seen person in time to avoid striking him. LaA 129S401.

1236-34 [a] (1) 83CalA655, 257P447. (2) 218Ala537, 119S667; NJSup 145A 232(1stcase); Utah 272P207. (4) MoA 108W(2d)75. (5) 12LaA97, 124S572; TexCivA 18W(2d)501. (8) LaA 129S 389; NJSup 145A325(1stcase). [b] (1) 79CalA234, 249P223. (5) Stopping. 49 RI 32, 139A652, 62ALR967.

1236-35 [a] (2) 203Cal 167, 263P238; 82CalA542, 255P858; Nebr 231NW809; NJSup 145A232(1stcase).

1236-36 [a] 78CalA733, 248P727; 81 CalA747, 254P679; 82CalA751, 256P224; 109Conn500, 147A16; 174Minn105, 218 NW249; NJSup 145A870(2dcase); NJ Sup 146A688(2dcase); 225AppDiv25, 232NYS71; 92PaSuper372; Utah 272P 207. [b] 12LaA547, 126S538.

1236-37 [a] (1) 102CalA280, 282P990; 11LaA485, 124S160; 133Misc293, 231 NYS657. (3) 97CalA242, 275P514; 102 CalA436, 283P317; LaA 130S137; Minn 232NW710; MoA 6SW(2d)993. See also 82CalA660, 256P457. (4) 10LaA188, 120S778; 12LaA13, 124S846. (6) 102 CalA221, 282P1009. (7) 85CalA332, 259 P470; 111Conn58, 149A210. (8) CalA 284P499; 10LaA189, 120S668; 200Wis 601, 229NW74. (10) 102CalA221, 282P 1009. (11) 229Ky284, 17SW(2d)233; NJSup 145A227. (18) Minn 232NW 715; Wash 292P1014. (20) Backing car on wrong side of street without warning. 82CalA215, 255P755. (21) Failure to set emergency brake when parking car. 82CalA542, 255P858. (22) Passing in front of approaching street car. MoA 14SW(2d)529. (23) Turning left in front of another vehicle without sufficient room. NJ 145A644 (1stcase). (24) Failure in not seeing stone and governing speed of bus accordingly. NJSup 144A585(1stcase). (25) Passing semaphore set against traffic. 91PaSuper478. (26) Turning across street into private driveway. Alta [1929] 4DomLR561. (27) Proceeding across congested square. Mass 172NE 93. (28) Other instances. 13LaA410, 128S320; 249Mich586, 229NW499. [b] (6) 12LaA547, 126S538. (8) Parking in highway. 123 Or50, 260P1012. (9) Transferring steers from truck to yard. 297Pa39, 146A261. (10) Failure to use chains. 108WVa635, 152SE201. [c] **Violation of statute held prima facie evidence of negligence.**–207 Iowa1271, 224NW576 (turning at intersection). [d] **That owner did not have car overhauled does not justify finding he was culpably careless.** 230AppDiv149, 243 NYS630.

1237-38 9LaA636, 119S900.

1237-39 38GaA619, 144SE827; 298Pa 554, 148A860.

1237-40 298Pa244, 148A105. [a] (3) Inference of negligence from driving at excessive speed on slippery pavement down grade is warranted. 92CalA20, 267P754.

1237-42½–New. That defendant's driver might have avoided a collision if he had done or omitted certain acts does not establish that his failure to do so was negligence. 87CalA99, 261P1049.

1237-43 204Cal 101, 266P803; 84CalA 599, 258P616; 11LaA692, 122S900; 296 Pa400, 145A909; 195Wis341, 218NW 188. [a] (1) 78CalA733, 248P727; 102 CalA600, 283P295; 110Conn271, 147A 822; 125Kan648, 266P69; LaA 124S 701; 12LaA359, 125S481; NJSup 146A 785; TexCivA 48W(2d)1013; TexCivA 21SW(2d)13; 154Wash261, 282P52. (3) 90CalA730, 266P588; 10LaA486, 120S 689; 13LaA208, 127S2; Minn 232NW 710; Nebr 232NW620; Or 276P668; 296Pa561, 146A141. (4) 156Miss236, 125S544; Alta [1928] 2DomLR845. (5) 204Cal 374, 268P369; 83CalA655, 257P 447; 101CalA503, 282P10(2dcase); 5 LaA140; 10LaA780, 123S129; 12LaA 477, 126S86; 12LaA562, 126S274; LaA 127S756; LaA 129S233; 157Miss303, 127S775; 221MoA823, 293SW460; MoA 18SW(2d)575; Nebr 232NW620; 128 Or409, 272P1027; 200Wis353, 228NW 745. (6) LaA 130S821; LaA 130S861; Minn 232NW344; Nebr 232NW620; Alta [1928] 2DomLR845. (7) 12LaA477, 126S86. (8) 12LaA477, 126S86. (9) CalA 288P805; 13LaA20, 127S751; LaA 127S756; 13LaA287, 127S760. (10) 9 LaA740, 120S262. (12) 254 IllA261. (16) MoA 15SW(2d)370. (18) Concurrent negligence. 223Ky446, 3SW(2d) 1082. (19) Forcing other car off road into ditch. TexCivA 4SW(2d)211. (20) Collision between automobile and mule. 150Va95, 142SE385. (21) Collision at intersection. 97CalA731, 276P149. (22) Injuries suffered in subsequent fall. 229 Ky284, 17SW(2d)233. (23) Driving across playground. 84Mont397, 276P 437. (24) Negligent parking. 92PaSuper304. (25) Reckless driving of chauffeur resulting in injury to occupant in collision with wagon. 252 IllA238. (26) Defective steering apparatus. LaA 125 S748. (27) Parking unlighted truck more than one foot from curb and less than sixty feet from intersection. 13 LaA604, 128S54. (28) Defective brakes. Nebr 231NW809. (29) Truck crashing into porch. NJ 151A477. (30) Concurrent cause. Cal 293P62. (31) Suddenly cutting in front of automobile. NC 155 SE247. (32) In general. CalA 287P518. (33) Other instances. 111Conn58, 149A 210; LaA 127S663; LaA 129S227; 157 Md528, 146A851; Mass 172NE93; 178 Minn353, 227NW203; NJSup 149A43; 230AppDiv149, 243NYS630; 299Pa469, 149A717. [b] (1) 110Conn271, 147A822; 13LaA105, 127S95(1stcase); 200Wis388, 228NW513. (4) 13LaA421, 127S404. (5) 256 IllA557; 233Ky329, 25SW(2d) 727; MoA 282SW161; MoA 28S8W 1036; TexCivA 29SW(2d)871. [b] (8) Application of brakes and skidding as proximate cause of injury. 222AppDiv 310, 226NYS311. (9) Driving over motorist engaged in repairing car. 129 Okl 134, 263P1086. (10) Where plaintiff collided with parked car in attempt to pass on right. 108Conn544, 143A886. (11) Failure to equip truck with skid chains. 84Mont397, 276P437. (12) Death of motorist. NJSup 144A317. (13) Defective brakes. 108WVa635, 152 SE201. (14) Violation of statute by allowing poles to protrude from side of automobile. LaA 130S237. (15) Other instances. 233Ky329, 25SW(2d)727. [c] **Evidence held sufficient to show neg-**

ligence of driver of automobile in which plaintiff was riding. **LaA** 130S564.

1237–45 92CalA20, 267P754. [b] (4) To show causal connection between defendant's negligent act and death of boy five months later. Mass 168NE154(1st case).

1238–47 12LaA523, 126S563.

1238–47½–New. That defendant's driver might have avoided a collision if he had done or omitted certain acts does not prove that his failure to do so was the proximate cause of the injury. 87 CalA99, 261P1049.

1238–49 IndA 168NE471; 263Mass139, 160NE783; 263Mass240, 160NE820; MoA 48SW(2d)875; Alta [1929] 4Dom LR314. [a] (1) 102CalA117, 282P421; 11LaA508, 124S156; 12LaA260, 124S553; LaA 124S678; 12LaA57, 125S144 (1stcase); 12LaA127, 125S153; Mass 172NE93; 248Mich416, 227NW547; NJ Sup 144A324; 154Wash634, 283P467 (2dcase). (2) 200Cal 706, 254P560; Md 150A728; 261Mass491, 159NE523. (3) 180Ark980, 23SW(2d)972; 80CalA342, 251P818; 83CalA635, 257P130; 93CalA 1, 268P1061; CalA 284P717; CalA 287 P518; CalA 292P140; 109Conn573, 145 A23; 126Kan408, 267P986; 9LaA186, 119S496; 3LaA327; 3LaA671; 6LaA 651; 9LaA700, 119S764; 10LaA197, 120S550; 11LaA40, 122S726; 10LaA 771, 123S169; 12LaA104, 124S566; LaA 130S354; LaA 130S821; 128Me 346, 147A423; Nebr 230NW588; NJ Sup 144A180; 132Misc89, 228NYS671; 90PaSuper260; 13PaDist&Co 452; Tex CivA 30SW(2d)409; Wash 289P524; Wis 228NW509; BC [1929] 3DomLR 617. (4) 123 Or610, 263P64; 127 Or103, 270P486(2dcase). (6) 180Ark980, 23 SW(2d)972; Iowa 230NW387; 126Kan 273, 268P117; Minn 231NW244, 292 Pa1, 140A555; 194Wis149, 216NW165; 196Wis614, 220NW203, 61ALR1243. (7) 101CalA748, 282P392. (8) 88Pa Super377. (10) 205Cal 625, 271P1051; 92CalA495, 268P483; 97CalA524, 275P 1029; 111Conn219, 149A671; 233Ky 763, 26SW(2d)753; 12LaA547, 126S 538; 243Mich634, 220NW770; 247Mich 121, 225NW533(2dcase); NJSup 151A 386(2dcase); 144Wash491, 258P34. (11) 2LaA106. (13) Driving of automobile by plaintiff's driver at night, when front lights did not fully meet demand of statute, has been held prima facie evidence of contributory negligence. 225AppDiv25, 232NYS71. (14) Failure to yield right of way. 10LaA 305, 120S883. (15) Pedestrian entering intersection on caution signal before traffic signal changed to "Go." 11 LaA564, 123S446. (16) Pedestrian walking directly into side of car. 233 Ky756, 26SW(2d)1035. (17) Repairman fixing street lamp. CalA 290P145. (18) Other instances. Minn 233NW316 (1stcase); 299Pa343, 149A477; RI 152 A253. [b] (1) 101CalA274, 281P1081; 102CalA669, 283P845(2dcase); CalA 289P245; Vt 148A283. (2) NJSup 139 A387. (3) 87CalA563, 262P481; 259 Mass191, 156NE6. (4) Cal 288P781; Cal 290P571; 81CalA423, 254P289; 86 CalA231, 260P600; 88CalA399, 263P 553; 97CalA242, 275P514; 97CalA731, 276P149; CalA 286P1057; CalA 290P 1051(2dcase); 106Conn143, 137A725; 108Conn602, 143A881; 127Kan479, 274 P204; 10LaA534, 120S229; 9LaA729, 120S231; 9LaA740, 120S262; 8LaA648; 12LaA481, 126S96; 13LaA57, 127S51; 13LaA546, 128S530; LaA 129S388; LaA 129S409; LaA 130S229; LaA 130 S861; 240Mich671, 216NW413; 242 Mich228, 218NW698; 176Minn83, 222 NW580; NJSup 148A181; 28 OhA219, 162NE639; 292Pa543, 141A491; RI 150A753; TexCivA 16SW(2d)337; Tex CivA 30SW(2d)423; Alta [1929] 4Dom LR561. (6) TexCivA 299SW665. (7) 88 IndA36, 159NE156; Mass 170NE402; Mass 171NE658; 148Miss827, 114S734; Nev 288P601; NH 148A461, NH 151 A262; NJSup 147A729; TexCivA 4SW (2d)210; TexCivA 4SW(2d)211; 195Wis 565, 217NW290. (8) 24F(2d)320; LaA 125S748; NJSup 147A400. (12) 100 CalA678, 280P989; Me 150A487; 267 Mass70, 165NE871. (15) 80CalA590, 252P739; 86CalA595, 261P481; 88CalA 67, 262P1106; 89CalA511, 265P318; 90 CalA730, 266P588; 97CalA311, 275P 526; 100CalA441, 280P197 (at intersection); CalA 286P474; 109Conn417, 146 A822 (between intersections); 111Conn 363, 149A855(1stcase); 218Ky535, 291 SW785; 10LaA313, 120S420(2dcase); 8LaA454; 12LaA520, 124S778; 127Me 316, 143A178; NJSup 145A224; 196 Wis334, 220NW375. (16) 73CalA733, 248P727; 155Wash552, 285P440. (22) 256 IllA557. (23) Motorcycle policeman. 195Wis19, 216NW522. (24) Pedestrian standing on safety platform. 241Mich361, 217NW32. (25) Collision with driverless truck. 79CalA406, 249 P837. (26) Store owner standing on pavement. 153Md264. 138A1. (27) Overtaking and attempting to pass another vehicle. CalA 284P499. (28) Collision with parked vehicle. CalA 290P 684; LaA 130S234(4thcase). (29) Collision with motor cycle. Me 151A443. (30) Motorist striking pole in attempting to avoid collision. CalA 291P903. (31) Other instances. 254 IllA469; 13 LaA376, 128S47; 221MoA362, 273SW 143; TexCivA 23SW(2d)516; Va 154 SE522. [c] **Evidence insufficient to show contributory negligence.**–88CalA671, 263 P1027. [d] **Evidence held not to show imputable negligence.** 92CalA145, 267 P887. [e] **Evidence held to show occupant, other than plaintiff, warned driver.** LaA 129S250. [f] **Evidence held insufficient** to show plaintiff asleep on vehicle at time of accident. SD 231NW 540. [g] **Evidence held to show there was ample room** for free passage between vehicles. TexCivA 29SW(2d)885.

1239–50 [a] (2) 10LaA760, 123S155. (3) 116Nebr835, 219NW235. (5) Pedestrian. 144Wash491, 258P34. (6) Jumping back into path of truck. 318Mo 666, 300SW795. (7) Trying to cross intersection ahead of defendant. 11LaA40, 122S726. (8) Failure to look ahead and going rapidly. 11LaA395, 122S876. (9) Evidence sufficient to support finding. 92CalA266, 267P926. (10) Passing car. 156Miss802, 126S906(2dcase). (11) Other instances. CalA 293P115; 233Ky329, 25SW(2d)727; LaA 128S 668; Wis 229NW533. [b] (1) 10LaA 763, 123S137; TexCivA 16SW(2d)337; 41Wyo 101, 282P1061(2dcase). (7) 41 Wyo 101, 282P1061(2dcase). (8) Collision between vehicles at intersection. 106Conn143, 137A725. (9) Occupant grasping steering wheel. 99CalA573, 278P906.

1239–51 CalA 268P445. [a] **Evidence held insufficient** to prove freedom from contributory negligence. 109Conn144, 145A662.

1240–60 34PortoRico 135 (plaintiff properly found by court to be partly, but not entirely, to blame for proximate cause of accident).

1240–70 256 IllA33.

1240–71 22AlaA215, 114S277.

1240–72 216Ala676, 114S137; 220Ala 130, 124S300; Ark 31SW(2d)302; 96 CalA169, 273P866 (location of accident); 79CalA234, 249P223; 79CalA339, 249P 533; CalA 257P577; 89CalA511, 265P 318; CalA 286P1057 (credibility of witnesses); CalA 290P515(2dcase); CalA 290P1062; 83Colo 211, 263P933; 107 Conn86, 139A635; 246 IllA69; Iowa 222 NW551; 233Ky38, 24SW(2d)915; Mass 169NE805; Mass 173NE524; 239Mich 380, 214NW128; 242Mich145, 218NW 653; 250Mich645, 231NW120; Mo 30 SW(2d)1065; MoA 21SW(2d)195; 84 Mont397, 276P437; NJSup 152A182(2d case); 198NC8, 150SE636; 34 OhA402, 171NE118; OhA 173NE303; Or 291P 1015; 289Pa565, 137A797; 86PaSuper 366; 90PaSuper14; TexCivA 23SW(2d) 522; Va 153SE664; 154Wash229, 281P 995(2dcase); 106WVa717, 146SE882. [a] **Evidence held sufficient for jury on** question whether accident occurred on street. 262Mass387, 160NE326. [b] **Time, place, and manner** of accident held for jury. 239Mich380, 214NW128. [c] **Location of center of intersection of highways** may be question for jury. 205 Iowa1394, 219NW813. [d] **Direction of verdict for defendant properly refused.**–254 IllA526. [e] **Where presumptions are not equally balanced, case** may be one for jury. 300Pa225, 150A 477.

1241–74 38F(2d)475(2dcase); 177Ark 35, 5SW(2d)728; 92CalA145, 267P887; 97CalA87, 275P456; CalA 289P900; CalA 292P132; 111Conn723, 150A508; 37GaA111, 139SE155; 45 Ida83, 260P 1027; 246 IllA425; 223Ky446, 3SW(2d) 1082; 259Mass211, 156NE15; 260Mass 206, 156NE884; 265Mass78, 164NE79; 152Miss377, 118S828; 321Mo 405, 11 SW(2d)8; 221MoA362, 273SW143; MoA 299SW85; MoA 7SW(2d)719; MoA 20 SW(2d)570; MoA 22SW(2d)1058; 80 Mont401, 260P702; 105NJL602, 147A 402; 198NC739, 153SE315; Oh 171NE 835; 138 Okl 63, 280P409; 126 Or373, 270P488; 294Pa490, 144A429; 90Pa Super176; 92PaSuper304; 93PaSuper 13; 141SC333, 139SE788; SD 233NW 283; TexCivA 26SW(2d)1091; TexCivA 30SW(2d)681; Utah 272P207; Utah 283 P160; 155Wash552, 285P440.

1241–74½–New. or defendant occupant, 154Md195, 140A70.

1241–75 CalA 291P903; 260Mass206, 156 NE884; 152Miss377, 118S828; 80Mont 401, 260P702; 198NC741, 153SE318; 141SC333, 139SE788; SC 155SE136; 197W's211, 221NW729.

1242–76 CalA 257P577; TexCivA 19 SW(2d)144.

1242–77 215Ala688, 115S239; 32 OhA 301, 168NE52 (violation of ordinance by third person); 34 OhA207, 170NE607; 49RI 364, 142A621. [a] 92CalA732, 268 P951. [c] **Violation of statute.**–Mass 172NE880.

1242–78 22AlaA343, 115S690; Ark 30 SW(2d)840(2dcase); Mich 233NW203; Minn 233NW309(1stcase); MoA 10SW (2d)327.

1242–79 296Pa561, 146A141.

1242–80 See also 92CalA732, 268P951.

1242–81 129 Or642, 276P693; 295Pa 101, 144A828.

1242–83 31F(2d)285; 261Mass394, 158 NE783. [a] **Evidence held insufficient to go to jury.**–CalA 285P1059; Mass 167 NE332.

1242–85 89CalA275, 264P580; 39GaA 149, 146SE328; 207 Iowa567, 221NW 514; 227Ky735, 13SW(2d)1028; 247 Mich157, 225NW609; 157Miss510, 128 S100; 221MoA246, 2SW(2d)205; 104 NJL387, 140A397; 136Misc197, 239NYS 565; 195NC613, 143SE1; Pa 149A333; Wash 291P714.

1242–86 266Mass220, 165NE91.

1242–87 26F(2d)534; 205 Iowa343, 218 NW69.

1242–88 97CalA87, 275P456; 37GaA 111, 139SE155.

1242–89 37GaA111, 139SE155; 89 Ind A139, 164NE859.

1242–90 85CalA31, 258P712.

1242–92½–New. Proof that husband and wife were tenants by entirety and that wife profited from crop conveyed in wagon colliding with motor cycle makes her liability question for jury. Or 291 P1015.

1242–94 203Cal 403, 264P484; Mass 173NE427.

1242–95 95CalA370, 272P797; 126 Or 155, 268P1020.

1242–96 43F(2d)45 (person on horseback); 216Ala676, 114S137; 220Ala130, 124S300; Ala 129S9 (gross negligence); Cal 293P62; 79CalA436, 249P840; 102 CalA221, 282P1009; CalA 285P731; CalA 286P1057; 110Conn697, 148A132 (1stcase); 36GaA815, 138SE286; 245 IllA454; 254 IllA469; IndA 168NE495; IndA 168NE701; 220Ky758, 295SW 1046; 259Mass272, 156NE254; 260Mass 206, 156NE884; 261Mass394, 158NE783; 261Mass442, 158NE893; 262Mass22, 159 NE449; Mass 167NE248; Mass 168NE 815; Mass 169NE148(1stcase); Mass 173NE498; Mass 173NE511; 239Mich 37, 214NW170; 238Mich669, 214NW 236; 239Mich699, 214NW939; 241Mich 361, 217NW32; Mich 233NW378; 172 Minn1, 214NW471; 172Minn134, 215NW 198; 179Minn293, 229NW97; 150Miss 68, 116S295; Mo 293SW135; 317Mo 64, 296SW1008; 320Mo 672, 8SW(2d) 599; MoA 296SW249; MoA 297SW180; MoA 17SW(2d)639; MoA 22SW(2d) 1058; MoA 24SW(2d)1054; 78Mont415, 258P236; 80Mont401, 260P702; NH 147 A896(1stcase); NH 152A275; 104NJL

87, 139A419; 104NJL391, 140A411; NJSup 139A004; NJSup 148A154; NJ Sup 149A826(1stcase); 226AppDiv509, 231NY701; 228AppDiv667, 238NYS [illegible] 136Misc197, 239NYS565; 126 Or [illegible] 270P438; 293Pa245, 142A [illegible] 34PaSuper581; 97PaSuper341; 97 PaSuper439; 98PaSuper574; 49RI32, [illegible] 34LR347; 8D 231NW540; [illegible] 3: TexCivA 300SW100; [illegible] 143A643; 144Wash155, 257 [illegible] 44Wash409, 258P39; 145Wash 520, 261P34; 149Wash180, 270P429; 293Wis49, 213NW625; 200Wis261, 227 NW257. See also Minn 232NW239. [a] Whether driver was guilty of gross negligence [illegible] Wash 287P359, [illegible] 143A676, 114SW137; CalA 291 [illegible] 10A139; 261Mass26, 158NE [illegible] Mass 171NE660; Minn 231NW [illegible] Miss 1[illegible]8824; MoA 31SW(2d)590; 3PaSuper221; 145Wash383, 260P245. [b] Question of [illegible] or canton negligence [illegible]

1242-32 [illegible] SW 2d [illegible]

1242-[illegible] [illegible] 13Mo[illegible], 149A [illegible] SW 2d [illegible]

1242-[illegible] Cal [illegible] P[illegible]

1242-2 [illegible] for [illegible] SW 2d [illegible]

1242-4 [illegible] SW 2d [illegible] Mass [illegible] Or 62, 270P522. [b] [illegible] 37Wyo 275, 260P [illegible] Evidence insufficient to go to [illegible] 88450. [d] Whether [illegible] s truck were de- [illegible] 155Wash628, 285P [illegible]

1242-5 265Mass78, 164NE79.

1242-7 [a] What, under circumstances, constituted ample lights as required by statute is for jury. CalA 284P1086. [illegible] Evidence insufficient to go to jury.– Iowa 2[illegible]

1243-8 [illegible] CalA[illegible] 279P[illegible] Conn 152 [illegible]

1244-9 [illegible] CalA[illegible] 279P[illegible] Conn 152 [illegible] NJSup [illegible] Ohio[illegible] 168 [illegible] Or [illegible] [illegible] TexCivA [illegible]

1244-11 [illegible] IllA[illegible] Iowa 222NW [illegible] NJ 15A394.

1244-12 CalA[illegible] [illegible] NC [illegible] Or[illegible] 275P[illegible]

1244-13 [illegible] Wis[illegible] NW627.

1244-18 CalA [illegible] 32Colo 431, [illegible] IllA[illegible] 265 Iowa[illegible], [illegible] Iowa [illegible] Mass [illegible] Or[illegible] 275P[illegible] [illegible] 8D [illegible] NW[illegible]

1244-17 [illegible] Mass [illegible] (2d cir.) [illegible] CalA[illegible] 281P[illegible] 87CalA[illegible] 255P [illegible] MoA 68SW(2d)979. [a] (1) Mass [illegible] NE494. (2) 179Minn86, 228NW347; MoA 208SW(2d)556. (3) 128 Or650, 275 P666; 147Wash624, 267P40. (4) 33 Ariz28, 262P5; 204Cal 287, 268P345; NJSup [illegible] (6) In cutting curve. Ala [illegible] (7) Other instances. 152 Miss[illegible] 120S198. [b] (1) 208Cal 350, [illegible] 102CalA396, 282P336; 208 Iowa[illegible] [illegible] 246Mich620, 225 NW[illegible] [illegible]Minn577, 219NW912; 225 AppDiv824, 232NYS540; 50RI 62, 145 A12; 149Va193, 141SE117; Wash 290 P828. (3) Utah, 283P160. (5) Waiting to board street car. 237Mich583, 213 NW188. (6) Alighting from street car. 32F(2d)27, 29 [citCJ]. (7) Other instances. 254 IllA469. [c] (1) 86CalA 459, 261P315; Mass 173NE545; MoA 218SW(2d)195; 126 Or532, 270P521. (2) 261Mass145, 158NE352. (3) 261 Mass145, 158NE352. [d] 177Minn249, 225NW98; 34 OhA207, 170NE607; Pa 151A678. [g] Collision with horse-drawn vehicle.–SD 231NW540.

1244-18 [b] (4) At twenty to thirty miles an hour passing school where many children are in plain sight, and on wrong side of street. 261Mass145, 158NE352. [e] (1) 261Mass60, 158NE 265. (4) At great speed and at night on strange road with dim lights. 82 Colo 491, 261P657. [h] 81CalA142, 253 P357. [m] 261Mass145, 158NE352. [n] (6) At twelve miles an hour on rainy and foggy night after drinking. NJL 142A552. [s] 208 Iowa361, 225 NW862; 90PaSuper360. [t] NJSup 144A322; 153Wash538, 280P15. [w] Auto coming from opposite direction.– 266Mass220, 165NE91. [x] Over icy roads.–58ND286, 225NW791.

1245-19 33F(2d)27; 219Ala353, 122S 437; 107Conn201, 139A782; 227Ky486, 138SW(2d)497; 158Md646, 149A543; MoA 299SW85; TexCivA 188SW(2d)744; Wis 228NW741.

1245-20 36F(2d)443; 94PaSuper548; TexCivA 20SW(2d)349. [a] Evidence not sufficient to go to jury.–298Pa522, 148A693.

1245-22 83CalA655, 257P447.

1245-26 181Ark925, 29SW(2d)676; 154 Wash57, 280P932 (where driver's view was obstructed).

1245-26½-New. Whether an automobile was being driven at a speed in violation of statute is a question for the jury. 154Miss707, 123S871.

1245-29 NJ 150A334; 132 Or332, 285P 823; Utah 283P160. [a] 79CalA339, 249P533. [b] (1) 256 IllA461 (whether negligence was willful). (2) 28 OhA42, 162NE456. (5) Striking boy on bicycle. TexCivA 296SW979. [c] (1) MoA 98W (2d)534; 149Va193, 141SE117. [d] (1) Utah 272P207. (3) MoA 26SW(2d)823. (6) Backing over child at street intersection. 82CalA215, 255P755. (7) Child crossing street. MoA 296SW203. [e] Coming out of private driveway.– 207 Iowa1001, 221NW949.

1246-30 227Ky486, 138SW(2d)497; Utah 272P207.

1246-33 203Cal621, 265P814; MoA 9 SW(2d)534.

1246-34 79CalA234, 249P223; 174 Minn577, 219NW912.

1246-35 CalA 257P577; 85CalA535, 259P958; 86CalA459, 261P315; 36GaA 815, 138SE286; 256 IllA425; 232Ky98, 22SW(2d)448; 234Ky702, 28SW(2d) 484; 221MoA823, 292SW460; MoA 20 SW(2d)556; 298Pa244, 148A105. [b] Stop light signal.–89 IndA139, 164NE 859.

1246-36 227Ky486, 138SW(2d)497; 232 Ky98, 22SW(2d)448; MoA 18SW(2d) 574; TexCivA 188SW(2d)744.

1246-40½-New. Question of driver's failure to sound horn on approaching an intersecting street, as required by ordinance which was not in evidence, should not be submitted to the jury. 320Mo598, 8SW(2d)924.

1246-49 TexCivA 18SW(2d)501; 200 Wis601, 229NW74.

1247-50 49RI 32, 139A652, 62ALR967.

1247-53 215Ala688, 112S239; Mass 168NE815; Minn 232NW712; Minn 232 NW715; 96PaSuper21 (causing plaintiff to turn and run into embankment and overturn to avoid collision). [a] Mass 172NE880; Mont 292P577; 196 NC314, 145SE555; Wash 292P1014. [b] 154Md516, 140A896; Wis 232NW 865.

1247-54 207 Iowa1018, 222NW420; 207 Iowa1271, 224NW576; NJSup 139 A317; 229AppDiv372, 242NYS11; 123 Or610, 262P64. See also 89 IndA139, 164NE359.

1247-56 See also 126Me202, 137A62.

1247-57 207 Iowa1018, 222NW420.

1247-62 82CalA215, 255P755; 290Pa 217, 138A755. [a] 101Vt94, 141A594. [c] (1) 146SC178, 143SE648. (7) Backing out from private property onto highway. 118Nebr395, 225NW36. [d] Evidence held insufficient for jury.–290 Pa1, 137A797. [e] Backing across sidewalk into plaintiff's premises.–89 PaSuper204. [f] Against pedestrian at intersection.–CalA 290P114.

1247-65 108Conn505, 143A888; 265 Mass74, 163NE750; 221MoA823, 293 SW460; Wis 228NW509. [a] 207 Iowa 1001, 221NW949. [b] Stopping without signal or noticing approach of other vehicle. 155Wash552, 285P440.

1247-67 154Md8, 139A541; 264Mass 233, 162NE355; Mich 233NW345; 180 Minn116, 230NW270; NJSup 146A689 (burned bus); 90PaSuper105; 152SC 239, 149SE329; Wash 289P1003; Wis 230NW31. [a] 33F(2d)440; 238Mich 457, 213NW705. [b] 239Mich699, 214 NW939; Minn 231NW244; Mo 27SW (2d)13; NJ 146A688(2dcase); NJSup 142A642; NJSup 145A870(2dcase); Okl 291P534; 131 Or612, 282P768; TexCivA 28SW(2d)892; 41Wyo 345, 285 P781. [d] CalA 289P245 (unlighted truck); Ida 291P1060; 266Mass17, 164 NE623; 238Mich457, 213NW705; 105 NJL608, 146A191; 89PaSuper99; Tex CivA 29SW(2d)484(2dcase) (parking truck with tank extending into road). [e] Where children playing.–223AppDiv 234, 228NYS20. [f] Evidence insufficient for jury.–MoA 17SW(2d)639.

1247-63 41GaA120, 152SE278; 254 IllA387; 178Minn465, 227NW493; Tex CivA 28SW(2d)892.

1248-70 109Conn602, 145A61; MoA 21 SW(2d)211; NJSup 148A208; Tex CivA 30SW(2d)681. [d] Heavy truck traveling steep grade leaving car track and going on pavement spotted with grease. 79CalA436, 249P840; 98CalA 268, 276P1055; MoA 14SW(2d)483; NJ 143A748. [e] Driving while blinded by sun.–55Wis339, 213NW574. [f] Driving into highway from private driveway.–208 Iowa1157, 225NW346. [g] Following too closely behind car which attempted to pass another. 229 Ky284, 17SW(2d)233. [h] Intoxication of driver.–158Md424, 149A4. [i] Where truck blocked sidewalk.–Oh 171 NE835. [j] Negligence of driver in running into rear of motor truck standing at loading platform. NJ 151A853.

1248-71 127Me335, 143A261.

1248-72 242 IllA93.

1248-74 [a] 177Ark1174, 9SW(2d)788; MoA 20SW(2d)556; NC 155SE163. [b] (1) 129Kan441, 283P921. (3) MoA 22 SW(2d)877. (7) With automobile stopping ahead. 155Wash552, 285P440. (8) Turning in front of other vehicle. 97PaSuper467. [c] 138 Okl 63, 280P 409. [e] (4) Speed and lookout passing automobile starting. Wis 229NW 541. [k] Evidence sufficient to go to jury.–Ariz 287P440.

1248-75 [a] MoA 282SW153. [c] 142 Okl 74, 285P84.

1248-76 [a] CalA 293P173. [b] Failure to give way.–CalA 284P499.

1248-78 94PaSuper398 (collision at crossover on three-way drive). [a] Defendant turning truck into path of auto passing it. 265Mass78, 164NE79.

1249-80 MoA 19SW(2d)306. [a] 38F (2d)1; 97CalA160, 275P484; 158Md 646, 149A543; 176Minn383, 223NW603 (1stcase); 176Minn619, 224NW256; NJ Sup 151A211(1stcase); 56ND351, 217 NW529; 145Wash520, 261P84; 195Wis 106, 217NW684; 197Wis300, 222NW 220. [b] (5) 158Md646, 149A543. (9) To enter driveway on other side of street. 223Ky784, 48W(2d)703. (10) Other instances. 251Mich110, 230NW 912. [c] (1) 265Mass444, 164NE448; Nebr 219NW805; 296Pa561, 146A141; 148SC161, 145SE790. (5) Suddenly changing course to left. TexCivA 20SW (2d)349. (6) Other instances. 158Md 424, 149A4. [k] (4) Driving into dust on left side. 146Wash74, 2b2P136. [l] At intersection.–Vt 148A874.

1249-81 [b] Turning across road into line of traffic on other side. 109Conn 602, 145A61.

1249-82 36GaA315, 138SE286; NJ 144 A190; 296Pa561, 146A141.

1249-83 178Ark599, 12SW(2d)415.

1249-84 MoA 19SW(2d)507.

1249-88 [a] 292Pa348, 141A150.

1249-92 IndA 168NE711(1stcase); 205 Iowa365, 218NW31; 127Me75, 140A 909; Mich 233NW373; 173Minn622, 217NW485; 175Minn623, 221NW680; MoA 297SW180; 88PaSuper361; 89Pa Super373; 95PaSuper230; RI 136A 885; Wash 290P831; Wash 290P864. [a] (1) MoA 30SW(2d)647; 86PaSuper 389; 90PaSuper422; 97PaSuper131; Wis 229NW58. [b] (1) Ida 28SP152; 231Ky639, 28SW(2d)956; 127Me75, 140 A909; 244Mich69, 221NW282; 173Minn 439, 217NW493; 177Minn222, 225NW 85; MoA, 30SW(2d)647; 105NJL221, 143A426; NJ 148A619; NJSup 145A 322; 295Pa168, 145A81. (3) 155Wash 351, 284P343, 68ALR254. (9) 94Pa Super395; 95PaSuper537. [c] (1) 102 CalA280, 282P990; MoA 48W(2d)875; NH 148A461; 145Wash597, 261P405. (4) 250Mich675, 230NW917; Wis 228 NW741. [d] (1) 221MoA823, 293SW 460. [f] 108Conn180, 142A749; 89Pa

Super136. [g] (1) Ala 129S9; 48 Ida 310, 282P72 (which car entitled to right of way); 243 IllA89; 205 Iowa1394, 219NW813; 127Me75, 140A909; 173 Minn439, 217NW493; 179Minn332, 229 NW341; NH 148A461; NJ 140A438; NJSup 150A557; NJSup 150A578; 32 OhA301, 168NE52; 128 Or650, 275P 666; 293Pa352, 148A527; 92PaSuper 586; 93PaSuper13; 154Wash572, 283P 184; Wis 228NW741. [h] IndA 171NE 665(2dcase). [i] (1) CalA 291P652; 176Minn285, 223NW137(1stcase); 221 MoA823, 293SW460; NJSup 145A322; 295Pa168, 145A81. (2) 132 Or488, 286 P525. [l] (1) 220AppDiv509, 221NYS 701; 144Wash155, 257P236. [o] (1) RI 150A753. See also 91CalA364, 267 P125. (2) Turning to left of "island." Mass 170NE51. [p] **Stopping and starting.**–108Conn9, 142A385. [q] **Whether defendant should or could have turned or applied brakes.**–48 Ida310, 282P72. [r] **Blinding snowstorm.**–179Minn120, 228NW751. [s] **Wanton and willful misconduct.**–251 IllA364.

1249-93 [a] 181Ark1024, 28SW(2d) 1052; 205 Iowa365, 218NW31; 260Mass 206, 156NE884; RI 150A753. [f] 30F (2d)578; 207 Iowa1271, 224NW576; 246Mich423, 224NW647; 295Pa95, 144 A899.

1250-96 [a] **Obstruction of defendant's view.**–198NC640, 152SE894.

1250-97 MoA 30SW(2d)647.

1250-98½–New. as to whether defendant had the right of way, 131 Or282, 282 P1087.

1250-98½–New. as to whether defendant was justified in absolute exercise of the right of way, 131 Or282, 282P1087.

1250-99 205 Iowa365, 218NW31; Iowa 227NW608; Iowa 233NW23; MoA 19 SW(2d)500; 123 Or20, 261P428; 86Pa Super389; 92PaSuper586; 145Wash597, 261P405.

1250-3 [a] Mo 300SW465.

1250-6 Va 154SE542. [a] 128Kan46, 275P1096; 238Mich669, 214NW236; MoA 20SW(2d)580; 222AppDiv179, 225 NYS486; 50RI 496, 149A612. [c] 151 Miss635, 118S450. [d] 289Pa565, 137A 797.

1250-7 [b] 155Wash552, 285P440.

1250-8½–New. Whether defendant, at street intersection, failed to yield right of way to automobile which struck plaintiff on sidewalk held question for jury. 132 Or332, 285P823.

1250-9 235Ky610, 31SW(2d)926. [a] 89CalA625, 265P324; 247Mich157, 225 NW609; RI 144A771; RI 150A498; 153 Wash208, 279P588, 67ALR92(2dcase). [b] (2) 151Wash279, 275P713.

1250-9½–New. , or in causing another automobile to strike him. 148Va573, 139SE275.

1250-11 Cal 289P614; 158Md463, 149 A1; Mass 172NE90. [a] 219Ala336, 122S351; 86CalA474, 260P957; 87CalA 38, 261P1069; 88CalA671, 263P1027; 94CalA770, 271P1101; 97CalA311, 275P 526; 111Conn723, 150A508; 204 Iowa 1162, 216NW627; 227Ky486, 13SW(2d) 497; 261Mass120, 158NE349; 265Mass 33, 163NE642(2dcase); 267Mass84, 165 NE872; Mass 171NE670; 239Mich37, 214NW170; 241Mich83, 216NW417; 242 Mich497, 219NW665; 172Minn134, 215 NW198; 173Minn138, 216NW605; 148 Miss871, 114S807; 221MoA173, 299SW 601; NJ 141A167; 105NJL174, 143A 315; 105NJL132, 143A328; NJSup 136 A505; NJSup 136A708; NJSup 142A 343; 224AppDiv623, 231NYS649; ND 232NW897; 128 Or582, 275P600; 297 Pa192, 146A539; 297Pa199, 146A551; 88PaSuper361; 149Va193, 141SE117; Wash 290P828; 197Wis211, 221NW729. [b] (1) MoA 14SW(2d)499. [c] (12) Eleven or more miles per hour. 216Ala 676, 114S137. (13) Exceeding speed ordinance. MoA 10SW(2d)75. [d] (5) Ark 31SW(2d)302. (6) 109Conn206, 145 A890. (15) Driver's attention distracted by boy riding bicycle thereby failing to see pedestrian in front. 152 Va236, 146SE265. (16) Starting at intersection in accordance with officer's instructions. 265Mass472, 164NE377. (17) Other instances. 48 Ida789, 285P 676. [e] (1) 206 Iowa771, 221NW489; MoA 10SW(2d)75; MoA 14SW(2d)499. But see 226Ky275, 10SW(2d)817. [f] (2) 104NJL306, 140A422. [g] (3) 206 Iowa771, 221NW489. (4) 205 Iowa573, 218NW278. [h] (1) 208 Iowa361, 225 NW862. (8) To avoid one pedestrian and thereby killing another. 92CalA 495, 268P483. [i] 91PaSuper478. [j] (8) Accident occurring at street intersection between curb line and property line. 147Wash597, 266P686, 58ALR 1194.

1252-12 243Mich429, 220NW781.

1252-15 291Pa437, 140A133.

1252-16 [c] **Pedestrian passing from behind parked vehicle.**–291Pa32, 139A 585. [d] **Unavoidable accident.**–318Mo 666, 300SW795; 198NC638, 152SE893.

1252-17 [e] 31F(2d)285; CalA 284P 1086 (unlighted standing vehicle); 249 Mich666, 229NW498; Mo 31SW(2d)792 (plaintiff pouring gasoline into car parked at curb). [f] **Passing safety platform.**–241Mich361, 217NW32. [g] **Generally.**–85CalA571, 259P968.

1252-19 [a] 85CalA535, 259P958; 93 CalA666, 270P263; 208 Iowa275, 225 NW406; 220Ky758, 295SW1046; 91Pa Super522; Va 153SE664; 107WVa390, 148SE379. [d] (1) CalA 257P577. [f] **Evidence insufficient to go to jury.**–82 Colo 434, 260P1079. [g] **Whether truck driver's negligence in turning without signal contributed to injury of child on sidewalk struck by another automobile unlawfully passing on right and forced to swerve onto sidewalk is question for jury.** 166Ga121, 142SE658.

1252-22 [e] Iowa 226NW920; 294Pa 490, 144A429; TexCommnA 12SW(2d) 556; 150Wash646, 274P713.

1252-24 [c] **At street intersection.**–144 Wash409, 258P39.

1258-29 Mass 172NE917(1stcase). [a] 33F(2d)27 (whether speed and failure to warn was proximate cause); CalA 287P152; 317Mo 64, 296SW1008. [b] 245 IllA132; 263Mass139, 160NE783; 78Mont415, 258P236; Wash 290P215. [d] **Evidence held sufficient for jury.**–78Mont415, 258P236.

1253-30 MoA 7SW(2d)417; Utah 283P 160.

1253-31 267Mass70, 165NE871. [a] (10) Driving parallel and side by side with street car. 29F(2d)87. [b] **Failure to keep lookout.**–153Wash75, 279P97.

1253-33 171Minn81, 213NW377. [a] 34F(2d)723. [b] TexCivA 296SW979. [f] (1) Wis 228NW741. [h] 227Ky587, 13SW(2d)753. [i] 179Minn578, 229NW 881; 197Wis374, 222NW239. [j] **Failure to warn.**–MoA 20SW(2d)570.

1253-34 [a] 147Wash269, 266P154.

1253-39 79CalA339, 249P533; Me 151A 443; Mo 30SW(2d)1065; 131 Or660, 284 P194; RI 136A845. [a] (1) 128Kan505, 278P712(1stcase). [b] 91CalA129, 266P 964. [c] **Generally.**–172Minn1, 214NW 471. [d] **Head-on collision.**–Iowa 228 NW880.

1253-44 [a] (1) Ark 30SW(2d)840(2d case).

1254-53 [b] (1) MoA 22SW(2d)215. (3) Going in same direction. MoA 7SW (2d)719. (4) Nonsuit held proper in passenger's suit. 87PaSuper81. [c] **Truck passing in front of street car causing sudden stop, thereby injuring passenger.** 49RI 498, 144A443.

1254-57 217Ala304, 116S158. [f] **Passing person on horseback.**–ND 230NW6.

1255-60 228AppDiv569, 240NYS225. [a] (1) 93PaSuper514. (11) 179Minn 528, 229NW784. (14) MoA 26SW(2d) 823. (17) 244Mich319, 221NW318; 227 AppDiv577, 238NYS575. (20) MoA 20 SW(2d)570. (23) Whether fifteen to twenty miles an hour was reasonable under statute. 261Mass491, 159NE523. (24) Excessive speed close to pavement with faulty coupling machinery. 94 CalA243, 271P127. (25) At excessive speed and under insufficient control in known school zone. 158Tenn333, 13SW (2d)322. [b] (8) Whether driver of truck slowed down and gave timely signal under statute. 261Mass491, 159NE 523. [d] (1) 153Wash10, 279P100. [e] (13) Duty to change course or to stop. 49RI 364, 142A621. (14) Striking seven-year-old boy crossing highway. 196NC 213, 145SE169. [f] (11) Striking child where view was obstructed. NJ 143A 546. (12) Auto coming out of alley. 266 Mass279, 165NE406. (13) Where lights were in favor of child who was halfway across. 105NJL402, 144A638. [g] (7) When approaching intersection of street and alley opposite public school building and ground on which children were playing. Mo 300SW280. [h] MoA 26 SW(2d)823. [k] (1) 34F(2d)723 (conflicting evidence); 179Ark225, 15SW(2d) 391; 96CalA169, 273P866; 97CalA654, 275P980; 108Conn505, 143A888; 226 Ky580, 11SW(2d)409; 248Mich204, 226 NW852(1stcase) (conflicting evidence); 55ND339, 213NW574; 295Pa548, 145A 605; 101Vt477, 144A380; 147Wash589, 266P727. [l] (1) Md 150A728. [m] **Child crossing in middle of block.**–239 Mich37, 214NW170.

1256-61 [a] 261Mass491, 159NE523.

1256-65 [a] 208 Iowa641, 224NW58; 132 Okl 53, 269P253; 106WVa119, 145 SE596. [e] **Failing to keep proper lookout.**–208 Iowa641, 224NW58. [f] **Clouded windshield.**–208 Iowa641, 224NW58.

1256-67 Mass 167NE661; 132 Or283, 285P242 (blind pedestrian at street intersection).

1256-68 220Ala198, 124S739; CalA 283 P886; Mass 168NE802(2dcase); Mass 169NE412; 219AppDiv630, 221NYS69; 29 OhA522, 163NE917; Or 289P491; Va 154SE506; Wash 290P710; 200Wis504, 228NW126; 200Wis321, 228NW599. [b] 220Ala207, 124S737; 220Ala198, 124S 739; CalA 287P354; 111Conn209, 149A 838 (reckless disregard of others' rights); 151Miss221, 117S531, 61ALR 1229; Wis 229NW57; NB [1930] 2Dom LR756. [c] Mass 171NE671. [f] 218 Ala670, 119S681; 108Conn371, 143A240, 65ALR943; 198Wis172, 223NW412; Wis 229NW57. [h] CalA 290P497. [k] CalA 285P879; 177Minn298, 225NW162. [l] 34 OhA207, 170NE607. [m] **Upsetting.**–37Wyo 275, 260P1089. [n] **Evidence insufficient to go to jury.**–CalA 285 P399; 108Conn371, 143A240, 65ALR 943; 264Mass235, 162NE307; 178Minn 363, 227NW181 (negligence of owner or driver); NH 148A466; 149Wash41, 270P103. [o] **Evidence sufficient to go to jury.**–297Pa79, 146A443. [p] **Driver killing bee on his arm.**–199Wis315, 225 NW935(2dcase). [q] **Relation of principal and agent.**–155Md400, 142A491. [r] **Colliding with train occupying crossing.**–297Pa458, 147A100. [s] **Starting while passenger alighting.**–180Minn433, 230NW888. [t] **Child accidentally thrown from bus.**–Wash 289P44. [u] **Running into projecting load of vehicle ahead.**–Mo 30SW(2d)35. [v] **Generally.**–228AppDiv502, 240NYS355.

1256-69 124 Or237, 264P459; Tex CommnA 29SW(2d)984.

1256-74 220Ala198, 124S739; 108Conn 628, 144A304; Mass 173NE511; Nebr 232NW616. See also MoA 31SW(2d) 117. [a] **Whether occupants engaged in joint enterprise.**–Nebr 232NW616.

1256-75 CalA 286P752.

1256-78 233Ky493, 26SW(2d)1. [a] 158Md233, 148A453; MoA 297SW180; 224AppDiv760, 230NYS470; 124 Or237, 264P459. [d] **Parking unlighted truck on curve.**–198NC672, 153SE162.

1256-80 [a] 151SC131, 148SE701(2d case). [c] **Defective brakes.**–226Ky30, 10SW(2d)482.

1256-82 225AppDiv415, 233NYS388; 30 OhA497, 165NE853; 35 OhA361, 172NE 533.

1257-86 89CalA275, 264P580; 156SC1, 152SE753. [d] 175Minn438, 221NW716. [e] 178Minn382, 227NW207; 195NC613, 143SE1. [f] **Defendant entitled to affirmative charge.**–220Ala101, 123S897. [g] **Agent or independent contractor.**–MoA 19SW(2d)766.

1257-87 Ala 130S782; Cal 292P966; 89 CalA511, 265P318; CalA 292P979; 157 Miss770, 128S507; Mo 9SW(2d)918; MoA 7SW(2d)298; NJ 150A391; NJSup 147A375; 197NC724, 150SE503; 57ND741, 224NW167; 57ND908, 224 NW906; 292Pa9, 140A532; 298Pa211, 149A883; 98PaSuper574; 156SC1, 152 SE753; TexCivA 19SW(2d)438; Tex

CivA 21SW(2d)13; 149Wash180, 270P 429; 151Wash279, 275P713. [d] (9) Being four or five squares beyond regular route on return trip. 228Ky164, 14 SW(2d)408. [i] MoA 282SW161. [j] **Defendant entitled to affirmative charge.** –220Ala101, 123S897.

1258–88 89CalA511, 265P318. [c] (1) 134 Okl 145, 272P475.

1258–89 Md 151A400; Mass 169NE501. [a] CalA 290P510; 335 IllA 335, 167NE 35; NH 149A746; TexCivA 1SW(2d) 476. [b] **To show driver was employee of defendant.**–TexCommnA 24SW(2d)28.

1258–91 [a] (1) 89CalA511, 265P318.

1258–92 248Mich241, 226NW880. [e] **Permitting children to ride on truck.**–218 Ala265, 118S458.

1258–96½–New. Where the presumption of the driver's agency arising from defendant's ownership of the vehicle is not rebutted by evidence, the question need not be submitted to the jury. 105 WVa118, 141SE631.

1258–99 [e] ND 230NW294. [l] 81 CalA86, 253P178; 254 IllA526. [p] **Agent.**–NJSup 139A430. [q] **Brother.**–Eng [1926]NIr131.

1259–2 208Cal 216, 280P965; 101CalA 147, 281P433; 224Ky427, 6SW(2d)481; Mass 173NE524; 31 OhA446, 167NE482 (volunteer); TexCivA 22SW(2d)508; TexCivA 25SW(2d)659.

1259–3 Ark 30SW(2d)840(2dcase); CalA 288P1099; 110Conn604, 149A400, 68ALR1044; 329 Ill 445, 160NE752; 224 Ky427, 6SW(2d)481; 261Mass91, 158 NE335; Mass 168NE178; Mass 173NE 529; 249Mich27, 227NW727; 248Mich 557, 227NW775; Minn 232NW712; TexCivA 25SW(2d)659. [a] (4) To wash and polish car. 96CalA564, 274P392. [b] (6) 254 IllA526. [c] (1) 81CalA86, 253P178. [e] Mass 168NE178. [f] (1) Mo 23SW(2d)1049. [g] (4) Other instances. CalA 293P95. [h] **Evidence held insufficient to go to jury.**–219Ala 627, 123S12.

1259–4 Ill 173NE394; 256 IllA19. [a] 34Ariz87, 267P947; 50RI 481, 149A376. [b] **Not on employer's business.**–RI 142 A616 (deviation from master's business by garage employee).

1259–5 Minn 232NW43. [a] (3) Taking family out in car owned by defendant. 198Wis315, 224NW102. (4) Other instances. MoA 23SW(2d)1066. [g] **Newspaper employee using own motor cycle to deliver papers.**–317Mo 64, 296 SW1008. [h] **Garage owner.**–Mass 168 NE180 (returning car to owner after effecting repairs). [i] **Truck owner and driver.**–180Ark53, 20SW(2d)320; 31 OhA 470, 167NE493. [j] **Automobile salesman.**–99CalA709, 279P485. [k] **Evidence held sufficient to go to jury.**–Mass 168NE180.

1260–6 224Ky427, 6SW(2d)481. [a] **Whether truck owner hauling clay for brick company was independent contractor held for jury.** MoA 31SW(2d) 246.

1260–8 [b] **Salesman selling cash registers** held to be employee. TexCivA 13 SW(2d)414.

1260–10 [a] (5) **By brother consenting to brother's driving.** 50RI 459, 149A18. [b] (1) 153Va675, 151SE282. (3) MoA 291SW163. [f] **Evidence sufficient to go to jury.**–266Mass531, 165NE655.

1260–11 NJSup 147A725(2dcase). [a] (1) NJSup 144A312(1stcase). [c] (3) Other instances. MoA 6SW(2d)979.

1260–12 [a] (2) 104NJL391, 140A411. (3) Mass 171NE474 (question of agency held for jury); 221MoA173, 299SW601; 49RI 414, 143A674 (driving friends to their home). [b] (3) Evidence that car was being driven by defendant's stepdaughter held sufficient to require submission to jury of question whether she was acting as defendant's agent. 81 CalA142, 253P357.

1261–15 Wash 290P849.

1261–16 Mass 169NE501.

1261–18 152Wash611, 278P673(2dcase).

1261–20 Iowa 227NW608; 251Mich28, 230NW946; 50RI 394, 148A186. [a] **Prospective purchaser.**–207 Iowa567, 221 NW514.

1261–21 NJSup 147A645(2dcase).

1261–24 12LaA167, 125S294.

1261–25 [e] **Taxicab.**–TexCivA 16SW (2d)349. [f] **Employee hired out with tractor.**–98CalA373, 277P156. [g] **Owner guest of driver.**–85CalA31, 258P712.

1261–28 See also 85CalA31, 258P712.

1261–30 265Mass408, 164NE374.

1261–30½–New. It is a question for the jury whether the driver was incompetent. 29 OhA216, 163NE306.

1261–34 TexCivA 18SW(2d)744.

1261–38 34F(2d)927; 79CalA406, 249P 837; 102CalA124, 282P405; CalA 291P 652; CalA 293P173; 82Colo 150, 257P 1079; 254 IllA387; 255 IllA189; 125 Kan515, 264P1073; 126Kan687, 271P 307; 232Ky56, 22SW(2d)446; 235Ky 60, 29SW(2d)632(2dcase) (care in emergency); 13LaA52, 127S124; 126Me558, 140A368; 259Mass272, 156NE254; 260 Mass206, 156NE884; 261Mass394, 158 NE783; 262Mass22, 159NE449; Mass 167NE248; Mass 169NE148(1stcase); 238Mich669, 214NW236; 244Mich69, 221 NW282; 172Minn591, 216NW537; 143 Wash444, 255P666; MoA 296SW249; MoA 297SW180; MoA 31SW(2d)590; 78Mont415, 258P236; 80Mont401, 260P 702; 83NH29, 137A445; NJ 137A792; 105NJL221, 143A426; NJSup 143A153; NJSup 149A826(1stcase); 228AppDiv 667, 238NYS303; 198NC193, 151SE197; 123 Or20, 261P428; 126 Or105, 268P 982; 290Pa217, 138A755; 298Pa158, 148A90; 90PaSuper422; 97PaSuper341 (for trial court); 97PaSuper439; RI 136A885; RI 139A654; TexCivA 22SW (2d)544; TexCivA 23SW(2d)516; 101 Vt285, 143A394; 144Wash404, 258P25; 145Wash383, 260P245; 154Wash261, 282P52; 198Wis503, 224NW481. See also MoA 21SW(2d)496. [a] **Extent to which intoxicating liquor contributed to automobile wreck** held for jury. 251 Mich597, 232NW371.

1262–39 CalA 284P676; 250Mich19, 229NW430; 172Minn591, 216NW537 (dictum); 117Nebr444, 220NW572, 58 ALR1473; 154Wash261, 282P52; 155 Wash628, 285P667.

1262–40 CalA 290P515(2dcase); 109 Conn573, 145A23; 37GaA465, 140SE896; 207 Iowa1001, 221NW949; 125Kan648, 266P69; 234Ky639, 28SW(2d)956; 154 Md8, 139A541; 265Mass74, 163NE750; Mass 168NE815; Mass 172NE891; 242 Mich228, 218NW698; 180Minn116, 230 NW270; MoA 6SW(2d)1017; MoA 21 SW(2d)211; NJ 146A688; NJSup 139 A904; NJSup 140A894; NJSup 142A 437; NJSup 146A689 (collision with defendant's unguarded burned bus in highway); 29 OhA101, 163NE206; 132 Okl 72, 269P350, 59ALR584; 126 Or363, 270 P530; TexCivA 21SW(2d)559(2dcase); 101Vt379, 143A643; 144Wash155, 257P 236; Wis 230NW31. [a] **Where plaintiff was struck from behind when stopping.** 98CalA268, 276P1055. [c] 242 IllA308; 265Mass74, 163NE750; 225 AppDiv25, 232NYS71; 129 Or435, 277P 291; 148SC161, 145SE790. [d] **Inadequate lights.**–Wash 289P1003.

1263–43 41GaA120, 152SE278; Minn 232NW710. [a] (6) Omission to maintain tail light on parked car. 83CalA 358, 257P109. [b] **Wrong colored light.**– 129 Or435, 277P291.

1263–46 [c] **Colliding with parked car at night.**–Ida 291P1060; MoA 15SW(2d) 876.

1263–48 CalA 293P173; MoA 15SW (2d)876; MoA 22SW(2d)65; 298Pa244, 148A105; 200Wis312, 227NW240. [a] 108Conn704, 145A29; 110Conn230, 147 A671(2dcase); Iowa 222NW551; 228Ky 440, 15SW(2d)277. [b] 222MoA138, 1 SW(2d)1030. [c] 266Mass220, 165NE91. [d] Iowa 233NW23; 244Mich69, 221NW 282; 123 Or610, 263P64; Wash 289P 533. [e] (1) 147Wash419, 266P169.

1263–49 TexCivA 21SW(2d)559(2d case). [a] 123 Or610, 263P64; TexCivA 30SW(2d)409.

1263–50 205 Iowa365, 218NW31; 123 Or610, 263P64.

1263–52 MoA 17SW(2d)639; 154Wash 261, 282P52. [a] 198NC193, 151SE197; TexCivA 28SW(2d)892. [b] IndA 167 NE720(1stcase); 174Minn105, 218NW 249; 31 OhA77, 166NE427 (three persons in driver's seat); Wis 231NW252. [d] CalA 290P120. [e] 154Md516, 140 A896; TexCivA 16SW(2d)914; 101Vt 514, 144A856. [f] 205Cal 519, 271P 1055; 95PaSuper520. [g] **Evidence requiring binding instructions for defendant.**–87PaSuper297.

1263–53 [b] **Autoist need not look out for vehicles in rear.**–219Ala324, 122S 316. [c] **Where injured party proceeds, while unable to see,** contributory negligence is a matter of law. CalA 289P 181.

1263–55 207 Iowa1018, 222NW420; 101Vt514, 144A856.

1263–57 Mass 172NE893; NJ 143A 748; 229AppDiv372, 242NYS11. [a] 204Cal 387, 268P345; 205 Iowa1394, 219NW813; 221MoA823, 293SW460; 134Misc56, 235NYS292; 148Wash291, 268P866. [b] 179Minn86, 228NW347. [c] **Left-hand turn between intersections.**–33Ariz28, 262P5. [d] **Left turn into own driveway.**–151Wash194, 275P 692(2dcase). [e] **Not driving on outside of curve.**–Wash 289P19.

1263–63 220Ala229, 124S510(2dcase); IndA 168NE701; MoA 17SW(2d)639; Wis 228NW509. [a] NJSup 140A32; 145Wash481, 260P996 (question whether sign on pavement was visible held for jury). [c] **After avoiding car at intersection.**–198Wis609, 225NW207. [d] **On seeing approaching automobile swerving.**–CalA 290P48.

1263–63½–New. Whether failure to stop within distance in which driver could see held question for jury under evidence. Minn 232NW710.

1263–66 Cal 292P649; 100Vt455, 138A 739. [b] **Stopping for repairs in traveled portion of highway.**–129 Or435, 277P291. [c] **Without rear light.**–180 Minn252, 230NW776.

1263–67½–New. Contributory negligence of driver in collision with truck parked without rear light, to warrant directed verdict must appear as matter of law. 180Minn252, 230NW776.

1264–69 265Mass78, 164NE79. See also Mass 172NE880; 177Ark1174, 9SW (2d)788; 196NC314, 145SE555; 97Pa Super467. [b] 138 Okl 63, 280P409. [d] **Passing.**–107Conn670, 142A461. [e] **Collision at crossover on three-way drive.**–94PaSuper398. [f] **Striking automobile turning across street into driveway.** NJ 151A102.

1264–71 [a] 82Colo 150, 257P1079; 176Minn619, 224NW256; MoA 1SW(2d) 1038; 83NH538, 145A263(1stcase); 131 Or180, 282P236; 296Pa561, 146A141; TexCivA 26SW(2d)1091 (defendant turning left in front of plaintiff); 101 Vt459, 144A378; 145Wash520, 261P84; 197Wis300, 222NW220. [c] (1) 56ND 351, 217NW529. (2) 94PaSuper435. [d] 82Colo 150, 257P1079; Wis 229NW 541 (while darting from parked position). [e] 82CalA660, 256P457; 223Ky 784, 4SW(2d)703 (where defendant turned left in front of plaintiff's path); WVa 153SE298. [f] 146Wash74, 262P 136. [g] **Failure to avoid collision.**– 127Me482, 144A395. [h] **Driving on wrong side of road.**–265Mass444, 164NE 448; NJ 144A190. [i] **Defendant making left turn at intersection.**–295Pa168, 145A81. [j] **Turning across road into line of traffic on other side.**–109Conn 602, 145A61.

1264–72½–New. , or vice versa. NJSup 139A904.

1264–74 CalA 290P895; CalA 292P 523; 256 IllA471; Iowa 233NW23; Mich 233NW321; 173Minn622, 217NW 485; MoA 297SW180; 123 Or20, 261P 428; 97PaSuper229; Wash 290P831; Wis 229NW860. [a] (1) 207 Iowa1271, 224NW576; 176Minn285, 223NW137 (1stcase). [b] (1) 92CalA285, 268P 430; 99CalA423, 278P1051; CalA 288 P866; CalA 291P597; 250Mich62, 229 NW406; 251Mich28, 230NW946; 179 Minn123, 228NW752; NJ 144A113; 126 Or105, 268P982; 128 Or650, 275P666; 131 Or282, 282P1087; 92PaSuper372. (2) 132 Or488, 286P525. [c] (4) Traveling in opposite directions, defendant exceeding speed limit. 224Ky460, 6SW (2d)454. (5) Plaintiff's car making left turn struck in rear by defendant's car. 95PaSuper537. [d] (3) Violation of rule as to right of way. 175Minn449, 221NW715. (4) Crossing ahead of car approaching from right. NJSup 145A 322. (5) Plaintiff failing to yield right of way. 207 Iowa1018, 222NW420. (6) Colliding with ambulance. TexCivA 13 SW(2d)464. (7) Entry against traffic signal. 198NC741, 153SE318. (8) Motorist normally having right of way struck by automobile from left. NJSup

151A485. (9) Generally. 85Colo 151, 274P739; 97PaSuper131. (10) Other instances. 158Md131, 148A426; 173 Minn439, 217NW493; NJSup 150A557; 118 Oh375, 161NE44; 155Wash351, 284 P343, 68ALR254. [e] 240Mich671, 216 NW413. [f] 175Minn449, 221NW715. [g] 37F(2d)230; 92CalA285, 268P430; Ida 288P152; Ida 290P724; 246 IllA 487; 207 Iowa1018, 222NW420; 127 Me75, 140A909; 240Mich671, 216NW 413; 244Mich511, 221NW637; 175Minn 623, 221NW680; 179Minn120, 228NW 751; MoA 297SW180; NJSup 142A431; 132 Or500, 286P517 (direction of verdict for defendant properly refused); 292Pa543, 141A491; 295Pa95, 144A899; 94PaSuper254; 94PaSuper266; 94Pa Super395; 147Wash419, 266P169. [h] Generally.–260Mass206, 156NE884; 246 Mich423, 224NW647; 144Wash155, 257 P236. [i] Speed.–145Wash597, 261P 405. [j] Failure to signal.–87CalA758, 262P764. [k] Failure to slow down.– 175Minn449, 221NW715.

1264–75 181Ark1024, 28SW(2d)1052; 207 Iowa1018, 222NW420.

1264–77 97PaSuper225; 98PaSuper 170. [a] 85Colo 384, 276P333(2dcase); 173Minn31, 216NW254. [d] Nonsuit held proper.–87PaSuper494.

1264–78 220Ala207, 124S737; 207Cal 275, 277P1043; 207Cal 279, 277P1045; CalA 283P886; 98Fla582, 124S6; 244 IllA458; 253 IllA135; 180Minn391, 231 NW10; Minn 232NW38; 35 OhA361, 172NE533; Vt 148A283. [a] (1) Mass 171NE658. (3) MoA 31SW(2d)580. [c] Mo 30SW(2d)35. [d] (1) CalA 282 P388; CalA 287P110; 82Colo 491, 261P 657; 254 IllA49; 176Minn410, 223NW 456(1stcase); 177Minn95, 224NW462; 177Minn249, 225NW98; 31 OhA73, 166 NE203(5thcase); 34 OhA207, 170NE 607; 101Vt285, 143A394. (3) Other instances. Mass 169NE557. [e] (1) 204 Cal 679, 269P529(2dcase); 222Ky496, 1 SW(2d)957. (2) 29F(2d)807. (3) Of car approaching at street intersection. 176Minn410, 223NW456(1stcase). [f] 101Vt270, 143A401, 63ALR1427. [g] 218Ala670, 119S681. [h] Failure to keep proper lookout.–195Wis565, 217 NW290. [i] Remaining in car.–195Wis 565, 217NW290. [j] As to whether passenger had knowledge of intoxicated condition of driver and effect of such knowledge on his conduct is for jury. 107Conn91, 139A639. [k] Ten-year-old boy held not contributorily negligent, as matter of law, in riding on rear end of truck pursuant to invitation. 104 NJL87, 139A419. [l] Whether plaintiff assumed control and direction of car.– 104NJL391, 140A411. [m] Walking back of car to pick flowers.–194Wis333, 216NW653. [n] Trying to stop runaway trailer.–90CalA764, 266P606. [o] Riding to fire.–198Wis163, 223NW408 (2dcase). [p] Placing hand on framework of open door while seating himself.–NJSup 146A428(1stcase), [q] Riding with driver having only one eye.–CalA 285P879. [r] Knowledge of intoxicated condition of driver.–Mass 170NE402. [s] Defendant driving with learner's permit.–96PaSuper164. [t] Reading while riding in back seat.–199 Wis567, 227NW17. [u] Failing to refuse to ride when air was full of dust. CalA 280P552. [v] Carrying on conversation with fellow occupant of back seat. 297Pa458, 147A100. [w] Where guest called driver's attention to approaching car.–255 IllA465. [x] Child.– Wash 289P44. [y] Failure to judge time for approach to intersection. NH 151A262. [z] Generally.–80CalA56, 251 P235; Mass 171NE671; MoA 297SW 180.

1265–81 [b] 218Ala55, 117S634; 207 Cal 279, 277P1045; TexCivA 48W(2d) 1013.

1265–83 Cal 287P343; 256 IllA471; 88 IndA36, 159NE156; Iowa 233NW58; 126Kan188, 268P119; 129Kan441, 283 P921; 174Minn277, 219NW92; MoA 25 SW(2d)491. [d] (3) 92CalA285, 268 P430; 251Mich461, 232NW393 (courts are loath to hold invited guest contributorily negligent as a matter of law). (6) 256 IllA461. [e] (1) Mont 292P 577. [f] 219Ala101, 120S914. [g] (1) CalA 288P866; 205 Iowa365, 218NW31; 208 Iowa1157, 225NW346; 251Mich372, 232NW216; Mont 292P577; 195Wis243, 218NW175; Wis 231NW252. (2) Passengers killed in collision with boiler on tractor trailer. NJSup 146A785. [i] 173Minn237, 217NW125; 101Vt459, 144 A378. [j] Vehicle, in which plaintiff was occupant, making left turn.–204Cal 387, 268P345. [k] Interfering with driver.–58ND921, 228NW427. [l] Position of plaintiff.–42F(2d)215. [m] Riding on running board.–Ala 128S433; 132 Or540, 285P822. [n] Failure to exercise ordinary care.–38F(2d)1. [o] Riding in car with defective headlights.– Minn 231NW244.

1265–84 39F(2d)445.

1265–86 92CalA145, 267P887. [a] 208 Iowa1157, 225NW346.

1265–87 NJ 141A165.

1265–88 CalA 289P245; 292Pa1, 140A 555. [c] Improper headlights.–241 Mich57, 216NW403.

1266–90 [a] 246 IllA118. [f] Section hand.–MoA 285SW114.

1266–92 CalA 292P276; Iowa 228NW 880; Me 151A443; 131 Or660, 284P194; 288Pa522, 136A785; RI 136A845. [b] (2) Into intersecting street ahead of defendant's car. 128Kan505, 278P712 (1st case). [c] (2) Failing to apply brakes sufficiently when placed in sudden danger by defendant's negligent act. 31 OhA470, 167NE493. [d] (6) Colliding with automobile after first seeing it one hundred and fifty feet from intersection. 204Cal 374, 268P369. (7) Colliding with unlighted boiler on tractor trailer. NJSup 146A785. [g] (1) 195Wis19, 216NW522. (2) Other instances. TexCivA 24SW(2d)491. [i] 89CalA663, 265P354; 91CalA129, 266P 964; 235Ky637, 32SW(2d)1; 260Mass 206, 156NE884. [k] Generally.–172 Minn1, 214NW471; 143Wash444, 255P 666. [l] Running into truck which was making left turn. MoA 7SW(2d) 452. [m] Sounding horn.–Wash 292P 1014.

1266–93 Mich 233NW381; 171Minn81, 213NW377. [b] (4) 147Wash269, 266 P154. [d] (3) Contributory negligence, relating to whether bicycle was being operated on wrong side of road, is for jury. 227Ky587, 13SW(2d)753. [g] 261Mass26, 158NE341. [h] 179 Minn332, 229NW341. [j] Place of collision.–30 OhA118, 164NE370. [k] Swerving in front of automobile.–Tex CivA 17SW(2d)184. [l] Failing to have proper light.–205Cal 181, 270P210. [m] Absence of lamp and speed.–CalA 286P1091.

1266–94 [a] Absence of light on plaintiff's bicycle. 227AppDiv672, 236 NYS249.

1266–1 258Mass517, 155NE599; SD 231NW540. [d] Ark 30SW(2d)840(2d case).

1267–7½–New. Whether a passenger in a wagon was guilty of contributory negligence in jumping therefrom as an automobile was about to collide with it is a jury question. 152Miss719, 120S 829.

1267–8 43F(2d)45; 224Ky274, 6SW (2d)264; ND 230NW6.

1267–11 CalA 283P885; 50RI 496, 149 A612. [a] CalA 260P337; 93CalA666, 270P263; 102CalA436, 283P317; CalA 283P885; 106Conn499, 138A223; IndA 168NE495; 208 Iowa275, 225NW406; 130Kan158, 285P571; 218Ky535, 291 SW785; Md 151A235; 267Mass447, 166 NE711; Mass 173NE423; 238Mich669, 214NW236; 172Minn134, 215NW198; Minn 219NW912; 317Mo 64, 296SW 1008; MoA 9SW(2d)534; 123 Or293, 261P890 (in not discovering automobile before it struck him); 296Pa198, 145A827; Utah 283P160; 144Wash404, 258P25; Wis 233NW94. [b] 249Mich 666, 229NW498. [c] (1) 206 Iowa771, 221NW489; 85Mont562, 281P345. [d] Whether intoxication of pedestrian contributed to injury.–Cal 290P33.

1267–12 MoA 296SW249; 78Mont415, 258P236.

1267–13 51SD584, 215NW885.

1267–15 NJSup 147A464. [a] (1) 89 CalA625, 265P324; 109Conn206, 145A 890; RI 144A771; RI 150A498. (6) 208Cal 105, 280P522. [d] (3) Sidewalk not impassable. Me 143A178. [f] (2) ND 232NW897.

1268–17 CalA 286P761; 256 IllA425; Mass 172NE90; Mass 172NE788; Mass 172NE895; NJ 148A745; NJSup 136A 505; 226AppDiv393, 235NYS532; 98 PaSuper574; Wash 290P828. [a] 179 Ark225, 15SW(2d)391; 80CalA444, 251 P952; 81CalA142, 253P357; 81CalA 747, 254P679; 84CalA721, 258P686; 86CalA474, 260P957; 87CalA38, 261P 1069; 87CalA382, 262P357; 89CalA267, 264P526; 97CalA311, 275P526; CalA 290P114; CalA 293P125; 252 IllA550; 203 Iowa476, 212NW682; 233Ky756, 26 SW(2d)1035; 158Md463, 149A1; 261 Mass120, 158NE349; 265Mass366, 164 NE83(1stcase); 267Mass84, 165NE372; Mass 168NE924; Mass 171NE469; 247 Mich291, 225NW569; 248Mich574, 227 NW767; 172Minn134, 215NW198; 173 Minn138, 216NW605; 320Mo 598, 8SW (2d)924; MoA 15SW(2d)370; 105NJL 132, 143A328; 222AppDiv413, 226NYS 479; 224AppDiv623, 231NYS649; 27 OhA26, 160NE737; 297Pa192, 146A539; 91PaSuper478; 149Va193, 141SE117; 144Wash404, 258P25; 149Wash587, 271 P804; 195Wis114, 217NW694. [b] 219 Ala336, 122S351; Cal 289P614; 88CalA 671, 263P1027; 90CalA730, 266P588; 102CalA600, 283P295; 111Conn723, 150 A508; 48 Ida789, 285P676; 234Ky702, 28SW(2d)484; Me 151A199; 263Mass 252, 160NE792; Mass 171NE670; 241 Mich83, 216NW417; 243Mich634, 220 NW770; Minn 232NW630; MoA 296 SW249; MoA 24SW(2d)200; NJSup 144 A322; 123 Or293, 261P890 (going from "safety island" to sidewalk); 124 Or1, 263P886; 298Pa522, 148A693; 150Wash 8, 272P50; 197Wis211, 221NW729. [c] (1) 80CalA109, 250P693; 102CalA600, 283P295; 129Kan577, 283P485; 128Me 358, 147A602; Mass 171NE474; 237 Mich570, 213NW90; 248Mich416, 227 NW547; 298Pa158, 148A90; TexCivA 13SW(2d)450. [d] 99CalA264, 278P 442; 86Colo 265, 280P880; 227Ky486, 13SW(2d)497; 83NH29, 137A445; 298 Pa509, 148A711; 91PaSuper478; 199 Wis549, 227NW38. [e] 204Cal 329, 267 P1079; 131Misc675, 227NYS644; 149 Wash468, 271P266; 197Wis538, 222NW 821. [f] (1) 225Ky819, 10SW(2d)281. (6) Where person waiting for street car stepped back to avoid being struck by truck. 221MoA188, 299SW137. (7) Other instances. 265Mass472, 164NE 377. [g] 206Cal 209, 273P578; 81CalA 86, 253P178; 87CalA382, 262P357; 92 CalA495, 268P483; 102CalA396, 283P 336; CalA 285P751 (no contributory negligence as matter of law); 265Mass 33, 163NE642(2dcase); 266Mass192, 165 NE20; MoA 296SW249; NJSup 142A 343; 148Wash429, 269P813; 197Wis 311, 222NW229. [h] Whether pedestrian was injured at public crossing held for jury. 106Conn499, 138A223. [i] On stepping off sidewalk into gutter.–NJ Sup 137A792. [j] Intoxication of pedestrian.–Mass 172NE895.

1269–21 205 Iowa573, 218NW278; Mich 233NW224. [a] (3) Failure to look for approaching automobile before crossing street. 27 OhA355, 161NE288. (4) Generally. 245Mich678, 224NW401. [b] 27 OhA355, 161NE288.

1269–22 31 OhA303, 165NE304.

1269–24 90CalA144, 265P558; 237Mich 583, 213NW188. [a] (5) Minn 232NW 264. (13) 84Colo 572, 272P623 (whether plaintiff negligently stood and allowed his automobile to stand on traveled portion of highway as prohibited by statute). (14) Pouring gasoline into car. Mo 31SW(2d)792.

1269–25 Iowa 226NW920. [a] (1) 221 MoA585, 283SW464; NH 152A275; 50 RI 62, 145A12; 150Wash646, 274P713. [b] Continuing work after seeing approaching auto.–294Pa490, 144A429. [c] Failure to exercise ordinary caution.– CalA 284P1086. [d] Generally.–CalA 290P145.

1269–26 Mass 171NE660. [c] Generally.–195Wis19, 216NW522.

1270–34 12LaA442, 124S780. [a] (1) 317Mo 64, 296SW1008; MoA 7SW(2d) 417; 118 Oh247, 160NE715. (2) MoA 7SW(2d)417. [b] (1) 84Colo 225, 268P 1021. (3) One slipping or falling on car steps or street, not observing approaching truck, or assuming that it would

stop. 33F(2d)27. [d] **Contributory negligence for trial court.**–CalA 290P79.

1270–37 105NJL405, 144A565; 154 Wash547, 283P186. [a] 151Wash486, 276P542. [b] MoA 7SW(2d)706. [c] 245 IllA132; Minn 232NW265; 78Mont 415, 258P236; 153Wash75, 279P97 (after street car had passed). [f] **At unpaved portion of street.**–Wash 290P215.

1270–43 Or 276P668.

1270–45 261Mass442, 158NE893; Tex CivA 20SW(2d)1070(3dcase); 194Wis 119, 215NW822. [c] (1) 202Cal 626, 262 P740. [g] (1) 266Mass279, 165NE406. [h] (1) 179Ark225, 15SW(2d)391; 87 CalA563, 262P481; CalA 291P641; 109 Conn87, 145A659; 295Pa548, 145A605; 193Wis187, 212NW648; 200Wis80, 227 NW247; Wis 233NW94. (2) 261Mass 60, 158NE265. (3) 244Mich319, 221NW 318; Minn 232NW630; 228AppDiv569, 240NYS225; 31 OhA273, 167NE407. (4) CalA 290P481. (8) 105NJL363, 144A 593. [i] (1) 173Minn260, 217NW122; 227AppDiv577, 238NYS575; 125 Or251, 266P229. (3) Utah 272P207. (6) 108 Conn505, 143A888. (14) CalA 288P798. (16) Whether child was playing. 261 Mass145, 158NE352. [j] (3) Crossing street. 147Wash539, 266P727. (4) Crossing intersection. 105NJL402, 144 A638. [l] **Stepping from street car.**–CalA 284P681. [m] **Guiding driver in backing into garage.**–31 OhA446, 167NE 482.

1271–46 249Mich76, 227NW759. [a] (6) 86CalA459, 261P315. (9) 292Pa293, 141A41. (10) Other instances. 228App Div569, 240NYS225.

1271–48 [a] (3) By older sister. 261 Mass491, 159NE523. [b] (3) 93PaSuper 514. (6) Child of tender years momentarily found alone on streets. 96Pa Super217.

1271–49 39F(2d)445; 83CalA358, 257P 109; 98Fla582, 124S6; 231Ky702, 22SW (2d)97; 12LaA359, 125S481; Mo 30SW (2d)1065; RI 139A654; 200Wis312, 227 NW240. [a] (1) 96CalA169, 273P866; Cal 289P614; 246Mich620, 225NW601; MoA 296SW203; MoA 9SW(2d)534; MoA 10SW(2d)75; MoA 14SW(2d)499; MoA 17SW(2d)994; MoA 28SW(2d)430. (3) Other instances. MoA 28SW(2d) 405. [b] (2) MoA 2SW(2d)106. [d] (3) Crossing street. MoA 296SW203; MoA 6SW(2d)983. (4) Playing in street. MoA 6SW(2d)995. [e] (1) MoA 6SW(2d)979; MoA 28SW(2d)408. (2) See also 149 Wash312, 270P811. (3) Other instances MoA 24SW(2d)1054. [g] See also MoA 285SW114. [h] (1) 318Mo 486, 1SW(2d) 113; 320Mo 598, 8SW(2d)924; MoA 277SW362; MoA 22SW(2d)887. (6) Invitee boarding motor truck. 317Mo 108, 296SW157. (7) Collision between plaintiff's automobile and defendant's truck. 91CalA369, 266P978. (8) Collision with parked car. 203Cal 758, 265P805. (9) Guest in defendant's auto. MoA 10SW (2d)327; MoA 25SW(2d)491. (10) Automobile collision at intersection. MoA 20SW(2d)577. (11) Collision by automobile with truck parked after dark without lights. Mo 27SW(2d)13. (12) Other instances. MoA 25SW(2d)135. [i] (5) Other instances. 233Ky329, 25 SW(2d)727; MoA 22SW(2d)890. [j] **Plaintiff driving single horse wagon.**–Mo 285SW449. [k] **Plaintiff on horseback.**–MoA 15SW(2d)917 (woman and child on horse taking fright). [l] **Occupant of another automobile.**–MoA 31 SW(2d)267.

1272–51 [a] 318Mo 666, 300SW795.

1272–53 156Miss236, 125S544.

1272–56 CalA 282P508.

1272–58 TexCivA 23SW(2d)522 (to show that accident was avoidable where issue is raised).

1272–59 154Md63, 139A564. But see 233Ky756, 26SW(2d)1035. [a] **Evidence not warranting instructions.**–233Ky756, 26SW(2d)1035.

1272–61 NC 154SE48; TexCivA 19SW (2d)438.

1272–62 88 IndA36, 159NE156. See also 207 Iowa567, 221NW514.

1272–63 Nebr 227NW321; TexCivA 30SW(2d)409; Utah 279P893.

1273–68½–New. Where there is evidence of negligence, the court need not charge on the res ipsa loquitur doctrine. 173 Minn215, 217NW102.

1273–68½–New. Inconsistent instructions are properly refused. 242 IllA93 (speed of machine).

1273–68¼–New. When the facts warrant it, the jury should be instructed that the relation of principal and agent is necessarily a preliminary question to be decided before that of negligence of defendants. 109Conn460, 146A847.

1273–68½–New. The failure to instruct on the presumption of innocence, where the negligent acts constitute a crime, is error. Vt 146A812.

1273–69 See also 194Wis149, 216NW 165. [c] **Distinction between shoulders of road and paved portion of it no error.**–108Conn191, 142A742. [d] **Defining "contributory negligence," "reasonable care," and "reasonable precautions" held proper.** 233Ky59, 24SW(2d)936.

1273–70 110Conn358, 148A371.

1273–71 219Ala112, 121S404, 64ALR 640. [c] **"Intersection."**–181Ark925, 29 SW(2d)676.

1273–72 See also Iowa 227NW620.

1273–74 23AlaA322, 125S61(2dcase); 102CalA221, 282P1009; Iowa 229NW 210; 49RI 364, 142A621; 107WVa440, 148SE496. [b] (8) Parking in violation of statute. 124 Or644, 264P349. (9) Right of way. 146Wash50, 261P645. (10) Care required of operator at street intersection. 49RI 364, 142A621. (11) That contributory negligence is no defense in action for wanton misconduct. 109Conn517, 147A138.

1273–75 204Cal 374, 268P369; 79CalA 406, 249P837; 97CalA367, 275P515; Iowa 228NW880; 126Kan188, 268P 119; 265Mass444, 164NE448; 241Mich 361, 217NW32; 320Mo 725, 8SW(2d) 607; MoA 19SW(2d)766; 145Wash597, 261P405. [a] (12) As to last clear chance. 111Conn41, 149A244.

1274–79 200Cal 628, 254P256; 98CalA 268, 276P1055; 207 Iowa1327, 224NW 824(2dcase); 208 Iowa361, 225NW862.

1274–81 200Cal 628, 254P256.

1274–83 208 Iowa361, 225NW862.

1274–87 79CalA234, 249P223; 110Conn 230, 147A671(2dcase); 40GaA606, 150 SE552; MoA 24SW(2d)712 (timely warning). [a] 220Ala229, 124S510(2dcase); 235Ky60, 29SW(2d)632(2dcase); 33 OhA177, 168NE761. [b] 102CalA221, 282P1009; 102CalA405, 283P148; 248 IllA392; 126 Or532, 270P521; 144SC 437, 142SE722; 154Wash261, 282P52.

1274–89 Ariz 287P440 (contributory negligence); 179Ark225, 15SW(2d)391; 179Ark742, 18SW(2d)345; 80CalA590, 252P739; 81CalA270, 253P776; 88CalA 67, 262P1106; 96CalA236, 273P1080; 97CalA87, 275P456; 97CalA377, 275P 840; 97CalA524, 275P1029; 98CalA268, 276P1055; 98CalA759, 277P894; 108 Conn9, 142A385; 108Conn180, 142A749; 109Conn77, 145A753; 205 Iowa666, 216 NW733; 207 Iowa1327, 224NW824(2dcase); 226Ky421, 11SW(2d)93; 242 Mich497, 219NW665; 246Mich91, 224 NW343; Minn 231NW244; 152Miss 377, 118S828; MoA 299SW85; MoA 3 SW(2d)1044; MoA 6SW(2d)986; MoA 15SW(2d)899; MoA 25SW(2d)491; 104 NJL130, 138A896; 29 OhA489, 163NE 915; 124 Or1, 263P886; 126 Or373, 270 P488; 129 Or435, 277P291; 149Wash 631, 272P32; 151Wash486, 276P542; 197Wis538, 222NW821.

1275–90 247Mich291, 225NW569.

1275–91 219Ala101, 120S914; 220Ala 207, 124S737; Ala 128S433; Ala 130 S548; 79CalA406, 249P837; 82CalA660, 256P457; 102CalA280, 282P990; CalA 290P1062; 98Fla720, 124S180; 40GaA 606, 150SE852; Iowa 228NW880; 232 Ky98, 22SW(2d)448; 178Minn382, 227 NW207; Minn 233NW239; Mo 30 SW(2d)1065; NJ 144A324; 231App Div751, 245NYS422; 131 Or612, 282P 768; Utah 273P515; 145Wash520, 261 P84; 154Wash588, 283P447.

1275–93 [a] 79CalA406, 249P837; 100 CalA775, 281P95 (to clarify meaning of term used); 158Md202, 148A232.

1275–95 [a] MoA 7SW(2d)298; 88Pa Super361; Utah 272P207. [b] 218Ala 55, 117S634; 179Ark742, 18SW(2d)345; MoA 297SW189; 105NJL204, 143A 444; 124 Or1, 263P886.

1275–96 MoA 13SW(2d)575; Va 154 SE547. [a] (2) 320Mo 672, 8SW(2d) 599; TexCivA 26SW(2d)373; Wash 290P215. [b] (1) 219Ala475, 122S642; 108Conn95, 142A466. (2) 148Miss871, 114S807; 223AppDiv234, 228NYS20 (parking and leaving car unlocked). [c] (1) 92CalA52, 267P724; 109Conn 517, 147A138; Iowa 230NW570 (driver of car following another car); 234 Ky702, 28SW(2d)484; 247Mich291, 225 NW569; MoA 15SW(2d)917; MoA 21 SW(2d)496; 32 OhA301, 168NE52 (where instruction excused defendant from liability if his driver exercised care in approaching intersection regardless of subsequent conduct). (2) 181 Ark1024, 28SW(2d)1052; 80CalA590, 252P739; 92CalA52, 267P724; CalA 287P354; 110Conn358, 148A371; 234 Ky438, 28SW(2d)493; Mass 167NE 661; MoA 299SW85; MoA 22SW(2d) 65; 292Pa293, 141A41; TexCivA 28 SW(2d)622; 144Wash409, 258P39.

1275–97 132 Or549, 287P77 (brakes). [b] 235Ky60, 29SW(2d)632(2dcase) (failure to signal for turn); 105NJL 213, 143A340, 61ALR1232. [c] Cal 293 P62; 97CalA87, 275P456 (speed at intersection); 102CalA221, 282P1009; 110 Conn540, 148A377; 111Conn209, 149A 838; 242 IllA166; Mass 169NE557; 178 Minn382, 227NW207; 178Minn540, 227 NW854; 156Miss77, 125S539; MoA 297 SW180; MoA 7SW(2d)452; 196NC213, 145SE169; 132 Or332, 285P823; Tex CivA 28SW(2d)622; 200Wis601, 229NW 74. [d] **Recklessness.**–93CalA601, 269P 972. [e] **Concurrent negligence** instruction held proper. 23AlaA574, 129S318.

1275–98 TexCivA 30SW(2d)697. [a] 219 Ala475, 122S642; 85CalA55, 258P988; 107Conn670, 142A461; 251 IllA364; 256 IllA425; 239Mich53, 214NW85; Mo 296 SW408; Mo 32SW(2d)580; 225AppDiv 399, 233NYS381; 26 OhA575, 160NE502; 27 OhA26, 160NE737; 146Wash50, 261P 645. [b] 218Ala227, 118S283; 220Ala 510, 126S127(1stcase); Ala 128S433; 80 CalA590, 252P739; 97CalA731, 276P 149; 101CalA426, 281P723; 102CalA 436, 283P317; CalA 284P499 (presumption of care); CalA 286P1097; CalA 287 P152; CalA 290P515(2dcase); Ida 290 P724; 207 Iowa1327, 224NW824(2dcase); 241Mich361, 217NW32 (pedestrian standing on safety platform); 249Mich76, 227NW759; Mich 233NW 225; Mo 285SW449; Mo 295SW751; Mo 32SW(2d)580; MoA 297SW180; MoA 21SW(2d)195; 121 Or371, 169NE 291; 27 OhA26, 160NE737; 31 OhA 273, 167NE407 (though charging to find for defendant if plaintiff's negligence contributed "in slightest degree" to his injury rather than to "any degree"); Or 289P1073; 12PaDist&Co 647; SD 228NW409; 101Vt285, 143A394; 149 Wash638, 272P36. [c] 221MoA188, 299 SW137. [e] **Failure to charge** held erroneous. 166Ga897, 144SE651(1stcase).

1276–99 23AlaA574, 129S318; IndA 168 NE246. [b] 194Wis149, 216NW165. [c] 80CalA56, 251P235; 83Colo 211, 263P 933; 157Miss510, 128S100. [d] 218Ala 227, 118S283; 81CalA747, 254P679; 97 CalA87, 275P456; 108Conn9, 142A385; 111Conn99, 149A399; 178Minn540, 227 NW854; Minn 233NW237; 323Mo 441, 19SW(2d)467; 86Mont545, 284P542; NJSup 152A81; ND 231NW785. [e] **Instruction misleading but not erroneous.**–323Mo 441, 19SW(2d)467 (using word "contributing" as to negligence of one of two defendants).

1276–2 CalA 293P115; Mich 233NW 225; Miss 130S906. See also MoA 296 SW249. [a] Cal 290P571; 84CalA721, 258P686; 41GaA4, 152SE116; 239Mich 37, 214NW170.

1276–3 84CalA599, 258P616.

1276–4 [a] (1) Mo 23SW(2d)96. (2) MoA 25SW(2d)133. (3) Charge that plaintiff has burden of proving that defendant knew, or, in exercise of ordinary care, should have known, that plaintiff was in such position that he could not escape injury when defendant started car. 174Minn481, 219NW769. (4) Imposing on plaintiff burden of proving his guest's freedom from contributory negligence. 109Conn517, 147A138. (5) Placing too great burden on defendant by instructing that certain speed is per se negligent and unlawful. 199Wis320,

226NW392. (6) Other instances. Mich 233NW178. [b] 208Cal 105, 280P522 (particularly in view of other instructions); CalA 282P508; CalA 290P108; 222MoA1036, 7SW(2d)398; 125 Or80, 265P801; SD 228NW409; Utah 283P 160. [c] Instruction held prejudicially refused.–260Mass206, 156NE884.

1276-5 [a] Instructions held correct.–Va 153SE664.

1276-6 [a] 203Cal 374, 264P485.

1276-7 128Me92, 145A748. [a] 199Wis 315, 225NW935(2dcase). [b] MoA 297 SW180; 123 Or615, 257P822, 263P59.

1276-8 Or 292P1038.

1276-9 231Ky211, 21SW(2d)272 (reasonable rate of speed). [a] CalA 287P 545; 41GaA120, 152SE278. [b] (1) Ala 128S233 (misleading); 203Cal 621, 265 P814; 102CalA405, 283P143; 102CalA 396, 283P336; 157Md528, 146A851; Mass 170NE51; MoA 21SW(2d)195; ND 230NW6 (passing man on horseback); Wis 229NW860. (2) 155Wash133, 283 P1076. (3) 196NC213, 145SE169. (4) 89CalA721, 265P541; 100CalA678, 280 P989. (5) As to carrying lights. 81 CalA747, 254P679.

1276-10 109Conn33, 145A36; 39GaA 222, 146SE914; 157Miss510, 128S100. [a] (1) 79CalA234, 249P223; 240Mich 671, 216NW413; 172Minn1, 214NW471; 124 Or237, 264P459; 125 Or1, 265P439. (2) Authorizing recovery against truck attempting to pass to right of overtaken automobile. 157Md528, 146A851. [b] (1) 254 IllA68; 235Ky637, 32SW(2d)1; NH 148A461; 118 OhSt375, 161NE44; 32 OhA301, 168NE52; 98PaSuper4; Wash 289P533. (2) 180Ark1144, 24 SW(2d)960; MoA 17SW(2d)603; 118 OhSt375, 161NE44; 123 Or20, 261P428; Vt 148A874. (3) Duty seasonably to turn to right. 146Wash43, 261P782. (4) Failure to charge held not erroneous. 38GaA487, 144SE403. [c] Charge held erroneous.–147Miss843, 112S788. [d] Passing other vehicles.–TexCivA 5 SW(2d)1010. [e] Instructions held erroneous.–207 Iowa367, 223NW100; 228 AppDiv194, 239NYS200.

1276-11 253 IllA107. [b] CalA 260P 337; 86CalA595, 261P481; CalA 287P 152; MoA 20SW(2d)580; 124 Or1, 263 P886; 144Wash409, 258P39; 146Wash 50, 261P645. [c] Instructions held erroneous.–106Conn499, 138A223; 241 Mich83, 216NW417; MoA 296SW249. [d] Instruction held not erroneous.–NJ 148A745.

1276-12 MoA 20SW(2d)570 (instruction not erroneous).

1276-14 [b] (2) TexCivA 28SW(2d) 622. (6) 132 Or549, 287P77; TexCivA 28SW(2d)622. [c] (4) Of failure to define what is meant by sounding of signal of warning of approach. 222MoA 1036, 7SW(2d)398. [d] Term erroneously defined.–Scope of duty. 317Mo 108, 296SW157. [e] Terms held erroneously defined.–Nebr 228NW528 ("proper lookout").

1276-15 151Wash279, 275P713. [a] (1) TexCivA 299SW665. (3) Not error to refuse to instruct on law enacted after accident. NJ 148A396. [b] 177Ark35, 5SW(2d)728; 181Ark925, 29SW(2d) 676; 87Colo 414, 288P887; 253 IllA107; 151Miss443, 118S300; 121 Oh77, 166NE 901; 129 Or210, 277P99. [c] 204Cal 28, 266P280; 91CalA129, 266P964; IndA 168NE246; 239Mich37, 214NW170; NJ Sup 137A528; 30 OhA211, 164NE773; 144Wash409, 258P39. [d] 88 IndA36, 159NE156. [e] In instruction on negligence in violation of statute, it is not error to include in same instruction excusable violations. CalA 284P681; 35 OhA91, 172NE298.

1277-16 [a] 316Mo 1235, 293SW142; 317Mo 108, 296SW157; MoA 14SW(2d) 483; MoA 20SW(2d)577. [b] 34F(2d) 927; Cal 290P571; 87CalA99, 261P 1049; 111Conn219, 149A671; Mo 285 SW449; 221MoA966, 281SW973; 222 MoA1036, 7SW(2d)398; MoA 17SW(2d) 567; MoA 21SW(2d)195; MoA 24SW(2d) 1054; MoA 29SW(2d)197; 196NC213, 145SE169.

1277-17 [a] 172Minn1, 214NW471.

1277-23 216Ala676, 114S137; CalA 284 P499; 40GaA415, 149SE805(2dcase) (instruction imposing on operator duty of insurer); MoA 22SW(2d)884.

1277-24 Ala 130S401; 81CalA690, 254 P671; 89CalA511, 265P318; TexCivA 23SW(2d)516. [a] Requests improperly refused.–58ND921, 228NW427 (failure of driver of car in which plaintiff was passenger to have required lights).

1277-25 216Ala676, 114S137; 219Ala 336, 122S351; Ala 128S233 (imputed); 98CalA268, 276P1055; CalA 287P152; 45 Ida83, 260P1027; 126Kan188, 268P 119; 263Mass252, 160NE792; 32 OhA 301, 168NE52 (unqualified charge that plaintiff had duty to stop her car, where only reasonable care required); 34 OhA 183, 170NE604; 35 OhA361, 172NE533; Utah 283P160 (instruction erroneously refused); 144Wash409, 258P39; Wis 229NW860.

1277-26 Ala 128S139; Ala 128S233; 108Conn436, 143A568; MoA 31SW(2d) 592; 295Pa95, 144A899; 145Wash520, 261P84; Wash 289P19.

1277-27½-New. the duty of an operator at a street intersection; 28 OhA30, 162NE434.

1277-28½-New. duty as to a driver's keeping a lookout at night; 218Ala55, 117S634.

1277-28¾-New. as to the right of way rule; 179Minn123, 228NW752.

1277-28¾-New. defective brakes; 132 Or549, 287P77.

1277-29 81CalA690, 254P671; 93CalA 1, 268P1061; Mo 23SW(2d)96. [b] Instructions erroneously refused.–Mo 23 SW(2d)96.

1277-30 109Conn77, 145A753.

1277-32 181Ark925, 29SW(2d)676; 228 Ky635, 15SW(2d)497; 318Mo 486, 1SW (2d)113; 220MoA1294, 290SW1014; MoA 20SW(2d)918; 144 Okl 237, 291P 87. [a] (1) 57ND741, 224NW167; 146 Wash50, 261P645; 146Wash66, 262P 133. (3) ND 230NW294. (7) Instruction denying recovery for injury arising from head on collision of automobiles if defendant's automobile was on proper side and unless plaintiff's automobile was on proper side. 205 Iowa 666, 216NW733. (8) Statutory rights and duties at street intersection. 57ND 741, 224NW167. (9) Care as to occupants of other vehicles. 228Ky635, 15 SW(2d)497. (10) Giving signals. 235 Ky60, 29SW(2d)632(2dcase). [b] 83 CalA508, 257P114; 111Conn99, 149A399; 251Mich597, 232NW371; Mo 285SW449. [c] Statutory elements necessary under right of way statute held stated. Wash 389P533.

1277-33 318Mo 486, 1SW(2d)113; 132 Or106, 284P579; 106WVa494, 145SE 817, 63ALR271.

1277-34 98CalA373, 277P156; 37GaA 310, 140SE46. [a] General statement not qualified.–32 OhA301, 168NE52.

1277-35 Iowa 228NW880 (instruction in language of statute).

1277-39 229Ky284, 17SW(2d)233.

1277-41 144Wash409, 258P39.

1277-41½-New. or not clear; 129 Or 64, 275P913(1stcase).

1278-42 MoA 297SW180.

1278-49 Va 154SE547. [b] (1) 218Ala 603, 119S841; 220Ala201, 124S740; 250 IllA364; 253 IllA107; 171Minn81, 213 NW377; 316Mo 1235, 293SW142; MoA 15SW(2d)370. (6) 317Mo 108, 296SW 157. [c] (1) 96CalA169, 273P866; 81 CalA690, 254P671; 81CalA747, 254P 679; MoA 27SW(2d)448; NJ 143A817. (6) TexCivA 28SW(2d)622. (13) 145 Wash597, 261P405. (14) 93CalA601, 269P972. (20) To keep "proper" lookout for pedestrians on highway. 208Cal 105, 280P522.

1279-50 [c] 320Mo 598, 8SW(2d)924; 146Wash66, 262P133. [d] 86CalA595, 261P481; 99CalA557, 279P183; 129 Or 435, 277P291; 148Wash359, 268P884; Wis 228NW509.

1279-51 105WVa423, 143SE91.

1279-57 Ala 130S416; 109Conn87, 145 A659; Wash 290P816.

1279-60 48 Ida310, 282P72; 132 Or 488, 286P525 (modification not erroneous).

1279-66 83CalA508, 257P114; 242 IllA 166. But see 254 IllA68. [a] See also NJL 142A642.

1279-69 37GaA310, 140SE46 (charge held proper).

1279-69½-New. It is not necessary to give the entire language of a statutory section as to signals, especially where the sufficiency of the signal is not challenged. 99CalA557, 279P183.

1279-70 216Ala684, 114S139; 244 IllA 458; 221MoA823, 293SW460; MoA 297 SW180. But see Minn 233NW239. [b] Cal 290P571; MoA 299SW85; MoA 18SW(2d)528; 106WVa717, 146SE 882. [c] 216Ala684, 114S139; 158Md 463, 149A1; 129 Or642, 276P693.

1280-71 156Miss802, 126S906(2dcase). [b] Refusal of instruction held error under pleadings and testimony. Wash 287P886.

1280-72 216Ala684, 114S139; Ala 130 S416; 83Colo 211, 263P933; 233Ky493, 26SW(2d)1; Md 151A400; MoA 285SW 1036; 126 Or373, 270P488; 132 Or619, 287P219; TexCivA 10SW(2d)168; WVa 155SE125.

1280-76 147Miss843, 112S788.

1280-78 38GaA487, 144SE403 (instruction held proper).

1280-80 217Ala304, 116S158; 58ND 286, 225NW791. [a] Ala 130S416; 41 GaA4, 152SE116; 256 IllA170; 207 Iowa 113, 222NW416, 62ALR1174; 318Mo 486, 1SW(2d)113; 320Mo 598, 8SW(2d) 924; 131 Or612, 282P768. [b] 203Cal 621, 265P814; 81CalA86, 253P178; 107 Conn91, 139A639; MoA 10SW(2d)75; ND 232NW897.

1280-81 218Ala55, 117S634; 102CalA 436, 283P317; CalA 284P681. [b] (1) NJSup 145A223.

1280-82 MoA 285SW120.

1281-84 207 Iowa1327, 224NW824(2d case).

1281-86 147Miss843, 112S788.

1281-87 242Mich497, 219NW665; 198 Wis34, 222NW304.

1281-88 251 IllA364 (wanton and willful misconduct); 147Miss843, 112S788. [c] Instruction held erroneous.–147Miss 843, 112S788.

1281-92 [b] (2) Other instances. 251 IllA320. [c] 158Md424, 149A4; 144 Wash409, 258P39.

1281-95 MoA 285SW542; 124 Or237, 264P459.

1281-96 98CalA101, 276P389; MoA 299 SW85; MoA 17SW(2d)567; MoA 24SW (2d)1054; 121 Or552, 255P477.

1281-98 222AppDiv267, 225NYS720.

1281-99 246 IllA382.

1281-1 251 IllA99; 253 IllA107; 221 MoA823, 293SW460.

1282-6 158Md463, 149A1; 90PaSuper 14.

1282-7 216Ala684, 114S139; 219Ala 101, 120S914; 220Ala207, 124S737; CalA 290P1062; 27 OhA47, 160NE734; 90 PaSuper14; Va 154SE499.

1282-8 216Ala684, 114S139; 98CalA 373, 277P156; 256 IllA425; 208 Iowa 361, 225NW862; 221MoA188, 299SW 137; MoA 17SW(2d)639; Nebr 231NW 153; 149Wash648, 271P1001; [a] 29 F(2d)87; 219Ala336, 122S351; 85CalA 455, 259P455; CalA 284P1083; CalA 284P1086; 255 IllA106; 158Md233, 148 A453; 158Md646, 149A543; 247Mich 291, 225NW569; 249Mich350, 228NW 766; 178Minn465, 227NW493; 150Miss 68, 116S295; 154Miss84, 121S282; 320 Mo 598, 8SW(2d)924; MoA 15SW(2d) 917; MoA 298SW1037; 124 Or237, 264P 459; Wash 290P816; Wash 290P831; Wash 290P864. [b] 29F(2d)87; 218Ala 55, 117S634; 178Ark250, 11SW(2d)774, 61ALR1348; 203Cal 374, 264P485; 207 Cal 279, 277P1045; 78CalA733, 248P 727; 98CalA101, 276P389; CalA 284P 499; 107Conn91, 139A639; 40GaA827, 151SE685; 246Mich620, 225NW601; 172 Minn591, 216NW537; Mo 9SW(2d)918; MoA 7SW(2d)706; 196NC213, 145SE 169; 30 OhA211, 164NE773; 49RI 364, 142A621; Vt 148A874; 149Wash638, 272P36.

1282-10 38GaA487, 144SE403.

1282-11 CalA 284P499.

1282-17 CalA 290P108; Mo 286SW66. [a] Instruction on unavoidable accident held not misleading. TexCivA 29SW (2d)828.

1282-18 MoA 277SW362; 153Wash75, 279P97 (where evidence precluded finding that collision was unavoidable).

1283-21 217Ala272, 116S123; Ala 130S 416; CalA 291P884 (presumption of care of deceased); 107Conn437, 140A

733; 108Conn544, 143A886; Ida 290P724; 265Mass472, 164NE377; 249Mich350, 228NW766; 156Miss802, 126S906 (2dcase); 316Mo1143, 295SW751; 158Mo424, 149A4; MoA 14SW(2d)453; MoA 9SW(2d)534; MoA 17SW(2d)359; MoA 27SW(2d)448; 121Or552, 255P477; 8PaDist&Co629; Utah 279P893 (as proximate cause); 196Wis305, 220NW179. [b] **Instruction held properly refused.**–As to duty of person on horseback. 224Ky274, 6SW(2d)264. [c] **Instruction held sufficient.**–SD 231NW540.

1283-22 [b] **Where there is no legally sufficient evidence** on which to base finding of contributory negligence, it is proper so to instruct. 157Md528, 146A851.

1283-23 222MoA1036, 7SW(2d)398; MoA 9SW(2d)534; 104WVa636, 141SE14.

1283-24 CalA 284P1083; 239Mich53, 214NW85; MoA 31SW(2d)592; 32OhA445, 168NE225; 125Or1, 265P439. See also Cal 292P451; 80CalA109, 250P693. [a] **Instructions properly refused as inapplicable under evidence.** 153Wash75, 279P97.

1283-27 207Iowa1327, 224NW824(2d case); 157Md528, 146A851 (refusal of instruction held error); 148Miss871, 1148807; MoA 19SW(2d)766 (refusal to give instruction that driver was under no duty to sound warning held not error); 132Or115, 284P565.

1283-30 233Ky763, 26SW(2d)753.

1283-31 197NC206, 148SE40. See also 230AppDiv404, 245NYS78.

1283-32 149Wash468, 271P266.

1283-33½-New. An instruction was held correct and as not inferring that it was the absolute duty of defendant, whose car collided with plaintiff's, to give a warning on approaching an intersection. MoA 6SW(2d)993.

1283-34 85CalA233, 258P1104; 98CalA101, 276P389; CalA 284P499; 45Ida83, 260P1027; 208Iowa1157, 225NW346; 320Mo725, 8SW(2d)607; 321Mo358, 11SW(2d)11; MoA 10SW(2d)327; MoA 20SW(2d)570; MoA 25SW(2d)491; ND 230NW6; 153Wash75, 279P97; Wash 291P714; 106WVa717, 146SE882. [b] **Instructions held erroneous.**–MoA 15SW(2d)917.

1283-35 146Wash66, 262P133; 147Wash589, 266P727.

1283-36 MoA 14SW(2d)502.

1283-37 MoA 298SW1045. [b] **Instructions held not erroneous.**–251Mich679, 232NW226.

1283-38 128Or409, 272P1027.

1283-39 92CalA52, 267P724; 233Ky59, 24SW(2d)936. [a] **Instruction as to right of way between two automobiles at street intersection held erroneously refused.** 221MoA362, 273SW143. [b] **Instructions held correct under the evidence.**–CalA 285P905. [c] **Instruction held properly refused.**–155Wash133, 283P1076.

1284-45 See also 254IllA68.

1284-48 Ala 130S401; 181Ark925, 29SW(2d)676; CalA 286P761; CalA 291P618; 37GaA389, 140SE632; 88IndA36, 159NE156; 233Ky763, 26SW(2d)753; 222MoA1036, 7SW(2d)398. [c] **Instructions held sufficient.**–251Mich679, 232NW226.

1284-51 35OhA361, 172NE533. [b] 92CalA52, 267P724; CalA 284P499; 111Conn99, 149A399; 248IllA545; 224Ky460, 6SW(2d)454; 172Minn493, 215NW861; 124Or534, 264P863; 88PaSuper199; 151SC537, 149SE241 (that violation of statute constituted negligence as matter of law); 146Wash43, 261P782; 149Wash638, 272P36. [c] CalA 284P1083; CalA 290P1062; 226Ky580, 11SW(2d)409; 224Ky274, 6SW(2d)264.

1284-52 [b] 84Colo433, 271P187; 255IllA189; 240Mich671, 216NW413. [c] (1) 100CalA678, 280P989 (instruction as to safety zone rules properly refused as inapplicable under evidence). (2) Requiring finding that speed exceeded certain rate before defendant could be found to have violated statute. 31OhA273, 167NE407.

1284-59½-New. An allegation in a complaint that defendant was under the influence of intoxicating liquors authorizes an instruction under a statute making intoxication conclusive evidence of inability to control and operate a vehicle. 45Ida427, 262P881; 56ALR317.

1284-93 CalA 290P108; 222Ky286, 300SW890; 224Ky460, 6SW(2d)454; 239Mich37, 214NW170; 251Mich679, 232NW226; 180Minn163, 230NW580; 56ND351, 217NW529; TexCivA 30SW(2d)681. See also 82CalA660, 256P457. [a] **Instructions held not erroneous.**–82CalA660, 256P457. [b] **Instructions warranted or not erroneous.**–99CalA423, 278P1051. [c] **Instructions properly refused.**–100CalA775, 281P95.

1284-64 Va 154SE547.

1284-65 222Ky551, 1SW(2d)985. See also 97CalA87, 275P456.

1285-66 208Iowa275, 225NW406.

1285-70 31OhA77, 166NE427; 32OhA451, 168NE230 (contributory negligence).

1285-73 217Ala30, 114S812. [a] 219Ala475, 122S642. [b] 92CalA52, 267P724; 220MoA1294, 290SW1014; MoA 17SW(2d)359. [c] MoA 299SW85.

1285-76 217Ala30, 114S812. [a] 107Conn670, 142A461; MoA 20SW(2d)918. [b] 80CalA444, 251P952; 320Mo725, 8SW(2d)607; MoA 17SW(2d)603.

1285-77 89CalA511, 265P318; 254IllA387.

1285-78 222MoA1036, 7SW(2d)398.

1286-86 [b] **Verdict held fatally defective** where instructions did not raise issue of ordinary care. 197Wis542, 222NW799.

1286-87 79CalA234, 249P223; 106Conn264, 137A753; TexCommnA 78SW(2d)521.

1286-88 78CalA785, 248P1031; 195Wis481, 218NW727. [a] **Finding that all "material" allegations in complaint are true** does not negative contributory negligence. CalA 290P1051(2dcase).

1286-89 [a] NJSup 147A455(1stcase).

1286-90 [b] **Findings held immaterial.**–CalA 287P562.

1286-93 256IllA461. [c] **Parent of owner of car** being driven by minor owner's companion is not absolved from liability by failure of jury to find verdict as to owner and driver. 80CalA109, 250P693.

1286-1½-New. or of requests for submission of particular issues. TexCivA 48SW(2d)222.

1286-2 TexCivA 48SW(2d)222; TexCivA 58SW(2d)1010; TexCivA 26SW(2d)722 (finding precluding direction of verdict). [a] (3) Other instances. Mass 170NE462(1stcase).

1286-3 [a] 129Kan475, 283P620; TexCivA 48SW(2d)222; TexCivA 15SW(2d)690; TexCivA 16SW(2d)337; TexCivA 29SW(2d)871; TexCivA 32SW(2d)696; 200Wis299, 227NW278. [b] TexCommnA 15SW(2d)218; TexCivA 48SW(2d)87; TexCivA 19SW(2d)144; 194Wis149, 216NW165.

1286-4 [a] 127Or103, 270P486(2dcase); Wis 229NW533.

1287-7 [a] **As between owner and hirer,** where jointly sued for injuries due to driver's negligence, verdict for owner and against hirer meant that driver was not owner's servant but hirer's. MoA 19SW(2d)559.

1287-9 240Mich402, 215NW290; NJSup 151A383; 136Misc138, 239NYS858.

1287-10 CalA 289P218 (where verdict did not exonerate, but was merely silent as to owner).

1287-12½-New. A verdict against the owner only is not a verdict in favor of the driver, but merely an indication of failure to find on the issue of the driver's negligence. 79CalA406, 249P837.

1287-15 TexCivA 22SW(2d)714. [b] **Findings held to support judgment.**–TexCivA 30SW(2d)423.

1287-21 [a] (8) Verdict in excess of actual damages where not justified by evidence. 22AlaA215, 114S277. (9) Excessive verdict indicating influence or prejudice. 172Minn543, 216NW233.

1287-24 [a] 219Ala256, 122S812(2dcase); 92CalA732, 268P951; 12PaDist&Co288; 13PaDist&Co452. [b] 208Iowa687, 224NW46; 56ND722, 219NW228; 12PaDist&Co91.

1288-28 [b] (14) That verdict is against owner only in action against owner and driver. 79CalA406, 249P837. (15) As to diminishing of damages in proportion to plaintiff's negligence. 151Miss443, 118S300.

1283-33 246IllA487.

1288-35 MoA 292P1106. [a] (1) 45Ida83, 260P1027; 3LaA46. (2) 200Cal726, 254P891 (motor cycle); 30Hawaii12. (10) Collision. 126Or105, 268P982. (11) Action by guests of driver in owner's auto. 148Wash516, 269P825. (12) Other instances. 254IllA526. [b] (1) 92CalA495, 268P483; 124Kan414, 261P30. (8) Negligence of operator of car emerging from private driveway. 173Minn163, 216NW803. (9) Contributory negligence of boy killed by automobile while he was coasting on playground. 81Mont79, 261P613. [c] **Verdicts for defendant not disturbed.**–Injuries to bicycle rider. NJSup 140A396. [d] **Judgments for plaintiff reversed.**–87PaSuper276.

1288-36 242IllA396. [b] (1) 3LaA734. [c] (1) 8LaA668.

1289-39 MoA 38SW(2d)1044.

1289-43 [a] 242IllA308. [b] MoA 6SW(2d)979.

1289-46 254IllA526; MoA 68W(2d)1017.

1289-49 81CalA86, 253P178; 109Conn33, 145A36; 125Kan648, 266P69; 172Minn493, 215NW861; TexCivA 58W(2d)1010. [a] 254IllA526. [c] 250IllA364; Iowa 227NW620.

1290-50 [b] 251IllA320. [c] **Error in failure to give instruction held prejudicial.**–41GaA4, 152SE116.

1290-54 151SC391, 149SE111.

1290-63½-New. The negligent party cannot fix the extent of his liability by repairing the automobile without the owner's consent. 92PaSuper259.

1291-81 Or 288P212.

1292-92 MoA 295SW475.

1292-12 [a] (1) 129Kan45, 281P895; 2LaA457. (2) 109Conn376, 146A819; 147Wash607, 266P733.

1293-18 92PaSuper259.

1293-21 132Or689, 288P212; 86PaSuper106.

1293-23 81CalA423, 254P289.

1293-28 252IllA194; 4LaA570; 7LaA274; 92PaSuper259; 10PaDist&Co637. See also 11LaA71, 128S352 (plaintiff is entitled to have all damages caused by defendant's fault properly repaired).

1294-29 81CalA270, 253P776; 252IllA194; 252IllA586; 12LaA661, 126S890; Or 288P212; 147Wash607, 266P733.

1294-34 81CalA423, 254P289.

1294-39 252IllA586.

1295-64 89PaSuper263.

1295-75½-New. Opinion evidence as to the amount of depreciation in value should be excluded where actual figures are shown. 252IllA586.

1296-1 [a] **Value after collision.**–NJSup 146A683(1stcase). [b] **Value before collision.**–NJSup 146A683(1stcase).

1297-13 249IllA15.

1297-16 81CalA423, 254P289; 89PaSuper257; 97PaSuper483.

1297-20 87PaSuper365. See also 242IllA308; 249IllA15.

1297-21 But see 242IllA396.

1297-23 242IllA401.

1297-23½-New. Opinion evidence as to the usual and customary charge for repairs is not pertinent where actual figures are shown. 252IllA586.

1298-32½-New. or, in general, of proof of inability to obtain or to operate another car. NJL 142A651.

1298-37 [c] **Evidence held incompetent.**–255IllA373.

1298-40 [a] (2) 10PaDist&Co374. (3) That damaged truck belonged to plaintiff. 89PaSuper428. [b] (1) CalA 284P974.

1298-46 10PaDist&Co574.

1298-51 81CalA423, 254P289; 243IllA60.

1299-57 252IllA586.

1299-73½-New. An instruction excluding recovery for diminution in value, where the value of the vehicle as repaired is less than it was before the accident, is erroneous. 81CalA270, 253P776.

1300-81½-New. An instruction denying recovery for loss of use pleaded and proved is erroneous. 81CalA270, 253P776.

1304-66 TexCivA 13SW(2d)230. See also 298Pa400, 148A511.

1304-67 Ida 286P353.
1304-68 30F(2d)808; 219Ala511, 122S830; 202Cal698, 262P718; 169Ga74, 149SE779; 226Ky123, 10SW(2d)630; 230Ky104, 18SW(2d)951; 249Mich372, 228NW707(2dcase); 198NC51, 150SE810; 128 Okl 17, 261P183; 156Tenn474, 2SW(2d)414; TexCivA 23SW(2d)796. But see 298Pa400, 148A511.
1304-70 [a] 298Pa400, 148A511.
1304-71 Ala 130S186.
1304-72 NC 154SE29; 128 Okl 17, 261P183; TexCivA 28SW(2d)178.
1304-73 219Ala656, 123S213 (not necessary to wait till business is being conducted); 178Ark399, 10SW(2d)861.
1305-74 Ala 130S186; 178Ark399, 10SW(2d)861; 202Cal698, 262P718. [b] **Evidence was not sufficient** to authorize finding that operation of filling station in question would constitute nuisance, and trial judge erred in enjoining plaintiff in error from operating it. 167Ga256, 145SE446.
1305-75 30F(2d)808; 219Ala511, 122S830.
1305-77 298Pa400, 148A511.
1305-78 219Ala656, 123S213; 12PaDist&Co 777; Wis 232NW862.
1305-83 156Tenn474, 2SW(2d)414.
1305-83½-New. Where location is both residential and commercial, court must say whether attempted use justifies restraint. 298Pa400, 148A511.
1305-86 226Ky123, 10SW(2d)630. [a] **Petition held insufficient to state cause of action.**-Ga 155SE327.
1305-87 But see 298Pa400, 148A511.
1305-88½-New. An adjoining property owner is not entitled to damages in the absence of showing an improper operation of a filling station. 226Ky123, 10SW(2d)630.
1306-2 175Minn276, 221NW6; Tex CivA 23SW(2d)796. See also NC 154SE29. [a] **Licensing filling stations** is proper exercise of police power. Wis 230NW70. [b] **Filling stations are peculiarly subject** to police regulation. TexCivA 27SW(2d)868.
1306-3 Ida 286P353; Iowa 228NW874; 217Ky135, 289SW223 (ordinance prohibiting filling stations within one hundred feet of church or school); 247Mich572, 226NW248; 128 Okl 17, 261P183; 50RI 108, 145A451; TexCivA 27SW(2d)868 (ordinance held valid); TexCivA 28SW(2d)178. [a] (2) NJ 143A747. (4) Ordinance prohibiting filling stations within one hundred feet of church or school, not unreasonable. 217Ky135, 289SW223. (5) City is authorized to adopt zoning ordinance regulating location of filling stations. 217Ky135, 289SW223. [b] **Ordinance establishing district within which gas filling stations cannot be constructed and operated** is valid exercise of police power. 128 Okl 17, 261P183. [c] **Ordinance held discriminatory** as between drive-in stations and curb stations. 33F(2d)427.
1306-5 NJSup 145A233. See also 131 Okl 122, 268P240 (prohibitory ordinance not violation of constitutional rights). [a] 128 Okl 17, 261P183.
1306-6 109Conn583, 145A48; Ida 286P353; 198NC51, 150SE810; 128 Okl 17, 261P183; 87PaSuper84.
1306-7 128 Okl 17, 261P183.
1306-8 Ida 286P353; 193NC432, 137SE183, 55ALR252; 198NC92, 150SE808; 198NC51, 150SE810; 128 Okl 17, 261P183.
1306-9 109Conn583, 145A48; 50RI 108, 145A451.
1306-10 NJ 143A865; 128 Okl 17, 261P183. [a] **Mayor and commissioners are not liable** in damages for refusing permit for gas station on contention ordinance is void. TexCivA 29SW(2d)437.
1306-12½-New. Neither city commissioners, nor pastor or congregation could waive ordinance to allow station within area prohibited by it. TexCivA 27SW(2d)868.
1306-14½-New. Lapse of time will not render valid invalid ordinance prohibiting erection of filling stations in certain locations. Ida 286P353.
1306-17 97Fla154, 120S3.
1306-20 169Ga74, 149SE779.
1306-23 116Nebr263, 216NW809.
1307-26 30F(2d)808. [a] **Zoning ordinance may except from its provisions** prior permits under which money has been expended. 109Conn422, 147A124. [b] **Failure of officials to protest against known violations** of restricting ordinance does not destroy public's right to enforcement of ordinance. TexCivA 27SW(2d)868.
1307-27 127Kan658, 274P732; 217Ky135, 289SW223; NC 154SE29; 131 Or674, 284P273; TexCivA 27SW(2d)868 (permit contrary to ordinance held invalid). [a] **Function of courts.**-128 Okl 17, 261P183. [b] **Ordinance held not unconstitutional.**-131 Or674, 284P273.
1307-30 TexCivA 23SW(2d)796.
1307-31 109Conn583, 145A48; 170Ga773, 154SE264; Nebr 233NW4. [a] **Refusal of application to erect filling station** held abuse of discretion. 169Ga74, 149SE779. [b] **Gas filling station** includes, not only house, but also tanks, pumps, structures, and supplying of gas and oil. 109Conn422, 147A124.
1307-32 NJ 144A167.
1307-36½-New. A "garage," in a zoning ordinance, includes a gasoline service station. NJL 142A557.
1307-36½-New. An ordinance excluding filling stations in zones where seventy-five per cent of the lots in every block were used for residence purposes held not to prohibit a filling station where thirteen of nineteen lots were used for residence purposes and five were vacant. 230Ky104, 18SW(2d)951.
1307-37 109Conn422, 147A124. See also 228AppDiv86, 238NYS438. [b] **Determination of prior use on certiorari.**-228AppDiv86, 238NYS438.
1307-39 TexCivA 10SW(2d)151. [a] **Jurisdiction to grant permits.**-223AppDiv196, 227NYS627. [b] **Construction of particular statutes.**-AlaA 129S792.
1307-40 NJ 144A167.
1307-41 110Conn80, 147A300 (subject to review only for abuse).
1307-43½-New. The mayor's conclusion that a location was not a suitable place for the establishment of a filling station has been involved in a refusal to grant a certificate of approval. 110Conn80, 147A300.
1307-43½-New. Correction of findings by adding facts surrounding the granting of a different certificate of approval properly denied. 110Conn80, 147A300.
1307-43¼-New. The court must hear revelant and material facts to determine whether the mayor, denying a certificate for a filling station, acted arbitrarily, illegally, or unreasonably. 110Conn80, 147A300.
1307-43½-New. Applicant's character may not be investigated under ordinance regulating filling station licenses. Wis 230NW70 (refusal unauthorized).
1307-43½-New. Duty of city to grant license is absolute when applicant complies with ordinance. Nebr 233NW4.
1308-44 NJSup 147A646; 135Misc719, 238NYS318; TexCivA 32SW(2d)685. [a] **Doubt as to whether license for filling station was refused because of traffic congestion or applicant's integrity** may make refusal unjustified. Wis 230NW70.
1308-45 111Conn616, 151A183 (holding refusal not to cause unnecessary hardship within zoning ordinance); 230Ky104, 18SW(2d)951. [a] **Violation of ordinance shown.**-NJ 143A865. [b] **Whether filling station license may be refused because of fraudulent practices** depends on intent of ordinance. Wis 230NW70.
1308-47 Iowa 228NW874; NJSup 142A344; 227AppDiv207, 237NYS589. [a] **Where filling station would constitute nuisance** issuance of license will not be compelled. 219Ala511, 122S830. [b] **Arbitrariness or unreasonableness of discretion** is determined by court. 110Conn80, 147A300.
1308-48 [a] **In proceeding to compel issuance of permit to build filling station in semiresidential section,** evidence has been held to show it would be nuisance per accidens. Ala 130S186.
1308-50 111Conn616, 151A183. [a] **Evidence held not to warrant finding** that refusal of permit was arbitrary. 42F(2d)107.
1308-50½-New. Evidence tending to show that conditions in the neighborhood of the location were such that there would be serious danger to traveling public may support a conclusion that the location was not a suitable place for establishing a station. 110Conn80, 147A300.
1308-50½-New. City council is presumably justified in denying license for filling station when acting within limits of ordinance. Wis 230NW70.
1308-52 128 Okl 17, 261P183. [a] **Permit without required consent of property owners** held void. 223AppDiv196, 227NYS627.
1308-53½-New. Statute requiring consent of majority of owners of all buildings within certain radius has been held void. 339 Ill 157, 171NE137.
1308-53½-New. Landowners cannot compel issuance of permit to build filling station over protests of adjacent owners in semiresidential section. Ala 130S186.
1308-55½-New. The right to use a sidewalk for ingress and egress is included in a permit to a filling station. TexCivA 10SW(2d)151.
1308-55½-New. A permit for a gas station not only authorizes the erection of the station itself, but also the covering of a brook with a culvert and filling in and grading the land for the location of the station. 109Conn422, 147A124.
1308-56 NJSup 145A233. [a] **Attempted revocation of permit is void** when based on invalid ordinance. 42F(2d)83. [b] **Possibility of proving nuisance per accidens** held insufficient to justify revocation. 249Mich372, 228NW707(2dcase). [c] **Arbitrary power of officer to revoke permit** will not be lightly inferred. NJ Sup 147A646.
1308-58 249Mich372, 228NW707(2d case); TexCivA 10SW(2d)151.
1308-58½-New. Revocation of gasoline storage and sales license by state fire marshal. Mass 171NE428 (review).
1308-60 247Mich572, 226NW248 (license fee held valid). See also 1LaA85. But see 177Minn539, 225NW904. [a] **Rate of taxation.**-23AlaA239, 124S119.
1308-62½-New. Statutes imposing privilege tax on car service establishments must be liberally construed in favor of citizen and not extended beyond clear meaning. 151Miss100, 117S370.
1308-62½-New. Corporation having one state license may operate two or more oil and greasing stations thereunder in city subject in addition to lawful city tax. 151Miss100, 117S370.
1309-68 226Ky123, 10SW(2d)630.
1309-71½-New. In an action for injuries received in stepping off the running board of an automobile, elevated by a hoisting machine, evidence has been held insufficient to show plaintiff's negligence as matter of law and sufficient to take the case to the jury on the question of defendant's negligence. 40GaA50, 148SE669.
1309-71½-New. A nonresident operator may be punished for negligence or other infraction of the law in the District of Columbia. DC 33F(2d)375.
1309-74 227AppDiv114, 237NYS73.
1309-79½-New. Failure of a statute penalizing driving an automobile while intoxicated to classify the offense as a felony or misdemeanor does not render the statute void for uncertainty. 34NM458, 283P907.
1309-82½-New. Failure of a statute penalizing driving an automobile while intoxicated to prescribe the place of imprisonment does not render the statute void for uncertainty where the omission is supplied by the code. 34NM458, 283P907.
1309-91 [a] **Vehicle exceeding statutory width.**-251NY415, 167NE519(1st case).
1310-12½-New. In a prosecution for unlawfully driving a car equipped with muffler cut-out, a refusal to charge on lack of criminal intent and guilty knowledge and charge to convict if defendant drove the car was held error. TexCr 7SW(2d)1078.
1310-17½-New. A complaint charging the violation of the Motor Vehicle Act need not be made by an officer, but can

be made by an individual who observed the violation of the provisions of the act. NJ 143A750.

1311-20 CalA 290P522; 13PaDist&Co 479.

1311-24 13PaDist&Co 615.

1311-25 CalA 290P522 (statute construed).

1312-65 [a] **Waiver of jury trial confers no final jurisdiction on examining court** where defendant is not entitled to jury trial because fine constitutes whole punishment of offense charged. 26 Oh NPNS593.

1313-66 [b] **Defendant's right to object to jurisdiction is not waived** by waiving summary trial and giving bond since question of jurisdiction can be raised any time. 13PaDist&Co 479.

1313-71 NJ 146A42(2dcase).

1313-74½-New. Mayor's judgment convicting defendant of speeding is presumed valid until annulled by appeal notwithstanding mayor is partisan. 149 Va427, 141SE249.

1314-92 149Va427, 141SE249.

1314-5 37GaA385, 140SE403.

1314-10½-New. Imprisonment in default of payment of a fine within the jurisdiction of the court depends on the provisions of the statute. 24F(2d)892 (sixty days on failure to pay two hundred and seventy-five dollar fine).

1314-10¼-New. Under some motor vehicle laws the justice of the peace may not fine or imprison except where accused pleads not guilty and waives his right to a jury trial. 26 OhNPNS593.

1315-22 246 IllA385; Mo 30SW(2d) 447 (motor vehicle tires). [b] **Part of statute providing for determination of ownership** of such automobiles held unconstitutional. 339 Ill 162, 171NE186. [c] **Provision of act has been held within police power.**–Mo 30SW(2d)447.

1315-26 Del 143A47.

1315-27 Del 143A47.

1315-28 Del 143A47; 227AppDiv114, 237NYS73; 9PaDist&Co 448.

1315-28½-New. or at a speed endangering the safety of others and actually resulting in injury. Del 143A47.

1315-33 13PaDist&Co 448.

1315-38 150Va611, 143SE641.

1315-41 150Va611, 143SE641.

1316-51 157Tenn635, 11SW(2d)904.

1316-52 13PaDist&Co 448.

1316-55½-New. Driving at a speed and under circumstances constituting culpable negligence constitutes assault with a dangerous weapon. OklCr 283P591.

1317-60 [a] **To support conviction for causing bodily harm by wanton driving** causal connection must exist between injury and driving. Ont [1930] 1Dom LR778.

1317-65½-New. Specific intent to kill is an essential ingredient of assault with intent to murder with an automobile. 40GaA503, 150SE451(2dcase).

1317-70 [b] **Indictment held sufficient** to charge offense of aggravated assault. 112TexCr363, 16SW(2d)817. [c] **Allegations held sufficient** to charge assault with intent to murder, even though indictment contains some immaterial and unnecessary allegations. 39GaA552, 147 SE781. [d] **Complaint held insufficient.**–TexCr 27SW(2d)810.

1317-71 168Ga690, 148SE731, 733 [quotCJ] (indictment for assault with intent to murder by operating automobile while under influence of liquor is not quashable for failure to allege use of weapon likely to produce death).

1317-76 168Ga690, 148SE731 (indictment for assault with intent to kill will support trial for assault and battery).

1317-78 150Va611, 143SE641.

1317-78½-New. The burden rests on the prosecution to show that defendant intended to do bodily harm to another or drove his car in a manner showing reckless and wanton disregard for human life and safety. 150Va611, 143SE 641.

1317-80 See also Mo 29SW(2d)135.

1317-81 Mo 29SW(2d)135.

1317-84½-New. Evidence identifying accused as one who committed the crime was admissible. 177Ark742, 9SW(2d) 15.

1317-84¼-New. **Admissibility of evidence to show motive.**–GaA 155SE103.

1317-85 Del 143A47; Mo 29SW(2d) 135; 157Tenn635, 11SW(2d)904. [a] (2) 85CalA575, 259P1005; 92PaSuper 121. (4) To support conviction of assault and battery of high and aggravated nature, 149SC128, 146SE697. (5) Of assault with intent to murder by striking with automobile. GaA 155SE 103. [b] (5) To authorize conviction of assault with intent to commit murder, in absence of evidence of specific intent to kill. 39GaA552, 147SE781. (6) To show that accused was guilty of reckless disregard of human life or of any conduct which was equivalent of specific intent to kill. 39GaA552, 147 SE781. (7) To establish guilt of defendant as principal in aggravated assault. TexCr 27SW(2d)810.

1318-88 150Va611, 143SE641.

1318-90 [b] (3) Instructing jury in effect that automobile driver who by his unlawful and felonious conduct strikes and leaves pedestrian without giving aid is liable for natural and probable result of his unlawful act has been held sufficient without inclusion of words "knowingly" and "willfully." 93CalA484, 269P560. [c] (3) Instruction omitting all reference to intention to do bodily harm. 150Va611, 143SE 641. (4) Instruction not stating that intention to do bodily harm will be imputed from injury by willful driving of automobile with reckless and wanton disregard of others' safety. 150Va 611, 143SE641. (5) Instruction defining offense in words of statute is sufficient in absence of exception or request. 176Minn164, 222NW909. [d] **Instruction has been held incomplete.**–Mo 29SW(2d)135.

1319-12 [b] **Federal Motor Vehicles Theft Act.**–41F(2d)654.

1320-20 Mass 169NE413. [a] **Each use as separate offense.**–329 Ill 501, 160 NE839. [b] **Single act held not violation of statute.**–TexCr 20SW(2d)1057 (2dcase).

1320-25 But see 38GaA744, 145SE667.

1320-26 38GaA744, 145SE667.

1320-32½-New. **Instructions.** Instructions in language of the statute were held proper. 38GaA744, 145SE667.

1320-33½-New. Such statutes are a valid exercise of the state's police power. 168LaS61, 123S600.

1321-38 172Minn493, 215NW861.

1321-43 MoA 27SW(2d)447 (ordinance); 58ND732, 227NW230. [c] **In West Virginia** warrant charging "reckless driving" does not charge any offense against definite provision of law. 107WVa693, 150SE141.

1321-44 [b] (1) OklCr 273P1010. (2) Statute prohibiting operation of motor vehicle "recklessly" "or so as to endanger property or life or limb of any person," establishes standard of conduct sufficiently definite to inform violator of nature and extent of offense and to afford ascertainable test of guilt. 108 Conn209, 142A840.

1321-49½-New. Driving recklessly, driving so as to endanger life, limb, or property, and driving under the influence of liquor are not identical offenses. 108Conn209, 142A840.

1322-51 94CalA520, 271P549.

1322-52½-New. Driving automobile so carelessly as to strike a standing automobile and cause personal injury is offense under penal code. 35PortoRico 555.

1322-63 134Misc697, 236NYS591.

1322-78 261Mass309, 158NE832. [b] **In Nova Scotia.**–NS [1928] 2DomLR703.

1323-81 See also 207Iowa555, 223NW 166.

1323-99½-New. Where two cars collide, the driver of one may be guilty of reckless driving although the driver of the other car is also guilty of reckless driving. 58ND732, 227NW230.

1324-3½-New. Officer of the Crown is liable although proceeding in the execution of his duty. NS [1930] 4Dom LR226.

1324-18 [a] MoA 27SW(2d)447.

1324-26 261Mass309, 158NE832.

1326-56 13PaDist&Co 264 (proof of failure to heed railroad signals and officer's signals held **variance with charge** of reckless driving).

1326-68 262Mass416, 160NE252.

1327-71 262Mass416, 160NE252.

1327-79 [d] (1) 23AlaA441, 126S614; CalA 287P543; CalA 288P44; MoA 27 SW(2d)447; 134Misc697, 236NYS591; ND 230NW1. [e] **Evidence insufficient to sustain conviction.**–TexCr 27SW(2d) 162.

1327-88 [a] 261Mass309, 158NE832.

1328-91 [a] 58ND732, 227NW230 (as to laws of road). [c] **Instructions held erroneous.**–TexCr 27SW(2d)162.

1328-97 261Mass309, 158NE832.

1329-12 Can [1929] 1DomLR634.

1329-13 230Ky677, 20SW(2d)741; 34 NM458, 283P907 (statute held not repealed by statute giving municipal corporations power to regulate operation of motor vehicles within corporate limits). [e] **In Minnesota under statute,** L. (1927) c 412 § 61, is not void for uncertainty as to meaning of words "under influence of intoxicating liquor," and is valid and constitutional. 176 Minn164, 222NW909. [f] **In Texas.**–Cr 26SW(2d)648. [g] **Duty to inform defendant** of right to be examined by own physician. 50RI 440, 148A415.

1329-15 See also Utah 287P909.

1329-19½-New. Driving an automobile while intoxicated is malum in se. 159 Tenn667, 21SW(2d)390.

1329-19¼-New. Automobile which could not be operated on own power may be "motor vehicle" under statute prohibiting operation by intoxicated person. Vt 150A68.

1330-31 [a] (2) Statute making offense of driving in intoxicated condition and causing injury to another's person or property a felony was held not impliedly repealed by Act (1928) No. 296. 168La291, 121S870. [c] **In Texas.**–107TexCr663, 298SW598.

1330-42 204Iowa977, 216NW271.

1330-54 108TexCr199, 299SW646.

1331-58 35Ariz427, 280P670.

1331-59 See also 108Conn209, 142A840.

1331-60 80CalA200, 251P675.

1331-66 [c] **Car in tow.**–Ont [1929] 1 DomLR269.

1331-68½-New. Guiding automobile being towed is "operating" it within statute prohibiting operation by intoxicated person. Vt 150A68.

1331-69 109TexCr508, 5SW(2d)513.

1332-77 [d] (2) Offense being misdemeanor, under Highway L. § 290 subd 3, as amended by L. (1926) c 732, City Court of Cortland has jurisdiction (Code Cr. Proc. § 56 subd 35; L. [1900] c 160 § 218). 132Misc410, 230NYS510.

1332-84 [b] **Jurisdiction was obtained** though defendant was arrested without warrant after crime was committed, where officer swore to information sufficient on its face to constitute charge. 132Misc410, 230NYS510.

1332-95 NJ 143A750; 107TexCr663, 298SW598; 110TexCr337, 8SW(2d)174.

1333-24 135Misc41, 237NYS511. [a] NJ 147A857; 106TexCr524, 293SW821. [b] 51Nev402, 279P759(2dcase); OklCr 282P1109. [c] 204Iowa977, 216NW271; OklCr 274P687.

1333-27 [a] OklCr 287P809. [b] **Allegation of arrest while committing crime is surplusage** as not affecting nature of charge and its truth being immaterial, its absence does not affect sufficiency of information. 132Misc410, 230 NYS510.

1333-29 204Iowa977, 216NW271; 230 Ky677, 20SW(2d)741; 317Mo 268, 295 SW741.

1333-31 204Iowa977, 216NW271.

1334-34 [a] 106TexCr524, 293SW821.

1334-41 [a] (2) TexCr 23SW(2d)379. (3) In prosecution for being drunk by voluntary use of intoxicating liquor and for operating motor vehicle while intoxicated, commonwealth had burden of proving, not only that defendant was drunk, but also that this condition was caused by voluntary use of intoxicating liquor. 264Mass535, 163NE158.

1334-42½-New. The state need not prove that defendant was "drunk" in a prosecution under a statute providing for the punishment of those driving "while under influence of intoxicating

liquor." 89 IndA561, 166NE21(1stcase).

1334-44 TexCr 31SW(2d)1084 (laying foundation). [a] (2) Testimony by person struck by defendant's automobile as to transaction and injuries was admissible. 132Misc410, 230NYS510. (3) Speed at which defendant was driving when arrested. 35Ariz427, 280P670. (4) Whether street or road is public highway may be proved by parol evidence. Ill 173NE75.

1334-45 [a] **Evidence held admissible.**–176Minn164, 222NW909.

1334-46 320Mo288, 68SW(2d)866; 108TexCr199, 299SW646. [a] (4) Testimony, by physician who saw defendant shortly after his arrest, as to whether defendant was intoxicated was relevant, material to issue and properly admitted, even though he made no physical examination. 132Misc410, 230NYS510. (5) Testimony that defendant gave another a drink on occasion in question is not irrelevant. 34NM458, 283P907.

1334-47 157Tenn383, 8SW(2d)479; 109TexCr207, 3SW(2d)807.

1334-48 Mo 18SW(2d)28. [a] (10) That witness smelled whisky when he approached defendant's car. 107TexCr571, 298SW580.

1335-50½-New. Failure to inform defendant of right to be examined by own physician does not preclude admission of state's medical evidence as to intoxication. 50RI440, 148A415.

1335-51 80CalA248, 251P686. [a] **Evidence held inadmissible.**–RI 147A876.

1335-52 80CalA248, 251P686. [a] 80CalA248, 251P686. [b] 80CalA248, 251P686.

1335-64½-New. Conversations as to the condition of accused, in his presence, between persons in whose company he was shortly before the time to which the charge relates are admissible. 176Minn164, 222NW909.

1335-66 107TexCr571, 298SW580.

1336-76 [a] (1) 92CalA417, 268P382; 102CalA493, 283P292; 166Ga561, 144SE109; 39GaA138, 146SE323(1stcase); 37GaA112, 139SE112 (on public highway); 207Iowa831, 221NW817; 176Minn164, 222NW909; 317Mo268, 295SW741; 320Mo288, 6SW(2d)866; Mo 17SW(2d)940; Mo 18SW(2d)28; 37OklCr89, 256P941; OklCr 274P39(2dcase); OklCr 277P280; OklCr 286P911; OklCr 287P733; OklCr 287P809; OklCr 290P347; OklCr 290P416; 157Tenn363, 8SW(2d)486; 159Tenn674, 21SW(2d)400; 108TexCr360, 300SW81; 109TexCr403, 5SW(2d)141; 109TexCr581, 6SW(2d)120; TexCr 20SW(2d)1063; 113TexCr602, 21SW(2d)1051; Wash 290P989; 105WVa585, 143SE348. [a] (5) Ill 173NE75. See also TexCr 31SW(2d)1084. (6) To take case to jury. 261Mass458, 158NE834. (7) To show that automobile was driven on public highway. TexCr 20SW(2d)783. [b] (1) CalA 292P675; 204Iowa833, 216NW29.

1336-80½-New. Nor is mere evidence of intoxication shortly after arrest sufficient. 204Iowa833, 216NW29.

1336-85 [a] (1) Mo 24SW(2d)985; 107TexCr571, 298SW580; 109TexCr207, 3SW(2d)807. [b] (2) Generally. Iowa 229NW743.

1336-86 108TexCr199, 299SW646. See also 132Misc410, 230NYS510.

1336-88 89IndA561, 166NE21(1stcase).

1336-90 OklCr 290P347. [a] (2) 263Mass22, 160NE305. (4) Other instances. 41Wyo72, 283P151.

1337-94 [a] **Instruction held not erroneous.**–204Iowa1131, 216NW704.

1337-99 89IndA378, 165NE780.

1337-1 108TexCr199, 299SW646.

1337-7 NJ 147A857. [d] **Judgment should contain provision** prohibiting defendant from driving on highway. 157Tenn363, 8SW(2d)486.

1337-16 157Tenn363, 8SW(2d)486. [b] **Amendment and repeal.**–93PaSuper404. [c] **In West Virginia.**–108WVa168, 150SE530.

1337-21 [a] (2) 207Iowa831, 221NW817; OklCr 274P687. (7) Three years' imprisonment. 320Mo288, 6SW(2d)866. (8) Imprisonment in penitentiary for eight months and ten days. OklCr 290P416.

1338-25½-New. Under some statutes the court may, as a condition of probation, impose a fine, provided the terms of the order do not provide for a greater punishment than that recommended by the jury. 98CalA723, 277P745.

1338-27½-New. Under California statute the court cannot impose greater punishment than jury recommends. 99CalA576, 278P1061.

1338-37 [c] **Necessity of sentence.**–110TexCr112, 7SW(2d)1075.

1338-38 [b] 166Ga561, 144SE109.

1339-39 OklCr 290P347.

1339-40 [b] (1) 104NJL457, 141A569. (2) Record of common pleas must show that defendant was convicted of offense charged in original complaint. 104NJL457, 141A569 [dist 100NJL240, 126A852 (aff 102NJL125, 130A614)].

1339-43 197NC707, 150SE353(1stcase). [b] (8) 166Ga561, 144SE109. (10) Variance. 112TexCr676, 18SW(2d)619. [c] (1) 80CalA248, 251P686.

1339-47 [a] (4) Sentence reduced to six months and fine to two hundred and fifty dollars. 37OklCr89, 256P941.

1339-51 OklCr 274P684. [e] **Defendant's criminal responsibility** was not lessened by coöperation of another in operating automobile with number plates not assigned to such automobile, 101Vt491, 144A689(2dcase).

1339-53 But see 149Wash479, 271P331.

1340-64½-New. Punishment. Under statutes in some jurisdictions, a justice of the peace, on a complaint for driving without a license, cannot impose greater punishment than a fine of one hundred dollars or imprisonment in county jail for thirty days. 145Wash289, 259P1077.

1340-68 [a] **Where operator's license is revoked,** and driver becomes resident of another state, held subject to arrest for again driving in District. 281US49, 50SCt163, 74Led694.

1340-69½-New. Where license restricts operation to truck only, licensee is guilty of offense where he operates touring car without license therefor. 261Mass228, 158NE771.

1340-76½-New. Where defendant's permit to operate a motor vehicle has been revoked in the District of Columbia, and he subsequently becomes a resident of a neighboring state, obtaining registration and license therein, he is not subject to arrest and conviction while temporarily driving his car in the District. DC 33F(2d)375.

1341-83 110TexCr240, 8SW(2d)183.

1342-20 29F(2d)61.

1345-97 See also 29F(2d)61.

1345-13 Ind 168NE22.

1349-6 Cal 291P580.

1349-19 [a] (1) OklCr 281P812.

1350-54 See also OklCr 281P812.

1351-76½-New. [§ 1366a] n½. **Failure To Comply with Traffic Lights.** Under some statutes a left turn should not be made until the traffic lights change to red. 227AppDiv114, 237NYS73.

1352-88 [d] **Where pedestrian has seen automobile approaching** statutory signals are unnecessary. 234Ky27, 27SW(2d)394.

1352-93 [b] **Instructions held erroneous.**–39GaA570, 147SE780(2dcase). [c] **Passing to left of horse going in same direction.**–35PortoRico325 (must not turn to left until another vehicle coming from opposite direction has passed). [d] **Evidence relative to speed is inadmissible.**–Miss 130S102.

1352-94 [a] (3) Other instances. 34PortoRico403.

1352-96½-New. Driver of truck required to keep to right may be convicted of violation of regulation, although he did not block any traffic. 111Minn488, 127NW495, 31LRANS682.

1353-11½-New. [§ 1372a] 20½. **Failing To Stop at Stop Sign.** Evidence held insufficient to sustain conviction for violation of city ordinance by failing to stop at stop sign. OklCr 287P737.

1354-28 41Wyo72, 283P151 (what constitutes corpus delicti).

1354-29 [a] **Construction and constitutionality** of statute defining crime of negligent homicide by operation of motor vehicle. 249Mich147, 228NW723.

1354-29½-New. Crime of negligent homicide is determined by facts in each case through application of a positive rule. 249Mich147, 228NW723.

1354-40 38OklCr338, 261P368. But see 243Mich300, 220NW777.

1355-41 80CalA200, 251P675; 168La861, 123S600 (driving without lights in violation of penal statute); 116Nebr125, 216NW294; 38OklCr338, 261P368. But see 121Oh332, 168NE846.

1355-44 98Fla464, 124S27.

1355-45 80CalA200, 251P675; 243Mich147, 228NW723; 38OklCr338, 261P368. But see Iowa 228NW80. [c] **Violation of city speed ordinance alone** held not culpable negligence. 124Kan556, 261P846.

1355-46 80CalA200, 251P675; 197NC135, 147SE817; 126Or118, 268P1016.

1356-48 Iowa 228NW80. [c] **Mere violation of statute or regulation** does not constitute wanton and reckless conduct. 265Mass128, 163NE758.

1356-48½-New. Motorist's failure to obey stop sign did not support conviction for involuntary manslaughter where he knew all he would know if he had stopped. 198NC682, 153SE155.

1356-53 Iowa 228NW80.

1356-56 38OklCr338, 261P368. [a] **Criminal intent is imputed to offender,** where homicide follows reckless driving. 153Va943, 151SE168.

1356-63 [a] 153Va943, 151SE168.

1357-66 [b] **Acts constituting culpable negligence.**–198NC682, 153SE155.

1357-67 [a] **In Pennsylvania.**–91PaSuper528.

1357-68 OklCr 281P310. See also 153Va943, 151SE168 (passing other vehicles).

1357-71½-New. Whether the intoxicated condition of the driver at the time of the accident was the cause of death of a person run over on a public highway has been held not a proper subject of inquiry. 155Tenn633, 299SW803, 59ALR685.

1357-71½-New. Defendant not liable where death results from independent, intervening cause. 153Va943, 151SE168.

1357-74 [a] (2) Operator of automobile which, solely because of mechanical defects, theretofore unknown, becomes suddenly out of control, held not liable for results which he could not reasonably prevent or avoid. 116Nebr273, 216NW820.

1357-78 78CalA598, 248P969; 80CalA200, 251P675; 102CalA493, 283P292; 335Ill432, 167NE10; 168La861, 123S600; 197NC135, 147SE817; 159Tenn667, 21SW(2d)390; Alta [1929] 1DomLR739.

1358-91 [a] (5) To charge manslaughter. 116Nebr125, 216NW294. (6) Indictment was held not bad for failure to allege that deceased was "human being." 97Fla988, 122S567. (7) Manslaughter by operation of automobile while intoxicated was held sufficiently charged. 97Fla988, 122S567. (8) In indictment for manslaughter in second degree, words "willfully and feloniously" were immaterial, and not prejudicial, and, if surplusage, could be stricken out by amendment. 133Misc658, 233NYS656. (9) Indictment for manslaughter held sufficient. Mo 23SW(2d)136. (10) Information charging murder. OklCr 289P1115. (11) Other instances. 48Ida688, 284P845; Ida 288P894; 338Ill353, 170NE265; 249Mich147, 228NW723; OklCr 288P374. [b] (3) Other instances. OklCr 276P701. [c] (3) Indictment was held not bad because of disjunctive allegation of driving while "drunk or intoxicated" and inflicting "mortal fracture" or injury. 335Ill432, 167NE10. (4) Indictments held sufficient. 126Or118, 268P1016. (5) Other instances. Fla 130S912.

1359-92 Ida 288P894. [a] (7) Mo 285SW419. (11) Other instances. Miss 127S277; 82Mont530, 268P507.

1359-2 335Ill432, 167NE10.

1359-7½-New. Nor is information charging homicide as a result of exces-

sive speed duplicitous. 124Kan556, 261 P846.

1359-9 147Wash198, 265P481, 59ALR 688.

1359-12 [b] (3) Description of vehicle collided with as automobile where in fact it was automobile converted into truck. 335 Ill 432, 167NE10.

1360-19 CalA 284P518.

1360-24 38 OklCr338, 261P378.

1360-26 159Tenn667, 21SW(2d)390 (disobeying statutory speed regulation).

1360-29 [a] (5) Where corpus delicti is established by evidence, exclusive of any admission or confession of defendant, evidence of his admission that he was in fact the driver of his automobile at time of collision is admissible. 78CalA598, 248P969. [j] **Physical facts.**–265Mass128, 163NE758. [k] **Condition of deceased's body** is admissible to show speed. TexCr 27SW(2d)1098.

1361-30 102CalA493, 283P292; 82 Mont530, 268P507. [d] (4) Admissible to show what witness observed when approaching scene of accident. Iowa 228NW80. [g] **That defendant was driving on wrong side of road** held admissible. 116Nebr125, 216NW294.

1361-37 TexCr 27SW(2d)1098.

1361-44 179Minn1, 228NW171. But see TexCr 27SW(2d)1098.

1362-53 See also 82Mont530, 268P507; 126 Or118, 268P1016 (whisky).

1362-56 197NC135, 147SE817.

1362-57 197Wis454, 222NW245. [a] **Leaving bodies of victims.**–109Conn490, 146A828.

1362-60 41Wyo 72, 283P151.

1362-62½-New. Evidence as to defendant's reputation for reckless driving is admissible in rebuttal of defense evidence. NJL 142A643.

1362-65 [a] See also 41Wyo 72, 283P 151. [b] (2) Unlawful driving of defendant was held not cause of girl's death. 200 Ind345, 163NE492. [c] 98 Fla464, 124S27; 48 Ida688, 284P845; 335 Ill 432, 167NE10; 337 Ill 462, 169 NE195; 175Minn537, 221NW899; 179 Minn1, 228NW171; Mo 23SW(2d)136; 116Nebr125, 216NW294; 38 OklCr338, 261P368; 91PaSuper528; 159Tenn667, 21SW(2d)390 (driving at more than thirty miles an hour when drunk); 159 Tenn674, 21SW(2d)400. [d] (2) 155 Tenn633, 299SW803, 59ALR685. (4) Sustaining conviction of manslaughter against owner of car as principal for permitting intoxicated friend to drive car resulting in collision killing another. 147Wash198, 265P481, 59ALR 688. [f] (3) Conviction of manslaughter was not authorized where evidence did not show that when attempting to pass standing cars it must have been apparent to defendant that attempt was likely to prove disasterous to another. 243Mich300, 220NW777. (4) That accelerator on automobile was defective just before meeting horse-drawn vehicle, causing loss of control. 116Nebr 273, 216NW820. (5) Assault with intent to murder. 40GaA503, 150SE451 (2dcase). (6) Involuntary manslaughter. 40GaA617, 150SE917(2dcase). (7) For murder by mistake while intending to commit felony, where proof of defendant's intoxication was insufficient. TexCr 18SW(2d)1073. (8) Other instances. TexCr 25SW(2d)833. (9) Murder in second degree. CalA 292P 675. (10) Second degree manslaughter. OklCr 292P389. [g] **Evidence held sufficient** to support conviction. 78 CalA598, 248P969; 93CalA484, 269P 560; 97Fla988, 122S567 (killing while intoxicated); 39GaA550, 147SE784 (killing while intoxicated); Ida 288P 894; 338 Ill 353, 170NE265; Ind 171 NE1; Mo 151A194; 265Mass128, 163 NE758; 245Mich530, 222NW765 (permitting inexperienced person to drive); Minn 231NW721; NJSup 145A4 (excessive speed); OklCr 283P809; OklCr 287P1103; OklCr 288P374; OklCr 289 P1115; 87PaSuper33; 197Wis454, 222 NW245 (killing child). [h] **Fact that defendant was driver of offending machine** is sufficiently shown by his admission of the fact, where corpus delicti has been proved apart from any admission or confession by him. 78CalA 598, 248P969. [i] **Conviction held palpably against weight of evidence.**–234 Ky27, 27SW(2d)394.

1362-67 RI 141A607.

1363-69 Utah 287P909 (evidence insufficient to show intoxication).

1363-73½-New. Excessive speed is prima facie evidence of negligence. 41 Wyo 72, 283P151.

1363-86 Iowa 228NW80 (evidence sufficient to go to jury); Miss 127S277; NJSup 145A4; 38 OklCr338, 261P368; 91PaSuper528; TexCr 27SW(2d)1098.

1363-90 179Minn1, 228NW171 (whether defendant was under influence of intoxicating liquor); NJSup 149A68 (evidence sufficient to go to jury); Utah 287 P909 (evidence insufficient to submit question of intoxication to jury).

1363-91 TexCr 25SW(2d)833.

1363-91½-New. Proximate cause of collision and death held for jury. Ind 171NE1.

1363-92 [a] (1) 80CalA200, 251P675. (5) Instruction to convict of manslaughter, if defendant's culpable negligence was proximate cause of decedent's death, irrespective of decedent's contributory negligence is not erroneous. 197NC135, 147SE817. (6) Instruction that it is unlawful to drive automobile at night with only one headlight burning. 41 GaA286, 152SE593(1stcase). (7) Charge that defendant was guilty of involuntary manslaughter in striking deceased with automobile, if he was running car in reckless and careless manner though at less than statutory speed limit, held proper under evidence. 159Tenn667, 21 SW(2d)390. (8) Other instances. 102 CalA493, 283P292; 40GaA725, 151SE 410(2dcase); Alta [1929] 1DomLR739. [b] (2) Instruction that driver was required to keep to right of road held error where killing occurred before effective date of act so requiring. 195NC 481, 142SE715. (3) Refusal of instruction requiring finding of criminal negligence in order to warrant conviction for involuntary manslaughter was held not erroneous. 97CalA664, 275P1010(2d case). (4) Other instances. 250Mich573, 231NW126; 197NC626, 150SE125(1st case); TexCr 27SW(2d)1098.

1364-93 124Kan556, 261P846. [c] **Charge held sufficient.**–38 OklCr338, 261 P368.

1364-95 [a] 78CalA598, 248P969; 48 Ida688, 284P845. [b] 78CalA598, 248P 969.

1364-96 124Kan556, 261P846. [a] 39 GaA550, 147SE784; Mo 23SW(2d)136. [b] 29F(2d)61.

1364-98 [a] (3) In instruction that contributory negligence is no defense to charge of manslaughter, term is sufficiently defined by phrase, "that is, negligence on the part of the person injured which contributed to the injury." 78 CalA598, 248P969, 974. [c] **Where in explaining gross negligence** court used words "willful," "wanton," and "wantonness," such words need not be defined where used in ordinary sense. 78CalA 598, 248P969.

1364-99½-New. Failure to define "under the influence of intoxicating liquor" in defining offense of driving automobile while under influence of intoxicating liquor is not error. OklCr 288P374.

1364-2 [a] (1) 80CalA200, 251P675.

1364-3 Ida 288P894.

1364-4 113TexCr98, 18SW(2d)921(2d case).

1369-5½-New. One charged with stealing certain parts and equipment of an automobile may be convicted of an attempt to commit such a crime under the statutes. 322Mo 1199, 18SW(2d)492.

1365-8½-New. Accused held not entitled under evidence to instruction as to his conduct in emergency. 48 Ida 688, 284P845.

1365-8½-New. Instruction as to rate of speed under statute held erroneous under evidence. Miss 127S277.

1365-9 [a] **Requests improperly refused.**–41Wyo 72, 283P151. [b] **Requested instructions properly refused.**–41Wyo 72, 283P151.

1365-14 [b] **Instructions properly refused.**–48 Ida688, 284P845 (where evidence showed violation of parking ordinance by third person).

1365-15 124Kan556, 261P846.

1365-16 [b] **Instructions held erroneous or properly refused.**–48 Ida688, 284P845.

1365-26 [b] 124Kan556, 261P846. [d] 124Kan556, 261P846.

1366-31 165La120, 115S407.

1367-69 12LaA179, 126S458.

1369-4 See also 79CalA514, 249P1090.

1370-21 168Ga765, 149SE49.

1370-35 [c] **Use of words "a car"** is sufficient designation of motor car or automobile as those terms are used in statute. NS [1928] 3DomLR225.

1374-17 [a] **Evidence of insurable value** held not relevant and competent. 33Ariz23, 262P4.

1374-18 See also 110TexCr240, 8SW (2d)183.

1377-74 [a] 100CalA439, 280P162(2d case); TexCr 29SW(2d)762. [b](1) 91 PaSuper566. [c] (1) 79CalA514, 249P 1090. [d] **Evidence held sufficient to sustain conviction of theft of automobile parts.**–110TexCr122, 7SW(2d)960.

1380-7 70Utah529, 261P804.

1380-29 33Ariz23, 262P4.

1381-34 92CalA778, 269P465.

1384-13 OklCr 270P860.

1384-17 79CalA291, 249P211. [a] **Statutes repealed.**–Ariz 285P282.

1384-18 106WVa46, 144SE718. [a] (1) 129Kan328, 282P755, 66ALR1225. [b] (2) Requirement that "he shall render such assistance as may be reasonable or necessary" is too vague and uncertain to be capable of enforcement, and, therefore, cannot properly form basis of criminal prosecution. 39GaA522, 147SE 782.

1385-19 But see 100CalA639, 280P999.

1385-22 203Cal 703, 265P914; CalA 292P675.

1385-24 203Cal 703, 265P914.

1385-25 [a] **Accidents involving particular injuries held within statute.**–CalA 288P19.

1385-27½-New. In a statute requiring that a driver, after an accident, "shall immediately stop and give his name," and requiring that he render all necessary assistance, the word "immediately" does not modify "render." 100CalA639, 280P999.

1385-28 102CalA493, 283P292. But see Ariz 285P282.

1385-30 243 IllA467.

1385-37 90CalA683, 266P813; 100CalA 639, 280P999 (one in control of car who urges driver to flee becomes equally guilty).

1385-39 See also Wash 291P719.

1385-39½-New. Where defendant, in control of, but not driving, the car, takes the wheel a short distance from the scene of the accident and speeds away, he becomes a principal in the offense. 100CalA639, 280P999.

1385-40 CalA 258P656; 243 IllA467.

1385-41 80CalA200, 251P675.

1386-47 80CalA200, 251P675.

1386-48 80CalA200, 251P675.

1386-50 317Mo 319, 296SW132; 106 WVa46, 144SE718. [a] (2) Other instances. 106WVa46, 144SE718.

1386-57 106WVa46, 144SE718.

1386-62 129Kan328, 282P755, 66ALR 1225.

1386-65 78CalA598, 248P969.

1387-69 [a] (4) Evidence of speed at which defendant was driving six miles from scene of accident has been held relevant. 87PaSuper25. (5) Facts and circumstances surrounding accident may be shown by prosecution. 79CalA291, 249P211. (6) Facts enabling jury to determine reasonableness of defendant's conduct and accuracy of his statements in relation thereto and to accident are competent. 79CalA291, 249P211. [c] (1) Contra CalA 262P428. [g] (5) Defendant's mental state and condition of sobriety may be shown. 79CalA291, 249 P211. [i] **Evidence of condition of bumper after accident** is not inadmissible because of absence of evidence that it was not in same condition before accident. 203Cal 628, 265P818.

1387-71 [a] 203Cal 628, 265P818; 79 CalA291, 249P211; CalA 258P146; CalA 262P428; 90CalA683, 266P813; 100 CalA639, 280P999; CalA 284P518; CalA 289P653; 87PaSuper25; 112TexCr71, 138SW(2d)859. [b] 203Cal 703, 265P 914; CalA 292P675.

1387-72 [a] (2) **To show that no as-**

sistance was possible or, if possible, that driver was relieved of duty to stop and stand ready to give required information and assistance. 80CalA200, 251P675. [b] **Evidence held to warrant jury's finding** pedestrian struck by automobile lived several minutes and needed assistance. CalA 289P653.

1388–77 102CalA493, 283P292.

1388–77½–New. Whether defendant failed to report accident to police or judicial officer is a question for the jury on conflicting evidence. 317Mo 319, 296 SW132.

1388–77⅓–New. Whether driver's failure to stop after injuring children was because of fear of others present may be a question for the jury. 108TexCr356, 300SW640.

1388–77¼–New. Whether defendant who took the wheel some distance from the scene of the accident still had sufficient time to return and render help is for the jury. 100CalA639, 280P999.

1388–77½–New. As is also the question whether he then knew a person had been struck and aided and abetted the one driving at the time of the accident. 100 CalA639, 280P999.

1388–77¾–New. What is required by the statute under the circumstances is for the jury. 100CalA639, 280P999.

1388–82½–New. An instruction that the driver of an automobile colliding with another must stop, render assistance and furnish information in all cases is too broad. 203Cal 703, 265P914.

1388–82⅓–New. An instruction is not erroneous which requires a finding that defendant in control of the car, although not driving, encouraged the driver to leave in order to conceal his identity. 100CalA639, 280P999.

1388–82¼–New. Where motorist is charged with failure to render assistance to pedestrian struck, instruction jury might find him guilty of not immediately stopping is erroneous. CalA 289P 653.

1388–87 [a] (3) 80CalA200, 251P675.

1388–97½–New. Ordinance forbidding parking within certain distance of fire plug is reasonable regulation. 27 OhNP NS589 (sufficiency of evidence to convict of violation).

1389–23 335 Ill 584, 167NE779 (construction of regulation).

1389–26 [b] **Evidence held sufficient** to comply with terms of city ordinance. Ind 166NE1. [c] **Evidence held insufficient** to comply with terms of ordinance. Ind 166NE1.

1389–26½–New. Evidence held sufficient to sustain conviction of violating a statute forbidding a load to extend more than six inches beyond the fender on the right side. 200Wis267, 227 NW942.

1390–35 [e] **In Arkansas.**–177Ark1042, 9SW(2d)243. [f] **Wrongful or illegal change of engine number not essential element.**–208 Iowa512, 226NW130.

1390–37 177Ark1042, 9SW(2d)243.

1392–95 Ind 168NE692.

1392–9 36F(2d)450.

1394–54 [b] 13F(2d)53. [c] 13F(2d) 125; 36F(2d)450.

1395–30 23F(2d)908.

1397–50 [b] **To constitute "vehicle taking,"** vehicle or automobile must be operated by electricity, steam or explosive power. Ind 172NE902.

1397–56 195Wis549, 218NW809.

1398–76 261Mass345, 158NE758; 195 Wis549, 218NW809. [a] **Former public way.**–Unauthorized use on premises formerly public way does not constitute crime. 261Mass345, 158NE758.

1399–99½–New. A person taking an automobile without the owner's consent with intent to permanently or temporarily deprive him of his title or possession is guilty of a felony under some statutes although he does not drive the car. CalA 265P890.

1399–1 157Tenn301, 8SW(2d)473.

1399–3 195Wis549, 218NW809.

1401–40 TexCr 248SW(2d)837.

1401–43 157Tenn301, 8SW(2d)473.

1401–60 Ind 172NE902. [a] (3) **To charge felony notwithstanding absence** of allegation of driving. CalA 265P890. [b] 204Cal 241, 267P701.

1402–84 [b] 91PaSuper566.

1404–36½–New. A motor truckman is not a common carrier within the statute requiring a certificate of public convenience where he has a contract to do the hauling of a corporation, but at intervals does hauling for his neighbors; 26 OhNPNS335.

1404–36⅓–New. nor is the owner of a car who in driving back and forth between home and place of work carries some of his neighbors, employed at the same place. 26 OhNPNS335.

1405–44½–New. To convict one operating an automobile under class H-3 license of receiving passengers in violation of rights of another operating under a certificate of convenience over a regular route, it must appear that the passengers were received between termini of and along such route. 107 WVa580, 149SE667.

1405–45 [a] **Affidavit held sufficient.**–23AlaA65, 120S469. [b] **Solicitation must be proved for** conviction of operating bus without license. 135Misc 337, 239NYS355.

1406–85 16F(2d)921.

1407–9 [a] (1) 27F(2d)310.

1407–10 [a] 26F(2d)24.

1407–12 34F(2d)92. But see 19F(2d) 316.

1408–27½–New. Defendant's possession of a stolen automobile within a short period after theft may raise the presumption that he stole and transported it in interstate commerce. 27 F(2d)715 (twelve days).

1408–27⅓–New. A presumption of guilt from the possession of a recently stolen vehicle grows weaker as the time of possession recedes from the time of the original taking. 27F(2d) 715.

1408–27¼–New. A presumption of guilt from the possession of a recently stolen vehicle is one of fact, and does not depend on statutory authority. 27 F(2d)715.

1408–35 [b] **Evidence as to relations of defendants** may be shown in prosecution for receiving and concealing stolen automobile and for conspiracy to conceal and to receive it though it may show one defendant's implication in theft of automobile and his apprehension in act of transporting liquor. 27 F(2d)257.

1408–36 [a] (1) 293F383; 26F(2d)24. (4) 26F(2d)24.

1408–38 [a] (4) As to when car ceased to be in interstate commerce. 27F(2d) 257. [b] **Presumption from possession.**–Question as to whether presumption from possession has been overcome was for jury. 27F(2d)715.

1408–42 [a] 23F(2d)908.

1409–63 [b] 27F(2d)310.

1409–63½–New. Nor will a question as to the admissibility of evidence be received where no exception to admission was taken. 27F(2d)519.

1409–70 112TexCr181, 15SW(2d)626 (1stcase).

1410–74½–New. Use of wrong license plates. An indictment for having wrong license plates displayed on an automobile need not negative the possibility that the proper license plates were displayed in addition to the wrong plates. 160Tenn225, 22SW(2d)361.

1410–74⅓–New. In a prosecution for having wrong license plates on an automobile, evidence has been held to make it a jury question as to whether the wrong plates were carried without knowledge of accused. 160Tenn225, 22 SW(2d)361.

MOUNTING

1410–12 11CustAUS426.

1410–13 11CustAUS426.

MOVABLE

1410–23 [a] **"Movable fixtures."**–4 HawaiiFed10.

MUNICIPAL

1416–81 Cal 293P53.

MUNICIPAL CORPORATIONS

43 C. J.—65–13 [a] (1) 315Mo 56, 285 SW57; 220AppDiv204, 220NYS615; Wash 270P813. [k] **City of Manila.**–48 Philippine309.

66–27 [a] (12) Artificial beings or corporations created by state. LaA 129S 433.

67–29 321 Ill 230, 151NE481.

68–62 80Mont515, 261P264.

68–63 80Mont515, 261P264.

69–65 196Wis604, 220NW398.

69–66 80Mont515, 261P264.

69–67 337 Ill 200, 169NE22, 66ALR 834.

69–77 337 Ill 200, 169NE22, 66ALR 834; 199 Ind78, 155NE198; 80Mont 515, 261P264; 197NC740, 150SE624; 115Tex205, 281SW837; 116Tex446, 294 SW829.

70–8 38F(2d)52; 104WVa660, 140SE 839.

70–94 97Fla127, 120S361(2dcase).

70–96½–New. State functionaries. 4 LaA480.

70–8 103NJL574, 138A467.

71–9 103NJL574, 138A467.

71–11 103NJL574, 138A467.

71–34 116Tex446, 294SW829.

71–35 116Tex446, 294SW829.

72–36 116Tex446, 294SW829.

73–66½–New. All public corporations performing any duties in a restricted area are to that extent municipal corporations. 144Wash585, 258P505.

73–69 127 Okl 234, 260P486, 487 [quot CJ].

73–70 127 Okl 234, 260P486.

73–71 127 Okl 234, 260P486, 487 [quot CJ].

73–78 127 Okl 234, 260P486, 487 [quot CJ].

73–83 200Cal 318, 253P726.

74–1 [a] **Board of commissioners of port of New Orleans** is held not corporation but state agency. 161La361, 108 S770.

74–12 194Wis397, 216NW509.

74–14 127 Okl 234, 260P486.

75–15 127 Okl 234, 260P486.

75–19 252NY437, 169NE637.

76–38 9PaDist&Co 281. [a] **In Missouri.**–318Mo 910, 1SW(2d)1021.

77–57 123 Or571, 263P901.

78–60 122 Okl 234, 254P47.

78–63 152Md343, 136A754; 129Misc 545, 222NYS696. [b] **Law providing that all corporations other than those formed or organized for government constitute private corporations** did not limit later legislation to create public corporations. 207Cal 323, 278P432.

78–65 201Cal 316, 256P1097; 250NY 429, 165NE836.

78–66 267Mass438, 166NE850.

78–67 197Wis163, 221NW856.

78–68 167La456, 119S425.

79–83 13PaDist&Co 760. [b] (2) 13 PaDist&Co 760.

80–88 [a] **Human habitation in dwelling houses or other buildings** is necessary element of town or village. Tex CommnA 26SW(2d)182.

80–94 TexCommnA 26SW(2d)182.

80–7 201Cal 316, 256P1097.

81–15 [a] **Town held to be "de facto corporation"** notwithstanding area was excessive. 220Ky651, 295SW993.

81–16 TexCivA 18SW(2d)204. [a] **Division of town.**–TexCommnA 26SW(2d) 182.

81–16½–New. Territory must be so conditioned that it may be subjected to municipal government. TexCommnA 26SW(2d)182.

81–17 TexCommnA 26SW(2d)182.

82–52 TexCivA 17SW(2d)63.

84–82 124 Or36, 263P893.

85–4 [b] **Charters must conform to state constitution and general laws.**–116 Tex440, 294SW1105.

85–15 138 Okl 295, 281P126.

85–20 [b] **Special charters or amendments thereof** are authorized by some constitutions when enacted in conformity with provisions applicable thereto. 145Va94, 133SE781.

87–62 85CalA507, 259P970; 123 Or 508, 262P943. [a] (4) Presumption that charter or amendment thereof is valid arises from enactment of statute. 145Va94, 133SE781. (5) Charter provisions contrary to constitutional provisions must be ignored. 116 Oh390, 156 NE455. (6) Charter should be construed so that provisions for dismissal

of officers may stand without conflict. TexCivA 297SW496. (7) Charter is to be strictly construed. 316Mo 762, 291 SW469. (8) Provisions of Greater New York Charter and Rapid Transit Act must be construed harmoniously. 247 NY320, 160NE384. (9) Recourse to titles may be had in construing doubtful terms. 119 Oh303, 164NE119.

87-64½-New. It constitutes the basic law of the city in its municipal affairs. 43 OklACR273.

87-68 MoA 16SW(2d)691.

87-70 [b] Ratification or rejection at election called for purpose.-93Fla378, 112S59.

88-89 243 IllA290.

88-92 TexCommnA 26SW(2d)182.

89-14 [c] Affidavits of three electors residing within limits of proposed municipal corporation, certifying to genuineness of signatures to petition, held sufficient. 100CalA537, 280P540.

89-16 MoA 2SW(2d)212. [a] 100CalA 537, 280P540. [b] Descriptions of commons or statement that there are none is jurisdictional. MoA 2SW(2d) 212.

90-19 MoA 2SW(2d)212.

91-37 167La456, 119S425.

91-39 14PaDist&Co 74.

92-44 243 IllA290.

92-45 [a] (2) Court properly struck out objections filed by town in which proposed village was located. 197Wis 163, 221NW856.

92-47 [a] (2) 97CalA769, 276P600.

92-49 92Fla356, 109S423. [a] (1) 92 Fla356, 109S423. (2) As to number of weeks of publication. 214Ala538, 108S 590.

93-54 132 Okl 200, 270P75.

93-57 132 Okl 200, 270P75.

93-59 239Mich340, 214NW193.

93-62 239Mich340, 214NW193.

93-64 97CalA769, 276P600. [b] Statute requiring notice of library district election to be published in weekly newspaper therein, if there is one, does not require notice to be published in newspaper printed outside of, and circulated within, district when none is published within district. 97CalA769, 276 P600.

94-78 100CalA537, 280P540.

94-79 197Wis163, 221NW856.

94-87 197Wis163, 221NW856.

95-83 197Wis163, 221NW856.

96-25 132 Okl 200, 270P75.

97-41 [a] (2) County judge's order reversing town supervisor's decision under Village Law eighty days after statutory time was valid, statute being directory. 229AppDiv397, 242NYS93.

98-53 243 IllA290.

98-60 80Mont363, 260P1042.

98-60½-New. An invalid part of a municipal charter granted by the circuit court under statute will not affect the validity of incorporation. 104WVa251, 139SE743.

98-62 97Fla127, 120S361(2dcase); 80 Mont363, 260P1042; TexCommnA 291 SW209 [aff CivA 257SW609]. [a] On completion of attempted annexation proceedings, annexed territory became part of reorganized de facto corporation. 331 Ill 296, 162NE835.

98-63 97Fla127, 120S361(2dcase).

98-64 97Fla127, 120S361(2dcase); 331 Ill 296, 162NE835. [a] Corporation may participate in consolidation proceeding.-Cal 292P478.

98-67 [b] Ordinances are binding on annexed territory on completion of attempted annexation proceedings resulting in reorganized de facto corporation. 331 Ill 296, 162NE835.

98-68 TexCommnA 291SW209 [aff CivA 257SW609]. [a] City, on completion of attempted annexation proceedings, constitutes reorganized de facto corporation and may not deny corporate existence to escape its obligations. 331 Ill 296, 162 NE835.

98-70 CalA 258P693; 331 Ill 296, 162 NE835; TexCommnA 12SW(2d)142; 144 Wash585, 258P505.

98-71 CalA 258P693; 331 Ill 296, 162 NE835; TexCommnA 12SW(2d)142; 144Wash585, 258P505. [a] Good faith attempt necessary.-CalA 258P693.

98-72 331 Ill 296, 162NE835; 144Wash 585, 258P505.

99-76 149SC234, 147SE346.

99-77 144Wash585, 258P505.

99-79 95Fla978, 117S377; Ill 172NE 763; TexCommnA 6SW(2d)80; TexCivA 17SW(2d)130(2dcase). [a] Validation of village incorporation not equivalent to legislative levy of taxes.-Ill 172NE763.

99-87 97Fla127, 120S361(2dcase); 80 Mont363, 260P1042; TexCommnA 12SW (2d)142.

99-89 56ND454, 217NW668, 670 [cit CJ]; TexCivA 291SW696.

99-90 TexCivA 291SW696.

99-91 331 Ill 296, 162NE835; 144 Okl 202, 291P115.

99-92 331 Ill 296, 162NE835.

99-94 29F(2d)552; 216Ala191, 113S10; 177Ark870, 9SW(2d)24; 97Fla127, 120 S361(2dcase); 124Kan780, 262P607; 323 Mo 248, 19SW(2d)714; 56ND454, 217 NW668, 670 [citCJ]; 56ND751, 219NW 336, 340 [quotCJ]; 126 Okl 153, 259P 133; 149SC234, 147SE346; TexCommnA 29SW(2d)982; TexCivA 291SW696.

100-95 124Kan780, 262P607; 83Mont 282, 272P543(2dcase); TexCivA 291SW 696.

100-96 TexCivA 17SW(2d)130(2dcase).

100-98 124Kan780, 262P607; 56ND751, 219NW336, 340 [quotCJ].

100-2 177Ark870, 9SW(2d)24.

100-8½-New. Order of probate judge does not preclude inquiry into validity of corporation. 216Ala191, 113S10.

100-11 216Ala191, 113S10.

101-12 MoA 2SW(2d)212.

101-29 [a] Assets not considered in adjustment proceeding are: (1) Storage vault in schoolhouse basement. 86 PaSuper164. (2) War memorial. 86 PaSuper164.

104-93 178Ark507, 10SW(2d)906.

106-22½-New. Presumption is in favor of legal existence of municipality. Ala 113S7.

106-24 97Fla69, 120S335.

106-29 100CalA537, 280P540.

106-32 Cal 287P475 (use of word "presidio" instead of "pueblo" in act incorporating San Diego held misnomer, "pueblo" being intended).

106-35 92Fla356, 109S423; Utah 289P 132.

107-39 93Fla378, 112S59.

107-40 132 Okl 200, 270P75, 77 [citCyc].

107-47 [a] (11) Charter of a town containing description "thence west; thence west one half mile to the place of beginning" and failing to close boundary, and reversing calls is improper. 93Fla378, 112S59. (12) In boundary between New York City and town of Hempstead, words "along Jamaica Bay" held controlling over straight line shown on map and mentioned in description. 245NY 515, 157NE839.

107-55 231Ky606, 21SW(2d)1010 (threads of river).

107-58 231Ky606, 21SW(2d)1010.

108-83 216Ala191, 113S10.

109-91 Fla 130S28.

109-92 99Fla1092, 127S323; Fla 130S 28; 250NY429, 165NE836; 222AppDiv 320, 226NYS145; 197Wis163, 221NW 856.

109-93 222AppDiv320, 226NYS145.

110-94 97Fla69, 120S335.

110-99 97Fla69, 120S335.

110-2 125 Or72, 265P1092.

110-5 97Fla69, 120S335.

111-6 97Fla69, 120S335; Fla 130S28; 222AppDiv320, 226NYS145.

111-6½-New. In Alabama merger of municipalities is not forbidden by constitution. 216Ala339, 113S245.

111-7 TexCommnA 12SW(2d)142.

111-8 222AppDiv320, 226NYS145.

112-13 See also 26F(2d)640 [certiorari den 278US654, 49SCt179(6thcase), 73 Led564].

112-14 218Ky794, 292SW320.

112-19 Fla 130S28; 250NY429, 165NE 836. [c] Statute has been held applicable to municipalities organized under general law only. Fla 130S28.

112-20½-New. Statute authorizing municipality to change boundaries has been construed as not authorizing extension of boundaries fixed by statute. 99Fla 1092, 127S323.

112-20⅓-New. Boundaries of municipality established by voluntary action under general law may be enlarged in manner provided by general law. 99Fla 1092, 127S323.

112-20¼-New. Boundaries of municipality established by statutes may be extended only by statutes. 99Fla1092, 127S323.

112-22 TexCommnA 18SW(2d)594.

112-24 [a] Requirement as to general law.-TexCommnA 12SW(2d)142.

113-25 [e] Ordinance held unreasonable annexing territory for obvious purpose of taxation with no material benefit resulting therefrom. 166La896, 118S75.

114-35 MoA 7SW(2d)1022.

114-41 37Wyo 259, 260P537, 541 [citCJ].

114-44 97Fla69, 120S335.

115-66 CalA 258P693.

115-73 328 Ill 126, 159NE206.

115-74 See also 166La896, 118S75.

115-76 MoA 7SW(2d)1022.

115-77 MoA 7SW(2d)1022.

116-82 MoA 7SW(2d)1022.

116-85 MoA 7SW(2d)1022.

116-89½-New. Incorporation of land primarily suited for town purposes is unreasonable where the only benefit derived by the municipality is additional taxes. MoA 7SW(2d)1022.

116-90 150Miss656, 115S890, 58ALR 849. [a] MoA 7SW(2d)1022.

116-94 122Kan311, 252P714.

116-95 MoA 300SW298. [a] In Kansas.-127Kan759, 275P134.

116-97½-New. "Piece of land" for annexation purposes may be in many tracts with as many owners. 122Kan311, 252 P714.

116-97⅓-New. Unplotted "piece of land" which may be annexed means land lying within or partly within municipality regardless of ownership. 122Kan 311, 252P714.

116-97¼-New. Evidence was held to show that land not bounded on three sides by subdivided land and being under statute could not be annexed. 321 Ill 385, 152NE159.

116-97½-New. Land used for the production of grapes, hay, and oats is used for "agricultural purposes" within a statute relative to the annexation of land by cities. 321 Ill 385, 152NE159.

116-97⅚-New. and tract of two and one-half acres only may be used for "agricultural purposes." 321 Ill 385, 152 NE159.

116-2 CalA 258P693

117-28 91PaSuper1.

118-36 157Miss778, 128S554.

118-43 151Miss676, 118S286(2dcase) (without consent); 125 Or72, 265P1092.

118-51 222AppDiv320, 226NYS145.

119-59 169Minn406, 211NW578 (detachment justified); 222AppDiv320, 226 NYS145.

119-63 Utah 289P132 (jurisdiction of court). [a] Courts are bound to confine exercise of power to restrict corporate limits of city within expressed or necessarily implied language of act. Utah 289 P132.

120-71 [a] In California.-204Cal 162, 267P318.

120-82 56ND146, 216NW344.

121-85 [a] (2) Other statements. Ida 286P24(2dcase).

121-90 Ida 286P24(2dcase) (court's power is limited to determining such facts); Utah 266P1044.

121-92 198 Ind574, 154NE384 (city's power to disannex territory is held not discretionary); 53SD324, 220NW910.

121-93 54SD573, 223NW938.

121-95 [a] Determination should be based on civic, rather than revenue, reasons.-53SD324, 220NW910.

121-96 53SD315, 220NW913.

121-97 206 Iowa556, 221NW351, 62 ALR1006; 53SD324, 220NW910, 912 [citCJ]; 53SD315, 220NW913; Utah 266 P1044.

121-98 Ida 286P24(2dcase); Utah 266 P1044.

121-99 [a] (1) 53SD315, 220NW913.

121-1 206 Iowa556, 221NW351, 62ALR 1006.

121-3 [a] Agricultural land which cannot within reasonable time and at reasonable cost be given benefits for which taxes are levied should be excluded. 53 SD324, 220NW910.

121-4 53SD315, 220NW913.

121-5½-New. In determining the rea-

sonableness of exclusion of land from town limits, the isolated power of taxation cannot be considered as either a benefit to the municipality or a detriment to a taxpayer properly included within the district. 149Miss424, 115S559.

121-5½-New. In determining such question the use of the streets of the town is not persuasive. 149Miss424, 115S559.

122-7 54ND657, 210NW180, 182 [cit Cyc].

123-37½-New. **In Colorado** question of dissolving and annexing contiguous city to another city must be decided by county court and contiguous city voters. 80Colo 445, 252P811.

123-37½-New. The trend of recent legislation and decision is toward relaxation of the rule in respect of procedure before official bodies, chiefly political in character and powers, and only occasionally exercising judicial functions. Nebr 229NW19(2dcase).

123-38 169La1191, 126S919(1stcase).

123-43 Utah 289P132. [a] **Statute not applicable.**–11PaDist&Co 10. [b] **Waiver of invalidity in proceedings** may be implied from course of conduct. 252NY308, 169NE394.

123-44 13PaDist&Co 198.

123-47 125 Or72, 265P1092.

124-48 97Fla69, 120S335; 252NY308, 169NE394.

124-52 206 Iowa556, 221NW351, 62 ALR1006.

124-53 174Ark765, 297SW819.

124-57 91PaSuper1.

125-59 26F(2d)640 [certiorari den 278 US654, 49SCt179(6thcase), 73L ed564].

125-66½-New. or upon written consent of a stated percentage of property taxpayers in territory annexed, 169La1191, 126S919(1stcase).

126-76 [a] **That city officials failed to find petitioners entitled to have land disannexed from city** does not relieve them from acting on petition. 198 Ind574, 154NE384.

126-82 [a] (2) Persons registered on same day several hours after signing petition for consolidation of municipalities were not registered, qualified electors. CalA 276P416. (3) Only electors registered and otherwise qualified at time of petition. Fla 130S9.

126-86 91PaSuper1; 8PaDist&Co 19; 13PaDist&Co 198; 70Utah564, 262P105.

126-88 8PaDist&Co 19.

127-3 161La1066, 109S840. [d] (7) Recording ordinance. MoA 296SW232.

128-14 222MoA787, 9SW(2d)829.

128-15 7Alaska330; 8PaDist&Co 19. [b] (1) 97CalA564, 276P120. [c] **Petition is improper in form** where after signatures had been obtained to various circulated multigraphed copies, such signatures were separated from the copies and attached to copy which had not been circulated and an affidavit was then made to compiled petitions by interested party as to genuineness of signatures. 8PaDist&Co 19. [d] **Petition held insufficient.**–97CalA564, 276P120.

128-18 See also 70Utah564, 262P105.

129-27½-New. Petition which is improper in form will be dismissed. 8PaDist&Co 19.

129-37 8PaDist&Co 19.

129-40 10PaDist&Co 629.

129-51½-New. A proportion of the freeholders objecting to annexation may be determined by an amended petition filed more than thirty days after enactment of the ordinance, 221Ky815, 299SW976.

129-51¼-New. and the fact that some of the remonstrants are not parties to the proceedings opposing annexation is immaterial. 221Ky815, 299SW976.

129-51¼-New. The number of remonstrants at the time of submission of the case is controlling. 221Ky815, 299NW976.

129-51½-New. Township supervisors are proper parties to contest annexation of part of township to borough. 13PaDist&Co 198.

129-55 26F(2d)640 [certiorari den 278 US654, 49SCt179(6thcase), 73L ed564]; 103NJL310, 135A788 (under general referendum provision). [a] **Basis of jurisdiction to order election.**–97CalA344, 275P889.

129-57½-New. Some statutes authorizing cities having a stated population to extend boundaries by a majority vote of qualified voters do not invalidate charter provisions authorizing extension of boundaries by ordinance without election but merely provide an additional method. TexCivA 300SW656.

130-59 But see 196NC17, 144SE377.

130-70 335 Ill 106, 166NE488.

130-76 [b] NC 154SE88.

130-77 335 Ill 106, 166NE488. [c] **County judge calling elections has authority** under some statutes to name judges and clerks of election and fix polling places. 335 Ill 106, 166NE488. [d] **Separate calls.**–335 Ill 106, 166NE488.

131-78 100CalA474, 280P196. [a] (4) Other instances. NC 154SE88.

131-79 [c] 335 Ill 106, 166NE488.

131-84 [a] (2) Alleged invalidity of annexation does not justify refusal to file results of election to exclude, though action challenging annexation is pending. 204Cal 162, 267P318. [c] **Immaterial error** in announcement of result, free from fraud and incapable of misleading, will not invalidate election. MoA 296SW232.

131-85 56ND751, 219NW336.

132-7½-New. In proceeding for disannexation, amount of corporate indebtedness need not be proved. IndA 169NE686(1stcase).

132-8 221Ky815, 299SW976; 53SD240, 220NW494; Utah 266P1044.

132-9 221Ky815, 299SW976; 53SD 240, 220NW494.

132-12 See also MoA 296SW232.

132-16 [b] (2) 53SD324, 220NW910; 53SD312, 220NW917; 54SD572, 223NW939; 70Utah564, 262P105. (14) To require peremptory instruction for petitioners for exclusion of territory from town. 149Miss424, 115S559. (15) Sustain circuit court's judgment, to effect that territory sought to be annexed to city was not needed, was unplatted, and vacant. 177Ark809, 7SW(2d)988. (16) Sustain refusal of application for exclusion of land from town. 54SD573, 223NW938. (17) That territory was inhabited. 97CalA344, 275P889. [c] (2) 53SD240, 220NW494. (6) To prove ordinance extending city limits unreasonable. MoA 296SW232.

133-21 174Ark765, 297SW819.

133-27½-New. Under some statutes city council must determine whether territory sought to be annexed is inhabited. 97CalA344, 275P889.

133-33 335 Ill 106, 166NE488; 13Pa Dist&Co 198; Utah 289P132. [a] **Court cannot hold severance of municipal territory incomplete** where statute provides to contrary. Utah 289P132.

133-34½-New. Ordinarily order should include provision for maintaining integrity of legislative districts. 238Mich552, 213NW707.

133-34½-New. But where at time of order action of county supervisors dividing county into legislative districts was pending, and action making such division was thereafter taken, failure to insert usual provision in order for election did not affect its validity, integrity of districts not being affected. 238Mich552, 213NW707.

133-38 53SD240, 220NW494.

133-43½-New. Order of trustees changing boundary of town ineffective, where not followed by publication or second order. 217Ky773, 290SW711.

133-43½-New. The determination of the common council is in effect a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction. Nebr 229NW19(2dcase).

133-43¼-New. Decree of segregation cannot be held in abeyance by defendant's entertaining secret intention of appealing. Utah 289P132.

134-44 13PaDist&Co 198.

134-46 97Fla69, 120S335. [a] (5) Under Act (1915) c 7 art 1 p 393, remedy of persons aggrieved by proceedings for annexation to borough of territory situated in adjoining county by ordinance is exclusively by complaint to next court of quarter sessions and not in equity. 91PaSuper1. (6) Under such statute "next court of quarter sessions" is next session after ordinance is passed and not next term after grievance arises through attempt to enforce ordinance. 91PaSuper1. (7) Under such statute court of quarter sessions of either county has jurisdiction to pass on validity of annexing ordinance when it has been passed and certified copies have been filed in respective courts as required by statute. 91PaSuper1.

134-47 169Minn406, 211NW578. [b] **Territory segregated from city by decree** cannot be restored to city by filing notice of appeal. Utah 289P132.

134-49 [c] **In Louisiana.**–166La896, 118S75.

134-53 CalA 258P693.

135-56½-New. Where a petition submitted to a village board contained the statutory signatures of electors, and the proposition contained therein was carried by a majority of voters, the action of the city council in passing on the validity of the proceedings is final in the absence of fraud or mistake. Nebr 229NW19(2dcase).

135-57 [a] **Proof of publication** has been held not requisite part of record on appeal from ordinance extending city limits. 157Miss778, 128S554.

135-58 177Ark809, 7SW(2d)988; 221Ky815, 299SW976; 53SD324, 220NW910; 54SD573, 223NW938.

135-58½-New. An order of the county court, excluding land from village limits under Rev. St. (1919) § 8593, has been held not a mere administrative order, but a final judgment, which may be reviewed on appeal from order quashing writ of certiorari by any person aggrieved. 222MoA787, 9SW(2d)829.

135-59 157Miss778, 128S554.

135-60 222MoA787, 9SW(2d)829.

135-64 Nebr 229NW769. [a] **Rule applies with peculiar force** where trial judge inspected premises before rendering judgment. Nebr 229NW769.

135-65 97CalA344, 275P889 (where city council has acquired jurisdiction to call annexation election, court on writ of review can go no further unless palpable fraud is shown from face of proceedings).

135-68 206 Iowa556, 221NW351, 62 ALR1006.

135-72 177Ark809, 7SW(2d)988.

135-76 166La896, 118S75.

135-82 TexCommnA 17SW(2d)780.

135-87 93CalA532, 269P934.

135-88 220Ky651, 295SW993.

136-95½-New. State cannot debar city officers from exercising jurisdiction over annexed territory although annexation proceedings were void where city, as constituted, has functioned for seven years. 157Miss836, 127S704.

136-95½-New. especially where annexed municipality has been abolished by statute. 157Miss836, 127S704.

136-95¼-New. Judgment of ouster properly denied where answer showed waiver and statute validated assessments. 99Fla579, 126S124.

136-96 See also 151Miss676, 118S286, 289(2dcase) [citCJ].

136-1 174Ark765, 297SW819.

136-5 See also NC 154SE88.

136-7 [a] **Proximity of annexed land to larger city,** alleged to cause value of land, does not defeat extension of city limits. MoA 296SW232.

137-11 See also 151Miss676, 118S286, 289(2dcase) [citCJ].

137-12 151Miss676, 118S286, 289(2d case) [citCJ]. [a] (3) Attempt of city to incorporate adjacent territory by ordinance under void charter provision without submitting matter to vote as required by law is not under color of law, and can be collaterally attacked. TexCommnA 12SW(2d)142.

137-13 157Miss879, 128S885(1stcase); TexCivA 300SW656.

137-14 252NY308, 169NE394.

137-15 CalA 292P985.

138-17 220Ky651, 295SW993.

138-20½-New. Proceedings to enjoin collection of tax because of lack of notice in annexation proceedings are held not collateral attack upon validity of ordinance. 161La1066, 109S840.

138-21 Ala 113S7. [b] (2) Corporation's acceptance of permit to raft logs within village limits. 161La1066, 109 S840.
138-22 Ala 113S7; 157Miss879, 128S 885(1stcase).
139-28 201Cal 316, 256P1097.
139-34 [a] **Annexation is not legislation** providing for purchase or construction of improvement. 31 OhA452, 167 NE474.
140-58 201Cal 316, 256P1097.
140-67 [a] **Where consolidated municipality was de facto,** exercise of control is questionable only in proper proceeding. Cal 292P478.
141-86 216Ala339, 113S245.
141-10 CalA 288P442. [a] **Default has been held properly entered** after expiration of time for pleading, notwithstanding proceeding for consolidation of defendant had been completed theretofore. CalA 288P442. [b] **Substitution of parties.**–CalA 288P442.
142-20 [a] **Covenant in deed conveying fee that names of streets shall remain unchanged** is not affected by statute consolidating municipalities. 136Misc406, 241NYS5.
142-26 See also 31 OhA452, 167NE474.
143-41 216Ala339, 113S245; 222App Div320, 226NYS145, 150 [quotCJ]. [c] **No exemption by contract.**–222AppDiv 320, 226NYS145.
144-48 222AppDiv320, 226NYS145, 150 [citCJ]. But see 230AppDiv601, 245NYS 510.
145-67½-New. An agreement between the council of a village and realty company, to install water mains without expense to the village, has been held to give no right of reimbursement to company when the village was annexed to an adjacent city. 30 OhA1, 164NE62.
146-82 222AppDiv320, 226NYS145, 150 [citCyc].
147-99 14PaDist&Co 66. [a] **Right of annexing borough to collect.**–14PaDist& Co 66.
147-2 137 Okl 159, 278P642.
148-18 See also 86PaSuper164. [e] **Report of auditor.**–14PaDist&Co 66.
149-22 [b] **Costs in judgment against town** held erroneously adjusted against city carved out of town, and which had joined with successful plaintiff. 223 AppDiv130, 227NYS535.
149-24½-New. New municipality formed by change of boundaries held liable for liabilities of old municipality including damages from torts to land included in excluded territory. Man [1930] 3DomLR507.
150-54½-New. Blocks must be inclosed or surrounded by streets. 38F(2d)28.
152-86 131Misc752, 228NYS204; 118 Oh204, 160NE695.
153-4 118 Oh204, 160NE695; 27 OhNP NS119 (statute construed). [b] (2) Not effective to make streets public as acceptance of dedication indicated on plot. 27 OhNPNS119.
153-11½-New. The legislature has power to declare what maps may be regarded as official maps and filed as such. 252NY308, 169NE394.
153-19 125 Or150, 266P891. See also 252NY308, 169NE394.
154-21 125 Or150, 266P891.
154-23 125 Or150, 266P891.
154-24 [b] **Fact that proprietor of portion of plat** by innocent mistake states he is owner of all plat in his declaration does not invalidate vacation as to part he in fact owns. 58ND536, 226 NW635.
154-25 [b] **Owner of other lots must act** within period for acquiring adverse possession to vindicate any rights he may claim to be abridged or destroyed by vacation. 58ND536, 226NW635.
155-60 319Mo 497, 5SW(2d)1080.
155-62 113TexCr306, 21SW(2d)663 (effect of home rule amendment on constitutional power to amend). [b] **Statute providing for alternative form of government** has been held unconstitutional as conferring special privileges. Ind 168NE10.
156-68 122 Okl 234, 254P47 (under constitutional provision granting self government). [a] **Permissive statute enlarging powers of all cities** is not objectionable as amending charter of city functioning under Home Rule Charter. 242Mich247, 218NW766.
156-70 151Miss718, 118S616.
156-72 32 OhA189, 166NE907; 122 Or 485, 259P908.
156-73 123 Or1, 260P1004.
157-78 [a] **City of St. Louis, Missouri,** derived its charter power exclusively under constitution of 1875, and charter adopted pursuant thereto can be amended only pursuant to constitutional provisions especially relating to such city. 319Mo 497, 5SW(2d)1080.
157-80 Fla 130S28; 267Mass438, 166 NE850; 123 Or1, 260P1004. [a] (6) 122 Or485, 259P908. (14) Statute authorizing cities and towns to amend and adopt charters does not authorize municipality to enlarge corporate powers beyond limitations prescribed by law. 99Fla1092, 127S323. [d] (12) Making ordinances authorizing public work or improvements or establishing benefit or taxing districts or sewer districts are emergency measures. 319Mo 497, 5SW (2d)1080.
158-85½-New. In Oklahoma charter adopted by city under constitutional provision granting independent self-government may also be amended by proposals submitted by legislative authority of city to qualified electors thereof for ratification. 122 Okl 234, 254P47.
158-85¼-New. Amendments must be conined to matters germane to the purposes of the municipal corporation. 123 Or1, 260P1004.
158-88 177Minn122, 224NW845; 13Pa Dist&Co 200.
158-89 12PaDist&Co 663 (must surrender entire special act or retain such as are not inconsistent with general act); 12PaDist&Co 790 (petition for surrender of special charter held sufficient). [b] **Municipality incorporated under special act** with subsequent amendment under general act is held incorporated under special act. 162La823, 111S177.
159-16 46Philippine171. [b] (4) Where city under special charter adopted city manager plan, and subsequently obtained new charter, held intention was not to place city in class adopting plan by charter, but to follow evolution of general law. 144Va286, 132SE187.
159-20 Ariz 282P42 (extension of city limits by ordinance, not amendment).
160-22 96CalA560, 274P375.
160-33 La 130S46.
161-39 218Ala371, 118S746; 116 Oh 390, 156NE455. [g] **Disqualification of some of petitioners** held not to excuse clerk from ordering election. NJ 139A 727. [h] **Certiorari** is proper remedy to review clerk's refusal to order election. NJ 139A727. [i] **In absence of statute** court cannot hold that petition to submit question of adopting city manager plan is prima facie evidence that signers were electors. Ind 166NE270. [j] **Duty of city clerk in determining whether petitioners were qualified electors** is judicial and cannot be delegated. Ind 168NE 10. [k] **Part of statute directing city clerk to determine qualification of voters within five days** is invalid as failing to prescribe method by which it could be carried into effect. Ind 168NE10.
161-40 [c] **Implied power.**–116 Oh390, 156NE455.
161-43 [b] **Submission by city legislative authority** as required by constitution clearly implies that some power and some duty is intrusted to that authority, in respect of sufficiency of petition. 116 Oh390, 156NE455. [c] **Function of submitting amendment** reposed in city legislative authority cannot be transferred to board of elections. 116 Oh390, 156 NE455. [d] **Where, under constitution, city council is authorized to submit amendments** (1) to voters, only such body has such power, 116 Oh390, 156 NE455.
161-44 319Mo 497, 5SW(2d)1080. [b] **Reservation of power in people of city of St. Louis to propose amendments** does not preclude similar exercise of power by lawmaking authorities of city. 319 Mo 497, 5SW(2d)1080.
161-46 116 Oh390, 156NE455.
161-47 116 Oh390, 156NE455.
162-51 [a] **Determination of sufficiency** of petition rests on city council, required by constitution to submit amendments to voters. 116 Oh390, 156NE455.
162-66 115 Oh722, 156NE213. [d] **Selection of general election day** for special election on charter amendment is held not to violate constitution or charter. 115 Oh722, 156NE213.
163-67 [e] (4) Publication March 7th, April 21st, and May 5th, of full text of proposed home rule charter amendment to be voted on at general election to be held May 6th, satisfies requirement of Nebraska constitution. 115Nebr861, 215 NW135. (5) Publication of proposed amendments to St. Louis charter for over sixty days before election in one paper doing city printing has been held sufficient though ordinance required publication in "papers doing city printing," where only one paper was shown to have been engaged. 319Mo 497, 5SW(2d) 1080.
164-69 TexCivA 318SW(2d)665. [d] **Ballots held sufficient.**–319Mo 497, 5SW (2d)1080.
165-87½-New. Council, adopting mayor's call for election for city under commission form resuming special charter, is held to adopt its recital of proper petition. 43 Ida693, 254P221.
165-87½-New. Prohibition of special election within ninety days before general election is held inapplicable to election for city to resume special charter. 43 Ida693, 254P221.
165-87¼-New. Mayor held authorized to fix date for and call election for city under commission form of government resuming special charter. 43 Ida693, 254 P221.
165-87½-New. Under constitutional provision authorizing legislature to resubmit charter rejected by voters county commissioners have not implied power to resubmit such charter. 299Pa390, 149 A655.
165-87¼-New. Under such constitutional provision county commissioners directed by statute to submit charter cannot without legislative sanction resubmit rejected charter. 299Pa390, 149A 655.
165-89 [b] **Effect of ratification by legislature.**–201Cal 327, 257P40.
165-90 [c] (3) Proceedings taken under amendment approved by joint resolution of legislature duly enrolled and filed cannot be questioned by directors of city either individually or as board. 201Cal 327, 257P40. [d] **Complaint to set aside referendum election increasing city council** held insufficient to state cause for equitable relief. 199Wis358, 226NW388.
165-95½-New. Mere technical irregularities will not void election where proposition for change was fully discussed and understood by voters and no charge of fraud made or lack of opportunity for free expression of voters' will. 122 Okl 234, 254P47.
165-95¼-New. Election is not rendered void by fact that provision for bond issue is embodied with other provisions in proposed change in form of city government and submitted under one ballot title, on ground of being unrelated and incongruous. 122 Okl 234, 254P47.
165-95¼-New. Submitting under one ballot provision for municipal bonds with other provisions in proposed charge in form of government did not invalidate election. 122 Okl 234, 254P47.
165-95½-New. A private citizen, having no interest other than that of the public generally in the result of an election to determine the adoption of the home rule charter, has no standing to contest such election. 118Tex326, 158SW(2d)227.
165-96½-New. [§ 149a] **Ratification by Legislature.** A joint resolution of the legislature ratifying an amendment of a city charter and promulgating the amendment has the essence of a legislative enactment. 201Cal327, 257P40.
165-98 [a] **Invalidity of statute** is not waived by taxpayer's failing to object to election to determine whether to adopt city manager form of government. Ind 168NE10.
165-99 317Mo 736, 296SW415.
165-9½-New. The provisions of a home

rule charter adopted pursuant to the constitution have the force and effect of statutes passed by the legislature and are of equal dignity. 322Mo 1050, 17 SW(2d)977.

166-26 162La823, 111S177.

166-29 117Nebr465, 220NW827.

167-32 317Mo 255, 296SW781. 115 Nebr861, 215NW135. See also 166La 566, 117S720.

167-33 115Nebr861, 215NW135.

167-35 123 Or1, 260P1004.

167-37 Mass 169NE894.

169-66 159Tenn99, 15SW(2d)745.

170-73½-New. change the appointing power from city council to the mayor, Mass 169NE894.

170-78½-New. An amended charter cannot abolish a state created office of ex officio justice of the peace. 123 Or1, 260 P1004.

171-96 245 IllA447.

172-5 122 Okl 234, 254P47.

172-24 NC 154SE15.

173-30 245 IllA447.

175-56 [b] Power and duty to protect creditors.-TexCommnA 291SW209 [aff judg TexCivA 257SW609].

175-70 NC 154SE852.

175-72 TexCommnA 291SW209 [aff judg TexCivA 257SW609]. [c] Validity of contracts.-TexCommnA 291SW209 [aff judg TexCivA 257SW609].

176-85 TexCommnA 291SW209 [aff judg TexCivA 257SW609].

176-90 [a] State constitution, Enabling Act, and general laws in pari materia constitute fundamental laws of home rule cities and rank in order given. Tex CivA 8SW(2d)249.

176-93 [a] Statute authorizing wharf improvement districts held not unconstitutional as permitting engaging in private business. 174Ark478, 295SW730.

176-97½-New. A municipal corporation takes control of all affairs over which it is given authority, to the exclusion of other governmental agencies. 196NC 17, 144SE377.

176-97½-New. Neither legislature nor city charter may deny to municipality right to exercise constitutional powers. 42F(2d)379.

176-1 92Fla187, 109S228; 152Md419, 137A39; 102NJEq475, 141A455; 246 NY1, 157NE911 (New York City); 193 NC573, 137SE666; 123 Or1, 260P1004; 116Tex472, 294SW832.

176-3 166La566, 117S720; 152Md419, 137A39; 242Mich247, 218NW766; 20 OhSt308. [a] Statute authorizing home rule city to manufacture anything public needs or uses is not unconstitutional. TexCommnA 27SW(2d)119.

176-4 20 OhSt308.

176-8½-New. A municipal legislative body cannot, by ordinance or resolution, change an organic law of a city. 35Ariz 214, 276P325.

176-10 318Mo 870, 2SW(2d)713.

177-11 92Fla187, 109S228.

177-12 92Fla187, 109S228.

177-15 174Minn410, 219NW760.

177-16 318Mo870, 2SW(2d)713; Tex CivA 31SW(2d)882.

177-17 TexCivA 13SW(2d)184; Tex CivA 31SW(2d)882.

177-20 83Colo 329, 266P214; 246NY 140, 158NE51; 128Misc642, 220NYS66.

177-22½-New. and statute legislating on subject of such grant is unconstitutional. 152Md419, 137A39.

177-22½-New. In the Philippines the local autonomy granted to municipal corporations is protected from higher usurpation of strictly local powers. 50Philippine686.

178-23 92Fla187, 109S228; 117Tex159, 299SW221; 117Tex256, 1SW(2d)596; TexCivA 31SW(2d)882.

178-25 92Fla187, 109S228.

178-28 92Fla187, 109S228; 115Nebr 861, 215NW135; TexCivA 20SW(2d) 403.

178-29 115Nebr861, 215NW135.

178-30 115Nebr861, 215NW135.

178-38 134Misc412, 235NYS226.

179-43 207Cal 473, 279P447 (freeholders' charters have all dignity of statutes); 79CalA171, 249P46; 98CalA87, 276P399; TexCivA 13SW(2d)184.

179-44 79CalA171, 249P46.

180-62 123 Or1, 260P1004; 116Tex446, 294SW829; TexCivA 13SW(2d)184; 193 Wis579, 214NW451.

180-63 [a] 97Fla807, 122S220.

180-65 223Ky269, 3SW(2d)606, 609 [citCJ]; 123 Or1, 260P1004.

180-66 84Mont478, 276P958; 196Wis 604, 220NW398.

180-67 204 Iowa683, 215NW967; 58ND 33, 224NW871, 63ALR1337; 133 Okl 289, 272P453.

180-71 204 Iowa683, 215NW967; 133 Okl 289, 272P453; 5PaDist&Co 754; 116 Tex446, 294SW829.

181-72 204 Iowa683, 215NW967.

181-73 204 Iowa683, 215NW967.

181-74 84Mont478, 276P958; 58ND33, 224NW871, 63ALR1337; 123 Or1, 260 P1004; 193Wis579, 214NW451.

181-77 220Ky839, 295SW1004; 84 Mont478, 276P958; Pa 151A883; 5Pa Dist&Co 754; 116Tex446, 294SW829.

181-78 204 Iowa683, 215NW967; 133 Okl 289, 272P453.

181-79 CalA 289P203; 204 Iowa683, 215NW967; 58ND33, 224NW871, 63 ALR1337; 193Wis579, 214NW451.

182-83 123 Or1, 260P1004.

182-80 204 Iowa683, 215NW967.

182-83½-New. or local; 123 Or1, 260P 1004.

182-84 137 Okl 222, 278P617.

182-90 161Tenn236, 30SW(2d)268.

182-91 161Tenn236, 30SW(2d)268.

182-92 116Tex314, 291SW202.

182-93 235Ky265, 30SW(2d)968.

182-97 69Utah186, 253P443, 445 [cit Cyc], 51ALR364.

183-1 91CalA1, 266P1029; 318Mo 870, 2SW(2d)713; Mont 276P183; 137Misc 462, 244NYS439.

183-3 240Mich94, 214NW968; Mont 276P183.

183-5 242Mich614, 219NW745. [a] Power to legislate with reference to waterworks or lighting works is of governmental nature. 193Wis579, 214NW451 (determination whether city shall construct or purchase works).

183-8 TexCivA 13SW(2d)184; 69Utah 186, 253P443, 445 [citCyc], 51ALR364.

183-9½-New. Municipal functions include supplying water by municipally owned system to those who are inhabitants of the city but do not include supplying water to those residing outside city. 121 Or340, 255P326.

183-12 206 Iowa261, 218NW563; 84 Mont478, 276P958; 140 Okl 165, 282P 332; 193Wis579, 214NW451.

183-15 204 Iowa683, 215NW967; 220 Ky839, 295SW1004; 103NJL574, 138 A467, 468.

183-15½-New. A city engaged in its proprietary capacity may exercise such powers as a private concern engaged in like business exercises. 193Wis579, 214 NW451.

183-16 103NJL574, 138A467.

184-18 288Pa420, 135A726.

184-20 97Fla807, 122S220.

184-26 164La1033, 115S136, 138 [cit Cyc].

184-29 204 Iowa798, 215NW957, 55 ALR430; 50Philippine686.

184-33 204 Iowa798, 215NW957, 55 ALR430.

185-42 But see EI 151A1.

185-43 204 Iowa798, 215NW957, 55 ALR430.

185-50 6PaDist&Co 403.

185-55 247NY311, 160NE381; 130Misc 226, 223NYS676; TexCivA 8SW(2d) 249; 104WVa660, 140SE839.

185-58 TexCivA 20SW(2d)808 (quasi judicial act of town council held conclusive on court).

186-92 32Ariz18, 255P490; 35Ariz214, 276P325; 207Cal 473, 279P447; 87Colo 73, 285P771; 15DelCh215, 135A484; 96 Fla737, 119S117; 99Fla1, 65, 115, 126 S308; 14Ga80; Ida 286P353; 328 Ill 242, 159NE199; 332 Ill 586, 164NE199; 334 Ill 78, 165NE129; 333 Ill 577, 165NE 348; Ill 173NE276; Ill 173NE484; 254 IllA74; 86 IndA401, 157NE286; Iowa 231NW475; Iowa 231NW705; 127Kan 663, 274P258, 63ALR610; 166La512, 117 S573; LaA 129S433; 12NH409; 243NY 401, 153NE849; 246NY1, 157NE911; 247NY320, 160NE384; 225AppDiv1, 232 NYS273; 138Misc257, 245NYS375; 1 HillNY616, 25Wend686; 15 OhSt21; 121 Or340, 255P326; 123 Or1, 260P1004; 130 Or309, 274P118; 288Pa420, 135A 726; 149SC234, 147SE346; 5Tenn495; 8HumphrTenn1, 47AmD597; 155Tenn 222, 291SW1067; TexCivA 244SW342; 141Va168, 126SE56; 145Wash588, 261 P112, 55ALR1175; 149Wash173, 270P 306; 151Wash55, 275P62, 65ALR794. See also 95Fla984, 117S507(2dcase); 152 Va1, 145SE425. And see 230US100, 112, 33SCt967, 57L ed1410.

188-4 39GaA702, 148SE299.

188-12 157Md185, 145A492; 27 OhA 442, 161NE542; 125 Okl 233, 257P311; Okl 288P316; Okl 292P40; 121 Or340, 255P326; 288Pa420, 135A726. See also TexCommnA 10SW(2d)694.

189-13 35Ariz214, 276P325; 121 Or 340, 255P326; 126 Or268, 269P853, 60 ALR260.

189-24 86 IndA401, 157NE286; 80 Mont102, 258P246; 81Mont19, 261P876.

190-28 91CalA1, 266P1029; 15DelCh 214, 135A484; Iowa 231NW475; 81 Mont19, 261P876; 288Pa420, 135A726.

190-29 Ariz 284P350; 15DelCh214, 135 A484; 92Fla975, 110S837; 337 Ill 194, 168NE884; 337 Ill 200, 169NE22, 66 ALR834; Ill 172NE829; Iowa 228NW 874; 80Mont515, 261P264; 81Mont19, 261P876; 59ND75, 228NW819; 121 Or 340, 255P326; 288Pa420, 135A726; Tex CivA 2SW(2d)1001; Utah 292P249; 196 Wis171, 218NW842.

190-30 207Cal 134, 277P308; 207Cal 473, 279P447; 91CalA1, 266P1029; Ida 286P353; 89 IndA349, 166NE437; Iowa 231NW475; 237Mich90, 211NW96; 38 OklCr207, 259P873. See 249NY88, 162 NE593. See also 35Ariz 120, 274P786.

192-45 15DelCh214, 135A484; 288Pa 400, 135A726.

192-50 15DelCh214, 135A484.

193-63 334 Ill 78, 165NE129; 149Wash 173, 270P306.

193-68 207Cal 134, 277P308; 15DelCh 214, 135A484; Ill 173NE276; 89 IndA 349, 166NE437; 130 Or64, 279P644; Pa 151A883.

194-72 288Pa420, 135A726.

194-74 But see 288Pa420, 135A726.

194-79 But see 222MoA459, 281SW56.

194-79½-New. A municipality, in exercising its proprietary powers, does not have power to do any act which its officers may think necessary for the proper conduct of the business. 201Cal 273, 257P530.

194-82 126 Or268, 269P853, 60ALR260.

194-83 [a] Charter amendment must be read in sense which harmonizes with subject matter and general purpose consistent with language itself. Wash 288P 913.

194-84 201Cal 134, 255P808. [a] Charter should be construed to make it operative.-132 Or660, 285P815.

195-91½-New. Charter is equivalent to legislative act.-32Ariz18, 255P490.

195-99 Iowa 231NW475; 116Tex446, 294SW829; 116Tex472, 294SW832, 834 [quotCyc].

195-1 82CalA187, 255P294, 169Ga649, 151SE513; 327 Ill 479, 158NE801; 332 Ill 586, 164NE199; 336 Ill 624, 168NE 690; 337 Ill 194, 168NE884; 337 Ill 200, 169NE22, 66ALR834; Ill 173NE484; 254 IllA74; Iowa 231NW475; 316Mo 762, 291SW469; 116Tex446, 294SW 829; 116Tex472, 294SW832, 834 [quot Cyc].

196-2 207Cal 134, 277P308; 207Cal 473, 279P447; 91CalA1, 266P1029; 334 Ill 78, 165NE129; 336 Ill 624, 168NE690; Ill 172NE829; Ill 173NE276; 254 IllA 74; 89 IndA349, 166NE437; Iowa 231 NW475; 222MoA459, 281SW56; 81 Mont19, 261P876; 102NJEq475, 141A 455; 132Misc62, 229NYS62; 59ND75, 228NW819; 121 Or340, 255P326; 126 Or268, 269P853, 60ALR260; 288Pa420, 135A726; 116Tex446, 294SW829 [quot Cyc]; 116Tex472, 294SW832, 834 [quot Cyc]. But see 153Wash139, 279P601.

197-3 116Tex472, 294SW832, 834 [quot Cyc].

197-7½-New. Powers of a proprietary character are given a more liberal construction than those which are strictly governmental. 201Cal 273, 257P530.

197-9 116Tex472, 294SW832, 834 [quot Cyc]; 150Wash402, 273P521.

197-11 155Tenn222, 291SW1067; 116 Tex472, 294SW832, 834 [quotCyc].

197-13 59ND75, 228NW819; 155Tenn 222, 291SW1067.

197-19 Iowa 231NW475.

198-24 Fla 130S28.
198-26 91CalA1, 266P1029.
199-37 Ariz 282P42 (effect given to every provision); 101CalA754, 282P394; 225AppDiv371, 233NYS184.
199-41 201Cal 134, 255P808; 94CalA 720, 271P795. [a] **Charter amendment must be understood in popular,** rather than technical, sense. Wash 288P913.
199-50½-New. Charter supersedes statutory law in conflict therewith in so far as such laws relate to purely municipal affairs. 125 Okl 311, 257P311.
199-50⅓-New. When a charter by general reference adopts state laws on any subject, such laws become part of the charter. 27 OhA442, 161NE542.
199-50¼-New. When consistent with construction of applicable laws, voters' action ratifying prior unlawful acts of officials should be upheld. Wash 289 P3.
199-53 153Wash139, 279P601.
199-55 82CalA187, 255P294.
200-60 82CalA187, 255P294.
200-64½-New. A provision of the Home Rule Law requiring liberal construction does not dispense with substantial adherence to statutory requirement. 246 NY140, 158NE51.
200-64⅓-New. The language of the home rule amendment providing that no charter shall contain a provision inconsistent with general laws may be given retrospective effect. 113TexCr306, 21 SW(2d)663.
200-64¼-New. In some jurisdictions home rule city under charter has all powers theretofore or thereafter granted to home rule cities by general law, Tex CommnA 27SW(2d)119.
200-64⅕-New. and can exercise powers incident to local self-government not inhibited by constitution and laws. Tex CommnA 27SW(2d)119.
200-66½-New. Long continued exercise of powers raises no presumption of grant of such powers. 80CalA561, 251 P925.
200-77 206Cal 90, 273P30; 322 Ill 82, 152NE602.
200-78 Ala 129S477; 110Conn291, 147 A804; 318 Ill 340, 149NE281; 326 Ill 100, 156NE753; 334 Ill 231, 165NE615; 152Md1, 136A41, 50ALR620; 262Mass 404, 160NE285; 220MoA602, 287SW 879; 104NJL402, 140A300; NJSup 142 A760; NJSup 147A649(1stcase); 121 Oh456, 169NE447; 24 OhA374, 157NE 708; 32 OhA472, 168NE227; 124 Okl 55, 254P41; 38 OklCr207, 259P873; 291 Pa109, 139A619; 50Philippine748; 145 Va554, 134SE914.
201-79 35F(2d)657; 216Ala178, 112S 742; 326 Ill 100, 156NE753; 32 OhA 472, 168NE227.
202-83 135Misc315, 237NYS237; 129 Or333, 276P1114; 86PaSuper337.
203-2 38 OklCr207, 259P873; 50Philippine748.
203-5½-New. Presumption is that city authorities in passing ordinances did not intend to violate organic law of state. 220MoA602, 287SW879.
203-7 244 IllA239; 255 IllA67; 130 Okl 175, 266P444; 135 Okl 253, 275P285; 156SC147, 152SE809(2dcase).
203-8 130 Okl 175, 266P444.
203-11 Iowa 228NW874; 224Ky390, 6 SW(2d)460; 161Tenn211, 30SW(2d) 248; 113TexCr522, 24SW(2d)409.
203-12 316Mo 9, 289SW838.
203-13 220AppDiv233, 221NYS114.
203-16 77Mont124, 249P1070, 1073 [citCyc]; 103WVa51, 136SE863.
203-18½-New. Exercise of police powers does not depend on consent of affected persons. 264Mass460, 163NE82.
203-27 224AppDiv483, 231NYS368. [b] **Discretion.**–235Ky265, 30SW(2d)968.
203-28 [a] **Broad rules** measure validity. 43F(2d)597.
204-32 88CalA691, 264P281. [a] **Building restriction cannot be imposed** except for promotion of public welfare. 152 Md671, 137A278.
204-33 206 Iowa452, 221NW354.
204-38 152Md671, 137A278; 150Wash 203, 272P517; 151Wash665, 276P886.
204-39 132Misc82, 229NYS32.
205-50 316Mo 9, 289SW838.
206-55 208 Iowa1273, 227NW125; 319 Mo 316, 4SW(2d)467 (construction of sewers); 198Wis411, 224NW106.
206-57 Iowa 228NW874.
207-72 170Minn356, 212NW585; Pa 152A23. [a] **Promotion of public convenience and welfare** is within police power. 82CalA187, 255P294. [b] **Welfare of "city,"** as used in city charter, means welfare of city as municipality and political agency. 9PaDist&Co 217.
207-74½-New. Police power extends to regulations merely for public convenience. 82CalA187, 255P294.
207-74⅓-New. Ordinance for public safety must tend thereto in some appreciable way, otherwise it is unenforceable. 170Minn356, 212NW585.
207-77½-New. City, under general legislative delegation of police power, or under charter, has power to regulate sales of secondhand goods. 142Wash 37, 252P137.
207-79 [a] **Effect of statute vesting state department of health** with authority. Mo 151A426.
207-80 CalA 290P140; 245NY553, 157 NE854 (heat for tenants); 123 Or180, 261P895, 58ALR665; 148Va795, 139SE 508, 55ALR781; 144Wash572, 258P520; Wash 290P1010. [a] **Ordinance regulating sale of secondhand goods** held within municipality's police power under Const. art 11 § 11. 142Wash37, 252 P137.
209-92 132Misc349, 230NYS295.
209-97 MoA 300SW316, 317 [citCJ]; 10PaDist&Co 775, 779 [quotCyc]; Wis 233NW82.
210-9 TexCivA 2SW(2d)1001.
210-10 NJ 149A61.
210-20½-New. Power of municipal corporation under Home Rule Act held not to include power to require excavators at own expense to insure adjoining buildings against falling. NJ 148A758.
211-43 83Colo 329, 266P214; 255 IllA 67; 77Mont124, 249P1070, 1073 [cit Cyc]; 221AppDiv357, 223NYS160; Sask [1928] 1DomLR1119. [b] **Agreement held not surrender** of city's taxing power. 319Mo 386, 4SW(2d)427. [c] **Contract to maintain fire patrol service** is not surrender of governmental power. 319Mo 386, 4SW(2d)427.
211-45 33F(2d)719.
212-47½-New. But town's exercise of police power is no valid consideration for release of its contract obligation. 221AppDiv357, 223NYS160.
214-95 84Mont478, 276P958.
214-96 251NY467, 167NE705.
214-1 97CalA131, 274P1039; 332 Ill 545, 164NE20.
214-1½-New. Ordinance prohibiting owning or operating gambling device does not refer to same offense as statutes prohibiting gambling. 192Wis585, 213 NW335.
214-1⅓-New. Statute relating to prosecution for punishment of crimes and misdemeanors does not include penalties imposed for violation of ordinances. 192Wis585, 213NW335.
214-3½-New. Constitutional provisions lodging power in municipalities do not deprive a state of sovereignty in respect of sanitation for promotion of public health which it elects to exercise by general laws. 120 Oh426, 166NE370.
214-5 316Mo 9, 289SW838, 841 [cit Cyc].
215-6 97CalA131, 274P1039; 332 Ill 545, 164NE20; 316Mo 9, 289SW838; 84 Mont478, 276P958; 90PaSuper288; 106 TexCr156, 291SW246; 151Wash665, 276 P886; 195Wis148, 217NW703.
216-16 215Ala532, 112S109; Ark 31 SW(2d)944; 92CalA200, 267P886; 111 Conn433, 150A811 (conflicting ordinance is void); 3Del 314, 136A279 (rules of board of adjustment); 339 Ill 157, 171 NE137; 122Kan390, 251P1091; 126Kan 569, 268P827 [quotCJ]; Mo 297SW32; 81Mont19, 261P876; 220AppDiv559, 222 NYS120; 128Misc642, 220NYS66; 230 AppDiv228, 243NYS686; 57ND768, 224 NW680; 121 Oh342, 168NE844; 123 Or 1, 260P1004; 14PaDist&Co 258; 116 Tex440, 294SW1105; 116Tex314, 291 SW202; TexCivA 5SW(2d)824; Tex CivA 10SW(2d)772; 118Va521, 88SE 174, 4ALR1480. [c] 317Mo 732, 296SW 366. [d] **Municipality has no authority to abrogate law** unless specifically empowered to do so. 230AppDiv228, 243 NYS686.
217-17 111Conn433, 150A811; 29 Hawaii62, 67 [citCyc]; 339 Ill 157, 171 NE137; 126Kan569, 268P827 [quotCJ]; 320Mo 120, 6SW(2d)935; 123 Or1, 260 P1004; 156SC147, 152SE809; Tex CommnA 6SW(2d)80; Wis 233NW82.
217-18 Ark 30SW(2d)220; 111Conn 433, 150A811; 3Del 314, 136A279; 332 Ill 545, 164NE20; 247 IllA77; Wis 231 NW261 (manufacturer of soda water licensed by state need not secure municipal license).
217-20 252 IllA168; NJSup 150A237.
217-21 111Conn433, 150A811; 332 Ill 545, 164NE20; 252 IllA168; 9PaDist& Co 430; 106TexCr185, 290SW177.
217-22 126Kan569, 268P827 [quotCJ]; TexCivA 291SW660.
218-23 230AppDiv228, 243NYS686; 14 PaDist&Co 258.
218-24 331 Ill 129, 162NE115.
218-23½-New. Where the constitution gives a general court supreme power over the subject of zoning, and the court has spoken, conflicting by-laws and ordinances must give way. Mass 167NE 659.
218-31 126Kan569, 268P827 [quotCJ].
218-32 [a] (1) AlaA 130S369; 179Ark 266, 15SW(2d)411; 92CalA200, 267P 886; CalA 285P918; 252 IllA168; 316 Mo 9, 289SW838; 317Mo 732, 296SW 366; 26 OhA79, 159NE843; Ont [1929] 1DomLR321; TexCivA 5SW(2d)824; (7) Sunday closing. 316Mo 9, 289SW838. (8) Blocking street railroad crossing. 248NY157, 161NE454. (9) Maximum loads for streets. 225Ky123, 7SW(2d) 833. [b] **Regulations held to conflict.**– 215Ala532, 112S109; 218Ala100, 117S 643; 317Mo 732, 296SW366; 106TexCr 185, 290SW177.
219-35 116Tex440, 294SW1105. [b] **Inconsistent defined.**–AlaA 130S369.
219-36 126Kan569, 268P827 [quotCJ].
219-37 126Kan569, 268P827 [quotCJ]; 316Mo 9, 289SW838.
219-38 221AppDiv36, 222NYS141; 123 Or180, 261P895, 58ALR665; TexCivA 297SW534.
219-39½-New. Where a municipal ordinance is not as broad as the general law, the latter governs. 57ND768, 224 NW680.
219-40 126Kan569, 268P827 [quotCJ]; 316Mo 9, 289SW838; 90PaSuper288, 290 [citCyc]; 138SC329, 136SE314; Tex CivA 5SW(2d)824; 106TexCr156, 291 SW246.
220-41 316Mo 9, 289SW838.
221-57 246NY140, 158NE51.
221-57½-New. But the municipal act must indicate clearly the exact parts of the general law superseded. 246NY 140, 158NE51 (city elections).
221-70 91CalA257, 266P1015; 123 Or 180, 261P895, 58ALR665.
221-72 135Misc209, 237NYS432; 123 Or1, 260P1004.
222-78-81 See also 133Misc161, 231NYS 85. [a] **Election law** is general law. 128Misc642, 220NYS66.
222-83 113TexCr522, 24SW(2d)409. [a] (2) Statute under which single act of sexual intercourse not punishable. 113TexCr522, 24SW(2d)409.
222-86 121 Oh342, 168NE844 (ordinance providing for greater punishment than statute); Wis 233NW82.
222-87 220Ala286, 125S387; 337 Ill 469, 169NE265; 232 IllA246; Wis 233 NW82.
223-96 Ind 170NE850.
225-19 [a] Ind 170NE850.
225-21 163Ga502, 136SE446 (ordinance not void as in restraint of trade); 316 Mo 9, 289SW838 (special legislation); 288Pa420, 135A726; 9PaDist&Co 577.
226-22 34PortoRico 19 (interfering with competition in sale of fresh meat).
226-25 [a] **Resolution attempting retroactively to increase rate to be paid for water by company having contract with city regulating rate** is void as attempt to destroy vested rights under contract. 102NJEq475, 141A455.
226-29 [a] **Ordinance held not invalid.**– NJ 151A61.
227-48 29Hawaii62, 67 [citCyc].
227-50 330 Ill 97, 161NE133; 332 Ill 586, 164NE199; Ill 173NE276; 152Md

1, 136A41, 50ALR620; 173Minn61, 216 NW535; TexCivA 5SW(2d)561.
228-53 330 Ill 97, 161NE133.
228-54 See also 27F(2d)478.
228-62 Ind 172NE309; MoA 17SW(2d) 616.
228-67 24F(2d)541.
228-68 [a] 195NC377, 142SE330, 57 ALR506.
229-70 17F(2d)202; 42F(2d)88; 164 Ga755, 139SE559, 55ALR230; 29Hawaii 62, 67 [citCyc]; 324 Ill 566, 155NE356; 326 Ill 100, 156NE753; 339 Ill 157, 171 NE137; Ill 173NE137; Ill 173NE276; 233 IllA278; 161La320, 108S552; 164 La564, 114S159; 152Md1, 136A41, 50 ALR620; 239Mich286, 214NW148; 170 Minn356, 212NW585 (ordinance designed to prohibit erection of any structure at any place within municipality unless licensed, without reference to proximity to other structures, is reasonable and void); 172Minn428, 215NW840, 55ALR 461; 173Minn61, 216NW535; 176Minn 151, 222NW639(2dcase); 153Miss136, 119S811; 317Mo 907, 296SW993, 54ALR 1082; 321Mo 969, 13SW(2d)628; 79 Mont314, 257P1007; 102NJL492, 134A 115; NJSup 137A886; 137Misc472, 242 NYS316; 193NC432, 137SE183, 55ALR 252; 124 Okl 55, 254P41 (ordinance prohibiting certain businesses within two hundred feet of school held reasonable); 87PaSuper84; 116Tex446, 294SW829; 116Tex509, 294SW831. [a] 326 Ill 100, 156NE753; 233 IllA579; 126Me537, 140 A382; 239Mich286, 214NW148; 320Mo 865, 8SW(2d)1001; MoA 25SW(2d)142; NJSup 136A803; NJSup 140A392; 247 NY311, 160NE381; 224AppDiv483, 231 NYS368; TexCivA 5SW(2d)561; 142 Wash37, 252P137. [b] **City under guise of regulating sale of dangerous commodity** may not adopt ordinance which has no reasonable relation to that end. 42F(2d)88.
230-71 137Misc472, 242NYS316.
230-74 Ill 173NE276; 208 Iowa1273, 227NW125; 116Tex446, 294SW829; 116 Tex509, 294SW831. [c] (1) 152Md1, 136A41, 50ALR620.
231-75 [a] **Requiring reports of accidents** at grade crossings is unconstitutional as compelling people, in no way to blame, to report under penalty of law. 28 OhA178, 162NE617.
231-76½-New. A municipality has no power to prohibit the doing of lawful acts which do not affirmatively appear to serve the public convenience or welfare. 20F(2d)743.
231-81 208 Iowa1273, 227NW125; 321 Mo 969, 13SW(2d)628; 195NC377, 142 SE330, 57ALR506.
232-83 42F(2d)88; 177Ark821, 9 SW(2d)75; 95CalA762, 273P826; 339 Ill 157, 171NE137; 320Mo 865, 8SW(2d) 1001; MoA 297SW993; 224AppDiv483, 231NYS368; 137Misc472, 242NYS316; 193NC432, 137SE183, 55ALR252; 198 NC51, 150SE810.
232-84 20F(2d)743; 110Conn291, 147 A804; 164Ga755, 139SE559, 55ALR230; 161La921, 109S742; 152Md1, 136A41, 50ALR620; 116Nebr263, 216NW809; NJSup 137A883; 137Misc22, 242NYS 86; 193NC432, 137SE183, 55ALR252; TexCr 28SW(2d)161. [b] (5) Where persons in same business are subject to different restrictions or entitled to different privileges under same conditions. 110Conn291, 147A804. (6) Other instances. 208Cal720, 284P654.
234-86 110Conn291, 147A804; 316Mo 9, 289SW838; 133 Okl 71, 271P162; Tex CivA 2SW(2d)1001; TexCivA 4SW(2d) 592. [b] **Only one subject of regulation affected.**–TexCivA 2SW(2d)1001.
234-87 174Ark1145, 298SW514; 81 Colo 344, 255P443. But see NJSup 137 A883.
234-88 162La202, 110S201; 102NJL 492, 134A115; TexCivA 2SW(2d)1001.
235-89½-New. Ordinance permitting hospitals and sanitariums in district forbidden to mortuaries is not discriminatory. 80CalA629, 252P746.
235-89¼-New. Ordinance not unreasonable and discriminatory because property where mortuaries are allowed is situated similarly to property outside zone. 80CalA629, 252P746.
235-89¼-New. Ordinance limiting mortuaries to particular district not discriminatory as to outside residents where no showing that needs were not supplied. 80CalA629, 252P746.
235-89½-New. Mortuaries may be classified separately from hospitals and sanitariums. 80CalA629, 252P746.
235-89⅙-New. An ordinance is not rendered special simply because it does not cover every conceivable subject which legislative authorities might have included in it. 203Cal665, 265P 806.
235-97 5LaAnn362; 18Md284, 78AmD 686; 153Mass161, 26NE241; 121 Or 340, 255P326, 328 [citCyc]; 116Tex 446, 294SW829; 145Wash588, 261P 112, 55ALR1175. [b] (4) Penal ordinance over water outside of corporate limits. 145Wash588, 261P112, 55ALR 1175.
236-11 95Fla979, 117S380; 221MoA 999, 295SW847; 116Tex446, 294SW 829; 145Wash588, 261P112, 55ALR 1175.
236-14 218US180, 30SCt615, 54L ed 991; 100Misc421, 165NYS1026.
236-23 92Fla975, 110S837; 316Mo 9, 289SW838.
237-24 142 Okl 38, 285P92.
237-43 217Ala201, 115S239; 4LaA480.
237-46 31 OhA452, 167NE474. See also 132Misc666, 230NYS464.
238-47 See also 225Ky784, 10SW(2d) 305.
238-49 4LaA480.
238-50 111Conn147, 149A410.
238-51 48Philippine309.
238-65 31 OhA452, 167NE474. See also 205Cal426, 271P487.
239-67 131Misc752, 228NYS204.
239-75 227Ky376, 13SW(2d)283; Oh 171NE336; 118Tex154, 12SW(2d)546.
240-76 TexCommnA 24SW(2d)816 (statute permitting surrender by city of its legislative power invalid).
240-77 [a] **Constitutional prohibition against delegation of municipal functions to special commission, corporation, or association** is not violated by statute with respect to duties of state fire marshal as to buildings liable to fire and so situated as to endanger other property. 84Mont478, 276P958.
240-81 230AppDiv71, 243NYS385; 33 OhA406, 169NE713; TexCommnA 16 SW(2d)520. [a] Conn 152A297; Ill 173NE339; 155Tenn70, 290SW608.
240-82 205Cal426, 271P487.
241-83 MoA 30SW(2d)157. See also 93CalA277, 270P270; 225Ky784, 10SW (2d)305.
241-84 225Ky784, 10SW(2d)305.
241-85 321 Ill 259, 151NE902; 255 IllA67; MoA 30SW(2d)157; 33 OhA 406, 169NE713; 160Tenn31, 22SW(2d) 237.
241-85½-New. An ordinance which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions and unconstitutional, except where it is impracticable or impossible to fix a definite rule or standard or where discretion vested relates to enforcement of police regulation requiring broad exercise of judgment. 322Mo342, 15SW(2d)343. [a] **Illustrations of improper delegation.**–322Mo342, 15SW(2d)343.
241-88 166Ga266, 142SE891; 316Mo 9, 289SW838; 155Tenn70, 290SW608.
242-92 322Mo342, 15SW(2d)343.
242-92½-New. A city may authorize others to do things which it might properly, but cannot understandingly or advantageously, do. 332 Ill 44, 163 NE369, 60ALR501.
242-93 316Mo 9, 289SW838.
242-94 332 Ill 44, 163NE369, 60ALR 501.
242-98 Ill 173NE137; Ill 173NE339; 225Ky784, 10SW(2d)305; 134Misc882, 236NYS607; 160Tenn31, 22SW(2d)237; TexCivA 10SW(2d)428; Va 154SE579.
242-2 NJSup 151A472.
243-5 321 Ill 259, 151NE902; 317Mo 907, 296SW993, 54ALR1082.
243-6 TexCivA 10SW(2d)151.
243-7 216Ala206, 112S823; 323Mo 161, 18SW(2d)896; NJSup 135A691.
244-8 216Ala206, 112S823; CalA 290P 519(2dcase); 120 Oh500, 166NE583.
244-9 156Md244, 144A357.
245-14 See also TexCivA 10SW(2d) 151.
245-30½-New. An ordinance adjusting a street railway franchise provided for arbitration as a fact-finding procedure, and was not void as surrender of legislative authority. 225Ky784, 10SW (2d)305.
246-48 22AlaA620, 119S599.
246-49 22AlaA620, 119S599.
246-55 208 Iowa1273, 227NW125.
248-77 170Minn6, 211NW673 (there is no legal requirement to get permit for keeping horses in city of St. Paul).
248-81 Ariz 291P1000; 91CalA136, 266 P831; 87Colo73, 285P771; 333 Ill 562, 165NE211; 338 Ill 488, 170NE713; Iowa 231NW705, 707 [citCJ]; Nebr 228NW114; 193Wis232, 213NW873, 52 ALR1033 (power exercised in manner prescribed valid exercise).
249-85 203 Iowa1203, 212NW579.
249-86 Ill 173NE276.
250-90½-New. A grant of power may imply a means of exercising it in addition to statutory methods. Nebr 228 NW114.
250-95½-New. In Porto Rico a municipal officer may be removed without an ordinance. 33PortoRico902.
251-96 Nebr 233NW4. [f] **Building permits.**–215Ala680, 112S205.
251-97 9PaDist&Co281.
252-13 Ill 173NE276; 173Minn61, 216 NW535.
252-17 [c] **Ordinances held invalid.**–321Mo370, 13SW(2d)40. [d] **Prohibitory ordinances not included in powers under city charter.**–113TexCr522, 24SW (2d)409.
253-22 215Ala680, 112S205.
253-32 84CalA33, 257P569.
253-36 176Minn151, 222NW639(2d case).
254-42 317Mo907, 296SW993, 54ALR 1082; 38 OklCr207, 259P873. But see 101 OhSt162, 128NE73 [rev 30 OCA369]. [a] (7) Ordinance making it unlawful for newsboys to call, yell, or announce in loud voice contents of newspapers offered for sale. 38 OklCr207, 259P873. (8) Ordinance requiring every person driving or operating locomotive, street car, or other vehicle to report accidents at grade crossings is unconstitutional as indefinite. 28 OhA178, 162NE617. (9) Requiring all persons attending dance halls to be attired in costumes "usual and seemly for such occasions." Sask [1930] 2DomLR596. [b] **Use of words "loud," "ordinary," and "usual" in penal ordinance as applying to sound of human voice,** without providing standard of comparison, renders description of offense indefinite and uncertain. 38 OklCr207, 259P873.
254-45 101 OhSt162, 128NE73; 38 Okl Cr207, 259P873. [a] (1) 232 IllA246. (4) Where particular fact on which exercise of police power must rest is not enumerated in ordinance. 42F(2d)107.
254-46 CalA 290P519(2dcase).
254-47 337 Ill 469, 169NE265.
256-65 162Ga641, 135SE84.
256-67½-New. Charter providing for referendum has been held constitutional. 42F(2d)379.
257-73 29Hawaii62; 131Misc752, 228 NYS204, 210 [citCJ].
257-76 215Ala680, 112S205.
258-80 245NY533, 157NE846.
258-81½-New. Refusal of permit, because of special conditions imposed, is unwarranted where the statute requires uniform rules. 164La628, 114S492.
258-85 102NJEq169, 139A911.
258-86 242 IllA472.
258-89 CalA 290P519(2dcase).
259-91 81Colo181, 254P440; NJSup 135A691.
259-94 NJSup 139A797.
259-96 [a] **Signatures.**–CalA 290P519 (2dcase).
259-97 [a] CalA 290P519(2dcase).
259-98½-New. The application should be made to the officer or body authorized or empowered to grant the permit. 164 La628, 114S492.

259-20 MoA 30SW(2d)157. But see 128Kan646, 278P1067.

260-26½-New. Refusal to grant a building permit is not res judicata on second application after alteration of plans. NJSup 142A367.

260-29 59ND104, 228NW816 (statute construed to permit review as to jurisdiction, but not as to discretion).

260-43 TexCivA 10SW(2d)151.

260-48 80CalA629, 252P746.

261-71 221MoA999, 295SW847.

261-72 [c] **Ordinance declaring conditions creating emergency.**-322Mo 342, 15 SW(2d)343.

263-97 222MoA331, 297SW141.

263-2 32 OhA129, 166NE599.

263-6½-New. Powers of city, operating under commissioner-manager plan granted by statute with respect to punishments of violations of ordinances, are the same and not greater than those granted to cities only. 81Mont19, 261P876.

264-15 TexCivA 10SW(2d)397.

264-16 31 OhA307, 165NE311; TexCivA 19SW(2d)459.

264-20 But see NJSup 151A472.

265-48 321Mo 969, 13SW(2d)628.

267-70 81Mont19, 261P876.

267-71 81Mont19, 261P876.

268-89 104WVa666, 140SE839. [b] (3) Laying out or opening streets. 104WVa 660, 140SE839.

269-94 96PaSuperI.

269-95 169Ga649, 151SE513; 96Pa SuperI. [a] **Act of one common council is controlling on succeeding administration** till council revokes or limits authority granted. 137Misc594, 244NYS 524.

269-9 201Cal 316, 256P1097; 92Fla187, 109S228; 154Md563, 141A269; 155Miss 160, 124S262(2dcase); Nebr 227NW325; 102NJEq221, 140A335; 197NC740, 150 SE624; 123 Or1, 260P1004; 291Pa395, 140A347. [e] **Power is subject to constitutional restrictions.**-92Fla187, 109S 228.

270-15 42F(2d)379; 332 Ill 545, 164NE 20; 252 IllA168; 224Ky390, 6SW(2d) 460; 50Nev173, 254P696 (state may exercise this right through its duly constituted commissions); 102NJEq221, 140A 335; 137Misc341, 242NYS142.

272-34 92Fla187, 109S228; 223Ky269, 3SW(2d)606; 233Ky688, 26SW(2d)554.

273-50 123 Or1, 260P1004.

273-51 123 Or1, 260P1004.

273-52 318Mo 870, 2SW(2d)713; 123 Or1, 260P1004.

274-61 136Misc258, 239NYS659 (what are "local affairs" under home rule act).

274-66 233Ky688, 26SW(2d)554; 320 Mo 1047, 10SW(2d)923.

274-68 92Fla187, 109S228; 97Fla69, 120S335; 199 Ind78, 155NE198; 152Md 419, 137A39.

275-81 [a] **Construction of provisions.**-195Wis437, 219NW858.

275-85 152Md419, 137A39; 128Misc 642, 220NYS66; 225AppDiv1, 232NYS 273; 123 Or1, 260P1004. [a] **In Maryland.**-152Md419, 137A39.

275-86 92Fla187, 109S228; 152Md419, 137A39. [a] **Acquisition and operation of public utilities.**-In Ohio, municipal corporations acquire power to acquire and operate public utilities and legislature is without power to impose restrictions or limitations upon such right. 118 Oh295, 160NE902.

275-87 117Tex256, 18SW(2d)596.

275-92 92Fla187, 109S228; 123 Or1, 260P1004.

275-96 123 Or1, 260P1004. [a] **Statutes providing for ordinances regulating plumbing** held mandatory, in spite of home rule provisions. TexCivA 293SW 659.

275-97 195Wis437, 219NW858.

275-1 152Md419, 137A39; 142 Okl 38, 285P92.

275-2 221AppDiv36, 222NYS141.

275-2½-New. Under some constitutional provisions, municipality does not have power to legislate locally on all subjects, 152Md419, 137A39.

275-2¼-New. but only on such subjects as are delegated to it by legislative grant of powers, 152Md419, 137A39.

275-2¾-New. and although the legislature may enlarge, diminish, or change such grant of powers, 152Md419, 137A 39.

275-2⅞-New. so long as powers granted remain unchanged, municipality has exclusive power to legislate on subjects defined. 152Md419, 137A39.

275-2¼-New. Under such provisions, power of local authorities to legislate on subject under legislative grant can be taken away only by amending or repealing act granting powers. 152Md419, 137A39. [a] **Statute held "local law" and not amendment of general law** and therefore invalid as infringing home rule provision. 152Md419, 137A39.

275-2½-New. The purpose of the home rule amendment to the Constitution is to secure a convenient and direct method of city government. 117 Tex256, 18W (2d)596.

276-9 221AppDiv36, 222NYS141.

279-37 Wis 230NW698 (claims involving moral obligation).

281-72 326 Ill 82, 157NE28; 246Mich 501, 224NW632; 137Misc341, 242NYS 142.

282-73 [f] (2) Street improvement statutes are bottomed on street and alley improvement implying ownership in city. NC 153SE632. [h] **In Arkansas.**-172Ark999, 291SW422, 50ALR 1202.

282-74 [b] 326 Ill 82, 157NE28.

283-79 129Kan834, 284P618.

283-81 318Mo 910, 18W(2d)1021 (zoological park).

283-85 201Cal 643, 258P945; 165La 159, 115S444.

284-87 Ida 292P1100 (due process). [c] 166NY1, 59NE716, 82AmSR605, 52 LRA814.

284-92½-New. Where a general law provides for a scheme of public improvements intruding upon the boundaries of one or several municipalities, such improvement ceases to be a municipal affair and comes within the general laws of the state. 201Cal 316, 256P1097.

286-22 [e] In Oklahoma public service commission has power to regulate charges for public services. 130 Okl 34, 264P878.

287-23½-New. In some jurisdictions, by constitutional provision, no grant, extension, or renewal of any franchise or other use of streets or other public grounds can divest the state or its subordinate subdivisions of control and regulation of such use and enjoyment. 130 Okl 34, 264P878.

287-37½-New. In Iowa, statutes conferring general power on city councils to pay obligations incurred under war pressure are unauthorized under legislative power to approve particular appropriations. Iowa 230NW373.

287-37¼-New. In Kentucky general assembly may not legislate on fiscal matters of municipality. 233Ky688, 26 SW(2d)554.

288-42½-New. Purpose to which profits derived from municipally owned utility shall be appropriated is not fixed by constitution or statute. 142 Okl 177, 286P343; 142 Okl 176, 286P345.

288-44 Ind 172NE186.

288-45 165La159, 115S444.

288-46 Nebr 227NW325 (statute held not violative of constitutional provision against imposing taxes for corporate purposes).

288-47 Ill 172NE13. [c] (2) Statute mandatorily requiring city to levy tax to create fund for firemen's pension is unconstitutional as imposing taxes on city. 235Ky383, 31SW(2d)620.

289-51 [a] (2) Under Const. § 181, General Assembly may require municipality to take such steps and impose such taxes as will provide for maintenance of order therein. 223Ky269, 3 SW(2d)606. [c] (2) Under Home Rule Amendment city has no authority to impose occupation tax inhibited by general laws of state. TexCommnA 6SW (2d)80.

291-67 104NJL38, 139A424; RI 151 A1.

291-68 TexCivA 290SW792.

292-81½-New. Local law adding members to board consisting of elective city officers becomes operative only after approval by majority of qualified electors of city voting upon proposition. 254NY344, 173NE7.

292-84 94Fla23, 114S235. [e] **Construction.**-155Md427, 142A634. [f] **Invalid curative statutes.**-99Fla130, 125S 912(1stcase) (attempting to legalize tax levies and assessments).

293-10 [b] 79CalA171, 249P46.

294-19½-New. In Missouri the Library Act is applicable to the city of St. Louis. 318Mo 870, 28W(2d)713.

294-20 318Mo 870, 28W(2d)713; Oh 170NE438. [b] **Provisions of charter held not invalid** as inconsistent with general law. TexCivA 15SW(2d)27.

294-21 318Mo 870, 28W(2d)713. [e] (5) Optional City Government Law held in force in city of Long Beach, and mandamus properly issued to compel election thereunder. 245NY537, 157 NE848. [f] (2) General law of state applies to city of Dallas irrespective of provisions of special charter. TexCivA 10SW(2d)770.

295-22 See also 136 Okl 33, 276P208.

295-23 [a] (2) Local law of second class city, abolishing office of superintendent of parks, is not void as superseding city charter provision under City Home Rule Law. 132Misc13, 228NYS 675.

295-25 [a] **In Wisconsin.**-195Wis437, 219NW858.

295-28 Fla 130S28.

295-30 117Nebr301, 220NW273. [a] (1) 201Cal 643, 258P945. (3) Enabling Act of 1917, prescribing steps necessary in enacting zoning ordinance, has no application to city and county of San Francisco, and hence zoning ordinance complying with provisions of charter for enactment of ordinances was not illegal on ground that provisions of Enabling Act were not observed. 205 Cal 426, 271P487. (4) Act providing for hearing and publication of ordinances before final action merely prescribes procedure to be followed by council in enactment of zoning ordinances, which procedure is municipal affair. 205Cal 426, 271P487. (5) Provision of charter will prevail in case of conflict between charter provision and general improvement law. 102CalA 299, 283P298. [b] (1) 138 Okl 295, 281 P126; 140 Okl 165, 282P332. (3) Issuance and redemption of municipal bonds is not matter of purely municipal concern, and, in case of conflict between charter and statutory provisions, latter control. 133 Okl 54, 270 P1112.

296-32 Mass 171NE487. See also 136 Okl 33, 276P208.

296-33 201Cal 643, 258P945; 27 OhA 442, 161NE542; 161Tenn203, 30SW(2d) 240. But see 318Mo 870, 28W(2d)713. [a] **Charter held not in conflict** with statute intended for all cities, towns, and municipal corporations. 96Fla141, 118S813. [b] **Charter provision held not inconsistent with general statute** and therefore did not repeal it. 97Fla127, 120S361(2dcase).

296-34 317Mo 736, 296SW415. [a] **As to taxing power,** city charters must be consistent with and subject to general statutes defining scope and policy of law on such subject. 317Mo 736, 296SW 415.

296-36 111Conn667, 151A268; 229Ky 186, 16SW(2d)1034.

296-39 220Ala415, 125S681; 262Mass 70, 159NE739; Mass 167NE417; 221 MoA999, 295SW847; 24 OhA251, 157NE 410; 298Pa276, 148A308. [a] **Courts should not be overly technical** in determining manner municipalities shall exercise statutory powers. Wash 289P3.

296-40 277US183, 48SCt447, 72LEd 842; 35F(2d)657; 181Ark869, 28SW (2d)331; 208Cal 502, 282P501; 92Fla 793, 110S127; 92Fla1030, 111S119; Ind 172NE309; 217Ky135, 289SW223; 229 Ky375, 17SW(2d)215(2dcase); 241Mich 71, 216NW410; 221MoA292, 3SW(2d) 266; MoA 5SW(2d)677; 131Misc581, 227NYS570; 132Misc73, 228NYS116; 222AppDiv289, 225NYS747; 135Misc 719, 238NYS318; 135Misc750, 239NYS 489; 135Misc346, 239NYS611; 230App Div522, 245NYS25; 24 OhA251, 157NE 410; Pa 151A883; 13PaDist&Co 32; 61 OntL563, [1928] 1DomLR952. See

also 225Ky784, 10SW(2d)305; 132Misc 666, 230NYS464; TexCivA 31SW(2d) 832. [a] **Action in exercise of expressly delegated governmental power of legislative character,** is not subject to judicial review. Mo 25SW(2d)1055. [b] **Discretion of municipal council in granting franchises for public benefit** cannot be taken away by court. 235Ky 234, 30SW(2d)960.

297-41 Ala 129S84 (arbitrary or unreasonable); 181Ark869, 28SW(2d)331 (reckless indifference); CalA 288P33; 92Fla1030, 111S119; 333 Ill 190, 164NE 218; Ind 171NE871; 152Md671, 137A 278; 24 OhA251, 157NE410; 294Pa246, 144A81; 13PaDist&Co 45; 158Tenn 498, 14SW(2d)716; TexCivA 13SW(2d) 401.

297-41½-New. , or fraud or collusion. 24 OhA251, 157NE410.

297-43 35F(2d)808; 322 Ill 82, 152NE 602; TexCivA 1SW(2d)907; 104WVa 660, 140SE839.

297-45 319Mo 316, 4SW(2d)467.

297-49½-New. Preamble of zoning ordinance and act under which it was enacted held not conclusive of question whether enacted as proper exercise of police power. 287Pa259, 134A409.

297-49¼-New. Municipal legislation and application to facts are subject to review. 81Colo 344, 255P443.

297-49¼-New. If public health, safety, comfort, or general welfare could have justified a zoning ordinance, the court must assume they justified it. 115Nebr 525, 213NW835.

297-49½-New. If validity of legislative classification for zoning purposes is fairly debatable, legislative judgment controls. 115Nebr525, 213NW835.

297-49½-New. Where a municipal regulation is undoubtedly void on its face, the judge of the court of the first instance should so declare. 132Misc349, 230NYS295.

297-49½-New. What is a public municipal function is always for ultimate judicial determination, although due weight will be given to a determination by the legislature. 97Fla127, 120S361 (2dcase).

297-49¾-New. In Canada the provincial legislature may provide that the action of municipal council within its jurisdiction shall not be open to review by the courts. Sask [1929] 3DomLR89.

297-50 [a] **Law courts have exclusive jurisdiction** to review municipal proceedings assailed on purely legal grounds. NJCh 144A794.

297-56 222AppDiv260, 225NYS530.

297-58 [a] **Where municipality exercises legislative discretion in letting of contracts** court in passing on them will deal only with question of their legality. 217Ala201, 115S239. [b] **Courts will not interfere with municipality's power to contract** unless it contravenes some fundamental principle or conflicts with organic law. 197NC740, 150SE 624.

297-60 181Ark377, 26SW(2d)70; 164 Ga529, 139SE46, 53ALR933; 6PaDist& Co 403.

297-61 164Ga529, 139SE46, 53ALR 933; Ida 286P353; 167La674, 120S47; 247NY311, 160NE381; 132Misc13, 228 NYS675; 133 Okl 84, 271P257; TexCivA 13SW(2d)184; 153Wash661, 280P80; 155Wash244, 284P93; 199Wis214, 225 NW838.

298-67½-New. Motive of person asking passage of ordinance does not affect its validity. 126Me537, 140A382.

298-73 149SC234, 147SE346; TexCivA 2SW(2d)1001. See also 217Ala201, 115 S239.

298-74 [b] (2) Such fact will not constitute fraud. TexCivA 18SW(2d)212.

299-80 274US325, 47SCt594, 71L ed 1074; RI 151A1; TexCivA 18SW(2d) 212.

299-81 274US325, 47SCt594, 71L ed 1074; 125Kan341, 344, 263P1069 [cit CJ]; 317Mo 1216, 298SW747, 55ALR 773; 24 OhA251, 157NE410. [a] **Court may not substitute its opinion as to necessity for regulations** over legislative judgment, where question is one on which reasonable minds might differ. CalA 290P140.

299-82 274US603, 47SCt675, 71L ed 1228, 53ALR1210; CalA 288P33; Fla 129S913; 317Mo 1179, 298SW720 (zoning ordinance); 132Misc13, 228NYS 675; 117 Oh227, 157NE758; 24 OhA 251, 157NE410; 27 OhNPNS307 (declaration of ordinance as emergency measure not disturbed); 130 Or309, 280 P504; 158Tenn407, 15SW(2d)1.

299-83 230Ky453, 19SW(2d)1073; 167 La674, 120S47; 117Nebr465, 220NW 827; 247NY320, 160NE384; 132Misc 666, 230NYS464; TexCommnA 18SW (2d)606; 195Wis35, 217NW705.

299-84 279US582, 49SCt430, 73L ed 856; 96CalA443, 274P397; CalA 290P 140; 40GaA96, 149SE54; Mass 167NE 417; 105NJL286, 144A630; 247NY311, 160NE381; 149SC234, 147SE346; 153 Wash661, 280P80. But see 321Mo 370, 13SW(2d)40.

300-91½-New. If validity of legislative classification for zoning purposes be fairly debatable legislative judgment must be allowed to control. 21F(2d) 440.

300-94 96CalA488, 274P438; Ida 286 P353; Ill 173NE276; 244 IllA185; 152 Md1, 136A41, 50ALR620; 153Miss136, 119S811; 221MoA195, 300SW308; Tex CivA 19SW(2d)459; 40Wyo 74, 275P 106.

301-95 Ind 163NE483; TexCivA 4SW (2d)616, 619 [citCJ].

302-97 27F(2d)618.

302-98 126Me235, 137A398.

302-99 272US365, 47SCt114, 71L ed 303, 54ALR1016; 274US603, 47SCt675, 71L ed1228, 53ALR1210; 27F(2d)618; 203Cal 665, 265P806; 82CalA187, 255P 294; 111Conn27, 149A205; 333 Ill 143, 164NE129; 206 Iowa452, 221NW354; 225Ky129, 7SW(2d)832; 168La172, 121 S613; 126Me235, 137A398; 170Minn 356, 212NW585; 316Mo 9, 289SW338; Nebr 233NW4; 129 Or333, 276P1114; 158Tenn407, 15SW(2d)1.

302-1 318 Ill 340, 149NE281; Ind 163 NE483; 152Md1, 136A41, 50ALR620; 170Minn356, 212NW585; MoA 5SW(2d) 677; 7PaDist&Co 162.

303-2 272US365, 47SCt114, 71L ed303, 54ALR1016; 323 Ill 368, 154NE131, 49 ALR103; 326 Ill 100, 156NE753; 326 Ill 467, 158NE121; TexCivA 4SW(2d) 616, 619 [quotCJ].

303-4 42F(2d)88; Ind 172NE309; 226 Ky409, 11SW(2d)94; 166La689, 117S 775; 118Tex154, 12SW(2d)546; Tex CivA 4SW(2d)616, 619 [citCJ].

304-5 Ida 286P353; 337 Ill 469, 169NE 265; TexCivA 4SW(2d)616, 619 [cit CJ].

304-9 336 Ill 573, 168NE661.

304-10 217Ala201, 115S239; Cal 287 P968; 40GaA96, 149SE54; 217Ky135, 289SW223; 193NC573, 137SE666; Pa 152A23; TexCivA 4SW(2d)616, 619 [citCJ]; TexCivA 14SW(2d)345; 151 Va801, 145SE257. [b] **Location of pipes for waterworks system** is within exclusive discretionary power of municipal officials. 137Misc632, 243NYS 160.

305-11 291Pa109, 139A619.

306-21 206Cal 315, 274P328; CalA 290 P140; 326 Ill 467, 158NE121; 13Pa Dist&Co 32; TexCivA 18SW(2d)212; Sask [1930] 2DomLR596. But see 225 Ky358, 8SW(2d)629.

306-23 Ida 286P353; 168La172, 121S 613; 299Pa402, 149A639; TexCivA 23 SW(2d)796. But see 217Ala201, 115S 239.

307-26 97Fla807, 122S220.

307-27 5PaDist&Co 281.

307-31 274US325, 47SCt594, 71L ed 1074; 274US603, 47SCt675, 71L ed1228, 53ALR1210.

307-32 274US325, 47SCt594, 71L ed 1074; 274US603, 47SCt675, 71L ed1228, 53ALR1210; 92CalA200, 267P886; CalA 290P140; 5PaDist&Co 281.

307-33 274US325, 47SCt594, 71L ed 1074; 274US603, 47SCt675, 71L ed1228, 53ALR1210; 32F(2d)274; Ill 172NE 710; 167La674, 120S47; TexCivA 4SW (2d)616, 619 [quotCJ].

307-36 207Cal 395, 279P136; 325 Ill 511, 156NE778.

308-38 274US325, 47SCt594, 71L ed 1074; 274US603, 47SCt675, 71L ed1228, 53ALR1210; 34Ariz495; 272P923; 82 CalA187, 255P294; 99Fla812, 128S4; 167La674, 120S47; 128 Okl 17, 261P183.

303-33½-New. Where an ordinance has no real or substantial relation to public health, morals, or safety, the courts must so adjudge. 98CalA165, 276P629.

308-39 272US365, 47SCt114, 71L ed 303, 54ALR1016; 323 Ill 368, 154NE 131, 49ALR103; Ill 172NE710; 136 Okl 113, 277P226.

303-40 125 Okl 212, 257P286 (court will indulge every presumption in favor of validity).

303-41½-New. Municipal legislation tending to the preservation of public health will be regarded favorably by courts. 150Wash203, 272P517.

308-43 TexCr 28SW(2d)161.

303-44 TexCr 28SW(2d)161.

308-45 152Md1, 136A41, 50ALR620; 40Wyo 74, 275P106.

308-46 272US365, 47SCt114, 71L ed303, 54ALR1016; Ida 286P353; 333 Ill 143, 164NE129; 339 Ill 157, 171NE137; Ill 173NE137; 152Md1, 136A41, 50ALR620; 321Mo 969, 13SW(2d)628.

308-47 321Mo 969, 13SW(2d)628.

303-48 272US365, 47SCt114, 71L ed303, 54ALR1016.

309-55 152Md1, 136A41, 50ALR620.

309-57 272US365, 47SCt114, 71L ed303, 54ALR1016.

309-58 272US365, 47SCt114, 71L ed303, 54ALR1016.

309-59 126Me235, 137A398.

309-62 272US365, 47SCt114, 71L ed303, 54ALR1016.

309-63 272US365, 47SCt114, 71L ed303, 54ALR1016.

309-67 225Ky784, 10SW(2d)305; 230 Ky453, 19SW(2d)1073; 298Pa276, 148 A308.

310-70 27 OhNPNS497.

310-73½-New. Constitutionality of ordinance must be tested by what may be done under its authority. 152Md1, 136A41, 50ALR620.

310-73¼-New. The court is without power to cancel a void ordinance. Tex CivA 12SW(2d)831.

310-73¼-New. Court cannot cancel invalid ordinance. TexCivA 12SW(2d) 833.

310-73½-New. A constitutional provision forbidding a local or special law where a general law can be made applicable, and declaring it to be a judicial question in any case, applies to city ordinances. 322Mo 1129, 19SW(2d)1 (ordinance relating to certain kinds of amusements held unconstitutional as special law).

310-73½-New. The mere fact that an ordinance is local or special does not necessarily make it invalid except where general law can be made applicable. 322 Mo 1129, 19SW(2d)1.

310-82½-New. In Pennsylvania a taxpayer claiming to be aggrieved by a borough ordinance may proceed by complaint in quarter sessions. 13PaDist& Co 32.

310-90 CalA 272P1076.

310-94 318 Ill 340, 149NE281; 326 Ill 100, 156NE753; 245 IllA233; 167La674, 120S47; 126Me235, 137A398; 152Md1, 136A41, 50ALR620; 79Mont314, 257P 1007; 103NJL355, 137A545; NJSup 133 A534; NJSup 135A672; NJSup 136A 207; NJSup 142A342; NJSup 142A345; NJSup 142A357; NJSup 142A364; NJ Sup 142A427; NJSup 142A431; NJSup 142A434; NJSup 142A436; NJSup 142 A438; 195NC377, 142SE330, 57ALR506; OkCr 287P776; 86PaSuper337 (good faith presumed); 158Tenn407, 15SW (2d)1; TexCivA 13SW(2d)401; Tex CivA 14SW(2d)901. See also 93CalA 277, 270P270. [a] See also 84CalA33, 257P569. [c] **Existence of necessary facts to sustain ordinance** will be presumed. 133 Okl 84, 271P257.

311-96 CalA 290P140; 111Conn27, 149 A205; 321Mo 969, 13SW(2d)628; NJ Sup 136A207; Vt 151A650. [a] 132 Misc82, 229NYS32.

311-98 17F(2d)202; 216Ala178, 112S 742; 80CalA629, 252P746; CalA 290P 140; 163Ga570, 136SE514; 326 Ill 100, 156NE753; 245 IllA233; 126Me235, 137 A398; 322Mo 1129, 19SW(2d)1; NJ 143 A816; NJSup 133A534; NJSup 136A 207; 104NJL13, 139A718; NJSup 142 A342; NJSup 142A356; NJSup 148A 206(1stcase); 32 OhA472, 168NE227;

TexCivA 14SW(2d)901; **TexCivA** 19 SW(2d)459.

312-99 321Mo 969, 13SW(2d)628.

312-2 216Ala178, 112S742; 98CalA165, 276P629; 168La752, 123S314.

312-4 155Tenn70, 290SW608.

312-5 316Mo 9, 289SW838; 27 OhNP NS497 (insufficiency of emergency not shown); Vt 151A650. [a] **Evidence held not to show that city council abused its discretion** so as to warrant interference by court. 30 OhA68, 164NE 124.

312-6 216Ala178, 112S742; 98CalA165, 276P629; 316Mo 9, 289SW838; 321Mo 969, 13SW(2d)628; **NJSup** 136A803; **NJSup** 142A427; 24 OhA374, 157NE708; **TexCivA** 26SW(2d)726.

312-8 216Ala178, 112S742; 195NC377, 142SE330, 57ALR506; 24 OhA374, 157 NE708; **TexCivA** 4SW(2d)616; **Tex CivA** 19SW(2d)459; **TexCivA** 26SW(2d) 726.

314-33 322Mo 1129, 19SW(2d)1 (classification of specified amusements must be reasonable).

314-52 [i] 225Ky516, 9SW(2d)296.

315-54 MoA 22SW(2d)182.

315-58 [a] (2) Statutory authority to regulate and suppress pigpens does not authorize city to prohibit keeping of swine within corporate limits between stated dates. **MoA** 22SW(2d)182 (keeping of twenty-nine hogs on four and one-half acres of pasture land held not keeping of pigpen).

315-61 173Minn61, 216NW535.

315-63 173Minn61, 216NW535.

316-91 TexCivA 297SW874.

317-94 Ga 155SE202.

317-97 Ga 155SE202.

319-44 173Minn61, 216NW535.

319-47 8KanA529, 56P541.

319-52 173Minn61, 216NW535.

320-65 27 OhNPNS307.

322-24 164Ga755, 139SE559, 55ALR 230. [a] **Forbidding colored barbers to serve white children under fourteen** held invalid regulation. 164Ga755, 139 SE559, 55ALR230.

322-32 But see 40Wyo 74, 275P106. [a]**Regulation of hours held unreasonable.**–164Ga755, 139SE559, 55ALR230.

322-33½ **NJSup** 135A661.

322-36 174Ark1145, 298SW514; **Ind** 172NE309; 245NY533, 157NE846. [d] **Statute authorizing village ordinance regulating or prohibiting posting of bills** held to include printing of lettering on signboards. 220AppDiv71, 220NYS 656. [e] **Ordinance declaring signboards within ten feet of street line nuisances** is not a zoning regulation. **NJ Sup** 151A285(1stcase).

323-41 174Ark1145, 298SW514; **Ind** 172NE309.

323-42 174Ark1145, 298SW514.

323-45 174Ark1145, 298SW514; **CalA** 288P33.

323-48 **Ind** 172NE309.

324-53 98CalA165, 276P629.

324-54 **CalA** 288P33; **NJSup** 151A285 (1stcase). [a] 174Ark1145, 298SW514. [b] **Billboards and signs.**–Ordinance prohibiting advertising signs except real estate signs of certain dimensions held valid. 220AppDiv71, 220NYS656.

324-60 See also **Ind** 172NE309.

325-65 **NJSup** 147A746 (dental office within ordinance regulating signs on buildings and "structures").

325-66 **MoA** 30SW(2d)157.

325-69 **NJSup** 147A746.

325-71½-New. An ordinance prohibiting commercial advertising on exterior sides of street cars is invalid. 98CalA 165, 276P629.

325-83 [b] **Requirement of board.**–322 Mo 1050, 17SW(2d)977.

325-87 **Utah** 273P969.

326-91 **MoA** 300SW316.

326-5 [a] **City of Brownsville, Texas,** held authorized to grant franchise to build and operate bridge over international boundary. **TexCivA** 292SW606.

326-13 **CalA** 290P140.

326-13½-New. Establishment of setback lines is within police power. 17 F(2d)202.

326-13⅓-New. Set-back lines are presumptively valid as having reasonable relation to public health and safety. 17 F(2d)202.

327-16 177Ark291, 6SW(2d)294 (alterations); 115Nebr525, 213NW835; **Tex CivA** 30SW(2d)339. [b] **Lunch wagon held "building."**–Lunch wagon, affixed to soil by sewer and water pipe connections, is "building" within city building code. 102NJL232, 136A600. [c] **Restrictions on use of land conveyed by city.**–41F(2d)484.

327-22 138 Okl 92, 280P467 (statute requiring public hearing held not to prevent city council passing temporary ordinance). [a] **Whether erection of building would violate neighborhood restrictions** is matter of no concern to municipality. 102NJEq467, 141A564.

327-23 33Ariz325, 264P692, 58ALR145; **MoA** 25SW(2d)142; **NJSup** 137A886; 133Misc904, 234NYS708.

327-24 **CalA** 290P1087; **NJSup** 135A 666; **NJSup** 137A886; 10PaDist&Co 761; **TexCivA** 4SW(2d)616, 619 [quot CJ]. [b] **Set-back line.**–**NJSup** 135A666. [c] **Ordinance held unconstitutional** as arbitrary exercise of power. 14PaDist &Co 127.

328-25 89PaSuper548.

328-28½-New. Right to erect "school and college buildings" includes all buildings ordinarily a part of college plant. 325 **Ill** 511, 156NE778.

328-28½-New. **Building regulations based on void plan** are likewise void. 131Misc752, 228NYS204.

328-29 **CalA** 290P140; 226AppDiv752, 234NYS36. [c] **Measurement of height.**–226AppDiv687, 238NYS359. [d] **That ordinance does not apply to entire city** does not invalidate it. **CalA** 290P140.

328-37 256Mass238, 152NE63; 124 Or 677, 265P790, 59ALR512. But see **Ind** 172NE309; **TexCivA** 2SW(2d)285.

329-40 199Wis214, 225NW838.

329-47 98Fla933, 124S722; 8PaDist&Co 147. [b] **Building consisting of several parts** (1) structurally connected and intercommunicating will be treated as one structure. 8PaDist&Co147. (2) Percentage prescribed will be based on value of entire building and not upon value of one of the several parts damaged by fire. 8PaDist&Co147. (3) Such percentage will not be measured by cost of repairs, but by proportion that sound value of part damaged bears to sound value of entire building. 8PaDist&Co 147. (4) If city interferes wrongfully with reconstruction of building, owner is entitled to loss of rent for part of building unusable from date of interference to date of decree enjoining further interference. 8PaDist&Co147.

329-51 13PaDist&Co443 (where repairs of small value).

330-57½-New. or common right, 8Pa Dist&Co147.

330-59 151Miss467, 118S293, 60ALR 1155; 120 Oh352, 166NE228; 8PaDist &Co147; 14PaDist&Co127.

330-60 81Colo 23, 253P27.

330-61 138 Okl 92, 280P467; 291Pa358, 140A136.

330-65 [c] **Ordinance not operative beyond real estate development,** ordinance was restricted to. **NJSup** 149A 523.

330-75 [a] 22AlaA620, 119S599.

330-76½ A filling station on the side of a street used for dwellings held not forbidden by ordinance. 81Colo 23, 253 P27.

330-76⅓-New. Erecting a lumber shed as an addition to an old building held not violation of ordinance. 142Wash 377, 253P122.

330-76¼-New. Reasonable interpretation of an ordinance must be upheld, where no appeal was taken until after the construction commenced. 131Misc 346, 225NYS680.

330-76⅕-New. Zoning ordinance requiring side yard may be reasonably interpreted to require one side yard only. 131Misc346, 225NYS680.

330-76⅙-New. Location of main entrance is not controlling, on question of which are front and rear sides of apartment, under zoning ordinance. 131 Misc346, 225NYS680.

330-76⅐-New. That provisions were inadvertently omitted from zoning ordinance does not affect reasonableness of building inspector's interpretation thereof. 131Misc346, 225NYS680.

330-76⅛-New. Where apartments were erected on express condition that there should be no cooking in the apartments, which would prevent their being regarded as tenements, under Tenement House Law, they are subject to the act regardless of hardship if they have cooking facilities. 133Misc881, 233NYS553 (what constitutes "tenement house").

330-76⅛-New. Widening of street by city and establishment of street car tracks will not destroy building restrictions. 249Mich347, 228NW761.

331-80 111Conn237, 149A783; 195Wis 657, 219NW271.

331-86 [p] **Ordinance requiring buildings to face on street on which lot faces** is applicable only to main structures, and not subsidiary structures, such as garages. **TexCommnA** 14SW(2d)825. [q] **Ordinance requiring garage to be built only on rear line of lot** is not violated by erection on rear line facing dead end of abutting street. **NJ** 143A 820. [r] **Height of building** must be taken from street side under ordinance restricting height. 226AppDiv752, 234 NYS36. [s] **Width of street,** one and one-half times which statute prescribes as height limit for tenement houses, cannot be treated as width of street plus width of park bordered by it, as provided in city resolution. 134Misc592, 235NYS 544. [t] **Height.**–**Application** of restriction as to height to building on two streets of different widths. 226AppDiv 507, 235NYS11. [u] **Rear yard of building.**–250Mich427, 230NW176; 33 OhA287, 168NE757. [v] **Ordinance restricting use of property** within 200 feet of certain street is applicable only to street designated. 14PaDist&Co127.

332-92 [c] **Lunch wagon,** attached to soil by sewer and water pipes, held "building" within code. 103NJL232, 136A600.

332-97 [c] **Dwelling or group of dwellings.**–Zoning ordinance, prohibiting "dwelling or group of dwellings" accommodating more than fourteen families on any acre of land, does not include "flats." 333 **Ill** 355, 61ALR561, 164NE699(2dcase).

332-4½-New. "front wall," 251NY349, 167NE466(2dcase).

332-11½-New. "private garage," **Tex CommnA** 14SW(2d)825.

332-14½-New. "sheathing," 88CalA 464, 263P555.

332-15 257Mass82, 153NE319. [a] (2) Designation of apartments as "apartment hotels," rather than as apartment houses, is immaterial, in determining whether apartments were tenement house, within definition of Tenement House Law. 133Misc881, 233NYS553.

333-29½-New. Zoning ordinances act not only negatively, but affirmatively, for public welfare. 81Colo 344, 255P 443.

333-29⅓-New. "Zoning" is used to describe the process of setting aside disconnected tracts of land, varying in shape and dimensions, and dedicating them to particular uses designed in some degree to serve the interests of the whole territory affected. 156Md40, 143A666.

333-31 200Cal 505, 253P932; 99Fla 812, 128S4; 335 **Ill** 509, 167NE119.

333-32 207Cal 134, 277P308; 93CalA 277, 270P270; 256Mass238, 152NE63; 134Misc882, 236NYS607; 128 Okl 17, 261 P183; 89PaSuper548.

333-34 162La202, 110S201.

334-37½-New. Mere hardship is insufficient ground for holding a zoning ordinance void. 294Pa246, 144A81.

334-39 200Cal 505, 253P932; 200Cal 505, 253P932; 130Misc63, 223NYS609; 137Misc806, 243NYS518; 131 Or674, 284 P273; 155Tenn70, 290SW608.

334-39½-New. Zoning provision of city charter is not unconstitutional forfeiture to provide notice, hearing, or compensation. 130Misc63, 223NYS609.

334-39⅓-New. Officers rezoning a district must not use the provision as a cloak for arbitrary and capricious action. 130Misc63, 223NYS609.

334-47½-New. City ordinance, prohibiting building within thirty feet from street, held within police power. 82CalA 187, 255P294.

334-50 274US325, 47SCt594, 71Led 1074; 203Cal 665, 265P806; 100CalA

700, 281P78; 110Conn92, 147A294; 83 NH253, 141A142, 143 [citCJ]; NJSup 136A803; 222AppDiv289, 225NYS747; 291Pa109, 139A619; 89PaSuper548. [d] **Zoning ordinance held within police power.**–152Md671, 137A278. [e] **Emergency ordinance preserving status quo** pending adoption of comprehensive zoning ordinance held valid. CalA 290P 480.

335–51 82CalA187, 255P294; 110Conn 92, 147A294; 110Conn130, 147A513; Iowa 228NW870; 166La776, 117S827; 168La172, 121S613; 168La752, 123S 314; Mass 172NE867; 245NY593, 157 NE871; 25 OhNPNS49; 89PaSuper548. [c] **Ordinances held not confiscatory.**–82 CalA187, 255P294. [d] **Retroactive legislation.**–27 OhA141, 160NE868. [e] **Impairment of obligation of contracts.**–27 OhA141, 160NE868.

335–52 37F(2d)336; 110Conn92, 147A 294; 317Mo 1179, 298SW720; 27 OhA 141, 160NE868; 136 Okl 113, 277P226; 196Wis635, 220NW209. [c] **Requirement of notice and opportunity to be heard** is satisfied by adequate opportunity given after passage of by-law to contest its validity and application. Mass 172NE867.

335–53 35F(2d)657; 126Me537, 140A 382; 317Mo 1179, 298SW720; 136 Okl 113, 277P226; 196Wis635, 220NW209.

335–54 26F(2d)640 [certiorari den 278 US654, 49SCt179(6thcase), 73L ed564]. [a] **Exemption of buildings already devoted to particular use** is not unlawful discrimination. 133 Okl 84, 271P257.

335–56 99Fla812, 128S4; Fla 129S913; 242Mich247, 218NW766. [a] **Necessity of amendment of charter.**–242Mich247, 218NW766.

335–58 CalA 286P161(2dcase); 110 Conn130, 147A513; 166La776, 117S827; 262Mass404, 160NE285; Mass 173NE1; Nebr 230NW592; 198NC70, 150SE674; 25 OhNPNS49.

335–61 272US365, 47SCt114, 71L ed303, 54ALR1016; 274US325, 47SCt594, 71 L ed1074; 137Misc22, 242NYS86.

335–62 317Mo 1179, 298SW720; 230 AppDiv245, 244NYS295.

335–63 244 IllA185; NJ 147A555(2d case).

336–70½–New. The adoption of a proper system of zoning is in the discretion of municipal authorities. 204Cal 687, 269P537.

336–72 42F(2d)88; 327 Ill 644, 159NE 225, 56ALR242; Mass 172NE867; Mo 27SW(2d)1030; 137Misc462, 244NYS439. [a] **Failure of board of trustees to publish** notice of public hearing on zoning ordinance rendered ordinance void. 230 AppDiv788, 244NYS651. [b] **Statute requiring hearing before enactment of zoning ordinance by city** is inapplicable to town. Mass 172NE867.

336–73 272US365, 47SCt114, 71L ed303, 54ALR1016; 274US325, 47SCt594, 71 L ed1074; 277US183, 48SCt447, 72L ed 842; CalA 290P1087; 81Colo 344, 255P 443; 326 Ill 100, 156NE753; 249Mich 52, 227NW743; NJSup 133A534; 131 Misc581, 227NYS570; 221AppDiv773, 223NYS467; 137Misc22, 242NYS86; 291 Pa358, 140A136; 50RI 108, 145A451; 148Va247, 138SE629. See also 196Wis 635, 220NW209. [a] 274US325, 47SCt 594, 71L ed1074; Ala 129S84; 34Ariz 495, 272P923; 82CalA187, 255P294; 326 Ill 100, 156NE753; 326 Ill 467, 158NE 121; Iowa 228NW870; Kan 291P780; 249Mich52, 227NW743; 83NH253, 141A 142; NJSup 136A803; NJSup 147A746; 23 OhA33, 155NE166; 289Pa458, 137A 630; 155Tenn70, 290SW608; 148Va 247, 138SE629. [b] **Regulations held unreasonable.**–Ill 172NE710; 249Mich52, 227NW743; 131Misc251, 227NYS358; 299Pa402, 149A639.

336–74 272US365, 47SCt114, 71L ed303, 54ALR1016; 325 Ill 511, 156NE778; 326 Ill 467, 158NE121; 164La564, 114S159; 130Misc492, 224NYS165; 221AppDiv 773, 223NYS467; 294Pa246, 144A81. But see 136 Okl 113, 277P226. [a] **Ordinance held not to confer arbitrary power on board of appeals.**–Nebr 230NW 592. [b] **Regulations held not arbitrary.** –Ala 129S84.

336–75 272US365, 47SCt114, 71L ed 303, 54ALR1016; 22AlaA620, 119S599; Ill 172NE710; 137Misc22, 242NYS86; NJSup 137A883; 287Pa259, 134A409. But see Mass 172NE867. [a] (1) 203 Cal 665, 265P806; 317Mo 1179, 298SW 720; 298Pa276, 148A308; 155Tenn70, 290SW608. [b] **Ordinance may prohibit new business of stated kind in district** while permitting continuance of existing establishments of same kind. 203Cal 665, 265P806. [c] **Exempting city from restrictions** held not to violate state or federal constitutions. 119 Oh136, 162 NE389. [d] **Held discriminatory.**–37F (2d)712; CalA 286P161(2dcase); 137 Misc22, 242NYS86; 299Pa402, 149A639.

336–76 277US183, 48SCt447, 72L ed842; 21F(2d)440; 207Cal 395, 279P136; 168 La752, 123S314; Nebr 230NW592 (ordinance held valid); 83NH253, 141A142; 103NJL355, 137A545; 133Misc907, 234 NYS708; 221AppDiv773, 223NYS467; 120 Oh418, 166NE226, 64ALR916; 287 Pa259, 134A409; 289Pa458, 137A630; 50RI 108, 145A451. [b] **Regulations held not arbitrary.**–83NH253, 141A142. [c] **Increased fire hazard due to vacancy** of majority of houses on one side of street justifies classification including them. NJ 143A865. [d] **Ordinances held violative of rule.**–NJ 147A555(2d case).

336–78½–New. Zoning law, with reasonable margin to secure effective enforcement, will not be invalid because individual cases may turn out innocuous in themselves. 115Nebr525, 213NW835.

336–78½–New. Leasing ordinance prohibiting apartment house held invalid. 103NJL711, 139A54.

336–78¼–New. Zoning ordinance restricting locality to private residences held invalid as to combined store and apartment building. 104NJL173, 139A 55.

336–78½–New. Statutory notice and hearing must be had. 207Cal 134, 277 P308.

336–79 272US365, 47SCt114, 71L ed303, 54ALR1016.

336–80 272US365, 47SCt114, 71L ed303, 54ALR1016; 80CalA629, 252P746; 99 Fla812, 128S4; 137Misc22, 242NYS86 (accomplishment of legitimate purpose); 289Pa458, 137A630. [a] **Regulations of mortuaries held not invalid** because certain risk is involved in transporting dead bodies of persons who had died of contagious diseases through city streets. 80CalA629, 252P746. [b] **Classification of mortuaries.**–80CalA629, 252 P746.

337–83 [a] **Zoning ordinance may be valid in its general aspect,** and at same time clearly arbitrary and unreasonable as applied to particular state of facts. 37F(2d)336.

337–84 272US365, 47SCt114, 71L ed303, 54ALR1016; 21F(2d)440.

337–85 272US365, 47SCt114, 71L ed303, 54ALR1016; Ala 129S84.

337–86 272US365, 47SCt114, 71L ed303, 54ALR1016.

337–88 317Mo 1179, 298SW720. But see 291Pa109, 139A619. [a] **Value of property rights destroyed.**–34Ariz495, 272P923.

337–89 317Mo 1179, 298SW720.

337–90 But see 21F(2d)440 (that zoning ordinance depreciated value of property does not render it invalid). [a] **That property would be of more value for business than residential purposes** will not justify court in finding ordinance checking, defeating or diverting such development unconstitutional. 34 Ariz495, 272P923. [b] **Ordinance is not invalid** because effect is to depreciate value of property affected. 294Pa246, 144A81.

337–92½–New. That use of property for gasoline station would be more profitable than use for residential purposes does not show that denial of application works unnecessary hardship. 222 AppDiv289, 225NYS747.

337–93 204Cal 687, 269P537. [d] **Where city had not passed general zoning ordinance** as permitted by statute, it is not authorized to enact ordinance prohibiting apartments within particular district. 208 Iowa1273, 227NW125 (contemplated adoption of ordinance held not to authorize city to pass prohibitory ordinance as emergency measure).

338–97 168La752, 123S314 (Louisiana constitution held not to prevent municipalities from creating zoning districts of limited area).

338–99 272US365, 47SCt114, 71L ed303, 54ALR1016.

338–3½–New. Increase in fire hazard has been held not to justify a zoning ordinance restricting a locality to private residences. 104NJL173, 139A65.

338–3½–New. neither does the increase in traffic and resulting danger to school children. 104NJL173, 139A55.

338–3¼–New. In testing validity of specific zoning ordinance provisions courts deal with them as cases arise in which their validity is directly involved, 99Fla812, 128S4.

338–3½–New. , but on attack on broad ground that ordinance adversely affects property value and marketability, ordinance will not be examined piecemeal. 99Fla812, 128S4.

338–5 33 OhA406, 169NE713. See also 291Pa109, 139A619. But see 82CalA 187, 255P294.

338–6 CalA 290P140; 206 Iowa452, 221 NW354; 126Me537, 140A382; 83NH 253, 141A142; 291Pa109, 139A619; 294 Pa246, 144A81. See also 205Cal 426, 271 P487.

338–6½–New. Ordinance prohibiting building less than thirty feet from street is sustainable on other than æsthetic grounds. 82CalA187, 255P294.

338–7 272US365, 47SCt114, 71L ed303, 54ALR1016; 274US603, 47SCt675, 71L ed1228, 53ALR1210; 166La776, 117S 827; 256Mass238, 152NE63; 245NY593, 157NE871; 48RI 175, 136A493; 196Wis 635, 220NW209. [b] **Establishment of set-back regulations** under city ordinance relative to zoning is generally lawful exercise of police power. 294Pa 246, 144A81 (ordinance requiring thirty-foot set-back held valid). [c] **Propriety of set-back restrictions** under zoning ordinance in strictly residential district, is question for city authorities. 294Pa 246, 144A81.

338–8 132Misc82, 229NYS32; 25 OhNP NS30; 48RI 175, 136A493.

339–9 [b] **Ordinance held not violated.**– 130Misc586, 224NYS326.

339–11 208 Iowa1273, 227NW125.

339–12 327 Ill 644, 159NE225, 56ALR 242.

339–13 See also 208 Iowa1273, 227NW 125.

339–19 327 Ill 644, 159NE225, 56ALR 242.

340–23 CalA 290P140; 333 Ill 355, 164 NE699, 61ALR561(2dcase) (ordinance, prohibiting dwelling or group of dwellings accommodating more than fourteen families on any acre of land, held unreasonable, if construed to apply to flats); 105NJL257, 143A437.

340–25 See alsoNJSup 137A883.

340–26 132Misc82, 229NYS32.

340–28 93CalA277, 270P270; 206 Iowa 452, 221NW354; 128 Okl 17, 261P183; 291Pa109, 139A619; 148Va247, 138SE 629. [b] **Zoning ordinance** held not to prohibit erection of automobile salesroom. 291Pa150, 139A741.

340–29 37F(2d)336; 204Cal 687, 269P 537; 80CalA629, 252P746; 93CalA277, 270P270; 110Conn92, 147A294; NJSup 135A661; 224AppDiv763, 229NYS754; 155Tenn70, 290SW608; TexCivA 48W (2d)616; TexCivA 14SW(2d)901; 148 Va247, 138SE629.

340–30 26F(2d)640; 204Cal 687, 269P 537; 80CalA629, 252P746; 96CalA443, 274P397; NJSup 135A661; 25 OhNP NS49; 155Tenn70, 290SW608; 148Va 247, 138SE629.

341–31 206 Iowa452, 221NW354; 155 Tenn70, 290SW608; 148Va247, 138SE 629. [b] (4) NJSup 136A803. (5) Garage. 5PaDist&Co 21. (6) Funeral homes. 136 Okl 113, 277P226.

342–34 272US365, 47SCt114, 71L ed303, 54ALR1016; 80CalA629, 252P746; 207 Cal 395, 279P136 (ordinance prohibiting excavation of rock, sand and gravel in residence district held unreasonable); 207Cal 134, 277P308; 331 Ill 406, 163NE 445; NJSup 142A436. [a] **Ordinance held reasonable.**–CalA 272P1076; 168La 172, 121S613; NJ 143A816.

342-34½-New. Building zone regulations. Zoning ordinance dividing a city into six districts, and prohibiting the erection of a new philanthropic home in first residence use district, without consent of owners of two thirds of property within four hundred feet of the proposed building, is not arbitrary and unreasonable. 144Wash74, 256P781.

342-35 206 Iowa452, 221NW354; 317 Mo 1179, 298SW720. [a] **Excluding dormitories** from residential district is not prevented from being invalid as arbitrary by proof of growth of city and traffic. 331 Ill 257, 162NE863.

342-39 222AppDiv297, 226NYS252.

343-46 See also 299Pa402, 149A639.

343-49 34Ariz495, 272P923; 168La172, 121S613.

343-50 80CalA629, 252P746. [a] **Area for mortuaries limited to specified district not rendered inadequate** by increase in population where city council may have intended ordinance to apply to changing conditions. 80CalA629, 252P746. [b] **"Necessities of city"** referred to in ordinance zoning undertaking establishments include not only area required for regulated business but also exclusion of such businesses from localities where they would be obnoxious to public health and convenience. 80 CalA629, 252P746.

343-52½-New. Building department, authorizing the erection of a building, cannot sanction the use of the building in violation of a zoning ordinance. 80CalA629, 252P746.

343-52½-New. An ordinance permitting the erection of schools but excluding dormitories is invalid as respects the latter, as arbitrary. 331 Ill 257, 162NE 863.

343-52¼-New. That a person had purchased property outside a strictly business district of the city, received a permit to construct a mortuary thereon, and paid a license for conducting such business at that location, has been held not to estop the city to pass a zoning ordinance prohibiting the maintenance of such business thereat. 34Ariz 495, 272P923.

343-52½-New. Where a purchaser of land proceeds with construction of a mortuary thereon with knowledge that a zoning ordinance is contemplated which would prohibit the maintenance of a mortuary in the district, he has no vested rights entitling him to set up loss arising from so proceeding. 34 Ariz495, 272P923.

343-52¾-New. The fact that a zoning ordinance establishing a residence district across the street from a business district operated to depreciate the value of property in the residence district has been held immaterial. 204Cal 687, 269P537.

343-52½-New. A city zoning ordinance, providing that no land shall be occupied or used for any purpose whatsoever until a certificate of occupancy is issued, has been held not violative of any constitutional provision. NJ 143A816.

343-55 204Cal 687, 269P537; 80CalA 629, 252P746; 156Md40, 143A666; 317 Mo 1179, 298SW720.

343-57 80CalA629, 252P746; Iowa 228 NW870; 166La776, 117S827; 168La 752, 123S314 (ordinance granting one year to close established business); 295 Pa257, 145A77. But see 96CalA443, 274 P397.

343-58½-New. A municipality cannot, under guise of regulating business and segregating it in particular district, grant a monopoly to business establishments and enterprises already situated in unrestricted districts. 96CalA443, 274P397.

344-60 137Misc524, 244NYS63.

344-63 CalA 286P161(2dcase); NJSup 135A661.

344-66 CalA 290P140; 245Mich261, 222 NW86. [a] (1) 111Conn616, 151A183; 99Fla812, 128S4; 244 IllA185; 126Me 537, 140A382; 263Mass270, 160NE887; 249Mich372, 228NW707(2dcase); NJ 147A553; NJ 147A555(2dcase); 131 Misc251, 227NYS358. (3) Use of garage on rear of property for storage of cement and builder's material is in violation of ordinance prohibiting use of property for contractor's plant and storage therefor. 294Pa209, 143A909. [c] **Orphan asylum.**-20F(2d)743. [d] **Zoning laws are strictly construed** as in derogation of common-law rights of property owners. 224AppDiv87, 229 NYS550. [e] **Application for permit to remodel building for particular use and commencement of suit to compel issuance** does not prevent application of ordinance prohibiting such use. 133 Okl 84, 271P257. [f] **Hotel and apartment building** held properly constructed within zone. Mass 170NE412. [g] **Two family dwelling or double house.**-230AppDiv245, 244NYS295.

344-68 [a] **"Street,"** within zoning act, held not to include court. 259Mass329, 156NE852.

344-70 94CalA774, 271P921; 244 IllA 185; 245Mich261, 222NW86; 132Misc 816, 230NYS457; TexCivA 28SW(2d) 178; 199Wis214, 225NW838.

344-73 94CalA774, 271P921; 109Conn 422, 147A124 (purpose of zoning ordinance excepting existing projects stated); 165La665, 115S817; 317Mo 1179, 298SW720. [a] **Extent of power to make zoning regulations is immaterial** where permit is expressly validated by legislative action of council. 165La665, 115S817.

344-74 TexCivA 28SW(2d)178.

344-75 91CalA136, 266P831; NJ 147 A555(2dcase); 294Pa209, 143A909; 295 Pa257, 145A77; 155Tenn70, 290SW608. [a] **What constitutes existing use.**-Any use within recognized business purpose is an existing use. 295Pa257, 145 A77.

344-80½-New. Parties proceeding with a building, violating a zoning law, after a stop order, do so at their own risk. 259Mass329, 156NE852.

344-80½-New. Statutory power to regulate and restrict building does not authorize prohibition within a zone. 147Miss534, 113S441.

344-80¼-New. Zoning laws are binding on mortgagee loaning money for the construction of a building, without knowing such construction was in violation of the zoning laws. 263Mass212, 160NE795.

344-80½-New. A zoning law is not retrospective so as to validate, prior to its enactment, penal provisions of a municipal ordinance then in existence. NJ 147 A555(2dcase).

344-80¼-New. A provision of a zoning statute operating as an exemption to a railroad or terminal company does not have the effect of permitting the company to lease its right of way to private individuals for the operation of filling stations. 138 Okl 92, 280P467.

344-80½-New. Zoning by-law held not enlarged by amendment of statute under which it was enacted. Mass 172NE 867.

344-82 274US603, 47SCt675, 71Led 1228, 53ALR1210. [a] **Building commission** is without power to modify or waive provisions of zoning by-law. 263 Mass270, 160NE887. [b] **Ordinance including certain property in residence zone** and repealing prior ordinance excepting such property is valid. 36F(2d) 242. [c] **Opposition to amendment of zoning resolution** creating new retail district must be made by owners of 20 per cent of entire frontage of new district. 135Misc845, 240NYS38. [d] **Redistricting.**-254NY268, 172NE494. [e] **Amendment of zoning by-law construed.** -Mass 172NE867.

345-83 274US603, 47SCt675, 71Led 1228, 53ALR1210.

345-84 [a] **Necessity of refiling.**-Conn 152A297.

345-89½-New. Benefit to particular owner does not authorize varying of zoning regulation. 222AppDiv19, 225 NYS402.

345-89¼-New. A building inspector cannot vary a zoning ordinance, 131 Misc346, 225NYS680.

345-89¼-New. , and an owner, erecting a structure according to a building inspector's evasive or unreasonable interpretation of an ordinance, may be required to remove the violation. 131Misc 346, 225NYS680.

345-89½-New. Power of board conferred by statute to make alterations in redistricting cannot be impaired by self denying resolution. 254NY268, 172NE 494.

345-90 [a] **Boundaries.**-223AppDiv764, 228NYS282.

345-93 155Tenn70, 290SW608.

345-94 [a] **Compliance with procedure established by general law is requisite** where city charter omits to provide any procedure for adopting zoning ordinance. 82CalA324, 255P538.

345-95 30Hawaii526. [a] **Charter or general law.**-CalA 290P480.

345-96 200Cal 505, 253P932. [a] **Legislative body has wide discretion** in determining where boundary line of building regulation ordinance shall be drawn. CalA 290P140.

345-98 82CalA324, 255P538.

345-99 [c] **Changing private property from one zoning classification to another.**-Kan 292P745.

345-11 244 IllA132; 134Misc882, 236 NYS607. [c] **Requirement held waived** by issue of street opening and plumbing permits during course of work, with knowledge that work was commenced and continued. 220AppDiv737, 221NYS 520. [d] **Village clerk** appointed by resolution of village trustees as administrative official charged with enforcing zoning ordinance may grant permit for construction of gasoline storage tanks. 134Misc882, 236NYS607. [e] **Right to require certificate of occupancy** depends on right of municipality to prohibit character of occupancy. NJ 147A555(2d case).

346-12 TexCivA 10SW(2d)151.

346-13 Ida 286P353.

346-15 222AppDiv308, 226NYS335. [a] 131Misc752, 228NYS204.

346-16 244 IllA132.

346-17 138Misc187, 244NYS413; 25 OhNPNS49.

346-18 82CalA187, 255P294; 224Ky 257, 6SW(2d)243.

346-19 NJ 151A863; 120 Oh352, 166 NE228.

346-20 NJ 151A863; 291Pa358, 140A 136; TexCivA 18SW(2d)768.

346-21 NJ 140A788; 120 Oh352, 166 NE228; 299Pa155, 149A195; Wis 230 NW70. [b] **Noncompliance with ordinance,** suspended until affirmative vote on referendum to be submitted to voters is no ground for denying permit. 117 Oh327, 158NE748. [c] **Restrictive provisions of proposed ordinance** cannot be given effect before enactment. 120 Oh 352, 166NE228.

347-22 NJ 142A556.

347-23 NJSup 135A802.

347-23½-New. or that proposed alterations would violate a restrictive covenant. NJSup 135A802.

347-27 NJSup 135A691.

347-27½-New. Although application for a permit is made before the statute authorizing a zoning ordinance it should be denied. NJSup 143A77.

347-27½-New. Application for a permit may be denied on amendment of ordinance after filing such application making it illegal to issue such permit. 205Cal 426, 271P487.

347-27¼-New. Where applicant for a permit to erect a hotel filed application at a time when ordinances of the city permitted the erection of a hotel, but before final action was taken on the application the board of supervisors enacted an ordinance limiting buildings in the locality, applicants were not entitled to have the permit applied for granted. 205Cal426, 271P487.

347-27½-New. Where property was not devoted to nonconforming use at the time of passage of a building zone resolution, refusal of a certificate of occupancy for nonconforming use is justified. 225AppDiv875, 232NYS640.

347-27½-New. Neglect of the village clerk authorized to issue permits to do things required cannot be taken advantage of by the village to the prejudice of an owner granted a permit. 134 Misc882, 236NYS607.

347-27½-New. Commissioner of public works cannot on behalf of city consent to construction of garage though city owned property. 136Misc653, 241NYS 252.

347–27½–New. Period of two years after passing of statute authorizing zoning ordinance affords municipality reasonable opportunity to adopt same as regards right to refuse building permit. **NJSup** 151A373.

347–28 [a] **Tenement house commissioner cannot raise issue of ownership.**–137Misc287, 244NYS449.

347–32 **NJSup** 147A571 (holder of contract for purchase); 137Misc287, 242NYS516; **Man** [1930] 4DomLR205. [a] **Adjacent property owners could not raise contention** that purchaser had no interest entitling him to erect building. **NJ** 151A863.

347–37 246 **IllA**152 [b] **Erroneous statement** that property abuts on avenue named does not render applicable ordinance referring to that avenue only. 14PaDist&Co 127.

347–42 [a] **Failure to file plans and specifications** held not mere informality. **NJSup** 136A602.

347–48½–New. Under a zoning ordinance requiring inspection and approval by village trustees or their appointees, inspection and knowledge of the clerk before the filing of an application is sufficient. 134Misc882, 236NYS607.

347–49 **NJSup** 136A602. [c] **Requirement not mere formality.**–**NJSup** 136A602.

347–50 [b] **Effect of approval.**–**NJ** 146A318(2dcase).

347–50½–New. City is not estopped by building inspector's failure to advise applicant of mistake in not filing plans. **NJSup** 136A602.

348–57 But see **NJ** 151A863.

348–58 [a] **After issuance of permit by building superintendent to whom matter was referred by board of commissioners,** public hearing is not required under ordinance requiring public hearing on notice before granting building permit. **NJSup** 144A578. [b] **All facts developed on hearing including present use and future need** must be considered in determining application. 229**AppDiv**320, 241NYS456 (grant of permit authorized).

348–68 109**Conn**583, 145A48; **NJSup** 135A80; 291**Pa**358, 140A136. [a] **Statutory appeal.**–109**Conn**583, 145A48.

348–70 136**Misc**259, 240NYS456 (appeal to higher officials prerequisite to court review).

348–74½–New. Zoning board may appear as a party on a hearing of an appeal from its refusal to approve a building plan. 289**Pa**458, 137A630.

348–74⅓–New. Board has burden of supporting refusal to permit use of building for purposes specified in application, by showing that authority exercised was within ordinances. 156**Md**40, 143A666.

348–74¼–New. An action commenced to have the denial of a permit to repair and reconstruct a building declared unreasonable does not preclude the owner from later making another application to repair and reconstruct the building or preclude city authorities from granting permission. 128**Kan**646, 278P1067.

349–76 See also **NJSup** 142A427.

349–82 25 **OhNPNS**49.

349–83 **NJ** 144A328; 226**AppDiv**687, 233NYS359; 226**AppDiv**752, 234NYS36; 25 **OhNPNS**49. See also 151**Va**801, 145SE257. [b] **Approval by board as required** of modified plans for apartment house did not entitle plaintiff's assignee to claim estoppel against right of village to deny the right to erect the building. 224**AppDiv**744, 230NYS58.

349–86 [a] **Adoption of zoning ordinance ipso facto revokes permit** for construction of building violating zoning restrictions, if holder of permit has done no work on construction nor incurred any liabilities for work and material. 225**AppDiv**179, 232NYS506.

349–88 299**Pa**155, 149A195. [a] **Void permit, however,** confers no property right. 102**NJEq**169, 139A911.

349–89 224**AppDiv**87, 229NYS550; 130**Misc**545, 224NYS56.

349–90 **NJ** 147A553; **NJSup** 136A503; **NJSup** 144A578; **NJSup** 150A669(2dcase) (no fraud shown); **NJSup** 151A268; 130**Misc**545, 224NYS56; 134**Misc**882, 236NYS607; 228**AppDiv**86, 238NYS438 (change of zone during progress of work); 299**Pa**155, 149A195; 37**Wyo**389, 262P22, 23 [citCJ]. [c] **Increased fire hazard** not ground for revocation of permit. **NJ** 142A558. [d] **Ground for revocation.**–137Misc287, 244NYS449.

349–91½–New. Where permit to erect building in zoning district is issued in accordance with court order and builder incurs obligations in operations municipality is estopped from interfering. 253**IllA**583.

349–92 131**Misc**486, 226NYS285.

349–93 138 **Okl** 92, 280P467.

349–96 **NJ** 143A865.

350–99 **TexCivA** 30SW(2d)339.

350–3½–New. By filing an application for a building permit after revocation of one previously granted, the applicant waives any question as to his right to retain the advantage gained by issue of the original permit. **NJSup** 142A364.

350–3⅓–New. Where a permit is granted prior to the zoning law it may be revoked where at the time the zoning law was passed substantial construction had not already commenced. 25 **Oh NPNS**49.

350–3¼–New. Board of commissioners' order not to issue permit after board of adjustment had authorized issuance is vitiated, where no notice was given to landowner. **NJL** 142A547.

350–3⅕–New. Requirements of an ordinance respecting the issuance of building permits are presumed to have been determined favorably to the applicant before granting the permit, and conclusively so after the building is partly constructed under the permit, in good faith and without fraud in obtaining the permit. **TexCivA** 10SW(2d)151.

350–3⅙–New. Petitioner not authorized to appeal from administrative order revoking permit is required to apply for variation in use of map. 137Misc173, 241NYS539.

350–3⅐–New. Arbitrator's award, under ordinance, upholding mayor's revocation is conclusive in absence of reservation of right of appeal. **TexCivA** 30SW(2d)339.

350–10 **MoA** 25SW(2d)142.

350–14½–New. Permission to continue a nonconforming business temporarily after a fire until a new location can be found gives the right only at the will of the board of appeals. 110**Conn**92, 147A294.

350–21½–New. An assignee of a void permit is charged with notice of its invalidity. 102**NJEq**169, 139A911.

352–96 156**Md**40, 143A666. [c] **Whether proposed structure complies with zoning laws** is within exclusive jurisdiction of superintendent of buildings. 138**Misc**232, 244NYS531.

352–97 298**Pa**19, 147A834(1stcase).

352–4 [a] **Particular rules not authorized.**–230**AppDiv**71, 243NYS385.

352–6 [a] **Grievance against issuance of permit** for apartment should be rectified by action within tenement house department. 137**Misc**287, 244NYS449.

353–13 [a] **Refusal of permit held proper.**–157**SC**496, 154SE756.

353–19 138**Misc**232, 244NYS531; 89**Pa Super**548.

353–20 206 **Iowa**452, 221NW354.

353–21½–New. No legislative powers are delegated by a zoning ordinance creating a board of adjustment to hear and decide appeals, although it is given power in specific cases to grant exceptions from the operation of the ordinance. 136 **Okl** 113, 277P226.

353–23 **NJSup** 143A151.

353–26 244 **IllA**185.

353–29 206 **Iowa**452, 221NW354; 103**NJL**305, 136A733; 198**NC**70, 150SE674; 48**RI** 175, 136A493. See also **NJSup** 142A353; **NJSup** 142A356.

353–30 103**NJL**305, 136A733.

353–33 **Nebr** 230NW592.

354–43 103**NJL**305, 136A733; **NJSup** 143A151.

354–44 241 **IllA**21; 155**Md**7, 141A340.

354–45 152**Md**671, 137A278; **Mass** 167**NE**659 (statute held to enlarge powers of board under ordinance conferring power and not to annul provision of ordinance allowing board to permit construction of garage on consent of property owners); 240**Mich**595, 216NW406. **Mo** 278SW(2d)1030; 230**AppDiv**21, 243NYS263; 298**Pa**276, 148A308; 89**Pa Super**543; 93**PaSuper**599. [a] (1) 262**Mass**451, 160NE312. See also 89**Pa Super**543. (2) That owner would earn more profit from apartment in violation of zoning ordinance is not unnecessary hardship. 129**Misc**676, 223NYS459. (3) Purchaser of realty in residence district is not entitled to have zoning ordinance varied because of small profits arising from confining property to residential uses. 131**Misc**581, 227NYS570. (4) "Practical difficulties or unnecessary hardships" sufficient to exempt applicant's property from general rule cannot be shown by anything less than positive proof that it is impossible to use property for any other purpose than that sought. 224**AppDiv**634, 232NYS141. (5) Difficulties and hardships which move board of adjustment to depart from strict law of zoning ordinance should be substantial and of compelling force. 294**Pa**246, 144A81. [b] **Inconvenience and expense to applicant in making improvement** are not proper criteria to authorize variation of building zone regulations. 225**AppDiv**97, 232NYS266 [aff 166NE328(3dcase). [c] **Burden rests on petitioner** to satisfy board that variance will not unduly conflict with public interest, and that literal enforcement of ordinance will result in peculiar hardship or loss. 50 **RI** 26, 144A674. [d] **Where ordinance prescribes conditions precedent** (1) board of appeal, under statute authorizing it to vary application of zoning ordinances, has power to vary application of provision of ordinance prescribing conditions. **Mass** 167NE659. (2) Without considering and varying such provision board is not authorized to vary zoning ordinance where conditions have not been performed. **Mass** 167NE659. [e] **Board of standards and appeals was without jurisdiction to reopen application** for variation of building zone resolution on substantially identical facts. 137**Misc**278, 242NYS517. [f] **Consent of property owners.**–136**Misc**476, 240NYS792; 136**Misc**653, 241NYS252 (80 per cent of those affected required).

354–45½–New. The board has power to authorize a departure from the minimum requirements of the housing code only in case of practical difficulties or unnecessary or unreasonable hardship. 240**Mich**595, 216NW406.

354–45⅓–New. The board has no power to condone or validate a violation for which no necessity existed. 240**Mich**595, 216NW406.

354–46 206 **Iowa**452, 221NW354; 224**AppDiv**744, 230NYS58; 135**Misc**315, 237NYS237; 137**Misc**806, 243NYS518; 294**Pa**246, 144A81.

354–47 137**Misc**806, 243NYS518; 89**Pa Super**543. [a] **Abuse of discretion not shown.**–50**RI** 26, 144A674. [b] **Owner cannot be illegally deprived of beneficial use of land.**–50**RI** 108, 145A451.

354–49 59**ND**104, 228NW816; **Wis** 230NW50. [a] **Board of commissioners** cannot set aside permit granted by board of adjustment. **NJ** 142A547. [b] **Concurrence of board of city commissioners** for change in zoning ordinance not required. **NJSup** 147A732.

354–50 110**Conn**92, 147A294 (zoning regulations held to authorize board to order barrel company to remove stock and discontinue business where more than fifty per cent of plant had been destroyed by fire). [a] (4) Board of adjustment has jurisdiction to determine whether building not complying with ordinance requirements would be public menace (P. L. [1926] p 526). **NJSup** 135A672. (5) Board may revoke permit or impose conditions in conformity with zoning ordinances. 102**NJEq**169, 139A911. (6) Board cannot insert condition that building specified, and any subsequent buildings erected, be occupied only by certain company and be used solely as wire factory. **NJ** 142A548. (7) Board cannot insert condition that north, east, and west facades of proposed building be of face brick with stone

trimming, etc., and that large trees be planted along line of plot. **NJ** 142A 549. (8) Board cannot insert condition that plot of ground be retained in which no factory buildings shall be erected. **NJ** 142A548.

354–51 130**Misc**667, 224**NYS**694.

354–51½–New. The board has no power to impose an easement on adjoining property for the purpose of enabling compliance with the labor law requirements as to fire escapes. 130**Misc**667, 224**NYS**694.

354–54 [a] **Where ordinance is not shown to be unreasonable,** application for modification should be denied. **NJSup** 142A356; **NJSup** 142A357.

354–58 138**Misc**187, 244**NYS**413.

354–59 131**Misc**652, 228**NYS**88.

354–62 **Mo** 27**SW(2d)**1030; 129**Misc** 676, 223**NYS**459; 50**RI** 26, 144A674.

354–63 **Mo** 27**SW(2d)**1030; 129**Misc** 676, 223**NYS**459.

355–67½–New. Board of adjustment has power to determine whether a proposed building, not complying with ordinances, would constitute a public menace. **NJSup** 135A672.

355–67⅓–New. Appeal taken to, and decision of, board of adjustment, before enactment of statute giving it power to determine matter involved, is ineffective. **NJSup** 135A661.

355–67¼–New. The board of standards and appeals had no power under greater New York Charter to vary the provisions of the labor law relating to fire escapes and fireproof passageways. 130 **Misc**667, 224**NYS**694.

355–67⅕–New. Prior denials does not deprive board of jurisdiction over erection of garage applied for on consents not previously produced. 136**Misc**476, 240**NYS**792.

355–68 [a] (2) **Board of appeals has** power in specific case to vary provisions of zoning ordinance without hearing witnesses. 244**NY**280, 155**NE**575. (3) Where it acts of its own knowledge, it must set forth in its return the facts known to its members not otherwise disclosed. 244**NY**280, 155**NE**575 [rev 217**AppDiv**177, 216**NYS**260]. [b] **Rules conflicting with statute** are invalid. 3 **Del** 314, 136A279.

355–71 [a] **Whether there is substantial change requiring new determination** on new appeal is primarily for board to determine. 137**Misc**448, 243**NYS**602.

355–72 [a] (1) 259**Mass**329, 156**NE**852. (2) Owners of property in neighborhood of one given permit to construct building of size prohibited by ordinance are aggrieved parties within zoning statute. **Ill** 172**NE**710.

355–75 But see 3**Del** 314, 136A279.

355–75½–New. Where the time for appeal is fixed by statute, it must be taken thirty days from the original order, and not from confirmation thereof. 3 **Del** 314, 136A279.

355–76 102**NJEq**169, 139A911; 298**Pa** 276, 148A308. [a] **Time should be computed** from date of notice of act appealed from. 102**NJEq**169, 139A911.

355–78 **Mass** 173**NE**1; 103**NJL**305, 136 A733. [a] **Purpose of notice** is not to poll neighborhood for wishes of persons interested, but to give them opportunity to submit facts, on which board will base its determination. 50**RI** 108, 145A 451. [b] **Notice in manner prescribed by board of appeal** (1) is essential to give board jurisdiction of appeal to vary application of zoning law. **Mass** 167**NE** 672. (2) Statute providing for such notice is mandatory. **Mass** 167**NE**672. (3) Board has no power to waive compliance with terms of its order. **Mass** 167**NE**672.

355–79 **Assignee of permit** is not entitled to notice of review of issuance of permit unless he has given notice of assignment to municipality. 102**NJEq** 169, 139A911.

355–81 298**Pa**276, 148A308. [a] **Duty of board to determine who are property owners.–Mass** 173**NE**1.

355–82 **Mass** 173**NE**1.

355–86 **NJSup** 142A367.

355–88 [a] **Applicant for variance of zoning ordinance** should be given hearing as to matters affecting his interest not well known and apparent. 50**RI** 26, 144A674. [b] **Evidence considered.–Mass** 172**NE**255.

355–92½–New. Remonstrances of other landowners against the granting of an application to vary the provisions of a zoning ordinance should be taken into consideration by the board in exercising its discretion. 50**RI** 26, 144A674.

355–92¼–New. A zoning board of review, in passing on an application for variance of a zoning ordinance, may view the locality, and, in exercise of its discretion, may consider matters well known to its members which bear on the local situation. 50**RI** 26, 144A674.

355–92¼–New. Failure of board to institute proceedings against owners violating setback provisions is no defense to proceeding to revoke permit for violation. 298**Pa**276, 148A308.

355–95½–New. Without testimony or report of inspection committee, board of adjustment could not adjudicate right to building permit. 103**NJL**305, 136A 733.

355–96 [a] **Failure to determine appeal within sixty days** does not cause board of adjustment to lose jurisdiction. **NJSup** 142A315.

355–98 [a] **In absence of quorum** permit is illegal, though majority of members present voted therefor. **NJ** 142A 545.

355–99 **Mass** 173**NE**1; 133**Misc**907, 234 **NYS**708.

355–2 [a] **New appeal from new ruling** must be passed on. 137**Misc**448, 243 **NYS**602.

355–3½–New. To overturn the decision of the building inspector refusing a permit, some evidence should be proffered to show error and overcome the presumption that the zoning ordinance was reasonable. **NJSup** 143A77.

355–3⅓–New. The determination of a quasi judicial body, acting under its granted powers, is final unless reversed by a superior body. 225**AppDiv**570, 234 **NYS**42.

355–3¼–New. Judgment of municipal board of adjustment is not subject to collateral attack. 198**NC**70, 150**SE**674.

355–3⅕–New. That violation could have been discovered by examining house plans does not preclude revocation of permit to construct house. 298**Pa**276, 148A308.

356–14 3**Del** 314, 136A279; 130**Misc** 667, 224**NYS**694; 225**AppDiv**570, 234 **NYS**42; 137**Misc**448, 243**NYS**602. But see 226**AppDiv**441, 235**NYS**254. [b] **Subsequent application to vary zoning ordinance not barred** by previous applications on different facts. 137**Misc**806, 243**NYS**518.

356–16 **NJ** 144A329.

356–19½–New. Rules of board as to reopening cases are invalid where they conflict with statute. 3**Del** 314, 136A 279.

356–21 156**Md**40, 143A666; **Mass** 171 **NE**430 (proper procedure); 102**NJEq** 169, 139A911; 7**PaDist&Co** 785. [a] **Parties.–NH** 149A78(1stcase). [b] **No appeal allowed** from decision of mayor, alderman and selectmen granting license. **Mass** 172**NE**255. [c] **Where review is statutory** court's jurisdiction does not extend beyond that conferred by statute. **Mo** 27**SW(2d)**1030.

356–22 206 **Iowa**452, 221**NW**354; 155 **Md**7, 141A340; 222**AppDiv**289, 225**NYS** 747. [a] **While appeal is pending before board** neither act appealed from nor action of board are subject to review in courts. 102**NJEq**169, 139A911.

356–23 **NJSup** 142A342; **NJSup** 142A 345; **NJSup** 142A356; **NJSup** 142A357; **NJSup** 142A364; 131**Misc**581, 227**NYS** 570; 136**Misc**476, 240**NYS**792; 137**Misc** 448, 243**NYS**602. [a] 224**AppDiv**744, 230**NYS**58; 230**AppDiv**21, 243**NYS**263. [b] **Presumptions.–NJSup** 142A342; **NJSup** 142A345; **NJSup** 142A357; **NJSup** 142A364; **NJSup** 142A367. [c] **Burden of proving that action of board was unreasonable** rests on prosecutor. **NJSup** 142A367.

356–24 **NJSup** 135A661; 129**Misc**676, 223**NYS**459; 137**Misc**278, 242**NYS**517; 50**RI** 108, 145A451. [a] **In Missouri.–Mo** 27**SW(2d)**1030.

356–25 **NJSup** 142A438; 48**RI** 175, 136 A493. See also **NJSup** 142A431. [a] (1) 93**PaSuper**599. (2) 129**Misc**676, 223 **NYS**459.

356–27 206 **Iowa**452, 221**NW**354; **NJ Sup** 142A353. See also **NJSup** 142A 427; **NJSup** 142A431; **NJSup** 142A 434; **NJSup** 142A436.

356–27½–New. A board of adjustment having revoked a certificate for alleged abandonment of a nonconforming use, permitted during continuance of the use, has the burden to prove abandonment. 295**Pa**257, 145A77.

356–27⅓–New. **Time for appeal.** Board cannot extend statutory time for appeal from its decision, either directly, 3**Del** 314, 136A279.

356–27¼–New. or indirectly, by making order on rehearing after expiration of time to appeal which confirmed prior order and from which appeal is taken. 3**Del** 314, 136A279.

356–27⅕–New. In latter case, appeal from confirming order is equivalent to appeal from prior order, and therefore is too late although taken within statutory time after confirming order. 3**Del** 314, 136A279.

356–27⅙–New. Where proper remedies against a decision of a board of appeals have not been pursued, the decision will not be reviewed on collateral attack. 335 **Ill** 509, 167**NE**119.

356–27⅐–New. Decision of a board of adjustment, on appeal from the building inspector's decision, denying a permit to erect a filling station, which decision was held by the court not to be abuse of discretion, was res judicata. 195**NC**793, 143**SE**827(2dcase).

356–27⅛–New. It is presumed that board's denying an application for a permit as forbidden by the zoning ordinance was right. **NJSup** 142A438.

356–27⅑–New. Where a petition for mandamus to revoke the cancellation of a permit for construction of a greenhouse alleged that a greenhouse existed on the premises, and such allegation was not denied, a new greenhouse sought to be erected could not be presumed to be intended for business or commercial use. 224**AppDiv**763, 229 **NYS**754.

356–27 1/10–New. In the absence of a contrary showing in the record, it will be presumed that rules of the board of appeal relative to notice and procedure were complied with. **Mass** 167**NE**672.

356–27 1/11–New. Recital in the record that a hearing before the board of appeal was duly advertised does not overcome irrefutable dates set forth in the record showing the contrary. **Mass** 167 **NE**672.

356–27½–New. Incidents of procedure will not be reviewed unless raised before board. 136**Misc**476, 240**NYS**792.

356–28 **Mass** 173**NE**1; 102**NJEq**169, 139A911; **NJ** 142A546; 131**Misc**486, 226 **NYS**285. See also 39**GaA**813, 148**SE** 596(1stcase). [b] **Who entitled to writ; "party aggrieved."**–Adjoining landowners are "persons aggrieved," entitled to certiorari to review proceedings of zoning board of review. 48**RI** 175, 136A 493; **NJ** 142A546. [c] **Time for appeal.** –Power of supreme court to review proceedings by board of adjustment heard without jurisdiction is unaffected by limitation of time for bringing certiorari. 103**NJL**305, 136A733. [d] **Time for application.–NJSup** 148A153(1st case).

357–32 50**RI** 449, 148A601.

357–33 49**RI** 283, 142A479.

357–35 [a] **In Iowa,** trial de novo permitted by statute is confined to question of illegality, including arbitrary and unreasonable action of board of adjustment, or action contrary to statute or unsupported by facts. 206 **Iowa**452, 221**NW**354.

357–36½–New. The supreme court may strike unreasonable conditions from an order. **NJ** 142A548.

357–37 See also 49**RI** 283, 142A479.

357–37½–New. A court order of certiorari removes a proceeding from the jurisdiction of the board of appeals, terminating its power. 225**AppDiv**570, 234 **NYS**42.

357–40 330 **Ill** 97, 161**NE**133; 151**Wash**

665, 276P886; 316Mo 9, 289SW838.
358-41 316Mo 9, 289SW838; 109TexCr 474, 6SW(2d)353.
358-42 142Wash37, 252P137.
358-45 TexCivA 4SW(2d)616, 619 [quotCJ].
358-47 But see 316Mo 9, 289SW838.
359-50 142Wash37, 252P137.
359-53 38F(2d)945. [a] NJSup 142A 359.
359-55 Ida 286P353; 318 Ill 340, 149 NE281.
359-57 193NC432, 137SE183, 55ALR 252; 195NC377, 142SE330, 57ALR506.
359-59 TexCivA 4SW(2d)616, 619 [quotCJ].
360-62½-New. Ordinance prohibiting undertaking establishments outside zone not unreasonable. 80CalA629, 252P746.
360-62¾-New. Ordinance regulating mortuaries is not invalid because of risk involved in carrying dead from contagious diseases through street. 80CalA 629, 252P746.
360-70 316Mo 9, 289SW838.
360-72 164Ga755, 139SE559, 55ALR230 (ordinance requiring opening of barber shops at 5:30 A. M. and closing at 7 P. M. held unreasonable).
360-73 164Ga755, 139SE559, 55ALR 230.
360-81 148Wash485, 269P1043, 60ALR 166.
361-86 But see 125 Okl 212, 257P286 (where business constitutes public nuisance per accidens, it is not lawful business and may be prohibited).
362-2 239Mich286, 214NW148. [c] **License for lawful business** may not be arbitrarily denied. 164Ga235, 138 SE234.
362-5½-New. An official having exclusive power to issue permits upon compliance with requirements of an ordinance may lawfully revoke or modify any permit illegally or improperly granted. 130Misc448, 224NYS41.
363-37 123 Or180, 261P895, 58ALR665. [a] 123 Or180, 261P895, 58ALR665.
363-39 148Wash485, 269P1043, 60ALR 166.
363-47 See also 246 IllA241.
363-49 5PaDist&Co 281.
364-54 148Wash485, 269P1043, 60ALR 166.
364-56 148Wash485, 269P1043, 60ALR 166.
364-57 TexCommnA 12SW(2d)976.
364-59½-New. An ordinance is unconstitutional which lays down no standard of fitness of premises for the purpose contemplated, but leaves determination thereof to uncontrolled opinion of inspectors. 28Hawaii534 (licensing dance halls).
364-59¾-New. Since operation of a public dance hall is not a nuisance within itself nor at common law, an owner using his property for such purpose cannot be foreclosed of his right to a judicial determination, as to whether his property is so used as to render it a nuisance. TexCommnA 12SW(2d)976.
364-59¼-New. Public dance halls may be constitutionally entirely suppressed and prohibited by exercise of police power. 148Wash485, 269P1043, 60ALR 166.
365-86 131Misc718, 228NYS569.
365-93 CalA 288P53.
365-97 CalA 288P53; NJCPl 150A217.
366-22 [a] **Regulating superintendence of work.**-166La689, 117S775.
367-36 Iowa 228NW874; 165La229, 115S469.
367-41 27F(2d)478.
367-42 87PaSuper84. [a] **Failure to outline plan or fix requirements for obtaining permit** does not render ordinance regulating storage of inflammable liquids invalid. Iowa 228NW874.
367-44 But see 134Misc882, 236NYS 607.
367-45½-New. State, having delegated power to cities to pass ordinances regulating storage of explosives, may resume it through legislative action, and thus deprive municipality of right to exercise it. 322 Ill 545, 164NE20.
367-45¾-New. Where a city has been divested of power to make ordinances regulating storage of explosives by statute, it cannot by its own action require such power. 332 Ill 545, 164NE 20.
367-45¼-New. Statutes relating to storage and transportation of gasoline and volatile oils, and providing that a state department shall have power to execute and administer laws and regulations relating thereto have been held not to show intention to entirely deprive city councils of power to regulate storage of oils and other explosives. 332 Ill 545, 164NE20.
368-65 8F(2d)871; NJSup 135A691; TexCivA 4SW(2d)616, 619 [quotCJ].
368-67 79Mont314, 257P1007.
368-68 79Mont314, 257P1007.
369-70 79Mont314, 257P1007.
369-72 8F(2d)871; 79Mont314, 257P 1007. [c] 79Mont314, 257P1007.
369-73 8F(2d)871.
369-75 TexCivA 4SW(2d)616, 619 [quotCJ].
369-81 79Mont314, 257P1007.
369-82 215Ala532, 112S109; 193NC432, 137SE183, 55ALR252.
369-83 79Mont314, 257P1007; 132 Okl 80, 269P273. [b] **Necessary minor repairs** of wooden buildings may not be prohibited. 79Mont314, 257P1007.
370-89 [a] **Abatement.**-132 Okl 80, 269 P273.
371-2 NJSup 135A691. [a] **Repairing building damaged by fire.**-132 Okl 80, 269P273.
371-5 8F(2d)871.
371-8 [d] **Fire commissioner's rejection of plans for garage as violating zoning ordinance** is unauthorized. 138Misc232, 244NYS531.
371-13 5PaDist&Co 135.
371-24 8F(2d)871.
371-24½-New. prohibiting storage of automobiles in buildings used as living quarters; 321Mo 969, 13SW(2d)628.
371-25½-New. , prohibiting location of wall too close to adjoining building. NJSup 135A691.
371-29½-New. An ordinance, prohibiting making of fire in open air, is intended to protect persons using streets, lanes, and alleys. Del 143A42.
372-44 92CalA200, 267P886.
374-81 246 IllA405.
377-43 321Mo 969, 13SW(2d)628.
377-45 TexCivA 297SW518. [a] **Whether proposed garage** would violate ordinance held previously for city to determine. TexCivA 297SW518.
377-45½-New. **"Private garage"** within ordinance as to location thereof on lot is a structure or building kept for the storage of motorcars by the owners of private residences, apartment houses, boarding houses, etc., for themselves and their guests or tenants, but not for the general public. TexCommnA 14SW(2d)825.
377-47 132Misc860, 231NYS82; TexCivA 22SW(2d)320; 155Wash618, 285P 656.
377-49 120 Oh500, 166NE583; 129 Or 333, 276P1114.
378-52 88CalA691, 264P281; 118Tex 154, 12SW(2d)546.
378-55 222MoA331, 297SW141, 145 [cit Cyc].
378-60 155Wash618, 285P656 (contract denominating right to handle garbage as franchise does not necessarily make it so).
378-61 222MoA331, 297SW141.
378-62 [b] **Where authorized contractor refuses to remove,** unlicensed person may. 222MoA331, 297SW141.
378-63 Ind 171NE199; 222MoA331, 297 SW141; Oh 164NE711(2dcase); 120 Oh 500, 166NE583; 129 Or333, 276P1114.
379-64½-New. A charter provision granting full power of self-government authorized the construction of an incinerator for the disposal of garbage. TexCommnA 10SW(2d)694.
379-65 Ind 171NE199; 222MoA331, 297SW141. [a] Wash 262P129. [b] 132Misc860, 231NYS82.
379-72½-New. Statute prohibiting maintenance of dumping ground within three hundred yards of public highway held violated. TexCivA 22SW(2d) 320.
379-75 [a] **Ordinances held reasonable.**-CalA 290P519(2dcase).
374-76 164Ga529, 139SE46, 53ALR933. [a] 164Ga529, 139SE46, 53ALR933.
377-47 104WVa138, 139SE640. [c] (2) Garbage incinerating plant is not "public building" requiring submission of plans to city planning commission under Gen. Mun. L. § 51. 130Misc151, 223 NYS454.
377-49 221AppDiv357, 223NYS160.
378-53 See also 104WVa138, 139SE 640.
379-67 Ind 171NE199.
379-77 CalA 290P519(2dcase).
379-79 See also Ind 171NE199.
380-93 25 OhNPNS328.
381-35 NJ 141A672; 144Wash572, 258 P520. But see 166Ga781, 144SE287.
385-61½-New. A city ordinance, placing health inspectors under civil service rules, and requiring examination of them, is void, as in conflict with constitution and code. 149SC449, 147 SE438.
385-64 NJ 141A672. [b] **In North Dakota.**-57ND929, 224NW890.
386-72 [b] **Whether there is fraud in city's acceptance of improvement** is question of fact. IndA 171NE304 (finding of fraud held sufficient).
386-74½ 229AppDiv742, 241NYS629.
386-83 9PaDist&Co 350.
386-84 132Misc349, 230NYS295.
386-85 216Ala206, 112S823.
386-88 216Ala206, 112S823.
388-44 148SC229, 146SE12.
388-59½-New. Ice is within contemplation of statute authorizing home rule city to manufacture anything needed or used by public. TexCommnA 27SW (2d)119.
388-59¾-New. That legislature authorizing city to manufacture electricity, gas or anything needed or used by public did not mention ice does not preclude manufacture thereof. Tex CommnA 27SW(2d)119.
389-87 90PaSuper288.
390-3 330 Ill 97, 161NE133. [a] **Definition in ordinance of laundries** to include those acting as depositories of soiled clothes and ironing them is proper incident to power to regulate. 330 Ill 97, 161NE133.
390-4 330 Ill 97, 161NE133.
390-6 152Md1, 136A41, 50ALR620.
390-10½-New. A laundry is not a nuisance per se. 152Md1, 136A41, 50ALR 620.
390-19 330 Ill 97, 161NE133.
391-54 193NC207, 136SE489.
391-55 92CalA200, 267P886.
392-58½-New. Establishment of municipal market held a municipal affair within meaning of provision in constitution authorizing charter amendments removing restrictions on regulation of municipal affairs not embodied in charters. 62CalA320, 217P538.
392-66 133 Okl 71, 271P162.
392-70 See also 152Wash315, 278P161.
393-95 152Wash315, 278P161.
396-49 [a] **Ordinance setting apart portion of street as public market** constitutes only revocable license or permit, and person so using street acquires no contractual right therein. 133 Okl 71, 271P162.
396-57 110Conn291, 147A804.
396-60 110Conn291, 147A804.
397-67 133 Okl 71, 271P162.
397-72 110Conn291, 147A804 (construction of words).
397-73 193NC207, 136SE489.
399-9 161La320, 108S552.
399-10 [a] **Imposition of excessive fee** on markets held invalid. 161La320, 108 S552.
399-11 161La320, 108S552.
399-29 38 OklCr207, 259P873.
400-45 TexCivA 2SW(2d)1001.
401-49 249NY88, 162NE593; 124 Okl 55, 254P41; 125 Okl 212, 257P286; 128 Okl 17, 261P183.
401-51 CalA 284P962; MoA 17SW(2d) 616; TexCivA 2SW(2d)1001.
401-53 6PaDist&Co 233; TexCivA 2SW (2d)1001.
402-54 CalA 284P962; 6PaDist&Co 233.
402-58 322Mo 342, 15SW(2d)343; 128 Okl 17, 261P183; TexCivA 2SW(2d) 1001.
402-59 TexCivA 2SW(2d)1001.
402-60 125 Okl 212, 257P286.
402-63 101NJEq185, 137A572.
403-64 219Ala511, 122S830; 322Mo

342, 15SW(2d)343; 222MoA1076, 118SW(2d)1082; 128 Okl 17, 261P183; Tex CommnA 12SW(2d)976; TexCivA 28W(2d)1001.

403-65 125 Okl 212, 257P286; 128 Okl 17, 261P182.

403-66 MoA 17SW(2d)616; 81Mont19, 261P876.

403-68 124 Okl 55, 254P41; 128 Okl 17, 261P183.

403-69 MoA 22SW(2d)182.

404-73½-New. A city cannot declare the place of a single individual to be a nuisance in the absence of general regulation applicable to all others of the same class. MoA 17SW(2d)616.

404-77 153Ark99, 239SW724.

404-34 See also 126Me537, 140A382.

406-6 153Ark99, 239SW724; 203 Iowa 576, 213NW262; 204 Iowa1246, 214NW 879, 54ALR474. See also 153Ark99, 239 SW724.

406-7 MoA 17SW(2d)616.

406-11 203 Iowa576, 213NW262.

407-24 125 Okl 212, 257P286. But see TexCivA 28W(2d)1001.

408-44 [a] **Resolution containing particular description of property** is necessary to assess property with cost of removal of weeds. CalA 284P479.

408-48½-New. Defect in mode of assessment cannot be reached in proceeding for alternative writ of review. CalA 284P479.

409-65 81Mont19, 261P876; 89PaSuper 252.

409-72 101NJEq185, 137A572.

410-73 TexCivA 48W(2d)616, 618 [cit Cj].

411-20 179Ark266, 15SW(2d)411.

411-23 Erratum.-Under "Kan.-" strike out bracketed phrase "[aff 211 U. S. 11, 29 S Ct 1, 53 L. ed. 68]."

411-27 [b] **Fact that club owns property in town** does not give it right to violate penal ordinance regarding operation of poolroom. 169La284, 125 S125.

412-33½-New. Ordinance prohibiting playing of billiards or pool in any club held invalid as beyond power to regulate and suppress billiard and pool tables and regulate clubs. Utah 292P 249.

413-65 34PortoRico 19 (legislature without power to regulate or delegate power to municipality).

414-76 135Misc845, 240NYS38; 150 Wash203, 272P517.

414-77 17F(2d)202.

414-83 321Mo 370, 13SW(2d)40.

415-84 See also 264Mass460, 163NE82.

415-87 321Mo 370, 13SW(2d)40; 87Pa Super 1.

415-88 87PaSuper84.

416-89 87PaSuper84. [a] **Excavation of rock and gravel by owner of land** cannot be prohibited except when necessary to protect legal rights of others. 207Cal 395, 279P136.

417-98 17F(2d)202.

417-9 17F(2d)202.

419-37 [b] 241 IllA71.

420-58 319Mo 562, 4SW(2d)773; 5Pa Dist&Co 754.

420-65 143 Okl 62, 266, 287P406. [b] **Water supply.**-264Mass460, 163NE82. [c] **Airports** may be operated in absence of charter prohibition. 143 Okl 62, 266, 287P406.

421-67 [a] **In Oklahoma.**-142 Okl 38, 285P92 (electric light and power plant).

421-70½-New. In some jurisdictions neither constitution nor statute specifically prescribes purpose for which profits of municipally owned utility shall be appropriated. 140 Okl 240, 285P80.

421-72 [a] **In Oklahoma** neither constitutional provision granting right to municipal corporations to engage in any business same as persons nor any statute prescribes rates or price that cities may charge for their products. 138 Okl 295, 281P126.

421-73 137 Okl 222, 278P617; 140 Okl 165, 282P332 (rates not prescribed by statute or constitution). [b] **In Oklahoma.**-142 Okl 29, 285P59; 142 Okl 177, 286P343; 142 Okl 176, 286P345.

421-75½ BC [1928] 1DomLR704.

421-78½-New. In some jurisdictions rates to be charged by municipally owned utility are not expressly fixed by constitution or statute. 140 Okl 240, 285P 80.

422-94 11PaDist&Co 591.

423-12 337 Ill 200, 169NE22, 66ALR 834.

423-28 16F(2d)763.

423-30 16F(2d)763.

423-31 16F(2d)763; 39F(2d)822.

424-17 [a] **Plaintiff should not pay costs of abortive trial** because she knows of relationship of jury but costs should abide event of new trial. Sask [1930] 3DomLR972.

425-58½-New. Grant of regulatory power must be strictly construed, and cannot be extended by inference. 26 F(2d)912.

425-71 16F(2d)763 (dictum).

426-80 280US145, 50SCt71, 74L ed234.

427-96 [a] 136Misc569, 240NYS316.

429-28 144Wash572, 258P520.

429-29 144Wash572, 258P520.

429-30½-New. Where a state board of health has specified what classes of persons shall be exempt from quarantine regulations, a municipality may not provide for exemption of others. 144 Wash572, 258P520.

430-53 170 Iowa437, 152NW610 (town ordinance held against public policy in view of repeal of similar statute).

433-18 126Me235, 137A398.

435-69 232 IllA246.

435-80 [a] **Powers of common council.**-241Mich139, 216NW461. [b] **Title in fee to right of way not necessary.**-241 Mich139, 216NW461.

436-84½-New. As fairly incidental to power to use tramways for carriage of passengers and goods, municipal corporation held authorized to deliver by cart or otherwise to any place designated by consignee such goods as were brought on tram lines. Eng 75LJCh 330.

436-97 316Mo 9, 289SW838.

436-98 291Pa363, 140A130.

436-1 316Mo 9, 289SW838.

436-2 316Mo 9, 289SW838; 291Pa363, 140A130. [a] **Ordinance for closing of bakeries after 9 A. M. Sunday** held uniform, classification being held reasonable. 316Mo 9, 289SW838.

436-2½-New. Ordinance forbidding operation of laundry between midnight Sunday and 6 o'clock following Monday is void. 152Md1, 136A41, 50ALR 620.

438-36 32F(2d)274.

438-44 151Wash665, 276P886.

438-52 217Ala444, 116S519.

438-54 [b] **Notice from health department to owner held essential** where sanitation expert seeks to recover upon implied agreement to clean privy vaults, under ordinance. 173Minn612, 216NW 534.

439-58 89PaSuper272.

439-72 80CalA629, 252P746. [b] **Conduct of establishments.**-Municipality can pass reasonable ordinance compelling proprietors of undertaking and embalming establishments to conduct them in as sanitary and inoffensive manner as possible, without defeating necessary purpose of maintenance. 34Ariz495, 272 P923.

439-73 80CalA629, 252P746.

440-94 167La674, 120S47.

440-97 116Tex472, 294SW832. [i] **City may forbid use of public square** to passenger vehicles as place of business. 116Tex472, 294SW832. [j] **Power cannot be enlarged by language** in another part of statute. 116Tex446, 294SW829.

441-2 116Tex446, 294SW829; 116Tex 509, 294SW831; 116Tex513, 294SW834.

441-3 116Tex509, 294SW831.

441-6 116Tex446, 294SW829. [a] **Ordinance in effect** forbidding use of streets and highways outside of city held invalid. 116Tex446, 294SW829.

441-20½-New. An ordinance forbidding parking on a certain street between designated avenues is valid exercise of police power. 8PaDist&Co 708.

442-57½-New. An ordinance, prohibiting advertisement of sale of goods without stating person advertising sale is dealer in goods, has been held within powers granted board of aldermen. 320 Mo 865, 8SW(2d)1001.

442-59 Conn 152A297; 168La172, 121S 613.

443-65 32 OhA129, 166NE599.

443-77½-New. The fact that a zoning ordinance does not declare violation of its terms shall constitute a crime, and does not provide any penalty for violation, does not render the ordinance illegal, or prevent its enforcement through an appropriate civil remedy. 93CalA 277, 270P270.

443-79 [a] **Ordinance prohibiting nothing** but merely defining certain terms creates no offense and judgment thereon cannot stand. 86Colo 555, 283P538.

443-80 Wis 229NW43.

444-95 132Misc307, 230NYS187; 192 Wis585, 213NW335.

445-18½-New. Offense under ordinance is not made criminal or quasi criminal because "punishable by fine." 192Wis 585, 213NW335.

445-18½-New. Nature of action for violation of ordinance is not changed by proceeding in name of city or state. 192Wis585, 213NW335.

445-18¼-New. Commencement of proceeding for violation of ordinance by warrant and complaint under oath does not make proceeding criminal. 192Wis 585, 213NW335.

445-18½-New. Nature of relief sought determines whether proceeding under ordinance is civil or quasi criminal. 192 Wis585, 213NW335.

445-18¾-New. Failure to entitle proceeding in name of people may be considered but is not conclusive in determining whether it is criminal or civil action. 228AppDiv279, 239NYS206.

446-28 But see 86Mont297, 283P430 (violation of ordinance constitutes offense under statute).

448-77 317Mo 907, 296SW993, 54ALR 1082; NJ 147A555(2dcase); 12PaDist& Co 397. [a] **Failure to attempt compliance with ordinance requiring permit** does not preclude defense based on unconstitutionality of ordinance as delegating arbitrary power to board. 317 Mo 907, 296SW993, 54ALR1082.

449-87 181Ark377, 26SW(2d)70; 334 Ill 431, 166NE115.

449-88½-New. City held not estopped from prosecuting for violation of building code by issuance of sewer and plumbing permit. 103NJL232, 136A600.

449-99½-New. Issuance of permit by health department does not estop prosecution for failure to obtain building permit. 103NJL232, 136A600.

450-22 228AppDiv279, 239NYS206.

451-26 228AppDiv279, 239NYS206.

451-34 78Mont114, 252P803.

451-35 220Ala286, 125S387. [a] **Detroit recorder's court** still retains jurisdiction of ordinance violations despite merger with police court (Pub. Acts [1919] No. 369). 238Mich78, 213NW204.

452-53 Utah 279P497.

452-64½-New. Where right is given by statute or ordinance to a particular class of persons for their special protection, liability is created in favor of such particular class, as against any person violating such right, which liability may be enforced by means of appropriate civil remedy. 93CalA299, 270P280.

453-72½-New. Statutes in some jurisdictions require criminal actions to be brought in name of people. 228AppDiv 279, 239NYS206 (applicable to action in Buffalo City court).

454-8 But see 255 IllA216.

457-59 [b] 105NJL515, 146A652.

458-93½-New. Prosecutions under Milwaukee ordinances may be commenced by summons without oath or warrant with oath. 192Wis585, 213NW335.

459-2 [a] 168La436, 122S282.

459-7 172Minn130, 214NW778.

459-14 OklCr 287P795.

460-42 [b] **Indorsement of complaint and warrant as though state were plaintiff** in justice's court for maintaining nuisance in violation of city ordinance is mere irregularity not affecting court's jurisdiction. 177Minn617, 225NW286.

461-43 [c] **Affidavit held insufficient.**-168La436, 122S282.

461-56 317Mo 907, 296SW993, 54ALR 1082; 23 OhA109, 155NE393. [a] 173 Minn93, 216NW535; 157Miss797, 128S 557. [c] (2) If accused might be guilty of everything charged without violating

ordinance, affidavit is insufficient. 23 OhA109, 155NE393.
461-58 [a] 23 OhA109, 155NE393.
461-59 [a] 176Minn151, 222NW639(2d case); 177Minn617, 225NW286. [b] NJSup 142A310; 105NJL515, 146A652.
462-60 NJSup 150A253.
462-64 [a] **Indictment for violating ordinance** regulating jewelry auctions, in charging offense, is to follow language of statute. 157Md185, 145A492.
462-67 317Mo 907, 296SW993, 54ALR 1082.
462-69 103NJL232, 136A600.
463-80 [a] **Incorrectly stating place of** accident in charge for failure to report accident does not make charge insufficient so long as accident occurred within city limits. 28 OhA178, 162NE617.
463-82 157Md185, 145A492. [a] (3) Count which showed that auction sale was not of goods of merchant whose stock of jewelry could be sold was not required to contain further negative to show that seller did not hold trader's license. 157Md185, 145A492.
463-87 NJ 149A61.
464-90 22AlaA131, 113S469; 133Misc 728, 234NYS89.
464-91 168La436, 122S282.
464-95 [b] **Where ordinance has been amended** title is sufficiently pleaded by stating title of original ordinance and adding "and the amendments thereof." NJ 149A61.
464-11 See also 93CalA277, 270P270 (failure of complaint affirmatively to show jurisdictional prerequisites to adoption of zoning ordinance held not to prevent recovery). [b] 22AlaA131, 113S469.
465-26 [a] **Complaint held not duplicitous.**-MoA 25SW(2d)142.
465-27 [a] 175Minn222, 220NW611.
465-41 221MoA195, 300SW308.
465-42 177Minn617, 225NW286. [a] (5) Pleading ordinance unnecessarily may be ignored as surplusage. Wash 262P129.
466-44 [b] (2) Duplicity of complaint is waived by failure to take objection at or before trial. 175Minn222, 220NW 611.
466-67 147Miss507, 112S673.
467-93 147Miss507, 112S673.
467-6 Mont 285P178.
468-12 241 IllA71.
468-46 [b] 245 IllA304.
469-56 157Miss797, 123S557.
469-67 [a] (1) 177Ark291, 6SW(2d) 294; 173Minn93, 216NW535; Utah 292 P205 (permitting animals to drink from source of water supply). (2) 36GaA96, 135SE518; 11PaDist&Co 125. (6) Drunken driving. 108TexCr597, 18W (2d)894. [b] (2) 147Wash458, 266P192. (7) To overcome presumption of innocence. 27 OhNPNS362. [g] **Breach of zoning ordinance held shown by evidence.**-222AppDiv297, 226NYS252.
470-69 35PortoRico 130 (one credible witness sufficient).
471-98 22AlaA545, 117S603.
471-8 But see 245 IllA304.
472-48 [a] (5) Existence of ordinance. 195NC425, 142SE328.
472-49 108TexCr597, 18W(2d)894.
473-64 108TexCr597, 18W(2d)894.
473-74 Utah 273P969.
473-80½-New. Where ordinance provided that "each day" would constitute a separate offense, conviction for separate violations on the same day is erroneous. 166La689, 117S775.
473-80¼-New. Motions in arrest of judgment after conviction may urge affidavit sets forth no offense against ordinances. 169La582, 125S625.
473-80¾-New. Where second count of complaint was abandoned at trial, general verdict supported judgment on first count. MoA 25SW(2d)142.
473-4½-New. In some jurisdictions the court may impose punishment in addition to that imposed by the jury. 21 AlaA394, 108S650.
474-14 NJSup 139A423.
474-15 NJSup 139A423.
474-17 105NJL515, 146A652.
475-34 21AlaA374, 392, 108S768.
476-55 21AlaA394, 108S650.
476-59½-New. Fine for violation of ordinance may be enforced by imprisonment as execution against body of offender, not as punishment. 192Wis585, 213NW335.
476-61 Utah 284P318 (interpretation giving effect to both statute and ordinance should be made, rather than invalidate ordinance or deny city power to specify place).
477-92 220Ala286, 125S387.
478-2 175Minn222, 220NW611.
478-4 33NM222, 264P956, 957 [quot CJ].
478-7½-New. Where defendant has treated prosecution as civil action, he is not prejudiced by holding that proceeding was civil and city authorized to appeal. 192Wis585, 213NW335.
478-10 202 Iowa372, 210NW464; Okl Cr 276P700.
478-11 33NM222, 264P956, 957 [quot CJ].
478-15 33NM222, 264P956, 957 [quot CJ].
479-26 MoA 12SW(2d)76.
480-48½-New. A writ of review challenges judgment of conviction under municipal ordinance for jurisdictional defects only. Utah 273P969.
481-95 NJSup 135A549.
481-4 147Miss507, 112S673; 35Porto Rico 130.
482-20½-New. , or allege diminution of the record. 96PaSuper375 (to show zoning ordinance had been offered in evidence).
482-24 23AlaA451, 126S616(1stcase).
483-40 22AlaA77, 112S813.
483-59½-New. Irregularity, error, or insufficiency of verdict is not ground for relief on writ of review. Utah 273 P969.
483-59¼-New. Where the complaint was sufficient to invoke jurisdiction of the court, the action of the court in holding it sufficient cannot be reviewed on writ of review. Utah 273P969.
483-60 86Colo 555, 283P538.
483-64 169La582, 125S625; 133Misc 728, 234NYS89.
484-88½-New. On writ of review the complaint will be examined only to determine whether it is sufficient to invoke jurisdiction of the trial court. Utah 273P969.
484-88¼-New. Where on application for writs of certiorari, mandamus and prohibition respondent judge makes no return to rule nisi supreme court is justified in accepting facts stated in petition as admitted. 169La717, 125S 865.
485-8 [b] **Neither assignment of errors nor appellant's brief** being filed, judgment will be affirmed. 23AlaA307, 124 S667(2dcase).
486-25½-New. Failure of the circuit court to impose sentence does not require reversal, remanding for sentence being sufficient. 22AlaA545, 117S603.
487-66 221MoA195, 300SW308.
487-76 22AlaA545, 117S603.
490-13 See also Utah 289P88.
491-24 [b] (5) In Porto Rico, Act (1924) No. 11 did not change number of members of municipal assemblies of first class from thirteen to eleven except for subsequent elections. 33Porto Rico 707.
491-30 220MoA1129, 296SW1034, 1036 [citCyc].
491-35 125Kan92, 262P579.
492-36 Utah 289P88.
492-43 [d] **For a discussion of powers and duties** at organization meeting see 9PaDist&Co 183.
494-69 Ind 166NE270.
495-80 154Md40, 139A551.
497-14 LaA 129S433.
497-16 TexCivA 18W(2d)373.
498-36 17F(2d)70.
499-51 216Ala318, 113S56, 58 [citCyc].
499-60 216Ala318, 113S56.
500-67½-New. A statute relating to the procedure in calling special meetings must be strictly construed. 153Miss 212, 121S859.
500-72 153Miss212, 121S859.
500-79½-New. or was physically unable to attend, Nebr 231NW751.
501-7 165La1003, 116S488.
502-13 But see 153Miss212, 121S859.
502-14 216Ala318, 113S56.
502-16 33PortoRico 343; TexCivA 290 SW792.
503-27 See also 29Hawaii392.
503-32 29Hawaii392.
503-40½-New. Board of commissioners, in absence of mayor, may pass a valid street improvement resolution or ordinance. TexCivA 290SW792.
505-64½-New. **Refusal to vote.** Although general rule is that, where no one dissents, those not voting are considered as voting in affirmative, 102NJL 508, 134A614.
505-64¼-New. the rule is inapplicable where members of council other than those voting affirmatively "refuse to vote for the resolution." 102NJL508, 134A614.
505-69 218Ky429, 291SW782; 131Misc 752, 228NYS204.
506-76 Utah 289P88.
506-77 33PortoRico 707.
506-78½-New. Unusual powers given minority of administrative board to prevent body from functioning should not be extended beyond what statute requires. 221AppDiv646, 224NYS544.
506-83 235Ky595, 31SW(2d)924; NJ 144A123; 33PortoRico 343. [d] **Counting as affirmative those who "refused to vote for resolution"** who were of same number as those who voted for resolution is erroneous. 102NJL508, 134A 614.
506-83 Oh 171NE336.
506-86 See also 33PortoRico 273. [f] **Where three voted for ordinance, one against, and one refused to vote,** ordinance held passed by two-thirds vote. TexCivA 20SW(2d)808.
508-5 202 Iowa701, 210NW947, 49ALR 705; 216Ky483, 288SW337; 236Mich 417, 210NW322.
508-18 222Ky658, 1SW(2d)1043.
509-25 220MoA798, 278SW798; 221 MoA853, 288SW88; 9PaDist&Co 183; Utah 289P88. [a] (1) TexCivA 290SW 792. [f] **In Ohio.**-29 OhA386, 163NE566.
509-26 See also Utah 289P88.
510-33 [c] **Statutory provisions as to refusal to vote.**-29Hawaii392.
510-34½-New. Two members of council present and not voting on ordinance are to be counted as acquiescing in what was done. 216Ky483, 288SW337.
513-87 220Ky808, 295SW1064; 231Ky 65, 21SW(2d)127.
513-83 Mo 25SW(2d)466. [a] **Power of board of trustees to correct record of proceedings.**-235Ky595, 31SW(2d) 924. [b] **Records held sufficient.**-339 Ill 638, 171NE737.
514-89 339 Ill 638, 171NE737.
514-99 TexCommnA 23SW(2d)300.
515-12 153Miss212, 121S859.
515-15½-New. Where resolution is filed with proper officers immediately on adoption failure to immediately transcribe it on record does not make it void. 339 Ill 638, 171NE737.
515-19 255 IllA67.
516-45½-New. Paving company has right to rely on regularity of records and proceedings of city council. Tex CommnA 23SW(2d)300.
516-46 255 IllA67; TexCommnA 23 SW(2d)300. See also 226Ky1, 10SW (2d)467.
517-48 220Ky132, 294SW1076; 229Ky 260, 16SW(2d)1052.
517-55 325 Ill 497, 156NE292; 338 Ill 228, 170NE308 (where records already approved); 229Ky213, 16SW(2d)1026; 119 Or543, 250P235.
517-58 [a] **Employment of plaintiff** can only be shown by resolution appearing in record and nunc pro tunc entry cannot be compelled. 229Ky260, 16SW(2d) 1052.
517-58½-New. Strict and technical rules applicable to judicial records do not apply to correction of municipal records. Mo 23SW(2d)167.
518-64 29Hawaii62, 67 [citCyc]; 80 Mont515, 261P264.
518-66 204 Iowa58, 214NW679.
519-78 29 OhA386, 163NE566; 193Wis 232, 213NW873, 52ALR1053.
519-79 29 OhA386, 163NE566; 193Wis 232, 213NW873, 52ALR1033. [a] (3) "A permanent rule of conduct or government." 193Wis232, 213NW873, 52ALR 1033. (4) "Regulation of permanent general nature." 193Wis232, 213NW 873, 52ALR1033.
519-81 164La204, 113S818.
519-82 225AppDiv313, 233NYS63.
519-82½-New. **Only difference between**

resolution and ordinance is that one is required to be published subsequent to passage, and the other is not. 193Wis 232, 212NW873, 52ALR1033.

519-86 Cal 293P67.

520-91½-New. Where the charter of city is silent as to the manner in which legislation may be enacted it may be done by resolution or ordinance. 229Ky 375, 17SW(2d)215(2dcase).

520-2 32F(2d)274; 164La204, 113S818; TexCivA 297SW904; TexCivA 138SW(2d) 184.

520-3 [d] **Ordinance will be declared valid** where statute and charter requirements are substantially complied with. TexCivA 297SW904.

520-4 [a] **Purpose of ordinance** need not be stated in caption. TexCivA 297SW 904.

521-20 CalA 288P33; 334 Ill 431, 166 NE115; 233Ky156, 25SW(2d)41; NJSup 147A746; NJSup 149A540; 86PaSuper 337.

521-21 NJSup 149A540.

521-23 243NY401, 153NE849.

521-23½-New. Statute defining requisites of title of ordinances does not apply to St. Louis. 316Mo 9, 289SW838.

521-23½-New. However, statutes apply only to cities within class embraced in particular statute. 316Mo 9, 289SW838.

521-26 [b] **Not invalid under the rule.**-Pa 151A883.

522-29 34F(2d)303; 290Pa117, 137A 664; Pa 151A883.

522-31 [a] (12) 91CalA257, 266P1015. (19) Providing for Sunday closing. 163 La409, 111S889. (20) Regulating sales of milk and prohibiting sales of impure milk. 166Ga266, 142SE891.

522-35 291Pa363, 140A130. [a] (11) 24 OhA251, 157NE410 (authorizing lease, sale of electric light plant, and granting franchise).

523-37 NJSup 148A206(1dcase); NJ Sup 149A540; TexCivA 297SW904.

523-42 12PaDist&Co 234 (particular sections held void). [a] (6) Title "Gas Franchise" held sufficiently to state purpose to grant right to supply with natural gas. TexCivA 297SW904. (7) Title of ordinance stating purpose to authorize execution of contract for leasing of subway to be constructed is insufficient, where contract authorized involves grant in excess of leasehold. 92PaSuper219.

523-46 233Ky156, 25SW(2d)41 (incomplete caption); Mont 285P178; 143 Okl 62, 266, 287P406.

523-47 291Pa363, 140A130.

524-48 230Ky453, 19SW(2d)1073; 176 Minn151, 222NW639(2dcase).

524-50 Mont 285P178 (prohibiting possession of liquor); Nebr 231NW751.

524-59½-New. Regulation closing on Sunday. 163La409, 111S889.

525-65½-New. Creating a franchise to construct, own, and use waterworks; 230Ky453, 19SW(2d)1073.

525-69 220Ky148, 294SW1025; TexCivA 138SW(2d)184. [a] (5) Enacting clause need not be at beginning. TexCivA 297SW904.

525-72 TexCivA 148SW(2d)901.

525-73 291Pa363, 140A130.

525-76½-New. Police ordinance need not expressly state that it is enacted in pursuance of police power of municipality. 321Mo 969, 13SW(2d)628.

526-78 321Mo 969, 13SW(2d)628.

526-97½-New. Suit cannot be maintained on ordinance illegally passed. 215Ky52, 290SW1032.

526-99 35 OhA243, 172NE159 (retirement of a councilman before adjournment).

526-1 207Cal 134, 277P308; 82CalA324, 255P538; 87Colo 73, 285P771; 224 Ky298, 6SW(2d)236; NJSup 137A217. [a] In New Jersey.-NJSup 137A217.

527-5 [a] **City council before taking action on legislative questions** may receive petitions and remonstrances from citizens to be affected. Cal 288P673.

527-5½-New. Valid ordinance must be enacted by governing body when acting in official capacity. 195NC425, 142SE 328.

528-25 [b] **Applicable only to ordinances granting franchise.**-155Wash618, 285P656 (ordinance giving one person exclusive right to handle garbage held not to grant franchise).

528-35 5KyOp25. But see 169Ga649, 151SE513.

529-44½-New. Adoption of a resolution by unanimous vote of all members of the council dispenses with the requirement of three readings. 174Ark98, 294 SW411.

529-56½-New. Ordinance to condemn property held one of a permanent nature. 49 OhS1463, 31NE606.

529-56⅓-New. Ordinance opening and extending street held one of permanent nature. 49 OhS1463, 31NE606.

529-56¼-New. Ordinance to improve street opened by condemnation held one of a permanent nature. 49 OhS1463, 31 NE606.

530-69 NJSup 147A741(2dcase).

530-75 29 OhA171, 163NE204.

531-5 [a] **Resolution cannot be validated by less formal action than should have been originally made.**-135 Okl 253, 275P235.

531-8 TexCivA 297SW904. [a] **Ordinances may be ratified** as to time or form of adoption, unless vested rights are interfered with and may be adopted by reference. TexCivA 297SW904.

531-12 245NY537, 157NE848. [a] **"Electors" signing petition.**-245NY538, 157NE849.

532-13 See also Me 151A426.

532-15½-New. The board of commissioners of the port of New Orleans is a political entity, empowered to pass ordinances without approval by the New Orleans commission council. 164La369, 113S879.

532-17 130 Okl 289, 267P261, 263.

532-20 Me 151A727 (appropriating money).

532-21 9PaDist&Co 577; 11PaDist&Co 524. See also 249NY480, 164NE553. But see 249Mich52, 227NW743.

533-29 220MoA602, 287SW879. [a] **This rule is applicable** if effect of approval giving year 1925 instead of 1926 was to destroy affirmative approval. 220 MoA602, 287SW879. [b] **Under Tucson charter,** ordinance receiving votes of five members of council need not be returned for repassage after mayor's failure to approve it. 34Ariz495, 272P923.

533-32½-New. Where the original resolution of a city council was transferred to the mayor and returned by him without his approval, it has been held that the signature of the mayor two months thereafter to a copy of the resolution entered in the minute book had no legislative value. NJSup 144A818.

533-37 [b] (4) "Resolution" or "order" is informal enactment of temporary nature, and is not law or original exercise of governmental duty, and does not require written approval of burgess. 294 Pa549, 144A733.

534-47 130 Okl 289, 267P261, 263.

534-47½-New. An ordinance for the submission to the electors of an amendment to the charter does not require approval of the mayor. 32 OhA189, 166 NE907.

534-63 220MoA602, 287SW879.

535-73 34Ariz495, 272P923.

536-94 [a] **Veto held effective.**-249NY 480, 164NE553.

536-1 But see 249NY480, 164NE553.

537-11½-New. Ordinance allowing fee to attorney, not passed twice before being sent to mayor, is invalid, although passed over veto. 218Ky52, 290SW1032.

537-13 NJSup 144A818.

537-23 244Mich480, 221NW622; MoA 248SW(2d)218.

538-24 MoA 248SW(2d)218 (signature as "mayor pro tem" held not to invalidate ordinance though there was no such officer).

538-40 260Mass594, 157NE700.

538-41 See also 244Mich480, 221NW 622.

538-42 117Nebr47, 219NW385.

539-43 244Mich480, 221NW622.

539-51 338 Ill 228, 170NE308 (need not be fully transcribed to render ordinance effective).

539-55½-New. Oversight of a clerk in copying an ordinance on a journal in leaving out essential elements of the title does not invalidate the ordinance. 217Ky452, 289SW1091.

539-64 But see 26F(2d)640 [certiorari den 278US654, 49SCt179(6thcase), 78 LEd564]. [a] (3) Other instances. 338 Ill 228, 170NE308.

540-66 253NY462, 171NE708.

540-66½-New. Property owners are entitled to notice of proposed zoning ordinance. 82CalA324, 255P538.

540-70 46Philippine171.

541-75 249NY480, 164NE553.

542-96½-New. **Charter provision requiring publication of resolutions** applies only to such as are contemplated by charter provisions or statutory enactment not in conflict with charter. 125 Okl 233, 257P311.

542-5½-New. 249NY480, 164NE553.

543-18 126Kan764, 271P270.

543-26 But see 82CalA324, 255P538; 265Mass41, 163NE653.

543-28½-New. Where publication is required, it means the whole ordinance. 46Philippine171.

544-35 244Mich480, 221NW622.

544-48 See also 244Mich480, 221NW 622.

545-66 See also 129Minn383, 152NW 777.

545-68 291Pa363, 140A130.

546-13 81Mont19, 261P876; Vt 151A 659.

546-13½-New. **Ordinance of borough** enacted pursuant to statute may be questioned in a court of equity. 6PaDist&Co 324.

546-13½-New. The validity of an ordinance is not affected by the fact that the city operates under the home rule charter. 117Tex256, 18SW(2d)596.

546-13¼-New. An ordinance adopted by a city organized under general law is subject to and controlled by general law. 207Cal 134, 277P308.

546-13½-New. A resolution placing the collection and disposal of garbage under the superintendent of public utilities has been held not void, where the mayor voted for an ordinance creating a department with supervision of all the city's utilities, and voted to instruct utilities commission to appoint a superintendent, although the mayor voted against confirmation of the person appointed. Tex CivA 108SW(2d)428.

546-13⅓-New. **Ordinance may by reference adopt provisions of statutes and statute need not be set out in verbatim.** Wis 229NW43.

547-18 215Ala532, 112S109; 174Ark 486, 295SW708; 95CalA762, 273P826; 207Cal 134, 277P308; 91CalA257, 266P 1015; 93CalA277, 270P270; 102CalA299, 283P298; 110Conn130, 147A513; Fla 128S864; Fla 129S330; 326 Ill 58, 156 NE791; 327 Ill 106, 158NE451; 334 Ill 431, 166NE115; 230Ky216, 18SW(2d) 992; 166La689, 117S775; 163Md156, 138 A7; 319Mo386, 48W(2d)427; 323Mo 1170, 21SW(2d)762; 81Mont19, 261P 876; NJSup 142A259; 123 Or180, 261P 895, 58ALR665; 129 Or333, 276P1114; 7PaDist&Co 255; 12PaDist&Co 234; 14 PaDist&Co 127; 158Tenn407, 15SW(2d) 1; TexCommnA 23SW(2d)295; Wash 262P129; Wash 290P1010; 192Wis585, 213NW335.

548-21 215Ala532, 112S109; 95Fla914, 117S793; 38BC92, [1927] 1DomLR446 [1926] 3WestWkly781, [1927] 3DomLR 909, [1927] 2WestWkly684.

548-24 215Ala532, 112S109; 327 Ill 106, 158NE451.

549-28 148SC229, 146SE12.

549-33 215Ala532, 112S109.

549-36 324 Ill 476, 155NE275.

551-60½-New. ; **zoning ordinances.** 89PaSuper548.

551-68½-New. ; creating fire limits and prohibiting inflammable buildings therein. 215Ala532, 112S109.

552-70 31 OhA311, 165NE311.

552-73 166La689, 117S775.

552-74 81Mont19, 261P876.

552-78 98PaSuper265.

552-84 [b] **Rule inapplicable.**-NJ 141 A672.

553-88 Ariz 281P947.

553-94 NJ 146A318(2dcase).

553-95 TexCivA 291SW660 (ordinance held not validated).

553-99½-New. **Ordinance within charter powers, but violating statute prohibiting tax on certain occupations, is not**

validated by statute validating city charters. TexCivA 291SW660.

553-2½-New. In Saskatchewan by-law passed without compliance with condition precedent is not validated by statute curing defects of form or substance in proceedings prior thereto. [1929] 4 DomLR958.

554-13½-New. Validity of provisions of ordinance not involved in suit need not be determined. 326 Ill 58, 156NE 791.

554-13¼-New. In suit to enjoin prosecution under alleged invalid ordinance, the only necessary parties are those threatened and enforcing officers. Tex CivA 300SW970.

554-13¼-New. The remedy of a person who is aggrieved by an ordinance is to resist its enforcement and thus contest its validity. NJSup 142A359.

554-13½-New. Applicant, by application for modification of zoning ordinance and recourse to board of appeals recognized validity and cannot assert its unconstitutionality. 111Conn616, 151A 183.

554-16 [a] **Certiorari is not maintainable** to challenge validity of ordinance imposing license unless conviction is shown. NJSup 139A426.

554-18 NJCh 147A502; NJSup 136A 415. [c] **When not to operate as stay.**-NJSup 136A415.

555-28½-New. In Porto Rico, the sole remedy for procuring annulment of an ordinance is the writ of certiorari. 33 PortoRico 348.

555-37 339 Ill 315, 171NE289.

555-39 230Ky453, 19SW(2d)1073 (citizen need not first make demand on municipal authorities). [a] **Petition held insufficient.**-230Ky453, 19SW(2d)1073.

555-50 [a] **Limit of power.**-50Philippine686.

555-52 50Philippine686.

555-53½-New. Appeal to the chief of the executive bureau is the proper remedy to correct an error committed by the provincial board. 50Philippine686.

555-54 NJSup 142A760. [b] (2) **In** contest over franchise rights by competing companies, attacks on ordinances granting franchises held not objectionable as collateral attacks. TexCivA 297SW904. [c] **Failure to review by certiorari** adjustment board's order refusing building permit precludes one from collaterally attacking zoning ordinance. 198NC70, 150SE674.

556-56½-New. Validity of municipal ordinance may be collaterally attacked, where ordinance is void and not voidable. 171Ark839, 286SW964.

556-57 Fla 128S864; 335 Ill 584, 167 NE779 (cannot question validity of ordinance as to six-wheeled vehicles where charged with violation as to four-wheeled vehicles); 163La409, 111S889; 251NY343, 167NE464. [e] **Property owners not affected by alleged irregularity** cannot attack validity of by-law on such ground. Mass 172NE867.

556-58 277US163, 48SCt502, 72Led833, 62ALR45; 163La409, 111S889.

556-59½-New. A building zone ordinance cannot be attacked as confiscatory by one who was notified of the illegality of his act in constructing a mortuary. 80CalA629, 252P746.

556-60 31F(2d)466; 20PaDist494.

557-68½-New. Any citizen has sufficient right and interest to question constitutionality of ordinance which interferes with competition in sale of fresh meat. 34PortoRico 19.

557-68¾-New. As long as property can be removed from restrictions imposed by zoning ordinance, owner cannot ask to have ordinance declared unconstitutional. 299Pa402, 149A639.

557-70 326 Ill 58, 156NE791. See also 244Mich480, 221NW622.

557-71 [a] **One seeking mandamus to compel issuance of permit** to erect gasoline station recognizes validity of ordinance requiring permit. TexCivA 29 8SW(2d)437.

557-73 Man [1930] 1DomLR834 (partial invalidity).

559-4 [e] **Granting of order quashing by-law deferred** in view of unusual conditions and emergency, where city passed by-law authorizing borrowing money to relieve housing conditions, without preliminary by-law applying Housing Act to city. 16 OntWN386.

560-26 [a] (2) Extrinsic evidence is admissible to show that early closing by-law was passed without petition. Sask [1929] 4DomLR958.

560-34 [a] **Amendment of ordinance repeals provisions** that are changed by and rendered repugnant to amendatory act. 334 Ill 431, 166NE115.

561-35 93CalA299, 270P280.

561-40 [a] **City's power to amend zoning ordinance** can only be exercised when public interest requires it. 339 Ill 315, 171NE289.

561-44½-New. Notice of amendment of building zone resolution may authorize resolution eliminating provision relating to alteration of premises. 137Misc173, 241NYS539.

561-44¾-New. Statute prohibiting modification of zoning ordinance without notice and opportunity for hearing is inapplicable to passage of original ordinance. Mass 172NE867.

561-46 324 Ill 476, 155NE275; 164La 564, 114S159.

562-55½-New. An ordinance purporting to amend an ordinance which was repealed has been held not void, but merely an amendment of the original paragraph created by the repealing ordinance. 334 Ill 431, 166NE115.

562-60 [a] **Ordinance held not attempt to amend** prior ordinance without setting out entire ordinance. 166La689, 117S775.

562-73½-New. Repeal of an ordinance, and substitution of other provisions in place thereof, amount to an amendment of such section. 334 Ill 431, 166NE115.

562-75 33PortoRico 265, 267 [citCyc].

562-77 33PortoRico 265, 267 [citCyc].

562-82 13PaDist&Co 443, 445 [quot CJ].

562-84 177Ark1097, 9SW(2d)323; 151 Va801, 145SE257.

563-88½-New. After court has held ordinance invalid municipality may abrogate or annul it. 35PortoRico 509.

563-99 125Kan741, 265P1101.

564-2 [b] **Statute prohibiting repeal of zoning ordinance without notice and opportunity to be heard** is inapplicable to original passage of zoning by-law. Mass 172NE867.

564-3 TexCivA 31SW(2d)843.

564-4 246 IllA152.

564-5 164La204, 113S818, 820 [citCyc].

564-12 [a] **Use of word "annul" instead of "repeal."**-Municipal ordinance "annulling" prior ordinance and "leaving ordinance without legal effect" is valid repealing ordinance. 33PortoRico 265.

564-19 103NJL310, 135A788; TexCivA 28SW(2d)178.

565-20 177Ark1097, 9SW(2d)323; 334 Ill 431, 166NE115; 218Ky794, 292SW 320; 103NJL310, 135A788; 33NM230, 264P962; 13PaDist&Co 443, 445 [quot CJ].

565-21 103NJL310, 135A788.

565-24 225Ky784, 10SW(2d)305.

565-25½-New. Ordinance held not repealed by implication. 80CalA629, 252 P746.

565-25¾-New. General zoning ordinance establishing limits of territory permitting particular class of establishments does not repeal another ordinance creating zone for such class where there was expressed intent not to repeal. 80CalA629, 252P746.

565-28 162La39, 110S81.

566-30 162La39, 110S81.

566-42½-New. Ordinance is **not repealed** by failure to enforce it. 334 Ill 431, 166NE115.

567-49 NJSup 143A151.

567-54 [a] **Proceedings under provisions of original ordinance** are barred by repeal without saving clause. 165La 665, 115S817.

567-58 131Misc669, 227NYS711; 35 PortoRico 16.

567-60 135Misc451, 238NYS215.

567-63 35PortoRico 16.

568-84½-New. An ordinance does not enact new law or revive one theretofore repealed where its only purpose is the codification of existing laws. 323 Ill 359, 154NE148.

568-84¾-New. Where an ordinance after its repeal was inadvertently included in municipal code, it was held not applicable. 323 Ill 359, 154NE148.

569-92 317Mo 524, 297SW404; Mo 24 SW(2d)154 (construction and whether in force).

569-94 81Colo 181, 254P440 (word "shall" construed as "may" to effectuate legislative intention). 327 Ill 106, 158 NE451; 221Ky610, 299SW582, 584 [cit Cyc]; 317Mo 524, 297SW404; Mo 32 SW(2d)281; 245NY208, 156NE668. [a] **Strict or liberal construction.**-323Mo200, 18SW(2d)900.

569-95½-New. Court cannot supply defect resulting from contradictory provisions of ordinances. CalA 255P209.

569-97 Ga 155SE34; 136Misc487, 241 NYS73; TexCommnA 12SW(2d)1009.

570-98 329 Ill 501, 160NE839.

570-5 [a] **Provision as to time of taking effect** held to apply to gas franchise. TexCivA 297SW904.

570-6 See also 294Pa549, 144A733.

570-10 BC [1928] 1DomLR704.

570-11 93CalA277, 270P270; Ida 286 P353; 98PaSuper265; 7PaDist&Co 255.

570-14 333 Ill 355, 164NE699, 61ALR 561(2dcase); 244 IllA185; Mo 32 SW(2d)281; TexCommnA 12SW(2d) 1009.

571-15½-New. To establish practical construction of ordinance acts or omissions must be inconsistent with other construction of which either is susceptible. Va 154SE526.

571-17 151Miss467, 118S293, 60ALR 1155; 25 OhA214, 157NE794; 13PaDist &Co 443, 445 [quotCJ]; 152Va649, 148 SE794.

571-22 84CalA33, 257P569.

571-23 TexCommnA 12SW(2d)1009.

571-29 255 IllA532.

571-30 325 Ill 511, 156NE778. [a] **Rule held not applicable.**-325 Ill 511, 156NE 778.

571-32½-New. Technical words relating to a trade, when used in an ordinance dealing with subject matter of such trade, are to be taken in their technical sense, unless the context or other considerations show a contrary intent. 88CalA464, 263P555.

571-33 329 Ill 501, 160NE839; 219Ky 554, 293SW1096; 155Md7, 141A340; Utah 279P893; 154Wash503, 282P848.

572-38 322Mo 1024, 18SW(2d)394.

572-39 [a] **Unless words of enactment are doubtful or ambiguous,** title of act, ordinance, or regulation generally does not control. 259Mass117, 156NE19.

572-40 See also 226Ky72, 10SW(2d) 475.

572-47 TexCommnA 12SW(2d)1009.

572-49 147Wash597, 266P686, 58ALR 1194.

572-53 128Misc642, 220NYS66 (rule applied).

573-56 116Tex314, 291SW202.

573-56½-New. By-law restricting a common-law right must be strictly construed. Ont [1928] 3DomLR216.

573-60½-New. Doubt in the construction of an ordinance authorizing issuance of bonds for a public improvement should be resolved in favor of the public. 323Mo 200, 18SW(2d)900.

573-61 244 IllA185.

573-61½-New. An ordinance restraining the exercise of a right or imposing restrictions on the use of private property will be strictly construed. 120 Oh 352, 166NE228.

573-67 MoA 300SW316, 317 [citCJ]; 252NY325, 169NE401; 119 Oh303, 164 NE119; 23 OhA109, 155NE393; 38 Okl Cr207, 259P873; 9PaDist&Co 373.

573-68 38 OklCr207, 259P873.

573-69 38 OklCr207, 259P873.

573-73 MoA 300SW316.

574-78 180Ark1003, 248SW(2d)846; 320 Ill 536, 151NE581; 86Mont297, 283P 430.

574-82 Vt 151A650.

574-84½-New. A void ordinance confers no right and imposes no obligations. 332 Ill 286, 163NE685.

574-84¾-New. A city ordinance is a law within the meaning of certain statutes defining crimes and public offenses.

86Mont297, 283P430.
574-84¼-New. Passage of ordinance as considered as fact finding on all prerequisite issues. Cal 291P393.
575-89 [b] After permit granted, ordinance operating to invalidate permit held void. But see 5PaDist&Co 203.
575-91 175Minn368, 221NW430.
576-1½-New. Provisions of ordinance intended for benefit and protection of borough may be waived by borough. 96PaSuper517.
576-4 TexCivA 13SW(2d)184.
576-5 247NY311, 160NE381; 155Wash 244, 284P93. [b] Ordinance has potential existence in presenti, though operative in futuro, upon issue of validity. 80Mont515, 261P264.
576-6 TexCivA 13SW(2d)184.
576-14 27 OhNPNS307; 125 Or92, 266 P230. [a] Question whether an emergency exists is for legislative branch of city. 27 OhNPNS497.
576-15 317Mo 1216, 298SW747, 55ALR 773; SD 228NW800.
576-16 125 Or92, 266P230.
577-24 26 OhNPNS161; 141Wash542, 251P887.
577-25 141Wash542, 251P887.
578-40 See also Del 143A42.
578-42½-New. An ordinance must be mentioned or referred to in such way as to show what ordinance is meant, although the statute provides that it shall not be necessary to recite or draw out an ordinance. Del 143A42.
578-43 [b] (2) Allegation that fire violated ordinance of mayor and council is insufficient in failing to state title and date. Del 143A42.
578-50½-New. Reference in petition to ordinance by section number is sufficient to inform defendant ordinance would be offered in evidence absent special demurrer. TexCivA 28SW(2d)871.
579-52 Wash 262P129.
579-53 MoA 9SW(2d)85. See also 170 Ga258, 152SE232.
579-57 147Miss507, 112S673.
579-62 Ill 173NE137 (reasonable).
579-68 GaA 155SE218; 228Ky512, 15 SW(2d)303; 119 Or543, 250P235. [a] (4) Enacted in exercise of sound discretion. TexCivA 14SW(2d)901.
580-85 CalA 290P140.
580-91½-New. Burden of proving no publication of ordinance is on accused interposing defense. 173Ark554, 292 SW993.
581-6 31 OhA273, 167NE407.
581-7 MoA 24SW(2d)218; TexCivA 24 SW(2d)517.
581-8 MoA 24SW(2d)218.
581-13 But see 168Ga259, 147SE513 (2dcase).
581-16½-New. But a statutory provision as to method of proof should be complied with. 29 OhA32, 163NE46.
581-18½-New. Testimony going to prove the reasonableness of an ordinance is admissible, although not directly controverting any allegation of the petition. 321Mo 969, 13SW(2d)628.
581-26 MoA 23SW(2d)235.
582-28 MoA 23SW(2d)235.
582-45 TexCivA 5SW(2d)598.
583-51½-New. Evidence held sufficient to show adoption by village trustees of resolution. 220AppDiv152, 221NYS43.
583-66½-New. That city's records did not affirmatively show that ordinance was published is insufficient to prove nonpublication. 173Ark554, 292SW993.
583-69½-New. Only method of annulling legislation by council is by referendum. 116 Oh469, 157NE318.
583-69⅓-New. There can be no referendum of a measure of the council declared to be an emergency and in the interest of public health. 116 Oh469, 157NE318.
584-73 200Cal 505, 253P932.
584-74½-New. Initiative and referendum laws merely reserve to the people the right to exercise inherent legislative power. 200Cal 505, 253P932.
584-76 128Misc642, 220NYS66.
584-82 200Cal 505, 253P932; 138Misc 257, 245NYS375. [a] (2) Scope of statutes must be determined construction in light of well established legal principles. 204 Iowa58, 214NW679. [b] 200Cal 505, 253P932. [c] City Home Rule Act.-243NY401, 153NE849.
584-84½-New. Any doubt as to whether people intended to apply initiative and referendum provisions of city charter to amendment of general zoning ordinance, reclassifying certain territory, must be resolved in favor of giving effect to the constitutional prerogative. 200Cal 505, 253P932.
584-90 [a] City council cannot waive requirements of statute. 146SC372, 144 SE78.
584-91 [b] (1) 125 Or92, 266P230. [c] In Ohio.-117 Oh258, 158NE606.
585-3 207Cal 134, 277P308. [b] Constitutional provision as to submission of question involving "public utility" held not to prevent submission as to purchase of land for airport. 121 Oh186, 167NE396(1stcase).
585-6 338 Ill 228, 170NE308 (proceedings under local improvement statute).
585-10½-New. All municipal legislation not expressly or by necessary implication excluded is subject to referendum under charter. 200Cal 505, 253 P932.
585-10½-New. Statute authorizing granting franchise without referendum held repealed. 162La823, 111S177.
585-10¼-New. Local character of zoning ordinance does not preclude application of referendum. 200Cal 505, 253 P932.
585-10⅙-New. Initiative and referendum is not inapplicable to rezoning ordinance because of more immediate interest to resident of particular locality. 200Cal 505, 253P932.
585-10¼-New. Initiative and referendum not inapplicable to rezoning ordinance as depriving residents of opportunity to present arguments under general zoning ordinance. 200Cal 505, 253 P932.
585-10⅐-New. Constitutional right to submit questions to direct vote cannot be abridged by superseded municipal ordinance. 200Cal 505, 253P932.
585-10⅛-New. Doubt as to application of initiative and referendum to rezoning ordinance must be resolved in favor of constitutional prerogative. 200Cal 505, 253P932.
585-10⅓-New. Statute requiring referendum on ordinance does not apply to ordinances authorizing improvements under Local Improvement Act. 321 Ill 318, 151NE888.
585-10 1/10-New. Where zoning ordinance is adjudged void subsequent ordinance may be enacted by council without submission to voters. CalA 288P 1092.
585-10 1/11-New. Jurisdiction of courts to pass on policy or constitutionality of proposed ordinance. 256 IllA147.
585-11 200Cal 505, 253P932; 204 Iowa 58, 214NW679; 123Kan207, 254P397; 125 Or92, 266P230, 232 [citCyc]. [b] Legislation on every municipal subject is subject to referendum unless expressly or impliedly excluded. 200Cal 505, 253P932. [c] Zoning ordinance passed as an amendment to general zoning law of certain city is not excluded from referendum provision of city charter by necessary implication. 200Cal 505, 253 P932.
585-12 125 Or92, 266P230.
585-15 204 Iowa58, 214NW679.
585-16½-New. On the other hand the fact that city council fixed salaries of firemen by ordinance, although not required by statute to do so, does not bring an amending ordinance increasing their salaries within the scope of initiative and referendum statutes. 204 Iowa 58, 214NW679.
585-17½-New. or amending the zoning law by reclassifying a portion of the city. 200Cal 505, 253P932.
586-27½-New. Referendum provision does not apply to an ordinance for improvement where the statute empowers governing officers to proceed with work where a proper and timely protest is not filed. 123Kan207, 254P397.
586-27⅓-New. Conduct of the governing body of a city with federal and state authorities in establishing the route through the city of a connecting road to be improved by federal and state aid is an administrative detail not subject to control by invoking an initiative and referendum statute relating to legislation by ordinance. 128Kan125, 276P62.
586-30 125 Or92, 266P230.
586-32 See also 53SD191, 220NW613. [a] Ordinance prescribing salary of public officer does not contribute to support of state so as not to be subject to referendum. 53SD191, 220NW613.
586-36 317Mo 1216, 298SW747, 55ALR 773.
587-37 124 Or36, 263P893.
587-38 [b] Statement held insufficient. -124 Or36, 263P893.
587-39 125 Or92, 266P230.
587-39½-New. Where, upon the face of an ordinance, it reasonably appears that an emergency exists, or might seem to a reasonable mind to exist, a general statement that immediate effect is necessary for the peace, health, or safety of the community is binding on the courts. 124 Or36, 263P893.
587-39⅓-New. Where it is apparent on the face of an ordinance that there is no urgent necessity for its going into effect immediately, but that the real reason for the declaration of emergency was to avoid a referendum, the ordinance will be declared ineffective. 124 Or36, 263P893.
587-39¼-New. A city charter may require a more explicit statement in declaring an emergency than the constitution requires of the legislature. 124 Or36, 263P893.
587-45½-New. providing a different procedure for amending a charter from that in effect. 124 Or36, 263P893.
587-46½-New. Where city council may pass zoning ordinance, local character thereof is insufficient to preclude application of referendum, under city charters. 200Cal 505, 253P932.
587-46⅓-New. The initiative and referendum provisions of city charters are not inapplicable to an ordinance amending the general zoning law, by reclassifying a portion of the city, as depriving residents of the opportunity to present arguments in the manner provided by the amended ordinance. 200Cal 505, 253P932.
587-46¼-New. Although the zoning ordinance is local and directly affects only a small part of the city population, there is nothing inconsistent in permitting the entire electorate of the city to pass upon it by referendum election or to enact it by initiative proceedings. 200Cal 505, 253P932.
587-47½-New. Railroad right of way for spur track. 162La823, 111S177.
588-59 16F(2d)401; 26 OhNPNS151; TexCivA 13SW(2d)184. [c] (2) Ordinance adopted without public hearing held void. 207Cal 134, 277P308. [f] Mere statement of intention to originate and file petition asking to initiate ordinance in respect of certain acts of city council is not sufficient for court to act on or to interfere with city council in exercise of its discretion conferred by law. 146SC372, 144SE78.
588-61½-New. or by any procedural requirements of a superseded ordinance dealing with the same subject. 200Cal 505, 253P932.
588-65½-New. Ordinance requiring two-thirds vote of city council to rezone certain territory over protest of owners of certain per cent of area included is not applicable to initiative and referendum provisions of certain city charters in some jurisdictions. 200 Cal 505, 253P932.
588-66 16F(2d)401; 26 OhNPNS151. [a] Applicability of constitution and statutes.-Method of testing sufficiency of petitions for referendum elections provided by Constitution and general laws held inapplicable to city of Dayton, Ohio. 16F(2d)401. [b] Petition insufficient.-146SC372, 144SE78.
588-69½-New. Filing of petition for referendum election on ordinance with town recorder is proper. 173Ark557, 292SW981.
589-76½-New. On clerk's failure to notify petitioners of irregularities in petition, reasonable time to amend will

be given. 26 OhA362, 160NE96.
589-76½-New. Certification by clerk of insufficiency of petition is not condition precedent to filing of additional petition. 26 OhA362, 160NE96.
589-77 16F(2d)401. [b] **Number of signatures.**-(1) Charter authorizing referendum ordinances on petition of ten per cent of "registered voters," and further petition of fifteen per cent of "electors," held to require signatures of twenty five per cent of registered voters. 16F(2d)401.
589-87½-New. Charter provision requiring certain percentage of signatures is jurisdictional. 16F(2d)401.
589-87⅓-New. Under a statute requiring a petition to be signed by qualified electors, electors need not be taxpayers. 53SD191, 220NW613.
589-87¼-New. Referendum petition circulated by persons employed therefor and paid on basis of number of signatures obtained is not invalid. OhA 173NE36.
589-87⅙-New. Members of committee appointed to represent petitioners for referendum need not subscribe to petition. OhA 173NE36.
590-2 Oh 173NE193.
590-3 27 OhNPNS221. [b] (2) Under some statutes time commences to run from date of final passage of measure by council, which is date of last action, and not date of approval by mayor. 257 Mass287, 153NE564. (3) Petition for referendum not filed in time to permit examination and certification required by statute is not presented within time. 257Mass287, 153NE564. (4) Time runs from date of filing of ordinance with mayor and not from date of repassage after disapproval by mayor. 27 OhNPNS221.
590-4 257Mass287, 153NE564.
590-9 173Ark557, 292SW981.
591-22½-New. City organized under home rule charter cannot have sufficiency of petition tested under general statutes. 16F(2d)401.
591-22⅓-New. Under some statutes examination and certification of petition for referendum are essential prerequisites to presentation thereof to council. 257Mass287, 153NE564.
591-22¼-New. Decree, finding petition for submission of ordinance to vote of city electors invalid as not in accordance with statute, was not subject to collateral attack. 333 Ill 190, 164NE 218.
591-22⅙-New. Jurisdiction of courts to pass summarily on form of petition. 256 IllA147.
591-24 But see 26 OhNPNS151.
591-25½-New. Failure of clerk to discover irregularities in petition is not chargeable to petitioners. 26 OhA362, 160NE96.
591-35 [b] **By failing to submit petition to electors within prescribed time** and ordering filing of acceptance of ordinance, council determines that petition is insufficient and invalid. 27 Oh NPNS221.
593-64½-New. Ordinance requiring two-thirds vote of city council to rezone territory held inapplicable to initiative and referendum legislation. 200 Cal 505, 253P932.
594-75½-New. City Election Act adopted by voters applies to all elections. 322 Ill 174, 152NE597.
594-75⅓-New. and an ordinance subsequently passed does not take special election out of operation of the act. 322 Ill 174, 152NE597.
594-75¼-New. City council cannot, by ordinance, abrogate or supersede the City Election Act adopted by city, 322 Ill 174, 152NE597.
594-75⅙-New. and by appointing election officers does not thereby take them out of City Election Act. 322 Ill 174, 152NE597.
594-75⅛-New. Until ordinance regulating utility rates was submitted to vote as required no contractual right to performance is acquired. 42F(2d)379.
594-75⅐-New. Charter provision requiring referendum may be read into contractual relation arising from passage and acceptance of ordinance within its terms. 42F(2d)379.
594-80½-New. Where an ordinance is suspended until affirmative vote on referendum to be submitted to voters, it is ineffectual before such affirmance. 117 Oh327, 158NE748.
594-90½-New. Enactment of contractual rate ordinance accepted by company cannot be impaired by repeal thereof after referendum period has expired. 27 OhNPNS221.
594-90⅓-New. Validity of repeal not considered where it effected all that supporters of referendum were striving for. 27 OhNPNS497.
594-90¼-New. Where zoning ordinance was adjudged void subsequent zoning ordinance could be enacted without submission to voters. Cal 290P1033.
595-7 [b] **Borough president is constitutional officer.**-254NY339, 173NE6.
596-17 150Wash542, 273P748.
597-51 92Fla187, 109S228.
598-53 289Pa458, 137A630.
598-58 199 Ind78, 155NE198; 289Pa 458, 137A630.
598-62½-New. zoning boards, 289Pa 458, 137A630.
598-70 166Ga781, 144SE287; 339 Ill 141, 171NE167; 123 Or1, 260P1004, 1008 [citCJ].
599-72 111Conn667, 151A268; 123 Or 1, 260P1004, 1008 [citCJ].
599-73 123 Or1, 260P1004, 1008 [cit CJ].
599-76 119 Oh462, 164NE512.
599-78 233 IllA481; 245 IllA346.
599-79 But see 168Ga702, 148SE584.
600-89 197NC404, 149SE375.
600-92 123 Or1, 260P1004, 1008 [quot CJ].
600-92½-New. The California statute providing for the consolidation and abolition of municipal offices and performance of their duties by certain county officers was not impaired by a later statute. 90CalA242, 265P864.
600-93 203 Iowa1203, 212NW579.
600-96 203 Iowa1203, 212NW579.
600-98 132Misc13, 228NYS675.
601-2 [a] **Charter amendment forbidding abolition of existing office** by council includes offices created by it as well as by statute. 111Conn667, 151A268.
601-12½-New. It is building inspector's duty on abolition of office to transfer property connected with office to proper authority. 35 OhA243, 172NE 159.
601-13 123 Or1, 260P1004.
601-19½-New. The validity of a local law abolishing office is not affected by the fact of nonconcurrence of a board whose only duty in connection with the office was to fix the salary. 132Misc13, 228NYS675.
601-20 [b] 132Misc13, 228NYS675.
602-26 123 Or1, 260P1004.
602-27 123 Or1, 260P1004.
603-35 246NY140, 158NE51 (Home Rule Law).
603-36 246NY140, 158NE51.
603-45 246NY140, 158NE51.
604-55 [b] (3) Statute providing for election of three commissioners and remaining two to be chosen by such three commissioners held not repugnant to equal protection clause of constitution. 97Fla127, 120S361(2dcase). (4) Extent of powers conferred is not test of whether officer is chief executive under constitution requiring his election by qualified voters, term mayor or chief executive in constitution being mere description of office. 229Ky752, 17SW(2d) 1031. [c] (2) Act providing for regulation of certain securities and creating securities commission held not violative of Art 319. 169La626, 125S737. [e] (23) Neither home rule amendment nor law confers power on individual cities to pass laws or make rules with reference to elections. 128Misc642, 220NYS 66. (24) It does not provide for organizing, but organizes, and is constitutional. 246NY140, 158NE51 (Const. art 12 § 1). (25) Purpose of home rule constitutional amendment is to give city right to determine whether officers shall be elected or appointed and precise method thereof. 246NY140, 158NE51. (26) Local law of Rochester providing for election of councilmen and appointment by them of city manager held not invalid as infringing on power of electors or as providing for appointment by authority not designated by legislature. 246NY140, 158NE51.
606-61 See also 229Ky752, 17SW(2d) 1031.
603-90 80CalA561, 251P925.
603-92 [a] **Rules respecting examinations for civil service positions** may be made by commission. Wash 287P663.
603-1½-New. Under some civil service rules commission is not authorized to review examination papers unless petition therefor is filed within thirty days of notice of results. Wash 287P663.
609-12½-New. Commission's power to determine eligibility as granted by statute must be exercised under rules and regulations adopted and approved by council pursuant to statute. 80CalA561, 251P925.
609-12⅓-New. Provisions of a charter relating to promotion are not rendered inoperative by the fact that a provision applying to original appointments contains the only provision granting power to a city manager to make appointments in classified service in view of the power of a commission to adopt rules. 80 CalA561, 251P925.
609-12¼-New. Commission may require mental and physical tests for promotion. 80CalA561, 251P925.
609-12⅙-New. The nature of rules and regulations for promotion to be adopted is left to the discretion of the commission within the limits of fundamental principles of the charter provisions. 80 CalA561, 251P925.
609-12⅛-New. Where an applicant has submitted to examinations for promotion, the action of the commission thereon is not open to review, 80CalA561, 251 P925.
609-12⅐-New. nor can such action be annulled for the reason that under a charter provision jurisdiction was vested in the commission to deal with promotions. 80CalA561, 251P925.
609-18 But see 129Misc867, 223NYS 432.
609-20 129Misc867, 223NYS432.
609-22 203 Iowa1203, 212NW579.
611-51 [a] **Constitutional provision as to free and equal elections.**-Statute held not violative thereof. Ind 166NE270.
611-54½-New. A charter provision that any candidate for elective office who receives the majority of votes cast at the primary election shall thereby be elected does not apply to election of city commissioners where two are to be elected, the one receiving the highest number of votes to be elected for two years and the one receiving the next highest for one year. 241Mich4, 216 NW401.
611-54⅓-New. Local law curtailing powers of elective city officers must be submitted to voters where it increased membership of city board consisting of elected officers. 135Misc874, 240NYS2.
611-55 229Ky752, 17SW(2d)1031.
611-57 [c] **Village officers.**-245NY534, 157NE847.
612-65 But see 228Ky15, 14SW(2d) 153.
612-72 [a] **Delegation of discretion.**-City council cannot delegate any discretionary duty to committee in regard to appointment. 228Ky15, 14SW(2d)153.
612-76 Mass 169NE894 (legislative power of city council not abridged by statute authorizing mayor to appoint heads of departments where work of department not legislative); 115 OhSt 509, 154NE810. [e] **Heads of departments.**-Mass 169NE894 (city auditor of accounts). [f] **Commission to construct waterworks.**-27 OhNPNS497.
613-77 Oh 172NE287; 88Tenn52, 12 SW422, 17AmSR870, 6LRA308; Utah 289P88.
615-15 228Ky15, 14SW(2d)153; (city council had authority to provide by ordinance for appointment of assistant city engineer). Mass 171NE487.
616-26½-New. Resolution of a city council that a person appointed by its committee under its authority be allowed salary, and that the mayor and

clerk be directed to draw and countersign the warrant, constituted express ratification of previous action taken toward the appointment. 228Ky15, 14SW(2d)153.

618–55 134Misc48, 234NYS571.

618–58 148Miss783, 114S820.

618–59 [c] **Provision of charter that city council should be judge of qualification and election of its members** does not deprive superior court of jurisdiction to try title to office of councilman. 197NC731, 150SE507.

619–65½–New. In determining whether plaintiffs had title to office of assessors, action of the council is controlling, not what presiding officer thought. 134Misc48, 234NYS571.

619–68 179Ark766, 19SW(2d)1018, 64ALR1258.

619–69½–New. In mandamus to compel payment of a warrant issued to a party claiming to be a municipal officer, the court could not decide the legality of the appointment where the answer did not set up the ordinance showing the manner of appointment. 86Mont100, 282P1045.

619–77 29Hawaii392. [a] (2) Council failing to confirm mayor's appointment within thirty days may fill vacancy by majority of whole council. 105NJL507, 146A204.

619–78 Utah 289P88. [g] **Board of commissioners.**–105NJL570, 146A331.

620–80 246NY237, 158NE315.

621–95 158La314, 104S56. See also 2 LaA572.

621–97½–New. In Porto Rico, selection of a person to fill a vacancy in the municipal assembly is primarily made by the people through the local organization of the political party to which the outgoing member belongs, and the assembly acts ministerially and not discretionally. 33PortoRico 337.

621–98 [b] **Vacancy was created when alderman was advanced to president of common council,** taking place of president advanced to mayor on death of mayor, authorizing appointment of alderman by mayor. 134Misc361, 234NYS539.

621–99 See also 200 Ind222, 162NE665.

622–14½–New. Village trustees may be authorized under statute to fill vacancy due to resignation of incumbent and ineligibility of successful candidate at next election. 128Misc36, 219NYS52.

622–22 See 200 Ind241, 162NE670. [d] **Filling of vacancy by "motion"** instead of "resolution" did not void appointment. 294Pa549, 144A733.

622–22½–New. One appointed to act as comptroller by the city comptroller, while acting as mayor on resignation of elected mayor, cannot act as mayor, but, on resignation of the city comptroller acting as mayor, the office of mayor may not be filled by succession, but the vacancy must be filled by the common council. 200 Ind222, 162NE665.

623–27 222MoA831, 11SW(2d)81; 128 Okl 228, 262P212. [g] **Construction of charter provisions** as to eligibility should be just, fair, and reasonable so as to arrive at real intention of charter and people adopting it. 128 Okl 228, 262P212.

623–28 [a] **Political affiliation.**–33 PortoRico 707.

624–35 157SC290, 154SE164.

624–42 217Ala80, 114S905. [d] **Failure to pay poll tax during term** terminates status as qualified elector and causes vacation of office. 217Ala80, 114S905.

625–50 157SC290, 154SE164.

625–53 [a] **Constitutional provision construed** to mean residence when serving as officer, not residence when appointed. Ind 166NE270.

625–62 83Colo 355, 265P92.

625–64 136 Okl 33, 276P208.

626–74 128 Okl 228, 262P212. [a] **Construction of qualification requirement** should be reasonable, just, and fair. 128 Okl 228, 262P212.

626–76½–New. Requirement that candidate pay property tax "for last two years next preceding election" refers to payment of tax merely, and does not require ownership of property for two years prior to election. 128 Okl 228, 262 P212.

627–96 134Misc762, 236NYS166 (statute must be strictly construed and complied with).

627–3½–New. Prior payment of taxes due and registration as voter are essential to eligibility to office of alderman. 169Ga702, 151SE347.

627–6 [d] **In Oklahoma.**–128 Okl 228, 262P212.

627–6½–New. Payment of taxes after registration while quo warranto action is pending and before decision does not validate registration. 169Ga702, 151SE 347.

629–38 [b] **Statute is to be liberally construed** in favor of eligibility. 230Ky 1, 18SW(2d)316.

629–38½–New. But a law prohibiting appointment to office of persons who have held elective office within year was held unconstitutional as discriminatory. 221AppDiv36, 222NYS141.

629–39 [a] **Term of office** which disqualifies refers to term of four years. 230Ky1, 18SW(2d)316.

630–45½–New. Local law excluding from appointive office any person who within one year has held an elective office held arbitrary and unreasonable. 128Misc642, 220NYS66.

630–45⅓–New. The statute is not applicable to one elected to fill a vacancy for the balance of the term. 230Ky1, 18SW(2d)316.

630–49 [a] **Statute held valid.**–Mass 168NE181.

630–57 [a] **Municipal office** under statute prohibiting aldermen from holding any other municipal office, includes membership on board of education. 169 Ga723, 151SE391.

631–64 [a] **City attorney has been held not to hold "office of profit under state"** so as to prevent holding office of chairman of athletic commission. 220Ala172, 124S211.

631–66 [a] **Commissioners cannot appoint one of themselves as city manager.** –170Ga361, 153SE34.

631–72 203 Iowa1031, 213NW934.

631–92 158Md260, 148A434.

632–93 36 OhA24, 172NE680.

632–95½–New. Constitutional provisions respecting incompatibility of offices have been held to have no reference to city or town offices. Mass 168NE181.

632–8½–New. alderman and member of board of education; 169Ga723, 151SE 391.

632–11½–New. district attorney and mayor; NM 289P594.

632–16 158Md260, 148A434.

633–26 Mass 168NE181.

633–35 [b] **In Ohio.**–118 OhSt99, 160 NE621.

633–36 [a] **Exemption of persons who have served city for stated time.**–118 OhSt99, 160NE621.

635–71 43 OklACR273.

636–88½–New. Contestant for municipal office is not required to go through statutory form of taking the oath and giving official bond until after the contest has been determined in his favor. 148Miss783, 114S820.

636–96 [a] (3) Statute and municipal code held to require city collector to give bond. 239 IllA628.

638–23½–New. Payment of premiums by municipalities on official bonds is an appropriation of public funds. 27 OhNPNS92.

638–32½–New. Until a contest for municipal office has been determined in favor of contestant, he is not entitled to a commission or to enter upon the duties of the office. 148Miss783, 114S 820.

638–34 Ind 171NE381(2dcase) (one continuing in office after law declared invalid); 136Misc851, 244NYS151; 149 SC234, 147SE346. [c] **Occupation of another office.**–109TexCr180, 3SW(2d) 798.

639–36 233 IllA481. [b] **Office shown to exist.**–110TexCr337, 8SW(2d)174.

639–41½–New. There can be but one de facto officer of a municipal office. 107 WVa375, 148SE324.

640–60 110TexCr337, 8SW(2d)174.

640–71 137Misc86, 241NYS431.

640–74 [d] (2) Enforcement of collection of tax not enjoined. 165Ga109, 139SE818 (petition not stating cause of action properly dismissed)..

641–77½–New. That one who acted as deputy city clerk could not, because a minor, be considered as a de jure deputy city clerk did not alone prevent his being considered a de facto deputy. 197 Wis573, 223NW83.

641–83 [b] **Under Saratoga Springs Charter,** upon resignation of public safety commissioner, his deputy does not have right to vote in his place in city council pending choosing of new commissioner. 245NY580, 157NE865.

641–86 229Ky752, 17SW(2d)1031.

642–92 80Mont515, 261P264.

642–3½–New. So an exempt fireman is not entitled to retain office after expiration of term fixed by statute, although the Exempt Fireman Act prohibits removal without cause and hearing of exempt fireman holding office for term not fixed by law. 103NJL526, 138 A209.

642–3⅓–New. Qualification of a newly elected officer terminates the prior officer's term if with color of title, where the election is contested. 200 Ind241, 162NE670, 163NE21(dis op).

642–7½–New. An officer's appointment until his successor is chosen terminates on qualification of the successor, the former officer being remitted to litigation to establish claim to office. 200 Ind 241, 162NE670, 163NE21(dis op).

643–9 [b] (3) Where city manager under statute holds office at pleasure of mayor and board, act does not violate constitutional provision prohibiting term of office exceeding four years. 229 Ky752, 17SW(2d)1031.

643–11 [c] 34PortoRico 761 (applicability of statutes).

643–13 103NJL526, 138A209 (license inspector). [a] **During good behavior.**–NJ 142A551.

644–15 [c] **Ordinance held not invalid** as in excess of power. Ill 173NE339.

644–22½–New. Appointment by council for greater or less than statutory term confers no title to office. 103NJL220, 135A783.

644–27 [b] **Charter provision authorizing vacancy in office of borough president to be filled for predecessor's unexpired term** rather than until commencement of next political year is unconstitutional. 254NY339, 173NE6.

645–31 See also Oh 172NE287.

645–34 NJ 147A329.

645–36½–New. Under statutory provisions regulating appointment by acting mayor, the term of office of city comptroller, appointed by one who had succeeded to office of mayor by virtue of being city comptroller when the elected mayor resigned, expired with the resignation of the comptroller who appointed him. 200 Ind222, 162NE665.

645–37 13PaDist&Co 200. [c] **Where statute extended election two years** appointee held office till expiration of that time and election held before that time is void. 294Pa549, 144A733.

645–39 105NJL507, 146A204.

645–46 [e] **Where classification of councilmen was delayed** till after expiration of term of those in short term class, held that latter held over. 147Va 319, 137SE483.

646–56½–New. Councilmen, classified under two-year term after term expired, held lawfully holding over until successor is chosen. 147Va319, 137SE483.

646–56⅓–New. Where council was classified into two groups after two-year term expired, successors of all should be elected at next general election. 147 Va319, 137SE483.

646–56¼–New. In Manitoba, an officer of a municipality who is hired for a year or until his successor is appointed may be dismissed without notice by appointment of a successor after the expiration of the year. Man [1928] 2DomLR657.

647–70 230NYS70.

647–71 294Pa549, 144A733.

647–72 See also 225Ky120, 7SW(2d) 825.

648–80 NJ 142A551.

648–81 103NJL220, 135A783. [a] **Appointment for greater or less than statutory period** held nugatory. 103NJL220, 135A783.

648–83½–New. Local law, shortening term of officer, held valid under rule that power that fixed term may change it. 128Misc642, 220NYS66.

648–83⅓–New. An amendment of a city charter, adopted by electors under a home rule statute, whose purpose was not to shorten the terms of city commissioners but to provide a new legislative body, is not void as shortening their terms although the offices are abolished. 242**Mich**68, 218**NY**96.

648–83¼–New. In Nova Scotia where by-laws provide that officer shall hold office during good behavior council cannot after appointment, limit tenure to fixed period. **NS** [1930] 2**DomLR**50.

650–21 227**Ky**611, 13**SW(2d)**758.

651–40½–New. Permanent chairman of joint meeting organized under statute held entitled to continue as such until completion of work though he has ceased to be member of governing body of one of municipalities composing joint meeting. **NJSup** 149A57(2dcase).

651–40⅓–New. Judgment entitling city counsel to immediate possession of office will not be staged on ground that he is under indictment. **NJCh** 150A198.

651–49½–New. In Nova Scotia officer appointed during good behavior may be suspended at ex parte hearing. **NS** [1930] 2**DomLR**50.

651–49¼–New. In Nova Scotia municipal by-laws have been construed as not empowering warden and three councillors to suspend keeper of municipal asylum and as giving such power exclusively to asylum commissioners. **NS** [1930] 4**DomLR**500.

651–51 260**Mass**529, 157**NE**522.

651–55 153**Wash**139, 279**P**601.

652–59 27 **OhNPNS**497.

652–62 [a] **Members of municipal assembly.**–33**PortoRico** 271.

653–65 181**Ark**919, 28**SW(2d)**1062 (statute construed).

653–74½–New. Legislature cannot, by its mere say-so, vacate an office to which the incumbent, with a fixed term, has been elected by the qualified voters of the town. 219**Ala**134, 121**S**397.

653–75 **NJ** 144**A**121.

654–76 [1] **Heads of departments.**–**Mass** 169**NE**894 (city auditor of accounts).

655–78½–New. Court as part of sentence of conviction can remove mayor from office under constitutional provision providing for removal on conviction. 299**Pa**276, 149**A**176.

655–80 181**Ark**919, 28**SW(2d)**1062.

656–83 [b] (4) Under charter of city of Electra City, commissioners may remove chief of police and fire marshal without giving reasons therefor. **Tex CivA** 297**SW**496.

656–97 219**Ala**134, 121**S**397.

657–13½–New. Grant of power to remove officer for certain causes excludes power to remove for other causes. 157 **Miss**225, 127**S**902.

659–56½–New. Under statute, city treasurer may be removed and vacancy in office declared on release of surety on his bond under statute, for irregularity in disbursements, and failure of treasurer to furnish new bond in ten days. 78**Mont**164, 253**P**311.

659–56⅓–New. In Porto Rico, it is ground for removal of a secretary-auditor that he authorized the payment of attendance fees to members of the assembly who did not attend a session. 33 **PortoRico** 902.

659–56¼–New. Borough recorder, creating a discordant condition in police and law enforcement department, has been held to justify removal. **NJ** 144**A** 121.

660–71½–New. Where statute imposes fine on councilman upon conviction of certain offense and provides that he shall forfeit office, conviction is condition precedent to forfeiture. **Ariz** 288**P**1.

660–78 291**Pa**98, 139**A**626. [c] (4) Mere friendly or sentimental interest. 29**Hawaii**1.

660–86 291**Pa**98, 139**A**626. But see 159 **Tenn**442, 19**SW(2d)**254.

661–88½–New. Under a statute making it unlawful for municipal officers to become interested in contracts with the city, such contracts subject the officers to the hazard of removal. 159**Tenn**442, 19**SW(2d)**254.

662–26 319**Mo** 705, 7**SW(2d)**357, 59 **ALR**95.

663–31 [c] **Removal by governor.**–131 **Misc**220, 226**NYS**585.

663–36½–New. After recorder has taken office, quo warranto and not certiorari is proper remedy to determine whether appointment was legally confirmed. **NJ** 137**A**548.

663–36⅓–New. Member of council, although not claimant to office, could not dispute title of person appointed recorder by certiorari. **NJ** 137**A**548.

664–55 23 **OhA**259, 155**NE**652.

665–83 **NS** [1930] 4**DomLR**500.

666–84 222**AppDiv**591, 604, 227**NYS**47.

666–99 176**Ark**489, 3**SW(2d)**334.

667–1½–New. Members of council who have reported adversely on district affairs are not disqualified from participating in hearing. 176**Ark**489, 3**SW(2d)** 334.

667–1⅓–New. Members of city council may vote on final decision although not present at all hearings. 176**Ark**489, 3 **SW(2d)**334.

667–1¼–New. A constitutional provision requiring a hearing does not require that the function of inquisition be divorced from that of hearing and decision. 247**NY**401, 160**NE**655.

667–15½–New. Sufficiency of proof may be decided as a whole, vote on each charge separately being unnecessary. 176**Ark**489, 3**SW(2d)**334.

668–25 23 **OhA**259, 155**NE**652.

668–27½–New. Complaint in ouster proceedings against town councilmen for unlawfully receiving salaries from town must allege conviction where statute makes conviction condition precedent to forfeiture. **Ariz** 288**P**1.

669–36 **Nev** 285**P**511. [a] **Officer elected at recall election** is subject to recall. 79**CalA**632, 250**P**583.

669–40½–New. Officer elected at special recall election is subject to recall. 79 **CalA**632, 250**P**583.

669–43 See also 27 **OhNPNS**185.

670–48 207**Cal** 263, 277**P**857; 79**CalA** 632, 250**P**583; 98**CalA**87, 276**P**399; **Nev** 285**P**511.

671–72 93**CalA**365, 269**P**757. [a] **Purpose of statute** requiring signatures of voters equal in number to twenty-five per cent of votes cast at last regular municipal election, at which officer was voted for, was to show substantial demand for removal. 79**CalA**632, 250**P** 583. [b] **"Last preceding regular municipal election at which such officer was voted for,"** as used in statute requiring signatures of voters equal in number to twenty-five per cent of entire vote cast at such election, refers to election for such officer, not for particular individual occupying such office. 79**CalA**632, 250**P**583. [c] **In determining sufficiency of joint petition for removal of all councilmen,** petitions for recall of particular councilmen cannot be considered. **CalA** 286**P**1082.

671–73 79**CalA**632, 250**P**583; 91**CalA** 521, 267**P**367 (petition sufficient); 98 **CalA**87, 276**P**399 (petition must contain statement of reasons in not more than two hundred words).

671–75 [b] **City clerk attaching to original petition** documents with blank spaces for signatures, did not destroy effectiveness of petition. 207**Cal** 263, 277**P** 857.

671–76½–New. Signers of petition for recall of city commissioner need not add to signatures, ages, and length of residence in city. 54**ND**380, 210**NW**4.

671–78½–New. Courts cannot disregard positive language of statute regarding requirements of recall petition. 192**Wis** 367, 212**NW**792.

671–78⅓–New. Date of signing recall petition must be added by voter petitioning for recall election, 192**Wis**367, 212**NW**792.

671–78¼–New. and such date includes year as well as day and month. 192**Wis** 367, 212**NW**792.

671–78½–New. Each signature on a recall petition is a separate and independent unit, and cannot be added to by what may be done in the same petition by others. 192**Wis**367, 212**NW**792.

671–78⅓–New. Signatures to a recall petition cannot be presumed to have been made between the first date on which the signatures could be attached and the date of filing where more than thirty days elapsed between such dates. 192**Wis**367, 212**NW**792.

671–78¼–New. Signatures to a recall petition must all be written within the required time preceding filing. 192**Wis** 367, 212**NW**792.

671–78⅓–New. Certificate of a county judge as to sufficiency of a recall petition is not final but is subject to review by courts where record discloses on its face the absence of jurisdictional essentials. 192**Wis**367, 212**NW**792.

671–78⅓–New. Recall petition containing signatures showing no year on date of signing is insufficient. 192**Wis** 367, 212**NW**792.

671–78 1/10–New. Where petition for a recall election is insufficient, mandamus will not lie to compel holding of proposed election. 192**Wis**378, 212**NW**796.

671–78 1/11–New. Under some statutes a petition for recall of a mayor is properly filed with the city clerk. **Nev** 285 **P**511.

671–80 See also 98**CalA**87, 276**P**399.

671–80½–New. Board of city commissioners cannot review determination of city auditor that petition for recall of one of their number is signed by sufficient number of qualified electors. 54 **ND**380, 210**NW**4.

672–82 [b] **Oath that signatures to petition** "were signed in my presence" is tantamount to statutory requirement that affiant saw them signed. **CalA** 284 **P**254.

672–86 207**Cal** 263, 277**P**857.

672–87 See also 96**CalA**705, 274**P**1015.

672–88 207**Cal** 263, 277**P**857; 96**CalA** 705, 274**P**1015; **CalA** 284**P**254. [a] (2) Certificate of city clerk is final as to all matters properly comprehended by correct performance of his duties (83 **CalA**648, 257**P**187). (3) but is not final if there has been failure to perform his duty (83**CalA**648, 257**P**187). (4) Certificate of city clerk is not final on question of fraud committed by verification deputies in certifying that signatures were appended in their presence (83 **CalA**648, 257**P**187), (5) nor as to forgery of names (83**CalA**648, 257**P**187), (6) nor as to additions to signatures of descriptive nature (83**CalA**648, 257**P** 187).

672–93 But see 93**CalA**365, 269**P**757.

672–94½–New. A clerk's statement in his certificate to a recall petition that he has examined the petition and compared the signatures with the original registrations and found the same sufficient is a sufficient compliance with a requirement that he shall show the result of such examination. 79**CalA**632, 250**P**583.

672–94⅓–New. City clerk, in order to furnish certificate as to signatures on recall petition, need not personally see every name signed to petition. 207**Cal** 263, 277**P**857.

673–95 83**CalA**648, 257**P**187. [c] **Charter authorizing recall petition is not void** for failure to provide method for ascertaining whether petition was signed by requisite number of qualified electors. 207**Cal** 263, 277**P**857.

673–4 95**CalA**598, 273**P**125.

674–6½–New. Mandamus will not lie where the certificate of the city clerk as to comparison of names on the recall petition is based on a comparison with printed indices furnished by the county clerk instead of with the original affidavits of registration. 83**CalA**648, 257 **P**187.

674–13 **Nev** 285**P**511

674–15 35**PortoRico** 572.

675–18½–New. Certiorari is proper remedy to review certificate as to sufficiency of petition for special recall election. 192**Wis**367, 212**NW**792.

675–21 35**PortoRico** 572.

677–40 131**Misc**220, 226**NYS**585.

677–47 260**Mass**529, 157**NE**522; 316**Mo** 524, 296**SW**90; 129**Misc**867, 223**NYS** 432; 131**Misc**577, 226**NYS**663.

677–48 129**Misc**867, 223**NYS**432.

677–49 129**Misc**867, 223**NYS**432.

677–49½–New. Exemption of volunteer

village fireman from summary removal from civil service is privilege which legislature may take away, 129Misc873, 223NYS521.

677-49⅓-New. but it should be taken away by plain expression of the legislature. 129Misc873, 223NYS521.

677-49¼-New. Statute adding requirements does not affect privileges earned. 129Misc873, 223NYS521.

678-50 129Misc873, 223NYS521.

678-51 260Mass529, 157NE522; 316Mo524, 296SW90.

680-71 260Mass529, 157NE522.

680-75 260Mass529, 157NE522.

681-96 250 IllA385.

682-25 316Mo524, 296SW90.

682-26 260Mass529, 157NE522.

682-27 260Mass529, 157NE522.

683-40½-New. Transfer of employees from class of laborers to chauffeurs held not to affect seniority of chauffeur so employed prior to transfer. 263Mass118, 160NE322.

683-40⅓-New. Civil service rules directing that laborers be suspended according to seniority applies to particular classifications and not to labor service as a whole. 263Mass118, 160NE322.

684-61 8PaDist&Co752; 9PaDist&Co183.

685-63 148Va675, 139SE270.

685-68 233 IllA481; 245 IllA346.

686-76 131Misc577, 226NYS663. See also 78CalA516, 248P689.

686-83 327 Ill443, 158NE683, 55ALR994; 136Misc851, 244NYS151.

687-84 Contra 327 Ill443, 158NE683, 55ALR994.

687-96 NJ 150A385.

688-3½-New. Officer prevented from performing services by mayor is entitled to compensation. 228Ky15, 14SW(2d)153.

688-7 86Mont100, 282P1045; 33Porto Rico418.

688-9 319Mo705, 7SW(2d)357, 59ALR95.

689-22 197NC404, 149SE375.

692-43 14PaDist&Co369.

693-50 43 OklACR273. [d] **That city attorney failed to qualify on reappointment** does not validate contract for compensation for services connected with his office performed while occupying office. 253 IllA218.

693-55 88 IndA498, 164NE637(2dcase); 88 IndA665, 165NE341; 104WVa538, 140SE544. [g] **Chief engineer of city may be required to perform other duties** than that of chief engineer, and be paid therefor, by resolution of board of directors of city. 104WVa538, 140SE544.

695-67½-New. A custom of allowing help to the city treasurer without authority of law is not justification for paying out money of the municipality therefor, nor for recovery of judgment against it. 83Mont370, 272P243.

695-68 [c] **Statutes construed as permissive.**-195Wis64, 217NW705. [d] **Constitutionality of statutes authorizing appropriation.**-195Wis35, 217NW705.

696-74 149Wash173, 270P306.

696-75½-New. Where the last authoritative census showed a city to have less than eight thousand population, and no other method of determining population by commissioners could be complied with, the mayor and commissioners were only entitled to compensation as for a third class city of less than eight thousand having commission form of government. 149Wash173, 270P306.

697-82 129 Or558, 278P581.

697-86 35Ariz120, 274P786; 149Wash173, 270P306.

698-94 TexCivA 31SW(2d)843.

698-97 31NM533, 249P106; 34NM326, 281P28.

698-99 See also TexCivA 31SW(2d)843. [c] **Where prior ordinance provided for fees but no salary,** resolution fixing salary is ineffective. TexCivA 31SW(2d)843.

699-6 [a] **City attorney of city transferred from third to second class** is entitled to same compensation till expiration of term. 215Ky558, 286SW847. [b] **Constitutional prohibition** has reference only to legislature and not to city ordinances. 80Mont515, 261P264.

699-8 218Ala282, 118S467.

700-11-15 80Mont515, 261P264.

700-11-15½-New. Right of city council to pass by-law pursuant to legislation for payment of increased allowance. Ont [1930] 4DomLR793.

701-30 See also 1LaA568.

703-64 33PortoRico418.

704-67 88 IndA665, 165NE341.

705-80½-New. Where plaintiff in an action against a city for services referred to ordinances as the basis for his action, they must be pleaded. 83Mont370, 272P243 (complaint demurrable).

705-87 327 Ill586, 158NE804 (proof of good faith is not requisite of defense); 122Kan692, 253P228 (in action by civil service employee for salary during period of wrongful exclusion, it was held that city did not owe him salary paid employees appointed under civil service regulations and that amount earned during period of exclusion was properly deducted).

705-97½-New. Charter held not to authorize withholding of policeman's pay pending trial for misconduct. 221App Div301, 223NYS146.

707-23 252NY141, 169NE118 (power to cancel obligation due to town); 221App Div462, 224NYS168; 196Wis171, 218NW842. [a] **Powers will not be extended beyond plain import of language.**-Nebr 231NW699.

707-24 [c] **Powers will be strictly construed.**-Nebr 231NW699.

707-25½-New. Exercise of powers by city officers in excess of their authority for great length of time raises no presumption of grant to city of such authority. 80CalA561, 251P925.

707-29 TexCivA 31SW(2d)1102.

708-45 229Ky752, 17SW(2d)1031; 137Misc86, 241NYS431. [d] **Mayor has no authority to accept oral report of arbitrators** contrary to provisions of written agreement to purchase land requiring written report. TexCivA 31SW(2d)1102.

709-58 27 OhNPNS167 (jurisdiction limited to violation of ordinances).

709-64 34Ariz495, 272P923.

710-76 96CalA128, 273P604(1stcase); 130Kan650, 287P708; 225AppDiv371, 233NYS184.

711-77 NJSup 151A489(1stcase).

712-83 [c] (3) Under such provision he may not appear for a judge of court of general sessions. 217AppDiv749, 216NYS411.

712-83½-New. Attorney hired by municipality held not authorized to bring error proceeding on behalf of state. 23 OhA307, 155NE412.

712-83⅓-New. A city attorney has the duty of representing the city in litigations and controversies regardless of whether they pertain to school or municipal matters. TexCivA 5SW(2d)257.

712-91 27 OhNPNS497.

712-93 [b] (4) Mayor of city of New York held to sternly high degree of responsibility for safety of life and property within his jurisdiction. 132Misc64, 229NYS598.

713-94 [c] **Statute requiring municipal clerk** to keep well-bound book to record proceedings, etc., is mandatory. 157Miss594, 128S757.

713-96 [b] **Comptroller.**-9PaDist&Co407.

713-99 See also 225AppDiv371, 233NYS184.

714-17 204 Iowa798, 215NW957, 55ALR430; TexCivA 29SW(2d)437 (public acts or duties).

714-18 203 Iowa1245, 212NW158, 53ALR375.

714-20 TexCivA 18SW(2d)936 (cannot be held liable for nonfeasance of council of which they are members).

715-22 204 Iowa798, 215NW957, 55ALR430; 224Ky298, 6SW(2d)236; 138 Okl110, 280P456.

715-25 TexCivA 297SW874.

716-29½-New. No action lies against a city clerk for failure to perform the duty safely to keep documents which are for the benefit of the public and not of an individual who may be prevented by such failure from making conclusive proof of a defense in an action against him. 178Minn225, 226NW697 (2dcase).

717-46 203 Iowa1245, 212NW158, 53ALR375; Mass 173NE406.

717-48 130Kan650, 287P708.

717-52 See also 138 Okl110, 280P456.

718-76 But see 295Pa323, 145A290.

719-77½-New. or paid out honestly and in the belief that it was within their powers, 201Cal273, 257P530.

719-83½-New. Money cannot be recovered as illegally disbursed where electors, at annual meeting, ratified acts done. 192Wis93, 212NW402.

720-6 295Pa323, 145A290.

721-25 21 OhA33, 153NE109.

721-41 208 Iowa133, 217NW472.

722-46 208 Iowa133, 217NW472; 323Mo990, 20SW(2d)22, 66ALR1053. See also MoA 290SW1019.

722-50½-New. City treasurer held not liable for funds lost through failure of bank designated by counsel where deposits were in excess of bonds approved by counsel. Mont 290P246.

723-71 [a] **Indemnity bond enforceable,** though not required by law. 116 Oh576, 157NE321. [b] **Indemnity bond for faithful performance of officer's duty** held "official bond." 116 Oh576, 157NE321. [c] **Obligation of signer of indemnity bond** for performance of officer's duties not signed by officer is primarily not that of surety. 116 Oh576, 157NE321. [d] **Joint and several liability exists** and surety is not liable unless principal is also. 22F(2d)306.

724-78½-New. Sureties on a town treasurer's bond are not liable as insurers or guarantors of funds coming into the treasurer's hands. 208 Iowa879, 226NW159.

724-83 [c] **Failure of depositary to insist that city treasurer's checks be countersigned** has been held not to relieve sureties from liability. 43F(2d)315 (failure to make monthly reports). [d] **Surety has been held not liable** for cost of auditing treasurer's account after his death. 43F(2d)315.

725-88 239 IllA628.

725-96½-New. A bond of a city collector, although running to the state instead of to the city, is good as a common-law bond. 323Mo150, 19SW(2d)691.

726-15 CalA 273P1106; 130Kan650, 287P708. [b] **"Official duties."**-207Cal714, 279P767.

727-16 43F(2d)315.

727-18½-New. depositing funds of city in bank knowing of insolvent condition thereof; 54SD515, 223NW723.

727-31½-New. Since giving of receipt for payment by purchaser of city bonds is ordinary duty of treasurer, as respects liability of bondsmen, 19 OhA476.

727-31⅓-New. the latter are liable upon failure to account for funds because of checks receipted for becoming worthless. 19 OhA476.

727-31¼-New. ; approving bonds for payment of unauthorized claim. CalA273P1106.

727-31⅓-New. Misappropriation of street assessment funds by the city treasurer. 35F(2d)812.

727-39½-New. ; loss of money by reason of failure of the bank in which the treasurer deposited money in good faith. 208 Iowa879, 226NW159.

727-41½-New. Sureties are not liable for loss because of city commissioners' failure to take bonds from depositary banks, as required. 29F(2d)417.

727-41⅓-New. Misappropriation of funds by the city treasurer collected beyond authority of the treasurer and not covered by bond. 35F(2d)812.

727-43½-New. Sureties on renewed city collector's fidelity bond are liable for water and light payments deposited and lost through bank's insolvency. MoA 290SW1019.

729-66½-New. Sureties on a city treasurer's bond cannot escape liability on the ground of alteration of the bond before approval, by erasure of the signature of a surety and substitution of another, in the absence of showing that the mayor had knowledge of the substitution at the time of approving the bond. 319Mo824, 5SW(2d)10.

729-68½-New. Stranger to tax collec-

tor's bond cannot sue thereon or require obligee to sue. 259Mass310, 156NE431.
729-69½-New. Statute held not to confer upon persons injured by breach of official bond of collector of taxes any right to prosecute bond or to demand prosecution by obligee. 259Mass310, 156NE431.
729-70 22F(2d)306.
729-78 130Kan650, 287P708. [a] (2) Allegation that bond of city collector running to state was in fact given to protect city is sufficient allegation of that fact. 323Mo 150, 19SW(2d)691.
729-79 323Mo 150, 19SW(2d)691 (petition need not plead ordinances where action is based solely on breach of suretyship).
730-99½-New. In an action against a surety on a city collector's bond, ordinances tending to prove breach of bond are admissible although not pleaded, where the action is based solely on such breach. 323Mo 150, 19SW(2d)691.
731-3 35F(2d)812.
731-15 319Mo 824, 5SW(2d)10. [b] (2) To show defendant's liability for certain item. 35F(2d)812. [c] **Findings held proper** of existence of no shortage. 124Kan823, 262P542.
731-17½-New. Finding of waivers of taxpayers dated within thirty days from publication of a street assessment ordinance makes out a prima facie case of compliance with the statute providing for payment of assessments in installments. 35F(2d)812.
731-22 196NC721, 147SE12.
732-39 199Cal 1, 248P230; 34Porto Rico 5 (mayor).
734-59 119 Oh303, 164NE119.
734-81 98CalA367, 277P194; NJSup 150A249.
736-16 NB [1928] 2DomLR661. [b] **Philadelphia art jury** is not special commission but agency of municipal government. 14PaDist&Co 327.
736-25 TexCivA 10SW(2d)428.
737-36 [a] **Replacement of incumbent** of office of director of certain departments is authorized by Walsh Act. NJ 142A550.
737-41 NJSup 35A676.
738-45 See also TexCivA 10SW(2d) 428.
738-57½-New. Groups of individuals exercising local or internal powers and duties may be deemed to be acting as departments of a municipality irrespective of the degree or kind of control over them possessed by the commonwealth as contrasted with local government. 263Mass173, 160NE665.
738-57½-New. Power given an administration board by statute may not be enlarged by a by-law. 221AppDiv646, 224NYS544.
739-92 [d] **Commissioners of public works are made members of board of estimate and apportionment,** under some statutes, in absence or illness of borough president, with power to discharge all duties of president. 225App Div371, 233NYS184.
742-41 111Conn667, 151A268.
742-42 [a] **Engineer need not be employed** except when public work is being prosecuted, under St. § 3447, providing for employment of competent engineer. 225Ky61, 7SW(2d)859.
742-49½-New. Petitioner is not entitled to mandamus for reinstatement where he was eligible for position when employment was available and did not show existence of present employment unlawfully denied him. 134Misc612, 235NYS640.
743-59 [a] **Police department may be department of municipality.**-263Mass 173, 160NE665.
743-67 267Mass438, 166NE850; Mass 171NE82(2dcase).
744-71 Mass 171NE82(2dcase).
744-77 Mont 285P928.
746-21 24 OhA445, 157NE905; Wis 230NW42. [c] **Attempted removal without charges and hearing** does not create vacancies and authorize appointment of new members. Wis 230NW42.
747-22 24 OhA445, 157NE905.
747-23 24 OhA445, 157NE905 (even if direct reinstatement not ordered by court, reversal is such implied order).
747-23½-New. And in some jurisdictions the mayor removing him may appeal from the court order impliedly directing his restoration. 24 OhA445, 157 NE905.
747-27 [h] **Providing equipment.**-Mo 28SW(2d)105. [i] **Deputy commissioner of public safety** cannot exercise functions of commissioner where commissioner was not absent or disabled. 229 AppDiv787, 242NYS57.
747-30 221AppDiv301, 223NYS146.
748-31 135Misc705, 238NYS253.
749-44 See also 224AppDiv115, 229 NYS589.
749-52½-New. General provisions of a city charter relating to the organization of the police department do not apply to the office of chief of police. 85CalA 507, 259P970.
749-52½-New. Some statutes do not authorize appointment of assistant chiefs as part of permanent force. Mo 28SW(2d)105.
750-76½-New. Under some charters the chief of police may be selected from the police department. 85CalA507, 259 P970.
750-79 [d] **Examination.**-225Ky120, 7SW(2d)825.
750-79½-New. Some charters exempt the office of chief of police from any and all civil service provisions thereof. 85 CalA507, 259P970.
751-99 225Ky120, 7SW(2d)825.
751-9 [a] **Chief of police waived right to file explanation** with mayor by filing appeal to civil service commission within two days after removal. 32 OhA394, 168NE151.
751-12 NJSup 144A608.
751-15 NJSup 144A608.
752-24 NJSup 144A608.
752-26 [c] **Ruling forbidding affiliation with secret society,** obligations of which were in direct conflict with oath of office, held salutary, and enforcement thereof upheld. 46Philippine432.
753-35 NJSup 144A608 (court will examine testimony, and pass on its admissibility and relevancy, and, if evidence does not support charges, will reverse judgment of removal).
753-41 NJSup 144A608.
754-68½-New. Business of buying and selling automobiles, irrespective of knowledge that they were stolen, was a practice incompatible with the duties of city chief of police. NJSup 144A608.
754-83 235Ky429, 31SW(2d)709.
755-11½-New. In some jurisdictions, appointment of deputy marshals with their oaths must be presented to the board of trustees for approval. 90CalA 463. 265P1035.
757-54 144 Okl 231, 291P95.
757-55 144 Okl 231, 291P95.
757-61 See also OhA 173NE309.
758-73½-New. Judicial determination for removal of marshal is not subject to collateral attack. 144 Okl 231, 291P 95.
758-81 OhA 173NE309.
758-84½-New. Marshal, accepting reduced salary and giving receipt therefor, cannot subsequently claim additional compensation at the old rate. 129 Or558, 278P581.
759-86½-New. Right to salary after filing of charges. OhA 173NE309.
759-97 129 Or558, 278P581.
761-37 [d] **Release on death of marshal.**-224Ky332, 6SW(2d)279.
761-41 235Ky778, 32SW(2d)339.
762-63 [b] 252 IllA10. [c] **Chaceman** appointed by board of commissioners is member of police department under statute. NJSup 136A197.
762-67 89CalA47, 264P529; 107Conn 451, 140A826.
762-74 [b] **In execution of governmental functions intrusted to them** policemen are but designated police agents and not servants of city. 233Ky12, 24 SW(2d)938.
763-78 153Mo 194, 54SW447. See 5 AppDiv169, 39NYS78. [a] **"Police officer" distinguished.**-153Mo 194, 200, 54 SW447. [b] **"Roundsman"** is not distinct from patrolman but is merely patrolman assigned to duty as roundsman. 5AppDiv169, 170, 39NYS78. [c] **"Turnkey" distinguished.**-153Mo 194, 200, 54SW447.
763-84 339 Ill 141, 171NE167.
763-91 339 Ill 141, 171NE167.
763-92 252 IllA10.
763-94½-New. Office of patrolman is created only by ordinance. 326 Ill 553, 158NE141.
763-98½-New. Where power to create office of night policeman is vested in city council, office is nonexistent in absence of establishment by ordinance. 339 Ill 141, 171NE167.
763-98½-New. In such case provision in municipal code prescribing powers and duties of night policeman is insufficient to create office. 339 Ill 141, 171 NE167.
763-98¼-New. Employment of persons not provided by law and having no fixed term is not invalid as attempt to create offices. Mo 28SW(2d)105.
763-98½-New. A provision in an ordinance creating a police department for such other patrolmen as may thereafter be fixed by council is not the creation of additional offices. 252 IllA10.
764-10 201Cal 1, 258P939; 105NJL11, 143A806 (statute does not apply to appointment made before its passage); NJ 151A113; NJ 151A116.
764-12½-New. Charter provisions prescribing qualifications of members of the police force are sometimes limited and controlled by civil service provisions contained in the charter. 85CalA 507, 259P970.
764-17 228Ky253, 14SW(2d)766 (1st case).
764-18 225Ky120, 7SW(2d)825.
764-19½-New. The giving of competitive examinations does not show that the position was duly established in competitive classification. 131Misc784, 228NYS272.
765-33½-New. Police officers of some municipalities are required to give a bond to city for faithful performance of official duties. Nebr 229NW894 (statute part of official bond).
766-38 [e] **Appointing power** to position in police department is in director of public safety. NJSup 151A210. [f] **Chief of police has no authority to appoint policewoman.** NJSup 151A210.
766-40½-New. The mayor in some jurisdictions has discretion to refuse to consent to the employment of additional regular police for the city, 104WVa259, 139SE757.
766-40½-New. and such discretion is not abused where its exercise is based on lack of necessity for additional policemen. 104WVa259, 139SE757.
766-40¼-New. Uniformed patrolmen assigned to police duty on motor cycles or in automobiles are patrolmen whose employment is authorized. Mo 28SW (2d)105.
766-43 225Ky652, 9SW(2d)986.
767-46 221MoA369, 273SW170.
767-54 See also NJ 145A618(1stcase).
767-55 [c] **Veteran** preferred under statute held not exempted from provisions for probationary period. 259 Mass286, 156NE250.
768-65 [b] 245NY500, 157NE834.
770-95 [h] **Authority not within statute cannot be exercised.**-219Ky465, 293 SW956. [i] **Entry of private premises.**-14PaDist&Co 4. [j] **Dispersal of assembly.**-14PaDist&Co 4.
770-2 [f] (4) Inquiry as to property found in street. 89CalA47, 264P529. (5) Other instances. Md 150A447. [j] **Coal and iron policemen** can exercise all functions of municipal policemen. 299 Pa109, 149A159.
770-2½-New. Members of police force are guardians of public safety directly chargeable with enforcement of laws. Mont 285P928.
771-13 See also CalA 287P982.
771-14½-New. Protection by city. City has discretion as to what means it will select for protection of policemen in discharge of duties. TexCommnA 290 SW736 [rev TexCivA 266SW196].
771-18 116 Oh586, 157NE325, 53ALR 36.
772-22½-New. Officer's bondsman is not liable for acts done outside official capacity. 219Ky465, 293SW956.
772-37 Nebr 229NW894. [a] (3) Surety of motor cycle policeman liable for his negligence. 116 Oh586, 157NE325,

53ALR36. (4) Liable on bond for negligence resulting in collision with pedestrian. Nebr 229NW894. [e] **Surety is not liable for negligence of policeman** on bond to "honestly, faithfully and impartially discharge" duties of office. 26 OhNPNS145.

773-42 220Ky484, 295SW431.

773-46 26 OhNPNS145.

773-50½-New. City has implied power, exercisable at discretion, to protect policemen in discharge of duties. Tex CommnA 290SW736 [rev CivA 266SW196].

774-67 [f] **Stenographer in police department** is not "policewoman" as regards tenure of office. NJSup 151A210.

774-67½-New. A chanceman continues as member of police department, although he holds over after expiration of appointment. NJSup 136A197.

775-69½-New. Special policeman, appointed pursuant to statutory authority, acting as such after expiration of period of appointment, may be a "de facto officer." 110TexCr337, 8SW(2d)174.

775-69½-New. There is no inherent right of indefinite tenure in office of policeman. Mont 285P928.

775-81 CalA 269P977.

776-29 But see 9PaDist&Co 674.

776-98 198Ind30, 152NE174.

777-5 See also 245 IllA383.

777-17 198 Ind30, 152NE174.

777-18 CalA 269P977.

778-24 198 Ind30, 152NE174; Mass 171NE648 (removal without notice and hearing). [b] (8) Special investigator. NJSup 147A740. [c] (3) A police officer's testimony that he had been a fireman for five years and three months, given at an unauthorized hearing before mayor in proceeding for removal, was not sufficient notice to removing officer of his status as exempt volunteer fireman. 224AppDiv203, 230NYS97. [e] Mass 171NE648. [g] 198 Ind30, 152NE174. [h] **Civil service law** is not designed to shield inefficient or unworthy public servants from removal by requirements of insubstantial formalities. Mass 171NE648.

779-39 259Mass286, 156NE250.

779-51 220AppDiv152, 221NYS43.

780-63 77CalA627, 247P614; Mont 285P928; 220AppDiv152, 221NYS43. [a] **Failure to file charges** is not ground for reversal of order of dismissal where charges were served. NJ 141A588.

780-68½-New. Where there is no such office as that which the employee claims to hold, it is not necessary to file charges against him before discharging him from employment of the city. 252 IllA10.

781-70 77CalA627, 247P614.

781-71 77CalA627, 247P614.

781-72 77CalA627, 247P614. [c] (6) 77CalA627, 247P614.

781-73 77CalA627, 247P614; 233Ky250, 25SW(2d)393. [a] (1) 77CalA627, 247P614. (2) 77CalA627, 247P614.

782-81 220AppDiv152, 221NYS43.

782-85 220AppDiv152, 221NYS43.

782-88 157Miss225, 127S902.

782-90 198 Ind30, 152NE174.

784-3 11PaDist&Co 316.

784-11 See also NJSup 147A644(1st case). [a] **Officer being passive occupant of automobile** being negligently driven by fellow officer has been held to have been illegally removed. NJSup 147A644(1stcase).

784-12 [b] (2) Taking drink of liquor held not "violation of law" or "misconduct" warranting suspension. 220Ky657, 295SW998.

785-29½-New. Dismissal of patrolman for making arrest without warrant while off duty and not in uniform is not warranted. 130Misc8, 223NYS553.

785-38 11PaDist&Co 316.

786-43½-New. That police officer testified before grand jury regarding gaming does not prevent discharge where he previously made admissions regarding gaming to police chief. 233Ky250, 25SW(2d)393.

786-43½-New. Removal of policeman cannot be set aside on ground he was not served wtih formal notice of dismissal. NJ 151A53.

786-50 [b] **That director of public safety called proceeding "investigation"** is immaterial on question whether fair trial was granted. NJ 141A588.

786-54 NJ 141A588.

787-56½-New. Conviction is not vitiated because one of councilmen publicly inquired of prosecuting counsel as to whether they were required to put their decision in writing. NJSup 144A799.

787-73 [c] **In New Jersey.**-151A53.

788-94 Mont 285P928; NJ 148A894.

789-99½-New. That mayor had expressed an opinion before trial of charges did not disqualify him. NJSup 144A799.

789-99½-New. Unwarranted writ of prohibition restraining member of commission from participation in trial of policeman will not affect his right to join in disposition of case where he heard all evidence. Mont 285P928.

790-19 105NJL492, 144A588(1stcase).

790-23 [c] **Admissions of police officer** to chief of police of guilt of gaming are admissible. 233Ky250, 25SW(2d)393.

790-24 Mass 171NE648.

790-29 224AppDiv763, 229NYS753.

790-34 [a] 224AppDiv229, 229NYS505.

790-37 See also CalA 269P977.

791-43 [a] (1) 225AppDiv601, 233NYS627. [b] (3) 229Ky810, 18SW(2d)283. (11) Accepting bribes. NJ 141A588.

791-44 [a] (1) 224AppDiv229, 229NYS505. [d] (3) 224AppDiv229, 229NYS505. (7) Making arrest without warrant while not in uniform. 223AppDiv468, 228NYS585.

793-74½-New. Legality of removal cannot be determined in collateral proceedings. NJ 150A385.

793-85 243 IllA100.

793-87 262Mass477; 160NE427.

793-88 221AppDiv682, 225NYS80.

793-89 See also 229Ky810, 18SW(2d)283.

793-92 262Mass477, 160NE427; NJSup 144A799; 221AppDiv682, 225NYS80.

793-92½-New. The court must consider that executive action is being reexamined. 262Mass477, 160NE427.

793-96 130Misc8, 223NYS553.

794-1 38GaA762, 145SE470(2dcase); 249NY172, 163NE297. See also Mass 171NE648.

794-9 Mass 171NE648.

794-10 243 IllA100; 249NY172, 163NE297; 223AppDiv468, 228NYS585.

794-11 See also 198 Ind30, 152NE174.

794-14 NJ 151A53.

794-15 262Mass393, 160NE431.

794-19 [b] **Jurisdictional facts** showing that relator is within classes entitled to hearing and to review by certiorari, under Civ. Serv. L. § 22, must be set forth. 224AppDiv203, 230NYS97.

795-28½-New. Return over hand of director and seal of city is conclusive of relevant matters therein contained. 105NJL492, 144A588(1stcase).

795-29 240 IllA208.

796-39 But see CalA 269P977.

796-41 233Ky250, 25SW(2d)393.

796-48 77CalA627, 247P614.

796-50 CalA 269P977; NJ 141A588.

797-59 [b] **In Massachusetts.**-262Mass477, 160NE427.

797-72½-New. Additional evidence may be permitted under some statutes. 206 Iowa144, 220NW72.

798-85½-New. Court cannot treat certiorari as a proceeding in mandamus, when it appears that there is no right to relief in a certiorari proceeding. 224AppDiv203, 230NYS97.

798-85½-New. Court's finding that officer should have inferred from mayor's notice that purpose was to give him opportunity for hearing has been held warranted. Mass 171NE648.

798-88 [c] **Public welfare should be considered** in determining reinstatement of police officer. Mass 171NE648.

799-95½-New. Effect of reinstatement after quashal of proceedings on certiorari is not to waive right to retry policeman on same charge. 240 IllA208.

799-97 [a] **Evidence held insufficient to show improper dismissal without hearing.**-198 Ind30, 152NE174.

799-99 252 IllA10 (municipality held not estopped to deny title to office).

800-28 107Conn451, 140A826.

801-64 [e] **Appeal.-NJSup** 151A379(2d case).

802-65 [a] (1) 12PaDist&Co 225 (some reason must be assigned other than "for good of service"). (2) In proceeding for demotion, findings of civil service commission in proceedings for removal are not conclusive. 12PaDist&Co 225. (3) Demotion is justified where director states he believes officer has acquired large sum of money dishonestly. 12Pa Dist&Co 225.

803-86 203 Iowa1203, 212NW579, 582 [citCyc]. [a] **Effect as separating incumbent from service.**-131Misc780, 228NYS272.

803-87 203 Iowa1203, 212NW579, 582 [citCyc].

803-92 203 Iowa1203, 212NW579, 582 [citCyc].

804-5 245 IllA383.

804-6 107Conn451, 140A826.

805-20½-New. A policeman need not report for duty during the period of unlawful suspension to be entitled to compensation. 107Conn451, 140A826.

806-40 231Ky835, 22SW(2d)255.

807-53 95CalA71, 272P606.

807-54 77CalA627, 247P614.

808-79 9PaDist&Co 674.

809-84 245 IllA346; 221MoA369, 273SW170.

810-98 245 IllA383.

810-3½-New. A policeman not performing any duties of an office to which he is promoted is not entitled to an increase. 105NJL103, 143A728.

811-30 221AppDiv301, 223NYS146.

811-36½-New. Delay of more than two years by ousted policeman held to bar petition in proceedings to collect salary. 240 IllA208.

812-48½-New. [§ 1405a] **dd. Recovery of Payment.** Salary paid a police appointee over the age limit established by rule, which was not binding on the council, cannot be recovered in a taxpayer's suit. 202Cal 1, 258P939.

812-48½-New. Where appointment to the police force is illegal, salary paid him is recoverable in a taxpayer's suit. 202Cal 1, 258P939.

813-55 79CalA171, 249P46; 223Ky269, 3SW(2d)606; 36 OhA24, 172NE680.

813-57 79CalA171, 249P46.

813-59 See also 332 Ill 353, 163NE689.

813-60 223Ky269, 3SW(2d)606.

813-64 79CalA171, 249P46; Oh 171NE586 (powers of trustees of police relief fund are statutory).

813-65 79CalA171, 249P46.

813-66 79CalA171, 249P46. [a] 79CalA171, 249P46.

813-70½-New. or have been incapacitated prior to their adoption, NJ 141A9.

813-73 79CalA171, 249P46.

813-75 79CalA171, 249P46.

813-76 79CalA171, 249P46.

813-81 [a] **Failure of disbursing officer so to deduct** does not prevent widow of deceased pensioner from being entitled thereto. NJSup 147A647.

813-81½-New. ; but failure to deduct from salary of policeman for fund does not disentitle his widow to pension. NJSup 136A197.

814-85 14PaDist&Co 186.

814-87 NJSup 136A197; NJSup 150A245.

814-92½-New. a chanceman, NJSup 136A197.

814-95½-New. Special patrolman, under contract providing that he shall have no claim to pension fund, afterward becoming regular patrolman cannot reduce time as special patrolman as basis for pension. 130Misc204, 223NYS740.

814-95½-New. The widow of a police officer who elected to take compensation under the Workmen's Compensation Act cannot recover a pension from the city. 248Mich480, 227NW788.

814-96 NJSup 136A197.

815-3 326 Ill 579, 158NE220, 54ALR940.

815-5 [c] **Death from heart spasm from exertion incident to ascending stairway to place of work** results from injury in performance of duty. CalA 290P646.

815-10½-New. Under an ordinance providing for relief in case of death while in service of the department, death need not result from accident nor while in performance of duties. 83Colo 89, 262P526.

815-12 [a] **Police commissioner may retire policemen** on pension in some municipalities. 260Mass476, 157NE529.

815-18 92CalA242, 267P921.

816-20 Oh 171NE586.
816-21 [a] **Rules of trustees of relief fund** providing for pension to discharged policeman have been held not to confer discretion to deny pension. Oh 171NE 586.
816-26½-New. The burden is on the pension commission to show that the chief of police had reached the retirement age. NJSup 139A343 (evidence held insufficient).
816-27 [a] **Acts have been held not such waiver** depriving policeman of any rights to pension. NJSup 150A245.
816-30½-New. Patrolman demoted to position of prison guard by reason of physical disability is entitled to pension as demotion was dismissal under statute. MoA 22SW(2d)902.
817-29 See also 330 Ill 79. 161NE145. But see 331 Ill 193. 162NE859.
817-40 246 IllA471.
817-41 79CalA171, 249P46; 82CalA265, 255P536.
817-44½-New. The amount that can be paid monthly should be estimated at the beginning of the fiscal year, and pensions distributed equitably on such basis. 223Ky269, 3SW(2d)606.
817-44¼-New. but, if unable to pay in full, the city does not owe pensioners anything from the balance left at the end of the year. 223Ky269, 3SW(2d) 606.
817-44¼-New. One who was member of police force for more than twenty years, and police commissioner for almost eight years, has been held entitled to pension allowed to chief inspector. 250NY396, 165NE824.
817-47 NJSup 150A245.
817-48½-New. Trustees of police pension fund cannot exercise discretion and deny pension where, on agreed facts, petitioner is entitled to pension. CalA 290P646.
817-48½-New. Under a statute providing for determination of disability by trustees of the fund on advice of a physician, the action of the board in determining disability without advice of a physician is at most an irregularity and is not void. Iowa 228NW578(2d case).
817-48¼-New. After an application for a pension has been filed and passed upon adversely, a second application cannot be filed. Iowa 228NW578(2dcase).
817-48½-New. A municipal pension board has only powers given by the act creating it. 252 IllA212.
817-53½-New. Question never submitted to board of trustees is not reviewable. 130Misc204. 223NYS740.
817-53½-New. Finding denying pension will not be disturbed where sustained by evidence. NJ 140A800.
817-53¼-New. A finding of police commissioners denying a pension to the widow of a policeman is conclusive in the absence of abuse. 100CalA270, 279 P1080.
817-55 260Mass476, 157NE529; NJSup 150A245.
818-63 330 Ill 79. 161NE145.
818-65 79CalA171, 249P46.
818-67 [b] **Pension granted to person not within statute.**-252 IllA212.
818-68 See also 330 Ill 79, 161NE145.
822-33½-New. Some statutes authorize board of police commissioners to appoint janitors. Mo 28SW(2d)105.
822-34 [a] **Stenographer in detective bureau is not "clerk"** as regards tenure of office. NJSup 151A210.
823-61½-New. Some statutes do not authorize appointment of assistant surgeon as part of permanent police force. Mo 28SW(2d)105.
823-69 215Ala59, 109S158.
823-80½-New. Court bailiff. Missouri statute authorizes board of police commissioners to appoint court bailiff not connected with permanent force. Mo 28 SW(2d)105.
824-83 240Mich94, 214NW968; 154 Wash330, 282P213. [b] **Fire department is governmental agency** performing public duty. 173Minn265, 217NW 130.
824-88 [a] **Fire patrol service** is within authority given to maintain fire department. 319Mo 386, 48W(2d)427. [b] **Statute authorizing creation of firemen's civil service commissions** in certain cities is not violative of home rule provision of constitution. 180Minn366, 230NW830(2dcase).
824-90 But see 199 Ind78, 155NE198.
827-71½-New. Under some statutes mayor cannot remove fire commissioners without cause being shown and a hearing before council. Wis 230NW 42.
827-71½-New. In such case attempted removal without charges and hearing does not create vacancies and authorize appointment of new members. Wis 230NW42.
829-29 See also 83NH439, 144A783.
830-60 See also 199 Ind78, 155NE 198.
830-61 199 Ind78, 155NE198.
831-74 CalA 288P143(2dcase).
831-79½-New. Firemen holding positions have the right, together with other citizens and voters within a city, to take an examination and be placed on the eligible list for appointment if passing the examination successfully. 225Ky358, 8SW(2d)629.
832-80½-New. Where petitioners had not served five years as firemen so as to be free from examinations petitioners employed as firemen before passage of ordinance requiring examinations were not exempt from taking examinations. 225Ky358, 8SW(2d)629.
832-80½-New. Statute may exempt firemen in continuous service for five years from examination. 228Ky253, 14 SW(2d)766(1stcase).
832-84 [b] **Who are veterans.**-Mass 172 NE218.
832-91 See also 134Misc131, 234NYS 159.
832-93½-New. In some jurisdictions charter provisions do not authorize the commission to base the determination of eligibility for promotions upon competition examinations. 80CalA561, 251 P925.
832-94 See also 80CalA561, 251P925.
832-94½-New. But the court cannot, in mandamus proceeding, require the commission, in certifying applicants for promotion, to refrain from compelling applicants to undergo mental or physical tests in order to be eligible for promotion. 80CalA561, 251P925.
832-99½-New. Resignation of member of fire department becomes effective when copies are deposited in office of fire department and with civil service commission. 180Minn157, 230NW633.
832-99½-New. Withdrawal after his death of resignation of member of fire department from files of civil service commission does not reinstate him. 180 Minn157, 230NW633.
832-4 See also 264Mass178, 162NE342.
833-23 252 IllA168 (transfer of fireman to pension roll at his own request).
834-30 But see 134Misc782, 236NYS 383.
834-35 121 Oh139, 167NE362.
835-52 But see 225AppDiv876, 233NYS 47.
836-84 98CalA629, 277P369.
836-88½-New. If an employee in the classified service is improperly discharged, remedy is not by appeal to, or retrial by the civil service commission, but by having an investigation by the commission as to the motives of discharge, or by resort to the courts. 244Mich64, 221NW283.
836-88½-New. Commissioners cannot be said to have acted irregularly in dismissing a fireman, where the latter did not apply for further return including all evidence. 98CalA629, 277P369.
837-15½-New. A member of the fire department legally suspended for a definite period is not entitled to reinstatement, unless he obtains assent of the civil service commissioner. 266Mass 513, 165NE681.
837-15½-New. Retrial by the civil service commission of a fireman discharged for intoxication after hearing by fire commissioners, and finding of civil service commission that commissioners had wrongly decided the facts, have been held outside the commission's authority, which merely permits civil service commission to reinstate an employee on finding that discharge was made for political or other improper reasons. 244Mich64, 221NW283.
837-15¼-New. After voluntary retirement and acceptance of pension, allowed by statute, an honorably discharged volunteer fireman cannot compel his reinstatement, after the position has been filled by another, by withdrawing his resignation and relinquishing his pension allowance. 133Misc779, 233NYS 504.
838-21½-New. Fireman may be suspended where council directs fire department chief to reduce personnel 203 Iowa1203, 212NW579.
838-21½-New. , and soldier's preference law does not entitle him to hearing on honorable discharge. 203 Iowa 1203, 212NW579.
838-21¼-New. Under a rule of the civil service commissioners, authorizing the appointing officer, with the consent of the commissioner, to reinstate any person who has been separated from the service by suspension for a definite period for cause, provided such reinstatement is with the consent of the commissioner on good cause shown, a fire department employee acquiescing in suspension for definite period was not entitled to reinstatement without the commissioner's consent. 264 Mass178, 162NE342.
838-23 203 Iowa1203, 212NW579.
838-27½-New. Statute authorizing reduction of member of civil service employers by resolution of city council when public interest requires is applicable to city firemen. 204 Iowa58, 214 NW679.
838-29½-New. A city fireman is not entitled under a soldiers' preference law to a hearing on honorable discharge because of reduction of the number of employees. 203 Iowa1203, 212 NW579.
840-58 [c] 77CalA310, 246P339.
840-64 315Mo 41, 285SW504. [b] (2) Under statute salary of fireman construed as "employee" may be fixed by council without passing ordinance. 204 Iowa58, 214NW679. (3) Definition of "employee" in Workmen's Compensation Act is immaterial in determining whether fireman is employee under statute authorizing city council to fix salary. 204 Iowa58, 214NW679.
841-75½-New. A fireman not performing the duties of an office to which he was promoted is not entitled to an increase. 105NJL103, 143A728.
841-83½-New. , or where there is no contract, express or implied, to pay for extra services. IndA 170NE83.
841-85½-New. Complaint in suit for recovery of pay for extra statutory day's service is insufficient where it fails to allege existence of unexpended appropriation from which payment could be made when contract was entered into. IndA 170NE83.
841-91½-New. A member of the fire department under civil service is entitled to salary during wrongful suspension. 170Ark54, 278SW625.
841-91½-New. and the city may not set off his earnings during time suspended. 170Ark54, 278SW625.
841-91¼-New. Fireman wrongfully suspended is entitled to salary although on reinstatement he did not reenter service. 170Ark54, 278SW625.
842-9 NJSup 140A667.
842-12 94CalA720, 271P795; 252 IllA 168 (ordinance held not in conflict with Firemen's Pension Act). [b] **Governing body of municipality** cannot be compelled to pass ordinance for payment of pension. NJ 151A112.
843-18 94CalA720, 271P795 (radical departure from ordinary pensioning laws in charter provision is not to be assumed to be legislative intent, without direct language to that effect); 331 Ill 459, 163NE396. See also 83Mont445, 272P677.
843-21 Utah 267P789.
843-23½-New. Fireman's widow is entitled to pension out of fund collected under statute in effect at time of husband's death. 100NJEq473, 136A 317.
843-27 100NJEq473, 136A317.

843-29 [a] **In Ohio.**-36 OhA24, 172NE 680.
843-33 **NJSup** 140A667. [a] **"Assess" held "levy."**-100NJEq317, 136A317.
843-41 [a] **Burden is on person claiming benefits to establish right.** CalA 288P143(2dcase).
843-42 Utah 267P789.
844-49 134Misc782, 236NYS383 (that decedent was active volunteer fireman at time of death must be shown).
844-50 CalA 288P143(2dcase).
844-50½-New. Effect of resignation from department.-180Minn157, 230NW 633.
845-62 94CalA720, 271P795. [a] (2) Illinois Firemen's Pension Act does not cover firemen whose disability did not arise out of, and was not caused by, discharge of duties. 252 IllA168.
845-69 243 IllA206; 104NJL453, 142A 362.
845-70 [b] **Failure to ask for pension** does not bar children from subsequently claiming benefits under statute. NJ 151A112.
846-74 134Misc782, 236NYS383 (that death occurred in performance of duties must be shown).
846-76 [d] (3) Where fireman was killed while riding on fire truck to obtain hooks for recovery of bodies of drowned persons, his death occurred outside scope of his duties. 134Misc782, 236 NYS383.
846-81 [d] 331 Ill 459, 163NE396; 233 IllA444. But see 244 IllA352. [e] **Effect of subsequent change of office.**-91 CalA542, 267P323.
848-10½-New. Whether relief association is charitable organization under statute forbidding suit by member for any benefit or sum due him is question for jury under proper instructions. 128 Me417, 149A23.
848-15 [a] (3) One serving in fire prevention service. 175Minn604, 222NW 284. (4) Skilled mechanic subject to call and service at fires. 175Minn605, 222NW284.
848-16 175Minn600, 222NW283.
848-19½-New. Under statutes, the membership of a fire department relief association may vote as benefit to a member full salary for the time lost through sickness contracted in the line of duty. 83Mont445, 272P677.
849-35 [a] **In New York.**-228AppDiv 707, 239NYS163.
852-35½-New. Board of highway supervisors has been held part of municipal government. Pa 152A23.
855-58 [a] See also 228AppDiv707, 239 NYS163. [e] **Assistant superintendent of bureau of street cleaning department** held not member of department so as to be entitled to benefit of certain statutes. 228AppDiv707, 239NYS 163.
856-66½-New. Incompetency, gross negligence, willful disregard of duties, mismanagement, waste of funds, and failure to file settlement with vouchers are sufficient cause for removal. 176 Ark489, 3SW(2d)334.
857-81 176Ark489, 3SW(2d)334. [b] **Certiorari is not proper remedy** to review removal of assistant superintendent of bureau of street cleaning by borough president. 228AppDiv707, 239NYS163.
858-94½-New. Under provisions of borough code, a borough to which the code is applicable has the right to have a commission appointed for management and supervision of municipal waterworks. 89PaSuper486.
858-13 174Minn410, 219NW760.
858-13½-New. In New Brunswick, a municipal power commission cannot maintain an action for breach of contract to supply electricity. NB [1928] 2DomLR661.
859-29½-New. Evidence has been held to support a finding that the position of superintendent of waterworks came within the Soldiers' Preference Act. 179 Minn99, 228NW447.
862-67½-New. Under some charters the board of waterworks commissioners is authorized to execute contracts for the purchase of waterworks machinery. TexCommnA 294SW521.
862-67⅓-New. Power granted to the board of waterworks commissioners to execute contracts for the purchase of waterworks machinery is not limited under normal circumstances by authority given to city council to act under special circumstance. TexCommnA 294 SW521.
862-67¼-New. A provision that a board of water commissioners may operate and maintain the system and borrow money for current expenses in operation does not deny the right to purchase necessary machinery. Tex CommnA 294SW521.
863-90½-New. Ordinance releasing city from liability for installing sprinkler system is no defense to liability for failure to shut off water. 148Va60, 138 SE503, 54ALR1485.
864-6 [a] **Where board is vested with power of removal** it acts in performance of governmental function. 319Mo 705, 7SW(2d)357, 59ALR95.
864-8½-New. In some jurisdictions the superintendent of waterworks appointed by the board of public service as administrative officer in charge of the water department cannot be suspended or discharged except in accordance with civil service rules. 264Mass158, 162NE1.
865-28 [a] **In Massachusetts.**-264Mass 158, 162NE1.
866-55½-New. In Ontario, Hamilton harbour commissioners are not civil servants or officers of dominion government. Ont [1930] 2DomLR509.
867-61½-New. In Ontario, Hamilton harbour commissioners are entitled to reasonable remuneration. Ont [1930] 2DomLR509.
868-83 147Wash224, 265P729.
869-6 9PaDist&Co 577. [c] **Commissioners cannot, by ordinance revision,** supersede statutory restriction on exercise of powers. 339 Ill 491, 171NE 526.
871-36½-New. Supervisor of golf course in city park was "employee" of city, which could remove him at any time. 9LaA545, 120S102.
871-41 246 IllA405; TexCivA 5SW(2d) 257. [b] (1) 247NY503, 161NE160.
872-58 TexCommnA 17SW(2d)36(3d case).
873-70 246 IllA405.
873-79 247NY503, 161NE160.
876-29½-New. Under some city charters the city superintendent of schools and the board of education can rescind the superintendent's existing contract of employment by mutual consent. 84 CalA312, 257P917.
876-29⅓-New. notwithstanding a statute that superintendents shall be elected by the board for a term of four years. 84CalA312, 257P917.
876-37 84CalA312, 257P917.
881-23½-New. Library directors have such control over donated property as the donor grants or the law provides. 318Mo 870, 2SW(2d)713.
882-28½-New. Charter provisions for a housing commission to eliminate overcrowded tenements and slums is for a municipal purpose under the constitution, and valid. 91CalA1, 266P1029.
883-41 99CalA607, 278P1060 (board of election commissioners cannot function independently from other departments of city government).
883-50 NJSup 143A378.
884-84½-New. Commissioner of public safety has no legislative power. 134Misc 412, 235NYS226.
885-10½-New. Resolution of ouster adopted by commissioners as body is unauthorized where power to try solicitor is solely in director of public affairs. NJSup 150A828.
886-29½-New. An attorney is entitled to recover costs advanced by him in suits brought to establish a street improvement district, but not for costs in suits brought by the district against him. 180Ark298, 21SW(2d)430.
887-41 TexCivA 10SW(2d)428. [a] **Municipal housing commission.**-91CalA 1, 266P1029.
887-41⅓-New. A resolution fixing the salary of a superintendent of public utilities at four hundred dollars per month, pursuant to ordinance creating a public utilities department, has been held not unauthorized, where it was not shown that no provision was made for his salary in the city budget. TexCivA 10SW(2d)428.
887-55 [a] (26) TexCivA 10SW(2d)428.
888-77½-New. Person who contracts. A contractor who operates under the supervision of a city is more nearly an employee than a contractor. 125Kan 524, 265P78.
889-88 [d] **Power to improve streets** implies power to employ inspector. 86 IndA407, 157NE63. [e] **Appointment of brokers without competitive bidding** is proper under statutory authority to lease lands. NJSup 151A203. [f] **Power to employ real estate brokers** is included in statutory power to lease land. NJSup 151A203.
890-10 [h] **Defense of policeman committing homicide in exercise of official duties.**-TexCommnA 290SW736 [rev judg TexCivA 266SW196].
890-12 [c] **Special counsel may be employed to assist city attorney** in litigation affecting interests of city. 56ND 454, 217NW668.
890-15 99CalA607, 278P1060 (controversy between two departments).
892-30 [a] (2) Mo 28SW(2d)105. (10) Day laborers. 104WVa538, 140SE544. [b] **Power given to board of police commissioners to employ help necessary for transaction of business** includes employment of persons necessary for various bureaus and shops. Mo 28SW(2d)105.
892-37 35Ariz214, 276P325.
893-43 RI 147A757.
894-65½-New. Reappointment after retirement. After retirement on pension for old age, employee is incapacitated from being reappointed. 130Misc124, 222NYS676.
894-78 But see 129Kan834, 284P618.
894-79½-New. Employee who had not continuously served for twelve months was not entitled to the benefit of a rule giving preference in reemployment to those who had so served. CalA 274P 1034.
895-80 Wash 288P913 (charter construed).
895-82 CalA 283P891.
895-83½-New. Soldiers' Preference Law applies only where qualifications are at least equal to other applicants. 203 Iowa1203, 212NW579.
895-93 [a] **Investigation preceding appointment.**-178Minn277, 226NW841.
896-8 [a] **Construction of statute.**-243 IllA374.
896-11½-New. Where ordinance authorized council to elect superintendent of municipal garage he does not become "officer" exempt from civil service. 259 Mass447, 156NE536.
896-11⅓-New. Rules of civil service of a city have the force of law. Mass 169 NE438(2dcase).
896-14 226AppDiv218, 235NYS207.
896-14½ 226AppDiv218, 235NYS 207. [i] **General superintendent and engineer of water department.**-174Minn 410, 219NW760.
897-21 [a] (1) 174Minn410, 219NW 760.
898-35½-New. The giving of competitive examinations does not show the adoption of a rule placing a position in the competitive class. 131Misc780, 228 NYS272.
898-51 337 Ill 100, 168NE904. But see 80CalA208, 250P1062.
900-79 But see 129Misc663, 222NYS415.
900-90 [b] **Knowledge of city superintendent** that payees in warrants were fictitious persons entered by him on time sheet is not imputable to city. Tex CommnA 29SW(2d)1027.
900-91 10LaA389, 120S135.
900-92½-New. An attorney has a right to defend a street improvement district and commissioners from any suit seeking to invalidate or overthrow assessment of benefits made by the commissioners. 180Ark298, 21SW(2d)430.
901-2½-New. Under charter provision in some jurisdictions term of employment continues until stated age when employee is automatically put on retirement system, 130Misc124, 222NYS676.
901-2⅓-New. but such employment may be continued for successive two-year periods, after reaching such age, on

application. 130Misc124, 222NYS676.

901-5 261Mass351, 158NE760. [c] **Age limit.**–245NY604, 157NE875. [d] **Provision in charter** that probationary period shall not exceed six months' duration prohibits commission from adopting rule requiring period of one year. 208 Cal 291, 281P64.

901-6 261Mass351, 158NE760.

902-25 See also 229Ky51, 16SW(2d) 499.

903-35 78CalA516, 248P689.

903-39½-New. After retirement on pension because of reaching prescribed age, employee is not entitled to further salary, although subsequently reappointed. 130Misc124, 222NYS676.

903-39⅓-New. and provision permitting continuance in employment on application therefor, for successive two-year periods, does not entitle such employee to compensation in absence of application. 130Misc124, 222NYS676.

904-48 123Kan344, 255P43.

904-48½-New. , or has retired on reaching the age limit. 245NY604, 157NE 875.

904-50 150Wash542, 273P748. But see 319Mo 1078, 8SW(2d)620.

904-51 170Ark54, 278SW625. See also 205Cal 366, 270P682; 82CalA5, 254P 919.

904-51½-New. After discharge without hearing, an employee is not entitled to the salary paid another appointed in his place. Mo 8SW(2d)895.

905-55 264Mass578, 163NE175. [b] **Recovery on quantum meruit** for extra work done at request of municipality held authorized though there was no express agreement as to compensation. NJSup 146A649(1stcase).

905-58 202Cal 95, 259P729.

905-66 246Mich139, 224NW649. [a] 33NM519, 270P886.

905-68 178Ark588, 11SW(2d)469; 246 Mich139, 224NW649.

906-71½-New. Where a contract regarding attorney's fees is unreasonable, recovery must be on quantum meruit basis. 178Ark588, 11SW(2d)469.

906-71⅓-New. A contract in regard to attorney's fee is binding unless so improvident as to demonstrate its unreasonableness. 178Ark588, 11SW(2d)469.

906-86 246Mich139, 224NW649.

906-88½-New. Agreement with civil engineer for payment of specified amount for services to date, and release from further liability held binding on city. 130Kan766, 288P595.

907-4 130Misc124, 222NYS676. See also 295Pa82, 144A897.

907-5 174Minn594, 219NW924; 131 Misc258, 227NYS82; 295Pa82, 144A 897. [b] **Statute not given retroactive operation.**–174Minn594, 219NW924. [c] **Provision for accidental death benefits** generally was not authorized by general pension and retirement statute. 155Md 507, 142A593.

907-5½-New. Statutory provision for retirement of veteran who has been in service for given number of years is not satisfied without proof of continuous service for that period. 258Mass559, 155NE633.

907-5⅓-New. Such continuity, however, does not mean that the service shall be performed without interruption from day to day. 258Mass559, 155NE633.

907-6 [a] **Long period of disability** will, as general rule, terminate employment. 174Minn594, 219NW924. [b] **"Twenty five-month periods of employment"** required under statute means time when employee is engaged in actual labor or services. 174Minn594, 219NW 924.

907-7 Mass 171NE432.

908-12½-New. A city employee voluntarily joining a retirement fund waives the right to object to retirement reaching the age designated. 130Misc124, 222NYS676.

908-12⅓-New. Under some statutes a city employee entitled to a retirement allowance has the choice of three options, and he cannot afterward change from the one selected without the consent of the retirement board. 173Minn589, 218 NW119.

908-12¼-New. Pension is a fixed right, not a mere gratuity, and cannot be suspended pending investigation of questionable practices during employment. 131Misc258, 227NYS82.

908-12⅙-New. A veteran of the World War who became an employee of the city after establishment of the retirement system has been held not to have pension rights given to World War veterans. 267Mass1, 165NE684.

908-12⅛-New. Plaintiff, having made contributions to city pension fund, so long as board would accept them, was not in default. 295Pa82, 144A897.

908-12⅛-New. Under New York City, charter one joining city employees' retirement system in 1926 held entitled to prior service certificate for service in congress in previous years. 136Misc 828, 241NYS81.

908-18½-New. But such certification does not entitle him to pay if in fact his appointment is invalid. 245NY604, 157NE875.

909-37 [a] (8) To recover salary for position within civil service plaintiff must allege that prescribed method was followed for his appointment and assignment. 78CalA516, 248P689.

909-38 RI 147A757 (authority of committee to expend money for broker's services). [b] **Evidence not sufficient** to show that services of broker were gratuitous. RI 147A757 (absence of record of contract). [c] **Evidence sufficient** to support verdict for defendant. 180Ark298, 21SW(2d)430.

909-39 178Ark588, 11SW(2d)469.

909-41½-New. Whether or not there was a contract of employment of a broker and ratification thereof is a question for the jury. RI 147A757.

909-43½-New. Evidence held to warrant finding that interruption in relation between city and employee had not been proved. 258Mass559, 155NE633.

909-43⅓-New. Where the city charter prescribes the civil service system for appointments and assignments for positions, no action on quantum meruit will lie for services performed in a civil service position where the prescribed method was not followed. 78CalA516, 248P689.

910-49 95CalA711, 273P99.

910-64 [b] **Indefinite suspension** without pay and tender of other position without preferment of charges and hearing held removal in violation of law. 161La361, 108S770.

910-67 NJSup 148A176.

911-74 But see PrEdIsl [1928] 4 DomLR841.

911-76 203 Iowa1203, 212NW579; 123 Kan344, 255P43 (discharge held justified); Mo 28SW(2d)105.

911-76½-New. Submission of bid by employee for reëmployment under different system constitutes recognition of right to end employment. 123Kan344, 255P43.

911-79 203 Iowa1203, 212NW579.

911-81½-New. City commission's charter power to supervise the removal of employees by city manager is nondelegable. 35Ariz214, 276P325.

912-84 [c] **Demotion** so far as it carries with it reduction of salary is indirectly a removal. 161La361, 108S 770.

912-93½-New. A rule of the civil service relating to registration of employees has the force of law as respects the right of discharged employee to be restored to employment, notwithstanding that he was not registered. 264Mass242, 162NE311.

912-95 261Mass351, 158NE760.

912-96 261Mass351, 158NE760; 264 Mass242, 162NE311; MoA 20SW(2d)1; 224AppDiv203, 230NYS97. But see 319 Mo 705, 7SW(2d)357, 59ALR95. [d] **Employee not entitled to reinstatement** where his work was taken over by another board having different civil service rules. 174Minn571, 219NW919.

912-97 322Mo 360, 20SW(2d)17; MoA 20SW(2d)1.

912-98 But see 319Mo 1078, 8SW(2d) 620.

913-99½-New. Judgment of discharge cannot be attacked collaterally, unless absolutely void on its face. 319Mo 1078, 8SW(2d)620.

913-99⅓-New. Municipal commission, with power to establish civil service commission cannot confer on it power to defeat city manager's charter power of dismissal by requiring consent of civil service commission. 35Ariz214, 276P 325.

913-99¼-New. Tenure of an illegal appointment to a position in the competitive class terminates on termination of the appointing body, if the appointment is sought to be sustained as to an exempt position. 226AppDiv218, 235 NYS207.

913-8 261Mass351, 158NE760.

913-9 [a] (2) Municipal laborers. 337 Ill 100, 168NE904.

913-9½-New. Under a statute providing that persons who have rendered long and efficient service shall retain their positions, a sanitary officer appointed without compliance with the civil service statute has been held not summarily removable. Iowa 215NW657.

913-11 [b] **Failure to give permanent appointment** at end of probationary period is not removal from office. NJSup 142A563.

913-12 261Mass351, 158NE760.

913-13 But see 32 OhA105, 167NE484. [c] **Employee held not temporary** where he was employed beyond temporary period, not for particular task, and on fixed weekly salary. 261Mass351, 158 NE760.

914-14 CalA 287P136; 203 Iowa1203, 212NW579; Mass 169NE792; NJSup 142A910.

914-19 203 Iowa1203, 212NW579.

914-19½-New. Under some civil service statutes the selection of employees for dismissal is to be determined on the basis of efficiency, competency, and length of service. 203 Iowa1203, 212 NW579.

914-19⅓-New. The city council may delegate to the chief officer of a department the duty to designate the employees who shall be discharged. 203 Iowa1203, 212NW579.

914-20 CalA 274P1034.

914-24 MoA 20SW(2d)1.

915-41 161La361, 108S770; NJSup 148 A176.

915-42 205Cal 366, 270P682; 264Mass 242, 162NE311; MoA 20SW(2d)1. [c] **Civil service employee totally incapacitated** and receiving compensation therefor need be given no written notice of discharge. Mass 169NE438(2dcase).

915-44 205Cal 366, 270P682.

916-50 205Cal 366, 270P682.

916-56 261Mass351, 158NE760; 319 Mo 705, 7SW(2d)357, 59ALR95; NJSup 148A176. See also 95CalA289, 272P757.

916-59 261Mass351, 158NE760.

916-64 [c] **Where mayor exercised his authority to abolish position of telephone operator** in city hall, public hearing was properly held before mayor. Mass 169NE792.

916-76 See also 82CalA5, 254P919.

917-79½-New. Order of dismissal is not nullified by civil service board's failure to act before expiration of suspension period, 82CalA5, 254A919.

917-79⅓-New. and suspending employee more than thirty days in removal proceedings does not entitle him to salary. 82CalA5, 254P919.

917-79¼-New. Judgment of board discharging employee after notice and hearing is not subject to collateral attack, unless void on its face. 319Mo 705, 7SW(2d)357, 59ALR95.

917-79⅙-New. Insertion in the minutes of the board of civil service commissioners of statement that charges against city employee were not sustained has been held a sufficient compliance with provision of charter, requiring finding of the board to be in writing. 95CalA 289, 272P757.

917-80 See also 319Mo 705, 7SW(2d) 357, 59ALR95.

917-86 See also 150Wash542, 273P748.

917-90 150Wash542, 273P748.

917-90½-New. A discharged employee's right to be restored to office may be cut off by the adoption of a new city charter. 317Mo 1208, 298SW833.

917-90½-New. Where a discharged employee takes no steps to review the action of the board, its judgment stands against him for whatever it may be worth judged on its face alone. 319Mo 705, 7SW(2d)357, 59ALR95.

917-92 Mass 169NE792.

917-93 Mass 169NE792.

917-94½-New. Some statutes do not authorize a bill of exceptions containing evidence upon hearing of appeal from removal of civil service employee. 34 OhA387, 171NE38.

917-94½-New. In absence of such authority no such bill of exceptions should be allowed. 34 OhA387, 171NE38.

917-94¼-New. Reinstatement. An employee separated from employment by continued incapacity is not entitled to reinstatement without a request to be placed on the "Special List." Mass 169NE438(2dcase).

917-94½-New. Failure of the city to reëmploy a laborer after suspension before those junior to him were put back to work did not give him a right to recover damages in an action on contract. Mass 168NE806(1stcase).

918-96 206 Iowa144, 220NW72.

918-4 224AppDiv203, 230NYS97.

918-4½-New. Under some statutes formal notice to the employer of the status of the employee is not necessary where the officer or board having power of appointment and removal has knowledge of the employee's preference rights at the time such officer or board seeks to remove him. 173Minn485, 217NW681.

918-8½-New. The word "towns" as used in some statutes includes villages. 173Minn485, 217NW681.

918-3½-New. Where it is the practice to make appointments annually at the beginning of each official year, a fireman who was appointed at the beginning of a year and reappointed without any specification of the term of employment is not employed for a fixed term so as to authorize his removal without notice at the beginning of the following year. 173Minn485, 217NW681.

918-10 203 Iowa1203, 212NW579; 206 Iowa144, 220NW72; 245NY586, 157NE868.

918-14 See also 148Wash565, 269P850.

919-28 224AppDiv203, 230NYS97.

920-7 See also 249NY198, 163NE732.

920-11½-New. Statutory provisions declaring on what municipal liability for injuries shall be predicated are controlling. 254NY91 171NE917.

921-14 32F(2d)913; 207Cal465, 279P148; 106Conn61, 136A872; Iowa 233NW58; Md 150A447; 82NH458, 136A357; NJ 151A593.

921-18 106Conn13, 136A876, 57ALR402; 203 Iowa1245, 212NW158, 53ALR375; 224Ky338, 6SW(2d)270; 116 Oh281, 156NE210, 52ALR518; 69Utah186, 253P443, 51ALR364. [b] 106Conn13, 136A876, 57ALR402.

922-19 Cal 293P53; 106Conn61, 136A872; 106Conn13, 136A876, 57ALR402; 106Conn378, 138A145; 247 IllA479; 254 IllA489; 203 Iowa1245, 212NW158, 53ALR375; 203 Iowa388, 212NW714; 125Kan524, 265P78; 125Kan574, 265P81; 129Kan443, 283P501; 222Ky664, 1SW(2d)1068; 224Ky338, 6SW(2d)270; 233Ky12, 24SW(2d)938; 234Ky410, 28SW(2d)489; 6LaA356; 171Minn391, 214NW656; 82NH458, 136A357; NJ 151A603(2dcase); 249NY198, 163NE732; 131Misc728, 228NYS82; 224AppDiv124, 229NYS613; NC 154SE844; 116 Oh281, 156NE210, 52ALR518; 24 OhA268, 157NE309; 28OhA263, 162NE684; 128 Okl 193, 261P953, 56ALR152; 130 Or461, 280P664, 66ALR1271; 32Porto Rico 521; TexCivA 8SW(2d)331; 69Utah186, 253P443, 51ALR364; 148Va60, 138SE503, 54ALR1485. [c] (1) 37 Wyo 389, 262P22. [d] Building regulations.-153Miss136, 119S811.

924-24 29F(2d)442; 23AlaA479, 127S257; Cal 293P53; 106Conn61, 136A872; 247 IllA479, 483 [citCJ]; 203 Iowa1245, 212NW158, 53ALR375; 222Ky664, 1SW(2d)1068; 224Ky338, 6SW(2d)270; 131Misc728, 228NYS82, 84 [citCJ]; NC 154SE844; 128 Okl 193, 261P953, 56ALR152; 130 Or461, 280P664, 66ALR1271; 133 Or41, 284P586; TexCivA 8SW(2d)331; 69Utah186, 253P443, 51ALR364; 148Va60, 138SE503, 54ALR1485.

925-26 Md 150A447 (ordinance forbidding discharge of firearms). See also 224AppDiv512, 231NYS379.

926-27 106Conn13, 136A876, 57ALR402; 319Mo 562, 4SW(2d)773; 28 OhA263, 162NE684.

926-28 219Ala19, 121S14; 23AlaA479, 127S257; 106Conn13, 136A876, 57ALR402; 108Conn697, 145A158; 204 Iowa798, 215NW957, 55ALR430; 174Minn184, 218NW892, 60ALR96; 153Miss136, 119S811; 197NC309, 148SE426.

926-28½-New. Maintenance of fountain in park constitutes governmental function with consequent nonliability for injuries connected with maintenance. 203 Iowa388, 212NW714.

926-30 106Conn61, 136A872; 82NH458, 136A357; 105NJL419, 144A809; NJ 151A603(2dcase); 197NC309, 148SE426; 120 Oh127, 165NE713.

926-34 106Conn13, 136A876, 57ALR402; 109Conn324, 146A735; 69Utah186, 253P443, 51ALR364.

926-35 106Conn13, 136A876, 57ALR402; 82NH458, 136A357; 69Utah186, 253P443, 51ALR364. [a] 106Conn13, 136A876, 57ALR402.

926-39 105NJL419, 144A809.

927-42 204 Iowa798, 215NW957, 55ALR430.

927-48 106Conn13, 136A876, 57ALR402.

927-50 131Misc728, 228NYS82.

928-55 29F(2d)442; 204 Iowa798, 215NW957, 55ALR430; 148Va60, 138SE503, 54ALR1485; 152Va278, 147SE223. [a] (2) For attempt at revocation of building permit. 204 Iowa798, 215NW957, 55ALR430.

928-56 204 Iowa798, 215NW957, 55ALR430; 148Va60, 138SE503, 54ALR1485.

929-57 204 Iowa798, 215NW957, 55ALR430.

929-59 TexCivA 28SW(2d)285.

929-69 48 Ida130, 279P614; 204 Iowa798, 215NW957, 55ALR430; 50Nev392, 263P768, 771 [citCJ]; 148Va60, 138SE503, 54ALR1485.

930-72 23AlaA479, 127S257; 106Conn13, 136A876, 57ALR402; NJ 147A468 (operating sewer system for revenue); 69Utah186, 253P443, 51ALR364. [b] (4) Party marketing in city's market conducted on a commercial basis held invitee to whom city owed duty of care. 104NJL258, 140A225.

931-74 4LaA182; 5LaA294; 237Mich633, 212NW952; 69Utah186, 253P443, 51ALR364 (bathhouses).

931-76 108Conn697, 145A158.

931-78 23AlaA479, 127S257.

932-79½ 106Conn13, 136A876, 57ALR402; 40GaA63, 148SE747.

932-81 106Conn13, 136A876, 57ALR402.

932-88 50Nev392, 263P768, 771 [quot CJ].

933-90 TexCivA 30SW(2d)399.

933-93 276US536, 48SC340, 72Led688; Sask [1930] 1DomLR939. See also Man [1928] 4DomLR593.

933-98 Md 150A447.

933-1 40GaA63, 148SE747; 249NY198, 163NE732. [a] (3) Swimming pool in park, primarily as commercial enterprise, held not authorized, and city is liable for acts in connection therewith. 40GaA63, 148SE747, 748 [citCJ].

934-6 265Mass195, 163NE757; 249NY198, 163NE732.

935-27 Sask [1930] 1DomLR878.

936-31 108Conn622, 144A468 (immaterial as to whether injured party was independent contractor or employee); 153Miss136, 119S811.

937-58 240 IllA493; 227Ky599, 13SW(2d)755; 151Wash457, 276P904. But see 154SC105, 151SE230.

937-59 Mass 173NE406.

938-65 TexCivA 299SW468.

938-66 222MoA109, 2SW(2d)632, 634 [citCJ].

938-67 220Ala505, 126S169 (construction and maintenance of streets); 92 Fla931, 110S873; 39GaA702, 148SE299; 332 Ill 70, 163NE361, 60ALR87; 128 Okl 193, 261P953, 56ALR152; 130 Or461, 280P664, 66ALR1271; 48RI 189, 136A437, 52ALR1007; TexCommnA 5SW(2d)761; 147Wash224, 265P729. See also 203 Iowa1245, 212NW158, 53ALR375.

939-71 32F(2d)913; TexCivA 299SW468. [a] (6) Board of health. 121 Oh412, 169NE457 (city liable where board's maintenance or destruction of sewer creates nuisance).

940-79 101CalA769, 282P820; 85Colo346, 276P30; 332 Ill 70, 163NE361, 60ALR87; 228Ky599, 15SW(2d)489; 265Mass327, 163NE873; 267Mass140, 166NE632; 224AppDiv512, 231NYS379.

940-80 29Hawaii656; 1LaA780; 8LaA339; 153Miss136, 119S811; 104NJL333, 140A329; 116 Oh281, 156NE210, 52ALR518; 128 Okl 193, 261P953, 56ALR152; 130 Or461, 280P664, 66ALR1271; Tex CommnA 5SW(2d)761; TexCivA 297SW865; 59 OntL350, [1926] 4DomLR97; Sask [1928] 2DomLR524. See also 332 Ill 70, 163NE361, 60ALR87.

942-85 TexCommnA 5SW(2d)761.

942-91 224AppDiv512, 231NYS379.

942-93 39GaA702, 148SE299; 32Porto Rico 521.

942-94 147Miss783, 113S897; 222MoA109, 2SW(2d)632; 219AppDiv444, 220NYS76; 24 OhNPNS90; 121 Or40, 252P399 (malicious prosecution instituted by mayor); 32PortoRico 521.

944-3 129Misc917, 222NYS757.

944-12 216Ala174, 112S435.

944-13 221AppDiv753, 223NYS501.

944-14 222MoA109, 2SW(2d)632, 634 [citCJ]. [a] (2) Though city employed pilots, city is not liable for acts of pilot where pilot was not under control of city. 32F(2d)988.

945-20 32PortoRico 521. [d] 222MoA109, 2SW(2d)632.

946-26 222MoA109, 2SW(2d)632, 634 [citCJ].

946-33 41GaA209, 152SE280 (failure of contractor to give bond does not alter rule); 224Ky338, 6SW(2d)270; 148Miss774, 114S881; 194NC6, 138SE343. [c] **Knowledge of trespasses of independent contractor** held not to make city liable. 148Miss774, 114S881. [d] **Mayor's undertaking to stop trespasses of independent contractor** held not to make city liable. 148Miss774, 114S881.

947-40 228AppDiv37, 238NYS401. But see CalA 272P1082.

948-55 297Pa344, 147A68; TexCivA 298SW631.

948-56 But see 133Misc56, 231NYS119.

948-58 35F(2d)142; 148Miss774, 114S881; MoA 17SW(2d)658. [a] (8) Scavenger. 148Miss774, 114S881. (9) Other instances. 85Mont302, 278P826. [c] **Where city retains control of street** in which contractor is constructing sewer and keeps thoroughfare open, it cannot avoid obligation to keep roadway and sidewalk in proper condition by placing work in charge of independent contractor. 297Pa344, 147A68.

949-60 Mass 170NE64; TexCivA 298SW631.

949-64 235Ky800, 32SW(2d)348; 48RI189, 136A437, 439 [citCJ], 52ALR1007, [b] (2) City is liable for injuries by hole in sidewalk resulting from unsupervised work of independent contractor removing tree. 48RI 189, 136A437, 52ALR1007.

952-87 193NC573, 137SE666.

952-88 193NC573, 137SE666.

952-94 Ala 130S83; 193NC573, 137SE666; 117Tex394, 5SW(2d)498, 499 [citCJ]; 148Va60, 138SE503, 54ALR1485; 147Wash224, 265P729; Man [1926] 3DomLR295. [1926] 2WestWkly524; Man [1926] 3DomLR433, [1926] 2West Wkly330. See alsoCal 293P53. [g] **Construction of airport.**-23AlaA479, 127S257 (as incident to transportation facilities maintained by city). [h] **Establishment and maintenance of public highways** when committed to municipal corporation are not always regarded as governmental functions. Md 150A447.

954-7 316Mo 1067, 296SW795.

954-11 See also 228AppDiv566, 241NYS313.

955-17 32PortoRico 521.

955-19 214Ala522, 108S539, 46ALR89.

955-22 246NY85, 158NE29.

956-23½-New. It has been held that

failure of municipality to abate a nuisance is negligence. 81Colo 134, 254P 153.

956-25 48 Ida130, 279P614; Md 150A 447; NJ 151A603(2dcase); 246NY85, 158 NE29 (snow on roof); 73Wis380, 41NW 407; Can [1928] 3DomLR564. [b] **In order that construction constitute nuisance** there must be something in its nature and in its relation to its surroundings and to use of surroundings which foreshadows dangerous possibilities. 203 Iowa388, 212NW714.

956-26 TexCivA 299SW468.

956-27 48 Ida130, 279P614.

956-29 246NY85, 158NE29.

957-32½-New. Fountain in public park is not nuisance when not inherently dangerous. 203 Iowa388, 212NW714.

957-36 [c] **Erection and operation of fire station** is lawful business. TexCivA 8SW(2d)329.

958-60 128Misc848, 220NYS345.

959-67 36F(2d)714; 128Kan13, 276P 284, 63ALR325; 135Misc622, 238NYS 143; Eng [1913] SC1078.

960-92 But see 222MoA109, 2SW(2d) 632, 634 [citCJ].

960-98 NS [1927] 1DomLR180.

962-18 [d] **Gathering constituting mob.-Kan** 292P937.

963-25½-New. "Mob" as used in statute imposing liability on city is not synonymous with "unlawful assemblages" as defined by statute prescribing punishment therefor. 123Kan362, 255P57.

963-25¼-New. Term is not strictly legal term, but is vernacular word descriptive of large and aggravated riot and is practically synonymous with "riot." 123Kan362, 255P57.

963-25¼-New. "Unlawful assembly" is not synonymous with "mob," but is formative period of mob. 123Kan362, 255P57.

963-25½-New. Liability for crimes generally is not imposed by statute imposing liability for mob violence. 123 Kan362, 255P57.

964-50 214Ala522, 108S539, 46ALR89; 332 Ill 70, 163NE361, 60ALR87. 233Ky 12, 24SW(2d)938; 224AppDiv512, 231 NYS379. [c] **Whether city shall have police department** and its character and extent is governmental function. Iowa 233NW58.

964-51 29Hawaii656, 662 [quotCyc]; 332 Ill 70, 163NE361, 60ALR87. Iowa 233NW58; 233Ky12, 24SW(2d)938; Md 150A447; NJSup 135A795; TexCivA 297 SW874. [a] 161Tenn363, 31SW(2d)691. [g] **Conversion.-222MoA109, 2SW(2d)** 632.

965-52 7Alaska555; TexCivA 297SW 874.

965-54 Iowa 233NW58; 233Ky12, 24 SW(2d)938; Md 150A447.

965-55 214Ala522, 108S539, 46ALR89; 216Ala72, 112S335; 92Fla931, 110S873; 234Ky410, 28SW(2d)489; Md 150A447; 222MoA109, 2SW(2d)632, 634 [citCJ]; NJSup 135A795; 224AppDiv512, 231 NYS379. [b] 161Tenn363, 31SW(2d) 691.

967-61 214Ala522, 108S539, 46ALR89; 220Ala505, 126S169. But see 151Miss 457, 118S290.

967-62 161Tenn363, 31SW(2d)691. See also 224AppDiv512, 231NYS379.

967-64 216Ala661, 114S55.

967-69 108Conn622, 144A468.

967-70 138Misc259, 245NYS497; 69 Utah186, 253P443, 51ALR364 (dictum).

967-71 30F(2d)935; 214Ala522, 108S 539, 46ALR89; 106Conn378, 138A145; 41GaA209, 152SE280; 129Kan238, 282P 698; 240Mich94, 214NW968; 115Nebr 208, 212NW37; 138Misc259, 245NYS497; 133 Or41, 284P586 (injury to fireman); TexCivA 293SW191 (not liable, at common law, for injuries to fireman); 69 Utah186, 253P443, 51ALR364 (dictum). [e] **Municipality held not liable for injuries to pedestrian** falling over hose maintained across sidewalk to prevent rekindling, as long as hose is reasonably in use. 106Conn378, 138A145. [f] **Nature of duty and act involved.-106Conn** 378, 138A145.

968-72 240Mich94, 214NW968. [a] (2) Village is not liable for injury to pedestrian from tripping over hose run across sidewalk by firemen engaged in extinguishing fire. 240Mich94, 214NW968.

968-75 TexCivA 293SW191.

969-88 265Mass195, 163NE757.

969-89 218Ky428, 291SW358.

970-90 IndA 162NE255; 218Ky428, 291 SW358.

971-5 39F(2d)973.

971-8 CalA 289P203.

971-9 125Kan574, 579, 265P81 [cit Cyc]. [b] (6) Conversion of automobile tires. 222MoA109, 2SW(2d)632.

972-12 See also 3LaA509.

972-14½-New. Maintenance and operation of bathhouses and swimming pools is conduct in city's private capacity rendering it liable for negligence of agents. 69Utah186, 253P443, 51ALR 364.

972-16 224Ky338, 6SW(2d)270; 133 Okl 289, 272P453; 152Va278, 147SE223. [i] **Maintenance of free garbage dump.-** 128Kan13, 276P284, 63ALR325 [dist 90 Kan379, 133P551, 95Kan513, 148P746]. [j] **Governmental function of disposing of garbage by incineration** is not completed till ashes are disposed of, and city is not liable for failure to keep under control fire from burning materials removed from incinerator and spreading to adjoining property. 208 Cal 74, 280P108.

973-20 214Ala522, 108S539, 46ALR89; 240 IllA493; 332 Ill 70, 163NE361, 60 ALR87; 174Minn184, 218NW892, 60 ALR96; 230AppDiv612, 245NYS680.

973-32 59 OntL350, [1926] 4DomLR97.

974-37 40GaA695, 151SE406(2dcase); 228AppDiv37, 238NYS401; 24 OhA268, 157NE309.

974-43 214Ala522, 108S539, 46ALR89; 37GaA666, 141SE223; 246NY85, 158NE 29; TexCivA 8SW(2d)331.

974-44 214Ala522, 108S539, 46ALR89; 216Ala4, 112S433; 48 Ida130, 279P614; Md 150A447; 174Minn450, 219NW774; 50Nev392, 263P768; 141 Okl 220, 284P 875; 290Pa331, 138A849, 54ALR1285.

976-48 214Ala522, 108S539, 46ALR89; 218Ala603, 119S841; 39GaA739, 148SE 421; 50Nev392, 263P768. [a] **Failure of city to place barrier about fire plug on sidewalk** to protect pedestrians was not governmental function. 39GaA739, 148 SE421.

977-52 228Ky599, 15SW(2d)489; 116 Oh281, 156NE210, 52ALR518.

977-53 126Cal 213, 58P707, 77AmSR 171; 31Conn213; 37Conn475, 9AmR 342; 66Conn360, 34A93; 106Conn61, 136A872; 32Me536; 52Me118; 57Me 375; 76Me531; 45Mich263, 7NW815; 57Mich158, 23NW621, 58AmRep357; 59 Mich51, 26NW279; 136Mich172, 98NW 1006; 151Miss457, 118S290; 14SC286; 19SC412, 45AmR785; 36Vt521; 56Vt 224; 61Vt336, 17A735; 71Vt473, 45A 1038; 75Wis642, 44NW770. See also 135US492, 10SCt1012, 34L ed260. But see 84Fed280.

977-62 106Conn61, 136A872; 248Mich 306, 226NW865(2dcase). [b] **Statutes applicable to chartered city.-207Cal** 657, 280P118.

977-64 [e] 109Conn324, 146A735 (placing and maintenance of sewer catch basin and cover by city is not within statute); 262Mass338, 159NE916; 116 Oh281, 156NE210, 52ALR518.

978-66 86 IndA401, 157NE286; 116 Oh 281, 156NE210, 52ALR518. But see Mass 168NE779.

979-69 35 OhA438, 172NE531.

979-81½-New. In Connecticut city held liable under its charter for injuries on city sidewalks only in case of structural defect making it dangerous. 105Conn 476, 136A93.

979-81½-New. A charter provision that nothing therein should be construed to make the city liable by reason of negligence does not exempt it from liability for injuries from defects in streets caused by its negligence. 50Nev392, 263 P768.

979-85 105Conn476, 136A93.

980-93 108Conn553, 143A850; 109Conn 662, 145A50; 157Miss207, 127S773; 199 Wis575, 224NW748.

981-10 262Mass514, 160NE260.

982-15 44 Ida756, 262P154, 157 [cit Cyc]; 193NC550, 137SE663. See also 246NY85, 158NE29.

982-16 155Miss170, 124S269.

982-17 158Md335, 148A242 (failure to make formal notation of acceptance); 91PaSuper290.

982-19 91PaSuper290.

982-20 155Miss170, 124S269.

983-23 321Mo 71, 10SW(2d)54, 61ALR 242.

983-37 91PaSuper290.

984-38 36GaA552, 137SE414; 44 Ida 756, 262P154, 157 [citCyc].

984-50 [b] **Public highway** becomes subject to municipal control by inclusion within municipal boundaries. 193 NC550, 137SE663, 664 [quotCyc].

985-54 193NC550, 137SE663.

985-58 86 IndA401, 157NE286. [a] **Failure to repair road outside city limits** imposes no liability on city. 86 IndA 401, 157NE286.

985-66 263Mass55, 160NE311.

986-74 150Wash157, 272P723, 63ALR 200.

986-84 Contra 262Mass514, 160NE260.

987-97 37GaA762, 142SE171; 158Md 335, 148A242; Mont 290P261; TexCivA 27SW(2d)584; [1923] SC782.

988-1 [a] (1) TexCivA 5SW(2d)205.

988-9½-New. Hole in sidewalk held not defect rendering city liable. 203 Iowa 41, 212NW365.

988-13 179Minn118, 228NW350(1st case); Mo 29SW(2d)710.

989-19 108Conn63, 142A569.

990-42 109Conn100, 145A644(2dcase).

991-45 109Conn662, 145A50; 225Ky 542, 9SW(2d)517. But see Iowa 231NW 326.

991-46 109Conn662, 145A50.

991-48 109Conn662, 145A50.

991-49 81Colo 134, 254P153 (defect caused by third party).

991-50 180Minn496, 231NW210.

992-55 78Mont180, 253P267 (unguarded trapdoor in sidewalk, maintained by business house, held defect in walk); [1915] SC895.

993-70 Man [1927] 1DomLR515, [1927] 1WestWkly417.

993-75 MoA 31SW(2d)123; 78Mont180, 253P267 (where city had exacted tax for use of trapdoor in sidewalk).

994-81 228AppDiv37, 238NYS401. [d] Alta [1926] 4DomLR1013.

994-82 GaA 155SE80.

995-83 228AppDiv37, 238NYS401 (laying of cement sidewalk is not nuisance).

996-10 25 OhA286, 158NE197.

996-11 [a] **Notice to head of street cleaning department** present at fireworks exhibition is not notice to city of potentially dangerous condition. 228AppDiv 566, 241NYS313.

997-15 246NY85, 158NE29. [f] **Fact that obstruction constituted public nuisance** is no bar for action for failing to remove it. 253NY423, 171NE694.

998-27 CalA 283P977; CalA 290P540; 88 IndA454, 164NE502.

999-28 228AppDiv37, 238NYS401; 50 RI153, 146A618, 65ALR375; 149Wash 109, 270P422.

999-30 CalA 283P977; 105Conn476, 136A93; 108Conn553, 143A850; 92Fla 339, 110S529; 39GaA739, 148SE421; 41 GaA603, 154SE204(2dcase); 48 Ida130, 279P614 (stricter degree of care is required to sidewalks than to ordinary streets); 203 Iowa41, 212NW365; 206 Iowa1109, 221NW812; 207 Iowa1168, 224NW828; Iowa 232NW682; 225Ky41, 7SW(2d)514; 227Ky690, 13SW(2d) 1022; 229Ky538, 17SW(2d)422; 231Ky 72, 21SW(2d)135; 2LaA444, 445 [cit Cyc]; 256Mass468, 152NE752; 171Minn 391, 214NW656; 155Miss540, 124S656; Mo 29SW(2d)710; MoA 297SW449; 86 Mont240, 283P222; 246NY85, 158NE29; 247NY503, 161NE160; 133Misc407, 231 NYS590; 228AppDiv37, 238NYS401; 228AppDiv162, 239NYS190; 193NC550, 137SE663; 28 OhA263, 162NE684; 127 Or76, 271P41, 61ALR256; TexCivA 5 SW(2d)205; TexCivA 27SW(2d)584; 150Wash157, 272P723, 63ALR200; Sask [1930] 1DomLR916; Sask [1930] 1DomLR939. [g] **Acts of commission** as well as omission are within rule. 216Ala4, 112S433.

1001-32 Mass 170NE64.

1003-40½-New. Where a city, through its street department, had made repairs to a street after annexation of terri-

tory of its location, the city had the duty of maintaining the character of repairs legally required within that particular locality. 225Ky41, 7SW(2d)514.

1003-43 [a] **Fact that other sidewalks** were permitted to remain in same condition as one where plaintiff was injured is no defense to city's liability. Iowa 227NW823.

1003-48 150Wash157, 272P723, 63ALR200; Alta [1926] 4DomLR1163.

1004-54 108Conn553, 143A850; 227Ky690, 13SW(2d)1022; 10LaA24, 120S418(1stcase); Mont 290P261; 228AppDiv37, 238NYS401; OhA 157NE120; 49RI15, 139A471.

1005-57 MoA 19SW(2d)522.

1006-65 But see 155Miss588, 124S795.

1006-70 49RI15, 139A471.

1008-89 248Mich306, 226NW865(2d case).

1008-90 246NY85, 158NE29.

1009-2 [a] **Fire hose across sidewalk to** guard against rekindling fire held not defect in sidewalk. 106Conn378, 138A145.

1009-3 MoA 17SW(2d)658; 246NY85, 158NE29.

1009-3½-New. Obstructions placed in highway by municipality for public benefit will not make highway defective unless they unreasonably obstruct or endanger public travel. 106Conn378, 138A145.

1009-6 228AppDiv103, 239NYS284.

1010-7½-New. Not every defect in street or sidewalk renders municipality liable for negligence. 289Pa197, 137A185.

1010-8 18F(2d) 806; 203 Iowa41, 212NW365; 289Pa197, 137A185; 149Va235, 141SE260. [b] **Use of mushroom markers at corners of safety zone is not** negligence as matter of law. 18F(2d)806.

1010-9 203 Iowa41, 212NW365; 262Mass338, 159NE916; MoA 4SW(2d)475; 134Misc516, 235NYS673; 50RI153, 146A618, 65ALR375.

1010-10 203 Iowa41, 212NW365; 2LaA444, 445 [citCyc]; 50RI153, 146A618, 65ALR375.

1011-12 50RI153, 146A618, 65ALR375; 149Va235, 141SE260. [a] (32) 247NY340, 160NE391. (33) Flagstones. NJSup 136A410. [b] (9) Splinters on board sidewalk. 256Mass468, 152NE752. (10) Carriage block or stepping stone on sidewalk adjacent to curb. 149Va235, 141SE260. (11) Other defects and obstructions not creating liability. 226AppDiv830, 235NYS599. [c] (10) Piling wet clay excavated in digging sewer in places from which it oozes over sidewalk creates nuisance rendering municipality liable. BC [1929] 4DomLR142.

1012-13 93Fla936, 112S885, 53ALR163; 300Pa159, 150A384. [m] (4) Safety island or platform. Man [1930] 1DomLR874.

1013-14 [a] (12) Projecting meter boxes. 97PaSuper578.

1014-18 See also TexCivA 24SW(2d)61.

1014-21 225Ky41, 7SW(2d)514; NJSup 136A410; Ont [1928] 4DomLR378. [a] (10) Hole seven inches in diameter and six inches in depth. NJSup 136A410. (11) Triangular hole in wooden walk four by ten inches. 172Minn524, 215NW851.

1014-22 203 Iowa195, 212NW484; 228AppDiv162, 239NYS190. [a] (12) 10LaA24, 120S418(1stcase). [b] (5) Depression maintained for sewer system and not constituting dangerous defect. GaA155SE499(2dcase).

1015-23 108Conn63, 142A569.

1015-24 248Mich306, 226NW865(2dcase) (barriers must not be dangerous to travelers).

1015-33 109Conn662, 145A50; 231Ky72, 21SW(2d)135 (not liable for plan not patently dangerous, but liable for plan palpably unsafe).

1016-34 193NC573, 137SE666. [c] **City is not liable** for injuries from error in adopting plan permitting location of street car tracks leaving insufficient clearance for vehicles. 193NC573, 137SE666.

1016-37 225Ky41, 7SW(2d)514.

1017-52 207 Iowa1168, 224NW828.

1018-53 [e] **Abruptness of elevation or depression caused by sidewalk inequalities** may have bearing on question whether town used due care in upkeep of sidewalks. 50RI153, 146A618, 65ALR375.

1018-59 253NY423, 171NE694; 150Wash157, 272P723, 63ALR200.

1018-60 253NY423, 171NE694 (limitation on lot owner's right to obstruct while constructing building).

1019-62 266Mass262, 165NE123.

1019-68 253NY423, 171NE694 (piling of material held reasonable).

1019-72 [d] **Duty of maintaining division of traffic** between pedestrians and vehicles rests on city where it permits sidewalk to be obstructed by building materials. 220MoA1027, 282SW502.

1020-78 [b] 48 Ida130, 279P614.

1020-81 105Conn447, 135A535. [c] **General conditions from snow and ice** do not render city liable for injury resulting solely therefrom. MoA 16SW(2d)659.

1020-82 245 IllA454.

1020-90 203 Iowa696, 213NW222; 222MoA749, 7SW(2d)707.

1020-91 244 IllA414; 203 Iowa696, 213NW222.

1021-92 222MoA749, 7SW(2d)707; Man [1929] 1DomLR65.

1021-93 109Conn100, 145A644(2dcase).

1021-94 Can [1911]SC18. [c] **Spreading of sand on sidewalk by adjoining property owner** does not relieve city of primary liability for injury to pedestrian slipping on icy sidewalk unless such action rendered walk reasonably safe at time of accident or unless such act, if done by city, would have been sufficient to show reasonable care. 108Conn553, 143A850.

1021-95 MoA 4SW(2d)1104; Can [1930]4DomLR213. [a] (3) Municipality is not guilty of gross negligence because during period of removal of defect place is in more dangerous condition. 61OntL405, [1928] 1DomLR171. (4) Injury from depression caused by permitting children to use part of sidewalk as slide is within statute. Ont [1929] 1DomLR191. [b] **In Manitoba.**–[1930] 4DomLR120.

1022-97 203 Iowa696, 213NW222; Iowa229NW229; 204 Iowa1183, 216NW698.

1022-98 81Colo134, 254P153; 239 IllA528; 248 IllA183; 203 Iowa565, 213NW212; 96PaSuper251.

1022-3 81Colo134, 254P153 (**rule held inapplicable** to particular facts of case); 239 IllA529, 532 [citCyc].

1023-11 81Colo134, 254P153; 244 IllA414; 203 Iowa696, 213NW222.

1023-15 81Colo134, 254P153; 107Conn79, 140A119; 203 Iowa696, 213NW222.

1023-16 Iowa 229NW229; Man [1930]3DomLR330. [b] (4) Iowa 229NW229.

1024-29 105Conn447, 135A535.

1024-30 [a] **Test is whether reasonable efforts are made to accomplish reasonable safety.** 105Conn447, 135A535.

1024-31 105Conn447, 135A535.

1025-52 105Conn447, 135A535.

1026-54 [a] (10) 203 Iowa696, 213NW222. (11) Snow and ice falling from roof on sidewalk several times each winter for many years. 246NY85, 158NE29.

1027-68 244 IllA414.

1027-70 107Conn79, 140A119; 204 Iowa1183, 216NW698.

1028-75 207 Iowa585, 223NW397.

1028-79 [d] (1) 105Conn476, 136A93. (2) "Structural defect" as used in charter means condition existing in sidewalk itself which makes it not reasonably safe for public travel. 105Conn476, 136A93.

1029-82 144Wash399, 258P317, 318 [citCyc].

1029-97 251 IllA542.

1030-11 Mass 168NE779.

1030-12 58OntL648, [1926] 3DomLR142.

1030-13 228AppDiv37, 238NYS401 (contractor undermining tree during repair of sidewalk).

1030-15 265Mass65, 164NE83(2dcase).

1030-18½-New. City is obliged to exercise reasonable diligence in inspecting and testing shade trees on streets and to remove or repair dangerous trees. 228AppDiv319, 238NYS662.

1030-19 109Conn662, 145A50.

1031-31 [b] **Snow and ice falling from** roof will subject city to liability to one injured on sidewalk if it had notice of condition. 246NY85, 158NE29.

1033-69 11LaA306, 123S399(2dcase); 193NC573, 137SE663.

1036-90 But see Alta [1929] 1DomLR461.

1036-6 7LaA387; 78Mont180, 253P267. [g] **Water meter box.**–37GaA762, 142SE171. [h] **Open bridge.**–193NC550, 137SE663.

1040-44 81Colo134, 254P153; 109Conn324, 146A735; 39GaA739, 148SE421; 2LaA444, 445 [citCyc]; 7LaA611; 266Mass159, 164NE917(1stcase); 243Mich465, 220NW890; 50RI153, 146A618, 65ALR375; TexCivA 24SW(2d)61.

1041-46 81Colo134, 254P153.

1042-55 TexCivA 27SW(2d)584.

1042-56 105NJL193, 143A435.

1042-57 NM 290P793.

1043-59 78Mont180, 253P267.

1043-60½-New. That a city paving contract is notice that a street will be obstructed and rendered unsafe does not dispense with the necessity of notice of obstructions in another street. MoA 17SW(2d)658.

1043-68 81Colo134, 254P153; 10LaA24, 120S418(2dcase); 2LaA444, 445[citCyc].

1045-83 92Fla339, 110S529; 228Ky599, 15SW(2d)489.

1046-88 MoA 19SW(2d)522 (density of traffic).

1046-92 41GaA603, 154SE204(2dcase); 228Ky599, 15SW(2d)489; 158Md335, 148A242; 246NY85, 158NE29; 226AppDiv328, 235NYS81.

1048-93 109Conn324, 146A735; 41GaA603, 154SE204(2dcase).

1048-96 45 Ida175, 260P1092; 10LaA24, 120S418(1stcase); 266Mass159, 164NE917(1stcase); Mo 23SW(2d)1045.

1049-5 37GaA762, 142SE171; 204 Iowa1055, 216NW774; 206 Iowa1109, 221NW812; 172 Minn524, 215NW851.

1050-8 45 Ida175, 260P1092.

1050-9 MoA 19SW(2d)522 (three hours and forty-five minutes).

1050-10 228Ky599, 15SW(2d)489; 228AppDiv566, 241NYS313 (two hours' notice to policemen); 35 OhA132, 171NE842.

1051-11 243Mich465, 220NW890.

1051-15 LaA 121S879; 226AppDiv328, 235NYS81. [a] (4) Latent defect in structure along sidewalk. 254 IllA29.

1052-24 105Conn447, 135A535.

1052-25 105Conn447, 135A535.

1052-29 41GaA603, 154SE204(2dcase).

1056-68 216Ala4, 112S433; 228Ky599, 15SW(2d)489; 228AppDiv566, 241NYS313. [b] **For actual notice** on part of city, notice must be brought home to some officer who has charge of such matters. 35 OhA132, 171NE842.

1056-73 216Ala4, 112S433.

1056-82 109Conn100, 145A644(2dcase); 292Pa237, 140A903, 904[citCJ].

1057-98 228AppDiv566, 241NYS313.

1058-21 316Mo1067, 296SW795.

1059-24 But see 266Mass262, 165NE123. [a] **Lack of knowledge of pedestrian as to street widening enterprise** does not revive liability of city to maintain way during pendency of work in reasonably safe condition for travel. 266Mass262, 165NE123.

1060-38 30 OhA558, 166NE147.

1060-48 235Ky800, 32SW(2d)348; 266Mass208, 165NE34; MoA 297SW449; MoA 17SW(2d)658; 86Mont240, 283P222; 50Nev392, 263P768, 771 [citCJ]; 193NC573, 137SE663. [d] **Failure as constituting nuisance.**–CalA 283P977.

1062-62 300Pa159, 150A384.

1063-69 93Fla936, 112S885, 53ALR163.

1063-77 235Ky800, 32SW(2d)348; 259Mass229, 156NE22.

1065-88 81Colo134, 254P153; 265Mass94, 163NE853.

1066-89 81Colo134, 254P153. [a] (3) City, in permitting obstruction of sidewalk forcing pedestrians into street, is guilty of negligence concurring with that of automobile driver causing death of pedestrian. 316Mo1067, 296SW795.

1066-92 MoA 18SW(2d)545.

1066-94 107Conn79, 140A119.

1067-97 107Conn79, 140A119.

1067-1 81Colo 134, 254P153; 107Conn 79, 140A119; Mass 169NE411.
1067-7 81Colo 134, 254P153, 156 [cit Cyc].
1067-11 78Mont180, 253P267 (where injury was due to unguarded trapdoor in sidewalk maintained by authority of city).
1071-49½-New. One who establishes that the hole or depression in which she fell and was injured, and over which she had repeatedly passed during many months, was not dangerous cannot claim that the city was negligent in knowingly permitting such defect to exist. 203 Iowa41, 212NW365.
1074-95 180Minn496, 231NW210.
1074-97 225Ky542, 9SW(2d)517; 96 PaSuper240.
1075-10 [c] Contra 82Colo 354, 260P96.
1076-18 CalA 283P977; CalA 290P540; 4LaA503; 7LaA218; NJSup 137A835; 247NY340, 160NE391; 289Pa128, 137A168; Sask [1930] 1DomLR916.
1076-20 [a] **Failure of city to maintain barrier at terminus of street at precipice** does not constitute nuisance as respects defense of contributory negligence. CalA 290P540.
1077-25 82Colo 189, 257P1094.
1077-30 81Colo 134, 254P153; 82Colo 189, 257P1094; 105Conn482, 136A95; 204 Iowa1055, 216NW774; 207 Iowa 1168, 224NW828; 225Ky41, 7SW(2d) 514; 2LaA442, 443 [citCyc]; 127 Or76, 271P41, 61ALR256; Can [1930] 4Dom LR1010(1stcase). [c] **Crossing street.**– 37GaA299, 139SE828.
1078-32 82Colo 189, 257P1094; 227Ky 690, 13SW(2d)1022; 231Ky72, 21SW (2d)135; 5LaA473; MoA 17SW(2d) 608 (3dcase); 228AppDiv37, 238NYS401; 28 Oh208, 162NE610; 127 Or76, 271P 41, 61ALR256; 139SC295, 137SE743; 104WVa378, 140SE333; 194Wis172, 215 NW819.
1079-35 194Wis172, 215NW819.
1079-36 Mo 29SW(2d)710. [e] **One wearing light high heeled shoes** without rubbers on slippery snow is not using ordinary care. Can [1930] 4DomLR1010 (1stcase).
1080-43 81Colo 134, 254P153.
1080-51 218Ala429, 118S640.
1080-56 But see 155Miss588, 124S795.
1081-62 87PaSuper454.
1081-64 204 Iowa1055, 216NW774; 87 PaSuper454.
1082-75 81Colo 134, 254P153; 105Conn 482, 136A95; 37GaA299, 139SE828; 38 GaA619, 147SE793(3dcase); 203 Iowa 696, 213NW222; 255Mass539, 152NE 346; Mass 168NE802(1stcase); MoA 9 SW(2d)872; Sask [1929] 2DomLR474.
1083-76 105Conn482, 136A95; 37GaA 299, 139SE828; 203 Iowa565, 213NW 212.
1083-77 See also NJSup 137A835.
1083-78 MoA 9SW(2d)872; 289Pa128, 137A168.
1083-79 103NJL604, 137A570.
1084-85 91Fla695, 109S223; 26 OhA 408, 159NE578.
1084-89 91Fla695, 109S223; 93Fla936, 112S885, 53ALR163; 13LaA2, 128S676.
1085-90 289Pa128, 137A168.
1085-92 37GaA299, 139SE828.
1085-95 12LaA397, 126S277; Pa 139A 168.
1086-9 Sask [1929] 2DomLR627.
1087-17 82Colo 189, 257P1094; 105 Conn482, 136A95; MoA 17SW(2d)608 (3dcase); NJ 150S370; Oh 171NE312; Sask [1927] 3DomLR514. [c] **Pedestrian** not bound to anticipate coal wagon driver dropping coal chutes. 288Pa203, 135A612.
1087-18 Iowa 232NW129; 222MoA749, 7SW(2d)707 (failure to abandon sidewalk because of defect held not negligence unless glaringly dangerous and defective); 90PaSuper29; 13PaDist&Co 53 (person riding on back of truck instead of walking to guide its course in safety as he was employed to do); 49 RI 15, 139A471. [a] (5) Other illustrations. 10LaA427, 121S371; 295Pa227, 145A124.
1088-20 289Pa128, 137A168.
1089-24 NJ 150S370; Oh 171NE312 (one injured by latent defect is not contributorily negligent as matter of law).
1089-26 37GaA299, 139SE828.
1089-28 Mo 29SW(2d)710; 86Mont 240, 283P222.
1089-33 206 Iowa1109, 221NW812. [g] (2) Injury from falling business sign held fairly to preclude question of contributory negligence. 129Misc421, 221 NYS457.
1090-36 37GaA299, 139SE828; Iowa 230NW421; 231Ky72, 21SW(2d)135.
1090-41 Iowa 232NW129.
1091-46 86PaSuper178; TexCivA 27 SW(2d)584; 36Wyo 66, 252P1021; Sask [1927] 3DomLR514. [b] **Whether one injured was contributorily negligent in not taking alternative way** held for jury. Oh 171NE312.
1091-50½-New. That pedestrian knew that sidewalk was slippery does not convict him of negligence in walking thereon. 81Colo 134, 254P153.
1092-54 105Conn482, 136A95; 244 IllA 414; 248Mich306, 226NW865(2dcase); 95PaSuper196.
1092-54½-New. Pedestrian knowing condition of crosswalk not bound to take another way. 203 Iowa696, 213NW222.
1092-63 204 Iowa1055, 216NW774.
1093-72 207 Iowa1168, 224NW828.
1093-73 316Mo 1067, 296SW795.
1093-76 227Ky758, 13SW(2d)1051; 13 LaA113, 126S243; 225AppDiv321, 233 NYS1. [a] 289Pa128, 137A168.
1093-78 86PaSuper178.
1093-81 108Conn63, 142A569.
1094-83½-New. Due care to discover obstructions must be exercised. 108 Conn63, 142A569.
1094-87 86PaSuper178.
1095-98 158Md335, 148A242.
1096-3 289Pa128, 137A168.
1096-18 289Pa128, 137A168.
1097-28 289Pa128, 137A168.
1098-46 37GaA299, 139SE828.
1098-47 97PaSuper413.
1099-49½-New. That the city did not create an emergency has been held immaterial. 37GaA299, 139SE828.
1099-52 But see 296Pa126, 145A706.
1099-53 218Ala429, 118S640; 246NY 85, 158NE29.
1099-59 166La472, 117S559.
1100-62 166La472, 117S559.
1100-63 218Ala429, 118S640; 166La 472, 117S559.
1100-64 See also MoA 21SW(2d)919.
1101-68½-New. Placing of building materials in public streets likely to be attended by accidents to persons lawfully using the streets, whether by wrongful act of interference of young children or otherwise, is wrongful if a reasonably prudent man would have foreseen that injury would probably result. 205Cal 629, 271P1062, 62ALR825.
1101-79 223AppDiv39, 227NYS248.
1101-82 265Mass524, 164NE381, 61 ALR1052.
1102-96 [c] **Reasonable care must be used** to protect public, aside from ordinance. 88 IndA253, 157NE55.
1102-6 See also 245NY583, 157NE866.
1103-11 203 Iowa195, 212NW484.
1103-13 166La472, 117S559.
1103-15 44 Ida756, 262P154.
1104-28 126Kan314, 317 [citCJ], 267 P979; 231Ky779, 22SW(2d)274; 172 Minn35, 214NW671; MoA 16SW(2d) 607; Ont [1928] 4DomLR536.
1104-29 126Kan314, 317, 267P979 [cit CJ]. [b] 297Pa564, 147A826. [c] **In Montana.**–290P261.
1104-30 MoA 9SW(2d)835.
1104-32 108Conn197, 142A681; 203 Iowa195, 212NW484; 172Minn35, 214 NW671; 199Wis575, 224NW748.
1105-33 Iowa 226NW928 (not relieved of liability by statutory duty of municipality); 172Minn35, 214NW671; 103NJL604, 137A570; 247NY503, 161 NE160; 86PaSuper256. [b] (2) Permitting walk to become slippery with oil spilled from pump renders abutting owner liable. 108Conn197, 142A681.
1105-34 108Conn197, 142A681; 321Mo 766, 12SW(2d)491, 62ALR1056. [a] (3) Broken flagstones and hole in sidewalk constitute public nuisance rendering abutting owner liable. NJSup 136A410. [b] **Matters not constituting nuisance.**– CalA 290P489.
1105-35 134Misc516, 235NYS673.
1105-36½-New. Abutting owner is not liable for failure to repair sidewalk where city is bound to repair. 203 Iowa 195, 212NW484.
1105-36¼-New. An owner is under a duty to refrain from doing anything which would render the sidewalk unsafe for public travel. 108Conn197, 142A 681.
1105-36¼-New. Abutting owner must use reasonable care to discover defects in sidewalk and remedy them. 136Misc 600, 240NYS304.
1105-36½-New. No greater duty rests on abutting owner to keep sidewalk in repair than rests upon municipality. 136Misc600, 240NYS304.
1105-42 158Tenn307, 13SW(2d)319.
1106-52 32F(2d)420; 263Mass313, 160 NE810; 265Mass480, 164NE447; 267 Mass73, 165NE699(1stcase); Mont 290 P261; 133Misc832, 234NYS79; 131 Or 665, 283P1115. [a] **Storekeeper owes no greater duty to customers than he owes to ordinary pedestrians** as respects snow and ice on sidewalk. 32F(2d)420.
1106-54 Mont 290P261; 131 Or665, 283 P1115.
1106-61 [b] **Snow falling from roof.**– 246NY85, 158NE29.
1107-62 225AppDiv202, 232NYS404.
1107-63 296Pa126, 145A706.
1107-70 Iowa 226NW928; 239Mich 260, 214NW96.
1107-71 Iowa 226NW928 (duty under ordinance is continuing); Mont 290P 261; 93PaSuper533.
1107-74 154Md650, 141A385, 386 [quot CJ].
1108-81 But see 48RI 255, 137A6.
1108-82 241NYS231 (property owner held not negligent in maintaining cellar way).
1108-83 247NY503, 161NE160.
1108-84 Mass 169NE495; 9PaDist&Co 703; 48RI 255, 137A6.
1108-87 DelSuper 148A289; MoA 21 SW(2d)919; 62 OntL136, [1928] 2DomLR856.
1109-88 48RI 255, 137A6. But see 33 Ariz325, 264P692, 58ALR145.
1110-6 204Cal 509, 269P437, 59ALR 435.
1110-7 See also 94CalA765, 271P918.
1110-8 265Mass524, 164NE381, 61ALR 1052; 253NY423, 171NE694.
1110-9 204Cal 509, 269P437, 59ALR 435.
1110-10 MoA 16SW(2d)607; [1915] SC895.
1111-11½-New. If an excavating contractor had the means of access to defendant's premises across a sidewalk in front of such premises, but for his own convenience and without defendant's direction or permission crossed the sidewalk at some point distant from defendant's property, defendant would not be liable for injury to a pedestrian from a defect in the sidewalk caused by the contractor's trucks, although defendant might have knowledge thereof. 224 AppDiv357, 231NYS181.
1111-14 [a] **Contractor using awning over sidewalk as scaffold** while attaching electric sign to front of building is liable for negligence to pedestrian on whom awning fell. 98Fla132, 123S564.
1111-18 225AppDiv202, 232NYS404.
1111-24 245NY634, 157NE888.
1111-25 199Wis575, 227NW385.
1111-27 289Pa123, 137A169. See also 151Wash457, 276P904.
1112-29 Mich 233NW400; 151Wash 457, 276P904.
1112-32 [e] **If sidewalk adjoining reconstruction work is not barricaded,** extreme care must be taken to prevent injury to pedestrians including warnings. LaA 128S676. [f] **Employees of contractor held justified in believing they could safely proceed with work** after onlooker warned removed self from dangerous position. LaA 128S676.
1113-38½-New. Liability of a paving contractor for injuries from unlighted obstructions results from his creation of the danger and does not rest on the paving contract. MoA 17SW(2d)658.
1113-45 [c] **Hole in highway.**–NJSup 137A835. [d] **Barricade should be obstruction** and actual impediment to travel, not merely warning. 12LaA128, 124S598. [e] **Pedestrian may assume it is safe to pass unless work indicates danger to normal person** when sidewalk adjoining reconstruction work is left open. LaA 128S676 [citCJ].

1114-59 MoA 27SW(2d)718.
1114-64 120 Oh438, 166NE374.
1115-65 262Mass338, 159NE916; 136 Misc912, 241NYS231 (maintenance not nuisance per se).
1115-67 33Ariz325, 264P692, 58ALR 145.
1116-70 226Ky415, 11SW(2d)105.
1117-76½-New. Parties obtaining permission from the city to use part of a street owed no duty to enter on and repair it, if damaged by others, nor to remove therefrom oil and grease deposited thereon by others, and cannot be held liable for injuries to one using the street. 150Wash157, 272P723, 63 ALR200.
1117-76½-New. Municipality has no power beyond regulation of necessary and temporary uses to authorize appropriation of sidewalk for private purposes. 253NY423, 171NE694.
1117-77 136Misc912, 241NYS231.
1118-91 28 Ob208, 162NE610.
1119-98 Wis 232NW527.
1119-5 199Wis575, 224NW748. [h] **Hole left in sidewalk on removal of gasoline pump** does not render owner liable for injury caused thereby, though pump was installed with owner's consent. 231Ky779, 22SW(2d)274.
1120-8 93PaSuper533.
1120-10 See also 86PaSuper256.
1120-13 See also 30 OhA427, 164NE768 (2dcase).
1122-33 108Conn197, 142A681; 28 Oh 208, 162NE610.
1122-36 CalA 262P345; Mo 19SW(2d) 1040; 289Pa123, 137A169.
1123-42 CalA 262P345.
1123-47 246NY85, 158NE29.
1123-48½-New. Failure to remedy the defect after knowledge and opportunity to repair renders the abutting owner liable. 108Conn197, 142A681.
1123-53 265Mass524, 164NE381, 61 ALR1052.
1124-55 132 Or46, 284P567; 198Wis 527, 224NW743.
1125-74 134Misc105, 234NYS486.
1126-77 220Ala678, 126S859; 125Wis 546, 104NW699, 1LRANS952, 4AnnCas 1085.
1127-84 220Ala59, 124S95; 133Misc56, 231NYS119.
1127-91 23AlaA443, 126S616(2dcase); 48 Ida550, 283P606; 49RI 209, 141A609, 59ALR1241; 134SC271, 132SE590; 125 Wis546, 104NW699, 1LRANS952, 4Ann Cas1085. Contra 125Kan574, 265P81.
1129-93 23AlaA443, 126S616(2dcase).
1130-18 220Ala678, 126S859; 23AlaA 443, 126S616(2dcase); 48 Ida550, 283P 606; 247Mich357, 225NW529; 157Miss 207, 127S773 (failure to prevent employee of highway department from removing storm sewer covering); MoA 17 SW(2d)621; 121 Oh412, 169NE457; 132 Okl 95, 269P361; 134SC271, 132SE590; 125Wis546, 104NW699, 1LRANS952, 4 AnnCas1085. See also 332 Ill 70, 163 NE361, 60ALR87. Contra 125Kan574, 265P81.
1131-22½-New. A city, constructing a drain benefiting only private persons, who were assessed the total cost, was not liable in damages for permitting the drain to become so obstructed as to cause water to seep into a property owner's buildings. IndA 163NE277.
1131-22½-New. The city is not liable for the maintenance of a sewer while it remained in the possession and control of a contractor as part of an incomplete project. 220Ala59, 124S95.
1131-27 [b] 220Ky808, 295SW1064.
1132-31 [b] **Adoption by city of drain tile,** installed by private citizen, can be determined only from records. 220 Ky808, 295SW1064.
1132-32 23AlaA443, 126S616(2dcase).
1133-45 30KyL562, 99SW265.
1134-61 125Wis546, 104NW699, 1LRA NS952, 4AnnCas1085.
1134-72 220Ala59, 124S95 (prior to completion of construction by contractor). [a] **City engineer not liable** where he merely acquiesced in plaintiff's connecting up sewer before project was finished by contractor. 220Ala59, 124 S95.
1134-74 But see 230Ky347, 19SW(2d) 968.
1135-82 105NJL107, 143A437. See also Nebr 230NW680.
1135-84 23 OhA513, 155NE490.
1135-89 230Ky347, 19SW(2d)968.
1136-9 Man [1930] 1DomLR247.
1136-10 134Misc105, 234NYS486.
1138-27 204 Iowa983, 216NW112.
1139-31 TexCivA 3SW(2d)857.
1139-33 TexCivA 22SW(2d)982.
1139-37 220Ala678, 126S859.
1140-60 48 Ida550, 283P606; 34 OhA 79, 170NE450; 131Misc624, 227NYS 660; TexCivA 23SW(2d)771. [d] **Raising level of land along creek,** confining waters to channel, held not basis for complaint, for damage by flood along lower part of creek. 131Misc624, 227 NYS660.
1141-67 MoA 18SW(2d)107; 134Misc 888, 236NYS566 (village, though not constructing culvert, held charged with maintenance as part of highway and had duty to prevent obstruction).
1143-91 220Ala618, 127S193.
1143-96½-New. Property owner cannot recover damages caused by surface water flooding premises without showing that damages resulted from city's negligent act or omission. Nebr 230NW 680.
1143-99 Man [1927] 2DomLR294. [d] **Reverting water to original natural course** from previous artificial diversion by private owners incurs no liability to city where no rights have accrued by prescription or equitable estoppel. 102 NJEq128, 139A909.
1144-1 Iowa 232NW800.
1144-2 Man [1927] 2DomLR294.
1144-4½-New. City's right to precipitate surface water on individual's land is recognized to limited degree as incident to street improvement. Iowa 232NW800.
1145-13 MoA 290SW621. [a] **City's answer that improvement diverting water was by state's direction** presented no defense, where street was not shown to be state highway under Rev. St. [1919] § 8498; L. (1st Ex. Sess., 1921) p 131. MoA 290SW621.
1145-20 40GaA830, 151SE678(1stcase) (duty to take care of drains); 169La 52, 124S143(1stcase); NJCh 151A871; 27 OhA250, 161NE226; 96PaSuper405; 13PaDist&Co 267; 105WVa209, 141SE 782.
1146-24½-New. Where city owning street gathers surface water into natural watercourse over individual's property, damage is damnum absque injuria. Iowa 232NW800.
1146-24½-New. Where owner fills up lot obstructing natural drainage, city is not liable for resulting overflow if not appreciably increased by street improvement. Iowa 232NW800.
1146-26 96PaSuper405 (forming mound of dirt and gravel across mouth of unpaved street). [c] Iowa 232NW800.
1147-27 Sask [1930] 1DomLR989 (special license in prior year permitting flow does not authorize flooding of land in subsequent years).
1147-35 230Ky347, 19SW(2d)968; 177 Minn547, 225NW898; 297Pa58, 146A 564; Wash 286P659.
1148-36 320Mo 459, 8SW(2d)61.
1148-37 320Mo 459, 8SW(2d)61; 127 Okl 40, 259P650; 132 Okl 60, 269P241.
1148-39 250Mich416, 230NW163.
1148-47 106Conn167, 137A745.
1149-48 Conn 152A210.
1149-51 106Conn167, 137A745; Tex CivA 3SW(2d)857; Can [1930] 1DomLR 465. [b] **Reasonable use and public necessity** held not to obviate rule. 106 Conn167, 137A745.
1149-52 106Conn167, 137A745; 127 Okl 40, 259P650; 132 Okl 60, 269P241.
1151-72 320Mo 459, 8SW(2d)61.
1151-74 See also 256 IllA452.
1151-77 132 Okl 60, 269P241.
1151-86 TexCivA 3SW(2d)857.
1153-10 23AlaA443, 126S616(2dcase); 48 Ida550, 283P606.
1153-11 220Ala497, 126S619; 48 Ida 550, 283P606; 140 Okl 160, 282P322 (initial defect).
1153-12 48 Ida550, 283P606. [c] (1) 48 Ida550, 283P606.
1153-15 220Ala678, 126S859.
1153-16 220Ala497, 126S619.
1156-58 132 Okl 95, 269P361.
1156-60 TexCivA 3SW(2d)857.
1159-5½-New. A contractor is not liable to one whose residence was flooded when a sewer became choked up where he connected up with the sewer before it was finished. 220Ala59, 124S 95.
1160-13 MoA 14SW(2d)694.
1160-17 297Pa58, 146A564. [b] **It is immaterial** whether nuisance resulted from construction or operation of plant. TexCivA 16SW(2d)862. [c] **Presumptions.**-TexCivA 16SW(2d)862.
1160-18 25 OhNPNS473; TexCivA 11 SW(2d)404; TexCivA 26SW(2d)327. [d] **Restraining order** held sufficiently definite. TexCivA 11SW(2d)404.
1160-19½-New. Denial of injunction restraining council from contracting for construction of sewerage system and outletting effluent into lake was not abuse of discretion. 190Minn442, 212 NW909.
1161-23 204 Iowa983, 216NW112.
1161-34 But see TexCivA 11SW(2d) 404.
1162-40 See also 207 Iowa1126, 224NW 26.
1162-41½-New. Dismissal of an appeal in a suit against the city and a private corporation seeking to abate a sewer constructed by defendants, as a nuisance, and for damages to plaintiff's land, eliminated both rights to damages against the city and to abatement. Tex CivA 13SW(2d)738.
1162-41½-New. Belief of city officials that the place selected for a sewage disposal plant was suitable does not excuse unreasonable location. TexCivA 16SW(2d)862.
1162-43 TexCivA 3SW(2d)857. See also 297Pa58, 146A564.
1162-57 [a] **Laches will not bar plaintiff** where he delayed seeking remedy for five years, relying on promises of defendants to stop nuisance. TexCivA 11SW(2d)404.
1164-86 108Conn697, 145A158. [a] **To deprive city of immunity from liability for negligence in operation of bathing beach,** rental received must be substantial. 108Conn697, 145A158.
1164-93 137 Okl 246, 278P1094(2d case).
1164-94 137 Okl 246, 278P1094(2d case).
1165-12 TexCommnA 9SW(2d)1030.
1166-21 131Misc728, 228NYS82, 84 [cit CJ].
1167-33 [a] 124 Or691, 265P433.
1168-56 [b] (2) A municipality is liable for injuries caused by negligence. Can [1930] 4DomLR938.
1170-79 332 Ill 70, 163NE361, 60ALR 87.
1170-94 249NY198, 163NE732; 126 Or 56, 268P760, 59ALR381; TexCivA 8SW (2d)271. [c] (2) Municipality maintaining supervised playground is liable for injuries to child from negligence of supervisor. Ont [1929] 4DomLR492. [d] **City may be liable for maintenance of dangerous pool** though it did not create it. MoA 5SW(2d)1106. [e] **Municipality constructing and maintaining diving board on pier in park** is required to make diving place safe. 53 SD600, 221NW700.
1170-95 249NY198, 163NE732. [b] (3) Municipality maintaining vicious bear in park is liable for injury to child resulting from negligence in construction of cage on ground of maintenance of nuisance whether or not municipality acted in governmental capacity. Tex CommnA 5SW(2d)761.
1171-96 69Utah186, 253P443, 51ALR 364 (dictum).
1171-97 292Pa537, 141A496; Eng 38 TLR102; 63 OntL626 [aff 64 OntL275] (supervised playground); Ont [1929] 3 DomLR317. [a] (2) It is duty of city to fill up pool dangerous to children where it cannot be fenced. MoA 5SW (2d)1106. [c] **Failure to place fence** around pond has been held not necessarily negligence. Mo 32SW(2d)72.
1171-98 Mo 32SW(2d)72.
1171-4½-New. A pleasure seeker in a town park cannot be expected to examine the proceedings of the town board in acquiring the land before availing himself of privileges held out to him. 249NY198, 163NE732.
1171-4½-New. Negligence of city in

maintaining pond where children are liable to receive injury does not exclude defense of contributory negligence of child drowned therein. **MoA** 26**SW(2d)** 997.

1171–10 **Mo** 32**SW(2d)**72.

1172–13 But see 63 **OntL**626 [aff 64 **OntL**275].

1172–17 32**NH**458, 136**A**357; **TexCivA** 299**SW**468. [i] 125**Kan**524, 265**P**78.

1173–23 **TexCivA** 299**SW**468.

1173–24 **TexCivA** 299**SW**468.

1173–24½–New. The immunity of a city from liability for negligence in the performance of its governmental functions is not imputed to one who operates for profit a swimming pool on land leased from the city under a contract requiring the lessee to maintain the pool in a safe manner. 128**Kan**230, 276**P** 796.

1173–26 See also **Mass** 170**NE**395.

1173–29 172**Minn**76, 214**NW**774.

1173–37 108**Conn**697, 145**A**158.

1173–38 106**Conn**13, 136**A**876, 57**ALR** 402.

1173–40 106**Conn**13, 136**A**876, 57**ALR** 402; 179**Minn**12, 228**NW**170.

1173–41 12**PaDist&Co** 541.

1174–54½–New. A municipality is not liable for injuries sustained by a person in a municipal market place by falling through an open manhole located where he was neither expected nor invited to go while he was on an errand personal to himself and not as a customer of the market. 204 **Iowa**948, 216**NW**52.

1174–55 204 **Iowa**948, 216**NW**52.

1174–56½–New. A person going behind a city market house stall where the public are not expected or allowed to go, for purposes of his own, is bound to use at least ordinary care to observe where he is going. 204 **Iowa**948, 216**NW** 52.

1174–56⅓–New. Where such person steps into an open manhole, he is guilty of contributory negligence as matter of law. 204 **Iowa**948, 216**NW** 52.

1174–62 See also 254 **IllA**489.

1174–62½–New. City owes no duty of care to trespassing child where dumping ground not attractive and city is not guilty of willful or wanton conduct. 254 **IllA**489.

1174–63 222**Ky**664, 1**SW(2d)**1068.

1174–64 222**Ky**664, 1**SW(2d)**1068.

1175–67 **TexCivA** 298**SW**631. See also **TexCommnA** 9**SW(2d)**1030.

1175–74 [a] **City waives defenses based on incomplete condition of wharf** where it receives vessel thereat by express permission for its personal advantage. **TexCivA** 298**SW**631.

1175–77½–New. A sailor passing over a city wharf at which his vessel was docked is not a trespasser or licensee but is an invitee. **TexCivA** 298**SW**631.

1175–77⅓–New. Where a city invites a ship to use its wharf, the duty of safeguarding sailors while on the wharf rests on the city and not on a person employed by it to make repairs under direction of its engineer. **TexCivA** 298**SW**631.

1175–77¼–New. Although the person so employed is an independent contractor, the city is liable to a sailor on such ship for injuries resulting from falling into a hole in the wharf left open without lights at night. **TexCivA** 298**SW**631.

1175–77⅓–New. The municipality is not liable for not maintaining guards at ponds, lakes, or streams not maintained for bathing purposes. 121 **Oh**37, 166**NE** 897.

1175–77⅓New. Permitting pole to float in ocean waters at municipal beach constitutes "dangerous condition" for which city may be liable. **CalA** 289**P**203.

1175–78 [a] **Assumption of case on part of city.–TexCivA** 298**SW**631. [b] **Matters not constituting negligence.–TexCivA** 298**SW**631.

1177–29 [1922] **SC**527.

1177–35 40**GaA**196, 149**SE**88.

1177–36 40**GaA**196, 149**SE**88; **IndA** 162 **NE**255; 126 **Or**56, 268**P**760, 59**ALR**381; 69**Utah**186, 253**P**443, 51**ALR**364 (dictum); **Utah** 267**P**1011; 148**Va**60, 138**SE** 503, 54**ALR**1485. [d] **That city is prohibited from selling or leasing system** does not affect rule. **Utah** 267**P**1011.

1178–38 95**PaSuper**62; **Can** [1930] 4 **DomLR**1018.

1178–39 121 **Oh**412, 169**NE**457.

1178–40 296**Pa**256, 145**A**837.

1178–43 126 **Or**56, 268**P**760, 59**ALR**381; 69**Utah**186, 253**P**443, 51**ALR**364 (dictum); 148**Va**60, 138**SE**503, 54**ALR**1485. [a] (13) **Failure to take adequate precautions to insure purity of water. Ont** [1929] 4**DomLR**772.

1181–75 322**Mo** 514, 17**SW(2d)**960; **NC** 154**SE**844.

1183–11 121 **Oh**253, 167**NE**892 (municipality is without power to prescribe condition precedent).

1183–12 230**AppDiv**612, 245**NYS**680.

1183–21½–New. In other jurisdictions the existence of a right to sue another does not prevent an action against a municipality. 290**Pa**331, 138**A**849, 54 **ALR**1285.

1184–24 126**Kan**153, 267**P**7. See also 26 **OhNPNS**213. But see 230**AppDiv** 612, 245**NYS**680.

1184–25 **TexCivA** 27**SW(2d)**551.

1184–26 216**Ala**174, 112**S**435; 106**Conn** 61, 136**A**872; 106**Conn**393, 138**A**129; 37 **GaA**631, 141**SE**322; 243 **IllA**552; 125 **Kan**482, 264**P**1049; 258**Mass**570, 155**NE** 636; 259**Mass**564, 156**NE**734; 171**Minn** 57, 213**NW**557, 59**ALR**404; 133**Misc**64, 231**NYS**139; 133**Misc**792, 233**NYS**512; 198**NC**271, 151**SE**199(1stcase); 50**RI** 486, 149**A**593, 68**ALR**1530; **TexCivA** 292 **SW**583; 149**Va**235, 141**SE**260; 152**Va** 74, 146**SE**303.

1185–27 But see 230**AppDiv**612, 245 **NYS**680.

1185–28 130 **Okl** 162, 265**P**1057.

1185–30 105**Conn**476, 136**A**93; 45 **Ida** 362, 262**P**507; 48 **Ida**550, 283**P**606; 80 **Mont**278, 260**P**717.

1186–33 80**Mont**278, 260**P**717.

1186–39 56**ND**285, 217**NW**163, 165 [citCJ]; **TexCivA** 27**SW(2d)**551. See also **Ala** 130**S**896. But see 230**AppDiv** 612, 245**NYS**680.

1186–40 146**Wash**27, 261**P**643.

1186–41 See also 50**RI** 486, 149**A**593, 68 **ALR**1530.

1186–42 **CalA** 285**P**1062(1stcase).

1187–50 216**Ala**26, 112**S**307.

1183–57 239**Mich**656, 215**NW**19. See also **Colo** 292**P**594.

1189–60 159**Tenn**220, 17**SW(2d)**4.

1189–64 But see **TexCivA** 12**SW(2d)**263.

1189–65 177**Minn**547, 225**NW**898; 230 **AppDiv**612, 245**NYS**680. [b] **Though nuisance may have resulted,** plaintiff is required to file statement of claim where it is based on negligence. 134**Misc**888, 236**NYS**566.

1189–67 [b] (1) 159**Tenn**220, 17**SW(2d)** 4. [h] **Tree protruding over highway.–** Suit for injuries by tree protruding over highway is based on "defective highway," within requirement for notice of injury under Gen. St. (1918) § 1414. 106 **Conn**61, 136**A**872.

1190–80 **TexCivA** 26**SW(2d)**706.

1191–91 126**Kan**153, 267**P**7.

1191–99 **Mass** 169**NE**495.

1191–3 258**Mass**368, 155**NE**3. [a] (1) 265**Mass**506, 164**NE**621.

1192–7 See also 56**ND**285, 217**NW**163.

1192–10½–New. In a death action brought by the widow as administratrix of deceased, a claim signed by her individually held sufficient when she was the sole beneficiary. 146**Wash**27, 261**P** 643.

1192–15 219**Ala**686, 123**S**83, 63**ALR** 1076; 243 **IllA**552; 246 **IllA**172; 56**ND** 285, 217**NW**163, 165 [citCJ]; 144**Wash** 691, 258**P**830. [a] (8) 153**Wash**179, 279 **P**570(2dcase). [c] (3) Witnesses may be permitted to testify though their names are not included in notice where they were unknown to plaintiff at time notice was given. 242**Mich**651, 219**NW**632. [e] **Administrators' notice of claim** need not state parents predeceased minor to show administrator's right to sue. **Ga** 155**SE** 520.

1193–17 250**NY**332, 165**NE**517.

1193–18 105**Conn**476, 136**A**93; 45 **Ida** 362, 262**P**507, 509 [citCyc]. [b] (2) 216 **Ala**174, 112**S**435; **IndA** 169**NE**885; 250 **NY**332, 165**NE**517; 196**NC**457, 146**SE**3; 56**ND**285, 217**NW**163; 144**Wash**691, 258 **P**830.

1193–19 140 **Okl** 160, 282**P**322.

1193–22 45 **Ida**362, 262**P**507; 56**ND**285, 217**NW**163, 165 [citCJ]; 143**Wash**367, 255**P**364 (claim will be interpreted with same liberality as pleading).

1194–30½–New. A claim presented by a father claiming damages for the death of his son, not stating that the mother was dead at the time of the homicide, is insufficient to authorize an action by him in which such allegation is made. 37 **GaA**631, 141**SE**322.

1194–31 **TexCivA** 27**SW(2d)**551.

1194–32 133**Misc**393, 233**NYS**36.

1195–46 221**MoA**505, 282**SW**128; 222 **MoA**749, 7**SW(2d)**707.

1195–52 **TexCivA** 292**SW**583.

1196–62 152**Va**74, 146**SE**303; 144**Wash** 691, 258**P**830. [b] 45 **Ida**362, 262**P**507; 152**Va**74, 146**SE**303; 143**Wash**367, 255 **P**364; 144**Wash**691, 258**P**830.

1196–63 144**Wash**691, 258**P**830.

1196–67 125**Kan**482, 264**P**1049.

1196–73 45 **Ida**362, 262**P**507.

1197–90 125**Kan**482, 264**P**1049. But see 133**Misc**792, 233**NYS**512.

1198–92 45 **Ida**362, 262**P**507; 170**Minn** 211, 212**NW**186; 173**Minn**458, 217**NW** 495; 80**Mont**278, 260**P**717; 133**Misc**792, 233**NYS**512. [c] 175**Minn**366, 221**NW** 241. [e] (14) 80**Mont**278, 260**P**717.

1200–15 105**Conn**476, 136**A**93.

1200–16 [c] (16) 45 **Ida**362, 262**P**507. [d] (4) 50**RI** 486, 149**A**593, 68**ALR**1530.

1201–17 258**Mass**570, 155**NE**636.

1201–18 45 **Ida**362, 262**P**507.

1201–19 **Mass** 169**NE**411 (presence of ice in hole).

1201–23 125**Kan**482, 264**P**1049.

1201–24 [c] (6) 45 **Ida**362, 262**P**507.

1202–32 **GaA** 155**SE**790(2dcase).

1202–40½–New. Claimant need not apportion the amount of damages to the several acts of the city which he claims caused the injuries. 196**NC**412, 146**SE** 3.

1203–49 105**Conn**476, 136**A**93; 265 **Mass**506, 164**NE**621.

1204–64 254**NY**91, 171**NE**917.

1204–67 254**NY**91, 171**NE**917.

1204–72 216**Ala**4, 112**S**433.

1204–74 **Ala** 130**S**856.

1204–75 [c] **Verification held sufficient.–** Verification of statement of claim against city was sufficient under Code (1923) § 2031. 216**Ala**4, 112**S**433.

1205–90 140 **Okl** 160, 282**P**322. [b] **Personal service required.–Mo** 23**SW(2d)** 1045 (delivery to agent expressly authorized amounts to personal service).

1205–96 **MoA** 18**SW(2d)**545 (service on mayor is properly made where mayor's name is signed to acknowledgment of receipt by his secretary). [b] (1) **Mo** 23**SW(2d)**1045. (4) Service of notice of injury on village recorder held sufficient. 170**Minn**211, 212**NW**186. [c] (6) 133 **Misc**393, 233**NYS**36. (8) Service of notice on city attorney does not satisfy requirement of service on mayor. 159 **Tenn**220, 17**SW(2d)**4.

1206–98 **MoA** 27**SW(2d)**718.

1206–5 37**GaA**762, 142**SE**171.

1207–14 [a] (4) Notice within thirty days, but more than ten days after pedestrian slipped on ice and fell through fence, held sufficient. 262**Mass**369, 160 **NE**248.

1208–21 159**Tenn**220, 17**SW(2d)**4.

1208–32 **Man** [1930] 3**DomLR**330 (various excuses considered together held sufficient).

1208–34 **Man** [1930] 3**DomLR**330.

1209–50 **Ont** [1930] 3**DomLR**825.

1210–54 56**ND**285, 217**NW**163.

1210–56 171**Minn**57, 213**NW**557, 59**ALR** 404.

1210–61 222**AppDiv**815, 226**NYS**158.

1210–62 69**Utah**186, 253**P**443, 51**ALR** 364; [1927] **CanSC**279, [1927] 2**DomLR** 1023.

1211–70½–New. After rejection of claim, insufficiency cannot be raised. 69 **Utah**186, 253**P**443, 51**ALR**364.

1212–88½–New. Where the city does not present in court a notice received by it, objection thereto is waived. **IndA** 168 **NE**191.

1212–93 69**Utah**186, 253**P**443, 51**ALR** 364.

1213–14 [c] (4) **Sask** [1928] 4**DomLR** 509. [d] **Computation of period for damages from negligent operation of sewage disposal plant.–**132 **Okl** 95, 269**P** 361.

1215-29½-New. In Alberta limitations period has been held not to run during negotiations where municipal agent led plaintiff to believe that claim would be paid. **Alta** [1930] 3**DomLR**670.

1216-51 37**GaA**666, 141**SE**223.

1217-59 [c] (1) 220**Ala**497, 126**S**619.

1217-62 220**Ala**505, 126**S**169 (by statute).

1218-70½-New. Tenant of part of building held improperly joined where liability over to municipality is that of owner of premises. 13**PaDist&Co** 751.

1218-86 [c] (2) 53**SD**160, 220**NW**472. (5) **MoA** 12**SW(2d)**518. (8) Action for injury to automobile from defect in street. 36**GaA**552; 137**SE**414. (9) Action for damages by falling into open coal hole. 88 **IndA**253, 157**NE**55. (10) Action for injuries from negligence in leaving unprotected opening in sidewalk. 37**GaA**762, 142**SE**171. (11) Actions for concentration of sewage on plaintiff's land. **TexCivA** 13**SW(2d)**738. [d] 153 **Miss**136, 119**S**811.

1219-91 203 **Iowa**1245, 212**NW**158, 160 [citCyc], 53**ALR**375.

1219-93 203 **Iowa**1245, 212**NW**158, 160 [citCyc], 53**ALR**375. [a] 40**GaA**63, 148 **SE**747; 203 **Iowa**1245, 212**NW**158, 53 **ALR**375. [b] **Complaint held not demurrable** on ground that defendant was engaged in governmental duty where there is no allegation showing such fact. 107 **Conn**351, 140**A**723.

1220-15 **TexCivA** 12**SW(2d)**604.

1220-21 [b] (3) Action for injury sustained in using slide in park. 39**GaA**519, 147**SE**789. (4) Action for injuries when fireman fell while descending ladder from burning building. 154**SC**105, 151**SE**230.

1220-22 [c] (1) 23**AlaA**314, 125**S**799 (3dcase); 39**GaA**619, 147**SE**793(3dcase); 248**Mich**306, 226**NW**865(2dcase); 317 **Mo** 1010, 297**SW**50; 53**SD**644, 222**NW** 268; **SD** 231**NW**935. (2) 199**Wis**575, 227**NW**385 (tree). (5) Injury due to oil on sidewalk. 38**GaA**249, 143**SE**922.

1221-24 [a] **MoA** 14**SW(2d)**694; **MoA** 18**SW(2d)**107.

1222-40 [a] (3) **Mont** 290**P**261. [c] **Petition held to state cause of action.**-28 **Oh**208, 162**NE**610.

1223-50 219**Ala**486, 122**S**664; 203 **Iowa** 1245, 212**NW**158, 53**ALR**375. [c] (1) 219**Ala**486, 122**S**664.

1224-75 218**Ala**429, 118**S**640; 245 **IllA** 484; 206 **Iowa**309, 218**NW**340. [b] (4) Leaving coal hole lids open longer than permitted by ordinance. 88 **IndA**253, 157**NE**55. (5) Other instances of sufficient allegations. 154**Md**650, 141**A**385. (6) Negligent maintenance of bear cage in public park. **TexCivA** 299**SW**468. (7) Negligence of subcontractor placing ladder against building. 132 **Or**46, 284**P** 567. [c] (5) 219**Ala**486, 122**S**664; 41 **GaA**146, 152**SE**144.

1225-82 **MoA** 16**SW(2d)**607.

1225-84 254 **IllA**489 (failure to allege attractive nuisance fatal).

1225-85 254 **IllA**489.

1225-87 **MoA** 16**SW(2d)**607.

1226-90 **SD** 231**NW**935.

1226-93 5**LaA**238; **SD** 231**NW**935. [b] **Allegations held insufficient.**-**MoA** 297 **SW**449.

1227-6½-New. Complaint held not demurrable for not averring how long the instrumentality remained unguarded on the street. 218**Ala**429, 118**S**640.

1228-22 220**Ala**497, 126**S**619.

1228-24 **TexCivA** 8**SW(2d)**331. [b] (1) 23**AlaA**443, 126**S**616(2dcase). [c] **Allegations held insufficient.**-23**AlaA**443, 126**S** 616(2dcase).

1229-25 [a] **Complaint held insufficient** for failure to show lapse of reasonable time after notice to remedy dangerous condition. **CalA** 289**P**203.

1229-30 216**Ala**4, 112**S**433.

1229-36 87**Colo** 107, 285**P**168 (complaint did not state cause of action). [b] **Complaint demurrable** when there is failure of such allegation. 106**Conn**393, 138**A**129.

1229-37 **TexCivA** 299**SW**468.

1229-42 106**Conn**61, 136**A**872; 37**GaA** 631, 141**SE**322; **TexCivA** 292**SW**583; 152**Va**74, 146**SE**303.

1232-82 See also 36**GaA**799, 138**SE**283.

1233-97½-New. Demurrer to a plea in abatement, raising the question of the filing of a claim for damages, has been held properly sustained, since the statute is inapplicable, and, if applicable, would be a matter in bar. 89 **IndA**128, 165**NE**264.

1233-99 [b] (2) 219**Ala**486, 122**S**664.

1234-19 149**Va**235, 141**SE**260. [f] 45 **Ida**175, 260**P**1092.

1234-24 258**Mass**368, 155**NE**3.

1234-28 172**Minn**524, 215**NW**851.

1235-41 206 **Iowa**309, 218**NW**340; 134 **Misc**105, 234**NYS**486. [a] (2) Express or implied notice of defect must be proved. 23**AlaA**443, 126**S**616(2dcase).

1236-43½-New. Petition held not to allege that death of swimmer in city's pool resulted from combined acts of negligence requiring proof of all. 81**Colo** 246, 254**P**1000.

1236-54 [c] (2) Evidence of damage to property because of insufficient culvert is inadmissible, where petition alleged injury to health, comfort, and peace only. 218**Ky**652, 291**SW**1030.

1237-60 80**CalA**271, 251**P**697.

1237-67½-New. Breadth of proof under complaint may not go beyond defects fairly embraced within notice of injury. 105**Conn**476, 136**A**93.

1237-69 See also 245 **IllA**484.

1238-84 [b] **Damages.**-Depreciation in value of property overflowed not recoverable in action for injuries to comfort and peace in occupancy of homes. 218 **Ky**652, 291**SW**1030.

1238-85 **Mo** 12**SW(2d)**504; 11**PaDist &Co** 245. [a] (8) **Mo** 287**SW**310. See 11**PaDist&Co** 245.

1239-89 [a] (7) 39**GaA**739, 148**SE**421.

1240-7 **Mass** 167**NE**651.

1240-10 242**Mich**651, 219**NW**632; 143 **Wash**367, 255**P**364 (evidence held not material variance).

1241-22 [a] (1) 48 **Ida**550, 283**P**606.

1242-38 37**GaA**299, 139**SE**828; **MoA** 27 **SW(2d)**718. [a] (3) Presumption is that drain constructed under sidewalk by abutting owner was constructed pursuant to ordinance requiring it and not voluntarily. 33**Ariz**325, 264**P**692, 58 **ALR**145. (4) It will be presumed that ordinance requiring property owner to construct drain under sidewalk was adopted for benefit of public rather than property owner. 33**Ariz**325, 264**P**692, 58**ALR**145. (5) Evidence of leaving pipe exposed in street held to authorize inference of negligence. 37**GaA**299, 139 **SE**828.

1242-43½-New. It is not to be presumed that a city was generally neglectful of its duty to maintain gutter coverings in sidewalks in safe condition. 80 **Mont**278, 260**P**717.

1242-43½-New. Where property owners sustained damages by flooding on the bursting of a city water main without fault on their part, they were entitled to the most favorable inferences fairly deducible from testimony given in their behalf on the question of the precise cause of the break. 133**Misc**56, 231**NYS**119.

1242-43¼-New. Inferences as to prior existence of defects in sidewalk for considerable time is not available in view of evidence. 111**Conn**36, 149**A**132, 66 **ALR**726.

1242-43½-New. A reasonable presumption is that the city has knowledge of the existence of death traps or pitfalls dug across streets. 11**LaA**306, 123**S** 399(2dcase).

1242-50½-New. The city is presumed to have known of a defect in a sidewalk at an alley intersection in a dense business section very soon after the defect came into existence. **MoA** 19**SW(2d)** 522.

1243-60½-New. No presumption that mayor had authority to direct placing of obstruction across street. 216**Ala**174, 112**S**435.

1243-68 [a] **Contributory negligence is presumed** where in broad daylight one falls into unguarded hole three by four feet in dimensions. 97**PaSuper**56.

1243-73 289**Pa**123, 137**A**169; **BC** [1928] 1**DomLR**1080.

1243-74 48**RI** 255, 137**A**6.

1244-75 129**Misc**421, 221**NYS**457.

1244-76 [a] (2) 289**Pa**123, 137**A**169 (breaking of plank). [b] **Mont** 290**P**261.

1244-77 155**Miss**540, 124**S**656; 129 **Misc**421, 221**NYS**457; 226**AppDiv**228, 235**NYS**81; 289**Pa**123, 137**A**169.

1244-78 289**Pa**123, 137**A**169.

1244-81 See also 289**Pa**123, 137**A**169.

1244-83 131**Misc**51, 225**NYS**659. [a] 129**Misc**421, 221**NYS**457.

1244-85 28 **Oh**208, 162**NE**610. [c] **Plaintiff is not relieved of burden of proving nuisance** by fact that city alleges that conditions were attributable to other causes. **TexCivA** 38**W(2d)**857.

1245-87 **CalA** 292**P**664 (drowning in tidewater lagoon); **Iowa** 233**NW**43; 155 **Miss**540, 124**S**656; 224**AppDiv**512, 231 **NYS**379.

1245-88 243**Mich**465, 220**NW**890.

1245-90 220**AppDiv**320, 221**NYS**441; 228**AppDiv**103, 239**NYS**284.

1245-91 111**Conn**681, 151**A**88.

1245-94 **CalA** 292**P**664; **SD** 223**NW**721 (3dcase); **TexCivA** 38**W(2d)**857.

1246-98 246 **IllA**172.

1246-1 258**Mass**570, 155**NE**636; 261 **Mass**142, 158**NE**326.

1246-2 48**RI** 255, 137**A**6.

1246-7 48**RI** 255, 137**A**6; **TexCivA** 3 **SW(2d)**857; **Sask** [1929] 2**DomLR**474.

1247-8 **Can** [1928] 3**DomLR**103.

1247-15 [a] **Burden is on defendants** to prove that plaintiff saw barrier and red light and deliberately disregarded warning. **NJSup**137**A**835.

1247-16 218**Ala**429, 118**S**640.

1247-16½-New. In action against abutting owner into whose hatchway plaintiff fell, burden is on defendant, after plaintiff's prima facie showing, to prove explanation releasing him from liability, such as interference by third party. 48 **RI** 255, 137**A**6.

1247-16½-New. Burden not on city to prove it was impossible with reasonable care to remove ice before pedestrian fell. **Iowa** 233**NW**43.

1247-18 105**Conn**482, 136**A**95.

1247-22 **IndA** 168**NE**191; **MoA** 98**W (2d)**872; 91**PaSuper**247.

1248-30 216**Ala**174, 112**S**435; 199**Wis** 575, 224**NW**748.

1248-31 218**Ky**652, 291**SW**1030.

1248-35 109**Conn**662, 145**A**59; 48**RI** 189, 136**A**437, 52**ALR**1007. [g] (6) **Evidence held inadmissible.**-**Mass**173**NE**417.

1249-40 265**Mass**195, 163**NE**757.

1249-42 23**AlaA**479, 127**S**257; 81**Colo** 246, 254**P**1000 (admitting testimony that water in city's swimming pool was cold not error).

1249-44 [b] **Evidence held inadmissible.**-218**Ky**652, 291**SW**1030.

1250-52 172**Minn**35, 214**NW**671. [g] **Lack of means or funds.**-On issue whether city performed duty of maintaining sidewalks, expenditures involved and city's physical resources are relevant. 105**Conn**476, 136**A**93. [h] **City's lack of control over independent contractor's workmen** is immaterial in action for injury from hole excavated in street. 48**RI** 189, 136**A**437, 52**ALR**1007.

1251-68 80**CalA**271, 251**P**697; 241 **IllA** 58. [d] (5) Ordinance requiring lights on building material in street held admissible, though material was on parkway, where accident occurred when "pretty dark" after sunset. 241**IllA**58.

1252-69 35**OhA**390, 172**NE**400.

1252-71 **MoA** 12**SW(2d)**518.

1252-76 255**Mass**539, 152**NE**346; 287 **Pa**588, 136**A**294 (water running over sidewalk).

1253-91 [d] **Blueprints.**-172**Minn**35, 214 **NW**671.

1254-94 216**Ala**174, 112**S**435; 287**Pa** 588, 136**A**294.

1254-8 216**Ala**174, 112**S**435; **Iowa** 226 **NW**928; **Mass** 169**NE**495.

1255-12 206 **Iowa**309, 218**NW**340. [a] (2) Testimony as to removal of ashes at crossing at later date inadmissible in absence of testimony to use of ashes at date of accident. 105**Conn**447, 135**A**535.

1258-49 207**Cal** 657, 280**P**118; 140 **Okl** 160, 282**P**322; 50**Kl** 153, 146**A**618, 65 **ALR**375.

1258-51 140 **Okl** 160, 282**P**322.

1260-76 **TexCivA** 298**SW**631. [d] **By whom made.**-**MoA** 18**W(2d)**227.

1262-11 **Mass** 169**NE**495.

1263-23 **SD** 223**NW**721(3dcase).

1264-32½-New. In an action for damages for the maintenance of a nuisance, where the statute of limitations is involved, evidence of the condition exist-

ing prior to the period of limitations is admissible with an instruction that it cannot be considered on the question of damages. Okl 260P140.

1266–71 17F(2d)202.

1266–78 40GaA633, 151SE42; 45 Ida 362, 262P507.

1267–89½–New. Evidence of twelve-year-old boy, probably mistaken as to place of accident properly received. 170 Minn211, 212NW186.

1267–91 [a] **Evidence held insufficient** to show conversion of automobile tires by city engineer. 222MoA109, 2SW(2d) 632.

1267–93 [a] (2) To sustain finding of negligence in maintenance of pipe line. Utah 267P1011. [c] (1) 107Conn197, 139A699; 36GaA552, 137SE414; 40GaA 633, 151SE42. (2) 288Pa203, 135A612. (11) To support recovery for fall on icy sidewalk. 203 Iowa696, 213NW222. (12) To deprive city of immunity from negligence. 108Conn697, 145A158. (13) To show that place of accident was public street or walk. 127 Orl, 270P924. (14) To show shooting of bombs in public place without permit constituted nuisance. 228AppDiv566, 241NYS313. (15) To justify finding that city directed work in such way as to create inherently dangerous condition. 228App Div37, 238NYS401. (16) To show joint liability of lot owner and city. 198NC 180, 151SE94. (17) To show presence of typhoid bacilli in water supply. Ont [1929] 4DomLR772. [d] (1) Mass 170 NE64; 222MoA949, 7SW(2d)380; 228 AppDiv103, 239NYS284; TexCivA 25 SW(2d)165. (6) To sustain allegation that fire truck was defective and operation dangerous. 30F(2d)935.

1267–95 255Mass539, 152NE346. [a] (1) 203 Iowa41, 212NW365; 223App Div39, 227NYS248; 131Misc624, 227 NYS660. (5) Of property owner in failing to guard air well being constructed in street in connection with building. Minn 219NW161. (6) Of contractor. Mass 170NE64. [b] **Evidence held sufficient to show negligence.**–178Minn326, 227NW177; 180Minn496, 231NW210; TexCivA 27SW(2d)584.

1268–6 NJSup 145A475(2dcase); 150 Wash157, 272P723, 63ALR200. [m] (1) 81CalA40, 252P1078 (injury from fall of awning); 39GaA739, 148SE421; LaA 128S317; 91PaSuper247; 91PaSuper 290; Alta [1930] 1DomLR847; (4) 203 Iowa565, 213NW212; 179Minn553, 230 NW89. (24) 179Minn351, 229NW319. (26) To show that presence of ice on sidewalk was sole cause of injury. 81 Colo 134, 254P153.

1268–6 [m] (27) To show natural flood channel where flood waters drained off into creek when flood subsided. 131 Misc624, 227NYS660. [m] (1) Mass 167 NE663. (4) Iowa 233NW43; Mass 173 NE240; [1930] 4DomLR1010(1stcase). (21) To establish city's negligence as to pedestrian slipping on icy sidewalk. 220AppDiv320, 221NYS441. (22) To warrant finding that ice on which plaintiff slipped came from gutter and trough maintained by defendants. 267Mass73, 165NE699(1stcase).

1271–7 [f] (5) To show that plaintiff was owner of damaged property when action was commenced. 89 IndA128, 165 NE264.

1271–8 [a] (5) To sustain finding of city's negligence in failing to have life guard at swimming pool. 81Colo 246, 254P1000. (6) To establish that bursting of water main resulted from negligent acts of city. 133Misc56, 231NYS 119.

1271–8½–New. Proof that a permit for the location and maintenance of a machine was obtained from the city showed that the ordinance generally prohibiting obstructions on sidewalks did not apply to such machines. 10LaA427, 121 S371.

1271–8½–New. Where property owners established that one or more of several acts of negligence caused the bursting of a water main, they were not required to prove the particular act that caused the damage. 133Misc56, 231NYS119.

1271–14 50RI153, 146A618, 65ALR 375.

1272–20 [a] (1) Mo 285SW1005. (2) 91PaSuper290.

1272–23 [a] 180Minn496, 231NW210.

1272–29 [f] (1) 207Cal 657, 280P118. [h] **Notice to contractor** of defect in plank walk. 289Pa123, 137A169.

1273–30 Mass 173NE541. [c] (1) 207 Cal 657, 280P118; 78Mont180, 253P 267; 48RI 189, 136A437, 52ALR1007. (6) To show that defective condition had existed for such time that owner should have discovered it. 198Wis527, 224NW 743. [d] (1) 111Conn36, 149A132, 66 ALR726; 10LaA24, 120S418(1stcase); 226AppDiv328, 235NYS81. (5) Notice to contractor of defect in plank walk. 289Pa123, 137A169. [f] (1) 81CalA40, 252P1078 (defective awning); 84CalA 420, 258P107. (9) That city's failure to have guard at swimming pool was proximate cause of death. 81Colo 246, 254P 1000. (10) That negligence in placing I-beams on parkway was proximate cause of death of one standing thereon when beams were dislodged. 241 IllA 58. (11) To warrant finding that slippery condition of traveled portion of street, because of undue accumulation of oil and grease, caused automobile to skid, thereby contributing to injury. 150Wash157, 272P723, 63ALR200. (12) To support finding that city so changed drainage course in paving streets as to cause water from normal rainfalls to overflow lot. TexCivA 27SW(2d)551. (13) Other instances. LaA 128S317; 136Misc487, 241NYS73. [g] (8) To show that bridge caused flood conditions. 131Misc624, 227NYS660. (9) To show that overflow of water was caused by culvert under road built by city. MoA 18SW(2d)107. (10) To show contractor's negligence. 12LaA397, 126S 277. (11) Other instances. 179Minn12, 228NW170.

1275–37 180Minn496, 231NW210.

1275–39 NJSup 145A466. [a] (1) 208 Iowa117, 224NW579; 12LaA397, 126S 277 (other instances); 9PaDist&Co 703. (2) Evidence held to show that pedestrian injured by stepping on pipe line while crossing street at point other than regular crossing was guilty of contributory negligence. 86PaSuper178 (stepping on pipe line). [b] (1) 241 IllA58; 8LaA541; Mont 290P261; TexCivA 27 SW(2d)584.

1276–40 [a] (1) 179Minn553, 230NW 89.

1276–43 265Mass506, 164NE621; 133 Misc393, 233NYS36. [b] (1) 259Mass 564, 156NE734.

1277–46 261Mass142, 158NE326; 265 Mass1, 163NE196; Mass 169NE411; Mass 173NE541; 80Mont278, 260P717. [a] **Evidence held insufficient.**–258Mass 570, 155NE636.

1277–60 78Mont180, 253P267; 226App Div529, 235NYS26; 196NC196, 145SE 17.

1278–69 81Colo 134, 254P153; MoA 12 SW(2d)518; Mo 29SW(2d)710; MoA 27 SW(2d)718; 78Mont180, 253P267; 91 PaSuper247. [d] 251 IllA109. [f] **Location of sewerage disposal plant.**–Whether there was reasonable necessity for such location. TexCivA 16SW(2d) 862.

1278–70 81Colo 134, 254P153; 78Mont 180, 253P267.

1278–72 149Va235, 141SE260.

1278–73 207 Iowa1168, 224NW828; 243Mich465, 220NW890; 130 Okl 162, 265P1057; 137 Okl 246, 278P1094(2d case).

1279–76 13PaDist&Co 53.

1279–77 254 IllA489; 263Mass330, 160 NE800.

1279–78 108Conn622, 144A468.

1279–80 221MoA505, 282SW128.

1279–81½–New. Whether a portion of a park had been opened to the public, MoA 5SW(2d)1106.

1279–83½–New. Whether a sidewalk which was barricaded so as to compel a pedestrian to walk in the street was withdrawn from public use is a question for the jury where the evidence permits of different inferences. 316Mo 1067, 296 SW795.

1279–84 218Ala429, 118S640; 225Ky 41, 7SW(2d)514; 260Mass225, 157NE 347; 262Mass136, 159NE439; 239Mich 656, 215NW19; MoA 16SW(2d)607; 78 Mont180, 253P267; 50Nev392, 263P768; RI 136A885; 151Wash457, 276P904; 198Wis527, 224NW743.

1279–85 81Colo 134, 254P153; 244 IllA 505; 203 Iowa696, 213NW222; 267 Mass152, 166NE638; 173Minn458, 217 NW495; 180Minn496, 231NW210; Mo 287SW310; Mo 29SW(2d)710; 103NJL 604, 137A570; NM 290P793; 225AppDiv 321, 233NYS1; 228AppDiv313, 238NYS 662; 289Pa197, 137A185. [b] (1) 227 AppDiv140, 237NYS355. (2) 317Mo 1010, 297SW50. (6) 298Pa119, 148A44. (8) Drag line. 115Nebr690, 214NW647. (9) Snow and ice. MoA 9SW(2d)872. (10) Other instances. 265Mass423, 164 NE487; 157Miss111, 126S826; 226 AppDiv571, 235NYS263.

1281–86 MoA 290SW621; NJ 151A633; 151Va964, 145SE732.

1281–87 53SD600, 221NW700. [a] (6) MoA 5SW(2d)1106. (10) TexCivA 298 SW631. (11) Allowing ball games in park adjacent to public highway. 225 AppDiv599, 233NYS516.

1282–88 172Minn524, 215NW851; 296 Pa256, 145A837.

1282–89 TexCivA 298SW631.

1282–91 289Pa197, 137A185 (whether repair called for); 50RI 153, 146A618, 65ALR375.

1282–93 Mass 173NE417. [b] **Evidence held insufficient** for jury on question of city's adoption of drain tile, installed by another. 220Ky808, 295SW1064.

1282–95 206 Iowa309, 218NW340.

1283–97 203 Iowa696, 213NW222; 122 Kan728, 253P240; 261Mass142, 158NE 326; 172Minn76, 214NW774; Mo 12SW (2d)504; Mass 172NE916; 78Mont180, 253P267, 268 [citCyc]; 50RI 153, 146 A618, 65ALR375.

1283–98 18F(2d)806; 84CalA420, 258 P107; 108Conn63, 142A569; 109Conn 324, 146A735 (stone covering sewer catch basin); 45 Ida175, 260P1092; 203 Iowa696, 213NW222; 242Mich651, 219 NW632; 155Miss546, 124S656; MoA 16 SW(2d)659; 78Mont180, 253P267; 149 Va235, 141SE260; 155Wash167, 283P 1085. [f] 203 Iowa696, 213NW222; 239 Mich260, 214NW96; 175Minn366, 221 NW241; 222MoA749, 7SW(2d)707. [g] (2) 231Ky72, 21SW(2d)135. (8) Other instances. 231Ky72, 21SW(2d)135. [h] **Whether, in not opening all of space subject to its control for street,** city was negligent is for jury. TexCivA 20 SW(2d)409.

1285–1 225AppDiv202, 232NYS404.

1285–2 206 Iowa1109, 221NW812; 261 Mass64, 158NE259; 261Mass142, 158 NE326.

1285–3 10LaA24, 120S418(1stcase); Mo 19SW(2d)1040 (whether fence was blown down across sidewalk by unusually severe windstorm on evening of accident); MoA 18W(2d)227; 289Pa 197, 137A185.

1285–5 18F(2d)806; 203 Iowa41, 212 NW365; 106WVa613, 146SE614(1st case).

1286–6 18F(2d)806.

1287–8 133 Okl 260, 272P363. See also NJSup 137A835.

1287–9 86Mont240, 283P222.

1287–13 See also 120 Oh127, 165NE713. [g] **Gasoline on sidewalk in front of defendant abutting owner's premises.**–108 Conn197, 142A681.

1288–17 108Conn63, 142A569; 203 Iowa565, 213NW222; 265Mass94, 163 NE853; MoA 5SW(2d)1106; 220AppDiv 813, 222NYS695; 228AppDiv319, 238 NYS662; 33 OhA366, 169NE587; 289 Pa197, 137A185; 96PaSuper226; 96 PaSuper240.

1289–18 41GaA603, 154SE204(2dcase); 45 Ida175, 260P1092, 1094 [citCyc]; 205 Iowa823, 218NW301; MoA 19SW(2d) 522; 289Pa197, 137A185.

1289–19 41GaA603, 154SE204(2dcase); Mass 168NE93; Mo 23SW(2d)1045.

1290–23 204Cal 509, 269P437, 59ALR 435; 94CalA765, 271P918; 239Mich260, 214NW96; 172Minn35, 214NW671; MoA 20SW(2d)537; 253NY423, 171NE 694. [b] (6) Failing to take precautions to make safe, walk on which gasoline had been spilled. 108Conn197, 142 A681. (7) In action for injuries to pedestrian by falling over merchandise left on sidewalk in front of defendant's

place of business on direction of defendant's receiving clerk, evidence has been held sufficient to take case to jury on question of defendant's reasonable and safe use of sidewalk. 94CalA765, 271P918.

1290–24 239Mich260, 214NW96; Mont 290P261. [b] **Evidence held sufficient** to go to jury. 28 Oh208, 162NE610. [c] **Whether owner and tenant had notice** that water was leaking from pipe and freezing on sidewalk held question for jury. Mont 290P261.

1290–25 156Miss758, 126S836; 298Pa 130, 148A58.

1290–27 172Minn35, 214NW671. See also 86PaSuper256.

1290–29 136Misc912, 241NYS231.

1291–34 Mass 169NE493; Mass 169NE 495; Mich 233NW400; 253NY423, 171 NE694; RI 136A885; **TexCivA** 8SW (2d)271; 198Wis527, 224NW743. [d] (7) 88 IndA253, 157NE55. (24) Whether subcontractor was negligent in reference to ladder which fell. 132 Or46, 284P567.

1292–39 81Colo 134, 254P153; 81Colo 246, 254P1000; 288Pa203, 135A612; **TexCivA** 8SW(2d)271. [b] **Whether intervening cause** was sole proximate cause has been held for jury. **TexCivA** 8SW(2d)271.

1292–40 84CalA420, 258P107; 203 Iowa696, 213NW222; 265Mass94, 163 NE853; Mo 287SW310; 78Mont180, 253 P267; 96PaSuper226. See also 150 Wash157, 272P723, 63ALR200. [c] 45 Ida175, 260P1092; 259Mass229, 156NE 22. [g] 81Colo 134, 254P153 (whether weakened arches of feet caused pedestrian's fall on icy sidewalk); 203 Iowa 565, 213NW212. [h] **Building material in street.**–241 IllA58.

1293–41 220Ala678, 126S859.

1293–43 SD 223NW721(3dcase).

1293–47½–New. To justify peremptory charge for defendant, the evidence must show that the intervening cause was the sole proximate cause of the accident. **TexCivA** 8SW(2d)271.

1293–48 81Colo 134, 254P153; 82Colo 189, 257P1094; 108Conn697, 145A158; 39GaA739, 148SE421; 88 IndA253, 157 NE55; 203 Iowa696, 213NW222; 204 Iowa1055, 216NW774; 205 Iowa823, 218 NW301; 207 Iowa585, 223NW397; 231 Ky72, 21SW(2d)135; 255Mass539, 152 NE346; 262Mass136, 159NE439; 262 Mass338, 159NE916; Mass 169NE493; 239Mich260, 214NW96; 242Mich651, 219NW632; 172Minn35, 214NW671; 172Minn76, 214NW774; 173Minn458, 217NW495; 178Minn326, 227NW177; Mo 29SW(2d)710; MoA 9SW(2d)872; MoA 16SW(2d)659; MoA 19SW(2d) 522; MoA 20SW(2d)537; 86Mont240, 283P222; 103NJL604, 137A570; NM 290P793; 26 OhA408, 159NE578; 126 Or56, 268P760, 59ALR381; 127 Or76, 271P41, 61ALR256; 289Pa197, 137A 185; 298Pa119, 148A44; 91PaSuper 247; 95PaSuper196; 96PaSuper226; 97 PaSuper413; 97PaSuper578; RI 148 A901; 53SD600, 221NW700; **TexCivA** 12SW(2d)604; 149Va235, 141SE260; 104WVa378, 140SE333; 36Wyo 66, 252 P1021. See also Mo 12SW(2d)504. [d] 297Pa344, 147A68. [e] 251 IllA542; **TexCivA** 292SW583. [g] (10) Whether plaintiff was negligent in falling to see drag line. 115Nebr690, 214NW647. (11) Whether automobilist colliding with telephone pole was guilty of contributory negligence. 104WVa378, 140 SE333. (12) Plaintiff's freedom from contributory negligence. 28 Oh208, 162 NE610.

1296–55½–New. in assuming a grass plot to be free from obstructions; 108 Conn63, 142A569.

1296–56½–New. in standing on building material in street; 241 IllA58.

1296–58 MoA 17SW(2d)608(3dcase).

1296–61 172Minn76, 214NW774.

1296–61½–New. whether pedestrian was negligent in using icy snow-covered sidewalk where ice was covered with freshly fallen snow; 81Colo 134, 254P 153.

1297–64 22F(2d)718; Mich 233NW400; MoA 26SW(2d)997.

1297–65 Iowa 230NW421; 103NJL604, 137A570.

1297–66 217Ala92, 114S903; 261Mass 188, 158NE658; MoA 16SW(2d)607; 34 OhA321, 171NE340.

1298–67 172Minn76, 214NW774.

1299–73 MoA 16SW(2d)607.

1300–83 94CalA765, 271P918; 206 Iowa 1109, 221NW812; 2LaA442, 443 [cit Cyc]; MoA 27SW(2d)718; 289Pa197, 137A185; 139SC295, 137SE743; 194Wis 172, 215NW819. [c] (1) 317Mo 1010, 297SW50. (6) 244 IllA414; Mass 167 NE651.

1301–85 38GaA529, 144SE347; 13Pa Dist&Co53; Sask [1927] 3DomLR514.

1301–93 170Minn211, 212NW186; MoA 18SW(2d)545.

1301–97 MoA 16SW(2d)659.

1301–98 MoA 16SW(2d)659.

1302–14 **TexCivA** 3SW(2d)857.

1302–15 [f] (1) Ala 130S896; 36GaA 552, 137SE414; 244 IllA505; 155Miss 588, 124S795; MoA 18SW(2d)227; 222 MoA749, 7SW(2d)707; NJ 151A593; 49RI 209, 141A609, 59ALR1241; RI 147 A664; **TexCivA** 26SW(2d)327 (defining nuisance). (2) 109Conn324, 146A735. (6) MoA 14SW(2d)694. [g] (1) Mo 29 SW(2d)710; Oh 171NE402; 35 OhA390, 172NE400; 150Wash157, 272P723, 63 ALR200. (2) 227AppDiv594, 238NYS340. [h] **"Structural defect;" definition.**–Instruction denying recovery for pedestrian's injury on icy sidewalk unless there was "structural defect" is defective in not defining term. 105Conn476, 136A93.

1303–16 [d] 170Minn211, 212NW186.

1304–17 109Conn100, 145A644(2dcase) (instruction properly refused). [a] (1) MoA 19SW(2d)522. (3) Duty to exercise ordinary care to place safeguards about hole. 40GaA633, 151SE42. [b] 108Conn553, 143A850. (2) Other instances. Ala 130S896. [d] **Instruction held proper.**–132 Or46, 284P567.

1304–25 [b] **TexCivA** 26SW(2d)327 (disposal of sewerage so as not to pollute river).

1305–27 220MoA1027, 282SW502.

1305–31½–New. Instruction on duty of city in supplying guard at swimming pool has been held not to make city insurer. 81Colo 246, 254P1000.

1305–33 [b] **Instructions held proper.**–Instruction, in action against city for damages based on alleged destruction of natural drain and negligent and wrongful construction of sewer, held not erroneous because authorizing jury to find for plaintiffs generally amount of damages to their premises. MoA 14SW (2d)694.

1305–34 218Ala429, 118S640 (instruction properly refused). [a] (1) 218Ala 429, 118S640 (properly refused). [b] (1) 150Wash157, 272P723, 63ALR200.

1306–35 [a] (1) MoA 19SW(2d)522.

1306–38 [b] (1) 36GaA552, 137SE414.

1306–39 [b] 319Mo1028, 5SW(2d)6.

1307–40 149Va235, 141SE260.

1307–51 37GaA299, 139SE828; 227Ky 599, 13SW(2d)755. [a] (9) As to comparative negligence not pleaded. 37GaA 299, 139SE828. (10) As not justified by evidence. 150Wash157, 272P723, 63 ALR200. (11) Other instances. 109 Conn100, 145A644(2dcase). [b] (1) 40 GaA633, 151SE42; 155Miss588, 124S795; MoA 14SW(2d)694; MoA 28SW(2d) 1044; Utah 267P1011; 144Wash399, 258P317; 150Wash157, 272P723, 63ALR 200.

1308–54 [c] (1) MoA 14SW(2d)694. (9) Other instances. Iowa 230NW421.

1309–55 36GaA527, 137SE127.

1309–60 MoA 18SW(2d)545. [a] (6) Other instances. 222MoA749, 7SW(2d) 707. [b] (1) 319Mo1028, 5SW(2d)6; MoA 14SW(2d)694; MoA 17SW(2d)608 (3dcase). [c] **Instructions held erroneously refused.**–Failure to charge as to abutting owner's right to cultivate grass plot in sidewalk is error. 108Conn63, 142A569.

1309–61 220MoA1027, 282SW502.

1309–68 132 Or46, 284P567.

1310–73 37GaA299, 139SE828. [d] (1) 81Colo 134, 254P153; 37GaA299, 139SE 828. [f] (1) 81Colo 134, 254P153.

1311–75 36GaA552, 137SE414.

1311–76 105Conn482, 136A95.

1313–84 [b] 239Mich260, 214NW96; Mo 19SW(2d)1040.

1314–93 23AlaA443, 126S616(2dcase); MoA 18SW(2d)545; 149Va235, 141SE 260.

1314–94 244 IllA414.

1314–95 218Ala429, 118S640.

1315–5 See **TexCivA** 8SW(2d)271. [d] (6) Finding pollution of river was caused by negligent acts of city and pollution was proximate cause of damage suffered implies negligent acts were sole proximate cause of damage. **Tex CivA** 26SW(2d)327.

1316–8 [b] (4) **TexCivA** 27SW(2d)551.

1316–20 See also **IndA** 166NE18.

1317–26 [b] **Verdict against one joint defendant** held not ground for reversal where averments of negligence of other defendant might be regarded as surplusage. 241 IllA58.

1317–29 224AppDiv688, 229NYS844.

1318–42 [b] **Evidence held sufficient** to entitle plaintiff to more than nominal damages. 216Ala26, 112S307.

1318–49 265Mass559, 164NE470, 62 ALR780 (damages for past injuries cannot be given).

1319–54 See also **TexCivA** 26SW(2d) 327.

1319–63 OhA 170NE456; **TexCivA** 22 SW(2d)982. [a] 105WVa209, 141SE782.

1320–64 218Ky652, 291SW1030; **TexCivA** 22SW(2d)982.

1320–77 See also 151Va964, 145SE732 (complaint, which alleged merely that plaintiff suffered great inconvenience and loss, did not cover elements of damage caused by annoyance and discomfort).

1321–80 **TexCivA** 22SW(2d)982.

1321–80½–New. Testimony as to typhoid fever is inadmissible against city, in absence of evidence that disease was caused by overflows from insufficient culvert. 218Ky652, 291SW1030.

1323–27 But see 230AppDiv612, 245 NYS680.

1323–33 [a] (2) 130 Okl 162, 265P1057.

1324–41 246 IllA172.

1324–51 124 Or691, 265P433; 126 Or 56, 268P760, 59ALR381.

1325–55 [i] **Condition of pavement.**–Evidence of water running on sidewalk is not prejudicial where it does not relate directly to alleged defect in pavement, but only to matters contributing thereto. 287Pa588, 136A294.

1325–56 204 Iowa1055, 216NW774.

1326–59 252NY437, 169NE637; 227App Div219, 237NYS539. See also 227Ky376, 13SW(2d)283 (municipal corporation may own land).

1326–61 226AppDiv383, 236NYS104 (statute held limitation on power of city to purchase).

1327–76 125Kan100, 263P12, 16 [cit CJ].

1327–78 125Kan100, 263P12, 16 [cit CJ]; 155Tenn222, 291SW1067.

1328–80 125Kan100, 263P12 (dictum).

1328–87 [c] **San Antonio** held to own all land within its limits when channel of San Antonio River was changed. **Tex CivA** 291SW1112.

1329–5½–New. Holding possession free of rent under agreement held not technical possession entitling city to dispute owner's right. 163La374, 111S 791.

1329–6 105NJL317, 144A720, 64ALR 304.

1330–10½–New. An informal lease of a private library and building for a year is valid as completed transaction where rent has been paid and possession taken. 199Wis54, 225NW204.

1330–12 254 IllA74.

1330–13 Pa 151A883 (equitable relief may be had for exercise of more extensive rights than those authorized).

1331–23 Pa 151A883 (airport, railroad and marine terminal).

1332–54 [b] **Discretion** as to apparatus it will purchase may be exercised by municipality within proper limits. NJSup 143A73.

1332–56 229Ky375, 17SW(2d)215(2d case) (building for courtroom purposes containing additional rooms rented for store and lodge rooms).

1333–62 95Fla982, 117S387; 158Tenn 498, 14SW(2d)716 (statute authorizing city park commission). [j] **Within or "near" city.**–158Tenn498, 14SW(2d)716 (land which may be acquired under statute).

1333-64 95Fla982, 117S387.
1333-67 See also Mass 172NE593.
1334-80 31 OhA452, 167NE474.
1335-83 155Tenn222, 291SW1067 (land outside city limits).
1335-85 165Ga509, 141SE304.
1335-88 166La512, 117S573 (charter, providing that all estates, incomes, funds or property now held in trust by city shall be held by city under this act upon and for same uses, trusts, limits, limitations, charities, and conditions as same are now held has been held not to perpetuate such trusts for all times); Pa 151A883; 47RI 444, 134A276; TexCivA 18SW(2d)813.
1337-12 125 Or553, 267P821, 823 [cit Cyc].
1339-37½-New. Where city abandoned use of land, possession of which had been obtained under agreement for use rent free, it was held it might not oppose repossession. 163La374, 111S791.
1339-37¾-New. Municipal electric plant can be constructed over railway right of way only on obtaining lease, license, or easement from railway by contract, donation, or exercise of the power of eminent domain. 193Wis579, 214NW451.
1340-40½-New. In a suit to compel the carrying out of a trust on which tidelands were granted to a city a judgment ordering the land company to deed to the city and ordering the city to accept certain groynes and land on which they were located has been held erroneous. 206Cal 635, 275P803.
1340-43 151Md670, 135A832; 149SC 234, 147SE346.
1340-44 But see 177Ark1097, 9SW(2d) 323; 227Ky343, 12SW(2d)1108; 227Ky 376, 13SW(2d)283.
1340-45 151Md670, 135A832.
1340-48 151Md670, 135A832; 242Mich 614, 219NW745; NJCh 148A630. See also 149SC234, 147SE346. [a] (3) Municipal light plant. 151Md670, 135A832. (4) Land owned and used for disposal of garbage and as dumping ground. 242Mich614, 219NW745. [d] **Approval of sale of light plant by public service commission** held not equivalent to legislative authority. 151Md670, 135A832. [e] **Electric light properties** cannot be sold without special legislative authority despite noncompletion of contract of purchase by city. 151Md670, 135A 832. [f] **Lease of aviation field.**–City, which has acquired municipal aviation field or airport, has no corporate power to sublet such airport to private individual. 127Kan663, 274P258, 63ALR 610.
1341-49 [e] **In Georgia** city of Vidalia has power, under its charter, to sell city hall. 165Ga509, 141SE304.
1341-51 137Misc618, 244NYS224; 131 Or157, 282P109; 146SC372, 144SE78; TexCommnA 29SW(2d)1041 (mining lease). [l] **Lease of municipally owned railroad.**–Modified and extended lease of Cincinnati Southern Railway is held approved. 26 OhNPNS584. [m] **Dock property of port organized as municipal corporation,** purchased with proceeds of bond issue authorized by popular vote, is not dedicated to public use. 131 Or 157, 282P109.
1341-52 242Mich614, 219NW745; NJCh 148A630 (may exercise power by ordinance or resolution). 131 Or157, 282 P109 (wharf property purchased from proceeds of bonds authorized by popular vote).
1341-54 165Ga509, 141SE304. [d] **That property sold was acquired with proceeds of bonds** does not require that proceeds of sale be applied to redemption of bonds. 165Ga509, 141SE304.
1342-56 193Wis232, 213NW873, 52 ALR1033.
1342-60 [a] **Power to lease waterworks plant** is conferred by grant of power to sell. 149SC234, 147SE346 (in absence of statutory inhibition lease may be for any term).
1342-65 142 Okl 38, 285P92 (sale is administrative act). Contra 151Md670, 135 A832. [a] **Oklahoma statute.**–142 Okl 38, 285P92.
1343-73 149SC234, 147SE346 (city of Rock Hill has plenary discretionary power to make such disposal of waterworks plant as it may see fit, subject to control of courts, under well-settled legal principles).
1343-77½-New. A city may lease property temporarily until such time as it may be devoted to the use for which it was acquired. 227Ky376, 13SW(2d) 283.
1343-77¾-New. In the discharge of an obligation to manage and dispose of property acquired for a special public use, a municipal corporation has discretion in the choice of means and methods, and the usual limitations are good faith and reasonableness. 149SC 234, 147SE346.
1343-78 Mo 221SW17; TexCivA 20SW (2d)326 (town held without power to burden street with oil and gas lease).
1344-79 96CalA488, 274P438 (where public convenience was promoted and city received consideration).
1344-84 196NC622, 146SE583.
1344-91 200Wis43, 227NW298 (deed to railroad of land held for monumental purposes set aside).
1345-96 34NM326, 281P28; 149SC234, 147SE346.
1347-26 [b] **City has no power to pledge income** from its property for definite period. Iowa 231NW475.
1347-28 [a] **In Texas.**–TexCivA 7SW (2d)942.
1347-31 166Ga510, 143SE767 (act, authorizing city to sell any real or personal estate of any kind for corporate purposes, authorized municipality to sell its electric light plant, without requirement of submitting question to voters); 224AppDiv558, 231NYS472 (deputy comptroller had no authority to agree for city to resell property purchased from city at public auction for any purchasers desiring to resell it and to return purchasers' deposit, and action could therefore not be brought against city for breach of such agreement).
1348-43 224Ky298, 6SW(2d)236. [a] (2) Proceedings to sell utilities held properly initiated by resolution. 193 Wis232, 213NW873, 52ALR1033. [b] **Title of ordinance.**–24 OhA251, 157NE 410. [c] **Failure to require security; cure by contract.**–24 OhA251, 157NE410.
1349-44 [a] (4) Commission's finding of benefit by sale of public utilities held not void because commission reserved decision on merits of public ownership. 193Wis232, 213NW873, 52ALR1033.
1349-45 166Ga510, 143SE767 (whether election to affirm sale was void has been held immaterial in determining validity of sale, where city had power to sell plant); Mass 172NE593; 193Wis232, 213NW873, 52ALR1033. [f] **Notice of election on sale of public utilities.**–193 Wis232, 213NW873, 52ALR1033. [g] **Combining sale of gas and electric utilities** held not to invalidate proceedings. 193Wis232, 213NW873, 52ALR681. [h] **Inclusion of additional property in preliminary agreement** held not prejudicial to sale where purchaser disclaimed interest. 193Wis232, 213NW873, 52ALR 1033. [i] **In Texas.**–TexCivA 7SW(2d) 942. [j] **Provisions held mandatory.**–Ariz 291P1000.
1350-54½-New. Sale of municipal light plant at same time as lease of realty and grant of franchise is proper. 24 OhA251, 157NE410.
1350-54⅓-New. In some jurisdictions the right of occupancy of one in possession of space in a market house owned by a municipality is that of a mere licensee, and not a tenant. 8PaDist&Co 314.
1350-54¼-New. And such occupancy is terminable upon reasonable notice, 8Pa Dist&Co 314.
1350-54⅕-New. although the occupant had originally taken possession under a three-year lease. 8PaDist&Co 314.
1350-54⅙-New. And where such lease had expired and his right of occupancy had terminated, after notice he became a mere trespasser, 8PaDist&Co 314.
1350-54⅐-New. and the laws applicable to ejectment, landlord and tenant, and trespass being inadequate, equity had jurisdiction. 8PaDist&Co 314.
1350-54⅛-New. Act providing for the sale or lease of a municipally owned public utility plant, unless protested by a certain per cent of qualified voters, in which case, a special election must be held, does not expressly or impliedly provide for a contest of an election held under the act before an ordinary of the county. 166Ga510, 143SE767.
1350-54⅑-New. The code, relating to contests of elections for public officers enumerated, does not purport to authorize a contest before an ordinary of election to authorize the sale or lease of a municipally owned public utility plant. 166Ga510, 143SE767.
1350-54⅒-New. Where a municipality owning an electric plant holds an election for the sale of the plant, as authorized, and the sale is authorized by sufficient vote, equity will entertain a petition by the city to enjoin a prosecution of the election contest before an ordinary. 166Ga510, 143SE767.
1350-54 1/11-New. Where property is no longer needed for governmental purposes and is held in a proprietary capacity, principles applying to leases between private parties apply to a lease thereof. Ariz 284P350.
1352-7½-New. Only municipality or taxpayer may object to invalidity of transfer. 195Wis19, 216NW522.
44 C. J.—65-8 34 OhA97, 170NE586.
66-14 32F(2d)795.
66-21½-New. Municipal corporations have only such powers to contract as legislature grants. Iowa 231NW705.
67-37 [a] **No inherent power exists** to make contract for machinery for power plant. Iowa 231NW475.
67-39 319Mo 386, 4SW(2d)427.
68-49½-New. Contracts beyond the power of a municipality are such as it cannot enter into for any purpose. Nebr 228NW114.
68-51 [a] (4) Contract whereby city should build additional water supply system, which should be managed, operated, and maintained by private company. 149SC234, 147SE346.
68-52 Cal 291P839.
69-60 Iowa 231NW705; 127Kan663, 274P258, 63ALR610; 165La1070, 116 S561, 562 [quotCyc]; Utah 269P129; 153Va71, 149SE632.
70-65 226AppDiv383, 236NYS104 (statute held to limit city's power to contract).
71-73 131Misc796, 228NYS631.
71-74½-New. Charter limitation of power to contract is not designed to relieve city from liability on its own contracts. 131Misc796, 228NYS631.
72-89½-New. five, 37F(2d)545 (contract for purchase of natural gas for operation of municipal plants).
72-3½-New. A contract financially advantageous to a city, operating to secure such advantage permanently or for a long period of time is not open to criticism, since the presumption must be indulged that the city contracted for its own benefit as a municipality. 149SC 234, 147SE346.
73-8 149SC234, 147SE346.
73-14 Cal 287P962; TexCommnA 16 SW(2d)520; TexCivA 26SW(2d)417.
74-15 Cal 287P962; 230AppDiv601, 245 NYS510; TexCommnA 16SW(2d)520; TexCivA 26SW(2d)417.
74-23 99Fla819, 128S14; IndA 169NE 77; 253 IllA218; IndA 169NE77; Iowa 231NW705; 127Kan663, 274P258, 63 ALR610; 177Minn44, 224NW261; Mo 25SW(2d)466; 140 Okl 247, 282P1090; TexCivA 27SW(2d)343.
75-43 199Wis523, 227NW35.
76-49 58ND33, 224NW871, 63ALR1337.
76-50 See also 197NC740, 150SE624.
76-53 [b] **Municipality has no power** for purchase of machinery for power plant, payment to be from pledge orders, out of net revenue. Iowa 231NW 475.
76-61½-New. In some jurisdictions city is not required to consult with public service commission in contracting for repairs or improvements to service plant. Mo 28SW(2d)356.
76-61⅓-New. Where such contract does

not interfere with rates, public service commission act has no application. Mo 288W(2d)356.

79-16 235Ky595, 31SW(2d)924.

80-23½-New. Governing body has right to declare unauthorized contract void and refuse compliance therewith. Tex CivA 268W(2d)417.

80-25 MoA 288W(2d)119.

80-26 MoA 178W(2d)376; 198NC564, 152SE636.

80-31½-New. Statute vesting in board actual purchase of supplies for city does not revoke power of common council to provide suitable apparatus for fire de- [illegible] 117Conn147, 149A410.

80-33 177Minn44, 224NW261.

83-64 NH 147A412; 137Misc310, 243NYS362.

83-68½-New. In exercise of business powers officers are governed as to mode by same rules as private individual or [illegible] 37F(2d)[illegible].

83-68½-New. Town acting specifically on subject matter divests officers of power to contract other than in conformity with vote of town. 111Conn510, [illegible].

83-72½-New. Under the Code providing that the director of public service of a city or the board of trustees in case of a village may make contracts pertaining to waterworks, the word "may" is construed as shall or must, so as to require the making of contracts. 20 OhA419, 165NE350.

86-13 RI 147A757 (authorization to obtain options for purchase of land does not authorize contract for expenditures).

87-35½-New. In some jurisdictions public service commission can neither make nor interfere with city's contracts with others. Mo 288W(2d)356.

87-37 140Okl 247, 282P1090; 136Okl 14, 275P1042. [a] **Persons must at their peril take cognizance of limits of powers of public officials to contract,** and failure to do so places contracting parties in pari delicto where contract is void. 153Va71, 149SE632.

88-52 [illegible] 37F(2d)[illegible].

88-61 [illegible] 198W(2d)254.

88-69 [illegible] 153Va71, 149SE632.

90-77½-New. [illegible], and a city engineer. 118Oh462, 164NE512.

90-79 231Ky650, 21SW(2d)1022.

90-89 [illegible] 153Va71, 149SE632.

91-1½-New. Payment of a city councilman for services as an inspector of improvement work is a violation of a charter provision that no member of council shall be interested in any contract wherein the city is interested. 130Or444, 280P657.

92-15 [illegible] Ala[illegible] 122S448, 253Ark907, 22SW(2d)613; MoA 282SW147.

93-31 [illegible] Va[illegible] 148SE632 (pecuniary interest in corporation).

93-34 Ill 172NE757.

93-36½-New. Personal or private interest must be financial interest coming directly to officer or company of which he is an officer. Pa 152A102.

93-37 179Ark556, 16SW(2d)4; CalA 293P145; MoA 282SW147; 12PaDist&Co709 (township commissioner as partner). But see CalA 293P148.

96-88 [b] **Provision for money penalty** for failure to comply with terms of contract is not necessary for its validity. 319Mo386, 4SW(2d)427.

97-92½-New. When a statute and city ordinances passed pursuant thereto provide when and the manner in which city contracts shall be made, such provisions must be strictly followed. 13PaDist&Co45.

97-96½-New. A municipality cannot be bound by a contract without showing of authorization. Mass 167NE311.

97-96½-New. Irregularities and informalities in the call of a special session of the city council will not nullify a contract, made by authorized officers when the city has profited by the completed work of an official. 9LaA554, 121S208 (2dcase).

98-14 319Mo386, 4SW(2d)427.

98-15 337Ill111, 168NE908.

98-26 244IllA239.

98-33 30Hawaii966; Oh 170NE438; 196Wis528, 220NW207.

99-40 36F(2d)417 (statute authorizing contract involving less than one thousand dollars without sealed bid).

100-50 Wash 290P856. [a] (12) Contract for purchase of land for city hall. 254IllA74.

100-58 Oh 171NE23; 153Va71, 149SE632.

101-59 Mo 258W(2d)466.

101-60 [a] **Contracts should conform to protective restrictions** provided for contracts expressly exempted. Cal 291P839.

101-62 See also Cal 291P839.

102-63 See also Mo 258W(2d)466. [a] **Declaration in council's resolution that facts constituted emergency** held prima facie evidence of emergency. Cal 291P839. [b] **Emergency contracts illustrated.**–Cal 291P839.

102-87½-New. Adoption of specifications complying with unpatented standard engines produced by one manufacturer to whom contract was awarded held not violative of statute requiring letting to lowest bidder. 135Misc750, 239NYS489.

103-93 111Conn147, 149A410.

106-66 339Ill491, 171NE426; 135Misc750, 239NYS489 (substantial compliance with statute sufficient).

106-69 247Mich343, 225NW506; 135Misc750, 239NYS489 (contract not rendered invalid by variation).

106-71 133Okl54, 270P851. See also 247Mich343, 225NW506.

107-94 169Ga124, 149SE914 (where bid withdrawn before formal acceptance).

109-25½-New. Failure in the notice to a bidder to state the hour for closing and opening bids as provided by statute does not invalidate the contract where information necessary for proper bidding was given and only one bid was submitted. Nebr 228NW174.

109-28 [a] Estoppel.–169Ga104, 149SE914.

110-43 [a] **Exercise of discretion of municipal authorities to accept or reject bids** will be controlled by courts only when necessary to prevent fraud, injustice or violation of trust. 247Mich447, 226NW214, 215 [cit CJ](2dcase).

110-55½-New. Charter provision prohibiting acceptance of bids from persons in arrears to city on debt or contract applies where previous contract was with board of education. 137Misc[illegible] 243NYS362.

111-66 25OhNPNS255.

111-68 12PaDist&Co490; 247Mich447, 226NW214(2dcase). [a] **Burden of proving lowest bidder is responsible** is on one assailing the contract. Pa 152A102.

112-78½-New. Lowest responsible bidder means one who is responsible and offers the lowest price on the advertised [illegible]. 247Mich343, 225NW506.

112-78⅛-New. An ordinance is not invalid because it provides that the responsibility of bidders shall be determined before the public receipt of bids. 13PaDist&Co45.

112-78¼-New. A provision of such ordinance for appeal to an impartial board sufficiently protects prospective bidders who are not allowed to file bids. 13PaDist&Co45.

112-78½-New. Where an ordinance provides that bidders must furnish information as to their private affairs it may provide that such information shall be confidential. 13PaDist&Co45.

112-78⅛-New. Ordinances regulating the manner in which the responsibility of bidders shall be determined have been held valid. 13PaDist&Co45.

112-78⅞-New. Such ordinance need not state what degree of fidelity, honesty of purpose, experience, or fixed and floating capital must constitute responsibility. 13PaDist&Co45.

112-78⅛-New. Such ordinance need not fix a standard for ascertaining responsibility, the making of standards being an executive function. 13PaDist&Co45.

112-79 Pa 152A102.

112-86½-New. Failure of lowest bidder for garbage removal contract to produce consents of boards of health of municipalities where he proposes to dump garbage justifies rejection of his bid. [illegible] NJ135, 142A337, 30ALR102.

112-91 196Wis528, 220NW207.

112-92 135Misc750, 239NYS489.

112-2 175Minn379, 221NW535.

113-14 247Mich447, 226NW214, 215 [cit CJ](2dcase).

114-28 254IllA74 (contract for purchase of land for city hall unenforceable); 255IllA67 (may be shown by record only); IndA 162NE61(1stcase); 118Nebr326, 224NW690.

115-44 40F(2d)579 (local assessments).

116-66 [b] **Ordinance.–Ariz** 291P1000.

117-70½-New. Mere irregularities in making contract are not fatal to recovery against city. Ariz 291P1000.

118-2½-New. Subway contract executed under statute by designated commission is not invalid because not signed by city clerk. 132Misc73, 228NYS116.

118-3½-New. The president of the board of commissioners of a park district, in signing a contract in the name of the district by himself as president, did so as principal and not as agent. 337Ill111, 168NE908.

120-30 Mo 258W(2d)466 (statutory requisites for valid contract applicable to St. Louis as well as other cities); 153Va71, 149SE632.

120-37½-New. **A contract for the repair and rebuilding of a city hall building** is void where the city council named a sum of money substantially in excess of the amount authorized by a vote of the people. 118Nebr326, 224NW690.

120-39 Iowa 231NW705.

122-69 TexCommnA 128SW(2d)200. But see Iowa 231NW705.

123-71 35F(2d)565; Cal 291P839 (contract let without advertising for bids); 165La1070, 116S661, 562 [quotCyc]; MoA 288W(2d)119 (contract for purchase of fire hose); 198NC564, 152SE686. Okl 291P981; TexCivA 278W(2d)343, 196Wis528, 220NW207.

123-74 109Conn700, 145A571; MoA 17SW(2d)376.

123-75 229Ky375, 178W(2d)215 (2dcase); MoA 288W(2d)119.

123-88 337Ill111, 168NE908.

124-89 Cal 291P839.

124-92 229Ky375, 178W(2d)215 (2dcase).

125-95 229Ky375, 178W(2d)215 (2dcase); 224AppDiv558, 231NYS472.

126-14 Cal 291P839.

127-33 33F(2d)41, Ariz 284P350; 319Mo386, 4SW(2d)427.

128-43 319Mo386, 4SW(2d)427; 250NY495, 166NE179.

131-64½-New. Conditional sales contract for sale of engines for city's electric plant held not to allow seller to control plant. Mo 288W(2d)356.

131-79 319Mo386, 4SW(2d)427; 250NY495, 166NE179.

132-83 320Mo682, 9SW(2d)598.

133-9½-New. Contractor cannot assign proceeds of what he has failed to do. 254IllA377.

133-5 Ont [1928] 1DomLR849.

133-9½-New. Right to modify contract to which city is party is solely with contracting parties. 132Misc73, 228NYS116.

133-9⅛-New. Change in economic conditions rendering city's contract unprofitable does not authorize its abrogation for impossibility of performance. 132Misc73, 228NYS116.

134-33 See also 35F(2d)365, NJCh148A630 (merely adopting resolution is ineffective).

134-35 229Ky375, 17SW(2d)215(2dcase).

135-49 Cal 291P839 (contractor held not responsible for emergency arising from city's fault).

135-59 319Mo386, 4SW(2d)427.

136-80 But see Mo 258W(2d)466.

137-86 But see 177Minn44, 224NW261.

[c] **Where there has been no material** use of property and no one having authority to bind city has taken any part in matter, rule does not apply. 177Minn44, 224NW261.

137-91 56ND371, 217NW525.

138-98 Iowa 231NW705.

139-12 128Kan253, 276P802(2dcase).

140-23 153Va71, 149SE632 (city is not liable to property owners on quantum meruit for cost of improvement under ultra vires contract). [a] **No recovery in quasi contract can be had for work performed.**–Cal 291P839.

140–29½–New. Action for conversion of supplies furnished under void contract cannot be maintained. **Oh** 171NE23.

140–29⅓–New. One furnishing labor or material in good faith to city under contract void for mistake in procedure may retain money received under quantum meruit. **Wash** 289P3.

140–31 33F(2d)541 (contractor not willing to accept concession as to any item must reject concession and prove that such item was for extra work and what it cost in order to recover therefor). [b] **Filing of claim under city charter for extra work** not contemplated by contract for repair and equipment of dredge held not waiver of, and admission that, contractor had no legal claim for extra compensation. 33F(2d) 541.

141–52½–New. Where contract for purchase of engines provides for payment out of engines' earnings, seller's only remedy is by mandamus or action for accounting. **Mo** 28SW(2d)356.

141–52⅓–New. In such case it is immaterial whether seller sues in federal or state court. **Mo** 28SW(2d)356.

144–10 255 **Ill**A67 (raises question of officer's authority to execute contract).

144–12½–New. Plaintiff must prove an ordinance authorizing a contract. **MoA** 17SW(2d)376.

144–16½–New. Where plaintiff makes out a prima facie cause of action when, by proof of the performance of his contract and that the debt is unpaid, the burden shifts to the municipality to show the illegality of the contract if it be unlawful. 134 **Okl** 101, 272P360.

145–48 But see **Or** 289P1044; **Wash** 289P3.

146–50. See also **Oh** 146NE512.

150–70½–New. In an unsuccessful attempt to show that a petition for recall election although sufficient in form was insufficient in fact, the expense incurred for witnesses and mileage fees did not constitute a proper municipal charge. 95**CalA**598, 273P125.

151–81 But see 332 **Ill** 393, 163NE786.

152–17 166**La**512, 117S573.

152–25 **TexCommnA** 188SW(2d)606.

155–75 128**Kan**100, 276P77.

155–77½–New. In Illinois the Local Improvement Act is a complete code governing the making of local improvements by special assessments on property benefited. 332 **Ill** 286, 163NE685.

155–77⅓–New. Act permitting extension of water mains into adjacent territory on petition of property owners resident therein to city governing body is not unconstitutional delegation of legislative power to petitioners. **Kan** 289P970.

155–79 See also **Cal** 293P53. [c] **Application to all improvements.–Ind** 173 NE287.

155–81 **Nebr** 229NW280.

156–84 118**Nebr**158, 223NW953. See also 95**Fla**984, 117S507(2dcase). But see **Ind** 173NE287.

156–86 [a] **Statute relating to referendum to voters** of ordinances authorizing improvement has been held repealed by Home Rule Act. **NJSup** 149A540.

156–93½–New. The provision in a charter that in the absence of a provision therein the law of the state shall be applicable makes the general law applicable to street improvement proceedings where not directly referred to in the charter. 86**CalA**167, 260P308.

156–93⅓–New. Statute granting power and specifying method of executing it may be followed in disregard of general inconsistent statute. **Ida** 292P1100.

156–97 154**Tenn**638, 290SW381.

157–10½–New. Some constitutions vest power to make improvements in corporate authorities of city. 338 **Ill** 488, 170 NE713.

157–10⅓–New. Board of local improvements is only clothed with such authority as is conferred on it by statute or by ordinance passed by authority of statute. 338 **Ill** 488, 170NE713.

158–19 137**Misc**341, 242NYS142 (county judge's power held not nonjudicial).

158–21 96**CalA**498, 274P371.

159–36 89 **IndA**349, 166NE437. [c] **Stadium** has been held to be "public building" which could be constructed and maintained by municipality. 35 **OhA**20, 171NE606.

159–37 89 **IndA**349, 166NE437.

160–51 **GaA** 155SE218.

160–56 83**Colo** 551, 267P405.

161–76 12**PaDist&Co** 652; 48**Philippine** 572. [b] **Viaducts.–Mo** 30SW(2d)112.

162–3 **TexCivA** 26SW(2d)382.

162–5 [b] See also 158**Tenn**423, 14SW (2d)728.

163–11 117**Nebr**465, 220NW827.

163–17 177**Minn**122, 224NW845.

163–21 But see 244**Mich**38, 221NW292. But see 248**Mich**590, 227NW714. [a] Contra **CalA** 285P414 (under statute).

164–24½–New. City's right to improve street at any time for use as public street is not impaired by non-user. **Tex CommnA** 24SW(2d)816.

164–29 151**Miss**840, 119S324. [b] **Statute held to authorize county and city to jointly improve** street forming part of state highway. **Ga** 147SE801.

164–35 168**Gal**, 147SE80. [a] **Grading of street by fourth-class city** without vote of council or petition by abutting property owners is unauthorized. 200 **Wis**230, 228NW117.

165–41½–New. A statute granting power to improve part of a street authorizes pavement of one side of a street. 195 **NC**550, 142SE161.

165–47 136**Misc**358, 239NYS659.

166–54 **TexCivA** 26SW(2d)382.

166–59½–New. In absence of contract between city and railroad necessity of repairing and paving and kind of material to be used may be determined by city. 135**Misc**497, 239NYS113.

167–79 [c] 99NY682, 114**AppDiv**519, 100NYS140; 138**AppDiv**35, 122NYS769; 63**Hun**271, 17NYS903; 65**Hun**14, 19NYS 723. [d] **Widening street is repavement**, though old pavement remains undisturbed. 99NY424, 2NE52 [aff 67 **HowPr**501].

167–82 83**Colo** 551, 267P405; 128**Kan** 100, 276P77; 165**La**412, 115S638; 9**Pa Dist&Co** 577.

167–93 128**Kan**100, 276P77.

169–28½–New. A city can change the grade of a street only by a proper order entered on its minutes, and no person can acquire contract rights with a city affecting the grade of a street except by having an order entered upon the minutes. **Miss** 121S295.

170–40 **NJCh** 150A202 (board walks); **NJSup** 150A777 (boardwalk along ocean front street); **TexCivA** 26SW(2d)382.

171–62 339 **Ill** 360, 171NE535. [c] **Culverts.–157Miss**498, 128S73.

171–64 [b] **Construction of sewers by city** is exercise of governmental function. 121 **Oh**412, 169NE457.

171–65 **TexCivA** 26SW(2d)382.

171–66 298**Pa**203, 148A112.

171–67 [a] (3) To provide for necessary drainage. 298**Pa**203, 148A112.

171–67½–New. Some statutes confer on cities authority to construct storm sewers but do not require them to construct storm sewers. **Nebr** 230NW680.

171–73 197**NC**85, 147SE736.

171–74 134**Misc**810, 236NYS455; 118 **Tex**154, 12SW(2d)546.

172–80½–New. It is not beyond the power of the city to assume the liability for the disposal of sewage and to save a private corporation, operating water supply system, harmless with respect to injury and damage resulting from such disposal. 149**SC**234, 147SE346.

173–85½–New. The city council is not limited by statute to the construction of sewers in streets forming or extending across exterior boundary lines of city. 91**CalA**168, 266P845.

173–88 118**Tex**154, 12SW(2d)546.

173–89 [a] **Contract for construction of ditch for drainage of city's outfall sewer over ninety-nine-year period** is subject to general police power and city's right of eminent domain, in case prescribed means of disposal should become nuisance or changing conditions should require different methods. 118**Tex**154, 12 SW(2d)546.

173–5 **Cal** 293P67. See also **TexCivA** 7SW(2d)942. But see 31 **OhA**452, 167 NE474.

174–11 30 **OhA**419, 165NE380.

174–14 197**NC**740, 150SE624.

174–20 93**CalA**753, 270P224. [b] **Operative agreement.**–Where contract to permit company to manage water supply system is essentially "operative" agreement, there is no necessity for express legislative sanction. 149**SC**234, 147SE 346.

175–21 149**SC**234, 147SE346.

175–35½–New. The power to acquire waterworks is not limited to present needs. 151**Va**396, 145SE355.

175–42 **Iowa** 226NW164.

175–47 See also **TexCivA** 7SW(2d)942.

176–54 151**Va**396, 145SE355.

176–57 197**NC**740, 150SE624; 151**Va** 396, 145SE355.

176–64 245**JlA**454.

176–65 See also **TexCivA** 7SW(2d)942.

177–69 **Iowa** 226NW164; 30 **OhA**419, 165NE380.

177–72½–New. Statutes authorizing incorporated cities to own and operate electric light plants for profit, and to supply electricity within and without their boundaries, are constitutional. 130 **Or**309, 274P118.

177–75 133 **Okl** 224, 271P1006(2dcase).

177–81½–New. Under some statutes authorizing payment for a municipal lighting utility by tax levy or bond issue, statutory methods are not exclusive. **Nebr** 228NW114 (word "may" in statute held not to mean "shall").

177–81⅓–New. Such statute implies power to make cash payment out of funds on hand and to pay the remainder out of net earnings of the plant. **Nebr** 228NW114.

177–83 **Iowa** 226NW164 (may contract for oil engines with equipment for cooling running water).

178–86 38F(2d)466. But see **Mass** 172 NE338.

178–89 93**CalA**615, 270P255.

178–90 **Wash** 289P3.

178–95½–New. The state can delegate to municipal corporations the power to maintain an electric lighting system for profit. 130 **Or**309, 274P118 (held public purpose under statute).

178–95⅓–New. Some statutes authorize municipalities to operate and maintain electric light plants without restriction. **Iowa** 226NW164.

178–95¼–New. A statute authorizing the maintenance of plants impliedly authorizes reasonably needed repairs and equipment and pledge of income from the plants to pay therefor. **Iowa** 226 NW164.

178–98 [a] **City owning plant may enlarge system.–NC** 154SE76 (use of funds derived from operation).

179–6 But see 32F(2d)693; 32F(2d) 696.

179–12 See also **TexCivA** 7SW(2d)942.

180–20 130 **Or**309, 274P118. [a] **Power expressly granted by statute.**–197**NC**740, 150SE624. [b] **Statute permitting city to serve consumers outside city limits** held not unconstitutional. 197**NC**740, 150SE624.

180–22 [c] **Greater New York Charter** and General City Law authorize city of New York to build tunnels. 136**Misc** 358, 239NYS659.

180–26 238**Mich**146, 213NW79.

180–36 238**Mich**146, 213NW79.

181–47½–New. A statutory provision that the construction of transit facilities under municipal agreement shall begin within eighteen months from the date of such agreement does not apply where the city undertakes the construction. 92**PaSuper**219.

182–58 [a] **That boardwalk would be limited to use of pedestrians** does not invalidate ordinance providing for its construction. **NJSup** 150A777.

182–61½–New. Acquisition and maintenance of an airport is a "municipal or city purpose" within the scope of powers which may be constitutionally delegated to a city. 321**Mo** 514, 11SW(2d)1045, 62**ALR**762.

182–61⅓–New. City's contract to fill in landowner's property on bay in order to improve city water front way be proper exercise of power. 254NY41, 171 NE899.

184–23 **Pa** 151A883.

184–24 **Wash** 289P61 (airport).

184–25 335 **Ill** 299, 167NE106; **Ill** 173 NE165.

185-35½-New. A port commission cannot act in conjunction with another district commission to improve a waterway controlled by the latter commission. 150**Wash**402, 273**P**521.
185-41 167**Ga**865, 147**SE**663.
186-66 But see 197**NC**740, 150**SE**624.
187-76 [a] (2) In Kansas. 289**P**970.
187-82 But see 151**Va**396, 145**SE**355.
188-98 **TexCommnA** 23**SW(2d)**300.
188-99 28 **OhA**480, 162**NE**819.
189-4 **CalA** 291**P**227; 166**La**512, 1178 573. [c] **Grading and paving of streets.** –298**Pa**203, 148**A**112.
189-8½-New. The grading of a street is not required before a district is formed. 180**Ark**510, 22**SW(2d)**405.
189-19 194**Cal** 305, 228**P**461; 51**CalA** 82, 196**P**118; 71**CalA**649, 236**P**180; 29 **Ida**609, 160**P**1112; 92**Kan**953, 142**P** 934.
190-20 194**Cal** 305, 228**P**461.
190-24 182**Cal** 151, 187**P**19; 27**NM** 312, 201**P**487.
190-25 29 **Ida**609, 160**P**1112; 27**NM** 312, 201**P**487. But see 171**Cal** 138, 152 **P**296.
190-26 182**Cal** 151, 187**P**19; 27**NM**312, 201**P**487. [a] **Where municipality adopts charter which is silent on subject of paving streets,** state law on municipalities governs. 27**NM**312, 201**P** 487.
190-28 93**CalA**615, 270**P**255; 334 **Ill** 231, 165**NE**615; 255 **IllA**67. See also **Cal** 293**P**67.
191-30 334 **Ill** 231, 165**NE**615; 330 **Ill** 264, 161**NE**486.
192-31 [d] **Private rights must yield** where improvement is necessary and means reasonable, public interest being paramount thereto. 264**Mass**460, 163 **NE**82.
193-44 **Cal** 288**P**673.
193-52½-New. In Ontario a municipality may pass a by-law for the opening of a street and improvement thereof before the land has been expropriated. 62 **OntL**140, [1928] 2**DomLR**950.
193-52½-New. but it cannot pass a by-law for laying a sidewalk along a street which has not been opened. 62 **OntL** 140, [1928] 2**DomLR**950.
193-52¼-New. Effect of failure to acquire right of way or street before work is done. **Cal** 293**P**57.
193-54 **Nebr** 231**NW**751, 752 [citCJ].
194-55 230**Ky**529, 20**SW(2d)**470 (prior action of council in approving grade is to be read in connection with ordinance).
195-59 See also 177**Minn**122, 224**NW** 845.
195-68 150**Wash**402, 273**P**521. [h] **Notice of election** to authorize city commissioners to acquire and construct power plant, consisting of single publication in official daily newspaper, has been held not substantial compliance with statute. 153**Wash**495, 280**P**26.
195-69 See also 147**SC**498, 145**SE**412.
196-71 118**Nebr**158, 223**NW**953.
196-73 [h] **Enlargement of electric light plant.–NC** 154**SE**76.
197-74 261**F(2d)**753.
197-81½-New. Bayou with channel and well defined banks is water course within statute requiring ratification of voters of alteration of channel. 157**Miss**498, 128**S**73 (construction of culvert to drain bayou held within statute).
198-89½-New. It is unnecessary that voters at municipal election on the question of establishing waterworks and sewerage systems show tax receipts at time of voting, where no tax period intervened after registration. 147**SC**498, 145**SE**412.
198-89¼-New. Where voter's name is on registration books, it is not necessary for him to produce municipal registration certificate. 147**SC**498, 145**SE** 412.
198-90 [b] **Ballot held to submit single issue.**–248**Mich**34, 226**NW**680.
198-93 [a] (4) Other instances. 59**ND** 75, 228**NW**819.
199-3½-New. Invalidity of local public act because of defective title cannot be cured by municipal election at which majority of voters approved it. 154**Md** 620, 141**A**410.
199-7 107**Mich**643, 65**NW**601; 96**Mo** 497, 9**SW**910; 317**Mo** 1, 293**SW**780, 52 **ALR**879; 134**Misc**810, 236**NYS**455.
199-12 **SD** 231**NW**524.
201-27 107**Mich**643, 65**NW**601; 96**Mo** 497, 9**SW**910. [a] (3) City under five thousand, entering into contract for paving under the statute permitting paving by incorporated cities, was not required to follow requirements requiring submission to vote of resident property taxpayers of questions of street improvement. **TexCivA** 8**SW(2d)**258.
201-28 177**Minn**28, 224**NW**254.
203-64 [i] **Boards of local improvements.**–337 **Ill** 547, 169**NE**731 (jurisdiction under statute); 338 **Ill** 228, 170**NE** 308.
203-65 183**AppDiv**417, 170**NYS**784.
207-16 140**Wis**211, 121**NW**132.
207-33 But see 226**Ky**518, 11**SW(2d)** 127.
208-44 60**NY**16; 131**AppDiv**465, 115 **NYS**467. [d] **Reconstruction, as distinguished from repair,** requires notice. 131**AppDiv**465, 115**NYS**467.
209-45½-New. A lot owner may waive notice to pave. 108**WVa**500, 151**SE**697.
209-48 But see 330 **Ill** 527, 162**NE**189.
209-49 [a] 330 **Ill** 527, 162**NE**189.
209-52 [a] (2) Where paving of sidewalk is separable into sections notice to pave entire frontage is not void because small section is not of established grade. 108**WVa**500, 151**SE**697.
212-20 231**Ky**65, 21**SW(2d)**127 (abutting owner could not complain if city council deemed it necessary that part of street only should be curbed); **Tex CivA** 8**SW(2d)**258.
214-44 [a] **Council sustains relation of trust to property owners and must act in good faith.–Iowa** 232**NW**430.
214-44 [e] **Specification of kinds of materials and manner of construction** may restrict commissioner's powers. **Ark** 31 **SW(2d)**758.
215-47 **Iowa** 232**NW**430; 138**Misc**62, 230**AppDiv**785, 245**NYS**21.
216-63 **Iowa** 232**NW**430.
216-68 126 **Or**268, 269**P**853, 60**ALR**260.
218-96 [b] **City engineer cannot be delegated power to change grade of street** where he did more excavating than expected in making street improvement. 231**Ky**650, 21**SW(2d)**1022.
218-1 30 **OhA**419, 165**NE**380.
219-8 149**SC**234, 147**SE**346.
220-9 83**Colo** 551, 267**P**405.
222-55 **TexCivA** 13**SW(2d)**184.
223-65 But see 32**F(2d)**696.
223-73 102**CalA**299, 283**P**298 (order on city treasury); **TexCivA** 8**SW(2d)**258; **TexCivA** 26**SW(2d)**382; 153**Wash**661, 280**P**80. See also **Utah** 275**P**1103. [c] **Entire cost** may be paid out of proceeds of bonds. **TexCivA** 8**SW(2d)**258.
224-74 168**La**111, 121**S**592. [a] (3) Catch basins at street intersections are to be paid for by city under ordinance providing that city shall pay cost of improving street intersections. 225**Ky** 61, 7**SW(2d)**859.
224-79 [a] 89 **IndA**645, 165**NE**449.
224-81½-New. Whether the expense of an improvement shall be paid from the general treasury or assessed upon abutting property, or other property specially benefited is a legislative question. 84**Mont**556, 276**P**938.
224-81½-New. A municipal legislative body cannot authorize public sewers serving the public and connecting with district sewers, and, by merely denominating them district sewers, tax the cost to lots in a named district instead of providing for payment from a general fund. 84**Mont**556, 276**P**938.
224-81¼-New. A main trunk line sewer of no benefit to nonabutting property unless lateral district sewers are constructed cannot be constructed as a special improvement district project but must be paid for from general funds or money derived from bond issue. 84**Mont** 556, 276**P**938.
224-81½-New. City may have power to make improvement and be without power to levy assessment for its cost. **IndA** 170**NE**85.
224-81⅓-New. Constitutional provisions for acquisition of revenue producing utilities by issues of bonds are held to be grants of power and not limitations as to means provided for such acquisition. 59**ND**75, 228**NW**819.
224-84 But see **TexCivA** 8**SW(2d)**258. [b] **Street improvements being beneficial generally to city and specially to property owners,** taxes may be levied for former and special assessments for latter. **Fla** 129**S**904(2dcase).
225-88½-New. That portion of street improvement expense is to be defrayed from city treasury does not prevent assessment of balance against benefited property. **Cal** 288**P**1083.
225-95 [c] **Cannot divert sinking fund. –NC** 154**SE**76.
226-2 **Fla** 129**S**904(2dcase).
226-4 **NJ** 141**A**588.
227-16 [c] **Charter provision authorizing council to appropriate** whole, but not portion, of cost of improvement held permissive and not mandatory. 102**CalA** 299, 283**P**298.
228-34 225**Ky**219, 7**SW(2d)**1042.
229-35½-New. The city, after judgment confirming the assessment of a paving improvement had been reversed, had the right to make a new estimate and pass new ordinance and institute new proceeding for construction of improvement. 332 **Ill** 286, 163**NE**685.
229-36 [e] **Ordinance held invalid.**–333 **Ill** 562, 165**NE**211.
230-40½-New. Invalidity of a statute providing that a city may require a county to pay the cost of improvements on a street on which county property borders, will not render improvement ordinance invalid, unless the debt thus created exceeds the constitutional limit. 227**Ky**414, 13**SW(2d)**281.
230-43 [b] Ordinance for improving channel of creek was held not void as attempting to establish drainage district not in conformity with statute. 335 **Ill** 299, 167**NE**106.
231-50 [g] **Several alleys.**–177**Minn**28, 224**NW**254.
231-53 [b] 254 **IllA**39.
231-56 [a] (13) Straightening course of creek and diverting water into underground conduit. 297**Pa**260, 147**A**58.
232-58 **Ga** 155**SE**200.
232-65½-New. A statute permitting city council to resurface streets without petition has been construed as not permitting resurfacing of more than one street in single proceeding. **Nebr** 229**NW**280.
233-75½-New. A city is not guilty of fraud in requesting railroad abutting owner to sign a petition knowing that the city was liable for the railroad's share of the improvement expense, where those not signing the petition had notice of the proceedings. 197**NC**127, 147 **SE**824(2dcase).
233-86 254 **IllA**39. [b] **Where city assumes payment of railroad company's assessment** railroad company being abutting owner has right to sign petition and rely on city performing its agreement. 197**NC**127, 147**SE**824(2dcase).
234-95 177**Ark**762, 9**SW(2d)**43. [d] (2) Persons who mortgaged property, retaining right to redeem, may be entitled to join in petition for local improvements as owners of real property involved. 177**Ark**762, 9**SW(2d)**43.
235-14 [b] 166**Ga**232, 143**SE**119.
235-16 177**Ark**762, 9**SW(2d)**43. [a] (3) Value of divided lots cannot be considered, since statute requires that court be guided solely by record of deeds in office of county recorder. 177**Ark**762, 9 **SW(2d)**43. [c] **Clerical error in computing assessed value** of property in district may be corrected at subsequent meeting of council. 177**Ark**117, 5**SW** **(2d)**932.
236-18 138 **Okl** 106, 280**P**445.
237-61 138 **Okl** 291, 281**P**138 (general manager).
238-79 [a] (2) Filing petition before passage of ordinance did not make ordinance void. **Cal** 288**P**673.
239-83 But see 244**Mich**38, 221**NW**292.
239-84 [c] **Petition to extend water main outside of corporate limits,** when accepted by council, may constitute contract although petition does not contain all details. **Kan** 289**P**970.
239-94 166**Ga**232, 143**SE**119.
240-96 93**CalA**728, 270**P**268. [a] See

also 39 Iowa224. [b] **Where expense is paid from general funds** some statutes do not require resolution of necessity to authorize city to construct or repair sewers. 206 Iowa908, 221NW571. [c] **In Nebraska.**–Nebr 231NW751.

240–99 93CalA728, 270P1009; 166Ga 232, 143SE119; Ida 292P1100 (proceedings held valid).

240–99½–New. Under some statutes local improvement to be paid by special assessment or special taxation must originate with board of local improvements. 338 Ill 488, 170NE713.

241–8 208Cal 564, 282P797(1stcase); 338 Ill 488, 170NE713 (resolution of board of public improvements). [b] **Statement that improvement is to be made under particular statute** is unnecessary where statute does not require it. 151Miss718, 118S616.

241–12 [b] **Resolution held sufficient** to give needed information as to time and place of hearing. 338 Ill 196, 170NE 313(2dcase).

241–15 244Mich232, 221NW290. [f] **Time of enactment.**–225Ky61, 7SW(2d) 859.

242–29 93CalA728, 270P1009. [b] 85 CalA775, 260P355.

243–30 93CalA753, 270P224; 93CalA 728, 270P268; 233Ky362, 25SW(2d)1025 (resolution held sufficient).

243–32 [c] (6) Resolution need not fix grade or set forth plans and specifications. 233Ky362, 25SW(2d)1025.

243–34 93CalA753, 270P224.

245–46 [h] **Objection of abutting property owners** to proposed resolution is merely addressed to discretion of governing body, though representing sufficient frontage to prevent improvement in case of subsequent protest. 54SD74, 222NW600.

245–48 Ill 173NE165.

245–50 Ga 155SE200.

245–51 NJ 151A449; NJSup 151A448 (2dcase); 19 OhSt405; 96PaSuper337; 63Tex651.

246–52 [e] **Publication of notice and passage of ordinance of intention as conferring jurisdiction.**–Cal 288P1083.

246–53 220Ala639, 127S210; 36 OhA 84, 172NE841.

247–60 [d] **Abutting owners** must be given notice of ordinance to change grade. 28 OhA480, 162NE819.

247–61 NJSup 151A448(2dcase).

247–63 [a] 151Miss718, 118S616.

248–75 Cal 293P57.

249–87 See also CalA 285P414 (as to lettering of notice).

249–91 126 Or417, 270P502.

250–93 CalA 285P414 (description of district not required).

250–98 [b] **Notice held sufficient.**–Cal 293P57.

251–11 Ind 171NE871 (notice actually received by mail is sufficient).

251–20 NJ 151A449; NJSup 151A450; NJSup 151A448(2dcase).

252–23 166Ga232, 143SE119.

254–69 317Mo 1, 293SW780, 52ALR879.

254–70 317Mo 1, 293SW780, 52ALR879.

254–71½–New. property owner, appearing and presenting objections, is charged with notice of relevant official proceedings of council which thereafter occur. TexCivA 7SW(2d)678.

254–76 48 Ida65, 279P1095.

254–78½–New. Statute authorizing oral protests has been held not exclusive. Mo 32SW(2d)63.

255–90 [j] **Signatures of electors instead of taxpayers** is insufficient. NJSup 149A540.

255–91 [b] **Protest by minor under fourteen insufficient.**–54SD74, 222NW 600.

257–6 Ariz 282P42 (property owners on all streets contained within limits of assessment district).

257–10 [a] **Determination of area.**–127 Kan874, 275P141.

257–11 320Mo 569, 8SW(2d)602. [a] **Signature of husband** has been held not to include his wife. Mo 32SW(2d)63.

257–12½–New. Municipally owned property which is liable for improvement must be considered in determining whether owners of over one half of property have filed timely protest. 143 Okl 165, 288P278.

257–13 Mo 32SW(2d)63; 54SD74, 222 NW600.

257–13½–New. , or at any time before petition is acted on. Nebr 231NW751.

258–21½–New. Agreement of mayor and council to give property owners objecting notice of further proceedings had by the council was held a mere gratuity, such that the failure to keep the promise did not deprive council of its power to make further appropriate orders for the improvement. TexCivA 7SW(2d)678.

258–22½–New. A new estimate of the cost of a public improvement need not be submitted to property owners where the change made in the improvement does not increase the cost more than twenty per cent. 336 Ill 93, 167NE774.

258–30 Okl 291P981.

259–36 [g] **Estimate by city engineer who did not take oath and furnish bond** is void. Okl 292P40.

259–38 221MoA853, 288SW88.

260–45 338 Ill 196, 170NE313(2dcase). See also 332 Ill 286, 163NE685. [b] 338 Ill 196, 170NE313(2dcase).

260–46 [a] 338 Ill 196, 170NE313(2d case).

260–47 [b] But see Nebr 228NW114. [e] MoA 23SW(2d)235. [f] 338 Ill 196, 170NE313(2dcase).

261–49 [b] **Estimate presented to city council** must be substantially same as original estimate unless changed at public hearing for improvement. 338 Ill 196, 170NE313(2dcase).

261–50 338 Ill 196, 170NE313(2dcase).

262–72 226Ky518, 11SW(2d)127; NJSup 151A450.

262–81 NJ 141A588.

262–89 See also MoA 300SW1039.

263–95 208Cal 19, 280P130 (engineer held not to have complete power and discretion).

263–1 [a] **Provision for drainage properly included** under ordinance authorizing street surfacing and sidewalks and gutters. Ala 130S390.

263–2 93CalA753, 270P224. [a] 93CalA 753, 270P224.

263–3 93CalA753, 270P224. [c] 338 Ill 196, 170NE313(2dcase); 221MoA853, 288SW88. [d] **Property owners protesting against construction of sidewalk** on ground that cost would exceed value of property must prove to city trustees value of property. CalA 285P865.

263–4 93CalA753, 270P224; CalA 291 P227.

263–5 93CalA753, 270P224; 105NJL 524, 146A463 (2dcase).

264–8½–New. Specifications need not require the completion of the work within any particular time but may permit the bidder to fix such time subject to a penalty for the failure to complete the work within the time so fixed. 105 NJL524, 146A463(2dcase).

265–22 [b] **Appointment of committee to determine benefits** by mayor under authority of council is sufficient compliance with statute. 116Nebr862, 219NW 394.

267–80 [b] **Where expense is paid from general funds,** hearing on question of necessity for building or repairing sewer is not required. 206 Iowa908, 221 NW571.

268–81 Ga 155SE200.

268–93½–New. , or prior to expiration of required time after first publication of notice. 132 Or496, 286P147 (immaterial that no remonstrances had been filed).

269–8 166Ga232, 143SE119.

269–9 93CalA615, 270P255.

270–24 See also 22AlaA600, 118S494.

270–25 See also 22AlaA600, 118S494.

271–30 MoA 22SW(2d)865 (repair work need not be authorized by ordinance).

271–30½–New. Improper apportionment of the cost of a street improvement does not affect the validity of an ordinance authorizing the improvement. 229Ky419, 17SW(2d)255.

271–31 TexCommnA 29SW(2d)982.

271–33 339 Ill 349, 171NE523; 130Kan 450, 286P218.

272–45 330 Ill 527, 162NE189; 13 PaDist&Co 597 (invalidation by amendment).

273–57½–New. The requirement of the inclusion of engineering fees in the cost is not essential where the whole cost was levied as a special assessment. 322 Mo 1024, 18SW(2d)394.

273–66 338 Ill 488, 170NE713; 339 Ill 349, 171NE523 (definite).

274–69 229Ky598, 17SW(2d)703.

274–71 339 Ill 638, 171NE737.

274–75 339 Ill 349, 171NE523; NJSup 150A777.

275–76 335 Ill 388, 167NE61.

275–82 177Ark762, 9SW(2d)43.

276–89 CalA 291P227.

277–99 338 Ill 196, 170NE313(2dcase). [c] **Survey for street improvement** need not be identified with any recorded plat or survey if lines and points can be identified by reference to existing monuments. 338 Ill 196, 170NE313(2dcase).

277–3 CalA 291P227.

277–7 337 Ill 547, 169NE731.

279–21 CalA 291P227.

279–24 [b] **Distances between inlets and manholes** need not be shown. 338 Ill 196, 170NE313(2dcase).

279–30 CalA 291P227.

279–33 335 Ill 388, 167NE61; 339 Ill 349, 171NE523. [d] **Before work can be excepted from street improvement,** it must be of same character as that proposed, and done to official line and grade. 93CalA728, 270A268.

280–45 230Ky529, 20SW(2d)470.

281–47 See also 330 Ill 527, 162NE189.

281–53 [a] 338 Ill 196, 170NE313(2d case).

281–54 [a] **Location and width of existing sidewalks not required to be shown.**–338 Ill 196, 170NE313(2dcase).

281–57½–New. An ordinance eliminating the grade but not providing for a change so as to assure restoration of ingress and egress to property owner is invalid. 28 OhA480, 162NE819.

281–59 [a] (3) If it fixes grade in such manner that elevation of curb and pavement reasonably appears. 332 Ill 286, 163NE685.

281–63 231Ky65, 21SW(2d)127.

282–72 338 Ill 488, 170NE713.

282–73 22AlaA600, 118S494; 231Ky65, 21SW(2d)127.

283–78 [b] (21) Other instances. 218 Ala282, 118S467.

283–88 [a] (5) Ordinance, estimate and plat should sufficiently describe improvement without parol testimony except to explain meaning of plat. 338 Ill 196, 170NE313(2dcase).

284–13 93CalA728, 270P268.

284–14 93CalA728, 270P268.

286–58 102CalA299, 283P298.

287–68½–New. Where amount for engineering and inspection costs was included in estimate of local improvements board ordinance specifically approving entire estimate is sufficient to include such costs. 338 Ill 228, 170NE308.

287–71 [e] **Ordinance for street widening not providing for removal of buildings** is not void where cost thereof is not to be defrayed from special assessment fund. 339 Ill 638, 171NE737.

287–72 But see 160Tenn31, 22SW(2d) 237.

288–89 [c] **Board of aldermen acts in legislative capacity** in enacting street improvement ordinance. MoA 5SW(2d) 677. [d] **Minutes of council reciting that it was regularly moved and seconded** that resolution for street improvement be read, and reciting vote that was taken, was not such irregularity as to say that resolution was not voted on or adopted. 231Ky65, 21SW(2d)127. [e] **Board of local improvements** is without authority to adopt ordinance essential for special assessment proceeding. 338 Ill 488, 170NE713.

289–2 [c] **Abutting property owner after completion of improvement** could not attack validity of improvement ordinance on ground that record did not show two readings, as there was nothing to indicate that ordinance enacted was not same as ordinance read. 231Ky 65, 21SW(2d)127.

291–38 96PaSuper492 (paving).

292–50½–New. Under the statute requiring a referendum, not only the initial ordinance authorizing construction, but every ordinance in furtherance of such construction is subject to referendum. 119 Oh210, 162NE807.

292–52 338 Ill 228, 170NE308. [a] (3) Statute requiring publication of notice

of petition for paving of streets. 9LaA 618, 121S661.

292-55 322Mo 1024, 18SW(2d)394. [a] **Purpose of publication.**–322Mo 1024, 18 SW(2d)394.

293-65 [d] **Map referred to' in ordinance need not be published.**–83Colo 551, 267P405.

293-66½-New. That resolution does not recite all conditions constituting the newspaper in which it was published a proper newspaper for its publication as required by statute is not fatal where the publication made complied with the statute. 322Mo 1024, 18SW(2d)394.

293-75 [a] **MoA** 23SW(2d)235. [b] **Showing that majority of members of board voted for improvement** is required in some jurisdictions. **MoA** 23SW(2d) 235.

294-79 231Ky65, 21SW(2d)127 (ordinance not permitting discrimination).

295-89 153Wash661, 280P80 (city has right to abandon local improvement initiated under special assessment plan).

295-5 [c] 322Mo 1024, 18SW(2d)394.

297-24 336 Ill 93, 167NE774.

297-29½-New. An unsuccessful bidder and tax payers cannot claim irregularity in adopting changed plans where all bidders bid in same plans. **NJ** 146A31.

298-39 11PaDist&Co 491.

300-59 [b] **Persons filing objection to certificate of completion and acceptance of improvement** have no right of appeal from order approving certificate. **Ill** 173 NE10.

300-62½-New. That objecting property owners were unfairly deprived of their right of appeal in street improvement proceedings did not render final action of the city council void. **TexCivA** 7SW(2d) 678.

300-64 93CalA615, 270P255.

300-71 [a] **NJ** 143A804. (2) Failure of city clerk to file insufficient petition protesting against ordinance is no reason for setting aside ordinance on certiorari. **NJSup** 149A540.

300-75 [c] **Where clerk has not determined sufficiency of taxpayers protest** certiorari to test validity of improvement ordinance will not lie. **NJSup** 151A204.

301-84½-New. Showing held to present debatable question warranting allowance of writ. **NJSup** 150A563.

301-91 [b] But see 226Ky518, 11SW (2d)127.

302-97 **Cal** 293P57. [g] **Cal** 290P11; CalA 285P414; 151Miss718, 118S616; 322Mo 1024, 18SW(2d)394.

303-99 181Ark1020, 29SW(2d)265; 96 PaSuper1.

305-28 229Ky419, 17SW(2d)255.

305-29 339 Ill 360, 171NE535. [b] (2) Fraud is not shown by fact that ordinance was enacted by members of general council in violation of pledges made while candidates for office. 227Ky481, 13SW(2d)491.

306-30 156Miss872, 127S558.

307-34 339 Ill 360, 171NE535.

307-37 **CalA** 285P865. But see 156 Miss872, 127S558.

310-62 138 Okl 291, 281P138 (authority of property owners' agents to sign petition).

312-69 225Ky219, 7SW(2d)1042. [f] **Disqualification of attorney for city** is not matter to be considered in proceeding to enjoin improvement. 33NM519, 270 P886.

312-71 **TexCivA** 8SW(2d)258. See also 93CalA615, 270P255.

312-72 83Colo 551, 267P405; 167Ga 416, 145SE855; **Ind** 171NE871 (order of city held not arbitrary).

313-77½-New. In an action to enjoin a city council from proceeding with a street improvement, amended allegations of the complaint, alleging condemnation of portions of the right of way of a railway company along the improved street, and that a deposit of money to pay for the property taken was made from moneys deposited with the city by the county, out of funds derived by the county from automobile licenses and other moneys received, was held properly stricken. 93CalA615, 270P255.

313-77½-New. Assuming that the council was bound by a promise to give protesting property owners notice of further proceedings relative to a street improvement, failure to give such notice did not warrant an injunction against the issuance of paving certificates to a paving contractor having no notice of such promise. **TexCivA** 7SW(2d)678.

313-98 219Ala134, 121S397.

314-2 167Ga416, 145SE855; 151Miss 840, 119S324.

315-7 225Ky219, 7SW(2d)1042.

316-17 [c] 317Mo 1, 293SW780, 52ALR 879.

317-25 48 Ida65, 279P1095.

317-34 231Ky65, 21SW(2d)127.

317-39 [b] (5) Suit barred where commenced more than thirty days after creation of district. 180Ark709, 22SW(2d) 559. [c] **Suit held proper.**–**Ark** 31SW (2d)758.

317-41 [a] (2) In suit to restrain opening of street in subdivision, private owners, who had purchased land in platted property, who did not seek to contest relief, are held not necessary parties. 334 Ill 46, 165NE143.

317-41½-New. In proceedings to stay proceedings for extension of a street through the petitioner's land, the question whether the petitioner is entitled to damages is not properly before the court. 91PaSuper85.

317-41½-New. although viewers have been appointed and have reported. 91 PaSuper85.

317-41¼-New. In such case, it is error for the court, in dismissing the petition, to require payment or tender of damages before opening the extension. 91Pa Super85.

317-41⅛-New. Whether proposed paving work constitutes repair and maintenance or construction is question of fact to be determined from evidence. **Okl** 292 P40.

318-45 227Ky481, 13SW(2d)491.

318-46 [b] **Insufficient allegation.**–**MoA** 58SW(2d)677.

318-51 [b] **Court cannot presume cost of improvements to owners of property will exceed value of property** or amount to confiscation of property without compensation. **CalA** 285P865.

318-52 [a] (2) **Burden of proving patentee obtaining contract acted fraudulently** is on property owners seeking injunction. **Iowa** 232NW430.

318-53 93CalA615, 270P255; 138Misc 62, 230AppDiv785, 245NYS821.

318-54 [a] (1) 93CalA615, 270P255. (4) To show that requirement of chemical analysis did not stifle competition in bidding. **TexCivA** 14SW(2d)345. (5) To show abuse of discretion. 93CalA615, 270P255. (6) To show probability of nuisance from construction. **MoA** 22SW (2d)865. (7) Uniformity of benefits. **Ark** 31SW(2d)758. (8) That patentee acted fraudulently in obtaining contract. **Iowa** 232NW430.

318-55 181Ark1020, 29SW(2d)265 (street not included in petition).

319-74½-New. When jurisdiction to construct a special improvement has been once acquired, mere irregularities thereafter do not defeat it. **Utah** 275P 1103.

319-78 225Ky219, 7SW(2d)1042; **NJSup** 150A676.

319-81 [b] (4) Other instances. 180 Ark964, 23SW(2d)990.

320-86 86CalA167, 260P308.

321-94 157Miss680, 128S744 (statute construed); **TexCivA** 8SW(2d)258; **Tex CivA** 26SW(2d)382.

321-95 [a] **Persons contracting must inquire into municipality's power to contract.**–99Fla819, 128S14.

321-96 339 Ill 491, 171NE526 (lawful obligations are payable out of general funds). [a] **Statutes construed** not to give board power to contract for improvement and repair of streets. 180 Ark964, 23SW(2d)990.

321-99½-New. A city council has been held authorized to split an improvement into separate projects and let separate contracts therefor. 229Ky419, 17SW (2d)255.

321-99⅛-New. City charter has been held to authorize city to contract for improvements. 40F(2d)579.

321-99¼-New. Contract for construction of so much of highways as could be constructed within appropriations has been held within Iowa selectmen's authority. 111Conn510, 150A502.

321-2 180Ark964, 23SW(2d)990; 174 Minn579, 219NW943.

322-5 But see 339 Ill 349, 171NE523.

322-11 198NC564, 152SE686 (commissioner of public safety). [b] (4) Contract by board of aldermen for survey for water system made before bond election held ultra vires. 165La1070, 116S 561.

322-12 339 Ill 491, 171NE526.

323-28 **NJ** 144A588.

323-32 **Miss** 121S295. [a] **Distinction exists between construction work and repairs,** under some statutes, as regards contractor's right to recover for repairing pavements. **Iowa** 231NW705.

324-38 255 Ill A67.

324-47 **Ont** [1930] 3DomLR434.

324-55 **Mass** 172NE230; 133 Okl 51, 270P851. [c] **Contingent or extra work.**–9PaDist&Co 766.

325-56 99Fla819, 128S14; **Iowa** 231 NW705; 33PortoRico 41.

325-57 206Cal 627, 275P415, 62ALR 219; 99Fla819, 128S14; **Iowa** 231NW 705; 33PortoRico 41.

325-58 **Iowa** 231NW705.

325-62 99Fla819, 128S14.

325-63 206 Iowa244, 220NW92; 206 Iowa908, 221NW571; **TexCivA** 8SW(2d) 258.

325-66 [b] **Council's vote authorizing purchase without bidding** is invalid where order requiring bidding is in force. **Mass** 172NE230.

325-69 137Misc594, 244NYS524. [a] (7) Improvements to be paid for exclusively from proceeds derived from such improvements are not part of general fund. **Utah** 279P878.

326-81½-New. Some statutes requiring competitive bidding on contracts for street improvements are not limited to contracts in special assessment proceedings. **Iowa** 231NW705.

326-84 99Fla819, 128S14; **TexCivA** 8 SW(2d)258.

326-85 206Cal 627, 275P415, 62ALR 219.

326-86 **TexCivA** 8SW(2d)258.

326-87 **TexCivA** 8SW(2d)258.

326-93 See also 93CalA728, 270P1009.

326-94 105NJL524, 146A463(2dcase).

326-96½-New. Statute must be strictly complied with. 299Pa173, 149A722.

327-3 But see 218Ala282, 118S467.

328-22 86CalA167, 260P308.

329-23 But see **NJSup** 150A676 (under statute construed).

329-29 138Misc62, 230AppDiv785, 245 NYS821.

330-30 **Iowa** 232NW430 (patentee may bid).

330-31 93CalA615, 270P255. [b] **That contract calling for patented pavement is awarded patentee** does not violate public policy. **Iowa** 232NW430.

330-34 86CalA167, 260P308.

331-46½-New. Where a municipal ordinance authorizes a sum of money to be borrowed for an improvement and municipal notes to be issued therefor, an advertisement for bids requiring the successful bidder to assume the loan if called upon to do so and a contract let pursuant thereto are void. 33Porto Rico 41.

331-49 86CalA167, 260P308; 339 Ill 491, 171NE526.

341-49½-New. All bidders must be accorded same treatment. 299Pa473, 149 A722.

332-65½-New. City authorities have a right to adopt a different form of advertisement from that set forth in specifications, provided the advertisement is sufficient to advise bidders in regard to the proposed work. **TexCivA** 14SW(2d)345.

332-67 But see 226Ky518, 11SW(2d) 127. [b] (3) Other instances. **Cal** 293 P57. [f] (1) **TexCivA** 14SW(2d)345. [h] (5) Advertisement may call for bids for materials only, labor only, or materials and work. **TexCivA** 14SW(2d) 345. [k] **Reference to resolution for purposes of description is sufficient under statute.** **CalA** 285P414.

333-68 [b] (2) Where proposals and bidding sheets are left open to each bidder to designate number of working days in which he would perform work.

NJ 146A49(2dcase).

334-83 [d] **Where there is newspaper published in city where work is to be done,** statutory requirement that notice to bidders should be published there is satisfied by publication in newspaper printed in adjoining city. **MoA** 178W (2d)604.

334-84 226Ky518, 118W(2d)127.

335-11 [a] **Bids held sufficient.–NJSup** 151A737(1stcase).

335-17 133 **Okl** 51, 270P851.

336-31½-New. Bids in the alternative for municipal improvement contracts are permissible. 105NJL524, 146A463 (2dcase).

336-31½-New. Bids for paving work on several streets taken on a unit price basis have been held sufficiently definite as to particular property. 218Ala282, 118S467.

336-41 [a] (2) Where contractor bidding on four contracts filled out blanks with respect to deductions to be allowed on contracts, if awarded in pairs, and also filled out blanks with respect to award of three additional contracts, indicating allowance of deduction on each contract, if four contracts were given to contractor, intention of contractor was to allow deduction on each contract, in addition to deductions agreed to if contracts were awarded in pairs. 225 **AppDiv**42, 232NYS261 [aff 250NY584, 166NE333(2dcase)].

336-45 225**AppDiv**42, 232NYS261 [aff 250NY584, 166NE333(2dcase)].

336-48 [a] **Statute providing deposit need not exceed certain amount** does not preclude board of water supply from requiring larger deposit in its discretion. 225**AppDiv**42, 232NYS261 [aff 250NY 584, 166NE333(2dcase)].

337-73 200**Wis**429, 228NW497.

337-82 200**Wis**429, 228NW497.

338-91 231**Ky**65, 21SW(2d)127.

338-92 [b] **Tie vote of council with deciding vote of mayor** is sufficient to award sewer construction contract. 221 **MoA**853, 288SW88.

338-96 320**Mo** 1047, 10SW(2d)923.

338-1 320**Mo** 1047, 10SW(2d)923.

338-4 225**AppDiv**42, 232NYS261 [aff 250NY584, 166NE333(2dcase)]. [a] (2) Award to lowest bidder on entire contract, though not lowest bidder on combined low bids where it was not required that contract be awarded lowest bidder. 225**AppDiv**42, 232NYS261 [aff 250NY 584, 166NE333(2dcase).

339-9½-New. Sufficiency of notice of award of contract. **Cal** 293P57.

339-27 226**Ky**518, 11SW(2d)127.

340-37 **TexCivA** 14SW(2d)345.

341-51 320**Mo** 1047, 10SW(2d)923.

341-56 12**PaDist&Co** 17. [b] (2) Bid was not "unbalanced," in violation of terms of city's invitation for bids, which provided that unit prices must not be improperly balanced. 133**Misc**671, 233 NYS241.

341-58 181**Ark**869, 28SW(2d)331 (discretion not abused).

341-59 179**Ark**356, 16SW(2d)4.

341-60 [c] (3) Where amount of excavation as stated in specifications was twice as large as actual quantity. 105 NJL524, 146A463(2dcase).

342-64½-New. Council may pass ordinance providing for determination of question as to who are reponsible bidders before receipt of bids instead of thereafter. 299Pa473, 149A722.

342-64½-New. Ordinance providing for determination of responsibility in advance of bidding and permitting only those classified as responsible to bid held invalid. 299Pa473, 149A722.

342-64¼-New. Finding that, in suit to enjoin enforcement of paving contract, bids were not on competitive basis has been held erroneous. 181**Ark**869, 28SW (2d)331.

342-65 See also 138**Misc**62, 230**AppDiv** 785, 245NYS21.

342-79 [a] **CalA** 285P414.

343-2 **MoA** 15SW(2d)353.

343-10 [a] **By-law authorizing contract subject to approval of council by resolution.–Ont** [1930] 3**DomLR**434.

343-11 **GaA** 155SE218.

345-41½-New. A city entering into a contract for street paving was not required to provide for outfall disposal of sewage, although contract provided for sewer mains. **TexCivA** 8SW(2d) 258.

345-41½-New. Provision of paving contract authorizing district commissioners to turn over state highway commission's state aid certificate to contractor or pay latter cash is not void as unilateral and without consideration. 180 **Ark**926, 23SW(2d)632.

345-43 **Ala** 130S173; **GaA** 155SE218. [b] (1) 229**Ky**213, 16SW(2d)1026.

346-52 See also **MoA** 7SW(2d)456.

346-56 **CalA** 285P414 (contract held not invalid); 208 **Iowa**422, 223NW371. [c] **Contract held void.–**208 **Iowa**422, 223 NW371.

347-72 **MoA** 20SW(2d)930 (provision authorizing extension of time under certain circumstances held not to render contract void).

347-82 **CalA** 285P414. See also **Cal** 293 P57.

347-84½-New. A contract, authorizing a contractor to make expenditures for materials subject to an engineer's approval of amounts exceeding a specified amount has been held valid and not a delegation of nondelegable municipal powers. **TexCivA** 8SW(2d)258.

347-86 **Cal** 293P57.

348-97 **CalA** 285P414.

348-99½-New. on request furnish tests of cement made by reliable chemist. **CalA** 285P414.

348-4½-New. Provision giving contractor discretion to vary proportions of sand and rock for certain purposes is not objectionable. **CalA** 285P414.

349-25 See also **MoA** 7SW(2d)456.

350-41½-New. A contract, providing for payment on a cost plus basis, has been held valid. **TexCivA** 8SW(2d)258.

350-49 226**Ky**1, 10SW(2d)467.

351-59½-New. Where the charter authorizes the use of a state law unless otherwise provided by ordinance, a contract to be paid by special assessment executed by the superintendent of streets, under statute, is valid. **Ariz** 282P42.

351-76 174**Minn**579, 219NW943.

351-79 95**CalA**270, 272P779.

351-80 43F(2d)452. But see 40**GaA** 540, 150SE652(1stcase). [a] **Statute requiring contractor's bond held inapplicable** to one given for construction of reservoir. 300Pa27, 150A100(2dcase).

351-86½-New. A bond given by a street improvement contractor not being a statutory bond, the surety rests under such obligations only as are therein expressed or fairly implied. 29F(2d)43.

351-86½-New. Contractor's bond not conforming to statute is treated as common-law bond. **MoA** 26SW(2d)1018.

351-86¼-New. All provisions of a contractor's bond must be read together. **MoA** 26SW(2d)1018.

351-86½-New. In construing a contractor's bond, effect must be given to each and all provisions of the instrument. **TexCivA** 19SW(2d)913.

352-6½-New. City suing as trustee for property holders within an assessment district is not required to allege in what manner it became trustee, 95**CalA**270, 273P819.

352-6½-New. nor to specify the amount of respective assessments and the amount to which each property owner is entitled. 95**CalA**270, 273P819.

352-10½-New. Where the city is the only party entitled to sue for breach of a contractor's bond, under which it is only obligee by reason of statute and the bond itself, it is not necessary to join the property owners as parties plaintiff. 95**CalA**270, 273P819 (action on behalf of property owners).

352-10½-New. Defendant surety company cannot urge a defense based on the assumption that the city will attempt to hold for its own use and benefit money which it received for the use and benefit of the real parties damaged. 95**CalA**270, 272P779.

353-28 95**CalA**270, 272P779.

353-34 [a] **Doctrine of substantial performance** is inapplicable in suit by creditor of contractor on bond. 175**Minn**256, 220NW958.

353-50½-New. Under statute a surety of a sewer contractor is not absolved from liability because the contractor assigned its contract to another without notifying the surety, which assignment the city accepted. 198**Wis**416, 224NW 720.

354-66½-New. Where a bond given by a street improvement contractor restricted its obligation to the city, another could not sue on the bond under statute. 29F(2d)43.

354-71 [a] **Questions of fact in case tried without jury.–**128 **Or**547, 274P503.

354-73 [b] **Construction of bond.–Iowa** 232NW137. [c] **Extent of liability.–Iowa** 232NW137.

354-85 **Iowa** 232NW137.

355-91 [c] **Constitutionality of statute.** –109**Conn**547, 147A144.

356-5 **TexCivA** 19SW(2d)913 (bond is enforceable as common-law obligation).

356-10 179**Ark**941, 18SW(2d)1017.

356-15 **CalA** 288P827.

356-17 **Cal** 287P503; 99**Fla**736, 127S 326.

357-18 [a] **In Florida.–**99**Fla**736, 127S 326.

357-21 See also 225**Ky**501, 9SW(2d) 229.

357-28 37F(2d)279; 43F(2d)418; 294 Pa401, 144A423; 299Pa305, 149A484.

357-31 29F(2d)9 [certiorari den 279US 840, 49SCt253(7thcase), 73L ed986].

358-42 **MoA** 26SW(2d)1018.

358-44 10**LaA**701, 122S135.

359-77 179**Ark**752, 18SW(2d)327; 97 **Fla**297, 120S556(2dcase); 94**PaSuper**579 (must be component part of completed structure).

360-96 94**PaSuper**579.

360-6 But see **Cal** 287P503.

360-14 But see 227**AppDiv**123, 237NYS 152.

360-19 [a] **Extent of recovery.–**148 **Wash**37, 268P169.

361-33 157**Md**420, 146A577.

361-38 152**Wash**186, 277P696. But see 148**Wash**37, 268P169.

361-47½-New. A surety on a bond of a paving contractor, in the absence of appropriate stipulation, cannot control the materialman's application of payments on indebtedness for which the surety was secondarily liable. 128 **Or** 547, 274P503.

361-47½-New. Where the principal contractor and materialman settle a debt due the materialman by payment of cash and a note, it has been held that the surety who has not consented to the new obligation is discharged. 179 **Ark**752, 18SW(2d)327.

361-47¼-New. Money advanced by bank to contractor to pay laborers' wages has been held a "loan" in suit against sureties. **CalA** 288P827 (bond construed).

362-56 [a] **Statutory remedy accorded materialmen is exclusive** whether bond be statutory or common-law. **Tex CommnA** 29SW(2d)1009.

362-58½-New. In an action by a materialman against the surety on the contractor's bond, it is no defense that the contractor transferred his title to material furnished and the transferee carried on the work, using such material as an integral part thereof. 97**Fla** 297, 120S556(2dcase).

362-63 174**Minn**579, 219NW943.

362-72 See also 148**Wash**37, 268P169.

362-73 But see 43F(2d)452.

363-76 179**Ark**941, 18SW(2d)1017.

364-83½-New. Under some statutes action may be brought at any time before expiration of ninety days following filing of claim. **Cal** 287P503.

364-86 29F(2d)9 [certiorari den 279US 840, 49SCt253(7thcase), 73L ed986]; 225 **Ky**501, 9SW(2d)229.

364-87 253NY417, 171NE692.

364-1 33 **OhA**247, 169NE39(2dcase).

364-7 [b] (8) Declaration aided by exhibit held sufficiently to show that lumber and materials, alleged to have been supplied by plaintiff, were used by contractor in prosecution of work. 97**Fla** 297, 120S556(2dcase). (9) Allegation in declaration of terms used by statute, in defining additional obligation of principal and surety on municipal contractor's bond, are sufficient to bring materialman within class of persons protected by such act. 97**Fla**297, 120S556 (2dcase).

365-9 148Wash37, 268P169.
365-12½-New. The burden is on the materialman, suing on a bond, to prove the allegation that plaintiff supplied lumber to the contractor in the prosecution of the work. 97Fla297, 120S556 (2dcase) (nature of proof).
365-15 148Wash37, 268P169. [c] **Evidence held sufficient.**-175Minn256, 220 NW958; 29F(2d)9 [certiorari den 279 US840, 49SCt253(7thcase), 73Led986]. [d] **Evidence held insufficient.**-179Ark 752, 18SW(2d)327; 152Wash186, 277P 696.
365-21 [a] **Instructions.**-Ark 30SW(2d) 825.
365-21½-New. Court has no power to strike portions of contract as meaningless where it would operate to reform contract without conformity to pleadings or facts. 37F(2d)279.
366-40 320Mo 1047, 10SW(2d)923. But see 151Va396, 145SE355.
366-43 151Va396, 145SE355.
366-44 198NC564, 152SE686.
367-57 255 IllA67.
368-69 117Nebr113, 219NW839.
368-70 Mass 172NE235.
369-90½-New. An illegal contract with one not the lowest bidder who was given the contract because of a bid for bonds, has been held not made legal by subsequently releasing him from the bond contract. 179Ark356, 16SW(2d)4.
369-90¼-New. Contract made while contractor was in default under another contract is not made valid by surety's payments. 137Misc310, 243NYS362.
369-93 148Wash37, 268P169. [d] **Construction of particular contracts.**-180Ark 643, 22SW(2d)381.
369-97 26F(2d)636; **MoA** 20SW(2d) 930.
369-1 38F(2d)193.
370-10 227AppDiv564, 238NYS637.
371-44 165La391, 115S631. [b] **Presumption of acceptance.**-165La391, 115 S631.
371-49½-New. Assignee is entitled to payment from unencumbered fund collected from property owners. 165La 391, 115S631.
371-49¼-New. Assignment of funds accepted by city prior to notice of assignment to contractor's surety held entitled to priority. 165La391, 115S631.
371-49¼-New. Surety on contractor's bond cannot offset losses against profits under separate contracts to prejudice of intervening assignment. 165La 391, 115S631.
372-51 [a] (1) See also 198Wis416, 224 NW720.
372-53 43F(2d)418.
373-71 [a] **Where contract for construction of dam provided for unit price method of measuring cost,** modification at demand of state engineer may be made in plans without reletting contract. 101CalA456, 281P717.
373-78 Iowa 230NW373.
373-79 [a] **Relinquishment by contractor of part of claim for extra compensation** does not constitute public benefit necessary to sustain claim for extra compensation. Iowa 230NW373.
374-97 319Mo 178, 5SW(2d)389.
377-42 168La894, 123S611.
377-43 168La894, 123S611; Mass 172 NE235.
377-46½-New. Under contract requiring contractor to buy all tar and pitch from village, furnishing of tar and pitch by village is condition precedent to performance on contractor's part. Vt 150 A148.
377-46¼-New. Contractor for street improvement may follow ordinance, though width of street at point improved is greater than in other squares. 233Ky 362, 25SW(2d)1025.
377-49 [c] **Sewer contractor can sue town for active breach of contract** under statute which does not furnish exclusive remedy. 168La894, 123S611.
378-65½-New. Contractor is not entitled to recover for breach because of encountering submerged logs not disclosed by city's blueprints. TexCivA 5 SW(2d)590.
378-67 Iowa 230NW373.
379-75 178Ark795, 12SW(2d)411.
379-83 But see Nebr 231NW763.
379-85½-New. Under a contract limiting liability of the municipality to the whole amount it agreed to pay the contractor, payments made to the contractor cannot be included in computing the total payments. 109Conn547, 147A144.
379-85¼-New. City cannot forfeit forty per cent for incomplete work as provided in contract where failing to give sixty days' notice as required. NJSup 149A115.
379-85¼-New. Municipality cannot withhold from one doing work for it sums due by him to third persons where not liable for claim. 299Pa305, 149A 484.
379-88 See also 117Nebr113, 219NW 839.
379-93 38F(2d)52.
380-97 [b] **Municipality is not liable in excess of engineer's estimate.**-Okl 291P 981.
381-16 MoA 7SW(2d)456; MoA 28SW (2d)443; 117Nebr113, 219NW839.
382-17 298Pa203, 148A112.
383-35 31F(2d)820. [a] **Recovery of cost of reconstruction** directed by engineer may not be had. 27F(2d)354.
384-49 [a] **City council has no authority to accept** sewer system. IndA 171 NE304.
384-51 226Ky353, 10SW(2d)1060 (rights of municipality under statute where work is defective).
385-61½-New. Under a statute, empowering the council to require the contractor to perfect public work, or modify the estimate of cost, or both, the council must act with due regard to the rights of the contractor, as well as of the abutting owners. 226Ky353, 10SW (2d)1060.
385-70 TexCivA 26SW(2d)382.
386-72 TexCivA 8SW(2d)819. (7) Acceptance by council when only three members and mayor were present is not evidence of fraud. 231Ky650, 21SW(2d) 1022.
386-74 See also TexCivA 8SW(2d)819.
388-4 31F(2d)820; Ark 30SW(2d)825 (with exceptions entitling party to arbitration).
388-5 31F(2d)820; 227AppDiv564, 238 NYS637.
388-14 See also TexCivA 8SW(2d)819.
389-31 NJSup 149A115.
389-33½-New. Where a bond furnished by a city contractor provided that no suit thereon could be brought after a stated date, the contractor breaching the contract and failing to renew the bond is estopped from claiming a right to continue the work after such date. 34F(2d)889.
390-42 [d] **Right to extend time cannot be exercised arbitrarily.**-Cal 292P 1073.
390-45 86CalA553, 261P1041.
390-55½-New. The city council may grant an extension of time in event material cannot be obtained after faithful effort, although the contract ordinance contains no provision therefor. MoA 20 SW(2d)930.
391-68 221MoA1217, 299SW816.
391-69 86CalA553, 261P1041.
394-28½-New. A provision that the stated per cent of the amount of estimates shall be reserved is for the benefit of the city alone, and the city may waive it and pay the estimates in full. 198Wis416, 224NW720.
394-28¼-New. In determining whether payments city made to defaulting contractor are excessive, contract and conditions existing should be given reasonable construction. 43F(2d)418.
394-29 Nebr 231NW763 (where delay is unreasonable and amount owed definitely ascertainable).
394-43 229AppDiv261, 241NYS613.
394-43½-New. Sewer contractor is not entitled to interest on compensation due during time payment was withheld as indemnity for damages from depression of street. Nebr 231NW763.
395-64 See 27F(2d)354.
395-67 205 Iowa742, 218NW580; Iowa 224NW589.
396-79 157Md420, 146A577. [a] **Questions for jury.**-157Md420, 146A577.
396-80½-New. Where there are conflicting clauses in a contractor's maintenance bond, the intention of the parties is ascertained by a consideration of the whole contract. 178Ark1036, 13SW(2d) 28.
396-80¼-New. Such bond should be considered together with the construction contract and the construction bond. 178Ark1036, 13SW(2d)28.
396-80¼-New. Under the terms of the bond, the decision of the district board as to the necessity of repairs may be conclusive. 178Ark1036, 13SW(2d)28.
396-87 157Md420, 146A577.
397-89 Iowa 224NW589; 169La852, 126S214.
397-91 169La852, 126S214.
397-98 But see 178Ark1036, 13SW(2d) 28.
397-98½-New. Damage caused by the negligence of a municipal engineer in control relieves the contractor of liability. 27F(2d)354.
397-9 Mass 172NE235.
398-10 Iowa 232NW137.
398-24 [b] **Surety's right to balance unpaid at time of default.**-97Fla538, 121 S571.
398-25 43F(2d)418. [a] **Payments by city to contractor** must be justified as made in discharging liabilities imposed by contract. 43F(2d)418. [b] **Deduction of charges by commissioners** for extra engineering services incurred because of noncompletion within time specified held proper. 43F(2d)418. [c] **Board of water commissioners terminating employment of contractor by resolution** does not put end to contract. 43F (2d)418.
399-34 Iowa 230NW373 (loss by interruption of sewer construction while doing government war work held insufficient to create moral obligation).
399-36 43F(2d)418; 318Mo 192, 300SW 1088. [a] **Where contract provides for extra compensation if quicksand is encountered,** material not falling within contract definition of "quicksand" should not have independent classification. 39F(2d)608.
399-38 38F(2d)52.
399-40 111Conn510, 150A502 (unused pipe); 231Ky650, 21SW(2d)1022.
399-42 38F(2d)52.
400-45 [a] **Repairs made to avoid controversy** where work was defective were not proper basis for compensation. 27 F(2d)354. [b] **Voluntary reconstruction to avoid controversy** does not entitle contractor to payment for salary and bond premiums to town's engineers. 27F(2d) 354.
400-48 43F(2d)418; 138Misc194, 245 NYS321.
402-61 43F(2d)418.
402-63 NJSup 150A395 (discretion of commissioner).
403-70 See also NJSup 149A115.
403-74 39F(2d)608.
403-92 [a] **Where expedients provided for fail to produce funds,** contractor is excused from his obligation till they again begin producing. 40F(2d)579.
404-94 [a] **Under contract** providing for payment of difference between total cost and anticipated state aid certificates, defendant held not to have assumed obligation to pay difference between five per cent bonds necessary to be sold to pay state aid certificates in cash and total principal and interest payments under such certificates. 180 Ark926, 23SW(2d)632. [b] **Improvement district held not required to pay** amount of state aid certificate in money from sale of bonds at loss. 180Ark926, 23SW(2d)632.
404-6 But see 111Conn510, 150A502.
405-10½-New. Contractor is not required to know total amount available from appropriations and check expenditures under contract for construction to extent of appropriations. 111Conn510, 150A502.
405-23 167Ga181, 145SE47. [a] **Contract held not payable out of special assessments.**-40F(2d)579.
405-24 But see 167Ga181, 145SE47.
406-39½-New. Contractors are bound to take cognizance of charter provisions that the cost of improvements shall be paid by levying special assessments against property of owners specially

benefited and not by a general tax. 130 Or64, 278P96.

406-43 234Ky120, 27SW(2d)662.

406-47 249 IllA586.

406-49 126 Or227, 269P207.

407-57 IndA 168NE187 (measure of recovery by assignee of contractor).

408-75½-New. Under some charters a paving contractor has no recourse against the city for the share of the cost of paving assessed against a front proprietor who successfully defends a suit for collection thereof, when it appears that the statutory per cent of the interested property holders did not sign the petition for the paving. 9LaA 3, 118S841.

408-76 But see 157Miss680, 128S744.

408-82 127Mc38, 140A910.

409-91 [a] (2) City's breach occurred as to period of limitations when city took physical possession of premises. Wash 287P211.

409-98 [a] Wash 287P211.

409-1 [b] (6) Other instances. Tex CivA 24SW(2d)97.

410-8½-New. It is no defense to city's claims for offset that defects resulted from changes made by city engineer where court held that engineer's acts were fraudulent. TexCivA 24SW(2d)97.

411-29½-New. In an action by a contractor's assignee a city asserting a counterclaim, based on defects in paving, has the burden of proving notice of defects to the contractor before receipt of notice of assignment. 205 Iowa 742, 218NW580.

411-29⅓-New. In an action for balance due, the burden is on plaintiff to show that he is entitled to recover, and the amount of recovery. 178Ark795, 12SW(2d)411.

411-29¼-New. Where a sewer contract contained a declaration by the contractor that he had examined the site of the work, he is presumed to have known the depth of the location and the locality of a gas main. 168La894, 123S611.

411-29½-New. Surety to recover of city paying contractor in full without notifying surety must show that it paid claims. 157Miss680, 128S744.

411-31 [b] (14) Other instances. 255 IllA67.

412-32 [d] (14) 39F(2d)608. (15) Show practical performance entitling contractor to equitable relief against city. 226Ky353, 10SW(2d)1060. [e] (9) Support verdict for contractor on theory that funds provided had been exhausted. 178Ark795, 12SW(2d)411. (10) Establish sewer contractor's claim for extra compensation. Iowa 230NW373.

413-38 Vt 150A148. [a] (12) Reasonable value of work done by contractor after funds provided by district were exhausted. 178Ark795, 12SW(2d)411. (13) Whether construction was improper or defective sewer pipe used. 41F(2d)516. [b] **Evidence held insufficient to go to jury** on question whether sewer district's president induced contractor to expend money in construction under unauthorized contract. 178Ark795, 12SW(2d)411.

413-39 [d] **Instructions held not warranted by the evidence.**-178Ark795, 12SW(2d)411. [e] **Instructions held erroneous.**-178Ark795, 12SW(2d)411 (ignoring issues).

413-47½-New. Recovery of the reasonable cost of repairing existing defects was properly allowed, notwithstanding the city had not procured such repairs to be made up to the time of trial. Iowa 224NW589.

413-47⅓-New. The reasonable cost of removing defective paving in preparation of repair is recoverable. Iowa 224NW589.

413-48½-New. Findings held to justify inference that material encountered in construction of sewerage system was not quicksand. 39F(2d)608.

413-49½-New. In a suit to require acceptance and apportionment of the cost against abutting owner, equity is not circumscribed by rules applicable to writs of mandamus, but may frame the decree to meet the requirements of the case. 226Ky353, 10SW(2d)1060.

413-49⅓-New. In such suit a decree directing the council to correct the estimate of the engineer to conform to the court's conclusion, and to make assessment against abutting lots, is within the powers of a court of equity. 226Ky353, 10SW(2d)1060.

413-49¼-New. Such decree is not objectionable, as permitting recovery against the city on quantum meruit, where the contract was validly executed and substantially performed. 226Ky353, 10SW(2d)1060.

414-60½-New. In a suit by a property owner, the court may properly refuse to cancel and annul a paving construction contract, since the mere existence of a contract did not affect any right possessed by the property owner. Tex CivA 12SW(2d)831.

414-69 [f] **Findings for subcontractor** held not against preponderance of evidence. 179Ark1199, 16SW(2d)985.

415-76 109Conn547, 147A144. [a] 109Conn547, 147A144 (town must pay claimants furnishing labor and material before and irrespective of recovery from surety).

415-82½-New. A materialman could assert a claim against the fund due the contractor only as a general creditor, where right of action against the bond was waived. 179Ark253, 15SW(2d)327.

415-82⅓-New. Statute authorizing filing of materialman's claim if improvements were undertaken at expense of city does not authorize recovery where expense is borne by abutting owners. 13LaA141, 127S456(2dcase).

415-83 See also 28F(2d)981.

415-96 See also 28F(2d)981.

416-5 179Ark253, 15SW(2d)327.

416-7 225Ky501, 9SW(2d)229.

416-11 [a] (15) Gasoline and oils for use in engines used in construction are lienable materials. 225Ky501, 9SW(2d)229. (16) Claim for rental and moving concrete mixer not within statutory provision for lien for "material and labor." 28 OhA340, 162NE686. (17) Furnishing of instrumentalities to contractor used by him in performance of contract does not constitute "labor" within Lien Law. NJCh 148A401.

417-14 [e] **Assignment by contractor of sums due him** cannot divest rights of materialmen, laborers, and surety. 180Ark643, 22SW(2d)381.

417-15 225Ky501, 9SW(2d)229.

418-23 NJ 146A307.

418-32 [e] (3) Where materialmen file notice of claim over six months after time when last sewer certificates were delivered to bank financing contractor, claim for lien can only become effective as to amount still due contractor at time when notice was served. 198Wis416, 224NW720. [g] **Claimant entitled to share** in distribution, though failing to file in time, but filing before another lienor, without refiling. 28 OhA340, 162NE686.

418-33 [b] NJ 146A307.

420-47 [e] **In Wisconsin.**-198Wis416, 224NW720.

421-58½-New. An assignee of claims for labor and material used in street improvement has been held to have the right to funds in the hands of the city and owing to the contractor, superior to the right of the contractor's assignee. 150Wash340, 272P975.

421-62 [b] **Chancery court will not determine amount due from municipality to contractor** where conceded amount due is more than sufficient to satisfy claims of parties. NJCh 149A356(2d case).

421-70½-New. Statute providing new plan for protection of laborers and materialmen held not retroactive so as to reduce time for bringing suit. 38F(2d)608.

421-70⅓-New. Materialman's action to enforce claim against municipality is not one to enforce a mechanic's lien within statute limiting time for commencing such action. 38F(2d)608.

421-75 TexCivA 7SW(2d)942.

421-79 [a] **Subpœna issued after statutory period** necessitates dismissal of bill. NJCh 148A198. [b] **Suit to enforce mechanic's lien** is not begun till bill is filed and subpœna issued. NJCh 148A198.

422-92½-New. A showing that materials were actually delivered at the building raises the presumption that they were used therein. NJ 146A307.

422-92⅓-New. Evidence held admissible as bearing on the price agreed on for the subcontractor's services in grading a street. 208 Iowa1354, 227NW400.

422-92¼-New. Dispute requiring construction of contract specifications and drawings held question of law for court. 227AppDiv564, 238NYS637.

422-9 180Ark643, 22SW(2d)381.

422-10½-New. A bank to which a contractor assigns all amounts due him can impound by equitable garnishment only such part of the fund retained by the district from sums due the contractor. 180Ark643, 22SW(2d)381.

422-10⅓-New. Sufficiency of evidence in action against contractor. NJSup 152A186.

423-13 Wash 287P29.

423-17 234Ky385, 28SW(2d)465 (duty of town to use ordinary care).

432-29 Miss 121S295.

433-52 But see 228Ky512, 15SW(2d)303.

434-58 But see 335 Ill 368, 167NE40, 64ALR760.

434-62 31 OhA129, 166NE426.

436-91 But see 208Cal 19, 280P130.

438-17 229Ky222, 16SW(2d)1022.

439-52 [a] (2) In ascertaining damages to land from street paving, inquiries as to dust, drainage, change of grade, and destruction of other pavement, etc., are pertinent. 219Ala465, 122S448.

441-84 49RI 209, 141A609, 59ALR1241. [a] **Liability exists regardless of negligence.**-49RI 209, 141A609, 59ALR1241. [b] **Court's finding of damages due to removal of lateral support** was proper, though based on cost of construction of concrete garage for restoring wall, where cost of garage was less than cost of excavating for retaining wall. 208Cal 19, 280P130.

441-87 CalA 272P1082.

441-88 But see 134Misc29, 234NYS281; 49RI 209, 141A609, 59ALR1241.

443-21½-New. Under statutes permitting a municipality to spread the cost of improvement in ten installments and requiring the compensation to be apportioned to the first installment, the award for property taken for the improvement should be credited entirely to the first installment and credit of the award pro rata against the entire ten installments is invalid. 333 Ill 135, 164NE171.

448-93½-New. Different persons who have different interests in abutting property are each entitled to compensation for his injury. Miss 121S295.

451-32 208Cal 19, 280P130 (even in absence of negligence in its performance).

451-46½-New. A borough is liable to abutting owners for damages occasioned by change of grade in a street made by a county in constructing approaches to a county bridge where the borough enacted an ordinance authorizing the county to make the change of grade at the cost of the county and provided that benefits and damages accruing to abutting owners should be assessed as provided by statute relative to borough improvements. 91PaSuper100.

452-53 208Cal 19, 280P130 (where proper precautions to avert injury have not been taken); CalA 272P1082.

455-29 10PaDist&Co 528.

456-49 See also 12PaDist&Co 631.

469-93½-New. Some local improvement acts do not limit the liability of the city for condemnation judgments to assessments levied as they are collected in case of owners whose property is taken without their request or consent. 252 IllA601.

472-46 Wash 287P29.

474-74 [a] (5) Petition for damages to leasehold. 39GaA499, 147SE416.

476-18 228Ky512, 15SW(2d)303.

476-22 229Ky222, 16SW(2d)1022; 134Misc29, 234NYS281.

476-28 [e] **Evidence held inadmissible.**-Wash 287P29.

477-37 But see 335 Ill 368, 167NE40, 64ALR760.

478-52 335 **Ill** 368, 167**NE**40, 64**ALR** 760.

479-65 [b] (16) To sustain finding that location and alignment of sewer were intrinsically dangerous and inherently wrong and in such close proximity to plaintiff's property as to cause injury by removal of lateral support. 208**Cal** 19, 280**P**130. [c] (5) To show that settlement of church was proximately caused by subway excavation. 134**Misc**29, 234**NYS**281. [d] **Failure to establish claim of injury by change in grade of street** does not preclude recovery for injury by change in grade of sidewall. 228**Ky**512, 15**SW(2d)**303.

479-69 [c] **Evidence held sufficient to take to jury** question whether damage could be repaired at small expense. 335 **Ill** 368, 167**NE**40, 64**ALR**760.

479-72½-New. Whether excavation by owner was proximate cause of slide of earth complained of; **Wash** 287**P**29.

480-83½-New. Instruction precluding recovery against city for consequential damages from street grading in absence of negligence and not requiring erection of retaining wall held proper. **Wash** 287**P**29.

481-94 143 **Okl** 165, 288**P**278; **Tex** 26 **SW(2d)**910.

481-99 **Fla** 129**S**904(2dcase); 47 **Ida** 697, 280**P**227, 65**ALR**1372; 160**Tenn** 634, 28**SW(2d)**639.

482-3 94**Fla**347, 115**S**669; **Iowa** 228 **NW**316; 88**PaSuper**117; 160**Tenn**634, 28**SW(2d)**639.

482-6 208**Cal** 339, 281**P**385 (city derives its power to levy and collect special assessment from its power of taxation). [a] **Power to levy special assessment is exercise of same power as that exerted in levy of ordinary tax,** and both have their source in fundamental power inherent in all governments. 207**Cal** 697, 280**P**360.

483-16 208**Cal** 339, 281**P**385; 94**Fla** 347, 115**S**669; **Fla** 129**S**904(2dcase); 83**Mont**111, 270**P**638; 126 **Or**268, 269**P** 853, 60**ALR**260; 127 **Or**188, 270**P**927; **Tex** 26**SW(2d)**910; 151**Wash**577, 276**P** 888.

484-21 [b] **Assessments for benefits from special improvement** is referable to taxing power. **Mo** 28**SW(2d)**1008.

484-26 159**Tenn**619, 21**SW(2d)**628 (power rests on assumed special benefits).

484-27½-New. Legislative power to authorize levying of special assessments is reserved legislative power. **Tex** 26 **SW(2d)**910.

484-27¼-New. City may, when acquiring title to land taken for street, make assessment for street improvement. **NC** 153**SE**632.

485-34 See also 218**Ala**282, 118**S**467.

485-35 229**Ky**81, 16**SW(2d)**772.

485-40 323**Mo** 704, 19**SW(2d)**891 (what property will be benefited).

486-42 26**F(2d)**753; 97**Fla**1007, 122**S** 570; 168**Gal**, 147**SE**80.

487-54 219**Ala**465, 122**S**448.

487-60 **Fla** 129**S**904(2dcase); 167**Ga** 579, 146**SE**462; **Mo** 32**SW(2d)**63; **Tex CivA** 30**SW(2d)**679.

489-68 170**Ga**699, 154**SE**268.

489-72 167**Ga**579, 146**SE**462; 170**Ga** 699, 154**SE**268; 48 **Ida**77, 279**P**412(1st case); 321**Mo** 830, 13**SW(2d)**36.

490-76 170**Ga**699, 154**SE**268.

490-82 **Fla** 129**S**904(2dcase); 167**Ga** 579, 146**SE**462; 170**Ga**699, 154**SE**268; **Ga** 155**SE**34; 244**Mich**334, 221**NW**125; 318**Mo**192, 300**SW**1088.

491-85 226**Ky**409, 11**SW(2d)**94.

492-98 **Fla** 129**S**904(2dcase).

492-2 See also **Fla** 129**S**904(2dcase).

492-4 **Fla** 129**S**904(2dcase); **Mo** 32**SW (2d)**63; 134**Misc**810, 236**NYS**455 (city, in making local improvement assessment, must strictly follow form and manner provided by law).

493-5-6 168**Gal**, 147**SE**80.

493-12 **IndA** 170**NE**85; **Mont** 285**P** 185; **Nebr** 229**NW**280.

493-13 36 **OhA**84, 172**NE**841.

493-17 **TexCivA** 30**SW(2d)**655.

494-29 [a] 219**Ala**465, 122**S**448.

495-44 229**Ky**81, 16**SW(2d)**772.

497-71 89 **IndA**645, 165**NE**449.

498-75 **Iowa** 227**NW**421; 323**Mo** 704, 19**SW(2d)**891.

500-1 208**Cal** 339, 281**P**385; 94**Fla**347, 115**S**669.

501-6 339 **Ill** 360, 171**NE**535. [b] **Benefit to village and county** does not prevent construction by city of sewer from being local improvement. 339 **Ill** 360, 171**NE**535.

501-7 339 **Ill** 360, 171**NE**535.

501-17 338 **Ill** 605, 170**NE**683.

501-18 338 **Ill** 605, 170**NE**683.

501-19 338 **Ill** 605, 170**NE**683.

501-20 338 **Ill** 605, 170**NE**683.

502-29 **IndA** 170**NE**85; 244**Mich**660, 222**NW**177. [b] **Boulevards.**-244**Mich** 660, 222**NW**177 (highway held to be boulevard); 245**Mich**314, 222**NW**729. [c] **Certain highway having none of characteristics of boulevard** held street, rendering abutting property owners liable for special assessment. 248**Mich** 590, 227**NW**714. [d] **Paving of boulevard** is not "local improvement" for which special assessment may be levied. 248**Mich**590, 227**NW**714.

503-35 See also 197**NC**127, 147**SE**824 (2dcase).

504-54 [a] **Open space between curb and sidewalk** is not required by statute authorizing curbing when set out in street beyond sidewalk. **Mo** 32**SW(2d)** 63.

504-65 208**Cal** 339, 281**P**385 (construction of underground conduits for electric light power has been held to be public improvement).

505-66 126 **Or**268, 269**P**853, 60**ALR**260.

505-67 133 **Okl** 224, 271**P**1006(2dcase); 126 **Or**268, 269**P**853, 60**ALR**260.

505-69½-New. A municipality cannot construct replacement to a general lighting system to be used for commercial purposes by special assessments against a small portion of property which has already been taxed its proportionate share of the cost of the general system. **CalA** 275**P**835.

506-1 [a] (10) To assess abutting owners for cost of paving intersections where tax is not more than three fourths of entire cost of street paving. **TexCivA** 12**SW(2d)**§33. [d] **Costs included under statute authorizing assessment.**-**Mo** 32**SW(2d)**63.

507-2 [b] (2) Statute providing that cost of construction of intersections and crossings shall be paid by city has been held not to apply to cost of constructing sewer. 227**Ky**414, 13**SW(2d)**281.

508-4½-New. Area paved by railroad company under contract with city is not exempt from assessment of its proportionate share of half cost of paving intersection. 169**La**1103, 126**S**673.

509-26 250**NY**29, 164**NE**732.

510-38 90**PaSuper**82; 95**PaSuper**601.

510-41 95**PaSuper**601; 10**PaDist&Co** 515.

510-42 293**Pa**360, 143**A**20.

510-46 293**Pa**360, 143**A**20.

511-45 95**PaSuper**435 (will of city can be expressed only by city council); 10 **PaDist&Co** 515.

511-45½-New. First pavement is one put down originally as a permanent improvement, or one that has been adopted as such by municipal authorities. 293**Pa**360, 143**A**20.

511-45¼-New. Surveyors for a city, unless specifically authorized, may not express the will of city as to whether construction should be adopted as first pavement since the matter was for the city council. 293**Pa**360, 143**A**20.

511-46 94**PaSuper**512.

511-51 95**PaSuper**601.

511-52 See 293**Pa**360, 143**A**20.

515-24 339 **Ill** 360, 171**NE**535.

515-33 **Pa** 143**A**77 (construction of culvert not authorized under such statute).

519-95 177**Ark**775, 7**SW(2d)**972.

520-16 See also 227**Ky**481, 13**SW(2d)** 491.

521-22 206 **Iowa**285, 220**NW**354.

522-55 152**Wash**523, 27**NP**423(2dcase).

523-78 298**Pa**193, 148**A**77.

524-81 298**Pa**193, 148**A**77.

524-91 See also 227**Ky**414, 13**SW(2d)** 281.

525-94 10**LaA**667, 120**S**884; 134**Misc** 120, 234**NYS**694.

525-97 207**Cal** 697, 280**P**360.

525-99 143 **Okl** 165, 288**P**278.

526-3 86**Colo** 305, 281**P**355 (property occupied by municipally owned street railway).

526-10 226**Ky**652, 11**SW(2d)**693.

526-14 298**Pa**193, 148**A**77.

526-15 **Mont** 287**P**164; 26 **OhNPNS** 173.

527-24 [a] **Money expended to meet such assessments is for school purposes** because of special benefits conferred on school property. **Mont** 287**P**164.

528-36 170**Ga**699, 154**SE**268; 223**App Div**485, 229**NYS**810.

528-38 [b] **Acreage property fronting on improved street** is proper subject of assessment. 160**Tenn**31, 22**SW(2d)**237.

529-49 134**Misc**810, 236**NYS**455 (permanent user for railroad purposes).

530-60 196**NC**756, 147**SE**301(2dcase).

532-98 160**Tenn**31, 22**SW(2d)**237.

532-5 170**Ga**699, 154**SE**268; 335 **Ill** 388, 167**NE**61; 32 **OhA**152, 167**NE**396 (2dcase); 135 **Okl** 155, 274**P**651.

535-56 **NJSup** 150**A**242.

536-69 335 **Ill** 388, 167**NE**61.

536-78 **Cal** 291**P**397.

537-90 **Cal** 291**P**397.

537-98 152**Wash**523, 278**P**423(2dcase).

538-7 **Cal** 291**P**397.

539-9 But see 220**Ala**390, 125**S**635.

540-47 207**Cal** 697, 280**P**360.

540-49 [a] **In California.**-91**CalA**148, 266**P**969.

541-81 [a] **Private cemetery is not "public property"** as respects exemption. **Cal** 291**P**397 (cemetery held to constitute unit, no part being reserved for public purpose).

542-92 293**Pa**390, 143**A**111.

543-12 See also **Cal** 291**P**397. [a] 9**Pa Dist&Co** 773. [c] **Where permanent fund accumulated** from sale of lots and other lots were available for sale for substantial amount, cemetery association is liable for tax. 293**Pa**390, 143**A** 111.

544-29 140 **Okl** 178, 282**P**611 (Cherokee Indian homestead allotments exempt under federal statute). [a] (1) **Tex CommnA** 26**SW(2d)**1055; **TexCivA** 22 **SW(2d)**969. (2) **Tex** 26**SW(2d)**910. (3) Except with consent of owner, and then by complying with certain provisions of law. **TexCivA** 8**SW(2d)**819. (4) Special assessment for street improvements is not included in word "taxes" in homestead exemption clause. **TexCivA** 30**SW(2d)**440.

544-39 **Ga** 155**SE**34; 94**PaSuper**279 (right of way extending to top of slope held exempt).

544-44½-New. Successor of exempt railroad succeeds to predecessor's exemption from liability for street paving. **Ga** 155**SE**34.

545-53 11**PaDist&Co** 633.

546-59½-New. Extent of property to be assessed for a street improvement tax is, within constitutional limitations, exclusively a question for the legislature. 227**Ky**289, 12**SW(2d)**863.

546-62 130**Kan**625, 287**P**587 (unplatted land held not assessable); 229**Ky**419, 17**SW(2d)**255. [c] **Where only one side of street is paved,** lots on such side may be assessed therefor. 195**NC**550, 142**SE** 761.

546-71 [b] (2) Under Kentucky statute owners of lot fronting on road joining street improved and within five hundred feet may be assessed where territory was not defined into squares. 233**Ky**368, 25**SW(2d)**1038.

547-76½-New. Whether an assessment shall be on all property benefited or abutting property only is a question of legislative expediency. 84**Mont**556, 276 **P**938.

547-76¼-New. Abutting property on a street where improvements are made may be assessed. 98**Fla**508, 124**S**2(2d case).

547-76¼-New. Property abutting on a street may be required to pay costs of improving or paving the street. 86**Colo** 305, 281**P**355.

547-78 156**Miss**456, 125**S**813(2dcase) (property adjacent to neutral ground).

548-89½-New. Voting bonds held not to prevent city's assessing two thirds of widening street against abutting owner. 165**La**412, 115**S**638.

548-89¼-New. Where division lines between streets have been destroyed, or

where there are none, and no parallel street intervenes, the entire abutting parcel must be assessed to pay for street improvements. 227Ky289, 12SW(2d) 863.

548–90 TexCivA 15SW(2d)27.

549–19½–New. A municipality cannot take land not needed for street purposes, and by such method arbitrarily subject certain properties to special assessments which otherwise could not be levied against them. 246Mich149, 224 NW616.

551–69 221MoA917, 222MoA540, 288 SW785; 157Tenn624, 12SW(2d)389.

553–91 IndA 168NE187.

554–1 231Ky650, 21SW(2d)1022.

554–2 176Minn62, 222NW522; 84Mont 556, 276P938; NJSup 151A450.

555–1,6½–New. Where city mistakenly lays sewer on land, assessment upon landowner for construction is illegal. Mich 233NW179.

555–31 [a] **Levy for extension of water mains to serve outside territory** may be made without outlining in advance boundaries of territory affected. Kan 289P970.

556–42 [a] **Laying off benefit district for special improvement** is purely legislative function. Mo 28SW(2d)1008.

557–58 221MoA703, 285SW178. [b] **Matters not impairing validity of organization.**–Ark 31SW(2d)758.

558–76½–New. Particular statutes providing for organization of improvement districts have been held constitutional. 181Ark474, 26SW(2d)589.

558–78 Mo 28SW(2d)1008. [a] **Satisfactory test** is similarity of improvement and situation of property with respect to each street to be improved. 177Ark775, 7SW(2d)972. [b] **Four separate areas** joined by streets already paved are not necessarily lacking in unity. 177Ark775, 7SW(2d)972.

558–79 177Ark762, 9SW(2d)43; 148 Wash140, 268P164.

558–81 148Wash140, 268P164.

558–81½–New. It is within the discretion of the city council to divide the city into three drainage areas and then treat the entire system as one unit for the purpose of assessing the cost of construction of sewers. 227Ky414, 13SW (2d)281.

558–83½–New. Location of a building on two lots, only one of which is in an improvement district, has been held not to affect the validity of the improvement district. 177Ark762, 9SW(2d)43.

558–83½–New. A sewer district in servient areas not benefited by joint district sewers constructed on upper levels will be omitted in the creation of a separate joint sewer district. 319Mo 178, 5SW(2d)389.

558–83¼–New. Rules of construction in fixing boundaries of conservation district. 337 Ill 253, 169NE185.

560–20½–New. Under charter making quarter block unit for paving assessments but giving power to make assessment as deemed equitable, block may be extended halfway to next parallel street. 143 Okl 244, 288P957.

561–45½–New. Where unplatted property from the center to the north was assessed back from the east marginal line of an improved street for a distance of one hundred feet, and from the center of the unplatted land to the southeast boundary line of the improved district was two hundred and fifty feet from the east marginal line of the improved street on which it abutted, the east line of the improvement district through the south half of the unplatted property should be moved west for one hundred and fifty feet so as to make it one hundred feet from the east marginal line of the improved street. 148Wash 560, 269P829.

561–45½–New. Unplatted lands are assessed the same distance back that platted lands are assessed back from an improvement. 148Wash560, 269P829.

561–45¼–New. A statute, providing for the establishment of boundaries in an improvement district has been complied with, where platted property to the north of an unplatted farm was assessed back from the east marginal line of an improved street a distance of one hundred feet and the unplatted farm from the center to the north was also assessed back from the east line of the improved street for a distance of one hundred feet. 148Wash560, 269P829.

562–51 See also 318Mo 192, 300SW1088.

562–54 But see 318Mo 192, 300SW1088.

563–68 227Ky481, 13SW(2d)491.

563–79 Ariz 286P191.

563–80 Ariz 286P191.

563–80½–New. Some charters permit inclusion within a new joint sewer district of a district in the same drainage area, although included in a joint sewer district already established in which a joint sewer has been constructed. 319 Mo 178, 5SW(2d)389.

564–85 [b] **In Arkansas.**–178Ark872, 12SW(2d)771.

566–22 83CalA240, 256P601.

566–29 [a] **In Missouri.**–A 27SW(2d) 1081 (city held not to have followed natural drainage area).

566–33 [a] **Error of recorder** in writing minutes of council cannot invalidate proceedings otherwise valid. 179Ark503, 16SW(2d)588.

566–37½–New. Under same statute, it is within the discretion of the council to refuse a petition, depending upon the singleness, unity, and benefit of a proposed improvement. 179Ark68, 14SW (2d)237.

566–37⅓–New. Variance of the estimated cost of an improvement included in proceedings of the city council did not render the paving improvement district invalid where such variance was apparently a clerical misprint. 179Ark920, 18SW(2d)910.

567–47 [a] (2) Paving improvement district held not void for vagueness and indefiniteness of boundaries where boundary set out in initial petition followed well defined streets and watercourse. 179Ark920, 18SW(2d)910. (3) Fact that initial petition and ordinance for paving improvement district stated that certain streets in West Batesville were to be paved did not render district invalid for uncertainty. 179Ark920, 18 SW(2d)910.

567–49 179Ark920, 18SW(2d)910 (initial petition for paving improvement district is not required to set out kind of paving to be done or material to be used).

568–60 [a] **Minutes of city council** reciting that majority in value of owners of property in paving improvement district signed second petition held sufficient though finding was not contained in resolution or ordinance. 179Ark920, 18SW(2d)910.

568–77 [b] **Evidence held sufficient** to show assessment of exempt property and that its extension on assessment roll was made by county assessor, though made at instance of citizens. 179Ark 503, 16SW(2d)588. [c] **In Arkansas.**–179Ark503, 16SW(2d)588.

569–78½–New. A finding of city council that a second petition for a paving improvement district contained a majority in value of the property owners in the district became conclusive where no appeal was taken as provided by statute. 179Ark920, 18SW(2d)910.

569–78⅓–New. A second petition for a paving improvement district, naming the streets to be paved by reference to the ordinance, and omitting to state the kind of pavement intended to be used, has been held sufficient. 179Ark920, 18 SW(2d)910.

569–78¼–New. Failure of the minutes of the city council to recite that it found from the evidence that the first petition for a paving improvement district contained the required names did not render organization of the district invalid, since the court would presume that the evidence warranted the finding. 179Ark 920, 18SW(2d)910.

569–80 [b] (2) Statement in first petition for paving improvement district that improvement was not to exceed seventy per cent of assessed value of property was surplusage, so that there was no resulting variance by virtue of statement in second petition that improvement was not to exceed fifty per cent. 179Ark920, 18SW(2d)910.

570–10 [a] **Contention that ordinance creating street improvement district was not properly passed** because alderman who voted on ordinance did not reside in district has been held without merit, where alderman was at least de facto officer. 179Ark766, 19SW(2d) 1018, 64ALR1258. [b] **Charter prohibiting passage of ordinance on day introduced not applicable.**–Ida 292P1100.

570–12 179Ark920, 18SW(2d)910 (ordinance creating pavement improvement district was not required to designate kind of paving to be used). [c] **Sufficient description.**–179Ark920, 18SW(2d) 910.

571–32 Nebr 231NW751, 752 [citCJ].

573–57 179Ark530, 16SW(2d)992. [b] **Patent clerical or typographical errors in publication of ordinance** in incorrectly describing boundary which could not have been misleading do not invalidate district or ordinance creating it. 179 Ark530, 16SW(2d)992.

574–73½–New. An order of court establishing the boundaries of a conservancy district held void for erroneous description. 337 Ill 253, 169NE185.

574–85 177Ark775, 7SW(2d)972; 136 Misc278, 240NYS778; 148Wash140, 268 P164.

575–88 208Cal 339, 281P385 (discretion held not abused); 319Mo 178, 5SW (2d)389.

577–10 179Ark68, 14SW(2d)237.

577–16 [c] (2) Taxpayers are precluded from questioning correctness of finding of council that majority in value of owners of property signed petition for improvement, where suit was not brought within thirty days. 180Ark510, 22SW(2d)405.

577–17 [b] (1) See also 181Ark474, 26 SW(2d)589. (2) Collateral attack is not available to test validity of district where last assessment was used to determine majority in value of property owners, notwithstanding council records showing contrary due to clerical error in records. 179Ark503, 16SW(2d) 588.

578–24 180Ark510, 22SW(2d)405.

579–42 [b] (3) In Pennsylvania lot fronting on city street is liable as whole for assessment for street paving in municipality on which property fronts where six feet in depth of property is within such municipality and property extends less than one hundred feet into adjoining municipality. 91PaSuper275.

580–54 NJSup 144A634; 36 OhA84, 172 NE841; 151Wash577, 276P888.

581–55½–New. An assessment will be deemed arbitrary and illegal if, on examination of the record of the proceedings and other evidence, the conclusion is inescapable that the property assessed could not be benefited by the contemplated work, or, if benefited, the benefit would be trivial. 34F(2d)293.

581–55½–New. The question of benefits for which a special assessment may lawfully be levied may be raised only in the manner provided by law. 208Cal 339, 281P385.

581–57 [a] **Evidence held to show** that property sought to be assessed for construction of sewer was not benefited. NJSup 144A634. [b] **Question is to be ascertained** from facts in particular case. Ark 31SW(2d)758.

581–58 34F(2d)293; 86Colo 305, 281P 355; 297Pa260, 147A58.

581–60 177Ark762, 9SW(2d)43; 181 Ark318, 26SW(2d)572; 93CalA753, 270 P224; 94Fla347, 115S669; 321Mo 955, 13SW(2d)646; 133 Okl 224, 271P1006 (2dcase); 297Pa260, 147A58; 155Wash 459, 284P738.

582–64 133 Okl 224, 271P1006(2dcase).

582–67 93CalA753, 270P224; 135Misc 555, 239NYS83.

582–72 [e] (6) Other instances. 135 Misc555, 239NYS83. [i] **Land owned by private corporation and devoted to private purpose** is subject to sidewalk assessment regardless of special use of property. 330 Ill 264, 161NE486. [j] **Regrading streets.**–155Wash459, 284P 738.

583–74 94Fla347, 115S669; 223AppDiv 485, 229NYS10.

583–77 181Ark318, 26SW(2d)572.

583–77½–New. Extent of benefits is

within province of city council. **Cal** 291 P393.

583-33 218Ala282, 118S467; 219Ala 465, 122S448; 94Fla347, 115S669; 331 Ill 58, 162NE117. [c] (3) "Increased value of such property" means superadded special value, expressed in dollars and cents, of property abutting on street, in excess of increased value of property. 219Ala465, 122S448.

584-35 218Ala282, 118S467.

584-85½-New. Assessment of property for changing and widening streets which took into consideration matters of private contract, not included in improvement and involving physical changes which may or may not take place is levied on a fundamentally wrong basis. 149Wash214, 270P827.

584-89 331 Ill 58, 162NE117.

584-93 30 OhA576, 164NE369.

584-94 34F(2,1)293 (opening of street held of no benefit to railroad property).

586-6 36 OhA84, 172NE841.

586-9 84Mont556, 276P938.

586-10 84Mont556, 276P938.

586-12 See also 38GaA648, 145SE109.

586-13 219Ala465, 122S448; 205 Iowa 918, 218NW618; 84Mont556, 276P938.

587-14 84Mont556, 276P938.

587-17 149Wash214, 270P827.

587-26 208Cal 339, 281P385.

587-29 197Wis173, 221NW750.

589-62 177Ark775, 7SW(2d)972.

590-67 170Ga699, 154SE268.

590-75 126 Or49, 268P743.

591-78 134Misc120, 234NYS694; 143 Okl 244, 288P957.

592-99½-New. Omission of entrance walk from curb to property may be considered on the question of damages. 218Ala282, 118S467.

592-5 227Ky52, 11SW(2d)1008.

593-8 [a] (6) **NJSup** 151A211(2dcase).

594-22 Mo 23SW(2d)1006.

595-32 [a] (6) Agreement with railroad did not cover subsequent improvements. **NJSup** 142A753.

595-32½-New. Contract construed as precluding possibility of reverter in fee giving grantor beneficial interest chargeable with encumbrance of grading tax bills. Mo 23SW(2d)1006.

596-40 MoA 27SW(2d)1081; 134Misc 810, 236NYS455; 160Tenn612, 27SW (2d)1086; TexCivA 27SW(2d)877.

597-43 330 Ill 527, 162NE189.

597-46 117Nebr47, 219NW385.

598-48 160Tenn612, 27SW(2d)1086.

598-49 [d] **Specifications on file in city engineer's office** including plan for widening streets do not cure defect in resolution providing only for paving. 160Tenn612, 27SW(2d)1086.

598-56 168Ga1, 147SE80; **NJSup** 150 A571.

599-63 GaA 155SE218.

600-96 233Ky362, 25SW(2d)1025; 9 LaA618, 121S661; MoA 17SW(2d)604; 117Nebr251, 220NW289; 126 Or49, 268 P743; TexCivA 12SW(2d)833. [j] **Failure of ballots,** used to determine whether city's debt should be increased for purpose of making improvement, to specify that properties specially benefited would be assessed has been held not to affect validity of assessments. 297 Pa260, 147A58.

601-63½-New. Failure to follow proceedings not required by statute is no objection to validity to special improvement tax bills. MoA 17SW(2d)604.

601-69 134Misc810, 236NYS455.

601-75 322Mo 1024, 18SW(2d)394.

601-77 83CalA240, 256P601.

601-80 337 Ill 391, 169NE251.

602-85 MoA 17SW(2d)604.

602-92½-New. The council's power to pass an ordinance for a street improvement authorized by a published resolution and conforming thereto is not destroyed by the preamble referring to a later ineffectual resolution. 322Mo 1024, 18SW(2d)394.

602-92½-New. An ordinance not describing the property necessary to be taken for a sewer is not a valid basis for judgment confirming an assessment. 337 Ill 391, 169NE251.

602-94 [c] **Where ordinance provided that mailing was nonjurisdictional,** failure to receive notice held not to bar proceeding. 83CalA240, 256P601.

604-12 168Ga616, 148SE517; 320Mo 1047, 10SW(2d)923.

605-33 [c] **Cost of engineering and inspection service** held not subject to competitive bidding because of trust required and since it must be done before advertisement for bids. 320Mo 82, 6SW (2d)604.

607-62 168Ga616, 148SE517.

607-64 MoA 15SW(2d)353.

608-77½-New. Improper apportionment of the cost of a street improvement does not affect the validity of the contract under which the work was done. 229Ky419, 17SW(2d)255.

608-77½-New. Illegal payment of extra compensation to contractor may invalidate entire assessment. 138Misc194, 245NYS321.

608-79 221MoA1217, 299SW816.

609-83 MoA 17SW(2d)604.

609-93 221MoA1217, 299SW816.

609-94 221MoA1217, 299SW816.

610-95 221MoA1217, 299SW816.

610-1½-New. A street improvement assessment is not void because of extension of time for completion of the improvement granted after the expiration of the original time fixed by the contract. 86CalA553, 261P1041.

612-27 TexCivA 23SW(2d)791.

613-53 95PaSuper546 (notice to subsequent owner unnecessary where former owner had proper and sufficient notice prior to improvement).

614-68 [a] **Assessment illegal in absence of resolution.-Mont** 285P185. [b] **Filing of resolution and notice of filing** necessary to validity of levy and assessment. **Mont** 285P185.

614-70 130Kan450, 286P218. [a] **Where charter authorized city to prescribe by ordinance method of procedure** in levying special assessment, ordinance, when adopted, had same effect as if incorporated in charter. 208Cal 339, 281P385.

614-74 [a] (6) Notice of intention to introduce ordinance. **NJSup** 146A63(2d case).

615-87 208 Iowa422, 223NW371.

615-97 [e] (2) Ordinance, introduced after improvement is substantially completed and providing for local, in place of general, assessment, enacted without notice of intention, is invalid. **NJSup** 146A63(2dcase). [f] **Calling of special meeting.-153Miss**212, 121S859.

616-99 92CalA69, 268P388.

616-1½-New. Where the statute was not complied with in calling a special meeting of the mayor and aldermen for the purpose of levying special assessments, jurisdiction is not conferred by subsequent appearance by a taxpayer for protest at the time and place provided by law. 153Miss212, 121S859.

616-11 Cal 291P393.

616-15 170Ga699, 154SE268 (commissioners); **NJSup** 150A229 (act held inapplicable to temporary assessors). [e] **City clerk** is not authorized to make assessment under Missouri statute. 221 MoA1225, 299SW819. [f] **Courts are not authorized** to make local improvement assessments, but it is duty of proper municipal officers to make proper and lawful assessment. 98Fla508, 124S2(2dcase).

618-29 **NJSup** 150A229.

618-34 Ill 173NE165.

618-36 Ill 173NE165.

620-60 Mont 285P185.

620-69 Ill 173NE165 (judicial).

620-70 But see Kan 289P970.

621-84½-New. Until assessment has been acted on by the council, it is lawful for the assessment to be withdrawn by the board of assessors for the purpose of equalizing assessments, correcting errors, or for reconsideration of the assessment as a whole. 178Ark67, 10 SW(2d)41.

621-91 36 OhA84, 172NE641. [b] **What is local improvement is question of fact.-Ill** 173NE165.

622-92½-New. Failure of council to hold a hearing on a report of the commissioners held not arbitrary or illegal where a hearing was had on a revised report. **NJSup** 147A743.

622-94½-New. A city cannot object that an action for determination of the value of property and the amount to be assessed is premature because made in advance of sale for nonpayment of assessment. 229Ky81, 16SW(2d)772.

623-11 168Ga1, 147SE80; 134Misc810, 236NYS455 (whether railroad rights of way are benefited by sewer improvement is question for assessors to determine after notice and opportunity for hearing is given railroads).

624-19 36 OhA84, 172NE841.

625-27 But see TexCivA 20SW(2d)403.

626-35 35Ariz155, 275P5.

628-59½-New. Notice that assessment roll has been delivered and is open for inspection when in fact none was delivered before day set for hearing is insufficient. 220Ala639, 127S210.

628-62 [a] **Statement that statutory provisions relative to payment will be incorporated in assessment ordinance** need not be included in notice of hearing on assessment. TexCivA 26SW(2d) 382.

629-71 TexCivA 30SW(2d)655.

630-6 WVa 154SE136, 137 [quotCJ] (holder of deed of trust held not entitled to notice).

631-16 118Nebr644, 225NW755.

631-35 220Ala415, 125S681.

635-96 See also 167Ga222, 145SE84. [a] **Cemetery property** has been assessed as unit. Cal 291P397.

635-97 219Ala465, 122S448; 228Ky 529, 15SW(2d)416.

635-99 228Ky529, 15SW(2d)416; 229 Ky598, 17SW(2d)703.

636-10 TexCivA 30SW(2d)655. [a] **Construction of statute.-TexCivA** 30 SW(2d)655.

636-21 But see 134Misc120, 234NYS 694.

637-34 98Fla508, 124S2(2dcase).

637-38½-New. Where a new board of assessors was told in the presence of the city council by the city attorney that it would be necessary practically to double the assessment of benefits as made by the old board in order to construct improvements for waterworks and a sewer system, it was held that doubling of the assessment by the new board pursuant to such statement was made upon a wrong basis and was arbitrary and void. 178Ark67, 10SW(2d) 41.

637-42½-New. That the city council did not, in confirming the commissioners' report, make a deduction for land deeded to the city by a railroad in the amount of assessment against railroad property has been held not to render the entire assessment void, as the railroad did not ask for a deduction. 34 F(2d)293.

638-53 181Ark318, 26SW(2d)572; 94 Fla347, 115S669; 176Minn62, 222NW 522; 117Nebr251, 220NW289; Nebr 230NW108; 136Misc278, 240NYS778; 30 OhA576, 164NE369; 160Tenn31, 22 SW(2d)237.

639-60 181Ark318, 26SW(2d)572.

640-68 229Ky598, 17SW(2d)703.

640-70 231Ky650, 21SW(2d)1022.

640-74 180Ark1075, 24SW(2d)856 (assessment held valid).

641-34 [b] (1) 83CalA240, 256P601. (3) Improvement ordinance, depriving property owner of right to pay in installments for noncompliance, is not invalid. 83CalA240, 256P601.

641-85 229Ky81, 16SW(2d)772.

641-94½-New. A former property owner's contributions, paid in conjunction with the federal government, state, and city, cannot be credited in determining the extent to which the property is assessable for a new improvement. 229Ky81, 16SW(2d)772.

641-96 But see 227Ky289, 12SW(2d) 863.

642-6 320Mo 682, 9SW(2d)593.

642-13 See also 205 Iowa918, 218NW 618.

642-18½-New. Under some statutes a tract of land, not intercepted by streets or otherwise and not abutting on any other street, must be appraised as a whole for the purpose of fixing the amount of assessment collectable, for street paving. 227Ky289, 12SW(2d) 863.

642-18½-New. Appraisement of such undivided tract for the purpose of determining street assessments under such statutes is not binding on the city, where only a portion of the tract was included. 227Ky289, 12SW(2d)863.

643-21 178Ark269, 10SW(2d)511.
643-22 See also 197Wis173, 221NW 750.
643-26 208 Iowa709, 226NW41.
643-30½-New. Under some statutes assessment is limited to one half of the value of the land after the improvements are made, excluding the value of the improvements. 229Ky81, 16SW(2d)772.
644-39 167Ga222, 145SE84; 330 Ill 31, 161NE80; 320Mo 82, 6SW(2d)604.
644-50 320Mo 82, 6SW(2d)604; 33NM 519, 270P886; 130 Or444, 280P657 (amount not excessive).
645-55 320Mo 82, 6SW(2d)604.
645-58 320Mo 82, 6SW(2d)604.
645-61 See also 225Ky61, 7SW(2d)859.
645-64 218Ala282, 118S467.
645-65 33NM519, 270P886.
647-11 [i] **Municipality must proceed along lines laid down by legislature,** as regards basing assessments only on work provided for in ordinance. NJ 151A449. [j] **Portions of work not provided for** in ordinance are improper basis for assessments. NJ 151A449.
648-13 [e] **Trunk line sewers** and water mains to meet needs of increased population and which were part of original installation have been held properly assessed against affected property. 155Md427, 142A634.
648-14 93CalA155, 269P186.
649-15 NJ 151A449; NJSup 151A450.
649-17 218Ala282, 118S467; 221MoA 853, 288SW88.
649-20 330 Ill 31, 161NE80.
650-26 [a] **That cost greatly exceeded estimate** did not necessarily show fraud. 225Ky61, 7SW(2d)859.
650-34 34F(2d)293. [c] **Assessment held not excessive.**-155Wash459, 284P 738.
650-37 167Ga222, 145SE84.
651-60 94Fla347, 115S669; 95Fla984. 117S507(2dcase); 226Ky72, 10SW(2d) 475. [b] (1) 94Fla347, 115S669. [e] **One half cost** of improvements on street adjoining river properly adjudged against city. 234Ky500, 28SW(2d) 509.
652-62 [b] **Plan of apportionment may be changed** by ordinance where no steps in pursuance thereof have been taken. 225Ky219, 7SW(2d)1042.
652-67 [a] **In Texas.-CivA** 26SW(2d) 382.
653-68½-New. An ordinance providing that the cost of construction or improvement of streets and sidewalks shall be borne by abutting owners on either side of the street to the extent of one third of the cost of the street and curbing and guttering, the remaining third to be paid by the city, has been held not to provide a general plan for the apportionment of the cost of sidewalk construction. 226Ky72, 10SW(2d)475.
653-68¼-New. An ordinance, dividing the cost of curbing and guttering, one third against property owners on either side of the street, and one third against the city, refers to the construction of the curbing and guttering as part of, and accompanying, the carriageway, and not to their construction as part of a sidewalk. 226Ky72, 10SW(2d)475.
653-74½-New. Under some statutes all persons appointed to office in a municipality may be removed by the officer or body making the appointment. Iowa 227NW122 (applied to position of sanitary and quarantine officer held by member of police force serving under civil service rules when appointed).
654-89 244Mich384, 221NW125; 246 Mich149, 224NW616; 134Misc120, 234 NYS694. [f] See also 335 Ill 388, 167 NE61. [g] **Hopes, speculation, or prejudice** cannot determine part each owner must pay. 27F(2d)618.
654-90 118Nebr644, 225NW755. [a] **Levy of four-fifths of cost of sewer on two-fifths of area** held not improper where such area was directly benefited. 40F(2d)216.
655-1 231Ky65, 21SW(2d)127.
655-2 [b] (2) Statute providing for apportionment of cost of paving street intersection on basis of foot frontage held not unconstitutional if applied to area paved by railroad company under contract. 169La1103, 126S673. [c] **Reasonableness of classification** depends on proof, mere statement of reasons not being proof that they have substantial foundation. 27F(2d)618.
656-13 160Tenn31, 22SW(2d)237 (apportionment on basis fixed by statute properly delegated to city engineer). [a] **As ministerial act under statute fixing basis of apportionment.**-160Tenn31, 22SW(2d)237.
657-26 234Ky500, 28SW(2d)509 (improving street intersection on abutting property owners).
657-37 151Wash577, 276P888.
658-41 85Colo 198, 274P743; 335 Ill 388, 167NE61; 143 Okl 244, 288P957.
658-42 246Mich517, 224NW619.
658-43 319Mo 880, 6SW(2d)570.
659-53 [a] (2) Purpose of statute requiring board of assessors to assess value of benefits for public improvement to accrue to each piece of property and requiring board to consider value, area, location of property, improvements thereon, and its relation to other property, is to determine effect of proposed improvement upon market value of real property, including buildings on it. 178Ark67, 10SW(2d)41.
660-59 Wash 292P113.
660-62½-New. A statute authorizing an assessment to be apportioned to abutting owners in a ratio of each property's assessed valuation on a street or a part thereof covered by petition has been held invalid because authorizing an assessment on a basis other than that of benefits. 197Wis173, 221NW 750.
660-63 But see 178Ark67, 10SW(2d)41.
660-68 Wash 292P113.
661-75 151Wash577, 276P888.
661-82 See also 167Ga222, 145SE84.
662-88 151Miss840, 119S324; 221MoA 917, 222MoA540, 288SW785.
663-94 Mo 24SW(2d)106.
664-7 244Mich384, 221NW125.
664-8 But see 96PaSuper1.
664-14 Ark 31SW(2d)758.
665-22 But see 229Ky598, 17SW(2d) 703.
665-24 [c] **Statutes applicable to nonabutting property.**-148Wash140, 268P 164.
665-29½-New. Entire cost properly imposed upon abutting property on one side of street where property on opposite side nonassessable. 96PaSuper1.
666-45 94PaSuper101.
666-46 91PaSuper409; 94PaSuper415.
666-47½-New. The propriety of making assessments according to the front-foot rule is dependent upon the character of the property which abuts upon the improvement and not that of land surrounding a village or town. 91Pa Super409.
666-48 221MoA917, 222MoA540, 288 SW785.
670-8 136 Okl 64, 276P226.
671-19 229Ky419, 17SW(2d)255.
672-35 Cal 288P673; 229Ky81, 16SW (2d)772.
672-36 Mont 285P185.
673-57 See also 221MoA703, 285SW 178.
674-71 218Ala534, 119S226.
674-76 218Ala534, 119S226. [b] **Maps held sufficient.**-218Ala534, 119S226.
675-80 TexCivA 30SW(2d)655. [g] (2) Not necessary to separate interest of joint owners. TexCivA 27SW(2d) 877.
676-90 TexCivA 22SW(2d)327.
676-93 218Ala534, 119S226.
676-97½-New. That assessment rolls were taken from the clerk's office to the engineer's office temporarily without proper authority will not affect the assessment. 219Ala465, 122S448.
677-2 335 Ill 299, 167NE106.
677-9 166La64, 116S670.
678-12 Iowa 231NW370 (that mistake in estimate of value of lot would be corrected).
678-13 176Minn240, 223NW135.
678-14 218Ala282, 118S467; 96CalA 498, 274P371; 208 Iowa422, 223NW 371; 117Nebr251, 220NW289. See also 177Ark775, 7SW(2d)972.
679-28 205 Iowa918, 218NW618; Tex CivA 16SW(2d)542.
679-31 Iowa 231NW370.
679-32 155Wash459, 284P738 (prima facie correct).
680-45 181Ark318, 26SW(2d)572; 208 Iowa422, 223NW371.
680-48 205 Iowa918, 218NW618.
680-56½-New. On collateral attack the court must indulge the presumption that the assessor considered all elements of enhancement of value or detriment. 177Ark775, 7SW(2d)972.
680-56¼-New. An assessment not appealed from is binding against abutting owners. Miss 122S484.
680-56¼-New. Actions of board of assessors and of revision are conclusive in absence of proof of fraud or substantial error. 40F(2d)216.
680-57 TexCivA 19SW(2d)442.
680-59½-New. Evidence of the value of a lot with and without an improvement has been held to warrant a finding as to the value of the lot exclusive of buildings. 229Ky81, 16SW(2d)772.
680-61 MoA 24SW(2d)218. See also MoA 300SW1039. [a] (4) Changes in grade. MoA 24SW(2d)218.
680-62½-New. , nor because the improvement did not permanently enhance the value of the property. 221MoA703, 285SW178 (oiling streets).
680-64½-New. An aggregate tax bill issued by a city clerk against two lots owned by the same persons for a sum exceeding the total assessment against them in the paving ordinance; in violation of an ordinance levying assessments separately, is void. 221MoA 1225, 299SW819.
680-64¼-New. Paving certificates are not void where property holders were accorded hearing after proper notice. TexCommnA 23SW(2d)300.
681-84½-New. Under statute a city issuing tax bills may, by a later special ordinance, substitute for a provision in the general ordinance that tax bills be issued in the name of the city collector a provision that bills be issued to a committee. MoA 17SW(2d)604.
681-84¼-New. Under its charter, the city of St. Louis may issue special tax bills payable to itself, instead of to a contractor, in order that it may be reimbursed for having paid the contractor for a street improvement. 321Mo 830, 13SW(2d)36.
682-95 221MoA853, 288SW88.
682-97½-New. An assessment levied against property and the owner of a one-half undivided interest therein as sole owner has been held void. Tex CivA 7SW(2d)594.
682-98 [b] **Indorsement by contractor's agent attested by city treasurer** that tax bill was satisfied has been held mere receipt. MoA 30SW(2d)182.
682-99 [a] (3) Tax bill signed by councilman as "mayor pro tem." MoA 24SW(2d)218.
683-14 See also 318Mo 192, 300SW 1088.
683-15 318Mo 192, 300SW1088.
683-28 221MoA917, 222MoA540, 288 SW785.
684-37 221MoA1217, 299SW816; MoA 20SW(2d)930 (burden of proof is on party attacking validity).
684-43 TexCivA 19SW(2d)948; Tex CivA 27SW(2d)877.
684-44 221MoA917, 222MoA540, 288 SW785; MoA 17SW(2d)604.
684-46 MoA 17SW(2d)604.
684-47 MoA 17SW(2d)604.
684-49 MoA 17SW(2d)604.
684-50 MoA 27SW(2d)433.
684-51 MoA 7SW(2d)456; MoA 27SW (2d)433.
684-53 221MoA708, 285SW130.
685-58 MoA 30SW(2d)182 (assignment by written trust agreement).
685-58½-New. Special tax bills may be transferred by delivery. MoA 17SW (2d)604.
685-58¼-New. Tax bills may pass by assignment. MoA 24SW(2d)218.
685-60 320Mo 1047, 10SW(2d)923.
685-68 TexCivA 26SW(2d)382.
685-69 134Misc810, 236NYS455.
686-83½-New. A purchaser after a protest meeting in provisional order proceedings is not estopped to contest the assessment because he was a member of council during such proceedings

but ceased to be such before the purchasing and before the assessment was finally made. 34NM227, 279P876.

687-85 231Ky65, 218W(2d)127 (after completion of work).

687-89½-New. Where estoppel is operative, it will be enforced at law, in summary proceedings and in equity. 168Ga616, 148SE517.

687-92 168Ga616, 148SE517; 244Mich 38, 221NW292.

688-93 IndA 170NE85 (no colorable authority whereby contractor may be said to have acted in good faith).

689-10 27 OhA258, 161NE29. [i] **Waiver of limitation inoperative.**–27 OhA258, 161NE29.

691-33 208 Iowa709, 226NW41.

691-37 95Fla984, 117S507(2dcase); 40 GaA56, 149SE634; 231Ky65, 218W(2d) 127; 244Mich232, 221NW290; NJSup 150A571; TexCivA 278W(2d)877.

691-38 226Ky518, 118W(2d)127; 229 Ky419, 178W(2d)255; 233Ky362, 25 SW(2d)1025; 9LaA618, 121S661; 156 Miss456, 125S813(2dcase); 320Mo 682, 98W(2d)593; MoA 158W(2d)253; 118 Nebr158, 223NW953; 196NC756, 147 SE301(2dcase).

693-61 168Ga1, 147SE80; 9LaA618, 121S661.

695-84 34NM227, 279P876.

695-95 208Cal 339, 281P285 (ordinances); 95Fla984, 117S507(2dcase); GaA 155SE218; 231Ky650, 218W(2d) 1022; 9LaA618, 121S661. See also 134 Misc810, 236NYS455. [a] **Holder of trust deed cannot attack assessment as confiscatory** where assessment was regular and he failed to make protest. WVa 154SE136.

695-96 218Ala534, 119S226; 220Ala 415, 125S681; TexCivA 278W(2d)877.

696-98 GaA 155SE218; 160Tenn612, 278W(2d)1086; TexCivA 278W(2d) 877.

696-1½-New. A property owner who files written notice of alleged defects in proceedings for creation of a special sewer district as required by statute and within the statutory time is not estopped to question the validity of the council's acts by failing to appear before it and object to the inclusion of his property in the district. 84Mont 556, 276P938.

696-1⅞-New. Where an ordinance provided the time for appeal to the board of supervisors where the assessment is claimed incorrect, a property owner could not attack the assessment where he did not prosecute the appeal and the appeal was denied. 99CalA791, 279P 490.

696-1¼-New. In absence of notice of assessment required by law, failure to file objections creates no estoppel. 220 Ala639, 127S210.

696-1⅛-New. Property owner's failure to protest street improvement or district benefited forecloses inquiry on such questions. Cal 288P1083.

696-4 197Wis173, 221NW750.

696-5 TexCommnA 238W(2d)300.

696-6 35F(2d)331.

696-9 168Ga616, 148SE517.

696-12 [c] (2) Assessment not invalidated where landowner failed to appeal to board of supervisors. 83CalA240, 256 P601.

697-13 [g] **Where property owner was justified in believing his property would not be assessed** for improvement and did not apply to board for relief before confirmation of roll, he will not be denied relief from excessive assessment. 246Mich149, 224NW616. [h] **Filing of notice requesting installment payment assessments** does not estop abutting property owner from asserting in suit against him by assignee of tax bill that contract is void. 320Mo 1047, 108W (2d)923. [i] **Petition for pavement of street** does not preclude grantee of petitioner from resisting liability for special assessment. 248Mich590, 227NW 714. [j] **Seeking to have contract awarded to particular bidder** does not estop taxpayer from alleging that ordinance under which improvement was made was void. 338 Ill 488, 170NE713.

697-23 NJSup 147A743.

697-24 TexCivA 278W(2d)877.

698-30 233Ky528, 268W(2d)566.

698-46 218Ala534, 119S226; 220Ala 639, 127S210; 180Ark510, 228W(2d) 495; 202Cal 542, 261P1006; NJSup 143 A861. But see Iowa 231NW370.

699-51 96CalA498, 274P371; 208 Iowa 422, 223NW371; 231Ky650, 218W(2d) 1022; 152Wash523, 278P423(2dcase).

700-52 202Cal 542, 261P1006; 200 Ind 443, 164NE313; 152Wash523, 278P423 (2dcase).

700-55 TexCivA 128W(2d)833. [a] **In passing on defense of limitation,** court may look to original petition to see when it was filed without its being offered in evidence. TexCivA 128W(2d) 833. [b] **Limitation for bringing suit** does not apply to fundamental defects. TexCivA 128W(2d)833.

701-83 158Tenn423, 148W(2d)728.

701-88 229Ky419, 178W(2d)255.

701-97 202Cal 542, 261P1006.

701-3 TexCivA 278W(2d)877.

701-5 208 Iowa422, 223NW371.

702-14 Iowa 231NW370.

703-27 [b] (2) Property owners not objecting to creation of improvement district but only to amount of assessments were not required to respond to preliminary notice in order to raise objection to cost of assessments. 86Colo 305, 281P355. [c] **Jurisdiction of city council is not exhausted** where one objection remains for consideration. Cal 291P395.

703-35 208 Iowa422, 223NW371.

704-43 332 Ill 286, 163NE685. [b] **Evidence.**–218Ala282, 118S467.

704-45½-New. Landowners' objection to confirmation of an assessment for an improvement has been held untenable where public hearing was had and the objecting landowners received notice. 336 Ill 93, 167NE774.

704-53 But see IndA 172NE658.

705-61½-New. Appeal must be taken within thirty days, under some statutes. Cal 291P397.

708-30 [b] **City council can increase assessment** against nonobjecting owners. Cal 291P395.

708-38½-New. Where the majority of abutting property owners petitioned for a street improvement under an agreement to pay according to their respective abutting frontage, and the aldermen passed a resolution assessing the cost of improvements upon the abutting owners, the action of a new board of aldermen in rebating part of the original assessment on the ground that the total cost was more than had been anticipated has been held unauthorized. 196 NC301, 145SE562.

708-39 92CalA69, 268P388; 246Mich 517, 224NW619.

709-41 See also 1LaA491.

709-45½-New. Recital in judgment or order making assessment final that assessment roll was delivered to clerk as per notice is not conclusive on direct attack. 220Ala639, 127S210.

709-47 NJ 141A662. [b] **In New York.**–223AppDiv845, 228NYS190 (assessment not reviewable by mandamus to direct cancellation).

709-48½-New. Proceedings are not void because hearing was before judge from outside county in absence of evidence that city paid his compensation or expenses. 339 Ill 638, 171NE737.

712-19 [b] **Ordinance attached to petition or filed** becomes part of petition and hence part of record. 333 Ill 562, 165NE211.

712-27½-New. City's motion to dismiss is not confession of errors when withdrawn before ruling. 339 Ill 638, 171NE737.

713-41 333 Ill 562, 165NE211.

713-41½-New. Landowners objecting to the confirmation of a special assessment for an improvement could not urge an objection that the names of other property owners were omitted from the assessment roll. 336 Ill 93, 167 NE774.

713-41⅛-New. An objection of want of notice to others of a public hearing on a proposed improvement was not available to landowners objecting to the confirmation of an assessment. 336 Ill 93, 167NE774.

713-41¼-New. Landowners objecting to the confirmation of an assessment could not complain that notices of a public hearing on matters of improvement were mailed to persons paying taxes on lots which might be benefited from the improvement. 336 Ill 93, 167 NE774.

713-44 338 Ill 228, 170NE308 (properly refused).

713-50 [a] (3) It is essential for city to aver and prove that ordinance authorizing improvement has been passed by city council. 333 Ill 562, 165NE211. (4) Ordinarily it is unnecessary to prove ordinance in special assessment proceeding. 333 Ill 562, 165NE271. (5) Where property owners' objections put in issue passage of ordinance in special assessment proceeding, it is necessary to prove ordinance. 333 Ill 562, 165NE211.

714-55 [a] (4) 338 Ill 196, 170NE313 (2dcase). (7) Other instances. 338 Ill 196, 170NE313(2dcase).

714-55½-New. Street widening ordinance introduced must be presumed to be one recommended by local improvement board until overcome. 339 Ill 638, 171NE737.

714-57 337 Ill 547, 169NE731 (testimony of resident in vicinity identifying street); 338 Ill 196, 170NE313(2dcase) (testimony of engineer as to distances not shown on plans); NJ 141A662.

714-60 330 Ill 264, 161NE486.

715-66 See also 330 Ill 264, 161NE486.

715-74 [a] (5) 331 Ill 58, 162NE117. (8) Valuation of property. 205 Iowa 456, 218NW468. (9) That assessments exceeded special benefits. 176Minn62, 222NW522. [b] (1) 330 Ill 264, 161NE 486. [c] 337 Ill 547, 169NE731.

715-77½-New. It is not necessary that twenty eight days elapse between date of first publication of notice and date of validation hearing. 40GaA713, 151SE 413.

716-83 [b] **Special form of verdict need not be submitted** requiring jury to set down after each parcel of objectors' land amount jury thought properties would be benefited. 337 Ill 287, 169NE 173.

716-92 [b] 330 Ill 264, 161NE486.

717-94 [c] 330 Ill 264, 161NE486. [f] **Erroneous or properly refused instructions.**–330 Ill 264, 161NE486 (that jury's view of property could be considered as evidence). [g] **Proper or sufficient instructions.**–330 Ill 264, 161NE486.

718-18 170Ga699, 154SE268.

719-51 155Wash459, 284P738.

719-53 155Wash459, 284P738.

720-85 205 Iowa918, 218NW618.

721-8½-New. Filing order in tax collector's office, without previous entry on court minutes, is a mere procedural defect not affecting validity of assessments. NJ 141A669.

721-12 [k] **Order as to cost of improvement not final** as to extras held not within contract. 330 Ill 31, 161NE80. [l] **Variance between judgment and ordinance.**–335 Ill 299, 167NE106. [m] **Election of city to proceed with improvement pending appeal.**–338 Ill 41, 169NE734 (election signed only by attorney for board held sufficient).

723-22 But see 332 Ill 236, 163NE672.

723-33 330 Ill 88, 162NE214. See also 332 Ill 236, 163NE672.

723-41 [a] **As to power of appellate court to enforce lien.**–Ala 128S794.

724-42 Iowa 232NW806.

724-46 157Tenn624, 12SW(2d)389.

724-50 [b] **In New York.**–134Misc810, 236NYS455.

724-52 NJSup 151A448(2dcase).

725-65 Iowa 232NW806. [a] **Statutory provisions are mandatory.**–Iowa 232NW 806.

725-72 130 Or444, 280P657.

726-79 197NC300, 148SE249(2dcase).

727-97 [b] **Amendment.**–Iowa 232NW 806.

727-3 [a] (1) 218Ala282, 118S467.

727-5 Ind 167NE132.

728-13 208 Iowa519, 223NW884.

728-17½-New. [§ 3233a] (1½). **Injunction Pending Appeal.** A bill alleging threatened entry, by the city upon a subway constructed by the owner of

property abutting a highway being widened under local improvement proceedings and that the walls and pipes in the subway would be destroyed states a sufficient case for an injunction notwithstanding pendency of an appeal from judgment in a local improvement proceeding. 333 Ill 422, 164NE673.

728-31 218Ala282, 118S467; 219Ala 465, 122S448 (transcript held prima facie evidence of correctness of assessment).

729-34 218Ala282, 118S467. [a] (5) 160Tenn31, 22SW(2d)237.

729-38 219Ala465, 122S448. [c] **Evidence held inadmissible.**–219Ala465, 122 S448.

729-39 219Ala465, 122S448.

729-40 219Ala465, 122S448.

730-47 [b] **Evidence held inadmissible.**–220Ala618, 127S193 (testimony showing insurance collected).

730-51 [b] (2) 205 Iowa918, 218NW 618.

730-56 Ala 130S66. [e] (2) Instructions held proper or improperly refused. 219Ala465, 122S448. (3) Instructions held erroneous or properly refused. 219 Ala465, 122S448. (4) Instruction in paving proceeding that property owner was not entitled to damages from surface water if construction did not change natural flow held proper. 220Ala618, 127S193.

731-70 87 IndA433, 160NE46.

731-71 See also 138Misc194, 245NYS 321.

731-73½-New. whether property included in a street improvement, district is subject to assessment; 48 Ida65, 279 P1095.

731-76 NJSup 151A450.

732-80 TexCivA 26SW(2d)382 (in absence of fraud).

732-82½-New. whether property owners derived proportionate benefits, in absence of showing of fraud; TexCivA 26 SW(2d)382.

732-95½-New. If a special assessment may be reviewed by courts when complained of as confiscatory, the rule is not otherwise merely because the assessment is according to frontage. 34NM227, 279 P876.

732-95½-New. A decision of common council as to the size of a storm sewer is not reviewable by the court unless there is a grave abuse of discretion and apparent lack of support. 134Misc810, 236NYS455.

732-97 176Minn240, 223NW135.

733-1 [d] **In Alabama.**–219Ala465, 122S 448.

733-6½-New. A technical irregularity or severable illegal items included in an assessment may be corrected or eliminated on trial of appeal in the circuit court. 219Ala465, 122S448.

733-12 249NY150, 163NE132.

734-30½-New. Judgment held properly amended so as to eliminate item of interest on amount of increased value. Ala 127S518.

734-30½-New. Statute authorizing execution on final judgment on appeal from assessment applies only to causes appealed to supreme court. Ala 128S 794.

734-30¼-New. Where jugment is silent as to lien, city may petition court for order of sale or proceed to sell under power granted by statute. Ala 128S794.

734-38 But see Ala 130S66.

734-44 [a] **Appeal allowed only for purpose of questioning court's jurisdiction.**–89 IndA389, 166NE609.

735-49½-New. Where proceeding was filed and objection to jurisdiction overruled and default entered all in one term, and at subsequent term appellants were allowed to appeal from order entered in previous term, appeal must be dismissed. 338 Ill 426, 170NE313(1stcase).

735-56½-New. Where village abandoned prosecution of appeal by failing to file transcript in supreme court, it was not precluded from prosecuting another proceeding based on different ordinance. 338 Ill 228, 170NE308.

735-56½-New. Under statutes in some jurisdictions municipality may appeal from judgment reducing or cancelling assessments. 155Wash459, 284P738.

735-58 331 Ill 88, 162NE214.

735-59 331 Ill 88, 162NE214.

735-61 NC 153SE632.

736-63 228Ky529, 15SW(2d)416.

736-81 331 Ill 88, 162NE214.

736-82 330 Ill 31, 161NE80; 332 Ill 236, 163NE672. See also 331 Ill 88, 162NE 214.

736-83 See also 332 Ill 236, 163NE672.

737-96½-New. Bill of injunction to preserve status quo in property pending appeal may be maintained by a property owner. 333 Ill 422, 164NE673.

737-96½-New. Under statutes municipality may file its election to proceed with local improvements pending appeal from order confirming assessment. 338 Ill 41, 169NE734.

737-1 330 Ill 264, 161NE486.

737-7 339 Ill 638, 171NE737.

738-13½-New. County court's determination that improvement is local improvement is subject to review. 338 Ill 605, 170NE683.

738-18 [c] **Regularity of successive proceedings.**–208 Iowa528, 224NW39 (where not incorporated in record).

739-26 335 Ill 388, 167NE61.

739-33½-New. The court of appeals could determine on appeal that the preponderance of testimony in the circuit court was sufficient to overthrow the assessment. 157Tenn624, 12SW(2d)389.

740-42 330 Ill 264, 161NE486.

740-45½-New. Incompleteness of record on appeal is alone sufficient to sustain order confirming assessment. 338 Ill 41, 169NE734.

740-48 330 Ill 264, 161NE486; 338 Ill 228, 170NE308.

741-72½-New. Certiorari is the proper remedy to review an order of the judge of the circuit court correcting assessment. NJ 141A666 (order may be returned to judge for purpose of correcting error or omission).

742-77 AlaA 130S174.

742-86 158Tenn423, 14SW(2d)728.

742-93 AlaA 130S174; NJ 146A328(1st case).

743-1 NJSup 147A743.

744-20 But see NJSup 147A626.

744-21 NJSup 144A634.

744-23 NJ 141A590; NJ 141A669 (right to certiorari not barred by laches).

747-67 NJ 141A669.

747-71 NJSup 147A743 (court should not change classification of street work as assessable improvement where prosecutor urged improvement).

748-86 167Ga222, 145SE84; 117Nebr 251, 220NW289.

748-2 Kan 289P970.

748-4½-New. or because description of land was not by separate lots as prescribed by statute; 220Ala639, 127S210 (sufficient description by acreage not objected to).

749-13 178Ark67, 10SW(2d)41.

749-14½-New. Direct attack on assessment is made by timely suit against district commissioners to have it declared void. 181Ark318, 26SW(2d)572.

750-28 But see 298Pa203, 148A112.

751-47 246Mich149, 224NW616.

752-53 227Ky481, 13SW(2d)491.

752-66 167Ga222, 145SE84; 335 Ill 213 167NE33; 94PaSuper106.

754-75 176Minn76, 222NW518; 197Wis 173, 221NW750.

754-82 220Ala639, 127S210; 118Nebr 644, 225NW755.

754-87 220Ala639, 127S210.

755-25 See also 220Ala639, 127S210.

756-37 See also 226AppDiv252, 234NYS 702.

756-46 But see 197Wis173, 221NW750.

756-49½-New. Where petitioners failed to take statutory steps for objection to an improvement and timely legal proceedings to prevent an assessment, they are barred from maintaining an action for an injunction. 168Ga227, 147SE524 (1stcase).

757-66 See also 181Ark474, 26SW(2d) 589.

758-69 [c] (1) 181Ark318, 26SW(2d) 572. (2) Suit to enjoin collection of assessment of benefits for improvement, when commenced within thirty days after publication of passage of ordinance, constitutes direct attack. 178Ark 67, 10SW(2d)41.

758-70 33F(2d)566; Ind 165NE564; 126Kan179, 267P962. [e] **Action against improper parties** does not remove bar to maintenance of action. 126 Kan179, 267P962.

759-75 197Wis173, 221NW750.

759-76 136 Okl 64, 276P226.

759-83 168Ga653, 149SE27; Ga 149SE 30(1stcase). 118Nebr644, 225NW755. [b] (2) Facts not showing laches. 130 Kan450, 286P218.

760-8 [a] (1) 126Kan179, 267P962.

761-13 [a] **Bill to enjoin levying assessments** held not demurrable. 94Fla 347, 115S669.

761-24 27F(2d)618; 33F(2d)566 (insufficient showing of discrimination). [f] **Allegations held sufficient.**–98Fla 508, 124S2(2dcase) (assessment of nearly twice cost of improvement).

762-26 33F(2d)566.

763-59 178Ark67, 10SW(2d)41; 206 Cal 90, 273P30; 92CalA69, 268P388; 322Mo 1024, 18SW(2d)394; MoA 15SW (2d)353.

764-62 208 Iowa528, 224NW39.

764-81 319Mo 178, 5SW(2d)389.

764-88 [i] **Evidence properly excluded.**–92CalA69, 268P388. [j] **Harmless error in exclusion of evidence.**–92CalA 69, 268P388. [k] **Refusal to hear witnesses** who would testify to material matters held error. 181Ark318, 26SW (2d)572.

765-95 [a] (1) See also 130Kan66, 285 P569. (13) 246Mich149, 224NW616. (19) That tunnel opening in park did not obstruct free use of park. 92CalA 69, 268P388. (20) That lots excluded would not be benefited. 92CalA69, 268 P388. (21) That certain property was improperly excluded from district. 318 Mo 192, 300SW1088. (22) That there was no abandonment of street improvement. 322Mo 1024, 18SW(2d)394. (23) That assessment was so excessive as to justify intervention of equity. 246Mich 149, 224NW616. (24) That city was influenced by traffic association in making street improvement. Cal 288P1083. (25) That value was certain amount, notwithstanding court's finding of less amount. 208 Iowa709, 226NW41; 208 Iowa892, 226NW42. (26) That there was no fraud in appraisement. 130Kan 66, 285P569. (27) That special assessment for widening street exceeded special benefits. Nebr 230NW108.

765-96 208 Iowa528, 224NW39; Tex CivA 26SW(2d)382. [a] (6) 96CalA498, 274P371. (12) 319Mo 178, 5SW(2d) 389. (13) 179Ark766, 19SW(2d)1018, 64ALR1258. (19) To establish fraud of council in failing to give promised notice of further action in local improvement proceedings. TexCivA 7SW(2d) 678.

766-2 [a] (3) Whether assessment exceeds value of benefits is question of fact. 181Ark318, 26SW(2d)572.

766-3 [b] IndA 171NE304. [d] **Finding of court sufficient** to overcome contention that property assessed was not in assessment district. Cal 288P1083.

767-27 206 Iowa244, 220NW92.

768-56 218Ala534, 119S226; 220Ala 415, 125S681; 333 Ill 382, 164NE835; 338 Ill 605, 170NE683; 200 Ind443, 164 NE313; 118Nebr644, 225NW755; Tex CivA 23SW(2d)791. See also 320Mo 1047, 10SW(2d)923.

769-30 98Fla508, 124S2(2dcase); 134 Misc810, 236NYS455.

769-84 134Misc810, 236NYS455; SD 232NW289.

770-2 97CalA393, 275P866. See also 206Cal 90, 273P30.

770-9 [a] (2) Statutes held not retroactive. TexCivA 26SW(2d)382.

771-10 126 Or268, 269P853, 60ALR260.

771-16 Mont 287P164 (unauthorized to make up for delinquent assessments against other property).

771-19 Cal 289P850; 129Kan106, 281P 883.

772-32 148Wash560, 269P829.

772-36 229Ky419, 17SW(2d)255. But see TexCivA 7SW(2d)678.

773-44 See also 244Mich232, 221NW 290.

773-45 126 Or268, 269P853, 60ALR260.

774-58 126 Or268, 269P853, 60ALR260.

774-77 142 Okl 216, 286P3.

776-12 TexCivA 26SW(2d)382.

779-73½-New. Where a city negligent-

ly permitted a decree of court to be entered and become final, enjoining it from levying and collecting a just and proper charge against a strip of land for paving, it cannot thereafter by reassessment impose upon the other abutting property owners the expense of improvement which was a legal charge against such strip. 135 **Okl** 155, 274P651.

779-90 **Cal** 289P850 (description held sufficient).

781-16 [a] **Existence of jurisdictional facts** where original assessment was vacated. **ND** 232NW289.

782-33½-New. Under statutes, during the life of a bond issue for improvements, units of assessment on lands included in the improvement district were fixed and could not be changed. 47 **Ida** 697, 280P227, 65 **ALR**1372.

784-83 But see 135 **Okl** 155, 274P651.

785-92 **TexCivA** 268SW(2d)382 (assessment property based on actual cost and not value of improvements).

787-42 See also **Wash** 292P113.

787-44 [d] **Evidence held sufficient** to sustain finding that reassessment was arbitrarily made without regard to benefits. 176**Minn**340, 223NW135.

787-65 [a] (3) Under Portland charter property owner has no right to appeal from deficit assessment in special assessment proceeding for street improvement. 132 **Or**660, 285P815.

789-96 See 155**Md**427, 142A634.

793-87½-New. Some statutes do not cure all defects where, before the assessment becomes final, a taxpayer appears at the time and place provided by law and protests and appeals from confirmation over his protest. 153**Miss**212, 121 8859.

794-95 **TexCivA** 308SW(2d)655.

795-25 [a] **Allowance of interest on special tax bills, not paid within time specified,** is governed by statute, and court cannot disallow interest. 320**Mo** 682, 98SW(2d)593.

795-32 **Wash** 287P1 (ordinance held not retroactive or invalid).

795-36½-New. Interest attaching to assessments becomes part of original obligation. **Mont** 287P164.

795-37 See also **Mont** 287P164.

795-41½-New. **Even though special tax bills do not contain correct recital of amount of taxes** the provisions of the charter relating to interest on tax bills, where not paid within the time specified, apply. 320**Mo** 682, 98SW(2d)593.

796-46½-New. from the date of the assessment. 164**Miss**750, 123873.

796-52½-New. expiration of specified period from date on which assessment became final; **Ala** 127S518.

796-60½-New. A charter provision providing for interest on tax bills if not paid within the specified time is not for penalty and relates back to the date of the original bill. 320**Mo** 682, 98SW(2d)593.

796-64 218**Ala**282, 118S467.

797-85 **Wash** 287P1 (ordinance permitting compounding of interest not invalid).

797-1½-New. Assessment is in nature of charge or incumbrance on property assessed. 36 **OhA**1 172NE641

797-2 **Conn** 151A331

798-10 [a] **Liens may be imposed** for public improvements in face of property owner's objections. 261**Mass**460, 163 NE82

799-61 3**LaA**529.

800-71 **Ga** 155S8200.

800-77 See also 7**LaA**266. But see 169 **La**19, 124S111

800-78 See also **TexCivA** 158SW(2d)113. But see 220**Ala**415, 125S681.

800-82 [c] **Lien prematurely filed stricken off.**–12**PaDist&Co** 712.

801-93 [a] 12**PaDist&Co** 330.

802-16 12**PaDist&Co** 517 (affidavit to petition for amendment is sufficient if signed by one of township commission ers).

802-22 6**LaA**271; 88**PaSuper**117.

802-23 6**LaA**271

802-31 **Mont** 287P164.

802-33½-New. Owners and purchasers of property abutting on street improvements are chargeable with notice of an improvement lien. 226**Ky**211, 108SW (2d)816.

802-33½-New. Under some statutes a city council is authorized to issue tax bills for a street improvement so as to create a lien on abutting property extending to, and abutting on, a parallel street. **MoA** 208SW(2d)930.

803-62 **TexCivA** 158SW(2d)27.

803-93 95**PaSuper**322.

804-90½-New. or certification of a tax bill to the city treasurer by the board of public works. 318**Mo** 192, 300SW 1032

804-92 **TexCivA** 158SW(2d)27.

804-10 See also **MoA** 78W(2d)456. But see 90**PaSuper**269

805-15 But see **MoA** 38W(2d)1038.

805-38 95**PaSuper**322

806-43 95**PaSuper**322.

806-53 98**Fla**176, 123S692 (priority of lien does not impair vested right of mortgage); 88**PaSuper**117; **TexCivA** 14 SW(2d)881; **TexCivA** 308SW(2d)676.

806-56 98**Fla**176, 123S692 (mortgage antedating statute); 233**Ky**528, 268W (2d)566; 229**AppDiv**41, 241**NYS**569; **TexCommnA** 58SW(2d)500

806-65 See also 47 **Ida**697, 280P227, 65 **ALR**1372.

807-68½-New. Special assessments enumerated in certain statutes do not have priority over general taxes. 47 **Ida**697, 280P227, 65**ALR**1372.

807-69 **MoA** 218SW(2d)640.

807-74 12**PaDist&Co** 330.

808-15 [c] **City operating under home rule charter** has power to provide in charter for issuance of assignable certificates payable in installments of deferred maturities. **TexCivA** 208SW(2d) 403.

808-16 But see **TexCivA** 208SW(2d)403.

809-27 [a] **Where assessment is corrected in suit by property owners,** judgment permitting exercise of option within thirty days from date of entry of judgment is proper. 225**Ky**61, 78W (2d)859.

809-28½-New. Agreement of owner to accept installment plan is not invalid because of failure of mayor and clerk to sign. 233**Ky**528, 268W(2d)566.

809-40 **MoA** 38W(2d)277

810-50 See also **TexCivA** 128W(2d)833.

812-96 [a] **To whom refund made.**–156 **Miss**320, 125S421.

812-13½-New. , or to where the mortgagee demands payment of an assessment on threat to elect to declare due the whole principal sum of the mortgage. 256**NY**29, 161NE732.

812-13½-New. or to relieve the land of a lien of assessment and the burden of penalties. 256**NY**29, 164NE732.

813-20 195**Wis**173, 221NW750.

813-35 244**Mich**223, 221NW290

815-71 [a] (6) States cause of action to recover part of assessment paid under protest as against motion to dismiss. 27 F(2d)618.

816-98 160**Tenn**634, 28SW(2d)639.

816-2 180**Ark**510, 228W(2d)105, 227 **Ky**52, 118SW(2d)1008; 223**Ky**29, 15SW (2d)416; **Mont** 287P164 (applicable to assessments against school property).

816-3 **Wash** 287P1 (ordinance held not invalid as retroactive).

816-4½-New. Where the sale of lots subject to special assessment resulted in failure to realize a sufficient sum to pay assessments without penalty, it was immaterial as to those lots that the court failed to impose a penalty for overdue installments. 228**Ky**539, 15SW(2d)416.

816-4½-New. Penalties attaching to assessment become part of original obligation. **Mont** 287P164.

816-21 229**Ky**604, 17SW(2d)706(1st case)

816-22½-New. City can charge advertising costs against school district failing to pay special assessment. **Mont** 287P164.

817-3 160**Tenn**403, 23SW(2d)897.

617-4 [a] **In Tennessee.**–160**Tenn**634, 28SW(2d)639.

818-10 140 **Okl** 131, 282P282.

818-11 323**Mo** 1197, 208W(2d)896 (proceedings for collection of special tax bills).

818-28 11**PaDist&Co** 166.

818-33 132 **Or**496, 286P147 (provision for deficiency judgment).

819-42 168**Ga**616, 148SE517. [c] **Statute imposing ten-year prescription** on claims, liens, and privileges for paving streets held not invalid as ex post facto law. 12**LaA**62, 125S473.

819-44 136 **Okl** 182, 276P738; 138 **Okl** 84, 280P430.

821-74 31 **OhA**465, 166NE389.

821-80 [c] **Prior to constitutional amendment** cemetery property so far as not yet devoted to burial purposes could be sold. **Cal** 291P397.

821-81 197**NC**511, 149SE740.

821-82 **Mont** 287P164 (property of school district).

822-92 83**Mont**111, 270P638.

823-21 See also 159**Tenn**619, 218W(2d) 628.

823-22½-New. Suits for enforcement of local assessment liens are not barred by the statute of limitations of six years applicable to actions to recover taxes. 218**Ala**534, 119S226.

823-22½-New. Statute held inapplicable in proceeding to collect assessment past due when act became effective. **NC** 151SE15.

823-22½-New. Ten-year statute held not to bar collection of assessments. **NC** 151SE15.

825-59 See also 226**Ky**1, 108SW(2d)467.

825-64½-New. A warrant to pay for laying a sidewalk need not be issued against an abutting property owner who offered to and did pay therefor. 228**Ky** 512, 15SW(2d)303.

826-66½-New. Special assessment warrants are not general obligations of the municipality and it is not liable thereon where no negligence is pleaded or proved. 47 **Ida**370, 275P1116.

826-6½-New. Failure to record an improvement lien has been held not to prevent enforcement thereof by the holder of street improvement bonds. 226**Ky** 211, 108W(2d)816.

827-21 83**Mont**111, 270P638.

829-78 168**Ga**616, 148SE517.

830-11 385 **Ill** 218, 167NE23.

831-25 [b] **Posting.**–92**CalA**501, 268P 487.

832-45 [a] **Sufficiency of particular plea.**–39**GaA**617, 147SE907.

832-51 **GaA** 155SE218.

833-81½-New. Judgment fixing a lien on property and ordering sale unless judgment is paid has been held not a personal judgment. 22**AlaA**600, 118S 494.

836-29 221**MoA**917, 222**MoA**540, 288SW 785.

836-42½-New. If statutory method for enforcement is adequate, enforcement is at law, if inadequate, enforcement is equitable. **MoA** 288W(2d)443 (statutory method held inadequate).

837-58 229**Ky**213, 16SW(2d)1026.

837-66 **MoA** 308W(2d)182. See also 320**Mo** 1047, 108W(2d)923.

838-81 **MoA** 38W(2d)1038.

838-82 **MoA** 38W(2d)1038.

838-90 See also **TexCivA** 88W(2d)311.

839-99½-New. An assessment is not a tax within the meaning of the constitution preventing the running of limitations. **TexCommnA** 16SW(2d)265.

840-18 See also 226**Ky**211, 108W(2d) 816.

840-28½-New. Where a city holds an amount contributed by a county to the cost of an improvement, it must prorate such fund among abutting owners in order to enforce a lien against them. **Miss** 122S484.

840-30 But see 320**Mo** 1047, 108W(2d) 923.

841-33 226**Ky**518, 118W(2d)127; 229 **Ky**213, 16SW(2d)1026.

841-40½-New. Affidavit of illegality alleging failure to levy legal execution, confiscatory assessment, and lack of benefits has been held to state defense. 41**GaA**139, 153SE790.

842-59 233**Ky**528, 26SW(2d)566.

843-91 **Iowa** 228NW316.

845-27 221**MoA**703, 285SW178.

845-33 221**MoA**703, 285SW130.

845-34 157**Tenn**78, 6SW(2d)323.

845-35 **MoA** 138W(2d)42.

845-54 221**MoA**703, 285SW178.

845-55 But see **TexCivA** 118W(2d)197.

846-60½-New. In a suit to enforce a lien of special tax bills, under charter, it was not necessary for plaintiff to

make the holders of liens parties defendant. **MoA** 13**SW(2d)**42.

846–66 34**Ariz**32, 267**P**418. [a] **Showing as to diligence.**–34**Ariz**32, 267**P**418.

850–83 **MoA** 24**SW(2d)**218 (that plaintiff was not real party in interest).

851–97 10**PaDist&Co** 804.

851–4½–New. Against contractor suing as trustee for assignee of tax bills, defendant cannot set up counterclaim against contractor. **MoA** 24**SW(2d)**218.

852–27 [f] (5) Issue as to whether proceedings ripened into contract is raised by general denial. 221**MoA**1217, 299**SW** 816.

853–40 **MoA** 30**SW(2d)**182.

853–41 **MoA** 27**SW(2d)**433; **TexCivA** 27 **SW(2d)**877.

854–42 [a] (2) 233**Ky**362, 25**SW(2d)** 1025 (grade of street is presumed included in plans and specifications).

854–46 [b] (7) That lots were outside town, where no such issue was raised. 234**Ky**637, 28**SW(2d)**970. (8) Other instances. **MoA** 300**SW**1039; **MoA** 30**SW (2d)**182.

854–47 [a] (10) **MoA** 24**SW(2d)**218.

855–53 [a] (4) 226**Ky**518, 11**SW(2d)** 127. (21) 221**MoA**708, 285**SW**130. (30) To justify finding that paving was worthless and conferred no benefit on abutting owners. **TexCivA** 8**SW(2d)**819. (31) To authorize finding that work was not done according to specifications, and that acceptance of work by city engineer was without proper investigation or upon mistake of fact. **TexCivA** 8**SW(2d)** 819. (32) That contract was not performed as required. 221**MoA**1217, 299 **SW**816. [b] (17) That inclusion of property in sewer district was invalid on grounds stated. 321**Mo** 955, 13**SW (2d)**646. (18) Fraud or collusion on part of board of council and contractor. 229**Ky**213, 16**SW(2d)**1026. (19) That chairman of board awarding contract was financially interested therein as contractor's partner. 226**Ky**518, 11**SW(2d)** 127. (20) That indebtedness incurred exceeded revenues applicable to improvement prior to contract. 229**Ky**419, 17 **SW(2d)**255. (21) Fraud on part of council in making improvement. 231**Ky** 650, 21**SW(2d)**1022. (22) That tax bill was invalid because work was defectively performed. **MoA** 20**SW(2d)**930. (23) Deviations from construction plan or that deviations were made for contractor's benefit. **MoA** 28**SW(2d)**443. (24) Other instances. **MoA** 30**SW(2d)**182. [c] **Determination of council as to assessment for improvement is conclusive and binding on all parties.** 231**Ky**650, 21**SW(2d)**1022.

855–56 9**LaA**618, 121**S**661.

856–89½–New. A sworn report of the county collector showing nonpayment of an installment of a special assessment makes a prima facie case. 333 **Ill** 382, 164**NE**35.

857–96 **MoA** 7**SW(2d)**456.

857–2½–New. It cannot be urged, wherein objectors were brought into court and given opportunity to contest validity of proceedings, that equity will not afford them relief or that they have been guilty of laches. 244**Mich**384, 221 **NW**125.

857–2¼–New. Under some statutes it is the duty of the court to value the land to determine whether the assessment is in excess of one half of its value. 230**Ky** 408, 19**SW(2d)**1070.

858–18½–New. City's failure to make out prima facie case required dismissal. 41**GaA**439, 153**SE**790.

858–20 231**Ky**65, 21**SW(2d)**127.

859–32½–New. Where validity of assessment in excess of one-half value of lot with improvement is raised, court should fix value thereof in judgment. 231**Ky**650, 21**SW(2d)**1022.

859–40 **TexCivA** 27**SW(2d)**877.

859–44 **CalA** 288**P**711 (necessity of personal demand).

860–46 **TexCivA** 19**SW(2d)**948 (hearing of proof as to value of services held proper without evidence regarding ordinance showing authority for recovery of attorney's fees).

860–54 230**Ky**408, 19**SW(2d)**1070 (judgment conclusive as to value of property).

860–66 95**Fla**410, 116**S**6.

861–72 **MoA** 24**SW(2d)**218 (assignment of error held insufficient).

861–74 See also **MoA** 26**SW(2d)**859(2d case).

861–75 229**Ky**419, 17**SW(2d)**255. [d] (2) Motion for new trial is necessary to raise constitutional question on appeal. **MoA** 24**SW(2d)**218.

861–77 9**LaA**618, 121**S**661.

862–82½–New. **Attorney's fees are not** recoverable in a litigation as to a paving assessment in which both sides were partly successful and partly unsuccessful. 154**Miss**755, 124**S**73.

862–84 [a] **Notice to issue scire facias.** –93**PaSuper**434 (insufficient service warrants striking off claim).

864–51 [d] **Ordinance or agreement** relied on as defense should be attached or reason for absence of given. 293**Pa**360, 143**A**20.

864–52 [b] (1) 94**PaSuper**415. (8) 95 **PaSuper**435. (10) Other instances. 94 **PaSuper**512.

865–63 95**PaSuper**546.

865–65 94**PaSuper**512.

865–71 98**PaSuper**188.

865–78 [a] **Evidence held insufficient** to establish status of land as urban. 94 **PaSuper**101.

866–81 [a] (2) Sufficiency of evidence of intent is for court. 293**Pa**360, 143**A** 20.

866–82 293**Pa**360, 143**A**20.

866–84 91**PaSuper**409; 94**PaSuper**101.

866–91 [a] **Instructions held proper.**– 91**PaSuper**409.

866–94 See also 90**PaSuper**209.

866–95 87**PaSuper**414.

866–7 93**PaSuper**489.

867–10½–New. Substantial undisputed evidence that an ordinance required the paving of over one hundred feet of the highway outside of city limits and that a share of the cost thereof was assessed against defendant's property warrants affirmance of judgment for defendants. 221**MoA**1217, 299**SW**816.

867–12 140 **Okl** 131, 282**P**282. [a] **Bidding,** as required by general taxation statute, is unnecessary in foreclosure sale for local improvement assessments. **Wash** 290**P**844.

867–18½–New. Where judgment on notes secured by liens on land requires sufficient of sale price to be cash to pay matured notes, sheriff should require sufficient additional cash to cover additional notes maturing before sale. 165 **La**385, 115**S**629.

867–18¼–New. Property owner must be afforded opportunity to pay legal assessment before sale of property where assessment is void as to excess over one-half value of lot. 231**Ky**650, 21**SW(2d)** 1022.

867–18¼–New. One failing to comply with bid at paving lien foreclosure suit may be subject to penalty. **TexCivA** 30**SW(2d)**814.

868–33 [a] 98**CalA**738, 277**P**867.

868–38 128 **Or**101, 269**P**221.

868–57 **Wash** 290**P**844.

869–60 [b] **Owners who did not ask court to value property in advance of sale** cannot have sale set aside by paying price into court. 230**Ky**176, 18**SW (2d)**1013.

869–74 [b] **Bill held insufficient.**–220 **Ala**390, 125**S**635.

869–87½–New. The contention that a judgment canceling tax deeds as void was erroneous because it failed to allow penalties and interest to the purchaser at tax sale is without merit where money tendered by the original owner's attorney in open court was not accepted. 99**CalA**401, 278**P**898(2dcase).

869–87⅓–New. In an action to quiet title and cancel a tax deed, plaintiff's deed is prima facie evidence that his grantee was the owner as against defendant never in possession who claimed solely under the tax deed for a delinquent street assessment. 99**CalA**401, 278**P**898(2dcase).

870–95 [a] **In Arizona.**–286**P**191.

870–6 99**CalA**401, 278**P**898(2dcase).

870–13 140 **Okl** 131, 282**P**282.

872–50 58**ND**740, 227**NW**363 (failure of city to have property struck off to it is negligence under statute).

872–58 130 **Or**64, 278**P**96.

872–59 [a] **Liability for damages to warrant holder for failure to pay amount bid into treasury.**–128 **Or**101, 269**P**221.

872–60½–New. Where a city purchased property sold for delinquent improvement assessments, and held certificates for about four years, it cannot thereafter maintain that the mayor was not authorized to bid in the property. 128 **Or**101, 269**P**221.

872–60½–New. A city, by purchasing lots against which special improvement assessments were levied, precluded itself from selling them in the regular way and thereby providing a fund from the proceeds of the property as required by law, authorizing an action by the holder of improvement warrants against the city for damages to recover the balance due under the warrants. 128 **Or** 101, 269**P**221.

872–60¼–New. Where property is adjudicated to a city for unpaid paving charges and taxes, they are not extinguished by confusion where the city does not assert ownership or take possession. 10**LaA**667, 120**S**884.

873–64 99**CalA**401, 278**P**898(2dcase). [a] 99**CalA**401, 278**P**898(2dcase). [b] **Statute strictly construed.**–99**CalA**401, 278**P**898(2dcase).

873–82 [a] **Due diligence not shown** where lot owner's name and address were matters of public record. 102**CalA** 417, 283**P**376.

874–94 See also 227**Ky**3, 12**SW(2d)**358.

874–15 **Wash** 290**P**844.

876–55 90**PaSuper**209.

876–62 **TexCivA** 29**SW(2d)**843(2dcase) (priority).

876–67½–New. Where the proceeds have been distributed as required by law and the assessments cancelled of record, the county treasurer is under no duty to reinstate the assessments on the tax rolls. 140 **Okl** 131, 282**P**282.

877–80 228**Ky**529, 15**SW(2d)**416; 229 **Ky**419, 17**SW(2d)**255; 9**LaA**618, 121**S** 661; 197**NC**511, 149**SE**740; **NC** 154**SE** 15; 160**Tenn**634, 28**SW(2d)**639.

877–81 **CalA** 285**P**1051 (personal judgment for expense of repair of sidewalk after notice to repair).

878–90 See also **TexCivA** 11**SW(2d)** 197.

878–98½–New. Paving assessment notes held to authorize attorney's fees on notes matured before or pending suit. 165**La**385, 115**S**629.

879–6 But see **Ont** [1930] 3**DomLR**714. [a] **Owner of property may be personally liable** notwithstanding lien on home is invalid. **TexCommnA** 26**SW(2d)** 1055.

879–7 **TexCivA** 15**SW(2d)**27; **NS** [1929] 1**DomLR**882.

879–10½–New. A widow occupying community property as a homestead, ownership of which was in her and her children as cotenants, is personally liable for not more than half of an assessment. **TexCivA** 11**SW(2d)**197.

879–24½–New. The grantee of premises who assumed paving liens as part of the consideration for the deed is personally liable for assessments. **TexCivA** 13**SW (2d)**398.

880–38½–New. A sewer district given the powers of a city as to sewers was not required as a condition precedent to the right to collect an assessment for sewer construction to construct appropriate catch basins where the district was relieved from purchase from the city of then existing basins. 128**Me**160, 146**A**80.

880–46 228**Ky**529, 15**SW(2d)**416. [a] (2) Bill to collect cost of sidewalk, setting forth note recognizing lien and admitting legality of proceedings, held to make prima facie case though ordinances and resolutions under which city claimed right to recover were not referred to. 156**Miss**87, 125**S**565.

880–48 13**PaDist&Co** 166 (ordinance under which curbing was done and method in which cost was ascertained).

880-49½-New. Remedy where statement of claim for cost of curbing fails to set forth ordinance and method of ascertaining cost is by motion to strike or for more specific statement. 13Pa Dist&Co 166.

880-49½-New. Defendant property owner must plead any invalidity in proceedings for construction and assessment relied on. 156Miss87, 125S565.

880-56½-New. A grantee personally liable under the assumption of an assessment is also liable for interest and attorney's fees on default where he had notice. TexCivA 13SW(2d)398.

881-77 TexCommnA 29SW(2d)1041.

882-79 TexCommnA 29SW(2d)1041.

882-96 85CalA775, 260P355.

884-25 10LaA283, 119S738.

884-26 10LaA283, 119S738.

884-26½-New. purchase, 10LaA283, 119S738.

885-41 [d] **Statute providing that any street laid out by borough must be opened within two years** does not apply when borough, by ordinance, adopts existing highway which was accepted and used by public prior to its incorporation. 87PaSuper588.

885-44½-New. A statute authorizing a township board to consider plats submitted, and prohibiting the board from requiring parties to conform to a plan, which may conflict with any general plan adopted by the county or state, is not unconstitutional, as depriving the township of the right of reasonable control over its streets. 246Mich383, 224NW659.

885-44¼-New. Where a plat submitted to a township board, located a highway in accordance with a county plan, rejection of the plat on the ground that street was not located in accordance with township plan, which was in conflict with general county plan, was unauthorized. 246Mich383, 224NW659.

885-44¼-New. Master plan of auditors, for location of streets and highways in a township, was part of a general county plan and was not open to review in a court of equity. 246Mich 383, 224NW659.

886-51½-New. Jurisdiction of a county plat board, relative to platting streets and highways, is limited to cases where the township board rejects a proposed plat, and the court by mandamus directs the township board to give its approval thereto. 246Mich383, 224NW 659.

886-60 TexCivA 12SW(2d)1074; TexCivA 13SW(2d)933. [d] (4) Town cannot acquire land for street by prescription. 9LaA618, 121S661.

887-62½-New. Highways established by use become streets of city or town when annexed thereto. IndA 169NE 873.

887-64 231Ky666, 22SW(2d)102 (thirty years).

887-65 235Ky222, 30SW(2d)207.

888-76 298Pa77, 148A41.

889-88 206Iowa533, 220NW315; 226Ky132, 10SW(2d)623; 245Mich314, 222NW729.

890-90 [b] **That street was designated as boulevard on plat of village, subsequently annexed to city,** does not make it "boulevard" within city's charter, providing for maintenance of boulevards. 245Mich314, 222NW729.

893-49½-New. If an ordinance directing the establishment of a new building line is considered as an initial step to widening a street, it was ineffective until abutting owners, either by gift, contract, or condemnation, transferred their rights to the public. 151Va801, 145SE257.

893-51 [c] **City council, on question of relocating street,** could consider not only needs of traffic, but also industrial growth and development and welfare of city. 30OhA68, 164NE124.

893-60 Ala 128S166.

893-61 249NY88, 162NE593.

893-62 34F(2d)303; 96CalA488, 274P438; 157Tenn249, 7SW(2d)992; 152Wash306, 278P159.

894-63 Ala 128S166.

894-70½-New. In an action to restrain a city from vacating a portion of a street not abutting on plaintiff's property, assessment of plaintiff's property for improvement of vacated street did not estop the city from vacating the street. 149Wash197, 270P431.

895-80½-New. Streets and alleys in a tract may be partially vacated, if it does not abridge or destroy rights or privileges of other proprietors in the plat. 151Va108, 144SE483.

895-90 See also 157Miss490, 128S332.

895-94 [d] **Road over land not divided into blocks** may not be vacated. 38F(2d)28.

896-95 96CalA488, 274P438.

896-95½-New. That an assessment has been paid for the widening of a road does not establish a contract relationship forever to maintain the road as widened. 34F(2d)303.

896-1 [b] **Vacation of state roads within city limits.**-251Mich256, 231NW621.

896-9 95CalA733, 273P138(2dcase).

896-10 Mass 167NE417.

897-12 95CalA733, 273P138(2dcase).

897-14 248Mich124, 226NW878. [a] 95CalA733, 273P138(2dcase); Mass 167NE417.

897-15 96CalA488, 274P438; 248Mich 124, 226NW878.

898-20 95CalA733, 273P138(2dcase).

898-21 95CalA733, 273P138(2dcase); SD 228NW800; TexCommnA 24SW(2d)816; TexCivA 27SW(2d)343; 152Wash 306, 278P159. [h] **Council in first instance** must decide whether or not closing of particular street is in public interest. 95CalA733, 273P138(2dcase).

898-25 96CalA488, 274P438.

899-28½-New. A lot owner purchasing under a recorded plat has no vested interest in streets and alleys shown on the plat, which may be vacated at the instance of private parties. 151Va108, 144SE483.

899-28½-New. The town council cannot vacate a street and alley to induce the owner of adjacent property to erect a business structure thereon. SD 228NW800.

899-39 95CalA733, 273P138(2dcase).

900-41 OhA 173NE260.

900-47½-New. State is not necessary party to proceeding by municipality to vacate state road within city limits. 251Mich256, 231NW621.

901-62½-New. A statute authorizing a court to vacate a town plat, if applicable to vacation of part or all of a city street, violates a constitutional provision reserving to cities reasonable control of streets. 248Mich124, 226NW 878.

901-63 249Mich494, 229NW408 (lower court acted within jurisdiction in determining facts in proceeding); 251Mich336, 232NW350.

901-64½-New. , statutes relative to the vacation of an alley do not make it mandatory on the court to vacate an alley or a portion thereof when the owner of two thirds of the land abutting on the portion to be vacated petitions for it. 244Mich681, 222NW108.

901-67½-New. Private persons may bring proceedings without consent or against objection of municipality where there was no acceptance of highway by action of officials. 249Mich494, 229NW 408.

902-69 [a] (2) Where petition is signed by persons who were not interested in original plat. 249Mich494, 229NW408.

902-75 [a] **Owner of lot neither alleging nor proving that rights** were abridged or destroyed showed no right to continuance. Va 154SE489.

902-76 149Wash197, 270P431.

902-78½-New. Petitioner not showing right or injury peculiar to himself cannot restrain vacation. Va 154SE489.

902-79 [a] **Order complying with valid statute** vacating part of plat of subdivision will not be held void because it complied with amendment which might be invalid. 249Mich494, 229NW408.

902-90 [c] **Written consent or published notice** is prerequisite to valid ordinance to vacate street. OhA 173NE 260.

902-90½-New. Petition may be filed with city authorities and may be reviewed by court only in direct proceeding. 251Mich336, 232NW350.

903-1½-New. Property at end of street sought to be vacated is abutting property requiring publication of ordinance where owner's consent is not filed. OhA 173NE260.

903-4½-New. Where plaintiffs, within a reasonable time after discovering vacation of alleys, petitioned council to vacate a resolution closing the alley and prosecuted the matter with reasonable promptness, they were not barred from enforcing their rights by laches. 243Mich679, 220NW672.

903-6½-New. Street commissioners' preliminary and tentative expression of opinion as to the desirability of discontinuance of a street is not binding on them at the hearing. Mass 167NE417.

903-7 But see Nev 280P644.

904-13½-New. Necessity or expediency of vacating street is deemed to have been determined by governing body from enactment of ordinance. 130Kan 610, 287P258.

904-13½-New. Owners of property lying outside city limits can challenge validity of ordinance vacating street. OhA 173NE260.

904-23 95CalA733, 273P138(2dcase).

904-25 157Miss490, 128S332.

904-25½-New. In some jurisdictions a petition to review a decision of a city refusing to vacate a part of a street must allege abuse of discretion or fraud. 248Mich124, 226NW878.

905-31½-New. Railroad company closing street pursuant to invalid ordinance is liable by reason thereof to whoever might sustain loss or damage. TexCommnA 24SW(2d)816.

905-50 But see Mo 30SW(2d)995.

905-51 149Wash197, 270P431.

905-52 149Wash197, 270P431.

906-53 Mass 167NE417; Mo 30SW(2d)995; Nev 280P644. [c] (2) Nev 280P644 (probable injuries to gasoline and garage stations held too speculative). [f] **Pleadings held insufficient to show special injury.**-Mo 30SW(2d)995. [g] **To sustain special injury,** property must be abutting or be deprived of reasonable access. Mo 30SW(2d)995.

906-56 See also Ala 128S166.

906-57½-New. The principle that in mandamus the court in a clear case is not bound to wait until the evil is done is inapplicable in a suit to restrain vacation of a street prior to hearing. Mass 167NE417.

906-58 130Kan610, 287P258.

906-64½-New. Under Massachusetts statute the superior court has no jurisdiction to consider on the merits a suit to enjoin vacation of a street unless suit is brought by not less than ten taxable inhabitants. Mass 167NE417.

906-64½-New. A complaint must state facts sufficient to enable the court to determine whether there is any danger of special injury. Nev 280P644 (complaint held insufficient).

907-66 [c] **Official action or inaction** for many years may work abandonment as to road, public character of which is in doubt. 166La1069, 118S142.

907-68 TexCivA 20SW(2d)326.

907-70 TexCivA 20SW(2d)326.

908-81 Iowa 227NW421.

908-91½-New. Statute declaring streets laid out shall forever remain as established held inapplicable. TexCivA 30SW(2d)936.

910-38 196NC756, 147SE301(2dcase).

911-79 [a] (1) TexCivA 13SW(2d)933. (4) RI 151A4. [b] (1) 84Mont397, 276P437. [f] **Acts of parties contemporaneous with city's taking possession of property for street** is evidence of regularity of condemnation thereof for street purposes. 196NC756, 147SE301(2dcase).

912-95 But see 121 Oh456, 169NE447.

914-99 Ind 171NE871.

914-2 328 Ill 552, 160NE206; 245 IllA 454.

915-19 TexCivA 20SW(2d)326 (ownership of property on both sides).

916-28 Ind 171NE871 (presumption); 151Va801, 145SE257.

916-34½-New. The exercise by a municipality of its proprietary powers over streets is public in its nature. 26F(2d)

912 [rev on grounds 279US159, 49SCt 282, 73L ed652].
916-35 328 Ill 552, 160NE206; 337 Ill 200, 169NE22, 66ALR834; Ind 171NE 871; 248Mich437, 227NW739; 249NY 88, 162NE593; 136Misc358, 239NYS 659; TexCommnA 29SW(2d)1041; Tex CivA 20SW(2d)255; TexCivA 27SW(2d) 343; 151Va801, 145SE257.
917-42 Mo 28SW(2d)1008 (alley).
918-54 130Kan630, 287P233 (entire width); 317Mo 1235, 298SW363. [a] (1) 28F(2d)159.
924-60 41GaA90, 151SE825.
925-70 170La432, 128S35(4thcase) (against abutting owner).
925-72 245 IllA233; 154Miss613, 122S 753(2dcase); 249NY88, 162NE593; 294 Pa451, 144A407(2dcase); 151Va801, 145 SE257.
926-78 180Ark96, 21SW(2d)406; CalA 291P654; 245 IllA233; 134Misc412, 235 NYS226; 151Va801, 145SE257.
926-80 136Misc358, 239NYS659.
926-82 42F(2d)107; 168La984, 123S 648. [c] **Viaduct built by railroad to carry street over tracks comes under control of city authorities.** 331 Ill 151, 162NE852. [d] **Constitutional reservation to cities of control over streets does not repeal act authorizing court to vacate town plat.** 251Mich336, 232NW350.
927-84 108WVa712, 152SE747.
927-84½-New. Such right should not be taken away unless legislative intent is clear. 225Ky123, 7SW(2d)833.
927-87 Va 154SE579.
927-89 TexCivA 27SW(2d)1105.
928-96 328 Ill 552, 160NE206; 10Pa Dist&Co 390. See also 156SC147, 152SE 809(2dcase).
928-98 133Misc161, 231NYS85; 121 Oh 456, 169NE447; 9PaDist&Co 680.
928-5 Ind 171NE871 (use of land dedicated for street including apportionment of street and roadway); 206 Iowa533, 220NW315.
928-11 TexCommnA 24SW(2d)816 (city must always remain in position to exercise its legislative power).
929-14 134Misc412, 235NYS226; Tex CommnA 16SW(2d)520.
929-15½-New. Granting a permit to a landowner for the maintenance of a driveway as a means of ingress and egress is not surrender of regulatory power. 148Wash314, 268P1043.
929-20 TexCivA 26SW(2d)726. [b] **Legislature has not relinquished its control over city streets as to one-way traffic** except as specified in statute. 134Misc 412, 235NYS226.
930-36 [a] (2) Contract between county and town not depriving town of police control over streets. Iowa 232NW682.
931-39 Mass 170NE395.
931-41 See also 133Misc161, 231NYS 85.
931-44 [e] See also 169Ga51, 149SE638, 65ALR1361.
931-46 TexCr 28SW(2d)161. [c] **Ordinance held not void.**-328 Ill 552, 160NE 206.
932-48 281US682, 50SCt449, 74L ed 1115.
932-54 35F(2d)808.
932-55 35F(2d)808.
932-56 [b] **That city took part of roadway for sidewalk** does not preclude city from regulating right granted to street railway to cross street. 168La984, 123 S648.
935-16 CalA 289P877; 121 Oh456, 169 NE447.
937-39 Mass 168NE779 (hearing required where tree is more than one and one-half inches in diameter).
937-51 Mass 167NE303; 157Miss498, 128S73.
937-52 157Miss498, 128S73.
939-76 254 IllA109; 152Miss731, 118 S350.
942-30 94CalA480, 271P507; 136Misc 890, 241NYS288.
942-34½-New. Property "abuts" when there is no intervening land between it and the street. 149Wash197, 270P431.
943-35 181Ark1117, 29SW(2d)668; 333 Ill 422, 164NE673; 33 OhA414, 169NE 719.
943-35½-New. Restrictions are most strictly construed against those urging them against the use of property by the owner thereof. TexCivA 10SW(2d)151.
943-47 336 Ill 573, 168NE661; Mass 169NE416; Mass 170NE395; 323Mo 799, 20SW(2d)888 (delivery of coal); 253NY73, 170NE498; 50RI 59, 144A888; TexCivA 23SW(2d)840; 148Wash314, 268P1043. [f] **Small value of property** does not impair right of ingress and egress as against one appropriating part of street. 148Wash321, 268P1045.
945-48 35Ariz155, 275P5; 83CalA415, 256P1103.
945-49 Ida 286P353; Mass 167NE303; 50RI 53, 144A888.
945-52 148Wash314, 268P1043.
945-52½-New. A municipality cannot permanently close its highways to abutting owners. 297Pa140, 146A557.
945-52¾-New. Obstruction of an abutting owner's access to a public street constitutes a private, as well as public, nuisance. 208Cal 29, 280P109.
945-52¾-New. There is no right of access by abutting owners to parkways or boulevards constructed within public parks or other reservations of that nature. Mass 170NE395.
946-61 Mass 169NE416; TexCivA 10 SW(2d)151. [a] Mass 167NE303. [b] **Tax or charge for privilege.**-City is without authority to enforce or collect fee, tax, or charge for privilege of using or maintaining driveway from street or alley across sidewalk space to lot or property abutting thereon. 134 Okl 142, 272P457(2dcase), 66ALR1047.
946-62 134 Okl 142, 272P457(2dcase), 66ALR1047. [d] **Grading to level ground even with driveway** is proper where necessary for reasonable ingress and egress. 148Wash321, 268P1045.
946-64½-New. Granting a permit is not surrender of regulatory power over streets. 148Wash314, 268P1043.
946-69 But see 35Ariz155, 275P5.
946-71 [a] **Abutting owner** has special easement for ingress and egress subordinate to public convenience of which city authorities are judges. Ind 171NE 871.
947-73 [b] (8) Storing automobile. 133 Misc260, 231NYS342.
947-75 128Me349, 147A421.
949-11 But see MoA 21SW(2d)919.
950-23 242 IllA472.
952-51 [a] **Concrete pillars in street supporting private spur track** does not unreasonably interfere with abutting owner so as to entitle him to removal thereof. 235Ky509, 31SW(2d)906.
952-58 176Minn151, 222NW639(2d case).
954-85 [c] **Property owner must bear expense** of conforming his use of street to dominant use of city. Ind 173NE287.
954-87 Ind 171NE871.
954-91 Ind 171NE871.
956-5 Ind 171NE871. [b] **City cannot arbitrarily, capriciously or unjustly deprive property owner of use of basement** after granting permission. Ind 171NE 871.
956-5½-New. Property owner lawfully using basement projecting under sidewalk may continue use so long as not obstructing or endangering public use. Ind 171NE871.
956-8 Cal 273P833; 208Cal 29, 280P 109; 336 Ill 573, 168NE661.
957-13 208Cal 29, 280P109.
957-14 Cal 273P833.
959-39 111Conn27, 149A205 (statute has been held to authorize building lines as incident to lay out of streets or as separate proceeding after street is laid out).
959-40½-New. When property abuts on a street or highway, the lot line and street line are in common. 149Wash197, 270P431.
959-48 235Ky222, 30SW(2d)207.
961-63 253NY73, 170NE498.
961-67 94CalA480, 271P507.
961-68 But see 179Minn495, 229NW 794.
962-74 208Cal 29, 280P109; 94CalA 480, 271P507; 328 Ill 552, 160NE206; 226Ky132, 10SW(2d)623; 137Misc618, 244NYS224; 151Va801, 145SE257.
962-75 Cal 273P833.
962-77 151Va801, 145SE257.
964-9 253NY73, 170NE498 (delay was unreasonable).
964-14 179Minn495, 229NW794.
964-15½-New. Plaintiff has been held entitled to show that the passway had been established by prescription before organization of the town in which the property was at present located. 226Ky 132, 10SW(2d)623.
964-16 [b] 179Minn495, 229NW794.
966-44 41F(2d)823; 181Ark1117, 29 SW(2d)668; Cal 273P833; 208Cal 29, 280P109; 94CalA480, 271P507; 231Ky 666, 22SW(2d)102; 248Mich437, 227NW 739; MoA 27SW(2d)456; 137Misc618, 244NYS224; 152Val, 145SE425; 148 Wash321, 268P1045; 149Wash197, 270 P431; 152Wash315, 278P161.
967-45 Cal 293P53; Fla 130S914.
967-48½-New. Where a bill for injunction by a landowner alleged that the village passed a resolution declaring it had a right of way across plaintiff's land, and ordered him and his agents not to interfere with such right, and that the village authorities invaded plaintiff's premises and required plaintiff's employees to cease work, and also alleged that the resolution was a cloud on title, and that there was an irreparable injury, equity had jurisdiction of the subject matter. 331 Ill 523, 163NE 468.
967-48⅓-New. Where a municipality undertakes to take possession of a street to which it has no right, the proper remedy is by injunction. 331 Ill 523, 163NE468.
967-48¾-New. Abutting owner may have injunction notwithstanding his own prior encroachments and obstructions on public alley. 220Ala672, 127S160.
967-51 219Ala56, 121S62.
967-53 152Wash306, 278P159.
967-55 41F(2d)823; 179Ark574, 17 SW(2d)296; 83CalA415, 256P1103; RI 151A4 (deposit of dirt and stones in front of premises); 149Wash197, 270P 431.
967-56 Mass 167NE303.
968-59 [a] (2) That continued use of street car tracks in front of property would ripen into prescriptive right is sufficient to entitle abutting owner to injunction regardless of present damage. 208Cal 29, 280P109.
968-61½-New. Cutting down or taking away a sidewalk is not ordinarily an irreparable injury to an abutting owner. NJCh 147A502.
968-62 [a] **That continued use of street car tracks, obstructing access to property, would ripen into prescriptive right,** has been held to entitle abutting owner to injunction regardless of present damage. Cal 273P833.
968-63 See also 89PaSuper1.
969-69 179Ark574, 17SW(2d)296; 133 Misc515, 232NYS17.
969-70½-New. Use of space by an adjoining owner will not be enjoined where such use was not threatened because of revocation of the permit by the city. 148Wash321, 268P1045.
970-90½-New. Realty company's consent to city's construction of boardwalk subject to right of access did not preclude enjoinment of boardwalk by city. 41F(2d)823.
970-99 Ga 155SE23.
971-17½-New. The burden is on the plaintiffs to establish use by the public for the prescriptive period. 247Mich 435, 225NW884.
971-19 [a] (10) To show special damage entitling it to imperative relief. 219 Ala56, 121S62. (11) To sustain finding that landowner had reasonable ingress and egress from his property through driveway at end of wall bordering paved street, and that landowner had no special right of ingress and egress over parking and sidewalk space on another street not abutting on owner's property. 148Wash314, 268P1043. (12) To sustain injunction preventing brick and tile manufacturer from injuring or destroying streets and alleys. 143 Okl 270, 288P479. [b] (7) To warrant decree enjoining construction of building as encroachment on street. 219Ala621, 123S25. (8) To sustain finding that maintenance of street car tracks on sidewalk in front of plaintiff's property did not interfere with access to property. Cal 273P833. (9) To sustain plaintiff's burden of proving

public's prescriptive right in alley. 247 Mich435, 225NW884. (10) To warrant injunction on ground that wall erected by defendant was encroaching on bed of alley. 156Md521, 144A494. (11) To entitle adjoining owner to enjoin erection of smokestacks. 181Ark1117, 29SW(2d) 668. (12) To sustain finding that street car tracks did not prevent free ingress or egress over plaintiff's property. 208 Cal 29, 280P109. (13) To require finding that tract of land was public street or alley or private way. 170Ga53, 152 SE44. (14) To sustain finding that defendants prevented plaintiff from entering and leaving premises. 252NY447, 169NE641. (15) To make issue for jury as to easement by prescription in favor of plaintiff. TexCivA 22SW(2d)479.

971-21 Ga 155SE23. [c] **Extent of relief.**–148Wash321, 268P1045.

972-37 249NY88, 162NE593; 196Wis 410. 220NW390.

972-39 249NY88, 162NE593.

973-48 249NY88, 162NE593.

974-50 TexCivA 25SW(2d)169.

975-79 93CalA88, 269P183.

977-10 Pa 152A23; TexCivA 13SW (2d)184.

978-20 58ND33, 224NW871, 63ALR 1337.

979-40 249NY88, 162NE593.

981-63 167La771, 120S290, 62ALR 1512.

981-65 95Fla279, 116S23.

981-66 152Wash315, 278P161.

981-66½-New. Legislative power over streets does not extend to occupation, if injurious to private rights. 249NY 88, 162NE593.

981-66¾-New. Municipal ordinance attempting to confer on public utility right to supply fuel gas to consumers outside city limits in excess of charter power is void. Okl 288P316.

982-76 234Ky645, 29SW(2d)650.

982-82 169La300, 125S130.

982-84½-New. City may grant franchise to another on failure of defendants to furnish required bond as condition to grant of franchise. 169Ga649, 151SE513.

982-84¾-New. Grant of franchise to another cannot be held arbitrary or unreasonable. 169Ga649, 151SE513.

983-28 See also 249NY88, 162NE593. [a] **Private use held not nuisance.**–Use for bay windows, stoops, areaways, and the like, not interfering unreasonably with traffic. 249NY88, 162NE593.

983-90 See also 249NY88, 162NE593. [b] **Custom and practice** is considered in construing charter respecting use of street for private purpose. 249NY88, 162NE593. [c] **Revocable license** to construct encroachments on streets which do not unreasonably interfere with traffic may be granted by city. 249NY88, 162NE593.

983-91 41F(2d)823; Ill 172NE829; TexCivA 20SW(2d)255; 152Val, 145SE 425. [d] **Unimproved streets.**–TexCivA 20SW(2d)326.

984-94 [c] **Illegal or permanent encroachments** are referred to in New York City charter prohibiting city from permitting encroachments on streets. 249NY88, 162NE593.

984-95 179Minn495, 229NW794 (ordinance on its face authorizing ordinary street use of surface under alley).

984-2 [c] (2) **For loading and unloading merchandise.** TexCivA 20SW(2d) 255. [e] **Bridge connecting buildings.**–Ill 172NE829.

985-22½-New. No one has an inherent right to carry on a private business along public streets, but such right can be exercised only under terms and conditions imposed by the city. 146SC436, 144SE157.

987-40 See also 225Ky784, 10SW(2d) 305 (operation of street railway company within city was largely, if not wholly, municipal matter).

987-49 251Mich457, 232NW231.

989-65 38F(2d)466; 254NY366, 173 NE224 (city and country highways). See also 9PaDist&Co 518.

989-73 [b] **Placing of street car rails by city over underground conduit system** causing telephone company great damage is unwarranted. OhA 173NE 45.

992-8 TexCivA 13SW(2d)184.

992-14 [c] **Rejection of all bids.**–235 Ky234, 30SW(2d)960.

992-15½-New. Some statutes providing for sale of franchise on expiration of prior franchise are directory as to time. 235Ky234, 30SW(2d)960.

992-21 [c] **Ordinance initiated by petition.**–129Kan592, 283P919.

993-26 196Wis410, 220NW390.

994-38 178Ark309, 10SW(2d)493.

995-51 But see 138Misc303, 244NYS 605.

995-61 247NY281, 160NE371.

995-62½-New. That franchise authorizing property owner to lay water pipes was not granted by ordinance did not justify trespassers in connecting with pipes without owner's consent. Tex CivA 25SW(2d)169.

995-64 TexCivA 25SW(2d)169.

996-76½-New. Property owner can enjoin others from connecting with water pipe laid with consent of city where they refused to pay for privilege. Tex CivA 25SW(2d)169.

996-77 151Wash457, 276P904. See also 178Ark309, 10SW(2d)493.

996-83 178Ark309, 10SW(2d)493.

997-99 225Ky129, 7SW(2d)832.

999-31 250Mich614, 231NW52.

1000-40 See 148Wash314, 268P1043.

1004-23 TexCivA 20SW(2d)326 (lease of street for oil and gas purposes).

1004-26½-New. Where a town, in violation of statute, leases a street for oil and gas purposes, any member of the public has the right to sue to enjoin the lessee from drilling a well in the street. TexCivA 20SW(2d)326.

1005-49 13PaDist&Co 32.

1006-55 41F(2d)823; 202Cal 698, 262 P718; 93CalA88, 269P183; 228App Div382, 239NYS140; 88PaSuper419; TexCivA 20SW(2d)255; 152Wash315, 278P161. [a] (1) Cal 273P833. (2) Continuing public nuisance. 41F(2d)823. [b] **Unauthorized obstruction is public nuisance,** whether actually nuisance at time erected or has become so by lapse of time or change of conditions. 228 AppDiv382, 239NYS140.

1006-56 94CalA480, 271P507; 297Pa 140, 146A557.

1006-57 41F(2d)823.

1007-59 219Ala56, 121S62.

1007-60½-New. even though public use has been largely discontinued for many years. 87PaSuper588.

1008-81 219Ala219, 121S514; 228App Div382, 239NYS140.

1008-84 Ala 128S166.

1008-89 [d] **Delivery of coal.**–323Mo 799, 20SW(2d)888.

1008-92 248Mich437, 227NW739.

1009-98 But see 206 Iowa1298, 221NW 953.

1009-99 206 Iowa533, 220NW315.

1009-1 But see 245 IllA454.

1009-6½-New. loading and unloading a platform over a sidewalk, TexCivA 20SW(2d)255.

1009-16½-New. railroad flagman's shanty, 248Mich437, 227NW739.

1009-28½-New. It is permissible to devote parking between the curb and sidewalk to many other uses than that of public travel, such as trees and telegraph and telephone poles, which necessarily obstruct travel. 206 Iowa1298, 221NW953.

1010-40 [f] **Removal of railroad bridge piers from paved portion of street** may be ordered for purpose of restoring free and safe use of street to public. 167La771, 120S290, 62ALR 1512.

1011-52½-New. Municipalities have basic power to control public streets for public benefit and must abate nuisance on street. 229AppDiv41, 241NYS 569.

1011-66 MoA 27SW(2d)456.

1012-69 219Ala219, 121S514.

1012-72 TexCivA 20SW(2d)255.

1012-76 TexCivA 29SW(2d)420.

1013-95 249NY88, 162NE593.

1014-2½-New. a platform over a sidewalk, TexCivA 20SW(2d)255.

1015-29 See also 249NY88, 162NE593. [c] **Petition held sufficient to state cause of action.**–TexCivA 29SW(2d)420.

1015-36 TexCommnA 29SW(2d)1041.

1015-37 See also 94CalA480, 271P507.

1015-43 88PaSuper419.

1016-58 206 Iowa533, 220NW315; 233 Ky734, 26SW(2d)1039; 88PaSuper419.

1017-68 Ala 128S166.

1018-70 Wash 287P680.

1019-86 151Va274, 144SE452.

1019-93 127Kan817, 275P176, 65ALR 696.

1019-2½-New. that the public is not appreciably inconvenienced, 254 IllA109.

1019-2¾-New. that sufficient part of street remains unobstructed to accommodate public, 254 IllA109.

1020-4½-New. that the obstruction is necessary for an abutting owner's business and was erected at considerable expense: TexCivA 20SW(2d)255.

1021-34 202Cal 698, 262P718.

1021-44½-New. , the public character of road obstructed. 13PortoRicoFed459.

1021-46 88CalA383, 263P555; 34 OhA 116, 170NE174; 13PortoRicoFed459. [b] **Evidence sufficient** to show dangerous character of depression in sidewalk. 233Ky734, 26SW(2d)1039.

1022-56 Ala 128S166.

1024-95 41F(2d)823; 88PaSuper419.

1026-34 254 IllA109.

1026-35 50RI 53, 144A888.

1026-37 Ill 172NE829.

1026-43 231Ky666, 22SW(2d)102.

1027-45 157Md464, 146A279.

1027-51 TexCivA 20SW(2d)255.

1027-61 224AppDiv623, 231NYS649.

1028-73 93CalA88, 269P183.

1030-93 Ill 173NE137; 134Misc412, 235NYS226.

1029-94 169Ga74, 149SE779; 336 Ill 573, 168NE661 (implies power to prohibit); 225Ky123, 7SW(2d)833; 135 Misc705, 238NYS253; 40Wyo 462, 278P 542.

1029-96½-New. Legislature may confer power to make traffic rules and regulation on municipal authorities. 253NY 462, 171NE708.

1029-97 Va 154SE579. But see 40Wyo 462, 278P542.

1029-98 [a] **Authorizing police chief to revoke driver's permit** who "in his opinion" becomes unfit to drive is unconstitutional. Va 154SE579.

1029-7½-New. Traffic ordinance should be construed in a manner harmonizing it with other traffic ordinances of the city, considering the purpose intended to be accomplished. 28 OhA30, 162NE 434.

1030-15½-New. An ordinance requiring the operator of a vehicle for hire on public streets to protect the public by a bond or insurance policy is not unreasonable. 100CalA384, 280P213.

1030-18 Fla 129S511.

1031-29 335 Ill 584, 167NE779; 225Ky 123, 7SW(2d)833. [a] **Act of legislature** held not to apply to city streets. 225Ky 123, 7SW(2d)833.

1032-70 [b] **Regulation requiring vehicles to slow down and stop if necessary** to permit pedestrians to cross at intersections is within power of municipality. 253NY462, 171NE708.

1033-76½-New. Authority to regulate the speed of vehicles on streets empowers the city to determine the extent to which others may do business on its streets. 134Misc664, 236NYS6.

1033-91 50RI 53, 144A888.

1033-94 [a] **Power to permanently designate avenue as no parking street.**–135 Misc705, 238NYS253.

1033-95 93CalA88, 269P183.

1034-6½-New. Construction of ordinance prohibiting vehicles to stand on street in congested district during business hours. 336 Ill 573, 168NE661.

1034-15½-New. Traffic ordinances do not apply to federal prohibition agents or other public officials engaged in performance of public duty, where speed and right of way are necessity. 29F(2d) 61.

1038-81 9PaDist&Co 361.

1039-97 SD 230NW848.

1039-1 SD 230NW848.

1042-46 252NY447, 169NE641.

1042-52 252NY447, 169NE641 (abutting owner's right to cross sidewalk with vehicles is not unlimited).

1044-74 231Ky666, 22SW(2d)102.

1047-94 84CalA721, 258P686.

1048-97 [b] **Crossings controlled by traffic device.**–Where pedestrians, having right of way at crossing controlled by

traffic device, enter crossing while green signal light is displayed, they have right of way after committing themselves to crossing till able to reach opposite curb. 29F(2d)437(2dcase).

1049-12½-New. Rights given by traffic regulations must be so used as not to injure another. 41Wyo 101, 282P1061 (2dcase).

1050-37½-New. Operator of vehicle using one-way street against traffic must use more than ordinary care. 292Pa 366, 141A244.

1051-54 But see 26 OhA536, 160NE508.

1052-65 Oh 170NE641.

1052-67 NJ 148A745; SC 155SE136.

1053-4 84CalA721, 258P686; Mass 171 NE452; 128 Or614, 275P667.

1055-39 229AppDiv317, 241NYS160 (pedestrian injured either from contact with runaway horse or in effort to avoid being struck).

1056-41 Ont [1930] 1DomLR519.

1056-42 89PaSuper420.

1058-70 But see 10LaA72, 120S271.

1060-95 11LaA564, 123S446; Mo 3SW (2d)244; 198NC771, 153SE457. [b] (2) 228Ky300, 14SW(2d)1079.

1061-10 Mo 3SW(2d)244.

1061-11 247NY365, 160NE400.

1061-14 228Ky300, 14SW(2d)1079.

1062-15 [b] **Persons under disability.**-Persons having use of one eye are bound to exercise unusual precautions in dangerous situation. 10LaA72, 120S271.

1063-28 157Md464, 146A279.

1066-79 228Ky300, 14SW(2d)1079.

1067-85 101CalA748, 282P392; 88Pa Super377; 197Wis311, 222NW229; 198 Wis1, 223NW121. [f] **Rule that traveler approaching crossing must look when it is possible to look effectively is** applicable to street crossings. 30F(2d) 578.

1069-93 Oh 170NE641.

1069-2 SC 155SE136 (ordinance not mandatory but merely suggestive).

1071-29 41GaA535, 153SE432(2dcase). [a] (12) Other instances. MoA 24SW (2d)644 (charge of specific negligence). [b] (3) In general. Mo 31SW(2d)974.

1072-46 Mass 167NE746.

1073-55 Mass 170NE397.

1073-69 [a] Mass 170NE397.

1073-71 [a] 92PaSuper172.

1074-84 [b] 221MoA362, 273SW143.

1074-90 228Ky300, 14SW(2d)1079; 221 MoA362, 273SW143.

1074-91 217Ala137, 115S105.

1075-93 264Mass586, 163NE155.

1076-98 Mass 167NE746.

1076-4 See also 228Ky300, 14SW(2d) 1079.

1077-5 MoA 24SW(2d)644.

1078-6 Mo 3SW(2d)244.

1078-7 264Mass586, 163NE155.

1079-11 [a] (4) Evidence held sufficient for jury on humanitarian doctrine. MoA 285SW797.

1079-14 See also Mo 3SW(2d)244. [d] (2) Instruction has been held not erroneous. MoA 24SW(2d)644.

1080-18 MoA 24SW(2d)644.

1080-22 228Ky300, 14SW(2d)1079; Mass 167NE746 (instruction held not erroneous).

1080-24 228Ky300, 14SW(2d)1079. [c] (3) Instruction held erroneous in action for death of pedestrian resulting in collision between two vehicles. 223AppDiv 482, 228NYS450.

1081-26 221MoA362, 273SW143.

1081-29 [b] (4) Instruction that motorist may presume that persons using street will conform to law. 217Ala137, 115S105.

1082-31 223AppDiv482, 228NYS450.

1084-24 GaA 155SE499(2dcase).

1086-62 SD 231NW524.

1086-66 [c] **Time of connection.-220Ala** 59, 124S95.

1087-72 177Ark1194, 7SW(2d)769.

1087-73 [a] **Company whose predecessors in title released land to city providing grantor and successors should not be obligated to pay for sewer taxes may recover taxes paid under protest.** Mass 168NE734.

1083-7 226Ky409, 11SW(2d)94.

1089-26½-New. Discontinuance. Operators of a sewer system, assuming duties and obligation of public utility, have the right to discontinue operation as such. TexCommnA 6SW(2d)96.

1089-26⅓-New. but not until a reasonable or long enough period is given to enable patrons to provide themselves with other sewerage service. Tex CommnA 6SW(2d)96.

1039-41 [a] **Rules for determining reasonableness of rate stated.-TexCommnA** 6SW(2d)96.

1092-96 25 OhNPNS20.

1092-2 227Ky343, 12SW(2d)1108.

1092-3 227Ky343, 12SW(2d)1108.

1092-5 98Cal 585, 277P500.

1092-8 227Ky343, 12SW(2d)1108.

1092-9 See also 227Ky343, 12SW(2d) 1108.

1093-12½-New. Cities may not use memorial buildings to carry on private business for profit. 127Kan183, 272P 113.

1093-12½-New. Where an ordinance seeking authority of voters to sell property was not submitted as charter amendment or treated as such and was not filed with, and approved by the governor, authority given by voters to sell does not preclude the city from leasing the property. Ariz 284P350.

1095-68 Cal 292P1076. [a] **City cannot exact fee in sovereign capacity.-Cal** 292P1076.

1096-75 Cal 292P1076.

1096-85 Cal 289P847.

1097-86 227Ky376, 13SW(2d)283. [c] **Wharf erected by lessee for private purposes only,** renders statutes respecting granting of franchises or privileges inapplicable. Cal 289P847.

1097-90 See also 227Ky376, 13SW(2d) 283.

1097-92 229AppDiv695, 242NYS374. But see 206Cal 315, 274P328.

1097-93 227Ky376, 13SW(2d)283.

1097-98½-New. A contract to construct a warehouse on submerged lands, granted by the state for harbor purposes, and the lease of a warehouse to a private corporation engaged in packing, processing, and shipping dried fruits, has been held not void as an attempt to authorize the use of public funds for private purposes. 206Cal 315, 274P328.

1098-6 227Ky376, 13SW(2d)283.

1098-7 227Ky376, 13SW(2d)283.

1098-21 [a] (6) City reserving repairing of pier is liable for cost of repairs by lessee after city's failure on reasonable notice. 131Misc796, 228NYS 631.

1099-22 229AppDiv695, 242NYS374.

1099-33½-New. The owner of vessels burning and sinking at a pier rented from the city cannot be held liable to the city for the cost of raising them, on the theory of the relation of landlord and tenant. 29F(2d)37.

1099-33½-New. Title to a float and runway established by the lessee under a lease vests in the city at the expiration of the lease. 267Mass381, 166NE628.

1099-33¼-New. Permit, revocable at will, to tie up vessels at pier at specified monthly rental, does not create relation of landlord and tenant. 24F(2d) 582.

1099-33½-New. Promise of shipowner to remove abandoned wreck cannot be incorporated in permit to use pier by reason of ordinance which city had not power to enact. 24F(2d)582.

1100-64 166La512, 117S573.

1100-65 30F(2d)749; 332 Ill 400, 163 NE816, 63ALR471; 332 Ill 571, 164NE 10; 166La512, 117S573; 223AppDiv48, 227NYS392.

1101-71 92CalA69, 268P388.

1101-73 [a] **Aviation field.-144 Okl** 208, 291P119.

1101-74 323 Mo 1031, 20SW(2d)665.

1101-81 233Ky688, 26SW(2d)554 (assignment of separate parks, playgrounds and equipment for use respectively of whites and negroes); Wash 288P258.

1101-85 [a] **City's leasing of land and dwellings from month to month during** arrangement of plans for enlarging park is not unlawful. 323Mo 1031, 20SW(2d) 665.

1101-86 [a] **Court of equity has power to grant appropriate relief to** adjoining owners in case of unreasonable delay in converting to legitimate park uses property intended for that purpose. 323Mo 1031, 20SW(2d)665.

1102-95½-New. Where a city purchased, at a succession sale conducted by a public auctioneer, a lot under a resolution authorizing the purchase of the lot for a city park, and the deed provided that the property should be used as a public park, the city acquired a fee-simple title, and not a servitude. 166La512, 117S573.

1102-95½-New. A statement of purpose in a resolution authorizing the mayor to purchase a lot in the name of the city for a park and in the deed was no part of a contract of sale, but was merely a declaration of public use. 166La 512, 117S573.

1102-95¼-New. Statute may authorize city's leasing of land for airport. NJ Sup 150A9 (airport lease need not go to highest bidder).

1102-4 166La512, 117S573.

1102-8 CalA 292P689. [d] **Log cabin representing pioneer home.-CalA** 292P 689 (use and denial of use as between rival pioneer societies).

1103-13 [c] **Location of memorial may be changed** from donated land to town cemetery by electors, in absence of limitation on their power. 200Wis43, 227 NW298. [d] **Log cabin representing pioneer home.-CalA** 292P689.

1103-31 332 Ill 571, 164NE10. But see 92CalA69, 268P388.

1104-43 [c] **Limitations.-223AppDiv** 48, 227NYS392.

1104-44 Ill 172NE757 (nonprofit industrial museum corporation).

1104-46 But see 9LaA545, 120S102.

1104-48 [a] (6) Ten-year lease of park space for refreshment stand held invalid as attempted alienation of city property. 223AppDiv48, 227NYS392. [b] **That proposed refreshment stand could do no additional harm to landscape features of park** held not to justify granting ten-year lease therefor. 223 AppDiv48, 227NYS392. [c] **Question for court.-223AppDiv48,** 227NYS392. [d] **Evidence held to show that lease was granted for private use.** 223AppDiv 48, 227NYS392.

1104-54½-New. Airport lease is not invalid for not conforming with resolution authorizing its execution and with which it was submitted. NJSup 150A9 (lease not invalid on ground ordinance rather than resolution is proper procedure).

1105-65 [b] **Particular provisions construed.-Cal** 292P1076.

1106-76½-New. Plaintiff, who laid out a golf course in a city park for the city, under an agreement for the use of a building for conduct of business near such course, and was subsequently removed by city officers, cannot maintain possessory action, since streets, public squares, and public parks are "public places" and public property. 9LaA545, 120S102.

1106-82 332 Ill 571, 164NE10.

1106-84 332 Ill 400, 163NE816, 63ALR 471; 332 Ill 571, 164NE10.

1106-85 But see 331 Ill 514, 163NE418, 60ALR763.

1107-88½-New. A second deed by grantors to the city to enable the city to operate a recreation center on the tract including playgrounds and a swimming pool has been held immaterial in determining whether the city could lawfully divert property from park purposes. 332 Ill 400, 163NE816, 63ALR 471.

1107-98 178Minn342, 227NW202(2d case) (statute held constitutional).

1107-99 Mass 172NE338.

1107-2 243 IllA581.

1107-3 Mass 172NE338.

1107-4 300Pa485, 150A889 (constitutional limitations construed). [c] Ill 172NE60.

1107-5 225AppDiv823, 232NYS539.

1108-21 [a] **General Municipal Law and Village Law** must be construed together and harmonized but if there is conflict village being special, controls. 135Misc346, 239NYS611.

1108-23 227AppDiv416, 237NYS545; 13PaDist&Co 57. See also 293Pa364, 143A10.

1108-25 141 Okl 34, 283P1003.

1108-28 Mass 172NE338.

1109-29 [a] (4) Appropriation for

advertising in support of proposed bond issue to be submitted to voters is not a "corporate purpose" and was unauthorized. 334 Ill 78, 165NE129. (5) Acquisition of airport is public and municipal purpose. 249NY435, 164NE242. (6) Conditions existing when question is raised determine question. 230NYS 675. [c] **Ownership and maintenance of golf course** is permissible as "municipal function." 97Fla127, 120S261(2d case). [d] **Handling and upkeep of fire engine and truck** is legitimate municipal expense. 235Ky595, 31SW(2d)924.

1109-31 Iowa 230NW373. [b] **Incidental private advantage** does not render contract invalid. 319Mo386, 48W (2d)427. [c] **In Iowa.**–230NW373.

1109-32 233Ky12, 248W(2d)938. [f] **Appropriation for additional compensation to sewer contractor** to cover loss caused by intervening government work is prohibited private gift. **Iowa** 230NW 373.

1109-34 86Mont114, 284P134 (statute held not invalid).

1110-55 Pa 151A883 (development of airport).

1110-56 136Misc358, 239NYS659 (bridges, tunnels and streets are public highways whose construction, management and operation constitute city purpose).

1110-65½-New. Acquisition and subletting of municipal airport is public purpose. **Kan** 289P955.

1110-67 154Md563, 141A269 (hospitals).

1111-71½-New. , a city hall, 137 **Okl** 44, 278P339.

1111-72 137 **Okl** 44, 278P339.

1111-78 96Fla527, 118S308(2dcase).

1112-2 9PaDist&Co 183.

1114-40 See also **Mass** 172NE328.

1114-44 9PaDist&Co 281.

1114-43 [a] **Appropriation subsidizing private opera company** is invalid. 9PaDist&Co 217.

1115-59 See also 10PaDist&Co 316.

1115-63 199Wis54, 225NW204.

1116-78 154Md563, 141A269.

1116-91½-New. A city is not liable for services and expenditures rendered and made in investigation of liquor law violations outside of the city for the benefit of other portions of the county. 90CalA 463, 265P1035.

1117-4½-New. The building of a municipal airport is a city purpose. 230 NY8675.

1117-12½-New. Acquisition, improvement, and development of land by a city for an airport is a "public purpose." 321Mo 514, 118W(2d)1045, 62ALR762.

1117-12½-New. As the city of St. Louis has power to establish and maintain an airport, it has power to contract a debt and issue bonds for that purpose. 321Mo 514, 118W(2d)1045, 62ALR762.

1117-12¼-New. Maintenance of an airport is legitimate municipal purpose. **Wash** 289P61.

1117-19 [a] (1) **Utah** 279P878.

1117-27 [a] **Statute held not repealed.** –174Minn509, 219NW872.

1117-28 Oh 170NE438.

1117-30 But see **Oh** 170NE438.

1119-48 154Md273, 141A125.

1119-54 [a] **Particular constitutions construed.**–234Ky812, 29SW(2d)547; 235Ky143, 29SW(2d)693.

1119-60 Okl 292P15.

1119-62 [a] 140 **Okl** 243, 283P249.

1119-63 Okl 292P15.

1120-79½-New. That total existing indebtedness is excessive is not determinative as to validity of any particular indebtedness but each item must stand or fall by itself. **Okl** 292P15.

1120-79½-New. Constitutional limitations on indebtedness prohibit municipality from filing pleading admitting indebtedness. **Okl** 292P15.

1120-82 Okl 292P15. [a] **Statute limiting time for attack on indebtedness incurred in violation of constitution** is void. **Okl** 292P15.

1120-84 229Ky719, 17SW(2d)1013.

1121-97 See also 293Pa364, 143A10.

1121-1 [a] 174Minn509, 219NW872; 13PaDist&Co 57.

1122-21 177Ark894, 9SW(2d)37. [a] (2) **Cal** 287P968.

1122-22 See also 293Pa364, 143A10.

1122-28 Pa 151A883. [b] **In Kentucky.**–225Ky224, 7SW(2d)853

1122-29 [a] (10) **Bonds issued for paving street intersections are not to be considered in deciding whether fifteen per cent indebtedness, allowed for water, light, and sewer purposes, has been exceeded.** 34Ariz544, 273P536.

1123-31 13PaDist&Co 57 (contractual obligations to pay in future for consideration received in present).

1123-32 140 **Okl** 243, 283P249 (outstanding warrants drawn against legal appropriations for prior fiscal years held included). [a] **Indebtedness requiring assent of voters** is included in "existing indebtedness" except that incurred under provision authorizing additional indebtedness for public utilities. **Okl** 292P15. [b] **Indebtedness incurred during prior fiscal year not exceeding income and evidenced only by contract or warrant** is not included. **Okl** 292P15. [c] **When incurred.**–**Okl** 292P15.

1123-36 [b] **Okl** 292P15.

1123-40 Okl 292P15.

1123-44½-New. , indebtedness incurred during fiscal year for liabilities imposed by constitution or statute. **Okl** 292P15.

1123-46 But see 10PaDist&Co 366.

1124-47 [a] (2) But see 320Mo 451, 8 SW(2d)73. [b] **In Oklahoma.**–**Okl** 292 P15.

1124-52½-New. In determining whether transaction violates constitutional limitation on indebtedness, law will look to substance thereof and not form. **Ind** 169NE51.

1124-59 168Ga41, 147SE66.

1124-64½-New. Arrangement in city's lease of property for purchase of property which is liable for payment of indebtedness is "indebtedness" within constitutional limitation. **Ind** 169NE 51.

1126-1 236Ky439, 208W(2d)77.

1127-7 Okl 292P15. [b] **On making of contract.**–**Okl** 292P15.

1127-14 [b] But see 166Ga232, 142SE 119 (act providing for pavement and bonds to pay therefor held not unconstitutional as indirectly creating public debt).

1128-22 13PaDist&Co 57. [b] **What constitutes current revenues.**–13PaDist &Co 57.

1128-26 13PaDist&Co 57.

1130-56 See also 225Ky773, 108W(2d) 296.

1131-59 225Ky773, 108W(2d)296.

1131-60 Okl 292P345.

1131-62 206Cal544, 275P421; 84Colo 494, 271P629; **Iowa** 226NW164; 227 Ky674, 128W(2d)1013; **Mo** 288W(2d) 356; 59ND75, 228NW819; 12PaDist &Co 363 (net revenue sufficient to pay interest and sinking fund charges); **Utah** 279P878. But see 225Ky773, 10 SW(2d)296. [a] **Budget system inapplicable** to payment of purchase installments for public utility unit purchased by city and payable from revenues derived from plant. **Utah** 279P 878. [b] **Contract for purchase by city, requiring it to credit fund** for all product or service of plant used by city for public purposes, does not create indebtedness. **Utah** 279P878 (purchase of generating unit for supply of electric current to inhabitants). [c] **Contract providing for payment for engines exclusively from savings made through them does not create debt.** **Mo** 288W (2d)356. [d] **Test is whether price is to be paid wholly out of earnings.**–**Mo** 288W(2d)356.

1131-64 34NM346, 282P1.

1132-68 But see 204Cal267, 267P873.

1132-68½-New. The necessity of fixing water rates, so as to discharge the principal and interest on short-term notes given by the board of water and power commissioners, has been held not to create additional liability on the part of the city in excess of constitutional limit. 206Cal544, 275P421.

1132-74 143 **Okl** 176, 287P1023.

1132-75 13PaDist&Co 57 (renewal of notes).

1132-76 34Ariz105, 268P773; 99Fla 617, 127S324; 235Ky143, 29SW(2d) 693; 142 **Okl** 92, 285P832; 142 **Okl** 96, 285P975; **Okl** 292P15.

1132-80 Ind 169NE51; 236Ky439, 20 SW(2d)77 (license or occupation taxes).

1133-93 242 IllA581; 12PaDist&Co 83.

1133-95 12PaDist&Co 57 (statement held not to comply with statute).

1133-99½-New. The procedure necessary to give effect to the borrowing power of a municipality is not an incident of such power, but a regulation for its proper exercise. 293Pa364, 143 A10.

1133-99½-New. Procedure necessary to give effect to borrowing power is not incident of power but regulation for its proper exercise. 13PaDist&Co 57.

1133-11 Pa 151A883. [a] 153Md93, 14A269.

1134-13½-New. A city's rental of additional electrical machinery under a contract providing for monthly payments and giving an option to purchase has been held not an emergency measure authorizing increase of indebtedness beyond limitation. 225Ky773, 108W (2d)296.

1134-13½-New. Some constitutional provisions requiring assent of voters apply regardless of source from which funds pledged to payment are to be derived. **Okl** 292P345.

1134-20 236Ky439, 208W(2d)77; 140 **Okl** 243, 283P249; 142 **Okl** 1, 285P73. [a] 48 **Ida**668, 284P843; 137 **Okl** 156, 278P331; 142 **Okl** 8, 285P43; 142 **Okl** 29, 285P59; 142 **Okl** 177, 283P334; **Okl** 292P15. [b] (1) **Okl** 292P15. [c] **Indebtedness not exceeding income and revenue for year** is not within operation of provision. **Okl** 292P15.

1135-44 [b] **Claim for legal services based on quantum meruit, rendered in attacking fraudulent judgment,** is voluntarily incurred and within constitutional provision. 137 **Okl** 156, 278P331.

1135-45 204Cal267, 267P873. [a] **In Oklahoma.**–**Okl** 292P15.

1135-47 Okl 292P15.

1135-49 Okl 292P15.

1137-38 198NC396, 151SE634.

1137-10 [a] **Purchase of equipment to be paid for solely out of saving from equipment** creates indebtedness requiring assent of majority of tax paying voters. **Okl** 292P345. [b] **That indebtedness is payable only from source other than ad valorem taxation** does not render inoperative constitutional provision. **Okl** 292P345.

1138-14 [c] **Ballot held to embrace only one proposition.**–**Wash** 289P3.

1138-20 See also 156Md196, 143A800.

1139-27 [c] **Statute held not to prevent voters from ratifying previous ordinance and contracts** where previous election void for want of notice. **Wash** 289P3.

1139-33½-New. A petition for election relative to the maintenance of a municipal band need not specify the rate of taxes to be levied on. **TexCivA** 158W (2d)1071.

1140-38 Okl 292P15.

1140-42½-New. Under Ontario Power Commissions Act the question of securing a supply of electricity from the commission must be submitted to those electors who are entitled to vote on money by-laws. **Ont** [1929] 3DomLR 629.

1140-44 TexCivA 158W(2d)1071.

1141-57 234Ky812, 29SW(2d)547 (only excess void).

1141-60 [a] **Mass** 172NE235; 118Nebr 326, 224NW690.

1141-63 48 **Ida**668, 284P843.

1141-70 253 IllA218; **Mass** 172NE235.

1142-81½-New. A city is not required to make provision for the payment of a street improvement debt before warrants are issued. **TexCivA** 128W(2d) 833.

1143-90 But see **Mass** 172NE235.

1143-3½-New. The requirement does not apply to a conditional obligation payable alone out of funds on hand and net earnings of a municipal lighting plant. **Nebr** 228NW114.

1143-3½-New. Constitutional limitations on the power of the state to incur indebtedness do not apply to municipalities. 142 **Okl** 92, 285P832.

1143-10 [a] **Where water plant is op-**

erated without aid of ad valorem taxation expenditures for operating expenses, replacements and extensions may be made from income without appropriation. 142 **Okl** 1, 285**P**73.

1143-11½-New. Some constitutional provisions for making of provision for payment apply regardless of source of funds pledged to payment. **Okl** 292**P** 345.

1146-44 143 **Okl** 287, 289**P**258.

1146-45 137 **Okl** 156, 278**P**331.

1146-50 253 **IllA**218.

1146-56 13**PaDist&Co** 117 (where money was properly used in purchase of fire apparatus and members of council paid money into municipal treasury).

1147-72 [b] **City cannot subsidize private opera company** directly or by contract to purchase tickets of admission. 9**PaDist&Co** 217.

1149-1 [a] 156**Miss**240, 125**S**816; 92 **PaSuper**219.

1149-7 321**Mo** 514, 11**SW(2d)**1045, 62 **ALR**762.

1150-23 But see 156**Miss**240, 125**S**816.

1152-47 **Pa** 151**A**883 (inapplicable to establishment of airport).

1152-48 92**PaSuper**219. [a] (2) Expenditure of public moneys for construction of warehouse held not illegal as lending credit of state to private corporation, though city contracted to lease warehouse to private concern for use in packing, processing, and shipping prunes. 206**Cal** 315, 274**P**328. [b] **Extension of lease.**–30 **OhA**110, 164**NE** 363.

1152-50 [c] **Ill** 172**NE**757.

1153-63½-New. The constitution does not prohibit a city coming under the Workmen's Compensation Act from taking insurance in an old line insurance company. **TexCommnA** 12**SW(2d)**200.

1153-64½-New. A statute providing for the establishment of zoölogical parks by cities is not violative of a constitutional provision prohibiting the legislature from authorizing cities to lend credit or grant money to individuals, associations, or corporations. 318**Mo** 910, 1**SW(2d)**1021.

1158-74½-New. Division of revenue into separate funds for administrative purposes is within legislative body's discretion. **CalA** 290**P**1058.

1158-77½-New. In some jurisdictions all financial affairs are handled on a fiscal year basis. 142 **Okl** 8, 285**P**48.

1158-78 [a] **Annual report of financial condition of municipal water plant** must be made whether operated as private enterprise not controlled by taxing statutes or otherwise. 142 **Okl** 1, 285**P**73.

1159-2 **MoA** 21**SW(2d)**643.

1159-6½-New. Council has no right to interfere with exclusive possession of city funds by treasurer. **MoA** 21**SW (2d)**643.

1159-17 But see **IndA** 165**NE**332.

1159-24½-New. Where a city made a deposit in a bank and took a time certificate of deposit, the transaction was in violation of the constitutional provision prohibiting municipal corporations from loaning money. 151**Wash** 55, 275**P**62, 65**ALR**794.

1159-33 96**Fla**737, 119**S**117.

1160-39 143 **Okl** 204, 288**P**458 (profits derived from municipally owned utility).

1160-46 [b] **CalA** 290**P**1058. [c] **Money necessary for recreation centers** held payable from general fund without recourse to regular park's appropriation. 207**Cal** 296, 277**P**1042.

1160-48 **MoA** 27**SW(2d)**1063 (to pay ordinary debts of city). [d] **Waterworks funds** cannot be diverted for purchase of fire hydrants. 31 **OhA**142, 166**NE**597. [e] **Purposes for which profits of municipally owned utility must be appropriated** are not prescribed by Oklahoma constitution or statutes. 143 **Okl** 204, 288**P**458.

1161-53 **IndA** 162**NE**61(1stcase).

1161-66 **CalA** 290**P**1058; 13**PaDist&Co** 57.

1161-72 56**ND**454, 217**NW**668.

1162-85½-New. Transfer of funds to current expense fund must be of funds available for current expenses. 142 **Okl** 8, 285**P**48.

1162-85½-New. Income remaining in "redemption fund" can be used to augment "general fund." **CalA** 290**P**1058.

1162-87½-New. Where money is placed in sinking fund by clerk without proper authority it is not part of such fund and city may segregate money therefrom. **NC** 154**SE**76.

1162-90½-New. Loans from a general fund to improvement districts to meet inability to pay their bonds or warrants because of delinquency of property assessed for improvements are valid. 86 **Mont**114, 284**P**134.

1162-9 48 **Philippine**309.

1163-10 244 **IllA**66. [a] (1) 247**NY**250, 160**NE**361.

1163-12½-New. Excise board has no authority to make appropriation for payment of warrants outstanding for previous fiscal year. 142 **Okl** 8, 285**P** 48.

1163-12¼-New. In some jurisdictions excise board cannot make appropriation for payment of interest on city's bonded indebtedness which matures subsequent to fiscal year. 141 **Okl** 300, 285 **P**65; 141 **Okl** 298, 285**P**66; 142 **Okl** 1, 285**P**73.

1163-12¼-New. In some jurisdictions as condition precedent to a supplemental or additional appropriation the income and revenue necessary therefor must have been accumulated or provided. 142 **Okl** 8, 285**P**48.

1163-12½-New. Board cannot make appropriation for payment of interest on outstanding bonded indebtedness maturing subsequent to fiscal year for which appropriation made. 142 **Okl** 29, 285**P**59.

1163-12¼-New. Board cannot make appropriation for payment of interest on outstanding bonded indebtedness maturing subsequent to fiscal year for which appropriation made. 142 **Okl** 8, 285**P**48.

1163-20 [c] **Appropriation for current expenses** is not void because it includes items of semi-permanent nature which will remain for use after expiration of fiscal year. 140 **Okl** 240, 285**P**80.

1164-21 245 **IllA**165.

1164-26 [a] 247**NY**320, 160**NE**384. [c] **"Estimate" defined.**–**Mo** 28**SW(2d)**105.

1164-27 **TexCivA** 10**SW(2d)**428. [b] (5) Budget Law has no application to payments under contract for purchase of public utility to be paid for out of net earnings of utility. 59**ND**75, 228 **NW**819.

1164-32 [a] (5) Board may deduct from balance on hand at end of fiscal year amount sufficient to liquidate all valid unsettled contracts made during that year. 142 **Okl** 8, 285**P**48. (6) Excise board cannot deduct from funds on hand at close of fiscal year an amount "reserved for appropriation." 142 **Okl** 8, 285**P**48; 142 **Okl** 29, 285**P**59. (7) Statute construed as to meaning of "surplus balance of revenue or levy" required to be deducted from computation of assessed valuation. 142 **Okl** 8, 285**P** 48. (8) Publication of estimate and right to attack. 141 **Okl** 130, 284**P**27.

1164-33 **In Oklahoma.**–143 **Okl** 204, 288 **P**458.

1165-34 [a] **In Missouri.**–**Mo** 28**SW(2d)** 105.

1165-62½-New. Board of police commissioners expending more than amount appropriated held not to have accepted appropriation so as to be precluded from suing to compel appropriation. **Mo** 28**SW(2d)**105.

1166-71 143 **Okl** 287, 289**P**258 (future liability).

1167-90½-New. A city may recover as an involuntary trust an illegal payment of a penalty on a street assessment made by it to the purchaser at a sale to enforce the assessment. 90**CalA**616, 266**P**613.

1167-4 [a] 86**Mont**100, 282**P**1045.

1167-16 252 **IllA**5 (warrant stating that it is issued in anticipation of road and bridge taxes of stated year held anticipation warrant and not demand warrant).

1168-23 **TexCommnA** 10**SW(2d)**694. See also 44**F(2d)**206.

1168-28 177**Ark**894, 9**SW(2d)**37.

1168-30 [b] **Necessity for submission to voters.**–**TexCivA** 12**SW(2d)**833.

1168-33 **MoA** 28**SW(2d)**119.

1168-34 But see 12**LaA**444, 125**S**331.

1169-45½-New. Power to issue certificates of indebtedness has been held not to include power to pledge unsold bond as security. 44**F(2d)**206.

1169-45¼-New. Constitutional provision for certificate of validity of bonds is inapplicable to municipal warrants. **Okl** 292**P**15.

1169-56 252 **IllA**5 (township warrant stating that it is issued in anticipation of road and bridge taxes of stated year held sufficiently to show that it is payable solely out of such taxes).

1169-68 **TexCommnA** 29**SW(2d)**1027.

1169-69 **TexCommnA** 29**SW(2d)**1027.

1171-3 **TexCommnA** 29**SW(2d)**1027.

1172-11 154**Wash**140, 281**P**332.

1173-40 [a] **Treasurer could recover back money paid** on reliance on bank's indorsement that warrants were genuine. **TexCivA** 17**SW(2d)**499.

1173-41 86**Mont**100, 282**P**1045 (showing that it is regularly drawn to person presenting it).

1173-42 86**Mont**100, 282**P**1045 (where it meets requirements of statute).

1173-43 86**Mont**100, 282**P**1045 (whether officer issuing warrant was legally appointed is not for treasurer to decide on presentation for payment).

1173-46 But see **CalA** 290**P**1058.

1174-58½-New. A bank paying out forged warrants without investigation was liable to the surety of a city protecting the city against forgery. **Tex CivA** 17**SW(2d)**499.

1174-58¼-New. A bank delivering warrants to the city treasurer warrants by its indorsement the genuineness of all previous indorsements. **TexCivA** 17 **SW(2d)**499.

1174-58¼-New. Bank cashing forged warrants is charged with notice that employee's fraud is not imputable to city which received no benefit. **Tex CommnA** 29**SW(2d)**1027.

1175-92 58**ND**740, 227**NW**363.

1177-41 229**Ky**325, 17**SW(2d)**210. [f] **Bonds cannot be issued under implied power.**–**Iowa** 231**NW**475.

1177-55 178**Ark**11, 9**SW(2d)**797; 140 **Okl** 165, 282**P**332 (legislature cannot relieve city of constitutional right or duty). [c] **Legislature cannot deprive municipality of right** to issue bonds to buy public utilities nor relieve it of duties imposed upon it. 137 **Okl** 222, 278**P**617. [d] **Villages.**–168**La**111, 121 **S**592.

1178-57 196**NC**17, 144**SE**377.

1178-61 319**Mo** 316, 4**SW(2d)**467. [a] **Fla** 129**S**904(2dcase); 167**Ga**579, 146**SE** 462; 207 **Iowa**1351, 224**NW**793; **Okl** 292**P**15.

1178-62 [b] **Conflict between charter and statute.**–133 **Okl** 54, 270**P**1112.

1178-62½-New. A statute declaring that bonds issued for the construction of a water flume shall be a direct lien on municipally owned waterworks is not invalid. 129**Kan**834, 284**P**618.

1178-64 31 **OhA**131, 166**NE**386.

1178-65 159**Tenn**647, 21**SW(2d)**620 (not construed literally so as to result in absurdity).

1178-69½-New. Meaning of word "issue" depends on context. 252**Mich**1; 232**NW**406 ("issuance" covers initial authorization).

1180-3 127 **Or**698, 273**P**331.

1180-5 96**Fla**527, 118**S**308(2dcase).

1180-7 96**Fla**527, 118**S**308(2dcase).

1180-8½-New. Where waterworks improvement bonds were duly authorized by separate proceedings and at a separate election for an entirely valid purpose, the invalidity of the contract by the city would not affect the validity of the bonds. 149**SC**234, 147**SE**346.

1180-18 [b] **Intended use of part of proceeds of improvement bonds** to retire indebtedness for preliminary work on public golf course will not render issuance of bonds invalid. 97**Fla**127, 120**S**361(2dcase).

1181-20 117**Nebr**301, 220**NW**273; 26 **OhA**265, 160**NE**241.

1181-46 SD 232NW53.

1181-47 156SC17, 144SE277.

1182-53 127Kan449, 273P965.

1182-59 [b] (3) City of Wheeling is authorized by its charter and by general law, to issue and sell bonds for the construction of a bridge across the east channel of the Ohio River within corporate limits. 166WVa325, 145SE662.

1182-62 168La111, 1218592. [a] Formal dedication of sidewalks was unnecessary in order to authorize municipality to issue bonds. 168La111, 1218592.

1183-64 TexCivA 88W(2d)249.

1183-65 Nebr 228NW114 (municipal lighting plant); Wash 289P3.

1184-81 144 Okl 208, 291P119.

1184-90½-New. Kansas City is authorized to acquire and maintain an airport and issue bonds for that purpose. 321 Mo 556, 11SW(2d)1054.

1184-90½-New. Municipalities are authorized under statutes to maintain and own airports, and bond issue for such purpose may be made. 127 Or698, 273P351.

1184-92 [b] Incidental benefit to private corporation does not void issue of bond. 97Fla127, 1208361(2dcase).

1185-17 [b] Time of refunding at or prior to maturity of indebtedness. 99Fla417, 1278339.

1185-23½-New. In some jurisdictions evidence of indebtedness for which refunding bonds are issued need not be canceled before approval of bonds by attorney general. 137 Okl 44, 278P339.

1185-23½-New, but must be canceled before delivery of refunding bonds. 142 Okl 152, 286P26.

1185-24 [a] (3) General improvement bonds issued by town did not become "refunding bonds" because of proposed payment from proceeds, of indebtedness for preliminary work on proposed municipal golf course, but were original bonds for purpose, in part, of originally funding or paying off expressly authorized floating debt. 97Fla127, 1208361 (2dcase).

1187-95 142 Okl 86, 285P975.

1187-96 Ark 328SW(2d)901, 227Ky576, 130SW(2d)791.

1187-97 142 Okl 86, 285P975 (bonded indebtedness for improvements).

1187-99 [a] Invalidity of judgment rendered on valid municipal warrant will not defeat refunding bonds issued to refund indebtedness evidenced thereby. Okl 292P15. [b] Refunding invalid indebtedness does not validate that which was invalid prior to refunding. Okl 292P15.

1187-99½-New. Refunding bonds must stand or fall with validity or invalidity of indebtedness refunded unaided by certificate as to validity. Okl 292P15.

1188-16 4a 1[illegible]71.

1189-65 11[illegible]192, 1[illegible]413.

1189-66 11[illegible]192, 1[illegible]413.

1189-67 20 OhA171, 16[illegible]NE204.

1189-83½-New. Improvement bonds, issued after the completion of an improvement, are not limited to the amount of an assessment wherein a property owner has elected to pay in installments. 91CalA[illegible]11, 1[illegible]5.

1190-13 5 CalA[illegible]6, 261P256.

1191-14 44Ok(2d)206; 158 Okl 295, 281P126.

1191-30 110Nebr[illegible]67, 210NW191.

1192-47 [b] 35ND[illegible], [illegible]NW819. [c] That cost of improvement will exceed ordinary income must be separately stated as to each improvement in ordinance. 88CalA686, 261P256.

1192-88½-New. Bonds are not invalidated by the failure of an ordinance to name the payee. 20 OhNPNS460.

1194-77½-New. After signing and filing a protest, it was not within the power of any of the protesters or of the clerk to withdraw from the protest any name attached thereto. 105NJL142, 143A364.

1194-77¼-New. Legislative status, when consummated, would not be changed either by an act of persons signing the statutory document or by an act of the clerk in failing to properly perform his ministerial duty. 105NJL142, 143A364.

1194-77¼-New. That the clerk did not file a certificate that the protest had been filed in his office cannot operate to defeat the clear right of property holders under the statute. 105NJL142, 143A364.

1194-80½-New. Obligations of a city designated as warrants and indicating the character as nonnegotiable are held not "bonds" within the charter requiring approval by an election. TexCommnA 168SW(2d)654.

1194-82 117Nebr301, 220NW273; 146SC470, 144SE153 (notes); SD 232NW53.

1195-85 Wash 289P3 (election void for insufficient notice). [a] Meetings of cities and boroughs authorized by special charter provision are direct successors of town meeting and are governed by same law. 108Conn145, 142A807.

1195-83 91CalA1, 266P1029; 252Mich1, 232NW406.

1195-85 55Fla617, 1278339; 225Ky312, 33SW(2d)460.

1196-90 [a] Where part of cost of street improvement is paid by special assessments city may issue interest-bearing warrants for its share without election where tax rate limitation is not exceeded. TexCivA 268SW(2d)382.

1196-95½-New. Motives of officials and electors are not proper subjects of judicial inquiry, so long as the means adopted for submitting the proposal to the people conformed to the requirements of law. 137 Okl 44, 278P339.

1196-4 See also 156NC17, 144SE377.

1197-16 166Ga28, 142SE262; 135Misc346, 239NY8611. [a] (2) 322Mo323, 15SW(2d)346.

1198-3½-New. That a bond issue was adjudged invalid was held not to exhaust the power of a city council to commence a new proceeding by passing a new ordinance to hold another election for the same purposes. 178Ark11, 98SW(2d)797.

1198-37 [a] 168La111, 1218592; 137 Okl 44, 278P339.

1199-49 149SC234, 147SE346.

1199-54 155Md125, 141A499.

1199-56 59ND75, 228NW819.

1199-67 166Ga28, 142SE262; 154SC350, 151SE576 (separate submissions not necessary). [c] 220Ala199, 1248663.

1199-69 166Ga28, 142SE262; 135Misc346, 239NY8611.

1199-76 166Ga28, 142SE262.

1199-79 166Ga28, 142SE262; 135Misc346, 239NY8611.

1200-92 166Ga28, 142SE262; 135Misc346, 239NY8611 (resolution has been held not invalid for omitting means of payment).

1201-9½-New. A bond issue is not illegal because the ordinance does not specify the rate of interest to be charged. 155Md125, 141A499.

1201-9½-New. Where an ordinance calling a bond election stated the time when first payments of the principal and interest would be made, the recitals thereof cannot be treated as surplusage. 94 CalA652, 272P767.

1201-10 243Mich34, 220NW680 (submission at separate elections held not void).

1201-16 88CalA686, 261P256.

1201-19 87CalA686, 261P256.

1203-33 166Ga28, 142SE262. [c] (2) Notice of special election on bond issue, not stating maximum interest bonds are to bear, is valid under Rev. St. [1919] § 8657, in view of § 8659, making provision for interest on such bonds not exceeding maximum specified. 322Mo323, 15SW(2d)346. (3) Order and notice are sufficient where it is stated that bonds are to bear interest at not more than five per cent per annum. TexCivA 88W(2d)249. [d] 59ND75, 228NW519; TexCivA 88W(2d)249. [k] Purpose of issue held sufficiently stated. TexCivA 88W(2d)249. [l] Purpose of indebtedness.—322Mo323, 15SW(2d)346.

1203-34 220Ala199, 1248663 (effect of advertisement); 181Ark333, 25SW(2d)60.

1203-35 See also 166Ga28, 142SE262.

1204-37 220Ala407, 125SC646. [a] (3) Failure to state that tax levy would be made annually to pay interest is held immaterial. TexCivA 88W(2d)249.

1204-43 151Wash19, 274P793.

1204-44 126Kan393, 268P93.

1204-46 143 Okl 266, 143 Okl 62, 287P406.

1204-50½-New. A notice given in less time before an election than is required by the statute invalidates the bonds. 108Conn145, 142A807.

1204-52 117Nebr301, 220NW273.

1205-65½-New. Voters registered in poll book but not voting not counted. Mo 318SW(2d)49.

1205-66 321Mo514, 11SW(2d)1045, 62ALR762.

1205-72 [c] Revision of registration.—321Mo514, 11SW(2d)1045, 62ALR762.

1206-83 137 Okl 44, 278P339.

1206-90 See also 129Kan834, 284P618 (ballot held not subject to infirmity of being dual proposition).

1206-93½-New. Inducements held out or promises made by a citizens' committee for the purpose of influencing voters do not constitute bribery and do not affect the validity of the bonds. 137 Okl 44, 278P339.

1207-95 151Wash19, 274P793.

1207-2 97CalA769, 276P600.

1207-13 135Misc611, 239NY8611 (ratification by electors has been held presumptively to understand bonds to be paid by taxation).

1208-14 155Md125, 141A499.

1208-15 146SC470, 144SE153.

1209-27½-New. A provision, that the result of a city election on the question of bonds issued for a hospital shall be proclaimed by the mayor and the result as proclaimed shall be conclusive unless attacked in the courts within thirty days after such proclamation, does not apply to an attack on the bond issue ordinance on other grounds. 178Ark11, 98SW(2d)797.

1209-27¼-New. Provisions of bond election statute making irregularities innocuous are usually given effect when fundamental rights of voter are protected. 220Ala407, 125SC646.

1209-27¼-New. Court cannot go behind expression of voters of village ratifying proposition for bond issue to determine what preelection promises moved voters to vote for proposition. 135Misc611, 239NY8611.

1209-36 323Mo200, 18SW(2d)900.

1210-48 138 Okl 295, 281P126. [c] Bonds issued for construction of waterworks represent a debt within Const. art 11 § 5. TexCivA 88W(2d)249.

1210-50 See also 233Ky156, 25SW(2d)41.

1210-51 [a] (2) Okl 292P15.

1210-52 138 Okl 295, 281P126 (condition precedent to issuance of bonds and part of contractual obligation thereof).

1210-53 See also 140 Okl 165, 282P332.

1211-54 34NM303, 280P258.

1211-63 But see Okl 292P15.

1211-65 13PaDist&Co201.

1212-66½-New. Some statutes providing for commissioner authorized to certify that bonds are in prescribed form and making certificate conclusive unless suit is brought within stated time are constitutional. Okl 292P15.

1212-66½-New. Limitation provided by such statutes apply to refunding bonds. Okl 292P15.

1212-66¼-New. Constitutional provision for county clerk's certificate as to validity of bonds does not apply to refunding bonds. Okl 292P15.

1212-75 [a] (3) One who only pays toll taxes is not citizen under statute allowing intervention. 97Fla688, 122810.

1212-76 [a] (13) Objection that fact that proceeds of general improvement bonds were to be used in part to pay antecedent loan from corporation rendered bonds invalid because one of commissioners who voted for issuance of bonds, and whose vote was essential, was manager of such corporation, could not be entertained in bond validation proceeding. 97Fla127, 1208361(2dcase).

1213-79 [b] Judgment of court granting or refusing order of validation is reviewable by bill of exceptions. 168Ga379, 1478SE764.

1213-87 168La1081, 1238720.

1215-16½-New. Bonds must be put on market before date of maturity. 247NY320, 160NE384.

1215-16¼-New. Unsold municipal bonds

or collateral security for certificates of indebtedness. See 44F(2d)206.
1215-17 129 Or534, 277P1005.
1215-18 [b] (2) Charter requirement that bond sales be advertised weekly for 30 days. TexCivA 31SW(2d)665. [e] **Who may advertise.**-44F(2d)206.
1215-20 TexCivA 31SW(2d)665.
1216-40 [a] (1) 168Ga616, 148SE517.
1217-43 132 Or297, 285P231.
1217-45 132 Or297, 285P231.
1217-63 [b] **City is liable for breach of contract** to sell its bonds just as private corporations or individuals. TexCivA 17SW(2d)163.
1218-65 [c] **Delivery to third person contrary to contract.**-TexCivA 17SW(2d) 163.
1218-81 38GaA491, 144SE336.
1218-82 See also 38GaA491, 144SE336.
1218-84½-New. Where a bid for municipal bonds was conditional on the bidder's investigating the legality of the issue, the city, accepting a check for an initial deposit, pending the bidder's investigation, was not negligent in failing to cash the bidder's check, held by it as trustee and could recover the amount thereof on the failure of the drawee bank. 38GaA491, 144SE336.
1219-94 [b] **"Proceeds of bonds"** sold for more than par value constitute entire purchase price including premium. CalA 290P1044(2dcase).
1219-95 CalA 290P1044(2dcase).
1219-98 166Ga28, 142SE262; 142 Okl 1, 285P73.
1220-11 166La512, 117S573.
1220-20 [b] **Construction of bonds.**-207 Iowa1351, 224NW793.
1220-24½-New. A city is bound by the recitals in an improvement bond, and, if they be false or fraudulent, the city must be the loser and not the bondholder, where the bond is payable out of a certain fund to be raised by taxation on the property benefited. 207 Iowa 1209, 224NW520.
1220-24½-New. Bonds may be valid although payable to a person named or bearer. 26 OhNPNS460.
1220-24¼-New. Laws existing when bonds are issued and under authority of which they are issued become part of the contract. 140 Okl 131, 282P282.
1222-57 155Md125, 141A499. [a] **Municipality may delegate to finance commissioners fixing of rate of interest** where rate is not restricted. 155Md125, 141A499.
1222-59 154Md273, 141A125.
1222-63 See also 207 Iowa1209, 224NW 520.
1222-71½-New. Improvement bonds issued after the completion of an improvement may carry lien of assessment. 218 Ala534, 119S226.
1222-71½-New. Bonds issued by the municipal housing commission and city council may be secured by specified property alone. 91CalA1, 266P1029.
1223-80½-New. Some constitutions do not prohibit funding of indebtedness evidenced by negotiable coupon bonds at maturity although maturity of indebtedness will be postponed beyond twenty-five years. 142 Okl 92, 285P332.
1223-82 207 Iowa1351, 224NW793. [a] **Effect of provision for payment from special assessments.**-Iowa 218NW20. [b] **Proviso for payment only out of special assessment fund** is not affirmative undertaking not to pay before due date except from such fund. 207 Iowa 1351, 224NW793.
1223-89 [a] **Statute controls charter provision.**-133 Okl 54, 270P1112.
1223-98½-New. Bonded indebtedness authorized at election is single transaction notwithstanding issuance of bonds in installments maturing at different intervals. 141 Okl 298, 285P66.
1224-21 142 Okl 92, 285P832.
1224-24½-New. Refunding bonds are issued concurrently with cancellation of prior valid existing indebtedness. Okl 292P15.
1224-24½-New. Under some statutes refunding bonds may be signed on date fixed for hearing of refunding proceeding. Okl 292P15.
1227-85 See also 178Ark11, 9SW(2d) 797.
1227-14 [a] **Ratification not shown.**-TexCivA 31SW(2d)665.
1229-49 220Ala407, 125S646.
1231-92 See also TexCommnA 10SW (2d)694.
1231-93 TexCommnA 10SW(2d)694.
1232-15 26 OhNPNS460.
1233-33½-New. Where the city sells its water and light plant, notes received for deferred payment and interest must be credited to the sinking fund to pay bonds and interest due thereon. 141 Okl 34, 283P1003.
1233-37½-New. Accrued interest and net premium from sale should be held in sinking fund to reduce tax levy. 142 Okl 29, 285P59; 142 Okl 1, 285P73.
1233-37½-New. Balance remaining after purpose of bond issue has been served must be placed in sinking fund. 142 Okl 1, 285P73.
1233-37¼-New. In some jurisdictions municipality may transfer general fund balance on hand to sinking fund for municipally owned utility. 143 Okl 204, 288P458.
1233-37½-New. In some jurisdictions profits derived from municipally owned utility may be appropriated to sinking fund. 143 Okl 204, 288P458.
1233-37¼-New. In such jurisdictions excise board may consider excess balance on hand in general fund as part of sinking fund in determining amount to be raised by taxation. 143 Okl 204, 288P458.
1234-42 169Ga53, 149SE575.
1234-46 [b] (3) See also 169Ga53, 149 SE575 (transfer to bank in violation of statute cannot be ratified by municipality). (4) Deposit in bank of fund collector to retire municipal bonds in return for certificates of deposit to treasurer is in violation of statute regulating investment. 169Ga53, 149SE575.
1235-88 Wash 287P874.
1235-89 Wash 287P874.
1236-93½-New. The right to refuse payment and insist on the payment of interest to a future date must be evidenced by the face of the bond and cannot be implied. Iowa 218NW20.
1236-2½-New. A city has no right to allow improvement bonds to run past maturity, and then pay interest, from a common fund raised by special taxes, to the detriment of bonds having a later maturity date. 207 Iowa1209, 224NW 520.
1236-4 47 Ida697, 280P227, 65ALR 1372; 140 Okl 247, 282P1090; 141 Okl 233, 285P1.
1237-15 Fla 129S904(2dcase).
1237-19 [d] **Purpose of provision for payment solely from special assessments** is to protect city, if it proceeds legally, from personal liability on bond. Iowa 218NW20. [e] **Bondholder cannot refuse payment from other source.**-Iowa 218NW20. [f] **Rights of bondholder are only in rem** where bond merely imposes lien on property and makes bond payable out of special assessment fund. Iowa 218NW20.
1238-25 47 Ida697, 280P227, 65ALR 1372 (payment of interest with sum collected to pay principal).
1238-28 Fla 129S904(2dcase).
1238-32 See also 47 Ida697, 280P227, 65 ALR1372.
1238-34 [a] (4) City is liable for amount improperly diverted to predatory animal fund and to other purposes. 47 Ida697, 280P227, 65ALR1372.
1238-44½-New. A holder of a bond payable from an assessment fund only is not entitled to refuse payment from other sources before maturity. 207 Iowa 1351, 224NW793.
1241-9 TexCivA 24SW(2d)732 (mere fact that bonds are invalid).
1242-42 28F(2d)195.
1242-50½-New. The purchaser is not charged with a notice of facts contrary to those adjudged by tribunals and officials having the responsibility of ascertaining the existence of facts justifying the bond issue when the bonds themselves do not disclose anything to the contrary. 28F(2d)195.
1244-73 TexCivA 24SW(2d)728 (where proceeds of bonds not paid to county treasurer); TexCivA 24SW(2d)732 (holder must show compliance with statute).
1247-34 See also 26 OhNPNS460.
1248-61 276US536, 48SCt340, 72Led 688.
1249-64 26F(2d)218.
1250-77 26F(2d)218.
1254-39 28F(2d)195. [b] (2) Under constitutional provision requiring county clerk to sign certificate and county attorney to indorse it on evidence of indebtedness, indebtedness cannot be questioned after delivery. Okl 292P15.
1256-83 40F(2d)508 (action not barred).
1257-1½-New. The city's failure to have a special fund ready to pay street improvement bonds due to collection of less interest by the county treasurer and the delay in remitting to the city, is no defense to an action by a bondholder, 207 Iowa1209, 224NW520.
1258-21 [d] **Sufficient against demurrer.**-207 Iowa1209, 224NW520.
1258-42 [a] **Validity of paving bonds issued by municipality is not presented for consideration** where dependent on validity of school warrants holders of which were not made parties. 220Ala 682, 126S871.
1260-71 [c] **One bidding off paving bonds** on proceedings regular on their face is prima facie liable. 220Ala682, 126S871.
1261-91 Ind 172NE186; 233Ky350, 25 SW(2d)748; 317Mo 736, 296SW415; 227 AppDiv351, 238NYS577; 161Tenn203, 30SW(2d)240.
1262-93 161Tenn203, 30SW(2d)240.
1262-97 317Mo 736, 296SW415; 300Pa 108, 150A293.
1263-28 178Minn342, 227NW202(2d case); 12PortoRicoFed229. [c] **Power to tax another municipality.**-Legislature cannot delegate to one municipality power to tax another, unless latter is part of territory in which larger subdivision may levy uniform tax. 227Ky7, 12SW(2d)348.
1264-35 La 130S46.
1264-43½-New. A statute authorizing the fiscal court of a county to tax at one rate, and the general council or board of a city in said county to tax at a higher rate, for the operation and maintenance of a district tuberculosis sanatorium in the county, is unconstitutional. 227Ky7, 12SW(2d)348.
1265-50½-New. In Porto Rico taxation must be collected by the insular government and the proceeds divided among municipalities. 12PortoRicoFed 229.
1265-55 227Ky7, 12SW(2d)348.
1266-66 149SC234, 147SE346. [a] **In exercising taxing power,** legislative department of city or town is exercising purely governmental functions. 131 Or 46, 280P873.
1266-73 207Cal 473, 279P447; 300Pa 108, 150A293.
1267-89 NS [1929] 1DomLR643.
1268-1 Utah 289P132.
1269-19 [c] **Publicity tax.**-96Fla737, 119S117.
1269-26 Fla 130S21.
1269-30 Fla 130S21; TexCommnA 5 SW(2d)756.
1270-44 Utah 289P132.
1270-48 94Fla347, 115S669; Fla 129S 904(2dcase); 86Mont114, 284P134 (statute not violating constitution); 118Tex207, 13SW(2d)353. [b] **The term "public purposes"** is used in popular sense, forbidding taxation for private purposes, but does not prohibit taxation for municipal purpose, which is public and not private, and authorizes taxation respecting both proprietary and governmental purposes. 118Tex207, 13 SW(2d)353.
1270-50 96Fla527, 118S308(2dcase).
1270-54 86Mont114, 284P134 (statute held void).
1271-76½-New. the establishment and maintenance of a municipal band; 118 Tex207, 13SW(2d)353.
1272-1 138 Okl 295, 281P126. [b] **Proposal by citizen to construct memorial building** on city property for community use is properly submitted to legal voters and not taxpayers only. 131 Or46, 280P873.
1275-56 339 Ill 169, 171NE175; 318

Mo 870, 28SW(2d)713; TexCivA 26SW (2d)382.

1275-62 235Ky143, 29SW(2d)603.

1275-67½-New. Deduction of amount reserved for appropriation cannot be made from funds on hand at close of fiscal year and levy based on deduction is excessive. 142 Okl 1, 285P73.

1275-67½-New. Balance on hand from operation of water plant at end of fiscal year must be considered as resource in determining amount to be raised by taxation. 142 Okl 1, 285P73.

1276-79 142 Okl 19, 285P38 (levy for current expenses); 142 Okl 8, 285P48 (levy for current expenses); 142 Okl 1, 285P73. [b] **Statute applicable to current expense limit.**-142 Okl 19, 285P38. [c] **Scaling of tax increased by vote.**-339 Ill 169, 171NE475.

1277-1 [b] (2) Council has right to determine city has more inhabitants than shown by United States Census. 231Ky170, 21SW(2d)813.

1277-7 [a] **Levy for park purposes.**-Okl 285P38; 142 Okl 8, 285P48; 142 Okl 29, 285P59. [b] **Tax levy for library fund.**-142 Okl 19, 285P38; 142 Okl 8, 285P48; 142 Okl 29, 285P59. [c] **Tax for cemetery purposes.**-142 Okl 19, 285P38; 142 Okl 29, 285P59. [d] **Levy for cemetery purposes** may be in excess of levy for current expenses. 142 Okl 8, 285P48. [f] **Levy for street repairs.**-Okl 285P38; 142 Okl 29, 285P 59.

1278-21 320Mo 451, 8SW(2d)73.

1278-26 [c] **Tax for interest on or fund to pay bonds issued to fund floating debt** is included in constitutional limitation of city tax rate. 235Ky143, 29SW(2d)603.

1279-28 168La111, 121S592; 197Wis 202, 221NW656. [a] **Validity of exemption.**-318Mo 910, 18SW(2d)1021. [b] **Levies not within limitation for current expenses** include levy for cemetery fund, levy for library fund, and levy for park fund. 142 Okl 1, 285P73; 140 Okl 240, 285P80.

1281-62½-New. Maximum rate authorized when taxes levied controls in determining excessive rates not rate permitted when taxes extended. Ill 172NE 13 (tax held unauthorized).

1281-63 But see Ill 172NE13 (unauthorized excess not validated by amending statute after levy).

1282-74 96Fla737, 119S117. [d] **Tax levy for fire engines is not invalid** because including levy for upkeep and handling. 235Ky595, 31SW(2d)924.

1282-79 Nebr 228NW114 (municipal lighting utility).

1282-80 335 Ill 245, 167NE24.

1282-86½-New. A village has the right to pay a part of the cost of a local improvement by general taxation. 335 Ill 245, 167NE24.

1283-91 168La111, 121S592. [b] **Benefit from paving and improving sidewalks,** necessarily flows from their common use, regardless of peculiar benefit necessary in case of special assessment. 168La111, 121S592.

1283-92 335 Ill 245, 167NE24.

1283-5 142 Okl 1, 285P73.

1284-39½-New. An act requiring a tax may not be evaded by diverting the fund or allowing time to pass in which the city may levy the tax. 318Mo 870, 28SW(2d)713.

1285-71½-New. In some jurisdictions tax levy based on appropriation of excise board to pay warrants outstanding for previous fiscal year is excessive to that extent. 142 Okl 1, 285P73.

1285-73 Fla 129S904(2dcase)

1288-28 142 Okl 8, 285P48 (bonded indebtedness).

1288-30 See also 142 Okl 8, 285P48; 142 Okl 29, 285P59.

1288-31½-New. Levy to pay interest and create a sinking fund to pay bonds issued for a municipally owned utility is valid. 137 Okl 222, 278P617.

1288-31½-New. In determining the amount to be raised by an ad valorem tax for the sinking fund, no deduction can be made for estimated receipts from other sources. 141 Okl 34, 283P1003.

1288-31¼-New. Where money collected is wrongfully credited to a general fund and expended, leaving no balance, the board cannot consider such amount as a balance in the sinking fund in determining the amount to be raised by taxation. 141 Okl 34, 283P1003.

1288-40 [a] **Tax levies held valid.**-140 Okl 165, 282P332 (to pay bonds for municipally owned utility). [b] **In Oklahoma.**-141 Okl 298, 285P66.

1289-48½-New. In determining amount of ad valorem tax for sinking fund no deduction can be made for estimated receipts from other sources. 143 Okl 105, 287P1028.

1289-55 85Mont329, 278P514. [b] (4) Personal property acquired after first of April of each year. 248Mich612, 227 NW715. [d] **In Alberta.**-Alta [1929] 4 DomLR1079(1dcase).

1291-90 Utah 289P132.

1292-37 NC 154SE685.

1293-38 NC 154SE852.

1293-52 206 Iowa556, 221NW351, 62 ALR1006.

1295-94 227AppDiv351, 238NYS577; TexCivA 29SW(2d)802.

1295-4 36F(2d)904.

1296-7 153Va71, 149SE632.

1297-28 [b] **Hotels.**-Furnishing and equipment not exempt. 155Miss473, 124S6.1(2dcase).

1299-70 [a] (2) Extent of exemption. Ont [1930] 1DomLR551.

1300-2 263Mass255, 160NE788.

1304-71 TexCivA 58SW(2d)614.

1305-3 [a] **In Ontario.**-Can [1929] 8 DomLR852; [1930] 4DomLR91.

1308-99 Fla 130S21.

1309-22½-New. The legislature has plenary power to determine the situs, for purposes of municipal taxation, of railroad rolling stock. TexCommnA 16 SW(2d)292.

1312-82 But see 226AppDiv241, 235 NYS189.

1312-83 128Mel, 145A241. [a] (5) Excise board cannot arbitrarily set over to sinking fund for municipally owned utility estimated income to general fund from other sources and levy tax for general fund. 143 Okl 204, 288P458.

1312-90 229Ky76, 16SW(2d)797.

1313-94 197Wis4, 220NW393.

1314-23½-New. Where an ordinance making a levy is unenforceable, delay beyond the statutory period in making a new levy does not avoid the tax. 229 Ky76, 16SW(2d)797.

1314-23½-New. The word "annually," in a statute authorizing an ad valorem tax, means yearly. 229Ky76, 16SW(2d) 797.

1314-24 [b] **Reservation from present funds amount to pay liability arising in next fiscal year** is unauthorized. 143 Okl 177, 288P334.

1314-34 138 Okl 284, 281P133 (submission of budget to county excise board); TexCivA 158SW(2d)713.

1315-54 141 Okl 283, 285P1 (sources of revenue considered in fixing tax rate for payment of annual interest and accruals to sinking fund).

1315-57½-New. A board fixing a tax rate is not required to deduct an amount equal to back taxes and a distributive share of income tax coming into the treasury after the beginning of the fiscal year from an annual appropriation. Mass 168NE73.

1315-57½-New. The word "may," used in a statute authorizing certain deductions, is construed as used in a permissive, and not mandatory, sense. Mass 168NE73.

1315-57¼-New. Under statutes, enumeration of items to be combined to ascertain the total amount of a levy are to be taken at their face value unless otherwise provided for by appropriation. Mass 168NE73.

1315-57½-New. Excise board cannot increase amount of appropriation pending hearing of protest by court of tax review. 142 Okl 242, 286P316.

1316-63 [a] TexCivA 158SW(2d)713.

1316-86 [a] **In Porto Rico.**-33Porto Rico 273.

1317-14 235Ky143, 29SW(2d)603.

1318-22 335 Ill 245, 167NE24.

1318-24 [b] **Constructing, repairing and maintaining streets** is for a single purpose within meaning of statutory requirement. 335 Ill 245, 167NE24.

1318-27 332 Ill 53, 163NE348.

1318-30 335 Ill 245, 167NE24.

1319-57 Mont 285P185.

1320-79 36F(2d)904.

1321-93 Ida 290P400.

1322-11 La 129S724.

1323-40½-New. Enactment of an ordinance to authorize the acceptance of a citizen's proposal to donate a memorial building is void in attempting to bind the city to levy an annual tax for the maintenance of the building for all time to come. 131 Or46, 280P873.

1324-55 Colo 293P333; 157Miss879, 127S694.

1325-83 10LaA667, 120S884.

1325-99 Fla 120S21. [b] **Location of property.** City cannot make its own valuation on property taxable by municipality but not located within city. 99Fla1027, 128S264.

1325-1 Fla 130S21.

1325-2 157Miss879, 127S694 (realty valuation system).

1326-15 157Miss879, 127S694.

1327-37 Fla 130S21.

1327-38 [a] **Municipality is without right to place its own valuation on transitory property of railroad** assessed altogether as unit. 99Fla1027, 128S264.

1327-40 Fla 130S21.

1328-59½-New. or error of law injuring complaining taxpayer, 158Md512, 148A832.

1328-60 158Md512, 148A832.

1328-63 [a] 157Miss879, 127S694 (void assessment of property on assessment rolls).

1335-74½-New. On an application to vacate allocatur of certiorari allowed to review a tax sale affecting the apportionment of taxes by a municipality, in matters affecting municipalities, certiorari should not be allowed, except upon the notice and the payment of taxes conceded to be due. NJ 143A545.

1336-4½-New. Petition in action attacking waterworks levy for sinking fund held not to state cause of action. 142 Okl 19, 285P38.

1337-22½-New. Under some statutes a lien of county and city taxes is the same as that of state taxes. 47 Ida697, 280P227, 65ALR1372.

1338-60½-New. A city may be estopped to enforce taxes as against a mortgagee who, in taking a mortgage relies on the record showing the tax paid. 179 AppDiv80, 166NYS221.

1341-49½-New. Plea of ultra vires is available to city in defense of action to recover taxes agreed to be refunded by city where property was illegally exempted from taxation for many years. 227AppDiv351, 238NYS577.

1342-54½-New. Under the Porto Rico statute where a tax imposed by a municipal ordinance must be collected by the treasurer of Porto Rico, the remedy of a taxpayer, claiming that the tax is unlawful, excessive or erroneous is to pay the tax under protest and sue for the refund. 33PortoRico 348.

1342-62 227AppDiv351, 238NYS577 (taxes must not be legally paid in order to authorize refund).

1342-64½-New. A change by the state tax commission in the assessment of state and county taxes does not impliedly change the assessment of municipal taxes, so as to require the municipality to make a refund, on the ground that there could be only one assessment of the state, county, or other taxes, where the statute expressly excepts municipal taxes from its operation. 148SC349, 146SE693.

1342-66 168Ga842, 149SE223; 263Mass 255, 160NE788; 148SC349, 146SE693 [cit'Cyc].

1344-16½-New. A statute which takes from village officers the right and duty to collect village taxes and committing collection thereof to county officers is invalid. 134Misc482, 235NYS713.

1345-37 18PaDist&Co 206.

1346-69½-New. Municipal officers have no authority to remit, abate, settle, or compromise taxes due the municipality, except in conformity with some provision of the statute. 128Mel, 145A241.

1351-19 TexCivA 48SW(2d)247.

1351-20½-New. the amount of taxes claimed to be due on each separate tract or lot, valued separately. TexCivA 48W (2d)247.

1351-40½-New. Under some statutes, the fact that the petition is verified, and

that defendant's answer is not verified, does not render defendant's evidence inadmissible. TexCivA 15SW(2d)713.

1352-44½-New. Where a city pleads that taxes had been legally levied and assessed, and defendant answers by general denial the evidence showing that no ordinance had been passed authorizing the levy, as required by statute, is admissible. TexCivA 15SW(2d)713.

1352-70 [b] **Evidence held insufficient** to show city had population of 10,000 so as to justify tax. 231Ky470, 21SW(2d)813.

1353-16 12PaDist&Co 507 (personal property of tenant assessed during his possession and levied on at that time on the premises).

1354-22½-New. The purchaser of a bankrupt's chattels cannot complain of irregularities in a subsequent tax sale of such movables where one to whom he resold them made no complaint. 168La 496, 122S594.

1354-22½-New. In Ontario bank's rights under Dominion Bank Act § 88 in goods in its possession are superior to right of municipality under Ontario Assessment Act when in conflict. Ont [1930] 2DomLR669.

1354-26 [d] (3) Assessments in former owner's name are nullities and cannot form basis of valid tax sale. 10LaA 667, 120S884.

1355-59 [b] **In Louisiana** sale is nullity where there was no resolution or ordinance levying tax and no delinquency notice was served on owner. 10LaA369, 120S902.

1358-67 152Miss605, 120S562; Alta [1928] 3DomLR404; Alta [1928] 3DomLR829.

1358-71½-New. Where property is adjudicated to a city for unpaid taxes and having charges they are not extinguished by confusion where the city does not assert ownership or take possession. 10LaA667, 120S884.

1358-74 NJSup 146A673 (fee subject to paramount claim).

1360-23 CalA 285P391 (owner's title held not divested).

1360-25 [b] **Billboard showing names of owners on property** is considered occupied. CalA 285P391.

1362-72 [a] **Sufficiency of description.**—Description sufficiently definite to enable levying officer to identify the property is sufficient. 168Ga213, 147SE506.

1362-73½-New. The principle that, before levy on indivisible property of great value, the marshal should exhaust smaller and less valuable parcels assessed is inapplicable where the assessment of any smaller tracts did not appear. 168Ga101, 147SE32.

1363-24 [b] **Constitutionality of charter provisions.**—City charter authorizing redemption from sale for nonpayment of taxes or licenses due city within two years following date of sale, is in irreconcilable conflict with constitution. 167La237, 119S33.

1364-60 NC 154SE85.

1369-88 NJSup 149A632 (no interest and costs where owner guilty of delay).

1370-15½-New. Payments made by holder of tax certificate together with interest thereon constitute lien on property. CalA 285P391.

1370-27½-New. A description which can be made certain will be treated as sufficient. 168Ga213, 147SE506.

1370-35 12LaA499, 126S97.

1370-40 168Ga213, 147SE506.

1372-95 248Mich190, 226NW897 (revenue from operation of city owned hydro-electric plant); 26 OhNPNS33, 46 [citCyc].

1372-96½-New. Profits to a city on a water or light system become part of the general revenue. TexCivA 7SW(2d) 942.

1372-96½-New. Neither statute nor constitution specifically prescribes purpose to which profits derived from municipally owned utilities must be appropriated. 142 Okl 29, 285P59.

1373-3½-New. Surplus need not be put into sinking fund in the absence of statutory requirement. 25F(2d)964.

1373-10 40F(2d)508.

1373-18 235Ky143, 29SW(2d)603.

1376-73 132Misc666, 230NYS464.

1376-73½-New. The statute does not permit taxpayers interfering with legitimate course of action by governing bodies. 132Misc666, 230NYS464.

1376-77 198Wis56, 223NW575(2dcase).

1377-86 [b] **City taxpayer having insufficient interest in subject matter** cannot intervene in action making city garnishee. Ariz 288P1024.

1377-99 338 Ill 488, 170NE713.

1380-44 TexCivA 7SW(2d)942. [d] **Cancelling deed.**—200Wis43, 227NW298.

1380-46 [a] **Plaintiff not taxpayer.**—NJSup 143A73.

1380-50 [b] **Impossibility of performance.**—132Misc73, 228NYS116.

1380-51 132Misc73, 228NYS116.

1380-61 TexCivA 7SW(2d)942.

1383-26 202Cal 345, 260P881.

1383-26½-New. A citizen and taxpayer cannot maintain an action in his own name to recover taxes due to the municipality although the city solicitor refuses to do so. 25 OhNPNS523.

1383-31 [b] **A stockholder of a corporation** cannot sue as taxpayer merely because such corporation pays taxes. 225Ky186, 7SW(2d)1067.

1384-33 129 Or534, 277P1005. [a] 198 Wis581, 225NW188.

1385-62 Nev 280P644.

1385-65 TexCivA 18SW(2d)212.

1386-69 339 Ill 360, 171NE535.

1387-77 Wash 288P646.

1387-84 206Cal 635, 275P803.

1389-13 [a] **Act must be one recognized as requiring intervention of equity.**—136Misc851, 244NYS151.

1390-47 TexCivA 18SW(2d)212.

1391-53 166La512, 117S573; 59ND75, 228NW819.

1392-58 Iowa 227NW514 (competition with plaintiff is not ground for injunction).

1392-59½-New. In some jurisdictions special damage entitling a taxpayer to relief is the prospective pecuniary loss incident to an increase in taxes which he will be compelled to pay. 157Md 576, 146A797.

1392-63 [a] **Act must cause waste** of public property, fraud, peculation, or endanger public health, safety or morals. 136Misc851, 244NYS151.

1394-83 36F(2d)904.

1394-88 Mass 168NE73 (assessors may be restrained).

1394-95 177Minn44, 224NW261.

1395-99 Mass 172NE230.

1396-10 99Fla819, 128S814. [b] (3) Taxpayer showing validity of original indebtedness cannot enjoin issuance of refunding bonds. 227Ky570, 13SW(2d) 791.

1397-19 [a] 108Conn145, 142A807.

1399-46 299Pa473, 149A722.

1400-58 132Misc73, 228NYS116.

1400-61 126Kan347, 267P996.

1402-80 [b] 133Misc671, 233NYS241.

1403-91 339 Ill 491, 171NE526; 248 Mich190, 226NW897; 177Minn44, 224 NW261.

1404-93 Wash 289P3.

1405-6½-New. Abandonment by railway of rails on village street held dangerous and public nuisance. 229AppDiv 41, 241NYS569.

1405-11 Wash 288P646. [b] **Expenditure of proceeds of bond issue authorized by vote of electors** to construct sewage disposal system will not be enjoined merely on ground that city had contract for sewage disposal which had many years to run. TexCivA 18 SW(2d)212.

1406-21 Wash 289P3.

1407-48 196Wis328, 220NW207.

1408-52 But see 196Wis328, 220NW 207.

1409-66 177Ark894, 9SW(2d)37; 90 CalA463, 265P1035.

1410-84 180Minn293, 230NW788.

1410-88 136Misc851, 244NYS151.

1410-89 136Misc851, 244NYS151.

1410-91 But see 136Misc851, 244NYS 151.

1410-94 136Misc851, 244NYS151.

1410-95 [c] **Action involves collateral attack on title to office.**—136Misc851, 244 NYS151.

1411-12 Iowa 227NW514.

1412-25 149SC234, 147SE346.

1414-41 178Ark309, 10SW(2d)493.

1414-43 178Ark309, 10SW(2d)493.

1414-45½-New. Operation of a motion illegally adopted by city council to furnish free water to city officers may be enjoined by a tax payer's action. 34 NM326, 281P28.

1416-70 But see 174Minn410, 219NW 760.

1416-73½-New. or unauthorized by law. Iowa 227NW514.

1417-93½-New. A suit to enjoin the unlawful expenditure of money will be dismissed, where to grant the relief sought would require the court to cause a recount of the ballots cast on the question of the adoption of a city charter. 29 OhA347, 163NE510.

1418-1 NJCh 144A794.

1418-13 [b] **Seeker of injunction must do equity.**—167Ga579, 146SE462.

1419-20 230Ky453, 19SW(2d)1073; 10 PaDist&Co 613.

1419-25 [a] (1) 233Ky12, 24SW(2d) 938; 197NC118, 147SE811. [b] (2) No demand is necessary where summons in action is issued on day before officers charged with fraud retire though not served until following day. 197NC118, 147SE811.

1419-27 32 OhA241, 167NE901.

1420-34½-New. Fact that taxpayers became village officials after commencement of suit does not preclude them from maintaining suit. 338 Ill 488, 170 NE713.

1420-38 [a] **Where municipality would have been estopped** by acts of officials to rescind contract for sale of bonds at unlawfully low price, taxpayer is estopped. 202Cal 345, 260P881.

1421-59½-New. A suit to restrain issuance of bonds is not premature because the validity of the bonds had not been tested by the attorney-general. TexCivA 8SW(2d)249.

1421-59⅓-New. A taxpayer cannot object to an ordinance giving the city an option to purchase a power plant until the city council sought to exercise the option. Iowa 227NW514.

1421-61 Mass 172NE593.

1421-64 NJSup 150A9. [a] NJ 151A 59.

1421-68 59ND75, 228NW819.

1422-75 202Cal 345, 260P881.

1422-76 339 Ill 491, 171NE526.

1422-78 [c] (3) In taxpayer's suit to enjoin collection of taxes because of invalidity of bonds, holder of bonds may invoke special statute of limitations making bonds incontestable. 28F(2d) 195. (4) Special statute is applicable to action to enjoin sale of bonds to construct public utility. 139 Okl 167, 281P777.

1422-81 [a] **Adequate remedy at law.**—Equity will not entertain suit by taxpayer in behalf of municipality to recover money unlawfully retained from municipality because remedy at law is adequate. NJCh 144A794.

1422-82½-New. The federal court of Porto Rico may enjoin a taxation which violates the Organic Act without requiring the payment and suit to recover. 12PortoRicoFed229.

1423-91 38F(2d)562.

1424-18 But see 177Minn44, 224NW261.

1424-26 132Misc666, 230NYS464.

1424-28 198Wis581, 225NW188.

1425-35 132Misc73, 228NYS116.

1425-40 224Ky298, 6SW(2d)236.

1426-57 [a] **In New Brunswick.**—[1928] 2DomLR583.

1426-65 [a] (2) One having only purported contract, signed by official, who has no authority to contract for city, and against whom no relief is sought or granted, is not indispensable party to suit to enjoin unauthorized purchase. 177Minn44, 224NW261.

1428-99 174Minn410, 219NW760. [b] **Absence of adequate legal remedy** need not be alleged. 136Misc851, 244NYS151.

1428-1 227AppDiv416, 237NYS545; 136Misc851, 244NYS151; 137 Okl 81, 277P1036.

1428-2 131Misc736, 229NYS26. [c] **Where town had entered into settlement,** and discontinued action to recover money received by town, allegations showing fraud or corruption authorizing setting aside of settlement are necessary before suit may be maintained by taxpayer. 132Misc666, 230NYS464.

1428-3 136Misc851, 244NYS151.

1429-14 [b] (1) 339 Ill 491, 171NE526.

(5) 167Ga579, 146SE462. (17) Petition to enjoin raising money in illegal manner. Mass 168NE73. (18) Suit to restrain illegal appropriation by city. Mass 172NE230.

1429-15 Cal 284P655. [a] (4) Petition to enjoin city from issuing funding bonds, containing no allegation that old indebtedness or any part of it was invalid, did not state cause of action. 227 Ky70, 13SW(2d)791. (5) Suit for injunction on account of sewer contractor's violation of eight-hour law. 157 Md576, 146A797.

1429-17 169Ga126, 149SE892.

1429-19 [a] **Allegations held insufficient.**–CalA 289P229.

1430-22 Iowa 231NW499; 225Ky186, 7SW(2d)1067. [b] **That plaintiff is stockholder in corporation paying city taxes** is not sufficient showing that plaintiff may bring suit. 225Ky186, 7SW(2d)1067.

1430-26 231Ky820, 22SW(2d)289, 66ALR1238 (failure to allege ownership of abutting property).

1430-32 Iowa 231NW499.

1431-46 [b] **In Ontario.**–Ont [1928] 2DomLR537. [c] **Facts showing emergency exists,** as contemplated by statute, must be pleaded where such emergency is necessary to permit city to exceed statutory limit of indebtedness. 229Ky719, 17SW(2d)1013.

1432-76 [b] **Defendant's denial raises issue of plaintiff's right** to maintain action, in suit to enjoin city's contract. Iowa 231NW499.

1432-82 Wash 288P646.

1432-84 203Cal150, 263P218; Mass 172NE230; Mo 28SW(2d)356. [e] **Court must presume that city council will spend funds in legal manner** and will not restrain expenditure of money alleged to be held in city treasury pursuant to law authorizing city to borrow money for specified purpose. 146NE372, 144NE78.

1433-97 225Ky186, 7SW(2d)1067.

1433-98 177Ark894, 9SW(2d)37; 235Ky143, 29SW(2d)603. [f] (1) 230Ky439, 20SW(2d)77.

1433-2 Iowa 231NW499; Iowa 231NW502.

1434-16 29OhA171, 163NE204.

1435-24 [b] **Failure to show that plaintiff was taxpayer** necessitated dismissal of petition based on allegation that plaintiff was taxpayer. 225Ky186, 7SW(2d)1067.

1443-51 [b] **Time of filing claim.**–CalA 282P661.

1443-52 48Philippine309.

1445-82 90CalA463, 265P1035. [b] (3) Claim for services on per diem basis must be itemized when required by ordinance. 90CalA463, 265P1035.

1445-17 90CalA463, 265P1035.

1450-49 233Ky13, 24SW(2d)938.

1450-52½–New. City without power to pay additional compensation for sewer construction lacks power to compromise claim for such compensation. Iowa 230NW373.

1450-61 See also 243 IllA460.

1451-74 95CalA151, 272P336.

1451-75 But see 95CalA151, 272P336.

1451-77 But see 157Miss225, 127S902.

1451-78 [f] **Interest on contracts with municipality** has been held recoverable only from date of judgment. Cal 291P839.

1452-85½–New. Where a city acts merely as trustee in collecting and disbursing funds for the construction of a tunnel it is not liable for a penalty in the form of interest for withholding money and bonds from the assignee of the contractor. 95CalA151, 272P336.

1453-2 48Philippine309. [f] **Foreign municipal corporation,** authorized by charter to construct port developments and to appoint registrar for its bonds within or without state, is subject to same liability to suit as private corporation. 134Misc133, 234NYS196.

1454-17½–New. A municipal corporation may in certain instances invoke an appropriate civil remedy to coerce obedience to its ordinances, adopted in the exercise of its police power. 93CalA277, 270P270.

1454-22 197Wis4, 220NW393; 196Wis604, 220NW398.

1457-73½–New. In an action ex contracta, a foreign municipal corporation is subject to the same liability to attachment as a private corporation. 134Misc133, 234NYS196.

1457-76 MoA 27SW(2d)1063.

1459-31 [b] (1) 252NY141, 169NE118.

1460-34 9PaDist&Co 474.

1460-35 10PaDist&Co 292.

1460-44 [a] **Statute governing condition precedent** is not "right" or "vested interest" under statute vesting all rights of former organization to commission form. Iowa 231NW495.

1460-49½–New. The consent to the prosecution of a city for acts or omissions, when acting as the agency of the state exercising general governmental powers conferred upon it, must be expressed in unequivocal language. 224AppDiv512, 231NYS379.

1461-53 251Mich691, 232NW407.

1461-55 TexCivA 17SW(2d)163.

1462-69 92CalA585, 268P920.

1463-92 TexCivA 17SW(2d)163.

1464-93 TexCivA 17SW(2d)163.

1464-4 92CalA585, 268P920.

1465-9 TexCivA 17SW(2d)163.

1465-21 196NO412, 146SE3.

1465-22 196NO412, 146SE3.

1465-25½–New. Averments should be such that if false, perjury may be predicated. 251Mich691, 232NW407.

1465-27 251Mich691, 232NW407 (verification held insufficient).

1466-42½ 92CalA585, 268P920; 196NO412, 146SE3.

1468-35 TexCivA 17SW(2d)163.

1469-2 [d] **Statute is not a "right" or "vested interest"** under statute vesting all rights of property of old organization to commission form. Iowa 231NW495. [e] **City under commission form of government** is generally included in limitations to actions against municipal corporations. Iowa 231NW495.

1471-39 But see 134Misc133, 234NYS196.

1471-47 NC 155SE577(1st case). But see TexCivA 16SW(2d)852 [cit CJ].

1471-50 But see TexCivA 16SW(2d)852 [cit CJ] (holding rule subject to statutory exceptions and distinguishing previous cases).

1472-52 [a] (1) TexCivA 16SW(2d)852.

1472-66 229AppDiv308, 242NYS689.

1473-75 253 IllA218.

1473-78 [a] **Description of town or city as party.**–128Me240, 147A151 (plaintiff city correctly described under statute).

1476-50 But see Okl 292P15.

1476-52 34F(2d)357 (filing of demurrer is general appearance).

1476-56½–New. Court does not obtain jurisdiction over municipal corporation by waiver of issuance and service of summons in absence of statute. Okl 292P15.

1478-4 [b] **Plaintiff described as "inhabitants of city of Biddeford."**–128Me240, 147A151.

1479-19 [a] **Plea must be verified.**–TexCivA 17SW(2d)130(2d case).

1479-33 [b] **Complaint held insufficient** in action by contractor for loss of interest. 33F(2d)36.

1486-6 253 IllA218.

1489-63 SD 226NW726.

1489-66 See also SD 226NW726.

1489-68 See also SD 226NW726.

1490-95 Okl 292P15. [c] **Where judgment roll does not show validity of judgment against municipality** judgment is subject to collateral attack. Okl 292P15.

1494-96 227Ky690, 13SW(2d)1022.

1494-2 SD 226NW726 (city is estopped from appealing from portion of consent judgment granting permissive relief).

1494-9½–New. Ratification by village board of court order directing issuance of building permit shows that board did not authorize appeal from order. 253 IllA583.

1500-13½–New. A dull, heavy, and uninteresting person. NJSup 147A625(1st case).

MUTUAL BENEFIT INSURANCE

45 C. J.—8-16 319Mo 1120, 6SW(2d)870.

11-55 [b] **Liability of society for failure to issue certificate.**–220Ala270, 124S889 (complaint held sufficient in action for damages).

11-58 218Ala37, 117S659.

11-61 244 IllA391; MoA 8SW(2d)1043.

12-65 Ga 155SE760.

13-84 See also TexCivA 10SW(2d)568.

13-92 MoA 8SW(2d)1043; TexCivA 18SW(2d)693.

15-43½–New. A certificate issued in violation of a statute prohibiting the issuance of certificates to persons beyond a stated age limit is void. MoA 5SW(2d)675.

16-55 Iowa 229NW323. [a] **Not void as unreasonable.**–Iowa 229NW323.

17-71 But see 218Ala255, 118S456.

18-77 133 Okl 209, 271P1012.

20-13½–New. Where insurer did not attempt to repudiate the contract on insured's claim for disability payments not covered by a policy, but offered to rescind the contract and restore moneys paid by insured, or, in the alternative, to permit insured to continue the insurance in force as written, the continued payment of assessments by insured after such offer was in effect an acceptance of the offer to keep the insurance in force. TexCivA 10SW(2d)568.

21-28 Ill 173NE80.

21-31 Ill 173NE80 (effect of reorganization). [a] **Payment of assessment with knowledge of terms of new certificate** has been held insufficient to show acceptance of new certificate. Ill 173NE80. [b] **Notice by reorganized benefit association that new certificate replaced old one** does not change obligations under old certificate. Ill 173NE80.

21-31½–New. In determining whether insured transferred "to some other plan" under the by-laws of insurer, it is wholly immaterial that inaccuracies appear. TexCivA 11SW(2d)523.

21-39 See also TexCivA 10SW(2d)568.

22-48 135 Okl 101, 274P478.

22-67 180Ark610, 22SW(2d)31; 245 IllA221.

23-63 140 Okl 28, 282P141; 92PaSuper247.

24-74 TexCivA 10SW(2d)568.

26-7 235Ky46, 29SW(2d)599.

27-17 235Ky46, 29SW(2d)599; 266Mass148, 164NE805.

28-23 294Pa6, 143A232.

29-28 30GaA395, 146SE917.

30-30 Ala 127S847; 169La989, 126S502.

30-43 235Ky46, 29SW(2d)599.

31-48 152Wash78, 277P383.

31-49 TexCivA 20SW(2d)836.

31-51½–New. A provision of the constitution attempting to relieve a grand lodge of the responsibility for the transmission to grand officers of dues and assessments is void. TexCivA 17SW(2d)96.

33-58 TexCivA 22SW(2d)1107.

34-65 See also TexCivA 20SW(2d)836.

34-71 255 IllA170; 235Ky46, 29SW(2d)599; MoA 275SW552.

35-76 MoA 275SW552; TexCivA 22SW(2d)1107. But see 245Mich548, 222NW744, 65ALR1033.

35-79 TexCivA 22SW(2d)1107.

36-85 128Kan745, 280P756; 91PaSuper136.

38-92 199Wis298, 226NW288. [a] **Members of association, certain to be wrecked if benefits are paid,** have no vested rights precluding rescission of by-law provisions. 199Wis298, 226NW288.

40-99 TexCivA 20SW(2d)101.

43-40 MoA 275SW552.

44-55 199Wis298, 226NW288 (association held not estopped).

44-57 199Wis298, 226NW288.

45-58 199Wis298, 226NW288.

46-69 39GaA395, 146SE917. See also 199Wis298, 226NW288.

52-59 179Minn151, 228NW608.

56-21 35F(2d)345 (holding Georgia code applicable); 235Ky46, 29SW(2d)599.

56-23 227Ky804, 14SW(2d)150; MoA 8SW(2d)1043.

57-31 245Mich548, 222NW744, 65ALR1033. [d] (2) Contract of foreign corporation, which provides that liability arising from disappearance of member or presumption of death of member arising from such disappearance shall not be incurred by insurer, and that it

shall only be liable when there is positive proof of death, will be enforced in state of forum when contract emanates from state wherein rule of law exists that such provision is valid. 132 Okl 130, 270P12, 60ALR586.

58-39 [c] **Exaction of chapter dues,** in addition to premiums, held unauthorized where insured not initiated in any chapter. 180Ark4, 20SW(2d)642.

59-53 TexCivA 8SW(2d)679. [a] **"Contribution,"** as used in certificate of benefit association, may have same meaning as "assessment." 337 Ill 431, 169NE254.

59-53½-New. Under constitution and by-laws of some societies member of certain number of years' standing who has attained specific age is exempt from payment of dues for endowment. 142 Okl 100, 286P905.

62-96½-New. Member transferring to life plan has been held not subject to increased rates for members not transferred to another plan. TexCommnA 27 SW(2d)535.

63-6 [c] **Unauthorized chapter dues** held paid under coercion where insured was unaware of society's lack of authority. 180Ark4, 20SW(2d)642.

64-12-13½-New. Where the beneficiary predeceases the member but the member continues to pay assessments until his death and the society did not know of the death of the beneficiary or that the member had no heir, relative or dependent to whom payment could be made, the personal representative of the member cannot recover assessments paid after the death of the beneficiary. 128Kan 97, 276P61.

65-36 218Ala420, 118S912.

65-39 TexCivA 11SW(2d)523.

66-55 [b] MoA 295SW820.

73-85 IndA 171NE878 (necessity of showing unjust expulsion, where contract repudiated pending appeal).

73-8 [a] (1) 135 Okl 93, 274P475(2d case). (3) It will be assumed that full amount of face of policy will be due at date of death of policy holder, although amount to be paid is based upon one assessment, to be made against roll of 1,000 members, to which the policy holder belongs. 135 Okl 93, 274P475(2d case).

75-39 Kan 289P467; Kan 289P476.

75-40 Kan 289P476.

80-4 220Ala382, 125S396.

81-20 244 IllA391; Kan 289P476. [e] **Unhealed wound** from appendicitis operation at time certificate was delivered voids certification under provision necessitating delivery while in good health. 218Ala255, 118S456.

82-35 34Ariz458, 272P647.

84-53 218Ala255, 118S456.

84-58 2LaA401; 4LaA430; 4LaA433; MoA 25SW(2d)1079. See also Kan 289P476 (hospital record).

86-95 6LaA569.

89-40½-New. Where an application correctly states the occupation but the association wrongly classifies risk, the certificate cannot be avoided for misrepresentation. TexCivA 13SW(2d)460.

91-78 244 IllA211.

92-7 249 IllA319.

93-13½-New. That contract contains provision that insured shall continue to be member of brotherhood does not convert contract into one for term insurance. IndA 171NE878.

93-14 But see 197Wis184, 221NW759.

95-45 See also 245Mich548, 222NW744, 65ALR1033.

95-49 [b] (2) That insured, at time of injury, was engaged in his regular occupation of superintendent of construction for persons other than employer mentioned in his application for accident insurance does not invalidate benefit certificate, where character of work was not more hazardous than usually incident to his occupation as stated in his application. TexCivA 13SW(2d)460.

98-77 MoA 2SW(2d)172.

98-87 218Ala613, 119S640.

98-89 179Ark203, 14SW(2d)1108; 39 GaA395, 146SE917; Ga 155SE76; 9LaA 420, 121S259. [a] **Prior accruing benefits.-TexCivA 13SW(2d)460.** [b] **Such provision does not change contract from one of insurance for life to term policy.** IndA 171NE878.

100-98½-New. Certificate is not carried in force after default by provision for extended insurance where insured elected to take under option relating to cash withdrawal value. Iowa 229NW727.

101-16 TexCivA 8SW(2d)546.

102-31 [b] **Notice not prerequisite to right of society to forfeit benefits.-96Pa Super9.**

106-86 TexCivA 17SW(2d)104.

107-6 219Ala560, 122S686.

103-14½-New. As respects payment of premiums by application of dividends or surplus, it is within the power and option of a fraternal order to retain all surplus and refrain from declaring dividends, in the absence of a contrary provision in the certificate or in the constitution and by-laws. 155Miss841, 125S 413.

108-14½-New. Where a fraternal order, instead of declaring a dividend, issues a certificate of additional insurance, the court cannot hold such act equivalent to making available a fund for payment of past-due premiums. 155Miss841, 125S 413.

108-26½-New. Member refusing to pay increased rates but who pays old rate forfeits all rights to old age benefits. TexCivA 26SW(2d)453.

109-33 TexCivA 17SW(2d)96.

110-45 LaA 129S554; 142 Okl 100, 286 P905.

111-50 244 IllA211.

111-57½-New. Interest paid in advance on loan made on certificate is not available to carry certificate after default. Iowa 229NW727.

111-57½-New. Arrearages paid on reinstatement after prior default is not available to carry certificate past lapse or forfeiture. Iowa 229NW727.

111-58 NJ 148A724.

112-70 180Ark4, 20SW(2d)642 (chapter dues, wrongfully collected, must be applied to avoid forfeiture).

112-71 [b] (1) Iowa 229NW727. [b] (3) Net cash value or legal reserve required to be deposited with commissioner of insurance is not available to member to carry certificate. Iowa 229NW 727.

113-78 180Ark4, 20SW(2d)642 (subsequent nonpayment cannot be complained of).

113-89 160Tenn158, 22SW(2d)631 (where constitution provided that dues and assessments should be deducted from benefits during disability).

114-91 MoA 297SW989.

114-1 245 IllA142.

115-13½-New. That insured was an illiterate man and did not understand that surplus would not be returned by way of direct payment or credit on premiums, as had been done in past years, does not excuse nonpayment of premiums. 155 Miss841, 125S413.

115-25 155Miss841, 125S413.

116-30 See also 177Ark875, 8SW(2d) 452.

117-36 Ala 127S847. [c] (5) Increased assessment provision. 178Ark24, 9SW (2d)773.

118-40 10LaA578, 121S318; NJ 148A 724. See also 95CalA29, 271P1111(2d case).

118-44 39GaA528, 147SE725.

119-52 39GaA528, 147SE725.

122-2 Ala 127S847 (member must be in good health when payment is received at proper office); 2LaA140. But see MoA 276SW81.

124-31 [c] **By-law** requiring payment of all arrearages on reinstatement is valid. Iowa 229NW727.

125-32 92PaSuper247; TexCivA 21SW (2d)36.

125-33 Ariz 291P996.

126-50 Ala 127S847.

126-54 151Miss312, 118S175.

127-64 [a] 151Miss312, 118S175.

127-70 157Miss753, 128S558.

128-76 MoA 5SW(2d)675.

128-79 Ala 127S847.

131-19 [a] (2) Reinstatement pursuant to absolute right under contract after default in payment of assessment is not in contravention of statute prohibiting issuance of certificates to persons beyond stated age limit. MoA 5SW(2d) 675.

132-27 1LaA263; 5LaA110.

135-34 247Mich172, 225NW515.

137-2 TexCivA 18SW(2d)693.

138-18 178Ark393, 10SW(2d)879; 335 Ill 174, 166NE521.

139-29 TexCivA 18SW(2d)693.

141-58 335 Ill 174, 166NE521; 244 IllA 211; TexCivA 9SW(2d)364.

143-62 219Ala560, 122S686; 9LaA420, 121S259.

143-72 335 Ill 174, 166NE521.

144-83 91PaSuper136.

145-89 TexCivA 26SW(2d)453.

146-95 91PaSuper136, 145 [citCyc].

146-97 335 Ill 174, 166NE521.

146-2 40GaA536, 150SE436(2dcase).

148-18 TexCivA 16SW(2d)371.

150-41 [a] (8) Ala 127S847 (negotiations recognizing right to reinstate); 246 IllA412.

150-44 34NM523, 285P489.

152-69 MoA 297SW989; 133 Okl 179, 274P22.

153-76 See also MoA 24SW(2d)1080.

154-96 MoA 276SW81.

154-97 MoA 297SW989.

156-17 But see 179Ark203, 14SW(2d) 1108.

157-23 152Wash78, 277P383.

157-28 NC 155SE158.

158-44 See also 246 IllA364.

160-58 MoA 297SW989.

162-3 [b] **Receipt of payment with application for reinstatement made on death bed** does not constitute waiver of forfeiture where by-laws require that insured be in good health. Iowa 229NW 727.

164-24 34NM666, 287P286.

165-34 220Ala382, 125S396 (incontestable provisions of statute).

166-51 335 Ill 239, 167NE52.

166-52 218Ala420, 118S912; 170Ga449, 153SE194. [b] **Presumed knowledge.-**218Ala420, 118S912.

166-59 246 IllA412.

167-63 TexCivA 9SW(2d)498.

167-65 319Mo1120, 6SW(2d)870.

167-68 Ariz 285P682; 243Mich542, 220 NW664(2dcase); 175Minn462, 221NW 721, 59ALR162; 319Mo 1120, 6SW(2d) 870.

169-81 170Ga449, 153SE194.

170-84 Kan 291P753; 175Minn462, 221 NW721, 59ALR162.

170-85½-New. Question of disqualification of divorced wife may be raised by any interested party. Ariz 285P682.

170-86 Va 154SE556.

171-88 [a] **Payment to attorneys of adverse claimants** awaiting determination of rights has been held waiver of eligibility of assignee as beneficiary. 170Ga 449, 153SE194.

171-94 35F(2d)345.

171-96 [a] (8) MoA 22SW(2d)206; TexCivA 9SW(2d)498.

172-98 Kan 291P753.

172-99 86PaSuper409.

172-3 Kan 291P753.

173-8 243 IllA219; 11PaDist&Co 110.

175-29 Kan 289P440.

175-31 35F(2d)345 (applying Georgia code requiring dependency); 175Minn 462, 221NW721, 59ALR162.

176-32 175Minn462, 221NW721, 59ALR 162.

177-48 [a] DC 26F(2d)981.

177-52 27 OhNPNS594.

178-68 35F(2d)345 (such beneficiary held not "dependent" under Georgia code).

178-73½-New. **Godchild** cannot be beneficiary. 12LaA592, 126S730.

178-75 TexCivA 23SW(2d)761.

178-81 148SC506, 146SE416.

183-73 35F(2d)345 (financee of married man, since promise void, held not dependent).

183-76 199Wis635, 227NW268.

184-96 But see 175Minn462, 221NW 721, 59ALR162.

185-8 Kan 289P467.

188-52½-New. The provision of a contract of insurance that each member holding insurance shall have the right to designate a beneficiary should not be curtailed or abrogated. 129 Or66, 275P 39.

188-53 218Ala415, 118S764.

188-56 129 Or66, 275P39. [b] **Designation by agreement with beneficiary.-**129 Or66, 275P39.

188–64½–New. The courts will, if possible, construe the designation of a beneficiary under a benefit certificate so as to bring it within the power given by the statutes and sustain its legality. 129 Or66, 275P39.
188–64½–New. If the by-laws of a benefit association require no formalities in the designation of a beneficiary, the courts will require none. 129 Or66, 275 P39.
189–67 129 Or66, 275P39.
189–81 218Ala415, 118S764.
190–87 Va 154SE556.
191–11 Va 154SE556.
191–12 See also Va 154SE556.
191–18 See also 1LaA368. [a] Insured causing beneficiary to be designated in certificate as wife has been held not to have intended second wife as beneficiary. 169La989, 126S502.
192–25½–New. Term "widow," as used in designation of beneficiary in insurance or by-laws, refers to person occupying that status on death of insured. 169La989, 126S502.
194–74 26 OhNPNS235.
195–82 NJCh 148A16.
196–97½–New. Assignment by husband and wife to secure husband's creditor has been held not void as made by wife to secure husband's indebtedness, nor transfer of her property in payment of husband's debt. 170Ga449, 153SE194.
196–5 170Ga449, 153SE194.
198–15 218Ala420, 118S912.
200–35 But see Nebr 232NW590.
202–43 218Ala420, 118S912.
203–62 170Ga449, 153SE194; TexCivA 9SW(2d)498.
203–63 170Ga449, 153SE194.
203–65 91PaSuper136.
209–26 91PaSuper136. [b] (1) 91Pa Super136.
212–51 170Ga449, 153SE194.
213–56 170Ga449, 153SE194. [d] (2) Other acts. TexCivA 10SW(2d)568.
213–57 [b] Acts not constituting estoppel.–TexCivA 10SW(2d)568.
217–19 [a] (11) Death by heat prostration. TexCivA 20SW(2d)101.
219–25 [a] Death pallor and other evidences of death satisfy requirement of by-law providing that there shall be external or visible marks on body. TexCivA 20SW(2d)101.
227–71 TexCivA 8SW(2d)679.
231–6½–New. A provision providing benefits for a total permanent disability, sustained prior to members attaining sixty years of age, is valid. TexCivA 10SW(2d)568.
231–8 [m] Particular certificates construed.–235Ky46, 29SW(2d)599.
232–10 255 IllA170. [b] (2) Beneficiary is entitled to face value in absence of evidence that one full assessment would not produce that amount. 255 IllA170.
232–14 TexCivA 17SW(2d)104.
233–16 TexCivA 9SW(2d)398.
236–49 MoA 8SW(2d)1043.
236–50½–New. That a foreign assessment plan insurance company wrote insurance in Missouri without a license, contrary to state laws, does not relieve it from the requirement that all policies issued by assessment companies specify the exact sum of money agreed to be paid. MoA 8SW(2d)1043.
237–62 [a] Compliance with requirements held sufficient.–TexCivA 20SW (2d)101.
237–72 249 IllA319.
239–8½–New. Filing of proof of disability is not a condition precedent to recovery of benefits accruing after arbitrary and oppressive suspension from membership, where provision for benefits is limited to members in good standing. 160Tenn158, 22SW(2d)631.
242–39 245 IllA221.
242–45 180Ark634, 22SW(2d)30.
245–68 TexCivA 31SW(2d)192. [a] (9) Grandchildren of deceased member has been held not entitled to relief, benefits payable, under constitution, to "children." TexCivA 31SW(2d)192.
246–69 13LaA362, 125S894.
247–96 180Ark4, 20SW(2d)642 (where time of beneficiary's death undisclosed).
247–97½–New. Benefits payable to named person as tutor for minor beneficiary are payable to father of minor qualified as tutor. 12LaA694, 127S74.
248–9 DC 26F(2d)981.
248–10 Kan 289P440 (certificate not void).
250–17 243 IllA219.
250–20 But see MoA 20SW(2d)161.
252–45 128Kan76, 276P51.
252–47 169La989, 126S502.
254–57 [c] Where beneficiary survives member, though only for short time, rights attach immediately on member's death. 253 IllA68 (death of member and beneficiary in automobile accident).
254–58½–New. Proof that a beneficiary, killed in a common disaster with a member, survived such member controls vesting of the benefit fund. 335 Ill 239, 167 NE52.
254–58½–New. A provision of a by-law for a substituted beneficiary if death of a beneficiary shall occur at the same time or in a common disaster with the death of the member does not effect a substitution, where proof can be adduced that the beneficiary survived the member for an appreciable period of time. 335 Ill 239, 167NE52.
255–66 Kan 292P928.
257–85 11PaDist&Co 174.
257–92 TexCivA 9SW(2d)498.
258–12 218Ala420, 118S912.
260–38 See NJCir 143A77.
260–43 27 OhNPNS414.
261–57 [b] (5) Under laws of association providing the drawing of check in favor of the treasurer of deceased member's camp, who shall pay it to beneficiary, payment to local treasurer was not payment to beneficiary. NJCir 143A 77. (6) Under law of fraternal benefit corporation that subordinate council and its officers shall be members' agents in performing their duties, delivery of check for old age benefit to treasurer of subordinate council in lifetime of member, consenting to termination of membership on receipt of such benefit, as provided by order's constitution and laws, was delivery to his agent, so as to preclude recovery by his widow on benefit certificate. 266Mass148, 164NE805.
262–76 180Ark944, 23SW(2d)637.
262–77 180Ark944, 23SW(2d)637.
262–78 [a] (2) 180Ark944, 23SW(2d) 637.
266–38 160Tenn158, 22SW(2d)631.
267–41 7LaA548.
268–48 179Minn151, 228NW608.
268–55 NJ 151A751.
269–57 TexCivA 16SW(2d)371.
269–58 179Minn151, 228NW608. [c] Wrongful suspension of insured deprives society of right to insist that remedies in society should be exhausted before resort to courts to secure benefits withheld. 160Tenn158, 22SW(2d)631.
271–81 RI 144A672.
272–92½–New. Where a claim for benefits is allowed and a check drawn, the requirement of arbitration is not applicable. NJCir 143A77.
274–16 See also 98PaSuper430.
275–44 MoA 289SW672.
276–55 [c] Court held without jurisdiction against foreign corporation having no property and not attempting to do business within state. 177Ark694, 8SW (2d)448.
276–62 [c] (2) Unincorporated mutual benefit association held not "insurance company" as to venue statute. TexCivA 21SW(2d)562.
277–70 95PaSuper56.
278–88 8LaA478.
278–91½–New. A limitation of six months after the claim is disallowed is not enforceable, where the beneficiary, during practically all of the six-month limitation, was irrational, and mentally incompetent to transact business. 27 OhA422, 162NE636.
279–99 [a] TexCivA 20SW(2d)101.
281–36 219Ala293, 122S36.
284–99 [b] Code form of complaint upon policy of insurance is not applicable to fraternal insurance contract. 220Ala 382, 125S396.
284–1 [e] 220Ala382, 125S396.
289–77 244 IllA391.
289–80 [a] (3) In general. 101CalA 625, 281P1054.
291–4 TexCivA 22SW(2d)1107.
292–24 253 IllA410; 227Ky804, 14SW (2d)150.
298–30 [a] Replication held demurrable for failure to allege payment of assessments. Ala 127S821.
298–33 [b] (3) Waiver of proofs of death properly pleaded. Ala 127S821.
300–59 [a] Where no issue was raised as to sufficiency of proof of death, admission of proofs of death brought into court by insurer is not erroneous. 220 Ala382, 125S396.
300–61½–New. Where a certificate provides for the maximum payment with a limitation of recovery, an association must plead and prove the facts reducing the amount of recovery below such maximum. TexCivA 17SW(2d)104.
300–70 [b] MoA 292SW1054. [c] 179 Minn151, 228NW608 (law of another state).
300–71 179Minn151, 228NW608.
301–87½–New. Where there is no pleading, under which the evidence that insurer returned the premium to the beneficiary after insured's death could be received, the evidence thereof is properly excluded; the general issue not permitting such evidence. 218Ala599, 119SW644.
302–99 249 IllA74.
302–8 Nebr 230NW109.
302–13½–New. Since a member of a fraternal corporation, in designating a beneficiary to whom a death benefit may be paid, must keep within the class of beneficiaries named in the statute, defendant fraternal association organized under such statute is not required to introduce any evidence in way of defense, where the evidence of plaintiff, suing as administratrix of her deceased husband to recover such death benefit, fails to show the person to whom, under defendant's charter and by-laws, such benefit is payable. 266Mass199, 165NE24.
302–19 218Ala420, 118S912; 1LaA11; TexCivA 31SW(2d)192.
304–63 See also 86PaSuper46.
305–81 10LaA578, 121S318.
306–11 219Ala560, 122S686; 245 IllA 142.
307–19 TexCivA 8SW(2d)546.
308–34½–New. Association is presumed to have received and retained money paid for insured's reinstatement in accordance with provisions permitting reinstatement. Ala 127S847.
308–40 But see 335 Ill 174, 166NE521.
309–66 34NM666, 287P236.
311–88 [d] Abortion.–MoA 292SW1054.
312–1 TexCivA 10SW(2d)188.
313–24 253 IllA410; MoA 8SW(2d) 1043.
313–26 TexCivA 19SW(2d)591.
313–27 337 Ill 431, 169NE254 (assessment on members to produce fund).
313–29 253 IllA410.
313–30 253 IllA410.
314–40 [f] MoA 292SW1054.
316–75 See also 86PaSuper46.
316–84 220Ala382, 125S396 (without proof of execution in absence of plea denying it).
317–92 [e] 12LaA592, 126S730.
318–19 But see 245 IllA142.
320–53 [a] (2) Where receipt was undated, evidence to show what dues were then paid is admissible. 180Ark634, 22 SW(2d)30. [c] Ambiguous receipt will be admitted where parties agreed that it covered dues. 180Ark634, 22SW(2d)30.
321–77 [f] (3) TexCivA 31SW(2d)879.
322–78 249NY78, 162NE589.
323–96 TexCivA 31SW(2d)879.
323–4 TexCivA 31SW(2d)879.
324–25 335 Ill 174, 166NE521.
325–37 MoA 276SW81.
326–58 MoA 292SW1054. [a] (2) Testimony as to fresh tracks corresponding with shoes worn by insured in unlawfully attacking neighbor. 218Ala616, 119 S635. (3) Evidence that one assaulted by insured was inside his own house at time of firing fatal shot. 218Ala616, 119S635.
330–20 [a] (1) 180Ark1168, 22SW(2d) 38. (11) To show permanent and total disability. TexCivA 16SW(2d)834. (12) To sustain finding that plaintiff was not totally and permanently disabled. TexCivA 8SW(2d)560. (13) To support findings entitling plaintiff to

recover. 179Minn151, 228NW608. [b] (5) To show justification for delay beyond period of limitation given in by-laws. 245Mich128, 222NW166.

330-21 [a] (2) 218Ala613, 119S640; 335 Ill 174, 166NE521.

330-21 [b] **Evidence disclosing breach of warranty** disproves prima facie case. **MoA** 258W(2d)1079.

331-27 [a] (5) To show that it was fraternal benefit society requiring service of summons on commissioner. 84 Colo 198, 269P584.

332-47 [a] (2) 140 Okl 28, 282P141.

333-50 [a] (1) **TexCivA** 31SW(2d)359.

333-57 [a] 95CalA29, 271P1111(2d case); 225Ky767, 10SW(2d)287.

333-58 [b] (1) **TexCivA** 9SW(2d)398.

335-78 245 IllA221.

335-83 [a] (2) To show timely making of proofs of death. 180Ark1168, 22SW (2d)38.

335-88 [c] (1) 180Ark1168, 22SW(2d) 38; **TexCivA** 17SW(2d)104. (3) 9LaA 420, 121S259. (8) To show unbroken **custom** of accepting dues and assessments after time of payment as provided in by-laws, and that deceased paid his dues and assessments within time established by said custom. 133 Okl 179, 274P22.

335-89 [c] **Kan** 289P440.

336-92 [b] (2) **TexCivA** 8SW(2d)546.

336-95½-New. Where an association, under a policy which it assumed, was liable in no event for more than the amount produced by one assessment on the members of the circle or group to which the member belonged, less cost of collection, the evidence has been held sufficient to sustain the burden of showing the amount of the assessment. 178 Ark205, 10SW(2d)17.

337-1 [b] (4) **TexCivA** 16SW(2d)371. [c] (1) 249NY78, 162NE589.

338-12 [a] (2) To show waiver of limitation provision in by-laws. 245Mich 128, 222NW166.

340-26 245Mich128, 222NW166.

340-31 [a] **Policy provision, requiring** positive proof of death of beneficiary member, does not exclude proof of death by circumstantial evidence. 132 Okl 130, 270P12, 60ALR586.

340-41 [c] (1) **TexCivA** 20SW(2d)101 (that insured died from heat prostration).

341-42 [c] **Death caused by self-inflicted abortion.**–**MoA** 292SW1054.

341-52 [c] (2) **TexCivA** 10SW(2d)188.

343-78 **TexCivA** 31SW(2d)879.

344-79 **MoA** 27SW(2d)1076; **TexCivA** 31SW(2d)879.

344-81 [a] **RI** 144A672.

346-20 **NJ** 148A724.

347-31 218Ala255, 118S456. [a] (6) Other matters. **MoA** 2SW(2d)172.

347-37 **TexCivA** 16SW(2d)850.

347-38 219Ala560, 122S686; 92PaSuper 247.

348-49 218Ala599, 119S644. [a] (4) Fraudulent misrepresentations as to health at time of reinstatement. **MoA** 5 SW(2d)675.

348-57 See also 249NY78, 162NE589. [a] (2) 178Ark393, 10SW(2d)879.

350-77½-New. or disability, **TexCivA** 12SW(2d)1072(1stcase).

350-81 [a] (5) Whether death due to rupture of blood vessels was attributable to disease. **TexCivA** 16SW(2d)357.

351-85 218Ala616, 119S635.

352-93 [a] (4) **TexCivA** 8SW(2d)560.

352-98 [a] **Instructions held erroneous.**–**TexCivA** 22SW(2d)1107.

352-6 **MoA** 292SW1054.

354-21 [a] **MoA** 292SW1054.

356-38 [b] **Findings held inconsistent.**–**TexCivA** 31SW(2d)879.

357-51 160Tenn158, 22SW(2d)631.

357-53 160Tenn158, 22SW(2d)631 (decree for benefit installments in default at date suit was commenced held incidental to relief awarded by way of reinstatement and authorized by prayer for general relief).

357-73 160Tenn158, 22SW(2d)631.

359-1 178Ark205, 10SW(2d)17.

359-5 180Ark4, 20SW(2d)642. [a] (4) Association formed to aid sick and indigent members and provide burial for dead members held properly found to be fraternal benefit society. **TexCivA** 31SW(2d)879.

360-7 **TexCivA** 8SW(2d)679.

360-12 245 IllA142.

NAMES

369-35 97CalA434, 275P963.

370-38 4HawaiiFed57, 58 [citCyc].

370-39 97CalA434, 275P963.

371-50 **Mass** 169NE542.

372-62 13PaDist&Co 164.

373-74 13PaDist&Co 164.

375-97 4HawaiiFed669; **LaA** 129S405 (return held to show service on defendant's wife).

376-4 168La443, 122S285; 4LaA312, 317 [citCyc]; **MoA** 23SW(2d)1075; 108 WVa458, 151SE429.

377-9 97PaSuper591; **TexCivA** 23SW (2d)484. [a] **Defendant's use of distinct trade-names for two stores** does not affect his exclusive liability for debts of each. **TexCivA** 25SW(2d)269.

377-21 [f] **After filing certificate of discontinuance,** use of trade name is illegal. 227AppDiv404, 238NYS11. [g] **Widow's failure to register, under Fictitious Name Act** did not establish non-use of husband's name. 300Pa206, 150 A468.

378-24 48 Ida240, 281P375 (statute applicable only in suit by one extending credit).

378-27 13PaDist&Co 9.

378-35½-New. Nova Scotia Registration of Partnerships Act is inapplicable to individual conducting business at store exhibiting sign descriptive of place of business. **NS** [1930] 2DomLR 415.

379-37 295Pa280, 145A288.

379-40 **Cal** 290P290; 48 Ida240, 281P 375. [c] (2) 12PaDist&Co 788. (3) Contractor and surety on contractor's construction bond, sued, had burden of proving that materialmen, used fictitious trade-name, without having first complied with act. 295Pa280, 145A288.

379-42 See also 98CalA686, 277P749.

379-43 47 Ida468, 276P320.

379-51 267Mass578, 166NE727.

381-80 220Ala549, 126S869 [quotCJ].

383-10 **TexCr** 28SW(2d)541.

383-12 **AlaA** 130S169(2dcase) (available to state); 4HawaiiFed57, 58 [cit Cyc].

384-14 97Fla988, 122S567; 9LaA467, 119S736; 150Wash121, 272P72. [c] (9) But see 112TexCr354, 17SW(2d)62. [d] (26) Daniel and Daniels. **TexCr** 28SW (2d)541. [g] (20) Gillispie and Gillespie. **CalA** 286P502. [h] (16) Hankins and Hankines. 204Cal 351, 268P331. [i] (3) Ila and Ira. 40GaA732, 151SE 240(1stcase). [l] (20) Lebouf and Leboub. 243Mich318, 220NW792. (21) Lowery and Lowry. 40GaA314, 149SE 389.

387-20 [c] (23) "Chester" O and "Chesley" O. 112TexCr354, 17SW(2d)62. (24) Custren and Custern. 14PaDist&Co 76. [f] (9) "Ferrel" and "Ferril." 11PaDist &Co 562. [g] (15) Other instances. **AlaA** 130S169(2dcase). [s] (18) Stanymes and Stanmyres. 23Ala369, 125S787.

389-23 41GaA321, 152SE913 (identity of person rather than of names as true issue). See also 200 Ind551, 165NE316, 65ALR980. [c] **To establish identity as matter of law,** similarity of name alone is insufficient where there is evidence to contrary. **TexCivA** 29SW(2d)911.

389-29 **Ind** 166NE649; **TexCr** 27SW (2d)653(2dcase).

390-35 [a] **Mechanics' liens.**–**OhA** 173 NE212 (names Ernest and Earnest).

NATURAL

395-25 **Cal** 291P825.

NAVIGABLE WATERS

405-19½-New. Whether stream is navigable or not is question for judicial ascertainment. **TexCivA** 25SW(2d)706.

406-23 31F(2d)109; 42F(2d)474; 248 Mich410, 227NW741; **MoA** 19SW(2d) 544.

408-25 **Wis** 228NW144.

408-26 [a] **Rifts and shallows do not** affect general character of stream as navigable stream. 230AppDiv338, 245 NYS44.

408-30 42F(2d)474.

409-33 153Wash168, 279P388 (lake held not navigable).

413-53 230AppDiv338, 245NYS44.

415-69 [c] (2) To constitute **statutory navigable stream,** it must retain average width of more than thirty feet from its mouth. **TexCivA** 25SW(2d)706. (3) Determination of width does not involve exercise of discretion but is mere matter of measurement. **TexCivA** 25SW(2d) 706.

416-92 181Ark574, 26SW(2d)892(2d case).

416-98 248Mich410, 227NW741.

417-8 [h] 40F(2d)323. [p] (7) 230App Div338, 245NYS44. [ii] **In Mississippi.**–152Miss17, 118S357.

418-10 [c] (2) San Francisco Bay. 92 CalA225, 267P1089. [q] **In Texas.**–26 F(2d)930. [r] **Inland lake serving as drain for surrounding country.**–42F(2d) 474.

418-13 **MoA** 19SW(2d)544.

419-17 **Wis** 228NW144.

419-18 [e] **Evidence held sufficient to** show stream navigable. 181Ark574, 26 SW(2d)892(2dcase). [f] **Navigability must be established by clear evidence.**–42F(2d)474.

420-23 [a] **Effect of Water Power Act** as investing commission with authority of government. 43F(2d)977.

420-24 [a] 278US367, 49SCt163, 73L ed 426.

420-25 35F(2d)235 (analogous to police powers of state).

420-28 See also 152Wash548, 278P419.

421-37 41F(2d)728; **Wis** 228NW144.

422-38 41F(2d)728.

424-64 **Can** [1929] 2DomLR481.

426-93 [f] **No authority where stream** is not navigable. 26F(2d)930. [g] **Artificially contrived navigability,** by construction of inland waterway, does not bring stream within statutes. 26F(2d) 930.

427-12 278US367, 49SCt163, 73L ed426.

431-54 230AppDiv338, 245NYS44.

433-82 **Can** [1930] 3DomLR48 (statute construed).

433-85½-New. Where there is no valid conflicting legislation by the Dominion under overriding power, a province has the right to control or use the waters in provincial rivers and to develop or authorize the development of water powers within the province, provided that navigation is not prejudiced and that Dominion requirements as to navigation are complied with. **Can** [1929] 2DomLR 481.

433-85½-New. The authority of provinces to control, regulate and use waters of provincial rivers, in the bed of which the Dominion has constructed works for purposes of navigation, is subject to the condition that the provinces do not interfere in matters, control of which is reserved exclusively for the Dominion, and that valid enactments of the Dominion in relation to navigation works or navigable rivers are observed. **Can** [1929] 2DomLR481.

433-90 [g] **Liabilities.**–35F(2d)235.

436-35 [a] **Authorization for creation of navigation districts** out of territory outside of county boundaries by commissioners' courts does not invalidate statute. **TexCivA** 8SW(2d)198.

438-66½-New. A navigation district is a public municipal corporation and cannot be dissolved or its powers cut down or destroyed in any private suit or litigation except in a direct suit by the state. **TexCivA** 8SW(2d)198.

438-74 118Tex391, 15SW(2d)1032.

438-79½-New. A district has the discretion to lease lands for a limited period for purposes not inconsistent with an act granting lands to the district. 118 Tex391, 15SW(2d)1032.

438-79½-New. Funds, derived by a district from the sale of sand and gravel, could be applied to the payment of warrants issued to satisfy an assessment for a local improvement. 152Wash523, 278 P423(2dcase).

438-80 See 96Fla109, 117S786.

438-88 [b] **Fact that no provision for hearing on question of special benefits** was made does not render statute invalid, where there was provision for hearing before commissioners' court on petition to create district pursuant to public notice. **TexCivA** 8SW(2d)198.

443-66 [a] (3) No liability for damages

to ship striking obstruction, where captain knew of blasting operations but failed to keep on clear side of channel. 27F(2d)442.

443-70½-New. The fact that the state and city contributed the right of way for a canal constructed by the federal government does not make them liable for damages resulting from the uses made of the right of way. 90CalA634, 266P552.

444-71 248Mich410, 227NW741 (inland lake); 230AppDiv338, 245NYS44 (primary use); 131 Or554, 284P172; Wis 228NW144 (fishing, boating, or other enjoyment).

445-75 [b] **Right of navigation is paramount to right of traffic over drawbridge or swinging bridge.**-40F(2d)649.

445-80 40F(2d)420 (waters within bulkhead line).

445-86 See also 30F(2d)332.

447-19 [a] **Where bed of navigable river is vested in crown in right of province,** title is subject to public right of navigation except in so far as at date of union crown possessed by law or has since acquired under Dominion legislation superior right to use or grant use of waters for other purposes. Can [1929] 2DomLR481.

447-25 Wis 228NW144.

450-73 29F(2d)115.

451-84 30F(2d)22; 249NY495, 164NE558 [certiorari granted 279US829, 49SCt348(2dcase), 73L ed980] (right to construct obstruction must be established independently of federal permit).

451-87 278US367, 49SCt163, 73L ed426.

451-87½-New. The act prohibiting obstructions, unless "affirmatively authorized by law," makes necessary both state and federal approval. 278US367, 49SCt163, 73L ed426.

454-29 244Mich192, 221NW113.

454-36 38F(2d)844.

455-49 Can [1930] 3DomLR48 (holding approval as curing defects of procedure for securing approval).

456-74 29F(2d)115.

457-75 29F(2d)115.

457-82 29F(2d)115.

457-84 See also 29F(2d)115.

458-98 Can [1930] 3DomLR48.

458-10 [c] **State engineer** is required to designate width only as to navigable waters. 92CalA225, 267P1089.

459-28 29F(2d)115.

459-29 See also 29F(2d)115.

460-33 BC [1929] 3DomLR161.

461-56 38F(2d)844.

462-57 41F(2d)747.

462-58 41F(2d)747.

462-62 41F(2d)747; 43F(2d)448. **Swinging bridge toward approaching tug** held not to constitute negligence. 40F(2d)649.

462-63 [a] 38F(2d)844. [d] **Question held for jury.**-NJSup 149A348. [e] **Evidence held sufficient** to sustain verdict for passengers on boat injured by partially opened draw. NJSup 149A348.

463-81½-New. It is duty of vessel approaching draw or swinging bridge to signal to open. 40F(2d)649.

463-82 [c] **Negligence not shown.**-43F(2d)448 (operation of tug by unlicensed person held not negligence per se).

463-83 38F(2d)844.

465-99 BC [1928] 2DomLR877; BC [1929] 3DomLR161 (ship navigated with ordinary care and skill held not liable for collision with bridge obstructing navigation constructed under authority of statute of Dominion of Canada).

465-5 Wis 228NW144.

465-6 [a] **Notice of application for preliminary permit to construct dam.**-42F(2d)692.

466-10½-New. Effect of construction of dam under license from federal power commission on finances of county cannot stand as barrier to improvement. 42F(2d)692.

466-24½-New. The jurisdiction of the Federal Water Power Commission to issue a license for the use of the waters of the Hudson River for power purposes, and the effect of such a license, are to be determined by the courts. 249NY495, 164NE558 [certiorari granted 279US829, 49SCt348(2dcase), 73L ed980].

466-24½-New. The finding of the Federal Water Power Commission, that project work for which a license is granted by it is in aid of navigation, is not conclusive on the courts, in the absence of evidence to support it. 249NY495, 164NE558 [certiorari granted 279US829, 49SCt348(2dcase), 73L ed980].

467-48 [a] **Until dam has been lawfully built in navigable stream,** there is no vested right to obstruct navigation by building dam therein. Wis 229NW631.

468-65 280US369, 50SCt140, 74L ed483.

468-65½-New. A license to a private corporation to install flashboards on a federal dam, is held not to exempt a licensee from liability for damages to upper riparian owners. 249NY495, 164NE558 [certiorari granted 279US829, 49SCt348(2dcase), 73L ed980].

468-71 [a] (3) Dredge owner proceeding negligently with operations with knowledge that submarine cables were not removed could not recover for damage to dredge. 42F(2d)79.

469-80½-New. A steamship and power company are held both at fault for the collision of a ship with a cable undergoing repairs. 31F(2d)486.

470-7½-New. A vessel causing damage to a jetty, by colliding therewith, is liable for damages. 32F(2d)236.

471-38½-New. A contract by a wrecking company to raise a wreck does not create a tort duty to get it out of channel after it is once partially raised. 31F(2d)532.

471-32½-New. A city is held not liable for the cost of raising vessels, sunken in navigable waters, in the absence of an agreement to pay. 29F(2d)37.

471-33¼-New. A waiver of a right to abandon vessels may not be implied merely because they were berthed while out of service during the winter lay-up, under a permit granted to the owner. 29F(2d)37.

472-45 29F(2d)588.

472-47 29F(2d)588.

472-49 See also 29F(2d)588.

472-54 29F(2d)37.

472-55 29F(2d)588.

473-61 [a] **Abandonment not shown.**-40F(2d)27.

473-70 27F(2d)185; 31F(2d)532. But see 29F(2d)588. [a] **Lighthouse service's efforts insufficient** fulfillment of government's obligation as owner. 40F(2d)27.

473-70½-New. The United States may set up efforts of Lighthouse Service in the complete discharge of the owner's obligation. 29F(2d)588.

473-71 40F(2d)27.

473-73½-New. A wrecking company is not liable to colliding vessels after casting adrift sunken scow which drifted considerable distance from buoy. 31F(2d)532 (where scow had drifted from buoy before being cast adrift).

473-73½-New. The failure of a wrecking company to continue contract to raise scow concerns only the owner. 31F(2d)532.

474-88 [d] **Discharge by municipality, acting in exercise of power conferred by state,** of sewage into tidal waters, does not constitute nuisance. Md 150A273.

474-91 [a] **Minimum penalty was sufficient** for unknowingly discharging oil into harbor. 42F(2d)211.

474-92 28F(2d)1004(2dcase).

474-2 28F(2d)1004(2dcase); 30F(2d)727; 42F(2d)211.

475-12 See also 30F(2d)727.

475-27½-New. Statutes are held not to authorize the diversion of water from Lake Michigan. 278US367, 49SCt163, 73L ed426.

475-27½-New. Where the secretary of war granted a permit authorizing diversion solely for the purpose of removing sewage and for incidental power purposes under specified conditions, it has been held that, in so far as the diversion was not for the purpose of maintaining navigation in the Chicago River, it was without a legal basis, and will be enjoined. 278US367, 49SCt163, 73L ed426.

475-27¼-New. A permit, given by the secretary of war to the sanitary district of Chicago, authorizing diversion of water from Lake Michigan for sanitary purposes, under conditions specified, is held not to give states other than Illinois any rightful interest in the maintenance of the diversion in interest of navigation of the Mississippi River or interstate commerce. 278US367, 49SCt163, 73L ed426.

475-27½-New. Where facts showed that a ditch constructed by riparian owners to lower the level of a lake did not enter the lake but began one thousand eight hundred feet from it, and that the water could get into the ditch only by flowing out of the lake into a bayou, the bayou was thus an outlet. 179Ark102, 14SW(2d)1101.

475-27½-New. Constructing a ditch by a riparian owner, for protection of lands against flood waters, lowering the level of the lake, is proper under the statute. 179Ark102, 14SW(2d)1101 (not below normal level).

475-27½-New. Laws authorizing improvement company to construct, maintain, and operate a system of water reservoirs, did not authorize such a decrease in the flow of streams as to destroy navigation for running of logs. 198Wis134, 223NW417.

475-27½-New. Decree enjoining Chicago sanitary district from diverting waters of Lake Michigan should permit diversion for domestic pumpage and for outflow from drainage canal. 281US179, 50SCt266, 74L ed799.

475-27½-New. Waters diverted from Lake Michigan for domestic pumpage of city of Chicago should not be returned to lake when purified. 281US179, 50SCt266, 74L ed799.

475-33 26F(2d)603.

476-56 [f] **Where erection of bridge was authorized,** bill for injunction is properly dismissed. 40F(2d)323. [g] **Construction of dam under federal license** will not be enjoined because of conflict between federal and state laws. 42F(2d)692.

479-90½-New. Where the sanitary district of Chicago much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the unlawful diversion of water from Lake Michigan to Chicago Drainage Canal in the future, they cannot complain if an immediately heavy burden is placed on the district by enjoining such diversion necessitating immediate heavy expenditures for the plants. 278US367, 49SCt163, 73L ed426.

480-14 See also 179Ark102, 14SW(2d)1101.

481-30 [c] (2) Nor is it liable unless it appears that condition was such a dangerous one as required respondent to anticipate and guard against danger. 27F(2d)442.

481-35 But see 31F(2d)981.

483-60 [b] 200Wis31, 227NW276.

484-80 27F(2d)442.

484-84 29F(2d)115.

484-85½-New. A vessel striking a bridge which is an unlawful obstruction is not presumptively negligent. 29F(2d)115.

484-87½-New. The presumption of negligence, applies in the case of a collision of a towed ship with a bridge, unless the bridge was negligently constructed or maintained. 29F(2d)115.

484-87½-New. A vessel sinking a buoy, marking a wreck, is presumptively negligent. 31F(2d)684.

484-87¼-New. Affirmative case of negligence must be made out against bridge owner for damage to tow in striking bridge. 40F(2d)649.

484-96 29F(2d)115. [b] (4) To warrant recovery against owner of swinging bridge for damage to tow. 40F(2d)649.

486-26 See also 29F(2d)115.

487-40½-New. The trial court is held to have properly enjoined the enforcement of a penalty against a railroad, for the failure to alter a bridge across a stream, incapable of being used in its natural state as an aid to commerce. 31F(2d)109.

490-17 152Wash165, 277P459; 152 Wash184, 277P465.
490-24½-New. The dedication of shore lands as a public highway should prevail over the state's right to use the lands for profit, where there is doubt. 152Wash165, 277P459.
490-24½-New. The law, establishing the shore and beach of the Pacific Ocean from Columbia River or Cape Disappointment, makes highway begin from the extreme southerly point of Cape Disappointment. 152Wash165, 277P459.
491-43 Mich 233NW159.
491-44 Mich 233NW159.
491-45 Mich 233NW159.
491-46 Mich 233NW159.
491-47 [a] **Right to take sand and gravel** is included in riparian rights. Miss 130S55.
493-64 280US369, 50SCt140, 74Led483.
493-74 See also Mich 233NW159.
494-75 131 Or554, 284P172.
494-89 96Fla181, 117S789.
495-6 248Mich655, 227NW685.
496-19 230AppDiv338, 245NYS44.
496-20 249NY495, 164NE558 [certiorari granted 279US829, 49SCt348(2dcase), 73Led980]; 132Misc848, 230NYS691.
497-21 132Misc848, 230NYS691.
497-32 248Mich655, 227NW685.
500-67½-New. Purchasers could not restrain use by vendors of lake partly on vendors' land on theory that vendors misrepresented location of lake. 248 Mich655, 227NW685.
500-75 7Alaska296.
501-81 12PortoRicoFed252.
501-93 See also Cal 292P1076.
502-99 7Alaska296; 331 Ill 514, 163NE 418, 60ALR763.
502-9 23AlaA228, 124S912(2dcase).
505-46½-New. In condemnation proceedings, grantees from state of foreshore held entitled to an award, and title is unaffected by colonial grants. 230AppDiv407, 245NYS121.
510-51½-New. Where riparian landowners could obtain relief against flood waters by exercising a continuing right given by the statute, authorizing the removal from a ditch or canal of anything tending to obstruct the flow of water, such owners were not barred by the seven-year statute of limitations from restoring lands flooded by the building of a levee. 179Ark102, 14SW(2d)1101.
512-98½-New. The title to land under water could not be acquired by merely filling in. 227AppDiv618, 235NYS660.
514-30 See also Cal 292P1076. [d] **Whether construction of wharf constitutes trespass is for jury.**-NC 154SE 624.
521-61½-New. One as an abutting owner on an enlarged slip, and by an express agreement, has free access to the slip as a part of the navigable waters of the river, and a right to moor vessels to a bulkhead built on its own land by the government. 30F(2d)332.
522-86 Can [1929] 4DomLR1010.
523-88 Alta [1928] 2DomLR154.
523-89 Alta [1928] 2DomLR154.
523-92 Can [1929] 4DomLR1010.
524-20 Iowa 231NW438; Can [1929] 4DomLR1010 (nontidal river navigable in fact). [h] **That land and avenue were encroached on by ocean** does not affect dedication of avenue or title to refilled lands. 41F(2d)823.
526-30 206Cal 662, 275P789.
526-41 But see 206Cal 662, 275P789.
527-55 See also 319Mo 149, 3SW(2d) 1008.
530-89½-New. In an action by the state to enjoin an owner of land adjoining a navigable river, in which there are islands, with accretions thereto belonging to the state, from filling up the channel adjoining his land, permanent injunction is the proper relief. 129Kan 645, 284P386.
530-89½-New. The fact that such islands are property of the state does not make the action one of ejectment. 129 Kan645, 284P386.
530-97½-New. The presumption is in favor of accretions as against an avulsion. 208 Iowa1094, 225NW367.
530-3 208 Iowa1094, 225NW367.
533-46 208 Iowa1094, 225NW367.
534-52½-New. Rights of former owner of submerged land are not restored by fact that city becoming vested with title excluded water by artificial means. 229 AppDiv385, 243NYS625.
534-52½-New. After loss of land by submergence without reclamation, land may vest in city under resolution of board of estimate passed pursuant to statute. 229AppDiv385, 243NYS625.
534-53 229AppDiv385, 243NYS625.
537-16 152Miss17, 118S357.
537-40 206Cal 148, 273P797.
537-48 Mich 233NW159.
538-58 319Mo 149, 3SW(2d)1008, 1016 [quotCyc].
538-60 7Alaska131.
538-63 332 Ill 322, 163NE683.
539-67 230AppDiv338, 245NYS44.
539-68 23AlaA228, 124S912(2dcase); Cal 292P1076; 152Miss17, 118S357; 230AppDiv338, 245NYS44; Wis 228 NW144 (rights incident to public use). [a] 331 Ill 514, 163NE418, 60ALR763.
540-73 230AppDiv338, 245NYS44.
540-74 230AppDiv338, 245NYS44.
540-76 NJCh 149A536; 12PortoRico Fed252.
540-79 NJ 151A61 (establishment of boundaries of beach strand).
541-81 148SC428, 146SE434.
541-84 [a] (1) 230AppDiv338, 245NYS 44.
541-87½-New. Ownership of land that was upland at time of admission of state to Union. Mich 233NW159.
541-89 23AlaA228, 124S912(2dcase).
541-94 Mich 233NW159; 12PaDist& Co 88.
542-96 42F(2d)474. [a] 200Wis107, 227NW394.
542-6 TexCivA 21SW(2d)569.
542-12 Cal 292P1076.
543-21 245 IllA376; 231Ky606, 21 SW(2d)1010; 251Mich67, 231NW70.
544-34 251Mich67, 231NW70.
544-52½-New. A person can have an incorporeal hereditament in the bed of a navigable river below low-water mark only by virtue of its being adjacent to land above low-water mark. 131 Or554, 284P172.
545-60 319Mo 149, 3SW(2d)1008, 1016 [quotCyc].
545-64 319Mo 149, 3SW(2d)1008, 1016 [quotCyc].
547-13 TexCivA 25SW(2d)706.
547-14 Cal 292P1076; 230AppDiv338, 245NYS44. [b] (1) Cal 289P847.
548-23 Cal 289P847.
548-25 152Miss17, 118S357.
548-26 206Cal 148, 273P797.
548-29 230AppDiv338, 245NYS44.
549-31 TexCivA 25SW(2d)706.
549-39 206Cal 148, 273P797.
549-43 [a] **In Mississippi.**-152Miss17, 118S357.
550-50 NJCh 149A536.
550-53 See also 206Cal 148, 273P797.
551-70 [a] **Construction of statute validating patents** on state lands in beds of streams. TexCivA 25SW(2d)706.
551-83 230AppDiv338, 245NYS44.
551-88½-New. The words of the constitution are to be considered as incorporated in a grant. 206Cal 148, 273P797.
552-93 But see 200Wis107, 227NW394.
552-95½-New. Usage and custom to establish boundary as other thread of river must have prevailed at the time of execution of instrument. 231Ky606, 21 SW(2d)1010.
552-95½-New. Term "waters of Gulf of Mexico" is not restricted to waters in bed of Gulf, but includes bays, inlets, and streams on gulf coast. TexCivA 25 SW(2d)987.
552-3 NJCh 149A536; TexCivA 21 SW(2d)569 (waters of submerged land subsequently becoming navigable).
552-5 170Ga855, 154SE255.
552-6 170Ga855, 154SE255.
553-11½-New. Lands under water acquired from state by mortgagor's assignees are not subject to mortgage on uplands. NJCh 149A536.
553-14 230AppDiv338, 245NYS44.
554-41 230AppDiv338, 245NYS44.
555-51 TexCivA 25SW(2d)706.
555-72 206Cal 662, 275P789.
555-73 206Cal 635, 275P803.
556-89 206Cal 635, 275P803.
557-16½-New. Lease by town board of lands under water must be upheld in absence of fraud. 137Misc376, 241NYS 675.
559-53 [b] **Land reclaimed by drainage** may be subject to disposition under state statute. Fla 128S810(1stcasc).
559-62 TexCivA 25SW(2d)706.
559-64 245 IllA376 (taking sand).
560-67 TexCivA 25SW(2d)706.
560-74½-New. State's right to use bed of lake except for trust purposes is subordinate to that of riparian owner. Mich 233NW159.
561-97½-New. That storm drain consented to by United States was to be constructed on tidelands is not fatal to legality for improvement of canal areas as surface streets. 207Cal 314, 278P236.
561-3 30F(2d)290(2dcase).
562-13 [a] (9) In action to quiet title to submerged land adjoining defendants' land, burden was on defendants to prove all elements of alleged prescriptive title. 97CalA696, 276P117.
563-41 245 IllA376.
564-45 [d] **Unsurveyed islands situated in unmeandered lake** have been held not part of lake. 200Wis107, 227NW 394 (islands passed with conveyance and did not belong to state).
564-47 [g] **Nonmeandered islands within meandered streams** pass by patent with lots to which they are adjacent, if by law riparian owner takes to thread of stream. 200Wis107, 227NW394.
565-58 319Mo 149, 3SW(2d)1008.
566-95½-New. To support a grant from the riparian commissioners, the grantee must be the owner of the ripa when it is made. NJCh 145A330.
566-4 148SC428, 146SE434.
568-27½-New. A grant of part of a tract of land adjacent to shore of Chesapeake Bay, with lines on all sides exactly defined and "with the privilege of the bay shore contained within said lines," has been held to include the shore line within its lines and any fast land that may have subsequently been added between the shore and nearest line. 156Md469, 144A489.
568-27½-New. Where deeds referred to some of the property involved as "marsh land," "islands," and "sand banks," the fact that what was an island when the deeds were executed may now be a marsh or land constantly or continuously covered by water at high tide would be no reason for reading into the deeds a meaning not intended at the time of execution. 148SC428, 146SE434.
569-40 See also Vt 146A417.
573-46½-New. Clauses of a grant to a city and a lease of easement of docking by the city to a steamship company, that no structures obstructing the public view or access to the water from any part of an adjacent public square should be erected thereon, did not constitute a base or determinable fee, but a condition or covenant running with the land and broken by inconsistent use. 29 F(2d)932.
575-81½-New. A riparian owner may lease lands for any lawful purpose under such conditions as he may exact. 227Ky376, 13SW(2d)283.
575-91½-New. In determining the location of the mouth of a river natural headlands on either bank should be considered. 152Wash165, 277P459.
575-91¼-New. A beach, constituting a public highway under statute, cannot be leased. 152Wash165, 277P459.
575-91¼-New. It is immaterial that a company described its fishing locations as being in the waters of the Columbia River and that it had no license to make locations elsewhere, in a suit to enjoin leasing of locations on a public highway. 152Wash165, 277P459.

NECESSARILY

580-99 94CalA520, 271P549.

NECESSARY

580-14 Liability of husband and wife for necessaries see Husband and Wife §§ 124-162.

582-62 Mich 233NW325.
582-65 4HawaiiFed648.
584-83 26F(2d)460.

NE EXEAT

590-16 NJCh 150A840 (court should exercise sound discretion).
592-42 NJCh 150A840.
597-58 MoA 150A840 (mere apprehension of departure held insufficient).
598-63 [e] **Action on bond by use plaintiff** will fall on demurrer. Fla 129S602. [f] **Breach of ne exeat bond** running to governor gave use plaintiff no right to sue thereon. Fla 129S602.
600-23½-New. Where a husband, sued for alimony, was required to give a ne exeat bond, a subsequent pendente lite agreement between the husband and wife as to the amount of temporary alimony, and that the agreement could be made a judgment of the court on default, did not discharge sureties on the husband's bond. 38GaA783, 145SE497.
600-29 38GaA783, 145SE497.
601-44 NJCh 147A543 (equity court will retain proceedings on bond). [b] **Court in which alimony proceeding is pending** may force payment in summary proceeding under rule to show cause. GaA 155SE356(1stcase) (continually nonappearing principal need not be served).
601-48½-New. Where only condition is that principal shall not depart from state, action on bond in name of supposedly use plaintiff will fall on demurrer. Fla 129S602.
602-72 [a] **Before answer filed**, defendant may move to discharge writ on giving bail. NJCh 150A840.

NEGLIGENCE

624-1 205Cal 629, 271P1062, 62ALR 825; 96CalA345, 274P407; 11LaA93, 120S76; 32 OhA293, 168NE59. [a] 27 F(2d)960; 220Ala201, 124S740; 11LaA 635, 124S631; 249Mich147, 228NW723; Mo 25SW(2d)92.
627-6 179Ark1087, 20SW(2d)186; 244 Mich208, 221NW314.
627-7 MoA 299SW85.
628-9 248NYS339, 162NE99.
628-14 98Fla132, 123S564.
628-21 179Ark631, 17SW(2d)889.
628-22 205Cal 396, 271P97. 60ALR 429; 180Minn395, 230NW895; 151SC 459, 149SE257.
628-24 229Ky365, 17SW(2d)224.
629-27 11LaA508, 124S156; 155Md660, 142A503; 197NC17, 147SE698; 32 OhA 293, 168NE59. [a] Mont 292P909.
631-29 199Wis320, 226NW392 (where reasonable to anticipate injury to another). [b] **Anticipation of injury is**, with ordinary care, inseparable element of definition of "negligence." 199Wis 320, 226NW392.
631-31 97Fla350, 121S95(2dcase).
631-35 219Ala167, 121S539; 41GaA72, 151SE686 (must be breach of legal duty); 338 Ill 270, 170NE247; 228Ky 184, 14SW(2d)768; 231Ky365, 21SW (2d)488; 196NC739, 147SE8; NC 155 SE259; 32 OhA216, 167NE699. See also 137Misc698, 244NYS654. [b] **Test of legal ability** for negligence is not applied retrospectively, but is measured by facts and circumstances as they appeared prior to injury, combined with facts and circumstances appearing at time of, or immediately following, accident. 152Va335, 147SE209.
632-36 MoA 289SW987; 197NC586, 150SE20.
633-45 OklCr 276P701.
633-50 86PaSuper218.
633-55 40GaA827, 151SE685. [b] 155 Miss765, 125S340.
634-70 96PaSuper164.
635-85 245Mich425, 222NW774; 197 NC586, 150SE20.
635-89 CalA 282P1008.
636-92 243 IllA281.
638-10 220Ala220, 124S516.
638-11 [a] **In advance of negligent act**, negligence is never imputed. 35F(2d) 602.
638-12 205Cal 328, 270P952, 60ALR 475; 32 OhA216, 167NE699.
639-22 280US102, 50SCt42, 74L ed207; 203Cal 398, 264P744; 88CalA354, 263P 578; 88CalA469, 263P838; 40GaA675, 150SE862; 228Ky300, 14SW(2d)1079; 228Ky379, 15SW(2d)236; 246Mich52, 224NW448(2dcase); 251Mich461, 232 NW393; 86Mont562, 284P539; Mont 292P909; 248NY339, 162NE99; 134 Misc351, 235NYS634; 130 Or693, 281P 846; 295Pa368, 145A431; 295Pa551, 145A602; TexCivA 11SW(2d)583; Utah 291P926; 101Vt448, 144A460.
643-23 CalA 290P1062; 40GaA841, 151 SE638; Or 291P365.
643-26 [a] **Where injury is natural and proximate consequence of neglect of duty**, liability follows. 226AppDiv 113, 234NYS476.
643-27 168La635, 122S889.
643-28 CalA 284P1082.
644-1-18 137Misc698, 244NYS654.
644-22 [a] **Precautions prescribed by statute do not relieve one from his common-law duty** to observe ordinary care to avoid injury to others. 228Ky635, 15SW(2d)497.
645-26 229Ky365, 17SW(2d)224. [a] **Every one owes duty at all times and in all places** not to wantonly injure another. Ala 130S63.
645-33 98Fla132, 123S564 (where thinking person of ordinary sense would recognize danger of injury if care is not used).
646-35 229AppDiv581, 243NYS179 (accountant certifying erroneous balance sheet inducing plaintiff to make loan).
647-40 35F(2d)142.
647-46 151SC280, 148SE870; TexCivA 19SW(2d)816.
649-55 137Misc126, 241NYS479.
650-64 [b] **Duty to exercise care** performing obligation to another may inure to third person. 253NY398, 171NE686.
651-69 199Wis168, 225NW821.
651-75 298Pa560, 148A851.
652-76 IndA 172NE129; 196NC330, 145SE570; 30 OhA520, 165NE749.
653-88 6LaA468.
654-93 102CalA422, 283P353.
655-97 NH 150A540.
655-1 42F(2d)950; 320Mo 655, 8SW (2d)918; 197NC586, 150SE20. [k] **No duty to anticipate fright** exists regardless of its consequences. NH 150A540.
658-13 85CalA596, 259P987.
661-33 NH 150A540; 196NC516, 146 SE209.
664-66 But see 295Pa301, 145A303.
665-78 Iowa 232NW421; 50RI 438, 148A417.
666-85 95Fla960, 117S383.
667-96 95Fla960, 117S383.
667-4 95Fla960, 117S383. [c] **Other definitions.**-TexCivA 28SW(2d)320.
668-5 TexCivA 30SW(2d)673. [b] Cal 293P62.
669-15 127 Or256, 270P784.
669-22 [a] **"Willful and wanton misconduct"** are not synonymous with "gross negligence." 41GaA4, 152SE116.
669-23 243 IllA281.
670-28 159Tenn511, 19SW(2d)234.
670-35 197Wis601, 222NW826.
672-48 109Conn428, 147A136; 256 IllA 557.
673-52 255 IllA106.
673-55 CalA 274P587.
673-59 129 Or44, 276P244.
674-61 CalA 286P752. [a] (2) Other definitions. 117Nebr661, 222NW42.
674-62 243Mich300, 220NW777.
674-68 253 IllA162; 253 IllA589.
674-70 CalA 286P752; 109Conn428, 147A136.
674-71 12LaA249, 124S589.
675-76 Mass 168NE206.
675-79 299Pa558, 149A877.
675-82 Ala 128S793; 159Tenn511, 19 SW(2d)234.
676-85 But see 242 IllA166.
676-86 218Ala410, 118S755; 109Conn 428, 147A136; 110Conn169, 147A568; 256 IllA461; 299Pa558, 149A877; 107 WVa372, 148SE323.
677-88 Ala 129S9; 251 IllA364; 255 IllA494.
677-90 252 IllA550.
677-91 218Ala410, 118S755.
677-93 CalA 274P587.
678-96 250 IllA222.
678-97 242 IllA166; 251 IllA389.
678-98 251 IllA364; 107WVa372, 148 SE323.
678-4 [c] (1) 253 IllA162; 253 IllA 589. [d] 253 IllA162; 253 IllA589. [f] **Failure to place gates or watchman at railroad crossing** does not constitute willfulness or wantonness. 253 IllA589.
679-8 Ala 129S9.
679-9 But see 256 IllA461.
680-11 See also Ala 130S401.
680-19 Iowa 232NW421.
680-21 299Pa45, 149A91.
681-22 TexCivA 30SW(2d)681; Wis 230NW618.
682-23 293Pa428, 143A108.
682-24 [a] **Due care defined** as reasonable exercise of foresight for harm. Okl 291P534.
683-41 WVa 153SE797.
683-42 WVa 153SE797.
683-44 WVa 153SE797.
683-45 Ala 130S807; 101CalA174, 281 P634; 206 Iowa1109, 221NW812; 207 Iowa30, 222NW344; 128Me314, 146A 903 (that care most common and usual in business); MoA 31SW(2d)575; 157 SC359, 154SE645; WVa 153SE797. [e] **Other definitions.**-Iowa 232NW421.
685-48 110Conn184, 147A762, 66ALR 1121.
685-50 293Pa472, 143A119.
685-54 178Ark753, 13SW(2d)298; 179 Ark448, 17SW(2d)286; 235Ky41, 29 SW(2d)592; 156Miss830, 127S284.
686-70 156Md639, 144A775.
686-72 TexCivA 30SW(2d)697.
687-88 198Wis172, 223NW412.
687-90 [a] **Ordinary care in landing an airplane** is highest degree of care, vigilance and foresight ordinarily exercised. Wis 230NW618.
688-2 157SC359, 154SE645.
689-15 CalA 289P190.
689-19 ND 232NW754.
689-21 179Ark225, 15SW(2d)391; 157 Md448, 146A282.
690-22 41F(2d)542; Ala 127S825; 180 Ark1067, 23SW(2d)980; 207Cal 657, 280P118; 84Colo 342, 270P659; 153 Miss880, 122S189(2dcase); 156Miss830, 127S284; ND 232NW754; TexCivA 30 SW(2d)681; 151Va740, 145SE342; 151 Va458, 145SE362.
693-23 97Fla350, 121S95(2dcase); LaA 130S229; Mass 171NE425 (reasonable action under circumstances where there is duty to act or avoid action). [b] **Greatest care under circumstances is required** by duty to protect life or person of human being. TexCivA 28 SW(2d)320.
693-24 198Wis163, 223NW408(2dcase).
694-30 9LaA44, 118S787.
695-32 [a] **Regardless of relationship one may not negligently injure another** without being liable in damages. 300 Pa225, 150A477.
695-34 Mass 168NE809.
696-46 Ala 129S60; 205 Iowa573, 218 NW278; 208 Iowa275, 225NW406; 180 Minn395, 230NW895; TexCivA 19SW (2d)816; TexCivA 26SW(2d)722. [c] (2) That every means known or reasonably discoverable be used to prevent death from agency lawfully in use. 101 CalA174, 281P634.
697-47 300Pa586, 150A483.
697-48 128Me207, 146A700.
698-55 [b] **Person need not anticipate** that another will be negligent. 11LaA 635, 124S631. [c] **Failure to anticipate unforeseen or unusual circumstances** or occurrences does not render one negligent. 300Pa586, 150A483.
699-65 TexCivA 25SW(2d)695.
703-97 [b] **Agent of manufacturer demonstrating washing machine in child's home** was under duty of ordinary care to child. 41GaA72, 151SE 686.
704-11 86CalA459, 261P315.
704-13 234Ky410, 28SW(2d)489.
706-24 101CalA769, 282P820.
706-26 27F(2d)960; 156Miss830, 127S 284 (person may rely on custom).
707-30 11LaA93, 120S76.
707-34 119 Oh422, 164NE518, 60ALR 128.
708-39 27F(2d)960; 115 Oh422, 164 NE518, 60ALR128.
709-40 30F(2d)349.
710-47 [c] **Failure to report proposed change of street grades.**-In absence of proof of custom among title companies, title insurer cannot be held liable for negligence. 227AppDiv5, 236NYS553.
710-49 29F(2d)37.

710-55 97CalA387, 275P813; CalA 290 P48; LaA 130S129; LaA 130S138; 323 Mo 840, 20SW(2d)684, 66ALR263; 12 PaDist&Co 647.
711-56 127Me335, 143A261; 130 Or 267, 278P99.
711-57 CalA 289P912.
712-71 Md 150A795.
713-76 178Minn347, 227NW352.
713-79 248Mich399, 227NW694; MoA 22SW(2d)65; 105NJL213, 143A340, 61 ALR1232.
714-93 179Minn325, 229NW136.
716-9 132Misc399, 229NYS666.
717-30 [a] (2) Violation of penal law is evidence of negligence, but not conclusive. Mass 168NE89.
718-32 267Mass501, 167NE235.
718-33 227AppDiv730, 236NYS576. See also TexCivA 19SW(2d)207.
718-34 7LaA262, 265 [citCyc].
718-38 41Wyo345, 285P781.
719-46 Oh 171NE598 (ordinance as to opening in street inapplicable to elevator shaft on private property).
719-54½-New. Questions of negligence must be determined with reference to standards of conduct prescribed by law. 57ND741, 224NW167.
719-55 254 IllA387; 106WVa99, 144 SE881, 60ALR570.
719-56 254 IllA387.
720-76 TexCivA 26SW(2d)722 (where violation is uncontroverted).
720-77 96CalA250, 273P1111; 248NY 293, 162NE84; 141 Okl 175, 284P297 (2dcase); TexCivA 26SW(2d)435; TexCivA 28SW(2d)565.
720-78 CalA 280P154; CalA 289P900; Ida 288P152; 7LaA262, 265 [quotCyc]; Mo 26SW(2d)980; 197NC83, 147SE729 (1stcase); 198NC107, 150SE716; 198 NC142, 150SE873; 198NC140, 150SE 876; 32 OhA26, 167NE589; 132 Or500, 286P517; 154Wash634, 283P467(2d case); Wash 289P1003. But see 253 IllA107. [f] **Rebuttal of presumption.**–CalA 289P900.
722-12½-New. **Commercial feeding stuffs.** Meat scraps which evidence indicated contained some beef, gathered from many shops and ground into poultry feed, are within the statute defining "commercial feeding stuffs." 248NY 293, 162NE84.
722-14 Ont [1929] 1DomLR160.
723-17 40GaA827, 151SE685; 131 Or 665, 283P1115. But see Mont 290P261.
723-22 SC 155SE136.
724-46 Ont [1929] 1DomLR160.
724-49 252NY325, 169NE401.
726-75 35 OhA113, 172NE300.
727-79 154Miss182, 122S371; 35 OhA 113, 172NE300.
728-86 35 OhA113, 172NE300.
728-87 Mo 26SW(2d)980.
729-4 Mo 26SW(2d)980.
730-8 131 Or665, 283P1115.
731-25 99CalA557, 279P183 (existence of unusual circumstances is defensive matter and must be shown).
732-38 35F(2d)761.
733-42 253NY369, 171NE574.
734-59 205Cal 328, 270P952, 60ALR 475; 137Misc698, 244NYS654; 195NC 548, 142SE765. See also 293Pa472, 143 A119.
735-64 180Ark1003, 24SW(2d)846 (pure accident); TexCivA 23SW(2d)512.
737-79 254 IllA289.
738-85 [w] **Repairing tire near sidewalk.**–Mass 169NE897(1stcase).
740-92 Ont [1929] 4DomLR175.
740-95 120 Oh438, 166NE374.
740-97 248 IllA306.
742-32 218Ala223, 118S406; 102CalA 422, 283P353; CalA 286P752; LaA 119 S703; 12LaA249, 124S589.
743-33 Md 150A788.
745-63 235Ky483, 31SW(2d)716.
745-64 110Conn178, 147A594; 120 Oh 438, 166NE374.
746-65 Md 150A788.
746-73 101Vt448, 144A460.
748-11 265Mass478, 164NE384.
752-63 39GaA608, 147SE911(1stcase).
753-72 109Conn158, 145A884.
754-81 220Ala669, 126S866.
754-82 228AppDiv665, 238NYS298.
754-87 220Ala669, 126S866; 332 Ill 592, 164NE177; MoA 27SW(2d)61; Oh 171NE598.
756-90 8LaA375; Oh 171NE598.
756-94 MoA 27SW(2d)61 (no duty to destroy pond); 90PaSuper151.
757-6 CalA 290P465.
758-13 [a] **Thing calculated to attract and excite curiosity of children if dangerous** is generally termed attractive nuisance. 233Ky198, 25SW(2d)373.
758-19 220Ala328, 124S892; 130 Or693, 281P846; TexCommnA 7SW(2d)867.
760-26 220Ala328, 124S892.
761-29 CalA 290P465.
761-32 197NC433, 149SE549.
762-34 CalA 290P465.
763-40½-New. Unless contractor knew or had reason to known dynamite caps were placed where children congregated he is not liable for child's injury therefrom. 233Ky198, 25SW(2d)373.
763-50 220Ala328, 124S892.
764-54 Pa 151A699; Utah 291P926.
765-61 220Ala328, 124S892; 220Ala 669, 126S866. [a] TexCivA 10SW(2d) 211.
765-63 338 Ill 89, 169NE811. [a] 105 NJL225, 143A343, 60ALR1430.
766-70 155Miss173, 124S271; 157SC 174, 154SE118. [b] **Objects held not so attractive to children as to constitute attractive nuisance.**–338 Ill 89, 169NE811.
767-76 180Minn496, 231NW210.
767-80 Mass 168NE206 (attractiveness of exposition grounds held not to constitute inducement to enter and play thereon).
767-81 88 IndA572, 165NE246.
768-83 See also 244 IllA180.
768-88 36F(2d)199; 40GaA675, 150SE 862.
768-88½-New. Owner of land with attractive nuisance must use ordinary care to make it harmless to children or prevent their going to or playing around it. 233Ky198, 25SW(2d)373.
769-99 CalA 290P465.
771-21 TexCivA 22SW(2d)695.
773-49 Pa 151A699.
775-89 TexCivA 21SW(2d)67.
776-1 TexCivA 27SW(2d)928.
776-10 205 Iowa547, 218NW316.
776-11 9LaA424, 119S703.
776-13 130 Or693, 281P846 (pile of bridge timbers).
778-32 [c] Utah 291P926.
778-36 155Miss173, 124S271.
778-40 MoA 23SW(2d)651 (high railing alongside of stairway enclosure).
779-45 256 IllA439; Iowa 229NW216; 222MoA865, 6SW(2d)48; MoA 27SW (2d)61.
779-46 222MoA865, 6SW(2d)48.
782-93½-New. a sidewalk over a ditch, 155Miss588, 124S795.
782-1 [a] See also 34PortoRico 545.
784-17 5LaA201.
784-24 254 IllA489.
785-27 338 Ill 89, 169NE811.
787-46 [c] (3) In Ontario occupier of land who erects a gasoline pump in adjoining highway is trespasser and cannot recover for injuries to pump negligently caused by person lawfully using highway. Ont [1929] 3DomLR119.
788-72 48 Ida227, 281P371; TexCivA 22SW(2d)746.
789-76½-New. In Ontario an infant who enters premises with an invitee may be a licensee. Ont [1929] 2DomLR782.
790-80 CalA 285P889; 235Ky211, 30 SW(2d)885; 152Miss333, 118S181.
792-10 12LaA652, 126S707.
794-40 48 Ida227, 281P371.
796-52 NC 153SE637.
796-55 BC [1928] 2DomLR235.
796-59 102CalA422, 283P353; CalA 285 P889; CalA 285P1053; 48 Ida227, 281 P371; Iowa 231NW665; 9LaA424, 119 S703; 12LaA652, 126S707.
797-65 48 Ida227, 281P371.
798-70 [a] **Employee of fruit grower using drier with permission of owner** is a licensee and could not recover for loss of hand. CalA 285P889.
798-80 Md 150A788.
799-84 CalA 285P1053; Iowa 231NW 665; NC 153SE637.
801-89 31 OhA311, 165NE302.
803-47 [b] **Duty to fireman entering building** is not limited to time when his presence is known. 255 IllA494.
804-57 Ont [1929] 2DomLR782.
805-62 218Ala223, 118S406.
805-65 NC 153SE637.
806-70 40F(2d)235.
806-74 88 IndA572, 165NE246; 228 AppDiv407, 240NYS132.
807-87 [a] School.–233Ky198, 25SW (2d)373.
808-6 CalA 285P889.
809-8 BC [1930] 3DomLR369.
810-19 TexCivA 8SW(2d)527.
810-21 See also 108Conn226, 142A739.
812-38 TexCivA 8SW(2d)527.
812-39 152Miss333, 118S181.
813-40 CalA 285P889; TexCivA 21SW (2d)1076; Vt 151A568.
813-41 12LaA652, 126S707.
813-42 245 IllA465.
814-52 218Ala223, 118S406; 84CalA 465, 258P394, 395 [quotCyc]; 90CalA 151, 265P574; 250NY513, 166NE306; 132Misc399, 229NYS666.
814-54 300Pa85, 150A163.
814-58 248 IllA270.
815-68 156Md340, 144A355.
815-80 Iowa 231NW665; MoA 22SW (2d)892; 198NC559, 152SE625(2dcase); Ont [1930] 3DomLR224. [b] (2) Instruction that child accompanying mother making purchases at grocery store was bare licensee was properly refused. 267Mass189, 166NE721. [c] **One who enters to pay account** may be regarded as an invitee. 38GaA395, 144SE46.
816-84½-New. A person going to a store with a prospective purchaser to examine goods is an invitee. 319Mo 573, 58W(2d)33.
816-90 152Wash19, 276P896. [a] **Care toward bathers at a swimming pool maintained by association for use of members and guests only** is approximately same as required from institution to which public generally is invited. CalA 291P848.
817-1 25F(2d)339; 127 Or427, 272P 556.
817-4 [d] **Paving inspector.**–Paving inspector, required to know contents of mixture being supplied in paving street, and injured while looking into mixer to investigate failure to have proper mixture, was an invitee and not bare licensee. 218Ala260, 118S276.
818-9 Vt 147A281. [c] (5) Other instances. 322Mo 349, 17SW(2d)927.
819-10 128 Or224, 274P302; TexCivA 32SW(2d)264. [a] See also 107WVa 236, 148SE70.
819-11 26F(2d)569; NJ 150A412.
819-12 [b] **Independent of the relation** of servant and employer is the duty of the owner to protect employee of contractor. 253NY491, 171NE754.
820-13 See also 127 Or326, 271P986.
821-29 CalA 285P1053; 88 IndA572, 165NE246; Mass 168NE206; Vt 147A 281.
821-32 Mass 168NE206.
822-38 See also BC [1930] 3DomLR 369.
822-39 245 IllA465; 88 IndA572, 165 NE246.
823-49 DC 41F(2d)970; IndA 170NE 558; 319Mo 275, 3SW(2d)1025, 61ALR 1269; 228AppDiv407, 240NYS132; 198 NC559, 152SE625(2dcase); 30 OhA528, 165NE865; 293Pa333, 143A8; Ont [1929] 4DomLR421. [a] (1) 230Ky 162, 18SW(2d)976(2dcase).
824-50 40F(2d)19; 218Ala260, 118S 276; 219Ala546, 122S677; 102CalA697, 283P837; CalA 293P80; 48 Ida227, 281 P371; 245 IllA465; Iowa 231NW665; 12LaA652, 126S707; 267Mass189, 166 NE721; Mass 169NE424(1stcase); 319 Mo 573, 5SW(2d)33; 104NJL557, 142A 337, 60ALR102; NJ 150A412; 249NY 103, 162NE599; NC 153SE637; 31 OhA 446, 167NE482; 127 Or326, 271P986; Vt 151A568; Ont [1928] 4DomLR598.
825-53 [a] 151Va614, 144SE713. [c] 218Ala223, 118S406.
825-56 26F(2d)569; 104NJL557, 142 A337, 60ALR102; NJ 147A442.
825-58 218Ala223, 118S406.
825-59 322Mo 349, 17SW(2d)927.
825-60 132Misc399, 229NYS666.
825-62 299Pa45, 149A91.
825-63½-New. Defendant's duty to avoid injury is no greater to one merely about to become an invitee than if the relation had been fully established. 322Mo 349, 17SW(2d)927.
826-71 218Ala223, 118S406; 90CalA 151, 265P574; 95CalA781, 273P630; CalA 285P369; CalA 293P80; 111Conn 584, 150A500; DC 41F(2d)970; Iowa 231NW665; 228Ky281, 14SW(2d)1063;

156Md340, 144A355; MoA 22SW(2d) 892; 104NJL557, 142A337, 60ALR102; 105NJL10, 143A741(2dcase); 29 OhA 513, 163NE918; 151SC280, 148SE870; TexCivA 32SW(2d)264. [d] 265Mass4, 163NE182.

828-72 26F(2d)569; 293Pa333, 143A8.

829-76 IndA 170NE558. [d] **Cure must be commensurate with the danger.**–TexCivA 32SW(2d)264.

829-77½–New. Duty or liability depends on the special circumstances and conditions in each case. 320Mo 1011; 8 SW(2d)982.

830-79 SD 233NW291; 151Va614, 144 SE713.

830-83 218Ala223, 118S406.

830-88 CalA 285P1053.

830-89 Ont [1930] 3DomLR224.

831-93 Vt 147A281; 61 OntL416, [1928] 1DomLR233.

832-95 Iowa 231NW665; Ont. [1929] 4DomLR421.

834-4 [c] (2) Other instances. 235 Ky211, 30SW(2d)885.

834-9 [a] 28F(2d)868.

835-21 See also 250NY513, 166NE306.

836-28 [d] **Invitee at store** does not exceed invitation by moving article for purpose of examining another. 319Mo 573, 5SW(2d)33.

836-29 [d] **Injured painter using window sash for support** has been held not to have exceeded invitation. Mo 31SW (2d)1065.

837-36 CalA 285P369; 318Mo 471, 300 SW278.

837-40 256 IllA247.

837-43 40F(2d)235; 40GaA239, 149SE 424; IndA 170NE558; 322Mo 349, 17 SW(2d)927; 298Pa142, 148A40. But see 90CalA151, 265P574.

838-51 243 IllA65.

838-52 [a] **Employer is not guilty of actionable negligence** towards employee's child as invitee who stuck bagging needle in its eye. 228AppDiv407, 240NYS132.

839-55 MoA 5SW(2d)649, 652 [citCyc].

840-69 128Me349, 147A421 (or for other reasonable purposes).

840-69½–New. One who remains on the sidewalk a short time in front of a shooting gallery, although watching its operation, does not, as a matter of law, lose his status as a traveler. 128Me 349, 147A421.

840-73 128Me349, 147A421 (where one was injured while watching operation of shooting gallery from sidewalk).

845-23 102CalA656, 283P823; 253 IllA 190; 231Ky433, 21SW(2d)790.

845-24 233Ky230, 25SW(2d)370.

845-26 228AppDiv407, 240NYS132.

846-27 TexCivA 178SW(2d)861.

846-44½–New. A person controlling a dangerous agency is not an insurer. Iowa 229NW244.

847-59 [a] (12) Fire on ground floor, caused by motor car brought in, in dangerous condition and causing damage to property of occupier of upper floor. Alta [1929] 2DomLR549.

848-75 166La472, 117S559.

849-87 [d] **One placing dangerous article in child's hands** is liable if negligence causes injury. IndA 173NE269.

849-89 298Pa560, 148A851.

849-90 Pa 152A90 (scaffold).

849-92 248NY197, 161NE469.

850-11 NJ 147A476; BC [1928] 4 DomLR172.

851-12 NJ 147A476.

851-13 IndA 169NE864.

851-14 41GaA70, 151SE690; 4LaA415; NJ 147A476.

851-16 90CalA563, 266P353; NJ 147A 476.

852-35 48 IdaI21, 279P1092; 48 IdaI 129, 279P1094.

853-33½–New. Where a fire was started by an unauthorized person, the owner of the premises where it started is not liable for spread to other premises. Can [1929] 1 DomLR1003.

853-46 [a] (3) Live ashes dumped on wooden scow without wetting sufficiently. 37F(2d)58.

855-91½–New. Under some statutes failure of a person who starts a fire to extinguish it is negligence per se. 58 ND209, 225NW323.

856-11 [b] CalA 291P661.

857-18 39GaA379, 147SE396.

857-20 180Ark231, 21SW(2d)168; 197 NC755, 150SE356.

857-23 30F(2d)349.

858-33 110Conn178, 147A594 (owner of private way is liable to adjoining owner's tenant who fell into open coal chute extending into such way).

858-49 [a] (2) Rule applies to bathing beaches. 32 OhA54, 166NE920.

859-53 32 OhA54, 166NE920.

859-63 6LaA53.

859-69 14PaDist&Co 320.

860-81 39F(2d)403; 14PaDist&Co 320.

861-95 198Wis527, 224NW743.

862-3 But see BC [1929] 3DomLR33.

863-18 231Ky433, 21SW(2d)790; 157 Md448, 146A282; 158Md39, 148A270; 267Mass217, 166NE562; Mass 169NE 136; 198NC559, 152SE625(2dcase).

863-19 31F(2d)889.

864-21 231Ky433, 21SW(2d)790.

865-29 156Md639, 144A775 (joist).

865-30 266Mass520, 165NE667; RI 147A759(1stcase).

865-31 [a] 318Mo 471, 300SW278.

866-38 [a] **Necessity for lights.**–Wis 232NW595.

866-44 298Pa333, 143A8.

866-53 158Md39, 148A270; MoA 26 SW(2d)838.

866-56 204Cal 244, 267P544, 58ALR 1039.

867-59 Cal 287P464; 220MoA948, 7 SW(2d)403.

867-60 [c] **Permitting doors to be left open when elevator absent.**–MoA 14SW (2d)701.

868-68 205Cal 629, 271P1062, 62ALR 825.

868-74 253NY300, 171NE63(1stcase).

868-77 [b] **Rule inapplicable** where painter fell because of insecure window sash. Mo 31SW(2d)1065.

869-79 [b] **Owner or contractor of** building need not go beyond what is reasonable and practicable in safety. 253NY491, 171NE754.

869-85 See also 3LaA270, 273 [citCyc].

870-94½–New. An employer is not required to take unreasonable precautions to prevent the spread of fire occurring through the negligence of an employee. 99CalA81, 277P878(2dcase).

871-4 SD 233NW291 (maintaining doorway not willfully injurious).

871-11 132Misc399, 229NYS666. [a] (6) Person lifting refrigerator on sidewalk and stepping back twenty-six inches onto property of another and falling into elevator well. 265Mass478, 164NE 384. (7) Only animals running at large are protected by statute requiring person digging opening on uninclosed land to inclose same. Ark 32SW(2d) 154.

872-15 220MoA948, 7SW(2d)403.

872-27 Wis 230NW708.

872-29 293Pa333, 143A8.

873-35 157Md448, 146A282.

873-36 TexCivA 8SW(2d)527.

874-53½–New. Time when pressure test should have been made of water-main was when prudent man in like circumstances would have made test. 43F(2d) 914 (custom not determinative).

874-65 297Pa105, 146A445.

874-69 322Mo 349, 17SW(2d)927; MoA 285SW109.

874-72 LaA 128S676; NJ 147A445.

875-74 [a] **Contractor repairing elevator** has no right to assume employer warned his employees of danger. Mo 26SW(2d)942.

875-76 250NY513, 166NE306.

875-77 156Md340, 144A355; MoA 22 SW(2d)892.

875-78 198NC559, 152SE625(2dcase); 151SC280, 148SE870; Vt 151A568.

875-79 Vt 151A568.

876-94 Mo 31SW(2d)1065.

876-4 NJ 150A434.

877-10 TexCivA 22SW(2d)746; Alta [1930] 4DomLR215.

877-14 LaA 128S676 (where one warned away, returns).

878-22 33 OhA539, 169NE709.

878-26 Ill 173NE394.

878-32 NJ 150A434.

880-60 30F(2d)776; 50RI 196, 146A 624.

880-68 MoA 22SW(2d)892.

881-89 6LaA468; Ont [1930] 4DomLR 684.

882-91 NH 146A161.

882-96 40F(2d)19; Mass 171NE466; SD 233NW291.

882-96½–New. A boiler insurance company was not liable for injuries to an employee of the owner, where an explosion occurred while the boiler was being tested to determine whether a policy should be issued, and the insurance company's inspector was competent to perform the duty delegated to him, which was to see whether the boiler would withstand specified pressure. 295Pa368, 145A431.

883-5 231Ky433, 21SW(2d)790; 233 Ky619, 26SW(2d)557, 69ALR482 (holding liability while at work for state is same as in private work); 11LaA604, 123S349 (duty of building owners to furnish employee safe place to work does not relieve contractor of liability for defective work which caused such employee's injury); 244Mich208, 221 NW314; 95PaSuper78; TexCivA 22SW (2d)746. [a] 244Mich208, 221NW314.

883-6 13LaA603, 128S46.

883-11 11LaA604, 123S349; Mo 26SW (2d)942. [a] **Seller of silo sending incompetent man to erect it** is liable to buyer's employee for injuries sustained through incompetency of person so sent, though such person became servant of buyer and was paid by him. 177Minn 420, 225NW393. [b] **Whether contractor complied with contract is irrelevant** to its liability for act or omission causing injury to plaintiff. Mo 26SW(2d)942.

883-12 253NY491, 171NE754. [b] (2) Experienced contractor employed to erect and bolt together steel framework of building is charged with notice that riveters and others would make customary use of framework to brace themselves in performing their work. 11LaA 604, 123S349.

883-13 30F(2d)776; 253NY486, 171 NE752.

883-16 CalA 290P643 (misuse and uninvited use by another).

885-35 333 Ill 78, 164NE162, 60ALR 353.

886-44 32F(2d)163 (contract held not to bar action).

886-45 228AppDiv83, 239NYS629.

886-61 333 Ill 78, 164NE162, 60ALR 353; 228Ky44, 14SW(2d)208. [d] **Automobile to be repaired.**–MoA 17SW(2d) 651.

887-74 41GaA697, 154SE301. [b] **Right of action has been held not confined to parties to contract.**–41GaA697, 154SE301.

887-75 228Ky44, 14SW(2d)208; 12 LaA405, 123S384; 28 OhA152, 162NE 633; 200Wis471, 227NW944.

887-76 93CalA609, 269P975; 169La 1156, 126S691; 266Mass70, 165NE19.

888-78 [a] **Seller's fraud** must be of positive character. TexCivA 26SW(2d) 368.

888-81 267Mass501, 167NE235; Mass 171NE639. [b] **Danger is inherent when due to nature of article** not to defect in article naturally harmless. Mass 171NE639.

888-82 [a] 318Mo 397, 1SW(2d)122, 124 [quotCyc].

888-83 228Ky44, 14SW(2d)208; 318 Mo 397, 1SW(2d)122.

888-87 12LaA405, 123S384.

889-99½–New. Rule that seller is not liable to third person on resale of dangerous article without proof of lack of buyer's knowledge and seller's failure to warn is not absolute. Mass 171NE 639.

890-20 [a] (2) Duty of manufacturer to comply with statute in sale of wholesome feed. 248NY293, 162NE84.

891-39 See also 250 IllA340 (toy pistol).

891-44 [a] (3) Porcelain bath tub faucet. NJSup 149A828.

891-47 39GaA355, 147SE119; NJSup 149A828; 28 OhA152, 162NE633. [a] **Nonuse for purpose intended** at time of injury of electric sewing machine with defective insulation does not necessarily relieve from liability. 28 OhA152, 162NE633.

892-52 [a] 12LaA405, 123S384.

892-56 CalA 290P919(3dcase).

893-58 TexCivA 26SW(2d)368.

893-69 318Mo 397, 1SW(2d)122. [b] 28 OhA152, 162NE633.
893-71 But see 39GaA355, 147SE119.
893-72 39GaA355, 147SE119.
895-2 220Ala220, 124S516; 92CalA732, 268P951; 110Conn184, 147A762, 66ALR 1121; IndA 172NE129; IndA 173NE 269; Mont 292P577; 33 OhA47, 168NE 619; Okl 292P335(2dcase); 298Pa256, 148A102; 300Pa55, 150A153; 90PaSuper176; 93PaSuper13; TexCivA 21SW (2d)6; 150Wash157, 272P723, 63ALR 200; 41Wyo 345, 285P781; Ont [1930] 4DomLR785; NS [1930] 4DomLR790.
896-3 IndA 172NE129.
896-6 321Mo 405, 11SW(2d)8.
896-14 Iowa 218NW625.
897-16 152Va484, 147SE461.
897-17 207 Iowa1293, 224NW820, 62 ALR1419. [b] In Iowa,-218NW625.
897-20 175Minn563, 222NW335.
897-3 90PaSuper176.
898-8 157SC359, 154SE645.
898-15 87Colo 294, 287P650; 232Ky 285, 23SW(2d)272; 320Mo 1011, 8SW (2d)982, MoA 286SW130; MoA 289SW 987; MoA 11SW(2d)750(2dcase); 84 Mont397, 276P437; 196NC516, 146SE 209; TexCivA 14SW(2d)867.
899-16 [a] (2) 265Mass408, 164SE374. (4) IndA 172NE131. (9) 293Pa131, 141 A734. (23) 218Ala566, 119S610(2d case); GaA 155SE85; 221MoA362, 273 SW143; TexCivA 8SW(2d)271; TexCivA 27SW(2d)556. (24) Dominant cause from which injury follows as direct and immediate consequence. Or 289P1055. [i] (2) Primary cause may be proximate cause. 221MoA362, 273SW143.
900-23 253NY423, 171NE694.
901-27 32F(2d)988; 35F(2d)602; 37F (2d)928; 92CalA145, 267P887; 98CalA 189, 276P591; 101CalA769, 282P820; 87Colo 294, 287P650; 110Conn184, 147 A762, 66ALR1121; 255 IllA535; 206 Iowa309, 218NW340; 128Kan749, 280 P900; 231Ky60, 21SW(2d)125; 233Ky 329, 25SW(2d)727; 13LaA345, 127S129; 4LaA455; 267Mass501, 167NE235; 222 MoA1146, 15SW(2d)970; MoA 20SW (2d)918; 84Mont84, 274P293; 230App Div332, 243NYS657; 196NC516, 146SE 209; 198NC448, 152SE405; 32 OhA492, 168NE237; Or 293P414; Pa 152A90; 92PaSuper416; 157SC359, 154SE645; TexCivA 9SW(2d)146; TexCivA 28SW (2d)1093; Wash 287P36; Vt 152A87; Va 154SE575. [b] One negligent act may be factor in producing several injuries. 110Conn184, 147A762, 66ALR 1121. [c] To be actionable per se negligence must be found to be proximate cause of injury. TexCivA 26SW(2d)722.
903-29 98CalA189, 276P591; 109Conn 77, 145A753; 7LaA262, 265 [quotCyc]; 265Mass408, 164NE374; 198NC8, 150 SE636; 95PaSuper588; Va 152SE370; Wash 286P46.
905-37 23AlaA490, 127S679; 179Ark 321, 15SW(2d)994; 92CalA732, 268P 951; 110Conn184, 147A762, 66ALR1121; 152Miss185, 119S164; 200Wis471, 229 NW64. [b] Determination of causal connection can be had only in light of all evidence. 219Ala546, 122S677.
906-40 42F(2d)799; 11LaA604, 123S 349; 85Mont604, 281P540; 137Misc530, 242NYS608; 132 Or479, 285P201.
907-41 205Cal 328, 270P952, 60ALR475.
907-43 41GaA385, 153SE96(1stcase).
907-44 IndA 170NE862 (father's drinking of carbolic acid and not sale to minor son was proximate cause of death).
908-52 110Conn184, 147A762, 66ALR 1121; 128 Or369, 274P905.
909-59 92CalA145, 267P887; IndA 173 NE269; 317Mo 1156, 298SW226, 235 [quotCyc].
909-60 110Conn184, 147A762, 66ALR 1121; 233Ky198, 25SW(2d)373 (motivating cause); 317Mo 1156, 298SW226, 235 [quotCyc]; 317Mo 919, 298SW789, 794 [quotCyc]; 221MoA362, 273SW143, 144 [quotCyc]; Ont [1929] 4DomLR598.
910-61 317Mo 1156, 298SW226, 235 [quotCyc]; 221MoA362, 273SW143, 144 [quotCyc]; MoA 11SW(2d)750(2dcase); 97PaSuper351.
911-68 180Ark231, 21SW(2d)168; 231 Ky564, 21SW(2d)990; 266Mass25, 164 NE612; 266Mass481, 165NE497; Mo 23 SW(2d)44; Mo 31SW(2d)974; MoA 29 SW(2d)221; 197NC718, 150SE361; 132 Or479, 285P201; 296Pa249, 145A822; 34PortoRico 1.
912-70 [c] One is responsible for act which may naturally cause injury, regardless of motive or care. CalA 286P 445.
913-74 MoA 15SW(2d)917.
914-79 218Ala586, 119S625, 63ALR1; 39GaA774, 148SE535; 338 Ill 270, 170 NE247; 245 IllA192; 265Mass408, 164 NE374; Mo 31SW(2d)974; MoA 22SW (2d)654; 229AppDiv520, 242NYS644; Or 293P414; 293Pa131, 141A734; Tex CivA 16SW(2d)146; TexCivA 16SW(2d) 865; TexCivA 25SW(2d)695. [f] (9) That another will commit crime. Tex CommnA 15SW(2d)550. [j] Rule of liability only for foreseeable consequences is limited to violations of common-law duty. TexCivA 26SW(2d)435.
917-81 156Miss758, 126S836; 295Pa 214, 145A123.
917-82 40GaA675, 150SE862; OhA 173 NE318.
918-84 11LaA93, 120S76; TexCivA 31 SW(2d)146.
918-85 197NC164, 148SE34.
918-89 110Conn184, 147A762, 66ALR 1121.
918-90 GaA 155SE88.
918-91 36F(2d)841; 102CalA656, 283P 823; 13LaA101, 126S573; 318Mo 397, 1 SW(2d)122; 321Mo 17, 10SW(2d)936; MoA 22SW(2d)654; 92PaSuper341.
919-92 31F(2d)717; 267Mass501, 167 NE235.
920-95 101CalA174, 281P634; MoA 20 SW(2d)592.
920-97 Ala 130S416; 92CalA145, 267P 887; CalA 290P684; 195NC788, 143SE 861; SC 155SE839; TexCivA 9SW(2d) 284; TexCivA 32SW(2d)525.
920-98 101CalA503, 282P10(2dcase); 102CalA656, 283P823; MoA 7SW(2d) 460; 128 Or369, 274P905; 128 Or310, 274P915; 298Pa256, 148A102; Tex CivA 8SW(2d)271; TexCivA 21SW(2d) 13; TexCivA 22SW(2d)714. [a] 300Pa 55, 150A153.
921-99 110Conn184, 147A762, 66ALR 1121; Mo 28SW(2d)97; TexCivA 28 SW(2d)906; 41Wyo 345, 285P781. But see 157Md514, 146A457.
922-1 42F(2d)799; 218Ala566, 119S 610(2dcase); 127Me466, 144A212 (contributing cause).
922-2 231Ky564, 21SW(2d)990.
923-4 MoA 24SW(2d)208.
923-5 206 Iowa309, 218NW340.
923-8 96CalA250, 273P111; CalA 290 P684; 92PaSuper386; 95PaSuper135.
924-10 318Mo 723, 300SW769; 136 Okl 97, 276P711; 140 Okl 45, 282P157.
925-13 CalA 290P684; CalA 290P505; 246 IllA425; TexCivA 21SW(2d)6.
925-14 CalA 280P552; 132 Or46, 284P 567; 153Wash549, 280P50.
925-17 294Pa265, 144A131.
925-19 [c] One thing being sole cause of accident necessarily excludes all other causes. 101Vt285, 143A394.
926-24 CalA 290P684.
926-27 120 Oh599, 167NE868.
927-29 TexCivA 32SW(2d)525.
927-30 137Misc551, 244NYS51.
927-31 12LaA405, 123S384, 388 [cit CJ]; TexCivA 21SW(2d)13.
928-32 129Kan229, 282P708; 229Ky 284, 17SW(2d)233; Md 150A801; 196 NC330, 145SE570; Pa 152A90; 97Pa Super351; TexCivA 8SW(2d)271; Tex CivA 32SW(2d)525; Vt 152A87. [d] (6) Placing tool chest containing dynamite caps on premises convenient for access for thirteen-year-old boy is not proximate cause of injury to such boy, who secured cap and applied lighted match to it while holding it in his fingers. 127Me544, 142A773.
929-33 Or 293P414.
929-34 TexCommnA 29SW(2d)984.
930-35 338 Ill 270, 170NE247; MoA 11 SW(2d)750(2dcase).
930-41 MoA 11SW(2d)750(2dcase).
930-46 253 IllA190.
931-50 205Cal 563, 271P1062; OhA 173NE318.
931-55 338 Ill 270, 170NE247; 104NJL 557, 142A337, 60ALR102; NJ 147A476; 137Misc126, 241NYS479; 293Pa131, 141 A734; 295Pa214, 145A123; SD 230NW 754; TexCivA 31SW(2d)146.
932-57 [a] One act may furnish "occasion" for another act which is cause of injury without contribution of first act. 338 Ill 270, 170NE247.
932-63 205Cal 563, 271P1062; 84Mont 397, 276P437.
933-66 Ont [1929] 4DomLR598.
934-68 35F(2d)543; 96CalA161, 273P 875; 266Mass25, 164NE612; 267Mass 501, 167NE235; TexCivA 8SW(2d)271.
935-77 265Mass408, 164NE374; 104 NJL557, 142A337, 60ALR102; TexCivA 16SW(2d)865.
936-79 104NJL557, 142A337, 60ALR 102.
936-83 230Ky162, 18SW(2d)976(2d case).
937-92 137Misc551, 244NYS51.
937-94 137Misc551, 244NYS51.
938-96 128Me409, 148A146.
939-17 140 Okl 45, 282P157.
939-19 205Cal 328, 270P952, 60ALR 475; TexCommnA 7SW(2d)521.
939-14½-New. Only acts unforeseeable in the exercise of ordinary care or act of God exculpate a negligent wrongdoer. 226AppDiv154, 235NYS331.
939-22 30F(2d)349; 85Colo 488, 277P 469; Colo 277P470; 128Kan423, 278P 45; 227Ky423, 13SW(2d)254; 221MoA 373, 273SW130.
941-32 Mo 23SW(2d)102.
941-33 253NY324, 171NE391.
942-36 85CalA55, 258P988; 47 Ida619, 277P542; 11LaA508, 124S156; MoA 29 SW(2d)743; 196NC515, 146SE135; 197 NC712, 150SE488; TexCivA 26SW(2d) 1091.
943-38 95CalA704, 273P95.
943-39 198NC741, 153SE318.
943-42 89CalA477, 265P268.
943-43½-New. The question of contributory negligence must be determined by the peculiar facts of each case. 208 Iowa 117, 224NW579.
943-43½-New. Jury must consider all existing conditions in deciding whether there is contributory negligence. Mass 171NE662.
943-45 128Me264, 147A149. [b] Where defendant is not negligent, there can be no contributory negligence. 101CalA 274, 281P1081.
944-54 203Cal 206, 263P518, 58ALR 129; 88CalA648, 263P1039; CalA 293P 80; 256 IllA569; MoA 27SW(2d)747.
944-55 NJ 151A596; TexCivA 32SW (2d)696; 197Wis349, 222NW249.
945-56 Iowa 231NW665.
945-60 132Misc399, 229NYS666; WVa 155SE653.
945-69 47 Ida619, 277P542; 58ND209, 225NW323.
946-72 218Ala260, 118S276; CalA 285 P369; 107Conn568, 141A652; 320Mo 586, 9SW(2d)606, 60ALR1064; NH 151 A262; Oh 172NE668.
947-75 86PaSuper280.
947-77 218Ala260, 118S276; 180Minn 125, 230NW469; NJ 147A445.
947-79 LaA 129S422; Mont 289P580; 35 OhA113, 172NE300.
947-80 31F(2d)889; 41F(2d)542; 220 MoA948, 78W(2d)403; TexCivA 12SW (2d)253.
947-81 41GaA472, 153SE444.
948-82 Ala 128S145.
949-83 30F(2d)578; MoA 27SW(2d) 747.
949-87 Ala 128S145.
949-88 153Wash93, 278P1072(2dcase).
950-95 90CalA151, 265P574; 228Ky 300, 14SW(2d)1079; Mass 168NE89; 29 OhA101, 163NE206.
950-97 88CalA174, 263P255; 87Colo 369, 287P866.
951-11 98Fla14, 122S789.
952-16 Iowa 228NW48; 293Pa472, 143 A119.
953-26 TexCivA 14SW(2d)856.
953-28 41F(2d)542. [a] Human frailties and acts of others must be considered. 293Pa472, 143A119.
954-38 29 OhA101, 163NE206.
954-39 102CalA380, 282P967; Iowa 231 NW665; 13LaA101, 126S573; NH 151 A262; TexCivA 10SW(2d)441; 153 Wash93, 278P1072(2dcase).
954-40 11LaA604, 123S349.
955-41 197Wis349, 222NW249.
955-42 [a] (6) Invitee at store is entitled to assume that premises are reasonably safe. 319Mo 573, 58W(2d)33.

955-44 90CalA151, 265P574; 108Conn 226, 142A739; Vt 151A568.
955-45 CalA 289P245; 228Ky300, 14 SW(2d)1079.
956-46 [a] **Person need only exercise ordinary care** to prevent injury by another, after it becomes apparent. 41 GaA203, 152SE581(3dcase).
956-49 CalA 284P1086; CalA 287P518; 332 Ill 627, 164NE142; 322Mo 349, 17 SW(2d)927.
956-50 Va 153SE711.
956-53 12LaA405, 123S384, 388 [quot CJ].
956-54 IndA 170NE558.
957-59 250NY513, 166NE306. See also 256 IllA247.
958-60 247 IllA270; Mass 169NE136; 322Mo 349, 17SW(2d)927; 196NC510, 146SE129; 97PaSuper413; 50RI 496, 149A612.
960-64 41F(2d)479.
960-66 NH 151A262.
961-81 203Cal 206, 263P518, 58ALR 129; 110Conn692, 147A17; 12PaDist&Co 647.
962-89 MoA 14SW(2d)511.
962-91 26F(2d)569.
962-96 MoA 21SW(2d)211.
963-97 207 Iowa862, 224NW28; 228 Ky440, 15SW(2d)277; 152Va484, 147 SE461; 107WVa245, 148SE109.
963-98 IndA 170NE564; Mo 24SW(2d) 143; Utah 280P1053.
963-1 232Ky56, 22SW(2d)446; 33PortoRico 755.
963-2 LaA 130S234(4thcase); 33PortoRico 755.
964-3 295Pa168, 145A81; 33PortoRico 755.
964-5 96CalA169, 273P866.
965-7 88 IndA52, 163NE231; 13LaA 304, 126S727; 33PortoRico 755.
965-9 Mass 169NE484; 151Va458, 145 SE362.
966-17 CalA 283P977; CalA 290P540.
966-21 93PaSuper262.
967-25 Utah 291P326.
969-51 Alta [1930] 3DomLR1005.
969-53 83NH439, 144A57.
969-57 TexCivA 28SW(2d)565.
970-64½-New. Questions of contributory negligence are to be determined with reference to the standards prescribed by law. 57ND741, 224NW167.
970-67 11LaA306, 123S399(2dcase).
970-68 CalA 289P900; 254 IllA387; 83 NH350, 143A516(2dcase); NJ 148A741; 13PaDist&Co 501.
972-84 MoA 293SW84.
972-89 But see 90CalA144, 265P558.
972-90 Ala 129S20(1stcase); CalA 289 P662; Del 143A42; 6LaA468; 13LaA 546, 128S530; Minn 232NW3; 227App Div47, 237NYS42; Vt 147A346; 148 Wash583, 269P838.
974-91 Nebr 227NW321; 153Wash208, 279P588(2dcase), 67ALR92.
974-95 96CalA161, 274P594; 11LaA 306, 123S399(2dcase).
974-97 See also 197NC712, 150SE488.
974-98 6LaA468.
974-4 99CalA573, 278P906; 248Mich 506, 227NW665(1stcase); 148Wash583, 269P838; 150Wash646, 274P713.
975-10 13LaA115, 126S724.
976-14 IndA 163NE622; 196NC510, 146SE129. [a] **Plaintiff's negligence is sufficient to bar recovery** if it concurs with that of defendant to cause injury. Mo 25SW(2d)92.
976-15 157Miss303, 127S775.
976-21 29F(2d)115; 41F(2d)542; 218 Ala223, 118S406; 203Cal 206, 263P518, 58ALR129; CalA 268P445; 338 Ill 270, 170NE247; 167La335, 119S69; 5LaA 410; 7LaA527; 10LaA715, 123S172; Mich 233NW331; 155Miss674, 125S93; Mo 25SW(2d)92; MoA 7SW(2d)370; 222 MoA1036, 7SW(2d)398; MoA 27SW(2d) 747; Mont 289P580; 252NY127, 169NE 112; 197NC64, 147SE683; 198NC780, 153SE412(1stcase); NC 155SE601; 86 PaSuper249; SD 233NW291; TexCivA 18SW(2d)727; TexCivA 22SW(2d)746; Man [1929] 4DomLR318.
978-22 225Ky465, 9SW(2d)217.
978-28 91CalA448, 267P164; 30 OhA 118, 164NE370; 299Pa343, 149A477; 88 PaSuper361; TexCivA 18SW(2d)804; BC [1928] 2DomLR220.
979-31 177Ark1174, 9SW(2d)788.
980-32 88PaSuper361.
980-44 11LaA508, 124S156; 323Mo 601, 20SW(2d)509; Mo 26SW(2d)980.
981-50 23AlaA595, 129S489; Ala 130S 401; 251 IllA364; Mass 168NE722; 85 Mont604, 281P540; OhA 173NE303; 159Tenn211, 19SW(2d)234. [a] **That one carelessly places himself in danger is never excuse for another purposely or recklessly injuring him.** TexCivA 28 SW(2d)320.
982-63 CalA 259P973; 86CalA244, 260 P927.
984-82 Cal 290P571; 90CalA114, 265P 517; 92CalA100, 267P758; CalA 284P 499; CalA 291P461; CalA 291P467; 233Ky763, 26SW(2d)753; 4LaA457, 460 [citCyc]; 11LaA564, 123S446, 450 [cit Cyc]; LaA 128S724; Mich 233NW203; 321Mo 929, 13SW(2d)541; 322Mo 386, 15SW(2d)335; Mo 24SW(2d)633; MoA 285SW114; MoA 4SW(2d)875; MoA 4 SW(2d)888; MoA 7SW(2d)749; MoA 14 SW(2d)483; MoA 17SW(2d)994; MoA 19SW(2d)902; 83NH401, 143A68; 195 NC764, 143SE829; 196NC466, 146SE83 (2dcase); 27 OhNPNS107; TexCivA 21 SW(2d)97; 151Va934, 145SE833; Wash 291P714; 106WVa361, 145SE756; 106 WVa717, 146SE882; Man [1930] 3DomLR215. See also 8LaA310, 312 [citCyc]. But see NJ 148A775. [c] **Failure of defendant after discovery of plaintiff's peril** to exercise reasonable care to avoid accident is sole proximate cause thereof. 85Mont604, 281P540. [f] **Peril must be from operation** of agency or instrumentality under defendant's control. MoA 27SW(2d)435. [g] **Other statements of rule.**–CalA 288P690.
987-84 315Mo 713, 290SW135; MoA 24 SW(2d)644; 85Mont604, 281P540.
987-85 85Mont604, 281P540; 151Va 636, 144SE711.
987-87 321Mo 358, 11SW(2d)11; MoA 7SW(2d)749.
988-98 218Ala410, 118S755.
988-99 206 Iowa1291, 222NW12; Mich 233NW203.
988-1 195NC764, 143SE829; 196NC 768, 147SE287.
988-1½-New. The last clear chance doctrine does not apply when the contributory negligence of the injured party bars recovery as a matter of law. 195NC764, 143SE829.
988-2 246Mich423, 224NW647; MoA 14SW(2d)529.
988-3½-New. The doctrine is applied without consideration of primary or antecedent negligence. 246Mich52, 224 NW448(2dcase); MoA 16SW(2d)719.
988-3¼-New. The last clear chance doctrine recognizes an injured person's continuous negligence, but forbids infliction of injury, if it can be safely avoided after his peril has become apparent, however negligent he may be. 151Va694, 144SE638.
988-3¼-New. Doctrine does not apply when, after weighing evidence, trial court finds that plaintiff, and not defendant, was negligent. 34PortoRico 213.
989-7 251Mich372, 232NW216; Mo 18 SW(2d)401(2dcase). [a] MoA 4SW(2d) 888.
989-8 233Ky756, 26SW(2d)1035; MoA 9SW(2d)96.
989-11 110Conn615, 149A219; 205 Iowa 547, 218NW316; TexCivA 27SW(2d) 331; Va 153SE711.
990-12 108Conn133, 142A676; 233Ky 763, 26SW(2d)753; 246Mich52, 224NW 448(2dcase); Mo 26SW(2d)980; 230 AppDiv394, 245NYS32. [a] **Where defendant has actual knowledge** of peril, doctrine only applies after defendant is aware, or should be, that plaintiff is unconscious of peril. Va 153SE711.
990-16 92CalA100, 267P758; 32 Iowa 467; 166 Iowa506, 147NW901; 185 Iowa872, 171NW167; 191 Iowa1333, 183 NW424; 193 Iowa1059, 188NW829; 196 Iowa1033, 195NW600; 200 Iowa267, 204 NW240; 207 Iowa30, 222NW344.
991-17 109Conn221, 146A494(2dcase); Md 150A263; Mo 30SW(2d)37; 254NY 206, 172NE471; Va 153SE711.
991-18 **Erratum.**–Strike out Iowa cases.
991-19 27 OhNPNS107. **Erratum.**–Strike out Iowa.—Bourrett v. Chicago, etc., R. Co., 121 NW 380.
991-20 153Wash179, 279P570(2dcase).
992-21 Va 153SE711.
992-22½-New. Dullness may not be used to excuse defendant from realizing danger. 92CalA100, 267P758.
992-23 Mo 24SW(2d)633 (injured party must actually be in or entering position of imminent peril). [a] **"Peril"** means imminent, impending, or certain peril. MoA 27SW(2d)435.
992-25 108Conn133, 142A676.
992-26 92CalA100, 267P758; MoA 27 SW(2d)435 (holding "impending danger" to be synonymous with "imminent peril").
992-28 85CalA233, 258P1104; 233Ky 329, 25SW(2d)727; MoA 14SW(2d)475; 254NY206, 172NE471; TexCivA 30SW (2d)681. [b] **Duty to warn.**–Alta [1929] 4DomLR233.
993-29 108Conn133, 142A676; 7LaA 125; Mo 26SW(2d)980; Va 153SE711.
993-34 [a] **In Missouri.**–322Mo 565, 15 SW(2d)798.
993-35 CalA 288P690; CalA 293P126; 167La335, 119S69; 12LaA277, 124S706; 13LaA632, 127S479; 251Mich372, 232 NW216; Mich 233NW203; 319Mo 865, 6SW(2d)954; Mo 30SW(2d)37; 120 Oh 197, 165NE737; 151Va636, 144SE711. [a] (2) The test is whether only defendant retains power to prevent accident. 92CalA100, 267P758.
994-36 9LaA232, 120S122.
994-39 203Cal 116, 263P220; 92CalA 100, 267P758; 85Mont604, 281P540; Alta [1929] 4DomLR233.
996-62 [a] **One with impaired faculties must exercise degree of care sufficient to make good these defects.**–CalA 284P 1083.
996-65 87PaSuper454.
996-68 87PaSuper454.
997-78 Cal 290P33.
998-85 205Cal 396, 271P97, 60ALR429; 105NJL363, 144A593.
999-87 MoA 26SW(2d)997.
999-88 102CalA600, 283P295.
999-92 MoA 26SW(2d)997.
1000-96 250 IllA53.
1001-98 9LaA19, 119S98; 29 OhA145, 163NE218.
1001-99 13LaA115, 126S724; TexCivA 32SW(2d)703.
1001-1 247 IllA128.
1001-2 MoA 299SW85, 89 [citCyc].
1002-3 243 IllA65; Mo 32SW(2d)72 (six years); 10LaA604, 120S696; BC [1930] 3DomLR369.
1002-4 246Mich130, 224NW636; 150 Wash578, 274P188.
1003-10 CalA 284P681 (mental capacity); 9LaA117, 118S847.
1003-17 NJSup 146A430.
1003-19½-New. A child of ten years may be capable of contributory negligence. 5LaA103.
1003-24 218Ala537, 119S667; GaA 155 SE85; MoA 21SW(2d)195. [a] **Violation of protectory statute.**–31 OhA273, 167NE407.
1004-26 105NJL363, 144A593.
1005-38 97CalA654, 275P980.
1005-41 89CalA702, 265P496, 499 [quot &citCyc].
1005-42 102CalA600, 283P295.
1005-43 205Cal 396, 271P97, 60ALR 429; Md 150A728; BC [1930] 3DomLR 369.
1005-54 95CalA162, 272P591.
1008-77 92CalA44, 267P918 (age).
1008-84 246Mich130, 224NW636.
1009-88 MoA 26SW(2d)997.
1009-91 MoA 26SW(2d)997.
1009-92 MoA 26SW(2d)997.
1009-94 14PaDist&Co 228.
1010-96 TexCommnA 7SW(2d)867.
1012-24 128Me358, 147A602.
1014-40 9LaA19, 119S98.
1014-41 [b] **Where custodian of child was confused in emergency,** she was not contributorily negligent. 13LaA115, 126S724.
1015-52 12LaA97, 124S572. See also Vt 146A5.
1016-66 218Ala670, 119S681.
1017-80 8LaA584; 321Mo 105, 9SW (2d)939.
1017-82 12LaA277, 124S706.
1017-83 220Ala220, 124S516.
1018-94 14PaDist&Co 228.
1018-5 14PaDist&Co 227.
1019-20 [a] **Unless negligence of driver was sole proximate cause of injury,** it will not be imputed to guest. Tex CivA 11SW(2d)247.
1019-22 Mass 170NE922. [a] **Negli-**

gence held not imputable.–Can [1930] 4**DomLR**938.

1019–23 86**CalA**136, 260P588.

1020–24–28 [b] **In California.–100CalA** 498, 280P377.

1020–31 **Mo** 23**SW(2d)**102.

1020–32 129**Kan**759, 284P407; **Mass** 168**NE**799; **NJSup** 147A779; 32 **OhA** 301, 168**NE**52.

1020–34 38**F(2d)**8.

1020–35 120 **Oh**239, 166**NE**137; 101**Vt** 459, 144A378. [c] **In Ohio.–34 OhA**207, 170**NE**607.

1020–37 98**CalA**568, 277P529(2dcase); 243**Mich**380, 220**NW**708; 34 **OhA**207, 170**NE**607; 34 **OhA**499, 171**NE**357.

1021–38 **NJSup** 150A235.

1021–41 **Mass** 167**NE**762.

1021–42 220**Ala**201, 124**S**740.

1021–44 120 **Oh**239, 166**NE**137.

1021–44½–New. Doctrine of imputed negligence is inapplicable to action between members of joint enterprise. 34 **OhA**207, 170**NE**607.

1021–47 **Mo** 23**SW(2d)**102; 105**NJL** 415, 144A604. [a] (2) Other illustrations. **Mo** 23**SW(2d)**102 (in matters relative to safe rearing and protection of minor children).

1022–49 **LaA** 130**S**354.

1022–54 **CalA** 279P1014.

1022–58 128**Kan**365, 278P23; 230**Ky** 53, 18**SW(2d)**864; **Mo** 23**SW(2d)**993; 131 **Or**631, 284P183. [f] **Care in selecting custodians.–Mass** 168**NE**99.

1023–59 38**GaA**637, 144**SE**810.

1024–62 29**Hawaii**604.

1024–66 253**NY**423, 171**NE**694.

1024–67 But see **Del** 143A42.

1025–74 **Mo** 23**SW(2d)**993.

1025–76 232**Ky**340, 23**SW(2d)**558; 58 **ND**921, 228**NW**427; 30 **OhA**276, 164**NE** 785(2dcase).

1026–82 200**Wis**598, 229**NW**73.

1026–83 232**Ky**340, 23**SW(2d)**558.

1027–97 **IndA** 167**NE**540(2dcase) (wife as gratuitous bailee of husband's automobile); **LaA** 129**S**565; **Me** 151A10; **Mass** 167**NE**762 (husband as gratuitous bailee of wife's automobile). [d] **Mere parental and filial relation between owner and borrower** is insufficient to bar owner from recovery. **Me** 151A10.

1028–5 **Mo** 32**SW(2d)**288.

1029–15 233**Ky**211, 25**SW(2d)**363; **Mo** 31**SW(2d)**1014; 198**Wis**291, 223**NW**846.

1029–16 **Conn** 152A59; 231**Ky**141, 21 **SW(2d)**236; 232**Ky**443, 23**SW(2d)**954 (1stcase); 233**Ky**493, 26**SW(2d)**1; 10 **LaA**526, 120**S**679; **Mass** 171**NE**658; 247**Mich**383, 225**NW**481(1stcase); 251 **Mich**210, 231**NW**569 (minors in school bus); **NJ** 151A91(2dcase); **NJSup** 143 A153; **NJSup** 149A40; 137**Misc**840, 244 **NYS**543; 41**Wyo** 345, 285P781.

1030–17 199**Wis**334, 226**NW**395.

1031–32 220**Ala**220, 124**S**516; 251**Mich** 121, 230**NW**926(2dcase); 83**NH**524, 145 **A**265; 292**Pa**489, 141A300 (each one is charged with negligent acts of others); 298**Pa**101, 147A854; **TexCivA** 15 **SW(2d)**170; 152**Va**264, 146**SE**277. [b] **If trip is joint adventure and accident is solely due to driver's negligence,** he is obliged by law to repair damage. **LaA** 129**S**250.

1032–33 84**Colo** 433, 271P187; **LaA** 130**S**247; **Mass** 170**NE**77; 101**Vt**459, 144A378; **Vt** 148A283; 148**Wash**192, 270P304, 62**ALR**436. But see 298**Pa**352, 148A527.

1032–34 **LaA** 130**S**247; **Mass** 170**NE** 77; 294**Pa**315, 144A139; 101**Vt**285, 143 **A**394; 152**Va**484, 147**SE**461.

1032–36 218**Ala**566, 119**S**610(2dcase); 220**Ala**220, 124**S**516; **LaA** 129**S**250; 34 **OhA**207, 170**NE**607; 154**Wash**57, 280P 932.

1032–43 28**F(2d)**718 [certiorari den 278**US**654, 49**SCt**179(5thcase), 73**L ed** 564]; 37**F(2d)**320; 37**F(2d)**710; 38 **F(2d)**1; 38**F(2d)**8; 38**F(2d)**963; **Ala** 128**S**233; **Ala** 130**S**807; **Ark** 32**SW(2d)** 633; 204**Cal** 679, 269P529(2dcase); 205 **Cal** 89, 269P932; 208**Cal** 364, 281P380; **Cal** 287P343; **Cal** 293P62; 99**CalA**357, 278P500; 101**CalA**274, 281P1081; **CalA** 283P886; **CalA** 285P879; **CalA** 288P81; **CalA** 289P189; 84**Colo** 433, 271P187; 228 **Ky**635, 15**SW(2d)**497; 229**Ky**284, 17**SW (2d)**233; 233**Ky**211, 25**SW(2d)**363; 233**Ky**309, 25**SW(2d)**733; 166**La**527, 117**S**579, 59**ALR**148; 10**LaA**12, 120**S** 414; 10**LaA**57, 120**S**791; 10**LaA**772, 123**S**187; 12**LaA**567, 125**S**142; 250 **Mich**252, 230**NW**167 (minor passenger); **Miss** 130**S**499; **Mo** 9**SW(2d)**166; 321 **Mo** 105, 9**SW(2d)**939; **MoA** 31**SW(2d)** 123; **Mont** 292P577; **NJ** 151A90; **NJ** 151A635; **NJSup** 149A338; **NJSup** 151 A469; 196**NC**726, 147**SE**15; 198**NC**672, 153**SE**162; 58**ND**921, 228**NW**427; 121 **Oh**437, 169**NE**456; **Oh** 171**NE**860; **Oh** 172**NE**667; 30 **OhA**558, 166**NE**147; 35 **OhA**361, 172**NE**533; **OhA** 173**NE**298; 297**Pa**79, 146A443; 298**Pa**352, 148A527; 151**SC**459, 149**SE**257; **TexCommnA** 24 **SW(2d)**18; **TexCivA** 12**SW(2d)**253; **TexCivA** 27**SW(2d)**899; 101**Vt**270, 143 A401, 63**ALR**1427; 152**Va**649, 148**SE** 794; **Va** 154**SE**575; **Wash** 291P714; 199**Wis**334, 226**NW**395. But see **IndA** 163**NE**622.

1034–45 **TexCivA** 27**SW(2d)**899.

1034–48 199**Wis**334, 226**NW**395 (plaintiff requesting friend to drive her to stated destination).

1034–49½–New. Guest of driver must use ordinary care for own safety, though not imputable with driver's negligence. 180**Ark**980, 23**SW(2d)**972; **IndA** 170**NE**94.

1034–50 248**Mich**406, 227**NW**737.

1034–58 166**La**527, 117**S**579, 59**ALR** 148; **Utah** 290P970. But see **CalA** 284 **P**717.

1035–64 34 **OhA**499, 171**NE**357 (holding that fact that wife was riding with husband involuntarily did not show joint enterprise because of married relation).

1035–74 **NJCh** 152A183.

1035–80 **NJSup** 149A122; **TexCivA** 28 **SW(2d)**906; 149**Wash**483, 271P264.

1036–90 205**Cal** 563, 271P1072; 94**CalA** 486, 271P372.

1037–7 11**LaA**5, 123**S**156; 13**LaA**434, 127**S**31; 246**Mich**52, 224**NW**448(2dcase); 88**PaSuper**361; 121 **Oh**371, 169**NE**291; **TexCivA** 23**SW(2d)**399. See also **Va** 154**SE**522.

1037–7½–New. Where the fright of a mule is not the fault of its driver, and such driver is unable to prevent the mule's backing into defendant's truck, there can be no comparison with defendant's negligence. 40**GaA**188, 149**SE** 85.

1038–18 196**NC**125, 144**SE**552.

1038–23 39**F(2d)**601. [a] **If conduct is negligence more than slight,** recovery is barred. **Nebr** 228**NW**361.

1039–26 **Nebr** 229**NW**12.

1039–27 **Nebr** 229**NW**12.

1039–28 180**Ark**413, 21**SW(2d)**611.

1039–31 **SC** 155**SE**438; **BC** [1929] 4 **DomLR**691.

1039–32 33**F(2d)**866; 219**Ala**692, 123**S** 215; **Ark** 29**SW(2d)**1085; 152**Va**783, 148 **SE**839. [a] (3) Where conduct of both parties is wanton, jury should render verdict which will mete out justice in particular case. 219**Ala**692, 123**S**215.

1040–33 **Ala** 129**S**60; 95**Fla**991, 117**S** 391; 226**Ky**472, 11**SW(2d)**131; 232**Ky** 702, 23**SW(2d)**564; 151**Miss**820, 119**S** 313; 157**Miss**303, 127**S**775; **Miss** 130**S** 50; 197**NC**391, 148**SE**436; 198**NC**475, 152**SE**169; **Or** 293P417.

1040–34 30**F(2d)**586; 32**F(2d)**976; 232 **Ky**702, 23**SW(2d)**564; 322**Mo** 937, 18 **SW(2d)**510.

1042–40 **Ont** [1929] 4**DomLR**62. [a] **Effect of action in particular court.–Ont** [1930] 4**DomLR**833.

1042–41 30**F(2d)**391; 97**Fla**350, 121**S** 95(2dcase); 151**Va**345, 146**SE**363.

1042–42 232**Ky**702, 23**SW(2d)**564; 152 **Miss**377, 118**S**828. See also **BC** [1928] 1**DomLR**1000.

1042–44 97**Fla**350, 121**S**95(2dcase).

1042–46 40**GaA**332, 149**SE**582.

1043–65 But see 33**NM**440, 270P794, 63 **ALR**237. [b] **Customer of beauty parlor.–SD** 228**NW**407.

1043–67 [a] (1) 219**Ala**546, 122**S**677; 51**Nev**372, 277P798; **Vt** 151A568. [b] **Test of assumption of risk is whether dangerous condition was known or plainly observable** and not whether due care was exercised by injured person. 31**F(2d)**85.

1044–68 26**F(2d)**569; 300**Pa**189, 150A 612(2dcase).

1044–69 But see 88**CalA**174, 263P255.

1044–77 **SD** 228**NW**407.

1045–82 251 **IllA**157.

1045–83 [b] **Whether more than one cause of action accrues** depends on whether damage was caused by one negligent act. 43**F(2d)**914 (plaintiff may recover in one suit items of damage not occurring simultaneously). [c] **Action accrues** when actual damage has resulted. 43**F(2d)**914.

1047–6 322**Mo** 640, 15**SW(2d)**779; 252 **NY**127, 169**NE**112; 252**NY**127, 169**NE** 112; **WVa** 152**SE**201.

1048–24 323**Mo** 662, 21**SW(2d)**873.

1049–37 180**Minn**560, 231**NW**239.

1049–49 [b] (4) **Furnishing medical aid and making settlement does not constitute waiver.** 180**Minn**560, 231**NW** 239. (5) Misrepresentations in obtaining release do not constitute waiver where there was ample time to give notice after discovery of fraud or mistake. 180**Minn**560, 231**NW**239.

1053–25 180**Minn**560, 231**NW**239.

1053–36 227**AppDiv**47, 237**NYS**42.

1054–45½–New. One committing a breach of duty causing injury is not protected by setting up a contract in respect of the same matter with another person. 11**LaA**604, 123**S**349.

1055–62 41**GaA**697, 154**SE**301.

1055–67 23**AlaA**574, 129**S**318 [quotCJ].

1056–86 **CalA** 287P354.

1056–87 **CalA** 287P354; 8**LaA**638; 84 **Mont**84, 274P293. [e] **Complaint held sufficient.–IndA** 173**NE**269.

1057–97 101**Vt**282, 143A297.

1057–98 39**GaA**355, 147**SE**119.

1057–9 48 **Ida**121, 279P1092; 48 **Ida**129, 279P1094.

1058–21 **WVa** 155**SE**653.

1058–22 **WVa** 155**SE**653.

1058–26 **Mont** 292P909. [a] (28) Upsetting ladder on which plaintiff's in testate was working. **MoA** 7**SW(2d)** 429. [b] (7) By permitting top of chute to become greasy. 254 **IllA**169.

1060–40 254 **IllA**362; 126**Kan**740, 741, 271P286 [quotCyc]; 86**Mont**562, 284P 539.

1060–41 84**Mont**52, 274P145.

1061–45 98**Fla**14, 122**S**789; 137**Misc** 126, 241**NYS**479.

1061–46 218**Ala**260, 118**S**276.

1063–57 **Ala** 127**S**534; 98**Fla**14, 122**S** 789. [c] **Complaint is not demurrable,** though not definitely alleging that plaintiff's employer was not a subcontractor under defendant, where it alleges that employer had contracted independently. 98**Fla**14, 122**S**789. [d] **Complaint or petition held sufficient.–41GaA72,** 151**SE** 686.

1063–59 **MoA** 7**SW(2d)**429.

1064–73 218**Ala**223, 118**S**406.

1065–85 34**PortoRico** 545. [b] (5) Other allegations held insufficient. **MoA** 5 **SW(2d)**1106. (6) Insufficient on attractive nuisance doctrine, but sufficient on common-law theory. 218**Ala**429, 118 **S**640.

1066–7 205**Cal** 629, 271P1062, 62**ALR** 825; 39**GaA**355, 147**SE**119.

1068–13 **MoA** 29**SW(2d)**221.

1068–25 319**Mo** 275, 3**SW(2d)**1025, 61 **ALR**1269.

1069–44 [b] (2) Count for injuries to invitee falling through elevator opening, charging breach of duty in failing to notify invitee of dangerous opening, held insufficient. 218**Ala**223, 118**S**406.

1071–73 218**Ala**223, 118**S**406; 85**CalA** 216, 258P1107; 254 **IllA**362; 205 **Iowa** 621, 218**NW**334; 126**Kan**740, 741, 271 P286 [quotCyc]; **MoA** 32**SW(2d)**97; 86 **Mont**562, 284P539.

1072–81 91**CalA**382, 267P181.

1072–83 219**Ala**324, 122**S**316; **WVa** 155 **SE**653. [a] (3) Other instances. 136 **Misc**468, 241**NYS**233.

1072–84 39**GaA**228, 147**SE**184; **IndA** 172**NE**129; 200**Wis**31, 227**NW**276.

1074–5 97**CalA**112, 274P1009; 205 **Iowa** 621, 218**NW**334.

1074–8 91**CalA**382, 267P181.

1075–21 219**Ala**324, 122**S**316; **Ala** 130**S** 318; **Cal** 287P464; 85**CalA**332, 259P 470; 101**CalA**58, 281P407.

1075–25 **Ala** 127**S**534; **MoA** 22**SW(2d)** 872; 136**Misc**468, 241**NYS**233.

1076–26 219**Ala**238, 121**S**722; 98**Fla**14, 122**S**789; 39**GaA**597, 148**SE**12; **MoA** 22**SW(2d)**872.

1077–29 169**Ga**201, 149**SE**698; 168**Ga** 259, 147**SE**513(2dcase).

1077–33 [a] **Allegations of negligence enabling person of ordinary understanding to know what is intended to be relied on are adequate.** 233**Kyl**, 24**SW (2d)**942.

1078-40½-New. Where specific negligence is set forth in a count, there is no place therein for general averments of negligence. 205 **Iowa**621, 218**NW** 334.

1078-43 30 **OhA**539, 165**NE**860.

1078-44 221**MoA**345, 273**SW**176; **MoA** 19**SW(2d)**528; 12**PortoRicoFed**106; 199**Wis**168, 225**NW**821.

1079-57 218**Ala**260, 118**S**276; 40**GaA** 695, 151**SE**406(2dcase); **IndA** 172**NE** 131; 205 **Iowa**621, 218**NW**334. [b] (5) Other instances. 107**WVa**552, 149**SE** 610.

1080-62 228**AppDiv**746, 239**NYS**478.

1081-65 35**Ariz**205, 276**P**322 (that averments were conclusions is immaterial, where complaint clearly disclosed facts constituting negligence); 168**Ga**259, 147 **SE**513(2dcase) (where failure to give warning is alleged as fact).

1081-66 205 **Iowa**621, 218**NW**334.

1082-78 39**GaA**228, 147**SE**184; 205 **Iowa**621, 218**NW**334.

1082-80 205 **Iowa**621, 218**NW**334.

1082-82 **MoA** 15**SW(2d)**378; **TexCivA** 14**SW(2d)**367.

1082-84 323**Mo** 1179, 20**SW(2d)**676.

1082-88½-New. Where the act alleged raises a presumption of negligence under the res ipsa loquitur rule, the petition is good against any sort of attack, whether made before or after verdict. **MoA** 22**SW(2d)**872.

1083-91 218**Ala**416, 118**S**662; 219**Ala** 223, 121**S**716; 12**PortoRicoFed**61.

1083-92 205**Cal** 629, 271**P**1062, 62**ALR** 825; 39**GaA**355, 147**SE**119; 30**Hawaii** 452, 454 [quotCyc]; 251**Mich**210, 231 **NW**569; 33**PortoRico** 201.

1084-99 234**Ky**410, 28**SW(2d)**489; 84 **Mont**52, 274**P**145.

1085-12 221**MoA**621, 287**SW**813.

1085-21 [a] **In Georgia.**-41**GaA4**, 152 **SE**116.

1086-33 251 **IllA**320.

1090-31 29**Hawaii**604.

1091-35 256 **IllA**461.

1093-70 [a] (2) Negligence in failing to perform work of raising building under contract in good and workmanlike manner and in manner of doing work. **CalA** 284**P**1082.

1093-80 91**CalA**382, 267**P**181; 139 **Okl** 64, 281**P**248.

1095-90 99**CalA**303, 278**P**448.

1095-5 219**Ala**692, 123**S**215, 218 [cit CJ].

1096-10 205**Cal** 629, 271**P**1062, 62**ALR** 825.

1096-16½-New. Each paragraph specifying negligence need not be followed by an allegation that such negligence proximately caused plaintiff's injuries, where all of such paragraphs are followed by an allegation that plaintiff was injured as a direct and proximate result of the aforesaid negligence. 318**Mo** 421, 1**SW(2d)**791.

1096-20 40**GaA**751, 151**SE**544.

1097-27 86**Mont**562, 284**P**539.

1097-31 9**PaDist&Co** 524.

1097-32 87**CalA**758, 262**P**764, 765 [quot Cyc].

1098-41½-New. Where one act of negligence is pleaded, all the results must be pleaded in one suit. 12**PortoRicoFed** 192.

1098-51 218**Ala**223, 118**S**406. [a] **Allegation that defendant's negligence is gross** does not mean plaintiff seeks to recover for willful and wanton misconduct. 41**GaA4**, 152**SE**116.

1099-56 [a] (4) Other allegations held sufficient. 253 **IllA**589.

1099-60 30**Hawaii**12.

1100-63 30**Hawaii**12.

1100-67 198**Wis**595, 225**NW**200.

1102-85 101**Vt**282, 143**A**297.

1102-89 **MoA** 27**SW(2d)**435. [a] (1) **MoA** 25**SW(2d)**491. (2) Other instances. **MoA** 24**SW(2d)**644. [b] (1) 321**Mo** 929, 13**SW(2d)**541.

1102-90 **Mo** 18**SW(2d)**401(2dcase).

1103-6 14**PaDist&Co** 179.

1104-12 39**GaA**355, 147**SE**119.

1105-24 **Wis** 230**NW**708.

1105-26 86**Mont**228, 283**P**226; 89**NC** 321.

1107-37 See also 7**Alaska**170.

1108-46 256 **IllA**111.

1108-51 135**Misc**446, 238**NYS**616.

1108-56 40**GaA**367, 149**SE**715.

1108-57 **Oh** 172**NE**667; 36 **OhA**380, 172 **NE**679.

1109-59 86**Mont**228, 283**P**226.

1112-19 204**Cal** 101, 266**P**803.

1112-21 128**Kan**749, 280**P**900 (petition held demurrable because allegations showed that plaintiff guest in automobile would have sustained no injury but for negligence of driver).

1112-28 245 **IllA**325.

1113-43½-New. In an action against the owner of a building for injuries from fall of an elevator, due to failure to make inspection or repairs, defendant's cross action, alleging that injuries were due to breaking of cogs in wheels or other device through dropping or pushing of heavy boxes from truck onto elevator by express company's employees, has been held demurrable. **TexCivA** 8 **SW(2d)**527.

1114-53 127 **Or**326, 271**P**986.

1114-55 128 **Or**310, 274**P**915.

1114-63 **CalA** 292**P**186. But see **CalA** 292**P**186.

1114-65 84**CalA**337, 258**P**397.

1114-66 84**CalA**337, 258**P**397; **CalA** 283**P**977; **CalA** 290**P**540.

1115-81 **Ala** 127**S**825; **Cal** 292**P**451; 84**CalA**337, 258**P**397; **CalA** 283**P**977; **CalA** 290**P**540; **CalA** 292**P**276; 86**Colo** 435, 282**P**568; 39**GaA**355, 147**SE**119; **Mo** 5**SW(2d)**409; 321**Mo** 887, 13**SW(2d)** 648; 86**Mont**240, 283**P**222; 134 **Okl** 251, 273**P**243; 129 **Or**203, 276**P**684, 63**ALR** 1071; **Or** 292**P**89; 152**Wash**657, 279**P** 114.

1116-88 85**Colo** 409, 277**P**299.

1116-89 86**CalA**459, 261**P**315.

1117-2 84**CalA**337, 258**P**397; 134 **Okl** 251, 273**P**243.

1117-3 47 **Ida**604, 277**P**570.

1117-4 **Cal** 292**P**451; 84**CalA**337, 258 **P**397; **CalA** 285**P**369; **CalA** 291**P**215; 322**Mo** 349, 17**SW(2d)**927; 134 **Okl** 251, 273**P**243.

1118-11 **TexCommnA** 12**SW(2d)**552.

1118-15 127**Me**316, 143**A**178.

1118-21 321**Mo** 887, 13**SW(2d)**648.

1119-22 84**CalA**337, 258**P**397, 401 [quot Cyc].

1120-40 **Ala** 127**S**835.

1120-41 84**Mont**397, 276**P**437; 85**Mont** 604, 281**P**540.

1120-49 [a] 220**MoA**948, 7**SW(2d)**403.

1121-61 219**Ala**676, 123**S**57; 84**CalA** 358, 258**P**115; 84**CalA**337, 258**P**397. [b] (5) In action for personal injuries and property damages in burning automobile through negligently filling gasoline tank. 84**CalA**358, 258**P**115.

1121-62 84**CalA**337, 258**P**397.

1122-64 **Ala** 127**S**825.

1122-68 84**CalA**337, 258**P**397, 401 [cit Cyc].

1122-74 219**Ala**676, 123**S**57.

1122-76 219**Ala**676, 123**S**57.

1122-77 84**CalA**337, 258**P**397.

1122-80 219**Ala**676, 123**S**57.

1123-81 84**CalA**358, 258**P**115.

1123-83 33 **OhA**311, 169**NE**480.

1124-12 86**Colo** 435, 282**P**568; 86**Colo** 435, 282**P**568 (last clear chance rule).

1125-44 **MoA** 31**SW(2d)**580 (humanitarian doctrine).

1126-63 99**CalA**81, 277**P**878(2dcase); 225**Ky**447, 9**SW(2d)**212; **Mo** 8**SW(2d)** 940; **Or** 293**P**414. See 293**Pa**333, 143**A** 8. [c] **Where only general negligence is alleged,** only general negligence need be proved. 205 **Iowa**621, 218**NW**334.

1126-64 [a] **Plaintiff submitting only instruction on measure of damages,** must prove all other assignments of negligence in petition. **MoA** 26**SW(2d)**823.

1126-65 [b] **In Georgia.**-41**GaA4**, 152 **SE**116.

1127-73 **MoA** 17**SW(2d)**608(3dcase).

1127-74 247 **IllA**128; 256 **IllA**461; **MoA** 23**SW(2d)**225; 84**Mont**397, 276**P** 437.

1128-80 **MoA** 26**SW(2d)**823 (assignments not submitted are abandoned).

1129-87 **MoA** 22**SW(2d)**897.

1129-6 **Mo** 8**SW(2d)**940; **Or** 293**P**414.

1130-18½-New. Where action for injuries to one falling into an open elevator shaft was submitted on the theory that the proximate cause of injury was defendant's failure to maintain a reasonably sufficient gate, not the moving of the elevator platform, which was averred as a mere matter of inducement or circumstance creating a dangerous situation imposing duty to maintain such gate, it was not incumbent on plaintiff to show that the elevator was not moved by fellow servant or mere stranger. 320**Mo** 1011, 8**SW(2d)**982.

1130-28½-New. Where the complaint alleges facts showing that the proximate cause of injury was plaintiff's own act, plaintiff must prove facts alleged to show that he acted with reasonable care and prudence in so acting. 86**Mont**228, 283**P**226.

1131-36 206 **Iowa**1319, 221**NW**944.

1131-43 256 **IllA**581; **MoA** 296**SW**249.

1133-59 85**CalA**332, 259**P**470; 175**Minn** 445, 221**NW**679.

1134-66 206 **Iowa**309, 218**NW**340; **Iowa** 231**NW**353; **Pa** 151**A**678.

1134-67 **Pa** 151**A**678.

1134-68 226**Ky**275, 10**SW(2d)**817.

1136-33 233**Ky1**, 24**SW(2d)**942; **MoA** 24**SW(2d)**644.

1137-91 **Utah** 290**P**169. [b] **Plaintiff may show damage to gear and transmission** under allegation that collision damaged door, axle, body, running board, fenders, "and other parts of plaintiff's said car." 22**AlaA**598, 118**S**230.

1138-8 40**GaA**814, 151**SE**541.

1140-20 30 **OhA**389, 165**NE**358.

1141-45 128 **Or**310, 274**P**915.

1141-52 **Mo** 286**SW**66.

1142-77 **Ala** 127**S**835; **DC** 32**F(2d)**957.

1142-78 **CalA** 286**P**718.

1143-97 **TexCivA** 26**SW(2d)**441.

1143-10 108**Conn**544, 143**A**886; 333 **Ill** 368, 164**NE**657.

1144-13 84**Mich**583, 48**NW**166.

1144-17 [b] **There is no variance** between allegation of gross or willful negligence and proof of simple negligence. 157**Miss**157, 127**S**274.

1144-18 [a] (5) Other instances. **Ala** 127**S**534. **Erratum.**-[a] (5) Strike out note.

1144-21 105**WVa**579, 144**SE**292.

1145-32½ 179**Minn**480, 229**NW**797 (contributory negligence).

1146-44 [a] (5) Capacity of children to exercise care for own safety. 256 **IllA** 569.

1146-50 [a] **The law presumes responsibility for acts of negligence.**-27**F(2d)** 392.

1146-50½-New. Persons are presumed to anticipate the natural and reasonable consequences of their conduct. 41**GaA** 72, 151**SE**686.

1146-58 **IndA** 169**NE**358.

1148-94 27**F(2d)**920; 180**Ark**1056, 24 **SW(2d)**340; 203**Cal** 403, 264**P**484; **CalA** 287**P**518; **DC** 42**F(2d)**605; 207 **Iowa** 1149, 222**NW**560; 225**Ky**243, 8**SW(2d)** 418; 228**Ky**184, 14**SW(2d)**768; 233**Ky** 325, 25**SW(2d)**736; **Mont** 290**P**261; **NC** 154**SE**667; 119 **Oh**422, 164**NE**518, 60 **ALR**128; 54**SD**233, 222**NW**932, 63**ALR** 984; **SD** 226**NW**644; **TexCivA** 32**SW** (2d)682. [a] **Transfer of title and possession** is not sufficient for inference that vendor authorized continuance of dangerous condition. 254**NY**64, 171**NE** 908.

1149-97 180**Ark**1056, 24**SW(2d)**340; **DC** 41**F(2d)**970; 256 **IllA**569; 156**Miss** 540, 126**S**201; 119 **Oh**422, 164**NE**518, 60 **ALR**128; 300**Pa**347, 150**A**618; **SC** 155 **SE**438.

1150-2 **NJSup** 149**A**828.

1151-8 [c] **Injury is not presumed to arise from cause creating liability,** if consistent with presumption it arose from cause not doing so. **Oh** 171**NE** 402.

1152-20 39**F(2d)**537.

1152-21 295**Pa**168, 145**A**81.

1152-22 **MoA** 300**SW**1028.

1152-23 [a] **CalA** 292**P**186.

1153-40 [a] (7) Presumption of due care was not to be weighed with the circumstances of accident in evidence. **Mass** 170**NE**922.

1155-79 157**Md**256, 145**A**611.

1157-40 34 **OhA**499, 171**NE**357.

1159-23 88**CalA**67, 262**P**1106. See also **MoA** 15**SW(2d)**952.

1159-26 [a] **Jury's disbelief of testimony** does not affect presumption. **TexCivA** 27**SW(2d)**911.

1160-28 **Cal** 269**P**657(2dcase); **MoA** 15 **SW(2d)**952; **Nebr** 228**NW**361. [b] **When evidence of plaintiff's actual conduct is introduced** statutory presump-

tion of his due care disappears. Mass 171NE662.

1160–29 88CalA648, 263P1039.

1161–35 CalA 292P186; 197Wis241, 221NW762.

1162–54 TexCivA 26SW(2d)340 (where unavoidable accident is raised by evidence); Wis 232NW595.

1162–56 108Conn115, 142A812; 206 Iowa1361, 222NW386, 61ALR351; 321 Mo 671, 12SW(2d)727; 49RI 364, 142A 621.

1162–56½–New. Persons who charge negligence must prove it by preponderance of evidence. CalA 285P731.

1163–62 TexCivA 18SW(2d)246.

1163–69 179Ark321, 15SW(2d)994; 203 Cal 604, 265P238, 59ALR480; 109Conn 144, 145A662; DC 41SW(2d)970; 206 Iowa1361, 222NW386, 61ALR351; 2LaA 130; 3LaA748; 11LaA635, 124S631; 158Md39, 148A270; Mass 169NE424(1st case); 244Mich208, 221NW314; 176 Minn210, 222NW924; 221MoA621, 287 SW813; MoA 31SW(2d)250; 252NY127, 169NE112; NC 154SE667; Va 153SE 664; 153Wash538, 280P15; 154Wash 634, 283P467(2dcase).

1165–70 TexCivA 21SW(2d)67.

1165–71 128Me349, 147A421; 253NY 486, 171NE752; SC 155SE438; TexCivA 21SW(2d)67.

1165–76 321Mo 671, 12SW(2d)727.

1165–79 87PaSuper463; 88PaSuper449.

1167–98 Mich 233NW178.

1167–2 [b] Prima facie case is essential. TexCivA 32SW(2d)682.

1167–3 NJ 151A598.

1167–5 2LaA565; 137Misc530, 242NYS 608; 30 OhA427, 164NE768(2dcase); 137 Okl 74, 278P286; Wis 232NW595. [c] Ecape from liability by delegation of responsibility is a defense to be proved, not a privilege presumed. 253 NY486, 171NE752.

1168–6 MoA 300SW559.

1168–13 36F(2d)102; 218Ala586, 119S 625, 63ALR1; 178Ark1046, 13SW(2d) 306; IndA 165NE774; 206 Iowa1361, 222NW386, 61ALR351; 206 Iowa309, 218NW340; Mo 28SW(2d)97; MoA 14 SW(2d)674; MoA 16SW(2d)616; MoA 29SW(2d)221; 84Mont397, 276P437; 86Mont240, 283P222; 196NC275, 145SE 611; 196NC516, 146SE209; 120 Oh438, 166NE374; 137 Okl 74, 278P286; 139 Okl 64, 281P248; 300Pal, 149A644; 49 RI 364, 142A621; TexCivA 14SW(2d) 856; TexCivA 19SW(2d)816; 153Wash 538, 280P15; Ont [1928] 2DomLR303.

1169–18½–New. In an action for injuries to an invitee or licensee by fall into an open elevator shaft while removing barrels from defendant's premises to those of plaintiff's employer, it was not incumbent on plaintiff to show that the elevator was not moved from the level of the loading dock by a fellow servant or mere stranger. 320Mo 1011, 8SW (2d)982.

1170–20 [a] Burden is on party who violated statute to prove excuse or justification. 179Minn325, 229NW136.

1170–21 206 Iowa1361, 222NW386, 61 ALR351.

1170–22 196NC516, 146SE209; 295Pa 168, 145A81.

1171–49 88CalA67, 262P1106; 91CalA 470, 267P346; 97CalA377, 275P840; 97 CalA731, 276P149; CalA 279P1014; 101 CalA174, 281P634; CalA 293P98; IndA 168NE495; 11LaA508, 124S156; 13LaA 546, 128S530; 13LaA345, 127S129; Mass 171NE671; 176Minn210, 222NW 924; Mo 24SW(2d)143; MoA 31SW(2d) 580; NJ 143A740; NJSup 149A338; 198NC795, 153SE413; 33 OhA311, 169 NE480; 33 OhA512, 169NE704; Tex CivA 19SW(2d)77; Va 153SE664; Wash 290P996; Wash 292P1014.

1173–50 39GaA739, 148SE421; NH 148 A24; 33 OhA311, 169NE480; 299Pa79, 149A104.

1174–57 Nebr 227NW321.

1175–58 218Ala566, 119S610(2dcase).

1175–60 NC 155SE601.

1175–63 [a] (11) Other applications of statute. Mass 170NE402. (12) As used in statute, there is no distinction between "due care" and "contributory negligence." Mass 167NE746.

1177–81 218Ala260, 118S276.

1177–85 1LaA477. See also 320Mo 1239, 10SW(2d)933.

1180–97 85Mont562, 281P345; 86Mont 240, 283P222; Mont 289P580; Oh 172 NE667; OhA 173NE245.

1180–3 TexCivA 8SW(2d)548.

1182–16 109Conn144, 145A662; 251 IllA127; 252 IllA151; 256 IllA569; 206 Iowa1361, 222NW386, 61ALR351; 252Mich41, 232NW744; 252NY127, 169 NE112. [d] (3) 252NY127, 169NE112.

1184–25½–New. When plaintiff's own case shows prima facie contributory negligence, if unexplained, he must introduce further evidence exculpating him. 86Mont228, 283P226.

1184–27 LaA 129S183; MoA 9SW(2d) 96; 195NC764, 143SE829; 101Vt379, 143A643; 151Va694, 144SE638; 151Va 458, 145SE362; Va 153SE711; 108WVa 576, 152SE13.

1185–31 MoA 4SW(2d)875; MoA 4SW (2d)888.

1186–61 205Cal 396, 271P97, 60ALR 429.

1187–71 218Ala537, 119S667.

1191–13 TexCommnA 9SW(2d)1104 (2dcase).

1191–15 256 IllA569.

1191–17 TexCommnA 9SW(2d)1104(2d case).

1192–27 204Cal 101, 266P803.

1193–47 Mass 168NE99.

1193–51 CalA 291P912; NJ 151A598; 157Tenn187, 7SW(2d)808, 60ALR254; Utah 290P169.

1193–52 [a] (1) 203Cal 604, 265P238, 59ALR480.

1193–54 31F(2d)769; 37F(2d)928; 43 F(2d)852; CalA 258P707; 102CalA656, 283P823; 102CalA723, 283P833; CalA 290P497; 251 IllA342; 255 IllA305; 12 LaA652, 126S707; MoA 5SW(2d)668; MoA 15SW(2d)378; MoA 22SW(2d) 897; 197NC240, 148SE251; 87PaSuper 325; 98PaSuper242; Ont [1930] 3Dom LR596. See also 4LaA281. [c] (9) Doctrine of "res ipsa loquitur" means that, without direct proof of negligence, accident which could not ordinarily happen in exercise of due diligence may take place under circumstances which justify finding that there must have been negligence. 134Misc534, 236NYS 100.

1196–60 LaA 130S669; 156Miss830, 127S284.

1196–68 Mass 168NE809.

1198–74 221MoA621, 287SW813.

1198–79 128Me207, 146A700.

1198–80 128Me207, 146A700.

1199–82 156Miss540, 126S201; 196NC 359, 145SE684.

1199–86 TexCommnA 27SW(2d)116.

1200–1 131 Or180, 282P236.

1200–2 318Mo 350, 300SW515.

1201–21 [c] (1) 203Cal 604, 265P238, 59ALR480; 13LaA115, 126S724 (boiler exploded); Mass 167NE666 (loud speaker falling from shelf above store door); MoA 5SW(2d)668; MoA 15SW (2d)378; 11PaD.st&Co 275; 137Misc 530, 242NYS608 (plank). (4) CalA 288 P79. (6) 150Va406, 143SE692 (tiling from building under construction). (20) NJSup 147A387 (chandelier fixture). (33) Plaster from department store ceiling. TexCivA 10SW(2d)191. [d] 36F(2d)102; 231Ky433, 21SW(2d) 790; 233Ky325, 25SW(2d)736 (shooting oil well); 158Md39, 148A270; Mass 169NE438(1stcase); 198NC559, 152SE 625(2dcase) (fall on oily floor); 298Pa 142, 148A40; Man [1928] 1DomLR648 (falling plaster).

1203–22 Utah 290P169.

1203–22½–New. or in case of escape of crude oil from a pipe line, MoA 17SW (2d)656.

1203–23 41GaA705, 154SE385. [a] NJ 150A371 (exploding bottle of vichy); NJSup 146A674(1stcase) (explosion of bottle of vichy). [b] 206 Iowa1361, 222 NW386, 61ALR351; 152Wash19, 276P 896.

1203–24–25 [b] 88Cal 682, 263P1022 (cafeteria patron falling down stairway); DC 41F(2d)970; 88PaSuper449 (where plaintiff fell on recently oiled store floor).

1204–26 Mo 25SW(2d)777.

1204–28 [b] Those dumping ashes so hot on scow as to burn it are presumptively negligent. 37F(2d)58.

1205–45 MoA 25SW(2d)122.

1206–50 250 IllA330.

1206–56 Mo 31SW(2d)21; 197NC240, 148SE251.

1207–57 CalA 290P482; MoA 31SW (2d)279.

1207–59 90CalA555, 266P297.

1207–60 LaA 130S669.

1207–61 12PaD.st&Co 769 (absolute duty amounting practically to that of insurer).

1207–63 245 IllA484.

1210–82 BC [1930] 3DomLR892.

1210–83 90CalA555, 266P297; 316Mo 317, 289SW597, 49ALR1034; 320Mo 655, 8SW(2d)918; NJSup 147A779; TexCommnA 15SW(2d)550.

1211–86 43F(2d)852; 203Cal 206, 263P 518, 58ALR129; 108Conn115, 142A812.

1211–87 197NC240, 148SE251.

1211–88 197NC240, 148SE251.

1211–89 197NC240, 148SE251.

1211–90 CalA 285P927.

1212–95 207 Iowa1149, 222NW560.

1212–97 197NC240, 148SE251.

1212–2 CalA 290P660; 129 Or242, 276 P255.

1213–7 84CalA180, 257P877; CalA 290 P482.

1213–11 197NC240, 148SE251.

1213–12 203Cal 206, 263P518, 58ALR 129. [b] 203Cal 206, 263P518, 58ALR 129.

1214–14 CalA 258P707.

1215–22 203Cal 206, 263P518, 58ALR 129; CalA 258P707; 96CalA149, 273P 862; 108Conn115, 142A812; 40GaA280, 149SE287; 249NY236, 164NE36; 197 NC240, 148SE251; 198Wis618, 225NW 328.

1216–25 Cal 287P464. See also 108 Conn115, 142A812.

1216–33 CalA 268P451; 205 Iowa621, 218NW334; LaA 130S669; MoA 285 SW165; 34PortoRico 545.

1217–34 CalA 291P912; 255 IllA305; 205 Iowa621, 218NW334. [b] Particular act of negligence need not be proved. MoA 22SW(2d)897.

1217–36 40GaA280, 149SE287; MoA 5 SW(2d)668; MoA 17SW(2d)656; 197 NC639, 150SE122. See also 128Me207, 146A700 (extends no further than to require submission to jury).

1219–38 203Cal 604, 265P238, 59ALR 480; CalA 290P497; 255 IllA305; 233 Ky171, 25SW(2d)33; 13LaA115, 126S 724; NJSup 147A387; 200Wis292, 227 NW274; BC [1930] 3DomLR892.

1220–39 MoA 285SW165. [a] The doctrine is nothing more than regulation of burden of proof.–37F(2d)928. [b] Although object falling from building does not raise presumption of negligence, slight evidence may shift the burden of proof. 299Pa45, 149A91.

1220–40 42F(2d)111; 90CalA555, 266P 297; 128Me207, 146A700.

1221–43 NC 154SE667.

1221–44 90CalA555, 266P297; CalA 290 P497; 128Me207, 146A700; 129 Or242, 276P255; 157Tenn187, 7SW(2d)808, 60 ALR254.

1222–48 [a] Defendant must show he did nothing he should not have done, nor omitted any duty he owed plaintiff. 12LaA652, 126S707.

1222–53 CalA 291P912; 30 OhA528, 165 NE365. [d] 37F(2d)58; 203Cal 604, 265 P238, 59ALR480.

1223–54 255IllA305.

1223–57 208 Iowa369, 226NW151, 157 [quotCJ].

1224–64 255 IllA305. [a] (5) Rule does not permit plaintiff to leave nothing to inference and recover on another theory. Mo 31SW(2d)21.

1225–79 205 Iowa621, 218NW334.

1225–83 102CalA697, 283P837; CalA 290P1047; 205 Iowa621, 218NW334; 206 Iowa309, 218NW340; 207 Iowa1149, 222 NW560; 221MoA621, 287SW813; MoA 22SW(2d)897; MoA 23SW(2d)225; Tex CivA 32SW(2d)220.

1226–86 MoA 291SW520.

1227–88 31 OhA118, 166NE588.

1227–89 CalA 290P482.

1227–90 MoA 22SW(2d)897.

1228–97 [a] (4) In action for death of hogs, evidence to show wholesomeness of stock food alleged to have caused death is improperly excluded. 208 Iowa882, 226NW178. [e] Ownership of property injured.–48 Ida121, 279P1092; 48 Ida 129, 279P1094.

1228–98 [a] (32) **In action for injuries sustained by falling through opening in fire escape, applications for permits to repair fire escapes is inadmissible.** 266 Mass520, 165NE667. (33) Statute under which duty may be established is no evidence that duty exists. 83NH401, 143A68.

1230–15 207 Iowa895, 223NW745; Mich 233NW331

1232–38 29F(2d)115.

1235–49 233Ky198, 25SW(2d)373.

1238–76 205Cal 629, 271P1062, 62ALR 825.

1239–92 But see 37F(2d)168.

1240–95 233Ky198, 25SW(2d)373.

1240–96 [b] **Condition three weeks afterward is inadmissible unless shown that there was no change.** Mc 149A618.

1240–97 293Pa333, 143A8.

1240–99 [b] (11) Other instances. 256 IllA381.

1241–6 243 IllA65; 119 Oh422, 164NE 518, 60ALR128; 30 OhA528, 165NE865; TexCivA 8SW(2d)527. See also 83NH 401, 143A68 (recognizing rule).

1242–7 178Ark753, 13SW(2d)298.

1243–13 96CalA161, 273P875; CalA 285 P1053.

1243–21 CalA 287P360; TexCivA 20 SW(2d)829. See also MoA 32SW(2d) 130.

1244–30 205Cal 629, 271P1062, 62ALR 825; 266Mass520, 165NE667.

1245–32 [a] **Evidence held inadmissible.** 266Mass520, 165NE19.

1245–41 254 IllA169.

1246–51 41GaA115, 151SE834; 233Ky1, 24SW(2d)942; 227AppDiv633, 235NYS 733.

1246–56 243 IllA562; 175Minn445, 221 NW679; 253NY491, 171NE754.

1247–57 244Mich208, 221NW314.

1248–66 TexCivA 8SW(2d)527.

1248–67 244Mich208, 221NW314.

1249–70 175Minn445, 221NW679; 12 PaDist&Co 336.

1250–78 244Mich208, 221NW314.

1251–85 But see TexCivA 8SW(2d)527.

1251–86 BC [1928] 2DomLR235.

1252–95 300Pa85, 150A163; Vt 151A 568. [d] **Cost of precautions.**–Vt 151A 568.

1253–99 205Cal 629, 271P1062, 62ALR 825. [a] **Evidence of customary safeguards is admissible.** 253NY491, 171 NE754.

1253–99½–New. Needs of one situation are not shown by needs of another situation. 83NH401, 143A68.

1253–6 See also 83NH401, 143A68.

1258–51 245 IllA484.

1260–84 255 IllA494.

1260–85 93CalA182, 269P556.

1260–93 [a] (1) 177Minn420, 225NW 393. [c] **Evidence held sufficient to show that plaintiff had dislocated neck.** 32 OhA293, 168NE59.

1261–95 85CalA535, 259P958.

1261–99 [a] (1) 206Cal 115, 273P580; Mass 171NE639. (6) 58ND209, 225NW 323. See also 10LaA186, 121SE331(2d case). (7) Fumigating lemon orchard. 93CalA182, 269P556.

1261–1 205 Iowa621, 218NW334; 98Pa Super473; 147NC487, 145SE400.

1261–5½–New. It is not a rule of law that the place where disease or blood poisoning was contracted cannot be shown except by expert testimony. 129 Or203, 276P684, 63ALR1071.

1261–6 27F(2d)920; 203Cal 604, 265P 238, 59ALR480; 85CalA216, 258P1107; DC 41F(2d)970; 33 OhA311, 169NE480; Va 153SE691. [c] (1) 36F(2d)102; Mass 169NE424(1stcase); 197NC755, 150 SE356; 87PaSuper463; SD 227NW482. (54) 88PaSuper449. (60) Burns received in Russian bath. 152Wash19, 276P896. (61) Defective stairway. 226AppDiv858, 235NYS423. (62) Other instances. IndA 172NE129; 97PaSuper275.

1262–7 [a] **Proof of negligence substantially sustaining allegations is sufficient.**–233Ky1, 24SW(2d)942.

1262–8 [c] (1) 90CalA151, 265P574; 244 IllA180; 231Ky133, 21SW(2d)790; 175Minn445, 221NW679; 176Minn210, 222NW924; NJSup 148A2(2dcase); 227 AppDiv210, 237NYS372; 28 OhA152, 162NE633; 30 OhA528, 165NE865; 28 OhA367, 162NE726; 31 OhA390, 166NE 592; 129 Or203, 276P684, 63ALR1071; TexCivA 13SW(2d)481; TexCivA 25SW (2d)188; 150Va406, 143SE692. (33) IndA 170NE558. (49) 249NY103, 162 NE599. (59) 175Minn545, 221NW904. (63) MoA 32SW(2d)130. (73) 204Cal 488, 268P901; 178Minn87, 226NW208. (74) IndA 169NE864. (75) 38GaA395, 144SE46; 89PaSuper526. (91) Falling ladder in store. MoA 22SW(2d)892. (92) Negligence of party in charge of building from which painter fell. Mo 318SW(2d)1065. [f] (5) Slippery and dangerous condition of recently oiled floor. 129Kan514, 283P917. [g] **Evidence insufficient** to show active operation of building by defendant attracting children to play. Oh 171NE598.

1264–11 247Mich157, 225NW609; 84 Mont1, 273P1051; Mont 290P261; Okl 293P235; 294Pa334, 144A286; 14Pa Dist&Co 320; 157SC392, 154SE431; TexCivA 16SW(2d)132(2dcase); Va 154 SE502.

1265–12 180Ark1056, 24SW(2d)340; 228Ky184, 14SW(2d)768; 233Ky325, 25 SW(2d)736; 235Ky211, 30SW(2d)885; 130 Or294, 279P861; TexCivA 25SW (2d)695; Va 154SE502. [b] 85Mont 270, 278P521. But see Iowa 232NW677.

1266–16 CalA 292P664; 109Conn144, 145A662; 231Ky24, 20SW(2d)1020; 321Mo 671, 12SW(2d)727.

1266–18 Ala 129S60; DC 41F(2d)970; 84Mont397, 276P437; 13PaDist&Co 53.

1266–25½–New. Disputable statutory presumption that one takes ordinary care of his own concerns will support finding despite evidence to contrary. CalA 285P731.

1267–27 Mo 25SW(2d)777; 88PaSuper 449.

1267–34½–New. Proof that device used is not only unlike that ordinarily employed but dangerous is evidence from which negligence can be found. 298Pa 560, 148A851.

1267–35 MoA 22SW(2d)892.

1267–38 MoA 18SW(2d)227. [a] (1) 84 CalA599, 258P616; 90CalA151, 265P 574; IndA 167NE721; Mass 167NE666; 175Minn445, 221NW679; TexCivA 13 SW(2d)481. (3) IndA 169NE864. (22) Oil on linoleum causing slipping. 38 GaA395, 144SE46. (23) Unsafe boiler. 13LaA115, 126S724. (24) Loud speaker falling from shelf above door. Mass 167NE666. (25) Fire originating from defective heating apparatus. 40GaA280, 149SE287. (26) Dislocation of plaintiff's neck. 32 OhA293, 168NE59. [b] (1) 251 IllA208; 206 Iowa309, 218NW 340; 205Iowa1369, 219NW399; 208 Iowa882, 226NW178; 170La1077, 129S 642; 227AppDiv281, 237NYS550. (12) Leaving horse and wagon unhitched and unattended. 92PaSuper416. (13) Slippery stairs. 93PaSuper606. (14) Other instances. 13LaA355, 126S723. [d] (1) 28 OhA152, 162NE633 (defective insulation of sewing machine).

1268–39 93CalA182, 269P556.

1268–40 11La473, 123S904(1stcase); Mo 28SW(2d)97. [b] (11) Other instances. 97PaSuper275.

1268–41 91CalA715, 267P741; 206 Iowa309, 218NW340; 137 Okl 74, 278P 286. [b] 90CalA563, 266P353; 139 Okl 284, 282P303.

1269–42 322Mo 901, 18SW(2d)408; MoA 26SW(2d)52; OhA 173NE31; 87 PaSuper489.

1269–44 Cal 291P173; CalA 288P716.

1269–45 TexCivA 26SW(2d)1091.

1269–46 Mass 167NE666; Mo 28SW (2d)97. See also Cal 291P173.

1269–47 205 Iowa1369, 219NW399.

1269–48 90CalA563, 266P353; 251 IllA 169; Mass 167NE666; 126 Or160, 269P 210, 59ALR875.

1270–49 205 Iowa1369, 219NW399; 318Mo 123, 300SW787.

1270–50 But see Ida 286P606; 126 Or 160, 269P210, 59ALR875.

1271–53 178Ark111, 10SW(2d)503; 206 Iowa309, 218NW340; 151Va278, 144SE 436.

1271–55 219Ala167, 121S539.

1271–58 177Minn303, 225NW160.

1272–66 [a] But see MoA 14SW(2d) 701.

1272–68 [a] (1) MoA 22SW(2d)892. [b] (11) Bucket falling from crane. 297Pa105, 146A445.

1272–71 [a] (8) Dropping empty shell on pavement. NJSup 147A459(2dcase). (9) Setting fire. 139 Okl 284, 282P303.

1272–73 [a] Mass 171NE466 (employment). [b] **Evidence held to authorize recovery.**–137Misc530, 242NYS608.

1273–77 [a] 38GaA395, 144SE46; 266 Mass520, 165NE667; 267Mass189, 166 NE721; 175Minn545, 221NW904; 105 NJL10, 143A741(2dcase); 107WVa236, 148SE70. [d] **Even if injured person were invitee, there is no liability in view of evidence of frequency of explosions which caused injury.** 12LaA652, 126S 707.

1273–78 [a] CalA 285P1053 (employee of subcontractor using runway erected by general contractor).

1273–79 [a] (7) Hoisting derrick. TexCommnA 7SW(2d)867. (8) Other instances. CalA 290P465.

1273–84 204Cal 329, 267P1079; CalA 279P1014; 85Colo 409, 277P299; 85 Mont562, 281P345; 33 OhA311, 169NE 480. [b] (1) 228AppDiv158, 239NYS 192; 197NC108, 147SE676; 31 OhA 390, 166NE592. [c] (1) 218Ala537, 119 S667; 13LaA115, 126S724; Ont [1930] 3DomLR224. (11) Collision with train. 151SC459, 149SE257.

1274–85 [a] (1) 90CalA151, 265P574; 176Minn210, 222NW924; 30 OhA528, 165NE865; 197Wis349, 222NW249. (16) Injury from protruding pipe. TexCivA 13SW(2d)481. (17) Slipping on linoleum. 38GaA395, 144SE46. [b] (1) TexCivA 25SW(2d)188.

1274–88 CalA 279P1014.

1275–93 57ND524, 223NW32 (reasonable care).

1275–95 109Conn144, 145A662.

1278–17 154Wash634, 283P467(2dcase) (evidence must be clear); 108WVa576, 152SE13.

1278–23 254NY206, 172NE471; 132 Or 648, 286P991.

1278–27 [c] (1) 38GaA637, 144SE810; 247 IllA128.

1278–29 [a] 153Va713, 151SE121.

1278–12 [a] **Evidence held not to show cause of action.**–228Ky473, 15SW(2d) 265.

1278–13 246 IllA425; NH 148A466; 105NJL294, 144A448. [a] **Evidence held sufficient to go to jury.**–MoA 15 SW(2d)964; TexCivA 16SW(2d)907. [b] **Evidence held insufficient to go to jury.**–32F(2d)545.

1278–14 248 IllA270; 234Ky181, 27 SW(2d)973; 10PaDist&Co 383.

1279–22 MoA 20SW(2d)574.

1279–23 244Mich208, 221NW314.

1279–26 NJ 147A445.

1279–27½–New. Defendant's ownership and control of premises where the injury occurred is for the jury. Tex CivA 16SW(2d)907.

1279–32 35F(2d)270; 37F(2d)230; 37 F(2d)320; 218Ala223, 118S406; 220Ala 328, 124S892; 178Ark732, 14SW(2d) 230; 204Cal 679, 269P529(2dcase); 205 Cal 153, 270P194; Cal 293P62; 84CalA 519, 258P683; 102CalA199, 282P1005; 102CalA600, 283P295; CalA 288P79; CalA 291P461; CalA 293P80; 39GaA 619, 147SE793(3dcase); 40GaA50, 148 SE669; 41GaA53, 151SE837; 41GaA 120, 152SE278; 41GaA759, 154SE718; 252 IllA151; IndA 170NE558; 228Ky 799, 16SW(2d)168; 231Ky141, 21SW (2d)236; 232Ky56, 22SW(2d)446; 127 Me335, 143A261; Mass 173NE434; Minn 232NW795; Minn 233NW237; MoA 16SW(2d)637; MoA 22SW(2d) 872; MoA 31S(2d)250; MoA 32SW(2d) 130; 83NH350, 143A516(2dcase); NH 148A24; NJ 148A619; 249NY555, 164 NE581(3dcase); 57ND279, 221NW42; Okl 291P534; 298Pa130, 148A58; Tex CommnA 23SW(2d)708; TexCivA 10SW (2d)191; TexCivA 30SW(2d)681; 101 Vt477, 144A380; 200Wis471, 227NW 944; Wis 230NW618.

1280–35 84CalA519, 258P683; 102 CalA199, 282P1005; 41GaA759, 154SE 718; 57ND279, 221NW42; Tex CommnA 15SW(2d)1022; 200Wis471, 227NW944.

1280–37 300Pa85, 150A163.

1280–38 218Ala670, 119S681; 41GaA 120, 152SE278; 128 Or224, 274P302; 151SC459, 149SE257; Va 154SE506. [j] (4) Defective revolving door. 264

Mass228, 162NE349.

1285–44 84Colo 342, 270P659; 127Me 335, 143A261.

1285–45 251 IllA299; 251 IllA364; 255 IllA494; 256 IllA461.

1286–57 [a] **Where evidence, in action for injury or death, is equally consistent** with absence as with existence of negligence of defendant as proximate cause of injury, plaintiff has failed to make out case for jury. 228Ky572, 15 SW(2d)427.

1286–61 MoA 25SW(2d)122; 195NC 788, 143SE861; NC 154SE667.

1286–63 97PaSuper7; TexCivA 8SW (2d)527.

1286–64 156Miss830, 127S284.

1287–67 233Ky325, 25SW(2d)736.

1287–70 281US90, 50SCt231, 74Led 720; CalA 292P523; 256 IllA485; 231 Ky433, 21SW(2d)790; 319Mo1028, 5 SW(2d)6; 323Mo601, 20SW(2d)509; NJSup 146A430; 198NC539, 152SE493 (1stcase); 57ND524, 223NW32; 34 OhA409, 171NE253; 142 Okl 74, 285P 84; 129 Or642, 276P693; SD 225NW 223; 119Wash687, 271P894.

1289–76 CalA 290P62; CalA 292P523.

1289–77 Ark 32SW(2d)154; 205Cal 396, 271P97, 60ALR429; 91CalA364, 267P125; 228Ky440, 15SW(2d)277; 127 Me228, 142A776; TexCivA 23SW(2d) 461; TexCivA 24SW(2d)783; TexCivA 28SW(2d)987.

1290–79 Cal 279P438; CalA 289P245; 321Mo929, 13SW(2d)541; 323Mo601, 20SW(2d)509; 197NC240, 148SE251; 129 Or642, 276P693; TexCivA 9SW(2d) 146; 149Wash587, 271P894.

1291–81 30F(2d)784; 31F(2d)769; 219 Ala427, 122S416, 63ALR1097; 101CalA 174, 281P634; CalA 287P354; CalA 288 P79; 177Minn243, 225NW100; MoA 4 SW(2d)888; 319Mo1028, 5SW(2d)6; MoA 31SW(2d)279; Nebr 228NW364; NJ 151A633; NJ 151A853; NJSup 145 A8; 31OhA118, 166NE588; OhA 173 NE31; 138 Okl 63, 280P409; Okl 293P 235; 129 Or642, 276P693; 98PaSuper 242; 98PaSuper473; Va 154SE545; Can [1930] 4DomLR1. [f] **Where plaintiff's evidence equally supports inference of** defendant's negligence and innocence, defendant is entitled to peremptory instruction. 234Ky243, 27SW(2d)952 (rule inapplicable).

1294–82 NJSup 147A469(1stcase). [a] (1) 207 Iowa895, 223NW745. (8) Defendant's evidence where plaintiff offered no proof. 224AppDiv131, 229NYS700. (9) Whether defendant placed, or could have known that dynamite caps were placed, in place where child found them. 233Ky198, 25SW(2d)373. (10) Other instances. 127 Or427, 272P556. [b] (6) Injury by automobile. 226Ky275, 10SW (2d)817.

1296–84 Ala 130S413; 85Colo 87, 273 P1030; Md 150A795; 197NC718, 150SE 361; 58ND913, 228NW424; 138 Okl 147, 280P622; 298Pa142, 148A40; RI 147A 759(1stcase); TexCivA 9SW(2d)146; Va 154SE545. [d] **Grease on top of chute.**–254 IllA169.

1297–85 TexCivA 9SW(2d)146. See also 323Mo307, 19SW(2d)865(2dcase).

1297–86 197NC628, 150SE184.

1297–87 197NC240, 148SE251.

1298–93 203Cal604, 265P238, 59ALR 480; 84CalA180, 257P877; 84CalA550, 258P616; 255 IllA305.

1298–93½–New. Whether explanatory evidence is insufficient to overcome inference raised by res ipsa loquitur is for trial court. CalA 291P912.

1298–95 CalA 258P707; 128Me207, 146 A700; TexCivA 15SW(2d)1053.

1298–96 128Me207, 146A700.

1299–4 30F(2d)776; 32F(2d)163; 37F (2d)230; 37F(2d)320; 218Ala260, 118 S276; 218Ala223, 118S406; 205Cal153, 270P194; 90CalA730, 266P588 [citCyc]; 94CalA66, 270P719; 95CalA781, 273P 630; 101CalA426, 281P723; 102CalA 124, 282P405; 102CalA380, 282P967; 102CalA615, 283P358; 102CalA744, 283 P850; CalA 284P1086; CalA 286P1091; CalA 287P545; CalA 290P597; CalA 290P1062; CalA 291P597; CalA 291P 884; CalA 291P903; CalA 293P80; 39 GaA619, 147SE793(3dcase); 40GaA50, 148SE669; 41GaA70, 151SE690; 41GaA 53, 151SE837; 41GaA120, 152SE278; 41 GaA759, 154SE718; 252 IllA151; 206 Iowa567, 220NW360; 206 Iowa1109, 221 NW812; 206 Iowa1291, 222NW12; 207 Iowa585, 233NW397; 208 Iowa117, 224 NW579; Iowa 227NW824; Iowa 231NW 665; 231Ky141, 21SW(2d)236; 233Ky 59, 24SW(2d)936; 156Md340, 144A355; 263Mass487, 161NE587; Mass 170NE77; Mass 171NE639; Minn 233NW237; Minn 233NW795; MoA 7SW(2d)460; MoA 14 SW(2d)511; MoA 19SW(2d)522; MoA 32SW(2d)130; 86Mont240, 283P222; NH 148A24; NJ 148A619; 105NJL294, 144A448; 249NY555, 164NE581(3d case); 254NY148, 172NE272; 231App Div755, 245NYS690; 198NC760, 153 SE405; NC 155SE601; 129 Or203, 276P684, 63ALR1071; 153SC339, 150 SE769; TexCivA 27SW(2d)331; Tex CivA 32SW(2d)264; Wash 289P44; 197Wis349, 222NW249. [f] (18) Passing through revolving door. 264Mass 228, 162NE349.

1301–6 180Ark705, 22SW(2d)380; CalA 268P445; 102CalA600, 283P295; CalA 287P152; CalA 293P173; 197NC712, 150SE488; 29 OhA513, 163NE918; 98 PaSuper557; TexCivA 27SW(2d)331; 198Wis228, 224NW104.

1302–15 35Ariz309, 277P812

1302–22 86CalA474, 260P957; CalA 291 P884; MoA 300SW993.

1302–24 256 IllA471; MoA 7SW(2d) 460; 293Pa472, 143A119. [a] (7) Tenant falling through floor boards. 153 Wash93, 278P1072(2dcase). (8) Other instances. 127 Or427, 272P556.

1303–27 NH 149A508.

1304–31 41F(2d)542; 202Cal474, 261P 465; 206 Iowa567, 220NW360; Iowa 231NW665; 319Mo1028, 5SW(2d)6; 85 Mont562, 281P345; Nebr 230NW588; NJSup 146A430; 57ND524, 223NW32; 31 OhA46, 166NE243; 31 OhA118, 166 NE588; 32 OhA26, 167NE589; 128 Or 582, 275P600; TexCommnA 11SW(2d) 303; 107WVa245, 148SE109.

1304–35 CalA 290P62; CalA 290P145.

1305–36 91CalA470, 267P346; 92CalA 495, 268P483; 100CalA441, 280P197; 247 IllA270; 256 IllA485; IndA 168NE 495; 206 Iowa567, 220NW360; 127Kan 527, 274P205; 228Ky300, 14SW(2d) 1079; 228Ky440, 15SW(2d)277; 179 Minn120, 228NW751; 179Minn172, 228 NW754; 179Minn332, 229NW341; 85 Mont562, 281P345; SD 230NW754; 106 WVa361, 145SE756; 107WVa245, 148SE 109.

1305–38 IndA 170NE564; MoA 9 SW(2d)534.

1306–39 218Ala260, 118S276; 204Cal 374, 268P369; 88CalA354, 263P578; 89 CalA122, 264P538, 540 [citCyc]; 91CalA 752, 267P731; 92CalA230, 268P385; 94 CalA48, 270P704; 100CalA441, 280P 197; CalA 292P276; 85Colo 508, 277P 770; 352 IllI627, 164NE142; IndA 168 NE495; IndA 170NE558; 206 Iowa567, 220NW360; 158Md131, 148A426; 158 Md328, 148A439; 319Mo1028, 5SW(2d) 6; Mo 29SW(2d)710; MoA 25SW(2d) 508; 86Mont240, 283P222; 86Mont228, 283P226; Nebr 228NW364; 57ND524, 223NW32; 120 Oh177, 165NE721; 31 OhA46, 166NE243; 31 OhA158, 166NE 425; 31 OhA118, 166NE588; 129 Or118, 276P695; 98PaSuper250; 98PaSuper 260; 98PaSuper473; 98PaSuper550; TexCommnA 11SW(2d)303; Wash 290P 874. [a] Wis 229NW655.

1308–40 88CalA354, 263P578; 50RI 226, 146A484.

1308–42 218Ala260, 118S276; 204Cal 374, 268P369; 205Cal 396, 271P97, 60 ALR429; Cal 276P338; CalA 265P1019; 95CalA423, 273P76; CalA 289P245; CalA 290P48; CalA 290P120; CalA 291 P903; CalA 292P276; TexCivA 14 SW(2d)856.

1309–45 NJSup 147A652; 253NY324, 171NE391. [a] **Whether defect had existed for such time as to be discoverable by ordinary care is for jury.** 198 NC559, 152SE625(2dcase).

1309–49 320Mo1011, 8SW(2d)982.

1309–50 205Cal73, 269P922.

1309–53 156Md146, 143A706; 266Mass 520, 165NE667; 30 OhA528, 165NE865. [a] (29) Failure to warn wife of protruding pipe. TexCivA 13SW(2d)481.

1310–58 [a] (4) Where injured person takes no precautions whatsoever. CalA 286P761.

1310–61 29 OhA101, 163NE206.

1310–62 83NH439, 144A57.

1311–68 102CalA600, 283P295; 41GaA 72, 151SE686. [e] 128Me358, 147A602. [n] (1) 195NC699, 143SE536. [t] 101 Vt477, 144A380. [dd] (1) 204Cal15, 266P281. [ff] TexCommnA 7SW(2d) 867.

1312–72 [c] IndA 168NE465.

1312–74 CalA 288P798.

1314–80 127 Or406, 271P733, 62ALR 574.

1314–84 208Cal652, 284P443; TexCivA 13SW(2d)481. [a] (2) 205Cal153, 270 P194.

1314–86 [a] Mass 170NE77. [b] CalA 285P918. [c] Mass 170NE77. [i] **Sister riding with brother.** 243Mich380, 220NW708.

1314–88 84Colo433, 271P187; MoA 21SW(2d)883; TexCivA 15SW(2d)170.

1314–90 265Mass4, 163NE182; 265 Mass125, 163NE862; 267Mass189, 166 NE721; 228AppDiv569, 240NYS225; 230AppDiv114, 243NYS496. [a] (3) Walking up to steps of defendant in face of barking dog. Mass 167NE228. (4) Leaving five-year-old son unwatched for brief period on lawn. 128Me358, 147 A602.

1315–92 180Ark1095, 25SW(2d)5; 323 Mo662, 21SW(2d)873; 151Va345, 146 SE363.

1315–93 Nebr 230NW588; 295Pa342, 145A293.

1315–95 Va 143SE887.

1315–3 101CalA748, 283P86; CalA 291P461; 34 OhA409, 171NE253; 139 Okl 287, 282P327; 151Va458, 145SE 362; 108WVa576, 152SE13. [a] **Evidence insufficient to warrant submission.**–MoA 22SW(2d)887.

1316–7 108WVa576, 152SE13.

1316–8 318Mo666, 300SW795; MoA 9 SW(2d)96; MoA 22SW(2d)890; 195 NC764, 143SE829.

1316–10 218Ala566, 119S610(2dcase); 219Ala445, 122S411(2dcase); 93CalA 182, 269P556; CalA 290P1062; CalA 291P848; CalA 291P611; 110Conn184, 147A762, 66ALR1121; 39GaA619, 147 SE793(3dcase); 41GaA759, 154SE718; 335 Ill164, 166NE530; 253 IllA444; IndA 170NE558; IndA 173NE269; 207 Iowa1018, 222NW420; 228Ky799, 16 SW(2d)168; 266Mass25, 164NE612; 321 Mo17, 10SW(2d)936; 323Mo601, 20 SW(2d)509; 221MoA823, 293SW460; 84 Mont84, 274P293; 84Mont397, 276P437; NJ 145A636; NJ 148A741; NJ 151A 633; 196NC275, 145SE611; 198NC107, 150SE716; 198NC448, 152SE405; 29 OhA513, 163NE918; 137 Okl74, 278P 286; 144 Okl123, 289P281; 296Pa114, 145A700; 151SC164, 148SE889; SC 155 SE839; TexCivA 21SW(2d)1076; Tex CivA 32SW(2d)525; 152Wash10, 277P 75; 197Wis349, 222NW249.

1318–11 37F(2d)320; 41GaA120, 152 SE278; 221MoA823, 293SW460; 28 OhA 183, 162NE614; 151SC164, 148SE889; TexCivA 30SW(2d)586.

1318–14 253 IllA444; NJ 151A633.

1318–18 87Colo294, 287P650.

1319–24 110Conn184, 147A762, 66ALR 1121; 198NC142, 150SE873; TexCivA 22SW(2d)714.

1319–29 246 IllA425; 318Mo397, 1 SW(2d)122; 322Mo514, 17SW(2d)960; 323Mo601, 20SW(2d)509; 29 OhA145, 163NE218.

1319–30 233Ky329, 25SW(2d)727; 296 Pa380, 146A30(2dcase).

1319–33 232Ky285, 23SW(2d)272; 142 Okl74, 285P84.

1320–34 218Ala566, 119S610(2dcase); 245 IllA192; 128Kan749, 280P900; 129 Kan229, 282P708; 28 OhA183, 162NE 614; TexCivA 18SW(2d)804.

1321–36 320Mo1011, 8SW(2d)982; MoA 11SW(2d)750(2dcase); 138 Okl63, 280 P409; Okl 293P235; 98PaSuper242; TexCivA 18SW(2d)740; TexCivA 18 SW(2d)744.

1322–39 [a] **Rule applies only where there is no substantial evidence as to cause.**–322Mo514, 17SW(2d)960.

1322–44 84Mont84, 274P293.

1322–46 28 OhA367, 162NE726; 92Pa Super251.

1323–49 Iowa 218NW492.

1323–54 229Ky716, 17SW(2d)1008.
1323–57 CalA 284P499; Conn 152A 72(1stcase); Mass 171NE452; NJSup 144A113.
1324–69 32F(2d)419; IndA 172NE 129; IndA 173NE269; MoA 16SW (2d)616.
1324–73 MoA 32SW(2d)97.
1324–74 156Md146, 143A706; NJSup 147A652.
1325–75 98Fla14, 122S789.
1325–77 CalA 290P465; 266Mass520, 165NE667; 298Pa560, 148A851. [c] (4) Opening in stairway landing. 266 Mass520, 165NE667.
1327–81 220Ala549, 126SS69; 95CalA 781, 273P630. [b] Iowa 231NW665. [d] (3) Volunteer minor whose services were accepted by agent of employer. 175Minn579, 222NW275.
1327–82 111Conn584, 150A500; Iowa 231NW665; 267Mass189, 166NE721; Nebr 230NW662; 231AppDiv755, 245 NYS690; 30 OhA528, 165NE865; Vt 151A568. [a] (4) Falling from balcony which gave way. 156Md340, 144A355. [b] (5) At bathing beach cutting foot on broken bottle. 32 OhA54, 166NE920.
1327–83 107WVa236, 148SE70.
1327–85 230Ky162, 18SW(2d)976(2d case); Utah 270P349.
1327–85½–New. Whether invitee assumed risk of injury held question for jury. Vt 151A568.
1328–82 [e] 244 IllA180; 157SC174, 154SE118.
1327–87 TexCivA 30SW(2d)549.
1328–83 243 IllA1; 244 IllA505; 247 IllA128.
1328–91½–New. Claim that injury to child playing was caused by dangerous agency does not necessarily require submission to jury of its attractiveness. 338 Ill 89, 169NE811.
1328–91½–New. Application of the attractive nuisance doctrine is a preliminary question for the court to decide. 130 Or693, 281P846.
1328–93 See also CalA 291P848.
1329–95 [c] Falling in bowling alley. 157Md514, 146A457.
1329–97 [d] (4) Skylight. 299Pa45, 149A91.
1329–98 [g] **Making scaffold.**–248NY 197, 161NE469.
1329–99 [a] (8) Cement and iron. MoA 7SW(2d)412. [d] (5) Pool of water in aisle of store. MoA 15SW(2d) 356. (6) Orange peel in rubbish on floor. 156Md146, 143A706. (7) Moist floor saturated with floor oil. 266Mass 12, 164NE486. (8) Greasy floor. TexCivA 16SW(2d)907. (9) In general. CalA 291P661. (10) Other instances. Ala 127S534.
1329–1 [c] **Collapse of scaffold.**–32 F(2d)163.
1329–2 [b] (4) Greasy steps leading from bookkeeper's office in meat market. 263Mass487, 161NE587. [c] (2) Chandelier fixture in store falling on customer. NJSup 147A387. [g] (3) 157 Md448, 146A282; 29 OhA513, 163NE 918. (6) Using skeleton stairway. 30 F(2d)776. (7) Negligence in constructing step. 102CalA380, 282P967. [j] **Falling through dirty skylight.**–95CalA 781, 273P630. [k] **Falling into opening in floor containing hot water.** 105NJL 294, 144A448. [l] **Unguarded raised platform.**–267Mass217, 166NE562. [m] **Hallways.**–MoA 20SW(2d)574. [n] **Aisles in department store.** NJ 147A 442.
1330–4 [d] **Failure to anticipate wind** would blow roof off. 109Conn158, 145A 884. [e] **Actor tripping over unlighted fountain on stage.** 198Wis228, 224NW 104. [f] **Defect in stairs.**–88CalA682, 263P1022.
1330–5 Cal 287P464. [a] 319Mo 573, 5 SW(2d)33; MoA 14SW(2d)701; NJ 148 A728. [c] 320Mo 1011, 8SW(2d)982. [h] **Failure to keep in repair.**–TexCivA 8SW(2d)527.
1330–6 108Conn226, 142A739. [a] 319 Mo 573, 5SW(2d)33; MoA 14SW(2d) 701.
1330–12 [g] (8) Concrete mixer and boiler. 35F(2d)142.
1331–18 178Minn271, 226NW932.
1331–26 39GaA355, 147SE119. See also 266Mass70, 165NE19. [d] **Oxygen in tank.**–318Mo 397, 1SW(2d)122.
1331–28 See also 137Misc126, 241NYS 479.
1331–30 88PaSuper449. [a] **Where uncontrovertible physical facts show that accident could not have happened as testified to by plaintiff's witnesses,** compulsory nonsuit should be ordered. 13 PaDist&Co 53. [b] **Where circumstances point as strongly to absence as to existence of due care,** nonsuit must be granted. Conn 151A433.
1332–31 89CalA602, 265P374; CalA 291P896; 40GaA50, 148SE669; NJ 147 A445; NJSup 147A387; NJSup 149A 526.
1332–32 203Cal 367, 264P252; 86Pa Super218; Sask [1929] 2DomLR236.
1332–33 Sask [1929] 2DomLR236.
1332–36 196NC510, 146SE129.
1332–40½–New. Where plaintiff fails to introduce evidence to remove a presumption of contributory negligence arising from his own evidence, he is properly nonsuited. 85Mont562, 281P 345.
1332–41½–New. Unless it clearly appears that plaintiff's negligence proximately contributed to defendant's negligent act, nonsuit cannot be granted. NJSup 149A526.
1332–43 Mo 23SW(2d)174; 132 Okl 53, 269P253.
1332–47 Mo 23SW(2d)993.
1333–53 41F(2d)223; 206 Iowa1361, 222NW386. 61ALR351; 158Md39, 148A 270; 30 OhA427, 164NE768(2dcase); 129 Or642, 276P693; 293Pa333, 143A8; 50RI 43, 144A884, 63ALR334.
1333–56 85Mont562, 281P345.
1333–58 42F(2d)70; Cal 293P62; Mass 167NE248; Mass 171NE441.
1333–63½–New. Unless there is evidence which as matter of law establishes absence of defendant's negligence or plaintiff's contributory negligence, court may not direct for defendant. Mass 171NE662.
1333–66 338 Ill 270, 170NE247.
1333–67 252 IllA151.
1333–69 338 Ill 270, 170NE247.
1334–72 118 OhA80, 161NE530.
1334–73 41F(2d)342; 180Minn252, 230 NW776.
1334–74 IndA 168NE191.
1334–74½–New. In the absence of a plea of contributory negligence, the court cannot direct a verdict for defendant where plaintiff's evidence merely tends to show contributory negligence. DC 32F(2d)957.
1334–83 157SC174, 154SE118 (attractive nuisance).
1334–84 CalA 293P126.
1334–86 MoA 32SW(2d)130. [a] 320 Mo 1011, 8SW(2d)982.
1335–91 231Ky433, 21SW(2d)790.
1335–92 32F(2d)163; MoA 296SW249; 150Wash148, 272P66. But see 40GaA 328, 149SE713. [a] (1) 320Mo 655, 8 SW(2d)918. (2) Negligence in sale of oxygen in tank. 318Mo 397, 1SW(2d) 122.
1335–93 245 IllA248.
1335–97 MoA 7SW(2d)412.
1335–98 253 IllA190; MoA 7SW(2d) 412; MoA 17SW(2d)613.
1335–99 219Ala101, 120S914.
1336–1 178Ark250, 11SW(2d)774, 61 ALR1348; 90CalA555, 266P297; 97 CalA112, 274P1009; 97CalA720, 276P 357; 29Hawaii604; MoA 7SW(2d)412. But see 150Wash148, 272P66.
1336–3 158Md424, 149A4. [a] **Instructions proper** in submitting issues of negligence. 233Ky1, 24SW(2d)942.
1336–10 221MoA917, 220MoA540, 288 SW985.
1336–15 MoA 29SW(2d)215; TexCivA 8SW(2d)527.
1336–16 244Mich208, 221NW314. [c] (2) Words "reasonably prudent man" instead of "ordinarily prudent man" is not error. TexCommnA 14SW(2d)1024. [f] **Using "ordinarily prudent person"** instead of "ordinary prudent person" is not error. TexCivA 15SW(2d)170. [g] **"Failure, if any, to exercise ordinary care"** is not objectionable as submitting degrees of negligence and degrees of care. MoA 19SW(2d)902.
1337–26 110Conn593, 149A201.
1337–27 98Fla14, 122S789. [a] (2) Other instances. 320Mo 1011, 8SW(2d) 982.
1338–36 244Mich208, 221NW314. But see 128 Or224, 274P302.
1338–37 96PaSuper431.
1338–44 129Kan514, 283P917.
1339–56 243 IllA1; NJ 148A728.
1339–59 [c] (2) Duty to invitee. 90 CalA151, 265P574.
1339–65 [a] (6) That violation of statute is negligence per se. 31 OhA46, 166NE243. [c] (2) Charge construed was not unequivocal instruction that there could be recovery without reference to defendant's negligence. 38GaA 395, 144SE46.
1340–67 41GaA120, 152SE278.
1341–69 318Mo 79, 1SW(2d)172; MoA 285SW151.
1341–70 See also MoA 19SW(2d)306.
1341–75 [a] (11) Falling ladder injuring customer in store. MoA 22SW (2d)892. (12) Other instances. 207 Iowa895, 223NW745; MoA 7SW(2d) 412.
1342–77 29Hawaii604.
1342–82 [a] **Instructions held not erroneous.**–Ida 287P944 (on acts abandoned).
1342–86 221MoA823, 293SW460.
1342–86½–New. Rule that instruction which directs a verdict must submit specific acts of negligence shown in evidence, although charge in petition may be general, held to have no application to court's remark in ruling on argument of counsel. MoA 14SW(2d)478.
1343–92 86PaSuper270.
1343–94 See also 243 IllA298.
1345–30 244Mich208, 221NW314; 139 Okl 64, 281P248. [a] (3) Instruction that if defendants' negligence shown, they were liable, is erroneous as ignoring proximate cause. MoA 16SW(2d) 616. [c] **Sole and proximate cause.**–32 OhA492, 168NE237.
1346–33 99CalA108, 277P1061; CalA 284P681.
1346–37 TexCivA 27SW(2d)899 (holding charge on proximate cause not erroneous which mentions concurrent cause but omits intervening cause).
1346–39 219Ala546, 122S677.
1347–46 TexCivA 19SW(2d)77.
1347–47 Mass 167NE666.
1347–48 TexCivA 22SW(2d)490.
1347–49 180Minn496, 231NW210 (court need not use words "proximate cause"). Contra 255 IllA535.
1347–50 [k] TexCivA 23SW(2d)512. [p] **Omission of phrase** "unbroken by any new and independent cause" not error. TexCivA 15SW(2d)170. [q] **Instruction defining proximate cause held erroneous.**–TexCivA 10SW(2d)1040. [r] **Definition held erroneous.**–TexCivA 22 SW(2d)490.
1348–55 [a] **Omission of element of "foreseeableness"** held erroneous. TexCivA 18SW(2d)740.
1348–66 95CalA781, 273P630.
1348–77 244Mich208, 221NW314.
1349–78 158Md424, 149A4; MoA 291 SW163.
1349–79 [b] **Instructions held authorized.**–40GaA831, 151SE689.
1349–89 295Pa203, 145A73; 298Pa101, 147A854.
1349–90 84CalA337, 258P397.
1350–92 Cal 292P451.
1350–93 35F(2d)634; 85CalA69, 258 P1006; 144 Okl 293, 291P1; 107WVa 245, 148SE109.
1350–94 321Mo 887, 13SW(2d)648.
1350–98 318Mo 486, 1SW(2d)113; MoA 285SW797; MoA 31SW(2d)113.
1350–99 318Mo 486, 1SW(2d)113.
1350–10 Wash 291P336. [a] (16) CalA 293P80; NJ 148A728. [b] (8) Nebr 231NW503; Nebr 232NW616. [c] **Striking out portion of defendant's instruction** relative to recovery by plaintiff on finding of contributory negligence not error. MoA 14SW(2d)511.
1351–23 [a] (6) Limiting case to defendant's negligence after court charged that plaintiff's negligence was likewise involved. NJ 145A110(1stcase). [b] (6) 101CalA174, 281P634.
1352–24 [a] **Instruction held not confusing.**–38GaA637, 144SE810.
1352–33 31 OhA154, 166NE140.
1352–34 Wash 291P336. [a] (8) 139 Okl 64, 281P248. (9) MoA 285SW127.
1353–36 [a] (8) 90CalA151, 265P574; MoA 14SW(2d)511.
1353–40 180Minn395, 230NW895 [dist

173Minn186, 217NW99].
1353-48 41GaA472, 153SE444.
1353-52 MoA 14SW(2d)511.
1354-76 [b] 89CalA702, 265P496. [c] (2) Ordinary care for child of six held error. GaA 155SE85.
1355-81 [b] In Georgia.-41GaA72, 151SE686.
1356-92 Va 154SE499.
1356-16 38GaA637, 144SE810; Nebr 227NW321.
1356-18 [a] (9) Proximately contributed to cause of accident. 97CalA524, 275P1029. (10) Contributed in "a substantial manner." 149Wash638, 272P36. (11) Plaintiff's negligence "directly contributing" to cause his injury. 33OhA512, 169NE704.
1357-20 MoA 24SW(2d)208.
1357-23 35 OhA16, 171NE352.
1357-35 254 IllA387.
1357-37 108Conn544, 143A886.
1357-38 84Colo 376, 270P656; 228Ky 635, 15SW(2d)497; MoA 18SW(2d)127.
1357-41 86CalA136, 260P588; 321Mo 105, 9SW(2d)939.
1357-43 [a] Refusal to instruct held improper.-Mass 170NE77.
1357-45 CalA 288P81. See also 297Pa 458, 147A100.
1358-48 Ala 128S233.
1358-52 32 OhA301, 168NE52.
1358-53½-New. Instruction that, if occupants of automobile were in joint possession and control of automobile, or were using it in joint enterprise, or as their joint property, plaintiffs were chargeable with driver's negligence, held improperly refused. 83NH524, 145NE 265.
1358-53½-New. Instruction seeking to invoke doctrine of imputable negligence held erroneously refused. 152Va245, 146SE200.
1358-53¼-New. Instruction that driver's negligence is imputable to guest is properly refused where evidence shows that nothing done by guest contributed to injury. 38F(2d)8.
1358-58 243 IllA65.
1358-65 [b] Instructions held not erroneous, as putting question of diminishing damages within discretion of jury. 170Ga208, 152SE474.
1358-66 Nebr 228NW364 (duty of court to instruct); Va 154SE522. [a] See also 40GaA188, 149SE85.
1358-70 Mo 26SW(2d)929.
1359-79 GaA 155SE500. But see 323 Mo 662, 21SW(2d)873.
1359-85 320Mo 791, 9SW(2d)972.
1360-94 [a] (5) That damage should be diminished in proportion to amount of default attributable to plaintiff. 40GaA 332, 149SE582. (6) Disjunctive and not conjunctive statement of condition upon which negligence of plaintiff would not preclude recovery. 40GaA341, 149 SE657. (7) Other instances. 232Ky 702, 23SW(2d)564; 155Miss376, 124S 356; Mo 6SW(2d)843; 117Nebr418, 220 NW685.
1360-96 [d] Charge held proper.-40 GaA814, 151SE541.
1360-98 [a] 181Ark1145, 27SW(2d) 520.
1360-99 Ala 129S60.
1360-8 Ark 29SW(2d)1085.
1361-17 233Ky763, 26SW(2d)753; Okl 292P39.
1361-20½-New. There must be evidence of circumstances surrounding the injury, of probative value, before the court will be justified in instructing upon the doctrine of the last clear chance. 106WVa361, 145SE756.
1362-42 MoA 285SW114.
1362-44½-New. Requested instruction, on doctrine of last clear chance, failing to include elements as to power of preventing accident, having ceased, and defendant being thereafter guilty of negligence in failing to avoid it, held properly refused. 98CalA101, 276P389.
1362-45 322Mo 1103, 19SW(2d)707, 65 ALR129.
1362-47 322Mo 1103, 19SW(2d)707, 65 ALR129.
1362-48 322Mo 1103, 19SW(2d)707, 65 ALR129 (where issue is simply one of negligence vel non).
1362-49 32 OhA492, 168NE237.
1363-68 Cal 287P449; Mass 171NE662 (refusal to change instructions erroneous).
1363-75 See also WVa 155SE125.
1363-79 85CalA535, 259P958; 29 OhA 522, 163NE917; 31 OhA118, 166NE588. [a] MoA 9SW(2d)813.
1363-81 CalA 290P1047. [a] Instructions held not to permit recovery on presumption of negligence. MoA 22SW (2d)892.
1363-90 85CalA535, 259P958. [a] (3) That jury were at liberty to draw inference of negligence from proof of occurrence only, where evidence was offered in explanation of inference. 108 Conn115, 142A812.
1363-94 Mo 25SW(2d)777 (where res ipsa loquitur is inapplicable).
1363-95 28 OhA318, 162NE699; 33 OhA 512, 169NE704.
1364-98 [a] (1) 157SC174, 154SE118. (5) Other instances. Mo 32SW(2d)580. [b] (1) 221MoA537; 282SW1037; MoA 25SW(2d)122 (properly refused).
1364-99 [a] (2) 97CalA731, 276P149. (9) To establish plaintiff's negligence. Nebr 231NW503.
1364-1 [b] (3) 90CalA555, 266P297.
1364-2 [b] (2) Other instances. 90 CalA555, 266P297.
1365-9 Wash 289P19.
1366-35½-New. Where declaration charges negligence in one count and willful and wanton injury in another, verdict finding negligence is finding of not guilty of willfulness and wantonness. 253 IllA589.
1366-35½-New. Where plaintiff relies on counts charging negligence and willful and wanton injury, general verdict for plaintiff cannot be sustained unless willful and wanton injury is shown. 253 IllA589.
1366-38 TexCivA 11SW(2d)247 (failure to submit issue raised by evidence, whether driver was guilty of negligence which was sole proximate cause of decedent's death, held reversible error); TexCivA 24SW(2d)447; NB [1929] 1 DomLR503.
1366-42 TexCivA 13SW(2d)966 (where issue whether negligence was sole proximate cause of collision with truck was not affirmatively pleaded by defendant nor involved in defendant's special defenses, defendants were not entitled to have such issue affirmatively submitted to jury, though evidence raised issue).
1366-44½-New. Where judgment is based on finding of discovered peril, finding that negligence of deceased was sole cause of injury is unnecessary. 118Tex607, 23SW(2d)343.
1366-48 111Conn528, 150A506 (construction of finding).
1366-49½-New. Where defense of contributory negligence is interposed, court must make finding with reference thereto. CalA 290P1051(2dcase).
1366-64 Ont [1930] 3DomLR140.
1367-65 253 IllA162; TexCivA 26SW (2d)298; TexCivA 26SW(2d)368; Tex CivA 28SW(2d)264. But see Tex CommnA 12SW(2d)556.
1367-67 See also IndA 168NE495.
1367-70 See also 33F(2d)508.
1368-73 [a] Verdict for plaintiff necessarily finds issue of contributory negligence in his favor. Ala 130S401.
1368-78 [b] Jury's findings different from facts pleaded does not establish as matter of law that injury was result of unavoidable accident. TexCommnA 7 SW(2d)521.
1368-92 TexCivA 26SW(2d)368; NS [1930] 2DomLR208.
1371-10 [b] 244 IllA180. [c] Mo 25 SW(2d)777.
1372-18 128Me404, 148A141; 198NC 682, 153SE155.

NEMO DEBET EX ALIENO DAMNO LUCRARI

1380-4 [a] Maxim held inapplicable.-Minn 231NW395. [b] Word "unjustly" used in maxim, means unlawfully. Minn 231NW395.

NET

1384-38 90PaSuper443, 444 [citCyc].

NEUTRALITY LAWS

46 C. J.—11-30½-New. Instruction held properly refused as too broad. 33F(2d) 394.

NEWSPAPERS

22-75 [a] 84CalA511, 258P726.
22-87 84CalA511, 258P726.
22-91 Iowa 229NW227.
22-94 98CalA69, 276P419 (such that general reading public might well look to it for news of passing events).
23-2 98CalA69, 276P419.
23-4 Iowa 229NW227; 176Minn635, 222NW646(1stcase).
23-7 Iowa 229NW227.
24-22 98CalA69, 276P419. [a] Harmless error.-98CalA69, 276P419.
24-26½-New. Subscribers whose subscriptions have expired are not bona fide subscribers of newspapers seeking designation as official county paper. Iowa 229NW253.
24-27 But see Iowa 229NW253.
24-48½-New. A declaration by a newspaper of affiliation to a political party and advocacy of its policies and candidates may entitle it to designation as a representative of the party. 108WVa 107, 150SE376.
26-71 [a] Publication within five miles of borough held to be in "vicinity." NJ Sup 147A720.
26-73 [a] (2) 84CalA511, 258P726.
26-78 [a] (2) 84CalA511, 258P726.
28-28 133Misc496, 233NYS110.
31-81½-New. Substantial compliance with statute requiring applicant to deposit statement showing names of bona fide subscribers is sometimes sufficient. Iowa 229NW253.
31-88 See also 207 Iowa797, 223NW 515.
31-94½-New. Where publisher in verified list of bona fide subscriber, recites expiration dates of subscriptions of listed subscribers, fact becomes matter of evidence. Iowa 229NW253.
31-9 Wis 229NW40.
32-30 207 Iowa797, 223NW515.
33-69 333 Ill 190, 164NE218.
34-85 170La3, 127S345(1stcase); 32SD 511, 143NW950, AnnCas1916A384.
34-86 [d] Newspaper impliedly agrees, on acceptance of assessment lists for publication, to publish lists within time prescribed by law. 336 Ill 359, 168NE 312.
35-12 32SW511, 143NW950, AnnCas 1916A384.
35-17 170La3, 127S345(1stcase).
36-57 133Misc496, 233NYS110.
37-91 [a] What law governs.-117Nebr 324, 220NW280.
38-93 Wis 229NW40.
38-95 Wis 229NW40 (contract held void).
38-98 336 Ill 359, 168NE312. [b] Amendment establishing straight rate has been held constitutional. Ill 173NE 274.
38-4 117Nebr324, 220NW280.
39-10 [b] Failure to publish assessment lists within time allowed by statute bars recovery of compensation. 336 Ill 359, 168NE312.
39-11 See also 97Fla176, 120S315.
39-12 228Ky390, 15SW(2d)251.

NEW TRIAL

58-3 [b] (4) Granting of new trial places defendant in same position as if no trial had been had. OklCr 290P354.
58-4 [d] (2) In Georgia motion to set aside judgment comes within rules governing new trials in some instances. 40 GaA568, 150SE569(2dcase).
59-8 170Ga523, 153SE213. [a] (1) MoA 23SW(2d)1080. (3) Motion for new trial is intended to reach matters of error not appearing on face of record. IndA 167 NE731.
59-10 88PaSuper193.
60-12 300Pa584, 151A343.
60-21 CalA 277P145.
61-29 30F(2d)986.
61-35 128Me379, 147A761. But see Tex 26SW(2d)905.
62-56 Ind 172NE309 (where demurrer sustained); IndA 162NE63.
66-16 CalA 288P124. [b] But see 139 Okl 123, 281P586. [g] 88PaSuper475; 96PaSuper162.

66-20 [a] 38GaA496, 144SE341(1st case).
68-37 [a] 10LaA437, 121S351.
68-45 Contra 129Kan14, 281P865.
70-60 NJ 143A740.
71-63 167Ga588, 146SE629.
72-72 235Ky699, 32SW(2d)25.
72-77 [c] **In Missouri.**–23SW(2d)126.
72-79 MoA 24SW(2d)641 (one new trial to each party).
73-87 [f] **Mistrial properly denied** where objectionable reference as to liability insurance was brought out on defendant's cross-examination of plaintiff. 196NC72, 144SE537, 59ALR1084. [g] **Defect in charge** is not ground for new trial where it was approved by party complaining. Minn 232NW326.
73-88 [b] **Acceptance of fruits of judgment** constitutes waiver of right to new trial. CalA 290P460 (effect of acceptance of judgment on one cause of action).
73-95 But see 127Me482, 144A395.
74-4½-New. In so far as the right to a new trial is affected, instructions of the moving party not known to the adverse party are unavailing after complete execution of the decree and acceptance of what was awarded thereunder. 169Ga47, 149SE557(2dcase).
74-4⅓-New. Court may properly refuse to recognize parties' stipulation for new trial. Ariz 291P995.
74-10 96CalA530, 274P430; CalA 290P460; 127Me493, 144A652; 224AppDiv366, 231NYS581. [d] 196NC649, 146SE571; 101Vt514, 144A856. [g] **Refusal to limit new trial** held not erroneous. Va 153SE711.
75-12 [a] (1) 230AppDiv79, 243NYS344. [c] **Where, under pleadings separate judgments cannot be entered,** limited retrial cannot be had. 230AppDiv79, 243NYS344.
75-13 230AppDiv79, 243NYS344.
75-16 CalA 290P460.
76-24 180Minn185, 230NW473; 101Vt514, 144A856. [i] **Negligence.**–It cannot be said as matter of law that in every case issues of negligence and damage are so inseparably blended that new trial cannot be confined solely to issue of damages. 96CalA530, 274P430. [j] **In Virginia.**–150Va283, 143SE694.
77-25 [a] NJSup 143A719(2dcase).
77-27 Ariz 283P719; 128Kan127, 276P74; NJSup 152A175(1stcase).
77-28 Ariz 283P719. [f] **Where verdict of damages was inadequate** and in disregard of evidence, new trial will not be limited to issue of damages. NJ 142A642. [g] **Where evidence on issue of liability was conflicting** and some of it was unsatisfactory in action for fraud order limiting new trial to issue of damages is erroneous. Ariz 286P180.
77-29 NJSup 145A470; 101Vt514, 144A856.
77-29½-New. A trial judge has power to grant both parties' motions for a new trial, so as to require a new trial on every issue raised by the pleadings, not merely a question of damages, on the inadequacy of which plaintiff's motion was based. 267Mass49, 165NE699(2dcase).
77-29⅓-New. A defendant, by taking part in a new trial without protest, waives any objection to a limitation of the rule for a new trial to the inadequacy of a previous verdict. NJSup 147A585.
78-36 Va 153SE711. [b] 38GaA298, 143SE777.
78-38 208Iowa914, 224NW568; 128Or310, 274P915.
79-48 Ala 127S534.
80-68 200Ind178, 162NE403; 132Okl272, 270P329.
81-70 220Ala559, 126S885.
81-74 Ala 130S327; 98Fla970, 124S729 (substitution of lawyers); 127Me377, 143A466; TexCommnA 14SW(2d)1024.
82-92 [a] **Refusal to appoint receiver** cannot be complained of by motion for new trial. Ga 154SE785.
83-9 40GaA427, 149SE711; 231Ky675, 22SW(2d)93.
84-30 GaA 155SE375. [c] **In Rhode Island.**–143A614.
84-39 38GaA337, 144SE11; 38GaA521, 144SE397; 39GaA603, 147SE897; 40GaA427, 149SE711; 41GaA206, 152SE587; GaA 155SE781(2dcase); 86Mont228, 283P226 (absence of nonessential allegations).
85-41 [a] 86Mont228, 283P226 (motion for new trial).
85-43 8LaA257.
85-47 DC 40F(2d)812.
87-67 167GaS843, 146SE835; Ga 154SE785; 92PaSuper143.
87-70 39GaA606, 147SE911(2dcase).
87-79 NJSup 147A586; 148SC152, 145SE699.
87-82½-New. The court has been held not to have abused discretion by sustaining defendant's motion for a new trial, giving plaintiff an opportunity to amend the petition, in an action for breach of contract to sell real estate, where the evidence showed a modification of the contract not alleged in the complaint. 321Mo287, 11SW(2d)26.
88-92 [a] (11) Failure of court to enter order in summoning special jury. 152Va783, 148SE839.
89-4 136Misc299, 240NYS615.
90-7 TexCommnA 14SW(2d)1024; 152Va783, 148SE839.
90-12 168Ga825, 149SE193; 40GaA239, 149SE424.
90-13 219Ala23, 121S24; 219Ala336, 122S351.
91-17 10PaDist&Co 16.
91-21 148SC226, 145SE789.
91-24 Ga 152SE23.
91-32½-New. Prior service of jurors at the first trial entitles defendant to a new trial. 196NC203, 145SE3.
91-36 170Ga242, 152SE254(1stcase); Sask [1930] 3DomLR972.
92-39 166Ga877, 144SE652.
92-50½-New. Juror being employee of a mill of which defendant was president entitles the party to a new trial. 146SC245, 143SE802.
93-54 [d] 137Misc756, 244NYS585.
93-55 But see 42F(2d)48.
94-57 196NC341, 145SE615.
94-58 MoA 27SW(2d)778; 13PaDist&Co 348.
94-60 96CalA204, 273P1097.
94-61 137Misc756, 244NYS585.
94-62 See also 207Iowa862, 224NW28.
94-63 219Ala23, 121S24.
95-66 Ark 32SW(2d)313.
97-95½-New. Fact that defendant's counsel has been obliged to address jury first will not be ground for new trial in absence of substantial wrong. NS [1930] 4DomLR208.
98-9 [b] (2) Remarks concerning defendant's competency have been held insufficient ground for setting aside verdict in his favor. NJSup 147A451(1st case). (3) Statement that there is evidence contradictory of requested instruction does not constitute ground for new trial. NJSup 147A586.
98-19½-New. The court's remark that a corporation, if not bound by a contract of an agent, could defraud the public, has been held not grounds for mistrial, where it was not shown whether counsel's argument warranted the statement. 39GaA490, 147SE420.
98-19⅓-New. Remarks of a trial judge in properly excluding evidence are not ground for new trial. 168Ga766, 149SE138.
99-33 85Mont352, 278P998 (interviewing witnesses and another after trial without receiving any additional evidence).
100-49 But see 142Okl134, 285P839.
101-52 170Ga523, 153SE213; 40GaA754, 151SE533; 200Ind616, 165NE911. [h] **Judgment or decree, if erroneous,** should be directly excepted to at proper time. 170Ga523, 153SE213.
101-57 87IndA603, 162NE239.
101-64 CalA 291P618. [a] **Conduct held not to require new trial.**–98Fla970, 124S729.
101-65 CalA 284P681; TexCivA 30SW(2d)652.
102-73 [a] But see 98Fla970, 124S729.
102-81 149Wash414, 271P78.
103-90½-New. Where there is no contrived concealment of testimony by plaintiff in regard to a previous accident resulting in a chronic and latent disease, lack of adequate preparation for trial by defendant has been held not to warrant a new trial on the ground that the verdict was obtained by perjury. 297Pa204, 146A574.
104-97 [b] **In Oklahoma.**–142Okl134, 285P839.
104-9½-New. New trial of a will contest, for violation of a rule excluding witnesses where it was not shown that the legatees excluded could hear proceedings from the doorway where they stood, has been held properly denied. 207Iowa959, 221NW451.
105-18 See also 222MoA1244, 8SW(2d)77.
105-19 It is only where there is persistent effort in disregard of ruling of court, for purpose of influencing jury, that new trial may be ordered. 227Ky841, 14SW(2d)174.
105-22 127Kan398, 273P172(1stcase); 222MoA1244, 8SW(2d)77.
105-25 Ala 127S534; Ala 130S786.
106-27 CalA 291P618 (proof that plaintiff carried insurance). [r] **Argument that if jury answered certain issues in affirmative they could sign verdict** and return it to court without answering others has been held not to require new trial. TexCivA 13SW(2d)993. [s] **Adverse reference to absence of codefendant** is ground for new trial where absent codefendant renders sufficient explanation for absence. TexCivA 15SW(2d)1060.
107-31 Cal 287P496 (new trial justified as to value of land in condemnation proceedings); 129Kan766, 284P427.
107-35 CalA 292P1006; 234Ky618, 28SW(2d)966; 222MoA1244, 8SW(2d)77; 13PaDist&Co 566; 160Tenn109, 23SW(2d)239.
108-39 222MoA1244, 8SW(2d)77; TexCivA 28SW(2d)225.
108-41 Vt 148A750 (preferable to declaring mistrial).
109-50 CalA 282P508; CalA 284P681; Va 143SE887. But see TexCivA 31SW(2d)850.
110-51 Ala 128S139; Minn 231NW714; 151Va345, 146SE363.
110-55 [c] TexCivA 13SW(2d)909 (must be plainly prejudicial).
110-57½-New. The judge should grant a new trial where argument of counsel improperly influences the jury although no objection is made. 33Oh242, 168NE859.
111-64 168La468, 122S584; 323Mo840, 20SW(2d)684, 66ALR263 (new trial proper on ground of improper cross-examination). [a] (9) Misunderstanding as to when trial of case would be resumed after adjournment at end of day. 11LaA22, 122S143.
111-66 39GaA111, 146SE518(2dcase).
111-74 [a] GaA 155SE510(2dcase).
111-78 129Kan766, 284P427.
112-80 38GaA617, 144SE921(2dcase); MoA 29SW(2d)243; 131Or501, 281P120; 14PaDist&Co 292.
113-86 170Ga369, 153SE29(1stcase).
113-92 169Ga294, 150SE164; 39GaA74, 146SE793; 39GaA490, 147SE420; Minn 232NW325.
113-94 [d] 177Minn592, 226NW203(2dcase).
114-5 40GaA188, 149SE85; Wash 290P984; 197Wis382, 222NW320.
114-8 86PaSuper109.
116-17 169Ga294, 150SE164; 11PaDist&Co 274; NS [1929] 1DomLR712.
116-19 [b] 40GaA328, 149SE713.
116-23 Ont [1930] 2DomLR565.
116-27 168Ga133, 147SE380.
118-43 12PaDist&Co 454 (new trial granted).
118-44½-New. In condemnation proceeding, the granting of a new trial has been held not error, where the court reversed the regular order of proof as to value notwithstanding the court's attempt to correct error by an instruction that the burden of proof was on defendant. 205Cal651, 272P585.
118-54 175Minn622, 221NW681(1st case).
119-56 NS [1930] 2DomLR219.
119-60 130Kan676, 288P570.
119-63 167Ga94, 144SE759.
120-77 323Mo299, 19SW(2d)472; MoA 318SW(2d)246; NJSup 149A826(2dcase); TexCivA 28SW(2d)899; 152Wash339, 227P834(1stcase); 106WVa206, 145SE272; Can [1928] 2DomLR869. But see NJSup 151A379(1stcase).
122-84 86CalA136, 260P588; Iowa 231NW304.
122-86 Can [1928] 4DomLR641.

122-87 Iowa 231NW304.
122-88 38GaA738, 145SE477; 177Minn 420, 225NW393; Mo 24SW(2d)143; Or 289P491.
123-94 Ala 129S20(1stcase); 167Ga 633, 146SE444; 40GaA806, 151SE564; NJSup 147A451(1stcase); NB [1928] 1 DomLR414.
125-8½-New. Where no objection was made at the time, a new trial cannot be had because the instructions were inaudible to the jury. 132Misc250, 230 NYS197.
125-12 40GaA188, 149SE85.
126-23 38GaA337, 144SE11; 38GaA 763, 145SE473(1stcase); 39GaA467, 147 SE430; MoA 15SW(2d)375; 296Pa389, 145A920; 296Pa568, 146A153
126-29 41GaA472, 153SE444.
127-36 170Ga349, 153SE11; Mo 29SW (2d)107; 12PortoRicoFed39.
127-44 221MoA1204, 300SW840; 9Pa Dist&Co 533.
127-46 135Misc479, 238NYS294.
128-51 218Ala350, 118S656; 39GaA51, 146SE127(2dcase); 39GaA467, 147SE 430; 40GaA328, 149SE713; 180Minn 264, 230NW778; 299Pa380, 149A662. [e] Failure to explain meaning of word "presumption" and how presumption might be rebutted and upon whom burden of doing so rests did not constitute grounds for new trial where there was no request to explain. 39GaA529, 147 SE778(2dcase).
128-56 Can [1928] 2DomLR869.
129-58 [a] Necessity of corroboration.-Alta [1928] 1DomLR610.
129-60 9PaDist&Co 399.
129-63 134Misc534, 236NYS100.
129-73 Conn 152A64; Ga 155SE185; 296Pa132, 145A703.
129-75 29F(2d)58; 169Ga28, 149SE 561; 266Mass286, 165NE416; 222MoA 1244, 8SW(2d)77.
130-76 266Mass286, 165NE416; Tex CivA 28SW(2d)225.
131-77 SD 226NW735.
131-84 TexCivA 18SW(2d)189.
132-86 47 Ida675, 277P1112.
132-91 169Ga799, 151SE484.
133-95 127Kan584, 274P214.
133-98 41GaA286, 152SE585(1stcase).
133-9 134 Okl 79, 272P868; Alta [1928] 4DomLR697. [p] Exceptions should point out any injury resulting to exceptors. 167Ga205, 144SE778.
134-10 NJSup 149A826(2dcase).
134-14 See also Ga 155SE321.
134-16 Alta [1928] 4DomLR697.
135-31 [c] In Texas.-CivA 19SW(2d) 373. [d] Where jurors agree to answer one issue in negative if certain defendant is included in answer to another new trial is required. TexCivA 25SW(2d) 283.
135-32 TexCivA 26SW(2d)726.
135-33 29 OhA145, 163NE218; Tex CivA 31SW(2d)669.
136-34 CalA 290P48; TexCommnA 14 SW(2d)1024; Wash 290P996.
136-36 Tex 32SW(2d)637; Tex CommnA 15SW(2d)1033.
136-36½-New. That jury in nine cases out of ten tried at term rendered verdicts for defendants is not ground for granting unsuccessful plaintiff new trial. SD 229NW937.
136-38 TexCivA 21SW(2d)574.
136-43 9PaDist&Co 603.
137-46 207 Iowa959, 221NW451.
138-69 MoA 4SW(2d)875; Utah 287P 320(2dcase); 151Wash641, 276P882.
138-72 207 Iowa959, 221NW451.
139-80 [a] Presumption of prejudice.-TexCommnA 15SW(2d)1033.
140-92½-New. It has been held not error for the trial judge to refuse to interrogate jurors as to whether they had read a newspaper article published after commencement of the trial and commenting on a prior trial of the case. 246Mich130, 224NW636.
140-95 129 Or435, 277P291.
141-8 TexCivA 9SW(2d)365.
141-15½-New. That a juror in an action against a physician for negligence in treatment had considered suing another physician and remarked that he should have sued him was not such misconduct as to authorize a new trial. 229 Ky37, 16SW(2d)489.
142-18 TexCivA 9SW(2d)743.
143-30 85Colo 409, 277P299.
143-31 206 Iowa338, 220NW341.
143-32 151Va363, 144SE477.
144-47½-New. Misconduct of a juror in failing to attend a view pursuant to an order of the court is ground for a new trial. 137 Okl 231, 278P1102.
144-49 Iowa 220NW338.
144-50 [e] Discussion by jurors that insurance company was defending defendant does not entitle one to new trial. TexCivA 8SW(2d)735.
145-53 TexCivA 7SW(2d)926; TexCivA 7SW(2d)1106.
146-70 128Me379, 147A761.
149-4 See also MoA 3SW(2d)1050, 1051 [citCyc].
149-6 218Ala493, 119S21.
150-33½-New. Display of racial prejudice by juror during deliberation of jury held to require new trial. TexCivA 31SW(2d)496.
151-37 TexCivA 22SW(2d)704.
151-40 TexCivA 11SW(2d)572.
151-41 TexCivA 20SW(2d)409; Tex CivA 30SW(2d)652.
151-43 TexCivA 9SW(2d)146; Tex CivA 24SW(2d)465.
151-45 TexCivA 13SW(2d)452. But see TexCivA 18SW(2d)189.
151-51 TexCivA 10SW(2d)422.
151-53 132Misc250, 230NYS197.
152-58 109Conn722, 145A563.
153-66 See also 218Ala493, 119S21.
155-7 TexCivA 14SW(2d)72.
157-24 Or 289P369.
158-34 But see Ont [1930] 1DomLR 225.
158-35 MoA 4SW(2d)499.
158-36 101CalA426, 281P723; CalA 284P1056; 207 Iowa862, 224NW28; 29 OhA145, 163NE218; TexCivA 19SW(2d) 373; TexCivA 24SW(2d)465; TexCivA 28SW(2d)306.
158-37 TexCivA 9SW(2d)146; TexCivA 14SW(2d)72; TexCivA 17SW(2d)110; TexCivA 26SW(2d)726.
159-40 89CalA477, 265P268. [b] (8) Jury's unfavorable comments and suggestions during course of trial. 102CalA 477, 283P132.
162-77 Ida 290P405.
163-90 299Pa321, 149A494 (after judgment non obstante veredicto).
165-8 153SC309, 150SE789 (so confused that jury's intention is not clear); 155SC340, 152SE652. [a] (3) But see NJSup 148A197(1stcase).
165-11 TexCivA 19SW(2d)416; Ont [1928] 4DomLR776.
166-18½-New. Consistent verdicts are never disturbed. NJSup 150A216.
166-20 [a] Whether seeming inconsistency justified new trial is for trial judge's discretion. Mass 172NE240.
167-21 But see NJ 146A47(1stcase); 135Misc859, 239NYS710.
168-26 43F(2d)537; AlaA 130S163(2d case); 85Mont27, 277P417; 86Mont579, 284P545; 134 Okl 66, 272P874; SD 225 NW59(2dcase); TexCivA 24SW(2d)99. [a] 134 Okl 70, 272P857.
169-33 137 Okl 27, 277P665.
170-42 [a] 88CalA141, 262P778; 39 GaA330, 147SE130; MoA 9SW(2d)863. [b] MoA 19SW(2d)534; 41Wyo 20, 281 P1000.
170-43 91CalA26, 266P597; 29Hawaii 459; 126Kan733, 271P311; Mo 29SW (2d)710; 229AppDiv150, 241NYS149; 106WVa254, 145SE390; 199Wis463, 225 NW697. [l] Whether inadequate or excessive verdict must be corrected. 229 AppDiv220, 241NYS676. [m] Verdict not requiring new trial.-300Pa1, 149A 644.
171-45 29F(2d)582; 218Ala453, 118S 807; 220Ala377, 125S393; 181Ark818, 28SW(2d)68; Ark 31SW(2d)421; 85 CalA55, 258P988; 88CalA141, 262P 778; CalA 290P67; 108Conn735, 143A 844; Fla 122S127(1stcase); 46 Ida652, 270P138; MoA 7SW(2d)296; MoA 27 SW(2d)499; MoA 27SW(2d)1051; NJ Sup 147A787(1stcase); NJSup 151A386 (2dcase).
172-47 43F(2d)999; 219Ala127, 121S 394; 225Ky688, 9SW(2d)1013; 225Ky 767, 10SW(2d)287; 231Ky591, 21SW (2d)985, 66ALR1526; 127Me323, 143A 171; Va 152SE370; Va 152SE373.
174-52 229AppDiv430, 242NYS687; 151Va636, 144SE711.
174-53 108Conn202, 142A836; MoA 15 SW(2d)922; MoA 299SW118; MoA 26 SW(2d)838; MoA 31SW(2d)566; NJ Sup 150A557; NJSup 150A574. [c] (3) Action for damages for personal injuries sustained when alighting from defendant's automobile. 200Wis299, 227 NW278.
174-55 205Cal 188, 270P364.
175-58 220Ala581, 126S857; 234Ky 639, 28SW(2d)956; 127Me323, 143A 171; NJSup 152A187; 295Pa219, 145A 80; 153Va649, 151SE135. [b] MoA 4 SW(2d)888. [d] Where evidence establishes any one of causes of action set forth in plaintiff's complaint, granting of new trial cannot be sustained. 95 CalA205, 272P761.
176-60 Ala 129S42.
177-61 218Ala378, 118S749(1stcase). [a] CalA 277P339; RI 145A310(2d case).
177-62 Cal 291P184; 128Me131, 145A 741(2dcase); 266Mass76, 164NE816.
177-65 136Misc600, 240NYS304.
178-66 127Me377, 143A466.
178-68 228AppDiv823, 240NYS120.
178-71 151Va815, 145SE255.
178-72 226AppDiv393, 235NYS532.
178-74 94PaSuper592.
178-75 218Ala599, 119S644; CalA 290 P120; 97Fla489, 121S805; 41GaA586, 154SE190(1stcase); 233Ky781, 26SW (2d)757; MoA 20SW(2d)289; NJ 145 A106(1stcase); NJSup 152A187; 135 Misc886, 238NYS707; RI 145A311; 50 RI 400, 148A314; 152Wash1, 277P74. But see 85CalA750, 259P1103.
180-76 NJSup 146A678; TexCivA 20 SW(2d)351.
181-79 Ida 287P951. [a] New trial granted despite conflict where against weight of evidence. 46 Ida652, 270P 138.
181-82 NJSup 144A316(1stcase); NJ Sup 145A751; NJSup 149A337; NJ Sup 149A526.
181-82½-New. or is flagrantly against the weight of the evidence, 227Ky841, 14SW(2d)174.
182-84 108Conn605, 143A853; RI 147 A667; RI 148A316; TexCivA 18SW (2d)267.
182-86½-New. To sustain verdict on rule to show cause evidence must show case within rules on which court submits case to jury. NJSup 150A50.
182-92 218Ala378, 118S749(1stcase); 35Ariz309, 277P812; 207 Iowa1094, 224 NW95(2dcase); 86Mont579, 284P545; 50RI 68, 145A101. [e] New trial is not required as matter of law where fairly contendable that verdict was arbitrary. Mass 169NE74.
183-96 [a] New trial denied.-22AlaA 642, 119S247(2dcase).
183-97 29F(2d)582; 41GaA586, 154SE 190(1stcase); 233Ky756, 26SW(2d) 1035; 135Misc452, 238NYS587; 135 Misc886, 238NYS707.
184-98 111Conn707, 151A165; Conn 152A72(1stcase). But see MoA 30SW (2d)1094.
185-16 Fla 130S601.
186-20 23AlaA590, 129S487; Cal 291P 184; CalA 285P893; CalA 292P1089; 40GaA364, 149SE425; GaA 155SE88; 175Minn226, 220NW822; Mo 25SW(2d) 84 (plaintiff held not to have failed to sustain burden of proof warranting new trial); 56ND937, 220NW446; Okl 293P264; 50RI 445, 148A597; RI 149 A383(1stcase); 157Tenn455, 9SW(2d) 1026; Va 152SE370; Va 152SE373; Va 154SE502; Wash 292P416; 106WVa 155, 145SE165. [c] See also 92CalA732, 268P951. [j] Where only ground of recovery submitted is not supported by evidence, new trial should be ordered. NJ 145A627(1stcase).
187-22 84CalA472, 258P138; NJSup 143A693; 230AppDiv136, 243NYS389.
187-23 85CalA18, 258P725; 92CalA 236, 267P939; Fla 130S601; Iowa 226 NW34; Mich 233NW378; 157Tenn455, 9SW(2d)1026; 106WVa522, 146SE49. See also Mo 32SW(2d)578. [e] (4) Evidence held not to preponderate against jury's determination. 83Mont452, 272 P998. [m] Trial judge must use his own judgment as to whether evidence supports verdict. Cal 287P496.
188-27 [b] (6) Where there is very little evidence to support verdict and jury have not been questioned on vital mat-

ters, new trial should be ordered. NB [1929] 1DomLR524. [c] **Merely because there were more witnesses in support of defendant's position** did not render plaintiff's verdict against evidence. NJSup 150A210.

188-30 [a] (3) Motion for reargument or appeal from judgment properly refused under evidence. 229AppDiv721, 241NYS435. [b] **Only when verdict is flagrantly and palpably against evidence** has court right to set aside verdict for insufficiency of evidence. 233Ky756, 26 SW(2d)1035.

189-31 169Ga235, 149SE785; 38GaA734, 145 SE672; 129Kan22, 282P638; 129Kan 766, 284P427; NJSup 150A48; 135Mich 886, 233NYS707; 149SC464, 147SE596. See also TexCivA 328W(2d)696. [b] **Refusal of new trial for alleged preponderance of evidence** held not error. Utah 290P759.

190-32 35CalA18, 253P725; 100CalA 634, 280P996. [a] **Rule governing appellate courts** that verdict will not be disturbed if sustainable on any theory is inapplicable to trial courts. 100CalA 634, 280P996.

190-34 206Iowa1263, 222NW16.

190-42½-New. Unless jury could not have reached conclusion on any fair interpretation of evidence, verdict cannot be set aside. 135Mich886, 238NYS707.

190-46 21Ala325, 118S770; 21CalA 557, 258P428; CalA 274P484; 100CalA 634, 280P996; CalA 285P893; CalA 288 P116 (where evidence warrants contrary finding). CalA 292P1039. CalA 293P 165; 127Kan40, 272P120; Mich 233NW 378; Mo 328W(2d)578; MoA 108W (2d)312; RI 149A95; 151Wash536, 282P327. [b] **That plaintiff's testimony warrants verdict is not alone sufficient** where controverted by defendant's testimony. NJSup 149A337.

191-48 NJSup 150A210 (court should hesitate before granting third trial); NJSup 150A211(2dcase) (though not absolute rule, ordinarily second verdict will not be set aside). See also 12Pa Dist&Co 66.

192-60½-New. Where several grounds of negligence are charged and in issue, and there is a general verdict, a new trial will be granted in case the verdict on any of the grounds is not justified. 176Minn512, 223NW296(2dcase).

193-76 TexCivA 118W(2d)591.

194-84 [a] (1) 200Ind616, 165NE911.

194-87 323Mo263, 198W(2d)654.

195-94 23IndA56, 163NE279.

195-99 MoA 48W(2d)499; MoA 108W (2d)965; Mont 285P184.

195-3 109Conn452, 146A831; 245 IllA 109.

196-11 110Conn536, 145A369.

196-19½-New. The court may infer bias and prejudice from the size of the verdict. Mo 238W(2d)126.

197-23 203Cal604, 265P238, 59ALR 430. CalA 2[illegible]P[illegible]79; 243Mich574, 227NW767. 155Mich689, 129NW114; MoA 208W(2d)659 (may correct jury's abuse of their discretion); 228AppDiv37, 239NYS101; 157SC320, 154SE247. Va 153SE332.

197-24 43F(2d)397. 220Ala377, 125S393; CalA 292P711; Iowa 232NW421; NJSup 152A252; 101Va[illegible]5, 143A391; 107WVa226, 148SE193 But see 227 AppDiv765, 237NYS92.

198-25 43F(2d)537; 220Ala436, 125S845; 204Cal515, 269P433; 84CalA557, 253P429 CalA 292P711, 207Iowa495, 223NW178; Mont 285P184 (only ground under statute); NJSup 150A211 (2dcase); 127Or450, 271P744 155 Wash117, 283P601 Wash 292P106. [c] (1) SD 226NW274 (four thousand dollars in personal injury case). (2) Other instances 87CalA736, 262P800.

199-29 128Mc201, 146A692.

200-32 NJSup 146A678.

200-33 Mo 151A429(1stcase) (unless error or improper motives are indicated).

200-35 But see 323Mo 826, 208W(2d) 906.

201-40 110Conn381, 148A131 (failure to make small deduction from contract price); 207Iowa137, 222NW436; NJ Sup 151A384 (holding verdict not clearly excessive); Okl 272P888. [f] **Where verdict for larger amount would have been sustained** by evidence, it is not error to refuse to set aside verdict at defendant's request. 138Okl146, 280P 578.

202-52 Mo 151A443.

202-53 95Ha5, 117S714; Ga 146SE97; 243Mich574, 227NW767.

203-56 NJSup 146A44.

203-58 84Mont397, 276P437; 85Mont 492, 279P374, 66ALR587; 296Pa561, 146A141, 151Va746, 145SE342.

205-79 96PaSuper293.

206-85 NS [1930] 1DomLR836 (agreement of counsel authorizing court to assess damages).

207-6 101CalA388, 281P690; NJ 145A 633; NJSup 143A736(1stcase); 9PaDist &Co 553; RI 144A105; 101Vt514, 144A 856; 154Wash536, 282P827; WVa 153 SE757.

208-9 Iowa 227NW584(2dcase); 235Ky 492, 318W(2d)725; NJ 143A719(2d case); NJSup 144A177; NJSup 145A 872(1stcase); 33OhA539, 169NE709. [b] **Inadequacy of award for land taken.**—Mo 208W(2d)954 (condemnation proceeding).

210-19 Conn 152A64; RI 150A254.

210-20 Conn 152A64.

210-22 151Wash641, 276P382.

210-23 Conn 152A64; 9PaDist&Co 399; 10PaDist&Co 341. [b] **Mere inconsistency between liability and damages** awarded does not warrant new trial. RI 150A254.

210-26 CalA 292P711.

210-28 NJSup 145A470.

211-36 Conn 152A64.

211-38 NH 147A413; WVa 153SE797.

211-39 CalA 292P711; 128Kan251, 276 P819.

211-41 101CalA388, 281P690.

212-44 CalA 292P711.

212-47 23F(2d)872.

212-49 Conn 152A64; MoA 248W(2d) 203; 101Vt514, 144A856; Wash 291P 709. [a] (3) **Evidence held to justify new trial after verdict of one thousand dollars for injury to brain causing loss of smell.** Mo 238W(2d)126.

212-53 CalA 292P711.

212-57 [a] **Verdict for nominal damages will be set aside** in tort action where there is undisputed evidence of substantial damage. 207Iowa1094, 224NW95 (2dcase).

212-58 CalA 292P711. [b] 105NJL 305, 144A323. [c] (2) **Granting new trial for inadequacy of verdict of nominal damages** is within trial court's discretion in action for wrongful death. MoA 128W(2d)933.

213-59 9PaDist&Co 99.

213-61 [c] 132Okl188, 270P38; 133 Okl181, 271P949.

213-63½-New. Under some statutes a verdict for a grossly inadequate amount in an action on contract or for injury to property may be set aside and a new trial granted. 133Okl181, 271P949.

214-73 101CalA186, 281P514 (new trial for purpose of setting up offset arising out of judgment recovered against plaintiff's assignor subsequent to trial held properly refused).

214-76 MoA 118W(2d)1112.

216-3 226AppDiv486, 235NYS511.

217-18 231Ky675, 22SW(2d)93 (permitting defendant to withdraw answer on which plaintiff had relied and refusing him continuance to meet change). See also 142SC386, 146SE249.

217-22 231Ky332, 21SW(2d)468.

218-38 [d] **Party's ignorance as to date of trial, known to his attorney,** is insufficient excuse. 220Ala50, 124S104.

220-57 [a] (2) Party's attorney is justified in believing no trial would be had till he heard further from opposing attorney respecting compromise. TexCivA 8SW(2d)298.

220-59 NJ 146A45(1stcase); NJ 147A 861(2dcase) (mere failure to appear).

220-60 228Ky790, 15SW(2d)1005.

222-61 91LaA70, 118S839; NJ 146A45 (1stcase); TexCivA 28SW(2d)232 (discretion of court not abused).

222-66 [c] (1) 228AppDiv666, 238NYS 300.

224-21 But see 23AlaA273, 124S122.

225-30 231Ky332, 21SW(2d)182.

227-62 321Mo1244, 14SW(2d)583.

228-71 233Ky38, 24SW(2d)915.

230-17 109Conn324, 146A735; MoA 17 SW(2d)596; 142Okl134, 285P839.

230-20 Iowa 233NW26.

231-30 Iowa 233NW26.

233-63 86CalA369, 260P846.

234-72 [b] Ala 130S211.

235-86 14PaDist&Co 246 (marriage of plaintiff to principal witness).

235-87 [a] (4) Where trial judge died before completion of draft of facts found. 83NH538, 146A816(1stcase). [g] In Oklahoma.—140Okl269, 282P1097.

236-89 [a] **Reliance on court reporter to furnish transcript of evidence and proceedings** for purpose of case-made does not constitute negligence. 140Okl269, 282P1097.

236-93 [a] **"Impossible,"** within statute permitting granting of new trial where it is impossible to make case-made within statutory time, means wholly impracticable under circumstances not created by, or attributable to, complaining party. 133Okl83, 271P242.

236-7½-New. Facts warranting new trial because of stenographer's death. ND 232NW298.

237-13 50RI473, 149A380(2dcase).

237-13½-New. New trial held unwarranted where certificate recited missing evidence was "misplaced." 41Wyo502, 287P436.

238-25 135Okl43, 273P997; 138Okl 88, 280P444.

238-26 Kan 293P407.

239-39 98CalA145, 276P394(2dcase). [d] **Failure to request continuance** indicates proper refusal of new trial. CalA 286P741.

240-60 Ala 130S211.

241-65 256IllA485; 321Mo1244, 14SW (2d)583; 148SC152, 145SE699.

241-67 218Ala327, 118S577; 256IllA 485; Kan 293P407; Vt 147A352; Wash 288P239.

243-89 102CalA464, 283P88; CalA 290 P668; 234Ky347, 28SW(2d)3; ND 231 NW604; Okl 272P1027; TexCivA 29 SW(2d)855.

244-90 177Minn474, 225NW399; 150Va 467, 143SE709.

244-91 MoA 18W(2d)247.

244-92 102CalA464, 283P88; CalA 290 P668; 40GaA22, 148SE600(2dcase); 41 GaA667, 154SE375; 127Mc377, 143A 466; 177Minn25, 224NW257; MoA 19 SW(2d)902. [b] 197NC268, 148SE233, 63ALR1357.

245-94 101CalA186, 281P514; 168Ga 106, 147SE57.

245-95 98CalA145, 276P394(2dcase).

246-6 207Cal498, 279P152; 99CalA 510, 278P1049; 127Mc377, 143A466; 131Or261, 282P556; 92PaSuper321; 97 PaSuper243; 53ND401, 220NW880; Va 153SE805.

247-11 36F(2d)394.

247-13½-New. Motion cannot be predicated on facts known to one of movant's attorneys before trial. 34NM509, 285P 494.

248-16 221Ala143, 128S130.

248-21 180Minn264, 230NW778.

248-24 98CalA145, 276P394(2dcase); 98CalA268, 276P1035.

249-30 36F(2d)394 (action in equity); 42F(2d)755; 44F(2d)24; 218Ala503, 119S15(2dcase); 220Ala219, 124S743; 221Ala124, 127S818; 89CalA674, 265P 520; 98CalA145, 276P394; 99CalA695, 279P467; 101CalA186, 281P514; 102 CalA464, 283P88; CalA 290P668; 86 Colo326, 281P358; 111Conn115, 149A 406; 169Ga226, 150SE89; 30Hawaii 954; 88IndA265, 163NE626(1stcase); 89IndA632, 166NE773; 207Iowa605, 223NW480; 229Ky198, 16SW(2d)1024; 231Ky347, 28SW(2d)3; 13LaA257, 127 S753; 127Mc377, 143A466; Minn 232 NW622; Mo 31SW(2d)81; NJSup 149 A126; 229AppDiv363, 241NYS575; 57 ND624, 223NW700; 132Okl92, 269P 365; 135Okl174, 274P871; 135Okl 196, 274P889; 136Okl26, 275P1045; 297Pa204, 146A574; 92PaSuper172; 10 PaDist&Co 209; TexCivA 19SW(2d)203; TexCivA 22SW(2d)704; TexCivA 22 SW(2d)1077; TexCivA 23SW(2d)737; TexCivA 27SW(2d)556; TexCivA 29 SW(2d)855; Vt 150A70; 150Va467, 143 SE709; Va 153SE805; Va 153SE832; 149Wash155, 270P302; Can [1928] 1

DomLR273; Sask [1928] 2DomLR424.
254-31 144 Okl 49, 289P335. See also 202Cal 681, 262P719.
254-34 95CalA336, 272P613(2dcase); 97CalA508, 275P984; 207 Iowa605, 223 NW480.
254-37 234Ky347, 28SW(2d)3; NJSup 151A380(2dcase); TexCivA 27SW(2d) 586.
255-42 GaA 155SE346.
255-49 [b] New trial properly denied.–TexCivA 22SW(2d)1077.
256-52 247Mich248, 225NW636.
257-55 253 IllA361; 207 Iowa862, 224 NW28.
257-61 230Ky64, 18SW(2d)879.
258-67 221Ala200, 12SS176.
258-67½-New. That one may well expect verdict on evidence entitles him to more favorable consideration than another failing to produce evidence. Vt 150A70.
258-70 224AppDiv306, 230NYS259.
259-82 179Minn99, 228NW447.
259-85 221Ala160, 127S905 (party's failure to develop evidence); 35Ariz343, 278P62; 207Cal 167, 277P327; 95CalA 205, 272P761; 207 Iowa605, 223NW480.
259-87 SD 231NW900.
259-88 86Colo 326, 281P358. [a] 129 Kan499, 283P625.
260-96 180Ark757, 22SW(2d)387 (hearsay and conclusions); 204Cal 609, 269P 622; 89CalA674, 265P520; 243 IllA562; 90PaSuper332.
261-98 But see 177Minn25, 224NW257.
261-8 221Ala200, 128S176 (new trial justified); 127Me377, 143A466; NJSup 149A526.
263-10 31 OhA401, 166NE918; Va 153 SE805.
263-12 CalA 290P668.
263-14 101CalA186, 281P514; 83NH 587, 146A816(2dcase); 229AppDiv363, 241NYS575; TexCivA 19SW(2d)923.
263-15 218Ala503, 119S15(2dcase); 35 Ariz343, 278P62; 89CalA674, 265P520; CalA 285P1052; 111Conn115, 149A 406; Iowa 229NW736; 130Kan831, 288P569; 127Me377, 143A466; 127Me 482, 144A395; MoA 1SW(2d)247; MoA 19SW(2d)902; NJSup 149A526; 224 AppDiv306, 230NYS259; 228AppDiv 413, 240NYS477 (application to vacate default judgment not sustainable as motion for new trial); 229AppDiv363, 241 NYS575; 31 OhA401, 166NE918; 136 Okl 26, 275P1045; 297Pa204, 146A574; 88PaSuper84; 92PaSuper172; 53SD401, 220NW880; Va 153SE805; Sask [1928] 2DomLR424. See also 38GaA 506, 144SE356. [e] Evidence adding to existing conflict is not ground. CalA 292P157.
266-16 Vt 150A70.
266-17 89 IndA632, 166NE773; 226Ky 750, 11SW(2d)933; 228Ky790, 15 SW(2d)1005; 229Ky43, 16SW(2d)492 (1stcase); MoA 20SW(2d)167; 226App Div486, 235NYS511; 120 Oh55, 165NE 533; 134 Okl 266, 274P1085; Can [1928] 1DomLR273. [b] Testimony held sufficiently decisive to require new trial.–234Ky347, 28SW(2d)3.
267-18 255 IllA230.
267-20 253 IllA81; 207 Iowa605, 223 NW480; 222MoA633, 300SW834; MoA 15SW(2d)874; 227AppDiv303, 237NYS 479; 136Misc735, 240NYS430.
268-24½-New. A motion for a new trial will be overruled where certain requirements of the statute are not complied with although new evidence might produce a different result. 168Ga248, 147 SE574.
269-30 [a] Probability that evidence is untrue is ground for refusal. TexCivA 23SW(2d)737.
269-32 176Minn200, 223NW97; MoA 1SW(2d)247. [a] (3) Where new witnesses are of such character that their testimony will carry little weight. 226 AppDiv486, 235NYS511.
270-40 249Mich666, 229NW498 (where identity of admitter not clear).
272-58 But see 176Minn200, 223NW97.
272-60 40GaA784, 151SE539.
273-69 221Ala124, 127S818; 89CalA 674, 265P520; 101CalA186, 281P514; 103CalA718, 284P1056 (on collateral matter); CalA 290P668; 166Ga788, 144SE317; 167Ga537, 146SE170; 169 Ga226, 150SE89; 40GaA312, 149SE306 (1stcase); 40GaA290, 149SE307; 41 GaA667, 154SE375; 243 IllA129; 89 IndA632, 166NE773; 229Ky198, 16 SW(2d)1024; 233Ky781, 26SW(2d)757; 127Me377, 143A466; Miss 125S345(2d case); MoA 18SW(2d)107; Nebr 230 NW588; NJSup 149A526; 35 OhA532, 172NE637; 297Pa204, 146A574; SD 226NW274; SD 231NW900; TexCivA 10SW(2d)1018; Utah 283P435; Va 153SE805; Wis 231NW580.
277-70 229Ky43, 16SW(2d)492(1st case).
279-78 84Colo 511, 272P6; 206 Iowa 1155, 221NW788; Nebr 222NW57; 131 Or261, 282P556.
279-80 127Me482, 144A395; NJSup 148A1(1stcase); SD 229NW302.
280-88 218Ala140, 117S647; 219Ala 623, 123S27; 101CalA274, 281P1081; CalA 290P668; 40GaA22, 148SE600 (2dcase); 41GaA423, 153SE229(2dcase); 207 Iowa862, 224NW28; 6LaA50; 127 Me377, 143A466; Minn 225NW111(2d case); Minn 232NW622; Nebr 230 NW588; NJSup 149A526; 226AppDiv 486, 235NYS511; 229AppDiv394, 241 NYS462; SD 226NW274; SD 230NW 226; TexCivA 23SW(2d)516; TexCivA 28SW(2d)950; 151Wash245, 275P559.
282-93 229AppDiv394, 241NYS462.
282-95 226AppDiv591, 236NYS212.
283-99 108Conn285, 142A737; 9LaA 563, 121S685(2dcase).
286-36 Ida 291P1074.
286-38 [a] (1) Mass 169NE912 (later statute).
286-58 TexCivA 15SW(2d)722.
287-64 [c] In Saskatchewan.–[1928] 2 DomLR424.
289-1 133 Okl 94, 271P241.
289-2 CalA 289P245; 52Nev140, 283P 403 (denial of motion without consideration on merits held error).
289-4½-New. A change of judges of court between the refusal of a motion and a subsequent renewal and allowance does not preclude reconsideration within the term by a successor of the former judge. 129Kan14, 281P865.
289-16 [a] In Nova Scotia.–[1928] 3 DomLR188.
290-23 [g] Nonresident minor defendant served by publication and represented by guardian ad litem is entitled to benefit of statute providing for new trial to permit him to make defense. 206 Iowa712, 221NW217.
290-32 [a] In determining who are adverse parties same rules govern as in case of appeals. 52Nev279, 286P120.
291-38 166Ga877, 144SE652.
292-30 SD 229NW390.
292-31 47 Ida241, 274P111.
293-91 [d] (6) Motion made over year after discovering new evidence. 136 Misc735, 240NYS430.
294-15 [a] 206Cal 130, 273P550.
294-21 Ida 291P1074; 231Ky107, 21 SW(2d)140; MoA 31SW(2d)583; NJSup 150A241 (judgment taken on affidavit of proof in defendants' absence held taken at trial); 142 Okl 110, 285P843; Tex CivA 18SW(2d)821; 39Wyo 372, 271P 876.
295-25 229Ky193, 16SW(2d)1024; 135 Okl 239, 275P343; 142 Okl 110, 285P 843; 41Wyo 20, 281P1000; Wyo 293P 370.
295-31 Ark 30SW(2d)223; Ind 172NE 309; 234Ky838, 29SW(2d)563 (holding that court properly refused to allow filing of motion not tendered in time); Nebr 227NW446(1stcase); 137 Okl 278, 278P1094(1stcase).
295-36 Wyo 293P370.
296-38 135 Okl 239, 275P343.
296-50 143 Okl 220, 289P315.
296-50½-New. Where a motion for a new trial is not deposited with the court clerk within the time provided by law for the filing of the same, the trial court is not authorized to direct the court clerk by order nunc pro tunc to antedate the filing of the motion for new trial so as to make the record show the filing thereof within the time required by law for filing. 135 Okl 239, 275P343.
296-54 41Wyo 20, 281P1000 (where rendered late at night on last day of term). [e] Counsel unavoidably engaged in other courts.–NJSup 148A1(2d case).
297-71 322Mo 802, 16SW(2d)92.
297-75 139 Okl 204, 281P803.
298-82 Kan 291P935.
298-92 See also 48Philippine507.
298-1 6LaA87; 139 Okl 204, 281P803 (from date of final judgment). [b] If notice of judgment entry is defective it is inoperative to set sixty-day period running. CalA 292P536.
299-13 MoA 4SW(2d)499.
299-16 36F(2d)394; 42F(2d)475; 40 GaA688, 151SE410(1stcase); GaA 155 SE770(2dcase); 231Ky107, 21SW(2d) 140; MoA 17SW(2d)567; 27 OhNPNS 409; 135 Okl 239, 275P343; TexCivA 24 SW(2d)457.
300-28 135 Okl 164, 274P659.
301-37 SD 231NW527. [c] Motions held not in time.–SD 231NW527.
301-39 58ND232, 225NW787.
301-41 58ND232, 225NW787.
301-47 180Ark1129, 21SW(2d)423.
301-51 [b] (8) Permission after time to allow signature on motion is not extension. 140 Okl 300, 284P30.
302-57 36F(2d)394; 207 Iowa1271, 224 NW576.
303-88 36F(2d)394.
304-7 [b] In the Philippines.–50 Philippine100.
304-12 100CalA33, 279P672.
305-29 Wash 290P430.
305-32½-New. A court rule requiring a memorandum of points and authorities to be served and filed within a certain time after filing notice of intention is directory only. 206Cal 769, 276P573.
305-34 TexCivA 21SW(2d)707.
306-49 Ida 287P953 (form of notice immaterial if complying with statute).
306-51 Ida 287P953 (notice and motion considered as single document held sufficient).
307-70 NJSup 145A223.
307-71 Ga 155SE482.
309-93 167Ga219, 145SE55.
309-14 CalA 286P447; SD 229NW390. [b] Insufficient excuse for delay.–53SD 195, 220NW530.
309-14½-New. Service is timely where notice of intention to move for new trial is filed before receiving notice of entry of judgment. Cal 269P925.
309-22 167Ga219, 145SE55.
310-35 CalA 285P857. [b] Statute requiring written notice of decision to start time running for motion for new trial must be strictly complied with unless waived. 51Nev76, 269P26. [c] Findings of fact and conclusions of law constitute decision within rule. SD 229 NW390.
311-49½-New. Service of proposed findings of fact and conclusions of law is not equivalent to written notice of decision, especially where proposed findings are unsigned. 51Nev76, 269P 26.
311-54 51Nev76, 269P26. [a] Intention to waive notice of decision cannot be inferred till notice of intention to move for new trial is given. 51Nev76, 269P26.
312-64 54SD373, 223NW319(1stcase); SD 224NW957. [a] Procedural mistakes of counsel do not constitute good cause for extension. SD 229NW390.
312-76½-New. Order staying proceedings pending appeal does not extend time within which to serve notice of intention to move for new trial. SD 229 NW390.
312-82 170Ga324, 152SE831.
313-96½-New. Where service of notice of entry of judgment is necessary to start the time running within which the trial court may pass on new trial proceedings, the parties cannot, by their conduct, waive the court's jurisdiction in respect thereto. 206Cal 130, 273P 550.
313-13½-New. Notice by prevailing party to bring on motion of unsuccessful party for hearing constitutes a waiver of an objection that the court lost jurisdiction by the other party's inexcusable delay. 53SD195, 220NW 530.
314-27½-New. Power of court to enlarge rule. NJSup 149A526.
314-30 NJSup 152A175(1stcase).

314-61 Mo 318SW(2d)978.
314-62 206 Iowa338, 220NW341.
314-62½-New. In some jurisdictions a motion by plaintiff not alleging a meritorious cause of action or facts making a prima facie cause of action is insufficient. TexCivA 208SW(2d)107.
315-82 TexCivA 298SW(2d)412.
315-87 [a] 134 Okl 9, 272P123.
316-88 TexCivA 248SW(2d)465.
316-94½-New. A motion on the ground of perjury need not be sworn to. MoA 178SW(2d)596.
316-2 Mo 318SW(2d)978.
317-10 255 IlA189. 157Miss822, 128SE70; 59ND301, 229NW371.
317-18 169Ga512, 153SE103. 40GaA246, 149SE308; 40GaA646, 151SE554; 40GaA715, 151SE521(1case).
318-22 160GaA216, 149SE598. 40GaA633, 151SE12.
319-61 NJSup 143A752, [a] (8) Failure to set out involves alleged to be erroneously admitted. 41GaA653, 153SE179(2cases). (9) Other instances. NJSup 143A752.
320-64 Ga 155SE624.
320-65 Fla 129So763.
320-75 Ga 155SE624; GaA 155SE356(2cases); Mo 285SW449. [a] (2) Oth. et assignments held sufficient. IndA 165NE555.
321-79 See also IndA 168NE585.
321-81 Mo 285SW449.
321-82 See also IndA 168NE585.
321-93 28 IndA550, 165NE542.
322-12 [a] (13) Other instances. 89 GaA467, 147SE411.
324-54 130KanS31, 298P509; MoA 19SW(2d)902.
325-56 MoA 19SW(2d)902.
325-59 Mo 318SW(2d)978.
325-60 MoA 19SW(2d)902.
325-69 But see Mo 318SW(2d)978.
326-91 [a] (6) That, under pleadings and evidence, findings and judgment should have been for plaintiff. MoA 16SW(2d)705. [b] (1) 88 IndA86, 163NE279.
327-99 168Ga209, 147SE658.
327-1 40GaA616, 151SE51. NJSup 146A64.
327-2½-New. The reason that the trial judge should have given the verdict in favor of defendant is too general. NJSup 146A64.
329-36 101VC[illegible], 115A394.
330-65 135 Okl 239, 275P848. [d] Acknowledgment of service of motion does not waive defect in time of filing motion. 167Ga219, 145SE55.
331-77 [b] Illness of one of several attorneys. 135 Okl 239, 275P143.
331-83 IndA 168NE262(2cases).
331-85½-New. Under some statutes the clerk's entry of a motion in the order book raises a presumption that the judge heard the entry read and is sufficient to call his attention thereto. IndA 163NE262(2cases).
332-92 31aA349.
332-95 [a] (2) Where original motion was based on several grounds, including ground of newly discovered evidence, amendment conditions of additional affidavit in support of such ground is merely amplification of motion, and does not add new ground. 35 Ariz144, 274P1042.
332-97 59ND301, 229NW371.
335-51 MoA 318SW(2d)566.
336-70 127Me321, 143A176.
339-22½-New. Court may grant motions for extensions, although no rulings had been made on prior motions for extensions. 35Portlttice 569.
340-38 ND 227NW442.
341-61 [b] In South Dakota.-224NW957.
341-63 40GaA649, 150SE924. 40GaA688, 151SE410(1stcase); GaA 155SE770(2cases).
341-69½-New. Failure to present opposing counsel with brief of evidence has been held not to be ground for dismissal of motion. 170Ga324, 152SE831.
342-74 169Ga832, 152SE103.
342-78 169Ga7, 149SE564.
342-79 See also 170Ga1, 152SE365.
342-81 40GaA653, 151SE410(1stcase). GaA 155SE770(2cases).
342-82 [c] Necessity of obtaining extension. 40GaA653, 151SE410(1stcase).
343-94 GaA 155SE770(2cases).
345-47 MoA 24SW(2d)183.
345-49 179Minn586, 229NW565.
346-49 29 OhA258, 162NE745.
346-50 Kl 150A254.
346-62 322Mo514, 17SW(2d)960; Mo 18SW(2d)401(2cases); Or 289P369.
346-66 127Me377, 143A166. 197NC268, 148SE233, 63ALR1357.
347-72 TexCivA 248SW(2d)465.
348-89 [c] 29 OhA259, 162NE745.
348-90 See also 218Ala209, 118S366. [a] (2) Trial docket of judge with notations and instruction directing verdict may be introduced on hearing of motion at subsequent term. 151Miss734, 118S425.
350-97 Ala 130S199 (admissibility of evidence); 143 Okl 134, 288P283; 153Va261, 145SE366.
351-38 Va 153SE637.
351-40 39P(2d)297; MoA 10SW(2d)965; 86Mont314, 283P437; NJSup 147A815; 29 OhA146, 163NE218; Or 289P369; Va 154SE687.
353-47 TexCivA 148SW(2d)304.
354-70 103CalA349, 284P464; Okl 292P356. But see Wash 290P996. [d] Affidavits that some of jurors had read articles published in local papers during course of trial, though instructed by court not to do so, are not permissible to impeach their verdict. 246Mich 36, 224NW434.
355-80 50Ri 207, 146A617, 63ALR633.
357-9 TexCivA 138SW(2d)909.
357-9 TexCivA 138SW(2d)909.
358-90 [a] Extraneous matter such as dictionary before jury during deliberation may be shown by juror's affidavit. 218Ala498, 119S821.
360-36 246Mich36, 224NW434; Mo 17SW(2d)960. [b] Quotient verdict not result of prearranged plan.-Mo 318SW(2d)978.
360-49 [c] NJSup 148A392(1case).
361-53 293Ky119, 168SW(2d)44.
361-54 TexCivA 258SW(2d)659 (statute requiring oral testimony held inapplicable).
361-56 MoA 48SW(2d)499.
362-60 NJSup 147A815.
362-61 143 Okl 134, 288P283.
362-62 But see 400GaA247, 149SE281.
362-70 103CalA718, 284P1056.
362-72 [d] Defendants asking rehearing are charged with failure to secure attendance of more than two jurors testifying, where postponement is not attempted. TexCivA 298SW(2d)885.
363-75 [b] Evidence held not to show that jury was influenced by improper discussion. TexCivA 308SW(2d)865.
363-76 [a] Juror cannot impeach his verdict in absence of some overt act contemplated by statute. TexCivA 21SW(2d)574.
363-80 53ND120, 220NW862.
363-93 See also 206 Iowa388, 220NW341.
364-87 Ala 130S199 (admissibility of evidence).
366-8½-New. The affidavit should show when defendant or the attorney learned of facts therein set forth. 86Mont111, 283P127.
366-16 103CalA718, 284P1056; 157Miss8, 127S575; NJ 147A111(1stcase).
367-23 154Wash598, 283P447.
368-31 Mo 318SW(2d)978.
368-35 39CalA682, 205P528.
368-43 [c] In California.-89CalA689, 205P528.
369-60 293Ky119, 168SW(2d)44. [a] (7) Construction of verdict contrary to jury's finding. 400GaA247, 149SE281. [b] (18) Iowa 233NW36. (20) That verdict was quotient verdict. Mo 18SW(2d)401(2cases). (21) Improper remark of stranger in hearing of juror. Utah 287P290(2cases).
370-61 293Ky492, 318SW(2d)735.
371-82 [b] (3) Attempt to influence juror. Ala 130S379.
371-85 [b] MoA 27SW(2d)778.
372-97 154Wash598, 283P447. See also 206 Iowa388, 220NW341. [c] Requirement may be waived.-TexCivA 24SW(2d)465.
373-14 TexCivA 248SW(2d)165; TexCivA 248SW(2d)548.
373-19 206 Iowa388, 220NW341; 322Mo514, 17SW(2d)960. [d] (3) TexCivA 108SW(2d)976. (7) Remarks of juror. TexCivA 268SW(2d)386. [e] (1) 230Ky230, 188SW(2d)997; TexCommqA 168SW(2d)531; TexCivA 88SW(2d)512, TexCivA 138SW(2d)909; TexCivA 148SW(2d)307; TexCivA 168SW(2d)232; TexCivA 188SW(2d)129; TexCivA 198SW(2d)378; TexCivA 218SW(2d)574; 151Wash641, 276P882. (4) 179Ark812, 18SW(2d)340; 322Mo514, 17SW(2d)960; 34NM26, 275P378; TexCivA 98SW(2d)146. (6) TexCivA 148SW(2d)304. (7) TexCivA 198SW(2d)920. (20) Unauthorized view of scene of accident. 254 IlA469.
374-21 Wash 290P710.
374-26 [a] (8) Juror's knowledge of facts not disclosed to trial judge. 219Ala23, 121S24.
376-61 19Philippine983.
378-83 [b] TexCivA 308SW(2d)416.
378-87 But see TexCivA 178SW(2d)494.
379-92 [c] Conclusions.-MoA 18SW(2d)107.
380-4 226Ky198, 10SW(2d)605.
380-19 142 Okl 82, 285P5 (such affidavits alone are insufficient as to nature of newly discovered evidence).
381-17 [c] Names of witnesses' associates are necessary. 88GaA710, 145SE486(2cases).
381-19 197NC268, 148SE233, 63ALR1357.
381-20 NJSup 149A526.
382-25 142 Okl 157, 286P14.
382-26 197NC268, 148SE233, 63ALR1357.
382-39 87CalA218, 261P1020.
384-42 86Mont540, 281P264.
384-48 197NC268, 148SE233, 63ALR1357; 142 Okl 157, 286P14.
384-50 Miss 126S316(2cases); 226App Div486, 235NY511; 138 Okl 138, 230P589; 142 Okl 82, 285P5.
385-51 88GaA710, 145SE486(2cases).
385-53 98CalA268, 276P1055. 239App Div363, 241NY576.
386-61 142 Okl 82, 285P5 (that it was discovered since trial). See also 142 Okl 157, 286P14.
386-64 226Ky198, 168SW(2d)1024; 135Misc405, 238NY236.
386-85 [b] 204Cal 609, 269P622; 101CalA426, 281P723; 226AppDiv486, 235NY511.
386-88 178Minn296, 226NW938. [a] 33F(2d)548. [b] 128Kan365, 278P23; 225Ky656, 168SW(2d)516, 127Me482, 141A195, 152Va783, 148SE839.
386-96 253 IlA481 (motion on ground of newly discovered evidence).
386-97 101CalA426, 281P723.
391-95½-New. Question on rule for new trial after a directed verdict in case where facts are not in dispute becomes one of law as if upon a case stated. 37F(2d)725.
391-98 [b] Payee has been held not to have abandoned motion for new trial by permitting himself to be examined after filing of supplemental bill. Mo 288SW(2d)1017.
392-46½-New. On a motion to dismiss a motion for a new trial on the ground of improper matter in the brief of evidence, the court may strike out such matter and deny the motion to dismiss. 169Ga7, 149SE564.
392-61 167Ga219, 145SE55. [a] (2) 366GaA483, 144SE345. (3) Successful party may bring notice of motion to attention of trial court. 47 Ida149, 272P254.
394-81 180Minn540, 231NW222 (premature entry).
393-85 [c] (7) Parties cannot by their conduct waive court's jurisdiction. Cal 269P926. [f] Decision may be announced orally in open court and then entered in minutes or be made known by order signed and filed. Mont 286P418 (announcement in court of denial of new trial if defendant would accept reduction, or that otherwise he would grant new trial, is decision within statute).
394-86 [d] Effect of premature entry of judgment. 101LaA137, 131S361.
394-87 Cal 28,P342.
394-88 See also 218Ala31, 117S467; 83Mont477, 271P992.
394-91 127Me193, 144A652.
394-96 Cal 287P342.
395-2½-New. Where motion for judgment notwithstanding verdict was

granted, passing on motions for new trial was premature. 149Wash227, 270 P825.

395-4 [b] **Hearing of motion on merits amounts to** finding that moving party was not guilty of inexcusable delay and that motion was presented at earliest practicable period. 47 Ida119, 272P254.

395-6 [b] 47 Ida119, 272P254. [c] **Noncompliance with court rule** requiring that motion be set for hearing within fifty days after service of notice of judgment does not prevent ruling on motion within statutory period. 206Cal 772, 276P574.

395-7 47 Ida119, 272P254.

395-16 [b] (1) MoA 10SW(2d)965.

396-19 TexCommnA 29SW(2d)963; Tex CivA 20SW(2d)838. [a] TexCivA 10SW (2d)1016.

396-23 40GaA688, 151SE410(1stcase).

397-31 [a] 196NC341, 145SE615. [b] **In Texas.**–CivA 10SW(2d)1016.

397-36 [c] (2) Continuance to prepare brief of evidence properly refused, where no showing that preparation of brief was prevented. 38GaA483, 144SE345.

397-52 179Minn136, 228NW558. [a] **In Arizona.**–35Ariz144, 274P1042.

398-69 See also 83Mont452, 272P998.

399-92 83Mont452, 272P998.

399-2 CalA 287P145.

400-21 [a] **Trial justice could not pass on his own ruling on admissibility of** evidence. 50RI 400, 148A314.

400-24 156Miss206, 125S423 (question of excessiveness of verdict).

400-31 [a] **Court should not grant new trial without regard to what evidence shows** as to liability. RI 150A254.

400-33 96CalA204, 273P1097. [b] **Privilege of argument** is within discretion of court. 103CalA490, 284P694.

400-37 339 Ill 276, 171NE271.

400-39 RI 150A254.

401-47 83Mont452, 272P998.

401-57 Mass 169NE74.

401-65 RI 150A254 (court's disregard of liability on hearing of motion based on inadequacy of damages is erroneous).

401-72 Mo 23SW(2d)126 (in considering size of verdict).

402-74 See also 43F(2d)397. [a] **Court must decide whether evidence is sufficient to support verdict,** not where preponderance lies. 43F(2d)999.

402-75 RI 144A105; 50RI 62, 145A12. [b] **Trial court,** in considering evidence offered on hearing of motion for new trial, has same latitude in passing on credibility of witnesses and weight to be given their testimony as jury has on original trial. TexCommnA 14SW(2d) 1024.

402-77 CalA 292P711. [a] **That letters were admitted to show that insurer had notice of fire does not limit their effect,** but court may on motion for new trial consider their effect as waiver of proof of loss. 152Wash241, 277P834(2dcase).

402-78 220Ala624, 127S192.

402-81 85CalA55, 258P988.

402-82½-New. The question of the insufficiency of the evidence cannot be considered where material evidence is not presented on the motion. NJSup 147A451(1stcase).

402-91½-New. Defendants' exercise of right to introduce evidence in support of their motion for new trial was matter resting within their discretion. Tex CivA 11SW(2d)234.

402-98 133Misc720, 233NYS295.

402-1 RI 144A105.

402-2 TexCivA 19SW(2d)373.

402-3 See also TexCivA 11SW(2d)234.

403-9 TexCivA 9SW(2d)146.

403-23 40GaA784, 151SE539.

403-25 See also MoA 20SW(2d)167.

403-34 175Minn346, 221NW424. [a] **May grant new trial for same causes trial judge may grant it.**–175Minn346, 221NW424.

404-55 Conn 152A135; Va 154SE502.

404-56 152Va910, 143SE720. [e] **Court must assume that jury found facts** most favorable to defendant. 132Misc866, 230 NYS529.

404-62 135Misc886, 238NYS707.

404-72 But see Ark 31SW(2d)421.

404-75½-New. Court's remarks held not finding that verdict was against preponderance of evidence. Ark 31SW(2d) 421.

405-76 Mass 173NE519.

405-79 111Conn103, 149A218; 111Conn 115, 149A406.

405-1 [a] **Statement by judge to clerk** that he decided to deny motion is not formal order precluding granting of motion. 93CalA276, 269P730.

405-4 [b] **Where testimony taken on trial had not been written up by reporter,** judge sitting in place of judge hearing case may properly decline to make order. 207Cal 44, 276P577.

405-10 27 OhNPNS287. But see 27 Oh NPNS393.

406-16 35F(2d)624; 37F(2d)707; 39F (2d)297; 41F(2d)733; 42F(2d)48; 43 F(2d)45; Cal 289P844; 85CalA55, 258 P988; 95CalA336, 272P613(2dcase); 103 CalA490, 284P694; CalA 285P1052 (where material facts are controverted by counter-affidavits); 85Colo 409, 277P 299; 111Conn115, 149A406; 47 Ida395, 276P47; Ida 287P951; Iowa 227NW584 (2dcase); Iowa 231NW304; Iowa 232 NW116; 234Ky618, 28SW(2d)966; 9 LaA70, 118S839; 10LaA437, 121S351; 9LaA563, 121S685(2dcase); 1LaA304; 1LaA798; 8LaA366; 11LaA22, 122S143; 12LaA531, 126S531; 127Me493, 144A 652; 264Mass533, 163NE251(1stcase); 265Mass133, 163NE642(2dcase); 266 Mass286, 165NE416; Mass 167NE661; MoA 298SW118; NJSup 142A417; NJ Prerog 152A6; 143 Okl 114, 287P1039; 297Pa204, 146A574; 89PaSuper179; 51 Philippine540; 150SC459, 148SE478; TexCivA 13SW(2d)750; Vt 148A750; 198Wis228, 224NW104; 41Wyo 20, 281 P1000; Sask [1928] 2DomLR424.

406-17 204Cal 609, 269P622; 86Colo 317, 281P363; Iowa 231NW304; Iowa 232NW174; MoA 15SW(2d)874; MoA 22SW(2d)58 (wide discretion); MoA 24SW(2d)215; MoA 29SW(2d)243; 300 Pa496, 150A899; RI 150A460; 151SC 164, 148SE889; 53SD195, 220NW530; 200Wis299, 227NW278. [a] ND 230NW 298.

407-18 CalA 290P120; Fla 130S601; 321Mo 287, 11SW(2d)26; MoA 10SW (2d)342; 143 Okl 116, 287P999.

408-19 CalA 290P120; 170Ga859, 154 SE344; 170Ga895, 154SE368; 38GaA 426, 144SE142(2dcase); 38GaA556, 144 SE506; 231Ky392, 21SW(2d)482; MoA 9SW(2d)664; MoA 22SW(2d)58; 139 Okl 123, 281P586 (greater latitude than in denying new trial); TexCommnA 7 SW(2d)872; TexCivA 7SW(2d)1106; 153Va261, 145SE366.

409-21 231Ky332, 21SW(2d)468.

409-28 138 Okl 123, 280P586 (discretion not abused); 151Va815, 144SE863. [b] **Discretion not abused.**–RI 150A460.

409-29 108Conn202, 142A836; 89Pa Super139. [a] **Discretion not abused.**–38GaA206, 143SE778.

409-30 41Wyo 20, 281P1000.

409-32 MoA 24SW(2d)649.

410-42 57ND885, 224NW306.

410-45 28F(2d)874(2dcase); 8SCalA1, 262P1100; 100CalA503, 280P394(2d case); 100CalA545, 280P557; 38GaA 343, 144SE11; 57ND500, 222NW621; 298Pa191, 148A108; Vt 147A352; Va 153SE832; Vt 152A41. [b] 248Mich 574, 227NW767; Utah 273P963; Vt 152 A41. [c] MoA 24SW(2d)203; 91Pa Super538; 154Wash536, 282P827.

410-46½-New. Where plaintiff complains of the verdict as inadequate, the court should first determine whether plaintiff is entitled to recover anything. 101CalA388, 281P690.

410-48 CalA 292P1006; 319Mo 744, 8 SW(2d)38; 320Mo 839, 8SW(2d)873; TexCivA 28SW(2d)225. [c] (1) 92Pa Super448. (2) 102CalA477, 283P132; 102CalA656, 283P823 (both holding discretion not abused). [d] (1) 108Conn 191, 142A742; 331 Ill 322, 163NE17. (2) 102CalA477, 283P132 (discretion not abused).

411-49 39F(2d)443; TexCivA 16SW(2d) 925; TexCivA 20SW(2d)409; TexCivA 28SW(2d)288; TexCivA 32SW(2d)696; Utah 287P320(2dcase). See also Tex CivA 32SW(2d)696. [c] TexCivA 23SW (2d)737. [d] **Where it is reasonably doubtful on testimony of jurors whether their misconduct influenced answer to any material special issue,** court must order mistrial. TexCivA 17SW(2d)494.

411-50 319Mo 744, 8SW(2d)38. [a] **Discretion not abused.**–TexCivA 28SW (2d)288.

412-54 207Cal 167, 277P327; 102CalA 272, 282P1019 (much of evidence cumulative); 88 IndA432, 164NE414; Nebr 230NW102; 226AppDiv486, 235NYS 511; 133 Okl 94, 271P241; 142 Okl 195, 285P983; Okl 293P220.

412-55 205Cal 11, 269P612; 99CalA 695, 279P467; CalA 293P111; 207 Iowa 862, 224NW28; 208 Iowa1324, 227NW 115; 264Mass498, 162NE905; 176Minn 210, 222NW924; MoA 18SW(2d)247; MoA 19SW(2d)902; Okl 293P220; 54 SD113, 222NW671; TexCivA 28SW(2d) 950; 149Wash155, 270P302. [a] 35 Ariz144, 274P1042; 208 Iowa1324, 227 NW115; 57ND885, 224NW306. [b] 180Ark757, 22SW(2d)387; 204Cal 141, 267P102; 93CalA455, 269P665; 98CalA 145, 276P394(2dcase); 102CalA272, 282 P1019; 102CalA464, 283P88; 225Ky 320, 8SW(2d)414; 264Mass498, 162NE 905; 176Minn210, 222NW924; 177Minn 25, 224NW257; 177Minn276, 225NW22 (1stcase); 178Minn87, 226NW208; Nebr 230NW453; 97PaSuper233; TexCivA 10SW(2d)136; TexCivA 23SW(2d)516. [c] **Where supporting affidavit is categorically denied,** there is sufficient ground for refusal. CalA 290P668.

413-59 247Mich245, 225NW635.

413-60 208 Iowa1324, 227NW115.

414-71 90CalA37, 265P514; 91CalA 213, 266P956; 92CalA230, 268P385; 96 CalA530, 274P430; 38GaA446, 144SE 223; 319Mo 1028, 5SW(2d)6; 83Mont 452, 272P998; 135Misc886, 238NYS707; 196NC712, 146SE804; 57ND885, 224 NW306; Utah 276P651; Wash 287P 206. [c] 90CalA37, 265P514; 86Colo 317, 281P363; Ida 287P951; Iowa 232 NW174; Mo 4SW(2d)802; 154Wash 536, 282P827. [d] 218Ala503, 119S15 (2dcase); 91CalA213, 266P956; 101 CalA388, 281P690; 319Mo 1028, 5SW (2d)6; 91PaSuper536; 150Wash157, 272P723, 63ALR200.

416-72 41GaA831, 155SE60.

416-81 39GaA94, 146SE343.

417-82 [a] 88PaSuper475.

417-83 35F(2d)624.

417-84 221Ala73, 127S504; 154Wash 536, 282P827. [a] 50RI 62, 145A12.

417-85 221Ala124, 127S818; 168La 468, 122S584; 127Me377, 143A466; 178 Minn87, 226NW208 (refusal not abuse of discretion).

418-87 NJSup 151A380(1stcase).

418-88 108Conn97, 142A460.

418-94 But see 108Conn285, 142A737.

419-19 84CalA472, 258P138.

426-74 84CalA557, 258P428; 127Me 493, 144A652; Mo 10SW(2d)663; 57ND 500, 222NW621; 300Pa586, 150A483; TexCivA 10SW(2d)1030; 101Vt285, 143 A394. [a] **Ruling of law submitting case to jury** is not reversed by granting new trial unless remittitur is filed. RI 145A19. [b] **Court may tender judgment for less sum and grant option to take such judgment or new trial,** but remedy is cumulative. Wash 292P106.

427-82½-New. Remission under order of court of portion of verdict places case in same position as if verdict returned for reduced amount. 102CalA 477, 283P132.

427-83 84Mont141, 274P844. [a] **Where judge hearing motion did not try case** he is governed by same rules which govern supreme court on appeal. 84Mont141, 274P844.

427-87 180Minn540, 231NW222.

427-92 TexCivA 9SW(2d)185.

427-95 43F(2d)537.

429-13 40GaA81, 149SE50(2dcase).

429-15 95Fla5, 117S714; MoA 20SW (2d)559; NJ 151A93; 120 Oh273, 166 NE186; Utah 292P1102. [d] **When plaintiff is given option to accept smaller verdict or stand new trial,** amount fixed should be for smallest amount evidence warrants. Wis 232NW593.

430-28 120 Oh273, 166NE186; Utah 292P1102.

430-30 120 Oh273, 166NE186.

430-32 111Conn575, 150A692; 176 Minn437, 223NW675; Minn 231NW716.

431-35 117Nebr854, 222NW633.

431-43 30F(2d)530.

431-45 See also 87CalA736, 262P800.

431-53½-New. or excessive verdict was result of jury's disregarding one instruction, 85**Mont**27, 277**P**417.
432-63 Wis 233**NW**94.
432-79½-New. Writing of remittitur in the combination docket in which the clerk is required to enter every act done in progress of the cause constitutes a filing. **Iowa** 228**NW**582.
433-82 [a] **Waiver of cancellation and new entry.-Iowa** 228**NW**582 (filing of motion after entry of remittitur held to constitute waiver).
433-83 Utah 272**P**197; **Utah** 292**P**1102.
433-96 [a] (4) Mere recital in clerk's minutes does not constitute order overruling motion for new trial. 142 **Okl** 175, 286**P**339. [b] **Order denying new trial has been held sufficient** to provide for time within which defendant might file bills of exception and statement of facts. **TexCivA** 31**SW(2d)**843.
433-97½-New. Action of trial court in immediately entering and signing another judgment when vacating former judgment on rehearing without hearing or reargument of the case is erroneous. 9**LaA**409, 119**S**538.
433-97½-New. Judgment granting new trial to one of defendants to action is proper. 321**Mo** 287, 11**SW(2d)**26.
434-25 MoA 10**SW(2d)**342.
434-43 MoA 27**SW(2d)**499.
435-49 [b] **Reference to one or more of reasons, stated in motion** satisfies statute. 267**Mass**49, 165**NE**699(2dcase).
435-55 But see **CalA** 289**P**897.
435-58 [a] **In Minnesota.-**180**Minn**344, 230**NW**787.
435-62½-New. Court is without power to make further findings in case, where motion for new trial is granted. 33 **OhA**497, 169**NE**603.
435-64 See also **MoA** 12**SW(2d)**933.
436-73½-New. An order overruling a motion for a new trial relates back to the force and purposes of the judgment originally entered. 135 **Okl** 85, 274**P**36.
436-73½-New. Where the trial court overruled a motion for a new trial by defendant, sued for negligent injury, on the ground that the jury was guilty of misconduct while deliberating on its verdict, but filed no conclusions of law or fact in support of its judgment, the trial court did not thereby find that there was no mention made of attorney's fees by the jury in its deliberations and before reaching its verdict. **TexCivA** 9**SW(2d)**146.
436-73¼-New. After denial of motion for new trial, order to restrain execution will be continued to allow application to circuit court of appeals. 36 **F(2d)**394.
436-73½-New. Order overruling amended motion operates to overrule original motion, grounds of which were included in amended motion. **MoA** 23 **SW(2d)**1080.
436-75 Mo 28**SW(2d)**1035.
436-83½-New. Granting new trial and vacation of judgment as to one defendant renders judgment against other defendants interlocutory and not final. **TexCivA** 9**SW(2d)**442.
436-83½-New. In an action for injuries, in which plaintiff recovered judgment against one defendant by default, and verdict of jury was returned in favor of the other defendant, order, granting new trial as against the successful defendant, without reference to the defendant who defaulted, should not be considered as setting aside the default judgment. 128 **Or**310, 274**P**915.
437-93 84**CalA**557, 258**P**428.
437-95½-New. That an informal memorandum opinion recited a particular ground is not conclusive that the ground expressed was the only ground for granting the motion, where the formal order recited no grounds. 153**Wash**31, 278**P**1074.
437-96 [a] **Order that new trial be had on "entire issue,"** where motion was brought for inadequacy of damages, held to mean new trial on every issue raised by pleadings. 267**Mass**49, 165 **NE**699(2dcase).
438-23 178**Minn**480, 227**NW**658.
438-30½-New. In denying defendant's motion for new trial, court impliedly determined that **no prejudice was suffered** by defendant through alleged misconduct of plaintiff's counsel or of jury. 94**CalA**463, 271**P**509.
438-32 128**Kan**471, 278**P**745; **Tex CommnA** 29**SW(2d)**314; **TexCivA** 16 **SW(2d)**969; **TexCivA** 20**SW(2d)**137. See also **CalA** 286**P**1072. [a] **Neither trial court nor appellate court can enter verdict or finding of fact in jury case,** but in proper cases can only direct jury to do so. **MoA** 17**SW(2d)**675.
439-38 SD 226**NW**748 (evidence held insufficient to justify directed verdict for defendant on which to base judgment, under statute); 150**Va**283, 143**SE** 694.
439-41½-New. Trial court is without authority to reduce amount of verdict in favor of plaintiff without giving plaintiff choice of entering a remittitur or submitting to a new trial. 319**Mo** 1169, 8**SW(2d)**580.
439-52 [e] (5) Proceeding to forfeit automobile for violation of prohibition law is a "civil action," within code authorizing court to set aside jury verdict and enter final judgment. 152**Va** 508, 147**SE**243.
440-60 109**Conn**481, 146**A**850. [b] **Trial judge is not required to reopen matter** and his refusal to do so is not ground of exception. 29**F(2d)**58.
440-72 204**Cal** 258, 268**P**364; **CalA** 260 **P**572.
441-89 100**CalA**725, 280**P**1028 (absence of notice of time of hearing).
442-29 233**Ky**538, 26**SW(2d)**30.
443-39 233**Ky**538, 26**SW(2d)**30 (available when other remedies unavailable).
443-50 231**Ky**332, 21**SW(2d)**468.
443-56 231**Ky**332, 21**SW(2d)**468. [a] **Where appeal is proper remedy,** statute is unavailable. 233**Ky**538, 26**SW(2d)** 30 (refusing continuance).
443-62 231**Ky**332, 21**SW(2d)**468.
444-83 233**Ky**538, 26**SW(2d)**30.
446-10 GaA 155**SE**227.
446-15 [b] **Petition held insufficient.-** 231**Ky**630, 21**SW(2d)**1006.
447-36 231**Ky**630, 21**SW(2d)**1006.
451-61 178**Ark**604, 12**SW(2d)**14.
452-93 [b] **Petition was properly dismissed** which did not incorporate record of proceeding in former suit and failed to set forth proceedings in former suit clearly. 229**Ky**498, 17**SW(2d)**404.
453-43 128**Me**207, 146**A**700 (verdict, in action sounding in tort, against defendant on whose part no negligence was proved).
454-49 [c] **Lack of technical proof of what litigants assumed to be true** is not ground for setting aside verdict on general motion after long trial, during which such assumption was acted on by all concerned. 128**Me**197, 146**A**442.
454-57 Me 149**A**386. [a] **Perjury must be willful** in some cases. **Me** 149**A**386 (evidence insufficient to show willful perjury). [b] **Where newly discovered evidence shows perjury at trial** new trial may be granted. **Me** 149**A**386.
455-60½-New. Question of law is raised which supreme court may consider, where verdict fails of support in evidence. 128**Me**453, 148**A**677.
455-84 [a] **Conclusion reached by jury,** to be accepted as final in appellate court, must rest upon rational basis. 128**Me** 453, 148**A**677.
455-86 128**Me**197, 146**A**442.
456-1 [a] **Trial judge's limitation of rule so as to give new trial on issue of damages only,** where damages allowed were inadequate, is not binding on supreme court. **NJSup** 145**A**470.
456-3 [b] **Case as settled by trial judge** is all that properly can be placed before supreme court on rule to show cause why new trial should not be granted. **NJ** 143**A**719(2dcase).
456-4½-New. Supreme court, on defendant's rule to show cause, must accept fact that jury, returning verdict for plaintiff in action to recover for personal injuries, evidently considered that injury was due to accident. **NJSup** 144 **A**318.
456-4½-New. Summary of facts is necessary. **NJSup** 149**A**126.
456-14 [a] **Court could set aside verdict as to counsel fees erroneously included** and sustain it as to lawful damages. **NJ** 145**A**636.
461-70 249**Mich**685, 229**NW**479.
461-72 1178**Minn**480, 227**NW**658 (c not review order granting new trial).
461-74 180**Minn**273, 230**NW**774 (cha not law of case). But see 41**GaA**189, 1 **SE**141.
462-96 51**Philippine**636.
462-10 54**SD**581, 223**NW**826.
462-11 [a] **Trial of issue of fact is a "new trial" unless it be another o second trial** for judicial determinati of same facts. 41**GaA**462, 153**SE**781.
463-18 Okl 291**P**981.
463-19 155**Wash**147, 283**P**691.
463-60 [b] **In Nevada.-**52**Nev**125, 28 396.
464-68 200 **Ind**270, 163**NE**97.
472-74½-New. Where suit was tw renewed recovery of mesne profits wo be restricted to trespass accruing wit in four years before second suit. **Ga** 1 **SE**185.

NIETO

478-93½-New. The term is used by e tension to include a descendant in a gi en line to third, fourth, and successi generations. 50**Philippine**888.

NIGGER SEED

478-95½-New. The small black see of an African annual herb of the ast family. **US** 15**CustA**288.

NOMINAL CONSIDERATION

484-33 [a] **"One cent" "one dime" a "one dollar"** are technical words us to express "nominal consideration." **M** 29**SW(2d)**103.

NOTARIES

502-10 170**Ga**562, 153**SE**520.
502-12 86**Mont**276, 283**P**213 (act of n tary in verifying notice of appropriatio of water right is ministerial).
503-23 [b] **Effect of marriage.-**In a sence of statute, feme sole is unautho ized to continue her duties as notar after her marriage. **NJCh** 147**A**541; **N Ch** 147**A**559(2dcase).
504-37 [d] **In British Columbia.-**[192 4**DomLR**528.
505-62 13**PaDist&Co** 736 (computatio of term and new term).
506-77 23**AlaA**365, 125**S**690.
509-23 243 **IllA**518.
511-47 158**Tenn**98, 11**SW(2d)**687.
511-58 NJSup 145**A**225(2dcase).
521-65 But see 9**PaDist&Co** 104.
524-33 233**Ky**142, 25**SW(2d)**51.
525-80½-New. The notary's parap "Ne varietur," across the face of a prom issory note, the payment of which secured by a mortgage passed befor him, does not guarantee either the ran of the mortgage or the value of the pro erty mortgaged. 9**LaA**143, 119**S**487.
526-96½-New. One who buys, unde an indorsement of "without recourse, from the payee, a promissory note th payment of which is secured by a mort gage on land, and which mortgage ha become worthless by reason of the fail ure of the notary passing it promptly t file it for record, cannot maintain a action against the notary or the suretie on his official bond for the loss thereb sustained without alleging that he ha exhausted his remedies against th transferor under his warranty. 9**LaA** 143, 119**S**487.
526-96½-New. In Quebec notary wh informs contractor that money has bee deposited in his hands by hypothecar lender and of instructions given doe not incur liability. **Can** [1929] 4**DomL** 800.
526-98 [b] **Debt and covenant are ap** propriate remedies on bond. **MoA** 29**SW (2d)**743. [c] **Whether damage is cause by negligence or willful act** is immate rial. **Iowa** 232**NW**121.
526-99 233**Ky**142, 25**SW(2d)**51; **MoA** 13**SW(2d)**558; **MoA** 29**SW(2d)**743. [e] **False certificate of vendee's acknowledg ment to conditional sales contract** does not impose liability on notary to as signee where there is valid acknowledg ment by vendor which is all statute re quires. **Iowa** 232**NW**121.
527-1 233**Ky**142, 25**SW(2d)**51.
527-3 233**Ky**142, 25**SW(2d)**51.
527-10 7**LaA**197.

528-26½-New. Assignee of deeds of trust bearing false certificates of acknowledgment executed by assignor's partner as notary has been held entitled to recover against the notary's surety damages representing the value of security, without pursuing remedy against the partners for fraud in the sale and assignment of the trust deed. MoA 13 SW(2d)558.

528-26½-New. Action on notary's bond is not within domain of tort. Iowa 232 NW121.

528-31 233Ky142, 25SW(2d)51.

528-33 Iowa 232NW121; 175Minn352, 221NW244; MoA 9SW(2d)668.

528-34 MoA 29SW(2d)743.

528-39 Iowa 232NW121; MoA 29SW (2d)743.

528-40 MoA 13SW(2d)558.

529-48 [a] Relying on record showing grantor in deed of trust as owner of realty under forged deed of record has been held not contributory negligence. MoA 29SW(2d)743.

530-93½-New. Special agents appointed to assist the state highway commission in collecting the motor vehicle license tax may, if qualified as notaries, collect the fee provided by law for administering the oath required of applicants for registration and certificates of title. 137 Okl 138, 278P344.

NOTICE.

539-78 TexCommnA 10SW(2d)692.

539-81 TexCommnA 10SW(2d)692.

539-92 322Mo 592, 17SW(2d)945. [a] (1) Iowa 232NW504. (4) 58ND258, 225 NW796.

540-99 TexCommnA 10SW(2d)692.

540-13 322Mo 137, 14SW(2d)652. See also 44F(2d)218.

540-14 152Miss781, 118S904.

540-16 But see 86Colo 493, 283P1042.

540-31 250Mich567, 231NW133(2d case). [c] (9) 58ND258, 225NW796. (10) Knowledge which courts impute to person on presumption so strong of existence of knowledge that it cannot be allowed to be rebutted. 118Nebr 644, 225NW755. (11) Other instances. 130 Or644, 281P169.

541-41 127Mo172, 142A580.

541-50 TexCommnA 10SW(2d)692.

542-74 See also 159Ala637, 48S691, 693. See also 68CalA312, 229P60; 4Hawaii Fed94, 95; 22Me175, 177; 139Mich455, 102NW969, 970; 84Mont478, 276P958; 49Nebr618, 621, 68NW1019; 220NY504, 116NE359; 58Misc279, 109NYS640, 643; 243Pa586, 90A338; 159Tenn531, 19SW (2d)229; Eng [1901] 2Ch598; 9Austr CLR89.

542-91 Iowa 232NW504.

543-6 [a] Compliance with statute.-208 Iowa596, 226NW140.

543-10 28F(2d)523; 221Ala32, 127S 186; 167Ga737, 146SE739; 242 IllA462; 208 Iowa62, 224NW831; NJ 144A730; NJ 146A303; NJCh 151A126; 198NC 693, 153SE257; 130 Or644, 275P55. [d] 206Cal 396, 274P517. [e] Means of knowledge are equivalent to knowledge. 87CalA559, 262P392.

546-32 [a] Party knowing facts which would reasonably put him on inquiry is chargeable with discovery of fraud as of time inquiry would have disclosed fraud. 87CalA559, 262P392.

547-45 Mo 25SW(2d)464.

547-49 NJ 144A730.

547-57 But see 178Minn55, 226NW201.

548-62 103NJEq268, 143A428.

548-83 250 IllA1; MoA 13SW(2d)42.

551-25 178Ark372, 10SW(2d)858.

552-36 35Ariz78, 274P776; Mass 172 NE603.

552-40 40Wyo 449, 278P538.

552-41 [a] (2) Where statute requires notice to be given for purpose of creating liability, actual notice is intended, unless another kind of notice was expressly authorized. TexCommnA 14SW (2d)798.

552-47 DelSuper 151A831.

553-63 Alta [1928] 1DomLR290.

553-73 208 Iowa596, 226NW140. [a] Notice to attorney of party.-208 Iowa 596, 226NW140. [b] If notice is not required for jurisdictional purposes, but to give information, absence of address is not fatal. 208 Iowa596, 226NW140.

554-79 170La932, 129S534.

554-88 But see 208 Iowa596, 226NW 140.

554-99 158Tenn209, 12SW(2d)528(2d case).

555-18 170La932, 129S534.

557-64 208 Iowa552, 226NW171.

557-68½-New. Proof of service of notice should be by affidavit unless a certificate of service is made by an officer authorized to serve the notice and to certify as to such service, and such certificate is made by statute sufficient proof of service. 89CalA396, 265P306.

557-73 40Wyo 350, 277P968.

557-75 Mass 172NE603.

558-76 Ind 168NE869.

558-79 12PaDist&Co 221.

559-24 12PaDist&Co 221.

559-26 89CalA396, 265P306. [b] "Place of residence" as used in statute means municipality where addressee resides and not his house. 175Minn112, 220NW435.

559-31 43F(2d)446; 9PaDist&Co 514; 49Philippine1003.

559-36 175Minn112, 220NW435.

560-44 89CalA396, 265P306.

561-75 221MoA911, 289SW19, 20 [quot Cyc].

561-94 30Hawaii94. [a] Statute requiring publication once a week for four successive weeks requires publication in each successive calendar week and during period of twenty-eight days. Ont [1929] 4DomLR610.

563-22 33F(2d)248.

563-25 103NJEq234, 143A137.

563-27½-New. The doctrine of notice is not confined to protection of titles, but extends to all substantial rights. 149Wash433, 271P93.

563-32 89 IndA318, 164NE298.

564-52 Del 151A831.

568-51 178Minn55, 226NW201 (sufficiency of evidence to sustain finding of actual notice).

568-60 Ind 168NE869; TexCommnA 10 SW(2d)692.

NOVATION

573-1 249Mich410, 228NW737; Tex CivA 8SW(2d)222.

574-2 249Mich410, 228NW737.

579-14 Iowa 231NW1; WVa 155SE 303.

575-17 TexCommnA 18SW(2d)609; TexCivA 14SW(2d)116.

576-35 166Ga889, 144SE772.

577-75 92PaSuper485.

579-14 331 Ill 38, 162NE157; Iowa 224 NW550; 36 OhA129, 172NE845.

579-15 Iowa 227NW599.

579-17 94CalA530, 271P554. See also TexCivA 8SW(2d)222.

579-25 [a] Novation may be set aside for fraud. 249Mich410, 228NW737.

580-27 128Kan377, 277P1017. [b] IndA 162NE64.

583-53 [a] 39Wyo 331, 271P217, 69 ALR840.

584-68 [c] Indemnity or surety contracts may be novated. 169Ga40, 149 SE573.

586-30 35F(2d)18; 95CalA741, 273P 107; CalA 293P168; 149SC386, 147SE 449.

588-46 Sask [1928] 1DomLR544.

588-52 TexCommnA 7SW(2d)872.

589-60 95CalA741, 273P107; 128Kan 377, 277P1017. [d] Intent must clearly appear.-La 129S671.

589-61 CalA 281P1062.

590-70 198NC210, 151SE188 (additional security).

590-76 170La163, 127S587; La 129S 671.

591-84 170La163, 127S587; TexCivA 8 SW(2d)222.

591-91 Alta [1930] 3DomLR990.

592-97 149SC386, 147SE449; 152Wash 342, 277P984.

592-3 149SC386, 147SE449.

592-5 IndA 173NE461; Mont 288P 614; TexCommnA 15SW(2d)550.

593-9 Mont 288P614.

593-10 Mont 288P614.

593-14 Mont 288P614.

594-19 221Ala520, 129S285; 152Wash 342, 277P984. [b] 28F(2d)857.

594-21 2LaA590.

594-33 35 OhA429, 172NE445.

595-39 IndA 173NE461; 227Ky369, 13 SW(2d)271; MoA 31SW(2d)568; BC [1929] 3DomLR638.

596-41 229Ky90, 16SW(2d)800; 11 LaA547, 123S408; 39Wyo 331, 271P 217, 218 [citCyc], 69ALR840. [e] Where electric company accepted notes of third parties from contractor, resulting in new debtors, acceptance of notes resulted in complete novation, and did not constitute "taking of notes," within statute not discharging lien. 148 Wash594, 269P809. [f] Acceptance of corporate notes held not substitution of corporate liability for individual liability. 297Pa432, 147A85.

597-45 227Ky306, 12SW(2d)856.

597-51 229Ky90, 16SW(2d)800.

597-51½-New. Seller of automobile jointly liable with purchaser to finance company is not released by company's acceptance of third party's assuming unpaid installments. TexCivA 27SW (2d)855.

600-81 10LaA648, 121S193. [a] Facts showing novation within rule.-39Wyo 331, 271P217, 218 [citCyc], 69ALR840.

601-83 Cal 292P465; 98CalA338, 276P 1033; MoA 17SW(2d)677. [c] It is not essential that assent to terms of novation be shown by express words, but it may be implied from circumstances attending transaction and conduct of parties thereafter. 227Ky369, 13SW (2d)271.

602-93 177Minn560, 225NW725.

602-94 Iowa 219NW324.

603-96 169Ga846, 151SE803; 208 Iowa 402, 226NW12, 13 [citCJ].

603-99 CalA 285P342; 179Minn408, 229NW356; MoA 17SW(2d)677; 83 Mont430, 272P679; 127 Or539, 272P898.

605-13 230Ky509, 20SW(2d)276 (making no complaint on seeing third person doing work).

605-19 110Conn392, 148A328.

607-31 94CalA530, 271P554.

610-67 28F(2d)857.

612-10 But see Iowa 231NW1.

613-33 Mont 288P614.

614-35 207 Iowa278, 222NW846; 83 Mont430, 272P679.

614-37 207 Iowa278, 222NW846.

614-40 Cal 292P465; 83Mont430, 272 P679.

616-59 TexCivA 8SW(2d)222.

616-60 40GaA376, 149SE792.

616-62 MoA 31SW(2d)568.

618-30 Cal 286P1038 (order for sale of pledged bonds); 39Wyo 331, 271P217, 69ALR840.

619-87 101CalA719, 282P427.

620-96 233Ky634, 26SW(2d)538. [c] Irrespective of subsequent release of new debtor, novation by which original debtor was released operated to release original debtor from all liability. 83 Mont430, 272P679.

622-8 CalA 293P168.

623-32 98CalA338, 276P1033.

624-46 Mont 288P614.

624-55 Mont 288P614.

625-59½-New. Where novation is pleaded adversary is given opportunity to resist it on ground of fraud, want of consideration and the like. Mont 288 P614.

625-61 94CalA530, 271P554.

625-62 8LaA359; 13LaA61, 127S108; MoA 31SW(2d)568; TexCivA 14SW(2d) 116.

625-63 296Pa291, 145A831; Tex CommnA 18SW(2d)609; 152Wash342, 277P984.

625-65 28F(2d)857; Ill 173NE80; Iowa 219NW324; 207 Iowa278, 222NW 846; MoA 31SW(2d)568; WVa 155SE 303. See also 151Va481, 145SE302.

626-66 83Mont430, 272P679.

626-77 101CalA719, 282P427 (acts of parties). [a] (10) Other instances. Iowa 219NW324.

627-86 83Mont430, 272P679.

628-98 Cal 292P465; 36 OhA129, 172 NE845; TexCivA 8SW(2d)222. [c] 331 Ill 38, 162NE157.

628-99 88CalA88, 262P820; MoA 31 SW(2d)568; 48Philippine482. See also TexCivA 8SW(2d)222.

628-1 [c] (1) 39F(2d)777; Cal 292P 465; 95CalA741, 273P107; IndA 173NE 461; 207 Iowa1011, 221NW574; 207 Iowa278, 222NW846; 229Ky426, 17SW (2d)212; 180Minn75, 230NW468; MoA

300SW1001. (8) Valuable consideration as between debtors. **MoA** 300SW 1001; 83Mont430, 272P679. [d] (1) 179Ark1199, 168W(2d)985; **CalA** 261P 729; 88CalA88, 262P820; 95CalA685, 273P585; 170Ga615, 153SE763; **IndA** 173NE461; 207 Iowa1241, 224NW550, 65ALR187; **Iowa** 228NW667; **Iowa** 228 NW670; 234Ky591, 28SW(2d)787, 70 ALR335; 247Mich527, 226NW226; **MoA** 31SW(2d)568; 36 OhA129, 172NE845; 35PortoRico 312; **TexCivA** 29SW(2d) 930; 151Va481, 145SE302; **WVa** 155SE 303.

630-7 207 Iowa1011, 221NW574; 128 Kan377, 277P1017; 227Ky369, 13SW (2d)271; **TexCivA** 31SW(2d)355.

630-9 208 Iowa404, 226NW79; **Tex CivA** 24SW(2d)535.

630-11 **TexCommnA** 18SW(2d)609; **TexCivA** 10SW(2d)196.

NUISANCES

645-14 [a] (1) 178Ark406, 10SW(2d) 886, 61ALR1138; 254NY64, 171NE908.

646-15½-New. Owner of property has no property right in a nuisance or in property which is being used in maintaining or conducting nuisance. 84Colo 582, 272P662, 63ALR693.

646-23 [a] (9) Other instances. 254 NY245, 172NE485. [j] **Any obstruction or encroachment on street interfering with public use** for travel may be public nuisance. 253NY423, 171NE694. [k] **What constitutes "considerable" number of persons.**–254NY245, 172NE 485.

648-39 **MoA** 17SW(2d)616.

648-43 254NY245, 172NE485.

649-51 **MoA** 22SW(2d)182.

649-52 **Ida** 236P353.

649-65 **Iowa** 228NW648.

650-69 [a] **Every continuance is fresh nuisance.**–248Mich437, 227NW739.

650-73 41GaA193, 152SE306.

651-95 **Md** 150A447.

651-11 232Ky199, 22SW(2d)587; 265 Mass135, 163NE893.

652-12 298Pa475, 148A695.

652-19 [a] **Method of abating public nuisance** is matter for administrative officers of municipality to determine. 250Mich416, 230NW163.

652-23 148SC229, 146SE13.

652-30 196NC641, 146SE592.

653-48 154Wash503, 282P848.

653-49 265Mass135, 163NE893.

653-50 220Ala556, 126SE864; **TexCivA** 30SW(2d)412; 151Va1, 144SE492; 154 Wash503, 282P848; 199Wis575, 227NW 385.

654-70 199Wis575, 227NW385.

657-96 221Ala203, 128SE166; 226Ky 123, 10SW(2d)630; 250NY83, 164NE 864; 296Pa510, 146A115; 298Pa400, 148A511.

657-1 179Ark857, 18SW(2d)356.

657-5 235Ky842, 32SW(2d)413; 137 Misc524, 244NYS63; 14PaDist&Co 114; 14PaDist&Co 115.

658-6 **Wash** 287P7.

659-11 245 IllA257 [citCyc].

666-12 41F(2d)929; 103CalA750, 284P 962; 226Ky123, 10SW(2d)630; 137 Misc524, 244NYS63; 14PaDist&Co 114.

660-14 178Ark406, 10SW(2d)886, 61 ALR1138; 132 Okl 226, 269P1096; 133 Okl 20, 270P559; 298Pa475, 148A695.

661-31 **Ark** 31SW(2d)396; 206Cal 669, 275P787; **Cal** 291P577; **MoA** 14SW (2d)694; 134Misc888, 236NYS566 (where nuisance is based on negligence, rules applicable to negligence will be applied).

663-66 199Wis575, 227NW385.

663-70 220Ala90, 124SS2; 38GaA586, 144SE825.

663-71 231Ky433, 21SW(2d)790.

663-73 **TexCivA** 21SW(2d)1098; 199 Wis575, 227NW385.

665-3 264Mass447, 162NE895.

666-12 179Ark857, 18SW(2d)356; 296 Pa510, 146A115 (immediate neighborhood); 14PaDist&Co 115; Wis 232NW 862. But see 336 Ill 100, 167NE782.

666-16 41F(2d)929.

666-17 179Ark857, 18SW(2d)356; 137 Misc524, 244NYS63.

667-18 247Mich98, 225NW611; 32 OhA 313, 167NE468; 9PaDist&Co 696.

667-19 251Mich684, 232NW223.

668-22 157Md389, 146A233.

668-39 [a] **Condition of immediate neighborhood as test.**–88PaSuper80.

669-40 178Ark406, 10SW(2d)886, 61 ALR1138.

669-42 298Pa400, 148A511.

670-47 [a] **Operation of miniature golf course after 9 o'clock in evening** is nuisance. 14PaDist&Co 115.

670-49 220Ala90, 124SS2.

670-54 39F(2d)800.

671-60 **Cal** 291P577; 108WVa242, 150 SE725.

671-61 But see **Cal** 291P577.

671-62 **MoA** 19SW(2d)544.

672-64 220Ala90, 124SS2.

672-73 See also 336 Ill 100, 167NE782.

672-74 178Ark406, 10SW(2d)886, 61 ALR1138.

672-78 103CalA354, 284P731; 128Me 349, 147A421 (licensed); 148SC229, 146 SE12. [d] **Erection of standpipe by town for its waterworks system** close to complainant's property is not nuisance. 157Tenn249, 78W(2d)992. [e] **That county supervisors were not doing their duty** was not basis for abatement of courthouse. 103CalA354, 284P 731.

673-85 **Iowa** 228NW648 (permit from city to erect garage does not authorize conducting it as nuisance).

673-86 **Cal** 291P204; **Ont** [1930] 4 DomLR731.

673-87 27F(2d)262.

674-94 264Mass447, 162NE895.

674-96 228AppDiv118, 239NYS47.

675-11 298Pa400, 148A511.

675-12 220Ala90, 124SS2; 85CalA388, 259P484.

676-14 179Ark857, 18SW(2d)356.

676-18 296Pa510, 146A115.

676-20 41F(2d)929.

676-24 **Ala** 130S186; 153Wash214, 279 P594.

676-86 **Mass** 172NE887.

677-30 245Mich261, 222NW86; 135 Misc216, 237NYS339 (injunctive relief will not lie).

677-91 **Mass** 172NE887.

679-56 **Md** 150A447.

680-84 [a] **Mere existence of danger** does not create liability unless defendant has notice thereof. 199Wis575, 227 NW385.

680-86 255 IllA216.

681-99 14PaDist&Co 114.

682-25 41F(2d)929; 319Mo 337, 4SW (2d)776.

682-29 246Mich606, 225NW638; 250 NY83, 164NE864.

682-35 133 Okl 20, 270P559; 14PaDist &Co 115.

683-37 88PaSuper80.

683-45 **Ark** 31SW(2d)396.

684-46 **Ark** 31SW(2d)396.

684-47 14PaDist&Co 114. [a] **Noise resulting from operation of delivery trucks** may constitute "nuisance." 224 AppDiv303, 230NYS289.

684-48 224AppDiv303, 230NYS289; 27 OhNPNS269.

684-49 41F(2d)929; **Ark** 31SW(2d) 396.

686-88 41F(2d)929.

686-93 157Md389, 146A233.

686-94 157Md389, 146A233.

687-3 135Misc216, 237NYS339; 27 Oh NPNS269.

688-12 220Ala90, 124SS2; 27 OhNPNS 269.

689-28 **CalA** 273PS33.

690-43½-New. It has been held that an airport is not a nuisance. **Mass** 170NE 385.

690-46 227Ky566, 13SW(2d)767, 63 ALR404; **Wash** 287P7. [e] **Rural community club gathering.**–153Wash214, 279P594.

692-3 [a] **Evidence held sufficient** to show operation of bakery constituted nuisance. 224AppDiv303, 230NYS289.

692-7 167Ga735, 146SE455(2dcase).

692-18 265Mass559, 164NE470, 62ALR 780.

693-36 See also 244 IllA185.

694-58 264Mass447, 162NE895; **Ont** [1930] 4DomLR731.

696-28 **Cal** 291P577; 222MoA1076, 11 SW(2d)1082; **MoA** 21SW(2d)889; 160 Tenn468, 26SW(2d)132.

696-30 6LaA640.

696-31 196NC641, 146SE592. [b] **MoA** 21SW(2d)889.

696-33 **NC** 155SE865(2dcase).

697-35 [a] **Injunction against extension refused.**–Wash 290P1008.

697-55 166GaS02, 144SE248.

699-16 [a] (2) Maintaining foul water and breeding place for mosquitoes. 38 GaA586, 144SE825.

699-24 **TexCommnA** 128W(2d)976.

699-25 **TexCivA** 128W(2d)239.

699-32 254NY245, 172NE485.

699-33 [b] **TexCivA** 128W(2d)239.

699-44 103CalA354, 284P731.

700-61 [b] **Interchange of conversation may be matter for police regulation,** not injunctive relief. 319Mo 337, 4SW(2d)776.

700-72 7Alaska64.

701-99 169Ga538, 150SE825.

701-7 **Mass** 170NE58.

702-24 250Mich665, 231NW57.

702-25 250Mich665, 231NW57.

706-19 154Wash503, 282P848 (lumber mill).

706-20 **MoA** 19SW(2d)544 (roofing plant).

707-71 298Pa400, 148A511.

707-72 But see 298Pa475, 148A695.

703-75 128Kan646, 278P1067 (question of fact); 9PaDist&Co 696. But see 298 Pa175, 148A695.

708-76 See also 95PaSuper328.

708-80 151Va108, 144SE483.

708-81 **Iowa** 228NW648.

708-82 **Iowa** 228NW648.

708-83 **Iowa** 228NW648; 298Pa400, 148A511.

708-83½-New. **Where location is both residential and commercial,** court must say whether attempted use justifies restraint. 298Pa400, 148A511.

708-84 219Ala656, 123SS213; **Iowa** 228 NW648; 296Pa510, 146A115; 9PaDist &Co 696; 10PaDist&Co 356.

708-85 **Iowa** 228NW648 (quarrelsome disposition of husband and wife is immaterial).

708-86 **Iowa** 228NW648.

708-87 296Pa579, 146A710.

708-88 296Pa579, 146A710.

708-89 **Iowa** 228NW648. But see 296 Pa510, 146A115. [a] **Adjoining railroad and business establishment across street,** will not classify land as semi-commercial in small city. 298Pa475, 148A695.

708-90 92PaSuper450.

708-95 But see 296Pa579, 146A710; 298Pa400, 148A511.

708-99 245Mich173, 222NW120; 296 Pa579, 146A710.

709-6 151Va1, 144SE492.

710-29 10PaDist&Co 553.

711-62 But see 168La172, 121S613.

712-79 **MoA** 22SW(2d)182.

712-93 [b] 179Ark788, 18SW(2d)364.

712-94 137Misc524, 244NYS63.

712-96 137Misc524, 244NYS63.

714-33 319Mo 337, 4SW(2d)776.

714-54½-New. Whether a junk yard constitutes a nuisance is largely dependent on the circumstances. 25 Oh NPNS493.

715-63 225Ky516, 98W(2d)296; **Tex CivA** 26SW(2d)1083.

715-67 225Ky516, 98W(2d)296.

716-5 [b] (2) Operation not nuisance. 41GaA204, 152SE266.

716-15 178Ark406, 10SW(2d)886, 61 ALR1138.

717-39 205Cal 328, 270P952, 60ALR 475.

717-53 [b] **Evidence held insufficient** to establish unprecedented rainstorm causing overflow. **TexCivA** 21SW(2d) 1098.

718-68 **Wash** 287P7.

718-96½-New. Generally, public improvements authorized by law do not constitute public nuisances. 30Hawaii 132.

719-5 248Mich437, 227NW739.

719-18 179Ark857, 18SW(2d)356. [b] **CalA** 272P1076; 294Pa17, 143A498.

723-86 But see 128Me349, 147A421.

726-75 205Cal 198, 270P443.

726-78 221Ala440, 129SS84; 132 Okl 226, 269P1096; 300Pa35, 149A832.

726-79 220Ala556, 126SS64; 132 Okl 226, 269P1096.

726-80 181Ark173, 25SW(2d)18; 254 NY64, 171NE908.

726-81 220Ala556, 126SS64; 168Ga 565, 148SE403(1stcase); 129Kan88, 281 P869.

726-82 [a] **Undertaking business may be nuisance** when in close proximity to preëstablished hospital and having depressing effect on inmates. 129Kan88, 281P869.
726-83 181Ark173, 25SW(2d)18 (transition from residential to business district).
727-5 132Misc556, 230NYS550.
727-8 Cal 291P577.
728-36 39F(2d)800.
728-44 Mo 30SW(2d)995.
729-45 168La172, 121S613.
730-46 168La172, 121S613; Md 150A 273.
731-47 33F(2d)690.
732-52 33F(2d)690; 233Ky299, 25SW (2d)730; Mich 233NW233(1stcase); NJCh 147A161; 151Va108, 144SE483.
733-53 222MoA980, 6SW(2d)659.
733-56 222MoA980, 6SW(2d)659.
734-73 85CalA388, 259P484.
735-80 [a] (1) 33F(2d)690; NC 155SE 865(2dcase).
736-91 Ark 31SW(2d)396.
736-94 But see 220Ala90, 124S82.
736-97 But see Ont [1929] 1DomLR9.
741-86 229AppDiv41, 241NYS569; 199 Wis575, 227NW385.
742-88 39F(2d)800.
743-2 103CalA750, 284P962 (specific notice unnecessary).
743-6 [a] **Request to abate nuisance is not condition precedent to decree** for abatement against one having prior notice. 39F(2d)800.
744-25 [a] **Cotenant of dam** may be liable to remove superstructure constructed by another after notice that it is nuisance. 39F(2d)800.
744-36 108Conn197, 142A681.
745-38 103CalA750, 284P962.
745-48 106WVa594, 146SE522.
745-52 225Ky255, 8SW(2d)421.
745-57 [a] **Grantee may assume structures are rightfully on land.** 39F(2d) 800.
746-62½-New. Purchasers at foreclosure sale of subject of nuisance are bound by decree requiring them to abate it. 39F(2d)800.
746-65 135Misc216, 237NYS339.
747-77 See also 155SC1, 151SE907.
748-23 [a] **Railway** cannot maintain public nuisance not connected with its own railway purposes. MoA 17SW(2d) 616.
749-37 TexCivA 20SW(2d)363.
749-40 11PaDist&Co 42.
749-44 37F(2d)180.
750-52 256 IllA452.
750-53 256 IllA452.
751-59 39F(2d)800; 248Mich437, 227 NW739; 250Mich416, 230NW163; 132 Or415, 286P151; 297Pa58, 146A564; 88 PaSuper419.
752-61 103CalA750, 284P962.
752-66 37F(2d)180.
752-70 37F(2d)180.
753-76 37F(2d)180.
754-95 152Miss54, 118S360 (actions to abate nuisances could be maintained in common-law courts).
755-5 84Colo 582, 272P662, 63ALR693.
755-13 84Colo 582, 272P662, 63ALR 693.
756-19 Wash 286P63.
756-20 245Mich261, 222NW86.
757-35 Wash 287P7.
759-60 Cal 287P455 (public health).
759-74½-New. In Georgia the procedure authorized by the Atlanta City Code § 2577 does not contemplate a proceeding to abate a nuisance. 40GaA300, 149SE305.
760-89 135Misc151, 238NYS197; 137 Misc524, 244NYS63.
760-90 207Cal 395, 279P136; 169Ga 538, 150SE825; 245 IllA257; 298Pa475, 148A695.
762-15 103CalA306, 284P725.
764-36 [a] (1) 243 IllA31.
765-40 135Misc151, 238NYS197 (owner's knowledge held to require judgment containing restraining provision).
766-56 298Pa475, 148A695.
766-59 152Miss54, 118S360.
766-65 [a] **Injuries held to come within general principles of equitable jurisdiction.**-Mass 171NE482.
766-77 Iowa 228NW648; MoA 21 SW(2d)889; 92PaSuper450.
767-78 Ala 130S186; 166Ga802, 144 SE248; 235Ky842, 32SW(2d)413.
767-79 30F(2d)808; 41F(2d)929.
768-81 See also Mich 233NW233(1st case).
768-87½-New. When it is generally known that acts are injurious, it does not require experiment or demonstration to determine whether result would have evil effect. 298Pa475, 148A695.
769-90 30F(2d)808.
770-96 41F(2d)929.
770-3 88PaSuper80.
770-4 152Miss54, 118S360; 10PaDist& Co 553.
771-7 152Miss54, 118S360.
771-13 245Mich261, 222NW86; 152 Miss54, 118S360; TexCivA 16SW(2d) 862.
772-15 336 Ill 100, 167NE782.
773-30 245 IllA257; 152Miss54, 118S 360; 128Me339, 147A419.
774-34 336 Ill 100, 167NE782; 245 IllA 257.
774-35 152Miss54, 118S360.
774-49 25 OhNPNS473, 480 [citCyc].
775-56 [a] **Social consideration** in its broad sense, must be given some weight in determining whether building would constitute a nuisance. Wis 232NW862.
775-57 220Ala90, 124S82.
775-60 [a] **Right to injunction** held not to result in greater damage to public. TexCivA 30SW(2d)412.
775-61 218Ala544, 119S660.
776-80½-New. Where the jury find that the nuisance can be abated at reasonable cost, the city cannot invoke the doctrine of balancing equities to prevent a permanent injunction against the maintenance of a dump ground. Tex CivA 20SW(2d)363.
777-84 [a] 39F(2d)800. [b] (2) Residents are not estopped to maintain suit to enjoin operation of quarry and rock crusher where suit is commenced before operations are begun, though crusher was operated in former years at same place, especially where operations differ. 179Ark857, 18SW(2d)356. [d] **Long delay between filing of bill and issuance of injunction** is no bar to latter. 264Mass447, 162NE895.
777-87 85CalA388; 259P484. See also Iowa 228NW648.
778-8 [a] **Acts of plaintiff held not to bar relief.**-151Va108, 144SE483.
781-75 336 Ill 100, 167NE782.
781-75½-New. Joint action may be brought by husband and wife who jointly own residence affected by nuisance from adjoining property. 255 IllA375.
781-81 But see 39F(2d)800.
781-88 TexCommnA 23SW(2d)713.
782-5 NC 155SE865(2dcase).
782-8 [a] 9PaDist&Co 743.
783-31 But see 246Mich606, 225NW638.
783-34 [b] 103CalA306, 284P725; 235 Ky842, 32SW(2d)413.
783-37 53SD405, 220NW921 (petition held sufficient).
783-39 30F(2d)808; 169Ga850, 151SE 811.
784-42 103CalA306, 284P725; 166Ga 802, 144SE248.
784-45 [a] (5) Other instances. Mo 30 SW(2d)998.
784-49½-New. Complaint held not to state facts warranting recovery of damages. 103CalA354, 284P731.
784-50 243 IllA31.
784-54 [d] 85CalA388, 259P484; 168 La752, 123S314.
786-92 [b] **Bill seeking to enjoin maintenance of filling station in residential neighborhood** held not demurrable. 219 Ala656, 123S213.
786-12 264Mass447, 162NE895.
787-16½-New. Issues held immaterial. 103CalA750, 284P962.
787-23 319Mo 337, 4SW(2d)776; Tex CivA 13SW(2d)230; Wash 287P7.
787-37 319Mo 337, 4SW(2d)776; 296Pa 510, 146A115.
787-38 294Pa17, 143A498.
788-48 [b] 207Cal 395, 279P136; 168 La752, 123S314; TexCivA 26SW(2d) 311.
788-49 196NC641, 146SE592.
788-50 But see 336 Ill 100, 167NE782.
790-82. Wash 287P7. [a] (1) 205Cal 193, 270P443; 85CalA388, 259P484; 103CalA750, 284P962; 336 Ill 100, 167 NE782; MoA 17SW(2d)616; 294Pa17, 143A498; 88PaSuper80; 155SC1, 151 SE907; TexCivA 30SW(2d)412. (6) To show special damage and right to sue. 151Va108, 144SE483. (7) To sustain injunction against undertaking establishment. 129Kan88, 281P869. [b] 179Ark 788, 18SW(2d)364; Ark 31SW(2d)396; Cal 291P577; 250Mich579, 230NW948; 319Mo 337, 4SW(2d)776; 154Wash503, 282P848; 153Wash214, 279P594; NS [1930] 2DomLR680. (2) To support finding that artificial walls of steel and concrete would not be equal or superior to loose rock, sand, and gravel which defendants proposed to excavate. 207 Cal 395, 279P136.
790-86 Mich 233NW233(1stcase); 319 Mo 337, 4SW(2d)776.
791-4 TexCivA 19SW(2d)377.
791-20½-New. Findings held not inconsistent. 207Cal 395, 279P136.
792-33 225Ky516, 9SW(2d)296.
792-36 85CalA388, 259P484; 225Ky 516, 9SW(2d)296; 245Mich261, 222NW 86; 250Mich665, 231NW57. [b] **If decree is not complied with or operation results in damage,** chancellor may permanently enjoin operation. 179Ark857, 18SW(2d)356. [c] **Equitable relief unavailable by private person** to prevent violation of zoning ordinance. 300Pa35, 149A832.
792-37 179Ark857, 18SW(2d)356; 167 Ga735, 146SE455(2dcase); 245 IllA257.
793-38 220Ala90, 124S82 (court should consider abatement of nuisance by improved methods before granting or refusing injunction); 245Mich261, 222NW 86; 250Mich665, 231NW57; 88PaSuper 80.
793-39½-New. The court may require defendant to pay a special bailiff appointed by the court to supervise operations as a condition of being permitted to operate in a proper manner where the court could decree a permanent injunction. 179Ark857, 18SW(2d)356.
793-40 132 Okl 226, 269P1096.
793-45½-New. Enjoining use of explosives cannot be complained of where user ignored heeding and warning in pleading. 89CalA107, 264P776.
793-50 39F(2d)800.
793-54 [c] **In suit by adjoining property owner** court of equity is without authority to order removal of building erected in violation of statute relative to amount of lot to be left unbuilt upon. 92PaSuper450.
794-66 134Misc284, 235NYS158.
794-72 117Nebr245, 220NW278, 58ALR 1033.
796-13 250Mich99, 229NW403 (where portion devoted to nuisance use unidentified). [a] **Entire premises cannot be closed** in some cases. 250Mich99, 229 NW403.
799-57 [a] (1) 85CalA388, 259P484; 157Md389, 146A233.
799-63½-New. Decree of abatement should not run against trustees and bondholders under deed of trust neither creating nor continuing nuisance. 39 F(2d)800.
799-64 See also 243 IllA31.
799-73 [a] 296Pa579, 146A710.
800-7½-New. Answer held insufficient to purge defendant of charge of indirect contempt. Ind 173NE456.
800-9 [b] (1) 296Pa579, 146A710.
802-46 155Wash526, 285P446.
802-51 TexCivA 30SW(2d)412.
802-55 Ala 130S83.
802-63 Ala 130S83.
803-64 Ala 130S83; 196NC719, 146SE 867.
804-93½-New. Abandonment of premises for period of years does not bar recovery of damages for injury thereto after return. 37F(2d)180.
806-32½-New. Persons held not to be necessary parties. TexCivA 21SW(2d) 710.
806-39 [b] 128Kan554, 278P757.
807-68 [a] (4) Petition held sufficient without specifically alleging that injuries were different in kind from those suffered by public. 222MoA980, 6SW (2d)659.
808-74 [a] **Pleadings held not to assert claim as for permanent nuisance.**-TexCivA 28SW(2d)861.
811-44 38GaA586, 144SE825.
811-68 [a] (6) To identify premises de-

scribed in complaint. 84Colo 481, 271P 617. (7) To show permanent character of nuisance. 41GaA193, 152SE306. [b] (1) NS [1930] 2DomLR680.

812-78 MoA 19SW(2d)544 (loss of profits).

812-79 92PaSuper450. [a] **Evidence held insufficient.**–MoA 19SW(2d)544.

812-89 TexCivA 21SW(2d)1098. [b] 235Ky197, 30SW(2d)882.

813-90 178Ark943, 12SW(2d)916; 155 Wash526, 285P446.

813-93 33F(2d)690.

813-7 [a] (5) Charge that public garage can only become nuisance when operated in unreasonable and unusual manner. 245Mich173, 222NW120. [c] 222MoA980, 6SW(2d)659.

814-8 31 OhA347, 166NE418.

814-20 MoA 19SW(2d)544.

814-25 [a] **Instructions held not erroneous.**–255 IllA375.

814-29 [b] **Verdicts held inconsistent.**–228AppDiv158, 239NYS192.

821-81 [a] (1) OklCr 291P139. [b] OklCr 279P696.

821-2 240NYS612.

824-72 255 IllA375 (noise, smoke, and vapor considered); TexCivA 16SW(2d) 862.

826-90 38GaA586, 144SE825; 41GaA 193, 152SE306.

826-91 TexCivA 26SW(2d)311.

827-97½-New. Continuing nuisance authorizes recovery of damages within the period of limitations. 38GaA586, 144SE 825.

827-16 38GaA586, 144SE825; MoA 19 SW(2d)544.

828-19 226Ky130, 10SW(2d)630; MoA 19SW(2d)544; TexCivA 26SW(2d)311; TexCivA 31SW(2d)457. [e] **Actual eviction** is not necessary. 37F(2d)180.

829-20 MoA 19SW(2d)544; 53SD405, 220NW921.

830-36 134Misc284, 235NYS158.

831-50 See also 37F(2d)180 (due diligence).

831-63 [g] **$1,750.**–255 IllA375.

831-64 [h] **$3,000 excessive by $2,250.**–167La578, 120S13(3dcase). [i] **$500.**–TexCivA 21SW(2d)1098.

OBJECTIVE SYMPTOMS

846-67 3LaA256.

OBLIGATION

848-30 [b] LaA 129S257.

OBSCENITY

854-5 See also 91PaSuper513. [a] **Court under statute** is under duty to protect weaker members of society from corrupt and depraving influences, exerted through literature, drama, or art. 133Misc611, 233NYS565.

854-13 38GaA392, 144SE36.

854-15 38GaA392, 144SE36.

855-29 [e] **Private house.**–89 IndA452, 166NE666(2dcase).

856-55 [c] **"Public road"** construed. NC 154SE747.

858-82 133Misc611, 233NYS565.

858-89 4HawaiiFed595; 230AppDiv 200, 243NYS193. [b] (4) Defendant's letter to another man, stating that he has been thinking of the other every day since they met, as defendant enjoyed their meeting and hoped they could meet quite often, and making an appointment for a subsequent meeting, does not contain obscene, lewd, lascivious, or filthy matter. 29F(2d)248.

858-89 [c] **That children might accidentally obtain pamphlet proper for doctors or nurses or adults** would not bar publication. 39F(2d)564.

858-95 [a] **Seller of book containing obscene passages cannot assume** children would not read obnoxious passages or read till their effects are weakened. Mass 171NE472.

859-3 See also 4HawaiiFed595.

861-68 251NY94, 167NE183.

863-94 [a] **Admitting only passages relied on held proper.**–Mass 171NE472.

863-95 [a] **Exclusion of oral testimony showing theme of book** may be discretionary. Mass 171NE472.

863-5 [b] (4) Evidence held sufficient to sustain verdict of guilty for sale by employee. 93PaSuper119. (5) Evidence held insufficient. Mass 171NE455. [g] **Possession of obscene pictures for sale.**–91PaSuper513.

864-12½-New. Whether place was public road or highway has been held for jury. NC 154SE747.

864-13½-New. The question of the participation of accused in the offense is for the jury on conflicting evidence. 91 PaSuper513.

864-21 [e] **Instructions held proper.**–91PaSuper513.

OBSTRUCTING JUSTICE

868-2 NJSup 149A124.

870-25 11PaDist&Co 552, 554 [citCyc].

872-45 179Ark725, 17SW(2d)866.

872-53 179Ark725, 17SW(2d)866.

872-61 11PaDist&Co 552, 554 [citCyc].

875-9 232Ky159, 22SW(2d)599 (under statute).

875-12½-New. Unauthorized placing of compound producing chemical or physical change in citrus fruit juice that inspector is preparing to analyze, is unlawful. 99Fla1311, 128S853(2dcase).

878-65 But see OklCr 293P273.

878-66 See also OklCr 293P273.

878-67 89 IndA254, 166NE28.

878-68 But see 28F(2d)122.

878-78½-New. nor is it necessary that any action or proceeding has been commenced and is pending; 99CalA37, 277 P1082.

879-88 Attempt to suborn perjury distinguished from attempt to induce witness to testify falsely see Perjury § 196.

881-29 [b] (3) Other instances. 35 PortoRico 701.

883-70 113TexCr169, 18SW(2d)628. [d] **Indictment held sufficient.**–37F(2d) 287; 99Fla1311, 128S853(2dcase).

883-77 [a] **Search warrant** need not be set out in full in indictment. 37F(2d) 287.

886-30½-New. An information for attempting to bribe a witness to induce false testimony or withhold true testimony has been held sufficient. 99CalA 37, 277P1082.

886-30½-New. An information for bribing a witness has been held sufficiently to allege an understanding and agreement that testimony would be thereby influenced. 99CalA37, 277P 1082.

886-30¼-New. Such information need not allege an understanding or agreement that testimony would be influenced. 99CalA37, 277P1082.

887-51 112TexCr416, 16SW(2d)1079.

887-53 [c] **In prosecution for resisting officer,** refusal to permit officer to be questioned as to where he had lived during past years, and what occupations he had followed, is proper. 246Mich459, 224NW605.

889-76 [a] 96PaSuper383.

889-80 [b] **Evidence held sufficient.**–OklCr 288P367(1stcase).

889-86 [b] (6) In prosecution for assault upon a deputy sheriff, evidence of defendant's guilt was sufficient to require submission of case to jury. MoA 9SW(2d)808(1stcase). (7) Other questions. 37F(2d)287.

OFFICERS

921-11 166Ga781, 144SE287.

922-19 Ill 173NE339.

923-28 [b] (7) Agency and trust. 197 NC404, 149SE375.

923-30 111Conn667, 151A268; 36OhA 24, 172NE680. [b] (6) Other definitions. NM 290P786.

924-42 See also 48Philippine650.

924-44 [b] (9) Under statute, officer is one who has qualified by giving bond and taking oath of office. Ill 173NE339.

925-50 91CalA1, 266P1029.

925-51 [a] (58) Troop captain of state highway patrol. 94PaSuper499. [b] (31) Members of executive committee of hospital medical staff. 166Ga781, 144 SE287. (32) Supervising engineer of sewer district. 231AppDiv739, 245NYS 557. (33) Nominees of political party. 96Fla512, 118S306. (34) Water master or manager of common irrigation lateral. 46 Ida505, 269P91. (35) Attorney acting in place of disqualified state's attorney. 252 IllA61.

926-52 94PaSuper499.

927-68 NM 290P786.

927-80 Ill 173NE339.

928-6 CalA 288P858; 97Fla750, 122S 239.

930-15 [a] (2) NJ 150A385.

932-39 Fla 129S861; NJ 150A385.

932-40 33PortoRico 703.

933-45 But see OhA 173NE309.

933-46½-New. There is no constitutional or inherent right to hold office, but it is a political privilege, and conditions of office holding must be complied with. 200 Ind515, 165NE241.

933-52 168Ga40, 146SE767(2dcase); Ind 166NE270.

933-54½-New. If conditions of office holding are prescribed by the constitution, they cannot be abridged, and, if not so prescribed, the legislature may prescribe them. 200 Ind515, 165NE241.

933-57 137Misc78, 242NYS635.

934-60 168Ga702, 148SE534.

934-71 137Misc78, 242NYS635; 157 Tenn269, 8SW(2d)364.

936-94 [a] **Removal for cause, except by impeachment, does not necessarily brand officer as ineligible** to hold same or other office. 169La394, 125S283.

936-96 220Ala309, 125S51.

936-3 59ND154, 228NW830.

937-5 [d] **Constitutional provisions held exclusive** as to qualifications of elective officers and their removal. 200 Wis518, 228NW895, 69ALR348(2dcase).

937-12 Tex 28SW(2d)526. [a] **Statute releasing persons previously impeached** and removing disqualification to hold office is unconstitutional. Tex 28SW (2d)526.

937-12½-New. Misconduct causing forfeiture of office does not prevent reëlection of an offender unless expressed terms of the statute make the offender ineligible for office. Ariz 281P947.

937-13 230Ky213, 18SW(2d)988. But see 13PaDist&Co 395.

937-16 Wash 291P321.

938-19 See also 11PaDist&Co 223; 13 PaDist&Co 560. [a] **Disqualification for nonpayment of poll tax** cannot be removed by payment subsequent to election. 220Ala309, 125S51.

938-20 Wis 228NW593. See also 167 Ga57, 144SE900.

938-39 [c] **Facts constituting residence.**–8LaA232.

939-44 [a] **Statutes held not violative of provision.**–161Tenn293, 30SW(2d) 601 (establishing board of barber examiners).

939-52 Can [1928] 4DomLR98.

939-57 See also Can [1928] 4DomLR98.

940-75 254 IllA331 (under statute); 117Tex547, 8SW(2d)666.

941-84 [a] (5) County commissioner. 180Minn246, 230NW637. [d] **Provision merely creates exception to general rule** that every person entitled to vote is eligible to elective office and does not conflict with constitutional provision to that effect. 180Minn246, 230NW637.

941-86 143 Okl 281, 289P254.

941-96 TexCivA 25SW(2d)651(2dcase) (applicable to water improvement district).

941-1½-New. Employee, discharged under nepotism statute cannot recover wages for remainder of year. TexCivA 25SW(2d)651(2dcase).

943-17 159Tenn546, 21SW(2d)4 (given ordinary and inherent meaning). [a] (9) Membership in judicial council is not incompatible with duties of circuit judges and judges of court of appeals. 226Ky501, 11SW(2d)133. (10) Attorney for county sheriff is not "public officer." 220Ala38, 124S213. (11) Coroner cannot be commissioned as deputy sheriff. GaA 155SE64. [b] **There is no incompatibility of office** precluding same person from holding more than one state office, except as prescribed by constitution, or laws enacted pursuant thereto, or in cases of incompatibility of duties and different positions. 226Ky501, 11 SW(2d)133.

943-18 [b] **Subsequent signing of written resignation** does not estop tax assessor from proving prior abandonment of office. 168Ga868, 149SE207.

943-22 [c] **Statute dividing state into administrative judicial districts** and authorizing designation of district judge as presiding judge thereof does not create "office" within constitutional provision. TexCivA 25SW(2d)259.

944-31 [a] (2) 9PaDist&Co 815. (3)

Members of departmental administrative boards are civil officers. 10PaDist&Co 36.

944-32 [b] **High school instructor** may draw salary as such although member of legislature. CalA 288P858.

944-39½-New. A statute creating a road commission and appointing a member of the legislature to serve thereon is a violation of a constitutional provision. 159Tenn546, 21SW(2d)4.

944-44 [a] **Violation is sufficient** if officer in one department performs duties and exercises power belonging to another department. 169La1046, 126S548.

945-48 [a] 132 Or185, 284P825.

945-51 [d] **City assessor and tax collector** is not holding two offices of emolument. TexCommnA 26SW(2d)196.

946-56 132 Or185, 284P825. [c] **Judge of one court serving as acting judge of another court.**–132 Or185, 284P825 (appointment of circuit judge to sit temporarily as member of supreme court).

946-56½-New. , nor prevent assignment to one of duties of another where there is no inconsistency between two classes of duties. 132 Or185, 284P825.

946-62 See also TexCivA 17SW(2d)130 (2dcase).

947-66 34Ariz189, 269P73.

947-69 34Ariz189, 269P73.

948-74 [a] **Prohibition restricted to designated officers** does not affect officers not within prohibition. 169La394, 125S283.

948-76 But see 168Ga868, 149SE207.

948-77½-New. A statute making tax assessors ineligible to any other office for one year after expiration of the term is not unconstitutional. 168Ga868, 149SE207.

949-3 12PaDist&Co 680 (forgery held within constitution); 13PaDist&Co 560. [a] **Suspension of sentence on payment of costs after entry of plea of nolo contendere** to charge of forgery is not conviction within constitution. 12PaDist&Co 680.

949-7 [a] **Restoration of citizenship** after serving sentence does not remove disqualification. Cal 290P884.

951-40 158Tenn34, 12SW(2d)532.

952-49 235Ky692, 32SW(2d)26.

953-72 235Ky692, 32SW(2d)26.

953-74 235Ky692, 32SW(2d)26.

954-87 235Ky692, 32SW(2d)26.

955-19 121 Oh511, 169NE599 (such provisions held not unconstitutional).

958-60 [a] **As between amendments to original act** later amendment prevails. NJ 143A822(2dcase).

958-61 Mass 169NE502.

960-96½-New. Officer accepts office on basis of law at time of election or appointment. OhA 173NE309.

963-66 [a] 228Ky684, 15SW(2d)473.

964-68 180Ark746, 22SW(2d)393.

965-92 TexCivA 17SW(2d)81.

965-1 169Ga406, 150SE641.

966-5 [a] **Appointing power is clothed with power to fix beginning of term of first appointee** even in absence of legislation fixing beginning of term, and thereafter all subsequent terms are to conform to beginning of term of first appointee. 167Ga594, 146SE467.

966-16½-New. Voluntary or involuntary discontinuance of service. Elective state officers who may not succeed themselves discontinue their services not voluntarily when term expires. 12PaDist&Co 205.

966-16¼-New. When state elective officers who may succeed themselves run again and are defeated their discontinuance from service is not voluntary but if they fail to run again discontinuance is voluntary. 12PaDist&Co 205.

966-16¼-New. When appointive state officers are not reappointed their discontinuance from service is not voluntary. 12PaDist&Co 205.

966-16⅓-New. When appointive state officers resign their discontinuance from service is voluntary. 12PaDist&Co 205.

966-16⅓-New. Officer remains such until removed or office becomes vacant by operation of law. OhA 173NE309.

969-63 169Ga406, 150SE641.

969-69½-New. A constitutional provision, that officers shall hold until their successors are elected and qualified, requires that time held over shall immediately follow expiration of term of office, and that there shall be no holding or occupancy of office by another between expiration of term and time incumbent holds over. 200 Ind241, 162NE670, 200 Ind241, 163NE21(dis op).

970-83 11PaDist&Co 319, 321 [citCyc].

971-93 Ill 173NE339. See also 144 Okl 288, 291P504.

971-6 See also Ind 169NE521.

972-27 See also 11PaDist&Co 319, 321 [citCyc].

973-32 34Ariz189, 269P73 (failing to attend meetings or sign awards for three months).

974-69½-New. An appointment to fill vacancy in an office is void, when there is no vacancy. Ind 169NE521.

975-71 But see 169La481, 125S567.

975-81 [a] **Only vacancies in elective offices** can be filled by governor. 234Ky473, 28SW(2d)745, 70ALR1077. [b] **Vacancies in constitutional offices** may only be filled by governor deriving power from Constitution. 234Ky473, 28SW(2d)745, 70ALR1077.

976-99 159Tenn693, 21SW(2d)623 (legislature may declare manner of filling vacancies not otherwise directed or provided by constitution).

976-4 Ind 169NE521.

976-4½-New. One elected to fill vacancy must qualify within reasonable time after he has received certificate of election. 233Ky549, 26SW(2d)503.

976-5 Del 152A45.

976-8 132 Okl 137, 270P6.

977-16 11PaDist&Co 755.

977-25 11PaDist&Co 439.

978-39 137Misc748, 244NYS445.

978-40 35F(2d)301; 227Ky611, 13SW(2d)758; 137Misc748, 244NYS445.

979-42 137Misc748, 244NYS445.

979-61 [a] **Statute must be complied with.**–137Misc748, 244NYS445.

979-67 35F(2d)301.

981-98 [a] **Signing written resignation** does not estop officer from proving abandonment prior to resignation date. 168Ga868, 149SE207.

981-99 49Philippine371.

982-33½-New. A statute authorizing the attorney-general to institute proceedings for suspension of certain officers for willful failure or neglect to perform any duties enjoined upon them by law only authorizes such proceedings for acts of omission and not for acts of commission. 135 Okl 278, 276P468.

983-47 252 IllA10.

984-56 27 OhNPNS185.

984-73 [a] **In Pennsylvania.**–13PaDist&Co 665 (constable serving as railroad policeman).

985-75½-New. Duties imposed on governor by statute for removal of enumerated officials are not mandatory. 179 Minn337, 229NW313.

985-76 4LaA580; 12PaDist&Co 14.

986-99 [d] **Officials acting in good faith** who violate statute through ignorance, error, or oversight cannot be removed from office. 159Tenn442, 19SW(2d)254.

986-1 138 Okl 241, 280P833; 139 Okl 52, 281P222; 297Pa364, 147A67.

987-18 135 Okl 278, 276P468.

987-23½-New. A statute, authorizing the attorney-general to institute actions against certain state, county, city, and municipal officers, upon direction of the governor, to remove them from office for willful failure or neglect to perform any duties enjoined upon them by law, only authorizes such proceedings for acts of omission, and not for acts of commission. 135 Okl 278, 276P468.

988-24 [b] **Compliance with duty prior to petition for removal.**–11PaDist&Co 285.

988-30 See also 29Hawaii21.

989-53 Utah 268P783.

990-65½-New. In Philippines officers of constabulary cannot be removed without hearing. 51Philippine568.

993-10 Pa 152A33.

993-11½-New. A constitutional provision for debarring or removing an officer is exclusive. 168La648, 123S111.

993-19½-New. A statute providing for the removal of officers by the governor held intended to create the governor a judicial tribunal. 152SC365, 150SE46, 66ALR574.

993-20 57ND511, 222NW652.

993-24 51Philippine568.

993-25½-New. Where probable cause exists for believing an officer guilty of misconduct, public interest may require proper presentation of charges, although at hearing officer may establish his innocence. 251NY156, 167NE204.

993-26 Mont 285P928.

994-33 But see 51Philippine568.

994-34 51Philippine568.

994-56 250 IllA13; 51Philippine568.

995-66 57ND511, 222NW652.

996-73½-New. The legislature in providing a method for the removal of an officer may create the governor a judicial tribunal and provide for an appeal from his decision. 152SC365, 150SE46, 66ALR574.

997-94 See also 159Tenn442, 19SW(2d)254.

998-8 See also 294Pa555, 144A748.

998-25 98CalA367, 277P194.

999-27 98CalA367, 277P194.

999-30 98CalA367, 277P194.

1001-69 98CalA367, 277P194.

1002-96½-New. Provision that elective officers may be removed by governor does not exclude removal by impeachment. 299Pa276, 149A176.

1003-19 Tex 28SW(2d)526.

1003-28 91CalA521, 267P367; 103CalA 113, 284P254; 52Nev216, 285P511; ND 232NW303.

1003-32½-New. A statute relating to recall elections must be construed in harmony with the reserved power of the people to recall their officers rather than with the requirement of charges to remove an officer. 246Mich312, 224NW384.

1003-40 [b] **Petition held sufficient.**–246Mich312, 224NW384. [c] **Inclusion of insufficient reasons** in petition would not avoid it if one or more were properly stated. 246Mich312, 224NW384.

1003-40½-New. A petition must state as reasons for demand, facts which, if true, would show nonfeasance, misfeasance, or malfeasance in office. 246Mich 312, 224NW384.

1004-43½-New. Statute requiring attachment to petition of affidavit as to genuineness of signatures and qualification of signers held valid. ND 232NW 303.

1006-89½-New. As soon as a majority of the votes are cast for a candidate at an election held in pursuance to law, he becomes legally and fully entitled to office, and his title is then complete, and no subsequent act affects his right thereto. 331 Ill 296, 162NE835.

1006-90 97Fla749, 122S239; 266Mass 18, 164NE654; 294Pa555, 144A748; 161 Tenn248, 30SW(2d)255 (de facto officer).

1006-91 266Mass18, 164NE654; 33PortoRico 720.

1007-99 94CalA277, 271P120; 170Ga 545, 153SE364; 166La743, 117S814; LaA 124S684; 158Tenn133, 11SW(2d)688; TexCivA 17SW(2d)81; TexCivA 23SW (2d)535 (aid plaintiff in contest for office). But see 57ND720, 223NW936.

1008-1 57ND720, 223NW936.

1008-3 235Ky692, 32SW(2d)26; MoA 28SW(2d)683. But see Ind 169NE332; LaA 124S684. [b] (2) One who has been declared elected to office, and has received certificate of election, and qualified, will not be restrained from entering upon discharge of his duties at suit of one holding office for definite term and until his successor is elected and qualified. 57ND708, 223NW931.

1009-5 LaA 124S684.

1009-6 57ND708, 223NW931.

1009-7 57ND708, 223NW931.

1009-8½-New. A court of equity will not disturb one in the possession of an office, where his title is such as would have warranted the issuance of a writ of mandamus to have secured possession. 57ND708, 223NW931.

1009-8½-New. A court of equity will not interfere by injunction to determine questions concerning the appointment or election of public officials or their title to office. 57ND708, 223NW931.

1011-48 But see 86Colo 240, 280P884.

1011-55 [a] **Neither secretary of state**

nor county canvassing board are necessary parties. TexCivA 23SW(2d)535.
1011–55½–New. Officer must be given opportunity to defend. 137Misc900, 245 NYS621.
1012–83½–New. An officer in possession must be a party to the suit. 6LaA485.
1014–25 161Tenn557, 30SW(2d)274. [a] **Officer whose election is contested** need not qualify till title is determined. 161Tenn557, 30SW(2d)274. [b] **Wrongfully excluded de jure officer drawing income elsewhere** is no defense to claim for salary. 161Tenn557, 30SW(2d)274.
1015–27 89CalA47, 264P529; 98Fla103, 122S222; Ill 172NE720; 95PaSuper423; TexCommnA 26SW(2d)196. [b] **Construction of statutes.–Wash** 291P1111.
1015–29 95PaSuper423; 95PaSuper561.
1015–30 But see NJ 150A385.
1016–31 [a] **That officer received no compensation for services rendered in another office** does not entitle him to compensation attached to office vacated by him by acceptance of such other office and failure to discharge duties of first office. 34Ariz189, 269P73.
1016–32 221MoA784, 288SW85.
1017–53 Man [1930] 3DomLR465.
1017–54 84Mont61, 274P148.
1017–58 [a] **Where not entitled to more than one office,** officer cannot collect compensation for more than one. Fla 129S861.
1018–67 [a] **Unearned fees are not property.** Fla 129S861.
1018–69 But see 13PaDist&Co 139.
1018–82 12PaDist&Co 807 (eligibility for membership in state fund).
1018–84½–New. In Canada an order of retirement not specifying any particular office retires an incumbent from all offices held by him. Can [1929] 3DomLR 138.
1018–86 226Ky501, 11SW(2d)133.
1019–87 207Cal 732, 279P992(3dcase); 152Miss578, 120S572. [b] But see 48 Ida632, 284P259. [c] **Separate allowance of salaries for specific services.**–236 Ky63, 32SW(2d)554.
1019–90 [b] **Compensation should be based** in proportion to duties and services required. 9PaDist&Co 689.
1019–91½–New. When an officer accepts office with knowledge of its duties and amount of compensation, it must be assumed that he assented to perform all services enjoined by law for such compensation. 152Miss539, 120S197.
1019–92 48 Ida632, 284P259 (legislature empowered to require reasonable fee in probate matters).
1019–94 NJSup 146A649(1stcase) (public officer cannot receive extra money for extra work).
1019–98 318Mo 698, 300SW1066.
1020–4 But see 161Tenn557, 30SW(2d) 274.
1020–8 96PaSuper395.
1020–10 6LaA465.
1021–22 Mo 298SW(2d)716 (performing duties incident to offices).
1021–24 218Ala274, 118S409; 227Ky 591, 13SW(2d)761; 228Ky127, 14SW (2d)404; 231Ky514, 21SW(2d)838; 157 Tenn222, 7SW(2d)815, 817 [quotCyc], 60ALR408.
1022–31 [a] 218Ala71, 117S626.
1023–42 235Ky692, 32SW(2d)26. [b] 228Ky127, 14SW(2d)404; 10PaDist&Co 706.
1023–44 [a] (10) 220Ala458, 125S906. [c] (5) County surveyor. 93CalA56, 268 P1068.
1024–52 220Ala458, 125S906.
1024–55 Mo 298SW(2d)716.
1025–61 **Erratum.**–Word "property" should be "population." 318Mo 698, 300 SW1066.
1025–72 228Ky127, 14SW(2d)404. But see 226Ky501, 11SW(2d)133.
1026–74 9PaDist&Co 374. [b] **Statute authorizing fee to county treasurer** for each applicant for motor vehicle operator's license is not void as increasing salary. Nebr 231NW701. [c] **Duties of county treasurer pertaining to licensing operators of motor vehicles are foreign to regular duties.** Nebr 231NW 701.
1027–88 93CalA56, 268P1068.
1027–93 204Cal 31, 266P522; 93CalA 56, 268P1068.
1027–94 157Tenn222, 7SW(2d)815, 817 [quotCyc], 60ALR408.
1028–15½–New. Public officers may collect fees only when expressly authorized by statute. Wash 291P1111.
1028–24 107WVa375, 148SE324.
1028–27 152Miss534, 120S453.
1029–28 160Tenn109, 23SW(2d)239.
1029–31 167Ga594, 146SE467.
1029–32½–New. Judgment that one of two claimants is de facto and requiring payment of services as such bars a subsequent claim by an unsuccessful contestant. 107WVa375, 148SE324.
1030–48 34PortoRico 314. [c] **Legal representative of deceased de jure claimant** may recover salary from de facto officer. 86Colo 240, 280P884.
1031–62 160Tenn109, 23SW(2d)239.
1031–71 137 Okl 95, 278P311. [a] **Official may take property** if purpose of transfer is under his duties. 227AppDiv 219, 237NYS539. [b] **Officer, whose duties appertain exclusively to one department,** cannot exercise power appertaining exclusively to another department. 234Ky473, 28SW(2d)745, 70ALR 1077.
1032–76 333 Ill 429, 164NE832.
1032–77 296Pa120, 145A794; 150Wash 20, 272P22.
1032–78 58ND841, 227NW564. [a] **Contracts of employment.**–58ND841, 227 NW564.
1032–79 58ND841, 227NW564.
1032–82 35Ariz403, 279P257.
1033–94 99Fla206, 126S283 (where official act is unjust, unreasonable, or arbitrarily made); 137 Okl 95, 278P311. [a] **Acts of public officials not based on reason** cannot escape condemnation as being capricious or arbitrary. 229App Div607, 242NYS601.
1033–97 207 Iowa639, 223NW386. [a] **Rule does not inhibit use of assistance** when act to be done requires examination or inspection of documents or physical objects, nor prohibit from arriving at conclusion of fact based on report of assistant. 265Mass41, 163NE 653.
1033–97½–New. In determining whether the power granted by legislative act to an administrative agency is of the kind which may be delegated, due regard must be paid to the nature of the subject-matter with which it deals. 196 Wis472, 220NW929.
1033–6 27F(2d)848; 179Minn337, 229 NW313 (subject to court review to limited extent); TexCivA 16SW(2d)862.
1034–11 254 IllA224.
1034–12 7LaA447.
1034–15½–New. Party must exhaust remedies before the legislative and administrative bodies before party may have judicial review of order of body exercising purely administrative and legislative functions. 37F(2d)114.
1034–15½–New. Courts have power to restore status quo ante where executive officer acts without or beyond powers given him. 37F(2d)860.
1034–17 89 IndA416, 165NE552. [a] **Only such disbursements as are expressly or impliedly authorized by statute** may be made by administrative board. 220Ala652, 127S235. [b] **Power of administrative board to make disbursements cannot be implied in absence of intention** to confer by entire scheme of legislation. 220Ala652, 127S235.
1034–21 [a] **Discretion vested in public officials in making contracts** requiring expenditure of public money must be a sound discretion exercised according to standards fixed for protection of public. 296Pa408, 146A24.
1034–21½–New. Boards, acting in a quasi-judicial capacity, may employ the yardstick devised by the use of reason and fairness, and in reviewing their determinations the courts must apply similar measures. 251NY156, 167NE204.
1034–21½–New. Decisions by boards exercising quasi-judicial functions must be based on the consideration of relevant facts, to present which to the board a fair opportunity must be given. 251 NY156, 167NE204.
1034–21¼–New. Administrative boards, when exercising quasi-judicial functions, are not required to apply technical rules of evidence. 251NY156, 167NE204.
1034–21½–New. Board first acting under power given to two different governmental boards with reference to same subject matter acquires exclusive authority. Oh 171NE241(2dcase).
1034–24 111Conn490, 150A742.
1034–25 [a] In Ontario.–62OntL162, [1928] 2DomLR805.
1034–29 Miss 130S754.
1035–41 111Conn490, 150A742.
1035–52 CalA 285P374.
1035–58 154SC55, 151SE218.
1036–65 NC 154SE393.
1036–75 89CalA47, 264P529.
1036–76 31F(2d)547; OhA 173NE201.
1036–77 196Wis472, 220NW929.
1037–87 225Ky165, 7SW(2d)1056.
1037–92 35Ariz120, 274P786; 89CalA 47, 264P529.
1038–97 85Mont435, 279P246, 66ALR 1033.
1038–2½–New. Statute held inapplicable to officer becoming surety on bond of another officer receiving no salary. 12PaDist&Co 388.
1038–4 84Mont413, 276P667.
1038–5 [a] **Actual fact, and not condition of books, as to misappropriation** by public officer, fixes liability in case books do not represent the true facts. 205Cal 320, 270P936.
1039–17 IndA 165NE332.
1039–23 178Ark361, 12SW(2d)1; SD 229NW522.
1040–38 See also 219Ala609, 123S202.
1040–42 178Ark153, 10SW(2d)513.
1042–87 84Mont413, 276P667.
1042–96 Utah 280P1065. [a] **Officer holding writ fair on its face may assume** that body with general jurisdiction had special jurisdiction to act in particular case in which writ was issued. Utah 280P1065.
1043–3½–New. Public officials are not to be charged with improvidence in wasting or giving away resources of state, unless such construction of their act is reasonably necessary. 133Misc 410, 233NYS49.
1043–3½–New. A public officer who is a member of a corporate body on which duty rests cannot be liable for neglect of that body. TexCivA 18SW(2d)936.
1043–3¼–New. A public officer is responsible for wrongful acts within the scope of authority if done in violation of his duty both to the public and a private party. 130 Or461, 280P664, 66 ALR1271.
1043–5 6LaA615, 620 [citCyc]; 153 Miss549, 120S434(2dcase); 130 Or461, 280P664, 66ALR1271.
1043–9 30Hawaii132; 155Miss115, 124 S251(2dcase); MoA 17SW(2d)986; NJ 149A766; 10PaDist&Co 613.
1043–10 179Minn263, 228NW916(2d case); 155Miss115, 124S251(2dcase).
1044–15 MoA 17SW(2d)986; 225App Div149, 231NYS477.
1045–20 7Alaska577, 579 [citCyc].
1045–21 132 Or265, 285P253.
1045–23 204Cal 535, 269P425, 61ALR 297.
1045–27 130 Or461, 280P664, 66ALR 1271.
1046–30 Iowa 232NW118, 120 [citCJ]; 129 Or302, 276P691; 199Wis523, 227 NW35 (failure to pay over money collected).
1047–46½–New. When a public officer is a promisee, suit must be brought in the name of his principal. 30F(2d)244.
1047–59½–New. An officer seeking to justify under an order of court has the burden of proving the existence of the order and compliance with statutory prerequisites. 208 Iowa392, 226NW73.
1049–96 94PaSuper499 (troop captain of state highway patrol held subject to indictment for malfeasance in office); 11PaDist&Co 773.
1049–5½–New. Essentials of the crime of neglect of duties by public officers, under statutes, are willful neglect in the discharge of official duty, and injury to the public. 196NC771, 147SE 305.
1051–48 [c] **Indictments insufficient** to charge neglect of duty by superintendent of state hospital. 196NC771, 147 SE305.
1051–55 196NC771, 147SE305.
1053–86 161Tenn248, 30SW(2d)255.
1053–87 Ind 169NE521.
1053–90 161Tenn248, 30SW(2d)255.

1054-94 161Tenn248, 30SW(2d)255.
1054-6 339 Ill 141, 171NE167.
1054-7 50Philippine259; TexCommnA 10SW(2d)984.
1055-17 TexCivA 31SW(2d)659.
1055-21½-New. Incumbent officer pending injunction proceeding to protect possession against interference of adverse claimant is de facto officer. MoA 28SW(2d)683.
1056-40 TexCivA 31SW(2d)659.
1057-49 Ind 169NE521.
1057-50 83NH339, 143A704.
1057-51 But see 29Hawaii392. [c] **Where statute creating office was unconstitutional,** acts of one appointed thereunder may be enjoined. 158Tenn34, 12 SW(2d)532.
1058-58 295Pa291, 145A278.
1059-65 33PortoRico 720.
1059-67 8LaA686.
1059-70 95PaSuper561.
1060-72 Utah 290P358(2dcase). [a] **De facto officer, performing duties of office,** is entitled to salary as between himself and county, though another was wrongfully excluded from office. 152 Miss534, 120S453.
1060-75 35F(2d)301; 294Pa555, 144A 748. But see 161Tenn248, 30SW(2d) 255.
1061-76 294Pa555, 144A748; 149SC 234, 147SE346.
1061-77 TexCivA 31SW(2d)659.
1061-78 294Pa555, 144A748.
1062-82 249 IllA399.
1063-97 152Miss539, 120S197.
1063-8½-New. In the absence of a contrary showing, it will be presumed that the authority of a deputy appointed by an officer is commensurate with the authority of the officer. 318Mo 813, 18W (2d)143.
1064-30 153Va362, 149SE531.
1065-61 54SD547, 223NW948.
1066-74½-New. Statute limiting liability to penal sum fixed in bond is valid. 231Ky346, 21SW(2d)452.
1067-81 219Ala609, 123S202.
1067-91 Ida 286P598.
1068-1 156Miss288, 125S825.
1068-4 233Ky142, 25SW(2d)51; 235 Ky429, 31SW(2d)709.
1069-15 NC 154SE828.
1070-24 But see 219Ala609, 123S202.
1070-35 58ND524, 226NW624, 64ALR 929.
1072-65 197NC50, 147SE695.
1078-85 108WVa658, 152SE527.
1079-15 [a] **Necessary allegations in action on bond of custodian of public money stated.**-SD 229NW522. [b] **Bill held sufficient.**-219Ala609, 123S202.
1081-91 SD 229NW522.
1082-92 SD 229NW522.
1082-97 153Va362, 149SE531.
1082-99 153Va362, 149SE531.

ON or UPON

1097-81 231Ky244, 21SW(2d)291.
1098-13 [c] 28 OhA248, 162NE647.

OPERATE

1111-95 142 Okl 208, 286P7 (to put machine to actual use in business for which it was constructed and intended).

OR

1125-34 7Alaska655.

ORCHARD

1130-76 93CalA609, 269P975.

OTHERWISE

1152-17 10PaDist&Co 749.

OXIDE

1165-99 [c] **Peroxide** is oxid having larger proportion of oxygen than any other oxid of same series. 40F(2d) 1006. [d] **Dioxide** is oxid containing two atoms of oxygen to molecule. 40F (2d)1006. [e] **Protoxid** is oxid containing only one atom of oxygen. 40F(2d) 1006.

PACKAGE

1167-43 12CustA327.

PACTO

1168-82 See also Modern Civil Law § 155.

PANDER

1172-98 Mich 224NW402 (panderer).
1172-99 Mich 224NW402 (panderer).

PAPER

1174-71 Profits which employee is to share see Master and Servant § 243 text and notes 72-77.
1174-72 [a] **Hoped for profits;** future profits. 45Misc484, 92NYS70.

PARDONS

1181-1 232Ky312, 23SW(2d)277. [b] (6) 295Pa264, 145A89.
1183-10 137Misc466, 244NYS431.
1183-17 [d] **Condition that convict shall be delivered and report to authorities of another state** does not divest instrument of character as parole. OklCr 287P1057.
1184-23 232Ky312, 23SW(2d)277 (sovereign); 137Misc466, 244NYS431.
1185-35 206 Iowa414, 220NW313.
1185-37½-New. A governor's power to release a convict under the constitution cannot be delegated. 101Vt510, 144A 678.
1186-56 111TexCr124, 12SW(2d)206, 63ALR978.
1187-87 [a] **In Indiana.**-200 Ind716, 164NE408, 63ALR218.
1188-97½-New. The executive department on proper showing may pardon, parole, commute, or extend such executive clemency as authorized by law and justified by the facts in the case. 120 Oh44, 165NE573.
1188-99 [a] **Treason and impeachment are specially excepted** by constitution from general pardoning power of chief executive. Tex 28SW(2d)526.
1188-11 Iowa 232NW798.
1190-38 [a] TexCr 29SW(2d)357.
1191-55 137Misc466, 244NYS431.
1192-75 152SC410, 150SE54, 65ALR 1459.
1192-83 295Pa264, 145A89; 113TexCr 194, 20SW(2d)416.
1194-97 TexCr 29SW(2d)357.
1196-23 But see 232Ky312, 23SW(2d) 277.
1197-50 [c] **Governor's order of commutation will not alone effect release of defendant** but is subject to action of board of parole in some jurisdictions. 250NY239, 165NE277.
1198-54 134Misc46, 234NYS489.
1198-61 [a] **Commutation is wholly within discretion of governor** on recommendation of prison board as to amount, and he may increase or decrease it as recommended. 225AppDiv193, 232NYS 459.
1198-68 137Misc466, 244NYS431.
1199-73 322Mo 859. Contra 320Mo 349, 7SW(2d)1000.
1199-90 [b] **Particular provisions construed.**-322Mo 859.
1199-91 [c] **Statutes merely advisory.** -232NYS459.
1199-93 [c] **Imprisonment after revocation is illegal** where neither by statute nor express stipulations of commutation commuting power is authorized to determine whether conditions have been violated. 320Mo 349, 7SW(2d) 1000. [d] **Where prisoner voluntarily accepts conditional commutation sentence** and agrees to comply therewith, conditions become binding upon him. 33F(2d)294.
1200-94 320Mo 349, 7SW(2d)1000; 322 Mo 859; 225AppDiv193, 232NYS459. [a] **Acceptance by convict must be conditions** on which commutation was granted. 320Mo 349, 7SW(2d)1000. [b] **Statute subjecting person to jurisdiction of parole board** held applicable to one not so subject when convicted. 227AppDiv464, 238NYS216.
1200-94½-New. Under constitutional provisions a governor may utilize the parole board or any other agency to aid him in enforcing terms imposed on a prisoner as a condition for his liberation. 225AppDiv193, 232NYS459.
1200-99 44F(2d)49; 110TexCr326, 7 SW(2d)589, 60ALR1403.
1200-2 44F(2d)49; 110TexCr326, 7SW (2d)589, 60ALR1403.
1201-7½-New. A condition that a prisoner shall be returned after completion of sentence imposed by the federal court is invalid. OklCr 269P782(2dcase).
1201-9 44F(2d)49.
1201-14 110TexCr589, 7SW(2d)589, 60 ALR1403.
1202-22½-New. Release from condition. The governor alone has power to release a convict from a condition imposed in granting a conditional pardon. 101Vt510, 144A678.
1202-23 110TexCr326, 7SW(2d)589, 60 ALR1403. [b] **Conditional commutation of sentence is not affected** by defendant's refusal to accept it. 137Misc 466, 244NYS431.
1202-24 33F(2d)294; Iowa 232NW 798; 110TexCr326, 7SW(2d)589, 60ALR 1403.
1202-25 110TexCr326, 7SW(2d)589, 60 ALR1403.
1202-26 110TexCr326, 7SW(2d)589, 60 ALR1403.
1202-27 110TexCr326, 7SW(2d)589, 60 ALR1403.
1202-29½-New. Notation of the date of expiration of the parol period at the bottom of the page of a conditional pardon is construed only as termination on the assumption that the terms had been complied with. 101Vt510, 144A678.
1203-45 110TexCr326, 7SW(2d)589, 60 ALR1403.
1204-51½-New. That the term of office of governor issuing an executive warrant of arrest had expired at the time the prisoner was apprehended did not affect the validity of the warrant. 101Vt510, 144A678.
1204-51½-New. An executive warrant does not become invalid by mere lapse of time between the date of issuance and the date of service which was not, under the circumstances, unreasonable. 101Vt510, 144A678.
1205-70 12PaDist&Co 75.
1205-83½-New. board of trustees of state institution, 12PaDist&Co 744.
1206-91 [b] **Statute not applicable to inmates of state institutions.**-12PaDist &Co 744. [c] **Person reaching penitentiary** is subject to power of parole board without complying with requirements of district judge as conditions to probation. 43F(2d)329.
1206-92 336 Ill 353, 168NE264.
1208-94 91PaSuper90. [a] **Statute providing for parole of prisoner sentenced to penitentiary** within three months of expiration of minimum term does not apply to convict sentenced to county prison for offense for which he might have been sentenced to penitentiary. 91PaSuper90.
1206-3 44F(2d)166; 231Ky750, 22SW (2d)126; 250NY239, 165NE277.
1207-4 231Ky750, 22SW(2d)126.
1207-7 But see NJ 151A294.
1207-9 [a] (2) Other instances. NJ 151A294.
1207-14½-New. Fact that parole is void does not affect original judgment. 250 Mich210, 229NW623.
1208-28 CalA 288P1109.
1208-30 231Ky750, 22SW(2d)126 (revoking order must be approved by governor).
1208-44 [a] **Revoking order** is only authority for warden to receive or reimprison. 231Ky750, 22SW(2d)126 (order held ineffective).
1208-46 101CalA251, 281P651.
1209-51½-New. Revocation revokes prisoner's right to be outside prison requiring prisoner to surrender himself or have himself submitted to custody within prison. CalA 292P142.
1209-54 40 OklCr434, 269P786.
1210-77 40 OklCr434, 269P786.

PARENT AND CHILD

1220-3 See also 222MoA553, 292SW85.
1220-7½-New. Where recognized relationship of parent and child exists, one denying such relationship has the burden to show by irrefragible proof that it does not exist. 135Misc486, 238 NYS723.
1221-38 157Md264, 145A614.
1222-59 110Conn463, 148A379; 169La 13, 124S129 (state has interest in child which goes beyond mere right and authority of father).

1223–61 Fla 129S822.
1223–69 218Ala330, 118S575; 151Miss 398, 118S184, 60ALR1325; 132 Okl 116, 270P569; 91PaSuper220.
1223–70 101CalA110, 281P435; 110 Conn463, 148A379.
1224–71 91PaSuper213.
1224–72 89 IndA653, 167NE377; 91Pa Super213.
1224–73 132 Okl 116, 270P569.
1224–74 132 Okl 116, 270P569; 91Pa Super220. [b] **Failure to pay for necessaries of child** does not necessarily deprive parent of right to custody. Sask [1928] 1DomLR743.
1224–74½–New. Statutory enumeration of instances where parent's authority ceases excludes others. Mont 292P582.
1224–74¾–New. Parent's right of custody continues unless one of statutory methods of depriving him of custody has been pursued. Mont 292P582.
1224–77 93CalA404, 269P689; 228Ky 286, 14SW(2d)1072; 179Minn472, 229 NW582 (father, where mother dead); 151Miss875, 119S802; Nebr 229NW885; 96PaSuper315; Utah 289P103.
1225–78 179Minn472, 229NW582 (award to maternal grandmother who had had care of child since early infancy).
1225–85 181Ark284, 25SW(2d)436; 48 Ida803, 285P1021; 137Misc347, 242NYS 108.
1225–86 91PaSuper213; 91PaSuper 220.
1226–87 13PaDist&Co 113.
1226–90 150SC117, 147SE749; TexCivA 23SW(2d)806.
1226–91 11PaDist&Co 712; Sask [1930] 2DomLR645. [d] **Where parents separate,** question of who was at fault becomes pertinent inquiry. 221Ala363, 129S1.
1227–93 221Ala363, 129S1; 150SC117, 147SE749; TexCivA 26SW(2d)664(2d case).
1228–2 181Ark284, 25SW(2d)436; 169 Ga66, 149SE571; 246 IllA394; 208 Iowa 908, 225NW952; 247Mich333, 225NW 610; MoA 292SW447; MoA 24SW(2d) 1048 (grandparents); 117Nebr796, 222 NW958; 135Misc320, 239NYS185; Or 289P1062; 151Wash328, 275P710. [c] **Presumption** is that child's best interests are subserved when in custody of parent. 23AlaA398, 126S176.
1230–4 151Wash328, 275P710.
1230–6 48 Ida803, 285P1021.
1230–8 48 Ida803, 285P1021.
1230–12 94CalA589, 271P523; 48 Ida 803, 285P1021; 96PaSuper426; 106 WVa383, 145SE738.
1231–16 96PaSuper315.
1231–19 151Miss875, 119S802; Mont 290P250.
1231–21 23AlaA398, 126S176; 135Misc 320, 239NYS185.
1231–26½–New. A father who temporarily transferred his child to his sister on his wife's death is entitled to have the child returned to his custody on his remarriage, in proceedings to adjudge the child dependent, where the father is law-abiding and decent although poor. 130 Or206, 278P1078.
1231–32 Can [1928] 4DomLR955.
1232–35 128Kan71, 276P49.
1232–39 202Cal 778, 262P742; 231Ky 179, 218SW(2d)247.
1233–41 [a] (3) **Promise** by one parent that other may have custody of child is sufficient consideration to support agreement of other parent. 202Cal 778, 262P 742.
1233–47 107WVa450, 148SE488.
1233–49 117Nebr796, 222NW958.
1233–49½–New. Natural parents married after the birth of a child who had been given to defendant immediately after birth to deceive the husband into believing it was defendant's child may recover custody of the child. 206 Iowa 998, 221NW552.
1235–65 218Ala330, 118S575; 93CalA 404, 269P689; 89PaSuper301. [a] **In absence of evidence that either parent is unfit to have custody,** separation agreements affecting custody of children will not be disturbed. BC [1929] 4Dom LR802.
1235–68 218Ala330, 118S575; 220Ala 376, 125S225; 221Ala363, 129S1; 181 Ark284, 25SW(2d)436; Fla 129S822; 246 IllA394; 230Ky296, 19SW(2d)959; 169La13, 124S129; 170La454, 128S275; 157Md264, 145A614; Mont 290P250; 83 NH576, 145A782(2dcase); 103NJEq355, 143A319; 34NM587, 286P828; 135Misc 320, 239NYS185; 135Misc668, 239NYS 301; 137Misc347, 242NYS108; 132 Okl 116, 270P569; Okl 292P1111; 298Pa 416, 148A524; 91PaSuper213; 91Pa Super220; 94PaSuper59; 96PaSuper 315; 96PaSuper426; 97PaSuper442; TexCivA 11SW(2d)185; TexCivA 14 SW(2d)915; TexCivA 15SW(2d)120; Utah 289P103; 106WVa383, 145SE738; 107WVa450, 148SE488; WVa 155SE 652; BC [1930] 2DomLR212; Sask [1930] 2DomLR645. But see 102CalA 445, 283P1112. [d] 178Ark583, 12SW (2d)879. [j] **If home life of child becomes undesirable,** subsequent application for custody may be made under changed conditions. Utah 289P103.
1237–69 157Md264, 145A614; 150SC 117, 147SE749.
1237–70 200 Ind448, 163NE269; 169 La13, 124S129 (it is duty of court, where welfare of child will be endangered by restoration, to refuse to restore custody of child to father); 103 NJEq355, 143A319; 91PaSuper213; 91 PaSuper220; 151Va136, 144SE432; BC [1930] 2DomLR212. [a] Sask [1928] 3 DomLR351.
1238–71 208 Iowa908, 225NW952.
1239–72 TexCivA 15SW(2d)120.
1239–75 132 Okl 116, 270P569. [b] **Father's natural right to preference** is not to be arbitrarily disregarded. 221 Ala363, 129S1.
1239–77 166Ga670, 144SE206; 222MoA 819, 10SW(2d)324; TexCivA 15SW(2d) 120. [b] (2) **Under statute requiring** that welfare of child be guide, parents need only be honest and respectable with disposition and ability to maintain and educate child. Mont 290P250.
1240–78 TexCivA 21SW(2d)365.
1240–80 128Kan787, 280P761 (mother dead and child having been reared by others).
1240–81½–New. In determining the custody of a child, the breaking up of established relationships of a type beneficial to the child is to be considered. 230Ky296, 19SW(2d)959.
1240–85 [a] **Where life of child may be affected,** health may be considered. 102 CalA445, 283P112.
1240–86 220Ala376, 125S225; 229Ky 473, 17SW(2d)417; Okl 292P1111; 94 PaSuper86; Man [1929] 1DomLR944; Sask [1930] 2DomLR645. [d] **It is presumed** that interests of child of tender years are best served by committing it to its mother's care. 97PaSuper442.
1241–94 230Ky296, 19SW(2d)959; NJ Ch 148A10; 132 Okl 116, 270P569; Tex CivA 22SW(2d)528; Utah 289P103.
1241–1 135Misc320, 239NYS185.
1242–4 Utah 289P103.
1242–5 135Misc668, 239NYS301.
1242–6 Utah 289P103.
1242–8 218Ala330, 118S575.
1242–9 Utah 289P103.
1242–11 157Md264, 145A614.
1243–15 135Misc668, 239NYS301; 94 PaSuper59; BC [1930] 2DomLR212.
1243–20 228Ky286, 14SW(2d)1072.
1243–21 169La13, 124S129. [b] **Inability to provide for children** will not defeat parent's right, where other arrangements are made for their support. 135Misc320, 239NYS185.
1244–25 178Ark583, 12SW(2d)879; TexCivA 14SW(2d)915. [b] (3) **Father turning child over to his sister** to be cared for temporarily does not abandon child. 130 Or206, 278P1078.
1244–28 228Ky286, 14SW(2d)1072; 168La834, 123S590 (immoral life); 97 PaSuper442.
1245–33 135Misc320, 239NYS185.
1245–34 170Ga824, 154SE356.
1245–38 229Ky473, 17SW(2d)417.
1245–42 102CalA445, 283P112. [i] **Father having served term in prison** is entitled to custody where he supported and cared for child. 30 OhA502, 165NE 850.
1246–49 130 Or206, 278P1078.
1247–52 Utah 289P103.
1247–52½–New. Financial ability of respective parties is not controlling but should be considered with ability to care for the child. 218Ala330, 118S575.
1247–57 135Misc320, 239NYS185.
1247–58 [b] **Court will consider religious training** of child in determining custody of child. 135Misc320, 239NYS 185.
1247–58½–New. Religious faith of child is not controlling, although to be taken into consideration. NJCh 148A 10.
1247–59 [b] **That award of custody to third person would send child into another state** is matter to be considered in determining right of custody. 151Miss 875, 119S802.
1247–62 90PaSuper400.
1248–68 Utah 289P103 (not conclusive).
1248–71 218Ala330, 118S575.
1249–78 SC 155SE271; Utah 289P103 (highest degree).
1249–78½–New. Some statutes giving a cause of action to spouses permanently separated for disposition of children independent of a divorce action create a civil action rather than a special proceeding. 34NM98, 278P202.
1249–81 [b] (5) Statutes confer **no** new authority. Cal 292P622.
1250–82 97PaSuper380.
1250–86 [e] **In Ontario.**–[1929] 2Dom LR623.
1251–92½–New. The juvenile court had no authority to pass on conflicting rights of a husband and wife as to the custody of a child. 150SC117, 147SE 749.
1251–92¾–New. In Canada courts of the province where parents are domiciled have complete jurisdiction to deprive one of them of custody and award it to the other although the child is a resident out of the province. Alta [1929] 1DomLR58.
1251–96 NJCh 148A10.
1251–9 [a] **Complaint has been held not defective.**–Utah 289P103.
1251–10½–New. Where bill to enjoin mother from removing child from father's custody does not aver that mother was at fault in separation or not proper person to have custody, a demurrer will lie. 220Ala376, 125S225.
1251–10¾–New. Parents' voluntary relinquishment of a child's custody to another does not open up for inquiry a question of the child's best interests and welfare unless an issue of the parents' disqualification is tendered by proper pleading and proof. TexCivA 19SW(2d)159.
1251–10¼–New. Petition held sufficient. 221Ala363, 129S1.
1251–13 102CalA445, 283P112; 151 Miss875, 119S802; 222MoA819, 10SW (2d)324.
1251–15 134 Okl 272, 273P345.
1252–16 102CalA445, 283P112; Nebr 229NW885.
1252–20 TexCivA 11SW(2d)185.
1253–43 [a] (1) 175Minn518, 221NW 868; 176Minn193, 222NW927. (5) 228 Ky286, 14SW(2d)1072; 134 Okl 272, 273P345; Or 275P661; 13PaDist&Co 281. (6) 91PaSuper213; 91PaSuper 220 (both cases relating to maternal grandmother); Utah 289P103. (7) 230 Ky296, 19SW(2d)959; 170La454, 128S 275; 137Misc347, 242NYS108. (13) To show that plaintiff was mother of child given to defendant to perpetrate hoax on defendant's husband. 206 Iowa998, 221NW552. (14) To show that child's welfare required that custody be given to maternal grandmother as against father. Wis 221NW868. (15) To sustain award of custody to aunt rather than father. 178Ark583, 12SW(2d)879. (16) To show that child's welfare required that its custody be given to mother as against paternal grandparents. TexCivA 11SW(2d)185. (17) To warrant inference that change in care of delicate infant would be unsafe. 102 CalA445, 283P112. (18) Other instances. 170Ga824, 154SE356; Utah 289P 103. [b] TexCivA 15SW(2d)120.
1253–44 [c] (1) 157Md264, 145A614. (2) 151Miss875, 119S802. [d] **Proof of bad reputation,** unsupported by any act of immorality or misconduct or circumstances tending to show immorality or unchastity, is insufficient to establish immoral conduct on part of mother and to deprive her of custody of her child. 151Miss875, 119S802.

1253-45 [b] **NJCh** 148A10.
1253-46 [a] 169Ga66, 149SE571; 231 Ky179, 21SW(2d)247. [b] **TexCivA** 15 SW(2d)120.
1253-50 [a] **Statutes in case of divorce and voluntary separation** may be considered. 221Ala363, 129S1.
1254-65 181Ark284, 25SW(2d)436; 102 CalA445, 283P112; 166Ga670, 144SE206.
1254-66 205Cal 674, 272P288(2dcase); 200 Ind448, 163NE269. [g] **Decree held not objectionable** in permitting father to advise with court as to selection of schools for education of children. 157 Md264, 145A614.
1255-76 298P416, 148A524.
1255-77 87Colo 41, 284P780; 298Pa 416, 148A524.
1256-88 **TexCivA** 21SW(2d)365; **Wash** 288P269.
1257-91 225Ky576, 9SW(2d)706.
1257-93 92CalA355, 268P415. [a] **Father may make himself secondarily liable.**–231Ky179, 21SW(2d)247.
1257-97 97PaSuper303.
1258-98 **Mass** 171NE815. [a] (2) Juvenile Act will not be construed to impose additional duties or obligations not already existing. 222MoA553, 292SW85.
1258-1 [d] **Common school education is a necessary** to which child is entitled at expense of parent. **IndA** 171NE386.
1258-6. 86CalA676, 261P539; **Ind** 173 NE321; 234Ky332, 28SW(2d)17; 152 Miss201, 119S299; 154Miss621, 122S769; **MoA** 15SW(2d)912; 97PaSuper166. [e] **Mother is secondarily liable** to support of minor child, and, where she renders such support, may recover from husband. 152Miss201, 119S299. [f] **Court may require support for education beyond minimum required** by law, where he is financially able. 97PaSuper303.
1259-7 **MoA** 26SW(2d)836.
1259-12 [b] **Mother's payment in full** of maintaining child at school has been held not voluntary support. **Cal** 290P8.
1259-13 334 Ill 586, 166NE33.
1259-17 93PaSuper232. [a] **Mother not relieved of legal duty** to support child by grandparents assuming obligation to support it. 93PaSuper232.
1262-63 **IndA** 171NE386. But see 94 CalA589, 271P523.
1262-64½-New. In Alberta, in absence of contract, express or implied, no action can be maintained against father for support of infant children except under Maintenance Order Act. **Alta** [1929] 4 **DomLR**797.
1262-65 86CalA676, 261P539; 41GaA 98, 152SE485(2dcase); 161Tenn217, 30 SW(2d)239, 70ALR569. [a] **Fact that another contributes to support of child** does not relieve father from obligation. 157Tenn352, 8SW(2d)484. [b] **Implied obligation** is to person furnishing necessaries. **Md** 150A720.
1262-71 **MoA** 27SW(2d)752 (that father was not acting as agent showed father's liability).
1263-79 **Iowa** 230NW326.
1264-98 **Iowa** 230NW326; 157Tenn352, 8SW(2d)484; 161Tenn217, 30SW(2d) 239, 70ALR569.
1266-27 **Man** [1929] 4**DomLR**1060 (2dcase) (maintenance by sister).
1268-48 [b] (1) 157**Tenn**352, 8**SW(2d)** 484.
1268-49 **IndA** 171NE386 (determined from particular facts and circumstances).
1268-52 251Mich553, 232NW253.
1268-53 251Mich553, 232NW253. [b] **College education** has been held not a necessary to which child is entitled at expense of parent. **IndA** 171NE386; 228 **AppDiv**298, 239NYS422.
1269-59 **Iowa** 230NW326; 228Ky286, 14SW(2d)1072; 157Tenn352, 8SW(2d) 484. But see 86CalA676, 261P539. [a] **Where alimony awarded to divorced wife to whom custody of children was awarded has been paid,** husband is liable for necessary medical services to children. **Iowa** 230NW326. [b] **Failure to notify divorced husband of emergency medical services to children in wife's custody** does not relieve husband from liability. **Iowa** 230NW326.
1269-68 244 IllA166, 169 [citCyc].
1270-85 90PaSuper68; 90PaSuper531.
1270-90 170Ga766, 154SE365. [a] **Discretion has been held not abused.**–170Ga 766, 154SE365.
1270-91 **MoA** 11SW(2d)1107.
1271-95 [d] (4) Infant child is entitled to hearing on petition notwithstanding previous order on petitions made by his mother. 92PaSuper117. [f] **In Porto Rico.**–33PortoRico 768.
1271-16 [b] **Petition held insufficient.**–168Ga86, 147SE373.
1272-20½-New. A complaint by a mother alleging that she is suing in the name and for the benefit of her daughter is not demurrable as one for her own support while an action for divorce is pending. 33**PortoRico** 768.
1272-20⅓-New. A complaint in an action in San Juan, Porto Rico alleging that defendant father is a sergeant in the United States army detailed in San Juan, Porto Rico sufficiently alleges defendant's domicile. 33**PortoRico** 768.
1272-20¼-New. Although a statute makes permanent separation of parents an indispensable element of a cause of action for disposition of children, a father adjudged in contempt for failure to pay monthly sums decreed to be paid for support of children will not be discharged because of failure of the complaint to allege such separation where the parties and the court regarded the separation as permanent. 34NM98, 278 P202.
1272-31½-New. Statement by person injuring child that he would pay for services to child does not authorize inference that he contracted for services so as to free father from liability. 41 GaA98, 152SE485(2dcase).
1272-35 [c] 170Ga766, 154SE365.
1273-46 [b] 161Tenn217, 30SW(2d) 239, 70ALR569.
1273-47 **MoA** 13SW(2d)1087.
1273-55 [b] (1) 251Mich553, 232NW 253.
1274-69½-New. Order of maintenance is improperly revoked on sole ground boy has attained age of sixteen years. 95PaSuper557.
1274-73 97PaSuper471.
1275-74½-New. A statute giving execution for money decrees in equity does not deprive a court of equity of power to enforce by attachment as for contempt its decree for monthly payments for support of children. 34NM98, 278P202.
1275-74⅓-New. Present ability to pay arrears of monthly sums allowed for support of children is essential to the validity of a contempt sentence to continue until payment. 34NM98, 278P202.
1275-74¼-New. In British Columbia municipality can compel payment of expenses incurred for neglected child pursuant to magistrate's order only as order of judge of supreme court is enforced. **BC** [1929] 4**DomLR**52.
1276-10½-New. A mother as guardian of children is not entitled to deduct from the estate of the children maintenance for them, where it is not shown that the sum furnished by the father is not adequate to maintain the family. 100**CalA**513, 280P 387(1stcase).
1277-20 138**Misc**526, 245**NYS**186 (father not accountable to child as administrator).
1278-53 41GaA98, 52SE485(2dcase).
1279-62 226Ky762, 11SW(2d)916; **Nebr** 232NW767.
1281-78½-New. An obligation to support a parent is personal only as to the nature of the obligation. 83NH374, 142 A702.
1281-83½-New. Where support for a parent was voluntarily provided by one child, such child cannot, after the parent's death, compel contribution from other children, although the obligation to support destitute parents is on all the children. 226Ky762, 11SW(2d)916.
1281-92 231Ky772, 22SW(2d)300; 153 Miss741, 121S482; **Nebr** 232NW767.
1287-60 **MoA** 17SW(2d)608(3dcase).
1287-64 83NH576, 145A782(2dcase).
1287-71 83NH576, 145A782(2dcase).
1294-97 **Mo** 28SW(2d)84(2dcase); 84 Mont397, 276P437; 83NH576, 145A782 (2dcase); 29 OhA229, 163NE508.
1295-99 **TexCivA** 14SW(2d)290.
1297-24 218Ala464, 118S741. But see 7LaA315.
1298-31 **MoA** 17SW(2d)608(3dcase).
1299-53½-New. Violation of a statute prohibiting night employment of minors is immaterial unless it directly contributed to injury. **MoA** 17SW(2d)608 (3dcase).
1299-53⅓-New. A parent's consent to a child's employment at night in violation of statute does not preclude recovery against a city for injuries sustained by the child by riding his bicycle into a dangerous hole in a street. **MoA** 17SW (2d)608(3dcase).
1301-84 84Mont397, 276P437.
1301-87 [a] **In Pennsylvania.**–94 PaSuper406 (verdicts may be in favor of parent and against child).
1301-92 97CalA377, 275P840; 231Ky 772, 22SW(2d)300 (testimony that father was at home sick held not to bring father within rule requiring a parent's assertion of right to damages).
1302-94 83NH576, 145A782(2dcase).
1302-96 **Mo** 28SW(2d)84(2dcase).
1302-2½-New. Parent cannot cure incapacity of minor to sue except through tutor. 12LaA97, 126S715.
1302-9 299Pa79, 149A104.
1302-10 97CalA654, 275P980; 12Pa Dist&Co 336.
1304-28 83NH576, 145A782(2dcase).
1304-28½-New. Neither child nor guardian was proper party plaintiff. 83 NH576, 145A782(2dcase).
1304-28⅓-New. To sustain recovery for loss of services and medical expenses, a mother should join as party plaintiff in her own right in an action brought in behalf of a minor by his next friend and mother. 93PaSuper72.
1304-31 135Misc817, 238NYS519.
1305-60½-New. Parents should have been allowed to show that the custody and support of a child remained with the parents, although a guardian was appointed. 83NH576, 145A782(2dcase).
1306-68 **MoA** 17SW(2d)608(3dcase).
1306-71 But see 299Pa79, 149A104.
1306-76½-New. In the absence of evidence to the contrary, a father and child are presumed to have been in good health, and the jury could infer from the apparent age of the father appearing as a witness, and from the age of the child, that each had a life expectancy of eight years, during which the child, had it lived, would have arrived at the majority. 38GaA637, 144SE810.
1307-85 **Miss** 129S599.
1307-98 12PaDist&Co 336.
1307-99 **Mo** 28SW(2d)84(2dcase); 230 AppDiv114, 243NYS496; 299Pa79, 149 A104.
1308-17 [b] (3) The value of services was determinable by all circumstances, including the age and earning capacity of the child, services rendered, the circumstances of the family, and experience of the jury. 38GaA637, 144SE810.
1310-29 38GaA637, 144SE810 (elements to be considered).
1311-37 See also **TexCivA** 18SW(2d) 189.
1314-80 [a] 103CalA173, 284P681 ($2,500); **NJSup** 152A172(1stcase). [c] **Damages held inadequate.**–NJSup 149A 69 ($100).
1315-90 [g] **Where parent purchased immovable property for son** in name of himself and son, subsequent sale by parent without authorization will give purchaser good title as against son's vendee. 9LaA14, 118S857. [h] **Proceedings in probate court for sale of minor's property after father had individually contracted for sale** did not make effectual original contract. 33 OhA232, 168NE857.
1315-91 49Philippine244.
1316-93 [c] (2) Contract of mother held not to encumber children's property but only her own. 35PortoRico 466.
1316-95½-New. Where a father acts as agent of his son in the purchase of property, he serves as a mere conduit of title, and never becomes owner of the property. 321Mo 1244, 14SW(2d)583.
1317-2 [f] **Cannot encumber usufruct without permission of court.**–35Porto Rico 466.
1318-21 235Ky741, 32SW(2d)327.
1318-26 [b] **Contract between parent**

and child becoming of age.–35**PortoRico** 939 (sufficient consideration for agreement of child to defray expense of education during minority).
1320–50 177**Ark**1060, 9**SW(2d)**1062.
1324–28 [a] 167**La**221, 119**S**28.
1324–43 109**Conn**77, 145**A**753. But see **NH** 150**A**905. [c] **NJSup** 143**A**3.
1325–46 41**GaA**120, 152**SE**278; **NH** 150 **A**905 (effect of liability insurance).
1325–47½–New. Minor cannot recover damages against father for personal injuries sustained in automobile collision due to concurring negligence of father. 200**Wis**601, 229**NW**74.
1325–52 [a] (2) Daughter sending money as parents' contribution or on their behalf requesting investment would be parents' agent. 249**Mich**63, 227**NW**789.
1326–56 226**AppDiv**858, 241**NYS**178 (son acting for mother).
1326–63 **TexCivA** 29**SW(2d)**428.
1326–65 136**Misc**500, 241**NYS**202.
1326–67 178**Minn**618, 225**NW**921(1st case). [a] **Child employed about affairs of parent** is regarded as servant of parent. 255 **IllA**572 (child attending school is not servant of parent).
1327–83 **TexCivA** 29**SW(2d)**428.
1327–90 266**Mass**566, 165**NE**679.
1328–6 [a] **Father's payment of note** to which his name was signed by his son is a circumstance in determining issue of son's authority. **TexCivA** 27 **SW(2d)**371.
1328–7 [a] **Evidence of ratification properly excluded** under evidence. **Tex CivA** 27**SW(2d)**371.
1328–14 [b] 10**LaA**631, 123**S**142. [c] 226**AppDiv**601, 236**NYS**185.
1328–15 [b] **TexCivA** 28**SW(2d)**214.
1328–16 But see 249**Mich**63, 227**NW** 789.
1328–18 **NJ** 150**A**406; **TexCivA** 27**SW (2d)**371.
1329–26 [b] (1) 6**LaA**450. See also 7 **LaA**584. (21) Father is not liable for minor's negligence causing breach of minor's contract. 12**LaA**31, 124**S**606. (22) Statute should be strictly construed. 12**LaA**31, 124**S**606. (23) To escape liability, father must show that by act of law residence of minor has been changed. 12**LaA**31, 124**S**606. (24) Parents are not responsible for injuries accidentally inflicted by their children on others. 12**LaA**640, 125**S**766. (25) Other instances. 13**LaA**194, 127**S**133 (2d case) (it is unnecessary to show parent's knowledge or consent to make him liable).
1330–27 90**CalA**481, 266**P**304; **Tex CivA** 10**SW(2d)**168; 154**Wash**241, 281 **P**991 (where there is no participation in fault).
1331–32 234**Ky**173, 27**SW(2d)**695.
1332–37 **TexCivA** 10**SW(2d)**168.
1332–45 153**Va**675, 151**SE**282; 154 **Wash**241, 281**P**991 (parent is liable only for his own fault and not that of child).
1333–51½–New. A parent having knowledge of a dangerous habit of a minor child, who takes no steps to correct such habit, is guilty of negligence. 154**Wash**241, 281**P**991.
1333–51½–New. While a child that is doli capax is liable for its torts, a parent may be held for negligence in causing the child to become dangerous and not attempting to restrain it. 154**Wash** 241, 281**P**991.
1333–54 154**Wash**241, 281**P**991 (defendant's negligence could be inferred from circumstances).
1333–55 [a] (3) Other instances. 129 **Kan**462, 283**P**655. [b] (5) Other instances. 129**Kan**462, 283**P**655.
1333–56 [b] (3) To show that parent was guilty of negligence in failing to exercise due discipline or care. 12**LaA** 640, 125**S**766. (4) To show that boy was guilty of negligence. 12**LaA**640, 125**S**766.
1334–57 [a] (8) Negligence of parents in failing to use due care to prevent vicious child from injuring other children. 154**Wash**241, 281**P**991.
1334–58 [b] **Instructions held erroneous.**–129**Kan**462, 283**P**655.
1335–75 36**F(2d)**386.
1336–3 **SD** 228**NW**377.
1338–20 151**Va**785, 145**SE**249.
1338–29 151**Va**785, 145**SE**249.
1341–74 **MoA** 17**SW(2d)**608(3dcase).
1342–90 109**Conn**77, 145**A**753.
1343–7 83**NH**576, 145**A**782(2dcase).
1345–35 **NH** 150**A**905.
1346–68 [b] 109**Conn**77, 145**A**753.
1347–71 **NH** 150**A**905.
1347–77 134**Misc**696, 236**NYS**589 (child born after divorce).
1347–80 [b] **Not class legislation.–Or** 292**P**98.
1349–27 **MoA** 27**SW(2d)**444. [a] **Continuing offense.**–87**CalA**65, 261**P**1071.
1349–32 94**CalA**589, 271**P**523.
1349–33 [c] (3) **Wife's refusal to live with husband** at place where he could make living would not constitute willful desertion on husband's part. 112 **TexCr**325, 16**SW(2d)**826.
1351–66 **Iowa** 228**NW**353 (without good cause). [b] **Facts not constituting good cause.–Iowa** 228**NW**353.
1351–72 97**PaSuper**41.
1351–74 206 **Iowa**1334, 222**NW**20.
1352–91 225**Ky**576, 9**SW(2d)**706; 226 **Ky**370, 10**SW(2d)**1112(1stcase).
1352–92 247 **IllA**255.
1353–95 206 **Iowa**1334, 222**NW**20; **Iowa** 228**NW**353 (child dependent on charity of mother's parents).
1353–3 110**TexCr**544, 9**SW(2d)**737(2d case). [b] **That father made small contributions for child's support and for short time was unable to make any** is not inconsistent with criminal neglect and omission. 87**CalA**65, 261**P**1071.
1353–4 151**Wash**218, 275**P**558.
1354–19 [d] (2) Parents' agreement, relied on by father in good faith, that mother, having sufficient means, should support minor child, would be good defense to prosecution of father for neglecting and refusing to support child. 151**Wash**218, 275**P**558. [e] **That private or public charity intervened** for child's relief does not constitute defense. 206 **Iowa**1334, 222**NW**20.
1355–34 39**GaA**643, 148**SE**165(2dcase).
1355–41 247 **IllA**255.
1356–59 110**TexCr**282, 8**SW(2d)**167.
1356–61 179**Minn**32, 228**NW**337 (cannot be convicted of wholly abandoning child).
1358–1 [b] **In Pennsylvania.**–97**Pa Super**41.
1358–13 But see 112**TexCr**325, 16**SW (2d)**826.
1358–15 But see **TexCr** 25**SW(2d)**843.
1359–17 [b] 318**Mo** 693, 300**SW**1071.
1359–41 [d] **State must prove beyond reasonable doubt** that defendant is able-bodied person. 23**AlaA**211, 123**S**99(1st case). [e] **Willfulness of neglect.**–113 **TexCr**327, 21**SW(2d)**520.
1360–43 **MoA** 27**SW(2d)**444.
1360–44 113**TexCr**327, 21**SW(2d)**520.
1360–46 **MoA** 27**SW(2d)**444; 112**TexCr** 325, 16**SW(2d)**826.
1360–48½–New. The presumption that a father's abandonment or omission to support a minor son was willful is rebuttable. 151**Wash**218, 275**P**558.
1361–71 [a] (1) **SC** 155**SE**838; 112 **TexCr**131, 13**SW(2d)**856(1stcase). [b] (1) 112**TexCr**325, 16**SW(2d)**826. (2) 110**TexCr**282, 8**SW(2d)**167; 110**TexCr** 544, 9**SW(2d)**737(2dcase). (5) Other instances. **TexCr** 27**SW(2d)**161. [e] **Evidence sufficient to support conviction.**–87**CalA**65, 261**P**1071.
1362–72 [a] (3) To show abandonment by its parents of infant child to care of foster parents. 103**NJEq**355, 143**A** 319. (4) To show that father abandoned child. 228**Ky**286, 14**SW(2d)** 1072. [c] **Proof of something more than mere separation and failure to provide adequate support** is required by statute as to what shall be presumptive evidence of willful abandonment. 197**NC**662, 150**SE**199.
1362–78 [b] (2) 113**TexCr**327, 21**SW** (2d)520; **TexCr** 25**SW(2d)**843.
1362–80 **Iowa** 228**NW**353.
1363–92 **Or** 290**P**1094. [a] **Evidence sufficient to go to jury.**–232**Ky**426, 23 **SW(2d)**556.
1363–93 206 **Iowa**1334, 222**NW**20.
1363–94 206 **Iowa**1334, 222**NW**20; **Iowa** 228**NW**353. [b] **What constitutes "just cause or excuse" for failure to support is for jury.** 150**SC**452, 148**SE** 474, 475.
1363–95 [b] (6) That, after showing of failure of defendant properly to support minor child, defendant had burden of showing, by preponderance of evidence, that neglect was not willful. 206 **Iowa**1340, 222**NW**23. (7) Charge to convict if defendant failed to provide adequate support, considering his circumstances in life and his means, has been held erroneous as omitting essential element of willfulness. 197**NC**662, 150**SE**199. [f] **Instruction not erroneous.**–38**GaA**362, 144**SE**51.
1363–96 [a] (3) In trial for leaving wife and children without sufficient means of subsistence, defendant was entitled to general charge, in absence of evidence that he was able-bodied person. 23**AlaA**211, 123**S**99(1stcase).
1363–97 [a] (3) As failing to state mother's equal liability for support. 206 **Iowa**1334, 222**NW**20; 206 **Iowa** 1340, 222**NW**23.
1363–7½–New. Judgment against defendant, providing for confinement in jail for one year, and for suspension on condition of payment to wife of the sum of thirty dollars per month for four years, and fifteen dollars a month for support of children until arriving at the age of eighteen, has been held valid. 197**NC**62, 147**SE**673.
1364–15 95**PaSuper**592 (amount reduced on appeal as excessive).
1364–24 110**Conn**171, 147**A**593 (recognizance has been held within fair intendment of word "bond"). [c] **Refusing offer of defendant convicted of child desertion to provide bond** for support of child as provided by statute and pronouncing sentence of imprisonment and denying motion for new trial have been held not error. **Ind** 168**NE**452. [d] **Taking recognizance for support of child directly to city** instead of its treasurer has been held formal defect insufficient to invalidate undertaking. 110**Conn**171, 147**A**593. [e] **Sentence for desertion of wife and children** requiring defendant to furnish bond to guarantee payments is improper as in excess of authority. **NJSup** 149**A**355.
1364–27½–New. Money recovered in action on bond goes to person furnishing support. 34 **OhA**30, 169**NE**823.
1364–27½–New. Action on bond may be brought by person entitled to benefit of security or in name of state for use of such person. 34 **OhA**30, 169**NE** 823.
1365–41½–New. A statute, authorizing imprisonment for failure to support wife and children, is not unconstitutional as imprisonment for debt. 150 **SC**452, 148**SE**474.
1365–42 [c] **Court cannot consider admissibility of evidence,** in absence of statement of facts. **TexCr** 23**SW(2d)** 729.
1367–4 89**CalA**336, 265**P**281.
1369–43 252**NY**474, 169**NE**650 (proof of loss of services is not necessary).
1370–64 [a] (2) To authorize recovery against sheriff for aiding in kidnapping grandchild. 225**AppDiv**454, 233**NYS** 461.

PARK

1373–89 [a] 332 **Ill** 571, 164**NE**10.
1374–98 101**Vt**325, 143**A**384.

PARLIAMENTARY LAW

1376–2 169**Ga**649, 151**SE**513.
1377–27 169**Ga**649, 151**SE**513.
1378–54½–New. The presiding officer's opinion as to what was necessary cannot be taken as a substitute for the doing of the necessary thing. 134**Misc**48, 234**NYS**571.
1378–54½–New. Adopting minutes of the previous meeting is not a legislative act. 167**Ga**555, 146**SE**173.
1378–60 **DelCh** 145**A**115; **NJSup** 146 **A**354.
1379–76 153**Miss**392, 121**S**113.
1380–84½–New. An amendment takes precedence over the original motion on which a vote must be taken after the amendment is disposed of. 134**Misc**48, 234**NYS**571.
1382–14 134**Misc**48, 234**NYS**571.
1383–23 **Mass** 171**NE**487.
1383–31 169**Ga**649, 151**SE**513.

PART

1385-44 13CustA569.

PARTIES

47 C. J.—14-10 157Miss788, 128S560 ("parties to cause").
14-18 157Miss788, 128S560.
14-19 157Miss788, 128S560.
15-26 **Ariz** 288P1034 (classification of parties).
16-77½-New. Any person having an interest in the subject matter of a litigation is a proper party. 108WVa417, 151SE324.
17-81 247 IllA429 (defendant may require that there be such plaintiff as will make recovery bar to any other action for same debt).
17-82 **TexCivA** 22SW(2d)684 [citCJ].
17-86 **TexCivA** 25SW(2d)193; **Tex CivA** 29SW(2d)426.
19-40 [a] (2) **MoA** 2SW(2d)125.
20-74 [a] **Injured employee, who suffered loss of memory and partial paralysis of brain,** and who was rendered physically helpless, was nevertheless capable of maintaining suit for injuries without appointment of next friend, where there was no evidence that he was at time of suit mentally incapable of conducting his affairs. 151Va740, 145SE342.
21-97 137Misc203, 242NYS598 (capacity to sue and jurisdiction of court).
22-23 **TexCivA** 24SW(2d)1116 (entitled to recovery of whole subject matter).
22-32 **TexCivA** 22SW(2d)504.
22-41 107WVa367, 148SE322(2dcase).
25-15 92PaSuperCt235 (right to maintain action for unearned insurance premiums does not depend on interest which use-plaintiff had in result).
25-18 [a] (2) **Fla** 129S602. (9) **Fla** 129S602.
25-19 170Ga573, 153SE362; 297Pa26, 146A139; 10PaDist&Co 331.
27-46½-New. Third persons cannot sue on an instrument under seal, regardless of the intention of the parties. 10 PaDist&Co 33.
29-95 **Fla** 129S602.
29-96 **Fla** 129S602.
32-54 8LaA731.
32-73 [a] (2) Where plaintiff, who did not own building destroyed by fire, but was named as insured in fire insurance policy, claims to be suing for benefit of insurance company, demand is properly rejected, in absence of allegation or proof that insurance company authorized him to institute suit. 9LaA 295, 119S543.
33-94 [a] **In Nebraska.**–229NW894.
33-99 50Philippine132. [a] **Fact that plaintiff is not real party in interest constitutes defense.**–225AppDiv788, 232 NYS511.
34-12½-New. In absence of objection to misjoinder, objection that party is not real party in interest is unavailing where real parties in interest are joined. 48Ida662, 284P557.
35-13 315Mo713, 290SW135; **MoA** 4 SW(2d)494; 138Misc183, 244NYS409. [e] **Seller was real party in interest as** against third parties who agreed to pay bona fide indebtedness of conditional buyer. 98CalA297, 276P1043. [f] **Party entitled to fruits of action** is "real party in interest." **IndA** 165NE 255. [g] **In action against gas company for fatal injury to post-office employee** owing to explosion of gas accumulating under post-office loading dock, administratrix of deceased is real party in interest rather than United States government. 245Mich277, 222 NW123.
35-17 [c] **In Philippines.**–50Philippine 132.
36-30 315Mo713, 290SW135.
37-47 **Colo** 291P1023; 99Fla1147, 128 S477(2dcase); 198NC627, 152SE801; **Or** 289P375.
37-48 **CalA** 292P179; 225Ky796, 10 SW(2d)291.
38-55 [a] (27) **Mortgagor of automobile** with respect to proceeds of theft policy payable to mortgagee. **MoA** 28 SW(2d)423.
39-62 [b] **Person to whom notes were delivered, under letter requiring him to collect notes** and apply proceeds in payment of other notes, was not trustee and had no right to deal with notes as trustee. 225AppDiv541, 233NYS577.
39-72 [b] **Where company assigned to plaintiff all of its books, accounts, open accounts, and sums due,** and plaintiff executed declaration of trust showing that assets of company were turned over to him as trustee for certain express purposes, it constituted express trust entitling plaintiff as "trustee of express trust" to bring action to recover balance due on open account in his own name. 245Mich146, 222NW 160.
44-20 138Misc29, 244NYS209; 196NC 284, 145SE563.
44-24 138Misc29, 244NYS209.
45-33 12PortoRicoFed388.
46-53 233Ky588, 26SW(2d)481; 24 Oh NPNS193; **Utah** 288P1068. [a] (21) One may sue for benefit of all landowners in water district to protect their rights. 206Cal400, 274P538. (22) In action for money collected by defendant, which he failed to deliver to plaintiff, plaintiff is trustee of other corporations having same stockholders and officers and operated and managed in connection with plaintiff and from plaintiff's place of business, so as to be entitled to maintain action for moneys due such other corporations from defendant. 94CalA94, 270P695.
51-29 **Ky** 26SW(2d)481.
53-74½-New. Several persons may properly join as plaintiffs in a suit brought for a common purpose although they are not jointly interested in the subject-matter of the litigation. 108WVa293, 150SE745.
53-74½-New. Of course there is no misjoinder of parties plaintiff where only one person is named as plaintiff and he sues solely in his individual capacity. **SD** 228NW372.
53-75 12LaA209, 125S754. [a] **In suit to annul confirmations of title given by plaintiffs to defendant,** and to be declared owners of undivided half of tract involved, petition is not objectionable for misjoinder of parties plaintiff, because various confirmations were not in one act, but by separate acts executed at different times. 166La1098, 118S453.
53-76 166La1098, 118S453.
53-77 12LaA209, 125S754.
54-83 97Fla679, 122S107(2dcase).
55-5 **TexCivA** 19SW(2d)144.
57-38 **Mass** 171NE713.
58-52 41F(2d)329 (conditionally necessary parties).
59-55 12PortoRicoFed392.
60-79 97Fla679, 122S107(2dcase); 264 Mass555, 163NE181.
62-1 [a] **All owners of chattel,** whether partners or not, should join in action to recover damages for injuries thereto or for wrongful taking or conversion or to recover possession. 83Mont477, 272 P992.
62-2 8LaA445.
63-17 [a] **All parties interested in suit** or that may in, any way be affected should be made parties, if known. **Tex CommnA** 29SW(2d)975.
63-20 101Vt233, 143A391.
64-22 **MoA** 31SW(2d)86.
66-48 83Mont477, 272P992.
66-63½-New. At common law no one could be defendant unless he was alone or jointly with the other defendants liable for entire demand. **TexCivA** 24 SW(2d)1116.
66-63½-New. Right to sue does not necessarily mean suitor is liable to be sued. 254NY218, 172NE475(2dcase).
67-81½-New. Where a party sued as trustee is the holder of a note secured by a deed of trust, he is in reality sued as a mortgagee, and the word "trustee" may be disregarded as surplusage. 151 Va845, 145SE321.
68-84 198NC5, 150SE618(2dcase).
68-85 34OhA52, 170NE178.
70-13 178Ark1011, 13SW(2d)314; 39 GaA264, 146SE794; 8LaA452; 8LaA 479; 156SC286, 153SE128. [c] **Where tort waived.**–133 **Okl** 183, 271P938.
72-36 36F(2d)269 (admiralty courts).
72-38 108WVa417, 151SE324.
72-40 134 **Okl** 17, 272P434.
73-51 36F(2d)269.
74-68 135Misc553, 238NYS239 (doubt must be fair).
75-85 137Misc721, 244NYS283. See also 137Misc721, 244NYS283. [a] (2) Other instances. 137Misc721, 244NYS 283.
76-89 **SD** 229NW380.
77-13 31F(2d)484 (solidary liability in Louisiana); **MoA** 31SW(2d)86.
79-35 167Ga865, 147SE63.
79-40 **MoA** 25SW(2d)484(2dcase).
80-44 **Md** 150A801.
85-24 **TexCivA** 24SW(2d)796.
85-27 **Utah** 290P367.
85-28 [a] (2) Action to recover loan, lost by reason of defendants' breach of contract to repay pro rata shares of loan and purchase property securing loan taken over by lender, is action for damages, and complaint therefore is not defective for failure to join, as defendant, company to which property taken over by plaintiff was transferred. 199Wis 440, 223NW559.
85-31 13PaDist&Co 541.
86-53 9LaA375, 119S445(2dcase); **Tex CivA** 22SW(2d)684 [citCJ].
87-64 232Ky844, 24SW(2d)912. [a] (5) Where residents of county executed notes to secure loans from banks to aid in construction of road through county, and, upon bank's failure to pay state highway commission money, commission brought suit against bank to enforce payment, note makers should be made parties. 225Ky759, 10SW(2d)274.
88-79 **Miss** 130S302.
90-2 31F(2d)484.
90-8 167Ga865, 147SE63.
90-11 **TexCivA** 22SW(2d)957.
90-12 **TexCivA** 22SW(2d)957.
91-34 [a] (2) That building contractor and nonresident holder of his note for amount due defendant for services in carrying out contract for promotion and construction of building are not parties to suit for half of defendant's commissions for procuring approval of project does not defeat plaintiff's right to determination of his title to half interest in note and contractor's stock in building company organized by him. **TexCivA** 14 SW(2d)935.
92-52 141 **Okl** 210, 284P642. [c] (3) **TexCivA** 16SW(2d)166.
95-97 [a] (1) 23AlaA471, 127S248.
97-40 127Me380, 143A599.
98-50½-New. In insular district court of Porto Rico party claiming interest in controversy has right to intervene whether case would ordinarily be in law or equity. 13PortoRicoFed237.
98-58 [b] (9) In general. 229App Div210, 241NYS561.
99-68 **Ind** 172NE887.
100-77 23AlaA471, 127S248. [b] **Interest shown.**–**Ga** 155SE199.
100-78 24 OhNPNS459.
100-80 220Ala395, 125S640.
102-4 **CalA** 279P463.
103-25 **MoA** 25SW(2d)566.
104-62 [a] **Grantee, assuming and tendering payment of amount due on deed of trust,** which was refused, can intervene in action by grantor to recover usurious interest, in which surplus after payment of debt from proceeds of foreclosure sale was attached. 196NC318, 145SE621.
105-70 208Cal550, 282P950 (on funds and credits sought to be attached).
105-76 249Mich518, 229NW506.
106-98 **TexCivA** 21SW(2d)547.
108-33 36F(2d)578.
108-34 **TexCivA** 24SW(2d)491.
109-75 See also **CalA** 285P354.
110-81 [b] **Intervention when case is called for trial is timely.**–**Utah** 274P136.
110-82 29F(2d)552.
110-85 206Cal456, 274P748.
110-91 36F(2d)578.
110-93 36F(2d)578 (application for leave to intervene must be timely made). [b] (3) **TexCivA** 24SW(2d)491. (8) Intervention is timely where party intervened at time all parties announced ready for trial. **TexCivA** 24SW(2d)491. (9) Under recent statute plea of intervention can be filed only in cause undetermined on merits pending on trial court's docket. **TexCivA** 30SW(2d) 364. (9) Judgment held final preclud-

ing intervention under statute. **Tex CivA** 30**SW(2d)**364.
110-94 See also **La** 129**S**658; **ND** 230 **NW**292.
111-99 254 **IIIA**521; 135**Misc**766, 239 **NYS**432 (where statutory proceedings terminated into final order).
111-3 228**AppDiv**641, 238**NYS**48 (before or after execution of judgment).
111-10 28**F(2d)**1000.
111-12 36**F(2d)**578.
111-15 220**Ala**395, 125**S**640.
112-27½-New. The power of the court to render judgment cannot be limited by a stranger to the action, filing an application to be made a party. 137 **Okl** 67, 277**P**1029.
112-27½-New. Failure of plaintiff to answer petition within time allowed admits the well-pleaded averments of petition. 86**Colo** 330, 282**P**193.
112-29 129**Kan**709, 284**P**614. [a] 23 **AlaA**471, 127**S**248. [b] **Petition held insufficient.**–**La** 129**S**658.
112-32 [a] **Petition not demurrable.**–23**AlaA**471, 127**S**248.
112-51 86**Colo** 330, 282**P**193 (plaintiff in original action has right to demur to petition in intervention). [a] **Demurrer to petition admits facts well pleaded.**–86**Colo** 330, 282**P**193. [b] **Intervener does not admit self-serving declarations in prior objections of original plaintiff** merely because latter subsequently demurred to petition. 86**Colo** 330, 282**P** 193.
112-53½-New. Objections to petition will not be considered as an affidavit if without evidential value or probative force. 86**Colo** 330, 282**P**193.
112-53½-New. Special demurrer to petition to intervene improperly assuming extraneous matters does not constitute demurrer at all. 86**Colo** 330, 282**P**193.
112-53¼-New. Under statute objections to verified petition cannot be considered unless verified. 86**Colo** 330, 282**P**193.
113-55 220**Ala**395, 125**S**640.
113-78 86**Colo** 330, 282**P**193.
113-82 86**Colo** 330, 282**P**193.
115-27 23**AlaA**471, 127**S**248; **TexCivA** 20**SW(2d)**148 (suit brought as of time of intervention).
116-42 167**Ga**690, 146**SE**635(1stcase); 167**Ga**821, 146**SE**851; 170**Ga**153, 152**SE** 246.
116-43 170**La**105, 127**S**380.
116-53 10**LaA**575, 121**S**353.
117-63 249**Mich**518, 229**NW**506.
117-81 86**Colo** 330, 282**P**193 (sole issue).
117-83 [b] **Where petition fails to state cause of action,** it is properly dismissed. 10**LaA**575, 121**S**353.
118-89 **TexCivA** 14**SW(2d)**890.
118-7 [b] **Allegations of intervention need not be answered** as they are held to be traversed by all parties without pleading thereto. 170**La**105, 127**S**380.
118-10 23**AlaA**471, 127**S**248.
119-19½-New. Intervener held not entitled to set up counterclaim against defendant for damages for fraud. **Mo** 24 **SW(2d)**125.
119-35 249**Mich**518, 229**NW**506.
119-38½-New. An intervener charging that parties to an action to reform a deed by striking out an assumption clause were conspiring to defeat recovery by the intervener of the amount of the deficiency judgment has the burden of proving the allegations. **Iowa** 228 **NW**305.
119-38½-New. That the grantor in such deed admitted the grantee's allegations that such clause was inserted by mistake does not relieve the intervener of such burden. **Iowa** 228**NW**305.
121-63 300**Pa**92, 150**A**165.
122-77 28**F(2d)**895; 297**Pa**564, 147**A** 826; 13**PaDist&Co** 717; 148**SC**133, 145 **SE**692.
122-87 13**PaDist&Co** 717.
123-91 37**F(2d)**48 (purchaser not liable for broker's commission).
123-9 180**Ark**668, 22**SW(2d)**162.
124-11 **Mich** 233**NW**223.
124-19 33**F(2d)**158; 226**Ky**326, 10 **SW(2d)**1071. [a] **Statute mandatory.**–**Iowa** 230**NW**413.
124-22 40**F(2d)**260; 235**Ky**115, 29 **SW(2d)**616; 10**PaDist&Co** 794.
125-25 208**Cal** 667, 284**P**445.
125-26 220**Ala**411, 125**S**650.
125-27 208**Cal** 667, 284**P**445.
125-28½-New. Where there is doubt on the question of the propriety of bringing a party in as defendant in a suit to sell property, it is best to bring him in in order to prevent future litigation. 148**SC**133, 145**SE**692.
126-35 **Minn** 231**NW**403; **TexCivA** 32**SW(2d)**244.
126-39 137**Misc**132, 241**NYS**486.
127-55 **NS** [1928] 1**DomLR**463.
127-61 39**F(2d)**162.
128-77 [a] **Adding additional defendants** does not give higher rights to plaintiffs than they had before. 297**Pa** 564, 147**A**826.
129-81 **Ariz** 286**P**819.
129-85 135**Misc**286, 238**NYS**9.
129-98 169**Ga**754, 151**SE**487(3dcase); 133**Misc**788, 233**NYS**483; 137**Misc**878, 244**NYS**241; **TexCivA** 23**SW(2d)**814.
131-16 137**Misc**132, 241**NYS**486.
132-29 180**Ark**828, 23**SW(2d)**264. See also **Ont** [1928] 2**DomLR**594.
132-33 95**CalA**617, 273**P**165; 35**Porto Rico** 183; **TexCivA** 14**SW(2d)**360.
134-67 151**Va**913, 145**SE**311.
134-74½-New. In British Columbia plaintiff cannot have default judgment vacated to bring in joint debtor as defendant. **BC** [1929] 4**DomLR**978(2d case).
136-4 13**PaDist&Co** 717 (by writ of scire facias).
136-19 229**Ky**254, 16**SW(2d)**1041.
136-20 35**PortoRico** 803.
136-30 [a] **In Arizona.**–283**P**279.
137-40½-New. Allegations of defendant's motion to bring in other parties is improperly treated as part of complaint at trial. 110**Conn**668, 149**A**392.
137-47 240**NYS**760.
138-59 230**AppDiv**332, 243**NYS**657. [a] **When third party shown to be liable over,** burden falls on party objecting to show prejudice. 230**AppDiv**332, 243 **NYS**657.
138-60 230**AppDiv**332, 243**NYS**657.
138-70 240**NYS**760 (motion by defendant may be addressed to attorneys for plaintiff); 137**Misc**809, 243**NYS**457.
138-73 133**Misc**263, 231**NYS**643; 137 **Misc**809, 243**NYS**457.
138-76 240**NYS**760.
133-77½-New. A motion and notice issued in an action in which plaintiff recovered judgment, to show cause why mortgaged land should not be sold to satisfy plaintiff's judgment, has been held not to make purchasers from the mortgagee parties to such original action. 197**NC**466, 149**SE**682(2dcase).
139-84 **MoA** 25**SW(2d)**558; **BC** [1928] 4**DomLR**567.
141-19 **NC** 154**SE**42.
143-67 35**PortoRico** 803.
143-68 [b] **Trustee made party in individual capacity.**–265**Mass**249, 163**NE** 848.
144-70 35**PortoRico** 803.
144-84 **Ariz** 283**P**279.
144-92½-New. There can be no recovery against parties brought in by amendment, but they are entitled to the affirmative charge, where the evidence does not make a case against any of the original parties. 218**Ala**280, 118**S**465.
144-93½-New. Bank recovering judgment against one sued by it on note cannot subsequently recover judgment against additional defendants brought in. 300**Pa**92, 150**A**165.
145-99½-New. Statute does not require plaintiff to move against additional defendants brought in by scire facias. 300**Pa**92, 150**A**165.
145-7½-New. Defendant's attorney is under no duty to formulate complaint for plaintiff. 240**NYS**760.
146-26 [a] **Respondents, in defendant's scire facias, need not answer** plaintiff's statement of claim, attached to writ. 300**Pa**92, 150**A**165.
146-34 227**Ky**183, 12**SW(2d)**321; 85 **Mont**341, 278**P**1011. [e] **Rule for bringing in new parties by counterclaim is same in both equity and law actions.**–225**AppDiv**673, 231**NYS**99.
147-40 [b] **That evidence heard on trial of cause of action asserted in cross petition** would be same as that on trial of cause of action asserted in petition is not sufficient to render cross petition permissible. 227**Ky**183, 12**SW(2d)**321.
148-69 But see 135**Misc**895, 238**NYS** 692.
149-82 10**LaA**736, 121**S**785. (3) Purchaser of movable, sued for same by owner thereof, may call his vendor in warranty in such suit. 9**LaA**519, 119**S** 435.
153-66½-New. That copartners, formerly incorporated, had used corporate stationery and neglected to change name in telephone book did not violate statute. **CalA** 288**P**434.
154-92 **Man** [1929] 4**DomLR**683.
157-56 180**Ark**488, 21**SW(2d)**959 (change of parties not permitted unless record authorizes amendment).
157-65 **Ala** 130**S**551.
157-66 **MoA** 24**SW(2d)**1080; 93**Pa Super**9.
157-67 **Ariz** 288**P**3; **SD** 229**NW**522 (substitution of independent school district for unincorporated board of education).
159-91 But see **Ala** 130**S**551.
160-5½-New. Where defendant in an action on account files a set-off, in excess of the amount sued for, a subsequent assignee of the account is not entitled to be substituted as plaintiff, in case of objection by defendant. 152 **Miss**307, 120**S**171.
160-7½-New. Substitution of one who was pledgee of note before suit and thereafter became assignee in place of receiver of payee five years after maturity held proper. 130**Kan**392, 286**P** 197.
161-20 180**Ark**488, 21**SW(2d)**959; **NJ Sup** 146**A**872.
162-34 **Mass** 172**NE**85 (that action previously brought and discontinued as to substituted defendant immaterial).
162-37½-New. The court has been held authorized to grant an amendment substituting a railroad cast in judgment as defendant, although the original declaration was against another railroad and process was served on its treasurer, who was also the treasurer of defendant, where, if suit had proceeded to judgment against the other railroad, judgment would have been res judicata of a subsequent suit against defendant. 245 **Mich**353, 222**NW**723.
162-40 [d] **In Oklahoma.**–137 **Okl** 67, 277**P**1029.
162-41 [a] **Refusal to permit supplemental bill making successor corporation party to cause,** so as to permit it to have benefit of all pleadings, decrees, proceedings, and other matters had in case, has been held abuse of discretion. 29**F(2d)**703.
162-43 **Can** [1930] 4**DomLR**1038.
163-45 198**NC**417, 151**SE**864.
163-50 [c] **Court can substitute individual not sued for corporation after entry of judgment** in action in which individual's answer was stricken on plaintiff's motion, but cannot enter judgment against him without permitting him to answer or demur to complaint. 150**SC** 529, 148**SE**550.
163-55 [a] **Application held sufficient.**–127**Kan**122, 272**P**138.
164-75 **Mass** 172**NE**85.
165-88½-New. Rendition of judgment between parties to a cause without expressly passing upon an application of a stranger for substitution is an implied denial of such application. 137 **Okl** 67, 277**P**1029.
165-92 **Mass** 172**NE**85 (case is same as if substituted defendant had been originally named).
165-94 29**F(2d)**703.
165-96 **Mass** 172**NE**85 (right to object to previous proceedings).
166-4 But see **CalA** 288**P**681.
169-53½-New. Where a misnomer of one plaintiff is corrected by amendment, a further amendment striking out the other plaintiff does not work an entire change of parties plaintiff. 218**Ala**280, 118**S**465; 218**Ala**645, 119**S**851.
169-53½-New. If, before final judgment, there is a complete change of parties defendant, the remaining defendant, not a party at the beginning of the suit, may claim a discontinuance, unless he has waived it. 219**Ala**399, 122**S**359.

169-62 38CalA758, 145SE535.
175-97 NJDist 147A332.
176-17 TexCivA 30SW(2d)569.
177-21 WVa 155SE658.
177-30 Fla 129S602.
178-32 Fla 129S602 (J. W. M., governor of Florida).
178-38 [b] **Petition defective for failure to show right in plaintiff to sue** is not rendered good by bringing suit for use of another. 170Ga573, 153SE 362.
179-55 137Misc203, 242NYS598. [a] **Where action should have been brought in name of copartnership,** defendant, interposing no demurrer and not pleading such fact as defense in answer, waived error. CalA 285P371.
179-56½-New. Trial court is under duty to take notice of absence of necessary party at any stage of proceedings. TexCivA 24SW(2d)796.
179-57 MoA 15SW(2d)939.
179-58½-New. or if not apparent on the face of the complaint, SD 229NW 522.
179-62 MoA 15SW(2d)939.
181-81 48 Ida447, 282P864.
181-82 Ark 31SW(2d)750; 128 Or542, 274P914.
181-83 CalA 291P269.
181-84 SD 228NW372.
181-88 48 Ida447, 282P864; Mont 288 P1021 (failure to allege that broker suing for commissions was duly licensed held ground for special demurrer). [d] (2) Other instances. CalA 274P549; 99 CalA381, 278P866.
182-89 SD 230NW22. [b] **In Louisiana.**–12LaA97, 126S715.
182-92½-New. Special demurrer challenging plaintiff's capacity to sue is tantamount to plea in abatement. Mont 288P1021.
183-99 Mont 288P1021.
185-20 [b] **Exception to plaintiff's right to maintain suit because of its lack of ownership** of building was not one of capacity requiring exception in limine, and exception filed at trial was timely and properly maintained. 9LaA 295, 119S543.
185-21 151Va740, 145SE342.
185-24 229AppDiv811, 242NYS598.
185-28 9LaA295, 119S543. [d] **By statute,** objection that plaintiff did not have legal capacity to sue has been held waived by defendant's failing to move within twenty days after service of complaint. 227AppDiv759, 236NYS430.
185-29 Mont 288P1021.
186-42 CalA 276P583; 48 Ida240, 281 P375; 323Mo 150, 19SW(2d)691; 152 Wash342, 277P984.
187-49 48 Ida240, 281P375.
188-69 26F(2d)890.
189-89 224AppDiv516, 231NYS51.
190-90 IndA 165NE255.
192-41 247 IllA532.
194-69 Fla 129S698. See also 197NC 150, 147SE824(1stcase).
194-70 220Ala399, 125S644; MoA 20 SW(2d)561(2dcase).
194-72 SD 229NW522.
195-80 CalA 291P269.
196-94 Del 151A322 (plea in abatement); MoA 20SW(2d)561.
195-81 [d] **Special demurrer** necessary to raise objection. 170Ga555, 153SE 419.
196-94 TexCivA 16SW(2d)166.
199-43 99CalA17, 277P1053.
200-59 39F(2d)826; 323Mo 150, 19SW (2d)691; MoA 28SW(2d)423.
201-67 MoA 20SW(2d)561(2dcase).
203-2½-New. The court will take notice, ex mero motu, of failure to make heirs parties to the executor's bill for reformation of the testator's deed. 219 Ala419, 122S645.
203-2¼-New. The court cannot require plaintiff to proceed against other parties, although their joinder is necessary to protect defendant. 178Ark1011, 13 SW(2d)314.
203-5 [e] **Complaint not demurrable** on ground proper party defendant not joined. Wis 230NW87.
204-6 MoA 22SW(2d)52.
204-8 170La763, 129S156; La 129S 673; SD 229NW522. [e] **Evidence must be adduced that there are necessary parties who have not been joined** where nonjoinder does not appear on face of pleadings. 170La763, 129S156.
206-29 Del 151A822; IndA 165NE68.
206-30 170La763, 129S156; Md 150A 850.
210-79 41F(2d)569.
210-88 99CalA17, 277P1053.
211-91 52SD159, 216NW887 (defendant answering after demurrer is overruled).
212-9 Md 150A850.
214-28 TexCommnA 12SW(2d)541.
215-52½-New. Question of misjoinder of parties is within sound discretion of trial court. 12LaA209, 125S754.
216-56 CalA 291P269.
216-59 48 Ida662, 284P557.
217-68 208 Iowa314, 223NW111; 226 Ky89, 10SW(2d)615.
217-75 144 Okl 293, 291P1.
217-77 144 Okl 293, 291P1.
218-94 226Ky89, 10SW(2d)615; 144 Okl 293, 291P1.
219-3 226Ky89, 10SW(2d)615.
219-9 Pa 151A674.
219-10 See also Pa 151A674.
220-18 TexCivA 32SW(2d)224. See also 97Fla679, 122S107(2dcase).
221-28 319Mo 401, 4SW(2d)438.
221-30 52Nev216, 285P511.
221-45 144 Okl 293, 291P1.
222-63½-New. Where an amended petition in a suit to restrain execution of judgment alleged that execution was in the hands of an officer who was a proper and necessary party, the amended petition is not demurrable or subject to motion to strike by reason of misjoinder of parties defendant. 31 OhA 512, 167NE486.
223-67 108WVa539, 151SE849.
225-86 Or 290P556.
225-95 But see 198NC5, 150SE618(2d case).
226-4 [b] MoA 21SW(2d)777 (misjoinder must be specially pleaded).
227-24 [a] **Necessity of inconsistency.**–Or 290P556. [b] **Difference in amounts for which different defendants are liable** is not ground for compelling election between defendants. Or 290P556.
227-24½-New. Denying motion to elect between several defendants in action for rent against lessee, assignee, transferee of stock in assignee, and sureties on bond for rent held proper. Or 290 P556.
227-34 See also 10PaDist&Co 115.
228-37 TexCivA 32SW(2d)224.
228-39 MoA 25SW(2d)539.
229-71 219Ala533, 122S625; 136Misc 37, 239NYS244.
231-86 TexCivA 13SW(2d)148.
231-98 But see 12LaA380, 124S532.
232-15 140 Okl 70, 282P319 (failure to object and filing answer for affirmative relief).
232-20 Iowa 230NW404 (waived by answering).
232-21 See also Mo 24SW(2d)125 (waiver by agreeing that amended answer to plaintiff's petition should be treated as answer to intervening petition).
234-55 TexCivA 22SW(2d)686.
234-59 247 IllA600 [certiorari granted 278US593, 49SCt36, 73L ed525]; 336 Ill 466, 168NE273.
235-74½-New. In a servant's action for damages, the master's special plea that plaintiff was not employed by defendant at the time of the injury was not a plea in abatement saving the point of misnomer. 247 IllA600 [certiorari granted 278US593, 49SCt36, 73L ed525].
237-93 247 IllA600 [certiorari granted 278US593, 49SCt36, 73L ed525].
238-6 40GaA427, 149SE711. See also 219Ala399, 122S359.
238-17 NJDist 147A332.
238-22½-New. Misjoinder or nonjoinder does not necessarily defeat an action as amendments are permissible. 50 RI 140, 145A874.
238-22¼-New. A ruling by the court that plaintiff had no right to request a specification by the court as to the ground of denial of motion to amend is not erroneous. Mass 167NE254.
238-25 TexCivA 29SW(2d)479 (on terms court imposes).
239-27 218Ala280, 118S465; 218Ala 645, 119S851.
240-28 99Fla592, 127S333.
240-37 But see SD 229NW522.
241-53½-New. Insertion of correct name must be in written matter, and filing separate paper with correction is insufficient. 99Fla592, 127S333.
241-59½-New. Defendants not having taken issue on allegations of motion to amend complaint by changing name of plaintiff allegations are admitted. 218 Ala280, 118S465; 218Ala645, 119S851.
241-59¼-New. Whether an amendment changing the name of the party introduces a new party is a question of fact for the court. 218Ala280, 118S465; 218 Ala645, 119S851.
241-62 41F(2d)292; 9LaA467, 119S 736.
243-87 CalA 286P1103.
244-88 CalA 286P1103.
245-11 TexCommnA 17SW(2d)805.

PARTITION

267-24 [a] **Extrajudicial partition not proper in testate succession.**–48Philippine737.
268-36 319Mo 930, 5SW(2d)636, 641 [quotCyc].
268-38 [a] (2) Widow who failed to sue for admeasurement of dower within statutory time after husband's death cannot enter into parol partition with daughter. 319Mo 930, 5SW(2d)636.
272-11 169La611, 125S732.
272-17 169La611, 125S732. [a] (3) An agreement and contract entered into setting apart to each child portion of estate rests on valuable consideration, constituting family settlement. 169Ga 543, 150SE912.
273-24 179Ark1004, 18SW(2d)1037.
273-27 27 OhNPNS585.
273-38 170La1019, 129S622.
276-87 322Mo 573, 16SW(2d)63.
277-7 319Mo 930, 5SW(2d)636; 198NC 229, 151SE270. [h] **Parol partition of land is voidable.** 198NC229, 151SE270.
277-8 NS [1930] 3DomLR762.
279-22 170La1019, 129S622.
280-52 153Va636, 151SE157. [a] **Time of taking effect.**–48Philippine737.
280-53 161Tenn187, 30SW(2d)227; 153 Va636, 151SE157 (partition deed).
281-54 161Tenn187, 30SW(2d)227; 153 Va636, 151SE157.
282-70 153Va636, 151SE157.
283-94½-New. Warranty of interest in property conveyed by act of partition. 170La1019, 129S622.
285-25 [a] (1) 129 Or128, 276P680.
285-26 322Mo 1219, 18SW(2d)77. [a] **Evidence held insufficient** to show previous parol partition. TexCivA 25SW(2d) 881.
288-76½-New. Proceedings in partition within state are statutory. 250Mich91, 229NW491.
288-80 219Ala660, 123S48; 334 Ill 539, 166NE118, 65ALR887.
290-9 333 Ill 101, 164NE169.
291-38 TexCivA 12SW(2d)1849.
294-77 221Ala219, 128S387(3dcase).
294-88 139 Okl 48, 281P283.
294-89 [a] **In Oklahoma.**–139 Okl 48, 281P283.
294-93 NJCh 150A338.
295-13 231Ky731, 22SW(2d)133; NJ Ch 147A559(1stcase) (perpetual lease); 31 OhA317, 167NE414.
295-24 134Misc845, 236NYS427.
297-33 Va 149SE615.
297-34 Va 149SE615 (conveyance to husband and wife after marriage and to survivor).
297-38 [b] **In Pennsylvania.**–12PaDist &Co 374 (not retroactive).
298-56 TexCivA 25SW(2d)881; Tex CivA 27SW(2d)857.
299-80 207 Iowa696, 223NW497; NJCh 152A9 (tenant by courtesy in possession).
300-82 334 Ill 539, 166NE118, 65ALR 887. [e] **That deed under which plaintiff claims title is ancient one is not enough to deny him his day in court.**–169La819, 126S72.
301-89 24 OhNPNS525.
302-4 160Tenn477, 26SW(2d)141.
306-64 [a] (2) 99Fla152, 126S135.
308-75 Ala 130S226.

308–77 [a] **Complainant has right to make adverse claimant party** and to seek relief by way of having claimant's title quieted either by original bill or by amendment. 218Ala562, 119S610(1st case).
309–86 TexCivA 11SW(2d)237.
311–13 219Ala660, 123S48; Mo 300SW 497; 35 OhA526, 172NE629. [b] Contra 323Mo 899, 20SW(2d)26.
311–15 224AppDiv647, 232NYS143.
312–24 160Tenn477, 26SW(2d)141.
316–88 [g] **Partition in kind** is not prohibited by will devising land share and share alike. Mo 30SW(2d)97.
317–90 [a] (5) Heirs at law may maintain partition upon lapsing of residuary estate notwithstanding power of sale given to executor. 134Misc310, 235NYS 304.
318–4 333 Ill 643, 165NE208; 335 Ill 395, 167NE94. [c] **Unreasonable delay in effecting sale** has been held to render partition not in contravention of will. MoA 31SW(2d)283 (five years).
320–30 Ill 173NE110.
320–40 198NC445, 152SE398.
321–49 110Conn516, 148A358. [a] (2) Partition will not be granted when to do so would involve violation of valid trust or defeat its purpose. 110Conn516, 148A358.
321–53 OhA 173NE208.
322–62 110Conn516, 148A358.
323–75 220Ala149, 124S202.
323–78 [a] (2) 220Ala149, 124S202.
325–95 50Philippine149.
326–8 [a] (1) Nebr 232NW770(1stcase).
326–14 [b] (1) Nebr 232NW770(1st case).
327–22½–New. A family meeting has been held not invalid, in that only five of the members appointed attended the meeting, and that it was held without giving three days' notice to the others who were appointed, where order of judge approved and homologated proceedings. 167La1063, 120S857.
327–30½–New. Plaintiff, suing in partition to establish an undivided interest in real estate as heir of father who had disappeared more than seven years previously, was not required to bring himself within the provisions of the statute, relative to administration of estates of absentees. 207 Iowa1145, 222NW390.
332–2 [c] **Partition of lands includes all improvements thereon,** as such improvements follow title in absence of agreement to contrary. NJ 146A184.
332–7 333 Ill 101, 164NE169.
333–11 334 Ill 539, 166NE118, 65ALR 887.
334–34 334 Ill 539, 166NE118, 65ALR 887.
335–47 Mo 32SW(2d)91.
335–52 221Ala209, 128S396; 170Ga225, 152SE243; 334 Ill 539, 166NE118, 65 ALR887; Mo 30SW(2d)608; NJCh 150 A338; 129 Or413, 272P902.
336–72 Mo 32SW(2d)91.
336–73 333 Ill 138, 164NE222.
336–77 219Ala660, 123S48.
337–83 219Ala660, 123S48; NC 153SE 602.
339–1 [a] (5) Owner of life estate in its entirety together with one half of remainder is not entitled, as against minor owning the other one half of remainder, to partition, notwithstanding statute, authorizing partition by consent of parties. 207 Iowa696, 223NW497.
341–26 219Ala234, 121S528.
341–30 Mo 32SW(2d)91; 10PaDist&Co 665.
343–46 [c] **Statute does not authorize decedent's widow to prevent partition** sale of decedent's property by withholding her consent to sale. 134Misc845, 236 NYS427.
343–52 160Tenn477, 26SW(2d)141.
344–68 221Ala150, 128S149; TexCivA 25SW(2d)881. But see 221Ala150, 128 S149.
344–70 [b] 219Ala660, 123S48.
345–75 [a] (6) Providing that certain persons holding estate with right to immediate use may sue for sale of land on ground that life estate is burdensome. Mo 23SW(2d)91.
346–93 107WVa300, 148SE119.
348–31 220Ala149, 124S202; 98Fla276, 123S768.
348–40½–New. Where a husband is entitled to have his statutory dower set off to him, heirs of his wife cannot have partition of the entire fee against his will. Mo 23SW(2d)91.
349–50½–New. Heirs of a wife have a right to have the remaining two-thirds interest in fee and the remainder in the other third partitioned after assignment of the widower's dower, and sold subject to his life estate. Mo 23SW(2d)91.
351–78 Mo 30SW(2d)608.
353–20 179Ark605, 17SW(2d)298.
355–61 12PortoRicoFed13.
355–72 See also NJCh 150A338.
357–99 [q] 322Mo 654, 15SW(2d)842; Mo 31SW(2d)805. [s] 137Misc11, 242 NYS558.
358–3 [c] (1) Mass 167NE268.
359–19 [a] **Proceedings thereunder.**–Mass 171NE645.
359–19½–New. or constitutional provisions, 143 Okl 57, 287P414.
360–32 208 Iowa625, 226NW144, 148 [citCJ]; 156Miss424, 125S554.
361–35½–New. Upon an issue raised by the administrator of the ancestor that it is personal property, the court will refuse to decide the question in the partition suit. NJCh 147A559.
361–38½–New. The orphans' court, in a partition proceeding, has power to amend a recognizance given therein by substituting as recognizees other than those named as such. 297Pa451, 147A 102.
361–38⅓–New. Where the court, by intermediate order, approved the sale and directed delivery of the deed on payment of cost, a delay of further proceedings to a later term did not operate to divest jurisdiction. 208 Iowa 1241, 227NW118.
361–41 NH 147A898(1stcase).
363–66½–New. Pleadings and proceedings are governed by rules applicable to ordinary civil actions. Mo 30SW(2d) 607.
363–83 139 Okl 48, 281P283 (partition of oil and gas lease).
365–15 221Ala150, 128S149.
365–18 334 Ill 539, 166NE118, 65ALR 887.
365–22 TexCivA 11SW(2d)814.
366–32 10LaA212, 120S666.
368–65 [a] **One heir cannot join other heirs as plaintiffs** in partition suit without their consent. 233Ky410, 25 SW(2d)1034.
374–14 See also NJCh 147A559(1st case).
380–20 But see 108WVa665, 152SE533.
383–75 334 Ill 539, 166NE118, 65ALR 887.
385–35 Mo 30SW(2d)607.
386–62 See also 249 IllA252.
387–86 220Ala411, 125S650.
388–93 249 IllA252.
389–29½ 227Ky125, 12SW(2d)278.
400–63 [a] (1) 221Ala429, 129S12 (bill conceding partial homestead need not show residue not part of homestead). [b] (1) 219Ala98, 121S89. [c] (3) As asking for partition in kind. 334 Ill 137, 165NE598, 65ALR344.
400–65½–New. In partition of personal property, facts must be pleaded indicating loss of value, mismanagement, irreconcilable differences as to the disposition or control of the property, or other circumstances justifying an equitable action. 139 Okl 48, 281P283.
401–67 11PaDist&Co 464.
403–13 179Ark605, 17SW(2d)298. See also Md 148A416.
403–20 102CalA606, 283P80 (plea of ownership of undivided one-half interest by plaintiff is equivalent to averment of title in fee).
404–30 [a] (4) Filing of evidences of title with petition necessary only when possible. 234Ky104, 27SW(2d)679. (5) Petition improperly dismissed because title papers were not filed in view of amended petition and proof. 234Ky 104, 27SW(2d)679. [b] In Ohio.–25 Oh NPNS470.
408–97 Md 148A416.
409–15 [d] **Answer held sufficient.**–170 Ga495, 153SE37.
409–21 128Kan607, 278P744.
413–9 [c] **Where answer denied that property was susceptible of partition in kind,** there was raised fact issue which could not be determined on general demurrer to petition. TexCivA 13SW(2d) 233.
414–24½–New. A bill for the sale of land for division is not subject to demurrer for want of equity on account of an insufficient averment as to the interest of the parties, in that a failure to make a positive statement in such respect is not jurisdictional. 219Ala98, 121S89.
415–31 218Ala562, 119S610(1stcase).
415–31½–New. A general demurrer to a bill for partition can only raise the question of the sufficiency of the bill for equitable relief. 333 Ill 101, 164NE169.
415–41 Mo 30SW(2d)607.
416–70 333 Ill 101, 164NE169.
418–95 220Ala411, 125S650; 249 IllA 252.
419–1 [a] **Burden of proof to show prejudice** from partition of land rests on party asserting it. 154Wash340, 282 P212.
419–8 232Ky741, 24SW(2d)560.
419–13 9LaA14, 118S857. See also IndA 169NE349.
419–15 150SC351, 148SE190.
420–31 221Ala74, 127S503.
421–36½–New. Divisibility of land. In the absence of evidence as to extent, character and location of land jointly owned, it will be presumed that the land is divisible. 228Ky161, 14SW(2d) 395.
422–63 [a] (9) To show that defendant attempted to commit fraud on complainant. 334 Ill 211, 165NE641. (10) To show that lands were partnership assets to which surviving partner was entitled for liquidation purposes. 205Cal 642, 272P573. (11) To show land involved, though homestead of surviving widow, was worth more than two thousand dollars. 221Ala74, 127S503. (12) Other findings. 180Ark973, 23SW(2d) 983. (13) Other instances. TexCivA 29 SW(2d)431.
422–64 [a] (4) 334 Ill 137, 165NE598, 65ALR344.
422–69 [a] (6) To show that surviving partner was entitled to land as partnership asset for liquidation purposes. CalA 264P772.
422–70 226Ky776, 11SW(2d)956.
423–75 [g] **Order reciting compliance with conditions of settlement** and dismissing case with prejudice held within jurisdiction of court. Iowa 228NW661.
424–4 [f] **Continuance to avoid necessity of partition not erroneous.**–Iowa 228NW661.
424–11 336 Ill 366, 168NE349.
425–34 [a] **It is within court's discretion** to rerefer report to referees, or to confirm it. 43F(2d)976.
426–55 IndA 169NE349.
426–64 See also 196NC801, 144SE924.
427–89 220Ala511, 125S655(2dcase).
427–97 But see 220Ala511, 125S655(2d case).
428–15 227AppDiv821, 237NYS501.
428–26½–New. The rule that, in partition suits, interlocutory judgment fixing interests of claimants must be the basis for final judgment, is inapplicable, where the interlocutory decree expressly excluded a certain block, title to which was contested, from the property to be partitioned. TexCivA 11SW (2d)237.
428–26⅓–New. Partition does not become fixed until all the purparts have been awarded. 299Pa291, 149A319.
429–45 228AppDiv629, 238NYS6 (interlocutory judgment).
429–47 TexCivA 29SW(2d)461.
429–53½–New. Free access to public highway should be provided for in decree to parties allotted lands remote from public lands. Va 154SE483.
430–65 But see Del 149A307.
431–5 TexCivA 29SW(2d)461.
431–7½–New. Failure of the court awarding partition to comply with request of petitionee to fix the time within which she might remove from the premises certain buildings belonging to her does not constitute error, since the law gives her reasonable time. Vt 147A 345.
435–85½–New. Under Ontario statute inchoate or actual dower right of widow

of absentee is validly affected by decree where guardian was appointed for absentee husband. **Ont** [1930] 2**DomLR** 135.

435-92 [b] **Party intervening after interlocutory decree** is not estopped from asserting his rights. 30**Hawaii**323.

436-21½-New. Refusal to reopen a partition case to introduce evidence on the value of improvements for the purpose of taking improvements into account is proper where made while suit is still pending and there is no allegation of value of improvements in petition. 322 **Mo** 573, 16**SW(2d)**63.

438-77½-New. Jury trial. It is error for the court to refuse to submit to the jury a special issue of ratification or waiver raised by pleading and evidence in a suit to avoid partition deed. **Tex CivA** 7**SW(2d)**657.

438-85 34**PortoRico** 120.

440-30½-New. Dominion and control of lands are essential to enforcement of decree for partition. 99**Fla**976, 128**S**416.

440-43 219**Ala**121, 121**S**419.

442-67 **Iowa** 231**NW**334.

443-70 **Iowa** 231**NW**334.

443-78 [a] **In Delaware.**-149**A**307.

443-82 **NJ** 144**A**714.

444-4 [a] **In West Virginia.**-108**WVa** 665, 152**SE**533.

445-10 139 **Okl** 48, 281**P**283.

446-33 181**Ark**736, 27**SW(2d)**523.

447-52 235**Ky**301, 31**SW(2d)**367.

447-60 233**Ky**304, 25**SW(2d)**735.

451-26 See also 232**Ky**751, 24**SW(2d)** 555.

455-95 **Md** 148**A**416.

455-3 219**Ala**660, 123**S**48.

457-30 219**Ala**660, 123**S**48.

458-40 [a] **Failure to introduce legal proof of indivisibility of land** does not render judgment for sale void where infant owner was properly joined as party plaintiff. 233**Ky**600, 26**SW(2d)**516.

458-49 220**Ala**411, 125**S**650.

459-80 220**Ala**411, 125**S**650; **Mo** 30 **SW(2d)**607 (interest of trustee in bankruptcy); 118**Tex**343, 15**SW(2d)**589; **TexCivA** 29**SW(2d)**461 (equitable rules and statutory provisions may be blended).

462-18 But see **Miss** 130**S**108.

462-21 228**AppDiv**629, 238**NYS**6 (purchaser paying off mortgage).

462-27 167**La**287, 119**S**51; 228**AppDiv** 629, 238**NYS**6.

463-35½-New. The surviving husband and children suing for partition of homestead property sold pending suit have been held entitled to all of the sum paid by the purchaser as accrued taxes on the property taken in part payment at a stated price. **TexCivA** 19**SW(2d)** 382.

463-45 118**Tex**343, 15**SW(2d)**589.

465-76½-New. In action by infant for partition of realty sold without authority, rentals received by purchasers should be considered. 228**AppDiv**629, 238**NYS**6.

467-91½-New. Royalties from oil and gas lease. Where land was partitioned among the heirs without mention of an oil and gas lease executed by deceased, royalties must be apportioned among the heirs in accordance with the principle of apportionment of rents, where the lessee brought in a gas well on that part of the farm which had been allotted and deeded to one of the heirs. 227**Ky**607, 13**SW(2d)**772, 64**ALR**630.

467-1½-New. Cotenant entitled to interest on value of use and occupation by other cotenant. **Miss** 130**S**108.

469-23 **Iowa** 230**NW**324.

471-64 **Mo** 29**SW(2d)**1100.

471-69 198**NC**466, 152**SE**161; 156**SC**29, 152**SE**712 (purchaser at mortgage foreclosure of improving tenant's undivided interest).

474-93 But see 168**La**534, 122**S**718.

474-94 See also 167**La**287, 119**S**51.

476-43½-New. Cotenant cannot assert as set-off value of use and occupation of predecessors in title of other cotenant. **Miss** 130**S**108.

476-44 167**La**287, 119**S**51.

476-49 But see **Miss** 130**S**108.

479-90 334 **Ill** 137, 165**NE**598, 65**ALR** 344; 322**Mo** 573, 16**SW(2d)**63.

483-75 [c] **Mortgage paid by predecessor in title.**-**Miss** 130**S**108.

484-2 255 **IllA**161.

485-13 219**Ala**98, 121**S**89.

486-40½-New. Under statute, the court may ascertain and decree homestead rights of widow as an incident of partition. 219**Ala**98, 121**S**89.

489-99 322**Mo** 573, 16**SW(2d)**63.

493-70½-New. Commissioners should be selected with due regard to intelligence and character. **Va** 154**SE**483.

494-13½-New. Decree appointing commissioners is final, and, where no appeal was prosecuted from it, fixes the rights of the parties. 334 **Ill** 137, 165**NE**598, 65**ALR**344.

496-77½-New. Transaction whereby special commissioner appointed to sell real estate and specifically authorized to assign purchase money bonds at their face value pledged bonds at less than their face value with bank is void with reference to liability of surety on commissioner's bond. 153**Va**484, 150**SE**403.

500-67½-New. Commissioners are bound by decree as regards interests of parties. **Mo** 30**SW(2d)**97.

501-8 229**Ky**369, 17**SW(2d)**207.

504-62 **Va** 154**SE**483.

504-72 **Mo** 32**SW(2d)**91 (report not contradictory).

506-38 [a] **Separate provisions are to be read** and construed together. **Mo** 32 **SW(2d)**91.

507-47 [a] **Report granting life estate to surviving husband** did not vest fee in children. **Mo** 32**SW(2d)**91.

507-51 [a] **Partition of oil and gas lease.**-139 **Okl** 48, 281**P**283 (commissioners are without authority given in case of statutory petition of real estate).

509-13 322**Mo** 573, 16**SW(2d)**63.

510-37½-New. Report of commissioners must be set aside when they are entertained or shown undue curtesies by litigants. **Va** 154**SE**483.

510-37½-New. Court must reject report when it appears that commissioners' conduct has been possibly influenced by acts of litigants. **Va** 154**SE** 483.

511-45 **TexCivA** 17**SW(2d)**469.

511-62 [b] **Evidence sufficient** to sustain decision of commissioners as to value. 235**Ky**759, 32**SW(2d)**336.

513-16½-New. Where a report of complete partition is confirmed, but certain allotment lines are slightly within the exterior boundary, it will be held that there was no intention to leave such narrow strip unpartitioned. 108**WVa**53, 150**SE**513.

522-64½-New. "Sale in partition" ordinarily means sale by committee appointed by court at auction at a time fixed. 110**Conn**516, 148**A**358.

522-67 [a] (1) **La** 129**S**664. (5) Sufficiency of procès verbal of family meeting. **La** 129**S**664.

522-68 [a] **Where court order directs sheriff to sell,** no execution or order of court clerk is required. 136 **Okl** 185, 276**P**742, 64**ALR**154.

522-76-78½-New. A court's order of sale of the land involved in a partition action is a public document and all bidders as well as other persons are charged with notice of its terms. 151**SC**114, 148**SE**704, 63**ALR**965.

523-89 219**Ala**121, 121**S**419.

524-16½-New. Where land is sold under order of court in a partition action, a successful bidder becomes a party to such action and is amenable to the jurisdiction of the court with the right to move in that cause. 151 **SC**114, 148**SE**704, 63**ALR**965.

524-17½-New. Where a bill is filed by the devisees under a will for division of property in kind, the fact that the decree appointing commissioners provides that, if they find that the premises cannot be divided, they shall appraise the land, does not justify order of sale. 334 **Ill** 137, 165**NE**598, 65 **ALR**344.

524-30 322**Mo** 1017, 18**SW(2d)**13.

525-40 136 **Okl** 185, 276**P**742, 64**ALR** 154.

526-70 219**Ala**660, 123**S**48.

528-32½-New. It is error for the court to make an allowance to the commissioner selling property without hearing evidence as to the value of the services performed. **MoA** 13**SW(2d)**573.

529-48 208 **Iowa**1241, 227**NW**118.

529-56 [a] **Changing terms of sale of** mortgaged property as fixed in judgment is in excess of authority of notary and auctioneer. 170**La**680, 129**S**128.

531-33 220**Ala**411, 125**S**650.

534-16½-New. The highest bidder at the sale of land under order of court in a partition action has a reasonable time after the sale to examine the title to lots bid off to him. 151**SC**114, 148 **SE**704, 63**ALR**965.

534-20 [b] **Acceptance by clerk of court** of cash portion of bid from highest bidder is tantamount to acceptance of bid and confirmation of sale. 151**SC** 114, 148**SE**704, 63**ALR**965.

534-21 [b] **Offer, prejudicial to infants' interest,** need not be accepted by court. **Va** 153**SE**705.

534-22 See also 250**Mich**91, 229**NW**491.

535-24½-New. Acceptance of highest bid by majority of trustees only held in compliance with decree. **Md** 149**A** 614.

537-99½-New. A court of equity has power to issue a rule requiring the purchaser at a sale under court order to show cause why he should not be made to comply with the terms of the sale and of his bid. 151**SC**114, 148**SE**704, 63**ALR** 965.

537-99½-New. To entitle the purchaser to relief from liability on his bid at the sale of land under court order, he must show, by great weight of evidence, a valid reason why he should not comply with the bid. 151**SC**114, 148**SE**704, 63 **ALR**965.

537-99¼-New. The purchaser of land sold under court order who conceived that his rights were prejudiced by failure of the court clerk to execute the deed has his remedy by rule against the clerk. 151**SC**114, 148**SE**704, 63**ALR** 965.

537-99½-New. Delay of over six years in seeking to compel the highest bidder at a sale of land under order of court to comply with his bid has been held not to entitle the purchaser to be relieved from his obligation on the ground of laches. 151**SC**114, 148**SE**704, 63**ALR** 965.

537-99¼-New. A successful bidder cannot arbitrarily abandon his offer pending confirmation of sale. **Iowa** 228**NW** 641.

538-13 232**Ky**751, 24**SW(2d)**555.

538-14 230**Ky**191, 18**SW(2d)**1003.

538-21 151**SC**114, 148**SE**704, 63**ALR** 965.

538-32 [a] **Transfer tax is lien on interest of decedent in property,** rendering realty sold for partition unmarketable till payment. 229**AppDiv**19, 241**NYS**35.

538-42½-New. Under statute, the purchaser has the right to insist on having an order of the court transferring a mortgage against the share of one of the coöwners in favor of her minor child to the proceeds of the sale before payment. 168**La**63, 121**S**303.

541-94 229**AppDiv**19, 241**NYS**35.

542-44½-New. In a suit to require the purchaser of land at partition sale to comply with his bid, heirs of the grantors under deed retaining a reversionary interest must be joined. 197**NC**353, 148 **SE**429(1stcase).

544-89½-New. Where the court's order for the sale of property did not provide for resale on failure of the purchaser to comply with the terms of the sale, the clerk of court is wholly without power to make a resale. 151**SC**114, 148 **SE**704, 63**ALR**965.

546-40 [c] **Order nisi entered by clerk confirming sale on partition** is void under statute. 250**Mich**91, 229**NW**491.

547-60 [a] (3) Purchaser at partition sale, who feels himself aggrieved by court's confirmation order, should, during same term, move to reopen question and file exceptions. 230**Ky**191, 18**SW** **(2d)**1003.

547-64 [a] (3) To show that price bid was fair and adequate. 218**Ala**593, 119 **S**631.

543-79 **Md** 149**A**614.

54°-89 [b] **Confirmation properly refused** where appraisal rendered it doubtful whether appraisers intended amount

of mortgages to be deducted from valuation made. 128Kan766, 280P778.
549-3 179Ark845, 18SW(2d)371.
549-6 [a] **Evidence held insufficient** to show such gross inadequacy of price as to indicate impropriety. Md 149A614.
549-9 319Mo542, 4SW(2d)760. [a] **Award should include interest** that might thereafter accrue. 170La302, 127S731.
550-29 Del 149A307.
550-38 208Iowa1241, 227NW118. [a] (2) 208Iowa1241, 227NW118. (4) Other instances. 208Iowa1241, 227NW118.
551-60 Del 149A307; 168La786, 123S325.
553-5 153Miss443, 121S135.
554-15½-New. The purchaser at a partition sale after having omitted to move for reopening the question of confirmation of sale during the term could not, in a suit to enjoin the collection of the sale bond, have the sale set aside on the ground that a building on the property was destroyed by fire prior to the confirmation. 230Ky191, 18SW(2d)1003.
555-60½-New. Failure of the guardian of minors or of the court to protect their interests, although error, does not affect the jurisdiction or validity of partition and conveyance thereunder. 208Iowa1241, 227NW118.
556-72 233Ky410, 25SW(2d)1034.
556-85 [a] **Evidence held insufficient.**-142Okl265, 286P799.
556-92 154SC407, 151SE570 (misunderstanding).
557-4 138Okl91, 280P436.
558-42 Va 155SE694.
559-65½-New. Heirs made plaintiffs without their knowledge or consent can sue for vacation of judgment of sale since appeal would be inadequate. 233Ky410, 25SW(2d)1034.
559-66 La 129S664.
560-86 [c] **Specification of defects.**-319Mo542, 4SW(2d)760.
561-2 [a] **Ordering of resale without acceptance of bid of purchasers** at first sale did not impose risk upon bidders to respond to possible deficiency. 250Mich91, 229NW491.
561-13 266Mass525, 165NE686.
561-17½-New. A suit by a bidder at a partition sale to enjoin the collection of his sale bond after confirmation of sale constituted a collateral attack on the judgment. 230Ky191, 18SW(2d)1003.
562-36 DelCh 144A44.
562-39 232Ky751, 24SW(2d)555.
562-40 [d] **Title to undivided interest, based on unrecorded deeds,** is not affected by partition proceeding and sale thereunder to which owner was not a party, and of which he had no knowledge. 178Ark709, 13SW(2d)294.
563-57 151SC114, 148SE704, 63ALR965.
566-15 Del 149A307.
567-35 231Ky423, 21SW(2d)658.
568-47 [b] **Terms of bid** requiring personal assumption of mortgage debt is obligatory on purchaser. 170La680, 129S128.
568-58½-New. Relative to the title acquired under an orphans' court partition, any defect in the recognizance is cured by the persons entitled to the money due on the recognizance accepting it when it is distributed to them. 297Pa451, 147A102.
569-62½-New. error in recitals of petition; DelCh 144A44.
570-88 [e] **Sale void for joinder of heirs as plaintiffs without their consent** does not pass title of heirs. 233Ky410, 25SW(2d)1034.
571-96½-New. Where the title to land sold at judicial sale is substantially defective, and the purchase money is held by the commissioner in custodia legis, the court, in the exercise of its equitable powers, properly decreed that the parties be restored to status quo. 197NC502, 149SE729(2dcase).
574-58½-New. In a suit for sale of mineral lands for division, a purchaser at the sale is not chargeable with the value of coal mined between the date of purchase and the date of confirmation of sale. 218Ala593, 119S631.
574-58½-New. Claim against purchaser for timber cut after purchase is properly rejected. La 129S664.
574-58¼-New. Purchaser not in possession until after lawful purchase not chargeable with rent. La 129S664.
574-63½-New. Orders in a partition suit are conclusive that the purchase money had been paid in, and subsequent purchasers are under no duty to investigate that question. 208Iowa1241, 227NW118.
575-76 DelCh 145A121.
577-25 DelCh 145A121.
578-45 218Ala593, 119S631.
578-57 232Ky751, 24SW(2d)555.
578-64 Iowa 230NW351. [a] **Check to plaintiff's estate.**-Iowa 230NW351.
579-81 [a] **Liability of sureties on bond of officer** appointed to distribute and invest proceeds. Va 155SE815.
580-25 170Ga225, 152SE243.
583-71 31OhA317, 167NE414.
583-75 31OhA317, 167NE414.
585-97 Iowa 230NW324.
586-28½-New. Referees choosing third person to effectuate distribution are bound for faithful performance of his obligation. Iowa 230NW351.
592-68 208Iowa1241, 227NW118 (court's record, though in form of certificate and irregular in form, held to set out findings and order of court).
598-64 Vt 147A345 (reasonable costs).
599-92½-New. All those found to be entitled to their respective shares of property partitioned in an action for common benefit must share expenditures regardless of whether the controversies were litigated under statute. 207Cal200, 277P475.
599-92½-New. In a suit by the heirs of a deceased husband against the widow to have dower in the homestead assigned and the remainder of the property partitioned, the court may charge the entire cost of the partition proceedings against the heirs. 98Fla344, 123S777.
599-2 167La287, 119S51.
600-20 Vt 147A345 (court in awarding partition is not required to order that costs be apportioned among persons interested).
601-41 [a] **Necessity for attorney to itemize expenses.**-170La302, 127S731.
602-79½-New. Since proceedings for partition are more or less equitable, the court has authority to direct payment of the petitioners' costs out of money in the hands of the clerk which the petitioners paid when awarded partition. Vt 147A345.
602-79½-New. Costs may be taxed against the estate of an incompetent under an agreement of compromise. Iowa 228NW661.
604-22 CalA 288P1085.
605-56 207Cal200, 277P475; CalA 288P1085; 97PaSuper277. [a] (3) Statutes permitting attorney's fee to be paid as part of costs in partition proceeding apply equally to partition in probate and chancery courts, and for partition in kind as well as in sales for division of real and personal property. 220Ala78, 124S197. (4) Fees to be limited to services rendered in securing partition. 221Ala150, 128S149.
606-64 [a] **Petitioner alone** is entitled to counsel fees. 97PaSuper277.
606-69 97PaSuper277.
606-71 220Ala78, 124S197 (judicial and revisable discretion).
606-72 220Ala78, 124S197 (counsel fees are not allowed out of common fund where counsel contests separate adverse claims); 26OhNPNS373; 129Or413, 272P902.
606-83 220Ala78, 124S197.
607-85½-New. Attorneys may assert claims against fee of agent of heirs where earned in litigation closely connected with partition proceeding. 170La302, 127S731.
607-94 333Ill83, 164NE148.
607-98 [e] **Where complainant in partition suit defeats relief prayed for,** his attorney cannot recover counsel fees from common estate but only against complainant's separate interest. 220Ala78, 124S197.
608-21 220Ala78, 124S197 (common fund).
608-35 26OhNPNS373.
608-37½-New. **Reference to statute.** A notice of motion for counsel fees need not refer to the code provision authorizing party to move the court for allowance of such fees. 207Cal200, 277P475.
609-48 220Ala78, 124S197.
610-75 220Ala78, 124S197.
611-3 TexCivA 25SW(2d)881.
612-25 227Ky125, 12SW(2d)278.

PARTNERSHIP

640-3 AlaA 130S164(2dcase).
642-5 [a] (10) Other instances. 198NC289, 151SE637.
644-43 [c] (4) 167La421, 119S413. (9) 9LaA706, 119S902. (16) Automobile truck is not ship or other vessel within the purview of statute. 9LaA378, 119S442(2dcase). (17) Selling and delivering saw logs. 12LaA535, 126S590.
645-45 [b] (18) Construction of houses. 10LaA273, 120S694(2dcase). (19) Transferring and storing movable property for hire. 9LaA378, 119S442(2dcase). (20) Refining oil. 1LaA94.
646-57½-New. A contract for the sale and delivery of cattle, providing for repurchase if fattened at an increased price, constituted a contract for sale and repurchase rather than one of partnership. 47Ida692, 280P678(2dcase).
648-22 38F(2d)707; AlaA 130S164(2dcase); MoA 30SW(2d)635; 13LaA468, 126S733.
649-33 NJCh 146A310.
649-34 TexCivA 16SW(2d)1100.
649-35 BC [1928] 4DomLR132, 140.
650-51 But see 41F(2d)501.
650-54 134Misc449, 235NYS55.
650-57 153Va779, 151SE165.
650-59 245Mich688, 224NW604; 198NC289, 151SE637.
651-65 [b] (11) Partnership agreement by motor cycle policeman and others for ownership and operation of filling station has been held not void as against public policy. 334Ill183, 165NE629.
651-66 [a] (15) Evasion of statute providing for license for fishing to residents only. 131Or522, 284P189.
654-29 Md 150A37; Mass 172NE243; 34PortoRico94; Va 154SE568. [d] **Agreement held not to constitute partnership.**-318Mo784, 1SW(2d)163, 58ALR493.
656-32 NJCh 146A310. [b] **Whether syndicate agreement creates trust relationship, partnership, or joint venture depends on way in which syndicate managers are to conduct affairs committed to their charge;** if they act as principals free from control of subscribers, trust is created; but, if they are subject to subscribers' control, it is a partnership. 225AppDiv102, 232NYS224.
656-33 [a] **Though parties describe arrangement as partnership,** none will be declared if terms of contract do not constitute partnership. Va 154SE568.
656-34 96CalA322, 274P84.
657-51 138Misc234, 244NYS541; 137Okl58, 278P330; 294Pa535, 144A537.
658-52 294Pa535, 144A537.
658-54 137Okl58, 278P330.
658-55 [a] **If agreement of partnership is executory and conditional,** no partnership is created until all conditions are fulfilled. 106WVa694, 146SE826.
658-60 294Pa535, 144A537.
659-61 [b] **Mutual and concurrent promises between parties** that they will contribute capital in certain designated proportions is a condition precedent to right to claim profits, unless waived. 106WVa694, 146SE826.
659-66½-New. In the notes are cited cases in which the court has considered the rights of the parties in real estate purchased in contemplation of consummation of partnership, where no partnership contract was completed. 333Ill523, 165NE135.
659-71 253IllA238.
662-40 CalA 288P834.
666-91 [a] **Coöwnership** is essential element of partnership. 153Va779, 151SE165.
666-2 251NY115, 167NE190.
668-28 30F(2d)330.
668-29 248IllA1.
668-30 38F(2d)309.
668-35 Mass 172NE243; TexCivA 16SW(2d)947.

669-36 318Mo 784, 1SW(2d)163, 58ALR 493; SD 225NW301; TexCivA 13SW (2d)432.
669-41 131 Or522, 284P189.
670-47 30F(2d)330; 96CalA322, 274P 84.
671-52 30F(2d)330; 144 Okl 74, 289P 742.
671-53 [a] **Evidentiary inference of fact remains.**–321Mo 910, 13SW(2d)537.
671-54 TexCommnA 13SW(2d)74.
671-55 178Ark997, 13SW(2d)21.
671-57 152Wash205, 277P447.
672-63 Mass 167NE677.
672-65 26 OhNPNS560.
672-68 96CalA322, 274P84.
673-78 AlaA 130S164(2dcase); 102CalA 136, 282P539; MoA 30SW(2d)635; 134 Misc449, 235NYS55.
674-81 153Va779, 151SE165.
674-82 144 Okl 74, 289P742; 127 Or399, 272P668.
674-83 [a] **Agreement to share profits and losses is partnership,** not aleatory contract. La 129S655.
675-17 102CalA136, 282P539.
676-18 IndA 169NE349.
676-22 181Ark265, 25SW(2d)434. [a] Contract for sale and delivery of cattle with provision for repurchase at advanced price, if they are fattened, constitutes contract for sale and repurchase rather than one of partnership. Ida 27SP222.
677-30 144 Okl 74, 289P742; 12PaDist &Co 668.
680-69 TexCivA 24SW(2d)1109.
681-31 Nebr 232NW777.
682-99 179Ark578, 17SW(2d)284; 12Pa Dist&Co 668; TexCivA 22SW(2d)533. [d] (3) Agreement by real estate agent to pay another one half of total commissions for finding purchaser does not create partnership between them. 31 OhA63, 166NE382.
682-1 128Me22, 145A250. [a] **Partnership shown.**–23AlaA246, 123S265.
684-8 96CalA322, 274P84; 34Porto Rico 94.
684-9 246Mich96, 224NW420.
686-30 179Ark578, 17SW(2d)284.
687-46 249Mich410, 228NW737; MoA 30SW(2d)635.
688-57 318Mo 784, 1SW(2d)163, 58ALR 493.
689-66 NC 154SE43.
692-19 WVa 155SE640.
698-99 1LaA140.
709-90 13LaA14, 127S54 (liability predicated on estoppel).
709-91 318Mo 784, 1SW(2d)163, 58 ALR493; NH 150A549; WVa 154SE 868.
710-92 10LaA471, 121S348; 134 Okl 121, 272P466; SD 224NW937.
710-93 13LaA14, 127S54.
710-97 13LaA14, 127S54.
711-1 179Ark387, 16SW(2d)9; 13LaA 14, 127S54. [d] 43F(2d)334.
711-2 9LaA323, 120S505.
711-6 See also 247Mich365, 225NW512.
712-9 13LaA14, 127S54 (must be publicly disclaimed).
712-10 13LaA14, 127S54.
712-12 39GaA611, 147SE896; 41GaA 818, 155SE92; 207 Iowa1332, 224NW 564; Nebr 232NW777; Sask [1929] 2 DomLR588. [d] **Corporation dealing with ostensible partners** was entitled to special notice of lack of partnership before doing work for one of them. 13 LaA14, 127S54.
713-15 318Mo 784, 1SW(2d)163, 58 ALR493.
713-16 41GaA818, 155SE92. [a] 41 GaA818, 155SE92.
716-88 [b] (3) "Alles Printing Co.," used by Alles as sole proprietor, is not forbidden by statute. CalA 275P513.
717-11 Wash 291P485.
718-31 339 Ill 400, 171NE504.
719-33 106WVa694, 146SE826.
719-44½-New. , and that plaintiff relied on such holding out in making contract, Nebr 232NW777.
720-53 TexCivA 32SW(2d)513.
720-74 13LaA39, 127S28(2dcase); NJ Ch 146A310.
721-86 41GaA818, 155SE92; 152Miss 318, 119S912; 196NC355, 145SE677(1st case).
722-93½-New. Evidence as to basis on which beneficiaries agreed with deceased for distribution of his property is incompetent. Minn 231NW916.
723-14 [c] **Deed reciting execution by partnership composed of defendant and another** is inadmissible where not signed by defendant. 41GaA207, 152SE260.
725-62 297Pa176, 146A536.
726-67 178Ark629, 12SW(2d)393; 179 Ark387, 16SW(2d)9.
726-68 [b] (11) That attorney verbally guaranteed payment of client's account with plaintiff. 11LaA158, 123S 141.
726-71 SD 224NW937; WVa 155SE 640.
727-89 106WVa694, 146SE826. [b] **Evidence held sufficient** to show claimant was not member of partnership. 157Miss311, 127S900.
728-91 WVa 155SE640; Wash 291P 485.
728-92 [a] 40F(2d)588; 178Ark629, 12SW(2d)393; 179Ark556, 17SW(2d) 282; 96CalA152, 273P845; 207 Iowa 430, 223NW154; 208 Iowa62, 224NW 831; Iowa 232NW663; 158Md292, 148 A536; Minn 231NW916; MoA 18SW (2d)140; NJCh 146A310; 251NY115, 167NE190; WVa 155SE640. [b] 43 F(2d)334; AlaA 130S164(2dcase); 96 CalA322, 274P84; CalA 288P834; 333 Ill 523, 165NE135; 207 Iowa1332, 224 NW564; 11LaA158, 123S141; Mass 172 NE243; 131 Or522, 284P189; 51Philippine676.
728-93 [a] 234Ky257, 27SW(2d)963; 179Minn175, 228NW614. [b] (1) 207 Cal 772, 279P778; 170La85, 127S373; 12PaDist&Co 668; Can [1930] 4DomLR 330. (2) To overturn finding that partnership did in fact exist. 101CalA664, 282P19(1stcase).
728-94 229Ky666, 17SW(2d)733; 180 Minn447, 231NW408; 129 Or138, 276P 1086.
728-97 [a] (4) Other instances. 181 Ark370, 26SW(2d)63.
729-5 [a] (3) Introduction as partner. CalA 285P1062(2dcase).
729-6 101CalA691, 282P390.
729-24 30F(2d)330; 334 Ill 183, 165 NE629; 10LaA471, 121S348; 247Mich 213, 225NW599; 134Misc449, 235NYS 55.
730-28 127 Or399, 272P668; SD 225 NW301.
730-31 [a] (9) 167La421, 119S413.
731-34 [a] (4) See also Wash 291P 485.
731-39 267Mass246, 166NE644. [a] (1) Wash 291P485.
732-44 [b] **Evidence held insufficient to show notice** that one ostensible partner was not a partner. 13LaA14, 127S 54.
733-51 NH 150A549.
733-53 [a] (1) WVa 154SE868.
733-58 179Ark387, 16SW(2d)9.
733-60 Nebr 232NW777.
733-61 TexCommnA 23SW(2d)677.
736-28 [a] (2) Object of statute is to protect public from fraud. 50Philippine 802.
737-32 TexCivA 23SW(2d)484 (contractual status).
737-38 [a] **Purpose of statutes stated.**–Ida 285P1015. [b] **Purpose of Fictitious Names Act.**–14PaDist&Co 261.
738-49 35F(2d)439. [e] **Individual's use of name followed by word "company"** did not necessitate filing of certificate, as not being fictitious or nondisclosure of partners. CalA 280P391.
738-59 95CalA101, 272P789.
739-64 [a] (2) Partners, doing business under name of "Andrews-Cordano Plumbing Company," must file certificate, since such name might designate either corporation or partnership. 205Cal 699, 272P587.
739-66 Cal 286P1015 (name held not fictitious).
739-66½-New. Nova Scotia statute is inapplicable to individual conducting business at store exhibiting sign descriptive of place of business so as to render him liable for debts of unregistered purchaser. NS [1930] 2DomLR 415.
739-67 95CalA575, 272P1108; CalA 288P434.
739-68 SD 232NW29.
739-69 Ida 285P1015.
740-77 CalA 288P434.
741-90½-New. Where a certificate filed and published was inherently defective, judgment for partners on a note payable to the trade name must be reversed. 100 CalA70, 279P814.
741-94½-New. A certificate of partnership filed in the office of the county clerk is presumed to have been regular and in compliance with the statute, then in force. 247Mich385, 225NW532.
741-95 [b] **Members of partnership failing to procure cancellation of certificate on dissolution of partnership** are liable to those extending credit in reliance on record. 14PaDist&Co 261.
741-99 [a] **In Philippines.**–50Philippine802.
741-1 [a] (4) In suit by partnership, in which defendant averred by way of affirmative defense that partnership had failed to file certificate showing names of partners, court could dismiss action for failure to file such certificate without hearing evidence. 205Cal 699, 272P 587. [b] **Motion to dismiss held improper** where defense of failure to file statutory certificate was not pleaded. 251 Mich273, 231NW575(2dcase).
743-22 CalA 288P434; 251Mich273, 231NW575(2dcase).
743-29 9LaA137, 119S483.
745-56 [b] CalA 291P864.
746-57 CalA 288P434; CalA 291P864.
746-60 [b] (2) Evidence held insufficient to show compliance. CalA 291P 864. [d] **Proof of partnership.**–CalA 275P513.
747-88 LaA 130S851; 118Nebr419, 225 NW51; 225AppDiv439, 233NYS477.
751-47 140 Okl 21, 282P149.
752-72 40F(2d)588; CalA 264P772. [b] **Insurance intended to insure interest of one partner for benefit of mortgagee of such partner's interest** did not become part of firm's assets, nor subject to partnership lien. 226Ky828, 11SW (2d)946, 61ALR1198.
752-74 CalA 264P772.
755-33 [a] (3) Partnership cannot take title to real estate where its articles of partnership are not reduced to writing. 12LaA196, 125S175.
759-76½-New. Partners vested with title to partnership realty hold title in trust for partnership. Va 154SE587.
759-82 205Cal 642, 272P573.
759-84 205Cal 642, 272P573.
760-94 Pa 151A796.
760-96 205Cal 642, 272P573.
761-4 Va 154SE587; Wash 287P55.
762-8 294Pa203, 143A913.
762-24 [a] (4) 205Cal 642, 272P573.
763-26 [a] (2) Partner who takes lease in his own name of property rented for partnership purposes holds it as trustee for firm. 294Pa203, 143A913. [d] **One partner and wife.**–334 Ill 183, 165 NE629.
763-33 299Pa354, 149A650.
764-56½-New. Real estate was, as between partners, personalty, where it was procured for and used in the business of the partnership. 294Pa203, 143 A913.
764-56½-New. In some jurisdictions real estate belonging to a copartnership is, as between the partners, regarded as impressed with the character of personal property. SD225NW301.
764-57 179Ark556, 17SW(2d)282.
769-17 [d] **Evidence held to justify conclusion** that real estate did not belong to partnership. 299Pa354, 149A 650.
771-48 42F(2d)212.
772-61 Mass 170NE826. [c] **This duty continues** during time partnership is being settled and closed. Mass 170NE 826.
772-62 Cal 290P577.
772-63 Mass 170NE826 (held immaterial that client had solicited partner); 240NYS250.
772-72 205Cal 642, 272P573 (with regard to all partnership transactions). See also CalA 264P772.
773-74 Mass 170NE826.
775-12 [a] **Contemplated partner failing to furnish required capital** acquires no interest in copartnership. 235Ky 296, 31SW(2d)373.
776-24 Iowa 229NW139.
776-26 SD 227NW841(2dcase).
776-27 But see 198Wis512, 224NW737.
776-30 86Mont19, 282P37.

777-46 86Mont19, 282P37.
777-47 86Mont19, 282P37.
777-60 6LaA110.
777-62 177Minn602, 225NW924, 66 ALR1.
779-79 **Ida** 285P1015 (transaction whereby pledgee of firm bonds acquired interest of certain partners therein held to constitute advancement drawing interest); 86Mont19, 282P37.
780-91 **Iowa** 227NW512.
780-96 But see 267Mass262, 166NE566.
781-1 **Va** 154SE587.
781-5 **Ida** 285P1015.
783-29 **SD** 227NW841(2dcase).
783-40 [d] **Sales price.**-96CalA152, 273P845 (though proceeds of sale thereof were not collected).
785-72 [b] **Enforcement of right.**-157Md378, 146A271.
786-92 86Mont19, 282P37; **Utah** 275P772; 108WVa64, 150SE226.
787-93 198Wis512, 224NW737 (such statute is merely declaratory of common law).
787-96 **TexCivA** 11SW(2d)545.
788-99 295Pa381, 145A427 (special compensation).
788-1 **CalA** 285P384. See also 108WVa64, 150SE226.
789-19½-New. Partner's acquiescence in nondistribution of profits during and after period of war constitutes acquiescence to nondistribution through fiction of bookkeeping entries. 227AppDiv378, 237NYS668.
789-19½-New. Provision that salary of partner in charge of New York office shall be specified in dollars has been held not applicable to additional salary in francs. 227AppDiv378, 237NYS668.
789-19¼-New. Assignment of interest in profits of partnership has no immediate effect. 39F(2d)546.
790-23 **CalA** 286P473.
790-25 [g] (4) Where partnership agreement required partners to give their entire time to business and limited compensation to share of profits, other partners were not entitled to offset sum representing value of extra services performed by them during plaintiff's absence. **TexCivA** 11SW(2d)815. (5) Provision in written partnership agreement that withdrawals of annual profits by partner in New York shall be at rate of five francs to the dollar has been held to constitute mere bookkeeping arrangement. 227AppDiv378, 237NYS668. (6) Under agreement between company and individual in form of hiring but in reality of partnership providing for deduction of wages of employees of company in determining profits, manager of company is officer and not employee. **Man** [1929] 3DomLR912. (7) Provision that withdrawals by partner in charge of New York branch shall be at rate of five francs per dollar, based on presumption that normal exchange conditions would continue, likewise failed with failure of conditions. 227AppDiv378, 237NYS668.
791-32 **CalA** 286P473.
791-43 227AppDiv378, 237NYS668.
791-44 96CalA152, 273P845.
793-68 249Mich35, 227NW732; 134Misc449, 235NYS55.
794-69 249Mich35, 227NW732.
794-73 [a] **To relieve self of duty to secure business,** a partner must make full disclosure. **Mass** 170NE826.
795-32 See also 207Cal772, 279P778.
795-89 [c] **Where contract, purporting to be agreement between partnership and corporation, was signed by partners individually, partner** who was creditor of partnership was party thereto and bound by its terms. **Iowa** 224NW550.
796-7½-New. The legal effect of a note of one partner for one half of the amount advanced by the other depends on the mutual intent of the parties. **Iowa** 229NW139.
797-32 **Conn** 152A142 (circumstances and conduct considered in construing scope and effect). [a] (6) Agreement for sale and purchase of partner's interest under which notes and mortgages were executed has been construed as operating as adjudication of all partnership accounts. 47Ida731, 278P218.
797-33½-New. A bill of sale of plaintiff's interest given to one of defendants and a repurchase agreement providing for plaintiff's recovery of a share on payment of his indebtedness were for the consideration of the court to take and construe the instruments together declaring their legal effect. **TexCivA** 11SW(2d)815.
798-41½-New. After a sale of a partner's interest under an agreement that he should be permitted to return to the firm on taking up certain notes and assuming his share of partnership indebtedness, advances made by the selling partner without reëntering the firm are not within the partnership. 47Ida731, 278P218.
798-43 **Conn** 152A142 (including leases).
798-47 **CalA** 285P707.
798-49 220Ala643, 127S237 (payment under contract of conveyance).
799-58 35F(2d)330 (life insurance policy).
800-82 249NY458, 164NE545.
800-85 135 **Okl** 231, 275P323.
801-1 249Mich35, 227NW732.
802-16 **Cal** 292P970; 41GaA453, 153SE440; 253 **IllA**238; 144 **Okl** 163, 289P1106. But see 235Ky208, 30SW(2d)892.
803-23 144 **Okl** 163, 289P1106.
804-25½-New. In an action of one partner against another to recover a share of the partnership assets and property the partner cannot recover judgment for rental values of partnership property. **TexCivA** 17SW(2d)494.
804-28 294 **IllA**297 (to recover fraudulent payment of funds); **TexCivA** 23SW(2d)527.
804-29 253 **IllA**238.
804-30 253 **IllA**238.
804-33 85Mont56, 277P631.
805-36 85Mont56, 277P631.
805-37 85Mont56, 277P631.
805-33 **TexCivA** 23SW(2d)527.
805-43 **Cal** 292P970.
806-59 157Md378, 146A271.
806-62 253 **IllA**238.
807-63 253 **IllA**238.
807-64 253 **IllA**238.
807-74 253 **IllA**238; 157Md378, 146A271.
808-79 96CalA152, 273P845.
808-81 253 **IllA**93 (liability for part of office rent).
809-90 **Va** 154SE587.
812-25 96CalA152, 273P845 (without previous accounting); **TexCivA** 11SW(2d)815 (members who purchased from mortgagee proportionate parts of partner's interest and divided plaintiff's share of profits among themselves have been held jointly and severally liable, with mortgagee, for conversion, where bill of sale and agreement for repurchase did not permit disposition of interest unless entire business were sold).
814-62 [a] **That cross-claim incidentally asks for accounting** to determine misappropriated amount does not make it of equitable cognizance. **Cal** 292P970.
814-71½-New. Law courts have jurisdiction where an action is for an accounting for a definite sum, equitable powers not being involved. 10PaDist&Co797.
818-30 [a] (12) For recovery of partnership interest in property. 169Ga199, 149SE788. [b] (6) Other instances. 230AppDiv15, 242NYS541.
822-86 198Wis512, 224NW737 (must be established by clear and satisfactory evidence).
822-89 [a] (8) Other instances. 181Ark1145, 29SW(2d)283 (absence of mutual mistake).
822-94 [b] (4) As to profits or losses under partnership contract. **TexCivA** 17SW(2d)494.
825-32½-New. Partners paying the amount of judgment against the partnership were not entitled to have such payments credited on the judgment against them in favor of another partner. 9LaA425, 121S227.
826-43 **NH** 149A746.
826-44 [a] **One employing partners to** sell property is bound by either, though dealing with one only. 41GaA721, 154SE386.
826-45 36F(2d)392; **NH** 149A746; **TexCivA** 17SW(2d)1116.
826-53 102CalA541, 283P829; 48Ida714, 284P1032; **TexCivA** 20SW(2d)328; **TexCivA** 26SW(2d)463 (delivery of property to third person to hold in trust).
827-55 **NH** 149A746.
827-56 50Philippine802.
827-61 **NH** 149A746.
830-6 **NH** 149A746.
831-11 **TexCivA** 17SW(2d)1116.
831-18½-New. Where creditor knew obligation for which note was given was personal obligation of one member of firm he could not assume it was made in course of firm business. **Iowa** 229NW681.
831-21 249 **IllA**297.
832-22 246 **IllA**297.
837-14 [c] **That partnership might also be liable because of receipt of benefits** does not relieve individual partner from liability. **Ariz** 283P924.
838-24 40GaA768, 151SE654.
840-42 **MoA** 14SW(2d)668.
842-67 **Nebr** 232NW777.
842-69 **Nebr** 232NW777.
845-2 **TexCivA** 14SW(2d)909.
845-6 154Miss233, 122S475.
846-9 136 **Okl** 123, 276P723.
848-38 102CalA136, 282P539 (listing partnership realty with broker for sale).
852-28 156Miss424, 125S554.
852-30 156Miss424, 125S554.
852-31 156Miss424, 125S554.
853-54 197NC237, 148SE241.
854-70½-New. Real estate of a partnership may be conveyed only by the partnership, and signatures of the wives of the partners are not necessary for conveyance thereof. 245Mich688, 224NW604.
854-80 **SD** 225NW301.
855-90½-New. General power of a partner to dispose of firm real estate is apparently limited to the object of payment of firm debts or restoration to the partner of capital contributed to the firm. **SD** 225NW301.
855-93 218Ala523, 119S214.
855-98½-New. Sale by two members of firm consisting of three members of their interest in bonds pledged by firm is not binding on firm. **Ida** 285P1015.
858-76 **SD** 227NW841(2dcase).
862-46 [d] **Presumption** is that individual member of company has no right to use assets to pay his individual debts. 249Mich403, 228NW796.
863-56 249Mich403, 228NW796 (note payable to company).
866-80 **CalA** 289P209(2dcase); 247Mich10, 225NW628.
870-22 **TexCivA** 14SW(2d)909.
870-23 **TexCivA** 14SW(2d)909.
870-27 **WVa** 153SE252.
872-51 41F(2d)584; 34NM470, 283P910.
874-78 40GaA768, 151SE654.
874-80 249Mich403, 228NW796 (proof of act necessary).
874-81 249Mich403, 228NW796 (proof of act necessary).
878-38 [b] **Power of attorney construed** not to authorize use of firm name as accommodation indorser. **WVa** 154SE872.
878-40 But see **WVa** 154SE872.
880-70 98PaSuper270.
880-71 [a] **In New York.**-225AppDiv256, 232NYS592.
880-75 225AppDiv256, 232NYS592 (providing partner is resident of state). [a] (2) Unless partner not signing is resident of state, statute providing that he is bound by authorization in note for confession of judgment is invalid. 225AppDiv256, 232NYS592.
880-77 [a] **In New York.**-225AppDiv256, 232NYS592.
884-36 **NH** 149A746.
884-40 **NH** 149A746. [b] **Partner is not agent of firm to admit that transaction** was firm business. **NH** 149A746.
885-48 **TexCivA** 20SW(2d)328 (forcible eviction of occupants of partnership premises).
886-74 11PaDist&Co570.
889-8 178Ark432, 10SW(2d)878.

890-29 See also **MoA** 30SW(2d)160.
890-30 **MoA** 30SW(2d)160.
891-43 **MoA** 30SW(2d)160.
891-46½-New. Both partners may be equally estopped to set up defense against consummating agreed exchange of land, where one partner is estopped. **CalA** 285P1062(2dcase).
893-72 **Iowa** 229NW681.
893-86 102CalA136, 282P539.
897-28 103CalA335, 284P736.
899-50 232Ky583, 24SW(2d)287.
902-8 40F(2d)588.
903-19 **NH** 149A746; 48Philippine132.
903-20 **TexCommnA** 14SW(2d)813 (partnership note).
904-21½-New. Ordinarily partners are not sureties for partnership debt but are joint obligors. **Va** 154SE587.
904-27 **MoA** 20SW(2d)701 (individual partner is liable though liability is not charged against him on books of creditor); **MoA** 23SW(2d)639.
905-34 [a] **Agreement between partners and seller exempting** individual members from liability, held enforceable. **TexCivA** 26SW(2d)449.
905-42 **LaA** 130S625.
905-43 36F(2d)392; **TexCivA** 29SW (2d)818.
905-44 48Philippine841.
905-50 13LaA39, 127S28(2dcase). See also 1LaA16.
905-51 9LaA378, 119S442(2dcase); 13 LaA14, 127S54.
906-54 13LaA39, 127S28(2dcase); 13 LaA14, 127S54.
906-66 36F(2d)392; 13LaA64, 127S10 (not commercial).
907-83 35PortoRico 307.
908-1 But see **CalA** 292P711.
908-8 [b] **Partner must be entitled to partnership assets and primarily liable for firm debts.-Va** 154SE587.
908-14½-New. Order of priority of joint judgments are same whether rendered on partnership debts or on simple joint obligations. **Va** 154SE587.
908-19 **Va** 154SE587.
911-56 228Ky645, 15SW(2d)446 (lien continues throughout existence of partnership); **MoA** 23SW(2d))639; **Va** 154 SE587.
911-59 **Va** 154SE587.
912-78 **Utah** 287P926.
913-98 229Ky674, 17SW(2d)726; **MoA** 23SW(2d)639.
914-2 229Ky674, 17SW(2d)726.
915-4 229Ky674, 17SW(2d)726.
915-5 **MoA** 23SW(2d)639.
917-38 But see 228Ky645, 15SW(2d) 446. [c] **Evidence held sufficient** to support finding that partner did not consent to his partner's giving mortgage on his interest in partnership property for individual debt so as to waive partnership lien. 228Ky645, 15 SW(2d)446.
918-48 **Va** 154SE587.
918-52 229Ky674, 17SW(2d)726; **SD** 227NW841(2dcase). [d] **Judgment against partner on individual debt is subordinate to subsequent judgment against partners on partnership debt.-Va** 154SE587.
919-53 181Ark633, 26SW(2d)1112.
919-55 54SD625, 224NW190.
919-62 **Utah** 287P926.
920-66 229Ky674, 17SW(2d)726.
921-90 **SD** 227NW841(2dcase) (advances to firm's capital in behalf of other partners).
921-93 **Nebr** 230NW501.
937-46 181Ark633, 26SW(2d)1112; 226Ky828, 11SW(2d)946, 61ALR1198; 228Ky645, 15SW(2d)446 (though mortgage was recorded before firm debts were incurred).
939-84½-New. Partnership judgments and individual judgments held properly given priority on individual realty of partner in order of rendition. **Va** 154SE587.
939-93 **Va** 154SE587.
940-1 **Va** 154SE587.
940-3½-New. Junior individual judgment creditor cannot compel senior partnership judgment creditor to resort to partnership realty before individual. **Va** 154SE587.
940-7 50Philippine802. [a] **In Virginia.-Va** 154SE587.
940-10 **Va** 154SE587. [b] **Judgments against partners jointly on firm debt as lien on individual partner's realty. Va** 154SE587.
942-43 **Nebr** 230NW501.
951-37 [c] **In Louisiana,** partnership domiciled therein cannot be sued in Ohio because partner was present in Ohio when service was attempted on partnership through him. **LaA** 129S185.
952-51 [d] (2) Defendants must interpose objection at very outset, or they waive it. **CalA** 274P549.
953-52 **Ill** 173NE486.
954-54 [e] **Conditions fixed by statute** must exist. **Ill** 173NE486.
954-55 [a] (1) 219Ala256, 122S12(2d case). [b] (2) Statute permitting partnership to be sued in firm name does not permit suit by partnership in firm name. 99CalA381, 278P866.
954-56 [b] (6) Partnership holding property within state may sue or be sued in firm name without alleging that partnership was formed for express purpose of holding property within state. 30 OhA367, 165NE109.
956-74½-New. Suit in partnership name after partner's death cannot be excepted to after verdict. 41GaA794, 154 SE809.
957-93 [d] (1) 34PortoRico 292.
962-61 But see 264Mass555, 163NE181 (where answer was general denial, court erred in ruling that nonjoinder of plaintiff's partner as plaintiff could be raised only by plea in abatement).
962-65 83Mont477, 272P992.
963-83 220Ala171, 124S412.
963-84½-New. Partnership which could not own land because its articles are not in writing is not a necessary party to an action against partners to establish a materialman's lien. 12LaA 196, 125S175.
963-84½-New. It is misjoinder to join partners for operating business in action against others for breach of contract. 34 OhA464, 171NE346.
964-5 [a] (4) In suit against individuals doing business under certain name, it is proper to make all partners defendants. 12PortoRicoFed5.
964-8 99Fla1169, 128S420.
966-45 **TexCivA** 19SW(2d)104.
969-7 99CalA381, 278P866 (dismissal without giving opportunity to amend is error).
970-33 219Ala399, 122S359.
971-49 219Ala399, 122S359 (death of partner pending suit); **TexCommnA** 13 SW(2d)685 (death of partner pending foreclosure sale).
971-61 **Ill** 173NE486; **Mich** 233NW 335.
972-64 **LaA** 129S382. [a] (6) Partner served in Ohio in suit on liability of partnership domiciled in Louisiana is not within jurisdiction of Ohio court. **LaA** 129S185. (7) Nonresident partnership may be personally cited at place where found engaged in business within state. **LaA** 130S254 (citation addressed to partnership personally served on partner).
972-67 **AlaA** 130S534.
974-7 178Ark995, 13SW(2d)13 (return held insufficient).
976-31 133Misc678, 234NYS837 (subsequent entry of special appearance held not to deprive court of jurisdiction over copartnership).
979-8 **TexCivA** 27SW(2d)599 (garnishment of firm fund).
980-15½-New. Partnership property within state in which nonresident has interest is subject to attachment although interest therein is owned by residents. **SC** 155SE273.
983-64½-New. The mortgagee of a partner's interest in particular firm property cannot enjoin the use thereof in the firm business pursuant to a partnership agreement. **SD** 227NW841(2d case).
985-87 [b] (2) Allegations held insufficient to show partnership liability on note executed in name of partner. 34 NM470, 283P910.
986-98 See also 153Va779, 151SE165. [f] **TexCivA** 13SW(2d)142; **WVa** 155 SE640. [g] **Allegation "or an unincorporated association"** after allegation of partnership has been held surplusage. 9PaDist&Co 451.
986-99 [b] **Facts pleaded and not designation by pleader determine whether agreement is one of partnership.** 52 Nev302, 287P274.
987-10 **Utah** 282P1029. [h] **Statute requiring affidavit of denial held inapplicable** where plaintiff alleged agreement to form partnership which was denied. **Va** 154SE568.
988-11 101CalA691, 282P390. [h] (1) **TexCivA** 16SW(2d)831. (2) **TexCivA** 16SW(2d)831. [i] **Denial by one of alleged partners** inures to benefit of all defendants. **TexCivA** 16SW(2d)831.
988-21½-New. In Porto Rico the federal court requires an allegation of the residence of partners. 12PortoRicoFed 158.
989-23 [c] **In Ohio.-30 OhA**367, 165NE 109.
989-27 [e] **Answer may be intended as** answer of partnership and individual members. **LaA** 129S447.
989-38½-New. A defense that plaintiffs constitute a partnership transacting business under a fictitious name without compliance with statute must be raised by the pleadings and is not raised by a general denial where the petition does not allege compliance with the statute. 136 **Okl** 298, 277P658.
992-71 321Mo 724, 12SW(2d)920.
992-72½-New. The court's refusal to submit an issue as to whether a contract of defendant was with a partnership is error where there was a general denial. 264Mass555, 163NE181.
993-88 220Ala171, 124S412.
995-7 136 **Okl** 123, 276P723.
996-13 **Iowa** 229NW681 (where creditor did not know partner had no authority to execute note). [a] **There is no such burden** where creditor knew note purporting to be partnership obligation was given for one partner's personal indebtedness. **Iowa** 229NW681.
996-13½-New. , and that creditor knew such note was not in course of partnership business. **Iowa** 229NW681.
996-16 [a] (6) Notice that one is not a partner. 13LaA14, 127S54.
998-48 220Ala336, 125S214. [b] **Evidence admissible against one partner, but not against a firm,** is inadmissible to prove facts not concerning existence and extent of partnership. **NH** 149A 746.
999-60 [c] (8) In action on partnership note where one partner disputed authority of other to execute same, testimony that witness had no notice that authority of one partner was limited is admissible. 220Ala336, 125S214.
1000-71 [a] (2) Other instances. **LaA** 129S458.
1001-73 [a] (3) To show that grantee of deed had knowledge of such facts as to put him on inquiry as to existence of partnership between grantor and his coöwner in property conveyed. 208 Iowa62, 224NW831.
1001-75 [a] (4) Assignment of firm stock certificate for money advanced for partnership purposes. **Kan** 292P768. [e] 156Miss424, 125S554.
1003-83 [a] (9) To support finding that premiums applied by purchaser of partnership insurance agency to pay indebtedness of sellers to insurance company were not to be credited to buyer. 226Ky839, 11SW(2d)973. (10) To sustain finding that individual members of partnership were owners of land. 12 LaA196, 125S175. (11) To show that plaintiff was doing business under firm name at time mentioned in complaint. 102CalA474, 283P87.
1003-87 **CalA** 292P275; 131 Or522, 284 P189 (legality of enterprise).
1004-96 198NC289, 151SE637.
1004-99 [a] **TexCivA** 12SW(2d)601.
1004-7 **SD** 224NW937.
1005-15 **MoA** 20SW(2d)701.
1005-21 94PaSuper95.
1006-37 40Wyo 274, 276P532.
1006-38 **MoA** 20SW(2d)701.
1006-42 **TexCivA** 16SW(2d)1100 (definition held proper in absence of objection).
1006-44 [c] (11) 156Miss758, 126S 836.
1008-63 220Ala336, 125S214. [c] (1) **Iowa** 229NW681 (ratification of note given by one partner).
1009-74 40GaA683, 151SE517.
1009-77 [a] (2) To show partnership

liability on note executed in name of partner. 34NM470, 283P910.

1009–82 169Ga409, 150SE551(2dcase).

1009–88½–New. Judgment against partnership is not judgment against individual unless he was member of partnership. 41GaA207, 152SE260.

1010–92 [b] 219Ala256, 122S12(2d case).

1010–94 AlaA 130S534. [a] (3) Identity of defendants being left uncertain by judgment itself, held that on reference to judgment roll, and to petition in original suit, that proceedings were had against parties individually. Tex CommnA 14SW(2d)813.

1010–2 35PortoRico 190.

1011–16 [a] **In Texas.–CivA** 18SW(2d) 231.

1012–30 93PaSuper49.

1012–41 13LaA39, 127S28(2dcase) (judgment held warranted).

1016–2 339 Ill 230, 171NE178 (not proved to be firm property).

1016–5 41GaA283, 152SE608.

1017–8½–New. An order for the sale of assets, permitting partners to bid the amount of judgment, is not erroneous where the partners owning the judgment had a preferred lien on the assets. 154Wash150, 281P333.

1018–24½–New. Order for sale of individual assets of partner before determination of liens on partnership realty is not erroneous. Va 154SE587.

1020–48 34 OhA84, 170NE443. [b] **Appeal by firm brings up appeal as to partners** when they are condemned as an incident to, and by reason of, membership in the firm. LaA 129S382.

1021–72 170Ga832, 154SE357. [a] **Transfer by two of three partners of their interest in firm assets** without consent of third does not make transferee partner. Ida 285P1015.

1021–75 [a] **It is presumed that value of retiring member was adjusted** in ascertaining value of his interest. IndA 173NE461.

1022–78 267Mass262, 166NE566.

1025–53 267Mass262, 166NE566 (share of damages for condemnation of leasehold accruing before retirement).

1027–4 [a] **As between retiring partner and continuing partner** presumption is that former is released from existing debts. IndA173NE461.

1028–18 207 Iowa1332, 224NW564 (not liable as matter of law).

1028–25 102CalA516, 283P143.

1029–42 102CalA516, 283P143 (new consideration). [b] **Crediting payments on purchase price of half interest** by new partner is sufficient to prevent recovery of entire purchase money where old debts paid were greater than plaintiff's interest in debts. 40GaA430, 149 SE920(2dcase).

1029–49 GaA 155SE345 (payment of attorney fees provided in note). [b] **Agreement to apply assets.–TexCivA** 11 SW(2d) 599.

1029–54 102CalA516, 283P143 (statute of frauds).

1031–89 IndA 173NE461.

1032–7 87Colo 427, 288P639.

1033–29 87Colo 427, 288P639 (statute).

1035–64 140 Okl 264, 283P235.

1037–21½–New. Presumption is that incoming partner acquires interest in chose of action to recover possession of stolen car, hence is entitled to join in suit. TexCivA 32SW(2d)224.

1037–24½–New. Construction of complaint to seek accounting on described property alone. Conn 152A142.

1037–24½–New. Petition for balance due on conditional sale brought by retiring partner for use of conditional vendor against partner assuming balance stated case. GaA 155SE345.

1037–30½–New. Where a partner sold interest in the firm to other members thereof, in consideration of a certain sum and payment of firm debts, there is a conclusive legal presumption that a claim for salary prior thereto was included in the consideration paid for his interest on sale thereof. 294Pa416, 144A422.

1038–38½–New. Evidence has been held sufficient to justify a directed verdict for plaintiff, in an action by a partnership to recover excess rent paid to a retiring partner. 135 Okl 231, 275P323.

1038–44 TexCivA 19SW(2d)104 (necessary party).

1039–56 [c] **Answer of retiring partner sued for partnership debt held insufficient.** 87Colo 427, 288P639.

1039–57 [a] **Burden of proof in action against retiring partner.–Ont** [1930] 3 DomLR804.

1040–85 102CalA516, 283P143; 169La 29, 124S135 (subsequent release from assumption of indebtedness).

1042–16 Iowa 230NW359.

1042–20 Iowa 230NW359 (widow).

1042–22 226AppDiv108, 234NYS349 (surviving partners held not trustees for estate beyond fulfillment of obligations to pay debts and distribute surplus).

1043–40 36F(2d)309 (rights and duties of surviving partner is controlled by specific legislation applicable); 205Cal 642, 272P573; CalA 264P772.

1044–47 [a] (2) It is duty of surviving partner to keep books and accounts. Iowa 230NW359.

1045–57 205Cal 642, 272P573; 13Pa Dist&Co 750. [e] **Corporate stock issued to individual partners but owned by firm** are partnership assets. Iowa 230NW359.

1045–61 13PaDist&Co 750.

1045–68 129Kan470, 283P644.

1047–13 36F(2d)309. [b] **Unsecured creditors of partnership** cannot complain of payments without court order on mortgage covering entire partnership assets. 36F(2d)309.

1057–89 226Ky361, 10SW(2d)1076.

1057–90 226Ky361, 10SW(2d)1076 (surviving partners have right to have partnership assets applied to payment of partnership debts).

1058–14 198Wis512, 224NW737.

1058–15 [a] **Absent showing of proper liquidation and insufficient assets** surviving partner cannot compel estate of deceased partner to contribute. 136Misc 69, 242NYS490.

1059–24 Iowa 229NW687.

1059–33 251NY402, 167NE514.

1059–35½–New, or widow Iowa 230 NW359.

1060–42 Mass 167NE338.

1060–48 Iowa 230NW359.

1061–67 226AppDiv108, 234NYS349.

1062–2½–New. Attorneys conducting the proceeding in the preservation of an estate by objecting to sale to a firm in which the executor was a partner held entitled to a fee of nine hundred dollars, and an attorney for the estate permitting such sale held entitled to a fee of one thousand dollars, where the estate is appraised at one hundred and forty-three thousand, four hundred and forty-one dollars and sixty-two cents. 132 Or 1, 279P850.

1062–2½–New. Allegation of community partnership if meaning universal partnership with decedent is insufficient to show right to appointment as administrator. 170La744, 129S150.

1062–4 [a] **Sale of deceased's property to partnership in which executor is partner** renders such sale void. 132 Or 1, 279P850.

1063–11 [e] **Sale of decedent's property to partnership in which executor is partner** subjects executor to accounting for profits gained by him. 132 Or1, 279 P850.

1063–15½–New. Where a firm in which the executor was a partner made twelve thousand, five hundred dollars profit in the purchase of property of decedent, the final account of the executor should be charged with half that sum. 132 Or 1, 279P850.

1064–28 [c] **Mode of presentation.–** Claim of notary and appraisers should be made in ordinary way by petition and citation instead of rule to show cause. 11LaA168, 123S143. [d] **Necessity of presentation.–Claim** should be presented to liquidator so that it may appear on his account when filed. 11LaA168, 123S143. [e] **Claim of notary and appraiser** is against liquidator as such and not individually, and claim cannot be entertained before liquidator filed account. 11LaA168, 123S143.

1065–35 [h] **Creditors may proceed by rule to compel liquidator** to file account, and, if claims are ignored, may oppose account. 11LaA168, 123S143.

1067–70 158Md597, 149A295; 300Pa 280, 150A599 (compensation allowed by statute). [b] **Statute allowing compensation** held inapplicable to partnership formed before act. 158Md597, 149A295.

1067–74½–New. Where the estate was appraised at one hundred forty-three thousand, four hundred forty-one dollars and sixty-two cents, the executors held entitled to a fee of one thousand five hundred dollars. 132 Or1, 279P 850.

1068–77 136Misc69, 242NYS490 (burden on survivor to show sale was fair).

1068–81 136Misc69, 242NYS490.

1069–95 [b] Failure of executors to secure direction of court before liquidating old firm, contrary to agreement to continue partnership one year after death of partner, established failure to meet requirements of their fiduciary position. 135Misc4, 237NYS635. [c] **Executors could not absolve themselves from penalties for violation of agreement to continue business** after partner's death on ground that son of deceased partner knew that old partnership was being liquidated. 135Misc4, 237NYS635.

1069–96 38F(2d)309.

1071–21 TexCivA 24SW(2d)1111.

1074–84 But see 12PaDist&Co 338.

1075–7 Iowa 230NW359.

1077–24 Iowa 230NW359. [e] (2) Refusal to allow increased salaries to partners over salaries received at death of deceased partner in accounting with widow held proper. Iowa 230NW359.

1078–37 Iowa 230NW359; Minn 231 NW916.

1079–49½–New. Widow of deceased partner has been held entitled to payment of her distributive share as ascertained at date of accounting. Iowa 230 NW359.

1080–60½–New. Surviving partners as trustees for liquidation held entitled to credits in transacting business in form corporate as though there was no formal corporate organization. Iowa 230 NW359.

1080–60½–New. Attorneys' fees paid by surviving partners in accounting proceeding with widow of deceased partner are not proper charge against her interest. Iowa 230NW359.

1080–61 Iowa 230NW359.

1083–17 95PaSuper390.

1083–19 135Misc4, 237NYS635.

1083–20 95PaSuper390.

1083–22 300Pa280, 150A599.

1085–44 247Mich385, 225NW532 (real party in interest under statute).

1087–67 227AppDiv622, 236NYS78(2d case) (action for accounting).

1089–84 250NY147, 164NE887.

1089–90½–New. Where guaranty of rent under lease was signed "by" one of the partners, such partner's executor is a proper party defendant, since by signing the guaranty he became liable individually, even if he acted without authority. 250NY147, 164NE887.

1091–33½–New. In an action by a surviving partner to establish interest in realty held by a deceased partner and his wife as joint tenants, children of the deceased partner are not necessary or proper parties. 334 Ill 183, 165NE 629.

1093–60½–New. Allegations held sufficient to entitle the petitioner to an accounting against the surviving partner. 251NY402, 167NE514.

1094–98 253NY80, 170NE500.

1096–10 [d] **Authority to sign guaranty.–**250NY147, 164NE887.

1100–82 13PaDist&Co 750.

1100–99 But see 198Wis512, 224NW 737.

1101–5½–New. Surviving partner not entitled to partition of partnership realty until after accounting to determine his interest. Kan 292P947.

1101–18 [b] (3) Where relationship of partners existed between plaintiff and decedent over thirty years without question up to moment of decedent's death, and plaintiff filed claim against decedent's estate for one-half interest in property, after death, there was no laches. 207 Iowa430, 223NW154.

1102–27½–New. Administrator of partnership estate and deceased part-

ner's executor de bonis non may intervene in surviving partner's action to partition firm realty. **Kan** 292P947.

1104-60 [d] 179**Ark**556, 17**SW(2d)**282. [f] **Cancellation of mortgage on growing crops.**-205**Cal** 642, 272P573 (findings for defendant sustained). [g] **Action to enjoin sale or mortgaging of growing crops.**-205**Cal** 642, 272P573; **CalA** 264 P772 (findings for defendant sustained).

1104-61 [c] **Existence of express agreement to pay wages for services to partnership.**-198**Wis**512, 224**NW**737.

1105-78 102**CalA**205, 282P968.

1107-5½-New. A partnership composed of an individual and another partnership may be dissolved in the same manner as a partnership composed entirely of individuals. 140 **Okl** 21, 282P149.

1108-18 140 **Okl** 21, 282P149.

1108-19 140 **Okl** 21, 282P149.

1109-33½-New. Where a partnership consists of an individual and another partnership, a notice of dissolution by such individual to either of the members of the other partnership is sufficient. 140 **Okl** 21, 282P149.

1110-43 102**CalA**205, 282P968.

1111-59 **Mass** 170**NE**826.

1111-66 38**F(2d)**309; 170**Ga**832, 154**SE** 357; 226**Ky**361, 10**SW(2d)**1076; **Mass** 167**NE**677; **TexCivA** 24**SW(2d)**1111.

1115-20 38**F(2d)**287.

1116-34 158**Md**292, 148**A**536.

1116-43 102**CalA**516, 283P143.

1116-46 [a] **Transfer by two of three partners of their interest in firm assets** without consent of third does not dissolve partnership. **Ida** 285P1015.

1117-61 102**CalA**516, 283P143.

1118-88 **CalA** 288P114(2dcase).

1119-2 42**F(2d)**65.

1122-58 **CalA** 285P707.

1122-59 **Mass** 172**NE**858; **Vt** 150**A**148.

1122-65 170**Ga**832, 154**SE**357.

1124-94 226**Ky**554, 11**SW(2d)**427.

1125-8 **Cal** 290P577.

1125-20 **CalA** 285P707; 102**CalA**205, 282P968; 170**Ga**832, 154**SE**357; 102 **CalA**205, 282P968 (insurance company suing partners on note executed by one partner after dissolution).

1132-46 95**CalA**720, 273P592.

1133-52 250**NY**63, 164**NE**743 (chargeable with equitable share of value appropriated by using land for his own profit).

1133-53 250**NY**63, 164**NE**743 (trustee for partnership).

1137-49 **Mass** 169**NE**154 (in absence of knowledge).

1138-84 227**Ky**353, 13**SW(2d)**266 (unequivocal notice).

1143-74 **CalA** 289P209(2dcase); 157 **Miss**93, 127S689.

1144-80 178**Ark**1144, 14**SW(2d)**224.

1144-81 33 **OhA**462, 169**NE**829.

1144-92 226**Ky**554, 11**SW(2d)**427 (cancellation of insurance policy).

1145-99 227**Ky**353, 13**SW(2d)**266.

1146-31 157**Miss**93, 127S689.

1147-51½ 178**Ark**1184, 13**SW(2d)**826.

1148-59½-New. Delay in suing former partner to impress trust on profits does not constitute laches. 240**NYS**250.

1148-67 [b] **Evidence held admissible.**-Evidence tending to show improbability of oral agreement sued on. 226 **AppDiv**86, 234**NYS**321.

1150-9 [a] **Allegations held sufficient to state cause of action.**-**MoA** 25**SW(2d)** 551.

1151-27 102**CalA**205, 282P968.

1151-28 102**CalA**205, 282P968.

1151-29 [a] (4) To establish liability of buyer's former partner for goods sold after dissolution of partnership on theory of estoppel. 153**Wash**186, 279P405. (5) To show fraud. **Iowa** 232**NW**496.

1151-31 **Mass** 169**NE**154. [a] (4) Whether plaintiff knew that partnership was dissolved when he sold goods to member of firm. **Iowa** 228**NW**6.

1152-48½-New. Where partnership was registered at time writ issued, fact that firm subsequently filed cessation certificate did not affect jurisdiction. **Vt** 150**A**148.

1152-49 13**LaA**495, 128S196.

1154-95 [a] (2) Where partnership of three brothers failed and two quit business, but third engaged in like business, such business has been held not to be partnership entitling brother to accounting, notwithstanding occasional use of old firm name. 246**Mich**479, 224**NW** 331.

1156-18 231**AppDiv**3, 245**NYS**547.

1158-59 **Iowa** 230**NW**359; 300**Pa**280, 150A599.

1159-73 [a] (3) Accounting between surviving partner and deceased partner's widow has been held proper in action by survivor wholly apart from widow's administration of decedent's estate. 150**Wash**312, 272P986.

1160-90 **Mich** 227**NW**671; 298**Pa**71, 148A48 (statement of account by surviving partner).

1161-12 86**Mont**19, 282P37; **NJCh** 152 A249; 294**Pa**203, 143A913. [e] **Surrender value of life insurance policies** carried for benefit of partnership is properly included as assets in determining share of deceased partner. **Iowa** 230**NW**359.

1163-34 250**NY**63, 164**NE**743 (partner held entitled to interest on advances). [c] (2) Partner permitting copartner conducting business in latter's name to include whole partnership income in his returns and pay tax accordingly is chargeable on accounting with amount paid in excess of taxes due, if computed on such copartner's share alone. 250**NY**63, 164**NE**743.

1164-41 But see 227**AppDiv**622, 236 **NYS**78(2dcase).

1164-42½-New. In an action for an accounting, plaintiff is not entitled to an allowance for good will where partnership is not established. 227**AppDiv**622, 236**NYS**78(2dcase).

1164-45 **Mass** 170**NE**826 (member violating dissolution agreement must account for fees recovered under violation).

1165-48 245**Mich**685, 224**NW**357.

1167-84 **Iowa** 230**NW**359 (no allowance for depreciation).

1168-89 [a] **Trucks contributed by partners without regard to value,** obviates necessity of taking into account difference in value in distributing proceeds. 181**Ark**327, 25**SW(2d)**756.

1168-98 **TexCivA** 32**SW(2d)**688.

1175-89 86**Mont**19, 282P37. [b] (2) Method of ascertainment of profits for given period of time where profits for like periods of time are known. 48 **Philippine**605.

1176-6 **TexCivA** 11**SW(2d)**815 (partner held entitled to share of profits during his absence less amount paid for extra help to take his place).

1177-17 But see **Mass** 167**NE**338.

1178-34 **Iowa** 230**NW**359.

1178-36½-New. Action of federal government in allowing expenses in computing income for taxation is immaterial in determining charges in accounting by surviving partners. **Iowa** 230**NW**359.

1182-89 **Miss** 126S842(4thcase) (no interest until balance is finally adjudicated); 300**Pa**280, 150A599.

1185-26½-New. A compromise agreement, executed by the members of a special partnership, which was not filed as required by French law, has been held valid until judicial determination of nullity. 227**AppDiv**378, 237**NYS**668.

1185-26½-New. The fact that the dissolution of a special partnership provided for in a compromise agreement between partners has not been effected has been held not to invalidate the compromise agreement. 227**AppDiv**378, 237 **NYS**668.

1186-30 But see 246**Mich**117, 224**NW** 613.

1186-32 **Mass** 170**NE**826.

1187-39 246**Mich**117, 224**NW**613.

1187-47 But see 98**CalA**430, 277P149.

1193-50 [a] (14) Other instances. 35 **PortoRico** 946.

1195-78½-New. Suit to set aside partnership settlement procedure. **TexCivA** 32**SW(2d)**688.

1195-78½-New. Effect of setting settlement aside. **TexCivA** 32**SW(2d)**688.

1196-82 [j] **Eight years** where there was ample opportunity to assert claim and most of witnesses were dead. **NJ** 146A377.

1196-83 155**Wash**417, 284P749(2d case).

1196-91½-New. Where liquidator to settle accounts between partners is appointed by dissolution deed questions of right or claim should be presented to him. 35**PortoRico** 946.

1198-29 [c] **Equity has jurisdiction** to compel discovery and accounting where there were conflicting statements between partners, charges of fraud, and necessity for settlement. 157**Md**378, 146 A271.

1198-30 42**F(2d)**65; 158**Md**292, 148**A** 536.

1198-32 **Ida** 285P1015.

1198-36 26 **OhNPNS**560 (when title to property is fraudulently taken in name of third person).

1199-49½-New. A claim of a creditor against a partnership cannot be adjudicated in an action for partition of partnership lands and for partnership accounting and settlement. 156**Miss**424, 125S554.

1203-10½-New. It is not defense that clause in lease forbids transfer without written consent of lessor. 294 **Pa**203, 143A913.

1203-10½-New. In an action to compel the executors to account during the year following testator's death on the ground that the executors violated an agreement to continue, approval by a son of the testator of an unofficial account of the executors has been held no defense to the act of the executors. 135**Misc**4, 237**NYS**635.

1203-19 218**Ala**644, 119S840.

1204-33 156**Miss**424, 125S554.

1204-34 [h] **Where foreign dissolving decree is final** court has jurisdiction of action for accounting. 229**AppDiv**685, 243**NYS**616.

1205-40½-New. Dismissal of a surviving partner's petition in a probate proceeding for an accounting, as involving an accounting between the petitioner and decedent's widow as partners, leaves the petitioner free to seek an accounting between them by an action wholly apart from the widow's administration of decedent's estate. 150**Wash**312, 272 P986.

1206-55 132**Misc**873, 230**NYS**719.

1207-69 **TexCivA** 16**SW(2d)**888.

1208-79 **TexCivA** 16**SW(2d)**888.

1209-92 [d] (9) One hundred years. 31**F(2d)**311.

1211-1 **Mass** 170**NE**826.

1213-17 [d] **But if interlocutory divorce gave wife husband's interest** in firm realty, she would be necessary party. **CalA** 286P1089.

1213-20½-New. Complainant wishing to attack mortgage on partnership realty mortgagee should join mortgagee as party. 221**Ala**343, 128S450.

1213-22 **Iowa** 232**NW**663 (holders of mortgages and deficiency judgments against land purchased for firm purposes).

1215-63 229**AppDiv**685, 243**NYS**616.

1217-91 [a] 107**WVa**136, 147S483.

1218-94 [f] **Where partner puts up bond** to prevent appointment of receiver, his subsequent acts are those of receiver. 48**Philippine**605.

1221-27 138**Misc**301, 244**NYS**600.

1222-34 229**Ky**71, 16**SW(2d)**503(2d case).

1222-50 [a] (3) Other instances. **Tex CivA** 24**SW(2d)**1111.

1225-87 [a] (2) Note from partnership's debtor to one of the partners, without knowledge of receiver of partnership, indorsed by such partner to third person to whom firm was indebted is not payment of receiver's claim against maker. **RI** 145A17. [b] **Payment by debtor to partnership creditor** does not entitle debtor to receive credit therefor on indebtedness to receiver at time of his appointment. **RI** 145A17 (note given by debtor to creditor).

1225-93 [a] **Crops on land sublet by partner.**-**SD** 228**NW**404(2dcase).

1226-11½-New. A bid at a receiver's sale of partnership assets on dissolution of the partnership, which is not a specific cash offer, is not entitled to be considered a bid. **TexCivA** 21**SW** **(2d)**1096.

1226-11½-New. Where a bid at a receiver's sale is objected to as being ambiguous, the bidder may remove all doubt by tendering a cashier's check.

TexCivA 21SW(2d)1096.

1226-11¼-New. A cash bid of a partner at a receiver's sale of partnership assets is entitled to approval over a bid which is not a specific cash offer. **TexCivA** 21SW(2d)1096.

1227-20 179Ark688, 17SW(2d)876 (such payment is not excused by insolvency of bank in which funds were deposited through no fault of receiver).

1227-31 [h] 218Ala644, 119S840. [j] 138Misc234, 244NYS541.

1228-35 [a] **Sufficient allegations.**-Bill, showing personal employment of agent to sell goods or agent's thrusting of joint agent on principal without latter's consent is not bad in view of averments that complainant secured for partnership business of acting as fiscal agent for sale of corporation's stock. 218Ala644, 119S840.

1233-4 **Mass** 170NE826.

1233-5 **Mass** 170NE826 (amendment allowed).

1235-38 **MoA** 13SW(2d)1085.

1235-39 11LaA519, 124S315(1stcase).

1235-41 339 Ill 400, 171NE504; **RI** 144A145.

1236-45 **Iowa** 229NW139.

1236-50½-New. The burden of proof is not carried by resort to inferences which can be drawn as favorably to plaintiff as to defendant. **Iowa** 229NW 139.

1237-58 [k] (2) Tabulations held admissible for court's convenience. **Ida** 285P1015.

1237-59 [h] **Payment of additional tax by partner** not shown on income tax report is inadmissible to prove additional fund in which plaintiff was entitled to share. **TexCivA** 10SW(2d)1030.

1237-61 **Iowa** 229NW139; 135Misc4, 237NYS635.

1238-62 **Mich** 227NW671. [a] **NJ** 146 A377 (between surviving partners and widow and son of deceased partner); **TexCivA** 29SW(2d)829 (that account included belt and saws). [g] (1) **NJ** 146A377 (special loans by partners to firm were properly charged as partnership liabilities and not voluntary contributions). (2) That partner advancing money for construction of buildings advanced money for use of partnership. **Cal** 287P341. [k] 134Misc449, 235NYS55 (plaintiff fraudulently induced to join in sale of land to defendant who immediately reconveyed to defendant partner). [s] 167La421, 119S 413 (funds belonged to partnership, and hence partner was without authority to divert funds to personal use). [w] **Tex CivA** 11SW(2d)815 (augmentation of profits by partner's withdrawal of sums from cash receipts). [ae] **Existence of partnership debts and obligations.-Tex CivA** 16SW(2d)888. [af] **That partner rendered services not contemplated by** partnership agreement. **TexCivA** 29SW (2d)829. [ag] **Other matters.-CalA** 285 P384.

1239-63 [c] **MoA** 13SW(2d)1085 (evidence of agreement to pay salary out of partnership earnings before division of profits was about evenly divided). [f] 11LaA519, 124S315(1stcase). [g] **Cal** 287P341 (receipt of money not accounted for). [i] **Minn** 231NW916. [m] 300Pa280, 150A599 (unaccounted for profits). [q] **Possession.-TexCivA** 10SW(2d)1030. [r] **Value of partnership property.-Minn** 231NW916. [s] **Transfer of property for partnership purposes.-207Cal** 772, 279P778. [t] **Interest.-Minn** 231NW916.

1239-66 [b] **The stage of proceeding in which to take testimony** is a matter of order of proof, not jurisdiction. **Cal** 286P425.

1239-67 [a] **Existence of contract to compensate** partner for services is question of law. **CalA** 285P384.

1241-89½-New. Failure to find on issue of estoppel of partner to claim interest in bonds held not error in view of other findings. **Ida** 285P1015.

1242-19 **Cal** 286P425. [a] **Stage of proceeding in which to order reference** is a matter of order of proof, not jurisdiction. **Cal** 286P425.

1242-20 295Pa381, 145A427.

1242-21 [a] (2) Necessity for submission of questions of accounting to auditor is within judicial discretion of chancellor, and his action will not be set aside unless it has been abused. 295 Pa381, 145A427.

1243-35½-New. That an individual to whom questions of accounting were submitted was designated incorrectly as an auditor rather than assessor is immaterial. 295Pa381, 145A427.

1243-35⅓-New. A statute regulating practice where disputes are submitted by agreement for trial without jury has been held inapplicable, where an assessor was appointed in an accounting case. 295Pa381, 145A427.

1244-60 See also 155Wash417, 284P749 (2dcase).

1247-93 227AppDiv378, 237NYS668. [y] **Allowance to partner.-245Mich685,** 224NW357 (not excessive in view of retention by copartner of control of real estate and business).

1247-94 [n] 86Mont19, 282P37.

1248-95 **Md** 146A271.

1249-28½-New. Mere statement of one partner to another during the life of the firm for the purpose of showing profits or losses does not amount to an account stated. 151Wash538, 276P880.

1249-28⅓-New. Income tax returns of a partnership could not be made the basis of an account stated as between a partner and other members of the firm. 151Wash538, 276P880.

1250-40 [i] **Dividends accruing on securities** pledged as collateral chargeable against surviving partner liquidating business. 300Pa280, 150A599.

1251-41 228AppDiv23, 238NYS394.

1252-58 300Pa280, 150A599.

1255-86 But see **CalA** 285P384.

1255-93½-New. A partner who was the collecting and disbursing officer of the firm and had in his hands funds which would permit payment if any amounts were due cannot complain that accrued interest was not added to unpaid bills for which he was given credit. 295Pa 381, 145A427.

1256-2 228AppDiv23, 238NYS394.

1257-6 **CalA** 285P384.

1257-15 [b] **Partner agreeing to make monthly payments** for privilege of entering established business is not chargeable with remaining payments on dissolution of partnership. 181Ark327, 25SW(2d)756.

1257-20 [d] **Deduction from amount due plaintiff** of claim for unpaid house rent is not allowed. 245Mich685, 224 NW357. [e] **One half of uncollectible accounts due partnership** in hands of one partner who was seeking settlement of partnership accounts held erroneously charged against him. 227Ky49, 11SW (2d)1001.

1258-23 227Ky49, 11SW(2d)1001 (though entire amount of wages paid partner was erroneously paid, court erred in crediting other partner by full amount of wages paid instead of by crediting one half of such amount).

1258-23½-New. A widow, having performed no services in the management of a new partnership between her and her husband's surviving partner as administratrix of decedent's estate or attorney for her as such, could not recover administratrix's fees and expenses as for administration of partnership property. 150Wash312, 272P986.

1258-27 [h] **Sale may be properly ordered prior to accounting.-221Ala343,** 128S450.

1259-46½-New. Sale of land subject to mortgage may be ordered though mortgagee is not party since sale is necessarily subject to his rights. 221Ala 343, 128S450.

1261-74½-New. An assessor was not bound to make special statements of fact and law before reaching his determination. 295Pa381, 145A427.

1262-89 86Mont19, 282P37.

1262-93 **TexCivA** 11SW(2d)815 (defendants objecting are required to file exceptions to report in advance of trial).

1263-6½-New. Set-off, neither pleaded nor reflected by the auditor in his report, is properly rejected where the auditor's report is in evidence and is not excepted to and proof of claim would have contradicted it. **TexCivA** 11SW(2d)815.

1265-49 [a] **Ida** 285P1015.

1266-68 [a] **Recovery of personal judgment is warranted,** notwithstanding unpaid contract entered into by defendants for procuring water supply, where contract was made after exclusion of plaintiff from partnership. 96CalA152, 273P845.

1267-78½-New. Widow of deceased partner suing to ascertain destributive share and to impress trust on assets is not entitled to personal judgment against survivors. **Iowa** 230NW359.

1268-98 [i] (2) Pleadings held to support recovery, based on smaller figure, as factor of amount of losses sustained by defendant. **TexCommnA** 13SW(2d) 74.

1271-36 295Pa381, 145A427 (statute limiting compensation of auditor to ten dollars for each day engaged has been held inapplicable).

1271-38 [e] **Where suit was necessary** to determine rights and claims of partners and for accounting and liquidation, costs of suit as well as costs of liquidation should be borne by partnership and not by individual partners. 167La421, 119S413.

1272-41 295Pa381, 145A427 (fees of assessor).

1272-42 295Pa381, 145A427 (order that defendant pay three fourths of costs, including assessor's fee, and plaintiff pay one fourth, held within court's judicial discretion).

1272-46 [a] (2) Refusal to charge partnership with costs of audit where indefiniteness in statements arose from manner of keeping partnership books. 300Pa280, 150A599.

1304-57 252NY405, 169NE626.

1304-58 252NY405, 169NE626.

1304-62 252NY405, 169NE626.

1313-43½-New. In action against limited partnership to recover money managing partner may be included as party defendant. 35PortoRico 710.

1314-91½-New. In action by unpaid partners by creditor against special partner who had withdrawn capital on dissolution plaintiff need not prove debt anew where it is waived by defendant. 252NY405, 169NE626.

PARTY WALLS

1328-64 [a] **Statute held valid.-166La** 566, 117S720.

1328-67 [a] 34 **OhA1**, 169NE827.

1329-83 [f] **Sale by owner constructing wall** without reserving adjoining owner's right in wall in deed or notice to purchaser does not breach contract. 40 GaA304, 149SE388(2dcase).

1333-35 198NC212, 151SE194.

1337-5 252NY222, 169NE284.

1338-7 252NY222, 169NE284 (electric sign).

1341-50 252NY222, 169NE284.

1348-47½-New. and such adjoining owner, or his lessee, is under no duty to assist in protecting the party wall; 32F(2d)145.

1348-49½-New. A custom of excavating in a certain manner for foundation cannot be relied on if it is in fact negligent. 32F(2d)145.

1349-66 198NC212, 151SE194.

1350-75½-New. If party claims to center of common party wall he must share equally in cost and ground required. **Utah** 290P958.

1351-94 13LaA258, 127S32.

1355-53 180Ark820, 23SW(2d)255.

1356-71 34 **OhA1**, 169NE827.

1363-48½-New. A purchaser of property, knowing that for a long time windows had been maintained in the wall of the adjoining building, above the first story, is charged with notice that such wall was not a party wall above the first story. **MoA** 15SW(2d) 957.

1366-3 [a] **Injunction held proper remedy,** where cutting wall would mar appearance and diminish strength. 34 **OhA1**, 169NE827.

1370-3 **Can** [1929] 4DomLR1087. But see **MoA** 15SW(2d)957. [a] (11) To show that brick furnished by witness was in consideration of adverse party's

construction of party wall. 40GaA304, 149SE388(2dcase).
1371-7 180Ark820, 23SW(2d)255.

PAS BONNE

1372-6½-New. In French, not good. 5 LaA637.

PASTURE

1376-98 NC 155SE451.

PATENTS

48 C. J.—14-4 [b] **"Patent protection" defined.**-37F(2d)385.
15-7 252NY107, 169NE105.
15-12½-New. Inventor has right, protected by courts, not to disclose invention publicly and to contract respecting mechanism without obtaining patent. Mass 172NE586.
16-42 41F(2d)261.
16-43 [b] **Reward for invention** is purpose of grant of patents. Can [1930] 3 DomLR190.
17-61 32F(2d)376.
18-71 [a] **Property is limited** to chattels which embody invention. 35F(2d)279.
19-91 39F(2d)667; Can [1930] 4 DomLR926.
20-12 43F(2d)628.
21-19 [b] **Specific mode of treating certain material** to produce new and useful article may be patentable. 40 F(2d)301.
21-21 Can [1930] 4DomLR401.
21-26 29F(2d)263; Can [1930] 4 DomLR401.
21-27 [a] **Process requiring new machine.**-35F(2d)433.
22-28 37F(2d)830.
23-58 32F(2d)266; 32F(2d)376; 35 F(2d)287; 35F(2d)433.
23-61 [b] (20) Dry ice. 38F(2d)62.
24-81 35F(2d)697.
24-90 Can [1930] 4DomLR617 (improvement not shown).
25-2 34F(2d)291 (where designs are novel and result of invention); 38F(2d) 852 (design for font of type is patentable subject matters within statute).
25-4 41F(2d)820.
26-23 39F(2d)667.
26-24 31F(2d)157; 38F(2d)730. [a] **Method laid down must produce desired result** from mere following of method prescribed. 29F(2d)179; 29F(2d)784.
26-25 31F(2d)157.
26-26 33F(2d)300; 37F(2d)760; 39 F(2d)769; 40F(2d)780.
27-31 37F(2d)582.
28-43 [a] **Construction of phrase** "not known or used by others." 38F(2d)852.
28-44 34F(2d)386 (patent has been held void for want of novelty); 37F(2d) 249; 38F(2d)809; 38F(2d)852; 39 F(2d)276; 39F(2d)278; 39F(2d)282; 39F(2d)493(2dcase); 39F(2d)595; 39 F(2d)667; 39F(2d)669(1stcase); 39 F(2d)669(2dcase); 39F(2d)675; 39 F(2d)681; 39F(2d)690; 39F(2d)697; 40F(2d)85; 40F(2d)567; 40F(2d)569; 40F(2d)753; 40F(2d)755; 40F(2d)765; 40F(2d)915; 41F(2d)820; 43F(2d)844; 43F(2d)898; 44F(2d)105; Can [1930] 4DomLR918; Can [1930] 4DomLR926. [a] **Patent held not anticipated** by prior art. 35F(2d)697. [b] **Patent held invalid as anticipated.**-36F(2d)228; 36 F(2d)319. [c] **Claims of patent held void** as anticipated. 36F(2d)357(2d case). [d] **Patentable novelty lacking.**-40F(2d)571. [e] **Public reception** will not take place of novelty. 37F(2d)249.
28-51 [a] **Patent held not anticipated** by prior art. 35F(2d)697.
28-52 38F(2d)760; 38F(2d)884; 43 F(2d)609.
29-57 38F(2d)884. [a] **Methods properly rejected.**-40F(2d)771. [b] **Methods erroneously rejected.**-40F(2d)767.
30-66 34F(2d)764; 38F(2d)242; 38 F(2d)884.
30-68 [a] **Processes anticipated.**-40 F(2d)575; 40F(2d)775. [b] **Processes not anticipated.**-40F(2d)567; 40F(2d) 760.
30-70 37F(2d)385 ("filtering" and "softening" held analogous).
31-83 38F(2d)685.
31-86 34F(2d)935.
34-96 33F(2d)942 (prior use must be considered); 39F(2d)102; 43F(2d)284; Can [1930] 3DomLR190; Can [1930] 4DomLR401.
35-3 [a] **Sale of product of invented machine is irrevelant** to question of public use of machine. 29F(2d)646.
35-4 29F(2d)646; 41F(2d)261 (mere acquaintance insufficient).
35-12 42F(2d)965.
36-14 36F(2d)525.
36-15 33F(2d)942 (proofs of prior use of tool must show some success); 38 F(2d)809.
36-21 38F(2d)852.
36-22 Can [1930] 4DomLR401.
36-24 Can [1930] 4DomLR401.
37-38 [a] **Prior use within two years constitutes anticipation,** where device used was invented by others. 37F(2d) 884.
37-39 42F(2d)965.
38-44 37F(2d)153; 38F(2d)361.
38-49 30F(2d)713; 36F(2d)287; 42 F(2d)965.
39-50 But see 31F(2d)463.
40-66 38F(2d)852. But see 29F(2d) 646.
40-71 38F(2d)852 (concealed by nature of invention itself).
40-74 [a] **Rule applicable, though earlier application shows only part** of structure covered by later claim. 40 F(2d)513.
40-75 36F(2d)522 (later applicant not "first inventor"); 40F(2d)513.
40-79 35F(2d)567; 36F(2d)120; 36F (2d)138; 36F(2d)142; 36F(2d)143; 36 F(2d)303; 39F(2d)975; 39F(2d)977; 39F(2d)980(1stcase); 41F(2d)88.
41-85 [a] (4) 37F(2d)385.
41-86½-New. Where method patent and machine patent are copending, one is not prior art as against the other. 37F(2d)830.
42-90 [a] **Patent later in date than patent in suit is prior art,** if granted on application filed prior to date of invention of patent in suit. 33F(2d)295.
42-91 [a] **Conception of essential features of invention prior to other's application** prevents patent issued on such application from constituting anticipation. 32F(2d)360.
43-8 31F(2d)427; 33F(2d)302 (prior patents furnishing evidence of prior state of art cannot deprive new combination of patentable novelty); 35F (2d)756; 42F(2d)750.
43-9 38F(2d)329; 39F(2d)681; 40F (2d)760.
43-10 36F(2d)432 (erroneously rejected as anticipated).
44-11 35F(2d)756 (as defense to infringement suit).
44-12 Can [1930] 1DomLR449.
44-14 31F(2d)157 (must have contemplated use of process); 32F(2d)55.
44-19 280US400, 50SCt185, 74L ed511; 34F(2d)995 (accidental showing of diagram without claim held not to be anticipation).
47-53 [b] **Joint invention** is good anticipation to later invention of either applicant. 40F(2d)513.
47-59 38F(2d)314; 41F(2d)22.
48-66 38F(2d)329 (copending patents). [a] **Previous application by same inventor on which no patent issued** did not form part of prior art. 40F(2d)460.
48-77½-New. Application relating to same subject matter is entitled to same date of application as first patent in some cases. 37F(2d)587(2dcase).
49-86 33F(2d)862.
49-88 [a] **Matter covered by disclosure but not claims of earlier application** may be claimed by later application of same inventor. 40F(2d)513.
49-91 35F(2d)697.
49-91½-New. In Canada the patent act contains a similar provision. Can [1930] 1DomLR449.
50-2 38F(2d)852.
50-7 32F(2d)875.
50-11 [a] **Prior unpublished drawings,** no matter how complete, do not negative novelty of machine or manufacture. 41F(2d)261.
51-34 33F(2d)302. [a] **Publication of merely fragments of type** cannot be treated as publication of font design as whole. 38F(2d)852.
52-53 35F(2d)106; 36F(2d)574; 38F (2d)1001.
52-59 [a] **Evidence held admissible to show patentable novelty.**-33F(2d)632 [app dism 33F(2d)636].
53-74 38F(2d)1001; 43F(2d)628.
53-75 21F(2d)128; 31F(2d)157 (evidence must leave no room for doubt); 31F(2d)463; 33F(2d)942; 34F(2d)386; 35F(2d)254; 38F(2d)242. [a] 30F(2d) 997; 30F(2d)999; 30F(2d)1000(1st case); 30F(2d)1003(1stcase); 30F(2d) 1005(1stcase); 30F(2d)1005(2dcase); 33F(2d)302 (as to one of several prior patents); 33F(2d)504; 34F(2d)994; 34 F(2d)1001; 34F(2d)1005; 34F(2d) 1010; 34F(2d)1012; 35F(2d)62; 35F (2d)65; 35F(2d)781 (claims properly rejected as copied); 37F(2d)623; 37 F(2d)627; 37F(2d)657; 37F(2d)721; 37 F(2d)745; 37F(2d)753; 37F(2d)754; 37 F(2d)760; 37F(2d)884; 38F(2d)236; 38 F(2d)358; 38F(2d)359; 38F(2d)361; 38 F(2d)364; 38F(2d)505; 38F(2d)694; 38 F(2d)1001; 40F(2d)773; 40F(2d)987; 40F(2d)1000; 41F(2d)672; 41F(2d) 721; 42F(2d)823; 42F(2d)865. [b] 30 F(2d)993; 30F(2d)1001; 31F(2d)128; 33F(2d)302 (as to some prior patents); 34F(2d)551; 34F(2d)670; 34F(2d)995 (as to claims); 34F(2d)1005; 34F(2d) 1012; 34F(2d)1014; 37F(2d)628; 37F (2d)959; 38F(2d)30; 38F(2d)329; 38 F(2d)361 (absence of corroboration); 38F(2d)639; 38F(2d)694; 38F(2d)852; 40F(2d)973; 40F(2d)976; 40F(2d)982; 40F(2d)1011; 42F(2d)869; 43F(2d)473; 43F(2d)628. [d] **Evidence held insufficient.**-32F(2d)875 (wide use of patented device).
54-77 29F(2d)646.
54-79 37F(2d)628.
54-80 31F(2d)157; 40F(2d)982; 40 F(2d)1011.
54-83 30F(2d)948; 31F(2d)157; 34 F(2d)935.
55-84 38F(2d)1001.
55-2 37F(2d)249; 40F(2d)915. [b] **Patent held invalid for lack of utility.**-36 F(2d)72.
55-92½-New. Where want of a patentable novelty is clear, extrinsic evidence will be accorded no weight. 33 F(2d)632 [app dism 33F(2d)636].
56-3 43F(2d)628.
60-64 38F(2d)220 (matters to be considered).
61-85 33F(2d)302.
61-88 31F(2d)32 (patent held void); 34F(2d)508; 36F(2d)126; 36F(2d)128; 36F(2d)133; 36F(2d)135; 36F(2d)140; 36F(2d)296 (application properly rejected); 36F(2d)302; 36F(2d)434; 36 F(2d)436; 36F(2d)438; 36F(2d)522; 36F(2d)525; 37F(2d)440; 37F(2d)441; 37F(2d)620; 37F(2d)751(2dcase); 37 F(2d)757; 38F(2d)490; 38F(2d)525; 38F(2d)630(1stcase); 38F(2d)852; 38 F(2d)894; 38F(2d)895; 38F(2d)1009; 39F(2d)123; 39F(2d)373; 39F(2d)606; 39F(2d)700; 39F(2d)710; 39F(2d)721; 39F(2d)722; 39F(2d)723; 39F(2d)725; 39F(2d)865; 39F(2d)899; 39F(2d)974; 39F(2d)982; 40F(2d)65; 40F(2d)910; 40F(2d)915; 40F(2d)972(2dcase); 40 F(2d)973; 40F(2d)976; 40F(2d)1016; 41F(2d)22; 41F(2d)43; 41F(2d)387; 43F(2d)191; 43F(2d)319; 43F(2d)343; 43F(2d)982; Can [1930] 4DomLR708; Can [1930] 4DomLR918. [a] **Patent held invalid** for lack of invention. 35 F(2d)523; 35F(2d)526; 35F(2d)534; 36F(2d)83; 36F(2d)150; 36F(2d)419 [aff 36F(2d)422]. [b] **Patent held valid** as against contention of lack of invention. 35F(2d)523.
63-90 37F(2d)751(2dcase).
64-92 38F(2d)170.
64-93 35F(2d)534.
66-25 31F(2d)188. [a] **For certain purposes law will take notice of existence of idea** apart from physical form. 41F(2d)261.
67-28 38F(2d)760.
67-30 38F(2d)995 (device need not work perfectly).
67-39 36F(2d)298; 36F(2d)302.
67-41 39F(2d)92.
68-46 Can [1930] 4DomLR918.
69-61 34F(2d)386 (greater degree of ingenuity than is possessed by ordinary mechanic must be exercised to constitute invention); 43F(2d)191.
70-66 42F(2d)395.
70-67 32F(2d)655; 42F(2d)395.
70-68 30F(2d)1006; 35F(2d)523; 34 F(2d)386.

72-72 41F(2d)721.
72-78 30F(2d)1000(2dcase); 35F(2d)887; 32F(2d)655; 36F(2d)426; 24F(2d)386; 35F(2d)4; 35F(2d)120; 39F(2d)687; 40F(2d)196. [b] **Infringement not avoided by difference in form.** 40F(2d)263.
72-79 32F(2d)655; 34F(2d)386; 35F(2d)63(2dcase); 36F(2d)426.
72-81 34F(2d)386; 36F(2d)426; 40F(2d)[illegible]
73-89 40F(2d)341. [b] **That substituted material may better serve purpose immaterial.**–40F(2d)252.
74-91 40F(2d)915.
74-94 40F(2d)252.
74-99 40F(2d)252.
74-4 40F(2d)252.
75-8 31F(2d)32.
75-14 37F(2d)620.
75-21 32F(2d)360; Can [1920] 4DomLR[illegible]
76-25 36F(2d)122.
76-30 40F(2d)600.
77-39 36F(2d)202; Can [1920] 4DomLR798; Can [1920] 4DomLR818.
77-42 31F(2d)32; 36F(2d)125; 38F(2d)809; 40F(2d)879; 42F(2d)822.
77-43 40F(2d)915.
79-45 35F(2d)106. [c] **Patent for device adapted to new use analogous to former use will be strictly construed.**–40F(2d)915.
80-49 35F(2d)523; 35F(2d)524; 36F(2d)426; 39F(2d)713; 42F(2d)822; Can [1929] 4DomLR82.
80-55 39F(2d)713.
81-67 32F(2d)202; 36F(2d)119; 36F(2d)845; 42F(2d)648; Can [1920] 1DomLR[illegible]
83-68 37F(2d)152; 40F(2d)62.
83-69 31F(2d)128; 34F(2d)[illegible]; 38F(2d)780; 34F(2d)1012; 34F(2d)1014; 34F(2d)[illegible]; 40F(2d)987; 40F(2d)910; 42F(2d)191; 42F(2d)929; 44F(2d)129.
83-71 33F(2d)283; 32F(2d)743.
84-73 34F(2d)386; 35F(2d)66. [b] **Combination of device and material is not patentable nor can use of such material be limited by device patent claim.** 36F(2d)202.
85-74 33F(2d)632[app dism 32F(2d)636] (in such case complete anticipation need not be shown); 40F(2d)987.
85-76 40F(2d)513.
85-77 32F(2d)202; 40F(2d)512.
85-87 35F(2d)[illegible]; 32F(2d)625; 32F(2d)995; 40F(2d)910.
86-83 32F(2d)260; 34F(2d)692; 38F(2d)490.
86-89 42F(2d)6. But see 31F(2d)390.
86-91 See also 34F(2d)761.
86-93 42F(2d)395.
86-95 35F(2d)523; 37F(2d)732.
87-97 32F(2d)558; 33F(2d)100; 37F(2d)620; 43F(2d)191.
89-19 35F(2d)4; 39F(2d)373. [a] **Lack of invention not shown.**–36F(2d)138; 36F(2d)285; 36F(2d)290.
89-20 32F(2d)55; 35F(2d)523.
89-21 35F(2d)68; 35F(2d)65.
89-22 40F(2d)65 (matters of common knowledge).
90-30 39F(2d)710.
91-43 34F(2d)577; 38F(2d)995; 39F(2d)713.
92-44 33F(2d)302; 40F(2d)263; 40F(2d)910; 40F(2d)915; 43F(2d)609.
92-45 38F(2d)229.
92-49 35F(2d)106.
93-53 32F(2d)875; 34F(2d)994; 35F(2d)120; 37F(2d)172; 37F(2d)751(2dcase); 38F(2d)236; 40F(2d)600 (not conclusive).
93-59 40F(2d)765.
94-60 33F(2d)743.
94-71 37F(2d)830.
95-82 37F(2d)153.
95-83 32F(2d)55.
96-1 [a] **Heavy expenditures for development of machine** may be important in doubtful case but is not alone evidence of patentability. 36F(2d)525.
96-3½–New. An affidavit of a witness which is little more than an expression of opinion as to patentability is entitled to no weight. 35F(2d)781.
96-10 37F(2d)421 (patentable tools and mechanisms). [a] **Design patent held not void for double patenting.** 40F(2d)434.
97-23 35F(2d)783 (application properly rejected for lack of novelty).
97-37 39F(2d)284.
98-33 35F(2d)783.
98-47 35F(2d)783 (properly rejected for lack of originality).
98-57 35F(2d)[illegible]; 32F(2d)852.
98-60 34F(2d)852.
99-64 37F(2d)421.
99-66 [a] **Test of ornamentation is whether it is matter of concern to anybody.** 37F(2d)421.
99-73 37F(2d)421.
99-80½–New. **It is unimportant that designs are mechanically useful.**–40F(2d)434.
99-82 34F(2d)1016; 35F(2d)63(1st case); 37F(2d)420; 37F(2d)421; 37F(2d)755; 39F(2d)284; 39F(2d)724.
100-97 38F(2d)852.
101-28 [a] **In Canada.**–[1920] 4DomLR926.
102-37 38F(2d)75.
102-58 34F(2d)551.
102-45 38F(2d)220.
103-47 38F(2d)75. [a] 38F(2d)75.
110-68 [b] **Facts not constituting abandonment.**–39F(2d)873.
110-73½ 39F(2d)672 (after reduction to practice).
111-88 37F(2d)153; 39F(2d)211.
111-90 32F(2d)146(2dcase).
112-8 39F(2d)672 (must be affirmatively proved).
112-10 [a] **Evidence held insufficient to establish abandonment.** 39F(2d)672.
112-12 39F(2d)[illegible]
113-27 [b] (3) **To invalidate patent for importation thing imported must be patented article itself and not material.** Can [1929] 4DomLR1061(1stcase).
113-30 36F(2d)292.
113-40 40F(2d)708.
113-41 30F(2d)713.
114-58 36F(2d)[illegible]; 35F(2d)232; 37F(2d)428; 37F(2d)439; 41F(2d)98; 41F(2d)261.
115-62 38F(2d)1001; 41F(2d)261.
115-63 [a] **Date of disclosure, drawings, description or models** of invention fixes date of conception. 41F(2d)261.
115-65 29F(2d)880; 39F(2d)677; 41F(2d)261.
116-78 [a] **It is question of fact whether senior party reduced an invention to practice.** 38F(2d)125.
116-80 36F(2d)292.
116-85 41F(2d)[illegible]
117-93 39F(2d)672.
117-99 41F(2d)261.
117-2 41F(2d)261.
117-8 36F(2d)838. [a] **One who actually reduces invention to practice** is entitled to indulgence over another who only does so constructively. 36F(2d)131.
117-9 [a] **Where inventor adduces no evidence of prior conception** to filing date is deemed date of conception. 41F(2d)261.
117-11 But see 35F(2d)59.
117-12 29F(2d)953.
117-15½–New. The Treaty of Berlin did not embrace the Treaty of Versailles so as to extend the time limit for registration of foreign patents six months after the effective date of the treaty. 32F(2d)495.
117-15½–New. A provision of the Treaty of Versailles relating to an extension of time for registration of foreign patents had become obsolete at the time of the negotiation of the Treaty of Berlin. 32F(2d)495.
117-17 41F(2d)261.
118-18 36F(2d)122; 39F(2d)715; 41F(2d)261. [a] 36F(2d)131; 42F(2d)565. [b] 36F(2d)122.
118-23 39F(2d)672.
118-24 41F(2d)261. [a] **Forbearance to apply for patent until after experiments** does not authorize finding of want of diligence in reducing conception to practice. 41F(2d)261.
118-30½–New. The inventor's ignorance of the law requiring diligence in reducing his invention to practice is immaterial. 36F(2d)122.
118-40 41F(2d)261.
118-40½–New. After an inventor establishes his priority, he does not forfeit his rights to a patent, in the absence of clearly proved abandonment. 36F(2d)292.
118-41 37F(2d)761 (matters to be proved).
119-43 [a] 30F(2d)867; 30F(2d)1003(2dcase); 35F(2d)886 (to award priority to junior party); 36F(2d)131 (priority to junior party); 36F(2d)137 (to award priority of senior party); 36F(2d)283; 36F(2d)287; 36F(2d)292; 36F(2d)360; 36F(2d)511; 36F(2d)515; 36F(2d)512; 37F(2d)761; 38F(2d)125; 38F(2d)256; 39F(2d)494; 39F(2d)663; 39F(2d)672; 39F(2d)704; 39F(2d)715; 40F(2d)378; 40F(2d)988; 40F(2d)995. [b] 29F(2d)871; 29F(2d)876; 29F(2d)880; 29F(2d)953; 31F(2d)463; 35F(2d)59; 36F(2d)298 (priority to senior party); 39F(2d)672; 39F(2d)677; 39F(2d)687.
119-46 36F(2d)122; 36F(2d)292; 37F(2d)954; 39F(2d)494; 39F(2d)715. [a] **Burden of showing diligence** is on junior applicant where there was no reduction to practice. 39F(2d)677.
119-51 38F(2d)1001
119-56 36F(2d)[illegible]; 38F(2d)232
119-58 41F(2d)261 (holding corroboration necessary).
121-31 36F(2d)122.
121-93 38F(2d)263; 37F(2d)439(2dcase).
122-9 37F(2d)430(2dcase).
122-13 34F(2d)456(2dcase).
124-66½–New. Reservation of right to make future application will not be permitted in pending application. 37F(2d)153 (divisional application held timely).
125-96 38F(2d)225; Can [1920] 4DomLR592. [a] **Descriptions held sufficient.** 37F(2d)954.
126-98 28F(2d)301.
126-99 38F(2d)505.
126-1 40F(2d)252.
126-2 40F(2d)708; 31F(2d)157; 32F(2d)266; 33F(2d)302.
127-7 31F(2d)157.
128-20 35F(2d)62. [a] **Disclosure held sufficient.**–33F(2d)657.
128-25 35F(2d)62.
129-34 33F(2d)302.
129-45 [a] **Failure to state full capacity or specify all advantages** of mechanism will not invalidate patent. 40F(2d)708.
130-64 [a] **Applicant cannot describe article by process** without showing article embodies invention. 37F(2d)622.
130-73 35F(2d)697 (not invalid for insufficiency of description where ingredients were known).
130-76 [a] **Proportions held sufficiently stated.**–37F(2d)954.
131-88 [a] **Claims properly rejected for failure of disclosure to support claims.**–40F(2d)573.
132-15 33F(2d)657.
132-22 33F(2d)280; 42F(2d)406.
132-24 31F(2d)145.
132-26 31F(2d)160; 35F(2d)62; MoA 188W(2d)142.
132-27 30F(2d)693.
133-32 [a] **Every use may be claimed.** 37F(2d)41.
133-32½ New. The applicant need not state the theory on which he bases advantageous results. 35F(2d)697.
133-33 [b] **Construction of particular claims.**–37F(2d)754 ("open chamber").
133-34 38F(2d)505. [b] **Claim held sufficiently definite** to be granted 38F(2d)301. [c] **Claims attempting to define product by process of manufacture** held properly rejected. 29F(2d)873. [d] **Claims of patent for product which is defined by process of producing it** will not be allowed, unless product involves invention, and cannot be defined except by process used in its creation 29F(2d)873.
133-35 38F(2d)505; Can [1920] 3DomLR156.
134-47 40F(2d)999.
134-48 31F(2d)250. [a] **Applicant may delineate into known art** sufficient to show nature of whole invention as improved, where claims cover improvement 39F(2d)710.
134-49 MoA 188W(2d)142. See also 36F(2d)597.
134-54 39F(2d)697.
135-75 38F(2d)825(2dcase).
135-79½ New. A mixture claim or a process and mixing claim may be based on the same inventive act 35F(2d)697.
136-7½–New. In the absence of fraud,

recitals of letters patent are conclusive evidence of the taking of necessary or statutory oaths. 33F(2d)603.
137-19 [a] **Drawings need not indicate** every suggested use. 36F(2d)845.
138-57 38F(2d)525 (question of invention is question of fact).
139-82 [a] **Claims persistently rejected** ought to be construed strictly against inventor. 43F(2d)929.
140-83 36F(2d)522.
140-94 [a] **Reconsideration waived.**-36 F(2d)522.
141-20 39F(2d)278.
141-28 34F(2d)525.
142-35 37F(2d)830.
142-38 37F(2d)623.
142-40 32F(2d)924.
142-43 35F(2d)697.
143-50 29F(2d)179; 31F(2d)780; 33 F(2d)603. [a] 38F(2d)760.
144-60 35F(2d)697.
147-31 37F(2d)830.
147-44 [c] (2) Petition twenty-four years after abandonment and ten years after denial of similar petition is properly denied. DC 39F(2d)520.
148-61½-New. A party who was not a senior party is not entitled to have a third party eliminated from interference, under Patent Office Rules, rule 114. 29 F(2d)639.
149-73 [a] (1) 36F(2d)290.
149-83 [a] **Use of patent issued on earlier application,** as reference in rejecting later application, is not precluded because applications are copending. 36F(2d)522.
150-2 43F(2d)961.
150-23 [c] **Party is bound by preliminary statement.** 37F(2d)426.
150-24 40F(2d)756.
151-25 40F(2d)756.
153-65 36F(2d)834.
153-72 See also 39F(2d)769. [b] **Application not invalidated** because filed after expiration of period. 37F(2d) 580.
153-73 [b] **Claims held not read on applicant's device.**-39F(2d)702.
154-87 36F(2d)298; 36F(2d)518.
154-89 30F(2d)1004.
155-1 36F(2d)518.
155-5 [a] **Dates of conception and reduction to practice** need not be considered till similarity of conceptions has been determined. 36F(2d)511.
155-12 [a] (2) Objection of inoperativeness is one which should not be insisted upon, particularly where application is involved in interference. 39 F(2d)687.
155-12½-New. scope. of claims; 37 F(2d)465.
155-13½-New. whether the senior party is entitled to priority as against all others; 36F(2d)122.
155-15 36F(2d)518.
155-18 36F(2d)518.
155-21 40F(2d)988.
156-32 36F(2d)292.
156-41 36F(2d)838.
157-47 36F(2d)131; 36F(2d)606; 36 F(2d)838; 36F(2d)283; 39F(2d)672; 40F(2d)995.
157-49 40F(2d)769.
157-51 39F(2d)672.
157-52 30F(2d)875.
158-79½-New. Patentee is entitled to priority of invention as to claims disclosing parallel spaced arms at the end of shoe and integral bushing, and adverse claimant as to a claim for a pressed brake shoe having a pair of radial planes with aligned openings surrounded by coaxial sleeves. 29F(2d)861.
159-95 [a] (3) Other instances. 40 F(2d)769.
161-52 [b] **Applicant's petition to Board of Patent Appeals may constitute** waiver of right to further prosecution before Primary Examiner. 40F(2d) 775. [c] **Rehearing by Board is not mandatory** by applicant's waiving right to have claim referred back to Examiner and accepts reconsideration. 40F(2d) 775.
161-54 [a] **Board of Patent Appeals cannot read elements into claim for** purpose of patentability. 39F(2d) 280.
161-57½-New. Applicant held entitled under circumstances to have claim reexamined and re-considered by experts of Patent Office. 40F(2d)775.
162-74 38F(2d)170.
163-92 [a] (5) Whether interference should have been declared cannot be determined where application was rejected. 39F(2d)278.
163-95 38F(2d)251.
164-13½-New. Affidavit in nature of reply brief cannot be filed without permission. 37F(2d)628.
164-15 39F(2d)278.
165-26½-New. An applicant for a patent failing to file a petition for appeal and pay an advance fee within the time prescribed by court rule will not be permitted to do so nunc pro tunc. 35 F(2d)71.
165-28 [d] **Functions of Court of Customs and Patent Appeals** is administrative only. 38F(2d)889(2dcase).
165-31 36F(2d)838.
165-34½-New. When patentable novelty has been denied by Patent Office, one appealing therefrom must make out clear case of error to obtain reversal. 38 F(2d)525.
166-39 37F(2d)959. But see 38F(2d) 170.
166-40 39F(2d)975; 40F(2d)569; 40 F(2d)982; 40F(2d)1000. [a] **Reference patent** must be taken as it appears in record. 36F(2d)436. [b] **That patent is not cited as reference** by examiner does not defeat jurisdiction of board of appeals to apply it thus. 36F(2d) 522.
166-41 37F(2d)628.
166-42½-New. Unless discretion abused rulings of Commissioner of Patents on questions of mere practice will not be reviewed. 40F(2d)756.
166-44 37F(2d)426.
166-45 37F(2d)430(1stcase).
166-58 36F(2d)606; 38F(2d)359; 38F (2d)891; 40F(2d)756; DC 39F(2d)520.
167-59 36F(2d)515; 36F(2d)606.
167-70 36F(2d)122; 36F(2d)131; 36 F(2d)518; 39F(2d)690; 40F(2d)988; 40 F(2d)995.
168-72 38F(2d)361; 40F(2d)571 (concurrence in rejection of claim); 39F(2d) 724.
168-73 38F(2d)359.
168-74 38F(2d)895; 39F(2d)669(2d case).
170-14 [a] **Adverse decision of Board of Appeals** must be alleged in bill in equity. 38F(2d)251.
170-15 38F(2d)251. [b] 38F(2d)251; 38F(2d)852.
170-17 But see 31F(2d)791.
170-20 [b] **Commissioner's traveling expenses** in attending taking of depositions on plaintiff's behalf are not included. 38F(2d)852.
170-21½-New. Equity rule authorizes counterclaim for patent awarded in interference proceeding to one suing under statute for other patents refused by Commissioner of Patents. 38F(2d)251.
170-24 38F(2d)852; 39F(2d)196; 40F (2d)915 (trial de novo); 41F(2d)261.
171-32 38F(2d)251.
172-71 41F(2d)261.
175-26 39F(2d)496. But see 39F(2d) 693.
175-28 37F(2d)281.
175-29 39F(2d)241.
176-30 33F(2d)548; 34F(2d)670; 37F (2d)41; 37F(2d)153; 37F(2d)249; 40F (2d)662; 51Philippine712.
176-36 32F(2d)55.
178-59 [a] **Presumption of validity of patent claims** is not weakened by failure of Patent Office Examiner to cite any reference offered on trial. 42F(2d)750.
178-65 26F(2d)686 presumption of patentability is strengthened by public approbation and fact that apparatus met needs of new situation). 32F(2d)831; 39F(2d)769; 41F(2d)820; 42F(2d)678.
178-67 42F(2d)678.
178-71 31F(2d)463.
178-72 38F(2d)30.
178-75 35F(2d)433.
179-96 36F(2d)684.
179-6 MoA 18SW(2d)142.
180-23 43F(2d)929.
180-28 36F(2d)845.
181-40 31F(2d)124.
181-42 [a] **That expert can duplicate patented process** by selecting parts taken from prior art does not overcome presumption of invention. 40F(2d)915.
181-43 23F(2d)907 (prevails where not rebutted by evidence); 33F(2d)302. But see 31F(2d)124.
181-49 31F(2d)255; 33F(2d)603.
182-67 136Misc178, 239NYS425.
183-76 32F(2d)774.
183-79 31F(2d)463.
183-80 MoA 18SW(2d)142.
183-86 33F(2d)603.
184-89 31F(2d)463.
184-97½-New. Generally court is not required to follow decision in prior interference. 37F(2d)281 (doctrines of stare decisis and comity held inapplicable).
185-6 39F(2d)241.
186-48 [c] **Matters essential to constitute "double patenting."**-37F(2d)830; 38F(2d)329.
186-54½-New. Validity of particular patents. 37F(2d)830; 38F(2d)62; 38F (2d)242.
189-4 37F(2d)281. [f] (2) Person using an invention, on which another claims a patent, is one who has an interest as will qualify him to initiate proceedings to annul such letters patent. Can [1930] 4DomLR926.
191-29 33F(2d)929. See also 33F(2d) 952.
191-37 35F(2d)526.
192-40 [a] (1) But see 35F(2d)526.
193-42 [d] (1) 35F(2d)526.
193-45 35F(2d)526.
193-46 40F(2d)547.
194-47 40F(2d)617.
194-49 42F(2d)452; 43F(2d)663. [b] (2) To deny validity. 42F(2d)452. (3) To show actual invention disclosed by original application or patent. 42F(2d) 452. [f] But see 42F(2d)452.
195-56 34F(2d)905.
195-68 34F(2d)905.
195-70 31F(2d)780.
200-63 37F(2d)758.
203-83 35F(2d)697 (distinguishing between essentials and nonessentials is permitted).
205-1 36F(2d)511.
205-4 35F(2d)697.
206-13 35F(2d)697.
206-14 35F(2d)697 (recital that mixture reacts by standing as well as with heat or actinic light)
206-16 [b] **Sole function of drawings and supplemental specifications** is to supply defects in description and illustrations. 36F(2d)511.
207-25 35F(2d)697 (mixture claims not distinguished from claim for mixing step).
207-26 33F(2d)146(2dcase).
210-74 But see USCA tit 35 § 64, as amended 45 St. at L. 732, c 730 (surrender shall not affect pending action or cause of action as to claims which are identical).
210-81 36F(2d)477.
211-86 34F(2d)386.
211-88 36F(2d)477.
211-89 37F(2d)153.
212-2 [a] 36F(2d)477 (four days before trial); 39F(2d)904.
212-3 37F(2d)153; 40F(2d)549 (after filing certiorari). See also 32F(2d)277.
212-4 31F(2d)565. [a] (3) Patentee, after decision of circuit court of appeals, holding one of several claims valid, should be permitted to withhold disclaimer as to other claims held invalid till after decision on certiorari. 31F(2d) 565.
212-5 [a] 36F(2d)447. [d] **Infringer's costs not taxable** against patentee failing to file disclaimer. 36F(2d)447.
212-8 38F(2d)71. But see 36F(2d)447.
213-10 36F(2d)447.
214-22 34F(2d)508; 34F(2d)664; 35 F(2d)433; 36F(2d)673; 37F(2d)293; 38 F(2d)314; 40F(2d)708; 40F(2d)910; 43 F(2d)617.
215-26 34F(2d)510.
215-32 33F(2d)300; 34F(2d) 664; 40 F(2d)547.
215-33 31F(2d)145; 32F(2d)266; 32 F(2d)376; 34F(2d)761; 40F(2d)999. [b] **Where inventor describes and claims only part of invention,** he is presumed to have abandoned residue to public. 31 F(2d)145.
215-34 38F(2d)242.
216-39 34F(2d)664.
216-40 33F(2d)952.

217-75 33F(2d)603.
217-78½-New. "polygon;" 38F(2d) 635.
217-83 31F(2d)145.
217-95 31F(2d)157.
217-96 34F(2d)[illegible].
218-99 42F(2d)785.
219-10 33F(2d)632 [appdism33F(2d) 636] (on issue of patentable novelty); 35F(2d)679. [h] **Later supplemental discoveries and improvements by others** have no tendency to take from patentees any credit or benefit to which they are entitled for particular advance in art made by them. 34F(2d)450(2dcase).
219-12 38F(2d)780; 40F(2d)910.
219-13 39F(2d)5[illegible].
220-19 33F(2d)862.
220-22 38F(2d)788.
220-31 37F(2d)153 (file wrapper is [illegible] of record).
220-23 34F(2d)450(2dcase); 35F(2d) [illegible] 36F(2d)673; 39F(2d)595; 42F(2d) 423. [d] **Infringement cannot be predicated** on use of member known to art where such member of particular form [illegible] 35F(2d)[illegible].
221-37 35F(2d)[illegible] (omission from [illegible] of [illegible]ial element in combination [illegible] claim); 35F(2d)268.
221-38 35F(2d)[illegible] 32F(2d)781; 35 F(2d)[illegible] 35F(2d)465; 40F(2d)173. [illegible] 35F(2d)525; 42F(2d)965. [c] 43F(2d)929. [illegible] **Where limitation is present in one claim but is omitted from others,** presumption arises that it was designedly omitted. 31F(2d)157.
222-39 32F(2d)673. [d] **Description of part of device as "depending" on another part** held not to mean gravitational [illegible]ng to such part but rather that [illegible] have right-angle relationship. 32 F(2d)[illegible].
222-40 40F(2d)1000.
222-41 [b] **General presumption exists** against limitation. 37F(2d)41.
222-48 39F(2d)904.
222-50 31F(2d)145; 35F(2d)62; 35 F(2d)781; 38F(2d)788; 40F(2d)708; 40 F(2d)988; 43F(2d)961.
222-51 40F(2d)910. [a] 34F(2d)995; 43F(2d)961.
224-52 43F(2d)961. [c] (2) Element not included in unambiguous claim cannot be read into it. 35F(2d)628.
224-54 31F(2d)145.
224-57 32F(2d)211; MoA 188SW(2d) 142. [b] 37F(2d)491. [c] **Claims broader than description** are properly rejected.-38F(2d)891. [d] **Claims rejected as too broad.**-40F(2d)1011.
225-59 31F(2d)255.
226-70 42F(2d)241.
227-82 33F(2d)952; 34F(2d)764.
227-83 [g] **Under doctrine of equivalents,** elements of claim may be treated as examples of a class, which extends as disclosure warrants and prior art permits, but claim must not be ignored in ascertaining what constitutes invention. 36F(2d)574.
228-85 38F(2d)242.
228-86 32F(2d)879; 39F(2d)92; 39F (2d)873; 42F(2d)6; 42F(2d)869. [a] **Patents held entitled to liberal interpretation.**-35F(2d)[illegible].
228-88 33F(2d)862.
228-96 38F(2d)242.
228-99½-New. **Where claim must be narrowly construed, only correspondingly narrow range of equivalents can be allowed.** 42F(2d)785.
228-1 [f] (1) 33F(2d)295; 33F(2d) 617; 39F(2d)928.
228-2 34F(2d)551; 38F(2d)505; 40F (2d)311.
229-3 42F(2d)790.
229-4 But see 31F(2d)145.
229-5 33F(2d)838.
229-6 34F(2d)446(2dcase).
229-8 33F(2d)617; 38F(2d)505.
231-9 39F(2d)92.
231-11 35F(2d)628; 36F(2d)195; 39F (2d)92; 39F(2d)126; 39F(2d)322; 39 F(2d)604; 39F(2d)938; 43F(2d)929; 43F(2d)961. [g] **Claims will be strictly construed against inventor.** 33F(2d) 222.
233-16 21F(2d)128; 42F(2d)869.
233-24 32F(2d)924.
233-27 31F(2d)157; 38F(2d)170. [c] **That some elements of combination are claimed in terms of means** defined in terms of function is not objectionable in combination claims. 29F(2d)153.
234-28 39F(2d)592.
234-29 32F(2d)673.
234-32 [a] **Number and variety of combinations** may be claimed provided in each instance new and operative device is disclosed. 35F(2d)628.
234-38 37F(2d)293.
234-41 See also 36F(2d)673. [a] **Generic and specific claims.**-35F(2d)697.
234-43 35F(2d)59.
234-44 30F(2d)1003(1stcase); 39F(2d) 548; 42F(2d)737.
235-56 [d] (3) Patentee claiming only design "as shown" is limited substantially to form disclosed by his drawing. 32F(2d)705.
239-6 252NY107, 169NE105.
244-87 [a] **Option agreement relating to sale of exclusive rights to use certain chemical processes** held to speak as of its date June 26, 1925, and not as of date of acceptance. 31F(2d)188.
244-90 [a] **Adequacy of considerations for assigning future inventions** is governed by existing conditions and benefits obtained. 43F(2d)408 (consideration held sufficient).
246-9 31F(2d)188; 32F(2d)247; 43F (2d)408.
246-11 See also 43F(2d)408. But see 31F(2d)188 (language plainly expressive of such purpose must appear).
249-58 [b] **Inadequacy of consideration** is not ground for court's setting aside contract of assignment where fairly made. 36F(2d)306.
251-95 [b] 128Kan347, 278P46 (contract for sale of patent right).
253-24 252NY107, 169NE105 (assignee left free to deal with invention as he wishes).
254-29 TexCivA 248SW(2d)737.
256-30 42F(2d)6.
256-54 See also 43F(2d)408.
258-91½-New. Assignee is entitled to patentee's solution of problem and variations of solution. 40F(2d)547.
260-22 See also IndA 169NE340.
260-25½-New. Plaintiffs may recover money without returning or offering to return drafts constituting a part of the consideration. 128Kan347, 278P46.
260-28 [a] (3) To establish connection of patent mark with steam washer mentioned in contract between defendant and plaintiff for sale thereof. 128Kan 347, 278P46.
260-35½-New. Declaration in action for breach of contract regarding inventions held sufficient without reference to letters patent. Mass 172NE586.
261-60 [b] (1) 36F(2d)306.
263-91 See also 33F(2d)617.
263-2 43F(2d)392 (license agreement held not consummated).
266-52 42F(2d)116. [a] (7) Contract providing for payment to licensor of net profits to certain amount and guaranteeing payment of "the aforesaid sum" by paying part during first year guaranteed payment only if profits were made. 226AppDiv5, 234NYS161.
266-54 32F(2d)564.
267-65 [a] (6) Agreement held merely to grant option to purchase., 32F(2d) 564.
267-69 31F(2d)994; 42F(2d)116.
268-75½-New. Title to patented article remains in owner of patent. 42F(2d) 172.
268-76 42F(2d)172.
268-78 42F(2d)116.
268-80 42F(2d)116.
268-82 42F(2d)116.
268-83 42F(2d)116.
269-12½-New. Licensee cannot share royalties paid patentee as damages for infringement. 37F(2d)62.
270-33½-New. License to use patented process may not be implied from sale of molds. 40F(2d)301.
272-53 [d] Evidence held sufficient to show consent to informal transfer or estoppel to deny assent. 44F(2d)216.
272-64 98CalA769, 277P887.
273-67 [a] 88CalA706, 264P549. [b] 88CalA706, 264P549. [c] 88CalA706, 264P549. [f] 88CalA706, 264P549.
273-70½-New. Whether a contract involves patent rights is immaterial in an action to rescind the contract. 88 CalA706, 264P549.
274-84½-New. Licensor may cancel license because of fraud of licensee. 40 F(2d)617.
274-86 36F(2d)244.
275-28 32F(2d)882.
276-44 [b] **Assignment of royalty.**-222 MoA339, 297SW91.
276-46 42F(2d)452.
276-54 [b] **Right to accrued royalties** is chose in action which is property. 39 F(2d)366.
277-64 [c] (3) Licensee cannot resist payment of royalties on pistons manufactured till license agreement has been repudiated or terminated. 32F(2d)882. (4) Contract held not to require payment after ceasing operation. 98CalA 769, 277P887.
277-76½-New. Licensee is not liable during certain period ending with issuance of letters patent. 42F(2d)452.
278-80 [b] **Particular provisions construed.**-151Wash450, 276P298.
280-97 34F(2d)905 (remedy is by suit on license agreement, not suit for infringement).
284-60 36F(2d)244 (failure to pay royalties). But see 31F(2d)969. [a] (3) There must be lack of legal remedy. 31 F(2d)969.
285-76 31F(2d)969.
285-79 36F(2d)244.
285-81 [a] **Court of equity should exercise extreme diligence** in investigating disputes between inventors and promotors, in view of inventors' universal lack of business judgment and financial means. NJCh 145A721(2dcase). [b] **Application to open decree in accounting suit** is directed to court's sound discretion. NJCh 145A721(2dcase). [c] **In suit for accounting,** complainant held entitled to opening of decree adjudicating that defendant had no further right in patents, when corporation admitted it never manufactured thereunder. NJ Ch 145A721(2dcase).
285-84 [a] **Delay of fourteen months** after entry of decree that defendant had no further interest in patents did not preclude opening of decree on complainant's motion to permit decision of accounting suit. NJCh 145A721(2d case).
287-32 [a] (4) 42F(2d)452.
287-35 [b] **Mixed questions of law and fact.**-44F(2d)24.
288-52 40F(2d)938.
288-58 [1] **Notice may be given otherwise than by statutory method.**-31F(2d) 898.
288-59 37F(2d)111.
289-65 [a] **Notice held sufficient.**-37F (2d)111.
289-67 31F(2d)898.
290-74 33F(2d)603 (false marking is no defense to infringement suit).
291-1 IndA 169NE340 (contract for sale of patent without complying with statute is void).
292-19 228AppDiv350, 239NYS473 (damages are recoverable for refusal to execute formal contract).
292-24 39F(2d)769; 41F(2d)220. [b] **Patent held valid when confined to specific forms.**-39F(2d)873.
294-45 38F(2d)639.
294-62 [a] **Advertisements libeling patents** are insufficient to constitute infringement. 39F(2d)548.
295-69 41F(2d)619. [b] **Implied license to renew perishable parts** of patented device is based on purchase of enduring parts from patentee. 38F(2d) 62. [c] **Device may be changed within certain limits** so as to make it adapted to particular use. 41F(2d)619.
295-70 41F(2d)619.
296-77 41F(2d)619. [a] **Contract precluding both assignor and assignee of patent** from manufacturing incubators did not give purchasers right to manufacture incubators of intermediate capacities. 41F(2d)619.
296-93 38F(2d)62.
296-2 See also 32F(2d)376.
297-21 36F(2d)135.
298-54 39F(2d)322; 39F(2d)761; 39F (2d)769; 39F(2d)904; 39F(2d)907.
299-55 280US30, 50SCt9, 74Led147; 35F(2d)628 (infringement is not avoid-

ed by purely literal departure).
299-57 280US30, 50SCt9, 74L ed147; 32 F(2d)105.
299-60 34F(2d)41 (difference held equivalent to distortion).
299-62 39F(2d)769; 39F(2d)873; 39F (2d)938.
299-66 33F(2d)302; 39F(2d)791; 40F (2d)62.
300-74 [a] **In determining whether patent has been infringed,** patentee is bound to his own theory as required by patent office and decisions of appellate courts in construing patent. 33F(2d) 347.
300-75 39F(2d)769.
300-80 [b] 31F(2d)459.
301-89 [a] **Redistribution of indentical functions** among elements of claim is irrelevant on issue of infringement. 38 F(2d)50.
301-95 35F(2d)254 (duality of function in single part does not avoid infringement).
301-99 42F(2d)869.
302-5 39F(2d)233.
302-18 31F(2d)250; 38F(2d)826.
302-19 33F(2d)993 (essential details of plaintiff's invention not contained in alleged infringing mechanism); 38F(2d) 505.
303-20 280US30, 50SCt9, 74L ed147.
303-26 34F(2d)519.
303-27 33F(2d)929.
304-29 38F(2d)685.
305-41 32F(2d)55; 33F(2d)952.
305-44 But see 33F(2d)952.
305-45 But see 32F(2d)55.
305-48 31F(2d)250; 31F(2d)566; 35F (2d)628; 36F(2d)150; 38F(2d)685; 38 F(2d)995; 39F(2d)126; 39F(2d)907; 51 Philippine712; Can [1929] 4DomLR 943. [c] **Ideas of others may be considered** and infringement avoided if possible by engineers looking for commercial article applicable to their problems. 32F(2d)376.
306-50 33F(2d)952.
307-56 280US30, 50SCt9, 74L ed147. [c] **Facts considered.**-32F(2d)376.
307-58 37F(2d)611.
307-61 32F(2d)673; 34F(2d)450(2d case). But see 39F(2d)592.
308-67 34F(2d)409; 38F(2d)490; 39 F(2d)592. But see 32F(2d)781.
309-73 37F(2d)491.
309-74 38F(2d)490; 38F(2d)639.
309-85 34F(2d)510 (variation in order of steps); 37F(2d)491; MoA 18SW(2d) 142; Can [1929] 4DomLR943.
310-91 38F(2d)170.
311-10 43F(2d)961. [b] **Alleged infringers are not precluded** from limiting claims to reasonable equivalents. 31F (2d)646.
311-19 43F(2d)961.
312-29 33F(2d)548; 37F(2d)582.
313-31 [a] 32F(2d)376; 32F(2d)924; 36F(2d)845; 41F(2d)673.
313-32 39F(2d)592.
313-34 37F(2d)465.
313-38 33F(2d)295; 39F(2d)589.
313-39 33F(2d)295.
314-45 32F(2d)266; 34F(2d)409; 34F (2d)761.
315-46 [a] (1) 32F(2d)376 (rule reasonably applied).
316-49 39F(2d)589.
316-50 41F(2d)387.
317-61 [a] 30F(2d)271; 30F(2d)495; 30F(2d)547; 31F(2d)128; 33F(2d)302; 34F(2d)81; 34F(2d)510; 34F(2d)635; 34F(2d)664; 36F(2d)673; 37F(2d)172; 37F(2d)293; 41F(2d)746; 43F(2d)628. [b] 29F(2d)918; 30F(2d)495; 31F(2d) 651; 32F(2d)21; 34F(2d)609; 36F(2d) 997; 37F(2d)5; 37F(2d)172; 42F(2d) 241.
318-76 31F(2d)569(2dcase).
319-92 42F(2d)678.
319-93 32F(2d)702; 32F(2d)705 (impression created must be derived from thing patented and not from one or more features approved by witness); 36F(2d)410. [b] 42F(2d)678. [e] 42F (2d)648; 42F(2d)677; 42F(2d)678. [f] 32F(2d)705. [g] **Infringement of design patent dependent on visibility.**-40F(2d) 434. [h] **Distinguishing features of design patent held copied to such extent** as to warrant preliminary injunction. 40F(2d)266. [i] **Articles may be compared as they appear in use for purpose** of determining whether there is infringement. 42F(2d)678.
320-94 32F(2d)702.
320-1 38F(2d)62.
321-27 38F(2d)721.
322-29 33F(2d)912.
322-41 39F(2d)904.
324-99 36F(2d)244 (suit to confirm cancellation of patent licenses).
327-44 36F(2d)410.
327-48 37F(2d)675.
327-63 43F(2d)582.
328-66 36F(2d)405; 44F(2d)234. [d] **Assumption and conduct of defense** of suit in behalf of defendant does not justify his being made party defendant in derogation of Judicial Code § 48. 35 F(2d)433.
328-73 35F(2d)433.
329-89 44F(2d)234.
329-95 36F(2d)85.
329-8 [b] (7) Name on office door and in telephone and building directories. 36F(2d)405.
330-33 33F(2d)777.
331-41 33F(2d)603.
331-44 33F(2d)777.
331-47 41F(2d)668.
332-67 39F(2d)132.
333-73 [c] **Delay of nearly year** after filing patent infringement suit before moving for preliminary injunction is not unreasonable. 39F(2d)487.
333-77 41F(2d)88 (failure to notify defendant during almost entire life of patent).
333-91 38F(2d)995.
335-16 31F(2d)255.
335-23 33F(2d)302.
335-27½-New. plaintiff's advertisement of defendant's alleged infringement to the trade and particularly to defendant's customers; 33F(2d)760.
335-29½-New. violation by plaintiff of oral agreement made with defendant; 38F(2d)639.
335-32 34F(2d)450(2dcase).
335-34 33F(2d)603.
335-34½-New. That the manufacturer of an infringing device gave instructions how to use it is no defense in a suit against a purchaser who failed to observe such instructions. 33F(2d)209.
335-34½-New. Defendants' discontinuance of infringing practices will not save them from both injunction and accounting in damages. 33F(2d)302.
335-34¼-New. That infringement is unsuccessful does not avoid claim of infringement. 38F(2d)314.
335-34⅓-New. Validity of defendant's patent which was junior to that of plaintiff is no defense to bill for infringement. 39F(2d)200.
335-34⅓-New. That patentee abandoned invention by delay in asserting claims in suit and failure to include them in earlier patent. 38F(2d)995.
336-37 [a] (4) 33F(2d)952. (6) **Patentee's admission** on application for reissue as to invalidity of certain claims, where facts were familiar to both parties. 34F(2d)670. (7) Delay in bringing action. 40F(2d)269.
336-39½-New. Owner of patent, having given exclusive license, may not acquiesce in use by another so as to estop licensee from restraining patent infringement. 36F(2d)497.
336-43 42F(2d)172.
337-56 31F(2d)994; 37F(2d)675. [b] **Federal government is not indispensable party** on ground that, because its employees were patentees, it has equitable title. 34F(2d)450(2dcase).
337-66 40F(2d)938.
337-67 42F(2d)116.
337-76½-New. A corporation acquiring title to patents and rights of action for infringement from original plaintiffs is entitled to permission to intervene as plaintiff. 33F(2d)452 (defendant filing counterclaim for fraud not prejudiced by intervention).
337-76½-New. A purchaser of patents from plaintiff in an infringement suit may be granted permission to intervene as party plaintiff. 33F(2d)452.
338-88 42F(2d)172.
338-89 31F(2d)994; 42F(2d)116.
339-98 42F(2d)116.
339-2 42F(2d)172.
339-3 42F(2d)116. [a] 31F(2d)994.
339-4 42F(2d)172. But see 42F(2d) 116.
339-9 34F(2d)50 (maker, user, or seller); 42F(2d)172.
339-13 [a] 35F(2d)526.
341-61 35F(2d)526.
341-64 36F(2d)267; 39F(2d)548.
342-70 34F(2d)519. But see 39F(2d) 548.
342-76 39F(2d)548.
343-99 42F(2d)172.
343-14 36F(2d)1001.
344-32 35F(2d)219.
344-34 35F(2d)219.
344-44 41F(2d)439.
346-86 43F(2d)582. [a] 33F(2d)452.
349-39 [a] (2) Evidence insufficient to state cause of action against agent of corporation. 36F(2d)267.
350-66 38F(2d)242.
351-78 [a] **Defendant's allegations** have been held not proper subject of counterclaim. 36F(2d)1000.
351-79 But see 39F(2d)200.
351-80 36F(2d)594(2dcase).
351-80½-New. Other instances of counterclaim allowed. 43F(2d)122(1stcase).
351-90 33F(2d)452.
353-28 [a] **Detailed allegations as to noninfringement** are no reason for striking out answer. 39F(2d)200.
353-30½-New. Motions to test validity on ground that patent on face lacks invention should be granted only when invalidity is absolutely clear. 40F(2d)434.
353-30⅓-New. Demurrer or motion to dismiss suit should only be sustained in clear cases, but court may act on information of common knowledge. 40 F(2d)662.
353-52 42F(2d)750.
354-55 32F(2d)615.
354-56 [f] **Evidence held sufficient** to establish prima facie right of plaintiffs as owner and licensee of patent. 33 F(2d)954.
354-58 31F(2d)898.
354-73 32F(2d)79; 34F(2d)450(2d case).
355-81 33F(2d)302; 51Philippine712.
355-82 42F(2d)241.
355-83 See also 37F(2d)5.
355-86½-New. Plaintiff contending that skilled artisan could determine pressure of neon gas in tube has burden of proving that persons were skilled in new art. 40F(2d)708.
355-88 34F(2d)386.
356-8 See also 37F(2d)153.
356-10 See also 34F(2d)609.
357-33 [a] (1) 31F(2d)124; 33F(2d) 632 [appdism 33F(2d)636]. (2) 33F(2d) 100; 33F(2d)219; 33F(2d)315; 42F (2d)395; 43F(2d)617; 43F(2d)628; (3) 42F(2d)398; 42F(2d)406; (4) 33F(2d) 302; (5) Patent held inoperative: 34F(2d) 905. [b] (1) 30F(2d)225; 30F(2d)232; 30F(2d)281; 30F(2d)948; 31F(2d)157; 31F(2d)255; 31F(2d)427; 31F(2d)463; 31F(2d)522; 31F(2d)780; 32F(2d)218; 32F(2d)266; 32F(2d)376; 32F(2d)702; 32F(2d)831; 32F(2d)879; 33F(2d)548; 33F(2d)929; 34F(2d)551; 34F(2d)895; 36F(2d)845; 37F(2d)172; 37F(2d)732; 37F(2d)830; 40F(2d)301; 41F(2d)596; 41F(2d)820; 42F(2d)6; 42F(2d)264; 42F(2d)869; 43F(2d)628; 44F(2d)190. (3) Sustain verdict that patent is invalid. 280US400, 50SCt185, 74L ed511; 29F(2d)305; 31F(2d)157; 31F(2d)651; 32F(2d)79; 32F(2d)105; 32F(2d)235; 32F(2d)277; 32F(2d)655; 32F(2d)774; 32F(2d)781; 32F(2d)875; 32F(2d) 1005; 33F(2d)146(2dcase) (for abandonment); 34F(2d)41; 34F(2d)609; 34F(2d)905; 36F(2d)673; 36F(2d)774 (1stcase); 37F(2d)5; 37F(2d)172; 37 F(2d)249; 37F(2d)281; 37F(2d)385; 37F(2d)953; 41F(2d)453. (4) Limit validity. 31F(2d)250. (5) Show patent is capable of construction together. 32 F(2d)376. [c] (3) Overcome general evidence that machines were kept from public till within two years before application for patent. 29F(2d)646. (4) That patentee was first and sole inventor. 37F(2d)5. (5) Establish validity of patent. 33F(2d)447; 33F(2d)743; 33F(2d)942 (as to some claims); 40 F(2d)173; 40F(2d)341; 40F(2d)513; 40F(2d)600; 40F(2d)640; 40F(2d)662; 40F(2d)708. (6) Such invalidity as to justify dismissal of bill. 40F(2d)434. [d] **Failure of defendant to avail itself**

of earlier devices or improve them and bodily appropriation of plaintiff's patented structure is persuasive on question of patentability. 38F(2d)639.

358–46 33F(2d)302; 34F(2d)519; 34F(2d)609. [b] (1) 34F(2d)875. [d] (1) 280US30, 50SCt9, 74Led147; 30F(2d)225; 30F(2d)232; 30F(2d)375; 30F(2d)948; 30F(2d)956; 31F(2d)157; 31F(2d)255; 31F(2d)432; 31F(2d)780; 32F(2d)55; 32F(2d)105; 32F(2d)218; 32F(2d)360; 32F(2d)558; 32F(2d)673; 32F(2d)831; 32F(2d)879; 32F(2d)1008; 33F(2d)88 (where validity of patent is not attacked); 33F(2d)117; 33F(2d)132; 33F(2d)209; 33F(2d)283; 33F(2d)302; 33F(2d)412; 33F(2d)603; 33F(2d)862; 33F(2d)929; 33F(2d)942 (as to some claims); 33F(2d)952; 33F(2d)954; 34F(2d)286; 34F(2d)446(2dcase); 34F(2d)450(2dcase); 34F(2d)508; 34F(2d)519; 34F(2d)525; 34F(2d)551; 34F(2d)693; 34F(2d)822; 34F(2d)931; 34F(2d)935; 35F(2d)32; 35F(2d)106; 35F(2d)254; 35F(2d)263; 35F(2d)384; 35F(2d)433; 35F(2d)628; 35F(2d)679; 35F(2d)697; 35F(2d)756; 36F(2d)150; 36F(2d)319; 36F(2d)357(2dcase); 36F(2d)410; 36F(2d)412; 36F(2d)477; 36F(2d)497; 37F(2d)153; 37F(2d)281; 37F(2d)491; 37F(2d)562; 37F(2d)587(2dcase); 37F(2d)611; 37F(2d)745; 37F(2d)830; 38F(2d)30; 38F(2d)50; 38F(2d)62; 38F(2d)242; 38F(2d)329; 38F(2d)490; 38F(2d)639; 38F(2d)685; 38F(2d)780; 38F(2d)826; 38F(2d)995; 39F(2d)126; 39F(2d)232; 39F(2d)233; 39F(2d)548; 40F(2d)252; 40F(2d)263; 40F(2d)458; 40F(2d)460; 40F(2d)510; 40F(2d)549; 40F(2d)640; 40F(2d)645; 40F(2d)676; 40F(2d)879; 40F(2d)910; 41F(2d)619; 41F(2d)628; 41F(2d)688; 41F(2d)742; 42F(2d)169; 42F(2d)291; 42F(2d)737; 42F(2d)739; 42F(2d)750; 42F(2d)760; 42F(2d)965; 43F(2d)609; 43F(2d)617; 43F(2d)790; 43F(2d)982; 44F(2d)190. [e] (1) 30F(2d)291; 31F(2d)100; 31F(2d)103; 31F(2d)145; 31F(2d)278; 31F(2d)279; 31F(2d)390; 31F(2d)646; 31F(2d)777; 32F(2d)211; 32F(2d)266; 32F(2d)615; 32F(2d)781; 32F(2d)1005; 33F(2d)146(2dcase); 33F(2d)148; 33F(2d)153; 33F(2d)155 [aff33F(2d)157] (invalid for anticipation); 33F(2d)295; 33F(2d)300; 33F(2d)455; 33F(2d)466; 33F(2d)603; 33F(2d)838; 33F(2d)993 (essential details of plaintiff's invention not contained in alleged infringing mechanism); 34F(2d)41; 34F(2d)211; 34F(2d)409; 34F(2d)450(2dcase); 34F(2d)761; 34F(2d)764; 34F(2d)895; 34F(2d)905; 35F(2d)169; 35F(2d)287; 35F(2d)567; 35F(2d)679; 35F(2d)728; 35F(2d)733(2dcase); 35F(2d)756; 36F(2d)72; 36F(2d)195; 36F(2d)574; 36F(2d)684; 37F(2d)281; 37F(2d)465; 37F(2d)582; 37F(2d)745; 37F(2d)899; 38F(2d)170; 38F(2d)220; 38F(2d)329; 38F(2d)628; 38F(2d)730; 38F(2d)788; 39F(2d)92; 39F(2d)111; 39F(2d)211; 39F(2d)322; 39F(2d)589; 39F(2d)592; 39F(2d)595; 39F(2d)604; 39F(2d)617; 40F(2d)173; 40F(2d)222; 40F(2d)311; 40F(2d)341; 40F(2d)513; 40F(2d)547; 40F(2d)819; 41F(2d)142; 41F(2d)458; 41F(2d)668; 41F(2d)764; 42F(2d)6; 42F(2d)485; 42F(2d)785; 42F(2d)861(2dcase); 42F(2d)865; 43F(2d)617; 43F(2d)961; 44F(2d)108. (6) Show infringement by structural changes in plaintiff's device which had previously been adjudicated noninfringing. 33F(2d)347. (7) Warrant granting of preliminary injunction for infringement. 40F(2d)196.

359–48 41F(2d)88.

359–66½–New. There is no presumption that the use of an infringing design induced defendant's sales. 31F(2d)492 [aff31F(2d)494(1stcase)].

360–73 [a] 33F(2d)912; 34F(2d)869. [c] **Evidence of contributory infringement held sufficient.**–34F(2d)672.

360–78 33F(2d)954.

361–98 34F(2d)869 (evidence held to sustain master's finding that prior settlement did not include payment of royalties on account of infringing sales involved).

361–3 [b] (3) To sustain finding that plaintiff failed to prove any profits. 31F(2d)459. (4) To show that part of infringer's profit resulted from use of other things than patented improvements so as to require payment of reasonable royalties only. 37F(2d)62.

362–6 37F(2d)62.

362–7 31F(2d)492 [aff31F(2d)491(1st case)]. [a] 35F(2d)1.

362–9 [a] 31F(2d)459.

362–20 [b] 31F(2d)459.

363–25 31F(2d)898; 38F(2d)314.

363–26 31F(2d)492 [aff 31F(2d)494(1st case)].

363–30 31F(2d)898.

363–40 38F(2d)314.

364–46 31F(2d)492 [aff 31F(2d)494(1st case)].

364–53 [a] (5) 40F(2d)708.

365–61 38F(2d)355.

365–61½–New. If counterclaim prejudices either party in trial of suit, court, on motion, can order separate trial thereof. 43F(2d)122(1stcase).

366–81 [a] **Whether real invention or mechanical skill is disclosed** is question of fact. 31F(2d)522.

366–95 34F(2d)450(2dcase) (court acts as jury would and determines whether on particular facts invention claimed has been taken).

367–14 36F(2d)623.

367–27 31F(2d)988 (complainant).

368–52 31F(2d)983; 31F(2d)988.

370–6 39F(2d)865.

372–23 31F(2d)522.

372–28 42F(2d)291; 44F(2d)226.

372–42 44F(2d)226.

373–57 34F(2d)711 (insufficient).

374–59 39F(2d)232.

375–74 33F(2d)209.

375–82 39F(2d)907.

376–86 39F(2d)487.

376–93 39F(2d)907.

376–97 36F(2d)319.

377–14 [a] 33F(2d)949 (prima facie showing); 41F(2d)948. [b] 34F(2d)711. [c] **Where possibility of infringement exists,** although defendant has discontinued use of infringing structure, preliminary injunction will issue. 39F(2d)487.

377–15 43F(2d)949.

377–17 33F(2d)910 (defendant's process antedated patent); 39F(2d)132; 43F(2d)949; 44F(2d)226. [c] (3) 32F(2d)546.

378–22 36F(2d)412 (unfair competition).

378–26 33F(2d)209.

379–34 32F(2d)241(2dcase) (patent about to expire).

379–39 42F(2d)749. [a] **Affidavit has been held insufficient** to sustain burden of showing facts not fairly presented at prior hearing. 42F(2d)291.

379–46 [b] **Against whom directed.**–33F(2d)949.

380–53 37F(2d)100(2dcase).

380–60 31F(2d)522.

382–83 [b] 32F(2d)895. [c] **Evidence held sufficient.**–MoA 18SW(2d)142.

383–1½–New. The question of infringement of a patent is not to be determined on a motion to punish for contempt. MoA 18SW(2d)142.

383–1⅓–New. Damages for violation of injunction pending appeal are limited to costs and attorney's fees in absence of evidence of damage. 41F(2d)910.

383–1¼–New. Attempt on motion for contempt to broaden injunction decree improper. 42F(2d)569.

383–5 [a] **Allowance held not excessive.**–41F(2d)910.

383–22 [a] 35F(2d)349.

383–22½–New. Employee as to whom infringement suit was dismissed cannot be punished for violation of injunction by employer based on employee's acts after termination of employment. 42F(2d)832.

384–23 36F(2d)998.

384–37½–New. Conduct within scope of defendant's license is not violation of injunction. 39F(2d)181.

384–42 38F(2d)50.

385–58 34F(2d)869 (profits held properly made basis of recovery where accounting was had on basis of profits and plaintiff failed to disclose royalties received).

386–61 38F(2d)314.

386–64½–New. Equity will not order accounting of profits in case of unconscionable enterprise even if infringement exists. 39F(2d)92.

387–73 35F(2d)1. [b] **Where infringement constitutes single tort,** damages may not be added to profits on same infringement. 35F(2d)1.

387–74 35F(2d)1.

387–81½–New. Failure to give notice of patent by marking or notify defendant of infringement prevented recovery of profits and damages. 40F(2d)505.

387–89 34F(2d)869 (profits from sales to Canadian corporation properly allowed); 35F(2d)1 (profits from leases of infringing boards portraying baseball games held properly allowed for terms which leases had actually run). [a] **Extra profits from sales to government during war** are recoverable. 34F(2d)869.

387–91 [a] **One having actual notice of patent** and knowledge of infringement is liable for profits though patented machines were not properly marked. 40F(2d)938.

388–2 34F(2d)869.

388–6 33F(2d)892.

390–18 34F(2d)869.

390–19 34F(2d)869.

391–46 31F(2d)898.

392–56½–New. Unexplained expense of litigation is not deductible. 31F(2d)898.

392–56½–New. The amount paid for legal fees in a litigation with the purchaser of infringing devices cannot be deducted. 31F(2d)898.

392–60 [a] Contra 37F(2d)111.

392–64 [c] **Bad debts.**–31F(2d)898.

393–71 37F(2d)62.

394–97½–New. A master has no authority to penalize defendant by compounding interest on profits and charging interest on interest. 35F(2d)1.

394–1 38F(2d)314. [a] **One having actual notice of patent** and knowledge of infringement is liable for damages though patented machines were not properly marked. 40F(2d)938. [b] **Damages include repair parts manufactured by defendant** and sold for use by infringers. 38F(2d)721.

395–6 31F(2d)898.

395–14 38F(2d)314.

395–22 [a] **Elements considered.**–38F(2d) 314.

396–28 31F(2d)492 [aff 31F(2d)494(1st case)].

396–43 But see 31F(2d)459.

397–48 31F(2d)898 (lost profits on account of sales to persons who purchased infringing device because they considered it superior to patented device held not recoverable).

397–50 31F(2d)898.

397–53 42F(2d)965.

399–70 31F(2d)459 (royalty is measured by saving to defendant by its use of plaintiff's patented invention); 37F(2d)62; 38F(2d)314. [d] **Under special act permitting suit** court should be conservative as to amount. 37F(2d)111 (license agreement and profits held not controlling). [e] **Five per cent royalty held not excessive.**–38F(2d)721.

399–82 37F(2d)62.

400–86 35F(2d)1 (grants of leases to use infringing device held separate infringements within rule). [a] 33F(2d)302.

400–90 35F(2d)1.

400–91 37F(2d)62. [a] 34F(2d)693.

400–93 37F(2d)62 (last infringement); 38F(2d)721.

401–16 37F(2d)293 (period between filing of bill and expiration of patent).

402–31 37F(2d)293.

402–36 [a] **Findings of master held justified.**–38F(2d)314.

404–81 [b] 34F(2d)869.

404–83 35F(2d)1.

404–96 But see 37F(2d)579.

404–99 33F(2d)760.

405–5½–New. Defendants not inhabitants of district and who had not committed acts of infringement are entitled to dismissal. 39F(2d)92.

406–21 35F(2d)268.

406–38 37F(2d)281 (decisions are not judgments in rem). [a] (5) Suit against automobile company, defended by association is adjudication for and against defendant company, member of association, on issues decided. 42F(2d)965. [b] **Company president verifying answer** is bound by decree. 39F(2d)791.

407-39 31F(2d)989.
407-40½-New. The rule that a specific decree of noninfringement protects the identical device is not to be construed in a too restrictive manner. 33F(2d)347.
407-41 But see 31F(2d)989.
408-51½-New. Party who intervenes and conducts infringement suit for defendant and is substantially bound by decree is entitled to court's aid in protecting decree from exaggeration. 42F(2d)904.
408-53 [b] (1) 34F(2d)551.
408-63 33F(2d632 [appdism 33F(2d)636]; 34F(2d)50. [a] (1) 33F(2d)412. (5) 41F(2d)361.
409-65 33F(2d)132.
409-67 34F(2d)577.
410-78½-New. An infringer is not relieved from liability for profits derived from the infringement by payments made by another infringer. 34F(2d)50.
410-83 31F(2d)337 (contention that plaintiff was no longer owner of patent or claims and intervention of plaintiff's counsel claiming interest in judgment could not be disposed of in application for rehearing without reopening case).
410-87 [b] **Sufficient showing of diligence.**-33F(2d)548.
411-96 37F(2d)709.
411-4½-New. Complainants entitled on appeal to amendment to conform pleadings to proofs. 35F(2d)433.
412-42 37F(2d)281 (limited strictly to consideration of record before it).
412-47 35F(2d)433.
412-51 [a] (7) Other instances. 42F(2d)406.
412-52 31F(2d)459; 33F(2d)743.
413-54 38F(2d)75; 41F(2d)142.
413-55 33F(2d)743 (conclusions of law are reviewable).
413-66½-New. A motion to remand to permit the district court to consider newly discovered evidence will be denied where it does not appear that facts were unknown before final decree and newly discovered testimony is cumulative only. 32F(2d)696(2dcase).
414-77 31F(2d)522.
415-8½-New. Where the decision on appeal does not determine whether a certain device constituted an infringement, the proper procedure is by supplemental bill or independent suit for infringement as to such device. 31F(2d)991.
415-11 But see 32F(2d)696(2dcase).
416-26 40F(2d)549.
417-44 40F(2d)460.
418-73 [b] **Refusal to allow fees of plaintiff's accountants** held justified. 38F(2d)721.
418-86 34F(2d)869 (accountant's fee not charged against defendant).
418-89½-New. Where employment of expert accountant was necessitated by patentee's unfounded charges, patentee is properly taxed for charges of accountant. 36F(2d)447.

PAUPERS

428-5 [a] (6) 154Wash416, 282P832.
429-13 TexCivA 29SW(2d)456.
431-41 Vt 148A408(2dcase).
432-58 [b] **Statute authorizing seizure of property of absconding husband or father,** leaving dependents likely to become public charges, held not unconstitutional as denying due process. 280US218, 50SCt94, 74Led378.
433-59 [d] (4) Evidence held to show that applicant for blind pension had greater vision than light perception so as to preclude right to pension. 322Mo677, 15SW(2d)790; Mo 15SW(2d)792; Mo 15SW(2d)793.
446-84½-New. Discharge terminates keeper's contract of employment and right to occupy county farm. 135Misc760, 240NYS680.
469-69 12PaDist&Co 292.
471-4 12PaDist&Co 292.
493-92 [b] (1) 179Minn251, 228NW929; Vt 145A410.
495-50 [f] **Statutory proceeding to have place of settlement determined.**-179Minn251, 228NW929.
498-90 See also 58ND612, 226NW737.
510-17 Sask [1929] 4DomLR1076(2dcase).
511-35 [b] **In New York.**-250NY136, 164NE882.
511-40 Sask [1929] 4DomLR1076(2dcase).
511-41 [c] **That other children contributed somewhat to destitute parent's support** does not relieve child from statutory obligation. 36OhA73, 172NE838.
512-43 [c] **Obligation cannot be enforced in action against third person.**-Nebr 232NW767.
515-96 Ill 172NE1. [a] (2) In complaint against son for failure to support father, city magistrates' family court has jurisdiction, where complainant father was in city of New York at time of trial, and intended to remain, and is likely to become charge, though he was at various times in other states and legal residence was elsewhere. 133Misc141, 231NYS593.
515-97 96PaSuper480.
515-1 Ill 172NE1.
515-6 Ill 172NE1.
516-13½-New., refusal and neglect, 36OhA73, 172NE838 (evidence held sufficient).
517-43 95PaSuper581 (further modification refused).
517-57 96PaSuper480.
518-69 Iowa 231NW298. [c] (6) Iowa 231NW298. (8) Two year limitations are applicable. Iowa 231NW298. [f] **In Alberta** municipality cannot recover from father under Town Act for hospital treatment of child where provision for relief was not made by written order. [1929] 4DomLR797.
519-72 [a] **Requisite statutory initial steps must be taken** before liability attaches on relatives. Iowa 231NW298.
519-73 See also 11PaDist&Co 18.
520-99 [f] (5) Overseer of poor may acquire by assignment from poor person cause of action existing in favor of poor person. 227AppDiv219, 237NYS539. (6) Overseer of poor has authority to take deed of poor person's real estate to reimburse town for support and maintenance of poor person. 227AppDiv219, 237NYS539. [g] **Claims against pauper's estate** by commonwealth and poor district entitled to share pro rata where funds insufficient to pay both. 12PaDist&Co 711.
521-9 See also 12PaDist&Co 711.
522-24 TexCivA 29SW(2d)456.
523-34½-New. Power of the board of county commissioners to superintend relief of the poor is subject to judicial authority and review. 154Wash416, 282P832.
523-35 [e] (5) Stepchildren of pauper are not included within definition of "family" under statute making town liable for support of family of pauper. Vt 150A133. [g] (6) Liability for maintenance of indigent person in sanatorium for consumptives attaches to municipality in which he was resident at time of admission. Ont [1930] 4DomLR417. (6) Hospitals and Charitable Institutions Act of 1927 did not repeal Sanatoria for Consumptives Act of same year. Ont [1930] 4DomLR417.
524-48 Vt 148A408(2dcase). [f] **Right of recovery** is not affected by fact that pauper did not ask himself for assistance. Vt 148A408(2dcase).
526-90 Vt 148A408(2dcase).
533-57 [a] (7) Evidence on application for blind pension held to preclude such pension. 322Mo677, 15SW(2d)790.
535-97 Vt 148A408(2dcase).
535-2 [b] **Duty of overseer of poor to afford relief** arises whenever he receives information that relief is required. Vt 148A408(2dcase).
535-3 Vt 148A408(2dcase).
536-19½-New. As to how a county should care for a pauper is a matter resting in the discretion of the fiscal court. 231Ky589, 21SW(2d)980.
537-42 13PaDist&Co 283.
539-79½-New. Under Saskatchewan statute doctor on rota who treats indigent resident admitted to hospital as emergency case is entitled to reasonable remuneration from municipality. Sask [1929] 4DomLR1071(2dcase).
540-89 154Wash416, 282P832 (under statute).
542-50 231Ky589, 21SW(2d)980.
545-91½-New. Constitutional provision imposing on counties duty to care for infirm and unfortunate residents includes insane persons. 130Kan428, 286P250.
545-91½-New. Constitutional provision imposing on state duty to support institutions for insane does not prevent legislature from imposing part of duty on counties. 130Kan428, 286P250.
546-19 [a] **Transient person, irrespective of financial condition, is "in need of relief"** within statute when committed to jail, authorizing sheriff's recovery against town. Vt 152A89.
547-40 13PaDist&Co 283.
548-46 Vt 148A408(2dcase).
549-74½-New. In an action against a town for the support of paupers brought into the state by plaintiff's decedent, an agreement between decedent and the institution from which the paupers were taken is not available as a defense. Vt 147A284.
549-75 [b] (2) 13PaDist&Co 283.
550-93½-New. In Saskatchewan municipality owning hospital is proper party to sue another municipality for treatment of its residents although statute declares that hospital board may demand amount. Sask [1930] 2DomLR81.
550-95 [c] (2) For relief furnished by hospital to penniless injured person. 154Wash416, 282P832.
552-27 Vt 147A284 (intent of plaintiff's decedent to charge town with support of paupers brought by him into state); Sask [1930] 2DomLR81.
553-48 [b] (4) To require inference that paupers were brought into state with intent to charge town with support. Vt 147A284.

PAWNBROKERS

561-23 [c] **Constitutionality of statute.**-OhA 173NE22.
561-35 CalA 292P1065.
563-82½-New. Loan Shark Law applies only to small loans on personal security. DC 41F(2d)982.
563-84 40GaA710, 151SE412 (agreement to pay attorney's fees).
563-88 [b] **Computation of interest** on basis of twelve months of thirty days each does not show intentional attempt to collect usurious interest. Ga 154SE324.
566-64½-New. Husband's transfer of pawn ticket for separate property of wife to third person held voidable at instance of wife. LaA 125S483(2dcase).
570-88 [a] **Incidental relief to bona fide purchaser of pawn ticket.**-LaA 125S483(2dcase).

PAYMENT

585-2 [a] (4) Ark 30SW(2d)858.
586-16 [d] SD 226NW341.
587-18 Iowa 225NW859.
588-28 42F(2d)158.
589-59 41GaA384, 153SE85(2dcase).
590-70 233Ky476, 26SW(2d)26 [cit CJ]; 200Wis175, 227NW866.
592-4½-New. Where money is payable on surrender of a lease, no demand is necessary on performance of the condition. 89IndA181, 164NE506.
592-4½-New. One becomes liable for payment when all acts necessary to fix liability on person to be charged have transpired. 39F(2d)109.
592-10 137Misc491, 244NYS4 (deferred payment).
592-15 37F(2d)695. [a] But see 149SC8, 146SE612.
593-17 TexCivA 29SW(2d)902 [quot CJ].
593-18 CalA 288P444.
593-19 TexCivA 29SW(2d)902.
593-22 [c] **Place of payment may be fixed by implied agreement** as well as by expressed. TexCivA 29SW(2d)902.
595-62 42F(2d)344.
605-93 136Misc520, 240NYS26.
606-98 [a] **In set-off,** rate at time of set-off applies. 37F(2d)564.
607-8 40F(2d)78.

608-29 Ill 172NE7.
609-36 170La593, 128S526.
610-40 48 Ida279, 281P472; SC 155 SE151.
611-42 102CalA541, 283P829; CalA 285P734; CalA 286P1105; CalA 290P 478; Iowa 230NW565; 85Mont149, 278 P116.
613-60 102CalA361, 282P1017; 103 CalA275, 284P685; Wyo 290P561.
614-63 134Misc476, 235NYS631. But see 103CalA275, 284P685.
614-64 134Misc350, 235NYS549 (refusal to surrender notes held to constitute acceptance as payment).
615-86 See also 101CalA204, 281P509.
617-21 102CalA541, 283P829; CalA 286P710; 168Ga876, 149SE213; 41GaA 395, 153SE104(2dcase); LaA 125S318 (2dcase); Mo 30SW(2d)46; 222MoA193, 297SW94, 97 [citCyc]; MoA 20SW(2d) 956; NJ 151A612; NJ 151A730 (retention of possession by drawer); 137Misc444, 242NYS185; 143 Okl 52, 287P402; 132 Or21, 281P834; 35PortoRico 908; Sask [1930] 1DomLR888.
618-23 110Conn397, 148A374; NJ 151 A612.
618-26 [b] But see MoA 20SW(2d)956. [d] **Where drawee bank accepts check and charges it to drawer's account**, and drawer has sufficient funds on deposit, debt is paid. 197NC253, 148SE253.
619-29 85Mont106, 277P612; 85Mont 293, 279P236.
619-30 Iowa 231NW416.
619-33 Iowa 231NW416; 59ND101, 228NW812. [a] Iowa 231NW416.
620-43 SD 230NW233 (acceptance by bank).
620-47 48 Ida279, 281P472; Ida 288P 164; 179Minn398, 229NW555; 132 Or 21, 281P834; SD 229NW298.
620-48 But see 40GaA554, 150SE439 (drawer remains liable where no loss resulted to him from delay).
620-50 LaA 125S318(2dcase).
620-56 Iowa 230NW565.
621-70 221Ala520, 129S285.
622-74 NC 155SE606.
623-80 143 Okl 52, 287P402.
623-85 [d] **Creditor accepting cashier's check after requesting bank draft** waives request and check discharges liability as fully as draft would have done. 143 Okl 52, 287P402. [e] **Where cashier's check is accepted in payment** debt is discharged although draft given in payment is protested. 143 Okl 52, 287P402.
629-68 40F(2d)583.
631-81 Okl 292P560.
634-32 CalA 288P1096.
634-41 [i] (4) Receipt in full cannot operate to discharge claims not within contemplation of parties when it was executed. NH 146A529.
635-54 MoA 24SW(2d)649.
636-70½-New. Where decedent contracted to pay plaintiff a monthly sum for life, checks given by him during lifetime are admissible. 228AppDiv674, 239NYS603.
637-81 NH 146A529.
641-9 11LaA699, 124S696.
641-14½-New. Receipts in full held controlling as to professional services rendered during the period covered. 298 Pa108, 148A53(2dcase).
642-44½-New. In absence of agreement imputation must be made in accordance with statute. 12LaA491, 126S453.
643-57 36F(2d)719; 233Ky217, 25SW (2d)359; 234Ky538, 28SW(2d)769; 97 PaSuper506; TexCivA 29SW(2d)513; Vt 146A6.
644-75 TexCivA 29SW(2d)513.
645-82 12LaA491, 126S453.
645-85 NS [1930] 1DomLR983.
647-15 See also Mass 170NE621.
647-21 Ill 173NE345; 233Ky217, 25 SW(2d)359; 234Ky538, 28SW(2d)769; Mont 292P714; 142 Okl 103, 285P949; TexCivA 29SW(2d)513; Vt 146A6.
648-22 [b] **Where check given for exact amount of bill**, collector by receipting bill imputed entire check to account for which bill given. 13LaA577, 128 S50.
649-36 Ill 173NE345; 233Ky217, 25 SW(2d)359.
649-43 30Hawaii359, 374 [quotCyc].
651-80 Ida 292P590.
652-7 133 Or20, 286P981.
653-45 TexCivA 29SW(2d)513.
654-51 87Colo 97, 285P942; 230Ky 465, 19SW(2d)1078 (letter, offering to credit payment on future services as architect, construed); 177Minn560, 225 NW725; TexCivA 19SW(2d)390.
654-59 142 Okl 103, 285P949; TexCivA 29SW(2d)513.
656-91 11LaA371, 123S368; 50Philippine253.
657-92 SD 229NW293.
657-5 32F(2d)805; 102CalA582, 283P 866.
658-12 254NY218, 172NE475(2dcase).
659-22 168La500, 122S595.
659-25 130Kan583, 287P579.
659-26 Ill 173NE345.
661-49 133 Or20, 286P981.
661-58 CalA 278P503.
663-90 181Ark105, 24SW(2d)964. [c] **Where guarantors are secondarily liable on one of several debts** neither debtor nor creditor need allocate payments in manner most beneficial to others. 181 Ark105, 24SW(2d)964.
663-92½-New. Payment cannot be imputed under statute or agreement, if creditor has knowledge of resulting prejudice to third person. 12LaA491, 126S 453.
664-3 99CalA462, 278P935; SD 228 NW374.
664-5 42F(2d)817; 140 Okl 138, 282P 295; 200Wis200, 227NW945.
665-18 MoA 22SW(2d)651; 34Porto Rico 838.
665-20½-New. Where facts appear on the face of the complaint which, together with legal presumptions arising therefrom, imply payment, such implication must be negatived. 35Ariz403, 279P 257.
666-26 38F(2d)104; 12LaA596, 126S 743; 251Mich173, 230NW944; MoA 22 SW(2d)651; 140 Okl 212, 282P279; 140 Okl 138, 282P295; Or 293P422.
667-43 See also 37F(2d)715.
669-83 13LaA1, 126S741.
671-13 Mont 292P714 (agreement to accept property).
675-7 11LaA435, 123S515.
678-39 12LaA596, 126S743; 140 Okl 212, 282P279.
680-21 35F(2d)265; 41GaA201, 152SE 585(2dcase); 253 IllA248; 11LaA435, 123S515; 140 Okl 138, 282P295; WVa 155SE312.
682-22 249Mich16, 227NW539; 200 Wis200, 227NW945 (burden is on defendant).
682-35 42F(2d)817.
683-59 11LaA184, 123S164; 137 Okl 136, 278P630; 150SC267, 148SE54.
685-77½-New. Where check was accepted by bank person denying payment by check has burden of showing there was no money in bank to pay check when given. SD 230NW233.
685-80 253 IllA248.
686-97 169La1020, 126S513(1stcase).
687-9 [b] (2) In proceedings against estate to recover for services rendered deceased, wages for domestic services are presumed to be paid at periods customary for payment. 294Pa323, 144 A141.
687-13 TexCivA 20SW(2d)1097.
688-24 [b] **Statute is declaratory of common-law rule.**-131 Or653, 284P163.
690-57 Vt 146A77.
691-65 Vt 146A77.
693-97 Ala 130S900; 107WVa1, 148 SE566.
696-6 169Ga830, 152SE73.
697-19 NJCh 148A392(2dcase).
699-56 NH 150A114.
700-67 But see 253 IllA176.
701-78 136Misc500, 241NYS202.
701-79 Mass 172NE82.
701-80 IndA 169NE537.
701-83 179Minn398, 229NW555.
702-88 33F(2d)494.
702-93 221Ala520, 129S285.
703-5 179Minn398, 229NW555.
703-8 132 Or21, 281P834.
705-23 33F(2d)278.
705-25 Iowa 230NW330.
705-30 [a] **Inference that there was money in bank to pay check on day it was given** is rebuttable. SD 230NW 233.
705-39 110Conn397, 148A374.
706-43½-New. Presumption is that acceptance of something other than money does not constitute payment of debt. 130Kan583, 287P579.
706-48 TexCivA 28SW(2d)214.
710-2 134Misc417, 236NYS37.
712-17 See also Ala 130S900.
713-26 134Misc417, 236NYS37.
713-27 134Misc417, 236NYS37.
720-29 CalA 288P1096.
720-32 Minn 231NW798 (checks held inadmissible to show payment of subcontractors' debts by contractor).
721-40 178Minn90, 225NW918.
721-54 178Minn90, 225NW918.
725-45 Utah 287P332. [k] **Evidence held not to require finding** that mules were not unconditionally delivered in payment. TexCivA 32SW(2d)676(2dcase).
726-46 [a] 230Ky44, 18SW(2d)868; 11LaA184, 123S164.
726-48 [a] 13LaA130, 127S402. [b] (1) 41GaA201, 152SE585(2dcase). [c] **Evidence of quantity and value of property and its acceptance is required** under plea of payment or set-off by delivery of personal property to plaintiff. 41GaA201, 152SE585(2dcase) (evidence demanded inference that cotton delivered applied to payments of notes sufficient to discharge amount of note).
726-49 208 Iowa1020, 226NW777 (legal services). [a] **Evidence sufficient** to show payment accepted in full settlement. 13LaA130, 127S402. [b] **Evidence held insufficient** to show agreement to accept certain property in full payment of amount due. 251Mich619, 232 NW217.
727-52 [b] 251Mich619, 232NW217. [e] TexCivA 17SW(2d)145. [k] **Evidence insufficient.**-41GaA201, 152SE585 (2dcase).
728-71 TexCivA 20SW(2d)1097.
728-76 NJ 151A612; 132 Or21, 281P 834. [b] 129Kan110, 281P902 (1stcase). [c] Iowa 231NW426; 156Miss878, 127 S300 (absent proof that check was paid).
729-80½-New. Evidence that a debtor's check for the price of goods was promptly deposited and that the drawee bank marked it paid, and charged the drawer's account with the amount, but did not remit the amount to the payee, does not establish payment. MoA 20SW(2d)956.
729-91 Ala 130S681.
730-19 35F(2d)265; 102CalA541, 283P 829.
731-21 [a] **What is reasonable time and due diligence in presenting check for payment** held question for jury. 40 GaA554, 150SE439.
731-28 RI 149A113(1stcase).
732-35 [a] **Directed verdict held warranted** by evidence conclusively establishing payment. 42F(2d)817.
732-42 Md 151A240.
732-47½-New. An instruction that a payment made pursuant to a verdict which was set aside was a payment on account has been held proper. NJSup 147A379.
733-65 See also 132 Or21, 281P834.
733-87 102CalA541, 283P829.
733-93½-New. Finding that creditor received and accepted note may be tantamount to finding of payment in view of contract. 102CalA361, 282P 1017.
734-7 GaA 155SE775(2dcase); 208 Iowa677, 226NW38; Nebr 229NW 771; OhA 173NE308; SD 228NW466.
736-8 230Ky398, 19SW(2d)1071 (cannot be recovered back on theory of gift).
736-13 156Miss227, 125S534. See also GaA 155SE775(2dcase).
736-17 [b] **Payments held not voluntary.**-155Wash234, 283P684.
741-82 But see Mont 285P174.
741-93 335 Ill 284, 167NE69.
742-96 [a] **That demand, voluntarily paid was illegal** is insufficient for recovery unless compulsion or coercion controls payer's conduct. CalA 292P 189.
742-5 335 Ill 284, 167NE69.
742-8 34 OhA267, 171NE111.
742-10 335 Ill 284, 167NE69. [c] (6) Other instances. CalA 292P189. [d] (1) Ga 154SE775; Md 149A465; 155 Wash234, 283P684.
743-11 CalA 292P189 ("coercion").
744-25 But see 337 Ill 122, 168NE886.
746-46 155Wash234, 283P684 (protection of stock investment).

748-69 150SC476, 148SE476.
749-77½-New. Payment induced as part of agreement for compounding a felony may be recovered where it was extorted by duress or oppression or undue influence. 220Ala214, 124S89.
750-87 335 Ill 284, 167NE69.
750-89 255 IllA400.
750-90½-New. The bad effect of ordinary legal process on a corporation's business held not to amount to compulsion of a stockholder. 155Wash234, 283 P684.
751-98 Md 149A465; 34 OhA267, 171 NE111.
753-21 168Ga842, 149SE223; 335 Ill 284, 167NE69.
753-23 335 Ill 284, 167NE69.
754-32 155Wash234, 283P684.
755-35½-New. Second payment of a note voluntarily made cannot be recovered on the ground of a false statement that the person receiving payment had possession of the note, where the person making payment had no right to rely thereon because he had the note in his possession. 150SC476, 148SE476.
755-35½-New. Surety paying only part of his indebtedness cannot recover because payment was induced by false statement that other sureties had paid balance. 253 IllA416.
755-47 CalA 292P189; 34 Oh267, 171 NE111.
756-43 161Tenn79, 26SW(2d)126.
757-63 MoA 28SW(2d)384.
758-76 [a] (4) Other instances. 161 Tenn79, 26SW(2d)126.
761-85 CalA 292P281.
761-92 12LaA15, 123S430.
761-93 IndA 168NE610.
763-9 255 IllA514 (mutual mistake).
764-18 34PortoRico 483.
765-40 250Mich540, 230NW929(2d case).
766-42 150SC476, 148SE476.
767-48 MoA 27SW(2d)1033.
768-73 Mont 285P174.
770-93 40GaA573, 150SE596; Iowa 232 NW483 (mistake of fact). [f] (4) To show mistake. 40GaA573, 150SE596.
771-97 [c] Question of voluntary payment may be raised under plea of general issue. 156Miss227, 125S534.
771-99 [a] Iowa 232NW483.
772-11 [a] (1) 220Ala214, 124S89. (4) Mass 168NE154(2dcase).
772-12 [a] (1) Utah 283P437(2dcase). [b] (5) 34PortoRico 475. (8) To show mental incapacity of payor. 225Ky150, 7SW(2d)1069.
773-15 220Ala214, 124S89.
773-16 335 Ill 284, 167NE69.
773-22½-New. Whether payment was voluntary or under duress as alleged in the bill is a question of law to be determined by allegations. 337 Ill 122, 168 NE886.
773-25 [a] (2) Instructions held insufficient. Nebr 229NW771.

PENSIONS

785-2 98Fla843, 124S728.
787-26 98Fla843, 124S728; Mass 171 NE432.
783-49½-New. Pensions to military veterans may be granted by Legislature. Mass 171NE432.
788-53 97Fla675, 122S8 (statute held not to authorize payment of pension to one not claiming to have served as soldier or sailor).
795-21½-New. Act granting pensions to relatives of members of army in Spanish-American war, Philippine revolution and Chinese rebellion applies to Philippines and to Americans and Filipinos. 51Philippine71.

PERJURY

820-2 14PaDist&Co 42. [c] (7) Other definitions. Mont 293P309.
824-89 9PortoRico 477.
825-90 14PaDist&Co 42.
825-99 14PaDist&Co 42.
827-22 14PaDist&Co 42.
828-34 14PaDist&Co 275.
829-63 14PaDist&Co 42.
830-74 14PaDist&Co 42.
832-5 Mont 292P734; OklCr 288P371 (2dcase).
833-10 99Fla1132, 128S494.
833-15 [a] Materiality of testimony alleged is governed by same rules as in trial of issues by courts. 99Fla1132, 128S494.
833-18 But see Mont 292P734.
834-21 OklCr 292P369.
834-25 Mont 292P734.
834-26 30Hawaii176; 318Mo 643, 300 SW714, 715 [quotCyc]; Mont 292P734.
835-30 34F(2d)741.
836-44 40GaA511, 150SE466.
841-99 [a] 34F(2d)741. [h] Suit to enjoin collection of judgment.-112TexCr 425, 16SW(2d)1172(2dcase). [i] Action by woman suing as feme sole.-112TexCr 486, 17SW(2d)831(2dcase).
842-18 OklCr 282P1110 (application for license to operate pool hall); 97 PaSuper559.
847-99 But see 34 OhA13, 170NE188.
849-29 318Mo 643, 300SW714, 715 [cit Cyc].
850-49 99Fla1132, 128S494.
858-7 [a] Clerk of District Court as well as United States commissioners may administer oaths. 39F(2d)325.
862-92 33F(2d)33.
862-95 37F(2d)241.
868-83 14PaDist&Co 42.
868-84 Mont 293P309.
870-23 [c] In prosecution for perjury committed in felony trial proceeding must be properly described. OklCr 288 P371(2dcase).
871-50 [b] Where it is apparent from wording of indictment that grand jury before which statements were made were investigating crime it need not be in terms so alleged. 99Fla1132, 128S494.
871-59½-New. In an indictment for perjury committed in a capital case, it is not necessary to allege the result of the original case where defendant thereby did not suffer the death penalty. 76 TexCr5, 172SW238.
873-86 181Ark665, 27SW(2d)781 (venue).
874-13 [b] Grand jury foreman.-233 Ky198, 25SW(2d)369; 233Ky347, 25 SW(2d)744.
875-23 33F(2d)222. [b] 39GaA697, 148SE423.
876-46 39GaA697, 148SE423.
877-60 14PaDist&Co 42.
878-82 99Fla1132, 128S494. [d] 39 GaA697, 148SE423.
879-4 181Ark665, 27SW(2d)781.
881-20 But see 181Ark665, 27SW(2d) 781. [b] 208 Iowa358, 226NW54.
882-26 14PaDist&Co 42.
883-28 39F(2d)325 (strict common law rules no longer in force). [a] (4) 181 Ark665, 27SW(2d)781.
883-39 [L] (2) 233Ky347, 25SW(2d) 744. (3) 233Ky347, 25SW(2d)744.
886-95 14PaDist&Co 42.
887-1 OklCr 288P371(2dcase).
888-33 14PaDist&Co 42.
889-39 OklCr 288P371(2dcase).
889-47 99Fla1132, 128S494.
889-60 37F(2d)692.
891-4 [j] All testimony given by accused may be considered. 2Del 20, 78 A640; 2Del 77, 78A405.
895-60 34F(2d)741 (notes taken in bankruptcy proceeding by unofficial stenographer not shown to have been sworn).
895-63½-New. Defendant may introduce parts of testimony not assigned so far as relevant to explain or qualify statements assigned. 14PaDist&Co 42.
895-66 33F(2d)33.
896-80 230Ky24, 18SW(2d)287; OklCr 292P369. [b] (15) SD 229NW398. (21) At former trial. 37F(2d)692.
897-81 112TexCr425, 16SW(2d)1072 (2dcase). [b] Subornation of perjury.-34 OhA13, 170NE188.
897-85 112TexCr425, 16SW(2d)1072 (2dcase).
898-6 [a] (3) To establish venue of crime in prosecution of which perjury is charged. 181Ark665, 27SW(2d)781.
899-24 [a] (6) In habeas corpus proceeding. Miss 119S355. [b] (4) Mont 292P734. (7) In other proceedings. 37 F(2d)241. [c] In prosecution for perjury in action growing out of written contract, it is necessary to produce contract. 6Ala324.
899-26 OklCr 288P371(2dcase).
899-33 [a] 179Ark1084, 20SW(2d)118; 103CalA149, 284P229.
900-39 112TexCr425, 16SW(2d)1072 (2dcase).
900-43 235Ky327, 31SW(2d)377(1st case). [c] Evidence held sufficient to sustain conviction.-40GaA511, 150SE 466.
901-44 99Fla1132, 128S494; 235Ky 327, 31SW(2d)377(1stcase); Miss 128S 769; 228AppDiv822, 240NYS231; 14 PaDist&Co 42.
902-55 103CalA149, 284P229.
902-57 14PaDist&Co 42.
903-58 228AppDiv849, 240NYS825.
906-4 179Ark1084, 20SW(2d)118; 181 Ark665, 27SW(2d)781.
907-12 14PaDist&Co 42.
908-20 [a] SD 229NW398. [c] Instructions held erroneous.-37F(2d)241.
908-32 [i] Withdrawal of instruction held error. Mont 293P309.
908-33 But see 40GaA511, 150SE466.
910-70 OklCr 290P195. [c] (2) Statute prescribing punishment for perjury in felony case applies to perjury in any felony trial, whether prosecuted by indictment or information. OklCr 288P371(2dcase).
911-89 234Ky153, 27SW(2d)702.
912-4 234Ky153, 27SW(2d)702.
914-51 [b] 39F(2d)325; 234Ky153, 27 SW(2d)702.
914-56 39F(2d)325.
914-61 But see 318Mo 643, 300SW714.
914-65 But see 318Mo 643, 300SW714.
915-84 98Fla473, 123S913(1stcase).
916-94 39F(2d)325.
916-96½-New. Conspiracy between suborned and suborner may be proved without specific charge of conspiracy in indictment. 234Ky153, 27SW(2d)702.
916-11 [d] Evidence held admissible.-234Ky153, 27SW(2d)702. [e] Evidence held inadmissible.-234Ky153, 27SW(2d) 702; Mass 168NE796.
916-14 [c] Mass 168NE796 (before grand jury).
917-30 [a] (4) Other instances. Mass 168NE796. [c] Evidence held to require directed verdict for defendant. 39F(2d) 325. [d] Question of conspiracy is for jury. 234Ky153, 27SW(2d)702.

PERMANENT

920-39 144 Okl 54, 289P296.
920-40 144 Okl 54, 289P296.
920-41 144 Okl 54, 289P296.

PERPETUITIES

937-48 NJCh 150A779.
938-57 DelCh 151A712; Pa 151A799.
939-59 160Tenn11, 22SW(2d)4. [a] (2) Devise in will permitting son to enjoy income of property for life, and providing for division of property amongst grandchildren at decease of son, and devising other property in trust for other children with remainder to grandchildren, has been held valid. 134 Misc791, 236NYS518.
941-79 NJCh 150A779.
942-90 337 Ill 442, 169NE197; Mass 167NE261; 137Misc679, 244NYS274.
944-96 133Misc695, 234NYS109 (date of death).
945-4 NJCh 150A779.
946-14 110Conn117, 147A367.
946-16 Pa 151A799.
946-17 110Conn117, 147A367.
947-27 But see 133 Or65, 283P747.
947-29 334 Ill 448, 166NE70 (postponement of distribution not affecting vesting of respective interests).
948-33 336 Ill 366, 168NE349.
950-49 228Ky594, 15SW(2d)456.
950-55 But see 228Ky594, 15SW(2d) 456.
952-77 86Colo 221, 279P721(2dcase); NJCh 149A589.
952-78 [b] Unconditional gift to charity will be held immediate although particular method of carrying out charity intended is too remote. Ill 172NE730.
952-78½-New. In gifts for charitable uses, law clearly distinguishes between parts of writing declaring gift and part declaring mode of administration. Ill 172NE730.
955-18½-New. Before an estate conveyed by deed can be considered within the scope of the statute of perpetuities, a reversionary clause contained in the deed must provide for reversionary interest over to third persons. 109Conn 529, 147A181.
955-26 109Conn529, 147A181.
955-31 221Ala309, 128S604.

959-82 133 **Or**65, 283**P**747. [a] **Conversely**, executory devise is valid if contingency on which it is to take effect must happen within life or lives in being and twenty-one years, plus allowance for periods of gestation thereafter. 133 **Or**65, 283**P**747.
964-14 247**Mich**168, 225**NW**545 (second life estate to children is for one life only); 153**Miss**815, 121**S**808(4thcase).
965-22 **Mass** 167**NE**261.
965-26 138 **Okl** 115, 280**P**413.
967-40 **Pa** 151**A**799.
967-48 198**NC**445, 152**SE**398.
968-61½-New. Where the word "issue" in a will means immediate issue who may be descendants beyond children or grandchildren, but not beyond a period which would bring it within the rule against perpetuities, the will does not offend the rule. 110**Conn**150, 147**A**562.
971-87 138 **Okl** 115, 280**P**413.
972-94 110**Conn**117, 147**A**367.
974-16 **Conn** 152**A**69.
974-20 337 **Ill** 442, 169**NE**197.
975-22½-New. The rule that general and specific legacies and trusts must be paid in full before anything can go to the residuary estate can be applied only in so far as such distribution can be made without violating the rule against perpetuities. 34**F(2d)**174.
978-49½-New. Where the power of disposition is absolute under Real Property Law of New York. 134**Misc**803, 237 **NYS**215.
978-57 138**Misc**42, 244**NYS**673.
978-60 **DelCh** 151**A**712.
979-72 **DelCh** 151**A**712.
982-15 230**Ky**429, 20**SW(2d)**83 (private trusts come within rule against perpetuities); 133**Misc**695, 234**NYS**109; 134**Misc**769, 236**NYS**437; 229**AppDiv** 356, 243**NYS**328.
982-16 133**Misc**695, 234**NYS**109. [b] **In New York.**-133**Misc**695, 234**NYS**109.
982-17 109**Conn**187, 145**A**648, 63**ALR** 783; 110**Conn**150, 147**A**562; 99**Fla**152, 126**S**135.
983-21½-New. A provision of a trust deed that distribution of respective shares to children may be postponed if any of such children be in debt and distributed after the death of the last surviving child has been held not violative of the rule against perpetuities, in view of the context of the deed clearly indicating that only testator's five children were intended. 336 **Ill** 366, 168 **NE**349.
983-25 **Conn** 152**A**69; 230**Ky**429, 20**SW (2d)**83; 12**PaDist&Co** 247; 50**RI** 242, 146**A**628.
984-29 337 **Ill** 442, 169**NE**197; 230**Ky** 429, 20**SW(2d)**83.
985-41½-New. Where a trust for the benefit of several persons is held in one fund to avoid violation of the statute against perpetuities, it is necessary, for the purpose of holding, that they constitute separate and independent trusts, and that each part of the principal fund should be liberated from the trust fund on the termination of lives in being at the death of the testator. 133**Misc**695, 234**NYS**109.
985-49 180**Ark**552, 22**SW(2d)**370; **RI** 150**A**819.
986-53 134**Misc**753, 236**NYS**388 (provided identity and locus of cemetery plot referred to could be determined).
986-54 134**Misc**893, 236**NYS**595 (perpetual and not objectionable).
986-57 135**Misc**441, 240**NYS**103.
986-60 **Ala** 130**S**209; 109**Conn**529, 147 **A**181; **Del** 147**A**165 (property conveyed to church trustees to be used for meeting house or burying ground); 99**Fla** 152, 126**S**135. [c] **In absence of power of sale** in instrument creating charitable trust, property conveyed for such purpose is theoretically inalienable. **Del** 147**A**165.
989-79 98**Fla**748, 124**S**169.
990-84½-New. A trust instrument, authorizing the trustee to pay the income on a mortgage indebtedness, is not void as directing unlawful accumulation where the statute provided that an express trust may be created to lease real property for the purpose of satisfying any charge thereon. 208**Cal** 463, 281**P**1026, 65**ALR**1059.
990-88 **Conn** 152**A**69; **DC** 32**F(2d)**960.
990-92 [c] **Purpose of statute stated.**-**Ill** 172**NE**730.
991-2 [b] (4) Provisions held not to be accumulations. **CalA** 285**P**365. [h] (2) 134**Misc**554, 236**NYS**232. [i] (4) Accumulation not unlawful. 300**Pa**116, 150**A**159.
993-15 334 **Ill** 448, 166**NE**70; 136**Misc** 113, 240**NYS**528.
993-22 134**Misc**791, 236**NYS**518.
993-24 134**Misc**195, 235**NYS**763.
995-36 **Ill** 172**NE**730. [a] **Ill** 172**NE** 730.
996-44 But see **Pa** 151**A**577.
996-44¼-New. That twenty per cent of income is added monthly to sinking fund for management does not establish unlawful accumulation. **Ill** 172**NE** 730.
996-47 **Ill** 172**NE**730; **Pa** 151**A**577. [c] **Ill** 172**NE**730. [d] **Devolution where illegal accumulation of interest relates to interest not vested in possession.**-**Pa** 151**A**577.
997-53½-New. In Illinois the statute against accumulations is not intended to defeat an intention of the testator as to who shall be entitled to property under the will. 335 **Ill** 564, 167**NE**777.
997-53⅓-New. Where it does not appear that testamentary sinking fund will create accumulations after running of statute objection to fund is not sustained. **Ill** 172**NE**730.
997-53¼-New. , or to be attempt to create gift. **Ill** 172**NE**730.
997-53⅙-New. Testamentary sinking fund clause creating temporary accumulations held not unlawful. **Ill** 172**NE** 730.
997-53⅙-New. Vested estate distinctly given for charitable uses is valid although provisions relative to use, management, or disposal are invalid. **Ill** 172**NE**730.
997-53½-New. Testamentary provision for establishment of sinking fund for improvement of charitable trust property held not to set aside unreasonable amount. **Ill** 172**NE**730.
997-68 **DelCh** 151**A**712; 337 **Ill** 442, 169 **NE**197; **Ill** 172**NE**730; **Mass** 167**NE**261.
1000-98½-New. A transfer in trust, void under the statute against perpetuities then in effect, has been held not validated by subsequent repeal of such statute. 34**F(2d)**488.
1002-63 227**AppDiv**125, 237**NYS**141 (power of alienation held not suspended).
1002-65 [b] **Statute not violated.**-136 **Misc**433, 240**NYS**688.
1002-66 [b] (2) Attempt to prevent transfer of stock to negroes held to violate statute regulating restraints on alienation. 103**CalA**117, 284**P**247.
1004-81 133**Misc**695, 234**NYS**109 (seven lives in being); 135**Misc**574, 240**NYS** 220; 136**Misc**270, 239**NYS**717; 230**App Div**704, 243**NYS**158; 137**Misc**660, 244 **NYS**183.
1004-85 247**Mich**168, 225**NW**545.
1005-93 137**Misc**679, 244**NYS**274.
1005-3 **TexCivA** 22**SW(2d)**313(2dcase).
1006-11 135**Misc**516, 238**NYS**554.
1006-19 198**NC**445, 152**SE**398.
1007-44 153**Miss**815, 121**S**808(4thcase) (gift to son in trust for himself and his brothers and sisters, with direction that property be distributed at end of ten years to donor's children, has been held to be donation to beneficiaries as class, not violating two donee statute).
1008-46 135**Misc**223, 237**NYS**412.
1011-6 134**Misc**803, 237**NYS**215.
1011-7½-New. Execution of power of appointment, setting up a third life estate, violates statutes against perpetuities. 134**Misc**803, 237**NYS**215.
1011-7½-New. Both wills must be read together to determine whether power has been validly exercised by another. 135**Misc**170, 237**NYS**390.
1011-7¼-New. Execution of power by a second life tenant creating five trusts out of the balance of the estate held void. 135**Misc**170, 237**NYS**390.
1012-16 134**Misc**803, 237**NYS**215; 135 **Misc**170, 237**NYS**390.
1012-17 339 **Ill** 45, 170**NE**699.
1012-18 133**Misc**695, 234**NYS**109.
1013-19 134**Misc**803, 237**NYS**215.
1013-26 226**AppDiv**142, 234**NYS**635.
1014-29½-New. In Kentucky restraint for a reasonable period may be imposed upon the alienation of property. 280 **Ky**141, 18**SW(2d)**957.
1014-29½-New. Whether restraint upon alienation of property is for a reasonable period must be decided upon the particular and peculiar circumstances presented by each case. 230**Ky**141, 18**SW(2d)**957.
1014-37 138**Misc**372, 245**NYS**703.
1016-48 138**Misc**368, 245**NYS**644.
1016-53 135**Misc**438, 240**NYS**211; 240 **NYS**725.
1018-79 246**Mich**288, 224**NW**425.
1021-21 229**AppDiv**356, 243**NYS**328.
1021-24½-New. In New York Real Property L. § 43 is not applicable to active trusts. 135**Misc**170, 237**NYS**390.
1022-27 136**Misc**416, 241**NYS**398.
1023-54 135**Misc**223, 237**NYS**412.
1023-55 **Mass** 172**NE**228.
1024-63 228**Ky**594, 15**SW(2d)**456.
1024-64 230**Ky**141, 18**SW(2d)**957.
1025-67½-New. The validity of a provision in a will restricting alienation of stock bequeathed to a legatee depends on whether restraint on alienation is or is not unreasonable. 228**Ky**594, 15 **SW(2d)**456.
1025-67⅓-New. A covenant between landowners prohibiting the sale of lots with less than a specified street frontage has been held inapplicable to prevent the transfer of a lot which had less than that frontage at the time of the agreement. 101**CalA**447, 281**P**703.
1025-70 [d] **Donation of property to town for monumental purposes**, though restricted only for those purposes, has been held not void as unlawful suspension of power of alienation. 200**Wis**43, 227**NW**298.
1025-72 109**Conn**529, 147**A**181 (deed conveying property in trust for religious purposes with reversion over if society should cease to support exercise of religion on property conveyed has been held to be charitable gift).
1025-73½-New. A mere general statement that the testator wanted his legacies and trusts paid in full before anything should go to residuary charitable corporations did not violate the state statute against perpetuities. 34**F(2d)** 174.
1025-73⅓-New. Under a state statute against perpetuities, the eight trust funds which terminated upon the death of the life beneficiaries could not, except as to the first one terminated, be used to supply a deficiency in any of the other trusts and legacies. 34**F(2d)** 174.
1027-92 229**AppDiv**356, 243**NYS**328. [d] (13) Attempt to create survivorship will not invalidate primary disposition of will, but will be cut off in case of trust which is not an entirety. 229**App Div**356, 243**NYS**328.
1029-2 134**Misc**769, 236**NYS**437; 134 **Misc**893, 236**NYS**595.
1030-5 134**Misc**363, 236**NYS**280.
1030-6 134**Misc**893, 236**NYS**595.
1030-10 [a] (2) Under will devising estate in trust to pay income to widow for life and to pay remainder of income to five beneficiaries, provisions for cross remainders on death of any of beneficiaries, and provision that distribution shall not occur till death of last survivor, have been held invalid. 134**Misc**893, 236**NYS**595.
1033-44 229**AppDiv**302, 241**NYS**589.
1033-50 **TexCivA** 22**SW(2d)**313(2dcase) (constitutional provision construed).
1034-62 169**La**696, 1258**S**58.
1036-19 [a] **Statute against perpetuities may not be waived.**-229**AppDiv**302, 241**NYS**589.

PERSONAL

1045-80 133**Misc**399, 232**NYS**308.
1046-99 30**Hawaii**217.

PHYSICIANS AND SURGEONS

1063-15 59**ND**286, 229**NW**569.
1067-1 [a] **Treatment** covers all steps to effect cure. **Ala** 130**S**203 (includes examination and diagnosis as well as application of remedies).
1068-47 32**F(2d)**669.
1069-30 [b] **Statute held not repealed.**

–99CalA702, 279P228.
1070–68 130 Or480, 280P653.
1070–72 Minn 232NW517.
1071–87 [a] **In Montana.**–86Mont297, 283P430.
1071–99 [a] **Veterinarian when permitted to practice,** and given legal status without examination, held a license holder. 34 OhA239, 170NE578.
1072–31 [j] **Exemption does not apply** when person making use of same prescribes or administers medicine and holds himself out to be physician. 59 ND286, 229NW569. [k] **Statute exempting from medical act practice of religion** of persons endeavoring to cure by prayer or spiritual means has been held to exempt those who believe disease is mental state primarily. 130 Or 99, 279P285.
1073–42½–New. Under ordinance not requiring license for two years after admission held not to exempt one admitted in another state over two years before. 23AlaA282, 125S208(2dcase).
1073–44 [a] **Exception not applicable.**–NJSup 147A744.
1073–47 34PortoRico 449.
1074–71 DC 37F(2d)991.
1074–75 [e] **In Missouri.**–MoA 28SW (2d)691.
1074–76 59ND286, 229NW569 (prescribe means direct use of medicine).
1076–16 NJSup 147A744.
1076–20 DC 37F(2d)991.
1076–21 See also 37F(2d)991.
1081–70½–New. the statutory right of an individual to select or employ a practitioner or the mode of treatment, 130 Or480, 280P653.
1081–70½–New. , that patient did not have disease for which he was treated, 36 OhA281, 172NE835.
1082–85 99CalA702, 279P228; Wis 231 NW162.
1082–88 [f] **Practicing system of treatment without use of drugs.**–(1) Utah 280 P733.
1083–89 27 OhNPNS252.
1083–94½–New. evidence as to what is science of naturopathy; 59ND286, 229 NW569.
1083–94½–New. evidence of what are religious tenets, rules and ceremonies of certain religious organization; 59ND 286, 229NW569.
1083–12 [f] (1) 136Misc32, 239NYS 111; 59ND286, 229NW569; 36 OhA281, 172NE835; 130 Or480, 280P653; 113 TexCr518, 22SW(2d)930; Utah 280P733. [f] (1) Wis 231NW162. [g] (1) DC 37 F(2d)991.
1084–13 TexCr 32SW(2d)460.
1084–20 [b] 208 Iowa842, 226NW371 (using word "duties" twice).
1090–65 [c] **Where governor fails for time to appoint new members** in place of those who should die or resign, later appointment of new officers makes them officers de jure. 130 Or99, 279P285.
1096–33 103CalA297, 284P938; 99Fla 296, 126S147. [a] **Such statutes should be so construed** as to carry out obvious intent of legislature. 103CalA297, 284 P938.
1096–34½–New. Law enunciated by court regarding disbarment of attorneys applies to revocation of dentistry license. 99Fla296, 126S147.
1096–36 [a] **Power conferred** must be under provisions of law that are reasonable and definite. 103CalA297, 284 P938.
1097–39 Kan 289P64.
1098–65 CalA 293P144; 99Fla296, 126 S147.
1098–76 CalA 293P144.
1099–92 [b] **Conviction** is not had till judgment is ordered, under registration statute. 128Me523, 149A153(2dcase).
1101–38 [b] **Conduct held not to be unprofessional** so as to warrant revocation of license. 103CalA297, 284P938. [c] **Statutes construed.**–103CalA297, 284 P938.
1101–42 [b] **That record does not show call of meeting of board of health** to revoke license does not render illegal meeting at which action was taken. Mo 26 SW(2d)773.
1101–46 Mo 26SW(2d)773.
1101–48 Can [1930] 4DomLR1008. [d] **Board is without jurisdiction** over physician to whom no notice is given. Mo 32SW(2d)83. [e] **Notice of new date** set for hearing must be given; physician is not charged with duty of ascertaining it. Mo 32SW(2d)83.
1101–59½–New. Under Utah statute consent of practitioners designated to take action and make report in proceeding to revoke physician's license is not prerequisite to initiation of proceeding. Utah 288P900.
1101–59½–New. Such practitioners must hear and determine issues on evidence at hearing before director of registration and make report after conclusion of hearing. Utah 288P900.
1102–68 [b] **Only charges contained in accusation can be considered** by dental board under some statutes. 99Fla296, 126S147.
1103–5 [a] (1) Mo 26SW(2d)773. (8) To show revocation was not clearly wrong. Mass 169NE547. [d] **Credibility of witnesses** is for medical board's determination. Mass 169NE547.
1103–15½–New. Opinions of professional brethren as to propriety of member's conduct is competent. Alta [1930] 3DomLR652.
1103–15½–New. Court is entitled to consider reasonableness of such opinion. Alta [1930] 3DomLR652.
1104–23 Mo 32SW(2d)83. [a] **Deprivation** of right of counsel for accused to be heard invalidates proceeding. Can [1930] 4DomLR1008.
1104–29½–New. Under the Alberta statute the discipline committee conducting an investigation of charges of improper conduct against a physician is only required to conduct the investigation fairly and impartially, and is not bound to investigate and adjudicate upon each charge. Alta [1929] 3DomLR62.
1104–40 Mo 26SW(2d)773 (record need not show affirmative finding of board that practitioner was guilty of offense charged).
1104–48½–New. Order is not void because it fails to state for what period of time license shall remain revoked. Mo 26SW(2d)773 (revocation held permanent where time not stated).
1105–60 [b] **Supreme court cannot reverse** board's decision unless it is clearly wrong. Mass 169NE547.
1105–65½–New. On certiorari court presumes board revoked practitioner's license because satisfied he was guilty of charges. Mo 26SW(2d)773.
1111–93½–New. An information for violating a statute requiring a physician to treat the eyes of a new-born infant is properly quashed. 249Mich376, 228 NW692.
1111–13½–New. Respective obligations and duties of physician and patient are controlled by relation between them. ND 232NW754.
1111–16 [c] **Relation held not to exist.**–128Me464, 148A684.
1112–31 12LaA230, 125S887(2dcase).
1113–43 CalA 292P162.
1113–44 Mo 26SW(2d)760.
1113–49 Cal 290P441; 128Me453, 148 A677; NJ 148A624(1stcase); Va 153SE 653; Va 154SE553.
1113–59 ND 231NW854.
1116–62 Ala 130S784.
1117–72 CalA 286P1078 (representation of skill by dentist); CalA 288P698.
1117–73 Ala 130S203; Cal 291P173; CalA 288P716; CalA 290P80; CalA 292 P162; Iowa 232NW821; Mass 172NE73; ND 231NW854; TexCivA 22SW(2d) 1077.
1117–77 231Ky678, 22SW(2d)115; Or 292P93. [a] (3) Physician operating diathermic machine. Or 292P93.
1118–88 132 Or641, 285P819; Or 292 P93.
1119–89 144 Okl 120, 289P291; Or 292 P93.
1120–4 Ala 130S784; CalA 290P80; Iowa 232NW821; NC 154SE12; ND 231 NW278; Or 292P93; Va 153SE653; Va 154SE553.
1120–5 ND 231NW854.
1121–20 CalA 290P80; ND 232NW754.
1121–21 ND 232NW754.
1121–24 CalA 290P80; 156Miss676, 126 S465. [b] (1) CalA 288P716. [q] **Fact that patient had syphilis held immaterial,** if cancer resulted from dentist's negligence. Mass 169NE797.
1123–26 Cal 291P173; CalA 288P716. [g] (7) Where tip came off mouth gag and entered patient's bronchus during emergency. 128Me453, 148A677. (8) Continuing tonsil operation after obstruction lodged in patient's bronchus. 128Me453, 148A677.
1123–29 Cal 291P173; CalA 288P716 (holding failure to protect socket after tooth extraction constitutes negligence by dentist in operation); CalA 290P80.
1123–30 ND 232NW754.
1124–34 41GaA385, 153SE96(1stcase) (patient caused to swallow bitter liquid by dentist but without any ill effect).
1124–37 Me 149A156 (negligence cannot be predicated).
1124–39½–New. Partial dislocation of a patient's neck by osteopathic treatment, being unusual, a finding of negligence against the osteopathic school in control of the treatment is warranted, in the absence of an explanation. 322 Mo 991, 18SW(2d)487.
1126–58 ND 231NW854.
1127–70 CalA 288P698 (holding plaintiff must prove negligence as distinguished from mere errors of judgment); Ala 130S784; Iowa 230NW311.
1127–76 [a] (1) 158Md60, 148A124.
1128–90 ND 232NW754.
1129–91 [a] **Different cause of action** may arise from subsequent treatment of socket from which tooth was extracted, apart from that for negligence in performing operation. CalA 288P716.
1129–92 [a] **Physician administering drug** which he knows is producing distressing results should remain within reach or provide another competent physician. 108WVa560, 152SE323.
1129–98 ND 232NW754.
1130–18 40GaA117, 149SE91(2dcase) [conforming to 148SE659] (operation not authorized by contract).
1131–26 249Mich363, 228NW681.
1131–26½–New. Patient's consent was necessary before extracting other teeth when she consented to extraction of baby roots only. 158Md60, 148A124.
1132–36 152Wash508, 278P181, 65ALR 1019 (negligent as matter of law).
1134–90 ND 232NW754; Or 292P93.
1134–93 ND 232NW754.
1134–97 ND 231NW854.
1134–98 111Conn482, 150A516.
1135–7 158Md60, 148A124 [quotCJ].
1135–9 ND 232NW754.
1135–13 [a] **Where patient rejected services** of surgeon employed by automobile owner and insurer and sustains independent injuries due to negligence during examination the surgeon is liable and settlement with original tort-feasor is no bar. 128Me464, 148A684.
1136–28 Or 292P93.
1136–32 Okl 292P335(2dcase).
1136–33 Okl 292P335(2dcase).
1137–46 Or 292P93. [b] (1) Or 292P 93. [e] **Physician employee supervising work not liable** unless he actually participated in wrongful act. Or 292P93.
1137–48 227AppDiv588, 237NYS611.
1138–54 138 Okl 270, 280P820.
1138–59 But see Cal 291P173.
1138–67 [b] Ohio.–27 OhNPNS372.
1139–90 207Cal438, 278P1044.
1139–91 [a] (15) Under doctrine of res ipsa loquitur. 255 IllA305. (16) Permitting light bulb to go down patient's throat. Okl 292P335(2dcase).
1140–13 Minn 232NW708 (to show defendants partners).
1141–22 [a] (1) Va 154SE553.
1142–27 CalA 290P80.
1142–28 CalA 288P716 (holding that in absence of demurrer, in action for malpractice in extracting tooth, evidence of subsequent treatment was admissible).
1142–37 281US90, 50SCt231, 74L ed 720; CalA 288P698; NJ 148A624(1st case).
1142–39 [b] **But requested instruction** that member of profession which implies skill, knowledge, and probity is entitled to presumption he performed duty is properly refused. 111Conn482, 150A 516.
1142–40 158Md60, 148A124 (dentist); ND 231NW854.

1142-42 111Conn482, 150A516; 232Ky 237, 22SW(2d)602 (incompetency).
1142-43 CalA 290P80.
1143-46 [a] **Breaking of novocaine needle in patient's jaw** is not evidence of negligence. Mass 172NE73.
1143-49 [a] (2) 102CalA723, 283P833. (5) Particles lodged in respiratory passages in extraction of tooth under anaesthetic. 255 IIIA305.
1143-50 231Ky678, 22SW(2d)115 (doctrine ordinarily inapplicable). [a] (9) Iowa 232NW821. (10) Fracturing jawbone while removing impacted wisdom tooth. 230Ky11, 18SW(2d)311, 69ALR 1135. (11) Other instances. 155Wash 474, 284P803.
1143-51 Ala 130S784.
1143-59 Ala 130S784; 111Conn482, 150A516 (holding res ipsa loquitur inapplicable to action against dentist for negligence in extracting tooth); Iowa 232NW821; 230Ky11, 18SW(2d)311, 69 ALR1135; Va 153SE653.
1144-60 230Ky11, 18SW(2d)311, 69 ALR1135; 231Ky678, 22SW(2d)115; NC 154SE12; ND 231NW854.
1144-62 152Wash508, 278P181, 65ALR 1019.
1144-72 39GaA597, 148SE12.
1145-73 158Md60, 148A124; Okl 292 P335(2dcase); TexCivA 22SW(2d)1077 (evidence of deceased's pain from X-ray burns).
1145-74 GaA 155SE85.
1145-75 [a] (15) Other instances. GaA 155SE85.
1145-84 Cal 291P173; 40GaA117, 149 SE91(2dcase) [conforming to 168Ga678, 148SE659].
1146-86 GaA 155SE85.
1147-88 GaA 155SE85 (showing diligence).
1147-1 Mo 26SW(2d)760.
1148-6½-New. Fact that physician had performed unsuccessful operations on other persons is inadmissible where lack of skill was not in issue. Mo 26 SW(2d)760.
1148-20 144 Okl 120, 289P291.
1148-22 ND 231NW278. [a] (37) 180 Minn273, 230NW774 (treatment resulting in death). (40) 33 OhA165, 168NE 771. (55) In administering X-ray treatment causing fatal burn. TexCivA 22 SW(2d)1077. (56) Failure to discover breaking of novocaine needle in jaw. Mass 172NE73. (57) Negligent tonsillotomy. CalA 292P162. (58) Forcible removal of child. Va 154SE553. (59) Other instances. NJSup 149A347; Alta [1930] 3DomLR500. [b] (23) 227App Div588, 237NYS611. (50) Error or mistake insufficient to prove negligence. NJ 148A624(1stcase). (51) Fractured hip. 207Cal438, 278P1044. (52) Failure to use X-ray in treating fracture. 32 OhA117, 167NE522. (53) Other instances. Ala 130S784; CalA 288P698; Minn 233NW317; 155Wash474, 284P 803. [c] **Proof of result alone is insufficient** to prove negligence in giving improper treatment. CalA 288P698. [d] **Prima facie case-made.**-233Ky171, 25 SW(2d)33.
1150-25 [c] **Finding that dentist should have removed broken needle** from jaw of patient or told her of its presence held warranted by evidence. Mass 172NE73.
1150-26 NC 154SE12; ND 231NW278. [a] (13) Failure to ascertain existence of compound fracture of leg, and that septic condition necessitating amputation resulted from physician's negligent treatment of fracture. 267Mass196, 166 NE736. [b] (21) Pain and swallowing of liquid. 41GaA263, 153SE96(1stcase). (22) Other instances. Minn 233NW 317; NC 154SE12. [c] **Dismissal is proper** where evidence does not show physician's negligence to be proximate cause. NC 154SE12.
1150-27 [a] (3) Joint and several liability. 249Mich363, 228NW681. (4) Dentist shown to be identified with corporate defendant. CalA 286P1078.
1150-28 [b] Alta [1930] 3DomLR500.
1150-29 [a] **Evidence held insufficient.**-267Mass196, 166NE736.
1150-35 NC 154SE12.
1150-36½-New. Burn may be considered with other circumstances in determining whether it was attributable to negligence or want of skill in giving X-ray treatments. Iowa 232NW821.
1150-37 CalA 288P698; CalA 290P 80; CalA 292P162; CalA 293P165; 111Conn482, 150A516; 230Ky11, 18 SW(2d)311, 69ALR1135; Va 153SE653 (unless doctrine of res ipsa loquitur clearly applicable); 155Wash474, 284 P803; 108WVa560, 152SE323. [a] **Whether plaintiff had mild case,** impropriety of treatment depending on that, required expert testimony. CalA 288P 698. [b] **Submitting question on required care** in extracting tooth, without consideration of expert testimony, is erroneous. 111Conn482, 150A516.
1151-39 87Colo 401, 288P633 (holding instruction that negligence could only be determined by expert evidence erroneous); 111Conn482, 150A516 (holding dentist's cutting of patient's tongue not to manifest gross want of care to dispense with need of expert testimony); 108WVa560, 152SE323. [b] **In relatively simple, nontechnical** malpractice cases negligence may be proved by nonexpert witnesses. 87Colo 401, 288 P633. [c] **Where dentist's conduct shows gross negligence,** expert testimony showing lack of proper care is not essential. 111Conn482, 150A516.
1151-46 NH 146A641.
1151-47 [a] **Motion to dismiss should be granted** in absence of evidence of negligence or want of skill or diligence, but dismissal is not final determination on merits. ND 231NW278. [b] **Evidence held insufficient to go to jury.**-Va 153SE653.
1151-48 102CalA723, 283P833; 158Md 60, 148A124.
1151-51 158Md60, 148A124 (extraction of teeth); 249Mich363, 228NW681 (evidence did not authorize directed verdict for doctor).
1151-52 40GaA117, 149SE91(2dcase) [conforming to 168Ga678, 148SE659].
1151-53 Ala 130S203; 180Ark505, 21 SW(2d)851; CalA 286P1078; CalA 290 P80; 87Colo 401, 288P633; Iowa 232 NW821; 267Mass196, 166NE736; Mass 168NE923; Mass 169NE797; Mass 172 NE73; 323Mo 346, 19SW(2d)285; NJSup 146A675; ND 231NW854; 132 Or641, 285P819; Or 292P93; 299Pa 268, 149A318; Va 154SE553; 155Wash 206, 283P709.
1152-54 281US90, 50SCt231, 74Led 720; CalA 286P1048; Mass 169NE797; 180Minn273, 230NW774; NJSup 146A 675; ND 231NW854. [a] **Whether surgeon's negligence caused** resulting deformity is jury question. Minn 232 NW708.
1152-56 Ala 130S203.
1152-58 Iowa 230NW311; 231Ky678, 22SW(2d)115; Mo 149A156; NJ 148A 624(1stcase) (evidence insufficient for submission to jury); ND 231NW278.
1153-61 ND 232NW754.
1153-64½-New. Uncontradicted testimony of a dentist, sued for malpractice in breaking a patient's jawbone while removing an impacted wisdom tooth, has been held to entitle him to a directed verdict. 230Ky11, 18SW(2d)311, 69ALR1135.
1153-67 180Minn273, 230NW774 (requested instruction as to duty of attendance properly refused); 138 Okl 270, 280P820 (sufficient).
1153-69 [a] Ala 130S203; 87Colo 401, 288P633; GaA 155SE85; Mo 26SW(2d) 700. [c] **If defendant is specialist,** it is improper to refuse his requested instruction on care required of specialist. 111Conn482, 150A516.
1153-70 [a] 249Mich363, 228NW681. [b] **Instructions held properly refused.**-249Mich363, 228NW681.
1154-76 89 IndA403, 164NE300. [b] NH 146A641; 152Wash508, 278P181, 65ALR1019.
1154-77 [a] (3) Other instances. 156 Miss540, 126S201. [b] (4) Physician's knowledge of consequences of negligent tonsillotomy. CalA 292P162.
1154-80 168Ga678, 148SE659; 180 Minn273, 230NW774. [b] Okl 292P 335(2dcase). [c] **Requested instruction held properly refused.**-NH 146A 641.
1154-81 [a] (7) **Sufficiency of evidence.** Colo 288P633.
1154-92 [a] (2) Measure of damages for breach of warranty by surgeon to make plaintiff's hand perfect by skin grafting operation would be difference between value of perfect hand and value in its present condition after operation. NH 146A641.
1155-96 But see NH 146A641.
1155-99 Minn 232NW708; 152Wash 508, 278P181, 65ALR1019.
1155-1 32 OhA117, 167NE522.
1155-9 [a] (23) CalA 286P1048 ($10,250). (27) Improper diagnosis and treatment of shoulder injury. ND 232 NW754 ($5000). (28) Injury from permitting electric light bulb to slip down throat into lungs. Okl 292P335(2d case) ($8000 held not excessive). (29) Other damages held not excessive. Minn 232NW708. (30) Other instances. CalA 290P80; Nebr 228NW601. [b] (12) Ten thousand dollars for muscle hernia due to unauthorized operation. 249Mich363, 228NW681 (ten thousand dollars). (13) $20,000. 32 OhA117, 167 NE522. (14) Other instances. NJSup 149A347.
1156-29 [a] Okl 292P335(2dcase).
1160-37 27 OhNPN8409.
1164-57½-New. An implied contract to pay for a physician's services would arise if the physician rendered the services under an expectation that they were to be paid for, and decedent either intended to pay for them or they were rendered under such circumstances that a reasonable person should have known that the physician expected payment. 109Conn507, 147A33.
1166-80 95PaSuper258.
1167-86 95PaSuper258.
1170-47 [a] **Where services were rendered to third person at request of agent of corporation** name of agent and his authority to bind corporation must be alleged. 35PortoRico 552.
1170-71½-New. "Professional dental services" include services of technician and materials. CalA 291P444.
1170-77 LaA 129S232.
1173-16 87Colo 401, 288P633.
1173-24 181Ark986, 26SW(2d)97.
1173-32 [b] **Extra compensation.**-LaA 129S232.
1174-46 109Conn507, 147A33.
1175-66 [d] 109Conn507, 147A33.
1176-97 169La1090, 126S669.
1178-14½-New. ; to choose. 30Hawaii405.
1178-23 169La1090, 126S669.

PILOTS

1188-99 [a] **Where number of pilots is reduced** below statutory maximum, by retirement of active pilots, it is not unlawful to license additional pilots. 98 Fla11, 122S788.
1192-12 41F(2d)515.
1199-14 31F(2d)961.
1199-15 31F(2d)961 (instruction that master was obliged to displace pilot because fog made operation of ship difficult held erroneous).
1203-97 31F(2d)961.

PIRACY

1206-3 138Misc38, 244NYS720.

PLANE

1220-98½-New. Plane is surface in which, if any two points are taken, straight line that joins them lies wholly in that surface. 40F(2d)573.

PLEADING

49 C. J.-31-4 Utah 290P367 (make up issues).
34-43 232Ky254, 22SW(2d)605 (record of case).
35-73 Utah 290P367.
35-2 MoA 188W(2d)569; 152SC305, 149SE243.
36-5 221Ala283, 128S376 (particularity of pleading contract supporting personal injury action).
36-7 TexCivA 308W(2d)939.
38-50 Wyo 290P1013.
38-56 36F(2d)277.
39-58 231Ky745, 22SW(2d)131; 135

Misc446, 238NYS616; TexCivA 22SW (2d)701.
40-72 But see 111Conn338, 149A890.
40-80 36F(2d)277; 41F(2d)148; 102 CalA452, 283P321; 111Conn383, 150A 313; DelSup 148A294; 98Fla847, 124S 441; 337 Ill 241, 169NE193; Mo 22SW (2d)821; MoA 21SW(2d)219; 137Misc 292, 241NYS691; 229AppDiv532, 242 NYS519; ND 231NW880.
43-94 99Fla1221, 128S643.
44-98 36F(2d)631; 42F(2d)21; 109 Conn621, 147A126, 64ALR1453; 235Ky 600, 31SW(2d)928; 170La483, 128S 284; Mo 30SW(2d)118; 298Pa568, 148 A849; 159Tenn498, 19SW(2d)245.
45-99 58ND617, 226NW810(2dcase).
45-1 170La483, 128S284; SD 231NW 938; Utah 280P715.
46-9 98Fla26, 123S527; 169Ga400, 150 SE647; 169La481, 125S567.
47-10 58ND617, 226NW810(2dcase).
47-13 Ala 130S329.
47-14 Ariz 291P1005; 101CalA122, 281 P419; 13LaA8, 126S742.
47-15 159Tenn498, 19SW(2d)245.
48-18 Mo 29SW(2d)103.
49-29 36F(2d)974; CalA 286P507.
49-36 IndA 169NE887.
51-57 298Pa568, 148A849.
52-78 [a] Allegations of implied agreement held inference of law. NC 154SE 37.
52-79 103CalA32, 283P946; 137Misc 289, 241NYS738.
53-94 227AppDiv85, 237NYS58.
53-8 41GaA598, 153SE611; 298Pa61, 147A847; TexCivA 23SW(2d)507; 155 Wash193, 283P699.
54-9 SC 155SE291.
55-53 86Mont562, 284P539.
56-56 GaA 155SE499(2dcase); 234Ky 263, 27SW(2d)968; LaA 130S648; 227 AppDiv448, 238NYS188.
56-83 [a] (20) 137Misc498, 243NYS 716; TexCivA 19SW(2d)855; TexCivA 30SW(2d)939.
57-84 GaA 155SE500; MoA 22SW(2d) 872.
57-98 CalA 288P819.
57-1 137Misc177, 243NYS322; Utah 285P1011.
58-11 TexCivA 21SW(2d)309.
58-15 See also GaA 155SE206.
58-19 CalA 290P122.
59-29 169Ga678, 151SE349.
59-31 103CalA650, 284P1035.
59-32 33F(2d)478; 221Ala514, 129S 465; Ga 154SE883; 338 Ill 433, 170NE 199(2dcase); 157Md521, 146A758.
61-33 220Ala82, 123S899; 152SC108, 149SE340, 65ALR1427.
61-34 DelCh 151A303.
62-44 42F(2d)26.
64-68 101CalA365, 281P1051.
66-18 [a] (7) CalA 288P792.
66-34½-New. That a case was duly and regularly called for arraignment held not mere conclusion. 99CalA569, 279P187.
67-48 MoA 24SW(2d)229.
68-66 Mo 23SW(2d)117.
68-71 227AppDiv733, 236NYS503.
68-74 52Nev432, 290P411; TexCivA 27SW(2d)857.
69-35 130 Or644, 281P169.
69-86 [a] (4) That corporation was "dummy." 137Misc177, 243NYS322.
69-4 Ga 155SE8.
70-12 CalA 287P525; Pa 151A879.
70-14 TexCivA 27SW(2d)258.
70-17 LaA 129S447.
73-82½-New. Allegation that work was completed over five years before lien filed is fact not conclusion. Ida 292 P232.
73-89 [a] (4) Wash 288P927.
75-34 TexCivA 22SW(2d)688. [a] Allegation that petitioner had "real and actual possession" is not conclusion. 170La949, 129S540.
76-55½-New. That on death of husband title became vested in wife's administrator held mere conclusion of pleader. 208 Iowa625, 226NW144, 148 [citCJ].
76-64 SD 230NW218.
78-92 [a] (3) TexCivA 28SW(2d)622.
78-4 [a] (4) 235Ky816, 32SW(2d)419. (9) 33F(2d)451.
79-5 [a] (4) 23AlaA290, 124S395; AlaA 130S768; 169Ga869, 152SE53(2d case).
79-25 But see 255 IllA362.
80-32½-New. Contract need not be set forth, though governing rights of parties, where action is based on transaction arising from contract. 41GaA38, 152SE136.
80-42 298Pa215, 148A92.
80-43 TexCivA 19SW(2d)353.
80-44 231Ky808, 22SW(2d)259.
81-55 323Mo150, 19SW(2d)691 (effect of contradiction).
82-94 41GaA231, 152SE611.
85-28 101CalA186, 281P514; 197NC 526, 150SE34; 134Misc315, 235NYS277.
85-29 130Kan522, 287P269; MoA 24 SW(2d)243; Mont 292P730; 135Misc 542, 238NYS20; TexCivA 27SW(2d) 830 ("concise statement"). [b] Allegations held surplusage.-170La712, 129S 139(1stcase).
86-32 Fla 130S421; 152SC305, 149SE 243.
86-38 337 Ill 469, 169NE265; 227App Div416, 237NYS545.
87-47 TexCivA 26SW(2d)726; Va 152 SE539.
87-48 35 OhA438, 172NE531.
87-52 160Tenn21, 22SW(2d)242.
87-60 151Wash457, 276P904.
88-65 TexCommnA 23SW(2d)675.
88-73 Wis 232NW561.
88-78 221Ala103, 127S550.
89-80 154Miss812, 123S825.
89-82 137Misc721, 244NYS283.
90-9 103CalA650, 284P1035.
91-22 [b] Allegations held not argumentative.-TexCivA 28SW(2d)622.
92-32 41F(2d)148 (substantial certainty sufficient); 43F(2d)309; Ala 130 S795; 102CalA452, 283P321; Mo 28 SW(2d)84(2dcase); 229AppDiv532, 242 NYS519.
92-33 Md 148A416; TexCivA 25SW (2d)255.
92-36 221Ala1, 127S204. [a] Pleading held not ambiguous.-Colo 293P345.
92-37 299Pa448, 149A700.
92-39 221Ala494, 129S267 (time and place).
93-44 35F(2d)262; 13LaA8, 126S742. [i] (21) Physician's negligence. Okl 292 P335(2dcase). (22) Other instances. 41 F(2d)148; 169Ga712, 151SE340; LaA 130S648; TexCivA 27SW(2d)830. [k] (9) Md 150A801. (11) TexCivA 30SW (2d)939. (31) Contract for work on mining claim. Ida 288P167. (32) Other instances. TexCivA 25SW(2d)255.
94-49 220Ala237, 124S519.
97-71 229AppDiv532, 242NYS519.
97-73 [a] (1) 23AlaA443, 126S616(2d case). [e] (6) Other instances. Ala 130S380.
97-75 Md 150A801.
97-77 LaA 130S573. But see 221Ala 139, 127S825.
98-83 9LaA233, 119S882; 227AppDiv 32, 237NYS20.
99-87 230Ky784, 20SW(2d)991(1st case).
99-93 Ariz 286P825; MoA 25SW(2d) 554. [b] (4) Missouri statute permitting fact to be pleaded in alternative does not require that alternatives must be consistent. Mo 30SW(2d)83. [c] Alternative allegations have been held permissible, though inconsistent. Tex CivA 25SW(2d)950.
99-94 101CalA769, 282P820; Fla 130 S421.
99-95 33F(2d)451.
99-96 [a] (24) Separate counts in suit on county depositary bond held not so inconsistent that proof of one disproves other. Mo 30SW(2d)83. (25) Other instances. 220Ala107, 124S231; 153SC305, 150SE774; Va 153SE722.
101-18 198NC767, 153SE449.
102-35 135Misc895, 238NYS692.
104-91 220Ala661, 127S230.
105-16 130Kan749, 288P733 (on demurrer); 229AppDiv369, 241NYS717; 157SC381, 154SE221.
105-16½-New. Court regards substance rather than form in determining sufficiency of pleading. 180Ark63, 20SW (2d)307.
105-17 219Ala681, 123S220; 220Ala 455, 126S113; 221Ala91, 127S519; 221 Ala10, 127S544; 221Ala126, 127S821; 221Ala51, 127S832 (presumptions are against pleader); Fla 129S501; Fla 130 S421; 169Ga400, 150SE647; 40GaA840, 151SE694; 41GaA51, 152SE148; 41GaA 318, 152SE846; 235Ky600, 31SW(2d) 928; 154Miss597, 124S64; 155Miss498, 124S658; 97PaSuper376. But see 219 Ala399, 122S359.
107-18 169Ga631, 151SE372.
107-19 221Ala472, 129S39; 23AlaA443, 126S616(2dcase).
107-28 143 Okl 220, 289P315; Wis 230 NW708.
108-29 Cal 292P474; 100CalA456, 280 P199; CalA 289P859; CalA 290P540; 109Conn292, 146A717; 86Mont228, 283 P226; OhA 173NE39; 138 Okl 256, 280 P790; 131 Or478, 283P34(1stcase) (in absence of demurrer); 132 Or145, 285 P214; Or 286P563; 156SC203, 152SE 878; 157SC85, 153SE640; TexCivA 18 SW(2d)854; Wash 288P241; Wis 230 NW692; 41Wyo 509, 287P316. See also 138Misc266, 245NYS372. [a] (2) CalA 283P977.
110-30 180Ark492, 22SW(2d)21; IndA 172NE131; Minn 232NW324; 252NY 430, 169NE635; 136Misc13, 242NYS 65; 153SC305, 150SE774; 153SC478, 151SE60; TexCivA 30SW(2d)809. [b] (2) TexCivA 19SW(2d)134; TexCivA 25SW(2d)675; TexCivA 27SW(2d)281; TexCivA 27SW(2d)306; TexCivA 30SW (2d)665.
111-31 36F(2d)974; 86Mont228, 283P 226.
112-36 137 Okl 294, 279P338.
112-33 103CalA650, 284P1035.
112-42 221Ala5, 127S534.
113-45 132 Or265, 285P253.
113-47 Ida 291P1060.
113-48 141 Okl 36, 284P65.
113-54 CalA 292P1000; 130 Or385, 280 P497.
114-55 Mo 26SW(2d)946; MoA 25SW (2d)523.
114-56 220Ala428, 125S807; 110Conn 68, 147A26(2dcase); 323Mo 531, 19SW (2d)679; MoA 20SW(2d)553; MoA 22 SW(2d)872; MoA 22SW(2d)1052; Mont 290P238(2dcase); 32 OhA419, 168NE 217; 130 Or522, 279P867; 155Wash107, 283P1087. [b] Exceptions for dismissal of amended petition will be regarded on appeal as plea in abatement. Tex CivA 29SW(2d)520.
116-59 Mo 29SW(2d)103; MoA 27SW (2d)435.
116-60 TexCivA 23SW(2d)507.
116-63 Cal 293P25.
116-65 CalA 289P859.
117-70 [a] Sufficiency of plea is determined not by its address but by substance of averments. 219Ala692, 123S 215.
117-79 GaA 155SE771; 231Ky498, 21 SW(2d)815.
117-82 [a] Petition and supplemental petition should be construed together. TexCivA 30SW(2d)397.
117-84 See also TexCommnA 26SW (2d)173.
117-86 Ala 130S554. [a] Replication cannot restrict meaning of answer.-221 Ala64, 127S844.
117-87 But see TexCivA 24SW(2d)515.
119-8 TexCivA 22SW(2d)508.
119-9 101CalA769, 282P820.
120-21 Mont 285P668.
122-55 34F(2d)120; CalA 288P74; Colo 292P601; Ga 154SE889; 41GaA 38, 152SE136; Iowa 232NW663; 235 Ky574, 31SW(2d)910; LaA 129S447 (holding answer when filed is on same footing as petition as regards conclusiveness); Mass 168NE78; Mass 170NE 43; 155Miss498, 124S658; MoA 28SW (2d)423; NJSup 151A597; 139 Okl 1, 281P234; TexCivA 29SW(2d)446; Tex CivA 29SW(2d)795(2dcase); Utah 280 P729. [b] Plaintiff's admission regarding defense was admissible after overruling demurrer thereto. 111Conn383, 150A313.
124-58 CalA 292P179; 86Colo 493, 283 P1042; LaA 129S447; 86Mont513, 284 P270.
124-60 [a] If contract for services to be rendered were executory, answer admitting services establishes execution, entitling plaintiffs to relief sought. Tex CivA 27SW(2d)857.
124-61 [a] Admission in pleading must be withdrawn, before party may disprove it. 41GaA38, 152SE136.
125-77 Okl 291P501.
125-79 41GaA38, 152SE136.
126-89 228AppDiv737, 238NYS459.

126-94 LaA 129S218.
126-99 40GaA740, 151SE540; Wash 288P927; Wis 231NW276.
127-8 [a] (35) Notice of misrepresentation. 169Ga187, 149SE910.
127-12 40GaA336, 149SE435; 140 Okl 45, 282P157. [a] (6) Other instances. 221Ala429, 129S12.
130-62 12LaA646, 126S575.
130-65 103CalA169, 284P482.
130-68 12LaA646, 126S575.
131-88 220Ala237, 124S519.
132-12 43F(2d)72; 221Ala51, 127S832; 98Fla140, 123SE547; Ga 155SE754; TexCivA 24SW(2d)796; TexCivA 30SW(2d)911.
132-15 140 Okl 19, 282P120(2dcase).
132-16 [a] **Complaint should state prima facie cause of action.** SD 229NW522.
132-18 Mont 292P909; 198NC767, 153SE449.
133-19 338 Ill 82, 170NE8; 58ND617, 226NW810(2dcase); 157SC85, 153SE640.
134-20 36F(2d)277 (that plaintiff has no real knowledge of facts is no excuse); 102CalA582, 283P866; DelSuper 148A294; TexCivA 25SW(2d)176.
134-21 Fla 130S421; Ida 291P1060; 159Tenn413, 19SW(2d)255.
134-22 256 IllA111.
135-25 Mo 29SW(2d)103.
135-27 36F(2d)277 (names of witnesses).
136-47 35PortoRico 474.
136-49 33F(2d)916; 37F(2d)593. [a] Mont 288P1021.
137-54 86Mont228, 283P226.
137-55 [a] (2) Other instances. 86 Mont150, 282P494.
137-64 160Tenn102, 22SW(2d)359.
139-76 169Ga595, 151SE5.
139-78 Mo 26SW(2d)946.
139-81 156SC203, 152SE878.
140-87 Ida 291P1060; Ill 173NE92 (statement insufficient).
143-33 152Wash323, 277P850.
148-16 [c] 104CalA128, 284P1047.
149-22 NJCh 147A338.
149-25 [a] **Averment of expectation of ability to prove allegations** at trial is necessary, in absence of disclosure of source of information. 300Pa327, 150A645.
149-31 220Ala6, 123S271; 135Misc626, 238NYS147; SD 229NW522; 200Wis 31, 227NW276. But see 230Ky465, 19SW(2d)1078.
150-32 157SC392, 154SE431.
151-33 SD 229NW522.
152-44 IndA 172NE131.
152-46 Ind 168NE865.
152-49 IndA 172NE131.
153-55 230Ky351, 19SW(2d)988.
153-60 220Ala338, 124S898.
153-62 DelSuper 148A294.
155-78 TexCivA 31SW(2d)839.
155-79 228AppDiv746, 239NYS478. [d] **Rule held inapplicable.**–231AppDiv703, 245NYS548.
157-84 CalA 291P269.
157-90 Conn 151A333.
158-7 Cal 292P624; SC 155SE841.
159-15 See also 138Misc278, 245NYS381.
160-48 230AppDiv505, 245NYS273.
161-49 [b] (3) Allegations of primary negligence and negligence under humanitarian rule not duplicitous. Mo 27SW(2d)13.
161-61 12LaA484, 126S599; 140 Okl 61, 282P888. [d] **Allegations held not multifarious.**–TexCivA 28SW(2d)622.
162-72 TexCivA 27SW(2d)268.
165-36 42F(2d)953.
165-37 Ark 31SW(2d)539.
166-43 140 Okl 61, 282P888 (in absence of motion correcting petition). But see 136Misc369, 240NYS83.
167-51½-New. Submission of case on theory supported by allegations is not precluded by presence of allegations tending to show liability on other grounds. MoA 27SW(2d)1036.
167-60 208Cal 251, 280P942. [b] **Damages** may determine nature of cause pleaded. 43F(2d)201.
168-63 208Cal 566, 283P65. [a] 41GaA 697, 154SE301.
168-64 Cal 287P450; 228AppDiv321, 239NYS16; 136Misc761, 240NYS801; 144 Okl 116, 289P331; TexCivA 27SW (2d)255.
169-67 129Kan573, 283P628; 137Misc 637, 244NYS231.
169-69 [c] **Resort may be had to allegations to aid in determining character of action.** 169La1170, 126S695.
169-77 103CalA188, 284P496 (construed as whole). [a] (3) Complaint mentioning conversion, but alleging damages in contract, states action in contract. 43F(2d)201.
170-78 Wyo 288P524.
170-79 41GaA697, 154SE301.
173-35 CalA 291P266.
173-36 52Nev152, 283P593.
173-39 Mo 30SW(2d)976(2dcase); 85 Mont229, 278P143; 35 OhA384, 172NE 446.
173-45 208 Iowa625, 226NW144; 227 AppDiv619, 235NYS730; TexCivA 24SW (2d)1101(2dcase).
174-50 234Ky202, 27SW(2d)955.
175-57 Mo 26SW(2d)929.
176-71 98PaSuper150.
176-72 134Misc389, 235NYS321.
176-73 Ariz 291P1005.
176-76 134Misc518, 235NYS492; 134 Misc614, 235NYS617.
176-84 TexCivA 24SW(2d)474.
178-10 13PaDist&Co 527; 13PaDist& Co 528.
179-48 59ND18, 228NW420.
181-92½-New. Defendant, defaulting in pleading, has been held not bound by allegations predicated on erroneous construction of documents. 229AppDiv544, 242NYS111.
182-2 MoA 25SW(2d)545; TexCivA 23 SW(2d)835.
184-43 221Ala77, 127S524 (plea of estoppel does not make it such).
184-53 255 IllA403.
189-39 SD 229NW522.
189-40 CalA 291P276.
189-50 [b] **Pleader need not go into details in pleading non est factum.**–41 F(2d)122.
190-69 135Misc895, 238NYS692.
192-78 137Misc838, 243NYS736.
194-95 Mo 31SW(2d)28; RI 151A893.
195-29 [e] (2) Answer setting up usury as defense at law but not alleging particular facts and circumstances of transaction is frivolous. NJ 151A 873. [g] (1) NJ 151A873. (2) NJ 151 A873.
201-98 35 OhA73, 171NE868.
206-52½-New. Defendant may not plead as of right after expiration of extension of time. 35 OhA73, 171NE 868.
206-71 [f] **Time between entry of order regarding security for costs** and compliance therewith must be computed as part of time within which to serve answer. 229AppDiv741, 241NYS 631.
208-17 35F(2d)301.
209-32 233Ky290, 25SW(2d)405.
209-42 [a] (7) 228AppDiv337, 239NYS 598.
212-68 IndA 168NE595.
213-30 [a] (2) Defenses growing out of same facts or consistent facts may be pleaded in alternative. 169La1120, 126S679.
213-82½-New. Where second separate defense and counterclaim pleaded were based on first separate defense, they must necessarily fail if first defense fails. 136Misc160, 239NYS337.
213-87 48 Ida364, 282P79 (no consideration and illegal consideration); MoA 20SW(2d)968.
214-7 137Misc398, 241NYS194 (reference held improper).
216-42 Mo 29SW(2d)103.
216-44 [a] (1) LaA 130S573 (pleas held not inconsistent).
216-45 Cal 290P577; 135Misc305, 237 NYS171.
217-46 Mont 286P410 (not so incompatible as to render one false).
218-54 233Ky27, 24SW(2d)917; 169La 1120, 126S679; Mo 29SW(2d)103; MoA 20SW(2d)968; Mont 286P410. [a] (10) Other instances. 48 Ida364, 282P79; 136Misc37, 239NYS244. [b] (48) Other instances. 232Ky741, 24SW(2d)560; 233Ky27, 24SW(2d)917; MoA 20SW(2d) 968; 135Misc305, 237NYS171.
221-87 [a] (27) Other instances. MoA 21SW(2d)777.
221-91 But see 229AppDiv456, 242NYS 586.
222-99 [c] (3) No consideration and counterclaim for damages. MoA 31SW (2d)552.
223-24 TexCivA 32SW(2d)674.
223-25 Fla 129S834; 40GaA324, 149 SE579(2dcase).
224-34 [b] **Issues relating to jurisdiction** are not necessarily involved. Tex CivA 23SW(2d)748. [c] **Controverting plea held insufficient** to show trespass within venue statute. TexCivA 24SW (2d)515. [d] **Controverting affidavit to plea of privilege** must set out facts specifically relied upon to confer venue. TexCivA 24SW(2d)515.
224-38 221Ala22, 127S553.
224-39 But see 255 IllA403. [a] **Pleadings held in bar and not in abatement.**–Or 289P1051.
224-40 [a] (3) Pleas in bar, unlike pleas in abatement, offer conclusive defense to actions on merits. TexCivA 32SW(2d)248. [d] **Pleas held to be in bar** rather than dilatory since going to merits. 40GaA324, 149SE579(2dcase).
224-45½-New. Defendant in action on contract cannot convert general denial into plea in abatement by using argumentative language and alleging that third person is liable. Or 289P1051.
228-1 38F(2d)199.
229-25½-New. Statute providing requirements of plea of privilege is not void because permitting pleading of conclusions. TexCivA 32SW(2d)500.
229-26 [d] **Plea to jurisdiction held sufficient.**–227AppDiv733, 236NYS503.
230-44 [a] **Pleas held sufficient.**–253NY 17, 170NE477.
230-51 [j] **Plea held sufficient.**–Tex CivA 32SW(2d)500.
231-54 TexCivA 22SW(2d)147.
233-86 TexCivA 30SW(2d)393.
234-89 IndA 172NE319; TexCivA 32 SW(2d)248.
234-91 TexCivA 22SW(2d)147.
234-93 TexCivA 25SW(2d)666.
234-99 Fla 129S889.
236-35 99Fla678, 126S909.
236-41 TexCivA 22SW(2d)147.
236-45½-New. Correctness of form in plea in abatement is matter of substance. Fla 129S889.
240-22 MoA 24SW(2d)699 (failure to move for new trial after overruling of plea in abatement); TexCivA 31SW (2d)679. [b] **Plea of privilege held not waived** by answers to prior petitions also praying recovery of land. TexCivA 28SW(2d)883.
241-49 [a] **Plaintiff's controverting affidavit** must be filed within five days after plea of privilege. TexCivA 31SW (2d)867.
242-51 [a] **Plea must be disposed of at term at which filed,** business of court permitting. TexCivA 32SW(2d)664.
243-77½-New. Facts alleged in controverting affidavit must be supported by evidence. TexCivA 32SW(2d)500.
243-82 TexCivA 25SW(2d)650.
243-86 But see TexCivA 23SW(2d)748.
243-90 TexCivA 23SW(2d)748; Tex CivA 24SW(2d)515.
243-91 TexCivA 25SW(2d)280. [c] **Plea of privilege erroneously overruled.**–TexCivA 20SW(2d)807.
244-12½-New. Denial of motion to specify ground on which plea was sustained has been held not error. Mass 171NE713.
245-25 TexCivA 32SW(2d)248; Tex CivA 32SW(2d)674. [i] **Matter defeating right of action** must be pleaded in bar. TexCivA 30SW(2d)393.
246-41 Mass 169NE548.
249-21 [a] 155Miss492, 124S649.
250-35 128Me433, 148A561.
251-55 128Me433, 148A561.
251-62 128Me433, 148A561.
254-14 IndA 169NE64.
256-53 86Mont150, 282P494.
257-71 [a] **Defendant cannot change argumentative denials** into affirmative defense by pleading them affirmatively. 253NY166, 170NE532.
259-88 CalA 284P967; CalA 285P734.
259-2 Nebr 231NW141.
260-17 [c] (1) CalA 290P1087.
261-20 Mo 30SW(2d)118. [a] **Court is not bound to analyze petition** to isolate allegations denied. Mo 30SW(2d)118.
263-59 198NC774, 153SE409.
263-64 Wis 231NW641.

263-67 103CalA392, 284P673.
265-79 CalA 285P734.
265-89 Cal 292P624; CalA 285P734. But see CalA 285P362.
266-90 137Misc297, 241NYS708.
266-92 CalA 285P734; 87Colo 339, 287 P644. [a] (15) Domestic corporation. 137Misc297, 241NYS708.
268-5 Cal 292P624.
268-6 130 Or570, 281P123(1stcase).
268-8 CalA 285P734.
268-9 [a] **Defendant's denials must be specific** where matters alleged in verified complaint are presumably within his knowledge. 101CalA652, 281P1108.
268-13 CalA 292P288.
268-17½-New. Defendant may deny allegations on information and belief without specifically setting them forth. 101CalA652, 281P1108.
268-17½-New. Denial on information and belief as to fraud must disclose source of information. 300Pa317, 150A 644.
268-19 208Cal 339, 281P385, 66ALR 1382; Cal 292P624; 101CalA122, 281 P419; CalA 292P288; Wash 288P1063. [d] **Where pleading merely alleges ownership in fee as ultimate fact**, presumption is not applicable. Cal 290P577.
269-23 231Ky660, 21SW(2d)1019.
269-24 [d] But see 230Ky558, 20SW (2d)460. [e] (3) Other instances. 86 Mont150, 282P494.
270-27 103CalA392, 284P673.
270-28 102CalA578, 283P365; 86Colo 414, 282P253.
274-66 GaA 155SE211; MoA 21SW(2d) 777. See also LaA 128S207.
275-74 221Ala488, 129S275; Cal 287P 93; 101CalA186, 281P514; 103CalA392, 284P673; CalA 288P434; CalA 288P 448; 111Conn317, 150A17; Fla 130S18; 233Ky171; 25SW(2d)33; 233Ky290, 25 SW(2d)405; 235Ky741, 32SW(2d)327; 11LaA485, 124S160; 12LaA527, 126S 525; 128Me299, 147A210; Mo 25SW(2d) 472; Mo 30SW(2d)118; 135Misc796, 238NYS463; 298Pa460, 148A522; SC 155SE622. [h] (4) Matter admitted by failure to deny is of less credence than unimpeached testimony. 135Misc486, 238NYS723. [n] **Answers held sufficient denials.**-41GaA505, 153SE531.
277-77 101CalA204, 281P509.
277-86 [a] **Statute making allegation of ownership conclusive** unless denied does not preclude evidence rebutting presumption that driver is owner's agent. Md 151A400.
277-88 103CalA392, 284P673.
278-96 Mass 172NE232.
278-1 235Ky425, 31SW(2d)701.
279-1 [e] **Consideration for renewal note sued on.**-Kan 292P935.
279-18 99CalA604, 279P216; 13LaA1, 126S741.
280-30 128Me433, 148A561; MoA 21 SW(2d)777.
281-35 Cal 287P459.
281-42 TexCivA 24SW(2d)778.
281-52 337 Ill 111, 168NE908; Ind 172 NE119. [d] **Admission coupled with new matter in avoidance** may not admit indebtedness sued on. Wash 291P1087.
282-53 43F(2d)991.
284-74 [h] **Admission of lien of only two thousand dollars on record.**-101CalA 122, 281P419. [i] **Admission of substantial performance of contract.**-101CalA 186, 281P514. [j] **Admission of benefit to defendant by improvement.**-208Cal 339, 281P385, 66ALR1382.
285-84 228AppDiv556, 240NYS273.
286-91 154SC435, 151SE738.
287-8 35F(2d)213 (sufficiency).
288-14 Mont 286P410.
289-27½-New. **In Massachusetts city's** failure to answer does not estop it from contesting title of petitioner in proceedings for damages for taking property. Mass 168NE78.
289-43 Ind 169NE843; Mont 286P410.
290-50 [b] **What constitutes affirmative defense.**-33F(2d)916.
290-51 MoA 26SW(2d)1020. [b] (1) 13 LaA8, 126S742.
291-53 Mont 286P410 (denial disregarded because of subsequent admission).
291-59 TexCivA 32SW(2d)674.
293-94 86Mont423, 283P1114.
295-15 233Ky230, 25SW(2d)370. But see Ind 169NE843.
296-54 [b] (2) 256 IllA274.
297-61 38F(2d)104. [g] **Affidavit of defense** in lieu of demurrer does not admit facts not well pleaded. 37F(2d)479. [h] **Where questions of law are decided against plaintiff without prejudice**, new action may be brought. 13PaDist&Co 321. [i] **Supplemental affidavit of defense** to averments of fact in statement of claim may be filed where decision is against defendant on affidavit raising only questions of law. 13PaDist&Co 321.
297-65 97PaSuper189.
297-66 98PaSuper150.
297-68 34F(2d)977; Pa 151A879; 14 PaDist&Co 179.
300-30 255 IllA322.
301-58 [a] (1) 97PaSuper129.
302-68½-New. Statute of 1929 held not to change time of filing prescribed in 1915 statute. 13PaDist&Co 428.
302-68½-New. When filed more than fifteen days after service of statement without leave of court, affidavit of defense will be stricken. 13PaDist&Co 428; 13PaDist&Co 430.
303-80 [b] 97PaSuper392; 97PaSuper 429; 97PaSuper585; 98PaSuper309; 98 PaSuper400; 13PaDist&Co 670; 14 PaDist&Co 167; 14PaDist&Co 188. [c] 97PaSuper267; 98PaSuper127; 98 PaSuper134; 98PaSuper179; 98PaSuper 217; 98PaSuper227; 98PaSuper274; 14 PaDist&Co 183.
304-88 255 IllA322.
304-89 96PaSuper57.
304-96 [a] **Affidavit stating defendant did not authorize execution of bond** put in issue its execution and president's authority to execute it. 41F(2d)122.
304-98 97PaSuper429.
305-28 96PaSuper363.
305-29 [b] 97PaSuper392; 98PaSuper 498.
306-38 [b] 96PaSuper400.
306-58 299Pa176, 149A175.
307-72 14PaDist&Co 167.
308-73 [c] **It need not be more definite** than plaintiff's statement. 97PaSuper 585.
308-87 300Pa242, 150A480.
310-15 97PaSuper189 (must be pleaded with definiteness and particularity). [e] **Sufficiency of allegations to constitute cause of action** is governed by same principles as complaint. 40F(2d)228. [f] **Pleas of set-off are purely statutory.**-221Ala167, 127S907.
311-27 37F(2d)715.
311-28 [d] **Relief against all original plaintiffs or defendants** need not necessarily be sought. Ida 293P327.
311-30 140 Okl 292, 283P563(2dcase). [a] (1) Mo 30SW(2d)49.
312-39 [e] (4) Defendant's claim in negligence action against codefendant may be stricken out and defendant relegated to remedy by separate action or by motion. 137Misc708, 244NYS180.
312-44 NJSup 148A14.
312-45 Ida 293P327.
313-46 [a] (10) Other instances. 231 Ky713, 22SW(2d)108; 231Ky811, 22SW (2d)288; 232Ky142, 22SW(2d)571; 135 Misc286, 238NYS9.
313-54½-New. In action to foreclose pledge of partnership assets, plaintiff's answer to partner's cross-complaint for accounting not showing how plaintiff's rights are affected may be stricken. Ida 285P1015.
313-54½-New. Plaintiff cannot rely on denial of one defendant's answer to codefendant's cross-petition. 233Ky290, 25SW(2d)405.
316-3 Cal 292P474.
316-14 137Misc498, 243NYS716. [a] (2) Counterclaim must amount to independent cause of action. 137Misc67, 241 NYS467. [e] **Answer held not to constitute counterclaim.**-231Ky253, 21SW(2d) 279; 200Wis11, 227NW392 (not demurrable as answer).
317-20 219Ala692, 123S215; 48 Ida369, 282P82; Ida 292P613. [d] (1) Cal 292 P474; TexCivA 22SW(2d)957.
318-21 Ida 292P613.
318-24 169La258, 125S69. [c] **Where caption of answer fails to contain name "counterclaim,"** no judgment on counterclaim can be sustained in absence of waiver of defect. 231Ky253, 21SW(2d) 279 (necessity of prayer for relief). [d] **Counterclaim held demurrable for failure** to allege value of property involved. 34 F(2d)744.
318-27 231Ky253, 21SW(2d)279 (counterclaim); 136Misc37, 239NYS244.
319-28 227AppDiv733, 236NYS578 (failure to allege willingness to perform contract).
322-88 [e] **Office of reply is to join issue** as to new matter set up in answer. 85Mont604, 281P540.
322-91 TexCivA 21SW(2d)699; TexCivA 22SW(2d)720; TexCivA 25SW(2d) 255.
323-1 [g] **In Montana.**-85Mont604, 281 P540 (affirmative defense of contributory negligence requires reply).
324-3 35 OhA76, 171NE870. [a] 41 F(2d)319.
324-4 SD 229NW522. [a] 40F(2d)928; 58ND846, 228NW214. [b] 41F(2d)319; 157SC469, 154SE855. [d] (2) 198NC781, 153SE411. [e] **Where executors have no personal knowledge of new matter**, motion is granted with greater liberality. 228AppDiv821, 240NYS540.
325-5 [e] (1) 12LaA341, 125S138.
326-29 253NY17, 170NE477.
326-33 200Wis11, 227NW392.
329-61 136Misc515, 240NYS20 (statements of law and immaterial allegations).
329-78 198NC514, 152SE497.
331-5½-New. Permitting filing of reply after denying defendant's motion for directed verdict is not abuse of discretion where defendant was afforded opportunity to meet allegations. Iowa 229 NW909.
331-5½-New. In British Columbia trial judge, who treated as defense counterclaim to which no reply was filed, cannot permit filing of reply after notice of appeal from judgment. BC [1930] 2 DomLR224.
334-60 221Ala138, 127S840.
334-64 But see SD 227NW469.
337-13 254 IllA445.
338-24 [a] (2) MoA 31SW(2d)117.
342-6½-New. Plea of general issue to replication not amounting to new assignment should be treated merely as a similiter. 254 IllA445.
342-9 254 IllA445.
342-15 235Ky574, 31SW(2d)910.
343-16 Nebr 232NW583(2dcase).
343-18 Nebr 232NW583(2dcase).
344-29 137Misc16, 242NYS125.
345-30 235Ky574, 31SW(2d)910.
346-62 [j] (8) Wash 291P1087.
348-83 Minn 231NW401.
351-13 Nebr 232NW583(2dcase).
355-93 85Mont604, 281P540; 253NY 359, 171NE569. [d] **"New matter constituting defense"** admitted by failure to deny means defense which in law defeats cause of action. Nev 292P587.
357-22 98PaSuper440.
357-26 98PaSuper440.
358-51 MoA 30SW(2d)1044.
362-52 198NC642, 153SE114.
363-70 TexCivA 32SW(2d)369.
363-74 [a] 221Ala469, 129S46.
364-75 198NC642, 153SE114.
364-77 Cal 293P25.
364-78 TexCivA 23SW(2d)527.
364-80 TexCivA 31SW(2d)1095.
365-16 111Conn663, 151A190 (to motion to dismiss).
366-38 Ga 155SE484.
366-40 OhA 173NE318.
367-44 CalA 286P482.
368-60 LaA 130S361.
369-79 Kan 293P385.
372-30 43F(2d)991.
372-32 198NC642, 153SE114; TexCivA 23SW(2d)527.
372-38 Ala 130S216; CalA 288P111.
374-62 Utah 291P303.
375-68 NM 290P793; SD 231NW935; Va 154SE572; Wis 232NW561.
377-72 Cal 292P950.
377-73 [c] 169La588, 125S627; 170La 573, 128S520.
378-77 220Ala295, 125S26.
378-78 102CalA452, 283P321; 169Ga 712, 151SE340.
379-88 169Ga712, 151SE340.
379-92 169Ga495, 150SE828.
380-99 169Ga712, 151SE340.
380-10 169Ga595, 151SE5.
380-11 GaA 155SE356(2dcase).
383-49 143 Okl 268, 288P481.

385-2 [b] **General demurrer held insufficient.**–TexCivA 24SW(2d)762.
387-24 33F(2d)451.
388-25 236Ky42, 32SW(2d)536.
389-26 La 129S655; TexCivA 29SW (2d)811.
389-28 198NC808, 153SE412(2dcase); Okl 293P235. [a] **Cause of action requisite to withstand general demurrer comprises plaintiff's primary right coupled with infringement thereof by defendant.** Mont 288P1021.
389-31 40F(2d)620; Ala 130S792; 102 CalA677, 283P871.
389-33 169Ga595, 151SE5; 170Ga10, 152SE47(2dcase); 169Ga869, 152SE53 (2dcase); Ga 155SE194; 141 Okl 1, 283 P571, 67ALR1059; 143 Okl 220, 289P 315; 153SC478, 151SE60; 154SC138, 151SE274(1stcase); SC 155SE627. [a] Fla 130S421.
391-43 [c] **If answer does not supply cause of action** to defective petition, exception may be subsequently urged. LaA 129S447.
393-67 198NC5, 150SE618(2dcase); 199NC346, 151SE729; NC 155SE248. [a] 198NC5, 150SE618(2dcase).
394-69 TexCivA 30SW(2d)428.
394-72 MoA 29SW(2d)201.
394-81 SD 229NW380.
395-90 221Ala48, 127S802(2dcase); 221 Ala419, 129S74; Ala 130S197.
397-6 37F(2d)479[quotCyc]; 41GaA 738, 154SE649; Md 151A44.
399-37 [b] **Where defect does not appear on face of pleading,** demurrer to bill of particulars is improper. 140 Okl 28, 282P141.
399-39 Md 152A227.
399-42 254 IllA163.
400-43 [b] **Plea is not demurrable, though double if presenting good defense in either aspect.**–220Ala314, 124S 886.
400-53 Ala 130S547; Md 152A227.
400-55 128Me512, 149A143.
400-57 Wis 231NW641.
402-74 41GaA809, 154SE711.
402-75 128Me433, 148A561.
402-81 98Fla1071, 124S812.
403-86 [d] **When disabled from legally issuing bonds,** city is liable to pay in money. 40F(2d)579 (that city had levied assessment is no excuse).
403-91 40F(2d)579 (general obligation).
403-10 254 IllA289; 128Me433, 148A 561.
406-51 231Ky574, 21SW(2d)979. [b] **Special demurrer held necessary.** Utah 290P954.
407-72 [b] **That replication sets up defendant's promise to pay note** with knowledge of defenses does not subject it to demurrer. 221Ala424, 129S276.
408-96 [a] Okl 291P573.
408-3 232Ky503, 23SW(2d)945, 68ALR 1481. [d] **Argumentative matter** in special demurrer may be improper. 86 Colo 330, 282P193.
409-4 235Ky506, 31SW(2d)897.
409-21 [a] **Demurrer ore tenus will not reach mere indefiniteness of averment,** or defect of pleading legal conclusions. MoA 31SW(2d)242.
409-22 NC 154SE844. [b] **Oral demurrer after answer improperly sustained,** if allegations of complaint entitled plaintiff to any relief. 198NC730, 153 SE316.
409-29 [a] NC 154SE844.
411-72 220Ala597, 127S164.
411-77 221Ala469, 129S46; CalA 288P 863; TexCivA 24SW(2d)762.
413-95 43F(2d)991.
414-18 Ala 130S380 (statement of ground too general).
415-27 CalA 286P482.
418-78 [a] **Special demurrer implies general demurrer.**–TexCivA 23SW(2d) 745.
418-81 [a] (7) Other instances. 41GaA 759, 154SE718.
419-83 Mont 288P1021; Wis 232NW 875.
419-87 220Ala328, 124S892.
420-97 34 OhA128, 170NE185.
420-18 101CalA365, 281P1051; Conn 151A531; 169Ga400, 150SE647; Iowa 232NW830; Kan 289P444; LaA 130S 361; 155SC543, 152SE703; Vt 151A 508.
422-19 [a] (11) Reasonableness of attorney's fee provided for in note. 40 GaA583, 150SE567. (12) Other instances. La 129S655.
422-24 La 129S655.
422-42 Vt 151A508.
423-43 MoA 31SW(2d)248.
423-48 [b] **Court is confined to facts pointed out by memorandum** as necessary. IndA 172NE131.
423-49 [a] **Where petition showed defendant's negligence was not proximate cause of injury,** demurrer thereto should be sustained. 40GaA751, 151SE544.
423-51 130Kan522, 287P269.
423-55 Mass 171NE490. See also 137 Misc177, 243NYS322.
423-57 Md 151A44.
424-64 NC 154SE844. [c] **Demurrers held not speaking demurrers.**–298Pa215, 148A92.
424-65 86Colo 330, 282P193. [c] **Allegations of fact in demurrer cannot be considered as responsive answer** to statement of claim. 298Pa215, 148A92.
425-67 [a] **In Georgia.**–155SE523.
425-68 169Ga400, 150SE647; IndA 171 NE304; LaA 130S361.
425-71 Vt 151A508.
425-72 235Ky328, 31SW(2d)377(2d case).
427-99 Wis 230NW720.
429-24 200Wis64, 227NW300, 67ALR 1381.
429-26 Fla 130S421; NC 153SE602.
432-39 169Ga678, 151SE349.
434-59 36F(2d)974; 37F(2d)947; 40 F(2d)620; 42F(2d)873; 43F(2d)225; 180Ark492, 22SW(2d)21; Ark 30SW(2d) 213(2dcase); 102CalA716, 283P370(2d case); CalA 289P857; 86Colo 377, 281 P742; 111Conn115, 149A406; 111Conn 663, 151A190 (motion to dismiss); Del 151A665; 40GaA751, 151SE544; 41GaA 509, 153SE575; 337 Ill 469, 169NE265; IndA 168NE488; IndA 169NE342; IndA 170NE346(2dcase); Iowa 232NW830; 130Kan749, 288P733; 233Ky619, 26SW (2d)557, 69ALR482; 234Ky364, 28SW (2d)37; 235Ky12, 29SW(2d)550; 235 Ky767, 32SW(2d)325; 169La450, 125S 445 (exception); 169La819, 126S72; La 129S655; 12LaA675, 127S70; 13LaA 646, 127S445; 13LaA270, 127S455; 13 LaA495, 128S196; 13LaA612, 128S688; 157Md6, 147A715; 158Md358, 148A546; Md 149A465; Mass 172NE605; Mo 25 SW(2d)98; Mo 31SW(2d)67; MoA 29 SW(2d)201; MoA 31SW(2d)248; MoA 32SW(2d)96; Mont 288P455; 230App Div88, 243NYS299 (motion to dismiss); 198NC364, 151SE735; 198NC477, 152SE 403; 198NC520, 152SE496; 198NC827, 153SE399; NC 155SE160; NC 155SE 560; 34 OhA128, 170NE185; 138 Okl 256, 280P790; 141 Okl 1, 283P571, 67 ALR1059; Okl 291P513; Or 289P387; 153SC478, 151SE60; 154SC48, 151SE 109; SD 227NW488; TexCommnA 26 SW(2d)182; TexCivA 26SW(2d)444; TexCivA 29SW(2d)420; TexCivA 29SW (2d)422; TexCivA 29SW(2d)805; Tex CivA 32SW(2d)523; Va 153SE722; Wash 286P89; Wash 289P536.
436-68 34 OhA128, 170NE185; OhA 173NE318; 141 Okl 282, 285P17; 143 Okl 268, 288P481; Okl 291P513; Okl 293P235.
437-84 [a] (6) Commissioner's acts of organizing and maintaining road. 180 Ark660, 22SW(2d)163. (7) Opinion of assessor that property was assessed at full value. Mo 23SW(2d)108. (8) That fourteen votes were cast after time for closing polls where petition alleged fourteen or more. 41Wyo 157, 282P 1058.
438-4 48 Ida121, 279P1092; 48 Ida129, 279P1094.
438-12 Mo 23SW(2d)108 (construction of admission).
438-14 Ida 288P157(2dcase); NM 291 P290(2dcase).
438-15 36F(2d)334; 337 Ill 100, 168 NE904; 235Ky600, 31SW(2d)928; Mo 31SW(2d)803; NM 291P290(2dcase); 142 Okl 19, 285P38; TexCivA 20SW(2d) 815.
440-17 Or 289P387.
440-18 Mo 22SW(2d)800.
441-25 111Conn115, 149A406.
442-39 198NC808, 153SE412(2dcase); NC 153SE632.
442-42 35F(2d)493.
442-45 12LaA484, 126S599; TexCivA 26SW(2d)322.
443-55 TexCivA 20SW(2d) 803. [c] **Trial court should consider defendant's answer** in passing on general demurrer to complaint, since if defective, it may be cured by answer. TexCivA 20SW (2d)843.
444-57 220Ala377, 125S393.
444-63 339 Ill 426, 171NE514.
444-68 DC 35F(2d)1010.
444-69 37F(2d)593. [a] **Demurrer to answer will not be sustained because of defective complaint** where entire record reveals facts constituting cause of action. 199Wis379, 226NW378(4thcase).
445-80 155Wash193, 283P699.
448-32 221Ala331, 128S799; MoA 28 SW(2d)448.
448-42 Ariz 286P819.
449-49 [a] **Right to question sufficiency of facts proved** was not lost by waiver of demurrer to complaint. 154Wash 376, 282P205.
449-54 [d] **Discretion of court.**–Tex CivA 25SW(2d)176.
449-55½–New. Demurring party has right to open and close argument on demurrer. CalA 286P482.
450-74 [a] (1) But see 169Ga812, 151 SE806 (where extraordinary relief sought in equity cases).
451-8 [a] **Sustaining demurrer is not final judgment on merits,** where complaint is amended. 37F(2d)87.
452-10 37F(2d)87.
452-13 TexCivA 23SW(2d)527. See also TexCivA 27SW(2d)281 (court cannot make further ruling on other exceptions).
452-20 [b] (2) **Referring exception to merits and requiring defendant to answer** is equivalent to allowing interrogatories on facts and articles. 13LaA 646, 127S445.
452-24 [a] **Right of defendant to introduce parol evidence** was not adjudicated by overruling of demurrer to answer. 40GaA517, 150SE458.
452-26½–New. Order revoking prior order sustaining demurrer with leave to amend does not adjudicate that petition denurred to as amended stated cause of action. 40GaA468, 150SE169.
452-26½–New. Judgment and order on demurrer to affidavit of illegality held to adjudicate that ground not stricken set forth good defense. GaA 155SE81.
452-29 [b] **Sustaining demurrer to answer** adjudicated counterclaim insufficient to entitle defendant to relief. 235 Ky705, 32SW(2d)54.
452-32 41GaA630, 154SE191.
452-32½–New. **Where demurrer of one joint tort-feasor is sustained** plaintiff may proceed against other or stand on petition. GaA 155SE83.
453-43 34NM636, 287P290(2dcase).
454-72 [b] (2) Where complaint stated cause of action, sustaining demurrer without leave to amend is error, though some grounds of special demurrer are well taken. CalA 289P904. [g] **In Florida.**–98Fla1087, 125S243. [h] **In Iowa.**–Iowa 227NW510(1stcase). [i] **In Arizona.**–Ariz 291P1005.
455-76½–New. If ends of justice will thereby be promoted permission to file amended pleadings should be granted. 197NC671, 150SE200.
455-78 [a] TexCivA 23SW(2d)820.
455-81 13PaDist&Co 321.
455-83 NJ 148A762.
455-84 154SC138, 151SE274(1stcase) (usual and entirely proper).
456-90 198NC669, 153SE163.
456-93 102CalA133, 282P507 (amendment sham and ineffectual).
457-12 [e] **In South Carolina.**–154SC 201, 151SE472(2dcase).
458-33 SD 231NW937.
460-73 232Ky199, 22SW(2d)587 (reasonable time).
461-4 [d] (2) Error in rejecting amendments to petition and sustaining demurrer renders nugatory judgment. GaA 155SE533(2dcase).
461-7 37F(2d)87; Md 149A442; TexCivA 25SW(2d)184; TexCivA 25SW(2d) 964; Wash 291P717.
462-16½–New. Where demurrer to plea in abatement is sustained the judgment should be quod respondeat ouster. 254 IllA163.
462-16½–New. Judgment sustaining

demurrer may not estop plaintiff from proceeding on amended pleading. 197 NC671, 150SE200.
463-32 Ind 172NE353.
464-61½-New. Judgment entry held sufficient to show separate demurrers were separately overruled. 220Ala661, 127S230.
467-7 40F(2d)379; 248Mich419, 227 NW698.
467-19 Mont 289P571.
468-20 136Misc447, 241NYS349.
471-5 TexCommnA 24SW(2d)391.
471-9 TexCivA 30SW(2d)419.
472-27 38F(2d)388; 103CalA93, 283P 970; CalA 290P534; 178Minn549, 228 NW150(1stcase); 156Miss673, 126S475; MoA 22SW(2d)860; 86Mont150, 282P 494; 86Mont169, 282P852; Mont 289P 571; NH 149A81; NJ 148A775; 198 NC627, 152SE801; NC 155SE734; NC 155SE871(1stcase); 300Pa161, 150A 296; TexCivA 24SW(2d)1101(2dcase); Wis 230NW135.
475-42 [a] Where plaintiff made no objection that original defense was changed held discretion not abused. Mo 23SW(2d)45.
475-49 Mo 23SW(2d)45 (unless substantial change in original claim); Mont 287P169.
476-56 [b] Question of counsel's good faith and judicial discretion whether party is surprised by proposed amendment. 229AppDiv811, 242NYS98.
476-60 Mass 173NE519.
477-71 CalA 286P507.
477-80 CalA 284P1083; Mass 172NE 221 (until final judgment); MoA 29SW (2d)193.
478-85 86Colo 454, 282P878; 87Colo 110, 285P764.
480-16 41F(2d)693; Cal 286P1017; Cal 287P92; CalA 293P175; 98Fla1087, 125S243 (formal application not essential). But see MoA 22SW(2d)860 (where plaintiff did not ask for continuance); NJ 151A852.
481-29 MoA 29SW(2d)193.
481-34 221Ala353, 128S447; 232Ky1, 22SW(2d)411; MoA 31SW(2d)103; 34 NM526, 284P761; TexCivA 28SW(2d) 233. [b] Allowance of amendments held not abuse of discretion.–MoA 24SW(2d) 686.
482-47 TexCivA 28SW(2d) 233.
484-85 300Pa161, 150A296 (holding no abuse of discretion in refusal).
485-2 IndA 171NE13.
490-6 143 Okl 220, 289P315 (Supreme Court may consider case as if pleadings have been conformed to proof).
490-7 Iowa 229NW684; 130Kan774, 288P536; Mass 172NE101; 179Minn19, 228NW440. See also 34 OhA259, 171 NE39.
491-13 103CalA465, 284P1083; CalA 287P552; Iowa 229NW684; 234Ky104, 27SW(2d)679; Minn 233NW14; 121 Oh 478, 169NE566; 132 Or689, 288P212. [a] In absence of abuse of discretion allowance of amendment of pleading to conform to proof will not be disturbed. MoA 22SW(2d)860.
492-14 143 Okl 220, 289P315.
492-16 CalA 287P552.
492-17 130Kan116, 285P574(1stcase); 132 Or689, 288P212.
492-18 229AppDiv150, 241NYS149.
493-20 144 Okl 293, 291P1.
494-32 230AppDiv197, 243NYS207.
494-33 [a] Complaint charging negligence in leaving horse drawn vehicle unattended is not amendable to allege negligent operation thereof. 230AppDiv 197, 243NYS207.
495-56 200Wis367, 228NW503.
496-82 Cal 286P1017; 128Me393, 148 A147, 68ALR481.
496-83 But see 102CalA756, 283P874 (new issue raised).
496-89 250Mich217, 229NW422; 157 Miss3, 127S575.
496-90 Mont 289P571.
496-96 CalA 287P552.
497-10½-New. Amendment to answer after decree is properly allowed under some circumstances. 52Nev279, 286P 120.
497-20 180Ark671, 22SW(2d)553; 128 Me393, 148A147, 68ALR481.
497-21 128Me393, 148A147, 68ALR481.
498-24 41GaA189, 152SE141.
498-30 37F(2d)296; CalA 285P1081; 12LaA97, 126S715 (where petition attacked for insufficiency).
499-35 Sask [1930] 4DomLR192.
501-74 155SC370, 152SE512 (whether delay is unreasonable is matter of discretion).
501-76 [a] Ida 290P724; TexCivA 28 SW(2d)844; Wash 292P104. [b] 52Nev 92, 284P307 (trial nine months after taking of testimony).
502-81 43F(2d)873 (defendant may still cross-examine). [a] 48 Ida447, 282 P864 (discretion not abused); MoA 28 SW(2d)372.
503-9 But see 155SC179, 152SE176.
503-15 Ga 155SE764; GaA 155SE771; MoA 24SW(2d)229.
503-16 GaA 155SE771.
504-24 Conn 151A333.
505-41 TexCivA 24SW(2d)1101(2d case).
505-48 169Ga567, 150SE817.
506-73 137Misc653, 244NYS90.
507-78 Ga 155SE327.
507-86 CalA 288P863; 40GaA598, 151 SE48(2dcase); 86Mont423, 283P1114; 98PaSuper473.
508-87 43F(2d)875 (allowing new ground for same cause of action); 170 Ga408, 153SE53.
508-88 [c] Man [1930] 2DomLR1008 (amendment allowed).
509-99½-New. after expiration of time for delivering copy of account, Mont 287P169.
509-1 Iowa 229NW687. [a] (2) 229 AppDiv811, 242NYS98.
510-3 CalA 290P1080.
510-8 41GaA293, 152SE593(2dcase).
511-10 41GaA293, 152SE593(2dcase).
512-37 37F(2d)87; 38F(2d)159.
514-39 37F(2d)87.
514-43 96CalA192, 273P1074.
515-45 41GaA614, 154SE457.
515-46 154Wash646, 283P179.
516-58 98PaSuper473.
517-64 130Kan622, 287P242.
517-67 40F(2d)379.
518-96 40GaA768, 151SE654.
524-11 43F(2d)23.
526-38½-New. Where action is for damages for fraud plaintiff cannot amend to seek cancellation of purchase-money notes. 229AppDiv162, 241NYS 282.
526-39 TexCivA 24SW(2d)1101(2d case).
528-70 CalA 292P132 (medical expenses).
531-46 156SC103, 152SE876. [e] Pleas in set-off cannot be limited to actual damages, in some cases. 221Ala167, 127 S907.
532-62 Iowa 229NW832.
533-68 [a] 86Mont169, 282P852.
537-30 51Philippine583.
537-33 180Minn310, 230NW826.
538-43 TexCivA 23SW(2d)786.
532-44 [a] Amendment held not to change defense.–Mo 23SW(2d)45.
539-60 [c] Allegation of amended counterclaim held insufficient to form issue when met by general denial. Ind 169 NE843.
541-85 232Ky503, 23SW(2d)945, 68 ALR1481.
542-20 But see Iowa 228NW878 (failure to get permission to file reply after trial purporting to conform pleadings to proof).
542-22 102CalA133, 282P507.
544-49½-New. Court is not bound to give parties a hearing before ruling on motion to amend. 35PortoRico 603.
544-69 [a] Abridgment of adverse party's rights raised by objection to allowance of amendment.–128Me393, 148A147, 68ALR481.
544-70 155SC370, 152SE512 (extension of time to pay costs held proper); TexCommnA 24SW(2d)391.
547-42½-New. Refusal to permit filing of amended petition on defendant's objection has been held equivalent to sustaining demurrer thereto. 234Ky511, 28SW(2d)765.
549-60 But see 37F(2d)902.
550-75 MoA 29SW(2d)193.
550-83 [a] (1) TexCivA 27SW(2d)561; TexCivA 27SW(2d)565; TexCivA 32 SW(2d)244. (3) Amended petition failing to identify parties held insufficient, notwithstanding reference to original petition. TexCivA 27SW(2d)565.
552-23 [b] Adversary must have opportunity to object to amendment and allowed time if rights are prejudiced. 229AppDiv811, 242NYS98. [c] Statement of proposed amendment should be served on opposing counsel or entry made thereof in record. 229AppDiv811, 242NYS98.
552-24 CalA 288P863.
552-29 MoA 29SW(2d)193 (not necessary to file additional answer if original raises issue).
553-46 TexCivA 27SW(2d)565.
554-49 CalA 287P552.
555-70 235Ky741, 32SW(2d)327; Md 151A21.
555-79 TexCivA 27SW(2d)561; Tex CivA 27SW(2d)565.
556-10 TexCivA 23SW(2d)405.
557-11 See also CalA 288P78.
557-33 156Miss673, 126S475.
558-38 TexCivA 24SW(2d)796; Tex CivA 27SW(2d)635; TexCivA 28SW(2d) 883.
559-39 Mo 31SW(2d)21.
559-41 86Mont423, 283P1114.
559-42 [b] Amended complaint as beginning of new action.–86Mont423, 283 P1114.
559-49½-New. Plaintiff's attempt to file amended statement is proof of insufficiency of original. 298Pa137, 148A 50.
560-70 37F(2d)320.
561-83 Iowa 233NW257.
562-97½-New. Motion to strike is impliedly overruled by allowance of amendment. Iowa 229NW832.
562-2½-New. Merely filing amended pleading setting up new and distinct cause of action could not operate as advancement of case or infringe on jurisdiction of federal court. TexCivA 22SW (2d)760.
562-6 46Miss635; Mo 232SW680, 682 [citCyc]; 12WendNY503; 97Tenn527.
567-26 144 Okl 110, 289P756.
567-27 TexCivA 30SW(2d)431.
568-38 Iowa 229NW724.
568-44 103CalA386, 284P477; 131 Or 670, 282P1080.
570-85 144 Okl 110, 289P756.
570-91 [a] (15) 142 Okl 89, 285P27.
571-98 TexCivA 30SW(2d)431.
573-12 [a] But see 131 Or670, 282P 1080.
573-14 [a] 11LaA608, 124S611.
573-28 Mo 28SW(2d)1017; TexCivA 25SW(2d)916. [b] Original and "supplemental" petition cannot be considered together to supply matter lacking in each. Mo 28SW(2d)1017.
574-32 Mo 28SW(2d)1017.
575-60 [c] Answers held properly allowed.–12LaA559, 126S566.
576-77 135Misc334, 239NYS267.
583-51 TexCivA 24SW(2d)786.
586-15 Utah 289P146.
586-23 TexCivA 24SW(2d)501.
586-29 Okl 281P977. But see CalA 290 P462.
590-69 CalA 291P273.
590-89 But see Utah 282P1029.
590-90 TexCivA 25SW(2d)927.
591-3 TexCivA 25SW(2d)671.
593-42 135Misc714, 238NYS195.
593-54½-New. Reply attempting to avoid for fraudulent procurement release of employers' liability needs no verification. MoA 28SW(2d)401.
594-81 152SC339, 150SE67 (agent's verification insufficient).
595-96 232Ky199, 22SW(2d)587.
596-28 Ga 154SE788.
597-55 Wis 232NW561.
598-72 13PaDist&Co 628.
602-35½-New. Probative value of answer filed under oath is equal to admissions under interrogatories on fact and articles. 13LaA646, 127S445.
602-35½-New. Rule that mere swearing does not establish fact and that statement contrary to natural law will not support verdict applies to evidence but not to complaint. 85Mont604, 281 P540.
602-59 73NJL455, 63A994.
609-44 But see LaA 130S848.
609-46 Md 151A44.
610-61½-New. Prayer for oyer has been held not to deprive party of right to object to inadmissible copies on trial. LaA127S635.

610–65 41GaA231, 152SE611.
611–69 156Miss689, 126S822.
612–70 13PaDist&Co 309.
613–79 [a] **Failure to attach exact copy** is not demurrable where a copy was filed. 170Ga509, 153SE214.
616–59 99Fla1221, 128S643; **Mo** 31SW(2d)788.
616–60 255 IllA93 (photostatic copy of policy).
617–70 Utah 291P303.
617–71 38F(2d)309; 169La588, 125S627; **Okl** 292P833; 300Pa327, 150A645; SD 229NW522; **TexCivA** 29SW(2d)493.
619–95 38F(2d)309; **IndA** 168NE699; 232Ky683, 24SW(2d)584; 234Ky608, 28SW(2d)955; 169La1127, 126S681; 170La281, 127S628; **NM** 290P739(2dcase); NM 291P290(2dcase); 252NY266, 169NE380; **TexCivA** 24SW(2d)97.
622–17 135Misc229, 243NYS120.
623–21 Md 151A240; **NJCir** 148A182.
623–24½–New. to inform adverse party regarding basis of suit, 254 IllA63.
624–34 51Philippine972.
625–45 98PaSuper162. [a] **Rule for more specific statement** is proper remedy where statement of claim is not sufficiently specific. 13PaDist&Co 476.
625–46 NC 154SE746(1stcase).
627–79 228AppDiv839, 240NYS547; 135Misc229, 243NYS120. [a] (1) 137Misc569, 244NYS538.
627–80 136Misc792, 242NYS255.
628–8 [b] (1) 136Misc346, 240NYS190.
629–13 135Misc446, 238NYS616.
629–14 Ill 173NE270 (as modifying and amplifying statement of claim); Utah 290P367.
629–16 [b] **Omission to plead special damage** cannot be supplied by bill of particulars without amendment of complaint. 136Misc447, 241NYS349.
629–17 Ill 173NE270.
630–23 But see 38F(2d)193.
630–33 WVa 155SE303.
633–64 Md 151A240.
634–70 135Misc552, 238NYS518.
635–71 Utah 290P367.
635–83 Va 154SE572.
636–12 36F(2d)277.
637–20 NJCir 148A182.
637–23 228AppDiv828, 240NYS361.
640–50 Alta [1930] 1DomLR344 (particulars after examination for discovery of defendant).
640–52 [a] **Plaintiff in case on day calendar** is presumed to have information necessary for proper bill of particulars. 136Misc755, 240NYS816.
640–63 See also NJCir 148A182.
641–77 BC [1930] 4DomLR582.
641–79 NJSup 149A57(1stcase).
645–70½–New. Sufficiency of affidavit on motion to amend order requiring bill of particulars to provide for statement that plaintiff is without knowledge. 136Misc755, 240NYS816.
645–85 Md 151A240.
645–92 See also 13PaDist&Co 360.
647–34 248Mich593, 227NW720.
648–58 But see 133Misc714, 233NYS332.
648–65 But see Va 154SE572.
648–69 But see 136Misc346, 240NYS190.
649–92 But see 136Misc346, 240NYS190.
[a] **Return of insufficient bill is prerequisite** to motion to preclude. 136Misc526, 241NYS64.
652–62 [a] (3) Bill of particulars when relating to issue in complaint, answer or counterclaim. Utah 290P367.
652–77 137Misc382, 244NYS23.
654–19 137Misc382, 244NYS23.
657–72 232Ky199, 22SW(2d)587; 138Okl 1, 280P278, 67ALR885. [j] (1) But see Man [1930] 2DomLR1000.
657–73 232Ky199, 22SW(2d)587.
661–34 [a] **Pleader who filed pleadings under honest mistake** to avoid effect of admission should apply for leave to withdraw such pleadings. 139 Okl 1, 281P234.
661–61 [a] (6) Other instances. Tex CivA 23SW(2d)883.
663–10 [a] **Withdrawal of demurrer.–** 230Ky333, 19SW(2d)980.
663–24 [b] **Plaintiff disallowing alleged cause of action** and proceeding on another theory alone is held to such theory. 229AppDiv839, 243NYS211.
664–29 CalA 286P507; Utah 287P320 (2dcase).
664–32½–New. Plaintiff may abandon amended petition and revive original one without rewriting. TexCivA 28SW(2d)233.
665–64 143 Okl 268, 288P481.
667–92 144 Okl 58, 289P716.
667–93 254NY352, 173NE219.
668–3 Nev 292P587. [a] 34 OhA464, 171NE346. [d] **Demurrer to complaint as amended by reply** has been treated as motion for judgment on pleadings. 155Wash193, 283P699.
668–5 42F(2d)413; 178Minn442, 227NW891; Mo 27SW(2d)1; MoA 28SW(2d)1040; 135Misc851, 241NYS579; 135Misc305, 237NYS171; 135Misc881, 238NYS599; 142 Okl 187, 286P294; Wash 286P853.
669–7 Wash 286P853. [a] CalA 289P665.
670–10 135Misc305, 237NYS171.
670–16 137Misc128, 241NYS481.
670–17 Wash 286P853.
670–19 CalA 284P967; 236Ky18, 32SW(2d)542; 227AppDiv582, 238NYS377 (remedy by appeal).
670–23 87Colo 73, 285P771.
670–25 35 OhA107, 172NE288 (holding to justify judgment on pleadings all averments must simply present question of law). [a] **Effect of failure to answer** on motion to dismiss. 38F(2d)879.
670–27 39F(2d)157; Cal 287P459; CalA 284P967; CalA 290P1087; 180Minn9, 230NW118; 141 Okl 30, 283P1002(2dcase); Wash 291P1087.
672–28 135Misc305, 237NYS171.
672–29 180Minn9, 230NW118. [f] **Judgment on pleadings cannot be based on written instrument not binding on opposite party.–CalA** 283P348.
672–30 CalA 284P967.
672–32 See also NC 155SE166.
672–38 Mo 25SW(2d)472; 141 Okl 67, 283P997.
673–40 [a] **Motion by impleaded defendant to dismiss counterclaim** of other defendants cannot be considered as made on pleadings. 137Misc381, 244NYS21.
673–44 CalA 283P348.
673–45 NM 290P739(2dcase).
673–49 135Misc480, 238NYS238.
674–70½–New. Judgment on pleadings is generally proper, where pleadings are insufficient to sustain a different judgment. 37F(2d)72.
675–79 CalA 283P348; 130Kan349, 286P211; 136Misc521, 241NYS158; 138Misc16, 245NYS2; NC 154SE631; 143 Okl 66, 287P716.
676–84 208Cal 578, 283P67. See also Wash 286P657. [e] 103CalA650, 284P1035; Alta [1929] 4DomLR568. [f] **In Alberta.–Alta** [1929] 4DomLR568.
676–92 102CalA94, 282P422; Or 292P1039. [i] **Items not specifically denied.–** 135Misc723, 238NYS308.
679–32 Minn 231NW393.
679–33 241NYS729 (affidavits may not be considered).
680–38 14PaDist&Co 140.
681–45 298Pa518, 148A840.
681–53½–New. Plaintiff is not entitled to judgment for want of sufficient affidavit unless decision of questions of law raised by affidavit disposes of whole or part of claim. 13PaDist&Co 321.
682–64 298Pa574, 148A858.
683–75 CalA 284P967.
684–1 [a] **Judgment on pleadings for plaintiff held erroneous.–CalA** 291P587.
685–42 DC 40F(2d)815(2dcase).
686–51 37F(2d)593; 128Me433, 148A561; NJ 148A762.
686–58 255 IllA484; Iowa 231NW376; 229AppDiv660, 242NYS676; 137Misc498, 243NYS716.
687–71 [a] **Motion to strike** is proper remedy if plaintiff is dissatisfied with affidavit of defense as pleading. Pa 152A95.
687–79 Mont 286P410.
688–83 [d] **So called exception to no cause of action** may not be stricken where it is set up in bar of claim. La 129S801.
689–96 Md 151A21; MoA 21SW(2d)907. [f] **Motion to strike is only remedy** where pleading improperly filed. 86Mont423, 283P1114.
689–6 198NC767, 153SE449.
690–29 Iowa 228NW878.
691–31 [a] (2) Other instances. 87Colo 451, 288P623.
691–35 221Ala424, 129S276; MoA 27SW(2d)1036. [e] **Where presumption that trial amendment raised new issues obtains,** motion to strike for surprise is properly sustained. TexCivA 29SW(2d)493.
692–45 40GaA538, 150SE436(1stcase).
692–55–56 CalA 289P234.
693–57 Ida 292P232.
693–73½–New. Where matter of defense depends not merely upon established practice of the court, but also upon a general rule of law, such matter is not to be taken advantage of by motion in suit at law. NJ 148A762.
693–78 Mo 23SW(2d)1013; NJCh 148A195(2dcase). [d] 169Ga781, 151SE490.
694–80 But see 86Colo 576, 283P1041; 136Misc46, 239NYS225. [f] (1) 135Misc822, 238NYS524. (3) 135Misc608, 238NYS154. (8) 135Misc138, 238NYS38; 137Misc16, 242NYS125; 229AppDiv470, 242NYS405; 137Misc498, 243NYS716. (10) Motion to dismiss counterclaim on ground that it failed to state cause of action can only be made by plaintiff. 137Misc381, 244NYS21.
697–90 Fla 129S763.
697–94 36F(2d)220; Ida 292P235; 179Minn349, 229NW312; NJ 148A721; NJ 148A897. [d] NJSup 151A448(1stcase). [f] **Where pleading contains more than one count,** of which one or more may be sham or frivolous, such adjudication held not erroneous. NJ 148A721.
699–3 Minn 231NW393.
699–18 See also Minn 231NW393.
700–36 227AppDiv448, 238NYS188; 228AppDiv325, 239NYS551.
701–39 [b] **Whether pleading is frivolous must be determined by pleading itself** whether sham may be determined by affidavit with burden on moving party. 135Misc305, 237NYS171 (reply held frivolous).
701–54 Iowa 228NW14(2dcase).
702–60 [a] **Where several defenses are sham and frivolous** they may be stricken without particularizing which are sham and which frivolous. NJ 151A72.
703–81 135Misc717, 238NYS333.
704–82 136Misc213, 239NYS335.
704–89½–New. Answer presenting no defense being partly sham and partly frivolous may be stricken. NJSup 151A470.
704–90 180Minn356, 230NW811; Minn 231NW393. [g] 180Minn480, 231NW224; NJ 150A576; 229AppDiv184, 241NYS290.
705–93 180Minn356, 230NW811.
705–94 Minn 231NW393. [d] 180Minn356, 230NW811; 180Minn482, 231NW220.
706–10 [d] **Insufficient description of parties.–**14PaDist&Co 126.
706–15 128Me433, 148A561.
707–17 TexCivA 24SW(2d)786.
707–21 [b] (5) Affidavit of defense will not be stricken where clear and not evasive although setting up defense with great particularity. 14PaDist&Co 291.
707–23 [d] **Indefiniteness and uncertainty.–**179Minn475, 229NW583.
708–26 Ala 130S772; 179Minn475, 229NW583. [a] (2) Defenses of no consideration and illegal consideration are inconsistent and subject to motion to strike or to elect. 48 Ida364, 282P79.
710–61 338 Ill 21, 169NE821.
711–64 298Pa137, 148A50.
711–78 200Wis11, 227NW392.
712–94 [d] (3) See also 136Misc913, 242NYS618.
713–13 Okl 291P573.
717–67 [a] CalA 288P855; Ind 172NE119; 128Me433, 148A561. [h] IndA 168NE706; TexCivA 23SW(2d)494.
718–85 Ala 130S547; 111Conn634, 151A171, 170Ga148, 152SE82; 40GaA842, 151SE671; 232Ky37, 22SW(2d)432; 135Misc608, 238NYS154; 198NC596, 152SE794; 198NC767, 153SE449; Wis 230NW720. [g] **What constitutes challenge for irrelevancy.–Wis** 230NW720. [h] **Allegations held sufficient.–**135Misc550, 239NYS241.
720–93 137Misc292, 241NYS691.
720–5 Mass 172NE68; 229AppDiv217, 241NYS605; 137Misc292, 241NYS691 (holding test to be whether allegation

tends to be a link in making out cause of action or defense); 137Misc703, 244 NYS179; TexCivA 25SW(2d)695.
723-37 136Misc160, 239NYS337.
724-52 Mo 29SW(2d)103.
724-61 221Ala48, 127S802. [b] (2) Allegations in teacher's complaint for wages as to necessity of employing attorney and claiming fee with penalty are properly stricken. Mont 290P252.
725-83 240NYS734.
726-93 135Misc675, 238NYS371. But see 198NC596, 152SE794.
727-11 37F(2d)892; 87Colo 275, 288P 408; 154SC138, 151SE274(1stcase). [c] (3) Where affidavit of defense is vague and uncertain, rule for more specific statement is preferable practice rather than motion to strike. 14PaDist&Co 291.
728-12 43F(2d)991; IndA 169NE77; IndA 171NE224. [c] Complaint held sufficient.–Wash 288P265.
730-28 Okl 292P335(2dcase); Okl 293 P235. [b] 98Fla847, 124S441 (discretion must be exercised within rules of good pleading). [c] Trial court has right ex mero motu to require more explicit pleading. 198NC774, 153SE409.
731-33 IndA 168NE204.
732-52 Cal 291P577.
734-85 Miss 126S471.
734-89 Mo 29SW(2d)97; SC 155SE 438.
734-97 Kan 293P407.
734-2 IndA 169NE77.
735-23 137Misc873, 244NYS112; 132 Or587, 286P995.
737-51 98Fla847, 124S441; 233Ky734, 26SW(2d)1039.
738-52 [a] (1) 180Ark437, 21SW(2d) 601. (30) IndA 169NE60; IndA 170 NE94. (43) Breach of contract. SC 155 SE270.
739-66 [c] Motion not sustainable by defendant against codefendant who is not required to serve answer. 135Misc 101, 236NYS704.
741-97 MoA 25SW(2d)558. [a] (23) Note, book account and account stated on same indebtedness. Cal 292P624.
742-7 But see 169La1076, 126S558.
742-10 [c] Plaintiff need not elect until after close of evidence. 228AppDiv 510, 240NYS232.
743-21 TexCivA 30SW(2d)428.
743-28 CalA 285P734.
744-29 132 Or587, 286P995.
744-35 MoA 29SW(2d)201; SC 155SE 268.
746-60 87Colo 451, 288P623.
746-63 MoA 21SW(2d)635.
746-67 233Ky27, 24SW(2d)917.
746-69 48 Ida364, 282P79 (no consideration and illegal consideration).
748-9 142 Okl 89, 285P27.
749-42 [a] Motion to dismiss mailed on last day allowed held timely, though not received until following day. 136 Misc76, 240NYS291.
749-43 [a] All motions should be filed at the same time.–86Colo 391, 282P255.
750-55 [a] Affidavits cannot be considered on motion for judgment after issue joined. 241NYS729.
751-63 241NYS188.
752-85 Ariz 291P1005.
756-49 155SC543, 152SE703.
758-81 SC 155SE268.
758-95 48 Ida722, 285P678 (right waived by answering and delay of motion).
760-44 MoA 31SW(2d)117. [a] 98Fla 847, 124S441.
763-72 MoA 31SW(2d)117.
763-79 [f] Amendment of motion.–Va 155SE699.
764-98 136Misc76, 240NYS291.
765-1 229AppDiv184, 241NYS290.
765-4 229AppDiv184, 241NYS290.
765-11 229AppDiv184, 241NYS290; 137Misc444, 242NYS185.
766-21 178Minn442, 227NW891; 241 NYS729. [a] 37F(2d)103(1stcase). [g] Where plaintiffs admitted no part of answer, court will look only to complaint. 37F(2d)49. [h] Well-pleaded allegations of opposite party are to be taken as true. 37F(2d)72. [i] Supreme court is authorized to look to pleadings for facts on motion for judgment on original proceedings. Mo 24SW(2d)629. [j] Trial court is not bound by averments in complaint established otherwise by appellate court. NJ 148A790. [k] Allegations of answer must be taken as true. 228AppDiv396, 240NYS123. [l] Allegations contrary to facts judicially noticed are not considered as true. CalA 292P175.
767-33 See also Kan 287P269 (only matters essential to cause of action need be considered). But see 34 OhA38, 170 NE379.
768-47 Mo 23SW(2d)1058; 34 OhA38, 170NE379.
768-48 Nev 292P587. [b] Meaning of foreign statute pleaded in defense is question of law. 138Misc266, 245NYS 372.
769-58 [e] Motion to strike pleadings opens up whole record. 37F(2d)593. [f] Allegations in complaint are to be regarded as true in motion to dismiss complaint for insufficiency. 134Misc863, 237NYS230.
769-60 228AppDiv546, 240NYS582.
770-69½–New. Error in overruling motion to dismiss which was in effect general demurrer rendered all subsequent proceedings nugatory. 169Ga192, 149 SE873.
770-71½–New. Disposition of issue need not be forced by defendant moving to strike amended statement. 299Pa 293, 149A492.
771-86 Pa 151A811 (court should protect original plaintiff by staying judgment).
772-12½–New. Where order to strike is made by circuit court judge, also in capacity of Supreme Court commissioner, designation as circuit court judge may be disregarded. NJ 148A721.
773-27 Wash 287P211.
774-57 [b] Order requiring petition be made more definite and certain is not final judgment.–31F(2d)769.
774-60½–New. Denial of defendant's motion respecting first cause of action, which was affirmed on appeal, did not have effect of declaring defense to first cause of action of plaintiff insufficient. 136Misc507, 240NYS11.
774-65 [c] Petition is taken as true where answer is stricken. Kan 290P3.
775-77 [e] 169Ga781, 151SE490.
775-82 [b] Effect upon proof and issues.–TexCivA 26SW(2d)295.
776-92½–New. Order made after term requiring petition to be made more definite and certain is not under court's control. 31F(2d)769.
776-2 CalA 288P863.
777-3 NJ 148A762.
780-52 TexCivA 29SW(2d)529.
781-58½–New. Questions of title and ownership may be raised only in actions wherein they are the direct issues. 137Misc287, 242NYS516.
781-60 [c] Joinder of issue without replication held sufficient.–98Fla792, 124 S275.
782-95 232Ky87, 22SW(2d)444. [b] Party is entitled to have case tried on issues made by pleadings.–221Ala58, 127 S847. [c] Bill of particulars and affidavit of merits may raise issue. Ill 173NE 270.
783-10 229AppDiv318, 241NYS300.
784-26 86Colo 526, 283P537; MoA 27 SW(2d)718; TexCivA 28SW(2d)312 (general denial to cross-action).
784-29 MoA 21SW(2d)777. [a] General denial, without plea of non est factum does not raise issue of execution of instruments sued on. TexCivA 29SW (2d)529.
785-38 SD 228NW407.
785-54 170La41, 127S358; Nebr 230 NW490 (insolvency); TexCivA 20SW (2d)849.
785-55 TexCivA 20SW(2d)849.
786-56 43F(2d)72; TexCivA 21SW(2d) 326.
786-57 38F(2d)457 (admission by counsel).
786-62 144 Okl 25, 288P942.
786-63 38F(2d)677.
786-64 Iowa 228NW646.
787-70 130Kan522, 287P269; MoA 21 SW(2d)937.
787-72 TexCivA 26SW(2d)726.
788-85 253NY17, 170NE477.
790-5 CalA 285P734.
791-15 Fla 130S18; 12LaA341, 125S 138; 137Misc287, 244NYS449; 140 Okl 19, 282P120(2dcase) (in absence of amendment); 141 Okl 210, 284P642; 144 Okl 25, 288P942; Va 153SE865. [a] Decisions of foreign state cited but not pleaded will not be considered. MoA 17SW(2d)392.
793-17 36F(2d)161; Conn 152A142. [a] Presumptions are irrelevant and inadmissible when they do not correspond to allegations and facts in issue. 51 Philippine676.
794-21 [a] Parol evidence to vary consideration in written instrument is admissible though not pleaded. TexCivA 20SW(2d)803.
795-37 230Ky194, 18SW(2d)1006.
796-56 Can [1930] 1DomLR63.
797-1½–New. Plaintiff is entitled to offer evidence in reply to any defense given in evidence by defendant. 35F(2d) 907.
798-10 [b] Defense of no right of action in plaintiff at time action brought is raised by general issue. 156Miss396, 124S437, 66ALR614.
799-30 253NY166, 170NE532; 35Porto Rico 183; TexCommnA 29SW(2d)984; TexCivA 28SW(2d)312; TexCivA 31 SW(2d)518.
800-33 MoA 21SW(2d)907; MoA 26 SW(2d)1020.
800-41 TexCivA 26SW(2d)377.
800-43 41F(2d)35.
802-66 Mo 31SW(2d)28.
803-88 136Misc755, 240NYS816.
804-4 99Fla391, 126S771; 254 IllA489; 144 Okl 25, 288P942; TexCivA 25SW (2d)947.
805-5 CalA 290P534.
805-6 86Colo 435, 282P568; 99Fla371, 126S759; 99Fla928, 128S25; 41GaA24, 152SE122; MoA 28SW(2d)127; Tex CivA 23SW(2d)786.
805-9 36F(2d)219; IndA 169NE68; MoA 28SW(2d)687; Mont 292P909; Pa 151A678.
806-11 Nebr 226NW802.
807-14 Mo 31SW(2d)978. See also Mont 292P909.
807-17 CalA 286P733.
807-21 Wash 289P44. [a] (7) Other illustrations. 36F(2d)702.
808-36 Mont 292P909.
808-39 Pa 151A678.
810-50 SD 226NW948; TexCivA 23SW (2d)507; TexCivA 25SW(2d)898; TexCivA 29SW(2d)855.
810-53 Mont 292P909.
810-54 Okl 291P114.
813-81 AlaA 130S520.
813-83 AlaA 130S520.
815-12 12LaA359, 125S481.
820-26 197NC735, 150SE510.
820-27 Oh 171NE108.
821-34 197NC735, 150SE510.
821-45 197NC735, 150SE510.
822-58 144 Okl 284, 290P1106.
823-63 144 Okl 284, 290P1106.
824-80 169La1085, 126S667.
825-4 221Ala48, 127S802.
826-38 Va 154SE568.
827-59 181Ark790, 27SW(2d)985 (unnecessary to plead surprise).
827-62 TexCivA 28SW(2d)871.
827-63 Mo 30SW(2d)471.
828-68 LaA 130S654.
828-74 136Misc656, 241NYS445.
830-28 36F(2d)841.
831-52 IndA 172NE131; 140 Okl 292, 283P563(2dcase); 132 Or345, 285P259; 157SC85, 153SE640.
832-72 MoA 27SW(2d)1036.
832-77 42F(2d)65.
833-12 86Colo 391, 282P255; 249Mich 685, 229NW479; MoA 31SW(2d)546; 198NC389, 151SE877.
835-18 170La483, 128S284; MoA 28SW (2d)456. [c] Joint defendants.–Where one joint defendant denies liability plaintiff does not waive defect in other's answer by going to trial as if both had tendered denial. Mo 30SW(2d)118.
835-14 CalA 289P245; TexCivA 31SW (2d)150.
838-38 SD 231NW904; Ariz 291P1005.
838-41 TexCivA 32SW(2d)224.
838-44 ND 231NW888.
839-57 170Ga691, 153SE767.
840-58 Ida 291P1060; 197NC735, 150 SE510.
840-61 But see 180Minn151, 230NW 634.
840-62 40GaA685, 151SE236.
840-64 103CalA140, 284P241.
841-72 38F(2d)624; TexCivA 31SW (2d)1093. [a] (4) Other instances.–40F (2d)260.

842-98 155Miss716, 125S111 (counterclaim).
843-7 40F(2d)228; 180Ark844, 22SW(2d)1020; 41GaA189, 152SE141; 12LaA525, 125S330; 132 Or345, 285P259.
843-9 40F(2d)228 (where pleading fails to state cause of action); 169Ga864, 151SE799.
843-10 Ariz 291P1003; LaA 126S235; MoA 27SW(2d)49.
843-14½ New. Evidence held not to show waiver of bad plea of contributory negligence. Mo 26SW(2d)929.
844-17 48 Ida351, 282P80.
844-18 235Ky810, 32SW(2d)401.
845-32 [b] (1) 179Minn467, 229NW575.
846-46 Mo 25SW(2d)472.
847-69 Mo 25SW(2d)472.
847-74 Utah 290P367.
848-75 136Misc526, 241NYS64.
848-95 Mont 287P169; TexCivA 28SW(2d)214.
849-97 [a] MoA 24SW(2d)175.
849-19 TexCivA 27SW(2d)561.
850-30½-New. Refusal to permit correction of error, in sustaining demurrer, by permitting evidence to go to jury, may waive error. 156Miss410, 124S786.
850-30½-New. Error in sustaining demurrers has been held not waiver, by agreement to carry them through case. TexCivA 22SW(2d)341.
850-36 41GaA24, 152SE122.
852-61½-New. Overruling exceptions to petition held not error, where both parties offered proof without claim of surprise. TexCivA 22SW(2d)1080.
853-69 Mo 26SW(2d)946.
853-70 Mo 26SW(2d)946; 86Mont228, 283P226.
853-72 41F(2d)1; Ill 172NE19.
854-73 MoA 22SW(2d)185. [c] MoA 22SW(2d)185.
855-81 MoA 28SW(2d)456.
855-83 337 Ill 173, 169NE1.
855-97 [a] **Failure to insist that trial court pass on motions** to make more definite and certain and to strike waives them. 231Ky244, 21SW(2d)291.
855-1 87Colo 451, 288P623.
856-5 87Colo 451, 288P623.
856-15 But see 227AppDiv444, 238NYS139.
857-18 MoA 30SW(2d)784.
857-26 40GaA783, 151SE528(2dcase); 41GaA4, 152SE116; Mo 23SW(2d)45.
857-28 [b] **Pleading in bar**, to amended complaint, that cause of action was changed, waived irregularity, absent motion to strike. 86Mont423, 283P1114.
857-29 Mo 23SW(2d)45; MoA 27SW(2d)1036.
858-31 Mo 23SW(2d)45 [quotCyc].
858-37 86Mont150, 282P494.
859-66 LaA 1298447 (holding if cause of action is established by evidence unobjected to, it is acted on by court as if formally pleaded).
860-63 MoA 23SW(2d)644.
860-70 [b] (1) CalA 288P870. [c] (3) Other cases under rule. 221Ala145, 127S835.
861-72 Mo 31SW(2d)978; MoA 22SW(2d)884; TexCivA 29SW(2d)855; TexCivA 31SW(2d)196. [b] **Materialman suing on contractor's bond** is not required to object to introduction of sureties' agents' power of attorney, unsupported by pleadings. TexCivA 29SW(2d)493.
862-88 48 Ida447, 282P864; Mo 31SW(2d)1041; TexCivA 31SW(2d)1093.
862-89 Kan 292P942.
862-92 CalA 290P534.
863-11 TexCivA 28SW(2d)255.
863-33 12LaA525, 125S330; LaA 126S572; LaA 1298447; TexCivA 26SW(2d)947; TexCivA 27SW(2d)294; TexCivA 29SW(2d)905.
864-34 35PortoRico 879.
864-37 133 Or663, 288P1003.
864-41 198NC669, 153SE163.
864-42 232Ky680, 24SW(2d)553; TexCivA 27SW(2d)294.
864-43 CalA 289P221; 48 Ida351, 282P80; 133 Or26, 286P593; TexCivA 24SW(2d)491.
866-52 232Ky680, 24SW(2d)553.
867-65 [a] **Allegations of answer of defendant considered** in supplying omissions in cross-petition by reference incorporating allegations of answer. Kan 291P777.
867-70 TexCivA 14SW(2d)290 (defects relating to parties may be corrected by exception).
868-81 LaA 1288536.
868-82 CalA 289P859.
868-83 221Ala51, 127S832; TexCivA 28SW(2d)255; Wis 232NW566.
868-84 [b] **Without account being in evidence** proof consideration of note was balance due on open account did not extend pleadings. LaA 1288536.
869-90 221Ala51, 127S832; 221Ala283, 128S376.
869-93 231Ky202, 21SW(2d)254(2d case).
869-1 231Ky160, 21SW(2d)250. [b] **Unless defects prejudiced substantial rights of adverse party** verdict will cure defective pleading. 231Ky160, 21SW(2d)250.
872-28 MoA 24SW(2d)171.
872-30 Mo 29SW(2d)103; Utah 284P997.
873-35 103CalA656, 284P990; 255 IllA465; 129Kan624, 284P401; 231Ky808, 22SW(2d)259; Mo 23SW(2d)45; Mo 25SW(2d)479; MoA 20SW(2d)928; MoA 22SW(2d)185; MoA 22SW(2d)872; MoA 24SW(2d)1069; MoA 25SW(2d)491; TexCivA 32SW(2d)655.
876-38 Ida 291P1060; MoA 25SW(2d)566.
877-44 235Ky289, 30SW(2d)1105.
877-46 255 IllA93; 256 IllA111.
880-77 Mo 25SW(2d)472.
880-93 But see 103CalA32, 283P946.
881-1 99Fla371, 126S759.
881-6 Mo 26SW(2d)946; MoA 27SW(2d)435.
882-8 MoA 22SW(2d)872.
885-45 248Misc387, 227NW764 (trial on wrong theory).
886-58 131 Or478, 283P34(1stcase).

PLEDGES

895-4 39F(2d)625; Fla 1298334. [a] (2) Delivery by debtor of "collateral security" and acceptance by creditor constitutes "pledge." TexCivA 22SW(2d)765.
896-8 CalA 288P884.
896-26 [a] **Pledgee of ring as security becomes bailee for hire.**–156Miss842, 127S291.
901-14 96PaSuper143.
905-94 39F(2d)625.
907-22 35F(2d)152 (setting aside notes by bank as security for county deposit).
910-72 39F(2d)625; 170Ga814, 154SE260; 41GaA685, 154SE298; 253NY477, 171NE749; TexCivA 22SW(2d)765.
913-97 170Ga814, 154SE260.
913-99 TexCivA 22SW(2d)765.
914-17 [a] CalA 284P977.
914-18 [b] **Pledge of incorporeal property** may be made by written assignment. TexCivA 22SW(2d)765.
915-43 CalA 284P977; 300Pa280, 150A599.
916-48 253NY477, 171NE749 (agent of pledgor is also agent for pledgee). [c] **Agent has custody but not possession in proper sense** sufficient to constitute possession necessary to support pledge. 253NY477, 171NE749.
917-64 [a] (2) **Promise of owner to hold particular thing thereafter for use of pledgee is insufficient.** 253NY477, 171NE749.
919-96 180Ark470, 21SW(2d)853.
919-9½-New. To constitute valid pledge of securities, there must be mutual assent or acceptance. 154SC267, 151SE579.
919-15 39F(2d)625; TexCivA 22SW(2d)765.
920-38 Ariz 288P7.
922-65 CalA 288P884; Fla 1298334; 155SC436, 152SE658.
925-10 CalA 292PC65.
928-66 96PaSuper143.
933-41 253NY477, 171NE749.
936-91 140 Okl 282, 283P242, 68ALR900.
942-80 38F(2d)96.
943-81½-New. To substitute accounts for accounts specifically assigned, there must be an agreement to substitute and actual substitution. 38F(2d)254.
944-96 156Miss842, 127S291 (dealing with property).
946-29 Fla 1298334.
946-32 156Miss842, 127S291.
946-33 156Miss842, 127S291.
947-40 156Miss842, 127S291.
948-60 [a] (3) **To sustain finding that loss was caused by lack of ordinary care.** 156Miss842, 127S291.
950-21 [d] **Necessity of pledge to authorize action.**–253NY477, 171NE749.
952-55 TexCivA 27SW(2d)1112 (negligence of pledgee is immaterial).
953-81 MoA 22SW(2d)1052. [a] **In absence of restrictions in terms of pledge**, holder may sue in his own name. TexCivA 22SW(2d)765.
954-14½-New. A pledgee need not reduce his claim against pledgor to judgment as condition precedent to suing on collateral security. TexCivA 22SW(2d)765.
955-31 [a] (1) LaA 1298387.
956-35 [b] **Evidence held insufficient** to take issue of bad faith in sale to jury. Ariz 288P7.
959-99 [a] IndA 169NE884 (to show ownership at time of conversion).
960-21 Ariz 288P7.
964-4 [a] **Note as collateral for future advancements is completely relinquished** by assignment to trustee for collection. 155SC436, 152SE658.
965-34 156Miss842, 127S291.
965-43½-New. Possession of pledge by assignor is in nature of trust for benefit of assignee of debt. 156Miss842, 127S291.
966-64 170La609, 128S651 (repledgee is not liable to original pledgor on sale for nonpayment of note secured).
969-29 LaA 1298387.
971-59 14PaDist&Co 280.
972-71 TexCivA 28SW(2d)1112.
972-72 TexCivA 27SW(2d)1112.
972-81 TexCivA 27SW(2d)1112.
973-1 But see LaA 1298387.
974-22 [c] **Time from which interest runs.**–14PaDist&Co 280.
975-28 LaA 1298387.
976-48 LaA 1298387. [b] **If pledge is not redeemed, it continues to be valid pledge.** 221Ala478, 129S840.
977-70 Fla 1298334.
980-28½-New. Pledgee can protect his special property in pledged note by action in equity or under hypothecation statute. 155SC436, 152SE658.
980-29½-New. Where the legal title to the collateral is in the creditor who intrusts it to his debtor, the trust is enforceable at law, but if the title is in the debtor holding in trust for the creditor, the trust is enforceable only in equity. NJ 147A863(2dcase).
980-34 But see TexCivA 28SW(2d)1104.
980-39 TexCivA 28SW(2d)1104.
983-85 [a] **Consent to conditions set by pledgee.**–208Cal606, 283P936.
987-76 CalA 292PC65.
988-86 [a] 136Misc139, 239NYS26.
990-21 129Kan199, 282P591 (that plaintiff has not availed himself of full benefit of collateral held is not complete defense).
991-50½-New. Right of party to sue in his own name on note pledged depends on necessity of protecting security in interest of pledgor. 155SC436, 152SE658 (pledgee cannot sue on pledged note after debt paid since not real party in interest).
994-99 [c] **Sale will not be enjoined** where collection would otherwise require numerous suits and unnecessary expense and delay. TexCivA 26SW(2d)925.
995-26 Ariz 288P7.
996-27 Ariz 288P7.
999-89 NJCh 148A652.
999-96 [a] **Pledgor entitled to redeem** property where pledgee purchased at sale without notice to him. NJCh 148A652.
1001-22 [c] **Notice held insufficient.**–NJCh 148A652.
1003-77½-New. Sale of note pledged as security is not invalid under laws of some jurisdictions because made without physical presence of draft issued therefor without payee's knowledge. Ariz 288P7 (stating California law).
1004-84½-New. Sale of pledged securities is governed by law of state where pledge agreement was made. Ariz 288P7.
1004-91 Ariz 288P7.
1005-97 [b] **As to guarantor of debt secured**, pledgee of collateral occupies

trust relation. **Ariz** 238P7.
1009–83 **Ariz** 288P7.
1016–41 [b] **Evidence held insufficient** to go to jury on defense of fraud. 143 **Okl** 140, 287P1003.
1018–88 [b] **Where sale of securities would be inequitable,** pledgor will be directed to sue thereon for benefit of pledgee. 136**Misc**466, 240**NYS**111.
1019–94 **TexCivA** 23SW(2d)886.
1019–95 **MoA** 25SW(2d)523.
1022–44 [a] (2) Where maker of collateral note pledged with bank is solvent, bank has no authority to compromise note. **TexCivA** 27SW(2d)1112.
1026–19 **TexCivA** 28SW(2d)1104.
1031–14 [b] (2) **Can** [1930] 4**DomLR** 18(1stcase).
1033–37 **Iowa** 231NW643.

POISONS

1049–27½–New. Sale of narcotic may prove crime under statute without element of intent. **Wash** 287P16.
1050–37 [i] **Presumption of possession by accused** is only applicable where occupation, control, or possession is of such nature as to support charge of illegal possession. **Ont** [1930] 3**DomLR** 925.
1051–50½–New. Jurisdiction of Detroit recorder's court in prosecution for possession of narcotics. 252**Mich**48, 232 NW748.
1054–23 **Utah** 289P100. [a] (1) **CalA** 285P349(1stcase). [b] (1) **OklCr** 283P 1030.
1060–53½–New. Words "any person" used in statute prohibiting sale, barter, or exchange of narcotics refers to all persons. 39F(2d)440.
1060–61 39F(2d)440 (statute held applicable only to "dealers").
1062–7 42F(2d)721. [a] (2) 38F(2d) 632; 39F(2d)440; 43F(2d)353. (6) 39 F(2d)440. [k] **Count held insufficient to identify specific offense.**–43F(2d)353.
1063–8 42F(2d)721.
1063–10 42F(2d)721.
1065–66 See also 42F(2d)721.
1066–96 [a] 38F(2d)779.
1066–99 [a] 36F(2d)954(1stcase).
1069–88 37F(2d)846.
1069–90 [a] **Statute must be strictly construed.**–40F(2d)557.
1069–94 37F(2d)77 (proof required for conviction).
1069–95 37F(2d)77.
1069–5 37F(2d)77.
1070–7 37F(2d)846.

POLARIZATION

1070–8 See 181**Fed**990, 1002.

POLICY OF THE LAW

1073–70 89**CalA**47, 264P529; 166**Ky** 730, 739, 179SW1074[citCyc].

POLITICAL

1075–22 [a] (2) Unincorporated voluntary association of persons sponsoring certain ideas of government or maintaining certain political principles or beliefs in public policies of government. 181**Ark**428, 26SW(2d)66, 70**ALR**1480.

POSSESSION

1094–21 **Mo** 31SW(2d)1059.
1094–22 **Mo** 31SW(2d)1059.
1096–50 [c] **"Constructive possession" distinguished.**–(1) 180**Ala**128, 60S273; 59**NY**136. **Actual possession affecting right to quiet title** see Quieting Title § 107.

POSSESSORY WARRANT

1111–15 [a] **Possession of agent is sufficient.**–40**GaA**832, 151**SE**664.
1115–94 41**GaA**490, 153**SE**785(1stcase).
1115–95 41**GaA**490, 153**SE**785(1stcase).
1115–5 But see 40**GaA**813, 151**SE**538.
1116–16 170**Ga**91, 152**SE**110.

POST OFFICE

1150–42 [a] **Government has been held entitled to recover only nominal amount** where no damages were suffered. 41 F(2d)229.
1158–13 226**US**53, 33**SCt**6, 57**L ed**119 [aff 34**AppDC**521, 535].
1158–16 44F(2d)227.
1158–19 44F(2d)227.
1159–35 44F(2d)227.
1160–53 40F(2d)451.
1161–84 40F(2d)451.
1164–51 44F(2d)227.
1165–63 44F(2d)227.
1165–70 44F(2d)227.
1175–5 [a] **Construction and application.**–280**US**173, 50**SCt**148, 74**L ed**356.
1191–14 39F(2d)564.
1191–24 [d] **Serious instruction** regarding sex matters, unless clearly indecent, is not within prohibition of statute. 39F(2d)564.
1191–25 [a] **Matter held not obscene.**–39F(2d)564.
1192–34 39F(2d)564 (personal motive of defendant is immaterial).
1192–35 39F(2d)564 (defendant's belief is no defense).
1196–12 [a] **Portions of magazine article alleged to be obscene** are properly read to jury. 35F(2d)25.
1196–23 [a] **Instructions properly refused.**–35F(2d)25.
1196–28 39F(2d)564.
1200–11 [c] **Inscriptions held not to render envelopes nonmailable.**–40F(2d) 451. [d] **Libel Law determines** whether words inscribed on envelopes are defamatory. 40F(2d)451.
1200–12 [b] **To be defamatory,** words on envelopes must charge some identifiable person with something. 40F(2d) 451. [c] **Statute has been held not applicable** to defamation of state. 40 F(2d)451.
1203–64 41F(2d)193.
1203–65 41F(2d)193; 41F(2d)221.
1205–94 [c] **Good faith** is complete defense. 36F(2d)16.
1205–2 36F(2d)766.
1206–21 38F(2d)406 (letter mailed to lull recipient into false sense of security).
1206–23 41F(2d)440.
1206–24 [c] **Whether corporation has been conducting legitimate business for substantial time is important** in considering sale of stock as scheme to defraud. 36F(2d)16.
1206–25 38F(2d)581; 41F(2d)193.
1207–26 40F(2d)363.
1208–44 [a] (13) Other illustrations. 36F(2d)441. [e] (1) 41F(2d)440.
1209–45 [d] **Business adversity does not necessarily spell fraud.**–36F(2d)16.
1210–64 [a] (8) Other instances. 44 F(2d)134.
1210–73 44F(2d)134.
1211–79 [a] **Loose statement of elements** will not invalidate indictment. 35F(2d)794.
1212–93 35F(2d)794; 41F(2d)193.
1212–98 35F(2d)794.
1213–99 [a] **Indictments held sufficient.**–35F(2d)794.
1213–11 See also 44F(2d)134.
1213–18 44F(2d)134.
1216–88 [a] (3) 36F(2d)766.
1217–90 41F(2d)193; 44F(2d)134.
1217–97 38F(2d)406; 41F(2d)440. [h] **Evidence held inadmissible.**–38F(2d) 406.
1217–3 35F(2d)689 (amount paid for and received by victims for stock); 41 F(2d)157; 41F(2d)193. [d] **Financial statement not identified** as having been used in scheme is inadmissible. 34 F(2d)413. [e] **Telegrams** from state superintendent of mines to curb exchange may be admissible to explain falsity of defendant's excuses. 35F(2d) 689. [f] **Evidence held inadmissible.**–36F(2d)16.
1218–8 [a] (5) To show lack of good faith. 38F(2d)406. (6) Director's letters of resignation revealing scheme. 35F(2d)689. (7) Other instances. 38 F(2d)406.
1219–11 43F(2d)944. [b] Proof of losses in other ventures is admissible. 43F(2d)944.
1219–20 38F(2d)406.
1220–24 But see 36F(2d)903.
1220–26 41F(2d)221.
1220–27 [a] **If any one of material representations made was false and so known** and purchases made in reliance thereof, conviction must be sustained. 38F(2d)406. [b] **Proof of all alleged false representations is unnecessary.** 35F(2d)794.
1220–29 40F(2d)363.
1220–30 41F(2d)193 (mailing of letter).
1220–31 [a] (6) Use of mails by defendant though not disclosing that he deposited mail in post office or was present when it was done. 36F(2d)441.
1220–32 35F(2d)689; 38F(2d)581; 41 F(2d)157; 41F(2d)193; 41F(2d)221; 41F(2d)440; 43F(2d)944.
1220–33 33F(2d)115; 36F(2d)16; 41 F(2d)193.
1220–38 38F(2d)406; 41F(2d)157; 41 F(2d)193. [a] **Evidence held sufficient to make prima facie showing** of letter being mailed at defendant's instance. 38F(2d)406.
1220–41 [b] **Instructions.**–44F(2d)134.
1220–44 [e] **Instructions properly refused.**–38F(2d)406. [f] **Instruction held justified** by allegations. 35F(2d)794. [g] **Instructions held proper.**–35F(2d) 794. [h] **Instruction improperly refused.** –35F(2d)454.
1221–46 44F(2d)134.
1221–48 35F(2d)27.
1221–52 [b] **Where evidence is uncontradicted,** submission of question is erroneous. 36F(2d)16 (whether dividends paid had been earned).
1223–98 41F(2d)173.
1225–25 But see 41F(2d)173.
1228–7 9F(2d)237. [a] **Allegation of knowledge that property was stolen held sufficient.**–9F(2d)237.
1229–16 [b] (2) 10F(2d)355.
1232–71½–New. Postmaster may accept deposit to buy postage due stamps. 41F(2d)173.
1235–36 [g] **Possession of stolen stamps.**–200**Fed**494, 118**CCA**598 (evidence insufficient). [h] **Possession of stolen war savings stamps** is not offense against United States unless stamps are property of government. 278**Fed**349.

POTESTATIVE CONDITION

1239–60 [a] 170**La**55, 127S362.

POWERS

1252–63 235**Ky**658, 32SW(2d)8.
1253–66 But see 235**Ky**658, 32SW(2d)8.
1253–70 13**PaDist&Co** 616.
1253–76 13**PaDist&Co** 616.
1254–80 13**PaDist&Co** 616.
1255–3 13**PaDist&Co** 616.
1255–4 13**PaDist&Co** 616.
1259–50 [b] (3) By donee of power to convey estate for support joining in trust deed to secure note of adult son and not for self. **Mo** 31SW(2d)778.
1260–60 **Or** 291P352. [a] **Del** 152A 117; **Or** 291P352, 353 [citCJ].
1260–63½–New. In construing instruments conveying power to convey real estate courts will enlarge limited to general power or cut down general power where intent is apparent. **Or** 291P 352.
1269–88 **Mo** 31SW(2d)778.
1271–20 **Or** 291P352, 354 [quotCJ].
1273–67 **Mass** 173**NE**437.
1276–20 235**Ky**658, 32SW(2d)8. [a] (1) 111**Conn**594, 151A252.
1277–24 111**Conn**594, 151A252.
1277–34 **Mo** 31SW(2d)778.
1280–71 221**Ala**150, 128S149.
1280–79 [c] **In Alabama.**–221**Ala**150, 128S149.
1285–41 221**Ala**150, 128S149; **Ill** 173 **NE**345.
1289–3 34 **OhA**348, 171**NE**245 (intent not presumed).
1289–12 34 **OhA**348, 171**NE**245.
1293–33 **Mo** 31SW(2d)778.
1295–39 34 **OhA**348, 171**NE**245.
1298–74 [a] **Validity of exercise of power of appointment** must be determined by reading instrument purporting to exercise power into document granting power. 138**Misc**42, 244**NYS** 673.
1298–76 111**Conn**594, 151A252; 137 **Misc**518, 244**NYS**130.
1298–82 221**Ala**150, 128S149.
1305–77 13**PaDist&Co** 667.
1305–78½–New. If testamentary power of appointment granted in trust deed is valid, property passes directly from trustee to appointees. 136**Misc** 688, 242**NYS**207.

1306–89 Mo 31SW(2d)778. [b] **Purchaser under power violating testamentary condition concerning priorities** has rights similar to tenant at will. Me 150A319.

PRACTICE

1315–63 [i] **Foreclosure of mortgages by advertisement** where attorney's fee is included in costs constitutes practicing law. Minn 232NW318. [j] **Proceedings in probate court.**–Minn 232NW 318.

PREMISES

1328–4 [a] (4) Furniture and fixtures included. DC 41F(2d)115.

PRIMA FACIE

1346–99 CalA 290P1042.
1347–10 CalA 290P1042.

PRINCIPAL AND SURETY

50 C. J.—12–5 128Me495, 148A796 (liability of surety is secondary to liability of principal).
13–16 [a] (8) One bound with principal for payment of money or performance of duty or promise. Fla 130S12.
15–47 [b] (7) Other instances. 232Ky 844, 24SW(2d)912.
16–58 249Mich518, 229NW506.
18–92 13LaA244, 126S587.
20–21 MoA 24SW(2d)1065.
27–63 [a] 128Me495, 148A796. [c] **Where maker's wife and father each furnished collaterals** to secure one-half of loan to maker, they were each cosureties as to note. 128Me495, 148A 796.
28–84 128Me495, 148A796.
28–85 128Me495, 148A796.
32–50 CalA 286P1103.
47–44 [b] **Liability of surety is unaffected** by fact that consideration may take one of several forms or is recited in instrument. Wis 233NW442.
47–47 180Ark869, 24SW(2d)326.
47–55 Kan 292P935.
50–83 Wis 233NW442.
50–95 CalA 288P879; 142 Okl 230, 286 P907.
61–83 Wis 233NW442.
65–77 180Ark869, 24SW(2d)326(2d case); TexCivA 29SW(2d)493.
66–88 221Ala424, 129S276.
70–68 NC 153SE597.
71–84 OhA 173NE241.
72–90 38F(2d)674; Cal 285P1045; CalA 288P827; 234Ky764, 29SW(2d) 29; MoA 26SW(2d)1018.
72–93 300Pa507, 150A900; 157SC221, 154SE167; Wash 290P813.
73–96 136Misc253, 242NYS682.
73–98 256 IllA305.
73–3 [a] (3) Ala 130S197.
74–11 [e] **Surety assuming performance of principal's contract** becomes subject to all his liabilities. 157SC221, 154 SE167.
75–29 TexCommnA 29SW(2d)1004.
76–48 228AppDiv188, 239NYS530.
76–51 136Misc762, 240NYS849.
77–52 Cal 285P1045; 228AppDiv188, 239NYS530; 136Misc762, 240NYS849.
77–59 135Misc560, 239NYS340.
78–64–65 MoA 26SW(2d)1018.
78–71 13LaA156, 127S433; Mo 26SW (2d)785; 13PaDist&Co 491; Tex CommnA 24SW(2d)385.
79–72 Mo 26SW(2d)785; TexCommnA 24SW(2d)385.
79–73 Iowa 232NW79; TexCommnA 24SW(2d)385.
80–75 NC 155SE731.
80–76 13LaA156, 127S433; 135Misc 560, 239NYS340.
81–83 Fla 130S440; Mo 32SW(2d)572.
82–85 37F(2d)279.
82–86 Cal 285P1045; MoA 26SW(2d) 1018.
83–88 Mo 32SW(2d)572.
86–20 38F(2d)674.
86–23 160Tenn603, 28SW(2d)346.
86–24 160Tenn603, 28SW(2d)346. [b] (2) Contractor's bond is not made operative before date fixed for commencement of work by his purchase of equipment. MoA 30SW(2d)1035.
89–87 40F(2d)606.
90–96 NJ 148A738. [d] **Only after surety has failed to make good** after defalcation has been called to his attention is surety liable. 44F(2d)62.
91–1 But see 221Ala1, 127S204.
91–4 221Ala1, 127S204.
91–12 38F(2d)674.
92–21 40F(2d)606.
93–29 14PaDist&Co 280.
94–50 CalA 293P140.
94–63½–New. Surety cannot release himself from undertakings by his own acts and conduct without obligee's consent. Or 290P556.
99–67½–New. Adjudication of surety's insolvency before bond became operative terminated bond. MoA 30SW(2d) 1035.
101–6 TexCommnA 29SW(2d)1004.
101–19 NC 155SE263.
102–28 198NC530, 152SE493(2dcase).
103–37 Cal 285P851.
103–56 But see NJ 148A738.
104–72 181Ark105, 24SW(2d)964.
105–75 181Ark105, 24SW(2d)964.
105–80½–New. Creditor may not retain a payment made upon an open and running account to apply on future purchases. 142 Okl 103, 285P949.
105–85 233Ky217, 25SW(2d)359.
110–50 233Ky217, 25SW(2d)359.
110–52 CalA 293P140; 233Ky217, 25 SW(2d)359; SD 229NW925. [b] (7) Failure to record purchase-money mortgage. 38F(2d)674. [e] **Reasonableness of time for recordation** of mortgage relative to release of surety by failure to record mortgage. 38F(2d)674.
116–37 38F(2d)674; Ala 130S197; Fla 130S12; 136Misc762, 240NYS849 (estate of surety).
118–49 155SC152, 152SE179.
121–87 Ala 130S197.
123–19 221Ala424, 129S276; TexCommnA 26SW(2d)187.
127–10 See also Ala 130S197.
130–39 Fla 130S12; 233Ky217, 25SW (2d)359; LaA 129S440.
131–41 See also 256 IllA230.
132–61 256 IllA230.
133–68 250Mich652, 231NW65.
137–26 Fla 129S577; 137Misc289, 241 NYS738.
138–31 Fla 129S577; MoA 31SW(2d) 98; MoA 31SW(2d)234. [e] **Where second extension specifies no definite period,** parties are understood as contemplating repetition of first extension. MoA 31SW(2d)234.
142–87 221Ala424, 129S276.
143–98 Fla 129S577; Minn 233NW12; SD 229NW925.
144–11 [a] (5) Where renewal note executed only by maker of original was never accepted by holder in lieu of original, there was no extension. TexCivA 30SW(2d)559.
145–30 CalA 288P879; LaA 129S440; MoA 31SW(2d)98; MoA 31SW(2d)234; 137Misc289, 241NYS738.
146–39 MoA 31SW(2d)234.
147–54 LaA 129S440.
150–15 [c] **Surety must show that fact of suretyship** was communicated to creditor. Me 151A138.
151–17 MoA 31SW(2d)234.
151–21 Fla 130S12. [b] **Payee may agree to extension** either before or after maturity, and surety cannot protest. LaA 129S440.
153–37 CalA 292P977 (benefit to surety is immaterial); SD 229NW925.
153–40 Me 151A138.
155–61 221Ala424, 129S276; TexCivA 27SW(2d)284.
155–62 232Ky844, 24SW(2d)912.
158–18 Alta [1930] 3DomLR988.
161–78 [a] (2) Failure to renew. Alta [1930] 3DomLR988.
163–28 GaA 155SE770(1stcase).
164–47 La 129S671; Alta [1930] 3Dom LR988.
165–57 TexCommnA 24SW(2d)385.
165–64½–New. A surety has the right to have retainage percentage applied to exoneration of losses sustained by breach of conditions of bond. Tex CommnA 24SW(2d)385.
170–35 38F(2d)674; 233Ky217, 25SW (2d)359; 250Mich652, 231NW65; Tex CivA 28SW(2d)848. [c] (3) Bills and notes. CalA 288P879.
172–69 234Ky591, 28SW(2d)787, 70 ALR335.
173–81 TexCivA 27SW(2d)284.
174–96½–New. Contractual waiver of diligence in bringing suit against principal does not waive failure to bring any suit at all. 41GaA617, 154SE293.
174–97 Iowa 231NW376.
175–99 250Mich652, 231NW65.
175–4 TexCivA 27SW(2d)284.
175–16 220Ala452, 125S903.
181–63 157Miss890, 128S83.
182–69½–New. That principal is beyond jurisdiction does not prevent discharge. Iowa 233NW257.
182–70 157Miss890, 128S83.
184–23 250Mich652, 231NW65 (parol release).
187–99 Iowa 231NW376.
188–19½–New. Where action abates, defendant and surety companies should be discharged from liability on bond to secure judgment. 138Misc15, 245NYS 398.
191–95 157Miss518, 128S574 (rights not measured by mechanics' lien statute).
192–15 But see 136Misc762, 240NYS 849.
194–57½–New. That creditor had recovered large sums of money from principal may be defense to surety on fidelity bond. Va 154SE492.
194–57½–New. That bank officers including cashier violated statute in investing bank's capital does not defeat surety's liability on fidelity bond. Va 154SE492.
197–6 228AppDiv188, 239NYS530.
197–7 Mass 170NE921.
198–13 MoA 32SW(2d)292.
198–15 228AppDiv188, 239NYS530.
199–23 Mass 170NE921.
202–91 NJ 148A738 (materialman).
202–7 But see 137Misc155, 241NYS635 (surety has been held not entitled to join principal as party defendant).
203–19 170Ga555, 153SE419.
205–52 But see TexCivA 25SW(2d)176.
205–54 But see 198NC610, 152SE800.
206–74 198NC477, 152SE403 (performance of incidental agreement).
207–2 221Ala424, 129S276. [i] (4) Other instances. 99Fla525, 126S643.
210–59 41GaA537, 153SE615.
211–81 137Misc289, 241NYS738.
212–99 234Ky591, 28SW(2d)787, 70 ALR335.
212–3 40F(2d)606; TexCommnA 24SW (2d)385.
214–32 38F(2d)674.
215–46 [b] (7) Evidence of oral contract is not included in written contract. Utah 290P367.
215–48 [a] (5) Oral proof of notice to creditor to sue. Iowa 233NW257. [b] (15) Other instances. GaA 155SE770 (1stcase).
216–54 [a] (5) Notice by sureties to creditor to sue principal. 41GaA617, 154 SE293.
217–66 Iowa 233NW257 (clear and convincing). [b] **Case must be clearly proved.**–13PaDist&Co 491.
217–75 [a] LaA 129S440.
218–76 [c] **Evidence held sufficient** to support finding that notice of default was given to surety in time. Va 154 SE492.
218–85 [a] (14) Contents and service of notice by surety. Iowa 233NW257. (15) Other instances. LaA 129S440; TexCivA 25SW(2d)176.
218–86 [a] (17) Other instances. MoA 28SW(2d)368.
219–96 [a] (5) Other instances. LaA 129S440.
219–5 TexCommnA 26SW(2d)187.
219–6 TexCommnA 26SW(2d)187. [a] (9) Other instances. MoA 31SW(2d)98.
220–38 221Ala424, 129S276; MoA 28 SW(2d)368.
221–42 38F(2d)674.
221–46 MoA 28SW(2d)368.
221–70 [a] **Instructions approved.**–MoA 31SW(2d)234.
224–15 But see TexCivA 25SW(2d)176.
234–43 220Ala626, 127S219; 128Me495, 148A796.
239–37 42F(2d)15. [a] **Right of discovery as to sums received.** 42F(2d) 15.
239–39 [b] **Waiver of payment of full amount** does not affect obligation to reimburse surety. 42F(2d)15.
244–27 Ida 291P1069; 128Me495, 148A 796 (exonerate property).
246–54 Ida 291P1069.
247–75 Iowa 229NW716; MoA 32SW

(2d)292; 154SC456, 151SE745.
247-76 CalA 293P120; Fla 130S12; NC 155SE263.
248-91 154SC456, 151SE745. [a] **Surety has been held estopped by conduct** from denying validity of transfer, and was therefore not entitled to indemnity from deceased guardian's estate. 154SC 456, 151SE745.
250-36 Iowa 229NW716; 137Misc155, 241NYS635.
256-46 But see 170La10, 127S347(2d case).
256-47 170La10, 127S347(2dcase).
256-55 But see 170La10, 127S347(2d case).
258-91 Wash 286P651.
262-56 [a] (3) Other instances. Wash 286P651.
266-32 See also MoA 32SW(2d)292.
274-14 MoA 32SW(2d)292.
276-46 108WVa589, 152SE3.
279-98 232Ky844, 24SW(2d)912.
279-99 180Ark869, 24SW(2d)326.
280-4 198NC374, 151SE723.
280-17 But see 300Pa501, 150A895.
281-28 Ida 288P162.
281-29 Ida 288P162.
285-4 Ill 172NE7.
285-7 Ill 172NE7.
287-23 180Ark869, 24SW(2d)326; OhA 173NE241.
294-31 Ida 288P162.
295-37 Ill 172NE7.
295-38 Ill 172NE7.
295-54 198NC610, 152SE800.
299-4 Mo 30SW(2d)71.
304-94 Ala 130S791.
306-26 [a] **In Missouri.**–30SW(2d)71.
308-51 [a] **Matters not constituting defense.**–Wis 232NW566.
310-97½–New. Under statute providing that persons severally liable on same obligation may be included; it has been held that sureties can unite as plaintiffs. Wis 232NW566.
310-8 Mo 30SW(2d)71.
311-26 But see Wis 232NW566.
312-71 [c] **Evidence of insolvency of certain sureties** is admissible. Mo 30 SW(2d)71.
318-73 See also Va 155SE815.
318-93 See also MoA 30SW(2d)1035.
319-6 [b] (4) Other instances. MoA 30 SW(2d)1035.
319-12 But see MoA 30SW(2d)1035.

PRISONS

338-1 CalA 292P520.
338-3 143 Okl 181, 288P342 (sheriff).
338-13 143 Okl 181, 288P342 (isolate prisoner having contagious disease).
339-35 143 Okl 181, 288P342 (sheriff's liability for failure to isolate prisoner).
341-86½–New. Petition held sufficient in action against sheriff and his bondsmen. TexCivA 32SW(2d)480.
341-92 143 Okl 181, 288P342.
344-74 TexCivA 32SW(2d)480. [a] **Right to regulate visits.**–TexCivA 32SW (2d)480.
345-76 TexCivA 32SW(2d)480.
346-6 CalA 288P1109 (amendment); Oh 170NE646.
347-7 170Ga632, 153SE762.
348-27 CalA 288P1109; CalA 291P224. [b] **Resolution allowing credits to prisoner** superseded former order disallowing future credits. CalA 291P224.
348-40 CalA 291P224.
349-49½–New. After petitioner's term has expired, such matters may not now be inquired into for purpose of reviving part of term which has expired. CalA 285P927.
350-72 CalA 288P1109.
369-4 See also 247Mich529, 226NW247.

PRIVATE ROADS

382-80 TexCivA 32SW(2d)271.
383-90 TexCivA 32SW(2d)271.

PRIVITY

407-99 Ark 31SW(2d)136.
407-1 Ark 31SW(2d)136.
408-16 Wis 232NW530.
408-17 Wis 232NW530.

PRIZE FIGHTING

411-4 [g] **"Prize fight or other fight,"** within Comp St. (1921) § 2015, means any pugilistic encounter or boxing match for stake or reward. Okl 292P 356.
416-15½–New. Statute does not prohibit exhibition of prize fight films in state but only interstate transportation. Ida 292P219.
416-15½–New. Sale of prize fight film in state after interstate transportation has ceased is legal. Ida 292P219.

PROBABLE CAUSE

421-78 [b] **Other definitions.**–TexCr 29 SW(2d)354.

PROCEDURE

426-70 40GaA761, 151SE522.

PROCESS

446-86 Ill 173NE486.
447-5 44F(2d)214.
448-35 [b] **Original notice,** served under statute requiring notice of amendment to petition, is sufficient, as such notice need not comply with formalities of original notice. Iowa 231NW440.
449-49 TexCivA 24SW(2d)757.
450-81 TexCivA 28SW(2d)1109.
451-8 Nebr 231NW805. [c] (1) Nebr 231NW805.
453-89 OklCr 287P781; OklCr 288P 363.
454-97 TexCivA 32SW(2d)488(2dcase).
457-89 [d] **Mistake in date as to beginning of term held fatal.**–Iowa 233NW 47.
458-37 [a] TexCivA 24SW(2d) 518.
460-71 181Ark279, 25SW(2d)1050 (complaint filed).
461-91 Fla 129S848.
461-95 Fla 129S848.
461-11 Vt 151A509.
465-44 See also 40GaA847, 151SE663 (2dcase).
467-88 15OhNPNS332.
467-90 Cal 287P450.
467-96 43F(2d)770.
467-98 Mich 233NW335.
468-21 Ind 172NE124 (trustees).
469-29 TexCivA 28SW(2d)608.
475-3 [a] **Liability held not joint so as to authorize service in another county.**–Nebr 229NW334.
479-32 [b] **Statutory debt for taxes** is not contract within Alberta Rules, rule 204 (e). Alta [1930] 3DomLR638.
480-26 14PaDist&Co 362.
481-50 163Ga525, 136SE545.
482-75 [a] **Actual service of process made by reading or delivery.**–225 Ill 197, 205, 80NE109, 8LRANS211, 116 AmSR133. [b] **"Service" meaning reading or delivery.**–5 OklCr119, 113P238.
487-95 [a] **Acceptance not dated invalid as to another defendant.**–159 Iowa230, 140NW414.
488-22 MoA 24SW(2d)697.
491-79 137Misc587, 244NYS529.
492-98 13LaA520, 128S529. [c] **In Louisiana.**–13LaA520, 128S529.
493-23 See also Wash 291P1079.
494-45 Minn 232NW632 (in sealed envelope where defendant received actual notice).
495-60 44F(2d)218.
495-61 Wash 292P1011 (in unrelated proceeding).
495-62 339 Ill 366, 171NE562.
495-78 [b] **Binding summons and order with rubber band** and twisting band around door knob is not affixing thereof to door to constitute substituted service. 137Misc587, 244NYS529.
495-84 98PaSuper469.
496-87 See also 137Misc587, 244NYS 529.
496-8 221Ala221, 128S440.
501-70 Utah 290P950.
502-76 37Nev55, 142P627 (rule applicable to chancery cases).
504-6 [b] **Actions held not in rem permitting service by publication.**–35F(2d) 842.
506-30 137Misc420, 242NYS308.
514-50 MoA 23SW(2d)639.
514-53 250Mich9, 229NW446.
515-61 59ND18, 228NW420.
515-66 250Mich9, 229NW446.
515-77 [a] **Affidavit held sufficient.**–Okl 292P353.
518-6 Nebr 229NW778 (insufficient).
518-12 [b] (4) Other instances. Nebr 229NW778.
530-60 [a] **"This cause" in caption** refers to particular cause designated in caption and is sufficient to give notice to defendant named. Fla 129S848.
530-64½–New. When order recites reading and filing of affidavit, it must be presumed that court read and filed affidavit. CalA 288P629.
530-78 [c] Fla 129S848.
534-45 Ind 172NE124.
547-87 CalA 292P544; Iowa 230NW 548.
548-99 Iowa 230NW548.
549-10 CalA 292P544.
551-28 161Tenn137, 29SW(2d)248.
557-4 But see Mich 233NW402.
558-15 Iowa 230NW548.
558-35 Iowa 230NW548.
559-45 256Fed981.
562-92 181Ark726, 27SW(2d)514; Cal 287P99.
562-94 44F(2d)214.
562-99 MoA 26SW(2d)874.
564-50 13PaDist&Co 650.
565-59 TexCivA 28SW(2d)199.
566-69 Ill 173NE486.
566-69½–New. Court has no power to alter substantial recitals in return. 44 F(2d)214.
568-82 Ill 173NE486.
571-35 CalA 291P255; 59ND335, 229 NW923.
572-59 [a] **No presumption** where affidavit of service by publication was filed same day summons and complaint were served. 59ND18, 228NW420.
572-65 See also Ill 173NE486.
573-79 255 IllA97.
574-96 [b] (1) 97PaSuper152; 97Pa Super554; 14PaDist&Co 102; 14PaDist &Co 337.
575-97 Ind 172NE124; MoA 26SW(2d) 874.
575-98 MoA 26SW(2d)874.
575-1 97PaSuper554.
575-8 250Mich9, 229NW446; 154SC 390, 151SE617.
576-9 NC 155SE868.
578-41 CalA 291P255; 250Mich9, 229 NW446.
578-48 [c] 250Mich9, 229NW446; 59 ND335, 229NW923.
580-70 BC [1930] 2DomLR720.
581-99 [a] Cal 287P99; 339 Ill 366, 171 NE562.
582-21 221Ala221, 128S440 (self-correcting).
582-34 3Greene Iowa357.
590-25 [a] **Mere filing of motion** to quash service of summons in foreign state upon nonresident has been held insufficient. Iowa 230NW548.
590-39 MoA 28SW(2d)456. [a] 97Pa Super554.
592-58 [a] Nebr 231NW805.
592-63 40GaA783, 151SE528(2dcase).
592-64 40GaA783, 151SE528(2dcase).
593-95 Iowa 230NW548.
594-98½–New. Hearing is required on issue of fact alleged in affidavit for publication of service. Nebr 229NW778.
594-2 CalA 293P117.
596-57 161Tenn155, 25SW(2d)580.
597-66 137Misc1, 242NYS408 (dispense with service of process).
598-92 98PaSuper469.
598-94 MoA 28SW(2d)456.
600-16 37F(2d)695.
600-25 181Ark726, 27SW(2d)514.
606-70 97PaSuper554.
607-75 181Ark726, 27SW(2d)514.
608-15 220Ala560, 126S634.
618-97½–New. Malicious institution of proceeding to inquire into sanity of another may constitute abuse of process. 14PaDist&Co 288.
620-22 41GaA424, 153SE224; GaA 155 SE380. [b] 41GaA709, 154SE654.
620-25 41GaA424, 153SE224.
621-40 [b] (5) To sustain recovery of damages. 41F(2d)382.

PROFIT or PROFITS

644-87 136Misc704, 242NYS192.
647-18 [a] 136Misc704, 242NYS192.

PROHIBITION

655-33 142 Okl 105, 288P463.
656-70 NM 291P295.

657–75 CalA 286P447; 87Colo 316, 287 P849.
657–76 Cal 292P124; 144 Okl 148, 289 P1108; SD 232NW20.
658–87 142 Okl 105, 288P463.
662–77 TexCivA 30SW(2d)816.
663–93 Mo 23SW(2d)117; Wash 290 P328.
663–99 CalA 292P662; Fla 129S345.
664–3 Cal 292P124; Mo 25SW(2d)459; Mo 30SW(2d)105; Mont 285P928; Oh 170NE866; 141 Okl 237, 284P1113; 144 Okl 148, 289P1108.
665–5 141 Okl 237, 284P1113.
665–5½–New. or both, where both are necessary. NM 291P295.
665–9 220Ala529, 126S102; NM 291P 295; 141 Okl 143, 285P132.
666–10 144 Okl 148, 289P1108; Wash 290P328.
666–12 141 Okl 237, 284P1113; 142 Okl 105, 288P463.
667–22 WVa 153SE491. [c] (2) WVa 152SE780.
667–23 Mo 26SW(2d)768; MoA 31SW (2d)226.
668–25 [a] **Filing in district court of suit in which judgment of court of civil appeals would be res judicata** is not obstruction of jurisdiction of latter court authorizing prohibition. TexCivA 23 SW(2d)468.
668–37 221Ala394, 129S262(3dcase).
669–45 [c] **Contempt proceedings to enforce judgment appealed from** in injunction suit may be restrained though contempt judgment has been entered. Utah 289P588.
669–53 TexCivA 30SW(2d)816.
670–63 99Fla333, 126S374.
670–68 CalA 290P662.
671–88 87Colo 178, 285P1104; 108WVa 517, 151SE707.
671–90 [i] **Settlement of bill of exceptions** where appellant's notice of intention to move for new trial was served too late may be prevented by prohibition. CalA 286P447.
671–99 [h] **Action in violation of arbitration agreement.–CalA** 287P556. [i] **Final order that appeal shall not act as supersedeas** cannot be annulled or corrected by prohibition. Mo 23SW(2d) 117. [j] **Certifying appeal.–141 Okl** 143, 285P132. [k] **Vacating judgment and setting cause for hearing for further lawful proceedings.–Wash** 290P328.
674–37 Mont 293P291.
675–49 CalA 292P650.
675–53 144 Okl 148, 289P1108.
675–56 Cal 286P425; CalA 291P609.
675–64 Cal 292P124. [b] **"Usurpation"** for which writ may be granted involves exercise of power not possessed by inferior officer. 220Ala529, 126S102.
675–65 [a] (4) Election commissioners from printing on ballot name of candidate for state senator whose papers were not filed as required by statute (Mo 30 SW(2d)609), (5) notwithstanding unauthorized certification by secretary of state (Mo 30SW(2d)609). (6) Secretary of state from recognizing petition nominating candidate for governor. SD 232NW20.
675–66 [a] (10) Member of police commission disqualified by bias or prejudice from sitting on trial of policeman. Mont 285P928.
676–71 CalA 291P861; CalA 293P117; Okl 293P199; Wash 293P283.
678–72 Oh 170NE866. [a] 232Ky407, 23SW(2d)590.
679–95 Mo 27SW(2d)21.
681–49 WVa 155SE173.
681–57 Okl 291P554.
681–63 220Ala529, 126S102.
682–72 Oh 170NE866; 141 Okl 239, 284 P874.
683–80 232Ky407, 23SW(2d)590.
684–2 CalA 288P629; Ida 293P323; 232Ky442, 23SW(2d)551(1stcase); Mo 23SW(2d)117; Oh 170NE866; 141 Okl 143, 285P132; Wash 289P25.
686–10 CalA 291P586; Utah 289P588.
687–17 Utah 289P588.
688–43 [d] 232Ky407, 23SW(2d)590.
688–55 Mo 27SW(2d)21.
689–82 233Ky501, 26SW(2d)43; Wash 289P25.
690–83 233Ky501, 26SW(2d)43.
691–2 Utah 289P588.
691–5 Cal 286P425.
691–9 221Ala394, 129S262(3dcase); 87 Colo 316, 287P849.
692–32 232Ky442, 23SW(2d)551.
692–44 [b] (4) 232Ky791, 24SW(2d) 619. (5) 232Ky407, 23SW(2d)590.
696–89 Mont 293P315.
699–27 [b] **Failure to serve application on real party in interest** does not warrant quashing writ, but merely calls for postponement till notice is given. Ida 293P323.
701–60 CalA 292P545.
704–20½–New. Where statute does not require return to be verified, return is not insufficient because not verified by respondent but only by his attorney on belief. Mo 27SW(2d)21.
704–39 Utah 289P132.
705–49 Ida 293P323.
705–61½–New. Appellate court may quash alternative writ to prevent expiration of time to move for new trial. CalA 289P209(1stcase).
706–85 CalA 286P1054.
707–87 220Ala529, 126S102.
708–3 142 Okl 105, 288P463. [i] **Question determined from order entered** and return to alternative writ. Wash 290 P328.
708–7 142 Okl 105, 288P463; Utah 289 P132.
710–32½–New. Contention of amicus curiæ that relator in prohibition proceedings to prevent printing of name on ballot was disqualified by filing two declarations cannot be considered. Mo 30SW(2d)609.
710–35 Okl 292P44 (writ specifying manner of preservation of ballots held not complied with).
711–39½–New. Subsequent writ may issue to compel obedience of former writ. Okl 292P44.
712–61 Utah 290P358(2dcase).
714–96½–New. Return not attacked in lower court for absence or insufficiency of verification is subject to consideration on appeal. Mo 27SW(2d)21.

PROPERTY

731–54 TexCivA 27SW(2d)885.
737–23 300Pa542, 151A15.
749–46 41F(2d)929.
761–54 [b] **Building owned by tenant at will** with right to dispose of it is personal property. NH 151A81(2dcase).
776–64 [a] **Actual physical possession** is not necessary incident to vesting of property. 43F(2d)642.
779–9 TexCommnA 29SW(2d)1041 (without liability for rent).
779–10 Me 150A531.
780–19 138Misc16, 245NYS2.
781–39 [b] **Acts of ownership necessary to constitute possession** depend on uses of which land is capable. Mo 31 SW(2d)1059.
782–53 TexCivA 27SW(2d)885.
783–9 339 Ill 540, 171NE632.
783–12 234Ky400, 28SW(2d)477.
786–87 48 Ida121, 279P1092.
786–98 111Conn452, 150A526; Mass 171NE643; TexCivA 26SW(2d)311.
787–29 111Conn504, 150A703.
787–50 TexCivA 29SW(2d)872.
788–57 [a] Mo 31SW(2d)28.
788–58 TexCivA 26SW(2d)1106. [a] 157Miss420, 128S347.

PROSTITUTION

801–27 [a] Ill 173NE355.
809–47 130Kan226, 285P639.
813–98 [b] **Evidence held insufficient.–Kan** 285P639.
815–55 Utah 286P960.
816–84 Utah 286P960; Utah 286P962.
823–79 [a] 41F(2d)495. [c] **Purpose or intent** may be proved by circumstantial evidence. 41F(2d)495.

PUBLIC

847–33 NJCh 150A847 (sheriff).

PUBLIC LANDS

905–4 Or 289P503.
905–10 Or 289P503.
905–12 41F(2d)30; Or 289P503. [b] **Statutes within police power.–Or** 289P 503.
906–13 [c] **Two-mile limit sheep herding law** does not establish grazing rights, it merely exercises state's police power. Ida 293P330. [d] **Injunction against grazing sheep** on public land alleged to have been grazed only by cattle. Ida 293P330.
906–18 [d] **Complaint held sufficient.–Ida** 290P722. [e] **Evidence held sufficient** to justify conviction of grazing sheep on cattle range. Ida 290P722.
936–50½–New. Homestead entryman held entitled to crops planted by one taking possession with knowledge of filing on land by entryman. Ida 288 P419.
960–9 [a] **Saline lands.–Nebr** 230NW 677.
979–75 [b] (3) 181Ark683, 27SW(2d) 106. (5) County court may inquire concerning facts necessary to validity of sale not shown of record. 181Ark 683, 27SW(2d)106. (6) Judgment of confirmation is conclusive of observance of statutory requirements on collateral attack unless contrary affirmatively appears therein. 181Ark683, 27SW(2d) 106. (7) Recital in judgment held sufficient finding that price received was market value. 181Ark683, 27SW(2d) 106. (8) Appraiser's failure to take and file oath and file appraisement held mere irregularities cured by confirmation. 181Ark683, 27SW(2d)106. (9) Recital in judgment of confirmation of filing of petition for sale is conclusive of county court's jurisdiction. 181Ark 683, 27SW(2d)106. (10) Judgment of confirmation, valid on its face, by court having jurisdiction is binding on all claiming interest in land unless assailed directly in same action. 181Ark683, 27 SW(2d)106.
988–24 [f] **Purchaser who has not paid full price** may give mortgage. Okl 292 P353.
992–76 [j] **Interest in grazing lease is personal property.–34NM602, 287P702.**
993–80 [c] **Interest in grazing lease may be assigned absolutely or as security.–34NM602, 287P702** (assignment as security held not violative of statute prohibiting encumbrance of lands granted).
994–90½–New. Creditor of lessee demanding transfer of rights in default of payment of rentals must show that default has been fixed under statute. 34 NM602, 287P702.
1021–53 Mo 31SW(2d)1059.
1030–17 43F(2d)591.
1037–22 [d] **Statute ceding land on Indian reservation for entry and settlement** did not withdraw it from statute giving railroad companies right to condemn right of way. 39F(2d)800.
1042–89 [f] **Burden of pressing claim by definite selection** rests on railroad company and government will not recognize claim sua sponte. 38F(2d)470.
1046–27 38F(2d)470 (equities of entrymen held superior to railroad's notwithstanding lis pendens in action to restrain entrymen from proving up).
1068–21½–New. Rights of railroad acquiring right of way over Indian reservation under act of March 2, 1899 relate back to filing of map with secretary of interior. 39F(2d)800.
1071–60½–New. Statute authorizing railroads to condemn right of way through Indian lands gives railroad right superior to one making entry after filing of right of way map. 39F(2d) 800.
1072–63½–New. Railroad's forfeiture of right of way acquired on Indian lands by failure to complete road within time allowed can be asserted only by government. 39F(2d)800.
1072–63½–New. Such right of way is good until forfeited by government. 39 F(2d)800.
1081–37 43F(2d)591 (evidence).
1098–52 [a] (3) Land may be described according to any survey which government has caused to be made. Nebr 230NW95.
1099–73 221Ala121, 127S671.
1111–25 43F(2d)591.
1112–36 43F(2d)591.
1137–58½–New. Right of state to withdraw from land settlement project. Cal 290P451.
1138–73 [m] **In California.–A** 291P907

(representations as to productivity held not fraudulent).
1139-78 [c] (8) Land in possession of others under claim of ownership or color of title is not vacant land. **233Ky** 414, **25SW(2d)**1009. [i] **In Nebraska.–** 230NW677.
1140-89 **Va** 155SE819.
1147-34 233Ky414, **25SW(2d)**1009 (land not vacant).
1149-58 [e] **230AppDiv**374, **245NYS** 444.
1164-54 **TexCivA** **29SW(2d)**500. [b] **TexCivA** 29SW(2d)500. [c] **Validity of certificate issued under special act.–Tex CivA** 29SW(2d)500.
1164-60 **TexCivA** 31SW(2d)172.
1164-62 **TexCivA** 29SW(2d)500.
1165-67 **TexCivA** 29SW(2d)500.
1165-68 [a] **Presumption of collection of fees before filing survey.–TexCivA** 29 SW(2d)500.
1165-69 **TexCivA** 29SW(2d)500.
1165-72 **TexCivA** 29SW(2d)500.
1166-76 **TexCivA** 29SW(2d)500.
1168-78 **TexCivA** 31SW(2d)172.
1167-84 **Tex** 30SW(2d)292.
1167-84½–New. Constitutionality of curative statutes, **TexCivA** 29SW(2d) 500.
1167-85 **TexCivA** 29SW(2d)500.
1170-8 [b] **Agreement to acquire lands for partnership** is void. **TexCivA** 26SW (2d)463.
1173-40 [b] **Sale is effective as of date** of filing application. **TexCivA** 32SW (2d)249.
1182-33 [a] **TexCommnA** 29SW(2d) 1021. [o] (5) Statute validating resale limiting right of reinstatement to applicants within stated time is constitutional. **TexCivA** 32SW(2d)249. (6) Application to restate must be filed within one year of effective date of resale. **Tex CivA** 32SW(2d)249. [p] **Nature of intervening right.–Tex** 26SW(2d)908; **Tex CommnA** 26SW(2d)627.
1182-36 [c] (1) See also **TexCommnA** 29SW(2d)1021. [e] **Duty to list forfeited unsold lands.–TexCommnA** 29SW(2d) 1021. [f] **Effect of void resale.–Tex CommnA** 29SW(2d)1021.
1184-48 [d] (10) Running of statute of limitations against attack on sales is arrested by statute giving owner of forfeited lands right to repurchase. **Tex CommnA** 29SW(2d)1021.
1195-80 170La531, 128S470; **NM** 290 P798; **Va** 155SE819.
1201-85 230AppDiv447, 245NYS478.
1205-79½–New. Right in lands under private grant made subsequent to establishment of pueblo of San Diego is subject to right and title of pueblo. **Cal** 287P475.
1238-70 **Cal** 287P475.
1255-34½–New. Upon death of locatee, under statute widow takes only life estate determinable on remarriage. **Can** [1930] **1DomLR**113.
1255-36 [f] (2) **Sask** [1930] **4DomLR** 677.

PUBLIC UTILITIES

51 C. J.—7-69 See also **Wash** 291P346.
7-80 **CalA** 293P148.
10-62 [a] **The principle of the right of regulation** is that certain business has such peculiar relation to public interest as to give right of public regulation. **Mont** 293P294.
11-73 **Mont** 293P294.
23-19 282US133, 51SCt65; **Mont** 293P 294.
26-2 But see **Alta** [1930] **4DomLR**1000.
27-25 282US133, 51SCt65.
28-49 [a] **Valid rate order may later become confiscatory.–**282US133, 51SCt 65.
30-75 **Nebr** 233NW452.
32-41 But see **IndA** 173NE458.
32-47 **Mont** 293P294. [b] **Statute authorizing commission to fix maximum and minimum rates** does not violate constitutional provision against price fixing combination. **Mont** 293P294.
34-64 **Nebr** 233NW447.
34-71 **Fla** 129S876; **Nebr** 233NW447.
35-89 111Conn634, 151A171.
36-3 **Fla** 129S876.
36-4 **IndA** 173NE458.
36-5 **Mont** 293P294 (clearly).
38-23 **Fla** 129S876.
38-24 **Fla** 129S876.
39-44 **Cal** 292P124; **Mo** 30SW(2d)112.
41-83 **CalA** 290P434.
42-3 **Oh** 172NE284.
44-23 **Wash** 291P346.
45-61 [m] **In Montana.–**293P294.
46-66 138Misc572, 245NYS514.
46-69 [a] **"Concurrence" of commission** requires their consent. **Mont** 293P294.
47-78 138Misc572, 245NYS514.
48-7 [a] **When scheduled rate is challenged,** challenge should affect rate only from date of filing of complaint. **Wash** 289P1006.
49-35 [a] **Proper challenge of rate is** prerequisite. **Oh** 172NE284.
49-48 **Mo** 30SW(2d)8.
50-76 **IndA** 173NE458.
51-86 98PaSuper514.
51-11 **Cal** 292P640.
57-55 **Oh** 172NE284.
58-66½–New. Pendency of action in United States Circuit Court has been held insufficient reason for postponing hearing by commission. **Oh** 172NE284.
59-2 43F(2d)478.
59-3 **Ill** 173NE380.
60-12 **Ill** 173NE380.
60-14 **Ill** 172NE706; **Ill** 173NE380.
60-18 42F(2d)899; **Ill** 173NE380.
60-20 **Ill** 173NE380.
61-32 **Cal** 292P640; **87Colo** 556, 289P 1090; **Me** 151A440.
63-66 **Ill** 173NE380.
64-88 42F(2d)463.
65-93 [a] **Corporation need not go beyond jurisdiction of commission** to acquire evidence under order of commission. 42F(2d)490.
72-21 [b] (5) Under Public Utility Act appeal only on question of jurisdiction, or question of law. **Alta** [1930] **4DomLR** 1000.
76-83 **Me** 151A440.
76-89 **Ill** 172NE706.
78-8 [c] **Error not warranting reversal.–Wash** 291P733.
78-10 **Ill** 173NE380.
78-14 **Mo** 30SW(2d)112.
80-46 **Fla** 129S876.
80-53 **87Colo** 556, 289P1090.
81-72 **87Colo** 556, 289P1090. [a] **Where order is materially injurious to legal rights or privileges it will be set aside. Fla** 129S876.
81-76 **Cal** 292P640.
81-79 [a] **Misapplication of law** may warrant setting aside of order. **Fla** 130 S587.
82-86 [d] **Commission's amended order filed in effort to effect compromise should be disregarded.** 42F(2d)490.
85-49 **Mo** 30SW(2d)105.
85-61 42F(2d)463.
87-4½–New. Whether foreign corporation was doing business in state was question of fact not determinable in proceedings for preliminary injunction. 42 F(2d)490.

QUIETING TITLE

137-45 **Mo** 30SW(2d)616. [a] **Action cannot have attributes of both law and equity.–Mo** 30SW(2d)616.
137-46 **Mo** 30SW(2d)616.
146-45 44F(2d)125.
149-82 14PaDist&Co 305. [c] (7) **99Fla** 1287, 128S809; **Mass** 171NE14.
153-16 35 **OhA**20, 171NE606.
157-70 198NC730, 153SE316.
160-19 [a] **Where record constitutes cloud.–Ill** 173NE162.
160-21 251Mich124, 231NW114; **CalA** 290P462.
169-73 **CalA** 289P179.
170-80 [f] **CalA** 289P179.
171-82 [c] **Mortgagee** is not legal title owner whom equitable owner cannot sue to quiet title. **CalA** 289P179.
171-86 **Cal** 287P459; **CalA** 290P530; **CalA** 291P663; **Mo** 29SW(2d)39.
172-88 **Conn** 151A512.
172-93 **Cal** 290P587.
173-95 **Utah** 287P926.
174-3 **Cal** 287P459.
174-8 **Cal** 287P459.
184-55 **Ga** 155SE8.
191-9 221Ala307, 128S592(2dcase).
197-80 [a] **That common grantor conveyed to plaintiff more than contract required** is not defense. **Utah** 290P958.
200-30 **Mo** 29SW(2d)39.
201-44 [b] 339 **Ill** 540, 171NE632.
203-66 **CalA** 292P175.
206-12 **TexCivA** 27SW(2d)548.
212-11 [b] **Utah** 290P161.
215-62 [e] (13) **NC** 153SE632.
217-81 **Fla** 129S501.
218-88 **Ga** 155SE8.
218-92 **Ark** 32SW(2d)616.
220-14 [d] **Where quieting title is only incident to primary relief sought on other grounds** bill need not allege complainant is in possession. **Ill** 173NE168.
221-15 **Ill** 173NE168.
224-56 [d] (4) Complaint to remove alleged lien as cloud on title is not ambiguous for failure to allege when lien should have been filed. **Ida** 292P232.
224-57 But see **Ida** 292P232.
225-67 339 **Ill** 540, 171NE632.
226-69 [a] (1) 339 **Ill** 540, 171NE632; 251Mich96, 231NW59.
230-54 339 **Ill** 540, 171NE632.
232-6 [c] 180Minn480, 231NW224.
237-22 **Ala** 130S780.
240-71 [c] (1) **Minn** 231NW790.
242-16 40F(2d)238.
247-3 **Conn** 151A512.
248-12 **Ga** 155SE8. [b] 221Ala307, 128 S592(2dcase).
249-21 **Conn** 151A512.
252-48 **Conn** 151A512.
253-62 [a] (2) 144 **Okl** 144, 289P706.
254-63 [a] (5) **Kan** 292P942; **Mo** 29 SW(2d)39. (10) **Kan** 292P942 (bar by limitations).
254-68 [a] (1) **Cal** 290P289; **CalA** 287 P509; **Conn** 151A351. (21) To support finding that plaintiff's deed was not fraudulent. **Utah** 290P958. [b] (1) **NM** 291P922.
256-69 [a] (1) **CalA** 290P458. (9) To support finding that defendant's interest was paramount to that of plaintiff. **CalA** 290P458.
257-91 [a] (2) 221Ala307, 128S592(2d case).
260-51 [e] **Issue as to validity of contract held not eliminated.–LaA** 129S423.
260-58 **Utah** 291P493.
262-99 **Mo** 29SW(2d)39.
262-9 **Wash** 290P802.
263-18 [a] **Ga** 154SE891; **Mo** 29SW (2d)39. [b] **Instructions held erroneous.–Ga** 154SE891.
263-24 [a] **Instructions held not erroneous.–Mo** 29SW(2d)39.
263-25 **Mo** 29SW(2d)39. [a] **Mo** 29 SW(2d)39.
271-48 **Ida** 292P232.
276-30 250Mich546, 230NW940.
277-50 [a] **Order directing receiver to pay rents to defendant** is proper where ownership is established in defendant. **Mo** 30SW(2d)616.
282-22 See also **Wash** 292P403.
283-54 **Cal** 281P835.
285-8 [b] **Questions of fact.–Conn** 151 A351.

QUO WARRANTO

313-72 136Misc851, 244NYS151.
314-78 **CalA** 292P985.
315-2 170Ga545, 153SE364.
316-15 But see **Ga** 155SE18.
317-27 157Miss648, 128S878.
318-39 339 **Ill** 622, 171NE625.
318-44 **NJ** 151A116.
320-69 144 **Okl** 202, 291P115.
321-93 14PaDist&Co 267.
321-95 300Pa134, 150A300.
323-28 **Ill** 173NE94.
328-36 **NJ** 151A113.
329-48 **NJ** 151A113.
329-49 **Miss** 129S682.
329-53 But see **NJSup** 151A374.
330-89 13PaDist&Co 415.
330-97 **Miss** 129S682.
331-1 **Ga** 155SE18.
334-77 157Miss648, 128S878.
336-36 **Mo** 28SW(2d)363.
337-41 [d] **Governor's failure to issue commission to appointee** and that therefore he has not filed oath does not prevent filing quo warranto. 170Ga562, 153SE520.
337-42 170Ga687, 153SE773; **Ga** 155 SE18.
340-97 **Ga** 155SE18.
340-6 [b] (3) Township is necessary party in proceeding to test validity of organization of township school district. **Mich** 233NW387.
343-60 **Ill** 172NE763.
345-13 But see **Ind** 172NE119.
353-81½–New. Court may strike answer raising only questions of law re-

garding legal sufficiency of information and may grant defendant opportunity to demur. 157**Miss**648, 128**S**878.

353–90 **Ind** 172**NE**119.

356–83 [b] **Evidence held inadmissible.–Ind** 172**NE**119.

357–85 [c] (21) Sustain findings as to identity of persons elected as directors of corporation. 180**Minn**486, 231**NW** 197.

358–10 [b] **Status of defendant when information is filed** determines whether he is usurper of office. **Ga** 155**SE**18.

359–28 157**Miss**648, 128**S**878.

360–43 [a] **Question of fact held presented** as to whether directors were de facto directors when applications for membership in corporation were acted upon. 180**Minn**486, 231**NW**197.

361–75½–New. Judgment will not be vacated because postea was signed during term where new term opened on day motion to vacate was made. **NJCh** 150 A198.

361–98 But see **NJCh** 150**A**196.

364–66 **Ga** 155**SE**18. [a] **Effect of failure of judge to sign within statutory limit.–Ga** 155**SE**18. [b] **Exceptions should be tendered for approval** within ten days after trial judge's decision. **Ga** 155**SE**18.

365–95 14**PaDist&Co** 267.

WORKMEN'S COMPENSATION ACTS

4–8½–New. The statute is not amendment to common law, but establishment of heretofore unknown obligations, compensations, and methods of procedure, all different from, and in place of, those afforded by common law. 216**AppDiv** 274, 214**NYS**732.

4–9 See also 10**PaDist&Co** 54 (opinion of attorney-general). [a] **In Oregon** Compensation Act intends that accident fund shall be bound primarily to contribute to workman's compensation. 7 **F(2d)**231.

5–11 53**ND**636, 207**NW**551. [c] **North Dakota** act is of compulsory type. 52 **ND**563, 203**NW**895. [d] **Kansas** act gives to every employer and to every employee entitled to come within its provisions right to elect whether or not he will do so. 129 **Okl** 32, 263**P**440.

6–23 220**Cal** 579, 253**P**926; 51**ND**710, 201**NW**680. [a] 83**NH**482, 145**A**142. [d] **Word "compensation"** means money relief afforded according to scale established to persons within acts, and not compensatory damages. 216**AppDiv** 274, 214**NYS**732. [e] **Compensation for injuries is matter wherein public is interested.–Mich** 233**NW**361.

6–24 118 **Obst**1, 160**NE**470; **Oh** 171**NE** 108 (right to participate in state insurance fund is statutory only); 124 **Or** 112, 258**P**193, 60**ALR**528; **TexCivA** 294 **SW**672.

7–25 17**F(2d)**753; 32**Ariz**299, 258**P**253, 55**ALR**975; 200**Cal** 579, 253**P**926; 231 **Ky**24, 20**SW(2d)**1020; 79**Mont**358, 257 **P**270; 102**NJL**479, 133**A**764; 216 **AppDiv**274, 214**NYS**732 (of employer); 216**AppDiv**577, 215**NYS**562; 221**AppDiv** 371, 223**NYS**418; 51**ND**710, 201**NW**680; 58**ND**581, 226**NW**586(2dcase) (under compulsory act); **ND** 231**NW**283; 133 **Or**468, 286**P**527; 92**PaSuper**103; 116 **Tex**201, 288**SW**116; **TexCivA** 294**SW** 672; **Utah** 263**P**78. But see **NH** 147**A** 753 (employer under Workmen's Compensation Act is not liable for injury when due to negligence of fellow servant). [c] 318 **Ill** 151, 149**NE**11. [d] **That injury was caused by fellow servant's negligence or disobedience of instructions** does not deprive injured servant of right to compensation. 195**Wis** 134, 217**NW**734.

7–25½–New. contributory negligence, 79**Mont**358, 257**P**270.

7–26 83**NH**392, 142**A**697; 216**AppDiv** 274, 214**NYS**732 (or fault); 51**ND**710, 201**NW**680; 193**Wis**515, 215**NW**448.

7–29 22**AlaA**575, 117**S**914; **Conn** 151**A** 518; 3**Del** 4, 129**A**344; 9**LaA**108, (Orleans) 119**S**88; 123 **Or**334, 262**P**250; 12 **PaDist&Co** 614 (governed entirely in its interpretation by statutes); **Tex CommnA** 12**SW(2d)**200; **TexCivA** 1 **SW(2d)**412; **TexCivA** 22**SW(2d)**1098; 193**Wis**515, 215**NW**448. But see **Utah** 263**P**78 (not contractual but constitutional right). Contra 32**Ariz**265, 257**P** 641; 155**Tenn**34, 290**SW**18.

7–31 6**LaA**739, 742 [quotCJ]. See also **Wis** 230**NW**622 (liability neither tortious nor contractual but depends on status created by employment).

7–31½–New. Payments provided by acts are founded upon injury. 216 **AppDiv**274, 214**NYS**732.

7–31⅓–New. Considerations of common-law defense of assumption of risk, negligence of fellow servant, and contributory negligence are excluded. **Mont** 275**P**270; 216**AppDiv**274, 214**NYS**732.

7–31¼–New. Compensation laws are in derogation of the common law, and common-law rules cannot be invoked either to enforce or defeat a claim for compensation asserted under the acts. 124 **Okl** 140, 254**P**66.

7–31⅕–New. Neither the commissioner nor any other person has power to waive any provisions of the Compensation Act. 208 **Iowa**430, 226**NW**124.

7–31⅙–New. The act creates a new right of action, not existing at common law. 169**Ga**251, 150**SE**78, 67**ALR**287.

7–31⅐–New. In some jurisdictions absolute right to compensation for injury or death is conferred whether deceased employee left dependents or not. **NC** 154**SE**66.

7–31⅛–New. Rights of employee accrue and are determined as of time of injury. 12**PaDist&Co** 614.

7–32 200**Cal** 579, 253**P**926; 110**Conn** 221, 147**A**705, 66**ALR**1428; 124**Kan**458, 260**P**627; 78**Mont**579, 254**P**880; 230 **AppDiv**496, 245**NYS**258; **ND** 233**NW**264 (3dcase) (confined to employers); 124 **Or**112, 258**P**193, 60**ALR**528; 155**Tenn** 441, 295**SW**68; **TexCivA** 294**SW**932; **TexCivA** 11**SW(2d)**627; 198**Wis**202, 223 **NW**444. See also 218**AppDiv**676, 219 **NYS**269 (purpose of Act is to protect workmen's dependent relatives in case death cuts off disability award).

8–33 124**Kan**458, 260**P**627.

8–37 124**Kan**287, 259**P**703; 124**Kan**458, 260**P**627. [b] **Intent of Workmen's Compensation Law** is to give employee common-law relief and in addition thereto eliminate defenses of negligence, contributory negligence, and assumption of risk. 51**ND**815, 201**NW**348.

9–38 41**F(2d)**593; 32**Ariz**265, 257**P**641; 35**GaA**599, 134**SE**357; 239**Mich**373, 214 **NW**62; **MoA** 27**SW(2d)**459; 78**Mont** 579, 254**P**880; 85**Mont**481, 280**P**641; **Mont** 289**P**563; 116**Nebr**418, 217**NW**952; 124 **Okl** 228, 255**P**582; 133 **Okl** 77, 271**P** 142; 124 **Or**112, 258**P**193, 60**ALR**528; 157**Tenn**206, 7**SW(2d)**807; **TexCivA** 1 **SW(2d)**412; **Vt** 146**A**68; **Vt** 146**A**71 (1stcase). [b] **Act intended to subject noninsuring employers** to very stringent rules of liability. 17**F(2d)**753.

9–39 124**Kan**287, 259**P**703.

9–41½–New. To protect employee against hazards of employment by making employer responsible. 200**Cal** 754, 254**P**1105.

9–42 124**Kan**458, 260**P**627; 239**Mich** 373, 214**NW**62; 78**Mont**579, 254**P**880; 290**Pa**225, 138**A**826; **Utah** 279**P**609. See also 105**NJL**228, 143**A**352.

9–42½–New. General purpose is to substitute, in certain cases, in place of common-law remedy and grounds off liability, system of money payments based upon loss of wages by way of relief for injury received by workers in course of, and arising out of, their employment. 216**AppDiv**274, 214**NYS**732.

9–42⅓–New. , and secure speedy settlement for injuries. 220**Ky**224, 294**SW** 1029.

9–42¼–New. Some statutes do not create a new or any cause of action against a wrongdoer for negligently causing the death of an employee. 117 **Nebr**85, 219**NW**802.

9–42⅕–New. Intent is to secure workmen and dependents against becoming objects of charity by making reasonable compensation, to be charged against cost of production or transportation, for all accidental calamities which are incidental to the employment, irrespective of the question of negligence. 28**F(2d)** 228.

9–42⅙–New. The acts substitute a new cause of action and a new procedure for common-law rights and liabilities. 28 **F(2d)**228.

10–51 77**Colo** 414, 236**P**1006; 165**Ga** 667, 142**SE**121; 120**Kan**326, 243**P**537; 118 **Or**260, 246**P**741; **TexCommnA** 42 **SW(2d)**200. [a] (2) 210**Ky**5, 273**SW** 533.

11–53 118 **Or**260, 246**P**741.

11–54½–New. In enacting an elective compensation act, the legislature may append such conditions as it chooses. 118 **Or**260, 246**P**741.

11–54⅓–New. Workmen's Compensation Law is presumed valid. 128**Misc** 626, 220**NYS**170.

11–54¼–New. Where there is causal connection between injury and employment, substantially contributing to injury, the Compensation Law is constitutionally valid. 276**US**154, 48**SCt**221, 72**L ed**507, 66**ALR**1402.

11–54⅕–New. State Compensation law may be held valid as applied to an award of compensation for the death of an employee while crossing tracks on his way to work. 276**US**154, 48**SCt**221, 72 **L ed**507, 66**ALR**1402.

11–57 35**Ariz**48, 274**P**634. [b] **Appropriate legislation under such constitutional provisions includes** statutory provision for judgment including reasonable attorney's fee to be fixed by court. 81**CalA**98, 252**P**1075.

11–58 [b] **Power to require employers to pay for vocational rehabilitation** of disabled employees is not denied by constitutional mandate to enact Workmen's Compensation Law. 34**Ariz**201, 269**P** 501.

11–59½–New. The provision of the California constitution vesting power in the legislature to create a complete system of workmen's compensation is not in conflict with the constitutional provision conferring on a city the power to provide compensation for its employees. 74**CalA**386, 240**P**792 ("compensation" held not to have same meaning in two provisions).

11–59⅓–New. The provision of the California constitution vesting in the legislature power to create a complete system of workmen's compensation is not in conflict with the constitutional provision authorizing cities to legislate in reference to municipal affairs. 74 **CalA**386, 240**P**792 (system of workmen's compensation held matter of public policy and not municipal affair).

11–59¼–New. Counties and municipalities are departments of state within the provision of such constitution vesting in the legislature power to create a complete system of workmen's compensation binding upon all departments of the state government. 74**CalA**386, 240 **P**792.

11–59⅕–New. Counties and municipalities are persons within the provision of such constitution empowering the legislature to enforce the liability for compensation under such system upon all persons. 74**CalA**386, 240**P**792.

12–70 82**CalA**610, 256**P**447; 165**Ga**667, 142**SE**121; 118 **Or**260, 246**P**741; **Tex CommnA** 283**SW**141.

12–71 **TexCommnA** 283**SW**141.

13–76 **Cal** 291**P**405.

13–81½–New. provision declaring presumptions of dependency, 217**Ala**361, 115**S**425.

13–82 87**CalA**766, 262**P**471.

13–82½–New. , provision saving the right of surviving spouse and heirs to recover exemplary damages for employee's death from gross negligence, while abrogating injured employee's right to such recovery. **TexCommnA** 283 **SW**141.

13–82⅓–New. , a provision for reducing award to judgment without summons or prior notice. **IndA** 151**NE**833.

13–82¼–New. , a provision authorizing the industrial accident board for good cause in meritorious cases to waive strict compliance with limitations as to notice and filing of claim before the board. **TexCivA** 21**SW(2d)**334.

13–83½–New. The Illinois act of 1919 is constitutional notwithstanding it makes the decision of the industrial board final on questions of fact and limits review by the courts to questions of law. 317 **Ill** 482, 148**NE**250, 39**ALR** 1257.

13–83⅓–New. A provision denying a right of appeal to residents of foreign

countries is not unconstitutional. 118 Or260, 246P741.

13-83¼-New. A provision that a husband cannot recover for compensable injuries causing loss of his wife's services has been held constitutional. 129 Misc500, 222NYS111.

13-83⅓-New. Legislative declarations of dependency with respect to wife for whose support husband does not contribute held constitutional. 214Ala130, 106S898.

13-83⅙-New. Statutory distinction between wife and children as dependents held reasonable. 214Ala130, 106S898.

13-83½-New. A statute permitting imposition of a penalty for failure of a nonsubscribing employer to pay an award for death within ten days is unconstitutional. 27 OhA4, 160NE637.

13-83⅓-New. The legislature is without power entirely to abrogate compensation to dependents of employee whose injuries result in death. Utah 263P78.

14-85 Ill 173NE64.

15-4½-New. **A compensation act** is not unconstitutional because it was to become effective on adoption of constitutional amendment requiring election of remedies in advance of injury. 29Ariz 419, 242P658.

15-4⅓-New. , or providing that awards shall be proper charge in cost of operating employer's business. 136Misc379, 240NYS70 (statute extending compensation law to include employment in business other than that carried on for pecuniary gain).

15-10½-New. Workmen's Compensation L. § 12, providing compensation for injuries received outside of the state under a contract of employment made in the state, is not void for failure to provide for enforcing an award for injuries sustained elsewhere. 320Mo 893, 8SW(2d)897.

15-10⅓-New. Claimant has the right to apply for rehearing on receipt of notice of discontinuance of participation in fund under some statutes. 29 OhA162, 163NE212.

15-10¼-New. A provision authorizing recovery by an employer against a person liable for injury is not invalid because of possible recovery of more than the employer is required to pay. 160 Tenn248, 23SW(2d)245.

15-11 32Ariz265, 257P641; 34Ariz201, 269P501; 35Ariz48, 274P634; 325 Ill 452, 156NE307; 212Ky123, 278SW533; 116 Oh67, 156NE107; 124 Or112, 258P 193, 201 [citCJperCoshow,J], 60ALR 528. [d] **Act held to further sound public policy.**–212Ky123, 278SW533. [e] **Amendments to act within police power.**–Making compensation nonassignable and exempt from legal process. 52Nev104, 282P879.

15-12 [a] **Incorporation of provisions, independent of exercise of police power,** is not precluded by fact that Compensation Act is police measure. 82CalA610, 256P447.

16-18 271US208, 46SCt491, 70L ed908; 281US98, 50SCt242, 74L ed726 (affecting insurance carriers); 41F(2d)593; 120 Kan331, 243P278; 120Kan326, 243P 537; 212Ky123, 278SW533; NJSup 151 A446; 116 Oh67, 156NE107; 118 Or260, 246P741; 188Wis53, 205NW496; 198 Wis202, 223NW444. [a] **Provision authorizing recovery by employer against person liable for injury** after award of compensation does not deny due process of law. 160Tenn248, 23SW(2d)245.

16-19 120Kan326, 243P537; 212Ky123, 278SW533; 116 Oh45, 156NE101; 116 Oh 67, 156NE107.

16-21 128Misc626, 220NYS170.

16-24 [b] **Failure to limit operation** of act to occupation inherently hazardous does not make it invalid as denying due process of law. 29Ariz419, 242P658.

17-25 30F(2d)144.

19-34 168Minn319, 210NW75.

19-35 77Colo 414, 236P1006 (statute allowing inclusion in decree for award requirement that employer give bond to comply therewith is valid though passed after claim accrued).

20-36½-New. A statute providing that an insurance carrier may recover amounts paid to the state treasurer where there is no person entitled to compensation does not take property without due process of law. 224AppDiv 346, 230NYS747.

20-40½-New. A statute making an award of the board conclusive has been held not unconstitutional. 220Ky381, 295SW464.

20-41 28F(2d)710 [certiorari den 279 US838, 49SCt252(9thcase), 73L ed985] (West Virginia act); 165Ga667, 142SE 121; 35GaA681, 134SE621; 264Mass495, 163NE161; NJSup 151A641; TexCivA 271SW424 (defenses closed to employee for failure to come under act); TexCivA 20SW(2d)342(2dcase) (must plead common-law essentials to cause of action). [b] **Defenses of contributory negligence or assumption of risk** held not available to employer rejecting Workmen's Compensation Act. 87 IndA27, 154NE41.

21-48 See also Ind 166NE2.

21-48½-New. A statute providing for reducing award to judgment is not invalid because it does not provide for summons or prior notice thereof. IndA 151NE833.

21-48⅓-New. That the supreme court, in denying a petition for a writ of certiorari to review on award, disposes of the case on plaintiff's own showing without hearing the other side does not deprive the proceedings of their judicial character nor deny plaintiff due process of law. 233Mich580, 214NW208.

21-49 34Ariz201, 269P501. [c] **Statute held invalid** in so far as it authorizes persons disabled otherwise than in industry to enjoy its benefits. 34Ariz201, 269P501.

23-65 [b] **Act limiting right of election** to accept act or bring action authorized by Const. art 18 § 7 to employees in specified occupation does not conflict with status of action of negligence as common-law action. 29Ariz419, 242P 658.

24-75 281US98, 50SCt242, 74L ed726. See also 34Ariz201, 269P501. [e] **Statute imposing fifty per cent penalty on employer,** in addition to award, is unconstitutional. 118 Oh555, 161NE334.

24-76 29Ariz419, 242P658.

24-79 See also 8LaA111.

24-80½-New. The law giving an insurance carrier a cause of action for payments made by it to the state treasurer and into a vocational rehabilitation fund in death cases in which no persons are entitled to compensation, has been held not denying equal protection of the law. 224AppDiv346, 230NYS747.

24-80⅓-New. Workmen's compensation act giving insurance carrier additional cause of action provided it shall pay prescribed amounts to state funds in death cases where no one is entitled to compensation does not violate equal protection. 281US98, 50SCt242, 74L ed 726.

24-87 34Ariz201, 269P501.

25-90 34Ariz201, 269P501.

26-94 165Ga667, 142SE121; 41 Ida747, 242P314, 243P654.

27-5 324 Ill 32, 154NE441; La 130S1.

27-10 Conn 151A518 (retroactive operation of statute).

28-11 212Ky123, 278SW533. [a] **Statute forbidding entry of consent award in court without assent of compensation board** held no violation of right to contract. 212Ky123, 278SW533.

28-12 212Ky123, 278SW533.

28-13 212Ky123, 278SW533.

28-14 212Ky123, 278SW533.

28-15 212Ky123, 278SW533.

28-16 TexCivA 31SW(2d)675.

28-17½-New. The state has power to enact a statute authorizing compensation to an employee for injuries sustained without the state where the contract of employment was made within the state. 165Ga667, 142SE121.

28-18 29Ariz419, 242P658; 86Colo 206, 280P483; 238Mich580, 214NW208; 195 Wis410, 217NW738. See also 134Misc 504, 235NYS541.

28-19 29Ariz419, 242P658; 238Mich 580, 214NW208; TexCommnA 285SW 1041.

28-40 TexCommnA 285SW1041.

28-21 238Mich580, 214NW208.

29-24½-New. The legislature can confer upon a court of common pleas more or less jurisdiction than is conferred upon the industrial commission. 31 OhA 91, 165NE586.

31-40 34Ariz201, 269P501.

32-43½-New. Employer who has elected to operate under statute and accept its terms cannot attack validity of any of its provisions. 238Mich580, 214NW208; 155Tenn34, 290SW18.

32-43½-New. An employer accepting the act is precluded from questioning its constitutionality. 238Mich580, 214NW 208; 155Tenn34, 290SW18.

32-43¼-New. An employee accepting the act may not challenge the validity of any of its provisions. 155Tenn34, 290 SW18.

32-43⅓-New. A person claiming benefits of the act by seeking damages for the death of an employee cannot assert the invalidity of provisions of the act regarding autopsy. 155Tenn34, 290SW 18.

32-43⅙-New. One who has elected to come under the act is estopped to deny the validity of an amendment affecting employment of minors. 245Mich325, 222NW768(2dcase).

32-44 28F(2d)710 [certiorari den 279 US838, 49SCt252(9thcase), 73L ed985].

32-45 Ill 173NE64; 252NY394, 169NE 622; 50ND215, 195NW287, 28ALR1337; TexCivA 291SW287.

32-46 200Cal 579, 253P926; 103Conn 101, 130A70; 111Conn693, 151A182; 165Ga667, 142SE121; 9LaA108, 119S 88; LaA 130S634 (Compensation Act has extraterritorial effect unless act expressly provides otherwise); 126Me144, 136A722; Mass 169NE427; 166Minn 149, 207NW193; 173Minn481, 217NW 680; 320Mo 893, 8SW(2d)897; Mont 286P408; 116Nebr656, 218NW410, 59 ALR728; Nebr 230NW688; 252NY394, 169NE622; TexCivA 17SW(2d)68; 193 Wis32, 213NW630; Wis 230NW67; Wis 230NW622 (statute of state where contract made is applicable until resident acquires status as employee in another state). [b] TexCivA 17SW(2d) 68. [d] **Whether employment is within state** depends on circumstances and facts of each case. 252NY394, 169NE 622.

33-47 86Colo 397, 282P264; 116Nebr 656, 218NW410, 59ALR728; 252NY394, 169NE622; 119 Oh539, 164NE758. [a] Wis 230NW622.

34-51 [a] (3) Other instances. Mont 286P408.

34-53½-New. Law of state where employee's death was caused governs question of measure of damages. 156Miss 567, 126S395.

34-58 32F(2d)791; 37F(2d)870; 32 Ariz265, 257P641; IndA 170NE561; 206 Iowa499, 221NW228. But see 84 IndA173, 150NE416. [c] **In Arizona** statute is construed as not providing that employee hired in California but injured in Arizona should be limited to compensation under California Act. 32 Ariz265, 257P641.

34-60 37F(2d)870 (subsequent filing of similar action in state where contract entered into not sufficient ground for disturbing judgment in other state).

35-62 85 IndA296, 152NE872; 221App Div214, 223NYS5; 230AppDiv531, 245 NYS357.

35-63 [a] **Where public policy of forum has never been expressed** by enactment of Workmen's Compensation Act, resident employee is not bound by Workmen's Compensation Act of another state where the contract was made and he was injured, under which he did not submit claim, but may sue under common law for negligence. 191 NC75, 131SE390.

35-65½-New. A workmen's compensation act which, by its terms, can be enforced only in own state cannot be enforced in a state which has not expressed its public policy by adopting a workmen's compensation act. 191NC 75, 131SE390.

35-65⅓-New. Verdict based on Workmen's Compensation Act of another state where contract was made and injury sustained will not support judg-

ment in resident employee's common-law action for employer's negligence. 194NC75, 121SE390.

36-66 5LaA304; 134Misc370, 235NYS616; 10PaDist&Co 3.

37-70 105Conn122, 134A795; 318 Ill 537, 149NE314; 2LaA47; 85PaSuper 390; 154Tenn324, 289SW520.

38-73 122 Or565, 259P205, 56ALR348.

38-77 [a] **In West Virginia** employer failing to file acceptance or joint election is not protected by state compensation act against damages for injury to employee engaged in interstate service. 102WVa66, 135SE662, 50ALR217.

38-78½-New. Some statutes expressly exclude common carriers engaged in interstate commerce. 155Tenn455, 294SW1099. [a] **Telegraph company is not common carrier** within meaning of Workmen's Compensation Act in some jurisdictions. 155Tenn455, 294SW1099.

38-79 105Conn122, 134A795; **NJSup** 152A179; 154Tenn324, 289SW520. See also 218AppDiv295, 218NYS207. [a] (20) Call boy employed to summon crews to take out trains used in interstate commerce is engaged in interstate commerce. 85PaSuper390. (21) Railroad police sergeant, riding on train, carrying interstate and intra-state shipments, to protect former class principally, held employed in interstate commerce. 318 Ill 537, 149NE314. (22) Workman icing cars for company under contract with railroad held not engaged in interstate commerce under clause in act. 143Wash271, 255P110. (23) Award to foreman of coal pocket in yard of railroad engaged in interstate commerce, injured unloading car, upheld. 248NY544, 157NE854. (24) Traveling salesman soliciting orders and forwarding them to home office is not engaged in interstate commerce. 136Kan191, 285P526. [i] **Limits of interstate employment.**—Employment follows interstate transportation and begins where workman makes forward move to serve therein and ends only after he has completely dissociated himself therefrom. 85PaSuper390.

39-20 **NJSup** 147A233.

39-30½-New. The business of providing public baseball games for profit between clubs in a league is not interstate commerce, although it necessarily involves traveling of players from one state to another. 165Ga667, 142SE121.

39-31 31F(2d)480.

39-32 39GaA285, 146SE792. [c] (1) 141Wash172, 251P130. (2) State compensation law is applicable to injuries to workmen engaged in preparing logs for transportation on navigable waters, breaking up rafts at destination, and floating logs to conveyor by which they are taken from such waters into employer's mill. 141Wash172, 251P130.

39-33 151Va740, 145SE342.

39-34 4HawaiiFed717. See also 7LaA495. [a] **Agreement between employer and employee** to submit controversies in case of injury to provisions of Workmen's Compensation Act does not confer jurisdiction upon industrial commission for injuries occurring in purely maritime employment. 114OhSt702, 152NE656.

39-35 203Cal676, 265P825; 295Pa18, 144A753(2dense); Can [1928] 3DomLR334. But see 209Ky780, 273SW542 (admiralty jurisdiction is exclusive where employee was engaged in performance of maritime contract). But see **TexCommnA** 299SW213 (admiralty jurisdiction held exclusive). [c] (2) To injury to stationary engineer employed on dredge in harbor, and who was not required to have federal license. 258Mass470, 155NE602. [d] **Employee on city dredges tender** while tied to wharf cannot recover for injuries under Workmen's Compensation Act. 198Cal273, 244P353. [e] **Admiralty Jurisdiction is exclusive.**—(1) Where contract of employment is peculiarly maritime as for services on engine on raft in navigable waters. 75CalA19, 241P894. (2) Where injury occurred while employee was working on raft in navigable waters. 75CalA19, 241P894. [e] (3) Where injury occurs in performance of maritime contract on navigable waters, unless contract is of merely local concern and its performance has no direct effect on navigation or commerce, and application of state law would not necessarily work material prejudice to characteristic feature of maritime law or interfere with its uniformity. 242Mich454, 219NW730. (4) Where employee was injured while repairing ship on navigable waters (242Mich454, 219NW730 [ship in slip in Detroit River]), (5) although vessel was withdrawn from service for extensive repairs (242Mich454, 219NW730). [f] **Mixed employment.**—75CalA19, 241P894. [g] **Injury occurring on navigable waters in performance of nonmaritime contract** is prima facie local and within operation of state Workmen's Compensation Act. 242Mich454, 219NW730.

39-86 24F(2d)63; 200Cal579, 253P926; 91CalA98, 266P968; 84IndA155, 150NE615; 118 Or642, 247P770; 193Wis515, 215NW448. [a] **State industrial commission** has jurisdiction in case of death by drowning of laborer performing duties in transporting employees from dredge to shore. 92CalA110, 267P763. [b] **Compensation acts may be applied to maritime torts** where enforcement does not materially affect rules of sea whose uniformity is essential. 92PaSuper418.

39-88 135Wash260, 237P711, 241P969. See also 5LaA618(2dcase).

39-89½-New. An action against an insurer doing business under the Workmen's Compensation Act on a policy for the benefit of injured employees to recover for death of a deck hand on a nonself-propelled dredge engaged in improvement of an inland harbor channel is not exclusively within the admiralty jurisdiction of the federal court. TexCivA 274SW280.

39-89¼-New. Admiralty has exclusive jurisdiction of maritime torts on completed vessels in navigable waters, and an employee injured on a vessel in a floating dry dock cannot recover under state statute. 102NJL337, 132A89.

39-89¼-New. **Under New York Act,** employer, employee, and insurer must waive admiralty remedy to come under the act. 244NY132, 155NE74.

39-89½-New. Act of parties, where stevedore was injured, held not to show waiver. 244NY132, 155NE74.

39-89¾-New. Waiver of admiralty rights is ineffective unless definitely announced before service of summons. 244NY132, 155NE74.

39-89⅞-New. Waiver by one party is revocable until waiver by all essential to waive admiralty rights under statute. 244NY132, 155NE74.

39-89¾-New. Voluntary payments by insurer to injured party have been held insufficient to show adoption of state law. **TexCommnA** 299SW213.

39-89⅞-New. Lack of jurisdiction of state court is not waived by appeal to set aside award of board. **TexCommnA** 299SW213.

39-89⅞-New. An employee killed through pure accident while unloading a ship used by his employer to transport his own goods exclusively is within the state Compensation Act. 31F(2d)497.

39-90 **NJSup** 150A771; 54SD482, 223NW600(2dcase); 100Vt72, 135A1. [a] 143Va244, 129SE268. [b] **Act of congress of June 3, 1922,** conferring on dock workers and repairmen benefits of state compensation acts, is not retroactive. 12PortoRicoFed458 (bill for injunction against Porto Rico workman's relief commission filed prior to such date sustained). [c] **Amendment to act,** after injury, is not applicable. **NJSup** 150A771.

39-91 89PaSuper170; 145Wash498, 261P85.

40-92 170Minn207, 212NW190; 220AppDiv61, 220NYS521; 37Wyo332, 261P648. [b] (3) Law in force at time of injury governs right to hospital treatment. 170Minn207, 212NW190.

40-92½-New. New Compensation Act does not attempt or purport to grant any right against a tort-feasor to a person, who at the time of the injury was an employee of a third person, that is not accorded every other person similarly situated as to casualties having no relation to status of employer and employee. 200Cal754, 254P1105.

40-93 220AppDiv61, 220NYS521; 35OhA177, 172NE292; 107WVa287, 148SE117. But see 7LaA634; 145Wash498, 261P85 (amount of allowance governed by time of injury, and not time of death).

40-94 129Kan690, 284P818 (right of appeal); 6LaA739; 229AppDiv46, 240NYS570 (time of filing claim); 27OhA314, 161NE356; 35OhA458, 172NE557.

40-94½-New. Employment contract made prior to enactment of compensation act is within act though when act became effective employee was non-resident. 111Conn693, 151A182.

40-95 15F(2d)906; 28F(2d)228; 213Ala202, 104S409 (phrase "arising out of and in the course of his employment"); 213Ala596, 105S648; 213Ala605, 105S693; 214Ala162, 106S799; 214Ala332, 107S905; 214Ala640, 108S862; 215Ala237, 110S17; 216Ala129, 112S734; 220Ala562, 126S626; 31Ariz224, 252P512; 32Ariz265, 257P641; 32Ariz293, 257P982; 199Cal221, 248P912, 47ALR359; 200Cal39, 251P635; CalA 287P567; 84Colo481, 271P617; 35GaA214, 132SE265; 43Ida625, 253P1104; 317Ill302, 148NE79; 318 Ill 312, 149NE278; 334Ill390, 166NE78; 83IndA181, 147NE811; 83IndA159, 147NE919; 85IndA186, 151NE17; 84IndA473, 151NE434; 86IndA578, 158NE909; 202Iowa136, 209NW289; 204Iowa1348, 217NW264; 122Kan825, 253P583; 219Ky691, 294SW159; 220Ky764, 295SW1044; 226Ky16, 10SW(2d)455; 226Ky7, 10SW(2d)463; 229Ky450, 17SW(2d)406; 234Ky24, 27SW(2d)393; 234Ky12, 27SW(2d)402; 9LaA173, 119S539; 9LaA639, 120S88 (exception of prematurity); 170La910, 129S526; 3LaA57; 3LaA523; 4LaA43; 4LaA258; 4LaA498; 6LaA673; 8LaA160; 127Me549, 143A270; 128Me50, 145A400, 67ALR239; Me 151A141; 153Md274, 138A235; 153Md343, 138A244; 267Mass319, 166NE821; 236Mich100, 210NW251; 167Minn407, 209NW26; 168Minn114, 210NW64; 169Minn367, 211NW327; 170Minn97, 212NW173; 171Minn75, 213NW546; 174Minn227, 218NW882; MoA 22SW(2d)839; MoA 25SW(2d)1084; MoA 28SW(2d)446 (repeal of provisions); MoA 31SW(2d)573; 78Mont579, 254P880; 81Mont36, 261P616; 83Mont527, 273P294; Mont 286P408; Mont 287P170; Mont 289P563; 114Nebr432, 208NW739, 46ALR1213; 114Nebr432, 208NW739, 46ALR1213; 118Nebr445, 225NW117(2dcase); Nebr 227NW87; 83NH221, 140A704; NJ 139A43; NJ 147A511; 34NM483, 284P115; 243NY257, 153NE67; 248NY93, 161NE431; 197NC595, 150SE44 (act must be interpreted within light of general policy of state with reference to maintenance of state agencies); NC 154SE66; 49ND534, 191NW839; 114 Oh607, 151NE769; 23OhA95, 154NE168; 24OhA196, 156NE508; 25OhA1, 158NE605; 24OhA66, 156NE616; 33OhA237, 169NE36; 34OhA196, 170NE600; 35OhA177, 172NE292; 112Okl245, 240P640; 115Okl67, 241P820; 115Okl273, 244P432 (provision for review of award at any time, on ground of change in conditions, is to be given liberal construction in interest of employee); 126Okl235, 259P265; 128Okl295, 262P1062; 132Okl290, 270P575; 133Okl77, 271P142; 136Okl170, 276P705; 138Okl166, 280P597; 138Okl235, 281P273; 139Okl302, 282P293; 140Okl238, 283P240; 39OklACR250; 119Or357, 249P820, 50ALR1129; 86PaSuper514; 91PaSuper106; 11PaDist&Co 13; 13PaDist&Co 673; 46RI509, 129A599; 48RI368, 138A183; 50RI16, 144A439; 50RI90, 145A314; RI 150A762; 51RD359, 213NW947; 152Tenn412, 277SW905; 155Tenn441, 295SW68; 156Tenn168, 299SW770; 156Tenn179, 299SW802; 158Tenn18, 118SW(2d)860; 115Tex551, 285SW1084; TexCommnA 283SW141; TexCommnA 285SW1041, 1042 [cit[CJ]; TexCommnA 288SW409; TexCommnA 299SW871;

TexCommnA 30SW(2d)305; **TexCivA** 275SW685; **TexCivA** 281SW1092; **Tex CivA** 283SW277; **TexCivA** 283SW929; **TexCivA** 284SW698; **TexCivA** 285SW 878; **TexCivA** 294SW932; **TexCivA** 1 SW(2d)412; **TexCivA** 1SW(2d)434; **TexCivA** 5SW(2d)812; **TexCivA** 10SW (2d)220; **TexCivA** 14SW(2d)111; **Tex CivA** 21SW(2d)31; **TexCivA** 21SW(2d) 691; **TexCivA** 25SW(2d)898; **TexCivA** 27SW(2d)314 (as to notice of injury); 66Utah256, 241P362 (statute relating to continuing jurisdiction of commission); 67Utah8, 245P378; 69Utah102, 252P 567; 99Vt301, 131A844; 144Va98, 131 SE240; 148Va125, 138SE494; 150Va 260, 142SE400; 150Va562, 143SE756; 153Va332, 149SE541; 142Wash160, 252 P697; 151Wash430, 276P89; 103WVa 519, 138SE97; 104WVa110, 139SE469, 54ALR785; 106WVa331, 145SE578; 107WVa533, 149SE665; 107WVa546, 149SE666; 196Wis159, 216NW137; 195 Wis19, 216NW522; 195Wis134, 217NW 734; 195Wis468, 218NW716; 200Wis 123, 227NW291; Wis 230NW130 (boy injured in public garage held "frequenter" under statute); NS [1928] 2DomLR 796. See also 265Mass300, 163NE910. But see 200Wis616, 229NW194 (rule inapplicable where evidence clearly preponderates one way or other). [a] (3) 49ND534, 191NW839. (4) Other statements. 85Mont41, 277P615. [c] 329 Ill 543, 161NE108. [h] **All doubts must be construed to favor workmen against exceptions.**–216Ala129, 112S734. [i] **Injustice resulting from construction extinguishing employee's rights** is evidence supporting another construction based on broader views of public policy. 83NH221, 140A704. [j] **Provision for forfeiture,** if employee persists in practice tending to retard recovery, must be strictly construed. 37Wyo 332, 261P 648. [k] **Portion of statute concerning manner in which it becomes or ceases to be operative as to individual** is not within rule of liberal construction. 322Mo 158, 16SW(2d)190. [l] **Statute applicable to gaseous mines.**–10PaDist& Co 716. [m] **Retroactive operation.**–252 NY1, 168NE442; **TexCivA** 22SW(2d) 540 (procedural requirements). [n] **Any doubt respecting right to compensation** is to be resolved in favor of employee. **MoA** 24SW(2d)224. [o] **Employer and not workman assumes ordinary risks** of business or employment under Compensation Act. **NC** 153SE 594. [p] **Workmen's Compensation Act should be construed in favor of its beneficiaries.**–**LaA** 130S634.

40–96 Cal 284P451(2dcase) (penal provisions of act); **Del** 151A822; 208 **Iowa** 430, 226NW124; 296Pa529, 146A130. See also 227**AppDiv**333, 237NYS488 (statute allowing additional compensation is penal and should be strictly construed). But see 154**Tenn**224, 289SW 520. [a] **Provisions of act cannot be waived by parties.**–**CalA** 276P407. [b] **Workmen's Compensation Act should be construed in favor of employer.**–**CalA** 292P525.

41–97 220Ala10, 123S201; 11**LaA**77, 120S246; 157Md200, 145A485; 266**Mass** 323, 165NE391; **MoA** 27SW(2d)459; 81 **Mont**36, 261P616; 120 **Oh**458, 166NE 403; 288Pa140, 135A903; 98Vt449, 129 A311 (not extended to alter common law in case not within terms of act); 200**Wis**134, 227NW287.

41–98 35F(2d)348 (words "surviving wife" mean widow); 214**Ala**640, 108S 862; 42 **Ida**141, 243P818 (strained construction held improper); 206 **Iowa**104, 218NW513, 62**ALR**342; 238**Mich**572, 214NW174; **MoA** 18SW(2d)86; 220 **AppDiv**18, 220NYS226; 288**Pa**104, 135 A652; 157**Tenn**613, 11SW(2d)672. [a] **Statutory definitions of words "employer"** and **"employee"** must control in so far as they may tend to modify common law. **Utah** 274P940.

41–99 42 **Ida**141, 243P818; 209**Ky**345, 272SW884; 236**Mich**100, 210NW251; **MoA** 24SW(2d)224; 78**Mont**579, 254P 880; 112 **Okl** 292, 240P1053; 132 **Okl** 290, 270P575; 133 **Okl** 77, 271P142; 138 **Okl** 166, 280P597; **TexCommnA** 13 SW(2d)364; 69**Utah**102, 252P567. [a] **Particular statutory provisions construed.**–1**LaA**616.

41–1 124**Kan**287, 259P703; 236**Mich** 100, 210NW251; **TexCommnA** 17SW (2d)1043.

41–2 214**Ala**640, 108S862; 31**Ariz**224, 252P512; 165**La**334, 115S582; 9**LaA** 465, 121S219; 154**Md**401, 140A712; 322 **Mo** 158, 16SW(2d)190; 81**Mont**36, 261 P616; 82**Mont**543, 268P495; 83**NH**221, 140A704; 121 **Oh**271, 167NE874; 197 **Wis**428, 222NW315. See also 197**Wis** 237, 221NW766.

41–2½–New. Strained construction should not be given. 318 **Ill** 312, 149 NE278.

41–3½–New. The statute must be construed in accordance with its spirit and intent. 206 **Iowa**104, 218NW513, 62 **ALR**342.

41–4½–New. Child Labor Law and Workmen's Compensation Act are in harmony and must be construed together. 98Vt449, 129A311.

41–4⅛–New. The act must be construed liberally in favor of injured party. **TexCivA** 285SW648.

41–4¼–New. Compensation Act is presumed to furnish substantial, not merely nominal, relief. 152**Md**474, 136A897.

41–4⅙–New. Statutory provisions making effective rights under the Workmen's Compensation Act are exclusive.

41–4½–New. mandatory.

41–4⅞–New. and jurisdictional. **Tex CivA** 291SW287.

41–4⅛–New. A provision making a contractor a statutory employer of subcontractor's employee cannot be extended further than necessary to accomplish the purpose. 288**Pa**443, 136A223.

41–4⅛–New. A statute extending the time for review of an award on the ground that the employee returned to work held retroactive. 324 **Ill** 32, 154 **NE**441.

41–4 1/10–New. The rule that mention of one constitutes exclusion of the other will be applied. **TexCommnA** 283SW 141.

41–4 1/11–New. Enactment of an amendment by the legislature, expressly construing a provision in the act, is binding on courts and must be followed. **TexCommnA** 283SW141.

41–4 1/12–New. That the legislature has made no change in certain provisions of the statute since its enactment raises an assumption that its administration has been in accord with the intent of that body. 145**Wash**263, 259P720.

41–4 1/13–New. Right of injured employees or dependents to participate in a state insurance fund is governed by the law in force when the cause of action accrues. 119 **OhSt**1, 160NE470.

41–4 1/14–New. The acts must not conflict with other statutes. 218**Ala**407, 118S 583.

41–4 1/15–New. The act must be liberally construed in favor of injured employees. 88 **IndA**22, 163NE27.

41–4 1/16–New. Operation of the act should not be stretched to make an employer an insurer nor to make it substitute for disability or old age compensation. 28**F**(2d)228.

41–4 1/17–New. The act relative to compensation for hernia is a statute which is not to be construed in favor of either party. 108**Conn**309, 143A155.

41–4 1/18–New. The law must be interpreted only in connection with the facts. **Ariz** 284P153.

41–4 1/19–New. Construction of particular statutes.–227**AppDiv**430, 237NYS348.

41–4 1/20–New. Rights long existing should not be taken away except by statute showing a clear purpose to do so. 227**AppDiv**430, 237NYS348.

41–4 1/21–New. The statute relative to notice to be given by an employer did not repeal a provision of the statute relating to notice to be given by an employee. **TexCivA** 218SW(2d)334.

41–4 1/22–New. In the absence of a provision in the act, the court must assume that the legislature intended that a common-law rule should apply in fixing the status of a loaned employee. 153**Va** 176, 149SE479.

41–4 1/23–New. Amendments to compensation act are not construed to apply retroactively if contract rights would be affected. 12**PaDist&Co** 614.

41–4 1/24–New. Industrial accident board and court are bound by provisions of compensation statute. **Mont** 289P563.

41–4 1/25–New. Extent of jurisdiction of industrial commission see **Okl** 293P257.

41–6½–New. Workmen's Compensation Act concerns itself solely with mutual rights and liabilities based on relationship of master and servant, and does not affect other relationships. 83NH482, 145A142.

41–6½–New. Regulations of the industrial accident board cannot be used in construing the Compensation Law, so as to give it a higher mandate than that of the statute. **TexCommnA** 14SW(2d) 798.

41–6¼–New. Rights of workmen's compensation claimant, employer, and insurance carrier become fixed on the date of the injured employee's death, and no statute subsequently passed should be construed to have the effect of enlarging or diminishing such rights or obligations. 225**AppDiv**167, 232NYS437.

41–8 CalA 284P474; 336 **Ill** 461, 168 NE286 (employment by village to haul dirt and fill up holes in common dirt road is not extrahazardous); 234 **IllA** 502; 214**AppDiv**345, 212NYS410 (employment in construction and maintenance of highway is "hazardous employment" within act); 52**ND**563, 203 NW895; 126 **Or**694, 270P759. See also 232 **IllA**495; 246 **IllA**118 (railroad employee engaged in interstate commerce); 195**Wis**15, 216NW495 (under insurer's policy provision, domestic on farm held included). [a] (1) 83**Colo** 556, 266P 1114; 166**Minn**251, 207NW636; 176 **Minn**100, 222NW525; 180**Minn**40, 230 NW124 (carpenter employed by bank to repair buildings on farm not farm laborer); 34**PortoRico** 747; 193**Wis**38, 213NW651. But see 195**Wis**15, 216NW 495 (employer may elect to accept provision of act including farm laborers). (2) See also 230**AppDiv**216, 243NYS464. (3) Nurseryman's helper held farm laborer under circumstances. **TexCivA** 30SW(2d)1055. (18) Employee assisting in operating wood sawing machine in sawing wood for farmer at hour rate of compensation is not engaged in employment incidental to farming but is engaged in hazardous employment within statute. 116 **Or**448, 241P385. (19) Employer of farm labor may elect to accept provisions of act by filing and posting statement of such election. 166 **Minn**251, 207NW636. (20) Employee hired to perform services in industrial business and then directed to perform farm labor was entitled to compensation for injury while engaged in industrial activity. 177**Minn**503, 225NW 428. (21) Employee of commercial thresherman held not farm laborer. 178 **Minn**512, 227NW661. (22) Claimant held not farm laborer. 230**AppDiv**216, 243NYS464. [p] **Logging and lumbering** impliedly includes cutting, hauling, and driving of logs. 125**Me**16, 130A355. [q] **Hazardous employments not enumerated.**–Under statute enumerating certain hazardous employments and providing that if any hazardous occupation not enumerated shall exist or arise it shall be included, only such hazardous employments as are specified or are of same general nature as those specified are included. 80**Mont**136, 259 P825. [r] **Erection of dwelling for home** has been held not "trade, business, or occupation" which owner carried on for pecuniary gain within definition of employment by Workmen's Compensation Law. 157**Md**200, 145A 485. [s] **Business of employer need not be exclusive,** but he must allege line of work which was followed by employer as trade, business, or occupation. 9 **LaA**183, 119S456. [t] **Horse racing included.**–9**PaDist&Co** 269. [u] **Stevedores.**–11**PaDist&Co** 72. [v] **Occupations not included.**–**Wash** 288P921. [w] **In Washington** classification is made by Legislature or Department of Labor and Industries. **Wash** 288P921.

41–9 125 **Or**526, 267P518. [a] (8) "Workman" is defined by statute as "any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, except a person whose employment is purely casual and not for the purpose of the employee's trade or

business." 34**Wyo** 357, 243**P**593, 594. [i] **In New York** domestic servants and farm laborers may elect to come within acts. 215**AppDiv**176, 213**NYS**202.

42-10 318 **Ill** 312, 149**NE**278; 133 **Okl** 273, 272**P**373.

42-11 318 **Ill** 312, 149**NE**278; 125 **Or** 526, 267**P**518.

42-12 41**F(2d)**342; 111 **Okl** 265, 239**P** 575 (statute held not to include employment as collector); 143**Wash**176, 254**P**1083. [b] (7) 3**LaA**761. See also 34**Wyo** 357, 243**P**593 (statute including buildings being "moved" as extrahazardous). (60) 141**Wash**172, 251 **P**130. (63) Business of carrying on sawmill or logging camp is hazardous employment within some statutes. 117 **Or**188, 243**P**96, 45**ALR**812. (64) Any occupation entailing manufacture or close proximity to dangerous quantities of dynamite, nitroglycerine and other like dangerous "explosives." 10**LaA** 674, 121**S**782. (65) Construction work 132 **Okl** 290, 270**P**575. (66) Operation of engines and other forms of machinery. 12**LaA**415, 125**S**883. (67) Wholesale mercantile establishment. 141 **Okl** 187, 284**P**633 (salesman within act). (68) Ice plants and storing ice. **LaA** 129**S**436 (includes delivery of ice to customers). (69) Operation of hand trucks. 227**AppDiv**259, 237**NYS**370 (includes use of "dolly" in moving heavy objects). (70) Collection of accounts for lumber company not hazardous. 141 **Okl** 20, 283**P**555 (injuries received when automobile wrecked). (71) Other provisions construed. 31**Ariz**187, 251 **P**553; 318 **Ill** 312, 149**NE**278; 121**Kan** 258, 246**P**501; 125**Kan**249, 264**P**46; 143 **Wash**176, 254**P**1083. (72) Other instances. 138 **Okl** 77, 280**P**449 (occupation not hazardous). [j] **Particular occupations held hazardous.**–Workman injured while capping bottle of soft drink by machinery operated by foot pedal after having filled bottle by power driven machinery was engaged in hazardous employment, filling and capping machinery being located in same room. 112 **Okl** 292, 240**P**1053. [k] **Employments held hazardous.**–Employment at service station handling gasoline. 12 **LaA**415, 125**S**883.

43-13 143**Wash**176, 254**P**1083.

43-13½-New. To be hazardous and to be covered by the acts, it is not necessary that the work be carried on for pecuniary gain of employer. 214**App Div**345, 212**NYS**410 (town).

43-13¼-New. Where an occupation is neither classified by the statute as extrahazardous nor so found by the industrial insurance department, the remedy for injury to an employee in such occupation is by common-law action, even if extrahazardous in fact. 143 **Wash**176, 254**P**1083.

43-13¼-New. Driving large delivery truck for wholesale merchant held not "extrahazardous" employment under statute. 146**Wash**266, 262**P**973.

43-13⅓-New. Whether person is employed in hazardous occupation under act is question of fact. 141 **Okl** 202, 284 **P**644.

43-13⅓-New. Where the business was hazardous change of employee to work more or less hazardous than he had been accustomed to did not change employment. 13**LaA**664, 127**S**146 (only remedy was under act).

43-13½-New. Employee of nonprofit golf club is not within statute limited to employments in trade, business or occupation carried on for pecuniary gain. 143 **Okl** 285, 288**P**954.

43-14 318 **Ill** 312, 149**NE**278; 13**LaA** 525, 127**S**59 (employment of taxicab driver in congested district held hazardous); 128 **Okl** 295, 262**P**1062. [a] (5) Employee injured while tearing down barn on land that employer was engaged in subdividing has been held not entitled to compensation under act. 318 **Ill** 312, 149**NE**278.

43-15 **TexCivA** 308**SW(2d)**1055. [a] **Where employer engaged in more than one business.**–69**Utah**473, 256**P**405.

43-16½-New. Under some statutes one whose duties are partly hazardous and partly nonhazardous is entitled to compensation although injured while performing nonhazardous duties. 12**LaA** 415, 125**S**883.

43-17 [c] **In New York** employees of railroad are within act although their employment is not classed as hazardous. 254**NY**349, 173**NE**218.

44-18 255 **IllA**422. See also 142**Wash** 69, 252**P**152.

44-19 See also 253**NY**303, 171**NE**64 (principal business non-hazardous and employee engaged in enumerated hazardous employment entitled to compensation).

45-24 167**Ga**397, 147**SE**50; 87 **IndA** 509, 162**NE**71; 5**LaA**17; 157**Md**200, 145 **A**485; 50**RI** 90, 145**A**314. See also 1**LaA** 296. [a] (17) See also 155**Tenn**491, 296 **SW**3, 53**ALR**1086. (23) Under statute making Compensation Act apply to employers having three or more employees, only employers usually and ordinarily having three or more employees are intended. 189**Wis**471, 205**NW**428. (24) Requirement of five employees refers to size of group employed throughout period in question, and not to total number of persons who may have entered and left employment during period. 103**Conn**49, 130**A**73. (25) Whether defendant employed 10 or more men is a question for the jury. 33**GaA**668, 127**SE**816. (26) Under Colorado statute lessee of mines is not liable for injuries to employee where it employed only two men. 82**Colo** 272, 259**P**1036. (27) But lessor of mine is liable, though lessee employed only two men, where statute provides that lessor operating business by leasing shall be liable for injuries irrespective of number of employees. 82 **Colo** 272, 259**P**1036. (28) Matters considered in determining whether employer "regularly" employed less than statutory number. 220**Ala**562, 126**S**626 (construing word "regularly" and holding checkers "regular" employees). (29) Four employees. 86**Colo** 590, 284**P**121. (30) Regular employment of more than three laborers required. 35**PortoRico** 209. (31) Whether employer employed requisite number of employees to come within act is question of fact for jury on conflicting evidence. **MoA** 26**SW(2d)** 52. (32) Period of employment sufficient. 230**AppDiv**216, 243**NYS**464. (33) Five employees. 103**Conn**426, 130**A**672. [s] **Employers of loggers, lumberers, and drivers** may come within act if they so elect. 125**Me**16, 130**A**355. [t] **In Texas** act of 1918 does not exclude municipal corporations from "corporations" included within definition of "employer." **CivA** 283**SW**929. [u] **Whether employers were engaged in an excluded employment** is question of fact. **CalA** 275 **P**844. [v] **"Commercial thresherman."**–Owner of threshing outfit threshing for groups of neighboring farmers held commercial thresherman. 180**Minn**49, 230**NW**274. [w] **Employers within Act.**–**NC** 153**SE**591 (hosiery manufacturers).

45-25 166**Minn**251, 207**NW**636; 240**NY** 341, 148**NE**543 (elective feature of Compensation Law held applicable to employment in business not conducted for pecuniary gain). [a] **Application to come within Compensation Act** will not be denied, even though employment is rendered on floating vessel in navigable waters, where no feature of general maritime law is invaded. 113 **OhSt**96, 148**NE**572. [b] **Employer is not required** to notify employees that he carries insurance for their benefit. **Tex CivA** 297**SW**1042.

45-26½-New. Single act of leasing sawmill, for part of product thereof, is "operating" or "conducting" business under a statute making the lessor liable for injuries to employees of lessee in conducting business. 77**Colo** 414, 236**P**1006.

45-26¼-New. Some acts make one conducting business by leasing liable for compensation of lessee's employees. 77 **Colo** 414, 236**P**1006.

46-28 205 **Iowa**74, 217**NW**551; 169 **Minn**183, 210**NW**1004. [e] (4) Where several workmen associate themselves together for performance of particular piece of work, and employ two or more extra workmen in execution of work, and carry compensation insurance for employees, associated workmen and their insurance carrier are liable for injury to one of such extra employees while engaged in work. 126 **Okl** 18, 257 **P**1104. [f] (5) Towns are to employees insured employers within the acts. 214 **AppDiv**345, 212**NYS**410. (6) Town, not superintendent of highways, is employer of laborers working on town highway. 214**AppDiv**345, 212**NYS**410. [h] **Towns** are employers within act to authorize recovery for injury in hazardous employment. 214**AppDiv**345, 212**NYS** 410. [i] **County in constructing road** is not engaged in trade or business within Compensation Act. 122**Kan**486, 252 **P**196. [j] **Persons or corporation operating business by leasing** (1) are expressly construed by statute in some jurisdictions to be employers and liable to pay compensation to lessees and their employees. 82**Colo** 272, 259**P**1036. (2) Terms of lease held to show lessor was operating its business by leasing of mine in which miner was killed. 82 **Colo** 272, 259**P**1036. (3) Lessor is not relieved of liability because of agreement by lessee to carry liability insurance which it fails to carry out. 82**Colo** 272, 259**P**1036. [k] **Cities and towns** not included within Texas act. **Tex CommnA** 288**SW**409. [l] **Independent contractor.**–Under statute, word "employer" does not include owner who requires his contractor to take out compensation insurance, nor contractor who sublets and requires his subcontractor to take out such insurance. 117**Nebr** 805, 223**NW**661. [m] **Statutory construction of definition.**–87**Colo** 594, 290**P** 287.

46-29 86**Colo** 206, 280**P**483; 322 **Ill** 60, 152**NE**483; 229**AppDiv**58, 240**NYS**720 (relation tested by employer's right of control); 7**PaDist&Co** 299. [b] (3) Driver employed by hirer to operate truck leased from owner who acted as hirer's superintendent of deliveries is servant of hirer. 88**CalA**369, 263**P** 823. (14) Housewife maintaining summer home is not employer within meaning of act so as to render her or her husband liable to pay compensation for accidental death of her caretaker. 166**Minn**339, 208**NW**18. (15) State held not employer because it apportioned highway tax and supervised expenditure. 126**Me**349, 138**A**559. (16) Other instances. 229**AppDiv**58, 240**NYS**720. [c] **Employment by agent for undisclosed principal.**–Person hiring another cannot escape liability under compensation act on ground that he acted as agent where he did not disclose agency and name of principal. 34**Ariz**387, 271 **P**713. [d] **Ostensible employer who in fact represents undisclosed principal** is, as to employee hired by him, occupyipg relation of actual employer and is responsible as such. 99**CalA**767, 279**P** 473. [e] **Corporation** as employer under act is distinct from its shareholders or officers. **NJSup** 150**A**672. [f] **Partnership.**–(1) That partners as such own interest in oil and gas lease is not conclusive that one employed to drill well is employee of partnership. 142 **Okl** 235, 286**P**314. (2) In such case it may be shown that employee is in exclusive employment of one of owners. 142 **Okl** 235, 286**P**314. [g] **Where fraternity home association sold building** which purchaser was required to remove from fraternity's premises, fraternity was not liable as employer. **IndA** 168**NE**131(1st case).

46-30 229**AppDiv**56, 241**NYS**411 (one cannot be both employer and employee at same time).

46-31 286**Pa**418, 133**A**792; **Wis** 232 **NW**870. [a] (2) Right to control and direct activities of employee is test of special employment. 203**Cal** 51, 262**P** 757. (3) Former railroad employee, working under direction of construction company in keeping railroad track clear, is "employee" of construction company, which is "employer." **Utah** 274**P**943. [d] **Who liable for compensation in case of special employment.**–Workman injured in special employment may look to either general or special employer for compensation. 203**Cal** 51, 262**P**757. [e] **Sale of business.**–Where employee

had no knowledge of sale of business shortly before injury; relation continued and previous employer who had not withdrawn election to operate under act was liable. 209Ky226, 272SW736. [f] **Liability of hirer of truck and chauffeur.**–(1) Person hiring truck and chauffeur from truck owner, and directing and controlling chauffeur while engaged in work and having right to discharge him, is employer of chauffeur within meaning of Compensation Act. 37GaA707, 141SE506. (2) In such case special employer is not relieved from liability for compensation for injuries to such chauffeur because he never paid or was liable to pay wages directly to him. 37GaA707, 141SE506. [g] **Employee injured in temporary special employment** of third person cannot hold general employer liable for compensation. 93PaSuper34. [h] **Mere payment of wages or salary** is not, of itself, sufficient to establish that recipient is servant of one paying same. 203Cal 51, 262 P757.

46–31½–New. Where at the time of an injury both general and special employers exert some measure of control over the injured employee, both may be held liable for compensation. 199Cal 694, 250P862.

46–31½–New. Where the surety is under an obligation to complete work, it cannot escape liability for injury to an employee by delaying taking up of the work after default. 152Va150, 147SE 537.

46–31¼–New. Persons who are generally the employees of a general employer and specially, the employee of a special employer, may look to either or both for compensation. 203Cal 224, 263 P799.

46–32 [a] (2) Agricultural society employing painter on its exhibition buildings held not within statute. 220App Div429, 222NYS70. (3) If fundamentally employer's business is not for gain, incidental employment, not for profit, does not bring parties within statute. 220AppDiv429, 222NYS70.

46–32½–New. Where a loss of vision was due to an injury received by employee while in the employment of one person, prior to his later employment by a self-insurer, the latter should not be made to contribute to the compensation. 114 Oh607, 151NE769.

46–32½–New. Payment of compensation is necessary to constitute one an employer within Workmen's Compensation Act. 34GaA156, 128SE777.

46–32¼–New. A truckman who, by custom of business, was required to take men near his truck and divide compensation for a job in a certain proportion is not the employer of the men assisting him within the act. 215AppDiv 359, 213NYS530 (where he had no right to select men to assist him).

46–32½–New. State and city held not partners so as to be jointly liable for injuries to a person working on the construction of a highway. 126Me287, 138 A66.

46–32¼–New. An employer who is not permitted to subscribe to Workmen's Compensation is not deprived of common-law defenses. TexCommnA 288SW 409.

46–32⅐–New. A municipality is an employer, when employing persons as a proprietary governmental agency, in any of the classes of work embraced in the act. 104WVa110, 139SE469, 54ALR 785.

46–32⅛–New. An employer cannot escape liability because a workman was working for him and another employer at the time of the injury. 88PaSuper 525.

46–32⅑–New. Under some statutes municipality becomes subject to act only when engaged in one of hazardous occupations specified. 142 Okl 247, 286P 789.

46–32 1/10–New. If employers remain owners of business fact of paying employees with borrowed money is immaterial to liability of insurer to injured employee. Mass 172NE254.

46–32 1/11–New. Farmers not exempt from liabilities imposed by act. NJSup 151A205.

47–33 199Cal 221, 248P912, 47ALR359; 200Cal 579, 253P926; CalA 276P412; 77 Colo 414, 236P1006 (where employment is in general, as opposed to one for completion of certain task according to agreed plan, price, and terms, relation of employer and employee is presumed in absence of proof to contrary); 86 Colo 590, 284P121; 86Colo 580, 284P 334; 39GaA510, 147SE738(1stcase); 322 Ill 187, 152NE548; LaA 130S257(2d case); 169Minn367, 211NW327; 112 Okl 292, 240P1053; 136 Okl 170, 276P 705; 46RI 509, 129A599; 146Va91, 135 SE890, 46ALR1427. [b] (7) 102Conn 471, 129A50. (31) Employee of trucking company caring for its horses during winter in barn erected by it on farm of another is not farm laborer and is entitled to compensation. 233Mich 541, 207NW831. (32) One hired on weekly wage to gather refuse held employee, though using own truck. NJ Sup 139A432. (33) Airplane pilot operating on percentage basis. 150Wash 230, 272P734, 62ALR225. (34) Mine manager or foreman who is also president and director of corporation without pay. 9PaDist&Co 57. (35) Party contracting with company to sell products and employee of such party are employees of company. 86Colo 553, 283P 548. (36) Secretary and treasurer of corporation. 200Wis8, 227NW292. (37) Window washer of private school. Mass 167NE914. (38) Officer of corporation employed as shop foreman, drawing wages is employee and entitled to compensation. NJSup 150A672. (39) Taxicab driver working for commission and not for salary. 13LaA525, 127S59. (40) Physician or nurse in hospital. 229AppDiv58, 240NYS720. (41) Professional men and other men of skill employed at regular salary for definite period. 229AppDiv58, 240NYS720. (42) Other persons held employees. 199Cal 221, 248P912, 47ALR359; 165 Ga667, 142SE121; 121Kan258, 246P 501; 169Minn183, 210NW1004; 54ND 496, 209NW972; 291Pa426, 140A339; Utah 266P721; 195Wis159, 217NW646. (43) Other instances. NJSup 152A242; 87PaSuper302. [c] (5) Other instances. 252Mass108, 147NE350; TexCivA 32SW(2d)262. (13) Principal owner of stock of corporation who was also president and had entire management thereof. 188Wis218, 205NW806, 44 ALR1213. (14) Checker working during loading of vessel partly on shore and partly on vessel is not within act where pay roll on shore and that on shipboard not clearly distinguishable. 135Wash260, 237P711, 241P969 (under statute). (15) One injured while on his way from employment agency to employer. 143Wash49, 254P831. (16) President of corporation engaged in selling its products by traveling. 205 Iowa967, 218NW613. (17) Other persons held not employees. TexCivA 1SW(2d)451. (18) Boiler repairer employed by basket factory to repair boilers. TexCivA 1SW(2d)945. (19) One volunteering brief and uncompensated service. 175Minn579, 222NW275. (20) President of corporation practically its sole owner. 176Minn422, 223NW 772. (21) Traveling salesman. 134 Okl 298, 272P1016. (22) Automobile salesman driving dealer to home town. CalA 288P129. (23) Maid employed in home of president of restaurant company. 252 IllA238. (24) Boy scout helping to prepare summer camp and getting board in return. Iowa 229NW841. (25) Receiver of oil company himself performing work in operation of lease. TexCommnA 24SW(2d)375. (26) Executive manager of motor transportation company. 255 IllA422. (27) President of corporation who was not paid wages. 179Minn304, 229NW101. (28) Newsboy. CalA 287P368. (29) One engaged in practice of profession whose services are engaged by another for limited purpose. 229AppDiv58, 240 NYS720. (30) Partner. 229AppDiv56, 241NYS411. (31) A dairy worker is not an employee within compensation statute. Md 150A804. (32) Trained nurse called on special case. 254NY349, 173NE218. [d] (2) Son of employer is excluded. CalA 276P407. [e] (4) Seaman held employee under act. 200Cal 579, 253P926. [p] 256Mass466. 152NE 880. [y] (1) 199Cal 577, 250P570. (5) Employee means every person in service of any person, firm, or corporation, under any contract of hire, express or implied, oral or written, or performing services for valuable consideration. 3 Del 4, 129A344. (6) Employee, though in employment of insured, is not employee entitled to compensation if at time of injury he is not engaged in usual trade, business or occupation of employer. 252Mass108, 147NE350. (7) Employee is controlled in material respects as to manner and method or means to be adopted in carrying out contract. TexCivA 271SW929. (8) Person in service of another under any contract of hire is employee. 169Minn 183, 210NW1004. [aa] **Clerical employees.**–(1) Under some statutes employees engaged in clerical work only are entitled to benefit of act when subjected to hazards of employer's business. 202 Iowa1044, 208NW709. (2) To entitle clerical employee to compensation under such statute, injury need not be caused by thing inherently or known to be hazardous or dangerous. 202 Iowa 1044, 208NW709. (3) Under such statutes injury need not result from employer's negligence. 202 Iowa1044, 208 NW709. (4) Under such statutes it is immaterial whether thing done when injury was sustained pertained to clerical work or other work of employer. 202 Iowa1044, 208NW709. (5) Hazards of business as used in such statutes mean anything connected with business of employer as distinguished from clerical employment. 202 Iowa1044, 208NW 709. (6) Under such statutes injury to clerical employee in grocery store resulting from tripping over scale while passing down stairway is compensable. 202 Iowa1044, 208NW709. (7) Rule applies though occasion for passing over stairway was not connected with employer's business. 202 Iowa1044, 208 NW709. [bb] **That person employed by automobile dealer to retake car was bound to reimburse dealer for expense of retaking** does not affect relationship of master and servant. TexCivA 274SW 309. [cc] **Persons employed exclusively** to care for home and serve members of family are not covered by Compensation Act. 166Minn339, 208NW18. [dd] **Workman.**–(1) Officer or executive having no duties of manual or mechanical labor is not workman. 82NH73, 129 A633. (2) General manager not working in dual capacity is not workman. 82NH73, 129A633. [ee] **Necessity of payment consideration for services.**–Some consideration must be in fact paid or payable for services in order to constitute person rendering them employee. 66Utah390, 243P113. [ff] **Test for determining question.**–Whether one person is employee of another depends on whether alleged employer possesses power to control the other in respect to his services and power to discharge him for disobedience or misconduct. 199 Cal 577, 250P570; 66Utah390, 243P113. [gg] **"Employee" indicates** person hired to work for wages as employer may direct. 66Utah390, 243P113. [hh] **Who pays wages** is element to be considered but is not conclusive. 286Pa278, 133A 504. [ii] **Agricultural laborers.**–(1) Persons employed to cut and rake hay and paid by day are agricultural laborers within meaning of statute excepting such laborers. 69Utah473, 256P405. (2) That employee who was killed while engaged in agricultural labor was kept in employ to perform work covered by Compensation Act after completion of agricultural work does not affect rights of his dependents to compensation. 69 Utah473, 256P405. [jj] **Piece worker.**–Workman paid by piece or quantity is within Compensation Act as well as one paid by day. 199Cal 577, 250P570. [kk] **Persons standing in representative capacity of employer** within exceptions of statute include president of corporation. 205 Iowa967, 218NW613. [ll]

Receiver may employ himself as individual and become entitled to compensation. **TexCivA 1SW(2d)**412. [mm] **Railroad employees engaged in maritime employment** were included with Longshoremen and Harbor Workers' Compensation Act regardless of fact that such workers already had remedy under federal Employers' Liability Act. 32 **F(2d)**179. [nn] **Test of relationship.**–98 **CalA**568, 277**P**529(2dcase); 334 **Ill** 390, 166**NE**78; 128**Mc**155, 146**A**82; 294**Pa** 230, 144**A**97; 91**PaSuper**271; 150**Wash** 230, 272**P**734, 62**ALR**225. [oo] **Officer of corporate employer.**–Salaried officer who exercises complete control of operations of company employing and discharging employees and directing execution of work is not servant of company. 91**PaSuper**271. [pp] **Persons held engaged in "clerical work" within exception of statute.**–Stenographer and typist. 206 **Iowa**104, 218**NW**513, 62 **ALR**342. [qq] **Common laborer** unloading sand from railroad car is held not within act. 176**Minn**592, 224**NW**247 (Wisconsin Act). [rr] **That insurance company issued compensation policy to council of boy scouts** does not change liability to scout injured while engaged in activities of council. **Iowa** 229**NW** 841. [ss] **President of corporation** (1) is not precluded from becoming employee within meaning of some acts defining employee. **Me** 149**A**147(2dcase). (2) When president of corporation acts only as such he is not employee within meaning of compensation act. **Me** 149**A** 147(2dcase). [tt] **Agricultural workers exception** includes work of dairying. **Md** 150**A**804.

47–34 CalA 287**P**368 ("contract of hire" defined by statute calls for personal service); 203 **Iowa**1171, 212**NW**419; 8 **LaA**406; 7**LaA**90; 7**LaA**366; 7**LaA** 715; 8**LaA**141; 8**LaA**797; 256**Mass**466, 152**NE**880; 168**Minn**67, 209**NW**644; 102 **NJL**231, 132**A**251; 252**NY**394, 169**NE** 622; 254**NY**349, 173**NE**218; 229**AppDiv** 58, 240**NYS**720; 52**ND**852, 204**NW**839; 25 **OhA**440, 158**NE**278; 129 **Okl** 32, 263 **P**440; 138 **Okl** 235, 281**P**273; 290**Pa**341, 138**A**855, 58**ALR**1463; 87**PaSuper**440; 48**RI** 113, 136**A**3; **TexCivA** 274**SW**309; **TexCivA** 1**SW(2d)**451; **TexCivA** 12**SW (2d)**1062; **TexCivA** 19**SW(2d)**346; 99 **Vt**301, 131**A**844; 153**Va**176, 149**SE**479; 143**Wash**49, 254**P**831; 150**Wash**230, 272 **P**734, 62**ALR**225; 198**Wis**345, 223**NW** 837. See also **CalA** 287**P**368 (person for whom service is performed must have right to control manner of doing work); 197**Wis**95, 221**NW**389. [a] 109**Conn**178, 145**A**887; **Ida** 286**P**612. [c] (1) 228**Ky** 649, 15**SW(2d)**465. See also 34**Porto Rico** 94 (claimant held partner not entitled to compensation). But see 154 **Wash**432, 282**P**905 (one may be employee, though partner, as far as division of profits are concerned). (6) 36 **OklACR**491. (10) In California working partner receiving wages irrespective of profits is entitled to compensation as employee. 198**Cal** 234, 244**P**321. (11) Managing partner, operating dredge under contract not providing for weekly wage, but for compensation contingent on profits and under which no profits were being made, held not entitled to compensation. 160**La**916, 107**S**621. (12) Partner carried on payroll as employee. 124 **Okl** 140, 254**P**66. (13) Partner cannot be employee within meaning of statute. **TexCivA** 293**SW**235. (14) Member of partnership receiving wages for his services and not subject to control of firm is not employee. 159**Tenn**51, 15**SW (2d)**737(1stcase). (15) Where each of two partners received weekly salary and share of profits, dependents of partner killed while engaged in labor for firm are not entitled to compensation. **IndA** 169**NE**879. [j] 169**Minn**183, 210**NW** 1004. [m] 125**Kan**581, 264**P**1051. [n] 166**Minn**251, 207**NW**636. [q] **Employment slip issued by employment agency** held not to constitute employment contract with employer named. 143**Wash** 49, 254**P**831. [r] **Written contract held to determine** whether parties come under Compensation Act. 160**La**916, 107 **S**621. [s] **Pecuniary consideration not necessary.**–83**CalA**122, 256**P**564. [t] **City or town included within scope of act** though not specifically. **Tex CommnA** 288**SW**409. [u] **Employee must be under employer's control.**–159 **Tenn**51, 15**SW(2d)**737(1stcase). [v] **Where port superintendent of corporation employs checkers** without disclosing principal they are employees of corporation. 220**Ala**562, 126**S**626. [w] **Volunteers.**–One who voluntarily assumed to drive truck for purpose of getting regular driver for hunting companion is not employee. **TexCommnA** 24 **SW(2d)**367. [x] **Discharged employee** returning on premises of employer, unless presence is referable to contract, is not in relation of employee to employer. **Wis** 231**NW**267. [y] **Where employee is loaned** with his consent to special employer, he becomes for time being employee of latter. **Wis** 232**NW**870. [z] **Effect of discharge.**–**Ala** 130**S**772.

48–35 83**CalA**122, 256**P**564; 256**Mass** 466, 152**NE**880; **TexCivA** 274**SW**309; **TexCivA** 1**SW(2d)**412. [a] 83**CalA**122, 256**P**564; 120**Kan**481, 244**P**1; 166**Minn** 186, 207**NW**621 (substitution of father for son in contract); 12**PaDist&Co** 359; 200**Wis**512, 228**NW**118. [b] 177**Minn** 462, 225**NW**448; 138 **Okl** 235, 281**P**273; 87**PaSuper**440; **TexCivA** 24**SW(2d)**799.

48–37 104**NJL**275, 140**A**790.

48–37½–New. Employment, under the West Virginia Workmen's Compensation Act voluntarily entered into, is a contract of employment, to be treated as all other contracts, and such contract is valid and binding on parties for injuries or death sustained within the contract of employment. 28**F(2d)**710 [certiorari den 279**US**838, 49**SCt**252(9thcase), 73**Led**985].

48–38 TexCommnA 283**SW**779; **Tex CivA** 10**SW(2d)**206; **TexCivA** 18**SW(2d)** 1102. But see **TexCivA** 22**SW(2d)**142 (2dcase) (partial invalidity of contract does not bar recovery of compensation). [b] **Employee engaged in work in violation of Sunday Law** is not deprived of protection of Compensation Act. **Tex CivA** 274**SW**309.

48–39 79**CalA**195, 249**P**33. See also 247**NY**357, 160**NE**397 (negligence in performance of duties and even disobedience to orders is not abandonment of employment).

48–40 288**Pa**104, 135**A**652.

48–41 199**Cal** 577, 250**P**570; 77**Colo** 414, 236**P**1006; 334 **Ill** 390, 166**NE**78; 88 **IndA**54, 163**NE**235(1stcase); **Mass** 167 **NE**284; 129 **Okl** 32, 263**P**440.

48–41½–New. One working as a day worker at instance of employer is within the act even though he began work as an independent contractor. 125**Me**16, 130**A**355.

48–41⅓–New. The liability for workmen's compensation is statutory and it is essential to recovery that the injured person comes within the fair terms of the statute creating the right to compensation. 66**Utah**390, 243**P**113.

48–41¼–New. Where a policy is intended to cover employers within provision of statute, that purpose ought to be indicated by its terms. 243**NY**257, 153**NE**67.

48–41½–New. Under some statutes, an employer cannot be relieved of liability by any contract, rule, regulation, or device. 99**Vt**301, 131**A**844.

48–41¼–New. Under such statute, unless claimant can show a scheme to avoid liability, he may not recover where the relationship of employer and employee does not exist. 99**Vt**301, 131**A**844.

48–41½–New. An employee voluntarily assisting successor after quitting held not under the act. 203 **Iowa**1171, 212 **NW**419.

48–41⅙–New. Resident employer's workman is under the act when working in the state, although hired outside. 171 **Minn**366, 214**NW**55.

48–41⅙–New. Corporation vice president owning one fifth of the stock has been held not a servant within the act. 288 **Pa**104, 135**A**652.

48–41⅒–New. In determining whether the relation exists, it is immaterial that the servant may have been employed by another person, 290**Pa**341, 138**A**855, 58 **ALR**1463.

48–41⅓1–New. or that he has also filed a claim against such other person. 290 **Pa**341, 138**A**855, 58**ALR**1463.

48–41½2–New. Insurer is not liable for compensation to employer under policy indemnifying him for accident to his employees. 83**Colo** 72, 262**P**521.

48–41⅓3–New. Compensation by means of the percentage of work done is not controlling on issue of existence of relationship. 83**Colo** 158, 262**P**1019.

48–41¼4–New. A compensation claimant is not estopped to claim recovery as employee by the fact that, subsequent to the injury, statements were filed showing his membership in partnership. 222**Ky** 216, 300**SW**595.

48–41⅕5–New. An employee whose appointment as secretary of a corporation, was merely nominal is not an executive officer within the compensation statute. 222**AppDiv**699, 225**NYS**141.

48–41⅙6–New. Consignee's employee held not "carrier's employee" within federal statute. **TexCommnA** 300**SW**35.

48–41⅐7–New. The contract of employment, and not the fact that work has commenced, establishes the relationship between the parties. 146**Wash**469, 263 **P**592.

48–41⅛8–New. The master of a vessel killed in starting the engine on another vessel belonging to the same owner is not an employee within the act. 27**F (2d)**144.

48–41⅑9–New. Where a foreign corporation transacted business in the state without a permit under the corporate name, and thereafter one stockholder sold out to other stockholder, but an amendment to the charter seeking a change of name was not filed, but the incorporation was permitted to expire by an action of the state in forfeiting the corporate charter, and there was no dissolution, defendant, injured after the transfer of the corporate stock, but several months before the forfeiture of the charter, was held an employee of the corporation as originally named, and was entitled to compensation under an insurance policy naming such corporation as the employer. **TexCivA** 7**SW(2d)**607.

48–41⅒0–New. In Maine, the act does not apply to one loading wood pulp for a paper company. 127**Me**228, 142**A**776.

48–41⅒1–New. Where an employer after the purported sale of a coal lease and the consolidation with another company, continued to conduct the business through the same officers and insured employees who were induced to sign a compensation register, it was thereafter estopped to claim that the employee was not working for it at the time of the injury, so as to escape liability as an employer. 228**Ky**367, 15**SW(2d)**291.

48–42 But see 48**RI** 368, 138**A**183.

48–45½–New. The manner of paying an employee is not necessarily the basis for determining the legal responsibility. 127**Me**252, 142**A**863.

48–46 [c] **Compensation held not to be awarded for injuries to partner** received while engaged as employee. 243**NY**257, 153**NE**67.

48–46½–New. Under some acts the lessor of a sawmill is liable to the lessee's employees no matter how many of the latter may be employed. 77**Colo** 414, 236 **P**1006.

48–49 See also 13**LaA**525, 127**S**59 (misrepresentation not rendering contract void but only voidable does not take case out of act).

48–50 37**GaA**238, 139**SE**688; 326 **Ill** 553, 158**NE**141; **Ill** 173**NE**339; 205 **Iowa**74, 217**NW**551; **Md** 133**A**889. [a] (3) Volunteer firemen belonging to company organized pursuant to city ordinance. 66**Utah**390, 243**P**113. [c] **City sustains relation of master** to employees engaged in construction of sewers. **Tex CivA** 283**SW**929. [d] **Contract for workmen's compensation insurance** between insurer and city and policy insured pursuant thereto held ultra vires and void. **TexCivA** 294**SW**276. [e] **City employee** cannot enforce rights under ultra vires compensation insurance policy issued to city. **TexCivA** 294**SW**276, 277 [citCJ]. [f] **Statutes held to apply.**–City employees in proprietary capacity. **TexCommnA** 288**SW**409.

48-50½-New. 35GaA447, 133SE476 (clerk of county board of roads and revenues held officer and not employee).
48-51 200Cal 44, 251P808, 49ALR1377. [d] **Policeman is not within Georgia act,** but may be covered by terms of city's insurance policy. 35GaA759, 134SE788. [e] **Convict** employed on state highway is employee under statutes in some jurisdictions. 200Cal 44, 251P808, 49ALR 1377. [f] **Citizen assisting deputy sheriff** in search for fugitives is entitled to compensation where wounded in consequence thereof. 200Wis451, 228NW591.
49-52 Ill 173NE339; 86IndA85, 156 NE168; 205Iowa74, 217NW551; 127 Kan255, 273P471; 34OhA382, 170NE 877 (deputy county officers); 144Okl 31, 288P951 (teamster hauling fertilizer for public park held not within statute); 87PaSuper440; Wis 232NW 871. See also 37GaA238, 139SE688 (policemen held entitled to compensation under terms of insurance policy). [a] (3) 167Minn407, 209NW26. (5) County policeman elected or appointed by county is not employee. 35GaA325, 133SE68. (6) Town marshall or night watchman guarding streets and general property of town is not within Oklahoma statute. 142Okl 247, 286P789. (7) Night policeman held employee. 339Ill 141, 171NE167. (8) Policeman killed while riding motorcycle is not within act where earnings exceeded statutory maximum figure. NJSup 151A489. [b] (11) Members of volunteer fire department of city are within statute. 170Minn278, 212NW461; 195Wis536, 218NW816. [c] (7) Workman removing brush from town road held town employee. 164Minn358, 205NW258. (8) Assistant mechanic and truck driver employed in state highway department. 52ND563, 203NW895. (9) Workman held employee of city rather than state. 126Me349, 138A559. [k] (2) Where such person was killed in performance of his occupation as such employee, his minor child may recover compensation under act. 199Cal 221, 248 P912, 47ALR359. [l] **Tree warden.**–102 Conn571, 129A524. [m] **Cities and towns,** when exercising functions of private corporations, are within Workmen's Compensation Law. TexCivA 283SW 929. But see TexCivA 293SW191. [n] **One compelled by sheriff to perform service as deputy** in assisting sheriff to effect arrest is employee of county within Compensation Act. 199Cal 221, 248 P912, 47ALR359. [o] **County commissioner** engaged in inspection of making of repairs of highway is not engaged in inherently dangerous employment and is not within protection of Montana statute as to public officers. 80Mont136, 259 P825. [p] **Servant hired by department** of game and fisheries held employee of state. 147Va89, 136SE651. [q] **Public officers.**–Under statute bringing elected and appointed paid public officers within its protection, only such officers are brought within its provisions as are connected with or engaged in hazardous occupations of same general character as those mentioned. 80Mont 136, 259P825. [r] **Election officers.**–(1) Woman regularly appointed as inspector at election by county board of supervisors is employee. 89CalA736, 265P 362. (2) County engaging woman to act as election inspector is engaged in business. 89CalA736, 265P362. [s] **Employees held not included.**–Can [1928] 1DomLR616. [t] **Volunteer deputy fish and game warden** without pay held public officer and not employee so as to come within provision of act. 208Cal 14, 279P937. [u] **Provision as to extrahazardous employments** did not operate to bring village within act regardless of nature of employment. 336Ill 461, 168NE286. [v] **Persons held employees of state.**–179Minn425, 229NW560 (persons employed by state livestock sanitary board). [w] **Juror held employee of county.**–27OhNPNS256. [x] **Jurors** held entitled to compensation as not within provision excepting state and county officials. 34OhA196, 170NE600.
49-52½-New. A deputy sheriff is not an officer of the county within a provision of act providing compensation for officers except elected officers. 142Va 84, 128SE574.
49-52⅓-New. A deputy sheriff enforcing the Prohibition Act is not an employee of the county. 142Va84, 128SE 574.
49-52¼-New. The fact that an accident occurred while a deputy sheriff was employed as an officer of the state is conclusive against employment relationship with the county. 142Va84, 128SE574.
49-52⅕-New. Compensation Law requiring insurance of county employees and payment of compensation held invalid as requiring tax levies for unauthorized tax purposes. 164Ga485, 139 SE11, 53ALR1286.
49-52⅙-New. It is necessary for a town to adopt a formal ordinance or resolution to make valid employment sufficient to authorize compensation. 86IndA407, 157NE63.
49-52⅐-New. A person employed by clerk of a school district without vote of the board held not employee within statute. 194Wis342, 216NW844.
49-52⅛-New. A convict injured while serving a sentence in a county chain gang is not an employee of the county. 37GaA85, 139SE96.
49-52⅛-New. Statute providing for certain plan of compensation where public corporation is the employer, or any contractor engaged in work for it, does not include national forest service. Mont 286P408.
49-53 3Del 4, 129A344; 40GaA787, 151 SE552 (statute held to include minors); 233IllA337; IndA 151NE33; 11LaA 106, 120S721; 150Md525, 133A593, 596 [citCJ]; 242Mich442, 219NW617; NJ Sup 139A245; 284Pa277, 131A241; TexCivA 293SW306; TexCivA 12 SW(2d)821; 98Vt449, 129A311. But see 169La44, 124S140 (employment of minor in violation of municipal ordinance does not exclude employee from benefits of act); 267Mass208, 166NE636; 112OhSt 337, 147NE342 (where minor's status in relation to Workmen's Compensation Law was made similar to that of adult); TexCivA 271SW424 (where minor is not barred from compensation). [g] **Remedy of minor employed in violation of Child Labor Act** is under such act, though occupation is declared extrahazardous under Workmen's Compensation Act. 329Ill 308, 160NE588. [h] **Where, in proceeding under act for death of sixteen-year-old employee,** employer did not have on file age certificate issued by school authorities, award dismissing application for compensation for want of jurisdiction has been held erroneous. IndA 168NE38.
49-53½-New. **In New Jersey** the common-law remedy for injuries to a minor is not superseded by statute. Sup 139 A245.
49-54 3Del 4, 129A344; 233IllA337; 242Mich352, 218NW773. Contra 146 Va91, 135SE890, 49ALR1427. [a] **Minor employee between certain ages may maintain action at common law** (1) for damages against employer who has failed to procure employment certificate. 117Nebr701, 222NW630, 60ALR830. (2) Minor need not have been classified in order to sue. 117Nebr701, 222NW630, 60ALR830. [b] **Father's employment of son** without permit held not unlawful. 250Mich238, 230NW191. [c] **Legality of employment** depends on Child Labor Act. 233IllA337 (jury question).
49-56 161Tenn355, 30SW(2d)225. See also 79Mont52, 255P337; TexCivA 21 SW(2d)314 (statute not applicable to dairy work between hours of 10 P. M. and 5 A. M.). Contra 284Pa277, 131A 241. [b] **Minor over fifteen** held lawfully employed and within statute. TexCivA 291SW565. [c] **Where employment is lawful though hazardous** minor employee is within act. 13LaA664, 127 S146. [d] **Occupations approved by department of labor and industry.**–(1) Father's employment of son without having occupation approved not unlawful. 250Mich238, 230NW191 (hiring as affecting partial emancipation). (2) Hazard under statute relating to approval of hazardous occupation is risk incident to nature of work. 250Mich238, 230NW 191. (3) Work of 16 year old boy as carpenter's helper not hazardous within statute. 250Mich238, 230NW191. (4) Where well-defined occupation approved as not unduly hazardous, special approval in each instance not required to render employment lawful. 250Mich238, 230NW191.
49-57 97CalA112, 274P1009; 10LaA 719, 122S141; 197Wis597, 222NW823.
49-58 225Ky753, 9SW(2d)1100; 250 Mich247, 230NW159; 98Vt449, 129A 311.
49-59 132Okl 152, 269P1084, 60ALR 837. [a] **Workmen's Compensation Act** renders infant sui juris as to acceptance thereof. 146Va91, 135SE890, 46ALR 1427.
49-59½-New. A child under fourteen years cannot lawfully consent to be bound by provisions of the Workmen's Compensation Act. 3Del 4, 129A344.
49-59⅓-New. Workmen's Compensation Law applies only to minors lawfully employed. 98Vt449, 129A311.
49-59¼-New. A child between fourteen and sixteen years for whom no employment certificate had been obtained could not consent to be bound by the act. 3 Del 4, 129A344.
49-59⅕-New. Settlement with a minor under the Compensation Act unlawful under Child Labor Law does not bar a common-law action against the employer. 98Vt449, 129A311.
49-59⅙-New. That employer violating statute can obtain no advantage from employment does not prevent employee from obtaining benefits under statute. 111Conn229, 149A679 (child held employee within compensation act).
50-60 24F(2d)101; 80CalA713, 252P 775; 86CalA445, 260P928; 101CalA1, 281P440; 81Colo 161, 254P160; 82Colo 272, 259P1036 (statute inapplicable); 106Conn110, 137A15; 109Conn39, 145A 149; 122Kan720, 253P219; 128Kan61, 275P1087; La 130S1; 11LaA414, 123 S454; LaA 127S25; 262Mass133, 159 NE511; 235Mich4, 209NW104; 105NJL 228, 143A352; 223AppDiv799, 228NYS 76; 221AppDiv606, 225NYS20; 298Pa 343, 148A529; 99Vt301, 131A844; Wis 230NW67. See also 5LaA203; 6LaA388. [1] (5) To render employer liable under Connecticut statute, relation of principal employer and contractor must exist in work wholly or in part for principal employer. 106Conn110, 137A15. (6) Work must be in, on, or about premises controlled by principal employer. 106Conn110, 137A15. (7) To impose liability for injury to contractor's workman, requirements of statute must be fully met by facts established. 106Conn110, 137A15. [t] **In North Dakota** county contracting for waste in courthouse is not liable to employee of contractor. 52ND852, 204NW839. [u] **Under Kansas statute** (1) work of building derrick as incident to drilling oil well is part of trade or business of oil company engaged in developing land covered by oil and gas leases and producing oil therefrom. 122Kan720, 253P 219. (2) Fall of employee of contractor from derrick in course of construction on land being developed by such company is accident occurring on premises on which company has undertaken to execute work within such statute. 122 Kan720, 253P219. [v] **Window cleaning company's employee** held not employee of manufacturing company whose windows he was cleaning at time of injury. 81Colo 161, 254P160. [w] **Persons accepted by original contractor as employees though not technically such** (1) may be entitled to compensation where injured in hazardous work of contractor under insurance contract issued to him against obligations to pay compensation as may be accepted by him. 124Okl 140, 254P66. (2) Under such contract transactions between contractor and subcontractor may be such as to render latter an accepted employee of contractor and entitled to compensation. 124Okl 140, 254P66. [x] **In Oklahoma** (1) under statute, original contractor is only liable to servants of independent contractor in event independent contractor fails to carry com-

pensation insurance for workmen employed by such independent contractor. 126 **Okl** 18, 257**P**1104. (2) Owner of coal mining lease is secondarily liable for personal injuries to employee of independent contractor, mining coal for such company, where such contractor fails to carry insurance protecting his employees against injury while working in mine. 128 **Okl** 188, 261**P**941. (3) Owner of coal-mining lease is secondarily liable for personal injuries to employee of independent contractor, who is mining coal for such owner, where such contractor fails to carry insurance protecting his employees against injury while working in said mine. 134 **Okl** 150, 274**P**16. [y] **Relationship held not that of contractor,** as basis for liability. 194**Wis**369, 216**NW**505. [z] **Principal contractor not considered employer of subcontractor's employees.**–27 **OhA**522, 161**NE**238. [aa] **In California** employee of independent contractor is not entitled to compensation. **CalA** 251**P**948. [ab] **In New York** liability is primarily on subcontractor whose employee was injured, and general contractor is under no statutory liability where subcontractor has secured compensation for his injured employee. 248**NY**107, 161**NE**436. [ac] **Contractor's right of control** is important consideration. 101**CalA**1, 281**P** 440. [ad] **Contractor held not liable for injury to employee of subcontractor.** 110**Conn**221, 147**A**705, 66**ALR**1428; 248 **Mich**321, 227**NW**712. [ae] **Work must have been part of trade or business of insured** in order to entitle employee of independent contractor to compensation. **Mass** 170**NE**56. [af] **Compensation act not applicable to employees of independent contractor.**–**TexCivA** 25**SW(2d)**188.

50–60½–New. Under New York statute, general contractor securing compensation for subcontractor's employees, is immune from third party action for injuries to subcontractor's employee. 221 **AppDiv**660, 225**NYS**126.

50–60⅓–New. Subcontractor's employee need not show that he cannot collect compensation against subcontractors to recover against general contractor. 221 **AppDiv**660, 225**NYS**126.

50–61½–New. Under such statutes, if the contractor or subcontractor is a subscriber, the servant of a subcontractor can recover compensation from the original contractor who has subscribed for insurance. 194**Cal** 134, 228**P**5, 34**ALR** 765 (aeroplane pilot).

50–61⅓–New. Some statutes limit liability in such case to services in or about employer's premises or premises under his control or management. 209 **Ky**188, 272**SW**380.

50–61¼–New. Under such statutes the mere fact that a contractor delivers work, completed elsewhere, on the grounds where the principal is doing work, does not render the principal liable. 209**Ky**188, 272**SW**380.

50–61⅕–New. In New York, where a subcontractor fails to carry insurance, his employees may bring a claim against the contractor for injuries. 216**AppDiv** 105, 214**NYS**486 (Workmen's Compensation L. § 56).

50–61⅙–New. A contractor rejecting elective compensation is not relieved from liability for negligent injury of subcontractor's employee. 288**Pa**443, 136**A**223.

50–61⅐–New. In Pennsylvania statutory employer's acceptance of act makes him a quasi guarantor for compensation to employees injured while working on premises under subcontract, 290**Pa**225, 138**A**826.

50–61⅛–New. and subcontractor is relieved from liability unless it is otherwise expressly agreed. 290**Pa**225, 138**A** 826.

50–61⅑–New. But where a subcontractor and statutory employer agree that the subcontractor shall carry compensation insurance for his own employees, and the subcontractor takes out insurance, the statutory employer is not called upon by the state to assume liability. 290**Pa**225, 138**A**826.

50–61⅒–New. It is not necessary in order to make such agreement effective that the employee should be a party to the agreement. 290**Pa**225, 138**A**826.

50–61 1/11–New. While both the statutory employer and his subcontractor are both legally obligated to pay compensation to the same employee, 290**Pa**225, 138**A**826.

50–61 1/12–New. only one of such employers is required to pay elective compensation, 290**Pa**225, 138**A**826.

50–61 1/13–New. and no other employer or one standing in that relation can be called on to pay it the second time. 290 **Pa**225, 138**A**826.

50–61 1/14–New. Where both the principal contractor and the subcontractor carry compensation insurance, evidence of subcontractor's agreement to pay compensation need be very slight. 290 **Pa**225, 138**A**826.

50–61 1/15–New. If for any reason subcontractor or his insurer is irresponsible, principal contractor remains liable. 290**Pa**225, 138**A**826.

50–61 1/16–New. City contracting with an employer to furnish labor and equipment to aid in removing snow from the street and at the same time employing its own men therefor occupies dual relationship of employer to own men and owner as to employees of contractor, 291 **Pa**1, 139**A**379.

50–61 1/17–New. and the city did not become the principal contractor within the compensation act because the ordinance authorized the expenditure to clean the streets. 291**Pa**1, 139**A**379.

50–61 1/18–New. Property owner does not become "contractor" because he lets contract for work to be done on premises. 291**Pa**1, 139**A**379.

50–61 1/19–New. City prescribing place, character, and result of work in cleaning streets was not employer of contractor's men. 291**Pa**1, 139**A**379.

50–61 1/20–New. City's relation as owner and not employer is not affected by hiring inspector. 291**Pa**1, 139**A**379.

50–61 1/21–New. Owner contracting with employer of men on cost plus basis is not necessarily employer of contractor's men, although controlling the work, 291**Pa**1, 139**A**379.

50–61 1/22–New. and contracting men are not loaned to owner. 291**Pa**1, 139**A**379.

50–61 1/23–New. Compensation for injuries is the exclusive remedy of an employee of a subcontractor as against an employer and general contractor. 131 **Misc**168, 226**NYS**395.

50–61 1/24–New. Subcontractor's answer to complaint by employee of another subcontractor held insufficient. 131 **Misc**168, 226**NYS**395.

50–61 1/25–New. Subcontractor could not defend action by the employee of another subcontractor for injuries on the ground that compensation is the sole remedy. 131**Misc**168, 226**NYS**395.

50–61 1/26–New. If general contractor has not secured compensation, subcontractor's employee may bring third party action against him. 222**AppDiv**374, 226 **NYS**345.

50–61 1/27–New. An employee of a subcontractor is not limited to a compensation under the act as against a general contractor. 248**NY**529, 162**NE**512.

50–61 1/28–New. In some jurisdictions the employee of an independent contractor, injured in the work connected with the property of the contractee or owner, is not entitled to compensation as an employee of such owner. 24**F(2d)**809.

50–61 1/29–New. Company owning instrumentality furnished to another for hire with two trained employees to manage it held to remain employer of men so furnished. 179**Minn**416, 229**NW**561.

50–61 1/30–New. Contractor and subcontractor may agree that subcontractor and workmen shall be employees of contractor for purposes of compensation. **Utah** 286**P**623.

50–61 1/31–New. Contract will be considered as whole to determine whether relationship of employer and independent contractor was created between claimant's employer and original employer. 144 **Okl** 81, 289**P**776.

50–61 1/32–New. Where vehicle with driver is contracted by one employer to another for particular job, driver remains employee of first employer. **Colo** 292**P** 229.

50–62 16**F(2d)**464; 68**CalA**151, 228**P** 667; **CalA** 251**P**948; **CalA** 285**P**912; 36**GaA**248, 136**SE**173; 36**GaA**551, 137 **SE**105; 86 **IndA**460, 158**NE**234; 203 **Iowa**306, 210**NW**923; 156**Md**639, 144**A** 775; 254**Mass**280, 150**NE**157; 242**Mich** 89, 218**NW**781; 168**Minn**67, 209**NW**644 (subletting arrangement held not to be conspiracy to evade Workmen's Compensation Act); 171**Minn**15, 213**NW**49; 254**NY**349, 173**NE**218; 213**AppDiv**486, 210**NYS**814; 219**AppDiv**181, 219**NYS** 148; 25 **OhA**440, 158**NE**278; 123 **Or**334, 262**P**250; 286**Pa**311, 133**A**498; 287**Pa** 403, 135**A**124; 9**PaDist&Co** 72; 160**Tenn** 538, 26**SW(2d)**1051; **TexCivA** 283**SW** 565; **TexCivA** 16**SW(2d)**950; **TexCivA** 21**SW(2d)**691; **Vt** 147**A**265; **Vt** 147**A** 267(1stcase); 100**WVa**263, 130**SE**492, 43 **ALR**330. See also 218**AppDiv**308, 218 **NYS**81. See also **TexCivA** 27**SW(2d)** 837 (employee of independent contractor). [a] (5) One under contract to cut timber who could and did employ others to do work is independent contractor. 216**AppDiv**773, 214**NYS**448. [j] **In Colorado** driver hired by independent contractor employed by company is employee of company under Compensation Act. 78**Colo** 399, 242**P**49.

50–63 202**Cal** 517, 261**P**704; 87**CalA** 290, 262**P**38(2dcase); 92**CalA**119, 267**P** 922; 77**Colo** 414, 236**P**1006; 105**Conn** 545, 135**A**911; 106**Conn** 284, 137**A**755; 107**Conn** 143, 139**A**642; 39**GaA**422, 147 **SE**530; 330 **Ill** 27, 161**NE**113; 5**LaA** 414; **LaA** 130**S**257(2dcase); **LaA** 130**S** 885; 169**Minn**329, 211**NW**313; 171 **Minn**15, 213**NW**49; 172**Minn**467, 215 **NW**838; 173**Minn**414, 217**NW**491; 50 **ND**465, 196**NW**556; 124 **Okl** 228, 255**P** 582; 123 **Or**334, 262**P**250; 291**Pa**426, 140**A**339; 157**Tenn**606, 12**SW(2d)**529; 160**Tenn**459, 26**SW(2d)**148; **TexCivA** 283**SW**1104; 155**Wash**402, 284**P**792; 194**Wis**615, 217**NW**408; 195**Wis**468, 218 **NW**716; 200**Wis**616, 229**NW**194. See also 58**ND**581, 226**NW**586(2dcase) (important and controlling factors generally). [a] (1) 204**Cal** 668, 269**P**542, 60 **ALR**299; **Iowa** 228**NW**41; **Iowa** 228 **NW**70; **LaA** 130**S**257(2dcase); 168 **Minn**67, 209**NW**644 (subcontractor not contractor, held liable as employer of injured workman); 219**AppDiv**541, 220 **NYS**625; 112 **Okl** 248, 240**P**613; 112 **Okl** 231, 240**P**618; 113 **Okl** 296, 241**P** 1092; 128 **Okl** 188, 261**P**941; 123 **Or**334, 262**P**250; 287**Pa**403, 135**A**124; **Tex CommnA** 298**SW**542; **TexCivA** 271**SW** 929; **TexCivA** 19**SW(2d)**346 (independent contractor is any person who undertakes to do specific piece of work for other persons without submitting himself to their control regarding details); **Vt** 147**A**265; **Vt** 147**A**267(1st case) (test in determining whether one is working for another as servant or as independent contractor is right of employer to control work). To same effect 291**Pa**426, 140**A**339. (3) 199**Cal** 577, 250**P**570; 204 **Iowa**1348, 217**NW**264; 242**Mich**89, 218**NW**781. (5) One obliged to follow will of employer, only as to result and not as to means, is independent contractor. 107**Conn**143, 139**A**642; 286 **Pa**311, 133**A**498. (6) That sum to be paid for work was not fixed is immaterial in determining. 287**Pa**403, 135**A**124. (7) Decisive test in determining whether relationship is that of employee or independent contractor under Workmen's Compensation Act involves consideration of who has right to direct work and who has general and complete control in determining when and how it shall be done. 204**Cal** 668, 269 **P**542, 60**ALR**299. (8) One who contracts to do specific piece of work, hiring and controlling assistants and executing work in accordance with own ideas, without being subject to orders in respect of details of work. 336 **Ill** 283, 168**NE**368. (9) One who renders service in course of occupation representing will of person for whom work is done only as to result of work and not to means. 336 **Ill** 283, 168**NE**368. (10) Provision for cancellation of contract on notice held immaterial in determining relationship. **Iowa** 228**NW**

41. (11) **Right to control held not** waived by employer. **Iowa** 228**NW**41. (12) Other statements of tests of relationship. **Iowa** 228**NW**41. (13) Other definitions. **CalA** 260**P**967; 93**CalA**313, 269**P**733; **TexCivA** 10**SW(2d)**803; 197 **Wis**35, 221**NW**390. [b] (5) There must be control as to details as well as method to constitute employment. 146**Wash** 85, 261**P**802. (6) Right to control manner of doing work is important consideration in determining whether worker is employee or independent contractor. 366 **Ill** 283, 168**NE**368. (7) Whether person is independent contractor or servant depends on right of control by principal. 200**Wis**127, 227**NW**288. (8) Principal test as to whether workman is employee or independent contractor is right of control with reference to details of work. 200**Wis**248, 227**NW** 877. [c] (1) See also **Iowa** 228**NW**41 (manner and time of payment not controlling). But see **CalA** 285**P**912 (real estate salesman's compensation consisting of commissions on sales not determinative that he was employee of broker). (2) **TexCommnA** 3**SW(2d)**414. (4) 146**Wash**85, 261**P**802. (5) That one engaged to haul lumber was paid according to work done and employer's superintendent exercised no control over amount thereof is not conclusive that he was independent contractor. 158 **Tenn**18, 11**SW(2d)**860. (6) Workman paid by piece or quantity comes within provisions of act. 101**CalA**1, 281**P**440. (7) Method of payment does not determine whether workman is employee or independent contractor. 160**Tenn**538, 26 **SW(2d)**1051. (8) That workman was paid by cord for cutting wood is not controlling on question. 160**Tenn**459, 26**SW (2d)**148. [d] (1) 202**Cal** 517, 261**P**704. (4) 77**Colo** 414, 236**P**1006. (4) See also 290**Pa**315, 138**A**863 (teamster hauling logs held employee). (41) Other instances. 242**Mich**89, 218**NW**781; **Tex CivA** 271**SW**929. (42) One painting without contract with property owner furnishing paint has been held employee. 167**Minn**72, 208**NW**421. (43) Person hauling garbage for village, under contract for monthly compensation, furnishing his own team but using wagon furnished by village and working under immediate and actual supervision of street commissioner is employee and not independent contractor. 166**Minn** 186, 207**NW**621. (44) Plumber occasionally employed to install gasoline tanks and pumps for gasoline refining and distributing company. 317 **Ill** 541, 148**NE**291. [d] (45) Other persons held employees. **Cal** 250**P**570; 75**CalA**729, 243**P**61; 105**Conn**545, 135**A**911; 204 **Iowa**1348, 217**NW**264; 169**Minn**329, 211 **NW**313; 169**Minn**367, 211**NW**327; 247 **NY**305, 160**NE**379; 286**Pa**311, 133**A**498; 287**Pa**403, 135**A**124; **TexCivA** 283**SW** 1104; **Utah** 264**P**965; 193**Wis**32, 213 **NW**630; 194**Wis**615, 217**NW**408. (46) One employed to operate sawmill. 37 **GaA**759, 142**SE**182. (47) Boiler repairer whose work was supervised by factory's superintendent, though he used his own tools. **TexCivA** 297**SW**884. (48) One hauling logs at rate per thousand feet, furnishing own truck and gas, held piece worker, result being indefinite, and contract subject to termination at will. 146**Wash**85, 261**P**802. (49) Person employed by a general contractor to lay shingles at specified sum per thousand. 79**CalA**660, 250**P**1117. (50) One performing manual labor for partnership of which he is member, in execution of contract with oil company is employee of oil company. **LaA** 125**S** 510. (51) Driver of team controlled by company engaged in collecting ashes is employee of company. **Mass** 169**NE** 137. (52) Person employed to cut timber as directed though exercising own judgment as to nature of timber. **GaA** 155**SE**77. (53) Other instances. **CalA** 260**P**967; 87**CalA**290, 262**P**38(2dcase); 89**CalA**194, 264**P**300; 93**CalA**313, 269**P** 733; 39**GaA**285, 146**SE**792; **Iowa** 228 **NW**41; 228**Ky**776, 15**SW(2d)**507; 245 **Mich**337, 222**NW**758; **NC** 153**SE**591; 58**NJ**581, 226**NW**586(2dcase); 141 **Okl** 140, 284**P**304; 95**PaSuper**8; 158**Tenn** 18, 11**SW(2d)**860; **TexCivA** 10**SW(2d)** 803; **Utah** 281**P**198. [e] (10) 204**Cal** 668, 269**P**542, 60**ALR**299; 68**CalA**151, 228**P**667; 93**CalA**324, 269**P**720; **Iowa** 228**NW**70; 209**Ky**73, 272**SW**31; 167**La** 107, 118**S**820; 9**LaA**173, 119**S**539; 170 **La**910, 129**S**526; **Mass** 172**NE**346; **Mich** 244**NW**355; 177**Minn**55, 224**NW**458(1st case); 225**AppDiv**436, 233**NY**393; 127 **Or**427, 272**P**556; 152**Va**293, 147**SE**246; 198**Wis**228, 224**NW**104. (48) Mechanic employed for repair job by broker having no pecuniary interest in work. 213 **AppDiv**501, 210**NYS**558. (49) Subcontractor constructing judicial ditch under supervision of engineer. 168**Minn** 67, 209**NW**644. (50) Person contracting to haul logs held independent contractor. 213**AppDiv**486, 210**NYS**814. (51) One engaged to cut trees on strip of land, furnishing his own help, tools and equipment, receiving certain price per log, and not subject to control except as to securing results. 233**Mich** 543, 207**NW**880. (52) Claimant who has right to perform contract according to his own methods and right thereunder to employ his own workmen and who is not subject to control of principal except as to result of work, though principal reserved right to terminate work at any time and claimant was not given specific piece of work to perform for lump sum. 112 **Okl** 231, 240**P** 619. (53) Person removing garbage under contract with city contractor for per diem compensation, furnishing his own teams and hiring and discharging his help. 232**Mich**593, 206**NW**322. (54) Other persons held to be independent contractors. **CalA** 251**P**948; 78**Colo** 399, 242**P**49; 106**Conn**284, 137**A**755; 330 **Ill** 27, 161**NE**113; 203 **Iowa**306, 210 **NW**923; 224**Ky**167, 5**SW(2d)**1043; 169 **Minn**183, 210**NW**1004; 171**Minn**15, 213 **NW**49; 117**Nebr**198, 220**NW**255; 216 **AppDiv**416, 215**NYS**382; 219**AppDiv** 541, 220**NYS**625; 195**Wis**468, 218**NW** 716; 196**Wis**402, 220**NW**199. (55) Owner hiring truck to corporation, under agreement permitting him to hire driver, though he could be discharged if work was unsatisfactory. 107**Conn** 143, 139**A**642. (56) Person furnishing own trucks and employees in hauling logs and bearing own expenses and paid per thousand feet for logs hauled. 37**GaA**286, 139**SE**832. (57) Loader of lumber on cars at fixed rate furnishing own equipment. 44 **Ida**566, 260**P**172. (58) One agreeing to deliver logs at specified foot rate. 222**Ky**144, 300**SW** 342. (59) Professional race horse driver. 221**AppDiv**628, 224**NYS**680. (60) One contracting to do wire lathing for general contractor building house. 123 **Or**334, 262**P**250. (61) Contractor cutting timber without control as to methods held independent contractor in action by his employee against owner of timber. 156**Tenn**202, 299**SW**1045. (62) Member of partnership operating gasoline filling station injured while building rock in storage plant erected by oil company under contract to supply partnership. **Ida** 286**P**369. (63) Truckowner hauling gravel under agreement for payment by load. **TexCommnA** 24**SW(2d)**7. (64) Person contracting to cut wood for stated consideration per cord. 160**Tenn** 538, 26**SW(2d)**1051. (65) Plasterer employing own workmen and tools and free from control as to manner of performance. 336 **Ill** 283, 168**NE**368. (66) One selling gasoline in own car to earn extra money besides her regular bookkeeping work. **Mass** 169**NE**156. (67) One selling furniture on commission in territory which he could cover as he pleased, furnishing own car and paying own expenses. 200**Wis**127, 227**NW** 288. (68) Person loading ties into railroad cars for fixed price per tie. 6 **LaA**223. (69) Trained nurse engaged specially by railroad company to render services to injured employee. 254**NY** 349, 173**NE**218. [f] (3) Contract purporting to make employee independent contractor construed as mere device to relieve employer of liability within prohibition of statute. **Iowa** 228**NW**41. (4) Other instances. 230**AppDiv**139, 243 **NYS**571. [g] 37**GaA**286, 139**SE**832; 169**Minn**367, 211**NW**327. [h] (2) **Tex CommnA** 298**SW**542. [w] **Person is presumed to be employee** (1) under statute where he is rendering service for one other than independent contractor unless he is excluded by act. 75**CalA**729, 243**P**61. (2) Determinative factor is who has power of control as to means and methods by which result is accomplished. 75**CalA**729, 243**P**61. [x] **Test** is whether employee uses his own methods without being subject to employer's control. 37**GaA**286, 139**SE** 832. [y] **Right of either party at any time to terminate contract** is strong circumstance against theory of independent contractor. 290**Pa**315, 138**A** 863. [z] **Test** in determining whether injured person was employee or independent contractor is whether employer had and exercised control of work. **TexCommnA** 298**SW**542. [aa] **Employer's unrestricted right to end service whenever he chooses,** without regard to final result of work, is very strong and sometimes conclusive circumstance, indicating relationship of employee, within Workmen's Compensation Act, instead of independent contractor. **Tex CivA** 16**SW(2d)**950. [ab] **Facts that one employed uses his own discretion** as to his hours of labor, is to be paid with reference to a quantitative standard, and furnishes some of his appliances are not conclusive that he is an independent contractor rather than an employee. **TexCivA** 16**SW(2d)**950. [ac] **One may be independent contractor though employer furnishes assistants** and reserves supervisory power. 156 **Md**524, 144**A**505. [ad] **General contractor and subcontractor** are not employer and employee, though former must see that latter insures his liability or is secondarily liable. 105**NJL**228, 143**A**352. [ae] **One who contracted with independent contractor for certain repair work** without exacting from contractor employer's certificate of registration issued by industrial board, was liable, with contractor, to contractor's employeee for injuries sustained while performing the work. 88 **IndA**54, 163**NE** 235(1stcase). [af] **Matters to be considered in determining question.**—200**Wis** 127, 227**NW**288. [ag] **Performance of entire piece of work at specified price** is not indispensable in law as regards status of independent contractor. 200 **Wis**248, 227**NW**877. [ah] **Provision respecting termination of employment** is not absolutely determinative of question whether workman is independent contractor. 160**Tenn**538, 26**SW(2d)** 1051. [ai] **Right to discharge not conclusive** that relationship one of employer and employee where it fits in equally with theory of independent association. **CalA** 285**P**912. [aj] **Right to hire and discharge others** is of little consequence in determining whether hirer is employee or independent contractor. 200 **Wis**616, 229**NW**194. [ak] **Ultimate test in determining whether one is employer or independent contractor** is authoritative control of important details of work. **TexCivA** 22**SW(2d)**952. [al] **Test is right of control** irrespective of actual interference in conduct of work. 208**Cal** 715, 284**P**661. [am] **Test is right to control** and not actual exercise of right. 160**Tenn**459, 26**SW(2d)**148. [an] **Test is whether hirer had right to control details of work,** not whether details were actually controlled. 200**Wis** 611, 229**NW**193. [ao] **Minor** cannot change status from independent contractor to employee by disaffirming contract after injury. 68**CalA**151, 228**P** 667. [ap] **Professional relationship between employer and trained nurse** is not limited to charitable corporations. 254**NY**349, 173**NE**218.

51–64 219**Ala**148, 121**S**408; 9**LaA**173, 119**S**539. [b] (3) Independent contractor is one rendering service in course of independent employment, representing owner's will only as to result and not as to means. 169**Minn**183, 210**NW** 1004.

51–64½—New. Owner of team hired to town for work on highway is not an

independent contractor, **214AppDiv**345, 212**NYS**410.

51–64½–New. nor is a laborer employed by the town to drive a team a servant of such owner while at work on highway and under supervision of town superintendent. 214**AppDiv**345, 212 **NYS**410.

51–64¼–New. A statute making a contractor liable for injury to subcontractor's employees, unless compensation has been secured, held not to preclude an action against the principal contractor for wrongful death of subcontractor's employee. 129**Misc**145, 221**NYS**93.

51–64⅛–New. Where the facts are undisputed, it is a question of law whether a claimant was an independent contractor or an employee. 169**Minn**329, 211 **NW**313.

51–64⅛–New. Where plaintiff's employer conducted an independent business on defendant's premises, he cannot claim compensation on the ground that relation of employer and defendant was that of an independent contractor. 99**Vt**301, 131**A**844.

51–64⅛–New. In the absence of showing that a contract between employer and defendant was a scheme to evade liability. 99**Vt**301, 131**A**844.

51–64⅛–New. Contracts to furnish labor and material for stipulated sum are independent contracts unless circumstances clearly show contrary. **TexCivA** 28**W(2d)**495.

51–64½–New. Whether one is independent contractor depends largely on circumstances. **TexCivA** 28**W(2d)**495.

51–64 1/10–New. Lessor held not liable under statute for compensation to lessee who was himself an employer and had insured his liability as such. 83**Colo** 72, 262**P**521.

51–64 1/11–New. Contract between parties is not conclusive in determining relation. 194**Wis**615, 217**NW**408.

51–64 1/12–New. Whether claimant was independent contractor or employee is to be determined from all facts and circumstances established. **Ida** 286**P**369.

51–64 1/13–New. That remuneration is in form of commissions is immaterial as to question whether claimant is an employee or independent contractor. **Minn** 232**NW**915.

51–65 83 **IndA**497, 148**NE**428; 85 **IndA** 627, 154**NE**35; 13**PaDist&Co** 604.

51–67 208**Cal** 633, 284**P**212; 86**Colo** 590, 284**P**121; 42 **Ida**141, 243**P**818; 89 **IndA** 483, 166**NE**885; 164**Minn**358, 205**NW** 258 (workman clearing brush from town road for town held within act); 103**NJL** 230, 135**A**800; **NJ** 151**A**639; 100**Vt**284, 137**A**326; **Vt** 147**A**265; **Vt** 147**A**267(1st case). [a] (2) Death of workman while blasting stump held compensable as occurring in regular course of business of company to whom workman had been loaned by sewer contractors. 290**Pa**341, 138**A**855, 58**ALR**1463. (3) To relieve employer from liability proof is required both that employment was casual and that it was not in regular course of business of employer. 290**Pa** 341, 138**A**855, 58**ALR**1463. (4) Though employment is by chance, without fixed duration of time, master is liable if work is in regular course of business. 290 **Pa**341, 138**A**855, 58**ALR**1463. (5) Regular course of business means during normal operations which constitute it. 290**Pa**341, 138**A**855, 58**ALR**1463. [b] **Uncertainty and irregularity of claimant's service under contract** characterizes nature of employment and not fact that what he might do would be done outside hours. **Vt** 147**A**265; **Vt** 147**A**267(1st case).

51–69 **CalA** 291**P**456; 83**Colo** 556, 266**P** 1114; 107**Conn**189, 139**A**778, 58**ALR**861; 318 **Ill** 312, 149**NE**278; 85 **IndA**259, 152 **NE**856; 201 **Iowa**67, 202**NW**374; 167 **Minn**72, 208**NW**421; 170**Minn**137, 212 **NW**192, 50**ALR**1173; **Mont** 292**P**902; **NC** 153**SE**591; 287**Pa**403, 135**A**124; **Tex CommnA** 6**SW(2d)**346; **TexCivA** 297**SW** 884; 148**Va**220, 138**SE**474; 34**Wyo** 357, 243**P**593. But see 86**PaSuper**136. [a] (14) Workman, temporarily employed to shovel snow from tracks of electric car company, which removal was necessary, comes within act to entitle him to compensation for frozen toes. 48**RI** 353, 138 **A**175. (15) Person injured while unloading furniture for employer in retail business after working few hours held not casual employee. 148**Va**220, 138**SE**474. (16) Other instances of casual employees. 91**CalA**577, 267**P**880. [b] **Facts held not to extend regular business to casual.**–91**CalA**577, 267**P**880. [c] **Employments held casual.**–Painting store front. **CalA** 291**P**456.

52–70 332 **Ill** 156, 163**NE**408; 86 **IndA** 460, 158**NE**234; 103**NJL**230, 135**A**800; **Vt** 147**A**265; **Vt** 147**A**267(1stcase). But see 208**Cal** 633, 284**P**212 (where employment is not casual). [a] (16) Former employee assisting successor temporarily. 203 **Iowa**1171, 212**NW**419. (17) Worker employed to remove snow and paid by hour. 103**NJL**230, 135**A** 800. (18) Other instances. 177**Minn** 518, 225**NW**426(2dcase). [c] **In Pennsylvania** to exclude operation of Workmen's Compensation Act, employment must be casual, and not in course of employer's business. 294**Pa**230, 144**A**97.

52–70½–New. In order that an employee may be excluded from the operation of acts of the second class he must be one whose employment is purely casual and also whose employment is not for the purpose of the employer's trade or business. 166**Minn**251, 207**NW**636.

52–70½–New. Some statutes exclude employees whose employment is not for the purpose of the employer's trade or business although their employment is not casual. 204 **Iowa**168, 214**NW**516.

52–71 105**Conn**591, 136**A**471; 327 **Ill** 132, 158**NE**360; 83 **IndA**497, 148**NE**428; 85 **IndA**627, 154**NE**35; 86 **IndA**460, 158 **NE**234; 89 **IndA**483, 166**NE**885; **NJ** 151 **A**639; 103**NJL**230, 135**A**800; 100**Vt**284, 137**A**326; **Vt** 147**A**265; 148**Va**220, 138**SE** 474; **Wis** 232**NW**864. [b] (2) Where florist employed carpenter to patch roof. 85 **IndA**627, 154**NE**35. [d] **Domestic servant** injured during definite period of two weeks held not casual. **NJ** 139**A** 705.

52–72 203 **Iowa**1171, 212**NW**419; 103 **NJL**230, 135**A**800; 148**Va**220, 138**SE**474.

52–73 216**Ala**129, 112**S**734; **CalA** 260**P** 967; 105**Conn**591, 136**A**471; 42 **Ida**141, 243**P**818; 105**NJL**199, 143**A**363; 49**ND** 915, 194**NW**663; 132 **Okl** 290, 270**P**575. [a] (5) House girl is not casual employee. 105**Conn**591, 136**A**471.

52–76 216**Ala**129, 112**S**734; 220**Ala**562, 126**S**626; 107**Conn**359, 140**A**637, 60**ALR** 1191.

52–77 166**Minn**251, 207**NW**636; 287**Pa** 403, 135**A**124. But see **Wis** 232**NW**864 (where claim of bartender in repairing houses of employer was disallowed).

52–78 30**F(2d)**974; 85 **IndA**259, 152**NE** 856; 194**Wis**603, 217**NW**325. [a] (4) Person owning only one small building which he rents out, and having no trade, business, profession, or occupation does not come within Compensation Act by hiring workman at weekly wage to reshingle building. 170**Minn**137, 212**NW** 192, 50**ALR**1173. (5) Stonemason engaged by builder to stake off ground preparatory to building is engaged in regular course of employer's business. 287**Pa**403, 135**A**124. (6) Bricklayer employed by laundry company to wall up pit near wells in which pumping equipment was installed is not engaged in employer's usual business. **Tex CommnA** 291**SW**197. (7) Persons employed to cut down tree on premises intended for use of business held not employed in usual course. 194**Wis**603, 217 **NW**325. [b] **Married woman owning home and four resident properties** occupied by tenants is not engaged in "business or occupation" so as to be liable for injury to casual employee. 177**Minn**518, 225**NW**426(2dcase). [c] **Employee injured while erecting garage for employer not in building occupation** is not injured in usual course of trade. 160**Tenn**660, 28**SW(2d)**348. [d] **Painting store front** (1) held incident to course of trade of employer's mercantile business. **CalA** 291**P**456. (2) That painter was puttying holes in awning gable which formed party wall at time of injury does not affect employer's liability for compensation. **CalA** 291**P**456.

52–78½–New. A stonemason engaged by a builder to stake off ground preparatory to construction is not a casual employee. 287**Pa**403, 135**A**124.

52–78⅛–New. By amendment, one who is casually employed, if injured in usual course of trade or business, comes under the act. **TexCivA** 285**SW**648.

52–78¼–New. Finding of temporary employment by defendant corporation is not inconsistent with general employment as a private chauffeur to the president. 286**Pa**278, 133**A**504.

52–79 209**Ky**226, 272**SW**736 (new employer purchasing business held not liable in absence of election by either, though employee had elected under previous employer); 126**Me**105, 136**A**455; 127**Me**252, 142**A**863. [b] 116**Tex**59, 286 **SW**195. [e] **Employees injured while blasting and wrecking building** for employer, electing to operate under Kentucky Compensation Act as "junk dealer," held not within protection of act or insurance policy issued thereunder. 218**Ky**330, 291**SW**754. [f] **Employer cannot rely** on bus estoppel to deny employees protection under Compensation Act by causing them to sign notice of election where they accepted board's decision dismissing applications for want of jurisdiction. 218**Ky**330, 291**SW**754. [g] **In Ohio** Workmen's Compensation Law contemplates payment of compensation regardless of employer's compliance with law. 118 **ObSt**340, 161**NE**32.

52–80 **TexCivA** 271**SW**424; **WVa** 133 **SE**623; **WVa** 135**SE**165. [c] **Declaration for injuries is demurrable** unless it alleges defendant's election not to comply with Compensation Law. 103 **WVa**519, 138**SE**97. [d] **Where there has been no election by employer and employee under an elective act,** rules of the common law apply. 215**Ky**128, 284 **SW**91. [e] **Agricultural and domestic servants.**–Compliance with certain statutory requirements necessary to bring them within compensation act. **Utah** 287**P**922 (employer may accept or refuse act as to one group only).

53–81 [c] **In Louisiana** Compensation Law is optional to be applied only as result of agreement, express or implied. 7**F(2d)**386.

53–83 15**F(2d)**976 (Oregon statute); 77**Colo** 414, 236**P**1006 (such statute gives employer privilege of escaping provisions of act by filing notice of rejection); 201 **Iowa**52, 206**NW**637; **MoA** 27 **SW(2d)**44; 126 **Or**450, 270**P**402. [g] **In Kansas** employer is not presumed to come within act where he has not employed five men continuously for thirty days prior to accident and has not filed his election to come within act. 129 **Okl** 32, 263**P**440.

53–83½–New. Statutes in some jurisdictions provide that acceptance of the act will be presumed where more than four men are employed. 82**Colo** 272, 259 **P**1036.

53–84 23**F(2d)**434; 252**NY**394, 169**NE** 622.

53–86 See also 245**Mich**325, 222**NW**768 (2dcase).

53–86½–New. In some jurisdictions it is wholly optional with the employer whether he will become subject to the act. 129 **Okl** 32, 263**P**440 (construing Kansas statute).

53–86½–New. Employee held not relieved from burden of proving negligence of employer not subscribing under Compensation Act. 258**Mass**82, 154**NE**518.

53–86¼–New. Nonsubscribing employer's duty held not enlarged by Compensation Act. 258**Mass**82, 154**NE**518.

53–86⅛–New. Employer's notice to industrial commission of advance payments merely operates to his credit in subsequent awards. 244**NY**132, 155**NE** 74.

53–86⅛–New. A town board continuing to pay employees for hauling gravel cannot relieve the town from liability under the act by notifying them that they must select their pit boss, furnish dynamite, and assume risk. 169**Minn** 367, 211**NW**327.

53–86⅛–New. An employer by accepting the provisions of the Workmen's Compensation Act includes all of its employees in all of its business. 238 **Mich**580, 214**NW**208.

53-86⅛-New. A general contractor electing not to come under the act is liable for negligent injury of subcontractor's employee compensated under the act. 288Pa443, 136A223.

53-86⅛-New. Where statute provides exclusive method for separation of risk assumed by insurer, parties cannot, without approval of commission, limit coverage in policy to certain occupations. 173Minn354, 217NW358.

53-86 1/10-New. An employer in two or more distinct kinds of business may elect to place one or all under the act. 127Me252, 142A863.

53-86 1/11-New. Employer applying to be self insurer five days before compensation commission was functioning although month after accident does not "fail" to comply with act. **MoA 27SW(2d)**44.

53-86 1/12-New. Under Pennsylvania statute principal contractor is relieved from liability to subcontractor's employees only when subcontractor and his insurer are responsible and pay compensation. 298Pa549, 148A847.

53-86 1/13-New. Delay in passing on application to be self insurer filed before commission was functioning does not authorize employee's election to recover as though employer rejected act. **MoA 27SW(2d)**44.

53-86 1/14-New. Employer electing to come within act and seeking to become self insurer after injury but as soon as application could be effective, was entitled to benefits of act. **MoA 27SW(2d)** 44.

53-86 1/15-New. Such application filed at earliest time application would be effective relates back to time act took effect. **MoA 27SW(2d)**44.

53-86 1/16-New. Employer is not required to take out insurance pending approval of application to become self insurer in order to be entitled to benefits of act. **MoA 27SW(2d)**44.

53-87 166Minn251, 207NW636; 51ND 710, 201NW680; **TexCivA** 282SW951. [b] (5) Evidence held to show election by both employer and employee to accept terms of Oregon Act. 118 Or642, 247P770. [g] 49SD411, 207NW460. [l] **Estoppel.**–Where insurance carrier negligently failed to file employers' papers indicating election with board in accordance with agreement till after employee's death, it is estopped to set up in defense that employer was not operating under act. 209Ky279, 272SW 740. [m] **That notice to industrial accident board was mailed by third person** does not affect its sufficiency. **TexCivA** 291SW565. [n] **Subscription to compensation fund** constitutes election by employer. 103WVa295, 137SE229. [o] **Failure to give notice immediately to** industrial accident board does not invalidate insurance nor make employer a nonsubscriber. **TexCivA** 291SW565. [p] **Penalty** in nature of fine on subscriber for willfully failing or refusing to report to board is for benefit of state, and, state not complaining, employee has no right to do so. **TexCivA** 291SW565. [q] **Time of notifying board** of becoming subscriber is immaterial as to status as subscriber or liability of insurer. **TexCivA** 291SW565.

53-88 TexCivA 282SW951; **Utah** 287P 922 (oral notice insufficient). [a] (2) Under some statutes, failure of employer, engaged in hazardous employment to post notice of such fact, does not deprive him of its benefits nor relieve him of his obligations thereunder. 18**F(2d)** 292. [d] **Employer of farm labor** must post as well as file notice of election to accept act. 166Minn251, 207NW636. [e] **Mere posting is insufficient** under some circumstances. **TexCivA** 282SW 951. [f] **Posting of notice** held sufficient under statute requiring notice in writing or in point, as to persons already employed and those just entering employment. **TexCivA** 291SW565. [g] **Notice on minor's release,** containing acknowledgment of receipt of written notice, showed actual notice to employee who signed it. **TexCivA** 291SW565. [h] **Place of posting.**–(1) Notices must be posted in places where they will be most likely to be seen by all employees. 106WVa331, 145SE578. (2) Instruction which tells jury that notices should be posted and kept posted about employer's place of business where employee is at work, open to view, unobstructed, and easily seen while going to and from employment, is erroneous. 106WVa331, 145SE578. [i] **Question for jury.**–Whether notice of election to comply with compensation act was posted in conspicuous place may be question for jury under evidence. 103WVa331, 145 SE578.

53-89 See also **Utah** 287P922 (posting required).

53-95½-New. In determining scope of employer's assent to come within the act, the assenting instrument and insurance policy are to be read. 125Me16, 130A355.

53-95⅓-New. An employer accepting the provisions of the Workmen's Compensation Act may not limit its liability by filing with it acceptance and statement of the number of its employees and their place and character of employment on a blank provided by the department of labor and industry. 238 Mich580, 214NW208.

54-97 15**F(2d)**976 (Oregon statute); 216Ala129, 112S734; 105Conn591, 136 A471; 37GaA238, 139SE688; 122Kan 260, 251P1112; 10LaA719, 122S141; **MoA 27SW(2d)**44; 129 Okl 32, 263P440 (construing Kansas Statute); 126 Or 450, 270P402; **TexCivA** 287SW911. See also 247 IllA352. [a] **TexCivA** 271SW 424. See also 15**F(2d)**976 (intimation to same effect). [g] **If workman elects** to come under Pennsylvania Workman's Compensation Act, benefits dependent thereon are matter of agreement and statutory consequences. 270US535, 46 SCt373, 70Led719. [h] **In Washington** (1) under statute, requiring employee to elect in advance of suit to pursue common-law remedy notice of election in advance of suit for third person's negligence is not required. 137Wash228, 242P16. (2) Workman must, in all cases, take compensation under the act when injury occurs at the plant (146 Wash218, 262P234), (3) or as against employer when injury occurs in course of employment away from plant (146 Wash218, 262P234). (4) But if injury occurs away from plant and is due to negligence or wrong of one not in same employ, he may elect remedy. 146Wash 218, 262P234. (5) Workman employed to work on city streets held not at plant while on way to or from work. 146Wash 218, 262P234. [i] **In Kentucky** employee must sign notice of election to come under act. 228Ky344, 14SW(2d) 1084. [j] **Executive officer.**–Statute, requiring election by corporate executive officers does not apply to policy issued before its enactment. 248NYS511, 162NE505. [k] **Employee must show that contractor has rejected act** otherwise he will be relegated to act for redress. 298Pa343, 148A529. [l] **Employee electing to sue uninsured employer** is entitled to damages in accordance with rule applicable in common-law action for negligence. **ND** 231NW 283. [m] **Effect of exercise of right of election.**–**OhA** 173NE211.

54-99 128Misc626, 220NYS170. [b] **Workman held to have elected** to take under Oregon Compensation Act. 7**F (2d)**231. [c] **Election to take under Oregon Compensation Act** is question of law for court. 7**F(2d)**231. [d] **Infant employee's** acceptance of benefits of act must be on terms presented by act. 146 Va91, 135SE890, 49**ALR**1427. [e] **Employee's administratrix having unsuccessfully pursued remedy** and act was bound by election. 251Mich393, 232NW 201.

54-1 267Mass208, 166NE636. [a] (2) Domestic servant, statute for benefit of employee. 215**AppDiv**176, 213NYS202.

54-2 51ND710, 201NW680. [b] **In West Virginia** employee engaged in interstate commerce by accepting benefits from state compensation act is not estopped from bringing common-law action against employer who has failed to accept act. 102WVa66, 135SE662, 50 **ALR**217.

54-2½-New. An action for damages shows election not to take under the Compensation Act. 262Mass531, 160NE 310.

54-2⅓-New. Under some statutes it is wholly optional with the employee whether he will come within the act. 129 Okl 32, 263P440 (construing Kansas statute).

54-2¼-New. Under the Kentucky Act it has been held that, where neither the employee nor a new employer purchasing the business had elected to accept its provisions, compensation was properly denied although the employee had elected to accept the act with the previous employer. 209Ky226, 272SW736.

54-2⅕-New. Where judgment against tort-feasor is not paid, widow is not barred from making a claim for compensation. 86 **IndA**307, 157NE366.

54-2⅙-New. In some jurisdictions, in order for both employer and employee to be bound under the act, there must be a mutual agreement with full notice that the employer is a subscriber and that an injured employee waives a common-law right of action and relies on right to recover under act. **TexCivA** 282SW951.

54-2⅐-New. Violation by an employee of a statute relating to the duty of drivers to school children does not bar compensation claim by his widow. 86 **IndA**307, 157NE366.

54-2⅛-New. After election by a policeman to come under the act, as to an insurance policy by the city, it holds good during the term of employment, and under a subsequent similar policy, until election is withdrawn or revoked. 35**GaA**759, 134SE788.

54-2⅑-New. Where an employee takes compensation, he may not sue his employer. 217**AppDiv**501, 217NYS277.

54-2 1/10-New. Under Texas statute an employee injured because of the employer's willful act or omission is not forced to accept inadequate compensation under the Workmen's Compensation Act which abolishes the right to exemplary damages, but may waive a claim for compensation and sue for actual and exemplary damages; **TexCommnA** 283 SW141.

54-2 1/11-New. but in such case he cannot recover exemplary damages for gross negligence if element of intention is lacking. **TexCommnA** 283SW141.

54-2 1/12-New. Federal employee electing to take compensation cannot sue the director general of railroads. 219**AppDiv** 589, 220NYS285.

54-2 1/13-New. Whether a workman receiving money from the compensation commission signed an instrument as a release or as a receipt for wages held for the jury. 219**AppDiv**589, 220NYS 235.

54-2 1/14-New. Under some statutes the employee is required to elect when he enters the service. 18**F(2d)**292 (construing Oregon statute).

54-2 1/15-New. Where an employee of one who is not presumed to come within the provisions of the act has not himself elected to come thereunder, it will not be presumed that he is within the provisions of the act, 129 **Okl** 32, 263 P440 (construing Kansas statute).

54-2 1/16-New. Election must be shown by clear and unequivocal language. 83 **NH**221, 140A704.

54-2 1/17-New. Provision that commencement of common-law action bars workman from benefit of act contemplates situation where election of remedies is open. 83**NH**221, 140A704.

54-2 1/18-New. Judicial determination that employee elected to accept compensation is determination that he did not elect to retain common-law rights. 83 **NH**221, 140A704.

54-2 1/19-New. Employer who has defeated employee's common-law action by showing election under the act cannot subsequently claim that such election was inoperative. 83**NH**221, 140A 704.

54-2 1/20-New. Employee's election to sue at law is not binding where he acts on a mistaken view as to prior acceptance of compensation, and he may still

proceed under the act. 83NH221, 140A704.

54-2½1-New. Boy not in defendant's employ at time of injury need not proceed under compensation law. 104NJL87, 139A419.

54-2½2-New. Employee receiving compensation cannot sue a third person causing injury. 222AppDiv540, 226NYS375.

54-2½3-New. Widow of an employee, electing to sue wrongfully before death from a cause other than injury, held estopped from claiming disability award. 222AppDiv398, 226NYS366.

54-2½4-New. Employee compensated by insurer, accepting judgment denying subrogation, may sue other than employer for injuries sustained. **Tex CommnA** 300SW35.

54-2½5-New. An express statutory declaration would be required to prevent an injured employee, compensated by insurer not taking the initiative, from suing a third person. **TexCommnA** 300SW35.

54-2½6-New. Compensation paid the consignee's injured employee by insurer should be deducted from damages recovered from carriers. **TexCommnA** 300SW35.

54-2½7-New. Under Texas statute it has been held that deceased employee's beneficiaries are not charged with notice that employer was workmen's compensation subscriber as affecting their right to elect. **TexCivA** 296SW920.

54-2½8-New. Election of remedies. Once the injured employee has elected to come within the Workmen's Compensation Act and an award has been made, any settlement with the person causing the injury will be a gratuity and not an election in lieu of the act. 246Mich185, 224NW394.

54-2½9-New. Under some statutes an employee having once filed a written declaration of election to repudiate the act is not required to file new election on each employment. 322Mo158, 16SW(2d)190.

54-2½0-New. Mere signing of a claim under the Workmen's Compensation Act by an employee does not operate to bar prosecution of action against third person, whose negligence caused injury. 149Wash368, 271P65.

54-2½1-New. The Workmen's Compensation Act is not the only remedy of an employee, as he may sue an employer. **NJSup** 145A321(1stcase).

54-2½2-New. Persons subject to and within the terms of the Wisconsin Workmen's Compensation Act are confined to it for their remedy. 176Minn592, 224NW247.

54-2½3-New. An infant's acceptance of an amount due him under the act does not estop him from suing his employer under the law relating to minors. 230Ky53, 18SW(2d)864.

54-2½4-New. Although the act is exclusive an employee may maintain an action for damages where he has no remedy thereunder. 133Misc616, 232NYS557.

54-2½5-New. A stevedore accepting compensation for injuries cannot sue a third person for damages on refusal of the employer. 35F(2d)136.

54-2½6-New. Personal representatives of a deceased seaman recovering under the Workmen's Compensation Law are barred from further recovery. 35F(2d)736.

54-2½7-New. Employee within act may maintain action against negligent agent of employer. **CalA** 288P834.

54-2½8-New. That employer would be required to pay twice is not ground to reverse judgment where employer's ultimate liability based on voluntary contract. **CalA** 288P834.

54-2½9-New. An injured employee unsuccessfully bringing action against a third person cannot thereafter recover under the act. **Mass** 168NE744.

54-2½0-New. Employer's payment of medical expenses does not constitute election by employee to accept compensation preventing recovery against third person. 137Misc509, 242NYS74.

54-2½1-New. Mere appearance of employee before compensation commissioner is not an election preventing recovery from third person. 137Misc509, 242NYS74 (formal assertion of claim requisite).

54-2½2-New. Injured employee requesting commission to assume jurisdiction after withdrawing claim for purpose of suing third person elects to take under act. 142Okl237, 286P309.

54-2½3-New. Under some circumstances employee will not be deprived of right to proceed under act on ground he had not signed compensation register. 233Ky702, 26SW(2d)530.

54-2½4-New. It is not employee's duty, when he sees employer's notice rejecting act, to make further investigation to see whether employer is under act. **Or** 291P380.

54-2½5-New. Some statutes requiring election by employee before taking under act or seeking remedy against employer are inapplicable where employer gives notice of election to commission and employees. **Or** 291P380.

55-8 Iowa 228NW41; **TexCivA** 299SW674. But see 246NY46, 157NE925 (where actual waiver by release after injury was held valid). [a] **Under statute extending time** for filing proceedings, claimant in pending action who has released on payment of less than full compensation may commence proceedings under provisions of statute not outlawed when extension statute became effective. 198Cal631, 246P1046, 46ALR1095. [b] **In Kansas** release is invalid unless verified by workman and filed with clerk of court within sixty days after execution. 122Kan178, 251P191.

55-9½-New. Settlement which did not mislead employee to its disadvantage did not preclude claim of widow. 83IndA181, 147NE811.

55-9⅓-New. But an employee is not bound to avail himself of the benefits of the law, and after injury may waive his right to compensation. 246NY46, 157NE925.

55-10 TexCivA 289SW75, 78 [citCJ]. But see 246NY46, 157NE925 (where it is stated workmen are free to contract as heretofore and to waive rights under statute or constitution).

55-12½-New. Employer cannot relieve himself by agreement or settlement without approval of commission. 325Ill452, 156NE307.

55-12⅓-New. Plaintiff, suing under the Employer's Liability Act, waives his right of action against his employer. 166La467, 117S558 [writ of error dism 278US556, 49SCt14(4thcase), 73Led504] (no recovery of statutory penalty from employer); **TexCivA** 10SW(2d)129.

55-13½-New. A release for a prior injury and resulting hernia is no bar to an award for medical aid and temporary total disability for subsequent hernia resulting from an accident. **MoA** 18SW(2d)97.

55-13⅓-New. Where an employer disclaimed the liability for an injury and advised the employee to settle his case with a third party, it was estopped from thereafter asserting its rights under provisions of the Workmen's Compensation Law, relative to a written consent in the case of a compromise of the claim against the third party, and the claim against the employer remained. 249NY175, 163NE298.

55-13¼-New. Employer's waiver of liability for injuries to employee by negligence of another does not bind employee in absence of knowledge. **CalA** 288P834.

55-13⅕-New. Rights of employer under federal law are not surrendered by election to accept one of two kinds of liability in matters within state control. 281US233, 50SCt308, 74Led823.

55-13⅙-New. Employer may be estopped from relying on failure of employee to accept act prior to injury. 233Ky702, 26SW(2d)530.

55-14½-New. Effect of election. Employer not accepting the Compensation Act cannot assert defenses of contributory negligence or assumption of risk. 214Ky431, 283SW416.

55-20½-New. Where officers of a corporation entered into a private agreement to perform all work and for compensation by the corporation in case of injury, the president was held barred from recovery in an action at law by acceptance of such compensation. 23OhA211, 155NE567.

55-20⅓-New. Under Illinois statute, if an employer does not pay compensation for which he is liable, insurer may be proceeded against directly or may be made party to the proceedings. 322Ill462, 153NE685.

55-21 206Cal102, 273P791; 103Conn701, 131A739; Conn135A575; 106Conn233, 137A724; 37GaA234, 139SE685; 11LaA562, 123S432 (where deceased employee left surviving him father who was dependent on him for support, sister of deceased is not entitled to compensation). See also 246Mich185, 224NW394. [q] **Only real party in interest** may sue. 86IndA684, 158NE526. [r] **In Georgia** award to father, who is head of family, for death of minor child, is not invalid as being for father and use of himself, his wife, and another minor child, where father was in fact dependent on deceased child. 37GaA777, 142SE189.

55-22 [a] (3) Dependency is present existing relation between two persons, where one is sustained by other or relies on other's aid for his means of living. 329Ill494, 160NE833. [b] **"Dependent" defined.**-83Mont122, 270P634. [c] **Under statute,** dependency on deceased employee implies some degree of need. **Mass** 168NE747. [d] **In Illinois, statute defines "dependency"** as present existing relation between two persons, where one is sustained by other or relies on aid of other for his means of living. 335Ill254, 167NE56. [e] **In Tennessee** statute specifying persons entitled to compensation does not include all dependents regardless of age or relationship. 159Tenn577, 21SW(2d)625 (aunt of deceased employee not included).

55-23 214Ala130, 106S898; 32Ariz54, 255P598; 194Cal173, 228P38 (not applicable in proceeding for award for death of mother of minors); 37GaA140, 139SE359; 202Iowa902, 210NW578; 121Ohl271, 167NE874; 47RI458, 134A8; 67Utah25, 245P381, 45ALR882. But see **Mass** 168NE747 (person not within such class cannot refrain from use of resources available to him for support and make himself dependent). [i] See also 194Cal173, 228P38 (that minors were sent to foreign country for education is immaterial as far as their status is concerned). [j] **Stepchildren** under sixteen years of age living with deceased at time of his death are conclusively presumed to be dependent. 202Iowa136, 209NW289. [k] **Children under eighteen years of age** are conclusively presumed to be dependent upon deceased father though they have stepfather. 35GaA214, 132SE265. [l] **Children of classes indicated by statute** are presumed to be dependent. 214Ala130, 106S898. [m] **In Maine** legitimate child under eighteen years is conclusively presumed to be entirely dependent where no dependent parent survives employee, provided child was relying on parent for subsistence when he died. 125Me147, 131A860.

56-24 214Ala130, 106S898; 32Ariz54, 255P598; 194Cal173, 228P38; 77CalA509, 247P227; 91CalA98, 266P968; 37GaA140, 139SE359; 322Ill165, 152NE590; 333Ill49, 164NE164; 339Ill292, 171NE158; Ill172NE46; 125Me313, 133A736; 147Md487, 146A392; 218AppDiv676, 219NYS269; 127Or599, 272P267; 10PaDist&Co67; 67Utah25, 245P381, 45ALR882. [a] (4) 10LaA347, 120S530; 218AppDiv676, 219NYS269; **TexCivA** 283SW633. (5) 229Ky450, 17SW(2d)406. (6) 9LaA465, 121S219. (7) 68Utah383, 250P651. (12) **TexCivA** 283SW633. (16) Unadopted child, not related, living in household. 209Ky642, 273SW494. (17) Nephew on uncle. 9LaA678. (18) Parents on son. 229Ky606, 17SW(2d)708; 233Ky497, 26SW(2d)34; 6LaA752; 265Mass439, 164NE

441(1st case). (19) **Widow and minor children.** 228Ky786, 16SW(2d)167. (20) Other evidence held to show dependency. 34GaA311, 129SE447; 123 Kan628, 256P992; 236Mich109, 210NW 305; TexCivA 283SW633. [c] (16) No dependency shown where wife lived in foreign country four years prior to employee's death. 188Wis228, 205NW795. (17) Of father on son. 35PortoRico 937; 198Wis583, 225NW202 (mother on son). [d] **Receipt and expenditure of money** held not sufficient alone to show dependency, as necessity must be shown. 218 AppDiv306, 218NYS885. [e] **Sister held entitled to lump sum award** unpaid on claimant's death. 218AppDiv676, 219 NYS269. [f] **Dependency award is made for support of dependents.**–218App Div306, 218NYS885. [g] **Statutory provision for death benefits going to relatives** held no bar to right to lump sum award to actual dependent. 218AppDiv 676, 219NYS269. [h] **Evidence held not to show dependency.**–2LaA690; 5LaA 421; 147Md487, 146A392; 88PaSuper 470. [i] **Instructions.**–Duty of court to instruct jury as to law applicable in determining whether claimants were dependents. 127 Or599, 272P267 (refusal of instructions is held erroneous). [j] **Extent of dependency is question of fact.** –Utah 278P1019. [k] **Evidence held insufficient to show dependency** of son on father. Mass 168NE747. [l] **Question is one of law** where testimony is uncontradicted. 233Ky497, 26SW(2d)34.

56-25 Utah 278P1019; Utah 286P628; 150Va562, 143SE756.

56-26 124Kan327, 259P695. But see 34NM483, 284P115 (dependents are entitled only in cases in which workman would have been entitled had death not ensued).

56-27 124Kan222, 257P721; 229Ky 490, 17SW(2d)405; 127 Or599, 272P 267.

56-28 195Cal 283, 233P335 (under statute making total dependency conclusive in case of child upon parent legally liable for maintenance, award for total dependency held properly awarded where employee in divorce proceedings had been ordered to pay twenty-five dollars a month for child's support and was contributing to support at time of injury).

56-28½-New. Compensation awarded to minor dependents should name person to whom money should be paid. 83 IndA131, 147NE813.

56-28⅓-New. Under Alabama code, wholly dependent mother of deceased employee leaving dependent widow and minor children is entitled to no compensation. 214Ala411, 108S46.

56-28¼-New. In order that claimants be dependent on employee, it must appear that money which had been given them by employee for support belonged to him. 217AppDiv278, 216NYS763.

56-28⅓-New. Where there are no persons entitled to compensation, award goes to state treasurer. 128Misc626, 220NYS170.

56-28⅙-New. At death of one of two dependent children, under Rhode Island statute, survivor is entitled to entire compensation. 47RI 458, 134A8.

56-28⅐-New. Fact of minor son's dependency on father's earnings is not affected by the fact that at the time of his accidental death the father had a substantial bank account, 236Mich109, 210NW305.

56-28⅛-New. in absence of evidence that the father had property from which the money in the bank came in whole or in part. 236Mich109, 210NW305.

56-28⅑-New. Dependency is a condition precedent to award of compensation. 125Me147, 131A860.

56-28⅒-New. Mere giving of assistance by divorced father living apart from daughter does not of itself make the daughter dependent. 125Me147, 131A860.

56-28⅓-New. A further test is whether she had necessity therefor in her station of life and counted on such contributions for her livelihood. 125Me147, 131A860.

56-28½-New. Deceased employee's widow's rights are no higher than those of deceased. 286Pa245, 133A261.

56-28¼-New. Dependency of parent on a child may arise out of services rendered by the child in work about the home. 37GaA777, 142SE189.

56-28¼-New. Statute held not to limit dependency to a class but rather to indicate priority of dependency. 124 Kan458, 260P627.

56-28⅕-New. Although deceased employee's dependents live in a foreign country he was liable for their support so as to create a presumption of dependability. 257Mass3, 153NE175.

56-28⅙-New. In Texas, a stepmother and certain other designated beneficiaries are not required to prove dependency. TexCivA 299SW286.

56-28⅐-New. Right of stepmother to lump sum settlement held same as other beneficiaries. TexCivA 299SW286.

56-28⅛-New. Where a loss to claimant is not shown compensation will be denied. 88PaSuper470.

56-28⅑-New. On the death of a dependent to whom an award of compensation was made, a person who did not make a claim for compensation within the statutory time and who was not mentioned as dependent in deceased dependent's petition for compensation is not entitled to the unexpired balance of the award. 85CalA201, 259P73.

56-28⅒-New. Under some statutes the widow is the beneficiary, to whom compensation is payable in the first instance, and the mother is entitled to compensation as a major dependent only if there are no beneficiaries. 83 Mont152, 269P403.

56-28⅓-New. On the death of a beneficiary to whom an award has been made, the industrial accident commission cannot go beyond the record of the original proceedings to discover other dependents to whom the unexpired balance of the award may be paid. 85CalA 201, 259P73.

56-28½-New. The word "dependency" implies a present relation between two persons, where one is sustained by another or looks to or relies on aid of another for support or for reasonable necessaries consistent with dependent's position in life. 331 Ill 254, 162NE846.

56-28⅓-New. The fact that there was a widow entitled to compensation if she so elected, did not preclude an award to the state treasurer under the statute allowing such payment where there are no dependents. 251NY127, 167NE194.

56-28¼-New. Failure of federal statute to define "widow" and "surviving wife" entitled to compensation indicates an intention to leave definition to state law. 43F(2d)983.

56-28⅕-New. Common-law wife of deceased employee residing in Maryland is not entitled to compensation as "widow" or "surviving wife." 43F(2d)983.

56-29 197Cal 17, 239P330; 203Cal 12, 263P196; CalA 260P354; Ill 172NE46; 202 Iowa136, 209NW289; 124Kan222, 257P721; 219Ky799, 294SW470; Mass 169NE409; 83Mont122, 270P634; 127 Or599, 272P267; 53SD13, 219NW884. Utah 278P1019; Utah 286P628. See also 32Ariz54, 255P598. But see 219Ky 770, 294SW497; 150Va562, 143SE756. [a] (2) Claimant who was neither next of kin nor member of employee's family at time of injury could not recover for his death, though she was his wife at time of death. Mass 169NE409.

56-29½-New. Wife's right to compensation arises from injury causing death and not from death. 145Wash498, 261 P85.

56-30 37GaA234, 139SE685; 86 IndA 175, 156NE518; 10LaA25, 120S896; 125Me313, 133A736; 85Mont481, 280P 641. [a] (2) Mother of deceased held not entitled to compensation as major dependent. 85Mont481, 280P641 (donations not evidence of dependency). [d] **Fifteen-year-old illegitimate daughter,** dependent upon employee for support, is entitled to compensation. 86 IndA 175, 156NE518. [e] **Foster parents** dependent on deceased employee held entitled to compensation, though not "members" of "his household." 220Ky 764, 295SW1044. [f] **Father living with son in house which father had transferred to son** was totally dependent on son where son's earnings were sole source of support. 88CalA369, 263P823.

57-31 88PaSuper522.

57-32 24F(2d)63; 331 Ill 65, 162NE 116; 153Va86, 149SE613.

57-34 32Ariz54, 255P598; 89 IndA653, 167NE377 (decree depriving father of custody of child relieved him of duty to support). But see 259Mass222, 156NE 28. [a] **Some reasonable probability that obligation will be fulfilled** (1) must be shown in addition to obligation itself in order to show actual dependency. 32 Ariz54, 255P598. (2) But to determine practical value of legal obligation, or actual dependency, at time of injury, employee's actual contribution to claimant's needs in his lifetime need not be shown. 32Ariz54, 255P598.

57-36 Ariz 269P77; 336 Ill 395, 168NE 271.

57-38 [a] **Minor child supported by stepfather** entitled to compensation for father's death. 92CalA355, 268P415.

57-38½-New. There is no liability for compensation if workman is under no legal obligation to maintain claimant. 201 Iowa955, 204NW420.

57-39 32Ariz54, 255P598 (legislature has right to make different classes of children under eighteen in matter of presumptive dependency); 336 Ill 395, 168NE271; 158Tenn12, 11SW(2d)852. [a] (1) 106Conn233, 137A724. [b] (4) 215AppDiv581, 214NYS615. [c] Tex CivA 13SW(2d)909. See also 201 Iowa 955, 204NW420 (common-law wife is not entitled to compensation). But see 157Tenn206, 7SW(2d)807 (putative wife entitled to compensation). [d] (3) Father is not excluded from compensation because widow of deceased was not entitled thereto. 167La249, 119S37. [e] (1) TexCommnA 273SW838. (3) Persons not step-parents. 159Tenn577, 21 SW(2d)625. [g] (1) See also 124Kan 222, 257P721. (2) Word "child" includes stepchildren. 219Ky799, 294SW 470. [h] (2) Fifteen-year-old girl may claim for death of mother, regardless of support by father. 334 Ill 586, 166NE 33. (4) No child is presumed dependent on parent unless it actually lives with or is supported by parent. 234Ky 75, 27SW(2d)415. (5) Child of deceased widow, if entitled to compensation, would not be so entitled as dependent but as employee's child physically or mentally incapacitated and dependent on widow. 128Me299, 147A210. [i] (2) Contra 156Tenn145, 299SW795. [j] (1) 124Kan222, 257P721. (2) TexCivA 280 SW310. (5) Child of wife born before marriage and not recognized by employee is not entitled to benefits. Tex CivA 280SW310. (6) Posthumous illegitimate child held not dependent under statute. 156Tenn145, 299SW795. (7) That child is illegitimate is not conclusive that he is not entitled to compensation. 46 Ida692, 271P1. (8) Under Pennsylvania statute illegitimate child to whom deceased employee stood in loco parentis is entitled to compensation. 13PaDist&Co 209. (9) Must be duly acknowledged under statute. 13 LaA696, 129S171. (10) That employee sent physician and clothing to illegitimate child held to have made it "dependent." 235Ky278, 30SW(2d)955. (11) Employee who recognized duty to illegitimate infant and did everything reasonably required was supporting child within statute. 235Ky278, 30SW (2d)955. [l] (3) Married daughter receiving gifts from father not necessary for support is not "dependent." 23 OhA 167, 155NE414. [m] (1) 156Tenn168, 299SW770. [o] 201 Iowa955, 204NW 420 (witness having living husband). [r] 329 Ill 497, 160NE835. [t] **Adopted child** is included in statute speaking of "all other children entitled by law to inherit." 213Ala599, 105S686. [u] **Minor child** of deceased employee is entitled to compensation, though she was living with another and decedent had

contributed nothing to her support, legal duty to support rested on parent. 82 **IndA**675, 147**NE**301. [v] **Child merely receiving support** and standing in no other relation toward deceased than person in loco parentis is not included. 213**Ala**599, 105**S**686. [w] **Mother and father.**–When father and mother have recovered verdict for damages for death of son, and mother dies after verdict but before judgment, father gets entire judgment by right of survivorship. 6 **PaDist&Co** 564. [x] **Children awarded to wife on divorce** and whom she supports are not dependent on father. 84 **IndA**26, 149**NE**185. [y] **Grandparents** may be dependents. **TexCivA** 283**SW** 633. [z] **Brothers** of employee held dependents. **TexCivA** 283**SW**633. [aa] **Sisters** of employee held dependents. **TexCivA** 283**SW**633. [ab] **In Indiana** dependency of child ceases at eighteen years of age as matter of law. 83 **IndA** 537, 149**NE**187. [ac] **Minor children of undivorced woman** living with workman supporting them are dependents entitled to compensation for his death. 222 **Ky**748, 2**SW(2d)**387. [ad] **Child taken into home of workman** six years before his death and reared as member of family is entitled to compensation. 157 **Tenn**206, 7**SW(2d)**807. [ae] **Dependency rather than blood or marriage relationship** is true basis of right to compensation for employee's death. 157 **Tenn**206, 7**SW(2d)**807. [af] **Married woman** living in adultery with deceased was not dependent. 219**Ala**436, 122**S** 411(1stcase). [ag] **Common-law wife** is dependent where her lawful husband died prior to decedent. **TexCommnA** 15 **SW(2d)**229. [ah] **"Dependent orphan"** includes grandchild of decedent supported by him in home of widowed daughter. 220**Ala**480, 126**S**116. [ai] **Child supported by deceased workman** for year, though unrelated to him, is held entitled to compensation under some statutes. 160**Tenn**235, 22**SW(2d)** 1037. [aj] **Woman not married to deceased workman**, though living with and supported by him, is not entitled to compensation. 160**Tenn**235, 22**SW(2d)** 1037. [ak] **Stepchild.**–(1) 230**AppDiv** 280, 243**NYS**654. (2) Necessity for blood relationship and dependency to come within Act. 234**Ky**75, 27**SW(2d)** 415.

58–40 212**Ala**477, 103**S**447 (compensation is not payable concurrently to more than one class of defendants). See also 13**LaA**416, 127**S**40 (stepchild living with mother who lived with deceased employee). [g] **Children conclusively presumed dependent** include only those of first degree. 213**Ala**599, 105**S** 686 (dependents by nature, children born into family of deceased). [h] **Orphaned grandchild** becoming member of grandfather's family has status of actual dependent. 213**Ala**599, 105**S**686.

58–40½–New. The absence of deceased from the parental domicile at the time of his accidental death will not bar a recovery. **LaA** 121**S**670.

58–41 32**Ariz**54, 255**P**598; **MoA** 28**SW** **(2d)**446. See also 125**Me**147, 131**A**860.

58–44 [b] **Amount of compensation does not depend on cash** contributions, but value of assistance may be considered. 67**Utah**483, 248**P**125.

58–46 Wis 230**NW**627 (receiving weekly stipend).

58–46½–New. Mother able to eke out an existence but actually in need of financial aid is entitled to recover. **LaA** 130**S**651.

58–49 27**Hawaii**431; 216**Ky**29, 287 **SW**18. Contra 5**PaDist&Co** 702. [c] **In New York** nonresident alien parent is not entitled to compensation if there is surviving alien wife who is, or is about to become, nonresident. 212**AppDiv**754, 210**NYS**344. (2) Time as of which this is to be determined is not time of injury or death, but as of whatever time such condition shall be shown to exist. 212**AppDiv**754, 210**NYS**344.

58–49½–New. Where an alien dependent widow leaves the United States, it constitutes a change of condition warranting the board to modify the original award in favor of the minor children of deceased. 27**Hawaii**431.

58–50½–New. Commission is not required to pay award to alien dependents resident in foreign country of deceased employee until consul of the foreign country in the state or other proper officer as provided by statute shall furnish necessary information. 112 **OhSt**553, 148**NE**100 (mandamus to compel allowance denied).

59–53½–New. In Oregon compensation may be awarded, in a proper case, to the nonresident alien widow of a deceased employee. 118 **Or**260, 246**P**741.

59–53½–New. Under the Pennsylvania statute a nonresident alien child under sixteen years of age is entitled to compensation. 91**PaSuper**106.

59–53¼–New. Under such a statute actual dependence is not necessary to entitle such child to compensation, 91**Pa Super**106.

59–53⅓–New. but proof of age under sixteen years is sufficient. 91**PaSuper** 106.

59–55 37**GaA**234, 139**SE**685.

59–58½–New. Employee's minor wife is "minor dependent" within statute providing that limitations shall not run against minor having no committee, guardian, or next friend. 215**AppDiv** 581, 214**NYS**615, 618 [quotCJ].

59–59 213**Ala**584, 105**S**657; 77**CalA**509, 247**P**227; 213**Ky**134, 280**SW**936; 126**Me** 358, 138**A**555; 215**AppDiv**581, 214**NYS** 615 (where widow is dependent, without proof of dependency, and entitled to compensation); 222**AppDiv**700, 225 **NYS**217; 121 **Oh**271, 167**NE**874; 66 **Utah**256, 241**P**362. [d] **In Alabama**, under statute (1) legal dependency is based on status at time of death or injury. 213 **Ala**584, 105**S**657. (2) "Conclusively presumed" merely declares dependency as matter of law subject to exceptions named in statute. 213**Ala**584, 105**S**657. (3) Nature and extent of husband's support may be evidence to confirm or refute character and intent of making contribution "in any way" to wife's support. 217**Ala**361, 116**S**425. [e] **That widow is willing to share compensation with grandchildren** is not prejudicial to employer. 213**Ky**134, 280**SW**936. [f] **Where parties had been in open cohabitation together**, woman in good faith believing herself to be wife of employee, she is entitled to compensation. 77**CalA** 509, 247**P**227. [g] **In Colorado** (1) where husband and wife are living together and wife is dependent on husband for support, wife is presumed by statute to be wholly dependent on him if he died while they were living together, as result of accident arising out of and in course of employment. 82**Colo** 281, 260**P**106. (2) Statute applies only where wife makes claim on account of death of husband and not on account of death of child. 82**Colo** 281, 260**P** 106. [h] **Presumption that husband discharged duty to support wife** exists where they were living together. **Ill** 172**NE**46. [i] **Marriage.**–If marriage between claimant and deceased employee "Indian way" was in good faith claimant is entitled to compensation. **CalA** 286**P**1045.

59–60 35**GaA**632, 134**SE**331 (evidence held to show that separation was not voluntary but was brought about by husband's misconduct); 84 **IndA**406, 150**NE**105; 9**LaA**288; 120**S**99. [b] **Wife abandoned without cause** is presumptively dependent. 155**Tenn**441, 295**SW** 68. [c] **Though separated from husband without her fault** wife is entitled to compensation under statutory presumption of her total dependency on a husband legally liable for support. **MoA** 25**SW(2d)**144.

59–60½–New. In New York actual dependency is not condition to surviving wife's right to compensation. 215**App Div**254, 213**NYS**28.

59–60⅓–New. Nor does a legal separation relieving husband from duty to support destroy the right. 215**AppDiv** 254, 213**NYS**28.

59–60¼–New. , or under such circumstances that law imposed duty on husband to support wife. 84 **IndA**473, 151 **NE**434.

59–61 35**F(2d)**348; 336 **Ill** 395, 168**NE** 271; 84 **IndA**473, 151**NE**434; 89 **IndA** 163, 166**NE**9; 128**Me**126, 145**A**742; 93 **PaSuper**463; 93**PaSuper**494. [a]–(5) Widow of deceased who lived apart from home maintaining herself for three or four months preceding his death. 165 **La**334, 115**S**582. (6) Wife who had taken another husband without divorce and was living apart from first husband is held not dependent. 219**Ala**436, 122**S** 411(1stcase). [c] 66**Utah**529, 244**P**656. [e] 35**GaA**632, 134**SE**331. [k] 209**Ky** 690, 273**SW**496. [l] **That wife living apart from husband supported herself** (1) raises presumption against dependency. 66**Utah**529, 244**P**656. (2) Such presumption may be overcome by showing that separation and nonsupport were temporary. 66**Utah**529, 244**P**656. [m] **Wife who had voluntarily abandoned husband** is not conclusively presumed to have been dependent on him. 35**GaA** 632, 134**SE**331. [n] **In Kentucky**, under statute, wife is conclusively presumed to be wholly dependent upon her husband unless she has voluntarily abandoned him. 209**Ky**642, 273**SW**494. [o] **Burden of showing liability for support on part of husband at time of injury** rests on widow living apart from him at such time. 222**MoA**1138, 14**SW** **(2d)**660. [p] **Sufficiency of evidence of dependency** depends on circumstances of each case. 88**PaSuper**522. [q] **Effect of husband's default.**–Actual dependency of wife living apart from husband may exist notwithstanding husband's default in payment where she has not acquiesced in his repudiation of his obligation. 88**PaSuper**522. [r] **Wife supported by husband in whole or in part** at time of accident is dependent though living apart from husband. 88 **PaSuper**522. [s] **In Pennsylvania** dependent wife is entitled to compensation though living apart from husband. 88**PaSuper**522. [t] **Wife is entitled to compensation only when "legally" entitled to support** under statutes in some jurisdictions. 83**Mont**152, 269 **P**403 (compensation is denied wife deserting husband). [u] **Dependency may be total or partial.**–88**PaSuper**522. [v] **Where at time of accident causing death of employee wife deserted him** voluntarily and without cause and was not legally nor in fact dependent on him compensation is properly denied. 41 **GaA**223, 152**SE**488. [w] **Widow guilty of irregularities forcing husband to abandon her** is not entitled to compensation for death of husband. 234**Ky**75, 27**SW(2d)**415.

59–62 213**Ala**584, 105**S**657; 128**Me**126, 145**A**742.

59–63 [e] **Involuntary absence of wife** held not to change status as dependent. 214**Ala**130, 106**S**900.

60–64 214**Ky**800, 284**SW**82; 13**LaA**416, 127**S**40; 5**PaDist&Co** 702. See also 226 **Ky**7, 10**SW(2d)**463.

60–65 128**Me**126, 145**A**742. [b] (1) 84 **IndA**406, 150**NE**105.

60–66 [a] **Receipt of alimony** followed by compromise of claim against his estate or for further alimony under judgment in action not for divorce does not defeat right of wife whose separation has been forced by act of her husband and is not voluntary. 209**Ky**642, 273**SW**494.

60–66½–New. A compensation board is authorized to hear evidence on the question whether the wife of the injured employee was justified in leaving her husband so as to render her dependent under the Workmen's Compensation Act. 84 **IndA**406, 150**NE**105.

60–68 [a] **Pleading.**–Claimant's demand is not insufficient because failing to allege she was living with husband at time of his death where she alleged marriage and total dependency. 13**LaA** 234, 126**S**600.

60–69 84 **IndA**473, 151**NE**434; 188**Wis** 228, 205**NW**795. [a] 188**Wis**228, 205 **NW**795. [b] 214**Ky**800, 284**SW**82.

60–69½–New. A wife, separated from her husband, who remarried believing the husband dead, is "surviving wife" of such husband within the statute entitling her to compensation. 215**AppDiv** 254, 213**NYS**28.

60–69⅓–New. That husband left home

in anger and did not return does not show that the wife was voluntarily living apart from her husband so as not to be a dependent. 155Tenn441, 295SW68.

60-69¼-New. Under a statute declaring a wife dependent upon a husband legally liable for support, a wife, separated from her husband by mutual consent or without fault on her part, and never requested by him to return, is a dependent, entitled to compensation for his death although not actually being supported by him at the time of the injury. 222MoA1138, 14SW(2d)660.

60-69½-New. Under such a statute, the fact that the wife could not maintain an action against her husband for maintenance is not determinative of the question whether he was legally liable for her support. 222MoA1138, 14SW(2d) 660.

60-69¼-New. Temporary alimony and award of compensation are not analogous. 83Mont152, 269P403.

60-69½-New. A marriage ceremony accompanied by cohabitation between a man and a woman, where one of them has a living wife or husband, is an absolute nullity and may be so treated by the parties. 40GaA483, 150SE110(2d case).

60-69⅞-New. A bigamous marriage did not entitle one claiming as the widow of a deceased employee to compensation. 336 Ill 395, 168NE271.

60-69½-New. Effect of release of liability for support of wife see CalA 293 P89.

60-70 See also 233Ky497, 26SW(2d)34 (gift of automobile from deceased employee to dependent father).

60-71 229Ky450, 17SW(2d)406; 233 Ky497, 26SW(2d)34.

60-73 203Cal12, 263P196; La 121S 671; 250Mich457, 230NW937; 197Wis 421, 222NW317, 62ALR156.

60-75 [a] (6) Parent is not totally dependent on child where parent has home and earning capacity with which to pay living expenses. 329 Ill 494, 160NE833.

61-77 MoA 25SW(2d)506. [a] (2) Mother whose only means of support was contributions from employee's wages and income from cows and chickens owned by him was total dependent. MoA 25SW(2d)506.

61-78½-New. , or although dependent performs household duties for family, 233Ky632, 26SW(2d)521.

61-78½-New. or although employee spent large part of his earnings on himself. 233Ky632, 26SW(2d)521 (test is whether mother had to look to him entirely for support).

61-78¼-New. Under an act providing for payments to a person partly dependent, if there are no wholly dependent persons, the existence of wholly dependent persons entirely precludes persons partly dependent. 148Md363, 129 A359.

61-79 329 Ill 494, 160NE833; 331 Ill 254, 162NE846; 335 Ill 254, 167NE56; Ill 172NE40; 230Ky562, 20SW(2d)448; 125Me313, 133A736; 157Md487, 146A 392; 127 Or599, 272P267; 196Wis159, 216NW137; 197Wis597, 222NW823.

61-80 331 Ill 254, 162NE846.

61-80½-New. Parents need not be totally dependent to be entitled to compensation. 219Ky326, 292SW803.

61-81 203Cal12, 263P196; 321 Ill 563, 152NE588; 322 Ill 165, 152NE590; 331 Ill 254, 162NE846; 219Ky326, 292SW 803; 224Ky173, 5SW(2d)1049; 125Me 313, 133A736; Mich 233NW209; 127 Or 599, 272P267. [a] (5) Use by sister of residence rent free is not basis of award of partial dependency under Compensation Law. 82 IndA624, 147NE283. (6) Father, using son's earnings in paying for automobile and in support of family, is partial dependent. 224Ky173, 5 SW(2d)1049. (7) Use of son's earnings to pay lien notes on lots cannot be considered relative to partial dependency. 224Ky173, 5SW(2d)1049. [b] **Dependents are not limited to recovery** of compensation sufficient to obtain barest necessities of life but are entitled to continue to live as before accident. 127 Or 599, 272P267.

61-82 331 Ill 254, 162NE846; 335 Ill 254, 167NE56; Ill 172NE46; 89PaSuper 449; 125Me313, 133A736; TexCivA 283 SW633. [b] Reasonable amount used out of contributions made for support of family for acquiring home or permanent place of abode for dependents is within intent and purpose of act. 73 CalA521, 238P1056. (3) Matter not amounting to contribution to support. Ill 172NE40. [h] **Substantial regularity** of contribution toward support is essential element of partial dependency. 170Minn159, 212NW175. [i] **Contribution may consist in labor.**–174Minn227, 218NW882. [j] **Other tests.**–Fundamental test is whether dependents regularly derived substantial benefit, which constitutes contribution, from acts of employee. 174Minn227, 218NW882. [k] **Contributions not for support.**–(1) Contributions solely to pay family indebtedness do not make members dependent on son, though debts may render it necessary for family to depend on him for support. 127 Or599, 272P267. (2) Money given by son to family as investment or for speculation is not contribution for their support. 127 Or599, 272P 267.

61-82½-New. Award may be based on average weekly contribution by deceased workman to partially dependent mother, during previous year. 83 IndA594, 149 NE371.

61-82½-New. Dependency does not exist where support rendered by parents more than offsets contribution by child. 219Ky326, 292SW803.

61-83 329 Ill 494, 160NE833; 336 Ill 395, 168NE271; 11LaA480, 123S907 (money which comes to dependent on death of workman does not affect question of dependency); 83Mont122, 270P 634; 127 Or599, 272P267; 89PaSuper 449; 93PaSuper463; 93PaSuper494. See also 203Cal12, 263P196. [b] **Father held only partially dependent.**–9 LaA465, 121S219.

62-84 196Cal593, 238P662; 33GaA 798, 127SE828; 120Kan684, 244P1050; 224Ky173, 5SW(2d)1049; 70Utah116, 258P339. [c] **Where there are more than one dependent.**–Where there were three producers in family and two nonproducers, employee's mother and one of her sons by a second marriage, decedent's contributions over his living expenses should be divided by two in ascertaining amount contributed to mother's support. 242Mich438, 219NW683. [d] **Unless deceased employee contributed to family fund more than his maintenance actually cost** he did not contribute anything to support of parents and minor sister. 127 Or599, 272P267 (amount of excess question for jury).

62-85 Ill 172NE40; 67Utah483, 248P 125. But see 173Minn498, 217NW679 (father to whom son occasionally contributed money held not partial dependent).

62-86½-New. Compensation board's finding that mother and two infant sisters of deceased were dependent upon him to extent of fifty per cent means each dependent was sixteen and two-thirds per cent dependent. 222Ky432, 300SW892.

62-86⅓-New. "Total dependency" exists if dependent receives entire support from employee, and "partial dependency" exists if dependent receives less than entire support from employee. 222 Ky432, 300SW892.

62-86¼-New. Partial dependent is not entitled to increased compensation because of termination of dependency of other claimants. 222Ky432, 300SW892.

62-86½-New. The subsequent marriage of a widow did not affect her rights as to an award previously made. 229Ky 490, 17SW(2d)405.

62-89 230Ky562, 20SW(2d)448; 125Me 313, 133A736.

62-91 TexCivA 10SW(2d)220.

62-98 32Ariz299, 258P253, 55ALR975; 7LaA96. See also 5LaA41.

62-99 See also 29PortoRico 776 (similar construction applied to section enumerating circumstances under which accident is not compensable).

62-99½-New. Under these acts it is entirely unnecessary for claimant to show any negligence on the part of the master. Mont 257P270; 144Va98, 131SE240.

62-99⅓-New. Employer is not liable for compensation under the act except in those instances where the right is expressly granted. 79Mont358, 257P 270.

62-99¼-New. The employer is required to furnish his employee with a reasonably safe place to work, 79Mont 358, 257P270.

62-99½-New. which means that the place of employment has been made as free from danger to life or safety of the employee as the nature of the employment will reasonably permit. 79Mont 358, 257P270.

62-99¼-New. Death from injury is basis of compensation. 222AppDiv398, 226NYS366.

62-99½-New. Under some statutes compensation is not allowed for death unless it occurs within three hundred weeks after the accident. 293Pa7, 141A643.

62-99⅓-New. Compensation has been held recoverable for death caused by act of God where the employee was in the discharge of duties subjecting him to greater hazard than ordinary public. TexCivA 299SW286.

62-99⅓-New. An employee cannot be deprived of compensation because of bad judgment in his effort to discharge his duty to his employer. TexCivA 14 SW(2d)354.

62-99⅓-New. Injury occurring outside state to one employed within state is within act. 250Mich454, 231NW132.

62-1 Utah 267P785.

62-2 153Md274, 138A235; Wyo 288P 15. [b] **Farming not hazardous.**–2LaA 159. [c] **Held hazardous occupation.**–(1) 5LaA179. (2) 5LaA218. [d] **Employments held hazardous.**–LaA 130S 885.

63-3 103CalA27, 283P974.

63-4½-New. Time of occurrence of injury. Where an employee becomes disabled on account of tuberculosis after his employer has withdrawn from the Workmen's Compensation Act, he is not entitled to recover compensation for occupational disease, although the disease was contracted prior to any manifestation of disability, and while both the employer and employee were subject to the act. 197Wis428, 222NW315.

63-5 111Conn188, 149A778; 142 Okl 237, 286P309 (burns); TexCivA 294SW 672. [b] **"Compensable personal injury"** is abnormal condition of living body which arises out of and in course of employment, and produces incapacity to work for requisite statutory period. 103Conn701, 131A739; 103Conn720, 131 A745. [c] **Heat stroke** held not "injury." TexCivA 296SW688. [d] **Foot blisters** sustained by walking over rough ground in course of employment constitute compensable injury. OhA 173NE 263.

63-6 51ND815, 201NW348; Tex CommnA 1SW(2d)608.

63-7 124Kan521, 261P820; 119 Or357, 249P820, 50ALR1129.

63-7½-New. Under some statutes "any injury arising out of and in the course of . . . employment" must be one resulting from an accidental injury, in view of other sections of the same act. 83NH392, 142A697 (injury must be accidental).

63-7⅓-New. Some statutes expressly provide that the terms "injury" and "personal injury" used therein mean only accidental injuries. 217AppDiv 316, 217NYS173.

64-8½-New. Death caused by garage worker inhaling carbon monoxide gas is due to "accidental injury" within the statute. 214AppDiv351, 212NYS327.

64-8⅓-New. Under some statutes workman to be entitled to compensation must sustain personal injury by accident caused by violent or external means. 133 Or450, 288P204.

64-9 43 Ida30, 249P87; 124Kan521, 261P820; 125Me524, 134A636. [a] **Includes injury from employer's negligence.**–41GaA708, 154SE466(2dcase).

64-10 33F(2d)1 (injury is accidental when it unexpectedly results from operation of known and usual causes);

215Ala64, 109S360; 43 Ida30, 249P87; 321 Ill 298, 151NE920; 124Kan521, 261 P820; 127Me491, 144A446(1stcase); 83 NH392, 142A697; 217AppDiv316, 217 NYS173; 198NC723, 153SE266; 119 Or 357, 249P820, 50ALR1129; 155Tenn 491, 296SW3, 53ALR1086; 156Tenn 256, 300SW569; TexCivA 294SW932; TexCivA 14SW(2d)1046; 66Utah203, 240P1103; 148Va125, 138SE494. [b] (2) Statutory definitions in other states. 173Minn564, 218NW126 (pneumonia from exposure while engaged in line of duty not accident). (3) Construing unforeseen "event" to include unforeseen "death." MoA 25SW(2d)1086. [d] (16) 172Minn489, 216NW241. (36) Freezing may constitute accidental injury. 117 Or188, 243P96, 45ALR812. (37) Heat prostration. 245NY201, 156NE665; 155 Tenn491, 296SW3, 53ALR1086. (38) Partial paralysis resulting from apoplexy caused by overexertion. TexCivA 18SW(2d)921. (39) Paralysis from cerebral hemorrhage due to sunstroke during course of employment. 295Pa73, 144A821(1stcase). (40) Infection following vaccination. TexCivA 27SW(2d) 600. (41) Other instances. 111Conn 188, 149A778; 13LaA228, 127S116; 89 PaSuper393; 96PaSuper189; 160Tenn 504, 26SW(2d)128; Utah 276P161. [g] **Apoplectic stroke** not resulting from shock, strain, or other injury to physical structure of body is not "accident." 284Pa348, 131A247.

64-10½-New. Some untoward occurrence aside from usual course of events. 284Pa348, 131A247.

64-11 326 Ill 116, 157NE32; 127Me207, 142A730; 133Misc616, 232NYS557; Tex CommnA 30SW(2d)305; TexCivA 294 SW932; TexCivA 296SW920. [a] (5) Event from unknown cause or unusual or unexpected event from known cause. 113 Okl 179, 241P170. (6) Impairment of painter's health due to poison gas fumes from carbon disulphide thinner has been held injury resulting from accident, 33F(2d)1. [b] **Where employee knew that he was susceptible to cedar poisoning** on coming into contact with cedar, attack of cedar poisoning was not personal injury by "accident." 47 Ida 380, 275P1114. [c] **Illustrations.**–Death from infection from vaccination by employer's physician. 249Mich690, 229NW 438. [d] **Death from inhalation or injection of gas or poison from coal** held accidental. 180Minn192, 230NW486. [e] **"Accidental injury" defined.**–Md 151 A134.

64-11¼-New. In some jurisdictions it must appear not only that the result may be unusual, unexpected, or unforeseen, 119 Or357, 249P820, 50ALR1129.

64-11½-New. but that the means used was accidental. 119 Or357, 249P820, 50 ALR1129.

65-12 124Kan521, 261P820; 217App Div316, 217NYS173; 155Tenn491, 296 SW3, 53ALR1086; 66Utah203, 240P 1103; 145Wash263, 259P720.

65-12½-New. and the occurrence must be referable to a definite place. 217App Div316, 217NYS173.

65-13 [a] (1) 147Wash303, 265P739. (2)MoA 28SW(2d)849 (in garage); 223 AppDiv797, 228NYS17; 8PaDist&Co 8.

65-14 32Ariz299, 258P253, 55ALR975; 321 Ill 298, 151NE920; 92PaSuper103. See also 144Va98, 131SE240.

65-15 40GaA787, 151SE552.

65-16 Ala 130S772; 88 IndA347, 163 NE841; NC 155SE728; 140 Okl 238, 283 P240 (assaults by fellow servants); 156 Tenn256, 300SW569.

65-19 [a] **Whether accident occurred question of fact.**–Wash 290P876.

65-20 125Me524, 134A626.

65-20½-New. An injury is "accidental" if it results from accidental means; was unexpected and undesigned, and it may be accidental if the result of mere mischance or miscalculation as to the effect of voluntary action. 112 Okl 245, 240P 640.

65-20½-New. "Objective symptom of injury" necessary for compensable accident under statute includes visible changed condition of body from life to death. MoA 25SW(2d)1086.

65-21 79Mont358, 257P970; 145Wash 263, 259P720. [a] (2) "Happening by chance or accident; coming or occurring unexpectedly or without known cause; chance; accident." Webster New Int. D. [quot 79Mont358, 257P270, 274].

65-23 24F(2d)926; 87CalA324, 262P 411; 116Tex201, 288SW116; 148Va125, 138SE494. [a] **Syphilis.**–1LaA689.

65-24 265Mass497, 164NE457, 62ALR 1458; TexCivA 294SW932. See also 9 PaDist&Co 787.

65-24½-New. Disease may be an accidental injury. 241NY153, 149NE334, 41 ALR1122.

65-25 215Ala64, 109S360; 151Wash 430, 276P89.

65-26 337 Ill 454, 169NE225; Ill 173 NE184; 265Mass497, 164NE457, 62ALR 1458; 241NY153, 149NE334, 41ALR 1122; 216AppDiv577, 215NYS562; 31 OhA430, 166NE380; 113 Okl 230, 241P 174; TexCivA 294SW932; 148Va125, 138SE494. [a] (13) Neurasthenia resulting from personal injury. 112 Okl 101, 240P96. (14) Fingers of driver coming in contact with abrasion on horse resulting in infection with blastomycosis. 159Tenn202, 17SW(2d)904. (15) Tuberculosis contracted from preparation and application of lacquer. 13 PaDist&Co 76. (16) Traumatic neurosis resulting from blow in groin. 180Minn 411, 230NW897. [b] (6) That apoplexy was due to overexertion. 96PaSuper 189. (7) That fall caused arthritis. LaA 130S657. (8) Other instances. Md 151A134. [f] **Diseases held not caused by "accidental injury."**–(1) Death due to disease caused by going from hot room to refrigerator is not compensable as "accidental injury." 241NY153, 149NE 334. (2) Partial loss of senses and weakening of nervous system suffered as result of heat stroke from intensified natural and artificial heat in sheet iron building. TexCivA 294SW606.

66-27 35GaA526, 133SE875; 216App Div577, 215NYS562; 112 Okl 101, 240 P96; TexCivA 16SW(2d)386. [e] **Disease results proximately if it is induced** by lowered resistance caused by accident. 215Ala64, 109S360. [f] **Disease must be traceable to accident.**–LaA 126S 579; LaA 126S584.

66-28 235Mich496, 209NW586. [a] (2) Germs inhaled through nose or mouth or absorbed into system through normal channels of entry, not assignable to determinate or single act, is thought of as disease. 240NY83, 147NE366, 39ALR 867. (3) If these become dangerous or deadly by contact with infected matter, we think and speak of what has happened as something catastrophic or extraordinarily a mishap or accident. 240 NY83, 147NE366, 39ALR867. (4) Scratch or abrasion of unknown origin itself trivial or innocent would find larger measure of misadventure in poisonous infection. 240NY83, 147NE366, 39ALR867. (5) Infection of grangrenous matter from corpse into cut in hand of embalmer's helper is accidental injury within Compensation Act. 240NY 83, 147NE366, 39ALR867. (6) Scratching pimple on neck with infected finger resulting in blood poison and death is accidental injury and compensable. 240 NY83, 147NE366, 39ALR867. (7) Injury and personal injury mean only accidental injuries arising out of, and in course of, employment and such disease and infection as may naturally and unavoidably result therefrom. 240NY83, 147NE366, 39ALR867. (8) No scientifically exact discrimination between accident and disease or between disease and injury. 240NY83, 147NE366, 39 ALR867. (9) That infection may be accidental is recognized by statute. 240 NY83, 147NE366, 39ALR867. (10) Voluntary act does not defeat right to compensation where there is no finding of willful intention to bring about injury. 240NY83, 147NE366, 39ALR867. (11) Intention of legislature was to enlarge and not to narrow meaning by coupling words "infection" and "disease." 240 NY83, 147NE366, 39ALR867. (12) Infection, like disease, may be gradual and insidious or sudden and catastrophic. 240NY83, 147NE366, 39ALR867. (13) When channel of infection is abnormal or traumatic, lesion or cut, it is accidental injury. 240NY83, 147NE 366, 39ALR867.

66-29 4LaA38; TexCivA 27SW(2d)690. [a] (3) Minn 232NW621 (resulting from series of puncture wounds). (4) Tex CivA 286SW862. [b] **Illness from infectious or contagious disease** is not proximate result of injury arising out of employment without exposure greater than that of commonalty. 84CalA506, 258P 698.

66-31 [a] (6) 31 OhA430, 166NE380. (12) 116Tex201, 288SW116. (16) 148Va 125, 138SE494. (17) Death from cold contracted from going in and out of refrigerator in shop held not compensable. 241NY153, 149NE334, 41ALR1122.

66-32 [a] (8) 10PaDist&Co 655. (22) Traumatic neurotic condition directly resulting from injury. 219Ky691, 294 SW159.

67-33 241NY153, 149NE334, 41ALR 1122.

67-33½-New. Disease caused by exposure and exhaustion without the intervention of bodily injury is not a personal injury within the meaning of the statute. 104Conn709, 134A259.

67-33¼-New. Disease must naturally and unavoidably result from the accident in order that the employee may be entitled to compensation therefor. 106 Conn360, 138A139.

67-33¼-New. Predisposition to disease does not preclude an award under the statute if the disability is proximately caused by the accident. 284Pa348, 131 A247; 51SD359, 213NW947.

67-33½-New. The term "injury" as used in the statute does not include diseases which are contracted, as distinguished from diseases which are occasioned by or follow as a result of physical injury. 22 OhA454, 153NE276.

67-33⅙-New. A distinction exists between an accidental injury and disease. 241NY153, 149NE334.

67-33⅐-New. But disease may be an accidental injury. 241NY153, 149NE 334.

67-33⅛-New. Under the Connecticut Act as amended in 1921 "weakened resistance" is not in and of itself a bodily injury. 103Conn93, 130A89, 91.

67-33⅛-New. Compensable injury need not be traced to a definite happening or event but may be caused by accident or disease. 103Conn93, 130A89; 103Conn 701, 131A739; 103Conn720, 131A745.

67-33 1/10-New. Influenza is a compensable disease. 103Conn93, 130A89.

67-33 1/11-New. Pneumonia is a compensable disease. 103Conn93, 130A89.

67-33 1/12-New. Injury or death following an extraordinary exposure to wet and cold, suffered in the course of the employment, may be compensable. 285 Pa317, 132A122.

67-33 1/13-New. Connecticut Act as amended in 1921 applies to nonoccupational diseases as well as occupational. 103Conn701, 131A739.

67-33 1/14-New. Disease from natural causes, even though hastened by exertion of employment, is not compensable as an accident. 284Pa348, 131A247.

67-33 1/15-New. Tuberculosis resulting from working in damp, unsanitary, and unventilated cellar is not compensable as an "accidental injury." 217AppDiv 316, 217NYS173.

67-33 1/16-New. Disease, to be compensable must be interpreted both as an accident and an injury. 127Me245, 142A 865.

67-33 1/17-New. Where it is not shown deceased was suffering from heart disease at the time of the accident nor that the injuries caused the disease from which he died there can be no recovery. 87PaSuper503.

67-33 1/18-New. Whether a particular infection is an accidental injury must be determined on the facts of each case. 159Tenn202, 17SW(2d)904.

67-33 1/19-New. Disability of an employee caused by a preexisting disease is not compensable under the law. 230 Ky108, 18SW(2d)958.

67-34 107Conn63, 139A503. [e] **In Connecticut,** under act as amended in 1921 (1) influenza, otherwise compensable, is not occupational when contracted by marble setter, and hence not within exception of communicable occupational diseases. 103Conn93, 130A 89. (2) Pneumonia, otherwise compen-

sable; is not peculiar to occupation of marble setting, and hence exception of communicable occupational diseases has no application. 103Conn93, 130A89. [f] **Diseases held not occupational.**–Cold caused by remaining in refrigerating plant of employer for ten minutes. 241NY153, 149NE334, 41ALR1122. [g] **Heart disease** is not occupational disease. 31 OhA430, 166NE380. [h] **Pneumonia not occupational disease.**–111Conn188, 149A778. [i] **Carbon disulphide thinner poisoning** contracted by painter in course of his employment is not occupational disease. 33F(2d)1.

67-36 195Wis410, 217NW738.

67-37 29PortoRico776; TexCommnA284SW931; 147Wash303, 265P739. [a] 29PortoRico776; TexCommnA284SW931.

67-38 3Del304, 136A375; 124Kan521, 261P820 (dictum); Md151A134; 245Mich256, 222NW77; MoA32SW(2d)449; 113Okl179, 241P170; 114Okl3, 242P765; 155Tenn491, 296SW3, 53ALR1086; TexCommnA284SW931; 68Utah206, 249P480; Wis231NW584. [a] (2) Abnormal condition of hand caused by leather poisoning. 127Me245, 142A865.

68-39 103Conn720, 131A745; 118Oh622, 163NE198. [f] **Amendment of 1921 to Connecticut Act** (1) limits compensable occupational diseases by excluding those of contagious, communicable, or mental nature. 103Conn93, 130A89; 103Conn701, 131A739; 103Conn720, 131A745. (2) Amendment applies to all forms of disease, occupational or otherwise. 103Conn701, 131A739. [g] **In New York,** aniline poisoning must occur "in process involving use" of dye, and statute does not protect worker who contracted disease while handling furs after completion of dyeing. 216AppDiv573, 216NYS167. [h] **Application of statute.**–247IllA275. [i] **Occupational diseases, to be compensable under statute,** must arise in course of employment. 109Conn378, 146A825. [j] **Must have been caused, aggravated, or accelerated by employment.**–Wis231NW584.

68-40 [a] (2) Injury attributable in part to accident is compensable, though employee was suffering from occupational disease contributing to his condition. Nebr230NW683.

68-41 76CalA565, 245P445; 127Kan91, 272P153; 6LaA532; 127Me207, 142A730; 292Pa550, 141A480; 93PaSuper320; TexCivA289SW420. See also 84Colo481, 271P617. [b] (7) Injury causing gradual swelling of knee as result of kneeling and putting more weight on injured knee than on other. 76CalA565, 245P445. (8) Employee's twisting of body while turning drill press. 298Pa22, 147A837(2dcase). [d] **Lifting** slate vault which had stuck in frozen ground, to enable it to slide down into grave. 127Me207, 142A730.

68-42 84Colo481, 271P617 ("hernia" defined); Ill173NE184; 10LaA397, 123S198; 11LaA549, 123S413; 3LaA205; 3LaA562, 565 [quotCJ]; 6LaA206; 166Minn41, 207NW183; 166Minn55, 207NW185; 177Minn98, 224NW459; MoA18SW(2d)84; MoA18SW(2d)86; MoA18SW(2d)89; MoA18SW(2d)97; 121Oh397, 169NE305; TexCivA289SW420; TexCivA30SW(2d)921; 68Utah567, 251P368. See also 1LaA56. [b] (2) Requirement that accidental strain immediately preceded hernia permits sufficient interval to intervene for effect to follow cause in usual course. Colo271P611. (3) Injured workman, by continuing to work for full week after accident causing hernia, is not entitled to compensation under statute providing that inability to work must "immediately" follow accident. 108Conn309, 143A155. [c] (3) Evidence held to prove rupture due to strain. 317Ill519, 148NE327. (4) Evidence held sufficient to show strangulated hernia. 14PaDist&Co217. [e] **Requirement that hernia appear "suddenly"** to be compensable (1) does not require external knot to be visible immediately after accident. 149Va307, 141SE225. (2) In such case requirement is satisfied by consciousness of inconvenience and soreness after injury although visible knot did not appear for over two months thereafter. 149Va307, 141SE225. [f] **Finding that hernia did not appear suddenly and immediately after injury** precludes recovery. TexCivA5SW(2d)783. [g] **Limitation as to recovery for hernia** extends only to claims for compensation for permanent partial disability. MoA18SW(2d)89.

68-43 98PaSuper108. See also 1LaA68. [a] (1) See also 95PaSuper209. (2) Carrying heavy chairs. 33OhA237, 169NE36.

68-44 TexCivA296SW920.

69-45 2LaA773, 776 [quotCJ]; TexCommnA18SW(2d)260.

69-45½-New. An internal injury resulting from an external force is a traumatic injury within a compensation act. 221Ky265, 298SW686.

69-46 24F(2d)926; 91CalA574, 267P321; CalA287P577; 321Ill61, 151NE593; 337Ill59, 168NE652; Ill173NE70; 200Iowa944, 205NW737; 208Iowa262, 225NW404; 13LaA402, 128S321; LaA129S375; LaA130S859; 1LaA302; 2LaA249; 2LaA435; 4LaA714; 5LaA71; 5LaA340; 152Md321, 136A644; 153Md631, 139A356; 266Mass355, 165NE120; 166Minn55, 207NW185; 167Minn475, 209NW635; 172Minn489, 216NW241; NJSup135A775; 218AppDiv451, 218NYS355; 51ND815, 201NW348; 57ND326, 221NW894; 112Okl250, 240P635; 138Okl45, 280P290; 144Okl89, 289P708; Okl291P533; 87PaSuper503; TexCommnA30SW(2d)305; TexCivA296SW920; 66Utah600, 245P343; 68Utah567, 251P368; Utah276P161; Utah290P764; 150Wash551, 274P105. See also 48Ida136, 279P1087 (aneurysm accelerated). [a] (6) Reawakening of dormant venereal condition was held cause of injury. NJSup135A775. [b] (2) Other instances. TexCommnA30SW(2d)305. [c] **Arthritis** is not "previous disability" within statute requiring abatement of compensation in part by reason thereof. 36F(2d)814. [d] **Employer assumes risk** of employee's diseased condition aggravated by injury. 36F(2d)814.

69-47 320Ill191, 150NE640; 2LaA773, 776 [quotCJ]; 3LaA562, 565 [quotCJ]; 166Minn41, 207NW183; 166Minn55, 207NW185; 167Minn475, 209NW635; MoA21SW(2d)897; 218AppDiv451, 218NYS355; 143Okl29, 287P69 (compensation for injury resulting in dilatation of heart not prevented because of imperfect condition of heart at date of injury); TexCommnA30SW(2d)305. But see 5LaA119. [a] (1) See also 3LaA683. (3) Coal miner predisposed to heart disease whose death was caused by shock of passing from very high temperature into ice-cold air. 79Mont358, 257P270. (4) Laborer held entitled to compensation for injury in course of employment and arising out of it, notwithstanding former operation was contributing cause. 320Ill191, 150NE640.

69-48 87CalA324, 262P411; 334Ill58, 165NE161; 337Ill454, 169NE225; 9LaA132, 119S498; 153Md631, 139A356; NJSup132A301; TexCivA290SW895. But see 6LaA530; 107WVa583, 149SE824 (compensation will not be awarded where death is liable to ensue from heart trouble at any moment and comes while employee is doing ordinary work of his employment). [a] (4) That deceased had syphilitic brain tumor does not affect right to compensation for death caused by fall. 293Pa448, 143A116, 60ALR1288.

69-49 153Md631, 139A356; 167Minn475, 209NW635. [b] **Later development of disease or sickness not caused by accidental injury** does not entitle injured employee to compensation. 143Okl29, 287P69.

69-49½-New. First employer is liable for a recurrence of condition caused by the original injury even though the employee at the time was working for another employer. 253Mass114, 148NE440.

69-49¾-New. An award for an injury received during employment which was later aggravated by working, resulting in the employee's total disability, is in harmony with law and evidence. 88IndA170, 163NE529.

69-51 [a] **Mutilation from disease** is not compensable though disease arose out of and in course of employment. 159Tenn202, 17SW(2d)904.

70-53 85PaSuper531. [a] (2) Scar on face is disfigurement. 3LaA83. [e] **Award for serious facial disfigurement** may not be had unless it is on face, and is serious and permanent. 215AppDiv176, 213NYS202. [f] **As additional damages.**–85PaSuper531.

70-54 104Conn709, 134A259; 327Ill438, 158NE673; 337Ill59, 168NE652 (where cause of injury or death is equally consistent with accident and with no accident, compensation will be denied); 337Ill454, 169NE225 (there must be direct relation between accident and subsequent death of employee); 124Kan550, 262P19; 9LaA475, 121S217; 128Me73, 145A455; NJSup152A78; NJCPl145A540(1st case); 226AppDiv623, 236NYS625 (death caused by injury); 230AppDiv535, 245NYS461; ND233NW264 (3d case) (common-law rule of causation); 128Or369, 274P905; TexCivA16SW(2d)354; TexCivA30SW(2d)921; Utah284P313; 194Wis606, 217NW303 (holding subsequent injury must be traced to prior injury in employment). See also 224AppDiv335, 230NYS755. [b] (1) See also 225AppDiv432, 233NYS376. (2) It is immaterial that injury in conjunction with latent systemic infection caused disability. 13LaA292, 125S877. [c] (12) Scarlet fever contracted while employee is in hospital for compensable injury is not compensable. 108Conn148, 142A739. [d] (21) That injury to employee's foot was proximate cause of death. 35GaA526, 133SE875. (22) That stiffness resulting from use of instrument in healing limb was caused by original injury. 214Ala87, 106S499. (23) That death resulted from injury received in fall. TexCommnA12SW(2d)558. (24) Death from anæsthetic in operation necessitated by accident in course of employment. 174Minn94, 218NW243. (25) That cancerous condition contributed to death. 128Or369, 274P905. (26) Other instances. 248NY93, 161NE431 (suicide resulting from insanity). [h] **Mere possibility of causal connection** between injury and death is insufficient. 285Pa145, 131A703. [i] **Causal relation between sickness of workman and his work** must be shown where rain fell on him while at work and he became sick and finally died. 35PortoRico902 (not due to duties inherent in occupation).

71-55 124Kan550, 262P19; 11LaA92, 120S682; 9LaA475, 121S217; 246Mich193, 224NW354; 128Or369, 274P905.

71-56 107Conn56, 139A644, 56ALR455.

71-56½-New. If employee was drunk at place where, if he fell, he would probably be killed, and he fell owing to his drunkenness, compensation should be denied. 242NY70, 150NE604.

71-56¾-New. Where the superinducing cause of death was exposure to wet and cold, it is immaterial that such exposure suffered in the course of the employment may have been aggravated by other causes. 285Pa317, 132A122.

71-56¼-New. A heat stroke may be compensable as an accident, but only when it is direct or superinducing cause of disability. 284Pa348, 131A247.

71-59 10LaA141, 119S777; 112Okl101, 240P96; 155Tenn491, 296SW3, 53ALR1086; TexCivA14SW(2d)1046; TexCivA23SW(2d)405; TexCivA29SW(2d)524 (need not be concurrent).

71-59½-New. Where injury by accident is moving, exciting, or contributing cause of disease, such disease must be said to have naturally resulted from injury within statute. 155Tenn491, 296SW3, 53ALR1086.

71-59¾-New. regardless of whether particular disease often or usually results from similar injuries. 155Tenn491, 296SW3, 53ALR1086.

71-59¼-New. Under some statutes compensation is payable only for disability or death proximately caused by an industrial accident. 69Utah452, 256P397.

71-59⅛-New. If the injury is the proximate cause of death, the previous phys-

ical condition of the employee is immaterial. 321 Ill 61, 151NE593.

71-59½-New. Where infection causing death was not result of the injury fact that deceased suffered slight injury is immaterial. Mont 289P563.

71-60 87CalA333, 262P394; 265Mass 12, 163NE194; 130Misc301, 223NYS 415; ND 233NW264(3dcase); Utah 275 P777. [a] (2) Where physician in course of such examination caused X-ray burns which created permanent disability connected with original injury, employer held liable therefor. 317 Ill 302, 148NE79.

71-61 23F(2d)434; 42F(2d)931; 233 IllA6.

71-62 130Misc301, 223NYS415. See also 221AppDiv371, 223NYS418 (holding physician and employer not joint tort-feasors).

71-65 78Mont579, 254P880; 215App Div634, 214NYS430. See also 3LaA699.

71-66 3LaA489, 490 [quotCJ]; 152 Tenn401, 277SW902; 69Utah452, 256P 397; Utah 290P770. [e] Where minor safe operation can prevent disability, refusal to submit thereto defeats claim. Utah 290P770.

72-67 326 Ill 584, 158NE209, 54ALR 634; 3LaA489, 490 [quotCJ]; 160Tenn 362, 24SW(2d)893; Utah 290P770 (determination of reasonableness of refusal). See also 4LaA40; 4LaA157; 5LaA 33; 8LaA403; 8LaA657. [c] Unjustified fear of operation for hernia is not reasonable ground for refusing operation.. 215AppDiv634, 214NYS430 (in absence of proof that such operation is fatal or dangerous). [d] Employee's timidity is no excuse for refusing surgical treatment. Utah 290P770.

72-67½-New. An employee's refusal to submit promptly to an operation does not prevent recovery for death unless such refusal introduces a new and independent cause of death aside from the injury. 69Utah452, 256P397 (refusal to consent to amputation of leg until just before death is held not to prevent recovery).

72-69 213Ala244, 104S422; 214Ala256, 107S837; 215Ala352, 110S702; 220Ala 440, 125S608(2dcase); 221Ala44, 127S 540; Ala 130S74; 32Ariz265, 257P641; 32Ariz299, 258P253, 55ALR975; 32 Ariz350, 258P306; 87CalA105, 261P 1106; CalA 288P726; 103Conn720, 131 A745; 104Conn709, 134A259; 105Conn 512, 136A105; 105Conn695, 136A677, 56ALR504; 110Conn384, 148A334; 36 GaA557, 137SE121; 39GaA210, 146SE 504; 169Ga746, 151SE363; 36GaA186, 136SE336; 37GaA238, 139SE688; 37 GaA539, 140SE899; 43 Ida30, 249P87; 43 Ida625, 253P1104; 43 Ida549, 254P 209; 318 Ill 151, 149NE11; 321 Ill 23, 151NE499; 321 Ill 61, 151NE593; 331 Ill 541, 163NE337; 331 Ill 401, 163NE 406, 60ALR1397; 333 Ill 340, 164NE 668; Ill 173NE49; Ill 173NE70; 202 Iowa67, 209NW415; 204 Iowa180, 214 NW700; 206 Iowa790, 221NW481; Iowa 233NW141; 124Kan521, 261P820; 124Kan550, 262P19; 231Ky705, 22SW (2d)117; 3LaA632; 4LaA516; 5LaA 134; 7LaA502; 125Me245, 132A698; 128Me47, 145A394; 128Me86, 145A737 (2dcase); 128Me353, 147A431; 156Md 535, 144A708; 234Mich648, 209NW101; 238Mich566, 214NW229; 239Mich501, 214NW953; 244Mich13, 221NW175; 250Mich238, 230NW191; 168Minn65, 209NW898; 169Minn370, 211NW330; 172Minn185, 214NW775; MoA 18SW (2d)89; MoA 27S(2d)459; MoA 32SW (2d)121; 83Mont527, 273P294; 114 Nebr432, 208NW739, 46ALR1213; NJ 151A598; 102NJL231, 132A251; 246 NY279, 158NE621; 220AppDiv375, 222 NYS79; 221AppDiv199, 223NYS738; 198NC723, 153SE266; 119 Oh41, 162 NE272, 59ALR367; 128 Okl 25, 261P 181; 128 Okl 295, 262P1062; 138 Okl 167, 230P603; 119 Or357, 249P820, 50 ALR1129; 133 Or450, 288P204; 154 Tenn287, 290SW30; TexCommnA 283 SW783; TexCommnA 299SW871; Tex CommnA 1SW(2d)260; TexCivA 294 SW672; 100Vt92, 135A8, 48ALR1396; Vt 146A68; Vt 146A71(1stcase); 143 Va62, 129SE330; 144Va98, 131SE240 (injury must be consequence arising out of employment); 199Wis192, 225 NW690; Sask [1925] 3DomLR621. See also 250 IllA92; 4LaA540. But see 24 OhA455, 155NE704; 7PaDist&Co 461. [b] 117 Or188, 243P96, 45ALR 812. [j] During period of employment not enough of itself.-246NY 279, 158NE621. [k] Compensation act does not provide for health or accident insurance.-TexCommnA 1SW(2d)260. [l] In Pennsylvania it is not necessary that injury arise out of employment, and it is only necessary that it be sustained in course of employment. 13 PaDist&Co 80. [m] Employer may limit sphere of workman's employment and prohibit him from working in dangerous place. Ala 130S74. [n] That claimant's action amounted to no more than negligence does not entitle him to compensation where he was not acting in course of employment at injury. Iowa 233NW141.

72-70 See also 336 Ill 117, 168NE113.

72-71 See also 142Wash69, 252P152. But see Wash 288P655.

72-71½-New. Mere fact that an accident occurred on the employer's premises is not enough to establish liability. 254Mass214, 150NE4.

72-71¾-New. Compensation is based on injury arising out of or in course of employment. 69Utah83, 252P292.

72-71¼-New. An injury must result from an occurrence arising from the employment in the industry. 28F(2d)228.

72-71½-New. Under the Pennsylvania statute it is not required that the injury arise out of the employment. 92PaSuper 374.

72-71¾-New. Under statutes in other jurisdictions it is held that injury to an employee is compensable only when it was sustained while in the course of his employment. TexCivA 10SW(2d) 1028.

72-72 36GaA557, 137SE121; 114Nebr 432, 208NW739, 46ALR1213; 114 Okl 140, 244P438; 128 Okl 25, 261P181; 128 Okl 295, 262P1062; 154Tenn287, 290SW 30; 156Tenn256, 300SW569.

73-73 32Ariz299, 258P253, 55ALR975; 43 Ida625, 253P1104; 321 Ill 23, 151NE 499; 323 Ill 377, 154NE128; 124Kan 550, 262P19; 231Ky705, 22SW(2d)117; 125Me168, 132A129; 126Me32, 135A824; 128Me353, 147A431; 180Minn400, 231 NW214; MoA 32SW(2d)121; 85Mont41, 277P615; 114Nebr432, 208NW739, 46 ALR1213; 198NC723, 153SE266; NC 155SE728; 119 Oh41, 162NE272, 59ALR 367; 128 Okl 25, 261P181; 128 Okl 295, 262P1062; 154Tenn287, 290SW30; 156 Tenn256, 300SW569. [a] TexCivA 294 SW672.

73-74 114Nebr432, 208NW739, 46ALR 1213; 128 Okl 25, 261P181.

73-75 [a] Compensable injury is one having to do with, and originating in, employer's business. TexCommnA 298 SW414.

73-75½-New. An injury not occurring in course of the employment does not arise out of it. 32Ariz299, 258P253, 55 ALR975.

73-76 215Ala220, 109S878; 220Ala10, 123S201; 86Colo 580, 284P334; 169Ga 746, 151SE363; 43 Ida625, 253P1104; 336 Ill 117, 168NE113; 336 Ill 223, 168 NE288; 89 IndA673, 166NE613; 231Ky 269, 21SW(2d)277; 13LaA179, 125S456; 252Mass211, 147NE576; 252Mass209, 147NE577; 267Mass307, 166NE827; 245 Mich332, 222NW711; 246NY279, 158NE 621; 224AppDiv327, 230NYS707; 226App Div616, 236NYS379; NC 153SE594; 24 OhNPNS56; 128 Okl 25, 261P181; 136 Okl 94, 276P712; 140 Okl 54, 282P153 (question is one of fact to be determined by commission); 285Pa440, 132A363; Vt 146A68; Vt 146A71(1stcase). [a] 43 F(2d)505; 213Ala202, 104S409 (death from accidental discharge of pistol by member of tug crew waiting to move barge while deceased was checking lumber being unloaded); 215Ala220, 109S 878; 220Ala440, 125S608(2dcase) (death of night watchman slain by trespasser in lumber yard); 86CalA189, 260P807; Colo 292P229; 103Conn93, 130A89 (influenza resulting in pneumonia contracted by marble setter from exposure to rain and to damp and partly heated buildings); 107Conn370, 140A728; 41 GaA133, 152SE125; GaA 155SE77; 43 Ida30, 249P87; 48 Ida524, 283P515 (injury resulting after completion of work from fall on walk which was slippery from snow and sleet); Ida 290P209 (death by being crushed by overturning tractor which servant was driving); Ill 172NE52; 236 IllA511; 208 Iowa1037, 226NW71; 121Kan258, 246P501; 129 Kan370, 282P729, 66ALR752 (injury to employee going to upper floor to pay bill owed to fellow employee); 167La161, 118S874; 11LaA270, 122S162; 6LaA216 (1stcase) (employee killed by lightning while eating lunch under tree near place of work); LaA 130S651; 125Me135, 131 A391; 251Mich309, 232NW369; 251 Mich316, 232NW408; 251Mich318, 232 NW409; 167Minn515, 208NW645 (injury to truck driver returning from business trip on which he had stopped to visit friend); 174Minn147, 218NW 555, 57ALR611; 175Minn489, 221NW 913 (death from monoxide gas while mounting spare tire on automobile preparatory to going on collection trip); 177Minn503, 225NW428; 179Minn416, 229NW561; Mo 29SW(2d)128 (other instances); MoA 22SW(2d)839; MoA 32 SW(2d)121 (sliding down rope used to hoist materials); 79Mont358, 257P270; 85Mont41, 277P615; Nebr 227NW87; NJSup 132A301; NJSup 151A486; NJ Sup 151A641; 224AppDiv319, 230NYS 647 [aff 249NY608, 164NE602(3dcase)]; 224AppDiv794, 231NYS65; 22 OhA112, 153NE247 (infection of cold sore by rubbing face with hands while handling carbon paper); Okl 291P533; 133 Or 468, 286P527; 133 Or541, 286P541; Tex CivA 9SW(2d)458; Utah 283P1054 (bookkeeper injured while crossing street after lunch to go to post office to get employer's mail); Wis 232NW 871. [b] (1) 111Conn655, 151A246; 139 Okl 103, 281P264. (28) Track layer injured by passing automobile while alighting from street car on which he was riding home on transportation ticket furnished by employer. 213Ala282, 104S527. (29) Injury from explosion on adjoining premises held not accidental injury arising out of employment. 249 NY282, 148NE523. (30) Employee riding home from work at noon interval injured alighting from truck four miles from place of work. 165Minn458, 206 NW717. (31) Collector injured while driving his own automobile. 111 Okl 265, 239P575. (32) Freezing of feet of logger after leaving camp. 117 Or188, 243P96, 45ALR812. (33) Assistant janitor of school building voluntarily assisting independent contractor employed to raise flagpole on school grounds. 49 SD491, 207NW446. (34) Automobile salesman killed in accident caused by driving car at excessive speed. Mass 170NE60. (35) Handy man of amusement company having epileptic fit causing him to fall and strike head on sidewalk. 253NY97, 170NE506. (36) Death from typhoid fever contracted from drinking river water while constructing bridge. 133 Or450, 288P204. (37) Drowning of lumberman. 37GaA539, 140SE899. (38) Engineer, custodian of school building, fatally injured by scuttle hole cover blown from roof of school building while he was repairing his own automobile in nearby public alley. 321 Ill 23, 151NE499. (39) Injury to eye of office employee while removing wreath from window of home, while preparing to go to work, does not arise out of employment though employee carried employer's money home at night and back to office in morning. 240Mich566, 215NW701. (40) Death from burglar's shot while on way from work on walk provided for convenience of employees. 25 OhA1, 158NE605. (41) Exhaustion from artificial heat while cleaning boilers resulting in death. 208 Iowa262, 225 NW404. (42) Other instances. 220Ala 686, 127S165; 221Ala44, 127S540; Ala 130S74; 32Ariz299, 258P253, 55ALR 975; 92CalA176, 267P913; 43 Ida625, 253P1104; 47 Ida295, 274P802, 66ALR 1396; 318 Ill 151, 149NE11; 331 Ill 541, 163NE337; 206 Iowa790, 221 NW481; 243Mich256, 220NW661; 244 Mich13, 221NW175; 180Minn400, 231 NW214; Mo 32SW(2d)75; MoA 27SW

(2d)459; NJ 151A598; 224AppDiv327, 230NYS707; 144 Okl 279, 291P571; 133 Or468, 277P91; 133 Or541, 277P97; Tex CommnA 283SW783; 100Vt92, 135A8, 48ALR1396. [h] **Relation of accident to service** controls decision. 215Ala352, 110S702. [i] **Character of work, not contract of employment,** determines whether employee is engaged in usual course of business. TexCommnA 6SW(2d)346. [j] **Test of liability stated.**–140 Okl 238, 283P240.

73–77½–New. In determining question, acts should be liberally construed. 117 Or188, 243P96, 45ALR812.

73–79 169Ga746, 151SE363; 79Mont358, 257P270. [b] **Injury to outside employee by trespasser while sitting in employer's office** did not arise out of, nor was it incidental to, his employment and therefore is not compensable. 215App Div184, 213NYS185. [c] **That employment occasioned employee's presence at place of injury** is insufficient to sustain award. 215AppDiv184, 213NYS 185. [d] **Defining terms must be construed** in connection with legal meaning of general clause. 215Ala352, 110S702. [e] **Provision should be liberally construed.**–220Ala440, 125S608(2dcase).

73–80 32Ariz265, 257P641; Cal 289P 619; 81Colo 521, 256P314; 103Conn760, 132A20; 104Conn331, 133A98; 106Conn 360, 138A139; 107Conn370, 140A728; 109Conn473, 147A11; 36GaA557, 137SE 121; 320 Ill 332, 150NE909; Ill 173NE 49; 85 IndA186, 151NE17; 124Kan550, 262P19; 125Me168, 132A129; 128Me353, 147A431; 234Mich648, 209NW101; Mo 298SW(2d)128; 114Nebr432, 208NW739, 46ALR1213; 117 Oh373, 159NE363; 118 Okl 101, 246P832; 128 Okl 295, 262P 1062; 134 Okl 300, 272P1030; 154Tenn 287, 290SW30; 157Tenn613, 11SW(2d) 672; 158Tenn323, 13SW(2d)318; Tex CommnA 18SW(2d)590, 61ALR216; Tex CommnA 18SW(2d)608; Vt 146A68; Vt 146A71(1stcase); 144Va98, 131SE240 (can be traced to employment as cause); 193Wis32, 213NW630. [a] (1) 158Tenn 148, 11SW(2d)900. (4) Accident arises out of employment within meaning of Workmen's Compensation Act if it was direct and natural result of risk reasonably incident to employment in which injured person was engaged. 209Ky226, 272SW736. [c] **Injury must arise "out of employment"** to be in course of employment. 162Ga656, 134SE761. [d] **That employee was in place where injury was received by reason of employment** is not sufficient to show it arose out of employment. 218AppDiv302, 218 NYS193. [e] **Tests for determining.**–218Ala107, 117S650.

73–80½–New. An accident arises out of the employment when it results from a risk incidental thereto as distinguished from a risk common to the public at large. 67Utah8, 245P378.

74–81 333 Ill 340, 164NE668; 336 Ill 117, 168NE113 (act of employee must be reasonably incidental to employment); Ill 173NE49; 83 IndA159, 147NE919; 124Kan327, 259P695; 124Kan550, 262P 19; 180Minn400, 231NW214; 117 Or188, 243P96, 45ALR812; TexCommnA 299 SW871; 192Wis574, 213NW292. [a] **Recognized tests** are whether work was reasonably related to employee's duties and whether done in good faith in furtherance of employer's business. 220Ala 562, 126S626. [b] **Services held incidental.**–Wis 232NW885.

74–82 103CalA27, 283P974; Ill 173NE 49; 117 Or188, 243P96, 45ALR812; Wis 230NW40.

74–83 215Ala220, 109S878; 220Ala562, 126S626; 32Ariz265, 257P641; 32Ariz 299, 258P253, 55ALR975; 109Conn378, 146A825; 110Conn384, 148A334; GaA 146SE47; 39GaA87, 146SE638; 320 Ill 332, 150NE909; 323 Ill 459, 154NE203; 114Nebr432, 208NW739, 46ALR1213; 250NY14, 164NE726; 250NY21, 164NE 729; 128 Okl 295, 262P1062; TexCivA 291SW940; TexCivA 294SW672; 193 Wis32, 213NW630; 199Wis192, 225NW 690. [b] (29) Death from inhaling carbon monoxide gas by garage workman. 214AppDiv351, 212NYS327. (30) Bathing in employer's free bunkhouse after end of day's work is not act arising out of employment of one employed on dirty work. TexCivA 273SW686. (31) Injury inflicted by other employees playing with knowledge and acquiescence of employer. 109Conn473, 147A11. (32) Injury to factory employee while helping restaurant proprietor to prepare lunches for fellow employees. 256Mass267, 152 NE312. (33) Death of chef suffocated by fire while in room provided solely for him by employer. 246NY279, 158NE 621. (34) Other illustrations. 104Conn 724, 134A264; 109Conn178, 145A887; 321 Ill 298, 151NE920; 323 Ill 459, 154 NE203; 1LaA564; 264Mass584, 163NE 171; NJSup 134A611; 244NY291, 155 NE579; 247NY357, 160NE397; 216App Div574, 216NYS275; 217AppDiv278, 216 NYS763; 30 OhA80, 164NE123; 287Pa 471, 135A129; 6PaDist&Co 288; 48RI 353, 138A175; 157Tenn613, 11SW(2d) 672. [d] (3) Death from shooting by unknown person, a few days before commencing work, does not arise out of employment. 104NJL275, 140A790.

74–84 Contra 114Nebr432, 208NW739, 46ALR1213.

74–85 240NY282, 148NE523. [a] (3) Accidental shooting by fellow employee of gasoline station is held not compensable. 162LaA147, 110S181.

74–85½–New. Acquiescence of employer. Where employer acquiesces in employee's performing duties in way fraught with special danger, he makes such danger an incident of the employment. Sask [1925] 3DomLR621.

74–85⅓–New. but in order to bring himself within this rule, the employee must show that such danger was habitually present. Sask [1925] 3DomLR621.

74–85¼–New. and that the employer knew or should have known it. Sask [1925] 3DomLR621.

74–85⅙–New. Strangulation of hernia by employee caused by lifting is a compensable injury resulting from accident. 85 IndA347, 154NE35.

74–85⅙–New. In order that his injury can be said to arise out of his employment employee must have been exposed by his employment to more than normal risk to which people of community generally are subject. 79Mont358, 257P 270.

74–85⅐–New. An employee resisting forcible efforts tending to prevent discharge of his duties is performing act incidental to employment. TexCommnA 299SW871.

74–85⅛–New. Allegations of complaint that the killing of an employee had to do with, and arose out of, employment are insufficient. TexCivA 299SW319.

74–86 15F(2d)906; 32Ariz265, 257P 641; 32Ariz299, 258P253, 55ALR975; CalA 262P805; 84Colo 19, 267P791; 103Conn760, 132A20; 104Conn709, 134 A259; 105Conn651, 136A472; 107Conn 56, 139A644, 56ALR455; 107Conn370, 140A728; 110Conn248, 147A680; 36GaA 557, 137SE121, 122 [quotCJ]; GaA 155 SE366; 43 Ida625, 253P1104; 320 Ill 332, 150NE909; 322 Ill 23, 152NE498; 331 Ill 401, 163NE406, 60ALR1397; 333 Ill 340, 164NE668; 83 IndA707, 150NE 25; IndA 172NE547; 208 Iowa1281, 227NW153; 124Kan550, 262P19; 231 Ky705, 22SW(2d)117; LaA 128S691; LaA 129S436; 7LaA296; 252Mass415, 147NE831; 254Mass214, 150NE4; 264 Mass193, 162NE893; 244Mich13, 221 NW175; 114Nebr432, 208NW739, 46 ALR1213; 114Nebr432, 208NW739, 46 ALR1213; Nebr 227NW87; 240NY 282, 148NE523 (injury from explosion on adjoining premises held not arising out of employment within Workmen's Compensation Act); 198NC723, 153SE 266; NC 153SE594; 25 OhA1, 158NE 605; 115 Okl 30, 241P175; 128 Okl 25, 261P181; 139 Okl 103, 281P264; 285Pa 443, 132A358; 49SD312, 207NW89; 154 Tenn287, 290SW30; TexCivA 278SW 347; Vt 146A68; Vt 146A71(1stcase). See 83NH392, 142A697. See also 218 AppDiv302, 218NYS193. But see LaA 130S887. [f] **Death of night worker shot by policeman guarding property** is held not accident arising out of employment. 320 Ill 332, 150NE909. [g] **Proximate cause of injury,** under Texas statute, is not restricted to sole cause and need not be nearest in time, but must be contributing cause without which injury would not have occurred. TexCivA 298SW666. [h] **Injury need not be proximate cause of death,** it being necessary only that it be efficient, exciting, or contributing cause. TexCivA 3 SW(2d)568.

74–87 213Ala88, 104S251; 32Ariz265, 257P641; 32Ariz299, 258P253, 55ALR 975; 202Cal 239, 259P1096, 54ALR 1392; 103Conn760, 132A20; 105Conn 394, 135A293; 105Conn651, 136A472; 108Conn493, 143A880; 109Conn473, 147 A11; 36GaA557, 137SE121, 122 [quot CJ]; 39GaA38, 146SE37(2dcase); 43 Ida625, 253P1104; 320 Ill 332, 150NE 909; 322 Ill 586, 153NE624; 331 Ill 401, 163NE406, 60ALR1397; 231Ky705, 22SW(2d)117; 9LaA392, 120S507; 13 LaA228, 127S116; 126Me450, 139A478; 128Me56, 145A737(2dcase); 266Mass 516, 165NE670; 246Mich589, 225NW 559; 171Minn75, 213NW546; MoA 27 SW(2d)459; 115 Okl 30, 241P175; 128 Okl 25, 261P181; 134 Okl 300, 272P 1030; 133 Or468, 286P527; 49SD312, 207NW89; TexCivA 278SW347; Vt 146A68; Vt 146A71(1stcase); 148Va 388, 138SE479; 149Va371, 141SE142; Wis 230NW130 (shooting accident held hazard of employment); Sask [1929] 2 DomLR286. See also 119 Oh41, 162NE 272, 59ALR367. [a] (34) Where lineman employed by city was bitten by dog as he was about to seek shelter from storm in private garage, injury did not arise out of employment. 234Mich648, 209NW101. (35) Injury to ticket seller assaulted by stranger is not compensable as "arising out of employment" in absence of proof of special risk. 215 AppDiv259, 213NYS254. (36) There is causal connection between injury to employee riding to lunch on company's truck with consent of employer, and employment where truck was used so as to get employee to return to work quickly. 125Mel, 130A350. (37) Injury to helper on truck from dart shot by boy. 322 Ill 586, 153NE624. (38) Murder of taxicab driver by intoxicated passenger arises out of employment. 172Minn439, 215NW678. (39) Where blacksmith's helper, after using sledge hammer, commenced coughing and spitting blood and died, award was upheld. 245NY543, 157 NE850. (40) Shooting by burglar of employee leaving work does not arise out of employment. 25 OhA1, 158NE 605. (41) Tubercular condition of foundry employee, due to breathing fumes and gas when trapped in furnace by falling held compensable. 26 OhA 497, 160NE484. (42) Award to garage employee disabled from bronchitis alleged due to inhalation of carbon monoxide gas upheld. 245NY569, 157NE 860. (43) Shooting held not to arise out of employment. 87Colo 234, 286P 279. (44) Other illustrations. 103Conn 760, 132A20; 105Conn394, 135A293; 105Conn651, 136A472; 83 IndA707, 150 NE25; 254Mass214, 150NE4; 171Minn 75, 213NW546; 154Tenn287, 290SW30; 148Va388, 138SE479.

75–88 36GaA557, 137SE121, 122 [quot CJ]; 285Pa317, 132A122. But see 114 Nebr432, 208NW739, 46ALR1213 (to effect that injury must arise within employment). [b] (1) LaA 130S563. (18) Injury in seeking redress from insult of fellow employee held within scope of employment. TexCivA 278SW347. (19) Willful assault intended to injure employee is compensable accident when directed against him as employee or because of his employment. 220Ala25, 123S225. (20) Killing of night watchman by one bearing personal animosity toward him does not arise out of his employment. 231Ky705, 22SW(2d)117.

75–89 [a] **Death of traveling salesman** from coming in contact with high voltage wire on highway held result of causal connection with employment. 130 Kan191, 285P536.

75–89½–New. In relation to the injury, it is sufficient if the accident is the incitation. 177Minn98, 224NW459.

76–91 85 IndA186, 151NE17.

76–92 [b] **Injury resulting from employee's unlawful attempt** to injure an-

other is not compensable. **TexCommnA** 298SW414.

76-93 Ala 130S74; 324 **Ill** 504, 155**NE** 292; **Ill** 173**NE**49; 250**Mich**51, 229**NW** 597 (accidental discharge of firearms not permitted to be kept by employees); 221 **AppDiv**631, 225**NYS**92. [a] (7) Workman climbing between cars found on track. **Sask** [1925] 3**DomLR**621. [c] **Material departure not proved** by employee's having dismounted from railroad car and being outside of it when injured. 158**Tenn**148, 11**SW(2d)**900.

76-93½-New. Injury from kick by horse while beating it when it balked arises out of employment, although employee told by fellow servant not to beat horse, where employee judged it necessary to whip horse. 81**Colo** 111, 253**P** 828.

76-94 200**Cal** 456, 253**P**712; 85 **IndA**92, 152**NE**841; 200 **Iowa**944, 205**NW**737; 208 **Iowa**262, 225**NW**404; 13**LaA**228, 127S116; 125**Me**135, 131**A**391; 50**ND** 465, 196**NW**556; 31 **OhA**430, 166**NE**380; 7**PaDist&Co** 442; 69**Utah**83, 252**P**292; **Utah** 267**P**785.

76-94½-New. An injury suffered as the result of a fall caused by an attack of epilepsy is not one arising out of the employment. 115 **Okl** 30, 241**P**175.

76-95 22**AlaA**299, 116**S**512; 200**Cal** 456, 253**P**712; 110**Conn**248, 147**A**680; 208 **Iowa**262, 225**NW**404; 167**Minn**424, 209 **NW**313; 6**PaDist&Co** 559; 8**PaDist&Co** 507; 69**Utah**83, 252**P**292. See also **Nebr** 230**NW**688 (employee need not show acceleration or aggravation of disease by injury). But see 223**AppDiv**553, 229 **NYS**652. [a] (2) Overexertion at high altitude, in course of employment, causing death by affecting previously diseased heart is held compensable. 200**Cal** 456, 253**P**712. (3) Sudden collapse and immediately ensuing death caused by hard labor on weakened heart is accidental injury arising out of and in course of decedent's employment. 83**NH** 392, 142**A**697. (4) Injury from fall caused by disease was compensable. 293 **Pa**448, 143**A**116, 60**ALR**1288. [b] **Revival of existing infirmity by injury held no defense to compensation claim.**-69 **Utah**83, 252**P**292.

76-95½-New. Accidental injury resulting from inherent or congenital weakness, unknown to employer, does not arise out of and in course of employment. 15**F(2d)**906.

76-95⅓-New. But for an injury resulting from an inherent bodily defect or not superinduced by extraordinary movement or action compensation is not allowed. 204**Cal** 185, 267**P**542, 60**ALR** 1279.

76-95¼-New. Weakened resistance of an employee, by itself, can never result in compensable injury. 110**Conn**248, 147 **A**680.

76-95⅙-New. Disability resulting from exhaustion of physical energies, not directly traceable to personal injury peculiar to employment, is not compensable. **Mass** 168**NE**798.

76-95⅛-New. Compensation Act does not include allowance for disability growing out of other injuries. 233**Ky** 699, 26**SW(2d)**513.

77-96 32**Ariz**265, 257**P**641; 202**Cal** 239, 259**P**1096, 54**ALR**1392; 324 **Ill** 152, 154 **NE**423, 53**ALR**1079; **LaA** 128**S**691; 126 **Me**32, 135**A**824; 252**Mass**415, 147**NE** 831; 258**Mass**521, 155**NE**425, 51**ALR** 508; 264**Mass**493, 162**NE**893; 265**Mass** 300, 163**NE**910; 234**Mich**648, 209**NW** 101; 170**Minn**143, 212**NW**187; 114**Nebr** 432, 208**NW**739, 46**ALR**1213; 114**Nebr** 432, 208**NW**739, 46**ALR**1213; 242**NY**115, 151**NE**148; 138 **Okl** 167, 280**P**603 (injury sustained by storm destroying building in which employee had taken refuge when returning from place where he had performed some service in his employment); 127 **Or**427, 272**P**556. [a] (9) Freezing of hands while shoveling coal is held not compensable as arising out of employment. 324 **Ill** 152, 154**NE** 423, 53**ALR**1079. (10) Death from heart failure while walking up sharp incline is not compensable where employee's condition, resulting from syphillis, was such that any slight exertion invited death. **TexCommnA** 18**W(2d)**260. (11) Death on destruction of building caused by tornado is not compensable. 28**F(2d)** 228.

77-97 32**Ariz**350, 258**P**306; 199**Cal** 596, 250**P**864, 49**ALR**446; 202**Cal** 239, 259**P** 1096, 54**ALR**1392; 202**Cal** 247, 259**P** 1099; 43 **Ida**549, 254**P**209; 320 **Ill** 332, 150**NE**909; 324 **Ill** 152, 154**NE**423, 53 **ALR**1079; 232 **IllA**495; 252**Mass**209, 147**NE**577; 252**Mass**415, 147**NE**576; 114 **Nebr**432, 208**NW**739, 46**ALR**1213; 115 **Nebr**565, 213**NW**820; 245**NY**201, 156**NE** 665; 224**AppDiv**319, 230**NYS**647 [aff 164**NE**603(3dcase)]. [a] (5) Injury to hospital nurse from falling on icy sidewalk between hospital and nurses' house where she was subject to call in emergency arises out of employment. 238 **Mich**566, 214**NW**229. (6) Employee working around oil derrick held subjected to greater hazard from windstorm blowing down derrick than general public. **TexCivA** 298**SW**164. [b] (1) 107**Conn**164, 140**A**114; **TexCivA** 29 **SW(2d)**524. (25) Where employment requires employee to be on street, he is subjected to different risk than ordinary traveler and so, if he is injured while engaged in that duty or something incidental thereto, accident arises out of employment. 43 **Ida**549, 254**P**209. (26) Injury to volunteer fireman resulting from collision between fire truck on which he was riding and private automobile being driven to fire by chief of fire department arises out of employment, though automobile has not been designated as fire apparatus and chief did not select shortest route. 170**Minn**278, 212 **NW**461. (27) Injuries to fireman. 114 **Nebr**432, 213**NW**820, 46**ALR**1213. (28) Death of driver of truck shot while filling radiator is not compensable as arising out of employment. **IndA** 169**NE** 354. (29) Death of automobile salesman from collision due to driving his car at excessive speed does not arise from ordinary risk of street within statute permitting compensation. **Mass** 170 **NE**60. [c] **Whether employee** killed by falling derrick during windstorm was subjected to greater risks than public at large held for jury. **TexCivA** 297**SW** 1081.

77-98 32**Ariz**350, 258**P**306; 324 **Ill** 152, 154**NE**423, 53**ALR**1079; 114**Nebr**432, 208**NW**739, 46**ALR**1213 (windstorm); 114**Nebr**432, 208**NW**739, 46**ALR**1213; 117 **Oh**576, 158**NE**829; 33**PortoRico** 794. [a] (1) 81**Colo** 233, 254**P**995; **IndA** 172**NE**547; 179**Minn**321, 229**NW**138. (9) For death by lightning to be compensable workman must by reason of his employment be more exposed to injury by lightning than others in same locality and not so engaged. 32**Ariz**350, 258**P**306. (10) Death of workman held not to arise out of employment. **IndA** 172**NE**547. [e] (2) Where nature and character of work and surrounding circumstances increased hazard of sun or heat stroke, employment is proximate cause of injury and injury is not excluded from list of compensable injuries by Texas statute. **TexCivA** 298**SW** 666. (3) Hazard of sunstroke or heat prostration is not materially increased by conditions under which employee works where such conditions are not proximate cause of injury. **TexCivA** 298**SW**666. [f] **It is question of fact** whether hazard was that incidental to ordinary outdoor work, or whether it was one which was inseparably connected with and substantially increased by employment. 205**Cal** 727, 273**P**33.

77-98½-New. But it has been said that neither the general rule nor the exception is based on sound reasoning, and if the risk, although common to the general public, is reasonably incident to the employment, an injury directly and naturally resulting therefrom arises out of the employment. 209**Ky**226, 272**SW**736.

77-98⅓-New. Risks of street travel. Injury to a janitor struck by an automobile while on an errand for his employer arises out of the employment. 209**Ky**226, 272**SW**736.

77-98¼-New. Drapery salesman shot on train by fellow passenger is held not injured in course of employment. 36 **GaA**557, 137**SE**121.

78-1 105**Conn**512, 136**A**105; 43 **Ida**625, 253**P**1104; 319 **Ill** 344, 150**NE**276; 86 **IndA**136, 156**NE**406; 12**LaA**508, 126**S** 452; 125**Me**443, 134**A**564; 126**Me**32, 135 **A**824; 126**Me**381, 138**A**561; 252**Mass** 415, 147**NE**831; 257**Mass**440, 154**NE**71; 169**Minn**428, 211**NW**579; 220**AppDiv** 359, 221**NYS**569; 23 **OhA**532, 155**NE** 704; 158**Tenn**102, 11**SW(2d)**690; **Tex CivA** 286**SW**283, 284 [citCJ]. But see 285**Pa**440, 132**A**363; **Utah** 283**P**1054 (where employee is upon substantial mission for employer which is major factor in journey).

78-1½-New. But this rule does not apply where an employee is on some substantial mission growing out of his employment and such mission is the important factor and not merely incidental to the journey or movement. 75**CalA** 280, 242**P**901.

78-1⅓-New. Injury to employee on public road on way to or from work in conveyance not furnished by employer where time thus consumed is not paid for does not arise out of employment. **Me** 136**A**724, 235**Wash**327, 237**P**733.

78-1¼-New. But where an automobile salesman was killed on one of two roads from his place of employment to his home and names of persons living along the road were found in his pocket, an award on the theory that he intended to call on prospective customers was held proper. 245**NY**542, 157**NE**850.

78-2 276**US**154, 48**SCt**221, 72**L ed**507, 66**ALR**1402; 7**LaA**721; 79**Mont**358, 257 **P**270; 102**NJL**479, 133**A**764; **NJSup** 134**A**560; 242**NY**115, 151**NE**149. [a] (7) Nurse falling on sidewalk, on island owned entirely by city for use of hospital, while leaving island in customary way, is entitled to compensation. 256**Mass**290, 152**NE**340; 238**Mich**566, 214**NW**229; 242**NY**115, 151**NE**149. [b] (2) 126**Me**159, 136**A**724. [c] **Transportation of launch.**-Carpenter employed to repair vessel in dry dock injured while being transported to work in launch under direction of employer's foreman could recover compensation. 22**AlaA**575, 117**S**914.

78-2½-New. And the rule applies where the way is in close proximity to the employer's premises. 276**US**154, 48**SCt**221, 72**L ed**507, 66**ALR**1402.

78-3 36**GaA**557, 137**SE**121; 126**Me**32, 135**A**824.

78-4 103**Conn**449, 130**A**674; 2**LaA**260. See also 79**Mont**358, 257**P**270.

78-5 Ill 173**NE**49; **Sask** [1925] 3**Dom LR**621 (climbing between cars on track).

78-6½-New. An injury to an employee riding to lunch on one of company's trucks with knowledge and consent of the employer is one arising out of employment. 125**Me**1, 130**A**350.

78-6⅓-New. Injury received while riding to job on truck as instructed by foreman, with knowledge and acquiescence of employer, is received in course of employment. 103**Conn**559, 131**A**394.

78-6¼-New. Injury to helper while on way to work is held compensable where ordinarily he rode to work on employer's truck. **NJSup** 135**A**684.

78-6⅕-New. Where transportation to and from work is part of consideration for service of employee, employee is entitled to compensation for injury received while being so transported. 287 **Pa**403, 135**A**124.

78-6⅙-New. The rule that employment begins when employee reaches employer's premises may extend to the use of adjoining premises for egress and ingress. 276**US**154, 48**SCt**221, 72**L ed**507, 66**ALR**1402.

78-6 7/7-New. An employer who consents to an employee's trespass by use of adjoining tracks to come to work cannot avail himself of such defense in compensation proceeding. 276**US**154, 48**SCt** 221, 72**L ed**507, 66**ALR**1402.

78-6⅛-New. Death from a burglar's shot while on way from work on a walk built for the convenience of employees does not arise out of employment. 25 **OhA**1, 158**NE**605.

78-6 1/9-New. Accident to sales agent subject to employer's call, occurring when he drove employer's car home to garage arose out of and in the course of employment. 149**Va**254, 141**SE**139.

78-6 1/10-New. An injury received while an employee was returning home after

doing special work for employer out of hours is compensable. 89CalA197, 264 P514.

78–6½–New. All dangers and perils incident to the use of the usual and customary method of entrance to and retirement from the employer's premises or zone of employment were perils incident to and "arising out of employment." TexCivA 11SW(2d)388.

78–10½–New. Where captain of coal barge living on barge was injured at railroad crossing while returning to ship, over usual route, with food, injury is held to arise out of and in course of employment. 102NJL513, 134A91.

79–11 79CalA215, 249P33; 89CalA736, 265P362; 107Conn370, 140A728; 37GaA 238, 139SE688; Ill 172NE52; 246NY 279, 158NE621; 158Tenn323, 13SW(2d) 318. See also 243 IllA1 [citCJ].

79–14 [a] (2) Bath after work. Tex CivA 273SW686.

79–17½–New. Injury to traveling saleswoman while selecting room does not arise out of employment. 218AppDiv 302, 218NYS193.

79–17½–New. Injury to discharged employee while leaving building after eating lunch, after discharge, does not arise out of employment. 22F(2d)939.

79–17¼–New. The crime should not be lightly imputed to one injured while employed as a caretaker of a railroad poultry car to support the theory that he went outside the line of employment to steal a watermelon from another car when injured. 158Tenn148, 11SW(2d) 900.

79–17½–New. An injury to a street car cleaner while constructing a tool box for his own tools and clothing does not arise out of his employment, particularly in view of the employer's statement that he could not have a locker until one became vacant. 218Ala107, 117S650.

79–17½–New. Incapacity resulting from voluntary submission by employee to vaccination at employer's hospital does not arise out of employment. 111Conn 365, 150A110.

79–18 198NC723, 153SE266; 195Wis 134, 217NW734.

79–19 39GaA690, 148SE307; 204 Iowa 180, 214NW700; LaA 128S691. But see NC 153SE594 (where injured servant did not participate in horse play).

79–20 Cal 289P619; 208Ky618, 271SW 687; 239Mich501, 214NW953; 105NJL 386, 144A815; 115Tex371, 283SW127, 46ALR1137. But see NC 153SE594 (risk from pranks of fellow workmen arises from and grows out of, business).

79–20½–New. In some jurisdictions an employee is entitled to compensation for injuries caused while he was going about his duties by horseplay on the part of other employees in which he did not participate. 115Tex371, 283SW 127, 46ALR1137; 195Wis134, 217NW 734. [a] **Reason for rule.**–115Tex371, 283SW127, 46ALR1137. [b] **Injury occurring while employee was waiting to go to work** seven minutes before time for commencement of work is within rule. 195Wis134, 217NW734.

80–21 5F(2d)398; 216Ala500, 113S578; 218Ala130, 117S755; 320 Ill 332, 150NE 909; IndA 169NE540; 8LaA128; 172 Minn178, 215NW204; MoA 17SW(2d) 578; NC 155SE728; 288Pa394, 136A 230; TexCommnA 298SW414; TexCivA 289SW701; Utah 266P270. But see 5 LaA84; 198NC723, 153SE266 (willful or criminal assault of third person does not prevent injury from being accidental); TexCommnA 299SW871 (injury while warding off friendly attack is compensable). Contra 140 Okl 238, 283P240.

80–22 5F(2d)398 (injury from pranks of youthful coworkers is one "arising out of employment"). [a] (2) Injury to employee, who, while operating machine, was interfered with by play of fellow employee, is one arising out of employment. 5F(2d)398. (3) Employee shot by insane fellow employee. 118Nebr276, 224NW289.

80–23 320 Ill 332, 150NE909; 322 Ill 23, 152NE498; 84 IndA559, 151NE705; 8LaA123; 240NY295, 148NE527; 245 NY139, 156NE642; 135Misc817, 238NYS 519; 156Tenn256, 300SW569; 144Va98, 131SE240 (employee killed as result of disagreement over method of work). See also 10PaDist&Co 702. [a] (7) Injury received by employee while seeking redress from insult by fellow employee held compensable. TexCommnA 298SW 414. [c] **Injury to foreman from assault** by another employee during dispute over work which both were employed to do is one arising out of employment. 240NY295, 148NE527.

80–24½–New. Compensation is generally denied where employee suffers injuries from an assault when claimant is himself the aggressor. 144Va98, 131 SE240.

80–24½–New. If the assault can be traced to an independent cause having no relation to the employment, the injury does not arise out of the employment. 144Va98, 131SE240.

80–24¼–New. Where one employee kills another for the purpose of robbing him of money of the employer in his custody, death arises out of the employment. 169 Minn245, 210NW1003.

80–24½–New. Willful assault upon employee by fellow-workman may be accident within act. 22AlaA26, 111S758.

80–24½–New. Injury to superintendent from assault by discharged employee is held arising out of employment. 245 NY139, 156NE642.

80–25 216Ala579, 114S195; 220Ala562, 126S626; 220Ala686, 127S165; 32Ariz 265, 257P641; 202Cal 688, 262P309, 58 ALR1392; 77CalA424, 246P825; 103 Conn760, 132A20; 107Conn370, 140A 728; 108Conn493, 143A880; 109Conn 178, 145A887; 110Conn384, 148A334; GaA 155SE366; 43 Ida549, 254P209; 323 Ill 377, 154NE128; 326 Ill 320, 157 NE209; 333 Ill 340, 164NE668; Ill 173 NE49; 208 Iowa1010, 226NW719; Iowa 233NW141; 217Ky103, 288SW1057; 9 LaA389, 120S512; 4LaA107, 109 [quot CJ]; LaA 130S885; Mo 29SW(2d)128; MoA 32SW(2d)121; 83Mont527, 273P 294; Mont 292P902; Nebr 227NW87; 245NY139, 156NE642; 246NY279, 158 NE621; 252NY11, 168NE446; 198NC 723, 153SE266; 118 Oh180, 160NE693; 33 OhA42, 168NE475 (even though intoxicated at time of accident); 26 OhNPNS487; 286Pa245, 133A261; 289 Pa401, 137A625; 290Pa480, 139A192; 92 PaSuper152; 92PaSuper328; 93PaSuper 255; 98PaSuper28; 7PaDist&Co 402; 158Tenn148, 11SW(2d)900; Tex CommnA 298SW542; TexCommnA 299 SW871; TexCivA 271SW929; TexCivA 291SW276; TexCivA 10SW(2d)782; Tex CivA 26SW(2d)691; TexCivA 29SW(2d) 524 (not necessarily on employer's premises); Vt 146A68; Vt 146A71(1st case); Wash 288P655. See also 332 Ill 163, 163NE458. [a] (7) 220Ala25, 123 S225. (40) 240NY295, 148NE527 (injury to foreman during dispute over work). (58) Prostration caused by excessive heat and bursting of blood vessel, resulting in death. 51ND815, 201 NW348. (59) Injury occurring while employee of automobile dealer was retaking car sold on credit occurred in course of employment. TexCivA 274SW 309. (60) Traveling salesman coming in contact with high voltage wire while traveling on highway. 130Kan191, 285 P536. (61) Injury to hospital chambermaid while leaving another hospital to which she was taken for treatment. 13 PaDist&Co 80. (62) Employee injured while traveling on trolley car to office of employer at latter's expense to report results of selling trip after spending preceding night at his home. 297Pa304, 146A894. (63) Death from pneumonia resulting from unusual exposure during course of employment in employer's mine. 296Pa502, 146A899(1stcase). (64) Injury to employee while riding to annual company picnic on orders of foreman. 110Conn384, 148A334. (65) Deputy sheriff killed while endeavoring to keep order and quell disturbance in coal company camp. 231Ky93, 21SW (2d)112. (66) Death of salesman when his car, operated by employer's son, overturned. Mass 169NE434. (67) Caretaker killed while being transported to church in defendant's car. NJ 147A 511. (68) Constable shot on accidently meeting fugitive while picking berries. 200Wis446, 228NW589. (69) Assault by fellow workman. 140 Okl 238, 283P240. (70) Murder of taxicab driver by intoxicated passenger. 172Minn439, 215NW 678. (71) Death of chef suffocated by fire in room provided solely for him by employer. 246NY279, 158NE621. (72) Other injuries in course of employment. 15F(2d)906; 202Cal 521, 261P987; 202 Cal 688, 262P309, 58ALR1392; 77CalA 424, 246P825; 94CalA251, 270P992; CalA 288P129; 103Conn760, 132A20; 208 Iowa1010, 226NW719 (under statute defining course of employment); 3LaA 85; 125Me361, 134A161; 250Mich454, 231NW132; 170Minn278, 212NW461; 173Minn414, 217NW491; 174Minn156, 218NW545; 174Minn147, 218NW555, 57 ALR611; 216AppDiv574, 216NYS275; Okl 272P373; 134 Okl 181, 272P847; 119 Or357, 249P820, 50ALR1129; 87 PaSuper458; 89PaSuper156; 93PaSuper 468; 95PaSuper289; 96PaSuper550; 8 PaDist&Co 8; TexCommnA 6SW(2d) 346; TexCivA 285SW878; TexCivA 1 SW(2d)434; TexCivA 11SW(2d)529; 192Wis574, 213NW292. [b] (7) Injury to outside employee, after finishing work, by trespasser, while waiting for pay in employer's office. 215AppDiv184, 213NYS185. (8) Injury to saleswoman while selecting room in hotel. 218App Div302, 218NYS193. (9) Death of crook while buying pistol for personal use on other than employer's premises resulting from discharge of pistol in hands of another. TexCivA 291SW276. [f] **To be "in course of employment"** injury must arise out of employment. 162Ga 656, 134SE761. [g] **Purpose of errand.** –Where purpose of errand is to procure articles to be used in employer's business, it is immaterial whether articles are supplied by employees or by employer. 82CalA480, 255P866. [h] **Injuries held not to have been in course of employment.**–Teamster injured while driving another's team into his employer's corral at request of borrower from owner. 12LaA78, 125S321. [i] **Phrase "injuries sustained in course of employment"** includes all injuries employee may receive except those specifically named as not included. TexCivA 21SW (2d)314. [j] **Mere fact of employment** is not enough to justify award of compensation for death of employee. 298 Pa336, 148A476. [k] **Failure of employee to use safety devices does not** take him outside sphere of employment. Wis 231NW251. [l] **Conversely, if not** doing what one so employed might reasonably do, or not at reasonable place, he is not "in course of employment." Iowa 233NW141.

80–25½–New. An employee doing "his regular work" at time of injury is injured in the course of employment. 125 Me1, 130A350.

81–27 208 Iowa1010, 226NW719; 246 NY279, 158NE621.

81–27½–New. If he is doing some act which he deems necessary for the benefit or interest of his employer. 208 Iowa 1010, 226NW719.

81–27½–New. Lightning causing death of an employee is an act of God within a statute declaring that an injury caused by act of God is not sustained in course of employment unless the employee was engaged in duties subjecting him to greater hazard from such act than ordinarily applies to the general public. TexCivA 281SW306.

81–27¼–New. Under some statutes employee at time of injury must be engaged in usual course of trade, business, or occupation of employer so as to entitle him to compensation. 253Mass420, 149 NE125.

81–27½–New. It is immaterial that risk was external to the employment so long as exposure to risk was caused by employment. 214Ala162, 106S799.

81–27¼–New. Recovery allowed where workman while on duty was accidentally shot by small boy. 214Ala162, 106S 799.

81–27½–New. The injury must be one originating in work and received while engaged in or about the furtherance of employer's affairs. TexCivA 290SW774.

81–27½–New. Death resulting from injury at home after resumption of work is held not in course of employment. 289Pa418, 137A662.

81-27⅛-New. Disease contracted by employee inhaling poisonous gas in course of employment not accidental injury. **TexCivA** 287SW911.

81-27 1/10-New. No recovery for occupational or industrial diseases. **TexCivA** 287SW911.

81-27 1/11-New. An accidental injury occurring in the course of employment is compensable, although arising from an unexplained cause. 293**Pa**448, 143**A**116, 60**ALR**1288.

81-27 1/12-New. Injury to grain elevator employee while engaged in erecting elevator is not sustained while engaged in usual course of employer's business. 37 **F(2d)**100(1stcase).

81-27 1/13-New. Provision applying act to employment in course of employer's trade or business in or about railway refers to railway operated by employer. 130**Kan**375, 286**P**222.

81-27 1/14-New. If claimant was not engaged in furtherance of business of employer although on his premises when injured, he is not in course of employment. 12**PaDist&Co** 542.

81-27 1/15-New. Usual course of business of textile mill does not include painting of cottages being constructed for employees. **TexCivA** 32SW(2d)262.

81-28 224**AppDiv**327, 230**NYS**707.

81-29 215**Ala**220, 109**S**878; **Ill** 173**NE** 49; 83 **IndA**159, 147**NE**919; 238**Mich** 560, 214**NW**90; 246**NY**279, 158**NE**621; 228**AppDiv**737, 239**NYS**102 (injury to strike breaker while returning from restaurant); 134 **Okl** 181, 272**P**847; 117 **Or** 188, 243**P**96, 45**ALR**812; 133 **Or**468, 286 **P**527; 286**Pa**245, 133**A**261; **TexCivA** 275SW685; **TexCivA** 25SW(2d)898; **Wis** 230NW36. [a] **Before commencement of work.**–Injury to eye of employee sitting near his place of work seven minutes before time to commence work, caused by nail playfully thrown by fellow servant is sustained as in course of employment. 195**Wis**134, 217NW734.

81-30 43 **Ida**549, 254**P**209; 4**LaA**107, 109 [quotCJ]. [b] **Discharged employee,** returning for his belongings and sustaining accident on premises, is not entitled to compensation. **Wis** 231NW 267.

81-30½-New. Period of employment generally includes reasonable time for ingress to and egress from place of work while on employer's premises. 83 **IndA** 159, 147**NE**919.

81-30⅓-New. Employee even after closing time is in course of employment until suitable opportunity has been given to leave place of work. 245**NY**139, 156 **NE**642.

81-31 **Ill** 173**NE**49; 128**Me**47, 145**A**394; 224**AppDiv**319, 230**NYS**647 [aff 249**NY** 608, 164**NE**602(3dcase)].

81-32 216**Ala**579, 114**S**195.

81-35 226**Ky**16, 10**SW(2d)**455.

81-35½-New. Course of employment does not include intervals between working hours during which employee leaves premises. 289**Pa**401, 137**A**625.

81-35⅓-New. Boss on construction work who is making trip to secure truck drivers is engaged in furtherance of employer's business when injured on Sunday. 287**Pa**471, 135**A**129.

81-35¼-New. Death from shooting by unknown person a few days before commencing employment does not arise in the course of employment. 104**NJL**275, 140**A**790.

81-35⅕-New. A contract for labor by the month with straight time pay does not necessarily mean that an employee is to work on Sunday, to have right to recover compensation for his death. **TexCivA** 10SW(2d)206.

81-35⅙-New. Employment does not begin until the employee reaches the place where he is to work or the scene of his duties, and does not continue after he has left that place. 336 **Ill** 223, 168**NE** 288.

81-36 82**CalA**480, 255**P**866; 322 **Ill** 187, 152**NE**548; 241 **IllA**392; 83 **IndA**159, 147**NE**919; **Mo** 29SW(2d)128; 117 **Or** 188, 243**P**96, 45**ALR**812; 133 **Or**468, 286 **P**527; 287**Pa**403, 135**A**124; **Tex CommnA** 298SW542; **TexCivA** 275SW 685; **TexCivA** 25SW(2d)898; 67**Utah**8, 245**P**378 (where city marshall was killed by discharge of gun which he was cleaning at home). But see 126**Kan**294, 268**P** 109 (under statute requiring that injury occur on, in, or about employer's place of business). [f] **Under Kansas Compensation Act** injury caused by being thrown from trailer to motor truck which was returning from delivery of goods is not received "on, in, or about" employer's factory. 122**Kan**408, 252**P** 240. [g] **"On, in, or about" premises.**–Employee injured while delivering ice to customer is not injured "on, in, or about" employer's premises within Kansas statute. 129**Kan**778, 284**P**382. [h] **"Premises"** in statute has reference to those at or near which service is to be performed. 220**Ala**686, 127**S**165. [i] **Where limits of employment are defined by physical barriers,** employees going outside limits are outside protection of act. **Wis** 231NW251. [j] **Employers effectually limit scope of employment** when erecting barriers making access to prohibited area difficult. **Wis** 231NW 251.

81-37 77**CalA**424, 246**P**825; 83 **IndA** 159, 147**NE**919; 287**Pa**403, 135**A**124; 297**Pa**230, 146**A**550. [a] **Traveling saleswoman not in course of employment** where injured in hotel auditorium, as hotel and not room there is her temporary home. 218**AppDiv**302, 218**NYS** 193. [b] **"Premises" construed.**–90**Pa Super**456.

81-38 32**Ariz**265, 257**P**641; 105**Conn** 695, 136**A**677, 56**ALR**504; 241 **IllA**392; 246**NY**279, 158**NE**621; 287**Pa**403, 135**A** 124.

81-38½-New. or places beyond premises in furtherance of employer's business. 287**Pa**403, 135**A**124.

81-38⅓-New. Injury, to be "within course of employment," must be on employer's premises or at the place where the employer's work is carried on. 290 **Pa**480, 139**A**192.

81-39 48 **Ida**524, 283**P**515; 287**Pa**403, 135**A**124. But see 320 **Ill** 332, 150**NE**909.

81-39½-New. The term "premises of his employer," is not limited to the soil over which an employer has legal dominion or title, but to that which he uses to all intents and purposes as his premises. 197**Wis**48, 221NW396.

82-40 126**Me**450, 139**A**478; 290**Pa**480, 139**A**192; 293**Pa**103, 141**A**635; 93**PaSuper**34. But see 86**PaSuper**283. [a] **In order that departure from usual place of employment shall not bar right to compensation,** it must not amount to abandonment but must be innocent or inconsequential. 293**Pa**103, 141**A**635.

82-41½-New. A construction contractor's plant is the place where he is performing his contract. 224**AppDiv**319, 230**NYS**647 [aff 249**NY**608, 164**NE**602 (3dcase)].

82-42 202**Cal** 521, 261**P**987; 153**Md**274, 138**A**235; 230**AppDiv**140, 243**NYS**622. [a] **Tool pusher injured in automobile accident while transporting drilling tools to distant oil well** is not injured in or about any place to which Compensation Act applies. 123**Kan**252, 254**P** 1040.

82-42½-New. Deceased's employment at place of accident some time prior to its occurrence does not make such place premises where services were "being performed" **at the time.** 213**Ala**282, 104 **S**527.

82-42⅓-New. Thus a store detective struck by a motorcycle while returning home from court where she testified for employer is injured while "in course of employment." 214**AppDiv**335, 212**NYS** 428.

82-42¼-New. A nonplant worker traveling streets on an errand for employer is within the Workmen's Compensation Law. 214**AppDiv**335, 212**NYS**428.

82-42⅕-New. Injuries by fires in barn furnished by employer, but use of which was optional, are held not arising "out of employment." 105**Conn**695, 136**A**677, 56**ALR**504.

82-42⅙-New. Injury from assault by discharged employee outside mill is held in course of employment. 245**NY**139, 156 **NE**642.

82-42 1/7-New. Generally employment exists only in area of duty. 100**Vt**92, 135 **A**8, 48**ALR**1396.

82-42⅛-New. Generally, except by special contract, the protection of the Workmen's Compensation law does not extend beyond the locality or vicinity of the place of labor. 133 **Or**468, 277**P**91.

82-42⅛-New. Injury to employee of coal company while unloading coal from cars distant from place of business does not occur in or about employer's factory. 130**Kan**375, 286**P**222.

82-42 1/10-New. Employee injured while off premises of employer is not entitled to compensation. 131**LaA**591, 128**S**709.

82-43 220**Ala**143, 124**S**200; 162**Ga**656, 134**SE**761; 39**Ga**210, 46**SE**504; 169**Ga** 746, 151**SE**363; 318 **Ill** 151, 149**NE**41; 323 **Ill** 54, 153**NE**630; 333 **Ill** 340, 164 **NE**668; 336 **Ill** 117, 168**NE**113; 251 **IllA** 560; 124**Kan**550, 262**P**19; 217**Ky**103, 288**SW**1057; 128**Me**47, 145**A**394; 252 **Mass**115, 147**NE**831; **Mass** 173**NE**552; **Nebr** 227**NW**87; 224**AppDiv**327, 230**NYS** 707; 229**AppDiv**54, 240**NYS**740; 286**Pa** 245, 133**A**261; 290**Pa**480, 139**A**192; 295 **Pa**545, 145**A**675; 297**Pa**172, 146**A**548; 11**PaDist&Co** 295; **TexCivA** 272SW520 (employee shot in self-defense by another on whom he made attack); **Tex CivA** 18SW(2d)923; **TexCivA** 148SW(2d) 106; **TexCivA** 148SW(2d)111; 200**Wis** 512, 228**NW**118. See also 13**LaA**664, 127 **S**146 (employee acting outside of scope of employment without order to do so); 105**NJL**228, 143**A**352. But see 247**NY** 357, 160**NE**397 (departure from strict line of duties does not conclusively establish that employee was acting outside of his employment). [a] (28) Where workman was hurt in making gate hinges as helper for blacksmith, doing such work privately for helper, and there was order against such work, he is not entitled to compensation. 162 **Ga**656, 134**SE**761. (24) Injury to day coal loader working at night without permission for own purpose and convenience and not as duty employed to perform is not in course of employment. 217**Ky**103, 288**SW**1057. (25) Foreman killed in encounter with workman whom he had threatened to kick off job. **Tex CivA** 248SW(2d)549. [c] **Rule not changed** (1) even where workmen are accustomed to do "private work" for other workmen. 162**Ga**656, 134**SE**761. (2) Where fellow workman directed "helper" to report extra work to superiors. 162**Ga**656, 134**SE**761. [d] **Hernia occurring while in bed** is not "arising out of or in course of employment" even if employee was subject to call day or night. **Iowa** 231NW490. [e] **Workman injured while asleep on employer's premises after completion of duties** is not injured "in course of employment." **WVa** 155 **SE**119.

82-44 110**Conn**384, 148**A**334; 321 **Ill** 28, 151**NE**499.

83-45 84**CalA**657, 258**P**620; 39**GaA**38, 146**SE**637(2dcase); 322 **Ill** 187, 152**NE** 548; **NJSup** 132**A**297. [b] (5) Employer removing dangerous electric wire from path while on way to work. 213 **Ky**226, 280**SW**954.

83-49 34**Ariz**387, 271**P**712; 82**CalA**430, 255**P**866; 166**Minn**251, 207**NW**636. But see 332 **Ill** 163, 163**NE**458.

83-49½-New. An employee is not within the act while performing service outside the scope of his employment as a voluntary accommodation to his employer or to others. 166**Minn**251, 207 **NW**636.

83-49⅓-New. An employer who directs an employee to perform services for a third person remains liable under the act for injuries sustained if the relation of employer and employee continued to exist between them during the performance of such services. 166**Minn**251, 207 **NW**636.

83-49¼-New. Injury to discharged employee while leaving building after eating lunch, after discharge, is not received in course of employment. 22 **F(2d)**939.

83-49⅕-New. An employee who at the direction of his employer performs services beyond the scope of his usual employment, but in consequence of relation and as incidental thereto, is within the act. 173**Minn**441, 217**NW**370.

83-49⅙-New. Thus one employed on a threshing outfit was held entitled to compensation for an injury while crank

ing car of employer. 173Minn441, 217 NW370.

83-49½-New. Where an employer specifies particular matters as his business, an employee injured while doing work for the employer at the latter's house, not connected with the business, is not protected by the act. 127Me252, 142A 863.

83-50 15F(2d)906; 84CalA657, 258P 620; 103Conn449, 130A674; 37GaA238, 139SE688; 43 Ida549, 254P209; 320 Ill 332, 150NE909; 321 Ill 23, 151NE499; 129Kan413, 283P58 (incidental to hazardous employment); 7LaA414; LaA 130S885; 128Me47, 145A394; 256Mass 267, 152NE312; 267Mass307, 166NE 827; 246NY307, 158NE570; 250NY14, 164NE726; 252NY241, 169NE370; NC 155SE728; 52ND563, 203NW895; 9Pa Dist&Co 509; 156Tenn256, 300SW569; TexCivA 11SW(2d)388; TexCivA 11SW (2d)529; 197Wis156, 221NW649; 200 Wis512, 228NW118; Sask [1929] 2Dom LR155. [a] (15) Making tool box. 187 Wis53, 203NW737. (16) Eating ice cream at invitation of janitor of hospital, by erecting engineer temporarily working on refrigerator at hospital, and contracting smallpox from which he died. 192Wis362, 212NW641, 57ALR 627. (17) Woman employed as election inspector injured by falling into service pit of oil station while procuring water to aid in resuscitation of another member of election board. 89CalA736, 265 P862. (18) Other instances. 247NY 513, 161NE164; 229AppDiv52, 241NYS 59. [b] **It is not necessary that injury should result from some danger necessarily incident** in use of premises in manner intended by employer. TexCivA 11SW(2d)388.

83-51 129Kan690, 284P818; 297Pa230, 146A550.

83-52 5LaA25; TexCivA 11SW(2d) 388.

83-52½-New. or is present and ready to obey orders, 18F(2d)453.

83-55 77CalA424, 246P825; 4LaA89. But see 142Va567, 139SE336 (where injury going to lunch is not compensable).

83-56 15F(2d)906; 37GaA238, 139SE 688; 6LaA216(1stcase); NJSup 152A 179.

84-57 2LaA483, 494 [quotCJ]; 265 Mass463, 164NE392.

84-57½-New. returning truck, used by him, to employer. 52ND563, 203NW 895.

84-58 39GaA38, 146SE37(2dcase); 200 Wis512, 228NW118. [a] **Dog** cannot legally be classified as fellow workman. 169Ga746, 151SE363.

84-59½-New. Where a police officer whose field of service embraced entire city went to his home while on duty to get his revolver and was there injured accidentally by discharge of revolver from which he later died, Compensation Law applied. 167Minn407, 209NW26.

84-59⅓-New. Risks from choosing dangerous position where employment does not carry employee are not incidents to employment. 325 Ill 574, 156 NE764.

84-59¼-New. Injury received in suppressing serious affray between coemployees over recommendation for discharge of one of them held compensable. TexCivA 293SW260.

84-59⅓-New. Where an employee chooses to go over road more dangerous than that afforded to public, his act in doing so is not incident to his employment. 323 Ill 377, 154NE128.

84-59½-New. Injury within "course of employment" may result from the condition of the premises or the operation of the business. 290Pa480, 139A192.

84-60 37F(2d)268; 220Ala686, 127S 165; 206Cal 562, 275P432; 87CalA105, 261P1106; 81Colo 521, 256P314; 84 Colo 19, 267P791; 105Conn695, 136A 677, 56ALR504; 34GaA409, 129SE799; 37GaA539, 140SE899; 43 Ida625, 253P 1104; 319 Ill 344, 150NE276; 323 Ill 377, 154NE128; 325 Ill 574, 156NE764; 333 Ill 340, 164NE668; Ill 173NE49; 255 IllA465; 12LaA508, 126S452; 13 LaA591, 128S709; 2LaA499; 4LaA371; 126Me381, 138A561; 126Me563, 140A 365; 252Mich33, 232NW702; 169Minn 428, 211NW579; 102NJL231, 132A251; 214AppDiv335, 212NYS428 (plant worker traveling to and from plant); 216 AppDiv107, 214NYS496; 220AppDiv 375, 222NYS79; 221AppDiv199, 223 NYS738; 221AppDiv205, 223NYS503; 24 OhNPN856; 144 Okl 279, 291P571; 289Pa401, 137A625; 297Pa508, 147A 533; 298Pa336, 148A476; 93PaSuper 301; 158Tenn102, 11SW(2d)690 (four hundred feet); TexCivA 286SW283, 284 [citCJ]; TexCivA 290SW774; TexCivA 10SW(2d)1028; TexCivA 26SW(2d)691 (after leaving premises); Utah 279P900 (though carrying saw customarily sharpened at home); Utah 283P1054 (where employee is upon substantial mission for employer which is major factor in journey); 143Va62, 129SE330 (injury on railroad bridge on way home); Wis 229NW547 (injury held not to have occurred on premises). But see 238Mich566, 214NW229; TexCivA 22SW(2d)952; Wis 232NW524. [a] (6) Employee injured while cranking his own car preparatory to going to work is not entitled to compensation. 216 AppDiv107, 214NYS496 (even though employed because he owned car which was also used in employer's business). (7) City street cleaner injured on street while on way to work held not entitled to compensation though on "premises of employer." 194Wis190, 215NW911. (8) Injury to employee bringing employer's mail while returning to work after lunch at home during noon hour held not compensable. 126Me563, 140 A365. (9) Where employer did not provide conveyance to take workers home, employee riding home on loaded car became mere licensee or trespasser, and injury did not arise in course of employment. 297Pa508, 147A533. [f] **Where main purpose of journey of deceased employee in his own car** was that of simply going home from place of employment, the carrying of tools as mere accommodation to employer does not show that injuries and death arose out of employment. 75CalA280, 242P 901. [g] **Where transportation is part of contract,** coming and going to work is considered within course of employment. TexCivA 286SW1113. [h] **Where conveyance in which injury occurs** is that of employer, held in course of employment. 257Mass3, 153NE175. [i] **Under special circumstances** covering time going to and coming from premises responsibility of employer is extended where employee, though off premises, is actually engaged in master's business. 95PaSuper468.

84-61 215Ala220, 109S878; 198Cal 698, 247P202, 49ALR411; 77CalA424, 246P825; 213Ky226, 280SW954; 231 Ky269, 21SW(2d)277; MoA 32SW(2d) 121; 26 OhNPN8487; 93PaSuper250; TexCivA 14SW(2d)106; TexCivA 26SW (2d)691 (getting on or off premises); 67Utah537, 248P490 [quotCJ], 49ALR 415; 143Wash49, 254P831. See also 86 IndA418, 158NE254. [d] **Bicyclist injured while returning** over prescribed course followed in delivering papers held "in course of employment on master's premises." 198Cal 698, 247P202, 49ALR411. [e] **In Louisiana** employee injured in going to or from work while still on employer's premises or in conveyance furnished by employer is compensable. 13LaA591, 128S709.

84-61½-New. or until he has left the employer's premises, or has had sufficient time to leave it; 245NY139, 156 NE642.

85-62 208Cal 715, 284P661; 103Conn 449, 130A674; 105Conn695, 136A677, 56 ALR504; 83 IndA159, 147NE919; 126 Me563, 140A365; 174Minn491, 219NW 869; Minn 231NW803; 83Mont527, 273 P294; 245NY139, 156NE642; 252NY 241, 169NE370; 156Tenn197, 299SW 780, 781 [quotCJ]; TexCivA 275SW 685; TexCivA 11SW(2d)388; TexCivA 11SW(2d)529; TexCivA 25SW(2d)898; 68Utah600, 251P555. [a] **That road was level and smooth** does not preclude recovery of compensation for death of employee caused by fall from truck owned by another employee while returning from work over road over which employer had right of way. TexCivA 275SW685. [b] **Employer permitting opening in fence** adjacent to railroad tracks held to have impliedly extended invitation to use same. 68Utah600, 251 P555. [c] **Employee using only unobstructed route** enters on course of employment on reaching zone under employer's control, though outside inclosure. 117 Oh373, 159NE363. [d] **Limitation of compensable accidents to those occurring "during the hours of service as such workmen"** held not to make noncompensable accident in employment during reasonably short period of ingress to place of employment. 174Minn 491, 219NW869. [e] **Injury to employee cranking automobile furnished by employer** preparatory to leaving home for work is within scope of employment. 34 OhA36, 170NE37.

85-63 325 Ill 574, 156NE764; 220App Div375, 222NYS79; TexCivA 148W(2d) 106; 135Wash327, 237P733. See also 96PaSuper237.

85-64 165Minn458, 206NW717; 289Pa 401, 137A625; 297Pa508, 147A533; 298 Pa336, 148A476; 200Wis134, 227NW 287. See also 11PaDist&Co 481.

85-64½-New. unless the employer regularly furnishes transportation to his employees to or from the place of employment. 165Minn458, 206NW717.

85-65 215Ala352, 110S702; NJ 145A 106(2dcase); NJSup 150A830; 252NY 241, 169NE370 (trip from which injury was sustained held not incident of employment); 223AppDiv582, 229NYS134; 225AppDiv186, 232NYS541 [aff 250NY 569, 166NE327(3dcase)]; 133 Or468, 286P527 (logging train); 98PaSuper 581; TexCommnA 18SW(2d)591; TexCivA 5SW(2d)812; 150Va260, 142SE 400; 135Wash325, 237P733 (conveyance not furnished by employer). See also Utah 269P512. [g] **Where transportation is part of consideration for service,** employee is entitled to compensation for injury received while being transported to and from work. 287 Pa403, 135A124. [h] **Injury on employer's train** while being taken to lumber camp after signing contract of employment is sustained in course of employment. 146Wash469, 263P592. [i] **It is question of law** whether contract of employment called for transportation in fellow worker's automobile where facts are not in dispute. 89 IndA 374, 166NE611(2dcase). [j] **Employee's use of own conveyance** does not take him out of scope of employment. Ill 172NE52.

85-65½-New. Injury to employee on public road several miles from employer's property on way home from work at end of day's work is not one arising in course of employment away from plant of employer under statute. 135 Wash327, 237P733.

85-65⅓-New. Failure of truck driver to observe detour sign while transporting employees has been held not to make risk extrahazardous. 253Mass 538, 149NE412.

85-65¼-New. Injury received while riding to job on truck as instructed by foreman, with knowledge and acquiescence of employer, is received in course of employment. 103Conn559, 131A394.

85-65⅖-New. Injury to fireman while on way home to midday meal held to arise out of, and in course of, employment. 125Me168, 132A129.

85-65⅙-New. Where transportation was part of contract, action is not defeated because such driver causing the injury used his own car. TexCivA 286 SW1113.

85-65⅐-New. Although he spent nights with his family, employee transported would be acting in scope of employment. TexCivA 286SW1113.

85-65⅛-New. Since to so hold would be against public policy. 25 OhA1, 158 NE605.

85-65⅑-New. Death from burglar's shot while on way from work is not within scope of employment. 25 OhA1, 158NE605.

85-65 1/10-New. And the fact that an employee was shot while on a walk built for the convenience of employees does not show death arose in course of employment. 25 OhA1, 158NE605.

85-65 1/11-New. An employee, injured

while riding on his way home after work over a road maintained by his employer for its own purposes, although nominally a public highway dedicated to public use, is entitled to compensation. 197Wis48, 221NW396.

85-65½-New. The employer must provide a reasonably safe way to enter and depart from the premises. 297Pa508, 147A533.

85-71 32Ariz265, 257P641; 206Cal 562, 275P432; 107Conn512, 141A649; 111 Conn365, 150A110; Ill 173NE49; 217 Ky103, 288SW1057; 5LaA288; 12SMe 353, 147A431 (touching moving machine to satisfy curiosity); 251NY90, 167NE 181(2dcase); 213AppDiv461, 210NYS 673; Wash 288P655. See also 86Pa Super77. [a] **Chauffeur killed on return trip by most used route** held engaged in "course of employment," notwithstanding previous deviation therefrom for purely recreational purposes. 298Pa471, 147A846.

86-72 18F(2d)453; 79CalA195, 249P33; 89CalA736, 265P362; 111Conn365, 150 A110; 37GaA238, 139SE688; 252NY 11, 168NE446 (deviating from work to ask fellow employee for chew of tobacco); 133 Or468, 286P527; 96PaSuper 318; 8PaDist&Co 8. See also 89 IndA 673, 166NE613; 251NY90, 167NE181 (2dcase). [b] **Right to attend to personal demand is not privilege of roaming all over premises.**–293Pa103, 141A 635.

86-73 261Mass436, 158NE845; 96Pa Super550.

86-76½-New. In cutting a twig to make room to sit down for lunch, 15F(2d)906.

86-77 8PaDist&Co 8.

86-81 [a] (2) Employee may satisfy needs of body in use of food, drink, and even tobacco and still remain in course of his employment while so doing. 213 AppDiv461, 210NYS673.

86-81½-New. Where employee has permission to do acts for his own personal benefit on employer's premises, he may combine such acts with work of his employment when occasion permits. 167 Minn269, 208NW802.

86-81½-New. and when so attending to both combined there is no departure from the scope of employment, 167Minn 269, 208NW802.

86-81¼-New. especially where employee is injured in the very act he started out to do in performance of the duties of his employment. 167Minn269, 208NW802.

86-81½-New. An accident resulting from a cause brought onto employer's premises by employee for his own purposes does not arise out of employment. 81Colo 521, 256P314.

86-81⅙-New. Where employee is engaged in recreation and social enjoyment, risk of injury is personal. 229 AppDiv54, 240NYS740.

86-81½-New. Traveling salesman while eating meals or sleeping at hotels or going on private errands is not engaged in employer's business. TexCivA 26 SW(2d)691.

86-82 201Cal 597, 258P86; 104Conn 331, 133A98; 318 Ill 151, 149NE11; Ill 173NE472; 217Ky103, 288SW1057; 10 LaA775, 123S168; 7LaA210; 8LaA817; 230AppDiv743, 243NYS474; 230AppDiv 140, 243NYS622; 26 OhNPNS243; 290 Pa480, 139A192; 297Pa172, 146A543; 96PaSuper340 (under statute); TexCivA 293SW333; Wis 231NW251. See also 286Pa52, 132A795. But see 170Minn97, 212NW173; 56ND663, 219NW213, 58 ALR186; TexCivA 4SW(2d)93. [a] (4) Injury to employee cranking his own automobile when about to go on employer's business is not compensable where employer gave express order that employees should not use their own cars, but could use employer's cars at their discretion. 215AppDiv56, 213NYS196. [d] **Evidence held not sufficient** to establish disregard of orders. 233Mich549, 207NW816. [e] **Injury occurs in course of employment** if in violating of rule employee did not go outside sphere of his employment. 219Ala529, 122S806(3dcase). [f] **In Pennsylvania,** if coal miner, in course of employment, causes explosion by violation of rule of employer but does not violate statute, he does not lose right to compensation. 13PaDist&Co 338.

86-83 Mich 233NW350.

86-84 10LaA740, 122S913. See also 53 SD13, 219NW884.

86-84½-New. An employee is not necessarily placed outside of the protection of the Compensation Act by disobeying an order. 168Minn114, 210NW64.

86-84⅓-New. Mere fact that, in attempting to board the train, relator violated statute and ordinance does not defeat his right to recover compensation. 171Minn75, 213NW546.

86-84¼-New. In order that disobedience of orders may bar right to compensation, orders must so restrict his activities that violation places him outside sphere of employment; 216AppDiv 574, 216NYS275.

86-84⅕-New. and where, although work is done in forbidden manner, it is not outside scope of employment, employee may recover compensation. 216 AppDiv574, 216NYS275.

87-89 9LaA180, 119S277; 260Mass222, 157NE342. [b] (2) Mere disobedience of orders. 260Mass222, 157NE342. [c] **Disregard of regulation** of department of labor not alone sufficient to show willful misconduct. 260Mass222, 157NE 342. [d] **Deliberate breach of statutory regulations affecting safety.**–Violation of traffic ordinances held not within statute. 13LaA525, 127S59.

87-90 See also 3LaA596. [a] (3) Other instances. 197Wis414, 222NW251.

87-91 39GaA87, 146SE638; 39GaA78, 146SE788; 148Va585, 139SE478, 58ALR 193. See also 8LaA428. [a] 83 IndA31, 147NE314. [b] 76CalA165, 243P892; 213Ky226, 280SW954; 156Tenn150, 299 SW787. [c] (2) As used in statute, involves element of malice or evil intent. TexCivA 278SW347. (3) "Something more than thoughtlessness, heedlessness or inadvertence." 150Md71, 132A374. [d] **Facts held not to show willful misconduct.**–226Ky7, 10SW(2d)463. [e] **Willful misconduct,** precluding compensation, involves intentional, deliberate action with reckless disregard of consequences. 226Ky7, 10SW(2d)463.

87-92 [c] **Culpable negligence.**–Peculiarity of tractor causing it to overturn held hazard of occupation and that injury was not due to driver's culpable negligence. 34Wyo 357, 243P593.

87-93½-New. Injuries caused by employee's criminal conduct are not compensable. 288Pa394, 136A230.

87-93⅓-New. There cannot be a willful failure to perform an unknown duty. 148Va585, 139SE478, 58ALR193.

87-93¼-New. An employee is not barred from recovery by the fact that at the time of the accident he was doing an act forbidden by general statute, unless the employer can show the employee had knowledge of the statute or that reasonable steps had been taken to bring notice of it to him. 148Va585, 139SE 478, 58ALR193.

87-94 231Ky269, 21SW(2d)277; 155 Tenn132, 290SW975. [a] (5) Miner injured while attempting to board motor car for purpose of requesting motorman to carry dinner bucket into mine has been held not guilty of willful misconduct. 231Ky269, 21SW(2d)277. [b] (2) Voluntary and intentional failure of workman to use safety appliance does not necessarily render omission willful. 139 Okl 243, 282P139. [c] **Accidental happening** arising from negligence of injured employee is not willfully self-inflicted. ND 231NW283.

87-95 156Tenn184, 299SW772; 156 Tenn150, 299SW787.

88-96 216Ala267, 113S271; 264Mass 495, 163NE161.

88-98 216Ala267, 113S271; 163Ga333, 150SE208; 158Tenn317, 13SW(2d)332. [a] (2) Where foreman instructed deceased employee not to work under particular rock on account of danger, and employee went under rock to load coal, and was crushed when rock fell, employee was guilty of willful misconduct. 158Tenn317, 13SW(2d)332. [b] **Under facts, court of appeals is not justified in inferring** that employee who proceeded to dig ditch against foreman's express orders, and was killed by a cave-in thereof, did not cause accident by his willful misconduct. 150Md71, 132A374.

88-99½-New. Employer pleading employee's willful violation of rule must show intentional doing of act violating rule. 216Ala267, 113S271.

88-2½-New. Death caused by striking match in gaseous mine in violation of statute is not compensable. 289Pa73, 137A126.

88-2⅓-New. Miner injured on employer's premises while violating mining laws is not entitled to compensation. 8 PaDist&Co 73.

88-2¼-New. The compensation act does not bar a recovery on account of injury due to the sleepy, awkward, or stupidly negligent conduct by an employee, but excludes compensation for injuries due to intention or intoxication. 250NY21, 164NE729.

88-2⅕-New. The rule that injuries, sustained in doing an act contrary to positive orders, are not compensable does not apply to negligent acts, willful misconduct, or acts in disregard of positive orders, where the employee's duties include the doing of the act causing the injury or are so connected that as to it he is not a stranger or a trespasser. 297Pa172, 146A543.

88-8 149Md562, 131A760, 43ALR417; 242NY70, 150NE604.

88-12 322 Ill 160, 152NE505; 88 IndA 347, 163NE841. [d] **Under statute allowing additional compensation for** "serious misconduct" of employer or managing representative, placing employee at work under overhanging wall of sand and gravel held "serious misconduct." 199Cal 420, 249P849, 58ALR 1374. [e] **Statute construed** as not to authorize double compensation. 227 AppDiv333, 237NYS488. [f] **Statute authorizing double compensation** must be one which forbids minor's employment. 227AppDiv333, 237NYS488.

88-12½-New. Some acts provide for increased compensation where employer carries no insurance. 77Colo 414, 236P 1006.

88-12⅓-New. Compensation is judicable according to the family status of the injured claimant at the time the injury happened. 116 Or656, 242P598.

88-12¼-New. Connubial connections contracted subsequent to the accident do not operate to increase the personal compensation of the injured claimant. 116 Or656, 242P598.

88-12⅕-New. Sewer construction is not within safety requirement for bracing "excavation incidental to building construction" as it relates to additional compensation for noncompliance. 116 Oh509, 156NE605.

88-12⅙-New. In Rhode Island compensation includes payments for lost earnings, illness and burial, and for medical services. 48RI 113, 136A3.

88-12 1/7-New. In classifying compensable injury specific injury of serious and permanent consequence is controlling. TexCivA 300SW196.

88-12⅛-New. Double compensation has been held properly allowed under a statute relating to the employment of a minor without a permit, where the parents did not participate in the false representations as to being over the permit age. 196Wis159, 216NW137.

88-12⅕-New. Compensation does not include all elements of damages, such as pain and suffering. 296Pa529, 146A130.

88-12 1/10-New. Additional compensation is provided for under some statutes. 86Colo 93, 278P609; 335 Ill 476, 167NE 86; 225AppDiv393, 233NYS333; 30 OhA 127, 164NE432; 197Wis414, 222NW251; 197Wis552, 222NW781; 197Wis597, 222 NW823.

88-12 1/11-New. Aggravation of injuries from being taken from hospital by alleged officers for purpose of extradition cannot be considered in making award. 233Ky793, 26SW(2d)1030.

88-12 1/12-New. General damages in amount fixed by court allowed in addition to loss of time and medical and hospital expenses. NS [1930] 3DomLR 445.

88-12 1/13-New. Where evidence is limited to expert testimony, and the rate

of compensation is fixed at the highest rate made by experts, the employee cannot complain. 12LaA338, 124S584(2d case).

88-13 162La556, 110S754; 9LaA205, 119S889; 10LaA323, 121S684(2dcase); 11LaA336, 123S451 (compensation held reasonable); MoA 24SW(2d)224 (loss of thirty one teeth held to authorize award of fifty dollars for disfigurement); NS [1930] 3DomLR445 (considered in allowance of general damages by court). [a] **Allowance of maximum weekly compensation** is proper under evidence of fractured jaw resulting in facial disfigurement and loss of teeth. 9LaA513, 119S722. [b] **In determining extent of disfigurement** due to fracture of jaw causing loss of teeth, original malformation of jaw not causing trouble in eating or noticeable facial disfigurement prior to accident should not be considered. 9LaA513, 119S722.

88-14 128 Okl 156, 261P926.

88-14½-New. The word "necessary" as used in a statute allowing compensation for retraining in case of loss of a member providing that the commission finds that retraining is necessary does not mean indispensable and such compensation should be allowed if it appears that retraining will materially assist the employee in restoring his impaired capacity to earn a livelihood. 166Minn139, 207NW202.

88-14⅓-New. Insurance. Under statute, employer who is uninsured as to compensation liability, is liable to fifty per cent. additional compensation. 83 Colo 158, 262P1019.

89-15 40F(2d)530; 4LaA18; LaA 130 S257(2dcase); 235Mich496, 209NW586 (eleven dollars ninety-two cents weekly, rather than fourteen dollars as awarded, on weekly wages of nineteen dollars and eighty-six cents, held proper); MoA 29SW(2d)730 (minor employee); Tex CommnA 15SW(2d)553; TexCivA 30 SW(2d)831; 69Utah83, 252P292; 200 Wis512, 228NW118. See also 7LaA703. But see 9LaA639, 120S88. [m] **Not necessarily accurate test.**-118Kan738, 236P837. [n] **Compensation based on more than wages received is erroneous.**-214AppDiv345, 212NYS410. [o] **Volunteer fireman paid certain amount for each fire call** does not receive daily wage and is not entitled to compensation on basis of amount paid him on number of calls on day of injury. 246Mich603, 225NW 493(2dcase). [p] **"Wage" defined by statute.**-3LaA425. [q] **In Nova Scotia,** where member of fishing crew receives share of proceeds of venture for his services, statute fixes wages at seven hundred and eighty dollars per year. NS [1930] 1DomLR809.

89-15½-New. In some jurisdictions compensation is based upon loss of earning power. 42 Ida141, 243P818.

89-17½-New. Compensation may be based on wages earned by minor at time of death during school vacation. 197Cal 143, 239P1067.

89-17¼-New. Earnings from former employer may be considered in computing compensation for death. 197Cal 143, 239P1067.

89-17¼-New. Earnings from dissimilar employments may be considered in computing award for death. 197Cal 143, 239 P1067.

89-17⅓-New. Provision that, if at time of injury, employee received wages of less than six dollars per week, then the compensation shall not exceed the full amount of such wages, relates to weekly average wages in an industry. 42 Ida 141, 243P818.

89-17½-New. Tips received by employee but not contemplated in contract of employment cannot be included in weekly wage. 214AppDiv826, 211NYS 487.

89-17⅙-New. In fixing compensation for disability, ability to earn in outside employment should be considered. 219AppDiv213, 219NYS529.

89-17⅙-New. Wages in Boston are not evidence of average weekly wages for same grade and class of work in "district" twenty-five miles away. 259Mass 376, 156NE533.

89-17⅐-New. Where there is no wage established for the kind of work in which the employee was engaged at the time of injury, compensation must be computed on the reasonable value of work. 200Wis512, 228NW118.

89-18 322 Ill 60, 152NE433; 125Kan 581, 264P1051; 152Md474, 136A897; 225AppDiv434, 233NYS403; 226AppDiv 700, 233NYS485; Oh 171NE337; Tex CivA 283SW261; TexCivA 292SW925; TexCivA 27SW(2d)600. But see Tex CivA 27SW(2d)838. [a] (6) Average weekly wages must be determined by past earnings and not by what employee may earn in future. 155Tenn229, 291 SW448. [b] (2) Weekly payments awarded widow for death of husband in course of employment is to be calculated on basis of daily wage based on seven-day week in accordance with showing that deceased was working seven days during each week. 11LaA140, 119S 714. (3) Award of three thousand dollars reduced to two thousand dollars. Sask [1930] 4DomLR78. [h] **Average weekly wages** of deceased employee must be found from evidence showing average actual payment. TexCommnA 292 SW529. [i] **Value of board considered.**-226AppDiv700, 233NYS485. [j] **Tips received by employee considered.**-226App Div700, 233NYS485. [k] **Working at same employment for two hundred and twenty-eight days** has been held not to constitute employment for substantially a year. TexCivA 20SW(2d)209. [l] **Age and experience can be considered** in determining average weekly wage only for immature and unskilled persons. Oh 171NE337.

89-19 85Colo 588, 277P777; 42 Ida141, 243P818; 202 Iowa773, 211NW413; 252 Mass426, 147NE877; TexCommnA 292 SW529; TexCommnA 15SW(2d)553; TexCommnA 17SW(2d)458; TexCivA 4 SW(2d)631. [b] (1) TexCivA 283SW 261. (2) Salary of other employees in same class is immaterial. TexCivA 300 SW667. [c] **In determining amount of compensation payable for death of employee** employed more than three hundred days, average weekly wage is ascertained by amount of wages actually received during year immediately preceding death, and not by taking three hundred times daily wage. TexCivA 7 SW(2d)913.

89-20 [a] **In Alabama** (1) only periods of off days to be considered in determining average weekly wages are those found to be of consecutive days. 213Ala 388, 104S829. (2) In determining average weekly wages, only off day periods of more than seven consecutive days can be considered. 213Ala388, 104S829.

90-21 40F(2d)271(2dcase); 41F(2d) 151; 317 Ill 541, 148NE291; LaA 129S 375; 226AppDiv715, 233NYS400; Tex CivA 16SW(2d)560; TexCivA 17SW(2d) 68; TexCivA 30SW(2d)588. [d] **In Alabama,** where employee had not been employee for fifty-two connective weeks, but worked intermittently, finding giving in detail wages earned and striking average weekly earning was held sufficient. 212Ala538, 103S548. [e] **In Tennessee,** where employee worked on holidays and Saturday afternoons and nights for less than fifty-two weeks, total wages received should be divided by number of weeks he was employed. 155Tenn229, 291SW448.

90-22 42 Ida141, 243P818; 252Mass 426, 147NE877 (rule applicable when no person of same grade is employed by same employer at same work); TexCivA 1SW(2d)692; TexCivA 31SW(2d)1108. [d] **There must be evidence as to earnings** of other employees. TexCivA 1SW (2d)692. [e] **Number of hours constituting normal** week is not considered in making comparison. Mass 169NE907.

90-23 41F(2d)151; 85Colo 374, 275P 939; 42 Ida141, 243P818; Md 150A878 (2dcase); 221AppDiv606, 225NYS20; TexCivA 16SW(2d)321. See also Tex CivA 26SW(2d)697. But see Tex CivA 27SW(2d)838. [b] (2) 215 AppDiv845, 213NYS85 (to arrive at average in such case, divide actual earnings by fifty-two). [f] **Applies to claimant working five days per week for sixteen weeks and four days per week for fifteen weeks.**-215AppDiv 845, 213NYS85.

90-24½-New. If duties of employee were such that it would be impractical to perform same duties except during summer months, earnings during such months represent annual earning capacity in such engagement for purposes of the act. 215AppDiv51, 213NYS160.

90-24⅓-New. In computing average weekly wages, annual earnings in the same kind of employment must be considered. 215AppDiv51, 213NYS160.

90-24¼-New. Normal wage rather than combination of normal wage and loans is to be taken. 125Me361, 134A161.

90-24½-New. In seasonal occupations, compensation should be based on claimant's reasonable earning capacity in his employment. 221AppDiv636, 225NYS 57.

90-24⅙-New. Compensation of laborer in highway construction, injured after working four days, should not be based on seasonal occupation where county carried on work in winter. 221AppDiv 636, 225NYS57.

90-24⅐-New. Injured piece worker employed not exceeding seven months annually, to pick farm products, is not engaged in such employment for "substantially" whole year. 221AppDiv622, 225NYS78.

90-24⅛-New. Neither board nor court has arbitrary power to award compensation as to period of time less than that which would give injured employee full relief under law. TexCivA 11SW(2d) 627.

90-24⅑-New. "Injury" as meaning incapacity in statute providing time for beginning compensation payments. Tex CivA 30SW(2d)921.

90-25 125Me361, 134A161; 88PaSuper 525. [c] **Finding that employment as mason's tender was concurrent** with position as caretaker held not contrary to law. 125Me361, 134A161.

90-26 171Minn402, 214NW265. Contra 226AppDiv700, 233NYS485. [a] (3) Rule applied where only testimony was as to total income of plumber who was employed part time by certain employer and who suffered injury while in service of such employer. When not so employed employee was in business for himself. Award based on total income, not per hour rate from defendant. 317 Ill 541, 148NE291.

91-28 121Kan480, 247P846.

91-29 [g] **Extent.**-(1) Expectation of injured minor's receiving higher wages is not limited to period covered by schedule for particular injury. 214App Div341, 212NYS139. (2) Intent of statute is not to limit measure of loss to wages during minority. 214AppDiv341, 212NYS139. [h] **Award based on higher wages than injured minor was receiving** held authorized. 214AppDiv341, 212NYS139. [i] **Conditions as they actually existed in particular employment at time of accident and all circumstances as disclosed in evidence** must be considered by industrial board in determining question. 225AppDiv 437, 233NYS399. [j] **Evidence held not to warrant award based on expected increase.**-225AppDiv437, 233NYS399.

92-53 110Conn282, 147A818 (inability to get work is evidence of incapacity, though not always conclusive); 3LaA 113; 3LaA117; TexCivA 278SW856; 98Vt514, 129A168; 195Wis327, 218NW 190. See also NC 154SE69 (defining "incapacity"). [g] **"Incapacity"** denotes lack of adequate power. TexCommnA 291SW1085. [h] **Existence and degree of "incapacity"** are questions of fact. TexCommnA 291SW1085. [i] **Employee continuing work held not entitled to compensation.** TexCivA 278SW856.

93-58½-New. An injured employee having refused work by employer at higher rate cannot have his present earning capacity valued on a lower basis. 215AppDiv734, 212NYS88 (refused because employer did not employ union labor).

93-58⅓-New. Loss of wages and loss of earning power are essentially different things. 8PaDist&Co 191.

93-58¼-New. Earning power under the act does not always depend on the sum actually received but on consideration

of all elements that make it up or detract from it as defined by the act. 8 PaDist&Co 191.

93-58½-New. Under the act an employee is entitled to sixty per cent of the difference between his earning power as impaired and what he received in wages before the accident. 8PaDist&Co 191.

93-58¼-New. That an employee sought and failed to obtain compensation for a permanent total disability in a suit against a former employer is no bar to a right to recover from another employer. LaA 123S488.

93-58½-New. A salesman, by electing to go into business for himself, is not, by reason of that fact alone, precluded from obtaining compensation for partial incapacity. Mass 167NE352.

93-58¾-New. Mere fact that employer retains claimant at his previous work is not conclusive that physical impairment has not resulted in loss of earning power. MoA 24SW(2d)224.

93-58¾-New. Under Missouri statute providing for permanent injuries other than those specified loss of earning power is not required to make injury compensable. MoA 24SW(2d)224.

93-62½-New. California statute does not require employee in weakened condition to measure his strength and capacity from day to day to satisfy himself as to ability to work. 72CalA350, 237P404.

93-63 [b] In Kansas injury is not test of right to compensation, but substantial impairment of workman's effectiveness, resulting from injury. 120Kan56, 242P147. [c] Disability contemplated by act classifying same is loss, total or partial of earning power from injury. 293Pa338, 143A21.

93-64 158Md285, 148A220. [d] Classification of disabilities.-78Mont579, 254P880. [e] "Permanent" used with partial or total disability indicates character of disability. 293Pa338, 143A21.

93-69 See also 243Mich261, 220NW728.

93-70 154Tenn273, 288SW726; Tex CivA 22SW(2d)1098. But see 245NY201, 156NE665. [a] Unpaid balance of disability compensation awarded to employee before death is paid to dependents. Oh 171NE108.

93-70½-New. Claimant's compensation is to be measured by the extent of the disability caused by the accident and not the date of the hearing. 113Okl230, 241P174.

93-70¼-New. Profits of employee in exercise of capital and credit are not considered in determining average wage. 217AppDiv796, 216NYS615.

93-70¼-New. Presumption is that employee is entitled to full compensation until he is able to resume work of same kind or general character. 86IndA111, 154NE778.

93-70½-New. Interest cannot be allowed unless claimed in pleadings. Tex CivA 285SW878.

93-70¾-New. Disability award after death is applicable only as to compensation due at death. 222AppDiv398, 226NYS367.

93-70¾-New. Compensation is not due at death, where the claim was controverted and no award was made before death. 222AppDiv398, 226NYS366.

93-70⅞-New. Death from cause other than injury does not entitle widow to disability award where no compensation was due at death. 222AppDiv398, 226NYS366.

93-70⅞-New. Rights of insurance company against tort feasor coincide with those of employer. 149Va560, 140SE831.

93-70$\frac{1}{10}$-New. Insurance carrier's right to recover from railroad for injuries to independent contractor's employee are not impaired by an indemnifying contract of an employer. 149Va560, 140SE831.

93-70$\frac{1}{11}$-New. The test provided by Workmen's Compensation Acts under subdivision "other cases" is loss of earning capacity, not loss of wages. 156Md74, 143A654.

93-70$\frac{1}{12}$-New. The fact that an employer violated a safety order, the partial cause of employee's injury, will not entitle the employee to an additional award. 197Wis15, 221NW420.

93-70$\frac{1}{13}$-New. Mere fact of awarding compensation payable in installments for the convenience of the employer does not affect the sum awarded as a whole. 97CalA30, 275P448.

93-70$\frac{1}{14}$-New. Under some statutes an injured employer can recover compensation only for a specified number of weeks from the date of the injury, regardless of an intervening period when he appeared to have recovered and during which no payments were made. 153Va332, 149SE541.

93-70$\frac{1}{15}$-New. An order of the industrial commission awarding compensation to an injured employee for a period of a specified number of weeks, covering a period subsequent to the mentioned weeks from the date of injury, has been held erroneous. 153Va339, 149SE543.

93-70$\frac{1}{16}$-New. Where injury causes temporary disability, court in its discretion may make award for fixed number of weeks to be based on probable duration of disability. 13LaA112, 127S18.

93-71 225AppDiv190, 232NYS502 [aff 250NY589, 166NE335(3dcase)]; Tex CivA 23SW(2d)405.

94-83 But see TexCivA 16SW(2d)386.

94-84½-New. Measure of earning capacity during period of award is ability to perform work for which injury does not disqualify employee. 223AppDiv550, 229NYS5.

94-87 TexCommnA 30SW(2d)305.

94-88½-New. Under some statutes the term "disability," as used in connection with apportionment of compensation where there was a preexisting disease, refers only to living employees so that the statute is inapplicable to claim for death benefits. 103Conn701, 131A739.

94-88¼-New. Where a statute does not prescribe a definite standard of vision prior to disability from injury, the fact that the eye was previously impaired will not be considered. 85IndA552, 154NE774.

94-88¼-New. A statute providing that, if an employee who suffers an injury has a permanent disability or injury suffered elsewhere, he shall be entitled to compensation only for the degree of incapacity which would have resulted from the later accident if the early disability or injury had not existed, was intended to absolve an employer from liability for injuries suffered in a prior employment. 165Ga771, 142SE1101.

94-88⅛-New. Under such statute it is the duty of the commission to determine the degree of incapacity from the later accident as if the earlier disability or injury had not existed. 165Ga771, 142SE101.

94-88¼-New. Insurer need not pay aged or diseased employee more than proportional part of his average weekly wage. TexCommnA 30SW(2d)305.

94-89 36F(2d)814 (compensation for temporary total disability and permanent partial disability from foot injury stated); 40F(2d)530 (temporary total and permanent partial); 125Kan370, 263P779; Kan 291P952; 235Ky650, 32SW(2d)35; 78Mont579, 254P880; 228AppDiv728, 239NYS205; 122Okl257, 254P98; 133Okl77, 271P142; 138Okl166, 280P597 (award for temporary total disability is proper though injury may later become permanent partial disability for which award may be made); 139Okl32, 280P1100 (temporary total disability and subsequent permanent partial disability); 141Okl142, 284P302 (temporary total disability and permanent partial disability); 142Okl290, 286P886 (temporary total and permanent partial disability); 143Okl3, 286P889 (temporary total and permanent partial disability); 143Okl92, 287P724 (temporary total and permanent partial disability); Okl 293P191 (temporary disability and permanent disfigurement); 152Tenn412, 277SW905 (compensation allowed for temporary total disability followed by permanent partial disability); TexCivA 20SW(2d)334. But see 91CalA465, 267P122; GaA 155SE795. [a] (2) Where spinal growth resulted from injury, compensation was awarded for both injury and for disability resulting from spinal growth. 113Okl230, 241P174. (3) Allowance for temporary total disability from injury to foot involving partial loss of member for period disability existed, though permanent partial disability also resulted. 154Tenn292, 289SW500. (4) Other instances. NC 154SE69.

94-91 See also 143Okl92, 287P724.

94-91½-New. Statute increasing maximum weekly compensation for permanent disability and retaining in full force remaining provisions of prior statute does not increase limit on total amount of compensation prescribed. 154Tenn326, 289SW518.

94-91¼-New. One is physically able to work as respects claim for permanent disability when he can do so without endangering his life or health. 321Ill117, 151NE606.

94-91¼-New. An award for protracted temporary total disability is properly allowed, even though some time has elapsed between the first temporary total disability and the next total disability from the same injury, statutory term continue meaning protracted. 224AppDiv332, 230NYS714.

94-91⅛-New. Period of temporary total incapacity should not include any part of period wherein incapacity has become permanent. 332Ill156, 163NE408.

94-91⅛-New. The words "total and permanent disability" have been held not to mean a condition of helpless paralysis reducing bodily functions to the minimum essential for the maintenance of a mere spark of life. 86Colo364, 281P740.

94-92 [a] Matters considered in fixing award.-In fixing award for permanent disability to minor employee commission may consider his qualifications, education, and experience, as well as actual earnings prior to injury. 195Wis327, 218NW190 (award for loss of hand at wrist, of girl of twenty, held not excessive).

94-93 86Colo364, 281P740; 1LaA716; 2LaA764; 5LaA727; TexCommnA 29SW(2d)987; 98Vt514, 129A168. See also 5LaA15. But see TexCivA 11SW(2d)533. [b] (4) Under statutes not basing disability or incapacity to work on impairment of earning capacity in employment in which employee was engaged, disability cannot be found to be total where earning power is not wholly destroyed. 78Mont579, 254P880. (5) If he is still capable of performing remunerative employment, he must make active effort to procure such work as he can still perform. 78Mont579, 254P880. (6) Where employee is able to do light work. CalA 259P369. [c] (8) Injury to hip of workman. TexCivA 293SW210. [e] TexCivA 293SW210. [g] 322Ill510, 153NE625; 322Ill571, 153NE629. [h] Finding of total disability held not erroneous as matter of law. 98Vt514, 129A168. [i] In Oklahoma, where claimant is working and earning wages, he is not entitled to total disability award, either permanent or temporary, unless by virtue of specific losses made by statute equivalent of total disability such as loss of both hands, both feet, both legs, etc. 112Okl101, 240P96. [j] Award for total and permanent disability is warranted only where employee is rendered wholly and permanently incapable of work. 322Ill510, 153NE625. [k] Inability to perform any work total disability.-Okl 291P531.

94-94 But see 110Conn282, 147A818 (must exercise reasonable diligence to obtain employment). Contra Utah 277P206.

94-96 86Colo364, 281P740; 110Conn282, 147A818; 320Ill618, 151NE588; Ill 173NE70; 10LaA685, 121S363; LaA 122S131; 11LaA305, 122S870; LaA 130S257(2dcase); 117Nebr148, 219NW899; 120Okl197, 251P40; TexCivA 17SW(2d)68; Utah 287P931 (circumstances not showing). See also 2LaA567. But see 158Md285, 148A220 ("total incapacity" means incapacity to do further work of any kind). [a] (6) Loss of sight is not total where considerable vision is attained by use of glasses. TexCommnA 291SW1085. (7)

Reduction to two two hundredths of normal vision warrants findings of permanent loss. 85 **IndA**552, 154**NE**774. (8) Employee awarded compensation for loss of one eye is entitled to compensation for total disability on loss of other eye from sympathetic infection, deducting amount paid. 299**Pa**182, 149 A312. [h] 36**Wyo** 325, 255**P**356. [i] (1) **TexCivA** 272**SW**601. (2) Inclusion of word "permanent" in otherwise proper definition of expression "total incapacity" held harmless inaccuracy. **TexCivA** 286**SW**565. [n] **Under statute** in Oklahoma loss of use of eye is not total disability where no other portion of body is disabled. 112 **Okl** 107, 240**P**93. [o] **Where disability not permanent.**–Total disability should not be declared permanent unless it clearly appears that affliction will not yield to treatment and workman will not be able again to work at any gainful occupation. 34**Wyo** 53, 241**P**219. [p] **"Total permanent incapacity" defined** and held synonymous with "permanent total incapacity." **TexCivA** 286**SW**565. [q] **Vision of "20/100" under Snellen tests of vision** held not basis for award of permanent disability for eighty per cent loss of vision under statute, as Snellen symbols are not fractional expression of numerical percentage of visual capacity. 218**AppDiv**310, 218 **NYS**213. [r] **Period of total temporary disability** is period immediately following accident. 324 **Ill** 268, 155**NE**326. [s] **Applicant must show that injuries will be reasonably certain** to leave him permanently totally incapacitated. 324 **Ill** 582, 155**NE**320. [t] **Loss of hands and distortion of face, nostrils, and eye** justifies finding of total permanent disability. 15**F(2d)**906. [u] **Broken leg.**–Lumberman totally incapacitated by broken leg held entitled to compensation for permanent total incapacity, and not limited to compensation for loss of foot. **TexCivA** 292**SW**265. [v] **Statutory permanent total disability.**–(1) Loss of use of legs by partial paralysis not loss of legs under statute defining such loss as permanent total disability. **Utah** 277**P**206. (2) Award not limited to cases where employee suffers actual loss of members of body. **Utah** 277**P** 206. (3) Results only when injuries incapacitate employee from performing remunerable employment without pain or unduly endangering his health. **Utah** 277**P**206. (4) Partial paralysis of legs, preventing walking except with canes, is not permanent total disability where upper part of body unaffected. **Utah** 277**P**206. [w] **As defined by statute.**–Small farmer injured while acting as night watchman at saw mill held to have suffered total permanent disability under statute. 9**LaA**639, 120**S**88. [x] **Under statute,** employee suffering partial loss of vision did not sustain total disability. 35**F(2d)**459. [y] **Employee totally disabled for manual labor** comes within total disability clause where manual labor was only work he had performed. 13**LaA**292, 125**S**877. [z] **Employee permanently and totally disabled.**–**Utah** 287**P**931.

94–97 7**F(2d)**613. See also 32**F(2d)** 300. [a] **When total disability is compensated for** claimant cannot recover on another disability arising out of same accident. 87**PaSuper**579. [b] **Employee pleading and proving total disability** is not limited to recovery for loss of use of member. **TexCivA** 31**SW (2d)**846.

94–97½–New. Employee receiving award for total disability may not recover further award for total disability for subsequent injury from same employer. 216**AppDiv**774, 214**NYS**491.

94–97⅓–New. Statutes allowing different amounts for permanent total disability depending on whether the employee is married or unmarried operate to fix the family status of claimant at time injury happened, 116 **Or**656, 242 **P**598.

94–97¼–New. and an unmarried employee who, after an award, marries and becomes the father of children by the wife of such marriage cannot have his award adjusted upon the basis of a change in the family status since the injury. 116 **Or**656, 242**P**598.

94–97⅙–New. Period of temporary total disability under statute is temporary period immediately after accident during which employee is totally incapacitated for work by illness attending injury. 78**Mont**579, 254**P**880.

94–97⅙–New. If the character of the injury resulting in temporary total disability is such that the extent of the disability cannot be determined, the employee is entitled to receive compensation therefor until he recovers or until it is determined whether his disability is total or partial. 78**Mont**579, 254**P** 880.

94–97½–New. Employee is entitled to award for permanent total disability unless wholly incapacitated for work at gainful occupation. 325 **Ill** 424, 156**NE** 358.

94–97⅙–New. Employee must show that accident rendered him wholly and permanently incapable of work at gainful occupation. 325 **Ill** 424, 156**NE**358.

94–97⅙–New. Disqualification from performing usual tasks of workman is total disability. 217**Ky**371, 289**SW**270.

94–97⅒–New. Total disability for work means totally incapacitated. 217 **Ky**371, 289**SW**270.

94–97⅑–New. Under some statutes an employee receiving injury while engaged in employment defined as "hazardous," which results in temporary total disability incapacitating him from performing any labor, is entitled to recover two thirds of the average weekly wages during the continuance of such disability for the number of weeks prescribed by statute. 121 **Okl** 197, 251**P** 40.

94–97⅑–New. Total incapacity, under statute, means such injury as disqualifies the injured employee from performing the usual tasks of a workman to such extent that he cannot procure and retain employment. **TexCivA** 283 **SW**208.

94–97⅓–New. To justify award for permanent total incapacity applicant must show by evidence that his injury will be reasonably certain to leave him permanently totally incapacitated from pursuing his usual and customary line of employment. 320 **Ill** 191, 150**NE**640.

94–97¼–New. To justify an award for permanent total incapacity applicant must show by evidence that his injury will be reasonably certain to leave him permanently totally incapacitated from pursuing his usual and customary line of employment. 320 **Ill** 230, 150**NE**625.

94–97⅕–New. Incapacity to work for the statutory period must be shown. 103**Conn**720, 131**A**745.

94–97⅙–New. An agreement for compensation during the period of total disability does not cover an impairment continuing after total disability has ceased. 86 **IndA**272, 155**NE**521.

94–97⅐–New. Where compensation is awarded for total temporary disability, the matter of permanent impairment though existing, is not covered. 85 **IndA**659, 155**NE**520.

94–97⅛–New. To justify an award for permanent total incapacity, evidence must show injuries will be reasonably certain to leave claimant permanently totally incapacitated from pursuing his usual and customary line of employment. 326 **Ill** 646, 158**NE**399.

94–97⅑–New. Judgment for temporary total disability must limit total recovery and permit reduction of future allowances. 26 **OhA**497, 160**NE**484.

94–97⅒–New. Where injury has not healed nor attained a permanent or quiescent state, so as to be confined to any degree of permanent impairment, employee is entitled to have his compensation continued for full statutory period of five hundred weeks, notwithstanding injury is confined to his leg below his knee, and compensation period prescribed for loss of a foot or leg below the knee does not apply. 88 **IndA** 64, 163**NE**232.

94–97⅓–New. Award for cost of operation for hernia and eight weeks' compensation for temporary total disability following operation is proper. **MoA** 18**SW(2d)**84.

94–97½–New. Where injury results in permanent or partial total disability, additional compensation may be had. **TexCommnA** 14**SW(2d)**1015.

94–97⅓–New. As to compensation for temporary total disability, hernia stands on same footing as any other injury made compensable. **MoA** 18**SW(2d)**89.

94–97¼–New. After period of total incapacity there may be period of partial incapacity followed by another period of total incapacity, and employee may be awarded compensation whether incapacity is total or partial. 266**Mass** 323, 165**NE**391.

94–97⅕–New. Period for which compensation is to be paid does not require that it shall be received continually and without interruption. 266**Mass** 323, 165**NE**391.

94–97⅙–New. The test whether an employee who, under stress of circumstances, attempted to work and did work after injury is whether her physical condition is so impaired by the injury as to prevent her from securing and holding employment for physical labor. **TexCivA** 19**SW(2d)**821.

94–97⅐–New. Allowance for temporary total disability and for permanent total disability is erroneous where the disability was permanent from the beginning. 41**Wyo** 220, 284**P**260 (double compensation not intended by legislature).

94–97⅛–New. "Totally incapacitated" means disqualified from performing usual tasks in way to enable employee to procure and retain enployment. **Tex CivA** 26**SW(2d)**322.

94–97⅑–New. Maximum compensation allowable for total disability is that provided for permanent total disability. **Okl** 292**P**865.

94–97⅒–New. Award for temporary total disability cannot be based on expectation of increased wages after reaching majority. 231**AppDiv**768, 245 **NYS**340.

94–98 14**F(2d)**86; 200**Cal** 39, 251**P**635; 107**Conn**63, 139**A**503; 35**GaA**772, 135**SE** 103; 321 **Ill** 533, 152**NE**535; 124**Kan** 214, 257**P**724; 9**LaA**108, 119**S**88; **Me** 151**A**141; 179**Minn**388, 229**NW**553; 138 **Okl** 45, 280**P**290 (temporary total disability); **Utah** 287**P**931. But see 2 **LaA**494. [b] (1) 124**Kan**214, 257**P**724; 114 **Okl** 170, 244**P**778.

§5–1 107**Conn**63, 139**A**503. [a] (1) **TexCommnA** 292**SW**204. [b] **In Connecticut** (1) statute provides full compensation shall not be allowed for disability due partly to preëxisting disease but compensation shall be allowed only for proportion of disability due to aggravation of disease by the injury. 103**Conn**701, 131**A**739; 103**Conn**720, 131 **A**745. (2) In such statute, term "disability" is used in sense of incapacity and refers to living employees, so that statute is inapplicable to compensation claim for death, in which case full compensation is awarded. 103**Conn**701, 131 **A**739. (3) Under statute preëxisting tendency to disease or condition of employment tending to produce disease is not preëxisting disease. 103**Conn** 720, 131**A**745. (4) Term "injury" as used in such statute is used in sense of compensable injury and is correlative with such incapacity or disability as is compensable. 103**Conn**720, 131**A**745. (5) If preëxisting disease existed prior to date of statute, prima facie right of employee to full compensation for disability due to aggravation thereof would be reduced to recovery for that proportion of disability due to such aggravation, but would not be so reduced where abnormal condition of body arose after statute. 103**Conn**720, 131**A**745. [c] **In Alabama** (1) general provisions as to compensation for loss when employee had received previous injury does not apply in cases covered by special provision for loss of second eye, leg or arm. 218**Ala**137, 117**S**663. (2) The statute making special provision in case of loss of second eye ap-

plies, though previous loss occurred outside of employment. 218Ala137, 117 S663.

95-1½-New. Award for total incapacity may be made, although it developed more than five hundred weeks after injury. 266Mass323, 165NE391.

95-1⅓-New. Where at time of injury in question employee had an industrially useful hand, he is entitled to loss by amputation as if previous injuries had not occurred. 89 IndA518, 167NE149.

95-2 34PortoRico 430. [e] **No award for loss of hearing** not associated with loss of earning power. 214AppDiv356, 212NYS73.

95-3 82Mont543, 268P495. [a] **Duty of employee to seek work.**-(1) Employee not totally disabled after hearing by board making award for permanent partial disability must make active effort to procure such work as he can perform. 82Mont543, 268P495. (2) Employee found to have been totally disabled to time of hearing, but only partially disabled thereafter, should have sought work prior to hearing to furnish evidence that work was not obtainable. 82Mont543, 268P495.

95-5 5LaA241. See also 2LaA522; 2 LaA556. [a] **Return of workman to service,** after permanent partial disability, at same or better wages than before, does not bar recovery of compensation. 122Kan178, 251P191.

95-6 128Kan403, 278P16; TexCivA 5 SW(2d)181. [c] **In Oklahoma** test as to right of injured employee to receive compensation is only dependent on his having received accidental personal injury resulting in permanent partial disability as provided in schedule of act. 115 Okl 173, 242P217. [d] **In Missouri,** under statute, commission has authority to allow compensation for permanent partial disability resulting from loss of portion of finger without evidence of loss of earning power. A 17 SW(2d)554.

95-7 110Conn248, 147A680; 161La 1108, 109S917; 143 Okl 29, 287P69 (temporary total disability); 94Pa Super19 (temporary loss of use); Tex CivA 297SW255; Utah 286P959 (injury to teeth). [a] **Injury to particular member** which incapacitates generally from performance of customary duties is not "specific" within meaning of statute. TexCivA 297SW255.

95-7½-New. Compensation acts define "partial incapacity" as lack of physical power in part only or physical inability in part of injured member. Tex CivA 26SW(2d)676.

95-8 But see 23AlaA515, 128S119 (entitled to statutory difference between average weekly wages at time of injury and percentage of amount he is able to earn in partially disabled condition). [a] **Where in cases of partial incapacity,** compensation shall be sixty per cent of average weekly wages, account is taken only of wages received prior to injury. TexCommnA 291SW1085.

95-9 112 Okl 101, 240P96; 156Tenn 193, 299SW798. [b] **In absence of evidence of wage earning capacity after injury,** there can be no award under such statute. 116 Okl 119, 243P720.

95-9½-New. Under some statute compensation for all permanent injuries of designated class is awarded regardless of earning power of injured employee after injury. Md 131A164.

95-9⅓-New. Compensation on "wage earning capacity" and not on actual earnings nor earning opportunity. 221 AppDiv155, 223NYS73.

95-9¼-New. Compensation for permanent partial disability to sight of both eyes is governed, in some jurisdictions, by statute providing that in cases of permanent partial disability not scheduled, compensation shall be fifty per cent of difference between wage before accident and wage which workman is able to earn thereafter, not exceeding stated sum per week for stated number of weeks. 156Tenn373, 2 SW(2d)89.

95-10 See also 8LaA762. [b] **Disability rating not lost by return to work at equivalent wage.-WVa** 154SE766.

96-12½-New. Period of total disability must be deducted from period fixed for permanent partial disability in determining compensation for permanent partial disability. 215Ala79, 109S377.

96-12⅓-New. Deduction from period of compensation for permanent partial disability of leg for compensation paid for temporary total disability held erroneous. 3Del 317, 138A358.

96-12¼-New. Amount, not period, of compensation, varies under statute. 3 Del 317, 138A358.

96-12⅕-New. Under Delaware statute, minimum compensation for permanent partial impairment of leg is five dollars per week unless wages are less. 3Del 317, 138A358.

96-12⅙-New. In jurisdictions where recovery is allowed for total disability, although employee's condition is previously impaired, the same rule applies where there is a partial disability. 35 GaA772, 135SE103.

96-12⅐-New. Injury to hand causing stiffness and lack of strength is compensable as partial disability to do work of reasonable character. 161La 889, 109S538.

96-12⅛-New. Permanent loss of use of hand held "partial incapacity." Tex CivA 293SW580.

96-12⅛-New. Award allowed for permanent partial incapacity to arm and hand. TexCivA 295SW279.

96-12 1/10-New. Where there is partial incapacity, employee is entitled to statutory minimum in case there is no evidence on which to base such compensation. 122Kan69, 251P184.

96-12 1/11-New. Measure of compensation provided by statute for partial disability should be used if possible of application. 82Mont543, 268P495.

96-12 1/12-New. Award for injury to left arm and right hand, according to ratio if partial to total loss of each member has been held proper. 156Tenn 184, 299SW772.

96-12 1/13-New. Permanent partial loss of hearing has been held compensable as a disability due to injury to a member resulting in less than total loss of use thereof. 156Tenn179, 299SW802.

96-12 1/14-New. The maximum period of compensation for temporary partial disability should be reduced by the period for which the employee was paid for total disability. 156Tenn64, 299 SW811.

96-12 1/15-New. Statute does not permit partial incapacity payment with award for permanent total incapacity. Tex CivA 300SW206.

96-12 1/16-New. Compensation for incapacity during time spent in hospital for operation and cure is properly allowed although operation was had over two months after injury. 149Va307, 141SE225.

96-12 1/17-New. The injured employee is presumed entitled to full compensation until able to resume work of same character in which he was engaged when injured subject to employer's right of tendering work suitable to his condition. 88 IndA64, 163NE232.

96-12 1/18-New. Where he is able to perform labor of character previously performed only with aid of specially designed tools, or by pain and inconvenience, or aid of his fellow workmen, the fact that he received as much wages after injury as before does not bar his right to compensation. 128Kan9, 275 P1075(2dcase).

96-12 1/19-New. An injured workman is not denied compensation where, at request of his employer, he returns to his employment and does such work as he can in spite of his injury. 128Kan403, 278P16.

96-12 1/20-New. Injury to hand of employee cannot be divided into two units, so as to permit of compensation for incapacity to both hand and arm. Tex CommnA 10SW(2d)982.

96-12 1/21-New. Under some statutes the method of computing compensation for permanent partial loss of use or function of members mentioned in a schedule providing for compensation for loss of members is to apply the percentage of disability to the period of compensation and not to the rate. 118Nebr 605, 225NW770.

96-12 1/22-New. Some statutes limit award for partial disability to stated number of weeks. 41GaA113, 151SE812.

96-14 TexCivA 294SW925; 193Wis46, 213NW660 (within six months of injury). See also 43 Ida477, 253P132. [c] **Whether award is to be in gross or weekly** is held not to concern employer in insurer. 193Wis46, 213NW660. [d] **Only exceptional circumstances** will warrant lump sum award. 217AppDiv414, 216NYS625. [e] **Evidence held insufficient to support judgment for lump sum award.-TexCommnA** 14SW(2d)798; Tex CivA 16SW(2d)929. [f] **Evidence held to warrant lump sum award.-Tex CommnA** 17SW(2d)1046. [g] **Evidence held not to require finding** that payment made employee constituted lump sum settlement in suit by insured to reform compensation policy and recover amount paid thereon to one of its employees. 168La422, 122S278.

96-14½-New. Judgment for lump sum award on refusal of insurer to comply with board's order has been held error in absence of determination of claimant's condition. TexCivA 271SW225.

96-14⅓-New. Arbitrator held without power to make lump sum award. 123 Kan628, 256P992.

96-14¼-New. Under statute permitting lump sum award where interest of justice would be promoted, award held erroneously made under circumstances. 220AppDiv786, 222NYS94.

96-14⅕-New. In Texas, lump compensation is payable only in case of total permanent incapacity. TexCivA 293SW 580.

96-14⅙-New. Court cannot commute compensation payments to lump sum unless injury results in total permanent incapacity. TexCivA 300SW196.

96-14⅐-New. Where permanent impairment of forearm did not result in total incapacity, awarding lump sum payment was held unauthorized. TexCivA 300SW196.

96-14⅛-New. Manifest hardship and injustice held not so apparent as to require lump sum payment. TexCivA 2 SW(2d)902.

96-14⅑-New. Employer voluntarily making periodical payments and applying for determination of further award is entitled to statutory discount on further lump sum judgment. 130Kan58, 285P550.

96-15 29F(2d)343; 215Ala79, 109S377; 39GaA47, 146SE45; 41GaA520, 153SE 524; 9LaA108, 119888; 10LaA141, 119 S777; 10LaA719, 122S141; LaA 130S 871; 225AppDiv190, 232NYS502 [aff 250NY589, 166NE335(3dcase)]; 139 Okl 302, 282P293; 159Tenn459, 19SW(2d) 243 (loss of eye); TexCommnA 13SW (2d)364; TexCommnA 25SW(2d)304; TexCivA 4SW(2d)90; TexCivA 11SW (2d)627. See also 154Tenn292, 289SW 500. [d] **Construction and application of statutes.**-(1) Such provisions are procedural and inapplicable to substantive matter of award of compensation. 82 Mont543, 268P495. (2) Award on percentage basis in order to do equity is erroneous. 82Mont543, 268P495. (3) Compensation allowed for permanent partial disability by internal injuries. 82Mont543, 268P495 (statutes held applicable). (4) Statute allowing percentage for total loss of member causing partial disability held not applicable to internal injury causing partial disability. 82Mont543, 268P495.

96-16 TexCivA 16SW(2d)560.

96-16½-New. In fixing percentage of loss of use of eye, reduction in vision before accident should be considered. 215AppDiv857, 213NYS327.

96-16⅓-New. In fixing percentage which fractional loss of vision bears to total loss of an eye, award should be based on percentage of loss of vision without use of glasses. Md 131A164.

96-16¼-New. In determining percentage of permanent disability by injury to eye it is erroneous to include in award percentage for disability attributed sole-

ly to nonindustrial disease. 206Cal 134, 273P572.

96-17 129Kan413, 283P58 (minimum of six dollars a week for temporary total disability); 161Tenn149, 29SW(2d)251. [a] **Injuries totally incapacitating employee not specific injury.–TexCivA** 29SW(2d)458. [b] **Section inapplicable to hernia** which another section treats. TexCivA 31SW(2d)669.

96-18 15F(2d)772; 10LaA397, 123S198; 11LaA321, 123S445; 3LaA696; 4LaA424; 5LaA350; 7LaA72; 7LaA496; 7LaA513; 7LaA734; 8LaA745; Me 151A141 (legs); 153Md274, 138A235; 174Minn551, 219NW867; 217AppDiv797, 216NYS720; 222AppDiv406, 226NYS89; 221AppDiv620, 224NYS734; 221AppDiv687, 225NYS372; 122 Okl 257, 254P98; 139 Okl 236, 281P964 (except medical treatment); 9PaDist&Co 507. See also 5LaA672; 5LaA693; 6LaA499. But see 124Kan115, 257P939; 217AppDiv797, 216NYS720. [a] (5) Compensation awarded on facts shown as for loss of right eye. 232Mich599, 206NW490. (6) Permanent partial loss of use of member is compensable as distinct scheduled subject of compensation. 36 OklACR474. (7) Where temporary total disability is followed by partial and temporary disability, a provision for permanent partial disability is inapplicable. 214Ala87, 106S499. [b] 115 Okl 173, 242P217.

96-18½-New. There can be no award for a scheduled injury occurring before such injury was included in the statute. 214AppDiv356, 212NYS73 (where injury is not associated with loss of earning power).

96-20 36F(2d)216.

96-21 221AppDiv687, 225NYS372. See also 219AppDiv152, 219NYS219.

96-21½-New. Provision in Compensation Act for payment for partial incapacity of sixty per cent of difference between wages before injury and earning capacity after injury not exceeding certain weekly amount, does not limit compensation to half the amount for fifty per cent loss of normal capacity. Tex CivA 274SW671.

96-21⅓-New. Compensation cannot be awarded for permanent partial disability and for specific loss of use of member under some statutes where both were result of some injury. 78Mont579, 254P880.

96-21¼-New. Laborer suffering permanent partial incapacity in loss of use of foot entitled to compensation therefor, although receiving same wages as before injury. TexCivA 285SW848.

96-21½-New. Employee losing first, and almost one-half second phalange of thumb is entitled to half compensation for loss of thumb. 174Minn551, 219NW867.

96-21⅔-New. No payment additional to schedule provision is due for disfigurement or disability from loss of member, except for medical services to cure defect from amputation. 174Minn551, 219NW867.

96-21⅞-New. Loss of eye, disfigurement, impaired earning capacity, expense of constant treatment of eye socket, and cost of artificial eyes are so distinct as to warrant separate awards. 88IndA22, 163NE27.

96-21⅞-New. When compensation is allowed under statute relating to compensation for specified injuries, such compensation allowed must be in lieu of all other compensation. 226Ky22, 10SW(2d)478.

96-21⅞-New. Employee, rendered deaf in one ear, almost deaf in other, and unable to maintain equilibrium by injury sustained is entitled to 65 per cent of average weekly wage for one hundred weeks. 13LaA402, 128S321.

96-21 1/10-New. Hysteria cannot be termed classification under compensation law but is only a disease. Wash 287P32.

96-22 214Ky675, 283SW1010; 226Ky22, 10SW(2d)478; Me 151A141; 227AppDiv673, 236NYS425; 144 Okl 81, 289P776; 285Pa395, 132A345; 285Pa385, 132A347; TexCommnA 25SW(2d)304; TexCivA 295SW279; TexCivA 11SW(2d)627. See also 219AppDiv152, 219NYS219. [a] **In Minnesota,** under statute, double disabilities coming within four hundred weeks' provision relate only to total disability of at least two members. 177Minn589, 225NW895. [b] **Singular including plural.**–139 Okl 302, 282P293 (statute relating to loss of use of eye applies to loss of use of both eyes).

96-23 167La570, 119S877; 140 Okl 59, 282P610 (compensation cannot be fixed on basis of partial permanent loss of hand); TexCommnA 27SW(2d)151 (total disabilities).

96-23½-New. Employee, suffering temporary disability of one leg while receiving compensation for loss of other leg, cannot receive compensation for former to begin when compensation for latter ceases. 215AppDiv857, 213NYS321.

96-23⅓-New. An injury producing disability to separate members and increasing the loss cannot be joined to decrease the compensation intended by statute. 156Tenn184, 299SW772.

96-24 337 Ill 246, 169NE161; 233Ky699, 26SW(2d)513; 93PaSuper224; 93PaSuper225; 161Tenn142, 29SW(2d)656. But see 141 Okl 155, 284P47 (commission may make award for temporary total disability and permanent partial disability). [a] **Award to employee,** suffering loss of arm and broken legs, of compensation in addition to that for loss of arm held proper. TexCivA 298SW164. [b] **In Oklahoma** (1) employee sustaining injuries to hand, arm, and leg resulting in temporary total disability was made, may have additional award for permanent partial loss of use of leg. 142 Okl 232, 286P338. (2) Where employee suffers specific injury, compensation may be awarded therefor in addition to that for temporary total disability. 144 Okl 89, 289P708.

96-25½-New. Under statutes where employee sustains injury resulting in loss of member he is entitled to payment of compensation, exclusive of any other compensation except as provided in other sections of the act. 78Mont579, 254P880.

96-25⅓-New. Compensation for loss of member is payable when loss occurs, 78Mont579, 254P880.

96-25¼-New. which may be when the accident occurs or amputation may become necessary immediately. 78Mont579, 254P880.

96-26 252NY492, 170NE118; 161Tenn142, 29SW(2d)656; TexCivA 298SW164. See also 214Ky635, 283SW1007. But see 219AppDiv152, 219NYS219; 144 Okl 81, 289P776 (provision for specific award for loss of toes governs provision for percentage of disability to foot).

96-26½-New. Under Tennessee statute, in case of a single injury affecting the use of body about the hip and back, causing permanent partial disability, petitioner is entitled to compensation in accordance with the last paragraph of § 28 subs (c). 153Tenn255, 283SW447.

96-28 See also 214Ky675, 283SW1010; 93PaSuper221.

96-29 122 Okl 159, 252P430. See also 214Ky675, 283SW1010.

96-29½-New. All disability resulting from permanent injuries is allowed under statutes in some jurisdictions. 125Kan747, 265P1114; 85PaSuper531 (additional compensation allowed for permanent disfigurement as well as loss of member).

96-29⅓-New. These statutes provide for a sole and single method for the specific injury, and exclusive of any other standard, and without regard to working capacity. 85PaSuper531 (specific number of weeks for loss of member or period fixed by board not exceeding certain number for permanent disfigurement).

96-29¼-New. Payment of maximum allowance for loss of leg held not to relieve employer from further liability for disability from injury to hip. 217Ky371, 289SW270.

96-29½-New. In computing percentage of permanent disability caused by second injury, disability caused by first injury may not be deducted. 202Cal 459, 261P466.

96-29⅔-New. "Average annual earnings" of an employee sustaining a second injury must be based on earning capacity in the labor market and not on wages received. 202Cal 459, 261P466.

96-29⅞-New. Schedule awards cannot be made to run consecutively. 224AppDiv324, 230NYS577; 230NYS706.

96-29⅞-New. Where employee sustains total disabilities from injury to hand and total disability from injuries generally under statute he can only recover for injuries producing longest period of total incapacity. TexCommnA 25SW(2d)304.

97-30 215Ala79, 109S377; 3Del 132, 131A868; 12LaA338, 124S884(2dcase); 12LaA600, 126S255; Utah 272P239. [a] **Compensation for injury to hand.–Utah** 272P239. [b] **Compensation for loss of portion of distal joint of finger** should be based in proportion to compensation for loss of joint rather than loss of whole finger. MoA 17SW(2d)554. [c] **Award held not excessive.–MoA** 29SW(2d)730.

97-31 161La1108, 109S917. [a] (3) Compensation for loss of more than a hand, but less than two thirds of arm, is determined by adding to compensation period for loss of hand such period as will equitably adjust compensation between loss of hand and loss of arm, not to equal, however, period for loss of arm. 201 Iowa607, 206NW146. (4) Thus where claimant had lost thirty per cent of use of his left foot as result of previous injury, and his permanent loss after accident was sixty-five per cent thereof, he was entitled to thirty-five per cent of schedule for foot, and allowance of sixty-five per cent was error. 213AppDiv545, 210NYS481. (5) Employee who lost first phalange of thumb and one-sixth part of second phalange is not entitled to compensation for loss of thumb but to relief under proportionate award provision. 3Del 132, 131A868.

97-31½-New. Under a statute providing award for permanent loss of sight or reduction to one tenth of normal vision, and also proportionate awards for other permanent reductions, latter provision does not apply to reduction to point of industrial blindness. 85IndA552, 154NE774.

97-33 See also 41GaA520, 153SE524 (proportioning to avoid small payments).

97-34 139 Okl 302, 282P293; Okl 288P473.

97-34½-New. Statute providing proportionate compensation in case of loss of substantial part of member is held not to be construed with statute dealing with total incapacity. 106Conn401, 138A448.

97-34½-New. Where there are specific provisions for loss of phalange of one finger and partial loss of use of index finger, award cannot be made for proportionate loss of use of hand. 250NY405, 165NE827.

97-35 233Ky699, 26SW(2d)513; 78Mont579, 254P880. But see 90PaSuper318.

97-35½-New. Where injury did not at first prevent continued employment, but later resulted in cancer causing death, temporary compensation to date of diagnosis of cancer, and permanent compensation to date of death is recoverable by personal representative. NJ 131A686.

97-35⅓-New. Claimant may be awarded compensation for temporary total disability and permanent partial disability to run consecutively. 154Md239, 140A215.

97-35¼-New. Awards for injuries to employees under act may not be consecutive. 249NY433, 164NE341.

97-35⅕-New. In some jurisdictions where concurrent injuries result in concurrent incapacities employee may receive compensation only for injury producing longest period of incapacity. TexCommnA 27SW(2d)151.

97-36 208 Iowa790, 226NW138 (amputation of finger through head of second phalange held loss of entire finger); 2

LaA778. See also 85Colo 576, 277P789.
97-38 85 IndA363, 154NE290. [d] **Injury to finger not necessitating amputation** is compensable as loss of finger. 85 IndA363, 154NE290.
97-39 8LaA779. See also 2LaA564. Contra 3Del 132, 131A868. [a] (1) But see Del 131A868 [disappr 171AppDiv 956, 156NYS262]. (15) Provision for loss of two phalanges does not cover loss of less than two. 162La556, 110S754. (16) Necessary amputation of leg about five and one half inches below knee joint constitutes loss of leg. 238Mich572, 214 NW174. (17) Where there is loss of one entire phalange and half of another phalange of finger, compensation is based on loss of whole finger. 86PaSuper514. (18) Loss of phalange of thumb is permanent injury. 90PaSuper434.
97-39½-New. Under provision of act "for loss by severance of at least one phalange of toe," where workman lost phalanges of two toes, an award for two periods of twelve weeks each is held proper. 48RI 353, 138A175.
97-40 104Conn569, 134A68; 316 Ill 622, 147NE375 (loss of sight compensable though impaired by previous injury and though payments had been made therefor by same or other employer); 234 Mich110, 208NW45; 231AppDiv768, 245 NYS371. [j] **Ear is not "member"** so as to allow recovery for loss of hearing in one ear. 33GaA666, 127SE804. [k] **Test showing vision of eye to be twenty one hundredths** does not support award for total loss of eye. 214AppDiv512, 212 NYS426.
97-40½-New. Claimant having fifty per cent vision before injury may recover total loss on losing remaining vision, 214AppDiv512, 212NYS426.
97-40½-New. but may not recover for total loss where his fifty per cent vision is reduced to twenty per cent of normal vision. 214AppDiv512, 212NYS426.
97-40¼-New. Employer is liable for loss of eyeball from accident although he had previously paid for industrial blindness in the same eye caused by a prior accident. 166Minn506, 208NW188.
97-40⅛-New. In Kansas more may be recovered for permanent partial loss of sight of eye than for total loss of eye. 120Kan747, 244P849.
97-40⅙-New. Under schedule awarding specified compensation for loss of two phalanges of any finger, loss of one phalanx of a finger is not compensable. 160La585, 107S436.
97-40⅐-New. Schedule award for loss of foot covers all results of injury, and damages for disuse of leg due to atrophy cannot be added. 217AppDiv797, 216 NYS720.
97-40⅛-New. Workman losing ninety-nine per cent of vision in one eye is entitled to compensation for loss of use of such eye, although vision could be largely restored by properly adjusted glasses. TexCivA 284SW698.
97-40⅑-New. Loss of all efficient vision of eye previously sixty four per cent normal entitled employee to compensation for loss of eye. 125Me395, 134A374.
97-40⅒-New. Provision for permanent impairment of physical function covers loss of three front teeth, although replaced. 162La556, 110S754.
97-40⅑-New. Loss of lense of eye held compensable as loss of substantial part of member. 106Conn401, 138A448.
97-40⅓-New. In determining compensation for loss of lense of eye it was held function of one eye may be considered. 106Conn401, 138A448.
97-40⅓-New. Permanent impairment of forearm held equivalent to loss of hand and not to loss of entire arm. Tex CivA 300SW196.
97-40¼-New. Where a member is not lost and there is not a total loss of use, the amount of compensation is not limited by the amount provided for loss of the member. TexCivA 300SW667.
97-40⅕-New. Compensation for loss of one eye when there was seventy-five per cent impairment of vision of the other eye previously existing is limited to the compensation provided for loss of one eye. 206 Iowa120, 219NW65.
97-40⅙-New. Compensation in addition to that provided for loss of foot is not authorized by atrophy and defect of movement at knee and hip resulting from amputation. 253NY108, 170NE511.
97-41 130Kan70, 285P592; LaA 128S 686; Me 151A141; 122 Okl 159, 252P 430; 87PaSuper159 (hand); 87PaSuper 532; 94PaSuper19; 8PaDist&Co 17 (eye); TexCivA 26SW(2d)676 (hand); TexCommnA 27SW(2d)151; TexCivA 29 SW(2d)899 (hearing). See also 10LaA 688, 122S157(2dcase); TexCommnA 10 SW(2d)982. But see 39GaA47, 146SE 45. Contra 95PaSuper160 (finger). [c] 215AppDiv632, 214NYS449 (compensation for fifty per cent of loss of use held justified). [h] **Loss of use of hand.**–(1) Extent of loss of use of hand necessary to authorize compensation as for loss of hand is that degree of loss of use which would result from amputation between elbow and wrist. 36 OklACR 474. (2) Where loss of use of hand is not total but partial and permanent, it is error to enter award as for loss of hand. 36 OklACR474. [i] **Permanent loss of use of hand** means permanent and entire loss of use to which hand is ordinarily and customariiy placed. 122 Okl 159, 252P430.
97-41½-New. Under some statutes, the compensation for a permanent partial loss of a member is based on the extent to which the loss bears to total loss. 217Ala235, 116S134.
97-42 See also 11PaDist&Co 278.
98-43 87PaSuper532.
98-43½-New. Loss of use of lower part of leg is not compensable as loss of use of leg as a whole. 83 IndA616, 149 NE456.
98-43⅓-New. The question whether there has been a permanent loss of use of a hand is one of fact. 122 Okl 159, 252P430.
98-43¼-New. Where proper award is made for permanent partial incapacity loss of use of arm is factor therein and additional award should not be made therefor. 130Kan58, 285P550.
98-45 3LaA374. See also 7LaA338.
98-46 75CalA709, 243P455; 217Ky371, 289SW270. [d] **Evidence held to show result of operation would be problematical.**–10LaA374, 121S640.
98-47 40F(2d)271(2dcase); 214Ala155, 106S870; 77CalA314, 246P570; 40GaA 38, 148SE764; 40GaA178, 149SE98 (refusal held justified); 125Kan581, 264 P1051; 217Ky371, 289SW270; 10LaA 374, 121S640; 1LaA210; 1LaA501; 2 LaA462; LaA 130S257(2dcase); 69Utah 452, 256P397. See also 1LaA42.
98-47½-New. Where nature and cause of condition and success of possible operation are not clear, compensation should not be suspended. 214Ala155, 106S870.
98-47⅓-New. Employee need not submit to operation as condition to compensation, unless success is reasonably assured. 214Ala155, 106S870.
98-49 3LaA489, 490 [quotCJ]. [c] **Questions of fact.**–121Kan841, 250P261; 216Ky262, 287SW713. [d] **Where board refused compensation for hernia,** employee is not bound to submit to operation at own cost and risk before suing to set aside order. TexCivA 31 SW(2d)673.
98-49½-New. Such refusal is ground for release of employer from obligation to maintain employee. 322 Ill 368, 153 NE708.
98-49⅓-New. Under statutes in some jurisdictions injured employee cannot be compensated unless he submits to medical treatment that may reasonably be regarded as offering some relief if not entire relief. 75CalA709, 243P455.
98-49¼-New. Motion at trial to suspend compensation until operation is properly denied, unless employee is given reasonable opportunity to be properly advised. 214Ala155, 106S870.
98-49⅕-New. Reasonableness of refusal to submit to operation is held surely question of fact. 124Kan115, 257P 939.
98-49⅙-New. Board cannot order an employee to submit to amputation of leg as recommended by surgeons, 78Mont 579, 254P880.
98-49⅐-New. but it may absolve employer from making payments during period of claimant's unreasonable refusal to submit to such operation. 78 Mont579, 254P880.
98-49⅛-New. Employee receiving payments for period of partial disability after period of temporary total disability instead of submitting to operation recommended by surgeons cannot demand additional amount payable under statute for loss of leg on submitting to operation. 78Mont579, 254P880.
98-49⅑-New. Premature use of injured limb is held not to relieve employer of further liability. 217Ky371, 289SW270.
98-49⅒-New. Insurer is not entitled to invoke defense of statute requiring submission to operation where it had not sought to have operation performed. TexCivA 293SW210.
98-49⅑-New. Assent to operation conditioned on payment of compensation to date held refusal of offer. 322 Ill 368, 153NE708.
98-49⅓-New. Right to raise question of refusal of offer made at hearing held not waived by act of commission in ignoring offer. 322 Ill 368, 153NE708.
98-49⅓-New. An employee is not required to have a second operation after an unsuccessful operation. TexCivA 299 SW674.
98-49¼-New. Where claimant accepts medical services after denial of compensation because of refusal to accept same, he is not entitled to compensation before acceptance. 41GaA100, 151SE826.
98-49⅕-New. Refusal to submit to removal of injured eye held not to forfeit compensation for loss of other eye from sympathetic infection. 299Pa182, 149A 312.
98-49⅙-New. Employee must make reasonable effort to minimize injury. Utah 287P931 (effort to obtain employment).
98-49⅐-New. In such case claimant is not entitled to compensation where he had recovered from injury before acceptance of services. 41GaA100, 151SE 826.
98-49⅛-New. Employee receiving operation for hernia receives some compensation. CalA 287P577.
99-50 34GaA311, 129SE447. [a] **Benefit where there are no dependents.**–"Other benefit" provided for by California statute where there are no dependents must be of such character as to be administered under scheme of act and under direction of commission. 82CalA 610, 256P447.
99-51 34GaA311, 129SE447; 200Wis 512, 228NW118 (basis of daily compensation); 200Wis446, 228NW589 (award of four thousand eight hundred dollars held not excessive). [h] **Awards held not excessive.**–(1) $4946.80, employee earning $5.81 a day, annual contributions to dependents $1615.60, with father, mother, grandfather and nine brothers and sisters, dependents. 196 Cal 593, 238P662. (2) Other instances. Mo 29SW(2d)128. [i] **Awards held excessive.**–Award to widow until death or remarriage. 13LaA234, 127S755(1st case) (modified to 300 weeks). [j] **Industrial board is without power to change** by rule amount of compensation to be paid to a dependent as fixed by statute. 241NY312, 150NE127. [k] **Amount and distribution as controlled by federal employers' liability act.**–176 Minn130, 222NW643. [l] **Sum awarded must represent** fairly and justly aid to support, which dependent might reasonably have anticipated from deceased employee but for accident. 196Wis159, 220NW377. [m] **Probable financial loss** should be basis of compensation to dependents. Utah 278P1019. [n] **Where compensation or disability is continuous to time of death** compensation for death is paid as though death occurred within two years from injury. 35 OhA169, 172NE294 (construing statute). [o] **Where lump sum settlement made prior to death.**–TexCivA 29SW(2d) 430(1stcase).
99-51½-New. In Arizona compensation payable to widow and children of deceased workman is not affected by amount paid workman during his lifetime. 29Ariz161, 240P277.

99-51½-New. To be entitled to compensation, death must have resulted from compensable injury. 176**Minn**464, 223**NW**773.

99-52 124**Kan**322, 257**P**721; 125**Me**285, 133**A**161. But see 125**Me**408, 134**A**450.

99-54 124**Kan**222, 257**P**721; 125**Me**285, 133**A**161; 151**Md**78, 134**A**133.

99-55 See also 246**Mich**185, 224**NW**394.

99-55½-New. **In Alabama** compensation is payable so long as any named dependent survives throughout a period of three hundred weeks. 212**Ala**477, 103**S**447.

99-55½-New. Where there is no finding as to exact date when injuries were produced, board is justified in taking the date when the injuries caused the employee to give up work as the date of injury, on theory that they at least occurred as early as that date. 265**Mass**12, 163**NE**194.

99-56 214**Ala**125, 106**S**869. [a] (2) Childless widow remarrying is entitled to lump sum equal to one half of unpaid compensation. 168**Minn**512, 209**NW**630.

99-58½-New. Under statutes providing that the total sum due shall be paid directly to the surviving wife or husband for her or his own use and for the use and benefit of the child or children, the wife is not accountable to the child for compensation received where she discharged the duty of properly caring for the child during the whole period of compensation. 235**Mich**549, 209**NW**844.

99-58½-New. Nor in such case are the wife's heirs, representatives, or assigns accountable after her death. 235**Mich**549, 209**NW**844.

99-58¼-New. So that after the mother's death the son has no claim upon property purchased in joint names of herself and second husband with compensation money on the theory that half belonged to the son, and the second husband holds such half as the son's trustee. 235**Mich**549, 209**NW**844.

99-58½-New. Liability for compensation becomes fixed at the time of injury, even though obligation to pay becomes enforceable only after award. 241**NY**312, 150**NE**127.

99-58½-New. In New York under statute giving the industrial board the right to adopt reasonable rules consistent with and supplemental to the statute, it receives no power to change by rule the amount of compensation to be paid a dependent as fixed by statute. 241**NY**312, 150**NE**127.

99-58¼-New. The statute alone determines the right to death payment. 29 **Ariz**161, 240**P**277.

99-58⅛-New. The liability for compensation becomes fixed when the injury occurs. 241**NY**312, 150**NE**127.

99-58⅛-New. Compensation for death is vested interest passing under will of beneficiary. **TexCivA** 278**SW**294.

99-58 1/10-New. In a suit by a widow on an award previously given employee when alive, widow is only required to prove his death, dependence, and causal connection between injury for which he was awarded compensation and his death, since findings and award in previous case are conclusive. 103**Conn**701, 131**A**739.

99-58 1/11-New. In Pennsylvania compensation is payable where death occurs within three hundred weeks of time of accident, if it results from injury, or, by reason thereof, an incipient condition was hastened to development ending in death. 285**Pa**145, 131**A**703.

99-58½-New. In Texas, surviving spouse and heirs are expressly given right to recover exemplary damages for gross negligence of employer. **Tex CommnA** 283**SW**141.

99-58 1/13-New. The refusal of the department of labor and industries to pay overdue installments of pension to a person holding a power of attorney executed by a widow entitled thereto is arbitrary, although the widow resides in Russia where it does not appear that the compensation would reach the village where she resides. 142**Wash**160, 252**P**697.

99-58 1/14-New. Such refusal is not justified by danger of confiscation of the money by the Bolshevik government. 142**Wash**160, 252**P**697.

99-58 1/15-New. Average earnings of injured workman must be computed in manner prescribed by statute, although actual earnings are greater or less than sum so determined. **TexCivA** 282**SW**266.

99-58 1/16-New. Dependent, to obtain compensation, need not show employee was awarded compensation before death. 151**Md**78, 134**A**133.

99-58 1/17-New. Workmen's Compensation Law creates distinct causes of action for disability and death benefits. **TexCivA** 289**SW**75.

99-58 1/18-New. Compensation for employee's death is not part of estate but is exclusive property of beneficiaries. **TexCivA** 289**SW**75.

99-58 1/19-New. Compensation awarded to partial dependents should be limited to the actual loss sustained. 70 **Utah**116, 258**P**339.

99-58 1/20-New. Unpaid portion of award should go to widow not to administrator. **Conn** 135**A**575.

99-58 1/21-New. Release given by injured employee after injury and prior to death, for his suffering and loss, is not a bar to action by dependents for their benefit for death of employer. 124**Kan**222, 257**P**721.

99-58 1/22-New. Under some statutes limiting the period of compensation to three hundred weeks, where an injured employee is paid compensation for total disability for a number of weeks and thereafter returns to work and receives wages up to the date of his death from the accident, his dependents are entitled to compensation for a period of weeks measured by the difference between three hundred weeks and the number of weeks for which he received compensation and wages. 238**Mich**436, 213**NW**696.

99-58 1/23-New. Widow receiving compensation for herself and minor son and who supports son is under no duty to account to him for his proportionate share of such compensation. 239**Mich**373, 214**NW**62.

99-58 1/24-New. Where compensation has been paid to an injured employee under the act during his lifetime and he subsequently dies of the injury, compensation to dependents begins with date of his death and continues for not more than three hundred weeks from date of injury. 239**Mich**506, 214**NW**938.

99-58 1/25-New. Statute permitting consideration of expected increase of earnings of injured employee in determining average weekly wage held applicable to death claim. 24 **OhA**66, 156**NE**616.

99-58 1/26-New. Findings held to show it impracticable to compute average weekly wages of deceased as defined by statute and justify resort to another way. **TexCivA** 293**SW**246.

99-58 1/27-New. Right to compensation which has accrued, vests as it accrues in the employee and survives as in any other contract. 105**Conn**398, 135**A**578, 51**ALR**1443.

99-58 1/28-New. Compensation Act gives cause of action to injured person and in case of death to beneficiaries. **Tex CommnA** 295**SW**588.

99-58 1/29-New. The industrial commission has a wide discretion in determining the amount of compensation to be awarded to partial dependents. 70**Utah**116, 258**P**339.

99-58 1/30-New. Compensation for incapacity of employee who dies during proceedings is payable to estate. 105**Conn**398, 135**A**578, 51**ALR**1443.

99-58 1/31-New. Compensation due employee at time of his death is payable to his widow. 248**NY**40, 161**NE**324.

99-58 1/32-New. Where an employee dies from causes unrelated to the accident, his widow has no claim for a death benefit. 248**NY**40, 161**NE**324.

99-58 1/33-New. Compensation awards are intended for the sustenance of beneficiaries and a lump sum award of death benefits should not be made to pay debts. 221**AppDiv**624, 225**NYS**46.

99-58 1/34-New. A lump sum award to a widow to complete the purchase of a home may be granted only on a satisfactory showing of benefits to dependents. 221**AppDiv**624, 225**NYS**46.

99-58 1/35-New. In the absence of a showing of willful misconduct by the employer, dependents of a deceased employee can recover only under compensation act. **Utah** 263**P**78.

99-58 1/36-New. Under some statutes, payments to dependents run from the date of the injury in case no payments had been made to employee. 265**Mass**12, 163**NE**194.

99-58 1/37-New. Where laborer was fatally injured while engaged in seasonal occupation, his average weekly wages are computed under statutes specially applicable thereto. 225**AppDiv**167, 232**NYS**437.

99-58 1/38-New. Compensation may not be denied dependents of deceased because act specifies no duration of payments of weekly compensation. 168**La**651, 123**S**112.

99-58 1/39-New. Average weekly wage of deceased employee must be ascertained before compensation can be awarded or judgment rendered. **TexCivA** 168**SW(2d)**321.

99-58 1/40-New. The death of a workman while receiving compensation for an injury terminates all rights to the compensation to accrue to him thereafter. 176**Minn**464, 223**NW**773.

99-58 1/41-New. Limiting compensation to amount ordered paid by divorce decree is proper. 88 **IndA**32, 163**NE**26.

99-58 1/42-New. Compensation claimant has no power to waive provisions of the act in record to the amount of compensation and the manner of payment. 208 **Iowa**430, 226**NW**124.

99-58 1/43-New. Widow may receive compensation for death of husband where none has been paid previous to death. 13**LaA**234, 126**S**600.

99-58 1/44-New. Allowance to father and mother jointly as tenants by entirety is not erroneous where deceased minor employee had contributed to common fund for family suppert, though wages were handed to mother. **MoA** 25**SW(2d)**1084.

99-58 1/45-New. In a proceeding for compensation for the death of a minor employee, an instruction that the jury might consider any increase in deceased's wages held properly given. **TexCivA** 218**SW(2d)**314.

99-58 1/46-New. Where employee's foot was amputated and he died from cause other than injury widow is entitled to unpaid compensation for amputation. **IndA** 171**NE**210.

99-58 1/47-New. In Missouri maximum award for death benefits under compensation act is not six thousand dollars. **MoA** 27**SW(2d)**755.

99-60½-New. Under some statutes where both father and son, whose joint earnings were required for the support of the family, meet with death in the same accident, the maximum provided by statute may be awarded for each death. 67**Utah**25, 245**P**381; 45**ALR**882.

99-61 **IndA** 168**NE**716; 124**Kan**222, 257**P**721; 222**Ky**644, 18**W(2d)**1032; 11 **LaA**66, 120**S**403(2dcase); 10**LaA**347, 120**S**530; **LaA** 125**S**510; 198**NC**614, 152 **SE**805 (three hundred and fifty weeks of average weekly wage to sole partial dependent); 11**PaDist&Co** 765. [h] **Award held proper.**-Twelve dollars per week to widow plus one dollar per week for each dependent minor, where deceased's average earnings for preceding fifty-two weeks was twenty-four dollars. 213**Ala**596, 105**S**648. [i] **In Alabama** grandmother surviving mother dying within three hundred weeks is entitled to only twenty per cent of weekly wage. 212**Ala**477, 103**S**447. [j] **"Weekly wages"** interpreted. 215**Ala**25, 109**S**151.

99-62 [a] **Compensation statute** has been held to indicate that section respecting compensation for death is independent of others. **Mo** 29**SW(2d)**128.

99-64½-New. On the widow's remarriage, each one of several minor children is entitled to his pro rata share of sixty-six and two-thirds per cent of de-

ceased's wages. 213AppDiv509, 210 NYS655.

99-66½-New. Compensation to widow continues for the period named in the statute until her death, 213Ala584, 105 S657.

99-66⅓-New. or marriage, as expressly provided by statute. 213Ala584, 105 S657.

99-66¼-New. Compensation to a widow does not cease on her commitment to a public institution for the insane. 213Ala584, 105S657 (statute applies only to injured employee without dependents).

99-66⅕-New. A clause in a statute "during dependency" means during the dependency as defined by the statute, 213Ala584, 105S657.

99-66⅙-New. that is, the period determined by the happening of an event on which it shall cease. 213Ala584, 105S 657.

99-66⅐-New. Payment of compensation does not depend on indigence after right has attached. 213Ala584, 105S 657.

99-66⅛-New. Continued compensation during the statutory period is not conditioned on the continued dependency on the bounty provided. 213Ala584, 105 S657.

99-66⅑-New. Under some statutes the actual cost of maintenance of a minor employee should be deducted in determining the amount of an award for his death. 67Utah25, 245P381, 45ALR882.

99-66⅒-New. A parent of a deceased minor employee should be allowed benefits received from him either by way of contributions or from his labors. 67 Utah25, 245P381, 45ALR882.

99-66⅓-New. Apportionment of an award may be made between the surviving wife wholly dependent on deceased for support and a minor child by former wife. 66Utah256, 241P362.

99-66½-New. Statutes expressly provide for apportionment of the award between one who was wholly dependent on deceased and one who was partially dependent. 66Utah256, 241P362.

99-66⅓-New. In determining benefits to surviving children, an award of two years' compensation in a lump sum to the widow on her remarriage must be considered so as to keep the total within the limit set by the statute. 214App Div354, 212NYS65.

99-66¼-New. After expiration of the two-year period following the remarriage of their mother, each of the children was entitled to an equal share of the legal per centum of the father's wages allowed as compensation. 214 AppDiv354, 212NYS65 (where lump sum of two years' compensation had been allowed to widow on her remarriage).

99-66⅕-New. An award to a dependent mother for payment accruing after the employee's death from other injuries has been held unauthorized. 213 AppDiv507, 210NYS701.

99-66⅙-New. Under statutes fixing compensation in case an injured employee has dependent minor children, an award to the widow and children in excess of fifty per cent of the employee's weekly wages is proper. 213Ala244, 104S422.

99-66⅐-New. Under the Arizona statute the employer is not liable for death occurring more than six months after the accident. 29Ariz161, 240P277.

99-66⅛-New. A provision that dependency of the widow shall terminate with her marriage subsequent to the death of the employee applies in case of a valid subsisting marriage, not in the case of void or voidable marriage. 83 IndA181, 147NE811.

99-66⅑-New. A decree of annulment of a subsequent marriage relates back to the time of the marriage contract. 83 IndA181, 147NE811.

99-66⅒-New. Under acts in some jurisdictions the employer's liability is confined to death resulting from the injury within two years thereafter. 209 Ky345, 272SW884 (constructing act as whole).

99-66⅓-New. In New York the total amount of awards for the death of an employee is limited to sixty-six and two-thirds per cent of the average wages of deceased. 214AppDiv354, 212 NYS65.

99-66½-New. The death benefits payable are governed by the statute as it existed at the time of the employee's death. 214AppDiv354, 212NYS65.

99-66⅓-New. Personal representative of deceased employer is entitled to compensation which accrued up to date of death. NJCPl 131A686.

99-66¼-New. Statute requiring apportionment of compensation where disability is partly due to preexisting disease has been held inapplicable to claim for death benefits, in which case full compensation is granted. 103Conn701, 131A739.

99-66⅕-New. In Utah, compensation is reduced to half of award when alien beneficiary at any time removes to foreign country. 68Utah334, 250P145.

99-66⅙-New. Awards to parents may be made within twenty-five per cent maximum only if and to extent that awards to surviving wife and children are less in aggregate than sixty-six and two-thirds per cent of deceased's average wages. 215AppDiv109, 215NYS 513.

99-66⅐-New. Commission held without power to award full compensation to alien widow who had moved to foreign country, under statute of award in such case. 68Utah334, 250P145.

99-66⅛-New. Evidence held not to show benefit or justice of lump sum award to widow and children. 217App Div414, 216NYS625.

99-66⅑-New. The right of a stepchild to compensation does not terminate on remarriage of the mother. 219 Ky799, 294SW470.

99-66⅒-New. Decree for lump sum is not injurious to insurer where all proper discounts reducing future payments to present value were allowed. Tex CivA 28SW(2d)866.

99-66¼-New. Increased compensation will not be allowed where death was not caused by failure to furnish "safe place." 194Wis337, 216NW485.

99-66½-New. Use of premises held not forbidden under statute providing for safety thereof. 194Wis337, 216NW485.

99-66⅓-New. A statute giving children under eighteen years of age compensation allowance on the remarriage of the widow is applicable to the child of an employee who died before the enactment of the statute, where the widow remarried after the statute was enacted, and the statute as thus applied is not retroactive. 158Tenn328, 13SW (2d)329.

99-66¼-New. Where compensation was awarded to totally dependent mother and sisters, sister remaining unmarried after marriage of other beneficiaries is entitled to entire compensation. 232Ky760, 24SW(2d)605.

99-66½-New. Compensation awarded to female infant during dependency held not to terminate on her arrival at age of sixteen although not incapacitated from wage earning. 232Ky760, 24 SW(2d)605.

99-66⅙-New. Under Missouri statute total dependent is entitled to award based on two-thirds of average weekly wage of employee for three hundred weeks. MoA 25SW(2d)147.

99-66⅐-New. Claimant held required to show impracticability of computing average weekly wage of decedent under certain provisions before resorting to others. TexCommnA 24SW(2d)26.

99-66⅛-New. Compensation cannot be awarded for death of person who worked only twenty days in employment without proof of matters necessary to form basis. TexCommnA 24SW (2d)26.

99-66⅑-New. Provision of such statute for payment in installments not exceeding twenty dollars per week is not limitation on amount of death benefit. MoA 25SW(2d)147.

100-70 9LaA465, 121S219; Utah 289P 114. See also 82Colo 281, 260P106 (mother living with husband may recover as partial dependent of son killed by accident arising out of and in course of employment). [a] **Statutes providing for benefits for persons wholly dependent** and, where there are none such, for a percentage of the benefit to persons partially dependent applies to partially dependent parents. 31Ariz 224, 252P512.

100-70½-New. Under some statutes the commission is vested with some discretionary power in making awards to partial dependents. 67Utah25, 245P 381, 45ALR882.

100-70⅓-New. Such discretion must be exercised reasonably and not arbitrarily and capriciously. 67Utah25, 245P381, 45ALR882.

100-70¼-New. Will of beneficiary parent may exclude brothers and sisters of deceased. TexCivA 278SW294.

100-70⅕-New. Contributions from son to pay taxes and life insurance costs are held within rule of necessities. Tex CivA 278SW294.

100-70⅙-New. Compensation to mother partially dependent is fixed at five dollars weekly under code. 214Ala131, 106S806.

100-70⅐-New. Award to father and mother jointly as tenants by entirety as partial dependents of minor deceased employee is not erroneous. MoA 25SW (2d)1084.

100-70⅛-New. Where statute requires payment of designated amount into state treasury where injured employee dies leaving no persons wholly dependent, such payment is not restricted to cases of partial dependency. Wis 232 NW699.

100-73 120Kan684, 244P1050 (statute prescribing amount of award to partial dependents construed); 7LaA304. [d] **Amounts considered in fixing annual rate of contribution.**-(1) Amount due employee, but not yet devoted to dependents' support at time of death, may be considered. 82CalA414, 255P764. (2) Rate of deceased employee's contribution to dependents is measure of their loss and not gross amount paid them for any particular period. 82CalA 414, 255P764. (3) Purchase of supplies by employee for family automobile may be considered. 82CalA414, 255P764.

100-74 33GaA798, 127SE828. [b] **Partial dependents** receiving all of employee's wages are entitled to compensation as total dependents. 33GaA798, 127SE828.

100-74½-New. Under some statutes compensation to partial dependents is measured by the amount which deceased was contributing to their support at the very time of the injury. 196Cal 593, 238P662.

100-74⅓-New. In determining the annual amount devoted to the support of partial dependents the amount contributed by decedent to a family fund must be reduced by the portion used to support him and persons not dependent. 196Cal 593, 238P662.

100-74¼-New. Where the commission finds that evidence is insufficient that any earnings at the time of injury were used for a purpose other than the support of himself and family, it is not required to consider amounts withdrawn from common bank account of father and employee at prior time and used in purchase of equipment and for upkeep of ranch. 196Cal 593, 238P662.

100-74⅕-New. Under a statute providing compensation to partial dependents in proportion to the amount contributed to them weekly, when payments to one partial dependent ceases, the others are not entitled to have his share redistributed to them. 83 IndA 131, 147NE813.

100-74⅙-New. An award of the maximum amount provided by statute for the death of a minor employee on whom his family was partially dependent has been held excessive where the evidence showed that the cost of the minor's maintenance was not much less than his contributions. 67Utah25, 245P381, 45 ALR882.

100-74⅐-New. Actions. Instructions as

to dependency held properly refused. **TexCivA** 278**SW**294.

100–74⅛–New. Partially dependent parents of deceased employee are held entitled to compensation for entire period of dependency. 32**Ariz**293, 257**P**982.

100–74⅛–New. Payment of interest on award. Where delay in presenting a claim before the commissioner was due to the claimant, the employer will not be charged with interest on deferred payments. 208 **Iowa**1010, 226**NW**719.

100–74⅛–New. In determining amount contributed to parents cost of employee's board while with them and paying no board should not be deducted. **Me** 149**A**151.

100–74⅛–New. Under some statutes partial dependents to whom employee contributed all his earnings are entitled to total death benefit. **MoA** 25**SW(2d)** 518.

100–74⅛–New. In absence of statutory provision therefor commission fixing award to parents as partial dependents is not required to deduct cost of keeping and boarding deceased minor employee. **MoA** 25**SW(2d)**1084.

100–74⅛–New. [§ 96a] C½. **Assignment of Claims.** Some statutes forbidding assignment of such compensation before issuance of a warrant therefor do not prohibit the delivery of warrants for such compensation to an attorney in fact nor payment of money to anyone on behalf of a beneficiary. 142**Wash** 160, 252**P**697.

100–74⅛–New. Under such statute the department of labor and industries has power to honor a power of attorney given by one entitled to compensation. 142**Wash**160, 252**P**697.

100–74⅛–New. Where a power of attorney by a widow of a deceased employee is given merely to facilitate payment of overdue pension money and not to operate as an assignment, the refusal of the department of labor and industries to pay the holder of the power is arbitrary. 142**Wash**160, 252**P**697.

100–75½–New. Dependents are those depending on contributions as part of income, but not necessarily as sole means of living. **TexCivA** 278**SW**294.

100–76 207**Cal** 144, 277**P**492; **CalA** 288 **P**726; 77**Colo** 414, 236**P**1006 (not included in "compensation or benefits" within statute providing for fifty per cent increase where employer carries no insurance); 39**GaA**699, 148**SE**294; 46 **Ida**739, 271**P**327; 262**Mass**51, 159**NE** 635; 262**Mass**95, 159**NE**636; 265**Mass** 449, 163**NE**710; 265**Mass**490, 164**NE** 458; **Mass** 169**NE**517 (discretion in unusual cases); 235**Mich**496, 209**NW**586 (amount awarded held supported by evidence conclusive); 170**Minn**207, 212**NW** 190; 175**Minn**319, 221**NW**65; 175**Minn** 319, 222**NW**508 (statute not limiting amount); **MoA** 18**SW(2d)**89; **MoA** 29 **SW(2d)**730 (necessity of special order of commission); 82**Mont**304, 266**P**1103; 83**Mont**527, 273**P**294; 253**NY**324, 171 **NE**391; 117 **Okl** 33, 245**P**580 (under some statutes employer cannot be held responsible for physician's and hospital's bills for service rendered to employee other than emergency treatment, unless he refuses to select or engage physician and suitable hospital accommodations within reasonable time); 132 **Okl** 279, 270**P**566; 141 **Okl** 187, 284**P** 633 (further medical treatment recommended by physician properly ordered by commission); 6**PaDist&Co** 308; 160 **Tenn**459, 26**SW(2d)**148; **TexCommnA** 12**SW**972; **TexCivA** 298**SW**164; **Tex CivA** 1**SW(2d)**1109; **TexCivA** 29**SW (2d)**524; **TexCivA** 31**SW(2d)**669. [a] (1) 122**Kan**469, 252**P**237. (2) Amount of allowance must be based on evidence. 121**Kan**690, 249**P**604. [j] (5) Board, in its discretion, may pay more than one hundred dollars for medical service, medicine, and supplies. 8**PaDist&Co** 757. (6) Board may also make such payments for greater period than thirty days after disability arises. 8**PaDist& Co** 757. [n] (3) Amount for which employer is liable for medical and hospital treatment is fixed by statute at not to exceed rate of one hundred dollars for each ninety days. 170**Minn**207, 212 **NW**190. (4) Words "cure and relieve" as used in statute should be construed as "cure or relieve." 170**Minn**207, 212 **NW**190. (5) Whether employee who has sustained total permanent disability is entitled to further medical and hospital treatment when all has been done that can be done to cure or improve his condition resulting from injury rests in discretion of commission. 170**Minn**207, 212**NW**190. [s] (2) Injury is not unusual because it occurs under other than ordinary circumstances. 258**Mass**515, 155**NE**419. (3) Injury requiring several months' treatment of bathing, massage and sedatives is not unusual as authorizing extra allowance for medical services. 258**Mass**515, 155 **NE**419. [w] **In California.**–Statute extending time for filing proceedings construed to apply as to pending actions only to collection of medical benefits. 198**Cal** 631, 246**P**1046, 46**ALR**1095. [x] **In Georgia** (1) amount is limited by statute to one hundred dollars. 35**GaA** 464, 134**SE**122. (2) No amount greater than specified in statute may be awarded in absence of insurer's agreement for greater amount. 162**Ga**244, 133**SE**237. (3) Commission cannot award more than statutory amount where insurance does not agree thereto. 35**GaA**464, 134 **SE**122. (4) Three hundred and seventy-five dollars held excessive under facts of case. 35**GaA**464, 134**SE**122. [y] **In Oklahoma** (1) employer is not liable to physicians in absence of express or implied contract where provisions of Workmen's Compensation Law have not been complied with. 113 **Okl** 112, 239**P** 451. (2) Where surgical operation, or tender thereof for hernia is unnecessarily delayed, employer will be liable for compensation during delay, where continued disability results from such hernia. 125 **Okl** 142, 256**P**898. (3) Duty to furnish operation for hernia can be relieved only by tender of such operation and refusal of employee to accept such operation. 125 **Okl** 142, 256**P**898. (4) Act provides for allowance of such medical bills as may be necessary during sixty days and for such time in excess thereof as in judgment of commission may be required. 132 **Okl** 77, 269**P**263. (5) Statute provides for allowance of such medical bills as may be necessary during sixty days after injury and for such time in excess thereof as in judgment of commission may be required. 132 **Okl** 77, 269**P**263. (6) Medical and surgical treatment provided by statute is not limited to sixty-day period but extends to time required in judgment of commission. 139 **Okl** 236, 281**P**964. [z] **Consequences resulting from unskillful operation** by physician furnished by employer should be included in award. 125 **Okl** 142, 256**P** 898. [aa] **Services rendered by physician other than one selected by employer,** when treatment extended to ailment other than that resulting from injury received by employee arising out of and in course of employment, do not render employer liable. 125 **Okl** 142, 256**P**898. [ab] **Doctor may sue at law,** under act, to recover for services to injured employee sent to him by foreman. 128 **Misc**189, 218**NYS**83. [ac] **In Massachusetts** (1) "unusual case" within act refers to injuries developing unexpected or unusual complications. 255**Mass**533, 152**NE**66. (2) That injuries do not occur under ordinary circumstances, or recovery is prolonged, does not make "unusual case." 255**Mass**533, 152**NE**66. (3) Tuberculosis caused by injury is not "unusual case." 255**Mass**533, 152 **NE**66. [ad] **Payment of burial expenses** does not exempt employer from necessity of paying expenses of hospital treatment. 88**PaSuper**17. [ae] **Hospital expenses.**–Under Pennsylvania statute, hospital expenses for thirty days may be allowed in addition to amount allowed for surgical and medical service. 91**PaSuper**429. [af] **Operations for cosmetic purposes.**–Industrial accident commission has power to order employer to pay for surgical operations on employee's face, though major object is for cosmetic purposes. **CalA** 259 **P**369. [ag] **Order requiring employer to furnish surgical treatment recommended by doctor's report** or to pay for such treatment by employee's physician is proper where employer, after twenty-two operations, admits inability to furnish further relief. **CalA** 259**P**369. [ah] **Order for payment of amount in excess of amount limited by statute** not authorized. 39**GaA**699, 148**SE**294. [ai] **Claimant refused operation awarded** may recover for changed condition occurring after award of operation. 41 **GaA**329, 153**SE**227(2dcase). [aj] **Right of statutory beneficiaries of deceased employee to recover.**–**TexCivA** 29**SW(2d)** 524. [ak] **Liability of employer to hospital** on death of employee. **RI** 150**A** 762. [al] **Where disability permanent.**–**CalA** 288**P**726. [am] **Participation in waiver on part of employer.**–**MoA** 29**SW (2d)**730. [an] **Properly disallowed** where extent of injury became known only gradually. **NJSup** 151**A**205. [ao] **When not recoverable from insurer.**–**CalA** 290**P**68. [ap] **Jurisdiction of proceedings to recover.**–**Okl** 293**P**257. [aq] **Hospital expenses of relative** undergoing skin graft operation for claimant's benefit are not allowable. 230**AppDiv** 553, 245**NYS**552. [b] **To recover for medical and hospital services beneficiaries must show** they incurred liability therefor or succeeded to rights of those who furnished services. **TexCivA** 29 **SW(2d)**524.

100–76½–New. Award made under statute, relating to compensation for specified injuries, is not in lieu of medical, surgical, and hospital treatment. 226**Ky**22, 10**SW(2d)**478.

100–76⅛–New. The injured employee, being primarily liable for medical, hospital, and doctor's bills, is entitled to recover amounts thereof from employer's compensation insurer. **TexCivA** 10 **SW(2d)**803.

101–77 76**CalA**333, 244**P**625; 326 **Ill** 48, 156**NE**776; 217**AppDiv**280, 216**NYS** 609; 225**AppDiv**481, 234**NYS**55; 117 **Okl** 33, 245**P**580 (selection of physician and hospital by employer in emergency case does not preclude employer from making different selection within reasonable time). But see 200**Wis**123, 227 **NW**291 (that employer promptly took employee, whose nose was injured, to nose specialist is no evidence of its failure to maintain panel of physicians from which employee could select one). [a] (2) If employee is dissatisfied with doctor furnished by employer, she should have requested panel of doctors from which to make selection of another doctor. 200**Wis**123, 227**NW**291. [i] **Employee personally liable for medical services** (1) where he refuses those offered by employer. 83 **IndA**493, 148**NE** 425. (2) Where he makes election to remove to another hospital without employer's or physician's direction. 326 **Ill** 48, 156**NE**776. [j] **Employer liable for medical expenses** where he authorized physician's employment. 326 **Ill** 48, 156**NE**776. [k] **In Alabama,** under Code (1923), § 7551, offer of required operation by employer should be accompanied by averment of fact that employer was ready, willing, and able to furnish required surgical skill. 217**Ala** 369, 116**S**514. [l] **Board may order surgical operation** at expense of employer. 202**Cal** 437, 261**P**295.

101–77½–New. Act does not preclude physician from recovering from employer in law action for services rendered to injured employee, at employer's request. 133**Misc**433, 232**NYS**486.

101–78 **TexCivA** 27**SW(2d)**314 (insurer liable for employee's doctor's bill after its own doctor proved unsatisfactory). [a] (3) Other instances. 91**CalA**121, 266**P**866.

101–79 217**AppDiv**280, 216**NYS**609. [d] **Insurer denying liability** prior to four weeks after injury need not have been further notified of hospital services or extensions to be liable therefor. **Tex CivA** 298**SW**164. [e] **Evidence held not to show refusal to give further medical treatment.**–**CalA** 275**P**958.

101–79½–New. Employee selecting physician does not act as agent for

employer. 48**RI** 113, 136**A3**.

101-79⅛-New. Employer's failure to protest against physician selected by employee does not ratify his employment. 48**RI** 113, 136**A3**.

101-80 **LaA** 130**S**257(2dcase); 117 **Okl** 33, 245**P**580 (right limited to cases of emergency treatment). See also 217 **AppDiv**280, 216**NYS**609; **TexCivA** 25 **SW(2d)**665 (employee entitled to recover for surgical operation without obtaining permission). But see 131 **Misc**635, 228**NYS**435 (employer is not liable for medical services in absence of demand).

101-81 202**Cal** 437, 261**P**295; 76**CalA** 333, 244**P**625; 217**AppDiv**280, 216**NYS** 609. See also **Okl** 291**P**551.

101-81½-New. But a telephone operator of employer has no authority to select physician and hospital accommodations for a fellow employee except for emergency treatment when the statute so limits such authority. 117 **Okl** 33, 245**P**580.

101-82 83**Colo** 239, 264**P**723; 13**LaA** 234, 126**S**600. [c] But see 129 **Okl** 15, 263**P**140. [f] **Physician employed to care for injured employee** has no authority to employ another physician. 212**Ala**535, 103**S**563. [g] **Hospital expenses.**-(1) Under Pennsylvania statute, there is no limitation on liability of employer for hospital treatment furnished for first thirty days except that cost shall be reasonable. 91**PaSuper** 429. (2) Standard for testing reasonableness of such cost is that cost shall not exceed prevailing charge in hospital for like services to individuals. 91 **PaSuper**429. (3) Commission cannot place other limitation upon amount to be allowed for hospital treatment than that fixed by such act. 91**PaSuper**429. (4) Under such statute amount which employer may be ordered to pay is question of fact to be determined under evidence in particular case. 91**Pa Super**429. [h] **Medical and surgical services.**-Under Pennsylvania statute, liability for medical and surgical services is limited to one hundred dollars. 91**PaSuper**429. [i] **As proper basis for claim for medical expenses** employee, offered services by employer, must furnish report of injury and treatment furnished by his doctor within certain time following first treatment. 228**AppDiv** 859, 240**NYS**823.

101-82½-New. Claimant given all possible medical care and receiving compensation is not entitled to allowance for alcohol rubs. 104**Conn**393, 133**A**98.

101-83⅓-New. The workmen's compensation board should not make allowance for medical bills, unless there is testimony that the injured employee has incurred expenses for purposes mentioned in the statute, but it is unnecessary that the injured employee has actually paid the expenses incurred. 226**Ky**22, 10**SW(2d)**478.

101-83 265**Mass**490, 164**NE**458; 141 **Okl** 195, 285**P**23 (doctor in charge impliedly authorized by insurance carrier to employ nurse without order of commission determining necessity); 7 **PaDist&Co** 413. [a] **Services rendered while employee confined in hospital.**-Insurer may be required to pay for services of nurses rendered injured employee while confined in hospital. **Tex CivA** 1**SW(2d)**415. [b] **Allowance of nurse's claim for services** to injured employee is within jurisdiction of commission in proper case. 141 **Okl** 195, 285**P**23.

101-84 213**AppDiv**606, 211**NYS**45 (mother of deceased not entitled to compensation for services as nurse); 121 **Oh**504, 169**NE**568. See also 103 **Conn**431, 130**A**705, 44**ALR**693 (where no allowance could be made to wife for nursing care).

101-84½-New. A claim for medical or surgical treatment is enforceable only as incidental to or part of award to injured employee. 215**AppDiv**728, 212 **NYS**432.

101-84⅓-New. By statute a claim for medical services is unenforceable unless a report of the injury and treatment on statutory form is given to the employer and the board within a fixed period. 215**AppDiv**728, 212**NYS**432.

101-84¼-New. Failure to give a required notice under the Workmen's Compensation Law does not affect the right to recover compensation in an action at law for services rendered at the employer's request. 215**AppDiv**728, 212**NYS**432.

101-84⅕-New. Medical expenses outside of those provided by statute may not be allowed. 167**Minn**424, 209**NW** 313.

101-84⅙-New. Furnishing medical, surgical, and hospital services must be regarded as the payment of compensation under the act, and by failure to file receipt or statement of the amount, the six months' limitations prescribed did not begin to run. 316 **Ill** 394, 147 **NE**394.

101-84⅐-New. Award of maximum for medical services under statute is error where employer had already paid part of such expense. 211**Ky**821, 278 **SW**169.

101-84⅛-New. Under act providing that physician's fees are subject to approval, commission has no power to require employer to pay money award to physician furnished by him. 144**Va** 240, 132**SE**177.

101-84⅑-New. After payment of full compensation employer cannot be held for cost of artificial hand for injured employee. **NJSup** 135**A**773.

101-84⅒-New. On happening of accident employee's contractual right to compensation including medical expenses vest. 126**Me**105, 136**A**455.

101-84⅓-New. Assenting employer cannot, in proceedings against insurer, have accident commission fix longer period or larger sum than prescribed for medical expenses. 126**Me**105, 136**A** 455.

101-84½-New. Surgeon's fee is properly allowed though operation was had after sixty day period. 149**Va**307, 141 **SE**225.

101-84⅓-New. Effect of payment. An employer who has become liable for medical services rendered an injured employee is not, by paying them, estopped from raising the question of liability for compensation. 331 **Ill** 401, 163**NE**406, 60**ALR**1397.

101-84¼-New. A widow not expending any amount for medical attention or burial expenses is not entitled to recover of employer for such expenses. 9**LaA**288, 120**S**99.

101-84⅕-New. The act does not prevent an employer from contracting to pay a physician a reasonable sum for his services to injured employees. 226 **Ky**655, 11**SW(2d)**705.

101-84⅙-New. Compensation commissioner has jurisdiction to make award for medical expenses accruing prior or subsequent to expiration of ten compensation year period. 111**Conn**401, 150**A**305.

101-84⅐-New. The compensation act does not govern the right of a hospital to which employer has sent employee to recover from employer's insurer. 253 **Ill**458.

101-84⅛-New. Proceedings by physician to recover value of his services in treating an injured employee is ancillary to the employee's proceedings to recover compensation and cannot be considered independently. 138 **Okl** 248, 280**P**846 (physician relegated to law court in absence of claim by employee for compensation for his injuries).

101-84⅑-New. A physician has been held not entitled to recover for services rendered an employee during three months, as the law does not provide for more than four weeks treatment unless the employee is placed in a hospital. **TexCivA** 21**SW(2d)**599.

101-84⅒-New. For a physician to recover for services rendered an injured employee, he must allege and prove that insurer refused, after notice, to furnish medical aid, and that such aid was furnished at the request of the injured employee. **TexCivA** 21**SW(2d)**599.

101-84½1-New. In some jurisdictions, where employee files compensation claim, physician can file claim for services in same action. 144 **Okl** 100, 289**P** 779.

101-84½2-New. In such case fact that no award is made in favor of injured person for compensation does not deprive commission of jurisdiction to allow physician's claim. 144 **Okl** 100, 289 **P**779.

101-84½3-New. In such case employer is liable for expense although employee selected surgeon and hospital. **MoA** 31 **SW(2d)**554.

101-84½4-New. Employee's failure to procure special order from commission for hernia operation does not preclude recovery of expense where employer denied liability. **MoA** 31**SW(2d)**554.

101-84½5-New. Term "similar treatment" in statute authorizing recovery therefor on order of commission should be liberally construed. **MoA** 31**SW(2d)** 554 (operation for hernia held similar treatment where truss had been prescribed).

101-84½6-New. Under some statutes employer may be required to provide treatment additional to treatment required for first sixty days whether original treatment was provided by employer or employee. **MoA** 31**SW(2d)**554.

101-85 77**Colo**414, 236**P**1006 (not included in "compensation or benefits" within statute providing for fifty per cent increase where employer carries no insurance); 34**GaA**182, 129**SE**1 (holding that, where evidence is undisputed that there were no medical expenses and employer paid for funeral, award of such expenses held unauthorized); 13**LaA**234, 126**S**600; **Tex CivA** 1**SW(2d)**1112; **Wis** 232**NW**699 (dependency need not be shown where accident proximately causes death). But see 25 **OhA**319, 158**NE**195 (award not contingent on dependency). [b] **Where death resulted from cause other than compensable injury,** funeral expenses cannot be recovered. 46 **Ida**739, 271**P**327.

101-85½-New. A physician not complying with the law as to the filing of the report of injury and treatment is not entitled to an award. 215**AppDiv** 736, 212**NYS**240.

101-85⅓-New. Medical expenses of last sickness extending over sixty-two-day period may be allowed to widow in commission's discretion under statutory provision for payment for medical expenses, 126**Me**215, 137**A**72.

101-85¼-New. notwithstanding another provision expressly allowing expenses for "last illness and burial" in case there are no dependents. 126**Me**215, 137 **A**72.

102-86 231**Ky**757, 21**SW(2d)**1026 (board must be made party to suit); 231**Ky**736, 22**SW(2d)**129 (consent of board necessary); 6**LaA**854; 136 **Okl** 138, 276**P**774; **TexCivA** 22**SW(2d)**142 (2dcase) (allowance of legal rate of discount held erroneous in absence of evidence). [j] **Objective examination.**-Under statute forbidding lump sum award for injury not ascertainable by objective examination, examination by X-ray held objective examination. 120 **Kan**722, 245**P**127. [k] **Necessity of commissioner's approval of agreement for commutation.**-Agreement between employer and dependent of deceased employee as to commutation of future payments is not enforceable, unless approved by industrial commissioner. 202 **Iowa**136, 209**NW**289. [l] **Sufficiency of application.**-(1) Petition for commutation must carry indorsement of approval of industrial commissioner. 202 **Iowa**136, 209**NW**289. (2) Such requirement is complied with by attaching to petition copy of actual written approval of commissioner. 202 **Iowa** 136, 209**NW**289. [m] **When compensation "definitely determinable."**-Compensation for death is definitely determinable and therefore commutable under some statutes where deceased workman leaves widow and stepchild, though widow may remarry. 202 **Iowa**136, 209 **NW**289. [n] **Application for commutation.**-(1) In some jurisdictions authority of board can be exercised only upon written application of injured workman or his beneficiary. 79**Mont**358, 257 **P**270. (2) In absence of such application board is limited to payment of compensation monthly. 79**Mont**358, 257 **P**270. [o] **Except as to commutation**

provided for in Workmen's Compensation Act, commission is without power to award compensation to nonresident aliens. 241NY312, 150NE127. [p] **Rule providing for computation as of date of death** of injured employee only applies to future installments of compensation. 241NY312, 150NE127. [q] **In Texas** (1) lump sum judgment is authorized only where party has been killed or totally incapacitated. **CivA** 292SW651. (2) Award of lump sum for partial disability held erroneous. **TexCivA** 292SW651. (3) Lump sum judgment has been held erroneous where injury did not cause permanent total incapacity. **TexCivA** 297SW254. [r] **To justify claim for additional compensation**, employer must show he got less than statute authorized. 164 La577, 114S163.

102-87 41F(2d)151 (not made to enable widow to buy house and save rent); 215Ala25, 109S151; 120Kan542, 243P1012 (commutation to lump sum not proper in absence of showing that judgment in action in district court for periodical payments was not properly rendered); 11LaA408, 123S496; 267Mass322, 166NE723; 217AppDiv414, 216NYS625; RI 150A818; **TexCivA** 17 SW(2d)68. [a] (8) Evidence held not to warrant award of lump sum. 217 AppDiv414, 216NYS625. [j] **Power to commute compensation** as to installments accruing only. 241NY312, 150 NE127. [k] **Principle of periodic payments** should be departed from only in exceptional cases. 217AppDiv414, 216 NYS625. [l] **Finding permanent partial disability** would last beyond time fixed for payment in act warrants commutation, where board is satisfied of ultimate outcome of injury. 293Pa338, 143A21. [m] **There being no available appropriate table of averages** to ascertain probable dependency, commutation of future payments cannot be allowed. 251NY67, 167NE174. [n] **Commutation authorized under particular circumstances.**–108Conn640, 144A465.

102-88 214Ala640, 108S862.

102-89 215Ala25, 109S151.

102-90 120Kan684, 244P1050; 121Kan 572, 708, 249P680; 115Nebr758, 214NW 631; 218AppDiv7, 217NYS679; **Tex CivA** 281SW1092; **TexCivA** 292SW265; **TexCivA** 21SW(2d)31.

102-91 115Nebr758, 214NW631; **Tex CivA** 21SW(2d)31.

102-92 120Kan684, 244P1050; 82Mont 543, 268P495; **TexCivA** 281SW1092.

102-92½-New. A supported finding by both the court and the industrial commissioner as to the advisability of commuting compensation is final on the appellate court. 202 Iowa136, 209NW 289.

102-92¼-New. The commission has authority to approve the settlement, 35 GaA599, 134SE357.

102-92½-New. but has no power to adjudicate against any change of condition or to determine that such change would or would not take place. 35GaA 599, 134SE357.

102-92½-New. In some jurisdictions lump sum judgment cannot be rendered for any injury not ascertainable by objective examination. 121Kan572, 708, 249P680.

102-92¼-New. Where claimant was badly scarred from chin to waist, the injury was plainly ascertainable by objective examination. 121Kan572, 708, 249P680.

102-93 [a] **Where manifest hardship and injustice would result**, lump sum award is proper. **TexCivA** 31SW(2d) 669.

102-93½-New. Award made on basis of life expectancy based on table covering normal persons where claimant suffered from dementia præcox is abuse of discretion as such persons are known to live shorter period. 218AppDiv7, 217 NYS679.

102-94 123Kan570, 256P136. See also 124Kan471, 260P620 (deposit of lump sum award is not final so as to preclude review).

102-94½-New. Right of redemption cannot be exercised by employees until after payments have been made under the award for the statutory period. 123Kan570, 256P136.

102-94¼-New. Payments made prior to the award cannot be said to have been made in pursuance of the award. 123Kan570, 256P136.

103-96½-New. Commutation as to dependent nonresident aliens. A commutation as to compensation not coming within the term "future installments" is void. 241NY312, 150NE127 (in view of statute providing for commutation of only future installments of compensation).

103-96¼-New. Under Workmen's Compensation L. § 25 legislature contemplated that each periodic payment to which dependent is entitled constitutes an installment of compensation. 241NY312, 150NE127.

103-96¼-New. By Workmen's Compensation L. § 17 the industrial commission has power to commute only such installments as may accrue periodically thereafter. 241NY312, 150NE127.

103-96⅙-New. In making proportional award for partial disability, payments rather than amount of such payments should be apportioned. 35GaA 772, 135SE103.

103-96⅙-New. After majority of employee, a lump sum settlement for injury during minority was held unauthorized without his and insurer's consent. 257Mass532, 154NE81.

103-96⅙-New. An insurer cannot complain of a lump sum settlement for an employee's death where proper discount reducing future payments to present value is made. **TexCivA** 281SW1092.

103-96⅛-New. Lump sum award to surviving wife, marrying alien, should be made under statute relating to remarriage and not under statute relating to aliens. 219AppDiv495, 220NYS 420.

103-96⅙-New. Insurance carrier's right to commutation of nonresident alien's compensation as of date of application is held not affected by delay in acting thereon. 220AppDiv63, 220 NYS478.

103-96 1/10-New. The power of the industrial accident commission to commute an award into a lump sum payment carries with it such matters as are purely incidental to the general order of payment. 76CalA639, 245P796.

103-96 1/11-New. Such commission has no power on ordering commutation of an award for death to direct payment of any portion of the award to general creditors of deceased employee or of his dependents not within the statutory category of possible lien claimants. 76 CalA639, 245P796.

103-96 1/12-New. Where commutation is ordered by board so that part of minor's award may be used in purchase of home, board cannot impose on defendant the guardian's responsibility of seeing minor's interests protected. 8PaDist&Co 47.

103-96 1/13-New. Apportionment of compensation in a lump sum between attorney and beneficiary has been held not erroneous under some statutes. **Tex CivA** 8SW(2d)696.

103-96 1/14-New. In view of statute providing for discount at the legal rate of interest on an increasing amount of weekly compensation by a correspondingly decreasing number of weeks, such provision should be applied to lump sum adjustments, and a discount of six per cent will be allowed in granting a lump sum settlement. **TexCivA** 9SW (2d)457.

103-96 1/15-New. Award for death of employee properly computed from date of renewal of request for commutation where award was rescinded because proofs not properly authenticated. 229 AppDiv36, 240NYS619.

103-96 1/16-New. Discount of award, using legal discount of 6 per cent is not prejudicial to employer's insurer. **Tex CivA** 27SW(2d)600.

103-97 32Ariz293, 257P982; 79Mont 358, 257P270; **TexCommnA** 285SW 1041; **TexCivA** 22SW(2d)144; **TexCivA** 26SW(2d)322 (lump sum allowed though proper rate of discount for determining present value was neither pleaded nor proved); **TexCivA** 30SW(2d)921. [a] **Lump sum settlement represents converted cash value of weekly installments** to which employee would be entitled, considering his then apparent condition. 35GaA599, 134SE357. [b] **Determination of present worth.**–**TexCivA** 31SW (2d)669.

102-98 35GaA599, 134SE357 (five per cent); 231Ky757, 21SW(2d)1026; 79 Mont358, 257P270; **TexCivA** 13SW(2d) 993; **TexCivA** 21SW(2d)31; **TexCivA** 31SW(2d)669. But see **TexCommnA** 17 SW(2d)1046.

103-99½-New. In some jurisdictions, however, the amount must be fixed on a business, not actuarial, basis, taking into account the extent of the workman's capacity, expectation of life, and ability to minimize effects of disability. **Alta** [1925] 3DomLR838.

103-4 Alta [1925] 3DomLR838 (holding that amount must be fixed on business, not actuarial, basis).

103-6 Alta [1925] 3DomLR838 (extent of incapacity and expectation of life).

103-7 Alta [1925] 3DomLR838 (ability to minimize effects of disability).

103-9 86Colo 364, 281P740; 10LaA688, 122S157(2dcase). But see 83 IndA257, 148NE161 (employer may find other work within capacity of partially disabled employee and wages thus earned are properly deducted from amount otherwise payable). [a] **Payment of full salary by employer to disabled employee during disability** is not gift to employee and estops employee from recovering compensation. 226AppDiv629, 236NYS 377.

103-10 2LaA200; **NJSup** 129A468 (or as traveling expenses and lost time in going to physician); 159Tenn202, 17 SW(2d)904. See also 4LaA286. But see 6LaA627.

103-11 214Ala394, 108S7; CalA 288P 726; 226Ky22, 10SW(2d)478; 9LaA639, 120S88; 9LaA513, 119S722; 12LaA 338, 124S584(2dcase); 8LaA614; 224 AppDiv11, 229NYS159; 161Tenn350, 31 SW(2d)693. See also 2LaA440.

103-14 [a] **Annuity or sick benefit received from employer** not applied as credit on compensation. **TexCivA** 30SW (2d)921.

103-14½-New. Deduction of amount used for the minor employee's support from the award to the parent in case of the employee's death is proper. 197 Cal 143, 239P1067.

103-14⅓-New. Lump sum award to deceased employee's widow on her remarriage must be treated as an advance payment for two years, and be considered in keeping total awards to not more than sixty six and two thirds per cent of deceased's average wages, 215AppDiv109, 215NYS513.

103-14¼-New. and award to deceased's mother must be reduced for such two-year period by amount that it caused total awards to exceed sixty six and two thirds per cent. 215AppDiv109, 215 NYS513.

103 14½-New. Sum paid for temporary total disability should be deducted from total permanent disability award. 36 Wyo 325, 255P356.

103-14⅙-New. Beneficiary cannot recover if injured employee before death was paid amount equal to statutory maximum for resulting death. **Tex CommnA** 295SW588.

103-14⅐-New. Employee receiving twenty four dollars per week at time of injury if subsequently employed at wages in excess of twenty four dollars is not entitled to award. 86 IndA122, 154NE 804.

103-14⅛-New. Under act, deduction authorized to be made from allowance given to dependents is any and all payments already made by employer to injured employee on account of injury from which death resulted, except medical and hospital fees. 124Kan222, 257 P721.

103-14⅑-New. Employee is entitled to recover only one half for fraud in lump sum payment. 164La577, 114S163.

103-14 1/10-New. Under statutes in some jurisdictions, claimant leaving the locality or state must notify and obtain permission of the commission. 70Utah167, 259P193, 55ALR730.

103-14 1/11-New. The statute is mandatory and failure to comply with it will

result in loss of right to compensation during claimant's absence. 70Utah167, 259P193, 55ALR730.

103-14½-New. Compensation for death has been held not subject to deduction because of contribution of preëxisting disease. 217Ala642, 116S666.

103-14½-New. An employer is not entitled to credit for any sum expended in the treatment and care of an injured employee in excess of the statutory allowance. 125Kan370, 263P779.

103-14¼-New. Under some statutes, an insurance carrier is not entitled to credit for the amount of compensation paid an employee for injury against a judgment awarding him compensation for an injury several years afterward, in absence of evidence that the old injury contributed to his present disability. TexCivA 10SW(2d)756.

103-14½-New. An employer or insurer may terminate the period of an injured employee's total incapacity and end or reduce liability for compensation by rendering available to claimant employment within his powers. 110Conn282, 147A818.

103-14½-New. Provision of statute for deduction of percentage of benefit where employee was disobeying rules does not apply to accident occurring on street not immediately connected with business. MoA 25SW(2d)518.

103-14½-New. Relief from liability of contractor by payment to subcontractor's employee of insurance carried by subcontractor. 298Pa343, 148A529.

103-14½-New. Under California statute commission may prevent double recovery by employee by crediting employer with proper part of employee's judgment against third person, Cal 291 P405.

103-14½-New. , but portion of recovery not actually received by employee cannot be credited in lieu of similar statutory compensation, Cal 291P405.

103-14½-New. , and portion of recovery for pain and suffering cannot be credited. Cal 291P405.

103-14½-New. Under such statute it is not error for commission to credit employer with employee's recovery against third person before employee claims compensation. Cal 291P405.

103-14½-New. As regards commission's power to credit employee's recovery against third person, recovery of judgment does not substantially differ from ratified settlement. Cal 291P405.

103-14½-New. To give commission power to make such credit employer must prove that employee has already recovered from third person damages in lieu of statutory compensation. Cal 291P405.

103-14½-New. Employer reimbursing himself by assertion of statutory lien on employee's recovery against third person does not waive other statutory rights to credits. Cal 291P405.

104-16 87CalA537, 262P38(1stcase); 87CalA766, 262P471. See also 86CalA 620, 260P1108. [a] **Increased compensation where employer corporation.**–Statutes provide for increased compensation where misconduct is that of executive or managing officer or general superintendent. 86CalA182, 260P578. [b] **Additional compensation** not allowed as conduct was not serious and willful. CalA 276P1060. [c] **Contractor, cannot be held guilty of serious and willfull misconduct** for violating safety orders where there was no evidence of knowledge of such orders. Cal 287P 974. [d] **Statutes strictly construed.**–Wis 230NW130.

104-17 Cal 284P451(2dcase); 250Mich 238, 230NW191 (double compensation refused); 229AppDiv35, 240NYS572 (double compensation refused); Wis 230NW130 (double compensation refused). [a] **Whether employer's acts or omissions constitute willful misconduct** depends on circumstances of each particular case. Cal 284P451(2dcase).

104-17½-New. Employment of boy sixteen is not such negligence as to allow double recovery. 220AppDiv18, 220 NYS226.

104-17½-New. Double death benefit is not recoverable where union has proper certificate as to age. 220AppDiv18, 220 NYS226.

104-17¼-New. Right to exemplary damages for employer's gross negligence is abrogated under some statutes where suit is by injured employee, Tex CommnA 283SW141.

104-17½-New. but not where suit is by employee's surviving spouse or heirs. TexCommnA 283SW141.

104-17⅛-New. Work on sewer is held not covered by act relating to safety requirements in connection with excavations incidental to building construction so as to authorize penalty. 116 Oh 509, 156NE605.

104-17⅞-New. To justify a penalty for failure of the employer to comply with the statutes or an order of the commission, is must appear that the injury was caused thereby. 194Wis610, 217NW316.

104-17⅛-New. Award of penalty for failing to provide safe place of work has been held unauthorized. 194Wis610, 217 NW316.

104-17⅛-New. Order regarding safe scaffolds omitting element of reasonableness has been held unauthorized. 194 Wis610, 217NW316.

104-17 1/10-New. Under some statutes employee's failure to use safety device provided by employer requires fifty per cent reduction of compensation although device is not required by law. NM 290 P409 (goggles).

104-17 1/11-New. Such statutes are not affected by provision limiting defenses of contributory negligence and assumption of risk. NM 290P409.

104-18½-New. [§ 100a] H. **Payment.** Three hundred weeks' period of compensation begins one week after the injury and cannot be extended by temporary interruptions during which no compensation is owing or awarded. 175 Minn319, 221NW65.

104-18½-New. Maturity of entire award for failure of insured to make prompt payments. TexCivA 29SW(2d) 902.

104-18¼-New. Compensation period ends when total disability ends. IndA 171NE882(2dcase).

104-18½-New. Heirs of employee are entitled to installments of compensation which accrue after death of employee from cause other than that which constituted basis of claim for compensation. TexCommnA 29SW(2d)1046.

104-18⅛-New. Compensation paid employee by insurance carrier is tantamount to payment by employer. NJCh 150A212(2dcase).

104-18⅞-New. [§ 100b] I. **Additional Award Where Defense Is Frivolous, or for Delay.** Facts have been held not to justify an additional award, under statute authorizing such award, where defense is merely frivolous or for delay. 173Minn481, 217NW680.

104-18⅛-New. [§ 100c] J. **Double or Increased Compensation.** It is not the policy of workmen's compensation acts to give double compensation. 34NM29, 276P27 (compensation refused where already obtained in another state).

104-18½-New. Where deceased child employed in digging sewer, double damages are allowed as for minor of permit age employed without permit. Wis 231 NW599.

104-18 1/10-New. Minor employed in digging sewer is engaged in forbidden employment within statute respecting permit. Wis 231NW599.

104-18 1/11-New. [§ 100d] K. **Release of Employer.** Release from damages for employee's death in consideration of payment of funeral expenses does not preclude recovery of compensation. Oh 172NE364.

104-18 1/12-New. [§ 100e] L. **Assignment of Compensation.** Employee cannot assign portion of compensation to employer in payment of antecedent debt. 161Tenn350, 31SW(2d)693.

104-18 1/13-New. Statute prohibiting assignment not extended by construction. 161Tenn350, 31SW(2d)693.

104-19 325 Ill 570, 156NE796; 124Kan 287, 259P703; 129Kan516, 283P508; Nebr 233NW447 (jurisdiction); TexCommnA 12SW(2d)972; TexCivA 12SW (2d)817; TexCivA 22SW(2d)1098 (suit on contract); 197Wis428, 222NW315. [c] **Change of venue by consent of parties** from county where injury occurred does not deprive court of jurisdiction to set aside award. TexCivA 297SW 255. [d] **Resort to or interference by courts** may take place only in accordance with rules and regulations established by legislature. 203Cal 522, 265 P195.

104-20 242Mich445, 219NW721; 118 Or260, 246P741; 115Tex551, 285SW 1084, 1087 [citCJ]; 116Tex59, 286SW 195; TexCommnA 14SW(2d)798; TexCivA 300SW137; TexCivA 29SW(2d) 444; TexCivA 30SW(2d)921. [d] **Each step prescribed** in progress of claim under Compensation Act is essential to jurisdiction. TexCivA 292SW651. [e] **Compliance mandatory.**–Each step toward maturity of claim from time of injury to final adjudication is mandatory requirement necessary to exercise of jurisdiction by each statutory agency. 115Tex551, 285SW1084. [f] **Trial procedure** in compensation suits, except as regulated by act, is identical with procedure in other civil cases. TexCivA 297 SW255. [g] **State as employer of servant** of department of game and fisheries should be party to compensation proceedings. 147Va89, 136SE651.

104-21 [a] **Delay in proceedings should be avoided.**–31Ariz224, 252P512. [b] **Employer need not plead** matter relieving it of liability for compensation for total disability where such matter is pleaded by employee. TexCommnA 292 SW204.

104-22 19F(2d)780. [a] **Right to file document in nature of pleading.**–Ill 173 NE472.

104-22½-New. Equitable principles prevail in compensation proceedings. 48RI 113, 136A3.

104-23½-New. Failure to take steps to enforce the right given by the Workmen's Compensation Act within the time limited by the statute extinguishes the right. 168Minn332, 210NW 47.

104-23½-New. Under the Minnesota statute, the right to compensation for the death of a deceased alien is lost by failure of his dependents and of the consular representative of the country of which they were nationals to institute proceedings within the time limited after giving of notice, by the deceased workman's employer to the department of labor, of willingness to pay. 168Minn 332, 210NW47.

104-23¼-New. Such statute does not limit the effect of the giving of such notice to cases where such foreign country has an official representative in the United States. 168Minn332, 210NW47.

104-23½-New. Failure to institute proceedings within the time limited by such statute is not excused because of the fact that, at the time of his death, the workman was a national of a country at war with the United States, where his dependents, at the time of service of the notice, were nationals of a country with which the United States was at peace. 168Minn332, 210NW47.

104-23⅛-New. The alien property custodian having seized a dependent's claim for the death of an employee, cannot avail himself of the rule that a state statute of limitations does not run against the United States unless consent is given by act of congress. 168Minn332, 210 NW47.

104-23⅞-New. Where the compensation commission did not fix a special time at which its order would become effective, such order was not effective until thirty days after publication. 112 OhSt421, 147NE518.

104-23⅛-New. Where employer did not deny liability, but disagreed as to length of time compensation was payable, employee's application for adjustment was held improperly dismissed on theory of agreement approved by a single member of the industrial board. 85 IndA273 154 NE23.

104-23⅛-New. Established rules of legal procedure are to be followed in compensation cases if applicable. 324 Ill89, 154NE412.

104-23 1/10-New. Employer's answer and request for transfer to proper county is

not waiver of jurisdiction. **TexCivA** 296 SW901.

104-23¼1-New. Failure to bring timely suit to set aside an award in the county of injury is a bar, although suit was brought in another county in time. **Tex CivA** 296SW901.

104-23½2-New. Parties may not by acts, confer jurisdiction on the court to set aside an award. **TexCivA** 296SW 901.

104-23⅓3-New. After the expiration of the time to set aside an award, the Industrial Accident Board alone has power over the decision. **TexCivA** 296SW901.

104-23¼4-New. Cause of action of injured employee accrues when he receives injury in course of employment, 118 **Oh** 1, 160**NE**470.

104-23⅕5-New. and that of dependents when the employee dies from the injury. 118 **Oh**1, 160**NE**470.

104-23⅙6-New. Statute relative to settlement of compensation claims between employer and employee is not mandatory but permissive. 10**LaA**149, 120S 258.

104-23⅐7-New. The time for beginning proceedings is tolled under the statute while the employee is totally disabled and bed-ridden as a result of the injury. 204**Cal** 432, 268**P**902.

104-23⅛8-New. The period for bringing proceedings is extended six months under some statutes by payment of wages to the injured employee while in the hospital. 92**CalA**298, 268**P**670.

104-23⅑9-New. Payment of compensation by an insurance carrier extends the running of the statute as to the employer. 86**CalA**406, 260**P**829.

104-23⅒0-New. Under some statutes a claim must be prosecuted within one year. **Utah** 278**P**60.

104-23⅓1-New. Where payments are commenced and continued without any valid agreement of settlement, statute of limitations does not take effect until a year after the last payment. 117**Nebr** 681, 222**NW**42.

104-23½2-New. Proceedings are not barred as to a corporation where although not a formal party to the proceedings, it was such in effect. 86**CalA** 406, 260**P**829.

104-23⅔3-New. Under some statutes, an employee is entitled to enforce a compensation claim by joint action against the employer and the insurance carrier and to recover against the employer and insurer jointly where the employer was liable. 157**Tenn**618, 11**SW(2d)**872.

104-23¼4-New. Compensation proceedings under the act are statutory proceedings by an administrative officer and not judicial proceedings. 33**F(2d)**137.

104-23⅕5-New. Under some statutes the principal employer, contractor, and subcontractor and their respective insurers are liable to an employee for compensation. 110**Conn**221, 147**A**705, 66 **ALR**1428.

104-23⅙6-New. Respective rights and liabilities of a contractor and subcontractor inter sese, jointly liable for compensation payments, must be determined by general principals growing out of the relation to each other. 110**Conn**221, 147**A**705, 66**ALR**1428.

104-23⅐7-New. The fact that for a limited purpose of attaining the object of the statute the principal employer is made subject to a like liability to an injured workman as the actual employer does not alter the relation between themselves. 110**Conn**221, 147**A**705, 66 **ALR**1428.

104-23⅛8-New. Where a contractor and subcontractor are held jointly liable for compensation to an injured employee of a subcontractor, liability of the subcontractor is primary while that of the contractor is secondary. 110**Conn**221, 147**A** 705, 66**ALR**1428.

104-23⅑9-New. An oil company and one contracting to drill a well therefor have been held liable in solido to one injured in the latter's employ, the relation being that of principal and contractor. **LaA** 124**S**636.

104-23⅒0-New. Where compensation law of state where injury occurred did not create new right remedy prescribed is not exclusive. 156**Miss**567, 126**S**395.

104-24½-New. [§ 101a] **A½. Filing of Report of Accident.** Report required by statute to be filed by employers not carrying compensation insurance. **NJSup** 151**A**205.

104-24⅓-New. Former employer held not excused from making report of accident under statute. **NJSup** 151**A**205.

104-25 12**LaA**254, 124**S**616 (hernia); **LaA** 130**S**251; 125**Me**374, 134**A**163; 127 **Me**374, 143**A**464; 256**Mass**466, 152**NE** 880; **Mont** 287**P**170 (name and address of injured person mandatory); 218**App Div**31, 217**NYS**744; 219**AppDiv**495, 220 **NYS**420; 112 **Okl** 230, 240**P**634; **Tex CivA** 290**SW**895; **TexCivA** 19**SW(2d)**397 (statute with reference to giving notice of injury within specified time has no application in case of death of employee); **TexCivA** 21**SW(2d)**334 (notice of injury need not be given till injured employee receives notice from employer as being subscriber under Workmen's Compensation Law); **TexCivA** 29**SW (2d)**534. [a] 35**GaA**504, 134**SE**174. [b] (10) Failure to give written notice is not excused by oral notice to employer. 215 **AppDiv**736, 212**NYS**88 (Workmen's Compensation Law, § 18). (11) That employer had actual knowledge of injury. 217**Ala**424, 116**S**121. (12) Copy of verified complaint cannot serve purpose of written notice. 217**Ala**300, 116 **S**147. (13) Employer's answers to interrogatories do not dispense with written notice. 217**Ala**300, 116**S**147. (14) Verbal notice is sufficient under some statutes. **TexCivA** 16**SW(2d)**386. [e] (2) To enable employer to make timely investigation of facts. 214**App Div**824, 211**NYS**555. [g] 240**Mich**316, 215**NW**310. [i] (5) Informal notice is sufficient. **TexCivA** 274**SW**309. (6) Oral notice is sufficient in absence of showing of prejudice from failure to give written notice of injury. 327 **Ill** 79, 158 **NE**405. [l] 213**Ala**399, 104**S**756. [n] **Burden of showing compliance** with giving of notice is on plaintiff. 213**Ala**305, 104**S**764. [o] **Where giving of required notice is not shown,** no recovery can be had and award will be reversed. 213 **Ala**305, 104**S**764; 219**AppDiv**495, 220 **NYS**420. [p] **Law requiring notice intends opportunity to employer** to investigate nature of injury and to lessen disability by treatment. 218**AppDiv**31, 217**NYS**744. [q] **Filing of suit constitutes notice.–TexCivA** 290**SW**895; **Tex CivA** 16**SW(2d)**386. [r] **Failure of employer to give insurer notice of injury** to employee held no defense as against latter. 322 **Ill** 462, 153**NE**685. [s] **In Tennessee** notice is not condition of right to bring suit but notice or excuse for not giving it is condition of recovery of compensation. 160**Tenn**513, 26**SW(2d)** 153. [t] **Employee who gave notice to employer and accident board of specified injury** affecting right arm is not limited to claim for only specific injury to arm where ultimate result of injury extended to other parts of body. **TexCivA** 19**SW (2d)**821.

104-25½-New. Notice to employer is not given by notifying insurer and being on job but unable to work. 216**Ala**264, 113**S**234.

104-25⅓-New. Notice to the employer is not shown by a letter between persons whose relation to the parties does not appear. 216**Ala**264, 113**S**234.

104-26 44 **Ida**680, 258**P**1079; 337 **Ill** 454, 169**NE**225 (actual notice is sufficient); 227**Ky**217, 12**SW(2d)**314. [b] (3) Report of accident not signed by claimant or certified by employer was sufficient in Ohio prior to amendment of July 14, 1925. 32 **OhA**224, 167**NE**896 (2dcase).

104-27 216**Ala**379, 113**S**400; 21**AlaA** 183, 107**S**735; 33**Ariz**490, 266**P**11; 203 **Iowa**1229, 212**NW**577; 125**Me**245, 132**A** 698; 125**Me**374, 134**A**163; 234**Mich**629, 209**NW**60; **Mont** 287**P**170 (statute mandatory); **NJSup** 129**A**468; 158**Tenn**86, 11**SW(2d)**679; **TexCivA** 290**SW**895; **TexCivA** 10**SW(2d)**405; **TexCivA** 17**SW (2d)**68; 200**Wis**237, 227**NW**950. [i] **In Tennessee** notice to be given within thirty days after "occurrence of the accident" does not require notice to be given at subsequent date when seriousness of injury becomes apparent. 153 **Tenn**144, 281**SW**927. [j] **Period commences to run** from date of accident. 203 **Iowa**1229, 212**NW**577. [k] **Statute is put in operation** by notice from employer and not by employee to commissioner. 173**Minn**414, 217**NW**491. [l] **Computation of time.–TexCivA** 16**SW (2d)**386. [m] **In case of hernia** Pennsylvania statute requires that notice be given to employer within forty-eight hours after accident. 13**PaDist&Co** 14. [n] **Employee not guilty of laches.–87 Colo** 486, 288**P**1051. [o] **After restoration to mental capacity.–Mont** 287**P**170 (statute mandatory preventing recovery of compensation if not complied with). [p] **Employer and insurer estopped to rely on limitations.–87Colo** 486, 288**P**1051. [q] **Where notice of injuries is given within prescribed time** additional injuries not known until after such time are within court's jurisdiction. **TexCivA** 29**SW(2d)**458.

104-27½-New. In Rhode Island a physician failing to present a claim within the statutory period is not entitled to recovery from the employer for treating an employee. 48**RI** 113, 136 **A**3.

104-27⅓-New. Employer's knowledge of physician's employment is not waiver of presentation of claim within statutory time. 48**RI** 113, 136**A**3.

104-27¼-New. A claim of an employee for a physician's services is subject to two-year statute of limitations. 48**RI** 113, 136**A**3.

104-27½-New. Claim of a physician against an employer for treatment of the employee is not "employee's claim for compensation." 48**RI** 113, 136**A**3.

104-27⅙-New. Claim of a physician against an employer for treatment of an employee is barred by the two-year statute of limitations. 48**RI** 113, 136**A**3.

104-27⅐-New. Six-year statute of limitations does not apply to a claim of a physician against an employer. 48**RI** 113, 136**A**3.

104-27⅛-New. Physician's claim against an employer for treating an employee is a claim under the Compensation Act. 48**RI** 113, 136**A**3.

104-27⅑-New. Established rules of procedure, so far as applicable, are followed in compensation proceedings. 325 **Ill** 570, 156**NE**796.

105-28 213**Ala**399, 104**S**756, 757 [cit CJ]; 213**Ala**604, 105**S**592; 217**Ala**409, 116**S**424; 21**AlaA**183, 107**S**735; 44 **Ida** 680, 258**P**1079; 321 **Ill** 298, 151**NE**920; 322 **Ill** 187, 152**NE**548; **Ill** 173**NE**184; 218**Ky**40, 290**SW**1036; 221**Ky**755, 299 **SW**991; 125**Me**374, 134**A**163; 125**Me**524, 134**A**626; 266**Mass**153, 165**NE**21; 240 **Mich**316, 215**NW**310; **Nebr** 230**NW**688 (actual notice); 245**NY**201, 156**NE**665; 114 **Okl** 140, 244**P**438; 120 **Okl** 197, 251 **P**40; 132 **Okl** 241, 269**P**262; 48**RI** 113, 136**A**3; 160**Tenn**504, 26**SW(2d)**128; **TexCivA** 16**SW(2d)**390; **TexCivA** 25**SW (2d)**665. Contra 154**Tenn**329, 289**SW** 519. [c] **Burden of showing that employer, agent, or representative had knowledge of accident** (1) is on employee. 44 **Ida**680, 258**P**1079. (2) Evidence held not to sustain burden. 44 **Ida**680, 258**P**1079. [d] **Evidence held insufficient** to show employer's knowledge of injury. 217**Ala**409, 116**S**424.

105-29 213**Ala**604, 105**S**592; 21**AlaA** 183, 107**S**735; 44 **Ida**680, 258**P**1079; 214**Ky**635, 283**SW**1007; 218**Ky**40, 290 **SW**1036; 223**Ky**839, 4**SW(2d)**1111; 224 **Ky**200, 5**SW(2d)**1042; 7**LaA**33; 128**Me** 177, 146**A**258; 240**Mich**316, 215**NW**310; 245**NY**201, 156**NE**665; 218**AppDiv**31, 217**NYS**744; 115 **Okl** 67, 241**P**820; 128 **Okl** 221, 262**P**201; 144 **Okl** 155, 289**P** 1103 (in absence of prejudice); 14**Pa Dist&Co** 217; 48**RI** 353, 138**A**175; 152 **Tenn**401, 277**SW**902; 153**Tenn**144, 281 **SW**927; 158**Tenn**86, 11**SW(2d)**679; **Tex CivA** 16**SW(2d)**386; **TexCivA** 27**SW(2d)** 314; **TexCivA** 29**SW(2d)**524. [a] (13) Oral notice to county recorder of injury to employee of his office held sufficient notice to county. 327 **Ill** 79, 158**NE**405. (14) Knowledge of foreman imputed to employer. **TexCivA** 27**SW(2d)**314. (15) Notice to foreman in charge of work is notice to employer. **TexCivA** 16**SW(2d)**386. [f] **Circumstances held to show** notice of injury to employee's

immediate superior. NJ 131A686. [g] **Failure of foreman to report injury** of which he had knowledge is not chargeable to injured employee. 88 IndA382, 164NE282.

105-29½-New. or where the subcontractor has knowledge, notice is waived even as to the contractor who may be liable for the subcontractor's failure to carry insurance; 216AppDiv105, 214 NYS486.

105-30 218Ky40, 290SW1036.

105-31 44 Ida680, 258P1079; 321 Ill 298, 151NE920; 218Ky40, 290SW1036; 112 Okl 230, 240P634; 115 Okl 67, 241P 820; 120 Ok 197, 251P40; 128 Okl 221, 262P201; 130 Okl 65, 265P131; 92Pa Super562; 194Wis600, 217NW327. [b] (1) 44 Ida680, 258P1079, 1080 [citCJ]; 112 Okl 230, 240P634. But see 115 Okl 67, 241P820. (3) 115 Okl 273, 244P 432. (4) 84CalA228, 257P895. (5) Burden on employer to show prejudice from want of written notice. 115 Okl 273, 244 P432 (effect of failure to sustain burden). (6) Evidence held not to sustain burden. 44 Ida680, 258P1079. (7) Where employee shows actual notice, burden of proving prejudice from lack of written notice shifts to employer. 128 Okl 221, 262P201. (8) Where claimant was president and manager of employer and acted in dual capacity of employer and employee, neither his knowledge nor that of his wife as secretary of employer will cast burden of showing prejudice on employer. 130 Okl 65, 265P 131. (9) Burden on employer to show prejudice from failure to give notice. 194Wis600, 217NW327. [e] 84CalA228, 257P895; 115 Okl 67, 241P820; 129 Okl 60, 263P462; 160Tenn513, 26SW(2d) 153. [i] **No finding of absence of prejudice.**–214AppDiv824, 211NYS555. [m] **Employer's testimony that he was not prejudiced** by employee's failure to give notice of injury does not excuse failure. 218AppDiv440, 218NYS272. [n] **Prejudice is determined by industrial board,** not by witness. 218AppDiv440, 218NYS 272. [o] **Finding of lack of prejudice** held not required where knowledge of injury is found to have been received. 259Mass350, 156NE718. [p] **Findings of absence of prejudice sustained.**–147Va 89, 136SE651.

105-31½-New. It is error to excuse failure to give notice in the absence of a finding that the employer had knowledge of the accident. 215AppDiv851, 213NYS325.

105-31¾-New. Third person cannot complain of failure to give employer notice. 80CalA208, 250P1062.

105-32 213Ala605, 105S693; 125Me 374, 134A163; 156Md412, 144A339; 254Mass460, 150NE183; 219AppDiv 495, 220NYS420; 154Tenn329, 289SW 519; 158Tenn86, 11SW(2d)679; Tex CivA 296SW920; TexCivA 19SW(2d) 397 (where both insurance association and subscriber had notice); TexCivA 23SW(2d)405 (physical and mental incapacity). [j] **Burden of excusing failure to give timely notice** is on claimant. 112 Okl 230, 240P634; 49RI 8, 139 A470. [k] **Failure to give timely statutory notice is not excused** by injury resulting in loss of both arms by amputation where employee was in full possession of mental faculties. 154Tenn 329, 289SW519. [l] **Failure to give notice, not excused by state industrial board,** held ground for reversal of award. 219AppDiv495, 220NYS420. [m] **Discretion of court.**–160Tenn 513, 26SW(2d)153. [n] **Jury may consider question of cause for not giving notice** where employee is ignorant of fact that employee carried insurance. TexCivA 23SW(2d)405.

105-33 125Me374, 134A163; 127Me374, 143A464; 49RI 8, 139A470. [a] (2) Where injury to claimant remains latent for more than thirty days. 126Me 358, 138A555. [c] **Ignorance of serious consequences** of accident by employee and employer's agent held to excuse failure to give notice. 153Tenn144, 281 SW927. [d] **"Mistake"** does not mean mistake of law but mistake of fact. 126 Me358, 138A555. [e] **Illness not excuse for giving notice** where, after leaving hospital, employee allowed months to pass before giving notice. 125Me374, 134A163. [f] **Where employee did not connect injury** with employment until too late. 49RI 8, 139A470.

105-33½-New. Under Vermont act, payment of burial expenses is not payment of compensation excusing failure to give notice of injury. 100Vt72, 135 A1.

105-33¾-New. Neither medical services nor burial expenses are "compensation" in statutory sense. 100Vt72, 135A1(2d case).

105-33¼-New. Where notice is excused, it must be given within reasonable time after disability is removed. 126Me358, 138A555.

105-35 49RI 8, 139A470.

105-36 21AlaA183, 107S735.

105-37 240Mich316, 215NW310. [b] **Notice to employee's immediate superior** is sufficient compliance with statute whether injury was reported to others in charge or not. NJ 131A686.

106-38 156Tenn197, 299SW780. [b] **Failure to give state notice** of injury is excused where department having servant knew of injury. Va 136SE151. [c] **Actual knowledge** of department having servant held sufficient notice to state. 147Va89, 136SE651.

106-40 217AlaA424, 116S121.

106-41 NJ 142A559 (examining physician).

106-41½-New. Failure to give notice may seriously prejudice the employer by not giving him an opportunity for adequate investigation. 214AppDiv824, 211NYS555.

106-41½-New. That the injured employee received thorough medical aid and treatment does not excuse failure to give notice. 214AppDiv824, 211NYS 555.

106-41¼-New. Objection as to notice is not tenable where findings of fact recite no controversy and no challenge at trial. 213Ala605, 105S693.

106-41⅓-New. Notice of injury is not necessary on award for death benefits. 245NY201, 156NE665; 215AppDiv845, 213NYS159.

106-41⅙-New. Notice may be waived. 213Ala605, 105S693.

106-41⅐-New. Employer not raising objection before board of failure to give written notice of death waives such notice, 215AppDiv845, 213NYS159.

106-41⅛-New. and it is immaterial that failure to give notice was excused on improper grounds. 215AppDiv845, 213NYS159.

106-41⅛-New. The employee of a subcontractor serving notice on his employer is not required to serve notice on the principal contractor, where the latter's attention was called to the fact that the award might be made against him. 216AppDiv105, 214NYS486.

106-41 1/10-New. Waiver of notice. Voluntary payment of compensation by an employer to an injured employee, amounting to a distinct recognition of liability, waives notice of injury. 235 Mich689, 209NW840.

106-41 1/11-New. An employer cannot object to delay in giving notice where it failed to make report to the department of labor and ignored the request of the department for a report. 240 Mich316, 215NW310.

106-41 1/12-New. Terms "notice" and "knowledge" in a statute refer to compensable injury. 203 Iowa1229, 212NW 577.

106-41 1/13-New. Granting medical service to an employee is not notice of compensable injury. 203 Iowa1229, 212NW 577.

106-41 1/14-New. Failure of industrial accident board to find that insurer was not prejudiced by lack of written notice is immaterial where it found that employer's timekeeper had knowledge of injury. 259Mass350, 156NE718.

106-41 1/15-New. In death case, prior notice of injury is not required. 245NY 201, 156NE665.

106-41 1/16-New. Delay in giving notice does not render it insufficient where claimant did not know of injury. 149 Va307, 141SE225.

106-41 1/17-New. Allegation held to allege filing within prescribed time. Tex CivA 300SW137.

106-41 1/18-New. Courts may inquire whether good cause existed for failure to file claim with accident board within six months. TexCivA 300SW137.

106-41 1/19-New. Notice to employer of injury is notice of everything which may reasonably be expected to result from it. 221Ky755, 299SW991.

106-41 1/20-New. To dispense with notice, knowledge of employer must be had within time for giving notice. 216 Ala300, 116S147.

106-41 1/21-New. Burden of showing reasonable excuse for delay is on claimant, 149Va307, 141SE225.

106-41 1/22-New. , but where shown, burden of showing prejudice from delay is on employer. 149Va307, 141SE225.

106-41 1/23-New. Notice may be waived. 160Tenn513, 26SW(2d)153.

106-41 1/24-New. Failure to give notice is excused where notice would serve no useful purpose. 160Tenn513, 26SW(2d) 153.

106-41 1/25-New. Burden of proving notice or excuse for failure to give notice rests on claimant. 160Tenn513, 26SW (2d)153.

106-42 [g] 22 OhA454, 153NE276.

106-43 204Cal 432, 268P902; 206Cal 102, 273P791; 169Ga251, 150SE78, 67 ALR287 (right of action ceases where claim not filed within statutory time); 39GaA668, 148SE286(1stcase); 332 Ill 156, 163NE408; 335 Ill 322, 167NE80; 87 IndA145, 159NE695; 234Ky24, 27 SW(2d)393 (necessity for claim after voluntary payments ceased); 154Md401, 140A712; 156Md447, 144A345; 234Mich 629, 209NW60 (claim for compensation for injury required to be made within six months after occurrence under Michigan statute); 242Mich84, 218NW768; 100NJEq444, 136A342; 252NY1, 168NE 442 (claim presented five years after injuries held barred by statute of limitation); 216AppDiv612, 215NYS547; 221 AppDiv484, 224NYS262; 121 Oh494, 169NE569; 131 Okl 73, 267P657; 115 Tex551, 285SW1084, 1087 [citCJ]; Tex CivA 297SW1042; TexCivA 20SW(2d) 263; TexCivA 29SW(2d)534; 108WVa 410, 151SE323 (time for application for compensation). [a] (3) In case employee, on expiration of period of compensation provided for in agreement, claims additional compensation for injury not provided for in agreement, failure of employer with notice to report to commission nature and extent of injury fully and in detail on eighth day after occurrence bars its right to raise defense of statute of limitations. 234Mich 629, 209NW60. (4) Under Compensation Act, where employee who promptly reported injury to foot suffered similar accident to same portion of same foot year later, there was new intervening cause, and even though it aggravated previous injury resulting in infection, it did not flow from first accident alone, but from both, requiring filing of claim for second accident. 216AppDiv612, 215NYS547. (5) Limitation of one year for dependents to institute proceedings for compensation for death of deceased employee does not begin to run till employer files notice with division of workmen's compensation under department of labor. 155Tenn285, 292SW3. (6) Statute barring claim unless agreement or petition is filed within two years of injury does not preclude petition after two years for injuries received from blood poisoning where agreement for compensation for blood poisoning was filed within the period. 126Me173, 137 A54. [c] (19) Limitation does not run against infant until guardian is appointed. 221AppDiv484, 224NYS262. (20) Where injury is latent and does not result in compensable disability till after expiration of statutory period, failure to give notice within such time does not defeat right to recover provided notice is given within statutory time after knowledge of compensable disability. Nebr 227NW449. (21) Where employee's claim against husband was filed within six months claim asserted against wife seventeen months after in-

jury was not further claim. 208Cal 633, 284P212. (22) Under provision for claim within stated time after injury running of limitation is not deferred until it can be determined whether there will be permanent disability. MoA 25 SW(2d)529. (23) Under such provision where bone was broken by accident limitation runs from date of accident although it was not then known that bone was broken. MoA 25SW(2d)529. (24) Application for compensation on day of employee's injury is not premature. OhA 173NE14. (25) Employee wrongly advised by employer's medical officer need not within two years make application to employer for compensation. OhA 173NE14. (26) Other instances. 90CalA725, 266P556; 332 Ill 386, 163 NE789; 332 Ill 611, 164NE216; 89 IndA 380, 165NE258; 117Nebr484, 221NW 99; 118Nebr445, 225NW117(2dcase); 225AppDiv489, 233NYS407; 91PaSuper 350; TexCivA 16SW(2d)390; TexCivA 17SW(2d)68; Utah 278P60. [e] (2) In Kansas claim may be made at any time within three months after accident. 123 Kan259, 255P35. (3) Limitation of time for filing claims does not apply to award against employer who has not complied with law. 56ND624, 218NW 869. [g] 329 Ill 48, 160NE218; 33NM 227, 264P946; 66Utah235, 241P223. [i] (14) Failure of claimant to file claim within statutory time after injury constitutes absolute bar to recovery notwithstanding no notice of contest is filed. 83Colo 252, 263P405. (15) In Michigan, claim for compensation for death made within six months after death is timely, although not made within two years after accident. 242 Mich452, 219NW602. (16) Application required to be made within year after injury. Utah 267P781 (injury resulting in subsequent loss of arm). (17) Commission is not without jurisdiction to hear and determine application for compensation not made within year after date of accident. Utah 267P781. (18) Failure of employer or insurer to plead statute is waiver of defense. Utah 267 P781. (19) Limitation held applicable to injuries resulting in death. 38Wyo 172, 265P707. (20) Limitation held applicable to claim by surviving parents. 38Wyo 172, 265P707. [j] TexCivA 281 SW1092. [k] (2) Whether compensation claim is meritorious and good cause is shown for failure to file notice of claim within statutory time is within sound discretion of commission. TexCivA 281SW1092. (3) That employee's surviving parents were in Italy is no excuse for failure to file claim in time. 38Wyo 172, 265P707. [s] (1) 329 Ill 139, 160NE212; 248NY10, 161NE204 (reasonably certain identification of case sufficient); TexCivA 274SW309; TexCivA 300SW667. (4) Claim need not state amount claimed nor all deleterious effects arising out of accident. 329 Ill 139, 160NE212. (5) Application held sufficient. 329 Ill 139, 160NE212. [y] 240Mich316, 215NW310. [ii] 213 Ky154, 280SW925; 232Mich154, 205NW 109. [oo] 49ND915, 194NW663. [uu] In New York (1) minor wife is minor dependent against whom limitations do not run where she has no committee, guardian, or next friend. 215AppDiv 581, 214NYS615. (2) Mother's guardianship of minor widow, having ceased by marriage of such minor, makes latter minor against whom statute does not run. 215AppDiv581, 214NYS615. (3) Minor widow's "next friend" must be one who has already performed for infant as to matter in hand, in order to permit statute to run against minor not having committee or guardian. 215 AppDiv581, 214NYS615. [vv] California statute extending time for filing proceedings construed to apply to existing claims not barred by limitation at time of its passage. 198Cal 631, 246P1046, 46ALR1095. [ww] Delay in filing claim held not waived by employer's delay in giving notice of contest. 82Colo 335, 259P509. [xx] Notice of accident is not equivalent to application for compensation. 154Md401, 140A712. [yy] Claim contained in notice may be sufficient.–248NY10, 161NE204. [zz] Failure of employer to disclose cause of action does not excuse filing claim within prescribed time. 131 Okl 73, 267P 657. [aaa] In Texas, "good cause" authorizing waiver of strict compliance is question of fact within discretion of board or court, reviewable for abuse. TexCivA 297SW1042. [bbb] Failure to properly diagnose infirmity or nature of injury will not limit right of recovery. 172Minn489, 216NW241. [ccc] Widow filing claim for death benefits need file no further claim for disability compensation. 222AppDiv398, 226NYS 367. [ddd] Whether claim has been made in proper time constitutes question of fact. 332 Ill 386, 163NE789. [eee] Claim filed later than statutory period has been held barred. 208Cal 633, 284P212. [fff] Time for filing claim for compensation for recurring disability is not fixed by statute in same jurisdictions. Mass 170NE72(2d case). [ggg] Limitation of time for filing claim is inherent limitation on right itself and right to compensation is extinguished by failure to file claim within statutory time. MoA 25SW(2d) 529. [hhh] Time under statute for serving written claim on employer held imperative. 130Kan203, 285P595. [iii] Time for filing claim.–41GaA514, 153 SE574; IndA 171NE882(2dcase); 130 Kan200, 285P604. [jjj] Time for filing petition for compensation.–Me 151A141. [kkk] Time of accrual of right to compensation.–35 OhA177, 172NE292. (2) Right of widow of employee who died from injuries accrues at his death. 35 OhA177, 172NE292. (3) Employee's right accrues when he receives injury. 35 OhA177, 172NE292. [lll] Good cause for failure to file within statutory time question of fact.–TexCivA 30SW(2d) 921. [mmm] Failure of employer to notify commission within statutory time after knowledge of accident tolls statute until notice is given. MoA 25SW (2d)529. [nnn] Extending time for filing claim.–109Conn469, 147A14. [ooo] Court cannot assume that time for giving notice required for hearing on extension of time to file claim is unreasonably short. 109Conn469, 147A14. [ppp] Section of act limiting time for presentation of claims is applicable only to claims payable out of fund and not to claims for award against employer who has failed to comply with act. 58ND 581, 226NW536(2dcase). [qqq] Time for presentation.–129Kan489, 283P654 (claim barred if demand not timely made, unless there is incapacity to make it). [rrr] Employer's failure to report accident does not excuse employee's failure to make claim for compensation. 234Ky24, 27SW(2d)393. [sss] Sufficient compliance with statute.–Mich 233 NW184.

106-43½–New. within a specified time, 122Kan653, 253P611; 213Ky154, 280 SW925; 236Mich109, 210NW305.

106-43⅓–New. Allegations of cause of action may be sufficient if statements of fact and not mere conclusions. TexCommnA 273SW838.

106-43¼–New. Those claiming compensation do not have to allege and prove negligence. TexCommnA 273SW 838.

106-43⅕–New. A claim on behalf of dependent, made by mere volunteer, is nullity, Utah 262P281.

106-43⅙–New. unless ratified by such dependent before the expiration of the time for filing the claim. Utah 262P 281.

106-43⅐–New. Objection that claim was filed without authority of dependent held not waived by taking of depositions. Utah 262P281.

106-43⅛–New. Objections that claim was filed without authority cannot be waived as to state insurance fund. Utah 262P281.

106-44 332 Ill 611, 164NE216 (held charged with knowledge as to time of filing); TexCivA 297SW1042; 38Wyo 172, 265P707. [b] TexCivA 281SW 1092.

106-44½–New. A verbal claim is sufficient. 123Kan259, 255P35.

106-44¼–New. Any language which constitutes a request for compensation is sufficient. 123Kan259, 255P35.

106-44¼–New. , or by lack of knowledge as to whether suffering is due to accidental injury sustained in work for the employer. 129Kan489, 283P654.

106-45 86CalA406, 260P829; 86Colo 206, 280P483; 235Mich689, 209NW840; TexCommnA 14SW(2d)798. See also Colo 293P342. But see 335 Ill 322, 167 NE80. Contra MoA 25SW(2d)529. [h] (1) 195Cal 577, 234P369. (2) Waiver by employer is binding on insurance carrier. 195Cal 577, 234P369. (3) Employer waives delay by sending employee to hospital for operation and paying bill therefor. 195Cal 577, 234P 369. [i] Failure to make timely demand held not waived.–129Kan489, 283 P654. [j] Evidence held to show waiver.–160Tenn459, 26SW(2d)148. [k] Estoppel of employer to assert physician was improper officer to take application of injured employee. OhA 173NE14.

106-46 86Colo 206, 280P483. See also Mass 173NE518; Nebr 227NW87; SD 227NW69. But see 154Md401, 140A712. [a] Insurer may be estopped to claim (1) that notice was not filed within proper time. 145Va391, 135SE21. (2) Estoppel held not shown by correspondence between insurance carrier and persons representing claimant. 154Md401, 140A 712.

106-48½–New. An insurer is not estopped to assert that claim was not filed in time by fact that physician, to whom the employer sent the claimant for treatment, led claimant to believe that he might delay filing claim where the claimant was sent to the physician only for treatment and the legal advice was unauthorized. 83Colo 252, 263P405.

106-49 TexCivA 290SW895. See also 248NY40, 161NE324.

106-50 198Cal 631, 246P1046, 46ALR 1095; 208Cal 633, 284P212; 90CalA725, 266P556; 86Colo 590, 284P121; 322 Ill 160, 152NE505; 336 Ill466, 168NE273 (application of employee of county must be filed against county and not against supervisors of county); 246Mich193, 224 NW354; 246Mich191, 224NW390; 114 Nebr475, 208NW122 (holding that claim need not be made within statutory period where injury is latent and of progressive character and culminates in compensatory disability); Utah 289P 94. [c] (1) 235Mich496, 209NW586; 236Mich109, 210NW305. (2) Unequivocal claim for compensation must be made (234Mich629, 209NW60), (3) but it need not be in writing (234Mich629, 209NW60). (4) Where employee refused to sign agreement on ground that it made no provision for particular injury, till assured by commission that rights in respect of injuries not included in agreement would not be waived, claim was made for compensation for injury. 243Mich629, 209NW60. (5) Burden is on employer to show harm from inaccuracy of statement. 235Mich 496, 209NW586. (6) Notice of result of accident, rather than of accident itself, is sufficient. 235Mich496, 209NW586. (7) Claim may be made by any person acting in behalf of dependent. 238Mich 576, 214NW315. (8) One who has no knowledge or information that there are any dependents may not make such claim for them. 238Mich576, 214NW 315. (9) Words "in their behalf" or "on their behalf" import agency or authority to act. 238Mich576, 214NW315. [j] Compensation claim of alien enemies held not barred by limitations. 84 IndA 373, 150NE391. [k] Indefinite or unreasonable delay in making should not be excused. TexCivA 297SW1042. [l] Claim for compensation for death is sufficient where it prays for sum of money for lost services. 37GaA777, 142SE189. [m] Whole controversy including claims of any and all persons should be submitted under statutes providing liberal plan of procedure. 87CalA333, 262P394. [n] Form of application is not jurisdictional.–34 OhA23, 170NE40. [o] Oral application for compensation held sufficient.–OhA 173NE14.

106-51 But see 238Mich576, 214NW

315. [b] **Statute of limitations.**–124Me 404, 130A180. [c] **Failure to file claim in time is not excused** by fact that widow resided in Poland and that transmission of papers through office of consul general was delayed. 81Mont36, 261P616.

106-51½-New. Statutory provision as to time of filing claim is mandatory in all cases. 81Mont36, 261P616.

106-51¾-New. and is not affected by provisions requiring liberal construction of the act and all proceedings. 81 Mont36, 261P616 (where there is no room for construction).

106-52½-New. No technical pleading is necessary in the statement of a claim. 324 Ill 89, 154NE412.

106-52⅓-New. A statement of a claim must contain sufficient facts to apprise the employer of the claim he is expected to meet. 324 Ill 89, 154NE412.

106-52¼-New. The application for adjustment of a claim should be in the nature of a pleading and should be consistent with the findings of the commission, but need not state all elements of a cause of action as in a declaration in an action at law. 320 Ill 281, 150NE 637.

106-52⅕-New. The application for adjustment of a claim is not a formal pleading and is not to be construed according to the rules of common-law pleading. 320 Ill 281, 150NE637.

106-52⅙-New. Application on regular form held to justify introduction of evidence as to actual disability caused by accident and an award to whatever extent justified by the evidence. 320 Ill 281, 150NE637.

106-52⅐-New. It is sufficient if the application for adjustment of a claim states the nature of the accident and character of injury so as fairly to advise the employer of the nature of the claim and enable him to ascertain facts and meet the claim. 320 Ill 281, 150NE 637.

106-52⅛-New. Proceedings under Pennsylvania act must be commenced within the time designated, 285Pa145, 131A703.

106-52⅑-New. but the statute limiting the time will not be extended by construction to cover cases not within its works. 285Pa145, 131A703.

106-52⅒-New. Where an employee died more than two years but less than three hundred weeks after injury, claim brought within one year of death is not barred notwithstanding the employee never applied for compensation while still alive. 285Pa145, 131A703.

106-52 1/11-New. Time for claim begins to run from time of incapacity. 125Me 524, 134A626.

106-52 1/12-New. In Alabama a claim for compensation for the death of an employee who had been receiving compensation is not barred until a year after last payment. 215Ala237, 110S17.

106-52 1/13-New. Statute limiting compensation to incapacity existing within a specified time does not limit the time of filing petitions to such period. 126 Me173, 137A54.

106-52 1/14-New. The purpose of fixing limitations in the statute is to permit an employer to investigate the claim promptly. 238Mich576, 214NW315.

106-52 1/15-New. Compensation Act alone fixes the period within which a claim must be filed. 48RI 310, 137A907.

106-52 1/16-New. Filing of a claim within the statutory period has been held indispensable for recovery. 48RI 310, 137A907.

106-52 1/17-New. Claim filed sixteen months after injury two months before employer ceased furnishing medical supplies held timely. 324 Ill 416, 155NE 380.

106-52 1/18-New. The claim of a physician for services to an injured employee, when within the jurisdiction of the commission, is not controlled by the statute fixing the time for felony claims but governed by the general statute of limitations. 129 Okl 15, 263P140.

106-52 1/19-New. Law requiring filing claim within specified time must be pleaded to be effective. 154Md401, 140 A712.

106-52 1/20-New. Filing of an application of minors for a death benefit and accrued compensation in proceedings pending before a commission gave the commission jurisdiction to hear claims of all persons for compensation arising from the same transaction. 206Cal 102, 273P791.

106-52 1/21-New. The time fixed for filing a claim for compensation affects the remedy, not the right, and must be pleaded to be available as a defense, and therefore the Commission need not exercise the prerogative to excuse delay on ground of no prejudice. 156Md447, 144 A345.

106-52 1/22-New. Delay in filing a petition is not acquiesced in by the city because of the sending of a letter by its engineer to the compensation bureau. NJCh 146A366(2dcase).

106-52 1/23-New. A statute providing that unexcused failure to file an application for compensation for injury not resulting in death within thirty days after the beginning of the disability shall bar the claim, is a special form of statute of limitations, which can be excused by industrial accident commission on statutory grounds. Md 144A 345.

106-52 1/24-New. An employee working and drawing wages after an accident and failing to claim compensation waives the right to claim compensation therefor for such period on the ground that the injury had not healed at the time of his discharge by his employer. 11LaA 14, 122S78.

106-52 1/25-New. The length of period of notice before hearing on a motion for an extension of time for filing a compensation claim is a matter within the legal discretion of the commissioner, and such notice may be required as is reasonable under the circumstances. 109Conn469, 147A14.

106-52 1/26-New. An essential element of a claim under the Workmen's Compensation Law is the filing thereof with the industrial commission within twelve months from the date of the accident. 169Ga251, 150SE78, 67ALR287.

106-52 1/27-New. Delay beyond statutory limit to make written demand after weekly payments had been suspended prevented proceedings for compensation. 130Kan410, 286P396.

106-52 1/28-New. Under Ohio statute filing of amended application does not deprive commission of jurisdiction of claim against non-subscribing employer filed during two year period. 34 OhA23, 170 NE40.

106-52 1/29-New. Failure to file claim for death raises no presumption that there were no dependents so as to give state right to payment into industrial fund. Ida 290P209.

106-52 1/30-New. Claim for injury is not barred because not filed within six months where filed before commission has acted on settlement agreement for another injury arising from same accident. MoA 31SW(2d)554.

106-52 1/31-New. In such case claim is not barred because not filed within six months after last payment under settlement agreement. MoA 31SW(2d)554.

107-63½-New. Contesting claims. By statute in some jurisdictions employer, 214AppDiv151, 211NYS752.

107-63⅓-New. or insurance carrier, desiring to contest claim, must file notice of controversy, 214AppDiv151, 211NYS 752.

107-63¼-New. within specified time. 214AppDiv151, 211NYS752.

107-63⅕-New. But failure to file notice is not a waiver of the right to contest the claim. 83Colo 252, 263P405; 214 AppDiv151, 211NYS752.

107-63⅙-New. The provision as to notice does not apply to death claims, 214 AppDiv151, 211NYS752.

107-63⅐-New. the statute only contemplating payment of compensation before award only in case of disability. 214 AppDiv151, 211NYS752.

107-65 222Ky591, 1SW(2d)1051; Tex CivA 271SW633; TexCivA 21SW(2d)31 (refusal to require claimant to be examined held not error); TexCivA 27 SW(2d)363 (insurer's motion in suit to set aside award properly denied for laches). [g] **Strict construction** is given provision. 156Tenn14, 299SW793. [h] **Examining physician must be authorized to practice in state.**–204 Iowa 1348, 217NW264. [i] **Employer not required to pay traveling expenses of employee** incident to his appearance before physician or surgeon for examination. 222Ky591, 1SW(2d)1051. [j] **Requirements of statute essential to imposition of penalty must be complied with** before compensation will be denied because of failure to submit to examination. 204 Iowa1348, 217NW264. [k] **Statute held inapplicable to autopsy on deceased employee.**–129Kan100, 281P860 (widow is under no duty to notify employer of post-mortem examination). [l] **Necessity for request.**–Mass 170NE72(2dcase). [m] **Duty of employer through its medical officers in examining employee's injury.**–OhA 173NE14. [n] **Employee struck in eye can rely on advice of employer's physicians** that no steel was therein. OhA 173NE14.

107-65½-New. Refusal to permit an X-ray examination of an employee during trial held not error. TexCivA 293 SW210.

107-65⅓-New. Statute held not to authorize court to require plaintiff to leave county for examination. 156Tenn14, 299SW793.

107-66 127Me207, 142A730. But see 155Tenn34, 290SW18. [a] **Statute authorizing autopsy** is not condition precedent to bringing suit. 214Ala332, 107 S905. [b] **Court may allow continuance** pending compliance with order for autopsy. 214Ala332, 107S905. [c] **Alabama circuit judge** granting order for autopsy has jurisdiction throughout state. 214Ala332, 107S905. [d] **Judgment not invalid for failure to enforce** autopsy order. 214Ala332, 107S905. [e] **Where judgment adjudicating employer was not entitled to autopsy remains unexcepted to,** claimant wife does not as matter of law forfeit right to compensation on account of refusal to permit autopsy by employer. 39GaA 273, 146SE641.

107-66½-New. Failure to call an impartial physician to examine the injured employee is not error of law. 262 Mass266, 159NE731.

107-66⅓-New. Physician held not disinterested. Del 151A724.

107-66¼-New. Where neither party complies with requirements, employee's application, at close of case, for appointment of medical examiner has been held properly refused. LaA 130S664.

103-82 213Ala596, 105S648 (widow); 335 Ill 322, 167NE80. [f] **Receiver** who employed himself as individual, may, as individual, maintain proceeding for compensation. TexCivA 18SW(2d)412. [g] **Consul-general** has authority to begin proceedings on behalf of foreign beneficiary. 335 Ill 322, 167NE80.

103-82½-New. Compensation accrued during lifetime of injured servant belongs to his estate. 105Conn545, 135A 911.

108-83 [b] **Death of employee pending proceeding.**–93PaSuper77 (prior to amendment of 1927).

108-84 105NJL636, 147A451(2dcase). [a] (2) Widower suing on his own behalf and on behalf of his minor children for compensation for death of his son need not qualify as tutor. LaA 121S671.

108-85 [a] **Revivor of pending action upon death of employee.**–(1) May be revived by dependents giving bond or by administrator without bond. 117Nebr 484, 221NW99. (2) Pleadings in application for revivor must state facts sufficient to bring applicant within statute. 117Nebr484, 221NW99.

108-85½-New. If an employee at the time of his death had a vested right to recover additional compensation for his injury, action therefor must be brought by his administrator. 154Tenn273, 288 SW726.

108-86 [a] **Insurer, paying compensation,** held entitled to be substituted as plaintiff in action against third person. 254Mass359, 150NE230.

108-86½-New. Where deceased employee's dependents, after having elected to sue third persons whose negligence caused employee's death, abandoned the action without the insurance carrier's consent, and were thereafter awarded compensation, which cause of action was barred by two-year limitation under statute, it was held that insurance carrier's cause of action against such third person under Compensation Act was barred. 243NY75, 152NE470.

108-86½-New. Some statutes permit claims for compensation for death to be made by agent or representative of the beneficiary. 142Wash160, 252P697.

108-86½-New. Minors. Under some statutes, an employee over eighteen years of age may maintain a proceeding in his own name. 129 Okl 60, 263P462.

108-86½-New. In Porto Rico, heirs of a deceased workman cannot be substituted for him in an action brought by him and extinguished by his death. 33Porto Rico 975.

108-86½-New. A compensation proceeding should be entitled in the name of the dependents and not in the name of decedent. 179Minn158, 228NW559 (2dcase).

108-86½-New. [§ 105a] E½. **Joining Insurance Carriers.** A claimant may make an insurance carrier a party defendant to his claim either at the time the original claim is filed or at any time by making a separate claim against the insurance carrier. 27Hawaii476.

108-90 35GaA599, 134SE357; 37GaA624, 141SE316; 320 Ill 544, 151NE495; 232Ky599, 24SW(2d)299; 6LaA462; Mich 233NW184; 156Tenn373, 299SW1056; TexCivA 271SW633; TexCivA 11 SW(2d)533. See also 166LaA467, 117S558 [writ of error dism 278US556, 49SCt 14(4thcase), 73Led504]; 8LaA136. [a] (2) Where employer and employee sign agreement to compensation and afterward employee signs settlement receipt in full, and two years later applies to industrial board to have agreement approved, board has jurisdiction to pass upon matter in absence of any finding that compensation period or disability had terminated. Receipt which recited termination of disability is not conclusive. 83 IndA242, 148NE177. [c] **In Tennessee** (1) agreement for greater benefit than statute provides is not binding without approval of court and will not be approved over insurer's objection. 153Tenn209, 280SW1011. (2) Where claimant is not represented by counsel, circuit judge should require his presence in open court or at least require service of notice upon him. 156Tenn 373, 299SW1056. (3) Merely writing approval upon instrument has no judicial effect since circuit judge speaks only through his minutes. 156Tenn373, 299 SW1056. (4) Where employer paid settlement, which was set aside, action of court in declining to charge penalty was proper. 156Tenn373, 299SW1056. [d] **In Georgia,** under statute, limitation prescribed in § 25 has no application to proceeding brought in proper case, under § 45, to review settlement agreement. 133SE851. [e] **Compensation board may, under some statutes, disregard widow's agreed claim** that she is only partially dependent. 212Ky137, 278SW 540. [f] **In Maine,** petition for review of agreement held not cognizable where period of compensation was left indefinite. 126Me401, 138A866. [g] **Where claimant and employer are equally at fault in attempting to effect settlement** without knowledge or consent of industrial commission, granting award for claimant is proper. 86Colo 206, 280P483. [h] **In Kentucky** agreement as to compensation does not prevent board from hearing application for compensation and allowing credit for amount paid. 232Ky599, 24SW(2d)299. [i] **Agreement not approved by commission** may be treated as agreement to voluntarily pay sum stated. 232Ky599, 24 SW(2d)299. [j] **Commissioner's power of approval is restricted** to agreements whose terms conform to provisions of Compensation Act. 208 Iowa430, 226 NW124. [k] **Power to approve implies knowledge of law.**–208 Iowa430, 226NW 124 (that, upon remarriage of surviving spouse prior to completion of payments, payments would terminate).

108-91 35GaA599, 134SE357; 320 Ill 544, 151NE495; IndA 170NE863 (payment and acceptance constituting conclusive presumption of payment in full); 124Kan287, 259P703; 212Ky123, 278SW 533; 112 Okl 230, 240P634; TexCommnA 295SW588; TexCommnA 12SW(2d)200; TexCivA 271SW633 (compromise agreement under act is in nature of accord and settlement thereunder in nature of satisfaction thereof); Utah 279P889 (settlement agreement made after award). [a] **Acceptance by employee** of amount tendered by employer does not prejudice him, where sole dispute is as to time payments should continue. 201 Iowa607, 206NW146. [b] **Compromise agreement can only be entered with consent of board.**–212Ky123, 278SW533. [c] **In Kansas,** release is invalid where it is not verified and acknowledged by workman, although it is filed with clerk of court within sixty days after execution. 122Kan178, 251P191; 125Kan 243, 263P785. [d] **Agreements held not binding as discharge** of compensation for partial incapacity. 50RI 16, 144A 439. [e] **Agreement constitutes complete bar to further claim for compensation** in absence of fraud, accident, or mistake. TexCommnA 17SW(2d)1043. [f] **Receipts.**–(1) Agreement and receipt of compensation payments by illiterate employee held not binding where misunderstanding resulted from incompetence of interpreter furnished by employer. NH 146A172. (2) Employee's receipt in settlement not binding as admission of full extent of employer's liability where based on mistaken assurance that disability had terminated. NH 146A529. (3) Employee's receipt of sum received in settlement held not release or compromise of liability but mere admission of satisfaction. NH 146A529. [g] **Payment.**–TexCivA 11SW(2d)533. [h] **Effect on death claim.**–Nebr 232NW 92. [i] **Hearing on void stipulation** need not be granted by department of labor and industry. Mich 233NW361.

108-92 68CalA510, 229P870; 46 Ida692, 271P1; 320 Ill 544, 151NE495; 87 IndA 145, 159NE695; 214Ky775, 283SW1067; 217Ky500, 289SW1107; 232Ky599, 24 SW(2d)299; 234Mich629, 209NW60; 172 Minn46, 214NW765; 115 Okl 273, 244P 432; TexCivA 21SW(2d)56. [c] Me 137 A54.

108-93 [a] **Employee held not entitled to set aside judgment effecting lump sum settlement** in accordance with agreement. LaA 130S639.

108-94 Wis 232NW885 (agreement held conditional until approved). See also Mich 233NW361.

108-95 35GaA599, 134SE357; 41GaA 547, 153SE626; 320 Ill 544, 151NE495; 234Mich151, 209NW193. [c] **Settlement agreement for burn on neck and ammonia poisoning** does not prevent award for disease superinduced by such injury. 162Ga130, 133SE851. [d] **Commissioner has jurisdiction to determine dispute** between claimant and insurance carrier arising under terms of memorandum agreement, and such dispute may properly be presented by insurance carrier to whom as agent employer delegates power. 208 Iowa430, 226NW124 (exclusive jurisdiction to interpret agreement whether parties appear or not). [e] **Upon grounds of mutual mistake,** commission has jurisdiction upon application to set aside agreement and make proper award. 130Kan576, 287P235.

108-96 124Kan287, 259P703; 216Ky 742, 288SW696; TexCivA 284SW968. [c] 121Kan622, 249P675; 112 Okl 230, 240P634. [d] **Remedy in proceeding before compensation board is exclusive** and relief cannot be sought in equity. 175Minn539, 221NW910.

108-96½-New. On application for relief from award entered on agreement of compromise, provisions of the civil code relating to rescission of contracts are applicable in a measure. 68CalA510, 229P870.

108-96⅓-New. A compromise agreement is not reviewable by the commission without application made therefor under the statute. 187Wis30, 203NW 740.

108-96¼-New. Where both parties knew that the extent of the injuries was uncertain, a compromise cannot be set aside on the ground of mutual mistake as to the nature and extent of the injury. 121Kan622, 249P675.

108-96½-New. Application to vacate approval of such agreement on ground of fraud, duress, or mistake should not be granted unless supported by evidence. 85 IndA548, 154NE776.

108-96⅙-New. Where fraud alleged is false representation by insurers, an instruction on fraud in case of breach of legal duty, trust, and confidence is error. TexCivA 284SW968.

108-96⅐-New. An erroneous receipt in full does not bind the employee. 3LaA 203.

109-99 85 IndA32, 152NE285; 216Ky 742, 288SW696.

109-99½-New. A waiver or agreement to waive compensation is invalid under some statutes. 115 Okl 273, 244P432.

109-99⅓-New. Under some statutes, a final receipt signed by an injured employee and approved by the commission is invalid where it is proved and found by the commission that a change in condition of the employee has occurred, and that additional compensation should be allowed. 115 Okl 273, 244P432.

109-99¼-New. Award by agreement is not "voluntary" award under the act. 211Ky821, 278SW169.

109-99⅕-New. Statutory period barring claims after suspension of "voluntary" award does not apply to award by agreement. 211Ky821, 278SW169.

109-99⅙-New. Where settlement had not been approved by the board, the court of appeals cannot enter dismissal. 216Ky742, 288SW696.

109-99⅐-New. Order of court of appeals dismissing an appeal as settled held void where not approved by the compensation board. 216Ky742, 288SW 696.

109-99⅛-New. Failure to repay money received under void compromise does not preclude claimant from moving to set aside dismissal. 216Ky742, 288SW 696.

109-99⅛-New. Employee's receipt of agreed amount in full for compensation, "subject to review and approval of commission," is not binding if not approved. 126Me173, 137A54.

109-99 1/10-New. Where injured employee turned over compensation payment to employer in consideration of retention in employment at the same salary, he cannot repudiate the agreement and recover the payments in the absence of fraud, accident, or mutual mistake. TexCivA 294SW610.

109-99 1/11-New. Death of beneficiary extinguishes the right to compensation, under statutes, notwithstanding the agreement for compensation was approved by the commission. 320 Ill 544, 151NE495.

109-99 1/12-New. Denial of liability in answer and at hearing has been held proof of failure to reach an agreement. 85 IndA259, 152NE856.

109-99 1/13-New. The department of labor and industry is without jurisdiction to set aside an agreement for compensation induced by fraud. 240Mich 566, 215NW701.

109-99 1/14-New. In such case the proper remedy is by suit in equity. 240Mich 566, 215NW701.

109-99 1/15-New. Evidence has been held sufficient to show that an agreement for settlement was obtained by the employee's fraud. 240Mich566, 215NW701.

109-99 1/16-New. Where the commission, on receiving a memorandum of agreement of settlement, gives notice that it has fixed the amount and period of weekly compensation and that any complaint will receive prompt attention, the commission is not precluded from revising the award and approving the agreement. 165Ga501, 141SE195.

109-99 1/17-New. In such case the award first made is not conclusive on the par-

ties and may be reviewed by the commission. 165Ga501, 141SE195.

109-99½8-New. Under employer's agreement, approved by the Industrial board, to pay an injured employee a specified weekly compensation during total disability, not exceeding the statutory period, the compensation period cannot be terminated until the lapse of such period unless by some exception of the statute or by cessation of total disability, and temporary or intermittent cessation of total disability would not terminate the compensation period. 88 **IndA**64, 163 NE232.

109-99½9-New. The substantive rights of the parties and liability of the employer for compensation arise from, and are measured by, definitions embodied in the act rather than on any agreement of the parties. **CalA** 260P967.

109-99½0-New. Where an employer refuses to grant a written agreement under the statute, regardless of whether the amount of compensation is in dispute, the employee is entitled to a judgment in court. 1**LaA**200.

109-99½1-New. In proceedings under the Workmen's Compensation Act a referee's dismissal of claimant's petition for review of a workmen's compensation agreement until the workman should return to work and establish a bona fide earning wage has been held not error, where his present earnings of one dollar and fifty cents a week did not show real earning capacity. 294**Pa**167, 144**A**103.

109-99½2-New. Payments under invalid agreement with a foreign guardian of a nonresident ward, because of failure to comply with the statutes for the removal of the ward's property from the state, are deemed voluntary payments for which the employer and surety are entitled to credit, under statute, if shown by competent evidence to have been actually applied to the use of the ward. 48 **Ida**85, 280P228.

109-99½3-New. Commission can interfere with settlement between workman and employer only when injuries were result of illegal act or gross negligence of employer. 35**PortoRico** 747.

109-99½4-New. A foreign guardian without complying with the state statute relating to a nonresident ward's property therein cannot lawfully enter into a contract fixing compensation and receive for the ward moneys awarded by the board although the agreement is approved by the board. 48 **Ida**85, 280P223.

109-99½5-New. The terms of the Compensation Act are read into every memorandum agreement of compensation. 208 **Iowa**430, 226**NW**124.

109-99½6-New. Assignment of compensation payable under the act in whole or in part is prohibited in some jurisdictions. 52**Nev**104, 282P879 (statute applicable both to original award and judgment allowing increased compensation).

109-99½7-New. A contract of claimant to pay an award to another is of no force or effect under a statutory provision forbidding assignment. 52**Nev**104, 282P879.

109-99½8-New. A contract of settlement between claimant and the employer, by which claimant waives any benefits under the Compensation Act, is void. 107**WVa**531, 149**SE**604 (release of employer made pending suspension of payments to investigate employer's protest of award).

109-99½9-New. An agreement attempting to release the right to show permanent disability at some future time is void. 107**WVa**533, 149**SE**665.

109-99½0-New. No agreement can be made which will change the method of compensation fixed by the act or prevent an employee from receiving an award guaranteed by the statute. 34**F** (2d)959.

109-99½1-New. A proceeding under the Workmen's Compensation Act may be impeached only by a direct attack for that purpose. 248**Mich**480, 227**NW**788.

109-99½2-New. Effect of letter from commission indicating it would not affirm stipulation for settlement. **Wis** 232**NW**85.

109-3 [a] **Compensable period upon reopening award** is determined by deducting time during which compensation was paid under original agreement, but not for intervening time before petition to reopen and for which no compensation was paid. 214**Ky**775, 283**SW**1067.

110-22 121**Kan**525, 247P644 (written communication held sufficient consent to arbitrate under statute); 121**Kan**690, 249P604; 121**Kan**841, 250P261; 122 **Kan**731, 253P570. [c] **In Kansas** (1) written request to arbitrate is not necessary. 121**Kan**572, 708, 249P680. (2) Except for limited review, decision of arbitrator is final. 122**Kan**825, 253P583. [d] **Single arbitrator may be agreed upon by parties or appointed by court** (1) upon application of either party to determine rights to compensation. 124 **Kan**87, 259P703. (2) All matters pertaining to right of claimant to compensation may be submitted to such arbitrator. 124**Kan**287, 259P703. (3) Decision of arbitrator upon questions submitted to him is final except for limited review provided by statute. 124**Kan**287, 259P703. (4) This method of determining right to compensation is special proceeding as defined by code. 124**Kan**287, 259P703. (5) Parties are not required to submit to such arbitrator all questions pertaining to right to compensation. 124**Kan**287, 259P703. (6) Only question of amount of compensation is deemed to be in issue before arbitrator unless parties consent or court's order of appointment expressly refers other questions. 124**Kan**287, 259P703. (7) Such limited arbitration does not determine claimant's right to compensation. 124**Kan**287, 259P703. (8) Other questions, upon claimant's right to compensation, must be determined by action in court. 124**Kan**287, 259P703. (9) Arbitrator, upon submission of all questions to him, cannot make lump sum award except as to such portion as is found to be due and unpaid at date of award. 124**Kan**287, 259P703. (10) As to portion not due and unpaid at date of award, arbitrator must provide periodical payments. 124**Kan**287, 259P703. (11) In event of death of employee, and his dependents are claimants, amount of compensation is due at his death giving them right to collect same by suit if arbitration is refused. 124**Kan**287, 259P703.

110-23 52**SD**72, 216**NW**850. [b] **Misconduct of arbitrator** held not shown. **Kan** 245P1015. [c] **Evidence held to justify award** as not excessive for permanent total disability. 121**Kan**128, 245 P1015. [d] **In South Dakota** (1) proceedings before arbitrators and commissioner are not court, but arbitration, proceedings. 52**SD**72, 216**NW**850. (2) Award of arbitrators is not judgment but may be entered as judgment in circuit court. 52**SD**72, 216**NW**850. (3) Board of arbitrators should be strictly impartial and facts should be found from a preponderance of evidence. 52 **SD**72, 216**NW**850. (4) Since their findings cannot be disturbed on appeal if supported by substantial evidence, responsibility is upon board and commissioner. 52**SD**72, 216**NW**850. (5) Award cannot be sustained where finding on issue of employment is indefinite. 52 **SD**72, 216**NW**850.

110-23½-New. In some jurisdictions, the only questions which may be submitted to arbitration, without consent of both parties, are the amount of compensation due to the employee, the character and quality of his disability, and the period for which payments of compensation should continue. 120**Kan** 338, 243P314.

110-23½-New. Appointment of arbitrator is not premature because some of the issues raised cannot be tried by him. 120**Kan**338, 243P314.

110-24 121**Kan**572, 708, 249P680; 121 **Kan**690, 249P604; 121**Kan**841, 250P 261. [b] (2) District court can review arbitration award only on grounds stated in statute, namely, lack of authority of arbitrator to act and excessiveness or inadequacy of award. 119 **Kan**355, 239P762; 122**Kan**731, 253P570. (3) Award held not excessive on review by district court. 119**Kan**355, 239P762. (4) Arbitrator held to have acted with authority in making award. 119**Kan** 355, 239P762. (5) District court is not authorized to review award on ground of that it is grossly inadequate because disability was total, and not partial, as found by arbitrator, where finding depended on evidence and weight given by him to conflicting oral testimony. 119 **Kan**355, 239P762. (6) Decision of arbitrator is final except as to questions of fraud, undue influence, serious misconduct of arbitrator, and grossly excessive award. 121**Kan**128, 245P1015; 122 **Kan**731, 253P570. (7) Arbitrator's award may be reviewed to ascertain whether amount of compensation was grossly inadequate. 122**Kan**731, 253P 570. (8) Application for such review may be made directly to district court upon allegation of gross inadequacy of award. 122**Kan**731, 253P570. (9) Such application may be made at any time before final payment of award. 122**Kan** 731, 253P570. (10) Elements of award which may affect its adequacy are nature of disability, whether total or partial; extent of disability, whether permanent or temporary; average earnings to be used as basis of computation. 122 **Kan**731, 253P570. (11) Inadequacy must be found in one or more of such factors, and may result from any one of them. 122**Kan**731, 253P570. (12) Inadequacy is to be ascertained by judicial inquiry, including hearing of all competent evidence offered. 122**Kan**731, 253P570. (13) Inquiry may include reports of physicians appointed by court to examine workman. 122**Kan**731, 258 P570. (14) Award of four hundred and twenty-six dollars properly found by district court to be grossly inadequate. 122**Kan**731, 253P570. (15) Finding by arbitrator, upon disputed evidence as to nature and extent of injury and the compensation to which plaintiff was entitled, cannot be set aside on mere ground of inadequacy of award. 127 **Kan**870, 275P151. [c] **Authority of arbitrator** cannot be questioned on review by party agreeing upon arbitration and person appointed to act as arbitrator. 121**Kan**128, 245P1015. [d] **Review of testimony.**–Contention that court refused to review testimony held untenable. 121 **Kan**128, 245P1015. [e] **Burden** of showing misconduct by arbitrator is on party complaining thereon on review. 121 **Kan**128, 245P1015. [f] **Discretion.**–Necessity and propriety of hearing further evidence on review is in discretion of court. 121**Kan**128, 245P1015. [g] **Appointment of physician** by court to examine workman is authorized in proper case by some statutes, but such statutes are permissive and not mandatory regardless of evidence and circumstances. 121**Kan**128, 245P1015. [h] **Grounds for review.**–Award of arbitrator may be reviewed by district court on grounds of gross inadequacy. 121 **Kan**841, 250P261. [i] **Time for review.** –Under Kansas statutes, reward of arbitrator may be reviewed for gross inadequacy or excessiveness at any time before final payment has been made under, or pursuant to, award. 121**Kan**841, 250P261. [j] **In South Dakota.**–(1) Findings of arbitrators and industrial commissioner are on same plane as jury verdict. 52**SD**72, 216**NW**850. (2) Court proceeds as on appeal from trial court of record and appellate rules govern. 52**SD**72, 216**NW**850. (3) Jury trial cannot be demanded on appeal in circuit court. 52**SD**72, 216**NW**850.

110-25 [a] **In South Dakota.**–(1) Statute requires that record of proceedings on trial before arbitrators must be preserved. 52**SD**72, 216**NW**850. (2) Proceedings on review on appeal must be upon such record. 52**SD**72, 216**NW**850. (3) Award on review must stand or fall on record made. 52**SD**72, 216**NW**850. (4) Board of arbitrators is trial forum for ascertaining facts, subject to discretionary power of commissioner to allow additional evidence on review. 52

SD72, 216NW850. (5) Review before commissioner is not trial de novo. 52 SD72, 216NW850.

110–27½–New. The decision of the arbitrators on whatever issues are referred is final except for a limited review provided by the statute. 124Kan 331, 259P702.

110–27½–New. On further review by the court of the lower court's review of the arbitrator's decision it must be assumed, in the absence of showing otherwise, that the lower court properly considered and decided questions raised by the party complaining. 121Kan128, 245 P1015.

110–27¼–New. On appeal from the court's review of the arbitrator's decision it is presumed, in the absence of showing to the contrary, that the court followed the law and gave due consideration to evidence. 121Kan128, 245P1015.

110–27½–New. After appeal has been taken from a decision of the commission, it may, on agreement with appellant, submit the claim to arbitrators. 117 Or 406, 244P317.

110–27¼–New. Commission has no authority to submit to arbitration a claim pending before it. 117 Or406, 244P317; 117 Or370, 244P319.

110–27½–New. Nature and extent of injury are questions of fact for the arbitrator. 120Kan329, 243P301.

110–27½–New. The court is not authorized to refer to an arbitrator, over objection, the question whether the relation of employer and employee existed between the parties. 121Kan258, 246P 501.

110–27½–New. a judgment on an award of an arbitrator will not be reversed on such ground where the appointment of the arbitrator was not objected to on such ground and no request was made for a jury trial on any issue. 121Kan 258, 246P501.

110–27$\frac{1}{10}$–New. Where facts are not equally consistent, and respective probabilities may be balanced, arbitrator may draw more justifiable inference. 321 Ill 298, 151NE920.

110–27$\frac{1}{11}$–New. It is better practice for arbitrator to allow attorneys to question witnesses and to suggest questions to attorneys than to question witnesses himself. 321 Ill 298, 151NE920.

110–27$\frac{1}{12}$–New. An employer is entitled to a trial on all questions of fact and law not submitted to an arbitrator. 124Kan331, 259P702.

110–27$\frac{1}{13}$–New. Such trial may be had either before or after the amount of compensation has been awarded by the arbitrator. 124Kan331, 259P702.

110–27$\frac{1}{14}$–New. On substitution of widow's administrator and guardian of children in her place on her death after submission parties or court should fix time for filing award. 130Kan303, 286 P201.

112–77½–New. Award finding that plaintiff did not sustain accidental injury while in defendant's employ has been held not result of arbitrator's misconduct. Kan 289P456.

114–9 76CalA639, 245P796; 86Colo 587, 284P119(2dcase); 86Colo 580, 284P334 (weight of evidence is for commission to determine); Ill 173NE161; 210Ky 708, 276SW812; 242Mich84, 218NW768; 179Minn272, 228NW931; 320Mo 893, 8 SW(2d)897; MoA 29SW(2d)730 (matters of discretion); 83Mont152, 269P 403; 121 Oh472, 169NE572; TexCivA 1SW(2d)1109; TexCivA 27SW(2d)314; Utah 286P628. (whether dependency exists). [b] (1) 239Mich508, 215NW21. (9) Commission has power to determine questions of fact. 31Ariz224, 252P512. [d] (1) 31Ariz224, 252P512; 239Mich 508, 215NW21. (2) Industrial accident commission is vested with quasi-judicial powers within limits fixed by statute. 66Utah235, 241P223. (3) Industrial commission is administrative body empowered to ascertain some questions of fact and apply existing law thereto. 195 Wis410, 217NW738. [e] 242Mich84, 218NW768. [j] (1) 36BC71, [1925] 3 DomLR1193. (4) Vested with wide powers under both constitutional and statutory provisions to accomplish substantial justice quickly and inexpensively. 196Cal 593, 238P662. (5) Board has exclusive jurisdiction in determining facts essential to its assuming jurisdiction. 36BC71, [1925] 3DomLR 1193. (6) Board does not possess equity powers. 82Mont543, 268P495. [l] (3) Limitations removed by statute where application has been filed for any portion of benefits. 196Cal 593, 238 P662. (4) Statute removing limitations apply in case of death of employee as well as in case of his injury. 196Cal 593, 238P662. [m] **Nature of board or commission.**–(1) Industrial commission is quasi-judicial body. 239Mich508, 215 NW21; Wis 204NW576. (2) Commission is but ministerial and administrative body with quasi-judicial powers necessary to discharge its functions. 78 Mont579, 254P880. (3) Commission may hear evidence and call witnesses (78Mont579, 254P880), (4) but it cannot render enforceable judgment (78Mont 579, 254P880). [n] **Scope of activities.**–Industrial commission is intended to be impartial tribunal as to all persons concerned and it must apply law fairly and justly. 187Wis358, 204NW576. [o] **Failure of an act supplementing original act to provide for jurisdiction of compensation bureau** will not deprive it of jurisdiction. NJ 142A559. [p] **State industrial commission is administrative body merely,** whose duty is to administer state industrial act and award such compensation as law authorizes. Utah 274P139. [q] **Industrial accident commission has power to determine all questions** of law and fact upon which liability for personal injuries of employee depend. 203Cal 51, 262P757. [r] **Powers and jurisdiction of board or commission.**–(1) Industrial commissioner possesses such powers as are expressly granted or necessarily implied. 208 Iowa430, 226NW124. (2) Commissioner has no jurisdiction of question involving restitution of moneys paid claimant after remarriage. 208 Iowa430, 226 NW124. [s] **In making awards, commission is administrative body,** whether such awards be binding on state insurance fund or on other insurance carriers. Utah 279P609. [t] **Commission is not disqualified because of interest** when making awards in favor of or against state insurance fund, members having no financial interest in fund. Utah 279P609. [u] **Under statute,** state industrial commission has exclusive jurisdiction to entertain, hear, and decide complaint of injured employee. 35F (2d)459. [v] **Commission's exercise of power limited by Compensation Act.**–CalA 290P68. [w] **Jurisdiction of commission attaches** where two or more employees are employed. Okl 291P965(1st case). [x] **Necessary prerequisite of jurisdiction of commission** is existence of relationship of employer and employee, and erroneous legal conclusion that it exists does not confer jurisdiction. CalA 287P368.

114–9½–New. Whether or not the employee at the time of the injury was within the Compensation Act is a question of fact for the commission. 125Me 16, 130A355.

114–10 Ariz 293P20; CalA 292P525 (Commission may regulate nature and extent of proofs); 321 Ill 208, 151NE 520 (pleadings informal); 153Md274, 138A235; 156Md482, 144A696; 136 Okl 18, 275P1053; TexCivA 30SW(2d)911; 66Utah600, 245P343; Utah 262P281. But see Colo 291P1033 (industrial commission must govern its procedure according to statute creating it). [a] (2) Refusal to reopen case under evidence respecting question whether hernia resulted from accident has been held not abuse of discretion. 234Ky72, 27SW (2d)431. [f] **In Oklahoma** strict rules of pleading and practice required in courts of record are not applied. 120 Okl 37, 250P138. [g] **Place of hearing.**–(1) Application to have hearings in other cities to take testimony should be made to board rather than to referee. 223AppDiv795, 228NYS378. (2) Hearing may properly be held in other cities to take testimony of physicians who examined claimant, where insurance carrier offers to pay expenses of claimant and his attorney, and testimony would be unavailable otherwise. 223 AppDiv795, 228NYS378. [h] **Rule-making power of commission** does not permit limitations on claimant's right to recover for industrial injuries. 27 OhA 314, 161NE356. [i] **Petition by receiver to recover compensation as individual** is insufficient where it fails to specifically allege that petitioner was paid any sum for services as employee. TexCivA 1SW(2d)412. [j] **No particular form of pleadings is necessary** to give state industrial commission jurisdiction to hear and determine claim for compensation. 132 Okl 300, 270P1103. [k] **Power of industrial commission** to determine whether refusal of medical treatment is justifiable is judicial in its nature and can be exercised only after hearing. 40 GaA38, 148SE764. [l] **Amended petition** has been held not to set up new cause of action different from that asserted in original petition which alleged due notice. TexCivA 23SW(2d)405. [m] **Special answer need not be filed** in order to warrant introduction of evidence to show that injury grew out of fight not connected with employment. IndA 169NE540. [n] **Petition has been held to allege reasons for delay** in filing claim for compensation as well as in giving notice of injuries. TexCivA 23 SW(2d)405. [o] **Claims adjuster appointed by commission** is its agent. Utah 289P94. [p] **Rule of commission allowing postponement.**–Va 153SE805. [q] **Assuming or refusing jurisdiction** to hear and determine controversy is not matter of discretion. Utah 290P776. [r] **Rules of commission.**–Relaxation of rules by commission. 144 Okl 279, 291 P571. [s] **Denial of continuance** held not abuse of discretion. Okl 293P244. [t] **It may delegate to agents** ministerial or administrative duties, including investigation of employments and places of employment with power to take testimony. Ariz 293P20. [u] **Commission may appoint referee** to take and certify testimony. Ariz 293P20. [v] **Commission cannot delegate** imperative duty to deliberate upon evidence before making award. Ariz 293P20.

114–10½–New. In compensation proceedings strict procedural rules are not applicable. 172Minn489, 216NW241; Utah 262P281.

114–10½–New. An application for adjustment of a claim is in the nature of pleading and must state the time, place manner, and character of the accident, so as to enable the employer to properly prepare his defense. 322 Ill 535, 153 NE716.

114–11 196Cal 179, 237P33 (commission has power to determine validity of policy of insurance); 168Minn67, 209 NW644 (commission held to have properly declined jurisdiction of whether general contractor was required to carry insurance where injured workman was employee of subcontractor).

114–12½–New. Under statute in some jurisdictions a petition for compensation is insufficient which fails to set forth acceptance of the provisions of the act by the parties. 157Tenn170, 7 SW(2d)58.

114–12½–New. A special defense must be pleaded by an affirmative answer. Utah 267P781.

114–12¼–New. A petition for compensation must be filed within the time limited by statute. Utah 267P781.

114–12½–New. Statutes have been enacted in some jurisdictions removing limitation of time for instituting a proceeding for compensation where application has been filed with the commission for any portion of benefits. 196Cal 593, 238P662.

114–12½–New. Such statutes apply in case of the death of the employee, 196 Cal 593, 238P662.

114–12½–New. as well as in the case of his injury. 196Cal 593, 238P662.

114–12½–New. When a claim for any portion of benefit has reached a point where it is necessary to submit it to the commission, the commission may exercise jurisdiction of the whole subject

matter of controversy, 196Cal 593, 238P 662.

114-12½-New. including further claims presented during continuance of jurisdiction, although not filed within the time required for presentation of the original claim. 196Cal 593, 238P662.

114-12½0-New. The Georgia industrial commission is not a court of general jurisdiction nor even of limited jurisdiction. 35GaA599, 134SE357.

114-12½1-New. It is an industrial commission, made so by express terms of the act of the legislature to administer its provisions as provided therein. 35 GaA599, 134SE357.

114-12½2-New. As such administrative commission it possesses only such jurisdiction, powers, and authority as are conferred upon it by the legislature. 76CalA639, 245P796; 35GaA599, 134SE 357.

114-12½3-New. or such as arise therefrom by necessary implication to carry out the full and complete exercise of the powers granted. 35GaA599, 134SE 357.

114-12½4-New. Under some statutes the commission has no power to dispose of any application except on the merits, unless it is dismissed or withdrawn by the applicant. 66Utah173, 240P440.

114-12½5-New. The commission has no power to dismiss an application for compensation on motion. 66Utah173, 240P440.

114-12½6-New. Some sort of initial pleading or document invoking its action is required to give the commission jurisdiction to make an award. 66Utah 235, 241P223.

114-12½7-New. Such initial pleading generally takes the form of an application for compensation. 66Utah235, 241 P223.

114-12½8-New. The filing of a receipt by an insurance company for money paid to an injured employee cannot operate as an application for compensation invoking the jurisdiction of the industrial accident commission. 66Utah235, 241P223.

114-12½9-New. Rehearing. The Michigan board may neither grant nor hold a rehearing. 232Mich500, 205NW588.

114-12½0-New. On petition for rehearing, where no mention is made of error with respect to findings, any illegality is waived. 76CalA565, 245P445.

114-12½1-New. Where the commission makes a supplemental award and no petition for rehearing is filed by the employer challenging such order, such award becomes final. 76CalA565, 245P 445.

114-12½2-New. Industrial commission is an administrative body. 164Ga642, 139SE212.

114-12½3-New. Industrial commission rules can relate only to procedural matters. 325 Ill 452, 156NE307.

114-12½4-New. Industrial commissioner's rule regulating termination of insurer's liability is unauthorized as attempt to create liability. 325 Ill 452, 156NE307.

114-12½5-New. An erroneous allegation as to date of injury does not preclude recovery of compensation. 320 Ill 488, 151NE238.

114-12½6-New. Industrial commission is not judicial body, 324 Ill 89, 154NE 412.

114-12½7-New. and performs no judicial functions. 324 Ill 89, 154NE412.

114-12½8-New. Employee's claim of change in conditions authorizing increased award involves a fact question for the industrial board. 87 IndA96, 156NE523.

114-12½9-New. Defense not pleaded to injured employee's petition is waived. 126Mo173, 137A54.

114-12½0-New. Where voluntary payments of compensation by an employee to the injured employee are discontinued, the question of further compensation and its amount lies with the compensation board. 235Mich689, 209NW 840.

114-12½1-New. In some jurisdictions, under rules promulgated by the board, if the employer denies liability he must file a written denial setting forth facts of his defense to the claim for compensation. 235Mich689, 209NW840.

114-12½2-New. A copy of the written denial must be furnished to claimant, 235Mich689, 209NW840.

114-12½3-New. and the employer is limited to the defenses stated in the written denial. 235Mich689, 209NW 840.

114-12½4-New. Failure or refusal seasonably to file such written denial is deemed an admission of liability. 235 Mich689, 209NW840.

114-12½5-New. Under the rule, failure to give notice of defense of statute of limitations precludes defendant from making the defense. 235Mich689, 209 NW840.

114-12½6-New. Award may be made for disability after employee's death based on notice of claim on file at time of death. 245NY201, 156NE665.

114-12½7-New. Compensation claim may be reopened after dismissal. 205 AppDiv159, 220NYS678.

114-12½8-New. In New York, procedure under the Compensation Law conforms substantially to Civil Practice Act. 205AppDiv159, 220NYS678.

114-12½9-New. Requirement that application for rehearing be made on the form furnished is not jurisdictional, but may be made in a manner raising the question necessary to hearing of the case. 24 OhA196, 156NE508.

114-12¼0-New. Commission's acknowlment of the receipt of a letter from employee's attorney seeking reinstatement of discontinued compensation and a request for proof is a waiver of the rule for rehearing. 24 OhA196, 156NE508.

114-12¼1-New. A letter requesting rehearing filed within thirty days from notice of discontinuance of compensation is timely. 24 OhA196, 156NE508.

114-12¼2-New. Under some statutes the industrial commission has authority to make rules governing the procedure of the commission. 121 Okl 260, 249P 395.

114-12¼3-New. Any action of the commission must be concurred in by two or more of its members. 121 Or314, 253P 1052.

114-12¼4-New. Commission has jurisdiction over entire state. 145Va637, 134 SE562.

114-12¼5-New. Judgment of commission is not void because of mistake in venue. 145Va637, 134SE562.

114-12¼6-New. Objections to venue must be made at an early stage of proceeding. 145Va637, 134SE562.

114-12¼7-New. Objection to venue may be waived expressly or by implication. 145Va637, 134SE562.

114-12¼8-New. Some statutes do not require the employer to be made a party to the proceedings. 103WVa295, 137SE 229.

114-12¼9-New. Denial of application is no bar to a later petition. 201Cal 169, 256P413.

114-12½0-New. In Illinois, the commission has jurisdiction to determine the rights of claimant against insurer and employer jointly. 322 Ill 462, 153NE 685.

114-12½1-New. An application for adjustment is not a formal pleading and need not state all the elements of the cause of action. 322 Ill 510, 153NE625.

114-12½2-New. Claimant is not required to file separate petitions against statutory employer, general contractor, and subcontractor. 290Pa225, 138A 826.

114-12½3-New. One petition, naming principal contractor and who employed claimant or decedent, is sufficient. 290 Pa225, 138A826.

114-12½4-New. It is sufficient if it states the nature of the accident and character of the injury sufficiently to enable the employer to prepare his defense. 322 Ill 510, 153NE625.

114-12½5-New. The application need not state the sum claimed each week for a complete and permanent disability. 322 Ill 510, 153NE625.

114-12½6-New. Commission is not deprived of jurisdiction by employer's assignment for benefit of creditors pending proceedings for compensation. 83 Colo 158, 262P1019.

114-12½7-New. Industrial Board held to have properly required attorney to prosecute compensation claim for nonresident alien. 87 IndA357, 159NE693.

114-12½8-New. Employer, to escape liability for employee's use of explosives, in violation of rules, must prove rules were posted and duly authenticated. 292Pa284, 141A35.

114-12½9-New. Petition for foot injury held not to limit compensation to scheduled rate for injury to specific member. TexCivA 48SW(2d)90.

114-12½0-New. Injured employee suing wrongdoer pleading employee's election to take compensation is entitled to have insurance carrier joined as plaintiff. 222AppDiv540, 226NYS375.

114-12½1-New. Where an employer did not elect to pay compensation under the Workmen's Compensation Act, and the company did not come within provisions of the statute making certain employers automatically bound by the act, the industrial commission was not shown to have jurisdiction of proceedings by an employee to recover compensation for injuries sustained during the course of his employment. 332 Ill 156, 163NE468.

114-12½2-New. Whether an accident arises out of employment within the Workmen's Compensation Act is a question of law under the facts of each case. Ill 163NE106.

114-12½3-New. In some states there must be a disagreement or dispute concerning a matter of compensation before either party may apply to the board. 87 IndA400, 162NE737.

114-12½4-New. Missouri board has jurisdiction of an injury occurring outside of the state where the contract of employment is within the state. 320Mo 893, 8SW(2d)897.

114-12½5-New. The extent or percentage of permanent disability resulting from a personal injury is generally a question of fact to be determined by the workmen's compensation commissioner. 106WVa572, 146SE372(2dcase).

114-12½6-New. Under some statutes, an allegation in a claim as to the amount of claimant's average daily wage at the time of the injury, when not denied, is sufficient to sustain an award. 134 Okl 174, 272P833.

114-12½7-New. Failure to appoint a successor to the alien property custodian who filed the original application on behalf of nonresident dependents within a year does not abate the action. 87 IndA400, 162NE737.

114-12½8-New. Such commission's jurisdiction is limited to controversies concerning compensation. 198Wis202, 221NW747.

114-12½9-New. Failure of the employer to comply with the requirement of filing written notice of his proposed defense does not waive such defense, in view of his oral statement concerning it and absence of objection by the employee. 243Mich256, 220NW661.

114-12½0-New. Answer of "no dispute" is not an answer of confession and avoidance within the statute, but matter in abatement waived by pleading matters in bar. 87 IndA400, 162NE 737.

114-12½1-New. The commission's jurisdiction to construe compensation policy and to determine whether the note was insured is a matter of law. 197 Wis237, 221NW766.

114-12½2-New. Where one not within the statutory classification of dependents claims as a dependent, the fact of dependency and the amount of compensation must be determined by the commission or board. 150Va562, 143SE 756.

114-12½3-New. In some jurisdictions a workmen's compensation board has exclusive original jurisdiction to determine matters within the purview of the statutes. 226Ky20, 108SW(2d)466.

114-12½4-New. Regardless of voluntary appearance, the industrial board has no jurisdiction to award compensa-

tion to an employee of one not an Indiana employer. 87 **IndA**509, 162**NE**71.

114-12½5-New. The misstatement of disease as "accident" in the petition is not fatal where cured by the answer and the hearing is on the theory of disability caused by occupational disease. **NJ** 142**A**559.

114-12½6-New. Some cases hold that jurisdiction is in workmen's compensation bureau. **NJSup** 142**A**433.

114-12½7-New. Jurisdiction of the industrial board of the subject matter of a proceeding must be derived from the Workmen's Compensation Act. 87 **IndA** 509, 162**NE**71.

114-12½8-New. Although claims of relatives of deceased are barred by limitations, the filing of a minor's application for death benefits gives the commission jurisdiction to determine the claims of the relatives, since the claim of the minor is not barred where the guardian was appointed subsequent to the minor being brought into the proceeding. **Cal** 269**P**641.

114-12½9-New. The plea of limitations is waived by payment of compensation by the employer and successful defense of action at law. 225**Ky**753, 9**SW(2d)** 1100.

114-12½0-New. The time limit for filing a compensation claim after which right to compensation is barred is limitation and condition of right of action. 88 **IndA**246, 163**NE**621. [a] **The time for filing a compensation claim** is not tolled by the employee's contract not to sue, based on the employer's promise of a life job. 88 **IndA**246, 163**NE**621.

114-12½1-New. A stipulation between claimant and supposed employer that the latter was in fact the employer of a deceased employee is not binding on the industrial accident commission where it appears that the stipulation was based on mistake. 88**CalA**369, 263**P**823.

114-12½2-New. The workmen's compensation bureau is not a legal entity subject to suit. 58**ND**303, 225**NW**812.

114-12½3-New. Where the Commission lacks jurisdiction, jurisdiction cannot be conferred by act of the parties. 167 **Ga**897, 147**SE**50.

114-12½4-New. A party claiming compensation cannot be compelled to go further than is required by provisions of act relative to pleading. **Tex CommnA** 14**SW(2d)**1007.

114-12½5-New. Compensation proceedings by a foreign beneficiary, amending the petition by changing the name of the widow, and striking out names of two children as beneficiaries, was properly allowed. 335 **Ill** 322, 167**NE**80.

114-12½6-New. It is not necessary for an employer to file a special answer, alleging that employment was casual, and not in the usual course of business. 89 **IndA**483, 166**NE**885.

114-12½7-New. Parties must take notice of papers on file in a workmen's compensation case. 89 **IndA**380, 165**NE** 258.

114-12½8-New. The industrial board had the right to determine, under the laws of descent and distribution, who were heirs of deceased employee's wife dying intestate. **TexCivA** 14**SW(2d)** 949.

114-12½9-New. No power is vested in a board arbitrarily to postpone a hearing on any petition properly before it. **Tex CivA** 18**SW(2d)**695.

114-12½0-New. An award cannot be based on a higher wage than that stipulated between the parties as the average weekly wage. 89 **IndA**38, 165**NE**760(2d case).

114-12½1-New. The industrial board is an administrative body and not a court and has no authority to pass on the constitutionality of a statute. **IndA** 168 **NE**38.

114-12½2-New. That employer might have been engaged in ultra vires act when employee sustained injury is immaterial as affecting right to compensation. **Ida** 286**P**612.

114-12½3-New. Application of employer and insurer to amend denial of liability and take additional testimony held properly denied. 250**Mich**46, 229 **NW**595(2dcase).

114-12½4-New. Substantive rights are to be enforced at sacrifice of procedural formality. **MoA** 25**SW(2d)**529.

114-12½5-New. Rules of pleading in civil cases do not apply in proceedings under compensation act. 34 **OhA**23, 170**NE**40.

114-12½6-New. In some jurisdictions findings of a referee are equivalent to the verdict of a jury. 299**Pa**182, 149**A** 312.

114-12½7-New. Commission may make insurer party to proceeding to determine its contractual relation with employer. 12**PaDist&Co** 685.

114-12½8-New. Estoppel cannot give commission jurisdiction of case where none in fact exists. **TexCommnA** 24**SW (2d)**375.

114-12½9-New. That employer was not making profit from work during course of which employee was injured held not to affect right of compensation. **Ida** 286**P**612.

114-12½0-New. Right of employee to recover is not affected by fact that policy was not issued in form required by statute. 12**PaDist&Co** 685.

114-12½1-New. In an application for compensation, where an allegation of the petitioner that she was dependent on the widow of the employee at the time of the death of the widow was not denied by answer, it could be treated as admitted. 128**Me**299, 147**A**210.

114-12½2-New. A hearing by the commissioner at the request of claimant or the employer, as provided by statute, applies only to matters going to the basis of the party's right, and not to the amount or duration of the award. 108**WVa**68, 150**SE**230.

114-12½3-New. Whether the relation of employer and employee existed between the contractor and a shingler is a question of mixed law and fact. 101 **CalA**1, 281**P**440.

114-12½4-New. It is the province of the industrial commission to consider and weigh conflicting evidence. 337 **Ill** 514, 169**NE**202.

114-12½5-New. "Workmen's compensation board" is an administrative agency appointed by law and informed by experience to find facts and to apply the law to those facts. 230**Ky**800, 20 **SW(2d)**988.

114-12½6-New. Conflict of evidence as to whether the injured employee intentionally violated a lawful rule of the employer is for the compensation board. 231**Ky**269, 21**SW(2d)**277.

114-12½7-New. Whether or not death of the employee was the result of an accident is a question of fact. 128**Me** 407, 148**A**35(1stcase).

114-12½8-New. Existence or nonexistence of a condition of dependency on deceased employee are questions of fact for the accident board. **Mass** 168**NE** 747.

114-12½9-New. The state industrial board has jurisdiction to determine liability of an insurance carrier under its policy. 227**AppDiv**256, 237**NYS**344.

114-12½10-New. In the absence of legislative authority, the state industrial board has no jurisdiction to reform a workmen's compensation insurance policy to comply with oral agreement, such power being exclusively in the courts of equity. 227**AppDiv**256, 237**NYS**344.

114-12½11-New. A rule adopted by the industrial commission after the injury was sustained can have no application thereto. 227**AppDiv**333, 237**NYS**488.

114-12½12-New. Issue of discount for redeeming liability of insurer by a lump sum payment is a question of fact to be determined in considering the facts. **TexCivA** 21**SW(2d)**9.

114-12½13-New. Pleading has been held sufficient to raise the issue of total permanent incapacity. **TexCivA** 22**SW (2d)**142(2dcase).

114-12½14-New. Mistaken designation of employer in petition will not prevent claimant from showing who was employer. 300**Pa**206, 150**A**468.

114-12½15-New. Petition mistakenly designating employer may be amended. 300**Pa**206, 150**A**468.

114-12½16-New. Person claiming under Compensation Act must invoke it by proper pleading. 220**Ala**661, 127**S**230.

114-12½17-New. Ordinarily duty of determining whether relationship of employer and employee exists rests primarily on commission. **CalA** 287**P**368.

114-12½18-New. Extent of dependency and amount of compensation to be paid parents of deceased son is question to be determined by compensation board in first instance. 233**Ky**497, 26**SW(2d)**34.

114-12½19-New. Commission in directing hearing on its own initiative should direct framing of issues. 250**Mich**238, 230**NW**191.

114-12½20-New. Referee sits in quasi-judicial capacity to determine facts and interpret law. 229**AppDiv**54, 240**NYS** 740.

114-12½21-New. Administrator of deceased employee cannot maintain action to recover disability benefits from state insurance fund. **Oh** 171**NE**108 (cause of action not sustained).

114-12½22-New. Successive applications. Commission may take cognizance of new application based on original injury so as to authorize appeal from order dismissing such application. 34 **OhA**391, 171**NE**115.

114-12½23-New. Question whether employee has complied with requirement of notice of injury is fact question for determination of commission in first instance. **TexCivA** 27**SW(2d)**314.

114-12½24-New. In some jurisdictions workmen's compensation commission is quasi corporation. **Mo** 27**SW(2d)**1026.

114-12½25-New. Defense of statute of limitations need not be pleaded to claim petition filed as objection made at hearing before referee prior to taking testimony is sufficient. 14**PaDist&Co** 264.

114-12½26-New. Industrial accident board, although not a court, is an administrative body authorized to exercise powers quasi-judicial in nature. **Tex CivA** 32**SW(2d)**262.

114-12½27-New. Two members of workmen's compensation board, in absence of vacancy therein, do not constitute full board. 235**Ky**613, 31**SW(2d)** 915.

114-12½28-New. Industrial commission in dealing with employer is bound by its ruling that employer was under compensation act. **Or** 291**P**380.

114-12½29-New. Whether deceased minor employee's father made misrepresentations as to minor's age is judicial question not within jurisdiction of commission. **Wis** 232**NW**535(1stcase).

114-13 [c] **Necessary parties.**–Third person, causing employee's injuries, held not necessary party and therefore not entitled to notice. 254**Mass**359, 150**NE** 230.

114-18 222**Ky**591, 1**SW(2d)**1051. [c] **Notice to employee of entry of order required.**–(1) Order and notice required to be of record. 222**Ky**591, 1**SW(2d)** 1051. (2) Order must recite facts sufficient to charge claimant with notice of its entry or copy must be served on him. 222**Ky**591, 1**SW(2d)**1051. [d] **Effect of submitting to examination without objection.**–**Kan** 289**P**456.

114-19 144 **Okl** 40, 289**P**267.

115-20 [a] **Commission's rule of excluding testimony** if examination is not conducted in compliance therewith has been held too broad. 251**Mich**300, 232 **NW**227.

115-21½-New. Commissioner can open proceedings and take further evidence after having filed informal finding of facts. 105**Conn**545, 135**A**911.

115-22½-New. Refusing to permit cross-examination of a physician testifying for claimant may be erroneous as arbitrarily depriving employer and insurer of fair trial. 215**AppDiv**176, 213 **NYS**202.

115-22½-New. The industrial commission must use its sound discretion in propounding leading questions to a witness. 67**Utah**8, 245**P**378.

115-22¼-New. Leading questions as to a material or disputed point or issue should be avoided in the direct examination of a witness by counsel or by the commission, unless the circumstances justify leading questions. 67Utah8, 245 P378.

115-22⅛-New. The hearing before the arbitrator or commission is informal. 320 Ill 281, 150NE637.

115-22¼-New. While common-law rules of evidence must be observed, the evidence is not necessarily confined to allegations of the application, but may extend to full development of facts of the accident and nature of the injury. 320 Ill 281, 150NE637.

115-22½-New. Commission has no power, in absence of statute, to make rules of procedure prescribing what particular evidence is necessary to entitle applicant to compensation for injury. 68Utah567, 251P368.

115-22⅝-New. Statutes in some jurisdictions provide that the commission shall not be bound by common-law or statutory rules of evidence or technical rules of procedure. 68Utah567, 251P368.

115-22½-New. Such rules do not authorize the commission to prescribe rules denying compensation because of absence of particular evidence. 68Utah567, 251P368.

115-22 1/10-New. The department of labor and industry has no power to authorize issuance of letters rogatory in the absence of statutory authority. 239 Mich508, 215NW21.

115-22 1/11-New. Such authority is not conferred by a statute authorizing it to promulgate rules for the governing of its organization and procedure. 239 Mich508, 215NW21.

115-22½-New. nor by a statute authorizing the taking of depositions by deputy commissioners. 239Mich508, 215NW21.

115-22 1/13-New. Competent and relevant evidence should be received, notwithstanding informality of its production. 6PaDist&Co 685.

115-22 1/14-New. It is the better practice for the commission to allow attorneys to question witnesses and to suggest questions to attorneys than to question witnesses themselves. 321 Ill 298, 151 NE620.

115-22 1/15-New. Notwithstanding defense that deceased employee was engaged in interstate commerce, claimant may introduce evidence to show dependency on employee. 107Conn454, 140A818.

115-22 1/16-New. and that injury arose out of and in the course of, employment. 107Conn454, 140A818.

115-22 1/17-New. and a finding in favor of the defense before giving claimant an opportunity to present such facts is erroneous. 107Conn454, 140A818.

115-22 1/18-New. Refusal to reopen case to take further testimony is not error where no reason is shown why witness was not called at original hearing. 223 Ky710, 48SW(2d)701.

115-22 1/19-New. Referee should not permit discussions between compensation claimant and interpreter nor interruptions by interpreter. 223AppDiv584, 229NY892.

115-22 1/20-New. The status of one as employee is a mixed question of law and fact for determination by the commission. 92CalA119, 267P922 (under evidence).

115-22 1/21-New. It is improper, in the face of objection, to receive a physician's statement regarding the cause of death without giving opportunity for oral examination. 257Pa124, 146A562.

115-22 1/22-New. Formal introduction of report of accident in evidence was unnecessary at hearing before commission. 86Colo580, 284P334.

115-22 1/23-New. Under Oklahoma statute it is error for commission, before hearing is closed, to refuse claimant opportunity to present further evidence. 142 Okl193, 286P302.

115-22 1/24-New. Contention that employer made no remittance to accident fund while employee was traveling is not available to employer where evidence was not taken on subject and commission indicated willingness to pay compensation. 133 Or468, 286P527.

115-22 1/25-New. Discrepancy in claimant's testimony as to time accident happened held not fatal variance. 143 Okl 94, 287P1009.

115-22 1/26-New. Commission is not bound to accept physician's opinion on whether disabilities are attributable to injuries. Utah 289P94.

115-23 34P(2d)549; 216Ala264, 113S 234; 202Cal517, 261P704; CalA 260P 567; CalA 287P567 (fact of injury); CalA 288P692 (permanent disability); 82Colo 335, 259P509; 37GaA539, 140SE 899; 47 Ida268, 273P758; 320 Ill 281, 150NE637; 321 Ill 117, 151NE606; 322 Ill 160, 152NE505; 325 Ill 504, 155NE 292; 333 Ill 505, 165NE157; 334 Ill 246, 165NE689; 335 Ill 322, 167NE80; 337 Ill 514, 169NE262; Ill 173NE170; 86 IndA639, 159NE155; 87 IndA276, 162 NE30; 89 IndA300, 165NE334; 200 Iowa150, 204NW225 (burden on claimant); 204 Iowa158, 214NW.16; 205 Iowa 262, 225NW404; 236Ky36, 32SW(2d) 544; 125Me215, 132A698; 265Mass156, 164NE110; 266Mass355, 165NE120; Mass 169NE156; Mich 233NW342; 177 Minn55, 225NW439(license); 57ND326, 221NW894; 136 Okl 170, 276P705; 138 Okl 235, 281P273; Okl 292P63; 123 Or 334, 262P250; 294Pa253, 144A79; Tex CivA 272SW601; TexCivA 218SW(2d)9; 69Utah473, 256P405. [c] (4) Where claimant was performing services for alleged employer at time of accident, burden rests on alleged employer to show that claimant was employee of independent contractor. 201Cal 603, 258 P84. [j] **Where policy of insurer is not present,** employee must produce secondary evidence. TexCivA 272SW601. [m] **Employee permanently partially disabled,** to recover compensation after hearing, must show wages he was still able to earn and that he made every reasonable effort to obtain employment. 82Mont543, 268P495. [n] **Party claiming compensation cannot be compelled to go further than is required by provisions of act** when proving his cause of action. TexCommnA 148SW(2d)1007. [o] **Disability.**—Employee must prove temporary or permanent partial disability for which compensation is claimed. 130Kan504, 287P585. [p] **That claimant was employee** as defined by statute. Me 149A147(2dcase).

115-24 34P(2d)926; 220Ala25, 123S 225; 220Ala562, 126S626; 32Ariz265, 257P641; 33Ariz299, 258P253, 55ALR 975; 206Cal562, 275P432; 71CalA295, 234P908; 103Conn720, 131A745; 43 Ida625, 253P1104; 320 Ill 618, 151NE 588; 321 Ill 23, 151NE499; 321 Ill 61, 151NE593; 325 Ill 574, 156NE764; 326 Ill 293, 157NE168; 328 Ill 278, 159NE 359; 334 Ill 58, 165NE161; 335 Ill 374, 167NE26; 337 Ill 464, 169NE225; 339 Ill 252, 171NE165; IndA 168NE609; IndA 169NE540; 202 Iowa67, 209NW 415; 204 Iowa180, 214NW700; 204 Iowa1348, 217NW264; 206 Iowa790, 221NW481; 208 Iowa1037, 226NW71; 208 Iowa1010, 226NW719; Iowa 231 NW490; 230Ky108, 18SW(2d)958; LaA 126S579; LaA 126S584; 125Me245, 132 A698; 239Mich501, 214NW953; MoA 238SW(2d)51, MoA 27SW(2d)459 (no presumption from injury on premises during working hours); 85Mont41, 277 P615; Mont 289P563; 34NM483, 284P 115 (proof of nonexistence of hernia, under statute, held required of dependents as well as of injured employee); 54ND199, 209NW364; 57ND189, 220 NW923; 113 Okl 179, 241P170; 120 Okl 2, 249P700; 128 Okl 25, 261P181; 139 Okl 79, 281P269; Okl 292P63; 133 Or 468, 277P91; 89PaSuper393; 98Pa Super581; TexCivA 293SW260; Tex CivA 268SW(2d)691; TexCivA 298SW(2d) 534. [b] **Claimant must show that condition, resulted from injury.** 326 Ill 166, 157NE206. [c] **Presumption that injury arose out of employment** does not arise from fact that it occurred in course of employment. 84 CalA233, 258 P104. [d] **Employee contracting contagious or infectious disease must show** greater exposure than common to recover compensation. 84CalA506, 258 P698. [e] **Burden of proving that employment contributed** to injury is on claimant. Utah 290P764.

115-25 212Ala477, 103S447 (employer in case of death from electricity held to have burden of showing proper construction, insulation, and safety of electrical appliance); 220Ala10, 123S201; 32Ariz299, 258P253, 55ALR975; 35Ariz 19, 274P161; 84CalA233, 258P104; 87 CalA324, 262P411; 37GaA539, 140SE 899; 46 Ida739, 271P327; Ida 289P992; 321 Ill 23, 151NE499; 329 Ill 490, 160 NE845; 330 Ill 70, 161NE86; 337 Ill 59, 168NE652; Ill 173NE131; 202 Iowa67, 209NW415; 208 Iowa1231, 227NW153; 254Mass496, 150NE299; 267Mass222, 166NE556; Mass 172NE79; 251Mich 360, 232NW227; 169Minn370, 211NW 330; 172Minn185, 214NW775; 51ND 815, 201NW348; 54ND199, 209NW364; 60Pa1288, 143A116, 60ALR1288; 297 Pa124, 146A562; 9PaDist&Co 787; Utah 285P306; 148Va125, 138SE494. But see 223AppDiv173, 228NY87 (employee presumed in course of employment when killed by falling from roof where he went for temporary relief from heat). [a] **Rebuttal of presumption** that death did not result solely from intoxication. 230AppDiv529, 245NY820.

115-26 32Ariz299, 258P253, 55ALR 975; 74CalA239, 240P58; 104Conn535, 133A580; Ill 173NE64 (acceptance of provision); Ill 173NE184; Iowa 233 NW141; 126Me32, 135A824; Mass 169 NE109; 79Mont358, 257P270; NJSup 147A733; 245NY199, 156NE664; 220 AppDiv359, 221NY8569; 158Tenn148, 11SW(2d)900; TexCivA 18SW(2d)923; TexCivA 30SW(2d)1055; 144Va93, 131 SE240 (burden is on claimant employee who has suffered from assault to show as proximate cause that it arose out of and in course of his employment); 149 Va371, 141SE142. [g] **Fact of injury during employment** raises no presumption that it arose in course thereof. 74 CalA239, 240P58. [h] **As to casual employee** presumption does not exist. 91 CalA577, 267P880. [i] **Whether burden is sustained** is question for commissioner. Iowa 233NW141.

115-26½-New. But willful misconduct on the part of the injured employee is a matter of affirmative defense, and claimant need not establish innocence of such misconduct. 103Conn720, 131 A745.

115-26⅓-New. Causal connection between injury and condition complained of must be shown by competent evidence. 200 Iowa150, 204NW225.

115-26¼-New. but the accident need not be proved to be the sole or even primary cause of disablement. 125Me 389, 134A200.

115-26½-New. Burden of proof rests upon claimant to show liability under allegations of application for compensation. 322 Ill 535, 153NE716.

115-26⅔-New. Where relationship of master and servant has been proved to have existed, it is presumed to continue 246NY307, 158NE879.

115-27 172Minn185, 214NW775; 288 Pa140, 135A903; 166Va145, 134A640; 187Wis21, 203NW906. [c] **This presumption has same probative force as direct evidence.**—288Pa140, 135A903.

115-27½-New. There is a presumption that one suing another other than as independent contractor or as expressly excluded in statute is an employee. 92 CalA119, 267P922 (burden of employee).

115-28 TexCivA 118SW(2d)388; 200 Wis123, 227NW291. [c] **Statement by trial court** as to what expert testimony did not show held, when considered with other testimony, not a ruling shifting burden of proof from plaintiff to defendant. 213Ala88, 104S251.

115-29 Mass 168NE747 (child of deceased employee was not conclusively presumed to be dependent on his father). MoA 288SW(2d)446.

115-30 CalA 293P89; 333 Ill 49, 164 NE164; 335 Ill 254, 167NE36; 339 Ill 292, 171NE158; Ill 172NE246. Mass 168 NE747; Mich 233NW209; NJSup 130 A538; 297Pa302, 146A893; Utah 286P

628; 196Wis159, 220NW377; 198Wis 583, 225NW202. But see 89PaSuper 449. [c] **Wife living apart from husband** at time of death has burden of proving dependency. 66Utah529, 244P 656. [d] **Dependency not presumed.**–Utah 286P628 (father not presumed dependent on son).

115–30½–New. The burden of proof is on claimant to prove the making of a claim for compensation. 254Mass483, 150NE215.

115–30⅓–New. The burden is on the employer to prove that the employment is casual. 103Conn720, 131A745.

115–30¼–New. An employer relying on intoxication as a defense has the burden of proving it. 103Conn720, 131A745.

115–30⅕–New. To show that the employee was at the time of the injury engaged in interstate commerce. 287Pa 590, 135A728.

115–30⅙–New. The burden is on claimant to show the extent of his disability. 324 Ill 420, 155NE322.

115–30⅐–New. The burden is on claimant to show that he was accidentally injured. 215Ala64, 109S360.

115–30⅛–New. Contractor has burden of proving that subcontractor carried insurance to avoid liability for injury to employee to subcontractor. 216App Div105, 214NYS486 (Workmen's Compensation Law § 56).

115–30⅑–New. But the employee of a subcontractor has the burden of proving that his injury is covered by the principal contractor's insurance. 216App Div105, 214NYS486.

115–30⅒–New. The burden is on the employer to prove culpable negligence of the employee claiming compensation. 34Wyo 357, 243P593.

115–30⅑11–New. It is presumed, in the absence of substantial evidence to the contrary, that injury did not result solely from intoxication. 242NY70, 150NE 604 (where employee was injured while intoxicated).

115–30⅑12–New. The burden is on the employer to show by substantial evidence that the employee was drunk at the time of the accident, 242NY70, 150 NE604.

115–30⅑13–New. and that the injury was caused by such drunkenness. 242 NY70, 150NE604.

115–30⅑14–New. The burden of going on with the case then shifts to claimant. 242NY70, 150NE604 (presumption being overcome).

115–30⅑15–New. But the ultimate burden is on the employer to establish his defense. 242NY70, 150NE604.

115–30⅑16–New. Burden is on one asserting that person injured is not employee to prove such fact. 79CalA195, 249P33.

115–30⅑17–New. Proof of giving of notice of accident is unnecessary where issue is not raised. 213Ky245, 280SW 961.

115–30⅑18–New. Burden is on claimant to establish contract of employment. 218AppDiv308, 218NYS81.

115–30⅑19–New. Any person rendering service for another, other than independent contractor or as expressly excluded by the provisions of the act, is presumed to be an employee. 199Cal 577, 250P570.

115–30⅑20–New. Where it is admitted that the injured person was actually performing services for another at the time of the injury, the burden of proof rests on such other to establish that the injured person was an independent contractor. 199Cal 577, 250P570; CalA 251P948.

115–30⅑21–New. Where employer seeks to establish employee's intoxication as sole cause of injury, he has the burden of proving such fact. 242NY70, 150NE 604.

115–30⅑22–New. Burden is on employer to show preëxisting disease which would prevent recovery of full compensation. 103Conn720, 131A745.

115–30⅑23–New. Rules for burden of proof in compensation proceedings are the same as in common-law actions. 324 Ill 89, 154NE412.

115–30⅑24–New. Burden is on employer to show existence of excepted case or that employee belongs to an excepted class so as to bar or diminish compensation. 103Conn720, 131A745.

115–30⅑25–New. A statute providing that disabilities first appearing after five years from the accident be conclusively presumed not due to accident held rule of evidence. 81Colo 191, 254 P444.

115–30⅑26–New. Such presumption is held not to apply to recurring disability. 81Colo 191, 254P444.

115–30⅑27–New. The burden is on the employer to show alleged willful misconduct. 106Conn250, 137A761.

115–30⅑28–New. Claimant must prove that he was employee. 105Conn545, 135 A911.

115–30⅑29–New. Refusal to permit autopsy is held not to raise presumption against widow. 260Mass74, 156NE691.

115–30⅑30–New. The burden is on employee alleging that he is incapacitated from obtaining remunerative employment to prove it by satisfactory evidence. 78Mont579, 254P880.

115–30⅑31–New. There is no presumption that injury during employment arose out of employment. NJCPI 137A 95.

115–30⅑32–New. Presumption that death did not result solely from intoxication held rebutted. 245NY199, 156NE 664.

115–30⅑33–New. A person rendering service is by statute presumed an employee unless he is an independent contractor or otherwise excluded. 79CalA 195, 249P33.

115–30⅑34–New. Earning capacity in other employments during period of award must be shown if employee cannot do work previously done. 223App Div550, 229NYS5.

115–30⅑35–New. Extent of such earning capacity must be proved and cannot be fixed arbitrarily. 223AppDiv550, 229 NYS5.

115–30⅑36–New. There is a presumption that children alive in July are alive in August. 257Mass3, 153NE175.

115–30⅑37–New. Refusal of employee's widow to have autopsy performed raises no presumption against her. 260Mass 74, 156NE691.

115–30⅑38–New. Court will not presume employee shot at work was shot while attempting crime. TexCivA 300SW230.

115–30⅑39–New. Presumption of continuity obtains when it is established that employees have entered upon the performance of duties and are found at the place where they might properly be, in the absence of evidence to the contrary. 194Wis489, 215NW898.

115–30⅑40–New. The burden of proof to show an employee's violation of law is on defendant. 11PaDist&Co 303.

115–30⅑41–New. The burden is not on claimant to show the exact cause of the injury. 293Pa448, 143A116, 60ALR 1288.

115–30⅑42–New. Where the employment of an employee is shown in a suit under the Workmen's Compensation Act, relationship of master and servant is presumed and the burden is on defendant to show that the employee was an independent contractor. 157Tenn606, 12 SW(2d)529.

115–30⅑43–New. Where claimant made prima facie case for award, the burden of producing evidence to overthrow prima facie case fell upon defendant. 158 Tenn148, 11SW(2d)900.

115–30⅑44–New. It will be presumed that material loss of use of hand as result of prior injury was taken into consideration in fixing employee's wages. 89 IndA518, 167NE149.

115–30⅑45–New. Burden is on employer to bring himself within exception of statute excluding from its operation employers who employ less than prescribed number of men. 220Ala562, 126S626.

115–30⅑46–New. Where employee who failed to file claim within statutory time shows that employer had actual notice, burden is on employer to show prejudice. MoA 258SW(2d)529.

115–30⅑47–New. Burden has been held to be on employer to prove that injury was not sustained in course of employment. 298Pa336, 148A476.

115–30⅑48–New. Where defendant denied liability under statute because injury was caused by third person for reasons personal to employee, defendant has burden of proof. 96PaSuper 550.

115–30⅑49–New. Where facts disclose that person was injured while in another's service, it will be presumed that injured person was employee. 200Wis 611, 229NW193.

115–30⅑50–New. One petitioning for discontinuance of compensation payments has the burden to show a right to modification of an award of compensation already made. 248Mich60, 226NW887.

115–30⅑51–New. The burden of proof is upon the employer to overcome the presumption that the injury was not the result of willful failure of the injured employee to use a safety appliance. 139 Okl 243, 282P139.

115–30⅑52–New. The same rules govern the burden of proof before the industrial commission as are applied in courts of law. 337 Ill 59, 168NE652.

115–30⅑53–New. It will be presumed that the person injured is an employee where facts disclose that one is injured while in the service of another. 200Wis 248, 227NW877.

115–30⅑54–New. It must be presumed that company engaged in hazardous occupation was operating under Compensation Act. 39F(2d)70.

115–30⅑55–New. Finding of employee's dead body enveloped in deadly gas warrants presumption that he was asphyxiated. CalA 287P540.

115–30⅑56–New. Employer has burden to establish contention that injury is not new one but result of former accident. CalA 287P567.

115–30⅑57–New. Burden is on taxi-cab owner to establish special defense that deceased was driving cab on journey of his own. 13LaA525, 127S59.

115–30⅑58–New. Claimants residing in Russia may be assumed to be still alive and that payments will be surrounded by reasonable safeguards. 229AppDiv 36, 240NYS619.

115–30⅑59–New. Burden is on employer to show right to exemption from liability. 230AppDiv216, 243NYS464.

115–31½–New. The industrial accident commission will take judicial notice of its former decision in the same case. 74 CalA411, 240P1021.

115–32 77CalA424, 246P825; 47 Ida208, 273P758; 335 Ill 322, 167NE80; 337 Ill 59, 168NE652; Ill 173NE70; 203 Iowa 1395, 214NW585; 213Ky636, 281SW 1039; 153Md274, 138A235; 154Md46, 139A570; 158Md116, 148A246 (testimony of other workmen); 267Mass322, 166NE723; 236Mich109, 210NW305; 167Minn407, 209NW26; 172Minn549, 216NW240; 172Minn489, 216NW241; 175Minn319, 221NW65; Oh 172NE366; 292Pa509, 141A481; TexCivA 13SW(2d) 909; TexCivA 22SW(2d)157 (evidence relevant and material on main issue of fact has been held admissible); 66Utah 600, 245P343; 152Va150, 147SE537; 200Wis512, 228NW118 (testimony of wages in similar service may be considered). See also 127Me207, 142A730. But see 322 Ill 160, 152NE505; 87 IndA 667, 162NE415. [a] (5) Coroner's verdict is incompetent evidence as to cause of death. 324 Ill 497, 155NE313. [l] (2) That machine causing injury was unguarded, as employee was entitled to compensation whether machine was guarded or not. 83 IndA646, 148NE424. [s] **Copy of testimony of witnesses at coroner's inquest,** though hearsay, was held admissible under California act. 195Cal 533, 234P317. [t] **Evidence erroneously excluded.**–TexCivA 271SW225. [u] **In Ohio** hearsay evidence received by commission must be admitted to jury on appeal. 21 OhA148, 152NE792. [v] **Provision of California act,** making admissible evidence objectionable under common law and statutory rules does not relieve commission from duty of so conducting proceedings as to give as little occasion as possible for courts to resort to provision. 195Cal 533, 234P317. [w]

Under statute, making widow's total dependency conclusive presumption, proof of partial dependence is held inadmissible. 212**Ky**137, 278**SW**540. [x] **Error to exclude written agreement of employment.**–217**AppDiv**796, 216**NYS**615. [y] **Experts.**–74**CalA**239, 240**P**58. [z] **Testimony of physicians,** consulted for treatment by decedent after injury, is competent and legal evidence. **NJSup** 142**A**555. [aa] **Hearsay evidence held admissible.**–203**Cal** 12, 263**P**196. [ab] **Evidence held admissible.**–300**Pa**206, 150 **A**468; **TexCivA** 29**SW(2d)**458. [ac] **Evidence held inadmissible.**–(1) **Mass** 171**NE**438. (2) In general. 135 **Okl** 63, 273**P**1000. (3) Hearsay, 158**Tenn**471, 14 **SW(2d)**717. (4) As res gestæ. 158**Tenn** 471, 14**SW(2d)**717. [ad] **In compensation proceedings for injury to employee's eye,** evidence that employee thereafter several times bumped his head was properly admitted to show extent to which his eyesight had been affected by injury complained of. 157**Md**596, 146**A**750. [ae] **Depositions** taken before commissioner of another state pursuant to notice by state industrial commission may be considered. 141 **Okl** 195, 285**P**23. [af] **Evidence must be taken as provided by statute** in absence of agreement or waiver. 139 **Okl** 269, 281**P**966 (ex parte statement held inadmissible). [ag] **Testimony of compensation claimant** that accidental injury resulted in seventy-five per cent impairment of his foot has been held competent since it was stated as fact based on his own experience. 89 **IndA**689, 167**NE**617(1stcase). [ah] **Coroner's certificate of death** is not prima facie evidence of facts stated therein. 14 **PaDist&Co** 277.

115–32½–New. Conversation with deceased relevant as showing act within scope of employment. **TexCivA** 271**SW** 929.

115–32½–New. So far as testimony of medical or surgical experts is concerned the rules of evidence before the commission are the same as those which prevail in trial courts. 75**CalA**709, 243**P** 455.

115–32¼–New. Testimony of physicians that unreasonable refusal of a deceased employee to consent to an operation was the proximate cause of death is inadmissible. 69**Utah**452, 256**P**397.

115–32½–New. Claimant may fully develop the facts concerning the accident and injury, although the common-law rules of evidence must be observed. 322 **Ill** 510, 153**NE**625.

115–32¾–New. As respects rules of evidence, hearings before a commission have a quasi-judicial character. 243 **Mich**250, 220**NW**697.

115–33 245**Mich**337, 222**NW**758; 193 **Wis**32, 213**NW**630. [a] **Claim filed with industrial accident board** is admissible to show compliance with act, not to establish injury. **TexCivA** 297**SW**630. [b] **Admission of copy of compensation claim,** without limiting purpose, held not error, in absence of request to limit. **TexCivA** 297**SW**630.

115–34 193**Wis**32, 213**NW**630.

115–35½–New. Testimony of employer's nurse and her report of accident and injury are competent as to how and when injury occurred. 86 **IndA**164, 156**NE** 467.

115–35¼–New. And evidence of employer's superintendent that such nurse had reported injury to him is competent. 86 **IndA**164, 156**NE**467.

115–35¼–New. Rules for admissibility of evidence in compensation proceedings are same as in common-law actions. 324 **Ill** 89, 154**NE**412.

115–35½–New. Ex parte written communications are incompetent as evidence. 203 **Iowa**1395, 214**NW**585.

115–35¾–New. Letter from physician stating opinion that cataract was result of injury to employee's eye is inadmissible. 203 **Iowa**1395, 214**NW**585.

115–35½–New. Whether cirrhosis was secondary cause of death is immaterial where primary cancer caused death. 260**Mass**74, 156**NE**691.

115–35¼–New. Statement of injured employee to wife that he got sliver in finger is direct evidence of injury. 259 **Mass**350, 156**NE**718.

115–35½–New. Where commission of a crime is relevant to the issue, evidence thereof is admissible. 8**PaDist&Co** 73.

115–35¼–New. Evidence held admissible under issues raised by pleading. 125**Me**245, 132**A**698.

115–35¼–New. In determining whether insanity arose out of employment, commissioner must consider circumstances, hereditary predisposition, personal characteristics, and life outside employment. 107**Conn**56, 139**A**644, 56**ALR**455.

115–35½–New. Where the primary cause of death is ascertained, evidence as to the secondary cause is of no consequence. 260**Mass**74, 156**NE**691.

115–35¼–New. Declarations of an employee as to his injuries before his death, if against his interest, are of great probative value. 8**PaDist&Co** 430.

115–35¼–New. Insurer's failure to tender medical treatment until after employee secured treatment will not bar such tender and proof of proper treatment on application to limit liability. 91**CalA**121, 266**P**866.

115–35¼–New. The diseased physical condition of an employee before injury is immaterial under the act, where accidental injury is the proximate cause of his physical disability. 332 **Ill** 328, 163 **NE**681.

115–35¼–New. Admissions made in an employer's first report, made at the request of an injured employee by one to whom no authority was given, will be disregarded. 224**AppDiv**327, 230**NYS** 707.

115–35¼–New. A physician who assisted in the autopsy of a deceased employee is a competent witness. 129**Kan** 100, 281**P**860.

115–35¼–New. Evidence is admissible to show accidental injury producing aggravation of existing physical trouble. 130**Kan**504, 287**P**585.

115–35¼–New. Statements by workmen as to cause of injury, made few days after alleged accident, are inadmissible as part of res gestæ. 14**PaDist&Co** 277.

115–36 37**GaA**539, 140**SE**899; 320 **Ill** 298, 150**NE**645; 320 **Ill** 618, 151**NE**588; 321 **Ill** 61, 151**NE**593; 321 **Ill** 117, 151 **NE**606; 322 **Ill** 524, 153**NE**660; 323 **Ill** 459, 154**NE**203; 324 **Ill** 268, 155**NE**326; 324 **Ill** 420, 155**NE**322; 326 **Ill** 120, 156 **NE**763; 326 **Ill** 92, 157**NE**26; 334 **Ill** 246, 165**NE**689; 335 **Ill** 254, 167**NE**56; **Ill** 173**NE**131; 200 **Iowa**150, 204**NW**225; 204 **Iowa**1348, 217**NW**264; 208 **Iowa** 1281, 227**NW**153; 126**Me**579, 140**A**377; 127**Me**207, 142**A**730; 239**Mich**501, 214 **NW**953; 51**ND**815, 201**NW**348; 294**Pa** 253, 144**A**79; 296**Pa**71, 145**A**707; 66 **Utah**494, 243**P**800; **Utah** 284**P**313; 148 **Va**125, 138**SE**494. But see 322 **Ill** 524, 153**NE**660. [b] **Mere possibility** of causal connection between injury and death is insufficient. 285**Pa**145, 131**A** 703. [c] **That strain caused appendicitis** is conclusion of speculation, surmise, or conjecture. 127**Me**214, 142**A**777. [d] **Members of accident board may use their own judgment** and knowledge in determining earning capacity of employee seeking award. **Mass** 167**NE**350. [e] **Hearsay evidence is admissible.**–**Ariz** 293 **P**20.

115–37 **Cal** 284**P**451(2dcase); 84**CalA** 506, 258**P**698; 107**Conn**164, 140**A**114; 47 **Ida**208, 273**P**758; 318 **Ill** 328, 149**NE** 264; 322 **Ill** 160, 152**NE**505; 324 **Ill** 89, 154**NE**412; 324 **Ill** 268, 155**NE**326; 325 **Ill** 102, 156**NE**319; 326 **Ill** 92, 157**NE**26; 326 **Ill** 293, 157**NE**168; 335 **Ill** 322, 167 **NE**80; 336 **Ill** 343, 168**NE**300; 336 **Ill** 350, 168**NE**302; 337 **Ill** 59, 168**NE**652; **Ill** 173**NE**161; **Ill** 173**NE**470; 208 **Iowa** 1281, 227**NW**153 (commissioner has task of determining where preponderance of evidence lies and credibility of testimony); 217**Ky**103, 288**SW**1057; 219**Ky** 326, 292**SW**803; 230**Ky**800, 20**SW(2d)** 988 (competent evidence); 125**Me**389, 134**A**200; 126**Me**32, 135**A**824; 257**Mass** 3, 153**NE**175; 267**Mass**232, 166**NE**556; **Mich** 233**NW**209; 218**AppDiv**31, 217**NYS** 744; 230**AppDiv**546, 245**NYS**660; 288 **Pa**394, 136**A**230; 292**Pa**509, 141**A**481; **TexCivA** 30**SW(2d)**921; **Utah** 246**P**298; 148**Va**125, 138**SE**494; 194**Wis**131, 215 **NW**815 (holding that findings concerning source of germ causing disease may be based on preponderance of probabilities or of inferences from established facts); 198**Wis**583, 225**NW** 202. See 127**Me**207, 142**A**730. See also 254**Mass**483, 150**NE**215; 152**Va**150, 147 **SE**537. But see 87**CalA**324, 262**P**411; 321 **Ill** 61, 151**NE**593 (commission must find for party in whose favor evidence preponderates); 325 **Ill** 261, 156**NE**325; 327 **Ill** 438, 158**NE**673 (preponderance necessary); 332 **Ill** 386, 163**NE**789; 333 **Ill** 152, 164**NE**145; 335 **Ill** 374, 167**NE** 26; 337 **Ill** 514, 169**NE**202 (facts showing liability of employer under Workmen's Compensation Act must be shown by preponderance of evidence); 339 **Ill** 252, 171**NE**165 (preponderance necessary); 200 **Iowa**150, 204**NW**225 (holding preponderance necessary); **Mont** 289 **P**563 (preponderance of evidence required); **TexCivA** 4**SW(2d)**90 (not necessary that witnesses specify percentage of incapacity); **Utah** 285**P**306 (preponderance of evidence required); 187**Wis** 358, 204**NW**576 (facts must be found according to weight of evidence). Contra 207 **Iowa**1129, 224**NW**86. [a] (101) 239 **Mich**501, 214**NW**953. (132) That employee was suffering from disease of blastomycocis resulting naturally and unavoidably from original injury. 162 **Ga**130, 133**SE**851. (133) That death of salesman did not arise out of or in course of employment. 218**AppDiv**531, 218**NYS**180. (134) That death of workman was not in course of employment. 104**Conn**535, 133**A**580. (135) That injury did not arise in course of employment. 328 **Ill** 278, 159**NE**359. [b] (1) **TexCivA** 300**SW**230. (3) 286**Pa**301, 133 **A**547 (that injury arose in course of employment). (21) 242**Mich**449, 219**NW** 607; 112 **Okl** 245, 240**P**640. (26) 196 **Wis**159, 216**NW**137. (29) 242**Mich**450, 219**NW**755. (30) 201**Cal** 603, 258**P**84. (42) 81**CalA**582, 254**P**582; 35**GaA**504, 134**SE**174; 35**GaA**571, 134**SE**334; 259 **Mass**350, 156**NE**718; 165**Minn**473, 206 **NW**933 (falling from scaffold or ladder); 168**Minn**114, 210**NW**64; 173**Minn** 481, 217**NW**680; 112 **Okl** 245, 240**P**640. (63) 120 **Okl** 2, 249**P**700; 127 **Okl** 52, 259**P**638. (65) 196**Wis**159, 216**NW**137. (126) 259**Mass**350, 156**NE**718. (134) 238 **Mich**560, 214**NW**90. (138) 242**Mich**438, 219**NW**683. (146) 323 **Ill** 80, 153**NE**699. (178) 84**CalA**233, 258**P**104; 172**Minn**185, 214**NW**775; 174**Minn**420, 219**NW**556. (223) 115 **Okl** 273, 244**P**432. (225) 82 **CalA**480, 255**P**866. (236) 292**Pa**550, 141 **A**480. (300) 131 **Okl** 260, 268**P**718. (313) 86 **IndA**578, 158**NE**909. (316) That employee was not entitled to compensation. 71**CalA**542, 235**P**748. (317) That hernia did not arise out of or was caused proximately by employment. 71 **CalA**542, 235**P**748. (318) That death resulted from electrical shock. 212**Ala** 477, 103**S**447. (319) That disability had not terminated, though wound made in operation for hernia had healed. 195**Cal** 577, 234**P**369. (320) That workman failed to give notice of injury in required time because of mistake and ignorance of law. 164**Minn**358, 205**NW** 258. (321) That injury occurred outside state. 50**ND**215, 195**NW**287, 28 **ALR**1337. (322) Temporary total disability. 112 **Okl** 230, 240**P**634. (323) That employee's failure to give notice of injury in required time did not prejudice employer. 164**Minn**358, 205**NW**258. (324) Denial of compensation. 83 **IndA** 646, 148**NE**424. (325) That employee's refusal to submit to examination by physician was reasonable. 83 **IndA**493, 148 **NE**425. (326) That deceased when injured was day laborer, and not independent contractor. 67**Utah**349, 247**P** 574. (327) That workman's death was caused by fall less than thirty-six hours before death. 67**Utah**349, 247**P**574. (328) Total dependency of applicant. 197**Cal** 17, 239**P**330. (329) Total dependency of applicant. 197**Cal** 17, 239**P** 330. (330) That death did not result from suicide. 187**Wis**21, 203**NW**906. (331) For loss of eye. 233**Mich**538, 208 **NW**44. (332) That sale of secondhand cars was inseparable part of employment of one who met death while attempting to sell secondhand car. **202**

Iowa67, 209**NW**415. (333) That injury to employee's forehead and eyes did not arise out of and in course of employment. 168**Minn**65, 209**NW**898. (334) That deceased was employee of town hired by road overseer pursuant to statutory authority under conditions giving him authority to act for town. 168**Minn** 245, 209**NW**910. (335) That death was due to pneumonia caused by wetting and exposure in course of employment. 285**Pa**317, 132**A**122. (336) That grandfather was dependent of deceased employee and supported out of family fund. 196**Cal** 593, 238**P**662. (337) That deputy sheriff was not in performance of duties as officer at time of injury. 67 **Utah**345, 247**P**495. (338) That disability resulted from accident and not from antecedent cause. 67**Utah**292, 247**P**298. (339) That workman was employee of defendant. 197**Cal** 164, 239**P**1072. (340) That workman was not employee of contractor doing work for master. 197**Cal** 164, 239**P**1072. (341) That death was due to strain on heart while employee was attempting to move heavy machinery. 234**Mich**634, 209**NW**47. (342) That accident occurred on certain day. 152**Tenn**401, 277**SW**902. (343) Finding of dependency. 34**GaA**311, 129 **SE**447. (344) That injury followed by abscess of knee was cause of disease of hip. 66**Utah**494, 243**P**800 (finding not erroneous as basing one inference or presumption on another). (345) That claimant was not living with husband employee at time of injury. 188**Wis**228, 205**NW**795. (346) That employee sustained accidental injury in course of employment as watchman while trying to close doors of employer's building. 167**Minn**269, 208**NW**802. (347) That driver of borrowed tractor was employee of owner. 34**Wyo** 357, 243**P**593. (348) That wife and infant daughter were totally dependent on deceased employee. 71**CalA**320, 234**P**915. (349) That tubercular development was accelerated by injury. 200 **Iowa**944, 205**NW** 737. (350) That injury resulting from fall was contributory cause to final breakdown of employee. 66**Utah**600, 245**P**343. (351) That injury was due to skylarking. 71**CalA**295, 234**P**908. (352) That children of woman who had illicit relations with deceased were not dependent on him within compensation act. 68**Utah**1, 248**P**1103. (353) That peritonitis from which workman died was direct result of injury received in course of employment. 125**Me**49, 130**A** 857. (354) That change in condition after settlement approved by commission, resulted from injury. 115 **Okl** 273, 244**P**432. (355) That town had employed deceased as inspector on street improvement. 86 **IndA**407, 157**NE**63. (356) That district manager was employee of real estate firm. 79**CalA**195, 249**P**33. (357) That salesman was injured in course of employment. 79**CalA** 195, 249**P**33. (358) That employee's injury caused temporary total disability. 78**CalA**584, 248**P**938. (359) That person employed to lay shingles at specified sum per thousand was employee and not independent contractor. 79**CalA**660, 250**P** 1117. (360) That deceased was killed by gas while working in mine owned and operated by defendant and leased to deceased's employer. 82**Colo** 272, 259**P** 1036. (361) That employee was sent by company doctor to his own doctor. 323 **Ill** 80, 153**NE**699. (362) That death of employee was hastened by accidental injury in employment. 327 **Ill** 79, 158**NE** 405. (363) Causal connection between injury in nose in course of employment and death two weeks later from septicemia. 327 **Ill** 438, 158**NE**673. (364) That death of bricklayer was due to sunstroke. 84 **IndA**470, 151**NE**437. (365) That exertions of employee together with concussion occasioned by fall contributed to death in employment. 85 **IndA**92, 152**NE**841. (366) That death from erysipelas following fall arose out of employment. 256**Mass**593, 152**NE**882. (367) That hernia suffered by hospital employee required to lift heavy articles arose out of and in course of employment. 258**Mass**475, 155**NE**423. (368) To show welder fell from bridge, while attending to call of nature and died from injury within scope of employment. 261 **Mass**436, 158**NE**845. (369) That murder of taxicab driver arose out of and in course of employment. **Minn** 215**NW** 678. (370) That unwitnessed accident to special officer arose out of and in course of employment. 223**AppDiv**153, 226**NYS** 482. (371) That injuries to telephone operator were received in course of her employment at the switchboard. 55**ND** 491, 214**NW**622. (372) That loss of eye was not due to accidental injury. 126 **Okl** 235, 259**P**265. (373) That injury was not proximate cause of disability. 127 **Okl** 32, 259**P**550. (374) That employee sustained no loss of time nor loss of vision as result of accident. 127 **Okl** 45, 259**P**639. (375) That injury did not arise out of employment. 128 **Okl** 25, 261**P**181. (376) That decedent met with accidental injury in course of employment. 290**Pa**267, 138**A**841. (377) That death of employee resulted from sarconia brought about by injury entitling dependents to compensation. 290**Pa**267, 138**A**841. (378) That employee's death was due to accident (inhalation of carbon monoxide gas). 8**PaDist&Co** 8. (379) That workman cut his own throat resulting in his death. 8**PaDist&Co** 430. (380) That failure to use safety appliances was not willful misconduct. 156 **Tenn**184, 299**SW**772. (381) To show total permanent disability. **TexCivA** 296 **SW**639. (382) That diabetes was attributable to injury and total incapacity resulted. **TexCivA** 297**SW**254. (383) That quarry employee's death from overexertion arose out of and in course of employment. **TexCivA** 297**SW**544. (384) That burns from molten iron causing erysipelas, caused workman's death. **TexCivA** 297**SW**630. (385) That employee killed by falling derrick during windstorm was subjected to greater hazard than general public. **TexCivA** 297**SW**1081. (386) That injury to legs rendered employee wholly unable to perform any manual labor. **TexCivA** 298 **SW**164. (387) Eighty-five per cent permanent partial incapacity from foot injury. **TexCivA** 4**SW(2d)**90. (388) That deceased was struck by falling rock causing injury resulting in death. 70 **Utah**333, 260**P**271. (389) That employees found dead were, at time of accident, engaged in performance of duties. 194 **Wis**489, 215**NW**898. (390) To give commission jurisdiction to enter award for reasonable medical expenses. 208**Cal** 159, 280**P**679. (391) Award for seventy-five per cent permanent impairment of claimant's right foot. 89 **IndA**689, 167 **NE**617(1stcase). (392) Award of fifteen dollars per week. 230**Ky**108, 18**SW(2d)** 958. (393) Award for partial dependency. 230**Ky**562, 20**SW(2d)**448; **Utah** 279**P**509(1stcase). (394) Violation of traffic laws. 169**Ga**333, 150**SE**208. (395) That employer had notice of accident and acted upon it. 337 **Ill** 454, 169**NE**225. (396) That death of employee did not result from accidental injury arising out of employment. 179 **Minn**291, 229**NW**100. (397) That one hired by real estate dealer engaged in building business to do necessary carpentry, plumbing, and general work about buildings was employee engaged in usual course of business. **Mass** 169 **NE**414. (398) That injured employee was employed by one who testified that he had agreed to build house for another. 121 **Oh**338, 168**NW**840. (399) That claimant at time of injury was employee and not independent contractor. **Tex CivA** 21**SW(2d)**691. (400) That employee had been working substantially whole of year immediately preceding injury. **TexCivA** 21**SW(2d)**691. (401) That employee when injured was employed by, and working for, company of which plaintiff was insurer. **TexCivA** 22**SW(2d)**157. (402) That deceased who was assisting employer in building road was not independent contractor. 200**Wis** 248, 227**NW**877. (403) That accident by slipping and falling on glue preceded stroke of apoplexy. 158**Md**34, 148**A**122. (404) That disability resulting from accidental injury arose out of and in course of employment. 158**Md**34, 148**A** 122. (405) That burning of employee while repairing blowtorch in preparation for use thereof in fixing frozen pipes arose out of and in course of employment. **Mass** 169**NE**414. (406) That accident to employee while going from place of work to place where he ate "arose out of and in course of employment." **GaA** 155**SE**366. (407) That employee killed was employee of purchaser of ties and not of manufacturer of ties. **MoA** 31**SW(2d)**573. (408) Evidence authorized inference that piece of steel entered employee's eye at time of first injury. **OhA** 173**NE**14. (409) For total, temporary disability for injury to testicle. 144 **Okl** 234, 291**P**961. (410) Other evidence held sufficient. 30**F(2d)**144; 41**F(2d)**48; 41**F(2d)**593; 42**F(2d)**1010; 215**Ala**220, 109**S**878; 216**Ala**129, 112**S** 734; 32**Ariz**350, 258**P**306; 33**Ariz**490, 266**P**11; 34**Ariz**2, 267**P**203; 34**Ariz**175, 269**P**77; 35**Ariz**19, 274**P**161; 73**CalA** 519, 238**P**1052; 199**Cal** 577, 250**P**570; 199**Cal** 596, 250**P**864, 49**ALR**446; 200**Cal** 456, 253**P**712; 202**Cal** 521, 261**P**987; 204 **Cal** 427, 268**P**633; 205**Cal** 727, 273**P**33; **Cal** 284**P**451(2dcase); 208**Cal** 715, 284**P** 661; **Cal** 288**P**66; **Cal** 289**P**627; 75**CalA** 280, 242**P**901; 76**CalA**158, 243**P**886; 76 **CalA**165, 243**P**892; 76**CalA**333, 244**P** 625; 77**CalA**314, 246**P**570; 80**CalA**713, 252**P**775; 83**CalA**313, 256**P**487; 83**CalA** 122, 256**P**564; 84**CalA**228, 257**P**895; 84 **CalA**506, 258**P**698; 85**CalA**184, 259**P** 110; 86**CalA**1, 260**P**375; **CalA** 260**P**967; 86**CalA**620, 260**P**1108; 87**CalA**766, 262**P** 471; **CalA** 262**P**805; 90**CalA** 101, 265**P** 508; 90**CalA**104, 265**P**510; 91**CalA**121, 266**P**866; 91**CalA**574, 267**P**321; 204**Cal** 185, 267**P**542, 60**ALR**1279; 92**CalA** 110, 267**P**763; **CalA** 275**P**844; **CalA** 276 **P**1060; **CalA** 285**P**876; **CalA** 287**P**540; **CalA** 287**P**577; **CalA** 291**P**456; **CalA** 293 **P**89; 80**Colo** 206, 249**P**1094; 83**Colo** 123, 262**P**1014; 83**Colo** 158, 262**P**1019; 83 **Colo** 556, 266**P**1114; 84**Colo** 481, 271**P** 617; 85**Colo** 376, 275**P**937; 86**Colo** 590, 284**P**121; **Colo** 293**P**342; 104**Conn**362, 133**A**37; 105**Conn**651, 136**A**472; 106 **Conn**107, 136**A**870; 106**Conn**250, 137**A** 761; 111**Conn**532, 150**A**514; **Conn** 152**A** 144; 165**Ga**667, 142**SE**121; 165**Ga**771, 142**SE**101; 35**GaA**504, 134**SE**174; 36 **GaA**487, 137**SE**113; 37**GaA**703, 141**SE** 504; 37**GaA**707, 141**SE**506; 37**GaA**759, 142**SE**182; 39**GaA**87, 146**SE**638; 39**GaA** 285, 146**SE**792; 43 **Ida**549, 254**P**209; 46 **Ida**326, 268**P**6; 46 **Ida**730, 271**P**459; 47 **Ida**380, 275**P**1114; 320 **Ill** 488, 151**NE** 238; 321 **Ill** 298, 151**NE**920; 323 **Ill** 459, 154**NE**203; 325 **Ill** 193, 156**NE**344; 325 **Ill** 378, 156**NE**346; 331 **Ill** 254, 162**NE**846; 331 **Ill** 336, 163**NE**9; 332 **Ill** 328, 163**NE** 681; 334 **Ill** 58, 165**NE**161; 334 **Ill** 390, 166**NE**78; 335 **Ill** 254, 167**NE**56; 336 **Ill** 343, 168**NE**300; 336 **Ill** 568, 168**NE**644; 337 **Ill** 37, 168**NE**665; 337 **Ill** 514, 169**NE** 202; 337 **Ill** 454, 169**NE**225; 339 **Ill** 458, 171**NE**627; **Ill** 172**NE**40; **Ill** 172**NE**49; **Ill** 173**NE**70; 84 **IndA**327, 150**NE**617; 85 **Ind A**186, 151**NE**17; 86**IndA**164, 156**NE**467; 88 **IndA**382, 164**NE**282; 89 **IndA**518, 167 **NE**149; **IndA** 169**NE**55; 202 **Iowa**902, 210**NW**578; 204 **Iowa**1348, 217**NW**264; 206 **Iowa**120, 219**NW**65; 208 **Iowa**1010, 226**NW**719; 208 **Iowa**1281, 227**NW**153; **Iowa** 228**NW**9; 122**Kan**469, 252**P**237; 128**Kan**9, 275**P**1075(2dcase); 129**Kan** 117, 281**P**852; 129**Kan**100, 281**P**860; 129 **Kan**215, 282**P**574; 129**Kan**413, 283**P**58; 130**Kan**191, 285**P**536; 130**Kan**638, 287**P** 240; 130**Kan**504, 287**P**585; 213**Ky**134, 280**SW**936; 214**Ky**357, 283**SW**93; 216 **Ky**262, 287**SW**713; 219**Ky**770, 294**SW** 497; 220**Ky**85, 294**SW**820; 220**Ky**224, 294**SW**1029; 220**Ky**449, 295**SW**406; 220 **Ky**785, 295**SW**1017; 221**Ky**265, 298**SW** 686; 222**Ky**216, 300**SW**595; 223**Ky**379, 3**SW(2d)**763; 224**Ky**434, 6**SW(2d)**495 (degree of dependency); 225**Ky**315, 8 **SW(2d)**419; 225**Ky**372, 9**SW(2d)**109; 226**Ky**204, 10**SW(2d)**809; 227**Ky**374, 13 **SW(2d)**253; 228**Ky**786, 16**SW(2d)**167; 234**Ky**654, 28**SW(2d)**990; 218**Ky**116, 290**SW**1049; 9**LaA**719, 120**S**247; **LaA** 130**S**885; 125**Me**245, 132**A**698; 125**Me** 313, 133**A**736; 125**Me**389, 134**A**200; 126 **Me**144, 136**A**722; 126**Me**597, 138**A**310; 126**Me**579, 140**A**377; 127**Me**207, 142**A** 730; 127**Me**549, 143**A**270; 128**Me**126, 145**A**742; 128**Me**407, 148**A**35(1stcase); 156**Md**690, 145**A**199; 254**Mass**460, 150 **NE**183; 254**Mass**483, 150**NE**215; 254 **Mass**496, 150**NE**299; 257**Mass**532, 154

NE81; 258Mass475, 155NE423; 259 Mass350, 156NE718; 265Mass12, 163NE 191, 265Mass497, 164NE167, 62ALR 1168, 266Mass67, 164NE653; Mass 169 NE175; Mass 169NE779, Mass 170NE 60, Mass 170NE838, Mass 170NE839, Mass 171NE438, Mass 172NE54, 236 Mich109, 210NW305, 215Mich261, 220 NW278, 214Mich[illegible], 221NW134, 214 Mich1, 221NW504, 215Mich266, 222NW 77; 216Mich191, 221NW390, 220Mich 460 231NW10, Mich 233NW350 169 Mich[illegible], 210NW1003, 169Minn370, 211 NW520, 169Minn413, 211NW477, 170 Minn97, 212NW173, 170Minn415, 212 NW187, 171Minn[illegible], 213NW516, 171 Minn309, 213NW297; 171Minn382, 214 NW677, 172Minn[illegible], 214NW923; 172 Minn178, 215NW[illegible]; 174Minn50, 218 NW170, 175Minn[illegible], 219NW993; 175 Minn[illegible], 219NW914, 175Minn319, 221 NW65, 175Minn[illegible], 221NW905, 177 Minn[illegible], 227NW214(1st case), 176Minn [illegible], 223NW668; 176Minn508, 223NW [illegible] (2d case); 177Minn39, 224NW244, 177Minn98, 225NW[illegible]; 177Minn197, 225NW540, 177Minn[illegible], 225NW117(1st case); 177Minn[illegible], 225NW284, 177 Minn519, 225NW652, 178Minn34, 225 NW[illegible] (2d case), 178Minn[illegible]16, 226NW 203(1st case), 178Minn133, 226NW[illegible], 178Minn[illegible], 226NW[illegible]; 178Minn538, 227NW[illegible], 178Minn519, 227NW663, 179 Minn58, 229NW269 (permanent partial disability), 179Minn[illegible], 228NW[illegible], 179 Minn[illegible], 229NW[illegible]; 180Minn289, 230 NW[illegible], 180Minn[illegible], 231NW195, Minn [illegible] NW[illegible] (2d case), Minn 232NW621; [illegible] MoA118, 148SW(2d)660, MoA 148SW (2d)21; MoA 148SW(2d)[illegible] MoA 248SW (2d)[illegible]; MoA [illegible]SW(2d)1084; MoA 29 SW(2d)30, MoA 248SW(2d)[illegible]; Mont 288P[illegible], 112Nebr148, 218NW899, 117 Nebr661, [illegible]NW42, NJ 111A6, NJSup 1[illegible]A[illegible], NJSup 142A343; NJSup 142 A[illegible], NJSup [illegible]A[illegible]; NJSup [illegible]A[illegible]; NJSup 152A[illegible], [illegible]NY[illegible], 161NE[illegible], [illegible]NY60, 171NE 906, 217AppDiv111, 216NYS634, 218 AppDiv31, 217NYS[illegible], 222AppDiv[illegible], [illegible]NYS[illegible] (aff 161NE[illegible] (1st case)), 220AppDiv[illegible], 216NYS[illegible]; NC 1[illegible]SE 594; 57ND189, 220NW[illegible]; 57ND[illegible], 221NW894; 30OhA442, 164NE[illegible]; 120 Okl197, 251P40; 129Okl60, 263P[illegible]; 129Okl271, 264P622; 131Okl171, 262 P[illegible]; 133Okl[illegible], 263P[illegible]; 134Okl[illegible], 264P[illegible]; 134Okl150, 264P16, 136Okl 94, 266P712, 136Okl202, 267P730, 136Okl241, 267P[illegible]; 136Okl287, 267 P737, 138Okl118, 270P[illegible]; 138Okl [illegible], 270P[illegible]; 139Okl32, 270P1100, 140Okl[illegible], 272P606, 141Okl69, 273P [illegible] 141Okl[illegible], 274P[illegible]; 141Okl[illegible], 274P[illegible]; 142Okl217, 276P308, 142 Okl[illegible], 276P[illegible]; 142Okl249, 276P [illegible] 143Okl94, 278P1009; 144Okl81, 279P[illegible]; Okl 292P[illegible], Okl 293P230, 148Or359, 271P[illegible]; 248Pa[illegible], 131A 703, 248Pa[illegible], 135A127, 248Pa149 152 A[illegible], 248Pa[illegible], 144A[illegible], 248Pa300, 153A207, 248Pa[illegible], 153A[illegible], 293Pa 589, 143A187; 293Pa80, 144A[illegible] (2d case); 293Pa[illegible], 144A[illegible]; 296Pa341, 149 A603; 297Pa[illegible], 146A[illegible]; 298Pa[illegible], 146A[illegible] (2d case); 298Pa[illegible], 148A[illegible]; 299Pa[illegible], 149A312, 299Pa193, 149A730, 8[illegible]PaSuper398, 89 PaSuper396; 89PaSuper[illegible] (as to cause of death); 91PaSuper189, 91PaSuper 350; 91PaSuper[illegible]; 92PaSuper132, 92 PaSuper328, 92PaSuper371, 94Pa Super1, 94PaSuper[illegible], 95PaSuper162, 95PaSuper35[illegible]; 98PaSuper[illegible]; 12Pa Dist&Co 5[illegible]; 12PaDist&Co 68[illegible], 31SD 167, 212NW564, 31SD[illegible], 215NW941, 53SD113, 219NW[illegible], 1[illegible]Tenn18, 148SW (2d)560; 1[illegible]Tenn471, 148W(2d)717; TexCommnA 148W(2d)1007, Tex CommnA 298W(2d)987; TexCivA 281 SW[illegible], TexCivA 290SW[illegible], TexCivA 293SW880, TexCivA 294SW923, Tex CivA 300SW66[illegible], TexCivA 38W(2d)[illegible], TexCivA 38W(2d)699, TexCivA 108W (2d)103, TexCivA 168W(2d)360, Tex CivA 188W(2d)810, TexCivA 218W(2d) 31; TexCivA 218W(2d)43, TexCivA 21 SW(2d)691; TexCivA 238W(2d)[illegible], TexCivA 258W(2d)180, TexCivA 298W 899, TexCivA 308W(2d)921, 69Utah[illegible], 262P292, Utah 263P[illegible]; Utah 266P[illegible], Utah 266P721, Utah 267P785, Utah 276 P161; Utah 278P[illegible] (2d case), Utah 278P 1019, Utah 280P[illegible], Utah 281P198, Utah 284P313; Utah 285P306, Utah 286P623; Utah 286P628; Utah 289P91, Utah 289P111, Utah 290P761; 14Va 220, 138SE171, 148Va388, 138SE179; 152Va150, 117SE537; 106WVa14, 111SE 568, 106WVa[illegible], 116SE275; 107WVa 583, 119SE[illegible]; 108WVa128, 121SE311; 108WVa122, 151SE318; 192Wis362, 212 NW641, 5ALR627, 191Wis131, 215NW 815; 191Wis600, 217NW307; 195Wis 267, 218NW182; 200Wis[illegible], 227NW 291; 200Wis611, 229NW193; Wis 230 NW627, Wis 230NW627, Wis 231NW 219 [c] (5) 323 Ill 19, 164NE161, (15) 325Ky103, 288SW1057; 293Pa103, 141 A635, (29) 19ND[illegible], 191NW539 (10) 326 Ill 616, 158NE399 (12) 366GaA186, 136SE535, 37GaA539, 119SE99, 322 Ill 535, 153NE716 (101) That injury arose out of employment 37Ariz65, 287P 611; 326 Ill 120, 156NE763; 111Nebr 432, 208NW739, 16ALR1213. (102) That injury was not suffered in due course of employment 11 Ida737, 212 P514, 243P654. (103) That injury to knee caused tubercular infection there of 200Iowa150, 201NW225. (104) That actual injury did not develop and make itself apparent till after six months from time of accident. 232 Mich154, 205NW109. (105) That thrombus phlebitis was caused by accident, 198SE312, 207NW89. (106) As to fact of injury and cause and nature thereof. 317 Ill 478, 148NE267. (107) That death was due to "accident" 66Utah203, 240P 1103 (108) Unverified proof of death did not create inference that employer had notice that deceased's condition required services of nurse. 213AppDiv606, 211NYS[illegible] (109) Average weekly wages or earnings during year next preceding injury. 12Ida141, 243P818, (110) That employee was permanently and totally incapacitated by injury causing diabetes TexCivA 297SW254. (111) That employer willfully failed to comply with commission's safety orders so as to authorize statutory increase in compensation to employee. 70Utah279, 259P927. (112) Award based on average weekly wages. TexCivA 208W(2d) 209 (113) That petition was filed with in year as required by statute. NJSup 117A638. (114) That one was not employee of owner of bowling alley. 200 Wis440, 228NW520 (115) That insanity of husband causing him to commit suicide resulted from accidental injury arising out of and in course of employment. 158Md149, 148A76. (116) That death was result of operation for recurrent hernia which caused cardiac and respiratory failure through infection. 227AppDiv[illegible], 228NYS338. (117) That injury or death was hastened or resulted from employment as proximate inducing cause. 12LaA139, 125S 596. (118) That hernia did not result from compensable injury. 180Minn355, 230NW813. (119) That hernia was preceded by accidental strain and accompanied by pain. 82Colo335, 259P509 (120) Other evidence held insufficient. 203Cal51, 262P737; Cal 262P641; 206 Cal102, 273P791; 74CalA239, 240P58; 75CalA709, 243P[illegible]; 77CalA509, 247P 22; CalA 260P96; 91CalA[illegible], 266P 866; 91CalA[illegible], 267P889, 95CalA186, 272P889; CalA 287P967; CalA 288P 692, CalA 290P922, 106Conn360, 138A 139, 39GaA[illegible], 148SE296 (2d case); 41 GaA[illegible], 148SE167; 16Ida326, 268P[illegible]; 320 Ill 191, 150NE640, 320 Ill 251, 150 NE633, 320 Ill 298, 150NE645; 324 Ill 420, 155NE322; 325 Ill 102, 156NE319; 325 Ill 261, 156NE[illegible]; 325 Ill 424, 156 NE360; 326 Ill 116, 157NE[illegible]; 332 Ill 61, 163NE381; 332 Ill 386, 163NE789; 333 Ill 162, 164NE145; 333 Ill 505, 165 NE[illegible]; 335 Ill 374, 167NE[illegible]; 335 Ill 322, 167NE80; 336 Ill 350, 168NE302; 339 Ill 352, 171NE165; Ill 172NE[illegible]; Ill 172NE19; Ill 173NE131; Ill 173NE161; 33Ind A[illegible], 149NE[illegible]; 5aInd A48, 154 NE776, 8Ind A667, 162NE415; 89IndA 274, 166NE611 (2d case); 204Iowa168, 211NW616, 222Ky284, 300SW609; 222 Ky710, 18SW(2d)701; 230Ky800, 20SW (2d)988, 235Ky613, 31SW(2d)915; LaA 129S[illegible] (2d case), LaA 130S874; 125Me 215, 132A698; 126Me32, 135A324, 126Me 575, 140A370; 257Mass[illegible], 154NE81; 261Mass495, 163NE161, 266Mass355, 165 NE120; Mass 170NE54; Mass 172NE 79; 245Mich256, 222NW77; 174Minn 359, 219NW292; 179Minn158, 228NW559 (2d case), 180Minn111, 230NW897; 180 Minn100, 231NW211; MoA 148SW(2d) 1[illegible]0, MoA 25SW(2d)114; MoA 28SW (2d)387, NJCP1 137A[illegible]; 219NY295, 164NE329; 216AppDiv538, 215NYS621; 217AppDiv278, 216NYS763; 218AppDiv 308, 218NYS881; 218AppDiv306, 218 NYS85; 218AppDiv533, 218NYS180; 222AppDiv510, 226NYS527; 223AppDiv 518, 229NYS85[illegible]; 223AppDiv533, 229NYS 65; 230AppDiv329, 245NYS320; NC 1[illegible]SE591; 136Okl170, 276P705; 284 Pa318, 151A247, 93PaSuper138 (expert opinion evidence); 95PaSuper310; 12PaDist&Co216; 157Tenn606, 12SW (2d)[illegible]; TexCivA 293SW580; TexCivA 108W(2d)206; TexCivA 108W(2d)220; TexCivA 218W(2d)78; TexCivA 228W (2d)1101; TexCivA 308W(2d)911; 70 Utah116, 258P839; Utah 275P[illegible]80; Utah 278P60; Utah 281P167; Wash 285P 1115; WVa 152SE557, [dl (4) 329 Ill 190, 160NE[illegible]5, (44) 112Okl218, 240P 613. (48) To show that wife living apart from husband had reasonable expectation of future support by him. 66 Utah[illegible]29, 244P656. (49) That burn on lip received in course of employment was direct cause of death resulting from cancer 321 Ill 61, 151NE[illegible]23 (50) That accident permanently disabled claimant to perform his usual and customary work. 321 Ill 117, 151NE606 (51) Basis on which to estimate amount of award for permanent partial incapacity 321 Ill 117, 151NE606. (52) That employee was incapacitated from doing light work and earning wages. 321 Ill 208, 151NE[illegible]20. (53) To show that employer whose general business was marketing sand and gravel had complied with or attempted to comply with provisions of compensation act necessary to bring agricultural employees within act 69 Utah173, 256P105. (54) To show that member of partnership operating gasoline filling station was employee of oil company. Ida 286P269 (55) To support judgment for permanent disability. LaA 126S579. (56) To show disease was result of accident. LaA 126S584. (57) To show that stroke of paralysis causing death resulted from compensable injury Ida 289P992. (58) To show causal relation between accident during employment and death. 229AppDiv39, 240NYS[illegible]78. (59) Other evidence insufficient. 320 Ill 230, 150NE625; 320 Ill 281, 150NE637; 153Md343, 138A244; 8Mont143, 268P195; 223AppDiv550, 229NYS[illegible]; 130Okl199, 266P163 TexCivA 288SW961; 192Wis571, 213NW 292 [jl (7) To require finding that employee received hernia from accident arising out of and in course of employment 218Ky40, 290SW1036; 166Minn 41, 207NW183. (8) To compel finding that retraining was necessary. 166Minn 139, 207NW202. (9) To show that death resulting from windstorm did not arise out of employment. 144Nebr432, 208 NW739, 16ALR1213. (10) To require award for hernia resulting from accident. 168Minn145, 209NW887; 171 Minn254, 211NW29. (11) To establish that strain to which employee was subjected in course of his work was immediate cause of rupture. 167Minn424, 209NW313. (12) To sustain award for total disability where previous allowance had been for partial disability (fractured skull). 209Ky370, 272SW 882. (13) That claimant suffered injury to back. 165Minn169, 205NW953. (14) That toolmaker and machinist asked by foreman to remove hubcap from auto on which company's employees were working was employee and not independent contractor. 75CalA[illegible]29, 243P61. (15) To show partial dependency. 37GaA140, 139SE359. (16) To authorize inference that person for whose death compensation was sought was employee of administrator and not of independent contractor. 37GaA70, 139SE365. (17) That employee was not permanently disabled. 321 Ill 208, 151NE[illegible]20. (18) That injury resulted from fall from ladder across counter while serving customer in course of employment 70Utah187, 259 P193, 55ALR730. (19) To permit jury to give verdict for lump sum award.

37F(2d)870. (20) To show an association rather than relation of employer and employee. CalA 285P912. (21) To show that act in which employee was engaged when injured did not constitute part of his employment. Ida 286P927. (22) To show death due to injury in service arising out and in course of employment. 13LaA234, 126S600. (23) To show that death of employee resulted from accident in course of employment from inhalation or injection of poisonous substance. 180Minn192, 230NW486. (24) To make out prima facie case of delivery of notice of injury. 159Tenn459, 19SW(2d)243. (25) To sustain refusal of award. 107WVa544, 149SE612. (26) To support award against employer for primary liability. 141 Okl 159, 284P51. (27) To prove that deceased was selling for defendant and had not ownership in commodities. Iowa 228NW41. (28) To show that employee was domestic servant not entitled to compensation. CalA 287P147. (29) To show that death from pneumonia was not compensable. 111 Conn188, 149A778. (30) To show dependency of mother of unmarried employee. 339 Ill 292, 171NE158. (31) To show that compensation board did not consider aggravation of injuries from wrongful acts of third persons. 233Ky 793, 26SW(2d)1030. (32) To show painful condition of arm caused by disuse warranting denial of further compensation. 13LaA378, 128S41. (33) Other evidence sufficient. 215Ala64, 109 S360; 330 Ill 70, 161NE86; 87 IndA276, 162NE30; 203 Iowa1395, 214NW585; 169Minn360, 211NW320; 82Mont543, 268P495 (lump sum award); 216App Div588, 215NYS621; 129 Okl 81, 263P 451; 293Pa121, 141A719; TexCivA 290 SW895. [k] (2) Temporary total disability beyond twelve weeks to warrant award beyond period of nineteen weeks. 215AppDiv607, 214NYS442. (3) To sustain award for total loss of vision of left eye. 214AppDiv512, 212NYS426. (4) To sustain award. 215AppDiv176, 213 NYS202. [q] Preponderance of evidence is required to show injury due solely to culpable negligence of claimant as basis for refusal of award on ground of negligence. 34Wyo 357, 243P593. [r] **Award based on higher wages than injured minor employee was receiving** held authorized under evidence. 214AppDiv 341, 212NYS139. [s] **Board must weigh evidence** and cannot award on mere undisputed evidence. 324 Ill 504, 155NE 292. [t] **Mere hearsay evidence and self-serving declaration** are insufficient upon which to support finding. 217Ky 103, 288SW1057. [u] **Statute requiring claimant clearly to prove that appearance of hernia was accompanied by pain and immediately preceded by accidental strain,** is held mandatory. 82Colo 335, 259P509. [v] **Board may weigh evidence** and draw reasonable inferences from facts deemed established. 87 IndA276, 162NE30. [w] **Evidence held to show:** (1) That employer posted notices to employees that insurance was carried for their benefit. TexCivA 297SW1042. (2) That injury causing death arose out of employment. WVa 155SE169. (3) That employee sustained traumatic injury requiring award. 235Ky534, 31SW(2d) 903. (4) Miscellaneous facts. 251Mich 309, 232NW369. [x] **In absence of testimony** as to earning capacity of employee seeking compensation for injuries, members of industrial accident board are entitled to use their own judgment and knowledge in determining that question. 265 Mass456, 164NE440. [y] **To find dependency, preponderance of evidence must affirmatively show** that during year preceding accident amount in excess of employee's cost of support had been contributed to alleged dependents. 196Wis159, 220NW377. [z] **Liability cannot be based on possibilities or probabilities.**–339 Ill 252, 171NE165. [aa] **Competent evidence is required to establish facts.** TexCivA 258W(2d)180. [ab] **Proof required to show dependency.**–Utah 286P628 (of father on son). [ac] **In determining whether preponderance lies with claimant,** probabilities may be balanced if claimant's alleged probability is substantially supported by evidence. 208 Iowa1281, 227NW153. [ad] **Members of accident board may use their own judgment** and knowledge in determining earning capacity of salesman seeking award. Mass 167NE352. [ae] **Employee's testimony** relative to receiving same wages after attack of lead poisoning as before is not conclusive on accident board. Mass 167NE350. [af] **Compensation for death of employee should not be denied** because there is no direct testimony from which reasonable value of work can be determined as basis of compensation. 200Wis512, 228NW 118. [ag] **Dependency not shown** by proof of dislike of deceased employee's adult son of employment obtainable in locality. Mass 168NE747. [ah] **That employee continued to perform services** is some evidence that he was not then totally disabled. Wis 232NW542.

115–37½–New. nor established beyond possibility of doubt; 70CalA435, 233P 381.

116–38 CalA 260P967; 92CalA110, 267 P763; 330 Ill 70, 161NE86; 200 Iowa 150, 204NW225; 213Ky134, 280SW936; 172Minn439, 215NW678; 87PaSuper 458; 94PaSuper379; 152Va150, 147SE 537.

116–39 47 Ida208, 273P758; 204 Iowa 546, 215NW603; 126Me579, 140A377; 292Pa509, 141A481; Utah 275P580. But see WVa 155SE169. [a] **Hearsay held insufficient to support award.**–Report of three doctors that applicant for compensation was permanently and totally disabled. Utah 277P206.

116–40 CalA 260P354; MoA 22SW(2d) 61; 70Utah549, 262P99. But see 203Cal 12, 263P196. [a] (3) Testimony as to deceased's declarations is hearsay and must be corroborated. 214AppDiv343, 212NYS111. [b] **In California** (1) proximate cause of injury may be proved by hearsay testimony. 195Cal 174, 231P 996. (2) California statutes leave no doubt that in compensation case hearsay evidence is legal evidence and may be sufficient in itself to sustain award. 195Cal 174, 231P996.

116–40½–New. Hearsay in respect to accidental injury must be corroborated by legal proof. 214AppDiv343, 212NYS 111.

116–40⅓–New. Hearsay is sufficient as basis for finding if not objected to. 286 Pa473, 133A819.

116–41 70Utah333, 260P271. [b] **Statements of deceased employee not of res gestæ** as to whether there was accident and whether it occurred in course of his employment are insufficient to support award. 68Utah206, 249P480.

116–41½–New. Physician's report is not objectionable as hearsay in some jurisdictions. 71CalA542, 235P748.

116–42 See also 332 Ill 328, 163NE681.

116–43 CalA 260P967; 39GaA285, 146 SE792; Ill 173NE184; 200 Iowa150, 204 NW225; 125Me245, 132A698; 175Minn 51, 220NW401; 290Pa267, 138A841; 158Tenn148, 118SW(2d)900; 106WVa14, 144SE568. [c] **Where claimant's testimony is uncontradicted and not improbable,** it cannot be disregarded. 165Minn 169, 205NW953.

116–43½–New. In determining questions of fact in workmen's compensation cases, the commission may draw all reasonable inferences from the evidence and circumstances. 127Me549, 143A270.

116–44 46 Ida739, 271P327; 320 Ill 298, 150NE645; 323 Ill 459, 154NE203; 200 Iowa150, 204NW225; Mass 172NE79; 149Va371, 141SE142.

116–44½–New. Incumbent on claimant to prove by direct and positive evidence, or from evidence from which such inference can be fairly and reasonably drawn, that the accidental injury arose out of and in the course of the employment. 320 Ill 298, 150NE645.

116–45½–New. The commission is the sole judge of facts, the credibility of witnesses, and the weight of their testimony. 80CalA388, 250P691; 68Utah1, 248P1103.

116–45⅓–New. Interest and motions of witnesses claiming dependency are important elements in determining the weight of their testimony. 68Utah1, 248 P1103.

116–45¼–New. But their interest alone does not require the commission to disregard their testimony, 68Utah1, 248P 1103.

116–45⅕–New. Although the circumstances may be such as to justify the commission in disregarding even their uncontradicted testimony, 68Utah1, 248 P1103.

116–45⅙–New. or at least to make a finding contrary thereto. 68Utah1, 248P 1103.

116–45⅐–New. The right to compensation is not governed by preconceived medical theories but by the evidence adduced in the case, interpreted according to the letter and spirit of the Compensation Act. 166Minn41, 207NW183.

116–45⅛–New. The determination of board as to whether the injured minor's wages would be expected to increase is not controlled by the minor's express intent to continue or not to continue indefinitely in such employment. 214App Div341, 212NYS139.

116–45⅑–New. The exact cause of infection following an injury need not be demonstrated beyond a possibility of doubt where there is sufficient medical testimony to sustain an award. 70CalA 435, 233P381.

116–45 1/10–New. Demurrer sustained where plaintiff evidence showed no loss of time by reason of the injury. 118Kan 210, 235P117.

116–45 1/11–New. Statute declared not to make testimony of witness conclusive. 208Ky548, 271SW592.

116–45 1/12–New. Industrial commission is authorized to discard evidence which is either true or knowingly false, although corroborated. 34GaA307, 129SE 305.

116–45 1/13–New. Where the industrial commission is warranted in discarding only evidence as to dependency, it is justified in refusing compensation claim. 34GaA307, 129SE305.

116–45 1/14–New. An employee is not bound by any mistaken statement made by reason of his confusion, excitement, or inexperience. 320 Ill 281, 150NE637.

116–45 1/15–New. Industrial board has exclusive province of rejection or acceptance of medical testimony. 218App Div310, 218NYS213.

116–45 1/16–New. Opinions of examining physicians are ordinarily entitled to great weight. 86 IndA111, 154NE778.

116–45 1/17–New. Interpretation of Snellen test by medical expert is not erroneous as matter of law, although he finds percentage of loss of vision higher than indicated under rules of American Medical Association. 244NY500, 155NE756.

116–45 1/18–New. In the absence of established method of determining loss of visual efficiency, the question is one of fact. 244NY500, 155NE756.

116–45 1/19–New. In order that expert testimony of cause of injury be sufficient, physician must state that ailment in question most probably came from alleged cause; 284Pa348, 131A247.

116–45 1/20–New. and his statement that alleged cause might have superinduced ailment does not meet this requirement. 284Pa348, 131A247 (apoplectic stroke alleged to have resulted from heat stroke).

116–45 1/21–New. Commissioner may accept medical testimony of claimant rather than that of defendants in determining whether death arose out of and in course of employment. 104Conn459, 133 A664.

116–45 1/22–New. It is peculiar province of industrial commissioner to accept testimony of such of expert witnesses as seem to him most consistent with all the testimony and of greater credibility. 203 Iowa1395, 214NW585.

116–45 1/23–New. Expert medical testimony is of great value but not absolutely essential. 125Me389, 134A200.

116–45 1/24–New. Finding must stand if rational and natural, although its supporting evidence is not viséed by expert. 125Me389, 134A200.

116–45 1/25–New. Evidence held insufficient to show primary cancer caused by copper poisoning. 260Mass74, 156NE 691.

116-45½₆-New. The commission cannot find for one party because there is evidence which if undisputed, would justify a finding, where such evidence is actually contradicted, leaving the whole evidence preponderating in favor of the other party. 320 **Ill** 618, 151**NE**588.

116-45½₇-New. Evidence establishing no more than a possibility or a probability is insufficient to show cause of death. 260**Mass**74, 156**NE**691.

116-45½₈-New. The commission must accept as true the positive, unimpeached testimony of credible witnesses, unless it is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing. 175**Minn**489, 221**NW**913.

116-45½₉-New. A claim cannot be defeated because the medical profession is unable to determine how the injury caused the affliction. 57**ND**326, 221**NW** 894.

116-45½₁₀-New. All testimony must be considered in determining whether an employee's disability was due to the injury or to a prior diseased condition. 332 **Ill** 328, 163**NE**681.

116-45½₁-New. A claimant must establish his case by a preponderance of evidence. 208 **Iowa**262, 225**NW**404.

116-45½₂-New. An employer is not liable by virtue of an alleged admission of liability by ordering a nurse and agreeing to pay the employee's hospital bill. 333 **Ill** 340, 164**NE**668.

116-45½₃-New. Evidence has been held insufficient to support finding of deputy commissioner of total disability made in proceeding under Harbor Workers' Compensation Act. 36**F(2d)**814.

116-45½₄-New. That deceased established separate living place for claimant not related to, but supported by, him does not require finding that claimant was not member of family. **Mass** 169 **NE**779.

116-45½₅-New. There must be evidence that death was traceable to injury arising out of and in cause of deceased's employment to sustain an award of commission. 336 **Ill** 343, 168**NE**300.

116-45½₆-New. Proof that the award is justified should be clear and convincing. **IndA** 169**NE**55.

116-45½₇-New. The accident board is not obliged to believe claimant's testimony that she was a member of the employee's family at the time of the accident. **Mass** 169**NE**409.

116-45½₈-New. Where **an injury** results in death, depriving claimant of his testimony, it need not be shown exactly how the accident happened. 290**Pa** 267, 138**A**841.

116-45½₉-New. It is sufficient if the facts justify the conclusion that the injury was accidental and sustained in the course of employment. 290**Pa**267, 138**A**841.

116-46 70**CalA**495, 233**P**392 (required by statute); 169**Ga**333, 150**SE**208; 213 **Ky**568, 281**SW**493; 242**NY**70, 150**NE** 604; 286**Pa**199, 133**A**256; 51**SD**359, 213 **NW**947; 70**Utah**116, 258**P**339. See also **TexCivA** 7**SW(2d)**607. [i] **By statute in** some jurisdictions commission facts involved in controversy. 70**CalA**495, 233 **P**392. [j] **Facts need not be set out** in award where they are undisputed. 219 **Ky**691, 294**SW**159. [k] **Finding held to require allowance of claim of disability before death.**–31**F(2d)**480. [l] **Finding held sufficient to sustain award.**–295**Pa** 69, 144**A**822 (finding of referee). [m] **Finding that employer's hospital facilities are inadequate is unnecessary** where order to pay for private treatment is conditioned on employer's failure to furnish treatment. **CalA** 259**P**369. [n] **Under Wisconsin statute** (1) findings are required only where evidence is conflicting. 200**Wis**616, 229**NW**194. (2) Where commission believes that facts are undisputed, it should so indicate by its finding. 200**Wis**616, 229**NW**194. (3) Where testimony is conflicting, at least informal recital of facts should be made. 200**Wis**616, 229**NW**194. [o] **Findings construed.**–(1) Finding that claimant was not wife of deceased employee and not dependent on him is not finding that she was not member of household. **CalA** 286**P**1045. (2) Finding that employee secured employment by incorrectly representing age does not charge fraudulent representation. 111**Conn**229, 149**A**679. [p] **In Oklahoma** order granting or denying compensation need not contain finding of facts on which order is based. 144 **Okl** 89, 289**P**708. [q] **Commission must draw proper inferences from facts.**–**Wis** 230**NW**36. [r] **Where commission found three different ways,** finding of fact was basis of judgment. **Colo** 292**P**229. [s] **Findings held sufficient.**–**CalA** 293**P**89. [t] **Findings held inconsistent with statement of claim.**–**Ill** 173**NE**472.

116-46½-New. Questions for the jury. Whether employment was casual is held for the jury. **NJSup** 134**A**899.

116-47 31**F(2d)**480; 34**Ariz**175, 269**P** 77; 73**CalA**521, 238**P**1056; 204**Cal** 427, 268**P**633; **CalA** 286**P**1045; 104**Conn**459, 133**A**664; 165**Ga**667, 142**SE**121; 205**App Div**159, 220**NYS**678; 286**Pa**199, 133**A** 256; 70**Utah**333, 260**P**271. [a] (14) Finding and award should conform to finding of facts tried to court in appeal from superior court judgment. 103**Conn** 101, 130**A**70. (15) Finding should contain recital of facts found, conclusions reached by the commissioner upon these subordinate facts, claims of law made by appellant, rulings made therein, and judgment rendered. 103**Conn**101, 130**A** 70. (16) Failure to find that injury was sustained or disease contracted during particular employment will not support award against one who was employer during that period. 70**CalA**495, 233**P** 392. (17) Board should find specifically whether disability was permanent and total or temporary total. 205**AppDiv** 159, 220**NYS**678. (18) Commission should determine whether deceased suffered permanent partial disability or permanent total disability. 196**Wis**406, 220**NW**188 (failure of claimant's attorney to present question not waiver). (19) Finding that injury and death were caused by serious and willful misconduct of executive or managing foreman or general superintendent of employer is finding of ultimate fact sufficient to determine issue without specific findings on probative matters. 90**CalA**101, 265**P**508; 90**CalA**104, 265**P**510. (20) Whether claim for compensation was given within statutory time and whether proper notice of accident was given are questions of fact to be determined like others. **MoA** 25**SW(2d)**529. [d] (1) 219 **Ky**691, 294**SW**159. (4) Compensation referees and boards should have their records in same condition in which those in all judicial proceedings should properly appear. 286**Pa**177, 133**A**159. [e] 120 **Okl** 37, 250**P**138. [h] (3) Findings of partial disability will not support award for total disability. 119 **Okl** 154, 240**P**1061. [k] **Findings must fix time employee remained on premises after employment ceased.**–215**AppDiv**735, 212 **NYS**87. [l] **Where question becomes material,** board should make specific findings. 242**NY**70, 150**NE**604. [m] **Specific finding that injury arose out of employment** is not necessary where evidence discloses that injury arose out of and in course of employment. 114 **Okl** 140, 244**P**438. [n] **In Oklahoma** (1) statute does not require that order granting or denying award shall contain finding of facts upon which order is based. 120 **Okl** 37, 250**P**138. (2) It is necessary only that order contain statement of commission's conclusion of fact at issue and its rulings of law applicable. 120 **Okl** 37, 250**P**138. [o] **Ability to earn need not be found** where award well within testimony. 318 **Ill** 328, 149 **NE**264. [p] **Compensation board must separate results of preëxisting disease** from those of accidental injury and apportion award accordingly. 213**Ky**568, 281**SW**493. [q] **Findings must concisely and comprehensively state cause and circumstances** of accident sufficient to support legal conclusions, and mere statements in language of statute are insufficient. 39**GaA**38, 146**SE**37(2dcase). [r] **All orders and awards must be deliberate** act of commission. **Ariz** 293**P** 20.

117-48 103**Conn**426, 130**A**672; 110**Conn** 282, 147**A**818; 218**AppDiv**31, 217**NYS** 744. See also 106**Conn**250, 137**A**761. [d] **Finding comprising both finding of facts and memorandum** of opinion is improper. 103**Conn**101, 130**A**70. [e] **Finding of disability** leaving question of permanancy open held sufficient. 219**Ky**691, 295**SW**159. [f] **Finding of partial dependency** of mother on son held sufficient. 83 **IndA**594, 149**NE**371.

117-48½-New. Claimant should move to strike out memorandum of decision and to insert subordinate facts on which conclusions are based. 103**Conn**426, 130 **A**672.

117-48⅓-New. Where commissioner struck out memorandum of decision, it was not necessary to consider motion to the same effect. 103**Conn**426, 130**A**672.

117-48¼-New. Statement as to discussion at medical meeting is held not fact proper to include in finding. 106**Conn** 401, 138**A**448.

117-48½-New. Where there is a conflict in evidence respecting compensation claimant's capacity to work, there should be a definite finding of earning capacity, based not only on evidence of actual experience in employment, but on medical testimony, as to claimant's ability to engage in some sort of gainful labor, and the question cannot be arbitrarily determined. 225**AppDiv**703, 231 **NYS**441.

117-49 87**CalA**766, 262**P**471; 218**App Div**31, 217**NYS**744; 66**Utah**494, 243**P** 800.

117-49½-New. Subordinate facts which are necessary to support ultimate conclusion must be stated. 104**Conn**459, 133 **A**664.

117-50 290**Pa**267, 138**A**841.

117-50½-New. The award must be warranted by the proof. 226**Ky**16, 10 **SW(2d)**455.

117-52 114 **Okl** 140, 244**P**438. [a] **Award should not be given technical construction** which will cause reversal. 219**Ky**691, 294**SW**159.

117-52½-New. The issues in a compensation case, although informally joined, should be disposed of by the board by determination on all material, controverted questions. 245**NY**70, 150**NE**604.

117-52⅓-New. In arriving at a conclusion a commissioner considers the probative force of the evidence. 67**Utah**292, 247**P**298.

117-52¼-New. In making findings the commission may not without sufficient cause arbitrarily refuse to follow uncontradicted evidence. 67**Utah**174, 246**P** 698.

117-52⅕-New. Where the board finds partial disability, it is the duty of the board to compute in dollars and cents the proportionate extent of impairment of earning capacity in accordance with the Compensation Act. 234**Mich**645, 209 **NW**50.

117-52⅙-New. An award apportioning compensation for lead poisoning between insurance carriers for successive employers is unauthorized in the absence of a finding that any stage of the disease existed during the prior employment. 70**CalA**495, 233**P**392.

117-52⅐-New. In case of award to minor children, the board should make an order specifying the person or persons to whom money should be paid. 83 **IndA**131, 147**NE**813.

117-52⅛-New. On filing of suit the board is without jurisdiction to charge the award. **TexCivA** 271**SW**225.

117-52⅑-New. Tender by insurer after suit brought without including statutory penalty for delay has been declared insufficient. **TexCivA** 271**SW**225.

117-52⅒-New. The commissioner may file a separate memorandum containing the reasons for his conclusions and judgment. 103**Conn**101, 130**A**70.

117-52⅑₁-New. Some statutes authorize including in decree for award a requirement that the employer give a bond to comply therewith. 77**Colo** 414, 236**P** 1006.

117-52½₂-New. It is duty of commission to determine whether employee's refusal to submit to an operation is reasonable or not. 75**CalA**709, 243**P**455.

117-52⅓₃-New. A statute, relating to

making of award within certain number of days has been held directory only. 76CalA565, 245P445.

117-52½4-New. Finding as to permanency of injury includes question of possible relief by surgical operation. 77 CalA314, 246P570.

117-52½5-New. Furnishing certified copies of findings and award. 75CalA 178, 241P912 (construction of statute requiring).

117-52½6-New. An award denying compensation for injury on the ground that it did not arise in the course of employment is not supported by a finding that he was kicked by a horse he was beating which he had been told not to beat. 81Colo 111, 253P828.

117-52½7-New. In memorandum of decision of compensation commissioner, claims of counsel and rulings made thereon should be shortly stated in finding. 103Conn701, 131A739.

117-52½8-New. Subordinate facts in finding must support conclusion as to death arising out of and in course of employment. 104Conn459, 133A664.

117-52½9-New. Findings should satisfy superior court requirements. 106Conn 250, 137A761.

117-52½0-New. Separate awards should be made for each person injured in same action, although joinder of their claims in one action is proper. 105Conn695, 136A677, 56ALR504.

117-52½1-New. Where a claim is properly brought against an employer and an insurance carrier and both defendants are served and the injury to the employee is covered by the insurance policy, the award should be against both defendants. 36GaA574, 137SE415.

117-52½2-New. Where a prior award was for temporary disability and subsequent award was for permanent partial impairment of same member, the latter award will not be disturbed for lack of finding that there had been change in condition. 85 IndA552, 154NE774.

117-52½3-New. The board has not the power to order an employee to work. 86 IndA111, 154NE778.

117-52½4-New. Payments made by compensation insurer in compliance with determination of arbitration committee have been held not voluntary. 254Mass359, 150NE230.

117-52½5-New. Petition must be consistent with findings. 324 Ill 423, 155 NE277.

117-52½6-New. Decisions of board are not judicial acts, although reviewable by circuit court. 326 Ill 166, 157NE206.

117-52½7-New. Error in name of corporate employer which does not prejudice it does not invalidate award. 218Ky 293, 291SW394 (R. Coal Co. for R. Incorporated).

117-52½8-New. Chairman of commission may draw all reasonable inferences from evidence and circumstances. 125 Me245, 132A698.

117-52½9-New. Petition to determine the extent of permanent impairment of vision is held not improper, although the commission found total permanent impairment. 125Me395, 134A374.

117-52½0-New. Excluding findings and order held proper. 115Nebr711, 214NW 647.

117-52½1-New. Findings are not insufficient because of omission of word "accident." 51SD359, 213NW947.

117-52½2-New. Findings are not insufficient because of conclusion of law rather than finding of fact that injury was caused by accident arising out of and in course of employment. 51SD359, 213 NW947.

117-52½3-New. Commission on reviewing compensation case may consider additional defense not raised before hearing commissioner. 148Va220, 138SE474.

117-52½4-New. Order closing claim for compensation is held effective, although not signed by supervisor. 143Wash380, 255P385.

117-52½5-New. Award of one-half compensation for death of older son to mother receiving monthly payments from younger son "as board" is held proper. 82Colo.341, 259P516.

117-52½6-New. Time for filing award see 126Kan217, 267P1000.

117-52½7-New. Award requiring employer to furnish employee further medical treatment necessary as indicated in testimony of designated physician is not so uncertain as to be unenforceable. 78 CalA584, 248P938.

117-52½8-New. Additional compensation for failure to insure is allowed under statutes in some jurisdictions, under some circumstances. 82Colo 272, 259P1036.

117-52½9-New. An award has been construed as one against both employer and insurer and not against the insurance carrier alone. 37GaA70, 139SE365.

117-52¼0-New. Award is not construed to effect illegal payments to person not entitled thereto. 37GaA234, 139SE685.

117-52¼1-New. Where an employer agrees with an injured employee to pay the latter stated compensation "during his disability," the court has no jurisdiction to determine such period of disability or that said injuries are permanent. 204 Iowa394, 214NW707.

117-52¼2-New. Agreement to pay compensation for undetermined duration of disability is legal. 204 Iowa394, 214NW 707.

117-52¼3-New. Power to award interest depends on statute. 202Cal 521, 261 P987.

117-52¼4-New. Interest is unauthorized where there was no unreasonable delay in payment. 202Cal 521, 261P987.

117-52¼5-New. Award does not draw interest as judgment until certified copy of findings and award is filed with clerk of court as provided by statute. 202Cal 521, 261P987.

117-52¼6-New. It is not necessary for the board to find the fact that there was dispute between the parties. 87 IndA 276, 162NE30.

117-52¼7-New. Where the industrial commission has found all of the facts essential to the determination of liability it is its duty to apply the existing law to such facts and determine which of successive insurance carriers is liable to pay the compensation awarded. 195 Wis410, 217NW738.

117-52¼8-New. The question as to when disability occurred entitling an employee to compensation from the employer's insurance carrier is one as to which the industrial commission has the power to find facts and apply law. 195 Wis410, 217NW738.

117-52¼9-New. Interest on amounts awarded is not authorized by law. 90 CalA725, 266P556.

117-52½0-New. The board should determine the time compensation should be paid for all disabilities excepting from permanent injuries. 293Pa338, 143A21.

117-52½1-New. If the evidence warrants a conclusion that the employee's disability will continue beyond the maximum period of time fixed by law for paying compensation, the award may so state and compensation may be ordered on that basis. 293Pa338, 143A21.

117-52½2-New. Where the board found that claimant had sustained partial disability permanent in character, and made an award covering the entire period, the order is not improper because it contained the word "permanent." 293Pa338, 143A21.

117-52½3-New. The board may not disregard uncontroverted credible evidence in making findings. 83Mont152, 269P 403.

117-52½4-New. It is proper to order that all payments awarded shall bear interest at the legal rate until paid from the date of award or the date at which payment becomes due. 87CalA652, 262 P469.

117-52½5-New. Part of an award imposing interest is erroneous in the absence of finding of unreasonable delay by an insurance carrier in paying compensation. 92CalA298, 268P670.

117-52½6-New. Where claimant was adjudged incompetent after commencement of the compensation proceedings, an award is properly entered in favor of applicant although his guardian appeared. 88CalA369, 263P823.

117-52½7-New. The commission has no authority to allow interest on unpaid portions of an award. 204Cal 427, 268 P633.

117-52½8-New. Evidence being conflicting whether an electrical worker in a mine, in operating a motor at excessive speed, causing cars the motor was pushing to jump the track and precipitate the roof upon the worker, causing his death, was violating any rule of the company, fifteen per cent decrease in the amount of compensation awarded to the beneficiary under statute was not authorized. 226Ky7, 10SW(2d)463.

117-52½9-New. Where the board cannot determine the period of disability, no specific time is fixed, compensation being paid while awaiting developments; 293Pa338, 143A21.

117-52½0-New. An award is not incomplete and unenforceable because of failure to fix the time payments should commence, where the board found the date on which temporary total disability began, since the statute fixes the time. 88 IndA382, 164NE282.

117-52½1-New. A finding by a single member, affirmed by the industrial accident board on appeal, must be taken to be the finding of the board. 266Mass 516, 165NE670.

117-52½2-New. Where the principal contractor and subcontractor were jointly liable for the death of the employee; an award against both was proper. 109 Conn39, 145A149.

117-52½3-New. An award for partial disability made after the death of the employee from causes other than the injury is unauthorized. 120 Oh59, 165NE 536.

117-52½4-New. Where the board found the employee was wholly disabled, an award for total disability "during disability" instead of "during total disability" was not illegal, since if the employee's condition should change to partial disability, the employer can apply for modification. 88 IndA382, 164NE 282.

117-52½5-New. An award requiring reasonable medical, surgical, and hospital treatment to be furnished was not void for uncertainty. 207Cal 144, 277 P492.

117-52½6-New. The finding of the commission has the force and effect of a jury's verdict. MoA 17SW(2d)578; MoA 18SW(2d)91.

117-52½7-New. Where the referee held that the state industrial board could not make an award against defendant insurance carrier, his statement that defendant's policy did cover compensation awarded was not an "award or decision," within Workmen's Compensation L. § 23. 133Misc713, 233NYS330.

117-52½8-New. An act of a single member of the board in finding that an employee suffered injury on a certain date, and entering an award without notice to the then insurance carrier, is such an irregularity and mistake as to warrant the board, on seasonable application, to set aside and vacate the award. 88 IndA 170, 163NE529.

117-52½9-New. Where an award is vacated by order of a single member of the board and the matter is set for hearing by the full board, such order, not appealed from, is final and conclusive. 88 IndA170, 163NE529.

117-52½0-New. Judgment denying compensation is adjudication against claimant's right to compensation on any existing ground on which commission could have granted compensation. 41 GaA100, 151SE826.

117-52½1-New. Statement of facts by commission held sufficient to sustain recovery for death of employee. MoA 25 SW(2d)1086.

117-52½2-New. Commission has jurisdiction to find that employee had departed from course of employment and was engaged in venture not arising out of employment. Utah 285P306.

117-52½3-New. Order for compensation to begin at date long after injury is not abuse of discretion where injured employee delayed applying until after date so fixed. 108WVa477, 151SE706.

117-52¼-New. That decision is under title "findings of fact" does not affect its real character. 200**Wis**616, 229**NW**194.

117-52¼-New. Commission's judgment denying compensation from date of injury because of refusal of medical services is res adjudicata of right to compensation up to time of refusal. 41**GaA** 100, 151**SE**826.

117-52¼-New. Conclusion that deceased was employee, although designated as finding of fact, is mere announcement of commission's decision. 200**Wis**616, 229**NW**194.

117-52¼-New. The commission has jurisdiction to make an award primarily against an employer if it finds either that the employer is not insured or that insurer has defaulted. **MoA** 21**SW(2d)** 191.

117-52¼-New. The board has been held without jurisdiction to enter an award denying compensation as against an insurance carrier where no claim for such compensation was made. **TexCivA** 20**SW(2d)**263.

117-52¼-New. Application for rehearing is properly denied where filed more than thirty days after receiving notice of final disposition of claim. 32**OhA**390, 168**NE**128.

117-52¼-New. A finding of the board supersedes the finding of a single member. **Mass** 167**NE**352.

117-52¼-New. Findings held not inconsistent. **Mass** 167**NE**352

117-52¼-New. The commissioner retained jurisdiction to award compensation on the basis of total incapacity where remand on appeal involved ascertainment of the amount claimant was able to earn after the injury. 110**Conn** 282, 147**A**818.

117-52¼-New. Where impairment of the employee's vision rendered it impossible for him to procure work, there is no basis of fact for an award of compensation for proportionate loss of the use of an eye. 110**Conn**282, 147**A**818.

117-52¼-New. Review by the full board on application of both parties is authorized, regardless of the validity of a so-called corrected award by a hearing member. **IndA** 168**NE**716.

117-52¼-New. The board is not a court within the rule requiring a record entry of judgment, but is an administrative body. 232**Ky**78, 22**SW(2d)**430.

117-52¼-New. Industrial accident board had power to reverse findings of fact of a single member on evidence reported by him. **Mass** 169**NE**409.

117-52¼-New. The industrial accident board is at liberty to refuse to give credit to any part of evidence reported by a single member, and may find facts at variance therewith. **Mass** 169**NE**425.

117-52¼-New. What is daily wage is question of fact within province of commissioner. 40**F(2d)**530.

117-52¼-New. Finding that injury was not cause of death held to eliminate particular injury as contributing cause of death. **Cal** 285**P**627.

117-52¼-New. Injured employee claiming right to specific compensation is not precluded from award according to proof of loss less than alleged. **TexCivA** 26**SW(2d)**676.

117-52¼-New. Degree of permanent impairment is question of fact. **Me** 151 **A**[4].

117-52¼-New. Single member and reviewing board are not bound to believe all testimony. **Mass** 172**NE**254.

117-52¼-New. Board cannot render award affecting insurer against whom employee failed to assert claim. **Tex CivA** 29**SW(2d)**534.

117-52¼-New. Questions for jury. OhA 173**NE**14.

117-52¼-New. Interpretation of testimony and inferences where directed verdict is asked. **OhA** 173**NE**14.

117-52¼-New. Order not showing whether it is full board order must be treated as order not by full board. 235 **Ky**613, 31**SW(2d)**915.

117-52¼-New. Where disability is traceable partly to pre-existing disease and partly to accidental injury board should apportion award accordingly. 235**Ky**534, 31**SW(2d)**903.

117-52¼-New. Granting award without rescinding previous schedule award may be error. 231**AppDiv**772, 245**NYS** 556.

117-53 109**Conn**599, 145**A**164; 222**Ky** 388, 300**SW**896. See also 243**Mich**261, 220**NW**728. [a] **Fact that improper finding of board was not appealed from** did not render it res judicata. 294**Pa** 253, 144**A**79.

117-54 NJ 151**A**626; **Utah** 290**P**764. See also **MoA** 30**SW(2d)**167. [a] **Character of commerce** in which railroad employee was engaged adjudicated under Iowa Workmen's Compensation Act must be taken as conclusively established. 270 **US**611, 46**SCt**420, 70**Led**757. [b] **Finding in compensation proceeding** to which widow of railroad employee was party is conclusive against administrator suing for benefit of widow under Federal Employers' Liability Act. 270 **US**611, 46**SCt**420, 70**Led**757. [c] **Finding of Iowa industrial commissioner** which had not inferred into award when judgment was rendered in Minnesota under Federal Employers' Liability Act is held not res judicata. 270**US**611, 46 **SCt**420, 70**Led**757.

117-55 254**Mass**359, 150**NE**230; **Tex CivA** 18**SW(2d)**1109. [b] **Finding in compensation proceeding** that employee of railroad was engaged in intra state commerce entered before judgment in action under Federal Employers' Liability Act held to be res judicata. 270**US** 611, 46**SCt**420, 70**Led**757. [c] **Commission exercises quasi-judicial function** and its awards are in effect judgments as provided by statute. **Utah** 279**P**612.

117-55½-New. Constitutional provision that commission has full authority to determine whether injury, disease, or death resulted from failure of employer to comply with statute is valid. 115 **OhSt**654, 155**NE**484.

117-56½-New. An award against a noncomplying employer is not final or conclusive upon fundamental or jurisdictional questions involved in the award. 51**ND**710, 201**NW**680.

117-56½-New. A finding on application of the widow of a deceased employee for compensation for his death is not binding on her subsequent application for compensation for the death of a son. 67**Utah**25, 245**P**381, 45**ALR**882.

117-56¼-New. A finding as to whether injury or death was due to neglect of the employer of statutory duty as to safety and health of employees so as to authorize additional award is final. 115 **OhSt**654, 155**NE**484.

117-56½-New. Voluntary agreement failing to provide what sums shall be paid as compensation is not final. 104 **Conn**569, 134**A**68.

117-56½-New. Since approved agreement for compensation has force of judgment, claimant may not file original petition for impairment resulting from original injury while it is in force. 126 **Me**173, 137**A**54.

117-56½-New. An award is not open to collateral attack in equity in the absence of fraud. 238**Mich**580, 214**NW**208.

117-56½-New. Statutes provide that decision of commission shall be final as to all questions of fact. 126 **Okl** 91, 258 **P**743.

117-56½-New. An award of the board has the same force as a judgment. **Tex CommnA** 295**SW**588.

117-56½-New. In a suit by a widow of an employee who died within two years after the award of compensation to him, to recover on such award, findings and award in former case are conclusive. 103**Conn**701, 131**A**739.

117-56½-New. In an order to establish a claim in such suit, the widow is only required to prove his death, the dependence, and causal connection between the injury for which he was awarded compensation and his death. 103**Conn**701, 131**A**739.

117-56½-New. Orders of industrial accident board are given force after time of finality and cannot be collaterally attacked. **TexCommnA** 285**SW**1041.

117-56½-New. Where the injuries are sustained as a matter of fact, the amount of compensation fixed by the commission within the limits prescribed by statute for such injuries is conclusive. 122 **Okl** 257, 254**P**98.

117-56½-New. Commission's order giving notice of intention to amend, has been held not final adjudication. 201 **Cal** 169, 256**P**413.

117-56½-New. Supplemental award for surgical and hospital treatment in accordance with original decision cannot be disturbed after such decision has become final. 81**CalA**137, 252**P**1069, 253**P** 976.

117-56½-New. Such award cannot be attacked on the ground that the employer did not receive notice of the injury, where the original decision left open only the reasonableness of the charge for medical treatment. 81**CalA** 137, 252**P**1069, 253**P**976.

117-56½-New. Both employer and insurer who had notice of proceedings but did not appear are conclusively bound by the award. 322 **Ill** 462, 153**NE**685.

117-56½-New. Mandamus may issue in a proper case to compel the commission to grant a rehearing. 118 **Oh** 475, 160 **NE**705.

117-56½-New. Decisions of the board are final on parties in the absence of appeal. **TexCivA** 5**SW(2d)**594.

117-56½-New. Findings against an employer have been held not to preclude the right to a hearing by dependents after his death. **Utah** 263**P**78.

117-56½-New. A finding as to whether failure to give notice of injury is within exception so as not to bar compensation is conclusive if supported by evidence, in the absence of fraud. 38**GaA**759, 145 **SE**536.

117-56½-New. The doctrine of res judicata applies to proceedings before boards and commissions under the Workmen's Compensation Act, and its decisions are binding on applicant, the employer, and the insurance company. 243**Mich**209, 220**NW**301; 247**Mich**301, 225**NW**607.

117-56½-New. Findings and awards entered in compensation proceedings on formal claims of employees, after hearing of testimony, have the force and effect of judgments, binding the parties thereto, and not subject to collateral attack in subsequent proceedings in admiralty. 30**F(2d)**402; **TexCivA** 10 **SW(2d)**263.

117-56½-New. Under statutes an award is a judgment of final adjudication on matters thereby covered unless jurisdiction to reopen the case is expressly reserved. 41**Wyo** 55, 281**P**1005.

117-56½-New. Finding of facts by the board without legal efficacy will not sustain the judgment. 230**Ky**800, 20**SW (2d)**988.

117-56½-New. Where at the time the relator received his injuries and filed claim the statute did not provide for rehearing before the industrial commission, that law governed. 121 **Oh**352, 168 **NE**41(2dcase).

117-56½-New. Entry of awards does not exhaust commission's power to extend award to cover additional medical treatment. **CalA** 288**P**726.

117-56½-New. Denial of compensation on ground employee's death was not due to injuries does not bar petition based on permanent impairment of legs. **Me** 151**A** 141.

117-56½-New. Findings of industrial board are equivalent to verdict of jury or findings of judge. **Mont** 289**P**563.

117-56½-New. Judgment is conclusive to existing conditions, but not to future conditions. **Mont** 293**P**291.

117-58 71**CalA**542, 235**P**748 (when denial by rehearing on newly discovered cumulative evidence proper); 83**IndA** 257, 148**NE**161 (where father agreed on amount payable for partial disability, which agreement was never approved by industrial board, attempt of board to modify amount payable was null and void for lack of award to modify); 130 **Kan**203, 285**P**595 (order of commissioner on own motion setting aside award and directing rehearing held void); 175 **Minn**612, 220**NW**408; 125 **Okl** 90, 256**P** 752; 140 **Okl** 57, 282**P**606; **Utah** 290**P** 776 (second rehearing). Contra 34 **OhA** 391, 171**NE**115. [e] **After award against**

corporation becomes final nunc pro tunc order charging respondent to individuals is not allowable. 39 **OkIACR**324. [f] **Commission has jurisdiction to grant rehearing under statute.** (1) upon petition of employee, on ground that order terminating payments under findings and award is incorrect on facts in case. 78**CalA**584, 248**P**938. (2) Such rehearing will be granted where no findings of fact were filed with order terminating payments and employer had failed to obey order requiring him to furnish medical treatment. 78**CalA**584, 248**P**938. (3) Commission does not exceed its jurisdiction in awarding increased compensation on rehearing, upon finding employer had failed to furnish medical treatment required by first order, and further fact upon evidence taken that employee was then under temporary total disability. 78**CalA**584, 248**P**938. (4) Commission, on rehearing, has jurisdiction to take further testimony and make disposition warranted by facts. 78**CalA** 584, 248**P**938. [g] **Findings and award on rehearing.**–(1) Finding of temporary total disability from specified date indefinitely is not inconsistent with original finding of temporary partial disability where new finding is based on facts developed at rehearing. 78**CalA** 584, 248**P**938. (2) Supplemental awards may not be used to correct errors in original award. 78**CalA**584, 248**P**938. (3) If order terminating payments was erroneous because whole record not considered, increased compensation awarded on rehearing is not to correct error but pursuant to rehearing and is not supplemental to order terminating payments. 78**CalA**584, 248**P**938. [h] **Time for rehearing.**–Order terminating payments is subject to petition for rehearing during period of twenty days. 78 **CalA**584, 248**P**938. [i] **Determination as to effect of new proof must be made by workmen's compensation** bureau rather than by its employees. 56**ND**525, 218 **NW**215. [j] **No jurisdiction pending appeal** to consider new evidence presented on petition for rehearing. 86**CalA**588, 260**P**1104. [k] **Board should make new findings and new award** on opening previous award and making new determination on additional testimony. 226**AppDiv**828, 234**NYS**335. [l] **Department may order rehearing without regard to time** petition for rehearing was filed. **CalA** 275**P**844. [m] **Commission must pass on admissibility of evidence,** which had been filed under oath with commission, at rehearing. 121 **Oh**41, 166**NE**893. [n] **Whether rehearing shall be granted** rests in discretion of commission. 139 **Okl** 163, 282**P**143. [o] **Upon rehearing after annulment of award** commission may, under statute, consider evidence received at hearings had before annulment. **Utah** 279**P**612. [p] **Rehearing properly denied.**–**Va** 153 **SE**805. [q] **Award for further medical treatment held authorized** under employee's answer to employer's petition for rehearing. **CalA** 288**P**726. [r] **Permitting making and filing** of application for rehearing is not discretionary. **Utah** 290**P**776. [s] **Commission's jurisdiction on rehearing** is not dependent on kind of order on original hearing. **Utah** 290 **P**776. [t] **Order on rehearing** is, in effect, new order for judgment, against which defeated party may apply for new rehearing. **Utah** 290**P**776. [u] **On second rehearing,** commission may adopt prior findings and make new order, or render new judgment. **Utah** 290**P**776. [v] **Dismissal of rehearing.**–35 **OhA**458, 172**NE**557. [w] **Granting rehearing may be discretionary** depending upon allegations or grounds. **Utah** 290**P**776. [x] **Granting rehearing, not limited,** sets aside prior order and case is tried anew. **Utah** 290**P**776.

117–58½–New. Correction of award. The commission may correct an award made under mistake. 88**Colo** 315, 265**P** 99; 125 **Okl** 90, 256**P**752.

117–58⅓–New. The commission has power to reopen the proceeding and receive further testimony. 56**ND**525, 218 **NW**215.

117–58¼–New. The board, on rehearing, may reverse or rescind an award. 126 **Okl** 235, 259**P**265.

117–58⅕–New. Granting of rehearing is discretionary with the commission under some statutes. 169**Minn**96, 210 **NW**624; 172**Minn**46, 214**NW**765; 172 **Minn**521, 216**NW**227; 172**Minn**489, 216 **NW**241; 172**Minn**603, 216**NW**242; 131 **Okl** 260, 268**P**718. [a] **Determination of question whether newly discovered evidence would be likely to change result** is peculiarly within province of commission. 131 **Okl** 260, 268**P**718. [b] **Necessary showing as to newly discovered evidence.**–131 **Okl** 260, 268**P**718

117–58⅙–New. Refusal to grant rehearing held not abuse of discretion. 169 **Minn**96, 210**NW**624; 172**Minn**46, 214**NW** 765; 172**Minn**521, 216**NW**227.

117–58⅐–New. Where the commission has found that a family was wholly dependent on the deceased husband and father and, on separate application, that the family was partially dependent on a deceased son, it is without power to modify its original finding on its own motion and without notice to the employer so as to find that the family was only partially dependent on the deceased husband and father. 67**Utah**25, 245**P**381, 45**ALR**882.

117–58⅛–New. Decision of single member. Under Massachusetts statute, after decision by single member, formal decision signed by majority of board is required. 253**Mass**52, 147**NE**897.

117–58⅛–New. Vote to affirm decision of single member is not equivalent to decision by reviewing board. 253**Mass**52, 147**NE**897.

117–58⅒–New. After death of one of board who voted to affirm decision of single member, affixing of his signature to decision of board by secretary, acting upon direction of board, is ineffective. 253**Mass**52, 147**NE**897.

117–58⅑–New. After both parties file notice of appeal commissioner cannot modify award without notice to either party. 202 **Iowa**773, 211**NW**413.

117–58⅓–New. Under some statutes and rules adopted pursuant thereto a motion may be filed within ten days by a respondent or insurance carrier to review the record taken on an application for an award and to vacate the award. 121 **Okl** 260, 249**P**395.

117–58⅓–New. Where the time for rehearing has expired, the power of the industrial accident board to amend or alter awards is limited to cases where the application is based upon new facts arising since the making of the award. 74**CalA**411, 240**P**1021.

117–58¼–New. An employer is not estopped from claiming the benefit of a final order denying additional compensation for increased disability by failure to plead it in bar to a subsequent petition complaining of the same disability. 74**CalA**411, 240**P**1021.

117–58⅕–New. A claimant failing to take advantage of an opportunity to be heard and make argument after an adverse decision cannot, after the expiration of eleven months, urge want of notice of the original hearing as a ground for rehearing. 169**Minn**96, 210**NW**624.

117–58⅙–New. Commission has no jurisdiction to resume case once determined without new development not known at time of award. 68**Utah**71, 249 **P**249.

117–58⅐–New. Under some statutes the industrial commission has continuing jurisdiction to modify or change its former findings or awards from time to time as in its opinion may be just, although there has been no change of conditions. 125 **Okl** 90, 256**P**752.

117–58⅛–New. Where there is no evidence to show that any portion of injury was caused by any prior employment, commission has no power to make any award to be distributed in proportion among any other employers. 76**CalA** 565, 245**P**445.

117–58⅑–New. Commissioner's refusal to correct finding is held not erroneous, where supported by evidence. 105**Conn** 545, 135**A**911.

117–58⅒–New. An order of the commission denying a rehearing will not be disturbed unless there has been a clear abuse of discretion. 172**Minn**46, 214**NW**765; 131 **Okl** 260, 268**P**718.

117–58⅓–New. Compensation commission has power of court of equity to reopen and modify award in cases of accident, fraud, or mistake, subject to statutory limitation that it be for proper action. 106**Conn**90, 137**A**19.

117–58½–New. Commissioner's ruling of lack of power to modify award applies only to reasons appearing in motion. 106**Conn**1, 137**A**26.

117–58⅔–New. Changed conditions of fact for which award may be modified under statute refer to conditions which are different from those existent when award is made. 106**Conn**1, 137**A**26.

117–58¾–New. Commissioner has power to reopen and modify award on ground of newly-discovered evidence; 106**Conn**1, 137**A**26.

117–58⅘–New. and where made ground of motion to open award, commissioner is required to rule on motion, 106**Conn** 1, 137**A**26.

117–58⅙–New. and, since proceedings before the commissioner are informal and because of absence of pleadings, 106 **Conn**1, 137**A**26.

117–58⅐–New. summarizing newly-discovered evidence is not indispensable to jurisdiction of commissioner to pass on motion. 106**Conn**1, 137**A**26.

117–58⅛–New. Finding that an agreement between decedent's father and insurer was entered into by mutual mistake of fact held unwarranted by evidence. 258**Mass**205, 154**NE**851.

117–58⅑–New. Approved agreement for compensation should be presented to superior court for reformation or cancellation as facts warrant. 258**Mass**205, 154**NE**851.

117–58⅒–New. An award may be set aside for fraud. 238**Mich**580, 214**NW** 208.

117–58⅓–New. In some jurisdictions a motion for a new trial or petition for rehearing before the commission is neither necessary nor authorized in view of provision for review of award by supreme court. 126 **Okl** 91, 258**P**743.

117–58½–New. In Georgia, industrial commission cannot open or set aside its award. 164**Ga**642, 139**SE**212.

117–58⅔–New. Under statutes in some jurisdictions either insurer or employer may institute suit to set aside final ruling and decision of board, **TexCommnA** 290**SW**726.

117–58¾–New. and in such case burden is on employee to show facts necessary to recovery of compensation. **Tex CommnA** 290**SW**726.

117–58⅘–New. In order to do this employee must both allege and prove the facts upon which he relies to obtain judgment. **TexCommnA** 290**SW**726.

117–58⅙–New. In such action variance between allegation that certain person was subscriber under policy issued by insurer and evidence that copartnership of which such person was a member was in fact the subscriber is fatal to judgment. **TexCommnA** 290**SW**726.

117–58⅐–New. Under statutes any interested party may within twenty days after rendition of final ruling and decision of board give notice to adverse party and to board that he will not abide by such final ruling and decision. **Tex CommnA** 290**SW**738.

117–58⅛–New. Statute does not require that notice of intent not to abide by decision shall be given to adverse party and board at same time. **TexCommnA** 290**SW**738.

117–58⅑–New. But notice must be given to both adverse party and board. **TexCommnA** 290**SW**738.

117–58⅒–New. Within twenty days after giving such notice he must bring suit in county where injury occurred to set aside such final ruling and decision. **Tex CommnA** 290**SW**738.

117–58⅓–New. Court has no jurisdiction to set aside such decision unless suit is brought within twenty days after notice is given to both adverse party and the board. **TexCommnA** 290**SW**738.

117–58½–New. But if notice is not given to both adverse party and board at

same time the suit may be brought within twenty days after last notice. **Tex CommnA** 290**SW**738.

117-58¼3-New. Guardian ad litem of incompetent employee may petition for opening of award. 79**CalA**215, 249**P**34.

117-58¼4-New. Case may be reopened on issue of employee's competency. 79 **CalA**215, 249**P**34.

117-58¼5-New. Award cannot be increased, after final order, without evidence. 201**Cal** 169, 256**P**413.

117-58¼6-New. Under some statutes only one rehearing can be granted, 84 **CalA**287, 258**P**130.

117-58¼7-New. and an order granting a second rehearing, after denial of compensation on a first rehearing, is functus officio. 84**CalA**287, 258**P**130.

117-58¼8-New. Award was held final where a petition for review was not brought within the time allowed by statute. 83**Colo** 72, 262**P**521.

117-58¼9-New. Denial of motion to reopen case by order entitled supplemental award which reaffirmed former award has been held not reopening of case on motion of commission. 83**Colo** 72, 262**P** 521.

117-58½0-New. In separate proceedings against insurer and employer, award discharging insurer was held final in its case. 83**Colo** 72, 262**P**521.

117-58½1-New. Commissioner's refusal to act on supplemental motion for correction of an award on the ground that it was filed too late, is proper. 107**Conn** 56, 139**A**644, 56**ALR**455.

117-58½2-New. Motion to correct finding and award was properly denied where excerpts of evidence were not properly certified. 107**Conn**248, 140**A** 124.

117-58½3-New. Award for permanent partial incapacity will be set aside where evidence furnishes no basis on which to estimate amount thereof although sustaining a portion of the award for total temporary incapacity. 321 **Ill** 117, 151 **NE**606.

117-58½4-New. Affidavits showing only that member of conpensation board may have been mistaken as to law are insufficient to justify opening the award. 222 **Ky**388, 300**SW**896.

117-58½5-New. Showing as to facts presented in affidavits has been held not sufficient to justify board in reopening case. 222**Ky**388, 300**SW**896.

117-58½6-New. Where motion recites workman was murdered, not accidentally killed, board's refusal to reopen case is error. 222**Ky**740, 2**SW(2d)**365.

117-58½7-New. In determining motion to reopen case for fraud or mistake on award, statements in motion must be considered true. 222**Ky**740, 2**SW(2d)** 365.

117-58½8-New. Under some statutes an interested party may, within thirty days after service of an order, apply for a rehearing on the grounds that the commission acted without authority or in excess of its powers. 126 **Okl** 235, 259**P**265.

117-58½9-New. An order of the commission on rehearing on such application has the same effect as an original finding, although made without additional evidence and without change of conditions being shown and although in direct variance with the original order. 126 **Okl** 235, 259**P**265.

117-58½0-New. An order made on such rehearing will not be disturbed when supported by sufficient competent evidence. 126 **Okl** 235, 259**P**265.

117-58½1-New. Attorney for claimant allowed portion of award as fee is not necessary party to suit to set aside award. **TexCivA** 2**SW(2d)**902.

117-58½2-New. Erroneous ruling as to misjoinder of parties does not affect the court's jurisdiction. **TexCivA** 2**SW(2d)** 902.

117-58½3-New. Evidence as to claimant's being charged with negligent homicide for acts subsequent to original injury is inadmissible. **TexCivA** 2**SW(2d)** 902.

117-58½4-New. In a suit to mature compensation award, court is without jurisdiction to enter agreed judgment setting aside award and allowing recovery against insurer in less amount. **Tex CivA** 5**SW(2d)**594.

117-58½5-New. Under the California statute the power of the commission to open up a cause is present after the expiration of the period provided by statute for rehearing and continues for two hundred and forty-five weeks from the time of injury, provided good cause is shown. 203**Cal** 761, 265**P**918.

117-58½6-New. Under such statute falsity of claimant's statements regarding previous injuries constitutes "good cause shown." 203**Cal** 761, 265**P**918.

117-58½7-New. An application to vacate approval of an agreement for compensation must set forth facts on which vacation of approval is sought. 46 **Ida** 692, 271**P**1.

117-58½8-New. Where the full board dismisses the application on the ground it has no jurisdiction of the real employers, a second application in which the real employers are joined is not thereby barred. 88 **IndA**101, 163**NE**282.

117-58½9-New. Where an employer's application to reopen an award is controverted, and an issue is made, the question whether fraud was practiced in the procedure by which the award was obtained is a matter for determination of the board. 226**Ky**25, 10**SW(2d)**480.

117-58½0-New. Proceedings for rehearing may be instituted by letters of claimant's counsel presenting a claim for continued incapacity, where the commission renders the letters and requests formal application. 29 **OhA**162, 163**NE**212.

117-58½1-New. Under some statutes the industrial commission is without jurisdiction to set aside an award made upon a joint petition of employer and employee, or to make any further award, where a hearing was had on such petition, and a final award made and no appeal taken therefrom. 134 **Okl** 179, 272 **P**848.

117-58½2-New. The commissioner can modify or change former findings in respect of any claim for compensation. 107**WVa**272, 148**SE**75.

117-58½3-New. The application must be filed within thirty days from the date of denial of further compensation. 29 **OhA**162, 163**NE**212.

117-58½4-New. In an employee's action against the compensation insurer to set aside an award, evidence has been held sufficient to support the trial court's finding that the employee had sustained a fracture of his heel bone, which caused total and permanent disability. **TexCivA** 14**SW(2d)**330.

117-58½5-New. A hearing in proceedings to set aside an order of the deputy commissioner in proceedings under Longshoremen's and Harbor Workers' Compensation Act, should be confined to a review of the testimony presented to the deputy commissioner. 30**F(2d)**144.

117-58½6-New. In a bill to set aside an award, the court is limited to inquiry whether the order is in accordance with the law. 34**F(2d)**549.

117-58½7-New. Power to grant further hearing on ground of newly discovered evidence should be exercised with great caution. 208**Cal** 633, 284**P**212.

117-58½8-New. Matter of petitioner having rehearing rests in discretion of commission. 179**Minn**321, 229**NW**138 (denial not abuse of discretion).

117-58½9-New. The granting or refusal of an application to set aside an award and for rehearing is in the sound discretion of the commission. 178**Minn**464, 227**NW**657 (refusal held not abuse of discretion).

117-58½0-New. The annulment of an award has the same effect as the reversal of a judgment. **Utah** 279**P**612.

117-58½1-New. Where an award was annulled and proceeding remanded to the commission, an amendment of its findings to support the award made without notice to the employer and opportunity for further hearing to present evidence is erroneous. **Utah** 279**P**612.

117-58½2-New. The commission is justified in setting aside an order denying a petition for rehearing where based on mistake. 208**Cal** 532, 282**P**948.

117-58½3-New. **Reopening case.**—A statute authorizing the state treasurer to have a case reopened must be construed in the light of the situation sought to be remedied. 41**Wyo** 220, 284**P**260.

117-58½4-New. Application of the state treasurer to reopen a case on the ground of prior disability should not be determined on ex parte affidavits when based on new evidence. 41**Wyo** 220, 284**P**260.

117-58½5-New. The court must determine whether new evidence is material, and, if so, must reopen the case for regular hearing. 41**Wyo** 220, 284**P**260.

117-58½6-New. Effect of grant of rehearing as precluding review. **Utah** 290 **P**776.

117-58½7-New. Evidence held not to show abuse of discretion in denying application for review to introduce additional testimony. **Ida** 290**P**204.

117-58½8-New. Where claimant made no complaint of board's refusal of compensation and filed no suit to set award aside board could not pass on question second time. **TexCommnA** 29**SW(2d)** 971.

117-58½9-New. In some jurisdictions commission has jurisdiction to grant or deny new trial on timely application made on grounds specified in rules of commission. 143 **Okl** 173, 288**P**346 (2dcase).

117-58½0-New. Finding of fact by commissioner cannot be arbitrarily set aside by him. **WVa** 154**SE**766.

117-58½1-New. Award to coal loader erroneously set aside. **WVa** 154**SE**766.

117-58½2-New. Industrial commission on rehearing may consider evidence taken on former hearing. **CalA** 291**P**456.

117-58½3-New. Commission cannot review award on claimant's petition not filed within statutory time where no extension has been granted. **Colo** 291**P** 1033.

117-58½4-New. Claimant insured, and insurer must be advised whether commission in reviewing award is proceeding in party's motion or its own motion. **Colo** 291**P**1033.

117-58½5-New. Irregularities in granting rehearing on motion not filed within statutory time are not cured by commission's order reopening case on its own motion. **Colo** 291**P**1033.

117-59 Ill 172**NE**761. [1] **Review of referee's award.**—(1) Commission may review award of referee on its own motion. 84**Colo** 19, 267**P**791 (immaterial that petition for review was signed by individual without stating for whom he was acting). (2) Review without notice to claimant is unlawful under statute requiring notice. 84**Colo** 19, 267**P**791. [m] **Time of filing petition for review.**—**Ill** 172**NE**761. [n] **Credibility of witnesses** is to be determined by reviewing board. **Mass** 173**NE**521. [o] **Presumption as to time of making motion for review.**—236**Ky**39, 32**SW(2d)**540.

117-59½-New. Where an award was made against an employer who later petitions the board to make a new award to include the insurance carrier and the board does so, it has been held that the board was without authority to make the second award and the first award is still in force. 27**Hawaii**476.

117-59½-New. With request for a proper copy of the evidence before the arbitrator or a stenographic report, 321 **Ill** 208, 151**NE**520.

117-59¼-New. it is amply sufficient to give the commission jurisdiction for review. 321 **Ill** 208, 151**NE**520.

117-59½-New. Petition for review is an informal application in writing and, when signed by the applicant or by his attorney for him, 321 **Ill** 208, 151**NE** 520.

117-59¾-New. if filed in time or within such further time as is given by statute, an application for such extension is in proper time. 321 **Ill** 208, 151**NE**520.

117-59⅞-New. A letter from claimant's attorneys to the commission in a proper case may serve, in place of a lost petition, to give the commission jurisdiction. 321 **Ill** 208, 151**NE**520.

117-59⅛-New. And an unauthorized nunc pro tunc order of the commission entered out of time, allowing filing of the petition, will not take away the jurisdiction of the commission already ef-

fective. 321 Ill 208, 151NE520.

117-59½-New. Order of an arbitrator becomes order of the commission where the petition for review is not filed within the required time. 321 Ill 208, 151NE 520.

117-59½-New. Where no objection is made to failure to file the stenographic report with the commission within the prescribed time and is not urged in a motion to dismiss, the objection is waived. 321 Ill 208, 151NE520.

117-60½-New. Findings of an arbitrator as to the nature and extent of injuries are final, subject only to limited review provided by statute. 120Kan 329, 243P301.

117-60½-New. Harmless error. That arbitrator questioned witnesses instead of allowing attorneys to do so is not reversible error in absence of prejudice. 321 Ill 298, 151NE920.

117-60¼-New. Under the Pennsylvania statute the compensation board may examine testimony taken before the referee and substitute its own findings of fact without hearing de novo or hearing other evidence. 91PaSuper189.

117-60½-New. On appeal to the commission from the action of a referee, the commission is not bound by the findings of fact made by the referee although supported by competent evidence. 178Minn34, 225NW921(2dcase).

117-60¼-New. Matters held not prejudicial on trial de novo by industrial commission. Minn 233NW300(1stcase).

117-66 325 Ill 424, 156NE360; 326 Ill 166, 157NE206; Mass 173NE520; 291 Pa379, 140A345.

118-68 328 Ill 345, 159NE777; 125Me 443, 134A564.

118-73 See also 204 Iowa546, 215NW 603 (letter held hearsay and inadmissible).

118-80½-New. On question whether deceased had accepted the act, application of deceased's father to the board has been declared admissible to discredit the father on a claim that deceased had not accepted the act. 208Ky 548, 271SW592.

118-80½-New. Photographs of claimant are admissible on issue of facial disfigurement. 215AppDiv176, 213NYS 202.

118-80¼-New. Deceased's statements on morning after injury held competent to show employer's knowledge of accident. 328 Ill 345, 159NE777.

118-80½-New. Evidence as to the effect of the removal of a testicle on the physical condition of claimant is admissible. 154Md239, 140A215.

118-81 322 Ill 165, 152NE590; 326 Ill 166, 157NE206; 208Ky548, 271SW592; 125Me245, 132A698; 125Me443, 134A 564; 154Md46, 139A570; TexCivA 296 SW688; Utah 258P339; 194Wis198, 215NW824.

118-82 329 Ill 209, 160NE353. [a] (8) 328 Ill 345, 159NE777. (27) That total disability would continue for year, and would be followed permanently by partial disability. 120Kan326, 243P537. (28) That claimant's cataleptic condition was not due to alleged injury. 83 IndA646, 148NE424. (29) Acts of contractor violating statute constituted serious and willful misconduct making him liable for penalty. Cal 287P974. (30) Injury to employee's back was caused by strain of lifting. 234Ky42, 27SW(2d)430. (31) That injured employee did not unreasonably refuse to accept medical treatment until too late to save his life. 234Ky166, 27SW(2d) 686. (32) Partial incapacity. Mass 167 NE352. (33) That salesman's ability to earn wages was reduced by half. Mass 167NE352. (34) That death was not result of injury sustained. 337 Ill 59, 168 NE652. (35) Mother was totally dependent upon deceased son. 250Mich 457, 230NW937. (36) Relation of injury to business of employer. TexCivA 27SW(2d)600. (37) Other evidence held sufficient. 321 Ill 298, 151NE920; 329 Ill 48, 160NE218; 329 Ill 139, 160NE 212; 329 Ill 221, 160NE114; 124Kan 214, 257P724; 223Ky839, 4SW(2d)1111; NJSup 132A91; 26 OhA497, 160NE484; 291Pa379, 140A345; TexCivA 289SW 75. [b] (16) 329 Ill 209, 160NE353. (29) That injury resulted from "horse play." 125Mel, 130A350. (30) That workman was totally or permanently incapacitated to labor. TexCivA 283SW 208. (31) That claimant was not independent contractor. 36GaA551, 137SE 105. (32) That disability was due to acceleration of disease by lifting iron. 83Colo 123, 262P1014. (33) Total dependency of mother. 329 Ill 48, 160NE 218.

118-88½-New. Question of credibility of witnesses is for the board to determine and it may disbelieve any part of the testimony. 258Mass489, 155NE460.

118-88½-New. Testimony held sufficient to support finding of industrial accident commission that deceased was thrown from truck in course of his work. 258Mass489, 155NE460.

119-92½-New. Finding that there was no evidence of dependency is held equivalent to finding of insufficient evidence of dependency. 126Me601, 138A 628.

119-96 286Pa199, 133A256.

119-97½-New. It is permissible for the board to substitute its own finding for the finding of the referee. 297Pa124, 146A562.

119-98 329 Ill 623, 161NE115.

119-99 IndA 169NE475(2dcase); 145 Va637, 134SE562. [b] **Upon a motion to trial court for decree upon award** trial court should assume commissions had properly decided all questions of venue and process. 145Va637, 134SE 562. [c] **On motion for judgment on award** question whether adverse party in such award is legal entity or individual cannot be decided. 145Va637, 134 SE562.

119-2 [a] **On motion for judgment on question of legality of award** for any reason not appearing on its face cannot be gone into must be raised when claimant seeks to enforce judgment. 145Va 637, 134SE562. [b] **Court has no authority to modify award** or change its effect, since jurisdiction to modify award is in industrial board. IndA 169 NE475(2dcase).

119-3½-New. Interest. Tender by employer of proper amount due prevents recovery of interest pending unsuccessful attempt of employee to secure increase of compensation period. 201 Iowa607, 206NW146.

119-4 [a] **Commission has power to reserve an award** for surgical and hospital treatment, although wherever possible a single final judgment should be made covering all matters involved. 81 CalA137, 252P1069, 253P976.

119-4½-New. Amendment may be allowed until appeal is perfected. Tex CivA 295SW202.

119-4½-New. Review of award of one member of board. Where appeal from award of deputy commissioner is not made within ten days as required by statute and time is not extended, the department of labor and industry has no appeal before it. 239Mich410, 214NW 401.

119-4¼-New. In such case a modification of the award of the deputy commissioner by the board is a nullity. 239 Mich410, 214NW401.

119-4½-New. Where an award of the board on appeal from an award of a deputy commissioner is set aside because not made in time, the award of the deputy remains in force. 239Mich 410, 214NW401.

119-4½-New. Where insurer raised contention against an award by motion to dismiss, filed with a single member, which was denied, and insurer's appeal brings every matter at issue before the board on review, the decision of the board, although not specifying any details, imports approval of a single member on every matter. 266Mass323, 165 NE391.

119-4½-New. Where a certified copy of a compensation award is filed with the circuit court, the court may render judgment for the amount of compensation then due and unpaid. IndA 169NE475 (2dcase).

119-5 [g] **Facts essential to jurisdiction.**-36BC71, [1925] 3DomLR1193. [h] **Injunction proceedings** may be maintained to set aside invalid compensation order. 34F(2d)549. [i] **Orders not appealable.**-35 OhA458, 172NE557.

119-5½-New. Order of commission based on rule, not effective until thirty days after its publication, is unlawful and beyond its jurisdiction where requisite time held not expired. 112 ObSt421, 147NE518.

119-6 208Cal 633, 284P212; 41GaA774, 154SE702; 322 Ill 403, 153NE678; 124 Kan631, 261P584; 121 Oh494, 169NE 569; 122 Okl 199, 253P493; Tex CommnA 27SW(2d)529 (failure of employee to file suit after giving required notice); Utah 279P609 (statute held to provide plain, speedy, and adequate method of review); 105WVa447, 143SE 109. But see 149Wash594, 271P880. [a] (6) 325 Ill 570, 156NE796. (9) Issuance of writ of certiorari held unauthorized in absence of receipt showing payment of probable cost of records. 322 Ill 403, 153NE678. [b] (3) 126 Okl 47, 258P731; 127 Okl 233, 260P467. (4) 126 Okl 47, 258P731; 127 Okl 233, 260P 467. (5) 126 Okl 47, 258P731. (6) Workmen's compensation insurer, seeking review of award of industrial commission, is bound by forum selected, assuming it had remedy by certiorari for commission's error in assuming jurisdiction to determine compensation. 197 Wis237, 221NW766. (7) Circuit court acquires jurisdiction solely under compensation act. Wis 231NW249. [c] (1) 114 Oh607, 151NE769. (6) This rule is applied where ground of commission's denial of employee's right is that his present physical condition is not attributable to industrial accident occurring in course of his employment but to other causes. 114 Oh607, 151NE769. (7) Such denial is held to be denial upon "jurisdictional ground going to the basis of the claimant's right" from which appeal lies to court of common pleas under Gen. Code § 1465-90 as amended. 114 Oh607, 151NE769. (8) Denial by commission of employee's right to continue to participate in insurance fund on ground that his loss of vision was due to inherited syphilis and not to injury received by him in course of his employment is denial upon jurisdictional ground under code. 114 Oh607, 151NE 769. (9) Claimant is entitled to hearing and determination, by Industrial Commission, of his claim that injury resulted in course of employment, so that if rejected he may appeal. 116 Oh734, 158NE88. (10) Writ directing commission to proceed with determination should not require it "to take final action upon the application." 116 Oh734, 158NE88. [l] (3) Action to review must be filed in supreme court within thirty days after notice of award or decision of industrial commission has been sent to parties affected. 121 Okl 55, 247P653; 121 Okl 57, 247P655(1stcase); 121 Okl 58, 247P655(2dcase); 124 Okl 244, 255P 581; 126 Okl 84, 258P741; 129 Okl 81, 263P451. (4) Period cannot be extended by entertaining petition to permit rehearing or review by industrial commission. 121 Okl 55, 247P653; 121 Okl 57, 247P655; 124 Okl 244, 255P581. (5) If action to review is not filed within statutory time, action will be dismissed. 121 Okl 55, 247P653; 121 Okl 57, 247P 655(1stcase); 121 Okl 58, 247P655(2d case); 124 Okl 244, 255P581. (6) Order of commission correcting unimportant mistake in award not complained of in petition to review does not extend time to bring action to review award or decision. 126 Okl 84, 258P741. (7) Where respondent in compensation proceeding files petition to review award of commission in supreme court and claimant desires to file cross petition to review same award, cross petition must be filed in supreme court within thirty days after notice of award or decision of commission has been sent to parties affected. 126 Okl 47, 258P731. (8) Cases holding that proceeding for review must be filed within thirty days from date of award or decision are specifically overruled. 129 Okl 81, 263P451. [m] (1) 115Tex 551, 285SW1084. (7) Suit to set aside judgment of industrial accident board denying claim for compensation after denial by employer's insurance company is not action on contract of insurance but one for compensation under statute.

TexCivA 276SW336. (8) Petition by wife of injured employee in action to set aside award denying compensation is not demurrable for failure to allege that claimant has not for period of three years prior to injury abandoned husband. **TexCivA** 280SW310. (9) Charge that defendant in action to set aside award denying compensation has burden of proof as to material allegations of answer is erroneous. **TexCivA** 280SW 310. (10) Objections to charge in such action are waived when not made after inspection of charge. **TexCivA** 280SW 310. (11) Suits to set aside award are analogous to appeals from trial courts to court of civil appeals. 115Tex551, 285SW1084. (12) Institution of such suit, like appeal, suspends vitality and finality of award, subject matter of which is withdrawn from board and all courts except that in which suit is filed. 115Tex551, 285SW1084. (13) Court in which such suit is filed has competent and exclusive jurisdiction to go to judgment and execute its decision. 115Tex 551, 285SW1084. (14) Before jurisdiction of suit to vacate award attaches, application for compensation, final award, timely notice of intention not to abide by award, and timely notice sent must concur. 115Tex551, 285SW1084. (15) Authority to bring suit is conditional upon its being filed within statutory period and in court of competent jurisdiction in county where injury occurred. 116Tex59, 286SW195. (16) Requirement that suit be brought in county where injury occurred is jurisdictional. **TexCivA** 299SW285. (17) Court in county where injury occurred held not to acquire jurisdiction of suit to set aside award by virtue of transfer made by court of another county and dismissal was not error. **TexCivA** 299SW285. (18) Where suit was originally commenced in county other than where injury occurred, held that defendant by filing plea of privilege did not waive right to question jurisdiction after order of transfer. **TexCivA** 299SW285. (19) Time for service on employee of insurer's intention to file suit to set award aside may be extended where insurer was unable to locate employee. **TexCivA** 1SW(2d)404. (20) Notice to employee's attorney of insurer's intention to file suit to set award aside does not dispense with necessity of serving personal notice on employee. **TexCivA** 1SW(2d)404. (21) Act dispensing with necessity of notice to employee of insurer's intention to file suit to set award aside is inapplicable to cases in which insured was required to give notice before act took effect. **TexCivA** 1SW(2d) 404. (22) Where insurer, unable to locate employee for purpose of serving notice of intention to file suit to set award aside, files suit within statutory time and immediately serves citation on employee, it need not also serve separate notice of intention to appeal from award. **TexCivA** 1SW(2d)404. (23) Provision requiring suit to set aside award to be brought in county of injury does not necessarily apply to action by insurer against employer. **TexCivA** 1SW(2d) 434. [n] 121 **Or**314, 253P1052. [u] **Final adjudication** only, of claimant's rights, may be appealed to district court. 53ND636, 207NW551. [v] **Only statutory method of appeal** from decision of industrial board may be followed. **TexCommnA** 285SW1041. [w] **In Kentucky**, upon appeal circuit court has authority to determine whether board acted in excess of powers. 217**Ky** 500, 289SW1107. [x] **In Texas** (1) district court has jurisdiction to entertain appeal from order of industrial accident board approving settlement where motion for review is based on fraud. **CivA** 284SW968 (jurisdictional requirements). (2) Allegation by insurer that claimant when injured was acting as employee of persons jointly engaged under contract, creating entirely new entity not covered by policy issued to either of such persons, and that insurer was not liable under Compensation Act, does not admit that insurer was liable in any event. 29F(2d) 278. (3) In suit by employee against insurer to have ruling denying compensation set aside, it is error to permit another insurer who had paid compensation under laws of another state to intervene and recover payments. **TexCivA** 17SW(2d)68. (4) Where board refused to review award on ground that no fraud, mistake, or change of conditions was shown, court has no jurisdiction of suit against compensation insurer. **Tex CivA** 14SW(2d)342. (5) District court acts as court of "limited jurisdiction;" remedies in such case being statutory, mandatory, and exclusive. **TexCivA** 9SW (2d)65. (6) Final ruling and decision of industrial board is prerequisite to jurisdiction. **TexCivA** 15SW(2d)1077. (7) Notice of injury, claim for compensation, and adjudication by industrial accident board are jurisdictional facts. **Tex CivA** 10SW(2d)129. (8) Fact that insurer appeals from award of board, and alleges final decision of board and notice of refusal to abide by it, does not authorize presumption in favor of court's jurisdiction sufficient to cure defect in employee's petition failing to allege notice of injury or claim for compensation in accordance with statutory requirements. **TexCivA** 10SW(2d)405. (9) Substantial evidence for plaintiff that he was totally incapacitated prevents setting aside of verdict on that ground. 37 F(2d)870. (10) In suit to set aside award record of board's findings is inadmissible in evidence. **TexCommnA** 25 SW(2d)302. (11) Suit to set aside award held properly brought in county where board found injury occurred though it actually occurred in another county. **TexCommnA** 25SW(2d)608. (12) Answers to issues submitted to jury held not conflicting in suit to set aside award. **TexCivA** 25SW(2d)180. (13) Failure of claimant suing to set aside award and recover compensation, to file award in trial court within time held not to prevent recovery. **TexCivA** 25SW(2d)180. (14) Where record shows without dispute that employee worked for stipulated wage for over one year preceding injury matter need not be submitted to jury. **TexCivA** 25SW (2d)180. (15) Trial growing out of suit to set aside award is de novo. **TexCivA** 25SW(2d)653. (16) In suit to set aside award proceedings before board and reasons for members of board making award are immaterial. **TexCivA** 25SW (2d)653. (17) Where by uncontradicted evidence it is shown employee did not receive injury in certain county as found by board court properly set aside award. **TexCommnA** 25SW(2d)608. (18) Insurer cannot defeat employee's cross-action by taking nonsuit in its suit to set aside award. **TexCivA** 25SW(2d)653. (19) Undisputed questions of fact are properly withheld from jury as questions of law for court in action to set aside award. **TexCivA** 25SW(2d)653. (20) In suit to set aside award and recover compensation court's submission to jury of reasonable discount rate if lump sum settlement was made held not erroneous. **TexCivA** 25SW(2d)180. (21) Legal effect of suit to set aside award is to invoke judgment of court on issue of insurer's liability on facts presented to board and to substitute court's judgment for that of board. **Tex CommnA** 25SW(2d)608. (22) Question of establishing jurisdiction in district court on appeal from award may be developed by any legal method. **Tex CivA** 25SW(2d)180. (23) Claim of insurance company in suing to set aside award that court had no jurisdiction because of defects in hearing before board held untenable. **TexCivA** 25SW(2d) 653. (24) Evidence held sufficient to raise issue of consent of insurer to operation from which jury could find implied consent in suit to set aside award. **TexCivA** 25SW(2d)653. (25) In suit to set aside award variance between allegations of employee's cross-petition for compensation and evidence held immaterial. **TexCivA** 25SW(2d)898. (26) In suit to set aside award, claimant cross-complaining held to discharge burden of proving court's jurisdiction. **Tex CivA** 29SW(2d)444. (27) Demurrer sustained in insurer's action against employee and other insurer to set aside award of board. **TexCivA** 30SW(2d) 911. (28) In suit to set aside award there is no presumption of jurisdiction of court or board. **TexCivA** 29SW(2d) 534. (29) Employee bound by award of board seeking relief in cross-action in insurer's action to set aside award. **Tex CivA** 30SW(2d)911. (30) Scope of inquiry in suit to set aside award is to establish injuries. **TexCivA** 29SW(2d) 458. (31) Application for continuance in suit to set aside award held too indefinite. **TexCivA** 28SW(2d)850. [y] **Question of jurisdiction** to set aside award by industrial accident board is for court. **TexCivA** 284SW968. [z] **Employee must bring review in court of competent jurisdiction** to avoid penalties of statute. **TexCivA** 278SW889. [aa] **Review of award granting additional compensation.**–Under statutes in some jurisdictions, supreme court has no jurisdiction to review award of commission granting additional compensation in absence of application for rehearing within time fixed by commission. 70**Utah**354, 260P279. [ab] **Denial of application for another hearing on additional evidence** does not render reviewable decision from which no appeal was taken within statutory time. 56**ND**525, 218NW215. [ac] **Complaint in action against commission for review** is demurrable where it fails to show that decision was made by commission. 56 **ND**525, 218NW215. [ad] **On claimant's petition for review of commission's order** made upon its review of referee's award without notice to claimant, commission should not direct award but direction should be made to commission to give claimant notice of review and hear him and his evidence and then make award. 84**Colo** 19, 267P791. [ae] **Denial of claim on rehearing** is prerequisite to jurisdiction in some jurisdictions. 119 **Oh**497, 164NE509 (compliance shown). [af] **In Colorado** (1) plea of estoppel and defense of contract by which insurer promised to pay award cannot be passed on by court. 84**Colo** 521, 272P3. (2) Petition for rehearing before commission is prerequisite to jurisdiction. 85**Colo** 173, 274P742. [ag] **In Oklahoma** (1) action to review award must be filed within thirty days after copy of award has been sent by commission to parties affected. 133 **Okl** 90, 271P237(1stcase); 136 **Okl** 209, 277P 265. (2) If action is not filed within statutory time, it will be dismissed. 133 **Okl** 90, 271P237(1stcase). (3) Time is not extended by filing motion to review or rehear award. 136 **Okl** 209, 277P265. (4) Copy of decision sent to parties affected before decision is made and filed is nullity. 136 **Okl** 209, 277P265. (5) Mailing copy of decision before decision is made and filed does not start running of limitation period for review. 136 **Okl** 209, 277P265. (6) Commission does not lose jurisdiction to modify, change, or set aside order till expiration of limitation period. 136 **Okl** 209, 277P265. (7) Only final awards or decisions are reviewable. 135 **Okl** 14, 273P212. (8) Intermediary order which leaves matter pending for further action is not order subject to review before award or decision is made. 135 **Okl** 14, 273P212. (9) Where petitioner gives timely notice of oral argument, but fails to file brief in support of his petition, and fails to respond to motion of respondent to determine cause, he thereby waives his right orally to argue his cause. 136 **Okl** 18, 275P1053. [ah] **Review by action.**–(1) 35**PortoRico** 927 (must be taken by filing of statement with secretary of district court within prescribed time after receipt of notice of decision of commission). (2) Complaint held insufficient. 35**PortoRico**927. [ai] **In Georgia** order of commission denying compensation on ground that employee refused to accept surgical services is final judgment under statute, subject to review on appeal. 40**GaA**38, 148**SE** 764. [aj] **In Kansas** act prescribes procedure. 130**Kan**410, 286P396. [ak] **In New York** compensation law provision for summary appeals involving awards does not prevent original suit to determine validity of ruling that amended act extending provisions to all employments applies to charitable corporations. 136

Misc379, 240NYS70. [al] **In Utah** (1) where application for rehearing is made, time for review begins to run after its determination. Utah 290P776. (2) Supreme court has no jurisdiction to entertain petition to review decision of commission where not filed within thirty days after denial of petition for rehearing. Utah 279P609 (statute applicable regardless of nature of insurance carrier or employer as self-insurer). [am] **Right to injunction** pendente lite. 230 AppDiv496, 245NYS258. [an] **It is function of Industrial Board** to approve stipulated facts or settle proposed case on appeal. 230AppDiv336, 244NYS649. [ao] **In Oklahoma** Supreme Court cannot review where conclusions and rulings are too indefinite for judicial interpretation. Okl 292P822(2dcase) (award should be reversed). [ap] **Liberal construction of decisions** should be made so as to bring them within purview of statute and as effecting its purpose. Wis 232NW885.

119-6½-New. In Ohio, supreme court has no jurisdiction to review decision of industrial commission as to additional award for violation of specific requirement but any facts as to which decision is not final may be decided on in independent action. 115 Oh654, 155NE484.

119-6⅓-New. An award which is temporary or partial does not authorize notice of appeal. 320Mo 1156, 10SW(2d) 916.

119-7 41GaA774, 154SE702. [b] **On application for judgment on award,** court has no jurisdiction to review decision of board, construe statute, or determine whether decision is correct. Ind 166NE2. [c] **Final decisions appealable.**–TexCommnA 29SW(2d)973.

120-8 227AppDiv256, 237NYS344 (jurisdiction limited to review of determination of board made within limit of board's authority). [d] **In Virginia** (1) act provides for appeals to supreme court of appeals as in equity cases from circuit and corporation courts. 144Va 21, 131SE203. (2) Hence appeal will not lie as matter of right irrespective of amount in controversy. 144Va21, 131 SE203. (3) And appeal will be dismissed where award is subject to credit which will reduce it to less than jurisdictional amount. 144Va21, 131SE203. [e] **Jurisdiction of district court is appellate,** and not original, trial in district court being de novo. TexCommnA 14SW(2d)1007. [f] **In Porto Rico** decision of workmen's relief commission is final and appealable though it provides that it may be reconsidered by commission at instance of workman or employer. 33PortoRico 281. [g] **Requirement of undertaking on appeal jurisdictional.**–140 Okl 5, 282P359. [h] **In Arizona.**–293P20.

120-10 43 Ida477, 253P132 (order denying lump sum settlement held appealable to district court); 32PortoRico 44. [b] **In Porto Rico** such "appeal" considered original action, statute providing that "appeal shall be taken by filing with the secretary of the district court for the judicial district where the accident occurred . . . a written statement of the facts of the accident giving rise to the claim before the commission. . . . Said statement shall be made in the form of an ordinary complaint, etc." 32PortoRico 44.

120-11 Ariz 285P680 (application too late when not made within time allowed by statute for appeal). [d] **In West Virginia** awards are not reviewable by writ of certiorari except in cases where commission has acted without or in excess of its jurisdiction. 103WVa295, 137SE229. [e] **Court must affirm reasonable award** on certiorari where made within commission's jurisdiction, and is not concerned with commission's process of reasoning. 78CalA584, 248P938. [f] **Record.**–(1) Where return to writ shows employer entered into certain stipulations but later, after first supplemental award, filed affidavits repudiating them, affidavits changing record will be disregarded. 81CalA137, 252P 1069, 253P976. (2) Findings of commission are part of decision, subject to review. 81CalA137, 252P1069, 253P 976.

120-12 214Ala489, 108S379; 53ND649, 207NW555; 66Utah173, 240P440. [b] **Powers of court limited by statute.**–329 Ill 623, 161NE115. [c] **Bond on certiorari.**–(1) Employer giving bond may avoid judgment of circuit court for payment of money and lien if decision confirmed. 329 Ill 623, 161NE115. (2) Bond may continue in effect many years where periodical compensation payments are directed. 329 Ill 623, 161NE115. [d] **Failure of clerk to make return within time limited** does not oust appellate court of jurisdiction under directory statute. 178Minn524, 227NW856(2d case).

120-13 214Ala489, 108S379; 216Ala 348, 113S290; 33Ariz490, 266P11; 208 Cal 159, 280P679 (commission's jurisdiction is sole question presented); 332 Ill 64, 163NE381; 336 Ill 279, 168NE 298. See also 87CalA469, 262P53(1st case). [d] **Informal service of writ of** certiorari held waived by conduct of respondents. 166Minn339, 208NW18. [e] **Whether commission exceeded powers** in refusing to furnish employer transcript of hearing cannot be considered in petition for writ of review. 202Cal 437, 261P295. [f] **Certiorari will lie without petition for rehearing after second award,** notwithstanding statute. CalA 275P844. [g] **Refusal of commission to furnish transcript of hearing on payment of statutory fees** cannot be considered on petition for certiorari. CalA 259P369.

120-13½-New. An application for review must be filed within the time prescribed by statute. 66Utah608, 245P 334.

120-13⅓-New. In Alabama, review cannot be had by appeal, only by certiorari. 216Ala366, 113S298.

120-13¼-New. Time for reviewing decree is counted from date of filing of decision. 214Ala489, 108S379.

120-13½-New. In Texas to give court jurisdiction to set aside award of industrial commission provision of statute regarding notice and bringing suit must be observed. TexCivA 286SW862.

120-13⅙-New. The court's authority over the commission on certiorari is less extensive than that given on appeal from court decisions. 91CalA574, 267P321.

120-14 See also 32PortoRico 44 (objection to jurisdiction because "appeal" not taken to district court where accident occurred held waived by filing demurrer and answer). [b] **In Oregon** appeal by claimant lies only to circuit court of county in which claimant resides. 118 Or260, 246P741. [c] **Statutes must be considered in pari materia.**–214Ala489, 108S379.

120-15½-New. Time for taking proceedings for review. In some jurisdictions appeal from the award or decision of the commission must be taken within a certain time after notice by the commission to the parties of the filing of the award or decision in the office of the commission. 121 Or314, 253P1052.

120-15⅓-New. The review must be taken within the time allowed by statute. 121 Or314, 253P1052.

120-15¼-New. No appeal lies from an interlocutory decision of the board. 66 Utah173, 240P440.

120-15½-New. The time within which proceedings for court review may be instituted runs from the date of award by the commission. 117 Okl 31, 245P 570.

120-15⅙-New. Where a petition for review is not filed within the time fixed by statute, the appeal will be dismissed. 40 OklACR270, 250P73.

120-15⅐-New. Notice need not be served on the attorney of claimant, he not being an adverse party within the statute. TexCommnA 289SW996.

120-15⅛-New. Where proceedings for review are not begun within the time limited by statute, the court has not jurisdiction. 126 Okl 18, 257P1104; 40 OklACR38 [reh pending]; 66Utah608, 245P334.

120-15⅑-New. Appeal must be taken within the time provided by statute. 56ND525, 218NW215; 126 Okl 18, 257P 1104; 121 Or314, 253P1052; 142Wash 48, 251P877.

120-15⅒-New. Under some statutes an application for writ of review must be made within thirty days from date of order awarding or denying compensation on rehearing. 66Utah608, 245P334.

120-15⅑-New. Such is the rule regardless of whether formal notice of the decision of the board was given to the parties aggrieved. 66Utah608, 245P334.

120-15½-New. The record is held to show that an applicant for a writ of review and his attorney had notice of a decision of the industrial commission on rehearing within thirty days of the date of its decision. 66Utah608, 245P334.

120-15⅓-New. In some jurisdictions the appellate court has no jurisdiction to review any order of the commission until after a final decision is made. 66 Utah173, 240P440.

120-15¼-New. The appellate court cannot review an interlocutory order of the commission denying a motion to dismiss an application for compensation. 66Utah173, 240P440.

120-15⅕-New. Where the commission refuses to proceed to a decision, it may be compelled to do so by writ of mandate. 66Utah173, 240P440.

120-15⅙-New. In some jurisdictions the appellate court is limited in its powers to the determination of whether the commission has exceeded its powers or has disregarded some positive provision of law in making its award. 66Utah173, 240P440.

120-15⅐-New. In such jurisdictions errors of judgment on the part of the commission are not reviewable. 66Utah 173, 240P440.

120-15⅛-New. When appeal has been taken from decision of commission, it ceases to be clothed with discretion in respect of a claim. 117 Or406, 244P317.

120-15⅑-New. Where compensation is denied on ground of lack of dependency of claimant, the burden is on the latter seeking review of order to establish dependency so conclusively that proceeding in mandamus would be sustained to enforce right. 67Utah197, 246P706.

120-15⅒-New. Order denying application for payment from a state fund on the ground that there was no coverage at time of accident is appealable. 115 Oh230, 152NE662.

120-15½-New. Appeal filed within time allowed. 103Conn431, 130A705, 44 ALR693.

120-15⅓-New. Original application to superior court to use its appropriate judicial power as to acts done by administrative body unlawfully or in excess of its power. 102Conn511, 129A539.

120-15¼-New. On appeal the superior court cannot retry the facts, but determine that finding and award are within jurisdiction and power of the commissioner. 102Conn511, 129A539.

120-15½-New. The court may correct an omission of some specifying finding in a subsidiary fact. 102Conn511, 129 A539.

120-15⅕-New. The court may correct a commissioner's finding by addition of a material fact not found. 102Conn511, 129A539.

120-15⅙-New. The court may correct a finding of a commissioner by striking out facts found without evidence. 102Conn511, 129A539.

120-15⅐-New. The court may correct finding of commissioner by adding thereto finding of admitted or undisputed facts. 102Conn511, 129A539.

120-15⅛-New. Correction of a finding may be made by inference drawn in a reasoning way. 102Conn511, 129A539.

120-15⅑-New. Correction of commissioner's findings is not subject to constitutional limitations. 102Conn511, 129 A539.

120-15⅒-New. The ordinary rules of procedure for new trials and judgments do not apply to Compensation Act which specifically provides for reviews of awards and judgments. 119Kan748, 241 P448.

120-15⅓-New. It is a ground for review that award was fraudulently obtained. 120Kan331, 243P278.

120-15⅓-New. Certified copy of award or decision of commission must be filed and attached to petition under some statutes. 112 Okl 230, 240P634.

120-15⅓-New. Questions not referred

to in award are held not reviewable. 203 **Iowa**171, 212**NW**419.

120–15½4–New. A motion in the nature of an application for a new trial does not extend the time for commencing proceedings for review. 126 **Okl** 18, 257**P** 1104.

120–15½5–New. In some jurisdictions proceedings for review must be commenced within thirty days after receipt of a copy of an award or decision from the commission. 126 **Okl** 18, 257**P**1104.

120–15½6–New. An appeal taken more than thirty days from decree awarding compensation will be dismissed. 216 **Ala**348, 113**S**290.

120–15½7–New. Under Connecticut statute either party may appeal from award within ten days after notice of entry of finding. 104**Conn**351, 133**A**106.

120–15½8–New. Amount need not be one to be paid in installments to authorize review. 325 **Ill** 193, 156**NE**344.

120–15½9–New. Employers' payment of medical and surgical expenses with finding of accidental injury constitute award authorizing review. 325 **Ill** 193, 156**NE**344.

120–15¼0–New. On appeal from an order of compensation, commission refusing to reopen case, trial court should confine itself to question of reopening. 152**Md**60, 136**A**54.

120–15¼1–New. On appeal from an order of compensation commission jury cannot decide law of case. 152**Md**60, 136**A**54.

120–15¼2–New. Appeal taken within thirty days from final action of commission dismissing application for rehearing is timely. 24 **OhA**196, 156**NE** 508.

120–15¼3–New. Under some statutes decision by commission, if claim is within its jurisdiction, is final. 24 **OhA**352, 157**NE**413.

120–15¼4–New. and on the other hand, where the commission denies claim for want of jurisdiction, petition for judicial review cannot be filed without first applying to commission for rehearing. 24 **OhA**352, 157**NE**413.

120–15¼5–New. An award supported by the facts proved and found will not be annulled because the commission gave erroneous reasons for its conclusions. 69**Utah**452, 256**P**397.

120–15¼6–New. Allegation that employee gave false and fraudulent testimony does not show want or excess of jurisdiction of commission justifying certiorari. 103**WVa**501, 138**SE**111.

120–15¼7–New. On certiorari, where only question raised involves sufficiency of evidence to sustain findings, appellate court cannot consider affidavits in re the stipulation made at hearing as record cannot be so made up or so charged. 76**CalA**565, 245**P**445.

120–15¼8–New. On writ of review, record of proceedings in lower tribunal must be ascertained wholly from the record as shown by return of writ, 76 **CalA**565, 245**P**445.

120–15¼9–New. except that in a proper case an amended and supplemental return might be required. 76**CalA**565, 245 **P**445.

120–15½0–New. A petition for review is sufficient if it states informally the substance of the award at the original hearing and asks for modification to conform to changed conditions. 324 **Ill** 423, 155**NE**277.

120–15½1–New. Petition for modification filed three years after award timely. 324 **Ill** 423, 155**NE**277.

120–15½2–New. In some jurisdictions a writ of certiorari will be dismissed on motion where the writ is not served on the adverse party or his counsel within the statutory time. 171**Minn**519, 214 **NW**795.

120–15½3–New. Where an employee's claim was denied by a referee and the whole case went to the industrial commission on motion for review, no action lies to review the commission's award denying compensation where no petition for review was made to the commission. 80**Colo** 429, 252**P**361.

120–15½4–New. The burden of establishing that an appeal was taken within the time required by statute rests on injured employee appealing from decision of department of labor. 142**Wash** 48, 251**P**877.

120–15½5–New. After the closing of a claim by the department of labor and industries, the filing of a petition to open the claim and an appeal from the denial thereof does not bring the appeal within the requirements of the statute. 142**Wash**48, 251**P**877.

120–15½6–New. Employer held entitled to dismiss its petition for review of award of compensation before hearing where employee is not prejudiced. 324 **Ill** 89, 154**NE**412.

120–15½7–New. While a petition for review is sui generis, 324 **Ill** 89, 154**NE** 412.

120–15½8–New. Court held without jurisdiction of suit to set aside award where the suit was not filed within twenty days after notice to adverse party as required by statute. **TexCivA** 283 **SW**694.

120–15½9–New. Rules of law as to jurisdiction are to be applied in review of compensation proceedings. 324 **Ill** 89, 154**NE**412.

120–15⅙0–New. Action to review decision of commission must be filed within statutory time after notice of award or decision has been sent to parties affected. 40 **OklACR**38.

120–15⅙1–New. An action to review an award of the commission under the Oklahoma statute must be filed within thirty days after notice of the award is sent to the parties affected. 120 **Okl** 210, 250**P**73.

120–15⅙2–New. The statutory period for lodging an action to review an award of the industrial commission cannot be extended by the commission entertaining a motion to modify the award. 120 **Okl** 210, 250**P**73.

120–15⅙3–New. Court's discretion is properly exercised in refusing the board leave to amend pleadings so as to deny injury instead of admitting it. 141 **Wash**55, 250**P**461.

120–15⅙4–New. Time for appeal from an award runs from entry of the award by the full board. 213**Ky**327, 280**SW** 1097.

120–15⅙5–New. Where the full board acted originally in making an award, the time for bringing an action to set aside the award cannot be extended by filing an application before the board for a review of its decision. 213**Ky**327, 280**SW**1097.

120–15⅙6–New. Appellate court has jurisdiction from order of board stopping compensation on employee's death. 43 **Ida**450, 254**P**212, 51**ALR**1438.

120–15⅙7–New. Under some statutes, on review of award the board in its sound discretion may permit introduction of further evidence. 85 **IndA**647, 155**NE**523.

120–15⅙8–New. Insurer's appeal from award without notice to employer, where only issue is between insurer and employer, will be dismissed, 220**AppDiv** 60, 221**NYS**76.

120–15⅙9–New. and attorneys representing employer and insurance carrier, attempting to cast entire liability on employer by appeal without warning, are guilty of reprehensible conduct. 220 **AppDiv**60, 221**NYS**76.

120–15⅞0–New. In some jurisdictions an action to review a decision of the commission must be filed in the supreme court within thirty days after notice of the award or decision has been sent to the parties affected. 122 **Okl** 199, 253**P** 493.

120–15⅞1–New. Failure to file petition for review within such time is ground for dismissal to the action. 122 **Okl** 199, 253**P**493.

120–15⅞2–New. The power of courts to review decisions of the commission is limited to the powers expressly conferred by statute. 121 **Or**314, 253**P**1052.

120–15⅞3–New. The court has no power to go outside of the record of the commission for the purpose of determining whether an order which appears to be final on its face was or was not final. 121 **Or**314, 253**P**1052.

120–15⅞4–New. Denial by commission by letter of petition for hearing for lump sum compensation held denial on merits allowing institution of suit. 116 **Tex**247, 238**SW**809.

120–15⅞5–New. Affirmance of decision of an industrial commissioner is an adoption of the findings made by him and there is no necessity for new findings. 51**SD**167, 212**NW**864.

120–15⅞6–New. Notice of appeal ineffectual where suit has not been filed in court of competent jurisdiction, under Rev. St. (1925) art 8307 § 5a. **Tex CivA** 295**SW**202.

120–15⅞7–New. Timely notice by registered mail supported court's jurisdiction of suit to set aside award denying compensation. **TexCivA** 296**SW**639.

120–15⅞8–New. Procedure on review has been held not controlled by statutes as to review from civil cases. 124 **Kan**631, 261**P**584.

120–15⅞9–New. An employer petitioning for review of award is entitled to a voluntary dismissal of the petition before final submission. 223**Ky**258, 3 **SW(2d)**602.

120–15⅛0–New. Petition for review of award of single member of the board is premature where an application for review by a full board is pending. 223 **Ky**258, 3**SW(2d)**602.

120–15⅛1–New. Filing duplicate copies of a petition to review an award in the clerk's office, one of which was received by the employer, is sufficient furnishing to the employer of a copy of the petition. 224**Ky**173, 5**SW(2d)** 1049.

120–15⅛2–New. Decree determining workman's present capacity, based in part on statements in a medical treatise outside the record, is sufficient to sustain an appeal. 126**Me**572, 140**A**370.

120–15⅛3–New. Where evidence was insufficient to justify an award of compensation, findings denying compensation cannot be set aside by a court of equity on the ground of newly discovered evidence. 242**Mich**445, 219**NW** 721.

120–15⅛4–New. An action to review an award or decision of the industrial commission will not be dismissed for failure of the petitioner to file briefs, 127 **Okl** 58, 259**P**853.

120–15⅛5–New. or for failure to file briefs within the time prescribed by court rule. 127 **Okl** 58, 259**P**853.

120–15⅛6–New. Under some court rules, an action to review an award cannot be dismissed without a full hearing upon any ground except failure to file the petition within the time required by law. 127 **Okl** 58, 259**P**853.

120–15⅛7–New. The validity of a suit to set aside an order of the industrial accident board is measured and determined by the provisions of the workmen's compensation act. 117**Tex**113, 298 **SW**516.

120–15⅛8–New. Under the Texas statute, an action to set aside an award of the industrial accident board must be brought in the county where the injury occurred. 117**Tex**113, 298**SW**516.

120–15⅛9–New. Under such statute, where a petition in such action, filed in due time, neither affirmatively shows nor negatives the fact that the injury occurred within the county where suit is brought, the court has jurisdiction to render judgment on an amended petition showing the occurrence of the injury in the county, filed after expiration of time for bringing suit. 117**Tex** 113, 298**SW**516.

120–15⅛9–New. Petition to court to set aside award of commission may properly include description of award. **Tex CommnA** 3**SW(2d)**425.

120–15⅛1–New. Stipulation that insurer perfected its appeal in statutory time dispenses with proof that notice of the injury and claim for compensation were filed in time. **TexCommnA** 4**SW(2d)**31.

120–15⅛2–New. Service of citations within twenty days after decision have been held sufficient notice. **TexCivA** 300**SW**137.

120–15⅛3–New. Evidence of mailing and receipt of registered letter containing notice of appeal show timely notice to industrial board. **TexCivA** 1**SW(2d)**646.

120–15⅛4–New. On review of record, court will consider substance, and not

form, of proceedings before commission. Utah 262P281.

120-15½5-New. Federal Longshoremen's and Harbor Workers' Compensation Act § 21(b) contemplates an interlocutory injunction only when an award has been made, and not when it has been denied. 27F(2d)144 (plaintiff sought to compel making of award).

120-15½6-New. A petition under such section must be so framed that it states more than conclusions of law. 27F(2d) 144.

120-15½7-New. A petition for injunction, under such section, should allege proceedings before the commissioner in narrative form, or have attached a transcript. 27F(2d)144.

120-15½8-New. Appeal is authorized only from final disposition of matter properly before the board. TexCivA 18SW(2d)695.

120-15½9-New. Jurisdiction of the district court in compensation cases depends upon the making of a final award by the industrial accident board. Tex CivA 11SW(2d)358.

120-15½00-New. Refusal of the board to set a case for hearing "at this time" is a final appealable decision. Tex CivA 18SW(2d)695.

120-15½01-New. A letter addressed by the board to claimant's attorney is not a "final ruling and decision" from which appeal will lie. TexCivA 15SW(2d)1077.

120-15½02-New. Filing of a suit to set aside an award of the industrial accident board to an employee injured while in the course of his employment must be within twenty days after notice that the award is not accepted, such being a jurisdictional prerequisite. TexCivA 10SW(2d)129.

120-15½03-New. Compliance with the statutory requirement of timely notice of appeal is jurisdictional. Tex CommnA 15SW(2d)565.

120-15½04-New. The filing of a petition with the clerk of the court is sufficient compliance with the requirement that suit must be instituted and prosecuted within a stated time. Tex CommnA 15SW(2d)594.

120-15½05-New. The district court has authority to set aside a purported compromise and settlement agreement of a compensation claim alleged to have been fraudulently procured, notwithstanding timely notice of appeal from the board's approval of the settlement was not filed with the board. TexCommnA 15SW(2d) 565.

120-15½06-New. Where the act requires a suit to set aside the award to be brought in the county where the injury occurred, a court of another county has no jurisdiction to set aside the board's decision. TexCivA 15SW(2d) 709.

120-15½07-New. One may not claim compensation and obtain an award as employee of one person and then sue in the courts as an employee of another. TexCivA 10SW(2d)129.

120-15½08-New. The jurisdiction of the court in a suit to set aside an award must affirmatively appear and cannot be based on presumption. TexCommnA 14SW(2d)1007.

120-15½09-New. An injured employee suing to set aside an award must establish the court's jurisdiction by competent evidence. TexCivA 11SW(2d) 358.

120-15½10-New. Attorneys representing claimant are not necessary parties defendant to a suit to set aside an award. TexCivA 12SW(2d)817.

120-15½11-New. A suit to set aside an award does not require the joinder of claimant's husband. TexCivA 12SW (2d)817.

120-15½12-New. Allegations of answer in a suit by an insurer to set aside an award have been held sufficient to present the issue of the right of recovery in a lump sum. TexCivA 8SW (2d)696.

120-15½13-New. A petition, in a cross action by an employee on insurer's appeal from an award by the board, failing to allege that notice of the injury and claim for compensation was made within the period specified in the statute, is insufficient to give the court jurisdiction to hear and determine the matter, particularly in the absence of proof of payment of compensation subsequent to injury. TexCivA 10SW(2d) 405.

120-15½14-New. The award must be described, in a suit to set it aside, in order that the court may determine whether it has jurisdiction of the subject matter. TexCommnA 14SW(2d) 1007.

120-15½15-New. A petition in a suit to set aside an award denying compensation has been held sufficient to admit proof of good cause for not filing a claim within six months after death. TexCivA 18SW(2d)810.

120-15½16-New. In a suit to set aside an award denying compensation, a petition alleging that claim was made before the board in accordance with law is sufficient, as against demurrer, to show jurisdiction of the court to set aside the award. TexCommnA 17SW (2d)457(2dcase).

120-15½17-New. In an action to set aside an award, a cross petition alleging that the employee's "average weekly wage was $48 per week or more" has been held sufficient against a general demurrer. TexCommnA 16 SW(2d)524.

120-15½18-New. An allegation in such petition that the injured workman claimed compensation before the board is sufficient as against general demurrer to show due notice and filing of claim. TexCommnA 16SW(2d)524.

120-15½19-New. That the petition was erroneously indorsed does not render the filing thereof a nullity, but the erroneous indorsement is a mere irregularity, which can be corrected by the trial court. TexCommnA 15SW(2d)594.

120-15½20-New. In an insurer's suit to set aside an award, a petition by claimant alleging that he was permanently injured as the result of an injury to his foot does not warrant submission of the issue of permanent incapacity to labor. TexCommnA 13SW (2d)364.

120-15½21-New. On appeal, the burden is on claimant of compensation, without regard to which party to the proceeding took the appeal. TexCivA 10SW (2d)405.

120-15½22-New. In suit to set aside an award of compensation for an employee's death by the industrial accident board, the burden is on claimant to show that decedent received some accidental bodily injury in the course and growing out of his employment, and that such injury was the proximate cause of his death. TexCivA 10 SW(2d)220.

120-15½23-New. Evidence has been held insufficient to show timely notice of the appeal to the board. TexCommnA 15 SW(2d)565.

120-15½24-New. An action of the trial court in permitting claimant to introduce physician's testimony as to the cause of deceased employee's physical condition, after evidence was closed and while counsel was addressing the jury, has been held not an abuse of discretion, in an insurer's suit to set aside a compensation award. TexCivA 10SW (2d)760.

120-15½25-New. A charge that the words "injuries sustained in the course of his employment" mean all injuries having to do with and originating in the work, business, trade, or profession of the employer, received by an employee while engaged in or about the furtherance of his employer's business, whether on the employer's premises or elsewhere, being in the language of the statute, has been held not objectionable as misleading and incorrect, where a more comprehensive definition was not presented. TexCivA 9SW(2d)458.

120-15½26-New. A petition for a writ of review has been held insufficient as not stating all material evidence, and not showing matters included in the application for rehearing. 98CalA668, 277P497(1stcase).

120-15½27-New. Where claimant in compensation proceedings returned to work pending determination of an appeal from a judgment sustaining an award of permanent compensation, the insurance carrier is entitled to a stay pending determination of the decision on appeal. 84Colo542, 271P1115.

120-15½28-New. Prima facie presumptions are in favor of the board's jurisdiction and the correctness of its decision. 156Md447, 144A345.

120-15½29-New. An order of the commission is not reviewable on a second appeal, where no appeal was taken from such order. 157Md47, 145A197.

120-15½30-New. Prayer for a directed verdict in favor of the employer and insurer, on the ground there is no evidence legally sufficient to entitle claimant to recover in a trial on an appeal from the industrial accident commission's award, is bad in form. 156Md74, 143A654.

120-15½31-New. An unsigned order is not a full board order, as regards to time for appeal. 228Ky776, 15SW(2d) 507.

120-15½32-New. In the absence of fraud or mistake, a petition for review, merely charging that the evidence was meager and the award flagrantly against the evidence, is fatally defective. 226Ky204 10SW(2d)809.

120-15½33-New. A petition for review not filed within the statutory time after rendition of award is dismissible. 229 Ky565, 17SW(2d)718.

120-15½34-New. The day on which the award is rendered is included in computation of time for filing petition for review. 229Ky565, 17SW(2d)718.

120-15½35-New. Where the board enters an order dismissing the case and subsequently enters an order sustaining the previous order, appeal should be taken from the first order made on hearing before the full board. 229Ky565, 17SW(2d)718.

120-15½36-New. The time to appeal begins to run from the date on which claimant received notice of the final order. 120 Oh445, 166NE376.

120-15½37-New. A nunc pro tunc entry of the commission, eliminating a paragraph included in a prior order by mistake, is not effective to postpone the date for appealing to the court. 31 OhA288, 166NE376.

120-15½38-New. Where letters by counsel for claimant seeking relief for claimant after denial of further participation in an insurance fund were sufficient to institute a proceeding for rehearing, and the commission authorized the filing of a formal application for rehearing thereafter, denial of the rehearing on the filing of a formal application constituted final action by the commission, and an appeal from such action of the commission, filed within thirty days after such denial, was within jurisdiction of the court of common pleas. 29 OhA162, 163 NE212.

120-15½39-New. Time for application for writ of review. Under Utah statute, a writ cannot be granted when not applied for within thirty days after denial of an application for a rehearing, although applicant did not know until such time had expired that the rehearing had been denied. Utah 273P306.

120-15½40-New. Under such statute issuance of a writ of review within thirty days after notice was given of the industrial commission's order did not give the supreme court jurisdiction when the writ was not applied for within thirty days after the order was made, although it had been customary to give notice, and the attorney did not learn of the order until after thirty days had expired. Utah 273P311.

120-15½41-New. Such statute does not, by implication, require notice of the decision to put in motion the time prescribed. Utah 273P306.

120-15½42-New. That applicant's counsel was misinformed by the commission's stenographer that there had been no decision does not authorize the su-

preme court to grant relief from failure to comply with such statute. **Utah** 273 P306.

120-15½43-New. That failure to apply for a writ of review to review a decision of the industrial commission within the time limited by such statute was caused by the commission's failure to give notice of its decision pursuant to its custom does not authorize the supreme court to excuse or relieve applicant from the operation of the statute. **Utah** 273P 306.

120-15½44-New. In some jurisdictions an action to review an award or decision of the commission must be filed within thirty days after a copy of such award or decision has been sent by the commission to the parties affected. 135 **Okl** 37, 273P887(1stcase).

120-15½45-New. The statutory period for lodging such action is not extended by filing a motion before the commission to review or rehear such award. 135 **Okl** 37, 273P887(1stcase).

120-15½46-New. Compensation claimant has been held not to have sustained the burden of proving that denial by the department of labor and industries of an award for permanent partial disability for stricture of uretha was contrary to the preponderance of evidence, and hence the action of the court in directing such an award was erroneous. 149 **Wash**594, 271P880.

120-15½47-New. In some jurisdictions the appeal is to be determined on the entire record. 88**PaSuper**470.

120-15½48-New. The district court may retain jurisdiction of a proceeding to review an award although the proceeding was also commenced in another county. 117**Nebr**661, 222**NW**42.

120-15½49-New. The district court has no jurisdiction of an employee's appeal from the board's order dismissing a claim for default by the employer in payment of a premium. 57**ND**487, 222 **NW**952.

120-15½50-New. No appeal lies from denial of a motion to reopen a case for production of additional evidence in compensation proceedings. 108**Conn**159, 142A745.

120-15½51-New. The commissioner's award in compliance with a judgment of the appellate court is not appealable. 108**Conn**159, 142A745.

120-15½52-New. Under a statute conditioning a reopening of a proceeding on the absence of a proceeding for review by certiorari, an abortive appeal, although accompanied by an opinion on the merits, is not equivalent to review by certiorari. 177**Minn**555, 225**NW**889.

120-15½53-New. In some jurisdictions certiorari is the only method of review. 177**Minn**555, 225**NW**889.

120-15½54-New. Commission is presumed to have jurisdiction of claim. **MoA** 258**W(2d)**529.

120-15½55-New. Proceeding to have supreme court determine whether commission acted without or in excess of its power and whether findings of fact supported award is in effect an appeal. **Ariz** 285P680.

120-15½56-New. Statute requiring petition for review to be filed within stated time is mandatory. 232**Ky**641, 24**SW (2d)**261.

120-15½57-New. Order of commission for award or for disallowance of compensation cannot be reviewed on certiorari after expiration of prescribed period from date of notice thereof. 179 **Minn**321, 229**NW**138.

120-15½58-New. Summons issued on appeal from award may be amended by court so as to correct date of return and answer though objection to jurisdiction is pending based on same defect. **Nebr** 229**NW**898.

120-15½59-New. Administrative rulings of commission are entitled to serious consideration. 133 **Or**468, 286P527 (construction of statute).

120-15½60-New. Statutory notice to be given adverse party on appeal may be given within reasonable time and even after steps to quash appeal in proper case. 95**PaSuper**215.

120-15½61-New. Employee who did not file notice of unwillingness to abide by commission's ruling within required time cannot predicate suit on notice given by adverse party. **TexCivA** 24**SW (2d)**756.

120-15½62-New. Objection that petition for review was not filed within statutory time may be raised by motion to dismiss. 232**Ky**641, 24**SW(2d)**261.

120-15½63-New. Statute requiring service of copy of petition is directory and not jurisdictional. **Nebr** 229**NW**898.

120-15½64-New. Petition for review not filed within statutory time cannot be treated as petition in action to vacate award. 232**Ky**641, 24**SW(2d)**261.

120-15½65-New. Failure to allege that notice of appeal was given or any appeal taken from the award, as and when required by law, is not fatal. **TexCivA** 19**SW(2d)**153.

120-15½66-New. Errors or irregularities in original award must be corrected through appeal and not by proceedings to change order. **TexCommnA** 27**SW (2d)**529.

120-15½67-New. Suit to set aside award of board. Petition held sufficient to give the district court jurisdiction in a suit to set aside an award. **TexCivA** 20**SW (2d)**334.

120-15½68-New. An employee's answer by way of cross action held sufficient as against general demurrer. **TexCivA** 20 **SW(2d)**209.

120-15½69-New. A petition to set aside an award held sufficient as against a general demurrer to show compliance with the statutes relative to notice and filing of claim. **TexCivA** 19**SW(2d)**397.

120-15½70-New. Undisputed evidence of payments sufficiently showed notice to the employer of the injury to give the court jurisdiction of the suit to set aside an award. **TexCivA** 20**SW(2d)**334.

120-15½71-New. Unless an appeal is perfected by timely filing of record, the supreme court has no jurisdiction and the appeal will be dismissed. 41**Wyo** 9, 281P195.

120-15½72-New. Whether resumption of work ended the period of total incapacity held for the jury. **TexCivA** 19 **SW(2d)**821.

120-15½73-New. A claim must have been first presented to, and acted upon by, the board. **TexCivA** 20**SW(2d)**263.

120-15½74-New. An employer cannot enjoin enforcement of an award on the ground of prior release before an attempt by the injured employee to enforce or collect under the award. 34**F (2d)**959.

120-15½75-New. An order of the commission making an award of compensation without a writ of certiorari to review the order became conclusive on expiration of the twenty days allowed. 336 **Ill** 279, 168**NE**298.

120-15½76-New. Filing of a complaint for review by claimant did not prevent the employer from appealing from the original judgment improperly entered. **IndA** 169**NE**475(2dcase).

120-15½77-New. The widow of a deceased employee is not required to repay the amount of judgment in full settlement of the award as a condition precedent to maintenance of an action to vacate the settlement. 231**Ky**736, 22**SW (2d)**129.

120-15½78-New. The twenty-day period within which a petition for review may be filed runs from the date the award was made and filed with a record of the proceedings. 232**Ky**78, 22**SW(2d)**430.

120-15½79-New. A statute providing for the time for filing a petition in court for review of the board is mandatory and jurisdictional. 232**Ky**78, 22**SW(2d)** 430.

120-15½80-New. The Baltimore city court held to have jurisdiction of an appeal from an order of the commission disallowing a claim for compensation. 158**Md**116, 148**A**246.

120-15½81-New. An employee could, where an injured arm became infected, in answer in a suit to set aside an award, claim damages for permanent and total disability. **TexCivA** 20**SW(2d)**833.

120-15½82-New. Where the petition did not allege compliance with the proper mode of appealing from an award of the board, overruling demurrer thereto is error. **TexCivA** 21**SW(2d)**583.

120-15½83-New. An answer alleging that decedent had been employed about two months at an average wage did not support an award of a lump sum for his death. **TexCivA** 21**SW(2d)**698.

120-15½84-New. Under statutes, before claimant can appeal from a decision of the commissioner denying his claim on some ground going to the basis of the claim, proceedings for rehearing must be had in accordance with the statute. 108**WVa**438, 151**SE**307; 108**WVa**402, 151**SE**310 (statute held to apply to pending claims).

120-15½85-New. Under statutes, a finding of the commissioner is not appealable unless it goes to the basis of claimant's or employer's right. 108**WVa**397, 151 **SE**309.

120-15½86-New. Where final action of the commission denies the right to compensation on a ground going to the basis of claimant's rights, application for appeal must be made within the statutory time after notice of such action. 108 **WVa**410, 151**SE**323.

120-15½87-New. Under statutes, by appropriate procedure, it becomes the duty of the commissioner to grant rehearing, and from his order predicated thereon application may be made to the supreme court for an appeal. 108**WVa**397, 151 **SE**309.

120-15½88-New. Where insurer failed to give statutory notice it can have no benefit from suit by employee to set aside award where suit dismissed before judgment. 41**F(2d)**312.

120-15½89-New. Award is merely suspended pending action to set aside award. 41**F(2d)**312.

120-15½90-New. Statute of limitations runs against suit to set aside award from date of final decision of proceedings before board. 41**F(2d)**312.

120-15½91-New. At hearing for review of award under federal Longshoremen's Compensation Act bill for injunction stands as affidavit in support of application for preliminary injunction. 41 **F(2d)**28.

120-15½92-New. In review of award under federal Longshoremen's Compensation Act usual rules for granting injunctive relief are applicable. 41**F(2d)**28.

120-15½93-New. Appeal from award operates as supersedeas. 170**Ga**612, 154**SE** 139.

120-15½94-New. Employee's motion to dismiss insurer's appeal may be disregarded where statement of substantive law required decision for employee. **Mass** 172**NE**254.

120-15½95-New. Appeal by employee as against one insurer will not perfect appeal against another insurer. **TexCivA** 29**SW(2d)**534.

120-15½96-New. Determination, as to whether future payments of compensation shall be commuted to lump sum is not reviewable. 233**Ky**393, 25**SW(2d)** 1024.

120-15½97-New. In Oklahoma supreme court has no jurisdiction to review award unless petition is filed within thirty days after notice of award, 143 **Okl** 172, 288 **P**347.

120-15½98-New. On petition to review commission's finding that it was without jurisdiction, court cannot determine extent of claimant's disability or amount of compensation. **Oh** 171**NE**31.

120-15½99-New. Provision for unanimous approval by commission before it is authorized to pay medical expenses in excess of two hundred dollars does not apply to determination on appeal. **Oh** 171**NE**35.

120-15½200-New. Finding on reëxamination that employee had been fully compensated, made prior to last payment, constitutes denial of claimant's right on jurisdictional ground and is appealable. **Oh** 171**NE**99.

120-15½201-New. Under some statutes filing of written undertaking to pay award is jurisdictional requisite of proceeding to review award. 143 **Okl** 144, 287**P**1040.

120-15½202-New. Pleading.—Allegation

by employee of facts showing timely claim for compensation is not prerequisite to jurisdiction of court. **TexCivA** 26SW(2d)697.

120-15½03-New. Employee's pleading held sufficient as against demurrer in insurer's suit to review award. **TexCivA** 26SW(2d)697.

120-15½04-New. Employee's allegation that board had rendered judgment and insurer's answer setting out award brings award before court so as to confer jurisdiction. **TexCivA** 27SW(2d)363.

120-15½05-New. In employee's suit to set aside award, defense of accord and satisfaction of award held properly stricken out. **TexCivA** 27SW(2d)363.

120-15½06-New. In some jurisdictions, in suit to set aside award, employee is not limited to statement of injuries as presented to board. **TexCivA** 27SW(2d) 363.

120-15½07-New. Where board determined compensation claim it will be presumed that it waived strict compliance with requirement of filing notice of injury. **TexCivA** 27SW(2d)363.

120-15½08-New. Court must defer largely to officers of department of labor and industries in administration of compensation law. **Wash** 287P32.

120-15½09-New. Though appeal from award was taken before expiration of 26 weeks from operation, court acquires jurisdiction to determine whether operation was successful. **TexCivA** 31SW (2d)669.

120-15½10-New. Award calculated in accordance with compensation act is binding on appellate court. **CalA** 291P 456.

120-15½11-New. Notation, showing time of receipt, on notice of intention not to abide by compensation award, is some evidence of probative force. **Tex CivA** 31SW(2d)673.

120-15½12-New. Filing of oral application for compensation commences proceeding conferring jurisdiction for subsequent appeal from Commission's adverse decision. **OhA** 173NE14.

120-15½13-New. Where employee, refused compensation, files proper notice not to abide by board's order, district court acquires jurisdiction of whole matter. **TexCivA** 31SW(2d)673.

120-15½14-New. Order of board refusing to allow taking of additional testimony and ratifying previous order dismissing application is final order authorizing petition for review. 235**Ky** 613, 31SW(2d)915.

120-15½15-New. Petition held to sufficiently allege "total incapacity." **Tex CivA** 31SW(2d)846.

120-15½16-New. Where claimant files notice of appeal, commission is under mandatory duty to certify record to circuit court without demanding payment of fees. **MoA** 32SW(2d)142.

120-15½17-New. Failure of petition to vacate award to allege compensation claim exceeded certain amount has been held not error. **TexCivA** 32SW(2d)240.

120-16 83**Mont**152, 269P403. But see 33 **OnA**393, 169NE586 (employee held justified in bringing action against commission where it denied his application for rehearing). [b] **State alone can raise objection** that state department was erroneously named as employer. 147**Va**89, 136SE651. [c] **State can object** that state department was erroneously named as employer only for its own protection, not to defeat recovery by employee from insurer. **Va** 136SE 151. [d] **State insurance fund** is not party interested in or affected by award so as to be entitled to appeal. 67**Utah** 301, 247P490. [e] **Facts showing acquiescence in judgment.-LaA** 130S871. [f] **Facts not showing acquiescence in judgment** warranting dismissal of appeal. **LaA** 130S871.

121-17 See also 220**Ky**85, 294SW820.

121-18 [c] **Administrator or executor,** not estate, is proper party to proceedings. 105**Conn**545, 135A911. [d] **In action by compensation insurer to set aside award against it** (1) employer is not proper party defendant. **TexCivA** 18SW(2d)434. (2) Dismissal of employer from such suit is proper where only issue involved as between insurer and employer is whether employer caused employee to perform extrahazardous work not contemplated by policy. **Tex CivA** 18SW(2d)434.

121-18½-New. Claimant appealing must bring himself within a statute granting the right of appeal. 118 **Or** 260, 246P741.

121-18½-New. Right of appeal is purely statutory. 118 **Or**260, 246P741.

121-18¼-New. Nonresident of county cannot appeal to circuit court from determination of commission. 118 **Or**260, 246P741.

121-18½-New. A claimant who is a resident and inhabitant of a foreign country has no right of appeal under some statutes. 118**Or**260, 246P741.

121-18¼-New. Under statute a dissatisfied employer may commence action to set aside, vacate, or amend an order on the ground that it is unreasonable or unlawful and the supreme court is vested with exclusive jurisdiction to hear and determine such action. 112 **OhSt**421, 147NE518.

121-18½-New. The employer of a deceased employee for whose death an award was made is entitled to maintain certiorari to review an award directing payment of a part of the award to creditors of the deceased employee. 76**CalA** 639, 245P796.

121-18½-New. Court's action in setting aside award held not reviewable as to claimant who filed no cross appeal. 214**Ky**470, 283SW438.

121-18½-New. In Maryland principal contractor and surety are held entitled to participate in trial on subcontractor's appeal from award. 151**Md**494, 135A 318.

121-18½0-New. In Delaware the statute permits no one except parties to a hearing before the board to appeal to the superior court. 3**Del** 445, 138A903.

121-18½1-New. Insurer not a party to a hearing has been held without the right to appeal from a decision of the board. 3**Del** 445, 138A903.

121-18½2-New. A provision of a workmen's compensation insurance policy giving insurer the right to represent the employer and requiring insurer to assume full liability for any award gives insurer the right to maintain an action to set aside an award against the employer alone without obtaining the employer's consent. 195**Wis**410, 217NW 738.

121-18½3-New. Claimant's attorneys, granted a portion of an award of compensation by the industrial accident board, are not necessary parties to a suit to set aside the award. **TexCivA** 10SW(2d)220.

121-18½4-New. Where none of the proceedings before the industrial accident board are in evidence in a suit to set aside an award, the appellate court will assume that the same parties were before the board as before the trial court. **TexCivA** 10SW(2d)220.

121-18½5-New. Right of insurer to appeal is not affected by his denial of liability under policy on ground that employee was a minor illegally employed. 12**PaDist&Co** 754.

121-18½6-New. In action, against insurer to set aside decision denying compensation employer against whom recovery sought if no valid insurance contract was executed may be joined. **Tex CommnA** 24SW(2d)370.

121-18½7-New. The doctrine of estoppel by acceptance of benefits of an award of the commission is inapplicable so as to prevent a review of an award. 138 **Okl** 45, 280P290.

121-18½8-New. Where neither mother nor sister appealed, the appellate court could not review adverse judgment against them. **TexCivA** 19SW(2d)595.

121-18½9-New. The industrial commission is authorized, under some statutes, to appear before the supreme court on granting a writ of review for the annulment of an award and to urge that settlement between the employer and employee's dependents after the award be disregarded. **Utah** 279P889.

121-18½0-New. Claimant should not lose the right of appeal to the supreme court for failure to apply for appeal in time when in good faith he secured a timely appeal to the wrong tribunal. 107**WVa**546, 149SE666.

121-18½1-New. Interested party who may sue to set aside award must be party to proceeding before board. **Tex CivA** 29SW(2d)847.

121-18½2-New. Appeal by insurance carrier for itself alone on issue hostile to interests of employer, without directing notice of appeal to or serving it on employer will be dismissed. 228**App Div**867, 240NYS661.

121-18½3-New. In employee's suit to set aside award and recover damages, insurer cannot implead third person alleged to have caused injury. **TexCivA** 26SW(2d)682.

121-18½4-New. Employer attempting to subject insurer to liability is adverse party joinable as defendant in action to vacate award. **Wis** 230NW67.

121-19 213**Ala**88, 104S251 (court cannot consider bill of exceptions where evidence is set out by court). [a] **In Arizona,** on review by writ of review, supreme court will confine examination to specific objections made. 34**Ariz**175, 269P77.

121-20 103**Conn**426, 130A672 (commissioner's transcript may be used by superior court only to correct subordinate facts and not to correctness of conclusions); 105**Conn**398, 135A578, 51 **ALR**1443; 222**Ky**388, 300SW896; **Tex CivA** 271SW633; **TexCivA** 10SW(2d) 803. [d] 209**Ky**370, 272SW882. [f] **Claim of physician rendering first aid treatment** may be allowed on appeal from judgment allowing compensation to injured employee though not presented to commission. **TexCivA** 18SW(2d) 415. [g] **Point discussed by compensation commission in memorandum of claim but not part of award** presents no question on appeal, though all parties invite consideration thereof. 109**Conn** 39, 145A149. [h] **On motion for order permitting submission of record on appeal,** supreme court will not assume to determine contents of record. 230**App Div**336, 244NYS649.

121-20½-New. In the absence of special exception, a plea that an employee was earning eight dollars a day when injured and had worked in the same employment at nine dollars a day for over a year preceding the injury is sufficient. **TexCivA** 10SW(2d)756.

121-20¾-New. An injured employee's statutory right to reimbursement for medical, hospital, and doctor's bills is enforceable in insurer's action to set aside an award of the industrial accident board, whether asserted before the latter or not, especially where part of the bills had not accrued when the award was made. **TexCivA** 10SW(2d) 803.

121-21 195**Cal** 174, 231P996; 220**Ky** 449, 295SW406; 228**Ky**786, 16SW(2d) 167; 233**Ky**497, 26SW(2d)34; 154**Md** 46, 139A570; 288**Pa**140, 135A903. [c] **Exception to evidence admitted must point out** evidence objected to and ground of objections. 35**GaA**759, 134SE 788. [d] **Compensation insurer,** failing to object at hearing, held to have waived failure to make state party as employer. 147**Va**89, 136SE651.

121-21½-New. The supreme court will consider only such points as the record affirmatively shows were presented to the commission for decision. 248**Mich** 327, 227NW722.

121-22 202**Cal** 247, 259P1099; 236**Ky** 39, 32SW(2d)540. [b] **Claimant cannot complain of hearing before referee,** no commissioner being present, where no objection was made. **Ariz** 293P20.

121-24 [b] **Objections to award** for medical treatment to employee, not assigned as error, cannot be considered. **TexCivA** 298SW164.

121-24½-New. On review by certiorari, question not urged before board will not be considered. 31**Ariz**224, 252P512; 242**Mich**452, 219NW602.

121-24¾-New. Where no subordinate facts support conclusion, whether there was any evidence to support such a find-

ing cannot be reviewed. 103Conn426, 130A672.

121-24¼-New. Questions not raised on hearing before one commissioner or on appeal to the board cannot be urged for the first time on appeal to the superior court. 356GaA326, 133SE639; 6PaDist &Co630.

121-24½-New. Such rule applies to the question of venue. 356GaA326, 133SE 639.

121-24¾-New. Such rule applies to the question as to the character of the employment. 356GaA326, 133SE639.

121-24[illegible]-New. Where the findings of the industrial commission are complete on the only issue involved, they cannot be attacked for failure to include another finding. 356GaA326, 133SE639.

121-24[illegible]-New. In some [illegible] the rule obtains that [illegible] not raised upon hearing before one of the commissioners, or on appeal to the full commission, cannot be raised [illegible] 356GaA326, 133SE639.

121-24[illegible]-New. [illegible] a contention that no proper claim was filed as required by law cannot be [illegible] 356GaA326, 133SE639.

121-24[illegible]-New. A claim that in fixing contribution to dependents no allowance [illegible] 104Cal[illegible].

121-24[illegible]-New. An insurer's contention that the proof did not show that the employer was duly insured is without merit where the proof shows that a [illegible] to an individual who [illegible] business and assigned the policy to the corporation and that insurer accepted premiums from the corporation and raised no such issue on pleadings. TexCivA 275SW645.

121-24[illegible]-New. Question of venue cannot be raised for first time on appeal to superior court. 356GaA326, 133SE639.

121-24[illegible]-New. [illegible] of the [illegible] not [illegible] an appeal from the award [illegible] 2[illegible]Ky[illegible] 2[illegible]SW463.

121-24[illegible]-New. Objection to jurisdiction of industrial board cannot be raised for the first time on appeal. 84IndA 327, 150NE617.

121-24[illegible]-New. Theory on which case was tried will be adhered to on appeal. 85IndA552, 154NE774.

121-24[illegible]-New. Pleading and proof of employee's physical inability to give notice of injury in time raised issue of good cause. TexCivA 296SW639.

121-24[illegible]-New. Where no mention of error is made, any illegality cannot be raised on certiorari. 76CalA565, 245P 445.

121-24[illegible]-New. Town, having denied liability and resisted payment, cannot on appeal question jurisdiction of board to hear application on ground that there was no bona fide effort at settlement. 86IndA497, 157NE863.

121-24[illegible]-New. After submission to board, parties waive right to question board's authority. 226Ky381, 295SW 464.

121-24[illegible]-New. Where, on the hearing of a claim for additional compensation on the theory that a former award should have been for loss of a leg instead of for loss of a foot, no claim was made by the employer, in denying liability, that the question was res judicata, such question will not be considered on certiorari to review the decision of the department. 238Mich572, 214NW174.

121-24[illegible]-New. Petition to review award on order of industrial accident board should allege facts to show jurisdiction of court. TexCivA 284SW 966.

121-24[illegible]-New. There should be filed copies of proceedings filed before board showing presentment of claim and denial thereof. TexCivA 284SW968.

121-24[illegible]-New. Premature suit to set aside an order of industrial accident board pending rehearing held merged by consolidation with another suit to set aside final order of board. TexCivA 284SW968.

121-24[illegible]-New. Formal findings of fact will be taken as supplemented by facts embodied in commissioner's certificate under Gen. L. § 5808. 100Vt472, 135A1.

121-24[illegible]-New. Petition not excepted to will be given the benefit of every reasonable intendment. TexCivA 4SW (2d)60.

121-24[illegible]-New. Questions must be determined on the record before the court. 127Me207, 142A730.

121-24[illegible]-New. Fundamental errors may be considered at any stage of the proceedings. TexCivA 9SW(2d)458.

121-24[illegible]-New. A contention that an award for death of an employee against the employer in addition to award against the insurance carrier on the ground of willful misconduct was invalid because of absence of a finding that the policy did not extend to the additional award cannot be considered when not presented by the record. 90 CalA104, 265P510.

121-24[illegible]-New. Where an order is entered before a full compensation board, the record should show that fact, in order to determine the time for appeal. 228Ky776, 15SW(2d)507.

121-24[illegible]-New. In absence of showing that agreement for compensation was approved by board appellate court cannot presume that it was approved. 232 Ky599, 24SW(2d)299.

121-24[illegible]-New. On certiorari to review award question of allowance for surgical care is not presented where employee took no steps to review award disallowing such claim. 250Mich46, 229NW595 (2dcase).

121-24[illegible]-New. Parties with approval of industrial board may agree on facts to be inserted in case or bill of exceptions and thereby dispense with necessity of printing voluminous record. 228 AppDiv388, 238NYS588.

121-24[illegible]-New. Where neither the decree nor motion for new trial referred to the notice of injury, and the attention of the trial judge was not directed to the error in awarding compensation, in the face of a defense of failure to give such notice, the defense was waived precluding consideration by the appellate court. 159Tenn459, 19SW(2d)243.

121-24[illegible]-New. The record on certiorari held not to present facts calling for consideration of the rule of loaned employee. 248Mich327, 227NW722.

121-24[illegible]-New. Objection of lack of evidence of claimant's acceptance of act cannot be raised for first time in reviewing court. 234Ky654, 28SW(2d) 990.

121-24[illegible]-New. Want of jurisdiction of commission cannot be raised for first time in reviewing court. 250Mich454, 231NW122.

121-24[illegible]-New. In suit to set aside award insurer cannot complain of notice of injury where he made no complaint before board. TexCivA 28SW (2d)850.

121-24[illegible]-New. Statute not relied on below and apparently inapplicable under record will not be considered. 111 Conn229, 149A679.

121-24[illegible]-New. Failure of board to file separate findings of fact and rulings of law held immaterial where facts were stipulated on questions on which evidence was conflicting. 233Ky793, 26 SW(2d)1030.

121-24[illegible]-New. Failure of board to pass on claim for medical bill does not deprive district court of jurisdiction to adjudicate such claim. TexCivA 27SW (2d)[illegible]

121-24[illegible]-New. Right to credit in nature of offset must be presented and relied on before board. 235Ky650, 32SW (2d)35.

121-24[illegible]-New. Petition for review must show facts upon which error is predicated. 235Ky650, 32SW(2d)35.

121-25 Kan 291P952; 21 OhA148, 152 NE792; TexCivA 278SW889. But see 107Conn248, 140A124 (evidence properly stricken in absence of showing of purpose or necessity of certification).

[a] **In Pennsylvania** notes of testimony are properly included in record. 88Pa Super470. [b] **Facts upon which increased award is based** must be disclosed by record. 253NY108, 170NE 511.

121-26 102Conn511, 129A539 (no part of evidence should be certified to superior court except to correct finding assigned as error).

121-27½-New. Where claimant filed no transcript of the evidence but only a copy of all evidence, it was error for the court to order the commission to file a transcript. 103Conn426, 130A672.

121-28 [b] **On certiorari to review award** (1) for total disability based on testimony given at hearing before board, testimony of plaintiff at hearing year and a half prior thereto, when finding of partial disability had evidential support and was not appealed from, cannot be used to affect disposition of case by supreme court. 236Mich100, 210NW 251. (2) Certiorari copy of such prior testimony which was used by defendant's counsel while cross-examining son of plaintiff who did not testify and which was included as exhibit in record which failed to show it was considered by board in making award cannot be recognized by supreme court on certiorari as part of testimony on which award was based. 236Mich100, 210NW 251.

121-29½-New. Transcript of evidence is not properly a part of the record where appeal is not connected with findings. 104Conn569, 134A68.

121-29½-New. On review of commissioners' refusal to open award for newly discovered evidence, record must contain former evidence and newly discovered evidence. 106Conn1, 137A26.

121-29¼-New. and in absence thereof, appellate court will not consider whether denial of motion was abuse of discretion. 106Conn1, 137A26.

121-29½-New. The reviewing court cannot consider any testimony not reflected in the finding, where no motion is made to add to the finding. 109Conn 178, 145A887.

121-29⅞-New. Under Ohio statute prior to amendment reports to commission by medical examiners and reports and letters to such examiners by examining doctors should be shown by record. Oh 171NE99.

121-29½-New. [§ 125a] **c½. Transfer of Cause.** A petition to set aside an order of the commission denying compensation and to recover compensation held to contain sufficient allegation to state a cause of action and to vest the court with jurisdiction. TexCivA 38SW(2d) 568.

121-30 41F(2d)28; 41F(2d)593; 41 Ida747, 242P314, 243P654; 130Kan410, 286P396; MoA 30SW(2d)650; 52ND 563, 203NW895; TexCommnA 285SW 1041. But see NJSup 132A297; TexCivA 271SW633; TexCivA 283SW261. Contra 118Nebr605, 225NW770. [d] 49ND915, 194NW663. [e] **In Colorado** court is required to base its judgment solely on judgment roll certified to it by commission. 84Colo521, 272P3. [f] **In Montana** trial in district court must be heard on record unless court, in its discretion, permits introduction of additional evidence. Mont 289P574.

121-31½-New. The burden is on the employee to prove by competent evidence the facts entitling him to the relief sought. [a] **Incapacity and extent in point of time** must be proved by claimant. TexCommnA 289SW996.

121-31⅓-New. In Texas, where an award is attached by suit in court, there is a trial de novo. TexCivA 294SW639.

121-31¼-New. Jurisdiction to hear case de novo on appeal depends upon jurisdiction of commission in first instance. TexCommnA 24SW(2d)375.

121-32 153Md274, 138A235; 154Md55, 139A548; 154Md46, 139A570; 156Md 412, 144A339; 156Md524, 144A505; 156 Md535, 144A708; Md 150A378(2dcase) (employee's average weekly wage); 78 Mont579, 254P886; 117 Oh337, 158NE 748; 119 Oh594, 165NE297; 27 OhA169, 161NE31; 127 Or599, 273P337; 128 Or 369, 274P905; TexCommnA 298SW542;

TexCommnA 12SW(2d)558; Tex CommnA 17SW(2d)1043; TexCivA 283 SW240; TexCivA 283SW261; TexCivA 8SW(2d)709; TexCivA 11SW(2d)191; TexCivA 11SW(2d)566; TexCivA 11SW (2d)594; TexCivA 13SW(2d)981; Tex CivA 14SW(2d)354; TexCivA 14SW (2d)939; TexCivA 16SW(2d)321; Tex CivA 16SW(2d)390; TexCivA 16SW (2d)950; TexCivA 17SW(2d)68; Tex CivA 18SW(2d)810; TexCivA 28SW (2d)850; TexCivA 29SW(2d)458; Tex CivA 30SW(2d)911; 101Vt143, 141A 684; 141Wash55, 250P461; Wash 288 P235 (evidence on conflicting theories). [b] (1) 153Md16, 137A357; 152Md648, 137A376. (7) Evidence held for jury as to whether cause of death arose in course of employment. 21 OhA148, 152 NE792. (8) Evidence held insufficient to sustain finding that receiver was receiving salary as employee. TexCivA 1 SW(2d)412. (9) Other evidence held sufficient. TexCivA 281SW289; Tex CivA 281SW895; TexCivA 281SW1092; TexCivA 283SW261; TexCivA 284SW 650; TexCivA 284SW698; TexCivA 294 SW639; TexCivA 1SW(2d)434; 141 Wash55, 250P461. [f] (7) Instruction defining permanent total incapacity for work held proper. TexCivA 286SW565. (8) Refusing instruction as to injury being proximate cause of death held proper. TexCivA 3SW(2d)568. (9) Issue involving "act of God" held too general. TexCommnA 3SW(2d)425. (10) Issue as to scope of employment held properly refused as submitting undisputed fact. TexCommnA 3SW(2d)425. [g] (3) To sustain finding of permanent total incapacity of employee suffering from abscesses in lungs as result of injury. TexCivA 286SW565. [i] (3) Other questions for jury. 152Md 321, 136A644; 22 OhA112, 153NE247; TexCivA 281SW289; TexCivA 286SW 565. [m] (2) Whether plaintiff sustained injuries in course of employment. TexCommnA 3SW(2d)414; Tex CivA 283SW240. (3) Whether injury arose out of and in course of employment. 149Md562, 131A760, 43ALR417. (4) Whether injured employee was employed by owners of oil lease or by drilling contractor. TexCivA 294SW 695. [o] (2) Judgment for future payments held erroneous where jury failed to find how long incapacity would continue. TexCommnA 289SW996. [t] (1) TexCivA 294SW639; TexCivA 1SW(2d) 434. [v] TexCivA 1SW(2d)434. [w] **Refusal to submit issue of average daily wage of person of same class as deceased employee** has been held not erroneous under evidence where deceased employee had not worked whole year in employment. TexCivA 275SW685. [x] **Jury should be cautioned** as to weight to be given hearsay evidence when admissible. 21 OhA148, 152NE792. [y] **Evidence held sufficient:** (1) To support finding that employee at time of injury was engaged in regular business of employer. 114Nebr326, 207NW508. (2) To sustain finding that claimant was employee of drilling contractor and not of owner of oil lease. TexCivA 294SW695. (3) To support finding that death of employee from gas explosion in camp tent resulted from injury sustained in course of employment. TexCivA 14SW(2d)949. [z] **Question of law.**–Whether death of bus driver resulted from heat prostration arising out of and in course of employment is for court as matter of law upon undisputed facts and inferences. 153Md343; 138A244. [aa] **Whether cupelo tender** died from molten iron burns held for jury. TexCivA 297SW 630. [ab] **In Ohio** (1) provision in statute requiring review "on record" is in irreconcilable conflict with another provision of same statute requiring trial "in ordinary way with jury trial if demanded" (117 Oh337, 158NE748), (2) "and latter" provision, being more in harmony with fundamental purpose of statute, must prevail (117 Oh337, 158NE 748). [ac] **Showing as to jurisdictional facts.**–(1) There is no fixed method of establishing jurisdictional facts authorizing court to try case de novo. Tex CivA 18SW(2d)712. (2) Recital in notice of appeal that award was made on certain date is not evidence of date or fact of award. TexCivA 18SW(2d)712. [ad] **Issues properly withheld.**–TexCivA 11SW(2d)533; TexCivA 14SW(2d)111; TexCivA 16SW(2d)386. [ae] **Only controverted issues of fact** should be submitted to jury. TexCivA 13SW(2d)909. [af] **Evidence held not to require instruction** that claimant's earning capacity was not limited to employment in which he was engaged at time of becoming incapacitated. TexCivA 16SW (2d)386. [ag] **Instructions held erroneous.**–TexCivA 30SW(2d)921. [ah] **Instructions held not erroneous.**–36F(2d) 219; 158Md116, 148A246; 128 Or369, 274P905; 154Wash659, 283P185. [ai] **Findings held not inconsistent.**–158Md 285, 148A220; TexCivA 16SW(2d)354. [aj] **Motion for instructed verdict properly overruled.**–TexCivA 17SW(2d)68. [ak] **Admission of letter** is not error, where parts of letter are admissible, and objection is to letter as whole. TexCivA 14SW(2d)337. [al] **Whether injury resulted from splashing of acid in employee's eye** held question for jury. 157 Md596, 146A750. [am] **Sufficiency of evidence.**–TexCivA 11SW(2d)533. [an] **Questions held for jury.**–158Md285, 148 A220; 158Md116, 148A246; Md 150A 864; TexCivA 30SW(2d)911. [ao] **Instruction held sufficient** to show that jury found that plaintiff was entitled to participate in fund. 33 OhA80, 168NE 572. [ap] **Instructions to jury.**–Tex CivA 20SW(2d)833 (refusal of instruction as to meaning of "permanent" held erroneous); TexCivA 21SW(2d)8 (refusal of requests held erroneous); Tex CivA 21SW(2d)314 (instruction as to amount held not erroneous under pleading and evidence); TexCivA 22SW(2d) 144 (erroneous instruction on burden of proof); TexCivA 22SW(2d)157 (held not erroneous on total incapacity). [aq] **Evidence sufficient to justify submission of question to jury.**–157Md571, 146A748. [ar] **Evidence sufficient to take case or particular questions to jury.**–TexCivA 21SW(2d)9; TexCivA 21SW(2d)314 (issue of hardship if lump sum payment denied under statute); 154Wash659, 283P185. [as] **Failure to define "manifest hardship and injustice"** in relation to payment of lump sum is not error. TexCivA 26SW(2d)322. [at] **Instructions held proper.**–Md 150A878(2dcase); 35 OhA169, 172NE294. [au] **Questions of law for court.**–Md 150A716. [av] **Burden of proof.**–(1) Md 150A716. (2) Burden of proof is on employee to make out his whole case. TexCivA 26SW(2d) 377. [aw] **Amount of compensation** to which employee is entitled is matter for court and not for jury. TexCivA 26SW (2d)676. [ax] **Evidence admissible.**–Tex CivA 27SW(2d)363. [ay] **Findings of jury.**–35 OhA169, 172NE294. [az] **Prayer for instructed verdict not granted** at instance of party having burden of proof. Md 150A716. [ba] **Verdict for award properly directed.**–Md 150A716. [bb] **Failure to define "proximate result" as used in special issue** is not error where statute does not require incapacity to be proximate result of injury. TexCivA 30SW(2d)921. [bc] **Questions of fact.**–OhA 173NE263.

121–33 154Md46, 139A570; 78Mont 579, 254P880; 79Mont358, 257P270; 117 Oh337, 158NE748; 27 OhA314, 161 NE356; 30 OhA208, 162NE777; 34 OhA 174, 170NE594 (entire transcript of proceedings before commission); 26 OhNP NS179; TexCivA 271SW633; TexCivA 281SW289; TexCivA 283SW261; Tex CivA 1SW(2d)1109; TexCivA 11SW (2d)358; TexCivA 11SW(2d)533; Tex CivA 14SW(2d)330; 151Wash95, 275P 66; Wash 290P876. [b] (7) Certified copies of notices from insurer and employer to industrial accident board are admissible where insurer refuses to produce original or certified copy of insurance policy. TexCivA 281SW289. (8) Evidence of injuries which appear at time of trial de novo to have been done by same accident are admissible though not presented to board, since such injuries are not new cause of action. TexCivA 283SW261. (9) On issue as to whether injured person was employed by owners of oil lease or by drilling contractor, all circumstances bearing on question may be shown. TexCivA 294 SW695. [c] (2) TexCommnA 5SW(2d) 494. [e] (2) In absence of complaint or statement in nature of complaint, evidence of submission to arbitration and award is admissible without formal answer or plea. 117 Or370, 244P319. [h] **Claimant's written claim for compensation** filed with industrial accident board is not conclusive. TexCivA 294 SW639. [i] **Employer's report of accident** is not conclusive on question whether deceased employee was widower. TexCivA 281SW1092. [j] **Finding must be sustained by competent evidence** showing with reasonable certainty cause for which defendant is liable. TexCivA 281SW1092. [k] **Necessity of evidence.**–85Mont41, 277P615. [l] **Burden of proving that person who employed deceased was independent contractor** does not rest on insurer. TexCommnA 12SW(2d)199. [m] **Introduction of award in evidence** in absence of jury is not error where purpose is to show jurisdiction. TexCivA 14SW(2d)337. [n] **Evidence held sufficient:** (1) To justify verdict awarding compensation for permanent total disability from blow on head. 34 OhA391, 171NE115. (2) To support finding that manifest hardship and injustice would result if compensation was not paid in lump sum. TexCivA 26SW(2d)322. (3) To support finding that partnership between injured employee and employer had been dissolved. TexCivA 26SW(2d) 697. (4) To sustain finding that injured employee was not affected with tuberculosis at time injury occurred. TexCivA 27SW(2d)296. (5) To sustain finding that total incapacity would be permanent. TexCivA 27SW(2d)296. (6) To sustain finding that tubercular condition was direct and natural result of injury. TexCivA 27SW(2d)296. (7) To support finding that injured employee had not worked for employer for substantially whole of preceding year. TexCivA 31SW(2d)1108. (8) To support finding that employee sustained foot blisters in county where petition was filed. OhA 173NE263. (9) To support finding that employee sustained foot blisters causing death, in walking over rough ground in course of employment. OhA 173NE263. [o] **Evidence held admissible.**–TexCivA 31SW(2d) 1108.

121–33½–New. The power given the court is that of review rather than trial anew, 78Mont579, 254P880.

121–33½–New. and the trial is a reexamination and redetermination on the record as certified, and on consideration of the additional evidence. 78Mont579, 254P880.

121–33¼–New. Statute gives district court wide discretion on appeal from board's award. 78Mont579, 254P880.

121–33½–New. On trial de novo because of additional testimony, whether finding of board that there was no accident was warranted by record becomes immaterial. 79Mont358, 257P270.

121–33½–New. Merely because evidence was admitted by accident commission does not make it admissible on trial. 152Md321, 136A644.

121–33½–New. Terms of the workmen's insurance policy need not be proved on such trial where they are fixed by statute. TexCivA 281SW289.

121–33½–New. Submission of the entire record containing the reasons for the referee's findings to the jury is improper as it is not evidence. 28 OhA 123, 162NE651.

122–34 120 Oh36, 165NE535; 33 OhA 80, 168NE572.

122–35½–New. On such appeal the jury sit as an appellate board of awards and is governed as to the amount of compenstion and the time and manner of payment by the provisions governing awards by such board. 115 Oh482, 154NE733.

122–35½–New. It is for jury to determine whether injury was sustained in course of employment and its extent. 115 Oh482, 154NE733.

122-35¼-New. Instruction to find only permanent disability, if any, is reversible error. 115 Oh482. 154NE723.

122-35½-New. Extent of plaintiff's incapacity is for jury. TexCivA 58W(2d) [illegible]

122-35¾-New. [illegible] in favor of the commission [illegible] there is failure to prove death caused [illegible] course of employment [illegible] 142NE796.

122-36 [illegible] 58W 2d [illegible]

122-36¼-New. [illegible] has demonstrated "course of employment" in the [illegible] the statute, it need not [illegible] connection defining the [illegible] TexCivA [illegible]NW695.

122-37¼-New. [illegible] 152Md [illegible]

122-37½ [illegible] Md46 [illegible]

122-38½-New. Pleadings. Formal [illegible] are not required. 117 Or370.

122-39¼-New. Even upon trial de novo [illegible] wide award, suggestion [illegible] to jury on probable [illegible] total incapacity of maxi[illegible] was not erroneous, or [illegible] TexCivA 272SW501.

122-39½-New. [illegible] judge must rule [illegible] of evidence and jury [illegible] evidence received. 24 OhA [illegible]

122-39¾-New. Statute relieving indus[illegible] from rule of evidence [illegible] part of charge to [illegible] 24 OhA66. 156NE616.

122-39[illegible]-New. Statute providing that [illegible] is not bound by rules of [illegible] rules of procedure [illegible] 24 OhA [illegible] 155NE[illegible]

122-39[illegible]-New. [illegible] injury to par[illegible] late was not error. 153Md631, [illegible]

122-39[illegible]-New. Ultimate issues of fact [illegible] go to jury on appeal from [illegible] accident commission. 153Md [illegible]

122-39[illegible]-New. On trial de novo the [illegible] not bound by a finding of the [illegible] as to a [illegible] of good cause for [illegible] and claim within [illegible] TexCivA 300SW 667.

122-23½-New. A motion by the department to dismiss an appeal from its decision is analogous to a motion for a nonsuit, and, on its being denied, the department can introduce evidence tending to uphold its decision. 151Wash 95. 275P66.

122-23¾-New. An instruction defining an independent contractor was held to be insufficient and misleading. 156Md 524. 144A505.

122-23½-New. In a suit to recover compensation for the death of an employee, a new trial for newly discovered evidence of an autopsy, showing that death was the result of an injury to the head of the employee, not known to plaintiffs until after trial, is properly denied, where the autopsy was held under consent of plaintiffs, who knew thereof several months before trial, and new evidence would not tend to show that the injury was received on the place of employment or in the course of employment necessary for recovery. TexCivA 108SW(2d)782.

122-33¼-New. Employee not bound to show that submitting to operation would have been more than ordinarily unsafe to justify award for permanent total disability. TexCivA 31SW(2d) 673.

122-33¾-New. Trial is de novo in suits to set aside final orders, judgments, or decrees. TexCivA 32SW(2d) 262.

122-39 32F(2d)513(2dcase); 33F(2d) 218; 22Ariz54, 255P598; 196Cal 593, 238P662 (court without power to disturb award, unless unreasonable); 71 CalA542, 235P748; 74CalA615, 241P 405; 76CalA158, 243P886; 77CalA509, 247P227; 79CalA195, 249P33; 84CalA 657, 258P620; 86CalA1, 260P375; CalA 260P967; 91CalA574, 267P321; 91CalA 577, 267P880; 101CalA1, 281P440; 77 Colo 424, 236P1005 (rule applicable to implied findings); 86Colo 580, 284P334; Colo 292P229; 109Conn62, 145A25; 165Ga771, 142SE101; 86 IndA387, 156 NE524; 87 IndA90, 160NE54; IndA 168NE609; 203 Iowa1229, 212NW577; [illegible] Iowa[illegible], 224NW[illegible]; 208 Iowa262, [illegible]NW[illegible]; [illegible] Iowa1[illegible], 227NW[illegible]; [illegible] Kan[illegible] 243P278; 124Kan115, 257 P[illegible]; 217Ky371, 289SW270; 220Ky 449, 295SW406; 124Me422, 130A275; 125Me147, 131A860; 125Me523, 134A 626; 126Me611, 140A185; 126Me572, 140A370; 127Me207, 142A730; 253Mass 535, 149NE409; 255Mass241, 151NE91; Mass 173NE521; 239Mich506, 214NW 938; 239Mich501, 214NW953; 242Mich 438, 219NW683 (credit to be given to testimony is for commission); 250Mich 46, 229NW595(2dcase) (on certiorari to review award); 250Mich464, 231NW 87; 251Mich309, 232NW369 (credibility of witnesses is for board); 169Minn153, 210NW871; 178Minn524, 227NW856(2d case); 180Minn473, 231NW188; Minn 232NW716; MoA 21SW(2d)191 (on record proper); MoA 22SW(2d)832 (circuit court passes only on questions of law); 52ND563, 203NW895; 30 OhA 127, 164NE432; 112 Okl 250, 240P635; 115 Okl 67, 241P820; 116 Okl 232, 244P 201; 114 Okl 140, 244P438; 117 Okl 296, 246P392; 118 Okl 101, 246P832; 119 Okl 275, 249P704; 120 Okl 197, 251 P40; 124 Okl 140, 254P66; 126 Okl 122, 258P905; 126 Okl 235, 259P265; 127 Okl 32, 259P550; 128 Okl 243, 262P648; 129 Okl 81, 263P451; 134 Okl 177, 272 P[illegible]; 134 Okl 123, 274P15; 139 Okl 182, 282P143; 39 OklACR249; 285Pa 3[illegible]5, 132A347; 285Pa443, 132A358; 2[illegible]6Pa199, 133A256; 293Pa121, 141A 719, 298Pa384, 148A498; 87PaSuper 458; 6PaDist&Co 685; 49SD312, 207 NW89; 154Tenn329, 289SW519; 159 Tenn459, 19SW(2d)243 (may only inquire whether on merits there is material evidence to support finding); 67 Utah197, 246P706; 70Utah333, 260P 271; Utah 272P239; Utah 286P628; Utah 287P931; Utah 289P94; 143Va 244, 129SE268 (binding in absence of fraud); 145Va79, 133SE663; Va 153 SE805; 143Wash380, 255P385; 187 Wis21, 203NW906 (fact findings within jurisdiction are conclusive in absence of fraud); 196Wis406, 220NW188. See also 127Me549, 143A270. But see 129Kan581, 283P487 (on review by district court under Kansas statute); Tex CivA 284SW968. [f] (2) 120 Okl 197, 251P40. [j] **Superior court has no authority to adopt finding of single member thereby overruling finding of industrial accident board.** 255Mass241, 151NE91. [k] **Court cannot weigh evidence on certiorari.**–88CalA513, 263P 869. [l] **Revisory powers of court are limited to ascertaining whether any evidence supports board's findings and if law has been properly applied to such findings.** 296Pa34, 145A603. [m] **Judgment of court must be based on record as transmitted to it by industrial commission.** 40GaA92, 149SE55. [n] **In Montana trial in district court is re-examination and redetermination of case.** Mont 289P574. [o] **Finding on weight of evidence is conclusive.** MoA 308W(2d)650. [p] **Statute authorizing trial court to set aside verdict once because against weight of evidence is inapplicable.** MoA 308W(2d)650. [q] **Findings within limits of jurisdiction cannot be interfered with.** Iowa 233 NW141.

122-40 30F(2d)144; 34F(2d)549; 35 F(2d)459 (to determine whether findings are supported by evidence); 36 F(2d)814; 41F(2d)28; 41F(2d)593; 43F(2d)505; 219Ala436, 122S411(1st case); 32Ariz350, 258P306; 33Ariz490, 266P11; 34Ariz2, 267P203; 197Cal164, 239P1072; 199Cal577, 250P570; 201 Cal603, 258P84; 202Cal521, 261P987; 203Cal51, 262P757; 203Cal12, 263P 196; 208Cal633, 284P212; 71CalA303, 234P921; 76CalA565, 245P445; 77CalA 509, 247P227; 79CalA195, 249P33; CalA 251P948; 82CalA414, 255P764; 84CalA228, 257P895; 84CalA554, 258P 415; 84CalA657, 258P620; 84CalA506, 258P698; CalA 260P967; 87CalA290, 262P38(2dcase); 87CalA324, 262P411; 87CalA652, 262P469; 87CalA766, 262P 471; 204Cal185, 267P542, 60ALR1279; CalA 287P368; CalA 287P566; CalA 287P567; CalA 292P525; 82Colo 272, 259P1036; 82Colo281, 260P106; 83 Colo 315, 265P99; 83Colo556, 266P 1114; 84Colo19, 267P791; 85Colo237, 275P910; 85Colo376, 275P937; 86Colo 590, 284P121; 86Colo580, 284P334; Colo 293P342; 106Conn107, 136A870; 107Conn164, 140A114; 107Conn370, 140 A728; 169Ga746, 151SE363; 34GaA307, 129SE305 (in absence of fraud); 35GaA 182, 132SE240; 35GaA326, 133SE639; 35GaA526, 133SE875; 35GaA632, 134 SE331; 35GaA571, 134SE334; 36GaA 487, 137SE113; 36GaA631, 137SE738; 36GaA784, 138SE246; 37GaA72, 139SE 128; 37GaA140, 139SE359; 37GaA539, 140SE899; 37GaA703, 141SE504; 39 GaA33, 146SE37(2dcase); 39GaA481, 147SE533; 39GaA699, 148SE294; 40 GaA92, 149SE55; 40GaA416, 149SE793; 41GaA261, 152SE600(2dcase); 41GaA 512, 153SE441(1stcase); 41GaA714, 154 SE467; 41GaA827, 155SE48; GaA 155 SE798; 46 Ida326, 268P6; 47 Ida380, 275P1114; 48 Ida524, 283P515; Ida 287 P202; 316 Ill 394, 147NE394; 323 Ill 459, 154NE203; 324 Ill 504, 155NE292; 326 Ill 120, 156NE763; 327 Ill 79, 158 NE405; Ill 173NE49; Ill 173NE161; Ill 173NE470; 83 IndA482, 148NE496; 83 IndA555, 149NE182; 84 IndA305, 151NE355; 86 IndA368, 158NE231; 87 IndA90, 160NE54; 87 IndA276, 162NE 30; 89 IndA38, 165NE760(2dcase); 89 IndA573, 166NE613; 202 Iowa1044, 208 NW764; 202 Iowa772, 211NW413; 203 Iowa1171, 212NW419; 203 Iowa1229, 212NW577; 203 Iowa395, 214NW585; 204 Iowa180, 214NW700; 208 Iowa262, 225NW404; 208 Iowa1281, 227NW153; Iowa 228NW9; 209Ky370, 272SW882; 212Ky1, 278SW171; 213Ky134, 280SW 936; 213Ky636, 283SW1039; 214Ky 470, 283NW438; 214Ky635, 283SW1007; 214Ky775, 283NW1067; 215Ky262, 287 SW713; 217Ky103, 288SW1057; 218 Ky293, 291SW394; 219Ky58, 292SW 469; 219Ky546, 293SW1056; 220Ky 449, 295SW406; 220Ky785, 295SW 1017; 220Ky764, 295SW1044; 222Ky 388, 300SW896; 222Ky644, 18W(2d) 1082; 223Ky529, 4SW(2d)374; 223Ky 710, 4SW(2d)701; 223Ky839, 4SW(2d) 1111; 224Ky200, 5SW(2d)1042; 224 Ky434, 6SW(2d)495; 225Ky315, 8SW (2d)419; 225Ky372, 9SW(2d)109; 226 Ky16, 10SW(2d)455; 226Ky7, 10SW (2d)463; 226Ky25, 10SW(2d)480; 227 Ky217, 12SW(2d)314; 228Ky844, 14 SW(2d)1064; 229Ky450, 17SW(2d)406; 230Ky108, 18SW(2d)958; 230Ky562, 20SW(2d)448; 232Ky243, 22SW(2d) 623; 233Ky273, 25SW(2d)384; 233Ky 699, 26SW(2d)513; 233Ky632, 26SW (2d)521; 234Ky42, 27SW(2d)430; 234 Ky72, 27SW(2d)431; 234Ky166, 27SW (2d)586; 234Ky654, 28SW(2d)990; 235 Ky278, 30SW(2d)955; 235Ky534, 31SW (2d)903; 236Ky39, 32SW(2d)540; 218 Ky116, 290SW1049; 11LaA66, 1208403 (2dcase); 125Me49, 130A857; 125Me 168, 132A129; 125Me245, 132A698; 125 Me313, 133A736; 125Me408, 134A450; 125Me524, 134A626; 126Me597, 138A 310; 126Me601, 138A628; 126Me572, 140A370; 128Me126, 145A742; 128Me 177, 146A258; 128Me353, 147A431; 128 Me407, 148A35(1stcase); 252Mass191, 147NE548; 253Mass537, 149NE411; 254Mass483, 150NE215; 254Mass496, 150NE299; 255Mass241, 151NE91; 256 Mass593, 152NE882; 258Mass170, 154 NE565; 258Mass475, 155NE423; 259 Mass222, 156NE28; 260Mass222, 157 NE342; 261Mass436, 158NE845; 264 Mass495, 163NE161; 266Mass355, 165 NE120; 266Mass516, 165NE670; Mass 167NE352; Mass 167NE914; Mass 169 NE425; Mass 170NE56; Mass 170NE 838; Mass 171NE438; Mass 172NE254; Mass 173NE521; 233Mich531, 207NW 852; 233Mich538, 208NW44; 234Mich 643, 209NW40; 234Mich634, 209NW47; 239Mich506, 214NW938; 239Mich501, 214NW953; 243Mich261, 220NW728; 245Mich256, 222NW77; 249Mich186, 228NW701(2dcase); 250Mich460, 231

NW40; 251Mich309, 232NW369; Mich 233NW342; Mich 233NW350; 167Minn 269, 208NW802; 168Minn65, 209NW 898; 169Minn153, 210NW871; 169 Minn245, 210NW1003; 170Minn159, 212 NW175; 170Minn143, 212NW187; 172 Minn94, 214NW923; 172Minn178, 215 NW204; 174Minn376, 219NW292; 174 Minn362, 219NW293; 175Minn51, 220 NW401; 175Minn612, 220NW408; 177 Minn503, 225NW428; 179Minn416, 229 NW561; Minn 233NW245(1stcase); MoA 25SW(2d)1086; MoA 27SW(2d) 459; MoA 28SW(2d)387; MoA 31SW (2d)573; 78Mont579, 254P880; 79Mont 358, 257P270; 83Mont122, 270P634; NJSup 140A562; NJSup 147A638; 243 NY257, 153NE667; 223AppDiv584, 229 NYS92; NC 153SE594; 35 OhA169, 172 NE294; 112 Okl 230, 240P634; 112 Okl 245, 240P640; 112 Okl 292, 240P1053; 113 Okl 179, 241P170; 113 Okl 230, 241 P174; 113 Okl 296, 241P1092; 115 Okl 173, 242P217; 114 Okl 3, 242P765; 116 Okl 20, 242P1042; 116 Okl 115, 243P 520; 115 Okl 273, 244P432; 117 Okl 283, 246P432; 121 Okl 260, 249P395; 119 Okl 275, 249P704; 120 Okl 37, 250 P138; 120 Okl 197, 251P40; 122 Okl 159, 252P430; 124 Okl 140, 254P66; 122 Okl 257, 254P98; 125 Okl 142, 256 P898; 125 Okl 155, 256P937; 126 Okl 91, 258P743; 126 Okl 122, 258P905; 126 Okl 289, 259P229; 126 Okl 235, 259 P265; 127 Okl 32, 259P550; 127 Okl 52, 259P638; 127 Okl 45, 259P639; 127 Okl 58, 259P853; 128 Okl 25, 261P181; 128 Okl 156, 261P926; 128 Okl 191, 261P 933; 128 Okl 188, 261P973; 128 Okl 243, 262P648; 128 Okl 295, 262P1062; 129 Okl 133, 263P1085; 129 Okl 271, 264 P622; 130 Okl 45, 265P114; 130 Okl 116, 265P644; 130 Okl 199, 266P463; 130 Okl 265, 267P241; 131 Okl 158, 268 P198; 131 Okl 260, 268P718; 132 Okl 241, 269P262; 131 Okl 303, 269P312; 132 Okl 290, 270P575; 132 Okl 300, 270 P1103(2dcase); 133 Okl 77, 271P142; 134 Okl 300, 272P1030; 135 Okl 23, 273 P207; 135 Okl 21, 273P208; 136 Okl 18, 275P1053; 136 Okl 302, 276P730; 136 Okl 244, 277P268; 136 Okl 287, 277P 937; 138 Okl 118, 280P585; 138 Okl 228, 280P823; 139 Okl 32, 280P1100; 139 Okl 47, 281P232; 139 Okl 79, 281P 269; 139 Okl 231, 281P949; 139 Okl 236, 281P964; 139 Okl 269, 281P966; 139 Okl 163, 282P143; 140 Okl 54, 282P 153; 140 Okl 57, 282P606; 141 Okl 154, 284P293(1stcase); 141 Okl 202, 284P 644; 141 Okl 204, 284P647; 142 Okl 235, 286P314; 142 Okl 285, 286P768; 142 Okl 249, 286P788; 143 Okl 29, 287P 69; 143 Okl 94, 287P1009; 143 Okl 279, 288P473; Okl 289P1103; Okl 291P531; Okl 291P533; Okl 291P551; Okl 292 P63; 36 OklACR474; 36 OklACR491; 38 OklACR352; 123 Or334, 262P250; 286Pa311, 133A498; 286Pa278, 133A 504; 286Pa301, 133A547; 290Pa267, 138A841; 291Pa157, 139A727; 291Pa 426, 140A339; 293Pa103, 141A635; 297 Pa302, 146A893; 298Pa336, 148A476; 299Pa493, 149A730; 89PaSuper503; 90 PaSuper237; 92PaSuper103; 95Pa Super355; 97PaSuper109; 98PaSuper 139; 8PaDist&Co 507; 9PaDist&Co 269; 10PaDist&Co 283; 11PaDist&Co 190; 53SD13, 219NW884; 153Tenn144, 281 SW927; 156Tenn184, 299SW772; Tex CivA 298SW164; TexCivA 300SW137; 66Utah256, 241P362; 66Utah529, 244P 656; 67Utah349, 247P574; 67Utah483, 248P125; 67Utah537, 248P490, 49ALR 415; 68Utah383, 250P651; 70Utah333, 260P271; Utah 263P746; Utah 267P 785; Utah 275P580; Utah 278P1019; Utah 280P728; Utah 285P306; Utah 289P114; 100Vt45, 134A640; 149Va 371, 141SE142; 152Va150, 147SE537; 143Wash380, 255P385; 106WVa563, 146 SE368; 106WVa555, 146SE375; 107 WVa583, 149SE824; 108WVa397, 151 SE309; 108WVa428, 151SE311; 188 Wis53, 205NW496 (any credible evidence); 192Wis362, 212NW641, 57ALR 627; 192Wis574, 213NW292; 194Wis 131, 215NW815; 194Wis198, 215NW 824; 196Wis159, 216NW137; 195Wis 267, 218NW182; 200Wis123, 227NW 291; Wis 230NW627; Wis 231NW249; But see 333 Ill 505, 165NE157; 294Pa 253, 144A79. [a] (2) Under later statutes. CalA 292P525. [b] (1) 228Ky 786, 16SW(2d)167; 254Mass483, 150NE 215; 254Mass496, 150NE299; 172Minn 549, 216NW240; NJSup 152A78. (2) Conn 152A144. (4) 217Ky371, 289SW 270; 254Mass371, 150NE151. (5) 202 Cal 459, 261P466. (8) 246Mich599, 225 NW524. (9) 36GaA631, 137SE788; 204 Iowa1001, 216NW695; 229Ky389, 17 SW(2d)258; 246Mich191, 224NW390; 128 Okl 295, 262P1062; 288Pa140, 135A903. (10) 86Colo 290, 281P 110; 37GaA759, 142SE182; 202 Iowa 67, 209NW415; 206 Iowa790, 221NW 481; 228Ky124, 14SW(2d)377; 253 Mass420, 149NE125; 246Mich193, 224 NW354; 172Minn551, 216NW239; 295 Pa60, 144A768; NB [1928] 1DomLR 114. (11) 202Cal 517, 261P704; 85 IndA657, 155NE514; 265Mass117, 164 NE68; Mass 167NE284; Mass 167NE 914. (12) 85 IndA647, 155NE523; 200 Iowa857, 205NW497. (18) 67Utah174, 246P698; 67Utah194, 246P705; 67Utah 197, 246P706. (80) 219Ky58, 292SW469. (94) That employee suffered total temporary disability. 188Wis53, 205NW496. (95) That injury to finger was proximate cause of subsequent condition. 165Minn354, 206NW433. (96) As to extent of permanent disability. 188Wis 53, 205NW496. (97) That injury was result of accident at time when surety company was not carrying risk. 112 Okl 250, 240P635. (98) That injury arose in course of employment, employer admitting this and no fraud appearing. 125Mel, 130A350. (99) Employment of more than two workmen. 112 Okl 292, 240P1053. (100) That employment was within compensation statute. 125Mel6, 130A355. (101) As to whether workman was employee or independent contractor. 199Cal 577, 250P570; 113 Okl 296, 241P1092. (102) That claimant sustained no permanent injury other than loss of use of one leg. 116 Okl 232, 244P201. (103) That employee had recovered from injury and was able to return to work. 116 Okl 20, 242P 1042. (104) Finding by commissioner of compensation period for more than loss of hand and less than arm at period between that fixed for loss of hand and that fixed for loss of arm held conclusive. 201 Iowa607, 206NW146. (105) That mother of deceased employee was not partially dependent on him for support. 71CalA303, 234P921. (106) Injury to shoulder was due to organic disease and not to a fall during course of employment. 67Utah157, 246P364. (107) Causal connection between accident and infection necessitating removal of eyeball. 166Minn506, 208NW 188. (108) That employee's disability caused by heart trouble and hardening of arteries was not result of injuries received. 233Mich531, 207NW852. (109) That paresis, caused by syphilis, was accelerated by injuries. 167Minn475, 209NW635. (110) That at time of filing claim employee was not suffering from injury previously received and for which he had received compensation. 234Mich643, 209NW40. (111) That deceased had contributed funds for support of son by former wife. 66 Utah256, 241P362. (112) That claimant failed to estabilish change in condition or other facts sufficient to entitle him to further compensation. 117 Okl 296, 246P392. (113) Reasonableness of claimant's refusal to submit to operation. 215AppDiv634, 214NYS430. (114) Whether claimant was member of deceased employee's family. Mass 169NE 779. (115) That lessor of mine was operating its business "by leasing." 82 Colo 272, 259P1036. (116) That deceased was employee and not colessee of mine. 82Colo 272, 259P1036. (117) That claimant not totally dependent. 37GaA140, 139SE359. (118) Whether at time of death of employee he and his wife were living together. 84 IndA473, 151NE434. (119) Amount of contribution to support of partial dependent that deceased employee would make. 196Wis159, 216NW137. (120) That employee's death did not arise out of, and in the course of, his employment. 37 GaA539, 140SE899. (121) Other findings held conclusive. 74CalA615, 241P 405; 84CalA554, 258P415; 84CalA506, 258P698; 87CalA766, 262P471; 92CalA 119, 267P922; 85Colo 279, 275P903; 109Conn62, 145A25; 36GaA784, 138SE 246; 326 Ill 116, 157NE32; 203 Iowa 1395, 214NW585; 204 Iowa180, 214NW 700; 206 Iowa120, 219NW65; 124Kan 115, 257P939; 212Ky1, 278SW171; 214 Ky470, 283SW438; 216Ky262, 287SW 713; 219Ky546, 293SW1056; 225Ky 223, 78W(2d)1037; 233Ky702, 26SW (2d)530; 126Me597, 138A310; 265Mass 439, 164NE441(1stcase); 267Mass232, 166NE556; Mass 167NE284; 246Mich 193, 224NW354; 246Mich191, 224NW 390; 246Mich599, 225NW524; 249Mich 449, 229NW423(1stcase); 169Minn491, 211NW683; 172Minn94, 214NW923; 175 Minn489, 221NW913; 176Minn638, 223 NW787(1stcase); 78Mont579, 254P880; 119 Okl 275, 249P704; 122 Okl 159, 252 P430; 134 Okl 179, 272P848; 142 Okl 285, 286P768; 143 Okl 94, 287P1009; 286Pa311, 133A498; 292Pa284, 141A35; 93PaSuper61; 157Tenn559, 11SW(2d) 889; TexCivA 298SW639; 148Va125, 138SE494; Wis 230NW36. [c] (3) That workman was totally or permanently incapacitated to labor. TexCivA 283 SW208. [f] (3) Where there is no evidence to support award, such award will be vacated. 131 Okl 303, 269P312. [j] **Evidence held to sustain award.**–35GaA 759, 134SE788; TexCivA 278SW294. [k] **Rule applies where there is no claim of fraud.**–212Ky1, 278SW171. [l] **Conclusion that loading logs on railroad car** was incident to "manufacturing of lumber" within assent to come within Compensation Act not erroneous as matter of law. 125Mel6, 130A355. [m] **In Illinois** finding will not be set aside unless manifestly against weight of evidence. 334 Ill 52, 165NE225; 334 Ill 390, 166NE678. [n] **That board gave erroneous reason** is not ground for setting aside its finding sustained by competent evidence. 232Ky546, 24SW (2d)275. [o] **Findings against clear preponderance** of evidence are not conclusive. WVa 152SE857. [p] **Finding of cause of injury** held supported by evidence. Ariz 293P20.

122–40½–New. or unless clearly opposed to the preponderance of the evidence. 52ND563, 203NW895.

122–40¼–New. or if commission could have found either way. 68Utah1, 248P 1103 (on issue of dependency).

123–41 220Ala562, 126N626; 31Ariz 224, 252P512; 34Ariz387, 271P713; Ariz 293P20; 195Cal 174, 231P996 (weight, effect, and sufficiency of testimony is peculiarly within province of commissioner); 197Cal 143, 239P1067 (permanency of employment); 202Cal 239, 259P1096, 54ALR1392; 70CalA 435, 233P381; 71CalA303, 234P921; 71 CalA542, 235P748 (conflict between medical books and physician's report); 71CalA749, 236P160; 72CalA240, 236P 962; 76CalA158, 243P886; 76CalA565, 245P445; 77CalA790, 247P526; 80CalA 388, 250P691; 81CalA582, 254P582; 83 CalA313, 256P487; 83CalA122, 256P 564; 84CalA506, 258P698; 86CalA588, 260P1104; 89CalA16, 264P286; 90CalA 357, 265P558; 91CalA304, 266P988; 95 CalA186, 272P589; 100CalA434, 280P 134(1stcase); CalA 287P566; CalA 288 P129; CalA 291P456; 77Colo 414, 236 P1006 (servant or contractor); 83Colo 158, 262P1019; 83Colo 239, 264P723; 83Colo 315, 265P99; 86Colo 530, 284P 334; 105Conn651, 136A472; 107Conn 56, 139A644, 56ALR455; 169Ga746, 151 SE363; 43 Ida477, 253P132; Ida 290P 204; 318 Ill 328, 149NE264; 323 Ill 80, 153NE699; 327 Ill 615, 159NE197; 337 Ill 59, 168NE652; 337 Ill 514, 169NE 202; 337 Ill 454, 169NE225; 84 IndA 305, 151NE355; 85 IndA259, 152NE 856; 89 IndA38, 165NE760(2dcase); 200 Iowa150, 204NW225; 200 Iowa857, 205NW497; 202 Iowa1044, 208NW709; 202 Iowa67, 209NW415; 202 Iowa398, 210NW459; 203 Iowa1171, 212NW419; 203 Iowa1395, 214NW585; 204 Iowa 180, 214NW700; 204 Iowa546, 215NW 603; 204 Iowa1348, 217NW264; 206 Iowa120, 219NW65; 207 Iowa1129, 224 NW86; 208 Iowa262, 225NW404; Iowa 231NW490; Iowa 233NW141 (mere conflict does not give jurisdiction to review); 220Ky224, 294SW1029; 220

Ky381, 295SW464; 226Ky204, 10SW (2d)809; 11LaA140, 119S714; 125Me 135, 131A391; 125Me147, 131A860; 154Md239, 140A215; 253Mass535, 149 NE409; 254Mass371, 150NE151; Mass 167NE350; 250Mich46, 229NW595(2d case); 251Mich300, 232NW227; 169 Minn153, 210NW871; 170Minn410, 212 NW813; 172Minn489, 216NW241; 174 Minn94, 218NW243; 177Minn55, 225 NW439(1stcase); 254NY60, 171NE906; 113 Okl 296, 241P1092; 115 Okl 67, 241 P820; 127 Okl 52, 259P638; 127 Okl 45, 259P639; 127 Okl 58, 259P853; 141 Okl 187, 284P633; 288Pa394, 136A230; 290Pa267, 138A841; 291Pa379, 140A 345; 96PaSuper463 (hernia); TexCivA 271SW633; 67Utah537, 248P490, 49 ALR415; 70Utah333, 260P271; Utah 290P770; 98Vt514, 129A168; 148Va 125, 138SE494; 152Va150, 147SE537; 106WVa57, 144SE717; 106WVa572, 146SE372(2dcase); 107WVa544, 149SE 612; 194Wis600, 217NW327; 34Wyo 357, 243P593. See also 336 Ill 568, 168 NE644; 293Pa448, 143A116, 60ALR 1288 (question whether death resulted from disease or fall is for board on conflicting evidence). [a] (1) 125Me135, 131A391. (3) Findings of commission on weight of testimony will not be reviewed in absence of fraud. 125Me135, 131A391. [g] **Evidence held insufficient** to support finding that disability was due to accident. 214AppDiv356, 212 NYS73 (where testimony was speculative); 215AppDiv741, 212NYS76 (where finding was based on unverified X-ray picture, not being legal evidence). [h] **That claimant testified falsely at prior hearing** is not ground for setting aside finding on conflicting evidence. 83Colo 239, 264P723. [i] **Implied findings** on conflicting evidence are conclusive. CalA 285P707. [j] **Credibility of witnesses** is for industrial commissioner. Iowa 231NW490.

123-42 203 Iowa1395, 214NW585; 208 Iowa262, 225NW404; 170Minn143, 212 NW187; 175Minn51, 220NW401; 177 Minn519, 225NW652; 89PaSuper449; 67Utah292, 247P298.

123-42½-New. , or the evidence would have supported different finding. 130 Kan504, 287P585.

123-42¼-New. Unless evidence is so conclusive as to establish dependency as matter of law, reviewing court cannot annul award denying compensation. 67 Utah197, 246P706

123-43 34F(2d)549; 43F(2d)983; 202 Cal 688, 262P309, 58ALR1392; Cal 269 P641; 206Cal 102, 273P791; 70CalA 435, 233P381 (medical testimony); 73 CalA519, 238P1052; 73CalA521, 238P 1056; CalA 290P922; 86Colo 580, 284P 334; 325 Ill 193, 156NE344; 325 Ill 378, 156NE346; 326 Ill 116, 157NE32; 335 Ill 374, 167NE26; 200 Iowa944, 205 NW737; 202 Iowa67, 209NW415; 202 Iowa773, 211NW413; 204 Iowa546, 215 NW603; Iowa 233NW141; 213Ky636, 281SW1039; 217Ky103, 288SW1057; 228Ky776, 15SW(2d)507; 229Ky389, 17SW(2d)258; 127Me549, 143A270; 253 Mass114, 148NE440; 169Minn241, 211 NW8, 60ALR1296; 174Minn147, 218 NW555, 57ALR611; Minn 232NW716; MoA 17SW(2d)578; MoA 30SW(2d) 650; MoA 31SW(2d)573; 126 Okl 122, 258P905; 286Pa199, 133A256; 288Pa 140, 135A903; 290Pa267, 138A841; 293 Pa448, 143A116, 60ALR1288; 295Pa14, 144A819; 51SD359, 213NW947; Tex CivA 9SW(2d)457; 66Utah494, 243P 800 (review by appellate court limited to question whether record presents sufficient substantial evidence to support award); 67Utah292, 247P298; 188 Wis228, 205NW795; 192Wis362, 212 NW641, 57ALR627; 194Wis615, 217 NW408. But see 341 Ill 46, 173NE131 (supreme court must set aside decision where it is without substantial foundation in evidence). [g] **Evidence held to support finding** that operation for hernia induced delirium tremens and that death resulted from operation. 169 Minn241, 211NW8, 60ALR1296. [h] **It is for board to determine weight of testimony** regarding cause of employee's death. 297Pa124, 146A562. [i] **Where different inferences can be drawn from evidence findings** must be viewed as supported by substantial evidence. MoA 24SW(2d)1077. [j] **Findings held supported** by substantial evidence. Iowa 233NW141.

123-44 202Cal 688, 262P309, 58ALR 1392; 76CalA565, 245P445; CalA 275P 844; 109Conn62, 145A22; 38GaA759, 145SE536; 88 IndA24, 163NE118; 208 Iowa1010, 226NW719 (cannot be predicated on conjecture); Iowa 233NW141; 125Me49, 130A857; 127Me207, 142 A730; 169Minn153, 210NW871; MoA 25SW(2d)1086; 286Pa311, 133A498; 290Pa341, 138A855, 58ALR1463; Okl 293P230; 51SD359, 213NW947; 152 Tenn401, 277SW902 (decree awarding compensation for three hundred weeks not disturbed for want of proof that disability will so long continue); Utah 284P313; 194Wis198, 215NW824. [b] 86 IndA406, 158NE249. [f] **Inclusion of improper item in allowance for medical expenses** will not be presumed. 83Colo 239, 264P723.

123-44½-New. The rule is the same whether decision or award is unanimous or only by a majority of commission. 67Utah292, 247P298.

123-44¼-New. Findings cannot be disturbed except upon clear and convincing evidence that commission acted arbitrarily or capriciously. 67Utah174, 246P698.

123-44¼-New. The appellate court may interfere with a finding only where there is no substantial evidence thereon, or, from the evidence, a fact finding is necessarily based on a conclusion of law. 92CalA119, 267P922.

123-45 31Ariz224, 252P512; 35Ariz19, 274P161; 73CalA519, 238P1052; 46 Ida 326, 268P6; 317 Ill 428, 148NE262; 84 IndA473, 151NE434; 202 Iowa1044, 208 NW709; 207 Iowa1129, 224NW86; 170 Minn410, 212NW813; 320Mo 893, 8SW (2d)897; 222MoA1138, 14SW(2d)660; MoA 24SW(2d)1077; MoA 25SW(2d) 144; MoA 25SW(2d)1086; MoA 30SW (2d)650; MoA 31SW(2d)573; 290Pa 341, 138A855, 58ALR1463; 292Pa509, 141A481; 293Pa448, 143A116, 60ALR 1288; 296Pa216, 145A905; 51SD359, 213NW947; 106WVa563, 146SE368; 107WVa583, 149SE824. [a] **In reviewing board's findings,** evidence must be considered in most favorable light to party obtaining verdict. 288Pa140, 135 A903.

123-45½-New. Judge of superior court on appeal has not that discretion to set aside order of industrial commission which he exercises in passing upon motions for new trial and petitions for certiorari where evidence authorizes finding for either party. 34GaA 307, 129SE305.

123-46 326 Ill 120, 156NE763. But see Mont 289P563.

123-47 32Ariz54, 255P598; 200Cal 456, 253P712; 96CalA337, 274P81; 76 CalA565, 245P445; CalA 262P805; 95 CalA186, 272P589; 82Colo 335, 259P 509; 105Conn545, 135A911; 111Conn 532, 150A514; 36GaA761, 138SE257; 46 Ida730, 271P459; 47 Ida380, 275P 1114; 48 Ida136, 279P1087; Ida 287P 202; 324 Ill 89, 154NE412; 327 Ill 615, 159NE197; 332 Ill 386, 163NE789; 339 Ill 252, 171NE165; 86 IndA639, 159NE 155; 86 IndA578, 158NE909; 202 Iowa 1044, 208NW709; 204 Iowa174, 214NW 529, 62ALR432; 206 Iowa120, 219NW 65; 208 Iowa202, 225NW357; Iowa 231 NW490 (holding undisputed facts, or insufficient evidence to support findings, are not binding on courts); 212 Ky1, 278SW171; 235Ky613, 31SW(2d) 915; 126Me572, 140A370; Mass 169NE 156; 165Minn169, 205NW953; 169Minn 153, 210NW871; 169Minn195, 210NW 876; 169Minn360, 211NW320; MoA 14 SW(2d)470; MoA 32SW(2d)107; 214 AppDiv825, 210NYS638 (award cannot be sustained where evidence and finding do not show extent of disfigurement); 111 Okl 265, 239P575; 112 Okl 230, 240P634; 113 Okl 179, 241P170; 113 Okl 296, 241P1092; 120 Okl 31, 250 P111; 120 Okl 37, 250P138; 124 Okl 140, 254P66; 126 Okl 91, 258P743; 126 Okl 235, 259P265; 128 Okl 25, 261P181; 130 Okl 116, 265P644; 131 Okl 303, 269 P312; 132 Okl 244, 270P85; 134 Okl 123, 274P15; 140 Okl 54, 282P153; Okl 292P63; 285Pa443, 132A358; 286Pa 199, 133A256; 288Pa394, 136A230; 289 Pa418, 137A662; 292Pa284, 141A35; 295Pa80, 144A821(2dcase); 91PaSuper 271; 7PaDist&Co 366; 154Tenn329, 289SW519; 66Utah529, 244P656; 67 Utah157, 246P364; 70Utah116, 258P 339. See also 81CalA137, 252P1069, 253 P976; 91CalA577, 267P880; 106Conn 250, 137A761; 208 Iowa1281, 227NW 153; 150Va260, 142SE400. [a] (1) See also 103Conn49, 130A73. (2) Authority of court restricted to ascertainment of whether commission exceeded jurisdictional power. CalA 260P967. [d] **In Maine** (1) whether findings of fact are supported by evidence is sole question on review, in absence of fraud, in view of Rev. St. c 50 § 4, as amended by L. (1919) c 238 § 4. 125Me16, 130A355. (2) Evidence must be taken most favorable for claimant. 125Me168, 132A129. [e] **Corroboration.**–225AppDiv323, 232 NYS469. [f] **Finding will be reversed** if found without proof or evidence is based on erroneous belief as to existence of fact. 296Pa503, 146A146. [g] **Findings supported by mere speculation are reviewable.**–208 Iowa1281, 227NW 153. [h] **Courts may review and set aside** commissioners' action if findings are unsupported by sufficient facts. Iowa 233NW141.

123-47½-New. Findings of the commission are conclusive and binding unless obtained by fraud or inconsistent with other findings in the case. 145Va 79, 133SE663.

123-48½-New. Award will not be disturbed in the absence of fraud, excess of jurisdiction, or findings are unsupported by the evidence. 83Colo 239, 264P723. [a] **Award is not procured by fraud on commission** where commission knew facts. 83Colo 239, 264P723.

123-48¼-New. Review is limited to determination of whether findings have legal evidence to support them. 292Pa 509, 141A481.

123-48¼-New. The opinions of the commission are not part of the record to be looked to for findings of fact but may be made part of record to give the appellate court benefit of their views. 143Va244, 129SE268.

123-48⅓-New. An order of the industrial commission denying compensation cannot be set aside on any grounds except those specified by statute. 34GaA 307, 129SE305.

123-48⅓-New. Where the facts not in dispute may be concluded oppositely by ordinary minds, their determination is for the trier of the facts. 125Me16, 130 A355.

123-48½-New. A commissioner's finding on the evidence that claimant was an employee engaged in manufacturing lumber and not logging is one of fact. 125Me16, 130A355.

123-48⅔-New. It is not the province of the appellate court to make findings of fact but to determine questions of law. 166Minn251, 207NW636.

123-48⅚-New. The question whether the wages of an injured minor would be expected to increase is for the board to determine under the evidence. 214App Div341, 212NYS139.

123-48 1/10-New. Defendants held entitled to amendment of findings to include definitions of optical terms. 106Conn 401, 138A448.

123-48 1/11-New. Defendants held entitled to correction of findings in details as to extent of eye injury. 106Conn401, 138A448.

123-48 1/12-New. Court may have jurisdiction to review findings of fact and to decide case on merits. NJSup 135A 775.

123-48 1/18-New. Evidence, not specifically contradicted as to employee's health, does not establish undisputed fact required to be added to findings. 105Conn651, 136A472.

123-48 1/14-New. Finding of fact will be set aside if contrary to manifest weight of evidence. 324 Ill 504, 155NE292.

123-48 1/15-New. The findings of the board, if supported by evidence, supersede those of single member thereof.

258Mass489, 155NE460.

123-48½6-New. An award based upon testimony taken under letters rogatory which were issued without authority will be set aside. 239Mich508, 215NW 21.

123-48½7-New. Where competency of evidence is admitted, whether on weighing it a fact should be found therefrom is a question of fact. 286P199, 133A256.

123-48½8-New. Burden of showing that findings of commission are not supported by the evidence is upon petitioner. 100Vt45, 134A640.

123-48½9-New. Where fair investigation of claim is made, ruling denying application for reopening case will not be reviewed. 143Wash380, 255P385.

123-48½0-New. District court may add to findings of commission other undisputed facts. 81Colo 111, 253P828.

123-48½1-New. Dogmatic assertions that percentage of disability as to vision is based on numerical fractions of Snellen symbols for testing vision held to lead to absurdities disproving theory of tests. 218AppDiv310, 218NYS213.

123-48½2-New. Under statutes in some jurisdictions the court may determine whether the award is manifestly against the weight of the evidence. 321 Ill 61, 151NE593.

123-48½3-New. Finding of commission will be given same weight as is given to other administrative bodies. 321 Ill 61, 151NE593.

123-48½4-New. and its decision will be reversed if against the weight of the evidence. 321 Ill 61, 151NE593.

123-48½5-New. A proceeding to review an order of the industrial commission is one to review errors of law, and not of fact. 128 Okl 191, 261P933; Okl 261 P973.

123-48½6-New. Refusal to correct findings by addition not supported by evidence is not error. 107Conn143, 139A 642.

123-48½7-New. Denial of motion to correct finding is proper where correction would not change result. 107Conn143, 139A642.

123-48½8-New. Findings are not conclusive unless supported by evidence of substantial value. 222Ky284, 300SW 609.

123-48½9-New. A finding of a commissioner, supported by some evidence and approved by the full commission, will be sustained. 37GaA688, 141SE669.

123-48½0-New. Facts established by claimant, without counsel, must not be unduly minimized. 107Conn370, 140A 728.

123-48½1-New. The court is not bound by a deputy commissioner's reasoning. 126Me572, 140A370.

123-48½2-New. The conclusion of a board, if natural and rational, must stand even though supporting evidence is not viseed by an expert. 127Me214, 142A777.

123-48½3-New. In a suit under the Workmen's Compensation Act to set aside an award, the evidence relative to whether a deceased employee was injured in the course of his employment under a contract with a subscriber with the Employers' Insurance Association was held sufficient for submission to the jury. TexCivA 8SW(2d)696.

123-48½4-New. The only function of juries in cases under the Workmen's Compensation Law is to pass on issues of fact. 156Md74, 143A654.

123-48½5-New. The rate of discount to be allowed in awarding a lump sum settlement, in proceedings under the Workmen's Compensation Act, is a question of fact to be determined in each case by the court or jury trying the facts. TexCivA 9SW(2d)457.

123-48½6-New. Where conclusions reached by the commission are manifestly contrary to the evidence they cannot stand. 175Minn489, 221NW913.

123-48½7-New. The district court, where the evidence appears in a record, must consider it in conjunction with all the other evidence in the case in determining whether the findings are justified by the evidence as a whole. 83Mont 152, 269P403.

123-48½8-New. The ruling on a question as to whether there was an accident authorizing compensation must be governed by the law under which an award was granted. MoA 18SW(2d)97.

123-48½9-New. Where the compensation authorities failed to make inferential findings, the courts will not interfere unless such findings are inevitable from the proofs presented. 296Pa216, 145A905.

123-48½0-New. In the absence of a finding that the employee was wholly and permanently disabled, the reviewing court must assume that the evidence was not sufficient to support such a finding. 88 IndA382, 164NE282.

123-48½1-New. The legal significance of the facts is a matter of law on appeal, where there is no dispute as to the inferences to be drawn therefrom. 157 Md487, 146A392.

123-48½2-New. Whether the injury was confined in its effect to the leg and ankle or caused the whole body to suffer are questions of fact to be determined by the evidence. TexCivA 20SW(2d) 334.

123-48½3-New. Where the award named the husband as sole respondent, the court must assume that no claim was made against his wife. 109Conn469, 147 A14.

123-48½4-New. Courts are not authorized to interfere with an award unless clearly not in accordance with the law. 33F(2d)218.

123-48½5-New. Evidence held sufficient to go to the jury whether a fall from an elevator resulted in a disease or infection causing death. TexCivA 18SW (2d)1093.

123-48½6-New. A reviewing court cannot determine credit to be given witnesses. Mass 167NE914.

123-48½7-New. A reviewing court cannot consider attacks on findings or omission of additional findings, where no evidence is presented. 109Conn469, 147 A14.

123-48½8-New. Appellate court has no authority to review finding of board and adopt that of single member. Mass 170 NE56.

123-48½9-New. In some jurisdictions only function of appellate court is to determine what kind of decree ought to be entered on decision of board. Mass 170NE56.

123-48½0-New. In determining sufficiency of evidence to support award appellate court will consider only evidence most favorable to claimant and will draw inferences most favorable to award. MoA 24SW(2d)224.

123-48½1-New. Finding of commission cannot be supported by taking bits of testimony out of their context and considering them alone. 200Wis616, 229 NW194.

123-48½2-New. Uncontradicted statement by plaintiff must be accepted as true. 12LaA348, 124S542.

123-48½3-New. Finding dependent on correct legal conclusion from consideration of many facts with legal principles is not binding on certiorari. CalA 287 P368.

123-48½4-New. Jurisdiction of appellate court is limited to determining whether evidence sustains award. CalA 287P567.

123-48½5-New. Only evidence tending to support finding will be considered. MoA 30SW(2d)650.

123-48½6-New. Judgment awarding compensation for total disability has been held unauthorized where jury's finding is not responsive to issue. Tex CivA 23SW(2d)405.

123-48½7-New. Where board made no findings of fact, dismissal of application cannot be sustained unless no conflict of evidence can be found on any decisive feature. 235Ky534, 31SW(2d)903.

123-50 203 Iowa1171, 212NW419; 238 Mich572, 214NW174; NC 153SE591; 126 Okl 122, 258P905; 69Utah452, 256 P397; 146Wash85, 261P802. But see NC 154SE69. [c] 195Wis468, 218NW 716.

123-50½-New. In Ohio it is held that constitutional provisions making decision of industrial commission final as to whether injury or death resulted from employer's failure to comply with specific requirements does not prevent review of questions of law. 115 Oh654, 155NE484.

123-51 200Cal 456, 253P712; 102Conn 471, 129A50; 43 Ida477, 253P132; 48 Ida136, 279P1087; 322 Ill 169, 152NE 479; 203 Iowa1171, 212NW419; 208Ky 618, 271SW687; 209Ky73, 272SW31; 217Ky103, 288SW1057; 220Ky381, 295 SW464; 228Ky367, 15SW(2d)291; 230 Ky800, 20SW(2d)988; 126Me358, 138A 555; 156Md74, 143A654; 79Mont358, 257P270; 115 OhSt654, 155NE484; 117 Okl 296, 246P392; 126 Okl 235, 259P 265; 128 Okl 191, 261P933; 128 Okl 188, 261P973; 144 Okl 279, 291P571; 36 OklACR491; 286Pa199, 133A256; 286Pa301, 133A547; 288Pa140, 135A 903; 291Pa157, 139A727; 90PaSuper 456; 154Tenn329, 289SW519; TexCivA 300SW196; 56Utah173, 240P440; Utah 286P628; 100Vt45, 134A640. [a] (9) Whether corporation vice president was "tenant" held question of law for court. 288Pa104, 135A652. [b] **Veracity of witnesses** is for commission, and if no testimony is rejected, determination of whether service rendered was such as was within contract is question of law. 128Me303, 147A215.

124-52 44 Ida566, 260P172; 46 Ida 730, 271P459; Ida 286P369; 204 Iowa 168, 214NW516; 208 Iowa1037, 226NW 71; 230Ky800, 20SW(2d)988; 231Ky 93, 21SW(2d)112; 231Ky269, 21SW(2d) 277; 231Ky705, 22SW(2d)117; 235Ky 278, 39SW(2d)955; 127Me374, 143A464; Md 150A804; Md 151A134; 252Mass 191, 147NE548 (appeal on record not without reasonable ground); Mass 172 NE346; MoA 29SW(2d)730; MoA 32 SW(2d)121; 83Mont152, 269P403; 36 OklACR474; 292Pa284, 141A35; 292Pa 509, 141A481; 88PaSuper470; 91PaSuper271; 98PaSuper139; TexCivA 30SW (2d)1055; 105WVa447, 143SE109; 188 Wis218, 205NW806, 44ALR1213; 200 Wis134, 227NW287; 200Wis123, 227 NW291; 200Wis8, 227NW292. [a] (1) 138 Okl 235, 281P273; 87PaSuper440. (2) Such question is reviewable where it depends wholly or principally on question of law. CalA 287P368.

124-53 48 Ida136, 279P1087; 6PaDist &Co 630; TexCivA 278SW294.

124-53½-New. sufficiency of undisputed evidence to support conclusions, 200 Iowa150, 204NW225; 224Ky167, 5 SW(2d)1043; 224Ky173, 5SW(2d)1049; 238Mich572, 214NW174.

124-54 322 Ill 169, 152NE479.

124-55 202 Iowa1044, 208NW709; 204 Iowa168, 214NW516.

124-57 [a] **Facts most favorable** to commission's conclusion will be considered. MoA 32SW(2d)121. [b] (1) 204 Iowa168, 214NW516.

124-58 [a] **Where facts are undisputed** question is one of law. TexCivA 32SW (2d)262.

124-59 200Cal 456, 253P712; 230Ky 800, 20SW(2d)988; 288Pa104, 135A652; 69Utah452, 256P397. [b] (3) Finding that decedent received injury arising out of and in course of employment is conclusion of law and not finding of fact where facts are undisputed. 49SD491, 207NW446.

124-60 100Vt284, 137A326. [a] **Where there is no issue of facts or facts are undisputed,** findings of board are subject to review. 217Ky103, 288SW1057.

124-60½-New. An award will be reversed, where tips, received by employee but not contemplated by contract of employment, are included in weekly wage. 214AppDiv826, 211NYS487.

124-60½-New. If the evidence on question of relation of employer and employee is oral, a mixed question of law and fact is presented, and therefore it is necessary for the court to review both the law and the evidence. 112 Okl 231, 240P618.

124-60¼-New. Construction of assent of employer to Compensation Act and of indemnity contract held question of law for court. 126Me102, 136A353.

124-60½-New. Where there is a mixed question of law and fact, the court may review the law question. 286Pa199, 133A256.

124-60¼-New. Where the facts are stipulated and adopted as the finding of

the board, the question whether an accident arose out of and in course of the employee's employment is one of law. 43 Ida825, 253P1104.

124-60½-New. Satisfaction of award, determining liability for injuries to contractor's workman, held not to render [illegible] of liability moot so as to prevent [illegible]. 81Colo 161, 254P160.

124-60¾-New. Court will review [illegible] 117Mo[illegible] 1[illegible]A[illegible]

124-60[illegible]-New. [illegible] wages [illegible] before and after injury [illegible] when award was not made [illegible] TexCivA 4SW(2d)9[illegible].

124-6[illegible]-New. Where the facts are [illegible] to state an order [illegible] 208 Iowa202, 2[illegible]NW[illegible]

124-6[illegible]-New. Judgment [illegible] MoA 2[illegible] SW 2[illegible]

124-6[illegible]-New. [illegible] 1[illegible]A[illegible]

124-61 (Ariz. 2[illegible]P[illegible] (Ga[illegible] [illegible] Minn[illegible] [illegible]NW[illegible] [illegible] Mo[illegible] 2[illegible]P[illegible] [illegible] Okl[illegible] [illegible] [illegible] [

jury, award was reversed and remitted. 215AppDiv734, 212NYS88. (12) Failure of board to make specific finding on material question and deciding claim on immaterial one. 216AppDiv577, 215NYS 562. (13) Where board states its inclination only, report should be returned for more specific findings of fact. 286 Pa199, 133A256. (14) Decision based on misunderstanding of testimony is error of law requiring remission. 127Me 249, 142A862. (15) Where board's finding is reversed because evidence is insufficient, case will be remitted. 296 Pa503, 146A146. (16) Order reversing commission's ruling rescinding award has no greater effect than to rule claimant entitled to compensation, and requires new order by commission either adopting amounts previously fixed or ascertaining new amounts. 157Md47, 145A197. (17) Where issue of fact whether compensated employee, acquiesced in judgment, so as to preclude appeal because amount awarded was insufficient, is presented on motion to dismiss appeal, case must be remanded to district court. 10LaA208, 120S777. (18) When findings on record are not sufficient to enable reviewing court to decide questions of law raised by appeal, it may remit record to board for more specific findings, but may not make findings of its own. 295Pa14, 144A819. [e] **Supreme court cannot grant new trial as matter of favor** either to industrial commission or to any party on affirming judgment of lower court. 187 Wis358, 204NW576. [f] **Sufficiency of judgment of recommittal.**—Judgment sufficiently indicates question for determination on new hearing, where it recites that evidence is insufficient to establish dependency for period of three months prior to injury, and is not sufficiently definite as to expense of last illness and funeral bills, and requires commission to receive testimony as to such amounts. 37GaA777, 142SE139. [g] **Where supreme court, affirms award and remands case,** commission is without power to grant new hearing. 174Minn153, 218NW 550. [h] **Where record is remitted for more specific findings** of fact, board should give all parties concerned opportunity to except to new findings. 294 Pa169, 144A89. [i] **Where commission failed to find** whether employee's death was caused by injury arising out of and in course of employment, and erroneously based denial of compensation partly on claimant's refusal to permit autopsy, trial judge may properly remand case to commission, where evidence authorized, but did not demand, finding that death was occasioned by injury arising out of and in course of employment. 39GaA273, 146SE641. [j] **Where court remits record to board for more specific findings of fact,** appeal is still pending, and when more specific findings are made, record is required to be sent back to that court. 294Pa169, 144A89.

125-68½-New. Appellate court, where evidence is not conflicting upon disapproval and reversal of order of commission, will direct necessary findings in accord with facts. 124 Okl 140, 254 P66.

125-69 286Pa199, 133A256.

125-69½-New. The remanding of a proceeding for a rehearing on the merits does not require a trial de novo, 166Minn212, 207NW499.

125-63½-New. nor the resubmission of the evidence already taken. 166Minn 212, 207NW499.

125-69¼-New. On such remand the case stands before the commission on appeal from the order of the referee where the previous decision of the commission was made on such appeal. 166Minn212, 207 NW499.

125-69⅓-New. On such remand the commission has discretion as to the evidence to be received by it and is not limited to that received by the referee. 166Minn212, 207NW499.

125-69⅙-New. Where appellant did not assign correction of finding as ground of appeal, clerk held to have erred in printing transcript of evidence. 104 Conn724, 134A264.

125-70½-New. The compensation bureau has no power after judgment to deny or reverse the right of a claimant established on appeal. 49ND915, 194NW 663.

125-70¼-New. After judgment the bureau may increase or decrease award or may award a lump sum, all pursuant to, and consistent with, the judgment rendered. 49ND915, 194NW663.

125-70¼-New. Voluntary dismissal. An employer's motion to dismiss a petition for review of award accompanied by an affidavit that it is satisfied with the order will be granted. 67Utah301, 247P 490.

125-70⅛-New. The state insurance fund is not denied any right by the granting of such motion. 67Utah301, 247P490.

125-70⅛-New. Where the probative facts fail, utterly, to establish the ultimate fact found, such may be annulled. 125Me16, 130A355.

125-70⅛-New. Where the evidence leads to only one conclusion on an issue as to which the commission has made no finding, the court may remand the case to the commission with directions to make findings in accordance with the undisputed evidence and to award compensation thereon. 166Minn251, 207NW636.

125-70⅛-New. Where award is set aside, original award is expunged from record. 325 Ill 570, 156NE796.

125-70⅙-New. Order, made pursuant to remand order, held unauthorized. 325 Ill 570, 156NE796.

125-70⅒-New. Where there are no findings of fact as to cause of death, it is proper to dismiss appeal. 105Conn394, 135A293.

125-70 1/11-New. Where no relevant evidence has been introduced to sustain finding, court is not obliged to return record to compensation board on reversing it. 286Pa199, 133A256.

125-70 1/12-New. Under some statutes, the court, on appeal from the commission, need not recommit the case but may enter proper judgment upon commission's findings as the nature of the case may require. 35GaA772, 135SE103.

125-70 1/13-New. Decree of superior court reversing decision of board and affirming that of board member is wrong both in form and in substance. 255Mass241, 151 NE91.

125-70 1/14-New. Filing of remittitur of portion of percentage of incapacity found by jury and judgment thereon held proper. TexCommnA 283SW491.

125-70 1/15-New. Judgment should incorporate provision retaining jurisdiction to modify; but this is not imperative. TexCivA 4SW(2d)90.

125-70 1/16-New. After remand, board may reopen case for fraud, take new testimony, and dismiss application if warranted on the merits. 223Ky725, 4SW (2d)702.

125-70 1/17-New. A clerical error in the findings is not ground for a reversal. 91 CalA574, 267P321.

125-70 1/18-New. The dismissal of a petition because an accident arose outside of a contract requires a reversal where it is based on the misstatement and misunderstanding of claimant's testimony. 127Me249, 142A862.

125-70 1/19-New. The order of the court requiring defendant to pay reasonable medical and surgical expenses of a deceased employee, the amount of which the court was unable to ascertain, is not erroneous. 85Mont41, 277P615.

125-70 1/20-New. In insurer's suit to set aside an award of compensation to insured's employee, the jury's findings were held to support the judgment for the employee, notwithstanding contradictory findings that he was "totally and permanently" disabled, and partially and permanently disabled, in view of a finding of total disability of thirty-one weeks and permanent partial disability thereafter, and the separation of the words "totally" and "permanently." TexCivA 10SW(2d)803.

125-70 1/21-New. The court's determination need not be supported by specific findings of facts. NJSup 142A433.

125-70 1/22-New. On appeal from an action of the industrial commission denying claimant right to further participate in an insurance fund, where the evidence does not show a temporary allowance, payments not shown to be a temporary allowance should be deducted from the permanent award. 29 OhA162, 163NE212.

125-70 1/23-New. In a suit to set aside an award of compensation by the board, brought in a county other than that in which the injury occurred, the court cannot grant an equitable relief because of the injured person's misleading conduct, where no reply setting up an equitable relief was filed to defendant's plea to the jurisdiction. TexCivA 15SW(2d) 709.

125-70 1/24-New. Where the findings do not show what duties claimant was performing when injured, no award can be made for such injury, on appeal. 109 Conn178, 145A887.

125-70 1/25-New. Decision of appellate court is mandatory and not advisory. 208Cal 705, 284P922.

125-70 1/26-New. Statute governing suit to set aside award does not give court same authority over its judgment as is conferred on board in respect to its decision. TexCommnA 24SW(2d)394.

125-70 1/27-New. Statute giving industrial board power to review its award is inapplicable to revisory power of court in such suit. TexCommnA 24SW(2d) 394.

125-70 1/28-New. Power of court over its judgments in such cases is subject to same limitations as in other cases. Tex CommnA 24SW(2d)394.

125-70 1/29-New. Judgment in such suit involving issues relating to degree and duration of incapacity and amount of compensation is conclusive after expiration of time for appeal. TexCommnA 24 SW(2d)394.

125-70 1/30-New. Some statutes do not provide for a motion for a new trial in the district court. 129Kan516, 283P508.

125-70 1/31-New. The district court on appeal from an award has the same power as the board, under statute, to compel payment of compensation in a lump sum. TexCivA 21SW(2d)31.

125-70 1/32-New. Dismissal of a suit to set aside a compensation award is not abandonment by insurer contesting the award where the case had been transferred to another district court. Tex CivA 22SW(2d)151.

125-70 1/33-New. Remand for proper and sufficient fact findings and conclusions of law see Okl 293P260.

125-71 36GaA34, 135SE319; 129Kan690, 284P818 (only questions of law reviewed in supreme court); MoA 21SW(2d)191 (review where only record proper is up on appeal); 53SD13, 219NW884; Tex CivA 299SW476. [a] (1) 333 Ill 49, 164 NE164. [c] 202 Iowa1044, 208NW709 (sufficiency of notice of appeal to district court). [d] 218Ky40, 290SW1036; 140 Wash703, 249P789. [f] (2) Findings of commission on conflicting evidence approved by district court will not be disturbed. 76Colo 588, 233P621 (findings as to whether claim was filed in due time and as to whether injury arose out of and in course of employment). [g] (2) After application has been perfected for review of decision of industrial commission by court, commission has lost jurisdiction of controversy and cannot be compelled by mandamus to grant rehearing or consider case further. 112 OhSt553, 148NE100. [o] (2) Finding of referee of causal connection between injury and death, sustained by court of common pleas, is conclusion on appellate court if there is sufficient competent evidence to sustain it. 285Pa145, 131A 703. [q] 49ND915, 194NW663. [v] **In Oklahoma** (1) after court has determined on review that claimant was employee of drilling company, commission has continuing jurisdiction to determine which of two companies is insurance carrier. 118 Okl 301, 248P637. (2) Determination of commission that one of two insurance companies is the insurance carrier is not in excess of its jurisdiction as being judicial construction of insurance contract. 118 Okl 301, 248 P637. [w] **In Iowa** weight of testimony

cannot be reviewed by supreme court but it may pass on questions of law based on admitted facts. 201 **Iowa**955, 204**NW**420. [x] **In Texas** (1) appellate court can consider only fundamental errors in absence of bill of exceptions. **CivA** 292**SW**651. (2) Jury finding on conflicting evidence is conclusive. **CivA** 297**SW**630. (3) Commission of appeals' jurisdiction in determining propriety of submission of question of permanent disability to jury, is limited to question whether or not there is any competent evidence from which jury might reasonably find permanent disability to exist. **CommnA** 148**SW(2d)**1015. (4) Commission of appeals has no power to pass upon sufficiency of evidence in determining whether there was evidence to authorize submission of such issue. **CommnA** 148**SW(2d)**1015. (5) Where there was testimony from which reasonable minds could find that employee's injuries were permanent and totally disabled him from performing his customary work, jury's verdict of permanent and total disability is properly sustained. **CommnA** 148**SW(2d)**1015. (6) Claimant is bound by finding of lower court on question submitted to it in action to set aside award. **CivA** 248**SW(2d)** 549. [y] **In Kentucky** (1) board may appeal from decisions of circuit court in review of board's rulings. 212**Ky**123, 278**SW**533. (2) Where judgment setting aside award permitted application for second hearing, timely appeal from judgment entered on second hearing might not be dismissed. 221**Ky**198, 298 **SW**392. [z] **Presumptions.**–(1) Appellate court must presume that trial court found that application was made prior to amendment of Workmen's Compensation Act. 27 **OhA**314, 161**NE**356. (2) In support of judgment of lower court reviewing court will presume necessary findings. **TexCivA** 258**SW(2d)**180. [aa] **Questions of fact.**–(1) Whether compensation proceedings were commenced before or after amendment of act requiring rehearing before appeal. 27 **OhA** 314, 161**NE**356. (2) District court judgment affirming award not reversed unless evidence clearly preponderates against it. 83**Mont**527, 273**P**294. (3) Findings of district court are not disturbed where supported by any evidence. 83**Mont**527, 273**P**294. (4) Findings of lower court will not be disturbed unless clearly opposed to preponderance of evidence. 57**ND**189, 220**NW**923. (5) Award based on legitimate inference from facts, affirmed by court of common pleas, should not be lightly disturbed. **NJ** 144**A**6. (6) Findings not supported by competent and substantial evidence are not conclusive. 46 **Ida**730, 271**P**459. [ab] **Application of law to undisputed evidence** is question of law subject to review. 46 **Ida**730, 271**P**459. [ac] **In Connecticut** (1) decision of superior court modifying award is final judgment from which appeal must be taken, award of commission in compliance with such judgment not being appealable. 108 **Conn**159, 142**A**745. (2) On appeal from judgment affirming award, only question is whether conclusions resulted from incorrect application of legal principles or violation of rules of reason or logic. 111 **Conn**365, 150**A**110. [ad] **In Colorado,** district court, not supreme court, must first determine rights of claimant to have undecided issues, raised in district court, referred back to commission for consideration. 84**Colo** 521, 272**P**3. [ae] **In Kansas** (1) no further review is provided for. 127**Kan**643, 274**P**233. (2) Law in force in January, 1929 did not provide for appeal from district court to supreme court. 129**Kan**516, 283**P**508. (3) Filing of motion for new trial in district court, where no motion is provided for by statute, does not confer right to appeal or prolong time within which appeal is to be taken. 129**Kan**516, 283**P**508. [af] **In Maryland,** order overruling motion to dismiss appeal taken from order of commission dismissing claim for failure to give notice of injury and file claim in time is not appealable because not final. 156**Md**412, 144**A** 339. [ag] **In Pennsylvania,** rule of compensation board attempting to limit liability for hospital expenses to one hundred dollars though larger sum was reasonably expended therefor within statutory period will be reversed though affirmed by court below. 91**PaSuper**429. [ah] **In Porto Rico,** commission cannot appeal to supreme court from judgment of district court on appeal from order of commission in matter of claim of heirs of workmen who died as result of accident. 33**PortoRico** 745. [ai] **Timely petition for review must be filed** in order to review board's original award on appeal from judgment confirming order reinstating award after reopening case. 232**Ky**243, 22**SW(2d)**623. [aj] **On record proper** summary judgment against employer only must be affirmed. **MoA** 218**SW(2d)**191 (fact question not reviewed). [ak] **Conclusion on facts not disturbed.**–**NJSup** 150**A**570. [al] **Verdict supported by evidence not disturbed.**– **TexCommnA** 298**SW(2d)**987. [am] **Final judgment reviewable by writ of error.**– 87**Colo** 577, 290**P**273. [an] **Review and remand to commission to determine award.**–35 **OhA**239, 172**NE**422. [ao] **Judgment affirming award warranted by evidence** cannot be set aside. **GaA** 155 **SE**366. [ap] **Findings within limits of commissioner's jurisdiction** cannot be interfered with by Supreme Court. **Iowa** 233**NW**114.

125–71½–New. Where an insurance carrier proved by a physician, who was a witness for the injured employee, suing to set aside the compensation award in his favor, that plaintiff was suffering from traumatic hysteria, it was held, that no error injuring the insurance carrier was shown in this connection, because plaintiff did not charge in his petition that he was afflicted with traumatic hysteria, and such issue was not submitted to the jury, the only effect thereof being to contradict plaintiff's contentions. **TexCivA** 98**W(2d)**65.

125–72 85**Colo** 237, 275**P**910, 37**GaA** 539, 140**SE**899; 320 **Ill** 618, 151**NE**588; 153**Md**274, 138**A**235, 151**Md**16, 139**A**70; 258**Mass**170, 154**NE**565; **MoA** 228**SW(2d)** 839 (judgment of lower court for award, with interest added, held in accordance with award of commission); 113 **Okl** 230, 241**P**174; 35**PortoRico** 846 (judgment affirmed dismissing complaint on appeal from denial of relief by commission), **TexCommnA** 308**SW(2d)**305, **Tex CivA** 18**SW(2d)**415; **TexCivA** 16**SW(2d)** 354. [b] (2) Admission of letter giving notice of accident is harmless where other notice was given and claim was filed within time required by statute. **TexCivA** 16**SW(2d)**386. (3) Other instances. **TexCivA** 25**SW(2d)**653. [c] **Instruction correctly defining total disability** but inaccurately including "permanent" therein is harmless error, jury not being misled thereby. **TexCivA** 286 **SW**565. [f] **Misconduct of jurors** in stating knowledge as to erysipelas causing death held not ground for setting aside verdict. **TexCivA** 297**SW**630. [g] **Cure of error of court,** in refusing to submit special issue by finding of jury in answer to special issue submitted by court. **TexCivA** 28**SW**336. [h] **Evidence held sufficient** to support finding as to extent of injuries. **TexCivA** 284 **SW**336. [i] **Failure to instruct** as to proximate cause is harmless where not prejudicial to appellant. **TexCivA** 38**W (2d)**568. [j] **Instruction assuming fact** is harmless where undisputed evidence shows fact. **TexCivA** 38**W(2d)**568. [k] **In injured employee's suit against insurance carrier to set aside award** in his favor made by industrial accident board, error in permitting plaintiff's attorney to ask insurance carrier's adjuster whether it was not true that employer had arrangement whereby it carried its own insurance and used name of insurance carrier was held not reversible. **TexCivA** 98**W(2d)**65. [l] **Judgment reversed** as against weight of evidence. 35**PortoRico** 703. [m] **Failure of court to approve commission's finding of fact** is not sufficient to set aside judgment affirming award. 164**GaA**116, 119**SE**93. [n] **Findings of jury not disturbed.**– **TexCivA** 308**SW(2d)**924. [o] **Findings held not prejudicial.**–**TexCivA** 318**SW(2d)** 1108. [p] **Error favorable to appellant** is not ground for reversal. **TexCivA** 31 **SW(2d)**1108 (method of computing compensation).

125–72½–New. That the judgment in a suit to set aside an award of the board does not expressly annul the award, and fails to expressly decree a recovery of the lump sum, was not a fundamental error, but subject to be reformed in the appellate court in these particulars. **Tex CivA** 148**SW(2d)**337.

126–74 **TexCivA** 28**W(2d)**866. See also **TexCivA** 258**SW(2d)**180 (submission of issues held harmless).

126–75½–New. In some jurisdictions the appellate court on review of an award confirmed by the court below can consider only the legal question whether there is evidence to support the findings. 36**GaA**199, 136**SE**87; 286**Pa** 49, 132**A**799.

126–75⅛–New. Matters of discretion will not be reviewed where abuse is not shown. **TexCivA** 281**SW**1092.

126–75¼–New. The finding of the commission approved by the court will not be disturbed by the appellate court where there is any evidence to support it. 36 **GaA**199, 136**SE**87; 222**Ky**216, 300**SW** 595.

126–75⅓–New. The findings of the jury are conclusive on the appellate court. 123 **Or**310, 261**P**71.

126–75⅜–New. **In Pennsylvania,** under the act of June 26, 1919 it is the duty of the supreme court to consider whether there is evidence to support the findings of the board, and, if so, whether the law has been **properly applied.** 286**Pa**49, 132 **A**799.

126–75½–New. The findings of the court trying a case de novo supported by evidence will not be disturbed. **TexCivA** 281**SW**1092

126–75⅝–New. The findings of the commission are conclusive as to the facts found if supported by the evidence. 37 **GaA**703, 141**SE**504.

126–75⅞–New. Findings are not disturbed unless they are clearly wrong. 111**Nebr**326, 207**NW**508.

126–75 1/10–New. Where the evidence is wholly insufficient to sustain findings of the board adverse to appellant but is sufficient to sustain findings and a decision in his favor, the supreme court will reverse the judgment of the district court affirming the decision of the commission and will remand the cause with instruction for entry of an award in favor of appellant. 41 **Ida**747, 242**P**314, 243**P**654.

126–75 1/11–New. The court has power to determine, on admitted facts, whether a claimant is a defendant under the Workmen's Compensation Act. 201 **Iowa**955, 204**NW**420.

126–75 1/12–New. In the absence of a motion for or order granting cross appeal by an employee on appeal by the employer from an award to the circuit court, the supreme court will not on appeal to it consider claimant's objection to modification of award by the circuit court. 209**Ky**370, 272**SW**882.

126–75 1/13–New. Where the court in insurer's suit to set aside an award enters judgment on purported remittitur by claimant of a portion of the percentage of incapacity found by the jury, insurer cannot complain that the award was less than the verdict authorized. **TexCivA** 274**SW**671.

126–75 1/14–New. Finding by a jury of a percentage of incapacity alone does not require judgment in any definite sum. **TexCivA** 274**SW**671.

126–75 1/15–New. Hence a judgment entered on remittitur by claimant reducing jury's finding of seventy five per cent of incapacity to fifty per cent is not within the class of judgments disregarding the jury's finding of facts. **Tex CivA** 274**SW**671

126–75 1/16–New. Findings by jury on conflicting evidence will not be disturbed when sustained by evidence. **Tex CivA** 291**SW**695

126–75 1/17–New. Doubts will be resolved in favor of the judgment of the trial court. **TexCivA** 281**SW**289.

126-75½8-New. Insurer cannot object to the admissibility of evidence repeated on cross-examination at its instance. **TexCivA** 281**SW**289.

126-75½9-New. Evidence held sufficient to warrant finding, approved by trial court, of total and permanent incapacity entitling claimant to compensation in lump sum. **TexCivA** 286**SW**565.

126-75½0-New. A judgment for compensation supported by evidence of any probative force will not be disturbed. **TexCivA** 281**SW**1092.

126-75½1-New. An insurer who stipulated that the only issue on trial de novo was whether operation would be more than usually dangerous is not in a position to urge any other objection on further appeal. **TexCivA** 281**SW**895.

126-75½2-New. Judgment reducing percentage of incapacity where evidence warranted finding of larger percentage held prejudicial to employee, but acquiescence in judgment estops employee from claiming benefit of error. **Tex CommnA** 283**SW**491.

126-75½3-New. Judgment for less than verdict held not prejudicial to compensation insurer and cannot be complained of on appeal. **TexCommnA** 283**SW**491.

126-75½4-New. Question as to payment of compensation pending appeal held moot, where no payments were made and act was passed suspending payments. 216**Ky**262, 287**SW**713.

126-75½5-New. Judgment of district court is not an appeal from inferior court under statute requiring appeal within ninety days after entry of judgment. 78**Mont**579, 254**P**880.

126-75½6-New. and appeal will not be dismissed for failure to serve notice of appeal to supreme court from such a judgment within such prescribed time. 78**Mont**579, 254**P**880.

126-75½7-New. Claimant cannot, in the supreme court, object to sufficiency of certificate of board's record and proceedings which district court received in evidence at his instance on appeal to it from board's award. 78**Mont**579, 254 **P**880.

126-75½8-New. Whether board correctly figured compensation payable employee for total permanent disability need not be considered where employer objected only to district court's finding of total disability on appeal and claimant objected only to deduction of amount already paid from award. 78**Mont**579, 254**P**880.

126-75½9-New. Claimant cannot predicate error on failure of lower court to make and file findings of fact where findings are not requested by him. 79**Mont** 358, 257**P**270.

126-75½0-New. Where the jurisdiction of the trial court to entertain an appeal from an order of the department of labor and industries was raised at the conclusion of plaintiff's testimony and at the close of all of the evidence, a motion for a new trial after the entry of judgment is not necessary to preserve the question. 142**Wash**48, 251**P**877.

126-75½1-New. The proceeding is not triable de novo to a jury. 54**ND**199, 209 **NW**364.

126-75½2-New. The findings of the trial court are presumed to be correct unless clearly opposed to the preponderance of the evidence. 54**ND**199, 209**NW**364 (findings held contrary to evidence).

126-75½3-New. Referee's findings, affirmed by compensation board and lower court, are conclusive unless unsupported by evidence. 284**Pa**348, 131**A** 247.

126-75½4-New. Supreme court cannot construe findings of arbitrators and commissioner as positive finding that employee had such knowledge of injury as would excuse claimant from giving notice of injury required by act where a reason assigned for review is employer's lack of knowledge. 51**SD**359, 213**NW**947.

126-75½5-New. Judgment denying compensation must stand if findings, being unchallenged fairly and reasonably tend to support it. 99**Vt**301, 131**A** 844.

126-75½6-New. The supreme court is controlled by the findings and will not consider the evidence. 81**Colo** 521, 256 **P**314.

126-75½7-New. Appeal from confirmation of award held controlled by prior decisions. 36**GaA**708, 137**SE**799(1st case).

126-75½8-New. Supreme court is not bound by directions of circuit court on remanding case to industrial commission. 326 **Ill** 166, 157**NE**206.

126-75½9-New. Supreme court is not concluded by circuit court judgment setting aside commission's award on second hearing. 326 **Ill** 166, 157**NE**206.

126-75¼0-New. Harmless error in the admission of evidence is not ground for reversal. 123 **Or**310, 261**P**71.

126-75¼1-New. An order recommitting the case to the commission for further testimony will be affirmed where it does not appear that the facts essential to support the award which are not supported by evidence are affirmatively disproved. 37**GaA**777, 142**SE**189.

126-75¼2-New. or cannot be established. 37**GaA**777, 142**SE**189.

126-75¼3-New. Evidence held to support the jury's finding that a workmen's compensation rider was attached to the indemnity policy when it was delivered to the employer. **TexCivA** 28**SW(2d)**866.

126-75¼4-New. Where the industrial commission fails properly to apply the law to the facts found and to determine which of successive insurance carriers is liable for compensation awarded, it is the duty of the supreme court, on appeal from a judgment setting aside the award, to apply the law and direct entry of the proper judgment. 195**Wis** 410, 217**NW**738.

126-75¼5-New. Under some statutes an appeal must be taken within thirty days from entry of the judgment. 88**PaSuper**525.

126-75¼6-New. The supreme court is not bound by the findings of the district court reversing the findings of the board. 83**Mont**152, 269**P**403.

126-75¼7-New. The supreme court may set aside, modify or change the findings of the board. 83**Mont**122, 270**P**634.

126-75¼8-New. The supreme court, where the evidence appears in the record, must consider it in conjunction with all the other evidence in the case in determining whether the findings are justified by the evidence as a whole. 83**Mont**152, 269**P**403.

126-75¼9-New. The supreme court must uphold the judgment of the district court reversing the board if the conclusions of law by the board were not correct. 83**Mont**152, 269**P**403.

126-75½0-New. The supreme court will not reverse the findings of the district court reviewing the order of the board unless the evidence clearly preponderates against them. 83**Mont**152, 269**P** 403.

126-75½1-New. The finding that the injury was by accident, arising out of and in course of employment, supported by evidence, is conclusive on appeal. **NJSup** 142**A**433.

126-75½2-New. An allowance for burial expenses must be reversed where they cannot be segregated from the amount of the lump sum settlement erroneously ordered. 85**Mont**41, 277**P**615.

126-75½3-New. Where there was some evidence to support a finding in favor of claimant, and the finding was affirmed by the superior court, the court of appeals is without authority to reverse the judgment affirming a finding of the commission. 38**GaA**346, 144**SE**146(2d case).

126-75½4-New. In this case, in which the claimant excepted to a judgment of the superior court affirming an order of the industrial commission, which denied compensation for an alleged hernia, it cannot be said that a finding in the claimant's favor was absolutely demanded by the evidence; consequently the superior court did not err in denying the claimant's appeal. 38**GaA**461, 144 **SE**343.

126-75½5-New. The conclusion reached by the workmen's compensation bureau, after examining the facts and hearing the testimony on an application of the wife for compensation for the death of her husband from wood alcohol poisoning, granting her an award affirmed by the court of common pleas, should not be lightly disturbed by the supreme court upon a mere inspection of the written word, where there is ample support in the testimony for the conclusion reached. **NJSup** 143**A**449.

126-75½6-New. On an appeal from an award of the board, affirmed by the court, the revisory powers of the appellate court are limited to such a consideration of the record as will enable the court to ascertain whether there is evidence to support the findings, and, if so, whether the law has been properly applied. 293**Pa**589, 143**A**187.

126-75½7-New. The supreme court must sustain findings of the board and the trial court unless the evidence clearly preponderates against them. 85**Mont** 41, 277**P**615.

126-75½8-New. The trial court's definition of permanent total incapacity as not implying an absolute disability to perform any kind of labor, but the disqualification to perform usual tasks of a workman in such a way as to enable him to procure and retain employment, is not error justifying a reversal of the judgment awarding compensation. **Tex CivA** 10**SW(2d)**756.

126-75½9-New. The submission of a special issue, requiring the jury to find that the injured workman's incapacity was permanent before answering in the affirmative the question whether the injuries resulted in a total incapacity, is not prejudicial to an insurance carrier. **TexCivA** 10**SW(2d)**756.

126-75½0-New. In a suit under the Workmen's Compensation Act to set aside a decision of the board and to recover compensation for the death of an employee, the sustaining of an exception to a part of the petition alleging that insurer, in its report to the board, admitted and assumed the liability, is not reversible error. **TexCivA** 10**SW(2d)**782.

126-75½1-New. A finding of the fact by the appellate court, as to the dependency, based on unrebutted testimony, is conclusive. 168**La**642, 122**S**892.

126-75½2-New. The compensation board's conclusion, approved by the court on an appeal and supported by the record, as to the cause of the employee's death, will not be disturbed. 297**Pa**124, 146**A**562.

126-75½3-New. On the trial of a suit by insurer to set aside a workmen's compensation award, if the facts were incompletely developed, the court of civil appeals should have remanded the cause for a new trial, instead of rendering the judgment for insurer. **Tex CommnA** 12**SW(2d)**199.

126-75½4-New. An undisputed fact testified to at the trial can be added to the finding on an appeal. 109**Conn**178, 145**A**887.

126-75½5-New. The finding of the referee, sustained by the compensation board and the trial court, that the paralytic condition of the claimant resulted from cerebral hemorrhage due to sunstroke suffered in the course of employment, will not be disturbed. 295**Pa**73, 144**A**821(1stcase).

126-75½6-New. Where there was testimony from which a jury on trial de novo on an appeal, might reasonably infer that an employee slipped on a greasy floor, receiving injuries in the course of employment causing death, the supreme court will not substitute its judgment for that of the jury. **Oh** 165**NE** 297.

126-75½7-New. An award for death affirmed by the court of common pleas will not be disturbed on the ground of the insufficiency of medical testimony to connect the cause of death with the accident where the supreme court finds the evidence sufficient. 295**Pa**71, 144**A** 829(1stcase).

126-75½8-New. An erroneous instruction on trial de novo in the appellate court may constitute reversible error. 156**Md**524, 144**A**505.

126-75½9-New. In Ohio, an admission of evidence other than the official transcript of the evidence adduced before the

industrial commission is an irregularity constituting reversible error, in the absence of a stipulation of the counsel agreeing on such admission. 119 **Oh**494, 164**NE**510.

126–75½0–New. Where the error in placing the burden of proof was duly raised in the trial court and assigned for an error in the court of civil appeals, it must be noticed in support of the reversal. **TexCommnA** 12**SW(2d)**199.

126–75½1–New. For an appellee to have a review of the exclusion of the uncertified papers by the trial court, he should reserve exceptions and bring the papers up on a bill of exceptions. **TexCivA** 18 **SW(2d)**712.

126–75½2–New. Where the trial court, without an objection, passed on special exceptions to the petition, the reviewing court will review the disposition made thereof. **TexCivA** 17**SW(2d)**68.

126–75½3–New. Where the trial court dismissed the employee's appeal from the commission's order on the ground that the record disclosed on its face that the application for the compensation was not filed in time and the delay was not excused, the appeal from such a judgment will not be dismissed for the want of a bill of exception. 156**Md**447, 144**A** 345.

126–75½4–New. An employer, obtaining a decision on the merits before moving to dismiss the employee's appeal from the commission's order because the record did not show failure to file a claim in the time required had been excused, cannot deny the prima facie correctness of an award on the appeal from the judgment dismissing the appeal therefrom. 156**Md**447, 144**A**345.

126–75½5–New. In Texas where the jurisdiction of a district court is challenged on an appeal, the presumption in favor thereof will not lie but the record must disclose the jurisdiction. **TexCivA** 18**SW(2d)**712.

126–75½6–New. The court will be held to have found the average weekly wage in such a manner as will support the judgment. **TexCivA** 18**SW(2d)**810.

126–75½7–New. In Texas, the lump sum judgment, including a sum for surgeons' and hospital fees, unsupported by proof of reasonableness, cannot be permitted to stand. **TexCivA** 14**SW(2d)**337.

126–75½8–New. Court of civil appeals must consider the evidence on an issue whether the one injured was an employee or an independent contractor in the most favorable light in support of the verdict. **TexCivA** 16**SW(2d)**950.

126–75½9–New. The supreme court cannot usurp power of the commissioner as a trier of facts. 208 **Iowa**1281, 227 **NW**153.

126–75½0–New. Under some statutes questions of law only can be considered. 129**Kan**581, 283**P**487.

126–75½1–New. The court of appeals, reversing judgment refusing to vacate judgment in full settlement on the ground that it was without consent of the board, cannot affirm the award in the absence of showing that testimony taken before the board was likewise before the circuit court. 231**Ky**736, 22 **SW(2d)**129.

126–75½2–New. Failure of employee to prove that employer was operating under Compensation Act cannot first be raised in court of appeals. 234**Ky**42, 27 **SW(2d)**430.

126–75½3–New. Acceptance of Workmen's Compensation Act cannot be first questioned on appeal from judgment affirming award. 234**Ky**166, 27**SW(2d)** 686.

126–75½4–New. Weight and credibility of additional evidence taken before the lower court on appeal from the commission's denial of compensation and submitted to the jury can be considered only on motion in the trial court for new trial. 158**Md**34, 148**A**122.

126–75½5–New. Assignments of error based on insufficiency of evidence cannot be considered on review from judgment reversing an award of the commission in the absence of an exception to the overruling of a motion for a new trial. **MoA** 22**SW(2d)**832.

126–75½6–New. Failure to raise before commission or circuit court jurisdictional question of employee's failure to file timely claim does not prevent assertion thereof on further review. **MoA** 25**SW (2d)**529.

126–75½7–New. Error in overruling exceptions to joinder of employer in action against insurer to set aside denial of compensation held cured. **Tex CommnA** 24**SW(2d)**370.

126–75½8–New. The appellate court cannot interfere with the jury's finding, supported by evidence, that hardship would result if a lump sum settlement were not allowed. **TexCivA** 21**SW(2d)** 31.

126–75½9–New. The appellate court must assume that facts found by the lower court support the judgment. **Tex CivA** 22**SW(2d)**157.

126–75½0–New. An order dismissing an appeal from an order of the department denying a claim held final adjudication which is conclusive in the absence of appeal. 154**Wash**363, 282**P**201.

126–75½1–New. The action of the circuit court sustained in setting aside compensation awarded for injuries of which a minor later died while an employee of plaintiff. **Wis** 228**NW**133.

126–75½2–New. On appeal from a judgment reversing an award, evidence adduced before the commission is not part of the record proper so as to justify a review of assignments based on insufficiency of evidence in the absence of such exception. **MoA** 22**SW(2d)**832.

126–75½3–New. The court of civil appeals cannot presume that a policy had been issued to the employer in the absence of a finding by the jury to that effect. **TexCivA** 19**SW(2d)**153.

126–75½4–New. An award of the industrial commission stands in the court of appeals on the same footing as a verdict of a jury approved by the trial judge. 40**GaA**92, 149**SE**55.

126–75½5–New. Harmless error in admission of evidence. **Md** 150**A**878(2d case).

126–75½6–New. Harmless error in giving instructions. **Wash** 288**P**235.

126–75½7–New. In some jurisdictions supreme court cannot reverse unless evidence clearly preponderates against judgment on appeal after review of board's decision. **Mont** 289**P**563.

126–75½8–New. Supreme court of errors presumes that both employee and employer accepted Compensation Act though employee was nonresident. 111 **Conn**693, 151**A**182.

126–75½9–New. Competency and value of hearsay evidence admitted without objection in lower court cannot be questioned on appeal. **MoA** 28**SW(2d)**387.

126–75½100–New. Claimant on appeal is given benefit of most favorable evidence with reasonable inferences therefrom. **MoA** 28**SW(2d)**387.

126–75½101–New. Affirmance of award is not shown to be erroneous because board submitted expert testimony to medical referees where additional evidence not in record was introduced in district court. **Mont** 289**P**574.

126–75½102–New. In absence from record of evidence taken in district court, it will be assumed that evidence justified findings. **Mont** 289**P**574.

126–75½103–New. Presumption is that district court considered only competent evidence. **Mont** 289**P**574.

126–75½104–New. Award against insurer larger than judgment in favor of insurer against third party alleged to have caused injury held not to show prejudice. **TexCivA** 26**SW(2d)**682.

126–75½105–New. Rulings of board and trial court respecting waiver of strict compliance with requirement of notice of injury will not be disturbed except for clear abuse of discretion. **TexCivA** 27**SW(2d)**314.

126–75½106–New. Attorney's affidavits as to whether award of board was introduced in evidence cannot be considered. **TexCivA** 27**SW(2d)**363.

126–75½107–New. Showing in reporter's notes that plaintiff offered award to court and not to jury does not show that award was before court. **TexCivA** 27**SW(2d)**363.

126–76 154**Tenn**134, 289**SW**533. [m] **Action under Louisiana statute** may be maintained in federal court. 15**F(2d)**, 171. [n] **In Kansas** in default of agreement, or if employer shall refuse to consent to arbitration of claim for compensation, claimant's right thereto under the act may be determined and enforced by action in court of competent jurisdiction. 124**Kan**287, 259**P**703. [o] **When action premature.**–9**LaA**639, 1208 88; 10**LaA**149, 120**S**258 (for additional compensation). [p] **Complaint has been held insufficient** as it does not show that remedy is not under act. 135**Misc**817, 238**NYS**519.

126–77 TexCivA 21**SW(2d)**583 (each step in claim for compensation is mandatory). [c] **In Texas** courts have no authority to entertain original suit to award compensation except in manner expressly provided by statute. **CommnA** 285**SW**1041.

126–79 [c] **Sufficient pleadings.**–**NJSup** 151**A**446.

126–80 167**La**161, 118**S**874; 167**La**411, 119**S**409; 168**La**513, 122**S**711; **LaA** 127 **S**36(1stcase); 157**Miss**810, 128**S**877(2d case) (Louisiana statute). [a] **Conditions precedent.**–7**LaA**13; 7**LaA**604. [b] **Joinder with employer.**–**NJSup** 151**A**446. [c] **Jurisdiction of court dependent on that of board.**–**TexCommnA** 29**SW(2d)** 971.

126–80½–New. An action under the act by a wife of deceased is not subject to abatement because of another action pending by her as administratrix for damages for death of husband. 213**Ala** 596, 105**S**648.

126–80½–New. Complaint failing to allege notice or knowledge of injury by defendant is insufficient on demurrer. 213**Ala**596, 105**S**648.

126–80¼–New. Pleadings may be amended by leave of court. 120**Kan**747, 244**P**849.

126–80½–New. Pleadings need not be in technical form required by common law. 213**Ala**605, 105**S**693.

126–80¼–New. In Alabama circuit court in such proceedings cannot assume equity jurisdiction to determine whether grandchild should inherit as adopted child. 213**Ala**599, 105**S**686.

126–80½–New. Every essential averment of fact in petition not admitted by answer is denied. 155**Tenn**491, 296 **SW**3, 53**ALR**1086.

126–80½–New. In some jurisdictions the proceeding is equitable in nature. 155**Tenn**491, 296**SW**3, 53**ALR**1086.

126–80½–New. Findings inconsistent with allegations of petition are not erroneous where hearing was without objection. 82**NH**403, 135**A**24.

126–80½0–New. Court has discretion to fix compensation, where there is no provision therefor. 162**La**556, 110**S**754.

126–80½1–New. Complaint alleging fraud in inducing employee to return to work held insufficient. 85 **IndA**659, 155 **NE**520.

126–80½2–New. Proof of last sickness and burial expenses is not required where such is properly pleaded and no issue is made by answer. 214**Ala**394, 108**S**7.

126–80½3–New. Actions to enforce payment of compensation in the courts cannot be classified as either in tort or contract. 154**Tenn**134, 289**SW**533.

126–80½4–New. but without regard to classification, they are personal and not local. 154**Tenn**134, 289**SW**533.

126–80½5–New. and are inherently transitory. 154**Tenn**134, 289**SW**533.

126–80½6–New. If venue is not restricted to locality by compensation act, 154 **Tenn**134, 289**SW**533.

126–80½7–New. the territorial jurisdiction must be controlled by general laws regulating venue. 154**Tenn**134, 289**SW**. 533.

126–80½8–New. Court having jurisdiction to enforce payment under the Compensation Act may adjudicate questions presented if it can obtain jurisdiction over person of defendants. 154**Tenn**134, 289**SW**533.

126–80½9–New. The Compensation Act does not localize action thereunder to the county where the injury occurred or the employee resides. 154**Tenn**134, 289**SW**533.

126-80½0-New. but permits action to enforce payment in the county where the employer has his office and place of business. 154Tenn134, 289SW533.

126-80½1-New. Proper forum in suit for additional compensation is that of domicile of employer. 164La577, 114S 163.

126-80½2-New. Claimant must prove injury on the specific facts alleged. Tex CivA 299SW674.

126-80½3-New. Pleadings under workmen's compensation acts should be liberally construed. TexCivA 299SW674.

126-80½4-New. Where claimant's petition fails to allege specific facts of injury, overruling exceptions thereto is error. TexCivA 299SW674.

126-80½5-New. Although complaint alleges giving notice and no evidence thereof is offered, where answer puts in issue fact of knowledge no variance arises. 217Ala424, 116S121.

126-80½6-New. In suit for injury causing hernia, plaintiff can plead and prove that he was ready for an operation and that defendant refused to have it performed. TexCivA 58W(2d)230.

126-80½7-New. The sole issue presented by an exception of prematurity is whether it appears from the evidence that plaintiff's allegation of defendant's refusal to pay him the maximum compensation to which he was entitled was founded on a reasonable cause or had a reasonable foundation in fact. 9LaA 639, 120S88.

126-80½8-New. The surviving dependents of a deceased employee were held not entitled under the statute to sue directly the surety of the employer, where it did not appear that there was ever any award or agreement as to the installments of any compensation due by the employer to the employee. 9 LaA159, 119S469.

126-80½9-New. A suit cannot be brought to have an amount of compensation to which an employee is entitled and the period of time during which it is to be paid fixed by the court so long as the employee is receiving the maximum compensation to which he is entitled. 10 LaA149, 119S558.

126-80½0-New. A lumber mill as a principal and a contractor as the employer may be made parties defendant in a suit by the dependents of the employee. 9LaA609, 121S670.

126-80½1-New. A petition, when attacked after the verdict and judgment, is held sufficient to support a judgment awarding the employee compensation. TexCommnA 16SW(2d)533.

126-80½2-New. A petition, not alleging that the fatal injury was received by decedent in the county in which the action was brought and containing no allegation from which such a fact could be inferred, was demurrable. TexCivA 16SW(2d)917.

126-80½3-New. The failure to allege that the employment required him to come constantly into proximity of gasoline and that gasoline is a dangerous explosive is held not fatal in an action for injuries, as being one of general knowledge. 10LaA674, 121S782.

126-80½4-New. A petition by an employee for a review of a preliminary agreement, for compensation for total incapacity only, should be treated as a claim for compensation for partial incapacity as to which the employer and the employee had failed to reach an agreement. 50RI 16, 144A439.

126-80½5-New. An allegation that, if the court should find that S, who employed plaintiff, was not P's agent and decides that S was an independent contractor, plaintiff would be entitled to recover from S was held not to state a cause of action against S. 9LaA183, 119 S456.

126-80½6-New. An allegation that the work was hazardous and dangerous was held insufficient for a failure to allege the employer was engaged in the line of work described in the petition as a trade, business, or occupation. 9LaA 183, 119S456.

126-80½7-New. One employed to unload cars of wood at defendant's factory is held entitled to sue defendant for compensation for injuries, even though the person having the contract to unload the wood, and not defendant, was his employer. 10LaA623, 121S676.

126-80½8-New. A failure to furnish medical attention within a reasonable time after the notice of an injury must also be pleaded. TexCivA 7SW(2d)607.

126-80½9-New. An allegation of employment for two months at an average weekly wage is insufficient to make a case for compensation based on weekly wages. TexCivA 7SW(2d)607.

126-80½0-New. A declaration in an action for the death of an employee, showing that the employer comes within the compensation act, must aver the facts taking the case without the act. 28 F(2d)710 [certiorari den 279US838, 49 SCt252(9thcase), 73Led985].

126-80½1-New. Sufficiency of petition. 8LaA674.

126-80½2-New. Defendant cannot avail himself of any matter of special defense not stated in his answer although it appears in the evidence. 160Tenn504, 26 SW(2d)128.

126-80½3-New. An injured employee may sue the indemnitor of his employer in advance of determination of liability of the employer. LaA 123S502(2dcase).

126-80½4-New. In a proceeding by a claimant to ratify a settlement, a third person claimed to be legally liable for the injury cannot intervene although claimant has brought suit against him for the use of the employer and insurer. 159Tenn586, 21SW(2d)396.

126-80½5-New. An employer not operating under the Workmen's Compensation Act could show under general issue that the accident was caused solely by some act of the employee. 231Ky 24, 20SW(2d)1020.

126-80½6-New. A petition alleging that plaintiff was in the employ of both defendants when injured has been held to state a cause of action against an individual as well as the company. LaA 124S636.

126-80½7-New. A petition alleging that the hip bone and the socket on the hip bone were broken, causing total and permanent incapacity, has been held broad enough to include all conditions and results set up in consequence of such injury. TexCivA 21SW(2d)43.

126-80½8-New. Employer in suit by employee is entitled to be informed by petition of material facts plaintiff depends on to recover. LaA 129S436.

126-80½9-New. Petition sufficiently alleging facts constituting personal injury. LaA 129S436.

126-80½0-New. Petition sufficiently alleging facts constituting accident under statute. LaA 129S436.

126-80½1-New. Petition held subject to objection as vague where it fails to allege where death of employee occurred. LaA 129S436.

126-80½2-New. Petition held sufficiently to allege that accident arose out of and in course of employment. LaA 129S436.

126-80½3-New. Fact that employee was dishonest or failed to obey statutory regulation will not defeat employer's liability in action to recover for death. 13 LaA525, 127S59.

126-80½4-New. Pleading. Declaration in action for death based on foreign Workmen's Compensation Law held sufficient. 156Miss567, 126S395.

126-80½5-New. Claimant need not allege that notice of injury was given to employer or excuse for not giving notice. 160Tenn513, 26SW(2d)153.

126-80½6-New. Employer should plead want of statutory notice. 160Tenn513, 26SW(2d)153.

126-80½7-New. Employee's willful misconduct outside sphere of employment precludes compensation although not pleaded. Ala 130S74.

126-81 148Md309, 129A654; 83NH482, 145A142.

126-82 17F(2d)574; 316 Ill 394, 147NE 394 (six months' limitation did not begin to run through failure of employer to file with commission statutory statement of compensation paid); 9LaA3, 118S770; 2LaA104; 225AppDiv489, 233 NYS407; 118 Oh622, 163NE198; 151 Wash337, 275P741. See also 9LaA609, 121S670; 4LaA272; 7LaA63. [a] (2) Employer is precluded from pleading statute of limitations where he fails to report accident as required by statute. NJSup 151A205. [b] **Computation.**–1 LaA88. [c] **Ordinary letter written to judge of civil district court relative to compensation** not verified, is insufficient to interrupt prescription. 9LaA8, 118S 770. [d] **In Louisiana** (1) prescription provided in Act No. 43 (1922) § 8 par 8, as reënacted by Act No. 216 (1924) and Act No. 242 [1928] § 8, par 9, applies only to suit for penalty, where lump sum settlement was not approved by court or usurious interest was charged, and not to suit for compensation under Employers' Liability Act, in which settlement is ignored as obtained by fraud. 9LaA244, 119S279. (2) One-year prescription begins to run from time employee becomes aware of injury. LaA 128S678. (3) One-year prescription does not operate against minor till he has qualified tutor. 13LaA696, 129S 171. (4) Cause of action accrues at death of employee and is barred after year from date of death. LaA 130S651. [e] **Interruption of statute.**–5LaA737. [f] **Where injury is latent** and does not result in compensable disability till after expiration of statutory period, failure to sue within such time does not defeat right to recover provided suit is brought within statutory time after knowledge of compensable disability. Nebr 227 NW449. [g] **Effect of infancy.**–235Ky 278, 30SW(2d)955.

126-83½-New. Gratuity did not amount to voluntary payment tolling statute of limitations. 208Ky422, 271SW589.

126-83½-New. Limitations not tolled where widow and mother may be regarded as minor's next friend. 208Ky 422, 271SW589.

126-83¼-New. Amendment to limitation provision declared legislative construction of original act. 208Ky422, 271 SW589.

126-83½-New. An award under the compensation laws is a specialty within the meaning of the statute. 148Md 309, 129A654.

126-83½-New. Provision in the act that disabilities beginning after five years from the date of the accident are conclusively presumed not due to accident held within statute of limitations. 81Colo 191, 254P444.

126-83½-New. An independent application for compensation for permanent impairment, which was not included in an award for total disability, is governed by the two-year limitation under some statutes. 86 IndA272, 155NE 521.

126-84 12LaA73, 125S483(1stcase). [a] **Affidavit.**–Sask [1928] 4DomLR982.

126-85 See also 5LaA686.

126-87½-New. A petition by an employee to fix the compensation for an injury before the expiration of payment to him of the maximum compensation to which he was entitled has been held prematurely brought under the statute. 10LaA149, 119S558.

126-90 But see 120Kan338, 243P314. [d] **Jury trial instructions.**–TexCivA 273 SW644.

126-90½-New. A statute requiring the right of claimant to be determined upon evidence in commissioners' record declared unconstitutional. 24 OhNPNS 398.

126-90½-New. Where questions of fact are submitted to a jury, the court is not bound by the jury's findings. 119 Kan864, 241P442.

126-90¼-New. Instructions to jury held inadequate but not misleading. 120 Kan56, 242P147.

126-90½-New. Insurer not liable for injuries not pleaded where not proximate result of injuries set out. Tex CivA 293SW932.

126-90½-New. "Adverse party" is construed to mean one in whose favor the board decided. 5PaDist&Co 529.

126-90½-New. The trial court need not look to the record in a prior compensation suit unless it is offered in evidence. 214Ala394, 108S7.

126-90½-New. Under a statute providing for trial by jury, when certain issues are raised by the employer's report, and trial of cause as court proceeding, refusal to take case from jury held not error. 37**Wyo** 332, 261**P**648.

126-90¼-New. Respective rights of husband and wife to recover compensation for other's death held immaterial. 165**La**334, 115**S**582.

126-91 220**Ala**440, 125**S**608(2dcase); 93 **Cal**A[illegible], 269**P**733; 108**Conn**309, 143 **A**[illegible]; 326 **Ill** 293, 157**NE**168; 331 **Ill** [illegible], 162**NE**[illegible]; 332 **Ill** 156, 163**NE**403; 201**Ky**24, 20**SW(2d)**1020; 9**LaA**62, 118 **S**[illegible](2dcase); 11**LaA**599, 123**S**383; **LaA** 124**S**[illegible](2dcase); **LaA** 124**S**623; 12**LaA** 72, 125**S**[illegible](2dcase); 12**LaA**153, 125 **S**[illegible](2dcase) (dependency); 12**LaA**139, 125**S**[illegible]; 2**LaA**81; 3**LaA**783; 4**LaA**103; 4**LaA**412; 5**LaA**346; 5**LaA**709; 5**LaA** [illegible]; 6**LaA**[illegible]; 7**LaA**16; 7**LaA**164; 7**LaA**207; 7**LaA**405; 7**LaA**444; 7**LaA** [illegible]; 7**LaA**460; 7**LaA**489; 7**LaA**597; 7**LaA**[illegible]; 156**Md**690, 145**A**199; 82**NH** [illegible], 135**A**24; **NJSup** 130**A**538; **NJSup** [illegible]; 22**AppDiv**553, 229**NYS**652; 22**AppDiv**327, 230**NYS**707; 285**Pa**443, 132**A**358; 155**Tenn**34, 290**SW**18; 160 **Tenn**513, 26**SW(2d)**153; **TexCommnA** 280**SW**740; **TexCivA** 78**SW(2d)**607; **Tex CivA** 10**SW(2d)**220; **TexCivA** 10**SW(2d)** 760; **TexCivA** 10**SW(2d)**782; **TexCivA** 20**SW(2d)**342(2dcase); **Can** [1929] 4 **DomLR**57. See also 90**PaSuper**96. [c] 213**Ala**599, 105**S**686. [h] **Proximate cause of death.**-154**Tenn**273, 288**SW** 726. [i] **To authorize award of lump sum,** employee must support his application by competent evidence that it is for his best interests. 332 **Ill** 64, 163**NE**381. [j] **Dependency.**-220**Ala** 480, 126**S**116. [k] **State seeking payment into industrial fund for employee's death** has burden of proving that there were no dependents. **Ida** 290**P**209.

126-92 213**Ala**244, 104**S**422; 214**Ala** 256, 107**S**837; 217**Ala**369, 116**S**514; 218 **Ala**130, 117**S**755; **Colo** 271**P**61; 124 **Kan**287, 259**P**703; 9**LaA**209, 119**S**147; 9**LaA**458, 121**S**220; 12**LaA**348, 124**S** 542 (presumption arises that accident caused disease); 12**LaA**511, 126**S**446; 1**LaA**514; 2**LaA**558; 2**LaA**195; 5**LaA** 187; 8**LaA**300; 126**Me**450, 139**A**478; 155**Tenn**34, 290**SW**18; **TexCommnA** 280 **SW**740; **TexCivA** 18**SW(2d)**740; **Sask** [1925] 3**DomLR**621. But see 15**F(2d)** 906. [a] (1) 285**Pa**443, 132**A**358. [b] **It is presumed in absence of proof to contrary** (1) that personal injury shown was accidental and that decedent did not willfully injure himself. **Tex CivA** 10**SW(2d)**220. (2) Claimant who is within classification of Workmen's Compensation Act defining dependents, is conclusively presumed to be dependent, and no evidence is required to show fact of dependency. 150**Va**562, 143**SE** 756.

126-92½-New. The burden is on defendant to prove defensive matter such as willful misconduct in general or as specified by statute. 213**Ala**244, 104**S** 422.

126-92½-New. Burden is on insurer to prove that the injury was induced by inherent or congenital weakness of employee. 15**F(2d)**906.

126-92¼-New. Burden of proving employee's willful misconduct is on employer pleading it. 216**Ala**267, 113**S** 271.

126-92⅛-New. The burden is on employer to show fact and amount of payments to injured employee before death to reduce compensation due wife. 214 **Ala**394, 108**S**7.

126-92¼-New. Burden is on claimant to show the amount incurred for last sickness and burial expenses. 214**Ala** 394, 108**S**7.

126-92½-New. and that no insurance association is liable for last sickness and burial expenses. 214**Ala**394, 108**S**7.

126-92¾-New. Rule that disabilities first evident five years after accident are presumed not due to it held rule of evidence. 81**Colo** 191, 254**P**444.

126-92⅞-New. Such presumption held inapplicable to recurring disability. 81 **Colo** 191, 254**P**444.

126-92⅒-New. Burden of proving that subcontractor was an independent contractor is on party asserting it in suit to set aside award. **TexCivA** 2**SW(2d)** 495.

126-92 1/11-New. Employee has burden of proof that employee persisted in practice retarding recovery. 37**Wyo** 332, 261**P**648.

126-92 1/12-New. Compensation claimant, in insurer's suit to set aside an award, need only prove employment by insured and that he is entitled to compensation. **TexCivA** 2**SW(2d)**495.

126-92 1/13-New. Employee meets burden of proving employment by proving implied employment by contractor and that subcontractor was under contractor's control. **TexCivA** 2**SW(2d)**495.

126-92 1/14-New. The burden is on the employer, filing an exception of prematurity, to prove that there is no reasonable foundation for plaintiff's allegations of defendant's refusal to pay him the maximum compensation to which he is entitled. 9**LaA**639, 120**S**88.

126-92 1/15-New. The employer had the burden of proof as to the defense of the employee's intoxication at the time of the injury. 10**LaA**740, 122**S**913.

126-92 1/16-New. Presumptively, where one person is employed to work on the premises of another and for that other's benefit, he is a servant, and, if the employer seeks to avoid the liability for the employee's acts on the groud that he was not a servant, the burden is upon the employer to establish that fact. 150**Wash**230, 272**P**734, 62**ALR** 225.

126-92 1/17-New. The burden to show the employee's intoxication at the time of the accident is on defendant. 4**LaA** 96.

126-92 1/18-New. The burden is on the employer to show a change of employment. 5**LaA**665.

126-92 1/19-New. The burden is on defendant to show that plaintiff's conceded disability is not the result of the injury shown to have occurred in the course of his employment. 12**LaA** 388, 124**S**568.

126-92 1/20-New. An employer interposing a special plea has been held to have the burden of proving by a preponderance of the evidence allegations in support thereof. 12**LaA**200, 124**S**634.

126-92 1/21-New. Burden of proving employee's willful intention to injure fellow employee is on one claiming exemption. 198**NC**723, 153**SE**266.

126-92 1/22-New. Presumption that act controls which flows from status of employer and employee may be overthrown by submitting evidence that statutory method to dissolve relationship has been followed. 298**Pa**343, 148 **A**529.

126-92 1/23-New. Where workman paid by cord, was injured while cutting wood, employer, claiming that workman was independent contractor, must prove relinquishment of right of control. 160 **Tenn**459, 26**SW(2d)**148.

126-92 1/24-New. There is presumption that one working for another is employee. 160**Tenn**538, 26**SW(2d)**1051.

126-92 1/25-New. Burden is on employer to prove willful character of injury in order to claim exemption. **ND** 231**NW** 283.

127-94½-New. Wife of deceased employee is precluded as a person interested from testifying to conversations with deceased. **Minn** 172**NW**311. Contra 124**Kan**327, 259**P**695.

127-94⅓-New. Dying declarations are admissible in some jurisdictions. 124 **Kan**327, 259**P**695.

127-94¼-New. A physician who treated an injured employee at his request may testify concerning the injury and its consequences. 121**Kan**525, 247**P**644; **TexCivA** 293**SW**932.

127-94⅕-New. Such physician's testimony is admissible, although an employee had no knowledge of the treatment where the injury and consequences were undisputed. 121**Kan**525, 247**P** 644.

127-94⅙-New. Evidence, that by common repute claimant wife was living with another man as his wife long after the alleged abandonment of deceased workman, is admissible. **Tex CivA** 273**SW**644.

127-94½-New. Where the testimony of a witness before the commission was read to the jury, it was not error to refuse to call such witness. 148**Md**363, 129**A**359.

127-94⅓-New. Testimony of employee as to ability to perform labor is admissible. **TexCivA** 293**SW**210.

127-94⅙-New. It is error to admit testimony of injured employee not conforming to pleadings. **TexCivA** 293**SW** 932.

127-94 1/10-New. Admission of testimony by workman that he passed army examination, though error, is harmless. **TexCivA** 295**SW**675.

127-94 1/11-New. Testimony of neutral physician appointed by court to examine employee is admissible. 122**Kan**69, 251**P**184.

127-94 1/12-New. Evidence concerning an autopsy on the body of a deceased employee is admissible in a proceeding by his widow for compensation for his death, although she did not consent to the autopsy where the demand for an autopsy was reasonably and seasonably made and the employer understood that she had consented. 155**Tenn**34, 290**SW** 18.

127-94 1/13-New. Expert testimony of effect of injury is admissible. 36**Wyo** 325, 255**P**356.

127-94 1/14-New. Personal examination by court of claimant at trial is not error, especially where consented to. 156 **Tenn**373, 299**SW**1056.

127-94 1/15-New. Evidence regarding number of men lifting on pipe at time of injury is admissible. **TexCivA** 5**SW** (2d)230.

127-94 1/16-New. Failure to plead special defense held ground for exclusion of testimony. 87 **IndA**233, 159**NE**433.

127-94 1/17-New. Contractor's ignorance as to whether subcontractor insured employees is inadmissible in determining the right of subcontractor's employee to compensation from the contractor's insurer. **TexCivA** 2**SW(2d)** 495.

127-94 1/18-New. The decree of the district court setting aside, on a resort to the courts, and holding of no further force or effect, a compensation award of the industrial accident board, rendered such an award functus officio, and certified copies thereof were not thereafter competent as evidence in a subsequent suit under the Workmen's Compensation Act. **TexCivA** 8**SW(2d)** 699.

127-94 1/19-New. A certified copy made by the industrial accident board of a doctor's affidavit in the compensation proceeding before the board was held not admissible in a subsequent suit by claimant as "order, award, or proceeding of said board" within the Workmen's Compensation Act. **TexCivA** 8 **SW(2d)**699.

127-94 1/20-New. The evidence of the employee's financial condition is admissible on an issue of a lump sum award under the Workmen's Compensation Act. **TexCivA** 9**SW(2d)**65.

127-94 1/21-New. There was no error in refusing to permit the employer to show an application for permission for self insurance, since his intent to take out the insurance has no bearing on the fact that he was not insured at the time of the injury. 99**CalA**108, 277**P**1061.

127-94 1/22-New. The evidence of repairs of an engine after the injury may be competent to show or explain other issues, provided the issue of the negligence is not involved. **TexCivA** 12**SW** (2d)1054.

127-94 1/23-New. Statements in the notice of the fatal injury and the notice of the injury furnished by the widow and deceased shortly after the injury were not admissible to show the place of the injury, but only to prove such notices were given. **TexCivA** 16**SW(2d)** 917.

127-94 1/24-New. There was no error in refusing to permit the employer to show that it had been proceeded against under penal provisions of the statute and had been acquitted. 99**CalA**108, 277**P** 1061.

127-94 1/25-New. An insurance policy is not admissible except for jurisdictional

purposes. **TexCivA** 19**SW(2d)**153.

127-94½6-New. Where insurer pleaded a former injury as the proximate cause of all suffering complained of, evidence pertinent to such issue was admissible. **TexCivA** 19**SW(2d)**622.

127-94½7-New. A question asked a medical witness, whether the patients told him when and how they received the injuries, was properly excluded as immaterial and irrelevant. **TexCivA** 19 **SW(2d)**622.

127-94½8-New. Questions asked the employee by insurer regarding the extent of the disability and the nature of the injuries, were properly excluded where plaintiff was not qualified to answer such questions. **TexCivA** 19**SW (2d)**622.

127-94½9-New. Evidence of employee's previous earnings under different employer is inadmissible on issue of earning capacity before accident. **NH** 151A 707.

127-95 217**Ala**422, 116**S**167; 324 **Ill** 582, 155**NE**320; 12**LaA**254, 124**S**616; 12**LaA**200, 124**S**634. [b] (1) 213**Ala** 244, 104**S**422 (miner killed by explosion when attempting to close water valve in return air course); 217**Ala**369, 116 **S**514; 217**Ala**422, 116**S**167; 87 **IndA** 233, 159**NE**433; 235**Ky**703, 32**SW(2d)** 56; 12**LaA**388, 124**S**568; 128**Me**303, 147 **A**215; 115**Nebr**565, 213**NW**820; 286**Pa** 301, 133**A**547; **TexCivA** 288**SW**662; **TexCivA** 5**SW(2d)**1008; 141**Wash**481, 252**P**107. (2) 122**Kan**653, 253**P**611; 115**Nebr**565, 213**NW**820; 298**Pa**381, 148**A**500. (4) 321 **Ill** 533, 152**NE**535; 3 **LaA**132; 3**LaA**175; **TexCivA** 289**SW** 416. (5) 9**LaA**660, 119**S**772; 12**LaA** 348, 124**S**542; **LaA** 129**S**163; **TexCivA** 274**SW**309; **TexCivA** 10**SW(2d)**756; **TexCivA** 128**W(2d)**1054; 37**Wyo** 332, 261**P**648. (7) 9**LaA**639, 120**S**88; **Tex CivA** 13**SW(2d)**993. (10) 213**Ala**604, 105**S**592. (13) 124**Kan**327, 259**P**695. (41) 214**Ala**256, 107**S**837. (66) That plaintiff suffered permanent partial disability on account of injury to his foot. 118**Kan**738, 236**P**837. (67) That plaintiff was entitled to compensation for loss of toe. 118**Kan**738, 236**P**837. (68) That wife had abandoned husband. **TexCivA** 273**SW**644. (69) That claimants were partially dependent on deceased. **TexCivA** 273**SW**686. (70) That total disability was permanent. **TexCivA** 295**SW**301; 34**Wyo** 53, 241**P** 219. (71) That gangrene was caused by injury complained of. **NJSup** 130**A** 538. (72) Sufficient to support award. 120**Kan**722, 245**P**127. (73) That defendant had due and legal notice of accident. 213**Ala**596, 105**S**648. (74) That employee was not engaged in "casual" employment. 213**Ala**596, 105**S**648. (75) That disability was permanent and injuries of serious character. 120**Kan**722, 245**P**127. (76) Award for loss of four fingers. 154**Tenn**230, 285**SW**553. (77) Of permanent partial disability. 120 **Kan**56, 242**P**147. (78) That there was a mutual mistake of employee and physicians for employer in executing release. 120**Kan**335, 243**P**304; **TexCivA** 299**SW**534. (79) That muscular atrophy was result of injury, arising out of and in course of employment. 120**Kan** 335, 243**P**304. (80) That employee going to dangerous part of mine to help put out fire after foreman forbade him did not make him guilty of willful misconduct. 213**Ala**244, 104**S**422. (81) That claimant was employee. **Minn** 232 **NW**915. (82) That injury to employee was within Compensation Act requiring transfer to compensation docket. 221 **Ala**625, 130**S**334. (83) Total loss of use of one ear. 156**Tenn**179, 299**SW**802. (84) Average earnings. 156**Tenn**64, 299 **SW**811. (85) That employee's average weekly wage was twenty-seven dollars per week. **TexCivA** 299**SW**534. (86) That injury from fall was traceable to prior injury in employment. 217**Ala** 424, 116**S**121; 194**Wis**606, 217**NW**303. (87) To sustain award. 33**F(2d)**218. (88) Of parents' partial dependency on deceased employee. 11**LaA**480, 123**S**907. (89) Of incapacity. 128**Me**299, 147**A** 210. (90) That accident occurred on ship where employee stated he was struck on head by piece of coal, though not corroborated. 34**F(2d)**549. (91) That motive for murder of watchman was robbery. 220**Ala**25, 123**S**225. (92) That ostensible garage owner was actual employer. 99**CalA**767, 279**P**473. (93) That blindness was caused by injury received in course of employment. 230**Ky**108, 18**SW(2d)**958. (94) That injury to side and abdomen was received at same time and in same fall. 11**LaA** 549, 123**S**413. (95) That employee was partially incapacitated. **Mass** 167**NE** 350. (96) That death of employee resulted from injury received in scope of employment. 31 **OhA**397, 167**NE**373. (97) That failure to pay lump sum to deceased employee's widow would work manifest hardship on her. **TexCivA** 19 **SW(2d)**397. (98) That employee died from injury received in course of employment. **TexCivA** 19**SW(2d)**397. (99) That injuries totally disabled employee for three hundred weeks. **TexCivA** 19 **SW(2d)**821. (100) Allowance for two hundred seventy-four weeks as for partial disability in addition to compensation for total disability for twenty-six weeks on account of hernia. 11**LaA**321, 123**S**445. (101) Awarding compensation for injury to back. 11**LaA**572, 123 **S**488. (102) That sacroiliac subluxation, if causing disability, was not sustained at time of accident. 12**LaA**82, 124**S**582. (103) That truck driver was violating statute. 12**LaA**447, 125**S**464 (2dcase). (104) That employee was not acting within course of employment. 12 **LaA**455, 125**S**298. (105) That plaintiff suffered stroke of apoplexy. 12**LaA**299, 125**S**457. (106) That employee was not disabled to do work of same character in which he was engaged at time of accident. 6**LaA**370. (107) That employee's deafness was caused by trauma acting through syphilitic condition. 13 **LaA**402, 128**S**321. (108) That employer had knowledge of injury so as to require report of accident to plead limitation. **NJSup** 150**A**221. (109) That employee did not receive injury to eyes from exposure to glare of welding machine. 12**LaA**668, 126**S**701. (110) For employee against uninsured employer. **ND** 231**NW**283. (111) As to amount of compensation for loss of eye. 160**Tenn** 459, 26**SW(2d)**148. (112) That employee was totally disabled. 13**LaA**292, 125**S**877. (113) That decedent was killed by policeman while resisting arrest. 12**LaA**508, 126**S**452. (114) Other instances. 15**F(2d)**54; 18**F(2d)**453; 219**Ala**148, 121**S**408; 219**Ala**614, 123**S** 78; 221**Ala**488, 129**S**275; 324 **Ill** 416, 155**NE**380; 324 **Ill** 497, 155**NE**313; 328 **Ill** 641, 160**NE**180; 334 **Ill** 52, 165**NE** 225; 236 **IllA**511; 84 **IndA**406, 150**NE** 105; 121**Kan**657, 249**P**603; 123**Kan**628, 256**P**992; 126**Kan**133, 267**P**4; 128**Kan** 618, 278**P**707; 130**Kan**58, 285**P**550; 214 **Ky**635, 283**SW**1007; 214**Ky**775, 283**SW** 1067; 162**La**556, 110**S**754; 9**LaA**132, 119**S**498; 10**LaA**25, 119**S**906; 11**LaA** 92, 120**S**682; 9**LaA**497, 121**S**233; 9**LaA** 501, 121**S**314; 11**LaA**388, 121**S**627; 10 **LaA**623, 121**S**676; 9**LaA**62, 118**S**852 (2dcase); 11**LaA**140, 119**S**714; 10**LaA** 144, 122**S**74; **LaA** 122**S**131; 10**LaA**688, 122**S**157(2dcase); 12**LaA**388, 124**S**568; **LaA** 124**S**623; **LaA** 124**S**636; 12**LaA** 153, 125**S**593(2dcase); 12**LaA**244, 125 **S**632; 12**LaA**643, 125**S**771; **LaA** 129**S** 443; **LaA** 130**S**251; 9**LaA**88, (**Orleans**) 119**S**77; 125**Me**221, 132**A**520; 125**Me** 374, 134**A**163; 148**Md**363, 129**A**359; **Mass** 155**NE**840; 267**Mass**319, 166**NE** 821; **Mass** 169**NE**137; 179**Minn**177, 228 **NW**607; **Mo** 32**SW(2d)**75; 115**Nebr**565, 213**NW**820; **NH** 146**A**529; **NJSup** 139 **A**440; **NM** 290**P**409; **Okl** 293**P**191; 126 **Or**694, 270**P**759; 296**Pa**71, 145**A**707; 296**Pa**216, 145**A**905; 159**Tenn**202, 17 **SW(2d)**904; 160**Tenn**504, 26**SW(2d)** 128; 160**Tenn**513, 26**SW(2d)**153; **Tex CommnA** 12**SW(2d)**536; **TexCommnA** 12**SW(2d)**1002; **TexCivA** 288**SW**471; **TexCivA** 5**SW(2d)**230; **TexCivA** 7**SW (2d)**1112; **TexCivA** 10**SW(2d)**756; **Tex CivA** 10**SW(2d)**760; **TexCivA** 14**SW(2d)** 1046; **TexCivA** 17**SW(2d)**68; 37**Wyo** 332, 261**P**648. [c] (12) 284**Pa**35, 130**A** 265 (hearsay evidence); **TexCivA** 272 **SW**520. (20) That release was executed under mutual mistake of fact. 121 **Kan**451, 247**P**856. (21) As to amount of workman's contribution to support of parents and amount of average annual earnings. 120**Kan**684, 244**P**1050. (22) That claimant was entitled to compensation for loss of hearing. 33**GaA** 666, 127**SE**804. (23) That permanent disability resulted from accident. 324 **Ill** 268, 155**NE**326; 119**Kan**837, 241**P** 453. (24) To show that death was in course of employment. 326 **Ill** 293, 157 **NE**168. (25) That infection of hand in course of employment was the direct cause of death by pneumonia eighty-one days later. 285**Pa**443, 132**A**358. (26) That employee killed while riding in fellow servant's car was killed in course of employment. **TexCommnA** 292**SW** 857. (27) That period of temporary total disability was fifty-eight and three-sevenths weeks. 324 **Ill** 268, 155**NE**326. (28) That claimant was entitled to award for rupture. 324 **Ill** 504, 155**NE** 292. (29) That death following operation for appendicitis resulted from injury within course of employment. 213 **Ky**154, 280**SW**925. (30) That injury arose out of employment. 124**Kan**559, 262**P**19. (31) That claimant was employed by owner of sawmill rather than by owner of timber. 194**Wis**186, 216 **NW**132. (32) That compromise agreement was induced by fraud. **TexCivA** 299**SW**534. (33) That death resulted from injury. 12**LaA**415, 125**S**883. (34) That death resulted from accident happening in course of employment. 12 **LaA**511, 126**S**446. (35) As to average weekly wages. **TexCivA** 19**SW(2d)**346; **TexCivA** 20**SW(2d)**334. (36) As to cause of disability. **Nebr** 227**NW**449. (37) That dizziness, headaches, and other pains resulted from injuries sustained. 11**LaA**336, 123**S**451. (38) That inhalation of gas unexpectedly emitted from oil well caused development of tuberculosis. **TexCivA** 18**SW(2d)**1102. (39) That truck driver was employee of company rather than independent contractor. **TexCivA** 19**SW(2d)**346. (40) Of permanent total incapacity. **TexCivA** 19**SW(2d)**622. (41) That hernia was result of injury sustained in course of employment. 12**LaA**296, 125**S**492. (42) That sister of deceased was wholly and actually dependent on him. **LaA** 130 **S**143. (43) Other instances. **CalA** 275 **P**844; **GaA** 151**SE**537; 334 **Ill** 246, 165 **NE**689; 9**LaA**209, 119**S**147; 9**LaA**183, 119**S**456; 9**LaA**159, 119**S**469; 9**LaA**173, 119**S**539; 10**LaA**47, 121**S**191; 9**LaA**458, 121**S**220; 9**LaA**448, 121**S**256; 9**LaA**501, 121**S**314; 11**LaA**270, 122**S**162; 11**LaA** 14, 122**S**78; 12**LaA**242, 125**S**488; **LaA** 128**S**667; **LaA** 128**S**678; **LaA** 129**S**429; 4**LaA**116; **RI** 144**A**109; **TexCivA** 10 **SW(2d)**782; **TexCivA** 21**SW(2d)**8; **Tex CivA** 30**SW(2d)**588. [f] (3) Evidence held to warrant submission of issue whether injuries resulted in permanent incapacity. **TexCivA** 274**SW**309. [g] (3) To show that death from rupture of artery of heart was caused by accident arising out of, and in course of, employment. 155**Tenn**34, 290**SW**18. [i] **Evidence held sufficient:**—(1) To sustain amount of award. 213**Ala**604, 105**S**592. (2) To show that failure to make lump sum settlement would be unjust. **Tex CivA** 274**SW**309. (3) To show permanent disability. 11**LaA**549, 123**S**413. (4) To show that employee sustained hernia in course of employment. 6**LaA** 206. (5) To show that malady of employee had no connection with burning of ankle in accident. 12**LaA**659, 126**S** 699. (6) To show that wife and deceased employee were living together. 13**LaA**416, 127**S**40. (7) To show that child was legitimate child of marriage. 13**LaA**416, 127**S**40. (8) To show that accident did not cause injury to spine. 13**LaA**44, 127**S**92. (9) To show that employee had not been ordered to do work in which he was engaged when injured. 13**LaA**664, 127**S**146. (10) To show that death of taxicab driver in collision at street intersection was result of mutual negligence of both drivers. 13**LaA**525, 127**S**59. (11) To show that parents of deceased employee were partial dependents. 13**LaA**525, 127**S**59.

(12) To show amount of compensation to be awarded parents for death of son. 13LaA525, 127S59. [j] **Evidence held insufficient:**-(1) To make prima facie case of ordinary service by claimant. Vt 147A265; Vt 147A267(1stcase). (2) To show that employee sustained accidental injury at stated time. 13LaA 24, 127S30. (3) To show that taxicab driver at time of death was on journey of his own. 13LaA525, 127S59. (4) To show injury by fall from ladder. 13 LaA24, 127S30. (5) To show that taxicab driver deliberately failed to use adequate guard or protection against accident. 13LaA525, 127S59. (6) To show connection between accident and rheumatic pain. 13LaA24, 127S30. (7) To show that actions of taxicab driver amounted to willfully injuring himself. 13LaA525, 127S59. [k] **Weight of evidence is for jury.**-141Wash481, 252P107. [l] **Prima facie case that claimant was employee of company** was made by finding that claimant undertook to sell automobiles during spare time under control of company. Vt 147A265; Vt 147 A267(1stcase). [m] **Evidence held to require award** of sixty-five per cent of employee's weekly wage for full period of one hundred twenty-five weeks. 11 LaA284, 123S417. [n] **Where undisputed facts show no actual dependency,** claimant's statement that he is dependent is not conclusive on court. 153Va 86, 149SE613.

127-96 [b] **Court depends largely on medical experts** in determining cause of death. LaA 129S443.

127-96½-New. Plaintiff must reasonably satisfy trial court that accident was within provisions of law and that injury was proximate result thereof. 213Ala305, 104S764; 126Me450, 139A 478.

127-96⅓-New. Counsel may argue weight of testimony of neutral physician. 122Kan69, 251P184.

127-96¼-New. A conclusion that death was caused by accident arising out of, and in course of, employment cannot be supported by suggestions as to cause of death which are mere conjectures. 155Tenn34, 290SW18.

127-96⅕-New. The proof of employment for two months at an average weekly wage is insufficient to make the case for compensation based on weekly wages. **TexCivA** 7SW(2d)607.

127-96⅙-New. In an action, brought on the ground that the injury hastened death from disease, aroused a dormant disease, or accelerated an active, progressive disease, the evidence to authorize a recovery must establish with some degree of certainty that there was some connection between the injury and death or disability. 9LaA132, 119S498.

127-96⅐-New. Where the employee suffered an injury to his head, and became ill several days thereafter, and died as a result of such illness, which was epidemic meningitis, plaintiff must prove by a preponderance of the evidence that the injury caused his illness. 9LaA62, 118S852(2dcase).

127-96⅛-New. Plaintiff must make out case by preponderance of evidence. 12 LaA415, 125S883.

127-96⅑-New. A decision of a member of the accident commission must be based on facts proved by the evidence and on natural inferences logically drawn therefrom. 128Me303, 147A215.

127-96 1/10-New. A deputy commissioner has a right to ignore the opinion of doctors and to rely on other evidence and his own observations and judgment in making an award. 33F(2d)218.

127-96 1/11-New. The test is whether the evidence establishes a causal connection between the injury and the death of the employee. **TexCivA** 19SW (2d)397.

127-96 1/12-New. Books of the employer are not conclusive as to the average earnings of the injured employee. 230 Ky108, 18SW(2d)958.

127-96 1/13-New. The employer must prove his special plea by a preponderance of the evidence. 12LaA200, 124S 634.

127-96 1/14-New. Plaintiff must prove that death is probably due to an accident or as a result of employment with at least some degree of legal certainty. 12LaA139, 125S596.

127-96 1/15-New. Instructions held proper. ND 231NW283.

127-97 251IllA560; 127Kan93, 272P 183; 9LaA159, 119S469; NC 155SE 728; 21OhA148, 152NE792 (in proceeding to recover for death from apoplexy injury should determine whether cause of death was from overheating or overexertion in course of employment); **TexCivA** 286SW1113. But see **Ill** 173 NE49 (question of fact). [a] **Whether injury sustained by truck driver,** while making changes in truck en route, was received in course of employment held for jury. **TexCivA** 291SW940. [b] **Whether trucker hauling gravel from pit** was independent contractor held properly submitted to jury. **TexCivA** 291SW940.

127-97½-New. Unreasonableness of claimant's refusal to permit an operation is a question of fact. 156Tenn6, 300SW6.

127-97⅓-New. It was a jury question whether muscular atrophy was caused by the injury. 120Kan335, 243P304.

127-97¼-New. Whether employer was prejudiced by failure of injured employee to give ten-day statutory notice is for jury. 121Kan525, 247P644.

127-97⅕-New. Demurrer to evidence properly overruled where sufficient compliance with the statute was to consent to arbitration shown. 121Kan525, 247 P644.

127-97⅙-New. Instructions to jury held not misleading. 118Kan738, 236 P837.

127-97⅐-New. Other questions for the jury are illustrated in 216Ala248, 112S 737; 150Md71, 132A374; 287Pa403, 135A124; **TexCivA** 294SW905.

127-97⅛-New. Ordinarily the extent of disability from injury is a question of fact. 156Tenn179, 299SW802; **Tex CommnA** 1SW(2d)608; **TexCivA** 1SW (2d)692.

127-97⅑-New. Evidence held insufficient to take question to jury. **TexCivA** 1SW(2d)692 (whether hernia existed prior to injury).

127-97 1/10-New. In an action by the parents and minor sister of the deceased employee for compensation under the Workmen's Compensation Law for his death, the evidence has been held sufficient to take to the jury the question whether the father's income was insufficient to take care of the family's indebtedness and support them properly without contributions by decedent. 127Or599, 272P267.

127-97 1/11-New. In an action against a bakery for the death of a child, the evidence showing that work done by the child was assisting the drivers of wagons for defendant who engaged his services and paid him on their own account was held sufficient to take to the jury the question whether the relation of employer and employee existed between the child and defendant company within the provisions of the Workmen's Compensation Law. 218Ala607, 119S 638.

127-97 1/12-New. The reasonableness of the request that the employee be compelled to submit to an anæsthetic is one of fact for the court. 128Kan618, 278P 707.

127-97 1/13-New. Question whether injured person was servant or independent contractor is one of law where contract lies in parol and facts are clear and undisputed. 160Tenn459, 26SW (2d)148.

127-97 1/14-New. Construction of unambiguous employment contract is question of law. 160Tenn538, 26SW(2d) 1051.

127-97 1/15-New. Status of employee is question for jury. **TexCivA** 22SW(2d) 952.

127-97 1/16-New. Sufficiency of employee's reason for failure to give notice of injuries and file claim is question for jury. **TexCivA** 23SW(2d)405.

127-97 1/17-New. Such question is one of fact where evidence is conflicting and more than one inference can be drawn therefrom. 160Tenn459, 26SW(2d)148.

127-97 1/18-New. Determination of deceased's weekly wages is properly submitted to jury where deceased was employed only six months prior to injury. **TexCivA** 27SW(2d)838.

127-97 1/19-New. [§ 140a] (6½) **Instructions. TexCivA** 29SW(2d)831.

127-97 1/20-New. Refusal of charge that employee's conscious or intentional violations of reasonable rule constitute misconduct is not covered by oral charge not fully and fairly covering issue, and refusal of charge that employee's conscious or intentional violations of known rule are willful misconduct is error. **Ala** 130S271.

127-97 1/21-New. Instructions held not supported by pleadings and evidence, making refusal proper. **TexCivA** 294 SW905.

127-1 Kan 289P410. [b] (4) Jury's finding of total incapacity for certain period held not in conflict with finding of partial incapacity. **TexCivA** 5 SW(2d)1008.

127-6 [a] **Decision stating findings and conclusions separately** should be made by court apportioning fund received on compromise settlement for death of employee leaving widow and minor children. 176Minn130, 222NW643.

127-7½-New. Under a provision that if income loss of a partial dependent is less than an amount stated he shall receive the full amount, failure to find total income of deceased employee will not defeat award. 20AlaA647, 104S912.

127-7⅓-New. Finding of jury held not uncontradictory and to indicate that jury understood issues. **TexCivA** 288 SW244.

127-7¼-New. Verdict that employee did not willfully contribute to cause of accident is sufficient under statute. 216 Ala267, 113S271.

127-7⅕-New. Modification of instruction on unsanitary or injurious practice tending to retard recovery by reference to advice of physician held not prejudicial. 37Wyo332, 261P648.

127-7⅙-New. Findings held contrary to everyday experience. **NH** 151A707.

128-8½-New. An application for a new trial under the Kansas statute must be filed within three days after a special finding by the jury. 126Kan794, 271P279.

128-8⅓-New. A denial of a new trial to permit the introduction of medical testimony, based on a claim of surprise, has been held proper. 159Tenn 202, 17SW(2d)904.

128-9 [a] **Such judgment is final,** except for enforcement and collection. 213 Ala412, 104S770.

128-11 TexCivA 293SW932. See also **TexCivA** 10SW(2d)760.

128-12½-New. The court has jurisdiction to render a lump-sum judgment or provide for periodical payments in its discretion. 124Kan287, 259P703.

128-13 [a] **Recovery is limited to injury pleaded.**-**TexCivA** 5SW(2d)783.

128-16½-New. Judgment denying compensation, but granting time for introduction of further evidence, held properly set aside. 215Ala348, 110S565.

128-16⅓-New. Statutory allowance for burial expenses should not be included in judgment in absence of pleading or proof. 214Ala394, 108S7.

128-16¼-New. A judgment of dismissal with prejudice to any future action, entered upon agreement of the parties after compromise and settlement of the claim and payment of the amount of compensation agreed upon as a final adjudication upon the merits, constitutes a bar to a future action on the claim adjudicated. 122Kan269, 251P 1100.

128-16⅕-New. The effect of such judgment is not destroyed by an allegation in a subsequent action on the same claim that the settlement was made through mutual mistake as to the extent of the injuries. 122Kan269, 251P 1100.

128-16⅙-New. Judgment should not retain jurisdiction for subsequent review of award, but should be final, subject to appeal. 23F(2d)682.

128-16⅐-New. That judgment award-

ing compensation for recurred and increased injury fixed definite date of recurrence and evidence did not show precise date held not fatal to judgment. 328 Ill 641, 160NE180.

128-16⅛-New. The court may, in cases of emergency or impending necessity, direct the making of advance payments to an injured employee, under the Texas statute. 29F(2d)343.

128-16⅛-New. In action for death based on foreign Compensation Law, equity court can make and enforce same orders as court of state where injury occurred. 156Miss567, 126S395.

128-16 1/10-New. In order for the person claimed to be liable for the employee's death to be bound by the judgment in compensation proceedings to have settlement ratified, he must have been made a party or served with notice to defend. 159Tenn586, 21SW(2d) 396.

128-16 1/11-New. Acquiescence in judgment. Collecting compensation awarded an employee under judgment is not acquiescence in judgment precluding recovery of the balance of the sum sued for. 169La479, 125S455(1stcase).

128-16 1/12-New. A decree awarding compensation which appears erroneous in the light of subsequent decisions cannot be changed at a subsequent term. 160Tenn93, 21SW(2d)1038.

128-16 1/13-New. Where evidence established total and permanent disability, court will not inquire into when employee might recover before entering judgment. LaA 129S163.

128-16 1/14-New. Judgment should state total amount awarded, whether due or payable in future installments. 98Pa Super28.

128-18½-New. New trial. New trial held improperly granted where there was no showing of diligence in procuring newly discovered evidence which was merely cumulative. 214Ala224, 107 S209.

128-18⅓-New. Court cannot incorporate in judgment provision for retention of jurisdiction for purpose of review on showing of change of condition, mistake, or fraud. TexCivA 31SW(2d) 846.

128-19 Ill 172NE761; 124Kan475, 260 P625. See also 22AlaA575, 117S914. [c] **In review on certiorari** where department, on appeal from deputy commissioner's order denying compensation, heard the case on its merits, it will be presumed that time for appeal from deputy's order would have been extended, if request had been made and supreme court could therefore dispose of case on its merits. 232Mich599, 206NW 490. [d] **Record on appeal** from certiorari proceedings see 33PortoRico 134.

128-19½-New. An appeal will be dismissed, if notice of appeal has not been given within the period prescribed by statute. 42 Ida132, 243P824.

128-19⅓-New. An award for an indefinite period during total disability is an appealable final order. TexCivA 272SW826.

128-20 324 Ill 504, 155NE292; 216Ky 742, 288SW696; LaA 127S36(1stcase); 125Me408, 134A450; 33NM15, 261P811; 156Tenn150, 299SW787. [a] (2) Objection at trial held not sufficiently to call attention to fact that amendment was not reverified. 213Ala605, 105S693. (3) Where jury's finding is against employee on issue on which claim for compensation depends, only remedy is to challenge finding. TexCivA 5SW(2d) 783. [b] **Objection to evidence as not within issue** is waived where no claim of surprise or motion for continuance was made. NM 290P409.

128-21 But see 39Wyo 372, 271P876 (as to necessity of motion for new trial for review by appeal).

128-22 TexCivA 292SW925.

128-23½-New. Admissibility of evidence. Where there is any legal evidence to support finding, technical questions as to admissibility of evidence will not be considered. 213Ala281, 104 S753.

128-25 214Ala332, 107S905.

128-25½-New. Only errors of law appearing on the face of the record are reviewable on certiorari. 217Ala369, 116 S514; 217Ala424, 116S121. [a] **Statute relating to proof of hernia** held not to change rule on review by certiorari. 217Ala369, 116S514.

128-25⅓-New. The law in force when the injury occurred must regulate the procedure on appeal, and when the right of appellant to introduce evidence not heard by the commission has since been removed by amendment it is error to refuse to permit the introduction of such evidence. 113 OhSt 33, 148NE343.

128-25¼-New. On appeal pleadings will be considered as if amended to correspond with evidence. 120Kan747, 244P 849.

128-25½-New. Where there is some evidence set out which supports court's finding, that is all that is required. 213Ala605, 105S693.

128-25⅙-New. Jury's verdict on issue of employee's willful conduct is subject to court's usual powers over verdicts. 216Ala267, 113S271.

128-25½-New. Circuit court judgment remanding cause to industrial commission for further action is interlocutory, and not reviewable by writ of error. 326 Ill 166, 157NE206.

128-25⅛-New. Compensation board may review award made at any time within compensatory period. 216Ky742, 288 SW696.

128-25⅛-New. Motion by employer on ex parte affidavits, filed during pendency of rehearing to have case remanded, held properly overruled. 161La889, 109 S538.

128-25 1/10-New. Error may be corrected in amended decree without authorizing new trial. 82NH403, 135A24.

128-25 1/11-New. Matters not appearing in the record cannot be considered. Tex CivA 286SW862.

128-25 1/12-New. Record held properly prepared. TexCivA 294SW905.

128-25 1/13-New. Date of injury has no bearing on merits of appeal. TexCivA 295SW301.

128-25 1/14-New. Court held to have jurisdiction despite error of date in award. TexCivA 295SW301.

128-25 1/15-New. Case tried under Compensation Act must be considered on that theory on appeal. TexCivA 285 SW648.

128-25 1/16-New. That motion to set aside decree awarding compensation was overruled held not to change status as to review. 214Ala130, 106S900.

128-25 1/17-New. Order granting rehearing in compensation case held reviewable. 214Ala224, 107S209.

128-25 1/18-New. Right to rehearing in compensation case determined by record. 214Ala224, 107S209.

128-25 1/19-New. When the fact that an employee was injured in the course of employment was not disputed, a finding of the industrial commission that he was not suffering disability as a result of the injury held a denial on "jurisdictional ground going to basis of claimant's right" and appealable. 23 OhA95, 154NE168.

128-25 1/20-New. Reviewing court must determine disputed questions of law and fact from evidence in the record made by the industrial commission. 322 Ill 160, 152NE505.

128-25 1/21-New. The supreme court, reviewing an award on a petition seeking additional compensation, may consider evidence, claim, and finding at the original hearing and evidence at the hearing on the instant petition. 328 Ill 641, 160NE180.

128-25 1/22-New. A deceased widow properly denied compensation held not entitled to complain of dismissal of intervention filed in behalf of a minor half-sister of deceased. 165La334, 115S 582.

128-25 1/23-New. Compensation claimant, unwilling to abide by the decision, must give personal notice to insurer and industrial accident board within twenty days. TexCivA 1SW(2d)702.

128-25 1/24-New. A letter advising insurer of unwillingness to abide by the decision sent to the industrial accident board is insufficient notice. TexCivA 1SW(2d)702.

128-25 1/25-New. An amendment of the statute effective more than twenty days after decision does not render notice unnecessary. TexCivA 1SW(2d)702.

128-25 1/26-New. Where a petition in error, bill of exceptions, or transcript of journal entries and original papers are not filed within the time limited by the trial court, the appellate court is without jurisdiction of proceedings in error. 37Wyo 471, 263P619.

128-25 1/27-New. The words disability and incapacity are generally synonymous, and the court's failure to submit an issue under the latter word, as used in the Act, is not error. TexCivA 9SW (2d)65.

128-25 1/28-New. The instructions given must be confined to the issues. Tex CivA 9SW(2d)65.

128-25 1/29-New. In a suit against an insurance carrier to set aside the compensation award in favor of plaintiff, the injured employee, the evidence that the employer had an arrangement whereby it carried its own insurance and used the name of the insurance carrier was held irrelevant, immaterial, and improper. TexCivA 9SW(2d)65.

128-25 1/30-New. A petition, not alleging that statutory requisites have been complied with, is demurrable. TexCivA 9SW(2d)65.

128-25 1/31-New. Procedure on appeal in ordinary civil cases applies to cases under the compensation act, except as otherwise provided. 39Wyo 372, 271P876.

128-25 1/32-New. Whether findings by court be treated as findings of court or of court as arbitrator held immaterial. 130Kan58, 285P550.

128-25 1/33-New. Presumption will be indulged in favor of finding as to reasonableness of excuse for failure of claimant to give notice of injury. 160 Tenn504, 26SW(2d)128.

128-25 1/34-New. Defendant may be estopped by his answer from asserting that the judgment is not within the issues. 11LaA480, 123S907.

128-25 1/35-New. Where both parties waived the right to jury trial and the court called an advisory jury, neither party could assign errors in giving or failing to give certain instructions. 129 Kan215, 282P574.

128-25 1/36-New. In some jurisdictions proceedings are reviewable by direct appeal. 41Wyo 119, 282P1055.

128-25 1/37-New. In some jurisdictions the trial court may grant a second extension for perfecting an appeal. 41 Wyo 119, 282P1055.

128-25 1/38-New. Supreme court is not bound by circuit court's directions on certiorari remanding cause to commission for further proceedings. Ill 172 NE761.

128-25 1/39-New. General terms of Compensation Law fixing time for filing record on appeal held applicable in cases under subsequently created appellate procedure. Wyo 291P314.

128-25 1/40-New. Time for perfecting appeal from order overruling motion for new trial commences to run from overruling of motion. Nebr 232NW92.

128-25 1/41-New. Other matters held reviewable. NH 151A707.

128-26½-New. The absence of evidence must be shown by the bill of exceptions. 217Ala369, 116S514.

128-26⅓-New. There is no office for bill of exceptions in certiorari where trial judge sets out evidence supporting findings. 213Ala605, 105S693.

128-26¼-New. Where findings of facts were omissive, bill of exceptions will be considered by supreme court. 214Ala 131, 106S806.

128-26⅙-New. Bill of exceptions will not be considered where the facts are not too meager to inform the court in respect of the entire circumstances having relation to the point in contest. 214Ala130, 106S898.

128-26⅛-New. Bill of exceptions is not considered except to ascertain the total absence of evidence. 214Ala130, 106S 900; 217Ala367, 116S512.

128-26 1/7-New. On certiorari, a bill of

exceptions is allowed only to determine whether there is any evidence supporting the finding. 214Ala256, 107S837; 217Ala422, 116S167.

128-26½-New. Mere incorporation of finding of fact in record on certificate held not to constitute it a bill of exceptions. 214Ala332, 107S905.

128-26½-New. Case is not triable de novo on evidence presented by a bill of exceptions, nor reviewed even as a finding in the trial court. 214Ala256, 107S837.

128-27 213Ala596, 105S648 (if any reasonable view of evidence supports it); 214Ala130, 106S898; 77CalA790, 247P526; 106Conn233, 137A724; 107Conn56, 139A644, 56ALR455; 160Ga810, 129SE75; 124Kan631, 261P584 (dictum); 126Kan794, 271P279; 125Me374, 134A163; 150Md71, 132A374; NJSup 132A301; 33NM15, 261P811; 54ND496, 209NW972; 288Pa140, 135A903; 49RI8, 139A470; RI 144A109; 154Tenn213, 288SW726; 155Tenn132, 290SW975; 155Tenn491, 296SW3, 53ALR1086; 142Va84, 128SE574 (in absence of fraud). [b] **Conclusions of fact held not reviewable.**–(1) 214Ala130, 106S898. (2) Findings as to dependency on substantial evidence held conclusive. 214Ala130, 106S898. [c] **Case not triable de novo.**–155Tenn132, 290SW975.

128-28 106Conn211, 137A642; 106Conn233, 137A724; 125Me361, 134A161; 285Pa443, 132A358; 5PaDist&Co702; 142Va84, 128SE574.

128-29 212Ala533, 103S548; 213Ala281, 104S753; 213Ala596, 105S648; 214Ala332, 107S905; 214Ala394, 108S7; 215Ala220, 109S878; 216Ala256, 113S83; 216Ala500, 113S578; 217Ala361, 115S425; 217Ala409, 116S424; 217Ala369, 116S514; 220Ala480, 126S116; 217Ala367, 116S512; 160Ga810, 129SE75; 123Kan189, 254P377; 124Kan287, 259P703; 219Ky546, 293SW1056; 1LaA597; 2LaA543; 2LaA546; 2LaA798; 3LaA77; 3LaA94; 3LaA645; 4LaA527; 4LaA532; 5LaA176; 5LaA348; 5LaA424; 6LaA669; 6LaA748; 7LaA73; 7LaA521; 125Me408, 134A450; 150Md71, 132A374; 114Nebr475, 208NW122 (evidence sufficient to sustain judgment of trial court); 115Nebr565, 213NW820; NJSup 130A538; 102NJL283, 132A302; NJSup 139A440; NJSup 152A179; 153Tenn255, 283SW447; 156Tenn202, 299SW1045; 156Tenn373, 299SW1056; 156Tenn268, 300SW6; TexCommnA 280SW740; Tex CivA 48W(2d)1023; 36Wyo90, 252P1027. See also TexCivA 10SW(2d)760. But see 13LaA44, 127S92 (court cannot rest case on portions of testimony favorable to servant and ignore that which is against him). [a] (1) 36GaA631, 137SE788; 129Kan215, 282P574; NJSup 132A297; 156Tenn197, 299SW780. (2) 86PaSuper231; 48RI184, 136A764. (3) 156Tenn197, 299SW780. (18) As to willful intention of employee in act causing injury. TexCivA 278SW347. (19) That injury was proximate cause of death. 214Ala394, 108S7. (20) Extent of injury. 156Tenn179, 299SW802. (21) That employer had actual knowledge of injury. 217Ala424, 116S121. (22) Reasonableness of refusal to submit to surgical operation. 156Tenn268, 300SW6. (23) Evidence sufficient to present issue of fact as to whether death was result of injury. TexCivA 16SW(2d)917. [b] **If there is any reasonable view of evidence** that will support conclusion of trial court, judgment will not be disturbed on certiorari. 214Ala332, 107S905. [c] **Where there is no conflict between statutory presumption that injury was result of employer's negligence and the evidence,** in action against employer failing to insure, jury's findings of negligence cannot be disturbed. 99CalA108, 277P1061. [d] **In Nebraska** rule is applicable to cases where judgment of district court was rendered before taking effect of L. (1929) c 81, providing for trial de novo. 227NW449.

128-29½-New. Findings on conflicting evidence will not be disturbed. 119Kan864, 241P442; 156Tenn268, 300SW6.

128-29⅓-New. The most favorable view in support of petitioner's claim, sustained by the trial court, must be accepted. 153Tenn255, 283SW447.

128-29¼-New. Conflicting evidence on total incapacity is properly submitted to jury. TexCivA 288SW244.

128-29½-New. Sufficiency of evidence is assumed where not set out in record. 216Ala256, 113S83.

128-29¼-New. Cause and manner of employee's injury is for jury in conflicting evidence. 216Ala267, 113S271.

128-29½-New. Finding of commissioner held not supported by subordinate facts. 106Conn211, 137A642.

128-29⅔-New. Amount awarded is a question of fact. 125Me361, 134A161.

128-29⅞-New. A verdict approved by the trial court will not be disturbed unless there is no substantial evidence to support it. 37Wyo332, 261P648.

128-29 1/10-New. The appellate court is bound to assume that a finding of the compensation board was supported by competent evidence where evidence is not before it. 222Ky432, 300SW892.

128-29 1/11-New. The appellate court cannot retry a compensation case on the basis of the conclusion it might draw from subordinate facts. 107Conn56, 139A644, 56ALR455.

128-29 1/12-New. A finding of the jury must not be conflicting. TexCivA 9SW(2d)65.

128-29 1/13-New. Findings on conflicting evidence will not be disturbed where supported by any evidence. 160Tenn459, 26SW(2d)148 (relationship as servant or independent contractor).

128-29 1/14-New. Award will not be disturbed if conclusions of trier of facts may be reasonably inferred from facts proved. 160Tenn513, 26SW(2d)153.

129-30 220Ala686, 127S165; 23OhA95, 154NE168; 155Tenn132, 290SW975. [b] **Legal power of industrial commission to make award or refuse it is question of law.** 23OhA95, 154NE168.

129-32½-New. A total lack of evidence to support finding of a material fact becomes question of law. 213Ala305, 104S764.

129-32⅓-New. Determination whether proper method of computation was used is a question of law. 125Me361, 134A161.

129-32¼-New. Opinion by court of appeals in compensation case that evidence was competent becomes law of the case. 24OhA66, 156NE616.

129-33 118Kan738, 236P837 (instructions to jury); 119Kan864, 241P442; 126Kan133, 267P4; 10LaA674, 121S782; 13LaA402, 128S321; 152Md60, 136A54; 153Md631, 139A356; 218AppDiv31, 217NYS744; 156Tenn268, 300SW6; TexCivA 292SW925; TexCivA 29SW(2d)831. [f] **Overruling of demurrer** to complaint which failed to allege knowledge or notice of accident is not prejudicial where evidence shows due and legal notice. 213Ala596, 105S648. [g] **Mistake in finding,** in form only, held harmless. 218AppDiv31, 217NYS744.

129-37 49RI8, 139A470.

129-38 106Conn211, 137A642.

129-40 9LaA159, 119S469; 285Pa443, 132A358; 155Tenn491, 296SW3, 53ALR1086; TexCommnA 291SW1085.

129-40½-New. Record in compensation case not returned on determination of question whether the referee's legal conclusion was supported by the evidence. 285Pa443, 132A358.

129-40⅓-New. Where the question whether or not an injury occurred in the county of venue was not developed, defendant's demurrer to the question of the jurisdiction having been overruled, the court of civil appeals will not render a judgment because the evidence failed to show the jurisdiction but must remand for a new trial. TexCivA 16SW(2d)917.

130-43 TexCivA 1SW(2d)692.

130-44 122Kan69, 251P184. [a] **Affirmance of judgment of court affirming award** does not deprive board of power to award lump sum settlement requested after appeal. Mont 293P291.

130-44½-New. The appellate court may reduce a judgment by deduction of any unwarranted sum. 119Kan837, 241P453.

130-44⅓-New. The court may give plaintiff his option to accept a reduction of the judgment or submit to a new trial. 119Kan837, 241P453.

130-44¼-New. After remand industrial commission has jurisdiction and must follow directions of court. 326Ill166, 157NE206.

130-44⅕-New. Where order dismissing appeal is void, the employee's right is not prejudiced. 216Ky742, 288SW696.

130-44⅙-New. The appeal must be dismissed where the insurance carrier fails to secure representation of employer on the argument. 222AppDiv700, 225NYS148.

130-44⅐-New. No decree can be entered in the appellate court against a person where the record shows he is insolvent and the cause was never at issue as to him and no decree was asked against him below. 156Tenn202, 299SW1045.

130-44⅛-New. Judgment, if based on mistake of fact, may be corrected. Tex CivA 300SW931.

130-44⅑-New. Judgment for amount exceeding demands of petition will be reversed and cause remanded for new trial. TexCivA 1SW(2d)702.

130-44 1/10-New. In Louisiana, the court of appeal is without jurisdiction to order the lump sum settlement. 9LaA291, 120S551(1stcase).

130-44 1/11-New. The case was remanded to determine the effect of a surgical operation pending an appeal. 5LaA19.

130-44 1/12-New. On reversal of judgment for defendant, the case may be remanded for trial on the questions as to whether claimant is entitled to compensation for permanent total disability or permanent partial disability, and the difference between wages received before the injury and the wages he is now able to earn, where those points are not shown by the evidence. 6LaA206.

130-44 1/13-New. On reversal of judgment for defendant, the case may be remanded for consideration of the question of the reasonableness of the contract with an attorney. 6LaA206.

130-45 320Mo893, 8SW(2d)897. [e] **Under statute authorizing suit to enforce award** to be bought in name of people of state, action running in name of "State of Oklahoma" sufficiently complies with statute. 116Okl131, 244P44. [f] **Action brought by state industrial commission** to enforce award prevents only one cause of action, though award may be made up of different items. 116Okl131, 244P44. [g] **Petition held to show sufficient compliance** with statute as to suits for enforcement of award. 116Okl131, 244P44. [h] **Employee held entitled to execution** to enforce award of arbitrator. 122Kan825, 253P583. [i] **Kansas statutes** construed to authorize issuance of execution on arbitrator's award. 122Kan825, 253P583. [j] **Suit to enforce award not barred** by judgment setting it aside, by court having no jurisdiction. TexCivA 278SW889. [k] **Penalties.**–(1) Purpose of statutory penalties is to encourage prompt payment of awards. TexCivA 278SW889. (2) Good faith of employer does not avoid penalties on failure to pay award. Tex CivA 278SW889. (3) Penalties not barred by tender of award without interest. TexCivA 278SW889. [l] **Court has been held without jurisdiction to suspend execution.**–CalA 288P127. [m] **Judgment maturing award.**–LaA 129S385; TexCivA 29SW(2d)847. [n] **Time when award becomes final judgment.**–Conn 152A280. [o] **When execution may issue.**–Conn 152A280.

130-45½-New. Where an award had not been removed to the supreme court, and amount was unpaid, the court of common pleas could order payment of the entire amount of compensation on an ex parte application. NJSup 129A709.

130-45⅓-New. Board in some jurisdictions cannot itself render an enforceable judgment. 78Mont579, 254P880.

130-45¼-New. An award reduced to

judgment loses an actionable character as a claim or award being merged in the judgment. 89CalA35, 264P293.

130-46½-New. Statutes imposing penalty for vexatious refusal to pay insurance apply to insurance payable under the Workmen's Compensation Act. **Tex CivA** 289SW750.

130-46⅓-New. An action to enforce an award is not an appeal, but an independent action requiring a trial de novo. But see **TexCommnA** 285SW1041.

130-46¼-New. The commission does not exceed its jurisdiction by asking the attorney-general to bring a suit to enforce an award against self-insurer, so as to justify writ of prohibition. 114 **OhSt**702, 152NE656.

130-46⅕-New. Commission has wide discretion to revoke right of employer to pay compensation direct. 114 **OhSt** 702, 152NE656.

130-46⅙-New. In some jurisdictions an award against a noncomplying employer is enforcible only by civil action in the name of the state. 51**ND**710, 201 **NW**680.

130-46½-New. In such an action, where the issues are found in favor of plaintiff, the verdict must be for the sum fixed by the compensation bureau under the schedule provided in the statute. 51**ND**710, 201**NW**680.

130-46⅛-New. In an action to enforce an award against a noncomplying employer, defendant may assert as defense any fact tending to show that the alleged injuries for which the award was made were not subject to the Workmen's Compensation Act, and hence that the claim was not within the jurisdiction of the commission. 51**ND**710, 201 **NW**680.

130-46⅛-New. In such action the employer is entitled to a jury trial of the issues of fact relating to the jurisdiction of the compensation bureau. 51**ND** 710, 201**NW**680.

130-46⅒-New. Where compensation insurer does not make weekly payments as they mature, the beneficiary is entitled under some statutes to elect to mature the total amount of the award and to recover such amount together with twelve per cent damages. **Tex CommnA** 280SW163.

130-46⅑-New. Statute providing for satisfaction of judgment under the Compensation Act is held to apply only where payment is made direct to plaintiff. 214**Ala**534, 108S333.

130-46⅒-New. Under some statutes, where a compensation award of the board has become final for want of appeal, and there has been unjustifiable default in payments of installments, claimant may sue to accelerate the balance of payments and may recover the entire amount due with twelve per cent penalties and reasonable attorney's fees. **TexCommnA** 285SW1041.

130-46⅓-New. Filing of suit to enforce an award excludes further jurisdiction of the board thereafter to change the award. **TexCommnA** 285SW1041.

130-46⅓-New. Failure to comply with an award of the board is not excusable so as to prevent acceleration of payments and suit to enforce the award, in the absence of an order of the board, timely obtained, ending or diminishing payments. **TexCommnA** 285SW1041.

130-46⅕-New. Suit to enforce an award arises out of a workmen's compensation proceeding and is therefore in derogation of common law, and rights and remedies therein are purely statutory. 115**Tex**551, 285SW1084.

130-46⅙-New. There can be no presumption of jurisdiction therefore from the mere fact that suit is brought in the court of general jurisdiction. 115**Tex** 551, 285SW1084.

130-46⅐-New. Allegations in petition showing grounds for receivership of insurer are purely ancillary to the main suit and give no aid in support of the court's jurisdiction not otherwise shown. 115**Tex**551, 285SW1084.

130-46⅛-New. Suit to enforce an award can be brought only in the county of the injury or of claimant's residence, the venue requirement being mandatory, exclusive, and jurisdictional 115**Tex**551, 285SW1084.

130-46⅑-New. To constitute "event" on which suit to enforce an award may be brought, there must have been a final award, against insurer, and failure or refusal by insurer to sue to set aside the award. 115**Tex**551, 285SW 1084.

130-46⅒-New. Suit can be instituted to enforce only final award which is active and vital, not one that is suspended by suit to set it aside. 115**Tex** 551, 285SW1084.

130-46⅓-New. Petition in an action for the balance of an award held not demurrable when it alleges that the check issued by insurer had been returned by the bank. 36**GaA**621, 137SE 786.

130-46½-New. Under some statutes, an injured employee is entitled as a matter of law to enforce the award and to recover attorney's fees and damages by a suit against insurer where insured did not sue to set aside the award. **TexCivA** 289SW750.

130-46⅓-New. Claimant held entitled to recover total amount of award with penalty and attorney's fees, where justifiable cause for default of insurer is not shown. **TexCivA** 293SW291.

130-46¼-New. In the absence of fraud, a suit may not be maintained to enjoin enforcement of an award where a writ of certiorari to review it and a motion for a rehearing have been denied on the merits. 238**Mich**580, 214NW208.

130-46⅕-New. Petition for judgment on order awarding compensation to estate of deceased dependent has been held not to state a cause of action. 37 **GaA**234, 139SE685.

130-46⅙-New. Purpose of provision reducing award to judgment is to enable claimant to issue execution in default of payment and to create lien on property of employer. **IndA** 151NE833.

130-46⅐-New. Provision reducing award to judgment without summons or any other prior notice is valid. **IndA** 151NE833.

130-46⅛-New. Statute authorizing party in interest to enter judgment in court on award of board applies only to award granting compensation, **IndA** 151NE833.

130-46⅑-New. and does not authorize the court to enter judgment for the employer on an award of the board denying compensation; **IndA** 151NE 833.

130-46⅒-New. consequently, a judgment so entered does not bar a subsequent action against the employer to recover damages for injuries. **IndA** 151 NE833.

130-46⅓-New. In some jurisdictions award may be enforced by suit and judgment in superior court of employer's residence in absence of further proceedings on appeal. 165**Ga**706, 142 SE83.

130-46½-New. Under statutes the award may be enforced by judgment against employer where insurance carrier becomes insolvent or the security fails to comply with his obligation. 165**Ga**706, 142SE83.

130-46⅓-New. Sufficiency of petition in action against employer on award. 165**Ga**706, 142SE83.

130-46¼-New. In an action to enforce an award, evidence is admissible to show conduct of defendant amounting to an admission that he was employer of deceased employee. 56**ND**663, 219NW213, 58**ALR**186.

130-46⅕-New. In such action evidence has been held sufficient to sustain a verdict that defendants were employers. 56**ND**663, 219NW213, 58**ALR** 186.

130-46⅙-New. Whether the death of a minor killed while working in a place where he had been forbidden to work was outside the employment may be a question for the jury in such action. 56 **ND**663, 219NW213, 58**ALR**186.

130-46⅐-New. In such action the employer may defend and raise questions of employment and liability. 27 **OhA**4, 160NE637.

130-46⅛-New. Such action cannot be maintained by the industrial commission for the benefit of complainant against the employer's receiver. 27 **OhA** 4, 160NE637.

130-46⅑-New. A penalty is not inflicted where the delay was caused by a proceeding to obtain a vacation or a modification of the award. 85**Colo** 475, 277P303.

130-46⅒-New. An employer, entering into a settlement with a minor for less than is legally due him, is not liable to a penalty where it resulted from a misunderstanding. 10**LaA**499, 119S731.

130-46⅓-New. Where an employer knew the employee sustained an injury but contested the claim, the court properly allowed twenty-six weeks' additional compensation. 168**La**513, 122S711.

130-46½-New. Under the Ohio statute, a judgment in favor of the state under the provisions of the compensation act, on behalf of an injured employee, is not a lien on the property of his employer superior to a mortgage on the property, where the injury was sustained after the enactment of the provision giving such judgments the same preference as judgments for taxes but the mortgage was given and recorded before such time. 250 **OhNPNS**315.

130-46⅓-New. Where five of seven members of the supreme court hold the provision for a penalty for the nonpayment of an award unconstitutional, although the constitution authorizes the statute to be declared unconstitutional only when all agree but one, the lower court has refused to apply the penalty. 26 **OhNPNS**519.

130-46¼-New. In a proceeding to mature an award, no attack can be made on the the award except to show it was void for want of jurisdiction. **TexCivA** 11SW(2d)847.

130-46⅕-New. The department has the authority to make any necessary orders for the purpose of making effective an award made by it within the statutory period. 207**Cal** 144, 277P492.

130-46⅙-New. Where the court has jurisdiction of a suit by the employee to recover the compensation awarded, it can render a judgment pursuant to an agreement of the parties for the payment of a certain sum in full satisfaction of all claims. **TexCommnA** 14SW (2d)1018.

130-46⅐-New. Where the employer has contested the claim for compensation, he cannot, in a suit to enjoin the enforcement of the award, attack the jurisdiction of the board and of the appellate court for lack of efforts of claimant to reach an agreement with the employer. **Ind** 166NE2.

130-46⅛-New. Where plaintiffs in a suit to mature an award against an insurance carrier could have set up every right asserted in the case by cross-action to the insurance carrier's appeal from decision of industrial accident board, the dismissal of the suit to mature the award is proper. **TexCommnA** 15SW(2d)594.

130-46⅑-New. In a suit against an insurance carrier to mature an award, in which an insurance carrier entered a plea in abatement for the pendency of an appeal from an award, the wrapper in which the petition of the insurance carrier is shown to have been contained must conclusively be presumed to have been filed within the time prescribed by the law. **TexCommnA** 15SW (2d)594.

130-46⅒-New. A judgment, predicated on an agreement of the parties for a settlement of the award for a reduced sum, is not void for want of jurisdiction as a judgment setting aside an award of the board. **TexCommnA** 16SW(2d)523.

130-46⅓-New. Forfeiture must be declared under statute where the employer repudiates the obligation under a judgment to pay an injured employee weekly compensation. 11**LaA** 408, 123S496.

130-46½-New. Judgments in actions by board or state against employee under statute have same preference as judgment rendered on claim for taxes against general assets of debtor. 27

OhPNS23 ("assets" includes only equity of redemption in real estate).

130-46½-New. Single judgment is contemplated as statutory method for enforcing payment of compensation award though successive executions may be necessary. **Mich** 233**NW**184.

130-46¼-New. Action on bond given to release attachment held premature. **Conn** 152**A**280.

130-47½-New. The statute against assignment of class before payment is contended to protect disabled workmen and dependents, not as a shield to resist payment. 89**CalA**35, 264**P**293.

130-47½-New. Such statute does not limit assignment of judgment based on award. 89**CalA**35, 264**P**293.

130-58 [a] **Compensation payable from surplus fund,** under statute, by mandamus, when either premium or award cannot be collected from insolvent employer. 118 **Oh**340, 161**NE**32 (penalty cannot be included in judgment for award out of surplus).

131-64 130**Kan**476, 287**P**607 (in suit on policy pleading arbitrator's findings).

131-66 7**Alaska**382. [i] (2) Appeal not without reasonable grounds. 258**Mass**475, 155**NE**423. [j] **In Idaho** (1) constitutional provision vesting in state board of examiners exclusive power to allow claims against state does not prohibit taxation of costs to claimant, though under statutes department of finance in proceeding for workmen's compensation insured in state insurance fund is party defendant. 41 **Ida**747, 242**P**314, 243**P**654. (2) Statute authorizing board or court before which proceedings under act are brought, prosecuted, or defended without reasonable ground, to assess whole cost of proceedings upon party who has so brought, prosecuted, or defended them does not supersede general statutes for taxation of costs to successful party. 41 **Ida**747, 242**P**314, 243**P**654. [k] **Free transcripts.**—Act requiring reporter to furnish free transcripts used on appeal in compensation cases held not repealed by law permitting him to retain fees for transcripts generally. 34**Wyo** 349, 244**P**135. [l] **In Wyoming** costs of transcript on appeal cannot be charged against either employer or workman. 34**Wyo** 349, 244**P**135. [m] **Fees of expert witnesses** are to be taxed as part of costs of suit. 11**LaA**140, 119**S**714. [n] **Costs held properly not allowed.**—**Ill** 173**NE**470.

131-67 122**Kan**469, 252**P**237; 143 **Okl** 84, 287**P**713; 154**Tenn**230, 285**SW**553; **TexCivA** 293**SW**260. [c] **In Alabama** costs are imposed on defendant. 213 **Ala**281, 104**S**753.

131-69 37**GaA**234, 139**SE**685.

131-72½-New. Appeal from judgment for lump-sum settlement held reasonable, preventing giving appellee attorney's fees or penalty for waiting time. 115**Nebr**758, 214**NW**631.

131-72½-New. In an action by an injured employee intervener obtaining judgment against both parties has been held liable for half of the costs on appeal where defendant secured a reversal. **TexCivA** 178**SW(2d)**68.

131-72¼-New. In Illinois, under the Compensation Act, the circuit court is unauthorized to award a successful petitioner the costs of certiorari to review the commission's order denying compensation. 335 **Ill** 322, 167**NE**80.

131-72⅛-New. Under some statutes, the expense of printing testimony cannot be taxed against claimant on appeal. 109**Conn**737, 147**A**671(1st case).

131-72⅛-New. Allowance of a fee to each of four physicians who testified as experts for plaintiff in an action under the Compensation Act held not an abuse of discretion warranting an increase of allowances. **LaA** 124**S**636.

131-72⅛-New. Commission may order employer to pay claimant expense incurred for depositions and expense of filing petition for review. 143 **Okl** 84, 287**P**713.

131-73 267**US**540, 45**SCt**399, 69**L ed**775 (statute limiting attorney's fee held valid); 2**LaA**415; 150**Wash**551, 274**P**105. See also 2**LaA**549; 2**LaA**553; 2**LaA**561, 3 **LaA**74; 33 **OhA**80, 168**NE**572 (subject to limitation provided in statute). [a] **Allowance held adequate.**—34**F(2d)**499 (one hundred dollars). [b] **Particular fees allowed for appeal.**—43**F(2d)**505 (one hundred twenty-five dollars).

131-74 34**F(2d)**499 (commissioner has large discretion in determining allowance for claimant's counsel); 169**Minn** 465, 211**NW**674; **TexCommnA** 280**SW** 163; 117**Tex**103, 298**SW**403; **TexCivA** 18**SW(2d)**1109.

131-75 117**Nebr**148, 219**NW**899; 154 **Wash**659, 283**P**185 (amount allowed held not abuse of trial court's discretion). But see 34**F(2d)**499 (additional allowance allowed for services performed in proceedings for review of award).

131-75½-New. Attorney's lien is not enforceable unless the amount of the same is approved in writing by a judge of a court of record or by the industrial commission. **NJSup** 132**A**301.

131-75½-New. In an action by an injured employee against an insurer to enforce an award, plaintiff is entitled to recover a reasonable attorney's fee when insured did not sue to set aside the award. **TexCivA** 289**SW**750.

131-75¼-New. Attorneys for claimant are not necessary parties on appeal from award. **TexCivA** 292**SW**925.

131-75⅓-New. Nonjoinder of claimant's attorneys in an appeal within the statutory time for bringing suit did not make award final against defendant. **TexCivA** 292**SW**925.

131-75⅙-New. Where compensation award is substantially reduced on appeal by defendant, plaintiff's attorney's fees for services in the district court may not be taxed against defendant. 115**Nebr**565, 213**NW**820.

131-75½-New. Service of notice of an attorney's lien cannot be made on an attorney who is not an attorney of record for defendants and is not shown to be their regularly employed salaried attorney. 122**Kan**725, 253**P**605.

131-75⅛-New. Petition to enforce an attorney's lien because of a settlement without regard to his claim must fail, where the lien was not perfected in compliance with statute before defendant parted with money in satisfaction of the claim of the injured employee. 122**Kan**725, 253**P**605.

131-75⅙-New. Where the question of attorney's fees was not raised until after affirmance of judgment awarding compensation, the trial court was without authority subsequently to render judgment therefor. 116 **OhSt**261, 155 **NE**798.

131-75¼₀-New. Attorney's fee is paid from award. **TexCivA** 278**SW**889.

131-75¼₁-New. Penalty for failure to make prompt payment without justifiable cause and attorney's fees held properly awarded under statute. 24 **F(2d)**202.

131-75¼₂-New. Notice to claimant is not a condition precedent to approval of attorney's fees by the judge. 116 **Nebr**394, 217**NW**603.

131-75¼₃-New. Approval of attorney's fees by the judge is a nonjudicial act which may be done anywhere within the district. 116**Nebr**394, 217**NW**603.

131-75¼₄-New. Attorney's fees on an award for temporary total disability held limited to a proportion of the amount due the employee with a provision for future payments. 26 **OhA** 497, 160**NE**484.

131-75¼₅-New. Fixing of a maximum attorney's fee, is not error where correct, although better practice requires it to be fixed by commission. 119 **OhSt** 594, 165**NE**297.

131-75¼₆-New. Insurer's failure to make husband a party to a suit to set aside an award to the wife for her brother's death, is not a civil wrong entitling her to penalties and attorney's fees, even if erroneous. **TexCivA** 12**SW** (2d)817.

131-75¼₇-New. An employee's widow recovering judgment against a tort-feasor for wrongful death, where the employer's insurance carrier intervened and also recovered judgment for amounts paid out by way of compensation is not entitled to reimbursement for attorney's fees and costs, from insurer. 9**LaA**257, 119**S**462.

131-75¼₈-New. Where claimant disputed attorney's fees, she had the right to have the department of labor pass on the matter whether she employed an attorney or acted through an agent. 247 **Mich**274, 225**NW**522.

131-75¼₉-New. A board, fixing attorney's fees, is not bound to accept his statement as to the number of hours he worked. 247**Mich**274, 225**NW**522.

131-75½₀-New. A board, fixing attorney's fees, could consider the number of witnesses, the length of the hearing, and the nature of the case. 247 **Mich**274, 225**NW**522.

131-75½₁-New. In an action by an injured employee against insurer, where another insurer intervened and recovered judgment against both parties, such intervening insurer was liable for costs of appeal on reversal. **TexCivA** 17 **SW(2d)**68.

131-75½₂-New. Where attorney accepts and receipts for amount in court order in smaller amount than his lien such order is conclusive. 130**Kan**149, 285**P** 624.

131-75½₃-New. Amount of attorney's fees may be within discretion of industrial commissioner. 180**Minn**388, 231 **NW**193.

131-75½₄-New. Attorney's fees cannot be collected out of compensation unless approved by industrial commissioner. 180**Minn**388, 231**NW**193.

131-75½₅-New. Under some statutes there is no authority for recovery of attorney's fees in a suit by a physician against insurer for services rendered an injured employee. **TexCivA** 21**SW(2d)** 599.

131-75½₆-New. Under some statutes power of trial court to fix attorney's fee is limited to method and percentages named in statute. **Oh** 171**NE**31.

131-75½₇-New. Insurer is liable under statute for penalties and attorney's fees where it contests payment and fails to make tender of award. 41**F(2d)**312.

132-76 201**Cal** 169, 256**P**413; 204**Cal** 88, 266**P**805; 72**CalA**350, 237**P**404 (insurer seeking reduction of compensation on account of employee's improved condition has burden of proof); 73**CalA** 726, 239**P**339; 84**CalA**308, 257**P**879; 85**CalA**134, 258**P**982; 86**CalA**1, 260**P** 375; 91**CalA**347, 266**P**992; 91**CalA**465, 267**P**122; **CalA** 287**P**544; **CalA** 292**P** 525 (refusal to submit to surgical treatment under award warrants termination of liability); 77**Colo** 424, 236**P** 1005; 83**Colo** 490, 267**P**202; 108**Conn** 31, 142**A**393; **Conn** 152**A**280; 39**GaA**47, 146**SE**45; 41**GaA**729, 154**SE**459; 320 **Ill** 544; 151**NE**495; 322 **Ill** 555, 153**NE** 608; 323 **Ill** 98, 153**NE**635; 324 **Ill** 423, 155**NE**277; 83 **IndA**257, 148**NE**161 (the industrial board may, where employer of partially incapacitated employee has found employment for latter within his capacity, permit reduction in payment equal to wages thus earned or if new employment is improperly refused may terminate payments of compensation but it has no authority to determine question of termination until employment has been offered and refused under claim that it is unsuitable or beyond capacity); 84 **IndA**170, 150**NE**398; 121**Kan**690, 249**P**604; 122**Kan**187, 250 **P**1068; 124**Kan**471, 260**P**620; 124**Kan** 631, 261**P**584; 225**Ky**372, 9**SW(2d)**109; 4**LaA**406; 253**Mass**553, 149**NE**606; 236 **Mich**100, 210**NW**251; 248**Mich**155, 226 **NW**871 (failure to close settlement by approval of final receipt left power only to award compensation for change for worse); 248**Mich**60, 226**NW**837 (subsequent employment at increased wage as gang foreman does not terminate payments to motorman); 170**Minn**382, 213**NW**32; 175**Minn**319, 221**NW**65; 225**AppDiv**393, 233**NYS**333; 121 **OhSt** 312, 168**NE**541 (separate awards); 114 **Okl**84, 242**P**531 (continuing jurisdiction of industrial commission to modify award); 115 **Okl** 273, 244**P**432; 123 **Okl** 64, 251**P**1040; 126 **Okl** 235, 259**P**265; 132 **Okl** 279, 270**P**566; 134 **Okl** 177, 272 **P**828; 135 **Okl** 21, 273**P**208; 139 **Okl**

155, 281P226 (change in claimant's condition necessary to review by commission); 139 Okl 231, 281P949 (evidence warranting discontinuance of award on complete recovery); Okl 292 P564; 88PaSuper353; 94PaSuper19; 8PaDist&Co 191; 9PaDist&Co 34; 153 Tenn255, 283SW447; TexCommnA 285 SW1041; TexCommnA 27SW(2d)529; TexCivA 5SW(2d)594; TexCivA 8SW (2d)709; 70Utah354, 260P279; 103WVa 504, 138SE112; 107WVa533, 149SE665. See also 3LaA413; 4LaA511; 4LaA529; 6LaA809; 156Md74, 143A654; 264Mass 300, 162NE341. But see 10LaA599, 120 S789; NJ 151A502 (employer's payment of judgment after litigated hearing and appeal did not permit opening case for additional claim of disability as last payment of compensation); TexCivA 14SW(2d)342. [a] (4) Change in employee's condition for worse authorizes award of additional compensation. 69 Utah102, 252P567. (5) Award can date only from discovery of changed condition or new development in injury. 69 Utah102, 252P567. [c] (3) After approval of agreement, board has no authority to make order fixing compensation without notice to employer. 217 Ky500, 289SW1107. [e] (6) Under some statutes application for review of award may be had at any time, provided it is not beyond time for which compensation is allowable. 213Ky636, 281SW1039. [s] 128 Okl 243, 262P648. [gg] 120 Okl 31, 250P111; 128 Okl 243, 262P648. [qq] 232Mich500, 205 NW588; 119 Okl 231, 249P706; 132 Okl 77, 269P263. [ww] 73CalA726, 239 P339. [fff] (1) 236Mich100, 210NW251. (2) Showing of change from partial to total disability justifies award for total disability not to exceed too weeks from date of accident. 236Mich100, 210NW 251. [hhh] **Award under agreement filed and approved by commission is final and cannot be set aside, diminished, or increased** (1) in some jurisdictions unless parties disagree as to continuance of any weekly payment under agreement. 35GaA250, 133SE291. (2) Order of commission in such case diminishing compensation upon determination of question of dependency as partial is void under agreement not specifically showing whether claimant was wholly or only partially dependent. 35GaA250, 133SE291. [iii] **Court on appeal** cannot direct amendment of award where supported by evidence at time of determination. 77Colo 424, 236 P1005. [jjj] **Statute not mandatory.**–Statute authorizing court to cancel award for compensation if his workman is earning as much as before injury does not mean that it must do so. 118Kan 738, 236P837. [kkk] **Application held insufficient** to show ground for modification of award. 112 Okl 247, 240P617. [lll] **Purpose of provision** is to grant relief from general rule that order or decision of quasi-judicial body, when filed, is not open to amendment or reconsideration. 68CalA510, 229P870. [mmm] **Provision for physical examination.**–(1) Under Michigan statute right to compensation is suspended, if employee refuses to appear for physical examination as provided in statute. 232 Mich147, 205NW120. (2) Physical examination provided for in Michigan statute must be by physician or surgeon licensed by board of registration of that state. 232Mich147, 205NW120. (3) Employee is not excused from appearing for physical examination by fact that he was deported for having unlawfully entered country. 232Mich 147, 205NW120. [nnn] **Such provision is permissive** and vests certain discretion in commission as to action to be taken. 68CalA510, 229P870. [ooo] **Burden of proof** is on party seeking relief under such provision, where original order was entered on agreement of parties, to show that it was result of fraud, mistake, duress, or undue influence. 68CalA510, 229P870. [ppp] **Where award is entered on agreement of parties,** application for additional compensation on account of new diagnosis of physical condition is governed in measure by provisions of civil code relating to rescission of contracts. 68 CalA510, 229P870. [qqq] **Time for application.**–Application made three years after injury and eight months after learning of new diagnosis held too late, as not being made promptly. 68 CalA510, 229P870. [rrr] **Restoration of benefits.**–On application for rescission of compromise, relative to question of restoration of benefits received by employee, it cannot be taken for granted that insurance carrier would owe him as much as benefits already paid, or more, where injury disclosed by new diagnosis to fall by employee from ladder is disputed. 68CalA510, 229P870. [sss] **Compromise agreement construed** as merely confirming statutory provision giving commission right to reopen award, and not to give right of either party to rescind agreement or altered unless commission should determine in exercise of its jurisdiction that such action should be taken. 68 CalA510, 229P870. [ttt] **Jurisdiction of court.**–(1) After final decision of appellate court application for change of compensation presents original question for commission or board and courts can take jurisdiction only where board has acted in statutory manner. TexCivA 275SW279. (2) If courts may assume jurisdiction without prior action by board claimant cannot have error of law committed by intermediate appellate court corrected where no motion for rehearing made, remedy being by such motion and appeal to supreme court. TexCivA 275SW279. [uuu] **Order construed.**–Order, on such application, denying relief in ground that compromise and agreement of party, on which original award was entered, was bar to relief held not to mean that such agreement and compromise is bar to relief under this provision in every instance. 68CalA510, 229P870. [vvv] **Certiorari.**–Though ground assigned in order denying relief may not be technically correct, if order is valid on any ground it is not subject to attack on certiorari. 68CalA510, 229P870. [www] **Discretion.**–Such provision conferred upon commission discretion to determine whether application for amendment or annulment of award is equitable, and where no equities are shown it cannot be said that commission has acted without jurisdiction to denying application. 68CalA510, 229 P870. [xxx] **On appeal** it will not be assumed that under such provision order fixing rights and obligations of parties would be lightly set aside upon mere petition of dissatisfied party. 68 CalA510, 229P870. [yyy] **Extent of inquiry authorized.**–(1) Commission is authorized to take into consideration all of conditions, pathological, physical, and industrial, which may have direct bearing on rights of injured employee. 115 Okl 273, 244P432. (2) In case award was refused, because claimant lost no time and there was no diminution of wages, and thereafter claimant was discharged, commission may consider fact that he was discharged. 115 Okl 273, 244P432. [zzz] **Finding of single member,** that employee was fully competent to do work offered, is not final determination that all incapacity had ceased. 252Mass236, 147NE561. [ab] **Discontinuance of compensation because of remarriage of dependent.**–(1) Void second marriage of employee's widow is not ground for discontinuance of compensation. 214Ala529, 108 S573. (2) Widow's wrongful intention in contracting void marriage does not affect her legal status as dependent under compensation act. 214Ala529, 108S 573. [ac] **Laches.**–Injured employee held not guilty of laches in applying for compensation for new and further disability. 77CalA41, 246P118. [ad] **Mistake in award does not warrant review** on ground of change of condition. 86 IndA55, 155NE835. [ae] **Substantial change in condition of injured employee** is necessary to give department of labor and industry jurisdiction to reopen award. 238Mich431, 213NW692. [af] **Where it develops that injuries have become permanent since award for temporary injuries,** commission may review award and increase compensation within maximum rate fixed by statute. 126 Okl 53, 258P728. [ag] **Filing application within six months** held not required. 77CalA41, 246P118. [ah] **Claimant cannot waive right to increase.**–125 Okl 155, 256P937. [ai] **Only board itself has jurisdiction** to review its award because of change of conditions, mistake, or fraud. TexCommnA 285SW1041. [aj] **Filing of petition for review in supreme court** divests commission of jurisdiction, and order made by commission while such petition is pending and undetermined is nullity. 123 Okl 64, 251P1040. [ak] **Jurisdiction not limited to changed conditions.**–119 Okl 275, 249P704. [al] **Burden of showing that effects of injury have ceased** and that continuing disability results from other causes rests on employer and insurance carrier asserting it. 120 Okl 31, 250P111. [am] **Marriage of dependent** sister held not "change in conditions" within statute authorizing termination of compensation for death. 84 IndA170, 150NE398. [an] **Where original award has become final** (1) commission is without jurisdiction to reconsider case or make any award based upon ailment held noncompensable. 73CalA726, 239P339. (2) Where no timely petition for rehearing or for review in appellate court, is made, decision of commission becomes final. 73CalA726, 239P339. [ao] **Evidence held insufficient to support award of compensation for recurrent disability.**–84 IndA166, 150NE399. [ap] **Petition held sufficient.**–201Cal 169, 256P413. [aq] **In Illinois** (1) award cannot be reviewed under Act § 19 par (h) after lapse of more than eighteen months after entering award. 321 Ill 240, 151 NE890. (2) But in such case review may be had under § 8 par (f), which is provision for review similar and additional to review under § 19 par (h), and is retrospective in application. 321 Ill 240, 151NE890. [ar] **"Returning to work."**–Working in soft drink parlor held "returning to work" within provisions of act requiring hearing for modification of award. 321 Ill 240, 151NE 890. [as] **Board may act** on its own motion. 126 Okl 235, 259P265. [at] **Burden is on employee to show change of condition** since original award and that change was due to original injury. 128 Okl 243, 262P648. [au] **Evidence held sufficient:** (1) To justify finding of commission that total temporary disability had not terminated. 202 Cal 437, 261P295. (2) To sustain finding of termination of incapacity. 84 CalA308, 257P879. (3) To sustain finding of change in claimant's condition since original award. 132 Okl 77, 269P263. (4) To justify additional award on ground that employee was still unable to work. Utah 274P139. (5) To show claimant suffering from traumatic psychosis developing after award for loss of leg. Ida 287P202. (6) To require allowance for total loss of use of eye on ground of change of condition. 144 Okl 89, 289P708. [av] **Delay of insurance carrier in petitioning for termination of compensation** does not deprive commission of power to withdraw compensation previously awarded which had accrued at time of filing petition. 84CalA308, 257P879. [aw] **Powers of compensation commissioners are wholly statutory.**–108Conn 31, 142A393. [ax] **Power to give modification retroactive effect.**–(1) Under Connecticut statute compensation commissioner has power in proper case to authorize cessation of payments for compensation as of time when incapacity ceased though incapacity ceased before application for modification. 108 Conn31, 142A393. (2) Whether facts justify exercise of such power rests largely in discretion of commissioner. 108Conn31, 142A393. [ay] **Review of determination of commissioner.**–Claim that award should be modified so as to relieve defendants from payment of compensation during period during which plaintiff refused surgical treatment

cannot be first considered on appeal. 108Conn31, 142A393. [az] **After final award on joint petition of employer and employee,** made after hearing and not appealed from, commission is without jurisdiction to set aside award or make further award. 129 Okl 101, 263P664. [ba] **Claimant must show change of condition due to original injury.**–132 Okl 77, 269P263. [bb] **Order awarding increased compensation will be sustained** where there is competent evidence to sustain finding of change in condition. 132 Okl 77, 269P263. [bc] **Subsequent award for permanent disability** has been held not to terminate liability for medical treatment. 85CalA134, 258P 982. [bd] **Evidence held insufficient:** (1) To show change of condition. 46 Ida 692, 271P1. (2) To justify vacating final agreement and reinstating compensation order. 296Pa503, 146A146. (3) To show worse condition within meaning of stipulation for reopening case. 41 Wyo 55, 281P1005. (4) To support finding that commission on making former award for temporary total disability found there would be no permanent impairment of use of eye. 144 Okl 89, 289P708. [be] **When change of condition must occur.**–"Change in condition," as ground for modification of award, must occur after previous award of commission. 133 Okl 81, 271P160. [bf] **Subject to statutory limitations.**–Board may reopen case and make further award at any time. 250NY507, 166 NE183. [bg] **Where accident board denied claim for permanent partial disability,** but allowed compensation for total disability for certain period, it properly refused to revise award to increase compensation after expiration of compensation period, in the absence of new or additional facts. **TexCivA** 17 **SW(2d)**850. [bh] **Claimant was entitled to file petition with commission for vacation of order** for weekly compensation and to ask for lump sum settlement in lieu thereof and have prompt determination. **TexCivA** 18**SW(2d)**695. [bi] **Industrial commission had power, on its own motion, to review** its referee's final award for error, mistake, or change of conditions. 85**Colo** 237, 275P910. [bj] **That two contrary inferences, equally logical,** may be drawn from facts, does not deprive employee of right to award of additional compensation. 246Mich599, 225NW524. [bk] **Judgment discharging employer's rule to modify judgment,** awarding compensation, is not erroneous because employee earned as much for one week as at time of injury, where evidence was conflicting as to whether he used or could use injured finger in subsequent employment. 10**LaA**599, 120S789. [bl] **On readjustment of children's compensation on remarriage of widow** children's weekly compensation accruing after widow's remarriage should not be charged with entire amount of commuted payments made under agreement for partial commutation. 91**PaSuper**64. [bm] **Limitation of time for exercise of power.**–Under Pennsylvania statute power may be exercised at any time within period of possible statutory liability. 88**PaSuper**353. [bn] **Additional compensation may be precluded** by settlement under judgment awarding compensation. 157**Tenn**380, 8**SW(2d)**362. [bo] **Change of condition due to original injury** must be established by claimant before commission can reopen case. 132 **Okl** 77, 269P263. [bp] **Effect of affirmance of former award.**–Affirmance of award for temporary total disability because of injury to leg does not prevent commission from reopening case and making award for permanent partial disability. 134 **Okl** 177, 272P 828. [bq] **Necessity of showing of good cause.**–Good cause must be shown to justify modification of award, especially where award was final, though statute does not expressly require it. **Utah** 274 **P**139. [br] **Failure of employee to improve as expected** justifies modification of award where order of commission expressly retained jurisdiction, though condition of employee had not become worse. **Utah** 274P139. [bs] **Commission's finding of change in claimant's condition** will not be reviewed when sustained by evidence. 132 **Okl** 77, 269 **P**263. [bt] **Objection that settlement barred right to additional compensation is waived by insurer** by paying additional compensation awarded. **Utah** 274 P139. [bu] **Proceeding as continuation of original proceeding.**–Petition to set aside original award on basis of temporary total disability and for award based on permanent total disability subsequently developed is not institution of new and independent proceeding but is reopening of original proceeding. 177**Minn**555, 225**NW**889. [bv] **In California** (1) statute of 1917 enlarged continuing jurisdiction of commission to alter, amend, or rescind any order, decision, or award on good cause shown. 203**Cal**522, 265**P**195. (2) Under such statute continuing jurisdiction of commission is not limited to consideration of changes in physical condition of workman but extends to all cases where good cause appears. 203**Cal** 522, 265**P** 195. (3) What constitutes "good cause" depends on circumstances of each case. 203**Cal** 522, 265**P**195. (4) That commission rated employee's injury as twenty-five per cent permanent disability, where as matter of law rating should be one hundred per cent permanent disability, is good cause for exercising continuing jurisdiction. 203**Cal**522, 265**P**195. (5) Application for compensation for new disability from former injury filed more than two hundred and sixty-two weeks thereafter is barred by limitation. 85**CalA**567, 259**P**955. (6) Running of limitations against such claim is not tolled by physician's services furnished without compensation or expectation thereof, though furnished at request of employer, especially where employee was not totally disabled or bedridden. 85**CalA**567, 259**P**955. (7) Doctrine of res judicata may not be invoked to defeat employee's right to appeal to continuing jurisdiction of commission. 203**Cal**522, 265**P**195. (8) That employee is barred from resort to courts by failure to apply for rehearing does not estop commission to exercise continuing jurisdiction. 203**Cal** 522, 265**P**195. [bw] **After affirmance of** award commission's power, if any, to alter award based on incorrect view of law previously adopted should be limited to exceptional cases. 208**Cal** 705, 284**P**922. [bx] **Award of compensation for injuries developing after prior hearing** is not contrary to law because of matters adjudicated on prior hearing. 41**GaA**113, 151**SE**812. [by] **Judgment denying compensation** is award within statute providing for review of award by commission on ground of change in condition. 41**GaA**113, 151**SE**812. [bz] **Change in condition** must appear in order to authorize commission to review former judgment. 41**GaA**100, 151**SE**826. [ca] **Upon death or remarriage of widow** of deceased employee compensation payable to her should end. 13**LaA**234, 126**S**600. [cb] **Evidence authorizing cessation of payments** for total disability. **LaA** 128**S**683. [cc] **Facts justifying refusal of further compensation.**–**CalA** 287**P**544 (refusal of employee struck on wrist by falling timber to accept reemployment at easier work). [cd] **Findings on appeal from refusal to reopen claim** (1) held to show that case should be reopened. **Wash** 287**P**32. (2) Further findings regarding giving treatment and final settlement held immaterial. **Wash** 287**P**32. [ce] **Limitations.**–Employee may show circumstances to fix time for running of limitations. **IndA** 171**NE**882(2dcase). [cf] **Supplemental claim of total permanent disability not showing matters not previously considered** does not entitle claimant to rehearing. **WVa** 153**SE**509. [cg] **Supplemental award for disability accruing subsequent to date of initial award** should be made when such disability was not then considered. **WVa** 153**SE** 510. [ch] **Statute not applicable where board refused compensation.**–**Tex CommnA** 29**SW(2d)**971. [ci] **Continuing incapacity for same injury** is not change of condition within statute authorizing board to review award based upon change of condition. **TexCommnA** 27**SW(2d)**529. [cj] **Discontinuance and refusal to make further payments** on ground that plaintiff was no longer disabled held justified under evidence. **LaA** 123**S**502(2dcase). [ck] **Power to annul award sustained on appeal** is not included in continuing jurisdiction of commission to alter previous decision for good cause shown. 208**Cal** 705, 284 **P**922. [cl] **Finding that injuries were not result of accident on which claim was predicated** held not adjudication precluding award for injuries subsequently developing. 41**GaA**113, 151**SE** 812. [cm] **Change of award dependent** upon change in claimant's physical condition. **TexCommnA** 27**SW(2d)**529. [cn] **Claimant must establish that change** in condition was due to original injury. 140 **Okl** 59, 282**P**610. [co] **Employee cannot reopen case on ground of newly discovered evidence** that condition was worse, where he had contended before final judgment for permanent partial disability that he was totally and permanently disabled. 41**Wyo** 55, 281**P** 1005. [cp] **It is assumed** that award includes only such items as are expressly authorized by statute, in suit to reduce compensation. 99**CalA**677, 279**P** 224. [cq] **No deduction from award of amount of settlement recovered by employee** against surgeon for malpractice allowed where it did not appear what part of settlement represented damages for past suffering. 99**CalA**677, 279**P** 224. [cr] **Further compensation allowed** where original injury required additional medical attention. 11**LaA** 599, 123**S**383. [cs] **Employer becoming party plaintiff in suit by employee against third party** must segregate items going to make up total of settlement, in order to secure reduction of award. 99**CalA**677, 279**P**224. [ct] **That award was modified on appeal** does not prevent modification by commission on change of conditions. 129**Kan**845, 284 **P**415. [cu] **Refusal to consider application for additional compensation is reviewable** where application involved matters not previously considered. **WVa** 153**SE**510. [cv] **Increased disability prerequisite** to increased award. **TexCommnA** 27**SW(2d)**529. [cw] **Employee failed to discharge burden of showing change in physical condition** justifying setting aside original award and increase in compensation. **Tex CommnA** 27**SW(2d)**529. [cx] **Claimant cannot capture outlawed installments** of compensation award by procuring second award of compensation. **Mich** 233**NW**184. [cy] **Change in condition** warranting diminution or increase of compensation is change occurring after previous award. **Okl** 292**P**564. [cz] **Evidence held to require modification.**–**Conn** 152**A**158. [da] **It is within discretion** of commissioner whether facts justify modification. **Conn** 152**A**158. [db] **Petition for additional compensation** may be regarded as one for review of payments. **Mich** 233**NW**184. [dc] **What constitutes reasonable diligence** in submitting to surgical treatment under award is question of fact. **CalA** 292**P**525. [dd] **Burden of proof.**–Claimant seeking increased compensation must show that change in condition was due to original injury. **Okl** 292**P** 564. [de] **Changing application of compensation awarded.**–Commission cannot direct that compensation awarded for permanent disability be applied as temporary total disability. **Okl** 292 **P**564.

132–76½–New. or reinstate widow as dependent after annulment of marriage subsequent to employee's death. 83 **IndA**181, 147**NE**811.

132–77 147**Wash**149, 265**P**176. See also 77**CalA**314, 246**P**570; 38 **OklACR**513 (time for review of order discontinuing award). [b] **Evidence held to sustain denial of additional award.** 77**CalA**790, 247**P**526. [c] **Fact that injured employee was confined in county jail** during portion of compensation period is not ground for suspension of award. 250**Mich**46, 229**NW**595(2dcase).

132–77½–New. An application to re-

voke or change an award because of fraud, mistake, or changed conditions made after final decision of court of civil appeals presents original question for industrial accident board. **TexCivA** 275 **SW**279.

132-77½-New. Where temporary disability develops into permanent impairment, a claim therefor may be made on account of a change in conditions under some statutes. 85 **IndA**659, 155**NE**520.

132-77¼-New. Statute providing for modification of award on account of a change of conditions does not apply where no change of condition is involved. 86 **IndA**272, 155**NE**321.

132-77⅛-New. Under statute, the compensation period, during which review may be had, is determined by the facts of the particular injury, and the fact that the period for which the award for temporary total disability was made has expired before motion to reopen on the ground of mistake and change in condition is made does not make the award final. **TexCivA** 10**SW(2d)**263.

132-77⅛-New. That the industrial commission, on reopening a case after final award of the referee, refusing compensation, made an award fixing claimant's maximum compensation at three thousand, one hundred and twenty dollars, did not affect the employer's substantial rights, since, if the commission's findings were correct, such amount was always due. 85**Colo** 237, 275**P**910.

132-77½-New. To set aside a final agreement, reasonably satisfactory evidence of mistake, more than a scintilla, is necessary. 296**Pa**503, 146**A**146.

132-77⅛-New. Where a deputy commissioner's compensation order on its face closed the case, a succeeding deputy commissioner, after a previous award became final, was unauthorized to reopen the case and make a further award. 29**F(2d)**741(2dcase).

132-78 109**Conn**599, 145**A**164; 39**GaA** 47, 146**SE**45; 322 **Ill** 555, 153**NE**608; 323 **Ill** 98, 153**NE**635; 122**Kan**187, 250**P** 1068; 10**LaA**599, 120**S**789; 232**Mich**596, 206**NW**524 (after order discontinuing compensation, department of labor and industry is without jurisdiction to reopen unless employee's condition has changed for the worse); 236**Mich**100, 210**NW**251; 159**Tenn**561, 20**SW(2d)** 1045(1stcase).

132-78½-New. Independent application by an employee for an award, based on supposed change of conditions, did not supersede a previous application for award of compensation for injuries. 89 **IndA**380, 165**NE**258.

132-79 201**Cal** 169, 256**P**413; 35**GaA** 599, 134**SE**357; 39**GaA**47, 146**SE**45; 124 **Kan**471, 260**P**620; 124**Kan**631, 261**P** 584; **Me** 151**A**141. (permanent impairment of usefulness of legs); 233**Mich** 531, 207**NW**852 (burden is on employer to prove its right to order discontinuing award); 236**Mich**100, 210**NW**251; 251**Mich**305, 232**NW**224; 8**PaDist&Co** 191. [j] **Further compensation** held not recoverable where continued incapacity was due to employee's lack of care. 221 **Ky**198, 298**SW**392. [k] **Final receipt for compensation may be set aside** if claimant's condition has changed to disability directly traceable to original injury. 296**Pa**503, 146**A**146. [l] **Deputy commissioner's finding** that injured employee had shown improvement and increased earning capacity held arbitrary and capricious in view of evidence. 32 **F(2d)**922. [m] **Evidence held sufficient** to justify award of additional compensation. 88**CalA**513, 263**P**869. [n] **Evidence authorizing additional compensation.**–**LaA** 128**S**686. [o] **Failure to obtain work** is not aggravation of injury authorizing application for readjustment of compensation under statute. **Wash** 288**P**926.

132-79½-New. There is no absolute rule of law requiring the rejection of all the testimony of a witness because willfully false on a material point. 252 **Mass**236, 147**NE**561.

132-80 [b] **Where, after award, injured employee did not recover as expected,** commission has jurisdiction to make subsequent award allowing additional compensation. 70**Utah**354, 260**P**279. [c] **Burden of proof.**–251**Mich**305, 232 **NW**224.

132-80½-New. Evidence has been held sufficient to sustain action of board in setting aside award for temporary total incapacity, on the ground of mistake and material change in condition, and in making a new award for total permanent incapacity. **TexCivA** 10**SW(2d)** 263.

132-80½-New. A new award becomes effective as of the time of entry, and claimant cannot be required to account for moneys already paid him under a previous award. 39**GaA**47, 146**SE**45.

132-82 See also 204**Cal** 88, 266**P**805.

132-82½-New. Employers and insurance carriers are entitled to no consideration in their application for reduction of compensation when they are in default in their payments. 76 **IndA**77, 131 **NE**420. Contra 86 **IndA**122, 154**NE**804.

132-82½-New. An application to modify an agreement or award of compensation is based on the jurisdiction acquired through the original proceedings. 66**Utah**256, 241**P**362.

132-82¼-New. A proceeding for additional compensation is a distinct proceeding in which an independent appeal may be taken. 27 **OhA**169, 161**NE**31.

132-82⅛-New. The commission has jurisdiction to review its award on its own motion. 119 **Okl** 275, 249**P**704.

132-82⅛-New. Commission has power under statute to review either an award or a settlement upon change of condition. 35**GaA**599, 134**SE**357.

132-82½-New. If a chance appears after a lump sum settlement has been made and approved by the commission, the settlement would not be conclusive notwithstanding such approval. 35**GaA**599, 134**SE**357.

132-82⅛-New. The appeal for review upon ground of change presents a quasi new case, although not a new proceeding. 35**GaA**599, 134**SE**357.

132-82⅛-New. and it is the duty of the commission to examine into it, 35**GaA** 599, 134**SE**357.

132-82⅛-New. If the matter sought to be reviewed has not been judicially determined or become res adjudicata and it still has jurisdiction of the subject matter. 35**GaA**599, 134**SE**357.

132-82⅛-New. The commission is not required to give a hearing on the merits of every such application of review, 35 **GaA**599, 134**SE**357.

132-82⅛-New. but only when a preliminary inquiry discloses that the application is probably meritorious. 35 **GaA**599, 134**SE**357.

132-82⅛-New. If such change has not occurred the application will be denied. 35**GaA**599, 134**SE**357.

132-82⅛-New. If the change has occurred it is the duty of the commission to modify the previous settlement or award subject to the provisions of the statute. 35**GaA**599, 134**SE**357.

132-82⅛-New. The right of a party at interest to review a lump-sum settlement is as clear as his right to a review of any other settlement. 35**GaA**599, 134**SE** 357.

132-82⅛-New. Where the original award for full amount of compensation was made to one legally entitled to it, the commission, modifying its order so as to apportion compensation between such claimant and another entitled to share therein, cannot without such claimant's consent make such modifying order effective as of employee's death so as to deprive such original claimant directly or indirectly of any part of the compensation already received by him. 66**Utah**256, 241**P**362.

132-82⅛-New. Under statutes making the powers and jurisdiction of the commission continuing and empowering it to modify its former findings or orders, commission may exercise such continuing jurisdiction for the full compensation period or until it has been fully paid. 86 **IndA**122, 154**NE**804; 66**Utah** 256, 241**P**362.

132-82⅛-New. Thereunder it may make such lawful modifications in the apportionment or distribution of the award as the newly developed facts justify. 66**Utah**256, 241**P**362.

132-82⅛-New. Where the original award was to the wholly dependent surviving wife of a deceased employee, the commission's existing continuing jurisdiction may be exercised to apportion the award between the wife and the newly-discovered minor child of deceased by a former wife, 66**Utah**256, 241**P**362.

132-82⅛-New. upon notice to all concerned and after full hearing. 66**Utah** 256, 241**P**362.

132-82⅛-New. Such continuing jurisdiction is properly invoked by application on behalf of such minor child by letters filed with the commission claiming as the son of deceased by his former wife. 66**Utah**256, 241**P**362.

132-82⅛-New. But upon the new claimant's application for apportionment the commission has power to suspend further payments until such new claim may be investigated and facts ascertained, 66**Utah**256, 241**P**362.

132-82⅛-New. and may make the apportionment effective as of the date of the order of suspension. 66**Utah**256, 241 **P**362.

132-82⅛-New. Department of labor and industry properly retains jurisdiction to determine future compensation where record shows that it never approved unconditionally a settlement agreement between the parties as to amount of weekly compensation. 234 **Mich**637, 209**NW**193.

132-82⅛-New. Where an employer made timely presentation of a claim and was awarded compensation for total disability which was later reduced by agreement conditionally affirmed by department, employee's right to have order reviewed is not barred by two year statute as to presentation of claims. 234**Mich**637, 209**NW**193.

132-82⅛-New. Department's conditional approval of agreement reducing weekly payments for total disability is not res judicata where the department did not pass on employee's physical condition but conditionally approved agreement on the fact that employee was paying him salary as night watchman. 234**Mich**637, 209**NW**193.

132-82⅛-New. Provision for termination dependency of widow on marriage subsequent to death of husband, marriage of such widow voidable for fraud does not terminate her right to compensation. 83 **IndA**181, 147**NE**811.

132-82⅛-New. An award may not be redistributed on marriage of one dependent. 83 **IndA**131, 147**NE**813.

132-82⅛-New. Annulment of marriage related back to time of marriage contract. 83 **IndA**181, 147**NE**811.

132-82⅛-New. Judgments determining the status of parties such as marriage are judgment in rem, as to all persons whether parties or not. 83 **IndA**181, 147 **NE**811.

132-82⅛-New. Where marriage was later annulled for fraud, receipt in full for compensation due was not conclusive of facts recited therein. 83 **IndA**181, 147**NE**811.

132-82⅛-New. Reinstatement adds nothing to appellant's liability as fixed by original award. 83 **IndA**181, 147**NE** 811.

132-82⅛-New. Industrial board had jurisdiction to hear original cause and having been acquired continued until marriage or death of defendant. 83 **IndA**181, 147**NE**811.

132-82⅛-New. Under Arizona statute, widow and children are not entitled to compensation not due at employee's death where he died more than six months after accident. 29**Ariz**164, 240**P** 277.

132-82⅛-New. Under Arizona statute compensation ceases on death of employee and personal representative cannot recover installment not then due. 29**Ariz**164, 240**P**277.

132-82⅛-New. Some statutes providing for review of awards at any time before final payment authorize review and modification of awards which have previously been reviewed and modified. 119 **Kan**748, 241**P**448.

132-82⅛-New. Upon ground of change of condition, injury which is distinct

from injury compensated and not a result thereof may not be made basis for modifying award. 112 **Okl** 247, 240**P**617.

132-82½8-New. Where no motion for rehearing was made, applicant is not entitled to correction of error of law. **TexCivA** 275**SW**279.

132-82½9-New. Compensation proceedings may be instituted after a second injury, where the employer voluntarily paid compensation for the first injury. 77**CalA**314, 246**P**570.

132-82½0-New. Refusal of the commission to make a further award for increased disability is justified by a finding that the present total disability was due to premature old age, 81**Colo** 106, 253**P**826

132-82½1-New. and that the permanent partial disability sustained was not greater than that for which the employee had theretofore been compensated. 81**Colo** 106, 253**P**826.

132-82½2-New. Death of an injured employee does not release insurer from obligation under an award to the employee for the loss of an eye. 43 **Ida**450, 254**P** 212, 51**ALR**1438.

132-82½3-New. Right to enforce payment under an agreement for compensation for the loss of an eye survives the employee. 43 **Ida**450, 254**P**212, 51**ALR** 1438.

132-82½4-New. In the absence of a finding of impairment or evidence of degree thereof on original hearing, finding of no change in the degree of impairment is not error. 83 **IndA**616, 149**NE**456.

132-82½5-New. Refusal to modify an award on the ground that there had been no material change in the employee's subsequent condition held sustained by the evidence. 83 **IndA**616, 149**NE**456.

132-82½6-New. Error in finding using the word "leg" instead of "foot" cannot be attached by the employer in appeal from later order directing resumption of payments. 83 **IndA**616, 149**NE**456.

132-82½7-New. Error in basing an award on inability to work instead of a percentage of impairment has been held no cause for reversing refusal to modify award. 83 **IndA**616, 149**NE**456.

132-82½8-New. Employee awarded compensation on the basis of an earning capacity of twenty four dollars per week cannot collect compensation for the time when earning an excess of twenty four dollars per week. 86 **IndA**122, 154**NE** 804.

132-82½9-New. Compensation is not a gratuity but is intended to make good a loss from disability, and terminates with the disability. 86 **IndA**122, 154**NE**804.

132-82½0-New. Employer making application to review an award is not required to pay compensation to the date of filing the application where the disability had terminated prior thereto. 86 **IndA**122, 154**NE**804.

132-82½1-New. Employer sued on judgment entered upon award cannot defend on the ground that changed conditions justified modification. 87 **IndA**248, 155 **NE**615.

132-82½2-New. Such a judgment is not subject to collateral attack. 87 **IndA** 248, 155**NE**615.

132-82½3-New. Upon modification of an award for total disability to an award for permanent impairment, employer should be credited for payments made. 86 **IndA**272, 155**NE**521.

132-82½4-New. Under some statutes, to reduce compensation, the employer may furnish the employee work suitable to his capacity, and if such employment is refused, the employee is not entitled to compensation unless the board decides that the refusal was justifiable. 86 **IndA** 111, 154**NE**778.

132-82½5-New. On widow's remarriage, her minor child was held entitled to the widow's share of the agreed compensation, notwithstanding an order terminating payment to the widow because of her marriage. 85 **IndA**312, 153**NE**894.

132-82½6-New. Industrial commission has no jurisdiction to modify an award after appeal has been taken. 202 **Iowa** 773, 211**NW**413.

132-82½7-New. Petition to review and revoke an agreed award held timely if within the period of award. 211**Ky**821, 278**SW**169.

132-82½8-New. Petition for review must be by the party entitled to benefit under the award. 211**Ky**821, 278**SW**169.

132-82½9-New. The compensation board cannot give to its award on review a retroactive effect. 213**Ky**636, 281 **SW**1039.

132-82½0-New. Any increase of compensation should apply from the time of the last motion, and not from the time of a previous abandoned motion. 213**Ky**636, 281**SW**1039.

132-82½1-New. Under some statutes, where the injury results in total disability within four months after disallowance of a claim by the compensation board, the board may change or revoke its previous order. 213**Ky**245, 280**SW** 961.

132-82½2-New. Provision in Compensation Act for continued payments, to dependents after injured employee's death held to refer to cases of presumed total incapacity. 125**Me**285, 133**A**161.

132-82½3-New. A finding of the department of labor and industry that disability existing at the time of hearing on application to terminate compensation was not due to accident but to natural causes is conclusive in the absence of fraud, although the testimony is conflicting. 238**Mich**431, 213 **NW**692.

132-82½4-New. Under the Oklahoma statute form or substance of application for review is immaterial as the board may review an award upon its own motion. 125 **Okl** 155, 256**P**937.

132-82½5-New. After suit to enforce an award is commenced in court having jurisdiction, the board loses further authority to change the award. **Tex CommnA** 285**SW**1041.

132-82½6-New. A provision that the industrial commission shall have continuing jurisdiction must have a liberal construction where the jurisdictional facts are established. 69**Utah**102, 252 **P**567.

132-82½7-New. On hearing of an employer's petition for modification, the question before the commission is not whether the disability had decreased, 321 **Ill** 240, 151**NE**890.

132-82½8-New. but whether he had returned to work or was able to do so, and was able to earn as much as before the injury or part of the amount he originally earned. 321 **Ill** 240, 151**NE** 890.

132-82½9-New. Evidence held mere amplification of nature and effects of original injury not warranting increased disability compensation. 322 **Ill** 555, 153**NE**608.

132-82½0-New. Whether disability of employee had recurred or increased has been held a question of fact, and the burden of proof is on him. 323 **Ill** 98, 153**NE**635.

132-82½1-New. Remand to commission to make finding required by evidence is unnecessary. 323 **Ill** 98, 153**NE**635.

132-82½2-New. Order held, in effect, not for compensation payments to begin at an alternative period. 323 **Ill** 98, 153 **NE**635.

132-82½3-New. An additional award for increase of disability after lump sum settlement is authorized where credit was given for total amount paid. 323 **Ill** 98, 153**NE**635.

132-82½4-New. Where the settlement was approved by the board, an employee cannot by petition for review, secure an award for an injury not included. 322 **Ill** 603, 153**NE**647.

132-82½5-New. An award for increased disability is not authorized where the petition to review makes no claim therefor. 322 **Ill** 603, 153**NE**647.

132-82½6-New. Adjudication by the accident board becomes the law of the case until vacated or reviewed. 262 **Mass**266, 159**NE**731.

132-82½7-New. The industrial accident board cannot award an operation after the expiration of the "compensation period." **TexCivA** 298**SW**639 ("compensation period" construed).

132-82½8-New. The board cannot award an operation after full payment of the compensation awarded. **TexCivA** 298**SW**639.

132-82½9-New. A deputy commissioner appointed to take testimony on an application by an insurer for an award, terminating compensation on the ground of change in condition, is without authority to dismiss the case, and, if he does so, the commission may treat the application as still pending. 37**GaA** 703, 141**SE**504.

132-82½0-New. The industrial commission can open an award made more than two years previously and make a new award on showing changes in condition. 149**Va**330, 141**SE**132.

132-82½1-New. The commission's right to open an award on a change in condition is similar to that of the court. 149**Va**330, 141**SE**132.

132-82½2-New. Claimant seeking an increased award has the burden of showing that conditions resulted from an accident. 149**Va**330, 141**SE**132.

132-82½3-New. Evidence was held not to sustain an award of increased compensation on the ground that injury to hand caused paralysis. 149**Va**330, 141 **SE**132.

132-82½4-New. Where an action by a minor against an employer for an injury is defeated on the ground of his being employed under an employment certificate making him sui juris for application of the Workmen's Compensation Law, and that acceptance of compensation prevented recovery in an action at law, the employer should continue payment of compensation where it left off. 225**Ky**753, 9**SW(2d)**1100.

132-82½5-New. An order vacating final receipt and reinstating compensation will not be disturbed, if based on sufficient evidence. 296**Pa**503, 146**A**146.

132-82½6-New. When an appeal of a compensation insurance carrier from an award was duly perfected and under the pleadings the employee became in effect plaintiff, the burden was on the employee to sustain the award by pleading and proving that a prior award of the accident board was set aside in compliance with statute, authorizing the board, on a showing of change of condition, mistake, or fraud, to review its prior award any time within the compensation period. **TexCivA** 10**SW(2d)** 263.

132-82½7-New. On a finding that condition had changed so as to entitle the employee only to compensation for permanent partial loss instead of permanent total loss, the commission was not authorized to discontinue compensation entirely on the new award allowing that diminished compensation should be entered. 39**GaA**47, 146**SE**45.

132-82½8-New. An injured employee has been held not a common laborer, so as to preclude the right to compensation if able to perform any kind of labor without regard to ability to do work he was engaged in. 244**Mich**19, 221**NW**145.

132-82½9-New. The period of compensation is not affected by the limitation that review shall not affect moneys already paid, where original award was erroneously for single, instead of multiple, injuries. 250**NY**507, 166**NE**183.

132-82½0-New. An employer and insurer are not necessary parties to the employee's proceeding to suspend an order reducing compensation since the statute requires that action be brought by the interested party against the deputy commissioner making the order. 32 **F(2d)**922.

132-82½1-New. After reopening an award for single disability, an award for like disability from combined injuries was not erroneous as reclassification, since classification refers not to the schedule period, but to general classification. 250**NY**507, 166**NE**183.

132-82½2-New. The burden of proof is on claimant to establish the right to have the final agreement set aside. 296**Pa**503, 146**A**146.

132-82½3-New. The action of the commission in refusing to vacate an award after hearing the evidence will not be reviewed by the court. 139 **Okl** 79, 281 **P**269.

132-82½4-New. An employer petitioning for readjudication is not entitled thereto in the absence of an allegation of increase or decrease of incapacity due solely to the injury. 159**Tenn**561, 20**SW(2d)**1045(1stcase).

132-82½5-New. Jurisdiction to reopen a case cannot be presumed where the motion was filed later than the second term after discovery that the condition was worse, in violation of statute. 41 **Wyo** 55, 281**P**1005 (jurisdiction held not conferred by consent).

132-82½6-New. Whether a stipulation for reopening a case is void under statute is immaterial in determining whether the court had jurisdiction to reopen the judgment which adopted in part statements in the stipulation. 41**Wyo** 55, 281**P**1005.

132-82½7-New. Compensation awarded at new hearing after denial of compensation held properly required to commence from date when prior payments were discontinued. 41**GaA**113, 151**SE** 812.

132-82½8-New. Under statute permitting application on ground of change in conditions at any time but not oftener than once in six months judgment of court fixing compensation and closing case is not authorized. **Ida** 287**P**202.

132-82½9-New. Where board had desired no changed condition existed as ground for reopening award it is unnecessary, on appeal from board's finding, for court concluding otherwise to remand case to board for further proceedings but court will direct judgment for proper further compensation. **Ida** 287**P**202.

132-82½10-New. Circuit's action in overruling discretion of board in refusing to reopen case and directing reopening held erroneous. 233**Ky**273, 25 **SW(2d)**384.

132-82½11-New. On appeal from commission's decision refusing to modify award, transcript is properly admitted in its entirety for consideration by court and jury. 34 **OhA**174, 170**NE**594.

132-82½12-New. Decision on prior appeal that claimant applying for modification of award was entitled to trial in common pleas court is conclusive on subsequent appeal. 34 **OhA**174, 170**NE**594.

132-82½13-New. Where evidence supported verdict for claimant on his petition for modification of award, entered on appeal to common pleas court, verdict cannot be set aside by reviewing court as influenced by passion and prejudice or as against evidence. 34 **OhA**174, 170**NE**594.

132-82½14-New. Where six months had not elapsed between time of payment of final award and petition to reopen it commission had not lost jurisdiction and time to apply for readjustment had not expired. **Ida** 287**P**202.

132-82½15-New. An employee is not entitled to added compensation for discomfort and pain in working for a two-year period at full wages after payment of compensation in full. 129**Kan** 422, 283**P**618.

132-82½16-New. Changed condition is the only question considered where application is filed after expiration of the time to sue in the supreme court. 141 **Okl** 127, 284**P**35 (denial of application sustained).

132-82½17-New. That employer filed no answer to application and went to trial under general denial does not prevent waiver of defense of "no dispute." **IndA** 171**NE**882(2dcase).

132-82½18-New. Right of dependent widow after death of employee to determination of permanent impairment of member. **Me** 151**A**141.

132-82½19-New. Either employee or insurer notwithstanding agreement for compensation may ask for determination of permanent impairment of member. **Me** 151**A**141.

132-82½10-New. Refusal to make increased award not reviewed where not arbitrary and capricious. **Wash** 288**P** 926.

132-82½11-New. Failure of commission to set forth in award facts as found held not to require further hearing. 41 **GaA**362, 153**SE**77(2dcase).

132-82½12-New. Failure of board to find change in employee's condition is equivalent to finding against employer asking review because of change. **IndA** 171**NE**223.

132-82½13-New. Change in award for permanent disability is contrary to finding that employee was still totally disabled. **IndA** 171**NE**223.

132-82½14-New. Where board finds that employee is still totally disabled award for permanent disability should not be changed. **IndA** 171**NE**223.

132-82½15-New. Statute prohibiting payment of compensation during confinement in public institution held applicable notwithstanding compensable disability was only partial. **Minn** 232 **NW**342(1stcase).

133-9 See also 6**LaA**587.

133-12 See also 6**LaA**849.

133-13 See also 6**LaA**823.

133-14 5**LaA**224.

133-17 200**Cal** 579, 253**P**926; 124**Kan** 521, 261**P**820; 262**Mass**133, 159**NE**511; 114**Nebr**468, 208**NW**141. [a] **Agricultural and domestic servants.**–Status of farm laborers and domestic servants excepted from compensation act remains unchanged as to common law remedies against employer. **Utah** 287**P**922.

133-18 5**F(2d)**462; 200**Cal** 579, 253**P** 926; 232 **IllA**495; 233 **IllA**6; 124**Kan** 327, 259**P**695; 124**Kan**521, 261**P**820; 3**LaA**358; 313**Mo** 225, 281**SW**762, 45 **ALR**1223; 248**NY**107, 161**NE**436; 217 **AppDiv**316, 217**NYS**173; 56**ND**392, 217 **NW**660; **Utah** 274**P**940. [h] **Effect of statute on rights of employees of subcontractor.**–(1) Secondary liability of general contractor under Workmen's Compensation Act, where subcontractor fails to meet his liability, is not exclusive so as to destroy common-law right of action. 248**NY**107, 161**NE**436. (2) Statute does not exempt general contractor from common-law liability to employee of subcontractor where no statutory liability is shown to have arisen. 248**NY**107, 161**NE**436 (must plead and prove statutory liability).

133-18½-New. Injury from assault by fellow servant held within exclusive field of act. 22**AlaA**26, 111**S**758.

133-19 82**NH**87, 129**A**729 (receipt for compensation and release of common-law liability).

133-19½-New. Payment of compensation for an injury precludes recovery for aggravation of the injury caused by malpractice of the employer's physician. 218**Ky**55, 290**SW**1039.

133-19⅓-New. Provision in Compensation Act that in action by employee against employer contributory negligence shall not be defense does not apply to employer's action against third person. 68**CalA**662, 230**P**15.

133-19¼-New. Acceptance of final award, although based on maritime law, extinguishes that remedy. 244**NY**132, 155**NE**74.

133-19⅓-New. Acceptance of interlocutory award is accord at most and not satisfaction, and does not bar cause on other grounds, although available as set-off. 244**NY**132, 155**NE**74.

133-19⅙-New. Right of action for injuries from maritime tort resulting in death is the same as before the enactment of the Workmen's Compensation Law, 217**AppDiv**775, 217**NYS**194.

133-19⅐-New. and such law, whether elective or compulsory, cannot displace admiralty jurisdiction of the federal courts or common-law jurisdiction of the state court. 217**AppDiv**775, 217**NYS** 194.

133-19⅛-New. In Texas an injured employee's common-law right of action for exemplary damages for gross negligence of his employer is abrogated; **TexCommnA** 283**SW**141.

133-19⅑-New. but, because of a constitutional provision, the right of the surviving spouse and heirs of the employee to recover such damages is expressly saved. **TexCommnA** 283**SW**141.

133-19⅒-New. Where it is difficult to say whether a particular compensation case falls under the state Compensation Act or the Federal Employers' Liability Act, it may be possible to proceed under both until the facts are developed. 155**Tenn**285, 292**SW**3.

133-19⅑1-New. A suit in a federal court for compensation for the death of an employee under the Federal Employers' Liability Act is not an abandonment of a claim for compensation under the state Compensation Act, and the petitioner, after adverse judgment in the federal court, may assert his claim under the state statute. 155**Tenn** 285, 292**SW**3.

133-19⅑2-New. Under some statutes, institution of an action at common law for damages bars proceedings to recover benefits under the act. 82**NH**221, 131**A**688.

134-20 But see 233 **IllA**6.

134-21 200**Cal** 754, 254**P**1105.

134-29½-New. , or by employment of minor in extrahazardous occupation in violation of Child Labor Law. 317 **Ill** 312, 148**NE**59.

134-31 But see 124**Kan**521, 261**P**820 (judgment denying relief under act held no bar to other action).

134-32½-New. Where the parties are not operating under the act and the injury is one not within its purview, it is not exclusive. 124**Kan**521, 261**P** 820.

135-40 51**ND**710, 201**NW**680; **ND** 226 **NW**586(2dcase) (action not barred by employee's release of third person as tort-feasor); 112 **Okl** 292, 240**P**1053. [b] **Option of employee.**–Where employer has failed to comply with act, injured employee may maintain civil action for damages or apply to compensation bureau for compensation under act. 51 **ND**710, 201**NW**680.

135-41 112 **Okl** 292, 240**P**1053.

135-41½-New. If the employer has complied with the statute, the employee cannot elect, but must take benefits of the statute. 51**ND**710, 201**NW**680; 112 **Okl** 292, 240**P**1053.

135-41⅓-New. Failure of an employer to secure payment of compensation by providing insurance does not oust the state industrial commission of jurisdiction where an employee receives an injury while engaged in a hazardous employment. 112 **Okl** 292, 240**P**1053.

135-41¼-New. In Georgia, action in first instance must be against the employer. 36**GaA**248, 136**SE**173.

135-41⅕-New. A railroad employee injured in intra-state commerce cannot maintain an action against his employer on the ground of gross negligence. 91 **CalA**770, 267**P**591.

135-42 216**Ala**129, 112**S**734; 122**Kan** 260, 261, 251**P**1112 [quotCJ]; 215**Ky** 128, 284**SW**91; 216**Ky**29, 287**SW**18; 225**Ky**753, 9**SW(2d)**1100; 240**Mich**593, 216**NW**374; 320**Mo** 893, 8**SW(2d)**897; **MoA** 21**SW(2d)**922; **MoA** 26**SW(2d)**52; 79**Mont**52, 255**P**337; 83**NH**221, 140**A** 704; 117 **OhSt**586, 160**NE**687; 29 **OhA** 396, 163**NE**577(2dcase); 129 **Okl** 32, 263 **P**440 (construing Kansas statute); **Or** 270**P**403; 298**Pa**343, 148**A**529 (relieved from common law liability); 13**PaDist &Co** 76; 154**Tenn**224, 289**SW**520; **Tex CivA** 286**SW**336; 66**Utah**161, 241**P**1058. But see 150**Md**525, 133**A**593. [e] 317 **Ill** 312, 148**NE**59. [f] **Where claim for compensation is denied by department of labor and industry,** compensation may not be recovered by action at law. 240 **Mich**593, 216**NW**374. [g] **Action at law to recover for death of employee** will not lie where employer and employee were both subject to Compensation Act. 242**Mich**93, 218**NW**663. [h] **There is no estoppel as regards election of remedies** where injured employee mistakes his remedy. 83**NH**221, 140**A**704. [i] **Employee electing to proceed under act** is precluded from maintaining action at law against employer. 56**ND**624, 218 **NW**869. [j] **Acceptance of act no defense in action based on defendant's negligence as landlord.**–235**Ky**204, 30**SW (2d)**900. [k] **Malicious assault.**–Employer intentionally and maliciously assaulting employee cannot avoid liability for damages on ground compensation is available. 180**Minn**470, 231**NW**233(2d case).

135-42½-New. Employee may sue his employer at law where the injury does not come within the act. 234 **IllA**502.

135-42⅓-New. Where the injury is not

within the statute, the employee is not required to file with the complaint a certificate showing election or refusal to be bound thereby. 3Del 304, 136A 375.

135-42¼-New. A contract requiring the contractor to comply with the Workmen's Compensation Law does not relieve employing railroad of liability under the Federal Employers' Liability Act for injuries to workmen doing work, the duty of performing which rested on it. 23F(2d)664.

135-42½-New. An employee, entitled to compensation under the act, is not deprived of the right to sue his employer for damages not compensable under the act. 28 OhA434, 162NE765.

135-42⅙-New. Under some statutes general contractor cannot be sued by employee of subcontractor where there is an agreement with the subcontractor to carry insurance. 298Pa549, 148 A847.

135-45½-New. An action at law is not barred by an unauthorized compensation proceeding. IndA 151NE833.

135-45½-New. Where the award denies compensation on the ground that the employee, being a minor, does not come under the act, subsequent action against the employer for damages is not barred. IndA 151NE833.

135-45¼-New. Trial on merits is unnecessary where proceedings at law are dismissed because employee has already elected to come under act. 83 NH221, 140A704.

135-46 83NH221, 140A704; TexCivA 318W(2d)675. [f] **Employee injured in interstate service** by accepting benefit of act is not estopped from instituting common-law action against employer failing to file acceptance. 102WVa66, 135SE662, 50ALR217.

135-47½-New. Where an employer elects not to operate under the Compensation Act, employee's sole remedy is an action at law, 49SD411, 207NW 460.

135-47¼-New. and where he fails in such action, his rights are determined so as to prevent proceeding under the Compensation Act. 49SD411, 207NW 460.

135-47¼-New. In order to deprive an employer of any defense by reason of his having rejected the protection of the Workmen's Compensation Act, it is necessary to prove that the injured person was an injured workman within the meaning of such act. 118 Or15, 245 P732, 45ALR821.

135-47⅙-New. Employee is not estopped from bringing his common-law action against his employer by having applied for and accepted current benefits under the act. 102WVa66, 135SE 662, 50ALR217.

135-47⅙-New. An employer amenable to the terms of the act must affirmatively plead and prove that he was a subscriber to the act in order to avail himself of the defenses of contributory negligence and assumption of risk in an action by an injured employee. Tex CivA 281SW234.

135-47½-New. An employee may have an action for damages against the employer who has failed to comply with the act, and first filing an application with the commission for compensation is not prerequisite. 81CalA98, 252P 1075.

135-47⅙-New. The act is construed to permit, but not to require, an employee both to proceed under the act and to bring his action at law, but he may pursue either or both remedies, neither of which is dependent on the other. 81CalA98, 252P1075.

135-47½-New. Where an employer procures neither insurance nor a certificate exempting him therefrom, the injured employee has an election whether to seek compensation or sue at law for damages. 88 IndA518, 162NE372 (complaint held sufficient to show that employer was in default).

135-47 1/10-New. Statute including municipal corporation as employer does not render municipality liable for expenses of person injured while assisting policeman to execute search warrant although it rejected act. 233Ky 12, 24SW(2d)938.

135-47 1/11-New. Under some statutes contractor refusing to be bound by act must respond in damages for injury to subcontractor's employee through negligence of contractor's servant. 298 Pa549, 148A847.

135-47 1/12-New. Plaintiff need not allege details intervening between blow which set dormant disease in motion. 13LaA 402, 128S321.

135-47 1/13-New. Rules of pleading and evidence may be relaxed whenever trial judge thinks it necessary in his discretion. 13LaA402, 128S321.

135-47 1/14-New. Petition by farm servant, losing fingers in meat grinder is based merely on common law duty to exercise ordinary care. 34 OhA490, 171 NE409.

135-47 1/15-New. Employee suing uninsured employer is entitled to damages applicable in common law actions for negligence. ND 231NW283.

135-47 1/16-New. Petition against employer held to state cause of action. Tex CivA 27SW(2d)621.

135-47 1/17-New. Employer notifying commission and employees of rejection of act as therein provided is not within act as regards liability to injured employee. Or 291P380.

136-48 219Ky839, 294SW472; 228 Ky379, 15SW(2d)236; 234Ky427, 28SW (2d)479; 235Ky618, 32SW(2d)14; 128 Me314, 146A903; 238Mich493, 213NW 703; 101WVa546, 133SE142. See also 243Mich512, 220NW794.

136-49 101WVa546, 133SE142. But see 49ND960, 194NW695 (noncomplying employer is liable for injuries or death sustained or occurring in course of employment regardless of fault); ND 231 NW283 (uninsured employer is liable to employee regardless of questions of fault). [b] **In North Dakota** under statute when employer has failed to comply with statute he is liable to injured employee within statute where damages are suffered by reason of injury sustained in course of employment without regard to questions of fault. 50 ND465, 196NW556.

136-51½-New. An independent contractor must allege and prove negligence. 203 Iowa306, 210NW923.

136-51⅓-New. In an action for the death of an employee, where defendant is not insured under the Workmen's Compensation Act, the only defense is that there was no evidence of defendant's negligence. 258Mass303, 154NE853.

136-52 152Tenn614, 279SW1043.

136-57 99CalA108, 277P1061; 33GaA 668, 127SE816; 35GaA681, 134SE621; 210Ky5, 273SW533; 219Ky839, 294SW 472; 220Ky682, 295SW981; 227Ky91, 11 SW(2d)985; 234Ky427, 28SW(2d)479; 235Ky618, 32SW(2d)14; 236Ky36, 32SW (2d)544; 125Me96, 131A5; 253Mass538, 149NE412; 267Mass5, 165NE698; 235 Mich373, 209NW53; 238Mich493, 213NW 703; 49ND960, 194NW695; 117 Or188, 243P96, 45ALR812; Or 291P380; 54 SD639, 224NW185; TexCommnA 128SW (2d)1002; TexCivA 281SW234; Tex CivA 283SW1104; TexCivA 14SW(2d) 97; TexCivA 27SW(2d)621; WVa 143 SE237; 105WVa513, 144SE225; 106 WVa394, 145SE637.

137-58 243Mich512, 220NW794; Or 291P380.

137-60½-New. or otherwise has failed to comply with the act. 88 IndA518, 162 NE372.

137-61 150Md525, 133A593. But see NS [1930] 3DomLR445 (provision applicable only in case of injuries causing death).

137-63 TexCivA 291SW667. [c] **Failure to obey rules no defense** where defendant's negligence is proximate cause of injury. TexCivA 291SW667. [d] **Leaving idle wire hanging,** when only remote cause, no defense. TexCivA 291SW667.

137-63½-New. The rule is otherwise where the employer was not negligent. 243Mich512, 220NW794.

137-65 15F(2d)972 (Massachusetts' statute); 15F(2d)976 (dictum); 31Ariz 214, 251P553; 219Ky839, 294SW472; 234Ky427, 28SW(2d)479; 235Ky618, 32 SW(2d)14; 236Ky36, 32SW(2d)544; 267Mass5, 165NE698; 235Mich373, 209 NW53; 238Mich493, 213NW703; 49ND 960, 194NW695; 117 Or188, 243P96, 45 ALR812; Or 291P380; TexCivA 281 SW234; TexCivA 283SW1104; TexCivA 291SW667; TexCivA 14SW(2d)97; 101 WVa440, 133SE114; WVa 143SE237; 105WVa513, 144SE225; 106WVa394, 145SE637. But see 150Md525, 133A593. [a] **Simple tool doctrine** is inapplicable. 227Ky91, 11SW(2d)985.

137-66 88 IndA518, 162NE372; Tex CivA 281SW234.

137-68 NS [1930] 3DomLR445.

138-71 15F(2d)976 (dictum); 210Ky5, 273SW533; 227Ky91, 11SW(2d)985; 125Me96, 131A5; 267Mass5, 165NE698; 117 Or188, 243P96; 45ALR812; Or 291 P380; 101WVa440, 133SE114; WVa 143SE237. But see 150Md525, 133A593 (defense held available).

138-72 88 IndA518, 162NE372.

138-75 83NH43, 138A302.

138-76 83NH43, 138A302.

138-77 219Ky647, 294SW172.

138-78 [a] **In Texas** employee must give notice of unwillingness to abide by decision of industrial accident board within twenty days after it is made in order to bring suit in court. TexCivA 294SW247.

138-78½-New. Common-law action of employee against employer for negligence remains open to all employees who are not subject to the provisions of the act. 114Nebr468, 208NW141.

138-78⅙-New. whether exempted from its operation by statute, 114Nebr468, 208NW141.

138-78¼-New. or because of election not to be bound by its provisions. 114 Nebr468, 208NW141.

138-78½-New. Employee injured by employer's willful act or omission may waive claim for compensation and sue for both actual and exemplary damages, but exemplary damages are not recoverable if the element of intention is lacking. TexCommnA 283SW141.

138-80 [a] **Compensation law is inapplicable** to physician's action against employer for agreed price of services rendered at employer's request. 138Misc 380, 245NYS688. [b] **Admissibility of evidence** in action by physician against employer for services. 138Misc380, 245 NYS688.

138-80½-New. Right of election to sue employer or take compensation under act is personal with employee and cannot be exercised by personal representative after his death. 29Ariz164, 240 P277.

138-80⅙-New. Doctor, requested by employer to treat employee, held not bound by act. NJSup 132A101.

138-80¼-New. A compensation carrier may, by subrogation, recover from the employer of an independent contractor for the death of the employee. 101Vt 250, 143A290. [a] **Facts held to show** independent contractor and not status of employee. 101Vt250, 143A290. [b] **Right of carrier to sue.**-93CalA196, 269 P685.

138-82 82CalA610, 256P447. [b] **Effect on claims of nondependents.**-(1) Provision that remedy under act "shall be exclusive remedy" applies where nondependent's parents bring action for death of son. 82CalA610, 256P447. (2) Provision that liability for compensation provided shall be "in lieu of any other liability" means liability to any person by reason of injury to employee, whether such person is dependent or nondependent. 82CalA610, 256P447. (3) Provision that death benefit to deceased employee leaving no dependents shall consist of burial expense and other benefit provided by law does not include statutory cause of action for wrongfully causing death. 82CalA610, 256P447. (4) Where conditions of compensation rendering Compensation Act applicable exist, it is immaterial whether person making claim based on injury to employee is dependent or nondependent. 82CalA610, 256P447.

138-84 157Tenn618, 11SW(2d)872.

139-85½-New. One seeking to defend under the act must plead and prove it. 232 IllA193.

139-86 267Mass319, 166NE821; 132 Okl 152, 269P1084, 60ALR837. See also 10LaA719, 122S141.

139-86½-New. Parents of a minor injured in employment within the act have no remedy except that prescribed thereby. 10LaA719, 122S141.

139-87 31F(2d)152; 234 IllA416; 237 IllA145; 251 IllA560 (right not effected by accepting compensation from employer not liable under Compensation Act); La 130S1; 128Me50, 145A400, 67ALR 239; 150Md655, 133A338; 219AppDiv 181, 219NYS148; 296Pa529, 146A130; Pa 152A90; 50RI 226, 146A484; TexCivA 6SW(2d)432; TexCivA 15SW(2d)46(2d case); TexCivA 22SW(2d)971; 197Wis 349, 222NW249; Wis 229NW81. See also 27 OhA522, 161NE238 (employee may recover of person causing injury). [i] **Person causing injury** cannot show that plaintiff has received payment under Compensation Act. 122Kan458, 252P 231. [j] **Amendment of 1927** prevented action against third person engaged in extrahazardous employment causing injuries. Wash 291P330. [k] **Necessary parties to action.**-Del 151A822.

139-88 255Mass605, 152NE46; 142 Wash69, 252P152.

139-89½-New. Provision in the Workmen's Compensation Act that in an action by an employee against an employer contributory negligence shall not be defense does not apply to employee's action against a third person. 68CalA 662, 230P15.

139-89⅓-New. In an action by widow of deceased employee against a third person for damages for death of an employee, defendant cannot interpose contributory negligence of employer as defense. 68CalA662, 230P15.

139-89¼-New. Provisions of the Workmen's Compensation Act do not extinguish right of action by personal representative of deceased employee given under the death statute where the employer has paid compensation. 165Minn 390, 206NW714.

139-89⅕-New. An answer in an action under the death statute alleging that full compensation has been paid in accordance with the schedule of the compensation statute does not infer that dependents of deceased employee had received as compensation the maximum amount recoverable under the death statute. 165Minn390, 206NW714.

139-89⅙-New. Neither the employer nor his insurer is a necessary party to an action against third person whose negligence caused the injury or death of employee. 165Minn390, 206NW714.

139-89⅐-New. In Oklahoma, where principal contractor requires subcontractor to take out compensation policy for benefit of employee of the latter, the compensation so secured is exclusive, and action does not lie against the principal contractor because of negligence of his employee. 124 Okl 228, 255P582.

139-89⅛-New. Statute does not provide for assignment of cause of action against principal contractor when the intermediate employee is the subcontractor or the intermediate contractor. 124 Okl 228, 255P582.

139-89⅑-New. In some jurisdictions compensation under the act is not an exclusive remedy, 70Utah441, 261P9.

139-89⅒-New. except where employee or his dependents assign his or their cause of action to insurer liable for compensation. 70Utah441, 261P9.

139-89⅓1-New. In order to assert their common-law right of action the dependents of an employee are not compelled to assign a cause of action against wrongdoers to an insurer liable for compensation. 70 Utah441, 261P9.

139-89⅓2-New. A general contractor, through whose actionable negligence an employee of a subcontractor is injured, is a "third party" as defined by the Compensation Act and is liable to the employee for all injuries sustained. 117 Nebr799, 223NW658.

139-89⅓3-New. An owner requiring his contractor to take out compensation insurance is a third party as to employees of his contractor. 117Nebr805, 223NW661.

139-89¼4-New. Where an employee of a general contractor who has sublet part of the work is injured, the term "third person," as used in the Compensation Act, applies to all persons other than the general contractor. 117Nebr 809, 223NW663.

139-89⅓5-New. Where an owner enters into a construction contract with a general contractor who engages a subcontractor to aid him, the subcontractor is the only employer of his employees and all others are third parties. 117Nebr 799, 223NW658.

139-89⅓6-New. Such owner is liable at common law for any and all damages sustained by his contractor's employees caused by his actionable negligence. 117Nebr805, 223NW661.

139-89⅓7-New. A contractor requiring his subcontractor to take out compensation insurance is a third party as to employees of his subcontractor. 117 Nebr805, 223NW661.

139-89⅓8-New. Such contractor is liable at common law to employees of his subcontractor injured through his actionable negligence. 117Nebr805, 223 NW661.

139-89⅓9-New. An action against a third party being a common-law and not a statutory action it is not necessary to allege and prove compliance with statutory requirements. 128Me50, 145A 400, 67ALR239.

139-89⅓20-New. Under some circumstances right to compensation is in lieu of all other remedies against any of parties in plant where all are in a sense of a single employ. 39F(2d)70.

139-89⅓21-New. Employee of general contractor may sue subcontractor for negligence of his servant which occasioned injury. 298Pa549, 148A847.

139-89⅓22-New. Whether a third person is in the same employ with the employee injured so as to give the commission exclusive jurisdiction depends on facts of the case. 141 Okl 69, 283P1018 (persons held "in same employ").

139-89⅓23-New. Some statutes do not restrict nature or extent of compensation recoverable by employee suing third person. Cal 291P405.

139-90 Contra 175AppDiv796, 162NYS 469 [aff 226NY581, 123NE895 and rev 95Misc150, 159NYS113]. [a] Contra 175 AppDiv796, 162NYS469 [aff 226NY581, 123NE895, and rev 95Misc150, 159NYS 113].

139-90½-New. Where recovery is had under the act against a subcontractor, the principal contractor is not a third person. 154Md159, 140A52.

140-92½-New. Under the provision of the statute making the remedy under the act exclusive where the employer and the person negligently causing the injury are both subject to the act and were engaged in the due course of business in the accomplishment of the same or related purposes, an ice company and a property owner operating an elevator for the delivery of ice and a stairway adjacent thereto are so engaged. Minn 210NW75.

140-92⅓-New. Where a third person is not subject to the act, an interstate carrier employee may sue directly. 234 IllA416.

140-92¼-New. Under the act, giving an injured employee election to sue a third person when injured away from the "plant," injury on elevator used in common by the tenant employer is away from the latter's plant and the employee may sue the lessor. 143Wash245, 255P 138.

140-92⅕-New. Statutory definition of "workshop" held not to include elevator on leased premises of employer, where the elevator was operated by the lessor. 143Wash245, 255P138.

140-92⅙-New. Abatement of action. An action by an employee against a tort-feasor, not his employer, is not within the application of the provision of compensation acts providing for nonabatement of actions thereunder. 200 Cal 754, 254P1105.

140-92⅐-New. A provision of the Compensation Act that the death of an employee or any other person shall not abate any right of action thereby established does not apply to an action by an employee against a tort-feasor, not his employer. 200Cal 754, 254P 1105.

140-92⅛-New. An employee of an express company, injured by a fall in an elevator shaft while engaged in his employer's business, who accepts compensation from his employer for his injuries, cannot recover against the owner of the building where both employer and owner are subject to the compensation act. 178Minn47, 225NW901.

140-92⅑-New. Under some statutes a taxicab driver injured in a collision with another competing taxicab through the operator's negligence can recover against such operator's employer, although he is receiving compensation from his employer and both employers are under the Compensation Act. 177Minn579, 225NW911.

140-92⅒-New. In such case the employers were not engaged in "furtherance of a common enterprise" or in "accomplishment of same or related purposes in operation on the premises where the injury was received." 177 Minn579, 225NW911.

140-93 39F(2d)70 (filing of claim for compensation bars action); 39F(2d)210 (employee held to have elected); 233 Mich552, 207NW850; 168Minn319, 212 NW20; 170Minn278, 212NW461; 246 NY46, 157NE925; 248NY10, 161NE204; 131 Okl 34, 267P659; 154Tenn130, 289 SW525; 146Wash594, 264P410. [c] **In Minnesota** (1) statute giving employee right of action at his option against either the employee or third party is limited to cases where such employee and third party were engaged in due course of business in furtherance of a common enterprise or the accomplishment of same or related purposes in operation on premises where injury received at time thereof. 165Minn475, 206 NW937. (2) Where defendant employee and a contractor were "engaged in accomplishment of related purpose" within statute, and employee had obtained compensation from employer under the act, he could not maintain his action against the employer. 165Minn475, 206NW937. [f] **Where employee elected to sue third person, then abandoned suit, he is estopped** to claim compensation later from insurance carrier or employer where his conduct caused them to lose rights of subrogation to such third person because of limitations. 218AppDiv300, 218NYS215.

140-93½-New. although not compelled to make such election in the same jurisdiction, 246NY46, 157NE925.

140-94 233Ky702, 26SW(2d)530; 9LaA 213, 120S133; 233Mich552, 207NW850; 168Minn319, 212NW20; 170Minn278, 212NW461; 178Minn313, 227NW47 (suit barred by proceeding for compensation to final decision on merits); 56 ND392, 217NW660; 117 OhSt608, 160 NE691; 50RI 226, 146A484; TexCivA 294SW248; 146Wash594, 264P410. See also 247Mich301, 225NW607. [f] 27 OhA522, 161NE238. [h] (1) 168Minn 319, 212NW20. (2) Employee is limited in amount of his recovery of damages in action against third party to limitations of amounts specified as compensation in the act. 168Minn319, 212NW20. (3) In such action for damages court must declare amount to be paid under the act. 168Minn319, 212NW20. (4) Appellate court may remand with instructions for proper modification of the verdict in accordance with statute. 168Minn319, 212NW20. (5) Total amount payable to employee cannot exceed ten thousand dollars. 168Minn 319, 212NW20. [k] **Acceptance of compensation under act constitutes election.**-242Mich428, 219NW680. [l] **Acceptance of temporary medical services from employer** does not preclude maintenance of action against third person. 160Tenn581, 28SW(2d)46. [m] **Word "elect"** contemplates existence of at least two remedies. 143 Okl 174, 288P 331. [n] **Time for election.**-143 Okl 174, 288P331. [o] **Notice of election** (1) must be given to commission and insurance

balance due under the act by a remedy specially provided therefor in some jurisdictions. 154Tenn130, 289SW525.

140-94¼-New. In New York compromise of suit against person causing injury without assent of employer, insured, or commission waives right to deficiency payment. 246NY46, 157NE925.

140-95 128Misc287, 219NYS138. Contra 246NY46, 157NE925. [a] 246NY46, 157NE925 (where it is stated that purpose of provision is solely to protect insurer as to amount of deficiency, and settlement without such assent is valid as between employee and defendant and releases employee's right to deficiency). [b] **Settlement in action against tort-feasor without written consent of employer and insurer** as required by statute, held vacated on motion, conditioned on repayment of amount to defendant. 128Misc287, 219NYS138.

140-96 [a] **In Kansas** person negligently causing injury cannot complain that, subsequent to period for election, employer permitted employee to proceed against tort-feasor. Kan 289P962.

140-97 See also 227Ky358, 13SW(2d) 260. But see 128Or224, 274P302.

140-97½-New. Making settlement with third party without consent of employer invalid and ineffectual as foundation for deficiency award against employer. 213AppDiv464, 211NYS16.

140-97⅓-New. Settlement made by widow with railway causing death of employee, deducted from compensation awarded, does not preclude widow's claim against employer. 215Ala220, 109S878.

140-97¼-New. Injured employee, whose remedy for injury in an occupation not classified as extrahazardous is by common-law action, is not barred therefrom by presenting a claim erroneously allowed by the industrial insurance department. 143Wash176, 254P1083.

140-97½-New. Settlement with a third party without consent of employer or insurer is valid but prevents recovery of deficiency. 246NY46, 157NE925.

140-97⅔-New. Where an employee, without electing to sue and without suing, settles with a third person causing the injury, without the approval of insurer, he cannot recover deficiency between the amount received and the amount to which he was entitled under the Compensation Act, although the employer advised him to go after the person causing the injury. 223AppDiv204, 228NYS399.

140-97½-New. To impeach compensation proceeding on the ground of inanity so that an action for damages may be instituted, a direct proceeding in equity is necessary. 247Mich301, 225NW607.

140-97⅞-New. An employee who accepts compensation from his employer cannot maintain an action for damages against a third person where such person was subject to the act and was engaged with the employer in furtherance of a common enterprise or in furtherance of the same or related purposes on the premises. 177Minn410, 225NW391.

140-97⅞-New. An action for tort against a third party, causing the injury and subsequent death of an employee, does not bar a claim for compensation, and satisfaction of judgment in such an action against a third party does not bar a claim for compensation against the employer. 83NH482, 145A

140-97 1/10-New. Employee suing his immediate employer and insurance carrier may also sue principal contracting with the employer in view of action against

claim disability award upon death of injured employee who had elected to sue third party with claim for compensation for deficiency. 248NY40, 161NE324 (disability compensation not paid employee during his lifetime).

141-1½-New. , or by reference to his interest in plaintiff's statement. 85Pa Super537.

141-1⅓-New. Fact that widow accepts compensation under the act does not preclude the administrator from suing a third person for the death of the employee. 117OhSt586, 160NE687 (extent of recovery).

141-2½-New. The net amount received as result of death action must be applied in reduction of amount payable by employer as compensation. 165Minn390, 206NW714.

141-2⅓-New. Under some statutes the right of the decedent's personal representatives to sue a third person is not lost by reason of a prior action by certain dependents of decedent against the employer to recover compensation. 49SD113, 206NW466.

141-2¼-New. Nebraska statute does does not, to any extent, relieve a wrongdoer who, as a third person, is liable civilly for causing the death of an employee. 117Nebr85, 219NW802.

141-2½-New. Payment by a third party in the discharge of liability or settlement of a claim for liability for wrongful death under statute does not either wholly or partly discharge the employer's liability under the Compensation Act. 83NH482, 145A142.

141-3 233Mich552, 207NW850; 170Minn278, 212NW461. [d] **Employee's ignorance of his statutory choice of remedies** (1) cannot be made basis of decree in equity setting aside agreement with employer under the act. 233Mich552, 207NW850. (2) In such suit employee has burden of proof and cannot have agreement set aside in absence of showing of fraud or that he did not know injury was caused by one other than his employer. 233Mich552, 207NW850. [e] **City policeman accepting pension under charter in lieu of compensation** (1) does not elect to come under act. 242Mich428, 219NW680. (2) Such acceptance does not preclude him from maintaining action for damages against wrongdoer. 242Mich428, 219NW680.

141-4 See also 178Minn313, 227NW47 (ignorance of law under which his course of action was election of remedies).

141-7½-New. The acceptance by a minor of a small amount from an insurance carrier, where no application had been made for compensation, will not prevent suit against a third person. TexCivA 294SW625.

141-8 281US98, 50SCt242, 74Led726 (where employee's administrator had settled with wrongdoer and given release); 23F(2d)434; 215Ala220, 109S878; 200Cal210, 252P605; 200Cal754, 254P1105; 95CalA71, 272P606; CalA 285P1053 (employee's claim not waived by his failure to intervene in action by state insurance fund brought within limitation period); 104Conn504, 133A577; 232IllA309; 236IllA511; 121Kan659, 249P687; 234Ky12, 27SW(2d)402 (death action); 12LaA321, 125S504 (insurer need not obtain conventional subrogation); 128Me393, 148A147, 68ALR481 (employer must pursue his remedy within statutory period); 149Md189, 131A343; 116Nebr418, 217NW952; 117Nebr85, 219NW802; 246NY46, 157NE925; 130Misc710, 225NYS70; 135Misc36, 237NYS655 (insurer held subrogated to widow's share of settlement); 128Misc626, 220NYS170; 288Pa85, 135A858; Pa 152A90; 87PaSuper143; 6PaDist &Co 556; TexCivA 15SW(2d)46(2d

to extent of compensation paid and payable by him. 85PaSuper537. [ee] (1) 121Kan659, 249P687. (2) Action barred in two years after injury inflicted. 121Kan659, 249P687. [hh] **In Nebraska** (1) right to bring action against third party rests with employer until employer can prove neglect or refusal to institute action. 114Nebr9, 205NW561. (2) Owners of building may be liable as "third persons," under statute, for death of workman killed through their negligence while in service of lessee's contractor. 116Nebr418, 217NW952. [ii] **Insurer may assign its cause of action,** arising from subrogation to employer's rights. 200Cal210, 252P605. [jj] **Time to sue.**–(1) Employer cannot sue until award is definite either by commencement of action or settlement. 232IllA309. (2) Tender and acceptance of compensation by employee fixes amount, and employer then may sue. 232IllA309. [kk] **Employee's settlement with wrongdoer** held not to preclude subrogated employer from bringing suit. 288Pa85, 135A858. [ll] **Person causing injury held subject to two suits,** by employer and employee, but to only one recovery unless negligent. 288Pa85, 135A858. [mm] **Employee suing must show that wrongdoer who settled with employer** knew of employment and amount paid employee. 288Pa85, 135A858. [nn] **Subrogation enforced** despite alleged increase of difficulty in future settlement. 288Pa85, 135A858. [oo] **Intervention by employer in employee's action against wrongdoer** held not necessary for subrogation. 288Pa85, 135A858. [pp] **Pleading.**–In action by employee against third person, declaration alleging facts from which lack of negligence of employer and legal liability of defendant are inferrable is sufficient. 236IllA511. [qq] **Harmless error.**–(1) As to instructions. 78CalA215, 248P307. (2) As to admission of evidence. 78CalA215, 248P307. [rr] **Refusal of employer to sue.**–(1) Where employer refuses to sue third person for personal injury to employee, not resulting in death, employee may sue. 117Nebr85, 219NW802. (2) Consent of employer to suit by employee for personal injuries, not resulting in death, constitutes refusal of employer to sue, entitling employee to maintain action. 117Nebr85, 219NW802. (3) Allegations of claim against employer and reassignment of cause of action against third party held sufficient. 195Wis633, 219NW274. [ss] **Employer paying compensation is one entitled to sue wrongdoer** to recover money expended. 242Mich428, 219NW680. [tt] **Reassignment to employee.**–Final determination of liability for compensation is not condition precedent to reassignment by employer. 195Wis633, 219NW274. [uu] **In Utah** assignment to state insurance fund of cause of action against third person is condition precedent to payment of compensation. 269P513. [vv] **Statute construed.**–254IllA323 (does not create new cause of action in employer but transfer of right of action of employee or his estate). [ww] **Petition by employer held sufficient.**–234Ky12, 27SW(2d)402. [xx] **Any defense which would have defeated injured party** had he been plaintiff is defense which would defeat plaintiff insurer suing by subrogation. 227AppDiv47, 237NYS42. [yy] **In Tennessee** statute authorizes recovery only of such damages as employee could have recovered, not exceeding amount of indemnity paid or payable by employer. 160Tenn248, 23SW(2d)245. [zz] **Sufficiency of notice.**–Letter of employer's insurer to injured employee's attorney, stating that it had filed suit and naming court, has been held sufficient notice required under statute. 12LaA321, 125S504. [ab]

Subrogation to employee's rights is not contrary to public policy.–338 **Ill** 82, 170 **NE**8. [ac] **Limitation of action.**–Statute limiting employee's right to sue held applicable to employer. 254 **IllA**323.

141–8½–New. Award by commission is not necessary for employer to recover under act. 232 **IllA**309.

141–8½–New. Employer may recover against a third person under the act where he settled with the employee. 232 **IllA**309.

141–8¼–New. An insurance carrier is not bound by waiver by an employer of its rights under the Workmen's Compensation Law. 249**NY**175, 163**NE**298.

141–9 12**LaA**321, 125**S**504; 149**Md**189, 131**A**343; 137**Misc**440, 243**NYS**746; 230 **AppDiv**314, 244**NYS**161; 56**ND**392, 217 **NW**660. See also **LaA** 129**S**234. But see **NJCh** 150**A**212(2dcase). [a] (1) See also 193**Wis**1, 212**NW**660. (2) Insurance carrier held not entitled to sue as assignee of dependents, proper remedy being action by administrator for entire group of beneficiaries. 254**NY**50, 171 **NE**903. [b] **Mass** 172**NE**590. [g] **Under Oregon Compensation Act,** employee's cause of action inures to state. 7**F(2d)**231. [h] **Death by wrongful act.**–Insurer held proper plaintiff where widow and children under eighteen elected to take compensation although nondependent child over eighteen did not elect. 228**AppDiv**45, 239**NYS**134. [i] **Where employee receiving compensation from insurer** assigns to insurer interest in judgment he might obtain against wrongdoer employee may bring suit in his own name. **TexCivA** 25**SW(2d)**717. [j] **Insurer cannot deduct medical expenses paid** from amount recovered against negligent insured without previous action brought. 230**AppDiv**314, 244**NYS**161.

141–10 Del 151**A**822; 11**LaA**604, 123**S** 349; 149**Md**189, 131**A**343; 151**Md**147, 134**A**26. See also 9**LaA**257, 119**S**462; 195**Wis**19, 216**NW**522. [d] **Assignments.**–(1) Employer's assignment of cause to employee held based upon sufficient consideration. 195**Wis**19, 216**NW** 522. (2) After assignment of cause to employee, employer held estopped to question its validity. 195**Wis**19, 216 **NW**522.

141–10½–New. Where an employee, after obtaining an award of compensation against the insurance carrier of his general employer and that of his special employer, instituted an action against a corporation whose negligence caused the injury, in which the insurance carrier for his general employer joined as plaintiff, and compromised such action, the negligent corporation paying a sum of money to the employee and one to the insurance carrier for the special employer and tendering a sum to the insurance carrier for the general employer which was refused, and the amounts paid and tendered exceed the amount of the award, the commission may properly credit the insurance carrier for the general employer with payment of its full share of the award. 71**CalA**262, 235 **P**53.

141–10⅓–New. In an action by an injured employee against a wrongdoer, an instruction is erroneous where it permits an increased recovery to reimburse an intervening insurer for the amount paid to the employee under the Workmen's Compensation Act. 35**GaA**353, 133**SE**645.

141–10¼–New. A statute requiring an employee suing a third person for injury to serve notice on employer of pendency of action requires continuance of action until such notice is served. 71 **CalA**34, 234**P**860.

141–10⅕–New. Refusal of continuance of action by employee against a third person until employer is served with notice of its pendency as required by statute is not reversible error, unless defendant is shown to have been prejudiced thereby. 71**CalA**34, 234**P**860.

141–10⅙–New. Where an employer subrogated to rights of employer or his dependents, it is optional with him to bring death action or continue one already commenced. 165**Minn**390, 206**NW** 714.

141–10⅐–New. But the action is not for his exclusive benefit in view of the interest of the employee or his dependents in the excess of his recovery over the compensation paid by him. 165**Minn** 390, 206**NW**714.

141–10⅛–New. Under statute not mentioning person by whom action shall be brought, it has been held that suit may be brought in name of employee, 85**PaSuper**537.

141–10⅙–New. the interest of employer appearing either by his joinder as an additional party plaintiff, 85**PaSuper** 537.

141–10⅒–New. or as a use-plaintiff, 85 **PaSuper**537.

141–10 1/11–New. and that a failure to adopt any of these methods, however, does not prevent subrogation to employer, in proper case, out of fund recovered. 85**PaSuper**537.

141–10 1/12–New. Under such statute, also, it has been held that upon refusal of employee to institute suit, employer may sue in name of employee. 85**Pa Super**537.

141–10 1/13–New. Insurer is not entitled to lien for medical expenses not in issue, 77**CalA**720, 247**P**583.

141–10 1/14–New. especially where insurer failed to furnish items of such alleged expenses. 77**CalA**720, 247**P**583.

141–10 1/15–New. Release by employee of a third person not under the act held to bar recovery by the employer from such third person of compensation paid under the act. 241 **IllA**49.

141–10 1/16–New. Term "subrogation" as used in the statute held intended as used in a legal sense. 288**Pa**85, 135**A** 858.

141–10 1/17–New. Under the Maryland statute the right of the employer to sue is not restricted as to time, by a provision relating to the employee or his dependents. 151**Md**147, 134**A**26.

141–10 1/18–New. In Maryland the statute provides that, where the death of the employee creates legal liability in a person other than the employer, and the employer or insurer fails to enforce such liability within two months after the award under the Compensation Act, dependents may enforce such liability. 149**Md**189, 131**A**343.

141–10 1/19–New. Such statute has been construed not to create a new liability but simply to designate in what manner the liability under common law and Lord Campbell's Act should be enforced, and changes parties who might be benefited by such enforcement. 149**Md**189, 131**A**343.

141–10 1/20–New. Such action is properly brought in the name of dependents of the employee to use of insurer, where insurer and employer failed to enforce such liability within the time specified. 149**Md**189, 131**A**343.

141–10 1/21–New. Under such statute a verdict is properly apportioned among dependents as jury deem just and equitable under proper instructions, after allotting to equitable plaintiff the amount awarded against it. 149**Md** 189, 131**A**343.

141–10 1/22–New. State paying compensation, may, as assignee, sue county for negligence causing injury. 146**Wash** 305, 262**P**977.

141–10 1/23–New. State, suing as assignee after payment of compensation, can recover only indemnity, regardless of sufficiency of original claim. 146**Wash**305, 262**P**977.

141–10 1/24–New. Assumption of risk by an employee is no defense in an action against a third party by an insurance carrier. 133**Misc**847, 233**NYS**619.

141–10 1/25–New. Evidence has been held sufficient to establish contributory negligence of deceased in an action by an insurance carrier against a railroad, precluding recovery. 134**Misc**6, 234**NYS** 293.

141–10 1/26–New. The cause of action given an insurance carrier for payments made to the state treasurer is separate and distinct from that created for the benefit of decedent's personal representative. 134**Misc**6, 234**NYS**293.

141–10 1/27–New. Evidence has been erroneously excluded in an action by insurer against a third party which tended to show that the employee causing the injury was not in defendan
ploy. 134**Misc**370, 235**NYS**646.

141–10 1/28–New. The burden of
contributory negligence of deceas
on defendant, in an action by
against a railroad as third part
Misc6, 234**NYS**293.

141–10 1/29–New. An employee's
istratrix, on failure of the emplo
an insurance carrier to sue th
feasor within ninety days after
was entitled to maintain suit a
be required to secure defendan
any claim by the employer or t
rier. 197**Wis**601, 222**NW**826.

141–10 1/30–New. An employe
waive his subrogated right to sue
party. 128**Me**50, 145**A**400, 67A

141–10 1/31–New. Under some co
tion acts the surrender of the
prosecute an action at common
damages arising from the ac
negligence of another applies s
the original contractor and its
employee where the injury was
by the actionable negligence of
contractor. 117**Nebr**809, 223**NW**

141–10 1/32–New. Where the e
has failed to comply with the C
sation Act, he is not entitled t
tain an action against a tort-fe
ther in his own right or as sub
the injured employee or his de
ND 226**NW**586(2dcase).

141–10 1/33–New. The right of
against a third party depend
whether the injured employe
have so recovered. 12**LaA**321.

141–10 1/34–New. The right of
ployee to sue where the emplo
to sue within ninety days afte
128**Me**393, 148**A**147, 68**ALR**481.

141–10 1/35–New. In an action by
ployer against a third party fo
ployee's injuries, the employer
allege or prove nonwaiver of
tion rights. 128**Me**393, 148**A**147
481.

141–10 1/36–New. Insurance carr
ing compensation may interven
ployee's action against third pe
ble for injury. **TexCivA** 24**SW**
(intervention petition held suffi
141–10 1/37–New. Negligent thir
sued by employee compensate
surance carrier cannot complai
sufficiency of insurer's interven
tion to state right to subrogati
CivA 24**SW(2d)**491.

141–10 1/38–New. Where insura
rier paying compensation fail
negligent third person injured
may do so. **TexCivA** 24**SW(2d**

141–10 1/39–New. Employee com
by insurance carrier can sue
third carrier where insurer i
merely claiming right of sub
and not claiming right to contr
tion. **TexCivA** 24**SW(2d)**491.

141–10 1/40–New. Insurer paying
ployee's death stands in no bet
tion in action against third per
personal representatives of
Mass 172**NE**590.

142–11 68**CalA**662, 230**P**15 (
ed at least to amount of com
paid); 104**NJL**189, 139**A**42;
135**A**858; 5**PaDist&Co** 577; 6**P**
556; **TexCivA** 15**SW(2d)**46(2dc
CivA 19**SW(2d)**595. See also 8
143. [c] (1) 85**PaSuper**537.
any recovery in excess of com
theretofore paid by employer
paid to employee and is treat
vance payment on account of
stallments. 85**PaSuper**537. [d
and hospital bills paid, are
from recovery. 253**NY**324, 171

142–12 78**CalA**215, 248**P**307.
Minn390, 206**NW**714 (employe
defendants).

**142–15⅓–New. Deduction for
fees.** Reasonable fees and co
ments should be allowed co
employee who prosecuted suit
ducted from amount recover
than given to employee as adv
ment. 85**PaSuper**537.

142–15⅓–New. Where com
has been awarded for the o
injury, and also an injury by m
of a physician, and the empl
sequently recovers from the d
amount of overaward may be
221**AppDiv**371, 223**NYS**418 (

142–15¼–New. In Maryland it is held that there can be but one recovery for the same tort causing injury to workman. 151Md147, 134A26.

142–15⅓–New. Insurer cannot recover for negligent injury by a physician treating an employee. 229Ky37, 16SW(2d)489.

142–15⅙–New. Insurer paying damagages for employee's death cannot recover from third person, absent showing that deceased employee left widow or next of kin. Mass 172NE590.

142–17½–New. A third person sued by a claimant for the use of the employer and insurer may defend on the ground that a judgment approving a compensation settlement was void for want of jurisdiction. 159Tenn586, 21SW(2d)396.

142–18 LaA 129S234 (assignment to insurer valid as conventional subrogation). [a] **Notice to employee of assignee insurer's right to sue.–LaA** 129S234. [b] **Sufficiency of evidence in assignee's suit.–LaA** 129S234. [c] **Consideration for assignment.–LaA** 129S234. [d] **Employer assigning to insurer held not necessary plaintiff** in insurer's action. **LaA** 129S234.

143–22 130Misc301, 223NYS415; 160Tenn581, 28SW(2d)46. But see 33GaA617, 127SE736; 32OhA26, 167NE589. Contra 6F(2d)191; 221AppDiv371, 223NYS418.

143–24½–New. But in an action by a widow of deceased employee, defendant third person cannot show that employer is liable for payment of an award made against latter to defeat recovery pro tanto amount awarded. 68CalA662, 230P15.

143–24⅓–New. Federal Compensation Act, providing reimbursement to United States from moneys recovered by its employee against a third party, impliedly sanctions an action against a third party by the injured employee without previous authority from the federal commission. 217AppDiv323, 217NYS128.

143–28 221AppDiv551, 224NYS559; 221AppDiv371, 223NYS418. But see 262Mass383, 160NE269.

143–29 But see 221AppDiv371, 223NYS418.

143–30½–New. Remedy under compensation act exclusive where injured employee sustained damages from negligence of employer's physician. 42F(2d)931.

143–30⅓–New. Action for malpractice passed to compensation fund by operation of law. ND 233NW264(3dcase).

144–40½–New. Employee's petition against a third person held sufficient without alleging that the employee was under the act. 232 IllA309.

144–40⅓–New. Employer's failure to deny allegation of rejection raises presumption of filing of notice of nonelection. 234 IllA173.

144–40¼–New. The fact that the employer is liable for compensation for an employee's death is no defense to an action against a third person. **Del Super** 148A294.

144–40⅕–New. In an action by an employee against a third party for injuries, waiver of subrogated right of the employer need not be alleged or proved. 128Me393, 148A147, 68ALR481.

144–40⅙–New. Presumption is that injuries to employee come within compensation statute. **Ala** 130S772.

144–40⅐–New. Complaint held insufficient to take case outside compensation statute. **Ala** 130S772.

144–46 [b] **Instructions held erroneous.**–150Md525, 133A593.

144–47 25OhA319, 158NE195.

145–50½–New. Determination of board that right of action barred by statute held binding under statute. 36Man61, [1926] 4DomLR46, [1926] 2WestWkly687.

145–55 80CalA754, 253P173; 51ND710, 201NW680; 119OhSt403, 164NE416; 121OhSt338, 168NE840. [b] (2) State insurance fund is not body corporate, public, quasi-public, or private. 67Utah301, 247P490. [h] **It is duty of industrial commission to manage and administer fund.**–67Utah301, 247P490. [i] **In Ohio** (1) total pay roll of employer is not basis for computation of premium for compensation fund in disregard of number of employees. 114OhSt221, 151NE171. (2) In action to recover amount due compensation fund on demurrer to defense that rate was not based on number of employees, fact that statute permitted adjustment of rates, based on casualty experiences, should be raised in form of reply to answer. 114OhSt221, 151NE171. [j] **In Texas** cities and towns are not exempt from provision penalizing employers misrepresenting pay roll to insurance association. **TexCivA** 283SW929. [k] **Injured employee is not deprived of his award from surplus fund** by state failing to collect premiums from, or fix liability upon, real employer. 121OhSt17, 166NE806. [l] **Requirement as to filing lists of counties** to whose credit sufficient money is in state insurance fund to provide for payment of compensation to employees of such counties. 119OhSt403, 164NE416. [m] **State has very broad power** to deal with matter of insurance under compensation acts. 198Wis202, 223NW444.

145–55½–New. In Ohio payment of additional award under Const. art 2 § 35 is not conditional on ability of state thereafter to recoup insurance fund by amount of award. 116OhSt67, 156NE107.

145–55⅓–New. Employee may recover additional award of fifty per cent under Const. art 2 § 35, irrespective of employer's solvency or negligence. 116OhSt67, 156NE107.

145–55¼–New. Insurance fund does not belong to employers but to workmen and dependents and, under Const. art 2 § 35, is administered by the state. 116OhSt67, 156NE107.

145–57½–New. Cost of making transcript on appeal in compensation case is not contingent expense payable from industrial accident fund. 34Wyo349, 244P135.

145–57⅓–New. "Contingent expenses" which are payable from accident fund, under some statutes, refer only to expenses in administration of state departments and not to expenses incurred in trials or appeals under compensation acts. 34Wyo349, 244P135.

145–57¼–New. Under some statutes interest earned by loaning surplus from accident fund belongs to employer in proportion of amount paid in by him and cannot be used to pay cost of transcript on appeal in compensation case. 34Wyo349, 244P135.

145–57⅕–New. Under some statutes there is a conclusive presumption that a contract of insurance contains a clause to the effect that the insurance carrier shall be directly and primarily liable to the employee to pay the compensation, if any for which the employer is liable. 195CalA577, 234P369.

145–57⅙–New. Under such statutes the status of an insurance carrier is not that of a mere surety. 195CalA577, 234P369.

145–57⅐–New. Dependents are entitled to payment from state fund, although premium paid after accident on commission's order, although attempt was later made to revoke such order and tender back of premium was made. 115OhSt230, 152NE662.

145–57⅛–New. Insurer has same relation to injured employee as state, and assumes obligations and burdens of employer. 15F(2d)906.

145–57⅑–New. The workmen's compensation fund is not synonymous with the state. 54ND211, 209NW388.

145–57⅒–New. Such fund is not a state fund. 54ND211, 209NW388.

145–57⅓–New. A claim against such fund is not a claim against the state. 54ND211, 209NW388.

145–57½–New. The state legislature cannot obligate an employer to contribute to the workmen's compensation fund without affording him protection against claims of workmen or their dependents payable from such fund. 141Wash172, 251P130.

145–57⅓–New. Under some statutes an attempt between an employer and his insurance carrier to exclude from coverage of a workmen's compensation insurance policy one particular construction job is an attempted cancellation of a contract of insurance to that extent and does not become effective as such cancellation, in the absence of the filing of notice of such intention with the commission as provided by law. 134Okl174, 272P833.

145–57¼–New. The fact that a policy was issued to the employer on the latter's untrue statements is no defense as between insurer and the employee. 249NY270, 164NE48.

145–57⅕–New. State surplus fund is unavailable to dependents of employee injured before January 1, 1923, though dying thereafter from injuries. **Oh** 171NE405.

145–57⅙–New. Under statute the state is not entitled to penalties upon premiums for accident and medical aid funds unless demand has been made and payment withheld. 153Wash565, 280P88.

145–57⅐–New. Rights of injured and dependents of killed employees to participate in state insurance fund are determined by statutory law only. 35OhA177, 172NE292.

145–57⅛–New. Insurance companies desiring to issue policies under compensation act must cover all employers entitled to become subscribers. **Tex CommnA** 26SW(2d)1057.

145–57⅑–New. Insurer must insure those employers required to suffer penalty of being deprived of common law defenses. **TexCommnA** 26SW(2d)1057.

145–58 See also 9PaDist&Co784. [b] (1) 51ND45, 199NW128. (2) 51ND45, 199NW128. (3) 51ND45, 199NW128 (where legislative command obeyed by using appropriate methods to obtain result). (4) 51ND45, 199NW128. (5) 51ND45, 199NW128. (6) 51ND45, 199NW128. (7) 51ND45, 199NW128. (8) 51ND45, 199NW128. [c] (1) 51ND45, 199NW128. (2) Presumption not conclusive and one questioning classification or rates must show clearly that they do not conform to statutory rules or are unreasonable or confiscatory. 51ND45, 199NW128. [d] **Classification applies to industries as class** operating generally under similar conditions and not as individual unit. 119OhSt205, 162NE800. [e] **Degree of hazard,** and not number of employees, or wages, determines classification. 119OhSt205, 162NE800. [f] **Discretion of commission is not abused** in specifying rate as to particular class. 119OhSt205, 162NE800.

145–62 [a] **Employer's failure to pay premium on date fixed by board's order** (1) automatically suspends right of employees to share in funds. 57ND487, 222NW952. (2) Partial payment on judgment against employer for premiums entitles employees to participate in fund for portion of year covered thereby. 57ND487, 222NW952. (3) Sole power is in board to determine compensation due employee where premiums are paid after injury. 57ND487, 222NW952.

145–63½–New. Failure of state to collect award from employer or to certify within prescribed time its noncollectibility does not prevent employee from obtaining award from surplus fund. **Oh** 170NE644.

145–63⅓–New. After certification by commission attorney general must begin suit against employer and within prescribed time to certify to commission result of effort to collect in default of which award must be paid from surplus. **Oh** 170NE644.

145–64 218AppDiv7, 217NYS679; 197NC595, 150SE44 (proceeds derived from self-insurer have been held available for use of industrial commission); 35OhA169, 172NE294. [a] (2) Law authorizes industrial board to require insurer to pay present value of future installments of award into state fund for commutation made in 1926 for accident occurring in 1916. 218AppDiv7, 217NYS679. [d] **In Kentucky** statutes do not require own risk insured to pay tax for maintenance fund when surplus

exceeds sixty thousand dollars. 218Ky 643, 291SW1034.

146-65½-New. Schedule of statements as to location of risk and other incidental matters held merely in nature of warranties on part of employer in favor of minor. **TexCivA** 286SW336.

146-65⅓-New. Such warranties affect only the right of the subscriber and insurer inter sese and not the rights of employees to compensation as provided by statute. 223**AppDiv**201, 227**NYS**708; **TexCivA** 286SW336.

146-65¼-New. Policy held to include all employees of insured in state, notwithstanding failure to name location and classification of work. **TexCivA** 286SW336.

146-65⅕-New. Insurance association created by act to act as insurer held not to be agent of subscribing employer. **TexCivA** 286SW336.

146-66½-New. Employer and two carriers are liable to injured employee under policies covering special work of employee done outside of general line of work. 215**AppDiv**257, 213**NYS**126.

146-66⅓-New. In Iowa failure of employer to take out insurance does not relieve him from liability under the act, although it subjects him to common-law liability. 201 **Iowa**52, 206NW637.

146-66¼-New. Payments made under such mistaken belief are made under mistake of fact, not law. 129**Misc**466, 222**NYS**701.

146-66⅕-New. Subrogation of insurers. 129**Misc**466, 222**NYS**701.

146-66⅙-New. Where authority of general agents to modify policies has been withdrawn, insurer is not estopped to deny that new firm was insured because of assurance of local agent that change would be made, although on prior occasion, before withdrawal of authority, general agent had made similar change and insurer had ratified it. 217**AppDiv**501, 217**NYS**277; **TexCivA** 286SW508.

146-66⅐-New. Temporary retention, during investigation of case and pending litigation, of premiums sent to general state agent after loss, does not estop insurer to deny that there had been any change of party insured by compensation policy. **TexCivA** 286SW508.

146-66⅛-New. Actions on policy; conditions precedent. 15**F(2d)**906.

146-66⅑-New. A compensation insurer is bound by its contract as between it and an employee, regardless of whether the employer then or thereafter became a subscriber entitled to the benefits of the Compensation Act. **TexCivA** 300SW667.

146-66⅒-New. As between an employee and the employer's insurer, it is immaterial whether the employer paid the premium on the policy. **TexCivA** 300SW667.

146-66 1/11-New. Ten provisions of a policy protecting an employer from loss under the Compensation Act, and its statements, warranties, and promises, do not affect the rights of injured employees. **TexCivA** 300SW667.

146-66 1/12-New. It is not contrary to public policy to allow an injured employee, employed in one state and injured in another to collect against separate insurers under the workmen's compensation laws of each state. **TexCivA** 300SW667.

146-66 1/13-New. A person employed in one state and injured in another is not deprived of the right to compensation under an insurance policy of the state where he was employed because, at the time of the injury, his employer did not have three employees in such state. **TexCivA** 300SW667.

146-66 1/14-New. Liability as between successive insurers. A company insuring an employer against liability for payment of compensation for an occupational disease at the time disability therefrom occurred is the one that must pay the compensation awarded. 195**Wis**410, 217NW738.

146-66 1/15-New. An injured employee has no right of action against his employer's insurer prior to award or judgment against his employer or an agreement with his employer fixing the amount of compensation. 10**LaA**397, 123S198.

146-66 1/16-New. Where insurer becomes insolvent and unable to continue payments, the employer is liable for payments. 157**Md**141, 145A354.

146-66 1/17-New. The duty to notify the employee that insurance has been taken out is mandatory. **TexCommnA** 14SW798 (actual notice necessary).

146-66 1/18-New. Where the second injury was a recurrence of a previous injury, the award should be against the original insurance carrier. 95**CalA**186, 272P589.

146-66 1/19-New. Under some workmen's compensation policies members of an employer's family are excluded from benefit's where employment and wages are not disclosed. 208**Cal** 151, 280P687.

146-66 1/20-New. A workmen's compensation policy in binding an insured and and those claiming under him as to injuries sustained by employees legally employed. **Cal** 280P690(1stcase).

146-66 1/21-New. Cancellation of policy. Conditions on which the right to cancel a compensation insurance policy depends must be strictly complied with. **Ariz** 284P153.

146-66 1/22-New. A compensation insurance policy cannot be canceled unless the industrial commission agrees to cancellation. **Ariz** 284P153.

146-66 1/23-New. The policy remains in force until the industrial commission consents to cancellation. **Ariz** 284P153.

146-66 1/24-New. The consent of the industrial commission to cancellation of a compensation insurance policy pursuant to a prior agreement between insurer and the employer cannot be retroactive so as to relieve insurer from liability on claims arising before consent was given. **Ariz** 284P153.

146-66 1/25-New. Cancellation of policy by insurer ineffective unless filed as required by statute. 250**Mich**464, 231NW87.

146-67 156**Md**447, 144A345; 124 **Or** 112, 258P193, 60**ALR**528; 198**Wis**202, 223NW444. [c] **Commission is administrative body** (1) and not court of justice. 66**Utah**256, 241P362. (2) It may exercise such powers only as are either expressly or by necessary implication conferred upon it by statute. 66**Utah** 256, 241P362. (3) It has no inherent power such as must frequently be exercised by courts of general jurisdiction. 66**Utah**256, 241P362 (cannot give its orders retroactive effect). [d] **Authority to fix time and place for hearing claims.**– 294**Pa**253, 144A79. [e] **Commission has power** under some statutes to prescribe standards for erection and equipment of physical plants. 197**Wis**552, 222NW781 (extent of power). [f] **Court review of acts in excess of jurisdiction.**– **Alta** [1930] 1**DomLR**621.

146-71½-New. Where liability policies limited insurer's liability to proportionate share of claim if other insurance covered claim, state industrial board was empowered to apportion liability between insurers whose policies covered claim. 215**AppDiv**257, 213**NYS**126.

146-71⅓-New. Jurisdiction of board over all issues arising in the course of the administration of such act is original and primary. **TexCivA** 271SW633.

146-71¼-New. If a brief sum settlement is made where there are dependent minor children, the department may and should require the appointment of a guardian. 239**Mich**373, 214NW62 (dictum).

146-71⅕-New. Commissioner acts in quasi-judicial capacity. 103**WVa**504, 138SE112.

146-71⅙-New. Writ of prohibition will issue in proper case to restrain issuing of award in excess of authority of commission. 144**Va**240, 132SE177.

146-71⅐-New. The industrial board is an administrative body, not a court, and may not exercise judicial power. **IndA** 151NE833.

146-71⅛-New. The state industrial board, being a creature of the legislature, has only such jurisdiction as is conferred by statute. 134**Misc**504, 235 **NYS**541.

146-71⅑-New. The commission, having no jurisdiction of one not an employee under the act, cannot be given jurisdiction by act of the parties. 39**GaA**510, 147SE788(1stcase).

LABOR UNIONS

24 Cyc—818-9½-New. In Ontario trade union having among its objects militant trade unionism is illegal. 62 **OntL**40, [1928] 2**DomLR**277.

819-9⅓-New. Such union cannot maintain action to enforce contract. 62 **OntL** 40, [1928] 2**DomLR**277.

818-9¼-New. Such union cannot collaterally attack cancellation of its registration in action to which registrar general is not party. **Ont** [1930] 2 **DomLR**513.

818-13 28**F(2d)**851; 158**Md**496, 148**A** 826; **Mass** 164**NE**393; 125**Misc**689, 212 **NYS**113; 136**Misc**490, 240**NYS**145; 287 **Pa**171, 134**A**430, 47**ALR**74.

819-16 35**F(2d)**723.

819-17 15**DelCh**391, 138**A**607.

819-18 Right to conduct open shop cannot be abridged by constitution of labor union or by contracts between union and its members. 25**F(2d)**906.

819-20 Agreement required of employees not to aid in changing open shop basis of employer's business gives no right of action to labor union of which some employees are members. 25**F(2d)** 906.

819-23½-New. Contract between street railway and union respecting number of operatives on cars is not void as against public policy so long as city has not exercised regulatory power over such matter. 204 **Iowa**1195, 213**NW**264.

819-24 35**F(2d)**723; 244 **Ill**540; 125 **Misc**689, 212**NYS**113. **Accumulation of strike fund** lawfully to conduct strike is proper object of labor organization. 214**Ala**565, 108**S**456, 47**ALR**270.

820-28½-New. Combination to demand change of employment conditions is not unlawful, and an employee who has left or been discharged from his employment may continue efforts to effect such combination so as to regain employment on terms satisfactory to him. 247**NY**65, 159**NE**863.

820-29 245**NY**260, 157**NE**130.

820-30 Strike to enforce employer's promise is lawful. 15**DelCh**391, 138**A** 607.

820-33½-New. Accumulation of fund necessary, for lawful conduct of strike is proper object. 214**Ala**565, 108**S**456, 47**ALR**270.

820-33⅓-New. Preventing members from working for subcontractor for labor only. Giving of notice to employer that members of union are working in violation of rules for person holding subcontract for labor only and will be warned accordingly does not give cause of action for damages to subcontractor whose contract is canceled by reason thereof. **Ont** [1929] 2**DomLR**336.

821-39 See 27**F(2d)**560.

821-41 244 **Ill**540.

821-43 Strike solely to compel unionization of employers' business is unlawful. 15**DelCh**391, 138**A**607.

823-61½-New. Striking employees have legal right to make use of peaceful means to give publicity to claims and induce support in their behalf. 170 **Ark**863, 281**SW**663.

823-61½-New. Workmen have right to strike to improve their conditions, provided object is not to gratify malice, 125 **Misc**689, 212**NYS**113.

823-61¼-New. or inflict injury on others. 125**Misc**689, 212**NYS**113.

823-62 12**F(2d)**945; 214**Ala**565, 108**S** 456, 47**ALR**270; 204 **Iowa**1195, 213**NW** 264; 115**Nebr**375, 213**NW**366. **Law will not concern itself with alleged injuries** to public from labor union rules where injury is too remote to measure or weigh. 15**F(2d)**16. **Railroad brotherhood rule prescribing procedure in changing existing rights to runs as understood by engineers** has been held inapplicable to resolution defining seniority rights of members. 155**Md**265, 141 **A**504. **Rules of labor union requiring out of state contractor** to employ fifty per cent of local men and grant shorter work day and higher pay schedule prevailing in either locality not shown in suit for injunction to be unlawful or injurious to public. 15**F(2d)**16. **Union may adopt laws for its government** to be administered by its members and, in absence of fraud, provisions thereof making decision of their officials and tribunals conclusive on members are valid. 214**Ala**565, 108**S**456, 47**ALR**270.

824-66 12**F(2d)**945.

824-67 12**F(2d)**945.

824-71 Rule forbidding employers, etc. Contra 12**F(2d)**945. **Constitution of brotherhood association of railway company's employees,** obligating them not to join any other association of like employees, is binding between association and its members though terminable by any member by withdrawal from company's employ. 247**NY**65, 159**NE**863. **Legality of constitution and by-laws** are determinable by courts. 135**Misc**828, 238 **NYS**460.

824-72½-New. Rule requiring nonresident contractor to pay higher wage scale than is in force in town where he resides or where work is done is valid as equalizing wages of workmen, 12 **F(2d)**945.

824-72⅓-New. and such rule is not open to objection that it provides for an improper classification. 12**F(2d)**945.

824-72¼-New. Validity of resolution of railroad brotherhood defining seniority rights cannot be attacked for irregularity in adoption after expiration of time prescribed for appeal. 155 **Md**265, 141**A**504.

824-73 155**Md**265, 141**A**504, 505 [cit Cyc]; 103**WVa**417, 137**SE**654. **Member of trade association acquiescing in contract establishing relations with employees** is held bound thereby. 23 **OhA** 426, 155**NE**154.

824-74 103**WVa**417, 137**SE**654, 655 [citCyc].

825-76½-New. In order to terminate contract governing trade relations, affirmative act by employers or employees is necessary. 23 **OhA**426, 155**NE**154.

825-76⅓-New. Employer, reinstating discharged employee, after latter complained to board of referees established under trade agreement, held to have ratified agreement governing relation with employee. 23 **OhA**426, 155**NE**154.

825-76¼-New. Affirmative assent to amendments adopted under contract establishing relations between employer and employee held not necessary to bind employer. 23 **OhA**426, 155**NE**154.

825-76⅕-New. Evidence that employer stated he would get in under agreement establishing relations with employees is held to show acquiescence and ratification of agreement by employer. 23 **OhA** 426, 155**NE**154.

825-76⅙-New. Contract between manufacturers' association and workers' union for benefit of employees of members of association is held valid, 23 **OhA**426, 155**NE**154.

825-76⅐-New. and such a contract may be enforced by employee, though employee's name did not appear in contract. 23 **OhA**426, 155**NE**154.

825-76⅛-New. Agreement between local union and stevedore company for compensation insurance, acceptance of which should bar recovery in admiralty for injuries, held not binding on libelant. 22**F(2d)**444.

825-76⅑-New. Agreements between unions and employers construed.—Agreement between union and manufacturer that union's members need not work on shoes containing parts made in factory where there is strike extends only to legal strikes. **Mass** 167**NE**323.

825-76⅒-New. Courts should give effect to contracts entered into for purpose of improving conditions between employers and employees. **CalA** 286**P** 1074.

825-76⅑-New. Remedies applied in enforcement of collective bargaining agreement between labor union and employers should be mutual. **CalA** 286**P** 1074.

825-76½-New. Employee engaged for indefinite period held entitled to recover for wrongful discharge under agreement between union and employer providing for investigation of charges and appeal. **MoA** 28**SW(2d)**687.

825-76⅓-New. Provision of agreement between union and employer held to require notice to employee of charges and opportunity to present proof and be represented. **MoA** 28**SW(2d)**687.

825-76¼-New. Contracts between employers and labor unions must be reasonably construed to maintain entire validity if possible. 12**PaDist&Co** 693.

825-76⅕-New. In Manitoba agreement between labor union and employer providing for consideration of seniority in dismissing employee does not enable individual workman, not member, to attach it to contract. **Man** [1930] 3**DomLR** 352.

825-76⅙-New. In Manitoba such agreement is not legally enforcible. **Man** [1930] 3**DomLR**352.

825-76⅐-New. "Collective bargaining" defined. 12**PaDist&Co** 693.

825-79½-New. Enjoining abolition of local union.—Trade union which has long recognized district union composed of workmen in allied trade and dealt with it as subordinate union will be enjoined from enforcing amendments to constitution which would abolish such district union. 31**F(2d)**689.

825-79⅓-New. Threatened revocation of charter of local chapter by officer acting beyond authority operating as expulsion of members and depriving it and them of property rights may be enjoined. 168**Ga**484, 148**SE**403(2dcase).

825-81½-New. Under constitutions of international unions, general supervision of the union and its subordinate unions devolves upon executive council consisting of officers of general union. 21 **F(2d)**497.

825-81⅓-New. Where such constitution provides for submission of proposition or amendments to membership under indorsement of executive council, submission by president in defiance of vote of other members of executive council is illegal and void. 21**F(2d)**497.

825-81¼-New. National union would not be liable for obligations of subordinate union. 131**Misc**203, 226**NYS** 411.

825-81⅕-New. National union taking over affairs of subordinate union held precluded from repudiating local's obligation to return employing firm's deposit on termination of contract secured. 131 **Misc**203, 226**NYS**411.

825-81⅙-New. Ratification of, or interference in, local strike of mine workers, in order to bind international union, must be in manner provided by its constitution. 28**F(2d)**851.

825-81⅐-New. Member of local union of international union of steam and operating engineers refused transfer to new local after charter of old union had been revoked is entitled to hearing on application for transfer, and court may compel international union to grant hearing and proceed with uncompleted processes in determining rights between member and local union, but cannot grant mandatory injunction requiring transfer card to be issued to member. 119 **OhSt**94, 162**NE**386.

825-81⅛-New. Where record shows that all proceedings were regular relating to revocation of charter of local union by international union and organization of new local union, and member of old union had full notice of, and participated in, hearings such member is precluded by action taken in those matters. 119 **OhSt**94, 162**NE**386.

825-82 Liability of surety on bond of officer of local lodge for embezzlement of liberty bond by officer. **Wash** 291 **P**328.

825-87½-New. Fisherman authorizing delegate to waive provision of written contract would be bound thereby whether or not meetings were authorized or conducted in accordance with rules of union. 39**F(2d)**348.

825-87⅓-New. In absence of evidence of fishermen attending meeting at which committee was appointed, it was held that they were not bound by committee's agreement to waive provision for allowances. 39**F(2d)**348.

825-87¼-New. Mere failure of packing company to exercise contract right to limit daily catch did not give fishermen notice of their delegate's unauthorized oral agreement to waive provision for

allowances. 39F(2d)348.

825-87⅕-New. Before fishermen's conduct can be construed as ratification of their delegate's unauthorized agreement to waive contract provision it must be shown that they were aware of such agreement. 39F(2d)348.

825-87⅙-New. Judicial powers may be vested in president and executive board. Mass 172NE790.

826-88 Member of local union is bound by rules of organization and subject to its discipline. Mass 171NE278.

826-89½-New. Negotiations for adjustment of wage scale is not equivalent to a lookout justifying refusal of admission to local union. 7F(2d)100.

826-89⅓-New. Local union must inform applicant with transfer card that offer to accept him after a refusal was unconditional and not waiver of his right to redress for previous wrong. 7F(2d)100.

826-94 NJSup 140A424, 425 [citCyc].

826-96½-New. Member, having paid-up card, held member for year regardless of removal as president and amendment of by-laws to make president's dues not payable in advance. 15DelCh401, 140A656.

826-96⅓-New. Defendants, sued by one as member of brotherhood, cannot try question of propriety of brotherhood's admitting complainant to membership. 15DelCh401, 140A656.

826-96 But see 23F(2d)743.

826-99½-New. Offense charged must be within those offenses enumerated in constitution, and fact that offense was committed in petition to court is no defense. MoA 293SW435.

827-7½-New. Union cannot compel members to join an unlawful strike by imposition of fines. 260Mass45, 157NE82, 52ALR1125.

827-7⅓-New. Joining forbidden strike is held not ground for expulsion. 233 IllA495.

827-7¼-New. Member cannot be expelled except as authorized by by-laws. 263Mass349, 161NE272, 62ALR311 (nonpayment of illegal insurance assessment is not ground for expulsion).

827-7⅕-New. Contempt.-TexCivA 13SW(2d)902.

827-7⅙-New. Requirement that member continue insurance taken on becoming member is at most but condition subsequent, and will not be allowed to work forfeiture, unless expressly required by conditions of membership. IndA 165NE68.

827-8 233 IllA495. **Charge held not to charge offense under association's constitution.**-52Nev400, 288P170. **Failure to afford trial as guaranteed by constitution and by-laws** renders expulsion proceedings void. 52Nev400, 288P170. **Member appearing without objection** waived constitutional provision requiring charges specifying offense in writing. Mass 171NE278. **Requirement of delivery of copy of charges before hearing** is waived where member notified of charges at hearing proceeds without requesting postponement. CalA 289P852.

827-10 CalA 289P852; 220MoA847, 294SW745. **In considering suit to enjoin suspension,** court will consider only matters necessary to protect plaintiff's property rights directly involved. MoA 293SW435. **Review of evidence.**-CalA 289P852. **Sentence is conclusive if authorized.**-CalA 289P852. **Suspension for violation of rules held supported by evidence.**-CalA 289P852. **Technicalities** will be disregarded unless accused was denied opportunity to defend and union did not exercise good faith. CalA 289P852.

827-12 240NY463, 148NE636.

827-13 115Nebr375, 213NW366.

827-13½-New. Court of equity will reinstate member where union, in suspending or expelling him, acted unfairly, in bad faith or beyond its powers and in violation of its own laws or laws of land. IndA 165NE68.

827-13⅓-New. Equities are all with expelled member in suit for reinstatement where his expulsion was due to his giving truthful testimony before interstate commerce commission. IndA 165NE68.

827-13¼-New. Court of equity will reinstate member where association in expelling him acted unfairly or beyond its powers and not in accordance with law of land. 52Nev400, 288P170.

827-14 MoA 293SW435.

827-15 IndA 165NE68; 52Nev400, 288P170. **Matters not construed as abandonment of membership.**-IndA 165NE68.

828-17½-New. Where unincorporated association provides for expulsion only upon written charges after hearing on notice but no remedy by appeal is granted, equity will enjoin the denial of the privileges of membership to member not given hearing. 240NY463, 148NE636.

828-17⅓-New. Facts held not to show that members were legally expelled. Mass 172NE790.

828-18 168Ga484, 148SE403(2dcase); Mass 169NE793; Mass 171NE278; Mass 172NE796; MoA 293SW435; 220MoA847, 294SW745. But see TexCivA 13SW(2d)902. **Rule not applicable** to action for damages for wrongful expulsion. 220MoA847, 294SW745. **Where legality of expulsion depends on questions of law** beyond jurisdiction of organization finally to determine expulsion will be restrained pendente lite. 135Misc828, 238NYS460. **When internal remedies exhausted.**-Mass 172NE790.

828-20 Action for damages lies for wrongful exclusion or suspension from membership in local union. 7F(2d)100. **Liability of members.**-263Mass349, 161NE272, 62ALR311. **Questions for jury in actions for illegal expulsion.**-263Mass349, 161NE272, 62ALR311.

828-21 7F(2d)100.

828-21½-New. Damages as property right.-Damages suffered by member of trade union being denied membership therein and right to work as a union laborer constitute "property rights" within jurisdiction of the civil courts. TexCivA 13SW(2d)902.

828-27½-New. Evidence held sufficient to support judgment for expelled member of labor union. 220MoA847, 294SW745.

828-27⅓-New. In suit to require defendants to recognize plaintiff as member of brotherhood, defendants have burden of proof as to affirmative defense. IndA 165NE68.

828-27¼-New. Parol evidence is admissible to show long established usage to punish offense charged against member. Mass 171NE278.

828-29 214Ala565, 108S456, 47ALR270. **As long as member chooses to recognize union's authority** provision in union rules, that union is to be final arbiter in certain disputes, is conclusive on such member. 214Ala565, 108S456, 47ALR270.

829-35½-New. Suspension of local union does not convert those indebted to local into trustees for local's creditors. 137Misc653, 244NYS90.

829-38 Lex fori of suit for breach of contract by labor union with grand lodge headquarters in another state is not within state where suit brought. 214Ala565, 108S456, 47ALR270. **Presumptions.**-155Md265, 141A504.

829-40 15DelCh100, 141A319. But see Mass 164NE393. **Membership of plaintiff in railroad brotherhood cannot be questioned** by defendant when admitted by brotherhood. 15DelCh100, 141A319 (membership sufficiently shown).

829-41 But see MoA 24SW(2d)1080. **Under Canadian Trade Unions Act.**-Ont [1930] 2DomLR513.

830-43 Suit for violation of anti-trust law against labor unions is properly brought in district where wrong complained of was committed. 7F(2d)481.

830-45½-New. Lex fori of suit for breach of contract by trade union with grand lodge in another state is held not within state. 214Ala565, 108S456, 47ALR270.

830-45⅓-New. Trade union sued for breach of contract to pay strike benefits, is held entitled to directed verdict. 214Ala565, 108S456, 47ALR270.

830-45¼-New. Under statutes in some jurisdictions personal service of summons, complaint affidavits and order to show cause on one purporting to be an officer of labor union is insufficient to give court jurisdiction in suit to enjoin picketing, though order to show cause directed service to be made on any officer of union. 127Misc173, 215NYS332.

830-45⅕-New. Trade union sued by member for breach of contract to pay strike benefits discontinued by officials duly authorized by laws of union is entitled to nonsuit. 214Ala565, 108S456, 47ALR270.

830-45⅙-New. Membership in railroad brotherhood cannot be questioned by defendants where admitted by brotherhood. 15DelCh24, 140A654.

830-45⅐-New. Defendants cannot defend on ground that complainant was not member where organization certified that dues were paid. 15DelCh401, 140A656.

830-45⅛-New. Contract between street railway and union as to number of operatives on cars will not be adjudged void where city, having regulatory power, is not a party, 204 Iowa1195, 213NW264.

830-45⅑-New. and in such action public interest will not be considered as element involved. 204 Iowa1195, 213NW264.

830-45⅒-New. Such action will not be entertained where object thereof is to obtain declaratory decree only. 204Iowa1195, 213NW264.

830-45⅑-New. Action to declare contract between union and employer illegal on ground it violated constitution of international union will not be entertained where international union is not party and makes no complaint. 204 Iowa1195, 213NW264.

830-45½-New. Whether contract between employer and employee violates public policy in unionizing entire industry will not be passed upon where no one complains of violation of rights. 204 Iowa1195, 213NW264.

830-45⅓-New. Burden of proof to show that complainant was not member is on defendants. 15DelCh401, 140A656.

830-45¼-New. Evidence held sufficient to show that complainant was member of unincorporated railroad brotherhood. 15DelCh24, 140A654.

830-45⅕-New. That one suing for brotherhood was organizer corroborated testimony that he was member in good standing. 15DelCh401, 140A656.

830-45⅙-New. Complaint by one union against another for unlawful interference with ownership and possession of real and personal property is insufficient to warrant injunctive relief where it shows adequate legal remedy. 85Colo585, 277P781.

830-45⅐-New. Burden of proof.-39F(2d)348.

830-52 Members of labor unions are liable for act of officers within scope of authority. 218MoA516, 279SW232.

830-53½-New. Injunction will not issue to require suspended carpenters to abide decision of boards of jurisdictional awards. 24OhNPNS546.

830-54 23F(2d)743. **That labor union rules were not observed in calling strike** is immaterial on application of employer for injunction. 245NY260, 157NE130.

830-54½-New. Equity will grant relief for fraud and deception pursued by labor union to undermine and destroy employer's rights. 15F(2d)652.

831-56 23F(2d)743.

832-62 15F(2d)652.

832-63½-New. Isolated instances of intimidation do not authorize injunction. 245NY260, 157NE130.

833-65 221NYS107.

834-69 Strike results only where there is relation of employer and employee. 25OhNPNS485.

835-77 221NYS107. **Picketing of baker's premises with placards declaring he was unfair to labor during strike** is held not to entitle baker to injunction. 221NYS107.

835-78 15DelCh391, 138A607; 245NY260, 157NE130; 37BC284, [1926] 3DomLR166, [1926] 2WestWkly254 (distribution of pamphlets). **All picketing**

may be enjoined, where unlawful picketing is continued, and violence and intimidation used and false statement as to employer's business distributed. 245 NY260, 157NE130. **If for purpose of improving members' working condition increasing wages, increasing its members or unionizing trade,** union may be justified in striking and picketing. 245 NY260, 157NE130. **Labor union may call strike or picket** employer's premises to induce him to employ union labor only or use either method separately. 245NY260, 157NE130. **Members of union are trespassers** in entering employer's restaurant for purpose of causing strike when patrons are present. 245NY 260, 157NE130. **Nuisance.**–[1926] CanSC 499, [1926] 3DomLR658. **Peaceful picketing will not be enjoined.**–245NY260, 157NE130.

RECEIVING STOLEN GOODS

24 Cyc—514–5 212Ky778, 280SW118. **Condition of legal title** is immaterial. OklCr 287P1083.

515–6 36Wyo 241, 254P120 [citCyc].

515–7 212Ky778, 280SW118; Nebr 230 NW438; 113TexCr233, 20SW(2d)206. **Under National Motor Vehicle Theft Act.**–5F(2d)546; 16F(2d)921.

515–8 19F(2d)316, 317 [citCyc]; Ind 166NE651; 105TexCr265, 287SW1099.

515–9 19F(2d)316, 317 [citCyc].

515–10 19F(2d)316, 317 [citCyc].

515–11 19F(2d)316, 317 [citCyc].

515–12 19F(2d)316, 317 [citCyc]; 162 Ga422, 134SE95; 327 Ill 194, 158NE 431; Iowa 229NW143; 115Nebr77, 211 NW200. **Gist of offense** is buying or receiving goods with felonious knowledge that they were stolen. 162Ga422, 134SE 95.

515–12½–New. Identity of owner of goods is not essential element of offense. 322Mo 69, 16SW(2d)30.

515–14 21AlaA423, 109S125; 92Fla809, 110S253; 323 Ill 567, 154NE418; 336 Ill 446, 168NE258; Ind 169NE40; 234 Mich558, 208NW754; 316Mo 256, 292SW 42; 322Mo 69, 16SW(2d)30; 147SC480, 145SE285. **Guilt of principal thief must be shown** whether captured or not, and whether known or unknown. 162Ga422, 134SE95.

516–15 323 Ill 567, 154NE418; Ind 169 NE40; 229Ky412, 17SW(2d)267.

516–16 123Kan113, 254P314; 154Md 332, 140A218; OklCr 287P1083. **Sufficiency of knowledge.**–154Miss176, 122S 372.

516–18 21AlaA423, 109S125.

516–19 **Word "conceals" in certain statutes** covers and includes words "with intent to defraud the owner." Nebr 230 NW438.

517–22 316Mo 256, 292SW42; 322Mo 69, 16SW(2d)30.

517–29 **Statutory provisions.**–14F(2d) 360.

518–30½–New. Alcohol, though contraband under National Prohibition Act, may be subject of receiving stolen goods. 105NJL529, 147A325.

518–31 108TexCr367, 300SW938.

518–32 **The receiving need not be from the thief.**–261Mass68, 158NE338.

518–34 256 IllA493; 83Mont177, 271P 449; 13PaDist&Co 371; 108TexCr367, 300SW933; 113TexCr212, 18SW(2d) 1068.

518–35 98Fla457, 124S427.

519–40 109TexCr67, 2SW(2d)851 (removal).

519–41½–New. Payment of value for stolen goods is no defense. 99Fla1187, 128S628.

519–43 **Under Georgia Pen. Code § 163** conviction of principal thief is not element of offense. A 134SE95. Receiver can waive conviction of principal thief and go to trial. 162Ga422, 134SE95. Where accused goes to trial without objection with knowledge that conviction of principal thief has been set aside by grant of new trial, he waives prior conviction of principal thief. A 134SE95. Provision relative to conviction of principal thief is regulation affecting time, when, and manner in which person indicted can be tried. 162Ga422, 134SE 95. **Guilt of principal thief,** whether taken or not and whether known or not, must be proved before receiver can be convicted. 162Ga422, 134SE95. Receiver cannot be prosecuted unless principal thief has been convicted. 162Ga 422, 134SE95. Where principal thief cannot be taken so as to be prosecuted and convicted, receiver must be prosecuted for misdemeanor. 162Ga422, 134 SE95. **Where conviction of principal thief is set aside after indictment of receiver,** subsequent plea of guilty of principal satisfies requirement of statute. 162Ga422, 134SE95. **Waiver of conviction of principal thief.**–162Ga422, 134SE95. Such waiver is effected where receiver, knowing that conviction of principal thief has been set aside by grant of new trial, goes to trial without raising objection. 162Ga422, 134SE 95.

519–44 **Place where goods were stolen** has been held immaterial. TexCr 28SW (2d)804.

519–45 **Possession out of state.**–234 Mich558, 208NW754. **County to county.** –105TexCr566, 289SW404.

520–47 **Indictments held sufficient.**–162 Ga422, 134SE95; Mo 274SW43. **Information held sufficient.**–Mo 24SW(2d) 1010.

520–48 19F(2d)316, 317 [citCyc]; 34 F(2d)92 (where exact language of statute is used, failure directly to allege that automobile was stolen is not fatal). **Allegations held sufficient.**–48 Ida760, 285P467; Ind 166NE651.

520–51 15F(2d)911 [citCyc]; 19F(2d) 316, 317 [citCyc]; 34F(2d)1; OklCr 279P973; OklCr 280P630.

520–51½–New. Under Louisiana statute, it is unnecessary to allege that goods were feloniously stolen or feloniously received. 163La641, 112S514.

520–51¾–New. **Consideration paid for stolen goods need not be alleged.** 163 La641, 112S514.

520–52 267US432, 45SCt345, 69L ed699, 37ALR1407 (transportation of automobile in interstate commerce); 196 Ind 675, 148NE193; Ind 166NE651; Ind 169NE40; MoA 27SW(2d)726.

520–53 154Miss523, 122S750. **An indictment or information following the words of the statute,** etc. Mo 285SW 422. **Intent to deprive true owner thereof** must be alleged. 169Ark503, 275SW 895. **Allegation of single intent sufficient.**–48 Ida760, 285P467.

521–54 323 Ill 567, 154NE418. **Indictment held sufficient.**–323 Ill 567, 154NE 418.

521–56 116Nebr1, 215NW459.

521–57 Contra OklCr 279P973. **Indictment under National Motor Vehicle Theft Act** need not allege owner's name, or value of automobile, or that it was stolen. 5F(2d)546. **Person whose possession was disturbed** may be treated as owner. OklCr 287P1083.

521–59 But see 162Ga422, 134SE95; 41GaA466, 153SE428(3dcase). Contra 162Ga422, 134NE95.

521–60 99Fla1187, 128S628; Ind 169 NE40; 154Md332, 140A218; 260Mass 233, 157NE538; 261Mass68, 158NE338; 109TexCr67, 2SW(2d)851; TexCr 28SW (2d)804. **Unless name is shown to be known** by grand jury or witnesses before it, or could have been ascertained with more diligence, allegation that person is unknown is sufficient. 109TexCr 67, 2SW(2d)851.

522–61 99Fla1187, 128S628.

522–62 15F(2d)911 [citCyc]; 164Ga 638, 139SE355; Ind 168NE458; TexCr 28SW(2d)804.

522–65 119Kan532, 240P850 (proof that goods belonged to "J. M. Corn Company" is not material variance from charge that they belonged to "J. M. Corm Company").

522–65½–New. Conviction of butcher for receiving carcass of steer, he knowing steer had been stolen, is proper as property stolen and received was the same. 118Kan629, 236P816.

522–65⅓–New. There is fatal variance where indictment charges receiving stolen cattle and proof shows only receipt of carcasses and hides of dead animals. 90Fla59, 105S140.

522–65¼–New. Variance between allegation and proof of prior conviction of principal thief not shown. 162Ga422, 134SE95.

522–65½–New. **Theft of greater amount of goods than that charged to have been received** may be shown. 103TexCr493, 281SW553.

522–65⅙–New. Alleged death of stolen hog before defendant received it held to preclude defendant's conviction for receiving and concealing hog. 109TexCr 426, 5SW(2d)158.

522–65½–New. State, in introducing in evidence stolen property, is not limited to that property described and charged in indictment. Ind 169NE40.

522–66 Ind 169NE40; 261Mass68, 158 NE338. **Indictment charging receipt from unknown persons** does not require finding of receipt from more than one. 104TexCr438, 284SW577.

523–67 **Variance held not material.**–CalA 292P692. **Proof of ownership.**–48 Ida760, 285P467; 197 Ind625, 150NE 917; 327 Ill 194, 158NE431. **Matters not constituting variance.**–203 Iowa536, 211 NW213; 196NC725, 147SE7.

523–70 47 Ida315, 274P628; 220App Div697, 222NYS456. **Conviction can be only for goods named in indictment,** regardless of evidence of owner of goods missed. 102TexCr444, 278SW446.

523–72½–New. Negligence of bank officials facilitating theft no defense by one receiving. 154Md332, 140A218.

524–74½–New. 323 Ill 567, 154NE418.

524–75 23AlaA269, 124S250(2dcase); 223AppDiv242, 227NYS658. **Statute making possession of stolen goods prima facie evidence of guilt** casts burden on defendant to show lack of guilty knowledge. 230Ky391, 20SW(2d)75.

524–76 **Evidence that bank officials knew that clerk was betting held inadmissible.** 154Md332, 140A218. **In prosecution for selling automobile,** knowing it had been stolen, proof of knowledge being ample, exclusion of statements of witness, who sold automobile to codefendant, not on trial, of what his vendor said as to manner of acquiring car, not communicated to defendant, were held properly excluded. 5F(2d)961. **Testimony as to hearing thief say he** was betting for others inadmissible. 154Md332, 140A218.

524–77 23AlaA393, 126S174(2dcase); 154Md332, 140A218. **Knowledge of theft may be shown** by direct evidence or by facts reasonably imputing knowledge but cannot rest on mere suppositions. 234Mich558, 208NW754.

524–78 147SC480, 145SE285.

524–78½–New. Evidence that defendant had paid for goods which were delivered to particular person held admissible. 13F(2d)451.

524–78⅓–New. Evidence that defendant was engaged on delivery wagon during month involved held properly excluded as of no probative effect. 13F(2d) 451.

524–79 27Hawaii177; 254Mass520, 150 NE854; NJSup 135A552. **Evidence that policy of insurance was issued on alleged stolen car,** insuring defendant's wife as owner, held admissible in prosecution for receiving stolen automobiles. 254Mass 520, 150NE854. **Evidence of presence in insurance policy of motor number of alleged stolen car** held admissible in prosecution for receiving stolen goods. 254 Mass520, 150NE854.

525–83 NJSup 136A295.

525–84 Mo 274SW43.

525–85 OklCr 286P811; OklCr 287P 1083.

526–88 21AlaA423, 109S125.

526–90 But see 109TexCr613, 6SW(2d) 359. **Admission of evidence of other burglaries** held error. 323 Ill 567, 154 NE418.

526–92 162Ga422, 134SE95; 162Ga422, 134SE95. **Where conviction of principal thief was reversed after indictment of receiver,** and principal thief pleaded guilty before trial of receiver, record of trial is admissible as prima facie evidence of guilt of principal thief. 162 Ga422, 134SE95.

526–93 155Miss295, 124S353(1stcase). **Judgment of acquittal,** etc. 260Mass233, 157NE538.

526–93½–New. Admission of evidence

of burglary by person selling stolen property to defendant in which defendant was accessary held proper. 191NC 231, 131SE573.

527-95 Statement of thief in presence of accused is admissible only in so far as accused assented to it. **Man** [1928] 3**DomLR**792.

527-96 Evidence of value is important where it bears on punishment. **Ill** 172 **NE**29.

527-96½-New. Concealing identity of stolen goods.-161**La**173, 108S326.

527-97 13**F(2d)**125 (evidence insufficient); 93**Fla**1063, 113S91; 99**Fla**1187, 128S628; 323**Ill** 567, 154**NE**418; **Ill** 172**NE**29; 196 **Ind**675, 148**NE**193; **Ind** 169**NE**40; 119**Kan**532, 240**P**850 (evidence sufficient); 233**Ky**84, 25**SW(2d)** 73; **MoA** 27**SW(2d)**726; 27**OhA**529, 161 **NE**367. **The knowledge may be inferred,** etc. 8**F(2d)**491; 73**CalA**334, 238**P**770; 327 **Ill** 194, 158**NE**431; **Ind** 169**NE**40; 123**Kan**113, 254**P**314; 170**Minn**72, 211 **NW**958; 155**Miss**295, 124**S**353(1stcase); **Mo** 300**SW**712; **Mo** 4**SW(2d)**813; 106 **TexCr**219, 291**SW**547. **Evidence held sufficient.**-13**F(2d)**53; 23**F(2d)**908; 168 **Ark**1082, 272**SW**833; 177**Ark**605, 7 **SW(2d)**315; 177**Ark**1194, 7**SW(2d)**768; **Cal** 270**P**379; 207**Cal** 366, 278**P**857; **CalA** 292**P**692; **GaA** 137**SE**862; 327 **Ill** 194, 158**NE**431; 337 **Ill** 383, 169**NE** 174; 197 **Ind**625, 150**NE**917; 201 **Iowa** 1089, 202**NW**90; 200 **Iowa**652, 204**NW** 256; 203 **Iowa**536, 211**NW**213; 229**Ky** 412, 17**SW(2d)**267; 256**Mass**214, 152**NE** 60; 170**Minn**72, 211**NW**958; **Miss** 118**S** 727; **NJ** 140**A**457; **NJSup** 136**A**295; 191**NC**231, 131**SE**573; 191**NC**233, 131**SE** 574; **OklCr** 286**P**811; 88**PaSuper**190; 106**TexCr**219, 291**SW**547; 110**TexCr**556, 9**SW(2d)**732. **Evidence held insufficient.** -21**AlaA**423, 109**S**125; 179**Ark**1198, 18 **SW(2d)**915; 336 **Ill** 446, 168**NE**258; **Iowa** 229**NW**143. **Finding of stolen goods on defendant's premises** held to raise issue as to conscious possession. 218**AppDiv**638, 219**NYS**73. **That employee with authority to sell appropriated proceeds to his own use** not sufficient to convict purchaser of receiving stolen property. 21**AlaA**423, 109**S**125. **Unexplained possession of recently stolen goods** is strong circumstance to be considered on question of guilty knowledge. **Ind** 169**NE**40.

527-98 Evidence held insufficient to sustain conviction. 116**Nebr**1, 215**NW** 459.

527-99 Evidence held sufficient.-**NJSup** 140**A**241; 191**NC**231, 131**SE**573.

527-2 Evidence held sufficient to show fraudulent intent. 73**CalA**334, 238**P**770. **Evidence held insufficient** to sustain verdict of conviction. 40 **OklCr**219, 267**P** 1045.

527-3 59**ND**67, 228**NW**413; 113**TexCr** 212, 18**SW(2d)**1068. **Evidence held sufficient.**-**Ill** 173**NE**467; 220**AppDiv**697, 222**NYS**456; 223**AppDiv**242, 227**NYS** 658; 109**TexCr**613, 6**SW(2d)**359. **Evidence held insufficient.**-221**AppDiv**4, 222 **NYS**460; 113**TexCr**212, 18**SW(2d)**1068.

527-4 8**F(2d)**491 (sufficient); 27**Hawaii** 177; **Mo** 300**SW**712. **Evidence held sufficient** to go to jury. 59**ND**67, 228**NW** 413. **Identity of goods.**-113**TexCr**212, 18**SW(2d)**1068.

528-5 160**La**667, 107**S**484 (proof as to parts of automobile held to conform).

528-6 41**F(2d)**654; 23**AlaA**269, 124**S** 250(2dcase); 168**Ark**1082, 272**SW**833 (unexplained possession may warrant conviction); 219**Ky**490, 293**SW**982; **Sask** [1927] 3**DomLR**679 (presumption held not applicable). But see 218**App Div**638, 219**NYS**73. **Evidence held sufficient.**-23**AlaA**269, 124**S**250(2dcase); 73 **CalA**334, 238**P**770 (to show goods were stolen by person other than defendant); **Ind** 169**NE**40; 219**Ky**490, 293**SW**982. **Evidence held insufficient** to show possession by defendant. 222**AppDiv**483, 226**NYS**508. **Uncontradicted evidence of defendant's possession** is sufficient to sustain conviction under statute making unexplained possession sufficient. **NJ Sup**151**A**365.

528-6½-New. ,but such possession does not necessarily create presumption that he received it with knowledge that it was stolen. 162**La**299, 110**S**482.

529-8 Evidence held sufficient to overcome statutory presumption from possession. 230**Ky**604, 20**SW(2d)**468.

529-8½-New. Recent possession of stolen property held not evidence of guilty knowledge of larceny. 323 **Ill** 567, 154**NE**418.

529-8½-New. Concealment may be shown by evidence of knowledge that article was to be stolen by another and participation in removal thereof. 109 **TexCr**67, 2**SW(2d)**851.

529-9 Evidence corroborative of thief's testimony.-**Ind** 166**NE**651.

529-10 323 **Ill** 133, 153**NE**615; 246 **Mich**65, 224**NW**383; 247**NY**36, 159**NE** 715. **Evidence held sufficient.**-203**Iowa** 536, 211**NW**213; **TexCr** 28**SW(2d)**804. **Record of conviction of thief.**-162**Ga**422, 134**SE**95. **Circumstantial evidence.**-113 **TexCr**212, 18**SW(2d)**1068. **Theft of other goods** received by defendant at another time sufficiently shown by evidence. 123**Kan**113, 254**P**314. **That goods were stolen is not established** by statement of trial judge that another had been convicted of stealing them. 97 **PaSuper**244.

529-11 154**Miss**523, 122**S**750.

529-12 23**AlaA**576, 129**S**312(1stcase). **Evidence held to show** goods worth over thirty dollars. **Mo** 274**SW**43.

529-12½-New. Evidence held sufficient in prosecution under National Motor Vehicle Theft Act for selling stolen automobile to show use in interstate commerce at time of sale. 5**F(2d)**961.

529-12½-New. Evidence held sufficient to submit case to jury. 5**F(2d)**940; 109 **TexCr**426, 5**SW(2d)**158.

529-12¼-New. Circumstantial evidence held sufficient to sustain conviction. 104 **TexCr**438, 284**SW**577.

529-12½-New. Evidence held sufficient to sustain conviction of receiving stolen property. 247**NY**36, 159**NE**715.

529-12⅛-New. Ownership of goods.-Testimony of thief that he stole property from car of railroad company named in indictment as owner is sufficient proof of ownership. 154**Miss**523, 122**S**750.

529-12½-New. Questions of law and fact.-Evidence held sufficient to take case to jury. 322**Mo**69, 16**SW(2d)**30.

529-12¼-New. Evidence held sufficient to sustain conviction. **OklCr** 279**P**973.

530-13 Instructions held not erroneous. -13**F(2d)**451. **Instructions held improperly refused.**-105**TexCr**265, 287**SW**1099. **Instruction on conspiracy held sufficient.** -**Wis** 231**NW**263. **Sufficiency of instruction.**-14**PaDist&Co** 210.

530-14 115**Nebr**77, 211**NW**200 (omitting from charge requirement that defendant must be found to have concealed goods stolen held error). **Instruction as to degree of proof** of guilty knowledge held erroneous. 170**Minn**72, 211**NW**958. **Instruction in prosecution** under National Motor Vehicle Theft Act defining "commerce" and "interstate commerce" held correct. 5**F(2d)**546.

530-14½-New. Instructions held sufficient.-23**F(2d)**908; 162**Ga**422, 134**SE** 95; 203 **Iowa**536, 211**NW**213.

530-14½-New. In absence of sufficient evidence to prove corpus delicti defendant entitled to affirmative charge. 21 **AlaA**423, 109**S**125.

530-14¼-New. Failure to charge jury to acquit, if they believed defendant's testimony that he had found stolen articles, has been held not error, since fact merely tended to prove plea of not guilty. 229**Ky**412, 17**SW(2d)**267.

530-14½-New. Instructions held erroneous in absence of explanation of recent possession. **NS** [1929] 1**DomLR**720.

530-14⅛-New. Instructions held not objectionable. **Iowa** 230**NW**425.

530-14½-New. Evidence held to authorize instructions. **MoA** 27**SW(2d)**726.

530-16 233**Ky**84, 25**SW(2d)**73.

530-17 228**Ky**98, 14**SW(2d)**386.

530-19 123**Kan**113, 254**P**314 (proper instruction); 162**La**299, 110**S**482; **OklCr** 276**P**697. **The question of guilty knowledge, etc. Ind** 169**NE**40; 248**Mich**619, 227**NW**705(1stcase); **ND** 230**NW**733. Request to charge that acquittal of one from whom goods received was evidence as to defendant's guilty knowledge properly denied. 260**Mass**233, 157 **NE**538. Instruction in words of statute held proper in view of proper indictment. 23**AlaA**411, 128**S**209. **Instruction held proper.**-179**Ark**216, 15**SW(2d)**312; 154**Miss**176, 122**S**372; 307**Mo** 352, 270 **SW**310; **MoA** 27**SW(2d)**726. **Instruction held misleading.**-163**La**641, 112**S**514. **Instruction held not pertinent to issues.** -163**La**641, 112**S**514. **Refusal of instructions** as to guilty knowledge held error. 323 **Ill** 567, 154**NE**418. **Instructions properly refused.**-23**AlaA**411, 128**S**209; **Mo** 274**SW**43. **Instructions held erroneous.**-27 **OhA**529, 161**NE**367 (authorizing verdict of guilty on belief by jury that any of several defendants jointly charged received property with knowledge of theft); **OklCr** 287**P**746. **Instructions held not erroneous.**-322**Mo** 69, 16 **SW(2d)**30; **TexCr** 31**SW(2d)**1080(2d case). **Instruction held inapplicable.** -333 **Ill** 603, 165**NE**146. **Instruction on guilty knowledge** held erroneous. 97 **PaSuper**244. **Peremptory instruction** requested by defendant improperly refused. 155**Miss**295, 124**S**353(1stcase). **Instructions held not objectionable.** -**Iowa** 230**NW**425.

530-19½-New. Questions for jury. 23 **F(2d)**908; 163**La**641, 112**S**514.

530-19⅛-New. Facts sufficient to warrant submission to jury of counts charging receiving of stolen goods. 163**La**641, 112**S**514.

530-19¼-New. Reasonableness and sufficiency of accused's explanation of his possession is for jury. 168**Ark**1082, 272**SW**833.

530-19½-New. Weight and significance of circumstantial evidence. 254**Mass**520, 150**NE**854.

530-19⅛-New. Sufficiency of evidence of ownership. 203 **Iowa**536, 211**NW**213.

530-19½-New. Evidence as to guilty knowledge held to warrant submission to jury. **MoA** 27**SW(2d)**726.

530-19⅛-New. Evidence held sufficient to go to jury.-230**Ky**391, 20**SW(2d)**75.

531-21 322**Mo** 69, 16**SW(2d)**30; **Mo** 274 **SW**43; 27 **OhA**533, 161**NE**341; 36**Wyo** 241, 254**P**120. **Jury's failure, when properly requested, to find value of property,** is error. 36**Wyo** 241, 254**P**120. **Verdict would not support conviction.** 197**NC** 475, 149**SE**680(1stcase).

531-21½-New. In prosecution for receiving stolen goods, it was not necessary for jury to pass on value of property stolen where property had been returned to owner. 23**AlaA**81, 121**S**2(1st case).

531-22 On first conviction, party is not liable to state imprisonment provided theft was not a felony and that value of property was restored to owner. 99**Fla**1187, 128**S**628.

531-22½-New. Judgment sentencing accused to county jail for one year because stolen property was restored should recite fact of restoration. 98**Fla** 1231, 125**S**353.

RECENT

532-1 Possession of property stolen within six days held recent. 36**Wyo** 466, 256**P**1040.

RECKLESS

533-10 "Destitute of heed or concern for consequence." 41 **Ida**106, 238**P**517.

533-12 192**NC**154, 134**SE**425.

533-13 213**Ky**356, 281**SW**164.

RECKLESSNESS

534-16 Extreme form of negligence. -216**Ala**52, 112**S**442.

RECLAMATION

534-18 Distinguished from "development."-310**Mo** 602, 275**SW**957.

RECOGNIZANCES

538-1 99**Vt**83, 130**A**756.

539-2 Other definitions are: Debt evidenced by record. 144**Va**648, 131**SE** 230.

540-7 99**Vt**83, 130**A**756.

541-15 99**Vt**83, 130**A**756 (under statute recognizances on petition to supreme court for new trial must be taken before justice of that court, recognizances before master in chancery are void and

cannot be validated by act of justice, court, or party).

553-47 But see 9**PaDist&Co** 799.

554-70½-New. Defenses.–It is no answer to motion to escheat recognizance that it was entered into with only one surety, where two were required. **NS** [1925] 3**DomLR**414.

568-45 Record is only evidence receivable to prove contents of recognizance. 144**Va**648, 131**SE**230.

RECOMMEND

573-5 See also 92**CalA**417, 268**P**382.

RECONSTRUCTION

575-14 19**F(2d)**380.

575-15 "Repair" and "reconstruction" have been said to run so closely into each other that it is difficult to draw line between them. 161**La**806, 109**S**498.

RECORDING

576-24 159**La**244, 105**S**305. **"Recording" and "filing"** are not synonymous. 159**La**244, 105**S**305.

RECORDS

586-3 131**Misc**75, 226**NYS**338. **Reports** of private individuals, correspondence of officials, and memoranda of public officers for own use held not "public records" unless so made by statute. **Document is not made public record by the mere fact** that it is in a public office or that it is in the custody of public officer. 78**CalA**751, 248**P**934.

586-7 Judgment roll, files, papers, and orders in case are judicial records and public records. **Ida** 293**P**323.

586-8½-New. Object of recording laws is to require public to act with presumption that recorded instruments exist and are genuine. 32**Ariz**182, 256**P** 1048.

586-9 See also 101**Vt**24, 140**A**157, 57 **ALR**156.

586-12 NC 155**SE**256.

587-20½-New. Where instrument must be registered to constitute notice, mere indexing alone is insufficient. 29 **Ont WN**13, [1925] 3**DomLR**1159.

587-25 16**F(2d)**206; 17**F(2d)**155 (reception by officer without action or intent to file held not filing); **GaA** 155**SE** 784(1stcase); 338 **Ill** 228, 170**NE**308 (instrument recorded when filed for recording); 121**Kan**206, 246**P**980; 107**WVa**192, 147**SE**877, 66**ALR**102. **Failure of register of motions to show filing of affidavit** does not affect validity of filing where affidavit was delivered for filing and marked filed. 82**CalA**88, 255**P**229. **Failure or refusal of clerk, without good cause, to receive and record paper** does not impair filing effected by delivery of paper with intention that it should become part of official records. 83**CalA** 764, 257**P**203.

587-26 177**Ark**579, 7**SW(2d)**318; 121 **Kan**206, 246**P**980.

587-27 177**Ark**579, 7**SW(2d)**318. **Omission or failure of officer to indorse paper** delivered to him for filing and keep it in records will not be allowed to prejudice party delivering paper. 121 **Kan**206, 246**P**980.

587-27½-New. Essence of "filing" is actual entry in proper phraseology and by proper authority on proper execution. **Iowa** 228**NW**582.

587-29 328 **Ill** 27, 159**NE**237.

588-32 16**F(2d)**206; 171**Ark**1036, 287 **SW**170; 175**Ark**1107, 1**SW(2d)**558.

588-34 Clerk's signature by rubber stamp to indorsement of filing paper is not prohibited by statute or on principle. 33**NM**356, 267**P**74.

588-35 266**Mass**329, 165**NE**410. **Assignment of mortgage** held not "sale" within statute requiring payment of privilege or license tax before registration. 23**AlaA**421, 125**S**401.

588-36 266**Mass**329, 165**NE**410.

588-37 10**LaA**17, 120**S**401.

588-39 205**Cal**46, 269**P**660; 94**CalA**223, 270**P**999. **Alta** [1927] 3**DomLR**829 (registrar held unauthorized to register postponement of mortgage). **Particular instruments,** etc.; and a sheriff's certificate of sale issued first mortgagee purchasing at its foreclosure sale. 82**Mont** 280, 267**P**214. **Clause of recording act held not repealed** by subsequent reënactment. 292**Pa**74, 140**A**615. **Plans and specifications of construction contract** need not be recorded in absence of statute. 170**La**10, 127**S**347(2dcase). **Notice of claim by stranger to title** is not entitled to be recorded. **Ida** 292**P**232. **Notice contemplated by recording statutes** is notice to "subsequent purchasers or encumbrancers." **Ida** 292**P**232.

588-40 98**Fla**885, 124**S**459; 49**Philippine**534.

588-44 16**F(2d)**206; 151**Miss**765, 118**S** 902.

589-46 Fla 130**S**18; 7**PaDist&Co** 19; **TexCivA** 271**SW**196. Contra 216**Ky**164, 289**SW**213.

589-48 TexCivA 271**SW**196. Contra 216 **Ky**164, 289**SW**213.

589-50 TexCivA 271**SW**196. **Where recording is merely directory,** recorder's negligence to make proper record will not affect validity of proceeding. **NH** 150**A**739.

589-53 101**Vt**24, 140**A**157, 57**ALR**156.

589-54 Construction.–149**Wash**264, 270 **P**806.

589-56 156**Tenn**321, 300**SW**588, 589 [quotCyc].

589-58 156**Tenn**321, 300**SW**588.

589-59 96**Fla**620, 119**S**333.

589-60½-New. Mere affidavit with jurat does not entitle written instrument to recordation. 216**Ky**164, 289 **SW**213.

589-60⅓-New. Selectmen of town have no express power to require town clerk to conform to their method of recording instruments. 101**Vt**24, 140**A**157, 57**ALR** 156 (photostatic copies).

590-61 151**Miss**765, 118**S**902.

590-65 154**Tenn**345, 289**SW**536, 50**ALR** 537.

590-73 98**Fla**885, 124**S**459; 225**Ky**735, 9**SW(2d)**1083.

591-75 44 **Ida**423, 258**P**169.

591-77 44 **Ida**423, 258**P**169.

591-79 44 **Ida**423, 258**P**169. See also 33**PortoRico** 26.

591-85½-New. Record may be amended only under official authority. 44 **Ida** 423, 258**P**169.

591-86 See also 29**PortoRico** 807.

591-87 In Porto Rico.–33**PortoRico** 26.

591-90 216**Ala**619, 114**S**208; 44 **Ida**423, 258**P**169.

592-91 216**Ala**619, 114**S**208.

592-99½-New. Forged cancellation of instrument on record is void. 193**NC** 474, 137**SE**420.

592-1 118 **Or**105, 244**P**868 [quotCyc]; 11**PaDist&Co** 696, 698 [citCyc].

592-2 118 **Or**105, 244**P**868 [quotCyc].

593-3 118 **Or**105, 244**P**868 [quotCyc].

593-4 224**AppDiv**127, 230**NYS**28 [aff 249**NY**606, 164**NE**602(1stcase)]; 118 **Or** 105, 244**P**868 [quotCyc].

593-5 78**CalA**751, 248**P**934; 131**Misc** 75, 226**NYS**338; 118 **Or**105, 244**P**868. **The legislature has power,** etc. 118 **Or** 105, 244**P**868. **All citizens** do not have unrestricted right to inspect records not strictly public. 131**Misc**75, 226**NYS**338. **Interest in record** which may be basis of official action directly affecting person entitles person to inspect record, though not strictly public. 131**Misc**75, 226**NYS**338. **State secrets** and police records may be withheld from persons directly interested. 131**Misc**75, 226**NYS** 338. **Accident reports** of motor vehicles bureau may be inspected. 131**Misc**75, 226**NYS**338. **Reports and communications of investigators** into origin of fires made to fire marshal have been held not open to public inspection. 198**Wis** 388, 223**NW**861.

594-16 224**AppDiv**127, 230**NYS**28 [aff 249**NY**606, 164**NE**602(1stcase)]. **Right to copy.**–129**Kan**806, 284**P**367.

595-28 Regulations held unreasonable where inspection of motor vehicle records are limited to one hour per day and to but one of several offices. 130**Misc** 239, 223**NYS**622. **Contract granting exclusive use of names** in motor vehicle records not rendered valid by payment of compensation to state. 130**Misc**239, 223**NYS**622.

595-35 131**Misc**75, 226**NYS**338.

596-39 118 **Or**105, 244**P**868 [citCyc].

596-46 116**Nebr**474, 217**NW**947, 59**ALR** 1056.

596-47 251**Mich**701, 232**NW**373.

597-62 128**Misc**10, 217**NYS**215; 46**Philippine**473; 48**Philippine**640; 48**Philippine**656; 48**Philippine**836; 48**Philippine** 844; 48**Philippine**973; 48**Philippine**983; 49**Philippine**122; 49**Philippine**252; 49 **Philippine**433; 49**Philippine**491; 49 **Philippine**495; 49**Philippine**542; 49 **Philippine**546; 49**Philippine**596; 49 **Philippine**769; 49**Philippine**823; 49 **Philippine**838. **In the Philippine Islands.**–44**Philippine**261; 45**Philippine** 178. **Holder under tax deed conveying fee** is entitled to registration without reference to adverse possession. 91**CalA** 726, 267**P**729. **Where predecessor** held title by adverse possession, successor is entitled to registration. 91**CalA**726, 267**P**729. **Registration under mortgage law in Porto Rico.**–29**PortoRico** 762; 29 **PortoRico** 807; 29**PortoRico** 810; 29 **PortoRico** 829; 29**PortoRico** 841; 29**PortoRico** 869; 29**PortoRico** 909; 29**Porto Rico** 943; 29**PortoRico** 994; 32**Porto Rico** 1; 32**PortoRico** 65; 32**PortoRico** 220; 32**PortoRico** 420; 32**PortoRico** 439; 32**PortoRico** 468; 32**PortoRico** 502 (applying Regulations for Execution of Mortgage L. art 92 subd 2); 32**PortoRico** 534; 32**PortoRico** 702; 32**PortoRico** 731; 32**PortoRico** 793; 32**PortoRico** 797; 32 **PortoRico** 815; 32**PortoRico** 818; 32**PortoRico** 849, 854; 32**PortoRico** 858; 33 **PortoRico** 26; 33**PortoRico** 108. **Dominion title proceedings in Porto Rico.**–33**PortoRico** 1. **Notarial Law § 20** providing that public instruments, where signatures of parties do not appear, are null and void, has been held not applicable where defect consists only in discrepancy between signature and name in body of instrument. 29**PortoRico** 841.

597-63 207**Cal**373, 278**P**863; 332 **Ill** 561, 164**NE**23, 63**ALR**658; 243**NY**80, 152**NE** 472.

597-63½-New. Registration under mortgage law in Porto Rico.–Doctrine that prior decision of same matter is conclusive is not applicable to case in which registrar assigns as curable defect which had been assigned as incurable in previous decision which was reversed on appeal as to such point. 33 **PortoRico** 784.

597-63⅓-New. In order that judicial sale made to satisfy default judgment of municipal court may be entitled to record, jurisdiction of court must appear from deed or otherwise. 33**Porto Rico** 786.

597-63¼-New. Where property sold at judicial sale to satisfy judgment against heirs was recorded in name of ancester, property should be recorded in name of heirs in order that conveyance to plaintiff creditor may be recorded. 33**Porto Rico** 786.

597-63½-New. Certificate of tax sale issued by collector of internal revenue reciting that proceeding was brought against heirs of named person cannot be recorded where property is recorded in name of such person and not in name of heirs. 33**PortoRico** 842.

597-63⅙-New. Before certificate of tax sale is entitled to record it must appear that notice to owner was given as required by Political Code §§ 336, 342. 33**PortoRico** 842.

597-63⅐-New. That attachment was recorded prior to tax sale does not prevent registrar from refusing to record defective certificate of sale. 33**Porto Rico** 842.

597-63⅛-New. Sales for taxes in order to be recordable must conform to provisions of Mortgage Law. 33**Porto Rico** 842.

597-63⅑-New. Act (1923) No. 12 provides for extinguishment of mentions and liens specified in §§ 1, 2 in order that, by lapse of periods of time stated, such defects in titles may disappear. 33 **PortoRico** 885.

597-63 1/10-New. Registrar has no power to annul erroneous record which has created status in favor of certain person without consent of such person. 33 **PortoRico** 911.

597-63 1/11-New. Purchaser, under contract reserving right of redemption in

vendor, cannot obtain cancellation of record of sale by stating in public deed that purchase price has been refunded to him. 33PortoRico 972.

597-63½-New. Where supreme court decides that defect assigned by registrar as incurable is not incurable defect but mere irregularity not affecting innocent purchasers, but does not direct that curable defect shall be assigned, registrar should not assign defect as curable defect. 33PortoRico 978.

598-66 50Philippine791. **The objects and purposes, etc.**-91CalA278, 267P134. **In Philippines.**-44Philippine343. **Construction of statutes.**-35PortoRico 398.

598-69½-New. Equitable interest by third person in judgment debtor's land, which rests in parole is not subject to registration law. TexCivA 289SW116.

598-69½-New. By statute land court has jurisdiction to pass on petitions for registration of mortgages of registered land in absence of duplicate certificate of mortgagor. 256Mass471, 152NE923.

598-69¼-New. Even though land court is without power to pass finally on subject matter it has power to hear and determine petitions to register mortgages. 256Mass471, 152NE923.

598-69½-New. Even though equity court decides rights of parties, land court has jurisdiction to determine effect as conveyances of instruments used. 256Mass471, 152NE923.

598-69⅙-New. Refusal to register instruments is matter for land court. 256 Mass471, 152NE923.

598-69⅙-New. Where mortgagee took conveyance and reconveyed land to mortgagor, land court was authorized to find merger which extinguished mortgagee's title. 256Mass471, 152NE923.

598-69⅛-New. Failure of mortgagee to present owner's duplicate certificate because it could not be found held to authorize land court to issue duplicate certificate. 256Mass471, 152NE923.

598-69⅙-New. Letters of attorney to convey registered land must be filed and registered under some statutes. 262 Mass555, 160NE532.

598-69 1/10-New. Persons holding mortgages have equitable right to registration. 262Mass555, 160NE532.

598-69 1/11-New. Surviving joint tenant succeeding to title by operation of law need not file with registrar membrial of death of other tenant. 328 Ill 468, 160 NE85.

598-69 1/12-New. Person, claiming to have been wrongfully deprived of interest in land by reason of decree under Torrens Act, is entitled to indemnity to extent of indemnity fund provided in statute without pleading and proving actual existence of fund, 26F (2d) 623.

598-69 1/13-New. and his right is not affected by his infancy at time of registration proceedings. 26F(2d)623.

598-69¼-New. In Porto Rico, if ownership of property is not recorded under Mortgage Law, instruments affecting such property may be recorded together with reference to such fact as curable defect. 34PortoRico 258 (attachment).

598-74 In New York.-243NY80, 152NE 472. **Statute requiring notice of mechanics' liens to be filed in registrar's office** held constitutional. CalA 286P 504.

600-88 262Mass45, 159NE543.

600-90 In absence of statutory provision proceedings are governed by rules of chancery practice. 329 Ill 482, 160NE 759. **Compliance with statutory provisions** is necessary to give court jurisdiction to pronounce judgment. 50Philippine708. **Procedure in determining sufficiency of answers in cadastral registration proceedings** is governed in Philippines by code of civil procedure. 51 Philippine396.

600-91 Failure of clerk to sign verification or jurat to petition does not entitle petitioner to dismissal thereof. 197NC 568, 150SE30.

600-93 In absence of notice, plaintiff in suit to quiet title has been held not bound by findings in title registration proceeding. 99CalA74, 277P883. **In Philippines.**-51Philippine324.

601-96 Sufficiency of production of duplicate certificate.-262Mass555, 160NE 532.

601-97 48Philippine589.

601-98 See also 48Philippine90. **Defenses which might be made to bill for specific performance** are not available in proceedings to register title. 325 Ill 146, 156NE313. **Title registration proceeding is chancery proceeding.**-339 Ill 540, 171 NE632.

601-99 Proceedings in land court are judicial in their nature and registration is generally conclusive. 262Mass 555, 160NE532. **Easements.**-261Mass 47, 158NE321.

601-99½-New. In Ohio application for new certificate following subdivision of registered lands under statute will be denied until approval of city planning commission is obtained. 27 OhNPNS 119.

601-99⅓-New. In Philippines answers of persons claiming same cadastral lot cannot be dismissed except on grounds mentioned in Act No. 190 §§ 101, 127. 51Philippine396.

601-99¼-New. In Philippines court is without jurisdiction to strike out answer of judicial administrator of intestate for cause not provided by law as ground for dismissal. 51Philippine396.

601-99⅕-New. Exercise of right to obtain confirmation and registration of title is "action." 51Philippine805.

601-1 See also 204Cal 119, 266P948. **Procedure on report of examiner** under Land Registration Act is same as on report of auditor in equity case. 168Ga 202, 147SE364.

601-7 167Ga690, 146SE458.

601-8½-New. An official examiner, in proceedings under Torrens Law, was held not guilty of fraud in failing to discover and report that city had an interest in the land. 243NY80, 152NE472.

602-12 339 Ill 540, 171NE632.

602-13 Persons whose names and addresses are known or ascertainable by diligent inquiry cannot be made parties by adding as parties "all, whom it may concern." 339 Ill 540, 171NE632.

602-15½-New. In Alberta, in order that holder of certificate may obtain protection of "Land Titles Act" he must have been bona fide purchaser at time of sale and also at time of registration. [1925] 2DomLR717.

602-15⅓-New. Grantors, who made absolute conveyance of all their interest, are necessary parties to petition by their grantees to register deed. 329 Ill 482, 160NE759.

602-15¼-New. Amendment of opposition.-In Porto Rico court has discretion to allow amendment of opposition where it is not verified or is otherwise defective. 33PortoRico 1.

602-16 168Ga755, 149SE136; 255Mass 583, 152NE40; 256Mass343, 152NE617; 256Mass379, 152NE625; 266Mass208, 165 NE34. **Condemnation proceedings do not vest title in condemnor** till damages awarded by judgment are fully paid. 336 Ill 327, 168NE319. **Extent of possession.**-51Philippine302. **Present actual possession** must be shown. 35Porto Rico 689.

602-17 256Mass379, 152NE625.

602-18 Mass 170NE807.

602-19½-New. Presumed that duplicate certificate of title is at registry with owner's consent. 262Mass555, 160NE 532.

602-22 Evidence admissible.-35Porto Rico 118 (private documents); 35Porto Rico 689 (on behalf of respondent). **Evidence inadmissible.**-259Mass354, 156NE 676.

603-24 322 Ill 519, 153NE617. **Evidence held sufficient.**-204Cal 119, 266P 948; 256Mass379, 152NE625; 258Mass 226, 154NE579; 264Mass436, 163NE70; 44Philippine83; 46Philippine146; 50 Philippine879; 50Philippine971. **Evidence held insufficient.**-327 Ill 139, 158 NE37; 169Minn472, 211NW686 (owner of tax title cannot have new certificate without proof of fifteen years adverse possession); Sask [1929] 4DomLR519; 33PortoRico 108. **Registration of public lands in favor of occupant against government** can be obtained under Philippine statute only on showing that occupancy began prior to July 26, 1894 and was continuous thereafter except while occupant was excluded by war or force majeure. 50Philippine380. **Where neither of two sales to separate persons was ever recorded,** title prevails in one who first took material possession of property. 35PortoRico 786.

603-25 That which really defines piece of land is not area, calculated with more or less certainty, but boundaries therein laid down, as inclosing land and indicating its limits. 44Philippine83. **Document is ineffective as proof of title** in absence of evidence identifying land described therein with land in question. 51Philippine51.

603-26 Judgment is not vitiated by erroneous statement relative to area of parcel sought to be registered, where it appears that land is so described by boundaries as to put its identification beyond doubt. 44Philippine83.

603-26½-New. Proof of occupation within reasonable time before and after application is sufficient to prove occupation at time of application. 327 Ill 139, 158NE371.

603-26⅓-New. Master of titles cannot require production of order of bankruptcy court vesting land of debtor in purchase from trustee as condition of registration. Ont [1928] 4DomLR425.

603-27 Refusal to hear contestant who failed to appear within sixty days fixed by court but who asks to be heard before court has made final order is abuse of discretion. 33PortoRico 1. **Opposing parties in cadastral proceeding** should be given opportunity to be heard. 50Philippine708.

603-28 Under California statute providing that no lesser estate than fee simple shall be registered unless fee simple is first registered, grantee under deed reserving to grantor minerals and rights relating thereto may have his estate registered. 197Cal 263, 240P19.

603-35 See also 35PortoRico 689.

603-37 262Mass45, 159NE543.

603-37½-New. Judgment, execution, levy, and sale did not in any way affect title in question or constitute lien thereon, though failure to comply with Torrens Law. 317 Ill 11, 147NE412.

603-37⅓-New. Registration may be ordered subject to rights of parties as shown by accounting to be made under order of court. 329 Ill 482, 160NE759.

603-37¼-New. In Ontario master of titles must give to final order of foreclosure its full effect according to its tenor. 61 OntL540, [1928] 1DomLR 937.

603-37⅕-New. Judgment confirming boundary line established arbitrarily by petitioner's survey cannot stand. 89 CalA787, 265P394.

603-37⅙-New. Costs.-Defendants are not chargeable with any part of cost of incorrect survey caused to be made by petitioners where defendants had another survey made. 89CalA787, 265P 394.

603-37⅐-New. In Philippines land granted by government as homestead may be partitioned in cadastral proceeding. 48Philippine973.

603-37⅛-New. In Philippines, after lapse of one year, decree in land registration proceeding cannot be changed, altered, or modified. 50Philippine797.

603-37⅙-New. Trial court in Philippines is without jurisdiction to amend decree of registration after expiration of one year for purpose of including new owners in certificate. 51Philippine409.

603-37 1/10-New. Rule applies, although original owner consents. 51Philippine 409.

603-37 1/11-New. Petition to cancel registration for fraud held insufficient for failure to allege that defendants were not purchasers for value or that they had notice of forgeries prior to date of their deeds. 335 Ill 352, 167NE101, 68 ALR350.

603-37½-New. Qualification of requested charge in land registration proceedings held erroneous. 168Ga755, 149 SE136.

603-37 1/13-New. Finding of law as to

possession and title, though in reality finding of fact, held immaterial under circumstances. 168Ga755, 149SE136.

603-37¼-New. General order of registration imports finding of every primary and subsidiary fact necessary to that conclusion. Mass 170NE807.

603-37¼-New. Cadastral judgment ordering segregation not exceeding stated quantity of land covered with certain kinds of trees does not prevent subsequent registration of land. 51Philippine 324.

603-37¼-New. Judgment entered in cadastral case without jurisdiction is void ab initio. 50Philippine708.

603-37¼-New. That liens noted in certificate are fraudulent does not affect rule. 51Philippine409.

603-37¼-New. Under opposition in cadastral proceeding claiming only undefined portion of lot, court is without jurisdiction to make award of whole lot. 50Philippine708.

603-37¼-New. Court, in cadastral proceeding, cannot decree lot to one making no claim to it.-50Philippine708.

603-37¼-New. Fraud authorizing setting aside of decree of registration under Philippine statute must be actual fraud proved as to time of, or prior to, judicial action. 50Philippine708.

603-37¼-New. Conclusiveness of finding of fact in registration proceedings. Ill 173NE477.

603-37¼-New. Right to cancellation of record on motion. 230AppDiv679, 245 NYS473.

603-38 Stipulation for Torrens title in connection with purchase of land is not satisfied by furnishing certificate issued upon judgment which has not become final, time for appeal not having expired. 45Philippine162. **In Hawaii.**-29Hawaii232. **In Philippines.**-44Philippine74; 45Philippine94. **Time to appeal.**-48Philippine227. **Appeal dismissed** because not properly taken or perfected. 35PortoRico 242. **No appeal lies** from interlocutory order in dominion title proceedings. 35PortoRico 584. **Right to appeal must appear** before appeal will be entertained. 35PortoRico 242.

604-39 204Cal 119, 266P948 (objection to order of reference); 167Ga690, 146SE 458 (where objector's exceptions to report of examiner, including exception to ruling on demurrer and exceptions pendente lite to judgment of court, were dismissed, and separate judgment overruling demurrer rendered, to which objector did not except, objector was concluded by judgment overruling demurrer); 35PortoRico 118.

604-40 Findings of fact of land court are final unless unsupported by evidence. 255Mass583, 152NE40. **Findings of fact** by land court are binding on parties on appeal from its judgment. Mass 169 NE664. **Choice of evidence to rely on** has been held for judge of land court to decide. Mass 169NE509. **Weight to be given to fact** that certain terms of deed would be contravened by location of line of adjoining land has been held for judge of land court. Mass 169NE 509. **Where record narrates part of evidence but does not purport to contain all that is material,** supreme judicial court cannot say that decision is not justified. Mass 169NE509.

604-41 256Mass343, 152NE617; Mass 169NE509. **Engineer's theories held to present no legal question.**-262Mass527, 160NE303. **Location of lines held question of fact.**-262Mass527, 160NE303. **Where no error is shown,** exceptions must be overruled. 262Mass527, 160NE 303. **No question of law raised by appeal.**-Mass 171NE82(1st case). **Finding containing no error of law** cannot be disturbed. Mass 173NE508.

604-44 264Mass436, 163NE70.

605-46 261F(2d)623. **Effect of withdrawal of opposition** prior to decree see 45Philippine94.

605-46½-New. In absence of evidence, findings of judge on questions of fact in proceedings for registration of land with appurtenant right of way across other land must stand on appeal. 266 Mass132, 164NE822.

605-46½-New. In proceedings to register title to land, findings of judge of land court on evidence not reported are final. 266Mass208, 165NE34.

605-46¼-New. Appellate court will assume that trial judge found facts warranting judgment denying motion for dismissal, if findings were necessary and in absence of evidence or findings in support of grounds of motion. 197NC568, 150SE30.

605-46½-New. Philippine statute relative to stay of execution applies to decrees of confirmation of title. 51Philippine805.

605-46½-New. In British Columbia conveyance by mortgagee under power of sale may be registered, although there is judgment registered against land subsequent to mortgage and mortgagee took quitclaim deed in satisfaction of debt, where it does not appear that mortgagee intended to release charge in favor of judgment. [1929] 3DomLR723.

605-47 There is strong presumption in favor of regularity or validity of Torrens titles, they being based on judicial decrees. 44Philippine343. **Court without jurisdiction to reopen case** and reinstate opposition after final decree. 45Philippine94. **Decree held res adjudicata** in subsequent proceedings involving same land and parties reversed. 256Mass340, 152NE355. **Amendment of certificate.**-48Philippine442. **Possessory information in Philippines.**-50Philippine879; 51 Philippine51. **Registrar cannot question findings of trial court** when dominion title judgment is presented. 34Porto Rico 335.

605-48 Proceedings to obtain possession.-48Philippine298.

605-49 Caveat under Alberta Land Titles Act by claimant of interest in mortgage by virtue of payment under agreement with owner thereof held sufficient. Alta [1930] 3DomLR304. **In Porto Rico.**-34PortoRico 29. **Recording of deed properly refused.**-34PortoRico 283 (explanatory deed seeking to increase area upon insufficient statement). **Authority of registrar.**-35PortoRico 737 (may decide whether court had jurisdiction of subject matter and as to nature and effect of orders). **Cancellation of mortgage.**-35PortoRico 564. **Deeds held eligible to record.**-35PortoRico 526 (conveying excess or surplus disclosed by survey of parcel of land). **Partition held eligible to record.**-35PortoRico 676. **Refusal of registrar to record.**-35Porto Rico 676.

605-50 335 Ill 352, 167NE101, 68ALR 350. **Dominion title is not recordable when possessory title is recorded** in name of third person, though such person was summoned as owner in dominion title proceeding not mentioning such record of possession. 34PortoRico 335.

605-51 261Mass47, 158NE321. **Character or nature of lien given** in original decree of registration is accepted. 46 Philippine535.

605-52 218NYS128 (in absence of fraud). **Owners of land** by registration of legal title have constructive possession. TexCommnA 294SW197. **Prescription and adverse possession** do not run against registered land under Act (Gen. L. c 185) § 53. 261Mass47, 158NE 321. **Bona fide purchasers** from one holding registered title are not required to inquire prior to date of their grantor's certificate. 335 Ill 352, 167NE101, 68 ALR350. **Registration of bona fide purchaser,** under Torrens Law, will be upheld, even though his vendor's registration was procured by forgery. 335 Ill 352, 167NE101, 68ALR350. **In Philippine Islands.**-50Philippine791.

605-53 261Mass47, 158NE321; 178Minn 55, 226NW201; 44Philippine261; 51 Philippine15. See also Alta [1928] 1 DomLR736. **In Philippines.**-44Philippine343. **Till things requiring registration are done,** executions and judgments are only contractual. 91CalA278, 267P134. **Unregistered deeds or contracts** do not affect Torrens titles nor create any interest in land. 178Minn55, 226NW201. **Cancellation of entries.**-35 PortoRico 398. **Cancellation of liens.**-34PortoRico 567 (at solicitation of grantor pursuant to conveyance). **Liberation from liens.**-34PortoRico 706. **Curable defects in instruments presented for registry.**-34PortoRico602.

605-53½-New. Where registration records show easement of way appurtenant to other land, easement passes to grantee in certificate of title to such dominant estate, though not mentioned in certificate. 261Mass47, 158NE321.

605-54 35PortoRico 357. See also 44 Philippine343. **Actions for damages.**-48 Philippine256. **Grounds for reopening case.**-48Philippine511. **Proceedings for cancellation.**-48Philippine632.

605-55 46Philippine814. See also 45 Philippine94. **In Philippines.**-44Philippine343. **Proceedings held not action to reopen decree** under Land Registration Act, § 38, but suit in personam against holder to compel return or retransfer of property. 44Philippine343. **At end of thirty days allowed by statute,** regularity of proceeding registering title cannot be attacked. 128Misc349, 218 NYS128.

605-56 99CalA74, 277P883; 45Philippine252; 46Philippine271; 50Philippine 1009 (where petition for review is filed within one year). **No reasons of public policy demand that person guilty of fraud** or breach of trust be permitted to use his certificate of title as shield against consequences of his own wrong. 44Philippine343. **In Philippines.**-45 Philippine252. **Suit to set aside registration for fraud.**-83CalA445, 257P117. **Limitation of action to cancel registration for fraud** see 83CalA445, 257P117. **Presumptions.**-48Philippine570.

605-56½-New. Fraud as used in Torrens Act is not limited to any particular kind of fraud but covers all kinds of fraud, including forgery. 335 Ill 352, 167NE101, 68ALR350.

605-57 207Cal 373, 278P863.

605-58 34PortoRico 395 (construing Mortgage Law as to requirement of cautionary notices and attachment). **Cancellation of mortgage.**-34PortoRico 749. **Documents held not registrable.**-Alta [1930] 2DomLR973. **In Philippines.**-50Philippine140. **Under Mortgage Law in Porto Rico.**-34PortoRico 258; 34PortoRico 170. **In Porto Rico.**-32PortoRico 731. **Lis pendens in Porto Rico.**-32PortoRico 32.

605-59 174Minn22, 218NW246. **Compiling cancellation of fraudulent registration** and execution of conveyance to representative of injured party see 44 Philippine343.

605-59½-New. Conveyances under mortgage law in Porto Rico.-Where it is desired to make it appear that parcel of land said to have been segregated from property subject to annotation of complaint was not affected by outcome of suit because not segregated from such property but from different property, error can be corrected only by unanimous consent of all interested parties and of registrar or by judicial order. 33PortoRico 26.

605-59½-New. Matters constituting ground for refusing to record. 33Porto Rico 515 (deed conveying property on forced sale on foreclosure of mortgage).

605-59¼-New. Matters constituting curable defects. 33PortoRico 515.

605-59½-New. Matters constituting ground for refusal to record. 33Porto Rico 737.

605-59½-New. Matters not constituting ground for refusal to record. 33 PortoRico 604.

606-60 44Philippine261; 51Philippine 417. **Private note of tax redemption not authenticated** cannot be made basis for transfer property in registry. 35Porto Rico 242.

606-61 44Philippine343. **Claimant who has failed through negligence to take due precautions to avoid loss** cannot recover damages from assurance fund. 50Philippine140. **Damages resulting from breach of trust by registered owner.**-Where owners of adjoining lands cause both tracts to be registered in name of one under agreement that, upon obtaining decree, he will convey to other portion belonging to him, but registered owner conveys whole to bona fide purchaser,

defrauded owner cannot recover from assurance fund. 50**Philippine**193. **Where owner's negligence** causes or contributes to loss, damages from assurance fund are not recoverable. 50**Philippine**16 (one failing to send registration fees and duplicate certificate of title held not entitled to recover for failure to register mortgage deed).

606-62 See also **Alta** [1930] 3**DomLR** 752.

606-62½-New. Under Illinois statute any person, aggrieved by act or refusal to act of registrar in matter pertaining to first registration of land, may petition the circuit court for relief. 324 **Ill** 584, 155**NE**758.

606-62½-New. Such statute only authorizes determination as to whether registrar has performed duties as authorized by Land Titles Act. 324 **Ill** 584, 155**NE**758.

606-62¼-New. And the circuit court cannot review judgments entered in separate and distinct proceedings. 324 **Ill** 584, 155**NE**758.

606-62½-New. A proceeding against registrar under this act is purely statutory and not substitute for action of ejectment or superseding other actions at law or in equity. 324 **Ill** 584, 155**NE** 758.

606-62¼-New. Under this statute a property owner cannot require removal from certificate of title of a memorial concerning assessment warrant on ground paving was not beneficial. 324 **Ill** 584, 155**NE**758.

606-62½-New. Mortgage of registered land is mere contract between parties with no effect on title until registration. 171**Minn**182, 213**NW**736.

606-62⅛-New. Purchaser of automobile could claim possession although no certificate of registration and ownership had been issued. 200**Cal** 419, 253**P**715, 50**ALR**1297.

606-62½-New. Purchaser for value will take property free from builder's lien for improvements where certificate shows holder to own land and improvements. 46**Philippine**362.

606-62½-New. Decree declaring equitable mortgage on land registered held conclusive. 46**Philippine**566.

606-62½-New. Purchaser who records is entitled to priority over unrecorded agreement where he shows he paid valuable consideration and had no notice of prior unregistered agreement. **NS** [1927] 2**DomLR**475.

606-62½-New. Under some statutes property may be withdrawn from registration. 128**Misc**10, 217**NYS**215.

606-62½-New. The repeal of such right to withdraw by an amendatory statute has been held not retroactive. 128**Misc**10, 217**NYS**215.

606-62½-New. Notation of release of registered property from mortgage lien made on certificate of title in registration book is not a "notation of transfer, lease or memorial," within statute, precluding withdrawal from registration. 128**Misc**10, 217**NYS**215.

606-62½-New. Finding of trial judge in proceeding to register title to land on question whether church was incorporated before 1828 held final. 256**Mass**550, 152**NE**921.

606-62½-New. Decree of district court is binding and conclusive and is not subject to collateral attack. 26**F(2d)**623.

606-62½-New. Married woman, who was of age at time of registration of land under Torrens Act and was served with process, has been held bound by court's decree in registration proceedings. 26 **F(2d)**623.

606-62½-New. Holders of certificate of title under Torrens Act intrusting certificate to another forging conveyance to himself, cannot recover against subsequent purchaser in good faith. 281**US** 457, 50**SCt**382, 74**Led**962.

606-62½-New. Lien claimant who recorded lien, but did not register it with registrar as required by act, is not entitled to lien. **Cal**A 286**P**504.

606-62½-New. Purchasers of land bought under state Torrens Act have no constitutional right to buy land free from restrictions inposed by act. 281 **US**457, 50**SCt**382, 74**Led**962.

606-62½-New. Purchaser has right to rely upon vendor's registered title. 338 **Ill** 620, 170**NE**777.

606-62½-New. Where vendor refused to convey realty, purchaser can protect his rights by filing affidavit with register of titles setting forth his interest. 338 **Ill** 620, 170**NE**777.

606-62½-New. Rights acquired under judgment of attachment creditor, where proceedings are duly registered, are superior to prior unregistered contract and deed. 178**Minn**55, 226**NW**201.

606-62½-New. Where same land has been registered in name of different persons, title should remain in name of person securing first registration. 50 **Philippine**791.

606-62½-New. Where court had no jurisdiction to order registration, certificate of title issued in pursuance of such order is void. 50**Philippine**975.

606-62½-New. Court has no jurisdiction to order reregistration in cadastral proceeding of land within military reservation after expiration of time fixed by statute for presentation of private claims to such lands. 50**Philippine**975.

606-62½-New. In Philippines plaintiff in action for annulment of certificate of registration on ground of fraud in documents introduced in proceedings has burden of proving fraud. 51**Philippine** 228.

606-62½-New. Decree of registration in Philippines will not be set aside unless application has been made within year and innocent purchaser has not become owner. 51**Philippine**606.

606-62½-New. In Philippines owner deprived of title by decree of registration through fraud or other wrong may recover damages against registered owner. 51**Philippine**606.

606-62½-New. Memorandum of power of attorney indorsed on back of original certificate of title is not admissible as evidence of contents of power of attorney. 51**Philippine**317.

606-62½-New. Certificate of title may be amended in case of extinguishment or lapse of registered real rights. 51 **Philippine**862 (annulment of guardian's lease).

606-62½-New. Possessory title may be recorded and contradictory record canceled where no opposition is made after summons and opportunity to be heard. 35**PortoRico** 39.

606-62½-New. Under Mortgage Law in Porto Rico failure of instrument to state measurement of one side is not curable defect where area is stated. 35 **PortoRico** 56.

606-62½-New. Cancellation of record. Effect on one not purchaser pendente lite nor party to proceeding. 35**PortoRico** 96.

606-62½-New. In Ontario, where registered owner of land, after selling it to one whose transfer is not registered who in turn has sold it to another whose transfer is not registered, sells to a transferee who procures a registered title, he is liable for breach of implied covenant of quiet enjoyment to purchaser from original vendee. **Ont** [1929] 3 **DomLR**790.

606-62½-New. Cancellation of record.-Whether or not record sought to be canceled falls within provision of statute is province of courts and not of registrars 35**PortoRico** 96.

606-62½-New. Statutes as to conclusiveness of decree registering title is inapplicable to adverse claimant not made party to or notified of proceedings. 339 **Ill** 540, 171**NE**632.

606-62½-New. Decree in registration proceedings estops party as regards location of line, but does not compel acceptance of title beyond such line. 137 **Misc**141, 242**NYS**128.

606-67 Bills of exceptions are within rule. **TexCivA** 275**SW**849.

606-71 Proof of existence and due execution of document must first be made, in order to prove existence of lost record by secondary evidence. 219**MoA**45, 275 **SW**994.

606-73½-New. Laches cannot bar right to registration. 216**Ala**411, 113**S**500.

606-74 Proceedings to supply lost bill of exceptions must be instituted in trial court and not in appellate court. **Tex CivA** 275**SW**849.

606-75 164**Ga**242, 138**SE**72; 130**Kan**53, 285**P**554 (power of probate court); **OklCr** 277**P**950(2dcase). **Statutes relative to restoration of lost or destroyed records** are merely cumulative and do not impair power otherwise existing. **OklCr** 277**P**950(2dcase).

607-77 164**Ga**242, 138**SE**72; 130**Kan**53, 285**P**554 (evidence of contents of will probated in 1920 held properly received by probate court in case instituted in 1927).

607-79 178**Ark**443, 12**SW(2d)**881.

607-88 49**Philippine**487.

608-89 13**PaDist&Co** 731.

608-92 164**Ga**242, 138**SE**72.

608-93 164**Ga**242, 138**SE**72.

608-95 164**Ga**242, 138**SE**72.

609-15 216**Ala**411, 113**S**500.

609-20 216**Ala**411, 113**S**500.

609-21 219**MoA**45, 275**SW**994; 219 **MoA**45, 275**SW**994.

610-30 Order of bishop for reconstruction of parochial archives destroyed by fire presumed regular. 32**PortoRico** 392.

610-38½-New. Findings of fact by land court are final. 253**Mass**586, 149 **NE**620.

610-38½-New. Findings of fact by land court are final and will not be reviewed on appeal. 257**Mass**483, 154**NE** 79.

610-39 164**Ga**242, 138**SE**72. **Rule applied to church records** restored by order of bishop. 32**PortoRico** 392.

611-44½-New. Legislative intent being to change law theretofore well settled, action may be pending in court before actual entry on court's docket where writ or complaint is lost, misiaid, or destroyed. 99**Vt**50, 130**A**756.

611-44½-New. Failure to return process as law directs vitiates all previous acts thereunder, and action cannot be said to be pending under statute of lost writs. 99**Vt**50, 130**A**756.

613-80 217**Ky**534, 29**CSW**310, 312 [quot Cyc].

613-84 Commissioner's deed held sufficient to sustain title after destruction of judicial records of proceedings. 217 **Ky**15, 288**SW**758.

614-95 Decree under McEnerney Act is binding on one claiming to own equitable interest as well as those claiming under legal title. **Cal** 283**P**813. Decree, under such act, is conclusive as against wife's equitable claim, where validity of decree is not attacked for fraud or mistake. **Cal** 283**P**813.

614-96 Cal 285**P**318 (effect of decree).

614-98 97**CalA**703, 276**P**118.

614-6½-New. Statutory conclusions of decree are not violated by lessee's attempt to show title to leased premises was in state, in proof of lessor's breach of warranty. 198**Cal** 560, 246**P**322.

614-8 But see 86**Mont**276, 283**P**213.

614-9 44 **Ida**423, 258**P**169.

614-10 But see 44 **Ida**423, 258**P**169; 47 **Ida**589, 277**P**548. **Automobiles.**-83 **Ind** A447, 144**NE**93. **Record cannot validate invalid instrument.**-**Mass** 169**NE**803.

615-20 205**Cal** 46, 269**P**660; 331 **Ill** 11, 162**NE**144; 221**MoA**31, 297**SW**724; 151 **Va**252, 144**SE**417. See also 127**Me**172, 142**A**580; 149**Wash**264, 270**P**806. But see 149**Miss**296, 115**S**339. **Power of attorney not describing particular real estate** so as to enable clerk properly to index it is not constructive notice of limitations on power of agent to contract for repairs. 118 **Okl** 147, 247**P**374. **Conversely,** instrument not entitled to record though actually recorded does not impart any constructive notice whatever. 75**Mont**416, 244**P**485. **Rule is otherwise** where instrument is not recordable. 217**Ky**214, 289**SW**213.

615-21½-New. Sections of statute must be considered together which relate to recording deeds, mortgages, and other instruments. 219**Ky**418, 293**SW**986.

615-21½-New. Where two persons advance conflicting claims to property under deeds from the same grantor, priority of registration decides. **Can** [1927] 2**DomLR**1146.

615-21¼-New. Construction of recording laws.-Recording laws should not, if

possible, be construed so as to produce fraud. 40Wyo 226, 278P76.

615-21½-New. Altered record is regarded as it stood before alteration. 47 Ida589, 277P548.

616-27 147Miss226, 113S547. **Concealment of blank form** held not within statute. Miss 113S547.

616-32½-New. Judgment of conviction of offense should not, in addition to imposing punishment of fine and imprisonment, declare such disqualification. 26F(2d)847 [certiorari den 278US625, 49SCt27(1stcase), 73Led545].

616-34 135Wash346, 237P994 (mutilation or destruction of carbon copy duplicate tax receipts held offense).

616-35 Information alleging pay roll is public record held sufficient. 159La 199, 105S288 (no need to allege it was public record within language of statute).

617-42½-New. It is not necessary to allege defendant is public officer in information for refusing elector right to examine records. 159La199, 105S288 (allegation that defendant had custody and control of records being sufficient).

617-42¼-New. Information need not allege board was created by statute or constitution, in prosecution for refusing elector to examine pay roll of such board. 159La199, 105S288.

617-42¼-New. Information in prosecution for refusing right to examine records must allege demand for examination was made during business hours. 159La199, 105S288.

617-42½-New. This allegation may be waived. 159La199, 105S288.

617-44 196NC100, 144SE555.

617-44½-New. To sustain conviction for secretion of paper of public office, state must prove secretion of effective paper belonging to, or kept in, such office for public purpose. 147Miss226, 113S547.

RECOUPMENT, SET-OFF, AND COUNTER-CLAIM

623-1 99Fla410, 128S831; 220MoA623, 288SW1000; 136SC111, 134SE275, 283 [citCyc]; 136SC179, 134SE285, 291 [cit Cyc]; 153Tenn260, 283SW448, 449 [cit Cyc]. 46ALR389; Wash 292P406. **Other definitions.**-147Va758, 133SE788. **Recoupment may be applied in proceedings in equity.**-Iowa 229NW716.

624-2 Recoupment, unknown at common law, is creature of statute. 190NC 638, 130SE743.

624-3 214Ala351, 108S16; 99NJEq806, 134A299; 136SC111, 134SE275, 283 [cit Cyc]; 136SC179, 134SE285, 291 [cit Cyc].

624-4 220MoA623, 288SW1000; 135SC 131, 133SE208, 210 [quotCyc].

624-5 135SC131, 133SE208, 210 [quot Cyc].

624-6 135SC131, 133SE208, 210 [quot Cyc].

624-7 135SC131, 133SE208, 210 [quot Cyc].

625-8 135SC131, 133SE208, 210 [quot Cyc].

625-9 135SC131, 133SE208, 210 [quot Cyc].

625-10 135SC131, 133SE208, 210 [quot Cyc].

625-11 179Ark43, 14SW(2d)233; 135 SC131, 133SE208, 210 [quotCyc].

625-12 135SC131, 133SE208, 210 [quot Cyc].

625-13 190NC638, 130SE743. See 147 Va758, 133SE788.

625-14 214Ala351, 108S16; 193NC470, 137SE320; 194NC368, 139SE596, 55 ALR819; 124 Or276, 261P432; TexCivA 5SW(2d)793, 795 [citCyc]. **Other definitions.**-Black L. D. [quot 190NC737, 130SE707]; 224Ky386, 6SW(2d)458; 98NJEq323, 129A145; 153Tenn260, 283 SW448, 46ALR389; 147Va758, 133SE 788. **Idea of set-off is not same as payment.**-190NC737, 130SE707. **Defendant must establish his right** as upon distinct action and assert claim for which he could not bring independent action at law. 224 IllA421. **Set-off implies demands** between same persons in same capacity at same time. Nebr 231NW 513.

625-15 194NC368, 139SE596, 55ALR 819; 124 Or276, 261P432; 118Tex149, 12SW(2d)550.

625-17 224 IllA421; 82NH396, 134A 347.

625-17½-New. Notice of set-off fills same office as plea, but requires no replication. 224 IllA421.

625-17⅛-New. Bill of particulars accompanying notice of set-off is part of record. 224 IllA421.

625-17¼-New. Notice of set-off must state nature of defendant's claim. 224 IllA421.

625-17½-New. Set-off is in nature of payment or credit when debts are mutual. 190NC595, 130SE328.

626-18 37F(2d)715; 42 Ida295, 245P 398; 247 IllA469; 128Me307, 147A227 (2dcase); 220MoA623, 288SW1000; 190 NC638, 130SE743; 135SC131, 133SE 208. **In North Carolina.**-190NC595, 130 SE328.

627-26 42 Ida295, 245P398 [quotCyc].

628-27 28F(2d)587; 42 Ida295, 245P 398 [quotCyc]; 82NH396, 134A347; 105NJL308, 144A312(2dcase).

629-32 93Fla611, 112S768, 780 [cit Cyc]; Ida 293P327; 220MoA623, 288 SW1000. **Statutes on set-off and counterclaim construed together.**-220MoA 623, 288SW1000. **Where no conditions are shown bringing into force equity powers of court,** statutory provisions governing set-off must be liberally complied with. 128 Okl 283, 259P260.

629-33½-New. Set-off must be availed of in manner provided by statute. 48 RI 478, 139A302.

629-33⅛-New. Statute of set-off must be read in connection with broader provisions of Practice Act. 108Conn497, 144A34.

629-34 93Fla611, 112S768, 780 [cit Cyc]; 220MoA623, 288SW1000; 137 Misc14, 242NYS189 (statute liberally construed). **Other definitions.**-202 Iowa 493, 210NW564; 224Ky386, 6SW(2d) 458; 20 OhA464, 152NE301 (defined by statute); 36Wyo 221, 254P134. **Rules of counterclaim statute are mandatory.** 137Misc67, 241NYS467.

630-35 220MoA623, 288SW1000; 99 NJEq806, 134A299; 190NC638, 130SE 743; 118Tex149, 12SW(2d)550.

630-36 190NC638, 130SE743.

631-37 37F(2d)635; 93Fla611, 112S 768, 781 [citCyc].

631-38 145Wash59, 258P1028.

631-40 136SC111, 134SE275; 136SC 179, 134SE285.

631-41 50ND322, 195NW564.

631-41½-New. Counterclaim which sets forth independent cause of action is open to same attack as if brought as separate action. 103Conn36, 130A162.

632-44 1LaA652. See also 9LaA316, 119S468(2dcase).

632-48 33PortoRico 144 (Civ. Code §§ 1163, 1164 applied).

633-55 167La183, 118S881.

633-57 166La497, 117S568.

633-58 42 Ida295, 245P398 [citCyc]; 22 OhA482, 154NE345.

633-59 Iowa 229NW716; 126Me59, 136 A284, 50ALR526; 256Mass246, 152NE 379; MoA 19SW(2d)19; 194NC368, 139 SE596, 55ALR819 (dictum); 22 OhA482, 154NE345; 37 OklACR588; 294Pa286, 144A135.

634-65 214Ala582, 108S450.

635-69 36F(2d)646 (set-off doctrine is more flexible in equity than in law). **In Maine.**-Contra 29F(2d)331.

636-72 20F(2d)74.

636-73 20F(2d)74; MoA 19SW(2d)19.

636-74 175Ark633, 300SW408; 194NC 368, 139SE596, 55ALR819.

637-75 In action by bank on note of depositor, liability of bank for misapplication of proceeds of lumber sold to its officers for its benefit may be offset in equity. 152Miss191, 119S173.

637-76 20F(2d)799; 58 OntL241, [1926] 1DomLR509.

638-77 20F(2d)799.

638-79½-New. Fraud constitutes ground for allowing equitable set-off. 37 OklACR588.

638-81⅛-New. In equity, set-off does not have to meet requirements of counterclaim under code. 136SC111, 134SE 275; 136SC179, 134SE285.

638-82 30F(2d)178; 108Conn497, 144A 34; 241NY418, 150NE501; 241NY418, 150NE501, 43ALR1320; 219AppDiv394, 219NYS727; 136SC111, 134SE275; 136 SC179, 134SE285; 58 OntL241, [1926] 1 DomLR509. But see 18F(2d)724. **Matured claim** may be set off against insolvent by creditor though claim against latter has not matured. 241NY418, 150 NE501, 43ALR1320. **Right of set-off not defeated** by insolvency before creditor's claim matured. 241NY418, 150NE501, 43ALR1320. **Rule of legal set-off applicable** while business is a going concern. 241NY418, 150NE501, 43ALR1320. **Rule that set-off against insolvent will not be allowed unless claim was due when insolvency first existed** is not applicable where it would result in preference or direct advantage to debtor. 241NY 418, 150NE501, 43ALR1320. **Date of insolvency in fact is not proper date** to consider in determining whether right of set-off exists. 241NY418, 150NE501, 43ALR1320.

638-82½-New. , providing claim of party asserting right of set-off has matured. 241NY418, 150NE501.

638-82⅛-New. It is immaterial that claim against party asserting set-off has not matured. 241NY418, 150NE501.

638-82¼-New. That seller was insolvent in fact before buyer's claim matured does not defeat buyer's right to set-off where, at time seller's assignor asserted claim, seller was going concern. 241NY418, 150NE501.

638-82½-New. Date of insolvency in fact is not time to consider in determining whether right to set-off exists. 241 NY418, 150NE501.

638-82⅛-New. While business is a going one, not in course of litigation, rule of legal set-off is applied. 241NY418, 150NE501.

640-83 108Conn497, 144A34.

640-84½-New. Court, in permitting redemption in conditional sale, may permit set-off in reduction of debt without regard to solvency of parties. 214Ala 582, 108S450.

641-85 149Miss892, 116S299, 300 [cit Cyc]. See also 147Va758, 133SE788. But see 18F(2d)724.

641-86 256Mass246, 152NE379.

642-93 But see 50ND966, 198NW550.

643-3 135SC131, 133SE208.

643-9 99Fla410, 128S831; 135SC131, 133SE208.

643-10 135SC131, 133SE208.

643-11 135SC131, 133SE208.

644-22 281US14, 50SCt200, 74Led670; 129Misc348, 221NYS486; 129Misc350, 221NYS492; 127 Or578, 273P334.

646-25 281US14, 50SCt200, 74Led670; 13PaDist&Co 215.

647-36 102NJL268, 132A247.

648-49 256Mass246, 152NE379.

649-51 Iowa 233NW108; 124 Or276, 261P432 (dictum).

650-58 124 Or276, 261P432 (dictum).

650-61 That contract required payment to be made before delivery for services in throwing silk will not prevent counterclaim for damages for throwing in unworkmanlike manner and returning other silk. NJSup 145A459(1stcase).

651-62 32F(2d)349.

652-65 Filing of counterclaim is not compulsory but only permissive under rules of court of chancery. 105NJL308, 144A312(2dcase).

652-69 In Florida.-99Fla410, 128S831. **In ejectment action,** counterclaim for deceit and fraud in inception of contract not allowed. 29Ariz156, 240P275. **Counterclaim not authorized** in unlawful detainer suit. 68Utah398, 250P982. **In action to set aside fraudulent conveyance,** fraudulent grantee, against whom no claim for personal judgment is made, may not set up counterclaim for money due to such grantee from judgment creditor of grantor. 202 Iowa493, 210 NW564. **In action for replevin,** conditional buyer held entitled to counterclaim for false representation amounting to breach of warranty. 129Misc348, 221 NYS486. **Set-off held inadmissible.**-166 Ga453, 143SE902; SC 141SE156.

653-72½-New. Where various counties contracted for payment of fees to attorney, to be paid out of funds recovered, such counties could not recoup amount payable to attorney against

county not party to contract. 205Cal 111, 270P201.

653–73 214Ala351, 108S16.

653–74 125 Okl 150, 256P910; 126 Okl 283, 259P260. See 147Va758, 133SE788.

654–80 153Tenn260, 283SW448, 46ALR 389; 147Va758, 133SE788.

655–84 But see 100WVa141, 130SE132.

656–89 307Mo 417, 270SW691.

656–92 190NC638, 130SE743 (no counterclaim valid against demand for taxes); 8PaDist&Co 481, 482, 483 [cit& quotCyc].

656–93 8PaDist&Co 481, 483 [quotCyc].

657–98 214Ala351, 352, 108S16 [citCyc].

658–5 117 Okl 77, 244P741; 126 Okl 283, 259P260.

658–11 5PaDist&Co 4; 10PaDist&Co 500.

659–12 178Ark845, 12SW(2d)779. But see 39GaA144, 146SE498. **Defendant in conversion** may plead as set-off action for recovery of money under statutes. 130Kan568, 287P251.

659–13 11PaDist&Co 370.

660–18 33PortoRico 144. **In Oregon.**–127 Or578, 273P334.

660–20 129Misc350, 221NYS492.

660–21 But see 55ND227, 212NW841.

661–22 224AppDiv527, 231NYS526.

662–27 5PaDist&Co 4.

662–30 54ND153, 209NW234, 236 [cit Cyc].

662–32 54ND153, 209NW234, 236 [cit Cyc]; SD 226NW341.

663–38 MoA 19SW(2d)19.

663–39½–New. Claim for damages arising out of broker's negligence in employing contractor is available by counterclaim in broker's action for commission under Civil Practice Act. 218App Div90, 218NYS241.

664–41 **Applied in:** 29PortoRico 803.

664–47 161La38, 108S117.

665–48 **Where defendant makes total denial of plaintiff's cause of action,** set-off is not available. 143Miss146, 108 S424, 47ALR45.

665–53 219Ala238, 121S722.

666–57 220Ala6, 123S271 (statute held not to enlarge class of claims that may be pleaded in recoupment).

666–59 **Where two banks agree to share losses on certain notes,** in suit between banks, one bank cannot set off amount paid by it to another on account of maker of notes. TexCivA 283SW1114.

666–60½–New. In determining right of defendant to defense of recoupment for matter arising out of plaintiff's demand, entire transaction must be considered. 153Tenn260, 283SW448, 46ALR389.

666–60½–New. **Claims similar in nature with plaintiff's demand** may be set up by defendant. 36GaA729, 137SE904.

666–60¼–New. To be available as counterclaim, matters set up must in some way qualify or defeat judgment to which plaintiff is otherwise entitled. 200Cal 222, 252P593.

666–61 20F(2d)670; 203Cal 190, 263P 530; IndA 169NE537 (maker of note cannot set off claims arising out of same transaction but prior to execution of notes); 203 Iowa565, 213NW212; Nebr 231NW513; Nebr 231NW758; 193NC 470, 137SE320; 37 OklACR588. **Appellant successful on appeal** in suit by United States cannot set off costs of appeal against costs due in trial court. 20F(2d)670. **By breach of contract,** parol trust cannot be converted to debt to be available as set-off. 14F(2d)116.

668–62 145Wash59, 258P1028.

668–63 227AppDiv516, 238NYS222; 55 ND227, 212NW841.

669–65 163La257, 111S697; 12LaA169, 125S162(2dcase). **Corporations sued for balance of purchase price** on contract made by another to which it was not party cannot recover amount paid by such other. 163La439, 112S38.

669–68 322 Ill 133, 152NE572; 254 IllA 514.

670–72 But see 119Kan756, 241P117.

670–75 Nebr 231NW758; 40 OklACR 690 [reh pending].

670–76 MoA 286SW405; 73Mont456, 236P1093; 192NC405, 135SE39 (Consol. St. § 531). **Abrogated contract** is no basis for counterclaim. 73Mont456, 236 P1093.

671–81 222MoA738, 7SW(2d)441.

673–92 37F(2d)564 (right of set-off depends on facts that debts have mutually matured); 288Pa472, 136A789 (insolvency).

673–93 MoA 22SW(2d)61; 74Mont245, 240P376; 192NC405, 135SE39.

674–5 133SC431, 131SE598, 602 [cit Cyc].

674–8½–New. Rule in insolvency should not be applied where it would result in preference or advantage to debtor rather than equality among creditors. 241NY 418, 150NE501.

675–15 250Mich311, 230NW184.

675–26 133Misc149, 231NYS640.

676–28 34GaA355, 129SE557; 37GaA 792, 141SE925.

676–29 34GaA355, 129SE557.

676–31 221Ala167, 127S907; 22AlaA 305, 115S147, 149 [citCyc]; 36GaA20, 135SE106; 121Me413, 117A575; 247NY 245, 160NE359; WVa 153SE147.

677–32 157Md652, 147A790, 65ALR 1285; Mass 168NE781 (defendant allowed to prove damages though plaintiff's breach occurred after defendant's liability had attached).

678–35 157Md652, 147A790, 65ALR1285 (though nonperformance due to defendant's breach).

678–38 220Ala6, 123S271; 36GaA20, 135SE106; 126Me59, 136A284, 50ALR 526; Mass 171NE453; 101NJEq430, 139 A327; WVa 153SE147.

679–41 153Tenn260, 283SW448, 46ALR 389.

680–48 222Ky320, 300SW872.

680–49 164Ga54, 137SE770; 38GaA570, 144SE358; 233 IllA190; 240 IllA216; 237Mich152, 211NW41; 112 Okl 119, 240 P115; 294Pa286, 144A135; TexCivA 13 SW(2d)467. **Action sounding in damages merely** is not subject to set-off. 221Ala167, 127S907.

681–50 2CalA665, 84P263; 29F(2d) 476; 178Ark37, 9SW(2d)781; 125 Okl 150, 256P910; TexCommnA 13SW(2d) 350; TexCivA 289SW106; 147Wash570, 266P726.

682–51 But see 126Me59, 136A284, 50 ALR526. **Purchaser of equity of redemption is entitled to set-off against mortgage indebtedness** debt due him by mortgagee on unsecured note. 190NC 595, 130SE328. **There is no practical distinction between legal and equitable set-off** when both law and equity are administered in same court. 190NC595, 130SE328. **Claim held to grow out of same transaction.**–149Miss892, 116S299.

682–51½–New. Involuntary discharge of deceased husband's debt, for which bank was held secondarily liable, can be set off against suit by heirs and widow for community deposit therein. TexCivA 283SW283.

682–52 216AppDiv514, 215NYS581; 127Misc676, 215NYS722.

682–53 93Fla611, 112S768; 224Ky271, 6SW(2d)241; 20 OhA464, 152NE301; SD 231NW938 (immediate and direct and presumably contemplated by parties); 149Wash158, 270P425. **Facts and circumstances in each particular case determine** whether counterclaim comes within statute. 20 OhA464, 152NE301.

682–54 Ariz 291P1005; 207Cal 498, 279 P152 (damages for fire caused by lessee's negligence, in lessee's action for failure to rebuild and termination of lease); 85CalA273, 259P341; 93Fla611, 112S768; 224Ky271, 6SW(2d)241; 244 NY209, 155NE102; 247NY245, 160NE 359; 131Misc779, 227NYS412; 132Misc 148, 229NYS541; 137Misc130, 241NYS 484; 59ND35, 228NW449; 19 OhA324; 112 Okl 38, 239P447; 121 Or40, 252P 399; 153SC43, 150SE316, 68ALR443 (tort action as counterclaim to action on contract); TexCivA 4SW(2d)336; TexCivA 27SW(2d)279; 36Wyo 221, 254 P134. **Counterclaim disallowed as not arising out of the same contract or transaction.**–200Cal 222, 252P593; 110Conn 528, 148A330; SD 231NW938.

684–55 178Ark37, 9SW(2d)781; 93Fla 611, 112S768; MoA 298SW101; 222MoA 738, 7SW(2d)441; 216AppDiv514, 215 NYS581; 222AppDiv132, 226NYS108; 127Misc676, 215NYS722; 55ND292, 213 NW359; 19 OhA324; TexCivA 283 SW529. **In Oregon.**–121 Or40, 252P399. **In action for services,** counterclaim alleging performance of services to defendant's nephew, and conversion of money by plaintiff, held proper. 127 Misc676, 215NYS722.

685–56 160Ga307, 127SE852; 130Misc 424, 224NYS66; 20 OhA464, 152NE301. **Counterclaim for fraudulent representations** is good against action on note, as arising out of same transaction. 231 NYS569.

686–58 93Fla611, 112S768; IndA 170 NE336(2dcase); 203 Iowa1256, 212NW 719; 219Ky624, 294SW179; 231Ky574, 21SW(2d)979; 315Mo 872, 288SW54(2d case); 221AppDiv84, 223NYS62; 130 Misc385, 224NYS1, 2 [citCyc] (counterclaim for rent stricken in action for conversion); 131Misc587, 227NYS469; 50ND322, 195NW564; 54ND153, 209 NW234; 20 OhA464, 152NE301; 153SC 43, 150SE316, 68ALR443 (cause of action for libel in connection with notes other than those in suit held not good counterclaim); 154SC411, 151SE569; SC 155SE291. **Code provision should not be extended** to cases not fairly within its provisions. 200Cal 222, 252P593. **Counterclaim on disability clause of insurance policy** held not under code provision, in action to rescind for fraud, as it neither tends to diminish nor defeat recovery. 127Misc68, 215NYS277.

687–61 127Misc676, 215NYS722.

687–62 270US593, 46SCt367, 70L ed750, 45ALR1370; 244NY209, 155NE102.

688–65 110Conn528, 148A330 (counterclaiming tort against contract); 93Fla 611, 112S768; 127Misc676, 215NYS722.

688–68 127Misc676, 215NYS722.

688–70 244NY209, 155NE102 (counterclaim for breach of trust is proper in action for notes given for property involved); 127Misc676, 215NYS722.

689–73 44 Ida27, 255P303; 189NC533, 127SE540 (depositor may counterclaim for deposit in action by bank on note); 196NC450, 146SE74; 127 Or386, 272P 260; 50SD614, 211NW454; TexCivA 285 SW838. **Defendant may counterclaim on plaintiff's note assigned to defendant after maturity,** in action for labor and services. 44 Ida27, 255P303. **In action on promise to pay sum of money or stated number of shares of stock** in which defendant counterclaims on note and plaintiff is allowed recovery in stock, court may apply defendant's counterclaim by deducting number of shares equivalent to amount claimed by defendant. 51Nev403, 277P980. **Tortious conversion of goods may be waived** and counterclaim can be asserted on implied contract for goods sold and delivered. 34F(2d)744.

689–77 229AppDiv839, 243NYS211 (action for conversion).

689–78 132Misc529, 229NYS539.

690–79 133Misc435, 232NYS545.

690–80 9LaA49, 118S783; LaA 125S 325; 13LaA603, 128S46; LaA 129S257; TexCivA 15SW(2d)137.

691–82 **In Louisiana.**–4LaA100; 4LaA 483; 10LaA361, 120S880; 10LaA424, 121S366.

691–83 **In Porto Rico.**–33PortoRico 136.

691–89 190NC595, 130SE328.

693–3 215AppDiv416, 213NYS569.

693–6 240 IllA216; 128Me364, 147A 655; MoA 275SW549.

693–10 **Whether damages are liquidated or not,** when arising from breach of contract, depends primarily upon terms of contract. 147Va758, 133SE788.

693–12 **Damages for breach of contract for future delivery of goods** are unliquidated. 147Va758, 133SE788.

694–14 TexCivA 299SW446.

695–25½–New. Under some statutes, unliquidated demands may be set off if founded on cause of action arising out of, or incidental to, plaintiff's cause of action. TexCivA 291SW602.

695–25½–New. **Claim held not unliquidated.**–TexCivA 293SW590.

695–26 99NJEq806, 134A299; 147Va 758, 133SE788.

696–28 31F(2d)940; 42F(2d)362; 219 Ala131, 121S420; 332 Ill 104, 163NE 416; 247 IllA469; 216Ky817, 288SW 751; 219Ky624, 294SW179; 222Ky320, 300SW872; 168La383, 122S118; 263 Mass107, 160NE333; 148Miss164, 114S 268; 99NJEq806, 134A299; 105NJL308,

144A312(2dcase); 227AppDiv733, 236 NYS503; 98PaSuper179; 153Tenn260, 283SW448, 46ALR389; 147Va758, 133 SE788. **In Oklahoma.**–128 Okl 283, 259 P260.

698–31 **In Oklahoma.**–111 Okl 239, 239P 623.

698–33 164Ga54, 137SE770; 38GaA570, 144SE358. **In Illinois.**–332 Ill 104, 163 NE416; 252 IllA439. **In Rhode Island.**–129A604.

700–35 29F(2d)331; Cal 292P474; 104 NJL260, 140A883; 127 Or386, 272P260; TexCivA 22SW(2d)957.

700–36 216Ky817, 288SW751.

700–36½–New. Cause of action arising in favor of defendant out of contract or transaction set forth in petition or connected with subject of action may be pleaded as counterclaim. 112 Okl 119, 240P115.

700–37 169La258, 125S69; 12LaA356, 125S486; TexCivA 15SW(2d)137.

700–38 See also 6LaA66.

703–59 273US18, 47SCt277, 71Led515, 50ALR1181; 214Ala351, 108S16. **In Georgia.**–34GaA355, 129SE557. **In action of assault and battery,** defendant may plead damages for assault committed by plaintiff. 214Ala351, 108S16.

703–62 153Tenn260, 283SW448, 46ALR 389.

703–63 219Ala692, 123S215 (personal injury action); 153Tenn260, 283SW 448, 46ALR389.

704–67 See also 36GaA116, 135SE848.

704–69 110Conn528, 148A330; 33GaA 687, 127SE666; 163Ga131, 135SE498; 248 IllA126; 8PaDist&Co 347; SD 228 NW807. See also 36GaA116, 135SE848. **Even in equity,** etc. But see 34GaA355, 129SE557. **In Arkansas.**–180Ark695, 22 SW(2d)562. **In Georgia.**–160Ga752, 128 SE913; 34GaA355, 129SE557. **In Oklahoma.**–117 Okl 77, 244P741; 126 Okl 283, 259P260. **In action ex contractu,** facts relieving debtor from liability may be shown, which, in action of test, might entitle debtor to damages. 163Ga131, 135SE498.

705–72 But see 16F(2d)270. **In Oklahoma.**–140 Okl 282, 283P242, 68ALR900.

706–78 See also 221Ala167, 127S907.

707–82 **"Transaction,"** as used in statute, means any act as affecting legal rights or obligations, and properly embraces entire occurrence out of which legal right springs or upon which legal obligation is predicated. 54ND573, 211 NW982.

707–84 19 OhA324, 327 [citCyc]; SD 228NW407 (libel). Contra 36GaA20, 135SE106. But see 36GaA729, 137SE 904. **Counterclaiming assault and malicious prosecution in action for assault** held proper. 130Misc424, 224NYS66. **In New Mexico.**–32NM259, 255P636 (suit on open account). **In Oregon.**–127 Or386, 272P260. **In Pennsylvania.**–13 PaDist&Co 129 (in physician's action against husband to recover compensation for services to wife, husband cannot counterclaim for malpractice). **In South Carolina.**–149SC378, 147SE322. **In Utah.**–Utah 292P206 (counterclaim not allowed in unlawful detainer).

707–85 TexCivA 22SW(2d)957.

708–86 134Misc447, 235NYS47.

708–90 CalA 288P723 (counterclaiming negligence against negligence); 177Minn 453, 225NW287(2dcase); 216AppDiv514, 215NYS581; 54ND573, 211NW982; 58 ND55, 224NW679; 19 OhA324.

708–92 216AppDiv514, 215NYS581; 54 ND573, 211NW982 (allegations held sufficient).

708–93 203Cal 190, 263P530; Cal 292 P970; 223Ky668, 4SW(2d)686; 168Minn 108, 209NW625 (damage to defendant in suit for price of flavoring extracts arising from conviction for selling extracts as intoxicating liquors not subject of counterclaim); 195NC155, 141 SE580; 196NC244, 145SE229; 117 Okl 77, 244P741; 119 Or481, 250P238; SD 231NW938.

709–95 160Ga307, 127SE852; 141SC10, 139SE202; 67Utah501, 248P477.

710–99 35Ariz343, 278P62; 195Cal 27, 231P340 (in action in claim and delivery charge that plaintiff maliciously prosecuted suit to harass defendant and obtain possession of property fraudulently, set up as counterclaim, held properly stricken out).

710–1 220MoA332, 286SW146.

710–2 156SC370, 153SE342.

711–6 164La612, 114S354.

711–6½–New. Compensation. In action on notes of corporation and stockholders' guaranty of advances made and to be made, defendants cannot set up in compensation unliquidated claim growing out of conversion of automobiles belonging to corporation. 164La612, 114S354(6thcase).

711–8 133 Okl 183, 271P938; 13PaDist &Co 215. **Where defendant waives the tort of conversion,** etc. 161Ga563, 131 SE493; 13PaDist&Co 215.

712–9 137Misc14, 242NYS189.

712–15 38GaA503, 144SE383; 252Mass 574, 147NE847; 143Miss146, 108S424, 47ALR45; 82NH396, 134A347; NJSup 133A174; 194NC368, 139SE596, 55ALR 819; 194NC401, 139SE841; 53ND24, 204NW837, 838 [citCyc]; 124 Or276, 261P432; 147Wash482, 266P707. **Holder of note of mortgagor** cannot complain of his agreement with mortgagee for public sale of property as regards right to set off against purchase price of goods bought at sale. 51SD13, 211 NW976. **Buyers at public sale** of property covered by recorded chattel mortgage are put on inquiry as to interest of mortgagee in proceeds. 51SD13, 211 NW976. **Buyers at sale of mortgaged property** cannot set off debt to them of mortgagor against purchase price where proceeds of sale were insufficient to pay mortgage debt. 51SD13, 211NW 976.

714–16 3Del 47, 130A236; 82NH396, 134A347.

714–17 82NH396, 134A347.

715–19 180Ark695, 22SW(2d)562; 33 PortoRico 567, 570 [citCyc]. **Manager's claim for salary and disbursements against corporation** is properly counterclaimed in action in conversion brought by stockholder in representative capacity. 126Misc799, 214NYS304 (Civ. Pract. Act §§ 261, 264, 266, 267).

715–23 3Del 47, 130A236 (recoupment not allowed in breach of contract action where defendant, as holding company, could not have sued plaintiff in its corporate name, but stood, with respect to counterclaim, in position of stockholder of defrauded corporation); 143 Miss146, 108S424, 47ALR45.

715–25½–New. Rule as to mutuality is not violated and there is no misjoinder where, in action between brokers, defendant counterclaims for share of commissions on sale of real estate retained by plaintiff, claiming that rights of owner of real estate are involved. TexCivA 285S838.

715–28 But see 194NC368, 139SE596, 55ALR819.

716–29 TexCivA 272SW258.

717–35 173Minn183, 217NW106; NJSup 133A174; 33PortoRico 567. **Debt against corporation** cannot be made subject of counterclaim in suit against president of corporation. NJSup 133 A174. **In Philippines.**–51Philippine243.

718–42 But see 35GaA333, 132SE922.

719–49 53ND24, 204NW837.

719–51 53ND24, 204NW837; 36 OhA 118, 172NE685.

719–52 2CalA665, 84P263; 196NC94, 144SE521(2dcase); 53ND24, 204NW837.

719–54 17F(2d)501. But see 40HunNY 494; 194NC368, 139SE596, 55ALR819.

720–58 62 OntL149, [1928] 2DomLR 715.

720–59 14F(2d)116; 300Pa102, 150A 157. **Mere naked trustee cannot assert cross-demand** to inure to his own benefit. 34 OhA267, 171NE111.

724–5 73CalA782, 239P302; 149Miss 892, 116S299, 300 [quotCyc]; 194NC 368, 139SE596, 55ALR819; 136SC111, 134SE275; 136SC179, 134SE285.

725–6 73CalA782, 239P302; 194NC368, 139SE596, 55ALR819.

725–7 194NC368, 139SE596, 55ALR819.

727–17 203Cal 190, 263P530.

727–19 243 IllA314; 33 OhA250, 169 NE38.

728–20 203 Iowa1256, 212NW719.

728–22 82CalA249, 255P529.

728–24 203 Iowa1256, 212NW719. **Set-off is not available to less than entire number** of defendants sued on a joint obligation. 33GaA674, 128SE76.

729–32 213Ala327, 104S798.

730–36 128Me339, 147A419; NJSup 148A166(2dcase).

731–43 215Ala13, 112S225; 166Ga163, 142SE678, 679 [citCyc]; MoA 279SW 208.

732–52 **In action against two defendants on note and mortgage and for money owing** one defendant cannot set up cross-demand for damages individually sustained from tort. 130Kan468, 286P248.

733–58 2CalA665, 84P263; 246Mich25, 224NW377; TexCivA 284SW334; TexCivA 286SW487.

734–69 214Ala182, 106S846 (rule conceded but not applicable); 2CalA665, 84 P263; MoA 256SW528; TexCivA 294SW 687; TexCivA 10SW(2d)144.

735–71 TexCivA 294SW687.

736–33½–New. Set-off of individual debt allowed in action brought by assignee of debtor who was surviving partner. 214Ala182, 106S846.

736–84 146SC167, 143SE646, 648 [quot Cyc], 60ALR580; TexCivA 28W(2d)1017 [quotCyc].

740–19 Contra 204 Iowa435, 215NW 597, 55ALR562.

744–57 220MoA623, 288SW1000; 36 Wyo 221, 254P134.

744–58 214Ala182, 106S846 (set-off of individual debt in action on assigned partnership claim); 22AlaA68, 112S543; 84Colo 62, 268P535; 207 Iowa1071, 224 NW72; 220MoA623, 288SW1000; 14Pa Dist&Co 324; Wash 292P406; 37Wyo 237, 260P678. See also 244 IllA314. **Assignee of mortgage and past-due note after demand for set-off takes subject to right of set-off** though he had no actual knowledge. 190NC595, 130SE 328. **Statute applying rule to set-off "as allowed by law"** held to refer to existing statute on subject. 37Wyo 237, 260P678.

745–59 129Misc669, 222NYS353; 132 Misc409, 229NYS626. **In California.**–203Cal 190, 263P530. **Where plaintiff assigns cause of action after defendant has filed counterclaim** and assignee is substituted as plaintiff, defendant is not entitled to recover over against assignee on counterclaim but can only use set-off defensively. 152Miss307, 120S171.

746–61 But see 190NC595, 130SE328.

746–64 85CalA273, 259P341.

746–64½–New. Claim of buyer of stock against seller is not proper counterclaim against assignee if money deposited in escrow to pay for stock. 214App Div378, 212NYS330.

746–65 209Ky648, 273SW553, 554 [cit Cyc]; 37Wyo 237, 260P678 (dictum).

746–66 316Mo 812, 293SW760.

746–67 But see 12LaA305, 125S465.

746–68 39 OklACR391.

746–69 37Wyo 237, 260P678.

747–72 TexCivA 38SW(2d)883; 37Wyo 237, 260P678.

747–73 37Wyo 237, 260P678.

747–74 37Wyo 237, 260P678.

747–76 85CalA273, 259P341; 205 Iowa 742, 218NW580; 74Mont398, 240P825; 294Pal, 143A206; 37Wyo 237, 260P 678.

748–78 37Wyo 237, 260P678 (dictum).

748–86 **In Maryland.**–148Md403, 130A 331.

748–94 TexCommnA 13SW(2d)350.

749–98 35GaA333, 132SE922.

749–2 48 Ida376, 282P88.

750–6½–New. Makers sued on notes by bank to whom notes were assigned were properly allowed damages for worthless cotton seed which bank sold to them. 178Ark1079, 13SW(2d)816.

752–21 203 Iowa1256, 212NW719; 220 MoA623, 288SW1000 (unliquidated counterclaim may be used to defeat recovery).

753–25 23AlaA311, 124S866.

753–29 TexCivA 299SW921.

753–30 **Fraudulently assigned claims** held subject to counterclaim. 220MoA 623, 288SW1000.

755–45 203 Iowa1256, 212NW719.

755–46 Nebr 231NW513; Nebr 231NW 758.

756–47 203 Iowa1256, 212NW719.

756-51 30F(2d)665.
756-54 Cal 292P474.
757-57 Mutual debts do not cancel each other without judicial action. 124 Or276, 261P432.
757-58 85PaSuper108.
758-59 Where amount due plaintiff slightly overruns amount due under counterclaim, both complaint and counterclaim are properly dismissed. 222 AppDiv341, 226NYS226.
758-62 37F(2d)715; MoA 298SW101; 82CalA249, 255P529.
758-67 154Tenn174, 285SW569, 570 [quotCyc].
758-68 154Tenn174, 285SW569, 570 [quotCyc].
759-69 154Tenn174, 285SW569, 570 [quotCyc].
760-78 But see 69CalA515, 231P587.
760-84 273US18, 47SCt277, 71Led515, 50ALR1181; 316Ill488, 147NE459 (may counterclaim or recoup only to extent of claim); 320Mo623, 8SW(2d)858; 36Wyo221, 254P134. **When defense is in nature of recoupment,** neither party can recover where damages for obligee's breach exceed plaintiff's claim. 36Wyo221, 254P134.
761-85 273US18, 47SCt277, 71Led515, 50ALR1181.
761-87 213Ala327, 104S798 (one of several defendants setting off individual debt); Fla 129S840; 190NC868, 129SE814; 36Wyo221, 254P134. Contra 3Del118, 131A320 (superior court); 193NC470, 137SE320.
761-88 Cal 292P474; 193NC470, 137SE320.
761-92 MoA 279SW208.
762-94 See also 252Mass563, 148NE136.
762-2 MoA 275SW549.
762-3 202Cal770, 262P748; MoA 275SW549.
763-10 In action for partition purchaser from defendant setting up counterclaim praying that his contract be held valid should be allowed to withdraw his counterclaim on payment of costs where amended bill shows outstanding title. 102NJEq385, 140A892. In such case purchaser withdrawing counterclaim should be left to his remedy at law. 102NJEq385, 140A892.
763-12 Defendants, after judgment for plaintiff, following overruling of motion for new trial, by filing transcript in court of appeals with motion for appeal, held to abandon cause of action set up in counterclaim. 219Ky675, 294SW165.
763-14½-New. In Saskatchewan, where counterclaim in action in district court is withdrawn it can be restored only by order of district court. Sask [1929] 3DomLR337.

RECOVER

763-4 "To recover" in action means success beyond mere nonsuit or dismissal. 128Misc395, 219NYS116.

RECOVERY

764-10 As generally used in contracts, "recovery" means one had by process and course of law. 15F(2d)383, 385 [citCyc].
764-13 18F(2d)752, 753 [citCyc]. **"Recovery" means success in action beyond dismissal or nonsuit.**–128Misc395, 219NYS116.

REDEEM

766-27 Miss 130S507.
766-30 74Mont513, 241P523. **As applied to redemptioner of property sold under execution,** term signifies right to purchase interest acquired by purchaser at sale whether latter is willing or not. 74Mont513, 241P523.

REDEMPTIONER

767-35 51ND20, 198NW679 (statute).

REDISCOUNTED NOTE

767-36 222MoA122, 2SW(2d)151, 153 [citCyc].

REFERENCE

778-26 But see 121OhSt605, 172NE374(2dcase).
778-28 170Ga419, 153SE29[2dcase] (statute); 219MoA1, 268SW99; 132SC360, 128SE172 (alternative in equitable action being for circuit judge to take testimony as chancellor in cases not within statute). 134SC207, 132SE620. **Under statute authorizing reference where personal view of premises is required,** held proper to refuse reference in action on lease calculating rents on comparison with rents paid in locality. 191NC593, 132SE566(1stcase). **Where receivers are appointed,** appointment of master in chancery is to be confined to cases where necessary, according to rules of equity. TexCivA 287SW121. **Statute authorizing reference without consent** of parties is applicable only to equity suits and those formerly cognizable in equity. Iowa 231NW431.
779-29 126Kan385, 267P1098; 198NC432, 152SE38(2dcase).
779-30 170Ga261, 152SE98(2dcase); 134SC71, 131SE768; 149SC12, 146SE601. **Actions held not of equitable cognizance authorizing compulsory reference.**–136SC327, 134SE369. **Actions to recover assessments** due mutual insurance association cannot be compulsorily referred, not being action in equity or involving equitable issues. 152SC448, 150SE125(2dcase). **Action by receiver of mortgagee to recover personal property** where defendants alleged payment and set up counterclaims, legal in nature, cannot be compulsorily referred, there being no feature of equitable jurisdiction. 151SC532, 149SE235.
779-31 In North Carolina.–194NC139, 138SE595.
779-31½-New. In North Carolina compulsory reference may be ordered in trial of question as to liability for assessments of stockholders of bank. 192NC366, 135SE48.
780-33 320Mo146, 6SW(2d)920; 134SC71, 131SC768; SC 138SE622.
780-33½-New. But compulsory reference will not be ordered on showing of mere possibility that several items will become centers of independent controversy. 240NY465, 148NE637.
780-33¾-New. There must be reasonable probability that such will be true development. 240NY465, 148NE637.
780-33¼-New. That defendant put plaintiff to proof by denial of knowledge or information is not sufficient to give right to compulsory reference. 240NY465, 148NE637.
780-36½-New. Action for damages for tort cannot be compulsorily referred. 219MoA1, 268SW99.
780-36¼-New. Order not erroneous in absence of plea is bar to entire cause where suit is on several notes. 192NC42, 133SE183.
780-36¾-New. Reference which will be very expensive and lengthy will be denied where plaintiff's auditors can examine books and papers which are in his possession. 34F(2d)547.
780-37 33F(2d)809; 34F(2d)163; 121Kan301, 246P676; 130Kan468, 286P248; 217MoA630, 274SW503; MoA 29SW(2d)170; 104NJL298, 140A580; 245NY520, 157NE842; 130Misc192, 223NYS710; 135Misc365, 238NYS91; 191NC535, 132SE563; 134SC71, 131SE768; SC 138SE622; TexCivA 8SW(2d)196. But see 141SC136, 139SE217. **In South Carolina.**–133SC149, 130SE881. **Right of trial by jury** does not obtain. MoA 29SW(2d)170.
781-38 See also 81CalA763, 254P662. But see 141SC136, 139SE217.
782-43 232Mich271, 205NW122.
782-43½-New. It is proper to refer case involving examination of bank account embracing large number of deposits and checks. 22F(2d)33.
782-44 Action held to involve mutual account.–127Kan151, 272P178. **What constitutes mutual account.**–127Kan151, 272P178.
782-46 Action by insurance company against agent to recover balance due on premiums and for accounting is one for accounting triable before referee. 146SC175, 143SE544.
782-50 222AppDiv783, 225NYS335.
783-58 Mo 32SW(2d)86; 121Or215, 253P1046; TexCivA 287SW121 (account held not to require reference). **Accounts held "long" accounts.**–130Kan468, 286P248; 245NY520, 157NE842; 121Or215, 253P1046. **Accounts held not "long" accounts.**–219MoA1, 268SW99; 222AppDiv512, 226NYS524; 224AppDiv33, 229NYS528; 230AppDiv768, 244NYS215. **Action held not to present long account or matter of complication,** which would warrant compulsory reference. 133SC149, 130SE881.
784-59 121Or215, 253P1046.
784-60 Where only defense is settlement between parties, reference is properly refused. 232Mich271, 205NW122.
784-61 320Mo146, 6SW(2d)920, 927 [quotCJ].
785-67 Iowa 231NW431.
787-78 Compulsory reference of consolidated action on breach of street paving contract held improper. 244NY515, 155NE878.
787-79 153SC321, 150SE802.
787-81 134SC71, 131SE768.
787-81½-New. Under statute compulsory reference may be ordered only in cases of equitable cognizance involving examination of long account. 132SC410, 129SE629.
789-89 Where only issues of law are raised by objections to account filed, they should be determined by surrogate. 215AppDiv651, 211NYS874.
789-94 151Va845, 145SE321.
789-98½-New. Reference to determine amount due for breach of replevin bond is proper. 261Mass261, 158NE662.
790-4 Where facts stand admitted ordering reference to take evidence is error. 157SC496, 154SE756.
790-10½-New. Some statutes provide for reference to determine disputed questions arising on hearing of motion to dismiss complaint. 130Misc720, 224NYS348 (dispute as to whether absolute deed a mortgage).
790-11 147SC461, 145SE288. **In South Carolina.**–140SC107, 138SE622; 140SC105, 138SE624.
791-12 Improvident reference.–219AppDiv337, 219NYS734.
791-25 80Mont537, 261P341.
792-31 Motion properly pending order on motion to frame issues. 140SC105, 138SE624.
794-47 130Misc192, 223NYS710.
794-52½-New. In Philippine Islands commissioner appointed on application of one party to audit accounts filed by the adverse party cannot be deemed referee where statute requires written consent of both parties to appointment of referee. 50Philippine507.
794-54 162Ga620, 134SE616; 162Ga625, 134SE619.
794-55 In Georgia.–162Ga620, 134SE616; 162Ga625, 134SE619.
794-57 Mo 32SW(2d)86.
795-64 240NY465, 148NE637.
796-70½-New. Applicant for reference must satisfy court that something more than mere formal proof of existence of long account will be involved. 240NY465, 148NE637.
796-79 Plaintiff held not entitled to compulsory reference.–240NY465, 148NE637.
796-81½-New. Compulsory reference held not justified where defendant puts plaintiff to its proofs. 240NY465, 148NE637.
796-81½-New. In application for reference, plaintiff has burden of satisfying court that something more than mere examination of long account will be involved. 240NY465, 148NE637.
796-81¼-New. In pleading sixty-two separate causes of action, with defendant denying knowledge or information, held plaintiff not entitled to compulsory reference. 240NY465, 148NE637.
796-81½-New. Whether issues must be submitted to jury or may be referred is to be determined from pleadings rather than from evidence. 127Kan151, 272P178.
796-82 32F(2d)732; 194NC139, 138SE595; 121Or215, 253P1046; 34Porto Rico632 (complicated account); 132SC410, 129SE629 (refusal of compulsory reference declared error); 156SC429, 153SE283. **Abuse of discretion.**–Ga 155SE26.
797-88 25OhA415, 158NE554.

798-2½-New. In action involving examination of bank accounts order of reference properly directed auditor to report findings as to indebtedness. 22 F(2d)33.
799-13 192NC188, 134SE419.
800-14½-New. Objection based on refusal of circuit judge to frame issues for jury in compliance with motion duly noticed is insufficient. 132SC360, 128SE 172.
800-16 223AppDiv19, 227NYS345; 134 SC207, 132SE620 (objection to compulsory reference based upon refusal to frame issues held insufficient); Alta [1926] 4DomLR1060, [1926] 3WestWkly 617 (going on with reference held not to estop attack on judgment).
803-45½-New. Trial judge cannot revoke an order of compulsory reference, made without objection or exception. 196NC428, 146SE68.
803-45½-New. Court can set aside compulsory reference, and submit case to jury on proper issues, if either party reserves right to jury trial. 196NC428, 146SE68.
803-50½-New. Retirement of appointing judge does not terminate power of referee where appointment was by judge sitting as court. 85CalA63, 258P980.
803-52 Mass 169NE518 (within discretion of court to order jury trial). See also NH 150A549.
804-54 All questions as to form or variance, etc. 99Vt304, 131A610.
804-58 Appointment of master in chancery does not vacate order theretofore entered unless such order would defeat purpose of appointment. TexCivA 287 SW121.
804-63 138Misc6, 245NYS28.
804-64½-New. Where party reserves and perfects right to jury trial under statute, effect of reference is to put burden on such party to overthrow report and to limit issues to those findings to which exception is specifically entered. NJCir 137A846.
804-64½-New. Where statute provides that upon compliance with statute case shall be tried by jury, statute does not change rule that moving party must bring case on for hearing. NJCir 137A 846.
804-64¼-New. Order does not prevent court's exercise of power to frame issue at proper time. 140SC105, 138SE624.
804-64½-New. Where defendant objects to compulsory reference, he cannot be deprived of right to have issues of fact submitted to jury. 192NC42, 133 SE183.
804-64⅛-New. Court's adoption of agreement to submit issue on reference gave it judicial character. 83NH115, 139A184.
804-64⅞-New. Under statute, practical purpose of compulsory reference, when exceptions have been filed to report of referee, is to develop and specifically delimit issues to be determined by jury, since by such reference jury trial is not waived, and parties as matter of law are entitled to have issues answered by jury. 196NC223, 145SE26.
804-64⅛-New. Even where auditor is appointed to assist jury in action at law, responsibility is still on jury, who are not equipped to handle complicated accounts. 26F(2d)801.
805-81 Prohibition against judicial officer "hereafter elected" in counties with population exceeding one hundred and twenty thousand acting as referees applies only to officers elected in county having such population at time of elections. 127Misc295, 216NYS357.
806-91 30 OhA151, 164NE539.
806-93 294Pa535, 144A537.
807-5 140Wash586, 250P346.
808-15 NJ 151A97; 140Wash586, 250 P346.
809-34 196NC428, 146SE68.
810-53 80Mont537, 261P341; 30 OhA 151, 164NE539; 121 Or215, 253P1046.
810-54 91Fla856, 108S887; 98Fla999, 124S457. But see CalA 289P927.
811-56 Referee is guided by same rules of law that would have controlled judge. 91Fla856, 108S887.
812-62 92CalA318, 268P412; Can [1929] 2DomLR418. **Order appointing referee to take evidence, hear argument, find facts, and state conclusions of law,** is reference for trial and not for mere statement of account preparatory to trial. 190NC590, 130SE508.
819-51½-New. If cause is referred before plea of set-off is filed, referee has no authority to consider it, unless reference provides therefor. 128Me307, 147 A227(2dcase).
822-78 133SC1, 130SE57.
823-85½-New. Proof broader than averment is inadmissible. NJSup 134A 185.
825-8½-New. If motion for new trial is filed and overruled, opportunity should be given to prepare and have signed bill of exceptions, which must be filed with referee's report. 26 OhNP NS445.
827-26 43F(2d)521.
828-43 80CalA66, 251P650; 30 OhA151, 164NE539.
830-67½-New. Court had no power to require witness to sign testimony taken before referee under statute, since this would be futile and unnecessary act. 30 OhA151, 164NE539.
831-84 227AppDiv205, 237NYS159 (mandatory).
831-88 227AppDiv205, 237NYS159 (extension need not be in writing). **Extension of time granted after expiration of previous extension** is tantamount to order rereferring cause to referee upon same terms as original order except as to time for report. 128Kan149, 276P 828.
832-92½-New. Report made after death of plaintiff is void, under statute. 130 Misc92, 222NYS557.
832-92⅛-New. If no motion for new trial is made within time limited therefor after notice of decision, referee files report which becomes decision of court. 26 OhNPNS445.
832-97 227AppDiv205, 237NYS159.
832-98 50SD266, 209NW540.
833-99 50SD266, 209NW540.
833-1 227AppDiv205, 237NYS159 (conduct of party may be such as to act as estoppel). **Irregularity in filing report may be waived.**-50SD266, 209NW540.
834-2½-New. Court does not lose jurisdiction of case by failure of referee to make report within time fixed. 128 Kan149, 276P828.
835-18 227AppDiv219, 237NYS539 (failure to show amount due on contract or interest makes report defective). **Report held not incomplete** for failure to include contract involved which was attached to complaint and embodied in report by reference. Mass 172NE855.
838-31 Under stipulation opening judgment and permitting defense and reference, award increasing amount held not error. 3Del 259, 138A392.
838-36 CalA 262P1103.
839-39 321Mo461, 12SW(2d)64.
839-44 Rulings of law.-Mass 167NE 641.
839-45 3Del 259, 138A392; Ida 286P 914; 11PaDist&Co 527. **Failure of report to show amount due or to become due** necessitates reversal of order confirming report. 227AppDiv759, 236NYS 430.
840-51 Ida 286P914.
841-56 3Del 259, 138A392.
841-60 Findings held inconsistent.-331 Ill 420, 163NE393. **Finding of fact warranted** by facts found by auditor. Mass 170NE815.
842-66½-New. That report of committee contains facts not relevant to issues does not render it invalid or insufficient. 108Conn515, 143A900.
842-68 To make or pass on requests for rulings of law is no part of duty of auditor, and are not strictly to be regarded as parts of report. Mass 167NE 641.
843-87 196NC428, 146SE68. **Brief of evidence.**-161Ga605, 131SE476. **In North Carolina.**-198NC282, 151SE635.
844-88 103Conn532, 131A399 (evidence or excerpts therefrom); 263Mass63, 160 NE317.
845-93½-New. Motion to suppress testimony is properly denied where irregularities in proceedings were waived or corrected by court before entry of decree. 247Mich642, 226NW659.
846-1 132SC136, 128SE841.
846-5 128Kan149, 276P828.
847-6 312Mo 694, 281SW725. **Time for filing.**-312Mo 694, 281SW725.
847-10 Rules relating to filing of postea on short notice are inapplicable to cases of reference. NJSup 150A584. **No effective filing of referee's report is made** where no postea accompanies it. NJSup 148A5.
848-12 50Philippine864. But see 190 NC590, 130SE508. **Party desiring judgment on report of referee** should file report with postea and give written notice. NJSup 150A584.
849-22½-New. Trial before referee to determine issues of law and fact is not final accounting where interlocutory judgment entered thereon adjudicated that plaintiff recover just and lawful amount, leaving to final judgment determination of amount of recovery. 214 AppDiv455, 212NYS690.
849-22½-New. "Auditor's unverified report" is not admissible in evidence, notwithstanding proper objection on that score was not made before trial. TexCivA 293SW701.
849-22¼-New. Auditor's report on reference by consent makes merely a prima facie case, and, when challenged, is reduced to pleading. 14F(2d)248.
849-22½-New. Auditor's report properly admitted in evidence, with charge that it was prima facie correct. 22F(2d) 33.
849-22⅛-New. Legal effect of master's finding is wholly matter of law and understanding of court and plaintiff as to purpose or effect of reference is not material. 83NH115, 139A184.
849-24 196NC223, 145SE26; 154SC 456, 151SE745 (scope of review). See Alta [1926] 4DomLR1060, [1926] 3West Wkly617. **Practice in federal courts.**-21 F(2d)657. **Procedure after report in compulsory reference** compared to procedure after verdict. MoA 29SW(2d) 170.
850-27 Construction of particular reports.-3Del 259, 138A392. **Burden is on plaintiff in error** to prove finding unsupported, presumption being that it is correct. 169Ga852, 151SE807.
851-36 205Cal 158, 270P181; 264Mass 414, 163NE63. **In Kansas.**-29F(2d)417. **Auditor's finding of fact confirmed by federal district court** is conclusive in action under Materialman's Act [28 U. S. St. at L. 278, as amended 33 U. S. St. at L. 811]. 13F(2d)78. **Rulings of auditor as to admission and exclusion of evidence** may be reviewed by court in appropriate instances. Mass 167NE641.
852-37 197Cal 765, 242P918; 92CalA 318, 268P412; MoA 29SW(2d)170; 132 Misc704, 230NYS482; 12PortoRicoFed 559. **On motion to set aside report,** conclusions of referee should be considered as verdict of jury. 121 Or215, 253P1046.
852-38 Mo 25SW(2d)783; 135SC33, 133 SE222; 99Vt384, 133A355. **Defendant's right to use words** "All-Steel" held question of law for court. 7F(2d)746. **Question of infringement of patents** depending on scope and validity of claims held questions of law for court on review of findings. 7F(2d)746.
853-40 CalA 289P927; 255Mass273, 151NE305, 45ALR788 (that party failed to remember transaction will not control definite finding of auditor). **Where report shows outstanding fact** so vital as to make legal consequences inevitable, court will give it effect without regard to other findings. 99Vt384, 133A355. **Where evidence is not set out,** findings are taken as true. 253Mass451, 149NE 156. **Effect of stipulation.**-28F(2d)407.
853-41 80Mont537, 261P341.
853-42 MoA 29SW(2d)170.
853-43 Ariz 245P28; 167Ga170, 144 SE893; 169Ga858, 151SE796 (exceptions of fact properly overruled); 169 Ga852, 151SE807; Mass 169NE518 (facts found by auditor are decisive unless contradicted or controlled by other evidence); 138Misc526, 245NYS186; 93Pa Super392. See also 264Mass414, 163NE 63. **Manifest error** will be corrected. 62 OntL360, [1928] 3DomLR495(2dcase). **Benefit gained by referee's having seen and heard** witnesses is matter of consid-

erable importance in determining weight to be given oral evidence. 299Pa272, 149 A486.

855-44 3Del259, 138A392; 264Mass 592, 163NE178; Mass 167NE641.

855-46 331 Ill 49, 162NE123; TexCivA 281SW221. But see 198NC282, 151SE 635.

855-47 By statute, only written evidence taken before referee is admissible to jury. 192NC42, 133SE183.

856-50 32F(2d)288; 33F(2d)809; 331 Ill 49, 162NE123; 256Mass262, 152NE 230; 260Mass541, 157NE698; Mass 169 NE518. **Auditor is not required to call witnesses** in order to make his report prima facie evidence of facts and conclusions set forth therein. 33F(2d)809.

856-53½-New. , and prima facie case for party made by one finding may be overcome by another finding, as finding sale was "short" in action to recover margins overcome by finding plaintiff intended actual sales. 256Mass147, 152 NE227.

857-63 Party objecting to statement in auditor's report should move to have it stricken out or request judge to instruct jury to disregard it. Mass 169NE518.

858-64 39GaA139, 146SE330.

858-69½-New. That referee found fact without sufficient evidence to support it is not proper ground of exception; 103 Conn532, 131A399.

858-69⅓-New. but it is proper ground of exception where report contains material fact without evidence, 103Conn532, 131A399.

858-69¼-New. or where report omits to find material fact which is admitted or undisputed. 103Conn532, 131A399.

858-71 227Ky306, 12SW(2d)856; 194 NC357, 139SE689; 198NC530, 152SE493 (2dcase); 155SC47, 151SE920; TexCivA 32SW(2d)688.

859-76 108Conn515, 143A900; 192NC 188, 134SE419. **In North Carolina.**-190 NC590, 130SE508 (right lost by failure to file till two terms had elapsed).

860-84 224AppDiv164, 230NYS39; 9 PaDist&Co 443.

861-87½-New. In action to recover rent under lease, wherein court appointed auditor to state accounts between parties under statute, his report could not be impeached where not excepted to before trial. TexCivA 8SW(2d)806.

861-88 108Conn515, 143A900; 35GaA 345, 133SE644. **Bill of exceptions** necessary. 25OhA415, 158NE554.

861-95 103Conn279, 130A576; Ga 131 SE529 (exception of law and fact held sufficiently definite); 35GaA345, 133SE 644; 230Ky757, 20SW(2d)752.

862-96 Necessary allegations.-103Conn 532, 131A399.

863-2 Ga 155SE27(2dcase) (grounds and record on which based); 35GaA345, 133SE644. **Setting forth evidence or reference to where it is to be found.**-161Ga 638, 131SE475; 161Ga698, 132SE626; 35GaA345, 133SE644.

863-10 194NC580, 140SE212. **In Georgia.**-161Ga711, 132SE547; 162Ga 625, 134SE619 (court has discretion to submit exceptions to jury); 169Ga858, 151SE796; 170Ga261, 152SE98(2dcase).

864-13 163Ga254, 135SE740 (exceptions to finding of auditor).

865-20 On exceptions to commissioner's report court must examine evidence and review conclusions of commissioner. 149 Va867, 141SE856.

865-27½-New. Where auditor's findings and conclusions are based on evidence erroneously admitted in case at law, court should submit exceptions of fact to jury. 35GaA19, 132SE125.

865-30 103Conn532, 131A399.

866-32 169Ga139, 149SE885 (where findings are supported by evidence); TexCivA 12SW(2d)233.

866-35 162Ga625, 134SE619 (decree entered on disapproval of exceptions); MoA 29SW(2d)170. **In consent reference,** judge may affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm report. 196NC398, 145SE776.

866-38½-New. Issue of fact raised by objections must be submitted to jury. 14F(2d)248.

866-38⅓-New. Where evidence supports finding of auditor it is not abuse of discretion to disapprove exceptions of fact but not where evidence does not support report of auditor. 170Ga261, 152 SE98(2dcase).

866-40 194NC357, 139SE689; 142SC 477, 141SE15.

867-41½-New. In Kentucky, where failure to file exceptions is due to misfortune or casualty, relief may be had under Civ. Code Prac. § 518. 216Ky582, 288SW316

867-43 194NC357, 139SE689. **Lack of notice** is waived by presence of party and failure to object. 215Ala76, 109S 166.

868-53½-New. Findings of special master may be sustained by court, though for excessive amounts, where all parties in interest consent in writing. 12Porto RicoFed559.

869-55 NJSup 148A5.

869-58 Report of referee, to take testimony need not be confirmed where filed for information of court. 130Misc554, 224NYS27.

869-59½-New. Right to confirmation after general issue answered by jury. NC 154SE43.

869-66 99Vt384, 133A355 (court may disregard unwarranted inference where facts fully reported).

869-71½-New. Report will be confirmed where no substantial errors appear. 134Misc306, 235NYS186.

869-71⅓-New. Whether auditor's report should be permitted to stand against claim of wrongly admitted expert testimony held within trial court's discretion. Mass 172NE855.

870-80 135SC33, 133SE222.

870-81 135SC33, 133SE222.

870-85 227Ky306, 12SW(2d)856.

870-86 CalA 262P1103; 83NH115, 139 A184.

870-87 NJSup 147A723. **Where there is reservation of trial by jury,** trial judge can only order report to be filed. NJSup 148A5.

870-89 Mass 168NE535.

870-89½-New. Where parties agreed facts should be found on reference, confirmation of report without objection for lack of jurisdiction gave it, as to jurisdiction, effect of agreed statement of facts. 83NH115, 139A184.

871-91½-New. Motion to file exceptions nunc pro tunc is properly refused when made three months after confirmation of report and payments have been made under it. 86PaSuper540.

871-93 135SC33, 133SE222.

872-5 196NC223, 145SE26; 25OhA415, 158NE554.

873-29 Facts held not to constitute misconduct.-223AppDiv19, 227NYS345.

874-30 218Ala637, 119S844(2dcase).

874-46½-New. Preparation by defendant's attorney of report for register, in accordance with register's decision and subject to his supervision, has been held not to constitute misconduct on register's part justifying setting aside of report. 218Ala637, 119S844(2dcase).

875-55 But see Mo 25SW(2d)783.

877-69 8PaDist&Co 140. **Failure to raise objection of want of notice of hearing before referee till after judgment** warrants denial of motion to set aside judgment on such ground. 76CalA670, 245P458.

877-79 NJCir 137A846.

877-81½-New. Motion to set aside judgment and report on ground of failure to give notice of hearing before referee may be denied where movant does not show that he could introduce any evidence not heard before referee or that finding by referee or court was erroneous. 76CalA670, 245P458.

878-94 NJCir 137A846.

878-95 220AppDiv15, 220NYS766.

878-99½-New. Report may be set aside without granting new trial where reference did not authorize or include findings of fact and law but was merely to aid court which went fully into matter of accounting and did not adopt report. 197Cal765, 242P918.

879-6 267Mass472, 166NE863; Mass 168NE173; Mass 172NE855; Mass 173 NE239.

879-8 69CalA276, 231P349; 39GaA139, 146SE330. But see 167Ga766, 146SE754.

880-26½-New. Exclusion of evidence as to damages is not ground for remand when finding of substantial performance of contract rendered it inapplicable. 190NC590, 130SE508.

880-26⅓-New. amendment of declaration by addition of new count after original finding, where original finding covered evidence on issues raised by such count: Mass 168NE91.

880-27½-New. Refusal to recommit was held proper where grounds were such as should properly have been made in exception to report. 160Ga337, 127 SE764.

880-27⅓-New. Report should not be recommitted for errors of law, calculation, or unauthorized findings of fact. 160Ga337, 127SE764.

880-29 170Ga261, 152SE98(2dcase).

880-32½-New. Failure to file exceptions in time, not result of surprise or excusable neglect within meaning of statute, where party charged with notice of each step in progress of cause. 190 NC590, 130SE508.

880-32⅓-New. Recommittal to require auditor to report evidence has been denied in action for price of goods sold where controverted questions of fact would ultimately be determined by jury. 18F(2d)635.

880-32¼-New. Questions on rulings as to admission and exclusion of evidence may be raised by motion to recommit case. Mass 167NE641.

881-37 69CalA276, 231P349.

882-51 299Pa272, 149A486.

882-52 NH 150A549. But see 170Ga 261, 152SE98(2dcase).

882-53 161Ga605, 131SE476 (must point out error); 170Ga261, 152SE98(2dcase).

882-54 Ga 131SE475 (motion properly overruled); 161Ga638, 131SE476 (must show reason for recommittal); 334 Ill 494, 166NE123.

882-58½-New. Court on its own motion after filing of report and exceptions may recommit case to readjust auditor's findings to correct measure of damages though no formal motion made, where exceptions based on erroneous measure. 34GaA298, 129SE562.

882-58⅓-New. Motion must be supported by affidavit where inquiries of fact are involved. Mass 167NE641.

882-58¼-New. Evidence and affidavits as to testimony and evidence at previous trials are not competent on motion to recommit. Mass 167NE641.

883-69 190NC590, 130SE508 (not required to give notice to parties on restatement).

884-79 Court on refusing to confirm report properly sends reference to new referee. 214AppDiv455, 212NYS690.

885-86 128Kan149, 276P828; 295Pa 406, 145A577; 49Philippine39.

885-87 After report court is not required to submit issues to jury, it not appearing that there was approval by court of exceptions. 160Ga337, 127SE 764.

885-88 Court should give reasons for reaching such different conclusions. 295 Pa406, 145A577.

885-89 Motion for judgment notwithstanding referee's finding of fact will be denied where findings do not show that movant is entitled to have his motion granted. 121Kan301, 246P676.

885-89½-New. Submission of issues to jury. In equity cases trial court can decline to submit exceptions of fact to jury unless he approves them. 169Ga 139, 149SE885; 168Ga836, 149SE126.

892-85 Death of referee before report.-129Misc617, 221NYS508. **Time of payment.**-223AppDiv19, 227NYS345.

892-87½-New. Commissioner not entitled to compensation where report contains no finding on any issue. 220Ky 476, 295SW440.

892-88 5PaDist&Co 124 (statute held repealed). **Charge held excessive.**-223 AppDiv1, 227NYS318.

893-2 139SC411, 138SE184.

894-6 Master may be required to report his charges and costs by entry of order by court sua sponte. 254 IllA409.

894-7 25F(2d)701.

894-8 5PaDist&Co 124. **Notice and op-**

portunity to oppose and contest fee and amount thereof should be afforded. 165 Ga326, 142SE164. **Erratum** in 1926 annos. page 2233 "**Reflecting** etc." should be 897–8 under **REFLECT.**

895–11 In Philippine Islands.–50Philippine507.

895–13 166Ga806, 144SE274.

895–16 161Ga711, 132SE547.

895–17 166Ga305, 143SE379. **Where plaintiff is in the main successful** on hearing of motion, fees of referee who took testimony will be ordered paid by defendant. 127Misc53, 216NYS68.

895–18½–New. Persons unsuccessful in resisting claim, 214AppDiv286, 212NYS 16.

895–18½–New. who alone asked for reference, are liable for referee's fees 214AppDiv286, 212NYS16.

895–18¼–New. and stenographer's charges. 214AppDiv286, 212NYS16.

896–26½–New. Court of equity may require complainants to pay costs or submit to dismissal of bill within prescribed time subject to final order taxing costs. 254 IllA409.

REFINING LOSS

897–7½–New. Refining loss, in business of refining cotton seed oil, is difference between weight of crude cotton seed oil and weight of refined oil produced therefrom. 176Ark601, 3SW(2d)673.

REFORMATION OF INSTRUMENTS

904–1 81Colo 58, 253P385; 230Ky710, 20SW(2d)714; 40 OklACR358 [reh pending].

904–2 114Nebr605, 209NW243, 245 [quotCyc]; 125 Okl 126, 256P515, 40 OklACR358 [reh pending]. **Other definitions.**–158Tenn452, 14SW(2d)714.

904–3½–New. Voluntary reformation. Parties to contract which, by mistake of scrivener, does not express mutual intent of parties may reform it voluntarily as effectively as if reformation was decreed in action in equity. 114Nebr371, 207NW 515, 44ALR73.

904–5 312Mo 609, 280SW424; 219MoA 133, 268SW691.

904–6 158Tenn429, 14SW(2d)726.

905–8 40F(2d)626; 90CalA276, 265P 1010; 154Md510, 142A625; 249NY217, 164NE29; 155Wash547, 285P438.

905–9 164Ga257, 138SE333.

905–11 96Fla219, 118S10; 158Tenn452, 14SW(2d)714.

905–12 88CalA60, 262P822; 170Ga28, 152SE60; 151Md383, 135A163; 29 OhA 51, 162NE718; 35 OhA107, 172NE288.

905–15 97Fla375, 121S102. **Statutes strictly construed** as in derogation of common law. 160Tenn358, 24SW(2d) 892.

905–17 215Ala515, 110S898; 215Ala 653, 112S235; 120Kan293, 243P535; 219Ky256, 292SW817. **Equitable or inequitable features of clause sought to be inserted** must be considered. 128 Or 483, 275P45. **Must be valid agreement** which, through mistake, is not expressed in instrument sought to be reformed. 219Ky256, 292SW817.

905–18 248Mich616, 227NW717.

906–18¼–New. To warrant reformation of instrument, there must have been meeting of minds of contracting parties concerning agreement. 249NY217, 164 NE29.

906–20 168GaA288, 147SE522; 235 Mich4, 209NW104 (provision relied on as basis of action on insurance policy must be inserted by reformation of policy before action thereon is maintainable); 50SD598, 211NW452. **Reformation of mortgage is unnecessary** in action for breach of covenant as to acreage conveyed and excess interest paid on mortgage and for credit for shortage. 203 Iowa880, 210NW566. **Suit in equity for reformation held not essential as condition** precedent to defense in action against seller's assignee for conversion. 219AppDiv410, 219NYS163.

906–20½–New. Under some circumstances instrument may be treated as reformed without actual reformation. Minn 233NW296.

906–22 161Ga672, 132SE442; 200 Iowa 979, 205NW784.

906–23 CalA 289P857.

906–25 201 Iowa561, 207NW610 (misrepresentation of maturity of mortgage causing damages not basis of reformation); 202 Iowa1362, 212NW125, 50 ALR1216 (where parol evidence is admissible to show nature of transaction); 83NH547, 145A269. **Where contract for sale of timber at fixed price per cord,** over term of ten years, with specified payments at given times, and providing for final adjustment, was sought to be reformed on ground of overestimate of quantity and alleged overpayment, it was held that remedy, if any, was to recover overpayment. 128Misc246, 218 NYS346.

906–28 161Ga672, 132SE442.

907–30 159Tenn126, 17SW(2d)15; 69 Utah460, 256P400.

907–32 23F(2d)628; 218Ala513, 119S 20; 72CalA497, 238P136; 163Ga838, 137SE253; 203 Iowa1144, 212NW691; 205 Iowa1360, 219NW507; Iowa 230 NW856; 165La319, 115S576; 73Mont 518, 238P591; 75Mont356, 243P582; 78Mont145, 252P872; 51Philippine57; 159Tenn69, 16SW(2d)25; TexCivA 297 SW1045; Wash 286P856; Alta [1930] 3DomLR1010. See also 214Ala295, 107 S815. **Cause for failure.**–Iowa 230NW 856.

907–33 39F(2d)50; 338 Ill 620, 170NE 777; 157Tenn275, 8SW(2d)489, 60ALR 693; TexCivA 26SW(2d)356. **Notice of reservations.**–73Mont518, 238P591.

907–34 95CalA656, 273P64; 249NY217, 164NE29; TexCivA 12SW(2d)243; 199 Wis440, 223NW559. **A contract made without fraud or mistake,** etc. Iowa 227NW591. **In absence of showing as to mistake,** written contract evidences intent of parties. 90CalA276, 265P1010.

907–35 See also 218Ala513, 119S20.

908–36 7Alaska457; 157Miss518, 128S 574; 128 Okl 201, 264P591; 51SD472, 214NW853.

908–36½–New. Instrument unambiguous in its terms and not tainted with fraud may not be reformed. 103Conn 285, 130A387.

908–36⅓–New. Where there is no fraud, misrepresentation, mistake, undue influence, or fiduciary relation, court will not interfere to reform contract, though harsh. 149Md385, 131A815.

908–36¼–New. Reformation will be granted in case of fraud, accident, or mistake in making indorsement without recourse. TexCivA 23SW(2d)835.

903–38 221Ala301, 128S779(2dcase); CalA 288P706; 163Ga868, 137SE253; 164Ga257, 138SE333; 338 Ill 620, 170 NE777; 164La334, 113S867; 236Mich 393, 210NW247; 307Mo 269, 270SW 646; Mo 272SW944; 78Mont145, 252P 872; 191NC359, 131SE729; 114 Okl 10, 243P195; 116 Okl 239, 244P175; 118 Or22, 245P515; 85PaSuper406 (accident or mistake); 51Philippine57; 69 Utah460, 256P400; 146Va680, 132SE 848.

908–39½–New. Mistake must appear on face of instrument to warrant reformation of instrument. 215AppDiv73, 213 NYS277.

909–42 177Ark19, 6SW(2d)315; 164 Ga257, 138SE333.

909–43 73CalA262, 238P752.

909–44 221Ala533, 129S571; 164Ga 257, 138SE333; 83 IndA244, 148NE159; 203 Iowa1144, 212NW691; Miss 130S 99; 129Misc363, 221NYS489; 118 Okl 244, 247P404. **Where stock was sold for more than mistakenly stated** in confirmation notice, court will reform instrument. 230AppDiv103, 243NYS408.

910–46 13F(2d)833.

910–47 13F(2d)833; 73CalA262, 238P 752; 329 Ill 637, 161NE118; 122Kan 716, 253P576; 9LaA509, 121S251; Miss 130S99; 55ND585, 214NW901; 158 Tenn429, 14SW(2d)726. **Court of equity may not make new contract.**–149 Miss47, 115S106. **Where mistake is as to identity itself of property to be conveyed,** reformation will not be granted. 240Mich475, 215NW302.

910–50 13F(2d)833; 119 Or224, 242P 628. **Reformation refused where language of instrument is direct and certain** and no patent ambiguity exists. 51ND354, 199NW592.

910–51 251Mich85, 231NW102.

910–52 83 IndA244, 148NE159; 203 Iowa1144, 212NW691; 191NC359, 131 SE729.

910–53 218Ala523, 119S214; 85CalA87, 258P969; 164Ga155, 138SE62; 83 IndA 244, 148NE159; 203 Iowa1144, 212NW 691; 241Mich576, 217NW892; 307Mo 269, 270SW646 (where draftsman is agent of both parties); MoA 300SW 313; NJ 152A173; 222AppDiv764, 226 NYS63; 128Misc299, 218NYS401; 191 NC359, 131SE729; 192NC269, 134SE 494; Or 292P1034; 8PaDist&Co 648; 45Philippine128; 134SC502, 133SE465; TexCivA 4SW(2d)232; Wash 288P916.

911–54 168Ark1049, 272SW641 (as against grantors in deed of trust); 164 Ga155, 138SE62; 203 Iowa1144, 212NW 691. **In Philippines.**–45Philippine 128.

911–54½–New. Notice of covenant to scrivener is no notice to vendee. 98NJEq 64, 130A546.

911–55 Iowa 230NW856.

911–56 248Mich550, 227NW711.

911–59 13F(2d)833; 329 Ill 637, 161NE 118; 9LaA509, 121S251; 51Philippine 57.

911–60 15F(2d)756; 36F(2d)323. **In Oregon.**–128 Or483, 275P45.

912–61 178Ark596, 12SW(2d)15.

912–62 229Ky746, 17SW(2d)1028; 232 Ky73, 22SW(2d)442. **In several states the courts are inclined to,** etc. 191NC 359, 131SE729; 146Va680, 132SE848.

912–63 219Ala683, 123S210; 221App Div727, 224NYS549.

913–70½–New. Necessity of mutuality or mistake of one known to other.–90 CalA276, 265P1010.

913–71 119Kan478, 240P400.

913–74 221Ky91, 297SW1109; 128 Or 483, 275P45.

914–78 156Tenn463, 2SW(2d)409.

914–80 229Ky746, 17SW(2d)1028; 307 Mo 269, 270SW646.

914–81 307Mo 269, 270SW646.

915–82 83 IndA244, 148NE159; 307Mo 269, 270SW646. **That donor drew trust agreement in his own hand** does not make error therein that of scrivener, as respects reformation. 215AppDiv73, 213NYS277.

915–84 215Ala515, 110S898; 173Ark 842, 293SW712; 107Conn387, 140A749; Iowa 229NW684; 122Kan793, 253P214; 126Kan354, 267P968; 209Ky744, 273 SW458; 219Ky256, 292SW817; 226 Ky97, 10SW(2d)608; 253Mass451, 149 NE156; Mass 169NE430; 100NJEq 293, 134A737; 125Misc430, 210NYS 18; 131Misc511, 227NYS137; Or 245 P515; 136Wash485, 240P682; 153Wash 641, 280P41; 104WVa200, 139SE714; Ont [1927] 2DomLR 323. **Unless fraud** is also alleged and proved. 219Ky256, 292SW817.

915–85 192NC269, 134SE494. **Chancery will not make a new contract,** etc. 204 Iowa1011, 216NW765; 205 Iowa 1126, 217NW429. **There must be antecedent agreement** to permit reformation of written instrument. 35F(2d)571.

915–86 13F(2d)833; 35F(2d)571; 213 Ala612, 105S802; 215Ala515, 110S898; 219Ala343, 122S413; 219Ala683, 123S 210; 170Ark58, 278SW645; 175Ark153, 298SW863; 175Ark1170, 300SW371; 73 CalA262, 238P752; 81Colo 58, 253P385; 104Conn36, 132A533; 110Conn319, 148 A353; DelCh 142A368; 163Ga868, 137 SE253; 164Ga155, 138SE62; 164Ga257, 138SE333; 169Ga852, 151SE807; 337 Ill 41, 168NE625; 239 IllA175; 200 Iowa824, 205NW507; 205 Iowa1203, 219 NW517; 209Ky657, 273SW524; 213Ky 763, 281SW1026; 217Ky815, 290SW659; 230Ky194, 18SW(2d)1006; 231Ky36, 20 SW(2d)1013; 234Ky1, 27SW(2d)389; 150Md1, 132A271; 154Md510, 142A625; 252Mass504, 148NE134; 253Mass451, 149NE156; 251Mich85, 231NW102; 165 Minn433, 206NW711; 147Miss335, 112 S469, 53ALR88; Miss 130S99; 307Mo 269, 270SW646; 312Mo 609, 280SW 424; 219MoA133, 268SW691; 115 Nebr520, 213NW750; 100NJEq293, 134A737; 98NJEq59, 130A839; 101 NJEq55, 136A713; 101NJEq442, 139A247; NJCh 151A117; 222 AppDiv764, 226NYS63; 221AppDiv727, 224NYS549; 191NC560, 132SE462; 192 NC269, 134SE494; 25 OhNPNS535; 119 Or224, 242P628; 51Philippine57; 51 SD472, 214NW853, 855 [citCyc]; 54SD 125, 222NW676; 136Wash74, 239P4;

136Wash485, 240P682; 137Wash391, 242P385; 104WVa200, 139SE714; Can [1930] 4DomLR985. **Mistakes in a deed must be mutual.**–168Ark1167, 273SW371. **Conveyance representing gift.**–24 OhA57, 155NE815. **Statutes not strictly construed** as to requirement of mutuality unless manifest justice of case demands it. 85CalA87, 258P969.

917–87 13F(2d)833; 24F(2d)951; 219Ala414, 122S414; 170Ark58, 278SW645; 173Ark960, 294SW58; 175Ark73, 298SW495; 79CalA748, 250P1106; CalA289P857 (under statute); 161Ga672, 132SE442; 163Ga868, 137SE253; 164Ga155, 138SE62; 166Ga747, 144SE256(2dcase); 85IndA418, 154NE692 (omission of name of one obligee in bond of indemnity); 88IndA386, 163NE290; 205Iowa1126, 217NW429; Iowa 228NW305; 127Kan772, 275P143; 235Ky164, 30SW(2d)876; 234Mich212, 207NW823; 234Mich147, 207NW898; 235Mich245, 209NW73; 240Mich85, 214NW967; 246Mich251, 224NW337(2dcase); 312Mo609, 280SW424; 317Mo1047, 297SW960; MoA 11SW(2d)71; MoA 17SW(2d)591; 83Mont68, 271P695; 115Nebr520, 213NW750; 192NC269, 134SE494; 29OhA51, 162NE718; 122Okl188, 253P88; 118Or22, 245P515; 6PaDist&Co12; 50Philippine558; 132SC295, 128SE27 (dictum); TexCommnA 24SW(2d)393; TexCivA 14SW(2d)109; TexCivA 31SW(2d)345; 136Wash74, 239P4; 150Wash570, 274P106(1stcase); 153Wash641, 280P41. **Mutual mistakes in deeds,** etc. 214Ala194, 106S814; 164GaA155, 138SE62; 264Mass303, 162NE334; 168Minn293, 210NW42; TexCivA 15SW(2d)1095. **Reformation and not cancellation is proper remedy** where parties to conveyance agreed on identity of property, but, through mutual mistake, supposed that it had greater frontage than it had in fact. 168Minn293, 210NW42. **Scrivener's error in using wrong range number** is mutual mistake. 136Wash74, 239P4.

918–88 196NC588, 146SE233; 118Or22, 245P515. But see 85CalA87, 258P969.

918–88½–New. Defendant purchaser's negligence in failing to report discrepancy between his order for piles and bill of lading can avail plaintiff nothing in his suit based on mutual mistake. 119Or224, 242P628.

918–89 160La439, 107S298; 165Minn433, 206NW711.

918–90 200Iowa824, 205NW507; 160La439, 107S298; 165Minn433, 206NW711. **For an unilateral mistake the remedy,** etc. 160La439, 107S298.

919–92 163Ga868, 137SE253; 164Ga155, 138SE62; 170Ga40, 152SE70; 252Mass504, 148NE134; 266Mass566, 165NE679; MoA 11SW(2d)71; 115Nebr520, 213NW750; 118Or22, 245P515.

919–93 191NC359, 131SE729; 136Wash74, 239P4 (error by scrivener).

919–95 13F(2d)833; 73CalA262, 238P752.

919–96 168Ark1167, 273SW371. **Misapprehension of one of the parties,** etc. 125Misc430, 210NYS18; 136Wash485, 240P682.

920–2 217Ala81, 114S688, 689 [citCyc]; Mo 272SW944.

920–3 Mo 293SW774.

920–7 13F(2d)833; 35F(2d)571; 219Ala683, 123S210; 175Ark73, 298SW495; 175Ark153, 298SW863; 175Ark1170, 300SW371; 177Ark815, 8SW(2d)443; 110Conn319, 148A353; DelCh 142A368; 161Ga672, 132SE442; 163Ga868, 137SE253; 29Hawaii304; 88IndA386, 163NE290; 200Iowa824, 205NW507; 205Iowa1203, 219NW517; 122Kan793, 253P214; 209Ky657, 273SW524; 230Ky194, 18SW(2d)1006; 231Ky36, 20SW(2d)1013; 234Ky95, 27SW(2d)675; 235Ky164, 30SW(2d)876; 150Md333, 134A124; 234Mich212, 207NW823; 249Mich698, 229NW450; 251Mich85, 231NW102; 78Mont145, 252P872; 101NJEq442, 139A247; 131Misc215, 225NYS470; 221AppDiv727, 224NYS549; 192NC269, 134SE494; 116Okl239, 244P175; 118Okl244, 247P404 (one willfully leading another into misconception of his legal rights as to matters contracted about cannot rely on rule that mistake of law will not support rescission of contract); 85PaSuper406; 51SD472, 214NW853; TexCivA 18SW(2d)432; TexCivA 12SW(2d)243; 146Va680, 132SE848; 108WVa321, 150SE749; Ont [1927] 2DomLR323.

921–10 13F(2d)833; 337Ill396, 169NE258; 252Mass504, 148NE134; 51SD472, 214NW853. **Concealment.**–150Md333, 134A124. **Grantee's fraud or breach of contract in procuring execution of deed by agreement which he did not intend to perform** does not authorize reformation. 235Ky164, 30SW(2d)876.

921–11 110Conn319, 148A353; Tex CommnA 18SW(2d)609.

921–12 164Ga777, 139SE549.

921–13 Where complaining party was able to read, equity will not reform contract for mistake as to contents of writing as to which other party made false representations in absence of fiduciary relations. 161Ga823, 131SE889.

921–15 88IndA386, 163NE290.

921–16 43F(2d)17; 109Conn292, 146A717, 720 [citCyc]; 52SD159, 216NW887; TexCivA 18SW(2d)432. **Silence as inequitable conduct** may not be ground for reformation where both parties are silent. 43F(2d)17.

922–24 31F(2d)10; 230Ky710, 20SW(2d)714; 166Minn507, 208NW408.

923–31 166Ga747, 144SE256(2dcase) (successive conveyances); 230Ky835, 20SW(2d)1015; 147Miss385, 113S336 (recorded deed); 6PaDist&Co12. See also 307Mo269, 270SW646. **Deed relinquishing dower interest in oil and gas lease** could not be reformed as to wife who could relinquish dower rights only as provided by statute. 168Ark842, 271SW980. **Where contract vendor, who had contracted to purchase from another, assuming mortgage, caused deed with assumption clause to be made to his purchaser who had agreed to purchase subject to mortgage,** equity may reform deed so as to apply assumption clause to original purchaser and absolve second purchaser from liability. 200Iowa1, 201NW787. **Deed made subject to existing land contract** reformed so as to give grantee benefit of contract. 232IllA583. **Correction of deed** may be obtained on its own account or as necessary preliminary step to granting further relief. TexCivA 18SW(2d)933. **Suit to correct description of deed** held to be in nature of action to quiet title. TexCivA 18SW(2d)933.

924–32½–New. Right to reform deed by imposing obligation on purchasers must rest upon antecedent contract which fixed all obligations of parties, unless it is validly amended after it becomes effective. 213Ala612, 105S802.

924–34 81Colo58, 253P385, 386 [citCyc]; 39OklACR237.

924–36 In Colorado.–81Colo58, 253P385.

925–42 5LaA558; 236Mich393, 210NW247; 127Misc751, 217NYS504; 51SD293, 213NW726; 192Wis319, 212NW523.

926–46 147Miss335, 112S469, 53ALR88; 29OhA51, 162NE718. **Statutory bond held not reformable** so as to defeat its purpose. 205Iowa975, 213NW612.

926–47 85PaSuper406.

926–47½–New. contracts of settlement and dissolution between partners, 200Iowa979, 205NW784.

926–56½–New. Pardon will not be reformed. 171Ark683, 285SW386.

926–56⅓–New. Contract by indorsement of note. 116OhSt609, 157NE478, 54ALR992.

926–56¼–New. There can be no reformation of imperfect execution of statutory power. 171Ark683, 285SW386.

926–56½–New. Certificate of deposit may be reformed. 125Kan182, 264P55.

926–56⅙–New. Agreement to cease practice of medicine in city may be reformed. TexCivA 17SW(2d)1083.

926–56½–New. Negotiable promissory notes. 221Ala533, 129S571.

927–57 Cal 273P567; 11LaA342, 122S730(1stcase); 100NJEq293, 134A737; 134SC233, 132SE48 (mortgage to deceased mortgagee); 151Wash529, 276P564.

927–59 215Ky543, 286SW783. **Where mortgage of married woman is void because husband's name does not appear in body of instrument,** reformation will be denied. 215Ky543, 286SW783.

927–59½–New. Reformation of contract depends on whether or not there was valid contract. 158Tenn452, 14SW(2d)714.

927–60 But see 101NJL452, 145A866.

927–61 240Mich475, 215NW302, 303 [quotCyc].

928–62 171Ark683, 285SW386; 335Ill52, 166NE477; 149Miss354, 115S40; 119Or277, 241P46. **There can be no reformation** of voluntary instrument. 171Ark683, 285SW386. **Merits of applicant** do not afford consideration to justify reformation. 171Ark683, 285SW386.

928–63 But see 215AppDiv73, 213NYS277.

928–65 128Or483, 275P45; 134SC233, 132SE48 (mortgages).

929–70½–New. Grantee may have reformation of voluntary deed as against grantor's heirs, and equity will grant such relief though mistake is not mutual. 86Mont43, 281P749, 69ALR416.

929–71 But see 215AppDiv73, 213NYS277.

929–71½–New. Trust agreement will not be reformed as between beneficiaries in regard to definite language, after death of donor, on theory that donor's intended plan of distribution was defeated by mistake in computation. 215AppDiv73, 213NYS277.

929–76 83IndA244, 148NE159. See also 219Ala419, 122S645.

929–77 335Ill52, 166NE477.

930–81½–New. Recital of nominal consideration does not render conveyance voluntary as between parties. 219Ala419, 122S645.

930–84 That a sheriff's deed cannot be reformed, etc. Mo 293SW102.

930–88 Equity will correct certain defects in instruments containing words of conveyance. 206Iowa1242, 219NW490.

931–97 80CalA459, 251P87; 241Mich576, 217NW892; 230AppDiv436, 245NYS219; 192NC269, 134SE494.

932–2 95CalA656, 273P64; 337Ill396, 169NE258; 237Mich526, 212NW88 (provision for interest on deferred payments).

932–5 122Kan793, 253P214 (words of negotiability).

932–9 221Ala533, 129S571; 240Mich529, 215NW329. **An arithmetical miscalculation,** etc. But see 243Mich550, 220NW667.

932–10 Execution of notes by board of public instruction can be reformed so as to bring notes within statute where executed within authority of board. Fla129S824.

933–13 Contra 15DelCh140, 132A688.

933–14 15DelCh140, 132A688.

934–23 CalA 289P857.

934–25 121Or277, 254P806.

935–46 170Ark58, 278SW645; 207Cal424, 278P1043; 158La753, 104S704 (as between original parties in act of partition); 11LaA87, 120S253; 6LaA144.

936–47 158La753, 104S704.

936–49 240Mich475, 215NW302.

936–50 240Mich475, 215NW302.

936–51 Iowa 229NW249.

936–52 170Ark58, 278SW645; 207Cal424, 278P1043 (omission of description); 110Conn374, 148A133; 164Ga257, 138SE333; 169Ga852, 151SE807; 323Ill309, 154NE120; 337Ill396, 169NE258; 164La913, 114S834; 1LaA640; 3LaA28; 6LaA144; 6LaA187; 240Mich475, 215NW302; 158Tenn429, 14SW(2d)726.

936–53 170Ark58, 278SW645.

936–54 164Ga257, 138SE333; 166Ga747, 144SE256(2dcase); 323Ill309, 154NE120; 240Mich85, 214NW967; 168Minn293, 210NW42.

936–55 168Minn293, 210NW42. **That grantor did not own property omitted from deed at time he made agreement to convey** is immaterial if he has since acquired it. 168Minn293, 210NW42.

937–57½–New. Deed omitting conveyance of right of way by reason of mu-

tual mistake may be reformed so as to correct such omission. 235Mich245, 209 NW73.

937-60 219Ala683, 123S210; 170Ark58, 278SW645; 161Ga672, 132SE442, 447 [citCyc]; 164Ga257, 138SE333; 83Mont 68, 271P695.

938-61 215Ala653, 112S235; 161Ga672, 132SE442, 447 [citCyc]; TexCivA 18SW (2d)432; TexCivA 21SW(2d)694; 147 Wash530, 266P182.

938-62 But see 158Tenn429, 14SW(2d) 726.

938-63 **Unreasonable excess.**–164Ga257, 138SE333.

938-66 151Va213, 144SE434.

938-68 170Ark823, 281SW391 (reformation so as to convey dower).

938-69 230Ky835, 20SW(2d)1015 (conveyance to grantees as tenants in common with remainder in fee simple to survivor instead of joint conveyance).

939-70 6PaDist&Co 12.

940-81 **As to quantity of land demised.**–TexCivA 23SW(2d)472.

940-85 39 OklACR237.

940-86 39 OklACR237; 48Philippine 523.

940-87 See also 214Ala295, 107S815.

941-91 204 Iowa384, 214NW725 (mortgage of part intended to embrace all of homestead). **Not violative of homestead statute** declaring conveyance invalid when husband and wife do not join in execution of same joint instrument. 204 Iowa384, 214NW725.

941-93½-New. Where purported mortgage does not describe in detail,property referred to as all of real property of mortgagor, he may be compelled to reform it or execute another document. 48Philippine523.

941-95 205 Iowa1360, 219NW507.

942-6 See also TexCivA 10SW(2d)200.

942-13 15DelCh140, 132A688; 69Utah 460, 256P400, 403 [citCyc].

942-14 226Ky97, 10SW(2d)608; 99NJ Eq629, 134A353. **Acquiescence by succeeding owners.**–158La753, 104S704.

942-15 221Ala533, 129S571.

943-17 221Ala533, 129S571; 205 Iowa 633, 216NW719.

943-19 168Ark842, 271SW980.

944-25 **Grantee seeking reformation of description in deed** must give mortgage as required by deed. Mass 172NE863.

944-27½-New. Subsequent grantee of part of lot is not required to surrender possession as prerequisite to invoking jurisdiction of equity to reform deed erroneously covering entire lot. 219Ala 683, 123S210.

944-28 But see 218Ala523, 119S214. **Bill will not be dismissed for failure to request grantor to correct mistake,** but complainant will be taxed costs if it appears that bill was unnecessary. 218 Ala523, 119S214. **Where grantor sold merchantable timber and was stopped** cutting by complainant holding under grantee, this was denial of right under deed warranting filing of bill to reform without prior demand. 218Ala523, 119 S214.

945-29 218Ala523, 119S214.

945-29½-New. **Offer to rescind** is not necessary. 40 OklACR358 [reh pending].

945-31 See also 132SC295, 128SE27.

945-35 132Misc699, 230NYS150.

946-44½-New. Where right of way for benefit of owners of adjoining properties was established with reference to encroachments thereon, subsequent grantee of one of the properties cannot set up encroachment to avoid reformation. 128Misc299, 218NYS401.

946-44¼-New. Attempted foreclosure by assignee of mortgages, if unjust, did not prevent reformation of deed to mortgagor by restricting description therein of part not intended to be conveyed. 219 Ala683, 123S210.

946-44¼-New. Other matters not constituting objection. TexCivA 29SW(2d) 461.

946-44½-New. Original owner and subsequent grantees held not estopped by laches to set up equitable mortgage against one claiming prior deed misdescribing land. Mass 172NE863.

946-45 DelCh 142A368; 97Fla375, 121 S102; 204 Iowa1151, 216NW707; 128 Misc246, 218NYS346; 52SD597, 219NW 560. **Reformation useless.**–201 Iowa561, 207NW610.

946-47 128Misc246, 218NYS346.

947-48½-New. Reformation is not necessary in order to permit party to recover on contract not representing true agreement. TexCommnA 16SW(2d)530, 66ALR758.

947-49 Utah 290P958. **Where instrument is in possession of party for several days,** he is not entitled to reformation. 130Misc721, 224NYS349.

947-50 104Conn36, 132A533. **If by reasonable diligence when put upon inquiry** knowledge of fact was obtainable by one relying on mutual mistake, equity will not relieve him. 116 Okl 255, 244 P414.

948-55 163La945, 113S156.

948-56 CalA 290P45; 329 Ill 637, 161 NE118; 200 Iowa824, 205NW507; 204 Iowa153, 214NW522; Iowa 230NW856; 138 Okl 58, 280P460; 51SD472, 214NW 853; 69Utah460, 256P400, 403 [quot Cyc]; Va 154SE538. **Where an agent made a mistake,** etc. 204 Iowa384, 214 NW725.

948-57 110Conn319, 148A353 (mere omission); 69Utah460, 256P400, 403 [quotCyc].

948-58 15F(2d)756; 35F(2d)571 (mere negligence is no defense to suit for reformation); 88 IndA386, 163NE290; 200 Iowa824, 205NW507; 204 Iowa153, 214NW522; 73Mont518, 238P591; Tex CommnA 18SW(2d)609; 69Utah460, 256 P400, 403 [quotCyc]. **Principle that contract for sale of real estate** is merged in deed does not apply where reformation is sought to make deed harmonize with contract. 200 Iowa824, 205NW507. **Complete knowledge and understanding** of contract is not inexorable requirement. 188Wis140, 205NW800. **Showing of diligence and absence of negligence** in discovering mistake is unnecessary, especially where no injury resulted. TexCivA 27SW(2d)579.

949-59 69Utah460, 256P400, 403 [quot Cyc].

949-59½-New. It is not sufficient merely to show that mistake was made and that one party relied upon it to his injury. 73CalA262, 238P752.

949-60 15F(2d)756, 759 [citCyc]; 128 Or248, 275P28; TexCivA 4SW(2d)232.

949-61 204 Iowa153, 214NW522; 205 Iowa7, 215NW732; MoA 285SW1015; 115 Okl 298, 243P137, 140 [citCyc]; 119 Or224, 242P628 (written order on sale of personal property and acceptance thereof); TexCivA 4SW(2d)232; 69 Utah460, 256P400.

950-63 35F(2d)571; 79CalA748, 250P 1106; 95CalA586, 272P1065; 88 IndA 386, 163NE290; 204 Iowa153, 214NW 522; 154Miss587, 122S544; 125 Okl 126, 256P515; TexCivA 298SW140; 143 Wash154, 254P1094; 188Wis140, 205 NW800 (meaning and effect of instrument not clear). See also Ark 31SW(2d) 420; 110Conn319, 148A353.

950-65 40 OklACR358 [reh pending]; TexCivA 4SW(2d)232.

950-66 40 OklACR358 [reh pending]; 143Wash154, 254P1094.

950-67½-New. Failure by plaintiff to read policy was not negligence, where policy, though giving but one street number, specified street frontage covering both buildings, and, if read, would not have informed plaintiff of error. 83 NH474, 144A261.

950-68 218Ala523, 119S214; 232 IllA 583 (grantee for valuable consideration); 194NC348, 139SE695 (mortgagor); 124 Or276, 261P432, 441 [citCyc]. **Lienholders against property conveyed by grantee in trust** to secure note can maintain suit to reform deed to grantee in their capacity as such, if they hold as privies to parties executing deed. 151Va213, 144SE 434. **Surety on building contract** is entitled to benefit of reformation. 45Philippine128. **Complete title is unnecessary** to authorize bill to reform deed. 218Ala523, 119S214. **Whether one is party to instrument or not,** deed cannot be reformed by him unless mistake claimed therein would in some way affect his interest. 201 Iowa765, 208NW 518.

951-70 168La37, 121S183; MoA 28SW (2d)448.

951-71 149Miss354, 115S40; 24 OhA57, 155NE815. See also 86Colo 98, 278P614 (2dcase). **Cal. Civ. Code § 3399,** etc. A 289P857.

951-71½-New. Judgment creditor of grantee is not entitled to reformation. 86Colo 98, 278P614(2dcase).

951-72 221Ala533, 129S571; 124 Or276, 261P432 (dictum).

951-73 219Ala526, 122S841; 52SD159, 216NW887.

951-76 See also TexCivA 31SW(2d)345.

951-77 124 Or276, 261P432 (dictum); TexCommnA 286SW173; TexCivA 23SW (2d)472 (last vendees entitled as against original lessor). **There is sufficient privity between subsequent grantees of two adjoining properties** to entitle one of them to reformation of deeds between adjoining owners creating right of way for benefit of both properties. 128Misc 299, 218NYS401. **Subsequent grantee has no greater rights than original grantee.**–Mass 172NE863 (land intended to be but not described). **Subsequent grantee cannot assume that mortgage required by original grantee's deed was satisfied** or that right to demand it was waived. Mass 172NE863. **Subsequent grantee is no more innocent holder than original grantee** as regards erroneous description in deed in chain of title. Mass 172NE853.

952-78 240Mich85, 214NW967.

952-81 151Va213, 144SE434.

952-81½-New. Holder of mortgage on land may not have deed to subsequent purchaser reformed so as to include assumption by purchaser of payment of mortgage on bare plea that such purchaser contracted to pay such mortgage. 201 Iowa765, 208NW518.

952-84 209Ky375, 272SW897.

952-84½-New. So also a builder's surety who undertook work after principal's default is entitled to benefit of reformation of principal's contract, prejudicial mistake being shown. 45Philippine 128.

953-87 214Ala150, 107S94; 221Ala533, 129S571; 85 IndA498, 154NE512; 317 Mo 1047, 297SW960; 114Nebr371, 207 NW515, 44ALR73 (general creditors); 39 OklACR237; 127 Or34, 270P907, 910 [citCyc]; 128 Or248, 275P28.

953-88 181Ark943, 28SW(2d)730; 232 Ky274, 22SW(2d)1029; 12LaA464, 125 S307. But see 169La819, 126S72.

953-89 Wash 287P46 (subsequent mortgagees).

953-91½-New. Agreement will not be reformed as to party against whom it is not enforceable. 128Misc838, 221NYS 269.

953-91¼-New. Where three persons own certain land and deed conveying interest of two erroneously includes smaller tract owned by one of grantors, such grantor may have deed corrected as against the third part owner of larger tract. 164La913, 114S834.

953-91½-New. Husband selling and conveying land belonging to community is under duty to sell it under correct description, and, on discovery of mistake, should correct mistake as far as possible, though community has been dissolved. 168La37, 121S183.

953-92 114Nebr371, 207NW515, 44ALR 73 (general creditors).

954-93 150Md265, 132A633.

954-3 207 Iowa1181, 225NW6.

954-3½-New. Landlord's lien cannot stand in way of reformation of prior chattel mortgage, restricting its scope on ground of mutual mistake. TexCivA 10SW(2d)200.

955-5 168La37, 121S183; 24 OhA57, 155NE815.

955-7 24F(2d)951; 240Mich85, 214NW 967; 147Miss385, 113S336; 155Miss 508, 124S648; 317Mo 1047, 297SW960; 39 OklACR237.

956-9 168Ark1049, 272SW641 (notice may be actual or constructive); 250 Mich601, 230NW933; 151Miss850, 119S 306(1stcase). **Statement in deed of trust that it is subject to first mortgage to person and in sum named** is notice warranting reformation of first mortgage as against subsequent mortgagee to in-

clude land omitted by mistake. 168Ark 1049, 272SW641.

956-11 Reformation granted against purchaser with record notice. 147Miss 385, 113S336.

956-13 166Ga747, 144SE256(2dcase).

956-14 NJCh 149A630 (quitclaim deed); 128 Or483, 275P45; 518D472, 214NW853.

957-15 122Kan709, 253P215, 218 [cit Cyc].

957-16 158La753, 104S704 (description in act of partition); 321Mo 576, 11SW (2d)1016; TexCivA 21SW(2d)552.

957-19 147Wash530, 266P182.

958-23 177Ark849, 8SW(2d)440. But see 245Mich224, 222NW169. **Mortgagee of grantee.**–128 Or483, 275P45.

958-24 85 IndA498, 154NE512; Tex CivA 282SW930; 147Wash530, 266P 182. **Possession as notice.**–33Colo 562, 267P400 (printed clause conveying rents, issues, and profits held not to put purchaser on notice of mistake). **Recitals in deeds** regarding defendant's leases, coupled with other facts, put plaintiffs, claiming under subsequent lease, on inquiry so as not to defeat defendant's rights to reformation against them. TexCivA 23SW(2d)472.

962-50 86Colo 169, 279P42; 234Mich 212, 207NWS23; 136Misc605, 241NYS 645; 40 OklACR358 [reh pending]; 157 Tenn332, 8SW(2d)481.

963-52 See also 95CalA394, 273P72.

963-54 31F(2d)411. But see 95CalA 394, 273P72.

963-55 TexCivA 9SW(2d)275.

963-57½–New. Reformation cannot be granted by jury.–MoA 25SW(2d)554.

963-60 234Mich212, 207NW823; 155 Miss185, 124S270(2dcase).

963-61 234Mich212, 207NW823; 157 Tenn332, 8SW(2d)481.

964-65 134Misc504, 235NYS541.

964-69 169Ark1102, 278SW36; 214Ky 305, 283SW80; 69Utah460, 256P400.

965-71 35F(2d)571. **Unless right to foreclose mortgage is barred,** action to reform satisfaction of mortgage would not be barred. 155SC414, 152SE640.

965-72 169Ark1102, 278SW36; 162Ga 295, 133SE257; 164Ga155, 138SE62; 327 Ill 538, 158NE694. **Suit to reform held not barred by laches** where both land mistakenly conveyed and land intended to be conveyed increased in value. 169Ark1102, 278SW36.

965-73 In Georgia.–164Ga155, 138SE 62.

966-74 163Ga868, 137SE253; 164Ga 155, 138SE62; 11LaA87, 120S253; 150 Md333, 134A124. See also 95CalA586, 272P1065. **Party in possession need not move for reformation** till possession is sought to be disturbed. 163Ga868, 137SE253.

966-75 163Ga868, 137SE253.

966-76 164Ga155, 138SE62 (thirty days held not to constitute laches); 164 Ga257, 138SE333 (reasonable time allowed); 327 Ill 538, 158NE694; 150Md 333, 134A124; 321Mo 576, 11SW(2d) 1016. **Laches shown.**–214Ky305, 283 SW80 (two and one half-year delay after notice); 150Md333, 134A124; 128 Or 483, 275P45. **Laches not shown.**–Ark 31SW(2d)420; Ga 144SE256(2dcase); 168Ga356, 148SE84; 85 IndA498, 154 NE512; 147Miss335, 112S469, 53ALR 88.

967-78 212Ala685, 103S892 (delay of sixteen years excused because of cordial relationship and joint use of property by complainant and his brother); 162 Ga295, 133SE257.

967-79 162Ga295, 133SE257.

967-79½–New. Since remainderman cannot sue till after death of life tenant, he is not chargeable with laches in suing after such death. 327 Ill 538, 158 NE694.

967-79¾–New. Facts establishing findings that plaintiff did not know of defect in policy, and was not at fault for not knowing thereof till shortly before proceeding was commenced, satisfactorily accounted for delay and did not bar relief for laches. 83NH474, 144A261.

967-80 221Ala533, 129S571; 97Fla644, 121S807; 52SD159, 216NW887. **In Manitoba.**–[1930] 3DomLR659.

967-81 218Ky210; 291SW36.

967-83 214Ala150, 107S94 (one who had legal title is necessary party); 12 LaA464, 125S307 (purchaser of grantee); TexCivA 29SW(2d)426. See also TexCivA 14SW(2d)109. **Grantor's wife** is not necessary party to suit for reformation of deed so as to include omitted property. TexCivA 1SW(2d)432.

968-84 222Ky584, 1SW(2d)1079.

968-86 219Ala419, 122S645.

968-87 TexCivA 296SW929.

969-1 97Fla644, 121S807. **Husband could not sue** to reform policy where he acted as agent for wife, and policy as reformed would create no liability to him. 170Ga573, 153SE362.

969-6 214Ala150, 107S94 (present owner and his original grantor). **Former owner who gave contract** to purchase held proper party in action to reform contract. 51SD110, 212NW502. **In action to reform contract of purchase and sale of patent rights,** person to whom license to use patent has been issued is proper party. 90CalA276, 265P 1010.

969-7 162Ga295, 133SE257 (grantee and parties to whom he conveyed).

970-20 204 Iowa1151, 216NW707. But see 101NJL452, 145A866.

971-26 219Ala343, 122S413; 168Ga356, 148SE84; 168Ga288, 147SE522; 153 Tenn408, 284SW382. **Petition held sufficient.**–164Ga155, 138SE62; 164Ga257, 138SE333; 169Ga33, 149SE636. **Petition held insufficient.**–164Ga880, 139SE 822. **Complaint held sufficient.**–CalA 289P857. **Bills held to state cause of action.**–250Mich176, 229NW427(2dcase). **Complaint held sufficient on demurrer that it alleged conclusions.**–51SD110, 212NW502. **Petition held to state cause of action for reformation** and not to quiet title. 21 OhA244, 153NE 172. **Possession of land by purchaser** need not be alleged in action to correct mistake in deed. 21 OhA244, 153 NE172.

971-27 214Ala295, 107S815; 215Ala 515, 110S898; 153Tenn408, 284SW382.

971-29 Complaint construed as one for reformation of written policy of insurance and to recover on policy as reformed. 55ND585, 214NW901.

971-32 169Minn92, 210NW628.

971-33 178Ark143, 10SW(2d)43 (complaint held sufficient); 122Kan793, 253 P214 (sufficient); 198NC498, 152SE396; 48Philippine5; 153Tenn408, 284SW382. **Allegations held insufficient.**–191NC243, 131SE665. **Bill need not negative fact that rights of third persons have intervened,** since this is defensive matter. 218Ala523, 119S214. **That grantor did not perpetrate fraud** need not be averred. 218Ala523, 119S214. **Assignees' bill** is defective if not averring facts showing they stood in original parties' place as to equities asserted. 221Ala 533, 129S571. **Complaint showing that plaintiff has no right to sue on contract as reformed** is demurrable. 170Ga573, 153SE362. **Petitions held sufficient.**–137 Okl 212, 278P1083; Okl 292P829.

972-34 129Misc363, 221NYS489, 491 [quotCyc].

972-34½–New. Bill need not negative fact that rights of third persons have intervened that would render inequitable or ineffective reformation. 218Ala 523, 119S214.

972-34¾–New. It was not necessary to aver that grantor did not perpetrate fraud by purposely executing deed knowing of mistake therein. 218Ala 523, 119S214.

972-34¼–New. Allegation that mortgage had been satisfied should have gone further to show that mortgagee had no interest in insurance policy sought to be reformed as against demurrer for failure to make mortgagor and mortgagee parties. 97Fla644, 121 S807.

972-35 75CalA212, 242P518; 166Ga 305, 143SE379; 120 Or196, 251P715. **Instrument should be attached to, or set forth in, pleading.**–169Minn92, 210NW 628.

973-36 75CalA212, 242P518.

974-45 Ga 155SE680.

974-47 166Ga138, 142SE693; 226Ky97, 10SW(2d)608; 222AppDiv764, 226NYS 63; 223AppDiv603, 229NYS121; 194 NC328, 139SE599; 35 OhA384, 172NE 446; 126 Okl 93, 258P892 (allegation of fraud in direct terms unnecessary if it can be implied from facts stated). **Fraud or mistake is indispensable,** etc. 164Ga777, 139SE549; 224Ky353, 6SW (2d)262. **Complaints held sufficient.**–90 CalA276, 265P1010. **Petition alleging mistake of law insufficient.**–166Ga293, 143SE239.

974-48 19F(2d)419; 164Ga155, 138SE 62 (allegations held proper); 164Ga 257, 138SE333 (allegations held sufficient); 166Ga138, 142SE693; 166Ga 293, 143SE239; 214Ky107, 282SW772; 235Ky767, 32SW(2d)325; 261Mass412, 158NE753 (bill sufficient); 169Minn92, 210NW628; 120 Or196, 251P715; 153 Tenn408, 284SW382; TexCivA 13SW (2d)395(2dcase). **Complaint held sufficient.**–40F(2d)626; 221Ala301, 128S779 (2dcase); Ariz 285P271.

974-49 213Ala340, 104S827; 213Ky763, 281SW1026; 150Md333, 134A124; 144 Miss178, 109S700; 52Nev364, 287P282; 135 Okl 265, 274P1079; 120 Or196, 251 P715. **Allegations held insufficient.**–150 Md333, 134A124. **Name of engineer causing mistake in calculation** of acreage of land sold held not essential in petition. 164Ga257, 138SE333.

974-50 214Ala651, 108S763; 219Ala 419, 122S645; 85CalA87, 258P969; 88 CalA319, 263P305; 162Ga295, 133SE 257; 170Ga40, 152SE70; 166Minn74, 207NW24 (name of plaintiff in fire insurance policy written incorrectly); Or 292P1034; TexCivA 4SW(2d)101.

975-53 150Md333, 134A124; 169Minn 92, 210NW628; 52Nev364, 287P282; 120 Or196, 251P715; TexCivA 21SW(2d) 694. **Actual fraud** must be alleged. 150Md333, 134A124. **Allegations held insufficient.**–231Ky36, 20SW(2d)1013; 150Md333, 134A124; 135 Okl 265, 274P 1079. **Facts showing fraud.**–122Kan 793, 253P214 (sufficient in action to reform note omitting words of negotiability). **Allegation that clause was inserted** in deed either through mistake of grantor or with fraudulent purpose held sufficient. 200 Iowa824, 205NW 507. **Allegation that plaintiff did not know effect of papers** is insufficient where petition did not allege fraud or that petitioner could not read. 166Ga 293, 143SE239. **Complaint held sufficient.**–221Ala301, 128S779(2dcase).

975-56 177Ark815, 8SW(2d)443.

975-59 Allegation that mistake was "suspected" is defective on apt demurrer. 221Ala533, 129S571.

975-61 219Ala343, 122S413; 144Miss 178, 109S700.

976-62 See also 153Tenn408, 284SW 382.

976-64 144Miss178, 109S700; 115 Okl 121, 242P214; 119 Or224, 242P628 (that mistake pleaded was not result of plaintiff's gross negligence); 120 Or196, 251 P715.

976-68 Where only cancellation is prayed for, a suit to reform deed is not created. 166Ga847, 144SE654; 198NC 498, 152SE396 (pleading without prayer for relief of reformation has been held insufficient). But see 204 Iowa732, 216 NW39; 157Miss783, 128S555.

976-69 224Ky353, 6SW(2d)262.

977-79 204Cal 94, 266P535.

977-80 99Fla202, 126S359; 169Minn92, 210NW628; 245NY77, 156NE621. **Allegations held construable** as ground for affirmative relief. Mo 293SW129. **Allegations held sufficient.**–Mo 293SW 133. **Cross petition held sufficient.**–127 Kan772, 275P143. **Cross complaint, based on mutual mistake, coupled with fraud,** is not demurrable because allegations of fraud are insufficient. 109 Conn292, 146A717, 720 [citCyc].

978-82 265Mass396, 164NE453. **Allegations held construable** as defense. Mo 293SW129.

978-84 79CalA748, 250P1106, 1107 [quotCyc]. **Answer need not first deny execution of contract** in form and effect as alleged by plaintiff. 79CalA748, 250 P1106.

978-85 52Nev364, 287P282; 245NY77, 156NE621.

978-89 Ground of special demurrer to answer is properly overruled where plaintiff, by appropriate amendment,

gives the information lacking. 161Ga 672, 132SE442 (name of agent who pointed out boundaries).

978-89½-New. Petition showing staleness of demand is subject to demurrer. 194Ky185, 23SSW398.

978-89½-New. Bill showing laches on face is demurrable. 219Ala343, 122S 413.

979-91½-New. Amendment was insufficient to show right to reformation, there being no allegation of intention or fraud, accident, or mistake of fact. 168Ga108, 147SE113.

979-92 MoA 28SW(2d)448 (defense of laches not pleaded is not available). **Mistake of assignors only** is insufficient to authorize reformation of contract for mutual mistake. 230Ky619, 20SW(2d) 439.

979-98½-New. Mutuality of mistake must be alleged and proved. 222App Div764, 226NYS863.

979-1 19F(2d)277; 9LaA413, 119S549; 115Nebr520, 213NW750; 115 OhSt575, 155NE134; 24 OhA57, 155NE815; 29 OhA51, 162NE718; 119 Or224, 242P628; 120 Or484, 252P705; Or 292P1034; Utah 292P206. **In transfer of note it** will be presumed that parties contemplated indorsement which will preserve negotiability and constitute transferee holder in due course. 205 Iowa1126, 217NW429.

980-2 TexCivA 12SW(2d)243.

980-3 But see 177Ark849, 8SW(2d) 440.

980-4 18F(2d)375; 31F(2d)503; 40F (2d)333; 40F(2d)395; 213Ala340, 104S 827; 215Ala515, 110S898; 219Ala683, 123S210; 221Ala301, 128S779(2dcase); 68CalA478, 229P858; CalA 290P45; 83 Colo 562, 267P400; 104Conn36, 132A 533; 96Fla219, 118S10; 99Fla851, 127 S894; 200 Iowa768, 205NW366; 204 Iowa153, 214NW522; Iowa 228NW305; 215Ky373, 285SW198; 10LaA195, 120S 650; 13LaA395, 128S300; 249Mich218, 228NW696; 142Miss676, 107S865; 115 Nebr520, 213NW750; NJ 147A506; NJ Ch 145A2(2dcase); 194NC328, 139SE 599; 55ND585, 214NW901; 24 OhA57, 155NE815; 116 Okl 239, 244P175; 119 Or224, 242P628; 118 Or22, 245P515; 120 Or484, 252P705; 127 Or446, 271P 593; Or 292P1034; 51SD293, 213NW 726; TexCivA 12SW(2d)243; TexCivA 28SW(2d)578. **That deed contains assumption clause not contained in preliminary contract** does not relieve grantee of burden of proving case warranting reformation because of insertion of such clause. 200 Iowa768, 205NW366. **In showing that a purchaser for value had notice,** etc. 317Mo 1047, 297SW960. **Burden of showing that holders of legal title purchased with notice of plaintiff's equity** rests on plaintiff relying on equity for reformation of deed. 83Colo 562, 267P400.

980-5½-New. Fraudulent intent need not be proved in equitable action to reform burglary policy. 223AppDiv603, 229NYS121.

980-6 Surrounding circumstances and conditions may be shown. 219MoA133, 268SW691. **Motives** may be shown. 219 MoA133, 268SW691. **Evidence properly excluded as irrelevant.**–109Conn292, 146 A717.

980-7 232 IllA583; 219MoA133, 268SW 691; 196NC770, 147SE1.

980-8 232 IllA583; 201 Iowa363, 207 NW334; 191NC359, 131SE729. See also 296Pa414, 146A94.

980-9 232 IllA583; 85 IndA498, 154NE 512; 219MoA133, 268SW691 (subsequent conduct).

981-10 168Ga356, 148SE84; 168La37, 121S183. **Deed sought to be reformed** is admissible in evidence. 123Kan755, 256P813.

981-13 161Ga93, 129SE778.

981-16 TexCivA 21SW(2d)694.

981-20 214Ala150, 107S94. **Where stenographer who drew deed testified that she had forgotten what instructions were given her,** subsequent statements that she was instructed to exempt part of land was admissible. 191NC359, 131 SE729.

982-23 See also 103Conn285, 130A387.

982-24 The statute of frauds, etc. 136 Wash74, 239P4.

982-25 174Ark1180, 298SW360; 85 CalA87, 258P969; 337 Ill 396, 169NE 258; 83 IndA244, 148NE159, 160 [cit Cyc]; Iowa 230NW856; 122Kan793, 253P214; 127Kan772, 275P143; 249 Mich218, 228NW696; 99NJEq864, 132A 678; 8PaDist&Co 648; TexCivA 10 SW(2d)200; 136Wash74, 239P4. **Where defect arises from accident or misconception,** parol evidence is admissible. 337 Ill 396, 169NE258.

983-26 174Ark1180, 298SW360; 170 Ga40, 152SE70.

983-27 17F(2d)549; 204Cal 94, 266P 535; TexCivA 21SW(2d)694.

984-30½-New. Executory contract for sale of land cannot be reformed by parole in equitable defense. 103Conn285, 130A387 (defense to action for "earnest money" for failure of title).

984-30¾-New. Practice Act of Connecticut does not enlarge plea of equitable defense so as to permit reformation of executory contract for sale of land by parole, and award damages to defendant. 103Conn285, 130A387.

984-31 73Mont518, 238P591. Contra 215Ky373, 285SW198. **Evidence held sufficient.**–234Mich212, 207NW823; 73 Mont518, 238P591. **Testimony of plaintiff alone** may be sufficient to warrant reformation, though his testimony is opposed to that of more than one witness. 73Mont518, 238P591.

984-32 13F(2d)833; 18F(2d)375; 83 Colo 562, 267P400; 110Conn319, 148A 353 (preponderance of satisfactory and sufficient evidence); 47 Ida430, 276P 306; 205 Iowa7, 215NW732; 210Ky21, 275SW9; 214Ky49, 282SW1061; 312 Mo 609, 280SW424; 115 OhSt11, 152NE 14; 115 Okl 298, 243P137; 51Philippine 57. **Evidence of validity of agreement held sufficient.**–232 IllA583.

984-33 122Kan716, 253P576; 215Ky 373, 285SW198; 154Md510, 142A625; 142Miss676, 107S865 (evidence held insufficient); 149Miss47, 115S106; Vt 146A1. But see 307Mo 269, 270SW646. **Evidence held insufficient.**–215Ky373, 285SW198. **Right to reformation must be established beyond reasonable controversy.**–234Ky95, 27SW(2d)675.

984-34 15F(2d)756; 17F(2d)549; 18 F(2d)375; 24F(2d)951; 31F(2d)10; 35 F(2d)571; 40F(2d)333; 40F(2d)395; 43F(2d)17 (mistake); 212Ala685, 103S 892; 213Ala340, 104S827; 213Ala612, 105S802 (clear, exact, and satisfactory); 214Ala150, 107S94; 214Ala295, 107S 815; 215Ala515, 110S898; 215Ala653, 112S235; 219Ala414, 122S414; 220Ala 479, 125S806 (clearly and satisfactorily establishing scrivener's error); 221Ala 301, 128S779(2dcase); 168Ark654, 271 SW18 (clear, need not be undisputed); 168Ark842, 271SW980; 168Ark1167, 273SW371; 169Ark1102, 278SW36; 171 Ark1188, 285SW9; 173Ark842, 293SW 712; 174Ark1180, 298SW360; 175Ark 73, 298SW495; 174Ark1115, 299SW18; 175Ark1169, 299SW1008; 175Ark1170, 300SW371; 176Ark597, 3SW(2d)683; 176Ark1205, 5SW(2d)342; 177Ark19, 6 SW(2d)315; 178Ark489, 11SW(2d)5; 178Ark1199, 13SW(2d)289; 181Ark180, 25SW(2d)15; 181Ark854, 28SW(2d) 336; Ark 31SW(2d)420; 79CalA748, 250P1106; 87CalA359, 262P339; 83 Colo 562, 267P400; 84Colo 592, 273P17; 104Conn36, 132A533; 96Fla219, 118S 10; 99Fla851, 127S894; 327 Ill 145, 158 NE364; 329 Ill 637, 161NE118; 335 Ill 52, 166NE477; 200 Iowa768, 205NW 366; 201 Iowa561, 207NW610; 204 Iowa384, 214NW725; 205 Iowa7, 215 NW732; 204 Iowa1011, 216NW765; 204 Iowa1096, 216NW768; 205 Iowa1126, 217NW429; 205 Iowa1203, 219NW517; Iowa 228NW305; Iowa 232NW670; 123Kan755, 256P813; 209Ky744, 273 SW458; 209Ky657, 273SW524 (proof must be "full, clear and decisive," convincing, and satisfactory); 210Ky21, 275SW9; 213Ky763, 281SW1026; 214 Ky49, 282SW1061 (full, clear, and decisive); 214Ky107, 282SW772; 214Ky 560, 283SW424; 215Ky318, 284SW 1076; 216Ky114, 287SW360; 216Ky 688, 288SW672; 217Ky178, 289SW210; 218Ky352, 291SW355; 219Ky635, 294 SW184; 220Ky307, 295SW148; 221Ky 550, 299SW164; 223Ky533, 4SW(2d) 372; 226Ky376, 10SW(2d)1074; 228 Ky628, 15SW(2d)509; 229Ky746, 17 SW(2d)1028; 230Ky619, 20SW(2d)439 (clear, unequivocal, and convincing); 230Ky710, 20SW(2d)714; 231Ky117, 21 SW(2d)145; 231Ky374, 21SW(2d)478; 232Ky469, 23SW(2d)922; 232Ky781, 24 SW(2d)603; 234Ky53, 27SW(2d)413; 234Ky95, 27SW(2d)675; 234Ky788, 29 SW(2d)557; 10LaA612, 120S218(2d case); 9LaA413, 119S549; 237Mich526, 212NW88; 243Mich447, 220NW750; Miss 105S640 (evidence held insufficient); 142Miss655, 107S876 (practically to exclusion of every other reasonable hypothesis); 307Mo 269, 270SW 646; 312Mo 609, 280SW424; 315Mo 1119, 287SW442, 445 [citCyc]; 317Mo 1047, 297SW960; 219MoA133, 268SW 691; MoA 17SW(2d)591; MoA 28 SW(2d)448; 76Mont332, 247P166; 79 Mont198, 255P737; 86Mont43, 281P749, 69ALR416; 115Nebr520, 213NW750; NJ 147A506; 101NJEq55, 136A713; 103NJEq521, 143A815; NJCh 145A 622; 191NC359, 131SE729; 195NC179, 141SE574; 198NC498, 152SE396; 115 OhSt11, 152NE14; 115 OhSt575, 155NE 134; 116 OhSt609, 157NE478, 54ALR 992; 24 OhA57, 155NE815 (evidence held insufficient); 29 OhA51, 162NE 718; 29 OhA296, 163NE573; 25 OhNP NS535; 115 Okl 298, 243P137; 126 Okl 93, 258P892; 40 OklACR358 [reh pending]; 134 Okl 124, 272P463; 141 Okl 122, 284P43; 142 Okl 168, 285P968; 119 Or224, 242P628 (reason for rule); 120 Or484, 252P705; 122 Or652, 260P 237; 124 Or560, 264P859; 127 Or446, 271P593; 128 Or248, 275P28; Or 292 P1034; 296Pa414, 146A94 (finding supported by evidence); 85PaSuper406 (evidence sufficient); 50Philippine558; 51Philippine57; 51SD293, 213NW726; 51SD472, 214NW853; 52SD159, 216NW 887; 157Tenn275, 8SW(2d)489, 60ALR 693; 159Tenn126, 17SW(2d)15; Tex CivA 271SW284; TexCivA 282SW930; TexCivA 298SW178; TexCivA 21 SW(2d)552; 69Utah460, 256P400; Utah 292P206; 152Va216, 146SE251; 136 Wash485, 240P682; 147Wash530, 266P 182; 148Wash37, 268P169; 104WVa 200, 139SE714; 108WVa321, 150SE749. See also 219Ala343, 122S413; 229Ky 613, 17SW(2d)711; MoA 11SW(2d)71; 134Misc623, 235NYS609. **Evidence held sufficient.**–171Ark1188, 285SW9; 319 Ill 60, 149NE586; 83 IndA626, 149NE655; 200 Iowa979, 205NW784; 201 Iowa363, 207NW334; 207 Iowa1181, 225NW6; 123Kan755, 256P813; 237Mich526, 212 Mo 88; 166Minn295, 207NW634; MoA 28SW(2d)448; 79Mont198, 255P737; NJ 151A846; 222AppDiv169, 225NYS 305; 55ND585, 214NW901; 23 OhA264, 155NE149; 124 Okl 37, 254P64; 137 Okl 212, 278P1083; 40 OklACR358 [reh pending]; 128 Or248, 275P28; 128 Or 433, 275P33; 91PaSuper27; 45Philippine128; 69Utah460, 256P400. **Evidence held insufficient.**–173Ark842, 293 SW712; 175Ark1170, 300SW371; 176 Ark1205, 5SW(2d)342; 85CalA542, 259 P1108; 83Colo 562, 267P400; Ill 173 NE118; 200 Iowa768, 205NW366; 202 Iowa374, 210NW438; 205 Iowa1126, 217NW429; Iowa 232NW150; 125 Kan124, 263P1055; 214Ky49, 282SW 1061; 214Ky560, 283SW424; 217Ky 178, 289SW210; 218Ky352, 291SW355; 230Ky290, 19SW(2d)970; 230Ky710, 20 SW(2d)714; 315Mo 1119, 287SW442; 316Mo 891, 292SW702; Mo 293SW774; 131Misc215, 225NYS470; 190NC284, 129 SE721; 115 Okl 233, 242P535; 117 Okl 104, 246P434; 117 Or350, 243P91; 118 Or22, 245P515; 120 Or484, 252P705; 51Philippine57; TexCivA 284SW610; Va 154SE538; 104WVa200, 139SE714; 34Wyo 324, 243P392. **Clear preponderance of testimony** is required. 118 Or22, 245P515. **Preponderance of evidence** is required to prove fraud. Ill 173NE118. **Evidence must be legal and exact.**–160 La439, 107S298. **Clear and unmistakable showing of mutual mistake** is essential. 169Ark1102, 278SW36. **Question of fact** for determination of trial court. 79CalA748, 250P1106. **Parol proof** must be of clearest and most satisfactory

character. 40F(2d)626. **Other statements of rule.**–155Wash547, 285P438.

984–34½–New. , or the clearest and most satisfactory. 13F(2d)833.

986–35 17F(2d)549; 19F(2d)277; 24F(2d)951; 214Ala187, 106S814; 168Ark654, 271SW18; 168Ark842, 271SW980; 176Ark1205, 5SW(2d)342; 177Ark1193, 9SW(2d)780; 181Ark350, 25SW(2d)758; 110Conn319, 148A353; 88 IndA386, 163NE290; Iowa 204NW211; 205 Iowa633, 216NW719; 214Ky305, 283SW80 (evidence insufficient); 216Ky114, 287SW360 (evidence held insufficient); 216Ky688, 288SW672; 231Ky117, 21SW(2d)145 (as to evidence of mutual mistake); 10LaA612, 120S218(2d case); 247Mich98, 225NW611; Mich233NW422; 307Mo 269, 270SW646; 115Nebr520, 213NW750 (evidence held insufficient to show mutual mistake); 83NH474, 144A261; NJ 152A173; 103NJEq521, 143A815; 130Mise599, 224NYS153 (evidence insufficient to justify claim for reformation); 222AppDiv9, 225NYS213; 22 OhA13, 153NE279 (mistake in description in deed); Okl 292P829; Okl 292P833 (evidence held not demurrable); 51SD293, 213NW726; Tex CivA 271SW284; TexCivA 12SW(2d)243; TexCivA 21SW(2d)552; 137Wash391, 242P385 (evidence sufficient). **Evidence held sufficient.**–168Ark654, 271SW18; 169Ark1102, 278SW36; 90CalA276, 265P1010; 204 Iowa384, 214NW725; Iowa 230NW856; 220Ky142, 294SW1059; 232Ky469, 23SW(2d)922; 233Ky674, 26SW(2d)551; 234Ky1, 27SW(2d)389; 234Ky53, 27SW(2d)413; 240Mich85, 214NW967; 241Mich439, 216NW929; 156Miss552, 126S195; 86Mont43, 281P749, 69ALR416; 128Misc299, 218NYS401; 192NC269, 134SE494; TexCivA 4SW(2d)232. **Evidence held insufficient.**–205 Iowa7, 215NW732; 207 Iowa1025, 221NW665; Iowa 229NW249; 214Ky290, 283SW88; 217Ky815, 290SW659; 13LaA395, 128S300; 141 Okl264, 284P859; Tenn 14SW(2d)714. **Contracts to support parents.**–85CalA87, 258P969. **Evidence held to warrant inference of mistake.**–85 IndA498, 154NE512. **Evidence held to show** that sale was made at price claimed by plaintiff. 230AppDiv103, 243NYS408. **Testimony held sufficient to make prima facie case** and put defendant on proof. 155Wash547, 285P438.

987–36 19F(2d)277; 174Ark1180, 298SW360; 181Ark854, 28SW(2d)336; 243Mich447, 220NW750; 249Mich218, 228NW696 (evidence held insufficient); 251Mich447, 232NW207; 142Miss676, 107S865; 98NJEq64, 130A546; 55ND585, 214NW901; 29 OhA51, 162NE718; 29OhA296, 163NE573; 105 Okl 79, 231P282; 51SD293, 213NW726; TexCivA 284SW610; TexCivA 298SW178; Tex CivA 26SW(2d)356; TexCivA 28SW(2d)578; Utah 292P206; 152Va216, 146SE251; 197Wis207, 221NW651; BC [1928] 1DomLR309. But see MoA 28SW(2d)448. **Evidence held sufficient.**–204 Iowa384, 214NW725. **Evidence held insufficient.**–170Ark1194, 281SW657; 201 Iowa561, 207NW610; 122Kan716, 253P576; 213Ky763, 281SW1026; 167Minn338, 209NW15.

988–37 35F(2d)956; 169Ark1102, 278SW36; 181Ark350, 25SW(2d)758; 337Ill 396, 169NE258; 126Kan354, 267P968; 213Ky763, 281SW1026; 218Ky684, 291SW1026; 229Ky613, 17SW(2d)711; 233Ky673, 26SW(2d)551; 151Md383, 135A163; 312Mo 609, 280SW424; 219MoA133, 268SW691; 222MoA763, 9SW(2d)673; MoA 28SW(2d)448; 115Nebr520, 213NW750; 98NJEq64, 130A546; 222AppDiv570, 226NYS544; 125Misc430, 210NYS18 (evidence held to support denial of mutuality of mistake); 191NC560, 132SE462 (evidence held insufficient to show mutual mistake in description of timber); 25 OhNPNS535; TexCivA 21SW(2d)552; 136Wash485, 240P682; 147Wash530, 266P182; 153Wash641, 280P41 (evidence of error must be clearly shown). See also 213Ala612, 105S802; 219Ala683, 123S210; 168Ark842, 271SW980; 79CalA748, 250P1106; 91CalA11, 266P601; 48 Ida798, 285P673; 210Ky21, 275SW9; 234Mich147, 207NW898; 317Mo1047, 297SW960; MoA 277SW939; Mont 287P217; TexCivA 282SW930. **Evidence held insufficient.**–82CalA728, 256P557; 161Ga823, 131SE889; 329 Ill637, 161NE118; Iowa 229NW684; 119Kan478, 240P400; 210Ky21, 275SW9; 214Ky107, 282SW772; 217Ky815, 290SW659; 230Ky619, 20SW(2d)439; 231Ky117, 21SW(2d)145; 76Mont332, 247P166; 141 Okl 122, 284P43; 144 Okl225, 291P100; 119 Or224, 242P628; 120Or196, 251P715; 122 Or652, 260P237; 147Wash648, 267P39. **Omission of material provision** through inadvertence of copyist is sufficient to show mutual mistake. 5F(2d)924. **Evidence held to show mutual mistake.**–177Ark19, 6SW(2d)315; TexCivA 294SW953.

988–38 161Ga823, 131SE889 (nonsuit properly granted); 127 Or446, 271P593. **Evidence insufficient** to show fraud in execution of oil and gas lease. 119Kan478, 240P400.

988–40 31F(2d)503.

988–41½–New. Evidence held insufficient to show estoppel precluding reformation of mortgage as against judgment creditor. 207 Iowa1181, 225NW6.

988–41⅓–New. Evidence held to make plaintiff's negligence question of fact. 167Minn494, 210NW66.

988–41¼–New. Proof is not confined alone to express statements of witnesses, 214Ky560, 283SW424.

988–41½–New. but may also be developed by character of testimony, 214Ky560, 283SW424.

988–41⅙–New. coherency of entire case, 214Ky560, 283SW424.

988–41⅐–New. documents, 214Ky560, 283SW424.

988–41⅛–New. circumstances, 214Ky560, 283SW424.

988–41⅛–New. and facts proved. 214Ky560, 283SW424.

988–41 1/10–New. Court should be slow to disregard written contract unless thoroughly convinced that mistake was made. 214Ky560, 283SW424.

988–41 1/11–New. Evidence held insufficient to justify award of damages.–149Miss47, 115S106.

988–42 212Ala685, 103S892; 174Ark1115, 299SW18; 209Ky744, 273SW458; 209Ky657, 273SW524; 220Ky307, 295SW148; 221Ky550, 299SW164; 9LaA413, 119S549; 154Md510, 142A625; 101NJEq55, 136A713; 134Misc623, 235NYS609; 25 OhNPNS535. But see 214Ky560, 283SW424.

988–43 173Ark960, 294SW58; 79CalA748, 250P1106; 84Colo 592, 273P17; 204 Iowa153, 214NW522; 83NH474, 144A261. **Finding that tax agreement was made before contract of sale was complete held contrary to great weight of evidence** in proceeding to reform deed. 213Ala612, 105S802. **Evidence held sufficient.**–204 Iowa153, 214NW522.

989–45 10LaA195, 120S650.

989–47 10LaA195, 120S650.

990–52 83NH474, 144A261. **Stipulation in deed as to payment of interest** on timber not removed within five years held to corroborate testimony as to mistake in conveying title in fee, and not merely title to growing timber. 213Ala340, 104S827.

990–54 83Colo 562, 267P400, 403 [cit Cyc]; 200 Iowa768, 205NW366; 142Miss676, 107S865.

991–58 CalA 285P1071. **Findings.**–Ariz 285P271. **Specific finding of mutual mistake** is unnecessary where it is obvious from other findings. 90CalA276, 265P1010. **Finding that lessee completed on certain date construction of certain buildings** from which lease and option commenced to run has been held to warrant assumption that construction started term of lease. 154Wash485, 282P911.

991–60 81Colo 58, 253P385 (court may set aside jury's verdict); 143Wash352, 255P147.

991–61 167Minn494, 210NW66; Mont 287P217.

992–62 55ND585, 214NW901. **Where court determines equitable issues against plaintiff,** cause may be dismissed. 55ND585, 214NW901.

992–65 Instruction that reformation for fraud could not be adjudged without proof of intent to deceive is not erroneous. 138 Okl 58, 280P460.

992–67 166Ga160, 142SE882; 191NC560, 132SE462; 194NC273, 139SE434; NC 146SE233; TexCommnA 18SW(2d)609.

992–70 23F(2d)628; Mass 169NE430 (meaning and choosing of language); 196NC770, 147SE1; 197NC775, 147SE624; TexCivA 15SW(2d)112. **Evidence held to present question of fact as to** negligence in signing contract without reading. TexCivA 4SW(2d)232.

993–71 Judgment as of nonsuit is properly rendered where evidence is insufficient for submission to jury on issue of mistake. 195NC179, 141SE574.

993–71½–New. It is proper for court to submit to jury under proper instructions as to what constitutes laches and negligence, question as to whether plaintiff by delay in bringing suit had been guilty of such laches and negligence as would prevent relief to plaintiff in equity. 162Ga295, 133SE257.

993–79 Reformation limited so as not to affect rights of purchaser from grantee. 234Ky1, 27SW(2d)389. **Security of third persons** should be protected. TexCivA 29SW(2d)461.

994–87 170Ark58, 278SW645; 164Ga257, 138SE333; 123Kan269, 254P1030; 136Wash74, 239P4. **Injunctive relief** may be granted in action to reform contract for sale of patent rights. 90CalA276, 265P1010. **Where reformation is for mistake** in description, so as to include more land than was intended, equity will decree reformation and abatement of purchase price. 170Ark58, 278SW645.

995–89 240Mich529, 215NW329; Nebr229NW330; 136Wash74, 239P4. Contra 100NJEq293, 134A737.

995–90 An insurance policy may be reformed and recovered upon, etc. 33F(2d)552; 99Fla851, 127S894; 55ND585, 214NW901.

996–93 164Ga257, 138SE333; 169Minn92, 210NW628. **Reduction in purchase price** conditional on defendant's inability to give good title to lands described in contract. 135Wash381, 237P718.

997–97 Defendant cannot claim reimbursement for expenditures in making changes or improvements encroaching on right of way which were voluntarily incurred after personal knowledge of plaintiff's claim for reformation of deeds creating right of way between adjoining properties. 128Misc299, 218NYS401.

997–3 But see 88CalA319, 263P305. **Decree held proper.**–NJ 151A846.

997–4 But see 88CalA319, 263P305.

997–6 205 Iowa156, 217NW829.

997–7 196NC770, 147SE1; TexCivA 4SW(2d)232.

997–7½–New. Implied denial of mutual mistake.–In action to quiet title and reform deeds so as to include certain lots, judgment against plaintiff as to interest of certain grantors has been held impliedly to deny claim of mutual mistake in deed. TexCivA 284SW608.

998–11 79CalA748, 250P1106; 84Colo391, 270P872; 104Conn36, 132A533; 40OklACR358 [reh pending].

998–16 218Ala523, 119S214 (complainant where no demand for correction made of defendant before suit).

999–19 114Nebr371, 207NW515, 44ALR73.

999–20 114Nebr371, 207NW515, 44ALR73.

999–21 114Nebr371, 207NW515, 44ALR73.

999–23 6LaA187; 114Nebr371, 207NW515, 517 [citCyc], 44ALR73.

999–24 214Ala150, 107S94; 86 IndA621, 158NE916; 6LaA187; 114Nebr371, 207NW515, 517 [citCyc], 44ALR73.

1000–25 114Nebr371, 207NW515, 517 [citCyc], 44ALR73.

1000–26 114Nebr371, 207NW515, 517 [citCyc], 44ALR73.

REFUND

1012–5 Other definitions.–50ND330, 196NW303. **Term means generally to** pay back, repay, or return money re-

ceived which ought not to have been paid. 266Mass276, 165NE389.

REFUSAL

1013-7 Embodies right of election.–148Va585, 139SE478, 58ALR193.

REGISTERS OF DEEDS

1021-46 Court clerk failing to show on certificate all mortgages against property is liable for resulting damages. 13 LaA323, 125S774.

1023-59 13LaA323, 125S774 (court clerk and his bondsman).

1023-64½-New. Rights of surety to have rights preserved under plea of discussion. 13LaA323, 125S774.

REGULAR

1028-17 Used in connection with other words.–290Pa341, 138A855, 58ALR1463.

REGULARLY

1029-22½-New. Implying uniformity, continuity, consistency, and method. 148Md545, 129A839.

1029-22½-New. Executing idea of occasional accidental, incidental, or casual use. 148Md545, 129A839.

REGULATE

1029-23 Synonymous with "control." 131SC471, 128SE410.

1029-24 131SC471, 128SE410.

1029-27 310Mo 184, 274SW827; 218 MoA155, 263SW853; 131SC471, 128SE 410.

1029-31 147Miss534, 113S441 (restriction does not include prohibition).

1029-32 131SC471, 128SE410.

1029-33 310Mo 184, 274SW827; 131SC 473, 128SE410.

1029-34 218MoA155, 263SW853.

1029-37 200Cal 632, 254P267. **To establish.**–Cal 254P267.

1029-38 8LaA39.

1030-40 310Mo 184, 274SW827; 125 Misc882, 212NYS400.

1030-48 310Mo 184, 274SW827; 218 MoA155, 263SW853; 131SC471, 128SE 410.

1030-49 310Mo 184, 274SW827; 131 SC471, 128SE410.

1030-50 218MoA155, 263SW853.

1030-51 Power to regulate may include power to license, but power to license does not embrace power to regulate. 310Mo 184, 274SW827.

REGULATION

1031-53 See also 8LaA39.

REHEARING

1033-59 Fla 124S827.

REJECTION

1036-74 As used in Tax Law.–128Misc 599, 219NYS566.

RELATION

1036-79 30Ariz480, 248P1086; **TexCivA** 30SW(2d)679. **Purpose and scope of doctrine.**–30Ariz480, 248P1086. **Doctrine of relation,** when invoked, must have connection with actual fact and must be based on lawful antecedent right. 84Colo 174, 269P574.

RELATIVE or RELATION

1037-88 82NH291, 133A166, 45ALR 1433.

RELEASE

1042-1 217AppDiv661, 217NYS56. **Other definitions.**–83 IndA500, 149NE 137. **Release is species of contract.**–83 IndA500, 149NE137. **Writing held release.**–217AppDiv661, 217NYS56. **Assignment distinguished.**–26 OhA546, 160 NE97.

1042-1½-New. Release is one which ends litigation by steps sanctioned by common law. 216AppDiv274, 214NYS 732 (in harmony with principles of Maritime Law).

1043-2 Instrument held covenant not to sue.–173Minn310, 217NW337.

1043-3 92CalA701, 268P943.

1044-4 253 IllA190; **ND** 230NW298. **Provision in covenant not to sue tenant that agreement may be set up as bar to suit** does not convert instrument into release so as to discharge landlord jointly liable. 172Minn171, 215NW225. **Instruments held covenants not to sue and not releases.**–ND 230NW298.

1045-9½-New. Subject matter. Obligation or contract right which is executory and in some respects dependent on contingencies may be released. Mass 173NE409.

1045-11 Documents held to be release.–Wash 286P95 (of one joint tort feasor).

1045-12 41F(2d)651. **Law cannot effect release** when such release would operate contrary to manifest intention of parties. 29 OhA402, 163NE636.

1047-22 141Miss253, 106S99, 43ALR 79; 223AppDiv272, 227NYS699. **Oral agreement of settlement** between wife of deceased and agent of defendant has been held valid, though nominee of surety company, which furnished indemnity bond to association of which defendant was member did not perform under agreement as required by state insurance department, especially where wife was unaware of arrangement of requiring acquiescence of appointee of surety for settlement, and referee found that settlement was made by authorized agent. 225AppDiv85, 232NYS290.

1047-24 Release on railroad's blank form held incomplete where not approved, only being marked "correct" by claim agent. 156SC529, 153SE568.

1048-30 41F(2d)651; 216Ala666, 114S 60; 218Ala173, 118S327; 323 Ill 143, 153NE744; 83 IndA500, 149NE137; 130 Misc362, 224NYS63, 65 [citCyc]; **Tex CommnA** 288SW434.

1049-34 218Ala557, 119S670.

1049-35 267US350, 45SCt247, 69Led 651; 32F(2d)680.

1050-40 215Ala172, 110S129 (payment of note before its due date is sufficient consideration for release of interest accrued); 216Ala666, 114S60; 200Cal 760, 255P188, 52ALR569; 141Miss253, 106S 99, 43ALR79 (release by grantee of mortgagor to mortgagee before foreclosure held good as to grantee's assumption of mortgage debt). **Consideration held sufficient.**–MoA 299SW152.

1050-41 Mass 172NE641. **Consideration of one dollar is valuable consideration,** though nominal. 218Ala557, 119S 670.

1050-43 200Cal 760, 255P188, 191 [quot Cyc], 52ALR569; 55AppDC381, 6F(2d) 684; 83NH365, 142A689. **Illustrations.**–258Mass585, 155NE589.

1051-46 251Mich329, 232NW232.

1051-49 215Ala172, 110S129. But see 317Mo 890, 297SW45.

1052-53 82Mont559, 268P549, 58ALR 1304.

1053-57 93Fla30, 111S525, 528 [cit Cyc]; 133Misc843, 233NYS632; 127 Or 235, 271P734.

1053-57½-New. Mere inadequacy of consideration is not sufficient to warrant setting aside of release unless it be so gross and palpable as of itself to supply presumptive evidence of actual fraud. 133Misc843, 233NYS632.

1054-69½-New. Where parties were not dealing at arm's length the release should be closely scrutinized. **Or** 293P 417.

1054-69⅓-New. Where release is sought to be avoided each case must be decided on own facts. **Utah** 290P759.

1054-71 125Kan252, 264P59. **Nervousness and neurasthenia** does not constitute mental incompetency. **CalA** 291P 273.

1055-73 222MoA964, 6SW(2d)51.

1055-74½-New. Weakness of mind of one party will not avoid release. 157 Miss326, 128S87.

1055-78 198NC123, 150SE709.

1055-79 198NC123, 150SE709.

1055-80 To invalidate a general release, fraud or other illegal acts must have operated to produce its execution and contributed to it as a cause. 258 Mass585, 155NE589.

1055-80½-New. In New York release under seal may only be impeached for fraud, mistake, or duress. 133Misc843, 233NYS632.

1055-80⅓-New. A meeting of parties' minds is necessary to make release binding. **OhA** 166NE906(2dcase).

1055-80¼-New. Where seaman did not comprehend that he was signing release, it will be held ineffectual. 34F(2d)923.

1055-80⅙-New. One signing release with understanding of its meaning and effect as bar to right to sue for damages cannot thereafter bring suit for damages. **Ariz** 283P719.

1055-80⅙-New. Seamen's rights are tenderly guarded and their acts when waiving rights, are carefully scrutinized. 41F(2d)651.

1055-82 21F(2d)280; 204Cal 354, 268 P334, 60ALR1381; 237 IllA50; 124Kan 622, 261P576; 194Wis51, 215NW576. **Release of damages, obtained when injured person was ill in hospital,** shortly after accident, on representation that his injuries were not serious, is invalid as based on mistake of fact. 237 IllA 50.

1056-86 258Mass585, 155NE589; 267 Mass193, 166NE627; **Mo** 281SW695; 317Mo 221, 295SW116; 222MoA964, 6 SW(2d)51; 82Mont559, 268P549, 58 ALR1304. But see 127 Or235, 271P734. **Release formally signed is prima facie good** and cannot be set aside in absence of duress, mistake, or fraud. 38F(2d) 743. **Ordinarily signer of instrument expressive of jural act** is conclusively bound thereby. 253NY159, 170NE530. **Erratum.**–In 1926 Annotations "141NE 368" should read "144NE368."

1056-86½-New. Seaman's release will be scrutinized with particular care. 22 F(2d)448.

1056-87 Ariz 283P719; **MoA** 22SW(2d) 88 (one accompanied by friend who can read is guilty of negligence in relying on releasee).

1056-89 21F(2d)280; 41GaA195, 152 SE263; **Mo** 23SW(2d)1034; **MoA** 8 SW(2d)1023; 104NJL215, 141A2; 127 Or235, 271P734; **Or** 293P417; 49RI 135, 141A79. **Inadvertence of attorney** resulting in failure to make release speak all previous oral agreements is not fraud. 245Mich369, 222NW771.

1057-90 178Ark1100, 13SW(2d)309; **Mo** 22SW(2d)1043.

1057-92 170Minn326, 212NW595.

1058-95 22F(2d)444; 170Minn326, 212 NW595.

1058-99 21F(2d)280; **MoA** 8SW(2d) 1023.

1058-1 21F(2d)280; 124Kan622, 261P 576; 115 Okl 233, 242P535; 194Wis51, 215NW576.

1058-2 21F(2d)280; 120Kan244, 243P 269; 247P856; 124Kan622, 61P576; 82 Mont559, 268P549, 58ALR1304; 83NH 232, 140A587, 589 [quotCyc]; 115 Okl 233, 242P535; 194Wis51, 215NW576. But see 173Ark729, 293SW9. **Doctor's statement that employee was well on way to recovery** held representation of existing fact. 194Wis51, 215NW576. **Release avoided for doctor's untrue statement** whether made in good faith or bad faith. 194Wis51, 215NW576.

1059-7 34Ariz292, 271P406; 194Wis 51, 215NW576. Contra 198NC123, 150 SE709.

1060-9 21F(2d)280; 97Fla392, 121S 475; 258Mass585, 155NE589; **Tex CommnA** 271SW79; **TexCommnA** 12 SW(2d)963.

1060-9½-New. One executing release must exercise reasonable care and diligence to ascertain its contents. 202 Iowa1229, 211NW875.

1060-10 TexCommnA 271SW79.

1060-11 MoA 282SW525; 222MoA964, 6SW(2d)51; **MoA** 21SW(2d)633.

1060-12 See also **MoA** 287SW801. **Release signed without negligence is fraudulent** where mutually intended as receipt for wages only, and injured party unable to read. 202 Iowa1229, 211 NW875. His failure to have instrument read to him is not necessarily negligence per se. 202 Iowa1229, 211NW875. **Release held void,** where employer's agent fraudulently omitted a material part when reading it, thereby inducing employee to sign. 157Miss432, 128S325.

1060-13 21F(2d)280; 124Kan622, 261 P576; **MoA** 12SW(2d)520; **Nebr** 230NW 453; **TexCommnA** 271SW79.

1061-14 TexCommnA 271SW79.

1061-19 34Ariz292, 271P406; 115 Okl 233, 242P535. **Misrepresentation held**

immaterial.–225AppDiv85, 232NYS290. **Representation of doctor that injured person will recover in short time** is one of existing fact. 34Ariz292, 271P406.
1061–20 Mo 31SW(2d)14; 196NC299, 145SE561; 115 Okl 233, 242P535.
1061–21 156SC529, 153SE568. **Representation that railroad was going into receivership** made by claim agent held not merely promissory. 316Mo 474, 290 SW425.
1061–22 MoA 282SW525.
1061–24 Mo 31SW(2d)14; TexCommnA 271SW79. **Misrepresentations of collateral matters,** not essential to general release, do not impair it. 258Mass585, 155 NE589. **Whether error in relying on statement was caused by honest or dishonest** opinion does not affect releasor's right to avoid release. MoA 30SW(2d) 784.
1062–26 258Mass585, 155NE589. **A duty to disclose held to exist.**–33F(2d) 491 (sale by broker at higher price unknown to vendor).
1062–32 208Cal 350, 281P66 (taking advantage of releasor's ignorance and misrepresentation of true character of releases will void releases).
1062–34 MoA 30SW(2d)626.
1062–34½–New. Deception accomplished by acts or language designed to produce false impression is equivalent to false statement. MoA 30SW(2d)1044.
1063–41½–New. Innocent misrepresentation by releasee's physician as to releasor's injuries may be effective to avoid release induced thereby. 176Ark737, 4 SW(2d)528.
1063–43 15F(2d)780.
1064–44 BC [1925] 3DomLR398 (no consideration for release, signature to which was obtained without its having been mentioned to releasor and against his intention and interest to execute held sufficient to find fraud and to justify setting it aside).
1064–45 Iowa 224NW771.
1064–47½–New. Gross inadequacy of consideration is important on issue of fraud. Ariz 283P719.
1064–48 22F(2d)444; 106Conn72, 136A 874; MoA 30SW(2d)1044; MoA 31 SW(2d)117; MoA 30SW(2d)784. **Statute permitting allegations in reply of facts showing release pleaded in bar** was procured by fraud contemplates only voidable release. 309Mo 638, 274SW815. **Seamen's release is never conclusive except** when knowingly made. 22F(2d) 444. **When releasor, unable to read,** signs upon fraudulent statements the release is void. MoA 30SW(2d)734.
1064–51 256Mass442, 152NE918; 123 Or469, 259P1064. **General release to insurance agent** from company is no defense to action for accounting due to fraudulent concealment of misappropriations. 216AppDiv78, 214NYS697 (because of fiduciary relation between parties).
1064–51½–New. Release may be impeached for fraud in procuring same. 125Kan252, 264P59.
1064–51¾–New. Alleged fraud of employer in securing settlement against railroad for injuries to employee is immaterial in absence of claim of fraud of railroad released. 172Ark428, 289SW2.
1064–54 258Mass585, 155NE589.
1065–59 37F(2d)259.
1065–59½–New. Need of money and suffering from pain does not constitute duress. 38F(2d)743.
1065–61 253 IllA288.
1065–65½–New. Need of money and suffering from pain does not constitute undue influence. 38F(2d)743.
1065–66 Ark 32SW(2d)440; Miss 130 S745(2dcase).
1065–67 Facts not constituting ratification of release procured by undue influence.–253 IllA288.
1066–71 Ratification must be within reasonable time.–222MoA1098, 14SW (2d)31 (reasonable time question for jury).
1066–78 MoA 8SW(2d)1023; MoA 30 SW(2d)1044. Contra 176Ark737, 4SW (2d)528.
1067–81 309Mo 638, 274SW815.
1067–82 309Mo 638, 274SW815; 219 AppDiv589, 220NYS235.
1067–82½–New. , or he may rescind contract and sue for injury, in which case consideration must be returned, 309Mo 638, 274SW815.
1067–82¾–New. or it seems that he may sue in equity to rescind release, offering to return consideration. 309Mo 638, 274SW815.
1068–85 Md 149A442. **Statute authorizing such defense to plea of release** contemplates only voidable contract of release or discharge and not void one. 309Mo 638, 274SW815. Such statute does not affect right of election of remedies which remains as before enactment of statute. 309Mo 638, 274SW 815.
1069–87 152Miss459, 119S190.
1070–89 213AppDiv324, 210NYS589; 157SC469, 154SE855. **In Missouri.**–309 Mo 638, 274SW815. **Attack allowed at law,** etc. 127 Or235, 271P734.
1070–94 237 IllA50; Mich 233NW424; MoA 285SW1015. **Creditor releasing debt in return for chattel security** cannot have it canceled after acquiescence for two years. 173Ark872, 294SW11. **Evidence sufficient** to warrant cancellation, where release was obtained under circumstances proving mistake of fact. 237 IllA50. **Where release is obtained by fraud,** it is not necessary to tender money received for release. 256Mass 442, 152NE918.
1071–96 CalA 291P273; 309Mo 638, 274SW815; 21 OhA390, 153NE212; 288 Pa389, 135A860. But see 217MoA208, 263SW550; 222MoA1098, 14SW(2d)31. **In Illinois,** etc. 251 IllA585. **Plaintiff's remedy to avoid release procured by fraud is by rescission** and putting opposite party in statu quo, in view of statute allowing plaintiff to allege fraud in reply when release pleaded in bar. 309Mo 638, 274SW815. **Sufficient tender.**–Mo 31SW(2d)14.
1072–97 171Ark103, 283SW31; 176Ark 737, 4SW(2d)528. **As matter of procedure or substance.**–Ark 283SW31.
1072–6 204Cal 354, 268P334, 338 [quot Cyc], 60ALR1381.
1073–8 Erratum.–In 1926 Annotations "213NY18" should be "232NY18."
1073–9 Ariz 283P719; 41GaA195, 152 SE263 (receipt for payment of claims); 241Mich83, 216NW417; MoA 8SW(2d) 1023; MoA 28SW(2d)401.
1073–11 241Mich83, 216NW417.
1073–13 39GaA350, 147SE135; MoA 8 SW(2d)1023.
1074–18 34Ariz292, 271P406.
1074–23 133SC256, 130SE893.
1074–28 Erratum.–In 1926 Annotations "213NY18" should be "232NY18."
1074–28½–New. It is unnecessary to restore consideration before bringing action for death where release covering injuries to boy later dying did not cover damages for death. 204Cal 354, 268P334, 60ALR1381.
1074–29 26F(2d)296; 99NJEq404, 132 A664. **Laches not shown.**–253 IllA288.
1075–32½–New. Where injured person executed general release of liability as to one of joint tort-feasors and failed to make such person party to subsequent action and made no attempt to rescind contract for release, judgment against other joint tort-feasor cannot be sustained on ground that execution of release was procured by fraud. 178 Ark596, 12SW(2d)15.
1075–34 82Mont559, 268P549, 58ALR 1304.
1075–37 155Md51, 141A434, 58ALR 767; 221AppDiv321, 223NYS174.
1075–38 217Ala105, 115S2; 126Kan98, 267P21; 83NH281, 141A467; 240NY 37, 147NE351 (release from defendant to bankruptcy trustee declared to cover only claims embraced in such action).
1075–39 Written release is conclusive and prior oral negotiations cannot be shown to vary terms. 78Mont145, 252 P872.
1076–40 Printed portion not inconsistent with parts filled in nor changed after signature is binding. 82Mont559, 268P549, 58ALR1304.
1076–41 83NH281, 141A467; 221App Div321, 223NYS174; 191Wis576, 211 NW756, 50ALR1106 (release of all demands held to include damages for physician's negligent treatment).
1076–41½–New. Parties must be deemed to have accepted release with knowledge of long-established rule of law governing such release. 221AppDiv 48, 222NYS619.
1076–42 MoA 12SW(2d)520; 221App Div48, 222NYS619; 91PaSuper53.
1077–45 123Kan420, 256P155.
1077–46 See also Mass 173NE409.
1077–47 38GaA788, 145SE518; 235Ky 574, 31SW(2d)910; Md 151A21; Mass 173NE409; 245Mich369, 222NW771; 49 RI 135, 141A79; 191Wis576, 211NW756, 50ALR1106. **Right of action for deceit may be settled by release.**–Mass 169NE 913.
1077–49 26 OhA373, 159NE848. **Release can always be looked into.**–38F(2d) 743.
1077–50½–New. Release from all claims, which divorced wife, executed in favor of her former husband, does not reinvest husband with title to household goods which previously had been turned over to wife and had become hers absolutely. 30 OhA76, 164NE127.
1078–51 CalA 291P611.
1078–61 21F(2d)858.
1078–62½–New. Matters of procedure, as distinguished from matters of substance, are to be determined by lex fori. 171Ark103, 283SW31.
1078–62¾–New. Thus, effect of failure of one seeking to avoid release to return consideration received is to be governed by lex fori. 171Ark103, 283SW31.
1079–64 Where plaintiff's testator assigned interest in estate in trust and later settled with one of the assignees, there is no bar to action against other assignee. 126Misc820, 215NYS607.
1079–68½–New. Widow's release of railroad from liability for death of husband and property damages will not bar lien creditor's right to recover balance due on purchase price of automobile destroyed in accident. 156Miss122, 125S 541.
1079–69 38GaA591, 144SE815.
1079–70 5PaDist&Co 235. **Release given dry dock company by master,** settling owners' claim for negligence, does not operate as defense to charterer's claim for loss of use due to such negligence. 13F(2d)3. **Release by mortgagor in possession with consent of mortgagor of chattel under title-retaining sale contract** duly recorded, for damages for injuries to chattel, is bar to action by mortgagee for injury. 190NC480, 130SE 319.
1080–75 124Kan66, 257P971.
1081–79 IndA 162NE62; 223Ky771, 4 SW(2d)734; 117Nebr29, 219NW580; 295Pa146, 144A904; 10PaDist&Co 723; TexCivA 6SW(2d)202; TexCivA 9SW (2d)401; Ont [1929] 4DomLR543. But see 215Ala562, 112S145. **Compromise with, and release of, some accommodation makers of note** does not release others but only entitles them to have pro rata shares of liability which released ones bear to total obligation credited upon note. 150Miss105, 116S 441. **Release pro tanto.**–Colo 269P9. **Rule by statute.**–39GaA263, 146SE653 (2dcase). **Such release constitutes breach or repudiation of contract.**–39 GaA263, 146SE653(2dcase). **Whether released joint note maker paid more than his proper share** of indebtedness is immaterial as to release of others. 39 GaA263, 146SE653(2dcase).
1082–80 Cal 293P26; CalA 284P226; 10LaA798, 123S796; 141Miss253, 106S 99, 43ALR79; TexCivA 278SW246.
1082–82 155Md51, 141A434, 58ALR767. But see 215Ala562, 112S145. **Intention to reserve right** against codebtors may be inferred from any expression negativing release of other codebtors. 170La 1044, 129S630.
1082–83 But see 170La1044, 129S630.
1083–84 Contra TexCivA 278SW246.
1083–86 215Ala562, 112S145; 145Miss 531, 111S150. **Upon release of one of** two joint and several debtors, obligation must be credited with one half thereof. 145Miss531, 111S150.
1083–86½–New. Corporation is released of stockholders' claims when one assigns stock and the other assumes corporation's debts. Wis 232NW883.
1083–87 223Ky771, 4SW(2d)734.
1084–91 TexCivA 9SW(2d)401.
1085–97 155Md51, 141A434, 58ALR767.

1086–99 21F(2d)858; 217Ala105, 115S 2 (full satisfaction); 172Ark428, 289SW 2; 126Kan98, 267P21; 232Mich2, 204 NW764; 173Minn310, 217NW337; Mont 292P577; 83NH190, 139A753; 213App Div326, 210NYS482; 217AppDiv661, 217 NYS56; 222AppDiv481, 226NYS673; 195NC127, 141SE489; OhA 173NE31; 290Pa74, 138A79; 154Tenn253, 290SW 5, 50ALR1052; TexCivA 271SW936; TexCivA 271SW941; TexCivA 297SW 244; TexCivA 6SW(2d)202; 68Utah298, 249P1032; Wash 286P95. See also 27 F(2d)8; CalA 291P611; NC 145SE561. But see 83NH281, 141A467; OhA 173NE 31. Contra 131 Okl 25, 267P641. **Part satisfaction.**–MoA 19SW(2d)557; 83NH 190, 139A753; 26OhA240, 159NE850; TexCivA 6SW(2d)202. **Complete satisfaction,** etc. Ala 115S2; MoA 19SW(2d) 557 (instrument held to release other joint tort-feasor). **Settlement with one joint tort-feasor pursuant to agreement with another joint tort-feasor** does not release latter contrary to his agreement where common law governs. 221MoA 448, 282SW459. **Release of statutory liability to make partial compensation for injury** does not operate as full discharge of others liable for same wrong. 83NH281, 141A467. **Settlement by plaintiff with another jointly liable with defendant** held not to release defendant entirely. 222AppDiv481, 226NYS673.

1087–1 21F(2d)858; Md 151A21; 232 Mich2, 204NW764; TexCivA 271SW941; Wash 286P95. **Where there has been no complete satisfaction,** further recovery may be allowed in some jurisdictions. 21F(2d)858.

1087–2 21F(2d)858; 224Ky419, 6SW (2d)491; Mont 292P577; TexCivA 271 SW936; TexCivA 9SW(2d)401. **Release reserving rights against another disproves satisfaction.**–83NH281, 141A 467. **Agreement must be construed consistent with intention of parties.**–Mont 292P577.

1087–3 In Missouri.–218MoA235, 265 SW1005; MoA 17SW(2d)621; MoA 19 SW(2d)557. **Intent of parties** must control in giving effect to releases, under some statutes, and where only one tort-feasor is named and no intent to release others appears, others will not be released. 217Ala105, 115S2.

1087–3½–New. Judgment recovered against one joint tort-feasor is reduced by amount of partial settlement with other joint tort-feasor. OhA 173NE31.

1088–4 40F(2d)280; 202Cal 359, 260P 869; 253 IllA190; Mass 171NE660; 127Misc457, 216NYS498, 499 [quotCyc]; 217NYS56; 10PaDist&Co 400; 154Tenn 253, 290SW5, 6 [citCyc], 50ALR1052. But see 35 OhA132, 171NE842. **Who are joint tort-feasors.**–196NC299, 145SE561; TexCivA 271SW936; Ont [1930] 2DomLR409. **Where action sounds in contract,** release of tort-feasor in same transaction is no release of defendant. 127Misc457, 216NYS498. **Release of one not liable in any event** does not release a tort-feasor. 217AppDiv661, 217NYS 56. **Railroad employee injured by strikers** is not barred from recovery against strikers by reason of settlement of claim against railroad company for failure to protect him. 154Tenn253, 290SW5, 50 ALR1052. **Negligence of surgeon,** chosen carefully by injured party, which aggravates injuries originally caused by tort feasor, renders latter liable therefor and release of tort feasor bars claims against surgeon. 128Me464, 148A684.

1088–5 172Ark428, 289SW2; 92CalA 701, 268P943, 944 [quotCyc]; 40GaA 652, 151SE114(2dcase).

1088–6 129Kan563, 283P511 (release of person causing injury held to release claim for physician's malpractice); 154 Tenn253, 290SW5, 50ALR1052.

1089–7 172Ark428, 289SW2; 207Cal 465, 279P148; IndA 159NE13; 128Me 464, 148A684 (surgeon causing injury independent of that caused by original tort-feasor); 127Misc457, 216NYS498; 20 OhA148, 151NE806; 154Tenn253, 290SW5, 50ALR1052. But see BC [1930] 1DomLR491. **Stakeholder who violated contract duty to stop payment of check held not joint tort-feasor** with seller in seller's deceit. 127Misc457, 216 NYS498.

1089–8 See also 220F783, 136CCA389. But see 178Ark596, 12SW(2d)15; 232 Mich2, 204NW764; 30 OhA528, 165NE 865.

1089–10 10LaA297, 120S408(1stcase); TexCivA 13SW(2d)918. **In Michigan.**–232Mich2, 204NW764.

1089–11 NH 146A529.

1089–12 TexCivA 30SW(2d)399.

1089–13 If settlement is only partial plaintiff can recover from defendant actual damages less amount paid. Tex CivA 30SW(2d)399. **Settlement in full** inures to joint tort feasor's benefit. Tex CivA 30SW(2d)399.

1089–15 20 OhA148, 151NE806; 290Pa 74, 138A79.

1090–16 217Ala105, 115S2. **Statutory release construed** as not releasing joint tort feasor unless expressed as full satisfaction of all claims. MoA 22SW(2d) 890.

1090–17 92CalA701, 268P943, 944 [quot Cyc]; CalA 291P611; 173Minn310, 217 NW337; 83NH281, 141A467; 217App Div661, 217NYS56; 195NC127, 141SE 489; 15 OhA409. **Reservation of right to sue others** held not necessary. 173 Minn310, 217NW337. **Covenant not to sue made pursuant to agreement and dismissal of action as against covenantee** held not to affect right to continue action against other tort-feasors. 173Minn 310, 217NW337. **Agreement of employee not to sue employer in consideration of payment equal to compensation under Workmen's Compensation Act,** containing covenant to reimburse employer out of any judgment in action against another based on negligence, is not in full compensation for injury. 83NH 276, 141A470.

1090–20 290Pa860, 138A860; Wis 232 NW865 (judgment should provide that amount paid by dismissed codefendant, under covenant, should be applied to satisfaction thereof).

1090–22 83NH190, 139A753.

1090–23 224Ky419, 6SW(2d)491; Mont 292P577.

1090–25 38F(2d)205. **General release of all causes of action** is complete bar to action for breach of marriage promise. 82Colo 380, 260P97.

1091–26 88PaSuper364; 152Va254, 146 SE284.

1091–27 MoA 25SW(2d)484(2dcase); 221AppDiv48, 222NYS619; 87PaSuper 498.

1092–30½–New. General words of release are limited by recital of particular claim, obligation, or controversy, in absence of language indicating contrary intent. 221AppDiv48, 222NYS619.

1092–30⅓–New. Covenant not to maintain action already brought is usually construed as release of one with whom covenant was made. 83NH190, 139A753.

1092–30¼–New. Promise by widow prior to appointment of husband's representative will not operate as release or bind other legatees or heirs. 40Wyo 297, 276P930.

1092–31 290Pa860, 138A860. **Equity court will be slow to hold** release covers liability not known or contemplated. 40F(2d)280.

1092–32 Rule applied to personal injuries subsequently appearing.–See MoA 18SW(2d)97.

1092–33 258Mass585, 155NE589.

1092–34½–New. Subsequent negligent acts not foreseen are not covered by release. 290Pa860, 138A860.

1092–34⅓–New. But actual construction of instrumentality causing damage which is subsequently made may be within contemplation of parties. 290Pa 860, 138A860.

1092–36 154Md588, 141A337.

1093–37 91CalA700, 267P563; 142Wash 580, 253P1083.

1093–38 179Ark527, 16SW(2d)989; 30 OhA316, 164NE782.

1094–44 But see 267US346, 45SCt245, 69Led649.

1094–45 122Kan269, 251P1100. **Affirmative allegations that release was without consideration** held to overcome mere inference of consideration from other averments. 219AppDiv41, 219NYS289.

1094–46 233 IllA84 (release is not well pleaded where it does not purport to release cause sued upon); MoA 30SW(2d) 1044; 83NH281, 141A467. **Plea of release goes to merits.**–34Ariz292, 271P 406.

1095–54 Plea alleging payment of note by maker's release of payee's indebtedness, pleaded good defense. 41GaA601, 154SE158.

1096–58½–New. Release of joint tort-feasor.–City, in order to avail itself of claim that it was released by release of codefendants, must plead facts showing primary liability of such codefendants or one of them where it does not appear from complaint. MoA 17SW(2d)621.

1097–71 In Arkansas.–173Ark729, 293 SW9.

1098–75 Reply held insufficient.–149 Miss603, 115S720; 222MoA1098, 14SW (2d)31.

1098–77 Insufficient averment of fraud.–157Fed155, 84CCA603, 13AnnCas752; 251 IllA585.

1098–78 Md 149A442.

1099–81 Issue of intrinsic fraud held not raised by reply. 40F(2d)858.

1099–84 84CalA154, 258P111; MoA 291 SW147; OhA 173NE31.

1099–86 MoA 30SW(2d)1044; 138Misc 1, 244NYS553; NC 153SE597. **Burden of proving that release of deceased's employer barred suit against others** jointly liable for death of employee rests on defendant in action for death. 83NH281, 141A467.

1099–87 Sufficient consideration will be presumed for release which is under seal and acknowledged.–133Misc843, 233 NYS632.

1100–89 24F(2d)116; 214Ala104, 106S 593, 46ALR1459; 202 Iowa1229, 211NW 875; 258Mass585, 155NE589; Nebr 230 NW453; 288Pa389, 135A860; TexCivA 300SW102. **Burden is on holder of note** to prove release was executed by mistake. TexCivA 294SW240. **Burden is on releasor to prove that release was signed through fraud,** mistake or duress. 38F(2d)743.

1100–91 21AlaA547, 109S894.

1100–92 38F(2d)743; 34 OhA563, 171 NE424.

1100–93 That property turned over by releasor for release was without value cannot be presumed. Wash 286P95.

1101–98 Burden of showing fiduciary relationship is upon releasor. 258Mass 585, 155NE589.

1101–4½–New. Duress, like fraud, is not to be presumed, but must be proved. 258Mass585, 155NE589.

1101–4⅓–New. Where release of joint tort-feasor shows it was without reference to full satisfaction as against others, release of others will not be presumed. 217Ala105, 115S2.

1101–4¼–New. Holder suing on joint and several promissory note, defended on ground that makers were released by release of one maker of note, had burden of showing that comakers consented to such release or any other facts in explanation or avoidance thereof. 39 GaA263, 146S653(2dcase).

1101–6 TexCivA 25SW(2d)950. **Evidence held irrelevant.**–82Mont559, 268P 549, 58ALR1304 (rule of defendant company not shown to be known to plaintiff). **Evidence of plaintiff's settlement** with joint tort feasor is improperly excluded. TexCivA 30SW(2d)399.

1102–12 216Ala666, 114S60; TexCivA 25SW(2d)950.

1102–15 21F(2d)280; 52ND112, 202 NW280. **Evidence that plaintiff's husband** was in financial difficulties is admissible as bearing on fraud. 217MoA 208, 263SW550. **Evidence held admissible to show fraud.**–195NC409, 142SE483.

1103–16½–New. Evidence that party alleged to have released rights to claim had large pecuniary interest in effecting settlement with third party which would be aided by waiver thereof is admissible on question of such release. 55 AppDC381, 6F(2d)684.

1103–18 19F(2d)412; 4HawaiiFed637. **Evidence held to show that releasor understood what he was doing** when he executed release, etc. 34F(2d)923. **Evidence held sufficient.**–124Kan66, 257P 971; MoA 12SW(2d)520; MoA 28SW (2d)401. **Evidence held insufficient.**–161 La38, 108S117; 259Mass28, 155NE788; TexCivA 6SW(2d)202. **Lack of consid-**

eration shown by evidence see 83 IndA 500, 149NE137. **Uncorroborated testimony of injured person may be accepted by jury** as to how accident happened and as to circumstances attending release. 202 Iowa1229, 211NW875. **Evidence held to show indorser of notes** had not been released. 10LaA798, 123S796. **Prima facie, release based on consideration** is valid. 34F(2d)923.

1104–19 That **releasor does not testify as to mental incapacity** is not conclusive where there is other evidence. MoA 30 SW(2d)1044.

1104–20 Evidence **held sufficient** to show mutual mistake as to extent of injuries. 176Ark737, 48W(2d)528.

1104–21 21F(2d)280; 82Colo 380, 260P 97; 198NC123, 150SE709 (gross inadequacy of consideration for release is sufficient evidence of fraud); 127 Or235, 271P734; 288Pa389, 135A860; Wis 227 NW933. **Evidence held sufficient to show fraud in procuring release.**–41 F(2d)617; 214Ala104, 106S593, 46ALR 1459; Ariz 283P719; 173Ark872, 294 SW11; 178Ark596, 12SW(2d)15; Ark 31SW(2d)963; 41GaA195, 152SE263; 248 IllA287; 202 Iowa1229, 211NW875; Minn 231NW710; Mo 23SW(2d)1034; MoA 18SW(2d)121; MoA 20SW(2d) 592; TexCivA 1SW(2d)938; TexCivA 15SW(2d)694; Wis 227NW933. **Evidence held sufficient to show that a release was procured without fraud.**–219 Ala441, 122S429; 171Minn499, 214NW 477; 54SD578, 223NW830. **Evidence held insufficient to prove that release was obtained by fraud.**–178Ark1100, 13 SW(2d)309; 93Fla30, 111S525; 258 Mass585, 155NE589; MoA 27SW(2d) 58; NC 145SE561; 198NC123, 150SE 709; 194Wis51, 215NW576. **Negligence of injured party.**–202 Iowa1229, 211NW875. **Evidence held sufficient.**–124Kan622, 261P576; 128Kan26, 276P 81. **Rule as to amount and kind of evidence** is same as in actions to set aside. 82Colo 380, 260P97. **Evidence held to show that principal did not know, when release was executed,** that it had been sold for more than amount stated by agent. 33F(2d)491. **Evidence held not to establish** that agreement was wholly void. 40F(2d)858. **Evidence held insufficient.**–40F(2d)858. **Mere statement of signer** that he did not understand nature of document which he signed does not overcome settlement. Wis 227 NW933.

1105–22 93Fla30, 111S525.

1105–22½–New. Testimony that releasor when indorsing draft was sick and incoherent negatives ratification of release for which draft was given. MoA 30SW(2d)1044.

1105–24 178Minn465, 227NW493 (whether agreement was release or covenant not to sue); MoA 8SW(2d)1023. **Whether employee in executing release relied on assurance of employer's physician** that he would soon recover from injury held for jury. 174Ark1180, 297 SW1020. **Delay in denouncing release** is for jury. 26F(2d)296. **Whether agreement is release or promise to defer suit** has been held for jury. 226Ky561, 10SW(2d)1064. **Whether railroads were both tort-feasors** so that conductor's release of employing railroad operated to release defendant railroad was held for jury. 148SC266, 146SE97.

1105–25 106Conn72, 136A874; 251 IllA585; 203 Iowa185, 210NW762; Iowa 224NW771. **Evidence held sufficient to warrant submission to the jury.**–MoA 287SW801; 222MoA1098, 14SW (2d)31; MoA 20SW(2d)592; 127 Or235, 271P734.

1105–26 82Colo 380, 260P97; Mo 281 SW695; 288Pa389, 135A860; TexCivA 300SW102. **Evidence held sufficient to go to jury.**–82NH87, 129A729. **Evidence of fraud** held insufficient for jury. 288 Pa389, 135A860. **Sufficiency of evidence to go to jury** is for court. 288Pa389, 135A860. **Evidence held insufficient to go to the jury.**–178Ark1100, 13SW(2d) 309; 82Colo 380, 260P97; 245Mich369, 222NW771; 317Mo 221, 295SW116; MoA 285SW1015; SC 155SE136; 156SC 529, 153SE568. **Release unimpeached by evidence** entitled defendant to directed verdict. CalA 275P468. **Where testimony to sustain defense of release does not raise any more than mere surmise or suspicion of existence of good faith** in effecting settlement of claim, court is warranted in directing verdict. TexCivA 15SW(2d)704.

1105–28 26F(2d)296; Ariz 283P719; 171Ark103, 283SW31; 208Cal 350, 281P 66; 203 Iowa185, 210NW762; 202 Iowa 1229, 211NW875; 258Mass257, 154NE 546; 157Miss432, 128S325; Mo 23SW (2d)162; Mo 31SW(2d)14; MoA 28SW (2d)401; MoA 30SW(2d)1044; 104NJL 215, 141A2; 195NC409, 142SE483; Or 293P417; 142SC492, 141SE90; Tex CivA 6SW(2d)192; Utah 290P759. **Evidence of alleged fraud** held, as matter of law, to show no question for jury. 26F(2d)73. **Responsibility for or knowledge of agent's representations** is jury question. 26F(2d)296. **Fraud of releasee's agents,** etc. MoA 282SW525.

1106–29 91CalA700, 267P563; 217MoA 208, 263SW550. **Validity of release of liability for injuries for jury** where releasor ignorant, hurt and in dire straits, at time of execution. 133SC256, 130SE 893 [perPurdy,J].

1106–30 Mo 282SW38; 82Mont559, 268 P549, 58ALR1304.

1106–31 217MoA208, 263SW550 (whether plaintiff ratified and adopted release procured by fraud).

1106–32 202 Iowa1229, 211NW875; 176 Minn156, 222NW913.

1106–34 14F(2d)24; 180Ark60, 20SW (2d)309.

1106–35 169Ark748, 276SW599; 203 Iowa185, 210NW762. **But where there was no evidence of want of sufficient mental capacity,** etc. 82NH87, 129A729.

1106–36 Md 151A21; 156SC529, 153SE 568. **Where setting aside release is condition precedent** to judgment, such relief is ancillary to main action. 194Wis 51, 215NW576.

1106–37 Instructions held incorrect or misleading.–213Ala115, 104S28 (instruction ignoring effect of concurring negligence); MoA 22SW(2d)890 (that dismissing suit against one defendant, for consideration without prejudice as to rights against other defendants, operated as full satisfaction of all claims); 82Mont559, 268P549, 58ALR1304; Tex CivA 282SW949 (properly refused). **Instructions held correct.**–171Ark103, 283 SW31 (as to effect of misrepresentations to induce signing of release); 174Ark 1180, 297SW1020; 202 Iowa1229, 211 NW875 (as to negligence in signing release); MoA 12SW(2d)520; MoA 30SW (2d)1044; Mo 282SW38; 82Mont559, 268P549, 58ALR1304. **Instructions held erroneous.**–Mo 23SW(2d)1034. **Refusal to charge held error.**–150SC29, 147SE 625.

1108–40 Construction of verdicts.–See 128Kan26, 276P81.

1108–42 TexCommnA 271SW79 (answer construed to be in conformity with verdict and jury's findings).

RELEVANT

1109–6 Other definitions.–209Ky325, 272SW753.

RELIGIOUS SOCIETIES

1115–2 In North Carolina.–192NC549, 135SE454.

1116–6 Validating acts.–158La377, 104S 121. **Holding corporation not entitled to incorporation.**–10PaDist&Co 576. **Where church organized under previous statute does not adopt later statute,** such church is not controlled by later enactments. 154Wash351, 282P224.

1117–8 154Miss516, 122S732. **Reincorporation** not following statute held void. 224AppDiv113, 229NYS520. **Record** required to be kept showing organization. 154Miss516, 122S732.

1118–11 163Ga557, 136SE550.

1118–14 A name so similar, etc. But see 10PaDist&Co 189.

1119–17 224Ky307, 6SW(2d)255.

1119–18 Church corporation cannot amend articles so as to change fundamental faith without consent of all members. 168Minn178, 209NW648. **Constitution or rule requiring approval of metropolitan** in all matters concerning management of society and change in its constitution is held unreasonable and invalid. 267Mass472, 166NE863.

1119–19 Members are bound by constitution if not in conflict with law or contrary to public policy. Nebr 230NW 658.

1120–22 By majority vote church corporation may amend its articles in respect to administrative and temporal matters or mere forms of worship not affecting religious doctrine. 168Minn 178, 209NW648. Amendment of articles by majority vote affiliating with another religious society has been held not to affect religious faith or creed. 168Minn 178, 209NW648.

1120–22½–New. No violation of discipline of church unless a substantial one. 289Pa139, 137A179.

1120–22¾–New. In case of a schism, the majority cannot overrule the minority in regard to the constitution where the minority adhere to the original tenets of the church, while the majority secede from these tenets. 35Man453, [1926] 2 DomLR626, [1926] 1WestWkly443.

1120–22¼–New. Organization's interpretation of its constitution and by-laws, as disclosed by opening chapel by vote of congregation, will be adopted as controlling. NJCh 144A874.

1121–28½–New. Members and officers of congregation instrumental in organizing it and sustaining contractual relations with it in respect of property are estopped to deny its corporate existence or its right to acquire the property. 323 Mo 776, 20SW(2d)899.

1121–29 172Minn471, 215NW845.

1121–32 172Minn471, 215NW845.

1123–39 122 Okl 229, 253P506. **Church membership** creates different relationship on higher plane than that in other voluntary societies. TexCivA 297SW 615. **Will of majority will prevail** where church is organized on express condition that majority of members thereof shall rule in church affairs. 122 Okl 229, 253P506.

1123–43 TexCivA 289SW461; TexCivA 293SW916, 919 [quotCyc].

1125–52 Expulsion without compliance with by-laws relative to investigation of charges and admonition is illegal and does not deprive member of voting power. 242Mich120, 218NW652. **Mere filing of charges** against member of Baptist Church does not automatically suspend him until cleared of guilt. 232 Ky303, 22SW(2d)1025.

1126–60 Right to participate in meetings.–Seceding church members, not returning to main church for worship, as authorized by court and invited by trustees, are held nonmembers without right to participate in congregational meetings. NJCh 144A874. **Corporate action may be taken by those assembled if** meeting is regularly called. 154Wash 351, 282P224.

1127–61 TexCivA 21SW(2d)1072 (arbitrary conduct of presiding officers justifies majority in conducting election).

1127–62 TexCivA 21SW(2d)1072 (authority of committee chairman on enrollment terminated within allotted period preceding convention). **Evidence held not to show error** of presiding officer in ruling as to method of voting. 232Ky 303, 22SW(2d)1025. **Majority vote** in Baptist Church meeting is final. 232Ky 303, 22SW(2d)1025.

1128–68½–New. Majority will control and minority must submit. 214Ala584, 108S517.

1128–68¾–New. Withdrawal from meeting of religious society does not prevent complaint as to activities after his departure in all cases. 101NJEq145, 136A911.

1128–68¼–New. Meeting called contrary to constitutional requirements is void. NS [1927] 2DomLR760.

1128–71 258Mass74, 154NE839.

1129–74 209Ky19, 271SW1091. **Members who remain in customary meeting-place** constitute regular business meeting of congregation though other members met elsewhere. 232Ky303, 22SW (2d)1025.

1129–76 Right to vote of persons on appendix or reserve roll of Presbyterian congregation held dependent on circumstances of each case in absence of gen-

eral custom. Ont [1926] 4DomLR365. Member of coöperating church held not entitled to vote. Ont [1926] 4DomLR 385. Person whose name was omitted from revised roll held not entitled to vote. Ont [1926] 4DomLR283. Persons whose names were omitted from new communion roll held no longer members. Ont [1926] 4DomLR280. Person received into another church upon letter from minister held not member of former church, although still on rolls. Ont [1926] 4DomLR278.

1120-21½-New. Where each faction has recruited forces by inducing large number of nonresidents to become members for sole purpose of voting, election of officers is invalid. RI 131A840.

1121-89 192NC549, 125SE454; TexCivA 298SW(2d)422. Ordination was, under evidence, necessary to defendants' official status as deacons of church, where defendants themselves on previous occasion recognized ordination as essential. 10LaA170, 120SE633. Postponement of time fixed by by-laws for election may not be made in advance. 242Mich120, 218NW652. Place of election.-242Mich120, 218NW652.

1121-90 Election of trustees is void when made under void reincorporation of church. 224AppDiv112, 229NYS520.

1122-93 TexCivA 298SW(2d)422.

1122-94 TexCivA 298SW(2d)422.

1122-94½-New. Church can have more than three trustees though affidavit of incorporation provided for only three. 339 Ill 622, 171NE625.

1122-96 154Wash351, 282P224 (trustees not taking oath required by by-laws).

1122-99 Title to offices of trustees of church cannot be questioned in suit to restrain sale of church's real estate and to vacate deed. 339 Ill 622, 171NE625.

1123-14 232Mich88, 205NW184. Expulsion of church clerk is illegal where charges were not submitted nor meeting held in conformity with church rules. 232Ky203, 228SW(2d)1025.

1124-24½-New. Board of church corporation in charge of affairs acts as trustee. 102NJEq199, 142A819.

1133-15½-New. Matters not constituting compromise and settlement of differences. Offer by summarily removed trustees who had been forcibly dispossessed of property to abide by decision of administrator of diocese in settlement of differences with rival faction which was never acted upon does not amount to settlement of such differences. 232 Mich88, 205NW134.

1135-22½-New. Members of church board of trustees cannot act individually, as in closing chapel as place of worship without authority from board itself. NJCh 144A274.

1135-29 Forcible seizure of property from possession of trustees summarily removed contrary to articles of association and by-laws and without color of law is illegal and void. 232Mich88, 205 NW184. In Nova Scotia.-[1928] 2 DomLR540.

1135-25½-New. In absence of vote of directors, or of committee of board of directors, conferring authority upon secretary, his authorization to make lease to person is not necessarily to be inferred from fact that house committee knew that such person was tenant, or that secretary had executed lease with privilege of renewal. 252Mass535, 147 NE295.

1136-41 192NC549, 125SE454.

1136-42 8LaA109. Corporate acts, of trustees, not complying with constitutional requirements cannot be legalized by ratification. 101NJEq145, 136A911.

1137-43 107WVa684, 150SE4 (trustees as secular representatives of church are bound by church's acceptance of benefits of contract executed by pastor).

1137-45 192NC549, 125SE454. Conversely.-122SC498, 129SE830. Pastor assigned to church subsequent to execution of contract held not liable on contract by reason of acting on committee. TexCivA 289SW461. Trustees of unincorporated religious society signing note are individually liable thereon by reason of church's want of capacity to contract. 99Fla1206, 128S635.

1138-46 122SC498, 129SE830.

1138-49 Majority acting legally can regulate temporal affairs of society. 101 NJEq145, 136A911.

1139-54 TexCivA 290SW828. Baptist church.-TexCivA 282SW834. Canons of church must yield to law of land, so far as they conflict with it. 296Pa307, 145A 862.

1139-54½-New. Majority cannot disfranchise minority. 101NJEq145, 136A 911.

1139-54½-New. Lutheran churches are governed by same statutes as reformed and German reformed churches. 101NJ Eq145, 136A911.

1139-54¼-New. Majority cannot appropriate corporate name at the expense of minority. 107NJEq145, 136A911.

1139-54½-New. Will of majority governs in determining policy of each Baptist Church. 221Ala315, 128S781.

1139-54¼-New. Person attending church luncheon is "frequenter" or one of public within statute requiring church to keep premises safe. Wis 230NW708.

1139-55 148Va381, 138SE477. See also 142Va789, 128SE268. Unincorporated church organization cannot be made liable on its contracts. 99Fla1206, 128S 635. Agreement to make debtor trustee held ultra vires.-339 Ill 622, 171NE625.

1140-57 192NC549, 125SE454.

1140-59 Acts held to amount to ratification.-102Conn609, 129A785. Acts held not to amount to ratification.-286Pa45, 132A717. Mere knowledge of individual members of church that work was being done on church property held not ratification of agreement to pay for it. 286 Pa45, 132A717.

1140-60 102Conn609, 129A785.

1140-60½-New. Liability of church society for pastor's salary is governed by law of contracts. 192NC549, 125SE454.

1140-60½-New. Relation of landlord and tenant exists between owner of property and members of church erected thereon using land with her permission. 230Ky239, 19SW(2d)991.

1140-61 Effect of vote of non-currence with church union under statute.-Can [1930] 4DomLR769.

1140-62 Constitution of Congregational church reciting its organic relation with other Congregational churches, and provision that particular church shall not be subject to control of any other ecclesiastical body has been held not to show that essence of organization was not to enter into relationship with other Congregational churches. 94CalA260, 271P 113.

1141-64 174Minn207, 219NW88.

1141-65½-New. United Church of Canada.-Can [1929] 2DomLR497.

1143-81 Roman Catholic church.-51 Philippine420.

1144-83 Pa 152A98.

1144-88 Agency of pastor, under permit from bishop to borrow certain amount for church, is terminated when that was done and obligation given therefor. 296 Pa467, 146A102. Unauthorized act of pastor in giving note is not ratified by new pastor paying interest thereon in ignorance of facts. 296Pa467, 146A102. One loans to church through pastor at his peril, where loan is made on old necessary permit from bishop and no inquiry is made of congregation. 296Pa 467, 146A102. Ecclesiastical relationship of itself does not set up legal relation on which to base liability for acts of one for other. Pa 152A98.

1144-90 Acts of priest not specifically authorized in supervision of church construction have no more effect than that of overseer, as regards authority to increase owner's liability. Pa 152A98. Priest cannot act for bishop, without specific authorization, in regard to construction of church. Pa 152A98.

1146-10 TexCivA 282SW834.

1147-19½-New. Duly elected pastor, leaving church with seceding members, remained pastor until pastorate was formally terminated by official action of trustees or congregation. NJCh 144A 374.

1148-36 TexCivA 282SW834. Evidence held sufficient to support finding that meeting of members of congregation of baptist church assuming to discharge pastor was not regular church conference held in accordance with recognized custom and usage after proper notice to members. TexCivA 282SW834. Refusal of temporary injunction against pastor preaching held not abuse of discretion. TexCivA 282SW834. Resolution of majority of church members requiring signing of new membership roll as condition of right to vote for pastor cannot be interfered with by court. TexCivA 18SW(2d)419.

1149-39 Plaintiffs must show that summary removal was authorized, where priest was ordered removed without trial by church authorities. 109Conn354, 146 A613.

1149-48 31Ariz97, 250P763. 765 [cit Cyc]. Even if connected with a parish a church is not thereby made a corporation for purpose of holding property. 256Mass550, 152NE921. Before separation of town and church, church had no separate legal entity capable of taxing and holding land. 256Mass550, 152NE 921.

1150-49 31Ariz97, 250P763. 765 [cit Cyc]; 172Minn471, 215NW845.

1150-52 49RI269, 141A703.

1150-52½-New. Bishop of Roman catholic church and successors in official capacity has capacity to take and hold fee simple not in sense of estate of inheritance descending to bishop's heirs but in character of estate which corporation takes under deed to it and its successors. 83Fla849, 112S846.

1151-62 Incorporated religious society may take devised property which together with that already owned did not exceed statutory limit. 125Misc909, 212 NYS616.

1151-65 Such restrictions cannot be taken advantage of collaterally by private persons, etc. 156Miss559, 115S223. Testator's heir at law and next of kin may attack will devising property to religious society, as interested persons. 125Misc909, 212NYS616. Where testator owned all shares of stock of realty corporation, society is not prevented from taking such stock on theory that effect was same as though realty passed to society. 125Misc909, 212NYS616. Power of sale of realty given by will proceeds to go to religious society is not invalid as attempt to evade statute limiting realty which such society may hold. 125Misc909, 212NYS616. Effect of holding in excess of limitation.-156Miss559, 115S223. Missouri constitution has been held not violated by deed to trustees of church of lots for purpose of erecting thereon house of worship and parsonage, and authorizing trustees to lease, bargain, mortgage or sell, such real estate whenever they may deem it necessary for the best interest of church. 322Mo 52, 148W(2d)982.

1152-71½-New. Statute increasing value of property which corporations not having capital stock may hold applies to incorporated religious societies. 125 Misc909, 212NYS616.

1152-71½-New. Statutes validating titles. Statute validating title to all real estate at time owned by religious society cannot affect title to property acquired by society after it went into effect. 150 Miss559, 115S223.

1152-71¼-New. Mississippi statute held not unconstitutional. 148Miss521, 115S223.

1152-75 Provisions of church discipline are read into deeds as fully as if set out therein. 26 OhNPN875. Deed held valid dedication of lot to religious purposes. 154SC415, 151SE741.

1155-81 336 Ill 551, 168NE658, 66ALR 172; 296Pa307, 145A862.

1155-81½-New. Provisions of constitution and regulations subsequently adopted cannot affect title to property of religious society or impose trust upon it. 267Mass472, 166NE863.

1155-85 336 Ill 551, 168NE658, 66ALR 172.

1155-85½-New. Church organization, using premises conveyed to trustees for school and church purposes, to be open to all christian denominations, did not acquire prescriptive title to exclusion of another church organization. 160Ga588, 128SE794.

1155-85½-New. Statute held not to vest

parish with title to land no longer used for church purposes. 256Mass550, 152 NE921.

1155–85¼–New. Where new corporation is formed to take over property of one previously organized, it does not acquire title to property without transfer and assignment by owner. 258Mass74, 154 NE839.

1155–86 122Kan607, 253P230 (gift conditioned on paying donor stated sum periodically for stated time). **Agreement to reconvey land upon breach of condition held not ultra vires.**–127Misc498, 216NYS616.

1155–89 See also 336 Ill 551, 168NE658, 66ALR172.

1156–91 Contract to reconvey on breach held to create mere possibility of reverter not requiring approval of supreme court. 127Misc498, 216NYS617. **Conveyance for religious purposes only,** buyer to reconvey if realty ceased to be so used, is held not to require courts' approval. 220AppDiv244, 221NYS396. **Purchasers' agreement to reconvey if it ceased to exist as religious purpose** held not ultra vires. 220AppDiv244, 221NYS 396.

1156–92 But see 230Ky339, 19SW(2d) 991.

1156–93 92CalA618, 268P665; 93Fla 849, 112S846, 852 [citCyc]. **Conveyance to trustees as tenants by entirety.**–322 Mo 52, 14SW(2d)982. **Society held not entitled to unconditional possession** where property continued to be used for trust purposes. 204 Iowa907, 215NW 970. **Statutory authority to mother church** to take over property of abandoned local church held not to apply to cases where rights vested before passage of such act. 204 Iowa907, 215NW 970.

1156–94 Where there are religious differences, beneficiaries of trust are those who adhere to religious principles of original creators of trust whether they constitute a majority of the congregation or not. Alta [1926] 2DomLR280, [1926] 1WestWkly912.

1156–95 93Fla849, 112S846, 856. [cit Cyc]. **Deed to bishop and successor and assigns not designating beneficiary nor manifesting intention to create trust** does not create express trust. 93Fla849, 112S846.

1156–96 93Fla849, 112S846, 856 [cit Cyc].

1157–98½–New. Subsequent use of property for church purposes cannot be considered for purpose of construing deed to bishop as creating express trust where it fails to designate beneficiary or purpose of trust. 93Fla849, 112S846.

1157–98½–New. Trust for members adhering to specified doctrines.–Where property is conveyed to trustees in trust for members of church adhering to specified doctrines, majority of members cannot change terms and beneficiaries of trust and hold property for use only of members adhering to essentially different doctrines. Ont [1929] 3DomLR 525.

1157–99 Where deed to trustees requires property to be used for purpose of erecting thereon house of worship and parsonage, erection of business building for rental purposes on part of lots and house of worship on the remainder without erecting parsonage does not comply with terms of deed, and is not within power conferred by trust. 322Mo 52, 14 SW(2d)982.

1157–2½–New. Where trust failed for indefiniteness as to beneficiaries, church declared to have acquired title through continuous open and notorious possession for twenty years. 148Md603, 129A 908.

1157–2½–New. Corporation does not hold legal title to lands held in trust by archbishop who attempted to transfer trusts; the title being either in archbishop for benefit of the faithful within his diocese, in transferees or in the faithful themselves. 249NY75, 162NE588.

1157–5 Del 147A165; 101NJEq145, 136 A911; 128Misc603, 220NYS850, 56 [cit Cyc].

1158–6 128Mich603, 220NYS850, 56 [cit Cyc].

1158–11½–New. Where unincorporated association never authorized incorporation or transfer by trustees, trustees may compel reconveyance on ground of fraud where grant was made without knowledge of incorporation of church. 92CalA618, 268P665 (jurisdiction and sufficiency of evidence).

1159–18 115Nebr114, 211NW611; 33 OhA150, 168NE763; 7PaDist&Co 789. **The majority of a church society having a congregational form of government,** etc. in controversy between majority and minority factions majority will not be denied right to worship in church house nor restrained from so doing. 122 Okl 229, 253P506.

1159–20 209Ky19, 271SW1091 (majority members and trustees entitled to use church after joining another assembly for number of Sundays proportioned to their members as compared with total membership).

1160–21½–New. Cardinal, holding legal title, need not visit church construction work to discover acts done without his authority. Pa 152A98.

1160–24½–New. Erroneous allegation in pleading that Greek catholic church corporation was under supervision of Russian catholic church does not put corporation without pale of Greek catholic church under auspices of which it was organized or deprive it of right to possession and ownership of property acquired. 232Mich88, 205NW184.

1160–24½–New. Ownership of church property by lay members carries right to receive and control revenues and profits derived therefrom. 299Pa70, 149 A94.

1160–24¼–New. In Ontario members of congregation of Presbyterian Church which had voted in favor of church union held not entitled to enjoin use and disposition of property. Ont [1929] 4 DomLR664.

1160–25 215Ala667, 112SE134; 154 Wash351, 282P224 (majority of votes cast as used in by-laws does not mean majority of members of congregation). **Bare majority of congregation** cannot transfer church property contrary to constitutional prohibition against alienation while three male members hold to congregation and recognize church government. Nebr 230NW658.

1160–26 215Ala667, 112S134; 339 Ill 622, 171NE625; 220Ky113, 294SW804. Where member of church vestry, as such, received offer from third person to purchase land, it was his duty to submit such offer to vestry, even though he might believe that church could not make good title. 103NJEq199, 142A819. **Quorum.**–154Wash351, 282P224. **Mortgage by persons acting without authority held void.**–219Ala683, 123S210. **Conveyance by trustees without consent of society** confers no title on grantees having knowledge of society's equitable ownership. Nebr 230NW658.

1161–27½–New. Rules in respect to conveyances by married women are not applicable to church organizations. 100 WVa441, 130SE670.

1161–30 In Ontario.–[1927] 3DomLR 535.

1161–31 Consistory of reformed and German reformed church may by statute have power to sell and convey without vote of congregation. 101NJEq145, 136A911.

1162–32 Del 147A165.

1162–32½–New. Religious societies may not dispense with constitutional and statutory requirements in conveying their real estate. 101NJEq145, 136A911.

1162–32½–New. Religious societies may in their by-laws provide proper safeguards for the conveyance of real estate. 101NJEq145, 136A911.

1162–32¼–New. Laws imposed by charter and by-laws become part of contract of conveyance. 101NJEq145, 136A 911.

1162–32½–New. Statute's charter provisions, constitution, and by-laws should be read together to determine requirements for sale and conveyance of property. 101NJEq145, 136A911.

1162–33 Court could not consider religious controversies between congregation and bishop on petition for permission to mortgage real estate. 296Pa307, 145A 862.

1162–36 Finding required by statute that mortgage will be to interest and advantage of those interested is necessarily implied by sanctioning of court of mortgage and its decree authorizing it. 296Pa307, 145A862. **Where there was necessity to satisfy indebtedness,** court properly directed execution of mortgage. 296Pa307, 145A862.

1163–43 In Kentucky.–220Ky113, 294 SW804.

1163–43½–New. Court may require trustees petitioning to lease church lands, already under lease to another party on more advantageous terms, to confirm existing lease or repay moneys paid and received in good faith thereunder, though such lease was not in first instance authorized under statute. 100 WVa441, 130SE670.

1163–45 100WVa441, 130SE670, 672 [citCJ].

1163–46 100WVa441, 130SE670, 672 [citCJ]. **Trustee's act in conveying property contrary to constitutional requirement** cannot be ratified by members acting individually. 101NJEq145, 136A 911.

1164–55 174Minn207, 219NW88.

1164–56 154SC415, 151SE741 (change of name).

1164–56½–New. One of two independent self-governing congregations of same religious faith cannot sue to recover the other's property on ground that latter is not using it for purposes for which it was acquired. 78CalA1, 247P605.

1164–56½–New. Majority of congregation from which minority separated does not forfeit right to use of property for religious purposes by temporarily leasing it for other purposes and uniting in worship with congregations of other denominations. 78CalA1, 247 P605.

1164–56¼–New. Congregation temporarily uniting in worship with congregations of other denominations under name of "community church" does not lose its identity and forfeit right to use property as matter of law. 78CalA 1, 247P605.

1164–56½–New. Where church was left with small membership, requiring union of church with one of different denomination it was entitled to income provided for its support though gift required maintenance of visibility of church. 83NH387, 142A686.

1165–57 221Ala315, 128S781; 31Ariz 97, 250P763; Ont [1930] 1DomLR726 (doctrines and qualifications of membership controlled by deed of trust). **There is departure from doctrines, practices, and usages of a national church** by local church which on reorganizing into an independent church refused to accept pastor from national office as required. 31Ariz97, 250P763.

1166–62 But see 224Ky307, 6SW(2d) 255. **Parties.**–49Philippine627.

1167–64 221Ala315, 128S781; 144Va 253, 132SE479.

1167–66 78CalA1, 247P605; 158La377, 104S121; 174Minn207, 219NW88.

1168–67 78CalA1, 247P605; 232Mich 648, 206NW564; TexCivA 290SW828. **Seceders who form a new organization,** etc. 224Ky307, 6SW(2d)255. **Acts affecting secession and separation.**–78 CalA1, 247P605.

1168–68 94CalA260, 271P113; NJSup 142A428. **Rights of parties must be determined upon principles which would** apply if the two congregations had been separate and independent of each other from beginning. 78CalA1, 247P605. **Where separation of majority from minority was not legal,** remains of society entitled to use name and property. 101 NJEq145, 136A911.

1169–69 78CalA1, 247P605; 115Nebr 404, 213NW584; 144Va253, 132SE479. **Rights of two distinct conflicting bodies to property held in trust** solely for congregation's use as religious society must be determined by ordinary principles governing voluntary associations. 78CalA1, 247P605.

1169-70 144Va253, 132SE479, 481 [cit Cyc].

1169-70½-New. Courts will not inquire into ecclesiastical teachings of pastor or congregation to decide which faction is entitled to church property. 115Nebr 404, 213NW584.

1169-70½-New. In Ontario, where property is held in trust for members subscribing to certain doctrines, members subscribing to additional doctrines not contradictory of those originally required remain members. Ont [1930] 2DomLR449.

1169-71 158La377, 104S121. **Provision in discipline** entitling members who remain with church from which congregation has separated to pro rata portion of property has been held not to apply to merger of churches. 26 OhNPNS75.

1170-74 Proportional use is permitted only so long as is required for ecclesiastical authorities to determine which faction is congregation. 224Ky307, 6 SW(2d)255. **In Kentucky.**-224Ky307, 6 SW(2d)255.

1170-76 224Ky307, 6SW(2d)255; 232 Mich88, 205NW184; Nebr 230NW658; 37 OklACR510; 122 Okl 229, 253P506. **Supreme court** has jurisdiction to determine whether title to lands should be vested in present archbishop, incorporated archbishop and consistory, or other trustee. 249NY75, 162NE588. **Controversy between church societies belonging to different organizations as** to title and possession of church building is for determination of civil courts. Nebr 230NW658.

1170-77 115Nebr404, 213NW584; 122 Okl 229, 253P506.

1171-80 Petitioners not entitled to trial in ejectment where cause of action on implied trust was not sustained by court. Oh 171NE30.

1171-82 In action to recover rental value of property, used by expelled members, church having power to sue is necessary party. 232Mich648, 206NW 564.

1171-83 Minority of congregation must demand action of church council or show demand would be unavailing, before suing in name of church. 87Colo 237, 287P89.

1172-85 Archbishop of Russian orthodox Greek catholic church, appointed by church council pursuant to its authority, and entitled to occupy church property, may enjoin interference with property by one illegally claiming such office. 214AppDiv483, 212NYS273.

1172-87 But see 40GaA27, 148SE626 (2dcase). **Complaint has been held to show that church was proceeding not as voluntary unincorporated association** in its adopted name alone, but in its adopted name by its deacons. Mo 9SW (2d)549. **Under Alabama statute,** bill praying for injunction concerning property rights may properly be filed in name of church, though unincorporated. 219Ala322, 122S341.

1172-88 As against persons not parties relief as to title to real estate cannot be granted. 232Mich88, 205NW184.

1172-88½-New. Necessary parties. In suit by one faction of church against another for sale and division of church property, where church is incorporated under laws of state and legal title to property is in trustees for benefit of church and neither trustees nor church are parties, court is without jurisdiction to direct sale. 37 OklACR510.

1172-88½-New. Attorney-general not a proper party to suit by church. 214 Ala234, 107S76.

1172-88¼-New. Laches.-Mere delay not exceeding time limited by statute will not bar action by society to quiet title to property conveyed by trustees without authority. Nebr 230NW658.

1172-89 167Ga199, 144SE761; 144Va 253, 132SE479 (holding demurrer properly overruled because in substance bill charges diversion). **Admission by answer of president.**-158La377, 104S121. **Pleading held insufficient** to show cause of action. 163La1073, 113S459. **Bill praying to restrain seceding members from interfering with property rights of church held sufficient.**-219Ala322, 122 S341. **Petition held insufficient to authorize action of trover.**-40GaA27, 148 SE626(2dcase).

1173-90½-New. Where petition of unincorporated association is silent as to whether defendant was not member, assuming that it should allege that plaintiffs were members, necessary inference is that defendant was member. 40GaA 27, 148SE626(2dcase).

1173-91 Where minority faction, including some of trustees, of independent church, are complainants, they have burden of proof. 144Va253, 132SE479.

1173-94 191NC829, 135SE851 (validity of action by which plaintiff declared nonfellowship with defendant held immaterial as affecting question of title to church property).

1173-97½-New. Evidence held insufficient to show valid appointment to sustain injunction against interference with possession of church property. 214App Div483, 212NYS273.

1173-97½-New. Evidence of validity of church council held sufficient to sustain validity of appointment of archbishop entitling him to possession of church property. 214AppDiv483, 212 NYS273.

1173-97¼-New. Evidence held sufficient to warrant finding, that governing body had jurisdiction, and that defendants were bound by its decision without right to stay of execution of decision pending appeal to higher church body. 232Mich648, 206NW564.

1173-97⅓-New. Evidence held to show sale of real property was in pursuance of vote by less than three quarters of electors. 101NJEq145, 136A911.

1173-97⅙-New. Evidence in case authorized finding or ruling of court and granting of interlocutory injunction. 167Ga199, 144SE761.

1173-97⅐-New. Evidence held sufficient to sustain verdict giving possession of church property to original trustees. 130Kan488, 287P603.

1174-4½-New. Question as to right to possession and control of church property as between factions has been held one for jury under evidence. 194NC64, 138SE412.

1174-4⅓-New. Right of original trustees to recover church property from opposing faction held for jury under evidence. 130Kan488, 287P603.

1174-5 298Pa231, 148A100 (refusal of equitable relief is not an abuse of discretion). **Injunction against assuming to act as trustees and interfering with property.**-232Mich88, 205NW184. **Interlocutory order** appointing receivers to enforce judgment held not to give property to member of congregation individually and members held entitled to delivery. 199 Ind528, 156NE545. **Order directing delivery of church property** to certain members in accordance with judgment awards possession to such persons in behalf of church and not individually, and such members are entitled to delivery from receivers put in possession by sheriff. 199 Ind 528, 156NE545. **Order of trial court, restraining persons chosen as deacons of church from selling church lot and interfering with use of the property for church purposes, has been held justified** under evidence that majority of members had not consented, at meeting at which church removal was agreed on. 10LaA170, 120S639. **Priest may be restrained from preventing holding of meetings** by congregation in church and required to supply keys thereto. 299Pa70, 149A94.

1174-7½-New. Order requiring parties, to whom archbishop attempted to transfer his trusts in church property pending receivership for corporation known as archbishop and consistory, to deliver deeds to receiver and execute such other deeds as might be required, did not adjudicate title in corporation. 249NY 75, 162NE588.

1174-10½-New. Dismissal without prejudice. Claim by trustees unlawfully removed for accounting by successors may be dismissed without prejudice where not properly presented by pleading or proof. 232Mich88, 205NW 184.

1174-10⅓-New. In adjudicating property rights in religious controversies courts confine themselves strictly to facts before them in the particular case. Or 253P506.

1174-10¼-New. Where the church is congregational and an independent sovereignty uncontrolled by any higher church tribunal, the controversy will be determined by ordinary principles of law governing voluntary associations. Okl 253P506.

1182-51 83CalA41, 256P476; 232Mich 88, 205NW184.

1182-52 8F(2d)149; 224Ky307, 6SW (2d)255; 261Mass462, 159NE453; Mass 169NE424(2dcase); NJSup 142A428; 33 OhA150, 168NE763; 298Pa231, 148 A100; TexCivA 297SW615; Alta [1928] 1DomLR848. **Schism developing among members of religious society** on account of interpretation of doctrines does not justify interference by court. 221Ala 315, 128S781.

1183-53 8F(2d)149; 56AppDC324, 13F (2d)296; 224Ky307, 6SW(2d)255; 232 Mich88, 205NW184; 130 Okl 70, 265P 112; TexCivA 18SW(2d)419; TexCivA 15SW(2d)109. See also Alta [1928] 1 DomLR534. But see TexCivA 29SW (2d)422. **Only where property rights are involved** will courts inquire into proceedings of church organization. 37 OklACR510. **Courts cannot construe usages and customs of church.**-TexCivA 1SW(2d)419. **In measuring violation of civil rights** courts may consider form rules and regulations of particular church. 232Ky303, 22SW(2d)1025.

1184-54 280US1, 50SCt5, 74Led131 (appointment of chaplain); 221Ala315, 128S781; 83CalA41, 256P476; 33 OhA 150, 168NE763 (use of property). **Whether governing body acted prudently or rightly** is not question for court. 232Mich648, 206NW564. **Only where property rights are involved** will courts of equity interfere with the internal affairs of religious organization. 164Ga 30, 137SE394. **Majority of baptist congregation** has ultimate power to determine all questions relating to government of local congregation. 224Ky307, 6SW(2d)255.

1186-57 224Ky307, 6SW(2d)255. **Charter is subject to construction by courts.**-49RI 269, 141A703.

1187-58 280US1, 50SCt5, 74Led131; 221Ala315, 128S781; 224Ky307, 6SW (2d)255; 130 Okl 70, 265P112.

1187-58½-New. Church council convened according to church statute is entitled to presumption of regularity. 214AppDiv483, 212NYS273.

1187-58⅓-New. Controversies between congregation and officers of church should not be decided on narrow technical lines. 296Pa307, 145A862.

1187-59 56AppDC324, 13F(2d)296; 224 Ky307, 6SW(2d)255; TexCivA 297SW 615. **Rule applied to congregational churches.**-224Ky307, 6SW(2d)255 (baptist church). **Errors must be corrected by church** not courts, absent infringement of civil rights. 232Ky303, 22SW (2d)1025.

1188-62 Contract right held affected, giving court jurisdiction, where clerk receiving salary was expelled. 232Ky 303, 22SW(2d)1025.

1188-66 174Minn207, 219NW88.

1188-66½-New. Civil authority has jurisdiction to protect members against invasion of civil rights guaranteed by constitutions of church and state. 224 Ky307, 6SW(2d)255.

1188-67 164Ga30, 137SE394; 115Nebr 114, 211NW611 (majority of members of nonsynodical and independent church may discharge pastor); TexCivA 298SW 441. **Conformity of decision of governing body to canon law of church** is not a question for determination of court, except in so far as it is necessary in determining whether such body had jurisdiction of subject matter. 232Mich 648, 206NW564.

1189-71½-New. In controversy seeking to restrain pastor from occupying pulpit and to terminate contract of employment by Congregational church, superi-

or court had jurisdiction to construe provisions of constitution of Congregational church, reciting its organic relationship with Congregational associations, and to determine that association of Congregational churches had withdrawn its fellowship from pastor, and effect of such action on pastor seeking to prevent court from taking further action. 94CalA260, 271P113.

1189-73½-New. Amendment of constitution and regulations in accordance with their express provisions by administrative board will not be enjoined by courts. 267Mass472, 166NE863.

1190-74 Whether administrative board rendered themselves ineligible to hold office by ignoring ecclesiastical authority is matter beyond domain of civil courts. 267Mass472, 166NE863.

1190-75 Irregular removal of officers held matter for membership of baptist church, not courts. 224Ky307, 6SW(2d)255.

1190-75½-New. In New York under Gen. Corp. L. § 32 court may establish validity of election complained of or order new election with such relief thereto as justice requires, 215AppDiv529, 214NYS259.

1190-75⅓-New. but it may not determine in advance who are qualified voters. 215AppDiv529, 214NYS259.

1190-75¼-New. or supervise conduct thereof on assumption that it will be illegally or improperly conducted. 215 AppDiv529, 214NYS259.

1190-75½-New. Under general statute providing proceedings in nature of quo warranto to try title to office or validity of election, civil court has been held to have power to decide disputed election of officers of religious society or to order new election where circumstances warrant; RI 131A840.

1190-75⅚-New. and where it appears that there have been violent disagreements in membership and that election was held in circumstances rendering it unfair and invalid, court will order new election under supervision of a master. RI 131A840.

1191-86 289Pa139, 137A179. **Charter held not violated.**–289Pa139, 137A179.

1191-88 172Minn471, 215NW845.

1191-88½-New. Consolidation valid, though joint committee has not first reported to general conferences. 289Pa 139, 137A179.

1191-88⅓-New. If union valid, unionists are true congregation and change is no diversion of church property. 289 Pa139, 137A179.

1191-88¼-New. When consolidation duly effected, dissenters are without authority. 289Pa139, 137A179.

1191-88⅙-New. Whether consolidation affected discipline is question for church authorities to decide. 289Pa139, 137A 179.

1192-89 See also Ont [1928] 4DomLR 37. **Church house** did not become property of consolidated churches worshipping therein under agreement that each church would retain own property until erection of new edifice. 176Ark371, 3SW(2d)45.

1192-92½-New. Unless system of church government is federated and not congregational, then law of church governs. 289Pa139, 137A179.

1192-92⅓-New. Sufficient if two thirds of members of annual conference in favor, if total vote more than two thirds of total membership. 289Pa139, 137A 179.

1192-92¼-New. Only those actually voting are considered in determination of validity of merger. 289Pa139, 137A 179.

1193-93½-New. Evidence held to justify finding of consolidation.–120Kan581, 244P1065.

1193-95 Members of consolidated church voting to exclude others on dissolution held to have assumed indebtedness incurred in remodeling own church edifice. 176Ark371, 3SW(2d)45.

1193-95½-New. The consolidation of two churches does not effect title to real estate used by one church, providing the legal effect of language used in deed is not to the contrary. 336Ill551, 168 NE658, 66ALR172.

1194-2½-New. Receivership. Bill, alleging incorporation, purchase of property, consolidation with unincorporated organization, change of name and sale of property, is insufficient to justify receivership where all acts were approved by trustee and member. 56AppDC350, 13F(2d)956.

1194-2⅓-New. Where churches entered into consolidation agreement, which was ratified at combined congregational meeting, pursuant to statute, individual church ceased to exist from date of meeting, and filing of agreement was mere ministerial act, postponement of which did not prolong life of individual church corporation. 28OhA325, 162NE714.

1194-2¼-New. On dissolution of churches consolidated under agreement to retain own buildings until another erected, owner held responsible for debts incurred in remodeling. 176Ark371, 3 SW(2d)45.

1194-2⅙-New. Where local church becomes extinct, presbytery can authorize assignment to township trustees of funds collected by former church trustee. Iowa 231NW329.

1194-3 Unincorporated religious society in absence of statute cannot sue or be sued.–99Fla1206, 128S635.

1194-5 Trustees acting as trustees and members and on behalf of members of church may maintain suit to enjoin merger with another congregation. 26 OhNPNS75.

1196-14½-New. Injury to member. In Quebec incorporated religious community can maintain action for damages caused it as result of personal injury to member through negligence. Can [1930] 2DomLR353.

1196-14¼-New. In such action recovery is limited to out of pocket expenses and there can be no recovery for loss of services. Can [1930] 2DomLR353.

1197-18½-New. Judgment which determines validity of appointment to archbishopric does not authorize order on motion without trial requiring bishop to turn over property to a receiver. 218 AppDiv121, 217NYS873.

1197-18⅓-New. Order which required pastor of incorporated parish to turn over property to archbishop where pastor was not a party was held unauthorized. 218AppDiv124, 217NYS875.

1197-24 154Miss516, 122S732. **Complaint insufficient** to give jurisdiction. Mass 169NE424(2dcase). **Bill for balance due on work done, failing to allege authorization by any of defendants,** held properly dismissed. 286Pa45, 132A717. **Sufficient allegation of incorporation.**–163Ga557, 136SE550. **Demurrer.**–192 NC549, 135SE454. **Injunction dissolved** where no member of church in question was a party and plaintiff had no property rights in church. 7PaDist&Co 108. **Complaint against religious corporation for failing to light hallway near stairs,** injuring plaintiff held to state cause of action. Wis 230NW708. **Petition held sufficient** to give court jurisdiction. Tex CivA 29SW(2d)422.

1198-25 168La1133, 123S807(1stcase). **Burden of proof** that condition existed by which title reverted back to grantor upon plaintiff. 170Ark996, 282SW364. **Admissibility of evidence.**–219AppDiv 592, 220NYS260. **Sufficiency of evidence.**–83CalA41, 256P476. **Presumption of incorporation.**–37GaA647, 141SE 426. **Burden of proof.**–296Pa467, 146A 102. **Evidence held insufficient** to show religious organization was legal entity organized under statute. 154Miss516, 122S732. **Burden is on member** claiming mortgage is not authorized by majority of congregation to show number of voting members in suit to cancel mortgage. 154Wash351, 282P224.

1198-26 256Mass550, 152NE921; Mo 9 SW(2d)549. **Questions of fact for jury.** –142Va789, 128SE268. **Contributory negligence of plaintiff** falling down stairs not shown as matter of law. Wis 230NW708. **Questions of fact for jury.** Church's failure to light hallway near stairs. Wis 230NW708.

1198-28 Churches organized under state laws are classed as charitable institutions in negligence cases. 174Minn 389, 219NW463, 62ALR716.

1198-29½-New. In suit by trustees of church property to recover possession thereof, in absence of equitable issues the legal title will prevail. 31Ariz97, 250P763.

1198-29⅓-New. Judgment enjoining interference with management of church held sufficient. TexCivA 29SW(2d)422.

REMEDY

1201-33 15F(2d)637, 642 [citCyc]. **"Administrative remedy"** is one not judicial, but one provided by commission or board created by legislative power. 15F(2d)637.

1201-37 149Md685, 132A51, 52 [cit Cyc]; 216AppDiv274, 214NYS732.

1201-40 316Mo524, 296SW90; 216App Div274, 214NYS732.

1201-41½-New. Remedies exist, may be, and are frequently applied in redress of wrongs or maintenance of rights, that are not within domain of litigation. 216AppDiv274, 214NYS732.

1201-41⅓-New. Remedy is the means by which the violation of a right is prevented, redressed, or compensated. Black L. D. [quot 23 OhA1, 154NE748]

1201-41¼-New. A legal means to recover a right. Wharton L. Lex. [quot 23 OhA1, 154NE748].

REMIT

1207-49 194NC720, 140SE705.

REMOTENESS OF EVIDENCE

1209-65 146Wash109, 261P777.

REMOVAL

1209-68½-New. Removal could only be accomplished by forming an intent to remove. NJSup 129A396.

REMOVAL OF CAUSES

1216-1 17F(2d)160; Mont 279P253; 85Mont532, 281P341. **Whether case is made for removal of cause** to federal court is federal question. 221Ala394, 129S262(3dcase).

1216-1½-New. Right of removal cannot be given by consent in case not covered by federal statute. 192NC510, 135 SE350.

1216-2 Right to remove action from state to federal court is constitutional right only in so far as congress is authorized to give right by statute. 30F (2d)953.

1216-2½-New. Congress has power to restrict or take away right of removal.–30F(2d)953.

1217-27½-New. Limitations by federal statute. 41F(2d)950.

1217-28 30F(2d)436; TexCivA 285SW 646. State court is controlled by decisions of federal court as to whether case is removable. 235Mich416, 209NW200. **Montana statute relating to organization of irrigation districts** is not invalid as depriving nonresident of right of removal. 31F(2d)515.

1217-29 But see 197NC337, 148SE439. Contra 137SC388, 135SE356.

1218-30 Agreement in application to do business in state not to remove causes cannot be made basis of denial of removal. 197NC337, 148SE439.

1218-32 7F(2d)177; 36F(2d)378; 38F (2d)303; 90CalA630, 266P563; 191NC 599, 132SE605; 192NC510, 135SE350; 49ND838, 193NW658; 120Or687, 252P 948 (submitting to jurisdiction of state court). **Effect of subsequent stipulation.** –138Misc280, 245NYS317. **Conduct not establishing waiver.**–Company going into state court for taking testimony is not precluded from having proceeding by beneficiary removed to federal court. 36F(2d)832(1stcase).

1218-32½-New. Defendant should not be deprived of right to removal upon

the ground of waiver unless a clear case of intent to submit and have a hearing in state court is made to appear. 8F (2d)881.

1218-40 13F(2d)256; 191NC599, 132 SE605; 138Misc280, 245NYS317.

1218-40½-New. Nor by acceptance of order providing that he be allowed statutory time to answer after vacation of default judgment on constructive service, 191NC599, 132SE605.

1218-42 15F(2d)395.

1219-47½-New. Nor, after applying for removal, by service of motion to take depositions in state court, which were subsequently taken. 8F(2d)881.

1219-50 82Colo 474, 261P659.

1219-52½-New. Nor by filing exceptions to report of jury in condemnation proceedings. 194NC131, 138SE613.

1219-52⅓-New. Federal court will entertain litigation transferred from state court only where given whole case to decide untrammelled by any procedural estoppels. 36F(2d)378.

1223-56½-New. Cause of action for assault and not grounded in negligence is not within Jones Act prohibiting removal from state court in certain cases. 38F(2d)889(1stcase).

1223-57. But see 38F(2d)298. **Statute refers to legislative denial or inability resulting therefrom** and is not intended to correct errors or wrongs committed by judicial tribunal. 29Ariz247, 240P863. **Improper impaneling of jury** in prosecution for murder is not ground for removal. 29Ariz247, 240P863. In prosecution for assault with deadly weapon is not ground for removal. 29 Ariz523, 243P601. **Statute authorizes removal of cause** involved in appeal from condemnation proceedings. 194NC131, 138SE613. **Statute authorizing judge challenged to sit in judgment of himself** is no ground for removal of cause where statute is inapplicable. 38F(2d)298. **That testimony of defendant before legislative commission** was used to obtain indictment against him did not disclose system of state laws in denial of his civil rights. 38F(2d)298.

1224-58 14F(2d)609; 23F(2d)530; 34 F(2d)449. See also 4HawaiiFed601. **Action against officer of customs for slander** committed while investigating unlawful importation of opium is removable to United States district court. 4HawaiiFed601. **Revenue or prohibition officer** to obtain trial in federal court need not admit act charged in state prosecution. 270US9, 46SCt185, 70Led449.

1225-60 31F(2d)136; 256Mass561, 153 NE26, 49ALR1222. **Cases which may be removed.**-271US99, 46SCt439, 70Led 854 (action between citizens of different states held removable, though venue would have been improper if suit originally brought in federal court); 7F(2d) 177 (suit under Louisiana Workmen's Compensation Law is removable); 7F (2d)511 (action on award under state statutory arbitration is removable); 7 F(2d)772 (stockholder's suit under state statute is removable); 30F(2d)436. **Cases which may not be removed.**-27F (2d)572 (controversy between state court receiver and one claiming preference, federal district court not having original jurisdiction); 192NC522, 135 SE522 (case arising under Federal Employer's Liability Act is not removable from state court). **Must be "suit."**-Attachment held to constitute suit. 40 GaA431, 149SE812(1stcase). **Case involving validation of proposed ordinance** held "suit," with adverse parties, and removable. 274US123, 47SCt511, 71 Led959. **Facts held to show** that plaintiff at time of injury was not engaged in interstate commerce, and that, therefore, since there was diversity of citizenship, case was removable. 20F(2d) 655. **Cases under federal Employers' Liability Act** are, by its terms, not subject to removal. 26F(2d)367.

1225-61 Action of tort for personal injuries is removable though alternative remedy under Workmen's Compensation Act not removable. 7F(2d)177.

1225-61½-New. Cases arising under federal Employers' Liability Act, etc. Provision of act against removal of action from state court is not repealed by Judicial Code, § 33. 21F(2d)226.

1225-61⅓-New. Action under Federal Employers' Liability Act against railroad receiver appointed by federal court is removable as action against federal court officers. 26F(2d)953.

1225-66 12PaDist&Co 557 (indictment against federal prohibition officer held not removable).

1226-69 Mich 209NW200.

1228-83 5F(2d)705.

1228-86 37F(2d) 862. **Proceeding under Kansas statute to renew drainage district assessment** is within federal court jurisdiction, other elements of removability existing. 28F(2d)56. **Proceeding under Oklahoma statute to renew tax assessment** by county treasurer involves judicial controversy within Judicial Code § 28, and is removable. 26 F(2d)951.

1229-89 14F(2d)688; 177Minn182, 225 NW9. **Illustrations.**-7F(2d)511 (suit under New York Arbitration Law for appointment of arbitrator is not removable); 14F(2d)688. **Different steps under New York Arbitration Law are not separate proceedings** as to removal of suit, but all constitute one arbitration proceeding, having from outset all elements of judicial controversy. 29F(2d) 40 [certiorari den 278US655, 49SCt179 (12th case), 73Led565]. **Suit begun by state process,** as attachment, is removable where diversity of citizenship and excess of jurisdictional amount exist. 5F(2d)705.

1230-91 271US127, 46SCt444, 70Led 868; 33F(2d)765; 36F(2d)504; 40 F(2d)617 (holding state court to have jurisdiction, so that Federal court had jurisdiction on removal). **Defendant does not voluntarily submit to jurisdiction** of federal court by taking steps for removal and demurring to jurisdiction. 33F(2d)765.

1230-93 The following classes of cases, etc. Actions arising under law regulating interstate commerce are removable, irrespective of amount involved. 32 F(2d)373.

1231-94 19F(2d)60; 34F(2d)501 (three thousand dollars). **Case showing no reasonable expectation of recovering jurisdictional amount,** reduced below such amount, is not within federal court's jurisdiction. 39F(2d)619(1stcase); 192NC 510, 135SE350; 12PortoRicoFed549 (three thousand dollars). **Condemnation proceedings against nonresident,** involving over three thousand dollars, held removable. 194NC131, 138SE613. **Where no one of several separable claims assigned is within jurisdictional amount** motion for removal was properly denied. 38GaA349, 143SE924. **Amount named in petition** is controlling. 38GaA349, 143 SE924. **Jurisdictional amount held not involved.**-27F(2d)167; 39F(2d)615. **Test** is value of property of which defendant may be deprived. NC 154SE738. **Amount of claim** is not conclusive. NC 154SE738.

1231-94½-New. Complaint determines amount of controversy. 20F(2d)142.

1231-94¼-New. Separate suits on insurance policies cannot be combined to make required amount. 25F(2d)320.

1231-94¼-New. Joinder of causes cannot be compelled by defendant to make cause removable. 25F(2d)320.

1231-94⅓-New. Amount must be determined as matters stand when petition for removal is filed. 34F(2d)501.

1232-97 31F(2d)136.

1232-99 192NC510, 135SE350. **In attachment suit against nonresident defendant** not served and not making general appearance amount claimed in declaration and writ and not amount which may be reached in hands of trustees governs. 18F(2d)631.

1233-2 Consolidated causes.-25F(2d) 916.

1234-9 22F(2d)997.

1239-36 17F(2d)609. **Cause held not removable.**-31F(2d)136.

1239-37½-New. Nonresident plaintiff, suing resident defendant on cause of action involving less than jurisdictional amount, where defendant not only answered, but filed cross-petition asking affirmative relief against the plaintiff for more than three thousand dollars, in addition to denying any liability is entitled to remove controversy to federal court. 29F(2d)579.

1239-37¼-New. Plaintiff, after counterclaim for more than three thousand dollars, is entitled to removal to federal court. 39F(2d)243.

1240-39 271US99, 46SCt439, 70Led854 (injuries to interstate shipment of cattle, alleged to be due to breach of statutory duty); 18F(2d)645; 19F(2d)60; 201Cal438, 257P521; 235Mich416, 209 NW200 (construction of Sherman Anti-Trust Act). But see 42F(2d)633. **Illustrations,** etc. 17F(2d)193; 129Misc131, 220NYS523. **Complaint determines** whether case sought to be removed arises under laws of United States. 271US 99, 46SCt439, 70Led854. **Intention to deprive litigant of right to remove** case otherwise removable cannot be presumed. 17F(2d)193. **Under federal Employers' Liability Act,** forbidding removal where state court has acquired jurisdiction, complaint, allegations of which raise fairly doubtful questions as to interstate nature of plaintiff's employment at time of injury, is not fraudulent attempt to defeat federal jurisdiction. 25F(2d)774. **Action against agent operating railway under transportation act is not removable** as arising under federal laws. 32F(2d)454. **Case arising under laws of United States, nonremovable on complaint when commenced,** cannot be converted into removable one, by evidence of defendant, or by order of court on issue tried on merits. 27 F(2d)403. **Action for damages for death of seaman** during course of employment is not removable. 41F(2d)219.

1241-41 33F(2d)994 (case removable in action under Carmack Amendment); Ark 32SW(2d)616; 201Cal438, 257P 521. **A suit does not arise, etc.**-17F(2d) 487. **A suit does not arise under the constitution or laws of the United States,** etc. 132Okl141, 269P1067.

1242-42 235Mich416, 209NW200.

1242-43½-New. Suit arising under federal law to regulate commerce may be removed to federal court regardless of amount in controversy. 15F(2d)532.

1242-44 Defense under United States constitution or laws does not authorize removal. 17F(2d)642.

1243-48 235Mich416, 209NW200 (petition held to charge violation by telephone company of Sherman Anti-Trust Act).

1244-53 129Misc132, 220NYS476.

1244-54 129Misc133, 220NYS499.

1244-55 Action in state court against insolvent national bank, to obtain reconveyance by bank of real estate to plaintiff, is not removable to federal court as one "for winding up the affairs of a national bank," where bank's receiver is not joined as defendant, and no relief is sought against him. 28 F(2d)615.

1247-69½-New. Causes held not to arise under federal laws. 17F(2d)642.

1248-80 13F(2d)415; 26F(2d)200. **Petition for removal** by officer automatically makes the case pending in district court. 5F(2d)684. **Illustrations.**-270US 9, 46SCt185, 70Led449; 270US36, 46SCt 192, 70Led459; 32F(2d)301. **Prohibition agents** are included in application of statute permitting removal of proceedings against U. S. revenue officers. 40F(2d)58.

1248-80½-New. Suit against officer of courts of United States for acts done under color of office or in performance of duties is removable. 18F(2d)656; 18 F(2d)657.

1248-80⅓-New. Amendment of August 1916 to Judicial Code § 33, so as to provide for removal of actions against officers of United States courts, does not apply to receivers of common carriers charged with duty of management and operation thereof, because of specific provision as to such officers in federal Employers' Liability Act, §§ 6, 7. 21 F(2d)226.

1248-80¼-New. Suits against any officer of United States courts are within

power of Congress providing for removal of suits against federal officers, officers appointed by federal courts, or for acts discharging their duties. 26F(2d) 953.

1249-82 37F(2d)72. **Action for money had and received** against insolvent national bank and its receiver is case "for winding up the affairs of a bank," which may be removed from state court to federal court on defendants' petition. 27 F(2d)403. But see **Iowa** 220NW63. But rule is otherwise where receiver was not made party but was merely served with notice of commencement of action. 27F(2d)403.

1249-84 26F(2d)200. But see 16F(2d) 609. **Right to remove action for personal injuries against railroad receiver** appointed by federal court is purely statutory. 26F(2d)953. **Federal court receiver** of carrier may remove action against him under Federal Employers' Liability Act in view of amendment of 1916 to judicial code. 34F(2d)213. Federal court receiver would have no right to remove action brought under Federal Employers' Liability Act independent of other provisions of law. 34 F(2d)213.

1249-87 13F(2d)415.

1250-88 270US438, 46SCt326, 70L ed 669.

1250-89 Action by nonresident plaintiff against defendants who were all residents of state in which suit was filed was not removable to federal court. TexCivA 12SW1044.

1250-90 20F(2d)387; 220Ala385, 125 S403 (all defendants must be nonresidents); 36GaA254, 136SE103; 33GaA 726, 127SE785; 220MoA876, 295SW492. **All nonresident defendants must unite** in application for removal to federal court. 220Ala385, 125S403.

1251-95 Suit is not removable on ground of diversity of citizenship where state is real party to action under Judicial Code § 28. 26F(2d)951. **Where county, not state, is real party** in proceedings under tax ferret statute for assessment of tax on corporate property removal of cause for diversity of citizenship was not improper. 26F(2d)951.

1251-96 37F(2d)862.

1251-98 220Ala385, 125S403; 256Mass 561, 153NE26, 49ALR1222; 220MoA 876, 295SW492. **Defendant remains party to action commenced against him,** though not served with process until abandonment of action. 220MoA876, 295SW492. **Right to remove cause depends on case disclosed** by pleadings when petition for removal is filed. 27 F(2d)457. **Parties' status and nature of relief asked must be determined** as at time of application for removal. 44 F(2d)57.

1251-98½-New. There can be no removal when state court is without jurisdiction. 20F(2d)220.

1251-98⅓-New. Where cause of action stated is under Federal Employers' Liability Act, cause not removable for diversity of citizenship. 14F(2d)230.

1251-98¼-New. Ejectment suit is not removable under federal judicial code on ground that by judgment of reversal all defendants except nonresident had been eliminated, as judgment was not final. 201Cal 438, 257P521.

1251-98⅙-New. Where questions of law and fact appear in suit in state court and state court has jurisdiction, circuit courts of United States have original jurisdiction concurrent with that of state courts, if diversity of citizenship exists under statute providing for removal. 30F(2d)436.

1251-98⅛-New. United States has no citizenship in any state, and suit against it cannot be removed on account of diversity of citizenship. 32F(2d)454.

1251-98⅙-New. Where action is brought under Federal Employers' Liability Act in state court of competent jurisdiction, defendant cannot remove to federal courts on ground of diversity of citizenship. **Mo** 6SW(2d)843.

1251-98¼-New. Removability depends upon state of record at time of filing petition. 34F(2d)790 (not affected by subsequent events).

1251-99 277US54, 48SCt454, 72L ed781; 19F(2d)60; 19F(2d)538; 28F(2d)131; 319Mo 865, 6SW(2d)954. **Where joint cause of action** is stated against resident and nonresident defendants, cause is not removable. 43F(2d)406. **Rule applies regardless** of nature of proceeding under state law. 26F(2d)495. **Refusal to transfer action** against nonresident employer and resident employees is held proper. 28F(2d)784.

1252-1 5F(2d)1001; 8F(2d)576; 17F (2d)160; 17F(2d)609; 31F(2d)997; 220 MoA876, 295SW492; 214AppDiv58, 210 NYS243. **Illustrations.**-8F(2d)576. **Action against nonresident pipe line company and resident superintendents** for death of pumper from alleged negligence of defendants is controversy wholly between plaintiff and company and is removable. 27F(2d)890.

1252-1½-New. Action by alien corporation against United States shipping board held not "between citizens of different states." 15F(2d)568.

1253-2 22F(2d)689; 30F(2d)436; 194 NC653, 140SE607. **Persons who are not formal parties.**-5F(2d)137 (one having such interest that final decree cannot be entered between other parties without radically and injuriously affecting his interest or leaving controversy so that its final determination may be inconsistent with equity and good conscience is indispensable party); 7F(2d)491 (parties having common interest in questions of law and fact involved); 27F(2d) 457; 28F(2d)131. **Persons who are formal parties.**-30F(2d)436.

1255-3 5F(2d)137; 8F(2d)576; 27F (2d)457; 30F(2d)436; 30F(2d)671; 36 F(2d)265 (agent); 43F(2d)49; 166Ga 54, 142SE541; 193NC28, 136SE254. **Illustrations.**-5F(2d)137. **The fact that a defendant is pecuniarily irresponsible,** etc. 16F(2d)79. **Defendant may remove** case to federal court on ground that codefendant is not necessary party. 267 US542, 45SCt385, 69L ed782. **Test whether party is indispensable to litigation,** depends upon whether he would be injuriously affected by granting complainant all relief sought, and whether such decree would be inconsistent with equity and good conscience. 30F(2d) 671. **Suit against city held not removable** where city filed interpleader joining foreign corporation which moved for removal, city being necessary party and requisite diversity of citizenship not existing. 27F(2d)457.

1256-5 196NC667, 146SE569.

1256-6 17F(2d)184; 26F(2d)383; 28 F(2d)45; 34F(2d)352; 43F(2d)406; 193NC838, 137SE925; 194NC816, 140SE 742; 198NC129, 150SE704(2dcase); 144 Okl 246, 291P59. **Federal and state courts will not sanction devices which are intended to prevent removal when right** is clear. 209Ky325, 272SW753. **Where plaintiff has no reasonable grounds for allegations** in complaint against resident defendants, nonresident defendant cannot be denied right to remove case. 27F(2d)890. **Joinder of parties defendant held proper.**-135Misc 913, 239NYS684.

1256-7 33F(2d)1010; 145Miss299, 110 S674; 193NC28, 136SE254; 198NC204, 151SE241; 13PortoRicoFed237. See also 43F(2d)293. **Evidence of fraudulent joinder.**-33F(2d)1010; 193NC28, 136SE 254. **Pleading and evidence of fraudulent joinder.**-43F(2d)293.

1257-8 16F(2d)79; 17F(2d)184; 35F (2d)551; 181Ark1095, 25SW(2d)5; 193 NC122, 136SE494; 196NC377, 145SE681 (2dcase); 198NC1, 150SE632. **A statement in the petition,** etc. 193NC77, 136 SE238. **Motive of plaintiff in joining defendants** is immaterial when in lawful assertion of rights. 189NC733, 128SE 146. **Rightful joinder** of resident defendants is not fraudulent in law, though made solely to defeat removal. 193NC 77, 136SE238. **Nonresident corporation sued with resident superintendent for personal injuries of employee is not entitled to removal for fraudulent joinder,** where injuries were caused by breach of duty of both to give instructions. 196 NC377, 145SE681(2dcase); 197NC395, 148SE460.

1257-9 316Mo 651, 291SW466; 198NC 1, 150SE632.

1257-10 14F(2d)406; 16F(2d)79; 33 F(2d)158; 38F(2d)209; 177Ark638, 7 SW(2d)332; 198NC31, 150SE639; 198 NC128, 150SE715. **Each case depends on its own facts.**-16F(2d)79.

1257-11 16F(2d)79.

1258-15 192NC710, 135SE783 (employer and foremen joint defendants); 198 NC129, 150SE704.

1258-15½-New. Where it is ruled that parties are properly in court, it is not error to overrule motion to remove. 219 MoA99, 268SW706.

1258-15⅓-New. Cause not removed where defendant is resident of state. 36 GaA254, 136SE103.

1258-15¼-New. Sustaining demurrer to evidence as to resident defendant held not to warrant removal for nonresidence of other defendant. 215Ala677, 112S203.

1258-15⅕-New. To constitute removable controversy elimination of resident defendant must be by voluntary act of plaintiff. 215Ala677, 112S203.

1258-15⅙-New. Instructing verdict in favor of local defendant, as to which there is right of appeal, does not render controversy removable as to nonresident defendant. 24F(2d)252.

1258-16 When an alien is joined as defendant, etc. 17F(2d)160.

1258-18½-New. Alien as plaintiff may sue in state or federal courts, he cannot be deprived of this right except by statute. 256Mass561, 153NE26, 49ALR 1222.

1259-21 40F(2d)948. **Widow and children, for whose exclusive benefit action for wrongful death by personal representative is prosecuted** are real parties in interest, and their residence controls on question of diversity of citizenship, as affecting jurisdiction of federal court. 29F(2d)628.

1259-30½-New. Action for personal injuries against agent operating railway under Transportation Act is not removable for diversity of citizenship between plaintiff and agent. 32F(2d)454.

1259-30⅓-New. Action is removable for diversity of citizenship between plaintiff and railway. 32F(2d)454.

1259-31 22F(2d)689.

1261-35 Action against Emergency Fleet Corporation held not removable on ground of diversity of citizenship. 19 F(2d)60.

1261-36 192NC510, 135SE350. **National bank** in course of liquidation retains status of citizen of state wherein located for purpose of removal of cause for diversity of citizenship. 27F(2d)224.

1261-37 33F(2d)765. **Erratum.**-"Walters v. Chicago, etc., R. Co., 104 Fed. 337" should read "104 Fed. 377."

1262-40 192NC206, 133SE460.

1263-42 12PortoRicoFed99; 13Porto RicoFed237.

1264-45 192NC48, 133SE174; 12Porto RicoFed96. **Purpose of removal stated.**-30F(2d)953.

1264-46 5F(2d)705; 15F(2d)280; 15 F(2d)725; 16F(2d)288; 22F(2d)306; 22F(2d)639; 26F(2d)495; 40F(2d)951; 192NC48, 133SE174; TexCivA 5SW(2d) 240. See also 82Colo 474, 261P659. **The case must be separable into parts,** etc. 17F(2d)160; 44F(2d)57; 189NC 733, 128SE146. **Term "controversy"** means something less than the whole suit. 5F(2d)1001. **Separability depends upon whether the cause of action** is several or joint. 190NC801, 130SE 864. **Test as to whether cause of action is separate and distinct** is whether separate suits could have been maintained and determination of neither is essential to disposition of other. 190 NC801, 130SE864. **Necessary to show** that resident defendant fraudulently joined for purpose of preventing removal. 192NC48, 133SE174. **Nonresident defendant,** other defendants being residents, cannot remove without showing separable controversy or fraudulent joinder of defendants. TexCivA 292SW 281. **Foreign corporation** sued with directors and some stockholders to set aside reorganization held to have separable controversy as to plaintiff. 25 F(2d)655.

1265-47 277US54, 48SCt454, 72L ed

781; 15F(2d)551; 15F(2d)725; 22 F(2d)689; 23F(2d)519; 26F(2d)495; 190NC801, 130SE864.

1265–47½–New. Suit may embrace several distinct controversies. 190NC801, 130SE864.

1265–47½–New. Whether action is joint or several only is question exclusively for state court. 37 OkIACR 433.

1265–47¼–New. Motive of plaintiff in asserting joint liability immaterial. 192NC48, 133SE174; 37 OkIACR433.

1265–47⅛–New. Separable causes of action remain separable, though assigned to one plaintiff, when viewed on motion to remove. 190NC801, 130SE 864.

1265–47⅛–New. Causes barred by limitation as to resident, will not be removed on petition of nonresident. 192 NC48, 133SE174.

1265–47½–New. Causes of action against shipbuilding company and Emergency Fleet Corporation held improperly joined for removal. 15F(2d) 568.

1265–48 271US318, 46SCt498, 70L ed 965; 15F(2d)187; 17F(2d)184; 22 F(2d)306; 30F(2d)953; 36F(2d)828; 40GaA700, 151SE414; 189NC733, 128 SE146; 190NC801, 130SE864; 191NC 207, 131SE625; 193NC28, 136SE254; 193NC77, 136SE238; 194NC787, 140SE 736; 196NC377, 145SE681(2dcase); 198NC1, 150SE632; 198NC31, 150SE 639. **The pleading by defendant,** etc. Separate answers by several defendants sued jointly on joint causes do not make separable controversies. 33F(2d)1010. **Question of removability of cause to federal court depends on state of pleadings and record** at time of application for removal. 30F(2d)695. **Where joint tort is committed,** plaintiff's election to sue wrongdoers jointly or separately determines character of action. 189NC 733, 128SE146. **Where complaint charging resident engineer with negligently operating train** did not state cause of action against him, in suit against him and company, case could not be remanded to state court. 21 F(2d)185. **Complaint charging separate publication of libelous article** entities defendant to removal of cause. 156SC92, 152SE821. **Mere failure to state cause of action** against nonresident defendant is not sufficient for removal. 22F(2d)863. **Petition sufficiently alleging that joint acts of negligence** caused death precludes removal. 228Ky752, 16SW(2d)170. **Nonresident defendant cannot raise, by petition for removal on ground of separability,** question whether resident defendant is liable on facts alleged, cause of action being whatever plaintiff declares it to be in pleading. 197NC309, 148SE426. **Removal will not be permitted on suppositiious theory that pleadings may later change** and that plaintiff may present complete and separable cause of action against one defendant. 30 F(2d)953. **Petition held not to present separable controversy.**–30F(2d)953.

1265–50 15F(2d)568.

1266–54 198NC31, 150SE639. **Resident petitioner** cannot, under Judicial Code § 28, remove separable controversy from state court to federal district court. 28F(2d)131.

1267–59 Only indispensably necessary parties should be considered in determining question of separability. 190 NC801, 130SE864.

1267–59½–New. But, if resident and nonresident defendants are severally liable, each only on cause of action alleged against him, then nonresident defendant may remove. 190NC801, 130SE 864.

1267–60 15F(2d)551; 27F(2d)631. See also 26F(2d)367. But see 33F(2d) 1010. **If defendants are jointly liable either in tort or contract** requisite separability does not exist. 190NC801, 130 SE864. **Joint tort-feasors.**–16F(2d)288; 30F(2d)695; 33F(2d)1010; 197NC393, 148SE429(2dcase). **Suit prosecuted as upon joint cause of action** presents no separable controversy. 228Ky752, 16 SW(2d)170.

1267–60½–New. Suit consisting of several legally distinct controversies permissible in North Carolina may be removed by nonresident defendant against whom distinct cause of action asserted. 190NC801, 130SE864.

1267–61 17F(2d)785; 36F(2d)265. **Controversies that are separable.**–5F(2d) 1001 (suit held to involve separable controversies, one of legal nature over title, other for accounting besides seeking partition); 22F(2d)622; 26F(2d) 100; 27F(2d)631; 43F(2d)49; 190NC 801, 130SE864. **Controversies that are not separable.**–22F(2d)306; 27F(2d) 631; 31F(2d)997; 37F(2d)338; 135 Misc913, 239NYS684; 191NC207, 131SE 625; 192NC102, 133SE421. **Demand against contractor and surety** for amount paid materialman not separable. 17F(2d)785. **Joinder of several causes of action by plaintiff under state statutes,** does not estop defendant liable solely upon independent contract from removing action. 39F(2d)309. **Complainant's failure to establish joint cause of action** does not give defendant right to remove in absence of showing fraudulent joinder. 40GaA700, 151SE 414. **Suit against contractor and surety** is separable. 26F(2d)495.

1269–62 23F(2d)519.

1270–63 23F(2d)519.

1270–66 Controversy between petitioner and owner of land is separable from controversy with owner of timber on land. 5F(2d)705.

1271–71 17F(2d)184; 21F(2d)620; 24 F(2d)591; 33F(2d)1010 (concurrent negligence is not separable). **But not in a joint action** for wrongful death, where complaint alleges fraudulent scheme to create apparent relationship of independent contractor to avoid liability for injuries. 191NC207, 131SE 625. **Complaint for employee's wrongful death alleging joint negligence of resident vice president and nonresident railroad** held to state joint cause of action not removable or rendered severable against railroad because of allegation of its failure to comply with statute. 189NC733, 128SE146. **There is no separable controversy,** etc. Other instances. 40GaA700, 151SE414; 22 F(2d)863; 36F(2d)828; 39F(2d)619 (2dcase); 43F(2d)293; 40GaA700, 151 SE414; 189NC528, 127SE538 (in action against joint tort-feasors one of whom is citizen of plaintiff's state); 193NC77, 136SE238 (superintendent held properly joined with employer in action for death of employee); 196NC 377, 145SE681(2dcase). Contra 5F(2d) 236.

1271–72 Petition in action for personal injuries against nonresident employee and resident employee held not to state separable controversy justifying removal by employer. 271US318, 46SCt 498, 70L ed965. **Action stating joint liability** of two defendants arising out of concurrent negligence does not present a separable controversy. 271US 318. 46SCt498, 70L ed965.

1271–72½–New. Where resident and nonresident are sued jointly, but no cause of action is stated against resident, cause is removable. 21F(2d)185.

1271–73½–New. Action against joint tort-feasors for pollution of stream caused by combination of individual acts is not separable so as to be subject to removal. 192NC102, 133SE421.

1272–75 A suit to foreclose a mortgage, etc. 31F(2d)301.

1272–81 Where any one of defendants could have been sued alone, action is separable and court should order removal. 82Colo 474, 261P659. **Though answers presented separate defenses,** action to quiet title and determine conflicting lien claims did not present separable controversy. 39F(2d)246(1st case).

1273–92 TexCivA 292SW281. **Time of removal.**–33F(2d)994; 317Mo 707, 296 SW386; 220MoA876, 295SW492. **Extension of time.**–138Misc280, 245NYS 317.

1273–92½–New. Where removability of cause is not disclosed on face of pleadings, nonresident defendant may remove instant that such removability appears. 31F(2d)765.

1273–92⅓–New. Where nonresident defendant made no request for removal **until after trial, because of insufficiency of evidence against local defendants,** his application was too late for consideration. 31F(2d)765.

1273–92¼–New. Defendant must petition for removal in federal court within twenty days after service of complaint. 135Misc633, 239NYS94.

1273–92⅕–New. Defendants demurring to original petition can move for removal on filing of amended petition setting up different cause of action. 43 F(2d)23 (time within which removal may be made is formal not jurisdictional).

1274–93 41F(2d)817; 222MoA872, 6 SW(2d)56; 191NC599, 132SE605. **Time is not tolled by motion to quash service** of summons. 20F(2d)944. **Effect of amendment of original pleading.**–30F(2d)410. **In proceedings originally commenced before commissioner of reclamation,** in which no requirement was made by statute to answer or plead to complaint on appeal from commissioner's order, and notice of appeal was merely served on commissioner, proceedings for removal instituted by petitioner, on contestants' appeal from commissioner's order, were instituted within time. 30F(2d)436. **Extension of time.**–33F(2d)909. **Defendants having answered,** right to remove is not revived by amendment alleging same cause of action. 39F(2d)620.

1277–94 41F(2d)817. **Removal after default** is too late though not if service was upon person without authority. 12PortoRicoFed243.

1278–97½–New. Federal statute requires petition for removal to be filed before trial. 220MoA413, 286SW724.

1278–97½–New. In such case after default judgment was set aside by state court cause was still pending therein so as to prevent issuance of writ of prohibition against trial of cause by state court. 220MoA413, 286SW724.

1279–7 23F(2d)329; 13PortoRicoFed 237. **Nonresident intervener having lien on, and possession of, property** sought to be seized in state court may remove suit. 23F(2d)329.

1279–7½–New. New party, brought in by cross-bill, against whom original defendants ask affirmative relief, not involved in original proceeding, may properly remove entire cause for diversity of citizenship. 31F(2d)822.

1280–9 13F(2d)415.

1280–10½–New. Under present statute right to remove confined to defendant. 192NC510, 135SE350.

1280–11 13F(2d)266.

1281–24 7F(2d)491; 14F(2d)406; 220 Ala385, 125S403; 166Ga51, 142SE539; 220MoA876, 295SW492. **Contrary rule.**–8F(2d)678. **There is no separable controversy.**–166Ga51, 142SE539. **The fact that one of defendants,** etc. 34F(2d) 790.

1282–28 33F(2d)1010.

1282–31 17F(2d)642; 220MoA876, 295 SW492.

1282–32 12PortoRicoFed355, 374. **In New York.**–214AppDiv58, 210NYS243. **Place of filing.**–23F(2d)368. **Time of filing.**–180Ark567, 22SW(2d)373; Va 154 SE492. **Notice.**–148Wash479, 269P827. **Removal of cause is accomplished by filing proper proceeding** in state court, with allegation of jurisdictional facts, though judge fails to sign order of removal. 30F(2d)410. **Motions to remand will not be granted on ground no petition for removal was filed to original petition** to recover damages, where actions did not become removable until filing of amended petitions. 32F(2d) 373.

1282–33 Notice.–29F(2d)432(1stcase).

1283–35 144Miss113, 109S862; 194NC 653, 140SE607. But see 152SC322, 150 SE309. **Power of state court.**–144Miss 113, 109S862. **Court may consider facts admitted or alleged by plaintiff in answer to petition.**–166Ga54, 142SE541. **Removal follows as matter of course.**–33F(2d)994.

1283–36½–New. Question of law arising on petition to remove cause to federal court must be decided in first instance by state court. 253Mass234, 148NE454.

1283–36⅓–New. Final determination of

questions of law in petition to remove cause within jurisdiction of United States supreme court. 253Mass234, 148 NE454.

1283-36¼-New. On petition for removal of cause, all questions of fact must be tried in federal court. 253Mass234, 148 NE454.

1283-36½-New. It is duty of state court to adjudicate whether on face of record case ought to be removed. 253Mass234, 148NE454.

1283-36⅔-New. Removal of cause from supreme court of state to federal district court rests in sound judgment of state court. 129Misc133, 220NYS499.

1283-36½-New. Where right to remove depends on issue of law, state court may determine removability of cause without suspending its action. 152SC322, 150SE 309.

1283-36⅛-New. Rule of court concerning filing of written instruments has been held applicable to appeal from order refusing removal of case. 152SC 322, 150SE309.

1283-37 17F(2d)379 (in open court or chambers); 177Minn182, 225NW9. **Time for filing.**-194NC131, 138SE613. **Waiver.**-28F(2d)784.

1283-38 Contra 17F(2d)379.

1283-38½-New. Petition sufficient on its face and accompanied by bond removes cause, even though adverse order entered by state court. **TexCivA** 285SW 646.

1283-38⅓-New. Petition must be filed within time fixed by state statute for answering. 21F(2d)93.

1283-39 13F(2d)415; 43F(2d)293; 221 Ala394, 129S262(3dcase); 201Cal 438, 257P521; 135Misc633, 239NYS94; 195 NC854, 141SE749; 198NC1, 150SE632 (petition simply traversing facts in plaintiff's petition is insufficient); 152 SC322, 150S309; TexCivA. 292SW281; Va 154SE492. **Where allegations disclose errors in proceedings** unauthorized by constitution or laws of state, federal court will not assume jurisdiction. 38 F(2d)298. **Where allegations are made to defeat removal,** petition will not be accepted to show case brought under federal act. 42F(2d)633. **Allegation in petition for removal that time had not expired in which to plead answer or demur** did not raise issue of fact. 180 Ark567, 22SW(2d)373. **Allegation that defendant is nonresident** is not conclusion from facts and petition need not set out evidence on which citizenship depends. 144Miss113, 109S862. **Application to state court accompanied by bond is not alone sufficient.**-135Misc913, 239 NYS684. **Petition defective** in not alleging that petition for removal was filed in state court before time for answering expired. 37F(2d)571. **Intentional omissions or misstatements of facts.**-129Misc 133, 220NYS499. **State court must determine** question of removal in face of proceedings alone. 235Mich416, 209NW 200. **In absence of petition** state court has same power to construe federal statutes as federal court. 235Mich416, 209 NW200. **It is error for state court** to deny petition if any ground set forth is well taken. 271US99, 46SCt439, 70L ed 854. **Removability of cause depends on material allegations of complaint.**-129 Misc133, 220NYS499. **Removability of cause held not affected by statements or conclusions of law** or anticipated defenses on complaint. 129Misc133, 220 NYS499. **State court must assume facts in petition are true,** but has jurisdiction to determine their sufficiency. 191NC 207, 131SE625. **In petition for removal supreme judicial court is bound** by allegations of fact of petition of record. 256Mass561, 153NE26, 49ALR1222. **Application should be denied** if case is not proper one for removal nor one within federal jurisdiction. 27F(2d)403. **Petition cannot usurp function** of special demurrer. 26F(2d)367. **Petition need state only those facts** which do not already appear in record. 82Colo 474, 261 P659.

1285-40 15F(2d)395 (affirmative allegation that defendant is nonresident is unnecessary).

1285-41 214AppDiv58, 210NYS243.

1285-43 33F(2d)1010. **Jurisdiction depends** on statements made in verified petition. 40F(2d)58.

1285-47 13F(2d)415.

1285-51 Authority of notary need not be verified. 17F(2d)609.

1285-51½-New. Complaint against railroad and resident sergeant in its police force held to show that sergeant was made party only to prevent removal. 15 F(2d)540.

1285-51⅓-New. Determination of sufficiency of petition must be made by judge and not clerk who is mere ministerial officer. 17F(2d)379.

1285-51¼-New. Statement in affidavit with which plaintiff makes no issue must be accepted as accurate. 15F(2d) 540.

1285-51⅙-New. Statement in petition for removal not inconsistent with complaint must be taken as admitted. 24F (2d)591.

1285-51⅐-New. Issue of fraud in allegation of petition must be determined by federal court on application for removal. 42F(2d)633.

1285-51⅛-New. Whether plaintiff's allegation that injuries occurred in interstate commerce was fraudulently inserted is tested by plaintiff's statements in removal petition. 42F(2d)633.

1285-51⅛-New. Defendant has burden of proving that allegations in petition were fraudulently stated to prevent removal. 42F(2d)633.

1286-52 Petition held to show case under Employers' Liability Act, thus barring removal. 26F(2d)367. **Petition for removal from insular court of Porto Rico** must show domicile of defendant outside of Porto Rico. 13PortoRicoFed350.

1287-54 214AppDiv58, 210NYS243 (whether action is removable is determined from face of entire record when application is made).

1288-56 16F(2d)79; 316Mo 651, 291SW 466. **Petition held insufficient.**-191NC 207, 131SE625 (involving question of independent contractor). **Petition held to present separable controversy.**-22F(2d) 622. **Sufficiency of allegations.**-82Colo 474, 261P659. **In construing pleading** to determine whether separable controversy exists, federal court goes to essence of cause of action. 40F(2d)951.

1288-57 16F(2d)79; 43F(2d)293 (allegations held mere conclusions); 189NC 528, 127SE538; 192NC48, 133SE174; 193NC77, 136SE238; 194NC653, 140SE 607; 37 OklACR433. **Facts alleged must compel conclusion as matter of law,** aside from deductions of pleader, that joinder is fraudulent. 196NC377, 145SE681(2dcase). **Sufficiency of allegations.**-16F(2d)79; 135Misc913, 239 NYS684; 194NC787, 140SE736. **Allegations for removal** for fraudulent joinder of resident defendants are taken as true and determined by state court on face of record. 193NC77, 136SE238. **Fact of former suit** against nonresident being discontinued on removal to federal courts not mere denial of allegations in complaint sufficient to effect removal. 192NC48, 133SE174. **Petition must allege joinder is without right,** made in bad faith, and without any reasonable basis, with full, concise, and explicit statement of facts sufficient to compel conclusion of bad faith. 191NC207, 131 SE625.

1289-59 15F(2d)532; 17F(2d)642. **Petition held to show** that indictment and state's prosecution thereunder arose out of acts done by petitioner as prohibition agent, so as to require federal jurisdiction. 32F(2d)301. **That allegations as to employee's injuries in interstate commerce were fraudulently inserted** held not sufficiently established to give federal court jurisdiction. 42F(2d)633.

1290-61½-New. Where Virginia code provided for itemized account, such showing is required for removal to federal court. 15F(2d)532.

1290-62 But see 15F(2d)532. **Leave to amend was denied.**-195NC854, 141SE 749. **Amendment allowed** where diverse citizenship was defectively alleged because of omission on notary's certificate which was corrected by notary. 11 F(2d)841. **Amendment respecting amount in controversy** will not be allowed. 13PortoRicoFed245. **By act of congress** amendment with respect to allegations of citizenship is expressly authorized. 13PortoRicoFed245 (applied in Porto Rico to allegations of domicile).

1291-66½-New. Amended petition for removal must be considered as filed as of date of timely motion to amend. 194 NC816, 140SE742.

1291-67 Filing of bond is mandatory where petition for removal is filed. 253 Mass234, 148NE454.

1291-68 Time of filing.-253Mass234, 148NE454.

1292-69 Sufficiency of bond.-7PaDist &Co 541; 12PortoRicoFed355, 374.

1293-70½-New. Determination of sufficiency of bond must be made by judge and not clerk who is mere ministerial officer. 17F(2d)379.

1293-71 17F(2d)379. **Clerk of state court,** being mere ministerial officer, cannot approve bond. 17F(2d)379.

1294-72 37F(2d)591. **Defects not amendable.**-253Mass234, 148NE454.

1294-72½-New. Valid bond cannot supplant invalid bond after expiration of time limit over objection of opposing party. 253Mass234, 148NE454.

1299-94 270US9, 46SCt185, 70L ed449 (petition held insufficient). **Petition held sufficient** to confer jurisdiction on federal court, in prosecution of prohibition agents. 40F(2d)58.

1300-97 Federal officer seeking trial for state offense in federal court abandons right to refuse to testify. 270US9, 46 SCt185, 70L ed449.

1302-8 Order for removal is not void notwithstanding lack of diversity of citizenship when court had jurisdiction of parties and of petition. 195NC203, 141SE587.

1303-9½-New. Circuit court of appeals or supreme court has no power to revise decision of district court in matter of removal though it may correct abuse of discretion as in other cases. 12Porto RicoFed96.

1303-9⅓-New. Removal of criminal causes. Certified copy of petition for removal and order of federal court thereon should be served on state court to preserve record for certiorari to issue from federal to state court. 12Pa Dist&Co 557.

1303-10 19F(2d)196. **Necessity.**-37 F(2d)571. **Constructive removal,** effective by filing petition and bond, becomes complete on filing of record. 6F(2d) 890.

1304-21 Requirement that moving party shall bring up record within thirty days after filing petition does not enlarge or diminish power of court before or after filing of record. 6F(2d)890.

1305-23 15F(2d)395; 201Cal 438, 257 P521; Mont 279P253; 85Mont532, 281 P341. **Suspension of proceedings in local court** proper pending decision on application to federal court, motion for removal having been refused in former tribunal. 32PortoRico 544.

1306-24 15F(2d)395; 17F(2d)184; 34 F(2d)828 (federal court may vacate proceedings taken in accordance with state practice conflicting with practice under federal statutes); 221Ala394, 129S 262(3dcase); 82Colo 474, 261P659; 235 Mich416, 209NW200; 220MoA413, 286 SW724; 191NC696, 132SE786; Tex CivA 285SW646; TexCivA 4SW(2d)109. **If the state court continues to act in a case,** etc. 221Ala394, 129S262(3dcase); 220MoA413, 286SW724. **Review of order relating to removal.**-317Mo 707, 296 SW386. **Entering any order by clerk or judge of state court save order of removal** held error when cause is properly one for removal and petition and bond were filed in apt time. 191NC696, 132SE786. **Jurisdiction of federal court** is not affected by order of state court refusing or granting removal. 15F(2d) 395. **State court has jurisdiction to determine and enforce lien of attorney for**

services in action removed to federal court. 135Misc910, 240NYS157. **No further proceedings can be had in state court** when sufficient cause for removal is made out. 191NC696, 132SE786.

1308-25 15F(2d)395; 33F(2d)1010; 235Mich416, 209NW200; 145Miss299, 110S674; 194NC787, 140SE736; 152SC 322, 150SE309. **If allegations of fact in petition for removal be controverted** they are triable only in court to which removal is sought. 145Miss299, 110S 674. **Right to removal could be determined** only by federal court. TexCivA 285SW646.

1308-27½-New. Permit plaintiff to submit to voluntary nonsuit. 191NC 696, 132SE786.

1308-31 177Minn182, 225NW9; 220 MoA413, 286SW724.

1309-31a½-New. Removal of action as to one defendant. Removal as to lessor of action to enjoin lessee's maintenance of public nuisance on lessor's railroad right of way does not deprive state court of jurisdiction to try suit against lessee where property rights of lessor are not affected. MoA 17SW(2d)616.

1309-31a⅓-New. On certiorari to review action of court in removing cause to federal court, state court may notice facts and records which have bearing on propriety of permitting case to proceed further on merits, though such record is not properly before it. 320Mo 465, 8SW(2d)16.

1309-31a¼-New. State court reviewing order of removal may take notice of proceedings in federal court adjudging that federal court has jurisdiction. 320Mo 465, 8SW(2d)16.

1309-31a⅕-New. After removal to federal court, it is immaterial whether local court recognizes removal or not. 12 PortoRicoFed99.

1309-36 State court bound by judgment remanding case.-TexCivA 19SW (2d)186.

1310-39½-New. Overruling plea of privilege on ground of waiver by proceedings in federal court is error. Tex CivA 4SW(2d)109.

1310-39⅓-New. Action of trial court denying second removal after remand will not be disturbed unless right of removal clearly appears. 143 Okl 203, 288 P344.

1310-40 17F(2d)906; 35F(2d)1005 (stipulation with respect to service of process being binding cannot be raised again in federal court); 43F(2d)521. **After the removal,** district court is invested with complete and plenary jurisdiction of parties and subject matter. 15F(2d)171. After removal court may pass on validity of service. 6F(2d)329. **Federal court retained jurisdiction** of controversy where in interval between filing amended complaint and cross complaint plaintiff failed to bring lack of jurisdiction to its attention. 7F(2d) 404. **Federal court has exclusive jurisdiction** after removal from state court. 221Ala394, 129S262(3dcase). **Federal court has jurisdiction of defendant's person** where he petitioned for removal in state court and contested plaintiff's claim in federal court. 156SC43, 152 SE721. **Jurisdiction, fixed by petition for removal,** continues until contrary established. 7F(2d)579. **Same jurisdiction as state court.**-8F(2d)206. **Waiver of objections.**-279US405, 49SCt 360, 73Led762. **Brevity of conspiracy charge permissible under state practice** cannot defeat statute providing for removal of prosecutions of federal officers to federal courts. 32F(2d)301. **Federal court has no discretion to refuse to take jurisdiction of prosecution against federal officer,** where facts found bring matter within terms of statute. 32 F(2d)301. **Federal court has jurisdiction to determine whether state court had jurisdiction,** and, if it determines that it had not, to dismiss case for want of jurisdiction. 32F(2d)373. **Applies to practice** rather than jurisdiction. 23 F(2d)519. **All controversies** which bear on removable controversy come within federal jurisdiction notwithstanding local requirements as to venue. 23F(2d) 519.

1311-41 Transferring cause removed from state court to another division after continuance and inability of judge, because of sickness, to hold court, is not abuse of discretion. 21F(2d)106.

1311-41½-New. Allegation in complaint relative to cause of action which was stated in complaint in state court but not urged after removal should be stricken out. 15F(2d)582.

1311-41⅓-New. Federal court should not dismiss but should retain for proper service if first service was ineffective. 25F(2d)257.

1311-41¼-New. Federal court's power is equal with that of state court as to steps necessary to obtain jurisdiction of defendant. 40F(2d)671.

1311-42 22F(2d)714. **Under Judicial Code, § 29,** case is to be put on trial calendar of term next after expiration of time for pleading. 17F(2d)105. **Time to plead.**-32F(2d)935.

1312-43 But see 6F(2d)890.

1313-45 34F(2d)66 (must allege suit not collusive under Equity Rules, rule 37). **When claim is legal and equitable** pleadings should be recast to state demands separately. 274US684, 47SCt755, 71Led1297.

1314-49 274US684, 47SCt755, 71Led 1297.

1314-50 Where Indian rights are involved, United States may participate in controversy after removal. 37F(2d)243.

1315-63½-New. Determination of federal court that allegations as to injury in interstate commerce were fraudulent makes petition one for common-law liability. 42F(2d)633.

1316-66 24F(2d)106.

1316-67 Dissolving injunction. 6F(2d) 890 (defendant may move to dissolve injunction on filing of record, though thirty-day period for filing has not expired).

1317-68 17F(2d)107; 17F(2d)900. **Scope of jurisdiction.**-TexCivA 8SW(2d) 315.

1318-74½-New. On granting motion to quash service on sheriff's return, motion to amend in accordance with facts, showing proper service, may be allowed. 25F(2d)257.

1318-75 Remedy for prejudice from premature and irregular order allowing receivers' and attorney's fees is by application to federal court after removal. TexCivA 8SW(2d)315. **State court's judgment vacating receivership** was not annulled by removal, case continuing where state court left off, under Judicial Code § 36. TexCivA 8SW(2d)315.

1319-78 12PortoRicoFed99.

1319-80 19F(2d)828.

1319-80½-New. Cross bills seeking to quiet title are properly transferred to equity side on removal of action to federal court, and issues presented therein tried first. 37F(2d)243.

1319-80⅓-New. Federal court having permitted removal on ground of fraudulent allegations should not submit to jury question whether injury occurred in interstate commerce. 42F(2d)633.

1320-83 23F(2d)519; 29F(2d)493; 38 F(2d)209. See also 28F(2d)131. **Part of cause may be remanded** where federal court has no jurisdiction thereof. 274 US684, 47SCt755, 71Led1297. **Amendment of complaint after removal** may eliminate only ground of jurisdiction, etc. 15F(2d)187. **Amendment of complaint** excluding separable controversy does not divest court of jurisdiction acquired on removal. 7F(2d)404. **Complaint held not to show cause of action** against brakeman justifying removal. 7F(2d)396. **Right to object to jurisdiction is deemed waived,** in suit for appointment of receiver by mere creditor, where after such appointment defendant petitioned for removal. 17F(2d) 107. **To justify remand** complaint must show with reasonable clearness cause of action against local defendant. 7F(2d) 396. **Motion for discontinuance** denied where application is not made to end litigation but to start second litigation in state court. 25F(2d)630. **Mere failure to plead in time** is not ground for remand. 26F(2d)100. **Motion to remand will not be granted because of want of diversity of citizenship between administrator,** bringing action for exclusive benefit of widow and children, and defendant, where defendant's citizenship was diverse as to widow and children. 29F(2d)628. **General appearance of party** in proceeding to remove cause does not give jurisdiction where federal court has no jurisdiction of controversy. 27F(2d)572. **Jurisdiction of district court to pass on motion to remand** was unaffected by appeal from order denying temporary injunction to restrain proceedings. 32F(2d)78. **Remand denied** where joinder of one defendant is fraudulent in endeavor to charge joint negligence. 37F(2d)591. **Waiver of remand.**-32F(2d)390(1stcase). **Waiver cannot confer jurisdiction.**-44 F(2d)57.

1320-83½-New. Federal court on motion to remand is appropriate tribunal. 256Mass561, 153NE26, 49ALR1222.

1320-83⅓-New. Defective verification of petition not ground for remand. 17 F(2d)609.

1320-83¼-New. Motion to remand will not be granted on ground of waiver of right of removal based on defendant's service of notice to take depositions in state court after applying for removal. 8F(2d)881.

1320-83⅕-New. In Porto Rico cause cannot be removed from insular court to federal court for diversity of citizenship where amount in controversy does not exceed three thousand dollars. 13 PortoRicoFed237.

1320-84 Plaintiff, not trying case improperly removed from state court on ground of diversity of citizenship, is entitled to remand. 27F(2d)451.

1320-87 Remand by court sua sponte.-14F(2d)406; 29F(2d)829.

1320-89 Waiver.-5F(2d)137 (entry of general appearance, procuring injunctions and delay of eight months after removal held waiver); 27F(2d)451. **In absence of showing of prejudice,** party improperly removing case cannot complain of remand, even though there is delay in making motion therefor. 27 F(2d)451.

1322-94½-New. Motion to remand, not raising issue on facts stated in removal petition, is equivalent to admission that facts therein stated are true. 33F(2d) 994.

1322-95 33F(2d)1010; 38F(2d)209. **On motion to remand** court may hear testimony and try questions of fact. 235 Mich416, 209NW200. **Evidence held not to show** that resident defendants were agents of nonresident defendant. 26 F(2d)383. **Where plaintiff does not take issue,** defendant need not produce proof to sustain petition for removal. 83 F(2d)1010.

1323-96 Affidavits of defendant seeking removal are taken as true unless denied by plaintiff seeking remand. 33F(2d) 1010.

1323-97 Petition may be considered for purpose of ascertaining facts where complaint is not in conflict. 17F(2d) 184. **When the petition charges, etc.**-24F(2d)252; 33F(2d)158; 33F(2d) 1010; 193NC77, 136SE238.

1324-4 7F(2d)491 (failure of record to show citizenship or residence of receiver of insolvent bank, claiming separable controversy, justifies remand). **Evidence that defendants were not jointly liable** as alleged may be considered. 5 F(2d)236. **Allegations of fraud** in petition for removal are not necessary for jurisdiction, on motion to remand, to decide fact determinative of right of removal, alleged in complaint and denied in petition for removal. 20F(2d) 655. **Disputed question as to whether defendant is domiciled in Porto Rico,** it being admitted that plaintiffs are domiciled there, will be determined before passing on remand. 13PortoRico Fed375.

1324-4½-New. Where petition for removal and supporting affidavits show diversity of citizenship, court must assume diversity existed in absence of opposing affidavits. 13F(2d)256.

1324-4⅓-New. Defendant has burden of proving that allegations in complaint as to interstate origin of injury

were fraudulently inserted to prevent renewal. 25F(2d)774.
1324-4¼-New. Presumptions.-Where notice of appeal from decision of reclamation commission was never served on original petitioner, and there was not showing that petitioner knew appeal was taken, court must assume that proceedings for removal for diversity of citizenship were instituted when it first knew of pendency of appeal. 30F(2d) 436.
1324-4½-New. All doubt should be resolved in favor of remand. 38F(2d)209.
1324-5 Where jurisdiction of federal court is doubtful, cause should be remanded. 30F(2d)953; 13PortoRicoFed 237. **Every doubt must be resolved against motion to remand,** where right of removal is in doubt. 30F(2d)410. **That notice of petition for removal used figures "1928" instead of "1929"** to describe date was harmless and not ground for remand of case. 32F(2d) 935. **A motion to remand will not be granted,** etc., because of joinder of additional defendants. 34F(2d)790. **If either cause of action is against nonresident** defendant solely, court will not remand. 40F(2d)951. **Only question on motion to remand** is sufficiency of petition to remove which shows federal question. 33F(2d)994. **District court must hear and determine issues** taken by plaintiff to statements in removal petition. 33F(2d)1010.
1324-5½-New. Court would not determine whether defendants were aggressors, on motion to remand to state prosecution of prohibition agents. 40F(2d) 58.
1325-6 33F(2d)1010.
1325-7 Blended suit separated into legal and equitable action, for purpose of trial, on refusal of motion to remand. 5F(2d)1001. **Striking out immaterial words** in complaint held not material error in conduct of inquiry, on motion to remand, as to whether plaintiff was injured while engaged in interstate commerce. 20F(2d)655. **Plaintiff's claim** that he was injured in interstate commerce, raising doubtful issue, and not merely colorable, held to require remand after removal on ground that such allegation was fraudulently inserted to defeat federal jurisdiction under terms of Employers' Liability Act. 25 F(2d)774. **Court is limited to what appears on face of plaintiff's pleading,** without resort to petition for removal, in determining whether cause is removable or should be remanded, as arising under federal question. 32F(2d)389. **In determining motion to remand, court will eliminate resident defendants** against whom no case is stated, testing petition by state law as construed by highest state court. 28F(2d)45. **Removal is federal question,** determinable by federal court, and motion to remand is proper and usual method of testing sufficiency and regularity of removal proceedings. 28F(2d)784.
1326-8 Court should not remand where removability is doubtful. 7F(2d)177. **Ground presented on motion to remand, that petition for removal was not filed in time,** has been held to present question of time of removal for court's determination, though petition to remand did not controvert allegations of petition for removal, question of time being one of law, to be determined on record. 30F(2d)410. **Rehearing of motion to remand.**-12PortoRicoFed374. **Court cannot determine matters which may be raised in later pleadings.**-42F(2d)633.
1326-8½-New. Court will determine whether action was fraudulently pleaded under Federal Employers' Liability Act to prevent removal, though entire cause might thereby be defeated. 25 F(2d)23.
1326-10 Second petition for removal may be filed after remand where pleadings after remand show that cause is removable. 13PortoRicoFed272.
1326-10½-New. When case was remanded to state court, temporary restraining order restraining further proceedings in state court was properly dissolved, and application to continue it during pendency of case was properly dismissed. 29F(2d)829.
1326-11 29F(2d)40 [certiorari den 278 US655, 49SCt179(12thcase), 73Led565]. **Under Judicial Code § 28,** order of district judge remanding case is not reviewable. 25F(2d)861. **Though order is made on face of record** and without further evidence, it is not subject to review. 29F(2d)829. **Merits of order remanding case to state court cannot be reviewed** by writ of error or appeal from order. 29F(2d)829. **Appeal from order denying temporary injunction to restrain proceedings in state court will be dismissed** where only purpose is to stay proceedings on remand and appeal attempts to do by indirection what statute forbids. 32F(2d)78. **Appeal from order of district court enjoining plaintiff** from prosecuting any further proceeding in state court is allowed, although involving validity of removal. 15F(2d)280. **In view of statute,** if any doubt exists, it should be resolved in favor of right to remove. 17F(2d)160.
1327-15 29F(2d)832.
1327-17 19F(2d)196.
1328-18 29F(2d)40 [certiorari den 278 US655, 49SCt179(12thcase), 73Led565]; 12PortoRicoFed338.
1328-19 7F(2d)777.

REMOVE

1328-2 219Ky757, 294SW483.
1329-3 219Ky757, 294SW483.
1329-5½-New. Remove, intent in mind within Conditional Sales Act. NJSup 129A396.

RENDITION OF JUDGMENT

1330-22 215Ala682, 112S238
1330-23 16F(2d)206.
1330-24 16F(2d)206.

RENEW

1330-28 8LaA281; 283Pa529, 129A587 (to renew lease means leasing again of premises).
1330-29 250 IllA258.
1331-31 39 OklACR8.

RENEWAL

1331-33 39 OklACR8.
1331-34 103Conn732, 132A20; 250 IllA 258; 8LaA281.
1331-34½-New. "renewal or extension;" 30Hawaii871.
1331-35 283Pa529, 129A587.
1331-39 Substitution for prior note of like tenor.-103Conn732, 132A20.

RENT

1333-44 241 IllA471, 474 [quotCyc]. See also 7Alaska437. [a] **Similar definition.**-136Misc704, 242NYS192. **"Compensation for the use of land or property."** 287Pa190, 200, 134A455.
1333-45 241 IllA471, 474 [quotCyc].
1333-45½-New. Certain profit in money, provisions, chattels, or labor issuing out of lands and tenements in retribution for use. 158La742, 104S637.

RENTS AND PROFITS

1335-52 Rents and profits comprehend income derived from any use of premises which does not impair or diminish fee. 116 Okl 281, 244P782.

RENUNCIATION

1336-53 221MoA211, 299SW1111.

REPAIR

1336-57 172Minn187, 215NW69.
1337-59 Good repair does not necessarily mean good condition. 101WVa 79, 131SE717. **"Repairs" and "reconstructions"** have been said to run so closely into each other that there is some difficulty in drawing line which separates them. 161La806, 109S498.
1338-62 135Misc497, 239NYS113; 6Pa Dist&Co 53; 101WVa79, 131SE717, 718 [citCyc]; Century D. [quot TexCivA 293SW869, 872].
1338-65 To mend.-Standard & Century D. [quot 101WVa79, 131SE717, 718]. **To renovate.**-Standard & Century D. [quot 101WVa79, 131SE717, 718]. **Does not mean to alter or change condition,** or replace with new or different material. 101WVa79, 131SE717. **To restore to its former condition,** not to alter either form or material. 101WVa79, 131 SE717. **To "repair a building"** is to replace it as it was, or restore it after injury or dilapidation, but not to enlarge or elevate it. 215Ky143, 284SW1025.

REPAVE

1340-68 Other definitions.-135Misc497, 239NYS113.

REPAY

1340-69 254 IllA19 (pay back; refund; to make return or repayment to).

REPLACE OR REPLACEMENT

1341-79½-New. To put a substitute in place of; cause to supply the place of in any manner. Standard D. [quot 155 Tenn25, 290SW8].
1341-79¼-New. When used in connection with insurance policy, it means repair or restore. 214Ala528, 108S342.
1341-79¼-New. Replace or replacement does not ordinarily mean right to exchange or substitute. 214Ala528, 108 S342.

REPLEVIN

1353-1 3Del519, 140A154; 99Fla410, 128S831; 87IndA55, 160NE47; 233 Mich633, 208NW28; 320Mo20, 6SW (2d)597. **Other definitions.**-133Misc 482, 232NYS516; 297Pa33, 146A113. **Gist of action** is wrongful detention. 20 OhA256, 151NE797. **"Replevin action" is speedy statutory remedy** to recover possession of property wrongfully taken and detained and damages incidental to detention. DC 39F(2d)512.
1354-7½-New. , and under some statutes, replevin is available when goods cannot be retaken without breach of peace. 129Misc234, 221NYS266.
1354-8 SC 155SE291 (compliance with statute).
1354-9 127 Or107, 269P232.
1354-11 44 OklACR86.
1354-12 177Ark1183, 9SW(2d)567; 77 CalA207, 246P165; 41 Ida767, 244P 404; 45 Ida604, 264P384; 141Miss564, 106S824; 151Miss390, 119S808(2dcase); 102NJEq341, 131A901; 129 Okl 211, 264 P194; 137 Okl 218, 278P1111, 38 Okl ACR613; SD 231NW288; 40Wyo 215, 276P448. **The primary object,** etc. 102 NJL268, 132A247; 128Misc20, 217NYS 480. **Replevin tries right to possession.**-97PaSuper197. **Successive liens cannot be adjudicated.**-36F(2d)364.
1355-13 MoA 20SW(2d)936; NJSup 143A144.
1355-13½-New. , or to enforcing a mere contractual duty. 102NJEq341, 131A901.
1355-18 41 Ida767, 244P404. **Where defendant wrongfully disposed of property before commencement of action,** remedy is conversion and not replevin. MoA 1SW(2d)1034.
1356-21 208 Iowa509, 225NW947; 320 Mo 20, 6SW(2d)597; 50RI 419, 148A 418.
1356-22 99Fla410, 128S831.
1356-23 Nature of statutory action.-41 Ida767, 244P404.
1357-30 127 Or635, 271P992.
1357-33 154Miss74, 122S490; 31 OhA 183, 164NE61.
1357-38½-New. Where property right asserted is not one recognized by law, replevin will not lie to recover chattel. 133Misc802, 233NYS570.
1358-39 24F(2d)308. **Delivery of deed from vendors to vendees** will not be enforced by replevin. 95Fla882, 116S 861.
1358-41 223Ky668, 4SW(2d)686.
1358-46½-New. Savings account represented by pass book admittedly in possession of defendant may be replevied. 201 Iowa834, 208NW508, 44ALR 1516.
1359-48 81CalA192, 253P172; 84Mont 601, 277P411.
1359-51 117 Or165, 243P101.
1359-55 9PaDist&Co 54.
1362-76 14PaDist&Co 215.
1365-1 36Wyo 392, 256P80, 83 [cit Cyc], 57ALR578.
1365-6 178Ark454, 12SW(2d)10; 10 PaDist&Co 175.

1366-12 247Mich89, 225NW525.
1366-13 14Me216.
1367-18 But see 221MoA1178, 299SW629.
1367-19 69CalA379, 231P364, 365 [cit Cyc].
1367-22 69CalA379, 231P364.
1367-25 170Ark147, 278SW962; 172Ark173, 287SW1012 (property held by trustee in bankruptcy); 151Miss734, 118S425; NJCir 149A832 (gambling devices to be used as evidence in criminal prosecution); NJCir 150A363; 220AppDiv600, 223NYS355 (used in lottery); 133Misc802, 233NYS570; 24 OhNPNS345; 94PaSuper516 (property in possession of receiver in bankruptcy).
1368-30½-New. Automobile is not in custody of law so as to permit defense in replevin where garage keeper held it without authority after conviction of plaintiff for driving while intoxicated upon arrest of plaintiff and impounding of car by police under ordinance. 68Utah30, 249P121, 50ALR1303.
1368-30½-New. In such case where police made no claim of holding car for expenses in impounding it and surrendered claim car check to owner of car, garage keeper could not defend on ground car was held for storage expenses under ordinance. 68Utah30, 249P121, 50ALR1303.
1371-52 95PaSuper491.
1371-57 170Ark147, 278SW962 (under code).
1372-59 170Ark147, 278SW962 (under code).
1374-71 82Mont349, 267P305.
1376-83 170Minn313, 212NW593. **If attachment is released it then becomes duty of sheriff to execute writ of replevin.** 170Minn313, 212NW593.
1379-99 200 Iowa227, 202NW588.
1382-12 82Mont349, 267P305, 308 [cit Cyc].
1382-13 82Mont349, 267P305, 308 [cit Cyc].
1384-35 82Mont349, 267P305, 308 [cit Cyc].
1384-36 82Mont349, 267P305, 308 [cit Cyc].
1385-42 24 OhNPNS225.
1385-44 81Colo 379, 256P4.
1385-50½-New. Property seized under search warrant as used for lottery and held for evidence cannot be replevied, nor can sufficiency of such seizure be questioned in replevin suit. 220AppDiv600, 223NYS355.
1385-51 Ariz 292P1020; 78CalA262, 248P293; 3Del 519, 140A154; 45 Ida340, 262P514; 233 IllA519; 241 IllA146; 251 IllA469; 199 Ind582, 159NE428; 84 IndA478, 151NE620; 86 IndA368, 158NE231; 200 Iowa705, 205NW351; MoA 274SW1106; MoA 4SW(2d)834; 81Mont375, 263P415; 86Mont322, 283P1110; 55ND71, 212NW400; Okl293P192; 127 Or130, 271P36; 287Pa337, 135A105; 14PaDist&Co 81; RI135A855; Vt 148A481; 141Wash14, 250P452; 154Wash25, 280P742.
1386-53 79CalA529, 250P405; 91CalA22, 266P579; 99Fla410, 128S831; 44Ida786, 260P168; 45 Ida340, 262P514; 157Miss380, 128S104; 86Mont322, 283P1110; 55ND71, 212NW400; 129 Or620, 278P572.
1387-54 179Ark510, 16SW(2d)994; 83CalA449, 256P864; 3Del 519, 140A154; 44 Ida786, 260P168; 178Minn344, 227NW199(6thcase); 148Miss472, 114S334; 155Miss227, 124S331; 217MoA554, 272SW1006; MoA 278SW1070; MoA 27SW(2d)776; 82Mont349, 267P305, 308 [citCyc]; 48Nev312, 231P1095; 14PaDist&Co 172.
1387-55 Cal 290P583; 83CalA449, 256P864; 258Mass548, 155NE638; MoA 278SW1070; MoA 27SW(2d)776; 289Pa414, 137A599.
1388-56 95CalA365, 272P1084; 99Fla1195, 128S639(2dcase); 99Fla410, 128S831.
1388-58 141Miss795, 105S850 (right to recover not affected by plaintiff's having become indebted to defendant).
1388-59 31NM469, 247P1066, 1068 [quotCyc].
1389-60 31NM469, 247P1066, 1068 [quotCyc]; 55ND71, 212NW400.
1389-61 178Ark136, 9SW(2d)1057; 258Mass548, 155NE638; MoA 8SW(2d)88; MoA 13SW(2d)582; 31NM469, 247P1066, 1068 [quotCyc]; 289Pa414, 137A599; RI 135A855 (superior title). See also IndA 168NE506. **Officer of corporation in possession of its property not in his own right but as agent of company has not such title as to support action.** 34GaA321, 129SE565.
1389-62½-New. In some jurisdictions suit may be maintained by one who is owner or who has acquired right of ownership. TexCivA 21SW(2d)83.
1389-64 3Del 519, 140A154. See also 246 IllA494.
1389-65 44 Ida786, 260P168; 48Nev312, 231P1095; 198Wis447, 224NW729.
1390-68 48Nev312, 231P1095 (personalty can be replevied from one showing no better right, though plaintiff is not owner); 92PaSuper463, 466 [quot CJ].
1390-69 Where sale or gift to plaintiff is relied on, delivery, either actual or constructive, must be established. 190NC586, 130SE500.
1390-70 96PaSuper16 (circumstances showing title divested and plaintiff not entitled to replevin).
1390-71 51ND106, 199NW193; 20 OhA256, 151NE797.
1391-74 129 Or620, 278P572.
1392-85 31NM469, 247P1066, 1068 [quotCyc] (lien claimant voluntarily parting with possession). But see 177Ark1183, 9SW(2d)567.
1393-95 191NC517, 132SE276.
1393-96 191NC517, 132SE276.
1393-99 95PaSuper129.
1394-1 MoA 10SW(2d)314.
1394-5 MoA 17SW(2d)597. See also 76CalA486, 245P205.
1395-14 44 OklACR86.
1395-16 Cal 290P583; 44 OklACR86; 134Wash133, 235P23. **If defendant's refusal is of character not to indicate conversion,** it cannot be basis of action for replevin. 33F(2d)202.
1396-17 Fla 130S462 (primary question under statute); 150Miss653, 116S298.
1396-18 233Mich633, 208NW28; 150Miss653, 116S298; 157Miss202, 127S771; MoA 1SW(2d)1034. **That property was in hands of sheriff** at commencement of plaintiff's action as result of replevin suit by defendant is immaterial where it was taken from possession of keeper prior to trial. 73CalA236, 238P763.
1397-19 125Me504, 130A509.
1397-23 128Misc20, 217NYS480.
1399-30 37GaA291, 139SE915; 233Mich633, 208NW28.
1400-33 83Mont185, 271P452.
1402-47 126Kan215, 268P122.
1402-50 What is not a voluntary surrender.–73CalA236, 238P763.
1403-58 MoA 27SW(2d)776; 128Misc20, 217NYS480. **Principal seeking to replevin cattle received by agent in exchange for principal's land** must discharge or tender discharge of agent's lien for expenditure in discharging mortgage. MoA 27SW(2d)776.
1404-67 148Miss575, 114S396; 245NY102, 156NE629.
1404-68 148Miss575, 114S396.
1404-73 77CalA207, 246P165; 148Miss575, 114S396.
1405-75 202 Iowa58, 209NW430.
1405-76 81Colo 454, 256P315; 202Iowa58, 209NW430.
1405-78 Cal 290P583; 77CalA207, 246P165; 128Me388, 147A868 (evidence held sufficient to show seasonable demand and that action was not premature); 148Miss575, 114S396; 76Mont38, 245P257; 86Mont150, 282P494; 116Okl287, 245P562, 47ALR171. But see 44 OklACR86.
1405-80 33F(2d)202.
1406-87 76Mont38, 245P257; NJSup148A569. **Defendant's attitude after demand** may be tantamount to refusal to deliver. NJ 152A4.
1407-91 But see 245NY102, 156NE629.
1409-20 82Mont349, 267P305.
1409-22 202Cal 359, 260P869; 85CalA204, 259P71; 96CalA689, 274P758; 96CalA703, 274P763; 97CalA692, 276P156(1stcase); 81Colo 454, 256P315; 202 Iowa58, 209NW430; 245NY102, 156NE629; 50ND322, 195NW564.
1410-29 73CalA236, 238P763; 202Iowa58, 209NW430.
1411-31 73CalA236, 238P763.
1411-32 44 OklACR86.
1411-35 But see 44 OklACR86.
1411-36 44 OklACR86.
1412-39 73CalA236, 238P763.
1413-64½-New. In some jurisdictions bringing of replevin suit and answer of defendant denying plaintiff's right of possession constitutes sufficient demand and refusal. 44 OklACR86.
1413-66 200Cal 419, 253P715, 50ALR1297.
1414-69½-New. Where right of plaintiff in replevin to possession depends on existence of indebtedness, defendant may show that debt was paid or otherwise extinguished at time action was commenced. 39Wyo 423, 273P687.
1414-71 177Ark1183, 9SW(2d)567; 178Ark136, 9SW(2d)1057; 34Wyo199, 242P415. **Purchase of property.**–Ont [1930] 2DomLR14.
1415-74 33F(2d)202; 75Mont36, 241P617; TexCivA 24SW(2d)737; 197Wis224, 221NW736. **Rule has no application** unless such right of possession in third party is absolute. 75Mont36, 241P617.
1415-75 In Montana.–76Mont415, 248P199.
1415-76 29F(2d)465 [certiorari den 279US847, 49SCt345(5thcase), 349(8th case), 73Led991].
1416-79 75Mont36, 241P617; 76Mont415, 248P199; NM 290P739, 740(2d case) [citCyc].
1416-81 99Fla410, 128S831; 103NJL1, 135A92; 102NJL268, 132A247; 292Pa403, 141A236; 13PaDist&Co 407.
1417-84 Contra 129Misc180, 221NYS733. **In Wyoming.**–39Wyo 423, 273P687.
1417-85 179Ark524, 16SW(2d)1000; 99Fla410, 128S831; MoA 274SW856; MoA 280SW730; 222AppDiv297, 226NYS281; 129Misc180, 221NYS733. **Counterclaim** held not to arise out of same transaction. 222AppDiv297, 226NYS281.
1418-87 6PaDist&Co 417.
1418-93 Mich 209NW660 (preëxisting debt of del credere factor is not such a consideration for transfer of automobiles held for sale as to sustain plea of bona fide purchaser).
1419-8½-New. , that defendant delivered property to third person, where such delivery was in fraud of rights of person entitled to its possession. 197Wis224, 221NW736.
1419-8½-New. Defendant is entitled to show plaintiff's breach of conditional sale contract. NJSup 143A144.
1419-8¼-New. Continued tender of defendant is material only on question of cost or right to judgment for value of property. Iowa 232NW812.
1420-19½-New. Where prize in merchants' voting contest is mistakenly awarded to one not entitled thereto, plaintiff to whom award is made on recount of votes may maintain replevin for possession of prize. 176Minn598, 224NW158.
1420-22 NS [1929] 1DomLR540. **Replevin may be had against receiver for goods purchased and paid for before receivership,** where it is not shown that receiver was appointed on creditor's bill. 9PaDist&Co 54.
1421-35½-New. Replevin will not be against agent when it is not maintainable against principal. 95Fla882, 116S861.
1422-45 Where there are several defendants, etc. 202 Iowa58, 209NW430 (sufficient that defendant proper party).
1424-63 21 IllA137. **In California.**–196Cal 701, 239P319.
1424-65½-New. Mortgagee's right of action for recovery of his interest in property against execution purchaser or those in privity with him has been held to accrue upon entry of judgment in trial court pursuant to mandate. 134Okl 107, 272P380.
1424-69 Waiver.–128Misc20, 217NYS480.
1424-71 220MoA1331, 296SW836.
1425-74½-New. Any one having qual-

ified or special interest, though not absolute owner, may maintain action. 224 IllA411.
1425–74½–New. Corporation organized as clearing house for milk bottles belonging to its members may bring action against junk dealer for such bottles. 224 IllA411.
1425–75 136Misc206, 240NYS492.
1426–87½–New. Defendant sued under fictitious name may have judgment as against contention that he was not original party to action and had not obtained leave to intervene. 96Cal 179, 273P829.
1426–89 98CalA257, 276P1071; 129 Okl 211, 264P194. **Any interest is sufficient to give right to intervene** under statute, whether protection may be had by intervener in some other way or not. 98CalA257, 276P1071. **Complaint in intervention held sufficient.**–86Mont322, 283P1110.
1427–98½–New. Party from whom both plaintiff and defendant trace their title is proper party defendant. 202 Iowa 58, 209NW430.
1427–1 130 Okl 130, 265P765. **If officer dies after substitution,** it is not necessary to revive action as to such officer. 130 Okl 130, 265P765.
1428–12 104Conn501, 133A576; 20 OhA 256, 151NE797. **Object of affidavit is to identify property and to determine amount of bond.** 104Conn501, 133A576.
1428–14 133 Okl 271, 272P430.
1429–17 173Ark705, 293SW43.
1429–21 11PaDist&Co 494.
1431–30 133 Okl 271, 272P430.
1432–42½–New. Failure to allege that demand was refused goes to validity of writ, and makes it void. 132Misc497, 230NYS177.
1434–59 133 Okl 271, 272P430. **Object of statute.**–133 Okl 271, 272P430.
1434–60 133 Okl 271, 272P430.
1434–61 133 Okl 271, 272P430.
1436–66½–New. Affidavit failing to set forth cause of detention according to best knowledge, information, and belief of person making affidavit is defective, under Civ. Prac. Act §§ 1095, 1096 subd 4. 132Misc497, 230NYS177.
1436–67 104Conn501, 133A576.
1436–70 40Wyo 283, 277P714.
1437–72 Sufficiency.–173Ark705, 293 SW43.
1437–73 104Conn501, 133A576.
1438–77 Where material and essential allegation in affidavit is shown to be false.–24 OhNPNS225, 226 [citCyc].
1438–84 20 OhA256, 151NE797 [citCyc] (too late where writ issued and served and possession thereby secured for plaintiff).
1439–89 132Misc497, 230NYS177.
1440–1 Amendment to allege demand and refusal is not permissible under statute. 132Misc497, 230NYS177.
1440–3½–New. Before omission may be supplied or mistake corrected in replevin, jurisdiction of person, property, and cause of action must be acquired. 132Misc497, 230NYS177.
1441–4 CalA 291P647; 5PaDist&Co 520 (truck returned and lienor recovers against bond); 50RI 402, 148A323. **Bonds stands in place of property to extent of defendant's interest.**–34Wyo 509, 245P295. **"The giving of such bonds determines nothing concerning the ultimate right of the parties to the possession of the property."** 320Mo 20, 6SW(2d)597, 601.
1441–6 In replevin by defendant for property taken by sheriff under writ of seizure, forthcoming bond accepted by sheriff does not inure to benefit of plaintiff in original suit. 151Miss734, 118S 425.
1441–7 In Iowa.–200 Iowa1051, 205NW 983.
1441–8 Jurisdictional.–111Conn112, 149 A252.
1443–20 175Ark527, 299SW993; CalA 291P647.
1443–27 221Ala160, 127S905.
1444–28½–New. Surety on original replevin bond is not estopped to deny recital of value and prove lesser value in chancerization proceedings. 50RI419, 148A418.
1444–29 In Oklahoma.–123 Okl 91, 252P 67.
1444–32½–New. There is implied condition in bond that property must be returned in substantially as good condition as when taken. 44Philippine378.
1445–38 123 Okl 91, 252P67, 69 [quot Cyc].
1445–39 123 Okl 91, 252P67, 69 [quot Cyc].
1447–50 102NJL425, 132A663.
1447–59 Statutes relating to proceedings in replevin in which plaintiff has possession and fails to prosecute suit do not apply to his failure to furnish additional bonds. 222MoA570, 293SW 61.
1449–72 In New Jersey.–102NJL425, 132A663.
1449–74 126Me593, 136A813.
1449–77 179Minn588, 229NW804(1st case) (amount of bond not in double amount of value of property). But see 11PaDist&Co 659.
1450–81½–New. Replevin bond taken by sheriff held not insufficient because surety who took oath before another was not of age. 102NJL425, 132A663.
1450–82 99Vt460, 134A592.
1450–85 247 IllA259; SC 155SE406.
1451–93 Replevin suit may be tried without order of delivery. 173Ark705, 293SW43.
1451–98½–New. Everything necessary to issuance of writ is jurisdictional. 132 Misc497, 230NYS177.
1451–1 13PaDist&Co 105.
1452–4 178Minn174, 226NW405 (writ held valid).
1454–32 93PaSuper457.
1454–33 General appearance by defendant, etc. 149Miss164, 115S201.
1455–39½–New. The action will not be sustained where service of writ and seizure of chattels is procured by fraud. 255 IllA403.
1455–40 222Ky670, 1SW(2d)1072.
1455–41 222Ky670, 1SW(2d)1072.
1456–46 Officer has right to take such possession. 168Minn77, 209NW532.
1456–50 147SC88, 144SE705. But see 38GaA621, 144SE919.
1456–56 Entry must be made peaceably.–168Minn77, 209NW532.
1457–64 87Colo 483, 289P366 (failure to allege and prove execution of writ).
1457–65 In Pennsylvania.–13PaDist&Co 105 (that defendant admits storing goods in another county held immaterial).
1458–67 101Vt356, 143A276.
1458–70 34Wyo 509, 245P295.
1458–73 71CalA779, 236P329, 332 [cit Cyc]; 117 Okl 111, 245P591, 593 [quot Cyc].
1458–74 100CalA491, 280P380; 82Colo 239, 259P6; 117 Okl 111, 245P591, 593 [quotCyc]. **Sale pending suit** constitutes conversion. 129 Okl 75, 263P105.
1458–75 71CalA779, 236P329, 332 [cit Cyc]; 117 Okl 111, 245P591, 593 [quot Cyc].
1459–76 117 Okl 111, 245P591, 593 [quotCyc].
1459–80 129 Okl 211, 264P194.
1460–83 147SC88, 144SE705.
1460–84 Bond takes place of property as security for plaintiff's debt. 139 Okl 58, 281P224.
1460–84½–New. Proof of defendant's possession at time of institution of suit is unnecessary where redelivery bond is given. 222MoA1113, 14SW(2d)683.
1460–84¼–New. Where defendant executes redelivery bond, he thereby admits he is in possession of property. 139 Okl 259, 284P15(2dcase).
1460–85 12PaDist&Co 604 (giving of bond); SC 155SE406.
1460–86 SC 155SE406.
1461–90 In absence of notice to obligee or sheriff of conditions under which sureties signed redelivery bond regular on its face and accepted by sheriff, it is valid and binding on sureties. 139 Okl 58, 281P224.
1461–94½–New. Sureties on bond in replevin constitute defendant their agent, with power to bind them by any compromise or adjustment within ordinary and reasonable purview and limitation of action. 196NC211, 145SE7.
1461–94¼–New. Court need not invoke estoppel to deny recital as to value where denial will not affect validity. 50 RI 419, 148A418.
1461–94¼–New. Recital of value to show superior court's jurisdiction not being vital to validity, estoppel of surety to show lesser value need not be invoked in chancerization proceedings. 50RI 419, 148A418.
1461–95 Evidence held to show good grounds for surety's withdrawal from official bond so as to create statutory vacancy in office. 78Mont164, 253P311.
1462–2½–New. Intervenor in claim and delivery proceeding does not become party in same sense and with same status as original parties or those made so pending action. 190NC192, 129SE 191.
1462–2¼–New. Intervener in claim and delivery proceeding is entitled as of right to be heard only upon issue of his title to property seized. 190NC192, 129 SE191.
1462–2¼–New. Burden is on intervenor in claim and delivery proceeding to make out his claim and show title to property in controversy. 190NC192, 129SE191.
1462–2½–New. Intervener is not entitled to recover alleged stolen chattel unless he was sole owner. 191NC517, 132SE276.
1462–2¾–New. In some jurisdictions interplea by adverse claimant cannot be maintained in action of replevin. MoA 24SW(2d)671.
1462–4 53SD551, 221NW266. **Where property was replevied** after issuance of distress warrant, officer should return all papers to court issuing warrant. 163Ga119, 135SE500.
1463–18½–New. Writ will not be quashed because issued on an insufficient bond where no exception was taken and writ was issued and counterbond filed after which plaintiff filed new bond which was sufficient. 8PaDist&Co 106.
1463–20 220AppDiv600, 223NYS355 (where attorney guilty of abuse of process, court may direct it to be restored).
1464–2 Allegations held insufficient, etc. 117 Or165, 243P101. **Allegations held sufficient.**–168Ark700, 271SW710; 76CalA486, 245P205; 83Colo 547, 267 P200; 69Utah401, 255P439. **Whether complaint is designated as an affidavit** or complaint, court has jurisdiction. 171Ark1097, 287SW384.
1464–9 69Utah401, 255P439, 440 [quot Cyc].
1465–10 171Ark1097, 287SW384; 136 Misc206, 240NYS492 (plaintiff need not allege inadequate legal remedy).
1465–16 173Ark705, 293SW43.
1466–33 In Pennsylvania.–8PaDist&Co 25.
1468–55 119 Okl 41, 247P670; 132 Or 92, 284P832. **Declaration held sufficient.**–98PaSuper41.
1469–60 168Ark700, 271SW710; 33GaA 627, 127SE617 (that plaintiff "claimed title" held sufficient).
1469–62 168Ark700, 271SW710.
1469–63 168Ark700, 271SW710 (holding "owner" constitutes allegation of general ownership).
1469–66 Allegations held sufficient.–126 Okl 139, 258P274.
1469–68 119 Okl 41, 247P670.
1470–69 168Ark700, 271SW710.
1470–70 168Ark700, 271SW710; 34 Wyo 374, 244P224.
1470–76 168Ark700, 271SW710 (especially when answer alleged defendant won property from plaintiff at gaming table).
1470–79 119 Okl 41, 247P670.
1471–86 CalA 287P119; 123 Or72, 260 P999.
1471–89 123 Or72, 260P999.
1472–90 123 Or72, 260P999.
1472–91 123 Or72, 260P999. **Description held sufficient.**–171Ark1097, 287SW 384; 35GaA414, 133SE294; 123 Or72, 260P999.
1472–92 123 Or72, 260P999.
1472–97½–New. Declaration need not describe all chattels actually seized. 126Me593, 136A813.
1472–98 126Me593, 136A813.
1472–1 See also 40Wyo 283, 277P714.
1473–7 119 Okl 41, 247P670.
1474–19 26 OhA552, 160NE516.
1474–25 Complaint held sufficient, though not alleging bad faith or fraud in obtaining of goods. 126Misc564, 214 NYS48.
1474–33 33F(2d)202, 208 [citCyc]; 44 OklACR86, 89 [citCyc]. See also 228

AppDiv141, 239NYS286.
1475-42 42 Ida688, 247P791 (expenses for automobile hire and value of time spent in locating property held special damages); 116 Or570, 242P610.
1476-45 228AppDiv506, 240NYS247.
1476-49 118Kan656, 236P447; 171 Minn130, 213NW536 (recognizing rule); 216AppDiv818, 215NYS624 (where complaint alleges wrongful detention only); 134Wash152, 235P21.
1476-52 171Minn130, 213NW536 (recognizing rule); 134Wash152, 235P21.
1476-54 155Miss227, 124S331 (plea of not guilty).
1476-56 163Ga760, 137SE236 (grounds for equitable relief).
1476-57 Plea or answer held insufficient.-103CalA392, 284P673.
1477-60 SC 155SE291.
1477-63 33F(2d)202, 209 [citCyc]. **Defenses well pleaded and not subject to be stricken.**-33F(2d)202.
1477-75½-New. Counterclaim.-Defendant cannot counterclaim for breach of warranty. 216AppDiv514, 215NYS581.
1477-75½-New. Counterclaim for balance due cannot include charges for services other than those performed in connection with replevied chattels. 132 Misc57, 229NYS45.
1477-75¼ For defendant to recover value of property, answer must claim property and demand its return. MoA 8SW(2d)88.
1477-75½-New. Answer held sufficient to entitle defendant to recover value of property and damages for detention. MoA 8SW(2d)88.
1478-95 SC 155SE291.
1479-96 SC 155SE291.
1479-97 33F(2d)202; 134Wash152, 235 P21. **Nature of plea.**-49RI 434, 143A 783.
1479-98 49RI 434, 143A783.
1480-6½-New. Where complaint alleges wrongful detentions only, answer need not allege title in third party but general denial is sufficient. 216AppDiv 818, 215NYS624.
1480-8 Allegations held sufficient.-127 Or635, 271P992. **Where property is taken on attachment, etc.** 116 Or538, 241 P69. Attachment.-116 Or570, 242P610.
1480-18 116 Or538, 241P69.
1481-25 125Me188, 132A216.
1481-27 125Me188, 132A216.
1482-35 5PaDist&Co 520 (affidavit held sufficient as setting up lien for repairs). **Affidavit held insufficient.**-98PaSuper41; 6PaDist&Co 417. **Affidavit held sufficient.**-11PaDist&Co 49.
1484-51½-New. Avowry is applicable only in replevin actions where goods, admittedly property of plaintiff, have been taken from his possession by defendant, and defendant seeks to set up facts which will justify such taking. 49RI 434, 143A783.
1487-81 But see 49RI 434, 143A783.
1487-83½-New. Reply may be required by rules of court where affidavit of defense justifies under distraint for rent. 9PaDist&Co 17.
1488-95½-New. Replevin writ is not demurrable for failure to allege value of chattels, 126Me593, 136A813.
1488-95½-New. nor for failure to describe all chattels seized. 126Me593, 136 A813.
1488-1½-New. Demurrer challenges declaration but not bond. 126Me593, 136A813.
1489-5 See also 245 IllA148.
1489-10 97PaSuper178 (counterclaim amendable).
1489-14 Amendment held not to change cause of action.-252 IllA262. **Action of replevin mistakenly brought,** where action lies for purchase price, cannot be amended by adding count in assumpsit. 233Mich633, 208NW28.
1490-15 If defendant wrongfully disposes of the property before the commencement of the action, etc. 73CalA 236, 238P763.
1490-24 Before judgment.-129 Okl 211, 264P194.
1491-30 81Colo 454, 256P315, 317 [cit Cyc]; 44 OklACR86.
1491-33 99Fla410, 128S831; 171Minn 130, 213NW536 (recognizing rule); 134 Wash152, 235P21. **Issue in replevin is** one of title not of debt, and money verdict is damages in lieu of property. 161 Ga371, 131SE44. **Plaintiff's title to property** is denied in qualified sense under general issues. 99Fla410, 128S831. **Main issue in claim and delivery** is right to possession. SD 231NW289. **In California.**-286P1101 (automobile).
1492-36 251 IllA469; 49RI 434, 143A 783.
1492-37 45 Ida604, 264P384.
1492-38 251 IllA469.
1492-42½-New. In Georgia in trover action issue is one of title and not of debt. GaA 132SE123.
1492-42½-New. Where plaintiff has replevied chattel delivered under contract of conditional sale, title is only question involved. 13PaDist&Co 407.
1492-43 7PaDist&Co 459.
1493-49 Fla 130S462 (put in issue by plea of not guilty). **Under Civ. Pract. Act § 826 allegation of concealment, removal, or disposal,** with intent to prevent finding chattel or to deprive plaintiff of benefit thereof, must be proved at trial. 217AppDiv550, 217NYS373.
1493-50 Under answer denying unlawful detention defendant could prove any fact which would disprove right of possession in plaintiff. 228AppDiv506, 240 NYS247.
1494-53 Value of property must be admitted or proved to warrant entry of alternative judgment. 38 OklACR613.
1494-54½-New. Value of chattels is not in issue in replevin. 126Me593, 136A 813.
1494-61 116 Or538, 241P69. **That property belonged to defendant in writ** must be proved. 116 Or538, 241P69.
1494-61½-New. Proof of special ownership is not admissible where facts constituting such ownership are not pleaded in answer. 116 Or538, 241P69.
1495-64 83 IndA385, 148NE486; 171 Minn130, 213NW536 (recognizing rule); 150Miss653, 116S298; 155Miss227, 124 S331 (defendant's incapacity to enter into contract which is basis of action); 122 Okl 67, 251P33; 129 Okl 211, 264P 194; 134Wash152, 235P21. **Where no answer was filed,** case stands, under Vermont statute, on general denial and every material fact is in issue. Vt 148 A481.
1495-66 Mont 271P452; 146SC322, 144 SE66; 34Wyo 199, 242P415, 418 [cit Cyc].
1495-67 200 Iowa705, 205NW351.
1496-68 Okl 293P192.
1496-70 99Fla410, 128S831; Fla 130S 462.
1496-71 251 IllA414.
1496-74 116 Or538, 241P69.
1497-81 171Minn130, 213NW536 (recognizing rule). **Lien.-MoA** 23SW(2d) 231. **Where right to possession is only issue,** evidence must be confined to that issue. 33 OhA345, 169NE581.
1498-86½-New. In replevin by tenant against landlord for property seized under attachment for rent and supplies, question of account is incidental to main issue of right of possession, and landlord without counter-affidavit may disprove itemized account for labor sworn to by tenant and attached to his affidavit in replevin. 141Miss564, 106S 824.
1498-86½-New. Where, though complaint alleges ownership in general terms, the answer alleges facts disclosing source of plaintiff's title to be that of chattel mortgagee, defendant cannot prove payment under plea of general issue but must affirmatively plead payment. 171Minn130, 213NW536.
1500-99 MoA 4[5W(2d)834; 81Mont 375, 263P415.
1500-6 233 IllA519; 245 IllA582; 86 Mont322, 283P1110; 196NC558, 146SE 229(1stcase).
1501-7 MoA 25SW(2d)562.
1501-9 146SC322, 144SE66. Contra 129 Or620, 278P572.
1501-11 326 Ill 285; 157NE243; 233 IllA519; 241 IllA146; 200 Iowa705, 205 NW351; 128Me545, 148A692 (administrator must show title in his intestate); 248Mich668, 227NW540; 147 Miss509, 112S871; 148Miss472, 114S 334; 81Mont375, 263P415; 55ND71, 212 NW400; 119 Okl 41, 247P670; 289Pa 414, 137A599; 97PaSuper197; 49RI 434, 143A783; 146SC322, 144SE66; Tex CivA 7SW(2d)964; TexCivA 21SW(2d) 83. **Burden is on defendant** to prove his right of possession independent of plaintiff's proved right to possession as owner. 45 Ida604, 264P384.
1501-12 251 IllA469; 200 Iowa705, 205 NW351; 86Mont322, 283P1110; 55ND 71, 212NW400; TexCivA 7SW(2d)964.
1502-13 233 IllA519; 124Me381, 130A 130; NJ 147A385.
1502-15 233 IllA519.
1502-18 9PaDist&Co 552.
1502-18½-New. Burden is on defendant of proving it was bona fide holder of stolen negotiable bonds, under Negotiable Instruments Law. 221AppDiv 122, 223NYS118.
1502-18½-New. Acts of officer in taking under writ of replevin are presumed regular. 126Me550, 140A182.
1503-19 148Miss472, 114S334.
1503-21 119 Okl 41, 247P670.
1503-23 34Wyo 199, 242P415, 418 [cit Cyc].
1503-24 MoA 8SW(2d)1086.
1503-25 104Conn501, 133A576. See also 251 IllA469. **Parties may show actual value,** despite presumption. 104 Conn501, 133A576.
1503-27 Burden of showing depreciation vote is on plaintiff. 220MoA502, 274 SW888.
1503-28 But see 147Miss509, 112S871.
1503-31 217AppDiv550, 217NYS373.
1504-35 Inadmissible evidence.-128Misc 20, 217NYS480; 53SD55, 220NW144. **Admissible evidence.**-176Ark684, 3SW (2d)999.
1504-36 Evidence held admissible as basis for determining "peculiar value" of property. 202Cal 359, 260P869 (racing history of stallion subject of action).
1505-37 Plaintiff's affidavit of the value of the property, etc. 220MoA502, 274 SW888.
1505-44 MoA 8SW(2d)88. **Evidence of value at time of taking is competent** where property has been lost or destroyed at time of trial. MoA 299SW 49. **Value at time of taking is competent.** MoA 8SW(2d)88.
1506-45 Where property has been lost or destroyed at time of trial, value at time of taking is admissible. MoA 299 SW49.
1506-50 99Fla410, 128S831; 236Mich 290, 210NW321 (wide range allowed to show business relations of parties); MoA 11SW(2d)759; 81Mont375, 263P 415; SD 227NW469. See also 205Cal 128, 270P188. But see 33OhA345, 169 NE581. **Evidence of possession,** in form of witness' testimony she assisted in inventorying articles involved, is admissible. Vt 148A481.
1507-54 42 IdaI34, 243P825; 55ND71, 212NW400. **Beliefs of defendant as to ownership of property** held not to constitute evidence that such were facts. 197 Ind365, 151NE2.
1507-56 MoA 11SW(2d)759.
1507-56½-New. Where defendant undertakes to trace his title to one other than one from whom plaintiff bought, plaintiff in rebuttal may show that it was sold to person from whom he derived title. 75Mont412, 243P812.
1507-59 123 Or72, 260P999. **Evidence held sufficient.**-176Ark684, 3SW(2d)999; 97CalA692, 276P156(1stcase); 87Colo 552, 290P276; 35GaA642, 134SE191; 232 IllA1; Mich 233NW440; MoA 8SW (2d)88; 131 Okl 193, 268P228; 38 Okl ACR442; Utah 280P720 (as to value). **Evidence held insufficient.**-78CalA262, 248P293; 108Conn524, 143A846; 233 IllA519; 150Miss653, 116S298; 81Mont 375, 263P415; 140 Okl 55, 282P151.
1507-59½-New. In trover action promissory notes are evidence of their own value. 35GaA34, 132SE123.
1508-61 35Ariz232, 276P523(2dcase); 202Cal 359, 260P869; 86CalA142, 260P 305; 246 IllA494; 123Kan711, 256P1008 (hotel furniture sold with hotel); MoA 25SW(2d)562; 86Mont530, 284P264. **Evidence held sufficient.**-181Ark1004, 29 SW(2d)272; 73CalA236, 238P763; CalA 290P300; 83Colo 595, 267P610; 45 Ida 604, 264P384. To prove plaintiff's ownership. 122Kan359, 251P1077 (automobile); 166Minn408, 208NW135 (horses).

To show lack of ownership in plaintiff. 287Pa337, 135A105. **Evidence held insufficient.**–Ariz 292P1020 (animals in herd of cattle); 34GaA321, 129SE565 (verdict for defendant authorized); Mass 108S507. **Proof of ownership of note and chattel mortgage securing it** prima facie establishes special interest in, and right to, possession of property. 251 IllA469.

1508–62 Vt 148A481.

1508–64 **Evidence held insufficient** to show ownership in defendant. CalA 291 P458.

1508–64½–New. Purchasers in good faith from one who took possession under process in claim and delivery action, in which no redelivery bond was filed by defendant, who subsequently suffered default and went into bankruptcy, are entitled to protection in their purchases against one claiming under prior oral transfer from defendant in such action, not followed by any delivery or change of possession. 205Cal 128, 270P188.

1508–64¼–New. In action of replevin for personal property, evidence that defendant was sharecropper on plaintiff's farm, and entered into agreement for equal interest in live stock and implements, and that defendant paid for undivided one-half interest in personalty, and had removed same from farm with plaintiff's consent, has been held sufficient to show that defendant was joint owner of personalty with plaintiff, precluding recovery in replevin by plaintiff. MoA 10SW(2d)314.

1508–65 **Proof of unlawful taking held insufficient.**–232 IllA1. **Evidence held sufficient to sustain finding** that tractor was held under writ of replevin after release of prior attachment. 170Minn 313, 212NW593. **Evidence held sufficient to show wrongful taking or detention.**–202Cal 359, 260P869.

1508–66 36GaA50, 135SE510 (sufficient); NJSup 140A394.

1509–68 **Evidence held to support,** etc. 203Cal 347, 264P477; 205Cal 1, 269P 610; 73CalA236, 238P763 (as to value of property); 91CalA585, 267P124; 95 CalA192, 272P329; 97CalA692, 276P156 (1stcase); 101CalA532, 281P1104; 42 Ida115, 243P823; 244 IllA282; 166Minn 408, 208NW135 (as to value of horses); 170Minn495, 213NW40 (verdict for defendant); MoA 8SW(2d)1086; 136 Okl 60, 276P230; 88PaSuper137 (verdict for defendant); 50SD364, 210NW156 (that defendant was owner of property in question). **Evidence held insufficient,** etc. 199 Ind582, 159NE428.

1509–69 But see 36GaA548, 137SE302. **In absence of proof of possession by defendant at commencement of action,** plaintiff cannot recover. MoA 18SW(2d) 1034.

1509–71 220MoA502, 274SW888 (evidence insufficient). **Evidence held sufficient.**–Colo 292P601; 166Minn408, 208 NW135 (damages for detention of horses); MoA 8SW(2d)88.

1509–73 NS [1925] 2DomLR914.

1512–90 But see 222MoA570, 293SW61.

1512–97 NJSup 143A734; Utah 280P 720 (on question of value).

1514–13 77CalA519, 247P218.

1514–14 77CalA519, 247P218; 168Ga 247, 147SE64.

1515–16 177Ark227, 6SW(2d)285.

1515–17 **Plea for return held to entitle defendant to alternative judgment.**–77 CalA519, 247P218.

1515–20 125Mei88, 132A216.

1516–26 **Nonsuit held "judgment for defendant."**–77CalA519, 247P218.

1516–31 177Ark227, 6SW(2d)285.

1517–38 236Mich290, 210NW321, 322 [quotCyc]; MoA 278SW1052.

1517–39 230Mich290, 210NW321, 322 [quotCyc]. **All equities between parties arising from main controversy** may be settled. 137 Okl 218, 278P1111. **Settlement of all equities** between parties growing out of main controversy is authorized. 143 Okl 190, 288P300. **All conflicting claims of parties to possession** of property should be settled. 129 Okl 211, 264P194.

1517–42 **Dispute over feed consumed by cattle** while in sheriff's custody will not be adjudicated. Cal 290P583.

1517–44 Contra 121Kan825, 826, 250P 283. **Plaintiff is not liable in such action for wrongful acts of sheriff** seizing property. Cal 290P583.

1517–45½–New. Tendency of courts in some jurisdictions has been to expand rather than contract issues triable in replevin. 121Kan825, 826, 250P283.

1517–45⅓–New. Where intervener owner of property did not execute redelivery bond and retake possession, only issue of value and damages, if any, should be submitted to jury. 35Ariz392, 278P 384.

1517–45¼–New. Trial judge in claim and delivery suit can set aside verdict and award new trial, order new trial nisi, or new trial on refusal to remit damages. 155SC340, 152SE652.

1517–45½–New. Defect in justification of sureties on replevin bond cannot be reached in replevin action. Cal 290P583.

1518–47 But see 221MoA1178, 299SW 629.

1518–51 **Statute providing that replevin action in justice court may proceed as one for damages where property claimed has not been taken** does not apply where property has been taken and returned to defendant upon giving redelivery bond. 122Kan274, 252P234. **Question requiring defendant to disclose defense** before taking case held properly excluded. Vt 148A481.

1518–53 178Ark168, 10SW(2d)19; 87 Colo 552, 290P276; 201 Iowa823, 208 NW359; MoA 299SW49; 10PaDist&Co 719; 151SC366, 149SE119 (punitive damages). **Evidence held sufficient for submission to jury.**–MoA 258W(2d)562.

1518–54 217AppDiv550, 217NYS373; Okl 293P192; 287Pa337, 135A105; 48RI 166, 136A443.

1519–56 128Misc20, 217NYS480; Okl 293P192; 5PaDist&Co 324; 146SC322, 144SE66. See also 81Mont375, 263P415. **Evidence held insufficient** to require submission of issue of partnership between plaintiff and defendant. 201 Iowa823, 208NW359.

1519–59 83Mont185, 271P452; 217App Div550, 217NYS373. **Proposed issue for jury on counterclaim** as to whether plaintiff wrongfully detained fixtures has been held in proper form. 137Misc 18, 242NYS118.

1519–60 178Ark168, 10SW(2d)19. **Evidence held sufficient** to take case to jury. 221AppDiv122, 223NYS118.

1519–61 180Minn264, 230NW778 (jury are not concluded by retail price placed by owner on property).

1519–62 52SD603, 219NW559.

1519–64 128Misc20, 217NYS480; 217 AppDiv550, 217NYS373; 53SD55, 220 NW144; 54SD435, 223NW354; SD 227 NW169.

1520–65 249Mich622, 229NW455; 157 Miss380, 128S104; 5PaDist&Co 324 (common-law doctrine). See also 178 Minn344, 227NW199.

1520–66 171Ark1097, 287SW384; Ark 23SW(2d)631; 157Miss202, 127S771 (livestock seized by sheriff for dipping); 116 Or570, 242P610.

1520–67½–New. **Direction of verdict for defendant held proper** where plaintiff failed to show right of possession of any particular property. 148Miss472, 114S 334.

1520–67⅓–New. Where undisputed proof shows that defendant was not in possession of house sought to be replevied when suit was begun, never occupied it, and claimed no interest therein, verdict should be directed for him. 247 Mich89, 225NW525.

1520–69 **Instruction on statutory consent rule** has no application in bail trover. 163Ga37, 135SE487. **Instruction directing verdict for plaintiff without requiring finding that plaintiff was entitled to possession of property** is erroneous. 222MoA51, 299SW604.

1521–70 **Evidence held sufficient** to warrant submission of issues. 35GaA642, 134SE191.

1521–71 MoA 299SW49.

1521–72 96CalA689, 274P758.

1521–77 **Instructions as to title and right of possession.**–Instructions held proper. MoA 10SW(2d)314; 197NC426, 149SE548.

1522–83 87PaSuper448.

1522–85 **Refusal to instruct as to damages held erroneous.**–157Miss202, 127S 771.

1522–86 **Punitive damages.**–87PaSuper 448.

1523–87½–New. It is error to give instruction in some jurisdictions that value of article should be determined as of date plaintiff demanded its return. 73 CalA704, 239P67.

1523–91 **In South Carolina.**–155SC340, 152SE652 (damages only in special finding).

1523–92 151SC366, 149SE119 (verdict held correct in form).

1523–94 **Findings of fact which follow pleadings** in statement of ultimate facts are sufficient. 78CalA141, 248P303.

1523–97 Okl 291P521.

1524–2 201 Iowa823, 208NW359 (finding that plaintiff was absolute owner of chattel held conclusive answer to issue of partnership between parties raised by defendant).

1525–6 See also 134SC191, 132SE173.

1527–23 78CalA141, 248P303; 93CalA 539, 269P765. See also Mo 12SW(2d)508 (2dcase).

1528–35 But see 39Wyo 423, 273P687.

1528–38 77CalA287, 246P345; 230Ky 64, 18SW(2d)879. **Plaintiff has right to waive verdict for return of property.**–134 SC10, 131SE778. **Where property has become worthless,** plaintiff may choose to take verdict for amount of debt. 134 SC10, 131SE778.

1529–48½–New. Finding by court that property was illegally withheld by defendant is proper though actual possession was in sheriff under writ. 95CalA 192, 272P329.

1530–49 **Silence of verdict in claim and delivery as to part of property claimed** is equivalent to verdict in favor of defendant as to such property. 83Mont 185, 271P452. **Effect of failure to find as to part.**–83Mont185, 271P452.

1530–52 126 Okl 139, 258P274.

1530–59 MoA 8SW(2d)1086.

1532–80 See also 83CalA449, 256P864.

1532–85½–New. **Right of plaintiff to elect to take money verdict.**–Where there is allegation and proof as to value, plaintiff may elect to take money verdict after argument and before submission of case to jury. 35GaA404, 133SE265.

1533–86 199Wis263, 225NW138. See also 134SC191, 132SE173.

1534–93½–New. **Where property was delivered on delivery bond and no redelivery bond was filed** finding of value not required. 42 Ida688, 247P791.

1534–94 73CalA704, 239P67; MoA 27 SW(2d)487; MoA 299SW49; 223AppDiv 421, 228NYS487; 123 Or72, 260P999.

1534–96 73CalA704, 239P67.

1535–97 123 Or72, 260P999.

1535–98 92CalA360, 268P459.

1535–1 126 Okl 139, 258P274; 123 Or 72, 260P999.

1535–2 126 Okl 139, 258P274.

1536–16 92CalA360, 268P459; 223App Div421, 228NYS487; 123 Or72, 260P999, 1001 [citCyc]. **Rule does not apply unless case is between plaintiff and general owner.**–123 Or72, 260P999.

1537–27 **Damages for detention** must approach actual, usable, and reasonable value of article to owner. 69CalA719, 232P734. **Findings held sufficient to support judgment for damages.**–97CalA 692, 276P156(1stcase). **Construction of verdict as to amount of damages.**–155SC 340, 152SE652 ($5,500).

1537–28 37F(2d)216.

1538–30 69CalA719, 232P734 (evidence held insufficient to support finding of damages for detention).

1538–31 197NC426, 149SE548 (judgment held sufficient).

1539–36 **In action by purchaser at sheriff's sale under chattel mortgage foreclosure judgment** property not included in sheriff's return should not be included in judgment. 141Wash389, 250P106.

1539–36½–New. Where property taken by sheriff on execution was replevied from him and judgment awarded part of it to him, but there was no proof of its value, failure to give judgment for sheriff for amount of executions in default

of return was held not error. 323 Ill 232, 154NE139.

1539-36½-New. Defendant who wins replevin action may at his election, have judgment for assessed value of property against plaintiff and sureties on replevin bond. 32NM264, 255P404.

1539-36¼-New. Judgment based on lack of jurisdiction cannot determine title. 47RI 240, 132A610.

1539-36½-New. Recital of defendant's ownership of property at commencement of action constitutes direct finding on issue of ownership and right to possession. 44 Ida505, 258P550.

1539-36¼-New. Under statute, plaintiff is entitled to damages for detention whether delivery of property can be had or not. 97CalA692, 276P156(1stcase).

1539-36½-New. Where plaintiff has recovered goods, judgment for damages for detention and costs is all that is necessary to be entered. 37F(2d)216.

1539-37 224AppDiv33, 229NYS528.

1539-37½-New. Under statute judgment void on its face where it did not declare value. 132SC168, 129SE136.

1539-39 224AppDiv33, 229NYS528.

1539-40 224AppDiv33, 229NYS528.

1539-42 Entire judgment roll may aid defective description of property in judgment. CalA 287P119 (description held sufficient).

1539-51½-New. Entry of judgment for defendant without more is proper if required by facts. Mass 167NE655.

1540-53 77CalA287, 246P345; 96CalA 179, 273P829; 190NC861, 129SE591.

1542-67 MoA 8SW(2d)88.

1544-87 MoA 10SW(2d)314; 83Mont 185, 271P452.

1544-88 83Mont185, 271P452.

1544-90½-New. Where verdict finds defendant half owner of chattel, judgment must be against plaintiff and sureties for property or value at defendant's election and for damages. MoA 78W(2d) 301.

1544-90¼-New. It is not error to award judgment to one defendant for stipulated value, notwithstanding, owing to partial payment having been made to such defendant by another, he may not actually have been out such amount of money in transaction. 96CalA179, 273P829.

1544-91 39GaA594, 147SE791(2dcase); MoA 31SW(2d)218; 82NH487, 136A139. **Defendant who has retained property in his possession** under delivery bond may insist judgment show value of property provided he is prejudiced by failure of judgment so to show. 202 Iowa58, 209 NW430. **Plaintiff wrongfully bringing replevin** cannot complain when required to pay value of property instead of being permitted to return it. 82NH487, 136A 139.

1545-92 36GaA548, 137SE302; Iowa 232NW812. **Where property was surrendered to defendant on bond after taking,** judgment for plaintiff should be in alternative for property or its value or value of plaintiff's interest if it is limited one. 140Miss467, 106S9.

1545-94 36GaA548, 137SE302.

1545-97 144Wash373, 258P31.

1545-97½-New. That plaintiff prays for possession of property or its value does not constitute election to take money judgment nor give defendant option to pay value and keep property. 122Kan 274, 252P234.

1546-1 Conn 151A321; 217AppDiv193, 216NYS500.

1546-7 See also 41Wyo 263, 284P1001.

1547-10 125Mel88, 132A216.

1547-14½-New. Rule in some jurisdictions is that judgment for defendant for return of property would be unwarranted in law where his answer did not claim a return as contemplated by statute. 199Cal 386, 249P513.

1547-14¼-New. Defendant may not have judgment for return of property without plea of general or special property and finding thereunder of right of possession. 335 Ill 274, 167NE23.

1547-14¼-New. Judgment of return of property is not authorized by verdict finding defendant not guilty and not determining issue of ownership or right to possession. 335 Ill 274, 167NE23.

1547-14½-New. One buying berries in regular course of trade is prima facie owner and entitled to their value from one wrongfully replevying. 249Mich622, 229NW455.

1547-14¼-New. Where articles removed by defendant had only junk value, judgment that he need only return them in substantially good condition is proper. Wash 287P658.

1547-15 NJSup 140A394.

1548-17 172Ark1, 285SW359; 173Ark 1160, 293SW1037; 77CalA287, 246P345; 77CalA519, 247P218; 41 Ida767, 244P 404 (statutory action of claim and delivery); 144Miss464, 110S230; 217AppDiv 193, 216NYS500; 217AppDiv550, 217 NYS373; 123 Or72, 260P999; SD 231 NW289; 144Wash373, 258P31 [citCyc]. **Where defendant has given redelivery bond and retained possession,** it is error to enter judgment against defendant for amount of plaintiff's claim and in addition thereto for return of property. 97 Okl 145, 223P180; 38 OklACR613. **Judgment in replevin for value and damages improper,** and should be for return or value and damages. 217AppDiv193, 216NYS500. **Where property was turned over to plaintiff before trial,** there is no necessity for judgment in alternative. 83Mont185, 271P452. **Alternative money judgment** becomes actionable where return is impossible. 35F(2d)842. **Where plaintiff obtained property on writ of replevin,** alternative judgment for property or its value is improper, but judgment should be for property with damages. 41Wyo 198, 283P1100. **Circumstances warranting judgment without option to return.**–Colo 292P601.

1549-18 96CalA703, 274P763; 101CalA 532, 281P1104; Okl 272P380; SD 231 NW289. **Where the chattels have been previously sold,** etc. 96CalA179, 273P 829.

1550-20 172Ark1, 285SW359; 202Cal 359, 260P869; 77CalA519, 247P218. **Amount allowed held not excessive.**–202 Cal 359, 260P869 ($7,500 in lieu of stallion and $7,500 for wrongful detention).

1550-23 101CalA532, 281P1104. See also MoA 14SW(2d)699.

1550-23½-New. Where evidence shows that defendant has possession and can deliver to plaintiff, failure to make judgment in alternative is not erroneous. 101 CalA532, 281P1104.

1550-26 139 Okl 256, 281P974.

1550-27½-New. Judgment for assessed value of property is not subject to collateral attack. MoA 14SW(2d)699.

1551-29 95CalA192, 272P329. **Condition of property tendered.**–200 Iowa913, 205NW841.

1551-30 130 Okl 95, 265P628.

1551-31 130 Okl 95, 265P628.

1551-32 130 Okl 95, 265P628.

1551-34 41Wyo 263, 284P1001 (three years held unreasonable time).

1551-36 Where the articles are so heavy and cumbrous, etc. 130 Okl 95, 265P628.

1552-39 129 Or598, 278P987.

1552-45 168Ark700, 271SW710 (court's power to compel delivery of bonds not affected by fact that before judgment defendant delivered part of property). **Effect of refusal to deliver property,** after judgment in alternative, is to bring into effect money judgment, or at least place plaintiff in position to ask for execution for money judgment. 200 Iowa913, 205NW841. **Writ of retorno habendo.**–248 IllA227.

1552-45½-New. Where judgment is in alternative form, defendant in replevying action is not required to issue writ to compel return of property before proceeding to enforce alternative judgment for money. 123 Okl 91, 252P67.

1553-50½-New. In Philippines judge may issue supplementary execution authorizing sale of property for satisfaction of judgment on owner's refusal to accept property because of condition. 51 Philippine620.

1553-53 200 Iowa913, 205NW841.

1553-55½-New. Denial of motion to quash execution held proper.–130 Okl 95, 265P628.

1553-58½-New. Effect of partial delivery before judgment.–Delivery by defendant to plaintiff of some of latter's bonds before judgment does not abate court's power after judgment to compel delivery by arrest as to balance. 168Ark 700, 271SW710.

1553-58⅓-New. Arrest for contempt.–Refusal of defendant to obey order of court commanding delivery of bonds to plaintiff constitutes contempt authorizing court to arrest and detain defendant as means of enforcing judgment. 168 Ark700, 271SW710.

1553-58¼-New. Action against surety cannot be maintained upon undertaking where in judgment no reference is made to chattel, its return, and value of chattel is not fixed. 219AppDiv253, 219NYS 387.

1554-61 Intimidation by defendants to gain possession of house after judgment in their favor held not to affect plaintiff's right of appeal. TexCivA 298SW 453.

1554-63 Bond and possession of property pending appeal.–248 IllA55.

1554-64 217AppDiv550, 217NYS373 (directed verdict).

1555-68 130 Okl 95, 265P628.

1555-70 73CalA704, 239P67 (instruction as to time of determining value requiring reversal).

1555-72 153Wash436, 279P744.

1555-73 73CalA704, 239P67 (retrial on issue of value only); 217AppDiv193, 216 NYS500 (judgment modified to conform with verdict).

1556-76 37F(2d)216. **Defendant was bound by jury's finding of unlawful detention** as regards allowance of costs. 37F(2d)216.

1556-76½-New. Statutes in some jurisdictions, providing that in actions not founded on contract plaintiff shall recover costs if he recovers any damages, have been construed to apply to replevin suits. 220MoA284, 286SW140.

1556-83 37F(2d)216; 128Misc20, 217 NYS480. **Where giving of bond by plaintiff is compulsory,** premium, when he is successful, is properly included in bill of costs. 37F(2d)216.

1559-99 151SC366, 149SE119.

1559-3 But see NJSup 142A670.

1559-3½-New. Plaintiff's having to close business for removal of property, he could recover amount paid as salary to employee during time business was closed. 97CalA692, 276P156(1stcase).

1559-3⅓-New. Though detriment due to loss of profits during close of business by reason of removal of property, cannot accurately be measured, compensation therefor as damages will not be denied. 97CalA692, 276P156(1stcase).

1559-8 Conn 151A321; 129 Okl 211, 264P194. **Damages for defendant depend on his right of possession.**–CalA 291 P458.

1560-12 177Ark227, 6SW(2d)285.

1560-13 MoA 13SW(2d)582.

1561-21 73CalA236, 238P763; 141 Wash162, 251P288, 289 [citCyc].

1562-30 98Fla304, 123S785.

1563-36 202Cal359, 260P869; 97CalA 692, 276P156(1stcase); CalA 291P458; 108Conn524, 143A846; 98Fla304, 123S 785; 35GaA404, 133SE265; 115Nebr 628, 214NW68; 102NJL359, 132A656; 68Utah30, 249P121, 50ALR1303. **Application of rule to specific property.**–124 Me381, 130A130; 68Utah30, 249P121, 50ALR1303; 155Wash171, 283P1091. **Damages for detention allowed only on return of property.**–115Nebr628, 214NW 68.

1564-38 102NJL359, 132A656. **Damages held excessive.**–124Me381, 130A130.

1564-40½-New. Party rescinding contract may not recover damages for its breach in replevin suit under guise of damages for detention of property sued for. MoA 13SW(2d)582.

1564-49 181Ark77, 25SW(2d)3.

1565-54 7LaA481; 41Wyo 198, 283P 1100. But see 337 Ill 222, 168NE912.

1566-58½-New. Where facts alleged in complaint are insufficient to constitute cause of action in replevin, alleged expenditures in ascertainment of facts and employment of counsel to ascertain and protect plaintiff's rights cannot be recovered, though allegations thereof indicate intent to state such cause of action. 94CalA557, 271P540.

1566-59 202Cal 359, 260P869; 77CalA

207, 246P165. **In California.**–73CalA 236, 238P763.
1567–65 Conn 151A321; 151SC366, 149 SE119.
1567–67 See also 151SC532, 149SE235.
1567–69 151SC366, 149SE119.
1567–69½–New. In absence of averment out of which exemplary damages could be sustained, damages claimed for detention are compensatory only. 205Cal 245, 270P447.
1567–71 202Cal 359, 260P869, 874 [cit Cyc].
1568–73 MoA 22SW(2d)68.
1568–77 127 Or107, 269P232.
1570–90 202Cal 359, 260P869, 874 [cit Cyc]; 220MoA502, 274SW888; MoA 299 SW49; MoA 8SW(2d)88; MoA 27SW (2d)492 (where plaintiff repossessed property under bond and disposed of it). **Rule is otherwise,** where defendant has destroyed, sold, or dissipated property, and no value can be put upon it at time of trial. 220MoA502, 274SW888.
1571–91 261Mass261, 158NE662; MoA 8SW(2d)88; 102NJL359, 132A656; 104 NJL251, 140A31.
1572–11 No right of action accrues on undertaking given officer taking no property. CalA 291P647.
1573–12½–New. Surety is not liable until all statutory requirements have been filled. 218NYS387.
1573–16 48 Ida254, 282P273(2dcase); NS [1930] 3DomLR231.
1574–22 255Mass132, 150NE870.
1574–25 Ind 154NE292; 126Me529, 140 A201; 123 Or461, 260P1014; NS [1930] 3DomLR231.
1574–26 123 Okl 91, 252P67. **Loss or destruction of property** while in plaintiff's possession does not relieve him of liability therefor under his bond. 202 Cal 359, 260P869.
1575–33½–New. Plaintiff cannot escape liability on his bond for return of property by procuring ex parte order permitting him to deliver property to court. 171Minn101, 213NW378.
1575–33½–New. Such procedure is not permitted under statutes of interpleader in some jurisdictions. 171Minn101, 213 NW378.
1575–34 123 Or461, 260P1014, 1016 [cit Cyc]. **Condition of property is question of fact.**–123 Or461, 260P1014.
1575–35 Ind 154NE292.
1576–37 170Ark797, 281SW10; 123 Or 461, 260P1014. See also 191NC542, 132 SE466. **Loss or destruction of property** while in defendant's possession does not relieve him of liability therefor under his bond. 202Cal 359, 260P869.
1576–38 130 Okl 247, 266P1107; 123 Or 461, 260P1014; 137SC446, 135SE557 (delivery to sheriff under execution held release of sureties on bond given to prevent delivery).
1576–41 202Cal 359, 260P869, 874 [cit Cyc]; CalA 291P647.
1576–43 126Me529, 140A201.
1576–44 126Me529, 140A201.
1576–47 In Texas.–CivA 23SW(2d)804.
1577–52 337 Ill 22, 168NE912; 225App Div524, 234NYS9; 46Philippine796 (issue of execution against surety held improper); 46Philippine805 (holding court without jurisdiction to issue execution).
1577–55 IndA 166NE774.
1578–60 261Mass261, 158NE662.
1579–67 337 Ill 222, 168NE912; 197NC 452, 149SE585(2dcase). **Costs of trial court taxed against sureties held error.** TexCivA 290SW299. **Dispossession of plaintiffs by intimidation pending appeal** from judgment for defendants held not to release sureties from liability on replevin bond for rents previously accrued. TexCivA 298SW453. **Sureties on replevin bond cannot complain** because principals refused to appeal from adverse judgment. TexCivA 298SW453. **Joinder of mortgagor in foreclosure** action releases sureties on claim and delivery bond. 74CalA629, 241P574. **Where judgment against surety is void,** he cannot recover proceeds on execution sale of his realty. TexCivA 293SW658.
1580–68 176NC211, 145SE7. **Return of property** by sureties on defendant's delivery bond discharges sureties. 177Ark 1193, 9SW(2d)783.
1580–69 Rule that extension of time granted to principal, or other acts which may result in substantial prejudice to surety, will discharge such surety, does not apply to replevin bond. 196NC211, 145SE7.
1581–71 But see GaA 155SE54.
1582–74 Giving of redelivery bond is not waiver or discharge of undertaking in replevin, nor are sureties released from judgment for costs in replevin action because property attached was sold under execution. 81Mont113, 261P618.
1582–74½–New. Giving of new replevin bond does not release old one. MoA 7 SW(2d)732.
1582–75 NJCir 145A469. **Sureties on replevin bond held liable only for return of property without damages** when such was extent of infant who replevied property. 198NC664, 153SE152.
1582–77 TexCivA 290SW299 (costs of appeal held properly taxed against appellant and sureties principals in appeal bond on joint appeal).
1582–79½–New. Liability on redelivery bonds.–Surety on redelivery bond is not released from liability by giving appeal bond by defendants, 19 OhA26.
1582–79½–New. nor by appointment of receiver of property who takes possession thereof. 19 OhA26.
1582–79¼–New. No liability attaches for property seized not claimed in affidavit to bondsman. 192NC175, 134SE 417.
1582–79½–New. Party taking property in claim and delivery proceedings becomes practically an insurer against damage to the property. 193NC464, 137 SE418.
1582–79½–New. Sureties on replevin bond cannot be held beyond terms of their contract. 198NC664, 153SE152.
1582–80 172Ark365, 288SW886; 177 Ark1193, 9SW(2d)783; Ark 31SW(2d) 413; 245 IllA570; 219AppDiv253, 219 NYS387; 190NC543, 130SE176 [citCyc]; TexCivA 278SW265. **Where the value of the property is diminished by the use of it,** etc. But see 171Minn101, 213NW 378. **Damages for depreciation in value recoverable.**–128Kan474, 279P3. **Measure of damages is market value** at time of trial. TexCivA 278SW265. **Where amount named in bond is greater than value,** recovery is properly limited to value of property. 172Ark365, 288SW 886. **In an action on a redelivery bond** on failure to return property in as good condition as when replevied, sureties are liable for damages not exceeding amount of bond. 130 Okl 247, 266P 1107. **Where property is returned** not substantially in same condition, surety is liable for difference between value when taken under writ and value when returned. 129 Or598, 278P987. **In an action on a bond given for goods seized under execution,** etc. 128Me481, 148A 682.
1583–81 256 IllA420; 190NC543, 130 SE176 [citCyc]; TexCivA 292SW914.
1584–82 Ind 154NE292. **Where property is returned in a damaged condition,** etc. Ind 154NE292.
1584–83 190NC543, 130SE176. But see 256 IllA420.
1584–84 81Mont113, 261P618.
1585–86½–New. Damages must be assessed upon same principles and rules as would have applied had damages been assessed in action in which writ of claim and delivery was issued. 190NC 543, 130SE176.
1585–86½–New. Actual damages.–Plaintiff may recover only such sum as jury assess as compensation for breach of bond. 190NC543, 130SE176.
1585–86¼–New. Deterioration during time of detention under defendant's redelivery bond should not be computed on separable articles attached by possessor to property wrongfully detained. 152Miss852, 120S175.
1585–88 IndA 170NE861.
1585–89 128Me481, 148A682; 190NC 543, 547, 130SE176 [citCyc].
1585–90 See also 190NC543, 130SE176.
1586–93 178Ark238, 10SW(2d)372; 196 NC232, 145SE8; 123 Okl 91, 252P67; 136 Okl 1, 276P492.
1586–94 But see 197NC452, 149SE585 (2dcase).
1586–95 69CalA251, 230P993. **Want of jurisdiction of person or subject matter is only ground** of attack in some jurisdictions. 123Okl 91, 252P67.
1586–97 Where amount held not conclusive.–172Ark365, 288SW886.
1587–3 190NC543, 130SE176.
1588–9 190NC543, 130SE176. **Surety may prove title in mitigation.**–50RI 402, 148A323.
1588–15 170Ark797, 281SW10; 191NC 542, 132SE466.
1589–16 191NC542, 132SE466.
1589–18 TexCivA 158SW(2d)664(2d case).
1589–20 Facts not constituting estoppel to claim liability on bond. 337 Ill 222, 168NE912.
1589–24 123 Okl 91, 252P67.
1590–25 129 Or598, 278P987.
1590–26 190NC543, 130SE176.
1590–27 190NC543, 130SE176 (right of independent action to recover of plaintiff and surety damages for breach of bond).
1590–32½–New. Action on statutory replevin bond is ex contractu.–123 Okl 91, 252P67.
1590–33 123 Or461, 260P1014, 1016 [quotCJ].
1590–34 123 Or461, 260P1014, 1016 [quotCyc].
1590–34½–New. Delivery bond for automobile being merged into judgment rendered against defendant, executing bond in favor of plaintiff in replevin suit, could not be basis of subsequent suit between same parties for depreciation in value of automobile, seized during pendency of appeal from judgment in replevin suit. 178Ark238, 10SW(2d) 372.
1592–49 Where sheriff had attached merchandise, he was not required to levy execution on merchandise already subject to attachment lien in his hands. 48 Ida254, 282P273(2dcase).
1592–53 Where alternative judgment is rendered, defendant in replevin action need not cause writ to be issued in order to procure return of property before bringing suit against sureties on replevin bond. 123 Okl 91, 252P67.
1593–61 Liability of goods to seizure is no defense. NS [1928] 1DomLR636. **Rights of surety not impaired** nor prejudiced by delay of nearly six months in correcting judgment for return of property or value. 180Minn168, 230NW464.
1593–63 118 Okl 294, 248P639 (surety may interpose defense of payment). **In Mississippi.**–35F(2d)842.
1593–66 Mass 167NE655.
1593–68 See also 171Minn101, 213NW 378.
1594–78½–New. Plaintiff and his sureties cannot go behind judgment for restitution when sued on his bond and defend on ground that property has been turned into court. 171Minn101, 213NW 378.
1594–78½–New. That judgment in replevin action has become functus officio at time of trial of action on replevin bond and judgment therein does not constitute defense where action was commenced within statutory limitation appealable to bond. 123 Okl 91, 252P67.
1594–80 139 Okl 256, 281P974.
1594–83 123 Okl 91, 252P67 (nor jurisdictional defects in form, execution, and approval of bond).
1595–91 See also Mass 167NE655.
1595–92 222MoA570, 293SW61.
1595–93 119 Okl 98, 248P1107.
1596–6 118 Okl 294, 248P639, 641 [quot Cyc].
1597–23½–New. Bailee of owner of property can maintain action as obligee for breach of condition in replevin bond. 177Minn515, 225NW425.
1597–24 123 Okl 91, 252P67.
1597–25 48 Ida254, 282P273(2dcase).
1597–27 139 Okl 256, 281P974.
1597–29 123 Okl 91, 252P67.
1598–32 123 Okl 91, 252P67, 69 [cit Cyc].
1598–35 123 Okl 91, 252P67, 69 [cit Cyc].
1598–37 Surety may be sued alone.–48 Ida254, 282P273(2dcase) (joining of principal's receiver is not misjoinder).
1598–40½–New. Sureties on replevin bonds are considered as parties of record. 196NC211, 145SE7.
1598–42 Allegations held sufficient, etc. 221Ala160, 127S905; 69CalA251, 230P 993.

1600-79 123 Or461, 260P1014.
1601-90½-New. Inadvertent omission of word in bond is not ground for demurrer to petition to which copy of bond is attached, where context read with statute supplies omission. 136 Okl 1, 276P432.
1601-5 337 Ill 222, 168NE912 (such plea is no more than demurrer).
1602-14½-New. Payments made after executions were returned unsatisfied are matters of defense. 48 Ida254, 282P273 (2dcase).
1602-24 126Me550, 140A182; 261Mass 261, 158NE662; 190NC543, 130SE176 (to recover more than nominal damages, plaintiff has burden to offer evidence from which such damages may be assessed).
1602-25 190NC543, 130SE176 (to establish ownership under mortgage); 57 ND159, 220NW848.
1603-26½-New. Person suing on bond need not prove value of goods if he accepts value admitted by defendant in entering into bond. NS [1928] 1DomLR 636.
1603-29 Admissions of sheriff as agent of plaintiff relative to approval or rejection of redelivery bond are admissible. 118 Okl 294, 248P639.
1603-40 Evidence held inadmissible.-256 IIIA420.
1604-46 190NC543, 130SE176.
1604-47 190NC543, 130SE176 (ownership not adjudicated may be considered by jury in determining damages).
1604-56 245 IIIA570.
1605-64 129 Or598, 278P987.
1605-67 104Conn501, 133A576, 577 [cit Cyc].
1605-69 Evidence held sufficient.-41 GaA816, 155SE54; Ind 154NE292; 196 NC232, 145SE8; 123 Or461, 260P1014. Evidence held insufficient.-71CalA779, 236P329; 245 IIIA570; 56ND272, 217 NW167; TexCivA 293SW453.
1605-70 104Conn501, 133A576, 577 [cit Cyc]; 256 IIIA420.
1605-73 104Conn501, 133A576, 577 [cit Cyc]; 256 IIIA420.
1605-74 104Conn501, 133A576, 577 [cit Cyc]. In Texas.-CivA 238SW(2d)883.
1605-76 Evidence, in action on redelivery bond, held sufficient to support judgment for plaintiff. 128Kan216, 276 P806.
1605-76½-New. Prima facie case is made out for execution creditors and sheriff as obligee of bond by return of execution unsatisfied. 48 Ida254, 282P 273(2dcase).
1606-78 53SD551, 221NW266. Rights of defendant presumed to have been litigated in replevin action will not be inquired into in action on redelivery bond. 53SD551, 221NW266.
1606-82 TexCivA 293SW896, 899 [cit Cyc].
1606-93 Instructions held proper.-221 Ala160, 127S905.
1607-94 Instructions held inconsistent.-126 Okl 279, 251P56.
1607-94½-New. Direction of verdict upon all issues except damages is proper where facts are established by uncontradicted evidence or agreement of counsel. 36GaA358, 137SE699.
1607-97½-New. Verdict erroneously directed for surety on replevy bond. 41 GaA816, 155SE54.
1607-98 48 Ida254, 282P273(2dcase) (recovery allowed for value of articles sold by replevinor).
1607-1½-New. Judgment in excess of value of property is void. TexCivA 293 SW658.
1607-1½-New. Judgment beyond conditions of bond held void. TexCivA 293 SW653.
1607-1¼-New. Only proper judgment in action on replevin bond is money judgment. 180Minn168, 230NW464.
1607-1½-New. Where judgment creditor joins with sheriff in suit on bond, judgment may be for sheriff for value and for use and benefit of judgment creditor to amount of his claim and for use and benefit of owner for remainder. 139 Okl 256, 281P974.
1607-1¾-New. Plaintiff's taking of property, sued for in trover held not to increase surety's risk requiring credit for property taken. 41GaA816, 155SE 54.
1607-4 57ND159, 220NW848.
1608-20½-New. Error to submit immaterial issue over objection of plaintiff. 190NC543, 130SE176.

REPORT

1609-7 76Mont574, 248P179.

REPORTS

1618-94 Law as to salary held not repealed.-49ND201, 190NW818.

REPRESENT

1619-3 11CustA167.

REPRESENTATIVE

1621-17 11CustA167, 171 [quotCyc].
1621-18 "Lawful representative" includes or means legal heirs where real property is involved as subject matter. Iowa 219NW485. Where personal property is involved, phrase is limited to executors and administrators when not qualified by text. 205 Iowa1326, 219NW 485, 59ALR835.
1621-21 11CustA167, 171 [quotCyc].

REPUGNANCY

1623-47 204 Iowa598, 215NW718.

REPUTABLE

1623-51 108Conn74, 142A473.

REPUTATION

1624-56 243NY134, 152NE700.
1624-66 "Character" and "reputation," etc. Ala 130S771.

REQUEST

1625-71 As used in will held precatory in its nature. 105Conn261, 135A555.

REQUIRE

1626-76 108TexCr274, 18SW(2d)308, 310 [citCyc].
1626-87½-New. To require act to be done raises in mind some order or other direction to do it. 25 OhNPNS869.

RESCISSION

1628-13 116Tex356, 291SW860; TexCivA 18SW(2d)426, 430 [citCyc]. Rescission of a contract, etc. 81CalA295, 253P328. Term which imports an entire abandonment, etc. 117 Or328, 243P 560.

RESCUE

1632-1 Another definition.-190NC319, 129SE802.
1635-44½-New. Evidence held sufficient to sustain conviction of rescuing prisoner. 175Ark1047, 18SW(2d)546.
1637-69 190NC319, 129SE802 (indictment sufficiently acquainting defendant with nature of crime).

RESELL

1638-2½-New. Should interpret meaning of word "resell" in light of general customs of trade and business with reference to sale of commodity dealt with. 168Ark504, 270SW946, 1119.

RESERVE

1640-12 73CalA527, 238P1077; 119 Or 127, 248P151.
1640-13 119 Or127, 248P151.

RES GESTÆ

1643-32 161La704, 109S394; Mo 256 SW787, 791 [citCyc]; 308Mo 288, 271 SW361.
1643-33 308Mo 288, 271SW361.
1643-34 OklCr 287P826. Relation of events rather than time.-308Mo 288, 297, 271SW361 [citCyc]. Contemporaneousness not exact.-TexCivA 271SW641.

RESIDE

1645-37 214Ala356, 108S18; 47RI 375, 133A651.
1646-38 47RI 375, 133A651; NS [1925] 2DomLR663.
1646-40 43 Ida64, 249P254. Often demands domicile, etc. 47RI 375, 133A651 (as to jurisdiction in adoption proceedings as domicile of child).
1647-45½-New. "Reside" and "dwell" have same meaning and used interchangeably. NS [1925] 2DomLR663.
1647-45¾-New. "Reside" has variety of meanings according to statute in which it is used. NS [1925] 2DomLR 663.
1647-45¼-New. "Reside" is elastic word and may receive different meaning according to position in which it is found. NS [1925] 2DomLR663.

RESIDENCE

1647-47 14F(2d)232; 287Pa115, 134A 463, 465 [citCyc] ("the question of residence is one of fact, depending largely on the party's intent").
1647-48 214Ala356, 108S18.
1647-49 47RI 375, 133A651. Not necessarily domicile.-143Va267, 129SE235. As domicile.-13F(2d)541; 92Fla818, 110 S539; 47RI 375, 133A651 (jurisdiction in adoption proceedings held domicile of child). As legal residence.-92Fla818, 110S539.
1648-52 194Wis353, 216NW499, 501 [citCyc].
1649-53 214Ala356, 108S18; 5PaDist &Co 503.
1650-60 90Fla879, 106S901, 43ALR 1127.
1650-61 9PaDist&Co 9.
1650-72 138 Okl 208, 281P276.
1651-79 Defined by Kansas statutes, etc. 123Kan222, 254P1026.

RESIDENT

1655-86 43 Ida64, 249P254.
1655-87 Person may live at place of which he is not resident.-73CalA565, 239P60.
1656-88 Corporations included or not.-Word "resident" in statute or constitution ordinarily means individual or citizen, not corporation. 215AppDiv15, 213 NYS877.
1656-89 58 OntL273, [1926] 1DomLR 646 [app dism 59 OntL16, [1926] 3DomLR279].
1657-90 43 Ida64, 249P254.
1657-91 194Wis353, 216NW499.

RESIDUARY ESTATE

1659-4 85PaSuper123.

RESIDUARY PERSONAL ESTATE

1659-7½-New. Residuary personal estate is that which remains after all obligations have been met. 47RI 64, 129 A832.

RESIDUE

1660-17 108Conn100, 142A851.
1660-19 85PaSuper123, 131 [quotCyc].
1660-20 85PaSuper123, 131 [quotCyc].
1660-21 194Wis330, 216NW501.
1660-22 194Wis330, 216NW501.
1662-25 194Wis330, 216NW501.
1662-26 194Wis330, 216NW501.

RESILIENT

1663-36½-New. Inclined to leap or spring back. 37F(2d)562.

RES IPSA LOQUITUR

1665-45 19F(2d)732; 68CalA252, 228P 879; 207 Iowa1149, 222NW560; 121 Kan648, 249P599; 101WVa499, 133SE 146.
1665-46 68CalA252, 228P879.
1665-47 68CalA252, 228P879; 220MoA 452, 276SW105; 219AppDiv685, 220 NYS705; 116 OhSt451, 157NE21, 53 ALR1486; TexCivA 8SW(2d)247. "The meaning of the maxim," etc. 219App Div685, 220NYS705. Application.-121 Kan648, 249P599.

RESIST

1665-48 165Ga254, 140SE491.

RES JUDICATA; RES ADJUDICATA

1666-56 91Fla103, 107S261. See also 50SD366, 210NW191, 192 [citCyc]. Concurrence of identity in four respects requisite, etc. 91Fla103, 107S261.
1666-58 91Fla103, 107S261.

RESPECTIVE

1671–86 NJCh 150A187.

RESPONDEAT SUPERIOR

1673–97 240 IllA165, 176 [quotCyc]; TexCivA 283SW285, 286 [quotCyc].
1673–98 240 IllA165, 176 [quotCyc]; 32PortoRico 58; 135SC123, 133SE205.
Application.–311Mo 77, 277SW566.
1674–99 240 IllA165, 176 [quotCyc]; 104WVa12, 138SE749.

RESPONSIBLE

1674–6 **"Lowest responsible bidder."**–55ND141, 212NW773.

RESTAURANT

1677–20 **Food at restaurant is not sold,** in nature of common-law sale of goods. 103NJL464, 135A805, 50ALR227.
1677–24½–New. Establishment where refreshments or meals may be obtained by public. Vt 146A417.

RESTITUABLE

1678–26½–New. "Restituable" means cannot be relieved against. Miss 107S 385.

RESTRICT

1683–49 147Miss534, 113S441. **Power to restrict does not include power to prohibit.**–147Miss534, 113S441.
1683–50 147Miss534, 113S441.

RESTRICTION

1683–51 **When used in connection with grant of interest in real property** "restriction" is limitation of manner in which one may use his own land. 101 NJEq649, 138A569.

RESURVEY

1684–59 **Other definitions.**–101Vt41, 140A156.

RETAINER

1686–75 143Va768, 129SE672.

RETIREMENT

1686–80 25 OhNPNS424. **"Shall be retired"** held to mean discontinuance in and incapacity to hold appointive office. 130Misc124, 222NYS676.

RETRAXIT

1686–82 119 Or636, 250P840.

RETURN

1687–88 TexCivA 276SW757.

REVENDICATION

1691–7 33PortoRico 172 (complaint held sufficient). **Particular heirs not appearing as plaintiffs** in action brought by other heirs for acknowledgment of their hereditary rights are not necessary parties. 33PortoRico 172.

REVERSION

1693–30 129Misc201, 221NYS656 (reversion and vested remainder in fee simple are convertible terms).
1693–30½–New. **Blackstone's definition** is defined to be residue of estate left in grantor to commence in possession after termination of some particular estate granted out by him. 516 Ill 318, 147NE266.

REVERT

1694–33 291Pa129, 139A832.
1694–34 126Me78, 136A350.

REVIEW

1696–1 118 Or546, 247P772.
1696–2 17F(2d)827, 829 [citCyc].
1696–4 17F(2d)827, 829 [citCyc].
1697–22 17F(2d)827, 829 [citCyc].
1698–28 128Me328, 147A427; Me 149A 837; Mass 167NE676; Mass 170NE110.
1698–29 **Right to, and scope of, review** are determined by statutory provisions. 128Me437, 148A566.
1698–34 71CalA418, 235P655; 118 Or 546, 247P772.
1699–41 **Grantor voluntarily assuming defense of suit against grantee for possession.** 128Me437, 148A566. **Notice to one avouched in to assume defense need** not appear of record. 128Me437, 148A 566.
1700–58 **While appeal and writ of review may be concurrent remedies,** they cannot be prosecuted at same time. 124 Or638, 264P845.
1701–61 118 Or546, 247P772.
1701–62 **Ministerial acts or orders are** not subject to be reviewed. 118 Or546, 247P772.
1704–12½–New. **In Montana,** prerogative writ of review lies to discharge one imprisoned for attempt when unable to obey court order. 78Mont92, 252P388.
1705–35 Me 149A837.
1708–66 Mass 167NE676.
1709–83 49Philippine625.
1713–28 **In Oregon.**–118 Or546, 247P 772. **Petition insufficient.**–70CalA393, 233P80.
1720–49 128Me328, 147A427.

REWARDS

1730–1 TexCommnA 298SW404.
1731–14 174Ark234, 295SW4, 7 [cit Cyc], 53ALR534.
1731–17 **Governor** may embody in offer of reward additional condition that accused be convicted, under statute authorizing offer for apprehension. 135 Wash1, 236P792.
1734–36 159Tenn290, 17SW(2d)908. **County court** has no power to adopt resolution offering to pay reward to any officer of county for arrest and conviction of persons violating liquor laws or to appropriate money for such service. 159Tenn290, 17SW(2d)908. **Statute authorizing county to appropriate money to pay district attorneys, general assistants, clerks, and officers for services,** authorizes appropriations only to assistants and clerks of district attorney-general and officers assigned or attached to his office. 159Tenn290, 17SW (2d)908. **Statute authorizing counties to compensate sheriffs and other officers for ex officio services** does not confer power to enact resolution offering bounty to officers for arrest and conviction of persons violating liquor laws. 159 Tenn290, 17SW(2d)908.
1735–46 **Additional conditions may be imposed by** governor of state to those mentioned in statute authorizing offer of reward. 135Wash1, 236P792.
1739–68 246Mich356, 224NW418; Tex CommnA 298SW404.
1741–87 TexCommnA 298SW404.
1741–88 **Regard should not be had to** mere letter of offer of reward to exclusion of spirit. TexCommnA 298SW 404.
1743–2 254Mass180, 150NE9, 42ALR 1142 (dictum); 246Mich356, 224NW 418; TexCommnA 298SW404.
1743–3 See TexCivA 293SW339.
1743–4 234 IllA64; 254Mass180, 150 NE9, 42ALR1142 (dictum).
1744–6 234 IllA64. **Inadequate information.**–234 IllA64.
1745–14 **It is immaterial that money which person arrested had under his control was secreted at unknown place** and was not in his physical possession at time arrest was made. TexCommnA 10SW(2d)534(2dcase). **Liability of insurer** offering to reward bank officers capturing persons "undertaking to rob or burglarize" bank held not limited to payment for capturing offender before getting possession of money. Tex CommnA 298SW404.
1746–18 TexCommnA 298SW404; Tex CivA 293SW339.
1746–24 135Wash1, 236P792, 793 [quot Cyc]. **Though conviction is prevented by suicide of accused** after conviction of crime other than named in reward, claimant is not entitled to reward. 135 Wash1, 236P792. **Conviction of precise offense.**–135Wash1, 236P792.
1747–25 135Wash1, 236P792, 793 [quot Cyc].
1747–26 135Wash1, 236P792, 793 [quotCyc]. **Failure of prosecuting officers to charge accused** with crime named in offer does not entitle claimant to reward, though accused is convicted of another crime. 135Wash1, 236P792.
1747–27 **To furnish information, etc.** 11PaDist&Co 327.
1750–45 168Ark736, 271SW340 (equal division); 246Mich356, 224NW418; 5 PaDist&Co 431.
1750–46 **One who first saw robbers and drove them into captor's hands** while attempting to capture them is entitled to share equitably with captors. 168 Ark736, 271SW340.
1751–47 168Ark736, 271SW340 (holding pursuers of robbers not entitled to share reward with those capturing them). **They need not show that they did all work.**–168Ark736, 271SW340.
1751–49 174Ark234, 295SW4, 7 [cit Cyc], 53ALR534; 234 IllA64; 246Mich 356, 224NW418.
1753–60 **Bank cashier and directors** held bank "officers" within insurer's offer to reward officer capturing persons undertaking to rob bank. TexCommnA 293SW404.
1753–62 **The policy of the law forbids,** etc. 122Kan349, 252P466.
1753–63 234 IllA64; 122Kan349, 252P 466 (officers whose compensation is fixed by law); 8PaDist&Co 544. But see 5PaDist&Co 431. **Chief of police.**–122Kan349, 252P466. **Under sheriff.**–122Kan349, 252P466.
1754–65½–New. or state. 234 IllA64.
1754–65½–New. Where such officers do not arrest under a warrant or where they arrest a fugitive from another state, rule is different. 8PaDist&Co 544.
1754–66 193NC659, 137SE711.
1755–67 222Ky260, 300SW629.
1755–68 126Kan36, 266P749.
1756–71 See also 5PaDist&Co 459.
1756–75 5PaDist&Co 431.
1756–79 35GaA641, 134SE347.
1756–82 **Sufficiency,** etc. 37GaA670, 141SE416. **Complaint in action to recover reward offered for conviction of any person for certain crime** must allege that information resulted in conviction in absence of allegation rendering proof of conviction unnecessary. 37 GaA670, 141SE416.
1758–92 126Kan36, 266P749; 246Mich 356, 224NW418. **Reasonable doubt.**–135Wash1, 236P792. **Evidence held insufficient** to show that arrested person at time of arrest was "fleeing homicide" within statute authorizing reward for apprehension. 143Miss769, 109S736.
1758–1 TexCommnA 10SW(2d)534(2d case).

REX NON POTEST PECCARE

1760–25 76Mont429, 247P332, 47ALR 424 (has no place in jurisprudence of this country).

RIDE

1762–44½–New. Used as transitive verb, to "ride" means idea of control or management; to manage or control while seated on; to sit on and control so as to be carried. 237NY391, 143NE 231, 35ALR32.

RIGHT

1764–62 216AppDiv274, 214NYS732.
1764–62½–New. acknowledged claim; 216AppDiv274, 214NYS732.
1764–63 254Mass292, 150NE95.
1765–64 79Mont432, 257P278.

RIGHT OF PRIVACY

1766–72 See also 7Alaska416.

RIGHT OF WAY

1767–82 249 IllA199; 81Mont430, 263 P692 [citCyc]. **As applied to interest of railroad company** "right of way" means "easement." 127Kan365, 273P 661(2dcase).
1767–99 **What not included.**–Private right of way. 128Misc893, 220NYS289.

RIOT

1772–1 NC 154SE314; 35 OklCr279, 250P544, 49ALR1129.
1773–5½–New. **Counseling or inciting** to riot see 29PortoRico 824.
1776–32 **If peaceful assembly becomes unlawful,** fights and affrays resulting from attempt to disperse it would constitute riot. 209Ky299, 272SW748.
1776–34½–New. Essentials of offense of remaining at place of riot. CalA 292P1068.

1777–36 Where two persons of assembly of hooded persons clad in garb of order flag another, there is concert of action between three or more persons necessary to constitute riot. 35 **OklCr** 279, 250P544, 49**ALR**1129.

1780–52 Tumult or disturbance are essential only where purpose is lawful, and are not essential where purpose is unlawful. 25F(2d)635.

1782–68 9PaDist&Co 530.

1786–3 Evidence held sufficient.–36GaA 654, 137SE863; 39GaA829, 148SE618 (2dcase).

1786–5 39GaA829, 148SE618(2dcase).

1786–6½–New. Evidence as to identity of conspirators.–For purpose of establishing identity of conspirators where offense was committed pursuant to system or peculiar method, extended range of inquiry into explanatory collateral facts may be proper. 35 **OklCr** 279, 250P544, 49**ALR**1129.

1786–8 39GaA829, 148SE618(2dcase).

1787–13 Questions for jury.–**NC** 154SE 314.

RIP

1790–1 Distinguished from "tear" in seam of garment.–47**RI** 125, 131A309.

RIPARIAN OWNER

1790–9½–New. Riparian owner is one who owns to line of ordinary high-water mark on navigable waters. 93 **Fla**535, 112S274.

ROBBERY

1796–1 This definition, etc. 101**CalA** 302, 281P660.

1796–6 274**US**277, 47SCt613, 71**L ed** 1045; 21**AlaA**177, 106S218; 178**Ark** 1117, 13**SW(2d)**597; 89**CalA**227, 264P 501; 143**Wash**288, 255P141. **This definition, etc.** 21**AlaA**289, 107S791; **Ill** 173 **NE**55; 145**Va**800, 133**SE**764; **WVa** 155 **SE**313. **Other definitions.**–154**Miss**36, 122S187; 148**Va**725, 138**SE**483. **Distinguished from simple larceny,** etc. 217 **Ky**94, 288**SW**1051; 168**La**322, 122S52; **OklCr** 287P842. **Robbery is offense against both person and property.**–21 **AlaA**177, 106S218.

1797–7 39 **OklCr**324, 264P631; 40 **Okl Cr**58, 266P783; **OklCr** 279P982(2d case); 110**TexCr**384, 10**SW(2d)**561; 143**Wash**288, 255P141. **In Alabama.**–21**AlaA**289, 107S791.

1797–8 Robbery in first degree.–81 **CalA**752, 254P666; 86**CalA**374, 260P 826; **CalA** 287P533; **CalA** 289P194; **Mo** 23**SW(2d)**122; 248**NY**123, 161**NE** 443.

1797–9 192**NC**490, 135**SE**324. **First degree.**–72**CalA**414, 237P796. **Robbery is felony whether committed by one armed or unarmed,** in latter case there must be element of force or putting in fear. 90**Fla**299, 105S834. **Robbery in second degree.**–101**CalA**302, 281P660 (committed by person going empty handed). **Whether weapon is dangerous one,** within statute providing that robbery perpetrated by person armed with dangerous weapon is robbery in first degree, does not depend on how weapon is used. 101**CalA**302, 281P660. **Robbery by person armed with dangerous weapon.**–**Ill** 173**NE**474.

1797–10 136**Wash**620, 241P9, 10 [quot Cyc].

1797–11 154**Miss**36, 122S187; 136**Wash** 620, 241P9, 10 [quotCyc].

1797–12 82**CalA**459, 255P836; 217**Ky** 94, 288**SW**1051; 255**Mass**506, 152**NE** 359; 153**Miss**587, 121S291; 244**NY**147, 155**NE**79; 145**Va**800, 133**SE**764; 136 **Wash**620, 241P9, 10 [quotCyc]; 150 **Wash**466, 273P742. But see **Ill** 173**NE** 474. **In Florida.**–90**Fla**299, 105S834. **Premeditation or deliberation** is not element of offense. 81**CalA**558, 254P298.

1798–13 82**CalA**459, 255P836; 48**Philippine**217; 145**Va**800, 133**SE**764, 768 [citCyc]. **To satisfy debt.**–145**Va**800, 133**SE**764.

1798–15½–New. Taking of pistol from another to prevent shooting with intention to return it is not robbery. 217 **Ky**94, 288**SW**1051.

1798–17 78**CalA**426, 248P1021. **Intoxicating liquor unlawfully possessed** may be subject of robbery. 230**Ky**656, 20 **SW(2d)**484, 66**ALR**1297.

1798–18 78**CalA**426, 248P1021; 92**Fla** 43, 109S303, 304 [citCyc]; 217**Ky**94, 288**SW**1051; 255**Mass**506, 152**NE**359 (any value whatsoever); 143**Wash**288, 255P141.

1798–19 85**CalA**269, 259P123; 325 **Ill** 57, 155**NE**838; 255**Mass**506, 152**NE**359.

1798–20 98**Fla**703, 124S44(2dcase) (money taken in part from money drawer in room in which bank cashier was held and in part from vault); 325 **Ill** 57, 155**NE**838; **Ill** 173**NE**55; 112 **TexCr**288, 16**SW(2d)**232(1stcase). **Illustrations.**–**Mo** 23**SW(2d)**183. **Words "taking from person of another"** in statute should receive same construction as at common law. **Ill** 173**NE**55.

1799–21 274**US**277, 47SCt613, 71**L ed** 1045; 77**CalA**641, 247P507; 217**Ky**94, 288**SW**1051; 317**Mo** 9, 295**SW**71 [quot Cyc], 58**ALR**652; **OklCr** 292P1043; 49 **Philippine**114. But see 41**GaA**368, 153 **SE**199. **Either force or fear,** etc. 209 **Ky**693, 273**SW**492; 154**Miss**36, 122S187. **Felonious element in robbery** as defined by statute is not supplied solely by use of force or fear. 82**CalA**459, 255P 836. **Actual assault** with deadly weapon is not necessary under some statutes to constitute first degree robbery. 72 **CalA**414, 237P796.

1799–22 178**Ark**1117, 13**SW(2d)**597; 317**Mo** 9, 295**SW**71 [quotCyc], 58**ALR** 652.

1799–24 16F(2d)535.

1800–25 89**CalA**405, 264P1105; **Fla** 129S112. **It is not robbery,** etc. or by the use of only, etc. (178**Ark**1117, 13**SW** (2d)597). **Exertion of force,** by statute may be actual or constructive. 255 **Mass**506, 152**NE**359. **That person robbed made no resistance** is no defense. 41**GaA**352, 152**SE**914.

1800–29 39 **OklCr**324, 264P631. **Use of unloaded pistol** held sufficient to class robbery as one "with dangerous weapon." 77**CalA**279, 246P337. **Putting in fear** must be fear under which possession of property is parted with. 178 **Ark**1117, 13**SW(2d)**597.

1801–30 325 **Ill** 57, 155**NE**838.

1801–31 209**Ky**693, 273**SW**492, 493 [cit Cyc].

1801–32 320**Mo** 267, 6**SW(2d)**934.

1801–35 170**Ga**70, 152**SE**114.

1802–36 21**AlaA**289, 107S791; 176**Ark** 104, 2**SW(2d)**55; 325 **Ill** 232, 156**NE** 274; 168**La**322, 122S52; 255**Mass**506, 152**NE**359; 249**Mich**543, 229**NW**442; 115**Nebr**302, 212**NW**610; 112**TexCr**288, 16**SW(2d)**232(1stcase). **Ownership or right of possession** must be in some one other than defendant. 82**CalA**459, 255P 836.

1802–37½–New. Place of committing offense.–Fact that force was exerted within store or building rather than on highway or out of doors is immaterial. 255**Mass**506, 152**NE**359.

1802–38 CalA 290P464; 230**Ky**589, 20 **SW(2d)**455; 315**Mo** 1326, 292**SW**413 (information held sufficient); **Mo** 11 **SW(2d)**1014; **OklCr** 287P842; 151**Va** 522, 145**SE**358. See also 83**CalA**34, 256 P455. **When based on a statute,** etc. **Mo** 278**SW**726. **Indictment held sufficient.**–**Mo** 274**SW**34; **Mo** 278**SW**663; 316**Mo**42, 289**SW**811. **Information held sufficient.**–311**Mo** 521, 278**SW**971; **Mo** 281**SW**940; **Mo** 289**SW**575; 316**Mo** 264, 289**SW**636; 316**Mo** 229, 289**SW**845; 316 **Mo** 122, 289**SW**904. **Degree of robbery** need not be alleged. 77**CalA**279, 246P 337. **Allegations held sufficient.**–98**CalA** 499, 277P170(2dcase); 99**CalA**297, 278 P449. **Informations held insufficient.**–**OklCr** 292P79(2dcase). **Failure to charge that accused was not armed with dangerous weapon** held not erroneous. **Fla** 129S112. **Statute invoked should be clearly followed.**–**Fla** 129S112.

1803–40 146**Miss**682, 111S749 (allegation held sufficient); **Mo** 300**SW**723. **The kind of fear,** etc. 209**Ky**693, 273**SW** 492, 493 [citCyc]. **Indictment charging robbery with pistol** sufficiently charges commission of crime with deadly weapon. 324 **Ill** 363, 155**NE**316.

1803–42 21**AlaA**175, 106S217 (allegation as to taking from person is material); 110**TexCr**214, 8**SW(2d)**164. **Description of person** not in statutory language held sufficient. 143**Wash**288, 255P141. **Allegations held sufficient.**–332 **Ill** 436, 163**NE**804. **Indictment charging assault on president and cashier of bank with intent to rob bank held** sufficient. 23**AlaA**387, 126S498.

1803–44 146**Miss**682, 111S749 (allegation held sufficient); 153**Miss**587, 121S 291.

1803–46 255**Mass**506, 152**NE**359 (defendant properly convicted on indictment); 111**TexCr**134, 11**SW(2d)**803. **Forms of indictment,** etc. 99**CalA**306, 278P492; 168**La**322, 122S52. **Allegation held sufficient.**–**GaA** 155**SE**797(2d case). **Failure to allege incorporation of bank property which was stolen** does not invalidate indictment charging taking of property of bank's president. 317**Mo** 388, 295**SW**82. **Indictment charging taking of bank president's property** is good though property stolen belonged to bank. 317**Mo** 388, 295**SW**82. **Erroneous allegation of ownership immaterial** if offense otherwise described with sufficient certainty to identify act of robbery. 78**CalA**68, 248P261.

1804–48 78**CalA**426, 248P1021; 92**Fla** 43, 109S303, 304 [citCyc]; 110 **Tex Cr**384, 10**SW(2d)**561. **Sufficient descriptions.**–98**Fla**703, 124S44(2dcase); **OklCr** 280P477; **OklCr** 287P1095.

1805–50 I70**Ga**70, 152**SE**114; 110**Tex Cr**214, 8**SW(2d)**164; 111**TexCr**134, 11 **SW(2d)**803; 143**Wash**288, 255P141. **Charge of force and violence putting victim in fear** held to denote element of taking against will. 143**Wash**288, 255 P141.

1805–53 143**Wash**288, 255P141.

1805–54 The ownership of the property, etc. 78**CalA**68, 248P261 (allegation of ownership by person and proof of his employer's ownership); 115**Nebr** 302, 212**NW**610; 111**TexCr**134, 11 **SW(2d)**803. **What is not a variance.**–86**CalA**329, 260P825; **GaA** 155**SE**797 (2dcase); 322 **Ill** 546, 153**NE**673; 325 **Ill** 57, 155**NE**838; **Miss** 119S207(1st case); **Mo** 278**SW**726; **Mo** 296**SW**391 (charge of taking from person and evidence of accomplice's taking money from cash register while defendant protected with gun); **Mo** 23**SW(2d)**183; 108**TexCr**544, 2**SW(2d)**238. **Fatal variance as to name of victim.**–21**AlaA**177, 106S218.

1805–55 168**Ark**580, 271**SW**330 (no variance where amount taken is greater than alleged); 108**TexCr**631, 2**SW(2d)** 256.

1805–56 What is not a variance.–110 **TexCr**503, 7**SW(2d)**562. **Sufficiency of allegations to admit proof.**–230**Ky**656, 20**SW(2d)**484, 66**ALR**1297.

1806–57 94**CalA**687, 271P777; 217**Ky** 94, 288**SW**1051; **Mo** 296**SW**391; 100 **TexCr**553, 271**SW**631; 108**TexCr**320, 300**SW**65. **All must share,** etc. 221**App Div**331, 223**NYS**339. **Principals and accessories statute held to apply to first degree robbery.**–217**AppDiv**34, 216**NYS** 478. **Accessory before fact may be convicted without showing that he, like principal, had intention** that person to be robbed should be killed if he resisted. 90**Fla**299, 105S834.

1806–59 75**CalA**447, 243P67. **Statute reducing offense to misdemeanor** in case of theft held not applicable to robbery. 104**TexCr**533, 286**SW**204.

1806–63½–New. Where guilty connection was shown, fact that threats were made by another did not absolve defendant. 100**TexCr**553, 271**SW**631.

1806–65 21**AlaA**175, 106S217 (identity of person assailed); 264**Mass**94, 162**NE** 7; 111**TexCr**504, 14**SW(2d)**1031(1st case). **Lack of owner's consent.**–111**Tex Cr**134, 11**SW(2d)**803. **Corporate existence of owner** need not be proved where taking from custody of employee charged. 322 **Ill** 546, 153**NE**673.

1806–66 Presumption from recent possession.–204 **Iowa**1135, 216**NW**642; 223 **AppDiv**442, 228**NYS**441.

1806–67 125**Kan**608, 265P1099; 167**La** 1003, 120S626; 115**Nebr**302, 212**NW** 610, 611 [citCyc]; **TexCivA** 289**SW** 1016 (evidence that person acted with defendant admissible, though he was previously convicted); 101**TexCr**474, 276**SW**250; 105**TexCr**633, 289**SW**1015 (testimony that witness surrendered money through fear); 108**TexCr**46, 299

SW240; 110TexCr384, 108W(2d)561. **A complaint of robbery, etc.** 104TexCr533, 286SW204; TexCr 299SW240. **Possession of money.**–104TexCr378, 283SW824 (testimony of prosecuting witness of amount of money in his purse day before robbery and statement in presence of accused of intent to collect money next day admissible to show accused's motive and knowledge). **Relationship of accused to servants in house robbed** is admissible in evidence. 74CalA510, 241P267. **Whether witness was afraid** or gave money willingly may be proved. 104TexCr533, 286SW204. **Evidence tending to support defense** that defendant was attempting to aid woman from whom prosecuting witness was attempting to take money which he had given her for act of intercourse is admissible. 113TexCr90, 18SW(2d)1084 (2dcase). **Evidence that prosecuting witness had pistol** has been held admissible in support of defense, that he proposed trade of pistols. 210Ky536, 276SW513. **Kind of money** taken may be proved. 104TexCr533, 286SW204.

1807–68 7F(2d)818 (articles found near scene of robbery shown to have been in possession of defendants); 75CalA447, 243P67; 97CalA56, 274P1003; CalA285P401; 168La161, 121S609; 168La322, 122S52; 170Minn504, 212NW894; 171Minn158, 213NW735; Mo 23SW(2d)152; 115Nebr302, 212NW610, 611 [cit Cyc]; 104TexCr378, 283SW824 (inconsistency of defendant's witnesses as to time defendant left town on day of robbery and fabrication of testimony by defendant); 110TexCr512, 8SW(2d)144, 60ALR290.

1807–69 212Ala606, 103S468 (exclusion of evidence of detention and examination of others in same charge erroneous where identity is issue); 324 Ill 322, 155NE310; 171Minn158, 213NW735; Mo 25SW(2d)113; 115Nebr302, 212NW610, 611 [citCyc]; 104TexCr378, 283SW824; 107TexCr606, 298SW431. **Evidence tending to identify accused held properly admitted,** though showing he had assumed false name. 75CalA561, 243P36. **Cross-examination as to alias** held proper. 316Mo31, 292SW434.

1807–70 221Ala510, 129S475; 174Ark1179, 298SW27; 125Kan608, 265P1099; 151Md456, 135A189; Mo 23SW(2d)122; 106TexCr462, 294SW200. **Illustrations.**–104TexCr533, 286SW204.

1807–72 Claim of right.–See also 82CalA459, 255P836. **Where defendants claimed to have retaken money** lost in fraudulent gambling game, exclusion of evidence of acts and declarations afterward held error. 104TexCr533, 286SW204.

1807–73 Evidence held sufficient.–316Mo42, 289SW811.

1808–75 74CalA510, 241P267; 79CalA541, 250P406; 337 Ill 413, 169NE210; 129Kan155, 281P886. **Possession of gold certificate,** similar to one stolen, denial of possession, and brief interval between robbery and search held circumstances tending to prove charge. 322 Ill 546, 153NE673. **Evidence of finding of property in possession of another** of whom defendant was accomplice is admissible. 84CalA642, 258P638.

1808–76 173Minn232, 217NW104; 110TexCr512, 8SW(2d)144, 60ALR290; 143Wash288, 255P141.

1808–76½–New. Testimony tending to show that pistol used in robbery was secured by defendant for a lawful purpose is incompetent where it is shown that it was afterward used for an unlawful purpose. 319 Ill 306, 150NE16.

1808–76⅓–New. Prior possession of revolver similar to one used in robbery is admissible. 179Minn301, 229NW99 (possession eleven months before robbery).

1808–78 17F(2d)223 (evidence held sufficient); 168Ark580, 271SW330 (conviction sustained); 69CalA609, 231P1014 (evidence held sufficient to prove attempt at robbery); 73CalA330, 238P372 (evidence sufficient); 77CalA279, 246P337; 77CalA477, 246P1083 (evidence held sufficient); 78CalA426, 248P1021 (evidence held sufficient); 102CalA647, 283P368; CalA291P214; 36GaA677, 137SE864 (evidence held sufficient); 325 Ill 410, 156NE375 (evidence held to sustain conviction); 334 Ill 549, 166NE35; 337 Ill 413, 169NE210; 119Kan564, 240P416 (evidence sufficient to sustain conviction for robbery in first degree); 221Ky148, 298SW385; 232Ky205, 22SW(2d)615; 171Minn158, 213NW735 (bank robbery); Mo 256SW464; Mo 296SW391; 49Nev386, 248P48 (evidence sufficient); NJ Sup 140A27; 221AppDiv245, 222NYS607 (evidence sufficient); 221AppDiv577, 224NYS529; 102TexCr333, 278SW216. **Evidence held sufficient.**–22AlaA300, 115S145; 34Ariz150, 268P618; 35Ariz202, 276P321; 35Ariz420, 279P256; 180Ark1081, 24SW(2d)971; 68CalA214, 228P671; 71CalA788, 236P185; 72CalA414, 237P796; 74CalA510, 241P267; 75CalA138, 242P84; 75CalA561, 243P36; 75CalA447, 243P67; 76CalA168, 243P894; 76CalA688, 245P781; 77CalA113, 246P110; 79CalA127, 249P60 (robbery in first degree; 79CalA541, 250P406; 80CalA151, 251P335; 81CalA19, 251P817; 81CalA558, 254P298; 83CalA62, 256P561; 84CalA642, 258P638; 86CalA329, 260P825; 87CalA243, 261P1068; 87CalA634, 262P50; 87CalA601, 262P369; 91CalA189, 266P972; 93CalA169, 269P197; 93CalA259, 269P671; 93CalA435, 269P687; 93CalA632, 269P951; 96CalA632, 274P601; 99CalA297, 278P449; 99CalA306, 278P492; 100CalA355, 280P136(1stcase); 101CalA103, 281P83; CalA285P401; CalA286P434 (first degree); CalA289P194; 87Colo84, 285P766; 99Fla1242, 128S820; 37GaA106, 138SE919; 321 Ill 594, 152NE516; 322 Ill 190, 152NE566; 328 Ill 446, 159NE807; 330 Ill 516, 162NE133; 331 Ill 380, 163NE149; 332 Ill 295, 163NE668, 62ALR274; 332 Ill 476, 163NE798; 333 Ill 200, 164NE150; 333 Ill 258, 164NE682 (as against claim of alibi); 333 Ill 293, 164NE692; 333 Ill 624, 165NE141; 334 Ill 412, 166NE40; 336 Ill 111, 167NE795 (robbery while armed with pistol); 336 Ill 399, 168NE306 (robbery with gun); 336 Ill 421, 168NE344 (robbery while armed with dangerous weapon); 338 Ill 590, 170NE703; 338 Ill 636, 170NE750; Ill 172NE806; Ill 173NE55; Ill 173NE474 (robbery while armed with dangerous weapon); 119Kan417, 239P756; 126Kan664, 271P283; 129Kan155, 281P886; 230Ky656, 20SW(2d)484, 66ALR1297; 232Ky568, 24SW(2d)276; 235Ky781, 32SW(2d)351; 264Mass94, 162NE7; 237Mich654, 212NW958; 239Mich695, 214NW965; 173Minn232, 217NW104; 179Minn301, 229NW99; Mo 274SW34; Mo 278SW726; Mo 284SW801; Mo 285SW737; Mo 285SW978; Mo 289SW575; Mo 289SW589; 316Mo264, 289SW636; 316Mo268, 289SW637; 316Mo122, 289SW904; 315Mo1326, 292SW413; Mo 296SW128; 317Mo354, 296SW397; Mo 300SW473; Mo 300SW723; Mo 1SW(2d)139; Mo 2SW(2d)712; 319Mo40, 2SW(2d)765; 321Mo1171, 14SW(2d)638; Mo 16SW(2d)35; Mo 18SW(2d)48; Mo 23SW(2d)152; 114Nebr783, 210NW165; 115Nebr391, 213NW347 (bank robbery); 118Nebr267, 224NW274; 50Nev212, 255P1002; NJSup 136A603; 40OklCr58, 266P733; OklCr 279P356; OklCr 279P980(2dcase); OklCr 279P982(2dcase); OklCr 280P1109; OklCr 281P315(1stcase); OklCr 282P897; OklCr 286P813(1stcase); OklCr 287P756(2dcase); OklCr 287P765; OklCr 287P842; OklCr 287P1060(2dcase); OklCr 287P1091(2dcase); OklCr 288P996; OklCr 292P383; OklCr 292P883(2dcase); OklCr 292P885(1stcase); OklCr 293P271; 91PaSuper447; 49Philippine444; 49Philippine555; 50Philippine90; RI 142A662; 104TexCr561, 286SW236; 106TexCr55, 289SW161; 106TexCr49, 290SW182; 108TexCr631, 2SW(2d)256; 108TexCr629, 2SW(2d)267; TexCr 7SW(2d)1116; TexCr 10SW(2d)98(1stcase); TexCr 12SW(2d)1017(1stcase); 112TexCr514, 17SW(2d)460; TexCr 18SW(2d)661(1stcase); Utah 276P166; 141Wash515, 252P128 (evidence held sufficient to warrant conviction). **Evidence held insufficient.**–72CalA414, 237P796; 334 Ill 549, 166NE35; 154Miss179, 122S392; 34NM454, 283P906; OklCr 274P676; OklCr 292P1056; 51Philippine393; 99TexCr135, 272SW188; 111TexCr504, 14SW(2d)1031(1stcase); 112TexCr270, 16SW(2d)239. **Evidence held to support verdict** of guilty as accessory before fact to robbery. 90Fla299, 105S834. **Evidence of use of loaded revolvers by defendants** held to warrant conviction. 77CalA477, 246P1083. **Registry of accused under assumed name in hotel with robbers, forty-eight hours after crime,** held no establishment of his implication in crime. 217AppDiv34, 216NYS478. **Proof cannot be by confessions alone.**–102TexCr415, 278SW216. **To warrant conviction, carrying death penalty,** state must prove robbery, use of firearm, or deadly weapon, and that defendants were guilty agents. 102TexCr415, 278SW216. **Unexplained possession of stolen goods** alone does not support conviction. 79CalA541, 250P406. **Demurrer to evidence** held properly overruled. Mo 278SW663. **Character of weapon used** may be shown by circumstantial evidence. 99CalA306, 278P492. **That revolvers and pistols were dangerous and deadly weapons** may be inferred from character of weapon in absence of countervailing testimony. Mo 25SW(2d)113.

1809–80 22AlaA107, 114S71. **Evidence sufficient** to show felonious intent. 72CalA414, 237P796.

1809–81 22AlaA107, 114S71; 200 Ind366, 163NE593(2dcase).

1809–82 20AlaA591, 104S347; 69CalA511, 231P596 (evidence sufficient); 74CalA510, 241P267 (evidence sufficient); 81CalA752, 254P666 (sufficient); 93CalA435, 269P687; 102CalA647, 283P368; 334 Ill 549, 166NE35; 232Ky171, 22SW(2d)586; 316Mo229, 289SW845; 221AppDiv245, 222NYS607 (evidence sufficient); 224AppDiv771, 230NYS213 [aff 249NY595, 164NE597(2dcase)]; 106TexCr394, 292SW548 (evidence sufficient); 107TexCr568, 298SW424; 141Wash515, 252P128 (evidence sufficient despite mistake in describing defendant's height made by complaining witness). **Evidence held sufficient.**–198Cal112, 243P667; 72CalA160, 236P987; 83CalA222, 263P306; 326 Ill 540, 158NE222; 339 Ill 421, 171NE557; 237Mich654, 212NW958; 177Minn363, 225NW278; 155Miss482, 124S652; Mo 289SW575; Mo 300SW1069; 116Nebr723, 218NW737. **Witness need not positively identify.**–87CalA313, 262P75. **Sufficient evidence of identity of accused.**–75CalA561, 243P36; 96CalA632, 274P601; 97CalA56, 274P1003; 336 Ill 399, 168NE306; 311Mo599, 278SW977. **Insufficient evidence of identity.**–334 Ill 549, 166NE35; 101TexCr449, 276SW272. **Identification by voice** is direct evidence. Mo 23SW(2d)179. **Insufficient evidence to identify** track in sand of average sized shoe. 109TexCr533, 5SW(2d)991. **Circumstances which may be considered by jury** are defendant's possession of stolen articles immediately after commission of offense, efforts to dispose of it, failure to deny his delivery of it to another or to deny accusation involving him in the crime. 74CalA510, 241P267. **Sufficiency of possession, to convict.**–74CalA510, 241P267. **Minor discrepancies and inaccuracies** held not to affect positive identification. 72CalA160, 236P987.

1810–84 AlaA130S904. **Evidence held sufficient.**–77CalA477, 246P1083; 41GaA252, 152SE615; 210Ky554, 276SW519; 101TexCr474, 276SW250; 111TexCr134, 11SW(2d)803.

1810–85 86CalA634, 262P50; 210Ky554, 276SW519; Mo 7SW(2d)1001.

1810–87½–New. Evidence held sufficient to show that victim carried money in pocket and that it was there when pocket was cut out at time of robbery. Mont 287P938.

1810–89 34Fed863; 21AlaA2, 106S344; 22AlaA107, 114S71 (intent); 22AlaA300, 115S145; 177Ark1039, 9SW(2d)233(2dcase); 88CalA222, 263P306; 89CalA526, 265P285; 101CalA302, 281P660 (whether person committing robbery and using gun is guilty of robbery in first or second degree); 325 Ill 57, 155NE838; 205 Iowa1024, 219NW41; 209Ky693, 273SW492 (whether defendant has been properly identified); 219

Ky745, 294SW507; 221Ky599, 299SW 203; 230Ky589, 20SW(2d)455 (defense of alibi); 232Ky214, 22SW(2d)629 (evidence held sufficient to go to jury); 168La855, 123S597 (evidence of corpus delicti held sufficient for jury); 311Mo 521, 278SW971 (question of guilt); Mo 285SW400; Mo 285SW445; 316Mo 42, 289SW811; 317Mo 336, 295SW1076; Mo 296SW391; Mo 300SW473; Mo 1 SW(2d)833; Mo 11SW(2d)1014; Mo 19 SW(2d)628; Mo 23SW(2d)179 (defendant's connection with crime held jury question); NJSup 151A376 (holding refusal to direct verdict not error); 221 AppDiv331, 223NYS339; RI 142A662; 151Va522, 145SE358. Identity of accused is question for jury. 72CalA414, 237P796. Manner of commission of crime.–72CalA414, 237P796. Connection of accused with robbery, even if not present, may warrant conviction if evidence presents jury question. 217 AppDiv34, 216NYS478. Evidence sufficient to go to jury.–74CalA510, 241P 267; 92CalA729, 268P927; CalA 288P 1095; 97Fla648, 122S2(1stcase); 324 Ill 363, 155NE316; 218Ky571, 291SW 745; 167La1003, 120S626; Minn 232 NW111; Mo 278SW726; Mo 281SW 940; 317Mo 426, 297SW358; Mo 300 SW504; 323Mo 15, 18SW(2d)474; Mo 23SW(2d)179; Mo 26SW(2d)937; 217 AppDiv34, 216NYS478; OklCr 287P803 (2dcase); 93PaSuper57; 143Wash288, 255P141. When weapon used to commit robbery is of such character as to admit but one conclusion as to its deadly nature question is for court. 324 Ill 363, 155NE316. Where facts are undisputed as to question of bona fides, and only one conclusion can be drawn therefrom by reasonable men, it is question of law for court. 145Va800, 133 SE764.

1810–90 Mo 278SW726; Mo 296SW 128; Mo 7SW(2d)1001; 150Wash466, 273P742. See also 244NY147, 155NE 79. A request to charge, etc. 81CalA 558, 254P298; Mo 7SW(2d)1001. See also 76CalA105, 243P882. Definition of crime.–Mo 285SW400 (first degree robbery). Charge properly refused as abstract.–215Ala42, 109S109. Instructions held proper.–OklCr 287P765 (robbery with firearms). Instructions held sufficient.–76CalA105, 243P882; 125 Kan608, 265P1099; Mo 278SW726; 313Mo 88, 280SW1023; Mo 281SW940; 316Mo 42, 289SW811; 316Mo 229, 289 SW845; 316Mo 213, 292SW721; 143 Wash288, 255P141. Instruction held not erroneous.–Mo 285SW445. Instruction held properly refused.–81CalA558, 254P298; 104TexCr533, 286SW204. Carrying away.–313Mo 88, 280SW1023. Instruction on grand larceny unnecessary.–313Mo 88, 280SW1023. Modified requests held proper.–76CalA105, 243P 882. Omitting word valuable from definition of robbery is proper under indictment for taking money. 325 Ill 410, 156NE375.

1811–91 Instructions held proper.–41 GaA352, 152SE914. Without consent of person in possession. 36GaA297, 136 SE815 (instruction sufficient).

1811–92 Requested instruction held properly refused.–22AlaA644, 119S248; 89CalA405, 264P1105; TexCr 16SW(2d) 232(1stcase); 111TexCr77, 11SW(2d) 316; 112TexCr239, 16SW(2d)130.

1811–93 Mo 285SW400; 244NY147, 155 NE79 (as to effect of intoxication on necessary intent). Charge as to intent.–36 GaA297, 136SE815 (sufficient); 154Miss 36, 122S187; 141Wash429, 251P855. Instructions held erroneous.–152Miss 900, 120S199; 136Wash620, 241P9. Modification of charge as to felonious intent when act follows another crime held not erroneous. 169La939, 126S 431.

1811–94 85CalA269, 259P123; 230Ky 589, 20SW(2d)455 (instruction on grand larceny held proper); 232Ky214, 22 SW(2d)629; 192NC490, 135SE324. The rule of the text, etc. 81CalA113, 252P 1063; 91CalA189, 266P972 (jury properly instructed that verdict should be guilty or not guilty); 237Mich654, 212 NW958. Instruction on larceny need not be given if there is no evidence to support it. 210Ky554, 276SW519. Instruction on larceny properly refused. Mo 7SW(2d)1001. Instruction as to larceny is not necessary where there is no evidence of any taking. 85CalA269, 259 P123. Instructions held not erroneous.–84CalA642, 258P638.

1811–94½–New. Where right to acquittal should be made to depend on intention, it is error to charge that if accused aided or encouraged by gesture he could not be acquitted. 100 TexCr135, 272SW188.

1811–94¾–New. Defendant is entitled to an instruction submitting his theory of case as where he claims he took pistol from another to prevent shooting with intention of returning it. 217Ky 94, 288SW1051.

1811–94¾–New. Under statute evidence held to warrant submission of question of lesser crime. 192NC490, 135SE324.

1811–95 83CalA34, 256P455; Mo 285 SW445; Mo 11SW(2d)1014. In California.–83CalA34, 256P455. Verdict held proper.–Mo 278SW726; Mo 285 SW400; Mo 285SW737; 316Mo 111, 289 SW564; 316Mo 264, 289SW636; 315 Mo 1326, 292SW413; OklCr 280P477.

1812–96 132Misc196, 229NYS281; 49 Philippine73; 49Philippine464; 151Va 522, 145SE358. For the construction of particular statutes, etc. 81CalA113, 252P1063; 86PaSuper455 (joint commission). Act repealing penalty being unconstitutional, valid statute prescribes it. 209Ky693, 273SW492. Instruments used to produce fear are aggravating circumstances which may increase penalty. Fla 129S112. Excessive punishment.–Mo 292SW19; 115 Nebr302, 212NW610; OklCr 281P315 (1stcase); OklCr 282P897; OklCr 287 P1091(2dcase); OklCr 289P798; OklCr 291P141; 141Wash324, 251P589; 108 WVa642, 152SE195. Punishment held not excessive.–114Nebr783, 210NW165 (nine months and three hundred dollars for harboring and protecting); OklCr 292P885(1stcase); OklCr 293P271. Possession of pistol by one principal in robbery is not possession of all as affects increased punishment, statute defining principal not applying. 221 AppDiv224, 222NYS311. Additional sentence for carrying dangerous weapon may not be imposed on unarmed person associated in commission of robbery with armed confederate. 248NY 123, 161NE443. Province of jury to determine.–Mo 292SW19. In case of codefendants, where jury on practically same evidence assessed punishment of one at forty years, life sentence imposed on other should be reduced. OklCr 292P383.

1812–96½–New. In Kentucky, since the opinion in Gibson v. Com., 204 Ky. 748, 265 SW 339, has been withdrawn, § 1159 of statutes of that state is in force. 210Ky536, 276SW513.

1812–98 317 Ill 39, 147NE400; 121Kan 369, 247P1053 (numerous assignments of error denied).

1812–99 Effect of repentance after attempt. 110Conn303, 147A801.

1813–1 Offense involves assault as well as intent to commit robbery. OhA 173 NE296.

1813–2 202 Iowa739, 210NW901 (legal existence of incorporated banking institution is not essential element of crime of entering bank with intent to rob). Indictments held sufficient.–21 AlaA289, 107S791; Mo 289SW831; 317 Mo 276, 295SW554. Information for attempt to rob held sufficient. 316Mo 111, 289SW564.

1813–5 179Ark10, 14SW(2d)245(1st case). Evidence sufficient to sustain conviction.–172Ark240, 288SW384; CalA 290P608; 123Kan19, 254P333; Mo 289 SW831; 49SD434, 207NW224; 135Wash 353, 237P497. Evidence insufficient to sustain conviction.–246NY334, 158NE 888; 104TexCr163, 283SW174 (defendant taking no actual part in assault or robbery). Evidence sufficient to go to jury.–317Mo 276, 295SW554. Charge held proper.–80CalA81, 251P688.

1813–6 Charge held sufficient.–316Mo 111, 289SW564. Instruction that larceny is included in robbery and jury may find defendant guilty of former crime held properly refused under evidence. 78CalA426, 248P1021. Requested instruction as to accused's good faith in taking money from witness held not justified by evidence. 72CalA52, 236P 355. Simple assault.–210Ky536, 276SW 513.

ROCK

1814–2 As including "shale."–Cal 292P 463.

ROOM

1815–22 Does not include screened off portion of store used for sleeping quarters. NJCh 136A801.

ROPE

1815–25½–New. Construction of wire or twisted fibers. 13CustA656.

ROUGH

1816–32½–New. "Rough or roughly" means careless, hasty, crudely done, rudely, characterized by violent or disorderly action. 234Mich505, 208NW746.

ROUGH HANDLING

1816–33 Negligent switching is rough handling. 234Mich505, 208NW746.

ROUGHHEW

1816–33½–New. To hew coarsely without smoothing. 11CustA457.

ROUND

1816–34½–New. As verb, "round" means to give curved form to; not angular; to go round wholly or in part; to go round corner or point. Iowa 232NW 760.

ROUTE

1817–42 Route in more general sense means course, line of travel, or transit. 13LaA459, 128S56.

RULE or RULES

1818–60 31NM120, 241P1027, 1043 [cit Cyc].

RUMOR

1821–79 76Mont574, 248P179.
1822–80 76Mont574, 248P179.
1822–81 76Mont574, 248P179.

RUN

1822–83½–New. To conduct; manage; carry on; as to run factory, hotel or business, and may be characterized as "running the business." 98Vt466, 129A 306.

RUNNING ALONG

1822–86½–New. Term means contiguous. 148Md438, 129A650.

RUPTURE

1823–98 81Mont351, 263P101.
1823–98½–New. Also generally, breaking or bursting asunder. 114 OhSt549, 151NE671.
1823–99½–New. Also to open or part, without extreme violence; 114 OhSt549, 151NE671.
1823–99⅞–New. distinguished from explosion. 114 OhSt549, 151NE671.

RUT

1823–5½–New. Rut and banks thereof in road or street was object within meaning of collision in contract of insurance. TexCivA 270SW1055.

SADDLERY

1824–17½–New. Material for making saddles and harness. 13CustA241.

SAID

1825–30 A word of reference, etc. Ala 121S815.

SAIL

1826–31 Vessel "sails" when she has intended cargo on board and is in complete readiness for voyage with stores and crew on board. 42F(2d)669.

SALES

35 Cyc—25–1 164Ga190, 138SE55; 87 IndA83, 154NE29; 203 Iowa610, 213NW

401; 25 OhNPNS178; TexCivA 58SW (2d)1037; 104WVa178, 139SE653. Other definitions.–318Mo 581, 300SW765; 118Nebr383, 225NW46; 190NC536, 130 SE500. Sale with right of redemption is sale in which vendor reserves right to take back property by returning price paid. 160La175, 106S735. Two active agents are necessary to constitute transaction a sale; seller and purchaser. 235 Mich206, 209NW87.

27-2 25 OhNPNS178.

27-3 148Md628, 129A915. Where creditor received proceeds of sale of his debtor's goods, it was held there was no sale. 58 OntL179, [1926] 1DomLR430. Promise to pay is an essential part of sale contract. 221Ala472, 129S39.

27-6 73Mont139, 235P767, 40ALR590. "Sale distinguished."–14F(2d)659; CalA 273P161; 87 IndA103, 159NE19. Agreement held to constitute executory sales contract.–194Wis369, 216NW505. Contract for sale of business held sale where parties were entitled to specific performance. 160La109, 106S711.

27-7 See also 6F(2d)633. In Porto Rico.–33PortoRico 147.

27-11 Agency to buy or sell.–87CalA 642, 262P415 (sale and not consignment); 88CalA418 (contract one of agency and not of sale); Del 146A605 (contract held to indicate agency relationship); 126Kan519, 268P859; 214Ky 76, 282SW769; TexCivA 22SW(2d)504 (consignment and not sale); 100Vt161, 135A702; 155Wash182, 283P695 (contract of agency and not of sale). Contract held exclusive selling agency and not executory sale contract. 214AppDiv 606, 212NYS710. Contract construed one of agency and not of sale.–178Minn 114. 226NW206(2dcase).

27-12 93CalA770, 270P235; 164Ga190, 138SE55. Agency and not sale and purchase of goods held to be created by contract whereby person gave note for price of goods in order to procure territory for sale thereof. 200 Iowa608, 203 NW710. In Porto Rico.–32PortoRico 51. Transaction construed as sale and not assignment of contract to sell.–125 Misc918, 212NYS324. Transaction held sale and not joint enterprise of parties. 114 OhSt479, 151NE685. Transaction one of agency in its inception held not to show that as to subsequent transactions parties acted as principal and agent and not as vendor and purchaser. 34GaA345, 129SE555. Contract of agency.–242NY376, 152NE120. Transaction held one of buyer and seller and not agency.–121Kan793, 250P286. As to distinction between sale and agency.–217 Ala399, 116S420. Agency does not become sale by contract as to number of books and that unsold books should be carried to account of agent. 37F(2d) 637. Contract has been held not to show sale but merely agency. SC 155 SE291. As distinguished from agency. –251Mich450, 232NW181(2dcase).

23-13 Relation held to be that of principal and agent, not vendor and purchaser.–Sask [1925] 3DomLR565. "Lease" distinguished.–158La105, 103S 526.

23-14½-New. To determine whether agreement involves sale or agency, court looks to intention. 222Ky164, 300SW 350.

23-14⅓-New. That instrument bears title, "Contract of Sale," is insufficient of itself to prove sale. MoA 4SW(2d)489.

23-14¼-New. Contract for sale, buyer to pay interest on unpaid price, has been held not an option, but a sale. 299 Pa372, 149A647.

28-20 TexCivA 275SW211. Evidence.–123Kan24, 254P386. Determination.–IndA 170NE351.

29-21 27F(2d)74; 39F(2d)466; IndA 170NE351; TexCivA 275SW211.

29-23 Goods "on memorandum."–132 Misc455, 230NYS102.

30-26 39F(2d)76; 8LaA61; 158Tenn 126, 11SW(2d)874. Agreement supplemental to consignment contract allowing commission for sale of consigned goods did not create sale to consignee. 298Pa530, 148A865.

30-27 219Ala65, 121S59; 9LaA743, 119 S564. See also 98PaSuper127.

31-29 49ND1059, 194NW824; 138 Okl 251, 280P815(2dcase).

32-32 204 Iowa1296, 210NW580; 124 Kan312, 259P795 (return of any merchantable grain and payment of difference in value is sale); 242Mich472, 219 NW610, 611 [citCyc].

33-35 85PaSuper281 (lease with option to buy). Contract in form of lease with option to purchase at nominal sum held sale. 163La1057, 113S454. Transactions held sales.–164La1103, 115S285.

33-37 Intention of parties.–121Kan488, 247P441.

34-39 Whether transfer with right to repurchase is sale or pledge depends on circumstances of particular case. 73 CalA44, 238P177.

34-42½-New. Transfer of assets of partnership to wife of a partner who paid all firm debts to save husband's name and business reputation is absolute transfer and not as collateral. 8F(2d)481.

34-42⅓-New. Where seller retains goods and buyer has right to redeem it is held a sale and title passes. Can [1927] 2DomLR289.

39-63 In case of sale with right to repurchase where vendee is to take possession of and operate store sold, agreement to pay for such services by vendor is implied, unless such liability is excluded by express terms of agreement. 73CalA44, 238P177.

39-64 73CalA44, 238P177.

40-67 See also 87PaSuper19.

40-68 252Mass279, 147NE321.

41-70½-New. Uniform Sales Act should receive uniform construction. Nebr 229 NW22.

41-70⅓-New. It prescribes rules of law which govern any cases coming within its provisions. Nebr 229NW22.

41-70¼-New. Under the Act any right, duty, or liability which would arise under contract to sell or sale by implication of law may be negatived or varied by express agreement. Nebr 229NW22.

41-71 221MoA1066, 295SW838; Wis 232NW547. Parties must agree on material and necessary details.–292Pa12, 140A542.

41-72 Agreement held invalid as sale for ambiguity and impossibility of consummation because of uncertainty as to execution. 69Utah331, 255P175.

41-75½-New. To constitute sale there must be transfer of beneficial interest from vendor to vendee. 166Ga820, 144 SE747.

41-75⅓-New. Contract held not so indefinite as to authorize seller to rescind. Ida 292P235.

41-76 Sale to purchasing agent is sale to principal.–218AppDiv22, 217NYS652. Joint and several contract as to parties.–319Mo 899, 8SW(2d)834.

41-76½-New. Principal is liable to seller regardless of whether sale was outright or on commission basis. 149 Va221, 141SE389.

41-77 Test of capacity is whether party knew what he was doing. WVa 153SE 244.

41-78 256Mass436, 152NE893 (mistake in name of seller held not to prevent enforcement); NJSup 137A214 (principal, selling throught agent, disclosed or undisclosed); 194Wis142, 215NW905.

41-79 44F(2d)152; 172Ark117, 288SW 377; 3LaA449; MoA 256SW516; MoA 256SW1099; 53SD297, 220NW497. Seller of lighting plant is obligated to deliver and install same under separate simultaneous contracts between buyer and seller, and buyer and installer, constituting single contract between seller and buyer. 35GaA550, 134SE142. Corporation owning oil lease which was partitioned between corporation and one who had contracted to develop lease held not liable to seller of equipment to such contractor, though it was located on acreage set off to corporation. TexCivA 294SW270. Joint obligation.–319Mo 899, 8SW(2d)834. Signature.–39GaA 742, 148SE349. Buyer of goods for business he operates in another's name is liable. AlaA 130S166.

42-80 But see TexCivA 11SW(2d)527. For one at whose solicitation goods are sold to another to become liable for price, there must be mutual agreement that relation of debtor and creditor exists. 214Ala62, 106S396.

42-82 MoA 15SW(2d)945. But see 152 Wash205, 277P447.

43-85 141Miss881, 106S110; 220MoA 1034, 278SW1081.

43-86 220MoA1034, 278SW1081.

43-88 Evidence held admissible.–MoA 297SW721. Evidence held sufficient to show defendant purchased goods for himself. AlaA 130S166.

43-89 32F(2d)23. Sale, nominally to certain company, but in fact to its customers, regarded as sale to such customers. 215Ala73, 109S364. Evidence held sufficient to establish that defendant was buyer's agent. 149Va221, 141SE 389.

43-90½-New. The sufficiency of the evidence was considered. 9LaA368, 120 S503; 177Minn560, 225NW725; 148SC 152, 145SE699; TexCivA 12SW(2d) 1056.

43-90⅓-New. Evidence held sufficient to support verdict finding contract not made with defendant personally. 85 OhA532, 172NE637.

43-90¼-New. Evidence held sufficient to show that defendant was contracting for himself and not for corporation. LaA 130S122.

44-91 32F(2d)23; 263Mass147, 160NE 821; 220MoA1034, 278SW1081; MoA 297SW721; 57ND824, 224NW668. Sale on credit of third person.–220MoA1034, 278SW1081.

44-94 56ND223, 216NW562. Uniform Sales Act.–56ND921, 219NW946.

44-94½-New. Contract must be certain as to subject matter. 36GaA230, 136 SE180.

44-94⅓-New. Where subject matter is too indefinite to be capable of identification, contract is incomplete, uncertain, and not binding. 218AppDiv654, 219 NYS331.

45-95 7F(2d)38 (sale of all spark plugs which plaintiff might require in normal course of business held not invalid for indefiniteness); 23F(2d)447; Wis 232 NW547.

45-96 35GaA635, 133SE634.

45-98 CalA 288P721. Contract for entire output of a producer is not void for indefiniteness. 5F(2d)723.

45-1 243Mich698, 220NW760.

46-5 35GaA635, 133SE634. See also Wis 232NW547. Validity of contract.–35GaA635, 133SE634.

46-8 Wis 232NW547.

47-9 221Ala469, 129S46; 164La767, 114S647; 7LaA247; 7LaA453.

47-14 12F(2d)676; 176Minn294, 223 NW137(2dcase).

47-15 246 IllA558; OhA 173NE39; Tex CivA 2SW(2d)344.

48-17 24F(2d)884; CalA 291P856; 164 Ga712, 139SE417; 36GaA230, 136SE 180; MoA 4SW(2d)489; 292Pa12, 140 A542. But see 137Misc491, 244NYS4. Indefiniteness to make sale contract invalid must reach a point where construction is futile. 228AppDiv113, 239 NYS182. Nature of security to be given for deferred payments was not agreed on, contract has been held sufficiently definite to sustain action for damages. 137Misc491, 244NYS4.

48-17½-New. Mutual promises of parties are sufficient consideration. 103 Conn624, 131A420.

48-17⅓-New. There is sufficient consideration where each party agrees to do certain things and each promise is made in consideration of promise of other party. 103Conn624, 131A420.

48-19 152Miss708, 121S817; MoA 16 SW(2d)742; 254NY179, 172NE462; 228 AppDiv113, 239NYS182 (subject to possible tariff revision). Certainty.–MoA 16 SW(2d)742. Price specified is not sufficiently definite where it is that paid by other railroads during certain year. 27F(2d)240. Fixation of price though necessary element of contract of sale may be made to depend on future event relative to transaction. 220Ala568, 126S 637. Provision for determination of price by appraisal to be effected jointly by parties is not suspensive condition and buyer is liable for true value where he fails to join in appraisal. 50Philippine387.

49-22 246NY174, 158NE64. In equity, etc.–246NY174, 158NE64.

49-23 270US124, 46SCt308, 70Led497;

126Me609, 139A680.

50-25 224AppDiv392, 231NYS148.

50-27 216Ky440, 288SW342; 283Pa434, 129A559 (mutuality sufficient); Tex CivA 9SW(2d)762; 104WVa178, 139SE653. See also 92CalA457, 268P490. **Consent of parties is essential element** of contract of sale. 36GaA230, 136SE180.

50-28 129 Or427, 275P684. **Order through agent.**-201 Iowa306, 207NW347.

50-30 TexCivA 300SW218.

51-31 246 IllA271; 202 Iowa786, 211NW230; 10LaA469, 121S335 (order taken by agent); TexCivA 278SW493; Tex CivA 285SW681; 144Wash229, 257P632. **Order to agent.**-123Kan454, 255P1116, 91PaSuper286. **Order for goods may be cancelled at any time before acceptance,** regardless of offeror's reference to order as "contract." 202 Iowa786, 211NW230.

51-32 TexCivA 285SW681.

52-38 Seller's conduct may be construed as urging buyer to keep unsatisfactory goods for further trial thus excusing unreasonable delay in rejecting goods. 103CalA486, 284P715.

52-39½-New. Writing stating seller has "this day sold to you" goods followed by details, addressed to buyer is a valid offer. 103Conn624, 131A420.

52-39½-New. Certainty.-Order for opera chairs, giving description, kind, approximate number, and price, and providing that any decrease in price shall be rebated by seller, and specifying terms of payment, is sufficiently definite where buyer later designates number to be shipped. MoA 16SW(2d)107.

52-40 23F(2d)436; 181Ark415, 26SW(2d)80; 73CalA467, 238P825 (defendant's offer to purchase and plaintiff's acceptance construed as one entire contract binding on both parties); 77CalA291, 246P332; 123Kan474, 255P973; Iowa 232NW689; 249Mich12, 227NW700 (buyer in confirming second contract unqualifiedly approved original contract); 220AppDiv160, 221NYS11; 152SC236, 149SE225; TexCivA 278SW278; 146Va488, 131SE810. **An order for goods,** etc. 207 Iowa826, 221NW843; Iowa 232NW689; 123Kan454, 255P1116; MoA 18SW(2d)554; 133SC281, 130SE870; Alta [1930] 2DomLR982. **Insufficient acceptance.**-237 IllA334. **Acknowledgment of receipt of an order** and statement that same shall have prompt attention or prompt and careful attention is not acceptance of order. 123Kan454, 255P1116. **Cable "Shipping both orders in April"** held written acceptance within terms of order. 125Misc898, 211NYS819. **Contract is complete** where seller's agent confirms it on its face. 232 IllA266. **Contract of sale is made** by order and agreement to buy by one person and agreement to sell and deliver by other. 51ND357, 199NW861. **In action for materials furnished to defendant's contractor,** time of defendant's acceptance of order is immaterial. 38Wyo 530, 269P27. **Letter of confirmation following cable acceptance** has no affect on contractual obligation. 125Misc898, 211NYS819. **Seller's failure to disavow agent's authority** held bound by acceptance. 163La799, 112S726. **Signing writing containing statement that seller has "this day sold to"** buyer, followed by details constitutes valid acceptance and creates mutual binding agreement. 103Conn624, 131A420. **Sufficient acceptance.**-254 Mass438, 150NE224; MoA 23SW(2d)1098. **Buyer ordering machinery** held bound to know of provision that order was not binding until approved. 181 Ark415, 26SW(2d)80.

52-41 163La799, 112S726 (letter acknowledging buyer's telegram and stating when shipment could be made held valid acceptance); 134 Okl 248, 273P258; 137 Okl 212, 278P1083 (offer and acceptance by mail); TexCivA 278SW278. **Manner of acceptance prescribed.**-37GaA198, 139SE366. **Acknowledgment of order promising shipment on specified date or when draft received,** if acceptance constituted agreement as to time of shipment, left indefinite in order. 133SC281, 130SE870. **Post card acknowledging receipt of order** and advising that it will receive prompt attention is not a binding acceptance, especially where not so intended. 133SC281, 130SE870.

53-42 123Kan474, 255P973; 10LaA469, 121S335; 87PaSuper338, 339 [quotCyc]. **Where goods are sent without order,** purchaser may accept or reject but must indicate rejection to seller. 27F(2d)791.

53-43 Seller retaining buyer's down payment cannot claim that his offer to sell is no longer open. 207 Iowa1063, 224NW80.

53-44 76CalA683, 245P766.

53-45 77CalA291, 246P332; 6LaA430; 191NC313, 131SE754. **Acceptance of counter offer.**-88PaSuper203; TexCivA 6SW(2d)211; 57 OntL505, [1925] 3DomLR527 [app allowed on other grounds 58 OntL130, [1926] 1DomLR199]. **Acceptance on condition.**-191NC313, 131SE754. **Offer by broker,** with limited authority to buy for buyer, in excess of authority, when accepted by buyer becomes binding at invoice price, though buyer had privilege of rejecting. 27F(2d)791.

53-46 202 Iowa786, 211NW230.

53-47 3F(2d)807; 16F(2d)39; 20F(2d)635, 636 [citCJ]; 23F(2d)436; 87 Colo 110, 285P764; 33GaA579, 127SE819; 218AppDiv179, 218NYS24; 138 Okl 67, 280P427(2dcase); 291Pa85, 139A615; 44Philippine326; TexCivA 15SW(2d)150. See also LaA 130S843. **Immaterial variance, etc.**-38GaA793, 145SE886; 134 Okl 248, 273P258 (order for sudan grass seed and acceptance of order for alfalfa and sudan grass seed). **Acceptance, which designated particular place** from which delivery was to be made of order for sugar, has been held sufficient where seller was given right of election. 267US233, 45SCt295, 69Led589. **Confirmations in writing by both seller and buyer of oral negotiation over telephone,** which differ by imposition of new condition in seller's confirmation favorable to him, do not render buyer liable for refusing shipment because of omission to reply to seller's confirmation. 120Kan479, 243P1039. **Order subject to acceptance by seller** held not made contract till such acceptance within reasonable time. 234 IllA366. **Unconditional acceptance not shown by acceptance,** providing credit arrangements are satisfactory. 34GaA260, 129SE119. By acceptance requiring goods to be ordered out "within four months from date." 34GaA260, 129SE119. **Letter stating that goods shipped to writer were not in contract** may be construed as rejection of offer. 103CalA486, 284P715. **Where seller's agent inserts additional separate order in order given,** buyer's repudiation of such additional order does not relieve him from obligation on original order accepted by seller. 6LaA124.

54-48 8F(2d)807; 267US233, 45SCt295, 69Led589 (acceptance diverting basis for calculating price differently from order, but amount being same in both cases, held sufficient). **Insufficient acceptance.**-57 OntL505, [1925] 3DomLR927 [app allowed on other grounds 58 OntL130, [1926] 1DomLR199]. **Certainty.**-33F(2d)657.

54-49 23AlaA244, 123S260 (statement that price is too low). **Expression of doubt** does not affect acceptance. 214 AppDiv626, 212NYS444.

54-50 8F(2d)807; 16F(2d)39; 256 Mass66, 152NE347; 218AppDiv179, 218NYS24; 224AppDiv392, 231NYS148; 224AppDiv618, 231NYS483; 44Philippine326. **Counteroffer rejected by offerors** prevents binding contract. 213NYS541 (regardless of reasons for rejection of counteroffer). **Delivery of installments** where order called for entire shipment is not an acceptance though coupled with acknowledgment of receipt of original order. 57 OntL505, [1925] 3DomLR927 [app allowed on other grounds 58 OntL130, [1926] 1DomLR199].

54-51 100CalA315, 279P1076 (conditions incorporated in original offer which was rejected form no part of contract).

55-52 163La799, 112S726; 179Minn385, 229NW348; 114 Okl 161, 245P39, 47ALR156; TexCivA 13SW(2d)923. **Where offeror stipulates that he must receive acceptance, contract is not binding** till acceptance reaches him. Tex CivA 278SW278.

55-52½-New. Approval of sample called for by contract is essential before there can be any binding agreement. 261Mass397, 158NE751.

55-53 207 Iowa826, 221NW843; 123 Kan474, 255P973; 143Wash557, 255P919, 62ALR444; 144Wash229, 257P632; 57 OntL505, [1925] 3DomLR927 [app allowed on other grounds 58 OntL130, [1926] 1DomLR199] (acceptance of installment deliveries). See also 37GaA198, 139SE366. **Buyer cannot impose new conditions** after shipment by carrier has gone well forward on its way toward destination. 122Kan643, 253P412. **Uniform Sales Act declaring rule** held inapplicable to conditional orders. 43 Ida337, 252P186.

55-54 171Ark1188, 287SW755. **The order is not accepted,** etc. TexCommnA 280SW517.

55-55 201 Iowa642, 207NW743; Iowa 229NW756; 225Ky418, 9SW(2d)119; 163La159, 111S661; Oh 158NE751; 5 PaDist&Co 652; 149Va147, 140SE275; 49RI 99, 140A3. **Omission of time of sale and warranty does not render contract incomplete** where it states quantity and price of goods sold. 24F(2d)329.

56-56 124Kan132, 135, 257P746 [quot Cyc]; 170La270, 127S624; 44Philippine326 (illustration of option to buy sugar mill). See also 227Ky73, 11SW(2d)991; Wis 233NW79. **Time is of the essence,** etc. 68CalA83, 228P717. **Option does not transfer** any interest in subject-matter to optionee. 170La270, 127S624. **What is reasonable time** to exercise option depends on circumstances. Wis 233NW79.

56-57 81NH535, 129A374 (option need not be supported by independent consideration). **In Philippines.**-44Philippine326.

56-58 88 IndA5, 163NE112; 146Miss651, 111S591.

57-59 3Del 390, 138A598; 170La270, 127S624; 144Wash229, 257P632. **Holding goods two months** held acceptance. 144Wash229, 257P632.

57-60 Acceptance must be plain and unconditional. 44Philippine326.

57-61 28F(2d)942.

57-63 Construction of contract.-81NH535, 129A374 (price capable of judicial ascertainment sufficiently exact).

57-64 7F(2d)38; 28F(2d)942.

58-66 Iowa 228NW886.

58-67 Iowa 228NW886; Iowa 229NW756 (failure to dissent from written confirmation of telephonic agreement); 227Ky73, 11SW(2d)991; NB [1929] 1DomLR34. **Course of dealing.**-53SD77, 220NW146. **Silence may operate as acceptance** where order taken by agent subject to approval is not rejected within reasonable time. 100Vt161, 135A702.

58-68½-New. Surreptitious transfer of possession without knowledge of buyer does not give rise to implied contract. 130 Okl 104, 265P108.

59-69 126Me609, 139A680.

59-70 170Ark398, 280SW1; 245 IllA531 [citCyc]; TexCivA 292SW251 [quot Cyc]. See also 133SC274, 130SE886. **Provision as to freight allowance contained in invoice** is binding on buyer receiving shipment without objection. 170Ark398, 280SW1. Buyer's failure to read invoice is not excused by previous custom in reference to freight allowance where seller's agent had previously demanded change in such allowance. 170 Ark398, 280SW1. **Where purchaser has privilege of rejecting goods** but sells them, acceptance results, even though buyer directs that sale be made for seller's account. 27F(2d)791.

59-73½-New. Contract not too vague and indefinite for enforcement. 148Md628, 129A915.

60-83 13LaA154, 127S412. **Correction of mistake.**-14F(2d)339.

61-89 Buyer may deny knowledge of contents where seller knows there is misapprehension as to thing sold in buyer's

mind. 175Ark659, 300SW390. **Seller must explain identity to buyer** where he knows buyer is under misapprehension as to identity. 175Ark659, 300SW 390.

62-92 [1926]CanSC692, [1926] 4DomLR 568.

62-95 **In case of mutual mistake as to terms,** either party might rescind. 161 La198, 108S414.

63-97 225Ky510, 9SW(2d)226.

63-99 47 Ida675, 277P1112; 13LaA557, 128S189; 6LaA124, 126 [citCyc]; 240 Mich79, 214NW973; 155Miss876, 125 S248; MoA 24SW(2d)670; 216AppDiv 583, 215NYS694. But see 11LaA541, 121 S617.

63-3 But see 102NJL468, 133A391 (holding testimony of fraudulent misrepresentations inadmissible in view of presumption that purchaser read contract).

63-7 **Representation must be made before execution of contract.**–100CalA409, 279P1083.

63-8 21F(2d)818; 261Mass116, 158NE 344; 263Mass76, 160NE408; 240Mich 64, 214NW964; Miss 130S290; 49SD1, 205NW710; Vt 146A248; 153Wash679, 280P78.

64-10 218Ala196, 118S377.

64-12½-New. **Seller's promise to furnish salesman to assist in making sales** is not representation of present fact so as to constitute misrepresentation. 230 Ky194, 18SW(2d)1006.

64-13 14F(2d)852.

64-14 93CalA328, 269P740; 242Mich 266, 218NW650. **It is essential that seller knowingly made representation** with intent to deceive buyer. 40GaA768, 151SE654.

64-15 Miss 130S290.

64-16 49SD1, 205NW710.

65-17 Ark 31SW(2d)539.

65-24 76CalA33, 243P707; 261Mass116, 158NE344. **Representation that 1914 truck** was made in 1916 held immaterial. 76CalA33, 243P707. **Representation of seller to secure registration of truck** in buyer's name held material. 76CalA33, 243P707.

66-25 CalA 291P681; 240Mich64, 214 NW964.

66-26 93CalA328, 269P740.

66-27 176Ark830, 4SW(2d)515; 180 Ark892, 23SW(2d)253; IndA 170NE331; 235Ky574, 31SW(2d)910; 261Mass116, 158NE344; TexCivA 25SW(2d)947; Tex CivA 26SW(2d)1095; 135Wash189, 237 P305.

66-28 La 129S678.

67-30 **Representation of financial condition, by its terms made continuing** may be relied on until party to whom it is made is put on notice that he can no longer rely on it. TexCivA 274SW1023. **Representation of financial condition made as basis of credit** may be relied on only for reasonable time ordinarily. Tex CivA 274SW1023.

67-31 21F(2d)818; 168Ark572, 271SW 333; 93CalA328, 269P740; 292Pa371, 141 A241; TexCivA 295SW352. **Original truth or falsity of representation of financial condition becomes immaterial when party to whom made is put on notice** that he can no longer rely thereon. TexCivA 274SW1023. **Where buyer was inexperienced and studied efforts were made to prevent investigation,** he has right to rely on representations of seller of hotel fixtures as to number of rooms in hotel, condition, income from property, and seller's interest. 77Colo 533, 238P69. **Buyer of partner's interest in firm** has right to rely on statements of partner who kept books as to whether accounts are good or bad. 23F(2d)977. **Reliance by buyer on statement** by seller's agent of probable quality of property bought is not justified where seller expressly declined to guarantee such quality. 87IndA674, 162NE416.

67-32 176Ark830, 4SW(2d)515; 76CalA 278, 244P916 (appreciable injury is sufficient); TexCivA 18SW(2d)429.

67-33 176Ark212, 2SW(2d)1109; MoA 256SW520. **Representations of a promissory character,** etc. 194NC344, 139SE 694. **Where writing excludes representations.**–153Miss185, 121S814; NJSup 146A677(2dcase); 194NC344, 139SE694. **Written contract stating character of article sold,** without mistake or fraud, cannot be avoided for false representation of quality. CalA 261P489. **Buyer is not estopped to claim rescission** because misrepresentations are not contained in written contract. CalA 287P139.

68-34 221Ala640, 130S386; Tex CommnA 292SW198 (buyer induced to sign by fraud of seller's agent may rescind unless he subsequently waives fraud).

68-35 194NC344, 139SE694.

68-36 **Failure to disclose fact** that seller had no fiduciary obligation to disclose is not, in absence of misrepresentation, ground for avoidance of contract. 27F(2d)240. **Rule of caveat emptor does not apply** where seller knowingly makes false statements. CalA 287P139. **In South Carolina.**–151SC506, 149SE271.

68-37 40GaA768, 151SE654 (must be actual fraud); 226AppDiv235, 234NYS 463; 292Pa371, 141A241.

69-39 128 Or191, 274P128.

70-42 125Kan670, 673, 265P1110 [cit Cyc].

70-46 164Ga311, 138SE580; GaA 155 SE211; TexCivA 295SW352.

71-48 164Ga311, 138SE580, 581 [cit Cyc].

71-49 126Misc845, 214NYS452; 120 Or 607, 253P531; 123 Or111, 261P72; 292 Pa371, 141A241.

71-51 CalA 289P185; 164Ga311, 138SE 580; Kan 290P1; 126Misc845, 214NYS 452; 119 Okl 233, 249P398; 135Wash 189, 237P305.

72-53 126Misc845, 214NYS452.

72-54 135Wash189, 237P305.

72-57 120 Or607, 253P531.

72-58 133Misc229, 231NYS544; 149 Wash561, 271P823.

73-60 120Kan278, 243P316 (though contract in writing and silent as to matter misrepresented); 149Wash561, 271 P823(2dcase). **Representation that paint will stand vibration without cracking** is one of fact and not opinion. 134Misc 638, 236NYS337.

73-61 MoA 256SW520; 138 Okl 58, 280 P460 (equal opportunity of inspection precludes right to rely).

73-62 203Cal 233, 263P802.

73-63 82 IndA667, 147NE294 (representations mere expressions of opinion and not fraudulent where buyer was only required to pay for quantity removed).

73-65 CalA 293P156; 208 Iowa254, 225 NW411.

74-66 CalA 293P156.

74-67 23F(2d)977; 7Alaska168; 176 Ark830, 4SW(2d)515; La 129S678; 190 NC169, 129SE406 (failure to read contract); 292Pa371, 141A241; 195Wis264, 218NW174. **Where defects in machine are patent and easily discoverable** buyer cannot defend against suit by seller on contract on ground that seller's implied misrepresentations as to character of machine constituted fraud. 36 GaA506, 137SE409.

74-68 204Cal 342, 268P342, 58ALR 1176; 100CalA43, 279P680; CalA 289 P185; 151SC506, 149SE271 (buyer held not required to make full inspection of locomotive where seller made oral and written representations). **Notice that locomotive is second hand** does not put buyer on notice not to rely on seller's representations. 151SC506, 149SE271.

74-69 23F(2d)977; 168Ark572, 271SW 333; 93CalA328, 269P740; 100CalA 409, 279P1083.

75-70 40GaA559, 150SE600 (no form of warranty can protect person committing actual fraud). But see 126Kan563, 268P738.

75-71 126Kan563, 268P738.

75-71½-New. Misrepresentations by seller as to who would make goods rendered contract voidable, not void. 242 IllA151.

75-74 83Colo 374, 265P694.

77-79 180Ark183, 20SW(2d)864 (letter stating improvement in affairs of buyer construed).

77-84 127Me503, 144A649.

79-90 95CalA7, 271P1096(2dcase).

80-93 11F(2d)873; TexCommnA 298 SW545; TexCivA 293SW632.

83-7 93CalA685, 270P239; 94CalA241, 270P1008; 167La28, 118S597; 140Miss 643, 106S433; NJSup 133A772; 138 Okl 251, 280P815(2dcase); 95PaSuper606 (transaction held outright sale and not on consignment); TexCivA 10SW(2d) 579. **The sufficiency of the evidence,** etc. 16F(2d)39; Ark 31SW(2d)138; 83 CalA399, 256P879; CalA 268P443; 98 CalA706, 277P506; CalA 292P146; 86 Colo 270, 281P111; 36GaA195, 136SE 110; 37GaA200, 139SE431; 42 Ida505, 247P796; 48 Ida221, 281P1; 201 Iowa 306, 207NW347; 207 Iowa843, 223NW 895; Iowa 230NW371; 123Kan454, 255 P1116 (insufficient to show order of agent accepted by seller); 129Kan55, 281P897 (mental capacity of seller); 165La788, 116S186; 167La255, 119S40; 9LaA410, 119S550; 10LaA469, 121S335; 11LaA57, 123S150; Mass 172NE595; MoA 18SW(2d)554; Mont 293P288; 82 NH487, 136A139; NJSup 145A231(2d case); 223AppDiv134, 227NYS449; 58 ND58, 225NW79; 117 Okl 300, 246P220 (sale to contractor for use in developing mining lease insufficient to show sale to owner of lease); 283Pa545, 129A580; TexCivA 275SW235; TexCivA 282SW 824; TexCivA 297SW634; TexCivA 15 SW(2d)150; TexCivA 22SW(2d)502; 148Va167, 138SE515; 143Wash671, 255 P1028, 52ALR1533; 153Wash679, 280 P78; 38Wyo 530, 269P27; BC [1930] 4 DomLR158. **Acceptance of order.**–22 AlaA217, 114S275. **Acts not connected with the transaction,** etc. 8F(2d)807. **Burden of proof** is on seller to show its contract to deliver coal to a corporation, accepted and signed by W, trustee bound him personally. 218MoA60, 262 SW66. **Conclusion that one signing purchase order was liable** therefor, held warranted by evidence. TexCivA 27SW (2d)915. **Evidence held admissible.**–177 Ark993, 8SW(2d)457; 100Vt161, 135A 702. **Evidence held to show** that shipments of watermelon were as consignments for sale for shippers account and not as outright sales. 136SC389, 134SE 292. No unconditional meeting of minds of parties to constitute contract. 218 AppDiv179, 218NYS24. Offeror's stipulation for receipt of acceptance before it bound him. TexCivA 278SW278. Cotton purchased in name of one corporation was in fact bought and deposited with warehouse company by another corporation. 160Ga237, 127SE744. Plaintiff's acceptance of defendant's proposal to buy paintings. 126Misc491, 215 NYS24 (and defendant's cablegram was in response thereto, not to earlier option to purchase). **Evidence held not to show** duress by purchaser of paintings. 126 Misc491, 215NYS24. **Evidence held sufficient to take case against mother to jury for goods ordered by son conducting business,** whether viewed as one of agency or estoppel. 136SC218, 131SE 424, 43ALR1212. **Evidence held insufficient** to show approval of sample essential to binding effect of contract. Oh 158NE751. **Evidence of plaintiff's sale of garage equipment to third person without consulting defendant** held to negative plaintiff's claim of prior sale to defendant. 69Utah331, 255P175. **Rejected contract held inadmissible.**–220 MoA821, 278SW822.

83-7½-New. **Burden of proof is on counterclaimant** to establish agreement to sell additional order. 142Va331, 128 SE518.

83-7⅓-New. **Burden of proof.** Seller has to show materials sold directly to defendant or that payment had been assumed as primary obligation for valuable consideration. 213Ala646, 106S42.

83-7¼-New. Seller must show to reasonable satisfaction of jury that materials were sold directly to defendant. 213Ala646, 106S42 (or that defendant assumed obligation to pay for valuable consideration).

83-7½-New. Sales note and testimony of subagent admissible in action for breach of contract. 143Va12, 129SE374.

83-7⅙-New. **Evidence held insufficient** to permit personal recovery against defendant. 213Ala646, 106S42.

83-7⅐-New. **Evidence held insufficient**

to show defendant's personal obligation to pay. 213Ala646, 106S42 (for goods sold and delivered).

83–7⅛–New. Evidence of post card describing order in definite terms and accepting it is sufficient to show binding contract. 22AlaA217, 114S275.

83–7⅙–New. Authentic sales are assailable only by counter letter or by answers of other party to interrogatories on facts and articles. **LaA** 129S416.

83–7⅒–New. Buyer is conclusively presumed to know and understand terms and legal effect of contract, absent fraud or mistake. **TexCommnA** 27SW(2d) 115.

83–8 168Ark572, 271SW333; 1LaA295; 242Mich266, 218NW650; 144 Okl 275, 291P66; TexCivA 299SW321. **Exclusion of irrelevant evidence held not error.**–217Ala32, 114S414. **Evidence held insufficient.**–Mich 233NW371.

83–9 242Mich266, 218NW650; 292Pa 371, 141A241.

83–10 23F(2d)977; 168Ark572, 271SW 333; 242Mich266, 218NW650; 292Pa 371, 141A241. **Knowledge of buyer.**–221Ky44, 297SW936. **Evidence held sufficient** to support judgment. **Tex CivA** 299SW313.

84–11 221Ala640, 130S386; 93CalA 328, 269P740; **TexCivA** 31SW(2d)858. **Evidence sufficient to show fraud.**–77 Colo 533, 238P69. **Sufficiency of evidence.**–246Mich695, 225NW546.

84–13 221Ky44, 297SW936; 251Mich 129, 230NW942. **The evidence was considered insufficient.**–22F(2d)749; Ark 4SW(2d)515; 40GaA768, 151SE654; 45 Ida270, 261P683; 204 Iowa66, 214NW 595; 123Kan368, 255P78; 221Ky44, 297SW936 (falsity of seller's representations in sale of restaurant); 222Ky 691, 2SW(2d)387; 224Ky848, 7SW(2d) 493; 1LaA12; 239Mich229, 214NW82; 113Nebr739, 204NW784; 144 Okl 275, 291P66; 120 Or607, 253P531; 51SD20, 211NW807; TexCivA 1SW(2d)385; Tex CivA 11SW(2d)262; 100Vt187, 136A28. **The evidence was considered sufficient.**–168Ark1116, 272SW644; 198Cal 196, 244 P335; 202Cal 98, 259P433; 69CalA688, 232P499; 81CalA164, 253P352; 100 CalA43, 279P680; CalA 289P185; 12 LaA216, 125S778; 171Minn211, 213NW 902; 180Minn334, 230NW796; MoA 18 SW(2d)583; 80Mont82, 258P1085; NJ Sup 150A216; ND 232NW609; 68Utah 530, 251P354. **Evidence held to warrant** directed verdict for seller. **MoA** 274SW526.

84–14 242NY425, 152NE250. **Falsity of buyer's statement** must be proven by competent evidence. **Iowa** 231NW380.

85–22 180Ark183, 20SW(2d)864; 83 Colo 374, 265P694; Iowa 202NW514 (fraud of seller sustained by evidence). **Evidence held sufficient** to sustain finding of fraud in purchase without intent to pay. **TexCivA** 293SW632; Mo 28SW (2d)1017; TexCivA 26SW(2d)357. **Evidence held insufficient.**–Iowa 231NW 380; 127Me503, 144A649; 247Mich312, 225NW600; 195NC51, 141SE352; Tex CivA 6SW(2d)165; TexCivA 28SW(2d) 306. **Inability or failure to pay** is not sufficient to show fraud or intent not to pay at time of purchase. **Tex CommnA** 298SW545. **Evidence held to sustain finding of absence of misrepresentation.**–225Ky270, 8SW(2d)399. **That buyer intended at time goods were sold** not to pay therefor must be proven by sellers in action to cancel sales. **Iowa** 231NW380.

85–22½–New. Evidence has been held to establish that defendant, through its agent, agreed to furnish plaintiff kellastone of such quality that it would readily adhere to woodwork of plaintiff's house. **MoA** 9SW(2d)681.

86–25½–New. Evidence of assent that defendant could have defeated existence of binding contract by immediate action on receiving confirmation, with price inserted, in refusing to be bound, and such failure was evidence of assent. 252Mass84, 147NE595.

86–26 15F(2d)470; 20F(2d)364; 23F (2d)783; 22AlaA217, 114S275; 171Ark 1127, 287SW371; 77Colo 285, 236P 1000; 36GaA195, 136SE110 (letters and telegrams); 37GaA198, 139SE366; 42 Ida505, 247P796; Iowa 227NW578(2d case); 151Miss532, 118S541; 221MoA 600, 283SW65; MoA 296SW255; MoA 31SW(2d)102; NJSup 143A217; 229 AppDiv278, 241NYS697; 59ND313, 229 NW808; 48RI 416, 137A879 (defendant's liability held for jury); 52SD30, 216NW586; TexCivA 297SW885 (direction of verdict for buyer on conflicting evidence whether sale was conditioned on transfer of lease to buyer held error); 99Vt446, 134A603; 142Va331, 128SE518 (additional order). **Questions for court.**–8F(2d)807 (where all evidence in action for breach was in writing whether there was contract of sale is for court). **Question of privity of contract** between farmer buying seed wheat through dealer and seller from whom dealer procured it is generally one for jury. 144Wash60, 256P777. **No question for jury as to purchase price,** where buyer accepted and used part of goods under memorandum contract. 133SC274, 130 SE886. **Evidence held insufficient as matter of law** to show purchase through agent. 40GaA377, 149SE799(1stcase).

86–26½–New. Whether contract was one for delivery subject to approval or one of sale with right to rescind if article unsatisfactory is question for jury on conflicting evidence. 201 Iowa493, 207NW561.

86–26⅓–New. The intention of the parties to enter into a contract of sale is a question of fact. 254Mass438, 150NE 224.

86–27 218Ala196, 118S377; 228AppDiv 396, 240NYS123.

86–28 21F(2d)818; 218MoA679, 267 SW70; MoA 295SW474; 102NJEq341, 131A901; 24 OhA282, 156NE217 (whether buyer had full knowledge of material facts); 136SC496, 134SE505; 151SC506, 149SE271.

86–29½–New. or whether representations were relied on, 151SC506, 149SE 271.

86–30½–New. Whether representations were false is held question for jury. 135 Wash189, 237P305.

86–30⅓–New. Whether buyer had opportunity to ascertain facts is held question for jury. 135Wash189, 237P305.

86–30¼–New. A verdict should be directed where there is no evidence that seller knew that statements were false or that buyer relied on them. 75CalA 189, 242P881.

86–30½–New. Where there is no evidence of fraud, plaintiff is entitled to directed verdict. 141SC121, 139SE181.

86–31 176Ark430, 3SW(2d)42; Tex CivA 293SW632; **Evidence held insufficient.**–MoA 290SW86.

87–33 In Porto Rico.–32PortoRico 117. **In Saskatchewan.**–[1929] 4DomLR65; [1929] 4DomLR103.

87–34 190NC157, 129SE414 (rule not changed by Motor Vehicle Registration Act, in absence of such provision); 128 Or142, 268P748.

87–37 117Tex368, 5SW(2d)960, 60ALR 672; 117Tex362, 5SW(2d)963 (bills of lading and drafts held written contracts). **Telegraphic correspondence** between seller and his broker and written instrument from them to buyer may constitute contract of sale. **TexCivA** 274SW 652. **Correspondence** from which court cannot determine quantity, kind, price, delivery point and terms, is lacking in necessary elements of completed contract. 86 IndA137, 155NE526. **Separate sales orders,** not referring to each other, held distinct contracts upon acceptance. 181Ark415, 26SW(2d)80. **Alleged oral agreement held ineffective** where contrary to written agreement. 42F(2d)449.

87–38 Intention of parties determines question whether verbal arrangement with agreement to reduce contract to writing creates binding contract. 42 Ida 505, 247P796.

87–39 140Miss155, 106S17. **Credit memorandum has force** and effect of any other written contract. **TexCivA** 24SW (2d)67. **Sale of farm implements.**–**Sask** [1929] 3DomLR153.

87–39½–New. Where contract provided that it covered all agreements, it could not be modified by oral agreements. 190NC169, 129SE406.

87–39⅓–New. Registration.–Alberta Bills of Sale Act § 16 does not apply to sale of interest in future crop. **Alta** [1929] 4DomLR1084.

87–41 171Ark11, 283SW17, 45ALR 1396; 35GaA635, 133SE634. **Illegal act cannot form basis of consideration.**–99 CalA235, 278P494. **Additional contracts being merely continuation of original illegal agreement** were also illegal. 13 LaA244, 126S587. **Buyer may disaffirm illegal contract for sale,** principally executory, even if parties are in pari delicto. **TexCivA** 30SW(2d)388.

88–43 35GaA635, 133SE634; 33 OhA 468, 169NE825. **Failure to comply with Motor Vehicle Law.**–**NJCh** 129A253. **It is no defense to an action for goods sold** and delivered that they were misbranded in violation of federal Food and Drug Act, where defendant declined to return them on plaintiff's request. **Utah** 280P721. **Agreements held not invalid.**–315Mo 927, 288SW20. **Contract held not in violation of statute.**–39GaA 353, 146SE920. **Contract of sale conditional on procuring appointment to office** of purchaser is illegal as against public policy. 171Ark11, 283SW17, 45 ALR1396. **Interstate commerce.**–215Ala 528, 112S102. **Sale on Sunday.**–140Miss 502, 106S97, 44ALR124.

88–45 279US253, 49SCt314, 73L ed688; 128 Or191, 274P128. But see TexCivA 286SW667; TexCivA 286SW668; Tex CivA 286SW679. **Contract for sugar** made in July, 1920, and deliverable more than thirty days thereafter held not to violate Lever Act passed Aug. 10, 1920. 267US233, 45SCt295, 69L ed 589. **Failure to deliver bill of sale** on transfer of second-hand automobile, as required by statute, held not to avoid sale. **TexCivA** 291SW1088. **Farm implements.**–**Sask** [1927] 3DomLR626.

89–53 82NH559, 133A821.

89–54½–New. In Saskatchewan, under statute, contract for sale of farm implement, omitting from statutory warranty as to keeping of spare parts period during which such parts will be kept, is not sufficient compliance with statute. [1928] 2DomLR494.

89–54⅓–New. Where contract for sale of farm implement is void for noncompliance with such statute, resale by buyer with seller's approval does not constitute conversion. **Sask** [1928] 2Dom LR494.

89–55 37Wyo 98, 259P520. See also 243 IllA362.

90–56 37Wyo 98, 259P520.

90–58 215Ala528, 112S102.

90–59 215Ala528, 112S102; 82NH559, 133A821.

90–59½–New. Where part of consideration for purchase of property is illegal, rule that entire contract is ordinarily void will not be applied to innocent party. 101CalA94, 281P396.

90–59⅓–New. Contract partly illegal was indivisible, where consideration was also indivisible. 13LaA244, 126S 587.

90–59¼–New. Invalidity of severable provisions of contract will not be considered when they have no bearing on recovery. 208Cal 168, 280P952.

90–61 15F(2d)839; 212Ky97, 278SW 586. See also 1LaA538, 541 [citCyc]. **Buyer entering into new agreement adjusting fraud in sale** waives right to complain of fraud. 231Mich631, 204NW 697.

91–62 15F(2d)839.

91–63 39GaA309, 147SE156.

91–65 But see 134Misc638, 236NYS337. **Jury question.**–48 Ida727, 285P472.

91–65½–New. Seller held not to have waived fraud in purchasing materials by acceptance of note, without knowledge of fraud. **TexCivA** 293SW632.

91–65⅓–New. Waiver of defense recited in note given for purchase price may waive seller's warrantees and reliance thereon. 40GaA768, 151SE654.

91–66 218Ala336, 118S580; 180Ark 892, 23SW(2d)253; 212Ky97, 278SW 586; 9LaA410, 119S550; 140 Okl 129, 282P343 (resale of portion is waiver of right to rescind for fraud); 133SC274, 130SE886; SD 227NW435; 145Wash 236, 259P712; 199Wis518, 227NW22

(acceptance without objection after examination).

92-67 218Ala196, 118S377; 242 IllA 151; 212Ky97, 278SW586; 220AppDiv 609, 222NYS396; SD 230NW761; Tex CivA 38SW(2d)824; TexCivA 29SW(2d) 893; 151Wash440, 276P91. See also TexCivA 48W(2d)97.

92-68 212Ky97, 278SW586. **Provisions of Uniform Sales Act** may be waived. 193Wis80, 213NW637.

92-69 212Ky97, 278SW586 (purchaser); 99NJEq578, 133A483 (purchaser of ice cream and confectionary store, induced by seller's false representation of amount of business done, held not entitled to rescind but to have elected to retain property, where though he was almost immediately aware of fraud he made efforts to secure reduction in purchase price and also continued for about eight months to make installment payments on chattel mortgage assumed by him as part of purchase price); Tex CivA 283SW642. **Buyer's offer of part payment** of note given for engine, without complaining of defects, held not ratification of purchase. 173Ark112, 292 SW111.

92-71 123Kan715, 256P993.

93-77½-New. Transactions prior to uniform sales act governed by common law. 82NH91, 129A876.

93-78 17F(2d)413 (state law); 252 IllA 82; 261Mass385, 158NE795; 240Mich 257, 215NW397; 246NY174, 158NE64 (pictures sold in London); 57 OntL505, [1925] 3DomLR927 [app allowed on other grounds 58 OntL130, [1926] 1DomLR199]. **In Philippines.**-44Philippine 87.

94-79 17F(2d)413.

94-80 6LaA802; 8LaA212; 8LaA254; LaA 122S85; 240Mich257, 215NW397; 319Mo 899, 8SW(2d)834; 114Nebr584, 208NW742; 247NY465, 160NE916; 220 AppDiv160, 221NYS11; 57 OntL505, [1925] 3DomLR927 [app allowed on other grounds 58 OntL130, [1926] 1DomLR 199]. **Thus where an order is given for the purchase of goods,** etc. 206 Iowa 1164, 221NW777; 242Mich642, 219NW 634. **Thus** contract for transfer of paintings, though signed in Pennsylvania, is English contract where price is paid and goods delivered in London. 126Misc491, 215NYS24 (even though it also permitted repurchase in Pennsylvania). **Acceptance mailed to seller in New York** fixes that place as place of contract. 26 F(2d)40. **Contract not binding until accepted** by buyer in Maryland, held a Maryland contract. 39F(2d)76.

94-81 21 OhA373, 153NE201. (Pennsylvania contract not within Uniform Sales Act of Ohio).

95-82 11LaA676, 124S775; 266Mass 370, 165NE408.

95-83 57 OntL505, [1925] 3DomLR927 [app allowed on other grounds 58 OntL 130, [1926] 1DomLR199] (acceptance of installment deliveries where original offer was for entire shipment).

95-87 8F(2d)689; 94CalA12, 270P400; DC 35F(2d)880; 236 IllA426 (as to time of delivery); BC [1929] 1DomLR874. **Particular contracts construed.**-TexCivA 274SW266.

96-88 33F(2d)248; 103Conn624, 131A 420; 164Ga712, 139SE417. Iowa 233 NW133; 118Kan411, 234P1003 (contract construed to be bargain and sale and not option). **The ordinary rule of construction applies,** etc. 76CalA460, 245P206. **Contract of sale is not void for uncertainty** because it did not specify dates on which shipments were to be made. TexCivA 25SW(2d)671. **Each word must be given meaning and effect** if possible. 151SC484, 149SE246.

96-89 103Conn624, 131A420; La 130 S469 (at time of making contract); 133 Misc473, 233NYS46.

96-91 70CalA724, 234P405; 9LaA137, 119S483; TexCivA 12SW(2d)843. But see Mo 32SW(2d)587.

96-92 CalA 273P161; 170La602, 128S 649; 117 Okl 55, 244P756.

96-94 28F(2d)518; 103Conn624, 131A 420 (proper meaning); Vt 151A507. **Words "F. O. B."** construed to justify buyer's interpretation that goods would come from city mentioned after words. 161La198, 108S414. **Letters will be read** as business men would read them. 254 NY179, 172NE462.

96-98 73CalA732, 239P350 ("suitable for Eastern Shipment" as used in contract for sale of grapes).

96-2 114Nebr584, 208NW742.

96-2½-New. Court cannot use custom to rewrite contract where existence of such custom is not alleged in pleading. 240NY501, 148NE659.

96-2⅓-New. And court will not attempt to rewrite and insert necessary terms where meaning of technical words used is not alleged in pleading. 240NY501, 148NE659.

96-3 **General words** should be restricted to sense analogous to less **general** words. 114Nebr584, 208NW742.

97-4 267US233, 45SCt295, 69Led589 (mistake in punctuation disregarded).

97-5 14F(2d)852; 27F(2d)240; 216 Ala551, 114S837; 22AlaA308, 115S293; 181Ark923, 28SW(2d)700; 73CalA467, 238P825; IndA 170NE101; 161La198, 108S414; La 130S469; 156Md346, 144 A510, 62ALR1497; MoA 287SW881; 227AppDiv369, 237NYS552.

97-6 76CalA460, 245P206; 237 IllA334; 161La198, 108S414; Mont 289P571; 151 SC484, 149SE246. See also 48 Ida611, 284P257. **All parts must be regarded,** but writing prevails over printing in case of conflict. 237 IllA334.

97-8 265Mass591, 164NE469.

97-8½-New. Where contract is silent as to delivery, seller's place of business is place of delivery. 99Vt78, 130A589, 52ALR586.

97-8½-New. A buyer who does not make demand for arbitration, as provided in contract, will be deemed not entitled thereto. 85 IndA506, 150NE 317.

97-8¼-New. Where the proximate quantity, price and terms of payment were stated contract was held to be complete. 12F(2d)969.

97-8⅕-New. Uniform Sales Act is not intended to restrict rights of parties to contract, but is a statement of rules applicable to construction of contracts. 54 ND559, 209NW996.

97-8⅙-New. Written contract to sell flour, price payable in thirty and sixty day trade acceptances, does not authorize payment of entire price on sixty day trade acceptance, 126Me417, 139A226.

97-8½-New. but, since law presumes equality of division, price is payable one half on thirty day trade acceptance and balance on sixty day trade acceptance. 126Me417, 139A226.

97-8⅛-New. Construction as to parties. -Where used automobile is sold to several persons, one of whom is infant, and all sign note for balance of price, all are jointly and primarily liable. 134Misc 582, 236NYS262.

97-8⅛-New. That seller was to ship goods to specified address is consistent with delivery "F. O. B. Factory." NJ DistCt 150A1.

97-8 1/10-New. Contract for future delivery should be given interpretation which will make it mutual instead of unilateral if possible. 33F(2d)248.

97-8 1/11-New. Particular words in contract of sale construed. 43F(2d)309 ("causeway").

97-9 87CalA117, 261P743; 78Colo 21, 238P36 (contract for sale of cattle and feeding contract); 241 IllA102; 265 Mass595, 164NE652; MoA 24SW(2d) 1083; 190NC203, 129SE607 (circular and correspondence declared to establish contract); 148SC511, 146SE534; 148 Va413, 139SE254. But see 142 Okl 286, 286P879.

97-10 148Va413, 139SE254; 46Philippine217, 238 [quotCyc]. **Seller's letter,** accompanying invoice, stating that seller expects goods to arrive at a certain date, constituted part of contract. 213App Div663, 211NYS208.

97-11 221AppDiv253, 223NYS110. **Two inconsistent contracts,** executed on different dates, held to constitute one contract. 221AppDiv253, 223NYS110.

97-12 43F(2d)923; MoA 10SW(2d)668; 118Tex255, 14SW(2d)53. **Oral negotiations or stipulations form no part of written agreement expressly providing** that it covered all agreements, expressed or implied, between parties. SD 227NW 374.

97-13 77CalA291, 246P332, 333 [cit Cyc]. But see 152Wash131, 277P453.

97-13½-New. Recital in order that it was executed by unanimous order of committee of association in executive session does not constitute reference to minutes so that order and minutes should be construed together. MoA 16 SW(2d)107.

97-14 34GaA14, 128SE774; 252Mass 314, 147NE863; 116 OhSt482, 156NE 595. **Rule applied** to contract for future delivery of gasoline for payment in advance of sum less than market price. 224 IllA401.

97-15 8F(2d)689; 100CalA315, 279P 1076; 103Conn624, 131A420; 6LaA712; 26 OhA485, 160NE482; 111 Okl 286, 239 P564.

98-19 8F(2d)689; 14F(2d)852; 36F (2d)982; 79CalA641, 250P710; 78Colo 21, 238P36; 2LaA232; 170Minn288, 212 NW459; 32NM528, 260P408; 285Pa356, 132A172; TexCivA 275SW235; 187Wis 34, 203NW746 (time and quantity of deliveries subject to buyer's directions). **Buyer's conduct held not to show acquiescence in seller's construction of contract** in view of buyer's explanation of his conduct. 160La475, 107S311.

98-21 36F(2d)583 (ratification by buyer of understanding); 226AppDiv397, 235NYS370.

98-23 **Description held sufficient.**-39 GaA742, 148SE349.

98-24 324 Ill 48, 154NE401. **Description held sufficient.**-324 Ill 48, 154NE401. **That weighing or counting must be done before quantity can be ascertained** does not render contract invalid. 217MoA 592, 274SW941. **Under contract to purchase minimum tonnage** per month option of designating precise quantity was in buyer. 36F(2d)982. **Contract for one's needs for particular enterprise** is sufficiently definite. 43F(2d)309.

98-26 **Seller's effort to select best onions at buyer's request** held not evidence of agreement to furnish No. 1 grade. 44 Ida 478, 258P931. **Where sale was for crop** grown on two described tracts of land estimated to produce quantity sold, buyer could not be compelled to accept fruit from other tracts, nor seller required to deliver fruit from other tracts. 38GaA 404, 144SE43.

99-31 **Particular contracts construed.**-CalA 290P545; 52ND746, 204NW669 ("tools" construed as including manure spreader). **Construction of particular words or phrases:** "About." 50Nev340, 259P415; "More or less." 50Nev340, 259 P415. **Where contract is for sale of ten to twenty carloads of lumber,** seller has choice of maximum and minimum output. 23F(2d)447. **Ambiguity arising from lack of exact specification in order** is removed by submission and approval of sample. 227AppDiv296, 237NYS472.

99-32½-New. Description in contract for sale of realty, of personalty to be left on premises conveyed held not to render contract ambiguous. 324 Ill 48, 154NE401.

99-32⅓-New. Contract calling for shipment of twelve to fourteen tank cars was enforceable as to minimum amount. Tex CivA 25SW(2d)671.

99-32¼-New. "As is, where is" construed. 42F(2d)553.

99-33 205Cal 144, 269P1113. **Contract for purchase of greater amount of lesser satisfactory.**-217MoA592, 274SW941. **Particular contracts construed.** 106Conn 464, 138A364. **Buyer's furnishing some containers for goods** does not make him liable to furnish others contrary to contract. 103CalA524, 284P1038.

99-34 13F(2d)627 (clause relating to weight of piece goods held to refer to unfinished goods); 24F(2d)12. **Agreement held not to show buyer's assumption of risk for deficiency.**-290Pa67, 138 A85.

99-36 92CalA598, 268P659. **Illustration.**-215AppDiv412, 214NYS10. **Attendant interest"** held to mean good will only. 160La261, 107S103. **Mention in contract of all articles to be left on premises held not necessary.**-324 Ill 48, 154

NE401. **Structural steel may not include** cast iron bed plates. 12LaA343, 126S76. Contract held to require seller to furnish rock for causeway whether on hand or not. 43F(2d)309.

100-40 29F(2d)193.

100-41 Sale of structural steel in building to be wrecked includes steel therein at time of contract not at time of construction. 12LaA343, 126S76.

100-43½-New. Requirement that "these cabinets" have particular finish equal to sample means all cabinets, not large percentage of them. 15F(2d)1003.

101-48 But see **Iowa** 232NW492.

101-54 Government regulation of smithing coal authorizing recovery of market price is effective regardless of use made thereof. 37F(2d)725 (regulation equivalent to statutory enactment).

101-55 218Ala216, 118S395; 128Misc 884, 220NYS454; **Utah** 269P1014.

101-58 37F(2d)725 (federal price fixing regulation).

102-63 CalA 279P1036.

102-70½-New. Contract, that seller fix price at end of month for each ensuing month, did not give seller arbitrary power to fix price. 283Pa434, 129A559.

102-70½-New. Where contract provided that buyer might offer for seller's consideration counterbid by some other responsible seller, seller could not capriciously claim nonresponsibility of competing seller submitting bid. 283 Pa434, 129A559.

102-71 48 Ida611, 284P257 (automobile dealer is entitled to additional discount from distributor after cancellation of contract between manufacturer and distributor). **Particular contracts construed.**-79CalA641, 250P710; 170Minn 288, 212NW459 ("present market replacement value" construed to mean cost of production new).

103-73 285Pa356, 132A172.

103-75 Fact that price was fixed according to Federal Excise Tax Law its repeal will not entitle buyer to reduction. MoA 25SW(2d)125.

103-78 135Misc89, 236NYS434; 151SC 383, 149SE105. **Particular contracts construed.**-26F(2d)895; 43F(2d)716. **Price of goods is to be construed as of time contract made.**-158Md486, 148A 836.

104-84 Contract for sale of coal providing that seller should bill it to buyer at stated price has the effect of fixing the price. 14F(2d)852.

104-84½-New. Under sale contract guaranteeing price against decline, sellers had till end of year to meet guaranty against decline in prices as respects extra allowance. 222AppDiv697, 225NYS436.

104-86 Contract construed not to permit filling station owner under contract to purchase gasoline to claim quantity discounts allowed to seller. 86 IndA 354, 156NE408.

104-87 Where contract provides for "posted market price" of certain company, standard does not fail so long as company posts price, though it does not purchase all oil produced. TexCivA 274SW272.

104-88 32NM518, 260P411, 55ALR261.

104-93½-New. Contract based on "price quoted by seller" requires sale at price quoted by seller in general market and not in particular localities. 100 CalA126, 279P1036.

105-94 5PaDist&Co 623 (value of by-products not included in cost of manufacture).

105-1 Cost landed price means actual cost to seller plus expenses incurred in landing them in seller's warehouse. Alta [1929] 2DomLR217.

105-1½-New. "Cost landed price." In Canada "cost landed price" means amount actually paid by seller and landing charges with discounts for immediate payment. Can [1929] 3DomLR 700.

105-4 "Current market price," as used in contract to buy and sell gasoline, means that contract price shall run or flow with market, following its fluctuations. 32NM518, 260P411, 55ALR260.

106-13 Provision for readjustment of price in case of change in existing rates of wages does not excuse buyer's breach where only change is increase and seller waives provision. 33F(2d)420.

106-13½-New. Obligation to sell gasoline at current price on demand for delivery is not affected by fact that price was result of temporary trade war. 32 NM518, 260P411, 55ALR261.

106-13½-New. or that buyer encouraged trade war to extent of purchasing from concern invading market and breaking price where he gave seller opportunity first to meet price. 32NM518, 260P411, 55ALR261.

106-13¼-New. Contract giving seller highest price paid to others.-Contract between mill owner and planter providing for payment for sugar cane at highest price paid to any other planter entitles planter to such highest price regardless of stipulations contained in contracts with other planters. 33Porto Rico 227.

106-13½-New. Where contract requires seller to fix price each month, buyer's statement of unwillingness to accept further deliveries after price has been fixed excuses seller from again fixing price. 297Pa483, 147A519.

106-15 299Pa372, 149A647 (storage charges). **Vendor's agreement** to pay pro rata share of taxes for "current year" refers to calendar year. 174Ark 33, 294SW5.

107-16 Contract sale "c.i.f." means sale free of cost, insurance and freight. 43 F(2d)476.

107-18 Repairs or commissions on resale of automobile cannot be deducted from price to be paid by seller buying back under unambiguous credit memorandum. TexCivA 24SW(2d)67.

107-21 34GaA298, 129SE562; NJDist Ct 150A1; 187Wis95, 203NW908 (expense of furnishing cars on seller). **Absence of specific word denoting place of delivery** is immaterial, where contract called for shipment "F.O.B. Factory." NJDistCt 150A1.

108-24½-New. Where buyer agreed with seller of pears to pay season's opening price of coöperative association which released the pears from seller member's contract without rendition of any service charge, buyer was not obliged to pay service charge established by resolution of association. 75CalA 666, 243P458.

108-25 Lading and lighterage charges held imposed on seller by contract. 16 F(2d)662.

108-26 144Va145, 131SE193 (without any act or expense on part of buyer).

108-27 4LaA131; TexCivA 22SW(2d) 680.

108-28 166La912, 118S81.

109-40½-New. Buyer may deduct seller's share of demurrage from amount of its bill. 107Conn40, 139A276.

109-48½-New. Charterer agreeing to return vessel in good condition is secondarily liable for injury occasioned by another to whom it was intrusted. 17 F(2d)180.

109-50 134Misc211, 236NYS68.

109-51½-New. Removal of goods by buyer. Contract held not to require buyer of building materials to remove it from plantation within stated period, but only from buildings. 160La475, 107S311.

110-52 Bracketed condition on face of "confirmation order" held not part of contract when not called to attention of acceptor. 77CalA291, 246P332. **Purchase price advances** held to include loans. 290Pa67, 138A85. **Effect of condition in small type.**-41F(2d)518. **Particular provisions construed.**-35F(2d) 829; 11LaA367, 122S902; 12LaA47, 125S157(2dcase).

110-60 129 Or357, 277P716. **Construction of strike clause** providing for suspension of deliveries. 229AppDiv463, 242NYS342.

110-63 Use of union labor.-69CalA225, 230P978. **Where contract is for skins of certain weight,** such weight is a condition not a warranty. Can [1927] 2 DomLR141.

110-63½-New. Defendant is bound by conditions on back of invoice, where he is aware of them. TexCivA 26SW(2d) 665.

110-63½-New. Agreement that materials furnished subcontractor shall be paid for as subcontractor receives check from principal contractor held not to limit subcontractor's liability. SC 155 SE151.

111-66 194Wis296, 215NW432 (holding purchaser not liable where contingency never happened).

111-75 242NY425, 152NE250. **Delivery subject to approval of third party** held condition precedent. 242NY425, 152NE250.

112-77 While stipulation for deposit by buyer to guarantee acceptance is in sense condition precedent to right to demand delivery, its breach will give seller right of action. 142Va769, 128SE 55.

112-79 133SC281, 130SE870 (time held of essence entitling buyer to rescind for delay). **Contract construed** as allowing twenty days after date to make delivery, failure of which released both parties. 240NY217, 148NE215. **"No arrival no sale"** means that if goods do not arrive at destination buyer acquires no property in them and is not liable for the price. 13F(2d)999. **Shipping instructions later.**-241NY440, 150NE509.

112-80 133SC281, 130SE870.

112-82 8F(2d)493, 495 [citCyc].

112-84 215Ala225, 109S873.

112-85 215Ala225, 109S873.

112-86 103Conn624, 131A420.

113-89 Construction as a whole.-103 Conn624, 131A420.

113-93 CalA 288P706.

113-94 132 Or596, 286P554.

113-95 Provision held independent obligation.-103Conn624, 131A420.

113-1 17F(2d)699; 221AppDiv174, 222 NYS650.

114-4 145Wash640, 261P390. **Contract held separable.**-204 Iowa881, 216NW258.

114-10 219Ky675, 294SW165.

114-14 221AppDiv261, 223NYS157.

114-15½-New. Under sales contract, making each invoice separate sale, buyer is entitled to special allowance on paying for each purchase, regardless of subsequent breach. 222AppDiv697, 225 NYS436.

115-21 21F(2d)309; 290Pa486, 139A 147.

116-25 77CalA66, 246P113.

116-28 229AppDiv278, 241NYS697.

116-32 54SD65, 222NW603; 144Wash 620, 258P517.

117-33 144Wash620, 258P517.

117-37 224Ky284, 6SW(2d)249, 250 [citCyc].

117-38 21F(2d)309. **Each delivery to sales company is separate sale,** under marketing contract. 136Wash155, 239P 2.

117-39 21F(2d)309; 290Pa486, 139A 147.

118-43½-New. Contract providing for monthly shipments, and quantity to be more definitely fixed after delivery of first hundred tons, provisions as to shipment were not of essence of contract and strict compliance not prerequisite to equitable relief. 81NH535, 129A374.

118-48 222MoA251, 296SW840, 844 [cit Cyc].

118-54 "Renewed" is to be given its usual meaning in contract providing for renewal in absence of notice to terminate. 6F(2d)564.

118-57 133 Okl 192, 271P937; 293Pa 422, 143A103. **Indebtedness already incurred** under contract cannot be extinguished by buyer's notice of termination. 87CalA642, 262P415.

119-58 283Pa434, 129A559 (reasonable time to submit counteroffer).

119-60 Contract requiring delivery within three months, by June 15, and requiring completion by July 1, held to be performed by July 1. 23F(2d)447.

119-61 Where contract is to be considered renewed in absence of notice to terminate, each renewal creates a separate specified term. 6F(2d)564.

119-63 Buyer's obligation to receive coal under a contract which referred to another contract is terminated by termination of contract referred to. 36F(2d) 982.

119-66 211AppDiv507, 207NYS565 (contract construed to require clothing dealer to buy from manufacturer at its

termination all unused material purchased for garments to be made for dealer).
120-68 246NY519, 159NE418.
120-74 315Mo1025, 288SW59 (statements admissible to show seller's idea of reasonable time for delivery); **Tex CivA** 283SW345. **Evidence held to show** that parties understood contract in accordance with statement furnished by buyer and not objected to by seller. 79 CalA641, 250P710.
120-75 TexCivA 283SW345. **Evidence held admissible.**-242NY425, 152NE250.
121-77 94CalA335, 271P208.
121-78 236 IllA426; 114Nebr584, 208 NW742.
121-79 114Nebr584, 208NW742.
121-80 But see **Sask** [1928] **4DomLR** 987.
121-81 21AlaA560, 110S322; 201 **Iowa** 493, 207NW561; 196NC208, 145SE5.
121-81½-New. Evidence held to show sale of sugar on usual conditions purchaser to supply confirmed letter of credit on receipt of contract. 126Misc 625, 213NYS540.
121-81⅓-New. That silo, ensilage cutter, and gas engine were sold separately. **RI** 129A266.
121-81¼-New. Evidence held to show sale or return contract. 214Ky526, 283 SW1022.
121-81⅓-New. Form of invoice used held admissible as showing nature of agreement. 214Ky526, 283SW1022.
121-81⅙-New. Evidence held sufficient to show that clause "first made October, as made" was not intended to limit subject of sale to oil produced by seller's mill only. **TexCivA** 283SW345.
121-81⅐-New. Sufficient reasons will be presumed for making rules of association part of the contract. 39F(2d)49.
121-81⅛-New. Evidence held insufficient to show that delivery of napkins was to be made at mill. **TexCivA** 22SW (2d)680.
121-81⅑-New. Party asserting that words have meaning different from ordinary meaning must prove it by clear, distinct and irresistible evidence. 43 F(2d)309.
121-81⅒-New. Evidence held sufficient to show parties intended to eliminate provision that damages for breach should be market value. **Ida** 292P235.
121-83 242NY106, 151NE146.
122-88 Evidence held to show that contract covered fuel requirements at two parts. 160LaI43, 106S724.
122-90 324 **Ill** 48, 154NE401. **Evidence held to show** intention to include all "steel scrap" of defendant corporation and subsidiary. 242NY106, 151NE146. **That buyer received bills from subsidiary corporation** is immaterial in action for breach of contract made with principal corporation. 242NY106, 151NE 146.
123-3 307Mo552, 271SW779 (in replevin for bills of lading where purchaser's check was not paid evidence held to show cash sale and acceptance of check as conditional payment).
123-8½-New. Provision "payable on presentation of invoice" contemplates invoice in proper form and correct in amount. 107Conn40, 139A276.
123-8⅓-New. A contract authorizing seller to require cash payment does not authorize requiring cash with orders. **MoA** 3SW(2d)251.
123-9 213Ala526, 105S666 (contract evidenced by series of telegrams); 267 **Mass**220, 166NE642; 26 **OhA**485, 160 **NE**482. **The construction of letters,** etc. See also 263**Mass**15, 160NE297. **Court must determine** meaning of "F. O. B. Factory" absent evidence to prove special meaning. **NJDistCt** 150A1.
123-10 5F(2d)807; 73CalA44, 238P 177; 220AppDiv679, 222NYS472; 221 **AppDiv**174, 222NYS650 (whether contract is entire or divisible). **Court must determine** whether unambiguous contract is one of purchase and sale or of agency. 172Ark1118, 291SW828.
123-11 172Ark1118, 291SW828; 47 **Ida** 604, 277P570; 216AppDiv780, 215NYS 267; 220AppDiv679, 222NYS472; 221 **AppDiv**253, 223NYS110; 227AppDiv838, 237NYS368; 36 **OhA**63, 172NE578; 49 **RI** 99, 140A3; **TexCivA** 278SW334 (evidence held to raise issue as to existence of agreement for immediate delivery); **TexCivA** 282SW894 ("posted market price"); **Utah** 269P1014; 147Va960, 133 **SE**685. **Existence of certain telegrams,** series of which constituted transaction, is for jury in so far as they may affect rights of parties. 213Ala526, 105S666.
123-12 24F(2d)12; 132Misc455, 230 NYS102. See also 214Ky526, 283SW 1022.
123-14 181Ark1145, 28SW(2d)1054; **RI** 135A158; **TexCivA** 278SW334 (delivery); **TexCivA** 285SW686; 149**Wash** 281, 270P802.
124-18 Okl 292P12.
124-19 172**Minn**526, 215NW854; **Tex CivA** 282SW894 (meaning of "posted market price"). See also 216**AppDiv** 780, 215NYS267.
124-23 TexCivA 22SW(2d)680.
124-25 242NY425, 152NE250; **TexCivA** 27SSW334.
124-26 180**Ark**1167, 22SW(2d)169 (delivery of cotton free from damage).
124-26½-New. Whether unsold tractor, in dealer's possession on termination of agency, was held on consignment is question for jury. 191NC291, 131SE 757.
124-29 TexCivA 280SW848. **Change to bailment** is possible while contract is yet executory. 284Pa41, 130A259. **Buyer's conditional agreement** to make other arrangements after seller's objection to letter of credit does not change contract already binding. 126Misc625, 213NYS540. **Inspection.**-168Ark94, 269 SW372. **Mere annexation of condition by seller after acceptance** held not binding on buyer. 163La799, 112S726. **Evidence** held insufficient to establish modification of agreement. 10LaA459, 121S 337. In action for price of merchandise sold, defendant has burden of proving modification of agreement in order to establish reconventional demand for damages under modified contract. 10 LaA459, 121S337.
124-30 TexCivA 274SW643. **Issue of whether time for delivery was extended** is for jury. **NJSup** 142A564. **It could not be said under evidence** that seller did not sustain burden of proving modification of contract as to time of delivery. **MoA** 25SW(2d)125.
124-32 117Tex368, 5SW(2d)960, 60 **ALR**672. **Instructions by buyer not to ship goods until further instructions acceded to by seller** abrogated provision that delivery be made to buyer. 214**App** Div308, 212NYS133.
124-33 14F(2d)852; 213Ala526, 105S 666. **Whether supplemental oral agreement** made has been held question for jury. 227Ky73, 11SW(2d)991.
124-35 167Minn334, 209NW14 (evidence showing executed agreement for substituted delivery of goods rather than substitution of new contract of sale). **Question of fact.**-263Mass15, 160 **NE**297. **Evidence** held sufficient to establish new contract. 97CalA235, 275P 446(2dcase). **Evidence sufficient to make jury question whether there was modification** of contract. 228AppDiv152, 239 NYS166.
124-36½-New. While contract of conditional sale remains executory, it may be changed into bailment with alternative of future conversion into sale on compliance with conditions. 86PaSuper 505.
124-37 14F(2d)852; 215Ala355, 110S 715; 220Ala568, 126S637; 8LaA449. But see **TexCivA** 286SW268. **Consideration is immaterial** where modified contract is fully executed. 213Ala526, 105 S666.
124-38 245 IllA291; 245NY315, 157NE 151; 229AppDiv443, 242NYS615; **Tex CivA** 13SW(2d)923.
125-39 15F(2d)897 (agreement not to rescind); **TexCommnA** 293SW559.
125-40 220Ala568, 126S637; 156Md 346, 144A510, 62ALR1497; **TexCivA** 274 SW643; **TexCivA** 286SW268 (agreement to return to original contract held consideration).
125-41 27F(2d)240; 220Ala568, 126S 637; **Nebr** 229NW22.
125-42 82CalA648, 256P434; 37GaA227, 139SE588; **TexCivA** 286SW268 (holding minds of parties did not meet on conditions of modified agreement). **Questions of law or fact.**-Ordinarily, etc. 227 Ky73, 11SW(2d)991; **NJSup** 140A401. **Evidence held sufficient to show agreement.**-**TexCivA** 274SW643. **Finding of no modification** not unsupported by evidence. 92CalA194, 267P901. **Modified price consented to by buyer** constitutes fully executed contract. 213Ala526, 105 S666. **Where buyer waived receipt** and directed delivery at warehouse, seller's notice that delivery had been made and that it would send receipt later is not undertaking to furnish warehouse receipt. 245NY315, 157NE151.
125-43 8F(2d)215; 126Me308, 138A 389. **For evidence held insufficient** to show modification. 8F(2d)215.
125-44 17F(2d)983; 203Cal 1, 262P 1087; 207 Iowa1063, 224NW80; 168La 471, 122S585; 165Minn54, 205NW626; 225AppDiv467, 233NYS348; 133 **Okl** 192, 271P937; 152Wash131, 277P453. **Modification as to price.**-240Mich701, 216NW376. **Evidence held to raise reasonable inference** that seller agreed to modification. 249Mich12, 227NW700.
125-45 236 IllA426 (as to delivery and payment); **IndA** 171NE388(2dcase); **TexCivA** 274SW643; **TexCivA** 297SW 1059 (jury's finding that written lumber purchase contract had not been modified by oral contract held supported by evidence).
126-47 89 **IndA**680, 166NE667. **Buyer's cancellation of letter of credit and notice that goods would not be paid for till examined** when acquiesced in by seller constitutes modification of contract. 18F(2d)635.
126-47½-New. Buyer's request for change of specifications assented to by seller implies reasonable extension of time rendered necessary by changes. 48 **Ida**777, 285P476.
126-48 252**Mass**135, 147NE598 (and did not give right to rescind at some future time); 240Mich701, 216NW376; 118Tex255, 14SW(2d)53. **Seller having knowledge of facts** at time of dispute and modification of contract as to price is bound and cannot claim fraud and coercion to recover refund of price to buyer. 213Ala526, 105S666.
126-49 284Pa41, 130A259 (bailment lease after change of original executory contract of sale becomes final agreement of the parties); **TexCivA** 298SW305.
126-50 48 **Ida**777, 285P476; 167**La**13, 118S485; 9**LaA**233, 119S882; 156**Md** 346, 144A510, 62**ALR**1497; 31**NM**395, 246P902; 152**Wash**131, 277P453; 100 **WVa**232, 130SE488. **Where seller repudiates modifying agreement** whereby it was agreed that buyer should make payments in accordance with original contract and should receive refund for defective articles, buyer is not required to make further payments as prerequisite to claim for defective goods. 203 **Cal** 211, 263P806.
127-54 TexCivA 286SW268 (holding acceptance of seller's offer to modify by reducing price too late after termination of contract).
127-56 CalA 288P687. See also 315**Mo** 927, 288SW20; 86**CalA**179, 260P608.
127-57½-New. Seller's consent to withhold delivery until advised extends contract for reasonable time only, 214**App** Div611, 213NYS110.
127-57⅓-New. during which time at least one of parties must act so as to show he deems contract valid and must take some affirmative step in reference thereto. 214**AppDiv**611, 213NYS110.
127-57¼-New. If new term is repudiated by buyer, original contract is restored. **TexCommnA** 293SW559.
127-57⅙-New. Modification extending contract granting exclusive selling agency for one year, made more than one year before expiration of the contract does not fix the termination of the contract as one year from date of modification. 129 **Or**357, 277P716.
127-59 222**MoA**251, 296SW840, 844 [cit Cyc].
127-63 5**LaA**460; 52**SD**201, 217**NW** 187; 187**Wis**34, 203NW746. See also 4**LaA**544.

127-64 TexCivA 300SW192. **Illustrations of options.**–75CalA171, 242P516.
128-66 24F(2d)306; 223Ky16, 2SW(2d)1031; 9LaA563, 121S685(2dcase); 154Wash172, 281P324. **Under English Law** contract to repurchase under certain conditions is valid. 126Misc491, 215NYS24.
128-69 73CalA732, 239P350 (buyer entitled to rescind); 231Ky374, 21SW(2d)478 (option to cancel order on sale of farm does not permit cancellation on negotiations for sale); 246NY174, 158NE64. **Harshness of contract.**–73CalA732, 239P350. **To terminate contract for sale of fruit crop** where crop was entirely destroyed it was not necessary that all of fruit should have been first harvested, delivered and culled. 73CalA732, 239P350.
128-70 246NY174, 158NE64; 57ND295, 221NW75; 133 Okl 192, 271P937. See also 2LaA688. **Evidence held to show** seller financially unable to repurchase paintings without pledging them to secure purchase price, under contract permitting repurchase when seller is financially able to do so for his own benefit. 126Misc491, 215NYS24. **Evidence held to show exercise of right of rescission by seller.**–179Ark1198, 20SW(2d)181. **Right to repurchase** is perfected only on strict compliance with contract. 126Misc491, 215NYS24.
128-71 **Request that sellers have truckman call for goods** as they had previously agreed to do is complete rescission of contract. 220AppDiv665, 222NYS389.
128-72 See also MoA 10SW(2d)668. **Time.**–154Wash172, 281P324.
128-75½-New. After exercising option to cancel, there is no further liability as to unexecuted parts of contract. 223Ky16, 2SW(2d)1031.
129-76 42 Ida115, 243P823; TexCivA 2SW(2d)911, 913 [quotCyc]. **Consideration essential.**–MoA 280SW77. **Evidence held to show** that buyer and seller each reserved right to cancel sales contract. 9LaA193, 119S271. **Terms.**–100Vt347, 137A193, 53ALR204.
129-77 MoA 27SW(2d)473; TexCivA 2SW(2d)911, 913 [quotCyc].
129-78 102CalA213, 283P107 (seller's refusal to agree to settlement). **Invoices transmitted and received on delivery** under oral contracts held not to show rescission and substitution as written contract. 255Mass189, 151NE59. **Not necessary for seller to stipulate** to return to buyer money he had received. 73CalA700, 239P70. **Held question for jury.**–TexCivA 2SW(2d)911. **Offer and acceptance of rescission of sale** are governed by rules governing inception of contract generally. 88CalA34, 263P285. **Seller's declaration that he would not rescind contract for sale of automobile unless buyer would buy new car** constitutes positive refusal to rescind. CalA 265P957.
129-79 28F(2d)145. **Sufficiency of evidence,** etc. 214Ala286, 107S808; CalA 265P957; 13LaA342, 123S48; MoA 27SW(2d)473; Utah 283P435. **Question for jury.**–207 Iowa245, 222NW886; MoA 277SW50. **Evidence held to present issue** as to whether contract was canceled by mutual consent. 214AppDiv611, 213NYS110. **Evidence relative to mutual cancellation** held sufficient for jury. 153Va649, 151SE135. **Seller's action for conversion of piano** is sufficient acceptance of buyer's repudiation of contract. TexCivA 21SW(2d)341.
129-80 TexCivA 2SW(2d)911, 913 [quot Cyc]. **Purchaser is not liable** for cost of loading and unloading goods returned. 154Wash120, 281P14.
129-84 134Misc58, 235NYS290. **Sufficiency of evidence.**–12LaA160, 125S158 (2dcase).
130-85 88CalA34, 263P285; 233Mich407, 206NW374; 234Mich697, 209NW43; 225AppDiv628, 234NYS137; 136Misc646, 241NYS630. **Abandonment by buyer and resumption of possession by seller** constitute mutual rescission. 234Mich697, 209NW43. **Failure of seller to notify buyer that returned goods were held subject to order** held not consent. 528D201, 217NW187. **Seller's assumption of ownership of subject matter of sale** is ratification of rescission of contract of sale. 88CalA34, 263P285. **Retaking possession of property by seller and lessor** on abandonment by purchaser and lessee does not amount to rescission. 102CalA53, 282P519.
130-86 222MoA251, 296SW840, 844 [cit Cyc].
130-87 TexCivA 283SW642; 69Utah161, 253P196. **Deliberate intent to defraud** is not requisite to rescission. CalA 287P139.
130-88 181Ark1106, 29SW(2d)288; 200Iowa843, 205NW511; 127Me503, 144A649; 127Misc50, 215NYS281; 8PaDist&Co677; TexCivA 31SW(2d)858; 69Utah161, 253P196. **Representations by seller that it (a corporation) had purchased bonds offered for sale,** upon facts represented as true in circular and advertisement, held to raise issue of misrepresentation. 127Misc50, 215NYS281.
130-89 26F(2d)331; 173Ark875, 293SW1026, 57ALR877; 39GaA309, 147SE156; 261Mass116, 158NE344; 236Mich540, 211NW64; 240Mich64, 214NW964; 248Mich496, 227NW695; 102NJEq341, 131A901; 247NY1, 159NE700; 226AppDiv235, 234NYS463; 91PaSuper157; TexCivA 283SW642; TexCivA 300SW192. **Facts held not to constitute ground for rescission.**–239Mich229, 214NW82. **Right of rescission not affected** by fact that company was allowed thirty days to determine whether it would purchase note. 173Ark875, 293SW1026, 57ALR877. **False statement of opinion** as to things sold may, under certain circumstances, be ground for relief by rescission. 81CalA164, 253P352.
131-90 204Cal325, 267P1085.
131-91 But see Man [1930] 2DomLR818.
131-92 240Mich79, 214NW973.
131-96 **Mere suspicion that buyer will not accept** does not entitle seller to refuse performance on his part. 285Pa120, 131A705. **Abandonment of contract by buyer.**–131Misc526, 227NYS468.
132-97 224Ky284, 6SW(2d)249. **Refusal of buyer** to recognize liability under contract after assignment by buyer held repudiation. TexCivA 292SW640.
132-98 159La1096, 106S652 (holding conduct and silence of buyer, coupled with purchase of goods elsewhere, showed rescission).
133-2 6F(2d)934; 159La987, 106S539; 76Mont24, 245P958, 46ALR906; Tex CommnA 299SW637; Sask [1926] 4DomLR647, 650. [1927] 3WestWkly391 [quotCyc].
133-5 219Ala666, 123S52; 86CalA507, 261P747; 251Mich215, 231NW617.
134-8 32F(2d)442.
134-10 121 Or531, 255P606. **Intentional concealment of insolvency or fraudulent misrepresentation** held essential. 121 Or531, 255P606.
134-11 121 Or531, 255P606.
134-12 241NY464, 150NE517; 121 Or531, 255P606.
134-13 121 Or531, 255P606.
135-14 121 Or531, 255P606. **Failing circumstances combined with other facts may be sufficient.**–121 Or531, 255P606.
135-16 96CalA145, 273P825; 6LaA429; 247NY170, 159NE899; 138 Okl151, 280P611 (breach of agreement to give exclusive market); 285Pa120, 131A705. **Breach of inducing term of contract** giving exclusive sales right gives buyer right to rescind. 215AppDiv267, 213NYS519. **Buyer in default cannot rescind.**–121 Or677, 257P23.
135-17 128Me163, 146A244; 247NY170, 159NE899.
135-18 236Mich323, 210NW244.
135-21 **Demand for payment before expiration of term of credit** does not entitle buyer to rescind. 222MoA888, 5SW(2d)1109.
135-24 49RI99, 140A3.
135-25 285Pa120, 131A705.
136-26½-New. **Anticipatory breach.**–Seller's threat to cancel contract unless buyer furnished guaranty of payment before stated time is anticipatory breach. 215AppDiv140, 213NYS106 (where no guaranty was furnished on contract providing for payment against shipping documents).
136-26⅓-New. Cancellation of order requested by buyer does not constitute breach entitling seller to rescind until accepted and acted upon by seller. 285Pa120, 131A705.
136-26¼-New. Buyer of defendant's business is not entitled to rescission because of defendant's subsequent sales to dealers where it was understood that seller would not be bound. 247NY170, 159NE899.
136-27 36GaA549, 137SE119 (failure to deliver in reasonable time); Iowa 231NW434; 129Misc762, 222NYS584 (notwithstanding clause making contract subject to delay); 131Misc407, 226NYS751; 128 Or142, 273P954; 285Pa120, 131A705; 285Pa131, 131A710. **Time of shipment.**–133SC281, 130SE870; 150Wash377, 272P957. **Inability to perform.**–213Ky77, 280SW478.
136-28 **Buyer's failure to send shipping instructions** required by contract prevents him from canceling contract for nondelivery. 241NY440, 150NE509.
136-29 **Failure for two months to ship required amount of coal** under contract for equal monthly installments during year is not ground for cancellation, though contract provided for cancellation in case of breach of any terms or conditions. 236Mich323, 210NW244. **Whether date of delivery is of essence of contract** is in absence of express agreement to be determined by terms of contract and circumstances of case. 116 OhSt482, 156NE595.
136-33 204Cal325, 267P1085; 80CalA284, 251P810. **Lien of third person under Bulk Sales Law** is not ground for rescission, especially where seller pays claims as presented. 223Ky640, 4SW(2d)412.
137-38 CalA 265P957; 214Ky443, 283SW407; 131Misc407, 226NYS751; Tex CommnA 25SW(2d)330.
137-39 224Ky238, 5SW(2d)1070.
137-39½-New. Slight deficiency in quantity does not authorize rescission. 224Ky238, 5SW(2d)1070.
137-40 7F(2d)561; 15F(2d)897; 223IllA138; 214Ky443, 283SW407; 224Ky263, 6SW(2d)245; 5LaA495; 12LaA67, 125S314; 256Mass195, 152NE630; 54ND559, 209NW996; 87PaSuper243; 200Wis331, 228NW505 (damaged by fire). **Extent of defect.**–TexCivA 26SW(2d)357.
137-41 **Authorized percentage of inferior goods held to apply to entire contract, not to separate shipments.** 7F(2d)561.
138-42½-New. Right to rescind may be lost through agreement. 252Mass135, 147NE598.
138-42⅓-New. Where buyer knew coal would be furnished by party other than seller who would have no opportunity to inspect before delivery, shipment of inferior coal by mistake which buyer rejected is not material breach warranting cancellation where seller did not insist on acceptance of shipment and did not refuse to furnish quality contracted for. 236Mich323, 210NW244.
138-42¼-New. **Redhibitory vice.**–Purchaser of race horse with knowledge that it is suffering from ringbone cannot avoid sale in redhibitory action when horse becomes lame from ringbone. 6LaA6.
138-43 220Ala116, 124S288; 170Ark1193, 281SW358; 78CalA652, 248P732; CalA 288P687; 173Minn535, 217NW941.
138-44 35GaA289, 133SE55; 38GaA665, 145SE111; TexCivA 274SW266. But see 230AppDiv206, 243NYS352.
138-46 176Ark336, 2SW(2d)1082; 204Cal325, 267P1085; CalA 288P687; 205Iowa557, 218NW264; 6LaA367; 50ND966, 198NW550; 91PaSuper157; SD 226NW268.
139-49½-New. Fact that purchaser of radio receiving set becomes dissatisfied with his purchase does not warrant rescission in absence of express warranty. 239Mich42, 214NW162.
139-50 73CalA732, 239P350 (destruction of subject matter before delivery). **Buyer cannot rescind** for failure of consideration unless he has been disturbed in possession or suffered damage. 74Mont408, 241P233.
139-52 50ND397, 196NW100.

139-53 216Ala21, 112S428, 430 [cit Cyc].
139-54 23AlaA566, 129S320(2dcase); 260Mass120, 156NE835; 263Mass147, 160NE821; 213AppDiv467, 210NYS648; 57ND295, 221NW75; 90PaSuper221; TexCommnA 293SW559; 100WVa515, 131SE12 (general rule); 199Wis518, 227NW22.
140-55 100WVa515, 131SE12 (carloads of lumber delivered singly at different times). **Agreement to cancel contract for sale of goods as to goods shipped before date of cancellation** is not a cancellation with respect to goods shipped on day of cancellation. [1926]CanSC 244, [1926] 1DomLR496. **Contract held not severable.**–Mich 233NW339.
140-59 157Md341, 146A223; 81NH535, 129A374.
140-61 81NH535, 129A374.
140-63½-New. by refusing to accept cancellation of order requested by buyer and expressly demanding that contract be carried out, 285Pa120, 131A 705.
140-64 69Utah161, 253P196 (suit for damages for fraud). **Seller who waives strict compliance must indicate intention before enforcing rights.**–289Pa569, 137A807.
141-67 **Failure to use reasonable diligence in presenting check** or draft received for cash sale waives right to rescind for nonpayment. 179Minn398, 229NW555.
141-69 See also 135Wash318, 237P716.
141-71 170Ark1131, 282SW961 (where delivery is by installments); 214Ky 443, 283SW407; 224Ky284, 6SW(2d) 249; TexCivA 283SW642; BC [1929] 4 DomLR296 (rescission for breach of condition). **Buyer's failure to object to method of delivery** held waiver thereof. 16F(2d)190.
141-72 CalA 273P161; 251Mich509, 232NW196. **Where seller promised to adjust unsatisfactory machine,** buyer held not estopped. TexCivA 299SW313.
141-74 123Kan672, 255P1113.
142-75 123Kan672, 255P1113; 132 Misc704, 230NYS482; 120 Or607, 253P 531; TexCommnA 292SW198; TexCivA 278SW343; TexCivA 283SW642; Tex CivA 29SW(2d)893; 143Wash352, 255P 147. See also Mich 233NW202.
142-76 123Kan672, 255P1113; 210Ky 806, 276SW803; Mass 167NE229; 243 Mich673, 220NW773; MoA 158SW(2d) 895; 120 Or607, 253P531; TexCivA 283 SW642; TexCivA 18W(2d)330; Tex CivA 18W(2d)385; TexCivA 29SW(2d) 893; Utah 283P731; 143Wash352, 255 P147. **Refusal of seller to accept.**–142 Miss851, 108S139. **Use not extended beyond limits of reasonable test** will not constitute waiver. 78CalA652, 248P 732 (tractor). **That buyer did not use article after discovering misrepresentation is immaterial** where he continued to exercise dominion and control. Tex CivA 18W(2d)330. **Buyer continuing to use property as his own after serving notice of rescission** waives election to rescind. 57ND824, 224NW668. **Use by buyer of property sold** for feed will be conclusive waiver of his right to rescind. 218Ala120, 117S757.
143-77 15F(2d)329 (asserting dominion without notice of rejection held estoppel); 21F(2d)515; 32F(2d)442; 6 LaA6; NJCh 144A454; TexCivA 26SW (2d)357. **Any act inconsistent with seller's ownership** done by buyer with knowledge of defect will preclude rescission. Utah 283P731.
143-77½-New. Buyer by obtaining verdict in its favor upon seller's cause of action upon ground that seller had converted property waived right to have counterclaim construed as involving remedy of rescission. 133SC369, 131 SE32.
143-77⅓-New. Buyer's letters demanding that seller return money or make good guaranty held abandonment and waiver of right to rescind. 133SC369, 131SE32.
143-78 202Cal 701, 262P730; TexCivA 299SW313.
143-86 29F(2d)327 [certiorari den 279 US846, 49SCt343(1stcase), 73Led991]; 69Utah161, 253P196. **Anticipatory breach,** by receivership, affects purchaser only if electing to treat it as breach. 43F(2d)923.
143-87 163La1057, 113S454 (holding buyer not entitled to rescission after delivery to carrier in view of acquiescence in delay).
143-88½-New. Buyer may waive prompt delivery by surrendering right to strict performance. 285Pa131, 131A 710.
143-88⅓-New. Waiver of right to cancel contract on ground of car shortage conditions is immaterial where final refusal of buyer to accept goods was not placed on that ground. 73CalA732, 239 P350.
143-88¼-New. Buyer's acceptance of part of goods does not preclude rescission for failure to deliver remainder within time specified, or at all. 131 Misc407, 226NYS751.
143-88½-New. Attempt to rescind on one ground does not preclude rescission on subsequently discovered ground. 156Miss157, 125S708.
143-88⅙-New. Waiver of right to rescind on one ground does not preclude rescission on another. MoA 24SW(2d) 191.
143-88⅐-New. Buyer of automobile refusing seller's offer to repair and replace defective parts unless seller unqualifiedly promises to take car back at end of stated time is precluded from rescinding for fraud. 152Va635, 148SE807, 811 [quotCyc].
144-91 Vt 146A248. See also 8LaA 120.
144-92 Vt 146A248; 144Wash229, 257 P632.
144-93 168Ark28, 268SW605 (where seller breached agreement first); 310Mo 386, 276SW1026; 86PaSuper396; Vt 146A72.
146-8 20F(2d)63.
146-9 157Md341, 146A223.
146-9½-New. Notice and reasonable time to perform must be given before rescission for buyer's failure to pay. 219 Ala666, 123S52.
146-11 39GaA309, 147SE156; 205 Iowa 557, 218NW264; 166La497, 117S568; 310Mo 386, 276SW1026; 222MoA251, 296SW840; TexCivA 280SW622; 144 Wash229, 257P632; 192Wis343, 212NW 670. **Rescission for fraud.**–213AppDiv 467, 210NYS648; 285Pa257, 132A342. **On buyer's rescission of sale of business,** allowance by referee to seller of inventory cost of goods disposed of by buyer held practical solution of problem. 217 AppDiv190, 217NYS497. **Buyer must offer to restore** status quo. 30F(2d)647.
146-12 245Mich237, 222NW101.
146-13 15F(2d)329 (holding buyer need not return goods but must give notice of rescission); 170Ark1193, 281SW 358; 101CalA407, 281P658; 102CalA 67, 282P518; 36GaA549, 137SE119; 204 Iowa1119, 216NW705; 166La497, 117S 568; 13LaA39, 127S28(2dcase); 263 Mass147, 160NE821; Mass 172NE595; 236Mich540, 211NW64; 240Mich621, 216NW431; 243Mich673, 220NW773; 142Miss851, 108S139; 155Miss876, 125S 248; 222MoA888, 5SW(2d)1109, 1110 [citCyc]; 127Misc50, 215NYS281; 132 Misc866, 230NYS529; 120 Or607, 253P 531; 133SC369, 131SE32 (in substantially its original form and condition); TexCivA 297SW545; TexCivA 1 SW(2d)429; [1926]CanSC397, [1926] 3DomLR517. But see 204 Iowa881, 216 NW258. **That sale was conditional** did not dispense with necessity of tendering device purchased to seller. MoA 15 SW(2d)895. **In determining amount purchaser should restore** to seller, court should consider customary rental charges for use of similar trucks and circumstances under which it is used, cost of operation, repairs, etc. 101CalA407, 281 P658. **Evidence held to justify finding** in fixing value of use of truck to purchaser at one hundred dollars, which he is required to restore on his rescission of conditional sales contract. 101CalA 407, 281P658. **Where part payment has been made,** buyer may retain property till seller is willing to return purchase money. 151SC506, 149SE271.
147-14 160La597, 107S459; 166La557, 117S590; 215AppDiv267, 213NYS519 (return of goods unsold insufficient).
147-15 222MoA888, 5SW(2d)1109, 1110 [citCyc]; 215AppDiv267, 213NYS519 (where goods are sold to be resold). But see 39GaA309, 147SE156. **Where bonds sold were exchanged for other securities at request of seller** buyers held entitled to rescind on return of all they received. 127Misc50, 215NYS281.
147-16 236Mich540, 211NW64; 142 Miss851, 108S139; 215AppDiv267, 213 NYS519; 5PaDist&Co 420; Utah 283P 731; 199Wis518, 227NW22.
147-17 57ND824, 224NW668; SD 226 NW268 (wear on automobile tire held not deterioration preventing rescission); Utah 283P731.
148-18 21F(2d)309.
148-19 202Cal 98, 259P433.
148-20 Mass 172NE595.
148-22 5PaDist&Co 27.
148-25 SD 226NW268 (delivery to person who had brought it to purchaser).
149-26 96CalA356, 274P421(2dcase); SD 226NW268; Utah 283P731. **Tender at place where tested by actual use** and found defective has been held proper. 176Ark336, 2SW(2d)1082. **Where tender would be refused at place of purchase,** tender there is unnecessary. 176Ark336, 2SW(2d)1082.
149-27 218Ala196, 118S377; 12LaA 216, 125S778; 236Mich540, 211NW64 (not necessary before seeking rescission); 142Miss851, 108S139; 155Miss 876, 125S248 (delay of seven months held unreasonable); MoA 295SW135; MoA 15SW(2d)895; 86PaSuper562; TexCivA 3SW(2d)824. **Party, continuing to perform contract for several months** after discovering defendant's fraud, has been held not entitled to rescind. 213AppDiv467, 210NYS648.
149-28½-New. Notice must be clear and unambiguous. 5PaDist&Co 27.
149-28⅓-New. On breach by manufacturer of his agreement to give buyer exclusive market, statutory rules of rescission are sufficiently met by buyer's tender of payment to seller of difference between amount of invoice price of goods returned and his account for merchandise purchased. 138 Okl 151, 280P 611.
149-29 MoA 294SW450; 127Misc50, 215NYS281. **Where property is wholly unfit for intended use** offer to return is not essential in order to rescind. 170 Ark1193, 281SW358.
150-31 127Misc50, 215NYS281. **Sale of fixtures.**–132Misc866, 230NYS529. **Anticipatory refusal to receive property.**–50ND341, 195NW555.
150-32 CalA 289P185; 127Misc50, 215 NYS281 (where seller's wrongful act made tender impossible).
150-33½-New. Offer to buy part of property does not excuse failure to return it as condition precedent to rescission. 199Wis518, 227NW22.
150-36 39GaA309, 147SE156; 154Miss 74, 122S490.
151-39 8PaDist&Co 677.
151-42 128 Or142, 273P954; Vt 146 A72.
151-43 220Ala116, 124S288; 176Ark 336, 2SW(2d)1082; 204Cal 325, 267P 1085; 76CalA33, 243P707; 202Cal 98, 259P433; 202 Iowa475, 210NW584; 210 Ky806, 276SW803; 235Ky66, 29SW(2d) 617 (illness no excuse); Mich 233NW 202; Minn 233NW302; 142Miss851, 108S139; 144Miss490, 110S427 (one year's delay held unreasonable); 82 NH462, 136A370; 247NYl, 159NE700; 213AppDiv178, 210NYS414; 127Misc50, 215NYS281 (disaffirmance held not unreasonably delayed as matter of law); 132Misc866, 230NYS529; 57ND824, 224 NW668; 118 Or339, 246P361; 120 Or 607, 253P531; 284Pa588, 131A479; 285 Pa257, 132A342; 90PaSuper221; 96Pa Super86; 5PaDist&Co 27; TexCivA 278SW343; TexCivA 283SW642; Tex CivA 1SW(2d)330; TexCivA 3SW(2d) 824; TexCivA 10SW(2d)779. **Right to rescind waived** where buyer did nothing after fifteen-day trial period and signed renewal notes for price. TexCivA 278 SW343. **Failure to rescind within reasonable time** operates as affirmance of

sale. 242Mich515, 219NW752. **Reasonable time to complete contract,** after parties treat contract as in force after date specified for delivery, must be allowed before rescission is justified. 293 Pa422, 143A103.

152-44 202Cal 701, 262P730; 80Mont 82, 258P1085. **Notice of rescission twenty-two days after buyer learned of falsity** of representations held not unreasonable. 76CalA33, 243P707. **Unreasonable delay.**-54ND559, 209NW996 (keeping threshing machine one year after discovery of defects).

152-47 78CalA652, 248P732 (two months' delay not waiver of right to rescind). **Unreasonable delay.**-7F(2d)565 (four months); 18F(2d)635; 82Colo 10, 256P635; 202 Iowa 475, 210NW584; 297Pa153, 146A541; TexCivA 3SW(2d) 824; 152Va635, 148SE807.

152-47 Laches.-92CalA457, 268P490; 251Mich509, 232NW196; MoA 24SW(2d) 191. **Unreasonable delay not shown.**-128 Or142, 268P748. **Delay held not unreasonable.**-100CalA1, 279P455(2dcase) (one month).

153-48 220Ala116, 124S288 (evidence held sufficient for jury); 202 Iowa475, 210NW584; Iowa 229NW321; MoA 24 SW(2d)191; 127Misc50, 215NYS281; 297Pa153, 146A541.

153-49 202 Iowa475, 210NW584; Minn 232NW522; 284Pa588, 131A479, 480 [citCyc]; 285Pa257, 132A342; TexCivA 1SW(2d)330.

153-50 12LaA216, 125S778; TexCivA 283SW642; TexCivA 3SW(2d)879.

153-51 160La443, 107S299, 301 [quot Cyc].

153-53 160La443, 107S299, 301 [quot Cyc]. See also 133SC369, 131SE32. **Applications of rule.**-160La443, 107S299.

154-54 160La443, 107S299, 301 [quot Cyc]; 165La723, 115S915, 918 [quotCyc perO'Neill,CJ]; 118 Or339, 246P361.

154-55 220Ala116, 124S288; 202Cal 701, 262P730; 80Mont82, 258P1085.

154-57 202Cal 98, 259P433; 78CalA 652, 248P732; 132Misc866, 230NYS529. **Mutual efforts to repair defects.**-251 Mich509, 232NW196.

154-59 But see 9LaA674, 119S781; Tex CommnA 288SW161.

154-62 15F(2d)329 (buyer held not entitled to sell goods in absence of notice of rejection); 297Pa153, 146A541. **Statement of particular grounds upon inquiry** does not preclude assertion of other grounds. 297Pa153, 146A541. **When unnecessary.**-CalA 288P687 (failure of consideration was total). **Notice of rescission held insufficient** to support action to rescind. CalA 287P547.

155-63 30F(2d)647; 90PaSuper221. **Reasons** need not be specified. 297Pa 153, 146A541. **Repudiation of contract** by purchaser without offer of restitution constituted no rescission of contract. 39 GaA309, 147SE156.

155-64 32 OhA310, 166NE912. **Conduct not amounting to rescission.**-297Pa 153, 146A541.

155-67 **Retaking from carrier after buyer's refusal to accept goods from carrier** is rescission by seller. 214App Div339, 212NYS307. **Wrongful user** by a vendor lienee may amount to rescission. 20SaskL422, [1926] 2DomLR166, [1926] 1WestWkly614.

155-68 242 IllA466.

156-69 See also 42 Ida115, 243P823. But see 103CalA764, 284P933. **Limitations of rule.**-101CalA704, 282P425.

156-70 See also 73CalA732, 239P350. **Buyer rejecting part of goods as defective and giving notice of refusal to accept further shipments** in effect rescinds contract. 240Mich524, 215NW324.

156-73 235Ky66, 29SW(2d)617. **There is no presumption that seller accepted goods on return** of C. O. D. shipment by carrier so as to work rescission and relieve buyer. 155Miss194, 124S333.

156-74 16F(2d)106 (abandonment of contract matter of intention); 266Mass 55, 164NE820. **Mere return not ipso facto rescission.**-16F(2d)106.

156-75 102Conn626, 129A782; 157Miss 182, 127S270 (return of goods to seller constitutes him a gratuitous bailee); 157Miss177, 127S294 (effect of storing returned goods to credit of buyer); 244 NY73, 154NE826 (tentative offer to return is not rescission under New York statute).

156-78 36GaA549, 137SE119.

156-78½-New. Facts constituting substantial evidence of election of buyer to rescind.-42 Ida115, 243P823.

156-78¼-New. Where, under terms of contract of sale, cancellation was not seller's sole remedy for buyer's refusal to make advance payment for shipment, failure to ship was held not cancellation of contract. 13F(2d)999.

156-78¼-New. Where buyer has not received property purchased and status quo has not been disturbed, notice of disaffirmance and rescission is sufficient. 204 Iowa881, 216NW258.

156-78½-New. Buyer, by assigning its claim for cash payment made on one-half carload of peaches to purchaser of other half, for purpose of recovering payment, rescinded contract for purchase of peaches. 128Or191, 274P128.

156-79 **Buyer may maintain action for rescission.**-127Misc810, 216NYS496.

157-82 **Action for reduction of price is included in redhibitory action to rescind sale,** under some statutes, to effect that judge in latter action may decree merely reduction of price. 166La557, 117S590.

157-85 Fla 129S779; TexCivA 3SW (2d)824. **Buyer must specifically allege sale.**-127Misc810, 216NYS496. **Buyer must plead return of property purchased** if it is of any value. TexCivA 280SW 622. **Complaint must expressly aver offer to return goods.**-127Misc810, 216 NYS496. **Allegations held sufficient** to show reliance on inducement and tender. TexCivA 299SW313.

157-86 69CalA688, 232P499 (executed contract rescinded for actual fraud); 13 LaA342, 128S48 (agreement to rescind); 7LaA595; 8LaA191; 8LaA348; Tex CivA 280SW622 (return of property purchased); TexCivA 26SW(2d)357. **Burden of proving duress** is on person seeking to set aside bill of sale on that ground. 116 Or626, 241P56. **Evidence held to warrant nonsuit of seller** suing to rescind for alleged insolvency of buyer. 121 Or531, 255P606. **Failure to furnish certificate of cattle club** showing transfer of cattle has been held not sufficient ground for rescission, absent covenant. CalA 287P547. **Intent to deceive** in making false representations need not be proved. TexCivA 25SW(2d)255. **Evidence held sufficient** to sustain grounds of rescission. 12LaA628, 126 S705(1stcase). **Evidence held insufficient** to justify cancellation of contract. Wis 230NW61.

157-88 121 Or531, 255P606.

157-89 **Evidence held insufficient.**-239 Mich229, 214NW82.

157-91 99NJEq578, 133A483.

157-93 166Minn195, 207NW305 (finding of misrepresentations sustained by evidence in action to rescind sale of bonds).

157-96½-New. Evidence sufficient to show cancellation before shipment. 168 Ark756, 271SW954.

157-96⅓-New. By buyer on ground mill feed was not satisfactory. 208Ky 676, 271SW1070.

157-96¼-New. Buyer's reliance on express warranty is admissible. 176Ark 336, 2SW(2d)1082.

157-96⅕-New. That other purchasers of goods made no complaint is inadmissible. 176Ark336, 2SW(2d)1082.

157-96⅙-New. Seller's denial of having made warranty not claimed by buyer is inadmissible. 176Ark336, 2SW(2d) 1082.

157-96⅐-New. Distinction exists between nature of proof required in action in rescission and action for damages for fraud and deceit. 247NY1, 159NE700.

157-96⅛-New. Party may, by pleading in alternative, on failure to show rescission, recover damages for breach of warranty. TexCommnA 299SW857.

157-96⅛-New. To entitle purchaser to diminution of price, under statute, he must not only establish that defect existed at time of sale, but must also show with reasonable certainty amount of reduction to which he is entitled. 166 La557, 117S590 (evidence held insufficient).

158-98 **Questions of fact.**-202Cal 98, 259P433; 173Minn535, 217NW941; SD 226NW268; Wis 230NW61. **Judgment for defendant in action for rescission** should not include reconventional demand for value of goods replaced by seller without request from buyer. 162 La99, 110S102. **Failure to find** that purchase-money notes were in possession of purchaser is immaterial where other findings dispose of issues. 204Cal 325, 267P1085. **Time for rescission as question of law or fact.**-86PaSuper562. **Questions for the jury.**-TexCivA 25SW (2d)255.

158-1 TexCivA 3SW(2d)824. **Finding as to time when contract was to be completed is immaterial** under some circumstances. 77CalA66, 246P113.

158-2 **Decree amended** by deducting value of stock from cash payment decreed to be paid to buyer where buyer had disposed of stock. 236Mich540, 211 NW64.

158-3 But see 204Cal 325, 267P1085.

158-3½-New. Where complete restoration to former position is impossible, terms on which rescission of contract for sale of business may be granted rests in sound discretion of court. 247 NY170, 159NE899.

158-4 159La1096, 106S652. **Recognition of buyer's right to terminate** held not to recognize buyer had not breached contract nor waive the breach. 170La 57, 127S363.

158-6 TexCivA 286SW667 (entitled to possession on demand).

159-7 233Ky386, 25SW(2d)1039; 295 Pa374, 145A425; 20SaskL422, [1926] 2 DomLR166, [1926] 1WestWkly614.

158-10 **Seller does not waive claim for damages for breach of contract** by giving notice of rescission expressly stating election to hold buyer responsible in damages. 203Cal 1, 262P1087.

159-14 68CalA652, 229P1025; 73CalA 700, 239P70; 6LaA550; 233Mich407, 206NW374; 133SC369, 131SE32. **Purchase-money notes in hands of bona fide holder.**-TexCivA 299SW313.

160-17 73CalA700, 239P70; 9LaA193, 119S271; 133SC369, 131SE32 (limited to return of purchase price, except where loss due to refusal of seller to accept tender).

160-19 133SC369, 131SE32 (and refusal). **Upon refusal of tender buyer may not abandon property** but must take care of it and bill seller. 133SC 369, 131SE32 (dictum). **If buyer abandons property after refusal of tender** his claim for return of purchase price should be reduced to extent of damage sustained by his neglect. 133SC369, 131 SE32.

160-21 146Va641, 132SE840; 100WVa 515, 131SE12. **Buyer may reimburse himself out of proceeds for expenses of resale** in such amount only as is reasonably incurred. 100WVa515, 131SE12.

160-22 146Va641, 132SE840 (buyer must sell at best market price).

160-23 133SC369, 131SE32 (buyer not entitled to damages on rescission except where loss due to refusal of seller to accept tender).

160-23½-New. Buyer is not entitled to damages for breach of special agreement where he has rescinded whole contract. 215AppDiv267, 213NYS519.

160-23½-New. Buyer rejecting part of goods as defective and giving notice of refusal to accept further shipments cannot make replacement by purchase in open market and charge seller with difference in cost. 240Mich524, 215NW 324.

160-23¼-New. Buyer of tractors cannot rescind contract for breach of guaranty and recover damages for not being allowed to retain tractors after discovering defects. TexCivA 1SW(2d)749.

160-23⅕-New. Disposition of proceeds of purchase money paid is made in accordance with terms of rescission agreement. 25F(2d)190.

160-25 TexCommnA 118W(2d)507. **Agreement to furnish buyer with "good and sufficient" bill of sale** of cattle implies that title is to be clear and stock unencumbered. 8CalA284, 251P810. **Sale of registered cattle.**-80CalA284, 251 P810.

160-28 NJ 141A163. **Vendor furnishes**

good title by proof of facts sufficient to relieve title of question beyond reasonable doubt. **TexCivA 2SW(2d)**485.

160–29½–New. Agreement to give written warranty of title is material and valuable consideration, refusal to comply with which constitutes breach of contract. 80CalA284, 251P810.

160–29⅓–New. There is clear distinction between record title and actual title to personal property, 80CalA284, 251P810.

160–29¼–New. and, regardless of ownership of actual title, one who contracts to deliver actual title, and also evidence thereof, fails to perform agreement till delivery of document purporting to convey title. 80CalA284, 251 P810.

161–30 TexCommnA 11SW(2d)507. **Mortgage on property no justification for refusing to accept** where price agreed to be paid for property is more than sufficient to satisfy mortgage debt. 160La109, 106S711.

161–35½–New. Validity of objection to title must be determined in light of facts known to objector. **TexCommnA** 11SW(2d)507.

161–35⅓–New. Where objection to title tendered by seller was valid and legal and not waived, it was immaterial that objector had other undisclosed reasons for rejecting title. **Tex CommnA** 11SW(2d)507.

162–39 189NC684, 128SE155 (written instrument not required for transfer of personal property).

162–40 216Ala321, 113S495 (automobile).

162–41 80CalA284, 251P810, 812 [cit Cyc]. **Definition.**–80CalA284, 251P810.

162–42 Receipt held insufficient.–80 CalA284, 251P810.

162–43 80CalA284, 251P810.

162–45 A seal is not necessary, etc. 80 CalA284, 251P810.

163–56 Agreement not mentioned in bill of sale is not merged therein. 130 Misc64, 223NYS634.

163–60 28F(2d)518; 34GaA298, 129SE 562; 249NY119, 163NE123. See also **MoA** 285SW141. **Time within which performance of conditions sufficient.**–142 Va769, 128SE55. **No title passes till condition happens.**–**TexCivA** 278SW471.

163–62 225Ky418, 9SW(2d)119.

164–64 221AppDiv174, 222NYS650.

164–66½–New. Bankruptcy is equivalent of repudiation. 230AppDiv714, 243 NYS248.

164–70 TexCivA 9SW(2d)762.

165–74 Iowa 233NW133 (buyer entitled to his bargain); 172Minn4, 214NW 475.

165–75 83CalA582, 257P156, 157 [cit Cyc]; **TexCivA** 6SW(2d)221.

165–80 141SC182, 139SE395.

165–82½–New. Seller discontinuing performance for cause has duty to apportion or prorate product fairly among customers in legal standing when breach occurs. 287Pa232, 134A386.

165–82⅓–New. There must also be fairness in apportionment in producing different grades. 287Pa232, 134A386.

165–82¼–New. Where seller of coal discontinued performance for cause, practice previously in vogue held immaterial in determining fairness in apportionment of product among customers. 287 Pa232, 134A386.

165–82⅓–New. Delivery of goods is essential to perfection of sale. 36GaA 322, 136SE803.

165–82⅙–New. If seller breached contract for sale of peaches, it was not entitled to recover anything, where buyer did not receive peaches. 128 Or191, 274 P128.

165–82⅐–New. Where seller aids purchaser, unable to perform, he is not liable to receiver of latter for breach of contract to deliver. 43F(2d)923.

165–87 131Misc471, 227NYS289. **Waiver by buyer of literal compliance as to dates of shipment,** rendering provision as to time of delivery indefinite, necessitates demand for strict performance before buyer can be relieved of obligations. 293Pa422, 143A103.

165–88½–New. Where seller could not deliver until receipt of shipping instructions as provided for by contract, buyer's failure to send instructions entitles seller to damages for breach of contract. 241NY440, 150NE509.

165–89 Notice to perform is unnecessary where buyer treated seller's statement as anticipatory breach. 136Misc 646, 241NYS630.

166–90 136Misc723, 244NYS71.

166–92 Failure of buyer to give shipping directions held breach of contract. 258Mass13, 154NE263.

166–93 241NY440, 150NE509 (holding that buyer is liable for breach of contract where seller was ready to make deliveries, but could not do so because of buyer's failure to give shipping instructions).

166–94 154Md695, 140A46.

166–1 226AppDiv266, 235NYS1.

166–1½–New. When contract calls for payment for each installment when put in order, subsequent deliveries need not be made till prior deliveries are paid for. 154Md695, 140A46.

166–2 Where buyer's order provided "time of shipment ninety days buyer's option," option is not one to refuse acceptance of goods but is only right to call for shipment at any time within such period. 37GaA200, 139SE431.

167–3 36GaA140, 135SE759.

167–8 48 Ida611, 284P257; **Ida** 292P 235; 6PaDist&Co 439.

168–15 117 Okl 55. 244P756, 757 [cit Cyc]. **Seller cannot demand payment of amount due on other contracts** as condition for performing contracts on which nothing was owing. 249NY68, 162NE586.

168–16 Evidence held to show inability of seller's assignee to perform. 214 AppDiv175, 212NYS31. **Evidence as to ability to deliver held sufficient to go to jury.**–214AppDiv205, 212NYS20. **Evidence held sufficient to show readiness to fill** entire order upon receipt of shipping instructions. 143Va469, 130SE393.

168–18 Notice of inability to deliver constitutes breach. 32 OhA254, 167NE 904.

168–19 117 Okl 55, 244P756, 757 [cit Cyc].

168–23 Notice held sufficient.–218App Div322, 218NYS301; 143Va469, 130SE 393.

169–25 83CalA582, 257P156, 157 [cit Cyc]; 117 Okl 55, 244P756, 757 [cit Cyc]; 32PortoRico 629. **Deposits under Porto Rico code commerce** where merchandise refused, see 32PortoRico 629.

169–28 117 Okl 55, 244P756, 757 [cit Cyc]. **Demand for payment.**–285Pa120, 131A705. **Deposit in court** does not change character of tender as respects measure of damages. 89CalA416, 264P 796.

169–29 240 IllA124; 117 Okl 55, 244P 756, 757 [citCyc]; 285Pa120, 131A705 (insisting on new terms constitutes breach).

170–30 Within reasonable time where no time fixed in contract. 241NY455, 150NE514 (before buyer can be held in default for failure to accept delivery). **Tender is not ineffectual** because steamer on which shipment was made had been diverted by charterer while on high seas. 276US469, 48SCt 378, 72Led657. **Brief delay in releasing right to use name** does not constitute breach of contract to sell property and good will of business. 133 Or 85, 288P404.

170–34½–New. Tender may be made before weighing and measuring for purpose of ascertaining price where there is no question as to identity of goods. 71CalA2, 235P438.

170–34⅓–New. That import duty has not been paid does not invalidate tender, though contract requires delivery of goods duty free where, according to custom and usage, time of payment of duty is when shipping instructions are given and none are given. 71CalA2, 235 P438.

170–34¼–New. Failure to tender document of title under c. i. f. contract bars action by seller who alleges due performance. 214AppDiv175, 212NYS31 (where seller offered to deliver goods).

170–35 Seller's offer of performance, conditioned that goods be selected by certain person, which was not condition of contract, is insufficient. 85 Mont31, 277P433(2dcase).

171–41½–New. Where contract for delivery of certain number of cases of goods provides for prorating in case of short pack rendering seller unable to make full delivery, such provision is one for seller's benefit leaving him to supply his deficit by purchase in open market. 201Cal 79, 255P795 (offer to deliver entire order held valid though there was short pack).

171–42 23F(2d)783; 26F(2d)33; 32 F(2d)74; 32F(2d)442; 34GaA298, 129 SE562; 123 Or243, 261P701. But see 35GaA206, 132SE264.

171–43 26F(2d)33; 103CalA524, 284P 1038; 12LaA625. 125S757; 1LaA465; 256Mass66, 152NE347; 123 Or243, 261 P701.

171–44 97CalA784, 276P374.

171–46½–New. Buyer is estopped to raise objections to tender not made at time of tender where he had opportunity to make such objections. 71CalA 2, 235P438.

171–46⅓–New. Rule applies where buyer, in connection with tender demands something to which he is not entitled. 71CalA2, 235P438.

171–46¼–New. Rule applies to objections to form of delivery order tendered. 71CalA2, 235P438.

171–46⅙–New. Evidence held sufficient to show that buyer had knowledge of and therefore waived objection that invoice accompanying delivery was based on gross shipping weights rather than net landed weights. 71CalA2, 235 P438.

171–46⅛–New. Instruction by buyer that seller hold shipment until further instructions is waiver of tender. 214AppDiv205, 212NYS20.

171–47 16F(2d)185; **TexCivA** 270SW 1087. **Acceptance of slag at pits and** not at furnace held contemplated, in action on bill for keeping trough open. 13F(2d)622. **Change of purchaser's place of business.**–40GaA356, 149SE716 (notice to discontinue shipments does not constitute notice as to goods already shipped).

172–48 Agreed delivery "f. o. b. Pacific Coast" held not satisfied by delivery in Texas. 16F(2d)185.

172–52 240NY501, 148NE659 (German marks).

172–53 240NY501, 148NE659; 131Misc 53, 225NYS638. **Where provision to deliver to buyer is abrogated** by instructions by buyer not to ship until further instructions, under statute place of delivery is at seller's place of business. 214AppDiv308, 212NYS133 (Personal Prop. L. § 124).

172–55 1LaA692, 693 [quotCyc]; **Tex CivA** 275SW406.

172–58 140Miss155, 106S17.

174–69 157Miss177, 127S294.

174–72 259Mass29, 155NE657.

174–75 150Md641, 135A136.

174–77 5LaA20, 24 [citCyc]; 150Md 641, 135A136; **TexCivA** 275SW161 (place of shipment).

175–87 38GaA756, 145SE474(2dcase); 1LaA116; 1LaA270; 308Mo 453, 273 SW95; **MoA** 285SW1028; **MoA** 25SW (2d)125; 240NY501, 148NE659 (delivery must be made by date fixed); 131 Misc407, 226NYS751; 285Pa131, 131 A710; **TexCivA** 270SW1087; **TexCivA** 283SW692. But see 36GaA140, 135SE 759. **Time indefinite.**–**MoA** 282SW470. **Contracts construed and held not to fix definite time for delivery.**–36GaA140, 135SE759. **Effect of provision against guaranty.**–115 Okl 199, 242P201. **Written and printed words reconciled.**–35 GaA683, 134SE627. **Contract for delivery "on or about December 15"** held complied with by offer to deliver on December 18. 12LaA625, 125S757. **Seller's failure to ship on time was an active breach which made it unnecessary to put him in default** where time was of essence of contract. 12LaA575, 126S257. **"Date wanted—as desired"** sufficiently fixes time for delivery. 43 F(2d)309.

176–88 168Ark756, 271SW954; 70 CalA708, 234P417; 12LaA431, 125S191 (2dcase); 240NY501, 148NE659; 293 Pa422, 143A103; **TexCivA** 281SW242.

176–89 7LaA411; **La** 130S469. **Rejec-**

tion is warranted by delay in shipment beyond date specified in contract, notwithstanding contract provision that date of bill of lading should be final as to date. 27F(2d)129(3dcase).

177-92 Failure of buyer to furnish at time fixed vessel to receive goods for exportation prevents recovery for refusal to deliver after that date. 162 Ga795. 134SE763.

177-93½-New. Notice to make prompt delivery after waiver.-After buyer has waived prompt delivery, he must give notice to seller that prompt delivery is expected thereafter, to make time again of essence. 285Pa131. 131A710.

177-94 32F(2d)825; 214Ala551, 108S 357 [quotCyc]. **Term "seller's 60 days"** allows seller to deliver bonds within 60 days and thereafter, until buyer makes demand and purchases in market. 136Misc814, 242NYS622.

177-94½-New. Uniform Conditional Sales Act makes every provision of conditional sale valid against all persons, where statutory requirements of filing have been satisfied. 3Del 66, 130A392.

177-95 245NY61, 156NE97 (contract providing "April shipment"). **"July and August delivery"** held to require delivery at any time during such months. 214Ala551, 108S357.

178-96½-New. Where "average" of certain quantity "daily or more" is to be delivered for specified number of days and circumstances of mutual interests require it, delivery of such approximate amount daily was required, and not of total amount some time during term. 6F(2d)564.

178-96½-New. Under contract for deliveries between certain dates, seller held entitled to compel buyer to accept and pay for undelivered balance within reasonable time after last date specified. 131Misc53. 225NYS638.

178-96¼-New. Under contract for deliveries of eggs before January 1, seller held entitled to expect buyer to complete taking deliveries not later than February 25. 131Misc53. 225NYS638.

178-6 23F(2d)783. **Delivery on ships, under contract of "shipment" during certain months,** which ships would begin voyages in months named, is sufficient. 236 IllA426. **After delivery to carrier,** law implies delivery to buyer in reasonable time. 236 IllA426. **Mode of shipment.-MoA** 285SW141.

179-8 But see 8F(2d)212; 5LaA355.

179-10 36GaA140, 135SE759; 218MoA 597, 265SW993, 995 [quotCyc]; 44Philippine874, 881 [quotCyc].

179-11 28F(2d)518; 99CalA631, 279P 159; 36GaA140, 135SE759; 36GaA549, 137SE119; 38GaA756, 145SE474(2d case); 236 IllA426; 237 IllA334; 1 LaA14(2dcase); 218MoA597, 265SW 993, 995 [quotCyc]; 85Mont31, 277P 433(2dcase); 241NY455, 150NE514; 129Misc762, 222NYS584; 135Misc299, 238NYS102 (seller must be afforded reasonable time to replace objectionable rug with one conforming to contract); 190NC169, 129SE406; 292Pa 122, 140A774; 44Philippine874; Tex CivA 291SW959. **Delivery within reasonable time** is not dependent on whether failure to deliver within such time would cause seller loss. 241NY455, 150 NE514.

180-12 218MoA597, 265SW993, 995 [quotCyc]; 44Philippine874, 881 [quot Cyc].

180-13 218MoA597, 265SW993, 995 [quotCyc]. **"Rush" and "prompt"** have no settled meaning but imply more than ordinary diligence. 102Conn626, 129A 782.

180-14 218MoA597, 265SW993, 995 [quotCyc].

180-15 218MoA597, 265SW993, 995 [quotCyc]; 44Philippine874, 881 [quot Cyc].

180-16 Fla 129S850 (delivery of fruit in shipping season).

181-21½-New. Delivery after waiver of prompt delivery.-Where buyer has waived prompt delivery as specified in contract, seller has reasonable time thereafter to perform; 285Pa131, 131 A710.

181-21½-New. and if extension is granted from time to time, buyer must inform seller that prompt performance is expected thereafter, in order again to make time of essence. 285Pa131, 131 A710.

181-22 8F(2d)689; MoA 287SW881.

181-23 220Ky791, 295SW1012.

181-24 102NJL468, 133A391 (holding delivery of machine within two weeks compliance with contract to deliver as soon as convenient).

182-28 6F(2d)214 (seller may take other contracts for delivery at earlier date, provided he has reasonable proof to believe that earlier contracts will not be delayed by later ones); 111 Okl 286, 239P564.

182-32 192NC626, 135SE627; Wash 290P695 (where option was with both parties but with more latitude to buyer). **Rule applicable** up to last day of period for delivery as specified in contract. 187Wis34, 203NW746.

182-33 "Shipping instructions later" in contract to sell obligates buyer to send instructions before seller is under obligation to deliver. 241NY240, 150 NE509.

182-34 82IndA667, 147NE294; Wash 290P695 (five months not too long a period).

182-35 Can [1930] 1DomLR369.

182-36 Can [1930] 1DomLR369.

182-38 187Wis34, 203NW746.

182-39 Where goods are to be shipped on given date or "as ordered out," purchaser must direct shipment within reasonable time and prior to date named. 36GaA140, 135SE759. **Where contract provided for delivery in lots as ordered,** during period specified, and orders for delivery of whole amount were given, seller had right to ship goods at close of period, even though purchaser had requested delay. 214 Ala109, 106S686.

182-41 36GaA140, 135SE759.

183-49 237 IllA334; 85Mont31, 277P 433(2dcase); 241NY455, 150NE514; 129Misc762, 222NYS584; 285Pa131, 131A710 (extensions of time made necessary by changes); 44Philippine874, 881 [quotCyc]. **Illustrations.**-237 IllA 334; 82 IndA667, 147NE294. **Attitude of parties** is sometimes important factor in determining what is reasonable time. 241NY455, 150NE514. **Coal delivered six weeks after execution of contract** held not "reasonable time." 129Misc762, 222NYS584.

183-50 99CalA631, 279P159; 44Philippine874, 881 [quotCyc]. **Sheep.**-99 CalA631, 279P159 (seller required to use reasonable and customary means to fatten).

183-51 44Philippine874, 881 [quot Cyc].

183-52 44Philippine874, 881 [quot Cyc].

184-53 253Mass37, 148NE101 (car shortage as cause for delay beyond control of seller); 44Philippine874, 881 [quotCyc].

184-54 44Philippine874, 881 [quot Cyc].

184-55 44Philippine874, 881 [quot Cyc].

184-56 8F(2d)689; 17F(2d)983; 36 GaA140, 135SE759; 48 Ida777, 285P 476; 122Kan643, 253P412; 241NY455, 150NE514; 214AppDiv626, 212NYS444; 216AppDiv409, 215NYS496; 285Pa131, 131A710; 293Pa422, 143A103. **Indicating belated delivery would be accepted precludes buyer from insisting** subsequent tender was untimely. 241 NY455, 150NE514.

184-57 13F(2d)747; 23AlaA244, 123 S260; 36GaA140, 135SE759.

184-58 17F(2d)983; 216Ala547, 114S 41; 217Ala280, 116S125; 47 Ida726, 278P224(3dcase); MoA 285SW141, 143 [citCyc]; BC [1930] 4DomLR158. **Acts held not waiver,** under circumstances. 221AppDiv253, 223NYS110.

184-59 232 IllA523; 6LaA447. **Consideration not essential for waiver.**-232 IllA523. **Stipulations to delay delivery held not new contract.**-232 IllA523. **Waiver of delay** held not to affect original contract. 232 IllA523. **On extension, time is extended for reasonable period.**-232 IllA523. **Consenting to delay on one contract** held not to amount to waiver of rights under another contract. 221AppDiv253, 223NYS110.

185-61 214La254, 107S101 (letter demanding after breach); 12LaA431, 125 S191(2dcase). **Offer to accept balance of goods if delivery is made at once** operates as waiver of breaches previously occurring. 175Ark816, 300SW433.

185-62½-New. , by change of plans where seller makes delivery within reasonable time after such modification. 285Pa131, 131A710.

185-63 48 Ida777, 285P476; 241NY 455, 150NE514.

185-65½-New. Buyer who waived seller's breach cannot later recover in reconventional denial where no further breach of contract. 214La254, 107S101.

185-65½-New. Where order for flour by barrel in stated amount was to be delivered "as wanted" by stated date, seller by continuing deliveries thereafter waives provision as to time of delivery. 142Wash513, 253P817.

185-65¼-New. Mere fact that seller in making such deliveries after date frequently objected to rate at which deliveries were being accepted does not prevent such waiver from operating. 142Wash513, 253P817.

185-65½-New. Such waiver is not affected by seller's instruction to salesman that flour must be taken out. 142 Wash513, 253P817.

185-66 6F(2d)990; 48 Ida777, 285P 476; 160La254, 107S101; Mich 233NW 202. **Provision in contract** that acceptance shall be waiver of damages for delay is valid and binding. 120Kan 702, 244P1042. **Acceptance of installment,** or part of it, out of time does not of itself waive time for delivery of other installments. 308Mo 453, 273SW95.

185-67 7F(2d)565; 36GaA506, 137SE 409 (acceptance, giving notes for price, and payment of note); 133SC274, 130 SE886 (acceptance without consulting seller).

185-68 164Minn466, 206NW380; 130 Misc359, 224NYS344. But see 130Misc 359, 224NYS344. **The contrary doctrine,** etc. 253NY166, 170NE532. **In absence of showing unreasonable delay in delivering pool tables,** buyer who accepted them cannot recover for rent of building during delay. 232Ky489, 23 SW(2d)914.

186-69 37GaA227, 139SE588.

186-73 37GaA227, 139SE588.

186-75 175Ark816, 300SW433.

186-75½-New. Acceptance of delayed shipment held to waive right to forfeiture or cancellation on account of delay. 214Ky443, 283SW407.

186-75½-New. Buyer cannot rely on default in delivering shipment as cause for countermanding future deliveries, after accepting delayed shipment. 214 Ky443, 283SW407.

186-75¼-New. Where seller acceded to request for change in specifications and extension of date of invoice buyer's receipt of goods and retention of part waives delay. 48 Ida777, 285P476.

186-76 190NC169, 129SE406 (or show waiver by buyer).

187-78 Sufficiency of the evidence, etc. 82CalA307, 255P541. **Sufficiency of the evidence,** etc. MoA 285SW141.

187-79 Evidence held insufficient.-99 CalA631, 279P159.

187-79½-New. Evidence admissible to show additional period required by seller to complete work made necessary by change of plans. 285Pa131, 131A 710.

187-79½-New. Evidence held to show time of delivery was of essence. La 130 S469.

187-82 36GaA549, 137SE119 (delivery of entire order held not within reasonable time as matter of law); 38GaA756, 145SE474(2dcase); 315Mo 1025, 288SW 59; 241NY455, 150NE514; 135Misc299, 238NYS102; 190NC169, 129SE406; 285 Pa131, 131A710 (evidence sufficient to make question for jury). **Reasonable time for performance after waiver of strict performance** is for jury. 293Pa 422, 143A103. **Whether delivery was made within reasonable time** after demand is for jury. 293Pa422, 143A103.

187-34 253Mass37, 148NE101; 315Mo 1025, 288SW59; 285Pa131, 131A710; 293Pa422, 143A103; SC 148SE576.
187-34½-New. Where buyer's subsequent conduct in receiving goods after rescission for delay does not conclusively establish waiver or estoppel directed verdict for seller for purchase price is improper. 133SC281, 130SE870.
187-34½-New. And if such conduct might reasonably support finding of waiver or estoppel buyer's motion for directed verdict is properly refused. 133 SC281, 130SE870.
187-34¼-New. Whether delivery was made at time in compliance with contract is question for jury. 35GaA683, 134SE627.
187-86 172Ark362, 288SW887.
188-88 See also 5LaA332.
188-94 172Ark362, 288SW887.
188-97 Installation of machinery.-77 CalA66, 246P113.
189-1 140 Okl 80, 282P635.
189-7 130Misc359, 224NYS344.
189-9 101CalA482, 281P1036; 245Mich 418, 222NW699.
189-10 MoA 300SW544. **Purchase and delivery of furs having been completed** when buyer took them from seller to another, with whom he independently contracted to have them finished and subsequently delivered to him, buyer could not refuse delivery or payment. 95CalA 101, 272P789. **Application by third party of goods** delivered is no concern of seller. 141Miss881, 106S110. **Delivery to buyer's customers** held under facts to be delivery to buyer. 104Conn674, 134A233.
189-13 118 Okl 26, 246P438, 440 [cit Cyc]. **Description of goods.**-11LaA242, 123S410(2dcase). **Unintentional mistake in delivering rug of wrong size** does not ipso facto constitute breach of contract. 135Misc299, 238NYS102.
190-18 CalA 290P545.
190-20½-New. When buyer requested seller to deliver in "pool cars" and goods were delivered to carrier, seller is entitled to recovery notwithstanding condition upon arrival. 191NC523, 132SE 273.
191-22 TexCivA 9SW(2d)762; TexCivA 27SW(2d)844.
191-27 20F(2d)364.
191-27½-New. Purchaser's several payments on purchase price are recognition of delivery theretofore made and which was acceptable to him. 82Colo 351, 260 P101.
193-51 172Ark362, 288SW887, 888 [cit Cyc].
193-52 172Ark362, 288SW887, 888 [cit Cyc].
193-53 172Ark362, 288SW887, 888 [cit Cyc].
194-60 32F(2d)195; 80Colo 369, 250P 689, 690 [citCyc]; 106Conn372, 138A 142; 40GaA425, 149SE719; 202 Iowa 1140, 211NW568; 8LaA305; MoA 25 SW(2d)138 (specific notice of shipment unnecessary in absence of such express agreement); 217AppDiv49, 215NYS727; 220AppDiv645, 222NYS331; 190NC169, 129SE406; 191NC523, 132SE273; 94 PaSuper136; 5PaDist&Co 746; 132SC 511, 129SE213 (under provision for delivery f. o. b. seller's factory); TexCivA 276SW322; TexCivA 21SW(2d)341. But see 8LaA198. **Delivery of C. O. D. shipment** to carrier is delivery to buyer and passes title to him, but right of possession does not pass till payment to carrier. 232Mich624, 206NW344. **Rule is subordinate to intention of parties.**-121 Or658, 257P10. **Diversion of goods shipped to another.**-40GaA425, 149SE 719. **Execution of bill of lading is not essential.**-40GaA425, 149SE719.
195-61 1LaA692, 693 [citCyc]; 5LaA 434.
195-63 80Colo 369, 250P689, 690 [cit Cyc]; 205 Iowa1341, 219NW481. But see 118 Okl 26, 246P438.
195-67½-New. Shipment under bill of lading to shipper's order, notify shipper, held not compliance with contract requiring shipment to shipper's order, notify buyer. 162La355, 110S556.
195-67¼-New. Delivery to carrier for transmission to buyer is delivery to buyer, though coal had not yet been loaded at mines. 106Conn372, 138A142.
195-68 106Conn372, 138A142.
195-69 70CalA708, 234P417, 419 [cit Cyc].
196-72 112 Okl 202, 240P732.
196-73 70CalA708, 234P417.
196-75 Buyer does not waive right to object to nontransference of bill of lading, by refusing to accept goods on other grounds, where seller could not have complied with contract within the time specified. 70CalA708, 234P417.
197-79 [1926]CanSC208, [1926] 1Dom LR314.
197-82 Contra 169Minn497, 212NW200.
F. o. b. provision does not determine absolutely which party is under duty to furnish cars. 169Minn497, 212NW200.
198-83 Where contract contains no provision as to furnishing cars, it devolves on seller to deliver goods on board cars after procuring cars for that purpose. 168Ark1167, 272SW848.
198-90 217AppDiv49, 215NYS727; 220 AppDiv645, 222NYS331; 94PaSuper136.
198-91 MoA 297SW721.
199-4 131Misc53, 225NYS638. **Seller could not claim constructive delivery** at another's warehouse till unascertained goods were appropriated to contract. 131Misc53, 225NYS638.
199-4½-New. Under contract buyer had to pay for goods on board ship after arrival though portion was destroyed. 22F(2d)454.
199-5 Under c. i. f. contract, obligation of seller is to deliver documents giving right to have goods delivered, rather than to transfer goods themselves, and tender of documents constitutes performance of contract. 30F(2d)647.
201-9 Intent of parties.-36GaA322, 136 SE803.
201-10 Statute requiring bill of sale.-TexCivA 286SW612.
201-19 Evidence held sufficient to show delivery.-82Colo 351, 260P101; 214Ky 443, 283SW407; 11LaA669, 124S602; 168Minn502, 210NW395; 68Utah470, 251P10. See also 154Md695, 140A46. **Evidence held insufficient to show delivery.**-12LaA233, 125S189.
202-27 229Ky666, 17SW(2d)733.
202-28 Mere possession by purchaser is presumptive evidence of title but is not conclusive. 80CalA284, 251P810.
202-32½-New. Dissolution of corporate seller before date of delivery held no prevention of delivery as matter of law, evidence establishing no breach of contract. 127Misc43, 215NYS264.
202-34 8F(2d)731; 22AlaA308, 115S 293; 154Md695, 140A46; 114 OhSt491, 151NE377. **Where buyer refused to accept deferred delivery** on agreed date, directed verdict for seller proper. 34 GaA288, 129SE291. **Direction of verdict for full amount of seller's claim error** where subsequent delivery of shortage was question of fact, and it appeared that seller had filed claim against carrier for value of material lost. 132SC 511, 129SE213. **Evidence held insufficient to go to jury.**-214Ky443, 283SW 407.
202-34½-New. Whether it was seller's duty to deliver leather held for jury. Mass 168NE776.
203-35 214AppDiv86, 211NYS293.
203-36 Seller suing for extra material must show full delivery under contract where buyer claims that all material was received thereunder. TexCivA 294SW 341.
203-37 214AppDiv86, 211NYS293; 127 Misc355, 216NYS155. **Where deficiency in rice bought was six pounds per bag, totaling sixteen thousand pounds,** held buyer entitled to reject. 127Misc355, 216NYS155.
203-40 217AppDiv647, 216NYS174. See also 115 Okl 199, 242P201.
204-41 213AppDiv143, 210NYS145 (seller's admission of his inability to comply with contract held to require directed verdict for buyer for money paid).
204-42 See also 217AppDiv647, 216 NYS174; 229AppDiv463, 242NYS342.
204-44 126Me308, 138A389.
205-46 77CalA690, 247P536.
205-49 77CalA690, 247P536. **Offer or delivery of larger quantity** held to constitute new offer, acceptance of which operates as assent according to terms of original contract. 77CalA690, 247P 536.
205-49½-New. If purchaser accepts more than what is specified in contract, contract price is evidence of reasonable value. 77CalA690, 247P536.
205-51 170La1065, 129S638.
205-52 70CalA724, 234P405.
205-53 170La1065, 129S638. **Delivery of maximum amount,** where price has decreased, is not imputable as bad faith on part of seller. 70CalA724, 234P405.
206-55 See also 136Wash53, 238P911. **Additions to stock of goods** by seller for buyer's benefit held not ground for repudiation, when buyer did not object thereto at time of his refusal to carry out contract. 136Wash53, 238P911.
206-59 70CalA724, 234P405 (ten per cent "above or below" defining "about"). **Where parties have exactly defined terms,** such definition is as binding as other parts of contract. 70CalA724, 234 P405.
206-60 Contract for sale of goods defining "about" as meaning ten per cent over or under quantity specified is simple and unambiguous and will be given full effect. 70CalA724, 234P405.
206-61 128Misc384, 219NYS5.
207-62 50Nev340, 259P415.
207-63 50Nev340, 259P415.
207-66 TexCommnA 16SW(2d)285 (contract held not objectionable as not being reasonably certain).
207-67 147Va125, 136SE673.
208-69 Contract to furnish buyer's requirements of coal calls for quantity required to supply reasonable wants. 147Va125, 136SE673.
208-70 [1926]CanSC18, [1926] 1Dom LR397.
209-82 Construction of contract.-129 Or357, 277P716.
209-83 70CalA724, 234P405. **Construction of option.**-88PaSuper334. **Where seller does not rely on reduction option** and deliveries are deficient even though later made good, seller is liable to buyer for damages resulting from reduced deliveries. 132Misc704, 230NYS482.
209-84 Matters not constituting election.-88PaSuper334. **Where option is with seller** but neither have relied thereon, buyer, sued for failure to accept under contract, cannot claim reduction under such clause. 132Misc704, 230NYS 482.
209-85½-New. Where seller insisted on deliveries under his contract, element of bad faith was not involved. 70CalA724, 234P405.
209-90 140Miss155, 106S17.
210-5½-New. Where installment deliveries delayed at buyer's request, his reference to goods then in seller's possession will not confine modification of delivery provisions to that portion or obligate seller to tender installments of balance before first part is accepted, 103 Conn172, 130A68.
210-5½-New. and buyer's subsequent repudiation of entire contract so far as unexecuted will not necessarily resuscitate provision for deliveries but will give seller option to tender all of balance within reasonable time. 103Conn172, 130A68.
210-5¼-New. Contract for sale of coal, providing that shipments for any one month should not be cumulating without parties' consent, does not defeat seller's right to recover for failure to receive contract amount. 137SC345, 135SE380.
211-7½-New. Buyer is not justified in refusing to accept part of coal diverted en route, where contract did not contemplate simultaneous delivery. 106 Conn372, 138A142.
211-8 Construction of contract.-6F(2d) 557; 267Mass220, 166NE642. **Agreement for reduction of deliveries** during two months construed merely as postponement of full delivery, not agreed diminution of contract quantity. 132 Misc704, 230NYS482.
211-12 40GaA680, 150SE865(2dcase); 163La227, 111S686, 689 [citCyc]; 176 Minn315, 223NW614, 63ALR210; NJSup 140A401; 127Misc355, 216NYS155. **Where contract provides for issuance of merchant's certificate as to condition, quality, and weight,** buyer held entitled to such certificate. 127Misc355, 216NYS

155. **Effect of custom.**–34F(2d)616.

212–17 But see Iowa 228NW47.

212–18 **Evidence held sufficient.**–LaA 120S122.

213–23½–New. Evidence that defendant breached other contracts in apportionment of deliveries in case of car shortage is inadmissible. 14F(2d)743.

213–25 145Wash284, 259P879. **Evidence as to weight or quantity sold held sufficient.**–214AppDiv537, 212NYS318.

213–25½–New. Evidence as to number of plates actually received by buyer is competent evidence on issues as to number of plates manufactured and delivered by seller. 227AppDiv669, 236NYS117.

213–27½–New. Quality held, under the evidence, a question of law. Mich 233 NW375.

213–29 13F(2d)747; 224Ky238, 5SW (2d)[illegible] 127Misc[illegible] 216NYS[illegible] 5[illegible] er confined to objections made at time of rejection); 100WVa540, 131SE[illegible].

213–31 17F(2d)983; 199Wis30, 225NW185. See also TexCivA 288SW(2d)876. **Claim for damages.**–132Misc704, 230NYS482.

213–32 36GaA694, 127SE342 (failure to ascertain alleged deficiency before giving note).

214–34½–New. Objection after action is commenced comes too late. 12F(2d)747.

214–34¼–New. Where only statement of weight and quality of olives furnished by buyer, as required by contract, showed grades and weight after large proportion thereof had deteriorated because of strong salt solution, in which seller barreled them at buyer's direction, seller was entitled to introduce evidence, and recover on basis, of weight of olives when sound. 206Cal677, 275P792.

214–24¼–New. Where buyer of books made no complaint for more than seven years that some of books covered by contract were not received and till after action to recover therefor, he was precluded, in view of his laches, from defeating recovery for books admittedly received, on ground that seller had violated its contract. 9LaA280, 120S110.

214–35 13F(2d)747. See also Mo 328SW (2d)587.

214–32 13F(2d)747. **Buyer entitled to cancel contract** for purchase of slack filled cans of peas on seller's insistence that buyer take them as then being filled. 191Wis635, 211NW764, 50ALR69. **Where fruit has recognized standard grades established by United States department of agriculture,** such grades are to be taken as standard. 58ND165, 225NW69.

215–39 13F(2d)747; 166La912, 118S81; 258Mass482, 156NE37; 190NC162, 129SE453.

215–45 12F(2d)747.

215–47 21OhA373, 153NE201.

216–48 **Where defect is due to material furnished by buyer,** he cannot recover from seller for damage due to defect. 173Ark1062, 294SW382.

216–53 167Ga231, 145SE68.

216–54 **Goods delivered must answer description contained in contract,** or which would be so contained if contract accurately drawn. 82NH96, 130A26.

216–55 15F(2d)329 (refusal to accept Java white sugar warranted where granulated sugar contracted for); 5LaA113; 190NC162, 129SE453 (commercial fertilizer of analysis guaranteed on bags delivered as required by statute); 192NC330, 135SE141; Can [1927] 2DomLR141. **Substantial compliance.**–150Wash274, 272P970. **Goods of different qualities.**–240Mich257, 215NW397. **Construction of contract.**–261Mass86, 158NE342. **Under contract for printing and delivery of theater programs,** if covers were so off-color and defective as not to conform to contract, and had not been accepted by defendant, recovery therefor cannot be had. 219Ala65, 121S59. **Breed.**–47 Ida675, 277P1112. **Plaintiff, who had agreed to manufacture for defendants, according to model,** certain vises, could not recover sale price thereof, where vises manufactured were not in substantial compliance with model. 151Wash243, 275P705. **Delivery of different grade of article** than that specified is not performance. 34PortoRico42 (rice). **Where seller remedies defects** claimed by buyer he performs contract and earns contract price. Wash 290P690.

217–56 240Mich524, 215NW324. **Though goods are like those bought and of equal value or usefulness,** buyer may reject them if it is not shown that he agreed to buy. TexCivA 283SW345.

217–57 221Ala176, 128S174; 240Mich524, 215NW324; TexCivA 283SW345; TexCivA 299SW928; Man [1928] 1DomLR201. **Buyer, requiring particular quality, which was specified in contract,** need not explain to seller reason for such specification. 161La198, 108S414. **Buyer's refusal to accept grapes,** which are not of quality agreed on, does not constitute breach of contract. 97CalA569, 275P892; CalA 288P795. **Seller's violation of buyer's written instructions to pick olives in boxes or pails,** instead of bags or sacks, to avoid bruises, did not defeat seller's right to recover for all sound olives. 206Cal677, 275P792.

218–60½–New. Purchaser cannot complain of defects to goods owing to his carelessness in inspection. Can [1927] 2DomLR1117.

218–61 99CalA438, 278P880; 51ND357, 199NW861; NB [1925] 3DomLR1129. **In sale by sample as well as by description,** goods must correspond with both under statute. 15F(2d)1003.

218–62 **Goods of particular locality.**–13F(2d)747.

219–67 **Plaintiff, who sold defendant potatoes f. o. b. car** Bokohoma, Okl., is entitled to judgment for their price on proving that, when loaded, potatoes were in sound, marketable condition. 9LaA201, 119S881.

219–71 106WVa642, 147SE22.

220–77 98CalA507, 277P167 (provision must be construed with entire contract).

220–78 **Agreement that oil well machinery would produce satisfactory result construed.**–100CalA315, 279P1076.

220–79 170Ark1037, 282SW370; 205Iowa51, 217NW557; 9LaA359, 120S517 (duty of vendor to cure defects); 34PortoRico14; NB [1925] 3DomLR1129. **Buyer not liable for repairs made by seller** where defective tank is delivered. 23OhA319, 156NE149.

221–81 168La66, 121S576.

221–82 But see MoA 277SW368.

221–85 127Misc355, 216NYS155 (rejection).

221–88 217AppDiv647, 216NYS174.

221–89 Contra 34PortoRico14. **Letter advising seller goods were not salable** has been held not rejection. 23AlaA507, 128S116(2dcase).

222–93 36F(2d)942; 105NJL261, 144A871; 58NS445, [1926] 2DomLR532. But see 92CalA598, 268P659; 97CalA784, 276P374. **It is not permissible to deliver much smaller number of cattle contracted for** of one class and supply deficiency by much greater number of less valuable class. 127Or509, 272P893.

222–95 103WVa637, 138SE755, 756 [cit Cyc].

222–96 240Mich524, 215NW324; 133Misc136, 231NYS285; 154Wash120, 281P14. **Under contract declaring each installment shipped severable,** seller's breach of one installment has been held not to entitle buyer to refuse any other installments. 315Mo927, 288SW20.

222–97 166La912, 118S81.

223–13½–New. **Meaning of "bulk" of "goods."**–As used in Uniform Sales Act term "bulk" in expression "bulk of goods" denotes goods, as distinguished from sample. 15F(2d)1003.

223–13¼–New. Legislature did not intend to distinguish between "bulk of goods" and "goods" themselves. 15F(2d)1003.

223–13¼–New. Word "goods" is appositional genitive defining "bulk," and terms mean same thing. 15F(2d)1003.

223–13½–New. and charge that "bulk" means something less than all goods sold is erroneous. 15F(2d)1003.

223–14 144Ala545, 398359; 16Kan571; MoA 279SW761, 763 [citCyc].

224–15 RI 133A440.

224–16 144Ala545, 398359; 16Kan571.

224–20 33F(2d)83.

224–21 228Ky11, 148W(2d)214; 6PaDist&Co 439.

224–23½–New. **In sale by sample as well as by description, it is not sufficient** if bulk of goods corresponds with sample, if goods do not also correspond with description, under Uniform Sales Act. 15F(2d)1003.

225–24 117Tex362, 258W(2d)963.

225–25 **Under contract requiring seller to furnish merchant's certificate as to agreed quality,** buyer may reject if certificate fails to state agreed quality. 127Misc355, 216NYS155.

225–27 **Contract construed as not a "satisfaction contract,"** allowing buyer arbitrarily to reject oil heater, in view of provision for joint test. 235Mich75, 209NW187.

225–29 80CalA263, 251P683; 233IllA138, 140 [citCyc]; 233IllA262; 240IllA157; 205Iowa1341, 219NW481; 213Ky77, 280SW478; 168La66, 121S576; 233Mich298, 206NW331 (under contract calling for delivery f. o. b. destination with thirty days' time on each shipment); MoA 280SW63; 220MoA556, 287SW796; 127Misc760, 217NYS588; 122Or137, 257P815; 123Or243, 261P701; 292Pa122, 140A774; 5PaDist&Co60; Can [1928] 4DomLR678. **Shipment to buyer's customers.**–104Conn674, 134A233.

225–30 123Or243, 261P701.

226–31 123Or243, 261P701, 703 [cit Cyc].

226–33 101CalA482, 281P1036 (sale by buyer without inspection).

226–35 **Where contract did not provide for inspection of apples before acceptance and payment,** buyer did not, as matter of law, waive right to question seller's performance by accepting and paying. 3Del497, 139A259.

226–35½–New. Under contract of sale by which goods are shipped with draft attached to bill of lading, buyer has no right of inspection before payment of draft. 85IndA506, 150NE317.

226–38 **Requirement that test at buyer's plant shall be as satisfactory as test at seller's plant construed.** 33F(2d)269.

226–39½–New. Buyer is bound by agreement to abide by report of official inspector of lumber. 240Mich257, 215NW397.

226–39½–New. Where seller agreed to be bound by inspection and buyer acted thereon, he is bound by inspection and liable for costs thereof unless he withdraws agreement. 168Ark94, 269SW372.

226–40 130Misc396, 223NYS559; Utah 283P435.

226–41 233Mich298, 206NW331 (where delivery f. o. b. Norfolk); 122Or137, 257P815; 94PaSuper136. **Sale f. o. b. shipping point.**–80CalA263, 251P683.

226–41½–New. General rules as to place of inspection are not invariable but subject to intention of parties in absence of stipulation in contract. 233Mich298, 206NW331.

227–47 77CalA591, 246P1064; 80CalA263, 251P683; 233IllA138; 205Iowa1341, 219NW481; 225Ky418, 9SW(2d)119; 127Misc760, 217NYS588; 122Or137, 257P815; 96PaSuper293 (due diligence required especially as to perishable goods); 133SC458, 131SE620. **Goods which deteriorate when opened** need not be inspected on arrival. 50ND612, 197NW590. **Under contract for return of goods** "at once" on rejection after inspection, ten days held reasonable to make test. 233IllA138.

227–47½–New. In absence of stipulation in contract any general rules as to time of inspection are not invariable but subject to intention of parties. 233Mich298, 206NW331.

227–48 But see 99CalA438, 278P880. **Letter of credit issued pursuant to contract** describing certificate of inspection as one "as to quality, weight and condition" is not conclusive that certificate is final and determinative of quality. 99CalA438, 278P880.

228–51 234IllA488.

229–54 92CalA598, 268P659 (candling eggs); 123Or243, 261P701.

229–55 80CalA263, 251P683; 233IllA138; 2LaA5; MoA 280SW63; MoA 297SW161; 133SC458, 131SE620; TexCivA 281SW226. **Buyer is put to election to**

accept or reject.–242Mich642, 219NW634. **Free and exclusive right of selection** is given by buyer's privilege under contract to reject unmerchantable goods. 32NM528, 260P408. **Where there is express rejection,** placing goods on buyer's premises, even with his consent, will not be effective delivery. 218Ala120, 117S757. **Buyer cannot repudiate** without proof of unsalability of goods by bona fide effort to resell and failure. 23AlaA507, 128S116(2dcase).

229–57 205Iowa1341, 219NW481; 131Misc160, 226NYS273.

229–58 77CalA591, 246P1064; MoA280SW63; 127Misc760, 217NYS588; 95PaSuper184; 96PaSuper86; 133SC458, 131SE620.

229–59½–New. Purchaser incorrectly addressing goods reshipped to seller with resulting loss thereof has no defense to action for purchase price. 217Ky399, 289SW226.

229–60 104Conn674, 134A233; 222Ky635, 1SW(2d)10, 56; 168La66, 121S576; 5LaA60; 242Mich642, 219NW634; 247Mich94, 225NW495; 144Okl63, 289P737; 92PaSuper206; 133SC458, 131SE620. But see MoA297SW161.

230–61 133SC458, 131SE620.

230–62 247Mich94, 225NW495. **No opportunity for inspection.**–128Or83, 262P939.

231–63 97CalA569, 275P892; 166La912, 118S81; 214AppDiv245, 212NYS170 (performance or tender in accordance with contract). But see 261Mass86, 158NE342.

231–65 176Ark562, 3SW(2d)331; 197Wis615, 222NW788.

231–66 58ND165, 225NW69.

231–67½–New. Where seller agrees to be bound by inspection agreement, burden is on him to prove withdrawal thereof. 168Ark94, 269SW372.

231–73 But see TexCivA298SW305. **Evidence that goods were defective** and worthless after short use was admissible, where, in action by indorsee on notes given for goods, there was some defect in indorsement. 219Ala382, 122S619.

232–76 Evidence as to decrease in price as motive for rejection of goods held inadmissible. 128Or191, 274P128.

232–78 181Ark649, 26SW(2d)1108.

232–80½–New. Admission of evidence to show that machine sold was not kind ordered was not error. 9LaA674, 119S781.

232–80⅓–New. Rejection of motor boat with statement as to poor construction and plugged holes below water line held to admit evidence of defects of engine bed. 219AppDiv353, 220NYS115.

232–80¼–New. Evidence that mill was operated as contemplated is advisable in question of whether stick was properly cut. 217Ala280, 116S125.

232–82 218Ala201, 118S393.

232–84 149Va755, 141SE759.

232–86 256Mass66, 152NE347.

233–98 148Wash453, 269P495. **The sufficiency of the evidence,** etc. 201Cal79, 255P795; 71CalA2, 235P438; 35GaA83, 132SE138 (grade of lumber); 240IllA157; 223Ky420, 3SW(2d)1071; 4LaA58; 261Mass86, 158NE342; 53SD29, 219NW890; 149Va755, 141SE759; 145Wash284, 259P879. **Evidence held to justify finding** of quantity of coal delivered. 106Conn372, 138A142. **Evidence held not to show** that defendant seller, who windrowed cane under contract, was guilty of any negligence or fault in matter. 158La1052, 105S61.

233–99 180Minn531, 231NW206. **Proof of adulteration.**–202Cal770, 262P748. **Evidence held sufficient.**–32Ariz90, 255P991; 99CalA438, 278P880. **Evidence not sufficient** to entitle sellers to recover damages for defendant's refusal to accept goods substituted for defective shipment. 36F(2d)942. **Evidence held to show quality** was not as per contract. 21F(2d)309. **To establish breach of contract** requires showing that apples were not as represented at date of sale. 229AppDiv432, 242NYS346.

232–1 167La857, 120S478. **Evidence held to show sufficient performance by seller.**–234IllA488.

233–5½–New. Evidence held sufficient: To show total weight of pears unfit for canning purposes. 75CalA666, 243P458.

233–5⅓–New. To show loss of goods was caused by negligence of carrier's or buyer's agent in reshipping on rejection to wrong address, and hence not chargeable to seller. 217Ky399, 289SW226.

233–5¼–New. To sustain finding that purchaser was justified in rejecting steel as not complying with contract. 12LaA114, 125S182.

233–5⅙–New. Evidence of grade of goods when shipped cannot be disregarded in absence of showing change en route. 92CalA194, 267P901.

233–5⅛–New. Breed.–Evidence held to show that certain of steers offered by seller were not of breed contracted for. 47Ida675, 277P1112.

234–7 MoA9SW(2d)681.

234–8 36GaA195, 136SE110; 313Mo268, 281SW402 (whether hay damaged when loaded on cars); 221MoA600, 283SW65; 219AppDiv353, 220NYS115; 127Or647, 271P966. See also 207Iowa1322, 224NW826.

234–8½–New. Whether number of defective articles is so material as to defeat essential purpose of parties to contract is for jury. 15F(2d)1003.

234–8⅓–New. Whether sheep tendered buyer were of kind and quality described in contract is for jury. 85Mont31, 277P433(2dcase).

234–8¼–New. Whether seller or buyer is responsible for unsatisfactory quality is question for jury. RI150A497.

234–21 123Kan672, 255P1113; 168Minn183, 209NW876; Tex26SW(2d)903. See also 254NY86, 171NE916. **Construction of contract.**–Tex26SW(2d)903.

235–22 Title passed on delivery under contract giving thirty days for return. 130Misc861, 225NYS167.

235–25 Man[1928]1DomLR201. **Seller may show rejection was not bona fide.**–151Md690/136A37.

236–39 123Kan672, 255P1113.

236–40 8LaA752.

237–42 Sask[1928]1DomLR213.

237–46 26OhA321, 159NE855. **Request for shipping instructions held not** equivalent to offer to return. 26OhA321, 159NE855. **Buyer may reject goods, sent on approval for any reason satisfactory to itself.**–MoA23SW(2d)1098.

237–52 TexCivA295SW352.

237–52½–New. Where seller failed to remove goods after notice and inventory, loss by fire is on seller. 162La929, 111S331.

237–54 But see TexCivA16SW(2d)891. **Buyer's letter, in which attempt was made to reject goods,** did not relieve buyer from exercising reasonable care to preserve property for benefit of seller, on delivery to him. 95CalA85, 272P340.

238–55 39GaA654, 148SE296; 123Kan672, 255P1113; 168Minn183, 209NW876.

238–57½–New. Refusal of buyer to make inventory is immaterial where seller has opportunity to do so. 162La929, 111S331.

238–58 123Kan672, 255P1113. **Trial period begins** on expiration of reasonable time after arrival of machine. 111Conn558, 150A711.

238–59 But see 9LaA326, 120S397. **Waiver.**–222Ky329, 300SW871.

238–60 123Kan672, 255P1113.

238–62 111Conn558, 150A711.

239–64 99Vt78, 130A589, 52ALR586.

239–64½–New. Mismarking package and delivery of goods to wrong party does not relieve buyer from liability who had option to return. 99Vt78, 130A589, 52ALR586.

239–65 123Kan672, 255P1113 (right or opportunity of seller to overcome discovered defects).

239–67 Time consumed in replacement held not unreasonable in view of condition of market, scarcity of material, and distance from market. 233Mich298, 206NW331.

239–69 2LaA381. But see 180Minn531, 231NW206.

239–70 71CalA479, 235P673 (goods left on carrier's platform); 133SC458, 131SE620.

239–71 11LaA621, 124S548 (defendant's agent picking out and ordering goods).

239–73 36GaA140, 135SE759; 224Ky238, 5SW(2d)1070; 127Misc355, 216NYS155 (buyer must be confined to objections made at time of rejection). See also 233IllA138; Miss119S353. **Long delay in making complaint,** during which time numerous samples were taken and requests for extensions of time for removal of goods were made, constitutes waiver. 11LaA520, 124S315(2dcase).

239–73½–New. Specification of defects in rejection letter held not to waive unspecified defects. 219AppDiv353, 220NYS115.

239–73⅓–New. Buyer, taking no steps to weigh and grade olives and send report to seller till long after contract time therefor, has been held estopped to complain of seller's failure to make written objection to such report within ten days, as required by contract, at least in absence of express notice of intent to hold him to strict compliance with such provision. 206Cal677, 275P792.

239–73¼–New. Buyer of lumber could not recover for loss where lumber was of defective grade, where contract provided that lumber should be held intact till settlement was made and that claims must be filed within five days and must be supported by affidavit, but buyer did not comply with such provisions and did not file claim till ten weeks after lumber was received. 10LaA177, 120S708.

240–75 82Colo351, 260P101; Iowa228NW878; 220Ky791, 295SW1012; 231Ky103, 21SW(2d)131; 147Miss603, 111S578; 217AppDiv647, 216NYS174. But see 99CalA438, 278P880. **Obvious defect.**–157SC426, 154SE412.

241–76 213Ky159, 280SW945; 1LaA538; 37OklACR569; 92PaSuper206.

242–77 167Ga231, 145SE68; 145Wash236, 259P712. See also 3LaA495; 3LaA639. **Renewal of note for price.**–147Miss603, 111S578.

242–79 23AlaA507, 128S116(2dcase); 39GaA488, 147SE719(2dcase); 232Ky245, 22SW(2d)614; 1LaA484; 1LaA621; 5LaA599; 147Miss603, 111S578.

242–82½–New. Use of article accepted under protest does not constitute waiver. 133Or128, 288P207.

243–92 170Ark1131, 282SW961.

243–93 155Miss469, 124S653; 155Miss478, 124S654(1stcase).

243–93½–New. Where buyer accepts delivery of installment which does not conform to contract, he must accept other deliveries which do conform. 170Ark1131, 282SW961.

243–94 213Ky159, 280SW945.

243–98½–New. Obligation to deliver within reasonable time can be no less because remedy for breach of contract causes seller loss. 241NY455, 150NE514.

243–98⅓–New. Obligation of seller to deliver within reasonable time does not depend on whether his failure to deliver within such time would cause him loss. 241NY455, 150NE514.

243–98¼–New. Where seller of coal discontinued performance for cause, that screening all run of mine coal might result in overproduction of certain grade would not relieve seller from performance of contract for different grade. 287Pa232, 134A386.

244–1 Iowa210NW440 (coal mining company not relieved of obligation to deliver screenings by refusing to screen coal mined); 143Va12, 129SE374 (refusal to deliver any goods at all).

244–5 But see 298Pa249, 148A81, 67ALR1428.

244–6 161La1077, 109S844; 32OhA254, 167NE904 (performance of contract to deliver as soon as possible not excused by embargo, fire, and labor trouble); 187Wis95, 203NW908.

244–9 203Cal257, 263P804.

245–11 TexCivA275SW235 (failure to supply specifications).

245–12 34F(2d)616; 298Pa249, 148A

81, 67ALR1428 (dealer required to pay more for commodity than contemplated).

245-16 Buyer's notice of hearing for restraining order to prevent sale did not justify seller's refusal to deliver. Iowa 231NW434.

245-16½-New. Advance in price of commodity.-Fact that seller was "jobber" does not change effect of contract to furnish certain quantity of steel in specified sizes and specifications five or six weeks before needed, and mere fact that purchaser knew seller was jobber did not justify seller to breach contract when price of steel began to advance. TexCivA 275SW235.

245-16⅓-New. Moratorium no excuse.-163La198, 111S675.

245-24 32 OhA254, 167NE904. But see 13F(2d)747.

245-25 See also 13F(2d)747.

246-26 20F(2d)890.

246-27 131Misc471, 227NYS289, 291 [citCyc].

246-28 253Mass37, 148NE101.

246-29 6F(2d)564; 73CalA732, 239P 350. **Fact that seller delivered to third party sufficient to cover buyer's order** prior to time goods were destroyed does not prevent nondelivery from being excused. 6F(2d)564.

246-30 73CalA732, 239P350.

247-35 58 OntL531, [1926] 2DomLR 783 (inability to obtain license to export). **Defense sufficient.**-58 OntL531, [1926] 2DomLR783. **Embargo by federal government.**-TexCivA 274SW643 (on grain sold f. o. b. place of shipment).

247-37 86 IndA137, 155NE526; 142 Okl 286, 286P879 (broken shaft in seller's factory). But see La 130S469. **Construction of stipulation,** etc. La 130S 469; 308Mo 453, 273SW95.

247-39 76CalA460, 245P206 (seller not relieved from his own negligence and unexplained delay); 226Ky306, 10SW (2d)1109(2dcase); 287Pa232, 134A386. **Provision as to crop failure** does not excuse performance where crop failure is partial only. 298Pa249, 148A81, 67 ALR1428.

247-40 253Mass37, 148NE101. **Test of proper distribution.**-14F(2d)743. **Pro rata calculations.**-14F(2d)743.

247-41 287Pa232, 134A386. **Engine trouble, incapacitating sugar refinery** is not unavoidable casualty excusing nondelivery unless such trouble in fact affected seller's ability to deliver. 5F (2d)807.

248-42 287Pa232, 134A386.

248-43 Strike provision protecting buyer in event of strikes causing stoppage or partial stoppage of its works or business excuses failure to deliver during strike on colliers used in delivery. 132 Misc704, 230NYS482.

249-51 15F(2d)514; 81NH535, 129A 374; 82NH91, 129A876; 32NM518, 260 P411, 55ALR261; 241NY455, 150NE514. **Buyer abandoning exportation of goods** purchased waived clean dock receipt thereby rendered impracticable. 245NY 315, 157NE151. **Statement by manager of buyer** that he would not receive or pay for any more raisins excused further delivery by seller. Wash 285P1118.

249-53 8F(2d)689; 34GaA298, 129SE 562; 237 IllA333; 224Ky284. 6SW(2d) 249; 136Misc723, 244NYS71. **Imposing additional conditions,** etc. Contra 170 Ark453, 280SW669. **Repudiation by buyer waives tender of performance.**-143Va469, 130SE393.

249-55 158La727, 104S632 (defense that buyer prevented performance not available).

249-56½-New. Waiver of delivery within reasonable time precludes buyer from urging subsequent tender was untimely. 241NY455, 150NE514.

249-56⅓-New. buyer being in default, seller not under duty to give notice of intention to withhold deliveries. 82NH 91, 129A876.

250-62 169Minn497, 212NW200.

250-66 7LaA224.

250-67 5F(2d)807 (evidence insufficient to show failure to give shipping instructions); 8F(2d)689; 1LaA272; 6 LaA746; 241NY440, 150NE509.

251-68 232 IllA523 (buyer is estopped to claim delay as breach); 158La727, 104S632; 256Mass66, 152NE347; 216 AppDiv409, 215NYS496 (waiver of delay and change of route by declaration of willingness to accept); 285Pa131, 131A710.

251-69 Where buyer after assigning rights denied liability, seller need not recognize breach of contract by releasing buyer and accepting assignee's credit. TexCivA 292SW640. **Notification by buyer that future shipments would be rejected.**-35F(2d)907.

251-70 98CalA75, 276P383; 234 IllA9; 157Miss182, 127S270; 50Nev157, 254P 1074. **Unjustified refusal of buyer to accept tender of goods** on ground it was made too late constituted breach of contract by buyer. 240NY217, 148NE215. **Refusal to deliver oil** to buyer's assignee held not breach of contract where delivery involved extending credit to assignee and release of buyer. TexCivA 292SW 640. **Refusal to accept further deliveries** unless seller agreed to further contract was repudiation of contract. 249 NY68, 162NE586.

252-73½-New. Notice that goods will not be accepted given before time for delivery constitutes waiver of right to insist on delivery. 121 Okl 131, 246P623.

252-73⅓-New. Attempted withdrawal of attempted repudiation of contract.-Where buyer, before time for delivery, has repudiated contract subsequent offer to accept goods if shipped will not operate as withdrawal of such repudiation so as to require delivery unless offer includes all material terms and provisions of original contract. 121 Okl 31, 246P623.

252-73¼-New. Mere suspicion that buyer will not accept goods does not justify seller's failure to perform. 285Pa120, 131A705.

252-75 42 Ida729, 249P771; 195NC173, 141SE542.

252-76 219Ala666, 123S52; 158La621, 104S476; 164La1063, 115S270; 152 Tenn367, 278SW68, 42ALR1052.

253-77 32 OhA254, 167NE904 (where refusal to deliver was not placed on ground of default).

253-80 26F(2d)40.

253-85 Failure of buyer to comply with all terms of agreement relieves seller from obligation to accept return. 230 Ky194, 18SW(2d)1006 (failure to pay notes as they became due).

254-86 31Ariz84, 250P564.

254-87 31Ariz84, 250P564; 130Misc 861, 225NYS167. But see 252Mass101, 147NE348.

254-89 233 IllA138; 233Mich53, 206 NW547. **Question for jury.**-252Mass101, 147NE348.

254-90 126Kan69, 266P748. **Particular contracts construed.**-141Miss762, 105S 762.

254-92 219Ala116, 121S392; 233Mich 53, 206NW547.

254-94 214Ky526, 283SW1022.

255-2 Presentation of draft to bank in papers stating name of vessel held sufficient declaration. 288Pa114, 135A541. **Where no date set for declaration and no demand made by buyer,** buyer cannot complain of loss of advantage in failure to declare. But see 288Pa114, 135A541.

255-3½-New. Such declaration is only necessary if terms of contract strictly demand it. 288Pa114, 135A541.

256-10 51ND357, 199NW861. **Uniform Sales Act requiring buyer to accept goods** held inapplicable to conditional orders. 43 Ida337, 252P186.

256-12 Where seller unconditionally offered to perform and buyer refused to accept unless seller agreed to further contracts, subsequent refusal by seller to deliver unless paid money due on other contracts did not entitle buyer to repudiate contract. 249NY68, 162NE 586.

256-15 126Me308, 138A389.

256-17½-New. To be relieved from his obligation to receive and retain goods purchased, buyer must show either that his signature on contract was induced by seller's fraud, or that signing was by mutual mistake, or that seller has not complied with contract. 225Ky175, 7SW (2d)1060.

256-18 It cannot be said that buyer refused to accept if he had no opportunity for inspection. 123 Or243, 261P 701.

256-19 221Ala176, 128S174; 213Ky77, 280SW478; 225Ky175, 7SW(2d)1060; 136Misc723, 244NYS71. **Buyer's letter declining to do anything respecting contract and advising seller to proceed in accordance with its judgment** held breach of contract. 220AppDiv160, 221 NYS11. **Refusal to accept unless price is reduced** constitutes breach as matter of law. 33F(2d)420. **Defect in attachment of one of two articles** does not authorize rejection of other. 228AppDiv152, 239 NYS166.

256-20 136Wash53, 238P911.

256-22½-New. Express repudiation of contract by buyer is equivalent to breach. But see 187Wis34, 203NW746.

256-22⅓-New. That buyer's statement during life of contract was not final repudiation is immaterial in seller's actions based on refusal to accept performance. 143Va469, 130SE393.

256-22¼-New. That sellers did not take advantage of right to treat refusal to give shipping instructions as repudiation of contract, not ground for complaint by buyers, in seller's action based on refusal to accept performance. 143 Va469, 130SE393.

256-22⅕-New. Where buyer repudiates contract by notification that he will not accept, seller may, at his option, treat same not as breach and hold contract open till time of delivery. 187Wis34, 203NW746.

256-22⅙-New. Where broker, buying goods for another, was not advised as to place of delivery, he was held entitled to reasonable time to ascertain whether delivery had been as per contract before electing remedy in event of seller's default. 214Ky443, 283SW407.

256-22⅐-New. Buyer may order deliveries stopped subject to seller's right to be compensated in damages. 102WVa 197, 135SE13.

256-22⅛-New. Seller's regret of action on buyer's breach was not waived by subsequent offers to deliver not accepted by buyer. 131Misc53, 225NYS638.

256-22 1/9-New. Seller has right to treat buyer's repudiation as breach of contract for months for which deliveries had not yet been made. 35F(2d)822.

256-22 1/10-New. Refusal of buyer to accept remainder of potatoes due under terms of contract is clear breach thereof. 155Wash75, 283P442.

257-27 Where time for delivery of cattle is at buyer's option subject to feeding contract, buyer is bound to accept upon termination of feeding contract whenever cattle are delivered to seller by feeder. 78Colo 21, 238P36.

257-27½-New. Where delivery is to be made within certain period, seller has no right to compel acceptance prior to last day thereof. 187Wis34, 203NW746.

257-29 242NY425, 152NE250.

257-29½-New. Where "average" of certain quantity "daily or more" is to be delivered for specified number of days, and circumstances of mutual interests require it, buyer is required to accept such approximate amount daily, and not merely to take total quantity some time during term. 6F(2d)564.

257-29⅓-New. Where seller refuses to deliver in accordance with contract and notifies buyer that buyer will be notified when further shipments will be made, buyer is entitled to reasonable time after notice within which to accept. 18F(2d) 412.

257-29¼-New. Where goods are shipped without agreement to purchase, or are materially defective, they need not be accepted, and consignee becomes bailee, holding property for owner's benefit, and, while he need not necessarily return property, he must exercise reasonable care to preserve against loss or damage. 95CalA85, 272P340.

257-29⅕-New. Refusal of seller to accept cancellation of order accompanied by demand for performance does not extend time for performance beyond period necessary for performance. 159Tenn 10, 158SW(2d)749.

257-30 23F(2d)783; 13LaA617, 128S 693; 195NC350, 142SE19; 24 OhA434, 157NE828; TexCommnA 299SW637;

TexCommnA 299**SW**870. **Purchaser may repudiate executory contract** subject to seller's right to recover damages. 50**ND** 157, 195**NW**12. **Only absolute refusal to go on** constitutes repudiation of contract. 16**F(2d)**190. **Notice of refusal dates breach.**–232 **Ill**A523. **Uniform Sales Act declaring rule** held inapplicable to conditional orders. 43 **Ida**337, 252 **P**186. **Finding repudiation by buyer justified** where after delay in accepting prior installments he offered to accept at new price. 37**F(2d)**455.

257–31 193**Wis**80, 213**NW**637. **On repudiation before time for performance** seller may accept breach as cancellation or may stand on contract. 5**F(2d)**314.

257–31½–New. Seller may or may not, at his option, treat as breach notification by buyer that he will not accept goods on contract for future delivery, as such notification is mere repudiation of contract. 187**Wis**34, 203**NW**746.

257–31⅓–New. Seller is entitled to recover any loss sustained by buyer's refusal to accept. 50**Nev**340, 259**P**415.

257–35 Offer to perform after repudiation of contract does not affect seller's right of action for breach. 170**Ark**453, 280**SW**669.

257–35½–New. Where buyer, after partial delivery, requested cancellation of balance of order, seller has right to treat such action as breach, 285**Pa**120, 131**A** 705.

257–35⅓–New. but till seller accepts such cancellation and acts thereon, there is no breach by buyer. 285**Pa**120, 131**A** 705.

257–35¼–New. That seller granted larger deductions from price to others does not justify buyer in refusing to accept goods. 222**AppDiv**697, 225**NYS**436.

257–36 16**F(2d)**185; 31**F(2d)**979; 102 **Conn**529, 129**A**527 (seller's silence coupled with execution by buyer of reinspection agreement); **Iowa** 233**NW**133; 6**LaA**570; 145**Wash**236, 259**P**712; [1926] **CanSC**208, [1926] 1**DomLR**314. **Conduct of seller showing that he does not intend to abide by terms of contract in material particular** excuses buyer from obligation to perform. 117 **Okl** 55, 244 **P**756. **Buyer may refuse to take good title** not pronounced good by his attorney acting in good faith, if such approval is stipulated for. **TexCivA** 297**SW**885 [citCyc]. **Buyer's motive** in refusing to accept is immaterial. **TexCivA** 297**SW** 885. **Buyer's refusal to accept** held unjustified. 136**Wash**53, 238**P**911. **Defects in quality of installment delivered under severable contract** does not give buyer right to refuse subsequent installment especially where contract so provides. 240**Mich**79, 214**NW**973. **On denial of right to inspect,** consignee may reject shipment without liability to seller. 220 **MoA**556, 287**SW**796.

257–37 Buyer's refusal to nominate vessels to receive coal is not excused by seller's prior inability to deliver output of mines as agreed. 36**F(2d)**982.

257–39 See also 10**LaA**742, 122**S**909(1st case).

258–41 214**La**254, 107**S**101 (defendant's vendee canceling his order); 136 **Misc**723, 244**NYS**71.

258–42 22**F(2d)**38.

258–42½–New. Premature tender by seller, followed by refusal of buyer to accept goods, does not justify refusal of goods purchased, if they are again tendered at proper time. 99**WVa**657, 129**SE**718, 47**ALR**189.

258–42⅓–New. Excessive freight is not ground for rejecting shipment. 292 **Pa**122, 140**A**774.

258–45 **MoA** 280**SW**63.

258–46 89**PaSuper**576. **Act held as acceptance.**–20**F(2d)**307.

258–47 218**Ala**120, 117**SE**757; **MoA** 279 **SW**155. **Buyer sending defective articles to customer to see if they will be accepted,** after notifying seller of defects, held not to have accepted them. **RI** 133**A**440. **Acceptance of one installment of shipment** held not acceptance under contract. 21**F(2d)**309. **Where sugar sales contract was divisible,** acceptance of one installment does not preclude rejection of balance. 21 **F(2d)**309.

258–48 Mere receipt of goods, after express rejection, even with buyer's consent, will not of itself create acceptance. 218**Ala**120, 117**S**757. **Where inspection is impractical** manufacturer's delivery to carrier will not constitute acceptance, though it may pass title as regards manufacturer. 41**F(2d)**339.

258–49 **TexCivA** 283**SW**634.

258–50 130**Misc**359, 224**NYS**344. **Superficial examination by employee of** buyer held not to preclude action for redhibition. 162**La**271, 110**S**419.

258–52 127**Kan**724, 275**P**155; 242**Mich** 171, 218**NW**793; 289**Pa**36, 136**A**849; 87 **PaSuper**228. **One who takes delivery of personal property,** pays freight charges for transportation, and either uses it for his own benefit or conveys it to another for consideration, is estopped from denying acceptance of property. 95**CalA**85, 272**P**340.

258–54 **Alta** [1930] 3**DomLR**886.

259–58 218**Ala**120, 117**S**757; 86**CalA** 505, 260**P**897; 203 **Iowa**1297, 214**NW** 574; 125**Kan**278, 264**P**27; 259**Mass**29, 155**NE**657 [citing Gen. L. c. 106 § 37]; 242**Mich**171, 218**NW**793; **Mich** 233**NW** 202; 168**Minn**183, 209**NW**876; 289**Pa**36, 136**A**849; 142**Wash**134, 252**P**523 (planting tulip bulbs). See also 90**PaSuper**91. **Retention of part of goods** bound buyer under contract denying right to countermand. 156**Miss**878, 127**S**300.

259–59 168**Minn**183, 209**NW**876 (where contract provided for cancellation of contract by giving notice).

259–60 252**Mass**101, 147**NE**348; **Alta** [1930] 3**DomLR**886.

259–61 **CalA** 290**P**545; **MoA** 280**SW** 63; **Sask** [1925] 3**DomLR**681 (holding that in absence of new contract, acceptance does not result from buyer's dealing with goods in attempt to make them suitable, after he had notified seller of rejection).

259–64 221**AppDiv**299, 223**NYS**71 (retaining article "on trial" for one year and four months held, as matter of law, more than reasonable time, under Sales Act); 289**Pa**36, 136**A**849. **Act of seller's manager** in sending mechanic and in going himself to examine molding machine sold buyer, and, after observing it, saying that buyer would hear from them further, waived stipulation in contract providing that detention of machine after thirty days from its arrival would constitute trial and acceptance and fulfillment of contract. 9**LaA**674, 119**S**781.

260–65 92**CalA**194, 267**P**901; 121**Kan** 469, 247**P**631; 221**Ky**819, 299**SW**978; 127**Misc**760, 217**NYS**588; 192**NC**538, 135**SE**458; 289**Pa**36, 136**A**849; 88**Pa Super**546. But see 220**AppDiv**645, 222 **NYS**331. **Advertising goods for sale.**–199**Wis**518, 227**NW**22.

260–66 221**Ky**819, 299**SW**978. See also 16**F(2d)**185. But see 213**AppDiv**178, 210**NYS**414.

260–68 18**F(2d)**635 (delay held unreasonable under Massachusetts statute); 95**CalA**85, 272**P**340; **Conn** 151**A**492; **Mich** 233**NW**202; 216**AppDiv**409, 215 **NYS**496; 130**Misc**359, 224**NYS**344; 24 **OhA**282, 156**NE**217 (retention without intimation of rejection); 89**PaSuper** 576; 96**PaSuper**86.

260–69 33**F(2d)**83; 181**Ark**415, 26**SW** (2d)80; 82**Colo** 10, 256**P**635; 252**Mass** 101, 147**NE**348 (return at semiannual settlement, within reasonable time); 215 **AppDiv**23, 213**NYS**52 (retention for four months where defect became apparent within few days after delivery is acceptance as bars rescission); 133**SC** 458, 131**SE**620. But see 103**CalA**425, 284 **P**713; 135**Misc**299, 238**NYS**102. **Waiver of return.**–82**Colo** 10, 256**P**635. **Storing rejected goods in warehouse** and threatening to sell them at public auction unless called for constitutes acceptance by buyer as exercising dominion over goods inconsistent with seller's ownership. 135**Misc**299, 238**NYS**102.

261–73 23**F(2d)**167; 225**Ky**418, 9**SW** (2d)119; 318**Mo** 516, 1**SW(2d)**103; 102 **NJEq**79, 139**A**438.

261–75 40**GaA**356, 149**SE**716 (though part of goods was not contracted for before shipment); 192**NC**538, 135**SE** 458; 25 **OhA**415, 158**NE**554; 289**Pa**36, 136**A**849; **TexCivA** 6**SW(2d)**211; 145 **Wash**236, 259**P**712 (voluntary acceptance and conversion held to estop claim of overpayment). **Waiver.**–213**AppDiv** 178, 210**NYS**414. **Acceptance at higher price, forced upon buyer after breach of original agreement,** held no waiver of such breach. 37**GaA**227, 139**SE**588.

261–76 92**CalA**598, 268**P**659; 217**App Div**647, 216**NYS**174 (remedy of buyer is for damages, in such case). See also 48 **Ida**399, 282**P**487; 151**Miss**492, 118**S**436; **Can** [1927] 2**DomLR**141. But see 102 **Conn**529, 129**A**527. **After period of shipment has expired,** request for continuance of shipments and acceptance at contract price makes contract applicable to subsequent shipments. 313**Mo** 268, 281**SW**402. **Buyer's acceptance of partial delivery** held not waiver of right to cancel contract for future deliveries. 191**Wis**635, 211**NW**764, 50**ALR**69. **On accepting sugars** buyer must apply them to contract. 23**F(2d)**149.

261–76½–New. Acceptance bars right to rescission for defects, 215**AppDiv**23, 213**NYS**52.

261–76¼–New. but buyer has his action for breach of warranty. 215**AppDiv**23, 213**NYS**52.

261–76⅙–New. Fact that transaction is conditional sale does not affect question. 215**AppDiv**23, 213**NYS**52.

261–76⅓–New. Condition that seller of coal report weights and car numbers on shipment held waived by acceptance and use of coal. 289**Pa**36, 136**A**849.

261–76⅙–New. Doubt as to whom goods were consigned held immaterial. 289**Pa**36, 136**A**849.

261–76⅞–New. Acceptance not bar to action for delay in delivery. 222**NYS** 785.

261–76⅛–New. Acceptance of seller's offer to furnish better grade of goods without complaint estopped buyer from claiming damages for defect in quality. 232**Ky**489, 23**SW(2d)**914.

261–77 Seller's application of sugars on contract for certain month is controlling in absence of substantial evidence warranting finding of change of purpose. 23**F(2d)**149. **Evidence sufficient to support finding of delivery.**–218**Ala**120, 117 **S**757. **Receipt of goods** may, under favoring conditions, constitute some evidence of acceptance. 218**Ala**120, 117 **S**757.

261–79 Evidence sufficient to show buyer did not waive its right of repudiation. 102**Conn**529, 129**A**527. **Buyer accepting goods without protest** has burden of showing what parts were not delivered. 12**LaA**343, 126**S**76.

261–80½–New. Where seller delivers property sold to buyer, in absence of evidence tending to show no use of property, it must be presumed that property was used. 218**Ala**120, 117**S**757.

261–81 213**AppDiv**178, 210**NYS**414 (evidence held sufficient).

261–85 Evidence held to warrant finding of refusal of tender. **Wash** 290**P** 695.

261–86 Sufficient return.–99**Vt**78, 130**A** 589, 52**ALR**586. **Upon issue as to grade and character of lumber** rejected by buyer's customer, evidence that after delivery customer made offer for inspection is inadmissible. 213**Ala**84, 104**S**3. **Evidence held to show** seller's acknowledgment of buyer's right to return goods. 162**La**929, 111**S**331. **Evidence held insufficient.**–23**AlaA**507, 128**S**116 (2dcase).

261–89 **MoA** 299**SW**53. **Sufficiency of the evidence.**–6**F(2d)**214 (evidence held to show no breach of contract as to time of delivery by seller); 77**CalA**690, 247**P** 536; 92**CalA**194, 267**P**901; 160**La**109, 106**S**711; 160**La**443, 107**S**299; 11**LaA** 213, 123**S**424; 220**MoA**1000, 272**SW**1018; 130 **Okl** 104, 265**P**108; **TexCivA** 283**SW** 687; 153**Va**14; 149**SE**517. **Evidence held to show waiver of** instructions not to charge merchandise unless orders were in writing or personally given by acceptance of goods ordered by agent. 69**CalA** 708, 231**P**764. **Finding that high pressure press** did not conform to plans of contract sustained. 69**CalA**763, 232**P** 465.

261–88½–New. Finding warranted that plaintiff could return goods if she so desired in January in accordance with custom or practice which existed between

parties. 252Mass101, 147NE348.

261–88½–New. Evidence held sufficient to show delivery in time. 216AppDiv 424, 215NYS485.

261–88¼–New. Seller's readiness, ability, and willingness to deliver held established. 17F(2d)699.

261–88½–New. Evidence of weight of twenty five sacks of flour from quantity sold at stated price per pound is insufficient to authorize recovery of agreed price for entire lot. 245NY315, 157NE 151.

261–88¼–New. In action for damages for repudiation of contract for sale of flour at stipulated price per pound, evidence of discrepancies in weight of bags of flour delivered held insufficient to justify buyer in refusing further deliveries. 245NY315, 157NE151.

262–89 252Mass101, 147NE348; 315Mo 1025, 288SW59; 151SC506, 149SE271; **TexCivA** 16SW(2d)306. **Buyer's right of recovery** under conflicting evidence is for jury. **Iowa** 231NW434.

262–90 33F(2d)83 (whether coats returned by buyer about month after delivery are retained beyond reasonable time has been held for jury); 315Mo 1025, 288SW59, 68 [citCyc]; 133SC458, 131SE620.

262–91 MoA 3SW(2d)251; 133SC458, 131SE620.

262–92 99CalA438, 278P880; 3Del 497, 139A259; 217AppDiv783, 217NYS594 (facts as to waiver of minor defects held sufficient to go to jury).

262–92½–New. Court's conclusion that buyer had right to repudiate contract as to future installments sustained. 102 Conn529, 129A527.

262–92¼–New. Where facts are controverted, what is reasonable time is for jury. 252Mass101, 147NE348.

262–92¼–New. It is question for jury whether extras were included in amount of lumber sold. **NJSup** 130A823.

262–92½–New. Whether there was shortage in goods delivered is question for jury; **TexCivA** 289SW164.

262–92½–New. as is also question whether such shortage arose from loss in transportation. **TexCivA** 289SW164.

262–92½–New. Where reasonable minds might differ, question whether seller made every reasonable effort to procure cars is for jury. 20F(2d)890.

262–92¼–New. Mere misbranding is not "defect in material or workmanship" as matter of law but presents question for jury as to obligation of buyer to return goods. 221AppDiv592, 224NYS501.

262–93 13F(2d)999; Cal 285P851 (seller's contract completed); 51ND357, 199 NW861. **Purchaser** is liable for goods purchased, though exclusive sales contract was not executed. CalA 286P1084.

262–95 13F(2d)999; 33PortoRico 241. **Rule of reasonable time** for payment does not apply. 76Mont24, 245P958, 46 ALR906. **Price is payable at residence of seller** where contract of sale is silent as to place of payment. **Wis** 229NW61.

263–97 137Misc491, 244NYS84; **Sask** [1926] 4DomLR647, [1926] 3WestWkly 391.

263–99 33F(2d)501; 230Ky449, 20SW (2d)82; **TexCivA** 276SW322.

263–4 83CalA307, 256P570; 5PaDist& Co 254. **Procurement of new lease.**–77 Colo 501, 238P50. **Provision deferring payment till demonstration and acceptance** requires actual physical demonstration. 151SC484, 149SE246.

264–5½–New. Purchaser is bound without recourse to seller where not claiming to be induced by fraud to sign note containing waiver of defenses. 40GaA 768, 151SE654.

264–8 6F(2d)934; 215Ala225, 109S873; 34GaA143, 128SE702 (under statute); MoA 285SW1028, 1033 [quotCyc]; 33 PortoRico 241. **Contract for delivery f. o. b. named city** means that price is to be paid when goods are delivered on board cars there. 90CalA179, 265P563.

265–9 CalA 280P158; 45Ida340, 262P 514; 319Mo 24, 3SW(2d)229; MoA 285 SW1028, 1033 [quotCyc]; 56ND491, 217NW658. **In absence of agreement that check be received in absolute payment,** delivery of ring was conditional. Cal 284P915.

265–10 159La987, 106S539 (evidence held to show requirement for buyer to pay on receipt of invoice and bill of lading). **Materialman agreeing to furnish contractor** material at cost for cash may add fifteen per cent profit for failure to pay cash. 174Ark35, 294SW62.

265–12 45Ida340, 262P514.

265–12½–New. Sale for cash is not complete till purchase price is paid. 222 MoA193, 297SW94.

266–17 151Wash440, 276P91.

266–18 Ark 31SW(2d)138. **Credit granted on condition.**–Mont 289P571.

267–21 219Ala65, 121S59.

267–22½–New. Seller's dissatisfaction with buyer's financial responsibility must be made in good faith. 15F(2d) 470.

267–26 222MoA888, 5SW(2d)1109.

267–31½–New. Clause "usual terms" in contract for sale of lumber construed as referring to time of payment and not manner of inspection. 101CalA482, 281 P1036.

267–31¼–New. Provision for security for deferred payment construed. 137 Misc491, 244NYS84.

267–32 56ND491, 217NW658.

268–33 22F(2d)837 (United States commissioner); 222MoA888, 5SW(2d)1109, 1110 [citCyc]. **Check indorsed "in full payment"** by buyer who returned part of goods as defective need not be accepted by seller. **NJSup** 151A386(1st case). **Seller retaining checks** but refusing to accept them as full payment is entitled to amount of unpaid checks in action for purchase price. **NJSup** 151A 386(1stcase).

268–34 222MoA888, 5SW(2d)1109, 1110 [citCyc]. **Check given as part payment** but reciting that it is deposit is nevertheless payment on account. 125Misc 830, 211NYS575. **Purchaser's deposit of profits subject to check of seller** may constitute payment. 136 Okl 1, 275P634. **Check constitutes payment after certification.**–MoA 27SW(2d)65.

268–36 147Wash390, 266P178.

268–38 81Colo 354, 255P625 (whether defendant purchaser could recover from wrong person paid entire amount is irrelevant as to liability to other joint cobligee). **Principal's forwarding pay to own agent** held not to discharge his liability to seller. 149Va221, 141SE389.

269–42 See also 1LaA37. **Acceptance of drafts by buyer** which were asked by seller constitutes payment, regardless of whether drafts were paid at maturity. 216AppDiv35, 214NYS621. **Failure to pay notes.**–229Ky820, 18SW(2d)273. **Agreement that any credit or acknowledgment by agent** shall be contingent on collection by principal held inapplicable to remittance of cash collections by collecting agent selected by principal. 58 ND669, 227NW186.

269–43 41GaA407, 153SE234; 220MoA 1034, 278SW1081; **NJSup** 133A772; 56 ND491, 217NW658; **TexCivA** 10SW(2d) 1023. **Irrevocable letter of credit** established with bank is not payment but security, and seller can proceed against bank or buyer. 288Pa114, 135A541.

269–44 220MoA1034, 278SW1081; **NJ Sup** 133A772. **Obligation of third person.**–Sask [1929] 3DomLR705.

270–45½–New. If debtor desires legal proceedings instituted to compel payment of note taken by creditor in sale of debtor's automobile, it is debtor's duty to advance necessary money and give security for costs and attorney's fees. 11 LaA442, 123S477.

270–47 40GaA768, 151SE654 (where defect existing at time contract executed). But see 158Md486, 148A836.

270–50 166La557, 117S590.

270–53 Commissions.–166La912, 118S 81.

271–54 1LaA682. **Decline in market value.**–1LaA524.

271–55 Effect of tender not kept alive on right to discount.–TexCivA 284SW 717.

271–55½–New. Where theft insurance policy assigned to seller to secure part payment of new automobile was forfeited by negligence of seller, amount thereof less seller's interest under loss payable clause should be credited as payment on new car. 167Minn183, 208NW819.

271–55¼–New. Purchasers have right to retain sufficient amount to discharge mortgage on property. 160La109, 106S 711.

271–55¼–New Under contract for shipments f. o. b. delivery point, buyer is entitled to credit for freight charges paid. 162La271, 110S419.

271–55½–New. Where seller repossessed itself of goods failing to meet specifications, buyer held entitled to deduction for same. 162La271, 110S419.

271–56 13LaA557, 128S189. See also 289Pa569, 137A807.

272–62 88IndA5, 163NE112.

272–66 203Cal 233, 263P802; 13LaA557, 128S189 (to date of suit and from judicial demand); 137Misc491, 244NYS84. See also 89IndA181, 164NE506.

272–68 22OhA466, 153NE300, 301 [cit Cyc]; **TexCivA** 284SW717.

272–69 82IndA667, 147NE294 (interest allowed in unpaid purchase price after reasonable time for removal of goods).

272–69½–New. Statutory provisions for interest.–TexCivA 271SW142 (not within rule).

272–72 219Ala65, 121S59; 76Mont24, 245P958, 46ALR906.

273–74 82NJ191, 129A876. **Railroad strike** preventing buyer from obtaining cars for shipment of goods delivered to carrier for plaintiff is no excuse for nonpayment of price. 71CalA479, 235P673.

273–76 83CalA307, 256P570; 32 OhA 254, 167NE904. **Seller's breach before purchase price became due** released buyer, though covenant to pay may have been independent. 83CalA307, 256P570.

273–77½–New. Buyer is not excused from obligations where on his insolvency seller demands cash on delivery. 26F (2d)40.

273–77¼–New. Seller's breach of contract for sale of cattle and dairy equipment before installment falls due excuses failure to tender installment. 86 CalA640, 261P493.

273–77¼–New. Failure of purchaser to open letter of credit as agreed is breach of contract excusing seller's failure to deliver. 228AppDiv552, 240NYS297.

273–78 23F(2d)567; 215Ala225, 109S 873; 262Mass39, 159NE524; **Wis** 230 NW61 (necessity for demand of prompt payment). **Seller drawing sight draft on buyer** impliedly consents to unavoidable delay in its presentation and collection. 35GaA137, 132SE234. **Strict compliance with option to discharge purchase-money note** by return of goods may be waived by acceptance of tender after maturity of note. **TexCivA** 286 SW258.

274–85 168Ark28, 268SW605. **Acceptance of payment after time stipulated** held not waiver of written agreement as to payments thereafter. 289Pa569, 137 A807.

274–86 But see 101CalA646, 281P1040.

274–86½–New. But acceptance of past-due installments after having notified buyer of refusal to proceed because of buyer's breach does not waive any of seller's rights. 217AppDiv667, 217NYS 138.

274–88½–New. Where seller refuses to deliver further installments because of buyer's failure to pay for previous installments, buyer cannot claim that seller's subsequent deliveries waived buyer's breach where seller, after making deliveries, gave notice requiring payment within reasonable time. 218AppDiv472, 218NYS497.

274–90 TexCivA 98SW(2d)762.

274–91 14F(2d)659; 101CalA482, 281 P1036; 44 Ill 114, 92AmD154; 203 Iowa 355, 212NW890. **Registration of automobile transfers** as required by statute held not condition precedent to passing of title between parties when bill of sale was recorded. 203 Iowa355, 212NW890.

275–94 14F(2d)659.

275–95 6LaA15 (promise of sale is not translative of property unless it is clothed with same formalities as sale). **Where contract is for purchase of cotton, price to be fixed on seller's call,** it remained executory till delivery. 220Ala 568, 126S637.

275–96 220Ala568, 126S637; 11LaA676,

124S775. **Question for jury.**–118 **Okl** 170, 247P667.

275–97 87 **IndA**103, 159NE19; 266**Mass** 220, 165NE91; 293**Pa**412, 143A182; **Tex CivA** 9SW(2d)762; **TexCivA** 10SW(2d) 408. **Question for jury.**–114 **OhSt**491, 151NE377. **Sale cannot be rendered executed, so as to pass title, merely by tender by vendee of remainder of purchase money, where vendor, repudiating contract, declines tender and refuses to deliver property.** 39**GaA**340, 147SE173.

276–99 101**CalA**482, 281P1036.

276–1 118 **Okl** 170, 247P667; 50**RI** 163, 146A403. **Risk of loss or injury is a test.**–45 **Ida**340, 262P514.

276–5 **SD** 232NW900.

276–7 82**Colo** 320, 259P1027.

277–9 14F(2d)659; 40F(2d)412; 172 **Ark**82, 287SW750; 172**Ark**362, 288SW 887; 75**CalA**231, 242P509; 85**CalA**616, 260P333, 336 [citCyc]; 89**CalA**416, 264 P796; 92**CalA**598, 268P659; 87 **IndA**55, 160NE47; 201 **Iowa**493, 207NW561; **Iowa** 230NW371; 166**La**9, 116S575; 31 **NM**611, 249P1014; 220**AppDiv**679, 222 **NYS**472; 229**AppDiv**278, 241**NYS**697; 118 **Okl** 170, 247P667; **TexCommnA** 276 **SW**904; **TexCivA** 15SW(2d)150; 149 **Va**755, 141SE759; 140**Wash**420, 249P 786; [1926]**CanSC**194, [1926] 1**DomLR** 1142; **Sask** [1927] 1**DomLR**448.

277–10 128**Me**218, 146A695.

277–12 75**CalA**231, 242P509; 31**NM** 611, 249P1014; **TexCommnA** 276**SW**904; **TexCivA** 9SW(2d)762. **Payment of insurance** may be evidence of vesting of title. 299**Pa**372, 149A647.

277–15 85**CalA**616, 260P333; **Tex CommnA** 276SW904; **TexCivA** 30SW (2d)1110; 140**Wash**420, 249P786.

278–16 **MoA** 19SW(2d)25.

278–17 40F(2d)412; 75**CalA**231, 242P 509; 128**Me**218, 146A695; 266**Mass**220, 165NE91; 31**NM**611, 249P1014; 118 **Okl** 170, 247P667. **Seller's duty under contract to feed mules** partially paid for by buyer is mere incident of his retention of possession under contract. **MoA** 284 SW195.

278–18 140**Wash**420, 249P786.

278–20 75**CalA**231, 242P509; 140**Wash** 420, 249P786.

278–21 75**CalA**231, 242P509; 85**CalA** 616, 260P333; 140**Wash**420, 249P786.

278–22 75**CalA**231, 242P509; 201 **Iowa** 493, 207NW561; 31**NM**611, 249P1014; **TexCivA** 10SW(2d)1012. **Where undisputed evidence shows transfer of title,** it is error to submit question to jury. 58**ND**165, 225NW69.

279–31 97**Fla**398, 121S465; 87 **IndA**55, 160NE47; 112 **Okl** 188, 240P743; 33 **PortoRico** 147; 144**SC**490, 142SE716, 719 [quotCycperCothran,J]; **TexCommnA** 276SW904; **TexCivA** 283SW920; **Tex CivA** 12SW(2d)1056; **TexCivA** 17SW (2d)1078. **In PortoRico.**–33**PortoRico** 147.

281–37 131**Misc**53, 225**NYS**638.

281–38 75**CalA**231, 242P509; 87 **IndA** 83, 154NE29. **Question for jury.**–127**Me** 503, 144A649.

281–44 137**Misc**879, 244**NYS**36.

281–45 222**Ky**539, 1SW(2d)970.

282–49 [1926]**CanSC**194, [1926] 1**DomLR**1142 (holding that title did not pass till delivery).

282–51 **TexCivA** 10SW(2d)1012.

282–52 45 **Ida**217, 261P679; 87 **IndA** 83, 154NE29; 289**Pa**414, 137A599; 153 **Wash**123, 279P398.

283–61 **TexCommnA** 291SW846 (title passed where hay sold was baled and stored in grower's barn). **Title under contract to sell growing hay** passed when hay was stored, though grower could mortgage crop on notifying buyer. **TexCommnA** 291SW846. **Hay stored in warehouse of grower** who had sold all hay grown to hay association cannot be attached by creditor of grower, though contract provided grower should haul to warehouse of association. **Tex CommnA** 291SW846.

283–64 75**CalA**231, 242P509; 87 **IndA** 83, 154NE29; 222**Ky**539, 1SW(2d)970; 168**La**827, 123SW588; **TexCivA** 283SW 634.

285–77 203**Cal** 233, 263P802; 71**CalA** 2, 235P438.

287–88 166**La**912, 118S881.

287–95 **MoA** 16SW(2d)742.

288–99 75**CalA**231, 242P509.

288–1 75**CalA**231, 242P509; 87 **IndA** 83, 154NE29.

288–2 75**CalA**231, 242P509; 95**CalA**85, 272P340; 87 **IndA**83, 154NE29; 233**Ky** 386, 25SW(2d)1039; 166**La**9, 116S575; **MoA** 7SW(2d)383. **Determination of quality by third party.**–101**CalA**704, 282 P425.

289–3 **That inspection is allowed buyer not determinative** of question of title. 144**Va**145, 131SE193.

289–5 254**NY**86, 171NE916. But see 18 F(2d)734.

289–6 **TexCommnA** 276SW904.

289–8 See also 254**NY**86, 171NE916.

289–8½–New. Buyer who agrees to pay for goods on arrival of cars is not entitled to inspect before payments. **NS** [1927] 2**DomLR**1183.

289–9 7**PaDist&Co** 618.

289–13 225**AppDiv**628, 234**NYS**137; **Tex** 26SW(2d)903.

290–15 **Acts held not to constitute approval.**–**Sask** [1925] 3**DomLR**681.

290–16 **Other definitions.**–31**Ariz**84, 250 P564.

290–19 31**Ariz**84, 250P564; **Ariz** 286P 820 (sale and return); 127**Kan**724, 275 P155; 162**La**929, 111S331.

290–22½–New. Price is fixed at time of sale and delivery. 31**Ariz**84, 250P 564.

290–22½–New. Buyer deals with goods as his own and disposes of them as he pleases by cash or credit, 31**Ariz**84, 250P564.

290–22¼–New. and is under no obligation to give any account or disposition of them, 31**Ariz**84, 250P564.

290–22½–New. and is only liable to pay for them at price fixed beforehand without any reference to price at which he sells them. 31**Ariz**84, 250P564.

290–24 24F(2d)35; 31**Ariz**84, 250P564; **Ariz** 286P820; 205**Cal** 1, 269P610; 118 **Or**62, 245P1083. **Relation of agency** is created. 31**Ariz**84, 250P564.

291–25 24F(2d)35; 31**Ariz**84, 250P564; 118 **Or**62, 245P1083 (transaction held consignment).

291–26 31**Ariz**84, 250P564; 81**PaSuper** 526. **Evidence sufficient.**–31**Ariz**84, 250 P564.

291–29 But see 24F(2d)35.

291–30 14F(2d)659; 75**CalA**231, 242P 509; 92**CalA**598, 268P659; 87 **IndA**55, 160NE47; 222**Ky**539, 1SW(2d)970; **Mass** 156NE700; 259**Mass**515, 156NE701; 235**Mich**306, 209NW97 (decision under Uniform Sales Act). See also 5**LaA**20, 24 [CitCyc]. **Goods held identified.**–**Tex CommnA** 276SW904. **There is no consummated sale at time of oral agreement** whereby one agrees to make deliveries of materials as needed but no specific goods are ordered, set aside or determined upon. 49**SD**68, 206NW423. **Payment of price insufficient to pass title** where goods are not ascertained. 87 **IndA**55, 160NE47.

292–42 75**CalA**231, 242P509.

293–44 130**Kan**30, 285P561.

293–48 87 **IndA**55, 160NE47; 240**NY** 118, 147NE607, 38**ALR**1540; 34**Porto Rico** 75 (sugar in warehouse of factory).

294–49 130**Kan**30, 285P561.

295–51 **TexCivA** 285SW941.

295–57 75**CalA**231, 242P509.

296–59 50**Nev**157, 254P1074; 240**NY** 118, 147NE607, 38**ALR**1540.

296–60 240**NY**118, 147NE607, 38**ALR** 1540. **Double compressing hay** and putting it in bins held not appropriation where control was retained by seller and hay delivered afterward to another buyer. 72**CalA**742, 238P121.

296–62 **CalA** 262P761. See also 240**NY** 118, 147NE607, 38**ALR**1540.

296–62½–New. **Under contract for sale of materials in building to be razed by purchaser who is to take immediate possession and remove them** title passes at once to purchaser, nothing remaining to be done by seller. 69**CalA**129, 230P955.

296–62½–New. Seller not entitled to appropriate eggs to contract and pass title without buyer's assent unless within reasonable time after date specified for delivery. 131**Misc**53, 225**NYS**638.

296–63 **DC** 35F(2d)880. **Hay held not segregated** so as to pass title to buyer. 72**CalA**742, 238P121.

297–66 14F(2d)659.

297–67 72**CalA**742, 238P121. **While anything remains to be done by seller** in preparing goods for delivery there is no transfer of title. 72**CalA**742, 238P 121.

297–73 14F(2d)659; 72**CalA**742, 238P 121.

297–75 14F(2d)659.

298–88 214**AppDiv**308, 212**NYS**133 (where buyer is notified); **Sask** [1927] 4**DomLR**647, [1927] 3**WestWkly**391.

298–91½–New. Under contract loss falls on seller through failure of appropriation, notwithstanding buyer paid draft and was willing to accept quantity shipped, actual delivery having become impossible through government seizure. 240**NY**118, 147NE607, 38**ALR**1540.

299–92 87 **IndA**83, 154NE29.

299–93 87 **IndA**83, 154NE29; 289**Pa** 414, 137A599.

299–95 **Can** [1927] 2**DomLR**141.

299–97 254 **IllA**14.

300–1 254 **IllA**14 (title passes to buyer when seller takes possession on receiving title from manufacturer).

300–2 96**CalA**650, 274P557.

300–5 95**CalA**7, 271P1096(2dcase).

301–8 **Appropriation.**–254 **IllA**14 (aeroplane sold by description).

302–14 101**CalA**482, 281P1036.

302–19 45 **Ida**340, 262P514.

302–20 96**CalA**650, 274P557; 45 **Ida** 340, 262P514.

302–21 56**ND**921, 219NW946.

303–28 214**Ala**670, 108S586; 69**CalA** 129, 230P955; 73**CalA**732, 239P350, 352 [quotCyc] (title passing at time of signing contract under express terms thereof); **Fla** 129S779; 1**LaA**185; **LaA** 129 S411; **Mass** 168NE736; 81**Mont**482, 263 P976; 84**Mont**424, 276P16, 63**ALR**528; **TexCivA** 278SW471; **TexCivA** 283SW 920. But see 11**LaA**676, 124S775; 190 **NC**586, 130SE500. **Title passes without delivery** despite undisclosed intention of sellers. **TexCivA** 278SW471. **In California.**–96**CalA**650, 274P557. **Partial delivery is not absolutely essential to passing of title.**–**Iowa** 230NW371.

303–29 118 **Okl** 92, 246P863, 864 [quot Cyc]; 144**SC**490, 142SE716, 719 [quot CycperCothran,J]; **TexCivA** 278SW471.

303–30 [1926]**CanSC**194, [1926] 1**DomL** R1142.

303–32 42F(2d)290; 45 **Ida**217, 261P 679; **TexCivA** 285SW941.

303–33 49**SD**68, 206NW423.

303–33½–New. Under New York Personal Property Law, if contract requires seller to deliver goods to buyer, particular title does not pass till delivery. 133**Misc**22, 230**NYS**611.

304–34 **MoA** 284SW195.

304–36 214**Ala**670, 108S586, 587 [quot Cyc]; 171**Ark**852, 286SW103; 267**Mass** 28, 165NE701; **MoA** 27SW(2d)492; 118 **Okl** 92, 246P863, 864 [quotCyc].

304–37 118 **Okl** 92, 246P863, 864 [quot Cyc].

304–38 118 **Okl** 92, 246P863, 864 [quot Cyc].

304–39½–New. Constructive delivery by bill of sale is sufficient as against third person claiming property under prior contract. 42 **Ida**115, 243P823.

304–41 232 **IllA**1, 7 [quotCyc]; 267 **Mass**28, 165NE701.

304–42 181**Ark**1031, 28SW(2d)1050; 232 **IllA**1, 7 [quotCyc].

305–43 232 **IllA**1, 7 [quotCyc].

305–44 232 **IllA**1, 7 [quotCyc].

305–45 232 **IllA**1, 7 [quotCyc].

305–49½–New. Actual possession need not be transferred, where rights of creditor, subsequent purchaser or encumbrancer are not involved. 42 **Ida**115, 243P823.

305–50 267**US**395, 45**SCt**233, 69**L ed** 678; **Ariz** 287P304; 87**CalA**642, 262P 415; **MoA** 7SW(2d)407; 122 **Or**137, 257 P815; **TexCivA** 283SW634.

306–51 219**Ky**106, 292SW762; **Sask** [1928] 2**DomLR**434.

306–52 But see 158**Tenn**126, 11SW(2d) 874.

307–54 295**Pa**374, 145A425.

307–55 23**AlaA**566, 129S320(2dcase); 203 **Iowa**1297, 214NW574; 130**Misc**396,

223NYS559; 53ND102, 204NW975.

307–59 122 Or137, 257P815. **Where delivery f. o. b. at designated place title is conditional** one, subject to right of inspection and rejection at that point. 233Mich298, 206NW331.

308–64 80CalA284, 251P810, 812 [cit Cyc].

308–65 80CalA284, 251P810.

308–68 72CalA742, 238P121.

308–69 172Ark362, 288SW887; 72CalA 742, 238P121; 80CalA284, 251P810; 251 NY146, 167NE201. **Intention is determined by reference to contract** primarily where transaction is evidenced by instrument in writing. 80CalA284, 251P 810.

308–71 80CalA284, 251P810.

309–73 Alta [1930] 1DomLR68.

310–90 254 IllA14.

311–3 Under Uniform Sales Act, where goods at time of sale are in possession of third person, seller has not fulfilled his obligation to deliver to buyer, unless and until such third person acknowledges to buyer that he holds goods on buyer's behalf. 235Mich306, 209NW 97.

312–7 172Ark362, 288SW887. **Seller's instruction to tenant in possession to assemble mules and cultivators and deliver them to buyer** and acceptance of seller's canceled note is sufficient delivery as against subsequent attaching creditors. TexCivA 17SW(2d)1078.

312–12 245NY383, 157NE502.

313–13 Acts held insufficient.–245NY 383, 157NE502.

313–14 Consent will not be inferred except on persuasive evidence, where warehouse had no knowledge of sales. 245NY383, 157NE502.

313–16 36GaA57, 135SE316; 50SD355, 210NW200, 201 [citCyc].

313–17 50SD355, 210NW200, 201 [cit Cyc]; TexCommnA 299SW870.

314–21 36GaA57, 135SE316.

314–23 36GaA57, 135SE316.

315–26 106Conn372, 138A142. But see 172Minn4, 214NW475. **Seller is entitled to recover price** after appropriation and ordering diversion. 106Conn372, 138A 142.

315–27 See also 5LaA20, 24 [citCyc].

316–38 40GaA425, 149SE719.

316–39 16F(2d)190; 43F(2d)33; 215 Ala426, 111S214, 215 [citCyc]; 221Ala 176, 128S174; DC 35F(2d)880; 240 IllA157; 252 IllA82; 226Ky322, 10SW (2d)1104; 126Me308, 138A389; 252 Mass135, 147NE598; MoA 27SW(2d)65 (delivery to carrier selected by seller); NJDistCt 150A1; 217AppDiv49, 215NYS 727; 220AppDiv645, 222NYS331 (liability of injury in transit on carrier, not seller); 133Misc609, 233NYS94; 58 ND165, 225NW69; 292Pa122, 140A774; RI 132A382; 52SD201, 217NW187; Tex CivA 276SW322; TexCivA 294SW612; 147Wash16, 264P992; 100WVa540, 131 SE6. See also 5LaA20, 24 [citCyc]; 149 Va755, 141SE759. **When goods sold f. o. b. are placed on cars title passes absolutely** and goods are at buyer's risk in absence of circumstances indicating retention of control. 144Va145, 131SE 193. **General rule that placing on cars of goods sold f. o. b. passes title** is subordinate to intention of parties and is not applicable when contrary intention is shown where contract is silent. 144 Va145, 131SE193. **Goods to be delivered f. o. b.**–115 Okl 199, 242P201; TexCivA 275SW161. **Circumstances held to show that buyer obtaining bill of lading and delivering it to carrier did not intend to take and retain shipment.**–TexCivA 283SW634. **Delivery to carrier f. o. b. point of shipment passes title out of seller,** and risk is on buyer despite right of inspection or that order bill of lading runs to consignor. 217AppDiv49, 215 NYS727. **Presumption that consignee is owner may be rebutted.** 217AppDiv49, 215NYS727.

316–41 But see 144Va145, 131SE193.

317–43 126Me308, 138A389.

317–45 205 Iowa1341, 219NW481; 126 Me308, 138A389; 236Mich412, 210NW 211. **It is immaterial that goods were not of quality ordered, at time of diversion, in suit for contract price.** Tex CivA 26SW(2d)665.

317–46 126Me308, 138A389.

317–47 MoA 7SW(2d)407; 292Pa122, 140A774.

318–49½–New. In case of contract for delivery f.o.b., buyer is not bound to accept goods prior to delivery f.o.b. 235Mich306, 209NW97.

318–49½–New. Seller's storing goods subject to purchaser's order on refusal of acceptance does not prevent delivery to carrier from passing title. 292Pa 122, 140A774.

318–51 22F(2d)454. But see 16F(2d) 662. **Payment of freight by seller.**–150 Md641, 135A136.

319–54 16F(2d)662.

319–58 172Ark82, 287SW750.

320–62 172Ark82, 287SW750.

320–66 MoA 27SW(2d)492.

320–67 36GaA57, 135SE316.

320–67½–New. Contract providing for cash against shipping documents on arrival of goods was not "C. I. F." contract. 22F(2d)454.

321–75 172Ark82, 287SW750; 84CalA 325, 258P148.

321–76 MoA 27SW(2d)492.

321–78 Delivery of order covering shipment directed to railroad is merely request to deliver, and is revocable before delivery. MoA 27SW(2d)492.

322–86 213Ala669, 106S139; Iowa 230 NW371; 125Kan807, 810, 266P650 [quotCyc]; Mass 168NE736; 118 Okl 170, 247P667, 669 [citCyc]; TexCivA 283SW920.

322–88½–New. Provision for alternative method of payment will not prevent passing of title where parties intend title to pass. TexCommnA 276SW904.

322–89 253Mass383, 149NE313.

322–90 128Me218, 146A695; MoA 27 SW(2d)487; 217AppDiv49, 215NYS727. **Title to goods shipped on order bill of lading, with right in buyer to inspect** and acceptance of bill of lading to constitute completion held not to pass title out of seller. 217AppDiv49, 215NYS 727. **Subvendee's rights are subject to condition imposed on vendee.**–MoA 27 SW(2d)487 (replevin defeated by refusal of vendor to allow removal of property not paid for).

323–91 217AppDiv49, 215NYS727 (intent implied from contract provision that contract should be complete on acceptance of bill of lading).

323–93 BC [1928] 2DomLR308.

323–99 153Wash123, 279P398.

323–1 89CalA416, 264P796; 160Ga387, 128SE190; 168Ga876, 149SE213; 35 GaA201, 132SE246; 50RI 163, 146A 403; 154Tenn689, 290SW994 (symbolic delivery not effecting transfer where buyer's checks dishonored). **Where personal property is delivered to another, to be paid for in cash,** and cash payment is made by check, which receiver believes to be good, but which proves to be worthless, no contract of sale arises, and no title to property passes. 39GaA301, 147SE154.

324–2 125Kan807, 810, 266P650 [quot Cyc].

324–3 160Ga387, 128SE190.

324–4 In Georgia.–40GaA563, 150SE 572.

325–11 319Mo 24, 3SW(2d)229, 230 [citCyc].

325–12 153Wash123, 279P398 (cash sale).

325–15 319Mo 24, 3SW(2d)229, 230 [citCyc].

325–17 125Kan807, 810, 266P650 [quot Cyc]; 127Me503, 144A649.

326–22½–New. Provision requiring payment on arrival and inspection is not equivalent to requirement of cash on delivery preventing passage of title by tender. 71CalA2, 235P438.

326–23 CalA 290P116; 307Mo 552, 271 SW779.

326–25 TexCivA 12SW(2d)1056.

327–31 MoA 11SW(2d)1110. **Evidence held sufficient to show waiver.**–71CalA2, 235P438.

327–32 125Kan807, 810, 266P650 [quot Cyc].

330–49 307Mo 552, 271SW779 (failure of seller to deposit for three days check given in conditional payment of bills of lading for oil held not waiver of title to bills).

330–50 TexCivA 283SW634.

330–54½–New. Title to goods sold f.o.b., where payment is to be made by draft, bill of lading attached, passes to vendee on delivery of goods to carrier. 214AppDiv410, 212NYS437 (Personal Prop. L. § 101 subd 2).

330–54½–New. This is subject only to right of vendor to withhold delivery until payment by vendee. 214AppDiv410, 212NYS437.

330–55 155Md30, 141A440.

331–62 Mass 173NE421.

331–67 47RI 125, 131A309. See also LaA 129S411.

332–80 149Va147, 140SE275.

332–86 21F(2d)168, 170 [quotCyc]; 215Ala460, 110S904. **Presumption is in favor of retention of title by seller** where bill of lading is taken in his name consigned to order of shipper. 144Va 145, 131SE193.

332–88 144Va145, 131SE193 (presumption of retention of title may be rebutted by circumstances and proof of previous dealings which evidence contrary intention). **Fact that seller shipped to own order not itself determinative.**–144Va145, 131SE193.

332–89 21F(2d)168, 170 [quotCyc]; TexCommnA 276SW904; 144Va145, 131 SE193.

333–90½–New. , or where carrier on consignor's request agrees to deliver to specified person, title passes to such person. 106Conn372, 138A142.

333–92 21F(2d)168, 170 [quotCyc].

333–96 213Ala526, 105S666; 112 Okl 202, 240P732; 117Tex377, 5SW(2d)965, 60ALR665; 144Va145, 131SE193, 194 [quotCyc].

333–97 21F(2d)168, 170 [quotCyc]; 213Ala526, 105S666; 83 IndA94, 147NE 722; 112 Okl 202, 240P732; 117Tex 368, 5SW(2d)960, 60ALR672; 117Tex 362, 5SW(2d)963; TexCivA 293SW935; 144Va145, 131SE193, 194 [quotCyc]. See also 5PaDist&Co 417. But see 58 ND165, 225NW69. **Price of goods burned before shipment may not be recovered by buyer** where contract required draft attached to bill of lading. TexCommnA 23SW(2d)700.

334–98 213Ala526, 105S666 (carrier as bailee may not deliver to consignee till bill of lading is released by payment of draft); 221Ala176, 128S174; 154Tenn 689, 290SW994; 144Va145, 131SE193, 194 [quotCyc]; 145Wash236, 259P712.

334–1 21F(2d)168, 170 [quotCyc]; 83 IndA94, 147NE722.

334–3 117Tex377, 5SW(2d)965, 60ALR 665.

335–19 125Kan807, 810, 266P650 [cit Cyc]; TexCivA 10SW(2d)163. **In Texas.**–CivA 289SW414.

335–19½–New. In Porto Rico, under Code of Commerce, § 51, contract not within exceptions mentioned in § 236, involving amount in excess of 1,500 pesetas ($300.00) cannot be proved by testimony of witness unsupported by other evidence. 29PortoRico 803.

336–26 171Ark852, 286SW103.

336–27 172Ark82, 287SW750; 70CalA 458, 233P415; 125Kan807, 810, 266P 650 [citCyc]; NJSup 151A597; Tex CommnA 29SW(2d)978; TexCivA 278 SW471. **Bill of sale may be conditional,** when no title passes till condition occurs. TexCivA 278SW471.

336–28 Fla 129S779; TexCivA 278SW 471.

337–37½–New. Under statutes, if it is stated in document of title that goods mentioned will be delivered to bearer or to order of some person named, it is negotiable. 254 IllA505.

338–39 Description of property.–217 MoA371, 266SW748. **Where bill of sale is recorded,** failure to secure registration of transfer held not to give seller's creditors any rights against property. 203 Iowa355, 212NW890.

338–41 Man [1930] 1DomLR896.

339–47½–New. Title to goods passing under a c. c. f. contract cannot revest in seller without his consent. 252Mass 135, 147NE598.

339–47½–New. Mutual revocation of certification of check given in payment cannot affect lien of attachment by creditor of purchaser. MoA 27SW(2d) 65.

339-50 208 **Iowa**573, 221**NW**486.
340-54 9**PaDist&Co** 608.
340-61 8**PaDist&Co** 615 (duty of buyer to inquire whether seller has title); **ND** 231**NW**538.
341-63 **CalA** 280**P**549(2dcase) (owner of diamond ring accepting worthless check would be entitled to ring as against purchaser or any other subsequent purchaser with knowledge of transaction); **IndA** 168**NE**506 (buyer of trade acceptance accepted by agent for goods could not maintain replevin action to recover goods where trade acceptance had been redelivered to seller, since buyer did not have title and right to possession of goods); 204 **Iowa**950, 216**NW**77; 153**Wash**123, 279**P**398.
342-66½-New. Purchaser having made part payment may sue in tort to recover entire damage to property. 38**GaA** 516, 144**SE**384.
342-67 209**Ky**49, 272**SW**17.
342-68 **Ont** [1929] 1**DomLR**222.
342-69 172**Ark**362, 288**SW**887.
342-70 209**Ky**49, 272**SW**17.
343-72 13**LaA**22, 127**S**461; **MoA** 27 **SW(2d)**487 (lack of subvendee's knowledge of original sales contract is immaterial); **TexCivA** 2**SW(2d)**911.
343-72½-New. Subsequent purchaser for value from buyer who had not fully paid price acquired title free from vendor's lien of prior seller. 10**LaA**626, 119**S**735.
343-74 69**CalA**129, 230**P**955.
343-74½-New. Effect of subsequent conduct of seller.–Where title has passed to purchaser from original buyer by assignment and delivery of bill of lading, subsequent conduct of seller in procuring duplicate bills of lading and delivering them to original buyer cannot affect title. 84**CalA**325, 258**P**148.
343-75 115 **Okl** 199, 242**P**201; 299**Pa** 372, 149**A**647.
343-77½-New. Where risk of loss in transit was, in accordance with contract, on seller during such period, seller was at liberty to exercise its own discretion in matter of insurance protection. 28**F(2d)**518.
344-83 257**Mass**135, 153**NE**566. See also 73**CalA**732, 239**P**350.
344-85 **MoA** 284**SW**195; **MoA** 7**SW (2d)**383. **General rule held inapplicable where parties otherwise agree.**–**MoA** 7**SW(2d)**383.
344-86 See also **MoA** 11**SW(2d)**1110.
344-88 23**AlaA**566, 129**S**320(2dcase); 168**Ark**603, 271**SW**327; 40**GaA**425, 149 **SE**719; 248**Mich**118, 226**NW**832; 220 **AppDiv**645, 222**NYS**331 (delivery to carrier); **TexCivA** 26**SW(2d)**665 (delivery to carrier).
344-89 217**AppDiv**49, 215**NYS**727.
345-97½-New. When title passes on delivery to carrier, risk of loss is on vendee even though vendor has right to withhold delivery till payment of price. 214**AppDiv**410, 212**NYS**437.
345-1 **Automobile dealer,** accepting car as part consideration for new car on reliable references, is, as to trustee under assignment for benefit of creditors of purchaser, bona fide purchaser within rule. 127**Me**172, 142**A**580.
345-5 289**Pa**414, 137**A**599.
346-7 **Creditor of consignee for sale receiving goods as credit on antecedent debt with notice** acquires no title as against consignor. **Ariz** 286**P**820.
347-19 297**Pa**551, 147**A**657. **As to chattels which vendor does not possess.**–137**Misc**332, 244**NYS**455.
348-32 **TexCivA** 273**SW**944 (where plaintiff was in actual possession, defendant was not bona fide purchaser).
350-47 196**NC**154, 144**SE**835; **TexCivA** 10**SW(2d)**200. **Record by one who mortgaged without having title** held not notice to buyer. **TexCivA** 294**SW**959.
351-53 120**Kan**725, 244**P**861.
352-70 215**Ala**309, 110**S**411 [citCyc].
353-75 177**Ark**342, 6**SW(2d)**302; 202 **Iowa**938, 211**NW**248; 251**Mich**220, 231 **NW**559; 117**Tex**377, 5**SW(2d)**965, 60 **ALR**665; **TexCivA** 278**SW**247; **Tex CivA** 2**SW(2d)**911; **TexCivA** 27**SW(2d)** 897; **TexCivA** 30**SW(2d)**797.
354-82 But see 251**Mich**220, 231**NW** 559.
355-85 258**Mass**215, 154**NE**755.
355-88 36**GaA**760, 138**SE**272; 7**LaA** 451.
355-90 31**Ariz**289, 252**P**192 (statute declaring rule held to apply to all innocent purchasers and creditors as to goods exposed for sale in regular course of business); 7**LaA**427.
356-91 318 **Ill** 432, 149**NE**225.
356-92 118 **Okl** 92, 246**P**863.
356-96 36**GaA**760, 138**SE**272; 214**App Div**410, 212**NYS**437.
357-5 39**GaA**301, 147**SE**154; 86 **IndA** 368, 158**NE**231; 120**Kan**725, 244**P**861; 259**Mass**515, 156**NE**701; 78**Mont**254, 255**P**1067; 289**Pa**414, 137**A**599; **Tex CivA** 4**SW(2d)**1056. **General rule** is that one cannot transfer better title than he has. 86 **IndA**368, 158**NE**231. **In Georgia.**–40**GaA**563, 150**SE**572.
357-6 120**Kan**725, 244**P**861; 259**Mass** 515, 156**NE**701; 132 **Or**395, 285**P**1109.
358-8½-New, or where subsequent sale is effected by fraud or negligence of real owner. 86 **IndA**368, 158**NE**231.
358-9 78**Mont**254, 255**P**1067.
358-9½-New. Rights of successive purchasers.–Where dealer fraudulently sold car left with him for sale and took note and conditional sales contract, bona fide purchaser of note and contract has rights superior to those of subsequent purchaser of car from dealer. 175**Ark** 811, 300**SW**434.
358-9½-New. Estoppel.–Seller's withholding of check for two weeks did not estop him as against buyer or his purchaser from denying payment of check and claiming title to cotton. 40**GaA**563, 150**SE**572.
358-17 52**SD**603, 219**NW**559.
359-19 94**CalA**724, 271**P**910.
359-20 94**CalA**724, 271**P**910.
359-21 94**CalA**724, 271**P**910.
359-21½-New. Where title passed to vendee on delivery to carrier, vendor merely retaining right to withhold property till paid for, vendee on obtaining possession can pass good title to bona fide purchaser. 214**AppDiv**410, 212**NYS** 437.
359-23 39**GaA**301, 147**SE**154.
359-26 **CalA** 280**P**549(2dcase); 36**GaA** 760, 138**SE**272; 249**NY**212, 163**NE**737; 223**AppDiv**781, 227**NYS**626.
361-35 **Seller of ring giving no indicia of title except possession** and taking proper steps on discovering fraud may recover from innocent purchaser. **Cal** 284**P**915.
361-36 23**F(2d)**939.
362-41 23**F(2d)**939.
362-43 170**Minn**43, 211**NW**947.
362-45 23**F(2d)**939; **CalA** 291**P**684; 36**GaA**48, 135**SE**111; 167**La**667, 120**S** 45; **Alta** [1929] 2**DomLR**190; **Sask** [1930] 3**DomLR**901. Contra [1926] **CanSC**129, [1926] 1**DomLR**257. **In Canada.**–[1926] 3**DomLR**699.
362-46 59 **OntL**55, [1926] 3**DomLR** 201.
362-47 22**AlaA**211, 114**S**273; 288**Pa** 207, 135**A**613; 295**Pa**450, 145**A**511.
363-48 8**PaDist&Co** 615. **Mere delivery of goods to bailee** does not clothe him with authority to transfer bailor's title. 295**Pa**450, 145**A**511.
363-53 8**PaDist&Co** 615; **BC** [1930] 4 **DomLR**509 (commercial agent).
363-56 31**Ariz**104, 250**P**766, 768 [cit Cyc].
363-57 31**Ariz**104, 250**P**766, 768 [cit Cyc]; 70**Cal** 41, 232**P**489, 491 [citCyc].
363-58 222**Ky**539, 1**SW(2d)**970.
364-63 But see 94**CalA**724, 271**P**910.
364-68 But see 170**Minn**43, 211**NW**947.
365-70 144 **Okl** 18, 288**P**1072.
365-72 170**Minn**43, 211**NW**947 (in suit against bona fide purchaser of bonds statements by seller after sale held properly excluded).
365-78 **Notice to buyer that eggs were appropriated to contract** held not to establish passing of title. 131**Misc**53, 225 **NYS**638.
365-79 132 **Or**395, 285**P**1109; 297**Pa** 551, 147**A**657 (negligence on part of purchaser may be inquired into as bearing on credibility and weight of testimony in support of good faith).
365-79½-New. Evidence held sufficient to show that transfer of automobile **by** dealer was fraudulent as to owner who left it with him for sale. 175**Ark**811, 300**SW**434.
365-79¾-New. Questions for jury.–Conflicting assertions of title between automobile dealer and one claiming title through consignee for sale held to raise jury question. **Ariz** 286**P**820.
365-79¼-New. Whether maker of bill of sale delivered to third person for delivery on maker's death intended to part with control. **ND** 231**NW**888.
365-79½-New. Evidence held sufficient to sustain finding that there was no delivery of bill of sale intrusted to third person. **ND** 231**NW**888.
366-81 **TexCivA** 19**SW(2d)**123 (word "warranty" necessarily implies sale). **Other definitions** are: "A statement or representation of fact," etc. 9**PaDist& Co** 156.
366-81½-New. Warranty may be either express or implied. 162**Ga**154, 132 **SE**889.
366-81¾-New. Express warranty is created by statement of seller. 162**Ga** 154, 132**SE**889.
366-81¼-New. Law creates implied warranty. 162**Ga**154, 132**SE**889.
366-81½-New. Implied warranty does not arise from contract of parties. 162 **Ga**154, 132**SE**889.
366-83 **MoA** 32**SW(2d)**116.
366-84 **Provision of sales contract that there was no warranty,** either express or implied, covering tractor sold, was valid. 228**Ky**569, 15**SW(2d)**423.
366-85 **Warranty is incident of sale.**–248**NY**73, 161**NE**423.
367-86 224**Ky**263, 6**SW(2d)**245; 130 **Misc**660, 224**NYS**535.
368-99 118 **Okl** 26, 246**P**438 (sale by described qualities of article not yet existing).
368-3 76**CalA**278, 244**P**916.
368-4 76**CalA**278, 244**P**916; 203 **Iowa** 1073, 211**NW**894. But see 204**Cal** 342, 268**P**342, 58**ALR**1176.
368-6 208 **Iowa**1389, 227**NW**409.
368-7 40**GaA**559, 150**SE**600; 204 **Iowa** 66, 214**NW**595; 116 **Or**554, 240**P**1113, 1114, 241**P**1009 [citCyc]. **Warranty may be made basis of fraud** if pleaded as such with necessary allegations to constitute fraud. 203 **Iowa**1073, 211 **NW**894.
369-8 203 **Iowa**1073, 211**NW**894; 204 **Iowa**66, 214**NW**595; 117 **Okl** 22, 244**P** 1113 [citCyc].
369-9 146**Wash**131, 262**P**143. **Statute withdrawing articles sold** under patent or other trade name from application of implied warranty of fitness does not apply to such articles when they are sold under express warranty. 295**Pa** 131, 144**A**909.
369-10 **Company selling automobiles to dealer** is not liable for breach of his warranty, he alone is liable. 197**NC** 147, 147**SE**822. **Where defendant roofing company admitted that agreement to maintain roof was made in favor of plaintiff,** she had right to enforce it as against contention that contract for constructing roof was made by defendant with contractor and that there was no privity of contract between plaintiff and defendant. 9**LaA**537, 119**S**740.
369-11 171**Ark**1179, 287**SW**577, 59**ALR** 1237; 334 **Ill** 281, 165**NE**793. But see **IndA** 168**NE**706; **IndA** 170**NE**101. **Recital in conveyance.**–149**Miss**257, 115**S** 425.
370-12 **Wyo** 291**P**809.
370-16½-New. Purchaser of notes given for purchase price of machinery does not warrant it. **TexCivA** 25**SW(2d)**919.
370-18 35**GaA**419, 138**SE**279; 245**NY** 512, 157**NE**838; 248**NY**73, 161**NE**423; 223**AppDiv**182, 228**NYS**302; 137**Misc** 126, 241**NYS**479; **TexCivA** 295**SW**275, 278 [citCyc] (guarantor cannot set up breach of warranty); 194**Wis**142, 215 **NW**905. But see 151**Wash**86, 274**P**1050. **Warranty in assignment of purchase-money note,** but not in sale contract, does not inure to purchaser of article sold. 142**Miss**536, 107**S**382. **Any buyer of canned goods may hold manufacturer on express or implied warranty,** without privity of contract. 217**App Div**43, 215**NYS**702. **There is no contractual relation** between manufacturer and purchaser from dealer, entitling

purchaser to recover damages for breach of warranty in prior contract. 216Ky637, 287SW994. **Seller of horse falsely representing that horse is gentle** may be liable for injuries to third person without fault. Md 150A801 (declaration held defective). **Injury to buyer's baby.**–222AppDiv624, 228NYS86.

370-19 216Ky637, 287SW994, 595 [cit Cyc]; 24NYS517, 1[illegible]332.

370-20 256GaA419, 1228SE279 (implied warranty); 216Ky637, 287SW994, 995 [cit Cyc]; 7GaA226, 263Mass235, 164 [illegible] 147Mass52, 16N[illegible]22, 245NY [illegible] 132Misc235, 229NYS 743. See also 61GaA208. **Recourse to manufacturer** [illegible] 161NE323.

371-24 215Ala[illegible] 122SE355. **TexCivA** 38W(2d)[illegible].

371-25 94CalA281, 271P123; 191NC 722, 1228SE12 (insufficient consideration); 47RI125, 131A309; Wyo 293P [illegible].

372-32 **TexCivA** 38W(2d)563.

372-36 Rpt see 176Ark562, 38W(2d) [illegible].

372-38 See also 94CalA281, 271P123. **Clause in order** that no representations of salesmen should be valid unless confirmed in writing does not preclude recovery where order was in confirmation of letter specifically conditioned on seller's agreement to agent's guaranty. MoA 236SW182.

372-42½-New. Two warranties covering same subject are necessarily inconsistent unless to same legal effect. SD 232NW966.

372-43½-New. Seller may limit warranty to any extent acceptable to purchaser. SC 155SE268.

373-47 210Mo665, 276SW49, 53 [quot Cyc].

373-48 47RI125, 131A309 (on final payment and delivery).

374-52 69CalA[illegible]4, 231P352; 225App Div407, 242NYS335; 116Or554, 240P 1113, 241P1009; 47RI88, 129A825 (promise construed express warranty). **Weights guaranteed** means that weight of cotton at compress should govern, and any shortage existing should be refunded. 168Ark818, 271SW462. **Illustrations of express warranties.**–210Mo585, 276SW45. "Guarantee" has been held used in sense of warranty. CalA 238P687.

374-53 173Ark112, 292SW111.

374-56 69CalA[illegible]4, 231P352. See also 94CalA281, 271P123.

375-58 85CalA156, 259P108; CalA 267P359, 261 [quotCyc].

375-59 43[illegible](2d)523, 59RI42, 144A [illegible] 53ALR[illegible]34.

375-60 231Ky494, 259SW121.

376-62 **As parties hold themselves out to purchaser,** so will they be bound on their contracts. 160La597, 107S459.

376-64 127Okl197, 260P[illegible].

376-66 238(2d)419, 111Conn297, 149 A687(listcase), 224Ky179, 38SW(2d) 1052, 243NY526, 157SE844, 222App Div146, 225NYS261, 47RI125, 131A 309. But see 178Ark496, 108SW(2d)902. Contra TexCivA 274SW266.

376-67 236IIIA472 (reliance held shown).

376-67½-New. **Inspection by buyer of article purchased** is important, but not conclusive, element in determining buyer's reliance on seller's judgment. 47RI 125, 131A309.

376-68 236IIIA472. **Under Uniform Sales Act** seller of ordinary merchandise produced in quantity does not impliedly warrant that goods are without latent defect. 196Wis339, 220NW192, 59 ALR1232.

377-69 236IIIA472; 3LaA579, 583 [quotCyc].

378-75 See also 69CalA394, 231P353.

378-78 77CalA578, 247P247, 249 [quot Cyc]; 270GaA558, 140SE892, 236IIIA 472; 206Iowa893, 221NW512; 126 Misc572, 214NYS133.

378-80 77CalA578, 247P247, 249 [quot Cyc]; 270GaA558, 140SE892.

378-81 **TexCivA** 38W(2d)563, 566 [cit Cyc].

378-82 206Iowa893, 221NW512; 160 La597, 107S459, 135SE321, 133SE829, 831 [citCyc]; **TexCivA** 38W(2d)563, 566 [citCyc].

379-86 228Ky569, 158SW(2d)423; 125 Me475, 135A31; 230AppDiv303, 243 NYS442.

380-87 125Me475, 135A31; **TexCivA** 258SW(2d)255. But see **IndA** 170NE 161.

380-88 **By agent.**–125Me475, 135A31.

380-89 41GaA788, 154SE716. **Representations in nature of warranties antecedent to contract** may not be urged as fraud where contract is in writing and contains specific warranties. 246 Mich64, 214NW964.

380-92 **If written contract was executed after completion of oral contract,** buyer can rely upon oral statements made to induce sale. 261Mass32, 158NE 262.

380-94 **Where note recites that fertilizer was sold "without any warranty as to results from use or otherwise"** buyer sued for price cannot contend for express warranty. 199NC162, 129SE 453. **Used in connection with other words.**–199NC162, 129SE453.

381-99½-New. **Written contract may expressly exclude** oral express warranty. 47Ida726, 278P224(2dcase).

381-99¾-New. Contract excluding warranties not specified does not warrant truck for purchaser's intended purpose though seller represents truck is suitable therefor. GaA 155SE211.

381-3 263Mass147, 160NE321; 105 NJL109, 143A332; **TexCivA** 278SW(2d) 880.

382-4 120Okl17, 250P119; 91PaSuper 157.

383-6 269US890, 468Ct45, 70Led175; 69CalA195, 230P964; 74CalA265, 239P 1098; 236IIIA111; 125Kan670, 265P 1110; 120Okl17, 18, 250P119 [citCyc]; 47RI125, 131A309 (that "purchase would not be regretted"); SD 231NW 940; 69Utah26, 252P270 (as to past earnings of hotel); Man [1928] 1DomLR97. **Statement of time goods are expected** to arrive is a mere statement of expectation and not a warranty. 213 AppDiv663, 211NYS208.

384-7 74CalA265, 239P1098; 239Mich 42, 214NW162; 47RI125, 131A309 ("good coat, would wear very good"); 137Wash353, 242P27. **Puffing statements.**–127Kan765, 274P1115.

384-9 74CalA265, 239P1094; 255Mass 189, 151NE659.

384-10 74CalA265, 239P1098.

384-10½-New. **Mere dealer's talk,** as distinguished from statements of fact, does not constitute express warranties. 47RI125, 131A309.

384-12 29F(2d)280; 111Conn297, 149 A687(listcase).

384-13 77CalA578, 247P247 (black grapes); 99CalA428, 272P880; 41GaA 788, 154SE716; [1926] CanSC472, [1926] 1DomLR718.

385-16 178Ark496, 108SW(2d)902.

385-17 99CalA428, 272P880.

386-20 Wash 276P292.

386-21 See also 239Mich42, 214NW162.

386-24 275US87, 478Ct274, 71Led540 (sale not "subject to inspection").

386-27 171Minn289, 214NW27; Man [1928] 1DomLR97. But see 295Pa140, 145A67.

388-30 99CalA473, 278P902; 21Ind 439; 116Or554, 240P1113, 241P1009.

388-31 206Iowa893, 221NW512.

388-34 **Where seller knew that cabbages sold in carload lots were to be resold at wholesale** in carload lots, his warranty that cabbages would be delivered to cars in merchantable condition required delivery in marketable condition in respect of sale of wholesale and not for immediate use. 147Va 996, 133SE506.

389-35 173Ark112, 292SW111; 77Colo 156, 234P1055; [1926] CanSC472, [1926] 1DomLR718 (dictum).

389-37½-New. , or that "it would" operate. 236IIIA111.

389-39 But see 74CalA265, 239P1098.

389-40 See also 132Misc136, 231NYS 285.

389-41 SD 231NW940. Contra 74CalA 265, 239P1098.

389-42 Contra 74CalA265, 239P1098.

389-43 Contra 74CalA265, 239P1098.

390-50 **Statements held not warranty of values.**–IndA 169NE346.

391-57 334Ill281, 165NE793; 216Ky 637, 287SW994 (express stipulation against implied warranties); 173Minn 87, 216NW790, 59ALR1164.

391-58 94CalA289, 271P129.

391-60 **Application of statute.**–334Ill 281, 165NE793.

391-60½-New. Doctrine of implied warranty is based upon presumption that men who receive something of value in commercial transactions intend to give in return something of value. 199NC162, 129SE453.

391-60¾-New. Doctrine of implied warranty should be extended rather than restricted. 192NC330, 135SE141.

391-60¼-New. Doctrine rests upon principle that honesty is best policy and contemplates transaction in which both parties may profit. 173Minn87, 216NW790, 59ALR1164.

391-60½-New. Doctrine should be extended rather than restricted. 173Minn 87, 216NW790, 59ALR1164.

391-60½-New. **Sale of secondhand articles.**–No implied warranties accompany sale of secondhand automobile made over into truck. CalA 261P489.

391-60½-New. Implied warranties are intended to hold sellers to course of fair dealing. SD 232NW900.

391-68 12F(2d)969; 198Wis447, 224 NW729.

391-70½-New. **Absence of express warranty** does not preclude existence of implied one. 47RI125, 131A309.

391-71 24F(2d)329; 92CalA598, 268P 659; 173Minn87, 216NW790, 59ALR 1164; 215AppDiv435, 213NYS681; 230 AppDiv303, 243NYS442; 95PaSuper 315; 151SE506, 149SE271 (implied warranty of soundness is not excluded by written contract). **Stipulation that written contract covered all agreements between parties** does not preclude implied warranty. 230AppDiv303, 243 NYS442.

391-72 119Kan783, 241P467, 471 [cit Cyc].

391-72½-New. **Statute providing that acknowledgment gives effect of authentic act,** has been held inapplicable where there was oral warranty and neither buyer nor seller knew that act of sale contained clause that no warranty had been made by seller unless indorsed thereon in writing. 11LaA541, 121S617.

392-74 24F(2d)329; 219Ala183, 121S 701; 172Ark534, 289SW490; 36GaA 41, 135SE219; 123Kan368, 255P78; 210 Ky806, 276SW803; 216Ky637, 287SW 994, 998 [citCyc]; 171Minn289, 214 NW27; 313Mo169, 281SW422; MoA 32 SW(2d)116; OhA 153NE856; 44Okl ACR13 [reh pending]; SC 155SE268; SD 232NW900. But see 43F(2d)63; 241Mich634, 217NW897. **Since adoption of Uniform Sales Act,** warranty not inconsistent with express warranty given may be implied. 171Minn289, 214 NW27. **Warranty by one not party to contract** does not supplant implied warranty on sale. 171Ark1179, 287SW 577, 59ALR1237. **Uniform Sales Act** is not in conflict with rule. SD 232NW 900.

392-75 162Ga154, 132SE889; 210Ky 205, 276SW803; 192NC330, 135SE141; 197NC1, 147SE434; SD 232NW900. **Parties to written contract of sale** may negative all implied warranties otherwise available under Uniform Sales Act. 54ND559, 209NW996.

392-76 83CalA589, 257P211; 94CalA 289, 271P129; 162Ga154, 132SE889; 36 GaA41, 135SE219; 207Iowa539, 223NW 862; 313Mo169, 281SW422; MoA 32 SW(2d)116; 33NM169, 262P529; 51ND 832, 201NW172; 128Or142, 268P748; 128Or142, 273P954. **Exclusion of implied warranty depends** on scope and terms of express warranty. 162Ga154, 132SE889. **Express warranties construed** not to provide exclusive remedy for breach of implied warranty of fitness. 51ND832, 201NW172. **Implied warranties not excluded.**–162Ga154, 132 SE889. **On sale of machinery** express warranty does not exceed implied warranty of suitability for performance of ordinary work for which described article is manufactured. 44OklACR13 [reh pending]. **Under Uniform Sales Act,** im-

plied warranty of fitness is not excluded by express warranty of material and workmanship. 247Mich398, 225NW592. **Express warranty as to material and workmanship** does not exclude implied warranty of fitness for intended use. 34NM409, 282P381.

393–80 57ND199, 220NW638.

393–81½–New. Seller of property by name and description cannot relieve himself of warranty implied by law that article is merchantable, or salable, or fit for use as other articles of that name and description. 192NC330, 135SE141.

393–81¼–New. In action on note given for fertilizer, evidence to show that fertilizer delivered was not that purchased is competent under plea of failure of consideration, notwithstanding note contained provision that fertilizer was sold without warranty. 192NC330, 135SE141.

393–81¼–New. Seller of well-known article having value only for definite specific purpose may not, by contract, relieve himself from implied warranty that article delivered is article sold. 192NC330, 135SE141.

393–82 85CalA156, 259P108; 94CalA281, 271P123; CalA 273P161; 110Conn255, 147A841(2dcase); 38GaA761, 145SE537; 12LaA506, 126S460; 129Misc288, 222NYS5, 6 [quot Cyc]; 143Wash557, 255P919, 62ALR444. But see 229AppDiv407, 242NYS335. **Any words or conduct indicating refusal to warrant** will preclude implication of warranty. 82NH96, 130A26. **Parties may by express provision relieve seller of implied warranty.**–82NH96, 130A26. **Seller's disclaimer of warranty held not too late where buyer's acceptance marked completion of sale.**–143Wash557, 255P919, 62ALR444. **Sale "as is."**–CalA 261P489. **Where there is express stipulation that property sold is not warranted,** warranty will not be implied. 228Ky569, 15SW(2d)423. **In Alberta.**–[1930] 3DomLR270. **Nonwarranty clause must be brought to buyer's attention.**–SC 155SE268.

393–82½–New. Stipulation against warranties other than expressed in written contract does not exclude implied warranty. 173Minn87, 216NW790, 59ALR1164.

393–82½–New. Provision of sale agreement relied upon as excluding implied warranty did not so operate, and, court having erroneously refused to permit defendant to prove breach of such warranty, verdict directed in favor of plaintiff, which followed as matter of course, must be set aside. 38GaA463, 144SE327.

393–82¼–New. Note sued on, reciting that seller was not bound by any sort of warranty, does not preclude setting up material false representations as inducing defendant to enter agreement. 40GaA559, 150SE600.

394–97 35F(2d)526; 233Ky176, 25SW(2d)353; 9PaDist&Co 525; 142Wash1, 251P861. **Under the Georgia Code,** etc. 36GaA48, 135SE111. **Seller must pay off attachment** on portion of goods sold. 215AppDiv412, 241NYS10. **In California.**–80CalA284, 251P810. **Buyer required to surrender property upon proof that it was stolen** is entitled to restitution of purchase price. 10LaA746, 123S144(1stcase). **In Kentucky.**–233Ky176, 25SW(2d)353.

395–3 TexCivA 19SW(2d)808.

396–8½–New. **In New York,** under statute, seller impliedly warrants title whether or not he is in possession. 215AppDiv412, 214NYS10.

396–9 233Ky176, 25SW(2d)353.

396–12½–New. In absence of proof that seller and buyer had knowledge that automobile was stolen, buyer is not entitled to relief for breach of warranty. 233Ky176, 25SW(2d)353.

396–12½–New. Facts held insufficient to place either buyer or seller on notice that car was stolen. 233Ky176, 25SW(2d)353.

396–19 Sales of bill of lading.–131Misc162, 225NYS410.

397–21 43F(2d)689; 216Ala642, 114S298 (radio); 176Ark993, 4SW(2d)904; 82CalA431, 255P772; 83CalA689, 257P211; 92CalA598, 268P659; 35GaA478, 133SE653 (under statute); 263Mass147, 160NE821; 217AppDiv43, 215NYS702; 190NC162, 129SE453; 192NC330, 135SE141; 128Or83, 262P939; 128Or142, 268P748; 47RI125, 131A309 (where buyer informs seller of purpose intended); [1926] CanSC472, [1926] 1DomLR718. **What constitutes merchantability.**–47RI125, 131A309. **Such implied warranty is not affected by express notice to purchaser** that vendor did not guarantee condition of article sold. 190NC162, 129SE453. **Purchaser relying on implied or statutory warranty** that article purchased is in sound and merchantable condition is not relieved from examination because examination would occupy time and be attended with inconvenience. 72CalA339, 237P408. **Warranty of merchantability** is warranty of fitness for general purposes. 23F(2d)416. **Where seller knew that buyer was purchasing goods for resale,** there is implied warranty of merchantability. **Mass** 170NE403. **Seller cannot escape liability** for implied warranty by attacking trade name or patent name. 136Misc468, 241NYS233.

397–21½–New. Where buyer has no knowledge of soda fountain equipment, which seller knows, and on advice of seller that soda fountain purchased would be adequate for purposes intended, seller has been held to have given assurance that soda fountain is suitable to general purpose. 100CalA43, 279P680.

397–22 13F(2d)747; 171Ark611, 285SW353; 221Ky494, 299SW181; 141Miss569, 106S818; MoA 276SW1047, 1048 [citCyc]; 82NH96, 130A26 (not essential part of contract); 103NJL464, 135A805, 806, 50ALR227 [citCyc]; TexCivA 290SW772, 773 [citCyc]; 137Wash353, 242P27 (sale by retailer of stock feed in original package). But see 151SC506, 149SE271. **Civil law doctrine.**–See also 3LaA500. **Written contract for sale of automobile** providing that it "is accepted without any express or implied warranties unless expressly contained herein" excludes warranty of quality not contained therein. 142Miss536, 107S382.

398–24 TexCivA 290SW772, 773 [cit Cyc].

398–25 171Ark611, 285SW353; 315Mo226, 285SW988, 51ALR494; 103NJL464, 135A805, 50ALR227; TexCivA 290SW772, 773 [citCyc].

399–26 180Ark12, 20SW(2d)313.

399–32½–New. New article.–There is implied warranty that new machine as contracted for will be delivered. TexCivA 284SW643.

399–33 159La946, 106S451 (cane syrup).

399–35 16F(2d)1005; 37GaA215, 139SE585; 236IllA472; 262Mass261, 159NE508; NJ 147A466; 134Misc272, 236NYS133; 136Misc468, 241NYS233 (trade-mark on article). **Knowledge that buyer is manufacturer of furniture is not knowledge** of special purpose of lumber sold. 236IllA472. **In Saskatchewan.**–[1925] 3DomLR537.

399–36 180Ark12, 20SW(2d)313.

399–37 20F(2d)215; 23F(2d)416; 24F(2d)329; 43F(2d)63; 43F(2d)309; 216Ala642, 114S298 (radio); 180Ark616, 22SW(2d)19; 181Ark649, 26SW(2d)1108; Ark 32SW(2d)443; 77Colo156, 234P1055; Conn 151A492; 236IllA275 (under Sales Act); 242IllA466; IndA 158NE489; 207Iowa1133, 224NW93; 227Ky754, 14SW(2d)170; 230Ky39, 18SW(2d)877; 160La597, 107S459; 167La857, 120S478; 11LaA541, 121S617; 1LaA396; 4LaA150; 4LaA489; 5LaA565; 6LaA744; 240Mich257, 215NW397; 173Minn87, 216NW790, 59ALR1164; 310Mo419, 276SW614; 315Mo226, 285SW988, 51ALR494 (that hogs fit for breeding purpose); MoA 274SW1100; MoA 276SW1047, 1048 [citCyc]; 103NJL464, 135A805, 806, 50ALR227 [citCyc]; 131Misc53, 225NYS638; 230AppDiv303, 243NYS442 (such warranty enters into or attends contract though not part thereof); 191NC313, 131SE754; 191NC722, 133SE12; 192NC330, 135SE141; 51ND832, 201NW172; 57ND295, 221NW75; 57ND500, 222NW621; 23OhA319, 156NE149; 112Okl119, 240P115; 120Okl3, 249P724; 120Okl17, 19, 250P119 [citCyc]; 133Or128, 288P207; 95PaSuper315; 47RI125, 131A309 (statute); 49RI70, 140A6; TexCommnA 288SW815; TexCivA 281SW226; TexCivA 290SW772, 773 [citCyc]; TexCivA 7SW(2d)636; Ont [1927] 1DomLR502. But see 156Md346, 144A510, 62ALR1497. **Statutory provisions.**–162Ga154, 132SE889. **Contracts for work and labor.**–69CalA384, 231P567. **If the thing is used for another purpose** there is no implied warranty of fitness for purpose for which it is used. **Alta** [1929] 1DomLR594. **"Particular purpose"** under Michigan Sales Act § 15 means purpose expressly or impliedly communicated to seller for which buyer buys the article. 51ND832, 201NW172. **There is no implied warranty** that material was suitable for stuccoing house, where owner did not rely on judgment of dealers. 221Ky60, 297SW941. **Knowledge of buyer's particular purpose** may be shown from sale alone in proof of warrant of merchantability. 47RI125, 131A309 (sale of coat impliedly warrants its use as article of apparel). **What constitutes fitness for purpose.**–47RI125, 131A309. **A vendor of ventilating fan** will not be held to warrant its satisfactory operation when installed by contractor with whom it had no connection, fan requiring proper installation to enable it to function. 9LaA199, 119S290. **Seller must know that buyer is relying on his judgment** or facts must charge him with such knowledge. 43F(2d)683.

399–37½–New. Where seller knows purpose product will be used for, there is statutory warranty of fitness in addition to implied warranty. 191NC722, 133SE12.

400–38 CalA 288P687; 87IndA318, 158NE919; MoA 276SW1047; 118Okl274, 247P985; 120Okl3, 249P724; 47RI125, 131A309 (article ordinarily used in one way).

400–39 250NY410, 165NE829.

401–40 24F(2d)524; 32F(2d)244; 43F(2d)63; 176Ark993, 4SW(2d)904; 178Ark496, 10SW(2d)902; 181Ark771, 27SW(2d)997 (except defects); 162Ga154, 132SE889; 37GaA215, 139SE585; 123Kan368, 255P78; 129Kan300, 282P701; 168La66, 121S576; 5LaA360, 362 [citCyc]; 125Me475, 135A31; 240Mich257, 215NW397; 245NY526, 157NE844; 228AppDiv396, 240NYS123; 118Okl287, 248P626, 59ALR1536; 297Pa153, 146A541; 145Va448, 134SE588, 590 [quotCyc]; 197Wis615, 222NW788. But see 295Pa131, 144A909; 151Wash86, 274P1050. **Statute that on sale under patent or trade name** of specified article there is no implied warranty of fitness for particular purpose is restatement of common-law rule. 24F(2d)329. **Such statute** applies only to goods known in market and among those familiar therewith. 24F(2d)329 (holding sale not "under patent or trade name"). **Manufacturer making machine according to model** only warrants that machine will be in accordance with model. 157SC426, 154SE412.

401–41 125Me475, 135A31; 145Va448, 134SE588, 590 [quotCyc]. See also 217AppDiv90, 216NYS148.

401–43 83CalA689, 257P211; 217Ky28, 288SW1031, 1033 [citCyc]. **Right possession** of article by buyer must be shown in order that rule may apply. 140Miss502, 106S97, 44ALR124.

402–45 41F(2d)217 (under statute); 41F(2d)339; 176Ark993, 4SW(2d)904; 181Ark649, 26SW(2d)1108; 82CalA431, 255P772; 162Ga154, 132SE889; 236IllA275 (under Sales Act); 83IndA652, 149NE452; 125Kan278, 284, 264P27 [citCyc]; 217Ky28, 288SW1031, 1033 [citCyc]; 222Ky691, 2SW(2d)387; 322Mo502, 15SW(2d)766, 64ALR936; 32OhA443, 168NE153; 128Or83, 262P939; 95PaSuper397 (repair parts of machinery); TexCommnA 288SW815. See also 133Misc136, 231NYS285. **Extent of warranty** on sale of lighting plant is implied warranty that plant is reasonably suitable for ordinary lighting, but not that it will give sufficient light

for needs of nearsighted man. 217Ky 28, 288SW1031. **That there is express warranty that equipment is free from defects in material and workmanship** does not exclude implied warranty of fitness. 241Mich634, 217NW897. **"Particular purpose"** construed as used in Uniform Sales Act. 128 Or83, 262P939. **Innocence of fraud or lack of good faith** is not circumstance which will relieve manufacturer of liability for loss by failure to fulfill contract requiring article manufactured to be fit for use for purposes intended. 133Misc136, 231 NYS285.

403-46 162Ga154, 132SE889; 123Kan 368, 255P78; 242Mich642, 219NW634; 322Mo 502, 158W(2d)766, 64ALR936. See also 217AppDiv90, 216NYS148. But see 133Misc136, 231NYS285.

403-47 71CalA723, 236P322; 125Kan 278, 264P27; NJSup 140A895. **Statute relative to implied warranty that goods shall be reasonably fitted for purpose for which they were ordered** is inapplicable to contract for manufacture of certain articles. NJSup 140A895.

403-48 123Kan368, 255P78.

403-48½-New. But if purchase is of particular kind designated, it does not comply with contract if its quality is such as not to be suitable for ordinary use for which purchased. 215AppDiv 435, 213NYS681.

404-49 15F(2d)1003; 37GaA215, 139 SE385; 256Mass195, 152NE630; 192NC 330, 135SE141; 26 OhA420, 160NE520; 128 Or142, 273P954; 128 Or529, 274P 1108; TexCivA 294SW612; 100WVa 515, 131SE912; [1926]CanSC472, [1926] 1DomLR718. See also 239Mich42, 214 NW162.

404-50 13F(2d)747 (sugar produced in particular locality); 196Wis339, 220 NW192, 59ALR1232.

404-51 175Ark196, 108SW(2d)902; 37 GaA215, 139SE585; 263Mass147, 160NE 821; 173Minn87, 216NW790, 59ALR 1164. See also 239Mich42, 214NW162. **By statute sale under trade name implies no warranty of fitness for particular purpose.** 22F(2d)749. **Sale of books to lawyer held not to carry warranty of fitness for use in practice.** 37 GaA215, 139SE585.

404-52 229AppDiv407, 242NYS335; 128 Or529, 274P1108; TexCivA 294SW 612.

405-54 15F(2d)1003; 77CalA591, 246 P1064; 101CalA482, 281P1036; 165La 723, 115S915; 7LaA39; [1926]CanSC 472, [1926] 1DomLR718.

405-55 173Minn535, 217NW941.

406-57 262Mass261, 159NE508.

406-59 173Minn535, 217NW941.

406-64 71CalA265, 239P1098.

407-66 74CalA265, 239P1098; 134Misc 272, 236NYS133 (mere purchase alone does not conclusively establish buyer's reliance on seller's judgment). But see MoA 272SW1017. Contra TexCivA 38W (2d)563. **No implied warranty in sale to dealer.**–74CalA265, 239P1098. **In Ohio.**–27 OhA475, 161NE557 (cake).

407-68 MoA 206SW224.

407-69 MoA 296SW224; 217AppDiv43, 215NYS702. **Seller impliedly warrants that canned goods corresponds to weight and measure on label.** 217App Div43, 215NYS702.

407-71 22AlaA210, 114S278; 83IndA 551, 149NE182, 183 [quotCyc]; 256Mass 183, 152NE318; 157Miss746, 128S563; MoA 296SW235; 129Misc765, 222NYS 724; 217AppDiv43, 215NYS702; 131 Misc164, 225NYS438; 132Misc896, 230 NYS743; 117 Okl 136, 245P646. **Manufacturer is liable if foreign substance** got into bottle during manufacture. Miss 130S479 (mouse in Coca-Cola).

407-72 83IndA551, 149NE182, 183 [quotCyc].

408-74 142Miss92, 107S283.

408-76½-New. Implied warranty of fitness follows article. 129Misc765, 222 NYS724.

408-77 171Ark225, 283SW374; 162Ga 154, 132SE889; 210Ky806, 276SW803; 131 Okl 194, 268P255; 44 OklACR13 [reh pending]; 49RI 18, 139A466. **Sale of butcher's refrigerator** held to carry implied warranty that it would preserve meats. 171Ark225, 283SW374.

408-78 176Ark671, 8SW(2d)973; Okl 292P9. **Where parties know drilling** rig is secondhand, there is no implied warranty of its condition. 177Ark223, 7SW(2d)772.

408-80 162Ga154, 132SE889; 5LaA360, 362 [quotCyc].

409-83 Ida 290P395; 233 IllA138, 141 [citCyc]; LaA 125S325; 171Minn289, 214NW27.

409-86 51ND357, 199NW861. But see 229AppDiv407, 242NYS335.

409-88 190NC162, 129SE453; 192NC 330, 135SE141. **Rule of caveat emptor is not applicable** to sale of commercial fertilizers in some jurisdictions. 190NC 162, 129SE453. **Sale of fertilizer "without any warranty as to results from its use or otherwise"** does not relieve seller from duty under implied warranty to deliver goods merchantable, salable, and fit for use intended for. 190NC162, 129 SE453. **Warranty of ingredients.**–190NC 162, 129SE453.

409-93 87CalA721, 262P779.

409-94 74CalA265, 239P1098. **Doctrine of caveat emptor** applies to kerosene. 145Va448, 134SE588.

409-95 74CalA265, 239P1098; 44 Ida 544, 258P547; 240Mich257, 215NW397; 141Miss569, 106S818; 315Mo 226, 285 SW988, 51ALR494; 120 Okl 240, 251P 472. **No warranty implied,** where goods carried no markings of alleged warranty of quality. 74CalA265, 239P1098.

410-97 100CalA43, 279P680; 151SC 506, 149SE271. **Implied warranty of title applies to conditional sales.**–Ariz 288 P666.

410-97½-New. If buyer gets article which was subject of contract of sale, it is immaterial that article is worthless in absence of express warranty or fraud. 190NC162, 129SE453.

410-97¾-New. Ordinarily, purchase of food permits buyer to assume that seller has had opportunity to examine articles sold, and, unexplained, will constitute conclusive evidence of reliance on seller's skill or judgment. 134Misc272, 236NYS 133.

410-99 219Ala183, 121S701; 177Ark 223, 7SW(2d)772; Ark 328SW(2d)443; 216Ky637, 287SW994; 6LaA218 (where seller of secondhand pipe said that he did not want to sell without inspection); 240Mich257, 215NW397; 120 Okl 240, 251P472 (sale of traction); 48Philippine621; 47RI 125, 131A309 (important but not conclusive element); NS [1928] 2DomLR873. But see TexCivA 38W(2d) 563. **In Porto Rico.**–32PortoRico 51.

411-1 23F(2d)416; 43F(2d)309; 240 Mich257, 215NW397; 141Miss569, 106S 818; 142Miss536, 107S382; 150Miss437, 116S816; 315Mo 226, 285SW988, 51ALR 494. Contra TexCivA 38W(2d)563.

411-2 240Mich257, 215NW397.

411-3 165La723, 115S915; 240Mich257, 215NW397.

411-4 229AppDiv407, 242NYS335.

411-5 6LaA42; 44Philippine87 (Civ. Code art 1484); 143Wash671, 255P1028, 52ALR1533.

412-7 94CalA289, 271P129; 11LaA541, 123S911. **On sale by dealer,** there is no warranty against latent defects in absence of fraud. 142Miss536, 107S382.

412-8 Who are manufacturers.–143 Wash671, 255P1028, 52ALR1533.

412-9 24F(2d)329; 49RI 18, 139A466; 143Wash671, 255P1028, 52ALR1533. See also 255 IllA514.

412-10 32F(2d)242; 74CalA265, 239P 1098 (seller not manufacturer); 44 Ida 544, 258P547; 129Kan300, 282P701 (sale of known, described, and specified article); 6LaA218; 141Miss569, 106S 818; Que [1925] 2DomLR856. But see 11LaA541, 123S911. Contra 44Philippine87.

412-11 Particular warranties construed.–178Ark898, 128SW(2d)899 (capacity of pump).

412-12 180Ark616, 228SW(2d)49; 9Pa Dist&Co 156. **Warranty that chemical toilet system is odorless, sanitary, and satisfactory** is not fulfilled by showing that it was so when first installed and for few months thereafter. TexCivA 274 SW266. **Construction of particular warranties.**–10LaA158, 120S240 (replacement of defective parts). **Warranty that oil burner would "properly heat building"** is not limited to temperature but includes silence for reasonable enjoyment thereof. 227AppDiv369, 237 NYS552.

412-12½-New. Contract drawn by warrantor construed most strongly against him. 218Ky119, 290SW1059.

413-14 37GaA464, 140SE797.

413-15 Oral warranty of quality, coupled with salesman's declaration to make price right to satisfaction of buyer and seller, if warranty was not complied with, did not make warranty unreasonable as giving buyer alone power to determine amount of allowance, but showed that allowance was to be reasonable one. 224 AppDiv543, 231NYS552.

413-15½-New. Subsequent written agreement, referring to original contract and purporting to construe guaranty, can be considered in determining intent of parties. 98CalA507, 277P167.

413-16 253 IllA431. **Failure of buyer to carry out terms incumbent upon him** estops him from relying upon warranty. 37 OklACR569. **Proper use by purchaser.**–215Ala511, 110S804.

413-19 200Wis367, 228NW503. **Test impossible of being made** by reason of burner being destroyed in fire does not render purchaser liable. 227AppDiv369, 237NYS552.

414-25 165La723, 115S915. See also 118 OhSt392, 161NE25. **"Weights guaranteed"** has no application to damage accruing after delivery and acceptance. 168Ark818, 271SW462. **Purchaser expressly assuming risk of mules dying.**–40GaA532, 150SE442(2dcase).

415-32 218Ky119, 290SW1059, 1061 [quotCyc].

415-33 130Kan711, 288P537 (guaranty of performance of heating system construed as extending for full heating season); 218Ky119, 290SW1059, 1061 [quot Cyc].

416-34 218Ky119, 290SW1059, 1061 [quotCyc].

416-35 218Ky119, 290SW1059, 1061 [quotCyc]; 34 OhA302, 170NE880; 87 PaSuper554.

416-36 218Ky119, 290SW1059, 1061 [quotCyc].

416-37 218Ky119, 290SW1059, 1061 [quotCyc].

416-40 146Wash37, 261P800.

416-42 119Kan788, 241P467, 471 [cit Cyc].

416-44 74Mont408, 241P233.

417-45 Where seller fails and refuses to appear and defend warranty in action against him and buyer by third person and buyer loses goods, buyer is entitled to recover from seller amount paid on price. 123 Okl 252, 253P90.

417-46 Defense of title.–214AppDiv395, 212NYS216. **In such case** buyer in suing for breach of warranty must prove surrender to real superior title. 214App Div395, 212NYS216.

418-47 214AppDiv395, 212NYS216.

418-48 74Mont 408, 241P233; 9PaDist &Co 525.

418-49 68CalA145, 228P722.

418-50 224Ky263, 6SW(2d)245. **Paint.**–48RI 288, 137A469. **Meaning of term as known to trade.**–92CalA598, 268 P659.

419-52 See also 200Cal 382, 253P320.

419-54 167La857, 120S478; TexCivA 296SW912.

419-55 266Mass370, 165NE408; 120 Okl 17, 19, 250P119 [citCyc]; 118Tex255, 148SW(2d)53. **Sale of animals.**–128 Or 142, 273P954. **Warranty that heat bags would be refilled if they failed to work** three to five years construed as warranty that they would produce heat for three to five years. 236 IllA275. **Warranty of milk cooling machine construed** as guaranty to maintain certain temperatures while warm milk passed over coil of pipes. 240Mich621, 216NW431.

420-56 Sale of heater.–MoA 297SW197. **Where article is reasonably suitable for purpose,** warranty is not broken. 172 Ark927, 291SW58.

421-58 121 Or277, 254P806.

421-59 202Cal 770, 262P748; 224Ky 263, 6SW(2d)245. See also 121 Or277, 254P806.

421-62 NJSup 147A45.

421-63 98CalA507, 277P167.

421-64½-New. Warranty that hogs are fit for breeding purposes is not warranty

that they will not communicate cholera to other hogs. 315Mo 226, 285SW988, 51ALR494.

421-65 TexCivA 20SW(2d)266.

422-68 See also MoA 274SW845.

423-76½-New. Warranty to use care in selecting hogs to avoid infection is breached by shipment of hogs visibly sick. SD 232NW900.

423-76¼-New. Knowingly or negligently furnishing false certificate of health is not compliance with agreement to ship hogs with health certificate attached. SD 232NW900.

423-77½-New. Effect of sale by description is to exclude from warranty matters which purchaser might by due diligence have discovered from inspection of sample. [1926] CanSC472, [1926] 1DomLR718.

423-77¼-New. Implied warranty of merchantability under statute does not require that goods sold be of first quality or even as good as average. 96CalA 18, 273P831.

423-81 197NC1, 147SE434.

423-82½-New. Implied warranty that eggs are sound and merchantable is not breached by defective egg or two in case. 92CalA598, 268P659.

423-83 77Colo 156, 234P1055. **Statutory provisions** requiring notice of defects within reasonable time exist in some states. 166Minn228, 207NW628. **Statute providing otherwise.**-86PaSuper 32.

424-85 Where breach of warranty is set up as counterclaim in answer to suit for price, failure to allege statutory notice of breach is demurrable. 28 OhA 22, 162NE451.

424-86 126Kan453, 268P740; 214Ky 367, 283SW393; MoA 10SW(2d)326. See also 125Misc816, 211NYS584. **Seller held not liable for money expended for repairs** in absence of notice by buyer as to breach of warranty. 214Ky367, 283 SW393.

424-88½-New. In New York, by statute, notice of defect must be given whether purchaser seeks to rescind, 125 Misc816, 211NYS584.

424-88¼-New. or merely to recover damages. 125Misc816, 211NYS584.

424-89 197NC147, 147SE822.

425-91 18F(2d)635; 252Mass135, 147 NE598; 122 Or137, 257P815; 284Pa 588, 131A479; 96PaSuper293.

425-93 295Pa131, 144A909. **Reasonable time.**-125Misc816, 211NYS584 (under all circumstances); 297Pa225, 146A 546. **Vessel is not merchandise** within meaning of Philippine Code of Commerce art 342 providing that purchaser not making any claim based on inherent defects within thirty days following delivery shall lose right of action against vendor for such defects. 44Philippine 87.

425-94 104Conn674, 134A233; 216Ky 637, 287SW994, 995 [citCyc]; Utah 283 P731. **Sufficiency of notice.**-Conn 151A 492.

427-5 Complaints of quality as notice.-Conn 151A492.

427-6½-New. Notice to seller of breach of warranty is insufficient where it fails to comply with provision of sales act requiring nature of breach to be stated in notice. 297Pa225, 146A546.

427-7 125Kan16, 20, 262P604 [quot Cyc] (dictum). **Waiver not shown.**-126 Kan453, 268P740. **Seller's denial of responsibility** excuses purchaser from rendering more detailed statement of damage in claim. 99CalA438, 278P880.

427-8 125Kan16, 20, 262P604 [quot Cyc] (dictum).

427-9 125Kan16, 20, 262P604 [quot Cyc] (dictum).

427-10 125Kan16, 20, 262P604 [quot Cyc] (dictum).

427-11 125Kan16, 20, 262P604 [quot Cyc] (dictum); 10LaA158, 120S240; 62 OntL76, [1928] 2DomLR615.

427-12 125Kan16, 20, 262P604 [quot Cyc] (dictum); Wash 291P319; 62 OntL76, [1928] 2DomLR615. **In Kansas.**-125Kan16, 262P604.

427-13 125Kan16, 20, 262P604 [quot Cyc] (dictum).

428-17 176Ark562, 3SW(2d)331; 253 IllA431. **Expense of repairs.**-10LaA 158, 120S240.

428-19 159La946, 106S451 (holding transferee of bill of lading did all reasonably necessary to minimize damage to goods by notifying shipper, who refused to act).

428-20 10LaA158, 120S240.

429-23½-New. Seller of machinery proving defective is entitled, after replacement thereof, to recover defective part. 10LaA158, 120S240.

429-23¼-New. Retailer is entitled to benefit of repairs made by manufacturer to make machine comply with retailer's warranty. 176Minn232, 222NW920.

429-24 110Conn255, 147A841(2dcase); 11LaA541, 123S911.

429-26 172Ark209, 287SW1010 (resale); 225Ky418, 9SW(2d)119; 154 Wash15, 280P351.

429-30½-New. Nor is failure to pay after delivery waiver. 236 IllA111.

429-30¼-New. Where seller failed to perform supplementary contract made for his benefit, buyer could not be held to have waived breach of warranty. 173 Minn87, 216NW790, 59ALR1164.

429-30¼-New. Buyer's refusal to execute bond for return of replevied property is not waiver of right to recover for breach of warranty of title. Ariz 288P666.

429-30½-New. Request for fulfillment of contract nullifies previous attempt to rescind. Minn 233NW302.

429-32 15F(2d)732; 170Ark1193, 281 SW358. **Delay in giving notice of defects** will not prevent recovery under some circumstances. 127Kan391, 273P 411. **Only after buyer knows, or should with diligence know, of defect** may failure to notify of defect amount to waiver of breach. 41GaA132, 152SE257(2d case).

429-32½-New. But it has been held that failure to give notice of breach within reasonable time after discovery of breach of warranty is waiver where buyer continues to use chattel for years thereafter. 125Misc841, 211NYS488.

430-33 245 IllA531; 216Ky637, 287SW 994. **Under Alberta Farm Implement Act** provision of warranty making failure to give immediate written notice of failure of implement to work well conclusive is valid. Alta [1930] 2DomLR 57.

430-33½-New. Breach of warranty is not waived as to first installment by notice only that last installment is defective. 41GaA132, 152SE257(2dcase).

430-34 111Conn564, 150A523; 236 IllA 472; 207 Iowa1322, 224NW826; 228Ky 11, 14SW(2d)214; 1LaA424; 173Minn 535, 217NW941; 112 Okl 119, 240P115; 133 Or128, 288P207. **In Porto Rico.**-32 PortoRico 51.

430-35 170Ark516, 280SW366; 200Cal 428, 253P320 (user for several months without objection); 96CalA18, 273P831; 253 IllA431; 213Ky159, 280SW945; 242 Mich642, 219NW634 (Alabama contract); 221AppDiv146, 223NYS107 (under Sales Act); 130Misc861, 225NYS167; 132Misc 866, 230NYS529; 37 OklACR569; 136 SC387, 134SE415 (retention of law books for nearly four years); TexCommnA 299SW857. **Agent's promise to adjust for poor quality** is no greater than purchaser's right to accept and offset for damages. 92CalA194, 267P901.

431-36 169Ark176, 273SW706; 171Ark 225, 283SW374; 171Ark994, 287SW185; 77Colo 156, 234P1055; 236 IllA472 (under Uniform Sales Act); 127Kan391, 273P411; 165La723, 115S915; 266Mass 370, 165NE408 (statement of Arkansas law); MoA 272SW1017; 117 Okl 136, 245P646 (implied warranty); 122 Or 137, 257P815; 49RI 70, 140A6 (under Sales Act). But see 181Ark458, 26 SW(2d)120; Conn 151A492; 47 Ida794, 279P302; TexCivA 18W(2d)385; Sask [1927] 3DomLR75. **Change by manufacturer's mechanic in back jaw and pitman of rock crusher,** so as to make size of opening correspond substantially with that mentioned in order and sale contract, after which buyers kept and used machine, did not alter parties' rights and liabilities as respects implied warranty. 197Wis615, 222NW788. **In determining whether buyer examining and accepting article is precluded from claiming breach of warranty,** court may consider circumstances attending sale, relative position and knowledge of parties, and whether buyer was in fact misled. CalA 261P489.

432-38 170Ark797, 281SW10; 36GaA 506, 137SE409; 123Kan466, 256P126; 262Mass99, 159NE505; 151SC303, 149 SE20. **Notice to seller of alleged defects and expression of dissatisfaction** does not relieve buyer of consequences of failure to return goods within time provided by contract. 36GaA506, 137 SE409. **Seller's attempts to remedy defects pointed out by buyer** do not constitute waiver of right to hold buyer to acceptance on failure to return goods within time stipulated in contract. 36 GaA506, 137SE409. **Terms of contract govern rights of parties.**-36GaA506, 137 SE409. **Seller's attempt to make machine operate** has been held not waiver of the provision. 170La602, 128S649. **Trial of machine.**-133 Or421, 289P1067.

433-40 See also 181Ark764, 27SW(2d) 1002.

433-40½-New. There is warranty as to latent defects surviving acceptance where contract for sale of castings provides that those which after test and acceptance showed injurious defects would be rejected. 21 OhA373, 153NE201.

433-40¼-New. But such provision is not express warranty against patent defects which would survive inspection and acceptance. 21 OhA373, 153NE201.

433-40¼-New. Warranties against hidden vices or redhibitory vices of second-hand automobile by seller is not waived by clause in act of sale providing "no warranties have been made by the vendor, unless indorsed hereon in writing." 11LaA541, 123S911.

433-41 228Ky11, 14SW(2d)214; 158 La727, 104S632; Miss 130S290; 154SC 424, 151SE788 (promise of adjustment); TexCivA 3SW(2d)879.

433-42 142Miss617, 107S757 (renewal note); Wash 291P319.

433-43 175Ark1141, 1SW(2d)816; 181 Ark764, 27SW(2d)1002.

433-45 173Ark112, 292SW111; IndA 158NE489; Iowa 230NW327 (renewal of note only part of which covered cost of warranted goods); 117 Okl 22, 244P 1113; 132 Okl 100, 269P357(3dcase); 49 RI 18, 139A466; TexCivA 296SW912; 152Wash37, 276P892. See also 133 Or 421, 289P1067.

434-47 120 Okl 3, 249P724 (giving of renewal note).

434-52 11LaA541, 123S911.

434-54½-New. In Oklahoma Pure Seed Law does not create any new rule of civil liability for breach of warranty in sale of seeds. 118 Okl 255, 247P410.

434-55 But see 236 IllA275. Contra 51 ND832, 201NW172.

435-56 144Ala545, 39S359; 169Ark176, 273SW706; 170Ark1193, 281SW358; 176Ark336, 2SW(2d)1082; Ark 30 SW(2d)817(2dcase); 16Kan571; 210Ky 806, 276SW803; 141Miss402, 106S533; 142Miss851, 108S139; 118Nebr260, 224 NW294; 112 Okl 119, 240P115; 123 Okl 252, 253P90; 128 Or142, 268P748; 96 PaSuper330 (under statute). **Return of goods** bars suit for breach of warranty. 22F(2d)680. **Seller retaining returned goods** is chargeable with value of required article. Wyo 293P381.

435-57 128 Or142, 268P748.

435-58 169Ark176, 273SW706; 77Colo 156, 234P1055, 1057 [quotCyc]; 236 IllA 111; 218Ky119, 290SW1059; TexCivA 14SW(2d)290; 146Wash131, 262P143.

436-59 169Ark176, 273SW706; 170 Ark1193, 281SW358; 236 IllA111; IndA 158NE489; 141Miss402, 106S533.

437-60 141Miss402, 106S533; 142Miss 851, 108S139. But see 227AppDiv369, 237NYS552.

437-62 35F(2d)829; 34GaA345, 129SE 555; 218Ky271, 291SW388; 38 OklACR 238; 52SD606, 219NW475; TexCivA 281SW226. See also 57ND199, 220NW 638.

438-68 See also 52SD606, 219NW475. **Buyer pursuing methods of adjusting defects provided in contract** cannot counterclaim for damages for breach of warranty when sued for price. 51SD

20, 211NW807. **In California.**–83CalA 689, 257P211.

439-69½-New. Where parties have stipulated what course shall be pursued by purchaser in event warranty fails, such provision must be followed by him in seeking to enforce warranty. 38 Okl ACR238.

439-70 141Miss402, 1068533; 142Miss 851, 1088139; 133 Or421, 289P1067. **Question for jury.**–133 Or421, 289P1067.

439-72 129Kan844, 284P623(1stcase) (return held sufficient). **Offer to return part of shipment** is insufficient. 142Miss 851, 1088139.

440-73 TexCivA 168SW(2d)87.

440-77½-New. Where offer to return is declined by seller, buyer must not appropriate goods to his own use if he desires to rescind contract. 141Miss 402, 1068533.

440-80 MoA 158SW(2d)895.

440-81 Miss 130S290; 217AppDiv194, 216NY8507 (buyer then may elect remedy, that is, to sue for breach or for recovery of price). **Waiver of condition requiring return does not waive restriction of remedy to return.**–TexCivA 281 SW226.

440-81½-New. Seller's promise after delivery to sell goods elsewhere will not excuse buyer's failure to tender or return them, where seller's promise was not based on warranty as to quality as to which buyer had raised no question and did not seek to return goods for breach of warranty. 34GaA345, 129SE 655.

441-82 15F(2d)897; 176Ark336, 28SW (2d)1082; 177Ark631, 7SW(2d)313; 77 Colo 156, 234P1055; 35GaA289, 133SE 55; 35GaA478, 133SE653 (partial failure of consideration under warranty of merchantability); 40GaA559, 150SE 600; 236 IllA111; IndA 170NE101; 10 LaA727, 123S158; 230AppDiv206, 243 NY8352; 50ND966, 198NW550; 120 Okl 17, 19, 250P119 [cit'ycl]; 47RI 88, 129A825; 142Wash134, 252P523; Alta [1927] 2DomLR1007. **Buyer seeking rescission** cannot ask damages for breach of warranty. TexCommnA 299 SW857. **Required elements of contract** must be present to assert a right based upon breach of warranty. 194Wis142, 215NW905. **Right of action for breach of warranty of seed accrues** when buyer ascertains that seed is not as represented. Ida 290P395.

441-83½-New. In Oklahoma L. [1919] c 138 § 8, making it illegal to sell seeds bearing false label, has no application. 118 Okl 255, 247P410.

441-84 15F(2d)732; 169Ark176, 273 SW706; 170Ark1193, 281SW358; 176 Ark336, 28SW(2d)1082; Ark 308SW(2d) 817(2dcase); 236 IllA111; 12LaA87, 123 S905; 10LaA727, 123S158; 141Miss402, 1068533; 144Miss490, 1108427; MoA 277SW368; 50ND966, 198NW550; 32 OhA186, 165NE592; 120 Okl 17, 19, 250 P119 [cit'ycl]; 43 OklACR263; 128 Or 83, 262P939; 95PaSuper397; 47RI 88, 129A825 (but not where counterclaim is subject of separate action). **Recoupment** may be allowed in some jurisdictions. 57ND500, 222NW621.

442-85 171Ark994, 287SW185; 236 IllA111; TexCivA 285SW667.

442-87 49RI 70, 140A6.

442-88 51ND832, 201NW172; TexCivA 38SW(2d)879.

442-89 TexCivA 284SW309.

442-90 Cost of pipe not meeting specifications of contract may be deducted from purchase price. 162La271, 1108 419.

442-91 35GaA289, 133SE55 (executed contract).

443-92 See also RI 129A604.

443-99 Limitation in contract.–170Ark 797, 281SW10.

443-3½-New. In action on contract to recover purchase price, defended on ground of breach of express warranty, defendant has been held not entitled to recover excess of damages suffered by him by reason of breach over amount due plaintiff for berries. 266Mass370, 165NE107.

443-5 248 IllA396.

444-6 224Ky170, 5SW(2d)1052.

444-9 Action for damages arising from sale of seed rice, which after planting was found to be not as represented, held not redhibitory action nor action quanti minoris. 160La597, 107S459.

444-13 15F(2d)897; 217AppDiv194, 216NY8507.

444-14 217AppDiv194, 216NY8507. **In Porto Rico.**–32PortoRico 51, 52.

445-15 But see 118Nebr260, 224NW 294.

445-16½-New. If buyer rescinds sale, returns goods, and accepts purchase price, he cannot thereafter maintain action against seller for breach of warranty. 118Nebr260, 224NW294.

445-16¾-New. Buyer seeking to avail himself of remedy of rescission which no longer exists is not precluded from invoking only existing remedies, based on theory of continued existence of contract. 57ND824, 224NW668.

445-16¼-New. Buyer claiming remedy which he does not have is not thereby precluded from invoking thereafter remedy which he does have. 57ND824, 224NW668.

445-17 MoA 10SW(2d)326; TexCivA 287SW127. **Statute requiring notice of election to rescind held inapplicable** to case where terms of warranty contract provide otherwise. 227AppDiv369, 237 NY8552.

445-19 10LaA158, 120S240.

445-23 236 IllA111.

445-29½-New. Seller must be given opportunity to defend title before buyer can recover damages for breach of implied warranty of title. Ariz 288P666.

445-29¾-New. Notice that property has been replevied and demand for protection are equivalent to demand to defend title. Ariz 288P666.

445-30 143Wash627, 255P657.

446-32½-New. or that seller remained silent when buyer made statements as to requirement, 69CalA394, 231P353.

446-33 Resale by buyer does not affect right to maintain action for breach of warranty. 133 Or421, 289P1067.

446-38½-New. It is no defense that property sold which did not pass inspection as warranted might do so in another year. 127 Or523, 272P890.

446-38¼-New. Fact that use of alkali-proof ink in sample was accidental does not excuse failure to use such ink in goods sold by sample. 227AppDiv296, 237NY8472.

446-38¼-New. Fact that delivery was enjoined by superior holders has been held not to excuse vendor from protecting vendee under warranty. Wis 232NW 547.

446-41½-New. Seller warranting machine cannot complain because buyer made continuous changes at seller's instigation in attempt to make machine work. 133 Or421, 289P1067.

446-42 72CalA339, 237P408 (complaint for breach of statutory warranty of merchantability of goods in possession of carrier held not to allege facts showing inability to inspect); 244NY73, 154NE 826 (complaint held sufficient as setting out cause of action for breach of warranty).

446-44 Sufficiency of counterclaim.–179 Minn467, 229NW575; MoA 148SW(2d) 456.

447-45 Sufficiency of allegations.–119 Kan389, 239P968 (breach of warranty of title); 136Misc468, 241NY8233. **Plea of recoupment** for money paid in excess of value of mule bought, held insufficient in not alleging conditions on which overpayments were made. 28GaA769, 113SE112. **Complaint held sufficient.**–IndA 170NE101. **Complaint held not demurrable nor subject to motion to strike.**–IndA 168NE706. **Nature of action.**–133 Or421, 289P1067.

447-47 82CalA431, 255P772.

447-48 TexCivA 38SW(2d)563. See also 172Ark534, 289SW490.

447-49 For cases in which the allegations were held sufficient, etc. 221Ky 494, 299SW181.

448-54 10PaDist&Co 503.

449-58 82CalA431, 255P772.

449-62 28F(2d)720; 22AlaA241, 1148 418.

450-69 Conn 151A492; 245 IllA531.

450-70 SD 231NW940. **Court cannot presume existence of essential facts showing breach of warranty.** SD 231 NW940.

451-71 MoA 148W(2d)456.

451-72 295Pa131, 144A909. See also 133SC369, 131SE32. **Allegations held insufficient.**–221Ky494, 299SW181. **Particular allegations held sufficient to show breach.**–27 OhA137, 161NE28.

451-75½-New. Pleading breach of warranty, where contract does not provide for rescission, does not entitle buyer to rescission. TexCivA 300SW192.

451-76 22AlaA241, 114S418.

452-77 22AlaA241, 114S418; 26 OhA 420, 160NE520. **Sufficiency of allegations as to special damages.**–212Ala490, 103S467; 82CalA444, 255P771.

452-80 97CalA304, 275P523.

452-86½-New. Counterclaim in action for price of goods alleging that there was breach of warranty as to part thereof and not alleging reliance on alleged warranty is insufficient. 216Ky112, 287 SW354.

453-87 151SC303, 149SE20; TexCivA 272SW562 (defense of failure to execute bill of sale and transfer license fee receipt not available unless pleaded).

453-88 Evidence in recoupment held admissible under pleadings. 236 IllA 111.

453-88½-New. Recovery not precluded by failure to offer proof of allegation where other allegations sufficiently proved. 138SC124, 135SE801.

453-94 47 Ida794, 279P302.

454-95½-New. Allegation of warranty and breach will not sustain recovery on subsequent promise of seller to repay price on buyer's surrender of property. TexCivA 272SW562.

454-98 96CalA18, 273P831; SC 155SE 268.

454-1 153SC371, 150SE900.

454-2½-New. Nonperformance by purchaser.–Under counterclaim for breach of warranty of durability of paint, plaintiff may show improper application of paint without pleading same in replication. 215Ala511, 110S804.

454-4 204 Iowa66, 214NW595; MoA 32 SW(2d)116 (breach of different warranty).

455-7 26 OhA420, 160NE520.

455-9 236 IllA472; 142Wash134, 252P 523. **Buyer who alleges inability to determine defects on inspection** must prove allegation. 236 IllA472.

455-10 28F(2d)720.

455-11 106Conn468, 138A438 (holding that warranty could not be modified by contemporaneous letter not pleaded); SC 155SE268; 48SD533, 205NW220; TexCivA 118SW(2d)260; TexCivA 198W (2d)123.

457-23 204 Iowa66, 214NW595; Iowa 230NW327; 237Mich577, 212NW972. **Doctrine of "res ipsa loquitur"** does not apply to breach of warranty. 191NC 722, 133SE12. **Burden on buyer** to show that agent had authority to make warranty. 144Ala545, 398S359.

457-24 CalA 267P359; 204 Iowa66, 214 NW595; Iowa 230NW327; 4LaA196; 237Mich577, 212NW972; MoA 274SW 845; ND 231NW281; 128 Or83, 262P 939; 86PaSuper32; TexCivA 283SW 341. **Judge's action in ignoring guaranty of performance,** treating it as guaranty of quality merely and requiring defendant to establish in what way apparatus is defective, is erroneous. NJSup 147A45.

458-25 202 Iowa475, 210NW584; Iowa 230NW327; MoA 297SW197. **Failure to sustain burden.**–202 Iowa475, 210NW 584.

458-26 Iowa 230NW327. **Notice of defect.**–86PaSuper32.

458-27 After acceptance of goods purchased, presumption is that they are of quality ordered, and burden is on buyer to prove contrary. 34GaA165, 128SE 589.

458-29 218Ky119, 290SW1059; NJSup 147A45. **Presumption of knowledge.**–160La597, 107S459. **Matter of defense.**–107WVa671, 150SE373.

458-29½-New. Burden of showing article was worthless rests on buyer. 35 GaA289, 133SE55.

458-29¼-New. Where hay shipped very early in season is found heated and in bad condition, inference is that it is due to failure properly to cure. Alta

[1927] 2DomLR1007.

458-29¼-New. In absence of rebutting or overcoming evidence, presumption of warranty implied from sale for special purpose becomes conclusive. Tex CommnA 288SW815.

459-30 24F(2d)329; Iowa 229NW321; 263Mass147, 160NE821; 230AppDiv303, 243NYS442 (agent's representations); Wash 286P282 (contract of sale).

459-32½-New. by seller's letter in confirmation of sale. 85 IndA577, 155NE48.

459-33½-New. Where only evidence of written contract is testimony that buyer had signed order, buyer may prove terms of verbal warranty. 218Ala196, 118S 377.

459-33¼-New. Where buyer is sued for purchase price, he may introduce original order containing written warranties to supplement conditional sales contract containing no warranty. 151 Va865, 145SE331.

459-34 24F(2d)329.

459-36½-New. or by evidence of representations not amounting to assertions of fact. 236 IllA111.

459-39 Evidence of requirements of goods purchased for special purpose not admissible where issue is knowledge of seller of such purpose. 236 IllA472.

460-41 10LaA158, 120S240.

460-42 Exclusion of evidence of express nonwarranty may be reversible error. 113 Okl 255, 247P410.

460-42½-New. Order for car for which another was substituted and actually delivered was properly excluded. 99Vt 227, 131A16.

460-42¼-New. Statements of saleswoman after completion of sale constituting express warranties of quality are inadmissible. 47RI 125, 131A309 (statement on final payment and delivery).

460-42¼-New. Statements of purchaser after completion of sale as to right to take or leave coat is not evidence of warranty made at time of sale. Pa 131A 309.

460-43 NJSup 147A45 (testimony as to what oil defendant did use and that it was or was not unsuitable has been held competent where contract did not require that any particular kind of oil be used); 21 OhA93, 153NE106. **Particular evidence held competent.**-225Ky526, 9SW(2d)516. **Evidence to show compliance with warranty.**-227Ky754, 14SW (2d)170. **Evidence held inadmissible.**-243 IllA483. **Evidence held improperly excluded.**-MoA 21SW(2d)219. **Evidence properly excluded** as to inefficiency of machine's operation when warranty was of merchantability. Mass 170NE403.

461-51 In action for breach of warranty that animal was not infected by contagious disease, testimony of purchasers at same sale from same herd is admissible to show that herd was infected. 116 Or554, 240P1113, 241P1009.

461-59 Judgment of owner against vendee of stolen automobile is admissible in evidence in vendee's action against his vendor on implied warranty of title. 36GaA48, 135SE111. **Judgment in bankruptcy** inadmissible. CalA 267P359.

461-59½-New. That property was taken from buyer as stolen property is competent in suit for breach of implied warranty of title. 39 OklACR139.

461-59¼-New. That insurance company has acquired ownership by payment of loss to owner is competent in suit for breach of implied warranty of title. 39 OklACR139.

461-60½-New. Evidence as to insurance on chattel sold in excess of value testified to by buyer is admissible. 99 Vt227, 131A16.

461-60½-New. Materiality of evidence.-Correspondence between buyer and seller as to payment of balance due was material. 99Vt227, 131A16.

461-60¼-New. Fact that defendant buyer attempted to sell goods at greatly reduced price and was unable to do so is evidence admissible on question of breach of warranty by delivery of defective goods. 128 Or83, 262P939.

461-60½-New. Other evidence held inadmissible.-247NY460, 160NE914.

462-85½-New. Buyer's refusal of reasonable opportunity to inspect and test for defects may be shown. 99Vt227, 131A16.

462-68 See also 22AlaA241, 114S418.

462-72½-New. Academic questions held not admissible. 22AlaA241, 114S418.

462-73 128 Or83, 262P939.

463-74 165La723, 115S915.

463-75 20F(2d)215.

463-77 But see 47RI 88, 129A825.

463-79 212Ala490, 103S467 (admission of evidence of difference in value between "hard" and "soft" hogs at place of resale held not error).

464-83 180Minn19, 230NW114.

464-84 In action for breach of warranty of fitness of hay press, evidence that buyer was compelled to pay for use of another hay press is inadmissible. 113 Okl 90, 239P230.

464-87½-New. Evidence as to market value without regard to time or place is not admissible. 28 OhA336, 162NE650.

464-89½-New. In action by box manufacturer for breach of warranty, excluding evidence of plaintiff's contract to make boxes and profits to be made therefrom was held proper. 255Mass 189, 151NE59.

464-90 Iowa 224NW48; 10LaA158, 120 S240; 149Wash701, 272P40; 154Wash 15, 280P351. **Evidence held sufficient.**-68CalA722, 230P174; CalA 267P359; 28GaA769, 113SE112; 243 IllA483; IndA 170NE101; 166Minn228, 207NW 628; 150Miss473, 116S883; 136Misc768, 240NYS819; RI 129A266; 157SC426, 154SE412; 54SD630, 224NW189. **Evidence held insufficient to show breach of warranty.**-191NC722, 133SE12. **Reliance by buyer** on seller's skill and judgment is provable by direct or circumstantial evidence. 51ND832, 201NW172. **Mere showing that tractor was not powerful enough** to do work contemplated by purchaser does not show breach of warranty. 216Ky637, 287SW994. **Seller held not to have relied** on seller's judgment so as to raise warranty. 230 AppDiv303, 243NYS442.

464-91 Evidence held sufficient to show warranty.-69CalA394, 231P353 (warranty that trees were free from scale); 77CalA578, 247P247; 11LaA541, 121S 617; 156Md346, 144A510, 62ALR1497; 224AppDiv543, 231NYS552; 56ND110, 216NW203 (title); 50RI 192, 146A773; TexCivA 11SW(2d)260. **Evidence held insufficient to show warranty.**-23F(2d) 416; 219Ala183, 121S701; 177Ark486, 9 SW(2d)81; Ark 32SW(2d)443; 96CalA 18, 273P831; 85CalA156, 259P108; 255 IllA8; 123Kan368, 255P78; 262Mass 261, 159NE508; 239Mich42, 214NW162; 217AppDiv90, 216NYS148; 220AppDiv 645, 222NYS331; 32 OhA121, 167NE492 (express warranty); TexCivA 283SW 546. **Reliance on warranty.**-24F(2d) 329; 116 Or554, 240P1113, 241P1009.

465-92 NJSup 147A45 (if there is guaranty of performance and thing does not perform, guaranteed party need only show that in first instance without being required to explain). **For evidence held sufficient to show,** etc. 24F(2d)329; 216 Ala642, 114S298; 78CalA652, 248P732; CalA 260P810 (boiler); 40GaA532, 150 SE442(2dcase); 45 Ida28, 260P426; IndA 168NE706; 159La946, 106S451; 160La597, 107S459; 12LaA87, 123S905; 262Mass275, 159NE617; 171Minn211, 213NW902; 173Minn535, 217NW941 (appearing solely by expert testimony); MoA 276SW1047; 136 Okl 83, 276P483; 39 OklACR139; 128 Or83, 262P939; 49 RI 70, 140A6; 50RI 192, 146A773; Tex CivA 290SW772; TexCivA 20SW(2d) 266; 143Wash58, 254P850; 200Wis367, 228NW503. **For evidence held insufficient to show,** etc. 101CalA482, 281P1036; 35 GaA289, 133SE55; 39GaA163, 146SE566; 44 Ida544, 258P547; 236 IllA472; Mass 172NE595; 237Mich577, 212NW972; 51SD214, 213NW19; 200Wis367, 228 NW503; Wyo 293P381. **Evidence held sufficient to support findings.**-67 CalA458, 227P627. **Evidence held sufficient to support verdict** based on breach of warranty. TexCivA 22SW(2d)322. **Where vendor of stolen automobile permitted judgment to be rendered against his vendee,** such judgment is conclusive under statute in action on implied warranty of title as to amount and right of plaintiff to recover in former suit. 36 GaA48, 135SE111. **In Oklahoma.**-118 Okl 255, 247P410.

465-92½-New. Evidence sufficient to show warranty had been made good. NJSup 129A465.

465-93 171Ark994, 287SW185 (evidence as to damages for breach held insufficient to support verdict for defendant); 218Ky119, 290SW1059; 20 OhA 501, 152NE733; 295Pa131, 144A909. **Damages.**-149Miss257, 115S425; MoA 297SW197; 154SC424, 151SE788; 51SD 214, 213NW19; TexCommnA 285SW599; TexCivA 290SW772.

465-94 Value.-77CalA578, 247P247.

465-94½-New. Evidence held insufficient to show warranty of sole ownership of equipment of bakery by seller and that no royalties were attached to it. 284Pa588, 131A479.

465-94¼-New. Seller not given opportunity to defend title in action against buyer is not bound by judgment against buyer. Ariz 288P666.

465-96 Nominal damages.-MoA 15SW (2d)895 (can only be recovered in absence of evidence of actual value); Man [1928] 4DomLR850. **Excess of counterclaim.**-179Minn467, 229NW575. **Damages for minor adjustments** are not recoverable. Ark 30SW(2d)817(2dcase).

466-97 22AlaA241, 114S418; 217App Div43, 215NYS702; 52ND112, 202NW 280 (expense of making article conform to warranty); 128 Or83, 262P939; 143 Wash627, 255P657; 101WVa87, 131SE 879.

466-98 22AlaA241, 114S418; 160La597, 107S459; 128 Or263, 274P322; 143 Wash627, 255P657.

466-98½-New. Special damages which are result of breach and within contemplation of parties are recoverable within general rules. 143Wash627, 255 P657.

466-98¼-New. Buyer may recover special damages from failure of rock crusher to produce ten yards per hour as guaranteed, owing to character of rock, where seller inspected rock before sale. 143Wash627, 255P657.

467-1 That building blocks were sold for use in building and became integral part thereof before buyer discovered breach of warranty is special circumstance entitling buyer to recover loss proximately resulting. 159Tenn628, 21 SW(2d)398.

467-1½-New. Proximate damage to be shown under Sales Act means actual proximate damages as distinguished from conjectural damages. 47RI 153, 130A593.

467-3 178Ark898, 12SW(2d)899.

467-4 128 Or263, 274P322. **Recovery of damage prior to discovery of defect.**-128 Or263, 274P322.

467-4½-New. Consequential damages may be recovered whether warranty is expressed or implied. TexCivA 281SW 600.

467-4¼-New. It has been held that $2,500 is not excessive where foreign substance in beverage caused ptomaine poisoning. Miss 130S479.

467-5 15F(2d)897 (recognizing rule).

467-6 15F(2d)897 (held exception to general rule in view of circumstances); 77CalA578, 247P247; Man [1928] 1DomLR877. **Evidence of damage** must be confined to time and place of delivery, in absence of evidence that seller knew they were to be resold on another market. 212Ala490, 103S467.

468-7 15F(2d)897; 218Ala336, 118S 580; 219Ala399, 122S359; 22AlaA241, 114S418; Ark 30SW(2d)817(2dcase); 210Ky806, 276SW803; 218Ky119, 290 SW1059; 224Ky170, 5SW(2d)1052; 149 Miss257, 115S425; 310Mo 665, 276SW49; MoA 297SW197; MoA 15SW(2d)895; 223 AppDiv46, 227NYS336; 28OhA336, 162 NE650; 43 OklACR263; 113 Okl 90, 239 P230; 128 Or83, 262P939; 47RI 88, 129 A825; TexCivA 27SW(2d)880. **Defect of part of machine.**-210Ky806, 276SW 803. **Defective material.**-TexCivA 281 SW600; TexCivA 22SW(2d)322. **Fitness for particular purpose.**-113 Okl 90, 239P230. **Warranty of quantity.**-128 Or 83, 262P939.

470-11 35GaA289, 133SE55; 35GaA 478, 133SE653; 141Miss328, 105S744;

141Miss402, 106S533; MoA 276SW1035, 1037 [citCyc]. See also 34GaA243, 129 SE121.

471-12 MoA 276SW1035, 1037 [citCyc].

471-15 174Ark437, 295SW710; 138 Okl 171, 280P842. **Evidence held insufficient** to show that goods were worthless or partial failure of consideration entitling defendant to abatement of purchase price in whole or in part. 34 GaA345, 129SE555. **Part payment.**–133 Or421, 289P1067.

472-18 210Ky806, 276SW803; 224Ky 170, 5SW(2d)1052; 295Pa140, 145A67.

472-19 212Ala490, 103S467; 128 Or 263, 274P322.

472-20 82CalA444, 255P771; 210Ky 806, 276SW803.

473-23 24F(2d)329; 22AlaA241, 114S 418; 217AppDiv43, 215NYS702; 221 AppDiv737, 225NYS228; 138 Okl 171, 280P842 (where property is worthless); 49RI 18, 139A466; 49RI 449, 144A158; 70Utah234, 259P406; 151Wash683, 277 P70. But see 47RI 88, 129A825. **Value of shortage in weight, penalties and fines imposed under law, counsel fees, and expenses incurred** in proving lack of guilt in selling short weight canned goods may be recovered by retailer against manufacturer. 217AppDiv43, 215NYS702. **Value of time and labor expended** in reasonable effort to utilize property for purpose for which it was manufactured. 127Kan391, 273P411. **Amount of settlements and expenses of defending claims against buyer** may be recoverable. 230AppDiv206, 243NYS 362.

473-25 138 Okl 171, 280P842 (where property is worthless); 133 Or421, 289 P1067.

474-26 128 Or263, 274P322.

474-30 70Utah234, 259P406.

474-31 22AlaA241, 114S418.

474-34 177Ark631, 7SW(2d)313; 178 Ark898, 12SW(2d)899; 9LaA537, 119S 740; 141Miss402, 106S533; 52ND112, 202NW280; 49RI 18, 139A466. See also 1LaA290. But see 26 OhA420, 160 NE530. **Express paid on parts furnished by seller in attempt to recondition machine** are recoverable. 133 Or 421, 289P1067. **Under contract not warranting property not repaired by seller** payments to others for repairs are not recoverable. GaA 155SE211.

475-35 128 Or263, 274P322; 98PaSuper 420. See also 35GaA478, 133SE653. **Where article is rarely obtainable on rental basis** buyer's earnings for period preceding time it became unusable may be considered in determining value of use until pump could be replaced. 128 Or263, 274P322.

475-40 CalA 260P810; 295Pa131, 144A 909.

475-41 295Pa131, 144A909.

475-45 204Cal 529, 269P453.

475-46 24F(2d)329.

475-47 49RI 449, 144A158. See also 47 RI 88, 129A825.

476-47½-New. Interest may be allowed though it was not specifically claimed in its declaration and though its damages are unliquidated. 47RI 153, 130A 593.

476-47¾-New. Buyer recovering damages for misrepresentation and breach of warranty cannot recover interest on purchase price originally paid. CalA 260P810.

477-50 99CalA473, 278P902.

477-52 99CalA473, 278P902.

478-56 24F(2d)329.

479-64½-New. In action against manufacturer by insurer of purchaser against liability for personal injuries, costs and judgments paid by insurer in actions against purchaser for personal injuries sustained by third persons from defects in machine purchased are not too remote to be recovered. 322 Mo 502, 15SW(2d)766, 64ALR936.

479-65 160La597, 107S459; 102NJL 131, 130A612; 128 Or529, 274P1108; 142Wash134, 252P523.

479-66 142Wash134, 252P523. See also 178Ark1079, 13SW(2d)816. **Price paid for bulbs** must be considered as part of cost of production. 142Wash 134, 252P523. **Where seed worthless for purpose contemplated.**–172Ark534, 289SW490.

479-67 In Louisiana.–A 125S325.

479-70½-New. Grower planting seeds with full knowledge of kind, condition, and quality cannot recover for crop failure. Ida 290P395 (seed potatoes).

479-70¾-New. In such case planting constitutes independent intervening act and immediate cause of resulting damage. Ida 290P395.

479-70¼-New. In such case measure of damages is difference between value of seed received and kind represented. Ida 290P395.

479-70½-New. Damages for breach of warranty of seed cannot be enhanced by purchaser's acts after ascertaining that seed was not as represented. Ida 290P395.

479-71 56ND110, 216NW203.

480-72 251 IllA139; 123 Okl 252, 253P 90.

480-73 251 IllA139; 214AppDiv395, 212 NYS216, 218 [citCyc] (costs awarded against him in defending suit); 56ND 110, 216NW203.

480-74 Buyer intervening in action against seller to foreclose lien and filing cross complaint against seller to recover purchase price is not entitled to attorney's fee as element of damage, where seller bore burden of defending against lien. 142Wash1, 251P861. **Where court found there was no mortgage,** buyer was held not entitled for counsel fees in defending chattel mortgage claim. 220AppDiv273, 221NYS 171.

481-79 171Ark611, 285SW353; 173Ark 112, 292SW111; Iowa 229NW321; 255 Mass189, 151NE59; MoA 14SW(2d) 456; MoA 276SW1044; 98PaSuper175; 98PaSuper420; 98PaSuper510; 49RI 18, 139A466; TexCivA 27SW(2d)880 (holding that misrepresentations were not knowingly made did not require directed verdict); 151Wash86, 274P1050; 151Wash683, 277P70. See also 43F(2d) 63. **Sufficiency of evidence,** etc. 256 Mass183, 152NE318 (whether mackerel was fit for consumption); Miss 106S 767 (quality of hay purchased after inspection); 155Wash394, 284P754. **Fact not intention.**–But see 206 Iowa893, 221 NW512.

482-82 13PaDist&Co 16 (though warranty is alleged to have been by parol). See also 221Ky494, 299SW181.

482-83 206 Iowa893, 221NW512; 207 Iowa1133, 224NW93; 255Mass189, 151 NE59; 295Pa131, 144A909; 47RI 125, 131A309 (statute).

482-86½-New. Whether buyer has knowledge of facts so as to prevent implied warranty is for jury. 215AppDiv 412, 241NYS10 (knowledge of encumbrances).

482-86¾-New. Striking evidence relating to parol warranties held error where conflicting evidence as to whether written contract was contemporaneous with sale presented jury question. 261Mass 32, 158NE262.

482-86¼-New. Where evidence, in action by purchaser of gas heater, overcome by carbon monoxide gas, against seller, who had expressly warranted heater, failed to show causal connection between absence of air shutter and injury to plaintiff, defendant's negligence has been held not for jury. 157Md122, 145A367.

482-87 168Ark818, 271SW462; 169Ark 176, 273SW706; 170Ark1193, 281SW 358 (whether goods were wholly unfit for intended use); 176Ark1203, 6SW (2d)4; Ark 31SW(2d)526; 94CalA289, 271P129; 101CalA482, 281P1036 (conformity to quality of sample); 37GaA 558, 140SE592; 206 Iowa893, 221NW 512; 208 Iowa1389, 227NW409; 233Ky 306, 25SW(2d)726 (whether radio worthless); 256Mass183, 152NE318 (implied warranty as to fitness of food); 263Mass147, 160NE821; Mass 169NE 438(1stcase); Minn 233NW313; MoA 274SW1100; MoA 277SW50; NJ 146A 46; 227AppDiv838, 237NYS368; OhA 153NE856; 128 Or83, 262P939; 92Pa Super85; 98PaSuper175; 47RI 125, 131 A309 (merchantability); TexCivA 285 SW667; 144Wash60, 256P777. **Sufficiency of evidence,** etc. 220Ala581, 128 S857; 171Ark1179, 287SW577, 59ALR 1237; 37GaA558, 140SE892; 204 Iowa 66, 214NW595 (refusal to direct verdict for seller held erroneous); 207 Iowa 1133, 224NW93; 20 OhA501, 152NE 733; 133 Or128, 288P207. **Evidence of breach of warranty** held insufficient to be submitted to jury. 191NC722, 133 SE12. **Evidence held to warrant peremptory charge** for plaintiff. MoA 274 SW845.

483-88 MoA 14SW(2d)456; 197NC1, 147SE434; 295Pa131, 144A909.

483-89 168Ark818, 271SW462.

483-90 Where evidence leaves it as probable that damage resulted from purchaser's negligence as that it resulted from defect, verdict should be directed. 20 OhA501, 152NE733.

483-91 MoA 15SW(2d)895; MoA 21 SW(2d)219; 227AppDiv838, 237NYS 368; 151Wash683, 277P70. **Whether plaintiff suffered permanent injury** held for jury. Miss 130S479 (mouse in coca cola).

483-92 77Colo 156, 234P1055.

483-92½-New. Nonsuit may be granted where buyer fails to prove damages. Ida 290P395.

483-93 Conn 151A492. See also MoA 7SW(2d)423. **Evidence held insufficient.**–23F(2d)167. **Where there was evidence of five and one-half months' delay before notifying of breach of warranty,** denial of directed verdict for defendant was held error. 131Misc301, 226NYS738. **When question of law.**–Conn 151A492.

483-95 MoA 277SW50; 12PaDist&Co 311 (under statute). **Period between purchase and discovery of defect** held not unreasonable as matter of law. 126Misc216, 212NYS227.

483-96 MoA 285SW801.

483-96½-New. Evidence held insufficient to warrant submission to jury of defense of estoppel to counterclaim. 179Minn467, 229NW575.

483-96¾-New. Whether seller had full opportunity to defend title held for jury in buyer's action for breach of implied warranty of title. Ariz 288P 666.

483-97 41GaA132, 152SE257(2dcase); 240Mich621, 216NW431; 82NH96, 130 A26; 48RI 288, 137A469; TexCivA 14 SW(2d)922. **Whether buyer waived right** to agreed guaranty is for jury. Iowa 233NW133.

484-98 Ark 31SW(2d)526; 36GaA64, 135SE317 (instruction implying that warranty that thing sold was of good material required furnishing of best material is erroneous); 118 Okl 255, 247P410; 151Wash86, 274P1050. **Instructions held to be within issues.**–112 Okl 202, 240P732. **Sufficiency of instructions,** etc. 172Ark534, 289SW490; Iowa 230NW327; NJSup 140A895; 128 Or83, 262P939. **Charge as matter of law restricting definition of trade term within too narrow limits in view of evidence** held reversible error. 82NH96, 130A26. **Refusal to submit for defendant alternative and lesser ground of recovery not claimed by plaintiff** held not error. 82NH96, 130A26. **Failure to submit question of existence of agreement as to quality held error.**–82NH96, 130A26. **Instructions held proper.**–216 Ala642, 114S298. **Instructions held erroneous.**–128 Or529, 274P1108. **Instructions properly refused.**–118 OhSt 392, 161NE25. **In action on note for purchase price** in which defendant pleaded breach of warranty, but made no effort to rescind purchase, court erred in charging Sales Act or any sections thereof. 128 OhA38, 162NE616. **Instruction as to recovery of purchase price erroneous** where element of rescission was not involved but action was for damages. 247Mich398, 225NW 592. **Instructions not warranted by evidence.**–Mass 170NE403. **Instruction on buyer's right to return unsound horse** held not erroneous for omitting to charge that return need be only in "substantially" same condition. 153SC 371, 150SE900.

484-99 Instructions held not mislead-

ing.–305Mo 130, 264SW396 (as to meaning of implied warranty alleged as defense).

484-3 313Mo 69, 281SW422 (plaintiff not put to election). See also 36GaA41, 135SE219; 47RI 125, 131A309.

484-4 There should be no charge on implied warranty when defense of express warranty only, is relied on. 36 GaA41, 135SE219.

484-5 153SC371, 150SE900; **TexCivA** 283SW341 (operation under normal speed only, not maximum, required). **Scope of instruction.**–40GaA532, 150SE 442(2dcase). **Instruction in words of warranty held sufficient,** though omitting word "successfully" before word "operate" in connection with machine, since "operate" implies successful operation within reasonable limits. **Tex CivA** 283SW341.

484-7 Conversely.–**TexCivA** 284SW309.

485-8½-New. Instructions that buyer was entitled to recover difference in value of goods warranted and price to be paid therefor were held sufficiently favorable to seller. 255Mass189, 151 NE59.

485-9 Findings held sufficient to sustain judgment. **Wash** 286P282.

485-10 Evidence held to support finding of implied warranty. 103NJL49, 134A776.

485-17½-New. Judgment is properly rendered for defendant on his counterclaim for price when plaintiff fails to establish breach of warranty and evidence in support of counterclaim is practically undisputed. 237Mich577, 212NW972.

485-17¾-New. Judgment for buyer without finding seller apprised of claim sustained only if only reasonable conclusion from facts found. **Conn** 151A492.

486-23½-New. In action on implied warranty by manufacturer of fitness for purpose, question of whether there was any evidence of such warranty must be determined alone from evidence tending to show fact. **TexCommnA** 288 SW15.

486-24 4LaA102; 258Mass215, 154NE 755; **TexCommnA** 276SW904; 143 Wash660, 255P1041, 1042 [citCyc].

487-29 Mere declaration in note that lien exists upon property sold for purchase price held insufficient. 172Ark 587, 289SW773.

487-35 158La941, 105S21; 161La114, 108S305; 151Miss734, 118S425; **214 AppDiv**308, 212NYS133. **La. Civ. Code, art. 3227,** etc. 161La114, 108S305; **6 LaA**155. **Cal. Civ. Code, § 3049** is inapplicable where seller retains title. **CalA** 278P503. **Miss. Code, § 1255,** etc. 146Miss225, 110S709. **Statute, giving landlord lien on crop** raised on premises for advances made by him to enable tenant to make crop, does not give lien on mule sold by landlord to tenant to facilitate raising crop. 177Ark 1183, 9SW(2d)567. **Rights of seller against one taking in good faith with** authority of buyer. **LaA** 129S377. **In New York.**–229AppDiv443, 242NYS615. **In Philippines.**–51Philippine329.

489-39 In Louisiana.–158La941, 105S 21.

489-42 Seller's lien prevails over right of purchaser's agent who made purchase and took assigned invoice as security for loan. 218AppDiv22, 217NYS 652. **In Philippine Islands.**–50Philippine160.

489-43½-New. General creditor obtaining first lien by execution attachment or mortgage will prevail over creditor for purchase price. 217MoA 554, 272SW1006.

489-45 147Miss489, 112S697 (not waived by taking chattel deed of trust on property sold).

490-46 9LaA153, 119S479(2dcase); 7 LaA335. See also 6LaA155. **In Porto Rico.**–33PortoRico 431.

491-56 143Wash660, 255P1041, 1042 [citCyc].

491-57½-New. Louisiana statutory lien is lost by allowing goods to be sold by purchaser with other things without demanding at least separate appraisement. 158La941, 105S21.

491-57¾-New. In Philippine Islands seller does not lose his preference by fact that personal property is converted into real property by destination, so long as its identity is not lost, 50Philippine160.

491-57¼-New. nor because, after such conversion, it is sold, with the realty to which it is attached, for lump sum and no request for separation is made before sale. 50Philippine160.

491-58 33F(2d)83; 69CalA129, 230P 955; 91Fla709, 109S677; 45 Ida217, 261P679; 135Misc697, 238NYS245; 32 OhA310, 166NE912; 113 Okl 150, 240P 104 (unconditional delivery). **Resumption of possession by seller** does not revive lien. 69CalA129, 230P955.

491-60 Ont [1930] 3DomLR32 (holding provision of contract for repossession revives lien).

492-64 Affidavit of illegality held insufficient to show consideration for oral warranties claimed as defense to foreclosure. 37GaA452, 140SE634.

492-65 Denial of performance by seller as raising issue. 229AppDiv443, 242 NYS615. **Suit may be sufficient demand.**–229AppDiv443, 242NYS615.

492-67 115 Okl 141, 242P205. **Record held to show right to purchase-money lien.**–151Miss734, 118S425.

492-69 Slight discrepancy between allegations and amount due has been held not to bar foreclosure of lien. 229 AppDiv443, 242NYS615.

493-74 104Conn342, 133A102.

493-75 58 OntL249, [1926] 1DomLR 818.

493-76 104Conn479, 133A573.

494-85 32PortoRico 316; 58 OntL249, [1926] 1DomLR818.

494-87 178Ark553, 11SW(2d)463.

495-89 32PortoRico 316.

495-90 32PortoRico 316.

495-91 32PortoRico 316.

496-96 104Conn479, 133A573.

497-4 252 IllA82; MoA 23SW(2d)202; 32PortoRico 316; Ont [1925] 3DomLR 870. **Subpurchaser as consignee.**–Ont [1925] 3DomLR870. **Consignment to third party; presumption of sale or agency.**–Ont [1925] 3DomLR870. **Straight bill of lading nonnegotiable.**–32PortoRico 316.

498-7½-New. or purchaser's agent; Ont [1925] 3DomLR870.

501-32 58 OntL249, [1926] 1DomLR 818.

502-48 252 IllA82.

503-50 252 IllA82.

506-86 179Ark510, 16SW(2d)994; 173 Minn83, 216NW531, 56ALR492; NH 146A165. But see 127Me503, 144A649. **Seller cannot complain of buyer's failure to tender** amount not brought to her attention at time of payment of all except disputed amount. CalA 288P 1096.

508-90 177Ark342, 6SW(2d)302.

508-94½-New. Seller may not complain of disposition to third person by buyer, it appearing that title passed to latter. 49Nev326, 245P700.

508-94¼-New. Claim and delivery are not sole remedy of sellers. 69Utah26, 252P270.

508-94¼-New. Seller may recover possession of piano on repudiation of contract by buyer. TexCivA 21SW(2d)341.

508-95 200 Iowa843, 205NW511; 258 Mass215, 154NE755; 154Miss74, 122S 490; 37Wyo 282, 264P91.

509-96 258Mass215, 154NE755.

510-2 9LaA743, 119S564.

510-3 See also 32PortoRico 316.

510-5 9LaA153, 119S479(2dcase).

512-25 Where seller sues in trover, contract provisions do not control. 37 GaA321, 140SE383.

513-36 168Ark28, 268SW605 (where seller breached contract first by withdrawing note from bank, given as payment); 102NJEq341, 131A901 (buyer may retain goods till advance payments restored, where seller practiced fraud on buyer); TexCivA 21SW(2d)341. But see 83Colo 374, 265P694.

515-51½-New. Where contract of sale provides that breach of warranty or any omission by vendor shall confer no right to damages for delay and loss of work or earnings or for other damages, buyer cannot defend on ground that delay in delivery of machine in condition to be used caused more damage to him than amount due on purchase price. 120Kan700, 244P1043.

517-72 Iowa 231NW380 (intention of not paying for goods).

517-74½-New. That seller is under duty to restore diamonds given as part payment is matter for defendants to urge. TexCivA 21SW(2d)341.

517-76 Evidence held admissible.–49 Nev326, 245P700. **Evidence held inadmissible.**–49Nev326, 245P700.

518-90 CalA 291P681. **Evidence held to authorize jury finding** that delivery of cotton was not upon cash sale. 160 Ga387, 128SE190. **Evidence held sufficient to show payment.**–CalA 288P1096.

518-93 Evidence held sufficient to support finding of court that title passed to buyer on making cash payment. 49 Nev326, 245P700.

518-96 Thus it is for the jury to say, etc. 173Ark1136, 294SW69 (whether there was meeting of words as to terms of payment). **Whether buyer was justified in rescinding for fraud of seller** is for jury. 102NJEq341, 131A 901.

518-97 Charge held proper.–37GaA 321, 140SE383.

519-2½-New. Findings held sufficient to support judgment. **CalA** 288P1096.

519-8½-New. Judgment in claim and delivery by seller wherein fraud is shown to have been practiced on buyer in sale of automobile, and where defendant turned in another car as part payment, properly provides that plaintiff shall not have possession of machine sold till defendant has been paid value of car turned in, with costs. 70 CalA 108, 232P986.

519-9½-New. Where seller consents to judicial sale of property, he is not entitled to interest. 181Ark1106, 29SW (2d)288.

519-9½-New. Court improperly awarded damages for detention of piano where buyers had right to hold possession to enforce restoration of part payment. TexCivA 21SW(2d)341.

519-9¼-New. Seller is not entitled to recover more than value he fixed upon piano as wholesaler where buyer did not interpose claim for recovery of part payment. TexCivA 21SW(2d)341.

520-16 6F(2d)214; 13F(2d)747; 16 F(2d)190; 221Ala176, 128S174; 76 CalA767, 246P74; 10LaA119, 119S551; 10LaA635, 120S539; 50Nev157, 254P 1074, 1077 [quotCyc]; 214AppDiv308, 212NYS133 (by statute); 115 Okl 141, 242P205; 285Pa131, 131A710; 289Pa 569, 137A807; 5PaDist&Co 417; 12 PortoRicoFed136; 12PortoRicoFed158; TexCivA 293SW935; 144Wash67, 256P 779. **Statute held to confer right of resale** but not to create duty on seller. 16 F(2d)190. **Where buyer under conditional sales contract returns goods, alleging his rescission,** seller refusing to accept rescission may resell without exercising option to forfeit contract for default in payment. CalA 265P957.

520-16½-New. Vendor may, if article is not perishable, hold it and take reasonable care of it. 10LaA635, 120S539.

521-17 13F(2d)747; 16F(2d)190; 76 CalA767, 246P74; 98CalA75, 276P383; 10LaA119, 119S551; 10LaA635, 120S 539; 168La66, 121S576; 2LaA64, 71 [quotCyc]; 50Nev157, 254P1074, 1077 [quotCyc]; 214AppDiv308, 212NYS133 (by statute); 195NC350, 142SE19; 115 Okl 141, 242P205; 285Pa131, 131A710; TexCivA 293SW935 (regardless of whether bank purchased drafts or not); 144Wash67, 256P779. **Where seller suffers no loss on resale,** he cannot recover from buyer. SD 230NW847.

522-18 50Nev157, 254P1074, 1077 [quotCyc]; 115 Okl 141, 242P205. **Where a seller retains goods for some time,** etc. 12PortoRicoFed158.

522-19 50Nev157, 254P1074, 1077 [quotCyc].

522-20 50Nev157, 254P1074, 1077 [quotCyc]; 148Va413, 139SE254.

522-21 50Nev157, 254P1074, 1077 [quotCyc].

522-22 50Nev157, 254P1074, 1077 [quotCyc].
522-22½-New. Right of resale is not lost by retention of partial payments. 289Pa569, 137A807.
522-22⅓-New. Right of resale is not lost by recovery of judgment for price. 289Pa569, 137A807.
522-23 213Ala669, 106S139; 39GaA 654, 148SE296; 115 Okl 141, 242P205; TexCivA 293SW935; 144Wash67, 256 P779.
523-24 5F(2d)949; 92CalA598, 268P 659; 66Utah340, 242P391. But see 221 Ala176, 128S174.
523-25 Wash 292P412.
523-30 66Utah340, 242P391.
523-31 221MoA600, 283SW65, 69 [quot Cyc]; MoA 25SW(2d)125 (that sale was at place of delivery immaterial); 288Pa114, 135A541; 289Pa569, 137A 807; 94PaSuper136 (bound to exercise reasonable care and judgment); 5Pa Dist&Co 417; 66Utah340, 242P391; 148 Va413, 139SE254.
524-33 221MoA600, 283SW65, 69 [quot Cyc].
524-34 289Pa569, 137A807.
524-35 289Pa569, 137A807; 66Utah 340, 242P391.
524-36 289Pa569, 137A807; 66Utah 340, 242P391.
524-41 See also 5PaDist&Co 417.
524-43 10LaA469, 121S335; 285Pa131, 131A710 (prompt sale); 289Pa569, 137 A807.
525-44 16F(2d)190; 289Pa569, 137A 807; 144Wash67, 256P779.
525-46 289Pa569, 137A807.
525-49 285Pa131, 131A710 (nearest available market).
525-51 289Pa569, 137A807. **Seller held to have realized best price,** though sale not conducted at place of delivery. MoA 25SW(2d)125.
526-56 **Lumber resold** must be of same specifications as lumber bought. 148 Va413, 139SE254.
526-59½-New. Burden is on buyer to prove alleged damage of resale. 16 F(2d)190.
526-59⅓-New. Where seller elects remedy of resale after buyer's default, he waives all other remedies he may have on contract. 50Nev157, 254P1074.
526-60 33F(2d)269; 234 IllA488; 292 Pa122, 140A774. **Passage of title** is necessary before action for price for sale of marks can be maintained. 240 NY501, 148NE659. **On buyer's failure to accept goods** no recovery for purchase price in absence of statute. 131 Misc53, 225NYS638. **Agreement by purchaser of ranch** to pay for oil and gasoline as part of consideration passing to sellers. 103CalA70, 283P859. **Purchaser may recover value of goods from subsequent purchaser** from same seller as having been rejected. 41GaA 83, 151SE661.
526-61 16F(2d)190; 3Del 137, 132A 217; 234 IllA488; 85 IndA315, 151NE 626; 163La1057, 113S454; 136Misc107, 240NYS459; 100Vt347, 137A193, 53 ALR204; 193Wis80, 213NW637. **Delivery in instalments.**-164La1063, 115S 270.
527-62 240NY501, 148NE659.
527-67 13F(2d)747; 17F(2d)983; 76 CalA767, 246P74; 85 IndA315, 151NE 626; 214Ky784, 284SW75; 191NC313, 131SE754; 132 Or596, 286P554; Tex CivA 270SW1087 (seller may hold goods and sue for price); 100Vt347, 137A193, 53ALR204; 144Wash67, 256P779; 102 WVa158, 134SE738. See also 41F(2d) 679. But see 149Va755, 141SE759. **In Georgia.**-35GaA683, 134SE627. **Right of seller to retain goods for buyer and recover price is not waived** by ineffective tender of goods to buyer after buyer's renunciation of contract. 35GaA 683, 134SE627. **Question respecting part not accepted** relates only to measure of damages. 229AppDiv278, 241 NYS697. **Where seller has substantially completed manufacture,** he may recover purchase price for special articles manufactured for buyer after repudiation by buyer. 132 Or596, 286P 554.
527-67½-New. Seller, under statute, cannot sue for price after rescinding by retaking goods from carrier following buyer's refusal to take goods. 214App Div339, 212NYS307.
527-67⅓-New. Statute requiring seller to do nothing toward carrying out contract after notice of repudiation does not prevent recovery when he goes ahead with manufacture of goods in exercise of reasonable judgment. 17 F(2d)983.
527-67¼-New. Countermand by buyer of executory contract.-Where executory contract for goods has been countermanded by buyer, seller cannot go on with performance, tender goods, and sue for price, but is limited to action for damages. 220MoA1000, 272SW 1018.
527-67⅙-New. After goods have been manufactured under such contract and appropriated to contract by seller, buyer may not countermand order. 220 MoA1000, 272SW1018.
527-67⅙-New. In such case, where buyer countermands order, seller may hold goods subject to buyer's order or ship them and sue for price. 220MoA 1000, 272SW1018.
527-67⅐-New. Such rule applies where goods were manufactured specially for buyer and have little or no market value elsewhere. 220MoA1000, 272SW 1018.
527-67⅛-New. In such case, where goods consisted of calendars and mailing tubes for them, seller may ship goods and sue for price though tubes may have marketable value elsewhere. 220MoA1000, 272SW1018.
527-67⅙-New. Fact that seller placed calendars in mailing tubes after countermand of order does not change rule where such service was voluntary. 220 MoA1000, 272SW1018.
527-67 1/10-New. Where buyer returns part of goods, seller may sue to recover price of goods kept. 222MoA251, 296 SW840.
528-68 32F(2d)74.
528-71½-New. Right of action vests in seller upon delivery of goods to carrier consigned to purchaser. 100WVa 540, 131SE6.
528-72 48RI 430, 138A57, 57ALR823.
529-74 34GaA298, 129SE562.
531-87 TexCivA 294SW270. See also 10LaA287, 120S684.
531-88 2LaA516.
531-89 TexCivA 31SW(2d)309.
531-89½-New. Refusal or failure of one party to accept or pay for goods purchased does not relieve it of joint obligation to pay. 319Mo 899, 8SW(2d) 834.
531-90 200 Iowa916, 205NW766; 219 Ky675, 294SW165, 167 [quotCJ]; 159 La183, 105S283; 243NY283, 153NE75; 285Pa120, 131A705; TexCivA 6SW(2d) 221, 222 [citCyc]. **Seller may recover agreed price where it is shown** that buyer's offer was accepted and goods shipped. MoA 25SW(2d)138.
532-91 13LaA233, 125S764; 126Me 308, 138A389; 172Minn4, 214NW475; 243NY283, 153NE75; 220AppDiv679, 222NYS472; 191NC523, 132SE273; 133 SC458, 131SE620; TexCivA 270SW 1087; TexCivA 6SW(2d)221, 222 [cit Cyc]. **Seller's insisting on inserting new terms in contract** and refusing to deliver when requested by buyer is breach of contract disentitling him to recovery. 285Pa120, 131A705. **Inspection and delivery** held to have been made as provided by contract so as to entitle seller to recover. 22AlaA308, 115 S293.
532-92 89CalA416, 264P796; 232 IllA 523; 241NY455, 150NE514; 285Pa120, 131A705; TexCivA 270SW1087. See also 17F(2d)983. **Sufficiency of tender.**-232 IllA523. **Though buyer does not expressly signify intention to accept,** seller must nevertheless offer to deliver before he can sue for price. 285 Pa120, 131A705. **Where lease was to be assigned only on payment of note given for part of price of restaurant,** assignment need not be tendered before commencement of action. 85CalA 8, 259P93.
532-93 85CalA8, 259P93; 214La254, 107S101; 243NY283, 153NE75. **Refusal of buyer to give shipping instructions** will not prevent seller from offering to perform and alleging performance. 71 CalA2, 235P438.
533-94 235Mich306, 209NW97; 172 Minn4, 214NW475; 50RI 163, 146A403; 133SC458, 131SE620; 144Wash67, 256 P779. **Under Uniform Sales Act** there can be no recovery of purchase price where, prior to performance by seller, buyer gives notice of intention to refuse to abide by terms of executory contract of sale. 188Wis508, 205NW 385. **Where executory contract of sale provides that, if buyer instructs seller not to ship goods, seller may either hold goods for buyer or deliver them to carrier consigned to buyer,** provision constitutes waiver of buyer's implied right under Uniform Sales Act to cancel or renounce contract. 188Wis508, 205NW 385. **Refusal of seller** to accept purchaser's repudiation, followed by purchaser's acceptance of goods, permits recovery by seller on contract. 50ND 157, 195NW12.
533-2½-New. At common law maker of note given for chattel was liable even though chattel was destroyed by fire before maturity of note. 224 IllA332.
533-2⅓-New. Where property in goods remains in seller to secure performance, maker of purchase notes is liable though goods were destroyed by fire. 224 IllA 332.
533-2¼-New. Seller is precluded from recovering only where provisions of contract breached by him constitute conditions precedent. 221AppDiv174, 222NYS650.
533-2⅕-New. or where breach was so material as to prevent his right to recover, 221AppDiv174, 222NYS650.
533-2⅙-New. and not where such breaches are severable, permitting buyer to counterclaim for damages. 221 AppDiv174, 222NYS650.
533-2⅐-New. Thus, seller's right to recover has been held not contingent on performance of provisions requiring assisting buyer by advertising and cooperation or prohibiting sales to others in buyer's territory, 221AppDiv174, 222NYS650.
533-2⅛-New. the remedy of buyer for breaches of such provisions being by counterclaim for damages. 221AppDiv 174, 222NYS650.
533-2⅑-New. Seller may recover price against buyer who retained goods more than one month notwithstanding goods had been returned to seller. 133SC458, 131SE620.
533-2 1/10-New. Acceptance and storage of goods returned by buyer does not destroy seller's right to recover. 133SC 458, 131SE620.
533-2 1/11-New. Where title passed by delivery to carrier, buyer's right to inspect goods could not prevent recovery of price. 52SD201, 217NW187.
534-5 See also 4LaA449.
534-9 233Ky386, 25SW(2d)1039.
534-10 In action on account annexed, obligation for goods bargained and sold, or sold and delivered, may be enforced. 124Me384, 130A209.
535-16½-New. Unpaid seller may maintain action on common counts. 213Ala669, 106S139.
535-16⅓-New. Seller may maintain quantum meruit for reasonable value of fruit although oral contract may be invalid. 75CalA737, 243P686.
535-16¼-New. Action on account annexed held proper. 126Me389, 138A689.
535-17 See also 245 IllA531.
535-20½-New. Unpaid seller may maintain action in special assumpsit. 213Ala669, 106S139.
536-22 Where note for price was signed by unauthorized person in buyer's name, right of action is on account and not on note. 58ND817, 227NW555.
536-27 53SD337, 220NW855; 69Utah 161, 253P196.
536-29 69Utah161, 253P196.
537-33½-New. Where seller rescinding for fraud can only recover part of his goods, he may bring action of trover for value of remainder at time of contract. 37Wyo 282, 264P91.
537-34 76CalA767, 246P74; 92CalA 598, 268P659; CalA 275P825(2dcase); 221MoA600, 283SW65. But see 1LaA 266.
537-35 69Utah161, 253P196.
537-36½-New. On buyer's refusal to accept goods, seller has election to store

goods for buyer and recover contract price, sell and recover loss, or keep them and recover difference between contract and market price. 37F(2d)876.

537-36½-New. On buyer's refusal to accept goods, seller could sue them and sue for difference between proceeds and agreed price or sue for full price. MoA 25SW(2d)125.

537-37 That seller caused arrest of his agent for giving check for price without funds in bank to meet it does not constitute defense. 127Kan354, 273P462.

537-39 Conduct subsequent to contract is no defense. MoA 274SW532. Seller's contract with another, breached by terms of sale, is no defense. MoA 274SW532.

537-40 NH 146A165. To relieve purchaser of liability for price, seller must have retaken property as his own.-21AlaA44, 104S887.

538-44 10PaDist&Co 80.

538-48 126Me308, 138A389.

538-50½-New. That seller turned over contract to manufacturer after delivering several installments is no defense. 154Md695, 140A46.

539-59 219Ala65, 121S59.

539-59½-New. Defense in suit for price of goods that bond guaranteeing defendant commission was void is eliminated by defendant's surrender of sales agency. 161La496, 109S43.

539-59⅓-New. Buyer cannot defeat action for price by showing that goods originally consigned to another were reconsigned to him while in transit. 289Pa36, 136A849.

539-59¼-New. Lack of notice of delivery and finding in defective condition held sufficient defense. 5PaDist&Co 60.

539-59⅙-New. Defense held insufficient as not alleging refusal to accept because of nonconformity. 5PaDist&Co 420.

539-59⅛-New. As not alleging details of inspection. 5PaDist&Co 420.

539-59⅐-New. Ground of defense not given as reason for refusing shipment cannot be interposed as defense. 292Pa122, 140A774.

539-59⅛-New. Demand for payment before agreed time is no defense. 2LaA44.

539-59⅙-New. Failure of seller to send bill of lading to buyer is no defense if buyer actually received goods and resold to another. MoA 7SW(2d)407.

539-59 1/10-New. Where railroad company entered into joint and several contract with another railroad for purchase of coal from fuel company, railroad was not relieved from liability under contract by virtue of fact that it did not use any of particular coal for purchase price of which suit was brought. 319Mo899, 8SW(2d)834.

539-59 1/11-New. In Saskatchewan seller's breach of collateral agreement to transport property from place of delivery to another place does not constitute defense to action for price where there was complete delivery at place where delivery was first made. [1928] 2DomLR434.

539-60 221Ala666, 130S405; 176Ark448, 3SW(2d)310; NJSup 146A677(2d case); 222AppDiv533, 226NYS474; 119Okl233, 249P398; 116Or641, 242P613. Acceptor cannot defeat liability on bill of exchange for fraud inducing sale of goods without returning goods or justifying failure to return. 105Conn434, 35A553. Election.-76CalA278, 244P916. Exercise of existing right to rescind held not essential to interpose defense. 76CalA278, 244P916. As between immediate parties to note given for goods sold fraud is defense. 105Conn434, 135A553. Fact that seller supplies missing parts of defective and worthless machine does not entitle him to recover price. 176Ark448, 3SW(2d)310.

539-61 TexCivA 16SW(2d)141.

539-64 35GaA588, 134SE203; 7LaA231; 190NC162, 129SE453. But see 85CalA173, 259P97. Receipt of different article than that contracted for is ground to assert failure of consideration. 190NC162, 129SE453. That goods were not of kind agreed upon may be pleaded as defense in action on note for price. OhA153NE856. Failure to furnish pedigrees of hogs sold in accordance with contract does not render sale without consideration where hogs were destroyed by fire after title passed. 205Iowa578, 218NW262. Question held not to show want of consideration.-221Ala473, 129S43. Seller's misrepresentations held to constitute failure of consideration. 13LaA705, 129S177(1stcase).

540-65 35GaA550, 134SE142 (installation of lighting plant so defective as to render it worthless); 35GaA588, 134SE203; 236IllA111; 11LaA398, 122S894 (2dcase); 5LaA1; 5LaA479, 482 [quot Cyc]; 6LaA296; 6LaA747; 6LaA765. Fact alone that article is worthless held insufficient. 190NC162, 129SE453. No failure of consideration where goods were resold by buyer and resale price collected. 215Ala426, 111S214. Unless goods are totally worthless for any purpose plea of total failure of consideration will not defeat action for price altogether. 36GaA41, 135SE219. Where article has substantial value although not as warranted rule is inapplicable. 202Iowa475, 210NW584. Where goods have junk value it cannot be said that consideration wholly failed. TexCivA 299SW274.

540-66 100Vt187, 136A28. See also 190NC162, 129SE453.

540-67 9LaA664, 120S79; 13LaA498, 124S849.

540-68 In action for agreed price buyer cannot show article purchased was worth less than he promised to pay, if it is not wholly without value. TexCivA 299SW274.

541-69 209Ky661, 273SW501 (damaged goods and prohibited goods); 87PaSuper243.

541-72 Breach of collateral agreement constituting failure of consideration.-221Ala666, 130S405.

541-72½-New. Purchaser held estopped from setting up defects in article purchased to suit on note given in payment therefor by prior dealings and offer. TexCivA 293SW629.

541-73 262Mass170, 159NE541. Seller's procuring automobile's release from seizure was not acquisition of title so as to preclude failure of consideration for notes. 12LaA207, 125S881.

541-74 74Mont408, 241P233; 100Vt187, 136A28.

542-79½-New. Seller without title cannot recover price. CalA 289P242.

542-79⅓-New. That title to automobile was in another when plaintiff sold it to defendant is good defense of failure of consideration in action on purchase notes. 12LaA207, 125S881.

542-82 But see 25OhA116, 157NE500.

542-83 35GaA550, 134SE142.

543-84 219Ala116, 121S392.

543-86 125Misc78, 210NYS129 (defendant may be obliged to elect defenses under statute).

543-87½-New. Purchaser who has received goods and retains them undisturbed cannot set up an outstanding title in third person to defeat action for price. 219Ala644, 123S15.

543-89 NJ 138A701; 125Or689, 268P56; TexCivA 17SW(2d)474; 154Wash120, 281P14 (contractor could not deduct increased cost for using certain materials, which was result of error on part of contractor's agent so purchasing them). Election of other remedy.-125Misc78, 210NYS129. If payment has been made in excess of the value of the goods, etc. 254IllA587. Buyer's remedy for alleged damage from resale must be by means of separate action or counterclaim. 16F(2d)190.

543-90 132Or596, 286P554 (damages for failure fully to perform, though there was substantial performance). Though damages are unliquidated, counterclaim may be interposed. TexCivA 284SW322.

543-91 221AppDiv174, 222NYS650.

543-92 218Ala336, 118S580; Ark 31SW(2d)132; 221Ky494, 299SW181; NJSup 146A677(2dcase); 222AppDiv533, 226NYS474; 125Or689, 268P56.

544-95½-New. or damages from breach of agreement to assist sales in form of advertising and coöperation. 221AppDiv174, 222NYS650.

544-97 163La664, 112S522.

544-1 Credit slip on purchase of new automobile could not be set off against price of automobile previously purchased. 41GaA389, 153SE88.

544-4 145Wash640, 261P390.

545-8½-New. Cross complaint for additional discount for selling automobiles may be filed by dealer in action by distributor to recover for automobile sold under dealer's contract. 48Ida611, 284P257.

545-9 178Ark957, 12SW(2d)903; 191NC523, 132SE273.

545-10 150SC1, 147SE654. On seller's misbranding, buyer's refusal to pay does not excuse seller from delivering balance of goods purchased, and buyer could hold goods shipped in recoupment. 221AppDiv592, 224NYS501. In case of anticipatory breach by seller, buyer can accept installment delivered, withhold purchase price, and hold seller for failure to deliver. 221AppDiv592, 224NYS501.

545-11 5PaDist&Co 420.

546-13 219Ala65, 121S59; LaA 129S257; 3LaA775; 180Minn531, 231NW206; 191NC523, 132SE273. See also 4LaA618. But see 98CalA517, 277P183; 167La183, 118S881. Fact that buyer was not charged for worthless seed does not preclude his recovery of damages. LaA 125S325.

547-14 295Pa140, 145A67.

547-16 147Va912, 133SE498 (seller may recover actual value only where defective goods are retained and used by buyer).

547-17½-New. Buyer cannot counterclaim because seller failed to furnish list of creditors, especially where seller promptly paid claims when due. 223Ky640, 4SW(2d)412.

547-18 163La664, 112S522; 12LaA114, 125S182; 156Md346, 144A510, 62ALR1497.

547-21 103WVa64, 136SE602.

547-23 233Ky386, 25SW(2d)1039.

548-24½-New. Cross complaint for amount expended for tires and equipment placed on truck purchased under contract may be filed by dealer in action by distributor to recover for automobile sold under dealer's contract. 48Ida611, 284P257.

548-30½-New. Buyer's payment of full price held to bar counterclaim for overcharge where payment was voluntary and with full knowledge. 232IllA27.

549-38 34F(2d)744 (statement of actual facts with statement that party waives tort and relies on implied contract is proper method of pleading implied contract to pay value of property converted); 133Misc494, 232NYS554. Statement of cause of action held sufficient.-7F(2d)814 (for price of furnace sold); 212Ala530, 103S556 (complaint held to conform substantially to statutory form); 88CalA784, 264P521; CalA290P545; 126Kan19, 266P747; 6LaA300. Complaint held not to state cause of action for purchase price of German marks. 240NY501, 148NE659. Complaint held sufficient to state cause of action. 126Kan655. Seller's complaint held to state cause of action. 131Misc53, 225NYS638. Petition held sufficient.-231Ky240, 21SW(2d)288.

550-39 240NY501, 148NE659 (complaint held insufficient). Plaintiff's averments must show that a contract was made. 7PaDist&Co 540.

550-40 98CalA291, 276P1066.

550-43 214Ala62, 106S396.

550-44 120Or229, 250P876. Allegation that certain payments were made leaving stated balance due is insufficient. 120Or229, 250P876.

551-46 Ida 287P201 (not necessary to allege claim was due when suit brought); 12PortoRicoFed158. Count of complaint construed as based upon original cause of action for price of goods sold.-214Ala62, 106S396. Demurrer to count as to nonpayment held properly overruled. 214Ala62, 106S396. Averments that checks issued by defendant for oil purchased from plaintiff were not paid when presented for lack of funds in bank are sufficient without alleging notice of dishonor. TexCivA 276SW787. In action on conditional sales agreement, allegation of complaint that none of subsequent installments to date of contract had been paid has been held

sufficient allegation that particular installment was not paid. 98CalA198, 276 P1064.

551-47 In Porto Rico.-33PortoRico 165.

551-48 241NY455, 150NE514. **Amendment should be allowed to show delivery.** 77Colo 285, 236P1000. **Allegation of delivery held sufficient.**-120 Or229, 250P876. **Waiver of delay in delivery held sufficiently pleaded.**-232 IllA523.

552-49 33PortoRico 241. **No agreement being alleged as to time of payment,** "the presumption is that the seller is entitled to payment immediately upon delivery of the merchandise, and the mere allegation that the debt was due is sufficient." 33PortoRico 241, 242.

553-50 Sale at "instance" of defendant construed to mean at his solicitation or suggestion. 214Ala62, 106S396.

553-51½-New. Waiver of condition must be alleged. 241NY455, 150NE514.

553-59 33PortoRico 241.

553-59½-New. Complaint must allege meaning of technical words, 240NY501, 148NE659.

553-59½-New. or of custom giving force to contract. 240NY501, 148NE 659.

553-59¼-New. Complaint must state whether defendant refused to accept goods or accepted goods and refused to pay. 12PortoRicoFed211.

553-61 MoA 277SW368; 11PaDist&Co 590. **In New York.**-219AppDiv308, 219 NYS593. **Breach by seller** must be pleaded by answer or counterclaim. MoA 274SW532.

553-62 Seller's verified complaint, with schedule of items of claim controverted only by specially denying numbered items and general denial, is insufficient. 213AppDiv789, 210NYS761.

554-64 Word "item" used in statute requiring buyer specifically to deny items in schedule attached to seller's verified complaint disputed by him in order to raise issue thereon, will generally mean particulars in such detail that account may readily be examined, and its correctness tested, entry by entry. 213AppDiv789, 210NYS761. **Answer insufficient,** where it shows resale by buyer without notice of nonacceptance or notice of breach within reasonable time. 127Misc760, 217NYS588. **Verified answer held to allege valid defense.**-TexCivA 28SW(2d)236.

554-66 219Ala116, 121S392; 225AppDiv475, 233NYS433. **Denial of delivery.** -228Ky144, 14SW(2d)416. **Failure of consideration** is not in issue in action on notes for purchase price of automobile where there is no allegation that car was not as represented. TexCommnA 280SW194. **Payment.**-7F(2d)883 (plaintiff need pay no attention to meaningless denial on information and belief or discern plea of payment therein); LaA 130S846. **Buyer not bound to make specific denials of unnumbered items** in schedule attached to seller's verified complaint. 213AppDiv789, 210 NYS761. **Affidavit of defense setting up novation** entered into by "duly authorized agent" of plaintiff, without naming agent or his official position, is insufficient. 87PaSuper408.

554-67 97Fla310, 120S852; 225AppDiv 475, 233NYS433.

555-70 12PaDist&Co 115.

555-74 Answer, in action on notes for lumber, was held insufficient, alleging, that seller repossessed part of lumber, amount unknown, and failing to aver wrong of repossessing or value. 228Ky 144, 14SW(2d)416.

555-76 Allegations of misrepresentation held deficient.-85PaSuper33. **Plea held insufficient.**-37GaA464, 140SE797. **False representations may not be set up on affirmance of note** not binding seller by any sort of warranty unless fraud was used to induce signing of note. 40 GaA559, 150SE600.

555-77 221Ala666, 130S405 (plea sufficient). **Averments held insufficient.**-37 GaA51, 138SE857.

555-77½-New. , and that sufficient notice of breach of warranty was given to seller. 85PaSuper33 (holding bad affidavit of defense omitting time and manner of notice and name of person to whom sent).

555-78 Allegations of fraudulent representations held sufficient.-MoA 279SW 226.

555-79 221Ala666, 130S405 (failure to allege falsity makes plea demurrable); 37GaA51, 138SE857; 221Ky494, 299SW 181; 197NC1, 147SE434. **Plea held sufficiently to present fraud.**-218Ala196, 118S377; 243 IllA362.

556-81 221Ky494, 299SW181; 74Mont 408, 241P233.

556-82 74Mont408, 241P233; 192NC 557, 135SE450.

556-83 74Mont408, 241P233; 192NC 557, 135SE450.

556-84 9LaA137, 119S483; 74Mont408, 241P233. **Allegations held insufficient.**-37GaA464, 140SE797.

556-85 235Ky526, 31SW(2d)901; 74 Mont408, 241P233.

556-89 292Pa122, 140A774; 295Pa140, 145A67. **Plaintiff proving delivery of grape vines** in good condition at designated place need not prove what caused subsequent change in condition so they would not grow. 70CalA778, 234P435.

557-91 Parol statements varying implied warranty in written contract of sale may not be shown and allegations setting up such statements render answer bad on demurrer. 217Ky28, 288 SW1031.

557-92½-New. Where defendant pleaded failure of consideration in that property was worthless evidence that property is worthless in present condition will not authorize verdict for defendant where evidence further shows that with small expenditures for repair it would perform good work. 36GaA64, 135SE 317.

557-92½-New. Purchaser may plead breach of express warranty as defense to action on purchase-money note. 40 GaA532, 150SE442(2dcase).

557-93 MoA 279SW226; 222MoA251, 296SW840; 102NJL128, 130A626. **Answer is good against demurrer** which alleges failure of consideration because seller had shipped out of state goods refused by defendant. 21AlaA614, 111S 45. **Plea held insufficient.**-37GaA464, 140SE797.

558-95 87PaSuper228. **Sufficient allegations.**-35GaA507, 134SE139.

558-95½-New. Plea alleging noncompliance with condition as to delivery by certain date and rescission held not demurrable. 215Ala384, 110S809.

558-98 Allegation that defendant was "informed" of deductions by another consignee held to state no cause of action. 127Misc760, 217NYS588.

558-99 82IndA667, 147NE294 (allegations insufficient); 165Minn486, 206NW 445 (counterclaim for delay held insufficient); 125Misc163, 210NYS502 (pleading insufficient); 295Pa140, 145A 67; TexCivA 294SW275. **Allegations that manufacturer of automobile** reduced price before delivery held not to show buyer entitled to credit on ground of mutual mistake. 33GaA625, 127SE 669. **Allegation that plaintiff is "indebted" to defendant** for "fare shortage" and "for certified weight" held to state no cause of action. 127Misc760, 217 NYS588. **Answer construed as counterclaim** to recover damages for breach of warranty inconsistent with rescission as to all or part of goods. MoA 295SW 135. **Plea in action on note alleging fraudulent representations as to material** in lighting plant for which note was given and that the fraudulent character of representations was ascertained after signing of note has been held to constitute plea of recoupment as making no reference to rescission or repudiation of contract. 218Ala336, 118S580. **Demurrer to counterclaim sustained.**-232 Ky245, 22SW(2d)614. **Plea good as recoupment,** not requiring restoration of property. 221Ala666, 130S405.

559-4½-New. By way of cross action failure of consideration or breach of warranty may be set up. TexCivA 285 SW667.

559-8 See also 218Ala196, 118S377.

559-9½-New. Replication alleging directions by purchaser to withhold shipment until certain time sufficiently alleges waiver of condition as to delivery by certain date. 215Ala384, 110S809.

559-11 11LaA398, 122S894(2dcase). **Where buyer reserves right to inspect goods,** issue involved is not merchantability of goods, but good faith in refusing them. Man [1928] 1DomLR201.

559-12 149SC424, 147SE315.

559-13 MoA 7SW(2d)407.

559-14 241NY455, 150NE514; 223App Div742, 228NYS23.

560-15½-New. Waiver of such condition must be proved. 241NY455, 150 NE514.

560-16 236 IllA403; 203 Iowa1297, 214 NW574; TexCivA 4SW(2d)97. **Allegations held sufficient to admit proof.**-141 Wash571, 251P885. **Where only issue is payment,** seller need not prove sale and delivery. 236 IllA403. **Where sole issue raised is as to contract price,** testimony as to condition of goods sold is inadmissible. 203 Iowa1297, 214NW 574. **Where action is against defendant as owner** even though it is not alleged that he held himself out as or represented himself to be owner, proof of ownership is admissible. 177Ark993, 8 SW(2d)457.

561-32½-New. In suit by company operating under license of food administrator for contract price of rice flour, such license and rules of food administration prescribing form of contract are admissible under general denial to show variance between form of contract actually used and that prescribed. 82 IndA698, 145NE526.

561-34 But see TexCivA 295SW229.

561-38 9LaA474, 120S130.

561-39 But see TexCivA 295SW229.

562-45½-New. Under general denial correctness of invoices offered in evidence by plaintiff must be proved although defendant offered no affirmative evidence directly contradicting them. Iowa 209NW435.

562-45½-New. In suit on account for goods sold, defendant, under general denial, could challenge credibility and probability of evidence of correctness of plaintiff's invoices including reasonableness. Iowa 209NW435.

562-45¼-New. Evidence of buyer on terms of contract is admissible under general denial of allegations of price agreed on. TexCivA 30SW(2d)810.

562-46 97Fla310, 120S852.

562-48½-New. Plaintiff alleging sale of goods to defendant cannot show he did not sell to defendant but that defendant merely guaranteed account of another. 57ND321, 221NW881.

562-56 180Minn467, 231NW194; MoA 15SW(2d)895. **Allegations sufficient for** introduction of evidence of delivery and of market value. 200 Iowa919, 205NW 787. **Contention that purchaser was induced to agree to postpone delivery date upon seller's false representation** that he had goods ready for delivery not sustained by testimony of purchaser's agent that at time of postponement he had reason to believe seller did not have goods on hand. 34GaA288, 129SE291. **Immaterial variances.**-35 OklACR441. **Variance not shown.**-MoA 295SW134.

563-61 126Me389, 138A689.

563-65 220AppDiv679, 222NYS472. **A variance as to the delivery is not material.**-133Misc22, 230NYS611.

564-69 TexCivA 300SW114.

564-70 In action on joint liability, plaintiff could, without variance, establish joint liability or individual liability of either defendant. 127Me187, 142 A727.

564-70½-New. Proof of request to withhold shipment till further instructions does not sustain averment of plea of accepted countermand. 21AlaA44, 104S887.

564-72 17F(2d)983; 169Ark1154, 278 SW32; 11LaA371, 123S368 (details of account); RI 149A860; 198Wis510, 224 NW716. **Counterclaim.**-50ND612, 197 NW590. **Substitution of seller.**-220MoA 59, 286SW417. **Plaintiff has burden of proving his main demand** and defendant has burden of proving his reconventional demand. 12LaA233, 125S189.

564-73 12LaA530, 126S593(1stcase); TexCivA 295SW229.

565-74 203 Iowa1297, 214NW574.

565-75 203 Iowa581, 213NW413 (reasonable value or agreed price); Iowa 221NW502; Iowa 229NW237; 192NC 330, 135SE141. **Reasonable value** if implied promise relied on. TexCivA 295 SW229.

565-76 202 Iowa786, 211NW230 (failure to prove delivery precludes recovery for price); 13LaA233, 125S764; MoA 279SW155; 149Va157, 140SE269. **Presumption that title passed on delivery to carrier** held not authorized by facts. 13LaA233, 125S764.

565-77 22AlaA308, 115S293; MoA 3 SW(2d)251.

565-78 33F(2d)83; 8LaA496; 100 WVa515, 131SE12. **That defendant pleading general denial also pleads nonconformity of goods with sample as separate defense** does not relieve plaintiff of burden of proving compliance with contract. 33F(2d)83.

565-79 7F(2d)883 (prima facie case held to show in seller's action for price); 44Philippine19; 142Wash381, 253P124. But see 214Ala601, 108S575; 43 Ida780, 254P1055. **In action by carrier as assignee** of consignor to recover price of goods delivered C.O.D., delivery being admitted, burden is on plaintiff to show want of payment. 232Mich 624, 206NW344.

565-80 Automobile.–169Ark1154, 278 SW32. **Negative averments of answer** may place burden on seller. CalA 289 P242.

566-81 17F(2d)983; 21AlaA44, 104S 887 (that plaintiff seller retook goods as his own); 10LaA635, 120S539; 7 LaA306; 261Mass86, 158NE342; 174 Minn320, 219NW159; MoA 7SW(2d) 407; 32PortoRico 117. **Agreement to charge debt to notes of plaintiff held by defendant** is on latter to prove. 124Me 449, 130A241. **Burden is on defendant to prove breach of contract** set up as defense. 214Ala6, 106S165.

566-82 177Ark195, 5SW(2d)939; 10 LaA226, 120S711(1stcase); 44Philippine19; TexCivA 12SW(2d)843; 142 Wash381, 253P124.

566-83 232Ky245, 22SW(2d)614; 10 LaA635, 120S539; MoA 271SW1029; 145Va681, 134SE692. **Buyer of lumber** pleading off-set for late delivery must prove seller's notice of probable damage. TexCivA 294SW275.

566-84 23F(2d)977; 204 Iowa66, 214 NW595.

566-84½-New. Illegality, 261Mass86, 158NE342.

566-85 23F(2d)977; 222MoA251, 296 SW840; 222MoA888, 5SW(2d)1109; 50 ND341, 195NW555 (burden on defendant to establish breach of warranty and compliance with terms of contract and statute as to rescission).

566-86 32PortoRico 117. **Substitution of contracts.**–32PortoRico 117.

566-88 220Ky791, 295SW1012 (buyer must prove breach of contract by delay in delivery); LaA 122S77; TexCivA 11 SW(2d)262.

566-88½-New. Seller of commercial fertilizer in cotton states is presumed to know that delay in planting cotton crop caused by its delay in shipping or delivering fertilizer may result in serious loss to buyer through ravages of boll weevils. 149SC424, 147SE315.

566-89 LaA 129S418.

566-89½-New. Provision in statute placing burden on one accused of violating liquor laws of disproving guilt are inapplicable to civil action for price of liquor sold, so that defendant alleging illegality has burden of proving such fact. Alta [1925] 3DomLR805.

566-90 12F(2d)969. **Parol evidence is admissible to show conditional delivery.** –43 Ida337, 252P186. **Evidence of items not involved in suit** is properly excluded where there is no confusion of items. 83CalA582, 257P156.

567-92 219Ala382, 122S619. **Collateral contract of warranty** held provable by parol. 40GaA532, 150SE442(2dcase).

567-93 Evidence that buyer would not have bought machinery if he had seen description in seller's advertising matter has been held properly excluded. 178Ark496, 10SW(2d)902.

567-95 222Ky329, 300SW871.

567-96 Evidence of sale of another cash register short time prior to sale in question is admissible on question of intent. 251Mich402, 232NW177.

567-97 But see 215Ala548, 112S120.

567-2½-New. Defendant's negligence not in issue and therefore lack of negligence is inadmissible in action on purchase-money notes given for automobile destroyed by fire. 224 IllA332.

567-2⅓-New. Acceptance order forwarded by seller is admissible where buyer has accepted and used part of goods. 133SC274, 130SE886.

567-2¼-New. Where no breach of contract is shown evidence of damage is inadmissible. 12F(2d)969.

567-2½-New. Resale contract has been held properly admitted in evidence. 240Mich701, 216NW376.

567-2⅔-New. Evidence admissible to show trade meaning of "candling." 131Misc53, 225NYS638.

568-8 On issue whether mortgagee participated in sale, evidence of negotiations between mortgagor and mortgagee is admissible. 221Ala63, 127S 813.

568-16½-New. In suit for sale of furniture testimony of defendant as to additional cost of putting floor plugs in defendant's house is immaterial on cross-examination as well as on redirect. Iowa 209NW435.

568-17 153SC371, 150SE900 (evidence as to what seller paid for horse sold to buyer); TexCivA 292SW251; TexCivA 292SW976. But see 11LaA398, 122S894 (2dcase).

568-19 219Ala607, 122S814; Ida 287P 201.

569-22 Under provision of contract of sale of grapes that they "are not being sold for any specific purpose," objection was properly sustained to question whether grapes picked in damp condition would stand shipping to east. CalA 273P161.

569-23½-New. Admitting post card from postmaster showing that buyer had deferred shipment held erroneous. IndA 155NE831.

569-23⅓-New. Where buyer asserts counterclaim, evidence that parties contemplated that seller would expend considerable sums in advertising is admissible on issue of buyer's damages. 221 AppDiv592, 224NYS501.

569-24 216Ala642, 114S298. **Parol evidence is admissible to show fraud.**–76 CalA278, 244P916.

569-26½-New. Where buyer claims return of goods and retaking by seller, evidence as to what became of goods after they were reforwarded is admissible in behalf of seller. 21AlaA44, 104 S887.

569-26⅓-New. Evidence held admissible on issue of waiver of right to rescind.–220Ala116, 124S288.

569-26¼-New. Evidence of promises of seller that buyer need not pay unless property proves satisfactory is admissible on issue whether buyer rescinded within reasonable time. 220Ala116, 124S288.

569-27 RI 147A874(2dcase). **Evidence as to taking of fixtures from defendant's possession** held immaterial. 221 Ala473, 129S43.

569-32 Testimony of owner of building and contractor buying from defendant to support off-set for late delivery of lumber whose price was sued for held inadmissible. TexCivA 294SW275.

569-33½-New. Evidence held admissible as to identity of article delivered with that purchased. 168Minn93, 209 NW867.

569-33⅓-New. Evidence that goods were rejected by purchaser from buyer's consignee is inadmissible where defense is that purchase was subject to inspection and rejection by buyer or his consignee at point of destination. 88PaSuper546.

570-39½-New. Acreage of potatoes, amount gathered, and estimated total crop held admissible in action on note for seed. 221Ala652, 130S396.

570-47 151Md690, 136A37.

570-48 Method of use.–21 OhA93, 153 NE106.

571-60½-New. Breach of implied and statutory warranty in sale of commercial fertilizers is admissible on issue of failure of consideration of note in suit given therefor. 190NC162, 129SE453.

571-60⅓-New. Evidence as to buyer's good faith in rejecting goods required to be of satisfactory quality may take wide range. 151Md690, 136A37.

571-61 Evidence held admissible.–LaA 129S431; TexCivA 12SW(2d)843. **Evidence held inadmissible.**–221Ala473, 129 S43.

571-64½-New. Evidence that bank was insolvent before goods were received held admissible where draft was not paid. 175Ark699, 300SW412.

571-64⅓-New. Where buyer failed to pay because of nondelivery of other shipments, testimony of seller that he had contracts with other buyers under which he could have made deliveries within extended time of contract is admissible. MoA 285SW1028.

571-64¼-New. Damages to buyer.–Evidence of money spent in making scrap iron suitable for use held inadmissible where seller had no knowledge of contemplated use and buyer accepted iron. 144 Okl 63, 289P737.

571-65 MoA 30SW(2d)646. **Evidence held sufficient.**–200Cal 428, 253P320; 13 LaA617, 128S693; LaA 130S568; 225 AppDiv628, 234NYS137; TexCivA 286 SW593; TexCivA 15SW(2d)150. **Evidence held insufficient.**–174Ark1180, 295 SW401; 13LaA140, 127S411(2dcase). **In an action for the price of goods delivered on defendant's order to a third party,** etc. 220MoA59, 286SW417.

571-66 203 Iowa1297, 214NW574; 167 LaA183, 118S881. **Evidence held sufficient** to support finding as to manner of determining amount of recovery. RI 149A860.

571-67 177Ark1195, 295SW373; 216 AppDiv424, 215NYS485 (evidence of delivery in time held sufficient). **Evidence held sufficient.**–Ark 32SW(2d)439. **Evidence sufficient to show excuse for noncompliance.**–135Wash614, 238P629 (grading and labeling fruit). **Evidence held sufficient to show buyer's agreement** to accept goods despite late shipment over another route. 216AppDiv 409, 215NYS496. **Evidence held to make prima facie case** for seller. 233 IllA262. **Evidence sufficient to show there was no compliance.**–9LaA674, 119S781.

571-68 80CalA263, 251P683; 154Wash 120, 281P14. **Evidence held sufficient to show price or value of the goods.**–41GaA 132, 152SE257(2dcase); Iowa 221NW 502; LaA 130S122 (price not subject to rebate); 123 Or69, 260P1011. **Evidence held insufficient.**–LaA 127S456(1stcase); TexCivA 295SW263.

572-69 140Miss643, 106S433. **Evidence held sufficient.**–170La625, 128S 656(2dcase); TexCivA 25SW(2d)919; Wash 286P56. **Evidence held insufficient.**–TexCivA 28SW(2d)236. **Evidence held to warrant recovery by plaintiff.**–See 177Minn560, 225NW725.

572-70 TexCivA 31SW(2d)309. **Evidence held to warrant recovery for plaintiff.**–172Ark1176, 289SW480; 175 Ark1169, 1SW(2d)72; 176Ark1203, 5 SW(2d)308; 69CalA195, 230P964; 70 CalA458, 233P415; 71CalA2, 235P438; Ida 287P201; 236 IllA403; 126Kan419, 268P860; 9LaA474, 120S130; 10LaA 273, 120S694(2dcase); 10LaA276, 120 S705; 9LaA438, 119S726; 11LaA 428, 123S429; 13LaA475, 128S701; 8LaA612; 8LaA666; 251Mich7, 231 NW45; 178Minn275, 226NW933; MoA 293SW466; MoA 21SW(2d)886 (of interest for five years); ND 230 NW17; 141 Okl 282, 285P17; 144 Okl 63, 289P737; 51SD306, 213NW578. **Evidence held not to warrant recovery by plaintiff.**–95CalA365, 272P1084; 9 LaA18, 118S771(1stcase); 12LaA530, 126S593(1stcase); 127Me187, 142A727; 172Minn4, 214NW475; 93PaSuper217; 148Va378, 138SE494. **Evidence held sufficient.**–173Ark1180, 291SW430; 203 Cal 233, 263P802; 38GaA397, 144SE 123; MoA 30SW(2d)646; NJSup 150A 211(1stcase); 104WVa178, 139SE653. **Judgment for seller held against weight of evidence.**–126Misc266, 214NYS139 (in

action for price). **Evidence held to warrant recovery by seller.** 70CalA724, 234 P405. **Verdict that defendant suffered no loss from nondelivery** held contrary to evidence. TexCivA 294SW963.

572–72 40GaA356, 149SE716. **Evidence held sufficient.**–140Wash420, 249P786.

572–73 TexCivA 294SW963; 149Va 755, 141SE759. **Sufficiency of the evidence,** etc. 168Ark603, 271SW327; 210 Ky785, 276SW840; 147Va208, 136SE 591.

573–74 Sufficiency of evidence to show passing of title.–98CalA65, 276P597; 140 Wash420, 249P786. **Evidence held to show** that seller intended to retain title in consigning to himself and giving buyer right of inspection. 144Va145, 131SE193.

573–74½–New. Evidence insufficient to show anticipatory breach in absence of evidence that buyer's attention had been called to memorandum before agreement had expired by lapse of time, and that buyer has accepted it as a breach. 283 Pa545, 129A580.

573–75 159La996, 106S542; **MoA 14SW (2d)**465. **Evidence held sufficient.**–181 Ark180, 25SW(2d)15; 89CalA264, 264P 491 (damage from failure to obey shipping directions); 103CalA486, 284P715; 111Conn558, 150A711; 80Mont82, 258P 1085; 50ND397, 196NW100; 50ND642, 197NW596; **TexCivA 15SW(2d)**150; 145Va681, 134SE692. **Evidence insufficient.**–169Ark1154, 278SW32; 36GaA 694, 137SE842; 34GaA288, 129SE291; 41GaA132, 152SE257(2dcase); 13LaA 646, 127S445; 121 Or277, 254P806; **Tex CivA 25SW(2d)**919; 143Wash352, 255P 147; 155Wash253, 283P1086. **Sufficiency of evidence.**–214Ala6, 106S165; **MoA** 294SW450. **Evidence held to show** buyer's loss due to lack of diligence in marketing grapes. 71CalA479, 235P673. **Evidence held to show** purchaser was relieved from liability for part of goods sold. 194Wis595, 217NW318. **Evidence held not to show** that crusher received by defendants was not one ordered. 197Wis615, 222NW788. **Evidence held to sustain** defense of rescission though defendant dealt with goods as its own and offer to return was not seasonably made. 71CalA197, 234P926. **Evidence held not to show** that seller retook as his own goods returned by buyer. 21AlaA44, 104S887. **Evidence held to sustain** finding of two hundred dollars difference in value of model actually sold and one represented. 143 Wash352, 255P147. **Evidence of payment held insufficient.**–142Wash381, 253 P124. **Evidence warranted finding** against defense that goods did not comply with contract. 266Mass168, 164NE 804. **Evidence held to support finding as to quantity of breakage of bottles** within seller's guaranty. 12LaA2, 124 S844(2dcase). **Failure of consideration.**–85CalA173, 259P97; 36GaA41, 135 SE219; 37GaA792, 142SE173; 39GaA 309, 147SE156; 39GaA488, 147SE719 (2dcase); 41GaA132, 152SE257(2dcase); GaA 154SE915; 190NC162, 129SE453. **Fraud.**–124Kan274, 259P697. **Counterclaim on plaintiff's agreement to stand certain losses** in previous transaction held sufficiently supported by evidence. 122Kan775, 253P409. **Damages.**–72 CalA278, 244P916. **Illegality.**–58ND853, 228NW204. **In action on note executed as purchase price for lighting plant** wherein defendant filed plea of recoupment on ground of fraudulent representation, evidence relative to difference in value of plant when delivered and its value as represented has been held insufficient to sustain such plea. 218Ala 336, 118S580.

573–76 11LaA398, 122S894(2dcase); LaA 129S418. **Sufficiency of evidence.**–180Ark12, 20SW(2d)313 (second-hand dredge boat); 7[illegible]CalA666, 243P458 (credit properly refused defendant buyer for expense and labor in peeling defective pears for canning); 82CalA431, 255P772; 97CalA235, 275P446(2dcase). 161GaA382, 131SE65; 39GaA457, 147SE 411; 45 Ida28, 260P426; 74 Ida794, 279P302; 159La996, 106S542; 9LaA410, 119S550; 10LaA550, 120S237; 13LaA 557, 128S189; 155Miss153, 124S265; 151SC506, 149SE271; **TexCivA 16SW (2d)**891; 140Wash420, 249P786. **Evidence held insufficient** to show lack of quality or defective workmanship. 159 La560, 105S620.

573–77 89CalA264, 264P491. **Evidence insufficient** to show that goods were shipped in bad condition. 135Wash614, 238P629.

574–78 Sufficiency of evidence.–219Ala 666, 123S52; 50ND612, 197NW590.

574–79 220Ky791, 295SW1012 (immediate delivery not shown). See also 25 **F(2d)**216. **Evidence held sufficient to establish defense as to delay in shipment.**–159La996, 106S542. **Evidence held insufficient.**–159La560, 105S620.

574–80 142Wash381, 253P124 (evidence insufficient). **Sufficiency or insufficiency of evidence to show payment.**–37GaA619, 141SE314; 208 Iowa677, 226NW38; 12 LaA233, 125S189 (overpayment); 166 Minn478, 208NW190 (sale of rye and flax); MoA 256SW509; **MoA** 282SW733. **Mere omission of credit item** held insufficient to overcome proof that credit was given for payment made. 12LaA395, 126S260.

574–80½–New. Evidence held insufficient to show discharge of contract by subsequent contract. **TexCivA** 280SW 266.

574–80⅓–New. Counterclaim for failure to assign drilling contracts held not sustained by evidence. 213Ky643, 281 SW793.

574–80¼–New. Evidence has been held insufficient to support recovery on counterclaim of profits for fraud. 199Wis 188, 225NW727.

574–80½–New. Evidence has been held to warrant jury finding for defendant on cross complaint that representatives of seller knew that representations that tree spray was harmless were untrue. 99CalA519, 278P915.

574–82 236 IllA472 (directed verdict for price proper where seller's claim is undisputed and proof fails to establish breach of warranty, express or implied); 226AppDiv343, 234NYS357. **Where defendant, in suit in detinue for automobile,** suggested that trial judge sitting as jury be required to ascertain amount of unpaid balance of purchase price, court's failure to make such ascertainment as provided for in statute has been held fatal to judgment for plaintiff. 22 Ala651, 119S594(1stcase).

574–83 181Ark415, 26SW(2d)80; 36 GaA506, 137SE409; 39GaA488, 147SE 719(2dcase); 41GaA488, 153SE612; 222 Ky329, 300SW871; **MoA** 275SW549; 222MoA888, 5SW(2d)1109; 102NJL128, 130A626 (directed verdict for plaintiff); 217AppDiv783, 217NYS594; 157SC426, 154SE412; **Utah** 269P1014. **Evidence held sufficient to warrant submission,** etc.–217AppDiv783, 217NYS594. **Where plaintiff introduces** evidence of price confirmed by admission of defendant and there is no conflicting evidence, plaintiff is entitled to directed verdict. 48 **RI** 221, 137A149. **Where evidence is sufficient to go to jury direction of verdict in part only for seller held error.**–217 AppDiv783, 217NYS594. **Question not raised by evidence** as to compliance with sales warranty should not be submitted to jury. 222Ky691, 2SW(2d)387. **Where written contract introduced covered sales transaction,** court properly directed verdict for defendant, where defendant paid into court amount sufficient fully to satisfy terms of written contract. 205Cal 556, 271P1053.

574–84 214Ala601, 108S575; 221Ala 473, 129S43; 220AlaA1, 123S262 (whether outfit shipped to defendant complied with his order has been held for jury); 83CalA307, 256P570; 35GaA 507, 134SE139; 203 Iowa1297, 214NE 574; 174Minn320, 219NW159; Miss 130 S489; 104NJL21, 138A702; NJSup 146 A654 (failure of consideration); 50ND 642, 197NW596; 57ND356, 222NW36; 85PaSuper29 (misrepresentation as to receipts from business sold); 85PaSuper394; 153SC371, 150SE900; 145Wash 640, 261P390; 106WVa270, 145SE436. **Evidence held sufficient to warrant submission to jury.**–214Ala601, 108S575; 95 CalA131, 272P299; 203 Iowa1297, 214 NW574; Iowa 227NW578(2dcase). **Evidence held sufficient to warrant submission to jury** see **Me** 151A537; 236Mich 27, 209NW817 (action to recover price for advertising contract); **MoA** 277SW 368; **MoA** 284SW195 (whether parties intended unconditional sale or executory agreement); 222MoA251, 296SW840; 128 Or83, 262P939 (motion for directed verdict properly overruled); 149 SC424, 147SE315. **Counterclaim for damages** should not be submitted to jury where defendant proves only nominal damages. 174Minn320, 219NW159. **Direction of verdict for full price** erroneous in view of evidence of decision for failure to deliver on time. 36GaA549, 137SE119. **Failure of consideration** for jury. **TexCivA** 285SW667. **Intention of seller to pass title** is ordinarily question of fact. 18F(2d)193. **Where there is single transaction with one item involved failing due at stated time,** directed verdict for full amount with interest is not error. 133SC274, 130SE886. **Whether seller was ready and willing to perform all things necessary to transfer actual possession** held question for jury. 71CalA2, 235P438.

575–85 181Ark415, 26SW(2d)80; 203 Iowa1297, 214NW574; 90PaSuper23; 91PaSuper286; **RI** 148A34; **Utah** 269P 1014; 143Wash162, 254P846; 145Wash 640, 261P390. **Where buyer was required to request delivery within reasonable time,** whether a reasonable time elapsed is question for jury. 192NC626, 135SE627.

575–87 218MoA597, 265SW993. See also **MoA** 7SW(2d)383.

575–88 100WVa540, 131SE6.

575–89 222Ky691, 2SW(2d)387; 151 Md690, 136A37; 232Mich25, 204NW701 (whether goods conformed to sample properly submitted to jury); 90PaSuper 382; 91PaSuper286; 98PaSuper234; 100WVa540, 131SE6; 100WVa515, 131 SE12 (whether lumber delivered was of kind and quality required under contract).

575–90 Ark 31SW(2d)132.

575–91 33F(2d)269; 94PaSuper351.

575–92 90PaSuper91.

575–93 214Ala601, 108S575. But see 142Miss851, 108S139.

575–93½–New. whether there was any shortage in goods returned; 222MoA 251, 296SW840.

576–95 217AppDiv783, 217NYS594; 86 PaSuper296; 149SC424, 147SE315.

576–97 214Ala601, 108S575; 177Ark 195, 5SW(2d)939; 77Colo 285, 236P 1000; 127Kan354, 273P462; 82Mont185, 266P394; **RI** 133A652; **TexCivA** 281SW 257; **Utah** 282P1040. **Acceptance of goods returned as payment pro tanto** is question of fact. 156Miss878, 127S300.

576–1 100WVa515, 131SE12 (reasonable expense charges on buyer's resale). **Reasonable market value of coal removed by seller** should be determined by jury in absence of agreement as to price to be allowed therefor. **Utah** 269 P1014.

576–2½–New. It is also question for jury or court sitting in lieu thereof what was reasonable time to wait before resale by purchaser if he rightfully rejected goods, 100WVa515, 131SE12.

576–2⅓–New. and whether they were disposed of at best obtainable price, 100 WVa515, 131SE12.

576–2¼–New. and whether defendant acted throughout in good faith. 100 WVa515, 131SE12.

576–2½–New. Whether defendant was negligent in not ascertaining arrival of onions is for jury. **RI** 147A874(2dcase).

576–4 240Mich701, 216NW376. **Instructions held erroneous.**–120 Or229, 250P876 (action for price or value of goods delivered to third person).

576–5 33F(2d)269; 220Ala116, 124S 288; 248Mich118, 226NW832; 102WVa 158, 134SE738 (erroneous instruction permitting recovery of only nominal damages). **Modification or refusal of requested instruction.**–142Va331, 128SE 518. **Instructions held correct.**–86CalA 507, 261P747. **Instructions held proper.**–104Conn674, 134A233; 41GaA83, 151 SE661. **Instructions held not erroneous.**

–MoA 271SW1029; 138 Okl 151, 280P 611; 90PaSuper446. **Instructions properly refused.**–39GaA457, 147SE411. **Instruction held not objectionable for failure to instruct that, if plea of rescission sustained,** automobile would become property of seller. 34GaA243, 129SE 121. **Instruction held not subject to exception that left jury with impression that buyer, under plea of fraud and rescission,** might be relieved of payment and retain automobile. 34GaA243, 129 SE121. **Instructions as to damages directing addition of penalty for delay in withholding price held unwarranted.** 233IllA262. **Instructions held sufficient.** –100WVa540, 131SE6. **Instructions on burden of proof** under pleading, court's instruction not erroneous. *134Wash150, 234P1053. **Refusal to instruct for buyer** held error in view of other instructions given. 221AppDiv592, 224NYS501.

576–6 MoA 285SW1028.

576–7 Instructions held sufficient.–32 F(2d)23. **Instructions held proper.**–221 Ala652, 130S396.

577–9 33F(2d)83; 126Me389, 138A689; 148Md188, 129A31; 85PaSuper29 (differing criteria of misrepresentation as to receipts from business sold). **Instructions held not misleading.**–180Ark 12, 20SW(2d)313.

577–11 213Ky159, 280SW945. **Instructions held sufficient.**–Ida 287P201; 233 IllA262; 153Md312, 138A269; 124 Or 494, 264P855. **Instruction held not to limit defendant on one contention.**–34 GaA243, 129SE121.

577–12 71CalA2, 235P438. See also Iowa 232NW500. **Instruction held proper.**–43 Ida337, 252P186.

577–13 85PaSuper29 (assuming fact). **Instructions held not violative of rule.**– 71CalA2, 235P438.

577–13½–New. or be too broad under evidence, 85PaSuper29.

578–14 103WVa64, 136SE602.

578–15 167Minn60, 208NW422 (evidence warranted that note given for tractor stood as payment for tractor taken in place of one for which note was given); 24 OhA282, 156NE217; 115 Okl 199, 242P201; RI 134A11; 144Va774, 130SE899 (instruction to find for plaintiff if defendant ordered goods held erroneous where evidence showed goods were charged to independent contractor). **Instructions held justified by the evidence.**–216Ala642, 114S298; 43 Ida 337, 252P186; 153Md312, 138A269; MoA 285SW1028; MoA 7SW(2d)396; 147Va 208, 136SE591. **Instructions held not justified by the evidence.**–110Conn255, 147A841(2dcase); 266Mass168, 164NE 804; MoA 21SW(2d)206. **Instructions properly refused.**–100WVa540, 131SE6 (as to right of inspection). **Instruction held applicable to facts.**–Wash 290P984.

578–16 177Ark195, 5SW(2d)939; 35 GaA508, 133SE648; 221Ky819, 299SW 978; RI 134A11.

578–17 Instructions properly refused.– 128 Or83, 262P939.

578–18 71CalA2, 235P438; 192NC811, 134SE454.

578–19 Sufficiency of findings to support judgment.–69CalA195, 230P964; 90 CalA179, 265P563; TexCivA 299SW928; Utah 271P31. **Verdicts held responsive.**– 317Mo 125, 295SW109. **Where jury found** buyer was not damaged by breach of warranty court erred in not rendering judgment for seller. TexCivA 300 SW192. **Conclusions held improper under the findings.**–TexCivA 31SW(2d)309.

579–20 70CalA778, 234P435 (finding held sufficient); MoA 295SW135.

579–21 See also 102CalA67, 282P518.

579–22 TexCivA 16SW(2d)871. See also 129Kan213, 282P588(1stcase). **Findings held not contradictory.**–82CalA 249, 255P529. **Findings held sufficient to support judgment.**–82CalA249, 255P 529.

579–26 141Wash571, 251P885 (defendant in action for price of automobile wheels held not entitled to judgment for dies). **In absence of proof of extent of partial failure of consideration,** there is no basis for judgment for defendant. TexCivA 299SW274. **Judgment for full amount claimed** is erroneous in absence of proof of value, where action is for value of goods. 29 OhA59, 162NE779. **Where plaintiff proved sufficient case to support judgment in his favor,** in absence of evidence to contrary, judgment of nonsuit has been held error. 98CalA 98, 276P1064. **Affirmative judgment for plaintiff held proper.**–100CalA409, 279 P1083 (termination of contract not shown).

579–29½–New. In action on check given as part payment for tractor defended on ground of breach of warranty of quality, judgment on cross complaint for notes representing balance of purchase price or for return of notes is improper. 78CalA652, 248P732.

579–29¼–New. Where plaintiff not shown to be holder of notes and it is not shown defendant would be compelled to pay them. 78CalA652, 248P732.

579–30 219Ala65, 121S59; 219Ky106, 292SW762; 160La109, 106S711; 12LaA 607, 125S760; 126Me389, 138A689; 148 Md188, 129A31; MoA 296SW255; 47 RI 88, 129A825; 102WVa158, 134SE 738. **Expenses of men sent to erect machine** and supervise operation held allowable. 163La664, 112S522. **Contract price of coal** held not subject to subsequent agreement as to additional profits, where allegations as to such agreement were withdrawn. 147Va125, 136SE673.

580–31 7F(2d)561; 179Ark510, 16SW (2d)994; 215Ky632, 285SW956; 160 La109, 106S711; 133SC458, 131SE620. **As dependent on whether amount due is readily ascertainable.**–79CalA641, 250 P710.

580–32 219Ala65, 121S59; MoA 295SW 135. **Resale by purchaser.**–100WVa515, 131SE12.

580–33 27F(2d)234; Iowa 221NW502; 228Ky144, 14SW(2d)416.

580–35 126Me389, 138A689. **Delivery after termination of contract** for sale of oil output, made by pipe line company, without fault of either party, held to render buyer liable only for market value at time of discovery. TexCivA 286 SW268. **Reasonable value of fruit** is the price received by buyer therefor less commissions and loading charges. 75 CalA737, 243P686. **Resale price, less payments,** held proper recovery by plaintiff suing defendant to account for car defendant sold. Utah 282P1040.

581–36 148Md188, 129A31; 47RI 88, 129A825 (seller at agreed price not reduced to recovery of worth by reason of defects). But see Ariz 283P924.

581–37 Buyer is entitled to recover part payment made on unsatisfactory goods agreed to be returnable, upon return thereof. 27F(2d)234.

581–37 144Wash229, 257P632.

581–38 219Ala65, 121S59; 53SD77, 220 NW146.

582–40 LaA 129S418.

582–40½–New. Where counterclaim was for less than amount due, amount recoverable was amount claimed less amount represented as delivered. 106 Conn95, 136A867.

582–40½–New. Where defendant secured by misrepresentation oil in excess of what plaintiff was obligated to deliver under contract, he was held liable to plaintiff for difference between contract and market price of excess oil. 160La763, 107S566.

582–40¼–New. Where owner elects to waive tortious taking and treats transaction as sale, value of property must be determined at nearest market, less cost of transportation. 34F(2d)744.

582–42 85PaSuper3 (findings supported by sufficient evidence); 85PaSuper394 (prima facie case established); RI 129 A801.

583–46 76CalA767, 246P74; 82CalA 648, 256P434; 225AppDiv467, 233NYS 348; 285Pa120, 131A705; 285Pa131, 131A710; 133SC458, 131SE620; NS [1930] 1DomLR802 (failure to provide ship). **Seller is not limited to statutory actions or measures of damage.**–37GaA 57, 138SE917.

583–47 170Ark453, 280SW669; NJSup 132A494; 136Misc723, 244NYS71; 285 Pa120, 131A705 (cancellation of balance of order); 285Pa131, 131A710; 153Va 14, 149SE517. **Seller might have treated buyer's repudiation as anticipatory breach,** entitling it to bring immediate suit for damages without tendering further deliveries. 249NY68, 162NE586.

583–48 22F(2d)599; 76CalA767, 246P 74; 4LaA418; 240NY217, 148NE215; 285Pa131, 131A710; 144Wash67, 256P 779; 193Wis80, 213NW637. **Where after partial performance by seller, buyer refuses to accept further installments,** seller may regard contract as repudiated and sue on that basis, or tender delivery and sue for nonacceptance of goods. 103Conn172, 130A68. **That seller retains property as his own after purchaser's refusal to accept** or that title was not in seller does not preclude suit for damages. 41GaA60, 151SE813.

584–54½–New. Where seller retakes property from carrier after carrier's tender to buyer and his refusal to accept, action for damages lies. 214App Div339, 212NYS307.

584–54½–New. Action for conversion will not lie where seller delivers goods and refuses to accept tender of return. TexCivA 284SW717.

584–55 234 IllA9; 327 Ill 362, 158NE 678; 187Wis95, 203NW908. **Premature tender** does not preclude further tender. 236 IllA426.

584–55½–New. A legal excuse for nonperformance must be shown. 327 Ill 362, 158NE678.

584–56 17F(2d)699; 234 IllA9; 240NY 217, 148NE215. **Ability and readiness is immaterial** where suit is brought for nonacceptance after tender following repudiation, question being did seller perform or offer to perform. 103Conn172, 130A68.

584–58 23F(2d)783; 26F(2d)33; 170 Ark453, 280SW669; 236 IllA426 (reply to seller's letter evasive); 253 IllA551; 240NY217, 148NE215; 131Misc53, 225 NYS638; 117 Or637, 244P531 (goods to be manufactured); 99WVa657, 129SE 718, 719 [quotCyc], 47ALR189. But see 35GaA206, 132SE264.

584–59 103Conn172, 130A68 (may treat contract as repudiated and sue on that basis); 249NY68, 162NE586; 192NC 607, 135SE531.

585–64 82CalA648, 256P434. Contra 163La159, 111S661.

585–64½–New. Where seller permitted time for performance to be postponed, he must give buyer notice to perform and allow reasonable time for performance. 159Tenn10, 15SW(2d)749.

585–65 100WVa515, 131SE12 (breach of warranty as defense pro tanto).

585–67 253Mass37, 148NE101 (delay "going to the root of the contract").

585–72 Refusal of goods for alleged failure of terms of delivery waives all other grounds for refusal. 236 IllA426.

586–73 Defense of unreasonableness of contract price in violation of Lever Act held insufficient for failure to allege the president had ordered discontinuance of price as unreasonable. 267US233, 45 SCt295, 69L ed589.

586–75½–New. or were provided against in contract; 102Conn626, 129A 782.

586–80½–New. Buyer who breached contract and forfeited down payment cannot offset damages therefor by advance payment of subsequent purchaser also forfeited in absence of showing that goods involved in two contracts of sale were same. 135Wash318, 237P716.

586–80½–New. Mutual mistake in contract is no defense as to part executed before repudiation by buyer. 26F(2d) 33.

586–81 5F(2d)314. **If seller elects to stand on contract** on repudiation before time for performance, he cannot sue till time for performance has expired. 5F(2d)314. **Option not to treat repudiation as breach.**–187Wis34, 203NW746.

586–84 Delivery in installments.–But see 37GaA639, 141SE220.

586–85½–New. Offer to reinstate contract after breach.–Where buyer in default fails to reply to seller's letter demanding performance and seller places claim in hands of attorney, buyer is not entitled to reinstate contract. 159Tenn 10, 15SW(2d)749.

586–86 81Colo 354, 255P625 (complaint sufficient to state cause of action in as-

sumpsit); 327 Ill 362, 158NE678.

586-86½-New. Petition must sufficiently state cause of action. 38GaA438, 144SE134.

587-87 Sufficiency of allegation.-73CalA467, 238P825.

587-88 327 Ill 362, 158NE678; 114Nebr584, 208NW742. **Allegation sufficient.**-214Ala109, 106S686; MoA 11SW(2d)1088; MoA 25SW(2d)125; 133Misc494, 232NYS554; 69Utah112, 252P570. **Allegations of buyer's action against subvendee for breach** held irrelevant. 16F(2d)185. **Refusal to accept** must be alleged. 117 Okl 55, 244P756.

587-90 327 Ill 362, 158NE678. **Delivery.**-241NY455, 150NE514.

587-90½-New. A legal excuse for nonperformance must be alleged. 327 Ill 362, 158NE678.

587-91 241NY455, 150NE514; 117 Okl 55, 244P756. But see 32F(2d)195. **Sufficiency of allegations.**-125Misc75, 210NYS54. **Allegations held sufficient.**-114Nebr584, 208NW742.

587-94 241NY455, 150NE514 (waiver of delivery in reasonable time).

587-95 34GaA298, 129SE562 (demurrer to amended petition as to measure of damages not sustainable because original petition stated erroneous measure). **Court has power to adjust damages** recoverable to facts where amount recoverable was not correctly alleged in complaint. 131Misc53, 225NYS638.

587-96 38GaA438, 144SE134; TexCivA291SW959. **Sufficiency of allegation.**-93CalA685, 270P239.

587-97 81CalA624, 254P615; CalA 268P443.

588-98½-New. Pleadings sufficient to show plaintiff real party in interest. 37F(2d)455.

588-99 70CalA708, 234P417 (plea of nondelivery held sufficient). **Proposed amendment held not to state defense.**-MoA 290SW616. **Counterclaim has been held sufficient.**-136Misc723, 244NYS71.

588-1 102Conn626, 129A782 (rescission); TexCivA 275SW70 (mistake of identity as to party contracted with).

588-2 215Ala355, 110S715.

588-7½-New. That resale would have avoided loss need not be specially pleaded. 163La159, 111S661.

588-7½-New. Overruling exception to answer alleging custom, general understanding, and prior understanding of buyer held not error. TexCivA 289SW155.

588-8 8F(2d)689 (evidence that contract was in effect at time of cancellation by buyer held admissible under complaint); 327 Ill 362, 158NE678. **Acceptance.**-327 Ill 362, 158NE678. **Complaint pleading performance** does not tender issue as to excuse of performance. 86CalA591, 261P313. **Evidence held to show no variance with complaint.**-97CalA784, 276P374. **In pleading tender and failing to plead waiver,** seller does not establish his cause of action by relying on acts of buyer claimed to constitute a waiver. 214AppDiv245, 212NYS170. **Seller is limited by contractual rights** in suit for damages due to breach of contract. 38GaA404, 144SE43. **Allegation balance was due** and evidence showing balance was to be paid in installments held not a variance. CalA 288P134.

588-9 33F(2d)657; 82CalA648, 256P434.

588-11 TexCivA 275SW70 (must plead and prove mistake).

588-14½-New. Seller may not rely on proof of acts of buyer claimed to constitute waiver without having alleged such acts in complaint. 214AppDiv245, 212NYS170 (in action by seller for buyer's refusal to accept and pay for goods tendered under contract, where seller had to show tender of goods called for under such contract).

588-14⅓-New. Performance or waiver of performance within reasonable time must be proved. 241NY455, 150NE514 (where no time is fixed in contract).

588-14¼-New. Seller's failure to notify buyer of intention to resell can be shown under general issue. 213Ala669, 106S139.

588-14⅓-New. Allegations held sufficient to admit proof of damages.-170Ark453, 280SW669.

588-14⅙-New. Seller relying on buyer's repudiation must allege and prove performance on his part. 327 Ill 362, 158NE678.

588-14⅐-New. In action for breach of contract for repurchase of automobile, wherein plaintiff alleged that defendants made false statements as to its condition and worth, it is not necessary for plaintiff to show fraud in order to recover. TexCivA 19SW(2d)151.

589-15 163La159, 111S661 (that loss was unavoidable); NJSup 145A231(2d case); 245NYS551. See also 5LaA278.

589-16 117 Okl 55, 244P756.

589-17 117 Okl 55, 244P756.

589-18 125Misc81, 210NYS40 (fact that buyer failed to give shipping directions does not exercise failure of seller to plead and prove readiness and ability to perform).

589-20 5F(2d)549 (evidence held to show market for rejected sugar at time and place of rejection); 221Ala176, 128S174; 297Pa483, 147A519 (available market for property purchased). **Burden of showing lack of reasonable care in making resale** may rest on buyer under circumstances of case. 66Utah340, 242P391. **Plaintiff must prove efforts to resell.**-16F(2d)190.

589-21 215Ala143, 110S372.

589-21½-New. Burden is on defendant who breached contract to show that plaintiff should or could have mitigated damages. 242 IllA151.

589-22 TexCivA 287SW87 (evidence held relevant to issues). **Evidence held inadmissible.**-234 IllA9. **Competent evidence consisting of correspondence of parties admissible,** though containing offer to compromise and self-serving declarations. 236 IllA426.

589-23 253 IllA551; Utah 279P499.

590-24 82CalA20, 254P937; MoA 299SW53.

590-25 IndA 168NE585; 253Mass37, 148NE101; 253Mass424, 149NE159.

590-26 23F(2d)447; 218Ala201, 118S393; 41GaA12, 151SE330; 165Minn406, 206NW931. **In case of repudiation before time for performance,** buyer may show market price at time of repudiation. 5F(2d)314.

590-27 267US248, 45SCt300, 69Led589 (evidence of particular sales of small lots of sugar at time of resale by seller when market was in unsettled condition held inadmissible); 214Ala602, 108S508; 39GaA742, 148SE349. **Proof of market value two years after breach** is too remote. 144Wash67, 256P779.

590-28 23F(2d)783; 33F(2d)83 (evidence of amount realized on sellers' resale of goods two and one-half months after their return by buyer has been held inadmissible). But see 33NM117, 263P504.

590-30 225Ky510, 9SW(2d)226. See also 218Ala171, 118S328(2dcase).

590-31 165Minn406, 206NW931 (evidence admissible).

590-32 253Mass37, 148NE101 (evidence of price for which buyer could sell under special contract incompetent on question of mitigation of seller's damages).

590-34 215Ala143, 110S372; 285Pa131, 131A710 (additional period required to complete work made necessary by change of plans); 148Va413, 139SE254. **Where a delay in the delivery is set up as an excuse.**-240Mich677, 216NW391.

590-35 215Ala143, 110S372.

591-37 170Ark1131, 282SW961.

591-37½-New. Plaintiff may show defendant's ability to perform in rebuttal of testimony of lack of ability. 25F(2d)441.

591-37⅓-New. Where plaintiffs resell goods on account of defendants, admission in evidence of amount which plaintiffs receive from private sale, which is not in manner provided by law, is error. 100CalA330, 279P1016.

591-37¼-New. Subsequent contract for purchase of same kind of goods at half original contract price may be admissible to show real reason for repudiation by defendant. 35F(2d)907.

591-38 297Pa483, 147A519. See also LaA 130S843. **Sufficiency of evidence.**-24F(2d)78; 36F(2d)589; 37F(2d)455; 221Ala176, 128S174; 170Ark453, 280SW669; 82CalA793, 256P296; 82CalA648, 256P434; 90CalA740, 266P362; 99CalA631, 279P159; 108Conn632, 144A301; 41GaA12, 151SE330; 242 IllA151; IndA 168A585; 125Kan117, 263P786; 12LaA575, 126S257; 13LaA154, 127S412; 179Minn385, 229NW348; 179Minn385, 229NW348; Nebr 229NW22; 58ND332, 226NW496; 117 Or637, 244P531; TexCivA 282SW824; TexCivA 290SW1113. **Evidence held sufficient to show contract.**-164La472, 114S101. **Evidence held sufficient to show agreement** as to all terms of contract before it was reduced to writing. 164La472, 114S101. **Evidence held insufficient.**-258Mass13, 154NE263; 224AppDiv276, 230NYS185. **Evidence held to sustain finding for seller.**-214Ala602, 108S508. **Verdict for seller held sustained by evidence.**-220Ky74, 294SW798. **Weight and sufficiency.**-23F(2d)783. **Where evidence shows that there was no contract,** there can be no recovery. 130 Okl 104, 265P108. **Defendant's demurrer to evidence properly overruled.**-MoA 290SW616. **Some basis of computation of damages** must be supplied by plaintiff. 224AppDiv276, 230NYS185.

591-39 Evidence held to warrant jury's finding that undelivered grapes which buyer refused to accept were United States grade No. 1 which contract called for. 97CalA784, 276P374. **Evidence insufficient** to show that seller prevented reinspection. 240Mich257, 215NW397. **Evidence insufficient to show** that grapes delivered were of quality agreed on. 97CalA569, 275P892. **Evidence insufficient** to support finding that seller tendered delivery of goods to buyer who refused to accept them. 103CalA524, 284P1038.

591-40 Sufficiency of evidence.-32F(2d)442; 34F(2d)10; CalA 268P443; 98CalA75, 276P383; 253 IllA551; **Evidence insufficient** to show improper diversion of coal by seller under contract with force majeure provision. 36F(2d)982.

591-40½-New. Though suit for refusing trees is common law action, yet defendant must establish defense of countermand as in equity where issue involved was of equitable nature. 231Ky374, 21SW(2d)478.

591-41 81Colo354, 255P625; 163La198, 111S675; 49ND741, 193NW327; 297Pa483, 147A519. See 224AppDiv276, 230NYS185. **Measure of damages for** repudiation before time for performance is damages which would have arisen at time of performance less abatement from means of mitigating loss. 5F(2d)314. Measure of damages in case where payment is demanded as condition to delivery is that which applies where title remains in seller. 89CalA416, 264P796. **Refusal to allow agreed amount on property to be applied in part payment.**-In action against automobile dealer for breach of contract to allow stated amount for used car, plaintiff is not entitled to recover for loss of use of car in addition to damages for breach. 69Utah112, 252P570. **Value of crop cut as for canning** on breach of contract for planting, harvesting, and delivering crop of peas for canning where no market therefor when breach occurred is proper measure where crop destroyed by storm before it could mature and be harvested for seed. 166Minn487, 208NW194. **Prospective profits held too uncertain** to be recoverable. CalA 288P795.

591-42 273US337, 47SCt351, 71Led670; 208Cal168, 280P952; 118Kan328, 234P988, 41ALR194; 12LaA625, 125S757; 49ND741, 193NW327; 297Pa483, 147A519. **Duty to minimize damages.**-203Cal187, 263P237.

591-43 91CalA11, 266P601; Alta [1926] 4DomLR538, [1926] 3WestWkly327 (seller held not entitled to amount of sales commission).

592-52½-New. Buyers, not exercising option to pay flat rate or classify and pay special rate, waive classification privilege. 50Nev340, 259P415.

592-52⅓-New. Seller need not avail

himself of anticipatory damages, but may wait. 26F(2d)40.

592-52¼-New. Where defendants purchased piano under false representations and tendered it into court, measure of damages is difference in value of piano as represented and its value when purchased. TexCivA 17SW(2d)474.

592-53 273US337, 47SCt351, 71L ed 670; 6F(2d)990; 7F(2d)555; 8F(2d) 601; 22F(2d)749; 33F(2d)83; 36F (2d)589; 41F(2d)679; 76CalA767, 246 P74; 81CalA624, 254P615; 82CalA20, 254P937; 82CalA648, 256P434; 3Del 497, 139A259; 34GaA298, 129SE562; 35GaA206, 132SE264; 37GaA57, 138SE 917; 39GaA742, 148SE349; IndA 169 NE333; 207 Iowa245, 222NW886; 214 Ky443, 283SW407; 162La698, 111S65; 10LaA469, 121S335; 12LaA183, 124S 562(2dcase); 126Me609, 139A680; 151Md690, 136A37; 256Mass66, 152NE 347; 33NM117, 263P504; 247NY465, 160NE916; 220AppDiv160, 221NYS11; 132Misc704, 230NYS482; 49ND741, 193 NW327; 131 Okl 22, 267P464; 143 Okl 99, 287P1019; 39 OklACR35 (at time of breach); 285Pa120, 131A705; 285 Pa131, 131A710; 286Pa501, 134A459 (requesting cancellation of order for special machine held not repudiation); 297Pa483, 147A519; 96PaSuper460; 6 PaDist&Co 439; 159Tenn10, 15SW(2d) 749; TexCivA 282SW824; TexCivA 283 SW345; TexCivA 19SW(2d)151; 66 Utah340, 242P391; 135Wash318, 237P 716; 155Wash75, 283P442 (at time of breach); 99WVa657, 129SE718, 47ALR 189; 187Wis34, 203NW746; Alta [1926] 4DomLR538, [1926] 3WestWkly 327. **Delivery f. o. b.**-34GaA298, 129SE 562. See also 8F(2d)704. **Postponement of delivery.**-82CalA648, 256P434; CalA 262P783. **The time of the actual breach.** -132SC358, 128SE171 (time fixed for delivery); 187Wis34, 203NW746. **Not date of repudiation** but date when there should have been delivery is time at which damages are determined where repudiation preceded time for delivery and seller chose to keep contract alive. 187Wis34, 203NW746. **Damage held fixed as of time of cancellation** under express provision. IndA 155NE214. **Delivery during quarter on buyer's shipping orders.**-187Wis34, 203NW746. **Failure to submit issue** whether seller had acted to minimize damages after notice of buyer's refusal to accept held error. 131SC364, 130SE334. **Greater amount than could be recovered for full performance on both sides** cannot be recovered as damages. 129 Okl 188, 263 P1105. **On rejection and return to seller,** same rule is applied. 37GaA57, 138 SE917. **Repudiation of contract by buyer before time for delivery.**-187Wis34, 203NW746. **Where delivery is to be made within certain period,** breach does not occur till last day of period. 187 Wis34, 203NW746. **Where there was conditional waiver of time of performance and new agreement as to time of tender,** on default to comply with new agreement damages are measured by injury sustained under original breach. 35GaA206, 132SE264. **In Massachusetts.** -170NE403.

593-54 22F(2d)749; 41GaA60, 151SE 813.

594-56 193Wis80, 213NW637 (highest market price there).

594-57 49ND741, 193NW327. See also 8F(2d)689.

594-59 151Md690, 136A37. **Damages where merchandise** is of peculiar character must be determined by some other criterion than difference between agreed price and general market value. 270US 124, 46SCt308, 70L ed497.

594-64 36F(2d)583 (market price higher than contract price); SD 225NW59 (2dcase). See also 193Wis80, 213NW 637. But see 170Ark453, 280SW669. **Where selling price had declined to market price** on day seller declared breach of contract protecting buyer against seller's price decline, seller cannot recover. CalA 262P783.

594-68½-New. Duty of seller to minimize damages.-In case of breach of executory contract by buyer, it is duty of seller to minimize damages. 102WVa 197, 135SE13.

594-68⅓-New. Where buyer notifies seller to stop delivering goods contracted for, shipments subsequent thereto are at seller's risk. 102WVa197, 135SE13.

594-68¼-New. Uniform Sales of Goods Act has not abrogated rule requiring injured party, on breach of contract, to use reasonable diligence in mitigating his damages. 28F(2d)328.

594-68⅙-New. Lost profits are recoverable under some conditions in lieu of, or in addition to, other allowances. 207 Iowa245, 222NW886.

594-68⅛-New. Interest is allowable on seller's recovery. MoA 25SW(2d)125.

594-68½-New. Seller's damages must be diminished by buyer's loss on coal undelivered during contract. 136Misc 723, 244NYS71.

594-69 234 IllA9; 286Pa501, 134A459 (where contract expressly specified that it was not subject to be countermanded, fact that special machine was not fully completed when attempted repudiation was made held immaterial).

594-70 242 IllA151; 151Md690, 136A 37; 297Pa483, 147A519. But see 24F (2d)78. **Measure of damages** for breach of contract for sale of logs held difference between purchase price and cost of delivery. 192NC607, 135SE531. **Damages for sale of all goods to be manufactured** includes damages for refusal of goods ready and those to be produced under contract. 26F(2d)33.

594-71 Mass 170NE403; 286Pa501, 134 A459; 297Pa483, 147A519 (where purchaser repudiates contract, seller must use every means reasonable to reduce injury); 199Wis30, 225NW185.

595-72 234 IllA9; 151Md690, 136A37; Mass 170NE403. **Verdict for damages held not excessive.**-234 IllA9.

595-73 273US337, 47SCt351, 71L ed 670.

595-74 108Conn632, 144A301. But see 207 Iowa245, 222NW886.

595-75 34GaA298, 129SE562; 117 Or 637, 244P531.

596-77 297Pa483, 147A519 (additional material required to carry out contract plus value of by-products obtainable has been held properly considered in determining loss of profits by buyer's repudiation).

596-79 Difference between value of article sold and contract price is proper measure of damages where article has no market value because specially made. 207 Iowa245, 222NW886.

596-83 CalA 262P783. **Time basis.**-125 Misc75, 210NYS54. **Measure of damages,** where goods are in process of manufacture at time of breach, is cost of goods so far as manufactured, plus profit which would have been made, less value of goods in process of manufacture. 6F(2d)990.

597-84 6F(2d)990; 49RI 168, 141A310. **It is not necessary for the seller to manufacture the goods,** etc. 49RI 168, 141 A310.

597-86 90CalA740, 266P362; 49RI 168, 141A310.

597-87 24F(2d)78; 90CalA740, 266P 362; 163La198, 111S675.

597-89 37F(2d)455; 101CalA704, 282 P425; 12LaA183, 124S562(2dcase); 96 PaSuper460 (amount received on resale not conclusive under circumstances); TexCivA 275SW70. **Where there is no market,** etc. 66Utah340, 242P391. Under statutes requiring only that seller exercise reasonable care and judgment in making resale, it is doubtful whether it is essential to prove market value in case of resale. 66Utah340, 242P391. **Seller is not required to sell at place of delivery** where buyer refused to accept goods. 3Del 497, 139A259. **Seller may establish his damages by sale for buyer's account.**-3Del 497, 139A259. **Under California civil code,** where property rejected is diverted to fill a prior order there is no resale under the provision relative to sale to satisfy seller's lien, and seller is entitled to recover difference between contract price and market value. 82CalA20, 254P937.

598-90 6F(2d)214; 16F(2d)190; 76 CalA767, 246P74; 92CalA598, 268P659; 99CalA631, 279P159; 101CalA704, 282 P425; 3Del 497, 139A259; 28Hawaii 211; 85IndA315, 151NE626; 213Ky 843, 281SW991; 224Ky238, 5SW(2d) 1070; 163La159, 111S661; 7LaA729; 165Minn406, 206NW931; 50Nev157, 254P1074; 230AppDiv69, 243NYS27; 131Misc53, 225NYS638; 286Pa501, 134 A459; 115 Okl 41, 242P205 (where sale made in accordance with statute); 38 OklACR86 (difference between contract price with interest from due date and net amount received on resale after deducting necessary expenses); 39 OklACR135; TexCivA 275SW70; TexCivA 283SW345. But see 37F(2d)876. **Amount allowed to seller held proper.**-213Ala669, 106S139. **In Oklahoma.**-115 Okl 141, 242P205.

598-91 66Utah340, 242P391.

598-92 33F(2d)83.

598-94 267US233, 45SCt295, 69L ed 589 (reasonable time for resale held not to commence till seller retook possession); 33F(2d)83; 221MoA600, 283SW 65. **Diligence of sellers** to save themselves from buyer's default held not to require sale to buyer's assignee who refused to pay contract price. TexCivA 292SW640.

598-95 267US233, 45SCt295, 69L ed 589; 267US248, 45SCt300, 69L ed597; 3Del 497, 139A259; 147Md516, 128A 359; 221MoA600, 283SW65. **That price realized was less than amount offered by original buyer** is not available as ground of complaint where offer was accompanied by false representations of inspection and was intended to induce seller to reduce price. 66Utah340, 242P391.

598-95½-New. Seller is not required, after breach by buyer, to continue deliveries to buyer's assignee to minimize damages. TexCommnA 299SW637.

598-96½-New. Seller cannot sue for damages, where resale price was more than contract price. 37F(2d)876.

599-97 32F(2d)195; 213Ala669, 106S 139; 267Mass98, 165NE878; 165Minn 406, 206NW931 (expense in handling and storing during period between refusal to accept and sale); 286Pa501, 134A459 (railroad charges, cartage, storage, and insurance); 297Pa483, 147 A519 (overhead expenses, consisting of salaries, taxes, legal fees, insurance, interest, and depreciation reserves, which are constant and will not be affected by performance of additional work, cannot be added to cost of manufacture to reduce damages allowable to seller); Alta [1926] 4DomLR538, [1926] 3West Wkly327. **Expenses incident to shipment of goods after notification by buyer to stop shipments** may not be recovered. 102WVa197, 135SE13.

599-99 50Nev157, 254P1074; 115 Okl 141, 242P205 (where sale made in accordance with statute); TexCivA 283 SW345 (broker's charge). But see 39 GaA654, 148SE296. **Salary of regular employee conducting resale** cannot be recovered. But see 163La198, 111S675.

599-4 49ND741, 193NW327.

599-8½-New. Protest fees on dishonored drafts are recoverable. TexCivA 283SW345.

599-8⅓-New. Attorney's fees.-In action against automobile dealer for breach of contract to allow stated amount for used car, plaintiff is not entitled to recover attorney's fees in absence of statute or stipulation authorizing recovery of same. 69Utah112, 252P 570.

599-8¼-New. Plaintiff manufacturing articles specially to fill defendant buyer's order is entitled to recover a reasonable charge for care and custody of merchandise on buyer's refusal to accept them, where nature of articles are such that they are not readily resalable. 132Misc414, 229NYS664.

599-9 1LaA105, 106 [quotCyc].

599-11 Contract provision, adjusting price to cost of production, applies in computing damages. 132Misc704, 230 NYS482.

600-16 22F(2d)59; 28Hawaii211; 222 AppDiv697, 225NYS436. **Where verdict for plaintiff** for breach of contract for sale of logs with interest fails to specify interest date, date when profits would

have been received held proper. 192NC 607, 135SE531.

600-16½-New. Measure for breach of contract to buy scales and accept transfer of lease is unpaid purchase price of scales less amount necessary to enable seller to perfect title thereto plus damages for refusal to accept new lease. 82Colo 320, 259P1027.

600-19 215Ala143, 110S372; Mass 172 NE789. **Evidence held insufficient to go to jury.**-231Ky374, 21SW(2d)478.

600-20 33F(2d)83 (reasonable time for resale of goods); 215Ala143, 110S372; 108Conn605, 143A853; 213Ky77, 280 SW478; 253Mass37, 148NE101 (amount ordered under indefinite contract and amount appropriated by seller); 240 Mich257, 215NW397; MoA 279SW761; MoA 299SW53; 192NC144, 134SE407; 138SC435, 136SE762. **Time when written contract became consummated,** is question of law for court. 102Conn626, 129A782. **Whether goods resold on buyer's failure to give shipping instructions** were of size specified in contract held for jury under evidence. 215App Div433, 213NYS634. **Refusal to direct verdict for defendant held not error.**-Mass 170NE403.

600-21 253Mass37, 148NE101 (whether seller's delay in deliveries was sufficiently serious to justify rescission by buyer); 253Mass424, 149NE159; 153Va 649, 151SE135. **Seller's proof of quantities delivered to buyer held** sufficient as basis for damages as against motion to dismiss. 213AppDiv587, 210NYS 816. **Whether buyer acted in good faith** in refusing offered guaranty is for jury. Iowa 233NW133.

600-22 Undisputed evidence held to make question of tender or excuse therefor one for court. 253 IllA551.

600-23 253Mass424, 149NE159.

600-25 15F(2d)1003 (whether defect material).

600-25½-New. whether buyer surrendered right to strict performance, 285Pa 131, 131A710.

600-25⅓-New. Whether buyer exercised option of rescission within reasonable time and with reasonable notice, MoA 10SW(2d)668.

600-26 41GaA12, 151SE830 (quality); 221MoA600, 283SW65; MoA 299SW53; 92PaSuper85. **Evidence held sufficient.**-23F(2d)167.

600-27 221MoA600, 283SW65; 215App Div433, 213NYS634. **Evidence held insufficient.**-23F(2d)167.

600-27½-New. Whether seller had duty to mitigate damages by reselling, 28F(2d)328.

600-23½-New. whether plaintiff took steps to minimize damages after notice, 131SC364, 130SE334.

600-29 177Ark1193, 7SW(2d)327; 207 Iowa245, 222NW886; MoA 25SW(2d) 125; 215AppDiv433, 213NYS634; RI 132A1 (claim for price of goods); 138 SC435, 136SE762. **Whether price obtained on resale is reasonable.**-231NYS 634. **Measure of damages is for court** to determine from all facts and circumstances. 24F(2d)78.

601-31½-New. On issue of damages for breach of contract whether seller of wood would have delivered substantial quantity before expiration of contract is for jury. 194NC736, 140SE738.

601-32 171Ark994, 287SW185; 87Pa Super243. **Refusal of instruction proper** as too broad and incomplete. 217Ala 280, 116S125. **Instructions held not erroneous.**-IndA 168NE585.

601-33 166Minn487, 208NW194 (proper instruction on measure of damages where there was no market for crop where breach occurred); 192NC230, 134 SE483. **In action by seller,** fact that buyer's customers canceled his contract on account of slow delivery does not warrant instruction that buyer was justified in canceling his contract with seller for slow delivery, and refusal of such instruction is not error. 253Mass37, 148 NE101. **Instruction held erroneous under evidence.**-295Pa408, 145A578. **Evidence held to justify instructions.**-MoA 25SW(2d)125.

601-34 33F(2d)60; 34F(2d)10; 253 Mass37, 148NE101 (instruction on apportionment of deliveries to various purchasers held correct). **Sufficiency of the instructions, etc.** TexCivA 275SW70. **Instruction held proper.**-220Ky74, 294 SW798.

601-35 Sufficiency of instruction as to resale.-37F (2d)455.

601-36 Instructions held proper.-130 Okl 104, 265P108.

601-38½-New. Charge as to bulk of goods corresponding to sample held erroneous in not making materiality of number of defective articles proper test. 15F(2d)1003.

601-38½-New. Instructions held erroneous. 19F(2d)273.

601-39 Verdict for seller unauthorized where evidence showed that indeterminable amount of fruit tendered to buyer under contract was from tracts other than those designated in contract. 38 GaA404, 144SE43.

601-42½-New. Verdict is not excessive because it does not allow for repairs where there is nothing in contract to indicate that plaintiff usually made repairs. 224 IllA598.

601-42⅓-New. Judgment warranted by findings. SD 233NW277(2dcase).

602-45 98CalA706, 277P506; 290Pa67, 138A85. **Advances held recoverable** without express promise to repay. 290 Pa67, 138A85.

602-46 255 IllA514 (retention of goods and partial recovery where mutual mistake as to value).

602-47 Exhaustion of supply of goods sold held not to preclude recovery of advances. 290Pa67, 138A85.

602-47½-New. Buyer has been held entitled to recover payment, if goods fail to comply with contract and custom of trade. 213AppDiv143, 210NYS145.

602-47⅓-New. Buyer has no lien for repayment of price in absence of breach of express or implied warranty. 69Utah26, 252P270.

602-47¼-New. If buyer is ready, able, and willing to comply with contract at time and place of delivery but is denied right of reasonable inspection he is entitled to recover money advanced. 123 Or 243, 261P701.

602-47½-New. Where furniture is not that ordered, buyer has right to hold furniture till reimbursed for freight paid. 11LaA242, 123S410(2dcase).

602-48 5LaA164.

602-49 102CalA213, 283P107; 236 IllA 275 (under Sales Act); 9LaA316, 119S 468(2dcase).

603-52 102NJEq341, 131A901; 247NY 1, 159NE700; 127Misc50, 215NYS281; 127Misc810, 216NYS496; Okl 291P521; TexCivA 285SW683; Alta [1927] 2Dom LR871. **Misrepresentations as to past earnings of hotel** held to give buyer no lien for repayment of purchase money. 69Utah26, 252P270.

603-52½-New. Buyer may not recover from seller tax included in price of goods which were subsequently declared nontaxable, in absence of proof of fraud, deceit, or mistake of fact. 125Misc886, 213NYS128.

603-53 42 Ida729, 249P771; 257Mass 135, 153NE566; 247Mich485, 226NW222 (1stcase); 32 OhA310, 166NE912; 138 Okl234, 280P819 (repudiation of contract by seller); 123 Or243, 261P701; 128 Or142, 273P954; TexCommnA 280 SW517.

604-57½-New. or his failure to give shipping directions, 125Misc81, 210NYS 40.

604-59 MoA 11SW(2d)1110.

604-60 CalA 265P957; 236 IllA275; IndA 168NE706 (seizure of automobile by seller and tender of reasonable value by buyer); 11LaA541, 121S617; 252 Mass135, 147NE598; 138Misc310, 245 NYS662; TexCivA 283SW634; 151 Wash243, 275P705. But see TexCivA 16 SW(2d)871.

604-64 RI 133A440.

604-65 80CalA104, 251P663; 163La86, 111S608; Nev 243P46. **Buyer of goods who paid manufacturer's war tax** in addition to price of goods is entitled to recover amount thereof from manufacturer in case of refund under ruling that sale was not taxable. 244NY351, 155NE669.

605-67 80CalA104, 251P663.

605-68 Fla 129S587.

605-69 145Wash236, 259P712.

605-72 Fact that buyer had resold goods prior to arrival held not coercion chargeable to seller. 145Wash236, 259 P712.

605-75 255 IllA27; 224Ky56, 5SW(2d) 271; 11LaA213, 123S424 (transportation charges to place of inspection); 129 Misc211, 221NYS113; 136Misc11, 240 NYS78; 289Pa569, 137A807; 292Pa334, 141A230; 135Wash318, 237P716 (failure to furnish bank guaranty for payment of drafts). But see 168La1073, 123S717; 12LaA625, 125S757.

605-76 85CalA616, 260P333. **Tender of amount less than due eight months after due date held insufficient.** 289Pa569, 137A807.

605-77 103CalA764, 284P933; 129Misc 211, 221NYS113; 289Pa569, 137A807.

606-78 289Pa569, 137A807.

606-81½-New. Uniform Sales Act relieving seller from liability to defaulting buyer on contract or for profit on resale does not authorize seller to retain balance of initial installment of purchase price after deducting expenses of care and resale. 50Nev157, 254P1074.

606-86 43 Ida64, 249P254; 233Ky306, 25SW(2d)726; 234Mich385, 208NW609, 610 [citCyc]; 247Mich485, 226NW222 [citCJ&Cyc] (1stcase); 127Misc810, 216 NYS496; 133SC369, 131SE32 (buyer who discovers misrepresentations after payment may elect to demand rescission and return of purchase price); TexCivA 285SW683; TexCivA 286SW326.

606-87 43 Ida64, 249P254, 257 [cit Cyc]; 133SC369, 131SE32 [citCyc] (limited to recovery of price except where loss is due to refusal of seller to accept tender of return of property); 69 Utah161, 253P196.

606-88 43 Ida64, 249P254, 257 [cit Cyc]; 234Mich385, 208NW609 [citCyc]; 133SC369, 131SE32; 69Utah161, 253P 196.

606-88½-New. Where seller rescinds contract, buyer may recover purchase money paid under common count for money had and received. 68CalA652, 229P1025.

606-89 234Mich385, 208NW609, 610 [citCyc].

607-90½-New. On seller's refusal to remove baking oven, upon buyer's rescission for cause, buyer's remedy was by foreclosing lien and sale of oven. 221 AppDiv146, 223NYS107.

607-90⅓-New. Action for rescission in equity is inappropriate where recovery of money may be had in action at law. 247NY1, 159NE700 (same proof required in either action).

607-93 200Wis40, 227NW256.

607-93½-New. Tender of balance of purchase money eight months after due held insufficient on which to base action to recover amount paid by buyer. 287 Pa569, 137A807.

607-96 98CalA787, 277P1099.

607-1 242 IllA466.

607-3 95CalA99, 272P330; 127Misc810, 216NYS496; Alta [1927] 2DomLR871.

607-4 30F(2d)647; 221Ala378, 129S 36; 236 IllA275; 233Ky306, 25SW(2d) 726 (tender of return must be kept good); 127Misc810, 216NYS496; 28 OhA38, 162NE616; Okl 291P521; 133 SC369, 131SE32. But see Vt 146A72. **Under Sales Act,** offer to return, by letter, held sufficient, where goods were worthless under guarantee. 236 IllA 275. **That goods not returned represent small proportion of price** does not excuse failure to return them before suit. MoA 24SW(2d)191.

608-12½-New. Where sale was rescinded by mutual consent, right of action for price paid will not be defeated because of inability to return small part of stock purchased, but deduction of proper amount may be made. 233Mich 401, 206NW374.

608-12⅓-New. Notice of rescission is unnecessary in order to plead total failure of consideration and recover money paid. 208 Iowa512, 226NW130.

608-13 9LaA674, 119S781.

609-17 Prescription.-1LaA638.

609-19½-New. Buyer's delay in bringing suit after demanding reimburse-

ment upon discovery of shortage worked no prejudice warranting defense of laches. 163La86, 111S608.

609-19⅓-New. It is not defense to action to recover purchase price that agreement contained provision for damages for breach. 96Cal 145, 273P825.

609-20 See also **Ont** [1929] 1**DomLR** 616.

609-20½-New. In action for price, on rescission of sale, of bonds, held president of company, bonds of which were sold, is not necessary party, so that purchaser could bring him in as defendant. 127Misc50, 215NYS287.

609-20⅓-New. Buyer may maintain suit to recover payments after assignment of rights where consent to assignment was essential and not given by seller. 257Mass135, 153NE566.

609-20¼-New. Depositary of earnest money under contract for sale is necessary party to action for recovery of deposit. 168La1073, 123S717.

609-21 127Misc810, 216NYS496 (sale must be expressly alleged). **Petition held sufficient.**-290Pa67, 138A85. **Petition construed as one on implied promise to repay amount of draft paid before refusal to accept goods and not as one for damages for breach of contract. TexCommnA** 280SW517. **Buyer electing to rescind on ground of fraud is not required to plead damages** to recover purchase price. **MoA** 295SW474.

609-22 Allegation that seller concealed corporation's intent to incur obligations greatly in excess of bonds offered for sale held to raise triable issue. 127 Misc50, 215NYS281. **Complaint held insufficient.**-135Wash189, 237P305 (reliance not alleged). **Complaint held to raise triable issue as to seller's false representations** regardless of statement precluding guarantee. 127Misc50, 215 NYS281. **Mala fides of seller need not be alleged.**-127Misc50, 215NYS281.

609-23 Complaint held to state cause of action.-131Misc390, 226NYS715.

609-24 207 Iowa1038, 221NW918.

609-27½-New. Seller's allegation that buyer's attorney made eccentric demand in passing on title was not equivalent to allegation that he acted arbitrarily or in bad faith. **TexCommnA** 11SW(2d)507.

609-27⅓-New. Suit for purchase price under express contract may be amended to recover reasonable value on implied contract. 41GaA83, 151SE661.

609-27¼-New. Buyer suing for purchase price on theory of rescission may amend pleading to claim for breach of warranty. 57ND824, 224NW668.

610-30 1LaA127. **Any evidence of sale such as mentioned in statement of case** is competent. **MoA** 23SW(2d)1098.

610-41½-New. In action by buyer to recover partial payment of purchase price under common count for money had and received, evidence of mutual rescission of contract is admissible. 68 CalA652, 229P1025.

610-41⅓-New. Evidence is admissible which tends to show buyer was acting in good faith and was willing to proceed with contract. 123 **Or**243, 261P701.

610-43½-New. , and memoranda of buyer showing weight of goods as weighed by him is admissible where, before payment, seller agreed to refund any excess shown thereby. **NJSup** 131 A87.

610-43⅓-New. In such action, where contract provided that railroad weight was to be accepted by parties, buyer may show that railroad weight was wrong, **NJSup** 131A87.

610-43¼-New. and he may produce evidence upon alleged promise of seller to refund any excess due shown by reweighing. **NJSup** 131A87.

610-44½-New. In buyer's suit to recover payments made on purchase price, credit slip sworn to by plaintiff is properly allowed where defendant, though he denies signing, admits on cross-examination that he recognizes item. 166La497, 117S568.

610-44⅓-New. In buyer's action against seller for money had and received in fraudulently inducing buyer to purchase motor truck, part of series of notes given for purchase price of truck are admissible to show amount paid. 88**IndA** 267, 163NE613.

611-47½-New. In action to recover part of purchase price paid for automobile represented to be a new car and claimed to be a used car, it may be shown that the car purchased had parts in it that did not belong to it and that it showed other indications of being an old car. 122**Kan**339, 252P468.

611-48 Sufficiency of evidence, etc. 21 **F(2d)**309; 80CalA104, 251P663; 87 **CalA**721, 262P779; **CalA** 265P957; 41 **GaA**38, 152SE136; 200 **Iowa**1349, 206 **NW**610; 122**Kan**339, 252P468; 11**LaA** 84, 120S264; 9**LaA**84, 118S835; **MoA** 15**SW(2d)**895; **Okl** 293P220; 136**Wash** 53, 238P911. **Evidence of quality.**-136 **Wash**53, 238P911.

611-48½-New. Admissibility.-To recover purchase price, evidence that engine failed to function properly is admissible. 219**AppDiv**353, 220NYS115.

611-48⅓-New. Photograph of alleged defective motorboat properly excluded as failing to show alleged defects. 219 **AppDiv**353, 220NYS115.

611-48¼-New. It is presumed that value of goods is at all times equal to price, where there is no evidence to contrary. 30**F(2d)**647.

611-48⅕-New. Seller, when sued for deposit made to cover purchase price, must plead and prove that attorney's rejection of title was arbitrary or in bad faith. **TexCommnA** 11SW(2d)507.

611-48⅙-New. Evidence held insufficient to show complete rescission of contract before suit. **MoA** 24SW(2d) 191.

611-49 Iowa 229NW321; 125**Me**514, 132A425; 85**PaSuper**245 (written contract subsequently canceled and substituted for oral contract).

611-51 See also 180**Minn**78, 230NW259.

611-52 Instructions held erroneous and properly refused.-123 **Or**243, 261P701.

611-52½-New. Under some circumstances it is question for jury whether buyer accepted or rescinded, and sufficiency of evidence justifying submission of question of rescission is mixed question of law and fact. 132Misc866, 230 NYS529.

611-52⅓-New. Whether buyer kept tender of return good is question of fact. 233**Ky**306, 25SW(2d)726.

611-53 68**CalA**358, 229P868 (**instructions erroneous for disregarding condition of goods as bearing on liability of buyer**). **Instructions held sufficiently accurate, etc.** 122 **Or**243, 261P701.

611-57 Instructions held confusing.-**MoA** 24SW(2d)191.

611-58 Affirmative charge for plaintiff held proper. 214**Ala**286, 107S808.

611-63 Whether plaintiff waived right to rescind held jury question. **MoA** 24 **SW(2d)**191.

611-63½-New. Ordinarily, question of buyer's default, precluding recovery, is for jury. 289**Pa**569, 137A807.

611-63⅓-New. Measure of recovery for jury. 176**Ark**1203, 3SW(2d)50.

611-63¼-New. Reasonable time for dealer to make allowance for old car is for jury. 38**GaA**756, 145SE474(2dcase).

611-65 11**LaA**541, 121S617. **Amount paid by seller for freight charges** should not be deducted. 241**Mich**487, 217NW 403.

612-76½-New. Judgment on rescission is not erroneous for failure to return seller's property where value was deducted from amount due buyer. 90**CalA** 715, 266P367.

612-76⅓-New. Court's finding supported conclusion of law that buyer should recover back sum paid in anticipation of reaching agreement. 98**CalA**706, 277 P506.

612-76¼-New. Other findings in addition to breach of warranty are required to justify entry of judgment in favor of purchaser for money paid. 227**AppDiv** 369, 237NYS552.

612-78 45 **Ida**340, 262P514. **Lien on goods.**-45 **Ida**217, 261P679.

614-97 TexCivA 10SW(2d)1012.

614-1 In subvendee's action against vendor evidence of vendor's acts damaging to vendee held properly excluded. **MoA** 27SW(2d)487.

614-5 Sufficiency of evidence, etc.-45 **Ida**340, 262P514; 196NC558, 146SE229 (1stcase).

615-15 15**F(2d)**897; 102**CalA**213, 283P 107; 35**GaA**550, 134SE142 (defective installation of lighting plant); 37**GaA** 227, 139SE588; 127**Misc**810, 216NYS 496; 225**AppDiv**628, 234NYS137.

615-18 TexCivA 13SW(2d)438.

615-19 127**Misc**810, 216NYS496; 285 **Pa**257, 132A342 (measure of damages is difference between real value at time of sale and fictitious value paid); **TexCivA** 29SW(2d)893.

615-20 124**Kan**413, 260P622; **226App Div266**, 235NYS1; **TexCivA** 280SW 266; **TexCivA** 13SW(2d)733.

616-21 214**Ky**443, 283SW407. **Remedies of buyer on delay of delivery.**-214 **Ky**443, 283SW407.

616-22 214**Ky**443, 283SW407.

617-31 42 **Ida**729, 249P771. But see 32 **OhA**186, 165NE592.

617-36 23**F(2d)**567; 118 **Okl** 26, 246P 438; **TexCivA** 283SW634. **Election of remedies.**-71**CalA**723, 236P322.

617-40 224**Ky**284, 6SW(2d)249, 252 [citCyc]; 7**LaA**485.

618-45½-New. Where cabbages are to be packed and shipped in carload lots for resale in merchantable condition, seller is not required to inspect in order to recover damages for breach of warranty. 147**Va**996, 133SE500.

618-46 7**LaA**577.

618-47 In Philippines.-44**Philippine**4.

618-52 15**F(2d)**897; 98**CalA**517, 277P 183; 147**Va**996, 133SE500.

618-52½-New. Buyer accepting defective goods after knowledge based on inspection must use reasonable efforts to reduce loss in order to recover. 147**Va** 996, 133SE500.

618-53½-New. Under New York Personal Property Law, buyer's remedy for breach of warranty is action for damages provided notice is given to seller within reasonable time. 244NY73, 154 NE826.

619-54 38**GaA**756, 145SE474 (2dcase); 226**AppDiv**266, 235NYS1.

619-55 Where buyer sets time for seller to recede from repudiation of contract, on seller's refusal action for anticipating breach accrues when buyer accepts repudiation. 126Misc625, 213 NYS540.

619-57 See also 44**Philippine**4.

619-57½-New. Prescription in action quanti minoris see 1**LaA**261.

619-58 258**Mass**483, 156NE37. **In Louisiana.**-3**LaA**345. **Remedy by cross complaint.**-44**Philippine**4.

619-60 48 **Ida**376, 282P88 (rescission or damages); 234**Mich**385, 208NW609; 133SC369, 131SE32 (buyer who discovers misrepresentation after payment may elect to retain property and sue for damages); **TexCivA** 286SW326. **Fact that contract was reduced to writing** does not preclude action based on fraud. 120 **Kan**278, 243P316.

619-63 43 **Ida**64, 249P254, 257 [cit Cyc].

619-65 43**F(2d)**923 (ability to pay not shown or notice given); 262**Mass**39, 159 **NE**524; 315**Mo** 927, 288SW20 (shipment deemed accepted if buyer fails to report defects in certain time and manner); 217**AppDiv**667, 217NYS138. **In Michigan.**-27**F(2d)**234.

620-68 140**Miss**155, 106S17, 18 [citCyc].

620-70 140**Miss**155, 106S17.

621-74 140**Miss**155, 106S17, 18 [citCyc].

621-79½-New. Clearly a rescission of contract by buyer is not condition precedent. 71**CalA**723, 236P322.

622-95 1**LaA**708.

622-99½-New. It is a defense to action by purchaser that injury arose from purchaser's own inexperience in handling goods. **Alta** [1927] 2**DomLR**728.

623-3½-New. In buyer's action for breach of contract to deliver coal, seller could not set off damages for buyer's failure to order coal during months when parties agreed that no coal should be ordered or delivered because of embargo, and charge authorizing jury to allow such damages was erroneous. 31 **F(2d)**435.

623-3⅓-New. Seller could not retake possession of goods, and then, when sued

for their value by buyer's administrator, set off debts due to seller. 178Ark 553, 11SW(2d)463.

623-4 TexCivA 275SW161.

623-6½-New. Plaintiff, doing business as corporation, is proper party, though goods were sold as partnership. 236 IllA472.

623-8 23F(2d)593; 221Ala472, 129S39; TexCivA 9SW(2d)177. **Complaint held sufficient.**-86CalA640, 261P493; Mont 289P571. **Complaint held insufficient,** etc. 221Ala472, 129S39; 73CalA612, 238 P1066; 222Ky635, 1SW(2d)1056. **Petition held sufficient.**-37GaA227, 139SE 588.

623-9 41GaA630, 154SE191.

623-15 44 Ida370, 256P947.

624-18 22AlaA241, 114S418; 115 Okl 144, 242P196.

624-19 22AlaA241, 114S418; 115 Okl 144, 242P196. **Complaint held to state cause of action for general and special damages.**-215Ala311, 110S396. **Petition not showing right to recover special damages** held demurrable. 40GaA799, 151SE526. **Allegation of special value and facts showing value was in contemplation of contract** is sufficient. Okl 292 P12.

624-19½-New. Failure to tender shipping documents is sufficiently alleged, by fair implication, by allegation that no goods were shipped. 127Misc51, 251 NYS214.

624-19⅓-New. Petition alleging rescission of contract is not sufficient to state cause of action for breach. TexCommnA 299SW857.

624-21 **Sufficiency of allegations.**-82 CalA444, 255P771. **Allegations not constituting fraud of seller as excuse for nonperformance.**-74CalA333, 240P39.

625-31½-New. Plea held demurrable which interposed defense to action on warranty and not to action as brought, for breach of executory contract. 215 Ala311, 110S396.

625-32½-New. Plea of rescission held insufficient as failing to set up release of damages prior to breach. 215Ala311, 110S396.

625-33 **Answer held sufficiently to allege** bad faith of buyer's attorney in refusing to approve title to goods to be delivered to buyer. TexCivA 297SW 885.

625-37 170La602, 128S649; 240NY233, 148NE331.

625-38 111Conn564, 150A523; 283Pa 352, 129A81 (market value at point other than mines provable under allegations). **Evidence admissible.**-TexCivA 283SW264; Wash 288P1063. **Claim of cancellation of contract for nonpayment** cannot be made under defense that there was no obligation to deliver goods claimed as constituting breach of contract. 242NY106, 151NE146.

626-41 103WVa64, 136SE602.

626-43½-New. Claim that contract was canceled for failure to make payments cannot be made under defense that there was no obligation to deliver particular goods under contract. 242NY106, 151 NE146.

626-43⅓-New. Seller relying on act of God to excuse performance under contract is required to plead it. 85Mont31, 277P433.

627-59 **Variance not material.**-143Va12, 129SE374.

627-60 TexCivA 9SW(2d)762.

627-61 43F(2d)557; 162La99, 110S102.

627-62 43F(2d)557; 142Wash134, 252 P523; Wis 232NW547.

628-63 262Mass39, 159NE524; 195NC 173, 141SE542.

628-64 50Nev157, 254P1074 (demand and refusal to deliver).

628-69 82CalA710, 256P279; 308Mo 453, 273SW95 (delay in delivery); 287 Pa232, 134A386. **Provisions of contract excusing delivery.**-287Pa232, 134A386. **Defendant has burden of proving** that buyer's attorney acted in bad faith in refusing to approve title to property to be transferred to buyer. TexCivA 297 SW885.

628-71½-New. Burden is on defendant to prove excuse, under clause of contract exempting seller from liability for failure to deliver when due to certain causes. 308Mo 453, 273SW95.

628-72 168Ark94, 269SW372 (correspondence regarding inspection); 37 GaA213, 139SE583; 153Md621, 139A 353; 252Mass265, 147NE892 (evidence to identify subject matter, where action was based on substitution by seller of other parts for those shown to buyer); 308Mo 453, 273SW95 (letter held admissible on issues of demand for delivery and waiver of any rights of buyer under contract, though letter contained statement as to buying of goods in market and this question was not pleaded); 32 OhA254, 167NE904. **Evidence admissible.**-69CalA763, 232P465 (in action for breach of contract to build high pressure press blue prints and part lost submitted by purchaser as specifications are admissible to show what the contract was); 35GaA137, 132SE234; 256 Mass233, 152NE235 (Gen. L. c 9 § 11; c 110 § 5; c 156 § 4; c 233 § 74).

628-73 148SC511, 146SE534; Wash 290P999.

629-78 37GaA213, 139SE583.

629-81 TexCivA 274SW643 (embargo by federal government). But see 298 Pa249, 148A81, 67ALR1428. **Refusing to permit seller to testify as to condition of sheep** at time of intended delivery is not error. Ida 292P235.

629-85 242NY106, 151NE146.

629-88 **Conversations** between plaintiff and defendant's manager are admissible under proof of letter by defendant referring plaintiff to manager as to contract matters. NJSup 142A564.

629-89 39F(2d)399; 220Ala581, 126S 857 (diminution of damages); 35GaA 511, 133SE878 (exclusion as speculative error); MoA 9SW(2d)681; 148SC511, 146SE534; 151SC484, 149SE246; 142 Wash134, 252P523. **Evidence admissible.**-TexCivA 9SW(2d)177. **Exclusion of evidence of traveling expenses to secure** delivery held proper. TexCivA 278SW 334.

630-91 223Ky544, 4SW(2d)368.

630-92 142Wash134, 252P523.

630-93 283Pa352, 129A81.

630-94 219Ala666, 123S52; 226AppDiv 174, 235NYS86; 283Pa352, 129A81.

630-95 But see 219Ala666, 123S52.

630-96 Ida 292P235.

631-7 283Pa545, 129A580 (evidence of profits excluded where breach, if any, was buyer's).

631-8 **Available market.**-44 Ida370, 256 P947.

631-10½-New. **Where evidence does not show that there was no market value at time and place of delivery,** other evidence is inadmissible. 217MoA592, 274 SW941.

631-12 **Evidence held sufficient.**-180Ark 1167, 22SW(2d)169; 97CalA600, 275P 970; 99CalA473, 278P902; 37GaA57, 138SE917; 37GaA213, 139SE583; 232 Mich112, 205NW142; 116 Okl 285, 244P 781; 118 Or621, 247P765; 121 Or658, 257P10; TexCivA 274SW652; TexCivA 275SW235 (contract to supply steel); TexCivA 294SW645; 151Wash382, 275 P737; 187Wis653, 205NW418; 194Wis 520, 217NW298. **Sufficiency of evidence to warrant recovery by plaintiff.**-Ida 292P235. **Opinion of witness** as to whether there was a market for goods and probable profit held not to justify exception to usual measure of damages. 147Va758, 133SE788.

631-13 20F(2d)63; 33NM295, 265P35 (evidence sufficient to support judgment for one defendant); Can [1930] 1DomLR369 (liability to obtain shipping space as cause of delay). See also LaA 130S843. **Evidence held sufficient.**-103 CalA764, 284P933; 111Conn564, 150A 523; TexCivA 274SW643. **Evidence held insufficient.**-86CalA640, 261P493. **Evidence held to show breach by buyer warranting seller's rescission.**-159La 987, 106S539.

631-14 **Sufficiency of the evidence.**-44 Ida370, 256P947; TexCivA 294SW645.

632-18 See also MoA 9SW(2d)681.

632-19 95Fla31, 116S2; 226AppDiv174, 235NYS86. **Sufficiency of evidence,** etc. 171Ark521, 285SW5; 203Cal 211, 263P 806; 69CalA763, 232P465; 35GaA137, 132SE234; 44 Ida370, 256P947; 317 Mo 125, 295SW109; 21 OhA482, 153NE 272; 147Wash585, 266P696; 107WVa 465, 148SE854. **Sufficiency of evidence to sustain verdict,** etc. 86CalA640, 261 P493; 82CalA710, 256P279; 124Kan 413, 260P622; 232Mich112, 205NW142. **Failure to prove damages** is fatal to recovery of even nominal damages. 142 Wash134, 252P523.

632-20 37GaA227, 139SE588; 223Ky 633, 4SW(2d)731; 163La799, 112S726; 252Mass314, 147NE863 (damages not limited to loss by purchase which buyer is compelled to make elsewhere); 127 Misc461, 216NYS473; 127Misc810, 216 NYS496; Wash 288P1063; Wis 232NW 547. **Damages for anticipatory breach.**-Wash 290P999. **Seller held liable to French buyer for damages where shipment included Costa Rican sugar and contract called for Cuban sugar,** former being subject to high duty in France. 127Misc461, 216NYS473. **Buyer can recover damages for breach of contract only up to time** buyer itself breached contract. 157Md341, 146A223.

632-21 127Misc461, 216NYS473 (expenses and damages incurred); 226App Div266, 235NYS1; 137Misc685, 243NYS 312 (under statute); 21 OhA482, 153 NE272.

632-22 173Ark1062, 294SW382.

633-24 12LaA216, 125S778; TexCivA 208SW(2d)266 (buyer cannot include in his damages arising out of purchase of worthless engine amount paid for electricity when engine is not in operation); 142Wash134, 252P523.

633-25 253Mass200, 148NE441; Tex CivA 283SW634. **Buyer is not entitled to damages caused by himself.**-232Ky 489, 23SW(2d)914.

633-27 220Ala581, 126S857; 173Ark 1062, 294SW382.

633-28 **Where buyer is not justified in refusing to receive and unload car,** he cannot recover accumulation of demurrage, storage, and extra switching. 128 Kan584, 278P759.

633-28½-New. **On failure to prove that defendant was accepted as member of coöperative organization,** principles applicable to ordinary contracts of sale apply in respect of damages. 90CalA 10, 265P832.

633-28⅓-New. In action for damages for shipment and delivery of rice of inferior quality, purchaser under statute is entitled to interest from date of commencement of action. 99CalA438, 273P 880.

633-29 29F(2d)327 [certiorari den 279 US846, 49SCt343(1stcase), 73Led991]; 173Ark1062, 294SW382; TexCivA 287 SW294; TexCommnA 38SW(2d)412. **Subsequent agreement to adjust matter** satisfactorily to buyer authorizes recovery of difference between values as represented and as delivered at place of delivery, where seller knew buyer was to resell goods, rather than at place of making contract. 15F(2d)897.

633-30 TexCommnA 38SW(2d)412.

633-32 39F(2d)399; 41F(2d)41; 219 Ala666, 123S52; 168Ark1167, 272SW 848; 176Ark1204, 4SW(2d)523; 90CalA 1, 265P828; 95Fla31, 116S2, 3 [quot Cyc]; 40GaA799, 151SE526; 45 Ida217, 261P679; 223Ky782, 4SW(2d)699; 160 La443, 107S299, 300 [quotCyc]; 161La 1077, 109S844; 163La159, 111S661; 163La799, 112S726; 126Me389, 138A 689; 249Mich12, 227NW700; 217MoA 592, 274SW941; 126Misc625, 213NYS 540; 21 OhA482, 153NE272; 32 OhA1, 167NE406 (where goods are sold to innocent purchaser by one who knows them to be stolen, seller must be presumed to have intended natural and logical consequences, including arrest, prosecution, and trial of buyer, and cannot be heard to say that such consequences, including cost and expenses, are not natural result of such sale); 115 Okl 144, 242P196; 129 Okl 296, 264 P889; TexCivA 280SW266; Utah 287 P908; 147Va960, 133SE685; 142Va769, 128SE55; 107WVa465, 148SE854; Can [1930] 1DomLR369. **Measure of damages for anticipatory breach.**-215App Div140, 213NYS106. **Cost and freight contract** to New York from Cuba requires delivery on shipboard, damages being based on market price in Cuba on last day of month of shipment. 126 Misc625, 213NYS540. **Delivery "cost**

and freight New York April shipment from Cuba" if to be in Cuba damages are based on market price on April 30, but if in New York damages are based on market price on date on which goods shipped from Cuba on April 30, by usual means, would arrive in New York. 126Misc625, 213NYS540. **For anticipatory breach** it is error to limit damages to market value within reasonable time after breach. 215AppDiv140, 213NYS 106. **On repudiation of contract,** measure of damages is governed by market value at time of repudiation, based on quantity and delivery conditions in contract. 126Misc585, 241NYS200.

633-32½-New. whether breach is by failure to deliver on due date, 126Misc 625, 213NYS540.

633-32⅓-New. or by anticipatory breach before due date. 126Misc625, 213NYS540.

635-34 30NM566, 240P469.

635-38½-New. Where goods tendered do not conform to contract and buyer refuses to accept them, he may, in action for breach of contract, recover amount which he has paid on purchase price. 71CalA723, 236P322.

636-42 126Misc585, 214NYS200.

636-47 34F(2d)649.

636-52 221Ky819, 299SW978.

637-60 168Ark1167, 272SW848; 95 CalA7, 271P1096(2dcase); 99CalA438, 278P880; 35GaA137, 132SE234; 168La 1078, 123S719; 4LaA585; 7LaA292, 293 [citCyc]; Mass 168NE776; 308Mo 453, 273SW95; 283Pa352, 129A81. **Market price should be taken at time** shipment should have arrived and not at time shipment should have been made. 240 NY507, 148NE660. **Damages measured by value of performance at stipulated time.**-253NY166, 170NE532.

637-64 175Ark816, 300SW433. **If there is no agreement,** etc. 165La788, 116S 186.

637-66 21AlaA560, 110S322.

638-68 219Ala666, 123S52; 245NY61, 156NE97 (construing Property L. § 148). But see 203Cal 257, 263P804. **Market prevailing at time notice given of refusal of delivery** is controlling where such time appeared to be reasonable date to expect delivery. **TexCivA** 274SW652.

638-69 But see 245NY61, 156NE97.

638-70 99CalA438, 278P880; 127Misc 51, 215NYS214; **TexCivA** 280SW266. **Though technical place of performance of c. i. f. contract was in different place** than were shipping documents were to be delivered and payment made, market price at place of delivery is proper basis for damages. 127Misc51, 215NYS 214.

638-71 217MoA592, 274SW941; 194 Wis520, 217NW298.

638-72 217MoA592, 274SW941.

638-75 194Wis520, 217NW298.

639-77 Words qualifying minimum tonnage will be disregarded in determining quantity as to damages. 36F (2d)982.

640-91½-New. Where buyer has paid only part of price in advance, statutory measure of damages in some jurisdictions is the excess, if any, of value of property to buyer over amount which would have been due seller under contract, if it had been fulfilled, 75CalA 283, 242P735.

640-91⅓-New. and it is error in addition thereto to award plaintiff amount of his advance payment on account of purchase price. 75CalA283, 242P735.

640-92 163La799, 112S726; 98PaSuper 17. **Buyer could not recover** where he purchased goods contrary to provisions of contract. 39F(2d)49.

641-93 28F(2d)328; 175Ark816, 300 SW433; 223Ky782, 4SW(2d)699; MoA 285SW1028. But see 283Pa352, 129A 81.

641-96 21AlaA560, 110S322.

641-97 37GaA227, 139SE588.

641-3 37GaA227, 139SE588.

642-5 223Ky782, 4SW(2d)699.

642-17 21 OhA482, 153NE272.

642-18 232Mich112, 205NW142; 115 Okl 144, 242P196; 295Pa131, 144A909.

643-19 In absence of knowledge that buyer would save fuel expense by operating evaporator with another or cause to know that he intended to do so, seller is not liable for amount that would be saved, contract providing for no liability for special damages. 27F(2d) 234.

643-20 213Ala660, 106S142; TexCivA 297SW601.

643-20½-New. Loading charges are proper element of damages for breach of contract for sale of lumber f. o. b. cars. 171Ark521, 285SW5.

643-20⅓-New. Cost of surfacing lumber in excess of contract price held proper element of damage for breach of sale contract, requiring seller to surface lumber as directed. 171Ark521, 285 SW5.

644-37 22AlaA336, 115S689; 45 Ida 217, 261P679; 21 OhA482, 153NE272; 126 Or345, 269P342; 33PortoRico 6; TexCivA 283SW264.

644-38 21 OhA482, 153NE272; Tex CivA 283SW264.

644-39 226Ky306, 10SW(2d)1109; Okl 292P12; 141SC182, 139SE395; TexCivA 283SW264; 146Va641, 132SE840.

645-42 126 Or345, 269P342, 345 [cit Cyc].

645-43 40GaA799, 151SE526.

645-45½-New. Where profits are direct and can be proved with reasonable certainty they may be recovered. Va 154 SE600.

645-46 232Mich112, 205NW142. **Damages held too remote.**-Va 154SE600.

645-48 TexCivA 278SW334 (traveling expenses to secure delivery).

645-49 28F(2d)518; 240NY507, 148 NE660 (arrival of goods at destination); 253NY166, 170NE532.

646-51 59ND313, 229NW808. **Loss of profits from inability to thresh** must have been occasioned by defendant's breach and not by adverse weather conditions. 59ND313, 229NW808. **It must appear with reasonable certainty** that damage would not have occurred if defendant had fulfilled his contract. 59 ND313, 229NW808.

646-53 59ND313, 229NW808.

646-57 TexCivA 13SW(2d)962.

647-63 Irrigation pumps for farm.-76 CalA460, 245P206.

647-66 151SC484, 149SE246.

647-75 127Misc310, 216NYS496; 44 Philippine4.

647-76 15F(2d)897; 43F(2d)309; 127 Misc810, 216NYS496; 144 Okl 63, 289P 737; 44Philippine4; TexCivA 20SW (2d)266 (plus special damages). See also 160La443, 107S299. **Exception to rule.**-15F(2d)897.

648-77 23F(2d)567.

648-78 Difference between contract price and price plaintiff compelled to pay may be recovered. 118 Okl 26, 246 P438.

648-79 3LaA239.

648-80 24F(2d)104; TexCivA 297SW 601. **Damages from delivery of cholera infected hogs** include value of hogs which died, including other hogs of seller, and expenses of veterinary and disinfection. 130Kan385, 286P203.

648-82 253Mass200, 148NE441. **Knowledge that goods are to be resold** and that loss of profits will result if they are defective does not justify award of special damages. 43F(2d)689 (buyer held not entitled to damages for loss of good will).

649-85 See also 44Philippine4.

649-87 229AppDiv407, 242NYS335.

649-89 147Va912, 133SE498.

649-90½-New. Failure of seller of pump to keep it in repair as agreed does not render him liable for damages for delay in making repairs where buyer did not give him any notice that he would suffer special damages from delay. 173Ark1062, 294SW382.

649-90⅓-New. Dairymen knowingly reselling sour milk as sweet cannot recover from their vendors for resulting loss of business. 223Ky544, 4SW(2d) 368.

649-92 247Mich493, 226NW239.

649-93 Ida 292P235.

649-94 37GaA213, 139SE583. See also TexCivA 278SW334. 217AppDiv667, 217NYS138 (holding evidence not to make out case of seller's breach as matter of law). **Sufficiency of evidence to warrant submission,** etc. 275US113, 48 SCt52, 72Led190; Ark 31SW(2d)138; 35GaA137, 132SE234; 207 Iowa1063, 224NW80; 140Miss155, 106S17; 308Mo 453, 273SW95 (question of delay due to railroad congestion properly withdrawn from consideration of jury). **Submission of all issues.**-TexCivA 18SW(2d) 750.

650-95 29F(2d)801; 213Ala7, 105S697 (refusing affirmative charge held proper under evidence); 220Ala581, 126S857; 85Colo 184, 274P821; 37GaA213, 139SE 583; 252Mass314, 147NE863; 5PaDist &Co 603; 86PaSuper396; RI 134A13; RI 135A158; TexCivA 278SW334; TexCivA 284SW643 (that contract of sale was superseded by subsequent agreement); 142Wash134, 252P523; 152 Wash131, 277P453. **Damages held for jury.** 253Mass374, 149NE115.

650-96 232Mich112, 205NW142; 151 Wash382, 275P737.

650-97 45 Ida217, 261P679.

650-1½-New. or a clause excusing delay for causes beyond seller's control. 176Ark1204, 4SW(2d)523.

650-2 237 IllA334 (whether delivery was within reasonable time); RI 136A 765 (evidence as to reasonable time for delivery and rescission held for jury).

650-3 252Mass314, 147NE863; 308Mo 453, 273SW95; TexCivA 274SW643 (by subsequent agreement).

650-4 Whether delivery had been prevented by act of third person, within terms of contract, held for jury. 7 F(2d)873.

650-8 148SC511, 146SE534.

650-9½-New. Whether purchaser knew or in exercise of ordinary care should have known that goods received were not goods ordered is for jury. 35GaA 511, 133SE878.

650-10 237 IllA334; 147Va996, 133SE 500. **Instructions held erroneous.**-237 IllA334 (as to time of performance). **Instructions on agreement for inspection** held proper. 168Ark94, 269SW372. **Instructions on burden of proof** held sufficient. 308Mo 453, 273SW95. **Instructions on immaterial issues** should not be given. 318 Ill 345, 149NE284. **Instructions on waiver of delay** in deliveries of installments held proper. 308Mo 453, 273SW95. **Instruction as to acceptance of order, taken by agent,** held erroneous. 237 IllA334. **Instruction as to construction of printed and written portions of contract** held erroneous. 237 IllA334. **Instruction as to construction of sales contract** as to reasonableness of time of delivery is of "utmost importance." 237 IllA334. **Instructions held proper.**-MoA 17SW(2d) 615. **Instruction held not erroneous.**-86PaSuper396. **Refusal of proper instruction** held reversible error. 170 Ark144, 278SW964.

650-11 41GaA178, 152SE293; 252Mass 314, 147NE863; 266Mass55, 164NE820; 247Mich493, 226NW239; **Instructions held sufficient.**-308Mo 453, 273SW95. **Instruction as to measure of damages** held justified by evidence. 142Va769, 128SE55. **Instruction held proper.**-37 GaA57, 138SE917.

650-12 215Ala311, 110S396; Ida 292P 235; 143Va12, 129SE374 (under evidence acts of plaintiff's agents not hinging on plaintiff).

650-14 215Ala311, 110S396; 168Ark94, 269SW372 (instruction properly refused as misleading). But see MoA 9SW(2d) 681.

650-14½-New. Instruction properly refused as argumentative.-168Ark94, 269 SW372.

650-15 252Mass314, 147NE863; 143Va 12, 129SE374 (instruction that failure of defendant's agent to furnish money did not affect plaintiff declared proper where plaintiff had no connection with financing plan).

650-16 252Mass314, 147NE863.

651-18 143Va12, 129SE374; 103WVa 64, 136SE602. **Refusal of requested instructions held error.**-26 OhA485, 160 NE482.

651-21½-New. In action for breach of contract in failing to deliver goods at contract price, it is not error to instruct

jury that buyer, by paying during certain period price higher than that fixed by contract, did not waive its right thereafter to insist on contract price. 147Va960, 133SE685.

651-23 29F(2d)327 [certiorari den 279 US846, 49SCt343(1stcase), 73Led991]; 147Va960, 133SE685.

651-25 147Va996, 133SE500.

651-28 69CalA763, 232P465.

651-35 See also 220Ky6, 294SW773 (property held to pass to buyer); 146 Wash543, 264P705. **Conditional sale** requires absolute obligation of purchaser to pay for the goods. 21F(2d)984. **Other definitions.**–243Mich401, 220NW 780.

652-36 216Ala21, 112S428. **Effect of custom and statutory provisions.**–132 Misc455, 230NYS102.

652-38 215Ala632, 112S109; 165Minn 252, 206NW385 (executory).

652-41½-New. Purpose of criminal statute prohibiting removal of goods to another country is to protect seller by restricting situs. 94Fla254, 113S629 (elements of offense).

652-41¼-New. District judge may, in making order for removal and sale of goods under conditional sales agreement, give purchaser leave to bid at sale. Alta [1927] 2DomLR1148.

652-41¼-New. Statutory regulation.–West Virginia Uniform Conditional Sales Act is valid legislative declaration of reasonable public policy. 102WVa 305, 135SE4.

652-41⅛-New. Sales Act generally applies to contracts of conditional sale of personal property. Mass 167NE229.

652-45 8F(2d)810; 220Ala216, 124S 514; 75CalA629, 243P468; 103CalA 220, 284P235; 161Ga371, 131SE44; 176 Minn483, 223NW908; 147Wash560, 266 P697; Ont [1930] 3DomLR32. See 243 Mich401, 220NW780. **Retention of title by agent** does not preclude idea of conditional sale. 220Ala216, 124S514. **Relation of seller and buyer** is contemplated. 147Wash560, 266P697.

653-46 75CalA629, 243P468; 43 Ida1, 249P89, 48ALR1225.

653-47 75CalA629, 243P468, 470 [cit CJ]; IndA 168NE506. See also 91Fla 709, 109S677. But see 220Ky6, 294SW 773.

654-48 196Cal686, 239P324.

654-49 75CalA629, 243P468. But see 147Wash560, 266P697.

654-50 75CalA629, 243P468.

654-51 75CalA629, 243P468.

654-55 30F(2d)551; 31F(2d)197; 103 CalA220, 284P235; 202 Iowa58, 209NW 430; 284Pa41, 130A259; 8PaDist&Co 169; 147Wash560, 266P697. **Reservation of title authorizing seller to retake possession on default** is outstanding characteristic of conditional sale, though contract provides alternative remedy of resale and application of proceeds toward balance due. 86CalA785, 261P506. **Contract held to be conditional sale** and not merely contract to pay specified sum from given fund. TexCivA 15SW(2d)93. **Provision in contract** reciting that one agrees to sell and other agrees to pay, and requiring purchaser to keep property insured in company acceptable to seller, has been held merely to raise inference that sale contract is conditional. 101CalA552, 281P1097 (extraneous circumstances may be considered where contract is ambiguous as to whether it is absolute or conditional sale). **Distinguished from trust receipt.**–Mass 171 NE643.

654-55½-New. Possession of personal property temporarily given with privilege to buy does not of itself show present transfer of ownership. 284Pa 41, 130A259.

654-55⅛-New. Note reciting promise to pay stated sum on or before certain date to order of named corporation, and agreement that title to property for which note is given shall not pass from payee till note or any judgment thereon is paid in full, is not conditional sale contract but negotiable instrument constituting mere promise to pay money, and referring to sale as mere incident. 151Va795, 145SE252.

655-57 35F(2d)439; 8PaDist&Co 169.

655-58 202 Iowa58, 209NW430; 220 Ky6, 294SW773; 5PaDist&Co 746 (evidence sufficient to establish conditional sale); 8PaDist&Co 169; 8PaDist&Co 743.

655-60 96PaSuper112; 12PaDist&Co 401.

656-61 8F(2d)493.

657-62 31F(2d)197; 104Conn559, 133 A673; 36GaA525, 137SE128; 265Mass 51, 163NE651; 222MoA1068, 9SW(2d) 840; 226AppDiv343, 234NYS357; 46 Okl ACR52; 49RI144, 141A77. See also 8 F(2d)493. **If main purpose is to pass title for agreed price** ultimately, contract will generally be held one of conditional sale rather than lease. 104Conn 559, 133A673. **In Pennsylvania.**–96Pa Super112.

658-66 251Mich329, 232NW232; Tex CivA 48SW(2d)1056; 146Wash543, 264P 705.

659-70 75CalA629, 243P468 (passes title).

659-71 214Ala267, 107S744; 75CalA 629, 243P468; 86CalA785, 261P506; 98 NJEq523, 131A524 (chattel mortgage not conditional sale); 48RI363, 138A 215. **Conditional sale contract** is similar to chattel mortgage in that title is reserved solely as security for performance by buyer. DelCh 150A81.

660-72 233Mich161, 206NW321 (evidence held not to justify submission of question of intent to jury). **Title retaining feature of contract is not destroyed** by seller carrying on his books general account containing both conditional sales and other items where manner of carrying account showed no intention of claiming any security on open accounts. 239Mich295, 214NW110, 55ALR1157.

661-74 In Canada.–[1926]CanSC485, [1926] 3DomLR712.

661-77 135 Okl147, 274P464.

661-78 31F(2d)799; IndA 168NE506; 126Kan519, 268P859; 118 Or62, 245P 1083; 285Pa557, 132A798.

662-79 7F(2d)11 (use of phrase "on consignment" on subsequent memorandum of delivery held not to affect character of contract).

662-80 87CalA117, 261P743. **Reservation of title as security and obligation to pay purchase price** may be embodied in same or different instruments. 118Kan 656, 236P447. **Trust receipts** obligating maker to hold property to order of seller for collection, sale, or exchange for other securities and payment of proceeds to seller or order held to constitute conditional sales reserving title in seller. 69CalA756, 232P748. **Trust receipt held sufficient** to create conditional sale relationship between parties. 202 Iowa938, 211NW248.

662-85 35GaA427, 133SE312 (purchase of mules from estate sufficient to show title retained).

663-87 69CalA756, 232P748 (trust receipts given to bank on payment by it of maker's indebtedness under conditional sales contracts held not to be origin of bank's title, but acknowledgment by maker of bank's title theretofore acquired of property in his possession).

663-88½-New. Conditional sale contract which, as recorded and docketed, indicates that deferred payments are to begin thirty days after date of shipment, but not stating date of shipment, is defective. 33F(2d)730.

663-89 215Ala632, 112S199.

663-90 8F(2d)493; 16F(2d)464; 163Ga 872, 137SE268. **Contract is valid between parties,** even when oral. 163Ga 872, 137SE268. **Statute is in nature of statute of frauds.**–163Ga872, 137SE268. **Statute outlaws all reservations of title** against third persons, when not in writing. 163Ga872, 137SE268.

663-91 220Ala155, 124S208; 155Wash 171, 283P1091.

663-93 13F(2d)628; 29F(2d)916; 33F (2d)730; 33GaA627, 127SE617 (description held sufficient); 128Me139, 145A 900; 220MoA507, 275SW984; 102NJL 181, 130A562; 127 Or206, 271P728 (sufficient); 155Tenn250, 292SW1 (note in which property was insufficiently described held insufficient to retain title); 135Wash228, 237P313. See also 101CalA 479, 281P1057. **Sufficient description.**–220MoA507, 275SW984; MoA 18SW(2d) 112(2dcase); 197NC371, 148SE461; 158 Tenn341, 13SW(2d)325; 135Wash228, 237P313. **Error in description** which is not controlling element may be aided by parol evidence. 102NJL181, 130A562. **Sufficiency of descriptions is matter for court,** that of actual identity is one of fact. 33GaA627, 127SE617. **Property described as "Nash roadster"** held sufficiently identified. 143Wash253, 255P 104. **Certainty required** in description is only such certainty as will enable third parties, aided by inquiries which contract itself suggests, to identify property. 197NC371, 148SE461. **Unsubstantial variance** in description of conditional sale contract and filed instrument purporting to be copy is immaterial. NJCh 146A346. **Nonexistence of other chattels to which terms of conditional sales contract could** apply may validate description in contract which otherwise would be too indefinite. 197NC371, 148 SE461.

663-93½-New. Conditional Sales Act in reference to descriptions stands by itself and is not affected by act relating to purchase and sale of motor vehicles. 102 NJL181, 130A562.

663-93¾-New. Description of property held sufficient where one is put on inquiry leading to knowledge of property intended. 102NJL181, 130A562.

663-93¼-New. No one but creditors having lien on property or subsequent purchasers without notice can object to insufficiency of description. Iowa 232 NW67.

663-94 Written contract must be executed completely "at time of sale," so that later insertion of serial number of machine sold invalidates transaction, under statute. 16F(2d)464. **Recording of conditional sales contract without signature of vendor** does not constitute constructive notice to bona fide purchasers for value who subsequently take property as security under deed of trust without actual notice. 153Va183, 149SE544. **Requirement of acknowledgment** does not invalidate contract executed before witnesses or destroy right to prove by such witnesses. AlaA 129S709.

664-95 147Wash294, 266P134. **Acknowledgment** is necessary in some states. 104Conn559, 133A673.

664-96 Description of truck held to be sufficiently definite to permit parol evidence of additional proof of identity. 33 GaA627, 127SE617.

664-99 86CalA785, 261P506; 3Del 66, 130A392 (even before passage of Uniform Conditional Sales Act); 236 IllA162; 254 IllA505 (under statute); 202 Iowa938, 211NW248 (trust receipt); NH 146A 165; 287Pa358, 135A216; 48RI363, 138 A215; 50RI499, 149A611. **Uniform Conditional Sales Act** does not render contract invalid by vendor's retention of title, nor prevent enforcement of terms of contract. 3Del 66, 130A392. **Contract for sale of meat** for term of year with stipulation for reservation of title until payment of drafts held valid contract of conditional sale. 175Ark341, 299SW34. **Terms will be enforced** as agreed on between parties. 133 Or85, 288P404.

665-2 206 Iowa356, 220NW324. **Statute, embodying validity of conditional sales with delivery to buyer,** is not against public policy. 236 IllA162.

665-4 Right to resell in ordinary course of trade does not convert contract into absolute sale. Iowa 232NW67.

665-4½-New. Agreement void for noncompliance with statute is not revived nor cured by delivery of subject of sale to vendee. NS [1930] 1DomLR882.

665-10 Stipulation for repossession and release of seller from his agreement to convey title to buyer is regarded as agreement for rescission, though buyer has agreed unconditionally to pay. 123 Or215, 261P691.

666-10½-New. Rescission of contract of sale on ground of fraud must be prompt upon discovery of facts entitling party to rescind. 116 Okl 88, 243P181 (under statute).

666-10⅝-New. Retaking of property by seller and later release thereof to purchaser on part payment is not rescission of contract. 35GaA768, 134SE803.

666-10¼-New. Where buyer is deceived by vendor into executing contract, he may, on discovering deception, rescind. 102NJEq341, 131A901.

666-10½-New. Waiver of right to rescind slight use of automobile after discovery of seller's breach of warranty does not prevent buyer from suing to rescind, where he offers to return car as soon as he knows of fraud. Mass 167 NE229.

666-10¾-New. On abandonment of contract by buyer with seller's consent, buyer is not entitled to recover damages for conversion by seller repossessing himself of car or to recover moneys paid on account of price. Alta [1929] 3DomLR954.

666-11 8F(2d)493; 214Ky9, 282SW190; 10LaA626, 119S735; 245NY186, 156NE660; 214AppDiv158, 211NYS763 (holding law as to filing does not affect sale between foreign residents in another state in respect to property at the time located in such state). **Courts of Kentucky will enforce conditional sales contracts** made in states where such contracts are upheld. 214Ky9, 282SW190. **Delay of thirty days after default, under conditional sale contract made in another state,** in taking possession held not to deprive seller of priority as against subsequent purchaser. 214Ky9, 282SW190. **One who, after being in Kansas where conditional sale agreement and mortgage on automobile were recorded,** purchased automobile elsewhere, held charged with constructive notice. 214Ky9, 282SW190. **Vendor of automobile in Kansas under conditional sale contract,** who later took mortgage on same property, held to have preference over purchaser with notice in Illinois. 214Ky9, 282SW190. **What constitutes reasonable time after default under conditional sale contract made in another state** for one retaining title to take possession in order to preserve his rights against subsequent purchaser depends on circumstances. 214Ky9, 282SW190. **In Louisiana.**-12LaA287, 125S499.

666-12 12LaA287, 125S499; 124Or592, 265P435.

667-16 104Conn559, 133A673. But see 82NH297, 133A21. Contra 245NY186, 156NE660. **Valid as against attachment** made before ten days after notice of removal. 29Ariz293, 241P305. **Law of place of beneficial operation and effect** of conditional sale contract governs contract made in another state where contract is made with reference to such place (104Conn559, 133A673), even though contract recites it is "made" in other state and shall be "executed" in accordance with laws of such other state (104Conn559, 133A673), and such place will be presumed to be that with reference to which parties contracted (104Conn559, 133A673), since terms "made" and "executed" mean signing and delivery only, and cannot be construed to mean "governed" (104Conn559, 133A673).

667-17 167La667, 120S45; 9LaA651, 120S250.

667-18 Terms of contract and intention deducible therefrom determine rights of parties. 203Iowa418, 212NW711, 56ALR233.

667-19 215Ala632, 112S199; 176Ark977, 5SW(2d)325; 75CalA629, 243P468; 27Hawaii614; 239IllA522; 265Mass51, 163NE651; 123Or119, 261P63, 55ALR269; 100Vt41, 134A641; 147Wash390, 266P178; Ont [1925] 3DomLR107. See 284Pa41, 130A259. **Possession of property** and right to its use and to acquire title is sufficient consideration for promise to pay price or deficiency after resale. 41Ida155, 238P530. **Reservation of title is only incident to securing payment** of purchase notes and does not represent debt. 118Kan656, 236P447. **Conditional sale** never raises question of lien, but one of title. 7F(2d)11. **In Kentucky.**-27F(2d)206; 220Ky6, 294SW773. **Vendee is equitable owner.**-127Misc221, 215NYS540. **Note authorizing seller to retake engine sold** if he deemed it unsafe did not authorize him to retake engine because not insured as required. TexCivA 295SW653. **Buyer cannot affirm sale so far as it provides for acquisition of title** in case payments are made and disaffirm in so far as it concerns amount to be paid. 292Pa403, 141A236.

668-20 226AppDiv343, 234NYS357. **Buyer acquires equitable property right.**-105WVa375, 143SE113.

668-21 91Fla709, 109S677.

668-22 43Ida1, 249P89, 48ALR1225; 51Nev89, 269P602; 226AppDiv343, 234NYS357. **Interest subject to execution.**-226AppDiv343, 234NYS357. **Attaching creditor may pay balance of price** thereby terminating rights of seller. Utah 287P175.

668-22½-New. Execution creditor of buyer can reach interest of buyer only by paying amount due on price. 35GaA334, 132SE783.

668-22¾-New. Vendee acquires not only right of possession and use, 43Ida1, 249P89, 48ALR1225.

668-22¼-New. but right to become absolute owner by complying with terms of contract. 43Ida1, 249P89, 48ALR1225.

668-22½-New. Of these rights no act of vendor can divest him. 43Ida1, 249P89, 48ALR1225.

669-23 226AppDiv343, 234NYS357.

669-24 143Wash102, 254P453 (sale by seller divests him of all title).

669-26 175Ark341, 299SW34, 37 [quot Cyc].

669-28 That writ from federal bankruptcy court in bankruptcy of former operator of butcher shop fixtures had been issued did not justify removal thereof by seller contracting to convey them, free from any defect in title, to one purchasing shop from concern taking it over after bankruptcy. 151Wash382, 275P737.

669-28½-New. Uniform Conditional Sales Act makes title in vendor not absolute (3Del66, 130A392), preventing vendor from dealing with it inconsistent with vendee's rights (3Del66, 130A392).

669-28¾-New. Unconditional license to sell mortgaged personalty operates as waiver of security so far as purchaser is concerned, 100Vt41, 134A641.

669-28¼-New. Purchaser gets good title though sale is conditioned on mortgagor's turning over proceeds of sale to owner. 100Vt41, 134A641.

669-28½-New. Conditional seller must comply with conditions, and on his failure to do so, stands as one who sold without permission. 100Vt41, 134A641.

669-28¾-New. Collateral agreement extending time for paying part due notes representing purchase price of engine sold held valid extension of maturity of debt. TexCivA 296SW653.

669-28⅞-New. Relation between purchaser and seller under conditional sales contract, pursuant to statute, is that of mortgagor and mortgagee. 196NC512, 146SE130.

669-28⅛-New. Each case arising under conditional sales contract must be determined in light of words of contract involved. Or 289P1058.

669-33 But see 101Vt42, 140A160. **Buyer cannot contract so as to attach lien to truck** prior to seller's rights. 22AlaA21, 112S758.

670-34 75CalA629, 243P468; 27Hawaii614; 28Hawaii519; Iowa 226NW168 (in another state). **Vendee may convey only** such title as he possesses. 71CalA690, 236P179. **Vendor is entitled to protect himself against vendee's transfer** to one financially irresponsible or other undesirable person by stipulation against transfer without consent of owner. 71CalA690, 236P179.

670-36 128Or1, 273P387; Can [1928] 3DomLR175(1stcase).

670-37 100Vt292, 137A336 (compliance with condition is necessary to validate resale). **Transfer by purchaser** to corporate successor without consideration held not sale in regular course in compliance with condition. 100Vt292, 137A336.

670-37½-New. Attachment by creditor of vendee constitutes "lien" within provision of contract that property be kept free of all liens and encumbrances. 3Del66, 130A392.

670-38 Alta [1928] 4DomLR837. **Insurance.**-218Ala324, 118S545(2dcase); TexCivA 9SW(2d)1046; 148Wash642, 269P789; 149Wash184, 270P434. **Risk of loss is on seller only where vendee is without fault and no agreement to contrary.**-102CalA100, 282P510.

671-40 43Ida1, 249P89, 48ALR1225. **Forfeiture of automobile** for illegal use. 102CalA100, 282P510.

671-40½-New. Under a stipulation of the contract against illegal use, buyer of automobile must use reasonable care to prevent such use. 102CalA100, 282P510.

671-41 93Fla247, 111S519; 250NY484, 166NE175. **Discharge of debt in bankruptcy** does not constitute payment. 166Ga173, 142SE887.

671-43 70CalA222, 232P758; 254IllA505. **Bill of sale** is not necessary to transfer title. 70CalA222, 232P758. **Where purchase is by husband with wife's money,** and she pays balance, she can convey free title to automobile. 36GaA537, 137SE119.

672-46 177Ark1114, 9SW(2d)571.

672-47 CalA 291P458; 239Mich295, 214NW110, 55ALR1157; 222MoA1068, 9SW(2d)840.

672-48 43F(2d)599; 131Misc786, 228NYS166.

672-48½-New. That purchaser's tender of overdue installments of purchase price is not in cash is immaterial, where tender is refused, because of seller's claim that he had sold property to another. 177Ark1114, 9SW(2d)571.

672-49½-New. Transfer of notes as accommodation paper as contemplated by parties does not pass title to buyer where seller retains contracts and takes up notes on buyer's failure to pay them. 239Mich295, 214NW110, 55ALR1157.

672-50 But see 220Ala216, 124S514.

673-53½-New. Automobile delivered in consideration of promissory note, exchanged automobile and cash was such agreement that seller had no right of repossession except upon breach of condition as set forth in agreement. 102NJL193, 130A611.

673-53¾-New. Where seller and buyer respectively agree to sell and buy, buyer is directly obligated to pay price. 133Or85, 288P404.

673-53¼-New. Necessity of entry of satisfaction on payment of mortgage. Iowa 233NW114.

673-55 Utah 287P175 (where contract so provides). **Possession may be deemed** without recourse to courts, under contract. 122Or597, 260P222, 55ALR180. **Refusal to pay installments due** constitutes breach. 133Or85, 288P404.

673-56 222MoA1068, 9SW(2d)840.

673-57½-New. Where contract is in effect conditional sales contract, parties may extend time by execution of new notes in renewal of last note due under contract. 265Mass51, 163NE651.

673-57¾-New. Default in payment of price does not constitute conversion.-37GaA267, 139SE909.

673-57¼-New. Default may be discharged by tender of balance due. Del Ch 150A81.

673-57⅞-New. Relief from forfeiture. CalA 290P122.

673-58 Extension of time for payment of installment waives forfeiture clause enforceable only by default of purchaser 196Cal686, 239P324. **Default in making installment payments** may be waived. 128Or600, 275P596. **Agreement held not to amount to waiver.**-136Misc720, 241NYS632.

673-59 31F(2d)50; 96CalA465, 274P428; 96CalA465, 275P525; 28Hawaii519; 89IndA59, 165NE766; 148Miss575, 114S396; 20OhA131, 153NE137; 100Vt292, 137A336 (implied license to resell held waiver when acted upon); 151Wash382, 275P737. **Seller, waiving compliance,** cannot insist on forfeiture for noncompliance. 196Cal686, 239P324. **Additional consideration for delay** held waiver of seller's right to repossess goods. 148Miss575, 114S396. **Mere inaction of vendor by failure to retake possession** under option to retake or waive claim to chattel is not waiver of condition reserving

title. 28Hawaii519.

673-60 20 OhA131, 153NE137.

673-61 Indorsement of notes.-But see 42 Ida411, 245P936. **Assignment of conditional sales notes** as collateral security for general line of credit does not vest title in holder of notes. 42 Ida411, 245 P936. **Filing claim for purchase price** with receiver makes sale absolute. 5F (2d)812.

673-62 98Vt429, 129A302.

674-68½-New. Upon buyer's default as to first installment seller's repossession under agreement to resell and apply proceeds on contract is waiver of his right of forfeiture. 205Cal 245, 270P447.

674-69 87CalA406, 262P396; 100CalA 715, 280P1003. **Held not waiver.**-29 Ariz293, 241P305. **Where contract provides for waiver of condition by writing,** oral waiver cannot be shown. 216 AppDiv583, 215NYS694. **Evidence held to show waiver.**-CalA 290P122. **Waiver of time** as essence held sufficiently pleaded. CalA 290P122. **Court should resolve all doubts in favor of buyer** when weighing evidence. CalA 290P122.

674-70½-New. Suit against purchaser for recovery of goods or their value does not constitute waiver of title precluding subsequent action against purchaser's wife to whom goods were given by purchaser. 168Ark84, 269SW66.

674-70½-New. Consideration for waiver.-Agreement to waive title to property given by purchaser to wife in consideration of wife's agreement to hold property and not return it to purchaser is not supported by consideration. 168 Ark84, 269SW66.

674-70¼-New. Mistaken belief of seller that his debt was secured by bond given by purchaser's wife in seller's action against purchaser for possession does not invalidate seller's agreement to waive retention of title. 168Ark84, 269 SW66.

674-70⅙-New. Conditional purchaser of goods may waive notice of resale after seizure by agreement made after seizure. Ont [1927] 2DomLR399.

674-70⅙-New. Fact that vendor's agent knew that property was to be used in rented building held not waiver of right to property by vendor. 214Ala263, 107 S743.

674-70⅐-New. Reinstatement of right to declare forfeiture after waiver of default.-That seller waived his right to declare forfeiture under conditional sales contract because of buyer's failure to pay monthly installments does not prevent reinstatement of right to declare forfeiture. 128 Or600, 275P596.

674-70⅛-New. In such case right is reinstated, where seller, after default of buyer, advises buyer that it would be impossible to carry delinquencies past certain date, and prior to repossession notifies buyer to turn over trucks to seller, if unable to go through with deal offered by seller. 128 Or600, 275P596.

674-70⅛-New. Seller had right to waive provision of contract that illegal use of automobile should terminate the agreement. 102CalA100, 282P510 (effect of failure to repossess car).

674-70 1/10-New. Pledging contract and indorsement of notes has been held not an abandonment of title. 50RI 499, 149 A611.

674-73½-New. Perfection of mechanics' liens may preclude claim that sale was conditional. 17F(2d)968.

674-73½-New. Assertion of materialman's lien is inconsistent with claim to same materials through conditional sale contract. 17F(2d)968.

674-75 205Cal 245, 270P447. But see CalA 261P1067; Or 289P1058. **Strict performance may be reinstated by notice** after such waiver. 146Wash416, 263P 178. **Stipulations for nonwaiver of default** by acceptance of overdue payments held valid. 146Wash416, 263P178. **Acceptance of payments on account of installments** does not waive provision making time of essence of contract. 86 CalA785, 261P506. **Intent to waive term of contract** is for trial court. CalA 290 P122. **Seller must give notice of intention to require strict performance** where he acquiesced in payment of previous installments after time fixed. CalA 290P 122.

674-75½-New. In action to recover on purchase-money note given under conditional sales contract, against purchaser and subpurchaser, seller, electing to sue on note and not to repossess property, cannot have judgment declared lien on property as against subpurchaser, on ground that purchasers are entitled to have property subjected to lien of judgment for seller, not having attached property. 148Wash675, 270P105.

675-76 177Ark1114, 9SW(2d)571. **Seller cannot declare forfeiture for default** during period of extension even though extension granted without consideration. 167Minn322, 209NW15. **Oral agreement to extend time of payment without consideration** does not constitute waiver of right to declare forfeiture where note is due in its entirety. 100CalA715, 280P 1003.

675-77 Oral extension of time held no waiver of other contract stipulations giving seller right to retake for named reasons. 216AppDiv583, 215NYS694.

675-77½-New. Substitution of different article.-Buyer suggesting and accepting substitution of different article and making payments till default cannot set up abandonment of written contract and substitution of oral one. 86CalA785, 261 P506.

675-77⅙-New. Strict compliance with provisions of conditional sales contract providing for installment payments may be waived. 100CalA715, 280P1003.

675-77¼-New. Seller's filing suit for balance due waived provision for terminating contract because of illegal use. 102CalA100, 282P510.

675-77⅛-New. Conditional seller's acceptance of balance of purchase money after rescinding contract revives it and entitles purchaser to possession. 40GaA 819, 151SE695.

675-77⅛-New. Provision in conditional sales contract permitting personal action against buyer for recovery of debt without waiving right of holder of contract to pursue property has been held void. 98Fla304, 123S785.

675-78 165Minn252, 206NW385; MoA 32SW(2d)116; 38 OklACR442. Contra 48 Ida254, 282P273(2dcase); 146Miss 476, 112S580, 57ALR530; 100Vt292, 137 A336.

675-85 220Ala677, 127S243; 202 Iowa 938, 211NW248; Utah 287P175; 144 Wash620, 258P517 (where requirement as to filing is complied with); Ont [1925] 3DomLR107. **On satisfying statutory requirements as to filing,** conditional vendor's right in property sold as against third persons is same as in any other chattel sold by him subject to provisions of contract. 3Del 66, 130A392. **In Georgia.**-163Ga872, 137SE268.

676-86 CalA 280P1013; 28Hawaii 519; 202 Iowa938, 211NW248; 134Misc721, 236NYS28; 144Wash620, 258P517 (where requirement as to filing is complied with). **Contractual provisions against transfer.**-71CalA690, 236P179. **Vendee may convey only such title as he** possesses. 71CalA690, 236P179. **Agent in possession of chattel under agreement amounting to conditional sale** cannot convey to third person, not claiming lack of notice, for preëxisting debt. 202 Iowa 938, 211NW248.

676-87 Cal 280P1013; 144Wash620, 258P517.

677-91 197NC174, 148SE39.

677-94½-New. Seller cannot refuse to accept unpaid balance of purchase price from purchaser of buyer though contract provided against transfer without seller's consent and seller did not consent to transfer. 71CalA690, 236P179.

677-94⅓-New. Assignee of vendor's right under conditional sales contract held entitled to recover pipe organ sold on default in payments. 102NJEq79, 139A438.

677-94¼-New. Where seller, repossessing goods under contract of conditional sale, and title is not revested, buyer from him gets no greater rights than he had. Vt 146A248.

677-94⅓-New. As respects third persons, no effect can be given to conditional sales contract, where seller has no title. 152Wash534, 278P417.

677-94⅙-New. Assignee of conditional sale contract cannot, by mere act of repossessing trucks, acquire lien on trucks, when he already owned legal title, nor create lien by retaking own property, as such lien by levy or attachment, is purely statutory. 134Misc721, 236NYS28.

678-98 22AlaA21, 112S758 (lien creditor); Mass 168NE916; 51Nev89, 269P 602, 605 [citCJperColeman,J]; 5PaDist &Co 746; 145Va627, 134SE585; 144 Wash620, 258P517 (where requirement as to filing is complied with); 193Wis 97, 213NW646; Man [1928] 4DomLR 917. **The contrary has been held,** etc. 8 PaDist&Co 743. **Creditor without notice.**-191Wis233, 212NW790, 54ALR266. **In Georgia.**-163Ga872, 137SE268. **Attaching creditor may discharge balance of price** as against vendor where buyer is not in default. 51Nev89, 269P602. **Assignee of conditional seller** did not acquire lien by attachment or levy on tires and tubes of plaintiff so as to render plaintiff's conditional sale contract void. 134Misc721, 236NYS28. **Attaching creditor of buyer** can acquire no interest in property adverse to rights of seller. Utah 287P175.

679-99 250NY484, 166NE175; 128Misc 455, 219NYS115. **Actual notice alone** of unrecorded conditional sales contract will defeat judgment creditor. NJ 148A 756.

679-99½-New. Rights of creditors will nevertheless attach, even though vendor tries to retain lien for purchase price. 284Pa41, 130A259 (dictum).

679-99⅓-New. Vendor's privilege cannot arise under conditional sale. 1LaA 409.

679-99¼-New. Levy or attachment requisite to creation of lien on property conditionally sold must be one evidenced by judicial process at suit of creditor. 134Misc721, 236NYS28.

679-99⅙-New. Where conditional seller of trucks did not bring action against purchaser to recover purchase price, his assignee therefore at time of seizure of truck is not a creditor, since no resale of trucks was had. 134Misc721, 236NYS28.

679-3 155Wash160, 283P686.

679-5 193Wis97, 213NW646.

680-7 174Ark575, 297SW846; 75CalA 629, 243P468; 103CalA335, 284P736; 318 Ill 432, 149NE225; 236 IllA162; 248 IllA279; Mass 168NE800; Miss 111S 109; 148Miss616, 114S387; 155Miss343, 124S430(2dcase); 214AppDiv158, 211 NYS763 (applying California law); 160 Tenn203, 22SW(2d)354 (title of vendor superior); 145Va627, 134SE585; 152 Wash534, 278P417. See also 37GaA480, 140SE774. But see 253NY450, 171NE 703. Contra 202 Iowa938, 211NW248; 292Pa86, 140A766. **Delivery of automobile** held to be sufficient consideration for purchaser's promise to adopt conditional sales contract. 213Ala156, 104S277. **Lessor repossessing land after recording** of sales contract held not bona fide purchaser. 287Pa358, 135A216. **Mere transfer of possession by seller** gives no indication of ownership. 236 IllA162. **Preëxisting debt is not such value as to make one who takes property** from purchaser under conditional sale a bona fide purchaser for value. 202 Iowa938, 211 NW248. **Purchaser held liable to seller for latter's interest.**-148Miss616, 114S 387.

681-8 177Ark579, 7SW(2d)318; 70 CalA41, 232P489; 87CalA117, 261P743; 91CalA16, 266P576; 91CalA22, 266P 579; CalA 280P1013; 107Conn365, 140 A758, 759 [citCyc]; 137Misc332, 244NYS 455; 92PaSuper425; 92PaSuper433; 49 RI 434, 143A783; 102WVa370, 135SE 286; Man [1930] 1DomLR346 (effect of constructive notice). But see BC [1930] 2DomLR166. **Statute which protects bona fide purchasers** for value without notice of unrecorded conditional sales does not change rule as to what may be sufficient actual notice. 213Ala635, 105S 897. **Means of knowledge is equivalent of knowledge** and whatever is sufficient to put one on inquiry is sufficient to charge him with notice of everything to which inquiry would lead. 213Ala635, 105S897. **Transfer of automobile to salesman to pay commissions due** is

transfer in usual course of business. 87 CalA117, 261P743. In Manitoba.–[1930] 3DomLR275. In Ontario.–[1929] 4DomLR806.

682–11 202 Iowa938, 211NW248; 218 AppDiv263, 218NYS143. But see 42 F(2d)515.

682–11½–New. Finding that "trust" was good faith purchaser not warranted. 134Wash81, 234P1046.

682–11⅓–New. Purchaser of automobile from lessee in reliance on certificate of title reciting encumbrance has no right against lessor. 12PaDist&Co 401.

682–14 If lex loci situs requires certain formality of acknowledgment and registry, omission is not cured by attestation and registration of lex loci contractus. 42F(2d)515.

682–15 42F(2d)515; AlaA 129S709; 33 Ariz483, 266P6; CalA 292P660; 36GaA 525, 137SE128; 202 Iowa938, 211NW248 (trust receipt in nature of conditional sale must be recorded to give constructive notice); NH 150A739; 253NY450, 171NE703; 195NC508, 142SE767; 196 NC512, 146SE130; 287Pa358, 135A216; 149Va147, 140SE275. See also 149Wash 264, 270P806. In New York.–132Misc 455, 230NYS102.

682–16 28F(2d)620; 174Ark575, 297 SW846; 28Hawaii 519; 242Mich589, 219NW713; 155Miss343, 124S430(2d case). **Rule of caveat emptor applies in** such case. 28Hawaii 519.

682–17 13F(2d)774; 104Conn559, 133A 673; 128Misc455, 219NYS115; 228App Div96, 239NYS148 (assignee of chattel mortgage); 124 Okl 286, 255P1015; 106 WVa583, 146SE521. **Purchaser as agent for subsequent purchaser.–13F(2d)774. Notice to company subsequently reorganized** is notice to new company so that it is not subsequent purchaser in good faith whether contract is filed or not. 13F(2d)774.

682–17½–New. Under statute, record is notice to world that owner of property has parted with absolute dominion over property, but retains title as security for debt, and of every fact which might be ascertained by inquiry which record proper suggests. 38GaA490, 144SE331.

683–18 13F(2d)774; 154Md77, 140A34; Nebr 229NW334 (seller or his assignee and buyer); 195NC508, 142SE767; 197 NC110, 147SE319; 8PaDist&Co 491; RI 135A855.

683–19 236 IllA162; 234Mich669, 209 NW109.

683–22 In New York.–36F(2d)721 (notice held insufficient).

684–24 But see 245NY186, 156NE660.

684–24½–New. Where laws of state where property was sold require contract to be recorded, reservation of title to goods sold for immediate shipment to state where recordation is not required is valid as against attachment without notice in latter state though contract was not recorded. 146Miss476, 112S580, 57ALR530.

684–24⅓–New. Rule applies though contract provides that it is to be governed by laws of state where it was made. 146Miss476, 112S580, 57ALR530.

685–27½–New. Assignee of recorded conditional sale contract who allows property to remain in possession of dealer, commingled with stock for sale, is not protected against subsequent purchaser from dealer without actual notice. 142Va190, 128SE506, 47ALR82.

685–27⅓–New. Recording of contract for sale by dealer of automobile and of assignment thereof is not notice to subsequent purchaser from dealer in apparent course of business.. 31Ariz104, 250P766 (demonstration car with dealer's license plate).

685–30 127Me172, 142A580.

685–31 199Wis292, 226NW308.

686–33 214AppDiv158, 211NYS763. **Uniform Conditional Sales Act** applies only to sales in state or district for use therein. 29Ariz293, 241P305. In Nova Scotia.–[1929] 2DomLR435.

686–34 Property not in the state.–124 Or592, 265P435.

686–37 Ont [1925] 3DomLR107 (where affixing them to building was held not to change their character as household goods so as to necessitate filing).

686–40½–New. Constitutional sale contract of narrow gauge locomotive used for local mining operations is entitled to record as "railroad equipment" or "rolling stock." 212Ala654, 103S853.

687–45 NJSup 148A624(2dcase) (error in index held immaterial). **Sufficient memorandum.–134Wash81,** 234P1046; 135Wash228, 237P313. **Description sufficient** to give constructive notice to mortgagee. 220MoA507, 275SW984. **Effect of failure of town clerk to copy affidavit,** and erroneous assumption of vendor as to proper recordation. NH 150A739.

687–49 NJ 147A861(1stcase) (ten days). **Sale in another state.–29Ariz293,** 241P 305; 214AppDiv158, 211NYS763. **Under Ga. Code, etc.–But see 8F(2d)493. In Massachusetts.–259Mass319,** 156NE 693. **In Washington.–144Wash620,** 258 P517. **In New York City.–228AppDiv** 141, 239NYS286. **Statute.–37GaA480,** 140SE774.

687–50 In West Virginia.–106WVa164, 145SE594.

688–51 13F(2d)774; 33F(2d)773. **Though not recorded till after statutory period,** contract is valid as against all creditors who have not in meantime secured some lien against property. 17 F(2d)417. **As against general creditors of buyer who have not acquired lien before recording of contract,** claim of seller in conditional sale contract is superior. Utah 272P941.

688–52 134Wash81, 234P1046 (filing prior to last delivery under contract is not unreasonable delay). **Where goods are delivered from time to time,** notice of conditional sale must be filed within statutory time after first delivery. 259 Mass319, 156NE693.

688–52½–New. Period for recording contract in county to which goods have been removed does not commence to run till seller has received notice of county to which goods have been removed. 106 WVa583, 146SE521.

688–53 35GaA427, 133SE312; 196NC 512, 146SE130. See also Minn 233NW 18.

688–56 Contract filed in county of purchaser's residence as stated in contract, when he really resided elsewhere, has been held improperly filed. DelCh 149 A418.

688–57 35GaA427, 133SE312 (record constructive notice of contents in another county even after removal of vendee with property to another county).

688–58 See also 33F(2d)730. **Where property has fixed situs in certain county,** it must be filed in such county under statutes. 175Minn354, 221NW239.

688–58½–New. In Montana contract of conditional sale of automobile must be filed in county where automobile is at time of execution of contract. 73Mont 122, 235P422.

688–58⅓–New. In some jurisdictions time of filing is not regulated by statute. 13F(2d)774.

688–58¼–New. Where purchaser is nonresident, filing in county where he first comes into actual physical possession of property is substantial compliance with statute. 13F(2d)774.

688–58⅓–New. Delivery to carrier does not pass title to purchaser so as to require contract to be filed in county of such delivery to be valid against subsequent purchasers. 13F(2d)774.

688–59 145Va627, 134SE585.

688–60 Contract attested without mentioning name, title or county of subscribing notary in body of his certificate of acknowledgment held not sufficient basis for record. 25F(2d)979.

688–61 Acknowledgment.–175Minn354, 221NW239. **Contract** should be liberally construed. 145Va627, 134SE585. **Witnesses unnecessary prerequisites** to filing of contract. 175Minn354, 221NW 239.

689–64 196NC501, 146SE83(1stcase).

689–65 30F(2d)551; 75Mont416, 244P 485; 193NC663, 137SE874. **Unrecorded conditional sales contract** is not void as to one claiming under invalid chattel mortgage. DelCh 148A418.

689–67 8F(2d)496 (trustee in bankruptcy of vendee); 154Md77, 140A34; 75Mont416, 244P485. See also 41F(2d) 726; TexCivA 31SW(2d)472. But see RI 135A855. **Statute has been held not unconstitutional.–US** 41F(2d)726. **Unrecorded conditional sale of automobile by husband to wife** is valid against third person unless latter has valid claim, in absence of sale. Miss 130S153.

689–75½–New. Failure to record does not discharge surety who has not been damaged thereby. 35GaA768, 134SE803.

690–76 23F(2d)799; 42F(2d)515; 23 AlaA290, 124S395; DelCh 149A418 (filing in wrong county); 80Mont524, 261 P283; NJSup 146A587(3dcase); 32NM 481, 259P618; 190NC480, 130SE319 (valid from date of registration); 124 Okl 286, 255P1015; 124 Or592, 265P435; 292Pa86, 140A766; 145Va627, 134SE 585; 153Va149, 149SE476; BC [1930] 1DomLR397. **Where sale of motor vehicle is void for failure to comply with statutory requirements** as to bill of sale, and transfer of license and registration certificate, purchaser is not within protection of Conditional Sales Act. 220 MoA502, 274SW888. **Government in proceeding to forfeit automobile held not purchaser for value without notice.–** 23F(2d)799. **Whether purchaser is bona fide purchaser is question for jury** where evidence is conflicting. 197NC 174, 148SE39. **Where bank makes loan to buyer** before delivery of property, being pledged warehouse receipts as security, it is not "subsequent good faith purchaser" as regards unfiled conditional sales contract. 28 OhA93, 162 NE460. **Landowner contracting with builder for erection of building with refrigerating plant** is not subsequent purchaser of plant installed under conditional sale contract with contractor. BC [1930] 2DomLR672. **Purchaser under trust deed.–CalA** 292P660.

691–80 124 Okl 286, 255P1015. **Actual notice.–73Wash122,** 234P1046.

692–85 8F(2d)810; 23F(2d)799; 28F (2d)713; 30F(2d)551; 33F(2d)773; 23 AlaA290, 124S395; DelCh 149A418 (filing in wrong county); Me 149A833(1st case); 190NC480, 130SE319 (valid from date of registration). See also 17F(2d) 413. **A receiver of the buyer,** etc. 28F (2d)713. But see 18F(2d)727; NJCh 146A346. **In New York.–18F(2d)727. Government in proceeding to forfeit automobile held not creditor.–23F(2d)799.**

692–86 42F(2d)515; 220Ala193, 124S 426; NH 146A165; 28 OhA93, 162NE 460; 142SC380, 140SE691, 55ALR1133. In Ohio.–28 OhA93, 162NE460.

693–87 25F(2d)342; 145Va627, 134SE 585; 193Wis97, 213NW646. **"Lien creditors,"** as used in Virginia statute, include only those creditors of purchasers who acquired their liens prior to recordation of conditional sales contract. 145Va627, 134SE585. **Adjudication in bankruptcy.–30F(2d)551. Transfer of warehouse receipt** before delivery of property to creditor by buyer does not confer lien so as to constitute creditor lien creditor within meaning of Gen. Code, § 8568; 28 OhA93, 162NE460.

693–88 32F(2d)400; Minn 231NW248; 250NY484, 166NE175; 193Wis97, 213 NW646.

693–90 Protection of statute is for "third persons," literally construed, including creditors. 163Ga872, 137SE268.

694–93 Notice to company subsequently reorganized is notice to new company, so that it is not subsequent purchaser in good faith though contract is not filed. 13F(2d)774. **Seller entitled to recover possession under judgment foreclosing lien against prior levy by judgment creditor** with notice of unfiled contract. 128Misc455, 219NYS115.

695–4 96CalA465, 274P428; 100CalA 403, 280P218 (seller's delivery to bank of title retaining contract as security constitutes sufficient and valid assignment); 103CalA220, 284P235; 41GaA 436, 153SE233(2dcase) (holding finance company's assignment under conditional sale contract not a sale under contract, but transfer of creditor's rights); 203 Iowa688, 213NW213; 143Wash253, 255 P104. **Assignee of conditional sales contract** stands in seller's shoes. 215 Ala39, 109S106. **Filing of assignment** does not import constructive notice where statute does not provide for filing of assignments. 81Mont509, 264P396.

Where seller assigned contract, reserving title, and buyer later returned property to seller, no title passed on subsequent sale by seller to defendant, but assignee may, on default, recover possession of property. 91Fla505, 107S639. **Assignors may be liable to assignee** for unpaid installments on default of purchaser. CalA 289P906. **Rescission of assigned conditional sales contract.**–248 Mich160, 226NW830.

695–5 33Ariz483, 266P6; 42Ida411, 245P936; 118Kan656, 236P447, 448 [cit Cyc]; 143Wash102, 254P453.

695–6 226AppDiv235, 234NYS463; 153 Tenn386, 284SW363. But see 50RI 499, 149A611. **Seller may sell and indorse** note to third party without transferring reservation of title. 118Kan656, 236P447. **Effect of subsequent sale to bona fide purchaser by vendor** who had retained possession. 181Ark1031, 28 SW(2d)1050. **Duties of assignee as to disclosure of provisions of notes.**–43 F(2d)599. **Estoppel.**–43F(2d)599. **Priority of claims.**–43F(2d)599.

695–7 29F(2d)193; 31Ariz104, 250P 766; 33Ariz483, 266P6; 178Ark546, 11 SW(2d)451(2dcase); 178Ark1199, 13 SW(2d)593, 65ALR781; 98Fla304, 123S 785; 35GaA727, 134SE843; 38GaA490, 144SE331; 203Iowa688, 213NW213; Mass 169NE148(2dcase); 101NJL530, 129A187 (purchaser charged with knowledge of assignment at time he gave check where he did nothing to stop payment or come to agreement with plaintiff); 102NJL499, 133A429; NJCir 134A885; 128Or1, 273P387; 53 SD337, 220NW855; 153Tenn386, 284 SW363; 142Wash190, 252P920; 143 Wash253, 255P104; 145Wash125, 259P 16; 152Wash534, 278P417; 152Wash 614, 278P697; 193Wis531, 214NW332. **Reassignment.**–147Wash390, 266P178. **Assignment of instrument simply reserving title** as security for payment of balance of purchase price, without assignment of obligation to pay it, does not give assignee right to sue in replevin. 118Kan656, 236P447. **Conditional sale contract** of automobile construed to be nonnegotiable interest, subject to defenses against assignor. 43 Ida15, 248P444. **Purchaser of automobile** may defend because of fraud of assignor notwithstanding provision to contrary to contract. 43Ida15, 248P 444. **Transferee of contract and notes** who is not innocent purchaser for value is subject to same defenses as transferor. 83IndA385, 148NE486. **Abandonment.**–143Wash253, 255P104. **Assignor's guarantee of buyer's performance** held not to affect buyer's rights or obligations. 143Wash253, 255P104. **Assignor held without right to rescil car** taken from buyer by assignee and stored in assignor's garage. 143Wash 253, 255P104. **Conditional sales agreement** is not negotiable instrument. 142 Wash190, 252P920. **False representation** as to amount collected held ground for rescission, though assignee had thirty days to investigate. 173Ark875, 293SW1026, 57ALR877. **Knowledge by assignee of agreement by seller to pay amount due on contract** does not release buyer of automobile from obligation to pay where contract and assignment were made to enable dealer to secure money to pay for car received by buyer. 31Ariz239, 251P891. **Notice of assignment.**–127Misc26, 215NYS168. **Notice on contract that payments are to be made at office of another** held not to show intent to assign requiring buyer to prevent fraud on assignee. 142 Wash190, 252P920. **Provisions in assignment contract** held not to preclude assignee from reclaiming car and avoiding sale. 143Wash253, 255P104. **Subject to equities of buyer.**–127Misc26, 215 NYS168. **To prevent buyer under conditional sales contract** from asserting defenses against seller's assignee, there must be affirmative action, inducing assignee to believe he claimed no set-off. 142Wash190, 252P920. **Vendee's attaching creditor who pays balance on contract to bank to whom seller assigned his contract as security** for advances and takes assignment from bank acquires no title. 74CalA567, 241P282. **Petition in action against assignor** held to state cause of action on agreement to repay expenses of repossession but not on implied agreement to remain liable as guarantor. 33Ariz56, 262P1. **Effect of failure of assignee to file contract.**–106WVa651, 146SE723. **Purchaser of conditional sales contracts from pledgor** in possession is invested with title to contracts. 128Or1, 273P387 (form of writing held sufficient to pass title). **In replevin by assignee** buyer may set up any defense he could set up against seller. 143Okl190, 288P 300. **Conditional sales contract does not have attribute of commercial paper** in hands of innocent purchaser. 43 F(2d)259(1stcase).

695–7½–New. Legal title to car sold under conditional sales contract, which passes to assignee, passes back to assignor when it pays to its assignee balance due, and buyer is in default. 178Ark136, 9SW(2d)1057.

695–7⅓–New. Instrument constituting absolute assignment of conditional sales contract was not such instrument as was entitled to record, and filing thereof was therefore not constructive notice to subsequent purchaser of property from conditional vendor retaining possession. 149Wash264, 270P806.

696–8 27Hawaii614.

696–8½–New. Assignment as security.–Where assignee of conditional sales contract sells property to conditional buyer, he is not guilty of conversion of contract. 58ND279, 225NW785.

696–8⅓–New. In such case conditional seller's remedy is against buyer in original contract of sale and against property. 58ND279, 225NW785.

696–8¼–New. Assignee of conditional sales contract covering mortgaged chattels is under no duty to give notice of ownership by recordation or personal notice or by taking possession of chattels to mortgagee or others. 100CalA 756, 281P89.

696–8⅕–New. Mere pledge of conditional sale contract has been held not to transfer title. 50RI 499, 149A611.

696–8⅙–New. Rights of pledgee of conditional sales contract are not enforceable until after default of pledgor. 50RI 499, 149A611.

696–8½–New. Bank as dealer's creditor had no claim for voluntarily collecting account which dealer had assigned to finance company. 43F(2d)599.

696–9 98CalA291, 276P1066; NH 146A 165; Vt 146A248.

696–10 118Kan656, 236P447. **Conversion held to lie** against purchaser reselling without complying with condition. 100Vt292, 137A336.

696–11 39GaA93, 146SE323(3dcase); MoA 285SW750, 752 [quotCyc]. **Statutory provisions.**–33Ariz56, 262P1. **Statute authorizing foreclosure** did not intend to transform an instrument retaining title into mortgage but to provide another method to enforce collection of debts. 168Ga805, 149SE217.

696–11½–New. Purchaser sued for price of engine levied on, but not removed, could bring cross action for wrongful levy. TexCivA 296SW653.

696–11⅓–New. Purchaser claiming damages for wrongful levy on engine to be used in irrigating rice crop had burden of proving that levy delayed pumping operations causing damage. TexCivA 296SW653.

696–11¼–New. Buyer refusing to deliver property on demand after default is guilty of conversion. 261Mass378, 158NE777.

696–11⅕–New. even though refusal is based on claim of reimbursement for money paid on contract and other property given in exchange, where contract provides order should not be subject to counterclaim or rescission. 261Mass 378, 158NE777.

696–11⅙–New. for in such case buyer has no lien on property for money so paid or property so given. 261Mass378, 158NE777.

696–11⅐–New. even though public authority condemns property purchased against use. 261Mass378, 158NE777.

696–11⅛–New. and buyer's offer to return property during trial for conversion is too late. 261Mass378, 158NE 777.

696–11⅑–New. Buyer's use of books after he delivered possession to another does not preclude such other's plea of limitation as against seller. TexCivA 4SW(2d)630.

696–11⅒–New. It was error to refuse finding as to record of instrument. 101 Vt42, 140A160.

696–11 1/11–New. taking property out of state, demand, and value. 101Vt42, 140 A160.

696–11½–New. Notification by seller's assignee to sheriff holding property under attachment against buyer does not operate as forfeiture of buyer's rights under contract for nonpayment of installments. 86CalA248, 260P834.

696–11 1/13–New. Pleading, evidence, and damages in action for conversion. GaA 155SE211.

696–13 8F(2d)810; 220Ala216, 124S 514; 22AlaA465, 116S892; 99CalA566, 278P905; 93Fla1121, 113S568; 98Fla 304, 123S785; 28Hawaii519; 165Minn 252, 206NW385 (assertion is abandonment of others); 148Wash675, 270P 105; 153Wash198, 279P395; 155Wash 36, 283P476. See also 244Mich529, 221 NW630. **There is no double recovery** by seller who sues for balance due on automobile forfeited to government. 102CalA100, 282P510.

696–14 83CalA8, 256P277; 91Fla709, 109S677; 84IndA280, 151NE105; 146 Wash315, 262P636; 147Wash560, 266P 697.

696–15 19F(2d)331; 168Ark84, 269SW 66; 177Ark342, 6SW(2d)302; 196Cal 686, 239P324; 28Hawaii519; 255Mass 623, 152NE55; 171Minn483, 214NW284 [citCyc]; 146Wash543, 264P705; BC [1928] 1DomLR628. See also 8F(2d) 810. Contra 203Iowa418, 212NW711, 56ALR233.

696–15½–New. But action against purchaser for possession is not election of remedies precluding seller from following property into other hands by subsequent suit against purchaser's wife. 168Ark84, 269SW66.

696–15⅓–New. Under executory contract of sale by which seller retains title and has option to retake property, his election to enforce payment is renunciation of option to retake property, but it is not cancellation of contract, which leaves title in seller, absolute title in seller being inconsistent with action for debt due for purchase price. 91Fla709, 109S677.

697–16 216Ala21, 112S428; 22AlaA 465, 116S892; 95CalA647, 273P122; 93 Fla1121, 113S568; 83IndA385, 148NE 486; 84IndA280, 151NE105; 171Minn 483, 214NW284 [citCyc]; 122Or597, 260P222, 55ALR180; 141Wash82, 250P 646. **Replevin action later dismissed** held not election to proceed against property. 171Minn483, 214NW284. **There is no election by act of seller in taking possession** on notice by purchaser of buyer's business to remove property, so as to prevent action for price. 92CalA747, 268P929. **Where purchaser abandons property,** seller's election to retake it cancels purchaser's debt under contract for balance of proceeds of previous year's crop which was to be portion of purchase price. 141Wash82, 250P646. **Where seller demands redelivery and buyer assents and seller recovers judgment in conversion against one thereafter converting goods,** there is an election to retake and seller cannot sue for price. 83CalA8, 256P277.

697–18 177Ark342, 6SW(2d)302.

697–20½–New. Remedies provided in the contract of sale are cumulative and not exclusive of statutory remedy. 37 GaA767, 142SE199.

697–20⅓–New. Seller taking possession is not thereby deprived of right to foreclose and obtain judgment for balance due where contract gives him option to foreclose by sale or by taking possession and crediting buyer with value. 206Iowa1090, 221NW774.

697–20¼–New. Seller is not limited to foreclosure of lien as remedy for buyer's breach of contract. 102CalA623, 283P393.

697–20⅕–New. Seller on default of buyer may elect to sue on contract or repossess property. 155Wash36, 283P 476.

697-21 216Ala21, 112S428; 22AlaA250, 114S420; 170Ark813, 281SW373; 101CalA646, 281P1040; 102CalA623, 283P393; 166Ga173, 142SE887; 40GaA819, 151SE695; 28Hawaii519; 43 Ida1, 249P89, 48ALR1225; 44 Ida290, 256P371; 84 IndA280, 151NE105; 204 Iowa756, 215NW962; 165Minn252, 206NW385; 171Minn483, 214NW284; 176Minn493, 223NW911; 216AppDiv583, 215NYS694; 122 Or597, 260P222, 55ALR180; 133 Or85, 288P404; 148Wash675, 270P105; 151Wash382, 275P737; 103WVa689, 138SE369. But see 226AppDiv343, 234NYS357. **Default of the buyer is an essential condition,** etc. 141Wash162, 251P288. **Retaking may be for security.**–122 Or597, 260P222, 55ALR180. **In Mississippi.**–144Miss521, 110S437. **Where buyer was not known to persons named as references,** and insurance was refused, and car was taken from state without written consent, held seller may retake car. 216AppDiv583, 215NYS694. **Seller may recover cost of delivery** on conditional buyer's breach of contract providing for delivery of property to seller at designated place. 146Wash543, 264P705. **Conditional seller, to repossess property** sold by invoking aid of local courts, must be governed by local laws. MoA 27SW(2d)437. **Whether retaking is for benefit of conditional seller or as trustee** for buyer is question of fact. Wis 232NW534.

699-22 216Ala666, 114S60; 22AlaA250, 114S420; 93Fla247, 111S519; 116Nebr666, 218NW588; 122 Or597, 260P222, 55ALR180; 155Wash171, 283P1091. **Recourse to courts** essential where owner cannot take peaceably. 22AlaA250, 114S420.

699-22½-New. but he may not regain possession by force and arms, 216Ala666, 114S60.

699-22¼-New. or by fraud, 216Ala666, 114S60.

699-23 177Ark1114, 9SW(2d)571; 98Fla410, 123S814(2dcase); 28Hawaii519; 204 Iowa661, 215NW628; 118 Or339, 246P361; 258Pa358, 135A216; 292Pa403, 141A236; 50RI499, 149A611 (where contract is pledged).

700-24 Trover suit by seller of itself amounts to rescission. 36GaA548, 137SE302.

700-26 179Ark328, 15SW(2d)409; 118Or339, 246P361. **Retaking part of machinery** by seller prevents recovery for remainder, conditional sale being single transaction. 216Ala21, 112S428. **Where buyer sells part of machinery,** he severs conditional sale contract, and seller may recover price after repossessing remainder. 216Ala21, 112S428. **Effect of seller's retaking property.**–180Ark1064, 23SW(2d)971; 40GaA819, 151SE695. **Contract is terminated** where seller takes possession on buyer's default and abandonment of property. 101CalA646, 281P1040.

700-26½-New. Lien of seller is discharged upon retaking goods. DelCh 150A81.

700-30 36BC424, [1926] 1DomLR1063, [1926] 1WestWkly654. **Material error** in statement of amount due will avoid notice of resale. 36BC424, [1926] 1 DomLR1063, [1926] 1WestWkly654.

700-32½-New. Tender of payments already made is not condition precedent to institution of action for replevin. 204 Iowa661, 215NW628.

700-32¼-New. Under statute, owner of bill of sale of personalty is not required to convey title to debtor prior to foreclosure of the contract. 168Ga805, 149SE217; 40GaA442, 149SE920(1stcase).

700-34 204 Iowa661, 215NW628; 216AppDiv583, 215NYS694.

700-35 MoA 27SW(2d)437.

701-36 77CalA207, 246P165; 148Miss575, 114S396; 148SC511, 146SE534.

701-37 Seller is not required to fix time for buyer to avoid foreclosure.–86CalA785, 261P506.

701-38 146Wash416, 263P178. **Reasonable time to make payments** must be granted before forfeiture, after acceptance of overdue payments. 146Wash416, 263P178.

701-46½-New. Breach of warranty may be shown as defense pro tanto in replevin action between original parties. 118 Okl 274, 247P985.

701-46¼-New. Fraud is good defense to action for recovery of possession, 116 Okl 88, 243P181.

701-46¼-New. and is authorized by statute in some jurisdictions, 116 Okl 88, 243P181.

701-46½-New. provided defrauded party has taken prompt measures to rescind on discovery of such fraud. 116 Okl 88, 243P181.

701-46⅛-New. But where purchaser made no claim of fraud nor sought rescission till five months after purchase and two months after first default, any misrepresentation as to character and quantity of property will not defeat recovery in replevin especially where misrepresentation relied on was oral and preceded execution of sales contract. 116 Okl 88, 243P181.

701-46½-New. That used car received by purchaser upon resale was sold after bankruptcy held immaterial. 100Vt292, 137A336.

701-46⅛-New. Defendant in action to recover furnace may counterclaim for damages to his building caused by negligent installation. 216AppDiv514, 215NYS581.

701-46⅛-New. Seller's alleged promise to resell is without consideration and not enforceable where all buyer did was to give up possession of car. 122 Or597, 260P222, 55ALR180.

701-46¼-New. Counterclaims.–In replevin, defendant cannot counterclaim for breach of warranty. 216AppDiv514, 215NYS581.

701-46¼-New. Buyer cannot set off claim for breach of warranty where agreement excluded warranties and no effort was made to rescind. 292Pa403, 141A236.

701-46½-New. Delay in bringing action in claim and delivery is not available as defense to buyer who refused to pay balance though frequently demanded. 86CalA785, 261P506.

702-51 42 Ida411, 245P936 (depositing notes as collateral with right to withdraw at any time does not prevent action by seller).

702-56½-New. Plea held demurrable. 216Ala21, 112S428.

702-56⅛-New. Allegations of defendant's counterclaim held to justify conclusion that defendant was entitled to possession of automobile sought to be replevined. Ariz 287P304.

702-56¼-New. Seller, in action to recover balance due on purchase price and value of repairs made, is not required to allege that purchaser has knowledge of purpose of seller in taking goods. 99CalA695, 279P467.

702-58 Seller seeking forfeiture must bring himself clearly within condition authorizing forfeiture. 196Cal686, 239P324.

702-60 213Ala156, 104S277 (evidence of balance due with possession acknowledged by plea makes prima facie case for assignee of seller suing in detinue); Minn 233NW18; 226AppDiv343, 234NYS357. **Burden of proving amount due,** if any, rests on plaintiff. 140Miss467, 106S9.

702-61 172Minn16, 214NW479.

702-64 Evidence held sufficient.–31 Ariz239, 251P891; 87CalA753, 262P467; 101CalA646, 281P1040; 36GaA548, 137SE302; 172Minn16, 214NW479; 127 Or206, 271P728; Wis 232NW534.

702-64½-New. Burden of proving identity of property seized under writ and property sold rests on plaintiff seeking to recover possession of property sold under conditional sale contract. 140Miss467, 106S9.

702-64⅛-New. Evidence insufficient to show removal of truck from Pennsylvania to New Jersey. NJSup 129A396.

702-64¼-New. Evidence held insufficient to identify property.–140Miss467, 106S9.

702-64⅛-New. Form of verdict.–Verdict in replevin, if for plaintiff, should be for the property, describing it, and its value or value of plaintiff's interest. 140Miss467, 106S9.

702-64⅙-New. Buyer asserting as special defense default of plaintiff in presenting check has burden of proving fact and extent of loss. 44 Ida505, 258P550.

702-64⅞-New. Evidence of buyer's statements as to his financial condition is immaterial as evidence in bail-trover action to recover goods. 35GaA727, 134SE843.

702-64⅛-New. Exclusion of evidence that seller did not place any value on conditional note held proper in action for conversion of property conditionally sold. 100Vt41, 134A641.

702-64⅛-New. Questions for jury.–Whether seller was guilty of such fraud as justified buyer in rescinding is question for jury. 102NJEq341, 131A901.

702-64$_{10}$-New. Findings held not to raise inference that renewal notes were in payment of original debt. 100Vt292, 137A336.

702-64$_{11}$-New. Findings held warranted by allegations in complaint. 100Vt41, 134A641.

702-64$_{12}$-New. Evidence held sufficient to show that seller under conditional agreement did not give buyer sufficient notice before seizing truck. NJSup 139A386.

702-64$_{13}$-New. Evidence held to show that buyer was not damaged by unlawful seizure. NJSup 139A386.

702-64$_{14}$-New. Evidence insufficient to show satisfaction of lien note by conveyance of land. 101Vt42, 140A160.

702-64$_{15}$-New. Evidence of opinion of value of land conveyed to holder of note held admissible. 101Vt42, 140A160.

702-64$_{16}$-New. Buyer pleading rescission has burden of proving it. 206 Iowa1090, 221NW774.

702-64$_{17}$-New. Evidence held sufficient to show that acceptance of notes was nonpayment. 222MoA1068, 9SW(2d)840.

702-64$_{18}$-New. Evidence held insufficient to support defense of rescission. 206 Iowa1090, 221NW774.

702-64$_{19}$-New. Under facts in this case, there was no removal, within meaning of statute, and re-recording was not necessary, as rights of defendant were not affected by statute. 105NJL474, 144A582.

702-64$_{20}$-New. Evidence held to support finding that automobile to be delivered by vendee as down payment was not delivered. 102CalA623, 283P393.

702-64$_{21}$-New. Evidence held sufficient to show demand for possession. 132 Or545, 286P553.

702-64$_{22}$-New. Evidence held sufficient to support findings that seller took possession of automobile to make necessary repairs in accordance with terms of contract and did not resell automobile. 99CalA695, 279P467.

702-64$_{23}$-New. In replevin suit after buyer's default in payment of first note and seller's transfer of remaining unmatured notes, which he paid after commencement of suit, such unmatured notes are admissible on question of buyer's damage for wrongful detention. 98Fla304, 123S785.

702-64$_{24}$-New. Evidence of retransfer to seller by finance company was properly admitted though not dated, aliunde evidence proving execution before suit brought. 41GaA389, 153SE88.

702-64$_{25}$-New. In order to sustain such defense buyer must prove damage equal to balance due on contract. 143 Okl190, 288P300.

702-64$_{26}$-New. Conditional buyer defending replevin action on ground of breach of warranty of fitness by seller may prove such warranty notwithstanding limited warranty by manufacturer. 143 Okl190, 288P300.

703-71 181Ark77, 25SW(2d)3; 36GaA50, 135SE510.

703-72 Verdict for less than balance due as to property shown to be worth much more held not excessive. 36GaA548, 137SE302.

703-72½-New. Recital in judgment of defendant's ownership of property at commencement of action constitutes direct finding on issue of ownership and

right to possession. 44 Ida505, 258P 550.

703-72½-New. Measure of buyer's damages on counterclaim in replevin where plaintiff is not in possession at trial is value of chattel at trial with damages from seizure. Ariz 287P304.

703-72¼-New. In replevin action, buyer is not entitled to judgment for damages for wrongful detention, where buyer's right to use truck for hire is restricted and there is no evidence of value of use of truck to defendant. 98 Fla304, 123S785.

703-72½-New. Extent of recovery of conditional buyer in replevin suit by seller to recover motor truck sold is value of buyer's special interest therein, and could not exceed amount paid by him on the purchase price of the property. 98Fla304, 123S785.

703-74 137Misc251, 242NYS720; 103 WVa689, 138SE369; 36BC424, [1926] 1DomLR1063, [1926] 1WestWkly654; 36BC488, [1926] 1DomLR1065. **In New York.**-132Misc225, 228NYS549; 226 AppDiv624, 236NYS559. **Seller may resell after statutory ten-day period for redemption,** without giving ten days' notice of sales. 217AppDiv196, 216NYS 506. **Buyer cannot compel resale** under statute unless fifty per cent of purchase price has been paid. 136Misc 398, 240NYS832; 137Misc251, 242NYS 720. **Consent to repossession authorizing resale is inferred** from failure of purchaser to reclaim property after notice of default. 161Tenn1, 28SW(2d) 51. **Establishing default.**-161Tenn1, 28 SW(2d)51. **Notice of default.**-161Tenn 1, 28SW(2d)51. **Seller's possession is not alone sufficient to authorize resale.**-161Tenn1, 28SW(2d)51. **Seller may resell goods** though conditional buyer makes no demand for resale. 137Misc 251, 242NYS720. **In California.**-101 CalA646, 281P1040.

703-75 Notice of sale, etc. 131Misc 870, 228NYS427. **Under some statutes,** where there is no resale, buyer is discharged of all obligations. 33Ariz56, 262P1. **Resale in office without view** has been held not "public auction." 253NY455, 171NE705.

703-76 BC [1928] 3DomLR875.

703-77 SD 232NW45. See also 253NY 455, 171NE705; WVa 155SE303. But see 137Misc251, 242NYS720. **Amount recoverable as damages** for seller's failure to resell is value of property at time of retaking less balance due on purchase price. 132Misc225, 228NYS549. **In New York.**-226AppDiv624, 236NYS 559. **Seller has no right of action against indorser** of buyer for balance due on purchase price, prior to resale. 107WVa503, 148SE864 (seller's delivery of repossessed goods to indorser without right of resale gives no right of action against indorser). **Time of sale.**-107WVa503, 148SE864 (insufficient excuse for delay).

704-83 Buyer must receive statutory notice of resale, actual knowledge being insufficient. 136Misc651, 241NYS476.

704-87 NH 146A165; 36BC488, [1926] 1DomLR1065 (where no notice of sale was given to buyer).

704-88 147Wash318, 265P737. See also 131Misc872, 229NYS283.

704-90 179Ark328, 15SW(2d)409. **Action by new purchaser to recover possession.**-Utah 279P53 (question for jury whether finance company as owner under title-retaining contract ratified resale).

704-91 173Ark1160, 293SW1037.

704-92 173Ark1160, 293SW1037; 41 Ida155, 238P530; 41 Ida169, 238P532. **In British Columbia.**-[1930] 2DomLR 608.

704-92½-New. Sheriff, retaking property under void writ on conditional buyer's default, acted as seller's agent, and property may be deemed peacefully retaken. 129Misc234, 221NYS266.

704-92⅓-New. Prior to resale under statute, seller has no right of action against indorser of buyer for balance due on purchase price of goods. 103 WVa689, 138SE369.

704-92¼-New. Statutory requirements of compulsory resale on default of conditional buyer, who paid over half of price, cannot be waived. 129Misc234, 221NYS266.

704-92⅕-New. Unreasonable delay in exercising privilege of resale is evidence of election by seller to keep what it has retaken and thus release purchaser. 243 NY95, 152NE476.

704-92⅙-New. Where machinery sold under contract of conditional sale was damaged by fire less than fortnight after retaking, it cannot be said as matter of law that seller's delay in resale was unreasonable. 243NY95, 152NE 476.

704-92½-New. Where less than half of purchase price had been paid on conditional sale contract, seller retaking goods in absence of written demand of buyer is not required to sell within any determinate time to avoid inference of election to keep chattels as its own. 243 NY95, 152NE476.

704-92⅛-New. On resale after seizure, seller can recover only either balance of debt or proceeds of sale with hire and interest from date of conversion to date of seizure, 35GaA727, 134SE843.

704-92⅛-New. but delay may not be found unreasonable without reference to circumstances. 243NY95, 152NE476.

704-92 1/10-New. At resale, property must be physically at place of sale.-217 AppDiv196, 216NYS506.

704-92 1/11-New. Burden of showing seller's failure to comply with statute as to resale rests on buyer. 131Misc 870, 228NYS427.

704-92 1/12-New. Resale is ineffective in absence of showing that letter to buyer contained proper notice. 136Misc 651, 241NYS476.

704-92 1/13-New. On failure to resell, conditional buyer cannot recover damages, in absence of right to have goods resold. 136Misc651, 241NYS476.

704-92 1/14-New. Conditional buyer has been held unable to recover damages on account of a void resale. 136Misc651, 241NYS476.

704-92 1/15-New. Ordinarily, property sold at public auction must be physically present at sale. 108WVa585, 152SE 10.

704-94 216AppDiv583, 215NYS694.

705-96 35GaA727, 134SE843 (payments not credited on debt); 133 Or 85, 288P404. **Where buyer takes affirmative and seeks judgment for amounts paid,** he must aver readiness to pay for hire and do equity. 35GaA 727, 134SE843.

705-97 118 Or339, 246P361.

705-98 118 Or339, 246P361. But see 35GaA727, 134SE843.

705-2½-New. Buyer is liable for depreciation in value of goods, and reasonable hire. 35GaA727, 134SE843.

705-2⅓-New. Contract becomes relevant, not to show title, but as evidence of value and rate of interest allowable. 35GaA727, 134SE843.

705-2¼-New. Where seller was guilty of fraud in inducing contract, buyer is entitled to return of advance payments before being obliged to surrender goods. 102NJEq341, 131A901.

705-4 CalA 289P906; 35GaA727, 134 SE843; 89 IndA573, 167NE542(2dcase); 207 Iowa1300, 224NW506; 244Mich529, 221NW630; 251Mich329, 232NW232; 118 Or339, 246P361; 123 Or215, 261P 691; 50RI 99, 145A307; 146Wash543, 264P705; 153Wash198, 279P395. See also NH 146A165. But see 99CalA695, 279P467; Utah 289P130. **In New York.**-243NY95, 152NE476.

706-5 123 Or215, 261P691; 50RI 99, 145A307. See also 35GaA727, 134SE 843.

706-6 See also Wis 232NW534.

706-6½-New. In Saskatchewan seller retaking chattel and suing on lien notes must show that he complied with requirements of notes and of Conditional Sales Act or he will be deemed to have taken chattels in satisfaction and to have rescinded contract. Sask [1929] 2DomLR863.

706-7 170Ark813, 281SW373; 172Ark 209, 287SW1010; 175Ark341, 299SW 34; 177Ark1114, 9SW(2d)571; 196Cal 686, 239P324; 43 Ida15, 248P444 (evidence sufficient to show fraud in procuring conditional sale contract of automobile); 44 Ida290, 256P371; 84 IndA280, 151NE105; 165Minn252, 206 NW385; 171Minn483, 214NW284; 176 Minn483, 223NW908; NH 146A165; 100Vt141, 134A641; 154Wash236, 281P 996(2dcase) (such provision in contract is not absolute acceleration clause but merely gave seller option which could not be exercised by buyer). **Mode of procedure,** etc. 91Fla709, 109S677. **Offer of bill of sale** is not condition precedent to demand for balance due and action to recover same. 70CalA222, 232P 758. **After repossession and resale,** seller may recover deficiency. 3Del 384, 138 A611. **Question for jury.**-132Misc866, 230NYS529.

707-8 178Ark695, 108SW(2d)897; 41 Ida169, 238P532 (complaint for balance of purchase price held sufficient); Utah 282P1040; 100Vt41, 134A641; 148 Wash675, 270P105.

707-9 43 Ida1, 249P89, 48ALR1225. **Only installments due** may be sued for in absence of agreement for acceleration on default. 48RI 430, 138A57, 57ALR 823.

707-10 133 Or85, 288P404. See also 48 RI 430, 138A57, 57ALR823.

707-11 36GaA50, 135SE510 (sum stipulated as value). **Evidence of value.**-36 GaA50, 135SE510. **In trover** unpaid amount due on debt is recoverable as damages. 35GaA325, 132SE921. **Evidence held admissible.**-36GaA50, 135SE 510.

707-12 Buyer, sued on contract, is not precluded, by having sold his equity, from showing that seller on resale failed to comply with statutory requirements. 168Ark670, 273SW7.

708-18 91Fla709, 109S677; 93Fla247, 111S519; 37GaA767, 142SE199; 204 Iowa756, 215NW962 [citCyc]. **Action for deficiency.**-37GaA767, 142SE199; 165 Minn252, 206NW385; 171Minn483, 214 NW284; MoA 285SW750. See also 220 Ala155, 124S208; 40GaA442, 149SE920 (1stcase); 176Minn483, 223NW908. But see CalA 288P138. **Seller, retaking goods sold,** need not wait for expiration of period of redemption before giving notice of sale. 130Misc597, 224NYS177. **Buyer is liable for costs and fees** in foreclosure proceedings. 122 Or597, 260 P222, 55ALR180. **Lien lost by failure of seller to bring property into actual possession.**-176Minn483, 223NW908. **Where purchaser cannot be given notice of repossession for resale,** as required by statute, seller may sue to establish default and foreclose lien. 161Tenn1, 28 SW(2d) 51. **Liability of seller for failure to comply with statute.**-230AppDiv 594, 245NYS262.

708-18½-New. Equitable lien.-In absence of statute, seller, under contract of sale of personal property, giving him right to retake property and retain payments made, in case of default in payments, may elect to consider property as security for payment of balance due, and may foreclose the lien equity and obtain deficiency judgment. 91Fla709, 109S677.

708-20½-New. Where seller has retaken property, foreclosure of buyer's interest is proper remedy. 133 Or85, 288P 404.

708-22 172Ark209, 287SW1010; 175 Ark341, 299SW34; 75CalA629, 243P468; 236 IllA162 (under Sales Act); 248Mich 24, 226NW660 (possession of husband to whom contract is erroneously made); 197NC174, 148SE39; BC [1930] 1DomLR26. **Seller cannot sue purchaser** and transferee in county of latter's residence. 163Ga872, 137SE268.

708-23 Mass 168NE916. **Form of action.**-3Del 66, 130A392. **Where property has been seized by sheriff under attachment by buyer's creditor,** seller may sue sheriff for value or recover property from buyer at sheriff's sale. Utah 287P 175.

709-25 95CalA365, 272P1084.

709-25½-New. Attachment by creditor of vendee is breach of condition by vendee to keep property free from liens and incumbrances, entitling vendor to possession under contract. 3Del 66, 130A 392.

709-25½-New. Seller is not entitled to repossess after breach of warranty unless damages from breach are less than balance due. 138SC124, 135SE801.

709-25¼-New. Upon breach of warranty by seller, buyer can hold article till it is put in condition notwithstanding retention agreement. 138SC124, 135SE 801.

709-26 Mass 168NE916.

709-28½-New. Bringing action of replevin is demand for possession against third person. 3Del 66, 130A392.

709-33 See also CalA 291P458. But see 155Miss343, 124S430(2dcase).

709-33½-New. Seller's right to recover goods is subject to right of subsequent purchaser to retain them on payment of balance due. Ont [1925] 3Dom LR107.

709-33⅓-New. In suit against subsequent purchaser for destruction of conditional sales lien, complaint is not demurrable on ground that it "does not allege the character of the lien," 213 Ala635, 105S897.

709-33¼-New. nor is complaint demurrable because it does not allege notice of lien, because of allegation of defendant's knowledge of lien. 213Ala635, 105 S897.

709-33½-New. Purchaser of automobile from conditional purchaser is innocent purchaser, by failure of conditional seller to place his name on registration certificate attached to automobile as legal owner in compliance with statute, where vendor did not know car would be brought into state and had expressly forbidden seller taking it from state where contract made. 75CalA629, 243P 468.

709-33¾-New. Defenses existing between original parties are not available against bona fide purchaser acquiring note and contract before maturity. 154 Miss501, 122S541.

709-33⅞-New. Fact that constable took automobile as officer under attachment is no defense in replevin suit by seller. Mass 168NE916.

709-35 10LaA626, 121S338.

709-37½-New. Complaint against sheriff by conditional seller must state that buyer is in default. 136Misc283, 240 NYS642.

709-38 Sufficiency of evidence.-TexCivA 4SW(2d)1056. **Necessity of proof of ownership.-Minn** 233NW18.

709-39 Seller must prove value or loss suffered to recover for finance company's negligently permitting third party to take property. **TexCivA** 27SW(2d)855.

709-40½-New. In suit for damages for destruction of conditional sales lien against purchaser from buyer, seller has burden of showing valid lien, which is not met by showing legal title and general ownership. 213Ala635, 105S897.

709-41 It cannot be inferred from evidence that vendor told defendant that vendee owned some mules that plaintiff represented that he had no title to mules under contract. 35GaA427, 133SE312.

709-41½-New. In action by seller against bona fide purchaser, proof of knowledge of seller's rights is essential where contract was not recorded as required by statute. 32NM481, 259P618.

709-41⅓-New. Evidence held sufficient.-To support judgment on theory of conversion or assumption of payment of notes given for purchase money. 171Ark 935, 287SW177.

709-41¼-New. To warrant finding that pledgee of bonds had not notice or knowledge that seller claimed title under contract not recorded as required by statute. 8F(2d)810.

709-41⅕-New. To support finding that plaintiff acquired title by assignment subject to purchaser's right to become owner on payment of amount due. 83 CalA366, 256P844.

709-41⅙-New. To show that frigidaire was delivered by dealer and installed prior to recordation of contract executed therefor by another purported purchaser. 153Va149, 149SE476.

709-41⅐-New. Admissibility.-Questions to officers of attaching creditor to show it had no notice of conditional sales contract were proper. 154Md77, 140A34.

709-41⅛-New. Unfiled contract of sale held admissible in evidence where answer was general denial, subject to being stricken out upon undisputed proof that defendant was bona fide purchaser. 80 Mont524, 261P283.

709-41⅙-New. Where plaintiff had failed to file contract, facts tending to show good faith on part of purchaser are admissible. 80Mont504, 261P268.

709-41 1/10-New. Evidence held admissible. 28 OhA93, 162NE460.

709-41 1/11-New. Evidence held to show no nonlienable items arising from rebuilding of old oven. 222MoA1068, 9 SW(2d)840.

709-41 1/12-New. Where evidence authorizes verdict found for plaintiff, and alleged newly discovered evidence, being merely cumulative and not being such as would likely produce a different result upon another trial, there is no error in overruling defendant's motion for new trial. 40GaA312, 149SE306(1st case).

709-41 1/13-New. Evidence held to sustain finding of identity of automobile and that it was secreted. Mass 168NE 916.

709-41 1/14-New. Where husband did not claim to be innocent purchaser for value, court did not err in excluding his testimony tending to prove waiver of seller's demand for possession before bringing suit, in action against husband to repossess automobile conditionally sold to wife. 248Mich24, 226NW660.

710-46 See also 154Md77, 140A34.

710-46½-New. Where contract is unrecorded, verdict may be directed for third person without actual or constructive notice. 154Md77, 140A34.

710-48½-New. In suit for damages for destruction of conditional sales lien, whether defendant purchaser from buyer knew of conditional seller's claim held for jury. 213Ala635, 105S897.

710-48⅓-New. Where conditional vendor sold property in his possession as bailee and transferred retention title contract to claimant, verdict against claimant for property or value with damages for detention is proper. 22AlaA211, 114 S273.

710-48¼-New. Verdict against conditional vendor interposing claim in action of detinue by owner against vendee, for property or alternate value, held proper. 22AlaA211, 114S273.

710-48⅕-New. Whether defendant was bona fide purchaser held properly submitted for jury, though both parties moved for directed verdict. 80Mont504, 261P268.

710-48⅙-New. Instructions precluding recovery by bona fide purchaser of note have been held erroneous. 154Miss501, 122S541.

710-48⅐-New. Judgment awarding possession to seller after entering judgment against seller sufficient to discharge garageman's lien and ending garageman's right to possession has been held authorized under statute providing that judgments may be moulded to suit facts. 158Tenn258, 12SW(2d)705.

710-48⅛-New. Assessment of damages for fair value of use during detention held proper in replevin suit. Mass 168 NE916.

710-48⅛-New. Damages may not be assessed for detention between time of assessment below and disposition on appeal of replevin suit. Mass 168NE916.

710-50 87PaSuper539; 145Wash81, 259 P13. See also 175Ark341, 299SW34. **Statement by counsel of third person** in possession that seller had no right to property may amount to conversion. Mass 169NE789.

710-54½-New. Tender of balance due by sheriff after seizure on attachment against buyer is too late. Utah 287P 175.

710-56 Utah 287P175.

711-57 171Ark935, 287SW177; CalA 285P877 (wrongful repossession by assignee of conditional seller).

711-59 Where property had been returned to seller before rights of creditors or subsequent purchasers accrued, question as to whether contract had been filed for record is immaterial. 165Minn 282, 206NW446.

711-59½-New. Injury to property.-Where vendor retains title as security he may maintain action against third person for injury to property while in possession of buyer. See also 153Tenn386, 284SW363.

711-59⅓-New. Conditional vendor, after default, may maintain action against third party for negligent injury to chattel sold. NJSup 150A235.

711-60 NH 146A165. **May recover value less amount due.**-43 IdaI, 249P89, 48 ALR1225. **Buyer may set up counterclaim for false representation amounting to breach of warranty** in action for replevin by seller. 129Misc348, 221NYS 486. **On sale of used car by seller** without crediting buyer on new car, latter can recover from seller for such amount. 143Wash102, 254P453. **If assignee of contract retakes car before suit on note and fails to resell it,** buyer paying half of purchase price may recover under statute actual damages not less than one fourth of price paid. 53SD337, 220NW 855. **Where seller wrongfully rescinds contract,** buyer may elect to assent to such rescission and recover payments made, in action for money had and received. 128 Or600, 275P596.

711-60½-New. Upon rescission for fraud of seller, buyer may recover money advanced in partial payments. 102 NJEq341, 131A901.

711-66 Where car is alleged to have been taken from bailment lessee on replevin by third party, he cannot recover rent paid lessor where he fails to prove involuntary loss and superior title in third party by sufficient evidence. 89Pa Super405.

711-68 163La752, 112S709 (under statute); 160Tenn140, 23SW(2d)913 (entitled to recover value of his interest in automobile before it was wrecked in accident).

712-69½-New. Buyer may maintain action for breach of implied warranty in sale of article though seller has repossessed it and purchase price not fully paid. 138SC124, 135SE801.

712-69⅓-New. Right of action for breach of implied warranty not waived by continued payments after notice of defects. 138SC124, 135SE801.

712-69¼-New. Purchaser after discovery of defects has right to demand return of payments without completing contract. 138SC124, 135SE801.

712-69⅕-New. Where there was breach of warranty, buyer was held entitled to recover down payment in seller's suit to recover article sold under reservation of title after default in payments. 171Ark 225, 283SW374.

712-69⅙-New. Breach of warranty.-At common law action would not lie for breach of warranty upon conditional sales contract. 240Mich621, 216NW431.

712-69⅐-New. Such rule has been changed by Michigan Uniform Sales Act. 240Mich621, 216NW431.

712-69⅛-New. Under such statute buyer of machine may recover on breach of warranty money paid on contract and expenditures made in efforts, concurred in by seller, to make machine perform. 240Mich621, 216NW431.

712-69⅛-New. Under such statute buyer cannot maintain action for breach of warranty where he has accepted goods or is estopped from asserting refusal to accept. 240Mich621, 216NW431.

712-69 1/10-New. Butcher shop operator, suing for damages by seller's removal of fixtures, covered by conditional sale contract, cannot recover both loss of profits from sale of meat on hand and loss of generally anticipated profits of business. 151Wash382, 275P737.

712-69 1/11-New. Butcher shop operator, discontinuing business as unprofitable two months and thirteen days after reopening shop following seller's wrongful removal of fixtures, covered by conditional sale contract, has been held entitled to recover only two months' loss of profits. 151Wash382, 275P737.

712-71 Vt 146A248.

712-74 96CalA465, 274P428 (including interest on installments); 192NC661, 135SE776.

712-75 See also 148Miss157, 114S260. But see 126Me369, 138A567. **In Minne-**

sota.–176Minn493, 223NW911. **Mere failure of seller to deliver voluntarily** property to buyer on payment of purchase money does not constitute conversion. 40GaA819, 151SE695.

712-76 Buyer, to recover for alleged conversion by seller in retaking, must show that value of car at time of taking exceeded unpaid purchase price. 143 Wash183, 255P99.

712-79 176Ark977, 5SW(2d)325. **Buyer must show damage from seller's breach** amounted to payments returned on demand. 148Miss157, 114S260. **Conditional vendee suing vendor for conversion** may recover payments made, but not insurance money. 160Tenn140, 22 SW(2d)227.

712-79½-New. Buyer may replevin automobile seized by seller for partial failure of consideration where such failure was not within terms of repossession clause of agreement. 102NJL193, 130A 611.

712-79¼-New. In Louisiana, under statute, buyer can recover damages from seller for unwarranted removal. 163La 752, 112S709.

712-79¼-New. Retaking and sale without compliance with statutory requirements.–Under West Virginia statute, buyer of automobile under conditional sales contract is entitled to recover his actual damages from seller who retakes and sells car without compliance with statutory requirements. 102WVa305, 135SE4.

712-79⅛-New. Evidence in action of claim and delivery by buyer held insufficient to support finding that defendants wrongfully repossessed truck under conditional sales contract. CalA 261P 1067.

712-79¼-New. In action for damages for injuries to goods and loss of business and good will by seller's wrongful removal of butcher shop fixtures, covered by conditional sale contract, plaintiff was not required to prove market value of property taken, as in action for wrongful taking or conversion thereof. 151Wash382, 275P737.

712-79½-New. In determining what is "fair and reasonable compensation" for loss of use of automobile replevined, it is important that there be evidence before jury from which they can determine value of automobile, market value of use of which owner has been deprived, and cost to owner of exercise of that use. 108Conn524, 143A846.

712-79⅛-New. Seller is not liable in trover to buyer for property seized under valid legal process against buyer who had notice. 40GaA819, 151SE695 (notice of seizure immaterial).

712-79⅛-New. Evidence held sufficient to support verdict against plaintiffs on their complaint and for defendants in cross complaint in buyer's action of conversion. 154Wash344, 282P218.

712-79⅛-New. Statement held insufficient as demand to authorize action of conversion by buyer. 154Wash344, 282 P218.

712-79¼-New. Testimony held admissible to prove, in buyer's action for conversion, that he voluntarily surrendered automobile. 154Wash344, 282P218.

712-79½-New. Purchaser from finance company acquiring possession of automobile on purchaser's behalf could maintain trover against company and its transferee. 41GaA436, 153SE233(2d case).

712-79⅛-New. Purchaser, showing that possession is wrongfully withheld, may maintain trover against vendor reserving title. 41GaA436, 153SE233(2d case).

712-79¼-New. Where seller acquires possession of automobile to repair it, he is guilty of conversion in then making sale of it to pay off balance of purchase price. 160Tenn140, 22SW(2d)227.

712-79¼-New. Injury to property.–Conditional buyer in possession may maintain action against third person for damage to property. 30Hawaii44.

712-80 DelCh 150A81; **NH** 146A165. See also **NH** 146A165. **In other jurisdictions** purchaser has no right of redemption after forfeiture. 176Minn493, 223 NW911.

713-84 DelCh 150A81. **On retaking, buyer may redeem,** but cannot recover partial payment. 216AppDiv583, 215 NYS694. **Amount of tender held sufficient.–DelCh** 150A81. **After sufficient tender,** situation is same as though defaults had not occurred. **DelCh** 150A 81. **Effect of tender of amount due.–CalA** 290P122. **If seller accepts tender,** title instantly passes to buyer. **DelCh** 150A81. **Title immediately passes to buyer** on proper tender after retaking by seller. **DelCh** 150A81. **Deficiency in tender** should be pointed out by seller. **DelCh** 150A81.

713-85½-New. Where seller fails to comply with statute, his failure to accept redemption money and surrender possession entitles buyer to actual damages. Ariz 291P1003.

713-86½-New. Possession by conditional vendee will support action for trespass or trespass on the case against third person who injures property. 153 Tenn386, 284SW363.

713-86¼-New. Reinstatement of contract after default by buyer is effected, under statute, by tender of "amount due under contract at time of retaking," not including balance of purchase price, where tender is made on same day assignee of seller declared property forfeited. 35Ariz479, 281P46.

713-86¼-New. In buyer's action for breach of contract seller may set up counterclaim in equity to foreclose buyer's interest in retaken property. 133 Or85, 288P404.

713-86⅛-New. Where automobile sold under conditional sales contract is taken out of county and returned from time to time during alleged period of removal, each return starts anew thirty-day period of removal from county of registry allowed by statute. 35Ariz479, 281P 46.

713-86⅛-New. Upon voluntary return to county of registry with tender of amount due as required by statute, contract will be reinstated though automobile was out of county more than thirty days. 35Ariz479, 281P46.

713-96½-New. Creditors.–Rights of creditors that have attached may be enforced by execution. 284Pa41, 130A259 (dictum).

713-96¼-New. In subsequent purchaser's suit under bill of sale to replevy automobile turned back to original vendor by conditional vendee under contract of which subsequent purchaser had no notice, plaintiff's vendor is proper party. 202 Iowa58, 209NW430.

713-96¼-New. In conversion action by subsequent purchaser against conditional vendor question whether vendor had title is for court. 107Conn365, 140A 758.

713-96⅛-New. Criminal responsibility for removal of property.–Question for jury. 23AlaA256, 123S279.

713-96¼-New. Situs of property. 23 AlaA256, 123S279.

713-96½-New. Elements of offense. 23 AlaA256, 123S279.

SALOON

714-7 326 Ill 230, 157NE195.

SALUS REIPUBLICÆ SUPREMA LEX

715-20 Applied in: BC [1925] 3DomLR 79.

SALVAGE

720-1 5F(2d)214; 23F(2d)214.

720-5 21F(2d)862.

721-9 32F(2d)333.

722-17 20F(2d)265. **Warning to change course preventing stranding** held "salvage service." 19F(2d)394. **Distinguished from "towage."**–27F(2d)920.

722-20 Lending men to leaky vessel for purpose of jettisoning cargo may constitute salvage service. 5F(2d)56. **Standing by leaky vessel in situation of apprehended danger** is service of salvage nature. 5F(2d)56. **Standing by in danger and rendering necessary assistance** constitutes "salvage service." 22F(2d)16. **Giving warning to change course,** preventing stranding, constitutes "salvage service." 22F(2d)16.

722-21½-New. Vessel whose efforts did not contribute to success of salvage is not entitled to award. 17F(2d)607.

723-22 19F(2d)10; 20F(2d)265. **That contract was made for floating vessel** aground does not prevent court's awarding salvage. 39F(2d)457.

723-23 Pumping out and floating stranded schooner is salvage service. 4 F(2d)699.

724-31 274US611, 47SCt663, 71L ed 1232.

724-33 17F(2d)607; 20F(2d)265.

724-35 23F(2d)214.

724-39 5F(2d)230; 7Alaska120.

726-49 22F(2d)16.

729-74 Statutes of United States entitle life salvors to share in salvage award. 42F(2d)524.

729-82 Crews employed by hour at fixed compensation to pull vessels out of mud embarking with notice of contract waived salvage claim. 39F(2d)457.

730-85 36F(2d)428. **One contracting to lighter lumber from steamship** is not entitled to salvage in recovering lumber going overboard from lighter. 32F(2d) 333.

730-86 Rule that salvage contracts are reviewable by courts does not prevent holding salvor to contract. 39F(2d)457 (salvage contract reviewable by courts).

730-87½-New. Where service is really one of salvage, ship cannot deprive crew of their salvage by contract. 13F(2d) 893.

730-87¼-New. Contract for towage, and not salvage under which nothing beyond regular work was done, is bar to award for salvage services. 13F(2d) 893.

730-88 274US611, 47SCt663, 71L ed 1232. **Removal of ship** from proximity to burning vessel held authorized. 23 F(2d)215.

731-89 274US611, 47SCt663, 71L ed 1232.

731-92 Request is not always essential, and acceptance is not necessary when prudent man would have accepted. 274 US611, 47SCt663, 71L ed1232.

731-95½-New. Where request for convoy was made because of fear of unfitness of master of leaky vessel, libellant answering by standing by and lending men is entitled to salvage though there was no real danger. 5F(2d)56.

731-96 7F(2d)886.

732-98 5F(2d)478.

736-35 13F(2d)893. **Service rendered under contract for towage** does not entitle crew to salvage where no personal service or act of personal salvage is rendered. 13F(2d)893.

738-60 43F(2d)177.

738-62 Charterer is joint adventurer with owner where rights are defined by agreement. 5F(2d)214.

739-74 20F(2d)265.

740-78 15F(2d)82.

740-78½-New. , and this rule applies to member of crew temporarily off duty who returns and takes part in salvaging of ship. 15F(2d)82.

742-93 35F(2d)543.

745-11 35F(2d)543.

746-19 15F(2d)648.

746-23 27F(2d)920; 41F(2d)860.

747-30 17F(2d)921.

747-31 17F(2d)921.

747-32 4HawaiiFed299. **Delay by salvors,** in failing at once to bring wrecking anchor to scene of stranding, held excused because of limited information. 15F(2d)648.

748-37 42F(2d)524.

749-50 Loss of barge while in tow raises no presumption of negligence on part of tug rendering salvage service. 27F(2d)920.

750-53 42F(2d)524.

750-54 34F(2d)825; 42F(2d)583.

750-55 17F(2d)873; 42F(2d)524; 7 Alaska120. **Statute creating right to salvage** should be liberally construed. 42F(2d)524.

751-57 24F(2d)147; 42F(2d)524.

751-59 15F(2d)648; 42F(2d)524. **For other cases discussing the ingredients of salvage services** see 24F(2d)147. **Similar statement of elements involved.**–34F(2d)825.

752-62 Accidental loss of life considered.–24F(2d)147.

754-81 15F(2d)648; 17F(2d)607; 17 F(2d)873; 17F(2d)950; 22F(2d)16. **Appraisal should not exceed** worth to

owner. 16F(2d)757. **In absence of market value,** court should consider value to owner, considering reproduction cost. 16F(2d)757.
754-83 43F(2d)571.
754-85½-New. Proportions of value lost and saved considered. 42F(2d)524.
754-86 17F(2d)873; 17F(2d)950.
755-88 **That salving vessel had been operating at a loss** does not deprive her of right to reasonable value of salvage service. 24F(2d)147.
755-90 17F(2d)873.
755-93 15F(2d)375 (apprehension of danger should be considered).
755-95 17F(2d)950.
755-96 17F(2d)950.
756-3 22F(2d)16. But see 34F(2d)825.
756-5 27F(2d)734.
756-6 42F(2d)583. But see 20F(2d) 618. **Salving vessel should be clearly shown to be negligent** before she is charged with her own injuries. 27F(2d) 734. **Elements of salvage award** are compensation for actual outlay and expenses and reward as bounty. 43F(2d) 571.
757-10 42F(2d)524.
757-10½-New. Administrative expenses and insurance have been held not required to be included in allowance of out-of-pocket expenses in determining salvage award, where salving vessel was government owned. 30F(2d)618.
757-12 5F(2d)478 (allowance to individual superintending work of salvage is permissible).
757-16 17F(2d)950.
758-25 42F(2d)524. **Claimants not parties to contract** cannot set it up to defeat life salvor's claim. 42F(2d)524.
762-57 14F(2d)154; 19F(2d)394; 42 F(2d)524.
762-60 43F(2d)177.
762-62 21F(2d)862.
763-69 42F(2d)524.
764-70 **Awards in particular cases.**-7 F(2d)69 (thirty-one thousand two hundred and fifty dollars reduced to fifteen thousand dollars plus expenses and costs of district court for beaching and flooding steel ship); 14F(2d)115.
764-71 34F(2d)825.
765-74 5F(2d)478 (award of fifty thousand dollars to several tugs for floating stranded vessel approved); 24F(2d) 147; 30F(2d)618. **Under five per cent.**-23F(2d)841. **Awards held proper.**-34 F(2d)825 (four thousand dollars).
765-75 43F(2d)196.
766-76 5F(2d)230 (allowance of less than double ordinary contract towage held not excessive); 4HawaiiFed640.
767-91 **Under ten per cent.**-17F(2d) 950.
767-92 30F(2d)366. **Award reduced** from two thousand five hundred dollars to one thousand dollars. 16F(2d) 757. **Under one per cent.**-43F(2d)721.
767-94 27F(2d)734; 4HawaiiFed299. **Under ten per cent.**-15F(2d)648; 17 F(2d)873; 35F(2d)52. **Fifty per cent.** -43F(2d)571. **Five thousand dollars award to tug for salvage services** preventing stranding of steamship, held excessive and reduced to three thousand dollars. 22F(2d)16.
770-5 14F(2d)154; 4HawaiiFed640.
770-11½-New. Establishment of respective liabilities to salvors of floated ship, freight, and cargo is not even prima facie determinative of relative rights of cargo, charterer, and ship as between themselves. 14F(2d)154.
770-11½-New. Where vessel was abandoned at sea, and neither owners nor crew afterward displayed any interest in her, net proceeds from sale of vessel should be applied to salvage award and balance of award charged against cargo. 34F(2d)825.
770-12 15F(2d)73.
771-13 15F(2d)73.
771-14 15F(2d)73; 23F(2d)214.
771-17 34F(2d)825 (owner entitled to amount of expenses out of total salvage award).
771-18 15F(2d)73.
771-19 One hundred dollars to helpers held excessive and reduced to fifty dollars. 19F(2d)10. One hundred and fifty dollars to one assisting divers reduced to seventy five dollars. 19F(2d) 10. Four hundred and fifty dollars to one supplying barge for divers reduced to four hundred dollars. 19F(2d)10. **Four thousand dollars and three thousand dollars** to divers held excessive and reduced to five hundred dollars. 19 F(2d)10.
771-20 See also 4HawaiiFed107.
771-21 17F(2d)950; 19F(2d)10.
771-24 30F(2d)618; 35F(2d)52 (three fourths).
772-26 19F(2d)10.
772-30 17F(2d)950; 19F(2d)10; 34 F(2d)825 (salvage award should be so distributed that fishermen should not lose amounts of their lays because of salvage operation).
772-31 24F(2d)147. **If some of the crew have exposed themselves, etc.**-42 F(2d)524. **Respective awards to members of crew for different services rendered.**-34F(2d)825.
773-36 5F(2d)214 (where there is agreement between owner and charterer that any salvage is to be for "equal account" and "settlement of same to be arranged for by owner," it was held error in libel by owner for all others interested to enter decree as if claims were prosecuted independently). **Owner of ship liable** cannot object to adjustment of rights by owner's execution to charterer of off-hire certificate. 5 F(2d)214.
774-42 179Ark256, 15SW(2d)326; 262 Mass170, 159NE541.
774-46 **Subcontractor has been held not entitled** to lien for salvage services but was required to look to contractor having salvage contract. 43F(2d)571.
775-50 21F(2d)862.
776-67 **Former Admiralty Rules, rule 19, allowing suit in personam,** is not changed by present Admiralty Rules, rule 18 allowing such suit against any party liable for salvage service. 8F(2d) 86. **Under express contract for services in salvaging boat,** remedy of salvagor in libel to enforce lien in United States district court was limited to boat, and remedy in action in state court for services was by personal judgment against defendant. 224AppDiv442, 231NYS362.
776-72 21F(2d)862.
776-73½-New. Attempt of advocate for cargo to raise question of assumption of liability by claimant of stranded vessel held improper in suit for salvage. 35 F(2d)52.
778-91 **Where contract was for services in salvaging boat** and price was agreed on, state court had jurisdiction of action for services but not if action was to recover salvage without express contract. 224AppDiv442, 231NYS362.
780-3 5F(2d)214.
780-4½-New. Master of tug could sue for all parties in interest, including owner, for salvage services by tug. 30 F(2d)366.
780-10 **Affidavit alleging indebtedness** of charterer to respondent can be considered where value of service has been agreed upon. 5F(2d)214.
781-15 42F(2d)583; 43F(2d)564.
781-19 43F(2d)196. **Evidence held insufficient.**-7F(2d)886; 15F(2d)648; 23 F(2d)485. Damages to salving tug was result of poor seamanship. 27F(2d)734; 43F(2d)564. **Evidence sufficient to show case of salvage rather than contract.**-42 F(2d)583. **Evidence has been held sufficient to warrant finding that title to coal remained in respondent as seller.**-43F(2d)564.
781-20 **Evidence held sufficient** to show that warning from tug to change course prevented stranding and probable loss of steamship. 22F(2d)16. **Libellant must show** it contributed to successful result by preponderance of evidence. 7F(2d) 886.
782-26 **Whether libellant contributed** to successful result in attempting to free stranded vessel held question of fact. 7 F(2d)886.
782-27½-New. Court in awarding salvage has duty of safeguarding marine property against spurious claims as well as recognizing meritorious ones. 15 F(2d)73.
784-55 **Respondent is not entitled** to turn amount of salvage into court, rather than pay it to proctors of libelants. 5 F(2d)214.
785-69 15F(2d)375. **Mere fact that reviewing court would not have granted so much** is insufficient to justify reversal. 15F(2d)375.
786-72 5F(2d)478; 17F(2d)921. **Presumption in favor of salvage award** is strong. 27F(2d)734.
786-73 23F(2d)841; 30F(2d)618.
786-75 17F(2d)921.

SAMPLE

791-9 **What not included.**-220AppDiv 196, 221NYS4.
791-9½-New. The word, as a verb, may mean to taste. 100CalA245, 279P819.

SANDAL

791-16½-New. Kind of shoe consisting of sole strapped to foot. 14CustA392.

SANITARY

792-21 149Md648, 132A160.

SANITARIUMS

792-22½-New. Sanitariums are generally privately conducted and supported. 14DelCh392, 129A512.

SATISFY

795-55 27 OhA9, 160NE638.

SCAFFOLD or SCAFFOLDING

797-89 **May consist of:** Roof boards laid loosely upon roof joists to which they are later to be nailed, used by bricklayers at work finishing wall of building, and placed there for that purpose. 217MoA104, 273SW418.

SCHOLARSHIP

800-20 199Cal 661, 250P657.

SCHOOLS AND SCHOOL-DISTRICTS

811-1 **Other definitions are:** A place for instruction in any branch or branches of knowledge. Webster New Int. D. [quot Ariz 254P1056, 1058, 52ALR 244]. **Term "schools" as used in statutes** is generic and embraces all schools maintained in counties under public school laws including primary or elementary, secondary, and high schools. 152Tenn675, 280SW692.
811-3 Mont 286P125(2dcase).
812-4½-New. **Free schools are those that charge no tuition.**-317 Ill 418, 148 NE289.
812-5 222MoA9, 297SW419.
813-10 83Colo 468, 266P501; Mont 288 P188. **Statutory definition.**-197 Ind 278, 149NE369, 150NE766. **School district is intended for all school purposes** enumerated in statutes and constitution. 165La256, 115S479.
813-13 **Other definitions.**-Any building which is appropriated for a use prescribed or permitted by the law to public schools. Webster New Int. D. [quot 31Ariz503, 254P1056, 1058, 52ALR244]. A building which is appropriated for the use of a school or schools or as a place in which to give instruction. Webster New Int. D. [quot 31Ariz503, 254P 1056, 1058, 52ALR244]. **Stadium** is schoolhouse under statutes in some jurisdictions. 31Ariz503, 254P1056, 52 ALR244.
813-13½-New. **School population of county.**-Such population under laws of Oklahoma consists of all persons of school age, whether of white or negro race. 38 OklACR609.
813-16 150Va290, 143SE733.
814-20 **Excusing pupils half hour early once weekly for religious instruction** held not aid of denominational schools in violation of constitutional prohibition of such aid by use of public property or money. 219AppDiv233, 219NYS189.
814-21 245NY195, 156NE663 (rule excusing children to attend religious instruction held not to violate provision). **Constitutional provision against using public property or money in aid of denominational schools** is not violated by excusing pupils half hour weekly for

religious instruction. 245NY195, 156NE663.

814-27 But see 150Va290, 143SE733.

815-31 Actions for breach of contract.–35GaA789, 134SE829. **Offer and acceptance constituting binding contract.**–35GaA789, 134SE829.

815-40½-New. Contract held void as violating constitutional rights of student in requiring him to attend and support a place of worship without his consent. 129Misc481, 220NYS799.

815-40½-New. Claim of minority trustees of institute organized as corporation to provide school for colored youth that there was special and continuing trust created by original donors of property and fund which court must enforce has been held not sustained, where funds had apparently been properly used and exhausted in maintenance of school, and property remaining was conveyed to corporation without condition or trust. 150Va290, 143SE733.

816-44½-New. Construction of contracts.–127Kan748, 274P1111.

816-46 181Ark806, 27SW(2d)1017, 69ALR709.

816-49 CalA 291P601.

816-50 76CalA473, 245P219, 220 [quot Cyc]; NJSup 150A191; 129Misc481, 220NYS799.

816-50½-New. Statement in school catalogue that cadet corps attend services of village churches, included as part of general descriptive matter, held not regulation. 129Misc481, 220NYS799.

816-50½-New. and if considered as a school regulation; held not binding on applicant for admission in view of general language, 129Misc481, 220NYS799.

816-50¾-New. and for the reason that it was unreasonable in view of circumstances of case. 129Misc481, 220NYS799.

816-51 76CalA473, 245P219; 232IllA493, 495 [citCyc]; 258Mass464, 155NE418, 50ALR1495. **Action is one to recover unpaid tuition,** and statute relating to liquidated damages and damages for breach of contract are inapplicable. 76CalA473, 245P219. **Father withdrawing son from school** before December 1st of school year becomes obligated for one-half of annual fee under contract. NJSup 150A191.

817-56½-New. A student remains liable to pay full amount of tuition and charges for entire year after expulsion for disobedience of reasonable rule or regulation. 129Misc481, 220NYS799.

817-56½-New. Pupil attending school for girls who secretly marries is liable to expulsion and no recovery of tuition paid for balance of year or whole year can be had, contract being indivisible. 258Mass464, 155NE418, 50ALR1495.

817-61½-New. In action by school against dismissed teacher, on agreement for payment of part of tuition money received by him, instruction that if discharge was justified, school could recover, is sufficiently favorable. 256Mass262, 152NE230.

817-61¼-New. Trustees of school entering into contract of employment of principal in their representative capacity are not individually liable for breach of contract although they exceeded their authority. 41GaA198, 152SE310.

817-61½-New. Action for breach of contract of employment as principal held against defendants individually and not as trustees of association owning school. 41GaA198, 152SE310.

817-61½-New. Petition in such action held not demurrable. 41GaA198, 152SE310.

817-61½-New. Evidence in such action held to show that defendants contracted in representative capacity as trustees. 41GaA198, 152SE310.

817-63½-New. School has full power to enforce its rules and regulations and to carry into effect its disciplinary methods among its students. 129Misc481, 220NYS799.

817-63¾-New. Any disobedience of a student may be punished, not only by suspension or other penalty, but even by expulsion. 129Misc481, 220NYS799.

817-63¼-New. School cannot require its students to attend churches of various denominations, independent of school itself. 129Misc481, 220NYS799.

817-63½-New. Private school may adopt rules for regulation of pupils and dismiss pupils who violate rules. CalA 291P601.

817-63½-New. Regulation forbidding boarding pupils from leaving premises without permission has been held reasonable and proper. CalA 291P601.

817-64 88CalA731, 264P273; TexCivA 148W(2d)1051. **Purpose of school system** is to promote general intelligence. 234IllA141. **High schools** are included in common school system under constitution and statutes in some jurisdictions. 198Ind95, 151NE411.

817-64½-New. State may require education of its children for its own protection. 81Colo 276, 255P610.

817-65 275US78, 48SCt91, 72L ed172; 202Cal 110, 259P730; 160Ga268, 127SE868; 213Ky810, 281SW999; 137Misc470, 244NYS427; TexCommnA 278SW183; TexCivA 278SW516; TexCivA 300SW211. **Construction of statutes.**–164La482, 114S104. **Statutory provisions concerning school establishment and regulation.**–156Miss251, 125S718.

818-66 TexCommnA 278SW183. See also 245Mich585, 223NW359. **Constitutional provisions concerning school establishment and regulation.**–160Ga752, 128SE887; 327Ill251, 158NE355 (assessment for local improvement held not violative of constitutional provisions); TexCivA 25SW(2d)215. **Requirement of uniformity.**–166Ga111, 142SE535; 219Ky565, 293SW1063; 129Or248, 275P917 (statute held not to impair uniformity). **High schools established under laws of state** come within definition of "schools of higher grade" in constitution providing for establishment of free public schools. 154Miss468, 122S737, 63ALR1161. **Law held constitutional.**–200Cal 637, 254P570. **Object of school laws** is to carry out constitutional provisos for school system. 234IllA141. **Schools for adults.**–143Okl 136, 287P1035. **Statute providing for regulation of junior colleges by parish school board** does not violate constitutional provision that state board of education have supervision over higher educational institutions. 169La646, 125S841. **Statutes held not unconstitutional.**–TexCivA 23SW(2d)504.

818-67 202Cal 110, 259P730; 332Ill181, 163NE385; 131Misc424, 226NYS245; 196NC17, 144SE377; 158Tenn445, 14SW(2d)730. **Statute held not special** nor an arbitrary classification. 200Cal637, 254P570.

819-69 160Ga268, 127SE868 (counties and municipalities); TexCivA 278SW516.

819-70½-New. After fourth class city becomes fifth class city, it may no longer operate schools as fourth class city schools. 215Ky40, 284SW386.

819-70½-New. Where fifth class city becomes fourth class city and subsequently becomes fifth class city again, its schools again become graded schools with obligations of preceding fourth class city schools. 215Ky40, 284SW386.

819-70¼-New. Maintenance of public schools is a purely governmental function. 80CalA131, 251P679.

819-70½-New. When city is acting in promotion and not in derogation of legislative school plans and purposes of state, school system may be made municipal affair. 207Cal 473, 279P447.

819-70½-New. Constitutional provision for state system of public schools is mandatory. 198NC480, 152SE401.

819-71 81Colo 276, 255P610; TexCivA 278SW516. **Constitutional provision giving school board control of instruction** should be given reasonable interpretation in view of parent's limited right to direct children's studies. 81Colo 276, 255P610. **Essentials of good citizenship.**–81Colo 276, 255P610. **School cannot limit parent's constitutional right** to education of children in public schools so as to make it subject to surrender of liberty to direct children's studies. 81Colo 276, 255P610.

819-72 317Ill 418, 148NE289; 198Ind 95, 151NE411; 154Miss468, 122S737, 63ALR1161; 73Mont442, 236P670; 195NC714, 143SE528; NC 154SE397; NC 155SE550; TexCommnA 17SW(2d)36(3d case); TexCivA 22SW(2d)683; TexCivA 22SW(2d)712. But see TexCivA 22SW(2d)499. **Prior resort to school authorities.**–TexCommnA 29SW(2d)312.

819-73 178Ark257, 10SW(2d)353; 74Mont25, 238P582 (courts will compel superintendent of schools to furnish clerk of school district with list of inmates for school census purposes, there being no other remedy provided); 195NC714, 143SE528; NC 155SE550. **Discretion of legislature in school affairs** must be respected by local authorities and by court. 196Ind436, 148NE481. **Resort to school authorities is condition precedent** to action by courts in relation to matter under control of such authorities, construing statute. 116Tex183, 288SW159.

819-73½-New. Court's jurisdiction does not attach until board of trustees and state superintendent of instructions have passed on controversy. TexCivA 275SW265.

819-73½-New. Exclusion of colored persons from public library on account of color, race, or previous condition of servitude is without power of governing board of public library. 106WVa476, 146SE389.

819-74 Ariz 261P629; 198Ind 95, 151NE411; 144Miss732, 106S113; 117Okl 172, 245P848; 143Okl 1, 286P902 (county's duty to maintain separate schools). **In Oklahoma.**–113Okl 234, 241P346. **Sufficiency of complaint in action to enjoin county superintendent** from designating colored school as separate school and designating white school as district school. 113Okl 234, 241P346. **Repeal of statutes.**–198Ind95, 151NE411. **Statutes held not unconstitutional.**–198Ind 95, 151NE411. **Statutes held not violative of provision.**–136SC345, 134SE380. **Statutes construed.**–224Ky50, 5SW(2d)484. **Status.**–135Okl 1, 275P292. **Reasonableness of order transferring pupil.**–129Kan852, 284P363(1stcase). **Establishment of school district for white pupils alone** has no effect on status of negro pupils within same territory. 232Ky434, 23SW(2d)948.

820-75 Chinese citizen held not denied equal protection of law by being compelled to attend colored school furnishing equal educational facilities. 275US78, 48SCt91, 72L ed172.

820-76 114ObSt188, 151NE39.

820-78 Can [1928] 3DomLR753. See also Can [1928] 1DomLR1041.

820-79 Statute construed.–Can [1930] 4DomLR190.

820-80 Location of land.–50SD274, 209NW543 (statute construed).

820-81½-New. Under constitution state grant of land to county vested legal title thereto in such county for benefit of public schools. TexCivA 275SW449.

821-83 224Ky184, 5SW(2d)1062; Mont 286P133. **In Mississippi.**–146Miss30, 111S581. **Lease of school lands.**–116Nebr 261, 216NW818.

821-87 215Ala524, 111S312; TexCivA 275SW449 (under legislative control but limited to purposes of trust arising from original grant); 105WVa42, 141SE447. **Commissions allowed for collection and handling of school funds raised by taxation** constitute part of such fund under some statutes. 169Ark436, 276SW2. **Determination of amount of excess commissions of county officers to be credited to school fund.**–169Ark436, 276SW2. **School funds held public funds.**–11LaA647, 124S628. **Constitutional provision for keeping public school fund inviolate** is not violated by imposition of penalty against school district for failure to pay assessments. Mont 287P164. **Fund required by constitution to remain inviolate** refers to permanent school fund and not to fund raised by tax levy. Mont 287P164. **In North Carolina.**–198NC480, 152SE401.

822-93 162La956, 111S341 (license tax on tobacco dealers).

822-95 TexCivA 25SW(2d)215 (Texas Rural School Act held not violative of constitutional provision for sale of school lands and investment of proceeds). In Mississippi.-148Miss462, 114 S332.

822-1½-New. Interest arising from moneys deposited in county depositaries.-Statute providing that interest arising from moneys deposited in county depositaries shall be placed to credit of common school fund was not repealed or modified by statute providing that interest collected from county depositaries shall be credited to respective funds and accounts earning same. 121 Okl 190, 249 P408.

822-1½-New. Interest derived from unused portion of money arising from sale of road improvement bonds deposited in county depositary should be disposed of in accordance with foregoing first mentioned statute. 121 Okl 190, 249P 408.

822-2½-New. Normal school trustees authorized to purchase land and buildings and pay therefor on amortization plan out of rents cannot include as part of amortization fund rental of buildings not being paid for. 148Wash126, 268P 862.

822-2⅓-New. Donations from private sources may be accepted by school district for erection of buildings. 13PaDist &Co 584.

822-3 215Ala524, 111S312; 242Mich 186, 218NW764; 315Mo 817, 287SW37; Mont 286P133; 139 Okl 185, 281P795; 141 Okl 65, 283P1008; 151SC99, 148SE 726 (apportionment of proceeds of bond issue held not arbitrary and in conflict with constitution); 157Tenn508, 11SW (2d)265; 117Tex516, 8SW(2d)655; 194 Wis464, 215NW902; Can [1928] 3Dom LR753.

822-3 Mandatory statutes.-231Mich664, 204NW737. **Transfer from maintenance fund to unappportioned county school fund.**-70CalA656, 234P125. **Much discretion is given county boards of education** under constitutional provision for apportionment of school fund so as to provide school terms in various schools as nearly as practicable of equal length. 214Ala620, 108S588. **Reapportionment is not authorized** where consolidated district, through misapprehension of law, applied for and received aid under one statute instead of another under which greater amount would have been received. 315Mo 817, 287SW37. **Apportionment between white and colored schools.**-44 OklACR98. **A teacher cannot compel** county treasurer to transfer money to fund of district against which she has claim, under statute permitting transfer of funds, where she failed to show needs of other districts or even of her own district and no district has preferential right of transfer. 80CalA 131, 251P679. **Action to recover money** derived from state and county apportionment will not lie where school district has received benefit thereof through budget each year. 140 Okl 229, 282P 670. **Disposition of funds received by independent school district.**-140 Okl 229, 282P670 (must be used for benefit of separate or minority school). **Constitutional prohibition against diversion of general fund to available school fund** held not violated by Texas Rural School Act. TexCivA 25SW(2d)215. **Constitutional provision relating to permanent school fund and appropriation thereof and of available school fund** held inapplicable to appropriation under Texas Rural School Act. TexCivA 25SW (2d)215. **Receipt of benefits of apportionment** precludes judgment by independent district against county. 141 Okl 55, 283P1010. **Severance taxes are not part of school fund** so as to render unconstitutional statute giving board of education, and not parish boards, control of expenditures for free school books. 168La1005, 123S655, 67 ALR1183.

824-4 142 Okl 19, 285P38. **Appropriation out of general fund** held valid under constitution. 215Ala524, 111S312.

824-5½-New. School funds apportioned never lose their character as public funds. 80CalA131, 251P679.

824-7 169Ark436, 276SW2; 174Ark 971, 298SW222; 137 Okl 193, 279P326 (2dcase).

824-8 125Misc692, 211NYS822 (printing cards in aid of denominational schools held unconstitutional).

825-14½-New. Deduction from school funds of just proportion of salaries of county collector and treasurer does not constitute diversion of school funds. 169Ark436, 276SW2.

825-14½-New. Decision of commissioner ordering trustee of school district to pay claim of board of education and of no money is available to raise such sum by tax is not illegal diversion of school funds. 125Misc230, 211NYS413.

825-14¼-New. but is levy of authorized tax. 125Misc230, 211NYS413.

825-14⅓-New. It is no diversion of moneys from purpose of their provision, to make a temporary transfer of school funds from one fund to another where the fund or district to which transfer is made has an assured income. 80CalA131, 251P679.

825-14⅓-New. Funds set apart for separate schools.-Funds created and set apart for maintenance of either separate white or colored school cannot be expended or used for maintenance of other. 135 Okl 1, 275P292.

825-18½-New. Effect of creation of high school districts.-Statute providing for division of county into high school districts and for levying of taxes to support same does not violate constitution by interfering with apportionment of funds for common schools, where separate means of support is provided and there is no intention to interfere. 136SC345, 134SE380.

826-22 86 IndA641, 159NE164.

826-25 169Ark436, 276SW2, 6 [quot Cyc]. **Obligation to invest proceeds of school lands** in productive fund held not impaired by statute providing for loans to school districts. 174Ark971, 298SW222.

826-26 169Ark436, 276SW2, 6 [quot Cyc].

827-32 32NM485, 259P623; 34NM451, 283P905. **Constitutional prohibition against incurring indebtedness in any year exceeding income and revenue provided for year** should not be construed as requiring balance in teacher's salary fund of school district at end of fiscal year to be kept, except as to liabilities incurred during such year, in "cold storage" for four years until all possible claims of such year have been barred. 70CalA656, 234P125. **Disposition of securities.**-195Wis561, 219NW97 (board authorized to deposit with bondholders committee bonds issued by insolvent institutions).

827-32½-New. Revolving Loan Fund Act providing that state shall borrow from school fund and lend to school districts held not invalid as enabling state to make profit on school fund, 174 Ark971, 298SW222.

827-32½-New. nor as making gift of school fund to such school districts, 174 Ark971, 298SW222.

827-32¼-New. nor as discriminating in that state board is empowered arbitrarily to grant aid to some districts and withhold it from others and to charge different rates of interest. 174Ark971, 298SW222.

827-32⅕-New. The question of statutory power of school board and whether it is exceeding such power in the expenditure of school funds is subject to judicial control. 203 Iowa1016, 213 NW593.

827-32⅙-New. Whether board is properly exercising such power as statute confers upon board is matter of discretion not subject to judicial control. 203 Iowa1016, 213NW593.

827-32⅐-New. Funds of separate school for colored children.-In common school district, district board has no authority to receive or disburse funds belonging to separate school. 135 Okl 1, 275 P292.

827-32⅛-New. Such board is not entitled to money received for separate school from state aid and gross production tax. 135 Okl 1, 275P292.

827-32⅙-New. Common school district cannot sue county to recover state aid funds apportioned to minority school and which are held by county treasurer for benefit of such school. 137 Okl 193, 279P326(2dcase).

827-32 1/10-New. Permanent school fund of state is not entitled, under act of congress, to interfere with exercise of discretion vested in state board of finance by such act for disposition of fund thereby created. 34NM394, 281P 456.

828-37½-New. Provision for payment of ten per cent of principal obligation as attorney's fee, in event of foreclosure, embodied in mortgage given to state in security of moneys loaned out of permanent school funds of state, is valid, notwithstanding proceedings in foreclosure may be instituted and conducted by salaried employee or officer of state. 135 Okl 107, 274P473.

828-38 85 IndA56, 152NE836.

829-44 135 Okl 107, 274P473.

830-59½-New. Equitable action for money had and received may be maintained for loan to trustees used by them to discharge legal liabilities, though they had no authority to borrow. 160Ga556, 128SE766.

831-73 State treasurer incurs no liability concerning investment or management of retirement funds by disposition of them under direction of annuity board. 195Wis561, 219NW97.

831-77½-New. Action may be maintained against county treasurer, who has not given required statutory bond, to recover school district funds illegally paid out, 220MoA322, 286SW136.

831-77⅓-New. though no warrant has been drawn, presented, and refused, 220 MoA322, 286SW136.

831-77¼-New. and though treasurer's term has not expired. 220MoA322, 286 SW136.

831-77⅙-New. County treasurer cannot be considered as bailee only of school funds and so required to exercise only ordinary care. 220MoA322, 286 SW136.

831-79 335 Ill 11, 166NE504; 202 Iowa 701, 210NW947, 49ALR705; 203 Iowa 26, 212NW368; 177Minn446, 225NW292; 74Mont152, 240P812; 127Misc492, 216 NYS501; 44 OklACR180, 182 [quotCJ]; 121 Or511, 254P357; 130 Or461, 280P 664, 66ALR1271 (agency of state); 289 Pa75, 137A140; TexCommnA 278SW 183. **Relation to county.**-32Ariz124, 256 P362; 74Mont152, 240P812.

832-80 245 IllA459. See also 5LaA508.

832-81 203 Iowa26, 212NW368; 11LaA 647, 124S628; 177Minn454, 225NW449; 75Mont154, 242P979; 76Mont458, 248P 369; 80Mont363, 260P1042; Mont 288 P188; 44 OklACR180, 182 [quotCJ]; 153Tenn306, 283SW751; TexCommnA 278SW183. See also 250IllA6. **Instruments of state,** etc. 153Tenn306, 283 SW751. **Political subdivision of state.**-122 Or124, 256P652. **Quasi-municipal corporation.**-122 Or124, 256P652. **Instruments of state.**-152Miss82, 118S372.

832-82 127Misc492, 216NYS501; 53 ND683, 208NW968, 45ALR1337; 44 OklACR180, 182 [quotCJ]; 289Pa75, 137A140; 8PaDist&Co 730; TexCommn A 278SW183. **Quasi-municipal corporation.**-11PaDist&Co 536.

832-83 331 Ill 144, 162NE128.

832-84 CalA 259P349; 239Mich46, 214 NW239; TexCommnA 278SW183; 195 Wis515, 218NW837. See also 95CalA 307, 272P1068.

833-85 Mich 233NW387; 100Vt75, 135 A12.

833-86 202Cal 110, 259P730; Mich 206 NW576; TexCommnA 278SW183. **Home rule amendment held not to apply** to independent school districts coextensive with cities. TexCommnA 278SW183.

833-86½-New. School district is entity whether its lines coördinate with one municipal corporation or it takes in parts of many political subdivisions. Mich 206NW576.

833-87 31F(2d)155; 330 Ill 522, 162 NE150; 245 IllA459; 152Miss82, 118S 372; 117Nebr6, 219NW583; 53ND683, 208NW968, 45ALR1337; 122 Or124, 256 P652; 289Pa75, 137A140; 53SD579, 221 NW697; TexCommnA 290SW1083; Tex CivA 10SW(2d)174; 99WVa466, 129SE

486; 197Wis284, 221NW860. **Purpose of their creation** is to provide free schooling to all entitled thereto. **Tex CivA** 22SW(2d)475(2dcase).

833-87½-New. School districts are state institutions. 123Kan495, 256P149.

833-87¼-New. School districts are agents of the state in the management of schools. 80CalA131, 251P679.

833-88 176Ark1062, 5SW(2d)315; 178Ark443, 12SW(2d)881; 332 Ill 181, 163NE385; 242 IllA488; 202 Iowa545, 210NW576; 152Miss664, 120S745; 136 Okl 265, 277P932; 117 Or274, 243P553; 136SC345, 134SE380; TexCommnA 276SW419; TexCommnA 278SW183; TexCommnA 287SW904; TexCommnA 3SW(2d)420; TexCivA 280SW260; TexCivA 285SW345; TexCivA 286SW501; TexCivA 291SW268; TexCivA 2SW(2d)889; TexCivA 5SW(2d)808; TexCivA 9SW(2d)384; TexCivA 23SW(2d)431 (discretion as broad as objects require). **Construction of statutes.**–315Mo1336, 290SW123. **Special law held valid.**–TexCivA 290SW279. **Power is plenary.**–181Ark253, 25SW(2d)443; TexCivA 291SW268. **Legislature can classify** school districts in any reasonable and uniform manner. 174Ark936, 298SW327. **Statute authorizing annexation of school district to another** has been held not unconstitutional as discriminatory. **Tex CivA** 24SW(2d)449.

833-89 172Ark602, 289SW778; TexCommnA 3SW(2d)420; TexCivA 280SW260; TexCivA 286SW501; TexCivA 287SW147, 148 [quotCyc]. **In Ohio.**–19 OhA481.

834-90 332 Ill 181, 163NE385; TexCivA 275SW449 (act creating county line school districts declared constitutional); TexCivA 285SW345; TexCivA 292SW942; TexCivA 1SW(2d)410; TexCivA 2SW(2d)889; TexCivA 8SW(2d)239. **Incorporated town** becomes independent district for school purposes when it establishes and maintains for four years high school fully accredited with state university. 115 Okl 48, 241P787. **Special act of incorporation may adopt provisions of general law.**–TexCivA 272SW559. **Constitutionality of statute** creating independent school district is not affected because act provides for appointing commissioners to prorate indebtedness. TexCivA 22SW(2d)475(2dcase). **School district declared void** by chancery court without appeal was not legalized by subsequent law validating school districts excepting those in litigation. 157Miss495, 128S338.

834-91 172Ark602, 289SW778; 177Ark260, 6SW(2d)281; Iowa 233NW147 (superintendent's powers); 117 Or274, 243P553; TexCivA 286SW264; TexCivA 291SW268 (school trustees); 152 274, 243P553; TexCivA 286SW501; 37 Wyo 259, 260P537, 539 [citCyc]. But see 333 Ill 304, 164NE696. **In North Dakota.**–53ND594, 207NW650. **Statute held not conflicting or to repeal earlier** statute as to consolidation by county board. 177Ark260, 6SW(2d)281. **Statute delegating to private persons power** of organizing school districts is unconstitutional. Nebr 231NW689.

834-91½-New. But no governmental agency can change boundaries without express authority. 173Ark781, 293SW722.

834-92 Ark 31SW(2d)959; 206 Iowa1183, 221NW776; 165La256, 115S479; Miss 130S684; 196NC229, 145SE1; 53ND594, 207NW650; 115 Oh333, 154NE742; 28 OhA129, 162NE637; 117 Or274, 243P553; TexCivA 286SW501; 37Wyo 259, 260P537, 539 [citCyc]. But see TexCivA 9SW(2d)506. **Power of county board of education.**–221Ala451, 129S473 (to create local district covering territory of two old districts); 162Ga189, 132SE756; 166Ga168, 142SE671; 213Ky717, 281SW815. **Power of county superintendent.**–314Mo486, 284SW129; 113 Okl 222, 241P145 (to attach part or all of adjacent district to consolidated school district); 119 Okl292, 249P690. **Statute construed to authorize boundary board to annex an entire district to another.** 117 Or274, 243P553. **Power of county school board to change boundaries of consolidated school district.**–143Miss880, 108S439. **Consolidation and annexation** of districts are not to be distinguished under act. 117 Or274, 243P553. **Board held empowered to add part of any one district to any other, within its discretion.** 164Ga251, 138SE156. **In Arkansas.**–173Ark514, 292SW697. **Power of district superintendent.**–319AppDiv615, 220NYS414. **Unless expressly authorized to do so,** county board or other agency cannot change boundaries of district created by legislature. 172Ark602, 289SW778. **Power of county board of supervisors.**–150Miss489, 117S111. **Power of school trustees, directors,** etc. 196NC229, 145SE1; TexCivA 26SW(2d)324. **Power of board of arbitration** is limited to jurisdiction expressly conferred. MoA 2SW(2d)113. **Power of county commissioners.**–179Minn30, 228NW168 (1stcase) (cannot carve new district out of old district so as to leave latter without schoolhouse). **Board cannot change existing districts** so as to deprive any educable child of school facilities within convenient reach. 156Miss251, 125S718. **Gerrymandering district** not permitted and annexation of territory must be operated fairly, justly and sensibly. 156Miss251, 125S718. **Special Act held not repealed** by general statute. 180Ark378, 21SW(2d)602.

834-92½-New. , and statute authorizing county boards to dissolve school districts does not apply to such district. 173Ark514, 292SW697.

835-93 152Miss664, 120S745; 80Mont363, 260P1042, 1046 [citCyc].

835-95 179Ark822, 18SW(2d)349; 181Ark208, 25SW(2d)23(1stcase); 39 Okl ACR270; TexCivA 13SW(2d)732; 37 Wyo 259, 260P537, 539 [citCyc]. **Appeal to probate judge from refusal of trustees to change boundaries of districts by detaching lands from one and attaching them to another.**–233Mich327, 207NW5. **Showing as to right to appeal.**–141Miss444, 106S768. **Appeals to state and county superintendent of public instruction.**–124 Okl 117, 254P101; TexCivA 284SW306 (state superintendent has power to review acts of county board of trustees in regard to school districts). **County board of supervisors.**–146Miss56, 111S831. **By whom taken.**–135 Okl 109, 274P467. **Persons entitled to appeal.**–221MoA257, 2SW(2d)110. **Matters of fact which may be proved on appeal.**–147Wash321, 266P150. **Notice of appeal.**–147Wash321, 266P150. **Owners of land not transferred cannot urge objection.**–147Wash321, 266P150. **Failure of school clerk to call meeting of school and town board** entitled petitioners to appeal to county superintendent. Wis 231NW174 (duty of district clerk to make return). **No appeal lies from election** on proposition for change of boundaries of consolidated school district lying in two counties. MoA 28SW(2d)678.

836-96 164La204, 113S818; 174Minn347, 219NW289; 174Minn380, 219NW456; 179Minn445, 229NW585; Miss 130S684; 219AppDiv563, 220NYS414; 222AppDiv320, 226NYS145; 225AppDiv176, 232NYS465; 140 Okl 31, 282P132 (county superintendent's action in attaching territory to consolidated school district); 152Wash412, 278P171, 65ALR1520; 37Wyo 259, 260P537, 539 [citCyc]. **Redistricting of school district** held not so arbitrary and oppressive as to authorize judicial interference. 37Wyo 259, 260P537. **Determination of county superintendent of schools as to boundaries of consolidated school district** is not reviewable by courts. Mo 30SW(2d)603. **Insufficient ground for reversal.**–179Minn445, 229NW585. **Order of county board of education forming new district** will not be disturbed unless arbitrary and unreasonable. 181Ark584, 26SW(2d)900(2dcase). **Appeal based on board of supervisors' action** who had no authority to review county school board's order, conferred no jurisdiction on circuit court. Miss 130S684.

836-97 85Colo 370, 275P934; 150SC391, 148SE218. **Action of board of county commissioners on appeal from ruling of county superintendent of public instruction** in matter of altering boundaries of or changing common school districts is final. 119 Okl 292, 249P690.

836-98 Evidence held insufficient.–170Minn32, 211NW960.

836-99 137Misc470, 244NYS427.

836-99½-New. Proceeding in statute which provides method by which elementary school district may withdraw from high school district is limited to exclusion of elementary school district from a high school district, combined with annexation of elementary school district in contiguous high school district. 76CalA517, 245P218.

836-99¼-New. Under statutes in some jurisdictions, there is no method provided for withdrawal of portion of high school district from district itself and formation of new high school district. 76CalA517, 245P218.

836-99¼-New. Such withdrawal is not permitted under statute limited by legislature solely to formation of new high school districts and not to withdrawal of any part of existing high school district. 76CalA517, 245P218.

837-2 173Ark514, 292SW697; 220MoA388, 286SW726; 221MoA257, 2SW(2d)110. **Relief.**–NH 149A869. **Where order of county board of education changing boundary lines is void** certiorari will lie. 181Ark208, 25SW(2d)23(1stcase).

837-3 In Oklahoma.–135 Okl 114, 274P669.

837-5 Miss 130S684.

837-5½-New. Where record contains all matters required by statute in legal form in organization of consolidated school district, such organization cannot be annulled in certiorari proceeding. 220MoA388, 286SW726.

837-6 217Ala103, 115S30; 179Ark822, 18SW(2d)349; 82Colo438, 261P457; 128Kan487, 278P741(2dcase); 165La256, 115S479; 80Mont363, 260P1042, 1046 [citCyc]; TexCivA 15SW(2d)144(2dcase). **Ohio statutes,** etc. 113 Oh658, 150NE36. **Preliminary steps toward organization of high school district,** under Rev. St. § 72-3501, may be taken by any person interested in formation of the district. 120Kan321, 243P262. **Taxable value of property.**–121Kan132, 245P1045. **Substantial compliance** with statutory requirements is sufficient. 315Mo1336, 290SW123; 221MoA257, 2SW(2d)110. **Town school districts may change boundaries in same manner** as common school districts. 314Mo315, 284SW135. **Two distinct districts may be created** by one resolution. 164Ga251, 138SE156. **Census, enumeration, and assessment, held not required** as condition precedent. 165La256, 115S479. **Proceedings for annexation of territory under repealed statute** are inoperative. 235Ky75, 29SW(2d)648(2dcase) (statute held repealed). **Act requiring state education council's approval to create school districts** is inapplicable to district created by prior decree incorporating borough. 300Pa73, 150A88.

838-12½-New. In proceedings to change school district boundaries trial court upon view of land may consider difficulties of roads. 50SD226, 209NW343.

838-12½-New. Evidence held sufficient to sustain finding that purpose of proceeding to alter boundaries was to make one district large enough to support two schools. 50SD226, 209NW343.

838-12¼-New. Misnomer of district in proceedings for extension of boundaries so as to include common school districts does not evidence purpose to organize consolidated school districts. 307Mo250, 270SW382.

838-12½-New. Resolution of school board creating school district need not have title indicating its object, as is required of statute. 165La256, 115S479.

838-12¼-New. It is not wrong in itself to take question of taxable wealth into consideration either in formation

or in alteration of school districts. 37 Wyo 259, 260P537.

838-12½-New. In suit by independent school district to recover taxes assessed against lands in adjoining county, which had been annexed to school district pursuant to statute, it has been held that state, on relation of trustees of common school district to which lands in question had subsequently been added, was properly permitted to intervene and litigate question of validity of proceedings by which boundaries of independent school district were extended to include land in question. TexCivA 9 SW(2d)384.

838-12¼-New. Although procedure for detachment of territory from school district is arbitrary, no constitutional rights are thereby invaded or involved. Wis 231NW174.

838-13 Ark 31SW(2d)959; 164Ga401, 138SE792; 317 Ill 111, 147NE497 (notice in manner prescribed by statute essential to validity and must appear in record); 113 Okl 222, 241P145. **Posting notice** by order of superintendent sufficient. 317 Ill 111, 147NE497. **Irregular publication of notice** will not invalidate proceedings where it is found that due notice was given. 192NC590, 135SE467. **Failure of county superintendent to appear** at meeting after notice or to recognize union district held not to prevent formation. 82Colo 438, 261P457.

839-14 245 IllA447; 113 Okl 222, 241P145 (annexation of territory to consolidated school district).

839-15½-New. Statute is constructive notice to voters of special charter district that property of district will be conveyed in case of adoption of county wide plan and no other notice is required. 192NC298, 135SE40.

839-16 179Ark729, 17SW(2d)895; 71CalA361, 235P79; 85Colo 370, 275P934; 164Ga401, 138SE792; TexCivA 13 SW(2d)119(2dcase); TexCivA 32SW(2d) 235. **Notice of election.**–168Ark587, 270 SW973; 150Miss489, 117S111; 315Mo 1336, 290SW123; MoA 16SW(2d)598; 126 Okl 130, 258P755. **Union or consolidation of districts.**–168Ark587, 270SW 973; 162Ga439, 134SE74; 318Mo 865, 1SW(2d)94; 126 Okl 130, 258P755; Tex CivA 24SW(2d)72. **Election to organize high school district** is special election. 326 Ill 310, 157NE177. **In Oregon.**–117 Or274, 243P553. **Popular vote of all districts held not to validate** attempted extension of boundaries of town district to include adjoining common school district. 314Mo 315, 284SW135. **Record of election** is sufficient if it shows result upon proposition submitted though it does not show details of what was done at meeting. 315Mo 1336, 290SW 123. **Separate petitions of patrons affected** must be filed before submission to electors is ordered. 156Miss251, 125 S718. **Where electors of consolidated district lying in two counties** voted against change of boundary no change was affected as regards tax assessment. MoA 28SW(2d)678. **Who are "patrons"** under statute requiring petition by patrons affected. 156Miss251, 125S718.

840-17 175Ark212, 298SW997; 230Ky 33, 18SW(2d)862; TexCivA 10SW(2d) 743. **Remonstrance by majority of electors** of whole territory to transfer three districts to adjoining district renders invalid transfer of district from which there were no remonstrants. 21 OhA 471, 153NE219.

840-18 71CalA361, 235P79 (where majority of registered electors of one district did not sign, it is immaterial whether petition was signed by a majority of electors of other districts); 230 Ky33, 18SW(2d)862; MoA 16SW(2d) 598. **Act of school board in calling election** on presentation of petition in due form for change of boundaries cannot be reviewed by courts. MoA 16SW(2d) 598. **Approval by board of arbitration** of illegal election held void. MoA 280SW 69. **As to form and contents of petition.** See also 150Miss489, 117S111. **All qualified voters in district affected by change** held entitled to vote where vote is proper. 164Ga251, 138SE156. **Conclusiveness of determination as to sufficiency of petition.**–126 Okl 130, 258P755. **County superintendent** must detach territory in accordance with election vote. 318 Ill 385, 149NE310. **Election called to organize township high school district** is special election and its character is not changed by fact it is held at same time as regular election of trustees. 324 Ill 534, 155NE473. **Election essential or valid** only where one fourth of patrons of districts in proposed consolidation object to rearrangement. 164 Ga251, 138SE156. **Filing of petition** for boundary election with secretary of one district who retains true copy and delivers original to secretary of other district under authority of order of board is sufficient. MoA 16SW(2d)598. **Finding of arbitration board** approving election unlawfully disorganizing district set aside as legal fraud. MoA 280SW 69. **Petition by patrons objecting to consolidation** for election on issue signed by less than minimum number required by statute held insufficient and mandamus properly refused. 165Ga 152, 140SE358. **Petition for election.**–126 Okl 130, 258P755. **Petition need not specify expense** of maintaining schools for current year as indebtedness to be assumed. 130Kan818, 288P1055. **Petition signed by fifty voters** held to give superintendent jurisdiction to call election. 325 Ill 64, 155NE854. **Proceedings held void.**–MoA 280SW69. **Public notice for organization of district** held sufficient under evidence. 325 Ill 64, 155 NE854. **Question need not be presented separately in each district** where proposition is to form new district out of parts of existing districts. 315Mo 1336, 290SW123. **Statute is mandatory.**–318 Ill 385, 149NE310. **Time for calling election.**–316Mo 721, 291SW457. **Voters in all districts** must vote on identical propositions as to alteration. MoA 280 SW69.

840-18½-New. Notice of election held to organize township high school district is defective where territory to be included is incorrectly described and election is void. 324 Ill 534, 155NE473.

840-18⅓-New. Voters upon proposition to organize township district are not estopped from questioning validity by taking part in election. 324 Ill 534, 155 NE473.

840-18¾-New. In Ohio it is held, under Gen. Code § 4696, that territory is transferred in contemplation of law from one district to another from the time of filing petition required. 23 OhA 329, 155NE505.

840-18⅚-New. Under constitution of Texas it has been held that statute authorizing annexation of common school districts to independent district without consent of voters is valid. TexCivA 286 SW501.

840-18⅞-New. Irregularity between order for election and certificate of election board as to date does not void election. 230Ky33, 18SW(2d)862.

840-19 179Ark822, 18SW(2d)349; Ark 31SW(2d)959; 102CalA266, 282P1021; 317 Ill 111, 147NE497 (district not invalidated by failure for six months to verify petition, county superintendent being authorized to accept signatures as genuine without verification); 88 IndA 420, 164NE292; 165Minn384, 206NW 719 (petition sufficiently signed for annexation of territory to independent school district); 80Mont363, 260P1042; 119 Oh262, 163NE495; 141SC347, 139 SE775; 150SC391, 148SE218; 197Wis 284, 221NW860; Wis 231NW174 (discretion not necessary). But see 71CalA 361, 235P79. **As to form and contents of petition.**–153Miss854, 121S842; 156 Miss644, 126S469 (territory of proposed district must be set forth); 315Mo 1336, 290SW123 (unauthorized designation of proposed district as Elmira district held not to invalidate organization); 80Mont 363, 260P1042; 50SD444, 210NW661 (description of territory held sufficient though township and range of property involved was not given); 54SD146, 222 NW690; Wis 231NW174 (substantial compliance with statutory requirements sufficient). **Transfer of portion of territory from one district to another.**–113 Okl 216, 240P623; 113 Okl 217, 242P 173. **Absence of affidavit** verifying facts set forth in petition does not invalidate annexation proceedings. TexCommnA 285SW601. **Allegation of necessity for formation of common school district from parts of others** is not necessary where changes in territory are stated. 315Mo 1336, 290SW123. **District in two or more counties.**–52ND60, 204NW845. **Failure to address petition to any person** is immaterial under some statutes. 50 SD444, 210NW661. **Irregularity in addressing petition** to boards of directors of district affected will be disregarded. 315Mo 1336, 290SW123. **In Ohio.**–113Oh 658, 150NE36. **Petition held not demurrable** on question relating to merits of application. 177Ark260, 6SW(2d)281. **Registration of voters; residence.**–141 SC347, 139SE775. **Signers.**–80Mont363, 260P1042. **Territory must be detached** regardless of equities of situation on filing necessary application. Wis 231 NW174. **Clerk has no power to hear and determine** sufficiency or merits of petition for detachment of territory. Wis 231NW174. **Freeholders signing petition for transfer to school district** must reside in transferred territory, and ownership alone is insufficient. 121 Oh213, 167NE872. **Notice of hearing on petition.**–NH 149A869. **Qualifications of signers.**–154SC74, 151SE105(2dcase). **Where petition is signed only by majority of district** without also showing majority of territory sought to be annexed, order of annexation based thereon will be declared void and unenforceable. 138 Okl 254, 280P807 (statute construed). **Transfer of territory.**–Oh 172NE285.

842-20 174Ark1017, 298SW203; 141 SC347, 139SE775; TexCivA 22SW(2d) 686 (attempted annexation held void for failure to obtain consent of boards of trustees). **Presentation of petition to superintendents** of two counties in which new district partly lay instead of to board of trustees of district out of which new one was to be formed confers no jurisdiction on superintendents to act where statute requires presentation to trustees. 80Mont363, 260P1042.

842-21 71CalA361, 235P79. **That petitioners for consolidation would not have signed if they had believed that majority of patrons did not want consolidation** is not ground for withdrawal. 181Ark253, 25SW(2d)443. **Jurisdiction of county superintendent to attach territory to consolidated school district is not lost** by withdrawal of names from petition after first notice of proposed change was posted. 140 Okl 31, 282P132.

842-21½-New. Under some statutes election on question of consolidation is not required where objections are not filed by one fourth of patrons. 165Ga 227, 140SE372.

842-21⅓-New. Petition requesting board not to include certain school in proposed consolidation but not expressly objecting thereto is merely appeal to discretion of board and cannot be considered as objection under such statute. 165Ga227, 140SE372.

842-21¼-New. Where last day of period to file remonstrance falls on Sunday, persons signing may withdraw names on Monday under Gen. Code §§ 4736-10216. 116 OhSt249, 156NE138.

842-21½-New. Persons signing remonstrance against formation of new school district may withdraw their names within period for filing under Gen. Code § 4736. 116 OhSt249, 156NE138.

842-23 Wis 231NW174 (duty of school clerk to call meeting). **Under statute providing that on annexation of part of town to city part of school district so annexed becomes part of school district** proceedings under statute providing for joint meeting of township board and members of city school board are unnecessary. 231Mich664, 204NW737.

842-29 80Mont363, 260P1042, 1046 [cit Cyc]. **Sufficiency of findings.**–141Wash 538, 251P882.

843-30 80Mont363, 260P1042. But see 220MoA388, 286SW726.

843-36 Order assuming indebtedness of

districts to be included in consolidation is condition precedent to consolidation under some statutes. 153**Miss**854, 121 S842.

843-36½-New. Annexation of one school district to another, from which it was separated by third previously annexed, held not invalid because both annexation orders were made same day. 219**AppDiv**563, 220**NYS**414.

843-36⅓-New. Petition for exclusion of certain territory from one district and formation of new district therefrom is special proceeding as regards right to appeal. 50**SD**448, 210**NW**662.

843-36¼-New. Final order granting petition for formation of school district is final order from which appeal lies. 50**SD**448, 210**NW**662.

843-36⅕-New. Court's finding that existing district is inconveniently located for pupils of territory desired to be organized shows sufficient justification for organization of new district. 50**SD**444, 210**NW**661.

843-36⅙-New. Where irregularities occur in school district, and they are validated by statute, subsequent entry upon minutes of board of proper description of district, which description shows that it was same territory embraced in former order, as shown by map of school district, such order does not establish consolidated school district, but merely furnishes proper description on minutes. 153**Miss**476, 121S267.

843-36⅐-New. Order establishing consolidated school district has been held too indefinite as regards designation of location of school house. 157**Miss**276, 127S280.

843-37 175**Ark**212, 298**SW**997; 317 **Ill** 47, 147**NE**408 (curative statute constitutional but inapplicable districts not being compact and contiguous); 321 **Ill** 192, 151**NE**496; 152**Miss**664, 120S745; **Miss** 121S267; **TexCivA** 275**SW**290.

843-38 317 **Ill** 111, 147**NE**497 (failure to show number of votes cast cured by superintendent poll book talley sheets and return).

843-40 Errors in describing boundaries in special act will not defeat legislative intention as to including old common school district in independent district. **TexCivA** 292**SW**942.

843-41 MoA 31**SW(2d)**215; **Tex CommnA** 287**SW**904. **In North Carolina.**-189**NC**675, 127**SE**704.

843-42 317 **Ill** 47, 147**NE**408 (evidence sustained finding that district was compact and contiguous); 121 **Oh**213, 167 **NE**872 (territory held not contiguous).

844-44½-New. Under statutes requiring county commissioners to divide new county formed out of old county into convenient number of school districts their order establishing of district comprising parts of two counties is nullity. 76**Mont**458, 248**P**369.

844-44⅓-New. In such case court reviewing order of county commissioners cannot upon finding erroneous exercise of discretion by them substitute its own discretion and establish boundaries or hold their order partially valid or invalid. 76**Mont**458, 248**P**369.

844-44¼-New. In such case, though order of commissioners was nullity result of what they did or failed to do was in effect creation of joint school district sanctioned under statutes. 76 **Mont**458, 248**P**369.

844-50 See also 221**MoA**393, 277**SW** 945; **MoA** 2**SW(2d)**113.

845-53½-New. School districts must afford children within their boundaries opportunity to attend with reasonable degree of comfort. 317 **Ill** 47, 147**NE** 408.

845-53⅓-New. Extension of boundaries of district so as to include adjoining common school district is authorized under some statutes notwithstanding statute providing that consolidated school district shall not be formed so as to include city or town containing two hundred or more children of school age. 307**Mo** 250, 270**SW**382.

845-53¼-New. Where incorporated city alone is organized as special school district, and territory is annexed to city, it becomes also part of special school district. 52**ND**351, 202**NW**807.

845-53⅕-New. Evidence held sufficient to sustain finding that boundary line between districts was changed as authorized by statute. 221**MoA**393, 277 **SW**945.

845-53⅙-New. Statute in some jurisdictions providing for creation of new district out of portions of two or more existing districts are construed to refer to creation of new district when all territory involved lies in one county. 80 **Mont**363, 260**P**1042.

845-53⅐-New. In Texas statutory authority to make adjustment of outstanding indebtedness does not authorize change in boundaries except as prescribed. **TexCivA** 9**SW(2d)**506.

845-58 317 **Ill** 47, 147**NE**408 (every reasonable presumption of validity indulged). **Every reasonable presumption** exists in favor of validity of organization of school district. 325 **Ill** 64, 155 **NE**854.

846-67 82**Colo** 438, 261**P**457; 140**Miss** 137, 106**S**435; 316**Mo** 21, 296**SW**806; 320**Mo** 353, 8**SW(2d)**66; 323**Mo** 248, 19 **SW(2d)**714 (proceeding held not collateral attack); 56**ND**751, 219**NW**336; **TexCommnA** 6**SW(2d)**91; **TexCivA** 272 **SW**559; **TexCivA** 292**SW**942; **TexCivA** 28**SW(2d)**889; **TexCivA** 15**SW(2d)**1097; **TexCivA** 16**SW(2d)**424; **TexCivA** 22**SW (2d)**712. See also **TexCivA** 10**SW(2d)** 174. But see 80**Mont**363, 260**P**1042. **Matters not constituting collateral attack.**-329 **Ill** 505, 160**NE**834. **School district** has no right to attack legality of another school district. **TexCivA** 8**SW (2d)**239.

846-68 75**Mont**154, 242**P**979 (de facto corporation). **By statute** in some jurisdictions legal organization of school district will be conclusively presumed where it has exercised its franchises and privileges for one year. 116**Nebr**202, 216**NW**663.

846-69 245 **IllA**447; 121 **Oh**213, 167**NE** 872 (acquiescence for seven years); **Tex CivA** 292**SW**942. **Legality of enlarged district formed by annexation of common school district to independent school district** can be determined only in suit brought for such purpose by state or under its authority. **TexCivA** 5**SW(2d)**808.

846-70 314**Mo** 315, 284**SW**135 (eight years). See also 230**Ky**33, 18**SW(2d)** 862. But see 245 **IllA**447.

846-70½-New. State itself cannot question legality of organization after long acquiescence in quo warranto proceeding. 335 **Ill** 11, 166**NE**504.

847-75 To show that school district is invalid for lack of compactness it must be shown that children cannot reasonably avail themselves of school. 325 **Ill** 64, 155**NE**854.

847-75½-New. Evidence declared relevant on question whether district was properly and legally established. 160 **Ga**268, 127**SE**868.

847-75⅓-New. Sufficiency of petition in suit to enjoin annexation of territory to independent school district.-Petition, showing that county superintendent of public instruction has attempted to order annexation of adjacent territory to independent school district upon petition not signed by statutory number of petitioners and has ordered funds of district included in such territory diverted to use of independent district, and that board of education of independent district is attempting to exercise authority over adjacent territory and offering to sell schoolhouse, is sufficient to state case for injunctive relief as against general demurrer or motion to dissolve temporary injunction. 38 **OklACR**51.

847-75¼-New. It is error to dissolve temporary injunction granted on such petition where only ground stated in motion to dissolve is insufficiency of petition. 38 **OklACR**51.

847-75⅕-New. Evidence held sufficient to show school district consisted of compact and contiguous territory. 325 **Ill** 64, 155**NE**854.

847-75⅙-New. Illegality of school district organization not shown by occasional failure of students to attend. 325 **Ill** 64, 155**NE**854.

847-75⅐-New. In absence of statute authorizing equity review submission to vote on petition of one fourth of voters held only appeal open to such voters. 164**Ga**401, 138**SE**792.

847-75⅛-New. Injunction will not lie to enjoin county superintendent of public instruction from putting into effect order changing boundaries of joint school district, where statute provides remedy by appeal to state superintendent of public instruction which is not availed of. 124 **Okl** 117, 254**P**101.

847-75⅑-New. Change in boundary lines held not in violation of statute as being for revenue only and for acquisition of territory. **MoA** 16**SW(2d)**598.

847-75 1/10-New. Remonstrators to transfer territory between school districts have been held "residing" in territory and entitled to file remonstrances though land on which they lived was not included in land transferred. 34 **OhA** 424, 171**NE**364.

847-75 1/11-New. Transfer of property from one school district to another against remonstrances of owner eating and sleeping on property not transferred has been held "abuse of discretion." 34 **OhA**424, 171**NE**364.

847-76 316**Mo** 21, 296**SW**806; **MoA** 28 **SW(2d)**683 (consolidated school district pending quo warranto proceedings relative to dissolution held de facto district). **Actual user.**-80**Mont**363, 260**P** 1042. **Estoppel.**-75**Mont**154, 242**P**979. **Where school district attempted in good faith to annex another district** under existing law providing for annexation but by mistake proceeded under law permitting extension of boundaries by taking in part of another district and district acquiesced in it five years it was de facto corporation. 75**Mont**154, 242**P**979 (semble).

847-77½-New. Consent to change of boundaries before expiration of statutory time.-Under statute, providing that no land taxed for building schoolhouse shall be set off by township board into another district for period of three years thereafter except by consent of two thirds majority resident owners of such land, means two thirds majority of owners of land in district as entity, and not such majority of owners of land in township. 233**Mich**327, 207**NW**5.

847-78 141 **Okl** 65, 283**P**1008; 141 **Okl** 55, 283**P**1010 (new district formed). See also 146**Miss**471, 111S737.

847-80 See also 181**Ark**939, 28**SW(2d)** 1071.

848-83½-New. Unauthorized extension of boundaries of city school district so as to include two adjoining common school districts does not destroy corporate existence of city school district nor offices of directors thereof. 307**Mo** 250, 270**SW**382.

848-83⅓-New. Change in boundaries of city constituting one school district automatically clauses like change in boundary of the school district. 167 **Minn**299, 209**NW**2.

848-83¼-New. Statutes, providing for detachment of certain lands from incorporated cities, do not apply to detachment of land from city constituting one school district where such detached land would be left unannexed to any school district. 167**Minn**299, 209**NW**2.

848-83⅕-New. Failure of order consolidating school districts to locate school site with certainty does not prevent teaching of schools and contracts with teachers. **Miss** 127S696(2dcase).

848-83⅙-New. School district, receiving school benefits from expenditure of its funds by adjoining district to which it was illegally merged, cannot recover money. **MoA** 28**SW(2d)**384.

848-84 146**Miss**471, 111S737 (at time of order).

848-86½-New. In North Carolina special charter districts do not as a rule cease to exist till they surrender their charters. 192**NC**298, 135**SE**40.

848-86⅓-New. Special charter district ceased to exist where trustees, pursuant to county wide plan, surrendered jurisdiction to county board of education though it properly was not then conveyed. 192**NC**298, 135**SE**40.

848-88 TexCommnA 276**SW**419 (sus-

taining school tax on property annexed to district).

848-88½-New. Special charter school district existing under Greenboro amended city charter of 1917 is subject to repeal by adoption of county wide plan under Consol. St. Suppl. (1924) § 5481, and conveyance of its property to county board. 192NC298, 135SE40.

848-89 128Kan487, 278P741(2dcase). **Village which is part of three common school districts** may be organized as special school district. 56ND751, 219 NW336.

848-89½-New. In North Carolina territory in special charter district, after adoption of county wide plan, becomes special tax district and remains liable for district's floating indebtedness and bond issue. 192NC298, 135SE40.

849-90 82Colo438, 261P457; 321 Ill 192, 151NE496; 335 Ill 11, 166NE504; Ind 172NE911; 126Kan166, 267P2; 127 Kan651, 274P728; 128Kan797, 280P892 (order of approval of board not invalidated by failure of correct entry thereof); 225Ky621, 9SW(2d)984; 227Ky 682, 13SW(2d)1007; 54ND657, 210NW 180 (right to object to regularity of organization barred by laches); 141SC 347, 139SE775; 143SC120, 141SE265; TexCivA 15SW(2d)144(2dcase); Tex CivA 32SW(2d)496. **After petition for high school district** is prescribed to superintendent of schools, formation thereof is determined by majority vote of electors of proposed district, although electors of same elementary district have voted unanimously against proposition, 71CalA361, 235P79. **Area.**-138SC445, 136SE757. **Community high school district comprises** single community for school purposes. 325 Ill 64, 155NE854. **Consolidation of school districts** distinguished from grouping of school districts to establish high school. TexCivA 5SW(2d)805. **Failure of majority of electors** of one elementary school district to sign petition for formation of high school district makes signing by majority of electors of other elementary school districts immaterial. 71CalA361, 235P79. **In California.**-71CalA361, 235 P79. **In Kansas.**-123Kan325, 255P87. **In Michigan.**-236Mich57, 209NW849. **In North Dakota.**-53ND575, 208NW154. **In Texas.**-CivA 291SW268; CivA 5SW (2d)805. **Irregularities** in formation of high school district do not affect corporate capacity of district. 138SC445, 136SE757. **Joint high and elementary schools** may be established under some statutes. 84 IndA125, 149NE356. Such schools may be established under Indiana statute though city having high school is located in civil township which contains school township. 84 IndA125, 149NE356. **Signers of petition for formation** of high school district may withdraw names before petition is presented to superintendent of schools. 71CalA 361, 235P79. **That less than one third of electors of one of several common school districts embraced in proposed high school district signed petition therefor** does not prevent formation of high school district from remaining common school district without new petition. 138SC445, 136SE757. **Contention that election to determine whether high school district should assume indebtedness** of one of elementary districts was invalid because there was but one voting box held without merit. Tex CivA 21SW(2d)76. **County board's order for teaching nine grades** in elementary district does not create rural high school district under statute. TexCivA 23SW(2d)594. **County commissioners have no authority to rescind prior order** establishing high school, where it had been disorganized by Legislature. 130 Kan749, 288P733. **County school trustees held authorized by statute to group districts into high school districts,** independent of petition by trustees of school districts and independent of election. TexCivA 21SW(2d)76. **Establishment by legislature of new high school district** without consent of trustees of common school districts is matter for legislature, not trustees. 153SC106, 149 SE760. **Grouping of contiguous common school districts** into high school district does not abolish several districts. Tex CivA 32SW(2d)235. **Establishment of new high school district by Legislature is not dependent upon presentation of petition** for establishment thereof. 153 SC106, 149SE760. **Necessary parties to suit involving validity of grouping common school districts to form high school district.** TexCivA 24SW(2d)796. **Construction of agreement** under which district would join grouping into high school district. TexCivA 32SW(2d)235. **School districts held under circumstances not consolidated** into high school district under statute requiring election. TexCivA 21SW(2d)76. **Statute creating high school district** held not invalid. 153SC106, 149SE760. **Qualifications of petitioners.**-Ill 173NE145(2dcase). **Submission to state superintendent of disagreement as to boundaries** by county officers of joint high school district may be informal if rights of parties to be heard are protected. 128Kan797, 280P 892.

849-91 94CalA779, 272P352; 327 Ill 269, 158NE396; 196 Ind436, 148NE481 (holding that school trustee is required to establish and maintain joint high school when demanded by voters acting within their rights); 84 IndA125, 149NE356; 128Kan615, 278P721. **In Kentucky.**-219Ky242, 292SW781. **Posting notices of election.**-128Kan615, 278 P721. **Power of legislature to dispense with requirement.**-TexCivA 280SW260. **Election to decide upon boundaries.**-128Kan797, 280P892.

849-91½-New. If township is without funds or has reached its constitutional debt limit, then it is not required to establish joint high school. 196 Ind436, 148NE481.

849-91¼-New. Recommendation for annexation of one school district to another, as required by statute, need not be in any particular form, and may be made orally as well as in writing or by vote. 73CalA236, 237P763.

849-91¼-New. Voting by supervisor in support of resolution to annex common school district to high school district stating that he had recommended such annexation is sufficient recommendation under statute. 73CalA236, 237P763.

849-91½-New. Statute providing for division of county into high school districts does not violate constitution authorizing establishment of "a liberal system of free public schools" since latter expression includes "high schools." 136SC345, 134SE380.

849-91⅛-New. Collection of taxes in high school districts formed by consolidation.-Where rural high school district is formed by consolidation of common school districts, collection of same local taxes as previously authorized in elementary districts is proper though vote of electors has not authorized assumption of indebtedness. TexCivA 280 SW260.

849-92 80Mont363, 260P1042; Tex CommnA 286SW161. **In Pennsylvania,** etc. 13PaDist&Co 726 (welfare of pupils primary object). **County judge's order for election on question of incorporation of common school district into independent district** suspends power of common school district to redistrict territory. TexCivA 26SW(2d)324. **Method of creation.**-TexCivA 26SW(2d)324. **Statute creating independent school district** and including existing common school district held constitutional. Tex CivA 20SW(2d)214.

850-93 Iowa 233NW147; 138 Okl 254, 280P807; 48SD641, 205NW706 (status of independent school district held unchanged because of unconstitutionality of statute). **Division of township** by board of supervisors does not have effect of dividing existing independent school district. 201 Iowa794, 208NW 291. **Majority of voters in additional rural territory** must approve new district composed of existing territory and additional rural territory in order to effect establishment of new district. 202 Iowa545, 210NW576. **Neither county nor township officers** have power to divide independent school district. 201 Iowa794, 208NW291. **Statutory method is exclusive.**-TexCivA 26SW(2d)324. **Independent districts have no vested rights** as against legislatures providing for severance of territory. Iowa 233 NW147.

850-93½-New. Statutes relating to joint school districts are not inapplicable to separate schools so far as their application relates to creation and existence of school for entire district. 138 Okl 231, 280P830(2dcase).

850-94 168Ark587, 270SW973 (holding consolidation statute applicable to consolidation of special school district with common or rural school district); 174Ark936, 298SW327; 76CalA517, 245P218; 82Colo438, 261P457; 164 Ga401, 138SE792; 88 IndA420, 164 NE292; 153Miss476, 121S267; Mo 274 SW800; 220MoA388, 286SW726 (territory may be less than fifty square miles if proposed district contains two hundred or more children of school age); 320Mo383, 8SW(2d)619; MoA 2 SW (2d)113; 137Misc470, 244NYS427; 121 Okl 101, 247P981; 142 Okl 264, 286P 805 (statute providing procedure for consolidation held exclusive); TexCivA 5SW(2d)808; TexCivA 15SW(2d)144 (2dcase). See also 235Ky771, 32SW (2d)345; 156Miss251, 125S718. **Proceedings for organization,** etc. 233Mich 414, 206NW798. **Consolidated district is new district.**-307Mo 250, 270SW382. **Consolidation distinguished from extension of boundaries of existing district.**-307Mo 250, 270SW382. **Inclusion of city or town containing two hundred or more children of school age** is prohibited under some statutes. 307Mo 250, 270SW382. **In Illinois.**-317 Ill 477, 148NE247. **In proceeding to restrain trustees of consolidated district from acting** and for levying any tax for support of district, questions as to rate of taxation and method of paying bonded indebtedness will not be decided where not properly raised. 161Ga460, 131SE 160. **Jurisdictional recitals in order.**-141Miss444, 106S768. **Notice of election.**-161Ga460, 131SE160. **Objections by patrons as condition of power to call elections.**-161Ga460, 131SE160. **Petition must contain names of majority of voters** in some jurisdictions. 121 Okl 101, 247P981. **Place of election.**-161Ga 460, 131SE160. **Power of board of education.**-161Ga460, 131SE160. **Proceedings for consolidation held regular.**-161 Ga460, 131SE160. **Signer of petition for consolidation of school districts may withdraw name** at any time before petition is acted upon. 121 Okl 101, 247P 981. **Signing of petition by majority of school patrons residing in territory to be annexed** is jurisdictional. 141Miss 444, 106S768. **Single election in entire consolidated district** is provided for by some statutes, and not separate election in each of districts which are to be consolidated. 161Ga460, 131SE160. **Statute authorizing annexation** of common school district to high school district held constitutional. See 73CalA236, 237 P763. **Ballots held valid despite failure of presiding officer** to indorse them. TexCivA 278SW465. **Collateral attack on organization.**-123Kan325, 255P87. **Consolidated district** may be left with only one common school district after detaching other districts. 318 Ill 385, 149NE310. **Consolidation election held valid** even if presiding officer of one district was presiding officer at special election. TexCivA 278SW465. **Election for consolidation** held special election, not requiring judge's signature to ballots. TexCivA 278SW304. **Failure to locate school building** in consolidated district held fatal to consolidation under statutes. 146Miss56, 111S831. **In Missouri.**-314Mo 315, 284SW135. **Irregularities in consolidation proceedings** cannot be looked into in absence of appeal to board of supervisors. 146Miss 56, 111S831. **Name of consolidated school district** need not contain word "consolidated." 162Ga462, 134SE103. **Order of consolidation not applicable.**-126 Okl 130, 258P755 (purely ministerial act). **Parts of subdistricts** as well as entire subdistricts may be included in

consolidated districts. 213Ky717, 281 SW815. **Posting of notices of result of election** is not vital or necessary and has no effect upon consolidation effected by vote of people. 126 Okl 130, 258P755. **Status of consolidated district.**–123Kan325, 255P87. **Statute authorizing consolidation** of districts held not in violation of due process. 146 Miss56, 111S831. **That districts included in new school district were not consolidated according to county wide plan** held not ground for exception. 192NC 590, 135SE467. **Annexation of common school district containing less than fifty scholastic population to independent district having more than one hundred and fifty scholastic population** is authorized under some statutes. TexCivA 5SW(2d)808. **Classification of school districts** may be determined in view of density of population, wealth, roads, and hilly character of topography. 174Ark 936, 298SW327. **Construction of statutes.**–195NC56, 141SE535. **Division of consolidated school districts.**–166Ga 168, 142SE671. **Election for consolidation of school districts cannot be sustained as election to annex territory** contained therein to contiguous district where election was held in only one district and returns were not canvassed and result declared as required by statute in case of annexation. TexCivA 5 SW(2d)805. **Legislature has free hand** in establishing school districts and dividing territory of state among them. 174Ark936, 298SW327. **Organizations held valid.**–317Mo 719, 296SW411. **Protest against consolidation held too late** when received after trustee has qualified. 165Ga152, 140SE358. **Requirements as to area or school population.**–316Mo 721, 291SW457 ("or" held not inadvertently used). **Statute establishing consolidated county school districts** in counties having population exceeding seventy-five thousand, makes valid classification of districts. 174Ark936, 298SW327. **Statute for consolidated school districts** held not void in providing general method for electing school trustees and for dividing territory among school districts. 174Ark936, 298 SW327. **Territory lying in two or more counties.**–[1924] c 283 § 114. 153Miss 64, 120S832. **In Nebraska.**–118Nebr189, 223NW957. **In Ohio.**–25 OhNPNS431. **Majority of electors in districts to be affected, and not majority of electors** in each district to be affected, is necessary. 177Ark734, 7SW(2d)798. **Recitals in petition of necessary facts to create consolidated school district between two or more counties** so as to embrace consolidated county line school are jurisdictional. 153Miss64, 120S832. **Statutory provisions must be strictly followed.**–153Miss64, 120S832. **Strict compliance** is not required if it is evident that noncompliance with statute has caused no injury. 320Mo 362, 8SW(2d) 616. **Territory embraced.**–177Ark734, 7 SW(2d)798. **Change of boundaries.**–323 Mo 248, 19SW(2d)714 (applicability of statutes). **Discretion of county board.**–181Ark584, 26SW(2d)900(2dcase). **Fact that school district enlarged by ordinance, overlapped and took in original district does not render ordinance invalid.** 169La831, 126S207. **Loss of identity by consolidation.**–TexCivA 22 SW(2d)712. **Petition for consolidation** need not be signed by majority of patrons of each constituent common school district included in proposed district. 157Miss276, 127S280. **Right of school district or portion thereof to withdraw from union district** where not specifically provided for. 102CalA266, 282P1021. **Statute is not invalid for failure to provide for appointment of directors of consolidated district** where another statute provides therefor. 181 Ark253, 25SW(2d)443. **Statutory requirements must be complied with.**–NH 149A869. **Territory remaining after consolidation** must be added to another district if insufficient to constitute district. 156Miss251, 125S718. **Where best interests of substantial majority residing in district as whole will be subserved** consolidation is authorized. 181Ark584, 26SW(2d)900(2dcase). **Necessity of approval of district trustees.**–TexCivA 32SW(2d)496; **Statute construed.**–TexCivA 32SW(2d)496. **Proceedings to quash order for consolidation of school district.**–Discretion of court in relation thereto. Ark 31SW (2d)129.

850-94½–New. Required number of voters of each district necessary on petition for consolidation. 133SC183, 130 SE645.

850-95 178Ark443, 12SW(2d)881; 164 Ga251, 138SE156; 231Mich664, 204NW 737 [citCyc]; TexCivA 32SW(2d)235. See also 245Mich411, 222NW763. **Funds.**–169Ark645, 276SW584. **Legislature may reduce territorial limits of school district so as to relieve segregated portion** from indebtedness, without providing for election. TexCivA 287 SW147.

850-96 TexCivA 287SW147, 148 [quot Cyc].

851-98 231Mich664, 204NW737.

851-99 233Mich581, 207NW810; MoA 10SW(2d)665; 131 Okl 230, 268P713, 714 [quotCyc]. But see 167Ga289, 145 SE443. **Breach of contract of employment of teacher.**–233Mich581, 207NW 810. **Duty of board of new district.**–135 Okl 29, 273P271. **Election in new district on question of assumption of indebtedness** is authorized under some statutes. TexCivA 5SW(2d)808. **In Oklahoma.**–43 OklACK62. **Order of application of assets.**–131 Okl 230, 268P 713. **Statute providing for formation of high school district by consolidation of common school districts** does not destroy districts without providing for payment of indebtedness, where it provides that outstanding indebtedness shall not become common obligation without majority vote of electors of districts. TexCivA 280SW260. **Statute requiring enlarged school district to assume indebtedness of original district** held invalid, and fact that election was held in enlarged district as to tax is immaterial. TexCivA 19SW(2d)946.

852-2½–New. City does not become liable after consolidation of its schools with contiguous districts for supplies purchased by its board of education prior to consolidation and chargeable only against funds in hands of board for school purposes at time debt was incurred. 34GaA93, 128SE231.

852-2⅓–New. Rural school district attempted to be annexed to another district cannot recover funds transferred after expenditure thereof for school purposes within district for which they were raised. 181Ark345, 26SW(2d)570.

852-2¼–New. Where consolidated school district having bonded indebtedness annexes entire school district, property in latter is not subject to ad valorem taxation to pay such indebtedness. 142 Okl 177, 286P343.

852-2⅙–New. Where consolidated school district having bonded indebtedness annexes entire school district property in latter is not subject to ad valorem taxation to pay such indebtedness. 142 Okl 176, 286P345.

852-2⅛–New. Common school districts succeeding to rights and immunities of consolidated district after dissolution are answerable for liabilities. MoA 28 SW(2d)683 (salary of teacher employed by consolidated district functioning as de facto corporation).

852-4 222AppDiv320, 226NYS145 (lack of trustees' or electors' vote immaterial); 128Misc346, 218NYS586.

852-4½–New. By statute in New York, bonds of school districts merged into consolidated district without consent of trustees or taxpayers cannot be made charge on consolidated district. 218 AppDiv553, 218NYS586.

852-5 244Mich28, 221NW296; 222App Div320, 226NYS145; 107 Okl 289, 231P 1045 (assets of disorganized district on consolidation); 136 Okl 265, 277P932; 10PaDist&Co 817; TexCivA 290SW279 (holding imposition of debt on new district not to create new debt); TexCivA 2SW(2d)889. **Equitable basis of apportionment** is on basis of taxable values. 86 IndA284, 157NE118. **On annexation of part of town to city, etc.** 231Mich 664, 204NW737. **Revenue from township's levy, on annexation of part of township to school city,** need not be apportioned according to number of children. 86 IndA284, 157NE118. **Statutes construed.**–318 Ill 385, 149NE316.

852-5½–New. Statute providing for annexation of school districts is not void as requiring payment by some of preexisting indebtedness of other where such taxes can be assessed only on rate of taxpaying voters. TexCivA 286SW 501.

852-5⅓–New. In construction of code, "any indebtedness on the school property in the territory annexed," shall be held to mean such indebtedness as, in ordinary course of administration of school affairs in original district by which indebtedness has been incurred, would have been paid by levy and collection of taxes upon taxable property in territory annexed. 119 Oh475, 164 NE516.

852-5¼–New. In applying statute to case where territory has been detached from one school district and annexed to another, where original district from which territory is detached has outstanding indebtedness, district to which such territory is annexed shall be held to pay such proportion of such indebtedness as tax valuation of territory detached bears to tax valuation of property remaining. 119 Oh475, 164NE516.

853-6 113 Oh466, 149NE634 (act held not violative of due process provision of constitution); TexCivA 2SW(2d)889.

853-7 114 Oh602, 151NE669 (county board of education without discretion); TexCivA 2SW(2d)889. See also Tex CivA 9SW(2d)506. **In Ohio.**–114 Oh602, 151NE669. **Consolidation order requiring consolidated district to pay bonds of independent district included** held not violative of statute prohibiting impairment of outstanding obligations. 181 Ark253, 25SW(2d)443. **Extent of testimony to be taken** is for court of common pleas' ultimate determination. 300 Pa422, 150A744 (other matters). **Statutory factors** considered in apportioning school districts' indebtedness and property are not exclusive. 300Pa422, 150A744.

854-17 300Pa422, 150A744. **Supreme Court cannot determine** whether Court of Common Pleas considered statutory factors or other helpful items. 300Pa 422, 150A744.

855-18 324 Ill 314, 155NE332. **Property subject to levy.**–113 Oh466, 149NE 634.

855-19 Mandamus.–76Mont458, 248P 369; 114 Oh602, 151NE669. **Old district held not entitled** to share of taxes turned over to new district in absence of determination by county board. 169 Minn460, 211NW832. **Order denying rehearing** as to creating school district held not reviewable in new district. 169Minn460, 211NW832 (action to recover share of funds). **Parties.**–Tex CivA 284SW306. **Allowing new district proportionate part of interest** accruing on certificate of deposit to date of order apportioning funds held not error. 169 Minn460, 211NW832. **Interest held to run from date of order of county board** directing old district to pay new district share of funds forthwith. 169 Minn460, 211NW832. **Determination of amount of state aid funds** in district's treasury approved by court held not disturbed because more complete data would have caused slight difference. 169Minn460, 211NW832.

856-27 Order of county board of education, detaching territory of school district and annexing it to rural school district, held void. 174Ark1180, 296SW 31.

857-29 34 OhA424, 171NE364. **Annexation of unorganized territory to school district.**–50SD311, 210NW51. **County board of education** cannot annex territory within special school district to another special school district. 174Ark 343, 295SW971.

857-29½–New. Petition signed by less than statutory number of petitioners is insufficient to give county superintendent of public instruction jurisdiction to annex adjacent territory to independ-

ent school district. 38 OklACR51.

857-29⅓-New. Statutes applicable to extension of boundaries so as to include entire school districts.-307Mo 250, 270 SW382.

857-29¼-New. Under some statutes territory outside of city when annexed to city becomes part of school district comprised by city. 71CalA557, 235P 667.

857-29⅕-New. Where effect of order of transfer of lands from one district to another is merely transfer of children and taxes, subsequent formation of special school district embracing such territory will abrogate such order of transfer. 169Ark645, 276SW584.

857-29⅙-New. Such order of transfer is temporary and remains in effect only while districts of and from which transfer is made remain in existence. 169 Ark645, 276SW584.

857-29⅐-New. Any change in status of territory operates as abrogation of order of transfer. 169Ark645, 276SW 584.

857-29⅛-New. Bad faith not shown.-That board of education repeatedly attempted to attach taxable territory from neighboring school district having large assessed valuation on small population and had been repeatedly defeated in litigation over such attempts does not show bad faith or unlawful conspiracy in further attempt to accomplish purpose under later statute. 122Kan701, 253P251.

857-29⅑-New. Order of county board annexing territory to special district held valid. 175Ark724, 300SW370.

857-29⅒-New. County board may change boundary lines of common school district. 175Ark724, 300SW370.

857-29 1/11-New. Certiorari will not lie to review county board order of annexation. 175Ark724, 300SW370.

857-29 1/12-New. Education commissioner's decision affirming order of district superintendent annexing territory of dissolved district to another district is final and conclusive. 222AppDiv320, 226NYS145.

857-29 1/13-New. In certiorari to review action of superintendent of schools of two counties in annexing or refusing to annex territory of school district in one county to school district in the other county, the two school districts are not necessary parties. 129 Okl 185, 263P 1108.

857-29 1/14-New. Notice required by statute authorizing annexation of territory is jurisdictional. 129 Okl 185, 263 P1108.

857-29 1/15-New. Order attaching territory of one district to another district without statutory notice, is void. 129 Okl 185, 263P1108.

857-29 1/16-New. Boundaries of independent school district embracing lands wholly in one county may be extended so as to include contiguous territory in another county. TexCommnA 25SW(2d) 610.

857-29 1/17-New. Where trustees of district protest, the county board is without power to annex such district for rural high school purposes. TexCivA 22SW(2d)499.

857-30 330 Ill 522, 162NE150.

857-32 74Mont25, 238P582 ("exact census" of school children within school district, required by Montana statutes is one including only children in district). **Since residence of minors** committed to state vocational school is that of father or mother, inmates thereof are not resident in school district where that institution is located and mandamus will not lie to compel superintendent of schools to furnish clerk of that district with list for school census purposes. 74Mont25, 238P582.

857-35 207 Iowa521, 221NW492; 164 La204, 113S818; 222AppDiv320, 226 NYS145. **If under certain statutes county board has implied authority to abolish districts** by alteration of boundaries so as to combine several no part of county may thereby be left out of district. 141Miss585, 106S820. **Petition properly denied** in discretion of county superintendent where district had issued refunding bonds. 207 Iowa521, 221NW 492.

858-36 Court has inherent power to decline to decree dissolution of graded school established for thirty-four years and where community has grown up around it, because of calamitous consequence which might result. 219Ky242, 292SW781. **Judgment of ouster in quo warranto proceedings** dissolves corporation immediately and takes away all of its rights, privileges, and franchises. 329 Ill 505, 160NE834. **Appeal.**-177Ark 982, 8SW(2d)501.

858-37½-New. County board had no authority to dissolve school district. 173Ark892, 293SW1035.

858-40 Kan 289P399. **County superintendent cannot alter an order of county board discontinuing certain schools** so as to cause it to order abolition of school districts. 141Miss585, 106S820. **Petition by majority of qualified electors** of school district required. Ark 31 SW(2d)736. **Petition for dissolution not considered** without showing genuineness of signatures of persons purporting to sign. Ark 31SW(2d)736. **Discretion of board controlled by best interests of children.**-Ark 31SW(2d)736. **Order refusing dissolution held reasonable exercise of discretion.**-Ark 31SW(2d)736.

858-41 Ark 32SW(2d)306; Kan 289P 399; TexCivA 32SW(2d)235 (taxpayers vote). **Assent of two thirds vote of all taxpayers residing** in district is required to effect dissolution of consolidated school district under statutes. 310Mo 258, 274SW1073 (assent of two thirds of those voting at election on question held insufficient). **Annexation involving disorganization** contrary to statute not permitted. MoA 280SW69. **The assent of a majority** of the legal voters, etc. See also Iowa 227NW532 (certain votes cast held illegal). **Nonresidents of district not qualified to petition for dissolution.**-Ark 31SW(2d)736.

858-44½-New. Too small daily attendance before statute is effective has been held not to authorize dissolution. 177 Ark982, 8SW(2d)501.

858-46 Certiorari will lie to quash order of county boards of education annexing territory of special rural school district to another special school district. 174Ark343, 295SW971.

858-46½-New. County board of education has no authority to dissolve special school district formed by legislative act. 173Ark892, 293SW1035.

858-46⅓-New. Order of county court dissolving special school district organized by legislative act held void. 173 Ark781, 293SW722.

858-46¼-New. Such order may be attacked ten years later in absence of estoppel. 173Ark781, 293SW722.

858-46½-New. Effect of dissolution of consolidated school district.-119 Okl 292, 249P690.

858-48 TexCivA 15SW(2d)1097. **Classification of school boards** according to size of district held not unreasonable. 202Cal 299, 260P739. **Education is not matter of local concern,** nor is it part of local self-government inherent in municipalities in which schools may be situated, but belongs to state at large. 244Mich241, 221NW299. **Statute creating high school district and appointing trustees** thereof is not invalid as exercise of executive or administrative function. 153SC106, 149SE760. **Statute respecting election of county school trustees** is not invalid for excepting from provisions district comprising city where constitution declares uniformity of manner of selection unnecessary. 156SC77, 152SE816.

859-49 192NC516, 135SE336; 192NC 765, 135SE863; 113 Oh405, 149NE397 (director of industrial relations is required to administer affairs of school department and keep records thereof). **Wisdom of purchase of land** by board of education presents no question of law. 192NC765, 135SE863.

859-50 [1926]CanSC246, [1926] 2Dom LR8.

859-51 See also 157Tenn269, 8SW(2d) 364. But see 156Tenn539, 3SW(2d)660.

859-55 Illinois state board of education was not abolished by act creating normal school board, and judgment against it in suit against latter board was erroneous, where it was not made party. 322 Ill 372, 153NE749. **Statute authorizing appointment** held to repeal former statute providing for election of treasurer of special school district. 52ND 120, 201NW856. **Confirmation by senate** of appointees of governor to state text-book commission. 232Ky376, 23 SW(2d)575.

859-56 232Ky376, 23SW(2d)575. **In Ohio.**-113 Oh405, 149NE397.

860-58 School code, providing method of removal of school directors, held not violative of constitutional article relative to manner of removal by officers. 286Pa129, 133A223.

860-59 Removal where Senate has not confirmed.-232Ky376, 23SW(2d)575. **Second appointee of governor cannot be removed** where there was no session of Senate subsequent to appointment to act thereon. 232Ky395, 23SW(2d)584.

860-60 213Ala289, 104S671.

860-61 Power of commissioner of education not unlimited.-214AppDiv40, 210 NYS439. **Legislature held to have placed educational affairs** under jurisdiction of department of education. TexCivA 291SW972.

860-65 Regulation of powers of state board is not limited by constitution to state educational institutions. 82Mont 126, 266P387.

861-70½-New. Statute conferring judicial powers on commissioner of education is not unconstitutional. 125Misc 230, 211NYS413.

861-70⅓-New. City charter providing that board of education shall have exclusive control of public schools does not divest school superintendent of all power of supervision. TexCivA 286SW 497.

861-70¼-New. Action of state board of education without concurrence of superintendent of public instruction is ineffectual. 222Ky438, 1SW(2d)530.

861-72 243NY373, 153NE495; 225App Div176, 232NYS465; TexCivA 275SW 265. **Authority of commissioner of education is limited** to decision of controversies regarding conduct of educational work in state. 128Misc42, 217NYS751. **Fact that question appealed involves construction of statute** held not to deprive commissioner of education of jurisdiction to hear appeal. 243NY373, 153NE495. **Jurisdiction of commissioner of education as to appeals** extends only to control and management of school system and to personnel and discipline of officials. 128Misc42, 217NYS 751. **On appeal as to boundaries** of high school district, state superintendent has no authority to act, until there has been disagreement between county superintendents and boards of county commissioners of two or more counties. 120Kan321, 243P262. **School commissioner has no power to subject property** of tax district to tax. 128Misc42, 217 NYS751. **Statutory appeal granted to persons aggrieved by board action** to commissioner of education held not to oust courts of jurisdiction. 128Misc42, 217NYS751. **Where lack of statutory authority** of school authorities is involved, court has jurisdiction though no appeal was taken to state superintendent. TexCivA 32SW(2d)235. **Improper diversion of funds or property** gives court jurisdiction notwithstanding no appeal was taken to state superintendent. TexCivA 32SW(2d)235. **Courts are without jurisdiction** until after such appeal is made on questions involving proper administration of school laws. TexCivA 32SW(2d)235. **Questions involving constitutionality** of school statute are within court's jurisdiction, though no appeal was taken to state superintendent. TexCivA 32SW(2d)235.

862-75 Appeal to higher department of education officials from order of local board held condition precedent to remedy in court. TexCivA 291SW972.

862-77 Where taxation questions are involved, decision of commissioner of education is not final or conclusive. 128 Misc42, 217NYS751.

862-78½-New. Decision reviewable on question of law.-TexCivA 295SW268.

862-78⅓-New. Decision of state super-

intendent and state board of education that teacher is entitled to payment of salary for full term of contract is binding on school trustees unless set aside by court of competent jurisdiction. **Tex CivA** 280SW903.

862-81½-New. Court will not interfere with exercise of discretion of state superintendent, unless there has been clear abuse thereof. **TexCivA** 284SW306.

862-81⅓-New. Before resort can be had to courts to review decision of state superintendent, appeal must be taken to state board of education. **TexCivA** 284 SW306.

862-81¼-New. Evidence before county board held immaterial. **TexCivA** 291 SW268.

862-81⅕-New. Orders of district superintendent of schools, which are within his jurisdiction, affirmed by commissioner of education, are not subject to judicial review. 219**AppDiv**563, 220**NYS** 414.

862-83 Failure to follow statutory procedure in appointing director will be set aside on appeal. 290**Pa**95, 137**A**811.

863-89 209**Ky**160, 272**SW**400 (retiring board cannot elect superintendent for term beginning July 1st, following year); 159**Tenn**693, 21**SW(2d)**623 (county superintendent).

863-91½-New. In Kentucky under statute providing for appointment of county superintendent for term of not more than four years from January 1st next succeeding his appointment election of successor to county superintendent appointed for two years beginning January 1, 1922, must take place in 1923 and only members of board of education then in office have power to elect. 218 **Ky**207, 291**SW**44.

863-93½-New. Where certificate of vacancy of office of county superintendent does not emanate from state board, and office is not ipso facto vacated by alleged educational disqualification of electee, record evidence of appointment by county board to fill apparent vacancy is not prima facie evidence of appointee's title. 214**Ala**353, 107**S**854.

863-97½-New. Appointment of county superintendent being complete when board adjourned is irrevocable, notwithstanding lack of his formal acceptance. 235**Ky**692, 32**SW(2d)**26.

863-98½-New. Police jury's finding may establish prima facie right to office. 163**La**213, 111**S**681.

863-98⅓-New. Where two wards in which city was located each had two members on parish school board, city is thereby represented. 169**La**646, 125**S** 841.

863-98¼-New. Jurisdiction of contested election of county superintendent of schools by magistrates instead of people is in quarterly county court. 159**Tenn** 605, 21**SW(2d)**619.

863-98⅕-New. Judgment of quarterly county court in sustaining contest of election of county superintendent may not be reviewed by circuit and supreme courts where not in conflict with law of land. 159**Tenn**605, 21**SW(2d)**619 (contestant's claim for damages must be asserted in separate proceeding).

863-99 In Kansas.-120**Kan**332, 243**P** 302. **Certificate of qualification.**-222**Ky** 438, 1**SW(2d)**530. **Effect of failure to take oath.**-**NC** 155**SE**550.

863-2 320**Mo** 877, 8**SW(2d)**881; 154 **Tenn**583, 288**SW**353 (holding county superintendent not ineligible because of failure to file certificate of qualification before statutory date).

864-5½-New. Residence and qualification to vote are required in some jurisdictions. 168**Ga**444, 148**SE**102.

864-7 214**Ala**353, 107**S**854.

864-7½-New. Time for qualification.-One elected to fill vacancy on county board of education must qualify within reasonable time. 233**Ky**549, 26**SW(2d)** 503 (delay held unreasonable).

864-7⅓-New. Failure of person so elected to qualify within reasonable time forfeits right to qualify. 233**Ky** 549, 26**SW(2d)**503.

864-7¼-New. Holder of certificate of election to such office is not entitled to notice before office is declared vacant **for failure to qualify within reasonable** time. 233**Ky**549, 26**SW(2d)**503.

864-7⅕-New. Failure of one elected to fill vacancy in county board of education to qualify within reasonable time authorizes board to declare vacancy and appoint another. 233**Ky**549, 26**SW(2d)** 503.

864-7⅙-New. In such case no judicial determination as to vacancy is required. 233**Ky**549, 26**SW(2d)**503.

864-9 Commission from governor not conclusive as to term of elected county board member. 169**Ga**406, 150**SE**641.

864-10 156**SC**77, 152**SE**816 (provision of general law for holding over by school trustees held applicable to trustees of Spartanburg county). **Member of county board of education, moving to another state and acquiring definite domicile** held no longer "resident" of county, thereby creating vacancy in office. 214**Ala**356, 108**S**18. **Court order declaring vacancy held error.**-169**Ga**406, 150**SE**641.

864-12½-New. Under statute empowering county board of education to appoint county superintendent for term of not more than four years, election and contract fixing term at two years are valid. 218**Ky**207, 291**SW**44.

864-12⅓-New. Constitutional requirement that general assembly fix time when constitutional officers shall enter upon duties held inapplicable to membership on county board of education. 233**Ky**549, 26**SW(2d)**503.

865-16 235**Ky**692, 32**SW(2d)**26 (for cause, on notice and due process); 117 **Oh**1, 157**NE**482; 158**Tenn**26, 11**SW(2d)** 897. **Arbitrary dismissal** not lawful and will be justification on quo warranto. 117 **Oh**1, 157**NE**482. **Changes in term of office and mode of selection.**-Act providing for election of county superintendent of schools and board of education by legal voters instead of by county court and for terms of seven years instead of two does not make merely colorable changes in violation of due process of law provision of constitution. 159 **Tenn**306, 17**SW(2d)**926.

865-21½-New. Exercise of honest judgment by city board of education in removing superintendent of schools, though erroneous, is not abuse of discretion. 218**Ala**631, 120**S**144(2dcase).

865-21⅓-New. Power to suspend members of board is exclusively executive function. 97**Fla**705, 122**S**7.

866-22 241 **Ill**A117; 319**Mo** 848, 5 **SW(2d)**54; 320**Mo** 594, 8**SW(2d)**69. **Allowance of traveling expenses to county superintendent** held unauthorized. 155 **Tenn**303, 293**SW**147. **Implied repeal of earlier statute.**-164**La**482, 114**S**104. **Power to elect superintendent carries power to fix salary.**-164**La**482, 114**S**104. **Raising salary of parish superintendent** held within board's discretion. 164**La** 482, 114**S**104. **Additional compensation.**-220**Ala**652, 127**S**235.

866-25 319**Mo** 848, 5**SW(2d)**54.

867-30½-New. Allowance for automobile for superintendent of education and insurance thereon is not authorized. 142**Miss**146, 105**S**774.

867-30⅓-New. In absence of provision to contrary authority of school board to elect superintendent carries with it authority to fix salary. 164**La**482, 114 **S**104.

867-30¼-New. Wisdom of board's raising salary of superintendent is not question for court but is addressed to board's discretion. 164**La**482, 114**S**104.

867-31 235**Ky**692, 32**SW(2d)**26; 322 **Mo** 1230, 18**SW(2d)**498. **De facto superintendent of parish schools** is bound to perform duties of office so long as he holds it. 165**La**552, 115**S**747. **Provisions in county charter** as to powers and duties of county superintendent of schools are controlled by general laws. 69**CalA**533, 232**P**480. **Unauthorized provisions in county charter** as to appointment of school superintendent held controlled by constitutional provision requiring election by qualified electors. 69**CalA**533, 232**P**480.

867-32 98**Fla**81, 123**S**545 (county board is without statutory authority to appoint secretary and office clerk for county school superintendent); 141**Miss**585, 106**S**820 (cannot abolish school district); 320**Mo** 877, 8**SW(2d)**881.

867-33 Discontinuance of all schools in established existing district is not within powers of county school board so long as resident children are not furnished other available public school facilities, though there are less than forty-five educable children there. 141**Miss** 585, 106**S**820.

867-35½-New. School board must resist actions by teachers' creditors for diversion of their salaries. 11**LaA**647, 124**S**628.

867-37½-New. Legislature in creating county line districts may impose on such counties and their officers burdens essential to proper organization and management. **TexCivA** 275**SW**449.

867-37⅓-New. Mere exercise of honest judgment by county board is not abuse of discretion, though erroneous. 214**Ala** 620, 108**S**588.

867-37¼-New. County board occupies status of trustee as to county property and county funds, for school purposes for which it is created. 93**Fla**182, 111**S** 521.

867-37⅕-New. Board may subdivide district and require residents to attend schools therein. 220**Ky**489, 295**SW**436.

867-37⅙-New. Power to be sued may be implied from other powers expressly granted. 93**Fla**182, 111**S**521.

867-37⅐-New. County commissioners have no authority to issue bonds for school buildings without statutory authority. 192**NC**516, 135**SE**336.

867-37⅛-New. Counties are recognized as administrative units of state-wide public school system in constitution. 192**NC**516, 135**SE**336.

867-37⅑-New. Members of county board of education were not individually liable for misconduct of members of city board of education, to whose duties county board members succeeded. 218 **Ala**631, 120**S**144(2dcase).

867-37 1/10-New. County board, which succeeded city school board, was not liable for breach of contract by de facto city board. 218**Ala**631, 120**S**144(2d case).

867-37 1/11-New. Statute substituting county board of education for county court held not to affect statutory procedure respecting matters previously within power of county court. 181**Ark** 253, 25**SW(2d)**443.

867-37 1/12-New. Selection of janitor for school in local tax district is within power of county board of education and not district school committee. 198**NC** 301, 151**SE**730.

867-37 1/13-New. County board of education is not department of county government making it duty of board of commissioners to purchase supplies. 198**NC** 325, 151**SE**718.

867-37 1/14-New. Power of county board of public instruction to appoint elective officers cannot be conferred by legislature. 98**Fla**66, 123**S**540.

867-37 1/15-New. Failure to sign minutes as affecting validity of orders. **TexCivA** 32**SW(2d)**496.

868-43 TexCivA 280**SW**903.

868-47½-New. Misapplication of funds applicable to teacher's salaries.-County superintendent illegally approving vouchers drawn on fund which could be appropriated only to teacher's salary under contract, with knowledge of contract and proceedings to enforce it, is liable to teacher. **TexCivA** 280**SW**903.

870-68½-New. Under Arkansas statute appeal may be taken to circuit court and case tried on merits. 177**Ark**497, 6 **SW(2d)**826.

870-2 Township treasurer is insurer of school funds coming into his possession. 338 **Ill** 134, 170**NE**236.

870-8½-New. Where township school trustee has certain powers enjoined on him by law, then township advisory board which acts coöperatively with him, cannot defeat performance of such trustees' duties. 196 **Ind**436, 148**NE**481.

870-8⅓-New. Members of town school committee are public officers. 103**Conn** 418, 130**A**707.

870-8¼-New. Town did not have power to compensate school committee for per-

formance of official duties. 103Conn418, 130A707.

870-8⅕-New. Vote of town meeting for payment of compensation to school committee unauthorized by statute. 103 Conn418, 130A707.

870-8⅙-New. In Vermont town manager is required to do all financial accounting formerly required of school directors, 100Vt75, 135A12.

870-8⅐-New. and is entitled to such books, receipts, vouchers, and other papers reasonably necessary to enable him to perform his duty. 100Vt75, 135A12.

870-8⅛-New. It was right and duty of school township trustee to exercise discretion in matter of consenting to permanent injunction against sale of bonds and execution of building contract, whatever may have been inducing cause. 88 IndA420, 164NE292.

870-8⅑-New. Statute providing for appeal from decisions of township trustees to county superintendent held repealed by statute. Ind 168NE16.

870-8 1/10-New. Trustee and township advisory board, in determining needs for school facilities, act in governmental capacity. Ind 172NE908.

870-8 1/11-New. Power of township advisory board is limited only to extent that township trustee may not be arbitrarily defeated in performing official duty. Ind 172NE908.

871-15½-New. Construction of statute authorizing call of special meeting. 248 Mich134, 226NW895.

871-17 Oral notice held sufficient for special meeting.-204 Iowa221, 215NW 235.

871-18 Sask [1929] 2DomLR161.

872-31 131 Or448, 283P18.

874-41 Call for special meeting, made orally by secretary at president's direction, held sufficient, 204 Iowa221, 215 NW235.

875-47 96CalA58, 273P863. Facts held to show one having removed from district was not qualified voter therein.-Tex CivA 278SW919.

875-48 Owner of property who moved from district held not qualified to vote. TexCivA 278SW919.

875-53 Unmarried woman without children or property is not entitled to vote at annual meeting of rural school district. 118Nebr682, 226NW333. Widow who had removed from district held not qualified to vote despite ownership of land. TexCivA 278SW919.

876-61½-New. Annual school meeting held empowered to exercise function of assembly to discuss and dispose of general question of school business. 44 Ida92, 255P318.

876-61⅓-New. Attempted action at annual meeting is void where regular meeting had been finally adjourned before action was taken. 37Wyo 124, 259P 812.

876-63 236Ky5, 32SW(2d)565.

876-64 233Mich10, 206NW364 (rescission of steps taken for selection of high school site).

877-72 212Ala493, 103S471, 473 [cit Cyc].

877-73 326 Ill 73, 157NE34; 326 Ill 179, 157NE200. Record should not be amended.-326 Ill 179, 157NE200.

877-76½-New. School board may amend records to show facts. 326 Ill 73, 157NE34.

877-76⅓-New. Records may be amended at any time after quo warranto, certiorari, or other proceedings have been instituted and decided. 326 Ill 73, 157 NE34.

877-76¼-New. When records are amended they cannot be contradicted by parol. 326 Ill 73, 157NE34.

877-80 202Cal 110, 259P730; 202 Iowa 701, 210NW947, 49ALR705 (board of directors); 153SC106, 149SE760 (legislature creating high school district has authority to name legal trustees of district). Legislature may establish agencies as board to operate public schools. TexCivA 278SW516. Present San Francisco board of education is successor of board established under legislative acts as far back as 1856. 202 Cal 110, 259P730.

878-83 TexCommnA 286SW161 (holding special act requiring county judge to order first election valid). Election called by an unauthorized body is nullity. 201 Iowa1159, 208NW725. Legislature has power to regulate school district elections.-213Ky810, 281SW999.

878-84 Assistant supervisor.-In West Virginia board of education cannot employ assistant district superintendent without approval of county superintendent. 108WVa505, 151SE703.

879-86 198NC217, 151SE254. School trustees held properly elected under Reorganization Act (Acts 39th Leg. [1925] c 48). TexCommnA 286SW161.

879-87 TexCivA 291SW957; 118Tex 331, 15SW(2d)1036. Fact that official board of which appellees in election contest were members refused to recognize validity of new election, called by contest board with assent of all parties, does not estop them from questioning appeal from decision of contest board as being appeal from judgment consented to. 201 Iowa1159, 208NW725. In case of a tie vote, so determined by county court, it should also order special election, as provided by statute. Colo 292P 1061(2dcase). Unintelligibility and illegibility of ballot, and that it was properly disregarded is properly determined by county court. Colo 292P1061(2d case). Where chairman of patron's meeting refuses to certify result, county superintendent, if he finds true returns are made by secretary should accept his certificate. Miss 130S482 (if superintendent does not act, court may). Requisites of voters.-WVa 155SE462.

880-90 35Ariz265, 276P843. But see 118Tex381, 15SW(2d)1036.

881-95½-New. Appointment under by-law fixing qualifications is invalid where such by-law is superseded by statute. 125Misc678, 211NYS749.

881-95⅓-New. Act does not make calling of election mandatory, though required petition is filed. 148SC326, 146 SE92.

882-98 Married woman whose husband paid tax on property owned by her but listed and assessed against him is eligible as taxpayer. 307Mo 447, 270SW101.

882-1 Officers must be individuals, citizens and residents of district unless otherwise specifically provided. 13Dist& Co 395.

882-2 154Tenn655, 289SW530. Acceptance of one office as resignation of another.-154Tenn655, 289SW530.

883-4½-New. No educational requirements are prescribed by law for members of board of education in some jurisdictions. 100WVa662, 131SE463.

883-6 Director chosen as treasurer need not take second oath where he has already taken oath as director. 171Minn 376, 214NW259. Members held within exemption of "inferior officers" and such statute does not require members of board of education to take oath before entering upon duties of office. 325 Ill 464, 156NE471. Under constitutional and statutory exemption of "inferior officers" from taking prescribed oath, members of board of education have been held inferior officers not required to take oath. 325 Ill 464, 156NE471.

883-9 Discretion of district board in fixing amount of bond of collector of school taxes will not be reviewed in absence of abuse. 13PaDist&Co 206.

884-15½-New. Fact that members elect of board of education threatened to sue or brought suit to enjoin erection of school building, which was later dismissed, does not disqualify them from becoming members of board. 325 Ill 464, 156NE471.

885-22 84Mont461, 277P9.

885-23 In Pennsylvania.-293Pa1, 141A 633. In Washington.-147Wash405, 266 P166.

885-24 125 Okl 97, 256P929; TexCivA 278SW283. Ordinary action for possession to office lies, despite statutory provisions. TexCivA 278SW283.

886-25 125 Okl 97, 256P929.

886-32 TexCivA 16SW(2d)424. One who has forfeited office by accepting incompatible office is de facto officer of office first held until removal therefrom. 104WVa35, 138SE461.

886-34 171Ark385, 284SW764; 175Ark 274, 299SW11; 180Ark378, 21SW(2d) 602; 204 Iowa689, 216NW83; 215Ky40, 284SW386; 104WVa35, 138SE461.

886-34½-New. Director retaining office after tie election is either de facto or de jure officer. 85Colo 505, 277P466.

888-43 153SC106, 149SE760 (school trustees' terms may be ended or extended at will of legislature).

889-46 TexCivA 278SW283. Legislature presumed to have intended occupancy of office until valid succession. TexCivA 278SW283. Trustees holding over are de jure officers.-TexCivA 278 SW283. Void election continues old trustees in office.-TexCivA 278SW283.

890-52 By resigning school director does not become eligible to appointment by school district and evade prohibition of accepting appointment during his term. 14PaDist&Co 360.

890-53 TexCivA 11SW(2d)605. Statute construed.-CalA 292P271.

890-57½-New. Question of motive of resignation will not be inquired into. 284Pa325, 131A226.

890-57⅓-New. Board cannot accept resignation of superintendent as of date after close of school year. CalA 292P 271.

890-57¼-New. Board could not arbitrarily change date of resignation of superintendent without notice to him. CalA 292P271.

890-58 289Pa82, 137A143 (school directors); 290Pa200, 138A748. In Pennsylvania.-286Pa233, 133A226. Statute is highly penal in character and must be strictly construed. 6PaDist&Co 545.

891-59 216Ala270, 113S252; 6PaDist &Co 181. Removal under resolution of council which is ultra vires is improper. 216Ala270, 113S252.

891-60 Pa 151A801; 5PaDist&Co 244 (failure to solicit bids). Letting to other than lowest bidder.-289Pa82, 137A143. Neglect of mandatory duties.-6PaDist& Co 105. School superintendent ready, able and willing to perform duties is entitled to damages where prevented by wrongful removal. 87Colo 52, 284P1026.

892-63 Okl 293P199 (immaterial how information is conveyed to superintendent). Negligent or willful violation of statute is necessary by members of board before their offices will be declared forfeited for making contract involving expenditure of money in excess of funds legally at disposal of board for current fiscal year. 101WVa485, 133SE127. Negligent violation of statute limiting expenditure of money by school board is one occasioned by or accompanied with negligent conduct. 101WVa485, 133SE127.

892-64 Insufficiency or incompetency does not include charge of being hard of hearing. 100WVa662, 131SE463. In West Virginia.-100WVa662, 131SE463. Pecuniary interest of district officer in proceeds of contract in letting of which he may have voted is "misconduct in office." 102WVa251, 135SE246.

892-65 256Mass584, 152NE743 (lack of harmony and coöperation held ground for removal of superintendent). Mere charge that one is hard of hearing is not ground for his removal as member of board of education. 100WVa662, 131SE 463.

892-66½-New. Failure of school directors to require tax collector to make monthly report to secretary of all taxes collected is not ground for removing directors; 6PaDist&Co 105.

892-66⅓-New. nor is directors' failure to require collector to pay taxes collected each month to treasurer; 6PaDist&Co 105.

892-66¼-New. nor reappointment of tax collector without first requiring him to settle his duplicate for preceding year, he being exonerated from taxes he could not collect. 6PaDist&Co 105.

892-66⅕-New. Resignation as bar.-Where resignation is validly accepted, court has no jurisdiction thereafter to entertain petition to remove, even though resignation is contended to have been in bad faith and for sole purpose of preventing influence by court, motive being unimportant. 284Pa325, 131A226.

892-66½-New. Removal from district is not ground for removal of member. **Okl** 293P199.

893-67 87**Colo** 52, 284P1026; 256**Mass** 584, 152NE743 (removal of superintendent held in compliance with statute). **Sufficiency of petition for removal.**-100 **WVa**662, 131SE463. **Clear proof of breach of mandatory statutory duties** by school director must be shown before penalty of removal can be imposed. 288 **Pa**411, 136A218. **Quo warranto** upon cause shown is proper procedure. 6**Pa Dist&Co** 181. **In Oklahoma.**-128 **Okl** 96, 261P211; 128 **Okl** 178, 261P940. **In Saskatchewan.**-[1929] 2**DomLR**347.

893-68 In Pennsylvania.-290**Pa**95, 137 A811.

893-69 138 **Okl** 30, 280P291. But see 5**PaDist&Co** 90. **In Pennsylvania.**-286 **Pa**233, 133A226.

893-73 290**Pa**200, 138A748.

893-73½-New. Recall.-Statute providing for recall of school officials has been held constitutional. 235**Mich**531, 209 NW572.

893-73⅓-New. Refusal of school director to rehire school teacher whose retention was desired by majority of electors of district is not ground for recall. 235**Mich**531, 209NW572.

893-73¼-New. Petition for recall must state clearly reason or reasons for recall and furnish information on which elector may form judgment. 235**Mich** 531, 209NW572.

893-73½-New. Such reasons must be based on some act or failure to act which in absence of sufficient justification would warrant recall. 235**Mich**531, 209 NW572.

893-73⅙-New. Statements in petition that director had stated that he would run district to suit himself and had intimidated other members of board are insufficient in absence of recital of any specific act of intimidation. 235**Mich** 531, 209NW572.

893-73⅐-New. Proceedings for removal of school directors may be had either against entire board or individual members. 289**Pa**82, 137A143.

893-73⅛-New. Power of court to remove school directors is discretionary, 289**Pa**82, 137A143.

893-73⅛-New. and review of such discretion on appeal is limited to whether court exceeded jurisdiction or improperly exercised discretion. 289**Pa**82, 137 A143.

893-73⅒-New. In proceeding to remove school director the directors' rights must be carefully considered as are rights of defendant in criminal court. 6**PaDist& Co** 105.

893-73 1/11-New. Re-election of school directors does not deprive court of power to pass on their guilt of charges in previously filed petition for their removal. 298**Pa**453, 148A518.

893-73 1/12-New. Final decree of removal dates back to time proceedings were commenced. 298**Pa**453, 148A518.

893-73 1/13-New. Where subsequent decree appointing successors is not assigned as error it cannot be considered on appeal from order of removal. 298 **Pa**453, 148A518.

893-73 1/14-New. Actual removal and not misconduct justifying removal is necessary to bar one from office of school director under statute. 297**Pa**364, 147A67.

893-74 181**Ark**859, 28**SW(2d)**55.

694-76 29 **OhA**121, 162**NE**653. But see 195**Wis**515, 218**NW**837. **Moving to another district for temporary purpose** with intent to return when purpose accomplished does not constitute vacancy of office of member of board of education. 103**WVa**692, 138**SE**329.

895-82 204 **Iowa**689, 216**NW**83; 215**Ky** 40, 284**SW**386 (where fourth-class city school is changed to graded school, vacancies in board of trustees are filled by governor); 225**Ky**428, 9**SW(2d)**117; 226**Ky**89, 10**SW(2d)**615; 297**Pa**242, 146 A601; 5**PaDist&Co** 241. **Resigning officer may be one of quorum** to elect his own successor, if resignation is conditioned upon such election. 204 **Iowa**689, 216**NW**83. **Majority of quorum** may fill vacancies. 204 **Iowa**689, 216**NW**83. **Amendatory statute as to filling vacancies** is presumed as meaning something. 198**NC**217, 151**SE**254.

896-83 297**Pa**242, 146A601; 10**PaDist &Co** 443.

897-87 Illegible ballot should not be counted where voters could exercise independent choice in selecting person for office. **Colo** 292P1061(2dcase).

898-1½-New. Action for money illegally paid to members of board for services may be maintained by school board. 240 **Mich**515, 215**NW**333.

898-1⅓-New. Action for money illegally paid to members of board of services, etc. If board refuses to bring such action it may be moved to act. 240**Mich** 515, 215**NW**333.

898-1¼-New. Under some statutes superintendent of public instruction cannot maintain such action. 240**Mich**515, 215 **NW**333.

898-3 Directors may fix reasonable compensation for collector of school taxes. 7**PaDist&Co** 760. **Actions for salary.-CalA** 292P271 (school superintendent). **Necessity of funds available for payment.-CalA** 292P271.

899-9½-New. Under some statutes the board may fix and change the salary of the office of secretary of the board. 96 **PaSuper**395.

899-11 TexCivA 24**SW(2d)**449; **Wis** 231**NW**174 (merely ministerial). **Board is agent of county** in creating indebtedness for maintenance of separate schools. 143 **Okl** 1, 286P902. **School boards are public bodies** having rights for educational purposes. **Can** [1926]**AC** 81, [1925] 3**DomLR**880. **School directors are not judicial officers.**-97**PaSuper**559.

899-13 323 **Ill** 309, 154**NE**120; 224 **IllA** 550; 123**Kan**495, 256P149; 214**App Div**40, 210**NYS**439; 56**ND**194, 216**NW** 564; 120 **Oh**335, 166**NE**230; 297**Pa**242, 146A601. **Duty to provide free transportation of pupils.**-214**AppDiv**40, 210 **NYS**439. **Appointment of superintendent.**-201 **Iowa**63, 206**NW**86. **Board of school trustees is neither natural nor artificial person** and does not enjoy same natural privilege and constitutional rights as do such persons. 202 **Cal** 299, 260P789. **In New York.**-136 **Misc**171, 240**NYS**422. **In Canada.-Ont** [1927] 1**DomLR**913. **Public boards are authorized to do voluntarily** that which they could by mandamus be compelled to do. 160**La**360, 107S139. **Superintendent of independent school district** is employee of board of education and agent of board in general work of organizing departments and grades and assigning teachers employed and is subject to orders of board. 111 **Okl** 277, 239P580. Acts of such superintendent in general scope of employment are acts of board. 111 **Okl** 277, 239P580 (refusal to accept services of teacher because she was married woman). **Under statute,** treasurer of independent school board has no authority to sell bonds in which sinking fund of school district is invested, that authority being vested in school board. 136 **Okl** 14, 275P1042. **Trustees of high school district** formed by grouping common school districts have power to administer property and funds of all member districts. **TexCivA** 32**SW(2d)**235.

900-15 202 **Iowa**701, 210**NW**947, 49 **ALR**705.

900-17 224 **IllA**550; 202 **Iowa**701, 210 **NW**947, 49**ALR**705. **Instruction in thrift.**-202 **Iowa**701, 210**NW**947, 49**ALR** 705. **Authority of boards of education to increase salaries of administrative and clerical employees.**-136**Misc**171, 240 **NYS**422.

901-19 173**Ark**1077, 294**SW**365; 224 **IllA**550; 247 **IllA**584; 204 **Iowa**570, 215 **NW**807; 3**LaA**2; **MoA** 273**SW**182; **Mont** 288P188; 132 **Or**673, 288P196; 11**PaDist&Co** 660; 13**PaDist&Co** 771; 538**D**579, 221**NW**697; **Wis** 233**NW**97. See also **Minn** 233**NW**296; 221**MoA**9, 297**SW**419. **Statutes prescribing respective duties and powers of district and board** are strictly construed, and persons dealing with bodies are bound to know thereof. 194**Wis**530, 217**NW**293.

901-20 202**Cal** 299, 260P789; 224 **IllA** 550 (as to building additions to schoolhouses); 214**AppDiv**40, 210**NYS**439 (holding that commissioner of education cannot add thereto or take away therefrom any of delegated powers).

901-21 By-law of board of education is invalid in so far as it related to qualifications of district superintendent of schools where board is not authorized to adopt a statute as a by-law under guise of supplementing statute so as to give it validity independent of statute. 125 **Misc**678, 211**NYS**749.

901-22 County board has been held not to have right or duty to sue trustees and treasurers of school district to account for funds raised by taxation. 169**Ga**240, 150**SE**206(2dcase).

901-27½-New. Member of school board while in discharge of public duty may not assume private duty in conflict with his public duty. 126**Misc**622, 214**NYS** 264.

901-27½-New. Thus arrangement whereby member of school board employed and supervised labor for contractor in repairing school building for which he received compensation is unlawful. 126**Misc**622, 214**NYS**264.

901-27¼-New. Rights of school board for educational purposes are not intended to override powers of municipality for protection of community as a whole. **Can** [1926]**AC**81, [1925] 3**DomLR**880.

901-27⅓-New. City board of education has discretion of exercising power relating to school system not prohibited by law, which it believes will establish and maintain an efficient school system. **TexCivA** 286**SW**497.

901-27⅙-New. Sale to district of school site by member or as part of scheme to give him personal benefit is against public policy. 320**Mo** 665, 8**SW** (2d)63.

901-28 247 **IllA**58; 143**SC**511, 141**SE** 896, 897 [citCyceperCothran,J, dis op].

902-30 179**Ark**729, 17**SW(2d)**895; 204 **Iowa**570, 215**NW**807; 225**Ky**428, 9**SW** (2d)117; 117 **Okl** 226, 245P884; 135 **Okl** 253, 275P285; **TexCommnA** 290**SW** 152. **Act of majority of quorum** is act of board. 213**Ky**493, 281**SW**469. **Failure of members present to vote.**-213**Ky** 493, 281**SW**469. **As to matter to come before board in future,** it may not bind members to act. **MoA** 28**W(2d)**208. **Quorum of board** has all powers which entire board could exercise if present. 213**Ky**493, 281**SW**469. **Combined vote** of high school and elementary school boards of six to four in favor of joint meeting permits no inference that majority of former favored action. 88**CalA** 731, 264P273.

902-32 255 **IllA**206; 204 **Iowa**570, 215 **NW**807; **Iowa** 229**NW**821; 256**Mass** 584, 152**NE**743 (adjournment held proper).

903-33 255 **IllA**206; 204 **Iowa**570, 215 **NW**807; 56**ND**194, 216**NW**564, 565 [cit Cyc]; 297**Pa**242, 146A601.

903-34 143**SC**511, 141**SE**896, 897 [cit CyceperCothran,J, dis op]; 198**Wis**320, 224**NW**119.

903-35 Form of ordinance.-164**La**204, 113S818.

903-36 88**CalA**731, 264P273; 206 **Iowa** 1139, 221**NW**833.

903-38 117 **Okl** 226, 245P884; 284**Pa** 325, 131A226.

904-39 117 **Okl** 226, 245P884; 5**PaDist &Co** 241; 37**Wyo** 124, 259P812 (action illegal where one member received no notice). But see 201 **Iowa**63, 206**NW** 86.

904-43 5**PaDist&Co** 241.

904-44 284**Pa**325, 131A226.

905-45 284**Pa**325, 131A226.

905-47 284**Pa**325, 131A226 (statute).

905-51 85 **IndA**663, 155**NE**516.

905-53 13**PaDist&Co** 584.

905-56½-New. Special meeting may be called for general purposes provided reasonable notice is given of time and place of meeting. 284**Pa**325, 131A226.

905-56⅓-New. Waiver of notice.-Giving of notice may be waived. 284**Pa** 325, 131A226.

905-56¼-New. Sunday service.-Where all except one member are present, fact that service of notice was on Sunday is immaterial where member not appearing was again notified on Monday, day of meeting. 284**Pa**325, 131A226.

906-57 Amendment.-232 **IllA**102.

906-59 118 **Okl** 59, 246**P**462; 12**PaDist&Co** 345.
906-60 13**PaDist&Co** 584.
907-64 213**Ky**493, 281**SW**469.
907-65½-New. Minutes entered in minute book subsequent to meeting and shown to be correct are sufficient record and admissible in evidence. 106 **Okl** 30, 233**P**431.
907-65½-New. Record imports verity. 335 **Ill** 11, 166**NE**504.
907-66 73**Mont**442, 236**P**670; 82**Mont** 126, 266**P**387; **Mont** 287**P**624 (statute not applicable where trustees attempt to act without or in excess of jurisdiction); 243**NY**204, 153**NE**49 (in New York, appeal may be made to commissioner of education). **Thus in Iowa**, etc. 202 **Iowa**701, 210**NW**947, 49**ALR** 705. **Action of commissioner of education in passing upon appeal from determination of board of education** held final and not subject to review. 243**NY** 204, 153**NE**49. **Diligence must be used in taking appeal.-TexCivA** 287**SW**693. **Compliance with decision of state board will be enforced by mandamus**, directed to school trustees, to perform ministerial duty. 82**Mont**126, 266**P**387. **County superintendent not disqualified.-84 Colo** 240, 269**P**15.
908-67 245 **IllA**270; 7**PaDist&Co** 66. **Action of board in condemning land** not reviewable in absence of abuse of discretion. 12**PaDist&Co** 345.
908-69 Where school board acts without jurisdiction or in excess of powers, courts will correct such action without appeal to school officials. 73**Mont**442, 236**P**670.
908-69½-New. By-laws.-Adoption of one section of Greater N. Y. Charter as by-law by board of education is not supplementing of statute as authorized where such section is self-executing. 125**Misc**678, 211**NYS**749.
908-69½-New. Invalid by-law does not continue in force by reason of saving clause in repealing statute permitting rules and regulations in pursuance of any law to remain in force until modified by board. 125**Misc**678, 211**NYS**749.
908-69¼-New. In view of statute petition to commissioner of education of aggrieved party need not show on face all facts necessary to confer jurisdiction on commissioner. 125**Misc**230, 211**NYS**413.
908-69½-New. Though not specifically set forth in appeal papers, facts in moving papers were held to sustain decision of commissioner of education. 125**Misc** 230, 211**NYS**413.
908-69¼-New. Resolution adopted by board is not nugatory because of affirmative vote of one member because thereafter private corporation of which he was an officer made contract with third party for carrying out purposes and objects of resolution. 202 **Iowa** 701, 210**NW**947, 49**ALR**705.
908-70 56**ND**194, 216**NW**564. See also 243 **IllA**434. **Payment of illegal claims.** -139 **Okl** 254, 281**P**956 (recovery under statute of double amount of claims paid justified by evidence).
909-71 But see 98**CalA**138, 276**P**424. **Nonliability for injuries to pupil from negligent driving of bus.**-128 **Okl** 193, 261**P**953, 56**ALR**152.
910-75 Choice of depositary not complying with statute does not relieve treasurer from liability for loss through depositary's insolvency. **MoA** 22**SW** (2d)196.
910-76 TexCivA 15**SW(2d)**679. **Trustee selecting plans for school building held not liable individually** in action for personal injuries resulting from fall down unguarded basement entry. **IndA** 158**NE**255.
910-77 140**Miss**355, 105**S**636 (members of school in discharging their duties are not individually liable for negligence); 8**PaDist&Co** 730; **TexCivA** 15**SW(2d)** 679. **Resignation as defense.**-284**Pa**325, 131**A**226.
910-77½-New. School board not chargeable in removal proceedings with delinquencies of treasurer merely because board appointed him and had a general supervision over him. 6**PaDist &Co** 105.
910-77½-New. County superintendent's order that school district pay superintendent of schools salary was binding on trustees only in their capacity as such, and did not render them personally liable for refusal to pay, where district's funds were exhausted before order. **TexCivA** 15**SW(2d)**679.
910-78 218**Ky**688, 291**SW**1062; 140 **Miss**355, 105**S**636 (members of school board are not liable to innocent holder for value of warrants negligently issued by them); 190**NC**250, 129**SE**577 (where contracting without requiring statutory bond liable only to indictment for misdemeanor).
910-78½-New. School board not liable in its official capacity for materials furnished to contractor in repairing schoolhouse, where board failed to require statutory bond. 190**NC**250, 129**SE**577.
910-80 218**Ky**688, 291**SW**1062.
911-86 Liability of successors.-161**Ga** 855, 132**SE**60.
912-90½ Trustees breaching teacher's contract and misapplying funds out of which salary could be paid are personally liable. **TexCivA** 280**SW**903.
912-91 MoA 273**SW**182.
912-92 Ga 155**SE**489.
912-93 Iowa 230**NW**418 (duty of treasurer to deposit money received in bank in county as directed by board of directors); 124**Kan**121, 257**P**931; 173**Minn** 428, 217**NW**496; 178**Minn**199, 226**NW** 514; 178**Minn**317, 227**NW**50(2dcase) (where bank in which funds were deposited was never legally made depositary); 53**SD**458, 221**NW**49. **Duties of treasurer of consolidated school district operating as independent school district** in relation to funds of district are such as are prescribed for treasurer of independent school districts. 124 **Okl** 101, 253**P**1012. **Deposit in legally designated bank** constitutes exception under some statutes, but exception is inoperative where treasurer is officer and stockholder thereof. 173**Minn**428, 217**NW**496. **Insurance funds.**-196**Wis**211, 218**NW**847. **Deposit of funds.**-129 **Or**663, 278**P**963, 64**ALR**1396.
912-94 124**Kan**121, 257**P**931. **Treasurer liable**, where depository's officer and knowing of insolvency. **SD** 231**NW** 288. **Treasurer of school district selecting depository in good faith** is not liable for loss caused by failure of depository. **SD** 231**NW**288.
912-95 124**Kan**121. 257**P**931.
912-96½-New. Compliance with statute as to selection of depositary and making of deposits relieves school treasurer from liability for loss of funds due to failure of depositary bank. 50**SD** 107, 208**NW**576.
913-3 Allowing subrogation to claims of contractors.-91**PaSuper**335. **Surcharges.**-91**PaSuper**335. **Directors cannot be surcharged with interest** on notes representing indebtedness incurred before fiscal year subject to audit. 96**Pa Super**346. **Officers who approved of improper expenditures will be surcharged** therewith on auditor's settlement of accounts. 96**PaSuper**346.
913-5 On appeal from surcharge by auditor accounts are required by statute to be investigated de novo, placing burden on appellant to establish credits. 96**PaSuper**346.
914-11½-New. Where school treasurer gave successor check on local bank for stated amount, and banker in presence of both told successor he need not use check but to give it back to outgoing treasurer as memorandum, and banker crossed out treasurer's name on bank's books and inserted successor's name, transaction was same as transfer of cash and deposit in bank. 178**Minn**199, 226 **NW**514 (successor held to have received such amount though bank did not have that amount in its vault).
914-11¼-New. School directors seeking statutory exemption from surcharge for unlawful expenditures have burden of proof to show right to exemption. **Pa** 151**A**801.
914-11¼-New. Directors not relieved from surcharge by failure of district to sustain loss from their illegal acts nor by fact that they made no gain. **Pa** 151 **A**801.
914-11½-New. Surcharge not continued where directors relieved under prior statutes. **Pa** 151**A**801.
914-12 5**PaDist&Co** 733 (demand condition precedent to giving of bond).
914-15 Where conditions of bond have been complied with, sureties are not liable thereon. 50**SD**107, 208**NW**576. **Failure of district clerk to record bond of district treasurer** does not release surety from liability. 54**SD**547, 223**NW** 948. **Payment of premium on treasurer's bond by district** is sufficient acceptance of bond on its part. 54**SD**547, 223 **NW**948. **Surety's acceptance of premium on treasurer's bond** makes contract binding on it. 54**SD**547, 223**NW**948.
914-16 TexCivA 280**SW**903. See also 53**SD**458, 221**NW**49. **Limitation by term of bond.**-124 **Okl** 101, 253**P**1012. **Term covered.**-196**Wis**211, 218**NW**847.
915-19 Moneys received before execution of bond.-196**Wis**211, 218**NW**847.
915-22 177**Minn**479, 225**NW**444; 196 **Wis**211, 218**NW**847. But see 50**SD**101, 208**NW**576. But see **SD** 229**NW**522. **Liability for funds deposited in bank not designated as depositary.**-34**Wyo** 189, 242**P**319. **Bad faith of treasurer of independent school district in leaving funds with depositary of which he was cashier** renders him and his sureties liable for loss of funds through failure of bank. 51**SD**187, 212**NW**863. **Surety held entitled to limit liability** as to responsibility for loss due to acts of depository. 173**Minn**428, 217**NW**496. **Effect of designation of bank as depositary.**-**SD** 224**NW**951. **Negligence in making deposit.** 54**SD**547, 223**NW**948. **Surety not liable for loss by bank failure** though school treasurer knew bank was unsafe when deposits were made. 175 **Minn**346, 221**NW**424.
916-24½-New. Treasurer and bondsmen are not liable for loss of funds due to failure of bank in which deposited, though treasurer required no bond from bank, where he acted in good faith in selecting bank as depositary in accordance with statute. 50**SD**107, 208**NW**576.
916-29½-New. Matters not precluding recovery on bond.-School district's approval of treasurer's report and payment of salary after insolvency of bank in which treasurer had deposited funds does not preclude district from recovering loss from treasurer's surety. 54 **SD**547, 223**NW**948.
917-38 54**SD**526, 223**NW**728.
918-43 Evidence held sufficient to sustain finding that money of school district was deposited in bank by treasurer and lost by reason of his breach of duty. 196**Wis**211, 218**NW**847. **To establish prima facie case**, it was incumbent on school district merely to prove regular receipt of school funds by treasurer and his failure to pay over or account for them on lawful demand properly made. **SD** 224**NW**951. **Burden rests on school district** to overcome prima facie defense of treasurer and bondsmen that money was lost through failure of depositary. **SD** 229**NW**522. **Complaint held insufficient.**-**SD** 229**NW** 522 (action against treasurer and bondsmen for failure to account for money deposited in bank which failed).
918-46½-New. Complaint in action on treasurer's bond need not allege that board required bond in amount of bond given. **SD** 229**NW**522.
918-46½-New. District treasurer's failure to require security for deposits may be considered in determining whether he acted in good faith and with diligence in selecting depositary. **SD** 229**NW**522.
919-55½-New. Resignation as defense. -Valid resignation by directors at meeting of school board cannot relieve them from criminal prosecutions if their actions warrant it. 284**Pa**325, 131**A**226.
920-70½-New. Defendant has been held properly adjudged not guilty of misdemeanor, on special verdict finding that he was merely salaried manager of partnership, from which he voted, as member of county board of education, to purchase school supplies. 196**NC**740, 146 **SE**857(2dcase).
920-72 8**PaDist&Co** 220; 125 **Or**553, 267**P**821. But see 152**Miss**82, 118**S**372. **Land for playground may be purchased** by school district to relieve district of

expense of free transportation of pupils. 8PaDist&Co 220. **Statute giving board of education all school property in annexed territory** held to include lots not then used for school purposes. 155Tenn 212, 292SW462. **Conveyance to school committee** and their successors in office, in fee simple conveyed fee-simple title. NC 154SE827.

920-73 No rights to underlying oil and gas are acquired by purchase and payment for land as school site, no deed being executed, though district occupies land as school site for more than fifteen years. 120Kan570, 245P150. **What is "school ground."**-8PaDist&Co 220.

920-75 Board of education is not a corporation independent of city where latter levies taxes and furnishes funds for education in city. 161Ga780, 132SE 436. Board of education of city held to hold all school property as agent or trustee of municipality. 161Ga780, 132 SE436.

921-83 School district does not obtain mere easement.-168Ga359, 147SE882.

922-89 32PortoRico 12. **Particular deeds construed.**-IndA 173NE288.

922-90 220Ky703, 295SW1063 (deed in consideration of maintaining school, within provision for forfeiture, vests fee in grantee); Mont 257P258. **Limitation of use.**-102WVa374, 135SE399. See also 32PortoRico 12. **Conveyance held not fee simple** but fee qualified by possibility of reverter. 110Conn267, 147A820.

922-92½-New. Recital in deed of agreement to erect school on land held not to create trust or condition, but was nothing more than covenant. 15DelCh286, 136A833.

922-92¼-New. Covenant requiring grantee to erect and maintain school for colored children held fully performed, where such school was maintained for nineteen years. 15DelCh286, 136A833.

922-92¼-New. Deed to county commissioners and their successors in office, for use of school directors so long as building erected on lot should be used by directors for purposes of education, did not invest school district with legal title to land. 295Pa112, 144A901.

922-92½-New. Present school district, as legal successor of original board, was vested with same contingent right in property purchased by county for use of school directors, so long as buildings were used for school purposes, and could not claim more extended estate than that possessed by predecessor. 295 Pa112, 144A901.

922-93 Board of education and county commissioners should be restrained from purchasing land and usury bonds in absence of legislative authority. 192NC 765, 135SE863. **In Vermont.**-100Vt75, 135A12. **School directors have exclusive authority** to purchase supplies for school districts under L. (1921) No. 103, as amended. 100Vt75, 135A12.

923-1½-New. Contract for purchase of building site is not void as waste of public money because owner refused to part with site for sum which purchasing committee considered reasonable market value. 159Tenn591, 21SW(2d)721.

923-3 102WVa374, 135SE399 (drilling of oil well enjoined).

923-4 80CalA131, 251P679; 104WVa 80, 138SE761. **Conveyance of property to corporation under contract to lease and repurchase** held authorized. 235Ky 141, 29SW(2d)594. **Extent of land is for board's discretion** and property used otherwise than for school uses must be separately treated. 298Pa193, 148A77. **Setting apart entire tract for recreation purposes** in connection with school built on tract held discretionary with school board. 298Pa193, 148A77.

923-5 Failure to use land as school site held **abandonment.** 82Mont295, 267P 289.

923-6 102WVa374, 135SE399.

923-10 173Ark1077, 294SW365; NC 154SE827.

924-13 Provisions of Home Rule Charter of city of Minneapolis requiring affirmative vote of five members of board of education, recorded by ayes and nays, in order to make valid sale of real estate, are mandatory. 177Minn19, 224NW268.

924-14½-New. School directors are exclusive judges of necessity of sale and application of proceeds where statute gives them power to sell. 173Ark1077, 294SW365.

924-14½-New. Purchaser is not concerned with application of proceeds.-173Ark1077, 294SW365.

924-14¼-New. Sale under agreement that purchaser will maintain school and receive pupils sent by directors is valid. 173Ark1077, 294SW365.

924-14½-New. Under deed to trustees of and "for school purposes," board acquired fee-simple title, notwithstanding board ceased to use land for school purposes. 228Ky334, 14SW(2d)1085.

924-14¼-New. Transfer of property from board of education to board of vocational education may be made under some statutes without consulting common council. Wis 229NW652.

924-18 But see 168Ga359, 147SE882. **School property, part of which was donated by commonwealth,** reverts to county board of education so as to permit passing good title. 225Ky21, 7SW (2d)499.

925-20 180Ark36, 20SW(2d)316 (official action of school board not necessary to show abandonment); 219Ky496, 293SW964; 248Mich112, 226NW867 (provision reserves to grantor right of reverter, dependent on breach of condition subsequent); 151Miss475, 118S303; Mont 257P258; 82Mont295, 267P289; 120 Oh335, 166NE230. **Change of grade of school pursuant to statute held not abandonment.**-214Ky284, 283SW99. **Conveyance for use and benefit of white children in school district and no further does not impose** trust or condition subsequent working reversion of title. NC 154SE827. **Grantor, having taxpayer's right to prevent improving property with public funds** because subject to reversion on abandonment, does not acquire any greater rights as grantor by reason thereof. 214Ky284, 283SW99. **Release by board to grantor held ineffective as reverter.**-214Ky284, 283SW99. **Right to furniture and apparatus on reverter.**-214Ky284, 283SW99. **What reverts to grantor.**-82Mont295, 267P289. **Reversion not effected** by statute requiring title to be in fee simple. 233Ky35, 24SW(2d)910. **Improvements** on abandonment for school purposes goes to reversioner. 233Ky351, 24SW(2d)910. **Grantor properly retook possession of school property,** under the evidence, showing abandonment. 180Ark36, 20 SW(2d)316. **Resumption of possession by grantor cannot be divested** by notice from school board after completion of repairs. 180Ark36, 20SW(2d)316.

925-21½-New. Under some statutes reverter of site granted for school purposes by reason of abandonment does not entitle grantor to schoolhouse thereon. 214Ky284, 283SW99.

925-21½-New. Under such statute, deed providing for reverter on abandonment of site for school purposes gives grantor right of possession of lot itself only. 214Ky284, 283SW99.

925-22 127Kan651, 274P728; 225Ky21, 7SW(2d)499; 192NC516, 135SE336 (under constitution of North Carolina erection of schoolhouses is necessary public expense); 196NC17, 144SE377. **Requiring or permitting children in district** to attend other schools held not conducting school as intended in statute. 234 IllA313. **In Kansas.**-130Kan421, 286P 230.

925-24 326 Ill 97, 157NE37. See also 234 IllA313. **Election held valid.**-326 Ill 73, 157NE34.

925-25 234Ky812, 29SW(2d)547 (kind and cost held matters for determination by board of education). **Discretion of board of education is not surrendered** by submission to voters of question whether indebtedness exceeding revenue shall be incurred. 234Ky812, 29SW(2d)547.

926-26 NJSup 142A432.

926-27 138SC445, 136SE757 (intent of trustees of high school district to go beyond discretion and erect building for consolidated school of all grades not shown). **Abandonment of project** after determination to establish school, making of contracts and sale of bonds, held not within power of trustee under statute. 198 Ind323, 152NE822.

926-32 117 Oh406, 159NE479.

926-34½-New. Directors of school district have implied authority to erect play shed for protection of pupils from weather. 131 Or448, 283P18.

926-35 TexCivA 300SW211.

927-38 224 IllA550.

927-44 Ind 172NE908.

928-52½-New. Want of repair of only available building held not excuse for abandoning school. 234 IllA313.

928-54 73CalA302, 238P721 (what statute applicable); 327 Ill 428, 158NE674; 190NC389, 130SE53 (statutory provisions regarding acquisition of site not applicable to right of way for electric wire to light public school). **In Canada.**-[1926]AC81, [1925] 3DomLR880. **Statute requiring high school to be located at county seat** does not require establishment of high school within corporate limits of county seat. 212Ky751, 280 SW114. **Statute** held to contemplate that petition to place question of purchase on ballot state desired price or required sum in case of condemnation proceedings. 325 Ill 72, 155NE850. Statute for acquisition of school site applied to voluntary purchase and condemnation. 325 Ill 72, 155NE850. Statute which prohibits acquisition of school site at greater than "maximum estimated price" held to include damages to land not taken in condemnation proceedings. 325 Ill 72, 155NE850.

929-56 137 Okl 65, 277P925.

929-59 164Minn134, 204NW925; Mont 287P624 (statute giving trustees of first and second class districts power to select sites held repealed). **In Illinois.**-327 Ill 428, 158NE674. **Petition for election** need not designate site but nominations may be made according to procedure prescribed for nomination of school trustees. 84Mont539, 276P954. **In Montana.**-287P624 (trustees' action without direction by electors held void).

930-63 335 Ill 11, 166NE504. **A subsequent election,** etc. 133 Okl 249, 271P 424.

930-65 137 Okl 65, 277P925. **Residents not disfranchised from voting** by order of federal supreme court to make survey of state boundary line till actual survey placing them in another state. 137 Okl 65, 277P925.

931-72 TexCivA 31SW(2d)468.

931-73 But see 134Misc598, 236NYS255 (board of education has no power to purchase sites, only to recommend purchase to city council). **In New York.**-128Misc835, 221NYS167.

931-74 13PaDist&Co 584.

931-76 Fla 111S521; 169Ga812, 151SE 806 (county board of education); 213 Ky493, 281SW469 (board of education); 50RI136, 145A768. **County board** has supervisory control only and no original jurisdiction in selection of location. TexCivA 31SW(2d)468. **School board has discretion** in location, in consolidated district. Mo 32SW(2d)59.

931-77 217Ala103, 115S30; 213Ky493, 281SW469; 153Tenn408, 284SW382. **Refusal of county superintendent of schools to approve site selected by board of education** is not subject to judicial review unless it clearly appears that he has willfully and arbitrarily disregarded his duty or that his decision was due to caprice, passion, partiality, or corruption. 104WVa35, 138SE461.

931-78 213Ky493, 281SW469. **Discretion not abused.**-213Ky493, 281SW469.

931-78½-New. City council's acceptance of option to purchase school site and owner's tender of deed held valid contract specifically enforceable against city. 128Misc835, 221NYS167.

931-78⅓-New. and city must make payment out of available funds. 128 Misc835, 221NYS167.

931-78¼-New. Discretion of county superintendent.-Some statutes vest county superintendent of schools with discretionary power to approve or disapprove site selected by board of education. 104WVa35, 138SE461.

931-78½-New. Approval of county superintendent.-Under Montana statute requiring approval of county superintendent or health officer, such officers have nothing to do with selection of site

in first instance but approval is required after voters have approved site. 84Mont 539, 276P954.

931-79 Statutes requiring election on petition to board of directors are mandatory if enforcement sought before election, but directory only after election has been held. 55ND767, 215NW267. **Resolution for purchase of land for school site, rescinded within thirty days after passage,** never became effective. 134Misc598, 236NYS255.

932-83 Separate elections for various steps in proceeding.-120Kan347, 242P1016.

932-88 239Mich46, 214NW239; 12Pa Dist&Co 345 (cure of defects by validating statutes). **Statutory requirements must be complied with.**-13PaDist&Co 584.

933-97 Giving notice of election is jurisdictional, and without it board of education has no power to act. 317 Ill 147, 147NE796.

933-1 120Kan347, 242P1016.

933-2 Descriptions of site for building held sufficient.-120Kan347, 242P1016.

933-6 317 Ill 147, 147NE796 (essential to jurisdiction of board that notice of election be given as required by statute).

934-11 It is duty of school board to carry into effect instructions of electors for erection of new schoolhouse. 164 Minn134, 204NW925.

935-21 Extent of jurisdiction.-233Mich 10, 206NW364. **Failure of school electors to appeal to superintendent** deprives them of right to complain in court of chancery. 233Mich10, 206NW364. **Good faith in designation of site previously disapproved by superintendent** held shown by record in suit for injunction. 233Mich10, 206NW364. **Reconsideration of site disapproved.**-233Mich 10, 206NW364.

935-24 Allegation in pleading alleging invalidity of location by reason of pendency of appeal, of taking of appeal in time, not excused by filing of documents showing disapproval of site by superintendent. 209Ky114, 272SW393. **Statutory provision as to time of appeal** is mandatory. 209Ky114, 272SW393.

935-31 But see **Mont** 287P624.

935-32½-New. County board without jurisdiction to relocate school unless appeal taken to it from order of trustees. **TexCivA** 31SW(2d)468.

936-33 TexCivA 32SW(2d)235. **Statute authorizing sale of "old site" held to permit sale** of any school property whether or not it had been used as a school. 160La360, 107S139. **Where consolidated school building burns,** county school board may relocate site though bonds were issued for construction of burned building and location was made prior to bond issue. 152Miss 235, 119S184.

936-34 217Ala103, 115S30; 160La360, 107S139; **MoA** 28SW(2d)1040 (without votes). See also 153Tenn408, 284SW 382. **Transfer of high school from one district to another.**-195NC714, 143SE 528.

937-35 296Pa482, 146A91; 153Tenn408, 284SW382; 147Wash467, 266P189. **Exercise of discretion by superior court on appeal** from decision of superintendent not interfered with in absence of error. 147Wash467, 266P189.

937-38 83CalA334, 256P588. **In Missouri.**-But see **A** 21SW(2d)645. **Popular vote only advisory** under statutes in some jurisdictions. 147Wash467, 266P 189.

938-40 118Nebr682, 226NW333. **One present but not voting** at annual meeting must be considered in determining requisite number for change of site. 118 Nebr682, 226NW333. **Parents cannot vote** on change of site in their home district where their children have been transferred as pupils to adjoining school district. 118Nebr682, 226NW333.

938-41 83CalA334, 256P588.

938-48½-New. In some jurisdictions statutes do not authorize contest of an election in school district upon proposal to move schoolhouse from one location to another. 55ND224, 212NW856.

939-50 District court has jurisdiction to enjoin removal by trustees notwithstanding no appeal is taken to state superintendent. **TexCivA** 32SW(2d)235.

939-51 147Wash467, 266P189.

939-52 Where vote of electors does not amount to an instruction to board as to purchase of site, injunction to restrain purchase of site previously selected by trustees will not be enjoined. 83CalA 334, 256P588 (vote being that site chosen by board be changed).

939-61 9PaDist&Co 113. **Particular contracts construed.**-160Tenn351, 24SW (2d)889 (as to covenants for necessary equipment for first class high school). **Powers of board.**-160Tenn351, 24SW (2d)889 (cannot bind successors as to continuance of particular class of high school). **Successors of board unwilling to maintain first class high school** during remainder of term must restore building to lessor as condition precedent to being relieved of obligation. 160Tenn 351, 24SW(2d)889.

940-67 In Michigan.-236Mich57, 209 NW849.

941-73 Reërection of destroyed school.-Sask [1928] 4DomLR522.

941-78 But see 209Ky726, 273SW498.

941-79½-New. Submission to voters is necessary. 245Mich585, 223NW359.

941-79⅓-New. Directors will not be restrained from building on ground not owned by district but to which homesteader would be estopped to assert title because of promise to convey when he received patent. 131 Or448, 283P18.

941-80 TexCivA 275SW265; **Wis** 229 NW652. **In Vermont.**-100Vt75, 135A12. **Duty to control and care for school buildings is nondelegable.**-247NY503, 161NE160. **Board of education of New York City** has charge and control of high school building and its appurtenances. 247NY503, 161NE160.

941-80½-New. Right of control challenged only by obtaining board's ruling and appeal therefrom to state superintendent of instruction. **TexCivA** 275SW 265.

942-87½-New. Principal may conduct supply station for sale of supplies to students at cost. 199Wis42, 225NW 141.

942-87⅓-New. Board is not required to open grade schools in buildings in particular location where investigation shows attendance would be so small as to require closing them. **MoA** 21SW(2d) 645.

942-87¼-New. Board may open grade school in central high school building upon petition of voters. **MoA** 21SW(2d) 645.

942-87⅙-New. Some discretion is vested in school board in determining whether or not school buildings are in fit condition for use. **MoA** 21SW(2d) 645.

943-88 School board has power under statute to change use of grade school building to high school and vice versa. 222MoA997, 6SW(2d)652. **So long as high and grade schools are used for school purposes,** court will not enjoin discretion of school board in interchanging pupils. 222MoA997, 6SW(2d) 652. **Vocational education.**-Wis 229NW 652.

943-5½-New. Sale of lunches and refreshments on school premises to teachers and pupils during lunch hour for sanitary reasons is incidental to school purposes and not unlawful use of school buildings. 158La659, 104S490.

944-13 124 Okl 223, 254P961.

944-14 324 Ill 254, 154NE889 (holding boards of education may plan repairs and alterations which may not be completed within ensuing year).

945-19 Statute requiring plumbing inspectors to be practical plumbers have been held inapplicable to inspectors appointed by superintendent for construction of school buildings. **Mass** 171NE 442.

945-20 324 Ill 254, 154NE889 (holding board of education authorized to contract for repair and improvement without election under school law); 224 IllA 550 (by erection of additional room).

945-21½-New. Sum voted must be spent on present buildings and not used to erect another. 6PaDist&Co 438.

946-31 200Cal 637, 254P570; **Ont** [1930] 1DomLR568 (board cannot lease premises). **Where act provides for change of location** and sale of old site, school board must sell all property no longer used, necessary, or suitable for school purposes. 160La360, 107S731. **Where permission was to sell old school property** and use proceeds to buy new one, sale not invalidated because old property not sold simultaneously with purchase of new site. 160La360, 107 S731.

946-33 See also 120 Oh335, 166NE230.

946-34 24 OhNPNS329. **Sale of unused realty** held valid under statute. 200Cal 637, 254P570.

946-36 200Cal 637, 254P570.

946-42½-New. Subsequent board cannot rescind sale after five years, in absence of fraud. 230Ky94, 18SW(2d) 887.

946-44 93Fla182, 111S521.

947-48 School district is bound to provide heat, light, and water for pupils in the performance of its public duties. 130 Or461, 280P664, 60ALR1271.

948-56 265Mass452, 164NE619.

949-75 117Nebr6, 219NW583; 124 Okl 223, 254P961 (repairs).

949-78 59 OntL213, [1926] 4DomLR13 (lease by corporate board of rural school trustees held ultra vires). **Board of education has authority to contract for architect's services** in reference to school proposed to be erected. 125Misc589, 211 NYS788. **Board of education of city** when it enters into legal contract does so as agent of city and not as independent corporation. 161Ga730, 132SE436.

950-79 No submission to electors is necessary of propositions of board of common school district to contract for remodeling of existing schoolhouse so as to provide for heating, sufficient water supply, and necessary toilet facilities. 55ND141, 212NW773.

950-80 Athletic wearing apparel to be loaned to members of football team cannot be contracted for by school committee. Mass 170NE72(1stcase).

950-83 215Ala587, 112S195.

950-86 120 Okl 303, 251P737. **In Oklahoma.**-142 Okl 260, 286P774.

951-88 120 Okl 303, 251P737.

951-90½-New. Contract attempting to create liability against funds of subsequent fiscal year.-Contract entered into during one fiscal year by which district undertakes to create liability against funds of subsequent year for services then to be performed does not create legal liability and will not support action for damages for its breach. 120 Okl 303, 251P737; 133 Okl 175, 271 P843.

951-91 Fla 129S824; 161Ga780, 132 SE436; 35 OklACR506; **Wis** 233NW97.

951-93 93Fla182, 111S521; 133 Okl 249, 271P424; **Sask** [1928] 4DomLR 522. **Board of education of New York City** has authority to compromise contractor's unliquidated claim for damages. 129Misc671, 222NYS355. **Improvements to existing buildings** are proper subjects of contract. 234 IllA 141.

951-95 Contracts let pursuant to meeting which was prevented by trustees from organizing as assembly held unauthorized. 44 Ida92, 255P318. **In California.**-86CalA527, 261P723.

951-96 178Ark260, 10SW(2d)374; **NJ Sup** 142A425.

952-97 107WVa173, 147SE708. **Contracts for plans and supervision of construction of school buildings** may be entered into before money is available in treasury. **TexCivA** 23SW(2d)829.

952-98 See also 9PaDist&Co 503.

952-1 Approval of school building plans by county superintendent is not required before paying architect for preparing them. 84CalA550, 258P619.

952-1½-New. In Oregon.-122 Or124, 256P652.

952-1⅓-New. Contract by school trustee for services of architect to prepare plans and specifications for schoolhouse, executed without authority from advisory board and without appropriation by board, was void. 89 IndA369, 164NE 499.

952-2 181Ark1046, 29SW(2d)268; 203 Cal 712, 265P821; 201 Iowa286, 207NW 124; Iowa 229NW821 (reasonable val-

ues of services shown); 204 Iowa689, 216NW83; TexCivA 5SW(2d)257. In action for dissolution of district.–201 Iowa286, 207NW124. Form of action against members of board held not to preclude exercise of power. 204 Iowa 689, 216NW83.

953–3 177Ark1162, 9SW(2d)802; CalA 259P349. Only in proper case does implied power authorize board to employ attorney. 121 Okl 108, 247P996.

953–6 121 Okl 108, 247P996 (employment of attorney as assistant to county attorney). But see 201 Iowa286, 207NW 124. City attorney.–203Cal 712, 265P 821; CalA 259P349. Where counsel provided by statute refuses to act, district has power to employ other counsel. Cal 265P821; CalA 259P349.

953–7 Removal of janitor.–170Minn301, 212NW598. Soldiers' Preference Act is inapplicable to school districts and honorably discharged soldier had no preference in employment by district as to janitor. Minn 231NW406(1stcase).

954–15 Evidence.–135Wash233, 237P 505.

954–16 75CalA680, 243P697. In West Virginia.–107WVa138, 147SE541. Nature of interest.–Mich 233NW439. What constitutes interest.–Mich 233NW439.

954–17 135Wash233, 237P505 (contracts for transportation of director's children held invalid because of interest of community of director and her husband).

955–22 52ND931, 204NW833 (contract for services of architect may be made without advertising for bids). But see 103NJEq257, 143A218. In Pennsylvania.–288Pa411, 136A218. Patented articles cannot be specified where it would prevent competition. 85 IndA 663, 155NE516. Builder must separately state prices bid for labor and materials. 25 OhNPNS355. Contracts not within statute.–159Tenn591, 21SW(2d) 721.

955–23 5PaDist&Co 244. But see 175 Minn30, 220NW164. Contract adding cost of central textbook depository to bid in fixing retail price held void. 171 Ark427, 285SW20. Coal is not a "supply" within statute requiring public advertising. 14PaDist&Co 327.

955–24 91PaSuper335. Employment of architect without competitive bidding held lawful. 198 Ind323, 152NE822.

955–25 Construction of statutes.–171 Ark427, 285SW20.

955–26 143Miss108, 108S273 (contract for transportation of pupils); 25 OhNP NS466; 296Pa408, 146A24. Construction of statutes.–171Ark427, 285SW20; 289Pa82, 137A143. After lowest bidder fails to qualify contract may be let to next lowest bidder. 25 OhNPNS466. Where lowest responsible bidder fails to qualify, board of education may contract with next lowest bidder. 25 Oh NPNS466.

955–27 143Miss108, 108S273.

955–28 Failure to bid on alternates not adopted by board is not informality requiring rejection of bid. 132Misc882, 230NYS681. Reservation of option in bid as to make of fans in conformity with proposal is not such informality as requires rejection. 132Misc882, 230 NYS681. Use of ciphers instead of word "none" to indicate amount to be added to, or deducted from, bid for alternates is not informality requiring rejection of bid. 132Misc882, 230NYS681.

955–30 Provision in specifications that decision of architect and school authorities shall control, if changes are necessary, held valid. 85 IndA663, 155NE 516. Directors may authorize minor changes in original contract not constituting independent undertaking. Pa 151A801.

956–34½–New. Competitive bidding requires submission of same terms to competing contractors. 289Pa75, 137A 140.

956–34⅓–New. Therefore, after award of contract to one bidder, if change or alteration is found necessary readvertisement with notice of new conditions is required. 289Pa75, 137A140 (elimination of penalty and workmen's compensation provision).

956–34¼–New. Policy referred to in bid submitted for furnishing insurance becomes part thereof and stipulations therein are to be considered. 297Pa 474, 147A239.

956–35 25 OhNPNS466.

956–37 143Miss108, 108S273 (contract for transportation of pupils); 55ND 141, 212NW773; 25OhNPNS466. But see 25 OhNPNS355. In Ohio.–25 Oh NPNS355.

956–38 143Miss108, 108S273 (rejection authorized by statute).

957–44 84CalA312, 257P917, 921 [quot Cyc]; 291Pa439, 140A126. City not bound by contract to purchase land for school site where vendors were, at the time, unable to perform. 134Misc598, 236NYS255. Certificate of fiscal officer, attached to contract, certifying as to amount to meet same, is binding upon political subdivision and taxpayers thereof. 32 OhA520, 168NE392.

957–45 168Ark38, 269SW375; 235 IllA 35; Ind 168NE185; MoA 2SW(2d)208; NJSup 130A822 (alternative clause in bid did not affect legality of award of contract); 134Misc598, 236NYS255; 300Pa413, 150A631 (failure to furnish bonds); 6PaDist&Co 689; 11PaDist &Co 145; 51SD548, 215NW776. Statute cannot validate contract violative of constitution.–Ind 169NE51. Submission of offer to sell land to board of education instead of city council does not invalidate contract of city council. 134Misc598, 236NYS255. Not every contract, made in pursuance to valid statute relating to leasing and acquisition of school buildings, is valid. Ind 171NE381(1stcase). Statutory requirements may be passed over in emergencies but statute cannot be entirely ignored. Pa 151A801. Statute mandatory.–Pa 151A801. School directors cannot contract below statutory limit to evade requirements. Pa 151A801.

957–46 168Ark38, 269SW375; 194Wis 342, 216NW844. Architect cannot bind board of education by agreement with materialmen to withhold funds due principal contractor to amount of their claims. 150Miss332, 117S251. Employment of architect in absence of ordinance by council and approval by board of estimate is invalid. 226AppDiv383, 236NYS104.

957–47 168Ark38, 269SW375 (holding that contract is not consummated nor intention to consummate presumed until reduced to writing); 217MoA504, 269 SW626; 34NM526, 284P761; 51SD548, 215NW776. But see 190NC389, 130SE 53. Written acceptance.–217MoA504, 269SW626. School district is not liable on alleged implied agreement to pay rent on holding over under lease. 51 SD548, 215NW776.

957–48 Written acceptance.–217MoA 504, 269SW626 (unless written bid to do work for school district is accepted in writing, there is no valid contract).

957–49 217MoA504, 269SW626; MoA 2SW(2d)208.

957–49½–New. Commission may withdraw from negotiation and decline to enter into formal contract at any time before legal contract is consummated. 168Ark38, 269SW375.

957–49⅓–New. Board of education was held warranted in relying on architect's assurances as to ability accurately to estimate cost of building in accepting plans. 125Misc589, 211NYS788.

957–49¼–New. Approval of board of architect's plan was nullity in authorizing building at estimated cost exceeding amount specified in appropriation. 125Misc589, 211NYS788.

957–49⅕–New. Statute prohibiting contracts by district requiring levy of higher rate of taxation than allowed by law renders such contracts void only as to any obligation sought to be imposed on the district. 169Minn15, 210 NW856.

957–49⅙–New. And where statute declares such contract binding on every member of school board, contractor is entitled to perform the contract without hindrance. 169Minn15, 210NW856.

957–49⅐–New. Under some statutes contracts are required to contain provision that contractor must accept terms of Workmen's Compensation Act. 289Pa75, 137A140.

957–49⅛–New. Where original contract is changed by eliminating requirement that contractor maintain workmen's compensation insurance, it is void. 289Pa75, 137A140.

957–49⅑–New. Contract held not for mere shell of building and not constituting waste of funds. 325 Ill 268, 156 NE283.

957–49 1/10–New. Contract for erection of school building and purchase of site does not increase debt of district where payable out of bond issue. 325 Ill 268, 156NE283.

957–49 1/11–New. Contractor's bid for construction of school and acceptance by city constitutes preliminary contract which contemplated later formal contract. 177Minn329, 225NW149.

957–49 1/12–New. Contract made without attempt to comply with statutory requirements imposes no contractual liability. 104CalA462, 286P173.

957–49 1/13–New. Contract allowing architect six per cent commission is not void as waste of public funds though another architect could have been employed for four per cent commission. 159Tenn591, 21SW(2d)721.

958–50 235 IllA35; 117 Okl 133, 245 P615.

958–51 235 IllA35; NJSup 136A713 (holding board liable where bid was accepted by chairman of building committee as was customary); 91PaSuper 335; 194Wis342, 216NW844. In Saskatchewan.–[1929] 2DomLR161.

958–54 6PaDist&Co 689.

958–55 235 IllA35; MoA 2SW(2d)208; 117 Okl 133, 245P615.

958–56 235 IllA35.

958–60 Pa 151A801 (applicable to fuel or supplies in excess of one hundred dollars).

959–64 91PaSuper335.

959–65 10PaDist&Co 325. But see 29 OhA310, 163NE575.

959–66½–New. Contract of county board of education not required to be approved by either state architect or state superintendent of public instruction. 190NC389, 130SE53.

959–66⅓–New. Board may contract for erection of electric transmission line to light public school building. 190NC 389, 130SE53.

960–70 168Ark38, 269SW375 (holding that until bond is executed and approved, there is no binding consummation of contract); Iowa 229NW707 (bond held not to be construed in connection with and not modified by contract); 217MoA504, 269SW626 (bond to perform void contract is void); 131 Misc143, 227NYS90; 115 Oh524, 155NE 127. Bond by compensated surety held subject to provisions of statute, though not complying with it. 115 Oh524, 155 NE127. Notice of statute.–115 Oh524, 155NE127. Construction.–117Nebr6, 219NW583. That certain obligations required by statute are omitted does not prevent bond from being statutory bond where omitted provisions may be supplied by liberal construction. 202 Cal 586, 262P300. Bond held to be statutory bond.–202Cal 586, 262P300. Acceptance of building by school board does not require formal acceptance by board in session but requires act with intent to receive building as compliance with contractor's duty. 174Minn366, 219NW546. Doctrine of substantial performance is inapplicable between surety and creditors of contractor. 174 Minn366, 219NW546. Capacity in which officers act in requiring bond.–117Nebr6, 219NW583. Contractor's failure to furnish bond cannot be used by him as defense against his own breach of contract. TexCivA 4SW(2d) 661. Failure to complete building on specified date was not default, within provision of bond for notice to surety of default within ten days thereafter. 27F(2d)421. Surety discharged by final settlement where it was not obtained by fraud. Ind 168NE875. Relative to payment of premium thereon.–128Me240, 147A151. Recovery against surety limited to claims pleaded.–Tex

CivA 29SW(2d)493. **Statute construed.**–TexCivA 32SW(2d)691.

960–72 115 Oh524, 155NE127; TexCivA 10SW(2d)786. **Surety is not liable for premiums** on liability policies not procured by contractor pursuant to any provision of his contract and not confined to injuries sustained by reason of the particular construction in question. 194NC430, 140SE31. **Surety is not liable for money loaned contractor** where not shown to have been expended or that it was to be expended for labor and material for schoolhouse and it appeared contractor was engaged on other contracts. 194NC430, 140SE31. **Surety is not liable under the bond** for money loaned to contractor for use in his business generally. 194NC430, 140SE31. **Surety assuming completion of contract** takes contractor's obligations with benefits of contract. 157SC221, 154SE167. **Surety required by bond to pay bank advancing money** to pay for materials and labor. 157SC221, 154SE167.

960–73 31F(2d)881; 218Ala632, 119S837(2dcase); 169Ga229, 150SE216 (construed as equivalent to promise by obligors to district that principal would pay laborers and materialmen); 40GaA705, 151SE408 (held not statutory bond binding obligors to indemnify materialmen and laborers); 201 Iowa1063, 206NW808, 47ALR495; 126Kan262, 267P983; MoA 288SW1007; 48Nev12, 226P302 (bond construed to have been given under statute requiring bonds for erection of public buildings to provide for payment of labor and materials though conditioned only to save obligee harmless); 191NC636, 132SE800; 54ND49, 208NW949 (liability to be assumed is similar to mechanic's lien on private property); 114 Oh58, 150NE426, 44ALR374 (surety is not obligated to pay rental on machinery used by contractor); 115 Oh524, 155NE127; 295Pa280, 145A288. **Amendment to statute providing that bonds given thereunder be conclusively presumed to be for benefit of laborers and materialmen** held not to affect bond given prior to amendment. 191NC636, 132SE800; 191NC664, 132SE804. **Bond held statutory bond** notwithstanding omission of conditions required by statute and inclusion of conditions contrary to statute. 201 Iowa1063, 206NW808, 47ALR495. **Liability as dependent on whether labor and materials were contracted for directly with contractor.**–Contractor's bond, conditioned faithfully to perform contract on part of principal and to satisfy all claims and demands incurred for same and, in case of default, to pay all persons who contracted directly with principal for labor or materials, means that in case of default liability is restricted to such claims and demands for labor and materials as were contracted for directly with principal and not otherwise. 114 Okl 47, 242P234. **Superintendents and timekeepers are engaged in "labor"** within meaning of statute. TexCivA 293SW647. **Where bond was given to indemnify board of education only and was not given under statute for benefit of laborers and materialmen,** surety was held not liable to unpaid laborers and materialmen. 191NC636, 132SE800; 191NC664, 132SE804. **Insurance premiums owing to company furnishing workmen's compensation insurance** are included under statutes. 174Minn366, 219NW546. **Condition will be read into bond,** although not contained therein. 150Miss332, 117S251. **Rights of surety against board of education.**–150Miss332, 117S251. **Though statute does not expressly authorize bond for benefit of materialmen,** materialman may sue on such bond where bond issued gives such authority. 131Misc143, 227NYS90. **Clause excluding materialmen and laborers from protection of bond** is void. 27F(2d)421. **Contractor or surety is not relieved from liability** by lack of power of board of education to contract for building. 153Miss635, 120S738. **Interest on sums due laborers and materialmen** is necessarily payable though bond is silent thereon. 153Miss635, 120S738. **Surety, not relieved from liability** by fraud of school board in withholding information. 153Miss635, 120S738. **Surety has no right to money received by contractor** as work progresses under contract though surety may resort to fund under retainage provision if compelled to pay laborers and materialmen. 153Miss635, 120S738. **Payment by school board to contractor's assignee** having notice of outstanding claims has been held to render board liable to surety. 40F(2d)577. **Materials furnished to another contractor.**–129Kan357, 282P713. **Construction of particular bond.**–169Ga229, 150SE216. **Validity and construction of bond.**–107WVa482, 148SE850 (bond referring to contract requiring bond held statutory bond). **Subrogation of surety.**–TexCivA 32SW(2d)691.

960–74 15F(2d)317; 95CalA307, 272P1068; Iowa 229NW707 (liability of surety limited by statute); 217MoA504, 269SW626 (holding bond not in terms following language of statute and not mentioning materialmen is enforceable if there is valid written contract between contractor and school district); 48Nev12, 226P302 (where bond required obligee to notify surety in case of contractor's default, order by obligee to pay last installment due on contract held binding practical construction that bond was for benefit of laborers or materialmen); 191NC653, 132SE808; 115 Oh434, 154NE786 (holding recovery available irrespective of fact that materialmen were not mentioned in bond, in view of provision in statute that recovery shall be subject to condition and provisions of act); 115 Oh524, 155NE127; 115 Oh626, 155NE389; 32 OhA146, 167NE691; 295Pa280, 145A288; 107WVa482, 148SE850 (provision in bond that no right of action shall accrue to any other than obligee held void). See also 218Ala632, 119S837(2dcase); 98PaSuper227; 11PaDist&Co 197. **Materialmen cannot sue on bond** given to secure contract with school district, where contract is void because not in writing. 217MoA504, 269SW626. **Complaint.**–191NC636, 132SE800. **Clause in bond making liability thereunder** differ from that provided by the statute is void. TexCommnA 288SW121. **Limitation of actions.**–191NC636, 132SE800. **In Texas.**–TexCommnA 288SW121. **Date and legality of contractor's assignment** to superintendent held immaterial. TexCivA 293SW647. **Evidence held properly excluded.**–174Minn366, 219NW546. **Bond affords no basis of action against school district in corporate capacity.**–117Nebr6, 219NW583. **Parties.**–TexCivA 7SW(2d)911. **Where contract requires that insurance be carried on work by principal,** lack of insurance on old walls to which contract work was to be attached does not affect surety's liability, not being within contract clause. MoA 288SW1007. **Issue of prematurity of materialman's suit held eliminated.**–TexCivA 29SW(2d)493. **In absence of plea of non est factum** surety cannot controvert materialman's prima facie case of execution and delivery of bond. TexCivA 29SW(2d)493. **Evidence admissible.**–TexCivA 29SW(2d)493. **Claim against surety not defeated** because claimant's salary not due until contract was completed, where waiver not intended. TexCivA 22SW(2d)964. **Contractor by promises to one having knowledge of abandonment** cannot bind surety. TexCivA 22SW(2d)964. **Interest.**–Utah 287P332. **That contractor did not use money received under contract to pay obligations under contract** is not defense. Utah 287P332. **Settlement of contractor with subcontractor** does not defeat liability of contractor and his surety to second subcontractor contracting with subcontractor settled with. Iowa 229NW733. **Subcontractor's assignment of proceeds of contract with original contractor to second subcontractor** does not constitute payment to assignee where he received nothing under it. Iowa 229NW733. **Time to sue.**–Utah 287P332.

960–75 31F(2d)881; 95CalA307, 272P1068; 201 Iowa1063, 206NW808, 47ALR495; Iowa 229NW707 (statement held not filed in time); 246Mich373, 224NW607(2dcase); 241NY464, 150NE517; 159Tenn69, 16SW(2d)25; TexCivA 24SW(2d)539 (materialman failing to file claims within statutory time cannot recover from surety); 151Wash519, 276P552. See also 120 Oh72, 165NE579. **Failure to file notice prevents subcontractor** from suing surety company. 241NY464, 150NE517. **Statement of claim filed with city clerk,** with knowledge of officers letting contract, is insufficient to protect materialman, under statute requiring statement to be filed with officers or agents contracting in behalf of city. 252Mass571, 147NE829. **Failure to file lien under statute** will preclude recovery from surety. 241NY464, 150NE517. **Provision in bond purporting to limit liability of surety to obligee named** is ineffective where contract required bond guaranteeing payment of all labor and material and statute requires such bond. TexCivA 281SW215. **Statute requiring notice within stated time after completion of contract and acceptance of building** requires notice to be served within such time after completion of building. 174Minn366, 219NW546. **In Mississippi.**–150Miss332, 117S251. **Cause held barred** where intervening claimant acted more than one year after abandonment of contract. TexCivA 22SW(2d)964. **Surety cannot complain of insufficiency of notice to creditors of pendency of suit.**–Utah 287P332. **Time to sue.**–Utah 287P332.

961–76 But see 153Miss635, 120S738. **Trustee's petition for use of materialmen and laborers** held subject to demurrer. 40GaA705, 151SE408. **Petition held sufficient.**–169Ga229, 150SE216.

961–76½–New. Right of subcontractor to recover on bond is not defeated by recovery by school district where bond was given for benefit of school district and those furnishing labor and materials and recovery by district did not exhaust penalty of bond. 201 Iowa1063, 206NW808, 47ALR495.

961–76⅓–New. Notice not specifying date of furnishing last item of material is sufficient where it otherwise complies with statute, provision as to date being surplusage and to be disregarded. 172Minn424, 215NW675.

961–76¼–New. Such notice must be served on the surety. 172Minn424, 215NW675.

961–76⅕–New. Failure to file verified statement of materials or labor employed on a public improvement is fatal to validity of claim. 204 Iowa307, 214NW882.

961–76⅙–New. Statutory conditions of a bond are part of bond executed under statute. 204 Iowa307, 214NW882.

961–76⅐–New. Sufficiency of statement. 204 Iowa307, 214NW882.

961–76⅛–New. Claims for labor or materials employed on a public improvement held properly filed with warrant issuing office. 204 Iowa307, 214NW882; 174Minn366, 219NW546; 150Miss332, 117S251.

961–76⅑–New. Statutory provision for filing itemized verified claims for labor and materials before action on bond is mandatory. 204 Iowa307, 214NW882.

961–76⅒–New. Where principal contract is void, no action can be maintained on bond for performance thereof. 171Ark427, 285SW20.

961–76 1/11–New. Acceptance by one furnishing materials for school building to subcontractor of note for amount due is held not waiver of right to recover on bond given under statute. 192NC418, 135SE113.

961–76 1/12–New. In determining right of surety on contractor's bond to retained percentages for erecting public building, lien statutes do not apply. 192NC407, 135SE136.

961–76 1/13–New. Statute prescribing time for exercise of right of action given materialmen on bond of contractor for building schoolhouse held to be one of

limitations and to be pleaded. **TexCivA** 283SW624.

961-76¼₁-New. Surety on school contractor's bond, given under statute is liable for materials furnished to subcontractor, though contractor had paid subcontractor without notice of materialman's claim. 192NC418, 135SE113.

961-76¼₅-New. One-year statute of limitations held applicable to materialmen's cause of action against surety on bond of contractor for schoolhouse. **TexCivA** 283SW626.

961-76¼₆-New. Action on bond accrues on completing deliveries of materials, though contract provides for partial payments each month. 131Misc143, 227NYS890.

961-76¼₇-New. Materialman's action on bond cannot accrue until city is fully protected on general contractor's default. 131Misc143, 227NYS890.

961-76¼₈-New. Surety having actual notice of contractor's default, could not escape liability for want of formal notice thereof under provision for notice within ten days after default. 27F(2d) 421.

961-76¼₉-New. Bond should be liberally construed. 27F(2d)421.

961-76¼₁₀-New. Actual notice to local agent of surety of contractor's default is notice to surety. 27F(2d)421.

961-76½₁-New. In action by surety to recover from school district balance on contract for construction of school building, construction of which it assumed according to terms of its bond when contractor defaulted, it has been held that cross action against surety by school district, alleging breach of building contract by surety and original contractor, was maintainable in its entirety without joining surety's principal. **TexCivA** 10SW(2d)786.

961-76½₂-New. Materialman is not required first to bring action under code, or assist for pro rata payment. 95CalA307, 272P1068.

961-76½₃-New. Joinder of contractor as principal on bond and sureties is authorized. 95CalA307, 272P1068.

961-76½₄-New. Joinder of school district and trustees thereof, though not necessary, was not prejudicial to surety on contractor's bond. 95CalA307, 272P1068.

961-76½₅-New. Complaint by materialman on contractor's bond, alleging agreement between contractor and materialman for furnishing of materials described in notice to withhold, duly verified and annexed to complaint, and that all materials were used in constructing building, stated cause of action against surety. 95CalA307, 272P1068.

961-76½₆-New. Admission in answer of surety that school district was duly organized and existing school district and public corporation constituted admission that district was state agency and political subdivision, and no further proof was required. 95CalA307, 272P1068.

960-76½₇-New. Attorney fees in action by materialman on bond of contractor may be included in judgment without filing of cost bill. 95CalA307, 272P1068.

961-76½₈-New. The rights of a surety to reimbursement from funds retained by school board as agreed reserve are superior to those of an assignee of the original contract. 35F(2d)376.

961-76½₉-New. The surety on a contractor's bond is not entitled to judgment against school board officers for misapplying reserve fund. 35F(2d)376.

961-76½₁₀-New. Where a school board seeks to retain a reserve for protection of possible lienors, it is liable to the surety if it makes payment of balance to contractor's assignee with notice of outstanding claims. 35F(2d)376.

961-76½₁₁-New. Where surety completes building after abandonment by contractor, it cannot knowingly receive services of laborer engaged by contractor and refuse payment therefor. **TexCivA** 22SW(2d)964.

961-76½₁₂-New. Surety is liable to such laborer according to his contract. **Tex CivA** 22SW(2d)964.

961-76½₁₃-New. School district wrongfully paying out fifteen per cent of contract price before expiration of required time is subject under contractor's bond to surety. 153Wash33, 279P86.

961-76½₁₄-New. Construction of assignment to surety in application for bond. 157SC221, 154SE167.

961-77 54ND49, 208NW949 (liability is substantially same as that of sureties on contractor's bond). But see 98Fla1, 122S793. **Complaint held insufficient under statute.**-48Nev253, 240P925. **Rule is otherwise in some jurisdictions.**-117 Okl 133, 245P615.

961-81 Failure to give bond held not to authorize cancellation of contract, where trustee refused to perform for other reasons and was unwilling to accept bond. 198 Ind323, 152NE822.

961-81½-New. Where bond does not contain statutory condition for payment of material and labor and district is compelled to pay therefor, it can recover from surety. **SD** 230NW23.

962-83 Failure of trustees to retain part of contract price until completion of work held not to discharge surety as against materialman. **TexCivA** 290SW 307.

962-85 31F(2d)881. But see 54SD646, 224NW182(2dcase).

962-85½-New. A fortiori, surety should not be held liable for extra work undertaken by contractor without any alteration of contract by valid and binding agreement between parties to original contract. **MoA** 288SW1007.

962-87½-New. Subcontractor giving receipt to principal contractor, to enable him to procure settlement with school board, waived claim against principal contractor's surety. 191Wis645, 211NW 670.

962-87¼-New. Finding that contractor's surety was not prejudiced by unpaid subcontractor's receipt held error, where receipt resulted in settlement with contractor who became insolvent. 191 Wis645, 211NW670.

962-87½-New. Surety on bond is relieved on paying into court full amount of penalty of bond. 192NC407, 135SE 136.

962-87½-New. Notice to charge surety.-Statute requiring notice to charge surety on bond is to be liberally construed and only substantial compliance is sufficient. 172Minn424, 215NW675.

962-87½-New. Contract for construction of school building being void because certificate of clerk was not filed as required by statute, surety could not be held for failure on part of contractor to perform under contract. 29 **OhA**310, 163NE575.

962-87½-New. Where complaint by materialman on contractor's bond, and bond set out as exhibit referred to contract as between same parties for same amount, made on same day, for same character of work and improvements, court was entitled to conclude that contract alleged was referred to in bond, and hence surety on bond was not relieved of liability by reason of variance from provisions of bond. 95CalA307, 272P1068.

962-87½-New. Where school board consented to judgment against it in materialman's action on contractor's bond, there was no such settlement or compromise by materialman with school board as would release surety on contractor's bond. 95CalA307, 272P1068.

962-87½₁₀-New. Notice of subcontractor's claim given board when there were sufficient of principal's funds on hand is sufficient so that delay does not release surety. 247Mich22, 225NW590.

962-87½₁₁-New. Where authorized agent of surety company represents to claimants, who are required to furnish surety with statement that claims are correct and will be paid, and that claimants need do nothing further, and, relying upon such representations, claimants fail to comply with statutory requirement, surety is estopped from asserting right to compliance with statute. 120 Oh72, 165NE579.

962-87½₁₂-New. If materialman has succeeded in reducing his claim against contractor's bondsmen by complying with provisions of code, bondsmen are relieved to that extent. 95CalA307, 272 P1068.

962-88 171Ark668, 285SW357; 177Ark 1162, 9SW(2d)802; 89 IndA369, 164NE 499.

962-89 177Ark1162, 9SW(2d)802; Iowa 229NW821; 227Ky332, 13SW(2d)1007; 56ND194, 216NW564, 566 [citCyc]; 117 Okl 226, 245P884; 38 OklACR317.

963-95 177Ark1162, 9SW(2d)802.

963-96 38 OklACR317 (contract made by individual member pursuant to authority of board held ratified by board).

963-97 117 Okl 226, 245P884; 38 Okl ACR317; **TexCivA** 23SW(2d)829. See also Sask [1927] 3DomLR173.

964-99 Iowa 229NW821 (resolution held complete ratification).

964-3½-New. Ratification must comply with all formalities required in executing original contract. **MoA** 2SW(2d) 208.

964-4 Irregularities in making of contract.-Where district board makes use of architect's report and survey and accepts his services before repudiation of contract, he can recover reasonable value of his services. 86CalA527, 261P 723. **Where contract for services was illegal because of want of previous authorization of voters,** district is liable for reasonable value of benefits received. 175Minn201, 220NW606.

964-5 221Ala483, 129S42. **Money borrowed to replace defalcation.**-52ND50, 203NW324. **Where there has been attempted compliance with requirements,** and district has used property supplied failure to conform strictly to statute will not defeat recovery. 104CalA462, 286P173.

965-7 MoA 2SW(2d)208. But see **Tex CivA** 23SW(2d)829. **Where contract is void for failure to comply with statutory requirements,** there can be no recovery on quantum meruit. 91PaSuper335. **Where power to contract is limited to prescribed manner** no implied liability arises from receipt of benefits under contract made without attempt to comply with requirements. 104CalA462, 286P173.

965-11 226AppDiv249, 235NYS30; 291 Pa439, 140A126. **Particular provisions construed.**-That fifteen per cent of contract price should be retained by school district for period of thirty days after final certificate. 153Wash33, 279 P86.

965-14½-New. Decision of superintendent interpreting contract is binding on contractor in absence of fraud, bad faith, falsity, or mistake of law. 226AppDiv249, 235NYS30.

965-15 84CalA312, 257P917, 921 [quot Cyc]. **Failure to obtain superintendent's consent** renders modification void. 243Mich357, 220NW745.

966-17 Contract for transportation of school children may be canceled by board where contractor fails to obtain driver's license as required by law and shows no intention to do so. 238 Mich78, 213NW204.

966-19 291Pa439, 140A126 (architect's contract as part of building program which was abandoned held not to entitle him to commission on plans drawn); 135Wash424, 237P1008 (school heating plant). **Changes in contract.**-153Miss635, 120S738 (erroneously refused by court as to reduction in case of purchase by board of substituted material). **Payment by school board under contract** could be made either to contractor or person designated by him. 153Miss635, 120S738.

966-20 34F(2d)751 (architect made comptroller of progressive payments to be made); 148Wash594, 269P809. But see 153Miss635, 120S738.

966-21 TexCivA 10SW(2d)786; 148 Wash594, 269P809.

966-21½-New. Architect is agent of board to act in its behalf. 149Wash594, 269P809.

966-22 148Wash594, 269P809.

966-23 224AppDiv286, 229NYS715; 148Wash594, 269P809.

966-24 District may retain from contract price damages suffered from breach of provision relating to time of completion. 157SC221, 154SE167. **Board may retain from funds sufficient**

amount to make deficiencies good. 157 SC221, 154SE167.

967-27½-New. Board of Education is justified in refusing to proceed under contract with architect furnishing plans calling for cost considerably more than estimated amount. 125Misc589, 211 NYS788.

967-27⅓-New. Contractor can recover on building contract where defects are due to faulty specifications. 143Wash 414, 255P113.

967-27¼-New. The insolvency of a contractor does not affect the subcontractor's obligation to perform. 241 NY464, 150NE517.

967-27⅕-New. Contract authorizing school board's extension of time without liability for delay held inapplicable to unreasonable delay, justifying contractor's abandonment of contract. 222 AppDiv504, 226NYS707.

967-27⅙-New. Contractor's mistake in calculating proposed expenditures on work does not justify refusal to perform contract. TexCivA 4SW(2d)661.

967-27⅐-New. Contractor's obligation to complete school in specified time cast on school board correlative obligation to clear site within reasonable time. 222AppDiv504, 226NYS707.

967-27⅛-New. Completion and final acceptance by school board can be shown otherwise than by formal resolution of board. 206 Iowa1144, 221NW 793.

967-27⅛-New. Where school board voluntarily accepts school building prior to issuance of architect's certificate, period for filing claims under statute expires thirty days after such acceptance, and subsequent resolution of acceptance by new board of directors does not invalidate first acceptance, nor extend time for filing claim against bond of contractor. 148Wash594, 269 P809.

967-27 1/10-New. In absence of express allegation as to when contractor should pay for materials furnished, time is fixed by law as time of delivery. 95 CalA207, 272P1068.

967-29 123Kan495, 256P149.

967-30 123Kan495, 256P149.

967-31 147Wash112, 265P463.

967-33 68Utah340, 250P392 (evidence held not to authorize recovery for services in drawing plans for heating system never installed).

967-34 190NC389, 130SE53 (without prejudice to defenses against assignor).

967-35 84CalA550, 258P619.

967-36½-New. Warrants issued by school district, accepted by contractor, for construction of schoolhouse, showing on their face that payment was to be made out of school district's building fund, which contractor was bound to know was limited, which could not have been paid for many years, have been held to show that contractor did not expect, and that it was not intention of parties that all of warrants should be taken up at once nor that price should be paid in cash. 178 Ark269, 10SW(2d)374.

967-39 104CalA462, 286P173.

967-40½-New. Contractor cannot recover on quantum meruit for extra work under statute requiring contracts of school districts to be in writing stating consideration, even if contract included such items. 222MoA59, 300SW 523.

968-48½-New. Evidence held sufficient to sustain finding that school building was accepted. 116 Okl 53, 243P514.

968-48⅓-New. Measure of damages.-Where board of education abandons project to construct school building without asking bids, it was not bound to accept cost of erecting smaller schoolhouse, erected about same time, as proper basis for determining architect's fee, which under contract was to specify percent of low bid. 213AppDiv 357, 210NYS686.

968-48¼-New. Under statute requiring approval of plans by commission, contractor held entitled to recover, where approval was had after construction had been completed. 221AppDiv304, 223NYS152.

968-48⅕-New. Burden of proving that plans for school building did not comply with statute is on trustee asserting defense. 221AppDiv304, 223NYS152.

968-48⅙-New. Claim due to contractor from board of trustees is assignable. 191NC664, 132SE804.

968-48⅐-New. Under some statutes, owner may not withhold funds belonging to contractor on notice from laborer or materialman that contractor has not paid for work or material. 192NC 407, 135SE136.

968-48⅛-New. When property such as public building is not subject to lien for work and material, no duty or obligation is imposed on owner or principal contractor by virtue of any notice or attempt to acquire lien thereon. 192 NC407, 135SE136.

968-48⅛-New. Contractor cannot recover cost of heating building during construction in absence of custom or contract provision therefor. 165La200, 115S458.

968-48 1/10-New. Contractor assumes risk of climatic conditions and cannot recover extra cost of work necessitated thereby. 165La200, 115S458.

968-48 1/11-New. That no formal notice to commence work under contract was given is held no bar to contractor's recovery for delay in preparing site. 222AppDiv504, 226NYS707.

968-48 1/12-New. Contractor is entitled to recover amount of its unpaid liability to subcontractors, resulting from school board's delay in preparing site. 222AppDiv504, 226NYS707.

968-48 1/13-New. Whether school board, in not clearing site for school until year after contracting, acted within reasonable time is question for jury. 222AppDiv504, 226NYS707.

968-48 1/14-New. Contractor discovering mistake in bid for construction three years later was not entitled to relief against forfeiture of deposit. 177Minn 329, 225NW149.

968-50 191NC653, 132SE808. **Unpaid subcontractors and materialmen acquired no lien on funds** withheld by city by reason of contractor's bankruptcy. 33F(2d)709.

968-53 138Misc53, 244NYS702; **Tex CivA** 22SW(2d)964 (construction of statute providing for bond and contract); **TexCivA** 32SW(2d)691. **Limitations of actions.**-TexCivA 276SW470. **Complaint** of materialman against county for materials furnished contractor based on failure of county commissioners to take bond of contractor has been held not to state cause of action under statute. 48Nev253, 240P925. **In North Carolina.**-192NC407, 135SE136. **In Louisiana.**-35F(2d)376. **Assignee of lien claims has burden** of establishing compliance with statutory requirements. 138Misc53, 244NYS702. **Assignment of lien claim** has been held invalid for absence of date. 138Misc53, 244NYS 702. **Sufficiency of filing of notice of assignment of lien claim.**-138Misc53, 244NYS702. **Unsigned notice of materialman's lien** has been held not to invalidate lien, where verification attached thereto was sworn to by member of materialman's firm. 138Misc53, 244 NYS702.

969-54 109Conn547, 147A144. **Lien.**-46 Ida403, 268P26.

969-56 But see **TexCivA** 31SW(2d) 679. **In Iowa.**-206 Iowa1144, 221NW 793.

969-56½-New. Notwithstanding validity of debt statute provides that to obtain benefit of bond plaintiff must file with officers of city who contracted in its behalf sworn statement of claim within sixty days after completion of work. 252Mass571, 147NE829.

969-56⅓-New. It is immaterial that plaintiff filed statement with city clerk of which members of committee had knowledge or that they had informally discussed his claim. 252Mass571, 147 NE829.

969-56¼-New. Plaintiff never having filed with city property committee statement required cannot maintain bill. 252Mass571, 147NE829.

969-56⅕-New. Statute which creates remedy makes notice condition precedent to recovery. 252Mass571, 147NE 829.

969-58½-New. Insolvency of contractor does not relieve subcontractor from obligations under its contract. 241NY 464, 150NE517.

969-58⅓-New. It merely gives him right to demand cash payment in place of extending credit. 241NY464, 150NE 517.

969-58¼-New. In action against surety on contractor's bond for labor performed, plaintiff is not entitled to recover, if he fails to allege time when labor was performed, rate per diem or length of time he was engaged in work. TexCivA 276SW470.

969-58⅕-New. In determining right of laborers and materialmen to retained percentages for erecting public building, lien statutes do not apply. 192NC 407, 135SE136.

969-58⅙-New. Unpaid laborers and materialmen have no lien on school building, 191NC664, 132SE804.

969-58⅐-New. nor on balance due contractor. 191NC664, 132SE804.

969-58⅛-New. Attorneys for parties establishing lien or equitable assignment on money due under contract are entitled to costs out of fund. 131Misc 281, 227NYS64.

969-58⅛-New. Assignment of money due under contract must be filed with city treasurer to be valid as against subsequent lienors. 131Misc281, 227 NYS64.

969-58 1/10-New. Questions of fact in action by subcontractors are for the jury. NJSup 140A18.

969-58 1/11-New. Filing notice of lien with head of department or bureau having charge of construction and with city treasurer is required by some statutes. 131Misc281, 227NYS64.

969-58 1/12-New. Such statute is to be liberally construed, substantial compliance being sufficient. 131Misc281, 227NYS64 (filing of copy held sufficient).

969-58 1/13-New. Filing with county clerk is ineffective. 131Misc281, 227 NYS64.

969-58 1/14-New. Lien must be continued by court order within statutory time after filing to prevent expiration, 131Misc281, 227NYS64.

969-58 1/15-New. but failure to file order continuing lien does not cause lien to terminate at expiration of such time. 131Misc281, 227NYS64.

969-58 1/16-New. Court cannot require consent to pay claims of subcontractors from funds withheld by city. 33F(2d) 709.

969-58 1/17-New. Whether subcontractors have lien on funds withheld by city is matter of local law. 33F(2d)709.

969-58 1/18-New. Evidence held to support finding that subcontractors for brick and tile work were not chargeable with amount paid by contractor for damp-proofing. 299Pa272, 149A486.

969-58 1/19-New. Materialman's action on contractor's bond. 12PaDist&Co 381 (statement of claim sufficient without attaching copy of construction contract).

969-58 1/20-New. No contractor or materialman can acquire lien on realty itself, in matter of public improvements such as buildings, but only on fund provided for payment thereof. 138Misc 53, 244NYS702.

969-60 NB [1928] 4DomLR13. See also **Ont** [1928] 4DomLR589. **County commissioners are liable for all amounts in budget** of board of education for purposes described therein and for additional expenditure approved by board of commissioners. 195NC213, 141SE 744 (teachers' salaries). **Fee of attorney employed by county court to protect school funds** may be paid out of school funds. 181Ark1046, 29SW(2d) 268.

970-66½-New. No liability for per capita cost is created in favor of one school district against another district because pupils in latter attend school in former district where county commissioner on appeal denied applications for transfer of such pupils. 129 Okl 94, 263P445.

970-67 203 Iowa1016, 213NW593; **MoA** 21SW(2d)645; 82Mont126, 266P 387; 117 Oh406, 159NE479. See also **Sask** [1927] 3DomLR173. **Statutes**

providing for transportation.–200 **Iowa** 1254, 206**NW**94. **Transportation to high schools.**–120**Kan**316, 243**P**329; 123 **Kan**495, 256**P**149. **Power is limited by statute** in some jurisdictions to transportation of children living over mile from school to and from school over designated routes under written contract confined to five days in week. 203 **Iowa**1016, 213**NW**593. **In Kansas.**–289 **P**959.

970–69 164**Ga**271, 138**SE**226; 203 **Iowa** 1016, 213**NW**593; 1**LaA**730; 143**Miss** 108, 108**S**273; 214**AppDiv**40, 210**NYS** 439.

970–69½–New. Statutes authorizing commissioner of education to require transportation to be furnished scholars not applicable to consolidated district. 214**AppDiv**40, 210**NYS**439.

970–70 164**Ga**271, 138**SE**226; 143**Miss** 108, 108**S**273. **Mandamus will lie** to compel school directors to provide free transportation to pupils who are clearly entitled thereto. 8**PaDist&Co** 220.

970–71 164**Ga**271, 138**SE**226 (dictum). **Notice of order of state board requiring school trustees** to provide transportation or alternative relief and of relator's election thereunder is sufficiently served on chairman of trustees. 82**Mont**126, 266**P** 387.

970–71½–New. And action of school board is not reviewable by courts except in case of bad faith. 121**Kan**41, 245**P** 1021.

970–72½–New. Statutes in some jurisdictions authorize suit against trustees of school district to cancel transportation contract made in violation of statute. 141**Miss**643, 107**S**197.

970–72⅓–New. Contractor for transportation is not required by statute to personally drive conveyance. 141**Miss** 643, 107**S**197.

970–72¼–New. He may employ for that purpose minor capable of doing work. 141**Miss**643, 107**S**197.

970–72½–New. Under statutes providing for transportation of pupils, board is not required to pay parent compensation for attendance of pupil on days when such pupil was not transported to school. 55**ND**809, 215**NW**284.

970–72⅔–New. Where parent chooses to convey his children to school in rural school district adjacent to that of his residence, he is not entitled to compensation for their conveyance at expense of his home district, though schoolhouses in both districts are more than three miles from his residence, when school in adjacent district, to which he did send his children, was at greater distance than one in his home district. 128**Kan**53, 275**P**1076.

970–72½–New. Action for recovery of cost of transportation.–Petition in action by parent against board of education held good against demurrer. 27 **OhNP NS**433.

971–75 30**Ariz**1, 243**P**609, 45**ALR**762; 83**Colo** 272, 263**P**723; 243 **IllA**327; 120 **Kan**413, 243**P**1038; 173**Minn**5, 216**NW** 533, 534 [citCyc]; 128 **Okl** 193, 261**P** 953, 957 [citCyc], 56**ALR**152; 121 **Or** 511, 254**P**357; 130 **Or**461, 280**P**664, 66 **ALR**1271. **Furnishing free motor transportation for school children** is public governmental function. 128 **Okl** 193, 261 **P**953, 56**ALR**152.

971–76 243 **IllA**327; 245 **IllA**459; 4 **LaA**123. See also 215**AppDiv**695, 212 **NYS**424. **A board of education** is not liable for negligence of teachers in charge of athletic exercises conducted in school yard. 215**AppDiv**695, 212**NYS** 424.

971–77 173**Minn**5, 216**NW**533, 534 [cit Cyc].

971–78 30**Ariz**1, 243**P**609, 45**ALR**762; 331 **Ill** 144, 162**NE**128; 173**Minn**5, 216 **NW**533, 534 [citCyc]; 177**Minn**446, 225 **NW**292; 29 **OhA**317, 163**NE**567; 99 **WVa**466, 129**SE**486. **Injury caused by play ground apparatus** imposes no liability. 49**ND**181, 190**NW**807.

971–79 77**Colo** 429, 236**P**1012.

971–80 30**Ariz**1, 243**P**609, 45**ALR**762; 208**Cal** 770, 284**P**1105(2dcase); 98**CalA** 138, 276**P**424; **CalA** 291**P**874; 331 **Ill** 144, 162**NE**128; 177**Minn**454, 225**NW** 449; 29 **OhA**317, 163**NE**567; 121 **Or**511, 254**P**357. **Such statutes do not apply to** exercise of governmental functions. 177 **Minn**454, 225**NW**449. **Application of Employers' Liability Act.**–130 **Or**409, 275 **P**686. **Burning rubbish in school yard incinerator** while children play is negligence. 92**CalA**44, 267**P**918. **In California.**–92**CalA**44, 267**P**918; **CalA** 283**P**977. **District liable for ministerial acts.**–130 **Or**409, 275**P**686.

972–82 245 **IllA**459; 120**Kan**413, 243**P** 1038; 177**Minn**454, 225**NW**449; 49**ND** 181, 190**NW**807; 121 **Or**511, 254**P**357; 130 **Or**409, 275**P**686.

972–83 173**Minn**5, 216**NW**533; 128 **Okl** 193, 261**P**953, 957 [citCyc], 56**ALR**152.

972–83½–New. Negligent operation of motor vehicle.–School district or school board is not liable in damages for injuries to pupil caused by negligence of officers, agents, or employers in operation of motor truck for purpose of transporting children to school where it has acted in good faith and without malice. 128 **Okl** 193, 261**P**953, 56**ALR**152.

972–84 30**Ariz**1, 243**P**609, 45**ALR**762.

972–86 Failure to return on demand property delivered under contract made without attempt to comply with statute does not render district liable in conversion. 104**CalA**462, 286**P**173.

972–87 121 **Or**511, 254**P**357. But see 49 **ND**181, 190**NW**807. **Exposing teacher in school to tuberculosis** is not maintenance of nuisance. 177**Minn**454, 225**NW** 449.

972–88 130 **Or**461, 280**P**664, 66**ALR** 1271 (not servants of directors); 154 **Tenn**179, 289**SW**502.

972–89 154**Tenn**179, 289**SW**502.

972–90 Duty to exercise reasonable care to remove danger see 247**NY**503, 161**NE** 160.

972–90½–New. School board is not liable for injuries to pupil received from defective gymnasium apparatus where it was not charged with employment of inspector for gymnasium equipment. 154 **Tenn**179, 289**SW**502.

972–91 331 **Ill** 144, 162**NE**128.

972–91½–New. Where school building was erected pursuant to specifications approved by school trustee, plaintiff in action for personal injuries from fall down unguarded basement entry held to have no cause of action against trustee, architect, or construction company. **IndA** 158**NE**255.

972–91⅓–New. It is board of education's duty to use reasonable care respecting potentially dangerous chemicals used in chemistry course. 222**App Div**284, 225**NYS**679.

972–91¼–New. Where syllabus of chemistry course was actually used, failure formally to adopt study course did not make board of education liable for injuries sustained in unauthorized experiment. 222**AppDiv**284, 225**NYS**679.

972–91⅙–New. No distinction is made in some jurisdictions as to torts arising out of performance of mandatory or permissive governmental functions of school districts. 177**Minn**446, 225**NW** 292.

972–91⅛–New. Fact that incidental charge is made for attendance at athletic contest conducted by school district does not impose liability on district. 177 **Minn**446, 225**NW**292.

972–91⅐–New. Long-continued existence of defective condition may establish constructive notice on part of school district, to render it liable to person injured for failing to remedy such condition within reasonable time after notice. 98 **CalA**138, 276**P**424.

972–91⅛–New. Injury to pupils.–In British Columbia school board is not liable for injury to pupil on highway caused by fall of decayed tree from other property. **BC** [1929] 3**DomLR**33.

972–91⅑–New. In Alberta school board providing apparatus for school children to play with is liable for injuries to child caused by unsafe condition thereof. [1930] 3**DomLR**600.

973–93 194**NC**137, 138**SE**614.

973–94 194**NC**137, 138**SE**614; 13**Pa Dist&Co** 771.

973–95 Trustees can expend funds where this is reasonably necessary to maintain schools properly. **TexCivA** 300 **SW**211. **Limitation on power to borrow money** is not limitation on right to incur obligations, **as for rent.** 209**Ky**726, 273 **SW**498.

973–96 That revenue for fiscal years was subsequently exhausted as by applying revenue to another year's indebtedness, does not relieve district from paying teacher's salary. **CalA** 291**P**276.

973–98 221**Ala**217, 128**S**435.

973–1 206**Cal** 775, 276**P**341, 63**ALR**408; 95**Fla**111, 116**S**71; 196**NC**17, 144**SE**377. **Applicability of statutes.**–86 **IndA**676, 159**NE**556. **Statute providing for raising money for county school purposes** by sale of bonds held not unconstitutional because bonds were made payable by school districts receiving proceeds. 148 **Va**661, 139**SE**262. **Unauthorized obligations cannot be validated** by legislative enactment. **Fla** 129**S**824.

973–2 98**Fla**87, 123**S**536. **In Indiana.**–86 **IndA**676, 159**NE**556.

973–3½–New. Electors of common school district have authority to provide funds for erection of new schoolhouse. 164**Minn**134, 204**NW**925.

973–3⅓–New. Constitutional provision requiring provision to be made for collection of direct annual tax is self-executing, 323 **Ill** 493, 154**NE**193.

973–3¼–New. and controls other statutory provisions. 323 **Ill** 493, 154**NE**193.

973–3⅕–New. Whether school board may proceed to expend money for school teachers' houses finally determined by higher school authorities. **TexCivA** 300 **SW**211.

973–3⅙–New. Funding of indebtedness generally is not prohibited by constitutional provision relative to funding of specific indebtedness after election. 168 **La**1118, 123**S**802.

973–3⅐–New. Statute authorizing issuance of bonds and payment of past indebtedness held not unconstitutional. 151**SC**99, 148**SE**726.

973–3⅛–New. Statute permitting subdivisions of state to fund indebtedness by issuance of interest-bearing certificates held constitutional. 168**La**1118, 123**S**802.

973–3⅑–New. Statute authorizing directors of school districts to insure buildings with mutual fire insurance companies held not unconstitutional. 297**Pa**474, 147**A**239.

973–7 229**Ky**719, 17**SW(2d)**1013; 312 **Mo** 1, 278**SW**769; 126 **Okl** 70, 258**P**915; 136**SC**345, 134**SE**380 (statute not violative of provision); 37**Wyo** 36, 258**P** 583. **In computing amount to determine whether limit has been reached,** item in contract to build school for "millwork" held properly included. 203 **Iowa**288, 211**NW**398. **Where architect's contract** called for payment on letting of school building contract, held such was properly considered in computing amount of debt. 203 **Iowa**288, 211**NW** 398. **Rent reserved in lease** has been held not to be debt. 9**PaDist&Co** 113.

974–8 In North Dakota.–52**ND**931, 204 **NW**833.

974–10 230**Ky**287, 18**SW(2d)**1114 (statute providing for free textbooks held not violative of such provision); 135 **Okl** 270, 276**P**186.

974–13 See also 44 **Ida**92, 255**P**318. **Lease of schoolhouse with option to purchase** does not create present indebtedness for full sum of all rents and if yearly installments do not make indebtedness exceed limit, constitution is not violated. **Ind** 169**NE**51.

974–15 Ind 171**NE**378; 120 **Okl** 303, 251**P**737; 134 **Okl** 101, 272**P**360; 35 **Okl ACR**506. **Under law existing in Oklahoma prior to statehood** contract made by officers of school district in excess of debt limit is not binding on district and judgment cannot be recovered against district thereon. 117 **Okl** 269, 246**P**444. **Constitutional limitation cannot be waived by school district.**–192**Wis** 283, 212**NW**783. **Contracts held not violative of constitutional debt limitation.** –234**Ky**836, 29**SW(2d)**565 (contract for sale of school site with option to lease and repurchase).

974–18⅓–New. Directors cannot by borrowing money on own credit for use in completing building render district liable, where power to incur indebtedness was exhausted. 316**Mo** 621, 291 **SW**136.

974-18⅓-New. And district could not bind itself to repay directors for moneys so advanced, though every taxpayer consented. 316Mo 621, 291SW136.

974-18¼-New. Directors advancing money in excess of limitation to complete school could not have title vested in them to part paid for with their funds. 316Mo 621, 291SW136.

974-18½-New. Directors in such case were held volunteers. 316Mo 621, 291 SW136.

974-18⅙-New. Where contract for employment of teacher is wholly executory and contingent and indebtedness does not arise until service is performed it is not in contravention of constitution. Mo 23SW(2d)1013.

974-19 126 Okl 70, 258P915; 140 Okl 243, 283P249; 35 OklACR506; 37Wyo 36, 258P583. **Limitation applies only to contractual indebtedness.**-70CalA656, 234P125. **Statute violative of constitutional provision.**-120 Okl 204, 250P1003. **Teacher's contract antedating fiscal and scholastic year.**-120 Okl 204, 250P1003. **Recovery for attorney's services rendered under contract for amount in excess of constitutional limitations** is not authorized under rule which permits public official to recover money expended in discharge of duties imposed upon him by constitution and laws of state in excess of such limitations. 134 Okl 101, 272P360. **Provision does not prohibit incurring indebtedness within limitation.**-143 Okl 177, 288P334; 143 Okl 180, 288P336.

974-19½-New. 120 Okl 204, 250P1003.

974-20 209Ky351, 272SW887; 126 Okl 70, 258P915; 143 Okl 170, 287P1023; 35 OklACR506; 136SC345, 134SE380 (statute not violative of provision). **The assessment to be resorted to,** etc. 209 Ky351, 272SW887. **"Taxable property"** includes moneys and credits, where "property" is defined by statute as including both real and personal property. 200 Iowa1190, 206NW145. **Statute has reference to time when liability is incurred** and not to time when manual act of signing and delivery of bond is performed. 198 Ind323, 152NE822.

975-21 134 Okl 101, 272P360; 140 Okl 243, 283P249; 37Wyo 36, 258P583. **In Oklahoma.**-35 OklACR506. **Refunding of indebtedness.**-35 OklACR506. **Constitutional limitation binding on people.**-126 Okl 70, 258P915. **Statute requiring electors to be taxpayers on real property within district** is violative of Wyoming constitution prescribing qualifications of electors. 37Wyo 36, 258P583. **Creation of contractual obligation in excess of limitation for purpose of submitting question to voters** is not authorized by constitutional provision authorizing creation of debt in excess of limitation upon assent of voters. 134 Okl 101, 272 P360.

975-24 But see 229Ky719, 17SW(2d) 1013. **Schoolhouse lease contract by city held evasion of constitutional debt limit.** Ind 169NE51.

975-27 Duly levied tax is asset in absence of proof of current expenses and amount thereof. 203 Iowa288, 211NW 398.

976-28 203 Iowa288, 211NW398 (valued at amounts actually realized).

976-30½-New. No distinction between voluntary and compulsory indebtedness is made by Oklahoma constitution. 35 OklACR506.

976-30¼-New. Constitutional provisions for payment of essential expenses of government and limiting indebtedness should be given effect by making provision first for essential expenses of government and, if any margin is left thereafter, indulging in conveniences and luxuries within constitutional limit. 35 OklACR506.

976-30¼-New. Temporary loans in anticipation of revenues for ensuing year constitute indebtedness of district within limitation. 192Wis283, 212NW783.

976-30⅕-New. Funds for maintenance and operation of schools advanced for other purposes constitute liability of district in determining debt limitation. 192Wis283, 212NW783.

976-30⅙-New. Assessments for special improvements against real estate of district constitute liability within constitutional limitation. 192Wis283, 212NW 783.

976-30⅐-New. Failure to enter indebtedness on account books of district does not authorize district to avoid debt limitation. 192Wis283, 212NW783.

976-30⅛-New. Assets not deductible.-Tuition fees paid into general fund and considered by school board in making up budget as funds for maintenance and operation cannot be deducted from indebtedness in determining debt limitation. 192Wis283, 212NW783.

976-30⅛-New. Real estate acquired by school district by exercise of right of eminent domain but not used for school purposes at time of execution of contract cannot be considered asset available as offset against indebtedness. 192 Wis283, 212NW783.

976-31 160Ga556, 128SE766; 161Ga 855, 132SE60; 165Ga101, 139SE817. **No action will lie on notes given for money borrowed** to maintain and operate school in local school district. 165Ga101, 139SE817. **No liability attaches** to local school district where trustees borrow money. 165Ga101, 139 SE817.

976-32 221Ala219, 128S435; 160Ga556, 128SE766 (no power by implication); 161Ga855, 132SE60. **In Alabama.**-213 Ala106, 104S273. **Statutes relating to power to borrow money** must be construed as a whole to ascertain legislative intent. 213Ala106, 104S273.

976-34 93Fla182, 111S521; 295Pa112, 144A901. But see 149SC76, 146SE675. **Money not expended for lawful purpose** may not be recovered. 187Wis547, 203 NW762.

976-39½-New. Transfer of funds.-Statute providing for transfer of money not needed in other funds to school fund is not unconstitutional as lending or giving credit of state or any subdivision thereof. 80CalA131, 251P679.

977-41 143 Okl 1, 286P902 (maintenance of separate schools). **Trustees of high school district formed by consolidation of common school districts** should keep and administer bond funds separately from maintenance funds, and bond fund of one elementary district separate from bond fund of other. Tex CivA 280SW260. **Under New York Education Law** relation of city of New York to school funds is that of custodian and depository. 245NY8, 156NE78.

977-45 Assent of school board to unauthorized disposition of funds does not render transaction valid. 126Kan122, 267P35.

978-49½-New. School funds held by county treasurer constitute general deposit, though he must keep special account of them. 74Mont152, 240P812.

978-49⅓-New. School funds are in the nature of trust funds. 204 Iowa570, 215 NW807.

978-49¼-New. They belong to the public and not to the district nor to the officers of the district. 204 Iowa570, 215NW807.

978-50 169Ga85, 149SE699, 65ALR 1121(2dcase) (proceeds of insurance on schools); 13PaDist&Co 771. **Sums set aside by board for teachers' salaries** cannot be diverted to other purposes without board's express sanction. 11 LaA647, 124S628.

978-52 New York City board of estimates appropriation for school purposes are to be disbursed on audit of board of education under Educational Law. 245 NY8, 156NE78.

978-53½-New. Recovery of money paid under illegal contract is authorized under some statutes. 135Wash233, 237P 505.

979-54 204 Iowa570, 215NW807. **Selection of depositary.**-174Minn286, 219 NW163, 65ALR1407.

979-56½-New. Deposit of school funds in bank is not a legally authorized deposit under statute when made only on the individual, unofficial direction of the several board members to treasurer to make such deposit. 204 Iowa570, 215 NW807.

979-56⅓-New. Such deposit is not made legal by the fact that the board of directors, after deposit was made, had knowledge thereof, 204 Iowa570, 215NW 807.

979-56¼-New. nor by the fact that interest was paid on such deposit. 204 Iowa570, 215NW807.

979-56⅕-New. Such funds when deposited without proper authorization in a bank that failed cannot be recovered from state sinking fund under statute. 204 Iowa570, 215NW807.

979-56⅙-New. Such statute permits recovery from state sinking fund of money lost through failure of bank in which school funds were deposited only when such deposit was properly authorized in compliance with statute. 204 Iowa570, 215NW807.

979-56⅐-New. Resolution is construed as not making bank district's agent to require collateral from depositaries. 179Ark805, 18SW(2d)372.

979-56⅛-New. Funds deposited by county treasurer with fiscal agency to pay interest maturing during next fiscal year are funds on hand to be accounted for. 141 Okl 291, 285P67.

979-57 226Ky476, 11SW(2d)143.

979-60 143 Okl 287, 289P258 (payment of rental on gymnasium).

979-62 Special appropriation for school purposes without fund available for payment of debt contracted is unlawful. IndA 162NE61(1stcase). **Estimates.**-136Misc171, 240NYS422.

979-63 Separate schools.-142 Okl 1, 285 P73.

979-65½-New. Statute authorizing bond issuance for building teachers homes is not exclusive and does not prevent school trustees employment of funds for that purpose. TexCivA 300 SW211.

979-65⅓-New. Statutes providing for free textbooks in common schools is not void as containing appropriating language too general to conform to constitutional requirement. 230Ky287, 18 SW(2d)1114.

979-65¼-New. Interest on bonds.-In Oklahoma excise board cannot make appropriation to pay interest on bonded indebtedness maturing in subsequent fiscal year. 141 Okl 291, 285P67.

980-68 224Ky184, 5SW(2d)1062; 116 Tex183, 288SW159. **Appropriation** for living quarters for teachers held not in excess of authority. TexCivA 300SW 211.

980-74 Registered warrants are indebtedness of county.-32Ariz318, 257P985.

980-81 MoA 2SW(2d)208.

981-82½-New. Audit of New York City board of education of amount due school contractor is final in absence of fraud. 245NY8, 156NE78.

981-83 245NY8, 156NE78.

982-93 In Vermont.-100Vt75, 135A12.

982-96 Board meeting.-124Kan300, 259 P796.

983-12 171Ark385, 284SW764.

984-20 See also Kan 289P399.

985-33 124Kan300, 259P796; 170Minn 83, 212NW25. **Payment to former holder without preservation of warrant** held breach of duty of treasurer and assignee was entitled to recover. 173Minn383, 217NW366, 56ALR1369.

985-34 178Ark436, 10SW(2d)875; 37 Wyo 237, 260P678.

985-35 170Minn83, 212NW25; 173Minn 94, 216NW789; 37Wyo 237, 260P678.

985-36 37Wyo 237, 260P678.

985-37½-New. By assignment of the warrant the assignee becomes owner of whatever claim original holder had against district for the indebtedness evidenced by the warrant, 124Kan300, 259P796.

985-37⅓-New. and by proper pleading and proof may recover on the indebtedness, though warrant was not a legal obligation. 124Kan300, 259P796.

986-41 178Ark436, 10SW(2d)875.

986-43 Order of county board of education directing county treasurer not to cash school warrants held void. 174 Ark1180, 296SW31. **In Vermont.**-100Vt 75, 135A12 (construing statute).

986-47½-New. Payment and sale by depositary of school funds.-Where treasurer deposited school funds to his credit in bank of which he was director and orders were presented to and paid by

bank and indorsed "not paid for want of funds" and then sold by bank, liability of school district is not discharged. 171 Minn376, 214NW259.

986-47½-New. Evidence held sufficient to show payment.-126Kan424, 268P841.

986-50 170Ga509, 153SE214.

987-59 177Minn30, 224NW251. **Registration of warrants is condition precedent to suit** under some statutes. 131 Okl 230, 268P713. **Where treasurer of district who is managing officer of bank holding school funds** cashes warrants with funds of bank which thereafter holds them as its property, holder of warrants may recover thereon from district. 175Minn166, 220NW428.

987-61 170Ga509, 153SE214.

987-62½-New. In action by taxpayers to enjoin payment of warrants school district may raise question that indebtedness created by warrants exceeded constitutional limitation. Iowa 229 NW821.

987-63 Notes with interest coupons payable successive years after date are bonds, and prohibited. Fla 129S824.

988-70 46 Ida800, 272P507; 127Kan 651, 274P728; 226Ky476, 11SW(2d) 143; 312Mo 1, 278SW769; Nev 292P 617; 194NC137, 138SE614; 195NC213, 141SE744; 136SC345, 134SE380. **Issue not invalid** because act creating district includes large area. TexCivA 272SW 559. **Statute in force when issuance of bonds was authorized** by resolution controls as to validity, though district formed prior to adoption of statute. 141Miss537, 106S750. **Validity of delegation of power by legislature.**-Legislature may delegate to school district power to issue bonds. 153Tenn306, 283 SW751. **"School purposes"** means such annual expenditures as are necessary to the conduct or maintenance of the school. 312Mo 1, 278SW769. **Repairing school buildings.**-172Ark726, 290SW371. **Order consolidating school districts without proper petition assuming indebtedness of districts as required by statute** is no authority for issuing bonds. 153Miss854, 121S842. **Particular purposes.**-181Ark1029, 29SW(2d) 267. **Single bond issue** held authorized to pay for repairs on school building and outstanding indebtedness. 181Ark 1029, 29SW(2d)267. **Issuance of refunding bonds** to pay outstanding bonds held valid. 99Fla936, 128S27(2dcase). **Construction and equipment of gymnasium and athletic field for high school** is purpose for which bonds may be issued. Mont 288P188.

989-72 173Ark892, 293SW1035; 46 Ida800, 272P507; 312Mo 1, 278SW769; 24 OhNPNS273 (order from department of domestic relations not authority for issue of bonds under Emergency Act); 136SC345, 134SE380; 53SD579, 221NW 697. But see 31F(2d)155. **Bonds for stadium** for competitive athletic games and sports may be lawfully issued by union high school district under statute providing trustees may call election to decide upon issue and sale of bonds for building schoolhouses. 31Ariz503, 254P 1056, 52ALR244. **School directors given power** under statute. 6PaDist&Co 193. **Whether emergency exists** to issue bonds for building addition to schoolhouse held for advisory board to determine. 85 IndA663, 155NE516. **Power to incur indebtedness for erection of schoolhouse** implies incidental power to include as part of indebtedness provision to furnish same. 312Mo 1, 278 SW769. **Bonds may be issued** to move bungalows to make school site available under statute providing for issuance to build school houses. 46 Ida800, 272 P507.

989-73 113 Oh405, 149NE397 (letter to board of education signed by chief of division of factory inspection that use of school building is prohibited unless certain changes are made is not an order on which may be predicated action of board of education in issuing bonds for new school building). **Notes,** equivalent to bonds, are not rendered valid by act validating board's warrants. Fla 129S824.

989-75 TexCivA 286SW264 (statute authorizing school board to issue bonds held not to offend due process of law clause). **Florida Constitution** held not to contemplate issue of bonds for maintenance of school where it provides for annual budget of county school expenditures. 98Fla152, 125S357. **Statutes held not unconstitutional.**-Mont 286P 125(2dcase).

989-76½-New. Statute extending power of board of trustees to issue bonds at higher rate is not retroaction as to district whose act of incorporation declares it to be cumulative to all general laws then or thereafter in force as to such districts. TexCivA 272SW559.

989-77 120Kan768, 245P112.

989-78 127Kan651, 274P728. **Adjudication by board** that proposed issue is not beyond limit held essential for valid bond issue. 146Miss118, 112S466. **Burning of schoolhouse** does not create emergency validating bond issue for erection of another in excess of constitutional limitation. 213Ky714, 281SW 808.

989-79 165La256, 115S479; 227Ky208, 12SW(2d)301; Mont 286P125(2dcase); 107 Okl 289, 231P1045 (bonds of consolidated district, added to bonds of individual district, exceeding limit held invalid); 136SC345, 134SE380 (eight per cent of assessed valuation); 151SC137, 148SE719. See also 335 Ill 11, 166NE 504.

990-81 Where amount voted exceeded limit, trustees had authority to issue bonds up to such limit. 154SC257, 151 SE469.

990-83½-New. On consolidation of districts, assets of disorganized district available for liquidating bonds outstanding may be considered in determining validity of new issue. 107 Okl 289, 231P1045.

990-83½-New. Bonded indebtedness is "incurred," within provision limiting same, when bonds are issued, not when authorized. 107 Okl 289, 231P1045.

990-83¼-New. Notes not issued under seal are nevertheless part of "bonded debt" of district. 141SC92, 139SE178.

990-83½-New. Where boundaries of school district, coincide with those of city, bond issue for school purposes is indebtedness of board of education. 229 Ky719, 17SW(2d)1013.

990-83⅙-New. In determining permitted amount of indebtedness as regards authority of city to issue bonds for school purposes, net indebtedness of school district whose boundaries coincided with those of city must be considered. 227Ky208, 12SW(2d)301.

990-84 173Ark892, 293SW1035; 34GaA 67, 128SE223 (requirement that district trustees follow law as required of county authorities); 166Ga867, 144SE765; 326 Ill 179, 157NE200; 165La256, 115S 479; Mont 286P125(2dcase) (statute held not to violate constitutional provision requiring law to specify purpose for which money to be used); 194NC 358, 139SE698; 144 Okl 102, 290P190. **Amount.**-120Kan768, 245P112. **Constitutionality of provision for submission.** -153Tenn306, 283SW751. **Mandatory and permissive provisions.**-241Mich366, 217NW15. **In North Carolina.**-195NC 132, 141SE546. **Statute held inapplicable** to issuance of bonds to buy lands and build schools pursuant to mandatory constitutional duty. 198NC480, 152SE401. **Law relating to residence as prerequisite to right to vote** has been held unconstitutional. 144 Okl 10, 289P 268. **Applicability of statute.**-Nev 292 P617.

990-84½-New. But in absence of constitutional inhibition legislature has power to direct issuance of bonds for educational purposes by school or high school district without submitting question to vote of people. 136SC345, 134SE 380.

990-85 173Ark892, 293SW1035; 36GaA 92, 136SE107 (assent of qualified voters voting is essential, if such two thirds is majority of registered voters); Mont 286P125(2dcase) (bonds not invalidated by submission of question to electors of county instead of to taxpayers); 144 Okl 102, 290P190. **Where board of education was unauthorized to issue bonds** for amount of tax voted at tax meeting, it could not later issue less amount without submission of question to taxpayers. 128Misc42, 217NYS751. **Removal of voters** to other county before election authorizes finding of intention to change domicile. 40GaA561, 150SE454.

990-86 36GaA354, 136SE540; 107 Okl 289, 231P1045 (three-fifths of voters participating, not of entire electorate, required); 144 Okl 10, 289P268; 136 Okl 10, 275P1056. But see 226Ky476, 11SW(2d)143. **Legislature may define qualifications of electors.**-116 Or543, 241 P386. **Part owner of property assessed** to other part owner for school taxes is qualified to vote. 235Mich338, 209NW 68. **Qualifications of voters in union high school districts.**-116 Or543, 241P 386. **Court will not pass on validity of** votes rejected where if allowed they would not affect result. 164La204, 113 S818. **Females** are entitled to vote where otherwise qualified. 162Ga462, 134SE103. **Payment of poll tax by female voters.**-162Ga462, 134SE103. **Qualifications enumerated in statute.**-31Ariz 503, 254P1056, 52ALR244. **Election carried by one vote** is valid where two ballots were unmarked and one of two who voted against bond issue and one who voted for it were not qualified. TexCivA 285SW1105. **Election for voting bonded indebtedness** is not invalid because remainder was to be used for maintenance of school, as against contention that tax for maintenance required only majority of votes while bond issue required two-thirds majority. 230Ky75, 18SW(2d)875. **In determining whether two thirds of qualified voters constituted majority of registered voters,** court is not authorized to deduct disqualified voters from registered voters. 168Ga626, 148SE663; 40GaA49, 148SE665. **Registration lists** of voters must show persons entitled to vote for school bond issue and determines number of lawful votes necessary to authorize bonds. 166Ga867, 144SE765. **Two thirds majority** in favor of bond issue, where illegally cast votes were excluded, held to confirm bond issue. 40GaA 561, 150SE454. **Persons entitled to vote.**-144 Okl 102, 290P190. **Statute making requirement of registration inapplicable** held constitutional. 144 Okl 281, 290P1101. **Removal of electors to another state** does not defeat their right to vote. 144 Okl 102, 290P190.

991-87 213Ky756, 281SW1031; 248 Mich134, 226NW895 (proposition held sufficient); Mont 286P125(2dcase). **Ballot.**-Mo 16SW(2d)44; Mont 286P125 (2dcase) (proposal held not dual); 114 Oh415, 151NE327 (form of ballot submitted to voters held not substantial compliance with statutory requirements). **Dual proposition.**-120Kan768, 245P112. **Submission of proposition to issue bonds for proper purpose in conjunction with unauthorized purpose** does not legalize issuance for either purpose. 53SD579, 221NW697.

991-88 Polling places.-164La204, 113S 818. **Election held at private office** instead of at schoolhouse as required by statute is void though only schoolhouse was merely improvised for temporary use. 152Miss241, 119S185.

991-89 Specification of rate of interest.-TexCivA 280SW1070.

991-90 35GaA110, 132SE137; 46 Ida 800, 272P507; 146Miss118, 112S466. But see 106 Okl 30, 233P431, 32 OklACR 479. **In Nebraska.**-114Nebr578, 208NW 738. **Time of publication.**-120Kan768, 245P112. **Notice held sufficient.**-TexCivA 294SW863. **Failure of proof of notice** held to invalidate bond order. 146Miss 118, 112S466. **Discrepancy between order for election and notice of election** held not to affect validity of bonds when election was not affected. Tex CivA 283SW535. **Notice posted by temporary clerk** where regular clerk was unable to do so is valid since statute authorizing appointment of clerk is directory. 312Mo 1, 278SW769. **Notice served approximately thirty days before election, though actually more than**

thirty days have elapsed before first publication, held sufficient under law. 36GaA80, 135SE318. **Proof of publication of notice of election** must be on file with county board of supervisors when they declare result of election and order bond issue by consolidated school district for school building. 144Miss769, 109S851. **Interest and time of payment.**–46 Ida800, 272P507. **Want of due notice.**–31 OhA131, 166NE386. **Notice calling election at schoolhouse is not indefinite** where district contained two school buildings across road from each other. 248Mich134, 226NW895.

992–91 168Ga67, 146SE908; 225Ky 165, 7SW(2d)1056. **Abstractor's list of voters and assessed valuations** signed by registrar after change held sufficient compliance. 164La204, 113S818. **Failure to print separate ballot** will not invalidate election. 213Ky756, 281SW 1031. **Filing plat made from plat of proposed consolidation** not consummated held sufficient. 139SC381, 137SE698. **Failure to post distance markers** around polls held not to invalidate election. TexCivA 294SW863. **Election clerks held properly appointed.**–TexCivA 294 SW863. **Neglect, mistakes, or misconduct of officers charged with conduct of or preparation for election** is not sufficient ground for setting aside election where voters have emphatically expressed their will. 213Ky756, 281SW1031. **Requirement that certified list of voters shall be furnished to managers of election ten days before election** held substantially complied with where list was furnished to attorney for school trustees. 162Ga462, 134SE103. **Where no voter is challenged** in school bond election, statute relating to procedure when right to vote is challenged does not apply. 248Mich134, 226NW895. **Place.**–157Miss276, 127S280.

992–92 143SC120, 141SE265 (signature of majority of freeholders not required). **Location of school in consolidated district** is essential prior to vote on bond issue. 146Miss56, 111S831. **Filing plat of newly-consolidated district** made by competent surveyor from old plat filed during consolidation held sufficient for bond election. 139SC381, 137SE698.

992–93 168Ga67, 146SE908; 204 Iowa 221, 215NW235; Mont 286P125(2d case); 117 Okl 172, 245P848. **Requisites of petition in district maintaining separate schools for races.**–117 Okl 172, 245P848. **That petition states that interest on bonds shall not exceed six per cent** does not render it defective. Tex CivA 280SW1070. **Petition held sufficient.**–194NC771, 140SE740. **Decision by board as to sufficiency of petition** need not be based on record of electors. 204 Iowa221, 215NW235. **Board's decision as to sufficiency** of petition, held final. 204 Iowa221, 215NW235. **Petition based on enumeration of qualified electors made by members of school board** held insufficient. 144 Okl 281, 290 P1101.

992–95 31 OhA131, 166NE386; TexCivA 14SW(2d)124. See also 46 Ida800, 272 P507. **That all members of school board sat as judges of election,** instead of only president, secretary, and one director, as required by statute, did not invalidate election in absence of prejudice. 200 Iowa1190, 206NW145.

992–96 166Ga867, 144SE765.

992–97½–New. Validity of school bond election cannot be attacked collaterally in suit to enjoin issuance of bonds pursuant to election. 31Ariz503, 254P1056, 52ALR244.

992–99 See also 171Ark385, 284SW764.

993–1 **But board cannot be compelled to borrow for high school building only,** when authorized by election to borrow for central school building. Mo 32SW (2d)59.

993–1½–New. Petition to validate bonds held not subject to demurrer. 35 GaA306, 133SE45.

993–1½–New. To authorize bond election, it must appear that sum to be raised is necessary and cannot be raised by tax levy. 216Ky266, 287SW735.

993–1¼–New. Record finding that sum to be raised is necessary and cannot be raised by tax levy is not prerequisite to calling school bond election by board of trustees. 216Ky266, 287SW735.

993–1⅓–New. Election contest.–In contest of legality of election for schoolhouse bond, constitutionality of election on ground of lack of authority to issue bonds cannot be raised. TexCivA 285SW1105.

993–1⅓–New. Election to authorize tax levy and bond issue in school district formed under county-wide plan because vote outside of part of old district which has ceased to exist was not separately shown. 192NC298, 135SE40.

993–1½–New. Mere irregularities not shown to have contributed to result will not invalidate election. 116 Or543, 241P336.

993–1½–New. Statute referring to elections for issuance of bonds for schoolhouses is not violative of due process clause under constitution. 168Ga67, 146 SE908.

993–1⅙–New. Board of trustees of school district has authority to entertain petition from registered qualified voters of district for call of election, and authority to grant order calling election, to advertise call, and act as managers in holding elections and declare result. 168Ga67, 146SE908.

993–1 1/10–New. Voters having passed on necessity of issuance of bonds for construction of schoolhouse by voting for their issuance at election, courts have no right to inquire into such necessity. TexCivA 14SW(2d)124.

993–1 1/11–New. Election as applied to consolidated school district can be called only in district in which there is existing provision for levy of local tax for support of schools of district. 168 Ga67, 146SE908.

993–1 1/12–New. Entire sum voted need not be expended where amount voted is within constitutional limitation. 234Ky 812, 29SW(2d)547.

993–1 1/13–New. Election not invalid because of failure to forward copy of certificate of result to deputy superintendent. Nev 292P617.

993–4 33NM470, 270P798. **Validity of contracts.**–Contract for sale held not void because made before approval by attorney general and registration by comptroller and without offer to state board of education. TexCommnA 25SW(2d) 317.

993–6 171Ark385, 284SW764; 173Ark 892, 293SW1035; 135 Okl 253, 275P285. **Contract for sale of bonds providing for brokerage fee** held not to violate statute prohibiting sale for less than par value. 173Ark892, 293SW1035.

993–7 **Interest on amount bid** from time bonds commenced drawing interest held payable by purchaser. 24 OhA428, 157 NE766.

993–9 **Advertisement in twice-a-week paper** instead of daily paper does not show fraud or collusion. 177Ark127, 6 SW(2d)16.

993–11 **Ignoring conditional higher bid** is proper and does not show fraud or collusion where unconditional sale is advertised for. 177Ark127, 6SW(2d)16.

993–12½–New. Measure of damages to school district for failure of buyer to receive and pay for bonds stated. 117 Okl 1, 245P60.

993–13½–New. When fourth-class city school district was abolished after voting bonds for school district and is succeeded by graded school district having some boundaries, trustees of graded district have authority to sell such bonds and expend proceeds for schoolhouse. 215Ky40, 284SW386.

993–14 93Fla470, 112S253. Nev 292P 617. **Amendment of statute pending proceedings.**–Under Ohio Code requirements of amendment to statute do not apply to issuance of bonds which have been authorized advertised for sale, and awarded to successful bidder prior to amendment. 113 Oh482. 149NE405. **Validity of bond issue** does not depend on tax levy already made. 89Fla271, 103S639. **Time of issuance.**–30NM454, 236P743. **Lapse of time** held not to defeat issuance of bonds. 144SC391, 142 SE650. **Adjudication that statutory limit will not be exceeded** is jurisdictional prerequisite to issuance of bonds in some jurisdictions. 152Miss443, 119S 809.

994–16 143SC120, 141SE265. **Bonds may be in name of county.**–194NC137, 138SE614. **Oklahoma Serial Bond Act** applies to issuance and sale of bonds by school districts. 127 Okl 234, 260P486. **Courts will not interfere** with discretion of officers as to amount of bonds issued, length of time they have to run, etc. 5F(2d)514.

994–20 323Mo 248, 19SW(2d)714 (auditor's duty before registering bonds). **Only district that is de jure corporation** is entitled to have bonds registered. 323Mo 248, 19SW(2d)714. **Statute construed.**–323Mo 248, 19SW(2d)714 (meaning of words "conditions of the law" as applied to district's corporate existence means conditions required to bring about de jure existence).

994–21 **That council delegated to mayor power to fix rate of interest** will not invalidate school improvement bonds. 213Ky756, 281SW1031.

994–23 See also 209Ky351, 272SW887.

995–29½–New. Conversely, bonds, issued to draw lesser rate of interest than election authorized, are not invalid. Tex CivA 20SW(2d)214.

995–30½–New. In statutory validation proceedings burden is on state to show facts authorizing validation though facts alleged in petition are admitted. 35GaA 109, 132SE127.

995–30½–New. In statutory validation proceedings burden is on state to show facts authorizing validation where substantial allegations of petition are denied. 35GaA109, 132SE127.

995–30¼–New. Petition has been held sufficient as against demurrer on ground that no proper defendant was set forth where petition was filed against district and alleged that it was properly constituted school district. 35GaA109, 132 SE127.

995–30⅓–New. Burden is on defendant district or intervening citizens to plead and prove that election for bonds was unauthorized because district was not one in which local tax was levied or was not in county which levied such tax. 35GaA109, 132SE127.

995–30⅓–New. Name in which validation proceedings conducted.–Proceedings to validate bonds of consolidated school district are properly conducted in name of district as fixed by proper school authorities. 162Ga462, 134SE103.

995–30⅙–New. Decree validating bonds is conclusive on collateral attack on validity of order on which taxing district was created. 149Miss461, 115S557.

995–30⅛–New. Judgment validating bond issue is conclusive on taxpayer where not excepted to within statutory time. 168Ga379, 147SE764.

995–30⅛–New. Validity of bonds cannot be attacked where no objection was made at time of validation. 168Ga502, 148SE273.

995–30 1/10–New. Judgment validating bonds for school is conclusive on district and citizens thereof that school district has legal right to incur debt. 168 Ga502, 148SE273.

995–30 1/11–New. Proceedings to validate bonds to be issued for purchase and construction of schools in county excluding city therein held improperly brought against county. 41GaA229, 152 SE588; 41GaA276, 152SE589(1stcase).

996–46 119Kan314, 239P959. **Bona fide holder.**–119Kan314, 239P959.

996–49 98Fla87, 123S536; 168La1118, 123S802; 142 Okl 110, 285P953 (sinking fund). **Statutes requiring annual maturity** of certain amount or fractional part of bonds issued are mandatory and bonds are void if failing so to provide. 141Miss537, 106 S750. **Disposition of bonds bought by investment of sinking fund.**–135 Okl 253, 275P285. **Investment of sinking fund in bonds to retire which funds was created** constitutes cancellation of bonds. 135 Okl 253, 275P285. **Investment of prior sinking fund in subsequent bond issue** does not operate as cancellation of bonds. 135 Okl 253, 275P285. **Power of treasurer.**–135 Okl 253, 275P285. **Maturities must conform to constitution-**

al limitations though statute may authorize issuing refunding bonds without resubmitting to electorate. 98Fla 87, 123S536. **Florida Constitution** held not to permit county school funds to be used for payment of bonds issued for current expenses. 98Fla1152, 125S357. **Duty to pay.** 99Fla936, 128S27(2dcase). **Maturity of interest coupons.**–142 Okl 110, 285P953 (bonds valid).

996-49½-New. Contract to repurchase at stated price bonds to be found and purchased by bank held binding on district although bonds were not tendered within time fixed. **TexCivA** 25SW(2d) 174.

997-50½-New. Indebtedness on bonds issued by school district for money borrowed is that of district and not of county. 32Ariz124, 256P362.

997-60 Evidence admissible.–135 Okl 253, 275P285. **Trial.**–54SD387, 223NW 324.

998-61½-New. Refusal to permit proof that certain persons voting in bond election were ineligible does not require reversal of judgment validating bonds where it has not been shown that such persons voted for the bond or that their vote affected result of election. 36GaA 354, 136SE540.

998-63 18F(2d)918, 924 [citCyc].

998-64 207Cal 473, 279P447 (city may aid public school system by taxation where its charter or provision of law warrants); 323 Ill 281, 154NE127; 332 Ill 181, 163NE385; 165La256, 115S479; 214AppDiv40, 210NYS439; 194NC137, 138SE614; **TexCommnA** 290SW1083; **TexCivA** 286SW620; **TexCivA** 14SW (2d)1051.

998-65 82Colo 438, 261P457; 126Kan 117, 267P28; 136SC345, 134SE380; **Tex CommnA** 290SW1083. **Power must be exercised in strict conformity with statutory directions.**–**TexCommnA** 290SW 1083. **Legislative authority must exist** before valid tax can be voted. **TexCivA** 20SW(2d)214.

998-66 Statute validating school tax by curative act is in excess of powers of legislature and void. 321 Ill 499, 152 NE560.

998-67 Taxes levied before judgment of ouster in quo warranto proceedings cannot be collected thereafter. 329 Ill 505, 160NE834.

999-71½-New. School taxes are state taxes and not purely local. 220Ky89, 294SW815.

999-71½-New. School tax is a state tax ordinarily.–216Ky78, 287SW212.

999-71½-New. In New York board of education of city has no power to raise money by taxation, its function in this respect being advisory only. 127Misc 477, 217NYS265 (reversed on appeal).

999-71¼-New. Legislature has full power to provide by general law for support of common schools by taxes except as restricted by constitution. 181 Ark253, 25SW(2d)443.

999-73 161Ga911, 131SE897 (Georgia constitutional and statutory provisions as to levying taxes for public school purposes stated); **TexCivA** 23SW(2d) 431. See also 146Val, 135SE693. **Constitutional amendment** held to modify statutory provisions as to special tax school district bonds only so far as repugnant thereto. 89Fla271, 103S639. **In Florida.**–89Fla271, 103S639. **New regulations** on amended Const. § 17 act 12, which do not modify existing statutory provisions held applicable in issuing bonds. 89Fla271, 103S639. **Statute requiring parish school boards** to change from calendar year to fiscal year basis held constitutional. 158La 251, 103S757.

999-74 TexCivA 282SW905.

1000-80 95Fla345, 116S81.

1000-82½-New. Act creating county line school district not unconstitutional because not providing reasonably sufficient guarantee of equality of taxation. **TexCivA** 275SW449.

1000-83 214AppDiv40, 210NYS439; 135 Okl 270, 276P186; 153Tenn306, 283SW 751. **Statutes held not violative.**–153 Tenn306, 283SW751 (statute, authorizing school district to issue bonds after approval of majority of voters, and fixing tax for payment of bonds).

1000-86 242 IllA488.

1000-87 TexCivA 22SW(2d)475(2d case).

1000-90 202Cal 110, 259P730.

1001-93 221Ala217, 128S435 (just policy demands that taxpayer shall receive tax benefits). **In Kansas.**–123Kan325, 255P87. **Tax levy for support of joint consolidated school district** should be based upon amount which it will cost to support such school. 123Kan325, 255P 87.

1001-94 323 Ill 281, 154NE127. **The words "educational purposes"** held to include maintaining county demonstration agent under taxing statute. 40GaA785, 151SE553.

1001-95 323 Ill 281, 154NE127; 234 IllA141 (to erect and maintain addition to high school); 124Okl 223, 254P961 (repairs and additions). **Building purposes held to include other purposes** to be expended for purposes included in building purposes. 323 Ill 281, 154 NE127. **Improvements.**–234 IllA141. **Tax for buildings** held separate from tax to support schools. 165Ga367, 140SE 863.

1001-97 Act relating to fiscal administration of school affairs held not unconstitutional as bill for raising revenue. 221Ky106, 298SW185.

1001-98 165Ga367, 140SE863. **Tax to retire bonds** may be in addition to regular school tax. 165Ga367, 140SE863.

1002-2½-New. A tax is properly levied to pay off money borrowed for school purposes. 8PaDist&Co505.

1002-4½-New. Per capita school tax is not occupational tax but personal tax. 6PaDist&Co532.

1002-6 Taxation by counties for educational purposes.–162Ga172, 132SE896. **Statute referring incidentally to tax rate,** and inadvertently omitting change in rate effected by act passed same day, should be construed to conform to increased rate. 221Ky106, 298SW185.

1002-7 174Ark971, 298SW222; 85Colo 134, 274P170; 160Ga268, 127SE868; 165Ga526, 141SE811; 337 Ill 276, 169 NE178; 123Kan325, 255P87; 166La 125, 116S723; 311Mo 349, 278SW74; 115 Okl 70, 241P495; 124 Okl 223, 254 P961; 141 Okl 130, 284P27 (separate schools); 8PaDist&Co 505; 54SD429, 223NW342; **TexCivA** 273SW914 (constitutional provision governing taxation is art 7 § 3 not art 11 § 5). See also 143Va325, 130SE414; 290Pa7, 137A864. **City constituting separate school district** is exempt from tax limitation. **TexCommnA** 287SW904. **City organized as independent school district** by extending limits for school purposes only not exempt from tax limitation. **TexCommnA** 287SW904. **"Incorporated cities or towns"** exempt from limitation or taxing power means cities and town incorporated for municipal purposes. **TexCommnA** 287SW904. **City extending boundaries as school district beyond municipal boundaries** does not cease to be independent school district within constitutional exemption from school tax limitation. **TexCivA** 275SW729. **City not constituting independent school district** may not levy school taxes in excess of fifty cents per one hundred dollars valuation where such is constitutional limitation applicable to cities at time. **TexCivA** 275SW729. **Tax of two dollars and eighty-two cents per one hundred dollars held prohibitive.**–**MoA** 280SW69. **Tax exceeding seventy-five cents** on one hundred dollars assessed valuation held valid. **CalA** 273P1091(2d case).

1002-8 Conditional provisions for two classes of school taxes combined in determining if limitation has been reached. 164Ga336, 138SE767.

1003-10 Implied amendment of constitutional limitation is effected by new provision authorizing counties to levy special school tax not exceeding specified amount in addition to existing authority. 214Ala88, 106S501.

1003-11 Building and repairs.–311Mo 349, 278SW74.

1003-12 165Ga526, 141SE811; 319Mo 486, 4SW(2d)436.

1003-12½-New. In North Dakota statute authorizes electors, by majority vote, to increase tax levy above limit otherwise prescribed. 49ND108, 190NW271.

1003-13½-New. Charter limitation, declared to relate to general taxation, and not to limit city's taxing power as independent school district. **TexCivA** 273 SW914.

1003-13½-New. In Texas, recorporated city which is also an independent school district is not restricted in levying tax by the general constitutional limitation. **TexCivA** 286SW620.

1003-13¼-New. Court is without authority to levy tax exceeding fifty cents on one hundred dollars where board of education did not intend to maintain school for eight months. 229Ky774, 17 SW(2d)1009.

1003-13½-New. Balance on hand in funds at close of fiscal year must be considered in determining rate of levy for succeeding year. 143 Okl 287, 289P258.

1003-13½-New. Constitution in some states authorizes levy to certain limit for separate schools, and if insufficient an additional levy within prescribed limit which is effective though in excess of other statutory limitations. 141 Okl 130, 284P27.

1003-14 164Ga336, 138SE767.

1003-15 164Ga336, 138SE767 (for buildings); 49ND397, 191NW618 (statute held not applicable to taxes levied for county tuition fund for support of public schools).

1003-16 But see 290Pa7, 137A864. **In Florida** amended Const § 17 act 12 has been held to supersede limitation of such levy to five mills as provided before amendment. 89Fla271, 103S639.

1003-18 208Cal 282, 281P57.

1003-20½-New. Levy for transfer fees payable upon transfer of pupils from one district to another is included in constitutional limitation on district tax levy. 115 Okl 70, 241P495.

1003-20½-New. Incorporated city which is also independent school district may levy separate tax for school purpose pursuant to such dual power and capacity. **TexCivA** 286SW620.

1003-20¼-New. Fact that judgment has been rendered against local school district for money borrowed without authority of law will not authorize levy of tax in excess of constitutional limit. 165Ga101, 139SE817.

1004-21 40GaA785, 151SE553 (where levy to pay salary of county demonstration agent exceeds limit such excess is illegal). See also **TexCommnA** 278SW183.

1004-25 In Georgia.–161Ga911, 131SE 897. **Land included in district after first of year** is not subject to district taxes for such year. **TexCivA** 1SW(2d) 410. **Seated land** taxable within meaning of tax laws. 14PaDist&Co 241.

1004-26 161La803, 109S496.

1004-32 Land included in district after first of year held not subject to taxes for such year. **TexCivA** 285SW345. **In Texas.**–**CommnA** 285SW271.

1005-36 328 Ill 23, 159NE203; 332 Ill 181, 163NE385; 316Mo 21, 296SW806. **Territory subsequently annexed.**–**Tex CommnA** 12SW(2d)130.

1005-37 221MoA393, 277SW945.

1007-48½-New. Discriminatory statutes.–Statute requiring railroad company to pay white graded school rate on its colored property is discriminatory and invalid. 213Ky563, 281SW532.

1007-53 See also **NB** [1928] 4DomLR 65.

1007-56½-New. Federal employee, who is resident, cannot claim exemption from personal tax. 6PaDist&Co 532.

1007-58 324 Ill 254, 154NE889; **Tex CommnA** 12SW(2d)130; **TexCivA** 282 SW905. **Duty to make levy** sufficient to produce statutory account in a year is not discharged by insufficient levy. 121 Kan562, 247P855. **Taxing authority of commissioners' court,** remained in effect till election and qualification of trustees where common school district is changed into independent school district. **Tex CivA** 14SW(2d)289. **Where trustees of consolidated district failed to make levy** for certain year, there was no valid levy. **TexCivA** 13SW(2d)940.

1008-63 In Kansas.–121Kan562, 247P 855. **Remedy for refusal of board of supervisors to levy tax for support of**

consolidated school on petition therefor is by appeal to circuit court and mandatory injunction to direct levy will not lie. 142Miss686, 107S763.

1008-64½-New. Tax levies by consolidated school district functioning as de facto corporation pending determination in respect to dissolution are only ones that can be recognized. MoA 28SW(2d) 683.

1008-65 Resolution of school district trustees giving amount and purpose of tax and percentage to be applied can be construed as "ordinance" to levy tax. TexCivA 30SW(2d)703.

1008-66 TexCivA 282SW905. Construction of statutes.-117Nebr102, 219NW811. **Decision of board of supervisors that petition for levy was signed by majority of electors** is final and appealable. 151Miss671, 118S349(1stcase). **In Mississippi.**-151Miss608, 118S443. **Constitutional and statutory system is exclusive** as to district taxes for school purposes. 207Cal 473, 279P447.

1008-67 321 Ill 499, 152NE560; Tex CommnA 290SW1083. **Remitting amendment of record** to show levy on certain date erroneous. 324 Ill 510, 155NE358. **Order for levy** is jurisdictional. Tex CommnA 290SW1083. **Showing as to carrying motion for levy.**-TexCivA 18W (2d)410.

1003-68 Record.-TexCivA 22SW(2d)475 (2dcase). **In Louisiana.**-11F(2d)967. **Order levying taxes held substantially in manner and form required by law.**-Tex CivA 285SW345. **Levy is sufficient** where trustees ratified and confirmed levy subsequent to failure to enter levy in minutes. TexCommnA 12SW(2d)130. **Motion made by trustees** that "the following order levying taxes be accepted" was sufficient levy. TexCommnA 12SW (2d)130. **Observation of statute** is presumed in absence of pleading or proof to contrary. 27F(2d)586.

1009-69 69CalA437, 231P598 (levy of tax for less than minimum amount called for by school superintendent does not invalidate assessment); TexCivA 12SW (2d)1094; TexCivA 30SW(2d)703.

1009-70 316Mo 21, 296SW806; TexCivA 31SW(2d)659. **School tax assessor not being resident of school district** does not render assessment void, he being de facto officer. TexCivA 31SW(2d)659.

1009-72½-New. Tax levies are not void because the commissioners appointed to pro-rate the districts' indebtedness never attempted to act. TexCivA 22SW(2d) 475(2dcase).

1009-77½-New. County clerk, on receipt of copy of resolution of board of education must extend tax to pay bonded school indebtedness, though it is not included in annual tax levy certificate. 323 Ill 493, 154NE193.

1009-77½-New. Testimony of school director's clerk held to justify amendment of record to show levy of tax at meeting held within statutory time. 326 Ill 179, 157NE200.

1009-77¼-New. Testimony of school director clerk held not sufficiently certain to authorize him to supply record showing tax levy within statutory time. 326 Ill 179, 157NE200.

1009-77½-New. Where clerk's default does not affect substantial justice of the tax, school directors' record may be amended. 326 Ill 179, 157NE200.

1009-77½-New. School district tax voted by annual school meeting which exceeds legal limit is not nullity but is valid to extent remaining after county clerk has rejected excess. 121Kan573, 249P594.

1009-77½-New. Certiorari by taxpayer to review invalid tax levy is not maintainable against commissioner of education in absence of decision by commissioner. 130Misc759, 225NYS60.

1009-77½-New. Taxpayer is entitled to certiorari to review levy and attempt to collect school tax, remedy by appeal to commissioner of education not being exclusive. 130Misc759, 225NYS60.

1009-77½-New. Method of reviewing tax assessments is not applicable to school taxes. 130Misc759, 225NYS60.

1009-78 326 Ill 179, 157NE200.

1010-79 321 Ill 499, 152NE560; 326 Ill 179, 157NE200.

1010-80 208Ky469, 271SW560 (order may not be entered nunc pro tunc).

1010-83 173Ark1180, 294SW376; 163 Ga924, 137SE397 (sufficient compliance with statute); 123Kan325, 255P87; Tex CommnA 12SW(2d)130; TexCivA 275 SW729 (city constituting independent school district held acting within its powers as school district in ordering school tax election within limits of city). **New school district** formed by division of old district may have election for local school taxation, though election for such purpose had been held in same year and failed to carry old district as constituted before division. 162Ga189, 132SE756. **Requirement to call second local tax election** upon properly presented petition is mandatory. 189NC 650, 127SE692. **Commissioner of education held without authority** to subject district to tax without consent of inhabitants. 128Misc42, 217NYS751. **Where election returns do not show whether anyone voted for tax,** levy is void. 173Ark1180, 294SW376.

1010-84 NC 154SE393. **Act placing on new district** indebtedness of old district, including tax previously voted, without permitting vote, held invalid. TexCommnA 295SW1091.

1011-85 Additional taxes authorized with assent of voters in school districts maintaining high school grades by Illinois statute are for school purposes, and not alone for high school purposes. 334 Ill 438, 166NE94.

1011-89 162La266, 111S700 (effect of omission of two districts). **Application for special tax election** has been held void where board of education had exceeded its power in cutting down school district. 189NC675, 127SE704. **Irregularity in conduct of annual meeting** held to render levy of special tax pursuant thereto unauthorized. 44 Ida92, 255P 318.

1011-89½-New. Where statute requires setting out of "amount" in notice, setting out "rate" held insufficient. 216Ky 766, 288SW690.

1011-89¼-New. Requirement in statute as to setting out of "amount" in notice is mandatory. 216Ky766, 288SW 690.

1011-89¼-New. Loss or destruction of certificate of result of election by county clerk does not impair its force as part of records of county court. 179Ark293, 15SW(2d)991.

1011-89½-New. Court of county revenues, in ordering special tax election, exercises governmental function, and, so long as it keeps within authority conferred, its action cannot be questioned. 219Ala110, 121S390.

1011-89½-New. Levy of tax annually for twenty years pursuant to election was not unauthorized as retroactive. 219 Ala110, 121S390.

1011-89½-New. Election held on Nov. 10, 1927, authorizing levy of tax for local school district, did not authorize assessment and levy of school tax in year 1927. 168Ga259, 147SE74(1stcase).

1011-90 219Ala110, 121S390; 179Ark 293, 15SW(2d)991; 164Ga336, 138SE 767; 163La266, 111S700 (removing ballot boxes denial of right to vote). **Elections for school taxes are "special elections,"** and compliance with requirements of statute as to registration for special elections is essential. 168Ga 67, 146SE908. **Failure to establish voting place for electors of district residing in one county** does not invalidate election where such electors voted in another county in district. 85Mont 141, 277P961(2dcase). **Lack of qualification of judges of election** does not affect validity of election to increase tax levy of school district under some statutes. 85Mont141, 277P961(2dcase). **Place of election.**-165Ga498, 141SE312. **Plaintiff** has burden of establishing failure to open polls. La 114S167. **Presumption** that ballot boxes contained duplicate election returns. La 114S167. **Qualifications of judges of election.**-85 Mont141, 277P961(2dcase). **Rural high school district annual tax levy** based upon estimate adopted by school electors at meeting on second Monday instead of first Monday of June as required by statute is void. 117Nebr102, 219NW811. **Statute requiring call for election to specify proposed additional tax** did not render invalid any election already held, under previous statute not requiring call for election to specify tax. 39GaA185, 146SE570(2dcase). **That election returns were not in evidence** did not show that they were not made or preserved. 164 La584, 114S166. **Statutes applicable.**-142 Okl 1, 285P73.

1012-91 Petition held sufficient.-168Ga 67, 146SE908.

1012-92 See also 168Ga67, 146SE908. **Minutes of meeting of board of education** held sufficient although not recorded until after election. 235Ky70, 29SW (2d)626.

1012-93 178Ark257, 10SW(2d)353; 189NC572, 127SE577 (notice of election on first Monday of September held valid). **Notice must contain amount of proposed tax,** or election is void. 164 Ga336, 138SE767. **School tax election held not invalidated by publication of notices of election** and registration at same time. 192NC590, 135SE467. **Reference to wrong statute in notice** held typographical error not invalidating election. 192NC590, 135SE467. **Failure to give statutory notice of election to increase school tax** does not invalidate election where notices were posted at schoolhouses, were mailed to taxpaying freeholders, were published as news item in only newspaper in district, and were given by distribution of hand bills, and it does not appear that any voter was deprived of right to vote. 85Mont 141, 277P961(2dcase). **Notice held sufficient.**-168Ga67, 146SE908; 235Ky70, 29SW(2d)626 (although signed in name of county board only); 235Ky59, 29SW (2d)628 (not describing subdistrict's boundary by metes and bounds). **That posters were small and type thereon inconspicuous** held not to invalidate election. 235Ky70, 29SW(2d)626. **Statement of amount of money to be raised** held unnecessary. 235Ky70, 29SW(2d) 626.

1012-94 TexCommnA 12SW(2d)130. **Form of proposition.**-334 Ill 438, 166NE 94.

1012-97 23AlaA114, 121S501; 168Ga 67, 146SE908; 37Wyo36, 258P583. **Local tax election** in school district under county wide plan held not invalid as including territory having various powers of taxation. 189NC572, 127SE577. **Constitution providing for submission to qualified property taxpaying voters** of school district of question of levy and collection taxes will be construed as meaning property taxpaying voters under statute providing for election by qualified taxpaying voters. Tex CommnA 12SW(2d)130. **Delinquent taxpayers.**-TexCivA 29SW(2d)451.

1013-98 230Ky33, 18SW(2d)862; Tex CivA 28SW(2d)887. **A provision authorizing a tax when two thirds,** etc. 160Ga268, 127SE868.

1013-99 331 Ill 428, 163NE314.

1014-8 Failure to serve county attorney with notice of contest of election to determine whether additional maintenance tax shall be levied is not ground for dismissal of contest where members of board of trustees of district which was returning board of election were named as contestees. 117Tex237, 18SW (2d)276. **Written communication to board of city commissioners** has been held not to constitute notice of contest authorizing suit to contest school tax election. TexCivA 28SW(2d)887.

1014-8½-New. Words "proper authorities" refer to ordinary of several counties of state, who is authorized to call election, receive election returns, and declare result. 168Ga67, 146SE908.

1014-8½-New. Statutes providing that election for school taxes shall be held under rules governing ordinary elections refer to general law relating to manner of holding elections for members of general assembly. 168Ga67, 146SE908.

1014-8¼-New. Statutes must be construed in connection with general law

governing special elections. 168Ga67, 146SE908.

1014-9 219Ala110, 121S390; 39GaA185, 146SE510(2dcase); **TexCivA** 280SW 351. **That judge of election was trustee of school district** does not render invalid election to determine whether school tax should be increased. **Tex CivA** 280SW351.

1014-14½-New. Opening of ballot boxes after certification of election result, unauthorized by city charter. 160Ga 217, 127SE862.

1015-15½-New. Where subdistrict is added to consolidated district after tax for consolidated district has been voted, district as whole may vote new tax in lieu of former one. 213Ky717, 281SW 815.

1015-16 320 Ill 560, 151NE561; 225Ky 9, 7SW(2d)490; 316Mo 21, 296SW806; 117Nebr102, 219NW811; NC 155SE562.

1015-17 135 Okl 270, 276P186.

1016-23 202Cal 110, 259P730.

1016-26½-New. Failure of county board of education to insist on school levy called for by its first budget, or to take action to set aside smaller levy made by fiscal court, does not estop it from requiring such court to make levy called for by revised budget. 225Ky9, 7 SW(2d)490.

1016-27 But see 49ND108, 190NW271.

1016-28 Mass 171NE672; 142 Okl 19, 285P38; 142 Okl 110, 285P953 (dates of maturity of interest coupons on bonds not considered in determining amount to be raised for interest purposes during any fiscal year).

1017-29 Method of collecting data on which tax levy is to be based for maintenance of high school by board of supervisors may be prescribed by legislature under express constitutional provisions in some jurisdictions. 79CalA 1, 248P1049.

1017-30 Mass 171NE672.

1018-34 30NM602, 240P307 (budget estimate submitted by county commissioners and school budget sent by state educational auditor, together with requests of county commissioners held sufficient to authorize increase of tax levies).

1018-37 79CalA1, 248P1049; 232Mich 639, 206NW573 (estimates furnished by board of education held not subject to reduction by board of estimates). **In levying the tax the board is limited** to determination of legality of different items of expenditure, the legality of purpose for which money is sought to be raised, and necessary rate of taxation including valuation of property as basis of rate. 79CalA1, 248P1049 (high school). **Fiscal court cannot correct** or omit item claimed to be improperly included in budget by county board, where county board acted in good faith. 221Ky106, 298SW185. **Recommendations of county board** in budget, free from fraud and prepared in good faith, are unrestricted except by tax limit. 221Ky106, 298SW185. **Levy in accordance with budget.**-229Ky774, 178SW(2d) 1009.

1018-38 225Ky9, 78W(2d)490; 232 Mich639, 206NW573.

1018-39 Where certificate states excess levy of certain rate was voted by school board, levy not in excess of amount shown to have been authorized is legal, though amount of excess levy shown by certificate is not same but less than shown by report of annual meeting and election. 133 Okl 228, 271P253. **Judgment for levy of tax to produce amount deducted from budget** held proper after jury finding that disputed amount was needed. 198NC430, 152SE 156.

1019-43 Office of assessor is not created or authorized under some statutes. **TexCommnA** 26SW(2d)196.

1019-52½-New. Taxes for educational purposes extended at excessive rates invalid. 316 Ill 410, 147NE492.

1019-52½-New. Amendment to existing statute authorizing levy at higher maximum rate not retrospective. 316 Ill 410, 147NE492.

1020-61 District limited to assessment valuations of state and county only when district collects taxes by state or county assessor. **TexCivA** 272SW559.

1020-64 140Miss137, 106S435 (separate assessment of property in district is sometimes required in case of consolidated district tax).

1021-65 140Miss137, 106S435.

1021-67 TexCivA 280SW260. **Error of clerk with whom estimate was filed in extending taxes in wrong column of tax book** does not invalidate taxes. 309Mo 291, 274SW456.

1021-70 TexCivA 280SW260.

1021-71 TexCivA 280SW260.

1022-82 69CalA437, 231P598 (notice in list of delinquent taxes construed to describe property as within Pasadena school district).

1022-83 69CalA437, 231P598 (indefiniteness of map of subdivision where property was situated held not to invalidate assessment).

1022-88 TexCivA 282SW905.

1022-92 Valuation for state and county purposes as limitation.-**TexCivA** 280SW 260.

1024-12½-New. Failure to swear to and certify roll within statutory time does not vitiate entire assessment where rolls were completed and delivered to tax collector within such time. **Tex CivA** 280SW260.

1024-15 See also **TexCivA** 282SW905.

1024-19½-New. Proceeding nunc pro tunc to amend records of board of review to show valid tax levy is unauthorized where it constitutes attempt to render new and different judgment. 215Ala418, 110S799.

1024-20 Action of state tax board in ordering increased amount of bonds after submission of bids held not to invalidate proceedings where matter was still pending before board. 85 IndA663, 155NE516. **Determination of state tax board** fixing amount of bonds is final but does not prevent subsequent proceeding to have larger amount fixed. 85 IndA663, 155NE516. **Trustees must appoint equalization board** where they exercised discretion to have taxes assessed by special assessor. **TexCivA** 30SW(2d)703. **School trustees** have been held not qualified to act as board. **TexCivA** 30SW(2d)703. **Trustees sitting as equalization board** do not have de facto status. **TexCivA** 30SW(2d)703. **School tax board of equalization** have large discretionary powers. **TexCivA** 31 SW(2d)659. **Board of equalization in fixing assessment** could consider amount of revenue necessary to be raised. **Tex CivA** 31SW(2d)659.

1024-22 TexCivA 31SW(2d)659.

1025-35½-New. Sheriff admitting liability for 1920 taxes and paid over such amount, he could not thereafter claim monies should be applied to taxes of 1921. 208Ky469, 271SW560.

1025-35⅓-New. School district is not required to accept tender of less than amount of taxes due in full settlement. **TexCivA** 282SW905.

1026-36 323 Ill 281, 154NE127.

1026-38 35 OklACR506. **Interest** is not recoverable under some statutes. 35 Okl ACR506.

1026-42½-New. Taxpayer cannot recover taxes paid under protest where they were rightfully collected. 222App Div320, 226NYS145.

1026-44 State revenue agent may collect school taxes, such taxes not being purely local or municipal. 220Ky89, 294SW815. **Office of collector** is not created or authorized under some statutes. **TexCommnA** 26SW(2d)196. **Construction of particular statutes.**-14Pa Dist&Co 241.

1027-45 99Fla358, 127S319 (constitution held not to prevent collection of school taxes by county officers).

1027-46 11PaDist&Co 259; **TexCommnA** 26SW(2d)196 (legislature held to have had power to impose duty on collector of city taxes). **County treasurer must account to school district** for all taxes assessed and levied by it and penalties thereon. 14PaDist&Co 241.

1027-47 Bond of tax collector, etc. 208 Ky469, 271SW560.

1027-51 Where creation of independent school district is void, tax collector is justified in refusing to collect taxes levied. **TexCommnA** 248W(2d)37.

1027-51½-New. Interest on penalties.-Allowance of interest on penalty for failure to pay taxes when due has been held erroneous. **TexCivA** 275SW729.

1029-72 See also 316Mo 21, 296SW806.

1029-77½-New. Lapse of year prevents questioning order detaching land from district in action to recover school taxes from district to which it was annexed. 170Minn32, 211NW960.

1029-77½-New. Statutes of limitation for collection of taxes. 118Tex655, 23 SW(2d)690.

1029-78 Constitutional provision that school funds shall be for exclusive use of public schools does not forbid payment therefrom of reasonable commissions for collection. 99Fla358, 127S319. **Expense of collection is not state purpose.**-99Fla358, 127S319.

1029-79 220Ala453, 125S906. **Commission determined by board** is controlling though reached after collection. 14Pa Dist&Co 380. **Collector not entitled to fees or commissions on taxes returned** to county commissioners for collection. 14PaDist&Co 241.

1030-86½-New. In a suit for a judgment for delinquent taxes, where the trial court sustained an objection to a school district tax not legally levied, but subsequent proof showed that the tax had been paid, it was held error to order judgment for such tax. 319 Ill 415, 150NE247.

1030-86½-New. Collection of penalty authorized by statute on unpaid taxes. 14PaDist&Co 241.

1030-89 Liability of sheriff in action by school board to surcharge sheriff's settlement. 233Ky728, 26SW(2d)1041.

1031-91 Interest.-215Ky344, 285SW 204. **Determination of liability of sheriff in suit against him for taxes collected.**-232Ky802, 24SW(2d)597.

1031-92 Extent of surety's liability. Where fiscal court of county, in return for payment of money from surety on sheriff's official bond, discharged surety from all claims thereon, and assumed liability to pay over to board of education excess commissions retained by sheriff, surety, on recovery of judgment against it by board of education for amount of excess commissions, was entitled to recover over from county. 228Ky362, 15SW(2d)287. **Fiscal court of county held without authority to release surety** on sheriff's bond from liability to school board for amount of commissions retained by sheriff in excess of reduced commission allowed for collection of school taxes. 228Ky362, 15SW(2d)287.

1031-93 Penalty refers only to state taxation and has no application to county district taxation. 233Ky728, 26SW (2d)1041.

1032-97½-New. In action to surcharge settlement of sheriff's account with county board of education, it was held court should have referred settlement to master with direction to ascertain number of poll tax payers, and charged sheriff with such number, subject to such allowances as had been made by county and fiscal courts, 215Ky344, 285 SW204.

1032-97½-New. and master to whom settlement is referred should determine exact amount of ad valorem tax due county board of education on property in county outside of graded school districts. 215Ky344, 285SW204.

1032-99 See also 316Mo 21, 296SW 806.

1032-3 In Texas.-**TexCivA** 23SW(2d) 459.

1033-8 See also 316Mo 21, 296SW806.

1033-8½-New. While collector must exhaust every means to collect from personalty, his failure to do so will not invalidate any proceedings against land. 14PaDist&Co 241.

1033-11½-New. Objection based on judgment subsequently reversed properly overruled. 322 Ill 185, 152NE601.

1033-11½-New. Statute limiting defenses to tax suits held not to deprive defendant of right to set up defense that land was not within district on first day of year for which levy was made. **TexCivA** 285SW345.

1033-11½-New. Taxpayer tendering taxes due under original rendition, refusing to pay amount fixed by trustees sitting as equalization board is not liable. **TexCivA** 30SW(2d)703.

1033-20 TexCivA 292SW964. But see **TexCivA** 16SW(2d)130(2dcase). **Evidence held sufficient.-TexCivA** 285SW 345. **Evidence held insufficient.-Tex CivA** 12SW(2d)1094.

1033-20½-New. In a proceeding to collect delinquent taxes, question of organization of district cannot be considered. 316 Ill 561, 147NE392.

1033-20⅓-New. Evidence held sufficient to show that taxes were levied and extended for consolidated school district and not for prior absorbed district. 309 Mo 291, 274SW456.

1033-20¼-New. In suit by school district for delinquent tax, verdict held not contrary to evidence. **TexCivA** 292 SW964.

1033-20½-New. Testimony as to value at which state and county assessed lands for same year was properly excluded. **TexCivA** 14SW(2d)1051.

1033-20¾-New. Burden was on defendant to establish his allegation that school district assessor and its board of equalization had willfully, arbitrarily, and unlawfully refused or neglected to assess certain other property in district for taxes. **TexCivA** 12SW(2d) 1094.

1033-20⅞-New. Evidence insufficient to show valid order levying tax. **TexCivA** 22SW(2d)475(2dcase).

1033-20⅞-New. Judgment providing each tract should be sold to satisfy portion of tax judgment, but not containing method for ascertaining tax chargeable against each tract could not be sustained. **TexCivA** 27SW(2d)918.

1034-32 164Ga143, 137SE766; 228Ky 652, 15SW(2d)452; **TexCivA** 278SW 516 [quotCyc]. **To discharge bonded indebtedness of old district.-TexCivA** 20 SW(2d)214.

1035-33 TexCivA 278SW516 [quot Cyc].

1035-34 TexCivA 278SW516 [quotCyc]. **Property taken into district** after January 1st subject to taxes for full year. **TexCivA** 278SW516.

1035-36 319Mo 486, 4SW(2d)436; **Tex CivA** 278SW516 [quotCyc]. See also 164Ga143, 137SE766.

1036-33 TexCommnA 3SW(2d)420; **Tex CivA** 287SW147. **New election necessary.-**164Ga143, 137SE766.

1036-40 TexCommnA 3SW(2d)420.

1036-44 Can [1925] 2**DomLR**685.

1037-53½-New. Supreme court on appeal cannot revise levy of school tax for sinking fund made pursuant to statute within limit allowed by statute and constitution. 311Mo 349, 278SW74.

1037-53⅓-New. Tax levy based on funding judgments procured by fraud and collusion may be attacked in court of tax review. 141 **Okl** 291, 285P67.

1037-53¼-New. Taxpayer's right to protect property from unlawful tax has been held not dependent on right to maintain statutory suit to contest election. **TexCivA** 28SW(2d)887.

1037-56 173Ark82, 291SW1006.

1037-61 TexCommnA 290SW152 (taxpayers held entitled to injunction where acts of board invalid by reason of disqualification of two trustees). **Intervention of jury** held not necessary to determine motion, on pleading and affidavits, to continue order restraining collection of school tax as illegal on admitted facts. 192NC590, 135SE467. **Limitations.-**166La125, 116S723. **Evidence.-**169Ga709, 151SE481(2dcase); 85Mont141, 277P961(2dcase); 143 **Okl** 170, 287P1023; **TexCivA** 31SW(2d)659. **Long delay in applying for injunction** may be proper ground for refusal. 169 Ga709, 151SE481(2dcase). **Injunction refused for delay** of over six months in commencing suit. **MoA** 30SW(2d)791.

1037-62 161Ga911, 131SE897 (injunction refused as unnecessary); 311Mo 349, 278SW74 (discretion of court); **TexCommnA** 12SW(2d)130; **TexCivA** 10SW(2d)174. **Excess of constitutional limit** of board's indebtedness must be proved by taxpayers seeking to enjoin payment of warrants for erection of school. 203 **Iowa**288, 211NW398.

1038-64 11F(2d)967.

1038-65 Ga 155SE767.

1038-66 85 **IndA**663, 155NE516; 140 **Miss**137, 106S435.

1038-70 But see 311Mo 349, 278SW74.

1038-71 6**PaDist&Co** 193.

1039-73 311Mo 349, 278SW74.

1039-77 311Mo 349, 278SW74.

1039-84 TexCommnA 295SW1091.

1040-85 See also **TexCivA** 21SW(2d) 355.

1040-89 Allegation held immaterial.-TexCivA 272SW559. **Petition held insufficient** where not stating amount of tax levy against plaintiff's property. 311Mo 349, 278SW74 (in view also of laches in bringing suit). **Petition held sufficient.-Ga** 155SE767. **Amendment of petition.-Ga** 155SE767.

1040-90½-New. In suit to enjoin collection of taxes by independent school district, in which defendant did not ask or obtain any judgment for taxes, it was immaterial that there was no order, ordinance, or resolution authorizing or directing institution of suits for collection of taxes. **TexCommnA** 12SW (2d)130.

1041-6 The words "for building purposes," etc. 337 Ill 281, 169NE188. **Building purposes not included in maintenance and support.-**207**Cal** 473, 279P 447.

1042-10 325 Ill 268, 156NE283.

1043-22½-New. It has been held that construction and maintenance of schools is ordinary charge of government to meet which ordinary taxes, not special assessments, must be resorted to. 161 **La**803, 109S496.

1043-24 136SC345, 134SE380.

1043-25 202**Cal** 650, 262P1092.

1043-26 31F(2d)155; 202**Cal** 650, 262 P1092; 79**CalA**1, 248P1049; 130**Kan** 509, 287P262 (statute of procedure to increase school district tax held not applicable to high school districts); 136 SC345, 134SE380. See also **CalA** 288P 799. **Statute providing for maintenance and support of junior college** by levy on property in district has been held constitutional. 169**La**646, 125S841.

1043-27 92**CalA**636, 268P686. **Board of supervisors' discretion** does not extend to determination of policy, wisdom or expense of maintaining a high school, as they are matters which devolve on the board of school trustees. 79**CalA**1, 248P1049.

1044-31 142 **Okl** 110, 285P953 (amount of interest coupons required to be apportioned to certain years in which tax leviable); 151SC99, 148SE726 (authorizing statute not unconstitutional); **Tex CivA** 20SW(2d)214 (that schoolhouse of old district is almost worthless will not invalidate tax to pay schoolhouse bonds). **Annual levy is authorized** under some statutes to pay annual or semi-annual interest as it falls due. 42 **Okl ACR**291. **Levies for interest on sinking fund indebtedness or bonds** cannot be omitted for current year and levied for subsequent year. 141 **Okl** 291, 285P 67.

1044-32 42 **OklACR**291. **Requirement of annual levies.-**117 **Okl** 129, 245P617. **Time for beginning levy for sinking fund.-**42 **OklACR**291. **Number of levies** for sinking fund purposes depends upon date of issuance and maturity of bonds and equals number of fiscal years intervening. 141 **Okl** 291, 285P67; 142 **Okl** 1, 285P73.

1044-36½-New. School district with less than 200,000 population can levy taxes for educational and building purposes only, but not to pay bonded indebtedness for school building. 338 **Ill** 382, 170NE223.

1044-36⅓-New. d. Other Purposes. Commissioner of education may direct board of education of union free school district to provide for transportation of children in remote districts by levy of tax. 243NY204, 153NE49.

1045-47 35 **OhA**194, 172NE415; 148**Va** 661, 139SE262. **If levied for a special purpose,** etc. 148**Va**661, 139SE262. **Payment of debts previously incurred.-**162**Ga**58, 132SE427. **Act governing cities of first class** indicates legislature intentionally omitted authority to equip schools out of bond issues. 229**Ky**325, 17SW(2d)210.

1046-48 Ga 155SE489.

1046-49 148**Va**661, 139SE262.

1046-52½-New. Taxes collected by school district from lands not within boundaries held not recoverable by district in which lands are situated. 104**CalA**444, 285P1091.

1047-59 Under Rev. St. (1919) § 11223, money received from railroad taxes and money remaining in school district treasury go only to teachers' fund. **MoA** 294SW107.

1047-70 26 **OhNPNS**33.

1048-72 192**Wis**283, 212NW783.

1049-89 Trustees of rural high school district will not be enjoined from using funds for any purpose other than maintaining schools in elementary districts and paying indebtedness of such districts in absence of actual or threatened violation of law or abuse of discretion. **TexCivA** 280SW260.

1049-90½-New. School district cannot recover funds erroneously distributed and consumed for educational purposes, by another district. 173**Ark**781, 293SW 722.

1049-90⅓-New. Remedy in such case is to enjoin by injunction, or, sue for erroneously receiving funds before they are expended. 173**Ark**781, 293SW722.

1049-90¼-New. Liability of county.- In Oklahoma county is not liable for money collected by county treasurer belonging to common school district, and by him erroneously apportioned to another common school district. 134 **Okl** 140, 272P468.

1049-92 See also 136**Misc**921, 244**NYS** 38.

1049-94 169**Ga**240, 150SE206(2dcase) (to compel accounting); 43 **OklACR**62; 171**Ark**385, 284SW764; 123**Kan**495, 501, 256P149 [citCyc]. See also 163**La** 213, 111S681. **Recovery of money illegally paid to school board members.-** 240**Mich**515, 215NW333.

1049-96 123**Kan**495, 501, 256P149 [cit Cyc].

1049-97 Compelling payment of indebtedness of disorganized district.-135 **Okl** 29, 273P271.

1049-97½-New. Recovery of money which has been illegally paid by town to trustees of academy and high school is not authorized by Gen. L. § 53 c 40. 252**Mass**258, 147NE878.

1049-97⅓-New. Where taxpayer has remedy to review school tax under Tax Law, he is precluded from bringing certiorari under New York Civil Practice Act. 128**Misc**346, 218**NYS**586.

1049-97¼-New. Taxpayer cannot recover money paid on contract for school building without full compliance with law, where township trustee acted in good faith in paying money appropriated for building and obtained for township full value for all money expended. 197 **Ind**128, 150NE18.

1049-97⅙-New. Mere fact that plaintiff is taxpayer does not give him standing to question action of public authorities when such action does not work any expenditure of public funds. 202 **Iowa**701, 210NW947, 49**ALR**705.

1049-97⅛-New. Hence a bank taxpayer within school district cannot enjoin operation of banking and thrift system in public schools where no portion of public funds are expended in carrying out such system. 202 **Iowa**701, 210NW 947, 49**ALR**705.

1049-97⅐-New. School district having needed school site in growing part of city for future use, and having bought one at fair and reasonable price, so far as appears, and having built on it, taxpayers will not be allowed, merely because of illegality of contract, on account of member of school board being personally interested in sale, to recover for district money paid by it for lot. 320Mo 665, 8SW(2d)63.

1049-97⅛-New. Taxpayers and trustees of common school district held to have authority to maintain suit against county board of trustees to set aside order grouping their district with anoth-

er school district, where new district had not been created or put in operation without first taking appeal to state superintendent. **TexCivA** 158W(2d)144 (2dcase).

1049–97⅕–New. Taxpayers may urge irregularities in preliminary election proceedings and appointment of trustees, failing in which election is conclusively presumed valid. **TexCivA** 168W(2d)424.

1049–97⅒–New. Lapse of six years held not to preclude taxpayers from attacking annexation of territory under repealed statute. 235Ky75, 298W(2d)648(2dcase).

1049–97⅓–New. Proper method for testing validity of organization of rural high school district is by quo warranto in name of state. **TexCivA** 238W(2d)504.

1050–99 325Ill268, 156NE283; **NC** 155NE550. **Appeal to commissioner held unnecessary** as condition to suit in courts where taxation is involved. 128Misc42, 217NYS751.

1050–1 235IllA35; 202Iowa701, 210NW947, 49ALR705; 52ND351, 202NW807; **TexCivA** 300SW211. **Petition held sufficient** as not stating ground for injunction. **TexCivA** 287SW693.

1050–2 169Minn15, 210NW856 (taxpayer cannot enjoin performance of contract illegal as to district but expressly binding by statute on members of school board individually). **Injunction will not lie at suit of taxpayer to prevent performance** of contract which imposes no obligation on district. 169Minn15, 210NW856. **Recovery on injunction bond for improper delay in performance** by injunction may be had by contractor. 169Minn15, 210NW856.

1050–4 Burden of proof.–216Ky266, 287SW735.

1050–5 160Ga268, 127SE868 (injunction denied); 169Ga240, 150SE206(2dcase); 235IllA35; 203Iowa1016, 213NW593; 167Minn45, 208NW409 (injunction will lie at suit of taxpayers, to restrain calling election under unconstitutional law); 116Tex183, 288SW159.

1050–6 173Ark892, 293SW1035 (no grounds for injunction since no valid challenge of board's power); 93Fla470, 112S253; 117Okl172, 245P848 (issuance of bonds voted at election called pursuant to petition not signed by requisite number of electors). **Pending contest involving titles to municipal offices filled at election at which bonds were voted** does not give court of equity jurisdiction to enjoin issuance of bonds. 213Ky756, 281SW1031. **Refusal to enjoin issuance of bonds till petition to county board of education for dissolution of district was determined** held proper. 173Ark892, 293SW1035. **Fraud and irregularity in election** on question of issuance of bonds is not ground for enjoining issuance of bonds and levying tax therefor at suit of taxpayer. **Mo** 22SW(2d)800.

1050–7 123Kan325, 255P87.

1050–7½–New. Provision of law that rules of board of education are reviewable only by commissioner of education does not apply to suit to enjoin improper use of funds; 125Misc692, 211NYS822.

1050–7⅓–New. or to determination of constitutional questions; 125Misc692, 211NYS822.

1050–7¼–New. or illegal acts of officials. 125Misc692, 211NYS822.

1050–9 145Miss747, 110S775; **TexCivA** 108SW(2d)216.

1050–10 **TexCivA** 281SW574; **TexCivA** 108SW(2d)216.

1050–10½–New. Taxpayer's suit to restrain payment of balance and recover money paid on repair contract may not be maintained because of unlawful arrangement with member of board of education, where such arrangement was entered into in good faith, work was properly done, and no loss to city resulted. 126Misc622, 214NYS264.

1050–10⅓–New. Action to annul annexation proceedings and enjoin collection of taxes on annexed property may be maintained by owners of property in territory unlawfully annexed. 50SD311, 210NW51.

1050–10¼–New. Obtaining leave to maintain action after action had been commenced held substantial compliance with statute. 50SD311, 210NW51.

1050–10⅕–New. Under some statutes order of joint committee of two members of board of county commissioners and superintendent of schools annexing unorganized territory to school district is not order made by board in matter properly before it within statute authorizing appeal so as to bar action to annul proceedings and enjoin taxation of annexed property. 50SD311, 210NW51.

1050–10⅙–New. Any right of taxpayers to sue officers of school district to restrain waste of public funds is statutory. 220AppDiv204, 220NYS615.

1050–10⅐–New. When petition was inadequate to justify injunction to restrain school district from changing location of school, it is immaterial whether district obtained permission from state board of education to make exchange of properties. **TexCivA** 287SW693.

1050–10⅛–New. Taxpayers seeking to restrain removal of school failing to allege that board of trustees acted secretly are presumed to have had notice of order of removal and contract for new school. **TexCivA** 287SW693.

1050–10⅑–New. Taxpayers, delaying appeal from order changing location of school for two weeks during which two innocent parties exchanged their property for school and contracts were entered into, will be denied injunction to restrain removal of school pending such appeal. **TexCivA** 287SW693.

1050–10⅒–New. Fact that taxpayer may prevent board from improving with public funds property subject to reversion on abandonment for school purposes does not prevent board from defending its title thereto. 214Ky284, 283SW99.

1050–10⅓–New. In suit to restrain further proceedings in erection of school buildings whether constitutional limit of indebtedness has been exceeded is not in issue. 325Ill268, 156NE283.

1050–10½–New. Decree authorizing cancellation of bond issue authorized by people held invalid. 325Ill268, 156NE283.

1050–10⅓–New. Taxpayers who did not sign any petition for consolidation of school district and did not participate therein are not estopped from bringing action to restrain such consolidation. 150SC391, 148SE218.

1050–10¼–New. Where plaintiffs' right to enjoin removal of district schoolhouse depended on valid existence of school district, fact that county was not laid off into school districts, would not entitle plaintiffs to temporary injunction. 168Ga301, 147SE571.

1050–10⅕–New. Acts of board of education, de jure or de facto who failed to take oath, could not be annulled in taxpayers' action to restrain school construction. NC 155SE550.

1051–13 Mont 287P624; **157Tenn**316, 7SW(2d)990. **Pleading.**–157Tenn316, 7SW(2d)990.

1051–20 Necessity of showing increased burden of taxation.–159Tenn591, 21SW(2d)721.

1051–22½–New. Taxpayers, without demand on board of education to take charge of building school building, are not entitled to injunction restraining county court from proceeding with construction through building committee. 159Tenn591, 21SW(2d)721.

1051–22⅓–New. One with knowledge not having objected, may be estopped to restrain completion of building already half completed. 131Or448, 283P18.

1051–23 160La1011, 107S783; 167Minn45, 208NW409 (in suit to restrain calling of election under unconstitutional law petitioners for election are not necessary parties). **Parties.**–52ND351, 202NW807.

1051–24 161La67, 108S127. **Bill by taxpayer or patron of school** having only general public interest to enjoin **public officer from dealing with proceeds of bond issued** must allege suit is brought on behalf of general public and failure to secure action by public officers. 145Miss747, 110S775. **Petition held to show notices of election** complied with law. **TexCivA** 283SW535. **Bill to enjoin issuance of school bonds held demurrable for failure to show** district sought to accomplish indirectly what constitution prohibited to be done directly. 99Fla936, 128S827(2dcase). **Complaint held sufficient** in absence of motion to make more specific. **Ind** 169NE51. **Petition held insufficient.**–Mo 22SW(2d)800; 159Tenn591, 21SW(2d)721 (suit to restrain expenditure of funds for school building).

1052–29 See also 88IndA420, 164NE292.

1052–36½–New. Where majority of directors adopt for district taxpayer's complaint and pray for recovery accordingly, action is one by district and it is immaterial whether taxpayer was entitled to institute action. 135Wash233, 237P505.

1052–36⅓–New. In action against township trustee to recover money expended for school building, evidence held to sustain finding that trustee acted in good faith in making expenditures. 197Ind128, 150NE18.

1052–36¼–New. Where final payment to contractor was not duly authorized, jurisdiction over subject matter is not divested. 160La1011, 107S783.

1052–36⅕–New. In action by taxpayer to enjoin payment of part of contract price on ground of fraud, contractor cannot raise claim of estoppel when action was begun before final payment and no showing of good faith is made. 160La1011, 107S783.

1052–36⅙–New. Fraud shown in padding bid for school construction. 160La1011, 107S783.

1052–36⅐–New. Judgment enjoining payment to contractors held not to preclude action by school board against contractor. 160La1011, 107S783.

1052–36⅛–New. Evidence held sufficient to sustain finding that school board purchased land from owner thereof and not from member of board 316Mo881, 292SW21.

1052–36⅑–New. Evidence held insufficient to show that director made profit on land sold to school board for high school. 316Mo881, 292SW21.

1052–36⅒–New. In suit to enjoin issuance of school bonds, evidence was held sufficient to go to jury on value of assessed property. **TexCivA** 299SW913.

1052–36⅓–New. Finding of county's adoption of plan of organization of schools and consolidation of school districts thereunder held supported by evidence. 195NC56, 141SE538.

1052–36½–New. In suit to declare change of school district boundary lines invalid, evidence of clerk's motives in fixing boundaries is irrelevant. **MoA** 16SW(2d)598.

1052–36⅓–New. If there could be recovery for school district of money paid by it for schoolhouse site because member of board was personally interested in sale, district would be bound under equitable principles to restore possession of land to rightful owners. 320Mo665, 8SW(2d)63.

1052–36¼–New. Loss of status as resident taxpayer.–Action brought by resident taxpayer to recover twice amount of school funds illegally paid out must be dismissed where plaintiff, before judgment, removes from district and thereby loses his status as resident taxpayer. 140Okl206, 282P459.

1052–39 In New York.–249NY16, 162NE570.

1053–40 Duty of school board to audit and allow claims cannot be delegated to any other person or officer. 201Iowa286, 207NW124. **Compromise of contractor's unliquidated damages claim,** against board of education, is an "audit" within statute. 129Misc671, 222NYS355. **School district is not included in word "municipality"** as used in statute requiring verified itemized statement before allowance of claim against mu-

nicipality. 175Minn201, 220NW606.
1053-41 Interest.-128Misc853, 220NYS 312.
1053-45 127Misc492, 216NYS501.
1053-47 But see 224AppDiv286, 229 NYS715.
1054-49½-New. Bringing action to enforce claim against school district is sufficient ratification by board of education of appeal taken by clerk to commissioner of education. 125Misc230, 211NYS413.
1054-49⅓-New. School district cannot question act of commissioner of education in ordering it to pay claim. 125 Misc230, 211NYS413.
1054-50 161Ga780, 132SE436. **Board of education of independent school district** cannot sue or be sued as such. SD 229NW522.
1054-53 32Ariz124, 256P362; CalA 279 P1032; 220MoA322, 286SW136; 129 Or 248, 275P917; 132 Or673, 288P196.
1054-54 93Fla182, 111S521.
1054-57 220MoA322, 286SW136 (may sue county treasurer to recover school funds illegally paid out).
1055-59 93Fla182, 111S521. **Power to bring actions to preserve and protect property of school district** is in board of education of district. Nebr 231NW 689.
1055-61 215Ala587, 112S195; CalA 279 P1032.
1055-66½-New. Taxpayer may enjoin illegal use of funds by directors. 224 IllA550.
1055-66⅓-New. Rights of action and defenses.-The right of public school district to recover or maintain action for transfer fees contemplated by statute is dependent upon estimate made and approved in which is included item to pay such transfer fees. 135 Okl 270, 276P 186.
1055-68 295Pa112, 144A901; TexCivA 31SW(2d)679. But see 155Tenn212, 292 SW462.
1055-69 206 Iowa1144, 221NW793.
1055-70 Laches.-218Ky742, 292SW310.
1056-80 Members sued "as constituting board of education" are sued as body, not as individuals. 125Misc692, 211 NYS822.
1057-85 School committee held not necessary party to suit between county board of education and county commissioners in action to require commissioners to provide funds to maintain county school. 192NC274, 134SE852.
1057-88 Iowa 230NW413 (another school district held necessary party); TexCivA 9SW(2d)506. **In taxpayers' suit to compel accounting** for fund raised by taxation, district treasurer and his predecessors are properly joined as defendants. 169Ga240, 150SE206(2d case).
1058-98½-New. Officers whose duty it is to do acts sought to be restrained are usual and proper parties to injunction suit. 125Misc692, 211NYS822.
1059-4 In action against city for heating system furnished to board of education cause of action held stated. 161 Ga780, 132SE436. **Petition held sufficient** in action to recover public money. 24 OhA428, 157NE766.
1059-5 88 IndA61, 163NE121. **Complaint or petition held sufficient.**-179 Ark195, 14SW(2d)1110; CalA 279P 1032.
1059-6 Complaint against city founded on quantum meruit held demurrable where board of education of city had no power to contract for school heating system. 161Ga780, 132SE436.
1059-7 117Nebr6, 219NW583.
1061-23 CalA 290P540; 216Ky525, 287 SW973 (holding evidence of contract with predecessor of plaintiff superintendent competent where agreement was to serve under same terms). **Report of bureau of inspection** held competent in action to recover public money. 24 OhA 428, 157NE766. **Evidence held admissible.**-CalA 279P1032.
1061-24 263Mass364, 161NE599. **Evidence held sufficient.**-221Ala483, 129S 42; 208Cal 770, 284P1105(2dcase); 92 CalA44, 267P918; 126Kan424, 268P841; 216Ky525, 287SW973; 175Minn201, 220 NW606; 177Minn454, 225NW449; 84 Mont461, 277P9; 125Misc589, 211NYS 788; TexCivA 23SW(2d)829; 104WVa 80, 138SE761. **Evidence held insufficient.**-170Minn83, 212NW25.
1061-26 Contract creating indebtedness in excess of limitation.-192Wis283, 212 NW783.
1061-27 Directing verdict.-170Minn83, 212NW25. **Question for jury.**-92CalA 44, 267P918. Negligence of school district in permitting piano used in school gymnasium to rest in insecure position on dolly is for jury. 98CalA138, 276P 424. **Questions of fact.**-38 OklACR317 (work included in contract). **Instruction held properly to present issue** in action by superintendent for compensation. 216Ky525, 287SW973. **Authority of controlling architect** to order certain payments could not be denied as matter of law. 34F(2d)751. **Instructions held proper.**-CalA 279P1032. **Instructions held erroneous** as to extent of liability, since statute sets measure thereof. CalA 279P1032.
1063-39 58ND934, 228NW435.
1064-51 178Ark260, 10SW(2d)374; 144 Okl 102, 290P190.
1064-53 In Kentucky.-219Ky565, 293 SW1063. **Age.**-129Kan196, 281P908.
1065-62 219Ky565, 293SW1063.
1065-63 219Ky565, 293SW1063.
1065-65½-New. Under statutes question of teacher's competency is determinable only by county superintendent of schools. Mo 23SW(2d)1013.
1066-73 Possession of life diploma does not confer right to pick out any school in state and demand employment. 104 CalA647, 286P482.
1066-77 245 IllA172.
1067-79 In Porto Rico.-32PortoRico 159.
1069-92 In Missouri.-A 26SW(2d)830.
1069-2 Commissioner's dismissal of appeal from ruling denying license held final and conclusive. 227AppDiv262, 237 NYS465.
1070-5 114Nebr795, 210NW151 (no right to refuse on sole ground that applicant is under eighteen years of age).
1070-6 114Nebr795, 210NW151. **Mandamus does not lie** pending rehearing after appeal to commissioner of education. NJSup 135A790.
1070-7 202Cal 299, 260P789; 225Ky 669, 9SW(2d)1002.
1070-8 45 Ida107, 260P1031.
1071-9 45 Ida107, 260P1031, 1032 [cit Cyc].
1072-24 219Ky49, 292SW483.
1073-36 See also 320Mo 877, 8SW(2d) 881.
1074-52 202Cal 299, 260P789. **Power to employ teachers in classes** necessarily implies power to classify. 202Cal 299, 260P789. **County board** must elect teacher recommended by subdistrict trustee. 222Ky514, 1SW(2d)977. **Power of county board** held exclusive. 169 Ga667, 151SE479.
1075-54 226Ky613, 11SW(2d)431; 5 LaA570. **In Georgia.**-161Ga637, 131SE 358. **Recommendation by subdistrict trustee.**-217Ky561, 290SW329. **Vote of de facto member of school board counted.**-165La552, 115S747. **Local board's power of appointing** is absolute and subject only to county board confirmation. 153SC222, 150SE776.
1075-56 Patrons.-175Ark274, 299SW11.
1076-64½-New. In California, under statute, "probationary" teacher is reelected and reëmployed annually until entitled to classification as "permanent" teacher. 68CalA403, 229P881.
1076-64⅓-New. Number of teachers to be employed may be determined by voters at annual school meeting. 121Kan 573, 249P594.
1076-64¼-New. Some statutes authorize appointment of same person as both high school and elementary school principal. 88CalA731, 264P273.
1076-64⅕-New. Failure of board of trustees to classify teacher as permanent teacher did not prevent operation of law in making such classification. 98 CalA6, 276P377.
1076-65 219Ky573, 293SW1058; 216 AppDiv562, 216NYS205; 153SC222, 150 SE776. But see 225Ky669, 9SW(2d) 1002. **Discretion held properly exercised.**-219Ky573, 293SW1058. **County board of education was under mandatory duty** to elect teacher nominated by subdistrict trustee. 226Ky613, 11SW (2d)431. **Appeal does not lie** to county board by teacher and parents for local board's failure to renew expired contract. 153SC222, 150SE776. **Local board's action** properly sustained by state board. 153SC222, 150SE776.
1076-67 219Ky573, 293SW1058; 216 AppDiv562, 216NYS205; 198Wis320, 224NW119.
1076-69½-New. County board of education cannot elect teachers on any recommendation other than that of subdistrict trustee, without giving such trustee ample opportunity to make nomination. 226Ky613, 11SW(2d)431.
1076-69⅓-New. The county board has no jurisdiction of an appeal from a local board's decision not to reëmploy certain teachers. 153SC222, 150SE776.
1077-76 69CalA533, 232P480 (authority given to county superintendent of schools to employ supervising teachers is not unlawful delegation of power to fix salaries of public officers); 160Ga 480, 128SE669 (county boards of education have exclusive power); 236Mich 57, 209NW849 (primary school board may hire extra teacher on establishing eleventh grade); 153SC222, 150SE776 (local board of trustees); 161Tenn324, 30SW(2d)250 (chairman and superintendent). **Board of education of independent school district** has such power to employ educational staff as is conferred by statute. 115 Okl 48, 241P787. **In Georgia.**-160Ga480, 128SE669. **Teacher signing contract is bound to know** whether or not officer was authorized to employ her, where directors had closed school. 206 Iowa1139, 221NW 833. **School trustees,** though they may fix salaries, make suggestions and recommend applicants held without power to employ teachers or contract for their services. 169Ga667, 151SE479. **Relation between district and teacher** is that of employer and employee. CalA 291P 276.
1077-77 Miss 130S754; 115 Okl 48, 241P 787. **Where common school is converted into high school.**-213Ky366, 281SW168. **That electors failed to provide** for longer term than statutory minimum does not preclude directors of consolidated district from contracting with teacher for longer than minimum school term. 180Ark840, 23SW(2d)263. **Local board's original power** of appointment is exclusive and county board may only confirm or reject. 153SC222, 150SE776.
1077-78 85Colo 505, 277P466. **County board is powerless** to order local board to reëmploy particular teacher after contract expires. 153SC222, 150SE776.
1077-79 CalA 291P276; WVa 155SE 647.
1078-85 Premature contract.-115 Okl 48, 241P787.
1078-90 Contract cannot be arbitrarily canceled without consent of superintendent. 142Miss510, 107S657.
1079-92 Notices offering teacher under contract, same position at a reduced salary, do not terminate contract. Alta [1926] 3DomLR288, [1926] 2WestWkly 431.
1079-93 See also 235Ky774, 32SW(2d) 353. But see 84Colo 385, 270P865.
1079-94 94CalA160, 270P725; 216App Div562, 216NYS205. **In Arizona.**-31 Ariz291, 252P509. **Teacher whose services were never declared unsatisfactory held not entitled to contract for following year** as matter of right, power of appointment being discretionary in board. 216AppDiv562, 216NYS205.
1079-96 202Cal 299, 260P789.
1079-97½-New. Under some statutes teacher not notified of reëlection or dismissal after third year is automatically reëlected for ensuing year. Mont 290 P252.
1079-97⅓-New. Under such statute no acceptance notice is required where no notice of reëlection is given. Mont 290 P252.
1080-8 69CalA533, 232P480 (county superintendent of schools held to have authority to appoint and fix salary of

supervising teacher).

1080-9 **In Georgia.**–160Ga480, 129SE669. **County superintendent of schools** in exercise of power to use "emergency and supervision fund" is not given un- [illegible] of public funds and there [illegible] that he will abuse [illegible] 88CalA532, 232P480.

1081-16 [illegible] 88CalA6, 276P377; 138 Okl [illegible] (validity of con- [illegible] location of school [illegible] of pupils in another county in district). **Contract for services to be performed and paid for in subsequent fiscal year** is void when made prior to making and approval of estimate for [illegible] year. 134 Okl 136, 272P 455. **Teacher may rescind** invalid contract [illegible] for lack of considera- [illegible] 88CalA[illegible], 264P273.

1081-21 244 IIIA257, 245 IIIA357; 195 NC[illegible] 144SE744. See also MoA 10 SW 2d 445. **Contract must be filed with** [illegible] 203 Iowa243, 212NW467.

1082-22 [illegible] Iowa243, 212NW467 (pres- [illegible] of board). See 242Mich478, 220 NW[illegible]. **In Missouri.**–217MoA389, 266 SW[illegible]. **Authority of officer signing** [illegible] be shown under statutory provi- [illegible]. 149Wash76, 270P120. **Sufficiency of signature.**–149Wash76, 270P120. **Contract has been held not invalid be-** [illegible] superintendent's refusal to sign. [illegible] Tenn24, 308SW(2d)250.

1082-24 [illegible] Iowa1139, 221NW833; Mo [illegible] SW 2d)1013 (term of employment not [illegible] be limited to duration of [illegible] individuals making up board).

1082-29 151Tenn324, 308SW(2d)250.

1082-31 [illegible] 88CalA533, 232P480 (incorrect [illegible]nation of fund from which pay- [illegible] is to be made disregarded as surplusage); NB [1927] 3DomLR505.

1082-32½-New. Contract, entered into [illegible] county superintendent of [illegible] and his wife appointing her su- [illegible] teacher in schools of county [illegible] annual salary and traveling [illegible] is prohibited by statute and is [illegible] to public policy. 75CalA680, [illegible]P[illegible].

1082-33 171Ark72, 283SW22; 160Ga 480, 128SE669; 169Ga667, 151SE479; [illegible] Iowa243, 212NW467; 221MoA47, [illegible]SW1001; MoA 10SW(2d)665. But see 178Minn422, 227NW351.

1083-36 161Tenn324, 30SW(2d)250 (writing is evidence of agreement).

1083-38 88CalA731, 264P273; 255 IIIA 89; 161Tenn324, 30SW(2d)250; Wis [illegible]NW97. But see 143SC511, 141SE 396. **Formal application,** etc. 217MoA 289, 266SW760. **Contract approved by county superintendent** is valid and binding on district when signed by two members of school board as result of informal meeting of school directors, held without prior notice, at which all directors were present. 118 Okl 59, 246P462. **Formal notice of meeting to employ teachers is not necessary.**–118 Okl 59, 246P462. **Where all members of board meet together,** no notice of meeting is necessary. 118 Okl 59, 246P462. **Prior to annual meeting,** school district board in Kansas, having only such powers as are conferred upon district boards in charge of common schools, has no power to make contract of employment with teacher. 129Kan659, 284P277.

1083-39 194 Wis530, 217NW293.

1084-40 118 Okl 59, 246P462.

1084-44 88CalA731, 264P273, 276 [quotCyc]. See also 132 IIIA102.

1084-45 127 Okl 193, 260P46.

1084-43½-New. **Contracts between teachers and county board of new district unauthorizedly created** are not necessarily void. TexCivA 284SW306.

1084-50 **Iowa** 227NW412 (president must sign contract with teacher employed by sub-director).

1085-52 139 Okl 109, 281P218.

1085-58 171Ark72, 283SW22; 171Ark 285, 284SW764; 206 Iowa1139, 221NW 833. **No estoppel** where board gives timely notice and no services are performed. 88CalA731, 264P273.

1085-59 171Ark385, 284SW764; 174 Ark562, 295SW[illegible].

1085-60 171Ark72, 283SW22; 206 Iowa1139, 221NW833; 127 Okl 193, 260 P46.

1085-61 127 Okl 193, 260P46. **Partial performance.**–171Ark72, 283SW22.

1086-65 99CalA736, 279P493 (permanent teacher under statute is entitled to active employment). **Marriage of permanent teacher** does not warrant her transfer to tubercular institution in another county. 99CalA736, 279P493. **Entirety.**–Teacher's contract is entire contract for period covered. Minn 232NW 329.

1086-66 Miss 130S754; 217MoA389, 266SW760 (construing Rev. St. [1919] §§ 11, 138, 2164). **Teacher's construction of communication from school trustees** as notice of reëlection is not binding on court. Mont 290P252.

1086-68 244 IIIA257; 198Wis320, 224 NW119.

1086-71½-New. **Statute as part of contract.**–Statute providing for appeal by discharged teacher to county superintendent becomes condition of teacher's contract as if written therein. 84Mont 453, 276P26.

1086-71½-New. Statute providing that teacher elected three successive years is deemed reëlected unless notified of dismissal is part of contract. Mont 290P 252.

1086-71¼-New. **Legislative grants and prohibitions** automatically become part of teacher's contract. Iowa 228NW585 (3dcase).

1086-71½-New. In classifying and assigning teacher, school board must act legally and bona fide. 99CalA736, 279 P493.

1086-71½-New. Teacher in consolidated district held not obligated to discontinue teaching merely because average attendance in particular month falls below stated number. Miss 127S696 (2dcase).

1086-71½-New. Board has no power, under statute, arbitrarily to appoint teacher to useless tasks or to unsanitary school or tubercular sanatorium without her consent. 99CalA736, 279P493.

1086-72 203 Iowa26, 212NW368. **Power of school board to remove teacher cannot be contracted away.**–41Wyo 451, 287P308.

1087-74 **Contract provisions contrary to policy of law.**–31Ariz291, 252P509.

1087-75 114 Okl 90, 243P945; 41Wyo 451, 287P308. But see MoA 7SW(2d) 1018. **Power to employ includes power to dismiss** in absence of law expressly or impliedly providing otherwise. 31 Ariz291, 252P509. **In Wyoming.**–39Wyo 442, 273P675.

1087-79 **Refusal to permit teacher to enter upon performance of duties** is dismissal within meaning of statutes in some jurisdictions. 82Colo385, 260P 521.

1088-82 32Ariz96, 255P994; 82Colo 385, 260P521; 142Miss510, 1078657. **Trustee not authorized** to discharge teacher who was hired to teach certain subjects covered by her license which trustee might designate, where trustee requested teacher to teach subjects not covered by her license and in the school she failed to make passing grade. 84 IndA 84, 150NE61.

1088-83 31Ariz291, 252P509; 32Ariz 96, 255P994; 203 Iowa26, 212NW368.

1088-84 **Contract provisions contrary to policy of law.**–31Ariz291, 252P509. **Provision that either party might terminate by notice** held void. 32Ariz96, 255 P994.

1089-86 See also 178Minn422, 227NW 351.

1089-83½-New. **In California** statute of 1921, relative to tenure of teachers' completing two years of successful service, is not retroactive. 68CalA403, 229P 881.

1089-91 31Ariz291, 252P509; 82CalA 330, 255P516; 203 Iowa26, 212NW368.

1090-93 41Wyo 451, 287P308 (family difficulties).

1090-96 **Delay in reporting for duty** does not authorize board to rescind contract or treat it as rescinded or abandoned where time is not of essence in view of practice of employing substitute teachers. 82Colo385, 260P521 (contention that delay is without good excuse not sustained under statute). **Marriage.**–198Wis320, 224NW119. **Refusal to comply with unreasonable assignments** does not authorize board to deprive teacher of her permanent status. 99CalA736, 279P493. **Physical inability to commence services at beginning of school year** and for period thereafter held such failure of performance as to release district. Minn 232NW329.

1090-97 130 Or82, 278P1075, 63ALR 1410 (teacher holding life certificate). **Under some statutes,** inability to comply with order of state department is valid cause for suspension. 119 Oh310, 164 NE228. **Power to provide other work.**–130 Or82, 278P1075, 63ALR1410.

1091-99 But see 31Ariz291, 252P509.

1091-5 31Ariz291, 252P509.

1091-9 39Wyo 442, 273P675. **School board exercises quasi-judicial function** in passing on question of discharging teacher. 203 Iowa26, 212NW368.

1092-10 82CalA330, 255P516; 92CalA 132, 267P713; 203 Iowa26, 212NW368. But see Mass 172NE117. **Strict rules of pleading not applicable** to school boards possessing quasi-judicial power. 203 Iowa26, 212NW368.

1092-17½-New. Where statute does not provide method of removal removing power may adopt its own procedure. 41Wyo 451, 287P308.

1092-17½-New. Proceedings for removal of teacher are remedial rather than penal. 41Wyo 451, 287P308.

1092-17¼-New. Proceedings for removal of teacher are not governed by strict rules of court procedure. 41Wyo 451, 287P308.

1092-18 243NY373, 153NE495.

1093-21 73CalA252, 238P742; 82CalA 330, 255P516; 77Colo 202, 235P351; 82 Colo 385, 260P521. But see 130 Or82, 278P1075, 63ALR1410. **Hearing after void dismissal.**–73CalA252, 238P742.

1093-22 73CalA252, 238P742; 92CalA 132, 267P713; 77Colo 202, 235P351; 82 Colo 385, 260P521; Iowa 228NW585(3d case). **Statute providing for discharge of teacher for cause is part of teacher's contract** and teacher has no right to hearing other than that provided for. Iowa 228NW585(3dcase). **Written notice** is not necessary where teacher has knowledge of cause of removal and appears at hearing. 41Wyo 451, 287P308.

1094-23½-New. **Informality concerning matters of evidence and procedure** does not defeat jurisdiction of board to act. Iowa 228NW585(3dcase).

1094-24 **Teacher cannot voluntarily** abandon contract. MoA 7SW(2d)1018. **Voluntary abandonment shown.** MoA 7SW(2d)1018.

1094-26 105WVa81, 141SE515.

1094-30 MoA 7SW(2d)1018.

1094-33 117 Oh1, 157NE482.

1094-35½-New. Statutes in some jurisdictions provide that nothing therein shall be construed as to deprive any teacher of his rights and remedies in court of competent jurisdiction on questions of fact and law. 73CalA252, 238P 742.

1094-35½-New. Under such statute, upon discharge of teacher for any alleged cause, he is entitled to maintain action to determine truth or falsity of charges preferred against him. 73CalA 252, 238P742.

1095-36 203 Iowa26, 212NW368; 117 Oh1, 157NE482, 485 [quotCyc]; 41Wyo 451, 287P308. **Jurisdiction and extent of power** of school board are reviewable by court. 203 Iowa26, 212NW368.

1095-37 127 Okl 193, 260P46. **Collateral attack.**–117 Oh1, 157NE482.

1095-38 Iowa 228NW585(3dcase); 243 NY373, 153NE495; 136Misc76, 240NYS 291. **In Iowa.**–203 Iowa26, 212NW368. **State superintendent cannot dismiss appeal from teacher's discharge** and at same time make it effective as disapproval or reversal of order appealed from. Iowa 231NW325.

1095-39 243NY373, 153NE495; 136 Misc76, 240NYS291.

1095-40 136Misc76, 240NYS291. **In Alberta.**–Alta [1929] 4DomLR425.

1095-40½-New. Where school teacher accepted notice of discharge from director and considered herself discharged

by ceasing to perform services from that time on, giving of official notice of discharge by board of education was unnecessary. 198Wis320, 224NW119.

1095-41 82Colo 385, 260P521; 203 Iowa 26, 212NW368; 39Wyo 442, 273P675. **Time to sue.**-32Ariz96, 255P994. **Failure to pursue statutory remedy.**-84Mont 453, 276P26.

1096-42 84 IndA84, 150NE61; 203 Iowa26, 212NW368.

1096-43 203 Iowa26, 212NW368.

1096-48 136Misc76, 240NYS291. But see Iowa 227NW412; Mont 290P252. Contra 203 Iowa26, 212NW368. **Where teacher was dismissed without notice or hearing on grounds other than unfitness,** appeal to county superintendent from order discharging teacher is unnecessary. 200 Iowa293, 204NW281. **Where no charge of incompetency is made,** dismissed teacher need not first appeal to county superintendent under some statutes. 200 Iowa293, 204NW281.

1096-50½-New. Teacher discharged by board on charges of incompetency after due notice and hearing may not maintain action in courts for damages on such discharge. 203 Iowa26, 212NW 368.

1096-50½-New. That discharge was accomplished lawfully and in good faith is defense to action for damages resulting from discharge. 45 Ida464, 262P 862.

1097-55 82CalA330, 255P516. **Admissibility.**-82CalA330, 255P516; 88CalA 535, 263P853. **Evidence held to show valid contract.**-118 Okl 57, 246P432. **Truth of charges must be proved by defendant.**-88CalA535, 263P853.

1097-57 221MoA47, 297SW1001, 1003 [citCyc].

1097-62 Damages for injury to business reputation and mental suffering by reason of wrongful discharge are not recoverable. 39Wyo 442, 273P675. **Where action is not tried till after expiration of term of employment,** teacher is entitled to recover damage covering entire term, and is not limited to damages accrued at time action is instituted. 39Wyo 442, 273P675.

1097-63 32Ariz96, 255P994; Iowa 227 NW412.

1097-64 32Ariz96, 255P994.

1097-65 221MoA47, 297SW1001, 1003 [quotCyc]. But see Iowa 229NW750.

1097-66 Iowa 227NW412.

1097-67 Iowa 227NW412.

1098-72 Sask [1925] 3DomLR578. **Necessity for formal contract.**-Sask [1925] 3DomLR578.

1099-78 Iowa 229NW750; Sask [1925] 3DomLR578.

1099-79 Mo 23SW(2d)1013; MoA 7SW (2d)1018; Mont 290P252; 194Wis530, 217NW293; Sask [1925] 3DomLR578. **Right of recovery by teacher upon district's breach of contract is not defeated** on ground she failed to diligently seek other employment after notice before beginning of term that district would not recognize contract. Mo 23SW(2d) 1013.

1099-83 39GaA173, 146SE350(1stcase).

1099-86 195NC213, 141SE744.

1099-86½-New. Teacher failing through inadvertence, to make or file statutory oath, is entitled under same statutes, to collect salary on filing oath with county superintendent. 118 Okl 57, 246P432.

1099-86½-New. Teacher cannot recover on quantum merult where hired by officers without authority. 127Me255, 143 A56.

1099-89 230Ky151, 18SW(2d)1000.

1100-92 Where attendance falls below statutory minimum teacher cannot recover balance of compensation. 12LaA 179, 125S458.

1100-93 84Colo 385, 270P865.

1100-94 198Wis320, 224NW119.

1100-95 MoA 7SW(2d)1018.

1100-96 127 Okl 193, 260P46; Sask [1925] 3DomLR578. **Revenues out of which salary is payable.**-CalA 291P276.

1101-2 Statute prohibiting future discrimination in salaries because of sex held not to interfere with existing discriminatory schedule. 245NY106, 156 NE631. **Salary schedule preserving existing rights** under former schedule valid notwithstanding statute prohibiting discrimination. 245NY106, 156NE 631.

1101-3 DC 32F(2d)942. **Discrimination on account of sex.**-245NY106, 156 NE631; 125Misc136, 210NYS582. **Statute prohibiting discrimination in teachers' salaries based on sex** construed to mean that there shall be no discrimination in determination of amounts to be paid. 214AppDiv431, 212NYS281. **Under statute providing that one thousand four hundred dollars shall be apportioned** to each school district for each teacher allowed to it, term "one thousand four hundred dollars" is used as a convenient factor in computing amounts to be apportioned to the several school districts and to emergency and supervision fund and has nothing to do with number of teachers to be employed. 69 CalA533, 232P480. **Teachers' Salary Act held inapplicable** to county high school districts. 85Colo 72, 273P879. **Statute authorized board of education to adopt minimum salaries** for teachers in junior high schools lower than those for older type of high schools. 136Misc1, 239NYS642. **Teachers entitled to increase under statute.**-37F(2d)444.

1101-4 MoA 10SW(2d)665.

1102-14 125Misc136, 210NYS582 (unlawful, because discriminatory, underpayment is not waived by accepting under protest pay at the lower rate, there being no consideration to support contract to waive).

1102-16½-New. In Maryland board of school commissioners has power to determine salaries of teachers. 151Md298, 134A332.

1102-16½-New. Provisions of Baltimore City Charter as to teachers' salaries held to prevail over previous laws on same subject. 151Md298, 134A332.

1102-16¾-New. Discrimination because of sex. 127Misc477, 217NYS265.

1103-18 Alta [1928] 1DomLR344.

1103-22 127Misc477, 217NYS265. **Funds unappropriated to any purpose** may be used to pay teachers' salaries for fiscal year. 195NC213, 141SE744.

1103-24 Time of payment.-CalA 289P 689; Mont 290P252.

1104-27 69CalA533, 232P480 (county superintendent of schools held authorized to allow and draw his requisition for salary of supervisory teachers employed by him).

1105-41 TexCivA 275SW267 (demand required before suit).

1105-42 152Miss559, 120S460. **Action for salary for balance of term may be maintained** by teacher discharged by independent consolidated school district before term expired. 53SD381, 220NW 869.

1105-43 125Misc136, 210NYS582.

1105-44 69CalA533, 232P480.

1105-45 69CalA533, 232P480 (recovery can be had only on proof of performance of services). See also 127Me255, 143 A56.

1105-46 221MoA47, 297SW1001. **Demand for payment must be made on board of trustees** where teacher was discharged by such board and afterward reinstated by state board of education. TexCivA 275SW267. **Statute placing educational affairs of state** under jurisdiction of department of education, and requiring teacher to exhaust remedies by appeal to superintendent of public instruction and state board of education before resorting to courts for relief, relate to claim for earned salary, as well as other matters arising in enforcement of public school regulations. TexCivA 9SW(2d)171.

1105-48½-New. Statute prohibiting discrimination in salaries because of sex. 127Misc477, 217NYS265 (construction).

1106-52 TexCivA 280SW903 (allegations held to show that trustees misapplied funds applicable to payment of teacher's salary); 39Wyo 442, 273P675. **Complaint held sufficient.**-Mont 290P252 (action based on reëlection). **Pleading held demurrable** for failure to allege avoidance of statutory discharge. Iowa 231NW325.

1106-53 Petition based on oral contract for services of teacher is properly dismissed on demurrer. 39GaA173, 146SE 350(1stcase).

1106-54 TexCivA 280SW903 (allegations held to show that trustees compelled teacher to abandon teaching).

1106-59 As to sufficiency of funds.-But see TexCivA 275SW267.

1107-64 MoA 10SW(2d)665; 125Misc 136, 210NYS582 (holding that it is no defense to action by teacher in mandamus to compel payment of salary to allege that payment of lawful salary will "upset the budget").

1107-67 MoA 7SW(2d)1018; MoA 10 SW(2d)665; 74Mont385, 240P391. **Burden on district** to show teacher might have obtained other employment of same character. Mo 23SW(2d)1013.

1107-68. Evidence held admissible.-Mo 23SW(2d)1013 (though not entered in regular minute or record book); TexCivA 15SW(2d)679; 41Wyo 451, 287P 308. **Evidence held inadmissible.**-Mo 23 SW(2d)1013; 138 Okl 143, 280P606, 65 ALR1092. **The minutes of a schoolboard,** etc. Mo 23SW(2d)1013 (admissible though not entered in regular minute book). **Evidence as to mitigation of damages** held admissible. 235 IllA426. **Minutes of meeting at which teacher was hired** held admissible, and it is error to exclude same. 232 IllA 102.

1108-69 MoA 30SW(2d)621; 74Mont 385, 240P391 (evidence held sufficient to show that plaintiff presented herself to officers of school district ready to enter upon discharge of her duties); 115 Okl 48, 241P787 (evidence held to show that plaintiff suing for breach of contract of employment as superintendent had no valid contract).

1108-70 Instructions held erroneous.-235 IllA426; 41Wyo 451, 287P308. **Instructions held not erroneous.**-Mo 23SW (2d)1013. **Costs.**-Mont 290P252.

1108-71 Mo 23SW(2d)1013; MoA 7SW (2d)1018; MoA 10SW(2d)665. **Minutes of meeting held to show contract** with teacher as matter of law. 232 IllA102. **Direction of verdict for defendant** held error where minutes of board showed contract as matter of law. 232 IllA102.

1108-72 CalA 291P276.

1108-74 134Misc123, 234NYS626; 137 Misc170, 241NYS535 (liberal construction). **Preference in favor of levies for fund,** over all other items except those for sinking fund or interest purposes, is given by statutes in some jurisdictions. 115 Oh55, 152NE646. **Amount of pension.**-135Misc916, 240NYS335. **Sufficiency of application for retirement and effect thereof when delivered.**-229App Div253, 241NYS421. **Election by teacher applying for retirement** to accent option need not be acknowledged. 137Misc170, 241NYS535 (validity of election). **Designation of beneficiary by teacher** applying for retirement must be acknowledged to be valid. 137Misc170, 241NYS535. **Option for receiving retirement benefit** is available to applicant any time with or after filing of application for retirement. 137Misc170, 241 NYS535. **Teacher does not cease to be member of state fund on** entering employ of district having local fund. Wash 289P30. **Unemployed teacher failing to contribute to fund** not entitled to participate therein. Wash 292P259. **Relations of members of fund contractual.**-Wash 292P259. **Statutes liberally construed.**-Wash 292P259. **Participation in fund dependent on contribution thereto.**-Wash 292P259.

1108-75 Elective provisions.-215App Div220, 213NYS738. **Under Education L. § 1109.**-215AppDiv220, 213NYS738. **Choice of secretary of teachers' retirement board** is decision of board which may not be made without concurrence of one member of teachers' representatives under New York statute. 247NY372, 160NE644. **Filing of medical board's certificate** that teacher was physically incapacitated and ought to be retired does not prevent applicant from thereafter making election of benefits under charter. 226AppDiv99, 234NYS518. **Committee of property of incompetent teacher** has right to make election for incompetent to retire for disability. 134 Misc123, 234NYS626. **Rule of teachers' retirement board** fixing date of retirement for disability cannot be considered by court where there is no proof of

existence of such rule. 134Misc123, 234 NYS626. In New York.–135Misc271, 238NYS642.

1108–75½–New. Under Education Law there is distinction between retirements for superannuation which is mandatory on state retirement board, and retirement for disability which is discretional. 212 AppDiv760, 210NYS419.

1108–75¼–New. When claim to retirement for disability is made by teacher court may, by mandamus, compel board and physician to act on claim within reasonable time, but it cannot compel board to decide question of right to retirement in favor of teacher. 212App Div760, 210NYS419.

1108–75¼–New. Report of physician on retirement for disability case held prerequisite to allowance of claim by teacher. 212AppDiv760, 210NYS419.

1108–75⅓–New. Rule of retirement board that claims for retirement for disability if approved shall not become effective within thirty days from date of filing held not unreasonable. 212App Div760, 210NYS419.

1109–82½–New. Appointment of secretary of teachers' retirement board, without concurrence of teacher member, where statute provides for such concurrence, is void. 130Misc442, 223NYS716.

1109–82⅓–New. Unless teacher's application for retirement for disability was mailed or delivered before death, it is unavailing. 131Misc383, 226NYS744.

1109–82¼–New. Estate of teacher applying for disability retirement should not be penalized because of teacher's death before required medical examination, from causes connected with grounds of application. 131Misc383, 226NYS744.

1109–82½–New. Appointment of secretary of teacher's retirement board without concurrence of board member elected by retirement association is valid. 221AppDiv646, 224NYS544.

1109–82¼–New. Where teacher mailed application for retirement, it is unaffected by his death before acted upon. 130Misc896, 225NYS176.

1109–82½–New. Teacher in school district of first class, thereafter becoming superintendent of schools of district other than that of first class, was not entitled to membership in state teachers' fund. 151Wash175, 275P81.

1109–82¼–New. Teachers' retirement board must act when application for retirement is presented. 134Misc123, 234 NYS626.

1109–82½–New. Delivery of teacher's application for service retirement does not result from mere deposit thereof in mails. 249NY414, 164NE335.

1110–87½–New. High school principal may not act as elementary school principal without consent of high school board. 88CalA731, 264P273.

1110–87½–New. Grade school principal must sign and deliver graduation certificate to pupil who has completed course. 221MoA9, 297SW419.

1110–91 See also 221MoA9, 297SW419. **Under constitutional requirements,** right of all children within age limit to attend school is fundamental one, which cannot be denied, except for general welfare. 221MoA9, 297SW419.

1110–92 Sufficiency of accommodation. –NS [1929] 4DomLR857. **County board** required to provide school privileges in Ohio if district fails to do so. 113 OhSt 177, 148NE682 (high school privileges).

1111–96 165Minn361, 206NW642.

1111–7 [1926]CanSC246, [1926] 2 DomLR8. **Enumeration.**–143 Okl 136, 287P1035.

1111–15½–New. Reading of Bible in public schools does not create religious test or qualification as condition of admission to public educational institution contrary to constitutional provision in some jurisdictions. 81Colo 276, 255 P610.

1111–16 Pupil held entitled by certificate to admission to high school but not necessarily in any particular building thereof. 33Arizl, 261P629.

1111–16½–New. Under statute authorizing trustees to make such segregation of groups of pupils as deemed advisable, trustees may provide for segregation on account of race to promote discipline. 33Arizl, 261P629.

1112–21 101NJL474, 129A765 (public policy forbids admission to free schools of pupils from homes in other states without payment of tuition); 217App Div233, 216NYS646. **"Residence" is not synonymous with "domicile."**–236Mich 677, 211NW60. **Effect of annexation of territory to city.**–82CalA91, 255P208.

1112–22 Determination of question of residence is with board of trustees and courts will not interfere with proper exercise thereof. 73Mont442, 236P670. **Children living in boarding house** for children held to have no legal residence apart from nonresident parents, and need not be admitted to school without tuition. 217AppDiv233, 216NYS646.

1113–23 236Mich677, 211NW60. **"Legal control"** excludes such relationship as teachers and pupil and teacher and pupil boarder, and child of nonresident having no other residence than that growing out of two years' attendance at boarding school in state has no right to free tuition. 101NJL474, 129A765. **Child going into district in good faith for purpose of acquiring home,** and not chiefly for purpose of getting school advantages, is entitled to benefit of public schools. 236Mich677, 211NW60. **Intent of parents to retain legal domicile elsewhere.**–236Mich677, 211NW60. **Emancipated minor may have residence apart from father** for school attendance. 194 Wis353, 216NW499. **Child residing with, and supported gratis by, resident of school district** is entitled to all free school privileges accorded to resident school children. 88PaSuper299.

1113–24 236Mich677, 211NW60.

1113–25 101NJL474, 129A765.

1113–26 Nonresident pupils from districts not having high school facilities must be admitted into high school departments of standardized schools, having facilities for seating and instruction. 54ND235, 209NW369. **Refusal to admit** further nonresident pupils when facilities for seating and instruction were already overloaded with nonresident pupils held not discriminating. 54ND235, 209NW369.

1113–27 Discretion of school authorities.–73Mont442, 236P670.

1113–29 73Mont442, 236P670.

1113–29½–New. In Kentucky pupil need not attend any high school in his home county where there is more convenient high school of equal rank in adjoining county to which he may go. 217 Ky67, 288SW1013.

1113–29⅓–New. Under such statute, whether high school of adjoining county is "more convenient" than that in his own county depends on distance, character of roads, and means of transportation. 217Ky67, 288SW1013.

1113–30 Right of inmates of charitable institution to attend outside high school. –206 Iowa967, 221NW519.

1114–34 220Ky489, 295SW436.

1114–35 220Ky489, 295SW436. **High school not supervised by state department** nor receiving its aid has been held not standardized high school within statute relating to admission of nonresident pupils. ND 231NW952.

1114–36 323 Ill 152, 153NE584; 220Ky 489, 295SW436.

1114–38½–New. Under statute, it is only when it is "more convenient by reason of distance" that parent, who owns property in rural school district adjacent to one in which he resides, may send his children to such adjacent school at his own discretion and without extra expense and tuition. 128Kan53, 275P 1076.

1114–42½–New. Board cannot be compelled to reopen one of several schools which was discontinued for lack of minimum attendance where though additional children move into district total is not sufficient to invoke mandatory duty of board to organize school. ND 230NW 734.

1115–44 317 Ill 495, 148NE244 (holding that law permitting county superintendent of schools to determine "convenience" is not unconstitutional as delegation of legislative power); 121Kan 287, 246P681 (statute providing for attendance at high school in adjacent county); Miss 127S696(2dcase); 129 Okl 94, 263P445. **Act empowering school districts to provide transportation** does not authorize transportation of children from one district to another district. 171Ark668, 285SW357. **Notice of hearing on request for transfer** required to be served on school board of district from which transfer requested may be served, by personal delivery, to proper person designated to receive same or by properly mailing notice with postage prepaid. 40 OklACR261. **Procedure for transfer.**–129 Okl 94, 263P445. **Discretionary power of county superintendent.**–254 IllA224.

1115–45 Appeal may be taken to board of county commissioners whose decision is final. 129 Okl 94, 263P445.

1115–46 In Kansas.–121Kan287, 246P 681.

1115–47 In Kansas.–121Kan287, 246P 681.

1116–52½–New. Necessity for available funds to pay transfer fees.–Right to transfer pupils from one district to another is dependent under some statutes upon district having caused levy to be made and available for payment of transfer fees. 115 Okl 70, 241P495.

1116–55 160Ga752, 128SE887. **Grandfather** supporting grandchildren in his home gratis may by mandamus compel authorities to admit them to school. 8 PaDist&Co 498.

1116–57 Affidavits of parents as to failure to maintain home for infants and as to relinquishment of care and custody to keepers of private boarding home for children held hearsay and mere conclusions. 217AppDiv233, 216NYS 646. **Parents cannot throw off responsibility so as to let minors acquire separate domicile,** without due inquiry into facts by court. 217AppDiv233, 216NYS 646.

1116–57½–New. Appeal to county superintendent is necessary before courts will consider school board's determination of residence of pupil. 73Mont442, 236P670.

1116–57⅓–New. Statute provides for appeals from school districts to county superintendent and from latter to state superintendent, court will not determine, whether pupil was or was not resident of particular district until such remedy is exhausted, unless board has acted without or in excess of jurisdiction. 73 Mont442, 236P670.

1116–58 TexCommnA 178SW(2d)36(3d case); TexCivA 286SW497 (establishment of health department). **Requiring health certificate** before pupils may attend is not unfair, arbitrary, or unreasonable rule. 165Minn361, 206NW642.

1116–58½–New. Rules of school health department do not infringe on rights of city health department, where they provide that no child shall be excluded on refusal to submit to examination and no treatment shall be given except in case of emergency. TexCivA 286SW497.

1117–59 165Ga889, 142SE152; 82NH 495, 136A263. **Parent cannot avoid penalty** for failure to have children vaccinated and to send them to school because of conscientious religious scruples. Mass 168NE101.

1117–60 New certificate to excuse child from vaccination may be required whenever there is reasonable ground to believe child is no longer unfit subject for vaccination. 82NH426, 135A159. **Findings of fact and orders of board** are conclusive on appeal, unless there is error of law and burden is on complainants to show error. 82NH426, 135 A159.

1117–67 82NH426, 135A159; TexCivA 291SW972; TexCivA 58W(2d)257.

1118–70 168Ga353, 148SE96. **Statute authorizing trustees to charge tuition for nonresident pupils** and to fix school terms does not authorize trustees to charge matriculation fees for resident students. 168Ga353, 148SE96.

1118–71 168Ga353, 148SE96. **Matriculation charge cannot be imposed** as condition to admission to school forming part of general public school system. 160

Ga752, 128SE887; 170Ga680, 154SE141. **That directors in their individual capacity provided part of funds** for equipment held not to change public character of high school so that tuition fee could be required. 221MoA9, 297SW419. **Discrimination between children paying matriculation fee and those not doing so** violates Constitution providing for free schools. 170Ga680, 154SE141.

1119-74 Act giving school district power to provide transportation does not empower it to pay tuition for district children in another district. 171Ark668, 285SW357.

1119-74½-New. Payment for transportation.-Statute requiring payment of certain amount per diem for transportation to parent or guardian of child living three miles or more from school applies to each child, though members of same family. 118Kan751, 236P827.

1119-74¼-New. Transportation facilities.-Order of commissioner of education directing withholding of school moneys from township because of failure to provide transportation facilities held authorized. NJSup 135A664.

1119-74¼-New. County board of education may prescribe reasonable incidental fees for heating and lighting school rooms and to delegate that authority to district boards of various schools. 214Ala349, 107S907.

1119-74½-New. Twenty-five cents per month for incidental expenses held reasonable and proper. 214Ala349, 107S907.

1119-75 44Ida244, 256P366; 217AppDiv233, 216NYS646; 116Tex288, 288SW1064; TexCivA 290SW1118. **Evidence held sufficient to show** pupil's nonresidence. 221MoA393, 277SW945.

1119-76 122Kan213, 251P631. **In absence of written or verbal contract,** county board of education is not obligated to pay school district for tuition of pupils outside of district attending school. 233Ky63, 24SW(2d)934.

1119-77 221MoA393, 277SW945; 117Oh59, 158NE169; 143Okl136, 287P1035.

1119-78 122Kan213, 251P631.

1119-79 116Tex288, 288SW1064.

1119-82 54ND235, 209NW369; 116Tex288, 288SW1064. **Tuition charge** when imposed on nonresident pupils must be alike for all. 54ND235, 209NW369.

1120-84 86IndA641, 159NE164.

1120-86 249IllA305; 126Kan51, 267P23; 311Mo167, 277SW934 (colored high school); 88PaSuper299; 54SD207, 222NW948; 105WVa429, 143SE111. But see ND 231NW952. **Statute construed.**-311Mo167, 277SW934. **Tuition in city high school at county seat.**-213Ky771, 281SW977. **Where parents have acquired legal residence for school purposes in high school district,** but maintain legal domicile in district having no high school, latter district is not liable to former for tuition of children where parents gave statutory notice of desire to have children attend high school. 236Mich677, 211NW60. **Child living with maternal aunt who supports him** is resident of district in which she resides. 88PaSuper299. **Children in charitable institution who attend high school in another district** not offering four-year course are not within application of statute requiring tuition from county of domicile of such children attending school in district where institution located. 206Iowa967, 221NW519. **Statute compelling district of residence to pay tuition** required by district of attendance irrespective of wishes of residence district held unconstitutional. 85Colo67, 273P652. **In Texas.**-TexCivA 238SW(2d)431.

1120-86½-New. Such statute is not unconstitutional as depriving taxpayers of property without due process of law. 125Misc230, 211NYS413.

1120-87 127Kan292, 273P427. **Nonresident of county** may attend high school therein in payment of tuition fee prescribed. 73Mont442, 236P670. **Resident of county** may attend county high school, not in his district, if there is room for him. 73Mont442, 236P670. **Attendance in high school in adjacent county is authorized** under statutes in some jurisdictions where pupils reside in county operating thereunder, but remote from high school therein. 121Kan832, 250P313.

1120-89 In Illinois.-317Ill495, 148NE244.

1120-89½-New. Bona fide resident of school district is entitled to attend high school therein without paying tuition. 73Mont442, 236P670.

1120-90 Under statute requiring county of residence to pay tuition of student attending most convenient school, evidence that roads to school in another county were in better condition than those to school within county held to sustain decree for tuition. 216Ky247, 287SW702. **Judgment requiring county to pay tuition for each succeeding year of attendance** held erroneous, as disregarding possibility of future conditions affecting convenience. 216Ky247, 287SW702.

1121-92½-New. In Kansas, under statute, county of residence is made liable for tuition of high school pupils attending high school in adjacent county on recommendation of county superintendent. 121Kan287, 246P681.

1121-92⅓-New. By statute community high school district is liable for tuition of residents of district attending high school outside of district with approval of county superintendent. 124Kan175, 257P957 (approval of county superintendent shown).

1121-92¼-New. Transportation of pupils.-Parent may recover cost of transportation of children of compulsory school age in Ohio when board does not provide school within four miles or fails to provide transportation. 113Oh177, 148NE682.

1121-92½-New. Where board of education of school district failed to comply with order to furnish transportation for children, commissioner of education was held to have power to order treasurer of county to withhold moneys appropriated to district. 243NY204, 153NE49.

1121-92¼-New. Under some statutes pupil may attend high school of adjoining county where more convenient than any in his own county, and board of education of his own county must pay tuition therefor. 217Ky67, 288SW1013.

1121-92½-New. In suit to recover tuition from county board of education, evidence held not to show greater convenience to pupil in attending high school in another county. 221Ky485, 298SW1095.

1121-92⅗-New. Statute applies only where pupil or his parents do transporting. 221Ky485, 298SW1095.

1121-92⅕-New. Constitutional provision relative to diversion of county funds is not violated by statute providing for payment by county of tuition for pupils resident in county having no high school who attend high school in adjacent county. 127Kan793, 275P188.

1121-92 1/10-New. In Ontario, county which does not give county aid to urban high school district may enter into agreement with high school board for attendance of pupils residing outside of district but within county, and may provide for payment of more than eighty per cent of cost of education of such pupils. 62OntL28, [1928] 2DomLR430.

1121-92 1/11-New. Requirement as to approval of bills.-Substantial compliance with statute as to approval of bills for tuition by county superintendent of adjacent county where pupils attend high school is sufficient. 127Kan793, 275P188.

1121-92 1/12-New. Sufficiency of evidence to sustain recovery against county for tuition of pupils attending high school in adjacent county. 127Kan793, 275P188.

1121-93 154Miss468, 122S737, 63ALR1161; 245NY195, 256NE663 (rule excusing children for half hour each week to attend religious instruction held not to violate law); 14PaDist&Co385. **Compulsory Education Law is not violated** by excusing children half hour weekly to attend religious instruction. 245NY195, 156NE663; 219AppDiv233, 219NYS189.

1121-96 14PaDist&Co385.

1121-97 53ND723, 208NW99.

1122-98 See also 9PaDist&Co753.

1122-99 82NH426, 135A159; SD228NW470. See also NH 146A170.

1122-99½-New. Excusing children from public school for period for purpose of religious instruction by denominational institution is unconstitutional. 125Misc692, 211NYS822.

1122-99⅓-New. Superintendent not required to investigate before prosecuting. 100Vt476, 138A741.

1122-99¼-New. Parent advising child to violate school rule should be prosecuted under compulsory education law unless he places child in private school. TexCommnA 29SW(2d)312.

1122-1 194NC620, 140SE434.

1122-2 But see NH 146A170.

1122-4 53ND723, 208NW99; 135Wash233, 237P505; 197Wis88, 221NW386. **Statute providing transportation** to consolidated schools does not deprive children or guardians of constitutional right because school board is given option of providing transportation or paying compensation therefor. 54ND245, 209NW376.

1122-6 135Wash233, 237P505.

1123-11½-New. That teacher who assaulted child had verdict rendered against him for assault and is reappointed by board is not ground for refusal to send child to school. 8PaDist&Co396.

1123-11⅓-New. Statute requiring persons having control of child of school age to cause such child to attend public school continuously for full number of days has no reference to tardiness or even temporary absence. Vt 145A260.

1123-15 Allegation that residence of defendant and children was within stated distance of school will be construed as meaning such distance by nearest route. 54ND81, 208NW845. **Complaint held sufficient.**-54ND81, 208NW845 (though specific statute referred to had been amended).

1123-16 8PaDist&Co396.

1123-16½-New. Transportation of pupils.-District board of consolidated or union school district is authorized to adopt regulations for transportation of pupils subject to approval of county superintendent and its action is conclusive in absence of bad faith or conduct equivalent thereto. 121Kan41, 245P1021.

1123-16⅓-New. Reservation of right by school district board of directors to terminate at any time contract for transportation of pupils is valid and effective part of such contract. 206Iowa1386, 222NW350.

1123-16¼-New. One signing such contract to transport pupils to school during school year voluntarily waives right to formal charge and hearing thereon before discharge during such year pursuant to such provision reserving right to terminate contract at any time. 206Iowa1386, 222NW350.

1123-16⅕-New. Where nearest school maintained within district of pupil's residence was five miles distant, and school in adjoining district was within half this distance, and school board of district of residence arranges for attendance of child in adjoining district and pays tuition, it is not incumbent on parent to request transportation to be furnished to more remote school within district, and obligation to pay for transportation minimum sum fixed by statute is not conditioned upon request by parent and refusal of that request. 57ND616, 223NW693.

1123-16⅙-New. Provision in Kansas statute, referring to pupils "who live three or more miles, by usually traveled road, from school attended," does not limit such distance to that actually traveled over and along public road or-

highway, but includes additional distance from residence where pupils live to such road, and distance from road to schoolhouse in which they attend school. 127Kan751, 275P146.

1123-16⅞-New. Under North Dakota statute, officers of common school district have power to arrange for paying for transportation of pupils from their district to attend school in another district. 57ND616, 223NW693.

1123-16⅛-New. Under North Dakota statute, obligation of common school district to furnish transportation is not limited to pupils attending schools within district. 57ND616, 223NW693.

1123-16⅛-New. District containing two cities, in one of which there is no high school, may provide for transportation of pupils living in city having no high school, as well as pupils living in unincorporated territory. 206Cal 775, 276P 341, 63ALR408.

1123-16 1/10-New. Statute authorizing high school districts to provide for transportation of pupils, except pupils living within limits of city, does not provide unconstitutional classification. 206Cal 775, 276P341, 63ALR408.

1123-16 1/11-New. Even though demand for transportation has been made, claim for compensation for transportation is not enforceable in absence of contract. 19 OhA18.

1123-16 1/12-New. Pupils held not pupils of abandoned school so as to require school authorities to transport them to another school under statutes. 197 Ind 278, 149NE369, 150NE766.

1123-16 1/13-New. Where school district was abandoned by consolidation with another district, trustee of abandoned district is not required to furnish transportation. IndA 167NE633(2dcase).

1123-16 1/14-New. Evidence held to show that district was consolidated district required to furnish transportation. Nebr 231NW782.

1123-16 1/15-New. Statute permitting county board to require district board to furnish transportation to high school students has been held not unconstitutional, 35 OhA81, 171NE846.

1123-16 1/16-New. Substantial compliance by county board of education with provision of statute has been held sufficient. 35 OhA81, 171NE846 (compliance with statute).

1123-16 1/17-New. Conviction of father for allowing daughter of thirteen to be absent four days cannot be sustained when absence was necessity of attending sick mother. 6PaDist&Co 781.

1123-16 1/18-New. Affidavit charging defendant with unlawfully, willfully, and negligently failing to send minor child to school sufficiently charges first offense. 26 OhA329, 157NE421.

1123-16 1/19-New. Prosecution can be maintained only for infractions incurred after notice has been given to such person to require child to attend school. Vt 145A260.

1123-16 1/20-New. Record must show previous conviction if penalty applicable only to subsequent convictions is imposed. 9PaDist&Co 148.

1123-16 1/21-New. Record must show compliance with statutory requirements as to notice to parent by school authorities. 9PaDist&Co 148.

1123-16 1/22-New. Evidence held sufficient to establish residence of defendant within statutory distance from school. 54ND81, 208NW845.

1123-16 1/23-New. Evidence as to child's physical condition held for jury. 100 Vt476, 138A741.

1123-16 1/24-New. Transportation of pupils is within exclusive jurisdiction of commissioner of education in some jurisdictions. 137Misc820, 244NYS569.

1123-17 Rights of truant officer to annuity.-Wis 229NW543.

1123-18 108WVa505, 151SE703. **Appointment under invalid statute** does not give appointees status as officers. 98Fla66, 123S540. **Statute unconstitutional.**-98Fla66, 123S540.

1124-19 158La251, 103S757 (resolution of parish school board closing schools for year held premature, arbitrary and unauthorized). **In Georgia.**-162Ga58, 132SE427.

1124-20 194NC49, 138SE433. **In Louisiana.**-158La251, 103S757.

1124-25½-New. Under statutes, school may be closed for lack of attendance of prescribed number of pupils at last preceding term. Iowa 227NW594 (closing not dependent on number of children in district of school age).

1124-25⅓-New. Children attending school outside district of residence may be counted in enumeration in determining whether sufficient pupils make operation mandatory. Miss 127SE696(2d case).

1124-26 NC 154SE397 (maintenance or discontinuance of junior college). **General Assembly has power to require** board to provide kindergarten, where funds are sufficient. NC 154SE393. **School board empowered by statute to** maintain kindergarten has no discretion to refuse to exercise such power. NC 154SE393.

1124-28 323 Ill 152, 153NE584 (high school pupils held under statute to include eighth grade graduates).

1125-32 NC 154SE393. **In Michigan.**-236Mich57, 209NW849.

1125-33 200 Iowa860, 205NW506; 127 Kan651, 274P728. **General Assembly is empowered** to authorize school boards to prescribe subjects and methods of instruction. NC 154SE393.

1126-42½-New. Certain studies plainly essential to good citizenship must be taught to every child. 81Colo 276, 255P 610.

1126-42⅓-New. Due process gives parents right to have their children taught what they judge best, 81Colo 276, 255 P610.

1126-42¼-New. and to refuse to have them taught what they think harmful, 81Colo 276, 255P610.

1126-42⅕-New. subject to qualification that teachers and places must be reputable and things taught not immoral or inimical to public welfare. 81Colo 276, 255P610.

1126-42⅙-New. Physical education and competitive athletic games may properly be included in public high school curriculum under statutes in some jurisdictions. 31Ariz503, 254P1056, 52ALR 244.

1126-42⅐-New. Grade school principal must sign and deliver to pupil entitled thereto graduation certificate submitted by county superintendent. 221MoA9, 297SW419.

1126-42⅛-New. And directors are without authority to forbid principal to deliver the certificate in such case. 221 MoA9, 297SW419.

1126-42⅑-New. Mandamus may lie to compel issuance of graduation certificate and release for credit at another school of credits of pupil entitled thereto. 221MoA9, 297SW419.

1126-44 171Minn142, 214NW18, 57ALR 185. **Pupils cannot be excused to attend** religious instructions. See also 5Pa Dist&Co 137. **Reasonableness of method of school authorities' assistance of parents in giving religious instruction to pupils tests legality,** so that excusing pupils half hour weekly to receive religious instruction is valid regulation. 219AppDiv233, 219NYS189.

1126-46 171Minn142, 214NW18, 57ALR 185.

1126-47 81Colo 276, 255P610; 171Minn 142, 214NW18, 57ALR185. **The Bible is not a sectarian book,** etc. 81Colo 276, 255P610; 171Minn142, 214NW18. **Bible is not so essential to good citizenship** that parents may not exclude it under their constitutional right to direct children's instruction. 81Colo 276, 255P 610. **Sectarian doctrines** apply to doctrines held by various sects of Christianity. 81Colo 276, 255P610. **Ultimate question is for courts** as to whether reading Bible in public schools constituted teaching sectarian doctrine. 81 Colo 276, 255P610.

1127-48 171Minn142, 214NW18, 57ALR 185.

1127-49 81Colo 276, 255P610; 171 Minn142, 214NW18, 57ALR185.

1127-50 81Colo 276, 255P610; 171Minn 142, 214NW18, 57ALR185.

1127-52½-New. Constitutional provision providing that no preference shall be given by law to any religious establishment or mode of worship is not violated by statute forbidding teaching of evolution theory in public schools, 154 Tenn105, 289SW363, 53ALR821.

1127-52⅓-New. since, though statute forbids teaching of evolution theory, it does not require that contrary to such theory shall be taught. 154Tenn105, 289SW363, 53ALR821.

1128-57 216Ky223, 287SW729. **Commission may adopt dictionary** as a textbook to be used to exclusion of all others. 16F(2d)137. **In Kentucky.**-18 F(2d)739; 216Ky223, 287SW729.

1128-57½-New. When so adopted and purchase contracted for, though listed as supplemental book, use of which is optional and not compulsory, it is entitled to protection of statute requiring exclusive use. 16F(2d)137.

1129-60 114Tex561, 273SW789 (irregularities waived); 114Tex576, 273SW 794 (irregularities waived); 114Tex 578, 273SW795 (irregularities waived).

1129-64 Sufficiency of adoption.-114 Tex561, 273SW789.

1130-72 263Mass364, 161NE599. **Constitutionality.**-168La1005, 123S655, 67 ALR1183.

1130-77 317 Ill 418, 148NE289.

1130-77½-New. Kentucky "free textbook" statute held not to intend appropriation from common school fund, and purchase of books is not ordinary government expense. 230Ky287, 18SW(2d) 1114.

1130-77⅓-New. Where statute appropriates none of school fund for free textbooks, and state's general fund is exhausted, board of education cannot purchase free school books. 230Ky287, 18 SW(2d)1114.

1132-86 216Ala367, 113S592 (contract provisions held authorized); 263Mass 364, 161NE599.

1134-9 154Miss468, 122S737, 63ALR 1161. TexCommnA 17SW(2d)36(3d case). **Statute providing for enforcement of discipline by juvenile court** does not deprive board of trustees of power to enforce discipline. Tex CommnA 29SW(2d)312.

1135-11 94Fla96, 113S677; 317 Ill 418, 148NE289 (deposit for school books).

1135-12 165Minn361, 206NW642. See also 32F(2d)586. **A presumption,** etc. 154Miss468, 122S737, 63ALR1161. **Whether a rule or regulation of the school authorities is reasonable,** etc. 154Miss468, 122S737, 63ALR1161. **Barring married persons.**-154Miss468, 122 S737, 63ALR1161.

1135-15½-New. Rule prohibiting pupil from taking lunch during noon recess except from school cafeteria or lunch brought from home is within power of board. TexCommnA 29SW(2d)312.

1140-50 Police power is basis of power to exclude from school children who are menace to their associates. 165Minn 361, 206NW642. **Mandamus lies to compel issuance of high school diploma** denied for alleged infraction of rules. 124 Kan89, 257P945.

1140-51 22AltaL171, [1926] 2DomLR 383, [1926] 1WestWkly939.

1140-56 See also 84Colo 240, 269P15. **Menace to other children.**-165Minn361, 206NW642.

1141-57 22AltaL171, [1926] 2DomLR 383, [1926] 1WestWkly939.

1141-59 128Kan507, 278P1065 (conduct must warrant exclusion in public interest).

1142-65 Facts held insufficient to warrant exclusion from community high school. 128Kan507, 278P1065.

1142-68 82NH159, 131A155, 42ALR 757 (final till reversed or corrected).

1142-69½-New. Conclusiveness.-Order of school board in dismissing pupil is binding, though erroneous, till reversed or corrected by court. 82NH159, 131A 155, 42ALR757.

1143-73½-New. Judicial review of order.-Court has power to vacate and set aside order of dismissal where it appears to be illegal; 82NH159, 131A155, 42ALR757.

1143-73⅓-New. and statute providing that dismissed pupil is not to attend school till restored by board does not prevent courts from exercising such ju-

risdiction since statute applies only to valid acts of board; 82NH159, 131A 155, 42ALR757.

1143-73¼-New. and where order is vacated, pupil may again attend school, not because of restoration by courts, but because order of dismissal is rendered void. 82NH159, 131A155, 42ALR757.

1143-74 Board acting within jurisdiction.-82NH159, 131A155, 42ALR757.

1143-76½-New. Where plaintiff is properly dismissed, fact that board acted maliciously does not render action wrongful or actionable. 82NH159, 131 A155, 42ALR757.

1143-76¼-New. Third parties bringing about judgment of school board dismissing plaintiff, within authority of board, are not liable for malicious dismissal while judgment is in force. 82 NH159, 131A155, 42ALR757.

1143-76¼-New. Member of school board who had nothing to do with dismissal, being absent from meeting at which action was taken, is not liable in action for malicious dismissal. 82NH 159, 131A155, 42ALR757.

SCIENTER

1144-7 In connection commonly used "scienter" signifies that alleged crime or tort was done designedly, understandingly, or with guilty knowledge. 237 Mich156, 211NW346.

SCIENTIFIC

1145-11 US 15CustA175.

SCINTILLA

1146-15 Oh 158NE559. **Scintilla of evidence,** etc. 112 OhSt506, 148NE82.

SCIRE FACIAS

1148-1 19F(2d)378; 318Mo 1134, 28W (2d)750.

1148-2 19F(2d)378.

1148-3 19F(2d)378.

1148-4 19F(2d)378; 3Del 36, 130A30 (scire facias on breach of conditions of recognizance is in nature of original action).

1148-5 19F(2d)378; 3Del 36, 130A30; 8PaDist&Co 714.

1148-7½-New. When writ depends upon original judgment, it will not obviate or cure defect that renders judgment void. 19F(2d)378.

1148-7⅓-New. If judgment on which scire facias was issued is a nullity, no final judgment can be based upon it. 19 F(2d)378.

1150-18 Defendant need not file sworn statement of claim with præcipe for scire facias to bring in additional defendant. 13PaDist&Co 431.

1151-28 97PaSuper340.

1151-34 318Mo 1134, 28W(2d)750, 752 [quotCyc].

1152-39 3Del 36, 130A30.

1152-40 3Del 36, 130A30.

1152-43 3Del 36, 130A30 [citCyc]; 13 PaDist&Co 465 (right of contribution).

1153-51 3Del 36, 130A30 (under statute); 128Me462, 148A681 (2dcase).

1154-58 3Del 36, 130A30 (may plead proper pleas in bar and in abatement).

1154-60 3Del 36, 130A30.

1154-62 3Del 36, 130A30.

1156-78½-New. Copy of original statement of claim should be served on additional defendant with writ. 13PaDist &Co 431.

1157-95 Amendment after error brought.-38F(2d)457. **Amendment of return relates back to date of service.**-38F(2d)457. **Amendment to show service on proper person** may be made although return shows service on another. 38F(2d)457.

1158-1½-New. Showing of deputy marshal as to service on proper person should prevail in preference to contentions of interested persons although return shows service on another. 38F(2d) 457.

1158-4½-New. In scire facias sur mechanic's lien it is error for court to direct verdict for greater sum than is due when plaintiff stopped work before completion. 87PaSuper15.

1158-4⅓-New. In such proceeding plaintiff may recover for plans and drawings only because they are incidental to, and enhance his work of, supervising actual construction. 87PaSuper15.

1159-29 6PaDist&Co 428. See also 8Pa Dist&Co 113.

1160-37 Motion to quash writ held too general to present objection for review.-38F(2d)457.

SCRAPE

1162-12 90Fla582, 107S354.

SEALS

1167-1 29Hawaii548, 551 [quotCyc]; 242NY475, 152NE266.

1168-8 31Ariz456, 254P223.

1169-9 125Me4, 130A504 (holding seals constructive rather than actual and used principally to authenticate documents). But see Pa 151A879.

1169-9½-New. Where contract requires no seal but one is used it does not affect contract. 12PortoRicoFed448.

1169-13 Mass 167NE674 (absence of wax or other adhesive seal and of recital or reference to seal made instrument one not under seal).

1170-15 165Ga359, 140SE869.

1173-32 242NY475, 152NE266. **To show intention,** recital must be in body of instrument, mere recital in attestation being insufficient. 165Ga359, 140 SE869.

1174-36 222AppDiv422, 226NYS491.

1174-39 In Georgia.-165Ga359, 140SE 869.

1174-42 But see 223AppDiv723, 226 NYS737.

1175-44½-New. To constitute "sealed instrument" seal or scroll must be affixed and some recognition thereof in instrument or by evidence aliunde. 222 AppDiv422, 226NYS491.

SEAMEN

1178-1 14F(2d)201; 20F(2d)362; 22F (2d)304; 28F(2d)725 [certiorari granted 279US827, 49SCt252(7thcase), 73Led 979] (third officer); TexCivA 11SW(2d) 392. **Includes** lien shipping for round trip. 17F(2d)557. **Stevedore** held seaman. 17F(2d)760. **Longshoreman** held "fellow servant." 17F(2d)760. **As used in Jones Act,** providing for recovery for death, term includes one working on vessel as longshoreman. 27F(2d)960; 136Misc850, 241NYS347. **Employee of American stevedoring company,** injured while unloading foreign vessel in American port, was not a "foreign seaman," but was entitled to benefits of Federal Employers' Liability Act under Merchant Marine Act. 149Wash1, 270P113.

1179-2 20F(2d)465. But see NJ 150A 670.

1179-8 14F(2d)364.

1179-10½-New. longshoremen, 281US 635, 50SCt440, 74Led1082.

1180-18 5F(2d)545.

1180-19½-New. Stevedore employed in discharging cargo of ship is seaman. 16 F(2d)146.

1180-19⅓-New. Longshoreman or stevedore held to be seaman. 41F(2d)651.

1180-21 But see 22F(2d)304.

1180-26½-New. Stevedores are not seamen. 14F(2d)534 (under Jones Act); 246NY300, 158NE876. But see 128Misc 665, 219NYS750; 221AppDiv688, 224 NYS662.

1180-26⅓-New. Orchestra leader on excursion boat held seaman. 14F(2d) 201.

1180-26¼-New. Stevedore at port does not become "foreign seaman" while loading foreign ship. 21F(2d)187.

1180-26½-New. Assistant wharfinger employed by city is not seaman as regards exclusiveness of maritime jurisdiction for injury. Cal 292P120.

1180-27 22F(2d)304. **Single person** performing duties of crew may constitute "crew" within meaning of statute giving lien for wages. 22F(2d)304.

1181-32 But see 22F(2d)304.

1181-36 If ferryboat corporation borrows services of stockholder's employee, he becomes seaman. 25F(2d)612. **Voluntary assistance in loading boat,** with master's permission, held not to render person seaman. 25F(2d)612.

1182-52 272US50, 47SCt19, 71Led157; 104NJL122, 139A58. **Longshoreman, injured in course of employment,** held seaman under federal statute. 272US50, 47 SCt19, 71Led157. **Longshoreman, performing work formerly done by crew,** held seaman. 272US50, 47SCt19, 71Led 157. **Employee, unloading ship used by employer to transport his own goods exclusively,** is not "longshoreman" or "stevedore," and Merchant Marine Act does not apply to him. 31F(2d)497.

1183-61 5F(2d)151 (contract of alien shipping on foreign ship under foreign flag is presumed to be valid under law of such nation).

1183-62½-New. There was implied warranty that seaman was fit to discharge duties of boatswain at time of signing as such, unless waived by master. 27 F(2d)182.

1183-63 Provision in articles of agreement between fishermen and packing association to subordinate agreement to law did not make statute applicable to fishermen's rights. 39F(2d)348.

1185-69 Signature before owner, master, or consignee.-18F(2d)675; 25F(2d) 835 (signature before master held sufficient).

1186-81 24F(2d)372.

1186-84 24F(2d)372.

1187-87 24F(2d)372.

1188-92 When voyage completed.-40F (2d)852.

1188-97 36F(2d)381 (agreement for bonus held enforceable though bonus not demanded).

1189-9 17F(2d)478.

1189-10 42F(2d)903.

1189-11 4HawaiiFed457.

1189-13 15F(2d)405.

1190-26 4HawaiiFed442.

1190-29 15F(2d)405.

1191-31 15F(2d)405 (master makes discharge).

1191-32 15F(2d)405.

1192-43½-New. Under Seamen's Act seaman is entitled to discharge and pay earned where "watches" are not composed of equal, or approximately equal, numbers. 269US364, 46SCt157, 70Led 313; 24F(2d)94.

1192-46 15F(2d)405. **Particular statute construed.**-13F(2d)614.

1192-48 13F(2d)614.

1193-51 13F(2d)614.

1193-55 41F(2d)456.

1195-74½-New. Fishermen accepting payments without protest did not waive amounts still due them under contract. 39F(2d)348.

1196-82½-New. Master, who acts reasonably in making deposit of seaman's wages with shipping commissioner, is entitled to release in full. 31F(2d)327 [aff 31F(2d)332(1stcase)].

1196-83 Extent of owner's duty.-41F (2d)754.

1198-94 7F(2d)378; 16F(2d)948.

1200-15 7F(2d)378; 14F(2d)530; 43F (2d)425; TexCivA 11SW(2d)392. **Admiralty court** liberally entertains jurisdiction on seaman's plea for maintenance and care. 19F(2d)355. **Where no physician was aboard and injuries were thought due to seamen's quarreling,** requirement that seaman work held not actionable wrong. 36F(2d)305.

1200-16 21F(2d)313; 43F(2d)425; TexCivA 11SW(2d)392; 145Wash460, 261P115. But see 25F(2d)869. **Statutes making vessel liable for treatment** of diseased alien seaman held not violative of Fifth Amendment. 269US304, 46SCt114, 70Led281. **"Alien seamen,"** under statute requiring vessel to give them medical treatment, means seamen who are aliens, not seamen on foreign vessels. 269US304, 46SCt114, 70 Led281. **Proximate cause of liability** is seaman's contract. 21F(2d)313. **Liability is contractual,** covenant being implied by law. 21F(2d)313. **Obligation held performed** by tendering seaman hospital certificate at port. 25F(2d)457. **Where no doctor is available,** and mess boy is given harsh, but effective, treatment for injuries, and later works steadily on another vessel, he is not entitled to damages for refusal to provide doctor. 30F(2d)951. **Longshoreman, injured while loading ship,** is not entitled, under Merchant Marine Act, to recover for maintenance, cure, and

wages, not being bound to voyage service. TexCivA 11SW(2d)392. **Where seaman leaves vessel** after injury, works elsewhere, and does not present himself for medical treatment, he is entitled to nothing for maintenance and cure. 35 F(2d)261.

1201-18 Seamen cannot refuse hospital privilege under general maritime law and then assert lien on vessel for increased expense incurred. 145Wash460, 261P115.

1201-20 73CalA605, 238P1087.

1201-22½-New. Seaman is not entitled to maintenance and cure from injury resulting from his willful misconduct. 43F(2d)425.

1202-24 After termination of voyage.-43F(2d)425.

1202-28 Construction of statute.-40F (2d)652.

1203-35 7F(2d)378.

1203-43 Evidence held not to warrant recovery by seamen.-25F(2d)457. **Evidence held to sustain findings denying claims.**-40F(2d)31. **Evidence held sufficient** to warrant award for maintenance and cure. 33F(2d)539. **Injured stewardess declining offer of hospital treatment** cannot maintain suit for maintenance and cure. 39F(2d)551.

1203-44 Seaman has lien on vessel for maintenance and care. 19F(2d)355.

1204-46 Under statutory provision for transportation of seamen of lost or wrecked vessels, seamen cannot claim transportation between domestic ports. 36F(2d)381.

1204-53 14F(2d)164.

1205-59½-New. Where government owned steamship was wrecked and sunk in Arabian Sea and part of crew proceeded to England, they are not entitled to transportation under federal statutes. 8F(2d)300.

1205-61 Payment may not be conditioned on waiver of right against vessel. 40F(2d)31.

1206-63 Seamen entitled to wages for time aboard after arrival at port of discharge because of ship's failure to have proper consular crew list. 40F(2d)652. **Where hiring is by month,** no wages can be earned till whole month's service is performed. PrEdwIsl [1929] 4DomLR 873.

1206-64 Seaman entitled to recover for waiting time, where master refused payment unless seaman would waive claim for injury. 40F(2d)31.

1206-65½-New. After seizure of vessel by marshal, seamen rendering services at request of owner and with knowledge of marshal are entitled to reasonable value of services. 27F(2d)183.

1210-85 A seaman or mate who is promoted, etc. 5F(2d)958 (first assistant engineer promoted to, and receiving wages of, chief engineer on one voyage and lesser amounts thereafter on other voyages cannot on end of employment claim difference in amounts).

1211-94 Seizure of vessel under libel constitutes dismissal under statute giving seamen right to extra wages on dismissal before termination of contract. 18F(2d)413.

1212-97 Seaman discharged for incompetence is not entitled to month's wages prescribed by Rev. St. § 4527. 25F(2d)835.

1212-99 Voluntarily leaving ship, though because of breach by ship, entitles seaman to wages only at contract price for actual period of service, and to pay for other work required beyond contract. 17F(2d)478.

1212-2½-New. Where seaman was in fault, penalty is not enforceable. 18 F(2d)675.

1212-2½-New. Ship's cook wrongfully discharged cannot recover double wages where wages were tendered and refused at time of discharge. 42F(2d) 903.

1212-2¼-New. In such case cook can recover only wages earned and one month's additional wages. 42F(2d)903.

1213-12 8F(2d)300; 24F(2d)94; 25 F(2d)835. See also 36F(2d)381. **Seaman awarded wages by decree of district court** is entitled to double wages from date of decree till payment. 25 F(2d)835. **Seamen employed by charterer** are entitled to penalties **though** charterer absconded. 25F(2d)908. **Discretion of court.**-20F(2d)342; 25 F(2d)908. **When not entitled to penalty for delay.**-31F(2d)327 [aff 31F(2d) 332(1stcase)]. **Sufficient cause shown.**-281US52, 50SCt189, 74Led696 (later statute construed). **Statute applies to foreign seamen** on foreign vessel. 40 F(2d)652. **Pay must have been withheld without reasonable cause.**-43F(2d) 425.

1214-13 8F(2d)300; 16F(2d)681; 21 F(2d)607; 24F(2d)372; 24F(2d)528; 31F(2d)115(2dcase) [aff 31F(2d)115]; 40F(2d)852 (neglect to make payment for time of return voyage where vessel burnt); 43F(2d)425. **Where there is doubtful legal question** as to seaman's right to wages before end of voyage, refusal to pay on demand does not draw penalty. 16F(2d)681. **Seamen refusing to complete voyage** but not logged as deserters are not entitled to penalties for nonpayment. 25F(2d)835.

1214-14½-New. Filing of petition in bankruptcy against owner of vessel and appointment of receiver is sufficient cause for nonpayment of wages within statutory time to prevent imposition of penalty. 8F(2d)110.

1214-14½-New. "Sufficient cause" for delay in paying seaman's wages affecting liability for double wages held not to require legal defense to wages. 17F(2d)623.

1214-14¼-New. Penalty being personal, claim against owner or master should not in any event be paid from funds looked to by subsequent liens. 8F(2d)110.

1214-14½-New. Seizure of vessel held to absolve vessel from delay in payment. 17F(2d)623.

1214-14½-New. Seamen have duty to minimize losses. 17F(2d)623.

1214-14½-New. Seamen have been held entitled to double payment for delaying payment. 21F(2d)987.

1214-14½-New. Delay may be excused under statute where "sufficient cause" exists, as appointment of equity receiver. 25F(2d)1002.

1214-14½-New. That master's deposit of seaman's wages with shipping commissioner was by draft does not warrant seaman's recovery of additional wages and penalty, where deposit was reasonably made, and seaman made no further demand till filing of libel. 31 F(2d)327 [aff 31F(2d)332(1stcase)].

1214-21 Discharge of seaman through illness does not release ship or owners. 7F(2d)674.

1214-24 18F(2d)675.

1214-26½-New. Master **of** coastwise vessel must give discharge and pay minor alien seaman ordered to ship on vessel bound for foreign port. 20F(2d) 342.

1214-26½-New. Seaman discharged for incompetence is entitled to earned wages. 25F(2d)835.

1214-26¼-New. Under terms of federal statute U. S. Rev. St. § 4527, seaman discharged without cause before one month's wages are earned is entitled only to wages earned to time of discharge and additional month's wages. 275US388, 48SCt162, 72Led326.

1215-28 40F(2d)652 (amount expended for clothing and for board while ashore). **Clothing purchased for, and furnished to, seamen from slop chest** do not constitute illegal advances. 25 F(2d)835.

1215-29 Damage to boiler from use of salt water cannot be deducted from chief engineer's wages where he used salt water on master's authorization when vessel ran out of fresh water. 25F(2d) 908.

1216-33½-New. Advances of clothing contrary to statute do not invalidate contract for seaman's services. 18 F(2d)675.

1216-34 Seaman injured in friendly scuffle while off watch, etc. In such case where seaman is not discharged and duration of disability is not shown, he is entitled to wages for voyage. 43 F(2d)425. **Seaman injured in friendly scuffle while off watch is entitled to** wages until discharged. 43F(2d)425.

1216-37 Where willful misconduct did not warrant discharge expense of injury can be deducted from earned wages. 43F(2d)425. **If willful misconduct warranted discharge** claim for wages for voyage is terminated. 43 F(2d)425.

1216-38 43F(2d)425. **Seaman engaging in prize fight, wrestling, or test of physical strength** is not engaged in discharge of obligation in shipping articles. 43F(2d)425.

1217-41 7F(2d)674.

1217-51½-New. Seaman held entitled to discharge and wages for violation by ship of statute requiring division into watches. 14F(2d)349.

1217-51½-New. It is immaterial that seaman, entitled to discharge, wages, and penalty for violation of statute by vessel, did not assign such violation as his reason for leaving ship. 14F(2d) 349.

1218-58 36F(2d)305 (penalty held not recoverable under evidence). **Refusal to work before destination known** held without justification. 40F(2d)652.

1219-69 24F(2d)372. **Demand for half wages,** made after seaman had determined to desert, is ineffective. 14F(2d) 851. **Matters not constituting desertion.**-17F(2d)478.

1220-71 24F(2d)528.

1221-78 25F(2d)835.

1222-90 24F(2d)528.

1222-90½-New. Delay in paying seaman held not "without sufficient cause" where he was absent without leave during regular payment of crew. 21F(2d) 987.

1224-3 Longer hours than contract time justifies seaman in leaving ship without forfeiture of previously earned wages. 17F(2d)478.

1224-9 Charging seamen with arbitrary amount held not justified. 40 F(2d)652.

1226-27 Remission of fines cannot be claimed under contract silent as to remission. 36F(2d)381.

1230-49 15F(2d)575; 17F(2d)623; 22 F(2d)448. **Seaman's release of lien for wages** on receipt of part payment is not binding after vendee's check for balance of wages is not paid. 22F(2d) 448.

1230-50 37BC24, [1926] 1DomLR1193, [1926] 1WestWkly632.

1230-51 Charter provision that charterer has no authority to incur liens does not affect right of seamen to lien for wages. 25F(2d)908.

1230-54 7F(2d)378 (libel for wages held contractual within California limitation statute). **Statute construed** in favor of seamen. 22F(2d)304.

1230-56 22F(2d)304. **Former masters acting as caretakers** of vessels moored in navigable waters and performing maritime services are entitled to preferred lien. 22F(2d)304. **Watchman not entitled to lien** for services after vessel was withdrawn from navigation where he had no agreement respecting wages. 24F(2d)441.

1231-60 18F(2d)413; 25F(2d)908; 25 F(2d)1002.

1231-62½-New. No lien for wages after seizure of vessel on legal process.-18F(2d)413.

1231-62½-New. Seaman may assign lien for fair and adequate consideration. 25F(2d)999.

1231-62¼-New. No maritime lien for wages arises during time vessel is in custody of marshal. 27F(2d)183.

1232-66 21F(2d)862.

1232-76½-New. Purchaser of vessel is put, on inquiry as to existing liens for seamen's wages. 15F(2d)575.

1232-76½-New. Failure to record bill of sale may be considered in determining equities after sale. 15F(2d)575.

1232-78 4Fed667; 7Fed507; 18F(2d) 413; 21F(2d)862; Eng 9Jur94. Mortgage.-22F(2d)304.

1234-93 But see 25F(2d)999.

1235-98 In Canada.-[1930] 2DomLR 421.

1235-1 Foreign seamen shipped on foreign vessel under foreign flag cannot sue in United States district court

where vessel is not in United States harbor. 5F(2d)151. **Seaman suing for wages** in law court must conform to statute which by lex fori regulation means to enforce right. 5F(2d)545.

1235-5½-New. Setting aside release signed by discharged seaman held not error in libel for usages and penalties for wrongful discharge. 20F(2d)122.

1235-5⅘-New. Consul's decision in seaman's libel for wages and return transportation is final in absence of showing that it is contrary to law. 14 F(2d)164.

1235-5¼-New. Jurisdiction of admiralty court in suit for wages against Greek vessel excluded by treaty. 14 F(2d)236.

1236-20 15F(2d)575. **Seaman's omission to file libel** till after sale held not to constitute laches. 15F(2d)575.

1236-21 21F(2d)858. But see 31F(2d) 115(2dcase) [aff 31F(2d)116]. **Suit for double wages** on account of wrongful delay must be brought within two years. 5F(2d)545.

1238-31 Doubt as to whether wages have been paid will be resolved in favor of seaman. 24F(2d)441.

1238-32 5F(2d)545 (letter to first officer construed to be but recommendation and not admission of liability for able seaman's pay); 36F(2d)381 (evidence held sufficient to show unseaworthiness). **Evidence held sufficient,** etc. 27 F(2d)182; 31F(2d)115(2dcase) [aff 31 F(2d)116]; 31F(2d)327 [aff 31F(2d) 332(1stcase)]. **Consular certificates,** etc. 15F(2d)405.

1239-33 27F(2d)183.

1240-39 31F(2d)107.

1241-45 Master failing to furnish accounts before bringing action is not entitled to costs. **PrEdwIsl** [1929] 4 **DomLR**873.

1241-46 40F(2d)852.

1241-52 24F(2d)683. **In determining damages recoverable for interference by United States vessels with sealing,** shares of crew are not deductible from gross probable income of venture. 24F(2d) 683.

1244-76 15F(2d)749.

1244-82½-New. Parties.-Owner of whaling park may bring action as representative of crew for loss of their agreed shares of profits because of interference with sealing by United States vessels. 24F(2d)683.

1244-82½-New. Federal statute conferring jurisdiction to determine claims for loss by interference by United States with sealing must be presumed to have been enacted in view of owner's right to bring such action. 24F(2d)683.

1244-82¼-New. Neither officers nor members of crew of whaling vessel may join with owners in recovery of proceeds of voyage in which they have shares. 24F(2d)683.

1245-84 17F(2d)526 (Washington statute does not allow seaman to impress lien on vessel for personal injuries from negligence of master or crew in wrongfully placing "portable gang plank," damage not being done by ship); 19F (2d)832; 32F(2d)284; 33F(2d)539 (negligence of assistant engineer not attributable to vessel or owner); 43F (2d)220; 128Misc419, 219NYS682; **Tex CivA** 11SW(2d)392. **Injury received while obeying orders.**-31F(2d)284; 128 Misc665, 219NYS750; 31 OhA379, 166 NE645. **Merchant Marine Act, incorporated,** applicable provisions of Employers' Liability Act. 277US226, 48SCt440, 72L ed860. **Owner not liable for drowning of seaman caused by captain's error of judgment** in attempting to rescue him after he fell overboard. 128Misc419, 219 NYS682. **Seaman held not entitled to recover under general maritime law** for negligence of mate. 16F(2d)984. **Seamen on British ship** is not entitled to recover under Jones Act. 16F(2d)984. **Under Federal Employers' Liability Act,** employer is not liable where seaman, acting as mate, created condition which caused his injury and there was no causal dereliction of employer. 229Ky 685, 17SW(2d)753.

1245-85 17F(2d)526 (generally liability of ship and owners for damages by negligence of captain to member of crew is limited to wages, and expense of maintenance and care); 36F(2d)970. **Evidence held insufficient.**-16F(2d)835.

1245-86 7F(2d)743 (defective block for cleaning smoke box tubes held to render vessel unseaworthy); 16F(2d)168 (evidence held to show injury to seaman due to defective condition of winch and not to negligent operation thereof); 24F (2d)374; 25F(2d)869; 30F(2d)951; 35 F(2d)261; 40F(2d)8; 41F(2d)456. But see 41F(2d)754. **Failure to furnish** ample provisions for voyage rendered ship unseaworthy. 7F(2d)676. **Fellow servant's negligence** has no relation to unseaworthiness of vessel or structural defects. 33F(2d)539. **Independent contracting stevedore** is responsible for selection and proper use of labor and equipment which it employs, when that equipment is supplied by vessel itself, and officers of vessel owe stevedore no duty of supervision. 27F(2d)960. **Liability of vessel depends** on unseaworthiness of vessel or failure to supply and keep in order proper appliances appurtenant thereto. 24F(2d)710. **Regardless of seaworthiness of ship,** seaman may recover where injury is due to shipowner's negligence. 24F(2d)374. **Right to recover for injuries** on foreign vessel in American port through unseaworthiness is governed by American law. 7F (2d)743. **Seaman held not entitled to recover** under law of great Britain, if applicable. 16F(2d)984. **Ship is not unseaworthy** because no method is provided for drawing hot water anywhere outside engine room. 30F(2d)951. **Stevedoring company is not insurer** with respect to its stevedores, vessel, her crew or cargo. 27F(2d)960. **Under Seamen's Act** (1915) § 20, as amended by Merchant Marine Act (1920) § 33, there is but single wrongful invasion of seaman's primary right, for which he is entitled to but one indemnity by way of compensatory damages. 278US130, 49SCt 75, 73L ed220. **Use of unfit tools as affecting assumption of risk.**-CalA 290P 75.

1245-87 Liability of person as charterer may be fixed by fact that vessel is victualed, manned, and controlled by him. 7 F(2d)676.

1245-88 41F(2d)456; 42F(2d)437. But see **CalA** 290P75. **Assumption of risk.**-28F(2d)283. **Assumption must be voluntary** under Federal statute. 37F(2d)355 (risk of unseaworthiness held not assumed). **Question for jury.**-128 Or286, 274P505(2dcase). **Risk not assumed.**-245Mich624, 223NW230. **Same definition of assumption of risk** is not required by law making statute as to right of action for death of railroad employees applicable to seamen. 41F(2d) 456. **Seaman does not assume risk** of defective winch where he has nothing to do with operation of it. 16F(2d)168. **Stevedores undertaking work at direction of superiors** do not assume risk, unless risk is so obvious and dangerous that no man of prudence would have obeyed his superiors. 27F(2d)960.

1245-88½-New. Owner is not liable for injuries sustained by seamen, due to defective condition of wharf, while returning to ship after voluntary trip ashore. 5F(2d)462.

1245-88⅓-New. Permitting loose explosive powder on deck at time cargo was being discharged is negligence. 16 F(2d)930.

1245-88¼-New. Right of action "in rem" by seaman for personal injuries does not survive to his administrator by Act (1920) § 33. 17F(2d)526.

1245-88⅕-New. Under Merchant Marine Act of 1920, plaintiff seaman is entitled to benefits of provision of act, though injuries were caused by negligence of fellow servant. 218AppDiv553, 218NYS589.

1245-88⅙-New. Jones Act (Merchant Marine Act of 1920) gives to seamen all right and benefits of Federal Employers' Liability Act. 218AppDiv553, 218NYS 589.

1245-88⅐-New. Jones Act (Merchant Marine Act of 1920) abolished the common-law doctrine of nonliability for fellow servant's negligence. 218AppDiv 553, 218NYS589.

1245-88⅛-New. Injury is not due to ship owner where plaintiff steward in line carrying bags up stairway was pushed back by those ahead. 218App Div553, 218NYS589.

1245-88⅛-New. Jurisdiction in seaman's libel suit for injuries while fastening cable on dock is ex delicto and must be determined from locality of injury. 15F(2d)580.

1245-88 1/10-New. Where seaman sustained injury after going on dock, admiralty court held without jurisdiction. 15F(2d)580.

1245-88 1/11-New. Under Jones Act an American seaman employed on British vessel, though he had not signed articles for shipment on vessel, is subject to British law and may not recover under such statute, since it is applicable only to seamen on American ships. 217App Div172, 216NYS295.

1245-88 1/12-New. Benefits of Merchant Marine Act (Jones Act) extend to stevedores loading foreign ships. 21F(2d) 187.

1245-88 1/13-New. Stevedore of American concern injured while loading foreign ship in American port is American seaman within Jones Act. 23F(2d)130.

1245-88 1/14-New. Operator of tug is secondarily liable for maintenance and cure of seaman injured by collision, notwithstanding recovery from owner of other boat solely at fault who defaulted. 24 F(2d)412.

1245-88 1/15-New. Foreign seaman governed by foreign law is not entitled to benefit of Jones Act. 221AppDiv688, 224 NYS662.

1245-88 1/16-New. Test whether one working on foreign vessel is foreign seaman and not entitled to benefit of Jones Act is whether or not he is employed directly by, and has contractual relations with, owner of ship. 221App Div688, 224NYS662.

1245-88 1/17-New. If he is thus employed by owners of ship, he is foreign seaman governed by rules of law of country in which ship is registered. 221AppDiv 688, 224NYS662.

1245-88 1/18-New. But if he is employed by independent concern and has no contractual relation with ship or its owner, though performing maritime duties thereon, he is entitled to benefit of Jones Act. 221AppDiv688, 224NYS662.

1245-88 1/19-New. Under such rulings American longshoreman killed while employed by stevedoring company in unloading foreign vessel in American port has cause of action where death was result of negligence of his employer. 221 AppDiv688, 224NYS662.

1245-88 1/20-New. Employee injured loading cotton in navigable water cannot recover under Liability Act. **Tex CivA** 300SW102.

1245-88 1/21-New. In absence of privity of contract between injured longshoreman and vessel, changing longshoreman's rights, his right of recovery for tort is that given him by country in whose territorial waters injury occurred, and not by country whose flag ship flies. 27F(2d)905.

1245-88 1/22-New. Merchant Marine Act is not repealed by Longshoremen's and Harbor Workers' Compensation Act, excluding certain cases of employment from application of general relief. 30 F(2d)144.

1245-88 1/23-New. Stevedores employed by stevedoring company loading foreign vessels are entitled to benefits of Merchant Marine Act. 27F(2d)905.

1245-88 1/24-New. Under Jones Act, employer was not liable for assault by one employee on another, though employee making assault was at time acting as gang boss. 224AppDiv260, 230NYS16.

1245-88 1/25-New. Such act makes Federal Employers' Liability Act rule of decision in action for injuries from marine service, but it does not apply unless relation of master and servant obtains. 206Cal 622, 275P410.

1245-88 1/26-New. Seamen's Act relating to injuries to stevedore applies, though stevedore was injured while aboard Brit-

ish vessel. 152Wash332, 277P992.

1245-88½7-New. Under Federal Employers' Liability Act, owner of car ferry is liable for negligent act of employees in leaving jackscrew in passageway between cars contrary to usual practice. 245Mich624, 223NW230.

1245-88½8-New. Negligence of boatswain.-Ship is not liable under general maritime law for injury to seaman due to negligence of boatswain. 29F(2d)110.

1245-88½9-New. Owner of vessel is not liable for injuries to employee resulting from negligent operation of winch by hookman, during captain's temporary absence. 30F(2d)723.

1245-88½0-New. Mate in charge of vessel, injured while unloading cargo, and winchman are fellow servants, under Federal Employers' Liability Act. 31F(2d)1004.

1245-88½1-New. Officer injured through winchman's negligence in operating winch is not precluded from recovering under Federal Employers' Liability Act, where he could not control winchman's immediate conduct. 31F(2d)1004.

1245-88½2-New. Fisherman, failing to use safety appliances provided and known to him, assumes hazards known, or open, obvious and apparent. 32F(2d)284.

1245-88½3-New. Jones Act has been held inapplicable to personal injury action by stevedore's employee against ship owner; employee not being "employee" of shipowner. CalA 291P283.

1245-88½4-New. Negligence of master of lighter making stern landing. 42F(2d)556.

1245-88½5-New. Action at law for death caused by negligence lies under Jones Act where negligence consisted of defective machinery, appliances, or equipment. 38F(2d)304.

1245-88½6-New. Action for death of longshoreman on American vessel in foreign port is governed by laws of United States. 136Misc850, 241NYS347.

1245-88½7-New. State statutes giving action for wrongful death are inapplicable in case of death of seaman within provisions of federal statute. 136Misc850, 241NYS347.

1245-88½8-New. Unprovoked assault on longshoreman by foreman has been held negligence within Federal Employers' Liability Act. 281US635, 50SCt440, 74L ed1082.

1245-88½9-New. Assault on seaman by foreman as reprimand has been held negligence under Federal Employers' Liability Act. 281US642, 50SCt443, 74L ed1086.

1245-88¼0-New. Under Federal Employers' Liability Act, employing stevedore is liable for foreman's assault on employee. 251NY218, 167NE422.

1245-91 7F(2d)741; 24F(2d)159; 127Misc677, 217NYS295. **Obedience of a seaman,** etc. 7F(2d)676. **Cases holding seamen guilty of contributory negligence, etc.**-43F(2d)220. **Cases holding seamen not guilty of contributory negligence.**-16F(2d)168. **Contributory negligence** of ship carpenter suing in state court does not defeat recovery, but merely mitigated damages. 150Va349, 143SE729. **Division of damages.**-25F(2d)869; 245Mich624, 223NW230. **Failure of captain** to attempt to rescue seaman, who had fallen overboard, held negligence, though seaman's negligence contributed. 7F(2d)953. **Failure of steward** properly to clothe himself for journey from ice bound vessel held contributory negligence. 7F(2d)676. **Fireman held not responsible** for selection of defective block for cleaning smoke box tubes. 7F(2d)743. **In action by stevedore for personal injuries,** it has been held that defense of contributory negligence will stand, as limited by admiralty rule, notwithstanding plaintiff came under provisions of Jones Act. 128Misc665, 219NYS750. **Negligence and contributory negligence** held to be questions for jury. 150Va349, 143SE729. **Seaman held not guilty of contributory negligence.**-16F(2d)930. **Seaman's knowledge of defects** does not avoid shipowner's liability. 22F(2d)488.

1246-92½-New. Assumption of risk.-Seaman does not assume risk of his employment. 127Misc677, 217NYS295.

1246-92⅓-New. Employer is not deprived of defense of contributory negligence because seaman without mate's license was acting as mate when injured, where boat's licensed mate was then off duty. 229Ky685, 17SW(2d)753.

1246-92¼-New. Assumption of risk.-Finding proper in action under Seamen's Act that employee, negligently chosing to walk along hatchway coaming when a safe way was open to him, did not assume risk of negligence of operator of vessel in failing to provide guard. 131Or108, 280P337.

1246-93 21F(2d)591. **Action for injuries to seamen is governed** by Maritime Law as modified by federal statutes. 281US635, 50SCt440, 74L ed1082. **Libel for maintenance** and care from personal injury held contractual within California limitation statute. 7F(2d)378. **Merchants' Marine Act** giving seamen election to proceed at common law for personal injuries suffered "in course of his employment" does not make Railroad Employers' Liability Act available to seamen injured on shore. 4F(2d)872. **No lien essential to proceeding** in rem against vessel arose under Jones Act. 277US151, 48SCt457, 72L ed827. **State courts have concurrent jurisdiction** with federal courts to recover for death of seamen under Merchant Marine Act. 271US557, 46SCt596, 70L ed1085. **Sufficiency of evidence.**-36F(2d)970. **Suit in rem for injuries** through unseaworthiness of vessel is maintainable, though case is governed by British law where seaman is injured on British vessel in American port. 7F(2d)743. **Under Jones Act** suit in rem against vessel for injury to seaman thereon does not lie. 29F(2d)110.

1246-93½-New. Stevedore may maintain action under Merchant Marine Act for injury while loading foreign ship. 21F(2d)187.

1246-94 271US33, 46SCt410, 70L ed813 (actions held to be under Merchant Marine Act as affecting application of Employer's Liability Act, incorporated by reference). See also 17F(2d)526. **Merchant Marine Act of 1920.**-248NY225, 162NE13. **Recovery under general maritime law does not preclude** action under common law as modified by federal statute for recovery of damages for master's negligence injuring seamen on ship. 145Wash460, 261P115 (under La Follette Act as amended by Jones Act).

1246-94½-New. Under Jones Act stevedores are entitled to benefits derived from jurisdiction of common-law courts. 224AppDiv260, 230NYS16.

1246-95 See also 42F(2d)556. **Negligence of captain** is imputable to owner. 7F(2d)953.

1246-96 See also 36F(2d)970.

1246-97 See also TexCivA 118W(2d)392.

1246-97½-New. Petition for damages for personal injuries against charterer, controlling wharf, and owners held not to allege partnership. 5F(2d)462.

1246-98 Washington statute giving seaman lien against vessel for personal injuries does not extend to representative of decedent in action for wrongful death. 17F(2d)526. **Action maintainable in state court.** 150Va349, 143SE729. **Applicability of statute.**-28F(2d)725 [certiorari granted 279US827, 49SCt252(7thcase), 73L ed979]. **Election of remedies.**-278US130, 49SCt75, 73L ed220. **Injured seaman may proceed under old maritime law,** as respects wages, maintenance, and cure, or under Merchant Marine Act. 28F(2d)725 [certiorari granted 279US827, 49SCt252(7th case), 73L ed979]. **Jones Act** does not authorize action in rem for injury to porter employed on steamer by slipping on accumulation of dust and water on deck. 24F(2d)710; 27F(2d)982; 221AppDiv214, 223NYS85. **Seaman injured on Norwegian vessel,** without gross negligence of owner, has been held not entitled to compensation in suit against shipowner, since Jones Act is inapplicable, and compensation could not be awarded under Norwegian Compensation Law, because of requirement that compensation be paid by government insurance fund, which was not made party, and requirement that right to indemnity from owner depends on proof of injury with intent or through gross negligence. 27F(2d)982.

1246-98½-New. Merchant Marine Act § 33 does not deprive state court of jurisdiction of seamen's common-law action for personal injuries, reserved to suitors by Judiciary Act (1789) § 9. 216App Div337, 215NYS123.

1246-98⅓-New. Such action may be brought in county where defendant has no place of business, if within federal district where it has office. 216AppDiv337, 215NYS123 (though principal place of business is in another state).

1246-98¼-New. Amendment of 1920 gives seaman entirely new action on law side of court and allows option between such action and old action on admiralty side. 20F(2d)465.

1246-98⅕-New. Old and new rights cannot be commingled, but must be separately asserted in forum having jurisdiction. 20F(2d)465.

1246-98⅙-New. Pleader having elected statutory remedy on law side of court has no right later to amend and transfer to admiralty side. 20F(2d)465.

1246-98⅐-New. Jurisdiction is vested in federal district court of action for injuries to seaman without reference to his citizenship. 20F(2d)465.

1246-98⅛-New. Admiralty court is without jurisdiction of seaman's libel for injuries after going on dock. 19F(2d)355.

1246-98⅑-New. Notwithstanding death occurred on land, action for death of seaman from falling through improperly lighted hatchway may be maintained under Merchant Marine Act. 8F(2d)223.

1246-98⅒-New. Jurisdiction of United States court of suit by foreign seaman against vessel of his nation is discretionary and will not be exercised against objection of foreign consul. 15F(2d)887.

1246-98 1/11-New. Fellow-servant rule does not apply in suit for injury to stevedore while employed in discharging ship's cargo. 16F(2d)146.

1246-98 1/12-New. Complaint held sufficient to state case under Merchant Marine Act and general maritime law. 8F(2d)16.

1246-98 1/13-New. Risk not assumed unless obviously dangerous. 8F(2d)16.

1246-98 1/14-New. Where seaman or stevedore is injured while rendering strictly maritime service, he may sue in state court and claim benefit of Jones Act. 219AppDiv438, 220NYS95.

1246-98 1/15-New. Risk of improper appliance is not assumed by accepting employment on ship improperly equipped unless it is part of duty to make requisition for proper appliances. 8F(2d)16.

1246-98 1/16-New. Simple tool rule inapplicable where defect or unfitness for which winch designed was not claimed. 8F(2d)16.

1246-98 1/17-New. Questions of fact are for jury. 24F(2d)374.

1246-98 1/18-New. Whether chain rail giving way when seamen seized it as wave struck him was securely fastened is question for jury, 22F(2d)488.

1246-98 1/19-New. as is also question of whether stanchions holding chain were of sufficient strength to withhold ordinary storm. 22F(2d)488.

1246-98 1/20-New. Defense of assumption of risk is not available where injury was caused by improper appliance. 24F(2d)374.

1246-98 1/21-New. In suit for injuries to stevedore, joinder of alien owners of vessel sought to be held liable at common law is improper. 24F(2d)591.

1246-98 1/22-New. Alien corporations owning vessel could not be impleaded in such action in absence of relation of employer and seamen. 24F(2d)591.

1246-98 1/23-New. Rules as to sufficiency of evidence in admiralty control. 25F(2d)322 (evidence insufficient to show negligence of master).

1246-98 1/24-New. Action for death

brought over two years after death of seaman is barred under Jones Act. 26 F(2d)290.

1246-98½5-New. Act of congress as to subject of death of seaman and actions thereon renders state laws inapplicable. 26F(2d)290.

1246-98½6-New. Seaman must elect between libel for wages, maintenance and cure, and indemnity and action at law for negligence. 145Wash460, 261P 115.

1246-98½7-New. Right of action for death under Merchant Marine Act (1920) § 33 (46 USCA § 688) is exclusive and supersedes state legislation. 28F(2d) 725 [certiorari granted 279US827, 49 SCt252(7thcase), 73L ed979].

1246-98½8-New. Where plaintiff based his right of action on Jones Act, § 33 (46 USCA § 688), and on defendant's common-law liability, fact that there was no liability under Jones Act was held not to estop plaintiff from proving his case under common law. 224AppDiv 866, 231NYS84.

1246-98½9-New. In action in state court by ship carpenter for maritime tort consisting of injury sustained while repairing ship at dock in navigable stream of United States, his recovery and relief to be afforded are to be determined by admiralty law. 150Va349, 143SE 729.

1246-98½0-New. Burden of proof is on plaintiff to prove boat was unseaworthy because of inadequate quota of licensed officers. 229Ky685, 17SW(2d)753.

1246-98½1-New. Limiting jury's consideration as to lack of light to question of plaintiff's contributory negligence has been held proper. 245Mich 624, 223NW230.

1246-98½2-New. Question of plaintiff's negligence is for jury under evidence permitting of different inferences. 245 Mich624, 223NW230.

1246-98½3-New. Sufficiency of evidence.—Verdict for plaintiff held not against weight of evidence. 245Mich 624, 223NW230.

1246-98½4-New. Evidence held sufficient to sustain finding that owner was grossly negligent in requiring deckhand to work near open hatch, on deck left dirty with coal dust and slippery from water and oil. 31 OhA379, 166NE 645.

1246-98½5-New. Evidence held sufficient to show proximate cause of death. 41F(2d)754.

1246-98½6-New. Evidence held sufficient to show negligence. 41F(2d)754.

1246-98½7-New. Evidence held insufficient to show proximate cause of deaths. 41F(2d)754.

1246-98½8-New. Federal statute authorizing action at law to be governed by Federal Employers' Liability Act supersedes state statutes. 281US38, 50 SCt207, 74L ed686 (action enforceable in law or admiralty).

1246-98½9-New. Evidence held sufficient to show negligence and want of contributory negligence. 35F(2d)602.

1246-98¼0-New. Evidence held sufficient. 36F(2d)254.

1246-98¼1-New. Evidence held insufficient. 36F(2d)305.

1246-99 Evidence held insufficient.—24 F(2d)159. **Evidence held to sustain finding** that deafness was caused by exposure while obeying orders of vessel's master. 7F(2d)676.

1246-1 8F(2d)223 (five thousand dollars for death not excessive); 16F(2d) 168 (seaman allowed twenty thousand dollars for injuries rendering him permanently crippled); 30F(2d)951. **Limitation of Suits in Admiralty Act** held inapplicable to suit for personal injuries sustained while obeying orders. 7F(2d) 676. **Under Federal Employers' Liability Act,** amount held proper for serious permanent injuries to mate, injured while in charge of vessel, partly as result of his own negligence, has been held proper. 31F(2d)1004.

1247-5 127Misc677, 217NYS295.

1251-21 35F(2d)717 (fellow servant rule held inapplicable); 43F(2d)443.

1253-36 8F(2d)361.

1253-44½-New. Instructions. 35F(2d) 717.

1253-44½-New. Questions for jury. 35 F(2d)717.

1253-44¼-New. In absence of proof of foreign law, case is governed by United States law. 43F(2d)443.

1253-44½-New. Seaman not alleging foreign law does not assume burden of proof. 43F(2d)443.

1253-44¼-New. Delay of more than three years in suing for assault held not laches under circumstances. 43F (2d)443.

1255-52½-New. Probate jurisdiction.—Where shipping commissioner collected wages of seaman lost at sea and deposited same in registry of federal court, they constituted "funds within commonwealth" so as to give probate court jurisdiction to appoint administrator. 33F(2d)615.

1255-52½-New. Under statute governing disposition of deceased seamen's wages, public administrator may be "legal representative of deceased." 33 F(2d)615.

1255-52¼-New. Congress has power to provide for disposition of effects and wages of seamen who die in service. 33 F(2d)615.

1255-52½-New. Deceased seamen's wages, unclaimed in hands of public administrator, will not escheat but will go into fund for ill and disabled seamen. 33F(2d)615.

1255-52½-New. Payment of deceased seaman's wages should not be made to public administrator where less than three hundred dollars. 33F(2d)615.

1261-21 13F(2d)614.

SEARCHES AND SEIZURES

1264-1 199 Ind546, 158NE902. **Other definitions.**—119 Or441, 249P1103. **Additional cost of treatment and cure** after discharge held recoverable. 25F(2d) 322. **Damages held not excessive.**—145 Wash460, 261P115. **"Search" is to "strip" person and examine contents more carefully** as distinguished from "frisk" which is running of hands rapidly over person of another. 126Misc698, 214NYS99.

1265-3½-New. American vessel, reasonably believed to be violating laws of United States may be lawfully seized by Coast Guard agents on high seas. 13F(2d)433.

1265-3½-New. Search warrant does not issue for thing of evidential value merely. 242NY13, 150NE585.

1265-3¼-New. Trailing of suspected offender by officer is not unlawful where no private rights or property are interfered with. 238Mich543, 213NW683.

1265-4 329 Ill 223, 160NE582, 585 [cit Cyc]; NJQuartSess 150A44; OklCr 292 P891. **Search warrant is process.**—40 OklCr76, 267P279. **Under warrant documents may be seized.**—16F(2d)202.

1265-65 6F(2d)584; NJSup 132A312; 131Misc521, 227NYS285; 154Tenn60, 289SW510. **Construction.**—216Ala522, 113S541. **Fourth Amendment** of Constitution must be construed in light of what was deemed unreasonable search and seizure when it was adopted. 267 US132, 45SCt280, 69L ed543. **Guarantee held not to protect** mere physical possession of incriminatory evidence. 17F(2d) 270. **In Tennessee.**—154Tenn60, 289SW 510. **National Prohibition Act** held to guarantee constitutional rights including buildings not dwellings. 17F(2d) 274. **One of several light housekeeping apartments** when occupied as home is entitled to same constitutional protection as separate house used as home. 38 OklACR681. **One testifying that he did not own** property searched cannot complain that search was unlawful. 140Miss367, 105S846. **Statutes authorizing search** of domicile are to be strictly construed. 89Fla202, 103S633. **Statute which requires warehousemen to place and permit inspection of tags on tobacco for identification purposes has** been held not against constitutional prohibition of general search warrants. 143 Va741, 129SE739.

1265-5½-New. Liberal construction should be given to provision. 199 Ind 317, 157NE657.

1265-6 28F(2d)189. **Construction.**—152 Miss761, 118S613. **In Mississippi.**—152 Miss225, 119S177. **Statutes as to search warrants** strictly construed. 14F(2d) 88. **State constitutional provisions afford no protection** from search to person not in possession of or owner of premises searched. 309Mo 520, 275SW 36. **Statute held not invalid.**—107TexCr 243, 296SW556.

1265-6½-New. Statutes which relate to search and seizure must be strictly construed. 199 Ind317, 157NE657.

1265-8 42F(2d)567; 94Fla134, 113S 704; 337 Ill 310, 169NE243; OklCr 280 P476; 159Tenn373, 19SW(2d)239; 107 TexCr169, 295SW619; TexCr 20SW(2d) 764 (warrant unnecessary to search pasture at considerable distance from house); TexCr 31SW(2d)721(2dcase) (room outside home held "place of abode" protected from illegal search); 145Wash87, 258P1030. **Belief that article sought** is in dwelling house is no justification for search without warrant. 269US20, 46SCt4, 70L ed145. **Laws authorizing invasion** of private premises by search and seizure proceedings are to be strictly construed. 233Mich169, 206 NW506. **Fact that article found is contraband** does not justify search without warrant. 242NY13, 150NE585. **Room in tourist camp** held "private residence" within statute. 107TexCr250, 296SW 533. **Search unlawful in inception** is not made lawful by what is found. 7F(2d) 760. **Statute making search of private dwelling** without warrant a misdemeanor does not affect right to arrest or enter dwelling without warrant where offense is committed in presence of officers. 7F(2d)247.

1265-9 15F(2d)953; 21F(2d)830; 47 Ida315, 274P628; 196 Ind665, 149NE 348; 214Ky480, 283SW430 (where search was for moonshine whisky); 227 Ky157, 12SW(2d)280; OklCr 280P476; OklCr 280P626; 39 OklACR227; 105 TexCr365, 288SW202; 107TexCr169, 295SW619; 111TexCr83, 11SW(2d)323; 112TexCr307, 17SW(2d)56(2dcase); 113 TexCr122, 18SW(2d)618; TexCr 27SW (2d)182; 145Wash87, 258P1030; 108 WVa494, 151SE713 (acts not amounting to waiver and consent). See also TexCr 28SW(2d)556. But see 42F(2d)567. **Constitutional right is not waived** by submission to search. 7F(2d)760. **Defendant cannot complain** of search of automobile or apartment of codefendant without warrant. 106TexCr462, 294SW 200. **Defendant does not waive his constitutional right** by consenting to search made under authority of a search warrant in some jurisdictions. 35 OklCr91, 249P354. **Officer having reasonable cause to believe** that offense is being committed in his presence may search and seize without warrant. 73Mont535, 237P495. **Person consenting to search of premises or vehicle** by officers without search warrant waives right to complain. 327 Ill 137, 158NE410. **Requirement for warrant may be waived.**—107 TexCr285, 296SW542. **Statements of defendant not amounting to consent.**—Okl Cr 280P319. **Immunity is personal and may be waived.**—OklCr 290P934. **Constitutional rights not violated** where defendants consent to search of premises. 35F(2d)594.

1265-9½-New. No search or seizure is permissible under law without proper warrant duly issued. 39Wyo 299, 270P 1065.

1265-10½-New. Police may not invade or trespass upon private property of individual without warrant, 126Misc698, 214NYS99.

1265-10½-New. though they may enter and inspect all licensed places to reasonable extent. 126Misc698, 214NYS99.

1265-10¼-New. Search warrant is not necessary for search of woodlands, pastures or fields not within the curtilage or close proximity of the residence. 39 OklACR227.

1265-11 See also 16F(2d)652; Miss 130S285; OklCr 280P851(1stcase). **Search of members of club cannot be defended** except if crime is committed in presence of officer or warrant of arrest is first obtained. 126Misc698, 214 NYS99. **Search and seizure of articles found on** persons legally arrested is not

unreasonable. 4F(2d)881.

1265-12 112TexCr506, 17SW(2d)809. **Constitutional right to immunity from illegal search is not waived by failure** to make and express objections to search of premises. 37 OklCr402, 258P514. **Officer must have probable cause to believe that law is being violated in his presence** in order to authorize him to [illegible] search without warrant. 74Mont [illegible] 240P[illegible].

1265-12½-New. That article found is contraband by statute does not justify unlawful search without warrant. 242 NY12, 150NE[illegible].

1265-12¾-New. In New York by stat-[illegible] warrant can be made [illegible] used to commit [illegible] use in [illegible] of crime. 242NY[illegible], 150NE [illegible].

1265-12¾-New. Where officer sees person illegally in possession of intoxicating liquor, seizure without search warrant does not violate constitutional [illegible] 113 Oh512, 150NE74. 42ALR [illegible].

1265-12[illegible]-New. Immunity from search and seizure without search warrant may [illegible] 261Mich[illegible], 217NW[illegible]; 25 [illegible] P[illegible].

1265-12[illegible]-New. Search of person without [illegible] warrant and [illegible] 124Misc [illegible] NYS[illegible].

1265-12[illegible]-New. Seizure made by fed-[illegible] and by [illegible] admission to [illegible] is violation of [illegible] 8F(2d)251.

1265-12½-New. Officer cannot promiscuously stop automobiles on public [illegible] and demand driver's license [illegible] to invade right [illegible] search and seizure, [illegible] automobile. 237Mich [illegible] NW[illegible].

1265-12[illegible]-New. Statute prohibiting search of certain premises without war-[illegible] be extended to include [illegible] than those specifically [illegible]. 102TexCr534, 281 SW[illegible].

1265-12[illegible]-New. Where arrest has law-[illegible], though without war-[illegible] may be made. 312Mo 99. [illegible]

1265-12[illegible]-New but a search, not inci-[illegible] arrest is not authorized [illegible] a warrant. 312Mo 99, 279SW [illegible].

1265-12[illegible]-New. That facts in posses-[illegible] have entitled them [illegible] not validate search [illegible] warrant. 8F(2d)251.

1265-12[illegible]-New. [illegible] seizing proper-[illegible] of ownership held [illegible] constitutional right [illegible] 1F(2d)562.

1265-12[illegible]-New. [illegible]cers, having law-[illegible] where they smelled [illegible] of smoking opium, were [illegible] of obtaining war-[illegible]. 5F(2d)276.

1265-12[illegible]-New. Where possible officer [illegible] obtained in advance of the [illegible] though he may not be [illegible] in all cases. 148Miss [illegible].

1265-12[illegible]-New. Probable cause, au-[illegible] search without warrant is rea-[illegible] ground of suspicion supported [illegible] circumstances warranting cautious [illegible] of guilt. 102TexCr408. [illegible] SW[illegible].

1265-12¼-New. Failure of defendant's wife to object to search of his dwelling without warrant does not waive his [illegible] of immunity against unlawful search. 39Wyo 299, 270P1065.

1266-12[illegible]-New. Search warrant is not necessary to board vessel which departed on voyage without proper clearance papers and seizure of such boat is legal. 31F(2d)499.

1266-12[illegible]-New. "Probable cause," authorizing search, is reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant cautious man in belief that accused is guilty of offense charged. 110 TexCr512, 8SW(2d)144, 60ALR290.

1266-12[illegible]-New. Radio information of crime and description of perpetrators is sufficient probable cause to justify search without warrant. 110TexCr512, 8SW(2d)144, 60ALR290.

1266-12[illegible]-New. Reasonable cause for belief that felony is being committed in dwelling house does not authorize search without warrant. 39Wyo 299, 270P1065.

1266-12[illegible]-New. Search of automobile on public highway may be made without warrant, where searching officer has knowledge or information of facts constituting probable cause. 110TexCr512, 8SW(2d)144, 60ALR290.

1266-12[illegible]-New. Commander of Coast Guard boat, having boarded motor boat, which had departed without proper clearance papers, does not need search warrant. 31F(2d)499.

1266-12[illegible]-New. Lessee or licensee of dwelling house who claims ownership of property unlawfully seized without warrant may complain, though not owner of premises. 32F(2d)902.

1266-12[illegible]-New. Knowledge acquired as result of search cannot legalize search unlawful when made. 34F(2d)877.

1266-12[illegible]-New. Driveways on premises can be entered without warrant where reasonable cause exists. 39F(2d)171.

1266-12[illegible]-New. Probable cause for search of trucks without warrant held to exist. 39F(2d)171.

1266-12[illegible]-New. Officers seeing gambling devices in rooms open to public can lawfully seize them without warrant. Wash 287P662.

1266-12[illegible]-New. Motion to suppress use of alleged contraband article as evidence should be entertained by court. 27 OhNPN8520.

1266-12[illegible]-New. Search of home without search warrant or warrant for arrest is unauthorized. OklCr 287P793.

1266-12[illegible]-New. In some jurisdictions issuance of search warrant for evidence or instruments of murder is unnecessary. Wash 287P57.

1266-12[illegible]-New. Person lawfully arrested for misdemeanor may be searched without warrant. Ind 168NE22.

1266-12[illegible]-New. Search of person of defendant without search warrant and where no legal arrest has been made and on mere suspicion violates provision against unreasonable searches. OklCr [illegible]P[illegible].

1266-12[illegible]-New. Search without warrant of pasture, not part of curtilage, is permissible. 113TexCr31, 198SW(2d) 49.

1268-12[illegible]-New. Where, in advance of search, there is evidence of probable cause, search of automobile without warrant is justified. TexCr 208SW(2d) 766.

1266-12[illegible]-New. Constitutional guaranty does not prohibit seizure without warrant where contraband is fully disclosed and open to any of senses. 108 WVa277, 150SE736.

1268-12[illegible]-New. Search of person lawfully arrested without warrant extends to automobile such person was operating at time. Ind 168NE22.

1266-12[illegible]-New. Search and seizure without warrant is unlawful though warrant is procured after search. 14Pa Dist&Co 2[illegible].

1266-13 5F(2d)282; 11F(2d)933 (affidavit held sufficient); 24F(2d)518; 29 F(2d)187; 34F(2d)30 (facts alleged in affidavit should be such as to warrant prudent man to believe that offense is being committed); 37F(2d)124; 43F (2d)184; 160Ga744, 1288SE909; 44 Ida 43, 254P788; 321 Ill484, 152NE500; Ind 168NE577; 215Ky700, 286SW1052; 216Ky220, 287SW704; 161La988, 1098 787; MoA 7SW(2d)375; 74Mont377, 240 P984; 75Mont476, 244P280; 24 OhNP N881 (determination of what is probable cause is ministerial act); 33 OklCr40, 241P1107 (place to be searched must be described with particularity); OklCr 276P785; OklCr 277P682; OklCr 279P361; 119 Or422, 249P1046; 112 TexCr431, 17SW(2d)55; 41Wyo 438, 286P390 (affidavit strictly construed); Out [1930] 3DomLR770. **A mere misrecital,** etc. 198 Ind1, 151NE405. **Warrant may issue when affidavit is filed,** etc. 136Wash374, 240P360. **Substantial conformance to the statute,** etc. 256 IllA415. **Absence of name of affiant** in copy of affidavit upon which search **warrant is issued** is not defect fatal to warrant. 197 Ind16, 164NE93. **Accuracy or sources of affiant's information.** –OklCr 276P785; OklCr 277P946. **Action of court or magistrate** in determining question of probable cause is judicial. 199 Ind317, 157NE657. **Affiant must personally appear before commissioner** in order that his affidavit may support issuance. 35F(2d)957. **Affidavit alleging only conclusions of law and facts** are insufficient. 44 Ida43, 254P 788. **Affidavit based on information and belief,** and uncorroborated, does not furnish facts necessary to confer juris-diction. 214Ky240, 282SW1097. **Affidavit containing hearsay** held illegal as basis for search of house at night. 35 F(2d)957. **Affidavit dated day after search warrant** need not be amended where evidence shows warrant was based on such affidavit, date being mere oversight. 144Miss87, 1098263. **Affidavit filed with justice of peace** need not be recorded in his records. 198 Ind198, 152NE814. **Affidavits held sufficient.**–26 F(2d)[illegible]; 283Mich[illegible]; 207NW[illegible]32 (description of premises); 236Mich 75, 209NW944. **Affidavits held insufficient.**–24F(2d)512; 43F(2d)184; OklCr 272P886; OklCr 281P597(1st case). **Affidavit insufficiently describing place to be searched is void.**–OklCr 288 P989(1stcase); OklCr 288P1000. **Affidavit made upon information, belief and advice only** is insufficient. OklCr 273P288. **Affidavit may be solely on information and belief.**–TexCr 268SW (2d)275. **Affidavit merely setting out facts stated to affiant by third person** is insufficient. OklCr 277P682. **Affidavit must bear countenance of truth** so that if untrue action for damages or perjury may be predicated thereon. 199 Ind317, 157NE657. **Affidavit must be true at time of final oath thereto.**–22F (2d)[illegible]24. **Affidavit must particularly describe place to be searched.**–40 OklCr 18, 266P494. **Affidavit must state evidentiary facts** and not mere conclusions. OklCr 274P41. **Affidavit not impeachable** by affiant showing that officer administering oath failed to read entire instrument to affiant. TexCr 318SW(2d) 452. **Affidavit not signed by affiant** void under statute. 215Ky523, 2[illegible]SW1118. Affidavit on information and belief is sufficient.–152Tenn431, 2[illegible]SW356; 159 Tenn263, 178SW(2d)899. Affidavit on information and belief insufficient.–160Ga 744, 1288SE909; OklCr 2[illegible]P5[illegible](2d case); 113TexCr600, 218SW(2d)1086 (1st case). **Affidavit on knowledge** must set out facts on which knowledge based. 152Tenn431, 284SW356. **Affidavit or complaint on information valid.**–102WVa 619, 135SE905. **Affidavit should particularly describe** place to be searched and owner or occupant should be named or described as unknown. OklCr 299P 1112. **Allegation that premises are occupied by parties unknown and whose** description is unknown is sufficient as to parties. TexCr 268SW(2d)211. **Application must contain description of** place intended to be searched. TexCr 278SW(2d)512 (description insufficient). **Certainty in affidavit of place to be searched** is a constitutional mandate in some jurisdictions. 198 Ind1, 151NE 405. **Charge in affidavit must be supported by evidence.**–44 Ida43, 254P[illegible]. **Conclusiveness of affidavits.**–OklCr 286P [illegible]. **Congress cannot make sworn** statement of belief sufficient.–18F(2d) 442. **Contempt proceedings** cannot be based on proceedings in federal district court or commissioner in connection with application for search warrant. 38 F(2d)833. **Credibility of affidavit** applying for warrant is for officer giving oath. 7PaDist&Co 737. **Defendant has burden of proof** of lack of probable cause where he seeks to controvert search warrant. 34F(2d)852. **Demonstrated guilt of defendant after execution of warrant** cannot be considered in determining sufficiency of affidavit on which warrant was issued. 216Ky279, 287SW726. **Description of place to be**

searched.–32 OklCr274, 240P1078. **Description of property to be seized held insufficient.**–18F(2d)442. **Designation of place in affidavit** as being occupied by estate of a deceased person is insufficient. 145Miss237, 110S513. **Designation of place to be searched.**–38 OklACR 681. **Determination of probable cause by United States commissioner.**–8F(2d) 512; 8F(2d)581; 15F(2d)644. **Entry of complaint in dockets.**–136Wash374, 240P360. **Error in dating affidavit not fatal.**–Miss 128S53. **Evidence held to show probable cause.**–22F(2d)834; 22F (2d)837. **Existence of probable cause is question for court.**–160Ga744, 128SE 909; 214Ky240, 282SW1097. **Facts, and not belief or conclusions of informant,** are necessary basis for showing of probable cause. 206 Iowa615, 220NW59. **Facts are required to be stated** and conclusions however positively stated are insufficient as basis of probable cause for issuing warrant. 75Mont476, 244P 280. **Facts must be alleged** as distinguished from conclusions. 21F(2d)575; 21F(2d)592. **Facts must exist at time showing is made for warrant.**–238Mich 171, 213NW159. **Facts raising only suspicion or surmise** held insufficient. 216Ky270, 287SW726. **Facts stated in application** must be sufficient to permit judicial officer to form his own conclusion. 316 Ill 376, 147NE472. **Facts sufficient to show probate cause** must be stated in affidavit. 32 OklCr203, 240P 1075. **Failure of affidavit for search warrant issued by justice of peace to name his district** does not invalidate warrant. 152Miss154, 118S719. **Failure of justice to make finding in his docket of probable cause.**–318Mo 827, 1 SW(2d)106; Mo 1SW(2d)153. **Finding may be based on sworn testimony taken before magistrate** and need not be based on information itself. 206 Iowa615, 220 NW59. **Finding of probable cause is conclusive** as between state and defendant. 152Miss225, 119S177. **Finding of probable cause is judicial function.**–Okl Cr 276P785. **For things of mere evidential value** warrant does not issue. 242NY13, 150NE585. **Hearsay** may furnish basis for probable cause. TexCr 26SW(2d)275. **Information and belief.** –107TexCr579, 298SW573; 187Wis115, 203NW760. **Insufficiency of affidavit** upon which warrant was procured is ground for quashing warrant. 13F(2d) 851. **Insufficient descriptions of place to be searched.**–32 OklCr203, 240P1075. **Insufficient showing of probable cause.**– 18F(2d)442. **Issuance of warrant constitutes finding of probable cause.**–152 Miss225, 119S177. **Issuance on conclusion of applicant alone is erroneous.**– 160Ga744, 128SE909. **It is for magistrate to determine** that truth of information detailed in affidavit for search warrant is sufficient, if true, to constitute probable cause. TexCr 24SW(2d) 1095. **It is province of magistrate** to determine whether complaint is based on probable cause. 112TexCr628, 18SW (2d)158; 152Va368, 147SE267. **Judicial finding of existence of probable cause** by officer issuing warrant is conclusive. 157Miss600, 128S753. **Language of verified complaint should be such** as to enable officer to identify property to be searched with reasonable certainty. 192Wis352, 212NW628. **Legislature may declare what showing shall constitute probable cause** if it does not require less to be shown than was required at common law. 312Mo 425, 279SW102. **Magistrate's finding that evidence is sufficient** is conclusive. 206 Iowa615, 220NW59. **Motion to quash** search warrant issued without probable cause should be sustained. 27F(2d)892. **Oath.**–146Miss662, 111S865, 51ALR836. **Observations of officer,** reasonably inducing suspicion of crime, may justify issuance of search warrant. 4F(2d)843. **Place to be searched** must be described as particularly as may be. OklCr 277P 682; TexCr 26SW(2d)655. **Power of United States commissioner to subpœna witnesses.**–38F(2d)833. **Private residence** is immune from search and seizure unless affidavit shows that residence or portion thereof is store, rooming house, place of storage, or place of public resort. 34 OklCr199. 245P906. **Probable cause.**–35F(2d)209; 316 Ill 376, 147NE472; 329 Ill 223, 160NE582; 199 Ind317, 157NE657; Ind 166NE769; 312Mo 425, 279SW102; 74Mont377, 240 P984; 38 OklACR681; 114 Or657, 236P 746. **Proceeding by federal judge or commissioner to procure evidence in aid of application for warrant** is exercise of function reserved to grand jury. 38 F(2d)833. **Provision that search warrant may issue** on affidavit of any credible person that he has reason to believe and does believe certain facts does not violate state Const. § 23. 142Miss71, 107S281. **Question of probable cause** and question of legality of search warrant are judicial questions, for the court and not for the jury. 29F (2d)8; 324 Ill 160, 154NE907. **Question on motion to quash search warrant** is to be decided from situation when issued, not from results. NJ 150A44. **Review of order issuing search warrant.** –Ind 166NE769. **Right to attack affidavit.**–OklCr 277P608. **Rule against admission of hearsay evidence** does not apply in inquiries into existence of probable cause. Ind 166NE769. **Rumor or general repute.**–238Mich171, 213NW159. **Search warrant is judicial finding** of facts in affidavit and of probable cause for search. 144Miss87, 109S263. **Search warrant issued in blank** by justice of peace who authorized officer put in anything he sees fit is insufficient. 109Tex Cr11, 28W(2d)453. **Search warrant issued upon affidavit of mere belief,** or on information and belief, is insufficient upon which to base finding of probable cause. 199 Ind317, 157NE657, 663 [cit CJ]. **Search warrant issued upon information and belief unsupported by facts** is illegal. 44 Ida43, 254P788. **Sufficiency of affidavits.**–43F(2d)184; 229Ky 488, 17SW(2d)399(1stcase); TexCr 24 SW(2d)1095. **Sufficiency of oath.**–149 Miss323, 115S555. **Sufficiency of probable cause.**–216Ky270, 287SW726. **Sufficient finding of probable cause.**–317Mo 413, 297SW63. **Testimony need not be reduced to writing** by magistrate holding hearing to determine if probable cause exists. IndA 168NE192. **Testimony on which magistrate acts** must be reduced to writing in formal complaint and verified by affidavit. 316 Ill 376, 147NE472. **To search premises other than private dwelling** search warrant may be based upon affidavit of one witness. 106TexCr88, 290SW768. **Truth of affidavit.**–229Ky488, 17SW(2d)399 (1stcase); 34 Okl 52, 244P451. **Truth of averments of affidavit** cannot be inquired into by courts when accepted and acted upon by magistrate. TexCr 26SW(2d)211. **Truth of statements in affidavit** on which warrant was issued cannot be attacked after execution of warrant. OklCr 283P263(2dcase). **Validity depends on showing** made on issuance, not on ultimate verdict. 35F (2d)865(2dcase). **Warrant based on accused's conclusion without facts** not based on sufficient showing of probable cause. 316 Ill 376, 147NE472. **Warrant treated as only "daytime" warrant** where affidavit stated location of property sought, knowing it not to be there. 22F(2d)834. **What is probable cause.**– 216Ky270, 287SW726. **Wife's affidavit will not be sufficient** for search warrant where execution of warrant will mean procuring evidence against husband in criminal prosecution. 215Ky523, 284 SW1116.

1266–14 338 Ill 52, 169NE822; 153Tenn 431, 284SW356; 110TexCr478, 9SW(2d) 352; 110TexCr403, 10SW(2d)549(1st case); 111TexCr193, 11SW(2d)516; BC [1930] 3DomLR238. **Commission's determination of probable cause** for issuance of warrant is conclusive if not arbitrary. 17F(2d)988. **For prize fight films** in interstate commerce warrant may not be issued unless used in commission of felony, where not stolen, subject to federal taxes, subject to forfeiture, nor possession illegal. 28F(2d) 189. **Prize fight films, transported in interstate commerce,** are not subject to seizure under search warrant because used "as means of committing felony." 28F(2d)189. **Probable cause.**–317Mo 413, 297SW63. **Warrants held sufficient.** –317Mo 413, 297SW63. **Manner and time of filing** affidavit held not to affect validity of warrant. IndA 169NE338.

1266–14½–New. Application for search warrant must name owner or party in possession of premises and describe latter with reasonable certainty. 220MoA 349, 285SW1021.

1266–14¼–New. A search warrant issued in one province may be properly backed in another province for use therein in aid of a prosecution pending in the issuing province. BC [1930] 4 DomLR235.

1266–14¼–New. In Canada, justice of any province may indorse warrant for execution in another province. Ont [1930] 3DomLR953.

1266–15 89Fla202, 103S633; 197 Ind 517, 151NE416; Miss 130S477 (warrant may be returnable to county court); MoA 32SW(2d)129; 24 OhNPNS81 (clerk of municipal court of Cincinnati and his deputies may issue search warrants); 157Tenn538, 11SW(2d)879; 152 Va368, 147SE267; 100WVa505, 130SE 669 (he can issue warrant only while in his own district); 188Wis266, 205NW 813; Ont [1930] 3DomLR770. **Affidavits and warrant issued thereon are public records** which no one has a right to alter, mutilate, or destroy. 8PaDist& Co 585. **Approval by county attorney.**– 75Mont475, 244P280. **Circuit clerk has no power to issue search warrant** without order of court and warrant so issued is a nullity. 309Mo 520, 275SW 36; 309Mo 534, 275SW41. **Clerk of court cannot issue warrant** on his own authority. 317Mo 413, 297SW63. **Clerk of municipal court** may be authorized to issue search warrant. 194Wis441, 217NW277. **Fact that no record was made of warrant** in office of justice of peace who issued it upon affidavit filed with him does not render warrant void. 197 Ind517, 151NE416. **Failure of officer issuing warrant** to add words or letters showing capacity in which he acted held not prejudicial to defendant. 221Ky84, 295SW1019. **Issuance by justice outside of his precinct.**–150Wash187, 272P729. **It is immaterial that change of name of ownership of premises** in affidavits and warrant were made in presence of man arrested, the prosecutor, the executing office, and the justice. 8PaDist&Co 585. **Justice may issue warrant** for search in another district and returnable there. 147Miss118, 112 S868. **Judge of state municipal court** held not empowered to issue warrant for federal search on mere information and belief affidavit. 273US28, 47SCt248, 71L ed520. **Police judge has no jurisdiction** outside of limits of incorporated towns. 219Ky139, 292SW771. **Power to issue warrant for search of person** held not conferred on justice of peace by express power to issue warrant for search of place for liquor. 194Wis229, 215NW896. **Search warrant signed for justice** of peace at his request held valid. 198 Ind198, 152NE814. **That justice permitted affidavit for warrant to be taken from his office** does not render warrant issued by him and search thereunder invalid in absence of injury to defendant. 197 Ind517, 151NE416. **That warrant is signed by mayor instead of city judge** does not render warrant and search thereunder illegal. 89 IndA225, 166NE 11. **Where justice of peace assumes to act under color of title,** his act in issuing search warrant is not subject to collateral attack. OklCr 276P785.

1266–15½–New. Justice of peace is not disqualified because he was to be paid costs allowed. 290Pa174, 138A679.

1266–16 33F(2d)71; 43F(2d)184 (unnecessary to name owner); 338 Ill 170, 170NE275; 198 Ind1, 151NE405; 198 Ind496, 154NE278; 198 Ind686, 154NE 670; IndA 169NE338 (affidavit must be so specific as to leave nothing to officers' discretion); 144Miss401, 110S122 (must conform to affidavit); 36 OklCr401, 254P 985; 40 OklCr18, 266P494; 40 OklCr 219, 267P1045; 40 OklCr366, 269P376;

290Pa174, 138A679; 13PaDist&Co 697; 153Tenn162, 281SW936; 109TexCr11, 2 SW(2d)453; 112TexCr219, 15SW(2d) 1048; 113TexCr31, 19SW(2d)49 (description of place in affidavit controls); 103WVa148, 136SE842. **More than one place.**–198 Ind1, 151NE405. **Affidavit held sufficient.**–107TexCr236, 296SW543. **Description and identification held insufficient.**–14F(2d)670. **Description as premises of named person without more** is insufficient. 40 OklCr18, 266P494. **Description held sufficient.–NJQuartSess** 150A44; OklCr 290P420(1stcase); 290 Pa181; 138A682; 103WVa148, 136SE 842. **Description held insufficient.–OklCr** 288P367(2dcase); OklCr 288P369 (to authorize search of building used for domestic purposes within curtilage); 290Pa185, 138A683. **Description in warrant may be aided by that in affidavit** where affidavit is attached to warrant and description of affidavit is incorporated in warrant by proper reference. 158Tenn400, 14SW(2d)51(1stcase). **Description should conform to description in affidavit.**–33 OklCr40, 241P1107. **Description should leave no discretion to officer** in choice between one or more places occupied by strangers to process. 153Tenn162, 281SW936. **Description which enables officer to locate premises without aid of information other than that contained in warrant** is sufficient. 318Mo 827, 1SW(2d)106; OklCr 277P 260; OklCr 277P683; OklCr 277P946. **Greater accuracy should be observed** in describing place than things to be searched. 290Pa181, 138A682. **In "John Doe" warrant** for search of house, description of person is unessential. 217 Ky503, 289SW1108. **Officer cannot seize by virtue of warrant property not described therein.**–121 Or561, 254P1010. **Owner or occupant need not be named** or described. Mo 1SW(2d)841. **Reference to street number** is insufficient where two streets bear identical names and numbers, or more than one building is at designated number, or number of occupants have different rooms at particular street number. 153Tenn162, 281 SW936. **Search warrant describing premises occupied by more than one family for business by single street number** is void. 198 Ind496, 154NE278. **That dwelling searched is home of defendant's mother** is not fatal to validity of search warrant. 206 Iowa615, 220NW 59. **Typewritten or printed warrants covering all cases of similar character** held not void, though omission of irrelevant matter is preferable. 290Pa181, 138A682. **Warrant to search residence in auto park** held not to authorize search of filling station and park. 36 OklCr 401, 254P985. **Warrant valid on its face may be shown to be invalid** because of defective description of property to be searched. 8F(2d)318. **Warrants held sufficient.**–38F(2d)837; 198 Ind1, 151NE 405; 198 Ind440, 154NE4; 200 Ind292, 163NE95; Ind 165NE755; Ind 168NE 577; IndA 169NE338; 217Ky503, 289 SW1108; 222Ky385, 300SW902; 222Ky 484, 1SW(2d)779; 162La357, 110S557; 236Mich75, 209NW944; 251Mich253, 231NW557(1stcase); 146Miss593, 111S 595; 318Mo 827, 1SW(2d)106; 322Mo 1203, 18SW(2d)58; MoA 17SW(2d)353; OklCr 281P824; OklCr 283P1032(2d case); OklCr 290P568(1stcase); 109Tex Cr246, 4SW(2d)82; TexCivA 98W(2d) 265(1stcase); TexCr 25SW(2d)875; 135 Wash609, 238P638; 150Wash187, 272P 729; 101WVa492, 133SE106 (farm); 107WVa60, 146SE887; Man [1930] 1 DomLR766 (on charge of keeping disorderly house). **Warrants held insufficient.**–33F(2d)982; 40 OklCr219, 267P 1045; OklCr 281P597(2dcase); OklCr 281P818(2dcase) (not stating town in which street named is situated); 13Pa Dist&Co 697. **Name of owner or occupant need not be stated** where place to be searched is otherwise particularly described in affidavit. OklCr 290P1112. **1267–17** 275US192, 48SCt74, 72L ed 231; 197 Ind16, 148NE420 (absence of name of affiant on affidavit on which warrant was issued not fatal defect). But see Mo 1SW(2d)841. **Although not naming the person against whom it is issued,** etc. TexCr 27SW(2d)180(2d case). **If a description is as particular,** etc. See also 96PaSuper383. **Automobile** "now being used by and controlled by John Doe et al" is valid. 216Ky451, 287SW951. **Description of automobile** held sufficient, though word "license" was not used in connection with license number. 216Ky451, 287 SW951. **"John Doe"** warrant is void. 142Miss100, 107S376. **Mistake in naming person** does not vitiate search warrant. 198 Ind182, 150NE367. **"Scripps-Booth automobile touring car, license No 232504"** is sufficient. 216Ky451, 287 SW951. **Search and seizure of brewery** held illegal under warrant for search of liquor. 16F(2d)317. **Seizure of property not described in warrant.**–152Miss761, 118S613. **Warrant for search of automobile held sufficient,** though person in possession was described under fictitious name. 216Ky 451, 287SW951. **Description of person** whose premises are described is not required. 41F(2d)365. **In determining sufficiency of description** recourse may be had to affidavit. 43F(2d)399.

1267–18 144Miss87, 109S263. **Other instances of surplusage.**–317Mo 413, 297 SW63.

1267–18½–New. Search warrant must be valid when issued and validity cannot depend on manner of execution. 13F(2d)242.

1267–18⅓–New. Where search warrants direct an unlawful seizure, whole seizure is void and warrant will be quashed. 13F(2d)242.

1267–19 Date for return essential.–146Miss677, 111S738.

1267–19½–New. Statute authorizing warrant against fictitious or unnamed owner of premises not unconstitutional. 213Ala649, 106S44.

1267–19⅓–New. Location of signature does not vitiate affidavit forming basis of search warrant. 104TexCr42, 282SW 585.

1267–19¼–New. Search warrant and search not unlawful because authorizing search in daytime or nighttime where search was in fact made in daytime. 17F(2d)937.

1267–19⅕–New. There can be no unlawful resistance without a valid search warrant. 14F(2d)670.

1267–19⅙–New. Complaint should not be too remote, 326 Ill 481, 158NE134.

1267–19⅐–New. Failure of justice signing warrant to add letters showing that he signed as such does not invalidate warrant. 215Ky54, 284SW401.

1267–19⅛–New. Determination of rights under warrant depends on facts sworn to, not conclusions of affiant or facts shown by search. 24F(2d)557.

1267–19⅑–New. Omission of date and subsequent insertion of date by unauthorized person does not invalidate warrant. 25F(2d)872.

1267–19⅒–New. Blanket form of search warrant averring in general terms that reasonable cause has been shown is improper under statute and common law. 89PaSuper435.

1267–19⅟₁₁–New. It is only where issuing magistrate fails to draw necessary legal conclusions from facts stated in affidavit for search warrant that his action in issuing warrant may be reviewed. 110TexCr90, 7SW(2d)551.

1267–19⅟₁₂–New. Burden of showing search warrant invalid for lack of probable cause, valid on its face, is on asserter of invalidity. 34F(2d)495.

1267–19⅟₁₃–New. Failure of search warrant to command that search be made in daytime will not invalidate it. 247 Mich656, 226NW685.

1267–19⅟₁₄–New. Failure of magistrate to insert in warrant name of party swearing to information is irregularity not rendering warrant illegal. OklCr 279P366.

1267–20 24F(2d)479; 33F(2d)4 (search warrant authorizing prohibition officer to make search held invalid, because not directed to internal revenue officer); 214Ala174, 110S152; 94Fla134, 113S704; 97Fla650, 122S110; 326 Ill 481, 158NE134 (warrant held to comply with constitutional requirements as to certainty); 198 Ind1, 151 NE405; 199 Ind317, 157NE657; 152 Miss225, 119S177; OklCr 279P931 (form prescribed by statute); 290Pa 174, 138A679; 134SC268, 131SE419; BC [1930] 3DomLR238. **Application for search warrant held sufficient** to satisfy constitutional provisions. 311 Mo 664, 279SW395. **Description of property on search warrant** held to comply as to particularity with Const. Amendm IV and Espionage Act (40US St atL228) tit 11, § 3. 13F(2d)242. **Persons having no interest** in premises searched or property seized cannot question validity of search warrant. 6 F(2d)222. **Search based upon warrant** issued without probable cause is unlawful. 74Mont377, 240P984. **Statement of offense.**–Alta [1930] 3DomLR 293. **Sufficiency cannot be questioned collaterally.**–220AppDiv600, 223NYS355 (Code Cr. Proct. §§ 791–793, 807–809). **Where nothing to show that officer seeking search warrant read or signed affidavit,** or knew what was in it, warrant was nullity. 134SC268, 131SE419. **Style.**–OklCr 287P769; OklCr 287P781; OklCr 288P363.

1267–21 338 Ill 52, 169NE822 (officer must comply strictly with statute in serving warrant).

1267–21½–New. Upon general denial of motion to quash search warrant state has burden to sustain writ. 199 Ind317, 157NE657.

1267–21⅓–New. Burden of showing invalidity of search warrant fair on its face rests on person asserting it. 215 Ky54, 284SW401.

1267–21¼–New. Inclusion of order for arrest in search warrant does not invalidate warrant. 312Mo 425, 279SW 102.

1267–21⅕–New. Alteration of warrant with oral consent of magistrate who issued it by inserting initials of person whose residence is to be searched invalidates warrant. TexCr 25SW(2d) 838.

1267–22 See also 250 IllA547 [citCyc]. **Warrant should be directed to person or persons by name** and not to class. 24F(2d)965.

1268–23 224AppDiv284, 229NYS690; 40 OklCr76, 267P279; OklCr 279P931 (warrant addressed to defendant held void). **Participation of federal officer in state search** held not to render proceeding federal undertaking. 273US28, 47SCt248, 71L ed520. **In Oklahoma.**–Cr 288P363.

1268–24 See also 40 OklCr76, 267P279.

1268–24½–New. That federal officers coöperate in their search with state officers cannot make federal officers' acts unlawful if otherwise lawful. Wyo 292 P2.

1268–25 33F(2d)639 (service of daytime warrant after sunset is invalid). **Definition of "daytime."**–MoA 31SW(2d) 559. **"Daytime," as used in statute,** held to include dawn and twilight. 22 F(2d)834. **"Daytime" in Espionage Act** means between sunrise and sunset. 33 F(2d)639. **Search of barn and shed not connected with residence is not authorized** by warrant directing search of certain residence. OklCr 280P628. **Search of house of alleged conspirator** several blocks from place of arrest held not justified as incidental to arrest. 269US 20, 46SCt4, 70L ed145. **Warrant executed at 5:30 p. m. in October** in Georgia, held not to be annulled because doubt as to "daytime" at time of execution. 22F(2d)834.

1268–27½–New. Officers, making search of premises under search warrant, may lawfully detain all persons found therein, until search is concluded. 136Wash374, 240P360.

1268–27⅓–New. Officers may, under warrant to search premises, lawfully search any one found therein, if they have reasonable cause to believe that he has upon his person articles for which search was instituted. 136Wash 374, 240P360.

1268–27¼–New. Search warrant cannot be extended beyond privileges granted in its issuance. 5F(2d)282.

1268–27⅕–New. In executing search warrant officers may arrest all persons found violating law, though warrant only required arrest of person named in affidavit. 24 OhNPNS81.

1268–27⅙–New. Unlawful search can-

not be made lawful by anything thereafter learned. 197 **Ind**635, 151**NE**724.

1268–27½–New. Officers executing warrant have no right of possession of real estate, or to remain on premises for unreasonable time. 17**F(2d)**151.

1268–27⅛–New. Formalities required by law must be strictly complied with. 199 **Ind**317, 157**NE**657.

1268–27⅛–New. Effect of search warrant cannot be avoided by absence of occupant of premises searched when warrant is executed. 100**Vt**259, 136**A** 835.

1268–27⅒–New. And if one's own premises are not invaded he cannot object to search of another's premises. 197 **Ind**539, 151**NE**427.

1268–27⅓–New. As where accused keeping mash and parts of still on his own farm carries other parts of still to his neighbor's land. 197 **Ind**539, 151 **NE**427.

1268–27½–New. Sheriff's action in searching place, not described in search warrant, held illegal. 198 **Ind**487, 154 **NE**280.

1268–27⅓–New. Service of warrant is sufficient when made at place specially designated therein. 198 **Ind**156, 152**NE** 803.

1268–27¼–New. That justice who issued warrant participated in search does not render search illegal where marshal served warrant. 146**Miss**593, 111**S**595.

1268–27⅕–New. Second search of building is not illegal where original search was not abandoned or completed. 146**Miss**593, 111**S**595.

1268–27⅙–New. Preventing removal of property.–Officers have right to prevent removal of anything of evidential nature while lawful search is in progress. 18**F(2d)**507 (taking alcohol from defendant's daughter).

1268–27⅐–New. Officer's authority is limited to search and seizure only of articles described in the warrant. 21 **F(2d)**567.

1268–27⅛–New. An invalid search is not made lawful by what it brings to light such as property which would authorize search. 21**F(2d)**567.

1268–27⅑–New. Warrant of justice of peace authorizing search of dwelling and neighboring lands in named district and county of the justice will not authorize search by officer of other buildings or places on part of owner's farm lying in another county. 104**WVa** 578, 140**SE**533.

1268–27⅒–New. Failure to give notice of purpose of search as required by statute will not render search illegal. 112**TexCr**586, 18**SW(2d)**657.

1268–27⅒¹–New. Summary assistance.–The words "his county," in statute, authorizing officer to summon as many of people of his county as may be sufficient to make arrest or search in case of resistance, are directory. 152**Va**368, 147**SE**267.

1268–27⅒²–New. Officer should conduct search so as to do least damage consistent with thorough investigation. **Wash** 290**P**422.

1268–27⅒³–New. Defendant cannot object to search of another's property without warrant. 155**Miss**386, 124**S**364.

1268–27⅒⁴–New. Immunity from prejudicial consequences of illegal search and seizure does not extend to unauthorized search of premises of another. **OklCr** 279**P**908(1stcase).

1268–27⅒⁵–New. Immunity from prejudicial consequences of illegal search and seizure is personal, not extending to unauthorized search of premises of another. **OklCr** 281**P**318(1stcase).

1268–27⅒⁶–New. Failure of officers to notify defendant that they possess search warrant does not render search illegal. **TexCr** 26**SW(2d)**211.

1268–27⅒⁷–New. Entry without notification or attempted notification of occupants or without usual formalities precedent to entry into premises of another is unauthorized. **TexCr** 25**SW (2d)**858.

1268–28 324 **Ill** 66, 154**NE**432; 220**MoA** 349, 285**SW**1021; **MoA** 20**SW(2d)**599 (six days' delay did not invalidate in absence of connivance); 113**TexCr**104, 18**SW(2d)**1082 (service seven days after issuance held invalid though officer, with magistrate's permission, had altered date); 103**WVa**148, 136**SE**842. **Return may be subsequent to service.**–147**Miss**118, 112**S**868. **Requirement that warrant be executed instanter** is satisfied by execution on day following date of issuance. 147**Miss**24, 112**S** 590. **Reasonable time depends on** distance of place to be searched, condition of roads, facilities for travel, etc. 324 **Ill** 66, 154**NE**432. **Fifteen days held reasonable delay.**–103**WVa**148, 136**SE** 842. **Second search with same warrant** used day previous is "unreasonable" in absence of reason by officer for delay in completing search. 103**WVa**753, 138 **SE**366.

1268–29 147**Miss**118, 112**S**868. **That warrant is made returnable before police justice** residing outside of district of justice who took affidavit and issued warrant does not render warrant invalid. 146**Miss**593, 111**S**595.

1268–30 Only clear and satisfactory evidence is sufficient to overcome return. 187**Wis**115, 203**NW**760.

1268–30½–New. Failure to make return and inventory forthwith does not affect validity of warrant and search and seizure thereunder. 17**F(2d)**937.

1268–30⅓–New. Improper return does not render search warrant void.–152**Miss** 154, 118**S**719.

1268–30¼–New. Error in return cannot affect validity of search warrant properly issued and served. **OklCr** 277**P**676 (1stcase).

1268–30⅕–New. Where officers to whom warrants were directed were present, fact that they were read to defendants by state police to whom they were not addressed is immaterial. 96 **PaSuper**383.

1268–30⅙–New. Failure to set forth in return copy of detailed receipt for goods seized does not invalidate warrant. 43**F(2d)**184.

1268–32 Return of property seized, etc. 124**Misc**872, 210**NYS**135.

1268–32½–New. On application for writ to prohibit use of evidence obtained by search, fact of county attorney's approval of issuance of warrant required by statute must affirmatively appear from record. 75 **Mont**476, 244**P**280.

1268–32⅓–New. In absence of statutory provision as to how such approval shall be evidenced, recital that it was obtained is prima facie sufficient to establish fact. 75**Mont**475, 244**P**280.

1268–32¼–New. Proceeding for return of illegally seized property from defendant in criminal prosecution is independent of such prosecution in which it is sought to use such property as evidence. 70**CalA**271, 233**P**85.

1268–32⅕–New. Officer in possession of property seized is necessary party to proceeding to recover possession thereof. 70**CalA**677, 234**P**117.

1268–32⅙–New. Possession of thing unlawfully seized for use as evidence in criminal proceeding may be had by application to court where indictment is pending. 153**Tenn**162, 281**SW**936.

1268–32⅐–New. Books illegally seized but unmistakably obscene within penal law should not be returned. 125**Misc** 570, 211**NYS**767.

1268–32⅛–New. Petition for return held properly denied where warrant issued upon information obtained while making arrest. 323 **Ill** 133, 153**NE**615.

1268–32⅑–New. In absence of appearance by plaintiff before magistrate, or further proceedings by him to secure return of property seized by peace officer under search warrant, plaintiff could not complain of defendant's acts in delivering property of original complainant on magistrate's order, under statute. 224**AppDiv**284, 229**NYS**690.

1268–32⅒–New. Independent summary proceeding for return of property seized for evidence can be maintained only where property has been seized under search warrant or is in custody of court officer. 32**F(2d)**873.

1268–32⅒¹–New. On motion to quash warrant and for return of property question as to whether warrant, issued by justice of peace under state law, was irregularly issued, served, and returned will not be determined. 30**F(2d)**300.

1268–32⅒²–New. Power of court summarily to order redelivery to claimant of property illegally seized. 42**F(2d)** 571.

1268–32⅒³–New. Owner of property unlawfully seized and detained by one not court officer has no summary remedy for return thereof. 39**F(2d)**561.

1268–32⅒⁴–New. Question of returning property again seized under later search warrant cannot be raised on application involving previous search warrant. 41 **F(2d)**231.

1268–32⅒⁵–New. Judge cannot order return of merchandise seized under warrant where appeal was taken from order setting aside search warrant. 41**F(2d)** 231.

1268–32⅒⁶–New. Defendant's remedy for illegal search is application for order suppressing evidence and directing return of property seized. **Ill** 172**NE**29.

1268–32⅒⁷–New. Motion for return of unlawfully seized property must be timely or right is lost. 89 **IndA**592, 167 **NE**568.

1268–32⅒⁸–New. Petitioner could question validity of warrant and claim property seized though he does not aver ownership, where warrant shows those facts. 43**F(2d)**184.

1268–33 In Tennessee.–153**Tenn**162, 281 **SW**936. **Petition praying for quashal of search warrant** may be treated as summary rule against district attorney to surrender property. 22**F(2d)**837.

1268–34½–New. District Court has jurisdiction to inquire into conduct of its commissioner and marshal where they still hold warrant and property. 22 **F(2d)**834.

1268–34⅓–New. In proceeding to quash warrant and suppress evidence where affidavit shows probable cause, burden is on defendant to show lack of it. 40 **F(2d)**309.

1268–34¼–New. Commissioner's determination as to probable cause is conclusive unless judgment is arbitrarily exercised. 34**F(2d)**952.

1268–34⅕–New. Action of commissioner in issuing warrant and hearing question of legality cannot be reviewed by appeal. 40**F(2d)**969.

1268–34⅙–New. Action of commissioner issuing warrant and hearing question of legality is reviewable by motion to quash or at trial. 40**F(2d)**969.

1268–34⅐–New. Court can consider motion to vacate search warrant on same grounds after denial of motion by commissioner. 34**F(2d)**952.

1268–34⅛–New. Whether order setting aside search warrant is appealable must be determined by appellate court. 41 **F(2d)**231.

1268–34⅑–New. It is not error to overrule motion to quash search warrant, since, after it was served and return made, it was dead. **IndA** 168**NE**192.

1269–35 315**Mo** 1267, 288**SW**50, 51 [cit Cyc].

1269–36 23**F(2d)**112; 315**Mo** 1267, 288 **SW**50, 51 [citCyc].

1269–39 17**F(2d)**988. **Duty to proceed immediately to secure decree of forfeiture** rests upon United States upon seizure of property, as delay obstructs rights of claimants. 14**F(2d)**432. **Propriety of seizure** may be raised by motion to vacate. 7**F(2d)**835, 836 [citCJ].

1269–40 37**F(2d)**124 (barn included within immunity against unlawful search); 336 **Ill** 421, 168**NE**344 (protection only against unreasonable searches and seizures); 197 **Ind**615, 151**NE**728; **Miss** 130**S**285; 119 **Or**441, 249**P**1103; 46**RI** 485, 129**A**596 (search declared reasonable); 161**Tenn**71, 29**SW(2d)**247 (persons in possession); 113**TexCr**31, 19**SW(2d)**49 (search without warrant not unreasonable where woods, ravines, or open spaces searched are not connected with home or place of business). **It is unreasonable search and seizure** that constitution prohibits. 28**Hawaii** 173, 120 **Or**444, 250**P**220. **Accused cannot complain of trespass upon premises of another** in making search. **OklCr** 286**P**350. **Affidavit to inspect records** showing mere fishing device violates

constitutional immunity against unlawful search. CalA 292P531. **Compliance with command of officer having warrant** does not constitute invitation precluding objection to sufficiency of warrant. 197 Ind16, 164NE93. **Consent to search.**–37 F(2d)677; TexCr 26SW(2d)218. **Constitutional immunity does not extend to unauthorized search of another's premises.**–OklCr 277P952(2dcase). **Constitutional provisions** apply only in cases of unreasonable searches and seizures. 7F(2d)65. **Constitutional rights against unreasonable search and seizure** are personal and available only to owner or claimant of property subject to search or seizure. 15F(2d)740. **Constitution does not protect against search by private individuals.**–321Mo 1237, 14SW(2d) 624. **Constructive possession of land is in owner** who is presumed to have actual possession also. 161Tenn71, 29 SW(2d)247. **Defendant not making claim to premises searched or property seized** cannot urge unreasonableness of search. 16F(2d)62. **Defendants not owning land** could claim constitutional protection only on invasion of house and immediate premises occupied. 161Tenn 71, 29SW(2d)247. **Evidence held insufficient.**–319 Ill 359, 150NE263. **Forcible entry and search without warrant** on detecting odor of alcohol is illegal. 41 F(2d)227. **Illegal search is not rendered valid** by fact that defendant, after initial search, made confession. 37F(2d) 134. **Immunity is personal** and accused cannot object that search of premises of third person violated constitutional inhibition. OklCr 277P608. **In criminal actions,** defendant is not entitled to complain of search of buildings, owned and occupied by his father apart from himself. 15F(2d)740. **In proceeding to revoke alcohol permit** wherein inspection of premises of permittee was involved, constitutional provision is inapplicable. 41F(2d)74. **Invasion of defendant's house** on general belief that defendant was engaged in liquor business without warrant is illegal. 232Ky353, 23 SW(2d)546. **Invitation to search** must be free from coercion, duress, or fraud in order to constitute waiver of constitutional guaranty. 197 Ind16, 164NE93. **Mere casual workman** disclaiming any interest in premises searched could not object to search of premises. 36F(2d) 699. **Motion by one without interest in premises searched or property seized** to suppress evidence obtained cannot prevail. 36F(2d)699. **No complaint can be made** of search of property not owned or controlled by complainant. Miss 130 S511. **Observance of automobile occupants emptying jug of liquor** does not constitute trespass and therefor not unlawful search. Miss 130S285. **Obtaining information by means of eye,** where no trespass has been committed, does not constitute unlawful search. Miss 130S285. **Only unreasonable searches are prohibited.**–316Mo 1032, 292SW 1033; Wash 287P57. **Order for examination of safe deposit boxes** without limitation to particular documents which have been identified is unauthorized. 104CalA469, 286P471(2dcase). **Ownership of property seized is not essential** to entitle owner of premises to complain of illegal search. 37F(2d)677. **Perception of odor of alcohol manufacture at point about fifty feet from building** has been held to constitute no misdemeanor to justify arrest without warrant and search and seizure of barn as incidental to arrest. 37F(2d)124. **Person cannot complain of unlawful search of another's home.**–38F(2d)635. **Postmortem examination of corpse** is not unreasonable search. 233Ky194, 25 SW(2d)358. **Presence or absence of warrant for search is not determinative** of the reasonableness of a search or seizure either at common law or under statutes. 120 Or444, 250P220. **Provision applies only to rightful owners of** property or persons rightfully in possession. 234Ky695, 28SW(2d)976. **Provision of act for regulation of practice of barbering authorizing inspection** held not to authorize unreasonable search **and seizure.** 161Tenn293, 30SW(2d) 601. **Rights of accused showing no title to money found in garden outside of home** are not invaded by search without warrant. Wash 287P57. **Search after entry by permission.**–111TexCr58, 11 SW(2d)318. **Search by federal agents without warrant on smelling odor of opium** is not violative of federal or state constitutions. 38F(2d)830. **Search for liquor for evidence** not unreasonable. 321 Ill 484, 152NE500. **Search in canyon, pasture, or field** not in close proximity to residence is not unreasonable though without search warrant. OklCr 287P1045. **Search of automobile.**–336 Ill 458, 168NE304; Okl 274P890; Okl Cr 276P513; OklCr 292P888(1stcase). **Search of barn as incident to arrest** without warrant has been held unlawful though offenses are committed in presence of prohibition agents. 37F(2d) 124. **Search of bathroom** located several yards distant from point of arrest was not incident to arrest and violated constitutional guaranty. TexCr 22SW(2d) 934. **Search of person after lawful arrest without warrant** is not unreasonable. OklCr 282P180(1stcase). **Search of person not legally arrested without search warrant** is unreasonable. OklCr 282P180(2dcase). **Search of premises in which defendant claims no interest** does not invade his constitutional rights. 159 Tenn245, 17SW(2d)919. **Search of private dwelling under void search warrant** violates constitutional right. 94 Fla134, 113S704; 235Mich646, 209NW 915. **Search of private dwelling without warrant,** without arrest, and without grounds is unreasonable. 13F(2d) 259. **Search of smokehouse within curtilage of dwelling house without search warrant** is unreasonable search. OklCr 283P795. **Search of woodlands, pastures, or fields without warrant** is not unreasonable where they are not within curtilage or in close proximity of dwelling. OklCr 274P686; OklCr 288P365 (2dcase). **Search under warrant authorizing search of two-family house** without naming part to be searched or occupant thereof is unreasonable. 38 F(2d)837. **Unlawful search.**–111TexCr 627, 13SW(2d)849. **Search without warrant must be based on probable cause.**–316Mo 878, 292SW29. **Seizure of books and papers under warrant not directing their seizure** is illegal. 25F(2d)872. **Test of legality of search without warrant** is whether it is reasonable. 245 Mich115, 222NW151. **The right to complain of illegal search and seizure** is personal.–40 OklCr352, 268P993; TexCr 24SW(2d)41; TexCr 24SW(2d)838. **Violation of ministerial duties.**–Mo 1 SW(2d)837; Mo 1SW(2d)841. **Waiver of immunity.**–37F(2d)415 (failure to resist entrance of officer into prescription room); OklCr 274P694. **Waiver of right to claim that searches and seizures are unreasonable.**–42F(2d)733. **Where officer knows of violation of law by use of senses of sight and smell,** search without warrant is not unreasonable. OklCr 274P1095. **Whether search and seizure** is unreasonable depends on circumstances of each case. 4F(2d)881.

1269–40½–New. Protection of such rights is one of court's highest duties and privileges. 216AppDiv6, 214NYS 507.

1269–40⅓–New. Invitation to search.–Invitation to search or seize must be free from coercion or fraud. 197 Ind16, 148 NE420.

1269–40¼–New. Obeying officer's command shows regard for supremacy of law and does not constitute invitation to search and seize. 196 Ind16, 148NE 420.

1269–40⅕–New. Saying to officer armed with search warrant "All right search all you want to," has been held no waiver under constitutional right against search and seizure. 196 Ind16, 148NE 420.

1269–40⅙–New. One may not complain of illegal search of premises not his own or in his possession. 214Ky480, 283SW430.

1269–40⅐–New. One disclaiming ownership or possession of searched premises may not claim constitutional privilege against search without warrant. 214Ky480, 283SW430.

1269–40⅛–New. Person who has no interest in premises searched nor in the property seized cannot raise question of illegality of search warrant. 17F(2d) 996.

1269–40⅑–New. All searches and seizures executed in violation of law are unreasonable. 199 Ind317, 157NE657.

1269–40⅒–New. Testimony must clearly show that consent to otherwise illegal search was really voluntary. 36 Wyo 368, 255P788.

1269–40⅓–New. That gambling devices or conducting of gambling was discovered is immaterial as concerns legality of search. 36Wyo 368, 255P788.

1269–40½–New. A defendant cannot avail himself of an objection to legality of search of place with which he had no connection, 198 Ind683, 154NE1.

1269–40⅔–New. or of seizure of property in which he had no interest. 198 Ind683, 154NE1.

1269–40¼–New. Search without warrant of houses belonging to defendant near his dwelling house held unlawful. 217Ky169, 289SW212.

1269–40⅕–New. One having several houses is protected from unreasonable search without warrant of any one house. 217Ky169, 289SW212.

1269–40⅙–New. One, not the owner of premises searched, and not claiming any interest in the property found, may not complain as to the legality of the search. 198 Ind440, 154NE4.

1269–40⅐–New. Defendant, in prosecution for cattle theft, cannot complain of admission of testimony obtained by search of mother's pasture without warrant. 105TexCr413, 289SW45.

1269–40⅛–New. Search without consent of those in control of premises is illegal, though premises are owned by mentally incompetent father living with them who consents to search. 224Ky 453, 6SW(2d)467.

1269–40⅑–New. Husband's consent to search of wife's house given when he was living with her therein is insufficient to waive wife's constitutional right to immunity from unreasonable search and seizure after he has ceased to live with her and she is suing for divorce. 241Mich616, 217NW797.

1269–40⅒–New. Doctrine that man's house is his castle does not apply to criminal process. 316Mo 571, 292SW78.

1269–40½–New. Person who has no interest in premises searched nor in property seized cannot raise question of illegality of search warrant. 24F(2d) 802.

1269–40½–New. Meaning of "curtilage," protected against unreasonable searches and seizures, should not be restricted as to operate as failure to protect home nor so expanded as to make refuge for criminals. 111TexCr288, 12 SW(2d)582.

1269–40½–New. One cannot object to unlawful search of property not belonging to or controlled by him. 113 TexCr69, 18SW(2d)659.

1269–40¼–New. Right to complain of illegal search and seizure is not available to anyone but wronged person. 113 TexCr142, 18SW(2d)663.

1269–40¼–New. Defendant, stranger to search warrant proceedings, and not owner of premises searched, cannot have evidence obtained by search suppressed, since immunity from unreasonable search is personal privilege to owner of premises. 89 IndA510, 165NE554 (1stcase).

1269–40½–New. Person hiring truck and drivers could not raise question in respect of legality of search of truck. 42F(2d)103.

1269–40½–New. Court gives careful consideration to questions involving illegal search and seizure. 34F(2d)30.

1269–40½–New. Defendant may waive right at time search and seizure is made. 108WVa494, 151SE713.

1269–40½–New. Statute requiring any person killing bovine animal to preserve hide unchanged for specified period after killing for inspection is not violation of constitutional provisions

against unreasonable search and seizure. 34NM405, 281P481.

1269-40½₀-New. Motion to suppress evidence obtained by search of codefendant's home and seizure therein cannot prevail. 43F(2d)358(2dcase).

1269-40½₁-New. One may consent to search of his premises and thereby waive irregularities in search warrant or dispense with warrant altogether. TexCr 31SW(2d)646.

1269-40½₂-New. Where premises searched were in possession and control of another, defendant could not complain of illegal search. TexCr 31SW(2d)651.

1269-41 7F(2d)60; 7F(2d)67; 8F(2d)251; 8F(2d)630; 14F(2d)229 (defendant not owner of premises searched nor of any interest therein nor of property seized held not entitled to raise question of legality of search); 38F(2d)106; 41F(2d)54; 41F(2d)538; 170Ark1083, 282SW673; Conn 151A526; Ind 167NE129; 118Kan775, 236P647; 161La240, 108S468; Mo 18SW(2d)827; 322Mo1203, 18SW(2d)58; 77Mont8, 249P574, 52ALR454; 82Mont515, 268P501; NJSup 132A312; 127Misc410, 217NYS303; 53ND203, 205NW67; 37OklCr402, 258P814; 290Pa174, 138A679; 161Tenn293, 30SW(2d)601. **Unlawful search not justified** by what is found. 37OklCr396, 258P812. **Cabin, two hundred and thirty feet from dwelling,** held not protected from search as part of home curtilage under constitution. 16F(2d)275. **Defendant who disclaims dominion** over place searched cannot raise question of validity of search warrant. 26F(2d)58. **"Houses"** does not include open fields surrounding dwelling house. 13PortoRicoFed410. **Property wrongfully seized should be returned to owners.**-16F(2d)345. **Rights under Fourth Amendment** must be equally enforced in favor of the guilty and innocent. 5F(2d)282. **Search of automobile held unwarranted** and unconstitutional on information used by officers. 16F(2d)320. **Search of dwelling by state officers** without warrant at instigation of federal prohibition agents and in coöperation with them violates constitution. 32F(2d)902. **Search of vessel apparently engaged** in violation of laws of United States is not violative of provision. 39F(2d)62. **Unlawful search not justified** by what is found. 74Mont377, 240P984. **Forfeiture proceedings by federal government** are within protection of provision. 38F(2d)1005. **Who may not invoke constitutional protection.**-35F(2d)777; 35F(2d)954; 36F(2d)164; 36F(2d)316; DC 35F(2d)877; Ind 168NE581; 113TexCr501, 21SW(2d)1057(2dcase).

1269-41½-New. Search and seizure if illegal is unreasonable and violates constitutional rights. 24OhNPNS1.

1269-41⅓-New. The same is true of the Fifth Amendment. 127Misc410, 217NYS303.

1269-42 159La831, 106S321. **Fourth Amendment to constitution** must be liberally construed to protect the citizen. 11F(2d)892.

1270-43 269US20, 46SCt4, 70Led145; 8F(2d)492; 18F(2d)442; 41F(2d)74; 77Colo392, 236P1019; 329Ill612, 161NE137; Ind 167NE545; Wis 231NW155 (testimony by voters no violation of constitutional rights). But see 42F(2d)562. **Documents of one defendant,** wrongfully obtained, are admissible against his codefendants. 7F(2d)760. **Documents which are only evidence of** crime, and not means of committing it are immune from seizure. 5F(2d)282. **Fact that books and papers of defendant were in possession of another** at time they were seized under void warranty does not preclude defendant's obligation to their use as evidence against him. 8F(2d)492. **Failure of government to institute forfeiture proceedings** held not to render seizure or search illegal by retroaction. 274US559, 47SCt746, 71Led1202. **In Louisiana.**-159La831, 106S321. **Officers executing warrant to search for liquor** cannot seize records, though owner at time of seizure was under arrest. 5F(2d)282. **Only owner of premises** is protected from unreasonable search and seizure. 311Mo630, 279SW135. **Statute requiring dealers in securities to furnish information respecting fraudulent practices** held not invalid as to searches and seizures. 243NY423, 154NE298. **Statute requiring warehousemen to furnish tax assessor with list of property stored and names of owners** is not unconstitutional as contemplating unreasonable seizure and search of papers. TexCivA 38SW(2d)947. **District court without summary jurisdiction** to direct return of papers. 40F(2d)593. **Replevin or bill in equity is appropriate remedy** against threatened use of papers unlawfully seized. 40F(2d)593.

1270-43½-New. Seizure of liquor from pocket of defendant under arrest declared legal and reasonable. 46RI485, 129A596.

1270-43⅓-New. One whose property has not been seized and the privacy of whose home has not been invaded cannot raise question that search is unreasonable or unauthorized. 17F(2d)996.

1270-43¼-New. Where affidavit on which warrant was procured is insufficient in law, court may order quashing the warrant and directing return of papers and documents seized thereunder. 13F(2d)851.

1270-43⅕-New. Though constitutional protection against searches and seizures extends only to such as are unreasonable, congress may grant further protection. 13F(2d)905.

1270-43⅙-New. Search without warrant not authorized by federal statute empowering federal officers to break into distillery. 15F(2d)598.

1270-43⅐-New. Statute empowering federal officers to break into distillery does not authorize them to break into every place. 15F(2d)598.

1270-43⅛-New. One who is not occupant of premises cannot complain that search was unreasonable. 15F(2d)953.

1270-43⅑-New. Special protection afforded by Fourth Amendment to person's houses, papers, and effects is not extended to open fields. 16F(2d)59.

1270-43⅒-New. Search on open premises quarter of mile from defendant's residence not unreasonable. 16F(2d)59.

1270-43⅓₁-New. Constitutional provision against unreasonable searches and seizures is designed to protect individual against abuse of official authority; 6F(2d)584.

1270-43⅓₂-New. and covers cases where entry is illegal, forced, or illegally obtained, under color of authority or by practicing fraud, 6F(2d)584.

1270-43⅓₃-New. and where entry is not obtained in any of such unlawful ways information so obtained may be used in obtaining a search warrant. 6F(2d)584.

1270-43¼₄-New. Husband claiming no interest in liquor found on wife cannot complain that her constitutional rights were invaded. 18F(2d)522.

1270-43⅓₅-New. Person whose property is seized under unlawful search of dwelling house is prima facie entitled to restoration. 24F(2d)185.

1270-43⅓₆-New. Search of automobile without warrant is justified where facts are sufficient to warrant prudent men believing automobiles were transporting liquor. 27F(2d)502.

1270-43⅓₇-New. Guest or employee, domiciled in unlawfully searched dwelling and joining in motion to suppress illegally secured evidence, can claim benefit of such motion. 33F(2d)467.

1270-43⅓₈-New. Action of policeman in seizing prohibited weapon which he sees or knows person is about to throw away does not constitute illegal search or seizure. 35PortoRico699.

1270-43⅓₉-New. Spontaneous surrender to policeman of revolver defendant was carrying in coat does not constitute illegal search and seizure. 35PortoRico715.

1270-43½₀-New. Where person disclaims ownership of house and gives officers permission to search, he cannot complain of search and seizure. 336Ill421, 168NE344.

1270-43½₁-New. Waiver.-Statements of defendant's wife, after hearing warrant read, held not to constitute waiver of defendant's constitutional rights nor invitation to search. Ind 167NE545.

1270-43½₂-New. Due process clause of Fifth Amendment to federal constitution is inapplicable to arrest, search, and seizure not under federal authority. 41F(2d)538.

1270-43½₃-New. Testimony of state officers in federal prosecution based on information obtained by illegal search not under federal authority does not violate Fourth or Fifth Amendments of federal constitution. 41F(2d)538.

1270-50 Proceeding, to compel bank to produce records of income taxpayer's deposits and withdrawals for stated period, invades no rights of depositor. 27F(2d)930.

1270-51 Requirement of Revenue Act of 1924 as to public inspections of lists of returns does not violate provision against unreasonable searches and seizures. 55AppDC341, 5F(2d)764.

1271-53½-New. Demand under Federal Trade Commission Act for access to books of account and records of packers held to be unreasonable and illegal. 15F(2d)133.

1271-53⅓-New. Federal trade commission cannot compel production of documents for scrutiny to determine whether Anti-Trust Law has been violated, until such documents become evidentiary. 34F(2d)323.

1271-61 37F(2d)124; 216Ala522, 113S541; 196Ind145, 147NE625; 213AppDiv643, 211NYS134; 127Misc410, 217NYS303; 113Oh512, 150NE74, 42ALR1151 [citCyc]; 28OklCr353, 230P946; 34OklCr198, 245P907; 37OklCr415, 259P150; 41OklACR1919. See also 242NY13, 150NE585. But see Ind 167NE129. **Probable cause for belief of violation of law** measures right to search without warrant. 216Ala522, 113S541. **Search not justified** upon probable cause and discovery of evidence as result of unlawful search. Mo 14SW(2d)434. **Search of house of third person.**-Mo 279SW141. **Search of person without warrant on mere suspicion** held unlawful and not justified by results. 106TexCr472, 293SW169. **Search without warrant on arrest without warrant for misdemeanor not committed in presence of officers** is illegal. 35OklCr196, 249P432. **Arrest and search of suspicious prowlers** by police without warrant. 35F(2d)777. **Search of place where arrest is made is proper,** even without search warrant, where search is made after arrest. 33F(2d)193. **Violation of constitutional rights of another** is no concern of one arrested for possessing liquor. 248Mich499, 227NW763. **Search of premises** held not unreasonable. Conn 151A526.

1271-61½-New. Search of person may be made in a lawful way. 144Miss405, 110S121.

1272-62 170Ark1083, 282SW673; 77Colo392, 236P1019; 161La988, 109S787; 84Mont348, 275P757; 127Misc410, 217NYS303; 24OhNPNS1, 14 [citCyc] (evidence excluded on timely objection); 119Or422, 249P1046; 108TexCr182, 299SW411. But see 37OklCr402, 258P814. Contra 140Miss279, 105S520. **Evidence obtained by unlawful search of dwelling** is not admissible to prove criminal offense of occupant. 94Fla134, 113S704. **Unreasonableness** of search is always question for determination whether made under color of warrant or not. 124Misc872, 210NYS135. **Wife** may complain of search of home rented or owned by husband on void warrant, so as to exclude evidence so obtained in prosecution against her. 142Miss100, 107S376. **Tenant of garage** cannot challenge statement in search warrant that person possessing whisky found therein was unknown, on motion to suppress. 251Mich253, 231NW557(1stcase).

1272-64 170Ark1083, 282SW673; 213AppDiv643, 211NYS134; 119Or422, 249P1046. But see 273US28, 47SCt248, 71Led520; 212Ky229, 278SW574. **House,**

apart from dwelling, held protected under constitution. 212Ky229, 278SW574.

1272-64½-New. Entry of club rooms, searching members therein, and stationing police officers therein is violation of prohibition against unreasonable search and seizure. 126Misc698, 214NYS99.

1272-64¼-New. Search of accused's room made after unlawful arrest is unreasonable. 242NY13, 150NE585.

1272-64¼-New. Immunity from prejudicial consequences of illegal search is personal and does not extend to unauthorized search of premises of another. OklCr 282P683.

1272-64½-New. Immunity is personal, and defendant cannot complain where premises of another are searched. OklCr 283P587.

1272-64¼-New. Where revolver was taken from unlicensed bearer, court on motion to return will not pass upon truth of claim that possession was merely temporary. 124Misc872, 210NYS135.

1272-64½-New. Extent of immunity.-Immunity against search and seizure extends only to unreasonable and illegal seizures. 28 OklCr353, 230P946.

1272-64¼-New. Power to make search and seizures must be exercised and law enforced without transgressing constitutional guarantees of citizen's right. 316 Ill 376, 147NE472.

1272-64½-New. Right to search premises some distance from house without warrant. 309Mo 89, 273SW736.

1272-64¼-New. Search under illegal and void search warrant is prohibited by constitutional guaranties against unreasonable searches and seizures and against compelling person to be witness against himself. 32 OklCr274, 240P1078.

1272-64¼-New. It violates constitutional guaranties. 32 OklCr203, 240P 1075.

1272-64½-New. Exemption does not extend to search of accused found on premises of another. 107TexCr121, 294 SW1107.

1272-64½-New. Search of private residence without warrant is violative of constitutional guaranties. 37 OklCr402, 258P814.

1272-64¼-New. Arrest and search on mere suspicion is violative of constitutional prohibition. 107TexCr24, 294SW 550.

1272-64¼-New. Statement by defendant to officer to go and search all he wanted to does not waive invalid search warrant. 219Ky139, 292SW771.

1272-64¼-New. Guarantee does not apply to unlawful search of premises not belonging to defendant. 224Ky453, 6 SW(2d)467.

1272-64¼-New. Officer having reasonable grounds to suspect that felony is being committed may break and enter home. 316Mo 571, 292SW78.

1272-64¼-New. For defendant to avail himself of his constitutional right against unreasonable search and seizure, his own premises must be invaded. 153 Miss622, 121S279.

1272-64¼-New. Where search warrants were invalid, search of premises for stolen goods was held illegal, though defendant consented to search. 157Tenn 648, 11SW(2d)868.

1272-64½-New. Suppression of evidence.-Denial of motion to return and to suppress as evidence properly seized under illegal warrant does not violate constitutional provision. 34NM366, 281P 474.

1272-64½-New. Accused will not be heard to object that search of premises of third person is violation of constitutional inhibition against unreasonable searches. OklCr 279P692(1stcase); Okl Cr 279P693.

1272-66 148Miss834, 114S873. See also 119 Or441, 249P1103.

1272-66½-New. Writ of attachment.-Order of court to open safe deposit box retaining leviable property and returning books and papers does not purport to authorize unreasonable search or seizure notwithstanding sheriff must make examination of all papers in box to know which to return. 240NY187, 148NE185, 39ALR1211.

1273-67 316Mo 1032, 292SW1033.

1273-69 322Mo 1203, 18SW(2d)58; Mo 30SW(2d)447. **Statutes,** etc. CalA 290P 906; 161La988, 109S787 (Extra Sess. [1921] Act 39 § 5 not invalid for failure to define probable cause); 311Mo 664, 279SW395 (authorizing issuance of warrant on application of prosecuting attorney or prohibition officers); 52SD129, 216NW874. **Federal constitution,** as to unreasonable searches and seizures, applies only to federal officers and agents and does not apply to searches and seizures under state laws. 311Mo 664, 279 SW395. **One whose private rights have not been invaded** cannot object to search as unreasonable. 40 OklCr377, 269P389. **Statute authorizing issuance of search warrant by inferior judicial officers** against fictitious or unnamed owner of premises is not violative of constitutional provisions. 213Ala649, 106S44.

1274-70 Ordinance requiring junk dealer to consent to inspection and search as prerequisite to license is not unconstitutional. 235Ky265, 30SW(2d)968.

1274-71½-New. Proceedings to restore illegally seized property.-But court of special sessions has no authority to order restoration of revolver to unlicensed person on allegation that it was obtained by illegal search, nor to enjoin its use in evidence. 124Misc872, 210NYS135.

1274-71½-New. Greater New York Charter § 315 making it duty of police to preserve peace, prevent crimes, inspect gambling houses, and to arrest all persons violating law does not authorize entry of club rooms, searching of members, and stationing of police therein. 126Misc698, 213NYS99.

1274-71¼-New. State constitutional provision against unreasonable searches and seizures is restricted to activities of state officers and cannot be invoked against independent action by federal officers or private persons. 82Mont515, 268P501.

1274-73 See also 4HawaiiFed73, 76 [quotCyc].

1274-73½-New. Return of property unlawfully seized.-Where revolver of defendant is unlawfully seized its return will not be ordered nor its use as evidence enjoined. 127Misc410, 217NYS 303.

1274-73½-New. In such case, accused's remedy, if any, is by independent proceeding against police officer. 127Misc 410, 217NYS303.

1274-74 NJQuartSess 140A586, 587 [citCyc].

1275-83 Conversely officer executing warrant valid on face is protected. 213 Ala649, 106S44.

1275-85 224AppDiv284, 229NYS690.

1275-86½-New. Officer making illegal search and seizure may be made to answer in civil proceeding, 125Misc882, 212 NYS400.

1275-86½-New. even where wrong was against violator of law. 125Misc882, 212 NYS400.

1276-87 77Colo 392, 236P1019; 242NY 13, 150NE585. See also 127Misc410, 217 NYS303. **Where several officers act jointly,** each officer is liable for acts of other in making unlawful search and for what followed as result of search. 149 Miss849, 116S104.

1276-90½-New. Searching defendant at his invitation not unlawful. 161Ga166, 129SE772.

1276-90½-New. Officer lawfully on premises on witnessing crime may seize instrumentality thereof without warrant. 11F(2d)892.

1276-96 148SC69, 145SE712.

1277-99½-New. Instructions held proper.-181Ark1132, 29SW(2d)683.

1277-2 39GaA761, 148SE414. See also Va 154SE485.

1277-5 39GaA761, 148SE414. **Seven hundred dollars** punitive damages are not excessive in case of unlawful search for stolen property. 218AlaA105, 117S 640.

1277-8½-New. In action of trespass and conversion against peace officer, making search and seizure under search warrant, whether defendant exceeded his authority, or used unnecessary severity, are held questions of fact for jury. 224 AppDiv284, 229NYS690.

1277-8½-New. Evidence relative to whether search was instigated, at direction of defendant, under irregular search warrant with knowledge of such irregularity, has been held sufficient for submission to jury. 148SC69, 145SE712.

1277-8¼-New. Whether property was damaged unnecessarily is for jury. Wash 290P422.

1277-8½-New. Whether search without search warrant was unreasonable is for jury. Va 154SE485.

1277-8½-New. Instructions held erroneous or properly refused. Va 154SE 485.

1277-8½-New. Question of probable cause and of malice is for jury. 181 Ark1132, 29SW(2d)683.

1277-9 Violation of law.-77Colo 392, 236P1019.

1277-9½-New. In New York by statute officer making unlawful search and seizure may be prosecuted for oppression. 242NY13, 150NE585.

1277-9½-New. He is also subject to removal or other discipline by his superiors. 242NY13, 150NE585.

1277-9¼-New. Officer who makes illegal search and seizure may be made to answer in criminal proceedings, 125Misc 882, 212NYS400.

1277-9½-New. even where wrong was against violator of law. 125Misc882, 212 NYS400.

1277-9½-New. Only officers purposely searching private residence without warrant are punishable. 107TexCr169, 295 SW619.

SEA-SHORE

1278-10 164La240, 113S833.

SEAWORTHINESS

1279-21 40F(2d)522.

1279-22 25F(2d)973. **Term includes** proper stowage of cargo. 26F(2d)92.

SECTARIAN

1282-43 81Colo 276, 255P610. **Sectarian instruction.**-81Colo 276, 255P610. **Not synonymous** with "religious." 81 Colo 276, 255P610.

SECTION

1282-46½-New. ; a division, a portion, or paragraph. Century D. [quot 187Wis 180, 204NW803].

SECURE

1283-53 331 Ill 230, 162NE829.

SEDUCTION

1294-1 Mo 273SW727; Alta [1928] 4 DomLR189, 190 [quotCyc]. **Seduction is not violation of agreement of marriage.** Mo 273SW727. **Other definitions.**-Miss 112S797; Mo 273SW727.

1295-2 229Ky502, 17SW(2d)435.

1295-3 29PortoRico 736.

1295-3½-New. In Porto Rico right of action exists, even though created by code of civil procedure and not by civil code. 29PortoRico 736.

1295-7½-New. Constitutional and statutory provisions abolishing feigned issues permit woman to sue for her own seduction on ground that she is real party in interest. 194NC25, 138SE405.

1295-8 220Ala237, 124S519; Alta [1928] 4 DomLR189.

1296-10 194NC25, 138SE405.

1296-13½-New. There is no hard and fast rule to ascertain whether particular facts constitute seduction, but each case must stand on own facts. Ida 289P74.

1296-14 29PortoRico 736. **False promise in itself by man known to woman to be married** cannot be made basis of claim for seduction. Iowa 227NW902.

1296-16 47RI 193, 131A695, 696 [cit Cyc].

1297-18 Phrase "unmarried woman" includes woman who has been divorced. 220Ala237, 124S519.

1297-19 203 Iowa910, 210NW94. But see Ida 289P74. In Iowa, etc. 227NW 902.

1297-20 220Ala237, 124S519. **Chastity at time of seduction** is enough. 216Ala 516, 113S581.

1298-29 229Ky502, 17SW(2d)435; 29 PortoRico 736.

1299-32 160La652, 107S478.

1302-53 29PortoRico 736 (no master

and servant relation need be shown under local statute).

1304-69 Promises of gifts.–153Miss892, 122S95.

1304-71½-New. In Porto Rico same rule applied under statute. 29**Porto Rico** 736.

1304-72 47**RI** 193, 131A695.

1305-73 But see 197**Wis**569, 222**NW** 798.

1306-77 197**Wis**569, 222**NW**798.

1306-78 197**Wis**569, 222**NW**798.

1306-82 Ida 289**P**74.

1306-85 Ida 289**P**74.

1306-85½-New. The essential of unchastity is not necessarily in the overt act. 203 **Iowa**910, 210**NW**94.

1306-85½-New. It is enough to show that the mind is unchaste and that purpose is impure and lustful. 203 **Iowa** 910, 210**NW**94.

1307-97½-New. In Porto Rico action by mother for infant daughter's seduction held ex delicto, and promise of marriage unnecessary element. 29**Porto Rico** 736.

1307-99½-New. Action for damages for seduction is ex delicto. **Ida** 289**P**74.

1308-8 229**Ky**502, 17**SW(2d)**435. **Complaint by female not alleging that cause arose within state** is sufficient. 220**Ala** 237, 124**S**519. **In complaint by female,** "summer or fall of 1926" is sufficient allegation of time. 220**Ala**237, 124**S**519.

1308-9½-New. In action by mother no allegation necessary that daughter was mentally defective where petition shows that daughter was under eighteen. 160 **La**285, 107**S**111.

1308-12 See also 216**Ala**516, 113**S**581.

1311-37 Allegations held sufficient to authorize recovery for mental anguish.–153**Miss**892, 122**S**95.

1311-43 Ida 289**P**74.

1311-44 172**Ark**44, 287**SW**598; **Ida** 289 **P**74. **Presumption is that plaintiff had reformed** and burden of showing her unchastity is on defendant. **Ida** 289**P**74.

1311-44½-New. So, also, when the action is by her parent, her general reputation for chastity is presumed to be good. 47**RI** 193, 131A695.

1311-45 194**NC**25, 138**SE**405, 407 [cit Cyc].

1311-46½-New. Plaintiff alleging pregnancy and childbirth has burden of proving acts which had that result. 104 **Conn**585, 134A73.

1312-51 Evidence held admissible.–172 **Ark**44, 287**SW**598. **Complaint or absence of complaint** by plaintiff is inadmissible. 220**Ala**237, 124**S**519.

1312-51½-New. Testimony of mother admissible without qualifying as natural tutrix under code. 160**La**285, 107 **S**111.

1312-53 220**Ala**237, 124**S**519.

1313-61½-New. Evidence showing that prior criminal charge was not for seduction is admissible. **Va** 153**SE**832.

1313-62 216**Ala**516, 113**S**581, 583 [cit Cyc].

1314-84 Ida 289**P**74. **Bad character for chastity prior to seduction.**–**Ida** 289 **P**74. **Motive for unchastity.**–**Ida** 289**P** 74.

1315-88 But see **Iowa** 227**NW**902.

1315-91 Ida 289**P**74.

1316-98 Ida 289**P**74.

1316-1 220**Ala**237, 124**S**519.

1316-2 Ida 289**P**74.

1317-11 216**Ala**516, 113**S**581 (holding evidence of pregnancy and childbirth admissible in corroboration); 220**Ala** 237, 124**S**519.

1317-14 See also 34**PortoRico** 106.

1318-25½-New. Testimony by woman seduced that she had not had previous intercourse is admissible as bearing on paternity of child, though her general reputation for chastity is not put in issue. 47**RI** 193, 131A695.

1319-34 May be proved by circumstances.–121**Kan**749, 250**P**292.

1319-35 Ida 289**P**74 (preponderance of evidence); 194**NC**25, 138**SE**405, 407 [cit Cyc]. **Evidence held sufficient.**–220**Ala** 237, 124**S**519; 172**Ark**44, 287**SW**598.

1319-36 194**NC**25, 138**SE**405, 407 [cit Cyc].

1319-37 Lewd and lascivious conduct of female at time of alleged seduction may per se establish her unchastity. 203 **Iowa**910, 210**NW**94.

1319-39 220**Ala**237, 124**S**519.

1319-39½-New. Defendant cannot be convicted of seduction on testimony of prosecuting witness unless corroborated as to promise of marriage and fact of sexual intercourse. 172**Ark**44, 287**SW** 598.

1320-40 Evidence held sufficient.–121 **Kan**749, 250**P**292.

1321-47 216**Ala**516, 113**S**581, 583 [cit Cyc].

1321-51½-New. In action by minor, no recovery may be had for loss of time or for services of nurse, physician, and hospital care. **Iowa** 227**NW**902.

1322-58 Expenses for treatment for disease contracted while in maternity hospital may be recovered. 47**RI** 193, 131A695.

1322-61 153**Miss**892, 122**S**95.

1323-67 Va 153**SE**832 (where deceptive arts were employed).

1324-77 Ida 289**P**74. **Damages held excessive.**–**Va** 153**SE**832.

1325-83 Evidence held sufficient for jury.–229**Ky**502, 17**SW(2d)**435.

1325-86 220**Ala**237, 124**S**519 (conflicting evidence held for jury).

1325-87 Ida 289**P**74.

1325-92 Ida 289**P**74. **Instructions held properly refused** as not authorized by evidence. 153**Miss**892, 122**S**95.

1326-3 216**Ala**516, 113**S**581, 582 [cit Cyc] (instruction on presumption and burden of proof of chastity held proper).

1327-8 Term "yielded to the embraces" is not equivalent to "sexual intercourse" and should be avoided in instructions. **Iowa** 227**NW**902.

1328-24½-New. Instruction permitting plaintiff to recover damages for pain and suffering caused by birth of child is error, where child was born after plaintiff married another than defendant. 88 **Ind**693, 165**NE**526.

1329-37 Va 154**SE**475.

1329-38 Miss 112**S**797.

1330-39 Miss 112**S**797.

1330-43 Proof that prosecutrix was unmarried female at time of seduction is indispensable. **TexCr** 26**SW(2d)**242.

1330-49 TexCr 24**SW(2d)**47.

1331-52 200 **Iowa**1250, 206**NW**260, 261 [citCyc]; 202 **Iowa**164, 209**NW**276.

1332-63 322**Mo** 1180, 18**SW(2d)**67.

1333-68 176**Ark**895, 2**SW(2d)**67.

1333-70 202 **Iowa**164, 209**NW**276. But see 152**Va**1002, 147**SE**231. **That prosecutrix was actuated wholly or partly by fear, lust, or both** disproves seduction. **TexCr** 26**SW(2d)**242.

1333-71 202 **Iowa**164, 209**NW**276.

1333-75 Miss 112**S**797.

1334-77 41**GaA**608, 154**SE**204(1stcase).

1334-78 217**Ky**688, 290**SW**514; 147**SC** 485, 145**SE**287.

1335-79 108**TexCr**354, 300**SW**941; **Tex Cr** 24**SW(2d)**47; 146**Va**267, 135**SE**710. **Statute reading "by means of any deception and promise of marriage"** construed to read "any means of deception by promise of marriage." 133**SC**147, 130 **SE**513.

1335-80 23**AlaA**307, 124**S**665 (intercourse pending engagement held not necessarily seduction); 202 **Iowa**164, 209**NW**276.

1335-81 Va 154**SE**475.

1336-90 146**Va**267, 135**SE**710.

1336-91 202 **Iowa**164, 209**NW**276; 217 **Ky**688, 290**SW**514, 516 [citCyc].

1336-91½-New. Promise made without intending to fulfill it is sufficient if woman is thereby deceived. 133**SC**147, 130 **SE**513.

1337-97 Miss 112**S**797.

1337-98 TexCr 26**SW(2d)**242.

1337-2½-New. Seduction is not proved if prosecutrix was forced to yield without expressly or impliedly consenting. **TexCr** 26**SW(2d)**242.

1338-7 Word "teacher" employed in Philippine statute includes not only teachers who give academic instruction, but also those who teach in trade schools. 50**Philippine**884 (teacher in charge of field work).

1339-19 111**TexCr**599, 13**SW(2d)**375.

1341-30 Information held sufficient.–316**Mo** 72, 289**SW**871.

1342-42 176**Ark**1203, 5**SW(2d)**329; 101 **TexCr**239, 275**SW**833.

1344-60 213**Ala**551, 105**S**709; 174**Ark** 800, 297**SW**854; 176**Ark**1203, 5**SW(2d)** 329; 210**Ky**745, 276**SW**814; 229**Ky**385, 17**SW(2d)**219, 64**ALR**263; 146**SC**138, 143**SE**674; 146**Va**267, 135**SE**710; 153**Va** 890, 149**SE**459. **Presumptions of prosecutrix's chastity and of accused's innocence** do not nullify each other. 146**SC** 138, 143**SE**674. **In case of seduction under promise of marriage** defendant has burden of showing prosecuting witness was not virtuous. 174**Ark**800, 297 **SW**854.

1346-76 AlaA 130**S**902; **TexCr** 26**SW (2d)**242 (that prosecutrix's parents were dead).

1346-77 Evidence for defendant held inadmissible.–217**Ky**688, 290**SW**514.

1346-79 169**Ark**1211, 278**SW**3 (letters of prosecutrix admissible). **Evidence held admissible.**–213**Ala**551, 105**S**709.

1347-80 213**Ala**551, 105**S**709.

1347-81 213**Ala**551, 105**S**709; 21**AlaA** 125, 106**S**67.

1347-84½-New. Refusal to permit defendant's witness to relate contradictory statements and admissions of prosecutrix as substantive evidence is not error. 225**Ky**261, 8**SW(2d)**386.

1348-87 200 **Iowa**1250, 206**NW**260 (use of indecent language and telling obscene stories).

1348-93 NJ 135**A**90.

1349-1 322**Mo** 1180, 18**SW(2d)**67.

1349-4 But see 153**Va**890, 149**SE**459.

1350-8½-New. Time of misconduct.–217**Ky**688, 290**SW**514.

1349-9 41**GaA**608, 154**SE**204(1stcase).

1350-8½-New. That prosecutrix continually kept company with other men may be shown as bearing on issue of chastity. 200 **Iowa**1250, 206**NW**260.

1350-9 229**Ky**385, 17**SW(2d)**219, 64 **ALR**263; 322**Mo** 1180, 18**SW(2d)**67; 153 **Va**890, 149**SE**459 (long after seduction).

1350-15 105**TexCr**57, 287**SW**57 (holding it proper to exclude evidence that father had been charged with rape at time when prosecutrix was but ten years old).

1351-24 101**TexCr**239, 275**SW**833.

1352-29½-New. Evidence that child was born as result of cohabitation, date of birth, and that defendant was its father is admissible in fixing date of crime and in proof of corpus delicti. 213**Ala**551, 105**S**709.

1352-29½-New. Such evidence is not relevant where it related to time subsequent to time fixed by prosecutrix as date of seduction. 213**Ala**551, 105**S**709.

1352-30 213**Ala**551, 105**S**709 (child born as result of cohabitation); 205 **Iowa**220, 217**NW**812. Contra 226**Ky**127, 10**SW(2d)**609. **Paternity of child** is material only where it is result of seduction and then only for purpose of corroboration of prosecutrix as to time of seduction and as to fact of intercourse. 21**AlaA**522, 109**S**553. **Date of birth** is admissible, if within period of normal gestation. 213**Ala**551, 105**S**709. **Evidence corroborating prosecutrix's testimony** that child was born as result of cohabitation and date of birth are admissible. 213**Ala**551, 105**S**709. **Period of average gestation** may be proved by qualified doctor in corroboration of prosecutrix. 213**Ala**551, 105**S**709.

1353-31 21**AlaA**522, 109**S**553.

1353-32 219**Ala**254, 122**S**610. **Prosecutrix** may testify that accused is father of child. 213**Ala**551, 105**S**709. **Evidence corroborating prosecutrix's testimony** that defendant was father of child is admissible. 213**Ala**551, 105**S**709.

1353-35 Evidence held inadmissible.–226**Ky**127, 10**SW(2d)**609.

1354-36 100**TexCr**600, 272**SW**200.

1354-40 That prosecutrix kept company with other men may be shown as bearing on question whether engagement existed between her and defendant. 200 **Iowa**1250, 206**NW**260.

1355-44 100**TexCr**600, 272**SW**200.

1355-50 AlaA 130**S**902.

1356-52 But see 21**AlaA**522, 109**S**553.

1356-53 But see 23**AlaA**307, 124**S**665.

1356-54 23**AlaA**307, 124**S**665 (defendant may cross-examine to disprove frequent visits).

1358-66 214**Ala**603, 108**S**543; **Va** 154 **SE**475. **Evidence held sufficient.**–169 **Ark**1211, 278**SW**3; 37**GaA**121, 138**SE**

921; 41GaA568, 153SE620; GaA 155SE 788; 119Kan564, 240P416; 217Ky688, 290SW514; Miss 112S797; OklCr 274P 688; OklCr 287P1080; 146Va267, 135 SE710. **Evidence held insufficient.**–152 Miss274, 119S198; 152Va873, 149SE522. **Evidence held to warrant finding of female's chastity.**–214Ala603, 108S543.

1358–67 174Ark800, 297SW854 (evidence sufficient).

1359–63 214Ala603, 108S543.

1359–69 Evidence held sufficient.–Miss 112S797.

1359–70 Evidence held sufficient.–Miss 112S797.

1360–71 Evidence held sufficient.–Miss 112S797; 316Mo 72, 289SW871; 152Va 1002, 147SE231. **Corroboration held sufficient.**–189NC545, 127SE579 (evidence of good character of prosecutrix sufficient). **Insufficient corroboration.**–189NC545, 127SE579 (testimony of prosecutrix as to innocence not supported by other evidence).

1360–73½–New. Pregnancy of prosecutrix may be amply shown by circumstantial evidence. NJ 135A90.

1361–75 229Ky385, 17SW(2d)219, 64 ALR262.

1361–76 21AlaA638, 111S315; 214Ala 603, 108S543; 189NC545, 127SE579; 192 NC708, 135SE777; 146SC138, 143SE674; 153Va873, 149SE522. See also 169Ark 1211, 278SW3. **Corroboration held sufficient.** 176Ark1203, 5SW(2d)329; Ark 308SW(2d)817(1stcase); 316Mo 72, 289 SW871; 100TexCr600, 272SW200; 151 Va545, 145SE377. **Insufficient corroboration.**–23AlaA262, 123S277(2dcase); 152Miss274, 119S198. **Evidence held sufficient corroboration of woman's testimony to require submission to jury.** 133SC147, 130SE513. **In Arkansas.**–179 Ark1198, 18SW(2d)1019; Ark 30SW(2d) 817(1stcase). **In North Carolina.**–189NC 545, 127SE579.

1362–77 162Ark1055, 272SW659; 202 Iowa164, 209NW276; 108TexCr354, 300 SW941; TexCr 24SW(2d)47. **Corroboration held sufficient.**–168Ark1055, 272SW659; 174Ark800, 297SW854; 103 TexCr445, 281SW550; 105TexCr104, 287SW57. **The birth of a child, etc.** 202 Iowa164, 209NW276. **Insufficient corroboration.** 202 Iowa164, 209NW276; 101TexCr152, 282SW813; 108TexCr354, 300SW941. **Admissions of defendant.**–176Ark895, 28SW(2d)67. **In Oklahoma.**–Cr 274P688.

1363–78 168Ark1055, 272SW659; 104 TexCr152, 282SW813. **Corroboration held sufficient.**–168Ark1055, 272SW659; 174Ark800, 297SW854; Mo 148SW(2d) 559. **Insufficient corroboration.**–See 322 Mo 1180, 18SW(2d)67.

1364–79 Mo 148SW(2d)559; OklCr 274P 688; 146Va267, 135SE710.

1364–79½–New. In North Carolina testimony of prosecutrix must be supported by independent facts or circumstances. 192NC700, 135SE377.

1364–80 322Mo 1180, 18SW(2d)67; 151 Va545, 145SE377.

1364–81 Mo 273SW727; 151Va545, 145 SE377.

1365–87 100TexCr600, 272SW200.

1365–92 Whether accused gave pills to prosecutrix to produce abortion is for the jury. AlaA 130S902.

1365–93 217Ky688, 290SW514; Mo 273 SW727 (whether promise of marriage was conditional is for jury); 316Mo 72, 289SW871. **Testimony of prosecutrix that she submitted to intercourse in reliance on conditional promise of marriage in event of trouble** does not require peremptory instruction for defendant where she testified to prior unconditional promise. 217Ky688, 290 SW514.

1366–94 21AlaA125, 106S67 (conflicting evidence); 214Ala603, 108S543; 169Ark 1211, 278SW3; 316Mo 72, 289SW871.

1366–95 Question of seduction for jury. 21AlaA125, 106S67 (under evidence).

1366–98 23AlaA39, 120S305.

1366–1 TexCr 26SW(2d)242.

1366–1½–New. Pregnancy of prosecutrix is question for jury, though evidence is circumstantial. NJ 135A90.

1366–2 OklCr 287P1080 (instruction to acquit if prosecutrix consented to sexual intercourse from any other reason than promise to marry). **Instruction held misleading.**–205 Iowa220, 217NW812. **Instruction held improperly refused.**–23 AlaA39, 120S305. **Instructions held not erroneous.**–41GaA568, 153SE620.

1367–5½–New. An instruction in the language of the indictment which follows the statute sufficiently defines seduction. 210Ky745, 276SW814.

1367–10½–New. Instruction on necessity for corroboration should state that jury must first believe prosecutrix and then find that testimony believed to be true was corroborated. 108TexCr373, 18SW(2d)289.

1367–11 37GaA487, 140SE799.

1367–12 Instructions on previous chastity of prosecutrix held to be proper.–210Ky745, 276SW814; 226Ky127, 10 SW(2d)609.

SEE

1369–1½–New. In negative statement as to vision, often expresses merely negation of conscious knowledge. 91Fla918, 109S193.

SEED

1370–2 See also 14CustA96.

SEISINA FACIT STIPITEM

1370–11 Doctrine repudiated.–160Ga 449, 128SE393.

SELECTION

1373–44 As used in statute may mean that city in choosing its officers may select one of two methods but no other. 128Misc642, 220NY866.

SELL

1374–54 318Mo 581, 300SW765.

1374–60½–New. When used by directors to a president or secretary of an embarrassed corporation with reference to its property, means not only to sell but to convey. 129 Okl 177, 264P169.

SEMICOLON

1375–72 See also 48Philippine676.

SENSE

1377–99½–New. "Sense" means rational appreciation. 76Mont565, 248P176.

1377–99½–New. "Sense" means recognition. 76Mont565, 248P176.

1377–99¼–New. "Sense" means apprehension. 76Mont565, 248P176.

1377–99½–New. "Sense" means belief. 76Mont565, 248P176.

SEPARATE

1379–24 Other definitions.–81Mont587, 264P667.

SEQUESTRATION

1387–10 Sask [1924] 2DomLR930.

1389–22 5LaA243.

1390–26 Construction of particular statutes.–TexCivA 278SW(2d)354.

1390–27 But see NJCh 149A50.

1390–31 Property belonging to joint owners, etc. See also LaA 128S715. **Partial owner of note may sue out writ in his name alone,** though note belonged to him and others. TexCivA 30 SW(2d)419.

1392–37½–New. Writ should not be sustained, where plaintiff has possession of property sought to be sequestered. 9LaA471, 121S254.

1392–38 TexCivA 286SW334.

1392–39 7LaA228.

1393–47 The contrary view.–3LaA234.

1393–49 LaA 128S715 (fear justified by denial of plaintiff's ownership); TexCivA 16SW(2d)894.

1393–50 168La496, 122S594.

1394–53 TexCivA 198SW(2d)328.

1394–62 102NJEq107, 140A241.

1395–68 Judge is not relieved from duty of signing sequestration order by fact that petition had not been filed with clerk (163La477, 112S371) or because costs of writ have not been paid (163 La477, 112S371).

1395–69½–New. That city was made party, though unnecessary, does not affect proceedings against vendee. 168 La496, 122S594.

1395–69¼–New. That one seeking sequestration sought additional relief against codefendant does not show misjoinder. 168La496, 122S594.

1395–69¼–New. Purchaser at tax sale subsequent to resale by purchaser at bankruptcy sale is necessary party to proceedings by latter purchaser against his vendee. 168La496, 122S594.

1395–74½–New. Writ issued prior to filing of bill of complaint is irregular and should be quashed on motion. 140 Miss461, 106S5.

1396–78 Seal.–Court has discretion to order substitution of correct seal on affidavit in case of mistake. TexCivA 278 SW943.

1396–79 TexCivA 286SW334, 335 [quot Cyc].

1397–87 See also 7LaA428. **Affidavit held sufficient,** where grounds stated were not inconsistent with those held had for duplicity. TexCivA 278SW 943.

1397–87½–New. Grounds that plaintiff feared defendants would make use of possession of property to injure it, and would convert to their own use fruits and revenue produced by it, were properly joined conjunctively. TexCivA 11 SW(2d)234.

1398–90 LaA 128S715 (allegations held not to require proof of fear).

1399–93 TexCivA 11SW(2d)224. See also TexCivA 278SW943.

1399–96 TexCivA 278SW943.

1399–97 TexCivA 286SW334.

1399–98 TexCivA 11SW(2d)234.

1399–99 TexCivA 293SW590 (description held sufficient); TexCivA 11SW(2d) 224.

1399–1 TexCivA 293SW590 (description held sufficient).

1400–2 Failure of bill to state plaintiff's residence may be remedied by amendment. 102NJEq107, 140A241.

1400–3 102NJEq107, 140A241.

1400–10 See also 1LaA29.

1401–11 Bond for more than required amount not objectionable. TexCivA 278 SW943.

1402–25 102NJEq107, 140A241. **Writ cannot be abated by mere denial of facts in affidavit.**–TexCivA 278SW943.

1402–27 TexCivA 16SW(2d)557.

1403–38 But see DelCh 142A783.

1404–46½–New. Levy constitutes judicial deposit in custody of court, not lien. TexCivA 17SW(2d)862.

1405–52½–New. Installment purchaser paying balance for furniture sequestered after default is not entitled to return of identical property. 12LaA679, 126S 702.

1406–57 TexCivA 16SW(2d)894.

1406–59 Nonresident defendant need not file formal appearance. 102NJEq 107, 140A241.

1408–65 11LaA645, 123S435. **In Louisiana.**–165La680, 115S823. **Release bond** reciting entry of appearance transforms sequestration suit into one commenced by subpœna. 102NJEq107, 140A241.

1408–67½–New. That names of other sureties not signing were called for in bond does not excuse sureties signing. TexCivA 17SW(2d)862.

1409–76 "Fruits," used in replevy bond, held to include natural accessions of live stock. TexCivA 278SW943.

1409–77 When writ has been improvidently issued, sureties on replevy bond are not liable. TexCivA 286SW334.

1409–79½–New. Liability of sureties becomes fixed on possession of property being left in defendant. TexCivA 17 SW(2d)862.

1410–81½–New. Personal judgment against defendant in sequestration forms no basis of claim against surety on release bond. 11LaA353, 123S358.

1410–83 Execution of second replevy bond to release property seized under second sequestration does not, as matter of law, release sureties on first replevy bond. TexCivA 198SW(2d)132.

1410–85 See also 3LaA657.

1411–91½–New. Irregularities in sequestration proceedings apparent on face of record rendering proceedings void constitute defense to sureties. TexCivA 291SW260.

1411–91¼–New. Surety cannot complain of errors committed against principal. TexCivA 17SW(2d)862.

1411–92½–New. Failure to enter judgment on dismissal of suit to foreclose lien does not preclude defendant from

maintaining action on replevin bond. TexCivA 293SW896.

1411-93 Amendment of judgment in sequestration suit on consent of attorney for receiver of defendant is not binding on surety on sequestration release bond. 11LaA353, 123S358.

1412-99 See also TexCivA 17SW(2d) 862.

1412-1 Sufficiency of evidence.-165La 680, 115SE823.

1412-2 Issues.-TexCivA 278SW943. **Sufficiency.**-TexCivA 278SW943.

1413-4 See also 7LaA236. **Depreciation in value.**-165La680, 115S823. **Judgment for all property covered by bond held not excessive.**-TexCivA 278SW943. **Verdict including probable increase of animals held not speculative.**-TexCivA 278 SW943.

1413-5 Depreciation in value.-11LaA 645, 123S435.

1413-6 TexCivA 8SW(2d)552; TexCivA 17SW(2d)862.

1413-9 TexCivA 8SW(2d)552. But see 1LaA699.

1413-9½-New. Under statute, sureties on replevy boud are not liable for interest on value of property from date of replevy bond to date of judgment. TexCivA 8SW(2d)552.

1413-10 TexCivA 278SW943. See also TexCivA 17SW(2d)862.

1413-11 TexCivA 17SW(2d)862.

1414-12 Recovery of costs not allowed.-TexCivA 286SW334; TexCivA 8SW(2d) 552.

1415-28 8LaA327.

1416-34 6LaA175.

1416-35 Awarding landlord machinery and equipment on leased plantation as against lessee partnership held proper under lease. 165La1091, 116S568. **Evidence.**-165La1091, 116S568. **Machinery not on leased plantation.**-165La1091, 116 S568.

1417-43 But see 6LaA294.

1417-45½-New. Failure of amended petition in suit on note to pray for writ already issued is not ground for quashing writ. TexCivA 30SW(2d)419.

1417-47 167La432, 119S417; 5LaA383.

1418-58 Attorney's fees for dissolving writ held not allowable where writ of sequestration was dissolved merely as incident of decision of case on its merits. 160La433, 107S295. **Attorney's fees not allowed defendant,** where motion to dissolve involved hearing on merits. 163La395, 111S798.

1418-58½-New. Where writ is dissolved after trial on merits, defendant is not entitled to attorney's fees. 163La395, 111S798.

1418-58¾-New. Damages, consisting of attorney's fees for dissolution, cannot be allowed unless writ is dissolved on motion or rule and not on merits. 167La227, 119S30.

1419-65½-New. Motion to dismiss writ upon general appearance will be denied. 102NJEq107, 140A241.

1419-69 TexCivA 293SW590 (to establish value of property).

1419-71 TexCivA 286SW334 (holding error in issuing writ on insufficient affidavit does not go to right to sue for debt and to foreclosure of lien).

1419-71½-New. Provision of statute that defendant in sequestration suit, who has replevied, is allowed to tender sequestered property to officer within ten days after rendition of judgment as credit thereon, need not be inserted in judgment itself, since right to return property is secured by statute, and requires no judgment for its preservation. TexCivA 8SW(2d)552.

1420-75 4LaA200; TexCivA 275SW 397; TexCivA 278SW1107 (mortgagees liable for suing out unlawful sequestration of property damaged in custody of officer). See also 167La227, 119S30.

1421-83 TexCivA 275SW397.

1421-86 TexCivA 291SW1088.

1421-87½-New. Defendant and surety on replevin bond not contending coöbligor has defense cannot complain of default judgment against coöbligor. TexCivA 278SW(2d)354.

1421-87¾-New. Judgment against surety on replevin bond not attempting to relieve itself from liability by delivering property to sheriff held sustained. TexCivA 278SW(2d)354.

1423-10 TexCivA 290SW299 (petition held sufficient alleging value at time of wrongful sequestration, replevy, and conversion).

1423-11 Damages in reconvention held well alleged against general demurrer.-TexCivA 278SW1107.

1424-17 TexCivA 31SW(2d)1101.

1424-23 On proof of no market, proof of intrinsic value is admissible. TexCivA 278SW1107.

1425-30 Good faith in procuring writ is for jury.-TexCivA 278SW1107.

1425-32 Verdict held properly not set aside.-TexCivA 278SW1107.

1425-38 Charge held not prejudicial.-TexCivA 278SW1107.

1426-46 TexCivA 278SW1107. **Verdict held not excessive** or result of passion and prejudice. TexCivA 278SW1107.

1426-51 TexCivA 278SW1107.

1428-66 TexCivA 278SW1107 (cattle).

1428-75 See also TexCivA 278SW1107. **In absence of market value measure of damages to cattle is difference** in reasonable value between time of taking and return. TexCivA 278SW1107.

1428-76 8LaA678.

1429-77½-New. Where writ was dissolved because of failure to furnish increased bond, damages consisting of attorney's fees were not recoverable. 167 La227, 119S30.

1429-78 See also TexCivA 16SW(2d) 894.

SERIALLY

1429-2½-New. Word "serially" as used in statute conferring on county right to redeem issue of bonds "serially" each year means designating bonds, notes, etc., in series of which different parts are redeemable at different specified dates. 119 Or127, 248P151.

SERVANT

1431-34 Construed as "domestic servant."-220MoA596, 287SW1072.

SERVICES

1434-45 Term includes materials, expenditures, and labor. MoA 280SW54. **As not confined to manual labor.**-90Fla 582, 107S354.

SESSION

1439-57 23AlaA354, 128S901.

SETTLE

1442-85 78Mont357, 254P174. **Term as used in statute for settlement of corporations' affairs** held to mean "dispose of." 78Mont357, 254P174.

1442-92 78Mont357, 254P174.

1442-93 To settle an account is not to determine the legal basis of an account. 16F(2d)92.

1442-96 78Mont357, 254P174.

SETTLEMENT

1443-7 115 Or624, 239P538, 540 [quot Cyc].

1443-8 115 Or624, 239P538, 540 [quot Cyc].

1443-9 115 Or624, 239P538, 540 [quot Cyc].

1443-10 115 Or624, 239P538, 540 [quot Cyc].

1443-11 115 Or624, 239P538, 540 [quot Cyc].

1443-12 115 Or624, 239P538, 540 [quot Cyc].

1443-13 115 Or624, 239P538, 540 [quot Cyc]; 7PaDist&Co 41.

1443-14 115 Or624, 239P538, 540 [quot Cyc].

1443-15 115 Or624, 239P538, 540 [quot Cyc].

1443-16 115 Or624, 239P538, 540 [quot Cyc].

1443-17 115 Or624, 239P538, 540 [quot Cyc].

1444-19 115 Or624, 239P538, 540 [quot Cyc].

1444-20 115 Or624, 239P538, 540 [quot Cyc].

1444-21 115 Or624, 239P538, 540 [quot Cyc].

1444-22 51ND1, 198NW546; 115 Or 624, 239P538, 540 [quotCyc].

1444-23 115 Or624, 239P538, 540 [quot Cyc].

1444-23½-New. Act or process of adjusting or determining; composure of doubts or differences. 51ND1, 198NW 546.

SEVERANCE

1448-53 See also 5LaA197.

SEWAGE

1448-60 298Pa193, 148A77.

SEWER

1449-65 298Pa193, 148A77.

1449-71 "Drain" distinguished.-119 Or 1, 247P319.

SHALL

1451-86 81Colo 181, 254P440; 36GaA 428, 430, 136SE830 [citCyc].

1451-87 36GaA428, 430, 136SE830 [cit Cyc].

1451-88 36GaA428, 430, 136SE830 [cit Cyc].

1451-89 81Colo 181, 254P440. **Imperative,** etc. 235Mich459, 209NW581; 192 NC634, 135SE612.

1452-90 130Misc821, 226NYS397.

1452-93½-New. or when essential to effectuate legislative intent; 81Colo 181, 254P440.

SHELL SHOCK

1454-16½-New. Term which describes not distinct type of nervous disorder, 197 Cal 306, 240P1000.

1454-16⅓-New. but condition produced upon certain organisms by sudden fear, 197Cal 306, 240P1000.

1454-16¼-New. or by highly exciting causes. 197Cal 306, 240P1000.

1454-16⅕-New. It is form of neurosis. 197Cal 306, 240P1000.

1454-16⅙-New. It is not settled, general insanity, 197Cal 306, 240P1000.

1454-16⅐-New. but functional nervous disease, 197Cal 306, 240P1000.

1454-16⅛-New. and not due to organic changes. 197Cal 306, 240P1000.

SHERIFFS AND CONSTABLES

1489-1 210Ky51, 275SW1 (not state officer).

1489-5½-New. Under constitutional provisions and statutes, constable is deemed primarily executive officer of his precinct and of justice courts sitting therein. 219Ala523, 122S835.

1491-24 230Ky213, 18SW(2d)988.

1491-28½-New. though elected sheriff defendant was not eligible to office because as incumbent he failed to settle for taxes due as required by statute. 190NC336, 130SE25.

1492-36 But see 244 IllA30. **Statute providing that county court may require additional bonds from sheriff** applies to all bonds. 230Ky534, 20SW(2d)284.

1493-39 In absence of notice to officer of election as sheriff, statute providing that office shall be deemed vacant on failure to give bond within twenty days after notice of election is inapplicable. TexCivA 19SW(2d)574.

1493-43 In Michigan.-234Mich391, 208 NW613, 614.

1495-61 190NC336, 130SE25.

1496-79 190NC336, 130SE25.

1496-80 190NC336, 130SE25 (settlement board conclusive).

1497-4½-New. Where sheriff elected dies before beginning of new term, commissioners court, in appointing sheriff to fill vacancy for new term, need not await expiration of twenty days allowed newly elected officer to qualify after notice of election. TexCivA 17SW(2d)81.

1498-13 TexCivA 19SW(2d)574 (death of sheriff elect before commencement of term).

1500-44 37Wyo 498, 263P708. **After complaint, notice, and hearing** governor may remove without further action by members of council. 125Me529, 133A 265. **Governor and council** held to constitute single tribunal. 125Me529, 133A 265. **Before governor may remove sheriff** majority of council must have voted for it. 125Me529, 133A265. **Governor**

does not vote with council. 125Me529, 133A265.

1500-45 Statute to be liberally construed carrying out salutary purposes intended in adoption of recall. 136 Wash467, 241P21.

1501-48 Voluntary intoxication.-210Ky 179, 275SW642.

1501-49 Failure to make arrests and execute process, etc. 75Mont116, 241P 1075.

1501-53 Illustrations of matters constituting neglect of duty.-210Ky179, 275 SW642.

1503-68½-New. Action to remove sheriff for misconduct is civil action. **Tex CivA** 9SW(2d)478.

1503-68½-New. Court's approval of sheriff's account is no bar to prosecution by state for removal of sheriff. **TexCivA** 9SW(2d)478.

1503-69 136Wash467, 241P21. **Charges held too general** and therefore insufficient. 136Wash467, 241P21.

1503-70 149Va406, 141SE237. **Accusation held insufficient.**-75Mont116, 241P 1075. **Surplusage.**-149Va406, 141SE237. **Charges held not indefinite.**-37Wyo 498, 263P708.

1503-71 Evidence held insufficient.-210 Ky179, 275SW642.

1503-72 37Wyo 498, 263P708. **Evidence held sufficient.**-46 Ida112, 268P8; 149Va406, 141SE237. **Harmless error** in admission of evidence. 46 Ida112, 268P8. **Evidence held admissible.**-46 Ida112, 268P8.

1503-72½-New. Instruction defining "willful" as meaning sheriff placed items in account knowing he was not entitled to payment, is held correct. **TexCivA** 9SW(2d)478.

1503-72½-New. In action for removal of sheriff from office for misconduct under Texas statute, charge instructing jury to determine whether sheriff was guilty of charges contained in relator's petition has been held substantial compliance with requirements of statute. **TexCivA** 9SW(2d)478.

1503-81½-New. District judge may suspend sheriff after judgment of removal and before appeal therefrom is perfected. **TexCivA** 3SW(2d)1117.

1503-81½-New. Execution of appeal bond does not suspend judgment removing officer from office and order of suspension. **TexCivA** 3SW(2d)1117.

1503-81¼-New. General assembly has power to provide method for removal.-152SC365, 150SE46, 66ALR574.

1504-89 106WVa170, 145SE184.

1505-91 TexCivA 17SW(2d)81.

1505-92 Where sheriff dies before commencement of new term to which he has been elected, appointee to fill vacancy holds only for unexpired original term. **TexCivA** 19SW(2d)574.

1505-3 Testimony of members of commissioners' court respecting their intent in making appointment to fill vacancy is properly excluded. **TexCivA** 19SW(2d) 574.

1505-4½-New. Burden of proof.-In proceeding to determine title to office made vacant by death of reëlected sheriff before commencement of new term, party alleging that deceased received notice of election has burden of proving allegation. **TexCivA** 19SW(2d)574.

1506-21½-New. Court may inquire only into jurisdictional facts in sheriff's collateral attack by quo warranto on removal from office. 37Wyo 498, 263P708.

1508-41 In Alabama.-219Ala523, 122S 835.

1509-56 Notice of election is necessary to put constable in default for failing to file official oath and bond. 310Mo 397, 276SW631.

1512-87 Failure to approve bond will not discharge surety, where bond was properly filed and officer continued to act with acquiescence of surety. 73Mont 490, 237P483.

1514-29 9PaDist&Co 107 (court of quarter sessions).

1514-32 8PaDist&Co 107.

1514-32½-New. Failure to qualify is not ground for removal where constable promptly qualified on receiving notice of election after delay chargeable to township clerk. 310Mo 397, 276SW631.

1515-42½-New. Statutes provide for removal of constable upon petition of his surety upon grounds specified in the statute. 8PaDist&Co 107.

1515-42½-New. Which in some jurisdictions do not include malfeasance in office. 8PaDist&Co 107.

1515-50 173Ark769, 293SW1030.

1516-74½-New. Act creating deputy sheriff's office in Alabama held valid. 22AlaA571, 118S237 [certiorari den 218 Ala166, 118S238].

1516-74½-New. Word "deputies," in statute relating to court attendants and providing for consent and approval of deputies to be appointed by sheriff, means persons deputed to act as court attendants and not as deputy sheriffs. 134Misc75, 234NYS581.

1517-80 IndA 168NE615.

1518-85 In California.-71CalA633, 236 P339.

1518-86 Utah 268P783.

1518-88 That deputy was appointed pursuant to void contract whereby candidate for sheriff agreed to allow another to select deputies does not warrant withholding of approval. 235Ky240, 30 SW(2d)945.

1518-89½-New. Right of sheriff to appeal from decision of salary board refusing to allow appointment of additional deputy is statutory. 293Pa557, 143A 189.

1519-96½-New. Statute limiting power of sheriff to appoint deputies, being in derogation of common law, must be strictly construed. 126Misc418, 213NYS 602.

1519-1 21 OhA26, 152NE788 (appointment as deputy constable of one under indictment for extortion upheld).

1519-4 Utah 268P783.

1520-5 Whether statute directory or mandatory.-CalA 286P1103.

1521-13½-New. Liability of deputy sheriffs on official bonds is governed by laws relating to official bonds generally, where applicable. 218Ala468, 118S 794.

1521-19 Utah 268P783. **In California.**-71CalA633, 236P339.

1521-21½-New. In Kansas, county commissioners cannot fix term of office of deputy sheriff appointed by sheriff under statute to patrol highways. 121Kan 109, 245P1019.

1523-55 105TexCr246, 287SW1095.

1523-57 In Kansas.-121Kan109, 245P 1019.

1524-65½-New. Sheriff may orally summon any person to assist him in effecting an arrest, 199Cal 221, 248P912, 47ALR359.

1524-65½-New. and such person will have all the authority of a formally deputized officer. 199Cal 221, 248P912, 47ALR359.

1524-69 21 OhA26, 152NE788.

1525-77½-New. At common law bailiff may appoint another to do an act within power of bailiff. **IndA** 168NE615.

1526-91 81CalA590, 254P648, 655 [cit Cyc].

1527-7 Utah 268P783.

1527-9 Sheriff is administrative officer of court, and not tribunal to determine doubtful questions of fact. **TexCivA** 292 SW648.

1528-13½-New. Sheriff has authority to investigate places amounting to public nuisances in violating liquor laws, 125 Misc658, 211NYS705.

1528-13½-New. and to indict and bring to trial person responsible therefor. 125 Misc658, 211NYS705.

1528-15 210Ky51, 275SW1 (as collection of state's revenues in his county); 147SC88, 144SE705. **In Oregon.**-116 Or 509, 241P983.

1528-19½-New. Sheriff is not officer of state. 210Ky51, 275SW1.

1529-20 126Misc418, 213NYS602, 605 [citCyc].

1529-21 126Misc418, 213NYS602, 605 [citCyc] (sheriff may require performance of such duties); 120 Or444, 250P 220 (searching automobile for intoxicating liquor).

1529-21½-New. Deputy sheriffs appointed by sheriff for road patrol under statute are subject to direction and control of sheriff appointing them. 121 Kan109, 245P1019.

1529-30 218Ky189, 291SW1.

1529-33½-New. Acting as process server. 126Misc418, 213NYS602.

1530-40 Contract for care and feeding of animals taken on distress made by deputy sheriff is not binding on sheriff. 92PaSuper526.

1533-75 149Va406, 141SE237.

1533-76 87Colo 251, 287P85(2dcase) (Halloween pranks of boys); 239 IllA 195.

1533-79 87Colo 251, 287P85(2dcase).

1533-89 However, it is not unlawful for him to do so; he merely steps aside from his official duty. **TexCommnA** 293 SW811.

1537-27 49Nev70, 236P559. **What constitutes reasonable diligence.**-241 IllA 189.

1538-37 137Misc824, 245NYS34.

1539-58 TexCivA 275SW152.

1539-60 49Nev70, 236P559.

1540-65 2LaA16.

1541-89 164Minn450, 205NW373.

1544-12 Del 151A721 (after seizure and advertisement for sale).

1547-42 In Kentucky.-219Ky35, 292 SW495.

1547-46 298Pa388, 148A493.

1548-56 210Ky51, 275SW1 (under constitution).

1549-58 177Ark752, 7SW(2d)973; **Tex CivA** 275SW147.

1549-59 126Me147, 136A810.

1550-64 85PaSuper463; 160Tenn148, 22SW(2d)355.

1551-71 Fla 125S358(3dcase) (statute held to make scale of sheriff's fees applicable to constables); 167Ga45, 144 SE756; 50Nev173, 264P696; **TexCivA** 275SW147 (immaterial whether fees seem large or small, wise or unwise).

1552-74 In Kansas.-121Kan109, 245P 1019.

1552-75 TexCivA 275SW147 (entitled to such fees as statute authorized).

1556-7 But see 27 OhNPNS469.

1558-27 But see 90PaSuper486.

1558-34 See also 6LaA64.

1560-44 County commissioners have no authority to add to or increase salary of any sheriff or deputy under statute intended to provide for emergency appointment of deputy sheriffs. 88 IndA 634, 165NE253.

1560-48 Sheriff cannot recover from county salary paid deputy where payment is not authorized by county commissioners. 51SD6, 211NW968.

1561-59½-New. Statute limiting compensation of sheriff's deputies in St. Louis to annual rate fixed by board of aldermen means that the rate to be fixed by the board of aldermen is the rate for holder of each classified position but does not require board to fix total appropriation or number of employees. 315Mo 84, 295SW501.

1561-59½-New. Where duties of bailiff and deputy sheriff are inconsistent, one person appointed to perform cannot receive pay for both offices. 88 IndA634, 165NE253.

1562-75 177Ark752, 7SW(2d)973.

1562-77 141SC407, 139SE842.

1564-90 70CalA237, 232P1001 (constable of first-class township in county of seventh class held not entitled to fees in criminal cases under statute repealed by statute providing for fixed salary); 145 Miss55, 111S144.

1564-94½-New. In counties having less than certain population and assessed property valuation, sheriff cannot recover lost fees in criminal prosecutions in justices courts in addition to amount for lost fees in circuit court. 153Miss 589, 121S277.

1565-97 96Fla476, 118S305(2dcase).

1565-1 But see **TexCivA** 275SW147.

1566-8 Sheriff removing prisoners under indictment in several cases cannot recover mileage in each case, but only for miles actually travelled in removing each prisoner. 116Tex348, 291SW842. **In Pennsylvania.**-88PaSuper293.

1567-18½-New. Sheriff entitled only to actual mileage for bringing in prisoner regardless of number of capias served on prisoner. **TexCivA** 275SW147.

1567-19 85PaSuper463 (statute constitutional).

1567-20 85PaSuper463 (statute constitutional).

1567-22½-New. Under statute imposing

fees for commitments in criminal matters, sheriff is not entitled to fee for commitment because of insolvency, 85Pa Super463.

1567-22⅓-New. or for commitment for treatment of communicable diseases, 85 PaSuper463.

1567-22¼-New. or for commitments of suspicious characters, 85PaSuper463.

1568-37 Grand jury witnesses.-219Ala 378, 122S333.

1569-40 Sheriff serving subpœnas in numerous cases against same defendant is entitled to mileage only for miles actually and necessarily traveled. 116 Tex348, 291SW842.

1570-57 126Misc802, 215NYS96 (two dollars for levying warrant).

1571-69 In New York.-126Misc802, 215 NYS96.

1572-75 125Misc257, 210NYS552 (collection of his fees but no part of judgment on execution is irregular, and he is not permitted to retain such sum).

1574-98 163La397, 111S799.

1575-5 See also 7LaA397.

1576-22 Sask [1929] 4DomLR792.

1576-25½-New. It is in court's discretion to deny allowance for custody and storage where officer unjustifiably refused to release property on bond. 48 RI 4, 135A50.

1578-38 135Wash464, 238P3.

1579-50 Failure to make application for allowance prevents allowance from being made. 126Misc802, 215NYS96. **Burden of proving propriety of expenses** rests on sheriff. **Sask** [1929] 4Dom LR792.

1579-51 80Mont258, 260P116.

1580-55 135Wash464, 238P3.

1581-68 Where amount bid on sale of real estate is credited on debt and no money is transferred, some statutes limit sheriff's commissions to one hundred dollars. 42 Ida164, 245P90.

1582-89 175Ark388, 299SW388.

1583-93½-New. Sheriff is not entitled to poundage where property at foreclosure sale brings in sum insufficient to pay junior encumbrance of purchaser. 33 OhA183, 168NE774(1stcase).

1584-97 166Ga700, 144SE251.

1584-10 Sheriff's per diem for court attendance held "fees" under statute providing for payment of deficiency of fees under twelve hundred dollars. 51 SD6, 211NW968.

1585-12 Constable not entitled to compensation for acting as sergeant at arms unless there is no regularly appointed sergeant at arms. 105NJL129, 143A 360.

1588-48 Expenditures payable out of special funds.-136Wash403, 240P560.

1592-89 TexCivA 9SW(2d)478.

1593-98 234Ky691, 28SW(2d)980.

1595-14 In Texas.-CivA 275SW147.

1598-34 Defendant never liable till levy is made.-137Misc824, 245NYS34.

1599-43 Fla 130S715.

1600-49 But see 134 Okl 299, 273P222.

1603-76 50Nev237, 255P1073.

1603-77½-New. Approval of sheriff's vouchers on statutory dry law fund by prosecuting attorney is required in some jurisdictions. 136Wash403, 240P560.

1603-77¼-New. In approving such vouchers prosecuting attorney acts in ministerial capacity, 136Wash403, 240 P560.

1603-77¼-New. and hence must approve expenditures if legal. 136Wash 403, 240P560.

1603-79 80Mont258, 260P116.

1605-96½-New. Unaudited claim held barred when not presented within statutory period. 50Nev237, 255P1073.

1606-17 88 IndA634, 165NE253.

1606-18 88 IndA634, 165NE253.

1608-34 Payment from fines and forfeitures.-220Ala94, 124S225.

1609-51 299Pa163, 149A186.

1610-56 County cannot recover money paid sheriff by solicitor general who was not agent of county in making payment and to which county did not have title. 167Ga45, 144SE756. **That payment was voluntary** does not prevent county from recovering compensation paid to sheriff under unconstitutional statute. 160Tenn109, 23SW(2d)239. **Where sheriff in good faith received salary under unconstitutional statute,** equity court will not enforce refund to county. 160Tenn109, 23SW(2d)239.

1611-63½-New. Where mortgagee of chattels pays under protest, money demanded by sheriff's caretaker, he is entitled to recover amount of reduction made by court. 135Wash464, 238P3.

1611-65 11PaDist&Co 63.

1612-80 Sheriffs are liable for direct injuries caused by neglect or want of skill, etc. 150Miss697, 116S814.

1612-83½-New. Sheriff is not liable for acts within scope of authority. 243Mich 589, 220NW775.

1612-83⅓-New. Penalties against sheriff may only be enforced when clearly within statute. 233Ky728, 26SW(2d) 1041.

1612-83¼-New. Officer, as sheriff, may be liable personally although not liable on official bond. NC 155SE160.

1613-85 Conn 138A138.

1613-89 152Tenn470, 279SW384, 385 [citCyc].

1614-98½-New. Deputy is not liable for acts within scope of authority. 243 Mich589, 220NW775.

1614-6 106Conn387, 138A138.

1618-36 169Ark662, 276SW591, 42ALR 1194.

1618-37 169Ark662, 276SW591, 42ALR 1194; 181Ark804, 27SW(2d)988; 75 CalA353, 242P874; 42 Ida224, 244P 1102; 234Ky751, 29SW(2d)17; 127Me 53, 141A99; NC 155SE160; 20SaskL 553, [1926] 3DomLR289, [1926] 2West Wkly422. But see BC [1928] 4DomLR 241. **Acts must have been done under color of office.**-75CalA353, 242P874. **Interpreting rule that act of deputy must be by virtue of office** in order to carry liability to his principal, such act of deputy must be done in attempt to serve or execute process or under statute giving him right to arrest without warrant. 152Tenn470, 279SW384. **In British Columbia.**-[1928] 2DomLR89.

1619-38½-New. Liability of sheriff for acts of deputy is not controlled by statute in some jurisdictions but is grounded on common law. 152Tenn470, 279 SW384.

1620-43 155Miss64, 123S873.

1620-54 75CalA353, 242P874; 42 Ida 224, 244P1102; 217Ky533, 290SW347; 6LaA382; 243Mich589, 220NW775; 194 NC234, 139SE380; 10PaDist&Co 186; 152Tenn470, 279SW384; 101Vt311, 143 A307.

1622-66 22AlaA218, 114S285.

1622-67 106Conn387, 138A138.

1623-81 169Ark662, 276SW591, 42ALR 1194.

1623-82 169Ark662, 276SW591, 42ALR 1194.

1624-97 217Ky533, 290SW347 (arrest of person in erroneous belief that he was fugitive from another state); 152Tenn 470, 279SW384, 385 [citCyc]. **Exception to rule.**-152Tenn470, 279SW384.

1624-98 See also 181Ark804, 27SW (2d)988.

1624-2½-New. Sheriff not liable for shooting of bystander by deputy acting outside scope of his authority. 194NC 234, 139SE380.

1625-6 38GaA621, 144SE919; TexCivA 292SW648.

1626-7 6LaA862.

1628-29 241 IllA189; TexCivA 8SW (2d)1046.

1629-37 38GaA621, 144SE919 (bail and trover process).

1631-58 38GaA621, 144SE919.

1632-61½-New. Officer's failure to take possession after finding property at place designated by defendant, has been held not seizure. 38GaA621, 144 SE919.

1632-62 216Ala62, 112S343.

1632-66 Constable refusing to execute writ issued by justice of another county unaccompanied by certificate of county clerk attested by his seal is not liable. 118Tex659, 23SW(2d)686.

1634-76 TexCivA 292SW648 (mistaken belief of sheriff that property was exempt as homestead does not relieve from liability).

1636-95 But see 220AppDiv507, 221 NYS776.

1636-4 TexCivA 8SW(2d)1046.

1639-40 136Misc49, 239NYS221.

1640-50 136Misc49, 239NYS221.

1641-56 36GaA330, 136SE474. **Sheriff failing to seize property should jail defendant or give bond with security.**-36 GaA330, 136SE474.

1641-56½-New. Where refusal of sheriff to execute order requiring him to put plaintiff into possession of realty purchased by plaintiff on foreclosure sale, unless plaintiff gave sheriff indemnity bond, was unjustified, sheriff is liable for all damages resulting. 225AppDiv 420, 233NYS373.

1642-63 258Mass264, 154NE579.

1644-78 6LaA770; 144Miss292, 109S 792.

1644-78½-New. It is proper for sheriff to place purchaser at foreclosure in possession of mortgaged premises where sale not invalid and vested title in purchaser as against mortgagors. TexCivA 275SW152.

1644-78⅓-New. Sheriff is liable for damages resulting to person against whom judgment was obtained resulting from any act in excess of his authority in executing writ of execution. 131 Or 554, 284P172.

1646-10 126Kan714, 271P302; 48Philippine149, 153 [citCyc].

1647-12 82Colo 364, 260P109.

1647-13 82Colo 364, 260P109. **Proper return is not made** of the exempt property where plaintiff is called upon by the custodian to pay storage fees. 82 Colo 364, 260P109.

1648-15 82Colo 364, 260P109.

1649-34 82Colo 364, 260P109.

1650-47 12LaA401, 125S460 (where only costs and not proceeds of sale were received by sheriff).

1652-68 163La586, 112S495; TexCivA 291SW1088; 145Wash81, 259P13. **Liable regardless of negligence.**-145Wash 81, 259P13.

1654-81 145Wash81, 259P13.

1655-87 97CalA725, 276P134.

1657-10 99Vt45, 130A580.

1660-34½-New. If he, through an honest mistake, in the exercise of his discretion, attaches an excessive amount, he is not liable to debtor. 258Mass264, 154NE579.

1660-34⅓-New. Where attachment in amount is unwarranted, officer becomes trespasser ab initio, and is liable. 258 Mass264, 154NE579.

1661-56½-New. Officer serving replevin writ without taking bond from plaintiff as required by statute is trespasser. 126Me550, 140A182.

1664-82½-New. Where property in possession of conditional purchaser was attached by sheriff, who did not take manual possession but discharged attachment on notice by seller that it owned property, owner could not recover against sheriff and his surety for loss of property. 149Wash679, 272P75.

1668-23 145Wash81, 259P13.

1669-25½-New. No civil liability of sheriff or his deputy arises for injury to automobile of plaintiff by deputy shooting at it for purpose of stopping it to arrest plaintiff for driving while drunk. 169Ark662, 276SW591, 42ALR 1194.

1670-31 The sheriff is liable where, etc. 145Wash81, 259P13.

1670-32 146Wash500, 263P949.

1673-58 4LaA452.

1673-60 51SD365, 213NW950 (valid attachment prerequisite to right of recovery).

1673-63 Determination of Sufficiency.-48RI 4, 135A50.

1673-64 Sheriff has no right to accept bond in replevin suit and release automobile taken into possession on writ of seizure. 151Miss734, 118S425.

1676-86½-New. Election by plaintiff in fieri facias to sue on forthcoming bond accepted by sheriff for release of property without plaintiff's consent is ratification of sheriff's act in releasing property which precludes subsequent suit against sheriff. 36GaA275, 136SE465.

1676-86⅓-New. Such ratification is not affected by fact that later sheriff took another bond with different sureties also without plaintiff's consent as substitute for first bond upon which no

suit was brought. 36GaA275, 136SE 465.

1679-7½-New. Where mortgagee claimed property attached, but constable retained same, holding title subject to mortgage, he was bound, under statute, upon debtor's request, to remove property or keeper without unreasonable delay. 258Mass264, 154NE579.

1681-24½-New. Sheriff, after delivering possession to plaintiff in replevin and receiving proper bond, has no absolute duty to return goods where action fails. 102NJL425, 132A663.

1682-34 126Kan714, 718, 271P302 [cit Cyc].

1683-60 Utah 287P175.

1689-30 Mass 169NE662; 44Philippine 895.

1698-19 51SD520, 215NW689 (failure to make return).

1699-39 Officer depositing funds coming into his official possessions, using good faith and due care in selection of depository, is not liable for loss from failure of depository. 74Mont170, 239 P771.

1700-43 159La831, 106S321.

1700-48 126Kan516, 268P823.

1703-74 285Pa498, 132A702; 89Pa Super422. **Sheriff distributing proceeds of execution sale prior to return day of writ of execution** assumes risk of proper disposition. 293Pa33, 141A647. **Distribution in accordance with certificate showing order of those entitled.**-285Pa498, 132A702.

1704-77 197Wis227, 221NW741.

1706-89½-New. In case of doubt or dispute, sheriff may pay fund into court to be distributed by court. 285Pa498, 132A702.

1707-96 Statute authorizing, in case of refusal to pay over money officially received, recovery of amount and twenty-five per cent damages, applies only to cases of intentional delinquency. 74 Mont170, 239P771.

1712-49 102NJL425, 132A663.

1712-51 See also 10LaA653, 121S189.

1713-54½-New. In suit against surety on sheriff's bond for sheriff's acceptance of insufficient surety, it is not incumbent upon plaintiff to object to security. 40GaA843, 151SE680.

1713-56 TexCivA 273SW653.

1715-67 219Ala173, 121S547.

1720-20 Statute in reference thereto is highly penal and should be construed liberally in application to facts of case. 181Ark134, 25SW(2d)423.

1721-21 51SD520, 215NW689.

1722-27 49Nev70, 236P559.

1722-33 Where execution recites judgment for greater amount than actual judgment sheriff cannot be amerced for failure to make timely return. 142 Okl 282, 286P780.

1727-84 49Nev70, 236P559, 560 [cit Cyc].

1727-87 49Nev70, 236P559.

1728-91 See also 151Miss447, 118S301.

1729-1 In order to make a return of nulla bona a false return, etc. See also 178Ark741, 11SW(2d)431.

1734-49 22AlaA226, 114S285, 287 [cit Cyc].

1734-50 87Colo 251, 287P85(2dcase) (unlawful act in shooting boy).

1734-54½-New. Sheriff owes duty to transport prisoner with reasonable care for latter's safety, independent of promise in official bond. Wyo 288P524.

1735-63½-New. Officer may retain for reasonable time stolen property, instrumentalities of crime, and evidentiary articles seized before arrest. 100 Vt228, 136A385.

1735-63½-New. Officer's detention of property held unjustified.-100Vt228, 136 A385.

1735-66 NC 155SE160. **Duty to keep prisoner in close and safe custody.**-NC 155SE160. **Permitting prisoner to drive automobile outside of jail yard** held permitting escape. NC 155SE160.

1737-93 TexCivA 274SW277. **Statutes protecting sheriff** are liberally construed. 298Pa463, 148A513.

1739-97 178Minn174, 226NW405.

1740-2 146Wash500, 263P949, 950 [cit Cyc].

1743-18 218MoA611, 265SW991.

1743-24 Mo 15SW(2d)910.

1744-30 Ark 30SW(2d)223; 197Wis78, 221NW394.

1744-31 146Wash500, 263P949; 197 Wis78, 221NW394.

1745-32 216MoA683, 273SW746. **Officer is protected** if want of jurisdiction of magistrate is not known to him. 197 Wis78, 221NW394.

1749-49 48Nev312, 231P1095. **Sheriff, justifying under void judgment,** cannot attack plaintiff's title as fraudulent. 48Nev312, 231P1095.

1753-92 Liability, etc. TexCivA 286 SW276.

1756-10 TexCivA 274SW277.

1757-23 127Me58, 141A99. **Object of bond** is to protect officer and not for benefit of judgment debtor. MoA 278 SW739.

1758-27 104CalA218, 285P732. But see 136Misc49, 239NYS221.

1759-31 10LaA179, 120S96.

1762-74 127Me58, 141A99.

1762-76 127Me58, 141A99.

1762-78 127Me58, 141A99.

1763-81 10LaA179, 120S96.

1766-17 72CalA255, 236P940; 146 Wash500, 263P949.

1780-51 127Me58, 141A99.

1787-28½-New. Effect of remedy against third person.-That plaintiff might have pursued other remedy against third person does not impair his right to maintain action against sheriff for conversion. 73Mont139, 235 P767, 40ALR590.

1788-34½-New. Where creditor giving indemnity bond seized car under mortgage, third opponent being declared owner of car may recover on such bond notwithstanding contention that debtor intended to mortgage to creditor car claimed by third opponent but that there was mistake in description as to motor number. 10LaA179, 120S96.

1788-39 127Me58, 141A99.

1788-41 49Philippine563, 573 [citCyc].

1789-49½-New. Foreign bank may sue sheriff for conversion of check garnisheed while in possession of its correspondent in this country. 81CalA317, 253P757.

1789-55½-New. In Arkansas under Crawford & M. D. § 8312 prosecuting attorney has power to bring action against sheriff for accounting without order of county court. 171Ark607, 286 SW811.

1789-55½-New. Probate court is authorized under statutes to render judgment in summary proceeding against sheriff for failure to make money on execution or to return any execution issued from said court. 218Ala621, 119 S657.

1791-98 208 Iowa509, 225NW947.

1793-29½-New. fails to file the return within required time, 51SD520, 215 NW689.

1794-39½-New. Third party claimant is not estopped from suing in conversion for claimed property by provisions of statute relating to third party claims. 81CalA317, 253P757.

1794-45½-New. Demand is not prerequisite to action for conversion for failure to return process in required time, since sheriff is trespasser ab initio. 51SD520, 215NW689.

1795-52 Action does not lie where demand has been complied with. Ont [1930] 3DomLR953.

1795-57½-New. In action to recover damages for sheriff's return of execution unsatisfied, it is good defense that judgment creditor accepted chattel mortgage securing judgment. 220App Div507, 221NYS776.

1795-57⅓-New. That third party claiming garnisheed property might have intervened in original action is no bar to his action against sheriff for conversion of the property after notice of claim. 81CalA317, 253P757.

1795-57¼-New. A sheriff may justify levy by alleging fraudulent title of plaintiff as against judgment creditor. 200Wis11, 227NW392.

1796-65½-New. Action for assault.-In absence of statute sheriff may be sued officially in another county for assault. 154Tenn279, 290SW22.

1797-75 77Mont572, 252P307 (three years). **In Saskatchewan.**-[1927] 1 DomLR271.

1798-77 130Misc149, 223NYS499.

1802-34½-New. Under statutes plaintiff personally injured in custody of sheriff while riding in automobile operated by deputy may sue in his own name in action against sheriff's administrator and surety on sheriff's bond. 41Wyo 324, 285P797.

1802-35 222MoA503, 281SW78.

1802-41 See also 118Tex212, 13SW(2d) 65.

1803-49 214Ala596, 108S514.

1803-51 Where deputy sheriff acted within scope of his official authority, injured party could sue deputy, sheriff, and sureties on sheriff's bond in same suit. 118Tex212, 13SW(2d)65.

1803-53 Indemnitor notified by constable of permission to defend is entitled, under California statute, to intervene, substitute himself as party, or proceed in name of original party. CalA 290 P484. **Notice by constable to indemnitor permitting him to defend** is in effect transfer of interest. CalA 290P 484.

1807-78 Petition held sufficient in action to recover overpayment of insolvent costs. 40GaA715, 151SE402.

1807-80 Petition held insufficient.-6 LaA119.

1807-84½-New. Petition of ousted sheriff against appointee in his place and his sureties for wrongful suspension held not demurrable. TexCivA 292 SW654.

1808-97½-New. Failure to allege debtor's possession or ownership of real property prevents recovery in action for failure to levy on real property. 27 F(2d)74.

1808-97⅓-New. In suit for failure to seize property under execution, there must be allegation that judgment debtor was possessed of property liable to seizure during life of writ. 27F(2d)74.

1810-14 82Colo 364, 260P109. **Allegations held sufficient.**-82Colo 364, 260P 109.

1810-15 82Colo 364, 260P109.

1811-28½-New. In action by third party claimant of garnisheed property for conversion allegation of service of claim is sufficient which sets forth instrument according to legal tenor or effect thereof. 81CalA317, 253P757.

1814-62 In action for failure to make return to execution, plaintiff need not allege value of property or that value exceeded amount of judgment. 49Nev 70, 236P559.

1817-5½-New. Amendment to answer alleging that seizure of wheels and axles comprised seizure of entire property was properly stricken, since wheels and axles did not constitute entire boiler. 38GaA621, 144SE919.

1818-9 Pleadings held sufficient.-201 Iowa521, 207NW579 (action for conversion of corn grown by subtenant and seized under attachment to enforce landlord's lien).

1818-15 See also 82Colo 364, 260P109.

1821-48½-New. Complaint in intervention filed by constable's indemnitor held mere demand to conduct defense in name of original defendant. CalA 290P484.

1828-94½-New. For failure to execute mesne bail process in trover case in which plaintiff therein obtained final money judgment damage to plaintiff to extent of judgment is presumed. 36 GaA330, 136SE474.

1829-10 5LaA221.

1829-11 22AlaA226, 114S285.

1830-17 36GaA330, 136SE474 (extent of injury on failure to levy mesne process).

1830-21 TexCivA 292SW648.

1831-26 56ND496, 217NW657, 658 [cit Cyc].

1831-29 250 IllA170 [citCyc].

1831-33 285Pa498, 132A702; 291Pa 531, 140A522; 9PaDist&Co 47.

1832-34½-New. Burden is on officer to show that he took valid bond. 126Me 550, 140A182.

1832-35 151Miss447, 118S301.

1832-36 TexCivA 48W(2d)318.

1832-55 155Miss64, 123S873; 81Mont 509, 264P396.
1833-56 TexCivA 283SW920. **Plaintiff claiming injury through abuse of process** may give estimate of loss. 258 Mass264, 154NE579.
1838-73 TexCivA 4SW(2d)318.
1840-86 77Mont572, 252P307.
1841-99½-New. Failure to return execution.-151Miss447, 118S301.
1842-5 126Me550, 140A182.
1843-26 TexCivA 273SW653.
1843-27 10LaA653, 121S189.
1843-28 126Me550, 140A182.
1843-29 Evidence held sufficient to support verdict in favor of plaintiff in action for conversion. SD 231NW601.
1843-33 Cal 292P495; 72CalA255, 236 P940 (evidence sufficient to show that sureties on constable's indemnifying bond were good and sufficient); 85CalA 468, 259P965; 241 IllA189 (diligence in serving writ of replevin); 48Nev312, 231P1095 (levy under void judgment, where plaintiff had property for purposes of sale and application of proceeds to debt); 56ND496, 217NW657; 9PaDist&Co 381.
1843-34½-New. Sheriff's concession that property belonged to plaintiff, that he attached it, took possession of, and sold it, has force of evidence and made prima facie case for plaintiff. 99Vt45, 130A580.
1843-35½-New. Sheriff's return to executions held sufficient rendering sheriff not liable for penalty for failure to return executions. 181Ark134, 25SW(2d) 423.
1844-41 TexCivA 4SW(2d)318.
1845-51 213Ky846, 281SW996; 225 AppDiv420, 233NYS373. **In action for damages for excessive levy,** whether officer abused discretion is question for jury. 258Mass264, 154NE579. **Evidence held sufficient to raise issue of fact for chancellor.**-151Miss447, 118S301.
1847-53 100Vt228, 136A385. **Where allegations of complaint are admitted,** plaintiff is entitled to directed verdict leaving damages to jury subject to any deductions. 82Colo 364, 260P109.
1848-60 145Wash81, 259P13 (jury properly restricted to question of value).
1850-77 Sufficiency of findings.-Cal 292P495.
1853-13½-New. On failure of sheriff to execute mesne bail process in trover in which plaintiff obtained money judgment, sheriff is not relieved by sale of property under execution on such judgment bringing proceeds in excess of judgment into court where proceeds were subject to superior lien leaving plaintiff's lien partly unsatisfied. 36 GaA330, 136SE474.
1853-15 36GaA330, 136SE474; 45 Ida 143, 260P1035; 163La586, 112S495; 125Misc257, 210NYS552 (holding that for failure to return execution within twenty days damages are, prima facie, amount of execution); 225AppDiv420, 233NYS373. **Damages held not excessive.**-22AlaA226, 114S285. **As of what time value determined.**-145Wash81, 259 P13. **In action for failure to execute mesne bail process in trover case in** which plaintiff obtained final money judgment, proper measure of sheriff's liability is eventual condemnation money whether rule or action on case is brought. 36GaA330, 136SE474.
1854-17½-New. Under statutes in some jurisdictions treble damages are allowed for levy on exempt property. 82 Colo 364, 260P109.
1854-17½-New. If plaintiff might have refused to take the property upon being required to pay storage fees he will nevertheless when he pays the fees and takes the property be required to credit value thereof on the treble damages. 82Colo 364, 260P109.
1854-20 See also 38GaA621, 144SE919; TexCivA 283SW920.
1855-22 TexCivA 4SW(2d)318.
1856-23½-New. One assaulted and beaten by deputy sheriff is entitled to more than nominal damages. 22AlaA 226, 114S285.
1857-34 See also 38GaA621, 144SE919.
1859-60 216Ala62, 112S343.
1863-97 54ND422, 209NW796 (officer not liable for failure induced by plaintiff).
1866-17 164La894, 114S725.
1867-30½-New. Evidence held to show plaintiff in rule to require sheriff to proceed with execution sale was assignee of judgment creditor. 164La894, 114S725.
1869-54 On motion for summary judgment affidavit merely stating opinion of plaintiffs' attorney that they had good and meritorious cause of action against sheriff held insufficient. 234Mich371, 208NW449.
1870-68 TexCivA 296SW661.
1871-77 174Ark715, 297SW817.
1877-37 34Ga389, 129SE793.
1878-48 10LaA653, 121S189. **Burden of proof that defendant debtor would have instituted bankruptcy** proceedings immediately upon levy by sheriff has been held to be upon sheriff. TexCivA 8SW(2d)1046. **Burden of proof is on sheriff** to show what proportion of proceeds of sale of property as whole should be applied to prior claim of assignee of conditional vendor. 36GaA 337, 136SE475.
1878-49 In determining whether debtor was insolvent at time sheriff's sale could have been had, which would have resulted in one creditor being paid within four months of instituted bankruptcy proceedings, it is held that property to be considered should include exemptions. TexCivA 8SW(2d)1046.
1879-51 Oral testimony held immaterial where sheriff's answer was untraversed. 34GaA389, 129SE793.
1879-52 TexCivA 296SW661.
1882-3 Amercement proceedings are summary in character. 54ND422, 209 NW796.
1883-4 54ND422, 209NW796.
1885-18 Amercement held not exclusive remedy.-51SD520, 215NW689.
1886-28 MoA 25SW(2d)490.
1895-28½-New. "Party aggrieved" by sheriff's failure to execute and return process is party at whose instance process was issued or one having beneficial interest therein by transfer or assignment from such party either in fact or by operation of law. 155Tenn207, 291 SW447.
1895-28½-New. Person against whom process is directed is not party aggrieved so as to be entitled to sue sheriff for penalty. 155Tenn207, 291SW447.
1896-45 Notices held insufficient.-225 Ky567, 9SW(2d)709.
1897-49 233Ky366, 25SW(2d)1023.
1898-67½-New. Sheriff, desiring to plead any defense, including answer and counterclaim, should do so in formal pleading. 225Ky567, 9SW(2d)709.
1898-67½-New. Sheriff cannot have judgment for counterclaim if response to motions are not in answer and counterclaim form. 225Ky567, 9SW(2d)709.
1899-93½-New. Plaintiff is entitled to reasonable attorney's fee as "extraordinary cost." 233Ky366, 25SW(2d)1023.
1900-3 75CalA353, 242P874.
1900-4 75CalA358, 242P874. **Enumeration of specific duties** limits condition requiring faithful performance of all duties. NC 155SE160.
1900-6 Sureties are liable for damages done by constable's unlawful or careless use of revolver or other pistol which he was authorized by statute to carry without obtaining license. 102 WVa162, 134SE749.
1900-9 Surety on official bond of deputy sheriff held jointly liable for compensatory damages in action for assault. 22AlaA226, 114S285.
1902-22 In Kentucky.-230Ky534, 20 SW(2d)284.
1903-27 213Ala637, 105S899 (in absence of stipulation or estoppel). **Where bond is silent as to date of execution but covers entire term, it extends to entire term,** though approved two days after alleged misfeasance of deputy. 213Ala637, 105S899.
1904-35 75CalA353, 242P874.
1904-36 215Ky36, 284SW426.
1904-39 218Ala468, 118S794. **Action for wrongful death** lies against sheriff and sureties for wrongful killing by deputy, acting under color of office. 243Mich589, 220NW775.
1905-42 75CalA353, 242P874 (calling magistrate to attend court).
1905-43 22AlaA226, 114S285; 245Mich 266, 222NW153; 104WVa226, 139SE 711.
1905-43½-New. Where writ has been partially executed, acts done under it and in connection therewith are done in execution thereof. 104WVa226, 139SE 711.
1905-43½-New. Surety is liable for any "trespass" which includes any act in excess of authority in attempt to discharge official duties. 243Mich589, 220 NW775.
1906-47 213Ala642, 105S877 (that deputy act within scope of authority or under color of office essential element of liability of sheriff and bondsmen); 75 CalA353, 242P874; 87Colo 251, 287P85 (2dcase); 42 Ida224, 244P1102; 243 Mich589, 220NW775; 155Miss64, 123S 873 (de facto deputies); 152Tenn470, 279SW384; 118Tex212, 13SW(2d)65; TexCivA 286SW276. But see 8F(2d) 352; 228Ky403, 15SW(2d)245. **Liability does not run against sureties on deputy's bond to sheriff** but against sheriff and his bondsmen. 152Tenn470, 279SW384.
1906-48 75CalA353, 242P874; 87Colo 251, 287P85(2dcase); 42 Ida224, 244P 1102 (releasing property after return of writ of garnishment); 215Ky36, 284SW 426; 228Ky403, 15SW(2d)245; 152 Tenn470, 279SW384.
1907-57 CalA 286P1103; 245Mich266, 222NW153.
1909-82 Evidence held insufficient to establish defense that plaintiff was negligent in failing to offer proof that process was not served, in suit on sheriff's bond for false return. 32F(2d)159.
1909-82½-New. Where bond refers to definite term of office and guarantees faithful discharge of duties of principal during his continuance therein, liability is extended to entire term. 213Ala637, 105S899.
1909-83 197NC50, 147SE695.
1912-11½-New. Sureties on sheriff's bond are not liable for damages for wrongful death since such suits are penal in their nature. 219Ala332, 122S 329.
1914-28½-New. Release of surety on attachment bond does not exonerate surety on sheriff's bond for latter's acts in converting attached property. 85 Mont1, 277P414.
1915-54½-New. Sheriff, collecting license fees from automobile owners, which are required to be turned over to state treasury under Arkansas statute, and who deposited such funds in officially designated state and county depository without express authority, was, together with his bondsmen, relieved from liability through proclamation of governor under statute, authorizing governor to relieve officers of payment of public funds deposited in officially designated state or county depository which has become insolvent. 178 Ark153, 10SW(2d)513.
1917-77 245Mich266, 222NW153.
1917-79 NC 155SE160.
1921-12 But see TexCivA 275SW152.
1922-21 By statute sheriff liable for failure to return attached property of exempt owners notwithstanding subsequent nunc pro tunc order of sale. 216 Ala120, 112S447.
1924-44 Where municipal court bailiff releases property levied upon to receiver in bankruptcy without order of court after sale has been enjoined, his bond is liable. 253 IllA315.
1926-59 Where there was no theory on which to support judgment against sheriff for amount paid by plaintiff in replevin brought by mortgagee of cattle levied on by sheriff and sold to plaintiff, there could be no recovery against sheriff's surety. 197Wis227, 221NW 741.
1928-78 197NC50, 147SE695; 9PaDist &Co 337.
1930-81 Sheriff taking certificate of deposit payable at definite time in future for fund received in condemnation proceedings is guilty of instant conver-

sion. 205 Iowa999, 218NW932.
1934-10 197Wis227, 221NW741. **Delivery of funds by out going sheriff to his successor** absolves sheriff and his bondsmen from all liability as to funds held by sheriff in unadjudicated condemnation proceedings. 205 Iowa999, 218NW932.
1935-18½-New. Fact that plaintiff wrote on back of check for purchase price that cattle was from owner and mortgagee prior to time that check was cashed by sheriff did not affect sheriff's liability to plaintiff. 197Wis227, 221 NW741.
1935-19½-New. No action may lie to recover from sheriff and his sureties allowances made by orders of fiscal court. 210Ky51, 275SW1.
1935-19¼-New. But sheriff and sureties may be charged with aggregate amount thereof under some circumstances. 210Ky51, 275SW1.
1935-19¾-New. Where such allowances are not only amounts involved in suit against sheriff to recover commissions and other fees in excess of salary, such allowances should be charged to him in satisfaction of such amount when ascertained as is necessary to compensate requisite number of deputies plus amount to which sheriff is entitled as yearly compensation. 210Ky 51, 275SW1.
1936-31 But see 151Miss726, 118S629.
1941-75½-New. Illegal search.-Surety on official bond of sheriff is liable for damages as result of illegal search by sheriff and deputies pursuant to invalid search warrant. 40Wyo 30, 273P691, 62ALR849.
1941-78 Continuance of restraint.-220 Ala50, 124S104.
1941-80 215Ky36, 284SW426; 152 Tenn470, 279SW384.
1942-84 22AlaA226, 114S285. **Making arrest.**-22AlaA226, 114S285. **Service of civil process.**-104WVa226, 139SE711.
1942-90½-New. Sheriff and surety held not liable to motorist on bond for negligence of prisoner after escape. NC 155SE160.
1946-24 151Miss726, 118S629.
1946-27 151Miss726, 118S629.
1956-57 151Miss726, 118S629.
1957-78 151Miss726, 118S629.
1960-11 Official bond of deputy sheriff constitutes contract between officer and his surety, on one hand, and state and all persons who may be injured by violation of bond on other, under statute. 218Ala468, 118S794.
1962-20½-New. Surety on sheriff's bond, sued by county, might sue other sureties thereon by cross-petition, though county did not sue them. 227 Ky583, 13SW(2d)766.
1962-27 But see 219Ala155, 121S510.
1964-44 157Miss740, 128S503 (in action to which sheriff party).
1966-57½-New. In suit against surety on sheriff's bond for sheriff's acceptance of insufficient surety on replevin bond plaintiff is not to make demand on sureties before filing suit. 40GaA843, 151SE680.
1967-72½-New. Claim against state bonding fund must be presented to insurance commissioner within sixty days after default. 53ND18, 204NW848.
1967-74 In suit by sheriff against his appointee and sureties on bond for wrongful suspension, amended petition for removal held no defense, where suspension was on original petition. Tex CivA 292SW654.
1967-76½-New. It is good defense that plaintiff contributed to sheriff's omission to make return of execution. 178Ark741, 11SW(2d)481.
1968-90 244 IllA30. **In Michigan.**-234 Mich391, 208NW613.
1973-25½-New. Sheriff's action against surety, for undersheriff's defalcation which sheriff made good, is properly brought in sheriff's individual and not official capacity. CalA 286P1103.
1973-26 Wyo 288P524.
1973-27 40Wyo 30, 273P691, 62ALR 849.
1973-36½-New. That claimant of property seized under execution made affidavit of joint ownership does not preclude suit by him alone for damages on bond. 222MoA503, 281SW78.
1974-37 132SC78, 129SE131 (sheriff a proper party and refusal to permit him to intervene is abuse of discretion).
1976-68 Allegations held not repugnant.-104WVa226, 139SE711.
1977-79 218Ala468, 118S794; 22AlaA 226, 114S285; 75CalA353, 242P874. **Complaint held sufficient.**-36GaA817, 138SE267. **Legal conclusions.**-75CalA 353, 242P874.
1978-83 230Ky88, 18SW(2d)886.
1978-84½-New. Where there is no allegation of actual damage by alleged improper execution of writ of possession, neither actual nor exemplary damages can be recovered on account of manner in which he executed writ. TexCivA 275SW152.
1979-95½-New. Acts done by sheriff in further execution of particularly executed distress warrant are properly charged as done while executing writ. 104WVa226, 139SE711.
1983-35 See also 40GaA843, 151SE680.
1983-36½-New. It is not necessary for plaintiff to allege place of residence either of principal or surety upon replevin bond or that they do not have property outside of state. 40GaA843, 151SE 680.
1984-48 Petition alleging false arrest by deputy constable states no cause of action against constable and surety on his bond. 234Ky751, 29SW(2d)17.
1984-48½-New. Complaint in action for wrongful arrest by deputy held sufficient. 220Ala50, 124S104.
1987-77 Special plea of self-defense and defense of another in action on sheriff's bond for killing plaintiff's intestate by deputy held fatally defective for failure to show that intestate was responsible for alleged danger, or that it was necessary in repelling such danger to kill intestate. 213Ala642, 105S877.
1987-78 Contra 9PaDist&Co 337.
1990-99 TexCivA 283SW920.
1993-45 218Ala468, 118S794; 22AlaA 226, 114S285.
1994-56 23AlaA67, 120S577(2dcase); 219Ala332, 122S342; 87Colo 251, 287P85 (2dcase).
1996-57 258Mass264, 154NE579.
1996-61 22AlaA226, 114S285.
1996-62 218Ala468, 118S794.
1997-66½-New. Sheriff could justify arrest, though plaintiff was in fact not drunk. 208Ky587, 271SW674.
1998-79 242Mich530, 219NW605; 75 Mont557, 244P506.
1998-82 Evidence sufficient to warrant recovery, etc. 75Mont557, 244P506. **Evidence not sufficient to warrant recovery.**-178Ark781, 11SW(2d)481; Tex CommnA 128SW(2d)118; TexCivA 16SW (2d)908; 197Wis227, 221NW741.
2000-95 213Ala642, 105S877 (whether deputy sheriff killed intestate in exercise of official authority held for jury); 218Ala468, 118S794; 23AlaA67, 120S 577(2dcase); 220Ala50, 124S104; 87Colo 251, 287P85(2dcase) (whether deputy was acting in official capacity is question for jury); TexCivA 292SW654. **Case properly held for jury.**-231Ky346, 21SW(2d)452.
2000-97 22F(2d)603; 218Ala468, 118S 794; 23AlaA67, 120S577(2dcase); Tex CivA 286SW276 (holding that instruction that writ was lawfully issued is not required).
2000-98 Instructions erroneous.-208Ky 587, 271SW674. **Instructions held correct.**-231Ky346, 21SW(2d)452.
2003-32 22AlaA226, 114S285; 40GaA 843, 151SE680 (including reasonable expenses of suit); TexCivA 292SW654 (wrongfully suspended sheriff, unable to find employment, may recover salary he might have earned).
2004-38½-New. Necessary and reasonable attorney's fee may be recovered without showing bad faith in action for damage by breach of sheriff's bond. 40 GaA843, 151SE680.
2004-41½-New. Abusive language cannot be considered in mitigation of damages for unlawful imprisonment. 23 AlaA67, 120S577(2dcase).
2006-55½-New. Order which was simply contract between fiscal court and sureties relating to settlement, was not judgment from which appeal could be taken within statute. 227Ky583, 13SW (2d)766.
2007-71 See also 87PaSuper66.
2007-81 172Ark279, 288SW382.

SHIFTING USE

2015-6 214Ky320, 283SW103.

SHIPMENT

2016-21 236 IllA426.
2016-22 236 IllA426.
2016-23 236 IllA426.
2016-25½-New. "Shipment" under c. i. f. contract means delivery to carrier for transportation on regular line of transportation between point of shipment and destination. 30F(2d)647.

SHIPPING

36 Cyc—13-4 Flag under which merchant ship sails is prima facie proof of her nationality. 19F(2d)417. **Vessel not properly registered** has nationality of owner. 19F(2d)417.
13-4½-New. Vessel, belonging to United States carrying cargo loaded by United States Grain Corporation to which it is consigned care of American Embassy, London and actually engaged in European Food Relief Service, is engaged in public business and not merchant vessel as affecting liability to suit for damage to cargo. 8F(2d)270.
13-4⅓-New. Pleading in libel suit for recovery of freight shipped through agent of government showed boat was one requisitioned by United States. 12 F(2d)961.
13-4¼-New. United States in taking over and operating ships in sovereign capacity as war measure does not waive sovereign rights or privileges. 12F(2d) 961.
13-4⅕-New. Cargo owners have been held not precluded from taking action to determine rights to security of vessel for payment of loss where owner of ship executed general average bond, though Federal Control Act would have prevented arrest of vessel. 37F(2d)49.
13-4⅙-New. Owner from which steamship was requisitioned by director general of railroads had at least a reversionary interest therein. 37F(2d)49.
13-4⅐-New. Steamship company's reversionary interest in vessel has been held sufficient to negative claim that general average bond executed by it as principal must be construed as having been executed as agent for Director General. 37F(2d)49.
14-9 Purpose of register.-18F(2d)305.
16-23 Forfeiture may be had for engaging in foreign trade without license. 274US501, 47SCt735, 71L ed1171.
16-24 16F(2d)264.
19-50 14F(2d)364.
19-51 Act May 28, 1908, provides for inspection of seagoing barge. 14F(2d) 364.
22-67 30F(2d)286.
22-68 18F(2d)673.
22-69 18F(2d)673 (without obtaining approval of United States Shipping Board).
22-70 274US501, 47SCt735, 71L ed1171; 13F(2d)433; 13F(2d)839; 16F(2d)607 (coaster trading in liquor); 17F(2d)304; 30F(2d)394(1stcase); 39F(2d)62; 43F (2d)491. **Coasting vessel engaged in illegal traffic.**-But see 5F(2d)1007; 13F (2d)839; 23F(2d)103. **Meaning of "trade."**-23F(2d)103. **The libel containing no description of foreign vessel has** been held sufficient. 38F(2d)822. **Coastwise vessel liable to forfeiture for engaging in liquor smuggling.**-17F(2d)304. **Decree of forfeitures held not invalid because of order for delivery at certain** point. 16F(2d)264. **Lack of knowledge by owner held no defense to forfeiture for violation.**-17F(2d)304. **Law authorizing forfeiture of vessel engaging in unlicensed trade** was not repealed by National Prohibition Act. 16F(2d)844. **Owner cannot plead lack of knowledge** as ground for resisting forfeiture for use in unlicensed trade. 16F(2d)844. **Procedure.**-16F(2d)607. **Seizure, if adopted, held sufficient** regardless of legality

thereof. 16F(2d)264. **Trading under pleasure yacht license.**–16F(2d)264. **Vessel licensed in coastwise trade,** taking contraband cargo from foreign ships at sea, is subject to forfeiture. 4F(2d) 815. **Where vessel employed in trade other than that for which licensed,** it is immaterial whether intoxicating liquors were carried. 16F(2d)844. **One claiming exemption from forfeiture of merchandise on board vessel** must plead facts showing ground for exemption. 38F(2d)822. **Necessity for violation of law as defense,** if such, to forfeiture of vessel and cargo, must be urgent and clear. 39F(2d)62. **Cargo is not liable to forfeiture, etc.**–39F(2d)62. **Evidence,**– 36F(2d)250; 39F(2d)62; 41F(2d)842. **Innocence of owner of vessel no defense to forfeiture in rem.**–43F(2d)491. **Rights of innocent lienor.**–44F(2d)170 (2dcase).

23–71 274US501, 47SCt735, 71L ed 1171; 13F(2d)433. **What constitutes "foreign voyage."**–5F(2d)1007 (tug towing lighter to vessel from which lighter was laden with liquor held not to have "proceeded on a foreign voyage," it not appearing whether vessel was foreign or domestic); 7F(2d)545 (towing lighter to ship at sea is not foreign voyage). **Liquor seized on board schooner on high seas** has been held not imported within statute authorizing seizure and forfeiture. 38F(2d)822.

23–72 16F(2d)264.

23–74 Allegation that tug transported liquor loaded on lighter held sufficient. 7F(2d)545. **In forfeiture proceedings** general allegations of violation of United States customs law is sufficient. 7F(2d) 545. **Knowledge of owner** that tug was being used to defraud revenue of United States held immaterial as to liability to forfeiture. 7F(2d)545.

23–74½–New. For violation of National Prohibition Amendment vessel licensed for coastwise shipping may be seized. 12F(2d)970.

23–74⅓–New. Failure of vessel at foreign port to obtain bill of health held not ground for forfeiture where vessel did not clear for port of United States, whether or not clearance was mere pretense. 13F(2d)548.

23–74¼–New. Failure to change registry on change of name is ground for forfeiture. 18F(2d)673.

23–74⅕–New. Where, after number was allotted to gas motor boat of less than five net tons, vessel was altered to increase her tonnage to over eleven and one-half net tons, vessel was subject to forfeiture. 30F(2d)286.

23–74⅙–New. Under Canadian Customs Act foreign vessel is not liable to seizure and forfeiture for entry in violation of act where entry was due to "unavoidable cause." BC [1929] 4DomLR679.

24–80 43F(2d)491.

24–81 Court has no jurisdiction to restore vessel lawfully forfeited. 42F (2d)558.

25–89 Evidence held insufficient, as matter of law, to present jury question or warrant conviction. 36F(2d)562.

25–96½–New. Water carriers are subject to and are required to file schedules of maximum rates with United States shipping board. 37F(2d)681.

25–96⅓–New. Water transportation unconnected with transportation by rail is not subject to provisions of Interstate Commerce Act. 37F(2d)681 (water carriers held not taking part with rail carriers under "common arrangement").

26–1 214Ala176, 106S862 (contract whereby cost of building boats was to be advanced by purchaser and stockholder of building company, boats to be used by builder in transporting logs to purchaser, construed as passing title).

27–7½–New. Vessel is not merchandise within meaning of code of commerce. 44Philippine87.

27–10 Evidence held sufficient to show ownership.–51Philippine476. **Evidence held insufficient to show ownership.**–18 F(2d)305.

27–13½–New. Burden of legal or equitable interest in vessel rests on libelant for loss of vessel. 18F(2d)305.

28–15 18F(2d)305.

28–16 18F(2d)305.

28–19 18F(2d)305. But see 51Philippine476.

29–31 204Cal231, 267P1081, 1084 [cit Cyc]; CalA 259P502, 504 [citCyc].

33–56 Petition failing to show disagreement as to operation and interference or "give and take" offer held not to state cause for sale. 17F(2d)266.

33–58 17F(2d)266.

35–71 Authority in home port.–204Cal 231, 267P1081.

36–80 Evidence held insufficient to prove that damage to cargo of barge was because tug was inadequate for tow. 30F(2d)860.

37–83 Action for share of cost of unauthorized alterations.–CalA 259P502. **In absence of authority** part owner is not entitled to personal judgment against coöwner for cost of repairs. 204Cal 231, 267P1081. **Silence coupled with knowledge** of repairs does not warrant personal judgment against coöwner for share of expense in excess of profits. 204Cal 231, 267P1081.

37–83½–New. Proceeding in rem against vessel is sole remedy of coöwner voluntarily advancing money for salvage and repair of vessel. 204Cal 231, 267P1081.

39–2 In the home port, etc. CalA 259 P502.

40–4½–New. Liabilities. Managing agent is not liable to indemnify owner against careless navigation of ship by compulsory pilot, unless he assumed such liability by agreement. 29F(2d) 950(2dcase).

40–8 Necessity of consent of shipping board.–24F(2d)710. **Ship is treated as personal property** by common-law courts. 261Mass1, 157NE725.

40–11 PrEdwIsl [1930] 1DomLR838 (effect of sale of share in British ship to foreigner).

40–12 Conditional sales.–241NY259, 149 NE851. **State law relative to resales by conditional vendors** held not invalid even if vessel might be temporarily taken out of service. 274US614, 47SCt718, 71L ed 1234. **State law as to resales by conditional vendor** held to govern and not to conflict with federal registration laws. 274US614, 47SCt718, 71L ed1234.

41–15 Evidence held insufficient.–42F (2d)290.

41–15½–New. Transfer by corporation of barges held by it under conditional sale from government in exchange for stock of subsidiaries will be carefully scrutinized on libel by subsidiary against United States for loss of barge. 18F(2d)305.

41–18 8F(2d)287 (mere sale and delivery insufficient). **Operation and initial payment under modified contract** held to constitute valid sale thereunder, superseding original agreement, though not signed by charterer. 13F(2d)808.

42–24 18F(2d)305.

42–27 18F(2d)305.

42–27½–New. Recovery cannot be had against seller on ground of misrepresentation as to deadweight capacity, when buyer's agent had equal opportunity for investigation. DC 26F(2d) 1004.

42–28 41F(2d)377 (holding fact that contract was drawn by layman will not justify strained meaning).

43–38 Delivery of bill of sale does not vest title where much work has to be done by way of repairs before delivery. 137Misc879, 244NYS36.

44–45 Presumption that giving of note to secure purchase price of ship constitutes final payment within bond indemnifying against liens is rebutted by terms of bond. 38F(2d)674.

44–46½–New. Under conditional sales contract vendor's failure to sell vessel, as required by statute, on retaking after default, renders owner liable to buyer for amounts paid on contract. 241NY 259, 149NE851 (in spite of possible conflict between state law as to recording and federal law as to registration of vessel).

44–46⅓–New. In such case seller is entitled to payments made for repairs and insurance which should have been paid by buyer under contract. 241NY259, 149 NE851.

44–46¼–New. Acceptance of steamer by buyer does not discharge seller from liability for breach of warranty in contract. 29F(2d)744(1stcase).

44–46⅕–New. Under statute seller cannot recover escrow deposit under guise of penalty, liquidated damages, or forfeiture. 32F(2d)31.

44–46⅙–New. Default in making first payment is waived by seller's subsequent credit without objection. 98CalA 787, 277P1099.

44–47 32F(2d)31.

44–49½–New. Foreclosure of lien.–Ordinarily unpaid vendor can foreclose his lien only by suit or sale on notice. 18 F(2d)948.

44–49⅓–New. Equity has jurisdiction to enforce lien on purchase money deposited in escrow. 32F(2d)31.

44–49¼–New. Lien on purchase money in escrow is not affected by failure to resell at considerable loss. 32F(2d)31.

44–49⅕–New. Under contract providing for resale on purchaser's default and charge of deficiency to purchaser, seller has lien against purchase money deposited in escrow. 32F(2d)31.

44–50 Rescission of sale for hidden defects.–44Philippine87.

44–51 But see 16F(2d)613. **Syrup used for making beverages** does not pass to purchaser of pleasure ship as appurtenance. 36 OhA94, 172NE687.

45–55 Under conditional sale of barges seller's right to apply proceeds of insurance payable to him to payment of repairmen's claims against barges is superior to right of purchaser to apply them to payment of purchaser's debts to repairmen. 8F(2d)63.

45–57½–New. Buyer cannot rescind because of boat's failure to conform to warranty for which vendor is not responsible. 137Misc879, 244NYS36.

45–59½–New. Thirty-day limitation of code of commerce, within which claim must be made for defects in articles sold, does not apply to sale of vessel. 44Philippine87.

45–59⅓–New. Right of purchaser under conditional sale to bind vessel for services. 17F(2d)874.

45–59¼–New. Contract by shipbuilding company in default under construction contract to buy ship from government, government retaining title to ships as security, is executed sale and government becomes mere secured creditor. 22 F(2d)38.

45–59⅕–New. and government's contract to sell ships is not abrogated by subsequent modification recognizing buyer's obligations. 22F(2d)38.

45–59⅙–New. Government's contract of sale of vessels is not abandoned or rescinded by its seizure of vessels on buyer's default. 22F(2d)38.

45–59⅐–New. Seller's failure to deliver legal title to ships because of buyer's failure to perform conditions does not relieve buyer of its obligation under contract of sale. 22F(2d)38.

45–59⅛–New. Waiver of dry dock inspection provided for in contract for sale, for which allowance was made to purchaser, inured to purchaser's benefit to extent of allowance, but did not relieve seller from warranty. 29F(2d)744 (1stcase).

45–59⅑–New. Evidence establishes seller's false representation to induce sale. 32F(2d)151.

45–59⅒–New. Resale by seller without notice to buyer who paid part of purchase money is rescission. 98CalA787, 277P1099.

45–59⅑–New. Evidence was held sufficient to support judgment for recovery of purchase money on seller's wrongful breach. 98CalA787, 277P1099.

45–59⅓–New. Buyer entitled to damages for failure of tug to contain towing engine. 42F(2d)553.

45–59⅓–New. Purchaser waiving dry dock inspection under modified contract in consideration of reduction in price does not rely on implied warranty of fitness and cannot recover for breach thereof. 43F(2d)683.

45–62 261Mass1, 157NE725. **Purchaser held not without notice** where his attorney had knowledge through recital in

satisfaction of mortgage. 13F(2d)552.
46-67½-New. Mortgage on vessel is mortgage on chattel. 241NY259, 149NE851.
46-67⅓-New. Mortgage of vessel is not maritime lien. 24F(2d)604.
46-73½-New. Rulings of supreme court of United States are confined to vessels enrolled and registered as vessels of United States. 241NY259, 149NE851.
46-73⅓-New. If not so enrolled local statute is to be followed. 241NY259, 149NE851.
47-76½-New. **Indorsement on ship's papers.**-Under Ship Mortgage Act mortgage is valid as soon as executed and recorded, though not immediately indorsed on ship's papers. 17F(2d)423.
48-87 21F(2d)875.
48-88 21F(2d)875. **Tort claim** arising from breach of carrier's duty to sail is prior to lien of mortgage. 17F(2d)423.
48-89 24F(2d)441 (services as mate).
48-91 But see 26F(2d)964. **Statute indicating intention to protect United States mortgage lien.**-26F(2d)964.
48-93 **Mortgage not invalidated as preferred** because of collector's failure to indorse on ship's papers. 7F(2d)505.
49-99½-New. Statute, giving preferred mortgage priority over other claims where ship is sold in admiralty suit, is not limited to suit brought expressly to enforce mortgage but includes any suit wherein mortgage is foreclosed. 17F(2d)423.
49-3 See also 16F(2d)613. But see 37F(2d)22.
54-31 **Purchase-money mortgage** held valid as soon as executed and recorded, though not immediately indorsed on ship's papers. 271US552, 46SCt589, 70Led1082. **Vessels to which statutory provisions apply.**-261Mass1, 157NE725.
56-35 **Floating dry-dock is not vessel of United States** within Federal Recording Act, because neither enrolled nor licensed, and state may therefore require mortgage on dock to be recorded. 28F(2d)513.
56-43 **Charter agreement** placing burden on owner of showing negligence where boat is damaged is binding. 136Misc374, 240NYS88.
57-49 **Inclusion of cancellation clause in charter party by agent** does not entitle shipowner to repudiate charter party where clause was usual one within scope of agent's apparent authority. NS [1928] 2DomLR229.
59-73 **Subcharterer** has no greater rights than charterer. 15F(2d)570.
60-75 **No contractual** liability, exists between shipowner and subcharterer. 15F(2d)570.
60-80 36F(2d)869 (by bill of lading); 42F(2d)229.
61-84 20F(2d)698; 32F(2d)343. But see 23F(2d)579. **Facts held insufficient, etc.**-20F(2d)698.
62-91 29F(2d)973; 43F(2d)858; Can [1930] 4DomLR527. **Practical construction by parties.**-8F(2d)586. **Provision authorizing charterer** to cancel charter if cargo license not procured is not applicable to cancellation because of delay in tendering vessel. 13F(2d)282. **Provision as to fire apparatus, not replied to by charterer,** held assent thereto. 16F(2d)199. **Where contract provided for use by bailee in business of owner only,** unless otherwise consented to, bailee is liable during unauthorized use. 214Ala176, 106S862. **The term about, etc.**-25F(2d)868. **Maintenance of wooden sheathing as protection** was not included within undertaking of owner. 158Md525, 149A275. **Time for return of dredge** under charter for not less than five months was time when hirer concluded its use. 158Md525, 149A275. **Particular charters construed.**-20F(2d)924. **Particular provisions construed.**-42F(2d)758.
62-92 31F(2d)948(2dcase); 43F(2d)858. **Addenda controls** if there is conflict. 20F(2d)924. **Typewritten clause** prevails over printed clause. 26F(2d)343.
63-93 32F(2d)359. **Particular phrases construed.**-8F(2d)586; 158Md525, 149A275. **Provision that questions arising under charter party shall be referred to arbitration in London in customary manner** does not oust court of jurisdiction of libel to recover freight paid. 18F(2d)983. **Stipulations for foreign arbitration of disputes** are unenforceable under Arbitration Act and afford no defense to libel in federal courts. 35F(2d)41.
63-93½-New. Under United States Arbitration Act making arbitration agreements enforceable, foreign arbitration is not condition precedent to admiralty court's jurisdiction, 22F(2d)326.
63-93⅓-New. but jurisdiction will be assumed and proceedings merely stayed till foreign arbitration is perfected, whereupon court will enter decree upon the award. 22F(2d)326.
64-99 See 28F(2d)356. **Covenant to insure** is not implied under a bare-boat charter. 27F(2d)622.
64-1 **Private terms** held not to take precedence over typewritten words at end of charter agreement. 13F(2d)498.
65-7½-New. Covenant to insure is not implied and is only imposed when found in agreement. 32F(2d)684.
65-7⅓-New. Statement by seller to captain of vessel to effect charter party, without knowledge of purchaser does not bind purchaser. 43F(2d)334.
65-8 21F(2d)865; 25F(2d)361.
65-9 25F(2d)361.
65-11 31F(2d)610.
66-15½-New. Charter becomes limited to port designated by charterer, where contract of affreightment specified different loading ports at charterer's option. 22F(2d)187.
66-17 Can [1930] 4DomLR527.
66-18 **Held American contract.**-27F(2d)795.
66-20 8F(2d)552; 14F(2d)488; 15F(2d)198; 16F(2d)506; 16F(2d)1003; 21F(2d)236, 238 [citCyc]; 34F(2d)981; 43F(2d)858. **Charter party held mere voyage contract,** not demise making charterer liable for injury caused by defective winch. 215AppDiv595, 214NYS221. **Agreement to deliver liquor transshipped at point on high seas** is not charter of whole vessel or demise of ship so as to make charterer owner pro hac vice. 24F(2d)27. **Rule that barges let with bargees are demised** is confined to those which have no motive power of their own. 33F(2d)94. **Charter of barge without motive power** and with captain furnished constitutes demise, making charterer owner pro hac vice. 39F(2d)637.
67-22 42F(2d)758.
67-23 **Charters of barges without motive power** are demises. 40F(2d)417.
67-27 Can [1925] 2DomLR853. See also 32F(2d)154. **Time charterer held not to have property right** so as to be able to recover for delay caused by repairer's negligence. 275US303, 48SCt134, 72Led290.
68-29 34F(2d)981.
68-32 7F(2d)131 (time charter construed not to make charterer the owner); 33F(2d)94 (boats held delivered on charter and not on demise); 42F(2d)229.
68-34 7F(2d)131 (charterer, who is not owner, lacked authority to bind ship).
68-35 **When vessel is chartered under demise charter** charterer may become bailee. 36F(2d)417.
69-42 16F(2d)1003.
69-43 **For injury caused by defect in ship's appliances,** charterer is liable where charter party is demise of ship. 215AppDiv595, 214NYS221. **Libelant owner of damaged barges,** also owner pro hac vice of injuring ship, cannot recover. 16F(2d)506.
69-47 215AppDiv595, 214NYS221.
69-49 **Owner's rights and authority continue** till displaced by clear and determinate transfer thereof. 215AppDiv595, 214NYS221. **Where doubtful from charter party** as to which is responsible for condition and appliances of ship, owner is deemed in control and is liable for resulting injuries. 215AppDiv595, 241NYS221.
70-50½-New. Owners retaining possession and operating ship are prima facie liable for negligent operation. 19F(2d)392.
70-50½-New. **Provision in charter party** held not to impose on charterers liability for owner's negligent operation. 19F(2d)392.
70-60 6F(2d)141; 8F(2d)500; 14F(2d)532; 20F(2d)320; 21F(2d)865; 23F(2d)487; 24F(2d)410; 29F(2d)797; 37F(2d)516 (implied warranty of seaworthiness). **The Harter Act** does not relieve owner from liability for unseaworthiness under his warranty. 8F(2d)500. **Nature of warranty.**-21F(2d)865, 866. **Rule applies to lighter,** even if contract was one of rental to act as part of wharf for unloading cargo, and not one of carriage. 25F(2d)126. **Competency of officers and crew.**-34F(2d)981. **Charterer must exercise care and skill** to properly construct containers where installing cribbing to enlarge capacity of ship for carrying goods. 36F(2d)227 (1stcase). **Charterer has been held entitled to benefits of implied warranty of seaworthiness** though he agreed to assume full responsibility for boat and return it in good working order and repair. 37F(2d)516. **Charterer has been held not estopped** to assert right to return vessel because of its unseaworthiness after period allowed by charter party in absence of evidence that owner was prejudiced. 37F(2d)516.
71-61 **Speed.**-34F(2d)572. **Charter party not requiring cleaning bottom during charter period.**-43F(2d)560.
72-65 29F(2d)797; 32F(2d)154; 245NY232, 157NE93.
73-68 8F(2d)500.
73-73 37F(2d)516. **Implied warranty of seaworthiness has been held not affected** by provision of charter party for return of vessel after thirty days if it failed to meet charterer's needs. 37F(2d)516.
73-75½-New. **Fumigation** not included in owner's obligation to keep vessel fit. 20F(2d)345.
73-75⅓-New. Expense of fumigation of vessel required at quarantine is on vessel. 31F(2d)530.
75-75¼-New. **Charterers constructing defective cribbing as joint undertaking with owner of vessel** should bear half of loss of deck cargo resulting therefrom. 34F(2d)442.
73-76 NB [1925] 3DomLR1036.
73-77 32F(2d)154; 36F(2d)869; NB [1925] 3DomLR1036.
73-78 NB [1925] 3DomLR1036.
74-80 **Circumstances held not to show unseaworthiness.**-24F(2d)993; 245NY232, 157NE93. **Burden on libelant to prove unseaworthiness.**-21F(2d)865.
74-82 24F(2d)993 (presumption may be rebutted).
74-84½-New. Fee held due to defect rendering ship unseaworthy. 20F(2d)143.
74-84⅓-New. Fee held due to owner's neglect. 20F(2d)143.
75-91 But see 38F(2d)874.
75-92½-New. Entry at auction house not a prerequisite to tender. 13F(2d)281; 13F(2d)282.
75-98 13F(2d)498.
76-99 13F(2d)498. **Demurrage clause** held not to affect guaranty in charter as to sailing date. 13F(2d)498.
77-7½-New. **Delay caused by performance of contract to tow made after making of charter party** does not relieve charterer from liability for delay. 171Minn507, 214NW510.
77-10½-New. Subcharterer, by deducting dispatch money concededly due it on lading and discharging in making payment for charter hire, did not thereby become liable for all added expenses of vessel in discharging cargo at higher than normal speed, due to fear of impending strike. 30F(2d)275.
80-25 6F(2d)779.
80-26 6F(2d)900.
80-27½-New. Delay on account of congested condition of port is chargeable to charterer. 32F(2d)343.
80-30 20F(2d)320.
82-45½-New. Specific provisions govern general provisions. 15F(2d)570.
82-45½-New. Owner not estopped from prohibiting voyage forbidden by charter because of acceptance of payments

on charter line from subcharterer. 15F (2d)570.

82-45¼-New. Under charter party for "about" stated term, charterer may require vessel to make another reasonable voyage in case prior voyage terminated before end of term. 31F(2d)530.

82-45½-New. If remaining time is too short for another reasonable voyage, ship may be surrendered or withdrawn. 31F(2d)530.

83-50 42F(2d)758.

83-52½-New. No requirement that ship bear cost of placing cargo in storage. 20F(2d)212.

83-53 20F(2d)583; 22F(2d)317.

84-57½-New. Damages recoverable by ship because of its added expenses in discharging cargo caused by subcharterer's failure to receive cargo as fast as it was discharged were limited to cost of piling so much of cargo as subcharterer should have taken at normal speed. 30F(2d)275.

85-64½-New. Owner is not liable for stevedoring under contract requiring charterer to load and store cargo at specified rates. 26F(2d)343.

86-74½-New. Expenses cast on ship in caring for cargo left on its hands because of subcharterer's failure to receive cargo as fast as required by charter party provision may be recovered. 30F (2d)275.

86-74½-New. Under charter requiring cargo to be brought alongside and taken therefrom at merchant's expense, shipowners are entitled to recover from charterers expenses incurred as result of failure of consignee to take delivery alongside. 28F(2d)447.

86-75 **Full freight recoverable** where not lost through negligence of barge or owner. 42F(2d)758.

88-91½-New. Charterer not entitled to payment of dispatch moneys for Sundays and holidays where such days were excepted from computation as lay days. 35F(2d)395.

89-97½-New. Under charter party making consignee liable for "port charges," consignee is liable for necessary towage to reach unloading dock. 22F(2d)192.

90-6 31F(2d)530.

90-9 34F(2d)980 (time consumed in fumigating).

92-27 **Deviations of vessel for lack of coal** due to poor quality of coal is not detention by average accident to ship. 36F(2d)104. **Average accident** entitling charterer to off hire allowance is not caused by rough weather slowing up vessel and causing deviation. 40F(2d)410.

95-45 18F(2d)977, 979 [citCyc].

98-75 20F(2d)320. **Voluntary payment by owner of charterer's money**, in satisfaction of claim for commission of broker for procuring outstanding charter, **held not** "recovery" by third party on commitments within meaning of requisition charter, and charterer was not foreclosed from recovery of unauthorized payment. 15F(2d)383.

98-77 6F(2d)779 (charterer compelled through duress to pay obligation of owner may recover amount).

99-80 **Where cargo is sold with consent of charterers, cargo owners, and cargo insurers at port to which vessel resorted for repairs,** owner is not liable for breach of contract to carry cargo to destination. 34F(2d)791.

99-83½-New. Where master informs charterer contract was void, charterer may take action to prevent removal of res beyond jurisdiction, and tender of cargo for shipment is not inconsistent therewith. 23F(2d)579.

101-96½-New. Damage arising out of special contract cannot be recovered unless defendant had notice of contract. 32 F(2d)343.

102-6 20F(2d)345. See also 214Ala176, 106S862. **Nonperformance of contract is not excused by railroad strike** preventing shipper from supplying cargo in absence of provision therefor in contract. 8F(2d)315. **What constitutes "deviation."**-20F(2d)320.

102-7 **Under express terms of contract** failure to deliver cargo for six running days held to render charter void. 25F (2d)590. **Tender of cargo, after expiration of time rendering charter void by its** express provisions, held not to revive charter. 25F(2d)590.

103-13 **Damages for delay in redelivery** of vessel by charterer must be minimized by owner hiring similar ship to carry out new charter. 15F(2d)99. **Charterers** justified in disposing of cargo to diminish damages. 20F(2d)320. **Where charterer redelivers vessel against protest of owner before expiration of charter and recharters it at lower rate,** owner is entitled to original charter hire for such voyage. 25F(2d)868.

103-14 **Damages for premature redelivery of vessel** is difference between hire expressed in original charter party and amount paid under later charter over period within which vessel should not have been redelivered. 34F(2d)980.

103-15 13F(2d)282; 32F(2d)343.

104-18½-New. Measure of damages for dead freight is gross freight on cargo not shipped, less any expenses saved by steamer because of not carrying it. 30F (2d)770.

104-18½-New. Where charter called for cargo of "about 400,000" feet of logs and charterers furnished three hundred seventy-one thousand four hundred seventy-nine feet, it was held that vessel was not entitled to dead freight for deficiency. 30F(2d)770.

104-19 **Carrier's failure properly to heat tanks containing creosote** was held not to have been due to fault in navigation or management of vessel, within charter terms relieving carrier for loss. 28F(2d)356. **Charterer's payment to barge captain of additional per diem amount for watching cargo** does not affect owner's liability for his failure to attend pumps. 34F(2d)981.

104-21 **Owners held not liable** for loss of cattle from unseaworthiness due to charterer's unauthorized conversion into cattle ship. 270US253, 46SCt212, 70L ed 271.

105-24 8F(2d)552; 42F(2d)758.

105-26 8F(2d)552.

106-30 42F(2d)161.

106-31 **Compromise agreement** discharging charterer's primary liability held discharge of ship's liability as surety. 270US253, 46SCt212, 70L ed571.

106-31½-New. Carrier of creosote has duty of taking proper precautions to preserve oil at temperature it was delivered. 28F(2d)356 (at least to minimum degree required by charter).

106-31½-New. Shipper's refusal to accept delivery of sediment does not defeat recovery for loss of oil for failure to minimize damage, where carrier was, under charter obligation to deliver cargo as oil, the sediment, while continuing as such, being commercially worthless. 28F(2d)356.

106-32 8F(2d)552; 43F(2d)858.

106-33 7F(2d)485; 256Mass53, 152NE 78. **Failure of charterer of scow for use in New York harbor to observe weather bureau's warnings** is not fault, rendering it responsible for sinking of scow. 27F (2d)988 (not custom of navigators on Hudson River to observe such warnings). **Under bare-boat charter,** lessee is bailee for hire, with obligation to return in condition received, necessary wear and tear excepted. 27F(2d)622.

106-34 7F(2d)485 (failure to put out fire on scow); 14F(2d)477; 32F(2d)684; 40F(2d)249; 40F(2d)417. **Owner of car** float, exposed by charter to current unloading practices of port, is charged with notices thereof. 23F(2d)487. **Where railroad and experts differ,** courts cannot say which of two methods of unloading car floats is right. 23F(2d)487.

106-35 **An injury, etc.**-14F(2d)477.

107-38 27F(2d)988; 42F(2d)58.

107-40 16F(2d)199; 19F(2d)1; 22F (2d)351; 24F(2d)993 (charterer and stevedore held liable); 37F(2d)58; 39F (2d)637; 41F(2d)255; 158Md525, 149A 275 (failure to notify owner to repair). See also 32F(2d)684. **Illustrations.**-7F (2d)732 (manner of loading coal barge held cause of her sinking); 14F(2d)477. **Charterer is liable for failure to provide water apparatus causing damage by fire.** 16F(2d)199. **The burden is on the charterer, etc.**-127Misc444, 216NYS287 (holding evidence insufficient to overcome presumption of negligence). **Presumptions.**-127Misc444, 216NYS287. **Refusal of consignee's engineer** to reduce load after wind rose is fault rendering charterer responsible for resulting loss of scow. 27F(2d)988. **Reversal of decree holding stevedoring company primarily liable** for damage to chartered lighter, imposes primary liability upon hirer. 39F(2d)577. **Hirer is under obligation to cease operations** if measure is necessary to avoid apparent danger to dredge. 158Md525, 149A275. **Legal duty of hirer to give owner notice** arises out of circumstances. 158Md525, 149A 275. **Where dredge is intrusted to exclusive possession of hirer** thirteen hundred miles from owner, hirer has duty to see that measures apparently needed to preserve it are taken. 158Md525, 149 A275.

108-41 7F(2d)485. **Evidence insufficient.**-40F(2d)249.

108-42½-New. Where inflammable character of cargo can be discovered by ordinary care from inscription on boxes, charterer is not liable for destruction of tugs and barges because of misrepresentation of nature of cargo or failure to find warning. 8F(2d)552.

108-42½-New. In libel against charterer for destruction of vessel caused by ignition of inflammable cargo, defense of unseaworthiness is without merit where charterer knew of condition at time of charter. 8F(2d)552.

108-44½-New. Failure of city hauling rubbish and ashes in chartered scows thoroughly to wet loads was not excused so as to relieve it from liability for damages by fact that wetting would have interfered with profits of person salvaging part of rubbish or, under certain circumstances, caused load to split. 29F(2d)783.

109-45 15F(2d)366 (clause construed as excusing negligence of charterer); 32F (2d)684; 147Wash619, 267P37. **Duty to insure.**-42F(2d)561.

109-47 158Md525, 149A275.

109-48½-New. Charterer under such provision is liable for damage in excess of ordinary wear and tear, together with deduction for repairs. 32F(2d)536.

109-48½-New. Charterer retaining vessel after owner's reply refusing to relieve him of liability for damages renders charterer's bailment subject to terms of reply. 32F(2d)684.

109-48¼-New. Charterer is liable for damage to vessel caused by stevedore. 32F(2d)536.

110-52½-New. **Owner held entitled to incidental expenses** of drydocking but not to expense of painting portion of hull undamaged. 17F(2d)9.

110-52½-New. Charterer is liable for value of use of vessel during time it is laid up for repairs for which charterer is liable. 32F(2d)536.

110-52¼-New. Where by reason of mistake of charterer's agent vessel is not returned after termination of charter, charterer is liable only for such damages as directly result from agent's mistake. BC [1928] 4DomLR833.

110-54 **Requisition charter construed** as not adoption of provision of existing charter with foreign government so as to render government liable for commission of broker. 15F(2d)383.

111-58 234 IllA141.

111-61½-New. 11F(2d)921.

111-61½-New. 11F(2d)921 (release of part of cargo not a legal consideration for contract to reimburse owner by United States Shipping Board Emergency Fleet Corporation).

111-61¼-New. 11F(2d)921 (agreement of shipowner not to sue charterer for breach is not legal consideration for contract by United States Shipping Board Emergency Fleet Corporation).

114-96 124 Or112, 258P193, 60ALR528.

116-17 **Noncompliance with arbitration clause** will not bar remedy in admiralty. 5F(2d)218.

117-18 **In suit against city for charter hire of scows, court of admiralty** is not concerned with questions of departmental method of city in making contract. 36F(2d)417.

117-22½-New. It is no defense to libel for breach of seaworthiness warranty that libelant has been paid by insurers. 32F(2d)154.

117-22⅛-New. Original libel in nature of cross libel is remedy of respondent in admiralty for damages for breach of another charter party. 32F(2d)343.

117-23 Indorsee of bills of lading may sue. 20F(2d)320.

117-28½-New. Owner of wharf on which ship was discharging cargo may be impleaded in libel against charterer for damage to ship. 42F(2d)58.

118-31 14F(2d)237; 136Misc374, 240NYS88. **Libel held insufficient** because of absence of pleading or proof of facts showing special damage. 16F(2d)927.

118-34 7F(2d)485 (burden of proving negligence of city for fire on scow carrying rubbish is on libelant); 14F(2d)532; 20F(2d)558; 32F(2d)343; 36F(2d)869 (seaworthiness); 37F(2d)952; 40F(2d)249; 41F(2d)255; 158Md525, 149A275; 136Misc374, 240NYS88. **Burden on shipper as to condition and quantity of goods.**-28F(2d)356. **Burden is on charterer to account for condition of vessel** returned in damaged condition where owner established seaworthiness. 39F(2d)637. **Prima facie case need only be proven** after which charterer must rebut presumption of negligence. 40F(2d)249. **When barge damaged while in exclusive possession of bailee,** latter must go forward with evidence. 40F(2d)417.

118-35 Presumption.-41F(2d)255.

118-37½-New. That captain of government vessel, in charge of floating pile driver left in battered condition by storm, took off crew of pile driver for night, is not negligence per se, so as to make government liable for sinking of pile driver. 31F(2d)211.

118-37½-New. In libel for recovery of lighter chartered to respondent, burden of proof to establish negligence of respondent is prima facie met by showing failure to return it. 27F(2d)622.

118-37¼-New. Prima facie presumption is that payment of dispatch moneys shall be calculated without taking account of lay day exceptions. 35F(2d)395.

119-41 42F(2d)58.

119-48 8F(2d)315; 8F(2d)552; 14F(2d)532; 17F(2d)9 (evidence held to show negligence of charterer and tow); 18F(2d)221; 20F(2d)558; 27F(2d)622; 28F(2d)356; 31F(2d)211; 32F(2d)343; 32F(2d)684; 37F(2d)952; 33F(2d)94; 147Wash619, 267P37. **Evidence held sufficient.**-8F(2d)500; 8F(2d)552; 37F(2d)516; 158Md525, 149A275; 171Minn507, 214NW510. **Evidence held insufficient.**-36F(2d)869. **Evidence held to sustain findings for owner.**-16F(2d)259. **Evidence not showing cause of damage is insufficient** to overcome presumption of negligence against charterer arising from return in damaged condition. 39F(2d)637. **Prima facie case of negligence** is made by evidence showing that boat was damaged during charter period. 41F(2d)255.

119-51½-New. Where suit against government for damages caused by loss of pile driver rented from plaintiff was not brought to trial until about thirteen years after loss, court will scrutinize case very carefully, and will not hastily or lightly attribute negligence to government officers. 31F(2d)211.

119-54 Instruction as to failure to take care to avoid extreme consequences however leaking of dredge may have been caused has been held not erroneous. 158Md525, 149A275. **Instruction has been held sufficient.**-158Md525, 149A275. **Instruction as duties owed by hirer to owner of barge** has been held not erroneous. 158Md525, 149A275. **Requested instructions** as to sufficiency of evidence of want of ordinary care has been held properly refused. 158Md525, 149A275.

120-55½-New. Three years will be deducted from full period of interest allowed libelant because of delay in prosecution. 30F(2d)275.

120-55⅛-New. Damages caused by cargo sifting through ceiling is not recoverable by owner of barge under charter party. 42F(2d)758.

120-55¼-New. Agreement of charterer to make repairs and return vessel rendered it liable for full value where ship became total loss. 43F(2d)427.

122-23½-New. Cook made master because only American citizen on board on departure of master has same authority as if commissioned in regular way. 141Wash623, 251P852.

125-51 7F(2d)69; 13F(2d)481.

125-52 7F(2d)131 (acts of master held not ratification by ship of contract of charterer for use of pier).

125-59 13F(2d)481.

126-61 13F(2d)481. **Illustration.**-13F(2d)481.

129-99 Charterers may rely on master's judgment as to dangers distinctly maritime. 34F(2d)442.

132-36 34F(2d)572. **Where log indicates bad weather conditions,** master is judge of what is required for safety of property and life. 34F(2d)570.

132-38 32F(2d)988.

132-40½-New. Captain, by steering through shallow of bay, cannot reasonably be expected to take notice of location of every member of his crew. 245NY232, 157NE93.

133-42 216Ala576, 114S181 [citCyc].

133-43 216Ala576, 114S181 [citCyc].

133-45 216Ala576, 114S181 [citCyc].

133-47 216Ala576, 114S181 [citCyc].

140-26 [1926] CanExch224, [1926] 4DomLR288, [1926] 3WestWkly225.

144-63 42F(2d)568.

145-72 27F(2d)935.

145-73 31F(2d)394.

145-75 In Cuba.-8F(2d)103. **After vessel is seized on legal process,** master is not entitled to maritime lien for wages. 24F(2d)438.

146-76 27F(2d)935.

147-88 But see 8F(2d)103.

148-96 24F(2d)438.

148-7 141Wash623, 251P852 (failure to collect money on check received on sale of catch of fish).

149-12 33F(2d)215.

150-15 15F(2d)342.

152-47 141Wash623, 251P852.

153-61 Evidence held sufficient.-141Wash623, 251P852.

154-69½-New. United States Shipping Board Emergency Fleet Corporation is not entitled to government rate on telegraph messages under Rev. St. § 5266, notwithstanding Act June 15, 1917 (40 U. S. St. at L. 182). 13F(2d)308.

155-77 But see 37F(2d)52. **Steamship company cannot absolve itself** from its obligation to charterer to furnish winchmen by securing similar promise from shipowner. 37F(2d)52.

156-89 44Philippine465 (agents).

156-90 12PortoRicoFed430.

157-1 5F(2d)580 (contract for "new patches on forward boiler" construed to require hard, not soft, patch); 36F(2d)501 (must be definite and positive).

157-4½-New. Evidence held insufficient to show definite agreement that repair work should be done on or before certain date. 36F(2d)501.

157-6 Owner not liable where actual agency of charterer for him is negatived and no ostensible authority is shown. Can [1928] 3DomLR856.

158-11 22F(2d)919 (seller reserving title); 68CalA363, 229P708 (registered owner who has parted with possession and control not liable for supplies furnished to captain, if there is no ostensible agency for such owner or reliance thereon).

158-13 68CalA363, 229P708. But see 15F(2d)70. **Reservation by registered owner of right to approve of operation of vessel,** as protection for large interest in unpaid purchase price, does not affect legal relationship of parties. 68CalA363, 229P708.

160-24 29F(2d)466. **Facts sufficient to show ownership pro hac vice, when supplies were furnished.**-68CalA363, 229P708.

160-30 Drydock company is liable to charterers for loss of use of vessel resulting from negligence. 13F(2d)3. **Measure of damages** for loss of use of vessel due to repairer's negligence is market value of use for period of delay. 13F(2d)3. **Time charterer cannot recover for delay** due to repairer's negligence where he was bound by charter to dock periodically for repairs, and contract for repairs was between repairer and owner. 275US303, 48SCt134, 72Led290. **Evidence held sufficient** to relieve independent contractor from liability for damage to sinking of vessel. 28F(2d)880.

161-35 Defendant's agents, making boats in ice fast to libelant's boat negligently and without consent, causing damage, committed maritime tort. 25F(2d)720. **Independent contractor making repairs** is liable for sinking of vessel due to failure to make sure that outboard discharge valve was closed, though crew alone had right to close valve. 25F(2d)157. **Liability of one inviting another to moor ship at a certain place** see Can [1930] 4DomLR897.

161-37 19F(2d)871.

162-43½-New. Negligence of employees of ship repairer in doing repair work on ship did not create liability as to ship or any one having interest therein. 250NY322, 165NE463.

162-45 20F(2d)337; 21F(2d)858.

162-46 16F(2d)309; 19F(2d)871; 20F(2d)337; 21F(2d)858. **Duty of furnishing loading tackle,** free from defects. 27F(2d)50. **Duty not discharged by showing inspection** before boom was lowered away, after disclosing a condition subsequently changed. 27F(2d)50.

163-48 19F(2d)871.

163-51 40F(2d)280.

163-52 Vessel is not responsible for master furnishing liquor to guest, who became intoxicated and was fatally injured. 27F(2d)886.

163-58½-New. Scow left in condition of peril by throwing off of line is required to make every effort to guard against danger. 43F(2d)360(2dcase).

164-65½-New. Though shipper, having no duty to procure pilot for vessel, did so, nevertheless when captain accepted him he became servant of ship, and shipper was not responsible for any incompetence or error of judgment on his part. 29F(2d)973.

164-67 15F(2d)727; 15F(2d)1017. **Lien attaches to:** Apparel. 15F(2d)727. Engine. 15F(2d)727. Furniture. 15F(2d)727. Hull. 15F(2d)727. Tackle. 15F(2d)727. Wireless apparatus rented to ship. 15F(2d)727.

164-68 Statute does not give lien for wrongful act of master in furnishing intoxicating liquor to guest causing him to be injured. 27F(2d)886.

165-71 Contributory negligence not shown.-40F(2d)280.

165-75 22F(2d)444.

166-79 22F(2d)251 (own negligence).

166-81 147Wash416, 266P141.

166-84 27F(2d)50; 41F(2d)651. **Using only available appliance** in removing hatch covers cannot be charged to employee as contributory negligence. 5F(2d)58.

166-84½-New. Res ipsa doctrine is applicable. 27F(2d)50.

166-86 20F(2d)337.

167-90 7F(2d)477; 17F(2d)318; 19F(2d)871. But see 42F(2d)666.

167-91 19F(2d)923.

167-92 19F(2d)923. **Use of tackle instead of hook** held not required in exercise of reasonable care. 19F(2d)871.

168-94 [1926]CanSC331, [1926] 1DomLR384 (proceeding at such rate of speed in fog that vessel could not pull up within limit distance of visibility).

168-1½-New. Captain's failure on turning tugboat, to warn engineer who was on deck, held not negligence. 245NY232, 157NE93.

168-1⅓-New. Stevedoring company is not insurer with respect to its stevedores, vessel, or her crew or cargo. 27F(2d)960.

169-2 43F(2d)566; 43F(2d)569.

169-3 Presumption.-15F(2d)455.

169-4 21F(2d)75.

169-5 43F(2d)569.

169-6 43F(2d)566; 43F(2d)569.

170-16 43F(2d)569.

170-17 43F(2d)566; 43F(2d)569.

171-18 43F(2d)569 (failure of barge captain to slacken lines of tow).

171-21 The fault must be that of the pilot alone.-6F(2d)6 (it is master's duty to interfere with conduct of pilot where

there is apparent and avoidable danger).
172-25 17F(2d)318.
172-26 17F(2d)318.
172-28 14F(2d)243; 14F(2d)533. **Persons invited by master** for reasons personal to himself are mere licensees. 14F(2d)243.
172-28½-New. Rule that shipowner must exercise some care to protect even trespasser is inapplicable where injured plaintiff was on vessel at invitation of master without owner's knowledge. 31F(2d)225.
173-30 23F(2d)488; 31F(2d)943; 37F(2d)932; 102NJL151, 130A545 (captain of tugboat passing from barge to dock assumes all incidental hazards and there is no liability on part of barge owner). **Where vessel is in dry dock** burden of furnishing light for safety of workmen is on dry dock company contracting to repair ship. 41F(2d)367.
173-32 16F(2d)309.
173-33 16F(2d)309. **Hazard created by vessel owner is not risk of employment.**–16F(2d)309. **Machinist making repairs on vessel** may assume proper care will be taken to protect him. 16F(2d)309. **Machinist working on vessel** is charged only with known defects. 16F(2d)309. **Owner's liability is not coextensive** with liability in rem. 16F(2d)309. **Stevedore company** may accept, as safe, place furnished by ship and need not make inspection. 23F(2d)218.
173-34 16F(2d)309; 41F(2d)651.
174-36 But see 4HawaiiFed285.
174-37 See also 37F(2d)52.
174-37½-New. Stevedore whose negligence caused injury to longshoreman held liable over to owner who paid damages under decree. 26F(2d)295.
174-37⅓-New. Defense of assumption of risk is available against stevedore under general maritime law and is not affected by Jones Act. 131Misc95, 225NYS689.
174-39 5F(2d)385; 16F(2d)309; 19F(2d)871; 21F(2d)858; 24F(2d)416; 25F(2d)602; CalA 291P283; 4HawaiiFed285; 253Mass85, 148NE371 (not insurers). **Facts sufficient to constitute negligence,** etc. 16F(2d)146. **Discharge of cargo to lighter.**–25F(2d)602.
174-40 5F(2d)385; 25F(2d)602; 41F(2d)367. **Lighterman, insecurely lashing ladder to ship** held to invite stevedore to use same, thus rendering lighter owner liable for damages. 25F(2d)602. **Ship is not bound to install ladder to lighter** receiving its cargo. 25F(2d)602. **Lighter's duty to provide safe access is not affected** by stevedore's usual performance of his own duty by borrowing ladder from ship discharging cargo into lighter. 25F(2d)602. **Lighter owner held primarily at fault** for injuries to stevedore's employee due to insecurely lashing of ladder by lighterman's employee. 25F(2d)602.
174-41 21F(2d)858. **Failure of owner to provide guard for open manhole held proximate cause** of death of worker. 5F(2d)58. **Ship's officers and stevedores** may be jointly responsible for maintenance of bulkhead. 21F(2d)858. **Degree of care in respect to hatch covers.**–CalA 291P283.
175-43 5F(2d)385.
175-44 41F(2d)367; 213AppDiv590, 211NYS80.
175-45 Duty of supplying light for carpenters repairing steamship is on independent contractor. 37F(2d)932.
175-46 135Wash509, 238P2. **Negligence as matter of law not shown.**–CalA 291P283.
175-47 19F(2d)871.
175-48 Stevedore company is not liable for employee's continued use of alleged insufficient loading gear. 26F(2d)173.
176-49 22F(2d)444; 27F(2d)960.
176-50 23F(2d)201; 135Wash509, 238P2.
176-51 5F(2d)385; 16F(2d)309; 16F(2d)460; 22F(2d)444; 259Mass394, 156NE836. **Machinist held to have right to assume** that owner's employees would use reasonably safe appliances. 16F(2d)309. **Negligence of stevedoring company** is no defense. 17F(2d)948. **Warning.**–259Mass394, 156NE836.
176-52 16F(2d)309; 16F(2d)460.
177-72 14F(2d)243. **Contributory negligence of stevedore or seaman** is insufficient as separate defense, unless labeled as partial defense in diminution of damages. 131Misc95, 225NYS689. **Defense setting up assumption of risk and contributory negligence** will be limited, as respects contributory negligence, by admiralty rule of comparative negligence. 131Misc95, 225NYS689.
178-73 19F(2d)923. **Res ipsa loquitur** inapplicable where turnbuckle collar fell on winchman. 23F(2d)218.
178-74 CalA 291P283. **Illustrations.**–7F(2d)155 (ship must show damage to shipment was from cause excusing it); 259Mass394, 156NE836. **Injured stevedore** has burden to prove owner's negligence as to alleged defective shackle pin. 26F(2d)173.
178-75 Evidence of similar accident held admissible. 16F(2d)210. **Expectation of defendant's employee** that appliance would break held inadmissible. 16F(2d)210.
179-76 19F(2d)871; 31F(2d)943; 32F(2d)886; 9LaA738, 120S69(2dcase); NJSup 145A620(2dcase); 226AppDiv681, 233NYS584. **Evidence held sufficient.**–8F(2d)299; 15F(2d)455; 26F(2d)173; 39F(2d)430; 43F(2d)360(2dcase); CalA 291P283; 215AppDiv243, 213NYS437; 135Wash260, 237P711, 241P969. **Evidence held insufficient.**–6F(2d)191; 7F(2d)477; 23F(2d)218; 24F(2d)628; 259Mass394, 156NE836; 245NY232, 157NE93; 217AppDiv778, 217NYS104 (against weight of evidence). **Owner's employees held to have negligently changed scaffolding** without notice to contractor's employee. 16F(2d)309. **Government inspection is some evidence** of reasonable care, but not conclusive. 253Mass85, 148NE371. **Ship held to have failed to show** freezing in refrigerator not due to negligence. 7F(2d)155. **Absence of light in 'tween deck held** cause of injury. 41F(2d)367.
179-78 37F(2d)52 (relationship between steamship company and negligent winchman held for court). **Evidence held sufficient** to take to jury officer's negligence in ordering seaman to paint draft numbers on stem of ship, in harbor, from slippery raft. 240NY474, 148NE650. **Evidence held to warrant the direction of a verdict** for defendant in action for injuries to stevedore's employee. 259Mass394, 156NE836.
179-79 22F(2d)444; 141Wash504, 252P526 (assumption of risk).
179-80 253Mass85, 148NE371; Wash 290P996.
180-81 135Wash260, 237P711, 241P969; Wash 290P996.
180-84 Refusal of instruction held error.–227AppDiv307, 237NYS475.
180-85 Instructions held proper.–253Mass85, 148NE371 (as to effect of government inspection).
181-3 Instrument held not to be a bottomry bond.–115 Oh157, 152NE27.
190-83 116Tex193, 292SW168.
204-8 Liability as "through carrier."–43F(2d)824.
204-12 But see 24F(2d)704.
204-16 Shipper upon receipts of goods in ordinary carriage contract becomes bailee for hire. TexCivA 285SW644.
204-18 28F(2d)356; 38GaA304, 143SE789. See also 37F(2d)909.
204-19½-New. Tug and barge company engaged in operating boats, tugs, scows, barges, and lighters and accepting business from public generally except where customer's financial responsibility not satisfactory, is public carrier. 140Wash613, 250P49.
204-19⅓-New. Shipping Act, prohibiting discrimination, applies to common carrier in foreign commerce. 31F(2d)663.
204-19¼-New. One contracting to unload lumber from ship and to unload it on dock is bailee liable only for negligence. 32F(2d)333.
204-19⅙-New. Charter controls in determining whether breach on part of ship was of simple contract obligation. 26F(2d)795.
204-19⅙-New. Act imposes obligation on ocean carriers to immediately file with Board copies of agreements between carriers, concerning rates, competition, and other matters prohibited by statute. 39F(2d)204.
204-19½-New. Scheme created by Shipping Act for regulation of rates and practices of ocean carriers, is essentially same as that prescribed by Interstate Commerce Act. 39F(2d)204.
205-20 But see Eng 10QBD521. **Held American contract.**–27F(2d)795.
205-21 32F(2d)283.
205-22 37F(2d)366.
205-23 35F(2d)184. But see 38GaA304, 143SE789.
205-27½-New. Statutes of state where contract was made, governing carriage by rail, cannot affect validity of ocean bill of lading. 22F(2d)898.
205-27⅙-New. Provision in American statute tending to make date element of document has no application to Argentine bill. 226AppDiv117, 234NYS442.
206-30 Particular contracts of shipment construed.–35GaA94, 132SE454; 169La724, 125S868 (provision for payment of broker's commission on "renewals or duplications" contracts for following year were not "renewals" or "duplications"); Mass 171NE236 (contracts to lighter and store cement has been held indivisible contract). **Carrier is protected from liability** under contract requiring approval of French high commissioner where original approval was withdrawn. 5F(2d)156. **Provision that owing to war conditions** shipment is at owner's risk in case of interference by any power relieves carrier from liability where French high commission took all space in boat for benefit of its government. 5F(2d)156. **Agreement held not void because of mutual mistake of fact** as to carrying capacity, where net computation was attempted and lump freight was agreed upon for full load in judgment of captain. 193Wis647, 215NW451.
206-31 Liability of agent.–21F(2d)653. **Agent's holding of letter and delivery order** of shipper held to constitute contract of affreightment with shipper. 25F(2d)621.
206-32 Contract for carriage of goods is contract of affreightment, though some towage is involved. 273US226, 47SCt368, 71Led663. **Cancellation of contract** held justified by war conditions. 6F(2d)996.
207-37½-New. Contract to furnish sufficient vessels to handle shipper's seasonal requirements with reasonable promptness is not discriminatory and does not give unreasonable preference. 22F(2d)12.
207-37⅓-New. To constitute valid contract, terms must be definite. 23F(2d)611.
207-37¼-New. That steamship company might violate law by giving undue preference to shipper does not invalidate contract to furnish reasonably prompt transportation. 22F(2d)12.
207-37⅙-New. Provision "expected time of loading late March early April" is not warranty, but mere representation. 32F(2d)969.
207-37⅛-New. Court cannot make new contract by inserting intended provision. 32F(2d)969.
207-37½-New. Statement of carrier's agent that there was little possibility of steamer being tied up has been held not to constitute warranty to deliver before close of navigation. 37F(2d)366.
207-38 Rafts of piling.–8F(2d)283. **To charge common carrier with libel** it is only necessary that goods shall have been delivered to him and accepted for transportation. 8F(2d)283. **Delivery of logs to ship's side,** accepted by master without objection, puts them at ship's risk pending loading. 25F(2d)229.
207-39 23F(2d)786.
203-46½-New. Shipment consists not in loading alone but in complete delivery of goods for transportation. 324Ill346, 155NE343.
208-47 20F(2d)56; 21F(2d)292. **Continuing contract of carriage,** not disapproved by shipping board, held valid. 5F(2d)890. **Agreement to use ship under contract** upon removal of restrictions, held breached. 21F(2d)292. **Waiver of carrier's breach** by acts of shipper. 41F(2d)134.

208-48½-New. Contract for carriage of freight is terminated by requisitioning of carrier's vessel for war purposes. 5 **F(2d)**890.

208-50 41**F(2d)**134; **Mass** 171**NE**236 (failure to pay warranted refusal of further performance).

210-58 15**F(2d)**888; 41**F(2d)**134 (owner entitled to full contract price). **Evidence held sufficient** to sustain finding of car shortage in suit for breach of contract to use barges in default of supply of cars. 41**F(2d)**134.

210-61½-New. Evidence insufficient to go to jury on existence of contract of carriage. 12**F(2d)**640.

211-67 See also 49**Philippine** 966. **Bills of lading** may be incorporated by reference in dock receipt. 15**F(2d)**101. **Memorandum by agent of steamship company acknowledging receipt of goods** is sufficient acknowledgment of receipt to show commencement of liability as carrier. 24**F(2d)**704.

211-68 In absence of agreement incorporating usual bill of lading in shipping permit there is implied agreement that carrier will issue customary bill of lading. 33**F(2d)**326.

212-75½-New. Ocean bill of lading referred to in bill of lading and form of which was mailed to shipper is part of bill of lading. 22**F(2d)**898.

212-75¼-New. Bill of lading is not superseded by unexecuted oral agreement.-**CalA** 261**P**729.

213-83 See also 27**F(2d)**129(3dcase).

213-89 14**F(2d)**971; 15**F(2d)**553; 25**F(2d)**275 (take place of prior oral contract); 33**F(2d)**326; 36**F(2d)**246 (carrier's duty to consignee of freight rests on bills of lading). **Bills of lading construed with charter party.**-18**F(2d)**977. **Date of bill of lading** is merely date on which owner of vessel receives property on board. 42**F(2d)**669.

214-90 27**F(2d)**547; 38**GaA**304, 143**SE** 789. **Change by subsequent indorsement.**-33**F(2d)**326. **Legibly printed provisions** are binding though printed in small type. 11**LaA**343, 123**S**374.

214-91 16**F(2d)**265; 31**F(2d)**610. **Particular clauses, etc.**-15**F(2d)**241. **Main object of venture.**-**BC** [1925] 3**DomLR** 774. **Bill of lading being drawn by steamship company** must be construed most strongly against it. 41**F(2d)**398. **Compliance with unreasonable requirement** may be excused in proper case by court. 41**F(2d)**398.

215-92 8**F(2d)**291 (doubt resolved against shipowner who drew bill and in favor of cargo owner); 16**F(2d)**265; 30 **F(2d)**302; 43**F(2d)**247; 43**F(2d)**248.

215-92½-New. Bills of lading are to be strictly construed against carrier. 29 **F(2d)**134.

215-94 160**La**992, 107**S**777.

215-97 Particular clauses, etc. BC [1925] 3**DomLR**774.

216-3 Bill of lading containing no recitals as to condition of goods does not affirmatively represent that they were received in good order and condition. 267**US**260, 45**SCt**269, 69**L ed**603. **Shipper issuing bill of lading** with no recital as to condition is not estopped to show that goods were received in bad condition. 267**US**260, 45**SCt**269, 69**L ed** 603. **Recital of receipt in good order and condition is only prima facie evidence** and does not amount to warranty as between immediate parties. 33**F(2d)** 70, 71 [citCJ].

216-4½-New. "Apparent good order and condition" recital in bill of lading refers to cases, not contents. 25**F(2d)** 122.

216-5½-New. Federal Bills of Lading Act is not applicable to bills of lading originating in foreign country. 216**App Div**322, 214**NYS**366.

216-5⅓-New. Master's verified statement admitting delivery and signed under belief that it was to enable shipper to collect insurance and not as master's protest will not estop respondents in libel in personam from asserting nondelivery in fact to vessel. 8**F(2d)**283.

216-5¼-New. One accepting cargo without knowing or inquiring as to conditions of bills of lading or charter party takes risk of what their terms may be. 18**F(2d)**977.

216-5⅙-New. Agreement for shipment of apples providing that terms of regular bill of lading, copy being attached, were to apply to shipment, incorporated bill of lading by reference. 21**F(2d)** 447.

216-5⅙-New. Freight contract is merged in bill of lading. 25**F(2d)**361.

216-5⅐-New. That buyer has cause of action against seller obtaining "on board" bill does not preclude it from recovering against carrier issuing such bill. 27**F(2d)**129(3dcase).

216-5⅛-New. Where seller obtained "on board" bill of lading, carrier was estopped to deny that it had received shipment on board. 27**F(2d)**129(3d case).

216-5⅑-New. When carrier has given bill stating that cargo has been received in good order, it is estopped to deny truth of assertion against purchaser of bill misled by representation. 27**F(2d)** 129(3dcase).

216-5 1/10-New. Terms of both railroad and ocean bills of lading form contract, binding both parties. 24**F(2d)**868.

216-5 1/11-New. In suit to recover cargo damage terms of bill of lading are controlling. 42**F(2d)**856.

216-5 1/12-New. Shipowner giving clean bills of lading for cargo known to be in poor condition is estopped to assert against buyer-consignee accepting draft that damage occurred receipt of goods, 43**F(2d)**736.

216-5 1/13-New. Courts should do everything possible to preserve integrity of bills of lading. 43**F(2d)**736.

216-5 1/14-New. Connivance with respect to false issuance of clean bills of lading is unnecessary to render shipowner liable by estoppel to consignee. 43**F(2d)** 736.

216-5 1/15-New. Where clean bill of lading is given for cargo known to be in poor condition, whether bill is negotiable is immaterial as affects shipowner's liability. 43**F(2d)**736.

216-5 1/16-New. although buyer-consignee learned of condition of goods after acceptance of draft but before payment. 43**F(2d)**736.

216-7 21**F(2d)**618.

216-8 Bill of lading for goods not actually delivered on board does not bind vessel or owner and is void. 42**F(2d)** 669.

217-15 325 **Ill** 296, 156**NE**294.

217-16½-New. Carrier is not estopped from asserting insufficiency of containers as against consignees suing for damage to goods where bill of lading failed to note such insufficiency. 8**F(2d)**91.

218-17 Dock receipt is not a negotiable document of title within Bills of Lading Act. 127**Misc**432, 216**NYS**413. **Bank holding bills of lading and drafts as collateral security** can sue carrier wrongfully delivering goods. 40**F(2d)**80. **Effect of lack of indorsement.**-138**Misc**576, 245**NYS**464.

218-21 See also 27**F(2d)**547. **Purchaser acquires no greater rights** than original shipper. 21**F(2d)**618. **Carrier is not estopped to show** loss of goods by looting after warehouse was destroyed by earthquake and that loss was due to causes for which it was not responsible under contract. 21**F(2d)**618.

218-23 42**F(2d)**669.

218-25½-New. Transfer of bill does not deprive shippers, who were also consignees, of right to recover damages to shipment. 28**F(2d)**398.

219-26½-New. Where collecting bank falsely represented that consular invoices had been sent direct to drawee, it is liable to drawee induced to pay draft against forged bill of lading. 216 **AppDiv**322, 214**NYS**366 (though representation may not have been sole inducing cause of payment).

219-26⅓-New. Where foreign bank discounted draft against shipment and its correspondent as garnishee in action against shipper delivered check representing proceeds of shipment to sheriff, with notice of foreign bank's claim of title, its lien or title was not lost under garnishment statute. 81**CalA**317, 253**P** 757.

219-26¼-New. Lien of foreign bank in such case is not lost by its surrender of bill of lading and other papers to shipper's factor who guaranteed payment of proceeds, 81**CalA**317, 253**P**757.

219-26⅕-New. nor is such lien lost by factor's resale of goods. 81**CalA**317, 253 **P**757.

219-26⅙-New. Lien of foreign bank attached to proceeds of shipment though factor's written guaranty did not so provide. 81**CalA**317, 253**P**757.

221-42½-New. Bills of lading for "Montreal, with transshipment at Port Colborne, Ontario," issued at Duluth is for carriage from Duluth to Montreal and not from Duluth to Port Colborne. 35**F(2d)**353.

221-42⅓-New. Liability for miscarriage after transshipment. 43**F(2d)**824.

221-42¼-New. Transshipment in course of ordinary methods to which shipper consents is not conversion. 43**F(2d)**824.

222-46 13**F(2d)**394. **Stipulations as to delivery in bill of lading** have been construed as justifying storage at another port when port of delivery is closed because of strikes or riots. 41**F(2d)**401.

223-53 32**F(2d)**530.

225-55 Shipowner's failure to correct identifying marks on shipment and adding mark of another shipper is negligent. 32**F(2d)**530.

225-62½-New. Clause of bill providing lighterage to be risk and expense of cargo was inapplicable to discharge at port where conditions did not necessitate use of lighters. 26**F(2d)**838.

225-62⅓-New. Carrier is liable for expense of discharging merchandise into lighters when bill of lading did not authorize it. 26**F(2d)**838.

225-62¼-New. Clause of bill specifying time of cessation of vessel's liability for goods on their delivery from tackles or deck, "whether such delivery be made to the consignee or into warehouse or lighter or on dock, or to shore cranes," was inapplicable, where use of lighters was not authorized. 26**F(2d)**838.

226-69 See also 23**F(2d)**611.

226-71 32**F(2d)**928.

227-77 Can [1929] 3**DomLR**184 (where contract provided for hauling to customary berth or to dock as ordered by consignees).

227-79½-New. Carrier, advising consignee that vessel was discharging at certain pier, waived its right to rely on contradictory provisions contained in shipping documents. 26**F(2d)**838.

227-79¼-New. Clause of bill authorizing ship, in event of congestion, to proceed to nearest convenient port where discharge may be had, is inapplicable, where there was room on pier to receive merchandise. 26**F(2d)**838.

228-81 23**F(2d)**786. **An officer of the custom-house,** etc. 50**Philippine**529. **Delivery on order bill of lading to one not holder of bill** is wrongful delivery. 14**F(2d)**978. **Delivery on dock receipt** running to buyer and authorizing delivery of bill of lading to buyer justifies carrier in delivering to buyer without surrender of dock receipt. 127**Misc** 432, 216**NYS**413. **Where consignee's employee surrenders documents of title, and loads cargo onto consignee's truck,** delivery is complete, as regards liability for loss from theft. 29**F(2d)**39.

228-82 40**F(2d)**80.

228-83 TexCivA 13**SW(2d)**983.

228-86 But see 23**F(2d)**667.

229-92½-New. Carrier's liability for misdelivery extends to any one who for value and in good faith purchases order bill of lading, before or after wrongful delivery. 40**F(2d)**80.

229-94. Mail carrier.-32**PortoRico** 865.

229-94½-New. Carrier is not liable for customs collector's release of goods after taking control. 21**F(2d)**484.

229-98½-New. Carrier, having knowingly and falsely represented that goods were being carried on vessel, cannot set up valuation clause to reduce damages for failure to deliver. 42**F(2d)**717(2d case).

229-98¼-New. Estoppel of carrier to deny that lost goods were shipped does not preclude shipper from basing claim for damages on failure to make shipment. 42**F(2d)**717(2dcase).

230-2 40**F(2d)**80. **Master must protect cargo** not accepted. 6**F(2d)**779.

230-3 Redelivery to shipper after issuance of bills of lading makes him warehouseman. 23F(2d)786.
231-21 17F(2d)513; 20F(2d)56; 22 F(2d)786; 24F(2d)536; 26F(2d)739 [aff 26F(2d)741(1stcase)]. But see 21F(2d) 292. **One month** held reasonable time. 20F(2d)56. **Delay held unreasonable.**– 20F(2d)56. **Carriers generally do not guarantee time** of arrival of vessel at port of destination. 37F(2d)366.
231-23 17F(2d)513 (delay not unreasonable); 23F(2d)786. **The freezing of canals or rivers,** etc. See also 37F(2d) 366. **Inability to procure full cargo** does not justify delay. 20F(2d)56. **When vessel stranded outside harbor Feb. 6, 1920,** reasonable time for delivery elapsed before March 1, 1920. 221 NYS298. **Where neither charter nor bill of lading specifies time of delivery,** carriers must use due diligence to foresee and anticipate customary weather conditions at Soo in early December and make efficient effort to overcome obstructions. 37F(2d)366.
232-25½-New. No time being specified for lading, time for computing delay in shipping did not begin to run until loading was completed. 24F(2d)536.
232-26 8F(2d)291; 43F(2d)571. **Implied warranty** is that vessel will not deviate unless compelled to do so by necessity. 8F(2d)291.
232-28 7F(2d)889 (general liberty clause is to be given effect when not conflicting with law or real intent of contract); 18F(2d)627; 43F(2d)571 (provision strictly construed against carrier). See also 12F(2d)721. **A provision of bills of lading, etc.**–7F(2d)893. **Bill of lading containing unrestricted deviation clause** permits only such deviation as will not defeat main object contracted for. BC [1925] 3DomLR774. **Under bill of lading authorizing call at particular port,** vessel is not liable for delay incidental to call at such port, except as due to its negligence. 20F(2d) 583.
232-29 8F(2d)291 (vessel bound from American port with wheat consigned to Italy deviated to New York to replenish fuel oil supply); 12F(2d)721. **Passing port of destination** with intent to discharge cargo on return is deviation. 26 F(2d)337.
232-29½-New. Deviation ends contract between shipper and carrier, thus making carrier liable for loss of merchandise. 12F(2d)721.
232-33½-New. Necessity to excuse ship's deviation must arise at sea during course of voyage. 8F(2d)291.
232-33⅓-New. Where bill of lading does not make time of essence of contract, shipper is not entitled to recover for delay in absence of proof of negligence. 18F(2d)627 (bill construed as not making time of essence of contract).
232-33¼-New. and not at loading port prior to inception on voyage. 8F(2d) 291.
232-33⅓-New. Delay caused by intense congestion at port obligates carrier to use reasonable efforts to make early delivery. 36F(2d)246.
233-34 Shipper, as condition of suing carrier after deviation, need not have been deprived of right against insurer. 7F(2d)893.
233-39 26F(2d)739 [aff 26F(2d)741(1st case)]. **Shipper suing for delay** has burden of showing negligence. 20F(2d) 583.
234-41 Evidence held to show that in view of liberty clause there was no deviation of which shipper could complain. 7F(2d)889.
234-41½-New. On appeal in admiralty suit for wrongful delivery appellate court is trier of facts. 18F(2d)220.
234-41⅓-New. On appeal, etc., on such appeal libelant must make out his case by fair preponderance of credible evidence. 18F(2d)220.
235-45 14F(2d)978. **Measure of damages for misdelivery** is ordinarily market value of goods at time and place where they should have been delivered less freight and custom duties. 18F(2d) 220.
235-47 In action against ocean carrier for damages for breach of contract in failing to deliver shipment in which clause limiting liability was inapplicable shipper was entitled to judgment for value of shipment less difference between freight paid and ad valorem freight rate on valued shipments. 133Misc21, 230 NYS602.
235-51 20F(2d)583; 23F(2d)786; 26 F(2d)739; 32F(2d)928. **Interest on suits under Admiralty Act** is allowed only at rate of four per cent. 20F(2d) 583. **Carrier without notice of special use** for which goods are intended is not liable for special damages for delay. 20 F(2d)583. **Generally measure of damages** for delay in delivery is diminution in market value. 20F(2d)583. **Allowance of interest on recovery against Emergency Fleet Corporation** for delay in delivery from date liability became fixed, to satisfaction of decree, held not improper. 20F(2d)583.
236-56½-New. Shipper held entitled to interest on aggregate damages for delay in transportation only from date when amended libel was served. 32F(2d)928.
236-57 20F(2d)217; 36F(2d)702 (under uniform bill of lading liable regardless of negligence). **Liability is that of insurer.**–132Misc752, 230NYS282. **Negligence.**–34F(2d)843.
237-60 21F(2d)447; 39F(2d)136. **Cooked** used in referring to decayed onions means heated to cooking point by exterior forces. 43F(2d)248.
238-62 29F(2d)26; 218AppDiv660, 219 NYS86; TexCommnA 291SW535 (care of frozen goods). **Neglect to take steps to prevent spontaneous combustion of jute** is directly chargeable to shipowner. 25F(2d)843.
238-62½-New. Noncompliance by shipper with statutory provision that owner of vessel shall not be liable as carrier if shipper fails to file notice of character and value of shipment does not relieve shipowner from liability as bailee for hire. 132Misc752, 230NYS282.
238-62⅓-New. Carrier, as bailee, is liable for damages resulting from his negligence. 132Misc752, 230NYS282.
238-63 That cargo was handled with joint assent of cargo owners after first outbreak of fire does not excuse vessel owner for negligence prior to such first outbreak. 25F(2d)843.
238-64½-New. Seller's agreement to indemnify carrier for merchandise surrendered after failure to ship did not release carrier from breach then existing. 25F(2d)275.
238-64⅓-New. Nor did seller's agreement to indemnify carrier against claim on account of refund of freight have that effect. 25F(2d)275.
238-64¼-New. As applied in admiralty, "deviation" now means any variation in conduct of ship in carriage of goods whereby risk incident to shipment will be increased. 28F(2d)249.
238-64⅓-New. Negligence under the law maritime does not differ from negligence at common law. 37F(2d)928.
238-65 Winds not amounting to storm and ice fields held not perils of sea. 23 F(2d)198.
238-66 15F(2d)241.
240-67 Carrier prevented from performance may annul contract by restoration of precontract situation. 6F(2d) 900. **Carrier vessel under embargo** may call contract off. 6F(2d)900.
240-68 43F(2d)177. **Unlucky twist of tide.**–40F(2d)954.
241-71 8F(2d)506. **Carrier cannot plead embargo** voluntarily assumed as to excuse for performance of contract. 6F(2d)900.
241-71½-New. Where carrier issued false "on board" bill of lading, and it could not escape liability under provision of bill exempting it from liability for loss of goods arising from acts of God. 27F(2d)129(3dcase).
243-33 But see 6F(2d)779.
243-85 7F(2d)452; 15F(2d)714; 17 F(2d)586; 21F(2d)191; 21F(2d)865; 22F(2d)159; 23F(2d)198; 24F(2d)849; 26F(2d)385; 33F(2d)232; 37F(2d)928 (ship must be seaworthy in fact). **Criterion of seaworthiness.**–8F(2d)422. **Obligation is not delegable.**–26F(2d)385. **Harter Act made no change in duty** to furnish seaworthy vessel. 21F(2d)865. **New compass data is not required** because rivets are renewed and slight changes made in ballast. 40F(2d)522. **Unseaworthiness must be proximate cause of accident.**–40F(2d)954.
244-86 34F(2d)843. **Bill of lading, providing ship shall have liberty to deviate** for purpose of saving life or property with "liberty to call at intermediate ports," do not excuse failure to make vessel seaworthy for entire voyage. 31F(2d)257.
244-87 17F(2d)762. **That particular storm causing damage was of extraordinary violence** does not relieve owner of ship from liability if ship was not in fact seaworthy. 34F(2d)843.
245-89 21F(2d)191; 30F(2d)62. But see 37F(2d)928. **Judgment finding want of due diligence** by owner to make ship seaworthy is not conclusive in action on insurance policy of actual fault and privity. 5F(2d)358.
245-90 26F(2d)385; 29F(2d)134. **Ship should be carefully inspected before each voyage,** though it is not necessary that as thorough test be made before commencement of voyage as that customarily made every four years. 27 F(2d)985. **Oil leakage**–35F(2d)49.
245-92 37F(2d)928. **Certificate of seaworthiness issued by surveyor** does not absolve shipowner from neglect with regard to condition of vessel where he possessed information which should have been communicated to surveyor. 25F(2d)843.
245-93 Shipper's agent's knowledge of unseaworthiness precludes recovery. 26 F(2d)775.
246-95 34F(2d)843 (owners failing to make chain locker water tight held not relieved from liability for damage to water soaked cargo by failure of crew to discover water in time to empty it).
246-95½-New. Duty of carrier to use due diligence to make vessel seaworthy is not satisfied by delegating that duty to a third person. 29F(2d)134.
246-96 7F(2d)452; 29F(2d)134; 32 F(2d)281; 35F(2d)49; 40F(2d)522; 43 F(2d)177. **Vessels held seaworthy.**–23 F(2d)590; 24F(2d)702; 4HawaiiFed 360. **Vessels held unseaworthy.**–8F(2d) 500; 16F(2d)154 (not having steering equipment); 29F(2d)134; 31F(2d)257; 35F(2d)49. **Fitness for special cargo.**– 25F(2d)843. **Need of repairs which could be completed before completion of loading cargo** does not make vessel unseaworthy at beginning of voyage. 33 F(2d)288. **Ship is liable for damage to tobacco** caused by water and oil. 33 F(2d)326. **Inability to withstand ordinary strains of loading or discharge** is unseaworthiness. 34F(2d)981.
248-97 17F(2d)762.
248-98 26F(2d)739; 43F(2d)241; 43 F(2d)243.
248-1 Shortage in crew of one man held not proximate cause of accident. 40F(2d)954.
249-2 21F(2d)191.
249-4 31F(2d)257; 36F(2d)706 (damage to cargo has been held not proximate result of unseaworthiness because of inadequate bunkers).
249-5 26F(2d)92.
249-7 Seaworthiness involves no more than reasonable fitness for purpose of voyage.–24F(2d)702. **Proper tests** to be applied to tops of double bottom tanks, in order to determine seaworthiness of ship, are either pneumatic, hydraulic, or steam. 27F(2d)985.
249-8 8F(2d)506; 22F(2d)159; 25 F(2d)843; 32F(2d)281; 40F(2d)657; 43F(2d)700; 133Misc516, 232NYS196; 135Misc238, 236NYS700 (stowage of heavy reels of wire on edge held negligent). **Stowage held proper, etc.** 4 HawaiiFed360. **Stowage of quebracho extract** between-decks held not negligence. 16F(2d)812 **Barrels in broken stowage** should be secured so as not to come adrift where voyage is one in which stormy weather is to be expected. 33F(2d)337. **Liability to purchaser.**– 43F(2d)732. **Carrier accepting goods requiring special care in stowage** is liable for damage resulting from failure to exercise such care. 43F(2d)732.
251-14 General custom will not justify

method of stowage which is clearly injurious. 8F(2d)506.
251-15 31F(2d)257.
251-16 22F(2d)159.
253-30 37F(2d)474 (deviation). **Amounting to deviation.**-27F(2d)1010.
253-34 152Tenn306, 278SW59 (state may recover unpaid license fees in suit for injunction).
254-35 See 27F(2d)1015.
254-43 8F(2d)506.
255-46 23F(2d)590; 34F(2d)981 (barge captain's failure to remain at pump held contributing cause of her careening and dumping cargo). **Shipowner not chargeable with negligence** for failure to change usual method of loading. 17F(2d)735.
255-48 43F(2d)247. **Violation of Hell Gate regulations** and failure to observe storm warnings held not proximate cause of accident. 40F(2d)954. **Opening of hatches to ventilate cargo** has been held almost wholly within master's discretion. 43F(2d)241.
256-49 31F(2d)241.
256-56 17F(2d)423; 20F(2d)56.
257-57 8F(2d)270.
257-59 36F(2d)706 (putting into port for coal as result of storm).
257-60 See also 24F(2d)849. **Delay of one day,** resulting in damage to bananas, held unjustifiable. 24F(2d)849.
257-62½-New. Failure of ship to sail by certain date because not loaded and freight not prepaid as agreed is not deviation authorizing recovery of damages to goods. 21F(2d)447.
257-62⅓-New. Stop at port en route, increasing distance from one hundred and eighty to two hundred and fifty miles, is not deviation when permitted by bill of lading. 21F(2d)447.
257-62¼-New. Discharge of grain cargo at point en route as rapidly as possible is not deviation authorizing recovery for damages to goods. 21F(2d)447.
257-63 272US718, 47SCt261, 71L ed491; 30F(2d)302; 36F(2d)706; 43F(2d)571. But see 43F(2d)248. **Inexcusable deviation makes vessel insurer.**-272US718, 47SCt261, 71L ed491; 24F(2d)736. **Deviation is unnecessary** departure from regular course. 272US718, 47SCt261, 71L ed491. **Emergency cannot excuse deviation** of former as result of plan or gross negligence. 272US718, 47SCt261, 71L ed491. **Leaving port with grossly inadequate coal supply,** with intention to stop at another port under pretended emergency, held inexcusable deviation. 272US718, 47SCt261, 71L ed491. **Liberty of call clause in bill of lading** will be construed as only permitting calls at ports properly in course of voyage, in absence of express provisions authorizing departure from usual route. 15F(2d)241. **Ship having exercised option of proceeding by one of two routes** is bound to proceed on course selected. 24F(2d)736. **Deviation clause cannot be broadened.**-30F(2d)302. **Stoppage at intermediate port for coal** constitutes deviation where master undertook voyage with inadequate coal with knowledge and intent to stop at intermediate port for coal. 31F(2d)257.
257-64 8F(2d)291. **Unauthorized deviation** deprives carrier of benefits of insurance clause. 7F(2d)893. **Where bill of lading authorized deviation** from scheduled route for purpose of discharging cargo, liability held not to attach. 15F(2d)241. **Carrier held liable as insurer** for shortage in oil because of deviation not covered by deviation clause. 21F(2d)79.
257-66 **Shipper is bound by custom relative to usual route** between points whether he has knowledge thereof or not. 24F(2d)736.
257-66½-New. Receipt of cargo with knowledge of inability to proceed on voyage because of insolvency is constructively fraudulent and constitutes a tort. 17F(2d)423.
257-66⅓-New. Delay may be deviation as well as departure from usual course. 19F(2d)441.
257-66¼-New. Unexplained delay of six times length of usual voyage is deviation which will toll limitation of bill of lading. 19F(2d)441.
257-66⅙-New. Facts under which delay will be excused. 20F(2d)56.
257-66⅙-New. Variation in course permitted by express provision of bill of lading is not deviation. 24F(2d)586.
257-66⅐-New. To make custom of certain line's ships, from Manila to call at European ports, binding on shippers, call need not have been made at same ports on each voyage. 29F(2d)134.
257-66⅛-New. Shippers of oil on government steamship, operated by private corporation as agent, are charged with knowledge of custom of latter's ships going from Manila, to call at European ports. 29F(2d)134.
257-66⅑-New. Where contract is made with knowledge of intense congestion at port, consignee cannot predicate damages for delay on deviation because of delay in discharge. 36F(2d)246.
258-71 4HawaiiFed360.
258-72½-New. If emergency requiring deviation arises either from gross negligence or deliberate intention to take proper precaution, shipowner is liable. 28F(2d)391.
258-73 49Philippine117. **Carrier authorized by bill of lading to employ lightermen** is not liable in absence of proof of negligence in so doing. 162La53, 110886. **Under contract for unloading of lighters at shipper's risk** carrier held not liable for leakage in oil casks by exposure to sun. 218AppDiv660, 219NYS86.
259-76 **After discharge into hands of customs authorities,** ship held not liable for damage to cargo, unless caused by wrongful act chargeable to vessel. 15F(2d)249.
259-77 **Full time allowed by bill of lading.**-8F(2d)162. **When consignee is not entitled to express notice.**-135Misc126, 236NYS580.
260-85 **Wheat constructively delivered on vessel's arrival at anchorage,** terminates carrier's maritime liability and it becomes liable as warehouseman. 40F(2d)439.
260-86 135Misc126, 236NYS580 (steamship company storing tomatoes in lighters when temperature was below freezing held required to protect them notwithstanding provision of bill of lading).
261-88½-New. After delivery of cargo to consignee's employee was completed by employee's loading cargo into truck, carrier was under no duty to watch cargo against theft while truck remained at carrier's piers. 29F(2d)39.
261-89 **Unseaworthiness of vessel causing delays long enough for incubation of fire by spontaneous combustion** held proximate cause of fire. 25F(2d)843.
261-91 36F(2d)706.
261-92 **That shipper loaded rice flat which caused rain water to run under its coverings injuring cargo** held not to relieve carrier from liability for damage. TexCivA 283SW647.
262-99½-New. Carrier of barges in collision at canal gate is not at fault in proceeding to carry out his contract of affreightment. 16F(2d)154.
263-7 **Acceptance of carrier's delayed performance** held not waiver of rights of action for damages. 20F(2d)56. **Election of remedies.**-129Misc305, 221NYS298.
264-15½-New. Consignee is entitled to sue in own name. 28F(2d)436.
264-16 **Laches.**-22F(2d)328; 34F(2d)627.
264-18 **Purchaser** to whom bill of lading was indorsed is proper party to subsequent suit. 23F(2d)198.
264-18½-New. **Limitation and laches.**-Action held barred when not brought within period prescribed in bill of lading. 129Misc305, 221NYS298.
264-18⅓-New. Libel against vessel for damages to cargo is properly brought in name of cargo owner for benefit of insurer entitled to subrogation. 24F(2d)849.
264-18¼-New. Buyer consignee, after delivery of goods to carrier, has right of action for breach of contract of carriage. 25F(2d)275.
264-18⅕-New. While contract of sale is still outstanding, buyer consignee alone has right of action against carrier. 25F(2d)275.
264-18⅙-New. After buyer's rejection of goods because of delay in shipment, seller has right of action against carrier. 25F(2d)275.
264-18⅐-New. Consignor cannot recover damages where consignor's property interest ceased prior to injury. 27F(2d)547.
264-18⅛-New. On libel by carrier to recover charges incurred by carrier in reconditioning goods damaged without fault chargeable to carrier, notwithstanding delivery by shipper to consignee of bills of lading, shipper is entitled by cross bill to sue carrier for breach of contract by carrier on shipper filing instrument ratifying suit against carrier, executed by consignee. 27F(2d)547.
264-18 1/9-New. Interlocutory decree that shipper recover for injury to cargo on filing proof that consignee authorized or ratified suit is improper. 34F(2d)120 (continuance to offer such proof held more appropriate).
264-18 1/10-New. **Consignee's indorsee of bill of lading,** on whose order goods were delivered to carrier, can maintain action for damages to shipment. 34F(2d)627.
264-18 1/11-New. That purchaser of flour from unnamed firm refused delivery does not show that shipper, in shipper's order bill of lading indorsed to another before arrival of vessel, is suing with indorsee's approval. 34F(2d)120.
264-18 1/12-New. Shipper's mere possession of duplicate shipper's order bills of lading, originals of which have been indorsed to consignee, does not show latter's authorization of suit by shipper. 34F(2d)120.
264-18 1/13-New. Suit for damaged cargo brought within three months after claim held not unreasonably delayed. 43F(2d)695.
264-19 41F(2d)528. **Shipper contracting for transportation** in seaworthy vessel may recover from owners of boat chartered by contractee with covenant of seaworthiness for loss of cargo from unseaworthiness of chartered boat. 6F(2d)141. **Specific insurance,** effected by shippers, does not preclude enforcing personal liability of carrier for loss. 20F(2d)640.
265-22 42F(2d)161. **Charterer failing to deliver goods because of unseaworthiness or improper loading** is liable in personam to cargo owner. 43F(2d)700.
265-25½-New. English rule that owner of cargo can only recover proportionate share of damages from parties liable does not apply in United States courts. 8F(2d)270.
265-25⅓-New. Recovery may be had for entire damage against either wrongdoer. 8F(2d)270.
265-25¼-New. Interpleaded bailee, of lighter sunk with plaintiff's goods, is not liable in absence of contract. 25F(2d)621.
265-25⅕-New. Where libelant shipped goods through steamship company as its agent, which transshipped goods on steamer of another line, which became total loss, such agent could be interpleaded by respondent United States under statute. 30F(2d)247 [certiorari den 279US847, 49SCt345(6thcase), 73L ed991].
265-25⅙-New. Direction by officer of charterer to stevedore to stow additional lumber on scow is intervening agency relieving stevedore from liability for overloading. 41F(2d)528.
265-25⅐-New. Charterer is primarily liable for loss of cargo because of unseaworthiness where vessel was seaworthy when delivered to charterer. 43F(2d)700.
265-25⅛-New. Where vessel is not proved seaworthy when delivered to charterer, vessel is primarily liable for loss of cargo and charterer secondarily liable. 43F(2d)700.
265-27 **Petition** not alleging that defendant failed to exercise proper diligence in selecting lightermen and showing that damage occurred after delivery

to lighters was properly dismissed. 162 La53, 110S86.

265–28 14F(2d)141; 34F(2d)120 (libel held sufficient to show shipper's right to sue). **Defendant's pleadings** held not to show intention to waive defense, under bill of lading, as to commencement of suit within five months. 25F(2d)739. **Answer held sufficient.**–42F(2d)717(1st case).

265–29 14F(2d)141; 21F(2d)653; 12 PortoRicoFed567.

265–31 Amendment asserting agency relationship sufficiently alleges status of libelant authorizing it to bring libel. 28 F(2d)436.

265–33 35GaA94, 132SE454 (proof of delivery to defendant in good condition required in suit to recover full value of cotton converted by defendant).

266–34 30F(2d)62. But see 22F(2d) 898.

266–36 21F(2d)653; 23F(2d)786; 39 F(2d)933; 43F(2d)857. **Burden in on shipper** to show negligence. 26F(2d) 331. **Limitation of liability.**–28F(2d) 249.

266–38 37F(2d)909; 42F(2d)161. **In action for conversion of silk,** evidence that lock on silk room was found broken and silk stolen therefrom justified presumption that theft was committed by carrier's employees. 134Misc439, 234 NYS622. **Where owner of vessel seeks relief from liability because of charterer's use** rules of presumption are same as where he sues for damage to demised vessel. 43F(2d)700.

266–39 8F(2d)422; 31F(2d)262. See also 25F(2d)275.

266–40 8F(2d)422; 130Or294, 279P 861; TexCivA 285SW644. **Failure to deliver goods in same condition as received** constitutes prima facie negligence. TexCivA 285SW644.

267–41 14F(2d)971; 30F(2d)676 [certiorari den 279US858, 49SCt352(10th case), 73Led999].

267–41½–New. In action for value of services stevedore had burden to show what its services were and amount thereof. 143Va656, 129SE687.

267–41⅓–New. In stevedore's action for value of services defendant had burden to prove as offset negligent loading and loss accordingly. 143Va656, 129SE687.

267–41¼–New. Production of bills of lading by libelant is presumptive evidence of its ownership. 14F(2d)978.

267–41½–New. Presumption is that steamship company will not violate law in carrying out contract of affreightment. 22F(2d)12.

267–41⅔–New. Burden of excusing refusal to transport shipment, in violation of special contract, is on steamship company. 22F(2d)12.

267–41⅞–New. Where shipped goods are not delivered, there is no presumption that loss resulted because carried beyond destination, 28F(2d)249.

267–41⅛–New. but presumption is that goods were lost before delivery where they could not be found at point of destination. 28F(2d)249.

267–42 33F(2d)337; 43F(2d)241; 134 Misc475, 235NYS592. See also 28F(2d) 398.

267–46½–New. Carrier is presumed to know manner in which cargo is loaded. TexCivA 283SW647.

267–46⅓–New. Tarpaulins, used for covering cargo, are presumed spread under directions of carrier. TexCivA 283 SW647.

267–50 See also 42F(2d)161.

268–52 6F(2d)900 (burden of proving that subjection to embargo was not voluntary is on carrier); 8F(2d)500; 21 F(2d)447; 24F(2d)868; 25F(2d)229; 33F(2d)326; 36F(2d)256; 43F(2d)247; 133Misc21, 230NYS602. But see 135 Misc238, 236NYS700. **Burden is not sustained** by evidence merely tending to establish doubt. 135Misc237, 236NYS 699. **Where evidence raises presumption of unseaworthiness or negligence,** shipowner has burden of showing affirmatively that damage arose from excepted peril. 135Misc237, 236NYS699.

269–54 13F(2d)871; 29F(2d)794; 31 F(2d)262; 36F(2d)256; 37F(2d)909; 43F(2d)243; 218AppDiv660, 219NYS 86; 135Misc126, 236NYS580 (burden is on consignee who was assignee of shipper's claims). **Where the bill of lading or receipt admits that the goods were shipped in good condition,** etc. 34F(2d) 627. **Where exception is of goods packed in fragile containers,** recovery must be based on affirmative showing of carrier's negligence. 218AppDiv660, 219NYS86.

269–58½–New. It has been held that, though acknowledgment of receipt of goods in good condition and proof of delivery in bad condition makes prima facie case of damage during voyage, burden of proving such fact does not shift but remains on shipper. 13F(2d) 871.

269–58¼–New. Though ship was liable for wetting and heating of rabbit skins resulting from improper stowage, it was not liable for damage resulting from scorching, in absence of evidence that such scorching occurred on vessel. 31 F(2d)257.

269–58¼–New. Nondelivery at destination is presumptive evidence of carrier's negligence. 132Misc752, 230NYS282.

270–59 7F(2d)732; 11F(2d)982; 17 F(2d)586; 17F(2d)762; 23F(2d)198; 26F(2d)468; 27F(2d)985; 37F(2d) 928; 40F(2d)657; 42F(2d)161; 43 F(2d)824. **Doubt as to seaworthiness must be resolved against owner** and in favor of shipper. 25F(2d)843. **Under Harter Act,** burden of proving due care in making vessel seaworthy is on owners in action for damages to freight from sea water. 34F(2d)843. **Sinking of vessel** not due to improper loading raises presumption of unseaworthiness. 43 F(2d)700.

270–61 7F(2d)452; 31F(2d)241; 130 Misc644, 224NYS587.

270–62 26F(2d)385; 42F(2d)161. Contra 11F(2d)982.

270–64 But see 43F(2d)177. **Statement by master has been held** insufficient to rebut presumption of unseaworthiness. 42F(2d)161.

271–69½–New. In case of doubt as to seaworthiness, doubt must be resolved against owner in favor of shipper. 27 F(2d)985.

271–69⅓–New. Where vessel sinks without known reason, law raises presumption of unseaworthiness. 33F(2d) 655.

271–69¼–New. Burden rests on owner to rebut such presumption. 33F(2d) 655.

271–69⅕–New. To rebut such presumption, carrier must show affirmatively that damage was caused by peril of sea or other cause excepted by bill of lading. 33F(2d)655.

271–69⅙–New. Owner of vessel sued for loss of cargo and impleading charterer has burden of proving delivery of vessel to charterer in seaworthy condition. 43F(2d)700.

271–69⅐–New. Proof that owner delivered vessel in seaworthy condition to charterer makes prima facie case for owner sued by cargo owner for loss of cargo. 43F(2d)700.

271–71 Shipper's letter admitting right under bill of lading to change course is immaterial. 24F(2d)736. **Contemplated voyage** may be shown by extrinsic evidence. 24F(2d)736.

271–72 8F(2d)162 (evidence of custom between parties affecting interpretation of contract as to notice of arrival admissible); 25F(2d)275; 23F(2d)213; 36F(2d)706 (vessel's log is competent evidence). **Evidence held inadmissible.**–25F(2d)843.

272–78½–New. Exclusion of evidence that steamship company's agent had notice of shipper's requirements before contract was executed, and was notified of necessity of furnishing shipping space on certain dates, is error. 22 F(2d)12.

272–78⅓–New. Evidence of previous good condition of vessel is admissible to rebut presumption of unseaworthiness arising from unexplained sinking of vessel. 33F(2d)655.

272–80 20F(2d)56; 43F(2d)243; 38 GaA304, 143SE789. **Evidence held sufficient.**–6F(2d)141; 7F(2d)452; 7F(2d) 732; 8F(2d)162; 12F(2d)917; 13F(2d) 555; 15F(2d)245; 17F(2d)513; 20 F(2d)56; 21F(2d)191; 21F(2d)447; 23F(2d)213; 23F(2d)786; 24F(2d)868; 25F(2d)229; 25F(2d)739; 26F(2d)92; 26F(2d)468; 27F(2d)722; 30F(2d)862; 32F(2d)333; 32F(2d)534; 32F(2d)688; 32F(2d)928; 33F(2d)70, 71 [citCJ]; 33 F(2d)232; 33F(2d)895; 33F(2d)974; 34F(2d)627; 34F(2d)981; 35F(2d)49; 35F(2d)353; 36F(2d)246; 37F(2d)928; 38F(2d)501; 38F(2d)992; 39F(2d)937; 40F(2d)418; 40F(2d)522; 43F(2d)243; 43F(2d)700; 43F(2d)824; 131Misc514, 226NYS511; 227AppDiv316, 238NYS 50; TexCivA 13SW(2d)983. **Evidence held insufficient.**–8F(2d)295; 8F(2d) 422; 8F(2d)500; 12F(2d)917; 14F(2d) 382; 15F(2d)241; 15F(2d)249; 16 F(2d)154; 23F(2d)198; 24F(2d)859; 26F(2d)327; 26F(2d)385; 29F(2d)794; 30F(2d)62; 30F(2d)860; 31F(2d)241; 31F(2d)262; 32F(2d)333; 33F(2d)215; 33F(2d)337; 36F(2d)256; 40F(2d)657; 41F(2d)226; 43F(2d)248; 218AppDiv 660, 219NYS86; 135Misc126, 236NYS 580; BC [1925] 3DomLR774. **Evidence held to show conclusively** that steamship company had no knowledge of frozen condition of goods, and was not therefore liable for damage therefrom. TexCommnA 291SW535. **On question of seaworthiness at time of sailing,** evidence of condition, performance and mechanical equipment during subsequent voyage may be considered. 40 F(2d)522. **Decline in value of nitrate** between time arrival was due and time of actual arrival not shown. 39F(2d) 933.

273–82 17F(2d)586.

274–86 43F(2d)247.

274–87½–New. Evidence held sufficient to sustain finding of breach of contract to deliver goods. 23F(2d)611.

274–88 20F(2d)56. **Measure of damages for deviation** is difference between actual value of shipment when it arrived and what it would have been worth if it arrived on ordinary voyage as routed. 24F(2d)736. **Measure according to terms of bill of lading.**–151Wash671, 276P535.

275–94 See also 23F(2d)611.

275–97 7F(2d)893; 12F(2d)721.

275–98 Burden of proof to show value of goods lost is on plaintiff. 161Ga480, 131SE283.

275–99 19F(2d)441; 31F(2d)974. **Carrier's liability for wrongful delivery** should be fixed as of time it made possible for person receiving goods to receive them. 40F(2d)80.

276–1 23F(2d)611 (rate of interest established by local law). **Measure of damages for voluntary deviation of ship** is difference between market value at time and place of delivery, and market value in condition in which it actually arrived, with interest. 28F(2d)391.

276–3 33F(2d)974.

276–4 33F(2d)974 (shipper held entitled to recover storage charge directly attributable to contamination of oil shipped); 135Misc238, 236NYS700 (shipper held entitled to interest on amount of loss). **Services of surveyor employed by underwriters** are not proper item of recovery for cost of salvaging steel rolls precipitated into river from capsized barge. 33F(2d)895. **Expenses of pumping operations which would have been necessary irrespective of carrier's negligence** are not recoverable. 33F(2d) 974.

276–9½–New. Plaintiff cannot recover full market value of goods in good order at time and place set for delivery under contract of affreightment, unless it is shown that goods were received in good order by carrier. 35GaA94, 132SE 454.

276–9¼–New. Fact that prior bill of lading issued by railway company under which goods were to be carried to port of shipment contained recital that goods were in good order is of no probative value against defendant shipping company who was not connecting carrier under such contract, and whose obligation was assumed under independent contract. 35GaA94, 132SE454.

276–9¼–New. Carrier cannot have benefit of any loan made by an insurance

company to cargo owner. 8F(2d)422.

276-9½-New. Carrier is not entitled to set-off against claim for damage to cargo, wharfage, or demurrage at place of delivery. 13F(2d)222.

276-9⅙-New. Measure of damage for delay is difference in market value when goods should have been delivered and when they were. 25F(2d)275.

276-9⅞-New. Interest for deviation on vessel operated by United States Fleet Corporation is limited to four per cent. 26F(2d)337.

276-9⅛-New. Trial court, in exercise of discretion, may allow interest. 25 F(2d)275.

277-15½-New. That fact that insurance has been paid to the shipper does not affect right to recover damages for loss of goods. 12F(2d)721.

277-15½-New. Amount received by shipper from bankrupt charterer must be credited before shipper can recover against vessel. 39F(2d)933.

277-17 17F(2d)623.

277-18 17F(2d)423.

277-19 24F(2d)849.

277-20 43F(2d)700.

278-22½-New. and to a preferred mortgage executed by purchaser of ship to seller; 17F(2d)423.

278-31 17F(2d)623.

278-31½-New. There is no lien on vessel for nondelivery of perishable goods due to seizure of ship under legal process in view of Harter Act and exempting clause in bill of lading, 8F(2d)103; 18 F(2d)627.

278-31¼-New. and claimant cannot complain because a lien ranking last was allowed him. 8F(2d)103.

278-35 22F(2d)12; 25F(2d)275 (delay due to crowded condition of harbor); 33F(2d)655. **Seaworthiness does not depend on ratings,** surveys, or inspection, and must be ascertained as fact independently of them. 25F(2d)739.

278-36 Instructions held not erroneous or improperly refused.-35GaA94, 132SE 454 (as to market price at port of delivery on question of damages). **In stevedore's action for value of services,** instruction held not erroneous as based on theory that plaintiff sublet contract. 143Va656, 129SE687. **No error in judge's charge to jury,** in referring to bill of lading as contract of carriage, and instructing jury to determine case by special provisions thereof. 38GaA 304, 143SE789.

278-37 245NY624, 157NE884; 130 Or 294, 279P861 (negligence in operation of refrigerating plant).

279-40½-New. Seaworthiness and due diligence are questions of fact. 40F(2d) 657.

279-41 Construction of Canadian Water Carrier of Goods Act see 43F(2d)824.

279-42 13F(2d)555 (holding shipowner liable for damage from fire due to failure to shift old bunker coal where knowledge of damage was shown). **This provision is incorporated in, etc.**-33 F(2d)232. **Statutory exemption waived** by provisions in bill of lading showing such intention. 17F(2d)513. **Vessel unseaworthy** due to negligence of owner, and that fact causing the loss, makes statute inoperative. 17F(2d)513. **Waiver of statutory exemption.**-25F(2d)843. **Statutory exemption from liability for loss or damage to cargo by fire does not apply** where owner contributed to loss by his own negligence by permitting vessel to sail in unseaworthy condition and otherwise and contracted to be responsible for loss by fire should vessel be unseaworthy. 25F(2d)843. **Provisions of uniform bill of lading** excluding lighterage from limitation statute is controlling in determining rights of carrier to exemption from fire losses. 36F (2d)702.

280-43 Statute requiring shippers to disclose character and value of shipment containing silks applies to liability of masters and owners as carriers, and not as bailees.-133Misc21, 230NYS602. **Shipper, specifying shipment as dry goods,** discharged his duty of notifying carrier of contents of shipment, though shipment included silks. 133 Misc21, 230NYS602.

281-44½-New. Rules and Regulations of Great Lakes, rule 11 § 16 applies only to cases where cargo was in danger from water. 24F(2d)702.

281-44¼-New. Under through bill of lading reserving to carriers by water in respect of their water carriage statutory exemption from liability for nonnegligent fire and defining "water carriage" as not including lighterage in or across river, harbors, or lakes when performed by or "on behalf of" rail carrier, phrase "on behalf of" does not indicate agency; hence steamship company is independent party liable for nonnegligent fire. 30 F(2d)735.

281-44¼-New. Canadian statutes relieving ship owners from liability for loss of cargo under certain conditions are in derogation of common law and strictly construed. Can [1930] 1DomLR 201.

281-44½-New. Where there is proof latent defect was probable cause of breaking of steering apparatus causing loss of cargo burden is still on ship owner to exclude all other possible causes of breaking to constitute exercise of due diligence under statute. Can [1930] 1DomLR201.

281-46 43F(2d)177 (inapplicable to private carrier). **Statute is not applicable** where contract of affreightment imposes liability for negligence. 42F(2d) 229.

282-47 22F(2d)328; 37F(2d)928.

282-48 273US326, 47SCt368, 71L ed 663; 7F(2d)452; 35F(2d)49.

282-53 134Misc439, 234NYS622. See also 273US326, 47SCt368, 71L ed663.

282-54½-New. Act authorizing owner exercising due diligence to exempt himself from liability applies only to common carriers. 24F(2d)849.

282-54¼-New. Act applies to tug pulling barge, as well as to barge, since they are treated as single vessel. 26F(2d) 334.

282-54¼-New. Limitation statute considers tug and tow one vessel in same fashion as under Harbor Act. 26F(2d) 334.

282-56 15F(2d)249; 21F(2d)191; 32 F(2d)154; 33F(2d)232; 34F(2d)674; 35F(2d)49. **Absence of pilot on stranded vessel** does not affect owner's right to exemption. 40F(2d)522. **Dropping anchor for half hour to discharge stevedores** does not make new stage of voyage begin at that point as regards seaworthiness. 40F(2d)522. **Test of seaworthiness** must be applied at commencement of voyage. 40F(2d)522.

283-59 26F(2d)385.

283-60 24F(2d)849.

283-61½-New. Act applies to difficulties arising after commencement of voyage. 24F(2d)849.

283-61¼-New. Where vessel was unseaworthy, perils of sea or mismanagement are no defense, in absence of showing damage would have occurred despite unseaworthiness. 25F(2d)739.

283-62 26F(2d)468. **Acts held not to constitute due diligence.**-8F(2d)422.

283-63 21F(2d)191. **Visual inspection of oil tank** constituted due diligence in determining seaworthiness. 41F(2d) 226. **Steamer sailing with defective water tank** is unseaworthy and liable for damage to cargo. 43F(2d)695.

284-66 24F(2d)849; 26F(2d)334; 26 F(2d)385; 35F(2d)49. **Rule applies to tug and tow claiming exemption.** 26 F(2d)334.

284-68 Where breakdown occurred at commencement of voyage, presumed defect existed before voyage commenced. 24F(2d)849.

284-69 37F(2d)928. **Injury to cargo has been held due to fault or error in navigation or in the management of the vessel,** where pilot allowed vessel to touch river bank. 34F(2d)674. **Failure to inspect hold** on discovering cargo leaks is fault in management, under act. 26F(2d)327. **Use of water** to rid deck of sulphuric acid is "fault in management." 26F(2d)327. **Private carrier liable for** losses from negligence. 42F(2d)482. **Provision not applicable to private carrier** in absence of agreement. 42F(2d) 482. **Obtaining sufficient compass data or supplementing insufficient deviation records** is matter of navigation not affecting seaworthiness. 40F(2d)522. **Engineer's failure to tighten plate of fresh water tanks** is error in management for which neither vessel nor owner is liable. 40F(2d)665.

285-70 Injury to cargo, etc.-7F(2d)155 (negligence in control of temperatures in refrigerator compartment).

286-73 21F(2d)191.

286-74 Ventilating apertures have to do with care of cargo and not management of ship. 35F(2d)184.

286-80½-New. Provision of act does not concern breaking down of machinery at outset of voyage; 24F(2d)849.

286-83 21F(2d)191.

287-85 31F(2d)257; 59 OntL252, [1926] 4DomLR360.

287-87 162La53, 110S886. **Where no special rate is given,** liability cannot be limited. 17F(2d)762. **Where barge is not common carrier,** her owner could, by contract, limit her liability. 29F(2d) 797.

287-89 Jettison clause held inapplicable where nature of cargo was disclosed. 26F(2d)327.

287-90 Eng 10QBD521.

288-91 31F(2d)262; 245NY624, 157 NE884.

288-92½-New. decay not caused by negligence, 13F(2d)871.

288-93 21F(2d)447.

288-96 32F(2d)928; 38F(2d)522.

288-97 35F(2d)353.

288-98 42F(2d)229.

288-99 14F(2d)382; 14F(2d)971; 15 F(2d)245 (letter held sufficient as notice of claim); 22F(2d)140; 24F(2d)868; 25F(2d)739; 30F(2d)676 [certiorari den 279US858, 49SCt352(10thcase), 73L ed 999]; 31F(2d)496; 36F(2d)246 (timely notice excused where congestion at port was intense); 43F(2d)695. **Sufficient compliance with condition.**-34F(2d)627; 39F(2d)88; 135Misc528, 238NYS24. **Insufficient compliance with condition.**-35 F(2d)184 (notations of "wet stain" in delivery book). **A provision releasing the owners from any claim, notice of which is not given before the removal,** etc. 35F(2d)184 (provision held valid where damage could have been ascertained before removal). **Waiver.**-22 F(2d)898; 11LaA343, 123S374. **Claim for misdelivery to one not presenting bill of lading** held within clause requiring notice within ninety days. 26F(2d) 198. **Condition that claims must be made "on taking delivery" construed.**-13F(2d)538. **Estoppel.**-22F(2d)898. **Interstate Commerce Act** does not invalidate provision. 22F(2d)898. **Notice must indicate intent to hold owner liable,** though provision does not require written notice, mere statement of damage being insufficient. 24F(2d)868. **Provision held not waived** by mere knowledge of shortage on part of carrier at time of delivery. 14F(2d)382. **Requirement of removal by owner** to render notice provision applicable is complied with where consignee, knowing goods are subject to condemnation, dumps them. 22F(2d)898. **Where agents for steamer at destination are agents for consignee,** formal written notice is not required. 33F(2d)337. **Notwithstanding knowledge of carrier** that goods were damaged, no claim for damage can be recovered unless notice was given carrier. 39F(2d)88. **Notice of claim for possible damage that might be found on delivery** held to include loss of goods known to have been injured and forwarded by another steamer. 43F(2d) 695. **Notice of claim before discharge of ship** or arrival of ship forwarding damaged goods held good as to known damaged cargo. 43F(2d)695.

289-1 14F(2d)971; 22F(2d)140 (provision requiring bringing suit within three months is valid and bars action brought fourteen months after loss); 25 F(2d)739; 26F(2d)270 (rule applied where bill of lading subsequently issued contained limitation); 43F(2d)871; 254 NY111, 172NE259; 220AppDiv731, 221 NYS679 (limitation to six months after delivery held invalid); 134Misc14, 233 NYS507. **Court has no power to determine period for bringing suit,** where it has held period provided in bill is too short. 41F(2d)398. **Construction and**

effect of provision.–43F(2d)871.

289–2 14F(2d)382; 30F(2d)676 [certiorari den 279US858, 49SCt352(10th case), 73L ed999]; 41F(2d)398; 43F(2d)247; 43F(2d)695 (thirty day limitation for bringing suit held unreasonable); 43F(2d)736 (provision for notice of claim held invalid because unreasonable); 11LaA343, 123S374 (provision for notice before removal or within thirty days after delivery to initial carrier held reasonable); 134Misc14, 233NYS507; 226AppDiv504, 235NYS89; 135Misc528, 238NYS24. **Clauses in bill of lading held not against public policy.**–14F(2d)971.

289–3½–New. Limitations are valid if reasonable, and carrier gives to shipper choice of two rates. 132Misc752, 230NYS282 (limitation held reasonable).

289–5 17F(2d)762; 38F(2d)992; 135Misc238, 236NYS700. **Burden of proof.**–22F(2d)328.

290–7 21F(2d)79; 32F(2d)281; 32F(2d)688; 135Misc238, 236NYS700.

290–10½–New. Six months' limitation held reasonable. 20F(2d)214.

290–10⅓–New. Bill of lading limitation giving benefit of insurance to carrier held enforceable. 20F(2d)214.

290–10¼–New. In federal courts, stipulation in bill of lading controls condition of liability where goods are detained after arrival. 8F(2d)162.

290–10½–New. Where no choice of rates was offered, stipulation limiting liability of general cargo valued at less than one hundred dollars per package to invoice value held unenforceable. 245NY361, 157NE267.

290–10⅙–New. Liability of ship may be limited by bill of lading referred to in dock receipt accepted by shipper without objection. 15F(2d)101.

290–10⅐–New. Deviation due to improper stowage deprives ship of benefit of clause giving ship benefit of cargo insurance. 27F(2d)1010.

290–10⅛–New. Carrier, after issuing through bill of lading, cannot thereafter contract against liability in transshipment. 27F(2d)671.

290–10⅑–New. Where carrier's contract contemplated no special damages to consignee by reason of carrier's breach thereof, consignee has no claim against carrier for delay. 36F(2d)246.

290–11 Harter Act may be made, by reference, part of contract. 23F(2d)194.

290–12 15F(2d)245 (exemptions in contract held not to prevent liability for negligence in making ship seaworthy); 227AppDiv316, 238NYS50.

290–13 30F(2d)279 [certiorari den 279US853, 49SCt348(9thcase), 73L ed996].

290–14 Clause in bill permitting deck stowage is valid under Harter Act. 27F(2d)1015.

291–19 23F(2d)194. **Where carrier is guilty of negligence in caring for refrigerating plant,** with result that cargo of pears was damaged, Harter Act § 1 is applicable, and defense of exceptions of bill of lading as to latent defects is inapplicable. 29F(2d)26.

291–21 6F(2d)883 (may limit liability for injury from collision); 8F(2d)500, 503 [citCyc].

291–23½–New. Agreement that report of surveyors at port of loading that vessel is seaworthy for carriage of coconut oil shall be conclusive proof that owner exercised due diligence to make it seaworthy, has been held invalid. 29F(2d)134.

291–23¼–New. Report of surveyors at port of loading that vessel's deep tank was in fit condition in their opinion to receive and carry coconut oil, without running undue risk has been held not to satisfy requirements of bill of lading, that their report shall be conclusive proof that owner exercised due diligence to make it seaworthy. 29F(2d)134.

291–23⅓–New. Under the Harter Act § 3 to avoid liability under statute vessel owner must prove exercise of due diligence in all respects. 40F(2d)522.

291–23⅕–New. Carrier issuing clean bills of lading with knowledge that goods were improperly packed cannot **rely on limitation as against buyer relying** on bills. 43F(2d)732.

291–23⅙–New. Carrier breaching contract cannot claim benefit of exemption in bills of lading. 43F(2d)732.

291–25 31F(2d)257; 217Misc22, 215NYS718. But see 25F(2d)275; 42F(2d)717(2dcase). **Shipper must be given opportunity to exercise choice as to rates as condition to validity** of limiting agreement. 217Misc22, 215NYS718.

291–28 42F(2d)717(1stcase).

292–30½–New. Clause in bill of lading that carrier, should have benefit of insurance thereon, and might deduct from any claim amount of loans by insurer to shipper or owner of cargo, has been held invalid. 29F(2d)134.

292–30⅓–New. Stipulation limiting carrier's liability for loss of goods to invoice cost thereof without offering shipper choice of rates is invalid. 31F(2d)974.

292–30¼–New. Provision limiting liability to stated amount per package where shipper does not declare on ad valorem basis is not affected by indorsement that freight is to be adjusted and collected from another. 33F(2d)326.

292–30⅕–New. Where no choice of rates is allowed except as to merchandise in packages, provision limiting recovery for damage due to negligence to cash value at port of departure is ineffectual. 33F(2d)974.

292–30⅙–New. Clause exempting carrier from further responsibility on delivery of goods into custody of continuing carrier is invalid. 40F(2d)752(2d case).

292–30⅐–New. Shipper accepting benefit of low rate dependent on valuation is estopped to assert higher valuation. 42F(2d)856.

292–30⅛–New. but is entitled to recover loss to extent not exceeding fixed valuation. 42F(2d)856.

292–32 Particular stipulations construed.–18F(2d)946; 26F(2d)836; 28F(2d)249; 33F(2d)288; 230AppDiv430, 245NYS224; Eng 10QBD521 ("collision" held to include any collision not caused by negligence). **Particular limitations construed.**–25F(2d)122 ("breakage" does does not extend to "warpage"). **Particular situation construed.**–16F(2d)812. **Necessary effect of equatorial climate** held within exceptions in contract to ship quebracho. 16F(2d)812. **Carrier deliberately converting goods** cannot insist on compliance by wronged party with portions of contract normally binding upon him. 40F(2d)78. **Carrier's wrongful delivery of goods** vitiates valuation clause of bill of lading. 40F(2d)78. **Notice of claim clause** must be considered as entirety. 43F(2d)736.

293–33 230AppDiv430, 245NYS224; 230AppDiv438, 245NYS289. See 27F(2d)671.

294–36½–New. Where ship makes delivery without requiring surrender of bill of lading, contrary to provisions thereof, it is "nondelivery of the entire shipment," requiring notice of claim under notice clause. 21F(2d)83.

294–39 Provisions exempting shipper from liability construed most strictly against shipper. 20F(2d)56.

294–39½–New. Exception of liability for "decay" extends not only to inherent decay, but to decay due to any cause, as sea water, not caused by negligence of ship. 13F(2d)871.

294–39⅓–New. Limitation of recovery for short delivery not applicable in suit for wrongful delivery. 14F(2d)978.

294–39¼–New. Limitation of liability in case of loss not applicable in suit for wrongful delivery. 14F(2d)978.

294–39⅕–New. Where delay in sailing is caused by carrier's lack of funds, filing of libel for wages by crew does not exonerate carrier from liability under stipulation exempting carrier from loss caused by legal process. 17F(2d)423.

294–39⅙–New. Shipowner may be exempted, by provision of bill of lading, from liability for delay caused by strikes. 24F(2d)536 (machinists making repairs).

294–39⅐–New. Negligence relating to ventilating perishable cargo is fault relating to cargo alone, as regards defense of exceptions in bill of lading relieving from liability for defects in steamer. 29F(2d)26.

294–39⅛–New. To render available exemption in contract of carriage from absolute warranty of seaworthiness, burden of proving exercise of due diligence rests on shipowner. 30F(2d)62.

294–39⅑–New. Where shipment is lost or damaged in consequence of deviation, clauses of exceptions in limiting carrier's liability cease to apply. 28F(2d)249.

294–39⅒–New. Provision of bill of lading for written notice of damage is reasonable. 39F(2d)867; 40F(2d)78.

294–39⅑–New. Suit for damages barred by one year limitation under bill of lading. 40F(2d)39.

294–39⅓–New. Notice of apparent damage is not equivalent to claim for damage. 40F(2d)39.

294–39⅓–New. Claim for damages must be in sufficient detail to warrant payment if well founded. 40F(2d)39.

294–39¼–New. Provisions of bill of lading regarding notice and claim for damage held reasonable. 40F(2d)39.

294–39⅕–New. Limitation of 30 days in bill of lading for bringing action for damage to cargo is unreasonable and void. 40F(2d)665.

294–39⅙–New. Notice of claim not in compliance with bill of lading. 40F(2d)665.

294–40 20F(2d)56. **Injury held due to peril or danger of sea.**–37F(2d)909 (driving of deal board through stern of barge); 37F(2d)928 (where leaky condition of schooner contributed to damage to cargo); 38F(2d)522 (rough voyage and pounding by seas).

294–41 40F(2d)418. **Injury held due to peril or danger of sea.**–35F(2d)184; 40F(2d)418.

296–42 30F(2d)862.

297–45 30F(2d)862; 37F(2d)928 (degree of violence of storm is not sole or even real test of what is peril of sea). But see 27F(2d)985.

297–51 25F(2d)229.

297–53 Where cargo loss occurs from excepted peril, ship is prima facie excused, and can only be held liable on affirmative proof of some negligence on ship's part. 31F(2d)262.

298–57 Delivery before severe winter conditions prevented has been held not to constitute condition precedent to payment of agreed high rate of freight. 37F(2d)366.

298–58 215Ala638, 112S215.

298–62 Delivery held sufficient to entitle carrier to freight. 28F(2d)135.

300–75½–New. Where federal government retakes ship from purchaser for breach of contract, before delivery of her cargo, right of purchaser to freights terminates and vests in government. 13F(2d)808.

300–75⅓–New. Carrier, accepting shipment of bleaching powder with knowledge as to nature of shipment is not entitled to recover cost of transshipment and expense of discharging cargo because of fumes of chlorine gas given off of such shipment. 27F(2d)722.

302–95 37F(2d)366; 214Ala176, 106S862 (holding repairs to equipment not included in transportation costs, under contract as modified); 160La992, 107S777 (holding shipper bound by contract rates where, after ample time to complain of alleged overcharge, he failed to do so). **Charter party** providing for application of any reduction in North Atlantic-Pacific West-Bound freight rates on lumber construed. 7F(2d)306. **Under clause in bills of lading permitting carrier to recover any special charges** in respect of cargo incurred by damage from defects, if carrier exercised due diligence to make steamer seaworthy and have her properly manned, equipped, and supplied, carrier is not entitled to recover if due diligence was not exercised. 27F(2d)547.

302–96 214Ala176, 106S862. **Steamship has been held entitled to compensation for expense** in disposing of bags

condemned. 43F(2d)248.

304-8½-New. Consignee paying discriminatory freight charge is entitled to damages for violation of statute prohibiting discrimination. 31F(2d)663.

304-8⅓-New. Steamship engaged in foreign commerce coming into United States ports is subject to provision of statute against discrimination. 31F(2d)663.

304-8¼-New. Evidence sufficient to support recovery for discrimination. 31F(2d)663.

304-8⅙-New. Action for damages for discrimination in freight charges is not one to recover excessive charges under mistake. 31F(2d)663.

305-14½-New. Where, in course of transportation, shipper requires return of goods to shipping point, he must pay full freights under bill of lading. 16F(2d)154.

305-15 16F(2d)154 (expense of hiring tug to complete trip, where tug hired to tow barges refused to proceed).

306-20 16F(2d)154. **Bankruptcy of carrier** does not affect rule. 16F(2d)154.

307-33 See 27F(2d)39. **Assignee of freight.**-33F(2d)881.

309-39½-New. Under executory agreement to purchase vessel, rights as between owner and purchaser to freight moneys and disbursements made in earning them are same as under mortgage. 22F(2d)323.

309-39⅓-New. Thus freights earned while purchaser is in possession belong to purchaser, 22F(2d)323.

309-39¼-New. but freights earned after owner retakes possession for breach of agreement, belong to owner, notwithstanding assignment by purchaser. 22F(2d)323.

309-39⅙-New. However, where seller makes no attempt to put purchaser in default, he cannot claim freights earned as against assignee of purchaser. 22F(2d)323.

309-40 See 27F(2d)547. **Purchaser not liable for freight** under charter party signed by seller only. 43F(2d)334.

309-45 18F(2d)977, 979.

309-45½-New. If, under bill of lading, shipper is primarily obligated to pay, carrier need not enforce lien on goods, 27F(2d)547.

309-45⅓-New. or seek payment from consignee. 27F(2d)547.

311-58 Retention of prepaid freight may be authorized on deviation for unseaworthiness. 277US323, 48SCt516, 72 Led901.

312-66 See also 16F(2d)154.

312-67½-New. Right to freight is not assignable, except by owner of ship. 27F(2d)39.

312-69½-New. Failure of assignments to express consideration or name assignee was not fatal to assignments. 27F(2d)39.

312-69⅓-New. United States Shipping Board Emergency Fleet Corporation, as mortgagee of vessel in possession of transport company, as transferee of buyer and owner of equitable interest therein, was not entitled to retain second freight charge collected from consignee on shipment, where freight had already been paid transport company and assigned in connection with bills of lading. 27F(2d)39.

313-75 37F(2d)366.

313-77 37F(2d)366.

314-80 Lien for freight and for general average is maritime and not governed by common-law rules. 15F(2d)270.

314-81 23F(2d)95; 5LaA504.

314-82 "Dead freight" distinguished from demurrage. 23F(2d)95.

315-90½-New. Freight is incident to ship, and there can be no maritime lien on freight if there is none on ship. 13F(2d)808.

315-90⅓-New. Seller's lien on freights for advancements and disbursements necessary in performance of charter party is superior to claim of assignee of purchaser, where freights were earned after purchaser became insolvent. 22F(2d)323.

316-2 22F(2d)323.

317-5 23F(2d)95 (express retention of lien).

317-10½-New. Unloading, if accompanied by circumstances indicating intention to preserve lien, does not constitute waiver. 28F(2d)135.

317-10⅓-New. Although barge owner had abandoned boat to underwriters, he had not lost possession of cargo for purpose of filing libel to enforce freight lien. 28F(2d)135.

320-35 15F(2d)97.

321-39 The Harter Act of Febr. 13, 1893, etc. 34F(2d)674. **Owner does not lose benefit of limited liability** by not having certificate of inspection required for passenger vessels where persons injured were not passengers. 5F(2d)387.

325-55 15F(2d)97.

329-74½-New. In prosecution for violating law regulating sale of steamship tickets, defendant held not agent of steamship company, and as such exempted from operation of act. 285Pa1, 131A489.

329-76 Steamship ticket for carriage of passenger on ocean carrier held contract defining terms of carriage. 130Misc570, 224NYS420.

330-80 8F(2d)259.

330-83 Condition requiring passenger to present written claim for damages within ten days from end of voyage held on facts to be unreasonable and not binding. 7F(2d)579.

331-88½-New. Limitation that steamer should not be liable for breach of contract unless suit was commenced within ninety days after action accrued and fifteen days after notice of claim is not unreasonable. 258Mass372, 155NE1.

331-88⅓-New. That agent of steamer altered ticket by inserting place of destination contrary to printed condition thereof does not invalidate it as a contract. 258Mass372, 155NE1.

331-88¼-New. Acceptance of ticket and lapse of time before its use implies assent to conditions of its issuance. 258Mass372, 155NE1.

331-88⅙-New. Notice of claim.-Provision of ocean steamship ticket requiring notice of claims for injuries to be given carrier within three days after landing is valid and not unreasonable. 130Misc570, 224NYS420.

331-88¼-New. Provision requiring notice of claim for injury in writing within thirty days after landing is valid. 35F(2d)47.

331-88½-New. That passenger is minor does not relieve him from compliance with provision as to notice of claim for injury. 35F(2d)47.

334-26 24F(2d)967; 34F(2d)559. **Continuous passage.**-149Md635, 132A153. **In case of ocean carriers,** degree of care demanded depends on circumstances and conditions peculiar to ocean travel. 130Misc570, 224NYS420.

335-28 See also 40F(2d)280.

335-28½-New. Ocean carrier of passengers is not liable for accident caused by perils of sea. 130Misc570, 224NYS420.

335-28⅓-New. Where heavy seas breaking over ocean vessel break deck window and flying glass injures a passenger, it is result of peril of sea for which carrier was not liable. 130Misc570, 224NYS420.

335-29 24F(2d)967. **Carriers are not insurers,** etc. 15F(2d)166, 48ALR1420. **Damages suffered by passengers from peril of sea** are not recoverable against ship without showing negligence. 40F(2d)276.

337-36 24F(2d)967.

337-37 24F(2d)967.

338-45½-New. Mere fact that conditions present a measure of peril does not necessarily import negligence. 15F(2d)166, 48ALR1420.

338-45⅓-New. Maintenance of raised platform ten inches high above aisle through cabin held failure to exercise high degree of care. 15F(2d)166, 48ALR1420.

338-45¼-New. Use of standard construction, unreasonably dangerous, may constitute negligence. 15F(2d)166, 48ALR1420.

338-45⅙-New. Passenger's duty is to exercise that degree of care which an ordinarily prudent person would use in like situation, 130Misc570, 224NYS420.

338-45⅛-New. and is coextensive with duty, if any, of carrier to warn passenger of dangers of his position. 130Misc570, 224NYS420.

338-45⅐-New. Experienced passenger on ocean liner coursing through high sea is guilty of contributory negligence, as matter of law, when injured while sitting on deck by flying glass of deck windows broken by high sea. 130Misc570, 224NYS420.

338-46 24F(2d)967.

339-47 33GaA696, 127SE671 (injury from fall while locking stateroom door to prevent repetition of unauthorized entry by ship's officer).

339-48 7F(2d)579.

340-63 5F(2d)387 (evidence insufficient to sustain finding that owner negligently failed to inspect bridle); 7F(2d)579 (condition requiring presentation of claim within ten days held waived by not pleading); 24F(2d)967; 30F(2d)822; 33F(2d)894; 35F(2d)47; 130Misc570, 224NYS420 (steamship ticket admissible in evidence as contract). **Evidence held sufficient** to show that navigators were guilty of bad seamanship precluding exoneration of shipowner from liability for damages. 34F(2d)559. **Res ipsa loquitur doctrine** held inapplicable to injuries sustained by breaking of bridle when motorship was towing barge. 5F(2d)387.

341-67 "Subject of statute."-323Ill427, 154NE198.

341-69½-New. If time allowed passenger by contract within which to present claim after termination of voyage was too short, notice of claim would be required within reasonable time. 30F(2d)822.

341-69⅓-New. Passenger was not entitled to recover for defective stateroom ventilator and resultant exposure, where no notice was given prior to commencement of suit. 30F(2d)822.

342-71 Facts held not to show contributory negligence.-15F(2d)166, 48ALR1420.

343-75 15F(2d)97. **Recovery of four thousand nine hundred dollars damages for breach of contract to transport** held excessive. 16F(2d)734.

344-83 Damages held not inadequate.-33F(2d)894 ($10,000 for assault by officer on female passenger).

344-91 38GaA578, 144SE354. **Keeping valuables in stateroom.**-33F(2d)329. **Burden of proving shipowner's negligence** is on passenger suing for damage to baggage. 40F(2d)276. **Passenger's gown contained in trunk is baggage** within contract requiring notice of damage. 40F(2d)545. **Written notice of injury to baggage** is condition precedent to passenger's recovery. 40F(2d)545.

345-92 Facts held to show contributory negligence.-33F(2d)329 (leaving jewelry on dresser by open window).

346-94 131Misc599, 227NYS539.

347-99½-New. Provision in tariff published under Shipping Act, which has no relation to rates and charges, and not being required to be inserted in published tariff, is not binding on passenger though ticket sold "subject to conditions of lawfully published tariff." 8F(2d)259 (provision limiting time for filing claim for loss or damage).

347-99⅓-New. Burden of proving allegations rests on passenger suing for theft of effects from stateroom. 33F(2d)329 (evidence held not to sustain burden).

347-3 8F(2d)382; 23F(2d)95.

348-6½-New. Demurrage for detention of drill used under government contract is recoverable on proof of prevention of realizing profits or of prospective hire during month necessary to complete contract. 41F(2d)557.

348-7 23F(2d)846.

349-10 18F(2d)977, 979 [citCyc]; 19F(2d)645. See 28F(2d)140. **Where delivery of shipments at different loading points** is single transaction, and inquiry as to possible demurrage at one loading point would have revealed claim

for demurrage at another loading point, defendant, receiving cargo, is liable for demurrage arising at both loading ports. 28F(2d)140.

349-13 25F(2d)125.

349-14 Purchaser not liable for freight under charter party signed by seller only. 43F(2d)334.

350-19½-New. Usages of trade regarding practice of carriers notifying consignees' of accrual of demurrage at loading ports, prior to arrival of delayed vessel, cannot overcome contractual rights and obligations of parties. 28F(2d)140.

350-20½-New. Consignee, accepting delivery under bill of lading incorporating terms of charter party, giving vessel lien on cargo for demurrage in all sums which may become due under contracts of affreightment, is liable to shipowner for demurrage occurring at discharging port, 27F(2d)795.

350-20⅓-New. and at loading port. 27F(2d)795.

350-21 18F(2d)977.

352-31 19F(2d)645.

352-35 17F(2d)386; 27F(2d)795. **Indorsee of bill of lading** incorporating provisions of charter party cannot resort to cesser clause to avoid demurrage liability. 19F(2d)645.

353-36 17F(2d)386; 19F(2d)645; 27F(2d)795.

353-37½-New. Cesser clause is personal exemption in favor of charterer. 27F(2d)795.

353-37⅓-New. Cesser clause in charter party has been held not incorporated by reference in bill of lading, so as to inure to benefit of indorsee thereof. 27F(2d)795.

353-38½-New. Provision that vessels should "take turn in discharging" implies vessel's waiver of reasonably prompt discharge and that charterer warrants vessel will receive turn, 22F(2d)317.

353-38⅓-New. and extent to which railroad's exclusive use of its dock for handling coal went beyond ordinary use determines charterer's demurrage liability. 22F(2d)317.

353-39 14F(2d)985; 38F(2d)874.

353-40 14F(2d)985. **Provision requiring loading "with customary dispatch"** is to be read in relation to circumstances existing when loading is to be done. 14F(2d)985.

353-41 But see 127 Or655, 272P275.

355-48½-New. Delay in loading vessel within lay days is not a breach of charter entitling shipowner to discontinue further performance under charter party, 8F(2d)382.

355-48⅓-New. but it is an event for additional compensation as extended freight within legal contemplation, if not expressed contemplation, of parties. 8F(2d)382.

355-48¼-New. and demurrage is payable though charterer is not at fault. 8F(2d)382.

356-55½-New. Clause in charter party that cargo is to be taken by consignee as quickly as steamer can deliver, but in no case at less than one thousand tons per "running day," has been held not to require steamer to discharge continuously day and night. 27F(2d)795.

356-56 18F(2d)977, 979 [citCyc]. See 27F(2d)795.

357-58 18F(2d)977, 979 [citCyc].

358-67 29F(2d)961; 31F(2d)44. **Consignee is not liable to charterer for demurrage charges paid by charterer** because of delay in procuring berth at consignee's dock where charterer contracted to deliver on board consignee's cars. 34F(2d)662. **Contract requiring consignee to furnish wharf and cars.**-43F(2d)476 (acts of consignee constituting acceptance of delivery and imposing duty to discharge cargo).

358-68 29F(2d)961.

358-69 But see 31F(2d)44.

359-70 30F(2d)288.

359-71 19F(2d)645. **Consignee is liable for expense of lightering ship** to enable it to reach berth safely afloat. 19F(2d)645.

359-73½-New. Ship unloading cargo was responsible for deficiency of equipment and any insufficiency or incompetence of stevedores, and was in fault where it did not make full use of facilities of wharf. 29F(2d)961.

360-78 18F(2d)977, 980 [citCyc]. **The delay of a stevedore,** etc. 18F(2d)977. **Delay caused by defective equipment** does not entitle ship to demurrage. 18F(2d)977.

360-80 Where bunkers were not available for more than two weeks after vessel's hatches were closed, charterer was not liable for demurrage. 28F(2d)282.

361-83 Demurrage held not recoverable where delay of agent in procuring answer to request for removal was unreasonable. 13F(2d)535.

362-88½-New. Charterer, under contract excepting liability for demurrage caused by strikes, is not liable, though having knowledge of strike at port designated for loading. 22F(2d)187.

362-89 8F(2d)382; 19F(2d)645; 20F(2d)199. See also 40F(2d)214.

362-90 Running of lay days was not postponed by strike, affecting only portion of discharging area of port, notwithstanding provision excepting strikes, where delay due to consignee's sending vessel to dock where strike prevailed. 27F(2d)795.

362-92 30F(2d)159.

363-94 7F(2d)184 (ice).

364-1½-New. Shipper was not liable for demurrage by reason of blocking of channel which was hindrance beyond control of either party and mutually excepted within terms of charter. 29F(2d)973.

364-3 8F(2d)382. **Lay days given for loading held not affected by official order** giving other vessels preference. 14F(2d)985.

364-4 18F(2d)469; 18F(2d)977; 35F(2d)398(1stcase) (free time is not extended by fact that Sunday and holiday fall within required period). **"At or off discharging port" construed.**-27F(2d)795.

364-6 42F(2d)123. **Lay days, under charter** providing that lay days shall commence twenty four hours after arrival at or off port, begin twenty four hours after arrival of vessel at roads thirty seven kilometers from docks. 19F(2d)645. **Delay of vessels in proceeding to docks,** due to variation of tide, is "hazard of shipowner." 19F(2d)665. **If "readiness to discharge,"** and not arrival "at or off" port, is test of beginning of lay days for discharge, days begin when vessel arrived at port, and not when she arrived at or just off her berth. 27F(2d)795.

365-9 31F(2d)44. **Terms of charter party determined proper person to receive notice of arrival** and readiness to discharge cargo, as between owner and charterer, and as between them charter party controls bill of lading, when there is conflict. 31F(2d)44.

366-11 33F(2d)366 (vessel anchored three and a half miles from shore held not warranted in giving notice). **If bunkers are available,** notice is effectual, though there is absence of sufficient bunkers at time. 26F(2d)91.

366-12½-New. Lay days run from time vessel is ready to receive or discharge cargo, regardless of when she reports herself ready. 18F(2d)469.

366-12⅓-New. Lay days run from time of report of readiness of vessel actually ready and not at midnight following report. 18F(2d)469.

367-17 18F(2d)977, 980 [citCyc]; 27F(2d)795 [certiorari den 278US652, 49SCt178(9thcase), 73Led563].

367-21 18F(2d)977, 979 [citCyc].

367-24 31F(2d)948(2dcase).

368-26 Claim held not released.-27F(2d)795.

368-26½-New. Bond conditioned to pay demurrage to "be agreed upon" and discharging cargo "without prejudice to . . . parties" leaves question of liability open in suit thereon, 17F(2d)386.

368-26⅓-New. and such bond obligates obligors to pay any demurrage due, whether or not liability was that of shipper, principal in the bond. 17F(2d)386.

368-26¼-New. Under such bond, shipper and surety are liable thereon notwithstanding claim of fraud in procuring execution of bond after cargo had in fact been discharged in reliance on bond. 17F(2d)386.

368-28 18F(2d)977 (contract provision held valid); 27F(2d)795 [certiorari den 278US652, 49SCt178(9thcase), 73Led563]; 30F(2d)770; 41F(2d)557. **Amount of bond for payment of demurrage** is not effectively reduced by agreement between shipper and surety where required notice of surety's consent is not given to vessel. 17F(2d)386. **Shipowner's obligation to minimize loss** from demurrage does not arise till expiration of lay days or contract repudiated. 19F(2d)645.

369-29 22F(2d)317; 127 Or655, 272P275.

369-31 18F(2d)291.

369-33½-New. Under bond conditioned to pay amount of demurrage to be agreed upon by agreement or judicial determination, question of amount due is left open in action on bond. 17F(2d)386.

369-33⅓-New. Interest on sum allowed for demurrage is recoverable. 18F(2d)291.

369-33¼-New. Consignee is liable for reasonable expenses incurred before lay days expire including lighterage, labor, and extra labor of stevedores, to extent such expenses were not more than demurrage saved. 19F(2d)645.

369-35 31F(2d)44.

369-36 30F(2d)288.

369-37 Fraction of day is treated as whole day in computing demurrage. 18F(2d)469.

370-50½-New. Laches.-Delay of four years in bringing suit has been held not laches barring delay in absence of change of situation of parties or prejudice. 18F(2d)469.

370-50⅓-New. Laches of owner, if available to defendant, purchasing bills from original holder, who became bankrupt before demurrage charges were claimed, should not bar decree in favor of owner where defendant, if diligent, could have protected himself. 28F(2d)140.

370-50¼-New. Where neither owner of vessel, nor steamship company, which acted as operating agent, raised question as to finality of owner's tender and steamship company's acceptance of vessel, charterer from steamship company could not raise such question, on issue whether it was liable to owner for demurrage due to unreadiness of vessel. 28F(2d)142.

370-52 See 28F(2d)140.

370-53 8F(2d)382; 19F(2d)645; 29F(2d)961. See 28F(2d)140. **Burden of proof** is on consignee to show that owner could have mitigated loss from delay caused by strike. 19F(2d)645. **Evidence held sufficient.**-28F(2d)142. **That vessel was not completely bunkered** till several days after accepted by charterer, and after lay time for bunkering had expired, does not show that she was not in readiness at such time. 28F(2d)142. **As respects consignee's liability,** burden of proving delay due to fault of vessel is on consignee. 27F(2d)795.

370-53½-New. Burden is on one who alleges modification of charter party as defense to prove such modification. 8F(2d)382.

371-58 41F(2d)557. **Evidence held insufficient.**-8F(2d)382; 30F(2d)159. **Evidence held not to show waiver or estoppel.**-13F(2d)535.

371-58½-New. Burden of showing readiness of vessel to receive cargo at time she reported ready is on vessel. 18F(2d)469.

371-58⅓-New. Under charter providing that "charterers are to furnish cargo alongside steamer as fast as steamer can load in suitable hours and weather," evidence was inadmissible that it was customary at loading ports to load cargo into one or two hatches at a time. 30F(2d)770.

371-61 23F(2d)95; 25F(2d)125; 31F(2d)948(2dcase).

372-63 23F(2d)95.

372-64 40F(2d)466; 41F(2d)812.
372-65 22F(2d)585.
373-69 **Rule is law of sea,** as distinguished from law of land. 24F(2d)975.
373-71 **Valuation of ship and consequent assessment** is postponed to termination of adventure. 41F(2d)812.
373-72 28F(2d)449; 32F(2d)555.
373-74½-New. Neither absence of cargo, nor common ownership of vessel and cargo, will affect application of principle of general average. 32F(2d)555.
373-75 281US515, 50SCt400, 74L ed 1008. **For owner of part of common adventure to shift portion of loss** due to sacrifice for common good, his equity must clearly outweigh equities of coadventurers. 39F(2d)136.
374-78 28F(2d)356.
374-79 28F(2d)356.
376-94½-New. Deterioration or decay of cargo cannot be allowed as part of general average loss. 39F(2d)136.
377-97 34F(2d)791. See also 22F(2d) 461. **Loss of part of cargo of creosote, attributable to carrier's failure to keep oil heated to specified temperature,** has been held not within law of general average. 28F(2d)356.
377-1 34F(2d)791.
381-22 **Damage to ship from jettison is part of loss by jettison** and comes within general average except under York-Antwerp Rules. 18F(2d)744.
383-31 22F(2d)585; 24F(2d)975 (where fire department acts solely for protection of vessel and cargo); 36F (2d)76; 36F(2d)99.
383-36 But see 130Misc97, 222NYS562.
387-61 18F(2d)744.
389-68 39F(2d)136.
393-92 32F(2d)555.
393-92½-New. Commission for collecting general average cannot be allowed on special charges. 32F(2d)555.
393-98 22F(2d)585. **Charterer in position of bailee of cargo** held to have remedy against vessel for cargo damage including right to recover general average. 15F(2d)203.
395-6½-New. Buyer accepting consignee's delivery of sound cargo, impliedly promised to pay general average contribution, and became liable therefor, without having ratified agreement. 30F(2d)251.
395-6⅓-New. Contribution in general average is required where ownership of goods is established in respondent and delivery of sound goods is accepted on tender thereof at destination, though only certificate, instead of policy of insurance, was tendered. 30F(2d)251.
395-6¼-New. Seller and buyer accepting delivery of sound cargo impliedly agreed to pay contribution due thereon, and must be held to have ratified consignee's action as their agent in executing general average agreement. 30F (2d)251.
395-3⅙-New. That contract required arrival of vessel with goods on board at port of destination is immaterial as respects liability for general average contribution from part of cargo delivered in sound condition. 30F(2d)251.
395-6⅙-New. Cargo owner's obligation for general average becomes unconditionally due upon acceptance of goods and is computed as of that date. 31F (2d)658.
395-7 24F(2d)587.
396-14 24F(2d)587. **At port of refuge,** where vessel requires extensive repairs, owner may reclaim cargo on paying charges. 24F(2d)587.
396-15½-New. Only where cargo is saved and delivered in continuous operation is cargo owner liable for contribution, after delivery of portion of cargo to him, for subsequent general average losses or expenses. 24F(2d)587.
397-21 34F(2d)791.
397-22½-New. Where contract provides for general average, it controls. 33F(2d)280.
397-23 34F(2d)791 (contract held not to entitle shipowner to recover).
397-24 34F(2d)791.
398-26 22F(2d)585.
398-27 36F(2d)99 (shipowners had duty of requiring average bonds before delivering their shipments to shippers).
399-30 41F(2d)812 (contract).
399-31 281US515, 50SCt400, 74L ed 1008; 15F(2d)202; 28F(2d)449; 33F (2d)280.
399-34 28F(2d)449.
400-37½-New. Owners are entitled to receive credit for exact equivalent of currency expended. 28F(2d)449.
400-37⅓-New. Under York-Antwerp Rules, incorporated in bill of lading, value of foreign currency expended is determined by its value at end of voyage rather than at time of adjustment. 28 F(2d)449.
400-45 128Misc575, 218NYS667.
403-68 22F(2d)585. But see US 41F (2d)812. **Lien for general average is maritime** and not governed by common-law rules. 15F(2d)270.
404-69 **Proviso in bill of lading for deposit** in amount requested by shipowners held unreasonable. 15F(2d)270. **Where reasonable security is tendered,** shipowner cannot refuse to deliver without cash payment. 15F(2d)270.
404-70 30F(2d)251; 31F(2d)658.
405-78 **Charterer held not volunteer** where it had issued bills of lading and paid claims of cargo owners libeling ship. 15F(2d)203.
406-37 22F(2d)585. **Where deposits could not be identified** as having come into hands of receiver, court could not order payment to adjuster prior to proof of all claims against funds. 17F(2d)208.
406-87½-New. Average adjusters, suing consignee for general average contribution due from part of cargo delivered to buyer in sound condition by consignee as seller's agent, with knowledge of such relationship, elected to hold agent liable and discharge seller. 30F(2d)251.
406-91 But see 34F(2d)791.
407-94 22F(2d)461.
407-94½-New. **It is question of fact** whether common interest remains so as to make cargo owner liable for contribution. 24F(2d)587.
407-94⅓-New. **Evidence.**—In libel against lighter for contribution, lighter is presumably in command of bargee who was on her. 40F(2d)466.
407-94¼-New. Fire department causing water damage not shown to have been summoned in behalf of respondent. 40F(2d)466.
407-97 **Statute giving right of action at law for death** does not impliedly repeal statute providing for limitation of vessel owner's liability. 37F(2d)355.
408-99 **Interpretation.**—8F(2d)313; 15F (2d)166, 48ALR1420. **Purpose of rule.**—271US19, 46SCt379, 70L ed805.
408-99½-New. **Under Suits in Admiralty Act,** the maximum limit of damages recoverable by cargo owners against a United States vessel for delay or failure to transport cargo is her value at time libel was filed, and not at time action accrued. 28F(2d)744.
408-4½-New. Statute should be fairly construed, but not to permit shipowner to relieve himself of liability and to keep portion of collision damages recovered. 17F(2d)250.
408-4⅓-New. Statute relating to shipowner's individual liability needs sensible construction. 26F(2d)21.
408-4¼-New. Words of statute, relative to limitation of individual liability of shipowners, must be taken in broad and popular sense. 279US59, 49SCt255, 73 L ed613.
409-10 **Act controls** over state statutes as to stockholder's liability. 26F(2d) 21.
409-10½-New. Municipal ordinance or state legislation cannot limit operation of federal act. 24F(2d)582.
409-14 24F(2d)967 (gasoline launch used to transport workmen across river). **Wharf-boat** attached to shore and used for office, warehouse, and wharf held not "vessel" within statutes limiting liability. 271US19, 46SCt379, 70L ed805. **Pleasure yacht, having completed one voyage** but not having completed unloading when injury occurred, held included in act. 25F(2d)505.
410-19 30F(2d)452 [aff 30F(2d)454(1st case) (certiorari den 279US844, 49SCt 265(2dcase), 73L ed989)].
410-21 31F(2d)757(2dcase). **Collision in foreign waters.**—31F(2d)757(2dcase).
411-23 27F(2d)1002.
411-27 279US59, 49SCt255, 73L ed613; 24F(2d)555; 37F(2d)355 (corporations entitled to benefits). **Stockholders of corporation owning vessel** may limit liability. 26F(2d)21. **Joint owner not agreeing to terms of charter party** executed by one of joint owners is entitled to limitation of liability provided for. 39F(2d)191.
411-31 18F(2d)782; 42F(2d)480.
411-32½-New. Charterer of lighter injured by collision with tug held entitled to limit liability. 14F(2d)237.
411-34 42F(2d)229.
412-36½-New. City's revocable permit to moor vessels at stipulated monthly rental did not constitute waiver of right to exemption from liability on abandonment of wrecked vessel. 24F(2d)582.
413-46 17F(2d)250. **Amount recovered and to be surrendered must include interest.**—17F(2d)250. **Counsel fees and costs** held deductible from amount recovered and to be surrendered. 17F(2d) 250.
413-46½-New. Where there is no market value, value to owner is standard to adopt for valuation of vessel. 25F(2d) 507.
413-50 41F(2d)754.
414-58 8F(2d)313; 25F(2d)103; 31F (2d)982(2dcase); 35F(2d)294. **Rule applies even where there is only single claim** against vessel. 25F(2d)505. **Error in navigation.**—34F(2d)674.
414-59 5F(2d)387; 15F(2d)166, 48 ALR1420 (Comp. St. § 8021, limiting damages, held applicable in action for damage for personal injury); 25F(2d) 602; 37F(2d)355. **Jones Act** held not to abrogate Limited Liability Act in case of injured seamen. 6F(2d)791. **Personal injuries to employees on vessel** held included. 26F(2d)21.
414-63 8F(2d)506. **Exception of liability from perils of sea is of no avail** if owners fail to exercise due diligence to make vessel seaworthy. 8F(2d)506.
414-64 42F(2d)480.
414-64½-New. Suit for limitation of liability is limited to disasters of particular voyage. 21F(2d)236.
414-64⅓-New. Voyage ends when vessel reaches port of final destination and is ready for unloading. 21F(2d)236.
414-64¼-New. Limitation of liability does not extend to claims for collision occurring after end of voyage, for damages of which limitation suit stated. 21 F(2d)236.
415-69 **Failure to provide fireproof vessel** or to provide latest appliances or safety devices does not constitute failure to provide seaworthy vessel so as to preclude limitation of liability. 31F(2d) 142.
415-70 **Fire extinguishers should be carried outside engine room** as regards owners' liability. 40F(2d)8. **Safe appliances and equipment** must be provided by owners. 40F(2d)8. **Negligence of owners in permitting fire hazard in engine room** held proximate cause of disaster. 40F(2d)8.
416-76½-New. Where unseaworthiness could have been discovered by due diligence, no limitation of liability. 20F (2d)304.
416-76⅓-New. Unseaworthy vessel held not to have voluntarily deviated. 20F (2d)304.
416-76¼-New. Ship and owner will be held liable without limitation for loss and damage to cargo resulting from deviation not expressly authorized. 15 F(2d)241.
416-76⅙-New. Unseaworthiness alone or deviation caused by it displaces contract of affreightment only in so far as damage is caused by unseaworthiness. 277US323, 48SCt516, 72L ed901.
416-76⅙-New. Towing tug sharing in proceeds of carriage held "transporting" cargoes and not liable for loss through faults or errors of navigation. 22F(2d) 410.
416-76⅐-New. Owner's failure to keep man on duty in fire room does not defeat right to limitation of liability, where connection with burning of vessel is not shown. 24F(2d)582.
416-76⅛-New. Film company is not entitled to limit liability for losses on un-

seaworthy ship used as prop in scenario. 25F(2d)973.

416-76⅙-New. Act of mate, as bearing on owner's right to limitation of liability, requiring members of crew to discard personal effects when taking to lifeboats, is justified. 27F(2d)908.

416-76⅙-New. Mere fact that there is but one claim for damages to British vessel by collision with Brazilian ship in Belgian waters is immaterial, in determining British libelant's right to trial of suit and litigating right to limitation of liability in United States court, acquiring jurisdiction through attachment of Brazilian vessel. 27F(2d)1002.

416-76⅙-New. Where owners of vessel contracted with city for place to tie up excursion boats for winter, under contract which did not provide for removal of wreckage, and one boat sank and blocked navigation, and city had vessel removed, owners have been held entitled to have liability to city limited to value of vessel. 29F(2d)207.

416-76½-New. **Where no negligence is shown on part of owners of vessel destroyed by fire,** question of limitation of liability, under statute, becomes of no importance. 31F(2d)142.

416-76⅓-New. Owner ordering unauthorized deviation is not entitled to limitation of liability. 43F(2d)571.

416-81½-New. **Claim for transportation of crew** to home port is not within statute. 27F(2d)908.

416-83 277US323, 48SCt516, 72Led 901; 16F(2d)765; 20F(2d)304; 24F (2d)967; 40F(2d)8; 41F(2d)718. **In the case of a vessel owned by a corporation,** etc. 37F(2d)355. **"Privity" and "knowledge" defined.**-37F(2d)355. **Occurrences held to be without the knowledge or privity of the owner.**-35F(2d) 447. **Repairs engineer,** failing to give detailed instructions as to use of gas bag used for lighting system on ferryboat, held not in privity with owner. 25F (2d)516 [aff 25F(2d)518]. **Corporations** become chargeable with knowledge or privity within rule through their managing officers or supervising agents. 25 F(2d)126. **Erie Canal regulation** requiring every boat to be equipped with rudder and wheelman is not applicable to towed barges not steered by rudder but steered by two lines. 34F(2d)925.

417-84 20F(2d)304. **Erie Canal regulation** requiring every cargo boat to be manned by at least one man requires that when barges in tow are singled out there shall be barge on each. 34F(2d) 925. **Company owning boat is bound to know** long existing structural defects rendered boat unseaworthy. 43F(2d) 562.

417-86 37F(2d)355.

418-87 8F(2d)422; 16F(2d)765; 22 F(2d)960.

418-88 37F(2d)355; 40F(2d)394.

418-89 **Vessel used for motion picture scenario,** with mizzen mast shot off and weakened by alterations, held unseaworthy. 25F(2d)973. **Owner must see that vessel is seaworthy** to claim limitation. 25F(2d)973. **Unseaworthiness at commencement of voyage** renders owner liable only for damage resulting therefrom. 33F(2d)775.

418-93 42F(2d)556.

418-95 See also 273US207, 47SCt357, 71 Led612. **On denial of limitation,** judgment may be in rem and in personam. 273US207, 47SCt357, 71Led612.

419-96 31F(2d)573.

420-97 **Claimants may not have limitation proceedings stayed** because petitioner has violated stipulation by bringing action for damages for alleged illegal attachment of vessel. 33F(2d)967.

420-97½-New. **Limitation petition** cannot be maintained where amount claimed is concededly less than value of vessel and freight. 20F(2d)457.

420-97⅓-New. **Where limitation of liability is denied,** proceeding may be continued in admiralty court for purpose of passing on claims. 24F(2d)967.

420-97¼-New. Limitation proceeding is an appeal to court of admiralty which is court of equity, and petitioner seeking equity should do equity and bring in all controversies in limitation proceedings. 36F(2d)712.

420-98 38F(2d)980.

421-6½-New. Owner need only surrender his own interest in vessel. 26 F(2d)334.

421-6⅓-New. Owner of lighter which sank with cargo, seeking to limit liability, has burden of showing seaworthiness, by fair preponderance of evidence. 25F(2d)126.

421-6¼-New. Evidence held to justify limitation of liability as to corporate owner of lighter which sank with cargo which it was unloading. 25F(2d)126.

421-6⅕-New. Shipowner seeking limitation of liability after damage to ship and cargo by fire while ship was undergoing repairs must assign any right of action against shipwright to trustee appointed by court for claimants. 34 F(2d)150.

421-6⅙-New. Owner of sunken vessel is not bound to raise her but may abandon her. 35F(2d)110.

421-8 273US207, 47SCt357, 71Led612.

421-9 273US207, 47SCt357, 71Led612. **Surety, pursuant to stipulation,** held not released on denial of limitation. 273US 207, 47SCt357, 71Led612.

421-18 8F(2d)313.

421-19 **Jurisdiction of admiralty court,** where injured seaman elected to pursue common-law remedy in state court, depends on right of owner of vessel to limit his liability. 35F(2d)447.

422-20 24F(2d)555; 36F(2d)712.

422-21 35F(2d)447 (having jurisdiction, court may deny existence of any liability).

422-22½-New. Bringing all claims into concourse for convenient disposition of actions against owner is not justified where value of vessel is far greater than claims. 17F(2d)120.

423-30 **Proceedings for limitation** are available in action in rem or in personam. 273US207, 47SCt357, 71Led612.

423-32½-New. Such jurisdiction is not affected by fact that libel against vessel has been filed in another district in which process was not issued. 21F(2d) 573.

423-32⅓-New. District court of district in which corporate owner of vessel is incorporated and in which vessel is at home port has jurisdiction of suit for limitation of liability. 21F(2d)573.

423-32¼-New. Where negligence claimed was within knowledge and privity of owner of vessel, admiralty court has no jurisdiction of proceedings by owner to limit liability. 35F(2d)447.

423-32⅕-New. Surrender of ship and pending freight and issuance of monition gives court jurisdiction of property or fund but jurisdiction of claimants is not acquired until after appearance. 36 F(2d)591.

423-32⅙-New. Valuation of vessel for purpose of limitation of liability by commissioner. 36F(2d)399.

423-33 36F(2d)712 (power to dissolve ex parte injunction).

423-34 6F(2d)791. See also 20F(2d) 975.

423-35 24F(2d)555.

423-38 27F(2d)1002.

423-41 **Right to limit liability** held lost by publishing advertisement for presentation of claims and promising payment and not taking steps to limit liability till vessel's value had greatly diminished. 7 F(2d)501.

424-46½-New. Where total claims would exceed value of vessel and freight, application is proper notwithstanding contract of carriage set time limit for presenting claims and total of claims actually presented were less than appraised value. 22F(2d)532.

424-46⅓-New. since right to limitation of liability depends on probable amount at date of filing of petition. 22F(2d) 532.

424-50 **Petition need not set forth all suits pending** in relation to matters alleged and in relation to voyage. 33 F(2d)967.

424-50½-New. Petition stating facts invoke statute is sufficient. 25F(2d)505.

424-51 7F(2d)238 (general denials to petition held sufficient); 19F(2d)354; 38 F(2d)886 (petition should state lay of venture or at least profits where schooner was not on commercial venture); 43 F(2d)195. **Evidence held to sustain claim of limitation.**-16F(2d)765. **Petition held to show petitioner not charterer** within statute. 19F(2d)354. **Charterer must allege** that he manned, victualed, and navigated chartered vessel. 18F(2d)782. **Owner has burden of proving,** not only seaworthiness of vessel, but also allegation of petition that his ship was lost by peril of sea. 32F(2d)87. **Burden of showing negligence** rests on claimants. 31F(2d)142. **The burden of showing want of privity in fault** is on claimant. 27F(2d)606. **Evidence held sufficient.**-27F(2d)606; 27F(2d)908; 32 F(2d)87; 33F(2d)775; 34F(2d)925; 35 F(2d)831; 37F(2d)95; 37F(2d)355; 41 F(2d)718; 43F(2d)562. **Evidence held insufficient.**-27F(2d)606; 32F(2d)87; 37F(2d)67; 43F(2d)562. **Burden of proof.**-33F(2d)775; 34F(2d)152; 37 F(2d)355; 41F(2d)754. **Proof of seaworthiness at commencement of voyage** prima facie entitles owner and charterer to limit their liability. 33F(2d)775. **Petition for limitation of liability** should allege sufficient facts to show right. 35 F(2d)447. **Burden on owner of vessel to** prove want of knowledge of boat's unseaworthiness. 43F(2d)562. **Petition not requiring election.**-43F(2d)571. **Shipper's knowledge of intended deviation inadmissible** as varying bill of lading on issue of limitation of liability. 43 F(2d)571. **Burden of proof as to merits is on claimant** where petitioner's right to limit liability is conceded. 35F(2d)741. **Admissibility of evidence.**-37F(2d)95. **Owner must show** that unseaworthiness is without its privity or knowledge. 37 F(2d)355. **Presumption of unseaworthiness** only arises under circumstances such that nothing but unseaworthiness can explain accident. 37F(2d)355. **There is no presumption of unseaworthiness** where condition showed contact with some obstruction. 37F(2d)355. **Petition has been held sufficient.**-38 F(2d)886.

424-51½-New. Burden of proof is on petitioner to show that negligent act of tugboat captain was not done with privity and knowledge of petitioner. 35 F(2d)543.

424-51⅓-New. **Evidence held sufficient** to justify finding that master of tug was negligent in failing to pump scow on discovery of leaking condition. 35F(2d) 831.

425-55 **Claimants may except to petition for failure to allege** jurisdictional facts, without first filing claims. 18 F(2d)782.

425-55½-New. Party cited by motion may except to petition without filing claim. 19F(2d)354.

425-55⅓-New. Motion to dismiss petition for limitation of liability denied. 14F(2d)456.

425-55¼-New. Before owner may have benefit of statutory limitation, he must file libel or petition setting forth facts and circumstances under which it is claimed. 20F(2d)457.

425-55⅕-New. Limitation claimed must be value of vessel and her pending freight. 20F(2d)457.

425-55⅙-New. Claimant in default for failure to file answer is not entitled to notice of further proceedings. 15F(2d) 857.

425-55⅐-New. **Burden of proof** on issue of limitation of liability is on petitioner, on issue of liability on claimant. 7F(2d)238.

425-55⅛-New. Burden is on claimants to establish claims by preponderance of evidence. 22F(2d)532.

425-55⅑-New. Evidence held to sustain denial of claims. 22F(2d)532.

425-55 1/10-New. Evidence held insufficient to show negligence of master or crew. 22F(2d)532.

425-55 1/11-New. Where owner of vessel which collided with another files petition for limitation of liability which is contested by owner of other vessel, intervention by cargo owner of one vessel is proper remedy where both vessels are privately owned. 24F(2d)657.

425-55 1/12-New. Provisions of Public Vessels Act is inapplicable to petition for intervention by cargo owners in claim of United States, for recovery of

value of government vessel sunk in collision, not brought pursuant to such act. 24F(2d)657.

425-55½3-New. Where, in collision between privately owned and government vessels in which both vessels were at fault, privately owned vessel filed petition for limitation of liability and United States filed claim, owners of cargo of privately owned vessel are entitled to intervene. 24F(2d)657.

425-55½4-New. Evidence held to show contract with stevedore was to deliver cargo over rail in position for lighter to take it. 25F(2d)602.

425-55½5-New. Burden of proof is on claimant, not petitioner. 26F(2d)480.

425-55½6-New. Owners of vessel have burden to prove allegation that schooner was seaworthy and properly equipped and default was without their knowledge or privity. 40F(2d)8.

425-55½7-New. Evidence held insufficient to sustain finding that ship was seaworthy. 40F(2d)8.

425-55½8-New. Unexplained loss of tugboat does not create presumption that boat was unseaworthy. 40F(2d)700.

425-55½9-New. Evidence held sufficient to show cause of loss of tugboat unknown and mystery. 40F(2d)700.

426-70½-New. Obligation to pay at least part of costs rests on shipowner notwithstanding denial of claims. 22F(2d)532.

429-90 24F(2d)582.

SHOE BUCKLE

430-18½-New., Buckle for fastening shoe, or one worn on shoe for ornament. 13CustA367.

SHOP

431-27 158La1014, 105S47.

431-29 161La867, 109S530, 532 [quot Cyc].

431-31 161La867, 109S530, 532 [quot Cyc].

431-34 161La867, 109S530, 532 [quot Cyc].

431-42½-New. Small establishment, or room, department, or building devoted to particular line in factory or large establishment, in which mechanics or artisans work, as shoe shop; car shop; machine shop. 158La1014, 105S47.

431-42½3-New. As applied to railroads includes offices, furniture, fixtures, equipment, appliances, or instrumentalities used in operation of office by railroad in conduct of its business. Tex CivA 275SW673.

SHOULD

434-78 36GaA428, 136SE830 [citCyc]. **May imply a duty** see 36GaA428, 136SE830.

SHOW

434-82 10PaDist&Co 91.

SICK

435-97 124Kan482, 260P655, 657 [quot Cyc].

435-98 124Kan482, 260P655, 657 [quot Cyc].

SICKNESS

436-1 124Kan482, 260P655.

436-1½-New. Condition interfering with usual vocations. 15F(2d)646.

SIC UTERE TUO UT ALIENUM NON LÆDAS

436-4 75Mont88, 242P344; 148Va437, 139SE308, 55ALR1376. **Applied in:** 202 Iowa225, 206NW815; 75Mont88, 242P344; 102NJL354, 131A873; 49ND636, 192NW969; 51ND188, 199NW523; 19 OhA510; 104WVa44, 138SE737.

SIDEWALK

440-19 TexCivA 5SW(2d)205, 206 [cit Cyc].

SIGN

441-42 Signing of paper writing or instrument is affixing of one's name thereto, with purpose or intent to identify paper or instrument, or to give it effect as one's act. 189NC775, 128SE349.

SIGNATURES

446-1 Purpose of signature is to authenticate writing and to bind signer. 219Ky569, 293SW1094.

446-2 219Ky569, 293SW1094.

448-6 22AlaA109, 113S490, 491 [cit Cyc].

448-7 29PortoRico841, 842 [citCyc] (vendor described in deed as "Manuel Victor Paradis y Nazario" signing as "Victor E. Paradis").

448-9 152Md609, 137A351, 352 [cit Cyc].

448-11 117Or374, 243P554. **Stamp.-MoA** 273SW237; 33NM356, 267P74, 77 [citCyc]; TexCr 23SW(2d)733.

449-12½-New. Though wrong name written, it may be effective as signature. 187Wis399, 204NW484.

449-16½-New. Party may adopt any mark, character, or name as his signature, which will bind him as effectually as though he had written his name in full. 208Ky715, 271SW1049.

449-17 190NC768, 130SE619; 104TexCr42, 282SW585, 586 [citCyc]; 187Wis399, 204NW484.

450-18 187Wis399, 204NW484. See also 219Ky569, 295SW1094. **Physical position of signature and internal structure of writing** will be considered in determining whether signature is sufficiently near end. 219Ky569, 293SW1094. **Signature sufficiently near end of writing** to show signer authenticated all he wished to authenticate held to satisfy statute. 219Ky569, 293SW1094.

450-19 219Ky569, 293SW1094.

451-25 TexCivA 275SW115; TexCivA 275SW117.

451-27 See also 187Wis399, 204NW484.

451-28 214Ala440, 108S1; 22AlaA109, 113S490; 76CalA288, 244P950 [citCJ]; 35GaA628, 134SE347 [citCyc]; 115Nebr553, 213NW819, 820 [quotCyc]; 187Wis399, 204NW484. **Doctrine of agency is not involved.**-35GaA628, 134SE347. **Relation of agency is not created** by transaction. 35GaA628, 134SE347. **Affixed by other party to contract.**-214Ala440, 108S1. **Mark not essential** where another makes authorized signature. 76CalA288, 244P950.

452-30 But see 201Iowa253, 207NW119.

452-32 117Or374, 243P554.

452-33 187Wis399, 204NW484.

453-35 187Wis399, 204NW484. **Mark is not signature,** but stands in place of signature. 13LaA551, 128S193.

453-38 22AlaA109, 113S490.

454-44 39OklACR87.

455-56 Signatures held authentic.-46Philippine968.

SILK

456-15½-New. Fine, soft thread produced by various species of caterpillars. Webster D. [quot 79CalA598, 250P703, 704].

SIMILAR

457-21 288Pa39, 135A724. **Not synonymous with "such."**-16CustA19.

SIMULATION

459-34 165La1019, 116S493.

SINCE

459-39 121Kan520, 247P433, 49ALR433.

SITUS

462-80 TexCivA 283SW548; TexCivA 1SW(2d)497.

SLAVES

484-47 In California.-85CalA558, 259P995.

484-47½-New. Children claiming under act of Febr. 6, 1867, held not entitled to inherit from father where parents were neither living and cohabiting as husband and wife in Arkansas when act was passed or when children were born. 171Ark912, 287SW373.

493-63 169Ark265, 275SW337 (has no extraterritorial effect).

493-64 169Ark265, 275SW337 (operates only on those living in state). **Where child was not product** of "moral marriage," recognition by putative father does not legitimatize. 140SC101, 138SE625.

493-66 226Ky13, 10SW(2d)477. **North Carolina.**-190NC372, 130SE21.

495-70½-New. Where parents were not living in Arkansas at date of passage of act, fact that they afterward came into state did not bring them within terms of act. 169Ark265, 275SW337.

495-70½3-New. Act legalizing cohabitation of former slaves and legitimizing their offspring declared applicable only to those living in state at date of act. 169Ark265, 275SW337.

495-70½4-New. Evidence sufficient to show that plaintiff was not legitimized by subsequent marriage of his parents as provided by laws of state in which he was born. 169Ark265, 275SW337.

495-70½5-New. Plaintiff relying for legitimization upon subsequent marriage of his parents has burden to show when and where it occurred. 169Ark265, 275SW337.

495-70½6-New. Where evidence shows illicit cohabitation, presumption is that relation continued till overcome by distinct proof of marriage. 169Ark265, 275SW337.

SLEEP

495-1½-New. For a psychological and medical description of ordinary healthy sleep see 103Conn583, 131A432.

SMART-MONEY

496-21 A term frequently used, etc. 36GaA817, 138SE267.

SMUGGLING

497-31 NS [1926] 3DomLR659, 661, 46CanCrCas8 [quotCyc].

SOAP STOCK

498-40½-New. Soap stock, in business of refining cotton seed oil, is resultant product of treatment of crude cotton seed oil with caustic soda solution in process of refining. 176Ark601, 3SW(2d)673.

SODOMY

501-1 168Ark1012, 272SW359. **With human being.-Mo** 7SW(2d)278 (per anum).

502-2 Statutory definition held to designate infamous crime against nature. 82Colo589, 263P19.

502-4 168Ark1012, 272SW359 (common-law distinction practically eliminated by statute).

502-10 194Wis391, 216NW496, 502 [cit Cyc].

502-12 97Fla367, 120S844.

503-14 194Wis391, 216NW496. **Crime involves use of male organ,** so that attempt at unnatural conduct toward woman is not culpable under statute. 194Wis391, 216NW496.

503-15 168Ark1012, 272SW359 (holding distinction between sodomy and buggery eliminated by statute); 194Wis391, 216NW496. **Act in the mouth,** etc. Mo 295SW788. **Statute held to adopt only common-law definition** of crime. 82Colo589, 263P19. **Use of mouth on person of another** does not constitute sodomy under Texas statute. 103TexCr439, 281SW857.

503-16 93CalA32, 268P958. **Insertion per os** held not to constitute crime of sodomy at common law or under statute, a penetration per anum being essential. 82Colo589, 263P19.

503-16½-New. Both agent and pathic may be convicted on proof of actual penetration. 168Ark1012, 272SW359.

503-17 194Wis391, 216NW496.

503-18 168Ark1012, 272SW359.

503-20½-New. Acquittal of one defendant charged with sodomy does not operate as acquittal of other defendant. 155Wash212, 283P687.

503-21 The "crime against nature," etc. 50Nev1, 248P900. **Information for attempt held sufficient.**-50Nev1, 248P900. **In information for attempt** it is sufficient to allege substantive crime by statutory designation. 50Nev1, 248P900.

504-23 Mo 295SW788; Mo 7SW(2d)278 (following statute and approved precedents); 35PortoRico212.

504-24 Sex.-35PortoRico212 (of the pathic).

504-30 50Nev1, 248P900.
505-37 **Obscene pictures** found in defendant's vest held admissible. 76CalA 558, 244P1086.
505-38 **Mo** 295SW788; 113Nebr517, 204NW74, 206NW153. **Indecent pictures shown complainant before offense held admissible** as showing preparation for act. 75CalA229, 242P508.
505-39 **Dying declarations are not admissible.**–114Nebr818, 211NW16, 49ALR 1280. **Complaint** not shown to have been made at first available opportunity may not be shown. 62 OntL1, [1928] 2DomLR244(2dcase).
505-41 97Fla367, 120S844. **Evidence held sufficient.**–75CalA229, 242P508; 80 CalA257, 251P648; CalA 259P762; 93 CalA32, 268P958; CalA 290P620(1st case); 118Kan362, 234P945; 86PaSuper567. **Evidence held insufficient** as corroboration of defendant's accomplices to sustain conviction. 168Ark 1012, 272SW359. **Evidence held not to warrant conviction of attempted sodomy.**–194Wis391, 216NW496. **Attempt.**–50Nev1, 248P900. **Circumstantial evidence** may be sufficient to establish penetration under statute. 93CalA32, 268 P958.
505-43 168Ark1012, 272SW359 (corroboration of testimony of accomplices held insufficient); 76CalA558, 244P 1086; 80CalA257, 251P648. **For evidence sufficiently corroborating testimony of participant,** etc. 76CalA558, 244P1086; 80CalA257, 251P648; 86 CalA84, 260P391. **Evidence of accomplice held sufficiently corroborated.**–75 CalA229, 242P508.
505-45 **Instructions held proper.**–50 Nev1, 248P900 (attempt). **Issue regarding penetration** held properly submitted. **Iowa** 229NW255. **Issue regarding sufficiency of corroboration of prosecuting witness** held properly submitted. **Iowa** 229NW255.
505-45½-New. **Questions for jury.**–Defendant's guilt of carnal intercourse under evidence is question of fact for jury. **Mo** 300SW710.
505-45⅓-New. Credibility of testimony is question for jury. **Mo** 295SW788.
507-55½-New. Crime of assault with intent to commit the infamous crime against nature is higher offense and includes an attempt to commit such crime, 76CalA558, 244P1086.
507-55⅓-New. and defendant may properly be convicted of lesser offense, even though he is charged with, and acquitted of, higher offense. 76CalA 558, 244P1086.

SOIL

507-5½-New. Face or surface of earth or ground. 12CustA110.

SOLD

508-14 **In stock subscription agreement,** "sold" means contracted for and not necessarily completely paid for. 36 Wyo 413, 256P84.

SOLE

509-20½-New. Single; separate; opposite of aggregate. Black L. D. [quot TexCivA 275SW415, 419].
509-20⅓-New. Bottom of shoe, boot, sandal, or slipper. 14CustA392.
509-21 **Used in connection** with other words. 90Fla620, 106S879; 150Md211, 132A635, 45ALR582.

SOLELY

510-23 33Wyo 240, 238P542. **Meaning "only."**–Man [1928] 4DomLR717.

SOLEMN

510-24 125Me529, 133A265.

SOLE PROXIMATE CAUSE

510-28½-New. **Synonymous with "proximate cause."** TexCivA 291SW 667.

SOLICIT

510-29 203 Iowa329, 210NW911.
510-30 203 Iowa329, 210NW911. **Other definitions.**–135Wash135, 237P3.

SOLIDARY OBLIGATION

511-35 **Discussed in:** 160La574, 107S 432.

SOLVENCY

512-45 **"Actuarial solvency"** as applied to fraternal beneficiary society. 338 Ill 441, 170NE735.
512-47½-New. **As applied to corporations,** means that assets equal liabilities, exclusive of capital stock. 136 Misc664, 240NYS502.

SON ASSAULT DEMESNE

514-63 TexCivA 283SW285.

SOUND

514-67 **Sound mind,** etc. 93Fla311, 112S80.

SPANGLE

517-90½-New. Small bit of brilliant tin or metal foil with holes for seamstress's needle. 15CustA165.

SPARK ARRESTER

517-92½-New. Name of various contrivances to prevent escape of sparks, as from smokestack. Webster Int. D. [quot 117 Or411, 244P313, 315].
517-92⅓-New. A spark catcher, as on locomotive. Standard D. [quot 117 Or 411, 244P313, 315].

SPECIAL

517-98 Utah 271P31, 35 [citCyc].
518-99 130Misc865, 226NYS1.

SPECIALIST

522-16½-New. Specialist is broker who remains at one post of exchange where particular stocks are dealt in and executes orders of other brokers for which he receives commission. 242NY 1, 150NE581.

SPECIAL PLACE

523-23½-New. Under statute, special place is particular place or point in given community such as named bank or other place "of meeting; and town or city is not such "special place." Tex CivA 271SW653.

SPECIALTY

524-35 110Conn413, 148A367.
525-42½-New. Award rendered by Workmen's Compensation Law, having its foundation and being created by statute, is specialty. 148Md309, 129A 654.

SPECIFIC PERFORMANCE

543-1 CalA 286P723; 21 OhA97, 152 NE771; 116 Or253, 240P886. **Specific performance** is equitable remedy governed by equitable principals. 33Ariz 128, 262P995.
543-2 99Fla1296, 128S821. **Right to specific performance** is founded in equity. 48SD602, 205NW661. **Bill to enjoin seller of business from violating his agreement** not to start new business does not seek merely nullification of particular acts done in violation of agreement, but specific performance of contract. 265Mass374, 164NE238.
543-3½-New. Equity has exclusive jurisdiction to decree specific performance. 208 Iowa625, 226NW144.
543-4 171Ark930, 287SW161 (agreement to bid certain amount at foreclosure sale is not enforceable as contract to purchase); 327 Ill 564, 158NE806; 207 Iowa306, 222NW838; 221Ky677, 299SW567; 245Mich541, 222NW703; 250Mich13, 229NW409; 134Misc598, 236NYS255; 229AppDiv450, 242NYS 396 (rights not existing); TexCivA 16 SW(2d)413. **Rescission of original contract** for sale of land, with agreement that payments made should be considered as rentals, has been held to terminate liability of vendor for specific performance of contract or for return of payments made thereunder. 9LaA 267, 120S113. **Abandoned agreement** is not specifically enforceable. Iowa 230 NW532.
543-5 335 Ill 46, 166NE458; 210Ky 429, 276SW115; 150SC493, 148SE554.
543-6 150Md575, 133A328; 101NJEq 442, 139A247; 244NY395, 155NE683; 6PaDist&Co 782.
543-7 234Ky169, 27SW(2d)694; 244 NY395, 155NE683; 6PaDist&Co 782; Va 153SE681.
544-11 181Ark919, 28SW(2d)1062; 229AppDiv450, 242NYS396; 48SD602, 205NW661; 70Utah124, 258P342, 64 ALR368.
544-12½-New. Remedy, to be adequate at law, must be as certain, complete, and efficient as specific performance. 13F(2d)6.
544-22 82NH449, 136A257.
544-26½-New. Plaintiff must show some equity running to himself to move court to grant specific performance. 245Mich452, 222NW713.
544-31½-New. Specific performance may be granted even though no damages from breach of contract are shown. 82NH449, 136A257.
544-33 13F(2d)311; 27Hawaii286 (renewal of option without consideration will not permit specific performance to be maintained on such option); 317 Ill 173, 147NE791; 338 Ill 11, 170NE10 (oral contract for conveyance of real estate); 153Md62, 137A477; 250Mich 515, 231NW60; 249NY183, 163NE554; 189NC610, 127SE706. **Sufficient consideration.**–91CalA621, 267P565; Mo 29 SW(2d)91.
547-37 322 Ill 489, 153NE677; 327 Ill 489, 158NE810; 249NY194, 163NE607 (1stcase).
547-38 85Colo 52, 273P644; 43 Okl ACR378.
548-39 252Mass379, 148NE132.
548-41 6F(2d)674; 14F(2d)776; 16 F(2d)339; 17F(2d)739; 19F(2d)311, 313 [citCyc]; 22F(2d)353; 34F(2d) 759; 38F(2d)444; 43F(2d)53; 81Colo 202, 254P764; 92Fla1081, 111S382; 93 Fla954, 113S100; 93Fla941, 113S415; 94Fla895, 114S666; 41 Ida783, 242P 793; 320 Ill 23, 150NE344; 321 Ill 462, 152NE210; 322 Ill 489, 153NE677; 325 Ill 589, 156NE793; 327 Ill 489, 158NE 810; 332 Ill 266, 163NE697; 337 Ill 271, 169NE222; 339 Ill 184, 171NE169; 339 Ill 371, 171NE510; 202 Iowa549, 210 NW593, 58ALR646; 206 Iowa21, 218 NW483; 207 Iowa306, 222NW838; Iowa 228NW562; Iowa 229NW744; Iowa 229NW832; 125Kan568, 264P 1038; 215Ky465, 284SW1094; 224Ky 56, 5SW(2d)271; 230Ky514, 20SW(2d) 278; 150Md575, 133A328; Md 148A 416; 258Mass383, 155NE193; 266Mass 550, 165NE873; Mass 167NE635; Mass 170NE567; Mass 171NE727; Mass 173 NE495; 235Mich693, 209NW812; 236 Mich391, 210NW233; 237Mich206, 211 NW643; 237Mich554, 212NW955; 238 Mich529, 213NW694; 239Mich348, 214 NW146; 240Mich475, 215NW302; 240 Mich295, 215NW311; 240Mich483, 215 NW315; 241Mich321, 217NW20; 246 Mich109, 224NW386; 247Mich614, 226 NW713; 249Mich633, 229NW602; 251 Mich215, 231NW617; 251Mich669, 232 NW209; 316Mo 333, 289SW939; 80 Mont159, 260P128, 132 [quotCyc]; 81 Mont44, 261P620; 83Mont317, 272P 522; 82NH193, 132A12; 102NJEq264, 140A406; 99NJEq788, 134A363; 101 NJEq479, 138A533; 101NJEq500, 138 A655; NJCh 147A581; NJCh 149A636 (1stcase); 243NY445, 154NE305; 130 Misc625, 225NYS106; 135Misc504, 240 NYS113; 21 OhA97, 152NE771; 139 Okl 35, 280P1075; 140 Okl 271, 282P 1104; 130 Or211, 279P939; 291Pa53, 139A606; 299Pa190, 149A193; 85Pa Super19; 50RI 409, 148A803; 150SC 493, 148SE554; 159Tenn126, 17SW(2d) 15; TexCivA 5SW(2d)1033; 70Utah 124, 258P342, 64ALR368; Va 152SE 343; 141Wash630, 251P854; 143Wash 302, 255P129; 199Wis503, 226NW950. But see 333 Ill 494, 165NE131, 65ALR1. **Where plaintiff's case is lacking in equity,** specific performance will be denied. 251Mich215, 231NW617.
549-42 237Mich557, 212NW955; 240 Mich483, 215NW315.
549-42½-New. Damages are preferable to specific performance as form of relief whenever they will serve purpose of indemnity. 147Va921, 133SE614.
549-43 16F(2d)339; 19F(2d)311; 38F

(2d)444; 215Ala388, 110S711; 92Fla 224, 109S306; 93Fla941, 113S415; 321 Ill462, 152NE210; 325 Ill 589, 156NE 793; 207 Iowa306, 222NW338; 219Ky 383, 293SW947; 240Mich295, 215NW 311; 247Mich614, 226NW713; 80Mont 159, 260P128, 132 [citCyc]; 82NH193, 132A12; 103NJEq121, 142A441; 243 NY445, 154NE305 (not matter of free will); 130 Or211, 279P939; 85PaSuper 19 (equitable principles govern); 70 Utah124, 258P342, 64ALR368; 101Vt 276, 143A382; 151Va913, 145SE311.

549-45½-New. Apprehended injury sufficient.-Equity will decree specific performance of express contracts when no actual injury has as yet been sustained but is only apprehended from peculiar relations of parties. 70CalA400, 233P 397.

550-46 318 Ill 266, 149NE245; 319 Ill 60, 149NE586 (specific performance to be granted as matter of right, where contract for sale of real estate is entered into without misunderstanding or misrepresentation); 320 Ill 23, 150NE344; 320 Ill 586, 151NE491; 321 Ill 462, 152 NE210; 327 Ill 489, 158NE810; 333 Ill 494, 165NE131, 65ALR1; 237 IllA156; Iowa 228NW562; 230Ky514, 20SW(2d) 278; 153Md501, 138A665; 233Mich425, 207NW16 (contract between principal and agent); 242Mich73, 218NW789; 21 OhA97, 152NE771; 151Va913, 145SE 311; 144Wash224, 257P627, 628 [quot Cyc]. **Party who has performed his part** of land contract is entitled to specific performance as matter of right. 329 Ill 555, 161NE91. **Specific performance of contract** will be decreed as matter of right and not as matter of favor, if contract is freely and voluntarily executed and its terms are clear and specific and it is free from objections. 332 Ill 266, 163NE697.

550-46½-New. Plaintiff has burden of showing right to specific performance. TexCivA 284SW228.

550-47 144Wash224, 257P627, 628 [quot Cyc].

550-48 320 Ill 23, 150NE344; 144Wash 224, 257P627, 628 [quotCyc].

550-49 320 Ill 23, 150NE344; 144Wash 224, 257P627, 628 [quotCyc].

550-50 144Wash224, 257P627, 628 [quotCyc].

550-51 144Wash224, 257P627, 628 [quotCyc].

550-52 144Wash224, 257P627, 628 [quotCyc].

550-53 219Ky383, 293SW947; Mont 226 P128, 132 [citCyc]; 144Wash224, 257P 627, 628 [quotCyc].

551-54 321 Ill 462, 152NE210 (evidence insufficient); 104WVa600, 140SE 689.

551-58 82NH193, 132A12.

551-62 34 OhA299, 170NE878.

551-64 16F(2d)339 (dictum); 162Ga 664, 135SE195; 318 Ill 266, 149NE245; 321 Ill 462, 152NE210; 329 Ill 555, 161 NE91; Iowa 229NW744; 238Mich529, 213NW694; 241Mich321, 217NW20; 249Mich633, 229NW602; 316Mo 333, 289 SW939; 80Mont159, 260P128, 132 [cit Cyc]; 82NH193, 132A12; 291Pa53, 139 A606.

552-65 101Vt276, 143A382.

552-67 Fla 129S767; GaA 155SE794; 30Hawaii313; 325 Ill 538, 156NE806; 339 Ill 340, 171NE263; Ill 173NE348; Ill 173NE477; 237 IllA156; 86 IndA484, 156NE589 (decree held warranted though purchaser had resold property); 87 IndA628, 160NE105, 107 [citCyc]; 121Kan3, 245P1017; 226Ky106, 10SW (2d)620; 148Md397, 129A504; 239Mich 81, 214NW160; 101NJEq297, 137A887; 102NJEq245, 140A319; 26 OhNPNS567; 5PaDist&Co 637; RI 142A535; 139SC 156, 137SE439; 142Wash411, 253P640. But see Ill 172NE32; 237Mich206, 211 NW643; 239Mich348, 214NW146; 226 AppDiv354, 235NYS523. **Specific performance of deed to require city authorities** as grantees to erect school building on land will not be enforced except in extraordinary case. 153Tenn408, 284SW 382. **Executory contracts held enforceable.**-TexCivA 8SW(2d)236; 142Wash 411, 253P640. **Adequate remedy at law** is no defense. 134Misc537, 235NYS257.

552-68 93Fla941, 113S415; 98Fla546, 124S816; 320 Ill 23, 150NE344; 320 Ill 586, 151NE491; 329 Ill 334, 160NE597; 334 Ill 566, 166NE56; 86 IndA484, 156 NE589, 592 [quotCyc]; 80Mont159, 260 P128. **Equity has duty** to enforce contracts concerning land. 101NJEq297, 137A887. **If no damages at all would lie,** specific performance will not lie. 12 PortoRicoFed21. **Where remedy if any is by redemption under foreclosure decree,** specific performance is not available. 245Mich452, 222NW713. **Relief to vendee.**-98Fla1103, 125S521.

552-69 317 Ill 173, 147NE791; 72Mont 318, 233P607. **Purchaser need not prove any special reason** for his desire to obtain land. 100NJEq493, 135A518.

552-69½-New. Suit for specific performance of contract for sale of land in Tennessee may be maintained in Alabama. 216Ala534, 113S613.

552-69⅓-New. Statute providing that decree shall operate as conveyance does not apply to land situated in another state. 216Ala534, 113S613.

552-69¼-New. Power to enforce specific performance of contract is vested solely in courts having equitable jurisdiction. 80Mont159, 260P128.

552-69⅙-New. Waiver of right.-Buyer of land, accepting deed without objection and with full knowledge that it did not conform to description in contract for sale, waives right to specific performance. 205Cal 703, 272P295.

552-69⅛-New. To enforce specific performance, land contract must be in writing complete in itself. 331 Ill 126, 162 NE141.

553-71 Contract giving authority to sell land as agent, agreeing to furnish sufficient title on sale for amount specified net, amounts to option and suit for its specific performance is not barred by statute of frauds on theory that additional memorandum necessary. 190NC 726, 130SE624.

553-72 317 Ill 173, 147NE791.

553-74 317 Ill 173, 147NE791.

553-76 89CalA485, 265P340; 153Va 110, 149SE417.

553-78½-New. option to purchase which has been accepted by purchasers; 217AppDiv150, 217NYS145.

553-78⅓-New. contract resulting from exercise of option to purchase contained in lease; 132Misc502, 230NYS262.

553-79½-New. contract arising out of exercise of option to purchase; 132Misc 502, 230NYS262.

553-82 Defectively executed lease is enforceable after occupancy thereunder as tenants. 32 OhA174, 166NE242.

553-82½-New. However, parol agreements within statute of frauds will not be enforced. TexCivA 294SW928.

553-82⅓-New. Contract to convey land to take effect on grantor's death in consideration for services is specifically enforceable. TexCivA 286SW624.

553-82¼-New. Option enforceable by either party where there has been acceptance on terms stated. 326 Ill 556, 158NE216.

553-82⅙-New. Oral contract provision without details rendered contract unenforceable. 107Conn181, 139A695; 59 ALR599.

553-82⅛-New. Where lease of real estate provided "that in case of a sale of the block by the lessors the lessee shall have the preference as a purchaser," lessors were not discharged by offering property to lessee at price which lessee declined to pay, but remained liable to lessee in specific performance suit on sale to third party at reduced price, which was not offered to lessee. 83NH 459, 144A67.

553-82½-New. Specific performance of contract to convey land for organizing corporation is not enforceable. CalA 288P801.

553-82⅛-New. Court of equity will specifically enforce grantee's covenant to keep open drainage ditches across land conveyed. 130 Or148, 279P546.

554-83 Can [1929] 3DomLR146 (agreement relating to use of stairway and passages in building).

554-84 See also 81NH535, 129A374.

554-89 148Md397, 129A504.

554-91 214Ala516, 108S257; CalA 287 P988; 160Ga321, 127SE872; 207 Iowa 505, 223NW182; 255Mass76, 151NE81, 45ALR1; 256Mass226, 152NE615; 160 Tenn351, 24SW(2d)839; Wis 230NW 140.

554-91½-New. In suit for specific performance to renew lease, equity has jurisdiction to find state of title in accordance to prior judgment at law, even though rendered after hearing in equity. 27Hawaii817.

554-94½-New. Title to infant's interest in land cannot be divested and transferred in suit for specific performance. Va 153SE705.

555-96 37F(2d)545; DelCh 141A697; 45 Ida217, 261P679; 239 IllA284; 236 Mich195, 210NW233; 239Mich348, 214 NW146; Mont 290P238(2dcase); 82NH 193, 132A12; NJCh 147A202; 151Va 913, 145SE311. **Contract for sale of automobile** will not be specifically enforced. 236Mich195, 210NW233. **Under Uniform Sales Act,** contract for sale of sugar beets defendant raised may be specifically enforced in equity. 243Mich 698, 220NW760. **Impossibility of replacing machine for long period of time** does not warrant specific performance. NJCh 147A202. **Contract to bequeath diamond and money for services** will not be specifically enforced, remedy at law being adequate. Oh 172NE275. **In absence of adequate remedy at law,** equity will assume jurisdiction for performance of contract for sale of personalty. Mont 290P238(2dcase). **Statutes.**-Man [1929] 4DomLR337.

555-97 215Ala388, 110S711.

555-3½-New. Contract for sale of sugar not specifically enforced. 163La 159, 111S661.

556-7 206 Iowa1105, 221NW816; NJ 151A600; 33NM136, 262P185. **Contract to repurchase note and mortgage** is not enforceable by specific performance. 206 Iowa1105, 221NW816.

556-10 170La547, 128S475.

556-12 49RI 476, 144A106.

556-18 45 Ida217, 261P679.

557-19 45 Ida217, 261P679; 157Md51, 145A378; 82NH193, 132A12 (unique service). **Where plaintiff has adequate remedy by replevin** specific performance cannot be had. 86Colo 441, 282P874.

557-21 101NJEq615, 138A876, 879 [quotCyc].

557-24 81NH535, 129A374 (production of garnet mine); 82NH193, 132A12.

558-25 22F(2d)38.

558-26 NJCh 129A253; 99NJEq254, 132A224.

558-27 22F(2d)353; 263Mass288, 160 NE892. But see IndA 169NE340.

559-29 13F(2d)6.

559-34 256Mass404, 152NE715; 81NH 535, 129A374.

560-37 87CalA654, 262P438; 87Colo 207, 286P109; Mont 290P238(2dcase); 214AppDiv530, 212NYS464; 222AppDiv 639, 227NYS408; 223AppDiv328, 227 NYS561; 154Wash34, 280P939. **The contract will be enforced** when, etc. 98 NJEq67, 129A755. **Purchasers of corporation stock and trust shares from dealer,** who subsequently acquired them from owners and pledged them to banks as security for his indebtedness, have been held not trust beneficiaries, but entitled to specified performance of contracts by dealer's administrator, though shares were not specific nor ascertained. 267Mass28, 165NE701.

562-38 DelCh 141A697.

562-39 153Md501, 138A665.

563-42 25F(2d)742; 81NH535, 129A 374 (damage irreparable).

564-47 45 Ida217, 261P679.

564-48 324 Ill 48, 154NE401; Tex CommnA 16SW(2d)259; 103WVa394, 137SE543. **Right to specific performance of realty conveyance** held not affected by fact that complainant had made no waiver of claim to personalty involved. 324 Ill 48, 154NE401. **Specific performance held not denied** when part of subject matter is personalty, and inability to compel title conveyance applies to personalty only. 324 Ill 48, 154NE401.

565-50 213Ala574, 105S659, 660 [cit Cyc]; NJSup 130A651 (part performance added reason supporting decree); 122 Or230, 257P801; 134SC54, 131SE 319; 153SC496, 151SE63. **Contract to**

buy railroad right of way will not be specifically enforced against railroad which had abandoned location of route before landowner had surrendered possession and before construction of railroad had been commenced. 21 **OhA**97, 152**NE**771.

566–54 98**Fla**546, 124**S**816.

567–57 98**NJEq**67, 129**A**755.

568–68 Fire or marine insurance.–148 **Miss**97, 114**S**145; 108**WVa**512, 152**SE**11 (oral contract).

569–73 98**NJEq**230, 130**A**463.

569–74 Mass 169**NE**891; 98**NJEq**474, 131**A**520 (where spouses already living apart); 134**Misc**250, 234**NYS**705.

569–74½–New. Where spouses are not already separated, equity will not enforce that part of separation agreement binding them to live apart. 98**NJEq** 474, 131**A**520.

569–74¾–New. Equity will not enforce maintenance provision of a separation agreement, unless parties are living apart at the time, or separation is to, and does, take place immediately following making of agreement. 98**NJEq** 474, 131**A**520.

569–80½–New. oral promise to abandon will contest; 126**Me**167, 136**A**814.

569–80¾–New. Suit held properly brought in equity.–126**Me**167, 136**A**814.

569–84½–New. Agreement to pay note of owner of property who executes bill of sale to defendant will be enforced against defendant and wife to whom property has been transferred with fraudulent intent known to wife. 70 **CalA**400, 233**P**397.

569–85½–New. Purchaser of specific property from grantor after general trust deed for benefit of creditors entitled to settlement of accounts by trustee and specific performance of contract if other assets sufficient to settle with creditors. 143**Va**79, 129**SE**269.

569–85¼–New. Contract to perform purely personal service cannot be enforced. 197**Cal** 577, 241**P**861.

569–85¼–New. Where multiplicity of suits may result, specific performance as to chattels may be had. 103**WVa**394, 137**SE**543.

569–85½–New. Agreement for informal adoption of child may be enforced. 99 **NJEq**39, 133**A**186.

569–85¾–New. Agreement as to distribution of estate may be enforced. 326 **Ill** 442, 158**NE**97.

569–85⅞–New. New agreement whereby plaintiff agrees to accept securities for decedent's estate is specifically enforceable because plaintiff could not recover money judgment. 239**Mich**348, 214**NW**146.

569–85⅞–New. Contract for sale of gas, where great loss would ensue and great expense was involved. 25**F(2d)**742.

569–85⅞–New. Contract to appoint coöperative marketing association agent of member. 33**NM**136, 262**P**185.

569–85$\frac{1}{10}$–New. Antenuptial contracts and contracts to dispose of property by will are enforced in equity on principles of resulting trusts. 131**Misc**208, 225**NYS**453.

569–85$\frac{1}{11}$–New. One who agrees to receive certain property in satisfaction of debt will be held to performance of his agreement in suit in equity. 101**Vt**276, 143**A**382.

569–85$\frac{1}{12}$–New. Court of equity will not directly enforce contract to render personal services by decree for specific performance, and it will not indirectly or negatively enforce such contract by injunction restraining violation thereof. 26**F(2d)**576.

569–85$\frac{1}{13}$–New. Bill seeking to enforce contract to alter, remodel, and repair building already constructed will not lie. 249 **IllA**39.

569–85$\frac{1}{14}$–New. Gas company losing customers on account of city's breach of contract leasing pipe line for use in supplying gas. 38**F(2d)**444.

569–85$\frac{1}{15}$–New. Agreement settling family disputes will be enforced. 337 **Ill** 520, 169**NE**324.

569–85$\frac{1}{16}$–New. Agreement between mortgagee and purchaser for release of mortgage and giving of another will not be enforced in purchaser's suit where there is adequate legal remedy. **Iowa** 229**NW**744.

569–85$\frac{1}{17}$–New. Railroad's contract to construct viaducts will be specifically enforced on account of inadequacy of legal remedies. **Mo** 25**SW(2d)**1055.

571–91 213**Ala**574, 105**S**659 (provision of mutual penalties does not affect right to specific performance); 215**Ala**161, 110 **S**10; 41 **Ida**783, 242**P**793. **If enforcement of penalty** would require payment of unreasonable damages, equity will require specific performance. 41 **Ida** 783, 242**P**793.

571–92 Contract held not to grant alternatives.–**DelCh** 147**A**305.

571–93 Under contract requiring purchaser to take title within ten days after decree fixing title or forfeit contract, withdrawal of vendor from his suit to clear title amounted to refusal to clear title, and filing of bill by purchaser for specific performance twenty-four days after entry of decree did not entitle purchaser to transfer of good title. 335 **Ill** 278, 167**NE**74.

571–94 82**Colo** 121, 257**P**355; 96**Fla** 379, 118**S**205; 101**NJEq**761, 139**A**174; 102**NJEq**245, 140**A**319; **NJ** 151**A**600; 98**NJEq**452, 131**A**104; 189**NC**434, 127 **SE**521, 525 [citCyc]; **TexCommnA** 280 **SW**561; 144**Wash**326, 258**P**4. But see **TexCivA** 20**SW(2d)**843. **Contract not unenforceable** because providing that part payment, if forfeited, shall be divided between vendor and his agent. 215**Ala**161, 110**S**10.

571–95½–New. Where party waived right to specific performance by agreeing to receive fixed amount for damages, he cannot subsequently ignore waiver. **TexCivA** 20**SW(2d)**843.

571–96 97**Fla**508, 121**S**553; 102**NJEq** 445, 141**A**174; 222**AppDiv**676, 225**NYS** 36; **TexCommnA** 280**SW**561; **TexCivA** 289**SW**1045. **To make contract an alternative one,** there must be something apart from provision for liquidated damages to show its payment is to be equivalent for performance. 98**NJEq** 452, 131**A**104.

571–96½–New. Where contract provides for protection of purchaser if conveyance cannot be procured through partition proceedings, it is not specifically enforceable. 325 **Ill** 429, 156**NE** 481.

572–97 TexCommnA 280**SW**561 (contract held to give purchaser such option). **Presumption.**–98**NJEq**452, 131**A** 104. **Contract held not to grant alternatives.**–98**NJEq**452, 131**A**104.

572–97½–New. Contract held not to grant alternatives at election of purchaser. **TexCivA** 20**SW(2d)**843.

572–98 42**F(2d)**74; 317 **Ill** 173, 147**NE** 791; 321 **Ill** 462, 152**NE**210; 4**LaA**191; 98**NJEq**359, 129**A**241; 101**NJEq**442, 139**A**247. **Mere pecuniary inability to fulfill a contract, etc. Mo** 25**SW(2d)** 1055.

572–99 43**F(2d)**53. But see **Mont** 290 **P**238(2dcase). Contra 324 **Ill** 48, 154 **NE**401.

572–1 92**Fla**929, 111**S**252; 98**NJEq**45, 129**A**708. **Provision in Florida, constitution** for charging in equity wife's separate estate does not authorize suit for specific performance against executor on contract for purchase of land signed by wife, she not being a free dealer. 93**Fla**258, 112**S**62. **That husband did not sign copy of contract for exchange of wife's property delivered to them,** does not preclude specific performance where he signed copy which plaintiff retained. 241**Mich**173, 216**NW** 376.

573–3 89**CalA**485, 265**P**340 (husband's contract to exchange community property in which wife did not join); 262 **Mass**501, 160**NE**340; 102**NJEq**264, 140 **A**406; **NJ** 146**A**194(1stcase). **Vendor's marriage subsequent to contract,** to sell land, being presumptively voluntary act, does not excuse performance by him. **Mass** 167**NE**292.

573–5 75**CalA**698, 243**P**889. **Demurrer to complaint.**–29**Hawaii**669, 678 [quot Cyc].

574–6 173**Ark**250, 292**SW**150; 96**CalA** 472, 274**P**581; 94**Fla**699, 114**S**508; 321 **Ill** 462, 152**NE**210; 331 **Ill** 225, 162**NE** 833; 220**MoA**1050, 279**SW**723; 223**App Div**494, 228**NYS**609; 33 **OhA**232, 168**NE** 857 (contract to sell property owned by minor children without order of court); **TexCivA** 282**SW**350; **Sask** [1930] 4**DomLR**276. But see 198**Wis** 445, 224**NW**473.

574–7 220**MoA**1050, 279**SW**723, 725 [quotCyc].

575–8 233**Mich**92, 206**NW**488; 220**MoA** 1050, 279**SW**723, 725 [quotCyc]. But see 124 **Or**543, 264**P**849.

575–9 220**MoA**1050, 279**SW**723, 725 [quotCyc].

575–9½–New. Vendee is estopped from specifically enforcing contract where he has participated with vendor in sale to third person. 237**Mich**257, 211**NW** 659.

575–10 15**DelCh**192, 133**A**695; 321 **Ill** 462, 152**NE**210; 331 **Ill** 225, 162**NE**833; **NS** [1929] 4**DomLR**813 (corporate stock); **Ont** [1925] 3**DomLR**825. **Lis pendens as notice.**–**Ont** [1925] 3**DomLR** 825.

575–11 94**Fla**895, 114**S**666; 86 **IndA** 632, 155**NE**712.

575–11½–New. Fact that at date of contract vendor had no interest in property is not of itself ground for denying purchaser specific performance. 69**CalA** 337, 231**P**361.

575–15 102**NJEq**466, 141**A**265.

576–17 321 **Ill** 462, 152**NE**210.

576–17½–New. Agreement to execute covenant not to convey to negroes will not be specifically enforced where conveyance has already been made. **Mo** 24 **SW(2d)**1017.

576–18 TexCivA 294**SW**928.

577–21 29**F(2d)**712; 30**F(2d)**137; 234 **IllA**335 (agency contract for yearly commissions of varying amount); 170**La**547, 128**S**475. **Decree for specific performance, which must necessarily be so general and vague** as to commit court to course of superintendence and direction, with many appeals thereto for interpretation, will be denied. 96**CalA**472, 274 **P**581.

577–22 19**F(2d)**311. **Court of equity will not ordinarily decree specific performance** when it cannot dispose of matter in controversy by decree capable of present performance. 26**F(2d)**576.

577–25 256**Mass**205, 152**NE**231; 245**NY** 605, 157**NE**876; 36 **OhA**31, 172**NE**689; 144**Wash**592, 258**P**486, 487 [citCJ]. But see 245**NY**535, 157**NE**847.

578–27 256**Mass**205, 152**NE**231. **Valuation of shares of business trust** for purpose of paying for deceased member's interest will be made by court, where required annual valuation has not been made. 26**Mass**205, 152**NE**231.

579–30 16**F(2d)**339 (dictum).

579–31 TexCivA 294**SW**928. **Where legal remedy is adequate,** agreement to enter partnership held not enforceable. **TexCivA** 294**SW**928.

579–34 234 **IllA**335.

581–46 43**F(2d)**53; 87**CalA**297, 261**P** 1115; 29 **OhA**141, 162**NE**724; 50 **RI** 409, 148**A**803 (sales contract).

581–48 CalA 292**P**136; **CalA** 292**P**175; 325 **Ill** 538, 156**NE**806. But see 116 **Or** 562, 241**P**1011.

581–50 Erratum.–**Eng.**–Holt v. Holt, 1 Ch. Cas. 190, etc., should read "But see" Holt v. Holt, 1 Ch. Cas. 190, etc.

583–54 118**Tex**154, 12**SW(2d)**546.

584–65 17**F(2d)**739; 41**F(2d)**4 (contract for sale of oil and gas in place); 215**Ala**433, 111**S**5; 219**Ala**172, 121**S**703. But see 82**NH**193, 132**A**12. **Intention of parties governs, where agreement provides for penalty,** as to whether such payment is in lieu of damages. 82 **NH**193, 132**A**12.

587–75 202**Cal** 656, 262**P**716; 76**CalA** 601, 245**P**439; 199**CalA**440, 249**P**862; 79**CalA**621, 250**P**577; 79**CalA**662, 251**P** 814; 96**CalA**472, 274**P**581; 15**DelCh**195, 134**A**99; 92**Fla**716, 110**S**128; 94**Fla** 1097, 115**S**498; 96**Fla**426, 118**S**208; 164 **Ga**628, 139**SE**339; 165**Ga**439, 141**SE**300; 325 **Ill** 589, 156**NE**793; 327 **Ill** 489, 158 **NE**810; 329 **Ill** 148, 160**NE**117; 329 **Ill** 424, 160**NE**762; 331 **Ill** 95, 162**NE**161; 331 **Ill** 126, 162**NE**141; 335 **Ill** 202, 167 **NE**90; 338 **Ill** 620, 170**NE**777; 203 **Iowa** 214, 212**NW**466; 206 **Iowa**21, 218**NW** 483; 124**Kan**652, 261**P**574; 165**La**266, 115**S**482; 153**Md**356, 138**A**242; 155**Md** 448, 142**A**522; 157**Md**196, 145**A**487; 172 **Minn**8, 214**NW**669; 140**Miss**769, 106**S** 513; 141**Miss**648, 107**S**277; 319**Mo** 290,

3SW(2d)701, 703 [quotCyc]; 320Mo 813, 7SW(2d)967; 115Nebr420, 213NW813; 52Nev364, 287P282; 98NJEq669, 130A 528; 99NJEq249, 131A687 ("regular agreement" to be drawn); 102NJEq243, 140A432; NJ 148A772; NJ 152A196; 99NJEq702, 133A779; 99NJEq183, 131 A895; 100NJEq150, 135A264; 101NJEq 500, 138A655; 102NJEq33, 139A712; 245NY628, 157NE886; 221AppDiv67, 222NYS659 (mere receipt); 127Misc571, 217NYS22; 131Misc340, 225NYS767; 135 Okl 38, 273P895; TexCivA 284SW 322; 143Va722, 129SE499 (letter purporting to be memorandum of agreement held not offer requiring acceptance but written memorandum of prior verbal agreement and enforceable); 147Va921, 133SE614; 152Va173, 146SE254; 195 Wis203, 217NW416; BC [1928] 4Dom LR902; NB [1928] 3DomLR632. **Contract held sufficiently definite and certain.**–98NJEq602, 131A585. **Essential requisite of all contracts that there must be a concluded contract,** etc. 115Nebr 420, 213NW813. **A contract to make a contract,** etc. 83NH459, 144A67. **Contract for sale of property, incomplete because of failure to indicate** upon what property second mortgage, vendor agreed to take back as part of purchase price, was to be given, and which was not supplied by any allegation in bill of complaint, has been held too incomplete and uncertain to be subject of specific performance. 155Md448, 142A522. **Contract deemed binding** when it appears to have been complete. 99NJEq 183, 131A895. **Contract for division of lands by heirs held specifically enforceable** even though it failed to take into account children of deceased brother. 171Ark168, 283SW360. **Specific performance of contract for division of lands between heirs held not defeated** because not containing agreement made by one heir that another have use of house on his tract for one year. 171Ark 168, 283SW360. **Preliminary agreement to execute "standard land contract"** cannot be specifically enforced without first determining form and terms of contract. 247Mich153, 225NW489. **Where agreement for sale of realty was incomplete** because acceptance was conditional, plaintiff may not have specific performance. 249NY97, 162NE597.

588–76 41F(2d)4; 199Cal 440, 249P 862; Cal 287P102; 76CalA601, 245P 439; 79CalA621, 250P577; 79CalA662, 251P814; 84CalA311, 257P905; 87CalA 297, 261P1115; 88CalA664, 264P256; 96CalA472, 274P581; CalA 292P136; 15 DelCh195, 134A99; 92Fla1110, 111S 386; 97Fla258, 120S354; 164Ga811, 139 SE716; 166Ga738, 144SE319; 168Ga 322, 147SE579; 37GaA220, 139SE583; 317 Ill 173, 147NE791; 320 Ill 597, 151 NE514 (oral contract to convey realty for services to be rendered); 323 Ill 440, 154NE197; 325 Ill 538, 156NE806; 325 Ill 589, 156NE793; 327 Ill 145, 158NE 364; 327 Ill 489, 158NE810; 331 Ill 126, 162NE141; 331 Ill 95, 162NE161; 332 Ill 422, 163NE823; 333 Ill 494, 165NE 131, 65ALR1; 335 Ill 46, 166NE458; 338 Ill 11, 170NE10 (oral contract for conveyance of real estate); 339 Ill 62, 170 NE705; 338 Ill 620, 170NE777; Ill 172 NE32; 203 Iowa214, 212NW466; 204 Iowa933, 216NW53; 206 Iowa21, 218 NW483; 207 Iowa103, 222NW569; Iowa 230NW532; 124Kan652, 261P574; 11 LaA84, 120S264; 1LaA362; 5LaA647; 153Md62, 137A477; 153Md356, 138A 242; 154Md581, 141A343; 155Md448, 142A522; 157Md196, 145A487; 158 Md13, 148A116; 232Mich233, 205 NW145; 237Mich557, 212NW955; 250 Mich13, 229NW409; 172Minn8, 214 NW669; 140Miss769, 106S513; 319 Mo 290, 3SW(2d)701; 320Mo 813, 7SW (2d)967; Mo 29SW(2d)91; 77Mont260, 250P823; 115Nebr420, 213NW813; 52 Nev364, 287P282; 99NJEq249, 131A 687; 102NJEq243, 140A432; 99NJEq 702, 133A779; 99NJEq183, 131A895; 100NJEq150, 135A264; 101NJEq500, 138A655; 101NJEq373, 139A486; NJCh 151A391; NJCh 152A1; 127Misc571, 217NYS22; 221AppDiv261, 223NYS157; 134Misc629, 235NYS589; 195NC165, 141 SE577; 118 Okl 103, 246P608; 140 Okl 271, 282P1104; 132 Or38, 284P562; 290 Pa237, 138A756; 150SC493, 148SE554; 147Va921, 133SE614; 151Va913, 145SE 311; 152Va173, 146SE254; 136Wash 74, 239P4 (agreement to exchange property subject to mortgage held sufficiently certain); Wash 291P469. **Time of performance.**–202Cal 665, 262P304; 283 Pa264, 129A62. **Where offeree accepts landowner's offer to sell land on either of two propositions,** there is no sufficient contract on which to base suit. 67Utah605, 248P1101. **Contracts held sufficiently certain and definite.**–193Wis 305, 214NW345; 193Wis419, 214NW 340. **Denial of specific performance of contract not sufficiently definite** held proper. 115Nebr420, 213NW813. **Land contract** held too uncertain for specific performance. 100NJEq150, 135A264. **Memorandum held too vague.**–220App Div210, 221NYS187. **Specific performance denied** where contract lacked date for final settlement, time of possession, and method of conveyance. 203 Iowa 214, 212NW466. **Where, from language employed, doubt appears as to intention** of parties, court will not decree specific performance. 323 Ill 440, 154NE197. **Where writing is so uncertain as to require incompetent evidence to make it certain,** it will not be specifically enforced. 79CalA621, 250P577. **Contract held not uncertain.**–102NJEq250, 140A 290. **Contract held enforceable.**–176Ark 315, 3SW(2d)964. **Agreement as to inventions and patents.**–30F(2d)139. **Contract for transfer of land has** been held not so ambiguous and uncertain as to bar specific performance under statute, notwithstanding provision as to obtaining from third person extension of mortgage. 94CalA180, 270P744. **Contract held too uncertain.**–332 Ill 266, 163 NE697. **Extrinsic evidence.**–247Mich153, 225NW489; NJCh 146A200. **Indefinite terms cannot be made definite** through forced or strained construction. 31F(2d) 188. **Agreement to execute irrevocable reciprocal wills.**–132 Or185, 282P241. **Equity will not read into contract** conditions so as to make it enforceable by affirmative decree. 50RI409, 148A803.

588–76½–New. Estoppel to assert uncertainty.–Where purchaser himself or by his agent prepared memorandum of contract, he cannot thereafter take advantage of omission from contract or uncertainty arising therefrom. 98NJEq 602, 131A585.

588–76½–New. Character of deed.–Contract not stating character of deed by which title is to be conveyed is insufficient. 99NJEq183, 131A895.

590–77 89CalA75, 264P341; 325 Ill 589, 156NE793. **Contract held sufficiently certain.**–334 Ill 566, 166NE56; 247Mich 153, 225NW489; 99NJEq657, 134A173. But see NJCh 147A581.

590–78 30F(2d)137; 167Ga710, 146SE 478; 168Ga322, 147SE579; 331 Ill 95, 162NE161; 332 Ill 266, 163NE697; 148 Md354, 129A366; 247Mich153, 225NW 489; 151Va913, 145SE311. **Contract held not ambiguous** so as to preclude decree for specific performance. 52Nev 364, 287P282. **Whether contract is ambiguous** must be construed in light of situation existing when contract was executed. 52Nev364, 287P282.

590–79 317 Ill 173, 147NE791; Mass 167NE286 (negotiations for issuance of stock held too indefinite and vague); 221AppDiv261, 223NYS157.

590–80 69CalA337, 231P361; 201 Iowa 788, 208NW283 (option to purchase contained in lease held specifically enforceable, though certain provisions usually contained in contracts of sale were not included and right to enter into additional agreements was reserved); 263 Mass288, 160NE892; 239Mich348, 214 NW146; 99NJEq702, 133A779.

590–81 92Fla1110, 111S386; 324 Ill 77, 154NE426; 337 Ill 271, 169NE222; 148 Md354, 129A366; 232Mich233, 205NW 145; 81NH535, 129A374; 99NJEq702, 133A779; 101NJEq373, 139A486; Tex CivA 281SW339 (preference right to purchase contained in lease); 152Va173, 146SE254; 136Wash74, 239P4. **Contract held sufficiently certain** to authorize specific performance. 171Ark168, 283SW360; 201Cal 605, 258P85. **What is reasonable in any case** depends on subject matter and purpose of agreement, situation and relation of parties, and circumstances under which agreement was made. 92Fla1110, 111S386. **Where contract called for warranty deed on part of some one whose name did not appear in contract,** and there was nothing to show that vendors were to sign deed, complainant was held not entitled to specific performance. 323 Ill 440, 154NE197. **Written agreement which does not purport to give absolute right without further negotiations thereon** held not specifically enforceable. 324 Ill 77, 154NE426. **General covenant to renew lease** is sufficiently certain. 86 CalA668, 261P488.

590–81½–New. Specific performance will not be granted where essentials of contract do not appear without aid of extrinsic proof. 85PaSuper19.

590–81¾–New. Memorandum of contract for sale of real estate containing all facts except such as may be proved by law is sufficiently certain. 86 IndA 632, 155NE712.

591–82 216Ala265, 113S233; Or 254P 474. **Partially executed contract.**–31F (2d)27. **Where indefinite terms of oral contract have been performed by plaintiff to defendant's satisfaction** specific performance may be granted. 140 Okl 271, 282P1104.

591–83 215Ala499, 111S231 (description held sufficiently definite); 168Ark713, 271SW345 (denying specific performance since description or identification insufficient); 170Ark908, 281SW671; 199Cal 440, 249P862; 90CalA625, 266P367; 89 Fla321, 104S583; 92Fla560, 109S580; 93Fla954, 113S100; 94Fla159, 113S685; 94Fla1201, 115S512; 96Fla426, 118S 208; 160Ga550, 128SE751 (implied that land in city shown in heading of contract in absence of proof to contrary); 164Ga706, 139SE337; 165Ga439, 141SE 300; 317 Ill 173, 147NE791; 326 Ill 556, 158NE216; 327 Ill 564, 158NE806; 336 Ill 297, 168NE305; Ill 173NE162; 162 La319, 110S489, 492 [quotCyc]; 153Md 62, 137A477, 478 [quotCyc]; 153Md 685, 139A559; Mo 286SW95, 98 [quot Cyc]; 98NJEq602, 131A585; 290Pa 237, 138A756; 143Va722, 129SE499, 502 [quotCyc]. **Description uncertain.**–168 Ark713, 271SW345 ("your holdings"); 95CalA117, 272P614; 91Fla454, 107S 631; Ill 173NE162; 162La319, 110S 489; 195NC165, 141SE577; 151Wash 529, 276P564. **No description at all.**–168Ark713, 271SW345; 195Wis203, 217 NW416. **Where the uncertainty is patent,** etc. 89Fla321, 104S583; 195NC 165, 141SE577. **Surrounding circumstances,** etc. 86 IndA632, 155NE712. **Description sufficiently definite.**–85Mont 389, 278P836; 143Va722, 129SE499. **Description held sufficient.**–201Cal 605, 258P85; 164Ga706, 139SE337; 166Ga 62, 143SE570; 329 Ill 334, 160NE597; NJCh 147A377; 139SC156, 137SE439; TexCivA 294SW938. **Erroneous description.**–TexCommnA 289SW993. **Where ambiguity is latent,** extrinsic evidence is competent to aid description. 195NC 165, 141SE577. **Contract need not describe land so minutely as to render resort to parol evidence unnecessary.**–195 NC165, 141SE577.

592–84 143Va722, 129SE499.

592–85 169Ga192, 149SE873; 162La 319, 110S489, 492 [quotCyc].

592–86 92Fla716, 110S128; 162La319, 110S489, 492 [quotCyc].

593–88 93Fla194, 111S511; 336 Ill 297, 168NE305; 89 IndA700, 168NE25.

593–91 153Md685, 139A559. **Description of land above water level** of proposed maximum capacity of basin and above strip one hundred feet wide around it held sufficient. TexCivA 290 SW239.

593–93 327 Ill 145, 158NE364; Tex CivA 294SW938. **By number of lot and block,** etc. 97Fla503, 121S560(2dcase).

594–99 144Wash224, 257P627.

595–4 96Fla426, 118S208; 165Ga439, 141SE300; 85Mont389, 278P836. **Down money paid by vendee.**–85PaSuper19. **Plaintiff purchasing from cotenant** believing him sole owner is not entitled to specific performance by heirs of other cotenants and those claiming under him. 212Ala667, 103S874.

595–4½–New. Wife of vendor.–Fact that wife of vendor is not named as con-

tracting party does not render contract ineffective where she signed and sealed same, knowing of its character; 284Pa508, 131A480.

595–4½–New. and failure of wife formally to acknowledge instrument is also immaterial. 284Pa508, 131A480 (statute).

596–5 22F(2d)353; 199Cal440, 249P862; 90CalA625, 266P367; 15DelCh195, 134A99; 165Ga439, 141SE300; 327Ill145, 158NE364; 335Ill46, 166NE458; 11LaA84, 120S264; 141Miss648, 107S277; 83NH459, 144A67; 100NJEq285, 134A840; 99NJEq657, 134A173; 222AppDiv825, 227NYS34; 127Misc571, 217NYS22 (terms to be agreed upon); 133Or300, 289P497; 151Va913, 145SE311; 152Va173, 146SE254; BC [1928] 4DomLR790. But see 133Or300, 289P497. **"Assumption of loan $9500,"** construed with context of instrument, too indefinite to identify particular loan and insufficient to authorize specific performance. 161Ga965, 132SE385. **Contracts construed.**–161Ga965, 132SE385.

596–6 97Fla503, 121S560(2dcase); 161Ga965, 132SE385; 165Ga439, 141SE300; 244Mich267, 221NW171; 83NH459, 144A67; 50SD332, 210NW153 (conflicting statements not invalidating contract). **Alternative provision for payment.**–157Md196, 145A487. **Contract giving lessee refusal to purchase.**–16F(2d)175; 83NH459, 144A67. **Previous uncertainty cured.**–152Va173, 146SE254. **Subsequent parol agreement to complete terms.**–152Va173, 146SE254.

596–7 62OntL257, [1928] 3DomLR64. **An agreement to renew a lease,** etc. 132Or38, 284P562. **Method of determining rent** is not of essence of contract giving option to renew lease on same terms except that rent shall be reasonable. 132Or38, 284P562.

596–8 Unfairness of contract must be determined as of time of making contract. 22F(2d)353.

597–9 41Ida547, 240P593, 597 [quot Cyc]; 333Ill321, 164NE671; TexCivA28SW(2d)1095. But see 199Cal440, 249P862; 203Iowa214, 212NW466; 283Pa264, 129A62. **In Missouri.**–320Mo813, 7SW(2d)967. **Filing specific performance suit** is waiver of uncertain provision regarding time of payment. Tex CivA 28SW(2d)1095.

597–10 94Fla1201, 115S512; 319Mo290, 3SW(2d)701, 703 [quotCyc]; 320Mo813, 7SW967.

597–11 Too indefinite, etc. 168Ga322, 147SE579.

598–12 335Ill202, 167NE90. **Agreement sufficiently certain.**–217Ky830, 290SW667; 50SD332, 210NW153.

598–12½–New. Details of mortgage omitted.–Where agreement recites balance is to be secured by second mortgage but contains nothing to indicate amount, term, or rate of interest of first mortgage, or whether of record or to be executed, the uncertainty is fatal. 99NJEq249, 131A687.

598–13 Rate of interest need not be named, legal rate being applicable. 216Ala265, 113S233.

598–13½–New. Default in payment of interest and taxes.–99NJEq183, 131A895.

598–14 Sufficiently certain.–130Misc891, 224NYS622.

599–16 107WVa576, 149SE672.

600–19 197Cal577, 241P861; 73CalA678, 239P92; 234IllA335; 134Misc629, 235NYS589.

600–21 95CalA352, 272P805; 320Ill23, 150NE344; 339Ill171, 171NE169; 206Iowa1208, 218NW506; 224Ky56, 5SW(2d)271; 167La67, 118S694; 149Md336, 131A568 (misrepresentation or misdescription); Mass 167NE635; Mass 171NE727; 243NY445, 154NE305; 293Pa529, 143A197; 150SC493, 148SE554; 151Va913, 145SE311. **Contention that, as plaintiff had informed defendants of book and page where lease was recorded** in registry of deeds, defendants could have made examination of its provisions, so that there was no misrepresentation because of previous misstatements by plaintiff's representative, could not be sustained. 266Mass550, 165NE873. **Equity will not specifically enforce contract for sale of land,** whether just or unjust, if unfairly obtained. 293Pa529, 143A197. **Fraud of defendant's agent.**–88PaSuper516. **If husband knew that marriage ceremony was void** and misinformed wife concerning it, misconduct would nevertheless not affect supposed husband's daughter, seeking to enforce oral agreement between herself and supposed husband and wife, which was valid on account of nullity of marriage. 264Mass166, 162NE300. **Misrepresentation by vendor.**–243NY445, 154NE305. **Misrepresentation by lessee** as to legal meaning of option clause. 320Ill23, 150NE344. **Misrepresentations by vendee.**–Mass 173NE495; 199Wis503, 226NW950 (third person buying for plaintiff knowing defendant did not want to sell to plaintiff).

600–22 Sufficiency of evidence.–81Colo202, 254P764.

600–22½–New. Equity will not decree specific performance of a contract unless it is strictly equitable and free from trickery and deception on part of one seeking to enforce it. 90Fla234, 107S175.

600–22½–New. Agreement must be bona fide. 158Md13, 148A116.

601–26 Intention to defraud is not necessary.–206Iowa1208, 218NW506.

602–27 173Ark583, 294SW12; 149Md336, 131A568. But see Mass 171NE727. **Alleged fraudulent payment by plaintiff to third person of sum of money, in order to secure contract** and induce defendant to execute same, did not relieve vendor of liability to convey, where evidence showed that vendor did not rely on third person in making contract, was in no way prejudiced thereby, and would obtain full price fixed by him under contract. Mich 244NW322.

602–29 149Md336, 131A568.

603–32 47RI441, 133A805.

604–39 205Cal703, 272P295; 339Ill184, 171NE169; 339Ill371, 171NE510; 150SC493, 148SE554; 151Va913, 145SE311. **Filing of bill** for specific performance satisfies requirement for mutuality of obligation. NJSup 140A244.

605–42 320Ill23, 150NE344.

605–43 238Mich52, 213NW175.

606–45 233Mich210, 206NW351 (misapprehension of wife as to purport of option to purchase lands in which she had inchoate right of dower).

606–46 233Mich210, 206NW351; 240Mich295, 215NW311.

607–47 192Wis218, 212NW275. **Mistake of law may produce situation appealing to chancellor's conscience.**–192Wis218, 212NW275.

608–52 176Minn324, 223NW612.

608–54 NJ 152A196.

609–63 206Cal282, 274P336; 333Ill31, 164NE194; Ill 172NE32; Iowa 228NW562; 240Mich483, 215NW315; 283Pa476, 129A565. See also Iowa 229NW199.

609–64 43F(2d)53; 81Colo202, 254P764; 329Ill334, 160NE597; 237IllA156; 205Iowa657, 216NW60; 240Mich483, 215NW315; NJCh 148A630; 299Pa190, 149A193; 88PaSuper516; TexCivA278SW466. See also 13F(2d)932. **Consideration adequate.**–Cal 289P165; 81Colo202, 254P764; 319Mo930, 5SW(2d)636; TexCivA 278SW466.

611–65 43F(2d)53.

611–66 But see 100CalA731, 281P76. **In California,** etc. 88CalA664, 264P256; 101CalA290, 281P630; CalA 281P1043. **Consideration for option.**–206Cal282, 274P336.

611–66½–New. Value of land at date of agreement of sale is to be considered when value is considered at all. 240Mich295, 215NW311.

611–66½–New. Assumption of mortgage as part of consideration.–Where there is no agreement that mortgage shall remain after settlement and be assumed by purchaser, fact that mortgagee will not permit it to so remain is no bar to specific performance against purchaser. 98NJEq602, 131A585.

611–67 NJCh 130A651. **Contract of residuary devisees** who hold subject to executor's power of sale will not be specifically enforced where plaintiff's price had previously been refused by executor and executor had contracted to sell to another at higher price. 321Ill266, 151NE893. **Inadequacy of price, improvidence, surprise, and mere hardship combined** are insufficient to justify refusal to enforce contract. 88PaSuper516.

611–69 Iowa 228NW562.

611–71 32OhA84, 167NE607.

612–74 7F(2d)885 [citCyc]; 43F(2d)53; 215Ala388, 110S711; 218Ala195, 118S379; 15DelCh112, 132A139; 92Fla1110, 111S386 (must be equitable); 317Ill173, 147NE791; 321Ill266, 151NE893; 339Ill184, 171NE169; 339Ill371, 171NE510; Ill 172NE736; Ill 173NE348; 205Iowa542, 218NW255, 58ALR153; Iowa 229NW249; 130Kan85, 285P584; 222Ky443, 1SW(2d)540; 224Ky56, 5SW(2d)271; Mass 171NE727; Mass 173NE495; 238Mich529, 213NW694; 241Mich321, 217NW20; 249Mich633, 229NW602; 77Mont260, 250P823; 249NY277, 164NE98; 299Pa190, 149A193; 48Philippine580; 151Va913, 145SE311; 104WVa600, 140SE689. See also 94CalA180, 270P744. **Agreements held unfair and unreasonable.**–15DelCh112, 132A139. **Agreements held not unfair or unreasonable.**–219Ala186, 121S731; Cal 289P165; 329Ill334, 160NE597; 205Iowa657, 216NW60; 205Iowa687, 216NW679; 244Mich267, 221NW171; 176Minn324, 223NW612; 224AppDiv252, 229NYS725. **As against claim that contract was inequitable,** it is subject to specific performance. 333Ill321, 164NE671. **Enforcement** of retiring partner's covenant to refrain from competing would not be denied on ground of hardship. 101NJEq170, 137A645. **Harsh, oppressive, and inequitable contracts** will not be specifically enforced. 219Ala186, 121S731. **If moral coercion produces contract, if it is executed under practical compulsion,** or if one party acts unfairly and the other yields to pressure of circumstances, equity will refuse specific performance, even though in law contract would be enforced. 249NY277, 164NE98. **Unfairness or oppression.**–15DelCh112, 132A139. **Consideration adequate.**–Md 150A867. **Overreaching,** not sufficient because of its degree to prevent specific performance, may, with other conditions, be enough to prevent such relief. Iowa 228NW562. **Owner of lot being aware of underground watercourse** and purchasers being ignorant thereof, specific performance will not be decreed. 252NY236, 169NE289.

612–74½–New. Agreement to litigate.–Equity will not compel party to litigate cause which such party has, since filing of the suit, become convinced is unfounded notwithstanding contract for which he has received part consideration to litigate and deliver property which it is expected will be adjudged. 252Mass379, 148NE132.

613–75 153Md62, 137A477. **Contract must be perfectly fair in all its parts.** 151Va913, 145SE311.

613–75½–New. Equity will enforce fair and open contracts between adults. 126Me167, 136A814.

613–75½–New. Agreement must be fair and reasonable. 158Md13, 148A116.

614–83 Defendant cannot refuse to perform because of refusal of purchaser to pay other indebtedness. 213Ala150, 104S323.

614–84 Alta [1927] 1DomLR472; Sask [1927] 1DomLR448. **Facts held not sufficient as defense.**–85PaSuper19.

615–86 Mass 167NE635; 238Mich529, 213NW694; 241Mich321, 217NW20. But see 243Mich618, 220NW670.

615–87 238Mich52, 213NW175; 151Va913, 145SE311; 199Wis503, 226NW950.

616–89 29F(2d)712; 93CalA516, 269P751; 162Ga757, 134SE620; 316Ill318, 147NE266, 38ALR1151; 339Ill340, 171NE263; 222Ky443, 1SW(2d)540; LaA124S687 (that it would be expensive for defendant specifically to perform is no defense); 154Md588, 141A337; NJSup 130A651 (change in conditions resulting in financial inability not defense). **Specific performance not denied** where promisor is dead, but death was in con-

templation of parties. 162Ga757, 134SE 620.

617-90 29F(2d)712; Cal 287P102; 329 Ill 334, 160NE597; 335 Ill 524, 167 NE864; Ill 173NE477; 240Mich295, 215NW311; 250Mich13, 229NW409; Mich 232NW715; 134SC54, 131SE319. But see 13F(2d)311.

617-90½-New. Dilapidation during delay caused by defendant.-Where defendant delays performance because he contends title is defective, dilapidation of premises during such delay is no defense to specific performance where he had ample time to search records which disclosed perfect title. 99NJEq359, 131 A891.

617-91 130Misc721, 224NYS349.

618-92 But see 230Ky514, 20SW(2d) 278. **Privileged communication.**-27Hawaii817.

618-92½-New. That purchaser was indebted to trustee does not prevent specific performance. 230Ky514, 20SW(2d) 278.

618-94 323 Ill 73, 153NE735. **Specific performance decreed.**-230Ky514, 20 SW(2d)278.

619-96 102NJEq371, 140A795.

619-97½-New. Fraud of defendant on codefendant.-Husband sued with his wife for performance of option to purchase cannot invoke his own deceit inducing his wife to join in signing option. 233Mich210, 206NW351.

619-2 99Fla1296, 128S821; Iowa 229 NW744. **Specific performance denied** when it will be prejudicial to rights of third person. 215Ala388, 110S711. **Third person may not be deprived of rights** not derived from either party to contract. 316Mo 333, 289SW939.

620-3 34F(2d)759; 243Mich698, 220 NW760.

620-5 35F(2d)609.

621-9 219Ala186, 121S731; Cal 287P 102; CalA 285P724; CalA 286P449; CalA 288P801; CalA 292P136; 333 Ill 31, 164NE194; 339 Ill 62, 170NE705; 206 Iowa21, 218NW483; 158Md13, 148A 116; 238Mich529, 213NW694; 250Mich 13, 229NW409; 250Mich515, 231NW60; 83Mont317, 272P522; 115Nebr420, 213 NW813; NJCh 151A391; 135 Okl 38, 273P895; TexCivA 294SW938, 939 [cit Cyc]; 151Va913, 145SE311; Va 153 SE705. **Mutuality, originally lacking in contract, afterward supplied,** is sufficient to support suit for specific performance, if existing at time suit is begun. 101Vt276, 143A382.

621-11 TexCivA 294SW938, 939 [cit Cyc].

622-17 127Misc164, 215NYS322 (mutual obligations necessary); 133 Or300, 289P497; Va 153SE705 (mutuality of obligation necessary). **Mutual promises.**-TexCivA 5SW(2d)529; 193Wis350, 214NW349, 53ALR281. **Agreement as to inventions** lacking in mutuality. 14 F(2d)776.

622-18 CalA 285P724. But see 247 Mich614, 226NW713.

622-18½-New. Joint contract, not enforceable against minor defendants, cannot be specifically enforced against any defendant. 87Colo 301, 287P284.

622-19 13F(2d)311; 19F(2d)311; 213 Ala574, 105S659; Cal 287P102; 73CalA 678, 239P92; 92CalA308, 268P404; CalA 288P801; CalA 292P175; 325 Ill 538, 156NE806; 335 Ill 33, 166NE541; 335 Ill 524, 167NE864; Md 148A416; 247Mich614, 226NW713; Mo 258SW(2d) 1055; 83Mont317, 272P522; 103NJEq 430, 143A550; Or 257P766; 133 Or300, 289P497; TexCivA 280SW331 (mutuality shown); TexCivA 294SW938, 939 [citCyc]; TexCivA 17SW(2d)106; 67 Utah605, 248P1101; 70Utah124, 258P 342, 64ALR368; 151Va913, 145SE311; Wash 270P1032; 100WVa559, 131SE 253, 262 [citCyc]. See also 197Cal 577, 241P861. But see DelCh 147A305; NJCh 147A505; 215AppDiv371, 214NYS 91. **Injunction** properly granted against member of association from selling his farm products to others than association where jurisdiction reserved to dissolve injunction should plaintiff fail to perform. 116 Or562, 241P1011. **Distinction defined between vendor who is stranger** to title and one who holds imperfect or encumbered title. 103NJEq 430, 143A550. **Mutuality not supplied** where request made authorizing investigation with right to withdraw if results are unsatisfactory. 19F(2d)311. **Trustee under will with power of sale** could have specific performance of contract to sell land descending to heirs. 99NJEq238, 132A206.

622-19½-New. Remedy by specific performance is mutual; that vendor in pursuing remedy, seeks in substance to enforce payment of specific sum of money, does not affect right. 94Fla704, 114S 513.

623-20 73CalA678, 239P92.

623-21 11F(2d)959; 16F(2d)339; 213 Ala574, 105S659, 660 [citCyc]; 152Md 146, 136A651; TexCivA 294SW938, 939 [citCyc]. **Mutuality of remedy** is satisfied if it exists when suit is filed. 19F (2d)311. **Tender of deed** held to supply "mutuality" lacking at inception of agreement. TexCivA 294SW938.

623-23 16F(2d)339; 88CalA319, 263P 305; 103NJEq412, 143A721; 99NJEq 490, 133A718; 85PaSuper19. See also TexCivA 294SW938. But see 97Fla508, 121S553.

624-25½-New. Joinder by wife of vendor.-Fact that wife of vendor plaintiff did not acknowledge contract does not preclude specific performance where she evidenced her willingness to convey by execution and acknowledgment of deed. 98NJEq602, 131A585.

624-26 82Colo 121, 257P355; 335 Ill 524, 167NE864; 86 IndA632, 155NE712; 153Md501, 138A665; 189NC434, 127SE 521. But see 6F(2d)674. **Contracts held bilateral.**-82Colo 121, 257P355.

625-27 19F(2d)311; 214Ala651, 108S 763, 764 [citCyc]; 215Ala120, 110S36; 206Cal 282, 274P336; 93Fla941, 113S 415; 335 Ill 524, 167NE864; 98NJEq 67, 129A755; 34NM111, 277P433(1st case); 133 Or300, 289P497; 85PaSuper 19; 151Va240, 144SE444; 152Va173, 146SE254. **Filing of bill for specific performance cannot be treated as written acceptance** where filed after expiration of period fixed by option for acceptance. 236Mich240, 210NW202. **Notice of exercise of option** may be served on member of trustee's household where it was immediately transferred to proper person. 102NJEq73, 139A709. **Where purchaser never legally obligates himself by written notice of acceptance** as provided in the option, he is not entitled to specific performance. 236Mich240, 210NW202. **Lessor cannot enforce option to purchase.**-Mont 288P1018.

626-28 CalA 292P136; CalA 292P175.

626-29 335 Ill 524, 167NE864 (agreement to repurchase).

626-30½-New. In contract in which one party agrees to sell and another to purchase property, provision that, if purchaser fails to consummate agreement, deposit is to be forfeited, does not show option in favor of purchaser and lack of mutuality. 69CalA337, 231P361.

626-30¾-New. Where lessee permitted violation of law resulting in forfeiture of part of lease, option to buy could not be enforced. 102NJEq73, 139A709.

628-34 72Mont318, 233P607, 612 [cit Cyc]; NJCh 147A505; TexCommnA 16 SW(2d)259. **Fact that vendor's wife is not bound to convey her dower interest** does render contract unenforceable for lack of mutuality, but it is sufficient that mutuality of remedy existed at time vendor's suit for specific performance was filed. 30F(2d)885.

629-40 169Ark1115, 278SW41, 42, 43 ALR114 [quotCyc]. **That one contracting to purchase land, of which infant was one of several joint owners, declined to accept deed tendered by special commissioners,** appointed in partition suit to which he was not party, because he had changed his mind, or fact that his refusal cannot be justified in ethics, is insufficient to warrant decree against him for specific performance. 152Va587, 147 SE206. **Unless infant has fully performed his obligation under contract,** specific performance will not ordinarily be allowed in his favor. 152Va587, 147 SE206.

629-41 169Ark1115, 278SW41, 42, 43 ALR114 [quotCyc]. **Where time is of essence, infant cannot have specific performance** on ratification after reaching majority. 169Ark1115, 278SW41, 43 ALR114.

629-42 11F(2d)958.

629-43 103WVa733, 138SE449. **Where married woman files good deed in escrow before decree,** there is mutuality of remedy entitling her to specific performance. 103WVa733, 138SE449.

629-43½-New. Fact that wife of vendor plaintiff did not acknowledge contract does not prevent mutuality where she evidenced willingness to convey by execution and acknowledgment of deed. 98 NJEq602, 131A585.

629-43¾-New. Married woman may become free dealer under statute, and if her contract to convey lands is executed as required by statutes, it may be specifically enforced, and she may maintain suit or action without joining her husband or next friend. 97Fla551, 121 S886(2dcase).

629-44 325 Ill 538, 156NE806; 29 OhA 141, 162NE724.

630-47 325 Ill 538, 156NE806; 70Utah 124, 258P342, 64ALR368. Contra 116 Or562, 241P1011.

631-48 73CalA678, 239P92.

631-49 219Ala186, 121S731; CalA 288 P801; 335 Ill 524, 167NE864; Mo 25 SW(2d)1055; NJCh 147A505; 20 OhA 400, 152NE394, 398 [quotCyc]; 48SD 470, 205NW29; 144Wash326, 258P4, 6 [citCyc]. But see 13F(2d)311. **Performance not sufficient** to entitle plaintiff to relief. CalA 288P801.

632-50 14F(2d)776, 778 [quotCyc]; TexCivA 284SW322. **Where land contract reserved such land** as vendor desired and was subsequently repudiated, held it could not be enforced. TexCivA 290 SW239.

632-51 321 Ill 877, 151NE877; 163La 1011, 113S357; 100NJEq147, 135A88; 101NJEq479, 138A533; NJCh 150A58; NJCh 152A161; 99NJEq243, 132A291; TexCivA 18W(2d)334, 336 [quotCyc].

633-54 252Mass513, 147NE837; 99 NJEq271, 132A487.

635-61 99NJEq243, 132A291.

635-62 Absence of reasonable doubt.-252Mass513, 147NE837.

636-63 100NJEq156, 135A329; 52ND 169, 201NW691 [quotCyc].

637-68 99NJEq243, 132A291.

638-70 But see 168Ga511, 148SE265.

639-76 168Ga511, 148SE265.

639-78 See also 252Mass513, 147NE837. **Reservation in other contract referred to.**-Alta [1925] 3DomLR329.

640-79 100NJEq147, 135A88.

641-87 15DelCh37, 131A142; 150Md 157, 132A595. **Title held sufficient.**-15 DelCh37, 131A142 (forty years). **Criterion in determining marketability.**-15 DelCh37, 131A142.

641-87½-New. F½. Waiver or Abandonment of Right.-Where vendee waives right to specific performance and elects to take damages for breach of contract, and vendor, relying thereon, sells property to third party, vendee is not entitled to specific performance. 99NJEq 48, 131A626.

641-87¾-New. To constitute such election, however, mere option, unaccepted by vendor, is insufficient; 99NJEq48, 131A626.

641-87¼-New. and where vendee merely makes offer to take land on reasonable abatement of purchase price, or his down money and stated sum for damages, and vendor does not accept same, there is an option, not an election, disentitling vendee to specific performance. 99NJEq48, 131A626.

641-87½-New. Offer by agent to perform will not prevent judgment for specific performance against principal where other party deals with principal directly. 83CalA441, 257P112.

641-87¾-New. Offer to compromise contract is not such offer of performance as will prevent judgment of specific performance. 83CalA441, 257P112.

642-89 245Mich541, 222NW703; 198 NC824, 153SE259(1stcase); Va 152SE 343.

642-89½-New. Courts may enforce specific performance of parol contracts notwithstanding statute of frauds, where there has been full or part performance on one side. 221MoA409, 282SW59.

642-89¾-New. Where legal remedies cannot restore plaintiff to original posi-

tion part performance will take oral contract out of statute and justify specific performance. Md 150A867.

642-90 164Ga628, 139SE339; 293Pa529, 143A197. **Part performance is essential** to take contract for sale of land out of statute of frauds. 199Cal 440, 249P862.

643-99½-New. Doctrine is creature of equity and is available in behalf of remedy of specific performance. Minn 232NW919.

644-3½-New. Parol agreement for sale of lands relied on must be certain and definite in its terms. 143Va90, 129SE248.

644-3½-New. Oral contract to devise is within part performance doctrine. 121Or432, 253P869.

644-3¼-New. Contract to devise is within doctrine of part performance. 83Mont214, 271P433.

644-3½-New. Triparty agreement, by which supposed husband after void marriage agreed to make will remembering wife and daughter, and wife agreed to convey him her property, though within terms of statute of frauds, was taken out of statute by full performance. 264Mass166, 162NE300.

644-3¾-New. Oral contract for sale of real property cannot be specifically enforced in absence of part performance thereof. 101CalA781, 282P528.

644-9 55AppDC330, 5F(2d)753; 164Ga628, 139SE339; 319Mo930, 5SW(2d)636; 72Mont318, 233P607, 609 [citCyc]; Va 153SE681. **Where there is standard for definitely measuring plaintiff's damages in money,** case is not taken out of operation of statute. 236Mich197, 210NW260.

645-10 Part performance sufficient to require specific performance involves such change in relation of parties that restoration to previous condition is impracticable, and refusal to go on and complete engagement would be virtual fraud. 335Ill46, 166NE458.

645-11 Alta [1930] 2DomLR567.

646-13 101CalA781, 282P528; 205Iowa687, 216NW679; 125Kan568, 573, 264P1038 [citCyc]; 100NJEq285, 134A840; NJCh 151A391; 121Or432, 253P869; 124Or574, 265P425; 147Va921, 133SE614; 149Va815, 141SE868; Va 153SE681.

647-20 317Ill173, 147NE791; 220MoA1050, 279SW723; 143Va90, 129SE248; 147Va921, 133SE614; 195Wis203, 217NW416; Alta [1930] 2DomLR567.

648-23 164Ga628, 139SE339; 236Mich197, 210NW260; 250Mich515, 231NW60.

650-33 88CalA105, 262P781; 101CalA781, 282P528; 121Or432, 253P869; 143Va884, 129SE727, 729 [citCyc]. **Contract to devise.**–121Or432, 253P869.

652-41 329Ill424, 160NE762.

652-47 164Ga706, 139SE337.

653-53 220MoA1050, 279SW723.

654-55½-New. Possession is not necessary element of performance.–236Mich197, 210NW260.

654-56 213Ala150, 104S323; 91Fla1059, 109S192; 159La1019, 106S550 (where defense was lack of written authority of defendant's agent); 221MoA409, 282SW59; 137Misc710, 244NYS293; 289Pa331, 137A455; 48RI33, 134A849 (sufficient to permit reformation of deed); 50SD463, 210NW663, 666 [cit Cyc]; Va 153SE681; 195Wis203, 217NW416. See also 222MoA524, 293SW476, 479 [citCyc].

656-57 329Ill424, 160NE762; 337Ill271, 169NE222 (possession without improvements does not entitle one to specific performance); 200Iowa1078, 205NW986; 155Md654, 142A508; Mass 169NE915; 240Mich454, 215NW389; 320Mo954, 8SW(2d)966; 72Mont318, 233P607, 611 [quotCyc].

657-58 214Ala143, 107S92; 240Mich408, 215NW305; 140Okl271, 282P1104; 48RI213, 136A767; TexCivA 283SW1109. **That making of permanent improvements was consideration to be paid** does not affect rule. 140Okl271, 282P1104.

658-59 335Ill46, 166NE458.

658-62 266Mass1, 164NE466. **Possession and planting of garden** is insufficient. 266Mass1, 164NE466.

659-75 100NJEq285, 134A840; 195Wis203, 217NW416.

662-80 Or 254P474.

664-87 72Mont318, 233P607, 611 [cit Cyc].

665-93 199Cal440, 249P862; 222MoA524, 293SW476, 479 [citCyc]; 195Wis203, 217NW416.

666-96 Partial change in possession between joint tenants is sufficient where sale is admitted and status of parties is so changed that it would work fraud or irremediable injury if equitable relief is denied. 143Va90, 129SE248.

666-98 Possession taken when owner was in hospital for insane pursuant to adjudication of insanity is not with express or implied consent of owner. SD 227NW566.

668-9 199Cal440, 249P862; 195Wis203, 217NW416.

669-16 240Mich454, 215NW389; 93Pa Super519.

670-17 325Ill559, 156NE754; 240Mich454, 215NW389 (improvements held valuable and permanent).

670-18 Utah 293P7.

671-27 TexCivA 283SW1109.

672-31 TexCivA 286SW624; 103WVa456, 137SE883 (services, possession, and improvements).

672-32 And see TexCivA 283SW1109.

672-33 55AppDC330, 5F(2d)753; Ida 288P167; Md 150A867; 236Mich197, 210NW260; 164Minn452, 205NW955; 83Mont214, 271P433; 149Va815, 141SE868; 195Wis203, 217NW416. **Test of enforceability** of parol agreement to convey or devise lands is whether during decedent's lifetime plaintiff could have prevented him from disposing as he saw proper. 55AppDC330, 5F(2d)753. **That promisee gave up occupation in another state at request of promisor** does not estop promisor or his heirs from asserting invalidity of parol contract to devise in consideration of services. 164Minn452, 205NW955. **Services as housekeeper** will not remove oral agreement to devise in consideration of such services from operation of statute of frauds. 124Or574, 265P425. **Services as farm hand or foreman** are not of such character as to authorize specific performance of oral contract to devise. 83Mont214, 271P433.

673-37 164Minn452, 205NW955.

673-39 27Hawaii457; 43Ida354, 253P849; 155Md654, 142A508; 236Mich197, 210NW260 (services such as are usually performed by child for parent); 164Minn452, 205NW955; 222MoA268, 296SW205. **Possession is not necessary element.**–236Mich197, 210NW260.

674-40 37F(2d)527; 178Ark549, 11SW(2d)456; 200Iowa1047, 205NW964; 205Iowa687, 216NW679; 232Mich664, 206NW500; 49SD442, 207NW449 (substantial performance renders contract enforceable). But see 30F(2d)5. **Evidence held sufficient.**–237Mich122, 211NW32.

674-41 Mo 274SW462; 137Misc717, 244NYS288.

674-41½-New. Where taken in connection with execution of document ineffectual, because of formal defects, such contract is enforceable. 99NJEq186, 131A634.

674-42 Nebr 231NW27.

676-47 See also Wash 291P469.

677-62 Or 254P474.

678-74 44OklACR235, 238 [quotCyc].

678-78 See also 166Ga738, 144SE319.

678-78½-New. Document ineffectual as will.–Execution of document by decedent pursuant to agreement to make will in favor of plaintiff in return for services, which is ineffectual as a will because of formal defects, is sufficient part performance to take agreement out of statute and entitle plaintiff to specific performance. 99NJEq186, 131A634.

678-78½-New. To enable one to invoke intervention of equity, existence of clear and definite contract to make mutual will must be alleged and proved, either by evidence of express agreement, or by unequivocal circumstances. 166Ga738, 144SE319.

679-79 121Kan529, 249P633.

680-91 91Fla900, 109S86; 95Fla952, 116S857; 156Md547, 144A774.

681-92 Lease—possession and improvements.–Or 254P474. **Possession, improvements, and payment.**–156Md547, 144A774.

681-94 176Ark303, 3SW(2d)342; 85CalA87, 258P969. **Parol gift of land not enforceable in equity.**–250Mich515, 231NW60.

681-95 164Ga96, 137SE833; NJCh 148A390.

681-97 176Ark303, 3SW(2d)342; 164Ga96, 137SE833.

683-98 176Ark303, 3SW(2d)342; 164Ga96, 137SE833.

683-99 176Ark303, 3SW(2d)342; 164Ga96, 137SE833; 198Ind393, 153NE768.

683-1 Utah 293P7 (in reliance on oral gift).

683-2 232Mich664, 206NW500.

684-7 195Wis203, 217NW416.

687-27 222MoA524, 293SW476, 479 [cit Cyc].

688-35 242Mich37, 217NW905.

688-39 319Mo930, 5SW(2d)636.

689-42 177Ark265, 6SW(2d)310; 76CalA601, 245P439; 163Ga755, 137SE57; 164Ga628, 139SE339; 27Hawaii457; 326Ill453, 158NE156; 200Iowa1047, 205NW964 (evidence insufficient to prove contract); 200Iowa1078, 205NW986; 203Iowa587, 213NW384 (contract for transfer of land in return for services); Me 149A833(2dcase); 237Mich278, 211NW629 (burden of establishing oral contract is on plaintiff); 100NJEq285, 134A840; 128Okl6, 261P136; 140Okl271, 282P1104; 37OklACR446; 134SC54, 131SE319; 195Wis203, 217NW416; Wis 229NW71 (agreement to convey easement). See also 103WVa463, 137SE892. **Evidence held sufficient.**–163Ga755, 137SE57; Minn 233NW20; 319Mo930, 5SW(2d)636; 320Mo954, 8SW(2d)966; 128Okl6, 261P136; 44OklACR235; 103WVa456, 137SE883. **Evidence held insufficient.**–177Ark265, 6SW(2d)310; 317Ill173, 147NE791; 203Iowa587, 213NW384; 237Mich278, 211NW629; 241Mich423, 216NW918; 70Utah19, 257P1046; Wis 229NW71. **Degree of certainty required is reasonable certainty** having regard to subject matter of contract. 134SC54, 131SE319. **More certainty is required than in law actions.**–70Utah19, 257P1046. **Parol agreement admitted by both parties with exception of one item** held sufficiently certain. 143Va90, 129SE248. **Parol evidence is necessarily admissible** in case of parol contract. 163Ga755, 137SE57.

690-43 Matters necessarily resting in parol and affecting title may be shown in suit for specific performance. TexCivA 28W(2d)485.

690-48 163Ga755, 137SE57; 164Ga628, 139SE339; 170Ga585, 154SE149; 322Ill169, 152NE479; Mo 274SW37; 320Mo954, 8SW(2d)966. **Evidence held insufficient.**–322Mo573, 16SW(2d)63. **Strong statements of rule.**–237Mich278, 211NW629 (parol contract must be proved "by a convincing preponderance of the evidence").

691-50½-New. Evidence held to show that minds of parties never met. 326Ill189, 157NE240.

691-50¾-New. In suit to enforce contract for sale of rice, plaintiff must prove contract. 174Ark1180, 295SW401.

691-51 288Pa98, 135A609.

691-52 77Colo370, 237P165.

691-53½-New. Evidence was held to show that correspondence for leasing of premises had not advanced beyond negotiatory stage. 131Misc340, 225NYS767.

691-53¾-New. Evidence held to show that offer of lease for twenty, twenty-five, or thirty years was not offer with option as to duration, but optional offer of one of terms named only. 131Misc340, 225NYS767.

691-54 329Ill148, 160NE117; 203Iowa587, 213NW384 (contract for transfer of land in return for services); 100NJEq285, 134A840; 128Okl6, 261P136; 37OklACR446; 121Or432, 253P869. **Evidence held sufficient.**–128Okl6, 261P136; 103WVa456, 137SE883. **Evidence held insufficient.**–203Iowa587, 213NW384; 195Wis203, 217NW416. **Irremediable injury which would follow failure to decree specific performance** held sufficiently established. 143Va90, 129SE248.

691-55 Utah 293P7.

692–57 40F(2d)948; 77Colo 370, 237P 165; Ill 148NE156; 205 Iowa687, 216 NW679; 207 Iowa103, 222NW569; Md 150A867; 232Mich664, 206NW500 [cit Cyc]; 168Minn426, 210NW284; 134 Okl 247, 273P255; 121 Or432, 253P869. **Evidence held sufficient.**–205 Iowa687, 216NW679; 121Kan93, 246P183; Md 150A867; 232Mich664, 206NW500; 168 Minn426, 210NW284; 311Mo 494, 279 SW38; 116Nebr789, 219NW142; 117 Okl 46, 245P641; Wash 289P36. **Evidence held insufficient.**–Ark 30SW(2d) 849; 77Colo 370, 237P165; 207 Iowa103, 222NW569; 168Minn426, 210NW284; 116Nebr789, 219NW142. **Contract must be clearly established.**–Ill 172NE32. **Mutual and reciprocal will is enforceable in equity.**–229AppDiv402, 242NYS165.

693–58 232Mich664, 206NW500; 99 NJEq657, 134A173.

693–59 203 Iowa1183, 212NW343 (equities considered). But see 205 Iowa687, 216NW679. **Evidence held to show** husband and wife made contract to dispose of combined estate. 99NJEq657, 134A 173.

693–59½–New. In action based on contract to devise, plaintiff after election to abandon adoption by deceased as additional ground of recovery cannot introduce evidence relating to adoption. 121 Kan93, 246P183.

693–60 19F(2d)56; 68CalA166, 228P 724; 321 Ill 442, 151NE877; 323 Ill 443, 154NE231; 324 Ill 367, 155NE296; 324 Ill 549, 155NE477; 325 Ill 559, 156NE 754; 327 Ill 406, 158NE692; 328 Ill 161, 159NE213; 328 Ill 193, 159NE220; 236 IllA187; Iowa 229NW744; Iowa 230 NW532; 159La981, 106S536 (purchaser who failed to make payments under contract); 159La1019, 106S550; 168La588, 122S859; 169La611, 125S732; 266Mass 366, 165NE402; 240Mich185, 215NW 408; 246Mich473, 224NW368; 168Minn 441, 210NW586 (specific performance granted); NJ 151A865; 100NJEq411, 136A186; NJCh 143A139; 128Misc118, 217NYS666; 134Misc623, 235NYS609; 189NC434, 127SE521; 116 Okl 260, 244P 410 (partial performance); 135 Okl 237, 275P341; 33PortoRico 136; TexCivA 271SW158, 161 [citCyc]; TexCivA 275 SW487; TexCivA 281SW299. **Compliance, in time and manner provided,** with all terms of contract must be shown by plaintiff. 333 Ill 494, 165NE131, 65ALR 1. **Main question, in suit for specific performance,** is whether complainant has made conscientious effort to comply honestly with contract. 333 Ill 629, 165NE 148. **Payment of portion of first year's rent** and agreement for transfer of realty for rentals to accrue is sufficient to warrant specific performance of ninety-nine-year lease. 98Fla59, 123S1. **Plaintiff must tender performance** of contract for sale of real estate. TexCivA 289SW436. **Purchaser who had refused tender of valid deed from grantor's agent** cannot maintain suit for specific performance. 128Misc118, 217NYS666. **Where plaintiff fails to perform,** specific performance will not be granted. 11LaA 197, 123S177.

693–62 106Conn484, 138A503; 327 Ill 406, 158NE692; 338 Ill 575, 170NE695; 236 IllA187; 201 Iowa561, 207NW610; 159La981, 106S536; 169La611, 125S 732; 250Mich86, 229NW589; 98NJEq 696, 130A518; 224AppDiv764, 229NYS 714; 33 OhA452, 169NE836; TexCivA 271SW158; 155Wash193, 283P699 (necessity of allegation). **Erroneous statement in contract as to due date of mortgage** on plaintiff's property held to prevent specific performance, in view of his inability to perform contract made. 267Mass327, 166NE765(2dcase).

693–62½–New. Plaintiff vendee, having given notice of exercise of option to purchase, cannot defeat decree for performance in favor of vendor by default in payment or tender. 168Minn62, 209NW 536.

693–62¼–New. Plaintiff has burden showing excuse for default. 19F(2d)56.

693–62¼–New. Vendor must be free from default in essential particulars to avail himself of purchaser's breach. 323Mo 1156, 20SW(2d)650 (rule refers only to claims affirmatively asserted by vendor and not to mere defenses set up by vendor in nature of bar).

694–64 213Ala574, 105S659 (no specific performance if vendor has no title); Ark 30SW(2d)219; 15DelCh37, 131A 142 (where title doubtful because of question of law or fact); 321 Ill 442, 151NE877; 164La175, 113S808; 13LaA 253, 126S534(2dcase); Mass 170NE567; NJCh 149A589; 130Misc721, 224NYS 349; 131Misc422, 226NYS255; 23 OhA 462, 155NE168; 144SC70, 142SE36; 48 SD602, 205NW661; TexCivA 271SW 158, 161 [citCyc]. **Owner of improved leasehold subject to payment of annual ground rent of one cent,** who conveyed same to her children subject to life estate in grantor, together with privilege to mortgage, sell, or otherwise dispose of or encumber, had such title as would entitle her to compel defendant to perform contract to purchase fee-simple estate subject to payment of stipulated ground rent. 157Md144, 145A369. **Title depending on presumption that court would direct verdict in favor of marketability** if question was before jury is not of such doubt as to justify refusal of specific performance. 15DelCh37, 131 A142. **Title held marketable; misdescription.**–98NJEq602, 131A585. **Vendor in default** because of inability to convey good title cannot recover payments advanced on encumbrances which vendee was to assume. 200 Iowa798, 205NW472.

695–66 See also NJCh 152A161. **Vendor's loss of title pending action of foreclosure of mortgage** which vendee had agreed to assume does not deprive vendor of right to specific performance where he was found by court to be able and willing to convey as agreed. 50 SD332, 210NW153.

695–66½–New. Decree requiring deeds from vendor and mortgagee foreclosing is proper where purchaser agreed to assume mortgage, 50SD332, 210NW153.

695–66⅓–New. though generally vendee is entitled to conveyance from his vendor and cannot be compelled to accept title from another. 50SD332, 210 NW153.

695–66¼–New. Title resting on adverse possession.–Though in cases where title of vendor rests on adverse possession, courts will grant relief with caution, 15DelCh37, 131A142.

695–66½–New. such fact alone is not sufficient to render title unmarketable, precluding specific performance; 15Del Ch37, 131A142.

695–66⅔–New. and where it appears that, if case was before jury, court would have no recourse but to instruct in favor of marketability, vendor is entitled to specific performance. 15DelCh 37, 131A142.

695–67 Kan 293P392; 229AppDiv593, 243NYS548.

696–69 130Misc721, 224NYS349.

696–70 198Cal 341, 244P1084; 237Mich 98, 211NW70 (merchantable title); 214 AppDiv640, 213NYS68 [citCyc] (purchaser not bound to take title with mortgage different from that contracted for). **The vendee cannot claim a better title than contract calls for.**–316 Ill 318, 147NE266, 38ALR1151.

697–72 168Ga511, 148SE265.

697–73 34 OhA299, 170NE878; 48SD 470, 205NW29.

697–73½–New. Implied terms of contract are not breached by purchaser moving into apartment without authority before time fixed for delivery of deed so as to destroy right to specific performance. 320 Ill 586, 151NE491.

697–73¼–New. In absence of breach going to essence of contract, it will be enforced. 320 Ill 586, 151NE491.

697–74 20F(2d)67; 325 Ill 559, 156NE 754; 327 Ill 254, 158NE442; 159La981, 106S536; 238Mich159, 213NW109; 237 Mich548, 213NW137; 251Mich215, 231 NW617; 168Minn269, 209NW889; 156 Miss142, 125S706; Mo 25SW(2d)1055; 115Nebr493, 213NW587; 100NJEq585, 135A796; 245NY616, 157NE881; 130 Misc625, 225NYS106; 136Misc384, 240 NYS76; 129 Okl 13, 263P109; 33Porto Rico 136; TexCivA 285SW874; 141 Wash496, 251P849; 143Wash302, 255P 129. **The burden of proof,** etc. 325 Ill 559, 156NE754. **Action in attachment** to recover deposit money on contract to buy land will preclude subsequent suit for specific performance. 98NJEq685, 130A527. **Failure to comply with terms of option contract** bars specific performance thereof. 237Mich548, 213NW137. **Performance not shown.**–77Colo 370, 237 P165. **That vendor's agent fraudulently allowed discounts to vendee on installments** will not affect rights of vendee in court of equity where he had no knowledge or reason to suspect that such agent was not accounting to vendor. 232Mich77, 205NW172. **Vendee, suing for specific performance,** held entitled to decree for deed upon showing of performance of conditions by him. 238 Mich159, 213NW109. **Where contract has some period to run,** vendee, without payment of balance due, cannot obtain immediate specific performance. CalA 274P572. **Written notice with reference to taking title as basis for suit** held not required under contract. 325 Ill 596, 156NE769.

698–76½–New. Where maker of note executed bill of sale to third person in consideration of latter's agreement to pay note and hold maker harmless from loss thereon, maker may compel specific performance of obligation without prior rendition of judgment against maker or payment of note by him. 70CalA400, 233P397.

698–76⅓–New. Restoration of status quo is not required in specific performance. Iowa 227NW637.

699–82 16F(2d)339; 325 Ill 559, 156 NE754; 338 Ill 620, 170NE777; 154Md 414, 141A348; NJ 151A56; 291Pa53, 139A606. **Where no time was fixed for performance of vendor's obligation** to finish construction of house and grade and sod lawn, it was not condition precedent to vendee's obligation to make second payment which was fixed at time prior to which performance of vendor's obligation was impossible. 237Mich206, 211NW643.

700–83 16F(2d)339. See also NJCh 147A388.

700–84 115Nebr136, 211NW998.

700–88 20F(2d)67; 174Ark1072, 298 SW353; 100NJEq585, 135A796 (payments on land contract).

700–89 TexCivA 275SW487 (intended anticipatory breach being shown defeats specific performance).

701–94 94Fla704, 114S513.

701–96 165Ga534, 141SE653; NJ 151A 865 (imposition of unauthorized condition); 136Wash74, 239P4 (tender, in contract to exchange property subject to mortgage, held sufficient as to terms of mortgage). **Deed tendered held sufficient.**–126Misc702, 214NYS1. **Tender held sufficient.**–124Kan672, 261P585; 98 NJEq602, 131A585; TexCivA 294SW 938.

702–4 333 Ill 31, 164NE194; 86 IndA 484, 156NE589; NJ 151A56; 101NJEq 403, 138A900; 125 Or240, 266P251.

702–5 327 Ill 564, 158NE806.

702–9 215Ala41, 108S849; 93Fla954, 113S100; 245Mich452, 222NW713; Tex CivA 58W(2d)878.

702–10 214Ala638, 108S740; Ill 173NE 477.

703–11 TexCivA 281SW299. But see 177Ark384, 7SW(2d)1. **Offer held insufficient.**–264Mass431, 162NE902.

703–12 200Cal 434, 253P718; 27Hawaii 323; 323 Ill 443, 154NE231; 324 Ill 367, 155NE296; 325 Ill 596, 156NE769; 332 Ill 376, 163NE777; 246Mich96, 224NW 420; 247Mich503, 226NW251; 323Mo 1156, 20SW(2d)650 (within time required by agreement); 49SD502, 207NW463 (tender sufficient). But see 214Ala674, 108S562. **Option.**–Mass 168NE783; 237 Mich548, 213NW137 (compliance with conditions, as tender in time and place agreed, held essential); 49SD502, 207 NW463; 136Wash84, 238P924. **Assignee of option under lease** must tender purchase money and rent due to time of offer. 200Cal 434, 253P718. **Contract providing for payment for land in cash and mortgages** held insufficient to entitle purchaser tendering full purchase price in cash to specific perform-

ance. 324 Ill 77, 154NE426. **Strict common-law tender is not essential** in order that stock subscriber be entitled to specific performance of subscription contract. 264Mass431, 162NE902. **Tender of mortgage instead of "contract" on other property** agreed to be taken in lieu of cash is insufficient. 327 Ill 406, 158NE692. **That contract tendered provided for seven per cent interest on deferred payment** cannot be objected to where earnest money receipt did not mention interest. 144Wash224, 257P627. **Upon failure of full tender in time and without waiver,** decree ordering conveyance held erroneous where modified to include amount not previously offered as required. 200Cal 434, 253P718.

704-13 326 Ill 556, 158NE216; 49RI 35, 139A655, 656 [citCyc].

704-14 333 Ill 629, 165NE148. **Offer only to make payments then due without obligating himself to perform in every particular provisions of contract** held insufficient. 323 Ill 443, 154NE231. **Tender of taxes, which vendee was not informed were due,** is not necessary. 49 RI 35, 139A655.

704-15 Waiver of objections.-144Wash 224, 257P627.

705-19 99CalA140, 277P1086; 93Fla 941, 113S415; 325 Ill 596, 156NE769; 327 Ill 564, 158NE806; 86 IndA484, 156 NE589; 152Md146, 136A651; 323Mo 1156, 20SW(2d)650; 285Pa112, 131A698 (vendor declaring agreement void and retaking possession); 6PaDist&Co 673. **Court of chancery is not bound by any fixed rule** to allow perversion or defeat of substantial ends of justice by omission of unimportant or useless act, which nothing but merest technicality could require. 333 Ill 629, 165NE148. **Tender of rent as condition precedent to specific performance of agreement to renew lease is excused** where facts show that landlord would have refused tender if made. 86CalA668, 261P488. **Rule inapplicable** where vendor's refusal to perform is rightful and is conditioned on failure of purchaser to perform. 323Mo 1156, 20SW(2d)650. **When time is of essence of contract,** failure of purchaser to tender performance is not excused by fact that vendor is unable to convey title as agreed. 323Mo 1156, 20SW(2d)650.

706-20 227Ky719, 13SW(2d)1031; 256 Mass302, 152NE342; 88PaSuper303.

706-22 337 Ill 396, 169NE258 (performance by vendor condition precedent to tender by vendee); BC [1929] 1DomLR 811.

706-23 Failure of vendee to make payment is not excused by failure of vendor to give copy of contract to purchaser seeking to enforce contract after time for payments expired. 329 Ill 555, 161NE 91.

706-24 Where impracticable and unnecessary because of will contest, demand of all heirs and devisees held not required. 214Ala638, 108S740.

706-24½-New. In suit to enforce option, assignee of option must show waiver of tender. 200Cal 434, 253P718.

706-24½-New. Upon waiver of full tender, optionee may have specific performance upon conditional payment of full amount due. 200Cal 434, 253P718.

706-24¼-New. On vendor's failure to furnish indicia of title, purchaser, not paying balance of purchase price, is not in default. 325 Ill 596, 156NE769.

706-24½-New. Where vendor fails to have deed ready, vendee need not tender payment. 328 Ill 487, 159NE819.

706-24¼-New. Purchaser is not excused from making tender because he thinks vendor will be unable to perform within time stipulated. 323Mo 1156, 20 SW(2d)650.

706-26 221Ala209, 128S396; TexCivA 285SW874. **Statute requiring deposit of money tendered** is inapplicable to tender by purchaser subsequently seeking specific performance. Cal 289P165.

707-29 213Ala150, 104S323; 101NJEq 297, 137A887; NJCh 131A581; 100NJ Eq421, 136A344. **Delay on part of purchaser.**-90Fla37, 105S100 (vendee in possession after part payment entitled to specific performance in absence of showing that time was of essence originally or subsequently by notice). **Delay on part of vendor.**-103WVa733, 138SE449. **Reasonable time is permitted for performance.**-101NJEq297, 137A887.

709-32 Contract for lease.-80CalA717, 252P786 (where lessor unable to give possession at date of lease).

709-33 In California.-88CalA664, 264P 256.

709-34 235Mich693, 209NW812.

709-35 19F(2d)56; 99NJEq730, 133A 528; TexCivA 5SW(2d)1033. **Purchaser plaintiff.**-235Mich693, 209NW812; 143 Wash302, 255P129; BC [1928] 2DomLR 65. See also 55AppDC383, 6F(2d)686. **From mere fixing of day for delivery of deed** intention to make time of essence of contract cannot be inferred. 112 Okl 233, 240P614, 616. **When time is essential,** purchaser's failure to make payments on contract date held to preclude relief. 143Wash302, 255P129. **Where manifestly particular moment is of controlling importance** time is of essence. 264Mass431, 162NE902.

710-38 127 Okl 141, 259P838; 143 Okl 187, 287P1006. **Mining property.**-127 Okl 141, 259P838 (gas and oil lease); TexCivA 5SW(2d)1033. **Duty of vendee to cause abstract to be examined** promptly and to either accept or reject title promptly where no time specified for examination. 127 Okl 141, 259P838 (contract for assignment of interest in oil and gas lease).

710-40 Time held of the essence for beginning of term of business building. 152Md146, 136A651.

711-42 27Hawaii286; 264Mass431, 162 NE902. But see 95CalA768, 273P611. **Where delay in exercising option was caused by statements of owner,** he cannot complain. 95CalA768, 273P611.

712-43 326 Ill 556, 158NE216, 54ALR 1376.

712-44 335 Ill 33, 166NE541; 116 OhSt 41, 155NE385; BC [1929] 4DomLR617. See also 155Md448, 142A522. **Purchaser plaintiff.**-291Pa503, 140A500.

714-53 See also 214Ala674, 108S562.

714-56 In absence of notice time cannot be made essential. 101NJEq297, 137 A887. **Notice held not to make time of essence.**-102NJEq157, 139A902. **Notice given to purchaser.**-98NJEq502, 130A 595; 99NJEq730, 133A528. **Where no time is fixed or is not essential purchaser may fix reasonable time** within which he will expect title to be made at peril of rescinding agreement. 134SC54, 131 SE319.

715-59 100NJEq421, 136A344; Tex CivA 5SW(2d)878.

716-68½-New. Contention that abstract was not returned within contract time held without merit where it was returned to vendor's agent within such time. 144Wash224, 257P627.

716-68¼-New. Where purchaser had been in default for three years before forfeiture was declared, forfeiture will not be set aside unless fraud shown. 324 Ill 549, 155NE477.

716-68¼-New. Vendor wrongfully refusing to perform when purchaser was not in default cannot defend on ground that time was of essence and that purchaser subsequently committed default. Ont [1930] 2DomLR609.

716-69 83NH47, 138A297 (estoppel); 101NJEq297, 137A887. But see 283Pa 551, 129A588. **Restraint of purchase is recovery of purchase money** granted to determine issue. 99NJEq483, 133A525.

717-70 214Ala674, 108S562; NJ 144A 808; Va 153SE681. See also 125 Or419, 267P527, 529 [citCyc]. **Where purchaser aware of objections to title proceeds with purchase** after time for completion has elapsed, he will be held to have waived right to object to delay. 134SC 54, 131SE319. **Waiver of time to elect to take title notwithstanding defects** held not shown. 327 Ill 254, 158NE442.

718-71 72Mont318, 233P607, 612 [citCyc]. **Though purchasers had said they would not take land if defect was cured,** vendors were not relieved of obligation to cure defects. TexCivA 16SW(2d)548.

718-72 34Ariz49, 267P598; 321 Ill 442, 151NE877 (must be at such time); Ill 172NE161; 136Misc384, 240NYS76. **Optionor need only have good title when option is exercised and suit for specific** performance is brought by optionee. 152Va173, 146SE254.

718-73 101NJEq479, 138A533.

718-74 168Ga511, 148SE265; 232Ky 415, 23SW(2d)596; NJSup 140A244; 112 Okl 233, 240P614, 616 [quotCyc]. **Vendors, unable to clear title for seven years,** were not entitled to specific performance. 167La573, 119S878.

719-76 232Ky415, 23SW(2d)596; 112 Okl 233, 240P614, 616 [quotCyc]. But see 321 Ill 442, 151NE877.

719-77 112 Okl 233, 240P614, 616 [quot Cyc].

719-78 Ill 172NE161 (where purchaser not prejudiced); 100NJEq421, 136A 344; NJCh 152A161; 36 OhA78, 172NE 839; 112Okl 233, 240P614, 616 [quot Cyc].

719-79½-New. Where defendant does not sufficiently raise question of title in pleadings, specific performance will be decreed subject to title, with reference to enable vendor to perfect title. Man [1925] 3DomLR473.

720-81 98NJEq377, 129A185 (action to recover deposit paid on account amounted to such step in rescission as to bar specific performance on discontinuance of such action).

720-81½-New. Specific performance will not be decreed of contract which parties had abandoned. 155Md448, 142 A522.

720-82 219Ky383, 293SW947, 949, [quotCyc]; Nebr 226NW805; 100NJEq 585, 135A796; 224AppDiv764, 229NYS 714; Pa 151A796. **Lessee's wish to have lease made to different corporation** did not constitute abandonment. 98Fla 59, 123S1. **Purchaser refusing to take tendered title** because of defect cannot later bring suit for specific performance. 116 Or376, 239P818. **Purchaser's right under escrow contract** for land held abandoned. 116 Or376, 239P818. **Question for court or jury** from facts or circumstances of particular case. 127 Okl 141, 259P838. **Right to specific performance of contract to devise is not lost** by discussion with administrator of claim for advances not within purview of contract. 205 Iowa687, 216NW679. **When land rises in value** party cannot then claim specific performance. 219Ky 383, 293SW947. **Where vendor rescinds or abandons contract** he cannot thereafter demand specific performance. 321 Ill 442, 151NE877.

721-85 25F(2d)404; 169Ark1115, 278 SW41, 43ALR114; 96Fla435, 118S161; 321 Ill 442, 151NE877; 325 Ill 38, 155 NE784 (two months); 249 IllA39; 219 Ky383, 293SW947; 99NJEq48, 131A 626 (no laches found); 99NJEq730, 133 A528; 99NJEq680, 134A316; 101NJEq 500, 138A655; 128Misc118, 217NYS666 (by vendee, six months after valid tender of deed by vendor); 134Misc598, 236NYS255; 55ND905, 215NW484; 57 ND674, 223NW808(2dcase); 139 Okl35, 280P1075; 5PaDist&Co 129. **Laches of cotenant.**-15DelCh112, 132A139. **Laches of purchaser held fatal.**-18F(2d)265; 74 CalA564, 241P408; 55App(DC)383, 6 F(2d)686 (purchaser permitting time to expire with no effort to perform and knowing his agent was taking no steps to perform). **Laches of vendor held fatal.**-115Nebr420, 213NW813. **No laches.**-77Mont260, 250P823. **Plaintiff must be vigilant in asserting his rights,** or he is left to remedy at law. 169Ark1115, 278SW41, 43ALR114. **Delay is viewed by courts with greater strictness** where person seeking to enforce performance of contract is not bound and other party is bound. 139 Okl 35, 280P1075.

724-86 Cal 287P102; 159La1019, 106S 550; 245Mich452, 222NW713; 55ND 905, 215NW484. **Long delay, unexplained by equitable circumstances,** renders court cautious in enforcing specific performance. 321 Ill 442, 151NE877.

724-86½-New. In specific performance, no general rule, applicable to all cases, as to what will and what will not constitute laches, can well be formulated. Existence or absence of laches in given case must be deduced from facts of that particular case upon consideration of all circumstances involved. 96Fla435, 118S 161.

724-87 19F(2d)56. **But see** 289Pa356, 137A603.

724-88 102NJEq157, 139A902; 128Misc 118, 217NYS666 (by vendee, six months after date for delivery of deed). **See** also **Or** 257P766. **Delay not constituting laches.**–50 SD332, 210NW153.

724-89 321 Ill 442, 151NE877; **Va** 153 SE681 (intention to abandon contract must be shown).

724-90 19F(2d)56; 339 Ill 340, 171NE 263; 57ND674, 223NW808(2dcase); 36 OhA78, 172NE839.

724-90½-New. It is only where vendor acts in good faith and there has been no change making specific performance inequitable that vendor's long delay will be excused. 321 Ill 442, 151NE 877.

726-95 236Mich391, 210NW233; 251 Mich669, 232NW209.

726-96 19F(2d)56; 323 Ill 443, 154NE 231; 332 Ill 376, 163NE777; 329 Ill 555, 161NE91; 219Ky383, 293SW947; T67 La97, 118S817; 246Mich109, 224NW 386; 143Okl 187, 287P1006. But see 316 Ill 318, 147NE266, 38ALR1151.

727-97 Purchaser at public sale with knowledge of facts which caused delay in making title held not relieved from specific performance because price declined subsequent to sale, in view of evidence. 134SC54, 131SE319.

727-3 102NJEq73, 139A709.

728-4 321 Ill 442, 151NE877. **Suit by vendee.**–96Fla435, 118S161.

729-19½-New. to purchase corporate stock; 293Pa577, 143A202.

729-21 93CalA516, 269P751; 159La 1019, 106S550 (four years); 256Mass 302, 152NE342; Mo 274SW462. See also 251Mich478, 232NW355(2dcase) (after tender).

730-22 159La1019, 106S550; 101NJEq 373, 139A486.

730-22½-New. Where plaintiff's delay is not due to any fault of his own, it is not a bar to specific performance. 255 Mass76, 151NE81, 45ALR1.

730-23 240Mich295, 215NW311; 251 Mich669, 232NW209; Mo 5SW(2d)405; 72Mont318, 233P607; 285Pa112, 131A 698. **In Oklahoma.**–140 Okl 271, 282P 1104.

730-26 Purchaser's delay will not defeat specific performance unless vendor has performed or has been ready and willing to perform all terms of contract stipulated for on his part. 41 Ida547, 240P593.

731-28 121Kan93, 246P183; 240Mich 295, 215NW311; 289Pa356, 137A603. See also 151Va240, 144SE444. **Where vendor requested affidavit from heirs** that they were sole heirs at law and next of kin of decedent, such request was held to raise inference that it was designed to allay fear or doubt that he did not intend to carry out contract of sale, and hence heirs were not precluded, because of laches, from subsequently suing to compel performance of contract. 333 Ill 183, 164NE179.

731-29 12PaDist&Co 318.

731-33 86 IndA484, 156NE589; 240 Mich295, 215NW311.

732-35 121Kan93, 246P183.

732-39 72Mont318, 233P607; **TexCivA** 5SW(2d)878, 880 [citCyc].

734-42 99CalA663, 279P167; 70Utah 49, 257P1058, 1059 [citCyc].

735-45 Action barred.–TexCivA 21SW (2d)705.

735-51 167Ga389, 145SE460; 153Md1, 137A518, 522 [quotCyc]; 29 OhA141, 162NE724. **Damages held adequate** remedy for failure to perform contract to devise land justifying refusal of specific performance. 77Colo 370, 237P165. **Only where damages would not compensate** for refusal to perform contract to devise land will performance be decreed. 77Colo 370, 237P165. **Performance by plaintiff** held not shown or excused by deceased. 77Colo 370, 237P165.

736-52 215Ala23, 109S155; 206Cal 213, 273P547; 208Cal 578, 283P67; CalA 277P1107; 162Ga664, 135SE195; 44 Ida 797, 260P423; 124Kan449, 260P651; Me 149A833(2dcase); 153Md1, 137A518, 522 [quotCyc]; 264Mass166, 162NE300; 249 Mich558, 229NW481; 250Mich302, 230 NW156; 114Nebr728, 209NW614; 99 NJEq657, 134A173; 104NJL286, 140A 276; NJCh 151A391; 219AppDiv627, 220NYS785; 127Misc387, 215NYS553; 219AppDiv425, 219NYS166; 32 OhA350, 166NE914; 121 Or432, 253P869; 126 Or 193, 268P75; 128 Or115, 268P1014; Tex CommnA 29SW(2d)334; 153Wash625, 280P70; 103WVa394, 137SE543; 193 Wis305, 214NW345. See also 87 IndA 42, 157NE104; 124Kan724, 262P499; Wash 291P469. **Decedent's administrator and devisee** of decedent's sole devisee are necessary parties to action, decedent's devisee's executor being proper party. 219AppDiv425, 219NYS166. **If services performed in consideration of contract to devise can be estimated** by pecuniary standard, specific performance will be denied. 44 Ida797, 260P 423 (particular services held not to warrant specific performance). **Only in case of absence of remedy at law** will specific performance be decreed. 44 Ida 797, 260P423. **Oral contract to make** will may be enforced in equity. 153 Wash625, 280P70.

736-52½-New. Such agreement will be enforced in equity against those to whom legal title has descended, 126Misc436, 213NYS119.

736-52½-New. provided contract is definite and certain and clearly established, 126Misc436, 213NYS119.

736-52¼-New. and on condition that it has been performed by other party, 126Misc436, 213NYS119.

736-52½-New. and is not objectionable as to adequacy of consideration, 126 Misc436, 213NYS119.

736-52½-New. and is not inequitable. 126Misc436, 213NYS119.

737-53 20 OhA476, 152NE729. **Performance by parent.**–77Mont260, 250P 823. **Necessity of inadequacy of other remedy.**–77Mont260, 250P823. **Performance by plaintiff.**–TexCivA 19SW(2d)936. **Agreement to bequeath property to child** in consideration of relinquishment of parental rights will be decreed specifically to perform even without statutory decree of adoption. NJCh 147A116.

737-54 37F(2d)527 (promised cash bequest not being of specific nature and having adequate remedy at law); 77 Mont260, 250P823; 124 Or574, 265P425. **Evidence held to establish making** of contract to bequeath property. Or 290P 751(2dcase).

737-55 See also 237Mich168, 211NW95.

738-60 124Kan449, 260P651; 83Mont 214, 271P433.

738-63 83Mont214, 271P433.

738-66 149Md336, 131A568; NJCh 147 A388; 20SaskL8, [1925] 3DomLR1199 (substantial performance). **Ascertainment of abatement price.**–149Md336, 131 A568.

739-67 8SaskL8, [1925] 3DomLR1199.

739-68 168Ga511, 148SE265; 98NJEq 502, 130A595; 220AppDiv776, 222NYS 48 (easement).

739-70 149Md336, 131A568. **Contract for sale of apartment building** and lot by street number "on a lot about 33 by 95 irregular," not enforceable by vendor where size about 33 ft front and 14 ft rear. 245NY647, 157NE894. **Entire contract for purchase of two lots** will not be specifically enforced as to one lot only where vendor cannot furnish marketable title as to other. TexCivA 1SW(2d)334.

739-70½-New. Substantial encroachment of building on adjoining land precludes recovery of full purchase price where contract stated slight encroachment. Iowa 229NW832.

740-71 101NJEq479, 138A533.

740-71½-New. Substantial defect in quality.–149Md336, 131A568.

740-72 41F(2d)76; 219Ala3, 121S415; 89 CalA485, 265P340; 92Fla48, 109S257; 94 Fla869, 115S534; Iowa 229NW199; 158 Md412, 148A816; 256Mass121, 152NE243, 46ALR745; 265Mass540, 164NE451; 240 Mich295, 215NW311; 240Mich529, 215 NW329; 250Mich13, 229NW409 (contract not signed by one of owners cannot be specifically performed against signers); 101NJEq772, 138A870; 103 NJEq121, 142A441; 217AppDiv150, 217 NYS145; 222AppDiv119, 226NYS135; 134Misc537, 235NYS257; 230AppDiv765, 244NYS213; 299Pa284, 149A184; 7Pa Dist&Co 719; 48RI 213, 136A767; 152 Va173, 146SE254. **Abatement limited to deficiencies in title or area of land.**–222 AppDiv617, 226NYS560. **That similar objections to title were disposed of satisfactorily to title company on closing title to another parcel** is no defense to action for partial specific performance with abatement for objections to title. 134Misc537, 235NYS257. **Vendor's offer to return purchase price and cancel contract** because of inability to convey title approved by title company is no defense. 134Misc537, 235NYS257. **Vendor's good faith in making contract** is no defense to purchaser's action for specific performance with abatement. 134 Misc537, 235NYS257. **Vendor's offer to give vendee lease** on premises upon being unable to remove objections to title is no defense. 134Misc537, 235NYS257.

741-73 316 Ill 439, 147NE376; 222App Div617, 226NYS560.

742-74½-New. Partial specific performance will be refused where unperformed part was essential term of contract and was left open for future agreement. 222AppDiv119, 226NYS135.

742-75 41F(2d)76. **Abatement for wife's inchoate dower** should be gross value of dower right without deduction for mortgages. 256Mass121, 152NE243, 46ALR745.

742-77 144Miss841, 110S793 (especially where defect is known to vendee); 99 NJEq198, 132A305. **Contract for exchange of real property** will not be specifically enforced by granting money compensation where defendant is wholly unable to convey. 89CalA485, 265P 340. **Specific performance as to undivided one-half interest** owned by one who contracted to convey all will not be decreed. 89CalA485, 265P340.

742-78 48RI 213, 136A767, 769 [citCyc] (rule cited but not applied). **Where administratrix as such contracted to sell lands as lands of estate** at time when title was vested in her and her children, purchaser is not entitled to specific performance as to undivided interests of administratrix and beneficiaries who consented to agreement, with abatement. Ont [1929] 2DomLR391.

743-79 92Fla254, 109S415; 256Mass 121, 152NE243, 46ALR745.

744-81 215Ala499, 111S231; 92Fla48, 109S257; 221Ky677, 299SW567; 256 Mass121, 152NE243, 46ALR745; 233 Mich410, 206NW351; 245NY523, 157NE 843; 48RI 213, 136A767, 770 [citCyc]. **In Alabama.**–215Ala499, 111S231 (on death of expectant dowress before husband amount reserved by purchaser with interest should be forthwith paid to vendor). **Where plaintiff merely seeks decree to extent of husband's interest** exclusive of dower right of wife, his right to specific performance is not defeated by nonjoinder of vendor's wife. 30 OhA179, 164NE643.

744-81½-New. Where wife, whose privy examination was not taken when contract was executed by husband and herself refuses to join in deed, contract can be enforced against husband, and husband and wife can be held in damages for deficiency in title. 196NC508, 146 SE142.

744-83 97NJEq91, 129A185.

745-84 NJ 150A392; 97NJEq91, 129A 185.

745-85 92Fla48, 109S257. Contra 256 Mass121, 152NE243, 46ALR745; 48RI 213, 136A767, 769 [citCyc].

745-86 NJCh 134A305; 283Pa508, 129 A459.

746-89 99NJEq198, 132A305.

746-90 338 Ill 620, 170NE777. **Refusal of vendor's wife to join in conveyance.**–118Nebr163, 223NW792(4thcase).

747-91 219Ala172, 121S703; 327 Ill 406, 158NE692; 88 Ind235, 151NE835; 206 Iowa1105, 221NW816; 237Mich206, 211NW643, 646 [quotCyc]; 240Mich357, 215NW355 [citCyc]; 241Mich91, 216NW 393; 251Mich669, 232NW209; 99NJEq 198, 132A305; 132Misc48, 228NYS609. **That purchaser had prima facie right to specific performance** is prerequisite to award of damages, in action for specific performance, or for damages, if vendor is unable to perform contract. 69 CalA337, 231P361. **Damages not recov-**

erable where cause of action for specific performance not stated. CalA 288P 801.

748-92 69CalA337, 231P361; 128Misc 364, 218NYS669 (without amendment); Ont [1925] 3DomLR875.

748-92½-New. Where vendor, relying on uncompleted cancellation contract, disables himself to perform, purchaser is entitled under original contract to accounting, as where vendors no longer control title of property. 29 OhA7, 162 NE781.

748-93 212Ala667, 103S874 (purchaser of whole tract from cotenant, supposing him to be sole owner, held entitled to conveyance of cotenant's interest with abatement of purchase price); 236 IllA 187; 266Mass550, 165NE873; 232Mich 77, 205NW172; 240Mich357, 215NW 355; 243Mich698, 220NW760; 322Mo 1064, 18SW(2d)1043; 222AppDiv570, 226NYS544; 223AppDiv721, 226NYS 671; 57ND674, 223NW808(2dcase). But see 327 Ill 406, 158NE692.

748-94 88PaSuper303.

749-95 But see Iowa 228NW562.

749-98 In California.-69CalA337, 231P 361. In absence of evidence to support finding of value of land, judgment cannot be had in alternative. 224AppDiv 525, 231NYS524.

750-1 Prayer in complaint limits amount of recovery to that prayed for. 223AppDiv721, 226NYS671.

750-3 327 Ill 406, 158NE692; 319Mo 290, 3SW(2d)701; 116 Or376, 239P818.

750-4 102CalA461, 283P111; 151Miss 630, 118S446; NJCh 149A636(2dcase) (return of plaintiff's money); 70Utah 19, 257P1046.

751-5 But see 195Wis203, 217NW416.

751-7 Time for election to foreclose vendor's lien.-231AppDiv764, 245NYS 689.

751-7½-New. There is no occasion for decree awarding damages in alternative for difference between purchase price and value of property in case of vendor's failure to comply with decree. 218 Ala195, 118S379.

751-7⅓-New. Where vendee is not entitled to specific performance because of want of equity in himself, he may not recover damages for same reason. 57ND 674, 223NW808(2dcase).

752-8 129Misc612, 222NYS315 (under prayer for general relief); 48SD602, 205 NW661.

752-12½-New. Where defendant vendor fails to perfect title until after learning, at close of hearing, that decision would be adverse, plaintiff vendee, in absence of special equities, will not be compelled to take title as sought by vendor in his counterclaim, but vendee will be permitted to change his attitude as to desiring the land and may have decree for return of deposit and expenditures instead. 127Misc884, 217NYS297.

752-12⅓-New. In suit by landlord to compel tenant to make alterations, where specific performance is denied, plaintiff may recover rent received free in consideration of making alterations. 223AppDiv83, 227NYS22.

752-12¼-New. Where services are performed in pursuance of contract to leave property by will and promisor fails to comply with agreement, and facts are such that specific performance cannot be had, recovery may be had against estate of promisor for reasonable value of services. 134 Okl 247, 273P255.

752-12½-New. Where court of ordinary has adequate jurisdiction of other matters and plaintiff fails to make case for specific performance, case should be dismissed. 167Ga710, 146SE478.

752-12¾-New. Where facts do not justify decree for specific performance, bill may be treated as one to redeem and redemption permitted. 247Mich503, 226 NW251.

753-13 Decree giving purchaser lien on land not purchased to enforce performance has been held erroneous. 240Mich 454, 215NW389.

753-14 38F(2d)444; 214Ala516, 108S 257; 152Va173, 146SE254. But see 216 Ala534, 113S613.

753-18½-New. Vendor should be preserved lien for his deferred payments in specific performance decree. 157Md196, 145A487.

753-19 80CalA478, 251P967, 971 [cit Cyc]; 152Miss106, 119S155; 156Miss 785, 126S832; 21 OhA429, 152NE323 (award to vendee of damages for failure to make improvements provided for held consistent). Damages and specific performance not allowed.-221Ala209, 128S 396. Pleading insufficient to justify recovery of damages. CalA 288P681.

754-21 CalA 288P681.

754-22½-New. Specific performance of contract to convey and damages for failure to make agreed improvements may be awarded in same action. 21 OhA429, 152NE323.

754-23 80CalA478, 251P967, 971 [quot Cyc]. Purchaser is entitled to interest on amount deposited in escrow where vendor refused to perform and remained in possession. 80CalA478, 251P967.

754-24 153Md390, 138A250; 246Mich 96, 224NW420.

755-25½-New. Vendee of land sold to him by promisor to devise to plaintiff impressed with trust in latter's favor is liable for interest after suit commenced. 168Minn57, 209NW537.

755-26 80CalA478, 251P967, 971 [quot Cyc]; 246Mich96, 224NW420.

755-27 80CalA478, 251P967, 971 [quot Cyc].

755-29 192Wis218, 212NW275.

755-29½-New. Where complainants obtained possession from defendant's tenant pending suit, court has power to restore possession to defendant. 99NJEq 788, 134A363.

756-30 192Wis218, 212NW275 (mistake of law).

756-32 Where defendant seeking by cross complaint specific performance of contract for exchange of lands has deposited deed with court, decree granting specific performance without requiring defendant to perform is proper where it provides that plaintiff shall receive deed deposited. 72Mont318, 233P607. Where contract provides for title to remain in vendor until at least certain sum has been paid on principal, vendee held entitled to conveyance upon payment of such sum, but he must secure vendor for balance. 258Mass383, 155NE193.

756-33 29F(2d)712; 221Ala610, 130S 332; 168Ga511, 148SE265. Court may provide in decree for payment of encumbrances to protect purchaser. 160 Ga550, 128SE751.

756-33½-New. Indemnity against lost note which grantee agreed to discharge.-236Mich453, 210NW486.

756-34 Where plaintiff in action for specific performance is permitted to redeem from forfeiture he should be required to pay amount paid by defendant for taxes and for improvements to extent that they have enhanced value of property. 239Mich88, 214NW102. Expenses allowed must be proved.-26 F(2d)78. Paving and other assessments must be paid by vendee. 221Ala 209, 128S396. Taxes paid while in default cannot be recovered by vendor in default. 221Ala209, 128S396. Repairs made while in default cannot be recovered by vendor in default. 221Ala209, 128S396.

757-35 286Pa413, 133A627. Taxes payable by vendee under contract.-236 Mich453, 210NW486.

757-37 Mo 286SW95, 100 [quotCyc].

757-37½-New. Vendee must pay money vendor paid to insurance company as premiums before he will be decreed specific performance. 215Ky465, 284 SW1094.

757-37⅓-New. Where subsequent lessee with notice had advanced money to obtain release from former tenant, court provides for repayment of this sum out of rent. 152Md146, 136A651.

757-38 215Ala41, 108S849; 163La853, 113S123; 239Mich88, 214NW102 (where plaintiff permitted to redeem from forfeiture); 286Pa413, 133A627; 103WVa 456, 137SE883 (decree making support of grantor equitable charge on his life estate). See also 92CalA308, 268P404. Where the contract requires execution of deed before final payment, etc. 236 Mich453, 210NW486. Mortgage for purchase money should run from date of delivery of deed. 48RI 213, 136A767. Where specific performance depended on payment of several demand mortgages, court ordered amount paid in lump sum. 100NJEq493, 135A518. Provision for tender to either of two trustees of vendor is proper. 329 Ill 334, 160NE597. Interest is not recoverable by vendor in default. 221Ala 209, 128S396. Deposit in court to await determination of rights of codefendants may be ordered where husband and wife jointly contracted to sell and wife filed suit against husband for accounting, involving sale of land. 252 IllA199.

758-38½-New. Where time for payment is indefinite, full preparedness to pay at time of granting is sufficient. 85PaSuper19.

758-41 48SD602, 205NW661 (in refusing specific performance decision is limited to its enforcement in equity, leaving open inquiry as to its effect at law).

758-42 206 Iowa1208, 218NW506. Cross complaint held insufficient.-Ill 173NE 348.

758-44 335 Ill 33, 166NE541; 267Mass 327, 166NE765(2dcase). Expenses in examining title.-130Misc721, 224NYS 349. Loss of profits.-167La573, 119S 878.

758-44½-New. Purchaser may not recover sums expended to test validity of ordinance prohibiting filling station, since vendor has burden to remove such objection to title. 130Misc721, 224NYS 349.

758-46 91Fla900, 109S86; 218AppDiv 519, 218NYS644. But see 227AppDiv 292, 237NYS460.

759-47 Assignee cannot substitute his personal liability for that of purchaser against objection. 103NJL541, 138A 569.

759-49 SD 225NW301.

760-53 253NY579, 171NE791(1stcase); 225AppDiv440, 233NYS395.

760-54 See also 251NY224, 167NE424. But see 126Misc463, 213NYS645; 224 AppDiv266, 229NYS712. Contra 218 AppDiv519, 218NYS644. Request by purchaser's assignee for extension of time does not make contract specifically enforceable against him. 250NY159, 164NE890(2dcase).

760-57 218Ala433, 118S633.

761-62 151Va913, 145SE311.

761-63 329 Ill 334, 160NE597; NJCh 129A253.

761-64 329 Ill 334, 160NE597; NJCh 129A253.

761-65 100NJEq295, 134A770 (where contract required vendee's bond to secure purchase price).

761-66 226Ky106, 10SW(2d)620.

761-67½-New. Third parties, with whom defendant made agreements to reduce extra compensation of plaintiff suing for specific performance of stock due as compensation, are necessary parties if it is sought to set aside these agreements, 214AppDiv530, 212NYS464.

761-67⅓-New. but not otherwise. 214 AppDiv530, 212NYS464.

761-68 25F(2d)742; 89CalA535, 265P 292; 92Fla48, 109S257; 324 Ill 48, 154 NE401; 324 Ill 615, 155NE762; 326 Ill 442, 158NE97; 337 Ill 396, 169NE258; 227Ky719, 13SW(2d)1031; 232Mich77, 205NW172; 316Mo 333, 289SW939; 322Mo 1064, 18SW(2d)1043; 220MoA 1050, 279SW723, 725 [quotCyc]; 218 AppDiv291, 218NYS197. Extent of liability.-316Mo 333, 289SW939. Where subsequent purchaser has prior independent title by adverse possession, he cannot be deprived thereof, though, after contract for sale to plaintiff was made, he purchased and accepted deed from plaintiff's vendor with notice thereof. 316Mo 333, 289SW939. Decree against subsequent grantee.-But see 152Va173, 146SE254.

762-69 152Md146, 136A651; 220MoA 1050, 279SW723, 725 [quotCyc].

763-70 220MoA1050, 279SW723, 725 [quotCyc].

763–71 316Mo 333, 289SW939.
763–72 15DelCh192, 133A695; 331 Ill 225, 162NE833; 146SC59, 143SE552, 59ALR1297; Ont [1925] 3DomLR825.
763–73 15DelCh192, 133A695.
763–74 218Ala433, 118S633; Mont 290 P238(2dcase); 218AppDiv291, 218NYS 197 (suit is against vendor and purchaser); 131 Okl 162, 268P216; 146SC 59, 143SE552, 59ALR1297; 151Va913, 145SE311. **Where plaintiff declines to join subsequent purchaser,** no relief can be had against him. Ont [1925] 3 DomLR875.
764–75 322Mo 1064, 18SW(2d)1043. See also 218AppDiv291, 218NYS197.
764–76 TexCivA 281SW339, 340 [cit Cyc].
764–81 159La1019, 106S550 (heirs of party to exchange); 148Md397, 129A 504; 48SD470, 205NW29, 31 [quotCyc].
764–82 333 Ill 183, 164NE79.
765–84 **Personal representative may sue for specific performance.**–130Misc 62, 223NYS613.
765–86 94Fla704, 114S513.
765–87 165Ga534, 141SE653.
766–93 85PaSuper19; 6PaDist&Co 234; 48RI 401, 137A699.
766–95 37P(2d)527.
767–98 48RI 401, 137A699. (where plaintiff has performed and no evidence of appointment of administrator, decree not set aside).
767–98½–New. **Where maker of note executed bill of sale to third person in consideration of latter's agreement to pay note and hold maker harmless,** maker may maintain action for specific performance against such person's personal representative and fraudulent grantee to whom such person's property was transferred to avoid performance of obligation assumed. 70CalA 400, 233P397.
767–98½–New. Specific performance to sell shares of stock can be had against personal representative. 267Mass28, 165NE701.
767–99 220MoA1050, 279SW723, 725 [quotCyc].
768–1 322Mo 1064, 18SW(2d)1043; 130Misc62, 223NYS613; 136Misc569, 240NYS316. **Grantor of vendors was properly joined as defendant,** where plaintiff based claim for relief on invalidity of provision in deed from original grantor restricting alienation without grantor's consent, and grantor refused consent to conveyance to plaintiff. 156Md229, 144A245. **Husband should have been made party** to suit, or proofs taken in court to demonstrate absence of his right of curtesy. NJCh 146A593. **In absence of joinder of all necessary parties,** no decree can issue. 220MoA1050, 279SW723. **One who actually owned and controlled property,** and for whom vendors held legal title, was necessary party. 157Md239, 145A 550. **Parties interested in will need not** be joined in bill for specific performance involving will only collaterally. 48RI 92, 135A601. **Rights of parties not joined cannot be determined.**–220 MoA1050, 279SW723. **Wife is not necessary party plaintiff** to suit by husband to enforce contract of exchange of property. TexCommnA 16SW(2d) 259. **Wife joining in deed held not necessary party.**–TexCivA 294SW938.
768–2 220MoA1050, 279SW723, 726 [quotCyc].
768–6½–New. The validity of chattel mortgage cannot be determined where mortgagee is not made party. 215Ala 388, 110S711.
768–7 160Ga831, 129SE546 (mortgagee and purchaser at mortgage sale properly joined); TexCivA 28W(2d)1008. **Second mortgage bondholders of water** company are not necessary parties to bill by city for specific performance of company's contract to sell waterworks to city. 215Ala120, 110S36. **Mortgagee, not party to contract,** cannot be compelled to convey mortgaged land since he does not own such land. Tex CivA 28W(2d)1008.
769–11 **Contract by trustees; cestuis que trustent held under the circumstances necessary parties.**–208Cal 185, 280P959. **Trustee** may sue in his own name. 87 IndA628, 160NE105.
769–14 130Kan826, 288P593. But see 292Pa384, 141A259. **Vendor's agent who negotiated sale not necessary party** though party to contract. 215Ala 161, 110S10.
769–15½–New. Stockholders not proper parties in suit against corporation for specific performance. 14F(2d)234.
770–18 329 Ill 637, 161NE118. **Seller's agent who has irrevocable agency to make sale within specified time and has made sale within time limited** has right to sue for specific performance by reason of his commission. 103WVa733, 138SE449.
770–19 103WVa733, 138SE449.
770–24½–New. Tenant by curtesy initiate may have specific performance of sale contract of his interest though wife's privy examination was not taken. 198NC228, 151SE190.
770–25 219AppDiv627, 220NYS785; 20 OhA400, 152NE394, 397 [quotCyc]; Wis 233NW79. But see 6F(2d)36. **Stockholders of corporation** holding option to purchase cannot enforce agreement of corporation taking conveyance to pay director of option holding corporation where only consideration was director's consent to become associated with purchasing corporation and agreement provided that it should not inure to benefit of any one but director. NJ 146A320(2dcase).
771–33 252Mass504, 148NE134.
771–34 **Death of vendor.**–214Ala638, 108S740.
772–35½–New. Specific performance of contract cannot be obtained by motion and order. 221AppDiv579, 224NYS514.
772–37 216Ala534, 113S613; 71CalA 266, 235P57, 59 [citCyc] (action by vendor); 243 IllA163; 115Nebr136, 211 NW998. See also 339 Ill 340, 171NE 263.
772–38 223AppDiv28, 227NYS85, 88 [citCyc].
772–39 161Ga838, 131SE891.
772–39½–New. Decree for specific performance, rendered at October term of superior court, based on service by publication on nonresident defendant during June, July term being appearance term, is valid. 168Ga15, 147SE37.
773–47 71CalA266, 235P57, 59 [citCyc] (action by vendor); 164Ga625, 139SE 147; TexCivA 25SW(2d)229.
773–48 112 Okl 233, 240P614 (proper to bring action in county where defendants or any of them reside). **Provision in statute that suit for specific performance "may" be brought** where any defendants reside does not require it to be brought there. 115Nebr136, 211NW998.
773–50 112 Okl 233, 240P614.
773–50½–New. **Process.**–In New York, language of Civil Practice Act, providing for service of sums out of state, is sufficiently broad to cover action for specific performance. 248NY261, 162NE 73.
773–50½–New. Constructive service on nonresident defendant under statute gives court of equity jurisdiction to grant enforceable decree affecting land within state in action for specific performance. 248NY261, 162NE73.
773–50¼–New. Specific performance may be had in civil law territory as well as in common-law state. 12Porto RicoFed21.
773–52 85Colo 52, 273P644; 94Fla895, 114S666; 29Hawaii494; 338 Ill 575, 170 NE695; 260Mass15, 156NE689 (allegations of conspiracy held to give no right to decree); 72Mont318, 233P607, 609 [citCyc]; 132Misc597, 230NYS360. See also 218Ala433, 118S633. **Bill, complaint, or petition held sufficient.**–177Ark 815, 8SW(2d)443; 68CalA171, 228P873 (complaint in action to compel judges in newspaper subscription contest to award plaintiff second instead of third prize held sufficient against general demurrer and motion for judgment on pleadings); 70CalA400, 233P397; 94Fla895, 114S 666; 160Ga831, 129SE546 (not subject to special demurrer as failing to state facts constituting legal fraud); 162Ga 757, 134SE620 (where there were allegations of definite contract whose terms were enforceable); 162Ga664, 135 SE195 (contract to make will); 164Ga 625, 139SE147; 164Ga706, 139SE337; 164Ga628, 139SE339; 165Ga439, 141SE 300; 165Ga534, 141SE653; 168Ga439, 148SE81; 87 IndA628, 160NE105; 130 Kan826, 288P593; 169La577, 125S623; 157Md239, 145A550; 77Mont260, 250P 823 (action based upon agreement to adopt child); 102NJEq193, 140A226; 31NM356, 246P907; 225AppDiv597, 234 NYS18; 117 Okl 303, 246P425; 119 Or 297, 247P761; 125 Or240, 266P251 (allegation of plaintiff's ownership of land at time of bringing suit not necessary in suit to enforce agreement for exchange of land); TexCivA 276SW944; TexCivA 287SW110; TexCivA 19 SW(2d) 936 (contract to leave property to adoptive child); 70Utah49, 257P 1058. **Petition held insufficient.**–Tex CivA 20SW(2d)843. **Allegations of bad faith** held sufficient. 69CalA337, 231P 361. **Complaint construed as one for specific performance and not creditor's bill.**–70CalA400, 233P397. **Form of action** for specific performance held not changed to creditor's bill by allegations of fraud against transferee of property. 70CalA400, 233P397. **Action to confirm sale of land at auction held under the** pleadings and evidence action for specific performance. 134SC54, 131SE319. **Exchange of land.**–TexCivA 283SW860. **Citizenship of person agreeing to adopt child** need not be alleged. 77Mont260, 250P823. **Where bill did not allege fraud** and no evidence was introduced to prove it, plaintiff was held not entitled to damages for fraud. 254Mass 339, 150NE90. **Petition held not to state case.**–168Ga230, 147SE382. **Clear and definite averments of fact,** and not mere conclusions, are required. 219Ala357, 122S435. **Plaintiff's title.**–NJ 144A588 (2dcase).
774–53 218Ala433, 118S633.
774–54 322Mo 1064, 18SW(2d)1043 (not objectionable as attempt to state two causes of action). **Plaintiff's satisfaction with defendant's title** is admitted by filing of bill. 233Mich203, 206NW526.
774–54½–New. **Supplemental bill.**–After decree ordering plaintiff's cotenant to convey tract as if owner of whole on plaintiff's depositing entire purchase price in court, plaintiff may file supplemental bill asking conveyance of such title as defendant could convey with abatement of purchase price. 212Ala 667, 103S874.
774–54½–New. **Plaintiff as matter of** pleading is not required to negative existence of encumbrances. 264Mass475, 163NE162.
774–55 DelCh 141A697 (bill insufficient).
774–56 225AppDiv342, 233NYS80.
774–56½–New. Devisee need not assert want of legal remedy in suit to enforce agreement to abandon will contest; 126 Me167, 136A814.
774–56½–New. nor need he assert irreparable injury where record shows necessity of expenses to establish will. 126Me167, 136A814.
774–57 255 IllA518 (bill must show absolute right without further negotiations); 148Md354, 129A366. **Bill or complaint held sufficient.**–43 Ida354, 253 P849; Nebr 230NW686. **Plaintiff alleging modification** of written contract must prove same. 174Ark1072, 298SW 353. **Execution of contract without wife.**–97Fla503, 121S560(2dcase).
775–58 213Ala574, 105S650 (complaint held good against demurrer for uncertainty of terms); 216Ala534, 113S613 (contract relating to land in other state failing to show terms or where contract entered into demurrable); 219Ala357, 122S435; 98CalA390, 277P197; 111Conn 141, 149A239; 92Fla1110, 111S386; 165 Ga439, 141SE300; 168Ga276, 147SE552; 44 Ida110, 255P309 (complaint held insufficient); 320 Ill 597, 151NE514; 326 Ill 189, 157NE240; 148Md589, 129A900 (court cannot supply description); 101 WVa742, 133SE618 (failure to allege date of contract and time for performance makes bill demurrable). **Allegations of contract sufficiently definite.**–

160Ga831, 129SE546. **This rule applies where vendor has conveyed title to third person and bill seeks to declare trust** for benefit of vendee seeking specific performance, and in such case title holder's knowledge of both existence and terms of contract should be alleged. 92 Fla1110, 111S386. **Agreement in writing** which does not purport to give absolute right cannot be specifically enforced. 326 Ill 189, 157NE240. **Petition held not to state cause of action.**–169 Ga290, 150SE154; 115Nebr412, 213 NW587. **Amounts and times of deferred payments.**–319Mo 290, 3SW(2d)701. **Copy of deed or detailed allegations as to its terms** is not necessary. 219Ala 357, 122S435. **Bill held not demurrable for indefiniteness.**–97Fla503, 121S560(2d case). **Petition held insufficient** to show right to enforce alleged contract to make will in plaintiff's favor. 167Ga710, 146 SE478. **In suit for specific performance of alleged contract to convey realty,** if terms of credit to be given to vendee are uncertain, vendee may waive all credit and pay cash if pleadings are so framed. 103NJEq121, 142A441.

775–58½–New. In broker's action against principal, petition not alleging that agency had ended or that valid contract of sale was made between parties and disclosure to principal during agency of knowledge of facts as to value or salability is insufficient. 322Mo 1064, 18 SW(2d)1043.

775–59 Adequacy of consideration need not be averred in Indiana. 87 IndA628, 160NE105.

775–60 Allegations sufficient.–160Ga831, 129SE546. **Complaint insufficient.**–40 F(2d)948. **Petition is not amendable** which alleges contract void for indefiniteness and uncertainty of consideration. 161Ga965, 132SE385 (setting forth allegations of amendment detailing alleged "assumption of loan $9,500").

776–62 201Cal 605, 258P85; 69CalA 705, 231P766; 72CalA748, 238P127; 80 CalA520, 252P334; 88CalA664, 264P 256. But see 206Cal 213, 273P547. **Complaint sufficient.**–91CalA103, 267P 172. **Complaint failing to state value of land** sought to be conveyed does not state cause of action. 69CalA705, 231P 766.

776–63½–New. In Illinois contract must appear to be fair, just, and not unconscionable. 255 IllA518.

776–64 91Fla38, 107S365; 91Fla454, 107SE631; TexCommnA 295SW578. **Allegations held sufficient.**–166Ga62, 143 SE570. **Where contract is incorporated in bill,** variance in description of land between allegations of bill and contract will not render bill demurrable. 97Fla 503, 121S560(2dcase). **Description of property by street number held sufficient.**–167Ga615, 146SE452. **Description insufficient.**–CalA 288P855.

777–65 94Fla895, 114S666, 667 [cit Cyc]; 160Ga831, 129SE546. But see 13 PortoRicoFed1.

777–66 91Fla38, 107S365; 155Md654, 142A508; 99NJEq894, 133A423 (complaint showing contract not in writing held properly stricken). **Possession.**–91 Fla38, 107S365. **Complaint held insufficient.**–Ida 288P167.

777–67 93Fla954, 113S100.

777–68 221Ala209, 128S396.

777–68½–New. In vendee's suit making wife of vendor party to suit upon contract in which she did not join and seeking specific performance by both husband and wife, vendee should allege that at time contract was made he either did or did not know of her dower interest as case may be. 92Fla1110, 111S386.

778–70 Bill may traverse bona fides of deed by alleged vendor.–99NJEq859, 133 A208.

778–71 214Ala143, 107S92.

778–72 219Ala357, 122S435; 102CalA 178, 283P331; 320 Ill 597, 151NE514; 331 Ill 140, 162NE112; 213Ky333, 280 SW1115 (petition for specific performance of contract to convey to purchaser procured by plaintiff held written contract for sale); Mo 25SW(2d)1055; 81 NH535, 129A374 (bill not demurrable); 191NC619, 132SE593; TexCivA 289SW 1045; TexCivA 21SW(2d)87. **Plaintiff has burden of proving** substantial compliance with his part of contract. 174 Ark1072, 298SW353. **Pleading held sufficient.**–106WVa79, 144SE884.

778–73 215Ala161, 110S10; 216Ala232, 113S40; 70Utah49, 257P1058.

779–77 219Ala357, 122S435; 85Mont 389, 278P836. See also 264Mass475, 163NE162. **Cross complaint sufficient** against general demurrer to show redeposit and retender of money under escrow agreement. 198Cal 341, 244P1084.

779–78 214Ala143, 107S92; 215Ala161, 110S10; 99CalA140, 277P1086; 327 Ill 406, 158NE692; 328 Ill 193, 159NE220; 331 Ill 140, 162NE112; 33PortoRico 165.

780–79 219Ala357, 122S435. See also 264Mass475, 163NE162. **Complaint held good** against demurrer on ground that title to land was in third persons, where allegation of tender of deeds from third persons to defendant. 213Ala574, 105S 659.

780–80 216Ala232, 113S40. **Where wife who did not join in contract of husband vendor is made party to suit by vendee,** the prayer should be framed, upon appropriate allegations, for conveyance of what husband can give with abatement or not according to facts. 92Fla1110, 111S386. **Whole legal title ordered conveyed** where complainant prayed only conveyance of portion to assignee. 48 RI 401, 137A699.

780–81 94Fla704, 114S513; TexCivA 20 SW(2d)843.

780–81½–New. Bill for specific performance of land contract may be treated as one to redeem from forfeiture where equities of parties require and there is prayer for general relief. 239 Mich88, 214NW102.

780–81⅓–New. Such rule has been applied in action for specific performance of agreement for sale of vendee's interest under land contract, where strict performance was waived by granting of extension of time, and payments to defendant were suspended by writ of garnishment, and plaintiff had paid amount due to original vendor and tendered balance into court. 239Mich88, 214NW102.

780–81¼–New. Prayer for more relief than plaintiff is entitled to does not vitiate complaint. 198Wis445, 224NW 473.

781–85½–New. Where petition for specific performance shows on its face that third persons who are not made parties to suit are, or will at some future time become, entitled to interest in premises, demurrer to petition for lack of such parties should be sustained. 167Ga389, 145SE460.

781–85⅓–New. Purchaser's complaint for specific performance is not demurrable for failure to allege earnest money was not returned. 198Wis445, 224NW 473.

781–85¼–New. Inability of vendor to furnish marketable title is matter of defense which might be urged at trial, but is not available by demurrer to complaint. 198Wis445, 224NW473.

782–89½–New. That agreement must be gathered from several instruments is no defense to suit for specific performance thereof. 82NH449, 136A257.

782–90 232Ky415, 23SW(2d)596.

782–91 Under general denial purchaser may show want of merchantable title. 86 IndA632, 155NE712.

782–92 121Kan93, 246P183; 148Md 397, 129A504 (suit not barred by laches, where there is no evidence of claim till shortly before filing of suit).

782–93 Non est factum.–322Mo 869, 17 SW(2d)345.

782–94 98NJEq617, 130A829.

782–95 Landowner may prove under general denial in city's suit for specific performance of option contract that survey was incorrect. TexCivA 297SW 347.

782–97½–New. rescission; 318 Ill 259, 149NE239.

782–97⅓–New. equitable defense that separation agreement is iniquitous or oppressive; 134Misc250, 234NYS705.

782–99 164Ga712, 139SE417.

783–1 But see 132Misc597, 230NYS360.

783–3½–New. Equitable defense to specific performance must be specially pleaded. 189NC434, 127SE521.

783–3⅓–New. Defendant cannot set up outstanding title in third party to defeat plaintiff's right to redeem property under contract between them, under which defendant agreed to hold property for plaintiff. 160Ga831, 129SE 546.

783–3¼–New. Where code renders conveyance in consideration of support of grantor voidable, it must be set up instead of demurrer. 216Ala232, 113S40.

783–4 Answer alleging contract requiring plaintiff to take and pay for land, conveyance of which is not sought to be enforced, states defense. 195Wis69, 217 NW700.

783–6 Cross bill held insufficient.–320 Ill 597, 151NE514.

783–8½–New. In action to quiet title and cancel contract of purchase, defendants may counterclaim for specific performance. CalA 274P572.

783–8⅓–New. In action by vendee's assignee to impress lien on property for down payment, vendor's grantee charged with being vendee in fact may interpose counterclaim for specific performance. 225AppDiv440, 233NYS395.

783–9 74CalA564, 241P408 (cross complaint demurrable for laches not excused); 316Mo 609, 291SW462; 225App Div440, 233NYS395. See also 223App Div83, 227NYS22.

784–12½–New. Sufficiency of evidence.–15DelCh195, 134A99 (evidence held insufficiently definite as to terms of contract to warrant specific performance).

784–12⅓–New. Cross-complaint for specific performance in action to quiet title is fatally defective in absence of pleading and proof that contract is founded on adequate consideration. 92 CalA570, 268P699.

784–12¼–New. Cross complaint seeking recovery of stock without market value held not insufficient for failure to allege inability to procure stock in market. Mont 290P238(2dcase).

784–13½–New. Evidence sufficient to show plaintiff's default. 324 Ill 549, 155 NE477.

784–13⅓–New. Plaintiff's proof of performance must be clear and satisfactory. 324 Ill 549, 155NE477.

784–14 77Colo 370, 237P165; 148Md 354, 129A366 (proof must be clear and explicit leaving no room for doubt); Utah 279P502; Wis 229NW71 (evidence held insufficient). **Evidence held insufficient.**–216Ala29, 112S312; Mo 274SW 37; Mo 297SW954. **Evidence held sufficient.**–104CalA635, 286P723; Wash 291 P469. **Oral contract to leave property at death** must be established by clear and convincing proof. 126Misc436, 213 NYS119. **Plaintiff must clearly establish case.**–216Ala29, 112S312.

784–14½–New. Value of services and property to be devised need not be shown in action based on oral contract to adopt and leave all property to adopted child. 162Ga664, 135SE195.

784–14⅓–New. Plaintiff must prove compliance, or readiness, willingness, and ability to comply, with terms of contract. 327 Ill 406, 158NE692.

784–14¼–New. Evidence held to show that plaintiff knew authority from city had not been obtained to construct building violating ordinance. 327 Ill 489, 158NE810.

784–14½–New. Plaintiff presumed to know that contract violated zoning ordinance. 327 Ill 489, 158NE810.

784–14⅓–New. Evidence held sufficient to authorize specific performance. 101 NJEq403, 138A900.

784–14¼–New. Onus is on plaintiffs to establish existence, terms, and written memorandum of agreement. 320Mo 954, 8SW(2d)966.

784–14⅛–New. Proof of formal declination of vendor to execute title was unnecessary where purchaser's right had been bitterly contested. 220Ala693, 127 S170.

784–14½–New. Defendants have burden of establishing rescission in land contract. 339 Ill 340, 171NE263.

784–14 1/10–New. Fraud is affirmative defense and must be proved like any oth-

er fact. 339 Ill 340, 171NE263.

784-15 Cal 289P165 (to show sufficiency of tender); 326 Ill 453, 158NE156.

784-15½-New. Presumptions. - Presumption that breach of contract to transfer real property cannot be adequately compensated in damages is raised by statute in some jurisdictions. 72Mont318, 233P607.

784-15½-New. No necessity for keeping money idle will be presumed as regards recovery of interest. 221Ala209, 128S396.

784-15¼-New. Burden of proof.-31F (2d)188; 218Ala85, 117S678; 90CalA 136, 265P501; 332 Ill 266, 163NE697; 332 Ill 376, 163NE777; 333 Ill 31, 164 NE194; 334 Ill 642, 166NE455; Ill 173 NE343; 206 Iowa21, 218NW483; 207 Iowa306, 222NW838; 226Ky214, 10SW (2d)837; 233Mich425, 207NW16; Mo 286SW95; 322Mo 869, 17SW(2d)345; 83Mont214, 271P433; 30 OhA179, 164 NE643; TexCommnA 23SW(2d)684; TexCivA 275SW487.

784-15½-New. General burden of proof rests on plaintiff. 237Mich168, 211NW 95.

784-15⅙-New. Burden on plaintiff to establish oral agreement. 237Mich168, 211NW95.

784-15⅐-New. Burden rests on plaintiff to prove performance or offer of performance on his part. 329 Ill 334, 160NE597.

784-15⅛-New. Plaintiff must prove existence of contract and its terms with reasonable degree of certainty. 76CalA 601, 245P439; 154Md414, 141A348.

784-15⅑-New. Burden to establish legal defense is on party asserting it, 217 Ky830, 290SW66 (fraud inducing execution of contract).

784-15⅒-New. Burden is on defendant to show that he held stock as pledge. 154Wash34, 280P939.

784-15/11-New. Burden is on plaintiff to show that he could give defendant title. Mass 168NE157.

784-15/12-New. Plaintiff is not bound to prove tender of deed, where defendant renounced transaction. Mass 168NE 157.

784-15/13-New. Burden of proof is on broker, suing for specific performance of contract to sell him property listed with him by defendant for sale to others, to show that agency was dissolved and other facts showing good faith and fair dealing with owner. 322Mo 1064, 18SW(2d)1043.

784-15/14-New. Plaintiff must prove that contract was in writing or that it has been partially performed. 76CalA 601, 245P439.

784-15/15-New. Vendor claiming forfeiture of contract has burden of proving it. 70Utah49, 257P1058.

784-15/16-New. Burden of proof as to condition subsequent is upon purchaser as affirmative defense. 131Misc488, 226 NYS275.

784-15/17-New. Defendant, admitting execution of contract, must prove alleged cancellation. 329 Ill 59, 160NE 147.

784-15/18-New. Burden of proving that contract was unfair rests on defendant. 329 Ill 334, 160NE597.

784-15/19-New. Burden of proving abandonment of contract is on defendant in suit for specific performance. TexCivA 28SW(2d)1095.

784-15/20-New. Fraud of broker acting as dual agent must be proved by weight of testimony. 337 Ill 396, 169NE258.

784-15/21-New. Plaintiff must show existence and subject matter of contract. 237Mich168, 211NW95.

784-15/22-New. Admissibility of evidence.-33Ariz128, 262P995; 208Cal 185, 280P959; 82Colo 121, 257P355 (evidence properly excluded); 111Conn700, 151A159; 160Ga281, 127SE848 (evidence admissible that land tendered was plaintiff's fair share of estate); 160Ga 831, 129SE546 (plaintiff properly allowed to testify that he had never disclaimed or stated that he did not have right to redeem and take up land held for him by defendant under contract); 165Ga103, 139SE870 (evidence as to gifts of land to other son than one seeking to enforce parol gift is not irrelevant or immaterial); 166Ga792, 144SE 286; 167Ga615, 146SE452; 170Ga585, 154SE149 (holding exclusion of evidence not shown material not error); 156Md547, 144A774; Mass 169NE891; MoA 13SW(2d)569; 140 Okl 271, 282P 1104 (making of improvements); 294 Pa295, 144A72; 48SD470, 205NW29 (in suit to compel specific performance of written leasing contract by which landlord agreed to convey portion of property to tenant, evidence of custom between parties as to division of crops is immaterial); 149Wash328, 270P1032.

784-15/23-New. Purchaser may show that delay in making payments was waived by vendor. 70Utah49, 257P1058.

784-15/24-New. Sufficiency of evidence. -30F(2d)5 (to establish decedent's oral promise to make will in favor of plaintiff); 32F(2d)247; 32F(2d)252; 35F (2d)609 (to warrant refusal of specific performance); 219Ala503, 122S815; 221 Ala427, 129S18 (to show bidders at auction knew vendor ordered sale stopped); 178Ark549, 11SW(2d)456 (performance of services under contract to leave property in consideration thereof); 198Cal 341, 244P1084 (evidence sufficient to support decree for performance); 208 Cal 578, 283P67 (sufficient to justify finding that no oral agreement was made by testatrix to will her entire estate to plaintiff); Cal 289P165 (to establish purchaser's readiness and willingness to perform); 76CalA601, 245P 439 (evidence held insufficient to warrant decree for specific performance); 80CalA478, 251P967; Ark 31SW(2d) 130; 89CalA345, 264P789; 90CalA136, 265P501 (to support finding that defendant did not agree to execute oil lease as alleged); 92CalA343, 268P408 (to show that vendor was ready and able to perform contract); 95CalA352, 272P 805; 95CalA768, 273P611 (to support finding that owner of interest in land delayed exercise of option beyond time fixed); CalA 277P1107 (to sustain contract by person rearing child to leave child all property); 82Colo 121, 257P 355 (evidence sufficient to sustain findings and decree for plaintiff vendor); 86Colo 479, 282P1067 (to support judgment for specific performance for defendant); 106Conn484, 138A503; 162 Ga630, 134SE756 (evidence held insufficient to establish individual contract of testator to devise property to plaintiff); 165Ga534, 141SE653; 167Ga615, 146SE452; 168Ga439, 148SE81; 43 Ida 354, 253P849; 318 Ill 259, 149NE239; 319 Ill 60, 149NE586 (evidence held sufficient to show that contract was made understandingly and fairly); 320 Ill 23, 150NE344; 320 Ill 586, 151NE491 (finding sustained that purchaser's representations were true); 325 Ill 559, 156NE 754; 325 Ill 596, 156NE769; 327 Ill 406, 158NE692; 329 Ill 21, 160NE130; 329 Ill 334, 160NE597; 331 Ill 95, 162NE 161 (contract must be clearly proved); 332 Ill 31, 163NE329; 332 Ill 266, 163 NE697; 332 Ill 376, 163NE777; 332 Ill 422, 163NE823; 332 Ill 484, 163NE828 (to warrant rescission and deny specific performance); 333 Ill 31, 164NE194; 333 Ill 494, 165NE131, 65ALR1 (to show defendant's signing of, and complainant's compliance with, contract); 334 Ill 642, 166NE455 (to establish rescission); 335 Ill 202, 167NE90 (to show election precluding suit for specific performance); 337 Ill 271, 169NE222; 337 Ill 396, 169NE258 (sufficient to justify finding that conduct of broker in acting in dual capacity did not vitiate contract); 338 Ill 433, 170NE199(2dcase); 339 Ill 62, 170NE705; 339 Ill 340, 171 NE263; 339 Ill 504, 171NE494 (to show lessor's knowledge or notice of default); Ill 172NE161 (to show definite contract for sale of lots); Ill 173NE343; Ill 173 NE348; Ill 173NE477; 206 Iowa21, 218 NW483; 206 Iowa208, 218NW506 (to show that contract to purchase land was induced by seller's fraud); 207 Iowa306, 222NW838 (to establish execution and delivery of contract); 224 Ky56, 5SW(2d)271; 226Ky214, 10SW (2d)837; 232Ky415, 23SW(2d)596; 164 La739, 114S637; 167La354, 119S254; 10LaA454, 121S229 (to show no consideration for lease with option to purchase); 168La493, 122S593 (to establish assignment of copurchaser's interest); Md 150A867 (to sustain decree for performance of oral contract to leave property by will); 263Mass288, 160NE 892; 264Mass431, 162NE902; 264Mass 524, 163NE86; Mass 167NE292; 233 Mich210, 206NW351 (to show fraud inducing execution of option to purchase land); 233Mich203, 206NW526 (to sustain finding that performance offered by plaintiff was not timely); 233Mich425, 207NW16 (fairness of contract between parties on confidential relation not established); 235Mich253, 209NW68 (to show fraud); 236Mich195, 210NW233 (to show fraud on part of defendant in action to enforce contract for sale of automobile); 239Mich348, 214NW146; 239Mich167, 214NW210 (to show agreement to reassign contract interest in certain lots); 238Mich689, 214NW247 (to show fraud of vendee in fiduciary relationship); 240Mich483, 215NW315 (evidence insufficient to show fraud); 240Mich141, 215NW329; 240Mich406, 215NW360 (to show good faith of purchaser); 242Mich377, 218NW659 (to show that wife signed land sale option); 242Mich73, 218NW789; 243Mich618, 220NW670; 250Mich515, 231NW60 (to establish performance of oral contract to convey land taking it out of statute); 251Mich215, 231NW617 (to show materiality of defaults of buyer of cherries); Mich 233NW403; 168Minn269, 209NW 889 (to show vendor's refusal to record release of right of way); 169Minn427, 211NW823; 175Minn27, 220NW154; Mo 286SW95 (degree of proof); 316Mo 333, 289SW939; 322Mo 869, 17SW(2d) 345; 323Mo 1156, 20SW(2d)650 (to show that time was of essence of contract); Mo 29SW(2d)91; MoA 13SW (2d)569 (to support finding for defendants in suit to specifically enforce decedent's oral gift); 72Mont318, 233P 607 (to sustain finding that injury from refusal to perform oral contract to convey could not be compensated in damages); 85Mont389, 278P836 (to warrant finding that purchaser was entitled to specific performance of land contract); 77Mont260, 250P823; 117Nebr536, 225 NW38; 103NJEq275, 143A346; NJ 146 A659 (evidence held insufficient to show duress in procuring execution of contract); 103NJEq121, 142A441; NJCh 143A139; NJCh 146A593; NJCh 147A 388 (evidence held sufficient); 98NJEq 357, 129A123; NJCh 152A77; NJ 152 A196; 249NY58, 159NE723; 216App Div255, 214NYS595 (evidence held sufficient to show that plaintiff in partition suit is sole surviving heir of owner of property entitled to compel specific performance by purchaser); 222 AppDiv119, 226NYS135; 222AppDiv467, 226NYS513; 224AppDiv252, 229NYS 725; 49ND265, 191NW462 (to show fraud inducing contract to purchase land); 30 OhA179, 164NE643 (to warrant cancellation of instrument for fraud by reason of inadequacy of price); 32 OhA316, 168NE61 (oral agreement to issue insurance policy); 133 Okl 27, 271 P145 (oral contract for sale of real estate); 142 Okl 219, 286P306; 43 Okl ACR173 (evidence sufficient to support judgment denying vendee specific performance); 126 Or193, 268P75; 294Pa 295, 144A72 (to show vendor's mental capacity); 33PortoRico 613; 48SD470, 205NW29 (to show substantial performance by plaintiff lessee suing for specific performance of contract to convey part of land); 50SD588, 211NW453 (insufficient evidence of merchantable title to warrant specific performance); 159 Tenn126, 17SW(2d)15; TexCivA 275 SW487 (reason why lease was not executed on day designated); TexCivA 1 SW(2d)334; TexCivA 11SW(2d)540 (to support damages in lieu of performance); TexCivA 15SW(2d)203 (to show plaintiff had interest in land contracted to be sold to plaintiff's husband); Utah 279P502 (to support finding of no oral contract by deceased either to convey or devise to son); 151Va240, 144SE444; 141Wash630, 251P854 (to show mental incompetency of giver of option); 151

Wash201, 275P571 (to show fraud in contract to divide estate); Wash 289P 36 (to show oral contract to make will and plaintiff's performance of services); 108WVa512, 152SE11 (evidence held insufficient); 40Wyo 261, 276P444.

784–15½5–New. Evidence held insufficient.–43 Ida354, 253P849; 328 Ill 487, 159NE819; 329 Ill 59, 160NE147; Iowa 229NW199; 154Md414, 141A348; 77 Mont260, 250P823; 102NJEq250, 140A 290; 131Misc488, 226NYS275; 66Utah 487, 243P798.

784–15½6–New. It cannot be assumed that city sewage plant, located mile from property defendant contracted to purchase, would in normal operation create conditions which would damage property. 154Md588, 141A337.

784–15½7–New. In son's suit to enforce deceased father's parol gift of land, testimony of death of daughter to whom father deeded part of land in dispute is irrelevant. 165Ga103, 139SE870.

784–15½8–New. In such action plaintiff's evidence that father was of unsound mind at time he made deed to daughter is properly admitted. 165Ga 103, 139SE870.

784–15½9–New. Evidence not clear and convincing is insufficient. NJCh 151A 391.

784–15½0–New. Oral agreement to execute will is closely scrutinized. NJCh 151A391.

784–15½1–New. In suit to enforce agreement to execute irrevocable reciprocal wills brought after death of one testator, agreement must be established by clearest and most convincing evidence. 132 Or185, 282P241 (evidence held insufficient).

784–15½2–New. Though not sufficient to authorize rescission at law, same proof will often be refused in equity to compel performance of contract. 139 Okl 35, 280P1075.

784–15½3–New. Courts of equity accept with caution evidence offered in support of contract for disposition of property of deceased person different from that provided by law. 337 Ill 271, 169NE 222.

784–15½4–New. One who seeks specific performance must establish by competent evidence that contract sued on is contract between parties. 339 Ill 62, 170NE705.

784–15½5–New. Where one party to contract dies, trial court must base conclusion on testimony as to parties' acts and surrounding circumstances. 208Cal 578, 283P67.

784–15½6–New. Finding that consideration was adequate for conveyance of realty is not sufficient to support judgment for specific performance of contract involving realty and furniture and furnishings. 103CalA32, 283P946.

784–15½7–New. There is no presumption of fraud where broker acts as dual agent. 336 Ill 446, 169NE258.

784–15½8–New. Evidence of instrument creating vendor trustee of property held admissible. 208Cal 185, 280P959.

784–15½9–New. Issues.–Refusal to receive evidence respecting partition is not error where cross complaint asking for partition was dismissed. CalA 288 P110.

784–15¼0–New. Proof of parol contract to convey land must be clear to warrant specific performance. 250Mich515, 231NW60.

784–15¼1–New. Oral testimony of interested parties as to conversations alleged to have taken place many years before trial should be carefully scrutinized. 77Mont260, 250P823.

785–17 87Colo 207, 286P109; 162Ga 630, 134SE756; 148Md354, 129A366; 148Md589, 129A900; 220AppDiv591, 222NYS172. **No variance.**–33Ariz128, 262P995; Ill 172NE161; IndA 169NE 340. **Allegation of contract with defendant** does not warrant proof of contract with defendant and other jointly. 162Ga630, 134SE756. **Evidence held sufficient.**–222MoA268, 296SW205. **Examples of substantial and fatal variance.**–101CalA290, 281P630; 337 Ill 111, 168NE908. **Defendant's proof must be consistent with answer.**–NJ 152A196.

785–18 290Pa566, 139A450. **Examples of immaterial variance.**–MoA 256SW136 (exact place of contract); 290Pa566, 139A450; 153Wash625, 280P70.

785–19 148Md589, 129A900.

786–21½–New. Evidence held sufficient: To decree specific performance in favor of vendor. DelCh 147A250.

786–21½–New. To show abandonment of contract by mutual consent. 336 Ill 168, 167NE790.

786–21¼–New. To justify finding that defendant was ignorant regarding state of plaintiff's title. Mass 168NE157.

786–21⅓–New. To show performance by plaintiff, saving it from operation of statute of frauds. 248Mich147, 226NW 853.

786–21⅓–New. Evidence held insufficient to show existence of contract. 215 Ala699, 109S922; 204 Iowa933, 216NW 53.

786–22 291Pa53, 139A606. **No variance.**–77Mont260, 250P823 (agreement to adopt and leave property by will).

786–26 Amendments allowed.–167Ga 604, 146SE447; Mass 167NE292; 283 Pa508, 129A459; 152Va173, 146SE254. **Amendment refused.**–98NJEq362, 129A 241. **As to parties.**–157Md239, 145A550. **Amendment to answer** in suit to specifically enforce contract to devise alleging administrator was estopped from setting up title in plaintiff against estate was refused as without merit. 168Ga 156, 147SE106.

787–27 91Fla1059, 109S192. **Such injunctions are not equitable attachments or liens** superior to rights of purchasers. 264Mass524, 163NE86.

787–28½–New. Dismissal.–Bill of complaint by purchaser to compel specific performance of contract for sale of land and for accounting for rents and profits has been held properly dismissed, on complainant's refusal to accept tender of performance and accounting, and on his assertion of claim for reformation by reduction of purchase-money mortgage, where not within scope of pleadings. 103NJEq337, 143A321.

787–28½–New. Findings.–In specific performance suit, court's findings, with reference to previous suit to reform contract, "that an action was instituted as therein stated; that the pleadings were therein stated; that the findings made by the court in said action are attached hereto, marked Exhibit A, and by this reference made a part hereof for all purposes" have been held not in effect a finding that findings in first case were true. 94CalA349, 271P348.

788–30 Instructions.–170Ga585, 154SE 149 (to enforce agreement to devise).

788–31½–New. Instructions in action to enforce contract to devise land held correct. 121Kan93, 246P183.

788–31½–New. Question whether contract as performed by cruisers appointed by parties to appraise quantity of timber cut from land was padded or fraudulent presented question of fact. Wash 270P1032.

788–32 160Ga550, 128SE751 (whether prescriptive title good marketable title); 168Ga156, 147SE106. **Instructions.**–163 Ga679, 136SE795. **Instructions held essentially correct.**–162Ga664, 135SE195; 167Ga368, 145SE661. **Instructions held not misleading.**–162Ga664, 135SE195. **Instructions held proper.**–164Ga696, 139 SE333. **Instructions held properly refused as misleading.** 162Ga664, 135SE 195. **Sufficiency of evidence.**–163Ga679, 136SE795. **Amount of verdict held not excessive.** 163Ga795, 136SE795. **New trial.**–136Ga795, 136SE795 (overruling of motion held proper). **Evidence held to make jury question.**–TexCivA 294SW 948. **Requested charge properly refused as argumentative.**–168Ga156, 147 SE106. **What is reasonable time for vendor to perfect title is question of fact.** –168Ga511, 148SE265.

788–32½–New. Question of law for court.–Sufficiency of title is question of law for court. TexCivA 1SW(2d)334.

788–32½–New. Questions of fact.–Tex CivA 15SW(2d)654(2dcase).

789–34 101NJEq373, 139A486. **Reference after decree.**–Man [1925] 3DomLR 473.

789–37 103NJEq121, 142A441.

789–39½–New. Trial and hearing.–Permitting plaintiff on defendants' motion for nonsuit to execute and tender new deed correcting mistake in description in first deed held proper. 81Colo 202, 254P764.

789–39½–New. Statement of judge held not to have misled plaintiff as to his burden of proving that he could give defendant title agreed on. Mass 168NE 157.

789–39¼–New. Evidence held insufficient to warrant specific performance of parol partition. 15DelCh112, 132A 139.

789–39⅓–New. General finding that lease was in full force and effect for further term was held to import finding that covenant relating to repairs was not violated. 255Mass76, 151NE 81, 45ALR1.

789–39⅓–New. Purchaser may have reference to inquire into defendant vendor's title. 219Ala3, 121S415.

789–39½–New. Decree of reference to investigate defendant's title, has been held not authorized, under bill merely seeking specific performance without raising question of sufficiency of title. 219Ala3, 121S415.

789–40 Amount of judgment.–167La 1063, 120S857. **Decree reciting that on return of plaintiff's deposit** bill be dismissed adjudicated right to recover deposit as respects final decree. 266Mass 172, 164NE921. **Definiteness of decree.**–246Mich96, 224NW420.

789–41 75CalA698, 243P889 (decree not erroneous for failing to provide for payment of consideration); 92CalA343, 268P408; 327 Ill 564, 158NE806; 206 Iowa21, 218NW483; 232Ky415, 23SW (2d)596; 189NC434, 127SE521; 56ND 698, 219NW112. **Decree ordering conveyance according to agreement with appurtenances** is not invalid, though conveyance of water rights acquired subsequent to agreement is thereby required, which rights are not mentioned in pleading or proof. 72Mont318, 233P 607. **Court cannot reform contract** under bill for specific performance. 323 Ill 440, 154NE197. **Plaintiff is entitled to only such relief as is warranted by pleadings.**–316Mo 333, 289SW939. **Failure to ask for affirmative relief** precludes granting of specific performance. 246Mich96, 224NW420.

789–41½–New. Relief against persons not parties.–Wife of party to contract for exchange of lands may not be required to join in deed where she was not made party to action. 72Mont318, 233P607.

789–41⅓–New. Where bill proceeds on assumption that defendant has title he contracted to convey, only decree complainant is entitled to is one conveying to him defendant's title. 219Ala3, 121 S415.

789–41¼–New. Decree may not be option to either party. TexCivA 16SW (2d)548.

789–41⅓–New. Court should not attempt to pass upon questions not properly in case. 323Mo 1156, 20SW(2d) 650.

789–42 332 Ill 266, 163NE697; 333 Ill 494, 165NE131, 65ALR1; 336 Ill 446, 169NE258; 86 IndA484, 156NE589 (findings held to warrant decree against owners by entirety); 123Kan72, 254P 362, 369 [citCyc]; 224AppDiv525, 231 NYS524; 189NC434, 127SE521. **Decree held proper.**–116 Or253, 240P886; 12 PortoRicoFed21; TexCivA 28SW(2d) 1095; 144Wash326, 258P4 (payment of taxes by defendant properly required; 192Wis218, 212NW 275. But see 86 IndA632, 155NE712. **Decree held supported by evidence.**–92Fla224, 109S306. **Fact that pleadings and judgment include certain personal property not sufficiently described in contract** does not render decree erroneous where property was inconsequential and contract was one to convey both realty and personalty and was therefore severable. 75CalA698, 243P889. **Particular decrees held not erroneous.**–325 Ill 596, 156NE769. **Date of commencement of decreed lease** should be that of contract, but beginning of pay-

ment of rent may be determined by decree. 152Md146, 136A651. **Evidence held sufficient.**–103WVa539, 138SE104. **Equity will not compel lessee to surrender possession,** on expiration of lease, on landlord's furnishing an undertaking to pay amount of appraisers' award for value of building erected by lessee with interest when it should be determined, since this would amount to rewriting of lease for parties, and deprive tenant of effective instrument for enforcing prompt payment. 133Misc 270, 231NYS622. **No reference to map can be used in description in decree** where map was not made part of contract though boundaries may be made clear if necessary by reference to roads. 12PortoRicoFed47. **Where contract is in general terms** but evidence localizes land in question, decree may individualize general description without separate bill of reformation. 12PortoRicoFed47. **Matters contemplated by contract.**–132 Or38, 284P562.

790–43 37F(2d)856. **Where plaintiff's guarantors were, by contract, to be satisfactory to lessor,** court may approve guarantor. 152Md146, 136A651.

790–43½–New. Findings held sufficient to support decree for specific performance against administrator. 28Ariz585, 238P390.

790–43⅓–New. Where complainant was not entitled to specific performance, he was held not entitled to injunctive relief. 216Ala534, 113S613.

790–43¼–New. Decree fixing time for performance is not erroneous, time not being objected to as unreasonable. Tex CivA 285SW874.

790–43⅓–New. Where no finding of terms of resale, specific performance will not be refused because purchaser resold property. 86 IndA484, 156NE589.

790–43⅙–New. Nor in such case will it be refused without finding that vendor's damages were ascertainable. 86 IndA 484, 156NE589.

792–59 255Mass607, 152NE363. **In New Jersey.**–101NJEq743, 139A165.

793–63½–New. Dismissal with leave to transfer case to law side.–Where facts do not justify specific performance of contract for sale of personal property, bill may be dismissed with leave to transfer case to law side of court. 236Mich 195, 210NW233.

793–65 6PaDist&Co 234. **Attorneys fees.**–117 Or673, 245P321.

793–65½–New. Decree for specific performance directing clerk of court to tax and assess costs in favor of complainant is insufficient, as amount of costs must be adjudicated by court. 94 Fla649, 114S502.

793–66 104CalA635, 286P723 (costs are taxed against one who is denied relief).

794–67 220Ala693, 127S170; 48RI 401, 137A699.

794–68 See also 168La802, 123S331.

794–68½–New. Where purchaser's objections reasonable and suit necessary to establish plaintiff vendor's title to part of property by prescription, costs are properly assessed against plaintiff. 158La1026, 105S52.

794–73 36 OhA31, 172NE689. **Contempt.**–159Ga355, 125SE828. **Decree for specific performance** carries implied finding that it is equitable. 82NH449, 136A257. **Decree in accordance with terms of contract** held to require simultaneous payment and delivery. 325 Ill 596, 156NE769. **Decree operates as conveyance** under statutes in some jurisdictions. 216Ala534, 113S613. **Statute does not prevent jurisdiction of suit** in state, though lands situated in another state. 216Ala534, 113S613. **Sufficiency of compliance with judgment.**–195NC3, 141SE361. **Though vendor leaves jurisdiction,** decree is enforceable. 223AppDiv28, 227NYS85. **Who bound by decree.**–118Nebr163, 223 NW792. **Though defendant purchased property plaintiff had contracted to exchange** from another, he is entitled to have judgment for plaintiff discharged. 135Misc327, 238NYS204. **Decree may be subsequently vacated** where it subsequently appears vendor's title is fatally defective. NJCh 151A371. **Vendee not having asserted right to rescission** cannot set up right upon petition to vacate decree on ground of defective title in vendor. NJCh 151A371.

795–74 Objection first made on appeal.–320Mo 954, 8SW(2d)966. **Discretion of trial court in granting** relief to defendant will not be reviewed in absence of abuse. 162Ga664, 135SE195.

795–75 123 Okl 38, 251P1028.

796–76 Statute permitting specific performance against administrator, unless right of petitioner appears "doubtful," permits specific performance, though administrator contests enforcement. 28 Ariz585, 238P390.

796–78 In Oklahoma.–123 Okl 38, 251P 1028.

SPECULATION

797–7 TexCommnA 3SW(2d)67.

SPEED

797–11 16F(2d)349.

SPENDTHRIFTS

800–1 Spendthrift is not necessarily idiot, habitual drunkard, or distracted person. 253 IllA89.

800–2 That adequate supervision and restraint has been or may be exercised by trustees administering trust fund held not determinative of question of conservatorship. 107Conn1, 138A905.

800–3 Strict construction.–But see 250 IllA416.

800–4½–New. In Rhode Island, under statute, guardian may be appointed if want of discretion exists, whatever its cause, and mental unsoundness need not exist. 50RI 210, 146A621.

800–6 Situs of property.–107Conn1, 138A905. **Residence of spendthrift** determines jurisdiction of court, wherever property is located. 107Conn1, 138 A905.

801–9 Motive of applicant held to pertain to administration of conservatorship rather than to affect its creation. 107Conn1, 138A905.

801–13 Evidence held to support findings.–107Conn1, 138A905. **Antenuptial agreement of alleged spendthrift** has been held insufficient to warrant inference that he might become public charge. 50RI 210, 146A621. **Mere proof that inheritance may be lost** is insufficient to sustain petition of adult children not entitled to support. 50RI 210, 146A621. **Trivial evidence of improvidence** in handling affairs is insufficient. 50RI 210, 146A621. **Evidence held sufficient.**–50RI 210, 146A621.

801–14½–New. Questions for jury.–Where reasonable men might differ in their conclusions, question of what is likely to occur in future to property of alleged spendthrift is primarily for jury. 50RI 210, 146A621.

802–16 Findings held to fulfill requirements of statute.–107Conn1, 138A905.

802–18½–New. Harmless error.–Erroneous submission to jury of issue of sanity is harmless where jury found in favor of complaining party. 50RI 210, 146A621.

802–18⅓–New. Where verdict and judgment are in favor of petitioners, question on review is whether inferences could have been drawn from evidence. 50RI 210, 146A621.

804–27 In Illinois.–327 Ill 139, 158NE 371.

804–28 See also 243 IllA331.

804–32 327 Ill 139, 158NE371.

SPENDTHRIFT TRUST

805–1 127Misc197, 216NYS334.

SPORTING

808–47 "Sporting woman" means prostitute in vocabulary of underworld. 16 F(2d)105.

SPRING

809–60 Utah 274P457.

809–64 Other definitions.–198Cal 473, 245P1087.

SPRINGING USE

810–66 214Ky320, 283SW103.

SPRINKLER LEAKAGE INSURANCE

810–68 Construction of provision avoiding policy in case of fall of building. MoA 26SW(2d)818. **Instructions held not erroneous.**–MoA 26SW(2d)818.

STABLE

812–90 Does not include private garage. 99NJEq288, 133A184.

STADIUM

812–91½–New. Derived from Greek, and originally measure of distance, 31 Ariz503, 254P1056, 52ALR244.

812–91⅓–New. the term was applied first to foot race of such distance and later to place where race was run. 31 Ariz503, 254P1056, 52ALR244.

812–91¼–New. Usually open area some six hundred feet long and flanked by terraced elevations providing seats for spectators of race. 31Ariz503, 254P 1056, 52ALR244.

812–91⅕–New. Modern and popular definition follows old one but is somewhat broader in scope. 31Ariz503, 254 P1056, 52ALR244.

812–91⅙–New. It is technically given as: "A similar modern structure with its enclosure used for athletic games," etc. Webster New Int. D. [quot 31Ariz 503, 254P1056, 1058, 52ALR244].

STAIRWAY

813–3½–New. Flight of stairs; Series of steps ascending or descending to different level. 171Minn408, 214NW269.

STATEMENT

817–46 117 Oh28, 158NE1.

STATES

826–1 216AppDiv362, 215NYS184. **Other definitions.**–Black L. D. [quot 31 NM120, 241P1027, 1049].

827–2 216AppDiv362, 215NYS184.

828–6½–New. State is public corporation. 76Mont429, 247P332, 47ALR424.

828–11 195NC143, 141SE471. **Declaration of Independence** is as much part of law of state as are its constitution and statutes. 29 OhA154, 163NE221.

829–12 State is political entity.–128 Okl 269, 263P635.

829–17 91Fla770, 108S820, 51ALR731.

829–18 16F(2d)313; 88CalA621, 264P 298.

829–19 Conflict between state and federal laws need not be expressed to make former invalid.–16F(2d)313. **State statute prevented from full operation within its purview by congressional inhibition** becomes fully operative on removal of inhibition. 16F(2d)990.

829–19½–New. Intention of federal constitution wholly to exclude state action will not be implied, unless act of congress, fairly interpreted, is plainly in conflict with state regulation on same subject. 278US261, 49SCt108, 73L ed 318.

829–19⅓–New. Power to exclude state action may be implied. 278US261, 49 SCt108, 73L ed318.

829–19¼–New. Power of each of two sovereigns to legislate for common field is as absolute as if it were only sovereign concerned. 43F(2d)222.

829–22 118Nebr174, 224NW18; 136 Wash25, 239P8. **Intention of sovereign state to renounce territorial domain of** own territory not assumed except on clearest evidence. 136Wash25, 239P8.

830–23 194Wis311, 216NW833.

830–26 23AlaA18, 121S427(2dcase) [certiorari den 219Ala154, 121S428(1st case)]; 136Wash25, 239P8 (under constitution). **Jurisdiction of state, extending three miles into sea,** gives similar jurisdiction of counties on shore. 136 Wash25, 239P8. **Bays.**–200Cal 235, 252 P732.

830–27 136Wash25, 239P8.

830–32 Effect of congressional grant of concurrent jurisdiction.–118Nebr174, 224 NW18.

831–38 22F(2d)993; 38F(2d)680; 154 Wash514, 283P462. **States did not surrender their police power when they en-**

tered the federal union. 143Va310, 130 SE516, §1ALR855.

831-39 38F(2d)897; 39F(2d)198; 42F (3d)692; 319Mo 423, 4SW(2d)433. **Where congress regulates particular subject in given manner,** under constitutional authority, state legislature has no right to interfere even as to phases of subject as to which congress is silent. 323Mo 653, 19SW(2d)879.

831-40 273US12, 47SCt265, 71L ed511; 16F(2d)313; Iowa 221NW364; 193Wis 538, 213NW633 (law of state construed to conform with federal law when applied to same subject matter); Wis 233 NW82. **State's constitutional powers must yield** to federal powers. 273US 12, 47SCt265, 71L ed511.

832-42 Wyo 292P2.

832-43½-New. United States does not take power or authority from constitution or laws of any state. 125Misc658, 211NYS205.

832-43½-New. States may not amend or repeal federal laws. 125Misc658, 211 NYS705.

832-43¼-New. Several states and United States are separate, though related governments. 126Misc762, 214NYS781.

832-43½-New. Besides duties of comity, they have rights and limitations as to each other as fixed by United States constitution. 126Misc762, 214NYS781.

832-43⅓-New. They have separate and distinct judicial systems. 126Misc762, 214NYS781.

832-43⅓-New. State court has duty to prevent violation of rights of citizens by federal authorities. 44Ida43, 254 P788.

832-43½-New. In interpreting federal statute as to effect on state legislation, intention should not be spread by construction over ground where express limitation does not reach. 318Mo 225, 2SW(2d)621.

832-43½-New. Contracts between private corporations and United States do not necessarily render corporations government agencies exempting them from state control. 208Cal 359, 281P389.

832-52 Federal statutes relating to introduction of liquor into Indian country remain in force after admission of territory as state. 16F(2d)876.

833-53 143Wash117, 255P94.

833-54 273US257, 47SCt391, 71L ed634 (supreme court may assume that corporations are controlled by law enacted after admission, though created before admission); 143Wash117, 255P94 (treaties with Indians reserving hunting rights to them).

833-55 114Okl190, 245P589; 39Wyo 314, 271P13. **In New Mexico.**-31NM44, 240P988. **Territorial statute must be construed** as though enacted after adoption of constitution. 142Wash243, 252 P913.

833-58 248Mich28, 226NW663.

833-60½-New. Act of congress generally known as the Enabling Act, under which Washington territory became state of Washington, made donations of public land owned by federal government to state for various purposes. 141 Wash110, 250P1090.

833-60½-New. one of which was for public buildings at state capitol. 141 Wash110, 250P1090.

833-60¼-New. The Enabling Act should be given liberal construction for purpose of carrying out its purpose and intent. 141Wash110, 250P1090.

833-60½-New. Purpose of enabling act is to provide temporary means for putting government established by state constitution in motion, and not to provide permanent system of laws for government of new state. 128Okl32, 261 P146.

833-61 27F(2d)586 (Oklahoma); 143 Wash117, 255P94.

834-67 Lease executed by state of Texas and lessee thereunder constituted instrumentalities used by state to develop its lands within treaty compact entered into with congress. 38F(2d)680.

838-98 "Full faith and credit" clause does not require Missouri to recognize foreign officer's right to exercise power within state. MoA 29SW(2d)236; 131 Misc586, 227NYS587.

838-4 217Ky846, 290SW690; MoA 29 SW(2d)236.

838-5½-New. Const. art 4 § 1, which requires one state to give full faith and credit to judgments of another, provides rule of evidence and not of jurisdiction. 28F(2d)526.

838-8 Compact between Oregon and Washington, respecting protection of fish in Columbia River, does not prohibit either state from narrowing class of persons who may take fish or appliances which may be used within its own waters. 21F(2d)76.

838-9 Compact between Kansas and Missouri whereby Kansas agreed not to levy taxes, assessments, or imposts on waterworks plant of Kansas City, within state, does not exempt property from assessments directly benefiting property. 27F(2d)613.

838-9½-New. Agreement as to exemption from assessments includes drainage district assessments. 34F(2d)357.

840-28½-New. Statutes defining boundaries construed.-Dauphine Island, being southernmost island within six leagues of Alabama shore, southern boundary or coast line of such island is southern boundary line of state, under Code (1923) § 85. 23AlaA18, 121S427(2dcase) [certiorari den 219 Ala154, 121S428(1st case)].

840-29 281US261, 50SCt296, 74L ed840; 23F(2d)69; 170Ga855, 154SE255; 118 Nebr174, 224NW18. **Line of greatest depth of water** is not necessarily middle of river channel. 269US152, 46SCt31, 70L ed206. **With reference to erection of bridge** spanning river, river and all territory necessarily spanned is true boundary. TexCivA 288SW875. **In Nebraska.**-281US261, 50SCt296, 74L ed840.

841-30 155Miss55, 122S747.

841-30½-New. nor center line of deepest channel, nor boundaries defined by widest navigable channel, 23F(2d)69.

841-32 325Ill378, 156NE346.

842-33 23F(2d)69; 200Iowa830, 205 NW531; 318Mo991, 2SW(2d)582; Tex CivA 25SW(2d)629.

842-34 268US252, 45SCt497, 69L ed937; 325Ill378, 156NE346; 318Mo 991, 2SW (2d)582; Mo 29SW(2d)64; TexCivA 25 SW(2d)629. But see 275US279, 48SCt 126, 72L ed280. **Boundary line between Iowa and Nebraska** changes by gradual erosion or accretion. 200Iowa830, 205 NW531.

843-39½-New. Legislature has no power to exclude from jurisdiction of state land or water embraced therein by express constitutional provision. 200Cal 235, 252P722.

843-41 325Ill378, 156NE346.

844-46 271US65, 46SCt357, 70L ed838. See also 275US279, 48SCt126, 72L ed280.

844-48 But see 270US295, 46SCt290, 70 L ed595. **Long acquiescence in possession** of territory and exercise of dominion and sovereignty over it may have controlling effect. 271US65, 46SCt357, 70L ed838. **Motion to exclude copy of survey,** memoranda, and field notes, made more than two years after admission thereof, held too late. 275US279, 48SCt126, 72L ed280.

844-49 Boundary long acquiesced in is conclusive, though later shown erroneous. 272US21, 47SCt9, 71L ed145. **Evidence held not to show** establishment of boundary by acquiescence. 272US21, 47 SCt9, 71L ed145. **Evidence held to sustain master's findings** as to location of Rio Grande River in 1850, in boundary dispute between New Mexico and Texas. 275US279, 48SCt126, 72L ed280. **Governments are bound** by practical lines recognized and adopted as boundary. 272US21, 47SCt9, 71L ed145. **Possession of part of territory** under claim of whole and with color of title extend possession to entire tract. 270US295, 46 SCt290, 70L ed595. **Stipulation that United States and Oklahoma had exercised jurisdiction** over land in dispute held insufficient to establish Oklahoma's right to such land by prescription, in boundary dispute with Texas. 272US21, 47SCt9, 71L ed145. **Wisconsin and Michigan boundary** as established by Wisconsin Enabling Act held established by long continued possession and by acquiescence. 270US295, 46SCt290, 70 L ed595.

844-50 268US108, 45SCt388, 69L ed 503; 269US152, 46SCt31, 70L ed206 (boundary held properly established). **Commissioners held not chargeable** with having established boundary without considering evidence. 269US152, 46SCt 31, 70L ed206.

844-51 268US108, 45SCt388, 69L ed503; 269US152, 46SCt31, 70L ed206 (state held chargeable with cost of unnecessarily printing evidence); 270US295, 46SCt 290, 70L ed595.

844-51½-New. Constructions of description of state boundary line presents question of law. 246NY467, 159NE400.

844-56 Constitutional provision fixing seat of government at stated place is not violated by statute providing for real estate commission with executive offices at place fixed by commission. 97Fla710, 122S225.

844-57 128Okl269, 263P635.

844-59 Test of governmental activity as obligatory function is whether it affects welfare of state as whole. 290Pa 388, 139A122, 55ALR311.

845-62 34Wyo134, 241P1063, 42ALR 1290.

845-66½-New. Highest duty of state is to provide for security of citizens. 153 Md297, 138A29, 56ALR1042.

845-66½-New. Constitutional provisions of some states forbid the state from engaging in works of internal improvement. 173Minn559, 218NW123.

845-66¼-New. Trial by jury is not essential to republican form of government, guaranteed by constitution of United States. 52SD51, 216NW600.

845-66½-New. State may administer government through agencies Legislature may choose, unless forbidden by constitution. 225Ky112, 7SW(2d)839.

845-66⅓-New. People are entitled to that form of government they wish, so long as it accords with fundamental ideas expressed in Bill of Rights. 232 Ky322, 23SW(2d)588.

845-66½-New. Legislative resolve must be presumed to have been passed with legitimate object in view. Mass 171NE 82(2dcase).

845-67 321Ill510, 152NE557.

846-77 Constitution held not to require that each county having population exceeding four fifths of ratio of representation in senate be established as senatorial district. 328Ill549, 160NE108.

847-80 257Mass184, 153NE562 (division of county into districts held invalid as unequal).

847-85 Constitutional provision requiring legislature to apportion senatorial districts at prescribed intervals is mandatory. 333Ill437, 164NE665 [certiorari den 279US854, 49SCt349(3d case), 73L ed996].

847-86 In California.-199Cal144, 248P 511. **In Michigan.**-238Mich552, 213NW 707.

848-88 199Cal144, 248P511.

848-89 199Cal144, 248P511 (valid statute authorizing consolidation and annexation proceedings of assembly district).

848-97 Terms of all members of general assembly expire for all purposes at end of terms for which they are respectively elected. 334Ill160, 165NE638.

849-1 Expenses of election contest.-227 Ky797, 14SW(2d)144.

849-7 128Okl269, 263P635.

849-8 See also NJCh 147A220. **Lawful session by either house makes legislative day for both houses,** though other house is not sitting, and such day is to be deducted from fifty days allowed by constitution. 216Ala545, 113S621. Both houses must be lawfully assembled in order to constitute "legislature." NJCh 147A220.

850-9 Lawful session by either house, though other house does not sit, makes legislative day for both. 216Ala545, 113 S621. **In absence of joint adjournment over,** either house may be in session any day within constitutional limitations. 216Ala545, 113S621.

850-10½-New. Constitutional right to assemble in joint session cannot be augmented by legislature. NJCh 147A220.

850-10⅓-New. Joint resolution adopt-

ed by legislature is not a "law." NJCh 147A220.

850-10½-New. Joint session is without authority to require answers of petitioner as to private affairs. NJCh 147A220.

850-10⅝-New. Legislature cannot amend or supplement joint resolution adopted by preceding legislature. NJCh 147A220.

850-11 216Ala545, 113S621.

850-12 In Oklahoma.-122 Okl 211, 253P500, 50ALR1232.

850-13 128 Okl 269, 263P635; 139 Okl 165, 281P776 (legislature without power to convene itself). Acts of members of legislature assembled without being called by governor, as required by constitution, are without authority of law whether it be for legislative or inquisitorial purpose. 128 Okl 269, 263P635.

850-14½-New. Legislature has no power to convene itself. 128 Okl 269, 263 P635.

850-16½-New. All power of legislature ceases upon its final adjournment. NJCh 147A220.

850-18 229Mich203, 201NW209; 284 Pa421, 131A253 (may be defined by statute).

850-20 NJCh 147A220. The legislature may authorize a committee to act in vacation.-168Ark989, 272SW678.

851-21 But see NJCh 147A220.

851-22½-New. Constitutional prohibition against hiring or paying for other than specified help forbids employment of other help than that designated therein. 213Ky291, 280SW1081.

851-22¼-New. Increase in number of employees.-Under some constitutions legislature cannot increase number of its employees except by general law which shall not take effect during term. 137 Okl 95, 278P311.

851-22¼-New. Such constitutions do not prohibit legislature acting in inquisitorial and investigating capacity or either house sitting as court of impeachment from employing such employees as may be necessary to proper discharge of such duties. 137 Okl 95, 278P311.

851-22½-New. Manner of determination of number of additional employees.-Legislature cannot delegate to committee power to determine number of employees to be employed by legislature acting in inquisitorial or investigating capacity, or to either house, but such employees must be employed under authority of law enacted by legislature. 137 Okl 95, 278P311.

851-23 99Fla401, 126S781; 99Fla755, 128S613. Governor's message returning bill is part of Senate Journal entry in which it is set out. 152Tenn 306, 278SW59.

851-24 234Ky846, 29SW(2d)567; 152 Tenn306, 278SW59.

851-25 152Tenn306, 278SW59 (house itself is only tribunal to correct error in legislative journal).

851-27 207Cal 227, 277P725, 65ALR 1497; NJ 145A618(2dcase); 118Tex237, 148W(2d)786. But see Mass 171NE82 (2dcase). A legislative investigating committee is not a judicial tribunal, etc. See also NJCh 147A220. The legislature may incur reasonable necessary expenses, etc. 118Tex237, 148W (2d)786. Power must be as broad as subject to which inquiry properly entered upon has relation. 207Cal 227, 277 P725, 65ALR1497. Sufficiency of subpœna.-NJ 145A618(2dcase). Committee requiring citizen to appear individually and not as public officer is unauthorized to require him to produce books of his wife. NJCh 144A546. Representatives and senators serving on tax survey committee created by concurrent resolution serve thereon in official capacities as members of legislature. 118Tex237, 148W(2d)786. Constitutional provisions must be observed.-Mass 171NE82(2dcase). Investigation of criminal charges.-NJ 150A322 (cannot compel self-incrimination of witness). Investigation conducted without allegations and governed by no rules of law is unconstitutional. NJCh 147 A220. Legislature or committee cannot constitute itself into court of general jurisdiction for purposes of investigation of conduct of citizen not member thereof. NJCh 147A220.

851-28 207Cal 227, 277P725, 65ALR 1497; NJ 145A618(2dcase). But see NJ 150A322. Joint session to authorize issue of joint warrant to bring citizen before such joint session for purposes of arraigning him for contempt of such session is unauthorized under some constitutions. NJCh 144A546. Lack of seal on warrant for arrest does not vitiate it if otherwise valid. NJ 145 A618(2dcase). Period of detention before arraignment.-NJCh 144A546. Power to punish for contempt must be exercised in strict conformity with rules of procedure which statutes provide. 207Cal 227, 277P725, 65ALR1497. Requisites of warrant.-NJCh 144A546 (requirements held to apply to joint warrant of both houses). Right to punish must be exercised by houses in separate relations.-NJCh 144A546 (warrant for arraignment before joint session held void). Stipulation that contemnor was afforded opportunity to purge himself before bar of senate by answering questions and producing documents is not waiver of other defects in contempt proceedings. 207Cal 227, 277P725, 65 ALR1497. Sufficiency of contempt resolution.-207Cal 227, 277P725, 65ALR 1497. Warrant commanding arrest for contempt contemplates penal action on account of alleged contempt. NJ 145 A618(2dcase). Where purpose of appointment of investigating committee was political, failure of citizen to appear in response to subpœna issued to him in his individual capacity and not as public official is not contempt. NJ Ch 144A546.

852-29 116Nebr748, 219NW9; 142 Wash450, 253P805. Members are entitled to mileage, etc. 142Wash450, 253 P805. Compensation of members serving as committee of legislature after adjournment, not having been prescribed and limited by constitution, may be fixed by act making appointment. 168 Ark989, 272SW678. "Compensation" includes both pay for services and reinbursement of amounts expended. 142 Wash450, 253P805. Extraordinary expenses.-157Tenn222, 78SW(2d)815, 60 ALR408. In Oklahoma.-122 Okl 211, 253P500, 50ALR1232. Statute held valid as not against public policy in regard to amount of pay per diem. 199 Ind436, 157NE723. Statutes held unconstitutional.-157Tenn222, 78SW(2d)815, 60ALR408. Term "per diem" in constitution is synonymous with "salary," importing idea of compensation for personal service. 157Tenn222, 78W(2d) 815, 60ALR408. Where constitution fixes compensation, it cannot be increased by statute. 122 Okl 211, 253P500, 50ALR1232 (allowance for hotel room rent and meals while at capital attending sessions held unconstitutional). Where constitution provides maximum compensation for members, so much of resolution creating tax survey committee, to be composed of members and nonmembers of legislature, as provides that members of committee from house and senate shall receive greater compensation, is unconstitutional. 118Tex 237, 148W(2d)786. Where mileage is provided by law, house resolution allowing per diem amount for expenses incurred in attending session is void under rule of expressio unius. 142 Wash450, 253P805.

852-32 137 Okl 95, 278P311.

852-34 In Florida.-90Fla708, 107S 366.

852-37½-New. Increase in compensation of employees.-Under some constitutions legislature cannot increase emoluments of employees except by general law which shall not take effect during term. 137 Okl 95, 278P311.

852-37¼-New. Expenses payable out of contingent fund.-Resolution creating tax survey committee, consisting of members and nonmembers of legislature, in so far as it directs payment of money out of contingent expense fund for expenses of both members and nonmembers of legislature, other than during session of legislature, is valid. 118Tex237, 148W(2d) 786.

852-37¼-New. Where member of legislature claims per diem salary and mileage for attending purported session of house of representatives, it is essential to determine whether such session was or was not legally convened. 139 Okl 165, 281P776.

853-40 140Wash433, 249P996. That commission is incorporated does not deprive members of their character as state officers. 29F(2d)823. In North Carolina.-30F(2d)121.

853-41 32NM265, 255P1077.

853-44 168Ark449, 270SW609 (holding county auditor not state office).

854-57½-New. Members of state board of equalization are state officers. 140 Wash433, 249P996.

854-58 32NM265, 255P1077.

854-61½-New. Position of chairman of state highway committee is not that of state officer under constitution or statute, nor are his duties prescribed by law. 144Wash135, 257P396.

854-62 99Fla1, 65, 115, 126S308; 152 Md566, 137A358; 13PaDist&Co 626; Can [1929] 1DomLR242. Proposed "State Motor Vehicle Insurance Fund" held quasi public corporation having aspects of private corporation, hence outside constitutional amendment concerning executive and administrative work. Mass 171NE294.

854-63 Despite absence of provision therefor in constitution, legislature may create state tax commission. 136SC 439, 134SE387.

855-66 99Fla1, 65, 115, 126S308.

855-68 121 Okl 83, 248P569; 128 Okl 269, 263P635; 146Wash588, 264P403. In ordering rangers out, governor is not required to wait till obstruction of traffic or deeds of violence occur. Tex CivA 286SW766. It may be assumed that governor acted within his authority in ordering rangers out and that conditions called for such action. TexCivA 286SW766. Not duty of governor to countersign warrants issued on treasurer for payment of either principal or interest on indebtedness created by state agency in violation of constitution. 94Fla967, 114S850 (improper emergency loan to state road department). Approval or disallowance of bills for administrative expenses of industrial commission. 56ND650, 219NW105. Office is continuing one, irrespective of person who occupies it. 52SD497, 219 NW125.

855-77 33Ariz513, 266P18.

856-79 234Ky473, 28SW(2d)745, 70 ALR1077.

856-85½-New. In South Dakota it is duty of secretary of state to furnish certified copy of bill on tender of statutory fee, but only if bill has become law. 51SD262, 213NW500.

857-93 121 Okl 285, 249P959.

857-94 Constitutional provision that member of legislature shall not be elected or appointed to civil office of profit and trust under state does not prevent employment of member of legislature as clerk to code commissioner. 29Ariz 504, 243P407.

857-97 See also 95Fla438, 116S41.

857-98½-New. In Oklahoma governor, secretary of state, state auditor, and state treasurer are not eligible immediately to succeed themselves. 121 Okl 83, 248P569.

857-98¼-New. Officer who succeeds to office of governor is not eligible to succeed himself to that officer. 121 Okl 83, 248P569.

857-6 Validity of statutes.-144Wash 157, 257P402.

858-7 97Fla750, 122S239; 6PaDist&Co 320. Court cannot examine into motive of appointment by governor. 6PaDist &Co 320.

858-8 78Colo 276, 242P57 (governor cannot alone fill vacancy due to expiration of term of incumbent when legislature is in session); 232Ky376, 23SW (2d)575 (statute must provide for some other manner of approval than by Senate). Presentation of name to senate for confirmation.-52SD497, 219NW125. Appointee of Governor is invested with powers, privileges, and responsibilities

of position until Senate acts on appointment. 232Ky395, 23SW(2d)584. **Appointment by Governor need not be communicated** to Senate but Senate must take notice of contents of register and act at next session. 232Ky395, 23SW(2d)584. **Appointment cannot be recalled** unless consent of senate is withheld. 232Ky395, 23SW(2d)584. **Appointee not being confirmed** by Senate need not be impeached when derelict but may be summarily rejected. 232Ky395, 23SW(2d)584. **Appointment to office is complete** when appointing authority has performed acts incumbent upon him to accomplish purpose though title to office and tenure of officer remains subject to action of Senate. 232Ky395, 23SW(2d)584. **Governor's power to make other appointments for vacancies created by nonaction of Senate** is as comprehensive as would have been after actual vote of rejection by Senate. 232Ky376, 23SW(2d)575. **Senate is charged with notice** of contents of Executive Journals and could without any executive communication confirm or reject appointments. 232Ky376, 23SW(2d)575. **Statutory requirement of confirmation by Senate is mandatory.**–232Ky376, 23SW(2d)575. **Title to office intended to vest in appointee** when appointment has been confirmed by Senate. 232Ky376, 23SW(2d)575. **Failure of governor to send name of recess appointee to Senate** for confirmation does not operate as revocation of appointment. 169La481, 125S567.

858–15½–New. No valid appointment can be made to office in possession of incumbent whose tenure has not terminated. 232Ky395, 23SW(2d)584.

858–18 "Taking office" is synonymous with "entering on duties of office" and officer does not take office until bond is given. 121Oh511, 169NE599.

859–22 Failure of appointive member of board of administration to file oath with secretary of state has been held, under statute, to create vacancy and work forfeiture of office. 49ND895, 193NW938.

859–31 6PaDist&Co 312. **Deputies appointed by superintendent of public instruction** may, in absence of latter, appoint county superintendent or trustee of normal school in case of vacancies. 6PaDist&Co 312.

859–32 Construction of statutes.–121Oh511, 169NE599.

859–33 94Fla620, 113S913.

859–35 319Mo492, 5SW(2d)57.

860–37 Term of state senator elected for four years expired 15 days after general election. 143Okl281, 289P254.

860–41 121Okl83, 248P569.

860–43 169La481, 125S567 (advice or consent of Senate not necessary).

861–46 No necessity of confirmation at special session.–167La907, 120S593. **Confirmation of recess appointments** may be made at special session though such purpose is not stated in call. 167La907, 120S593. **Right of officer whose term expires during recess of senate to continue to discharge duties till his successor is inducted into office** cannot interfere with governor's authority to appoint his successor. 167La907, 120S593.

861–47 78Colo276, 242P57 (expiration of term of civil engineer, member of state board of land commissioners, creates vacancy which governor can fill by recess appointment). **Conviction of crime.**–6PaDist&Co 22. **Vacancy arising from fact that newly created office has never been filled** is not vacancy within statute providing for filling vacancies in board of charities and correction during recess of senate, and for holding office till next session of legislature. 52SD497, 219NW125.

861–48½–New. , or failure to nominate. 6PaDist&Co 155.

861–53 Appointees not confirmed by Senate are subject to authority of Senate and hold office until rejected by Senate and cannot be removed by Governor. 232Ky395, 23SW(2d)584. **Statute providing for removal of persons** applies only to officers appointed by Governor with consent of Senate and not to persons appointed to board of pharmacy. 232Ky322, 23SW(2d)588 (not confirmed by Senate). **Removal by Civil Service Commission.**–Colo 293P338. **Reinstatement of officer removed by Civil Service Commission.**–Colo 293P338.

861–54 121Okl83, 248P569 (method of impeachment of governor).

861–59 160Ga422, 128SE181 (no inherent power).

861–60 177Ark912, 9SW(2d)10; 232Ky322, 23SW(2d)588. See also 232Ky395, 23SW(2d)584. **Governor can remove public officer only when power is expressly given or arises by necessary implication** under constitution or statutes. 160Ga433, 128SE181.

862–62 232Ky395, 23SW(2d)584; 232Ky322, 23SW(2d)588. **Where appointment is by governor under statute providing fixed term of office,** governor has not power of removal during term. 160Ga433, 128SE181. **Where constitution or statute authorizes appointment by governor without fixed tenure of office,** appointment may be revoked at governor's pleasure. 160Ga433, 128SE181.

862–63 But see 83Colo379, 265P687.

862–65½–New. Where person is appointed to office by Governor, recall of his designation would operate as removal from office. 232Ky395, 23SW(2d)584.

862–68½–New. Suit for reinstatement by civil service employee is barred by laches. 159La465, 105S510 (not brought for almost three years after discharge).

862–68⅓–New. Reinstatement of employee in classified civil service after absence without leave is discretionary with civil service commission with consent of appointing officer under some statutes and civil rules. 112Oh707, 148NE686.

862–68¼–New. Changes in civil service classification.–**Unsubstantial and merely colorable changes in classification of positions as made by civil service commission** are not sufficient foundation to warrant ousting of one employee and appointment of another person to perform substantially same duties. 97CalA516, 275P974.

862–68½–New. Governor's approval required of employment of employees of Industrial Commission. Ariz292P1099.

862–70½–New. "Proceedings," in statute affecting stay of proceedings in which legislators are parties, imply action, procedure, and prosecution. 176Ark167, 2SW(2d)9.

862–70⅓–New. Dismissal of action for failure of plaintiff assemblyman to deposit master's fees and bond is not proceeding within statute relating to stay fifteen days before and fifteen days after legislative session. 176Ark167, 2SW(2d)9.

863–71 In Minnesota.–165Minn268, 206NW396. **State examiner and inspector.**–134Okl200, 272P826.

863–72 Statute requiring commission to fix rate to be paid to those operating privately owned cars on state business applies to officers and employees of rural credit board. SD225NW54.

863–73 State auditor's expenses attending national convention of state auditors are not expenses incurred in discharge of official business within meaning of statute authorizing payment therefor. 219Ky212, 292SW837. **Statute authorizing payment to members of legislature** of incidental expenses held unconstitutional. 132Or175, 285P205.

863–74 316Mo272, 289SW338.

864–82½–New. Appointee is entitled to salary provided by law at time of appointment. 6PaDist&Co 320.

864–82⅓–New. Governor's approval required of compensation of employees of industrial commission. Ariz292P1099.

864–83 117Kan755, 233P510; Wis228NW593 (except by constitutional amendment). **Act allowing stated per diem expense money for certain state officers** is unconstitutional. 117Kan755, 233P510 (lieutenant governor and members of legislature). **Holdover senators** may be provided for by legislature so as to receive same salaries as formerly where salaries are increased. Wis228NW593. **"Public officers"** held to include members of legislature. Wis228NW593.

864–85½–New. Where constitution fixes maximum compensation which may be allowed to state officers, any law directly or indirectly increasing compensation of such officers in excess of such maximum is unconstitutional. 117Kan755, 233P510 (statute making per diem expense allowance to members of legislature).

864–86 Under constitution, forbidding payment of salary or compensation as agent, officer, or appointee to any person holding office of honor, trust, or profit under state, legislative members of tax survey committee are debarred from receiving compensation for their services. 118Tex237, 14SW(2d)786.

864–90 152Miss539, 120S197.

864–93 De facto officer, performing service and paying expenses thereof, may recover same from state where there is no de jure officer claiming office. 33NM310, 267P68.

864–94 Fla129S861.

865–96½–New. Time to sue.–Member of legislature employed as clerk by code commissioner is not within Arizona statute requiring suit by state and county officers for salary to be brought within ninety days from time salary became due. 29Ariz504, 243P407.

865–96¼–New. Filing of schedule with governor.–Claim for compensation as clerk to code commissioner is not within Arizona statute requiring payment for personal services with certain exceptions to be in conformity with schedules and amendments submitted by officers and approved by governor. 29Ariz504, 243P407.

865–97 State may not recover on counterclaim for amount paid architect in absence of showing that attorney-general was authorized to prosecute claim in accordance with statute. 196Wis430, 220NW185.

865–99 99Fla1, 65, 115, 126S308; 75Mont429, 244P287 (board of examiners without power to reduce appropriations by legislature made within constitutional restrictions); 144Wash157, 257P402 (power of officer to sign vouchers to evidence approval of expenditures is extinguished by abolition of commission of which he was chairman); 146Wash588, 264P403 (final determination as to execution and enforcement of laws is lodged in governor). **Power of rural credit board to employ attorney.**–48SD397, 204NW897. **State ranger** had no occasion to exercise any official act, since maintaining picket line during strike was lawful. TexCommnA293SW811. **Though constitution is silent on subject,** legislature may prescribe powers and privileges of comptroller general and state tax commission. 136SC439, 134SE387.

865–1 Statutory commission cannot delegate any of its powers and duties to any officer or agent. 197Ind556, 151NE418.

865–3 29F(2d)770 [certiorari den 279US841, 49SCt254(5thcase), 73Led987]; 161La1002, 109S816; 52Nev171, 283P400. **Action of majority of state committee is controlling** as to acts within its jurisdiction. 144Wash157, 257P402 (state capitol committee). **No judicial power** is possessed by secretary of state whose duties are merely ministerial. 192Wis307, 212NW651.

865–4 29F(2d)770 [certiorari den 279US841, 49SCt254(5thcase), 73Led987]; 196Wis430, 220NW185.

865–4½–New. State can act only through agents. 76Mont429, 247P332, 47ALR424.

865–4½–New. Assurances and promises of members of state boards or commissions while not sitting as board or commission but made as individuals do not bind board or commission. 102WVa88, 134SE465.

865–4¼–New. State ranger has no authority to interfere with "picket service" of striking employees. TexCivA286SW766.

865–4⅓–New. Secretary of state is deemed to be constructively present in every part of state. 135Misc368, 237NYS689.

865-4¼-New. Where under statute information obtained by auditor-general by examination of books of gasoline dealers is confidential he is not prevented from furnishing legislature names of delinquent fuel taxpayers and amounts owed by them. 12PaDist&Co 428.
865-6 Ida 286P918 (commissioner of public investments); 157Miss114, 126S 333 (state auditor must honor state collectors requisition); 51SD262, 213NW 500 (furnishing copy of bill). State department of conservation held to have jurisdiction of sand, gravel, and shells owned by state as "natural resources." 164La306, 113S857. In Washington.-141Wash110, 250P1090. Sovereign right of state is to have its laws observed and administered by officer charged with that duty. SD 232NW20.
866-12½-New. Rights of state cannot be prejudiced by unauthorized act or omission by one of its officers or agents in failing to record deed to state. 217 AppDiv328, 216NYS785.
866-12¾-New. Ranger has no more authority as police officer than is vested by law in local police officers except as to territory covered. TexCivA 282SW 257.
866-13 That enterprise was beyond powers of employing commission does not relieve employee from liability to account for funds received. ND 231NW 880 (employment by highway commission to edit highway bulletin). Complaint for accounting held sufficient.-ND 231NW880. One employed by commission in charge of department of state government is accountable for money and property received by virtue of employment. ND 231NW880.
866-17½-New. No presumption of settlement arises from mere fact that auditor has authorized treasurer to receive money for interest on public deposits. 319 Ill 437, 150NE435.
866-18½-New. Equity has jurisdiction to compel state treasurer to account for public moneys. 319 Ill 437, 150NE435.
866-18⅓-New. Proof that state treasurer loaned public funds to others with secret arrangements was held sufficient to justify order requiring him to account. 319 Ill 437, 150NE435.
866-18¼-New. Public official must pay interest on public funds into state treasury. 319 Ill 437, 150NE435.
866-18½-New. State officer's liability to account for profits on public funds is same whether he profits directly or indirectly. 319 Ill 437, 150NE435.
866-20 23F(2d)638.
866-21 160Ga366, 127SE851.
867-22 160Ga366, 127SE851 (individual must show special and peculiar injury); 102WVa663, 136SE195.
867-23 But see 206Cal 556, 275P436; 206Cal 552, 275P438.
867-24 251Mich503, 232NW364.
868-33 219Ala228, 121S521, 64ALR 1022. Allegation in suit on official bond that claim was duly presented is sufficient on general demurrer to show performance of conditions precedent. 52 ND225, 202NW651. Failure to allege damages in suit on official bond is not objectionable under general demurrer. 52ND225, 202NW651. Requirement that claim on bond of public employee must be filed immediately and not later than sixty days after discovery of wrongful act is condition precedent to right of recovery. 52ND225, 202NW651. That law enforcement officer may have acted improperly in performing his duties does not relieve surety on official bond from liability for his assault and battery. 219Ala228, 121S521, 64ALR1022. That officer acted in gratification of feeling of resentment does not relieve surety from liability if he acted in promotion of his duties. 219Ala228, 121S521, 64ALR 1022. Damages.-58ND524, 226NW624, 64ALR929.
868-34 Ida 286P598 (duties held covered by bond). It is for jury to decide whether officer acted under color of office in committing assault and battery. 219Ala228, 121S521, 64ALR1022.
869-49 93Fla5, 112S289.
869-50 In Oklahoma.-122 Okl 268, 254 P710.
869-51 317Mo 696, 296SW418.
869-53½-New. Where state associates itself in corporate capacity with private persons, it becomes, in eyes of law, private person and bound accordingly. 13 F(2d)308.
869-53⅓-New. Subject to constitutional limitations, legislature has complete control of property of state institutions. 225Ky205, 7SW(2d)1046.
869-53¼-New. When state creates corporation to engage in private business and acquires part of capital, it cannot claim privileges of sovereign as to such transactions. 33F(2d)848.
869-54 State road department is state agency and part of state government exercising part of sovereign power of state. 94Fla967, 114S850. Historical association contracting with Pennsylvania historical commission for preservation of historical public buildings is agent of state and is not liable for negligence of its officers and agents in exercise of its governmental function. 88PaSuper534 (no liability for death of boy in pond on public grounds).
869-55 State highways.-117 Or566, 245 P308, 45ALR527.
869-56½-New. Orders of department of commerce relative to fire hazards.-Under Ohio administrative code effective July 1, 1921, powers and duties of fire marshal were vested in department of commerce, and orders relating to fire hazards must be made in name of department of commerce and under its seal. 25 OhNPNS389.
869-57 171Ark1111, 287SW388, 389 [cit Cyc]. Parks.-Cal 290P444. Deed by city conveying land to commonwealth for parkway need not run to treasurer and receiver general. Mass 172NE593.
869-58 But see 171Ark1111, 287SW388; 157Tenn429, 7SW(2d)40. Statute permitting lease of university lands to nonprofit corporation is not giving of state property for private use. 196Wis518, 220NW816.
870-59 159Tenn321, 17SW(2d)901. Acceptance of gift by governor for use of state National Guard held impliedly ratified by acts of legislature. 171Ark1111, 287SW388.
870-60½-New. Property accepted for state by officer without authority belongs to state. 171Ark1111, 287SW388.
870-60⅓-New. Park commissioners could grant exclusive privilege of landing boats at park, and could not be enjoined from prohibiting others from landing boats. 222AppDiv535, 226NYS 356.
870-60¼-New. Park commissioners held authorized to grant exclusive privilege of operating navigation line to and from park. 131Misc483, 226NYS 353.
870-60⅕-New. Commissioners not required to operate boats themselves. 131 Misc483, 226NYS353.
870-60⅙-New. Commissions held required to provide transportation facilities to park under statute. 131Misc483, 226NYS353.
870-60⅐-New. Plaintiff granted exclusive privilege to operate navigation line to park held entitled to enjoin defendant from operating competing line. 131Misc 483, 226NYS353.
870-66 124 Or112, 264P441, 60ALR528.
870-68½-New. Product of work of state road department is state property. 94 Fla967, 114S850.
870-69 160La360, 107S141. Act held not void as providing for donation of state lands.-217Ala311, 116S695.
870-72 227AppDiv219, 237NYS539.
871-78½-New. Under statute, subjecting city park to use as county site, when acquired for that purpose, is grant of any contingent interest of state therein to county. 217Ala268, 115S422.
871-79½-New. Accrual.-State can provide conditions on which debts due to it shall accrue and become valid. 156Miss 396, 125S416.
871-80 42F(2d)120; 338 Ill 179, 170 NE205; 295Pa433, 145A520; 8PaDist& Co 93; TexCivA 28SW(2d)184. See also 313Mo 307, 281SW702. Waiver of priority.-34Wyo 134, 241P1063, 42ALR 1290.
871-81 338 Ill 179, 170NE205. As to Missouri rule under statute.-313Mo 307, 281SW702. State in making deposit in bank does not exercise governmental function. 173Ark103, 291SW1003, 51 ALR1332. In Oklahoma.-139 Okl 134, 281P579.
871-82 Statutory right denied under facts.-147Wash86, 265P167.
871-83 313Mo 307, 281SW702.
871-83½-New. State's right to preference cannot be transferred to individuals, except by express legislative sanction, and then only for purpose of serving interests of all people. 295Pa 433, 145A520.
871-84½-New. Priority between purchaser of delinquent tax sale certificate and land office commissioner's lien arising from loan of trust funds. Okl 293 P262(2dcase).
871-87 Ill 172NE3; 144Miss614, 109S 900 (statute not in violation of constitution as authorizing revenue agent to extinguish obligation of taxpayers); 38 OkIACR289. Constitutional inhibition of laws to release or extinguish indebtedness, liability, or obligation to state is not infringed by act repealing occupation tax law without making any provision for collection of taxes which have already accrued thereunder, all potential taxpayers being equally affected by such repeal. TexCivA 273SW615.
871-88½-New. Statute, providing for abatement of pending suits by revenue officers under anti-trust statutes, is not in violation of constitutional provision against legislature's remitting, releasing, postponing, or diminishing obligation or liability due to state. 143Miss489, 108S180.
871-89 230AppDiv374, 245NYS444. Sovereign power never becomes indebted by implication at common law. 235Ky 728, 32SW(2d)42.
871-90 General court may bind community by its contracts for property privileges, easements, and improvements necessary or useful to public. 261Mass 523, 159NE55.
872-92 33F(2d)318 (when acting in its proprietary capacity).
872-93 52Nev171, 283P400.
873-1 75CalA681, 242P100.
873-2 Executive state officers have no general authority to make executory contracts binding on state. 113Nebr846, 205NW568. No officer is authorized to lease building for state department. 113Nebr846, 205NW568.
873-3 235Ky24, 29SW(2d)619; 113 Nebr846, 205NW568; 196Wis430, 220 NW185. See also 180Ark937, 23SW(2d) 963. Provision held authorized in contract for school books. 216Ala367, 113 S592.
873-6½-New. Contract between public welfare department and denominational or sectarian institution for per diem payment for services rendered in care and treatment of sick and injured is violation of constitution. 8PaDist&Co 239.
873-6⅓-New. It is immaterial that advisory board of such institution has on it members of other sects if board has no power in directing finances or policy of institution and no power to perform contract entered into on its behalf. 8 PaDist&Co 239.
873-7 74CalA681, 242P100; 291Pa497, 140A527.
874-13 Construction of statute requiring consideration by department of finance of contracts made by departments. Cal 293P69.
874-20 216Ala367, 113S592.
875-23 285Pa153, 131A707.
875-25 35 OhA354, 172NE438.
875-29 291Pa497, 140A527.
875-37½-New. Where board is vested with discretion as to specifications of work, advertisement for bids need not set out specifications. 285Pa153, 131A 707.
875-37¼-New. Change in specifications after advertisement for bids precludes awarding lawful contract under original advertisement, where change is not also advertised. 285Pa153, 131A707.
875-37¼-New. Discretion of director of public works in awarding bid can only

be exercised respecting matters that could be reasonably anticipated as included in specifications. 35 OhA354, 172 NE438.

876-40 In North Dakota.-54ND113, 208 NW837.

876-41 Requirement is mandatory.-285 Pa153, 131A707 ("lowest bidder").

876-42 55ND141, 212NW773, 775 [cit Cyc].

876-44 178Ark836, 12SW(2d)405.

876-45½-New. Term "lowest bidder" implies previously prepared specifications, freely accessible for all competitors, which form sole basis for bids. 285 Pa153, 131A707.

876-46½-New. Bidder participating and making no objection till competitor's bid has been accepted is not entitled to relief because method of determining lowest bidders and of letting contracts, though method prescribed by statute, was not followed. 54ND113, 208NW837.

876-47 120 Oh378, 166NE361. **Bond has been held to cover labor** in removing from premises equipment. NJ 149A762. **Surety has been held liable** for amount due from contractor for removal of equipment from premises with interest. NJ 149A762.

876-49 Conflict of laws.-322Mo 121, 14 SW(2d)576. **Statute requiring public officer to take bond conditioned as required by statute** does not prohibit surety from executing bond expressly restricting its liability to obligee. 178Ark 676, 12SW(2d)872.

876-50 120 Oh378, 166NE361.

876-50½-New. Assignee of defaulting contractor is not entitled to sums due from state on building as against surety who completed buildings. 126Misc360, 212NYS675 (assignment, though recorded, not being lien).

876-50⅓-New. Surety completing building on abandonment by contractor is entitled to unpaid balance from state as against assignee of contract. 126 Misc360, 212NYS675.

876-50¼-New. Such right is subject to right of materialman lienor to have his claim paid in full. 126Misc360, 212NYS 675.

876-50⅕-New. In New Mexico no right to lien exists in favor of laborers or materialmen on state contracts, but suit may be maintained by materialman in his own name on contractor's bond. 11 F(2d)910.

876-50⅙-New. When building completed within statute of limitations.-Where, after state architect has rejected certain woodwork in public building, it is agreed between state and contractor, subject to consent of surety, that contractor may receive balance due for completion of building on his agreement to replace rejected work when plaster on walls has cured, and to put up deposit guaranteeing completion of building, state architect's final estimate made after receiving surety's consent to arrangement and agreement that it would continue to be bound does not establish that building was "completed" at that time so as to set in motion six months' limitation against action on bond under Kansas statute. 322Mo 121, 14SW(2d) 576.

877-58½-New. Lienor is entitled to sum due from state on building in preference to assignee of contract. 126Misc 360, 212NYS675.

877-58⅓-New. Assignee of defaulting contractor is not entitled to sums due from state on building completed by surety as against lienor. 126Misc360, 212NYS675 (assignment, even though recorded, not being lien).

877-59 49SD549, 207NW550 (statutes authorizing employment of assistants by rural credit board not applicable to legal services provided for by other section of statute); 198Wis393, 223NW840. **State bonding department** has no implied authority to contract with private person for auditing accounts of public employee. 58ND841, 227NW564.

879-70 285Pa153, 131A707 (statute mandatory); 291Pa497, 140A527. **In North Dakota.**-50ND301, 195NW823.

879-71½-New. Conformity to advertisement.-Contract cannot be awarded where there was change in specifications subsequent to advertisement for bids, unless change is advertised. 285Pa153, 131 A707.

879-72 230AppDiv374, 245NYS444.

880-84½-New. Investment of university bond redemption fund held not limited to investment in securities bearing less than particular rate of interest. Utah 263P83.

880-86 230AppDiv374, 245NYS444; Oh 171NE399. **Contract providing that no charge should be made for delay or hindrance** held bar to action for increased cost due to delay. 127Misc75, 215NYS 313.

880-87 131Misc262, 226NYS625. **Particular contracts construed.**-291Pa497, 140A527 (printing).

880-88½-New. Law under which agents, appointed by law to make contract for state, act is as much part of contract as if transcribed therein. 171Ark427, 285 SW20.

880-88⅓-New. Practical construction.-Acts of officials or agents of state relied on as constituting practical construction of lease must be within scope of their authority. 133Misc410, 233NYS49.

880-89 Oh 171NE399. **Additional compensation.**-142Miss123, 105S502.

881-96 Effect of extension of time on stipulated damages.-176Ark697, 3SW (2d)985.

881-1 Contractor with knowledge not entitled to extra allowance for misrepresentations of material to be excavated or for removing rock without blasting near water mains on engineer's orders. 131Misc262, 226NYS625.

881-6½-New. Statute, making assignment of money due or to become due under public improvement contract, invalid unless filed within stated time after execution, applies only when third persons' rights are involved. 132Misc95, 228NYS289.

881-6⅓-New. Where such assignment is not filed in time, it is void as against third persons, though they are not prejudiced. 132Misc95, 228NYS289 (evidence held to show that assignment was executed more than statutory time before filing).

881-6¼-New. Liberal construction required by such statute does not cure failure to file assignment within statutory time. 132Misc95, 228NYS289.

881-6⅕-New. Lien rights against state funds applicable to payment of contract price of public improvements and assignments of money due under such contracts are purely statutory. 132Misc95, 228NYS289.

881-6⅙-New. Such statutes must be strictly complied with. 132Misc95, 228 NYS289.

881-6⅐-New. "Date" of assignment, referred to in statute requiring assignment of money due on public improvement contract, to be filed within ten days, means time of execution of assignment, as stated in instrument itself, and not time when it was actually executed. 225AppDiv159, 232NYS410.

881-6⅛-New. Liens.-137Misc622, 244 NYS312.

881-6⅛-New. Under New York Lien L. § 23, subcontractor's claim for hauling sand, cement, and stone for road construction work is subject of valid lien against fund due from state for contract price of work. 132Misc95, 228NYS289.

881-6 1/10-New. Such claim is not entitled to preference as for labor. 132Misc 95, 228NYS289.

881-6 1/11-New. Under New York statute, lien of subcontractor's laborer attaches only to sum due or to become due to his employer. 132Misc95, 228NYS289.

881-6 1/12-New. Under such statute lien of subcontractor's laborer is not limited to sum payable to subcontractor as determined by priorities of all liens against fund, but only by amount due subcontractor under contract. 132Misc95, 228 NYS289.

881-6 1/13-New. Contractor is entitled to recover cost of insurance and interest for period of delay as expense resulting from state's active interference with completion of contract. 132Misc688, 230 NYS517.

881-6 1/14-New. Contractor, whose work is completed within time prescribed by contract, is not entitled to damages on account of delays caused by general contractor's failure to have site ready. 132 Misc688, 230NYS517.

881-6 1/15-New. Assignment of moneys due.-137Misc622, 244NYS312.

881-7 34F(2d)533 (state has no power to impair obligation of contract to which it is not party).

881-13 Cal 284P209; Cal 293P53; 72 CalA68, 237P59; 80CalA754, 253P173; 42 Ida738, 248P456, 49ALR1057; 120 Kan413, 243P1038; 169Minn226, 210NW 1006 [citCyc]; 76Mont429, 247P332, 47 ALR424 [citCyc]; 117Nebr865, 223NW 130; 219AppDiv207, 219NYS325; 194 NC817, 140SE733; 47RI 13, 129A606, 42 ALR1204; 132SC241, 128SE172; Va 152 SE336; 154Wash101, 280P739(2dcase) (for negligence of county officer). **Where the constitution forbids the legislature to make any gift** of public money, statute respecting state's liability for agents' torts does not violate constitution. Cal 284P209; Cal 289P160. **Doctrine of respondeat superior not applicable to state,** unless assumed voluntarily. 76Mont429, 247P332, 47ALR424. **State may lawfully assume liability for torts of its agents** when not prohibited by state constitution or supreme law of land. 76Mont 429, 247P332, 47ALR424. **State may limit liability for tort of agent** and prescribe such terms as it sees fit to impose where it assumes any liability for tort. 76Mont429, 247P332, 47ALR424. **Not liable for negligence** in absence of statute. 117Nebr865, 223NW130 (resolution by one branch of legislature held insufficient). **Liability for death of employee.**-150SC302, 148SE57.

882-14 120Kan413, 243P1038.

882-16 In New York.-See also 132Misc 45, 228NYS576.

882-17 80CalA754, 253P173; 189NC 469, 127SE543. **Negligence is not imputable** to sovereign. 189NC469, 127SE 543. **Statute establishing North Dakota mill and elevator association** authorizes civil action against state doing business as such association to recover damages for personal injuries sustained through negligence of association in operation of mill. 56ND861, 219NW834.

882-17½-New. But state docks commission is not exempt from liability for negligence of employee furnished to pilot vessel. 25F(2d)480.

882-17⅓-New. Rule of liability for wrongs committed by state or any agency thereof refers exclusively to breaches of contractual obligations, and not to tortious acts committed in course of employment by agents or employees as such. 80CalA754, 253P173.

882-17¼-New. Special enabling act, giving court of claims jurisdiction of particular injury claim and eliminating contributory negligence, is constitutional and must be obeyed. 130Misc559, 224 NYS354.

882-17⅕-New. In maintenance of memorials of important events, men, or institutions, state performs governmental function. 88PaSuper534.

882-17⅙-New. Right of action for injury from operation of instrumentality used by state is statutory. Cal 289P160.

882-18 122 Okl 211, 253P500, 50ALR 1232.

883-19 114 Okl 38, 241P178; 122 Okl 211, 253P500, 50ALR1232. **Duty of raising sufficient revenue for each fiscal year to defray current expenses** is imposed by constitution on legislature in some jurisdictions. 94Fla967, 114S850. **Promising or pledging of unmatured parts of appropriation** by board of education for building construction has been held not to create new debt. 220Ala539, 126S161.

883-20 117Kan755, 233P510.

883-21 178Minn244, 226NW633 (constitution is not contravened by statute with main purpose of creating preserve for wild life which is public purpose); 114 Okl 38, 241P178; 122 Okl 211, 253P 500, 50ALR1232. **Statute held not violative of constitutional provision** as incurring debt without vote of people. 137 SC288, 135SE153. **Scheme of debt liq-**

uidation set up by constitution for retirement of bonds from sinking fund cannot be departed from either directly or indirectly. 294Pa25, 143A505. **What does not constitute debt.**–WVa 153SE 305.

883–22½–New. Executive branch of government has no power to incur indebtedness unless granted by constitution or statute. 33Ariz197, 263P589.

883–22¼–New. Such power is limited to particular case, authorized by constitution or statute. 33Ariz197, 263P589.

883–22¼–New. Power of governor to incur liabilities to meet particular emergency given by statute terminates when legislature meets in regular session or in special session, authorized to act on subject before governor has taken action. 33Ariz197, 263P589.

883–22½–New. Damage caused by ordinary rain is not emergency within statute. 33Ariz197, 263P589.

883–22¾–New. Legislature has authority to appropriate money to pay any valid indebtedness incurred by road improvement districts for purposes for which organized. 180Ark311, 22SW(2d) 41.

883–23½–New. In North Carolina legislature may provide for issuing and sale of bonds for erection of school building. 192NC516, 135SE336.

883–26½–New. Issuance of bonds and loan of proceeds to World War veterans is for public purpose. 193NC496, 137SE 669.

883–26¼–New. Proposed law necessitating use of tax moneys to pay for investigations of automobile accidents is unconstitutional use of public funds. Mass 171 NE294.

883–26½–New. Statute held not to authorize board of administration or any other state officer to create debt of any kind. ND 229NW105.

883–27 94Fla967, 114S850; 74Mont1, 238P316 (provision that no appropriation shall be made in excess of total tax provided for by law during any fiscal year refers to anticipated income from all sources, not merely from direct taxation); 56ND436, 218NW156; 114 Okl 38, 241P178; 124 Or112, 258P193, 60ALR528. **Constitutional limitation binding on people.**–126 Okl 70, 258P915. **In absence of constitutional restrictions,** legislature can authorize state to borrow any amount of money. 294Pa25, 143A 505. **Procedure for creating debt exceeding certain amount is provided for under constitution** in some states which directs that statute must distinctly state the tax. 207 Iowa923, 223NW737 (millage not required to be stated if it can be computed). **Statute providing method of financing buildings by educational institutions** is not invalid as authorizing invalid indebtedness. 225Ky205, 7SW (2d)1046. **Statute held not to violate constitutional provision** prohibiting increase of state's public debt without submission of question to qualified voters. 152SC455, 150SE269.

884–32½–New. Constitutional limitations do not obtain with reference to appropriations of money out of state treasury. Wis 230NW698.

884–33 74Mont1, 238P316 (act for issuance of treasury notes to refund outstanding registered warrants does not create debt so as to require levy of tax sufficient to extinguish it, but merely changes evidence of indebtedness). **Statutes held invalid as to provision for payment.**–207 Iowa923, 223NW737.

884–34 Supplemental appropriation to be paid from current revenues to carry out policy of state as to public schools does not create debt within constitutional limitation on power of legislature to create debt to meet casual deficits or failure in revenue. 114 Okl 38, 241P178. **Statute authorizing lease of university lands by regents to nonprofit corporation** for erection of university buildings does not create state debt. 196Wis518, 220NW816. **Contract for construction of state highways** does not violate constitutional provision restricting power to issue bonds, where it merely provides for paying for construction as work is done. 97Fla28, 119S149. **Limitation does not apply to Toll Bridge Act** since indebtedness is against bridges acquired and not state. 225Ky324, 8SW(2d)392.

884–35 94Fla967, 114S850; 124 Or112, 258P193, 60ALR528.

884–37 97Fla28, 119S149.

884–39 124 Or112, 258P193, 60ALR528.

884–41 217Ala311, 116S695.

885–43 124 Or112, 264P441, 60ALR528.

885–46 174Ark214, 295SW9 (issuing notes to build roads held not contrary); 261Mass556, 159NE70. **Matters not within constitutional prohibition.**–174Ark971, 298SW222. **Act authorizing state to issue bonds to build highway bridge** does not violate constitutional provision as to loan of state credit. 176Ark139, 28W (2d)44. **Act providing for bond issue to raise money for loans to war veterans** is constitutional and does not constitute gift, but loan in fulfillment of state's obligation to soldiers. 193NC496, 137SE 669. **Constitutional provision does not restrict** lending credit to corporations under public management. 261Mass523, 159NE55. **Statute held not to pledge or loan state's credit.**–95Fla530, 116S449. **Toll bridge franchise** held not violative of constitution prohibiting funds, credit, and property of state from being loaned or granted. 159La909, 106S377. **Guaranty of securities of railway managed by state board** held valid, though securities might be outstanding at termination of public control. 261Mass523, 159NE55. **Constitutional provision held not violated.**–118Tex288, 15SW(2d)538; 118Tex 268, 12SW(2d)127. **Statute securing new right of way to railroad** in exchange for part of road taken for use as highway is not violation of constitution. 243 Mich649, 220NW881. **Statutes permitting purchase of lands for park purposes to be transferred to United States** are not invalid as gift of state's credit to corporation. 159Tenn321, 17SW(2d) 901.

885–47 174Ark214, 295SW9 (road districts not within statute); 329 Ill 120, 160NE163; 168La1005, 123S655, 67ALR 1183 (constitution held not violated); 261Mass523, 159NE55; 261Mass556, 159 NE70; 152Miss356, 119S819; 248NY 112, 161NE438; 250NY258, 165NE284; 251NY417, 167NE519(2dcase) (constitution held not violated); 127Misc75, 215 NY313; 132Misc182, 229NYS235; 134 Misc1, 234NYS224; ND 229NW105 (statute not violating constitutional provision); 5PaDist&Co 84 (appropriation for "Old Age Commission" held unconstitutional); TexCivA 288SW875 (statute authorizing interstate bridge upheld). **Acts are not within constitutional prohibition.**–148Miss13, 113S898. **Appropriation for redemption of bonds of drainage district issued to pay warrants outstanding at date of appropriation act** is not violative of constitutional prohibition against gift of public money. 199 Cal 668, 251P207. **Prohibition against assuming debts or liabilities of corporations** refers to private corporations and has no application to school districts. 174Ark971, 298SW222. **Sums paid convicts working on state roads** as compensation therefor do not constitute gift. 200Cal 44, 251P808, 49ALR1377. **Act creating state bridge corporation** held not to violate constitutional prohibition. 217Ala311, 116S695. **Allowance of legal expense in procuring reinstatement of illegally discharged civil service employee** may be authorized by legislature. 248NY112, 161NE438. **Allowance of private claims for benefits enjoyed by state without recompense,** or injuries inflicted by persons for whose acts state is responsible may be authorized by legislature. 248NY112, 161NE438. **Claims founded on equity and justice and involving moral obligation of state** may be allowed by legislature in exercise of wide discretion. 248NY112, 161NE438. **Public money may not be expended to acquire property for sale to private individuals.**–261Mass556, 159NE70. **Statute requiring refund on motor fuel used for purpose other than motor vehicles** held void as making gift from public treasury. 329 Ill 120, 160NE163. **In Kentucky.**–225Ky324, 8SW(2d)392. **Issuance of bonds to pay for land condemned for park** held not within prohibition. 196NC284, 145SE563. **Statute authorizing regents to lease university lands** to nonprofit corporation for erection of university buildings is not loan of state credit. 196Wis518, 220NW816. **Statute relieving landowners from payment of wasted portion of money loaned under supervision of state loan board** has been held unconstitutional. 35Ariz1, 273 P721(2dcase). **Voluntary unauthorized acts of public officer** cannot obligate state even morally so as to authorize donation of state funds to persons affected thereby. 35Ariz1, 273P721(2dcase). **When claim is founded in justice and equity,** legislature has power to grant relief. 35 Ariz1, 273P721(2dcase). **Worthiness of claim alone** is not sufficient to authorize grant of state funds. 35Ariz1, 273P721, (2dcase). **Test** is whether statute is designed to promote public interests as opposed to furthering advantage of individuals. Cal 287P455. **Statute providing that state funds** shall be used to purchase free school books held constitutional. 168La1005, 123S655, 67ALR 1183. **Statute allowing exemption from taxation** is not violative of prohibition. 48 Ida618, 284P203. **Statute authorizing garnishment of state officers' and employees' wages** has been held not unconstitutional as authorizing donation to individual. Ariz 289P515. **Act held valid.**–Cal 287P455. **Consideration in nature of public benefit** is generally required for every payment or promise of public funds. Iowa 230NW373. **Moneys spent in discharging state's obligations to land settlers under colonization project** held not gift. Cal 290P451. **Payment of warrants outstanding prior to act authorizing payment** has been held not invalid as gift of public money. 208 Cal 661, 284P668.

886–48 168La1005, 123S655, 67ALR 1183 (constitution held not violated); 290Pa388, 139A122, 55ALR311. **Bequest to orphans' home to purchase useful and pleasing Christmas presents** has been held not violative of constitution forbidding use of public funds for sectarian purposes. CalA 292P144.

886–49 290Pa388, 139A122, 55ALR311.

886–50 127Misc75, 215NYS313. **Statute held not invalid.**–82Mont382, 267P 499.

886–51 95Fla530, 116S449; 122Kan508, 252P463 (Motor Vehicle Act of 1925 held not unconstitutional as providing that state shall pay more than twenty-five per cent of cost of road or more than ten thousand dollars per mile). **More liberal policy** in regard to certain improvements has been provided for in Wisconsin by constitutional amendment. 187Wis180, 204NW803.

886–54½–New. Statute authorizing court to vacate judgment of forfeiture of recognizance does not release or extinguish or authorize court to release or extinguish indebtedness to state in contravention of Const. art 4 § 23. 320 Ill 336, 150NE634, 43ALR1230.

886–54¼–New. Constitutional prohibition against appropriation to sectarian institution is reservation of power in people. 290Pa388, 139A122, 55ALR311.

886–54¼–New. Caring for indigent is not governmental duty so as to be outside of inhibition against appropriation to charity where it affects welfare of state only incidentally. 290Pa388, 139A 122, 55ALR311.

886–54½–New. "Hospital service" does not include noncharitable elements, so as to remove it from operation of constitutional inhibition against appropriation for charity. 290Pa388, 139A122, 55ALR 311.

886–54¼–New. Nor is such inhibition rendered inoperative by lack of profit by sectarian hospital claiming appropriation. 290Pa388, 139A122, 55ALR 311.

886–54½–New. Restriction on right to carry on works of internal improvement. –Kansas statute imposing tax on motor vehicle fuel dealers is not violative of constitutional provision relating to right of state to carry on works of internal improvement. 127Kan859, 275P209.

886–54¼–New. Claimant's failure to obtain full amount of damages by

court's limitation to amount claimed created no equitable or moral obligation on part of state in favor of claimants. 136Misc242, 240NYS673.

887-55 Construction of statutes.-9Pa Dist&Co 745 (opinion of attorney-general).

887-56 Inspection fees.-313Mo 334, 281 SW946. **Money received by public officers managing railway under private ownership** held not within statute. 261 Mass523, 159NE55. **Receipts from public operation of privately owned railway** held not within statute. 261Mass556, 159NE70.

887-58 117 Or498, 244P540, 541 [cit Cyc], 58ALR114.

887-60½-New. "State revenue" is current income of state from whatever source derived that is subject to appropriation for public uses. 314Mo 33, 282 SW1007.

887-60⅓-New. Motor vehicle registration fees, part of which are used to pay and retire state bonds, are state revenue. 314Mo 33, 282SW1007.

887-63 97Fla750, 122S239.

888-76 Farm loans.-131 Okl 282, 268P 1100.

887-79½-New. Payment to federal soldiers is "public purpose" of state and act providing for loans to such soldiers is valid. 193NC496, 137SE669.

889-84½-New. State loan commission may invest university bond redemption funds in specified securities without limitation as to premium or interest. Utah 263P84.

889-84¼-New. State loan commission need not secure specified securities at par in investing university bond redemption fund. Utah 263P84.

889-84¼-New. Valid investment of bond redemption fund is not precluded by fact that fund will be less than principal of bonds at maturity, where bonds are bought at premium. Utah 263P84.

889-85 Cal 289P160; 313Mo 334, 281 SW946 (though required by statute to be paid into general revenue fund); 86 Mont200, 283P202, 67ALR1020 (state board of examiners, and not public service commission, held empowered to direct payment of moneys from state gasoline inspection fund); 124 Or112, 264P441, 60ALR528; 141Wash110, 250 P1090 (capitol building construction fund includes expenditures for furniture and furnishings of administrative and legislative building). **Liability insurance premiums** held properly payable from "emergency" fund. Cal 284P209.

889-86 Insurance commissioner could not expend license tax to employ detective to investigate burning of buildings. 196NC184, 145SE28.

889-87 Royalties from shells, sand, and gravel received by conservation department belong to conservation fund except as to unexpended balance. 164La306, 113S857.

890-89½-New. Unexpended balance from fiscal year in that year's appropriation to care for expenses of prisoners employed in construction of roads constitutes "balances theretofore appropriated for the construction of roads," etc., within statute providing that all unexpended balance shall revert to general fund at end of fiscal year except "balances theretofore appropriated for construction of roads." 34Ariz425, 272P 95.

890-92 Investment of funds.-124 Or 112, 264P441, 60ALR528.

890-93 Taxpayers' actions.-146Wash 588, 264P403.

890-1½-New. Where provisions of appropriation bills conferring power on legislative chairman and Governor to approve segregations of lump sum appropriations were declared invalid, it devolved on heads of departments to apportion and allot funds under lump sum appropriations. 252NY27, 168NE817.

890-2 175Ark585, 299SW1000; 314Mo 33, 282SW1007; 243NY173, 153NE39; 33 OklCr5, 242P290; TexCivA 297SW 1055 (county cannot use state's share of delinquent taxes to pay for abstract of property delinquent for taxes); 196Wis 430, 220NW185. But see 134 Okl 288, 273P352. **Statute excluding stock dividends from computation as income and declaring regulation retroactive** held not violative of constitutional provision against paying out money except by appropriation. 243NY173, 153NE39. **Statutes held not violative of provision.**-318Mo 910, 1SW(2d)1021.

891-6 314Mo 33, 282SW1007.

891-6½-New. Statutes authorizing creation of deficiency in appropriations.-Pol. Code § 680, empowering board of control with consent of governor to authorize creation of deficiencies in appropriations in case of actual necessity, empowered such board with consent of governor to validate expenditures by state boards or officers in excess of sums available by virtue of appropriations by legislature in cases of actual necessity requiring such expenditures for proper functioning of state agencies. 194Cal 37, 227P775.

891-6⅓-New. Provision of such statute that board of control, having legalized deficiencies, shall authorize payment thereof out of any money which may be appropriated for such purpose, renders applicable to payment of deficiency indebtedness any money which may have been or may thereafter be appropriated for such purpose. 194Cal 37, 227P775.

891-6¼-New. Word "purpose" as used in such statute means objects for furtherance of which board or officer was engaged in functioning and for which specific appropriation was made. 194 Cal 37, 227P775.

891-6⅕-New. Under such statute, whenever appropriation in budget law has been exhausted by proper expenditures of fish and game commission, board of control with consent of governor may legalize further expenditures by commission for purpose of its functioning to be paid from fish and game preservation fund. 194Cal 37, 227P775.

891-7 Authorization by board of control of creation of deficiency in appropriation, as authorized by statute, is not legislative in character but merely renders available appropriation already made. 194Cal 37, 227P775. **Power of executive.**-33Ariz197, 263P589.

891-8 33Ariz197, 263P589; 137SC288, 135SE153, 156 [citCyc]. See also 95Fla 117, 116S66 (can be exercised only in manner contemplated by constitution). **In Arizona.**-30Ariz417, 248P32.

891-9 114 Okl 38, 241P178.

892-13 But see 314Mo 33, 282SW1007. **Constitutional requirement** that no money shall be paid out of state treasury except upon appropriation "made by law" does not require introduction of appropriation bill. 74Mont1, 238P316.

892-13½-New. Proposed law under initiative, for creation of motor vehicle insurance fund, is constitutional as against contention that it makes specific appropriation of public money. Mass 169NE552.

892-13¼-New. Segregation of lump sum appropriations.-Under statute requiring filing of tentative segregation of amount appropriated, term "segregation" means statement in considerable detail of purposes for which money appropriated is to be used. 226AppDiv 331, 235NYS555.

892-14 32Ariz235, 257P648; 175Ark 585, 299SW1000. **Statute not appropriation.**-141Miss701, 105S541.

892-15 176Ark1178, 5SW(2d)332; 162 La956, 111S341 (appropriation held specific); 33 OklCr5, 242P290; 137 Okl 95, 278P311.

892-16 33 OklCr5, 242P290; 137 Okl 95, 278P311. **Appropriation for institution for feeble minded** held for purpose sufficiently defined. 35 OhA354, 172NE 438.

892-17 74Mont1, 238P316.

892-18 181Ark609, 27SW(2d)102.

892-20 180Ark311, 22SW(2d)41; Tex CivA 297SW1055. **For acts held to constitute sufficient appropriation** see 180 Ark311, 22SW(2d)41; 35 OhA354, 172 NE438. **For acts held not to constitute a sufficient appropriation** see 32Ariz235, 257P648; 33OklCr5, 242P290.

893-22½-New. Statute providing for supervision and auditing of offices held not appropriation bill and therefore valid. 141Miss701, 105S541.

893-23 Appropriations to pay district attorney's expenses held not subject to comptroller's credit. 32NM178, 253P20.

893-25 152SC455, 150SE269.

894-29 30Ariz417, 248P32 (Financial Code [1922] §§ 5, 7 held to repeal all continuing appropriations not expressly approved); 194Cal 37, 227P775 (statutes creating and regulating fish and game preservation fund held to constitute continuing appropriation); 137 SC288, 135SE153, 156 [citCyc]. **Appropriations held continuing.**-56ND650, 219 NW105.

894-30 162La956, 111S341 (appropriation held within limitation); 75Mont 429, 244P287 (two years); 137SC288, 135SE153. **Valid statutes.**-75Mont429, 244P287 (increasing rate of tax levy for period of ten years and directing successive legislatures how proceeds shall be appropriated and authorizing appropriations for each of ten years). **Particular statutes held not in conflict with constitutional provision.**-137SC288, 135SE153.

894-32 313Mo 334, 281SW946. Compare 119 Oh117, 162NE394. **Statute imposing license tax on gasoline** has been held not violative of Constitution prohibiting appropriation for payment on claims against state. 99Fla1, 65, 115, 126S308. **Statute creating depository of certain funds,** has been held not to violate constitutional provision prohibiting appropriation for payment of claims against state. 99Fla1, 65, 115, 126S308.

894-33 43 Ida519, 253P128 (appropriation to reclaim state's waste lands is for public purpose); 168La1005, 123S 655, 67ALR1183 (purpose of such constitutional provision); 261Mass523, 159 NE55; Mass 171NE294; 76Mont429, 247P332, 47ALR424. **Appropriations made to compensate student at state university for injuries** sustained in university building through negligence of state agent is for public purpose. 76 Mont429, 247P332, 47ALR424. **Donation not public purpose.** 76Mont429, 247P332, 47ALR424. **Whether appropriation is for public or private purpose** is primarily for legislature to determine. 76Mont429, 247P332, 47ALR424. **Incidental benefit to individuals.**-199 Cal 668, 251P207. **Reclamation and flood control.**-199Cal 668, 251P207. **Appropriation to reimburse official for expenses incurred in official capacity,** when proceeded against, or because of performance of duty, is for public purpose. 195Wis35, 217NW705. **In Iowa.**-230NW373. **Appropriation for purchase of free school books** held constitutional. 168La1005, 123S655, 67 ALR1183.

894-34 217Ala311, 116S695. **Appropriation to satisfy a moral obligation.**-195Wis35, 217NW705.

894-36 193NC496, 137SE669 (loans to veterans of World War). **Payment to federal soldiers** of World War is "public purpose" of state. 193NC496, 137 SE669. **Act providing for loans** to veterans to World War is not gift, but loan, in fulfillment of state's obligation to soldiers. 193NC496, 137SE669.

895-42 Appropriations may be made for any purpose for which taxes may be levied and collected, but for none other. 76Mont429, 247P332, 47ALR424.

895-42½-New. Taxpayers have right of action to contest expenditure of public funds for purchase of free school books. 168La1005, 123S655, 67ALR 1183.

895-42⅓-New. Mothers' Assistance Act held constitutional. 6PaDist&Co 78.

895-42¼-New. Expenses of impeachment and removal of officers.-Legislature has power to appropriate by special appropriation bills such funds as are necessary to carry into effect constitutional provisions relative to impeachment or removal of officers. 137 Okl 95, 278P311.

895-43 124 Or261, 264P445; 142Wash 850, 253P805. **Scope of Appropriation Act.**-314Mo 33, 282SW1007. **Statute appropriating and granting all state taxes to municipality** has been construed to include only general property taxes and to exclude income, motor vehicle, gasoline, inheritance, and corporation license taxes. 124 Or261, 264

P445. **Purchase of road bond from university bond redemption** fund held not unauthorized appropriation from state's general fund. **Utah** 263P83. **Where appropriation is made to pay for personal injuries** and provision for disbursement restricted to education, care, and keep of beneficiary, court cannot allow any part of such sum for services of attorney in obtaining appropriation. 208 **Iowa**603, 226NW64. **Reappropriation.**–35 **OhA**354, 172NE438.

895–43½–New. Particular appropriation acts construed.–198**Cal** 23, 243P429 (act providing for completion of construction, equipment, and furnishing of state buildings in city of Sacramento).

895–43⅓–New. Funds set aside.–Act of appropriating money sets aside amount specified for purpose designated out of money in treasury not otherwise appropriated. either there at time or lawfully brought there afterward. 114 **Okl** 38. 241P178.

895–43¼–New. Appropriation constitutes direction to levy tax to raise amount.–114 **Okl** 38, 241P178.

895–43⅕–New. As affecting power to make further appropriations.–Provision of Appropriation Act that state shall not be liable in excess of amount appropriated does not limit power of state through later legislation to make further appropriations. 199**Cal** 668, 251P 207.

895–43⅙–New. Moneys appropriated to state fish revolving fund are public funds. 173**Minn**559, 218NW123.

895–43⅐–New. Construction.–Acts providing for appropriations for public improvements must be strictly construed. 323**Mo** 200, 18SW(2d)900.

895–47 74**Mont**1, 238P316 (statute providing for payment of principal and interest of state treasury note directly by treasurer and not on warrant drawn by auditor held valid as payment by "proper officer"). **Legislature may provide** for registration of unpaid state warrants. 74**Mont**1, 238P316. **Statute for financing construction of state highway system** by appropriation of proceeds of state gasoline and motor vehicle tax is not void for failure to provide for levy of tax for sinking fund. 152**SC**455, 150SE269.

895–48 74**Mont**1, 238P316 (this provision does not require introduction of appropriation bill).

895–49 Nebr 226NW911 (authorized and required to do so upon presentation of proper vouchers).

895–51 State treasury notes issued to refund outstanding state warrants are evidence of indebtedness to same extent as warrants and do not change state's obligation in any way. 74**Mont**1, 238P316.

896–61½–New. Duty of governor to countersign warrants.–Under some statutes where auditor has approved claim and issued warrant therefor, it is duty of governor to countersign warrant and he has no right to review legality of claim. 29**Ariz**504, 243P407.

896–75 Time of payment.–170**La**435, 128S37.

897–83 Evidence of indebtedness by state to finance construction of highway system held not "bill of credit." 152**SC** 455, 150SE269.

897–84 See also 174**Ark**214, 295SW9.

898–91 235**Ky**86, 29SW(2d)583; 74 **Mont**1, 238P316 (L. [1925] c 176, authorizing sale of state treasury notes to secure funds for payment of outstanding warrants, is valid). **Issuance of bond** to raise money for loans to veterans of World War, twice approved by people and legislature, held constitutional. 193**NC**496, 137SE669. **Construction of statutes.**–323**Mo** 200, 18SW(2d) 900.

898–94 180**Ark**387, 21SW(2d)867 (construction of hospital for nervous diseases).

898–96 94**Fla**967, 114S850. **Legislature may issue bonds** only to maximum amount named in constitutional provision. 294**Pa**25, 143A505.

898–98½–New. Popular referendum held not required as to debentures to anticipate collection of revenues provided by law for state road fund, and particularly proceeds from gasoline excise tax. 32**NM**485, 259P623.

898–98⅓–New. Bonds were not unauthorized because executed under name and seal of commonwealth. 235**Ky**86, 29SW(2d)583.

898–98¼–New. Highway commission has been held authorized to issue bonds to pay half cost of interstate bridge. 235**Ky**86, 29SW(2d)583.

898–98⅕–New. Bond contract for sale of bonds to pay for bridge is not invalid because agreement provided that state should own one half of bridge. 235**Ky**86, 29SW(2d)583.

898–5½–New. Public sale.–Statute relating to publication required to be given in certain city as to time and place fixed for sale of state highway bonds substantially complied with is not affected by merger pending publication of two newspapers selected for publication where identity of neither newspaper was lost. 194**Cal** 712, 230P665.

898–5⅓–New. Advertisement for bids for purchase of bonds should call for bids in accordance with terms in setup. 230**Ky**381, 19SW(2d)967.

898–5¼–New. Contract with successful bidder as result of private negotiations is void. 230**Ky**381, 19SW(2d)967.

898–5⅕–New. State highway commission advertising for bids may make several set-ups. 230**Ky**381, 19SW(2d) 967.

898–5⅙–New. State highway commission is without authority to give successful bidder option to purchase future bonds. 230**Ky**381, 19SW(2d)967.

898–5⅐–New. Set-up should state with definiteness and certainty agreements of highway commission and bidder. 230 **Ky**381, 19SW(2d)967.

898–5⅛–New. Waiver of lien on bridge should be inserted in bonds. 230**Ky**381, 19SW(2d)967.

898–5⅑–New. Advertising for bids for bonds for construction of additional bridges authorized to be included in substitute contract is unnecessary. 235 **Ky**86, 29SW(2d)583.

898–5 1/10–New. Bonds to purchase interest in bridge were not invalid because state paid share as work progressed. 235**Ky**86, 29SW(2d)583.

898–5 1/11–New. Statement in bond contract that bonds might be registered did not invalidate them. 235**Ky**86, 29SW (2d)583.

898–5 1/12–New. Bonds for share of interstate bridge are not invalid because state has no right to collect tolls after payment or because adjoining state must approve rates. 235**Ky**86, 29SW (2d)583.

898–5 1/13–New. Bonds of state cannot be repudiated merely because signed by state officers outside jurisdiction of state. 35F(2d)421.

900–28½–New. Actions to enjoin misapplication of funds.–31**NM**641, 249P 1074, 58**ALR**573; 195**Wis**450, 218NW 810.

900–28⅓–New. Rights and remedies of taxpayers.–54**ND**22, 208NW837; 285**Pa** 153, 131A707.

900–28¼–New. Injunction bond in taxpayers' suit.–It is error to issue temporary restraining order enjoining secretary of state from executing contracts on petition of taxpayers without requiring statutory bond. **Mo** 286SW882.

900–28⅕–New. Rights and remedies of taxpayers.–To restrain carrying out of contract, taxpayer need only show that award was illegal. 35 **OhA**354, 172NE 438.

901–29 50**SD**643, 211NW451 (presentation of claim and refusal of claim by state auditor as condition precedent to action against state on claim). **State bonding fund.**–52**ND**65, 201NW988. **Statute construed** to require claimant to present to insurance commissioner claim on state bonding fund liable for default or wrongful act of public employee within sixty days after discovery of default or wrongful act. 52**ND**65, 201NW988.

901–30½–New. Constitutional provision prohibiting statute providing for payment of claims against state without previous authority of law refers only to claims arising out of contracts, 76**Mont** 429, 247P332, 47**ALR**424.

901–30⅓–New. and not to claims arising out of torts of agents of state. 76 **Mont**429, 247P332, 47**ALR**424.

901–30¼–New. Where improvement plan failed, attempted recourse against small portion of land, not theretofore discharged from liability for benefits, is unnecessary to enforce obligation of state under statute. 243NY231, 153NE 58.

901–31 219**AppDiv**124, 219NYS530; 134**Misc**1, 234NYS224.

902–33 43 **Ida**519, 253P128 (claims determined by legislature); 243NY231, 153NE58; 213**AppDiv**737, 211NYS420; 134**Misc**1, 234NYS224. **Amount paid by holder of bonds, issued for improvement of creek in purchasing lands at delinquent assessment sale on advice of state officials,** held not to be moral obligation of state. 243NY231, 153NE58. **Where state approved improvement plan of creek and authorized bonds, and certificates to be issued to prosecute improvement,** and state officials represented that benefit assessments would be sufficient to care for obligation, but improvement plan failed, it was held that state could not be said, as matter of law, not to have moral obligation. 243 **NY**231, 153NE58. **Action of legislature not conclusive** where it recognizes moral or equitable obligations, and courts are not precluded from deciding correctness of legislature's judgment. 134**Misc**1, 234NYS224. **In absence of legal liability, legislature cannot allow claim** unless in fulfillment of moral obligation. 254NY117, 172NE261.

902–37 Claims founded on equity or moral obligation under legislative enactment require some benefit to state. 132**Misc**182, 229NYS235.

902–37½–New. Statute allowing payment of attorney's fees for judges successfully defending litigation growing out of official acts has been held invalid. 254NY117, 172NE261.

902–39½–New. Appropriation of state funds that are made by law can be used only for payment of claims duly authorized, audited, and approved. 95**Fla** 117, 116S66.

903–44 Authority of governor.–29**Ariz** 504, 243P407.

903–45½–New. It has been held that legislature must confer final duty of awarding payment, based on assumed moral obligation of state, on appropriate body with power to reject as well as to award. 243NY231, 153NE58.

903–46 32**PortoRico** 841 (**Organic Act** § 20); 50**SD**643, 211NW451.

903–48 248NY112, 161NE438; 127 **Misc**75, 215NYS313. **Statute permitting court of claims to pay** claims for increased cost of public structures due to delay, in face of contract provisions to contrary, held unconstitutional as conferring gratuity and aid to corporation. 127**Misc**75, 215NYS313. **In New York.**–214**AppDiv**386, 212NYS222 (implied consent). **Court of claims is not deprived of jurisdiction** by claimant's recovery of damages against third party from defective highway. 223**AppDiv** 543, 228NYS718.

903–49 76**Mont**429, 247P332, 47**ALR** 424 (statute not violative of constitutional provision prohibiting consideration of claims by legislature before having been considered by board). **In Idaho.**–43 **Ida**519, 253P128.

904–54 See also 76**Mont**429, 247P332, 47**ALR**424.

904–55 Claims disallowed.–132**Misc**182, 229NYS235.

904–59 43 **Ida**519, 253P128 (exclusive power). See also 32**PortoRico** 841. **Auditor should allow claim presented by board of examiners,** unless act authorizing allowance is invalid. 43 **Ida**519, 253P128.

904–59½–New. Enabling statute provision, authorizing recovery against state if claimant was free from contributory negligence and state negligent, held jurisdictional fact. 219**AppDiv**124, 219 NYS530.

904–59⅓–New. Though one member of

court of claims dissents, findings of such court are still findings of court. 219AppDiv124, 219NYS530.

904-59¼-New. Negligence of National Guard trooper, causing injury and death of pedestrians when horse ran away, is question of fact for court of claims. 130Misc800, 225NYS381.

904-59½-New. Evidence was held to show that National Guard trooper was not negligent, and state held not liable for injury and death of pedestrians run down when horse bolted. 130Misc800, 225NYS381.

905-65 245NY634, 157NE888; 245NY638, 157NE890. **Appeal is exclusive remedy** under some statutes. 115Nebr869, 215NW129. **Appeal must be taken in manner provided by statute.**-115Nebr869, 215NW129. **Perfection of appeal.**-115Nebr869, 215NW129.

905-67 50SD643, 211NW451.

905-70 125Misc186, 211NYS149.

905-71 Wis 230NW698.

906-76 38F(2d)52; 157Miss225, 127S902; 114Nebr612, 209NW221; 115Nebr650, 215NW137; 115Or562, 239P193; 198Wis393, 223NW840; 198Wis399, 224NW110(1stcase). **Obligation of state to pay interest is not materially different from that of individuals.**-219AppDiv184, 219NYS78. **State is liable for interest on debt on same legal and equitable principles as individual.**-128Misc4, 217NYS583.

906-77 115Nebr650, 215NW137 (statute authorizing suit construed as permitting allowance of interest); 219AppDiv184, 219NYS78. But see 225AppDiv606, 233NYS503.

906-78 219AppDiv184, 219NYS78.

906-82 219Ky349, 293SW543.

906-86 144Wash157, 257P402 (governor's signature to vouchers to pay claim from state fund is ministerial act).

906-87 117Tex166, 299SW227.

907-91½-New. Acceptance of legislative appropriation in payment of claim bars claim for any balance. Nebr 232NW94.

907-96 Under Missouri statute, state of Oklahoma may sue Missouri bank in Missouri to recover for use of depositors' guaranty fund money due Oklahoma bank, though there are resident creditors. 220MoA474, 274SW945.

907-3 104CalA133, 285P753. See also 273US12, 47SCt265, 71L ed511.

908-4 Fraud of state's representative inducing sale may be asserted as defense in action on note for price of seed grain. 169Minn226, 210NW1006.

908-7 273US12, 47SCt265, 71L ed511.

908-8 115Tex205, 281SW837, 842 [cit Cyc].

908-9 115Tex205, 281SW837, 843 [cit Cyc].

908-11 164La334, 113S867. **Suit for benefit of private individuals.**-137 Okl 67, 277P1029.

908-11½-New. Statute authorizing people to sue to recover money or other property obtained from any municipality without right, though right of action therefor exists by law in some other public authority, does not create new cause of action but merely authorizes state to intervene and enforce causes of action against offending parties. 133 Misc843, 233NYS632.

908-13 216Ala367, 113S592; TexCivA 28SW(2d)885.

909-14 93Fla672, 112S561.

909-15 134Wash568, 236P280 (to enjoin construction of toll bridge which connects parts of highway.

909-16 State docks commission need not sue in name of state in connection with its ordinary business affairs. 25 F(2d)480.

909-17 146Wash588, 264P403.

909-18 Refusal of attorney-general to act in suit where he is defendant to test constitutionality of act relating to sale of gasoline by state authorizes suit by taxpayers or electors. 48SD608, 205 NW614, 43ALR397.

909-20 See also 136Misc447, 241NYS 349.

909-22 157Tenn429, 7SW(2d)40 (taxpayers).

909-25½-New. Actions for redress or prevention of public wrongs must be prosecuted in name of state. 52Nev52, 280P644.

909-27 104CalA133, 285P753.

910-36 93PaSuper285.

910-38 137 Okl 67, 277P1029.

910-39 218Ky742, 292SW310; 222Ky 502, 1SW(2d)954. **State is not affected by laches of its officers.**-219Ky185, 292 SW785.

910-40 But see Sask [1925] 3DomLR 537.

910-42 Sask [1925] 3DomLR537.

911-45 5F(2d)659; 13F(2d)500; 29 Ariz181, 239P1030; Cal 284P209; 72 CalA68, 237P59; 80CalA754, 253P173; 103CalA234, 284P510; 103CalA354, 284 P731; 90Fla88, 105S323, 42ALR1456; 93Fla672, 112S561; 198 Ind620, 154NE 380; 125Kan558, 264P740; 227Ky138, 12SW(2d)303; 233Ky619, 26SW(2d)557, 69ALR482; 8LaA441; 317Mo 696, 296 SW418; 76Mont429, 247P332, 47ALR 424. Nebr 233NW447 (department of public works); 31NM557, 249P112, 50 ALR1404; 243NY15, 152NE451; 215App Div109, 213NYS513; 127Misc710, 217 NYS545; 219AppDiv207, 219NYS325; 219AppDiv124, 219NYS530; 191NC243, 131SE665; 195NC291, 141SE733; 51ND 603, 200NW524; 54ND637, 210NW501, 503 [citCyc]; 58ND643, 227NW52 (by alien resident); 116 Okl 236, 244P422; 118 Or568, 247P815; Or 292P309; 54SD 482, 223NW600(2dcase); TexCivA 25SW (2d)193; TexCivA 26SW(2d)1082; 68 Utah486, 251P16; 195Wis366, 218NW 440, 57ALR352. **Plaintiff's pleading must show unqualified consent** of defendant to be sued in suit against state. 58ND643, 227NW52. **Court cannot enforce third party's lien on funds in state's hands** where as prerequisite to enforcement it must determine legal controversy between state and contractor. 215AppDiv109, 213NYS513. **No judgment can be entered against state** without legislative authority therefor. 215 AppDiv109, 213NYS513. **Where state claims funds as damages for contractor's breach,** or on any other ground, supreme court may not without state consent determine whether state breached contract, or render judgment directing state to pay specified sum to lienor. 215App Div109, 213NYS513 (issue being triable in court of claims in action to foreclose mechanic's lien).

912-46 54ND637, 210NW501, 503 [cit Cyc]. **Upon principles of county,** courts of state will not entertain suit by resident of another state against that state for injuries suffered while working in mine owned and operated by latter state in former state. 52ND84, 201NW867.

912-48 99WVa397, 129SE320. **Express consent necessary.**-Cal 289P160. **Appearance of attorney-general** answering to merits is not a waiver. Nebr 233 NW447.

912-49 13F(2d)500; 99Fla333, 126S374. **Special appearance** by state and motion to vacate service of summons and dismiss action with costs is not waiver of immunity to suit. 52ND84, 201NW867.

912-50 243NY140, 153NE28; 127Misc 710, 217NYS545.

912-51 85 IndA56, 152NE836.

912-52 125Kan558, 264P740.

912-53½-New. Where state cannot be sued directly, it cannot be sued indirectly. 219AppDiv207, 219NYS325.

912-53½-New. Except as provided in constitution, every state has absolute immunity from suit. 22F(2d)147 (Const. Amendm. 11).

912-54 54ND637, 210NW501.

913-55 54ND637, 210NW501; 50SD37, 208NW162. See also 317Mo 696, 296SW 418.

913-56 198 Ind620, 154NE380; 317Mo 696, 296SW418; 54ND637, 210NW501; 50SD37, 208NW162. **In New York.**-215 AppDiv109, 213NYS513. **In Indiana.**-85 IndA557, 155NE50. **Statute permitting suit held to confer no greater right than that existing against individuals.**-198 Ind620, 154NE380. **New York Court of Claims Act** establishes universal waiver in all cases prosecuted before court of claims, unless liability sought to be enforced is extra legal. 248NY112, 161 NE438 (special enactment not required to authorize allowance of legal private claims against state).

913-57 118Nebr501, 225NW672.

913-60 54ND637, 210NW501.

913-61 22F(2d)147; 125Kan558, 264P 740.

913-62 What constitutes consent.-126 Misc642, 214NYS418 (after advertisement for three weeks). **In New York.**-243NY140, 153NE28.

913-63 224AppDiv512, 231NYS379; 54 ND637, 210NW501.

913-64 219AppDiv584, 219NYS348. See also 103CalA354, 284P731.

913-66 Particular statutes construed.-206Cal 556, 275P436; 50SD37, 208NW 162.

914-67 103CalA234, 284P510; 99Fla 333, 126S374; 213Ky174, 280SW943; 219AppDiv124, 219NYS530.

914-68 103CalA234, 284P510; 51ND 603, 200NW524 (suit against guaranty fund commission or state not authorized where not respecting title to property or arising upon contract). But see 206Cal 556, 275P436. **Statutory authority to fix terms of sale** of state lands does not authorize suit to enforce contract to sell. 90Fla88, 105S323, 42ALR1456. **Suits on claims for payment of which there is no available appropriation** are not authorized under statutes in some jurisdictions. 50SD37, 208NW162. **In North Dakota.**-58ND303, 225NW812. **Action to recover license tax** by corporation is not a "claim on contract" authorizing suit against state. CalA 270P690. **"Actions arising upon contract"** within statute authorizing such actions against state include action for money had and received to recover excessive income taxes. ND 231NW883.

914-73 Statutes strictly construed.-103 CalA234, 284P510.

914-74 Creation of state agency with power to sue and be sued held to waive immunity of state as to suits against such commission. 16F(2d)322.

915-78 80CalA754, 253P173; CalA 291 P907 (additional remedy); 118Nebr501, 225NW672; 54SD482, 223NW600(2d case). **Effect of statute waiving immunity** from suit is also to waive immunity from liability for cause of action. 132 SC241, 128SE172.

915-79 5F(2d)659; 196NC184, 145SE 28; 155SC77, 151SE887.

915-80 5F(2d)659; 155SC77, 151SE 887.

915-81 155SC77, 151SE887.

915-83 54ND637, 210NW501; 129 Or 302, 276P691.

916-85 13F(2d)500; 90Fla88, 105S323, 42ALR1456; 31NM120, 241P1027; 31 NM557, 249P112, 50ALR1404; 195NC 284, 141SE886; 195NC291, 141SE733; 54ND637, 210NW501, 505 [citCyc]; 129 Or302, 276P691; Or 292P309; TexCivA 26SW(2d)1082 (suit against national guard officers); 103WVa37, 136SE507 (state road commission).

916-87 90Fla88, 105S323, 42ALR1456.

916-89 90Fla88, 105S323, 42ALR1456; 202 Iowa484, 210NW532.

916-90 90Fla88, 105S323, 42ALR1456.

917-91 54ND637, 210NW501.

917-92 243NY15, 152NE451.

917-93 Ala 130S805.

917-94 13F(2d)500; 17F(2d)196; 35 PortoRico 168; 48SD608, 205NW614, 43 ALR397; 102WVa663, 136SE195. **A suit to restrain state officers, etc.**-74 Mont1, 238P316 (where act appropriating money is attacked on ground that appropriation exceeds state's income, complaint must show that other appropriations theretofore made exceed difference between appropriation attacked and anticipated income of state).

917-95 31NM120, 241P1027; 48SD608, 205NW614, 43ALR397; 102WVa663, 136SE195, 197 [citCyc].

918-97 28 OhA107, 162NE466.

918-98½-New. Averments of bill for injunction declared too general. 213Ala 289, 104S671.

918-98½-New. Action for penalty against California harbor commissioners for violating federal statute held not "suit against the state." 21F(2d)967.

918-98¼-New. Statute held to authorize suit against state officer to restrain unlawful salary payments. 130Misc781, 225NYS350.

918-99 13F(2d)500; 218Ala120, 117S

757; 90Fla88, 1058323, 42ALR1456; 31 NM120, 241P1027; 48SD417, 204NW301; 103WVa432, 137SE878.

918-1 103WVa432, 137SE878.

918-3 48SD608, 205NW614, 42ALR397 (holding courts cannot interfere with property interest of state in gasoline to be sold under L. [1925] c 184 nor with right to sell it, but any one in custody of it may be prevented from selling without legal authority).

919-6 90Fla88, 1058323, 42ALR1456; 93Fla672, 1128561 (proceeding against school lands held suit against state).

919-6½-New. **Joinder of state highway commission for purpose of determining conflicting interests** in funds on its hands does not violate constitutional provision prohibiting suits against state. 123 Okl 170, 252P404.

919-7 16F(2d)322; 179Ark13, 148SW(2d)233; 181Ark529, 268SW(2d)579; 99Fla333, 1268374; 204Iowa376, 213NW532; 227Ky138, 12SW(2d)303; 105NJL656, 146A206(2dcase); 213NY15, 152NE451; 191NC243, 1318E665; 156NC54, 115SE22; 58ND303, 225NW812; 149SC219, 146SE570; 155SC77, 151SE257; 155SC219, 152SE429; TexCivA 13SW(2d)331, 99WVa397, 129SE320 (action against state road commission for tort). **In California.**-80CalA754, 253P173. **Workmen's compensation bureau.**-58ND 303, 225NW812.

919-8 16F(2d)322; 317Mo696, 296SW418. **Surety company settling with insured** for injuries received due to defects in state highway could not sue state highway department on theory of subrogation. 155SC77, 151SE887. **Legislature has power to restrict or withdraw statutory right of action** against state highway department for damages. 156SC232, 153SE165.

919-9 17F(2d)17 (state held not necessary party to injunction suit by railroad); 25F(2d)480; 99CalA337, 278P452; 317Mo696, 296SW418; 151Va495, 145SE419. **Suit against state bank temporarily under management of agency of state** is not action against state. 20F(2d)775. **State agency authorized to conduct ordinary business ventures** is subject to suit. 25F(2d)480. **State does not waive its immunity from liability for torts** of its officers or agents when it engages in prosecution of private business. 80CalA754, 253P173.

919-12 16F(2d)322; 43F(2d)582; 50SD250, 209NW358. **Action maintainable** to compel performance of plain official duty or of authorized contract. 43F(2d)582. **Suit against highway commission by patentee** for royalty on patent infringements. 43F(2d)582.

919-13 But see 47Ida346, 275P780.

920-16 **In North Dakota.**-58ND66, 224NW661.

920-18½-New. **Complaint** must allege compliance with statutory conditions such as presentation of claim to proper officer in statutory time. 52ND65, 201NW988.

920-19 58ND643, 227NW52; TexCivA 13SW(2d)391.

920-20 But see 99CalA337, 278P452. **Statute permitting change of venue** applies only to suits properly brought under statutory leave. 103CalA234, 284P510. **Venue of actions against state treasurer under Torrens Law.**-103CalA 234, 284P510.

920-26 5F(2d)659.

921-23 TexCivA 25SW(2d)989.

921-30 34F(2d)470.

921-30½-New. , and while state is interested in enforcement of laws generally and duties of its officers and agencies, still this general interest does not constitute state a party in interest in every proceeding for such enforcement. 71CalA421, 236P377.

921-34½-New. **Taxpayer or elector need not have special interest** or suffer special injury to enable him to protect public rights by action to test constitutionality of act relating to sale of gasoline by state. 48SD608, 205NW614, 43ALR397.

921-34¼-New. **Taxpayer having interest** in public funds may sue to restrain unauthorized or unlawful expenditure of state money, regardless of amount of individual loss occasioned thereby. 285Fa153, 131A707.

921-35 23F(2d)283; 196Wis76, 219NW428.

921-37 130Kan196, 285P620.

922-41 **Court of claims is not deprived of jurisdiction to try counterclaim** by failure of claimant to establish his claim. 213NY629, 154NE634.

922-41½-New. **Evidence.**-In action against state for value of services in taking testimony before railroad commission and transcribing such testimony, verdict of two and one half cents per folio for transcribing testimony has been held adequate under evidence. 198Wis393, 223NW840.

922-41½-New. Claimant suing state on quantum meruit for work done by authority of senate resolution has burden of proving cause of action. Nebr 232NW94.

922-43 **Default judgment** rendered in action against state is of no force or effect where process was not served as required by statute. 58ND66, 224NW661.

922-45 194CalA577, 286P743.

922-49½-New. **Judgment that state bank has no right, title, or interest in real property** is not judgment against state where bank was taken over by bank commissioner after commencement of suit. 137Okl67, 277P1029.

922-49¼-New. **Interest.**-Where state submits itself to suit, it comes into court on same basis, as to liability for interest, as other suitors, unless statute provides contrary. SD 229NW394.

923-54 120Kan471, 213P1011.

923-64 47Ida346, 275P780.

923-65 SD 229NW394; 198Wis399, 224NW110(1stcase).

924-67 103NJL541, 138A569.

924-68 198Wis399, 224NW110(1st case).

924-69 111Conn427, 150A308.

924-70½-New. **Attorney's fee** will not be allowed to intervening state supervisor of building and loan associations in suit between association and its stockholders, who as state official under supervision of banking commissioner is entitled to services of attorney-general. 120Kan471, 243P1011.

924-70¼-New. or where, if for valid reason attorney-general's services are not available, attorney's fees may in proper case be paid from contingent fund of bank commissioner. 120Kan 471, 243P1011.

STATUTES

940-4 78Mont1, 252P301.

941-6 91Fla241, 1078364. **An ordinance impairing the obligation of a contract,** etc. 91Fla241, 1078364.

941-12½-New. There cannot be effective and operative law that is essentially different from clearly expressed statute law. 130Misc365, 226NYS1.

941-14 **Office of statute** is to remedy defects in common law and adapt it to changes of time and circumstances. 242Mich95, 219NW69.

941-15 63CalA393, 229P876 (rule of equity, as well as one of law, subject to change by statute); 111Conn72, 149A231.

942-19½-New. Generally state statutes have no extraterritorial effect. 169Ark 265, 275SW337.

942-20 154Tenn458, 285SW705 (irregularity in election to determine will of people as to stock law for county does not affect validity of subsequent act). **Statutes held not subject to referendum.**-261Mass533, 159NE55.

942-21 53ND140, 205NW17 (provision by people against inaction of then legislative agents); Wash 286P839 (legislative reapportionment). **In Arizona.**-30Ariz417, 248P32. **Certain sections of Arizona Penal Code of 1913** held not capable of repeal or amendment by legislature. 30Ariz417, 248P32. **Penal Act (1913) § 675,** superseding initiated measure, having been executed before constitutional amendment prohibiting repeal or amendment of initiated or referred measures, may be modified, amended, or repealed by legislature. 30Ariz417, 248P32. **In California.**-195Cal686, 235P450. **Ordinance initiated by petition** authorizing contract with utility company to supply gas in city held constitutional. 21OhA465, 153NE217. **Statutes enacted by initiative are of equal dignity** with those passed by legislative assembly. 75Mont429, 244P287. **Initiative and referendum system applied** to municipalities. 170Ark1160, 282SW971. **Certificate of attorney-general** on initiative petition concerns merely matters of form. 262Mass603, 160NE439. **Proposed law, introduced by initiative petition,** held neither "law" nor "measure" within constitutional amendment relating to initiative. 262Mass603, 160NE139. **Constitutional provision requiring "description" of proposed law** means fair portrayal of its chief features comprehensible to voters. Mass 171NE294 (provision held mandatory and not complied with). **Reference to approval by voters** as "the passage of the act" held improper but not fatal. Mass 169NE552.

942-23 See also ND 232NW303. **Statutes liberally construed.**-ND 232NW 303.

942-24 53ND140, 205NW17 (provides for appeal directly to people from affirmative action by their representatives). See also ND 232NW303. **Act consolidating offices** of sheriff and assessor held not suspended by filing of petition for referendum so as to permit filing of candidacy for assessor. 49Nev 405, 248P44. **Effective date of Workmen's Compensation Act of Arizona** held not postponed till ninety days after adoption of constitutional amendment, so as to allow referendum. 29Ariz419, 242P658. **Matters unnecessary to be submitted to referendum vote,** etc. Gasoline tax bill appropriating money for maintenance and repair of highways. 112ObsA590, 148NE95. **Statute requiring "verified" copy** of ordinance against which referendum is sought to be filed with city auditor or village clerk is complied with when such ordinance is certified by clerk of city counsel. 20ObA 135, 153NE155. **Bill held not subject to referendum petition** under such statute. 254Mass617, 151NE680. **In North Dakota.**-54ND289, 209NW558. **In Arkansas.**-176Ark1093, 58SW(2d)350. **Initiative and referendum.**-128Okl269, 263P635. **Fact that Land Title Law was adopted by initiation** does not relieve it of constitutional restrictions. 104CalA 528, 286P504. **Majority of qualified votes of county** may be required. 170Ga414, 153SE56 (city court not abolished where act complied with). **General statutes relating to mode of submitting questions to electorate and conduct of election thereon** apply to referendum in some jurisdictions. 34NM438, 283P902. **Sufficiency of legislation to render referendum effective.**-34NM438, 283P902. **Amendments of such statutes** are valid though not passed by referendum. 93CalA478, 269P670. **Construction of referendum provisions.**-Or 292P306. **Necessity of constitutional or statutory authority for referendum.**-Or 292P306. **Referendum of local or special law to qualified freeholder electors** does not comply with constitutional provision that referendum be to "qualified electors." Fla 130S575. **Statutes liberally construed.**-ND 232NW303.

942-24½-New. In North Dakota, under constitution, where referendum petitions relating to legislation other than emergency measures designate time for holding referendum election at general election, governor has power to accelerate date by calling special election. 56ND655, 197NW637.

942-24½-New. Under constitutions in some jurisdictions initiative and referendum powers are reserved to legal voters of every municipality and district as to all local, special, and municipal legislation of every character in their respective municipalities and districts. 119Or138, 248P169.

942-24¼-New. Manner of exercising such powers is required to be prescribed by general laws. 119Or138, 248P169.

942-24½-New. except that cities and

towns may provide for manner of exercising such powers as to their municipal legislation. 119 Or138, 248P169.

942-24½-New. County is district within meaning of constitutional provision giving initiative powers to municipalities and districts. 119 Or138, 248P169.

942-24¼-New. And it is subject to requirements of statutes enacted pursuant to such constitutional provision, 119 Or138, 248P169.

942-24½-New. By constitutional provision not more than ten per cent of legal voters may be required to order referendum, 119 Or138, 248P169.

942-24½-New. and not more than fifteen per cent to propose any measure by initiative, in any city or town. 119 Or138, 248P169.

942-24½0-New. Statutes enacted pursuant to constitutional provision supersede prior statutes requiring petition signed by three fifths of qualified electors for order submitting proposition to change county seat to electors of county at next general election of county officers. 119 Or138, 248P169.

942-24½1-New. And initiative petition presented to clerk for filing, containing names of more than fifteen per cent of legal voters, is sufficient. 119 Or138, 248P169.

942-24½2-New. Fact that circulator of initiative petition received reasonable compensation does not affect validity of petition. 114 Okl 285, 244P801.

942-24½3-New. Fact that address of signer of petition is written by one other than signer does not affect validity of signature. 114 Okl 132, 244P806.

942-24½4-New. Fact that initiative petition was circulated by minor does not of itself invalidate it. 114 Okl 285, 244 P801.

942-24½5-New. Substantial compliance with requirement that copy of referendum petition be filed with secretary of state is sufficient. 114 Okl 132, 244P 806.

942-24½6-New. Signatures to initiative petition must be in handwriting of person whose signatures they purport to be. 114 Okl 285, 244P801.

942-24½7-New. Initiative petition must be signed and sworn to by person who circulated petition. 114 Okl 285, 244P 801.

942-24½8-New. Signatures to initiative petition must be disregarded where post-office address is omitted. 114 Okl 285, 244P801.

942-24½9-New. Omission of street and house number is not ground for disregarding signature to initiative petition. 114 Okl 285, 244P801.

942-24½0-New. Presidential electors are considered as state officers in determining per cent of signatures necessary to referendum petition. 114 Okl 132, 244P806.

942-24½1-New. Clerical and mere technical errors will not vitiate petition. 114 Okl 132, 244P806.

942-24½2-New. Copy of petition filed in office of secretary of state need not bear any indorsement. 114 Okl 285, 244 P801.

942-24½3-New. **Time for filing supplementary petition.**—Decision of secretary of state that filing of supplementary petition was timely is not conclusive but is subject to review by courts. 19 OhA107.

942-24½4-New. Motion to reconsider postponement ruled out of order and motion to suspend rules voted down by house do not operate to extend time for filing supplementary petition. 190 OhA107.

942-24½5-New. Where supplementary petition is not filed within ninety days after rejection of initiated bill, there is no basis for referendum, action by secretary of state in proceeding with referendum will be enjoined. 19 OhA 107.

942-24½6-New. Ninety-day limitation prescribed by constitution for filing supplementary petition upon initiated bill is mandatory. 19 OhA107.

942-24½7-New. Where initiated bill in course of proceeding before house of representatives is indefinitely postponed and no further action by house is had thereon, action of house amounts to rejection of petition, and limitation of time for filing supplemental petition begins to run from date of such postponements. 19 OhA107.

942-24½8-New. In some jurisdictions constitution provides that not more than eight per cent of legal voters shall be required to propose any measure by petition, 119 Or101, 248P146.

942-24½9-New. and that the whole number of votes cast for justice of supreme court at last election preceding filing of petition shall be basis of number of signatures required, 119 Or 101, 248P146.

942-24½0-New. and not eight per cent of total vote cast for all of candidates for such office. 119 Or101, 248P146.

942-24½1-New. Provision is construed to require eight per cent of greatest number of votes any one candidate for supreme court justice receives. 119 Or 101, 248P146.

942-24½2-New. Amendment to constitution providing for initiative and referendum does not lessen power of legislature in matter of enacting laws. 119 Or141, 248P358.

942-24½3-New. Such amendment takes from legislature exclusive right to enact laws leaving legislature coördinate legislative body with the people. 119 Or141, 248P358.

942-24½4-New. Initiative and referendum provisions in constitution do not affect principle that fundamental purpose of legislation is to speak will of majority of legislative agents chosen by the people. 53ND140, 205NW17.

942-24½5-New. Principle is applicable whether legislature or people through initiative are law makers. 53NW140, 205NW17.

942-24½6-New. If effect of referendum in striking out part of statute is to remove therefrom inducement for its enactment so that remainder is substantial departure from legislative purpose or bring about object not contemplated, entire statute falls. 53ND140, 205NW 17.

942-24½7-New. Constitutional provision for initiative and referendum controls legislative enactments providing for carrying constitution into effect. 116 Or264, 240P418.

942-24½8-New. Act passed by legislature and approved by governor is inchoate till passed upon by referendum. 194Cal 85, 226P77.

942-24½9-New. Law relating to buying and selling of foreign exchange held not in effect amendment of act relating to banks and banking, invalid because not submitted to vote of people as required by constitution. 323 Ill 427, 154 NE198.

942-24¼0-New. In some jurisdictions, under constitutional provisions, referendum cannot be ordered as to laws necessary for immediate preservation of public peace, health, or safety. 121 Or 459, 255P900.

942-24¼1-New. Emergency clause attached, in plain violation of constitutional provision, to statute regulating taxation or exemption, does not excuse secretary of state from performing his ordinary duties respecting process designed to carry into effect referendum provisions of constitution and laws. 121 Or459, 255P900.

942-24¼2-New. And mandamus will issue directing him to refer relator's request for referendum to attorney-general to provide ballot title so that petitions may be circulated for reference to people of act passed by legislature as provided by constitution and statutes. 121 Or 459, 255P900.

942-24¼3-New. Initiative and referendum petition regular in form and duly certified is prima facie evidence of its validity and authenticity. Me 137A53.

942-24¼4-New. Signatures on such petition, which are not original, should not be counted, Me 137A53.

942-24¼5-New. but fact that some signatures on petition are not original does not invalidate verification, and remainder of names should be counted. Me 137A53.

942-24¼6-New. Authority to sign petition cannot be delegated, even though done in good faith. Me 137A53.

942-24¼7-New. Petitioner, verifying signatures on petition, should have personal knowledge thereof and cannot verify on hearsay alone however honest his belief. Me 137A53.

942-24¼8-New. but signatures need not be subscribed in his presence to warrant him in verifying them. Me 137A53.

942-24¼9-New. Nature and weight of evidence, and what constitutes personal knowledge warranting verification of petition, are for judgment and determination of body acting on petition. Me 137A53.

942-24¼0-New. Fact that verification of certain names on petition is based on hearsay does not invalidate verification as to remainder of names. Me 137A53.

942-24¼1-New. Constitutional provision for referendum applies only to measures passed by legislature. 50Nev 302, 258P291.

942-24¼2-New. Referendum of amendment of initiative act is unauthorized under Nevada constitution. 50Nev302, 258P291.

942-24¼3-New. Provisions of initiative clause with respect to description of proposed measure in petition held mandatory. 257Mass91, 153NE322.

942-24¼4-New. Law may require circulators of petitions for hire or reward to be licensed, or otherwise regulated. 260Mass423, 157NE537.

942-24¼5-New. Suppression of petition for referendum is criminal offense. 260 Mass423, 157NE537.

942-24¼6-New. First request is blank containing ten qualified names, filed as petition though incomplete. Each blank furnished for separate signers is petition within L. (1923) c 183. When all filed they constitute one complete petition. 260Mass423, 157NE537.

942-24¼7-New. Requirement that not over one fourth of signers shall be from one county does not apply to first petition or blank filed, but to petition when completed by filing all required number of subsequent signers. 260Mass423, 157 NE537.

942-24¼8-New. No measure relating to religion or religious practices can be made subject of initiative petition under laws of some jurisdictions. 255Mass 366, 151NE378.

942-24¼9-New. In some jurisdictions question whether preliminary requirements have been complied with are for attorney-general to determine. 255Mass 366, 151NE378.

942-24¼0-New. He is to pass on question whether initiative petition is in proper form before making his certification of approval or disapproval. 255 Mass366, 151NE378.

942-24¼1-New. In absence of bad faith his decision is final and cannot be set aside by courts. 255Mass366, 151NE 378.

942-24¼2-New. Signatures on petition for referendum of one statute cannot be counted in petition for referendum of another. 51SD385, 214NW623.

942-24¼3-New. Duplicate and triplicate signatures by same elector in petition for referendum of statute should be stricken. 51SD385, 214NW623.

942-24¼4-New. Unverified signatures to petition for referendum of statute should be stricken. 51SD385, 214NW 623.

942-24¼5-New. Where original heading to petition for referendum of statute is cut off and signatures pasted on another petition, signatures cannot be counted. 51SD385, 214NW623.

942-24¼6-New. Where petitions for referendum of statute were originally unverified, having printed verification forms executed and pasting them on petitions does not satisfy law, and signatures cannot be counted. 51SD385, 214 NW623.

942-24¼7-New. Signatures to petition

for referendum of statute, where signers themselves did not write their residence, business, date, and address, could not be counted. 51SD385, 214NW623.

942-24½68-New. Requirement in statute that petition should be liberally construed is not violation of substantial requirements. 51SD385, 214NW623.

942-24½69-New. The word "measure," in constitutional provision, means particular act of legislature, and not general principle sought to be approved therein or act mentioned by referred act. 32Ariz515, 260P435.

942-24½70-New. Petition for referendum on statute repealing prior act does not prevent legislature from enacting emergency measure conflicting with such act. 32Ariz515, 260P435.

942-24½71-New. People at all times may prevent going into effect of legislation establishing any particular law, or legal principle, and not carrying emergency clause, by use of referendum, 32Ariz 515, 260P435.

942-24½72-New. while at same time retaining power through failure to invoke that remedy of changing their minds in regard to their previous action without waiting till next general election. 32 Ariz515, 260P435.

942-24½73-New. Under Michigan constitution, counties engaged in building roads for state purposes under supervision of state administrative board with money supplied by state at large are exercising state function, and statute appropriating money to be paid to counties for such purpose is within constitutional exception from referendum of laws appropriating money for state institutions. 240Mich584, 216NW450.

942-24½74-New. Statute reducing corporation income tax held not exempt from operation of referendum. 316Mo 1008, 292SW1037.

942-24½75-New. **Submission at general or special election.** Under some constitutions initiative measure must go to next regular general election held throughout state, unless governor orders special election for express purpose. 128 Okl 269, 263P635.

942-24½76-New. Affirmative vote by people at special election gives no force and effect to initiative measure where same was not ordered submitted at special election by legislature or governor. 128 Okl 269, 263P635.

942-24½77-New. **Reference to title of bill to be submitted.**-Short ballot title of bill referred to people after it has been enacted by legislature is not supposed to be substitute for title of bill but is means of identifying bill referred or initiated and is sufficient if it does so. 130 Or304, 278P91.

942-24½78-New. Short ballot title: "Two Additional Circuit Judges Bill," used to describe bill referred to people, purpose of which is to provide for two additional circuit judges in certain judicial district, is sufficient. 130 Or304, 278P91.

942-24½79-New. That short ballot title refers to act to be submitted as "bill" does not render title insufficient. 130 Or304, 278P91.

942-24½80-New. Legislation providing for purchase or condemnation of new right of way to be transferred by state to railroad in exchange for portion of its roadbed needed for highway improvement is not local act requiring local ratification, under Michigan constitution. 243Mich649, 220NW881.

942-24½81-New. **Attorney-general's statement of purpose of initiated bill** has been held fair and not misleading. 129 Or503, 278P92.

942-24½82-New. Statute providing that arguments for and against bills referred to people by legislature, shall be filed and printed "in same manner," does not mean within same time as limited time for filing arguments for and against measures proposed by people. 148 Wash445, 269P818.

942-24½83-New. Under Washington statute, authorizing arguments advocating proposed measure or referendum to be filed with secretary of state within ten days after referendum petition, and arguments opposing measure to be filed within twenty days after petition, ten- and twenty-day limitation for filing arguments relates only to initiative and referendum measures proposed by voters and not to referendum measures proposed by legislature. 148Wash445, 269 P818.

942-24½84-New. Ten- and twenty-day limitation after referendum petition for filing arguments for or against measures proposed by voters, is manifestly unreasonably short for proposals made by legislature, and hence should not be sanctioned, in absence of express legislative declaration to that effect. 148 Wash445, 269P818.

942-24½85-New. **Initiative measures need only receive majority of votes cast on such measure.**-134 Okl 288, 273P352.

942-24½86-New. Constitutional provision exempting acts making appropriation for maintaining state government from reference includes appropriations to enable government to perform its legal duties. 155Md563, 142A723.

942-24½87-New. Act increasing gasoline tax to provide for construction of lateral roads is appropriation for maintaining state government and is exempt from reference. 155Md563, 142A723.

942-24½88-New. Where constitution provides for submission of part of any act in referendum, mandamus to compel reference of entire act was erroneous, even though act did, or did not, as here, create new function for state. 155Md563, 142A723.

942-24½89-New. Act abolishing highway committee has been held subject to referendum. 152Wash221, 277P837.

942-24½90-New. Duties of county clerk or registrar of voters respecting referendum petition are ministerial. 204Cal 207, 267P696.

942-24½91-New. Contention that constitutional requirement as to referendum applied only to reapportionment by commission and not by legislature is without merit. 204Cal 207, 267P696.

942-24½92-New. Duty of secretary of state to submit referendum petition to electors is mandatory. 204Cal 207, 267 P696.

942-24½93-New. Person circulating referendum petition under statute is agent of signers and they are bound by his acts. 53SD356, 220NW907.

942-24½94-New. Such person must personally know signers. 53SD356, 220NW 907.

942-24½95-New. Under South Dakota statute, insertion of signer's residence, business, post-office address, date of signing, and verification by person circulating petition are equally as important as names of signers themselves. 53SD356, 220NW907.

942-24½96-New. Permission of such statute for use of ditto marks to indicate signer's place of residence, business, and post-office address does not excuse signer from inserting ditto marks himself. 53SD356, 220NW907.

942-24½97-New. Such permission does not excuse signer from himself writing in date of signing petition. 53SD356, 220NW907.

942-24½98-New. Affidavit of person circulating petition, required by such statute, is false if he is not qualified voter, or is unacquainted with person signing, if names on petition are not personally signed with residence, address, and date of signing, if signers are not resident qualified voters, or if signer of affidavit received compensation. 53SD356, 220 NW907.

942-24½99-New. Under such statute verification by person circulating petition is essential. 53SD356, 220NW907.

942-24½100-New. Under such statute false affidavit by person circulating petition is no affidavit. 53SD356, 220NW 907.

942-24½101-New. Where person not knowing facts required by such statute makes affidavit, such affidavit is false and all names on petition must be rejected. 53SD356, 220NW907.

942-24½102-New. Under constitutional and statutory provision, only authority conferred on courts is to compel secretary of state to file petition if legally sufficient or to enjoin him from certifying or printing it on official ballot if not legally sufficient. 126 Or641, 270P513.

942-24½103-New. No power exists in courts to determine in advance of adoption constitutionality of initiative measure. 126 Or641, 270P513.

942-24½104-New. Act providing for civil service among employees of certain counties is special act invalid where not approved by majority of electors. 246 Mich632, 225NW615.

942-24½105-New. Statute making it felony to possess still held not unconstitutional as being in conflict with referendum statute making it misdemeanor to possess property designed to manufacture liquor. 101CalA7, 281P100.

942-24½106-New. Passage of initiative law is exercise of same power of sovereignty as that of legislature. Wash 286P839.

942-24½107-New. That act of legislature was passed pursuant to constitutional mandate does not exempt it from referendum under constitutional provision. 323Mo 742, 19SW(2d)642.

942-24½108-New. Statute authorizing town commissioners to issue bonds for payment of school indebtedness held valid without submitting act to vote of people. 197NC450, 149SE589.

942-24½109-New. Initiative petition purporting to empower legislature with right to convene itself for impeachment purposes is in contravention of constitution investing governor with such power. 139 Okl 165, 281P776.

942-24½110-New. Fact that measure passed by legislature and to be referred to people was called bill instead of act is not confusing in view of terms of statute. 130 Or304, 280P495(2dcase).

942-24½111-New. In arranging petitions and in matter of procedure for referring acts of legislature to people, attorney-general must follow language of statute. 130 Or304, 280P495(2dcase).

942-24½112-New. Act providing for automobile registry tax to replace portion of general property tax is not law necessary for support of state government constituting exception to referendum clause. SD 226NW280.

942-24½113-New. Referendum petition circulated among voters held not invalidated by omitting surplusage contained in original petition filed with secretary of state. Or 292P324.

942-24½114-New. Petition for referendum without ballot title on cover or elsewhere thereon when circulated held ineffective. Or 292P306.

942-24½115-New. County is district within provisions reserving initiative and referendum powers to legal voters of district as to local and special legislation. Or 292P306.

942-24½116-New. Verification on information and belief of affidavit required by statute to be attached to petition for initiative or referendum. ND 232NW 303.

942-24½117-New. Circulation of valid referendum petition held proper notwithstanding pending appeal from ballot title prepared by attorney-general. Or 292P324.

943-25 **Alaska act,** imposing license on fish canneries, held not violative of act creating territorial Legislature. 269US 269, 46SCt110, 70Led270. **Court's refusal to instruct jury before argument in criminal case** has been held not error notwithstanding Alaska statute relating to procedure. 43F(2d)86.

943-30 **Passage of bill by senate on first reading before election of speaker by house of representatives** is not void where bill is passed on day fixed by constitution for meeting of general assembly. 159Tenn16, 15SW(2d)739.

944-33 **Effect of failure to make required apportionment.**-334 Ill 160, 165 NE638 (deadly Weapon Act).

944-34 **Resolutions.**-213Ky291, 280SW 1081. **In Oklahoma.**-122 Okl 116, 251P 748. **Express and implied powers.**-128 Okl 269, 263P635.

944-35 **Wide latitude must be allowed legislature** in its enactments of law. 91 Fla1044, 109894.

944-39 31Ariz252, 252P515; 179Ark

719, 18SW(2d)362; Conn 151A518.

944-40 31Ariz252, 252P515.

944-41 31Ariz317, 252P1018; 310Mo 184, 274SW827 (act regulating speed and distance from curb of automobile held within terms of special message); 318 Mo 870, 2SW(2d)713; 323Mo 729, 19 SW(2d)671; 121 Okl 64, 247P656; 128 Okl 269, 263P635; 154Tenn633, 290SW 381. **Governor's proclamation and message to special session of general assembly submitting subject of regulating and licensing motor vehicles** held to authorize enactment of Motor Vehicle Act regulating speed and use of automobiles in street. 310Mo 184, 274SW 827. **Legislature may require of governor communication** authorizing legislature to act upon certain subjects. 121 Okl 64, 247P656. **Manner and form in which governor may recommend measure.**–121 Okl 64, 247P656. **Statutes responsive to call** on subject of publication of legal notices in newspapers. 114 Nebr303, 207NW515. **Constitutional requirement** is mandatory. 31Ariz317, 252P1018. **Acts held valid.**–163Ga239, 135SE912 (Automobile Registration Act); 317Mo 319, 296SW132. **Governor has exclusive power to convene legislature on special occasions** under some constitutions. 128 Okl 269, 263P635. **Legislature has no inherent power to convene itself.**–128 Okl 269, 263P635.

945-42 310Mo 184, 274SW827 (special message addressed to each house is message to general assembly); 154Tenn 638, 290SW381. **Call to pass "general enabling act"** for certain purposes held to embrace act applying to all municipalities within named population limits. 154Tenn638, 290SW381.

945-42½-New. Special message addressed by governor separately to both branches of general assembly is a message to general assembly within meaning of constitution, 310Mo 184, 274SW 827.

945-42¾-New. and is "recommendation" to consideration of general assembly of subjects embraced therein. 310Mo 184, 274SW827.

945-43 167Ga165, 144SE726, 60ALR 747.

945-46 109TexCr261, 4SW(2d)43.

945-47 168Ark1033, 275SW652 (before convening of legislature).

946-54 3Del 577, 140A691.

946-57 See also 137 Okl 186, 279P319. **Bills held not revenue bills.**–137 Okl 186, 279P319.

946-60½-New. Licensing use of boats carrying fishing parties for hire is not revenue measure. 3Del 577, 140A691.

946-62 131SC511, 127SE574 (act to regulate trapping and transportation of furs held not revenue measure).

947-64 La 130S46; 114 Okl 193, 245P 649; 121 Okl 102, 247P1106; 122 Okl 120, 251P740. **In Texas.**–TexCivA 292 SW942. **Variance from published bill.**–219Ala590, 123S36. **Purpose of provision.**–Fla 129S593.

947-66 114 Okl 193, 245P649; 122 Okl 120, 251P740; 142 Okl 29, 285P59. **Bill introduced, placed on readings, enrolled, and signed by speaker of house before expiration of period of notice** has not force and effect of law, though passed by senate after expiration of such period. 122 Okl 120, 251P740. **Special or local bill is not before legislature for any purpose** till such requirements have been complied with. 122 Okl 120, 251P740. **Statute passed without required notice** is void. 99Fla496, 126S117.

947-67½-New. Determination of fact of publication is legislative function, and court will presume that legal evidence thereof was established in legislature. 95Fla457, 116S78.

947-69 Act held local and notice required.–21AlaA483, 111S39; 166La566, 117S720.

947-69½-New. If proposed act is not special or local, notice of intention to apply for its enactment is not required. 308Mo 390, 272SW940.

947-73 166La566, 117S720.

947-74½-New. Act relating to administration of justice in county is held not special or local. 308Mo 390, 272SW940.

947-76½-New. Under constitutional provisions in some jurisdictions no bill affecting taxation of certain levee districts can be considered till after publication. 143Miss861, 108S296.

947-76⅓-New. Such provisions do not apply to general laws dealing with revenues of entire state, 143Miss861, 108S 296.

947-76¼-New. such as statutes levying privilege tax on billiard balls. 143 Miss861, 108S296.

947-76⅙-New. Requirement of notice does not apply to general laws so as to invalidate such law lacking notice. 218 Ala71, 117S626.

947-76⅙-New. Publication of notice of intention to have local law amending municipal charter enacted is not required. La 130S46.

947-77 214Ala353, 107S854; 219Ala 590, 123S36; 21AlaA295, 107S727. **Notice held sufficient.**–213Ala665, 106S170; 21AlaA295, 107S727. **Notice held insufficient.**–218Ala274, 118S409; 99Fla755, 128S613. **Details of proposed act** need not be published. 219Ala590, 123S36.

948-78 Fla 129S593. **Lack of recital in act of publication of notice** will be deemed to mean that notice was not published. 166La566, 117S720. **Affidavit of publication must identify bill** but need not set out substance. Fla 129S 593. **Affidavit of publication must correspond** to affidavit attached to bill when introduced. Fla 129S593.

948-82 172La496, 110S732.

948-83½-New. Constitutional provision that no law shall be passed except by bill is not violated by statute providing that regulations of war department shall be paramount in case of conflict with National Guard regulations. 77Colo 516, 238P44.

948-83⅓-New. Statute providing for enforcement of Eighteenth Amendment and prohibiting all acts and omissions forbidden by National Prohibition Act is not violative of constitutional provision that no law shall be passed except by bill. 31NM220, 243P333.

948-83¼-New. Legislature may provide for expenses incident to its sessions by resolution. 132 Or405, 285P1111.

948-83⅙-New. Legislature cannot legislate generally by resolution as to matters involving property or other rights. 132 Or405, 285P1111.

950-93½-New. Constitutional requirement of three readings for bills to impose taxes applies to material amendment to statute authorizing imposition of taxes. 190NC96, 129SE184.

950-93⅓-New. Statute substituting board of managers for county commissioners held not, because of transfer of power to tax, act to raise revenue within constitutional provision requiring three readings. 190NC96, 129SE184.

950-93¼-New. Statute authorizing property valuation not revenue bill and does not require reading on different days. 192NC161, 134SE403.

950-93⅙-New. Act requiring act validating proceedings issuing bonds to be submitted to electors, but not amending, changing, or modifying terms of validating act, is not required to be passed in compliance with constitutional provision requiring laws to raise money to be passed after three readings. 194NC 22, 138SE443.

950-94 174Ark214, 295SW9.

950-97 See also 160Tenn403, 23SW(2d) 897.

951-6 214Ala353, 107S854 (holding inclusion, in act making county office elective, of provision for nomination under general laws not material departure); 217Ala311 116S695; 22AlaA559; 118S235 [certiorari den 218Ala168, 118S 237]; 175Ark860, 3SW(2d)1; Wash 292 P430 (refers to bills pending in legislature). **Legislative journals must be considered** in determining whether original purpose of bill is altered. 217Ala 311, 116S695. **Where subject expressed in caption is single,** any amendment germane thereto may be introduced at any time prior to third and final reading. 159Tenn16, 15SW(2d)739. **Amendment eliminating parenthesis** held not to change substance of bill. 170La326, 127S739(2dcase).

952-8 158Tenn166, 11SW(2d)882. **In North Carolina.**–194NC49, 138SE433.

952-10 Statute held not to violate constitutional provisions relating to manner of passing bills by general assembly. 176Ark139, 2SW(2d)44.

952-13 99Fla401, 126S781.

952-15 174Ark214, 295SW9. **Elimination of amendment,** concurred in by senate, is not within requirement of yea and nay vote on appropriation laws, where amendment simply transferred existing appropriation. 196Wis518, 220 NW816.

953-16 192NC161, 134SE403; NC 154 SE93(1stcase). **Act merely changing municipal boundary description is valid** though no aye and no vote on three several days was taken. NC 154SE88.

953-19 174Ark214, 295SW9.

953-20 In North Dakota.–54ND289, 209 NW558. **Statute held within exception** as to necessary maintenance of government, and therefore not requiring two-thirds vote. 175Ark585, 299SW1000.

954-21½-New. Constitutional provision held not violated by passage of Income Tax Act. 179Ark886, 19SW(2d)1000.

954-21¼-New. Construction of particular constitutional provision.–179Ark 886, 19SW(2d)1000.

954-22 Appropriation in nature of donation is not within provision. 180Ark 311, 22SW(2d)41.

954-25½-New. Appropriation bill containing items in excess of amount recommended in governor's budget message held adopted in accordance with Nebraska constitution by three-fifths record vote. Nebr 231NW772.

955-27½-New. Money appropriated for building highways is appropriated for state rather than local purposes within meaning of constitutional requirement of two-thirds vote in favor of bill appropriating money for private or local purposes. 240Mich584, 216NW450.

955-27¼-New. Act providing for tax on gasoline to raise funds to be paid to counties for construction and maintenance of highways under supervision of state administrative board is not within constitutional requirement. 240Mich584, 216NW450.

955-28 98Fla1166, 125S375. **Transmission, after passage,** to other house of legislature is not "introduction" of bill in such other house. 98Fla1247, 125S 908.

955-29 Failure of bill with emergency clause to receive constitutional vote in one house is not equivalent to amendment striking such clause from bill. 55 ND239, 212NW843.

956-33 170La326, 127S739(2dcase). **Where affidavit of publication of bill** in house complies with constitutional provisions, entry of affidavit in senate journal is unnecessary. 98Fla1247, 125S908; 99Fla226, 126S353. **Location of journal entry of affidavit of proof of publication** of special or local bill. 98Fla1247, 125 S908.

957-34 If the constitution does not require legislative journals, etc. 89Fla 361, 104S577.

957-35 170La326, 127S739(2dcase). **If there is final favorable action upon entire bill** by requisite vote, record showing failure of one house to give requisite vote to make emergency clause effective does not contradict emergency recitals in enrolled bill. 55ND239, 212 NW843.

958-38 174Ark214, 295SW9. **Concurrence in amendment.**–169Ark448, 275SW 766.

958-40 123Kan399, 256P811; 234Ky 846, 29SW(2d)567; 159Tenn379, 19SW (2d)274 (granting or withholding approval is legislative, rather than executive). **Veto power** is not executive in its nature but essentially legislative. 249 NY480, 164NE553.

958-41 51SD262, 213NW500. **General appropriation bill** must be presented to governor for approval before it becomes law since statute requiring "every" bill to be so presented includes "all" bills. 51SD262, 213NW500. **Journal entry of governor's return of bill** passed by both houses and approved by him is not essential to its validity as law. 159Tenn 379, 19SW(2d)274. **Provision making governor's approval condition precedent to its validity** has been held unconstitutional. Ind 172NE887.

959-42 After adjournment of legisla-

ture.–Conn 151A518.

959–42½–New. Evidence insufficient to show evasion of presentation. 234Ky 846, 29SW(2d)567.

959–43 Attorney-general's actual possession of bill under governor's directions was governor's possession in law. Ind 172NE887.

961–47½–New. Under Kansas constitution, bill regularly passed by both branches of legislature but not signed by presiding officers, enrolled, or presented to governor till more than five days after adjournment and not approved by governor till six days after adjournment, does not become valid law. 123 Kan399, 256P811.

961–47⅓–New. Under Connecticut constitution, bills presented to governor may not be signed by him more than three days after final adjournment of general assembly. 109Conn621, 147A 126, 64ALR1453.

961–47¼–New. In some jurisdictions statutes not approved by governor within three days after adjournment have been held unconstitutional. Conn 151A 518.

962–52 Legislative appropriations in excess of governor's budget recommendations, made by three-fifths vote of each house, are not subject to veto under Nebraska constitution. Nebr 231NW 772.

962–53 A return to be effectual, etc. 172Minn162, 215NW200, 54ALR333. In computing period of three days in which bill is to be returned, Sunday is only day to be excluded, and not holidays. 172Minn162, 215NW200, 54ALR333. Veto is consummated by returning vetoed bill to proper officer. 234Ky846, 29 SW(2d)567.

962–54 If authority be given to veto any item, etc. 43 Ida175, 249P1067. Where the governor is given the authority to veto a part, etc. 226AppDiv331, 235NYS 555. Power to veto item in appropriation bill does not give power to reduce it. 43 Ida175, 249P1067. Where veto of part of gasoline tax statute is declared unconstitutional, such tax is of full force and effect from date original act took effect. Gasoline dealer need not account to state for increased tax imposed by statute which was vetoed from time act took effect till veto of tax provision was declared to be unconstitutional. 31 Ariz485, 254P1060, 53ALR258. Entire bill held vetoed, though last item not separately vetoed.–51SD262, 213NW500. In South Dakota.–51SD262, 213NW500.

963–55 43 Ida175, 249P1067; Ind 172 NE887; 152Tenn306, 278SW59; 159 Tenn573, 20SW(2d)1042 (rule not affected by defective certification). Where Philippine legislation clearly void, failure of congress to take action under law reserving power of annulment does not create inference of approval. 277US189, 48SCt480, 72L ed845. Where adjournment of legislature prevents executive from returning bill within prescribed time, bill does not become law, whether "adjournment" is final or otherwise. 279 US655, 49SCt463, 73L ed894. Failure to file vetoed bill with secretary of state within time required in case of approved bills does not result in bill becoming law. 168La688, 123S125.

963–57 51SD262, 213NW500 (becomes law if not vetoed). Failure of legislature to follow strict rule of procedure in repassage of bill does not invalidate act affected. 140Wash433, 249P996.

963–59 140Wash433, 249P996.

964–60 TexCivA 27SW(2d)340.

964–66 Power of legislature to prescribe procedure.–140Wash433, 249P996.

965–67 92Fla543, 110S343.

965–69 But see Ind 172NE887. Requirement directory only.–154Md620, 141 A410.

965–70 Constitutional requirement that laws shall be published in English and Spanish applies only to laws in form in which they were enacted and not to statutes adopted by reference. 31NM220, 243P333.

966–72 Publication is complete where act has been passed by both branches of legislature and approved by governor, and it takes effect from that date. 160 Ga467, 128SE581.

966–75 155Md13, 141A383.

966–77½–New. Original house journal controls where there is error in printed copy of house journal. 213Ala665, 106 S170.

966–77⅓–New. Where there is conflict between journal and printed record, former will govern. 171Ark547, 285SW2.

966–78 117 Oh215, 158NE89; TexCivA 291SW281, 283 [citCyc].

967–81 If the variance does not materially affect, etc. 22AlaA559, 118S235 [certiorari den 218Ala168, 118S237].

967–82 Enrolled bill cannot be impeached by house and senate journals. 218Ky794, 292SW320. Journal entry will prevail over reports of enrolling committee. 98Fla1166, 125S375.

967–83 34Ariz394, 271P867; 320 Ill 352, 151NE248; Ind 168NE10 (provision for carrying into effect). Legislature must not leave matter to be supplied by courts.–159La872, 106S364. Index to contents of statute held not necessary to its validity. 162La165, 110S 188.

967–83½–New. Office of caption of act is to call attention of legislators in both houses of legislature to scope and contents of proposed legislation and to inform them of purposes sought to be accomplished. 165Ga55, 139SE877.

967–85 326 Ill 310, 157NE177; 154Tenn 613, 290SW14.

968–87 There is no limit to legislative power so far as names, labels, and characterizations go. 29F(2d)854.

968–88 338 Ill 385, 170NE280; 321Mo 92, 11SW(2d)48; 49Nev208, 242P587. Law must be complete in all its terms when it leaves legislature. 338 Ill 385, 170NE280. Should be upheld if possible of construction giving sensible effect and rendering it of binding force. 34NM306, 281P29.

968–89 313Mo 160, 282SW34; 318Mo 870, 2SW(2d)713; 213AppDiv716, 211 NYS85. See also 235Ky24, 29SW(2d) 619. Conflicting and inconsistent provisions, etc. TexCivA 280SW260 (provisions held not inconsistent).

969–90 267US233, 45SCt295, 69L ed589 (Lever Act prohibiting exaction of unreasonable prices for necessaries held void for indefiniteness); 8F(2d)279; 43 F(2d)154; 172Ark835, 290SW591; 203 Cal 731, 265P947, 58ALR1500; 73CalA 548, 238P1089; 99CalA747, 279P470 (well meaning of legislature is no test of validity); 325 Ill 357, 156NE474; 104 Kan141, 177P360; 224Ky156, 5SW(2d) 892; 312Mo 157, 279SW33; 117Nebr42, 219NW794; 83NH176, 139A747; 147 SC116, 144SE846; 153Tenn498, 284SW 61 (statute levying privilege tax in cities and taxing districts including territory surrounding or adjacent to them is not unenforceable as to persons within city or taxing district); 106TexCr37, 289SW 1072; 39Wyo 461, 273P696. Statutes held valid.–162Ga246, 134SE42. Statute held not invalid for uncertainty.–TexCivA 275SW111; TexCommnA 29 SW(2d)995. Statutes held invalid for uncertainty.–39Wyo 461, 273P696. Statute held sufficiently definite.–TexCivA 275SW111. Meaning of provision not ascertainable from statute itself cannot be enforced by court itself. 144Miss125, 109S129. Statute held not too indefinite. –74CalA473, 241P409 (Street Opening Act). Statutes have been held not invalid for indefiniteness and uncertainty. Ariz 289P515; Okl 292P841; Tex CommnA 26SW(2d)168. Amendment to statute by striking certain words and replacing them by others held invalid. 312Mo 157, 279SW33. Exemption of vehicles operating within "usual transfer delivery zone" from operation of statute imposing license tax on operators of motor vehicles for hire over highways is void for indefiniteness. 199 Cal 42, 248P244. "Prevailing rate of wages" held not invalid on ground of uncertainty. 128Misc317, 218NYS571. Use of alternative conjunctions "and" or "or" held not permissible in statutes. 159La872, 106S364. Statute creating office of county collector and failing to provide for payment of salary from specific funds held not void for uncertainty. 171Ark490, 284SW754. Statute held not meaningless.–170La851, 129S368.

969–91 276US272, 48SCt246, 72LEd 568; 22F(2d)341; 168Ark449, 270SW 609; 180Ark387, 21SW(2d)867; 90CalA 602, 266P291; 162Ga246, 134SE42; 164 Ga204, 138SE206; 47 Ida74, 272P707; 128Kan715, 280P773; 223Ky269, 3SW (2d)606; 162La956, 111S341; 172Minn 277, 215NW177, 54ALR333; 313Mo 160, 282SW34; 321Mo 92, 11SW(2d)48; 323 Mo 138, 19SW(2d)12; 74Mont1, 238P 316; 49Nev208, 242P587; 140 Okl 63, 282P882; 37 OklACR650; 34PortoRico 441; 137SC288, 135SE153; 154Tenn 105, 289SW363, 53ALR821 (statute forbidding teaching of evolution). Statutes held not so uncertain as to be incapable of enforcement.–121Kan348, 246 P511, 1120, 54ALR295; 169Minn69, 210 NW616; 49Nev208, 242P587; 122 Or 644, 259P780; 140Wash433, 249P996. Mere difficulty in ascertaining meaning of statute will not render it nugatory. 49Nev208, 242P587. Statutes held valid. –29F(2d)113; Ga 133SE847; 168Ga67, 146SE908; Ida 290P387. Statutes held not void for ambiguity.–155Md86, 141A 518; TexCommnA 292SW869. Statutes held not invalid for uncertainty.–36F(2d) 670; 79CalA650, 250P686; 99Fla1, 126 S308. Statute held not void for indefiniteness.–168Ga723, 149SE37. Statute held not void for uncertainty and vagueness for administration. 197NC644, 150 SE178. Statute held controlling to particular facts in which it is applicable no matter how unskillfully drawn. 13 LaA704, 127S28(1stcase).

969–92 213AppDiv716, 211NYS85; 137 SC288, 135SE153; TexCivA 299SW478. Phrase in taxing statute held sufficiently definite. 242NY277, 151NE452. Particular statutes held not void for uncertainty. 137SC288, 135SE153. Statutes held not invalid for indefiniteness.–14F(2d)341. Statute held not invalid because of indefiniteness and uncertainty. 242NY277, 151NE452.

969–93½–New. Statutes in derogation of common law must be clear and explicit. 203 Iowa231, 212NW553.

970–94 271US33, 46SCt410, 70L ed813 (section of Employers' Liability Act limiting time for suit held incorporated in Merchant Marine Act as respects rights of injured seamen); 22F(2d)288; 74CalA1, 239P702; 95CalA414, 273P 150; 328 Ill 512, 160NE60; 330 Ill 79, 161NE145; 161La296, 108S543 (reference to federal legislation for definition of "intoxicant"); 83Mont400, 272P525; Mont 287P640; Nebr 209NW741; 114 Nebr813, 210NW273; 31NM220, 243P 333; 283Pa588, 129A845 (statute authorizing exercise of power may point to another statute on procedure); 155 SC520, 152SE700; 157Tenn29, 3SW(2d) 657; TexCivA 287SW301. Legislature and cities may adopt laws otherwise unobjectionable by appropriate reference, without necessity of reënacting them in terms. TexCivA 8SW(2d)249. Adoption of earlier statute by reference makes it as much part of later act as if incorporated at length. 271US33, 46 SCt410, 70L ed813. Does not include subsequent additions or modifications. 328 Ill 512, 160NE60. Includes law as in force at time of action or proceeding. 328 Ill 512, 160NE60; 339 Ill 491, 171 NE526. Subsequent additions or modifications of a statute are not included in adoption by reference. 339 Ill 491, 171 NE526. Reference applies to law in force when law is invoked.–Ill 172NE 770.

970–94½–New. Statute passed for special purpose and effective during named conditions and for limited time may be extended by later statute to be effective without limit and without conditions. 8F(2d)335.

970–94⅓–New. Where adopting statute refers to general law regulating subject involved, reference will be regarded as including law in force when action is taken. 245Mich585, 223NW359.

970–95 218Ala8, 117S483; 309Mo 520, 528, 275SW36 [citCyc]; 136 Okl 191, 276P769; 287Pa42, 134A390. But see 331 Ill 576, 163NE466. A reference in one act to another act, etc. 138 Okl 225, 280P568. Constitutional provision that no law shall be revived, extended, or

conferred by reference to title only is not violated by act providing for improvement of streets and levy of special assessments therefor and for exercise of such authority in conformity with provisions of stated article and chapter of laws of stated year. 121 **Okl** 18, 247 **P**15. **Statutes held not to violate constitutional provision.**–23**AlaA**357, 127 **S**799; 34**NM**611, 286**P**970; 125 **Okl** 278, 257**P**785. **Purpose of provision** is that statutes shall carry on their face sufficient that, by inspection, their import may be known. **NM** 242**P**440. **Statute attempting to adopt penal provisions of National Prohibition Act by reference to its title only** is invalid. **NM** 242**P**440. **Act held not to violate constitutional provision** as to incorporation of other acts by reference. 176**Ark**139, 2**SW(2d)**44. **Constitutional provision prohibiting revivals or amendments of laws by reference** is not violated by adoption of laws otherwise unobjectionable by appropriate reference. **TexCivA** 8**SW(2d)**249. **Statute held not obnoxious to provision.–NJSup** 152**A**175 (2dcase). **Act placing drainage district created by special act within general law held independent act** and not void for extending special act. 181**Ark**669, 27**SW(2d)**100.

970–96 84**Colo** 279, 269**P**894; 323**Mo** 138, 19**SW(2d)**12.

970–96½–New. Constitutional requirement that law shall be enrolled, engrossed, and read in full in each house is satisfied where law in form as enacted is so enrolled, engrossed, and read without portions of other statutes adopted by reference. 31**NM**220, 243**P**333.

970–96⅓–New. Statute adopting by reference penal provisions of National Prohibition Act by reference to its title only without setting name out in full is violative of such constitutional provision. 31**NM**220, 243**P**333.

970–96¼–New. Prohibition applies to previous law whose provisions are sought to be extended and not to provisions of law being enacted. 31**NM**220, 243**P**333.

971–97 114**Nebr**540, 208**NW**639; 287 **Pa**42, 134**A**390.

971–97½–New. Purpose to reënact statute must appear, not only in title, but as well in enactment. 246**Mich**393, 224 **NW**402.

971–3 NC 150**SE**624. **Hypothetical situation.**–12**F(2d)**951.

971–5 29**Hawaii**422, 433 [citCyc]; 52 **ND**231, 202**NW**391 [citCyc].

971–6 198 **Ind**701, 154**NE**668; 199 **Ind** 78, 155**NE**198; 81**NH**566, 129**A**117, 39 **ALR**1023 (substance rather than form determines validity); 242**NY**277, 151**NE** 452; 127**Misc**141, 215**NYS**412; 192**NC** 620, 135**SE**616; 5**PaDist&Co** 515; **Tex CivA** 275**SW**147; **TexCivA** 290**SW**743; 152**Wash**327, 277**P**852. **Whether or not statute would be carried out** is not relevant to its constitutionality. 47**RI** 431, 133**A**812. **Pension statute held not void as impracticable** because fund may prove insufficient where replenishment is provided for. 223**Ky**269, 3**SW(2d)** 606. **It is no constitutional objection** that statute provides for unnecessary, cumbersome, expensive, and complicated machinery for its own execution. 96 **Fla**799, 119**S**376.

971–6½–New. Court cannot strike down statute unless it can say that its basis is arbitrary or fanciful or not in good faith and on sufficient grounds directed at evil. 168**Minn**378, 210**NW**163.

971–6⅓–New. Novelty of statute does not militate against its validity. 127 **Misc**141, 215**NYS**412.

972–7 176**Ark**139, 2**SW(2d)**44; 201**Cal** 327, 257**P**40; 196**NC**284, 145**SE**563; **TexCivA** 1**SW(2d)**670; 140**Wash**433, 249**P**996.

972–8 22**AlaA**559, 118**S**235 [certiorari den 218**Ala**168, 118**S**237]; 92**Fla**543, 110 **S**343; 99**Fla**755, 128**S**613 (necessity that constitution show intent that court review enactment).

973–10 321 **Ill** 466, 152**NE**141; 332 **Ill** 192, 163**NE**546; 122**Kan**701, 253**P**251; 126 **Or**177, 269**P**216, 220 [citCyc], 60 **ALR**504.

974–15 90**CalA**602, 266**P**291.

974–15½–New. Fact that emergency clause was substituted after passage of bill will not affect validity of act. 179 **Ark**886, 19**SW(2d)**1000.

974–16 Question whether constitutional provision regarding reënactment or publication on amendment has been complied with is for court, under all facts of case. 225**Ky**86, 7**SW(2d)**827.

974–18 220**AppDiv**549, 222**NYS**96. **Constitutionality may depend on object** sought to be accomplished. 52**SD**229, 217**NW**218. **Statute held capable of administration.**–33**NM**553, 273**P**928, 62**ALR** 296.

974–19 220**AppDiv**549, 222**NYS**96.

974–20 254**NY**117, 172**NE**261. **In no event,** etc. 76**Mont**305, 247**P**162. **Extreme cases.**–33**NM**553, 273**P**928, 62**ALR** 296.

974–20½–New. Measures of reasonableness of act are not what is best but what is fairly appropriate to purpose of act under all circumstances. 320 **Ill** 536, 151**NE**581.

974–20⅓–New. Statute is not invalid because it might have gone farther, or because it may not succeed in bringing about result desired. 279**US**337, 49**SCt** 336, 73**L ed**722.

974–20¼–New. Imposition of statutory penalties is not necessary to effectiveness of creation of legal rights by suitable language. 281**US**548, 50**SCt**427, 74 **L ed**1034.

974–22 Statute presumed duly enacted in absence of contrary showing of legislative journals. 89**Fla**361, 104**S**577.

974–23 174**Ark**214, 295**SW**9; 177**Ark** 296, 6**SW(2d)**312; 93**Fla**603, 112**S**556; 335 **Ill** 388, 167**NE**61; 202 **Iowa**753, 210 **NW**945 (enrolled act duly signed is presumed to have become law pursuant to requirements of constitution); 209**Ky** 101, 272**SW**43; 169**La**458, 125**S**447; 253 **Mass**529, 149**NE**407; 158**Tenn**119, 11**SW (2d)**858; 159**Tenn**349, 19**SW(2d)**261; 160**Tenn**403, 23**SW(2d)**897; **TexCommnA** 288**SW**409; 99**Vt**17, 130**A**701; 145**Va**94, 133**SE**781; **Va**/154**SE**477; 140**Wash**433, 249**P**996. See also 234**Ky**846, 29**SW(2d)** 567; 191**NC**648, 132**SE**657. **Presumed that legislature complied with requirements of constitution** providing for publication before consideration. 143**Miss** 861, 108**S**296.

974–23½–New. Legislature cannot by statute create presumption that presentation of bills to governor was made in accordance with constitutional provision. **Conn** 151**A**518.

974–23⅓–New. There is no presumption that notice of intention to apply for local bill was published where time between calling and adjournment of legislature has not elapsed. 99**Fla**496, 126**S** 117.

975–24½–New. Judgment unappealed from, under statute later declared unconstitutional, held binding. **Ind** 167**NE** 526.

975–24⅓–New. Acts under unconstitutional statute are invalid. **NJSup** 147**A** 380(2dcase).

975–25 But see 98**Fla**703, 124**S**44(2d case); 99**Fla**496, 126**S**117. **Partial invalidity.**–152**Tenn**518, 279**SW**387. **Statute cannot validate previous invalid statute,** but it may validate previous administrative assessments or proceedings in so far as they are not violative of constitution. **Fla** 126**S**367.

976–27 18**F(2d)**918; 41**F(2d)**241; 214 **Ala**38, 106**S**231; 217**Ala**458, 116**S**662; 220**Ala**231, 124**S**523; 21**AlaA**295, 107**S** 727; 29**Ariz**419, 242**P**658; 168**Ark**449, 270**SW**610; 169**Ark**436, 276**SW**2; 175 **Ark**860, 3**SW(2d)**1; 178**Ark**170, 10**SW (2d)**9; 179**Ark**886, 19**SW(2d)**1000; 180 **Ark**770, 22**SW(2d)**993, 68**ALR**1018; 199 **Cal** 21, 248**P**235; 199**Cal** 42, 248**P**244; 200**Cal** 667, 254**P**551; 200**Cal** 585, 254**P** 946, 62**ALR**1341; 200**Cal** 598, 254**P**951; 203**Cal** 106, 263**P**1017; 74**CalA**504, 241 **P**399; 75**CalA**323, 242**P**887; 86**CalA**558, 261**P**1080; 88**CalA**621, 264**P**298; 93 **CalA**277, 270**P**270; 95**CalA**762, 273**P** 826; 103**CalA**6, 283**P**891; **CalA** 290**P** 93; 92**Fla**543, 110**S**343; 92**Fla**617, 110 **S**451; 95**Fla**345, 116**S**81; 95**Fla**530, 116 **S**449; 97**Fla**749, 122**S**239; 98**Fla**1166, 125**S**375; **Fla** 128**S**864; **Fla** 129**S**330; 165**Ga**520, 141**SE**412; 28**Hawaii**222; 45 **Ida**112, 261**P**244; 45 **Ida**676, 266**P**665; 317 **Ill** 132, 147**NE**797; 320 **Ill** 605, 151 **NE**675; 323 **Ill** 427, 154**NE**198; **Ind** 166 **NE**270; **Ind** 168**NE**10; **Ind** 171**NE**65; 201 **Iowa**1050, 205**NW**543; 129**Kan**601, 284**P**807; 210**Ky**199, 275**SW**385; 217 **Ky**305, 289**SW**312; 235**Ky**24, 29**SW(2d)** 619; 159**La**527, 105**S**608, 610 [citCyc]; 160**La**957, 107**S**709; 165**La**989, 116**S** 482; 168**La**761, 123**S**317, 69**ALR**574, (regulation of business of making loans); 125**Me**319, 133**A**738; 154**Md**620, 141**A**410; 158**Md**654, 149**A**446; **Md** 150 **A**735; 253**Mass**529, 149**NE**407; 254 **Mass**569, 151**NE**63, 46**ALR**563; 242**Mich** 247, 218**NW**766; 249**Mich**147, 228**NW** 723; 177**Minn**146, 225**NW**86; 307**Mo** 137, 270**SW**339; 309**Mo** 520, 528, 275**SW** 36 [citCyc]; 313**Mo** 693, 282**SW**702; 316 **Mo** 272, 289**SW**338; 315**Mo** 1320, 289**SW** 935; 315**Mo** 823, 290**SW**416; 320**Mo** 10, 6**SW(2d)**333; 320**Mo** 332, 8**SW(2d)**887; 320**Mo** 893, 8**SW(2d)**897; 52**Nev**426, 289 **P**393; 242**NY**277, 151**NE**452; 252**NY** 27, 168**NE**817; 253**NY**243, 170**NE**905; 213**AppDiv**414, 210**NYS**269; 128**Misc** 642, 220**NYS**866; 134**Misc**778, 236**NYS** 250; 191**NC**761, 133**SE**395; 192**NC**184, 133**SE**454; 116 **OhSt**127, 156**NE**114; 122 **Okl** 86, 251**P**486; 36 **OklCr**186, 253**P**510; 119 **Or**141, 248**P**358; 122 **Or**644, 259**P** 780; 125 **Or**428, 266**P**875; 128 **Or**274, 274**P**308; 283**Pa**422, 129**A**637; 288**Pa** 81, 135**A**651; 288**Pa**230, 136**A**213; 88**Pa Super**284; 9**PaDist&Co** 310; 50**Philippine**259; 155**Tenn**364, 293**SW**757; 160 **Tenn**468, 26**SW(2d)**132; 114**Tex**535, 273 **SW**799; **TexCivA** 290**SW**279; **TexCivA** 285**SW**345; **TexCivA** 23**SW(2d)**431; **TexCivA** 24**SW(2d)**449; 113**TexCr**450, 21**SW(2d)**499; **Utah** 284**P**328; 143**Va** 697, 129**SE**731; 146**Va**1, 135**SE**693; 146 **Wash**17, 261**P**796; 193**Wis**145, 211**NW** 916; 194**Wis**376, 216**NW**837. **Effect of exclusion of invalid part.**–199**Cal** 21, 248 **P**235. **Invalid proviso in nature of exception** will not invalidate general provisions of statute unless it clearly appears that provisions of exception are so intimately and inherently connected with general provisions to which it relates that legislature would not have enacted general provisions without exception. 195**Cal** 548, 234**P**398. **Void portion easily severable** from rest of act will be treated as nullity. 152**Tenn**258, 277**SW**71. **Question whether constitutional provisions shall be upheld is primarily one of intention.**–122 **Okl** 86, 251 **P**486. **Law exceeding constitutional limitations** may still be operative within its legitimate sphere and void only as to excess. 327 **Ill** 106, 158**NE**451. **Doctrine of elision applied with hesitation.**–160**Tenn**468, 26**SW(2d)**132. **Provisions of act covered by caption** are not rendered void by other provisions not covered by caption. 168**Ga**723, 149**SE**37.

977–28 267**US**552, 45**SCt**441, 69**L ed** 785; 6**F(2d)**243 (rate of calorific standard prescribed for gas companies by N. Y. L. [1923] c 899 held inseparable); 7**F(2d)**628; 16**F(2d)**313; 24**F(2d)**455; 176**Ark**324, 3**SW(2d)**340; 180**Ark**713, 23 **SW(2d)**617; 195**Cal** 516, 234**P**396; 199 **Cal** 21, 248**P**235; 206**Cal** 775, 276**P**341, 63**ALR**408; 95**CalA**762, 273**P**826; **CalA** 290**P**93; 326 **Ill** 18, 156**NE**814; 327 **Ill** 433, 158**NE**743; 329 **Ill** 120, 160**NE**163; **Iowa** 230**NW**865; 117**Kan**755, 235**P**510; 209**Ky**101, 272**SW**43; 217**Ky**305, 289**SW** 312; 219**Ky**554, 293**SW**1096; 170**Minn** 293, 212**NW**445; 143**Miss**745, 109**S**724; 323**Mo** 653, 19**SW(2d)**879; 252**NY**27, 168 **NE**817; 134**Misc**778, 236**NYS**250; 122 **Okl** 86, 251**P**486; 124 **Or**112, 258**P**193; 60**ALR**528; 288**P**230, 136**A**213; 152 **Tenn**660, 280**SW**688; 157**Tenn**690, 12 **SW(2d)**386; **TexCommnA** 295**SW**1091; 6**SUth**251, 249**P**1016; 199**Wis**338, 226 **NW**310; **Can** [1925] 2**DomLR**691. **The presumption,** etc. 278**US**287, 49**SCt**115, 73**L ed**287, 60**ALR**596. **Legislature cannot save void act** by inserting provision that void portion shall not invalidate any other part. 152**Tenn**258, 277**SW**71. **Provision that if any part of act shall be held invalid it shall not affect validity of act as whole,** coupled with declaration that legislature would have passed act and each part thereof irrespective of fact that any part be declared unconstitutional, is intended to indicate to court

that statute would be enacted with objectionable parts eliminated. 199Cal 21, 248P235. **Statute providing for imposition of license tax on operators of motor vehicles for hire** has been held to show legislative intention that statute should operate notwithstanding elimination of unconstitutional provisions for exemptions. 199Cal 21, 248P235. **Where there is statutory declaration that invalidity of any section of statute shall not affect validity of other sections,** there is presumption that legislature intended act to be divisible. 278US235, 49SCt115, 73L ed287, 60ALR596.

978-29 Fla 128S864; Fla 129S330; 217 Ill 132, 147NE797; 124 Or112, 258P193, 60ALR528. **Part of statute providing that state need not allege or prove lack of permit** held entirely unconstitutional, where provision as to alleging held bad, on ground that the two are inseparable. 125Me319, 133A738. **Emergency act extension,** being invalid because emergency has passed, provision relating to posting of rates in hotels falls. 24F(2d)894.

978-30 278US235, 49SCt115, 73L ed287, 60ALR596; 199Cal 21, 248P235; 207 Iowa923, 223NW737; 117Nebr42, 219 NW794; 118Nebr835, 226NW464, 69 ALR257; 194Wis376, 216NW837. **Obnoxious part held not inducement to passage of act.**–115Nebr435, 213NW578.

978-31 199Cal 21, 248P235; Ind 168 NE10; 143Miss745, 109S724, 725 [quot Cyc]; 33 OklCr5, 242P290; 122 Okl 86, 251P486; 146Wash17, 261P796. **Invalidity of provision for assignment of portion of fund derived from motor license fees to counties** would not destroy effectiveness of provision for payment of such fees into state treasury. 199Cal 21, 248P235. **Unlawful exemptions contained in statute imposing license tax on operators of motor vehicles for hire** have been held separable from balance of act and, when eliminated, to leave complete legislative enactment sufficient to accomplish purpose of legislature. 199Cal 21, 248P235.

978-31½-New. Declaration in statute that provisions are severable and that, if provisions shall be declared unconstitutional remaining provisions shall not be impaired, will be given effect where unconstitutional part can be severed and workable piece of legislation remains. 88PaSuper284.

978-33 Tex 28SW(2d)515; Tex CommnA 282SW793.

979-34 21AlaA295, 107S727.

979-35 218Ala149, 117S473; 118Tex 449, 16SW(2d)809.

979-36 226Ky501, 11SW(2d)133.

979-39 91CalA1, 266P1029.

980-40 TexCivA 24SW(2d) 61.

980-41 145Misc867, 111S372 (section of statute relating to compensation of deputy clerks inseparable from part of statute declared unconstitutional); 318Mo 870, 2SW (2d)713; NJSup 135A678; 250NY 429, 165NE836; 123 Or180, 261P895, 58 ALR665. But see 219Ala1, 121S696; Ind 168NE10. **Provision that invalidity of one provision shall not affect validity of others** will not prevent entire act being declared invalid where invalid provision is inseparable. 229Ky752, 17SW (2d)1031.

980-42 TexCivA 9SW(2d)506.

980-42½-New. or school districts, Tex CivA 285SW345.

981-44 168Ark449, 270SW610; 169Ark 436, 276SW2; 170Ga800, 154SE388(2d case); 143Miss821, 107S659 (salaries of county officers); 309Mo 595, 274SW749 (invalid part not invalidating creation of county parole board); 318Mo 248, 300 SW493. But see 218Ala665, 120S145.

981-45 217Ala458, 116S662; 201Cal 414, 257P515; 73CalA90, 238P117; 159La 527, 105S608, 610 [quotCyc]; 160La957, 107S709; 154Md620, 141A410; 157Md 576, 146A797; 191NC761, 133SE395; 283 Pa422, 129A637; 153SC106, 149SE760; 159Tenn546, 21SW(2d)4. **The few instances,** etc. 194Wis376, 216NW837.

982-47 27F(2d)994; 43F(2d)711; 179 Ark886, 19SW(2d)1000 (income tax); 195Cal 1, 231P34 (provision authorizing personal judgment against property owners to collect assessments in irrigation district, if invalid, held not to invalidate entire act); 200Cal 667, 254P 551; 202Cal 110, 259P730; 86CalA558, 261P1080; 95Fla530, 116S449; 129Kan 601, 284P807; 253Mass529, 149NE407; 319Mo 799, 6SW(2d)907; 242NY277, 151 NE452. But see 243NY193, 153NE45; 253NY49, 170NE489; 213AppDiv716, 211 NYS85; 226AppDiv421, 235NYS517; 236 NYS250 (transfer tax); 191NC761, 133 SE395; 130 Or73, 279P271 (emergency clause unconstitutional); 295Pa571, 145 A797, 63ALR1086; Utah 284P328; Can [1925] 2DomLR691 (whole act declared ultra vires); Can [1929] 1DomLR242. **Where a single comprehensive scheme of taxation,** etc. 227Ky7, 12SW(2d)348. **Determining factor** is ultimate result sought by legislature. 226AppDiv421, 235NYS517.

982-48 316Mo 272, 289SW338. **Act providing for county budget system held entirely invalid,** invalidity not being confined to clause excluding counties having commission form of government. 217Ky305, 289SW312.

982-52½-New. Improperly authorizing cumulative voting by minority electors does not invalidate election as whole. 328 Ill 512, 160NE60.

982-56 321 Ill 484, 152NE500; 199 Ind 129, 154NE802; 309Mo 520, 275SW36; 100TexCr50, 271SW628. **Where such statute in part provided for regulation of pleading and burden of proof,** and this part was held unconstitutional, rest was not invalidated, as parts were separable. 125Me319, 133A738.

983-57 145Va825, 133SE753.

983-58 326 Ill 18, 156NE814; Iowa 230 NW540.

983-58½-New. Particular tax must fail, where constituting part of scheme of tax legislation which is unconstitutional in other parts. 326 Ill 18, 156NE 814.

983-58½-New. Applications.–Statute invalid because taxing foreign corporations on percentage of authorized capital stock cannot be upheld with reference to par stock actually issued. 326 Ill 18, 156 NE814.

983-60 278US515, 49SCt235, 73L ed483. See also 315Mo 823, 290SW416. **An invalid provision,** violating due process clause, renders whole act void. 329 Ill 120, 160NE163.

983-60½-New. or by reason of provision relating to payment of expenses of litigation, 323 Ill 427, 154NE198.

983-61 7F(2d)715 (invalidity of portion of Film Registration Act authorizing tax commissioher to cancel permit for certain class of films held not to impair rest of act).

983-61½-New. or by reason of surplusage in title. 162La956, 111S341.

983-63 29Ariz419, 242P658; 254Mass 569, 151NE63, 46ALR563; 144Miss125, 109S129; 320Mo 10, 6SW(2d)333; Nebr 233NW458; 133Misc473, 233NYS40; TexCivA 282SW891. **Invalidity of provision limiting continuances in actions** against nonresident automobile owners does not invalidate entire act and allows court to grant reasonable continuances. 27F(2d)364.

984-64 126Me121, 136A664, 51ALR 1194 (where main body of statute is held invalid, remedial provisions for its enforcement are also invalid); 158 Md685, 149A547.

984-66 14PaDist&Co 4.

984-67 Iowa 230NW865; 249Mich147, 228NW723; 154Miss621, 122S769; 323 Mo 729, 19SW(2d)671. But see 209Ky 101, 272SW43; 168La648, 123S111; 143Miss745, 109S724. **The rule in favor of upholding the constitutional parts,** etc. Iowa 230NW865. **In several cases the whole statute,** etc. 168La958, 123 S639(2dcase), 67ALR1447. **Invalidity of provision with regard to appeals** held not to invalidate statute creating offense of disorderly conduct. 14PaDist&Co 4. **Valid portion not enforceable** unless separable from invalid portion. Iowa 230NW865.

985-68 307Mo 137, 270SW339; 143Va 697, 129SE731; 196Wis451, 220NW 534; 37Wyo 488, 263P621. **Where invalid parts not severable,** statute unconstitutional as to foreign corporation is so as to domestic corporation. 176 Ark324, 3SW(2d)340.

985-69 218Ala149, 117S473; 32Ariz102, 255P1092; 169Ark33, 273SW711; 103 CalA6, 283P891; 95Fla345, 116S81; 320 Ill 536, 151NE581; 233Mich414, 206 NW798 (statute not made local by basing classification upon population); 315 Mo 298, 286SW705; 104NJL38, 139A 424; 53ND278, 205NW880; 25 OhNPNS 251; TexCommnA 288SW182; Wash 292P410; Wis 231NW273. **Other definitions.**–75CalA591, 243P55; 99Fla333, 126S374; 144Miss125, 109S129; 156Miss 99, 125S710; 313Mo 693, 282SW702; 319Mo 976, 5SW(2d)83; 31NM7, 240P 482; 123 Or225, 261P443. **Acts held general.**–318 Ill 230, 149NE297. **Particular statutes held to be public acts.**–32Ariz102, 255P1092. 31NM188, 242P 683.

986-70 21AlaA483, 111S39; 204Cal 653, 269P630(2dcase); 75CalA591, 243P55; 160Ga292, 127SE842; 308Mo 390, 272 SW940; 50Nev125, 253P671; 52ND533, 204NW356; 134 Okl 152, 272P448; 123 Or225, 261P443. **Must be general in application** to particular class and all of class within like circumstances. 31NM 7, 240P482. **Statutes having reference to cities of specified population** are general in their nature. 318Mo 910, 1SW (2d)1021.

986-70½-New. Whether act is general or special must be determined from act itself and from facts of which court will take judicial notice. 169Ark33, 273SW 711.

986-70½-New. Under constitutional provision, requiring law of general nature to be uniform in its operation throughout state, statute is invalid which bases compensation of state examiners upon compensation of auditor of county in which tax district examined is located. 114 Oh266, 150NE27.

986-71 99Fla333, 126S374; 191NC780, 133SE164; 53ND278, 205NW880, 883 [citCyc]; TexCivA 285SW844 (applies to individual of class and not all of class); Wash 292P410. **Other definitions.**–180Ark713, 23SW(2d)617; 319 Mo 976, 5SW(2d)83; 52ND231, 202NW 391; 123 Or225, 261P443. **A false or deficient classification,** etc. 310Mo 620, 276SW20; 323Mo 1241, 21SW(2d)767; 135 Okl 270, 276P186. **Law cannot be declared special because of arbitrary or unreasonable classification** unless it appears beyond reasonable doubt that there are no distinctive circumstances appertaining to class reasonably justifying restricted operation of law. 323Mo 1241, 21SW(2d)767.

986-72 216Ala469, 113S584 (act making effective constitutional amendment held local so as to require notice); 180Ark 713, 23SW(2d)617; 191NC780, 133SE 164; 52ND231, 202NW391; 53ND278, 205NW880; 123 Or225, 261P443; 105 TexCr416, 289SW69, 70 [citCyc]. **False or deficient classification.**–140Miss676, 106S273. **Illustrations of local laws.**–TexCivA 20SW(2d)822. **Laws held local.**–200Wis271, 228NW140.

987-73 168Ark1108, 273SW707; 108 Conn83, 142A477; 123 Or225, 261P443. **Illustrations of general laws.**–217Ala311, 116S695; 218Ala149, 117S473; 218Ala 71, 117S626; 218Ala274, 118S409; 220 Ala515, 126S162; 102CalA299, 283P298; 108Conn74, 142A473 [app dism 278US 570, 49SCt82(2dcase), 73L ed511]; Ind 173NE321; 121Kan348, 246P511, 1120, 54ALR295; 308Mo 390, 272SW940; 313 Mo 693, 282SW702; 319Mo 976, 5SW (2d)83; 31NM7, 240P482; 34NM346, 282P1; 52ND533, 204NW356; 125 Okl 278, 257P785 (statute providing for improvements in towns of over one thousand population); 123 Or225, 261P443; 34Wyo 153, 242P326. **Question whether act is general or special or local is determined** by generality with which it affects people as whole rather than extent of territory over which it operates. 308 Mo 390, 272SW940. **Act applicable to all counties of given population** may be general law, though effective only in one county. 218Ala71, 117S626.

988-74 Special laws are not all local, though all local laws are special. 135 Okl 270, 276P186.

988-75 140Miss676, 106S273; 144Miss

125, 109S129. **Use of general terms will** not make local and special law general, where facts show it is not general law. 315Mo 298, 286SW705.

988–77 7F(2d)364; 168Ark1108, 273 SW707 (holding that general law applies to all of a class); 317 Ill 197, 148 NE5; 318 Ill 230, 149NE297; 335 Ill 136, 166NE451; 337 Ill 100, 168NE904; 33NM553, 273P928, 62ALR296; 196NC 284, 145SE563 (statute will not be deemed private merely because it extends to particular localities or classes of persons where applicable to all parts of state). **Statutory distinction between felonies and misdemeanors** does not violate constitutional provision against special or nonuniform legislation. CalA 286P749.

989–78 21F(2d)226; 168Ark1108, 273 SW707; TexCommnA 288SW182. **Statute applying equally to all within natural class** is not special legislation or void as not acting uniformly. CalA 286P749.

989–79 168Ark1108, 273SW707; 312Mo 1, 278SW769 (limit not surpassed); NJSup 152A175(2dcase); 123 Or225, 261P443. **Illustrations of local acts.**–140Miss676, 106S273. **Local law may be included in general law.** 153Md523, 138 A487.

989–79½–New. **But for some purposes** phrase "special act" or "special legislation" has been applied to acts affecting whole class, as in rule as to repeal of special legislation by implication by subsequent general legislation. 21F(2d) 226.

989–79¾–New. Test in such case is whether statute deals deliberately with specific situations or conditions and declared definite policy with reference thereto. 21F(2d)226.

989–79¼–New. An act cannot be both a general and a local statute. 180Ark 713, 23SW(2d)617.

989–80 137SC496, 135SE538. **Special act authorizing county to issue bonds** held not unconstitutional. 137SC496, 135SE538.

989–82 220Ala231, 124S523; 146Va1, 135SE693. **But local law may not operate to set aside general law.**–241NY96, 149NE211. **Law for benefit of individuals** inconsistent with general law cannot be passed. 152Tenn82, 274SW536. **Conflict of provisions of special law with those of general law** held no objection to validity of special law. 153SC106, 149SE760.

990–84 176Ark1093, 5SW(2d)350; 179 Ark719, 18SW(2d)362; 71CalA542, 235 P748; 75CalA591, 243P55; 96Fla799, 119S376; 162Ga185, 132SE753; 168Ga 479, 148SE332; 121Kan408, 247P859; 148Md330, 129A370 (constitution does not prohibit local legislation to meet particular local conditions); 127Misc56, 215NYS209; 225AppDiv489, 233NYS 407; 191NC375, 131SE753; 296Pa299, 145A858; 94PaSuper470; TexCommnA 280SW567. **Classifications.**–75CalA591, 243P55; 224Ky390, 6SW(2d)460; 167 Minn421, 209NW531; 161Tenn293, 30 SW(2d)601; 142Va577, 128SE633; 142 Va596, 128SE638. **Reasonable classification** for purpose of legislation is not prohibited by provisions against local or special laws. 52ND231, 202NW391. **Statute authorizing directors of irrigation district to impose upon landowners burden of constructing and maintaining laterals** creates unreasonable classification and arbitrary burden on landowners and is violative of constitutional provision. 114Nebr329, 207NW525. **Provision to be construed in connection with other constitutional provisions** making exceptions. 145Va94, 133SE781. **Workmen's Compensation Act barring compensation for death resulting more than three hundred weeks after accident** is not violative of constitutional provision prohibiting different limitations for suits against corporation other than those fixed by general laws. 293Pa7, 141A643. **If law includes less than all who are similarly situated,** it is special and therefore invalid because it omits part of those which law includes. 322 Mo 1129, 19SW(2d)1. **Reasons for classification need not appear on face of statute.**–161Tenn293, 30SW(2d)601.

990–85 181Ark533, 26SW(2d)577 (constitutional provision).

990–86½–New. **Legislation authorized by constitution** is not special or local within constitutional prohibition against enactment of special or local laws though its application is purely local. 308Mo 390, 272SW940.

990–86⅓–New. **Under home rule amendment to constitution,** legislation relating to cities, special or local in effect, is invalid without emergency clause and two-thirds vote. 127Misc56, 215NYS209.

990–86¼–New. Law is not special within constitutional prohibition if applicable to all alike of given class, provided classification is not arbitrary or without reasonable basis. 322Mo 1129, 19 SW(2d)1.

991–87 202Cal 717, 262P724; 71CalA 542, 235P748; 79CalA422, 249P835; 161 Ga907, 132SE218 (Act [1923] p 640 held not to provide for taking greater interest than is provided for by general law); 164Ga434, 138SE847; 166Ga111, 142SE 535; Ga 155SE180(1stcase); 208Ky643, 271SW695 (Coöperative Marketing Act did not violate constitution); 217Ky305, 289SW312; 148Md330, 129A370 (statute regulating transfer of title to noncommercial automobiles, is not special); 158Md654, 149A446; 246Mich632, 225 NW615; 178Minn337, 227NW41 (statute not violative of constitutional provision); 178Minn335, 227NW180 (statute held special legislation); 310Mo 620, 276SW 20; 122 Okl 4, 250P81; 132SC241, 128 SE172; 133SC189, 133SE340; 133SC 189, 133SE340; 116Tex314, 291SW202; TexCivA 24SW(2d)464. See also 50Nev 125, 253P671. **The existence of a general law, etc.** However, etc. 122 Okl 4, 250P81. **Statutes held not violative of rule.**–165Ga520, 141SE412; 174Minn305, 219NW172; 319Mo 976, 5SW(2d)83; 117Nebr588, 221NW712; 114 Okl 269, 247P20 (providing for improvement of streets in incorporated towns). **Act applying to any county adjoining city now or hereafter having population of seven hundred thousand** cannot apply to county having such city within its boundaries. 315Mo 298, 286SW705. **Act providing for rural sewer districts in St. Louis County** held violative of constitutional provision. 315Mo 298, 286 SW705. **Repeal and reënactment of general law with amendment** held not to prevent amendment being special legislation where amendment would not be constitutional if passed as separate proposition without repeal. 150Md163, 132A773. **Statute held valid.**–81Mont423, 263P687; 133SC189, 133SE340. **Particular provisions held not within constitutional prohibition.**–137SC288, 135SE 153. **Limitation of provision.**–84CalA 295, 257P876. **Act requiring juries to prescribe punishment** in counties of between sixty and seventy thousand inhabitants held violative of constitutional provisions. 166Ga539, 144SE6. **Under constitutional provision,** legislature may not pass law relating exclusively to property, affairs, or government of cities. 251NY467, 167NE705.

991–88 217Ala458, 116S662; 71CalA 542, 235P748; 317Mo 671, 296SW808; 241NY96, 149NE211; 135 Okl 270, 276P 186; 135SC348, 132SE673. **Law providing for state aid roads through towns** not over two thousand five hundred in population held valid as not special law. 164Ga434, 138SE847. **Special situation to authorize special legislation** must possess characteristics impossible of treatment by general legislation. 7 F(2d)364.

992–89 166Ga460, 143SE769; 167Ga45, 144SE756; 122 Okl 4, 250P81 (statute relating to term of county assessor). **In South Carolina.**–132SC241, 128SE172; 133SC189, 133SE340; 135SC348, 132SE 673. **Question made judicial.**–317Mo 671, 296SW808. **Where question is ultimately judicial,** range of legislative discretion cannot extend beyond limits marked out by organic law. 132SC241, 128SE172.

992–90 67CalA328, 227P664 (such provisions are mandatory and must be substantially followed); 73CalA268, 238P 787; 201Cal 414, 257P515; 71CalA374, 235P81; 71CalA542, 235P748; 75CalA 591, 243P55; CalA 291P233; 96Fla799, 119S376; 167Ga45, 144SE756; 168Ga 479, 148SE332; Ga 155SE180(1stcase); 200 Iowa1293, 206NW297; 308Mo 444, 272SW921 (provision violated by statute, leaving to discretion of county courts in counties of same class whether salary of prosecuting attorney be based on votes cast at last presidential election or on salary authorized to be paid to such officer at time of general election in 1920); 312Mo 157, 279SW33; 193NC290, 136SE709, 710 [citCyc]; 52 ND533, 204NW356; ND 229NW105 (statute held valid); 117 Oh258, 158NE 606; 27 OhNPNS31 (exception held discriminatory and invalid); 33Wyo 387, 240P208. **"The uniform operation,"** etc. See also 73CalA268, 238P787 (economic poison act). **Uniform does not mean universal.**–67CalA328, 227P664. **Uniformity provision means** that statute shall not discriminate as between persons who, or things which, stand in same relation to such statute "in respect to the privileges and immunities conferred upon it or the acts which it prohibits." 67CalA328, 227P664. **Act requiring juries to prescribe punishment in counties** of between sixty and seventy thousand held violative of provision. 166Ga539, 144SE6. **Constitutional requirement of uniformity is mandatory.**–312Mo 157, 279SW33. **In determining legality of classification,** matters to be considered are general subject of regulation, and its character, extent and purpose, together with those naturally to be affected thereby. 73CalA268, 238 P787. **Requirement means** that laws must be applicable to all persons under like circumstances. 208 Iowa49, 222 NW548. **Statute empowering cities to maintain playgrounds** and supervised system of recreation has been held valid. 165Ga520, 141SE412. **Statute providing for primary nomination of judges** held not violative of constitutional provision that laws relating to courts be general and uniform. 323 Ill 561, 154NE 474.

992–91 169Ark33, 273SW711; 180Ark 713, 23SW(2d)617; 196Cal 77, 235P 1000; 202Cal 299, 260P789; Cal 292P 267; 71CalA374, 235P81 (punishing one having possession of firearms who has been convicted of felony); 73CalA268, 238P787; 74CalA109, 239P413; 75CalA 591, 243P55; 78CalA58, 247P923; 80 CalA131, 251P679; 89CalA390, 265P325; 102CalA299, 283P298; 45 Ida380, 263P 45; 47 Ida74, 272P707; 320 Ill 536, 151 NE581; 197 Ind475, 151NE390; 199 Ind 95, 155NE465, 50ALR1518 (statute held void as violating state and federal constitutional provisions prohibiting special act); 200 Iowa1293, 206NW297; 208Ky 643, 271SW695; 213Ky618, 281SW805; 178Minn337, 227NW41; 144Miss125, 109 S129; 319Mo 1120, 6SW(2d)870; Mo 29 SW(2d)716; 56ND41, 216NW212; 117 Oh258, 158NE606; 153Tenn30, 281SW 925 (distinction of counties as to population held unreasonable); 33Wyo 387, 240P208, 218 [quotCyc]. **Exemptions from payment of license fees.**–199Cal 21, 248P235; 199Cal 42, 248P244. **Classification must be neutral not arbitrary.** 193NC290, 136SE709. **A reasonable distinction,** etc. 134 Okl 152, 272P448. **Classification must be based on natural and reasonable distinctions.**–208 Iowa49, 222NW548. **Unless palpably arbitrary** legislative distinction will not be overthrown. CalA 290P116.

993–92 218Ala8, 117S483; 201Cal 414, 257P515; 75CalA591, 243P55; 170Ga 585, 154SE149; Ind 166NE270; 226Ky 762, 11SW(2d)916; 174Minn36, 218NW 238; 180Minn44, 230NW115; 52ND533, 204NW356; 117 Oh258, 158NE606; 156 Tenn544, 3SW(2d)661; 33Wyo 387, 240 P208, 218 [quotCyc].

993–93 22AlaA502, 117S485; 180Ark 713, 23SW(2d)617; 201Cal 414, 257P 515; 67CalA328, 227P664; 84CalA425, 258P164; 164Ga434, 138SE847; 169Ga 552, 150SE839; 321 Ill 230, 151NE481; 122Kan701, 253P251; 128Kan100, 276P 77; 208Ky643, 271SW695; LaA 130S 634; 174Minn305, 219NW172; 180Minn 366, 230NW830(2dcase) (statute author-

izing creation of firemen's civil service commissions in certain class of cities and villages); 144Miss125, 109S129; 53ND 278, 205NW880; 117 Oh258, 158NE606; 114 Okl 269, 247P20 (statute providing for improvement of streets in incorporated towns having population of more than one thousand); 134 Okl 152, 272P448; 148SC229, 146SE12; 143Va741, 129SE 739; 33Wyo 387, 240P208, 218 [quotCyc]. **Though only one city comes within class** legislation is not special. 122Kan701, 253P251. **That statute applies only to small number of people** does not render it unconstitutional for want of uniformity, where others have not seen fit to put themselves within particular situation to which statute applies. 208 Iowa49, 222NW548. **Statute excepting one or more counties from operation of general law without fixed basis for discrimination** is invalid. 134 Okl 152, 272P448.

994-95 But see 169Ark448, 275SW766.

994-96 148Miss13, 113S898 (suspension of general law for benefit of particular individual); 152Tenn82, 274SW536 (suspension of general law for benefit of particular individual); 152Tenn258, 277 SW71; 160Tenn577, 28SW(2d)50 (statute exempting single county from cost of constructing state highway through several). **Constitutional prohibition against suspension of general law** for benefit of individual or corporation not violated. 148Miss13, 113S898. **Scope of restriction.**–149Md223, 131A332, 43ALR1. **General law applicable to all counties cannot** be affected by special law applicable to only one. 160Tenn577, 28SW(2d)50. **Statute forbidding highway commission to impose expenses of highway on particular county without its consent** is not justified as dealing with county in governmental capacity. 160Tenn577, 28SW (2d)50.

994-97 319Mo 976, 5SW(2d)83. **Act authorizing municipalities to adopt building ordinances** held not violative of provision as attempted partial repeal of general law. 166La566, 117S720.

994-97½-New. Variation of general law by special law. Special law empowering cities to maintain playgrounds and supervised systems of recreation is not violative of prohibition against variation of general law affecting private rights without consent of persons affected where there was no general law on subject. 165Ga520, 141SE412.

994-98 32F(2d)669; 35Ariz26, 274P 163; 196Cal 77, 235P1000; 206Cal 497, 274P974; Nebr 231NW693; 135Wash32, 236P790 (statute valid). **Statutes held not objectionable.**–118Nebr38, 223NW 462; SD 229NW294 (exempting money or other benefits from fraternal benefit societies from liability for debts of members or beneficiaries); 68Utah251, 249P 1016. **Statutes held valid.**–174Minn305, 219NW172. **Statute held not unconstitutional as special law.**–159La909, 106S 377. **Classification.**–35Ariz26, 274P163. **Act granting additional compensation to deputy sheriff of particular county** is unconstitutional as violative of prohibition against grant of favors and benefits inconsistent with general law. 159Tenn 651, 21SW(2d)395.

995-99 120Kan273, 243P311.

995-2 See also 119 Oh117, 162NE394.

995-3 226Ky762, 11SW(2d)916. **Act held not invalid.**–Minn 232NW517.

996-4 180Ark1023, 24SW(2d)314; Cal 290P451; CalA 290P116; TexCivA 15 SW(2d)27. **Registration of land titles.**–317 Ill 11, 147NE412. **Statute validating conditional sales contracts** as to third parties upon notice given held valid. 287Pa358, 135A216. **Special statute** validating highway district and approving bond issue is not invalid as special law giving effect to invalid instruments or creating or extending liens. 22F(2d)681. **Statute validating titles to real estate owned by religious corporations** held valid. 150Miss559, 115S323.

996-6 93Fla603, 112S556 (statute for protection of fish held valid); 317 Ill 11, 147NE412 (reasonable classification). **Statute relating to buying and selling of foreign exchange and requiring applicant for license to furnish bond with** surety company **held not grant of special privilege** to surety companies. 323 Ill 427, 154NE198.

997-8 207Cal 323, 278P432; 78CalA58, 247P923 (relating to taking of crabs); 167Ga150, 145SE57; 323 Ill 580, 154NE 427; 224Ky390, 6SW(2d)460; 321Mo 58, 12SW(2d)742; 155Tenn476, 295SW 469, 54ALR725; 161Tenn293, 30SW(2d) 601; 135Wash32, 236P790 (barbers' licenses). **Particular statutes held not invalid.**–155Tenn476, 295SW469, 54ALR 725. **Statute forbidding false advertising** must be general. 212Ky152, 278SW 593. **Statute prohibiting exhibition to prospective purchaser of city property lease not fairly stating rent** held not to give special privilege. 323 Ill 580, 154 NE427.

997-9 322Mo 1129, 19SW(2d)1 (statute need not be based solely on ground of preventing labor). **Sales of articles of food** do not necessarily prevent such from being in violation of the statute. 6PaDist&Co 391. **Selling tobies** on Sunday by innkeeper is violation of act. 6 PaDist&Co 593. **Public amusement businesses** may be dealt with as valid classification for Sunday statutes. 322 Mo 1129, 19SW(2d)1.

998-10 167La81, 118S699(2dcase); 308 Mo 584, 274SW466 (law as to sale of soft drinks in original bottle held not special).

998-12 168La761, 123S317, 69ALR574; 147Miss695, 112S877 (banking).

998-13 135 Okl 147, 274P464.

999-14 Statute authorizing building and loan associations held not invalid as special act discriminating between borrowers who may or may not be stockholders. 143Miss381, 109S10.

999-15 207Cal 323, 278P432; Nev 292P 291; 114 Oh582, 151NE709. **TexCommnA** 294SW195 (Texas Employers, Insurance Association held not a private corporation forbidden to be created by special laws). **Corporation, acting as agency for administration of law, is not within prohibition against creating private corporations by special law. TexCommnA** 294 SW195. **Special statute** validating highway district held not invalid as special law creating corporation. 22F(2d)681. **Statute creating board of commissioners of state bar** held not to create corporation by special act. 45 Ida676, 266P665.

999-16 125Kan88, 262P1032; Nev 292P 291; 196Wis518, 220NW816.

999-17 207Cal 323, 278P432; 167Minn 286, 209NW9.

1000-18 167Minn286, 209NW9; 174 Minn36, 218NW238; 193Wis561, 214NW 353.

1001-21 195Cal 1, 231P34 (act giving corporation owning property in irrigation district right to vote in matters affecting their property held not enlargement by special act of their chartered powers); 151Miss676, 118S286(2dcase).

1001-23 128Misc63, 217NYS626 (statute providing for interest on damage awards for change in street grade is a general one and applies to cities); 197 NC740, 150SE624; 52ND533, 204NW 356 (statute relating to detaching farm lands from city held valid); 153Tenn 393, 284SW370 (legislation affecting governmental capacity); 154Tenn483, 290SW405, 50ALR1158; 161Tenn236, 30 SW(2d)268 (county); 145Va94, 133SE 781.

1001-24 196Cal 43, 235P1004 (all municipal corporations need not be organized under one general law); 167Ga579, 146 SE462; Ind 166NE270; 124Kan780, 262 P607; 223Ky269, 3SW(2d)606; 317Mo 671, 296SW808; 48Nev93, 227P1014 (townships); NY 125Misc1, 210NYS786; 225AppDivl, 232NYS273 (act valid); 52 ND533, 204NW356 (statute relating to disconnecting farm lands from cities held general and valid); 114 Okl 269, 247 P20 (statute held valid); 299Pa297, 149 A490; 9PaDist&Co 577. **Change of boundaries of municipality** must be under general law. 120Kan42, 242P456. **Charter provision** that city shall not be liable for injury to person or property from defect in street unless certain conditions are fulfilled held not violative of general law adopting common law or of constitutional provision prohibiting special or local acts incorporating cities. TexCivA 8SW(2d)331. **Constitutional prohibition of special statute relating to affairs of cities without emergency message from governor** applies to statute authorizing pension of police commissioner. 250NY396, 165NE824. 250NY429, 165NE836. **Constitutional provision authorizing legislature to grant or amend charter of more than ten thousand inhabitants by special law** is not affected by such provisions. TexCivA 274SW265. **Particular statutes held not in violation of constitutional provision.**–43 Ida693, 254P221. **Statutes held not violative of such provisions.**–210Ky482, 276SW143; 318Mo 910, 1SW(2d)1021; 133SC189, 133SE340. **Legislature may act if subject be, in substantial degree, matter of state concern,** though intermingled with it are concerns of locality. 251NY467 167NE705. **Statute has been held not unconstitutional as special legislation.**–CalA 291P654.

1001-24½-New. Act of March 14, 1925 (34 St. at L. p 135) does not violate constitution as special legislation on theory that it applies to only one city, being general in its terms. 137SC266, 135SE60.

1001-24½-New. Statute amending, repealing, or supplemental to another relating to government of cities held not "private, local or special act." 104NJL 38, 139A424.

1002-25 335 Ill 106, 166NE488; Ind 166NE270; 124Kan780, 262P607; 125 Misc1, 210NYS786; 105TexCr416, 289 SW69; TexCr 289SW72(1stcase); TexCr 289SW72(2dcase); TexCr 289SW72 (3dcase); TexCr 289SW72(4thcase); TexCr 289SW73(1stcase); TexCr 289SW 73(2dcase). But see 152Val, 145SE425. **Act authorizing city to issue coupon notes held not local law extending charter** in violation of constitutional provision. 133SC189, 133SE340. **General act authorizing city to sell lighting and ice plant** is not attempt to amend charter by special act, although there is but one city to which act applies. 137SC266, 135SE60.

1002-26 148SC229, 146SE12.

1002-28 126Kan170, 267P1; 224Ky732, 7SW(2d)216; 142Miss146, 105S774; 120 Oh297, 166NE214 (law authorizing establishment and maintenance of county library); 131 Okl 90, 267P645; Tex CommnA 288SW182 (so by constitutional provision); 198Wis326, 223NW852; 199Wis85, 225NW873; Wis 232NW770 (2dcase). But see 99Fla628, 127S486 (2dcase); 161Tenn236, 30SW(2d)268. **Fact that some counties may never apply statutes to their purpose** does not render it not uniform if it may be availed of by all. 67CalA328, 227P664. **Statute held valid.**–81CalA590, 254P648; 140Miss676, 106S273 (classifying counties for compensation of county prosecutor). **Statute held invalid.**–48Nev93, 227P1014 (special law directing county commissioners to allow claim against county for personal injuries); 134 Okl 152, 272P448. **Act to change from fee to salary system** in certain counties, etc., is general law and not special law. 160Ga657, 129SE38. **Basis of classification.**–315Mo 298, 286 SW705. **Classification on basis of population.**–114 Okl 193, 245P649. **Constitutional provision for establishment of uniform system of county governments** is mandatory. 67CalA328, 227P664 (provision construed). **Legislative control over property held by county as state instrumentality** cannot be exercised by local or special law. 33NM504, 270P897. **Rule applies in cases specified by constitution,** though general law would be inapplicable. 48Nev93, 227P1014. **Special court for single county.**–114 Okl 193, 245P649. **Statute attempting to abolish county and distribute its territory between existing counties** is violative of constitutional prohibition against passage of local or special laws changing county lines except in creating new county. 33NM504, 270P897. **Statute providing for establishment of county library** held not local in character. 120 Oh297, 166NE214. **Statutes held not unconstitutional as local laws.**–289Pa437, 137A 635; 53SD174, 220NW618. **Constitutional prohibitions against special legis-**

lation apply where statute applies to county not in governmental capacity. 161Tenn236, 30SW(2d)268. **Classification of counties.**–Nebr 231NW693.

1002–28½–New. Classification of county and intercounty bridges according to cost for collection of tolls does not render act void as special legislation. 290 Pa427, 139A136.

1003–30 168Ark1108, 273SW707 (holding legislature has power to classify cities according to population with respect to powers and salaries); 93CalA 532, 269P934; 168Ga479, 148SE332; 196 Ind436, 148NE481; Ind 166NE270; 121 Kan408, 247P859; 129Kan834, 284P618; 130Kan464, 286P204; 150Md163, 132A 773; 171Minn312, 213NW914; 176Minn 472, 223NW912; 180Minn366, 230NW 830(2dcase); Nebr 231NW693; 125 Okl 278, 257P785; 137 Okl 186, 279P 319; Okl 293P209; 291Pa395, 140A347; 7 PaDist&Co 269; 7PaDist&Co 598. See also TexCivA 8SW(2d)249. **Classification held unreasonable.**–104NJL486, 141A571. **Object of statute and not form of act governs** in determining validity. 150Md163, 132A773. **Statutes held invalid.**–134 Okl 152, 272P448. **The test is not wisdom** but good faith in the classification. 287Pa342, 135A308. **Classification held arbitrary** and unreasonable. Fla 129S747.

1003–31 168Ark1108, 273SW707 (holding existing power, political or legislative, not judicial).

1004–32 168Ark1108, 273SW707; 321 Ill 230, 151NE481; 125Kan88, 262P 1032; 223Ky269, 3SW(2d)606; 150Md 163, 132A773; 144Miss125, 109S129; 251NY467, 167NE705; 137SC266, 135SE 60. **Arbitrary and illusory classification.**–See also 121Kan408, 247P859. **Multiple Dwelling Law** held valid, even though in effect applicable to single city. 251NY467, 167NE705.

1005–33 214Ala409, 108S231 (holding Gen. Acts 1923 p 580 not local law); 168 Ark1108, 273SW707 (powers of cities and salaries of their officers); 84CalA425, 258P164; 321 Ill 230, 151NE481; 121Kan 408, 247P859; 127Kan207, 272P177; 128 Kan100, 276P77; 128Kan452, 278P714; 246Mich632, 225NW615; 313Mo 160, 282 SW34; 314Mo 55, 282SW715; 316Mo 995, 292SW70; 318Mo 248, 300SW493; 319Mo 316, 4SW(2d)467; 114 Okl 193, 245P649; 125 Okl 278, 257P785; 152 Tenn258, 277SW71; 152Tenn466, 278SW 660; TexCommnA 18SW(2d)594; Wash 292P410. **Classification which makes no provision for future changes** is local or special legislation. 114 Okl 193, 245P 649. **In Oklahoma.**–121 Okl 18, 247P15.

1005–34 121Kan408, 247P859; 246Mich 632, 225NW615; 167Minn421, 209NW 531; 179Minn358, 229NW346; 177Nebr 824, 223NW1, 62ALR637; Nebr 231NW 693 (holding law applicable to counties over 150,000 population for retirement of bonds by gas tax, unconstitutional); 152Tenn466, 278SW660. But see Wash 292P410. **Classification by population,** etc. 121Kan408, 247P859.

1006–35 196 Ind436, 148NE481; 171 Minn312, 213NW914; 156Tenn544, 3SW (2d)661. **Classification held arbitrary.**–150Md163, 132A773. **Circumstances held not to validate classification.**–150Md163, 132A773.

1007–36 168Ark1108, 273SW707; 246 Mich632, 225NW615; 318Mo 870, 2SW (2d)713. But see Wash 292P410. **Under peculiar circumstances,** etc. 171Minn 312, 213NW914. **Classification by population** held arbitrary. 150Md163, 132A 773.

1007–38 318Mo 870, 2SW(2d)713.

1007–39 180Ark937, 23SW(2d)963. **Statute vesting escheated property in board of education** for use of public schools is not special legislation. 221 Ky470, 298SW1111.

1008–40 181Ark533, 26SW(2d)577.

1008–41 Cal 290P451.

1008–42 319Mo 316, 4SW(2d)467; 195 NC722, 143SE530. See also 251NY467, 167NE705.

1008–43 177Ark296, 6SW(2d)312; 201 Cal 414, 257P515; 162Ga185, 132SE753; 164Ga434, 138SE847; 43 Ida233, 253P 377 (law held valid as operating on all equally in like situation); 321 Ill 466, 152NE141; 328 Ill 587, 160NE201; 333 Ill 158, 164NE173, 61ALR649; 197 Ind 475, 151NE390; 207 Iowa923, 223NW 737; 120Kan273, 243P311 (valid); 190 NC123, 129SE154; 133 Okl 162, 271P 672; 131 Or168, 281P182(2dcase); 7 PaDist&Co 2; 159Tenn699, 22SW(2d) 236 (private act not void as class legislation); TexCommnA 288SW182; WVa 153SE589 (statute held void). See also 77CalA404, 247P527. **Statutes held valid.**–130Kan464, 286P204; 154Miss 536, 121S826(2dcase); Mo 297SW47; 118Nebr38, 223NW462. **Statute may provide for construction and maintenance of public roads by designated county,** without violating constitutional inhibition against special legislation. 158Tenn350, 13SW(2d)321. **Statutes held special.**–99Fla628, 127S486(2dcase). **Statute held local,** not special. 153Md 523, 138A487.

1009–44 326 Ill 535, 158NE116, 54ALR 777; 121Kan408, 247P859 (statute held special and repugnant to constitutional provision); 225Ky324, 8SW(2d)392.

1009–45 34 OhA201, 170NE597. **Statute authorizing leasing university lands** to nonprofit corporation for building to be leased to the university is not void as private or local law. 196Wis518, 220 NW816.

1009–46 196NC284, 145SE563.

1009–47 169Ark33, 273SW711; 204Cal 653, 269P630(2dcase); 332 Ill 192, 163 NE546; 129Kan834, 284P618 (water plants); Mo 296SW815; 51Nev215, 273 P983; 197NC85, 147SE736; 199Wis85, 225NW873. **Act applying to county adjoining a city having population of seven hundred thousand** held to apply only to St. Louis county. 315Mo 298, 286SW705. **Irrigation district may be created by special act.**–200Cal 550, 254P542. **Irrigation districts** are required to be created by general rather than special laws under some constitutions. 35Wyo 73, 246P918. **Special act creating reclamation district** held valid. 200Cal 277, 252 P1043. **State aid of state land by appropriations for reclamation of waste lands** held valid and not lending state aid to irrigation district. 43 Ida 519, 253P128. **Statute appropriating money for reclamation of waste lands in irrigation district** held not violative of prohibition as to special legislation. 43 Ida519, 253P128. **Valid drainage act applicable to St. Louis county alone** could not be passed. 315Mo 298, 286SW 705. **Act authorizing county judge to order construction** of disposal plant if approval is unreasonably withheld is not unconstitutional as a private or local bill. 137Misc341, 242NYS142. **Acts held constitutional.**–227AppDiv345, 238NYS55. **Statute authorizing inclosure of creeks by cities of third class** held not local law. 297Pa260, 147A58.

1009–48 NJSup 133A753 (statute regulating promotions in police departments held unconstitutional as local and special).

1010–50 180Ark713, 23SW(2d)617; 181 Ark253, 25SW(2d)443; 200Cal 637, 254 P570 (law held general); 80CalA131, 251P679; Ill 172NE13; 165Minn384, 206NW719 (valid statute); 167Minn45, 208NW409 (statute applying only to consolidated school districts theretofore formed held unconstitutional); 175Minn 316, 221NW231; 179Minn358, 229NW 346; Mont 286P125(2dcase) (valid); 196NC17, 144SE377; 135 Okl 270, 276P 186; Pa 151A801 (statute held general); 153Tenn30, 281SW925 (act directing purchase of free text books held unconstitutional). **Act distributing money to counties for schools held general law** despite variance in distribution. 215Ala524, 111S312. **Pensions to public school teachers** of named county may be provided for by special law. 154Tenn483, 290SW405, 50ALR1158. **Valid statutes.**–122Kan701, 253P251 (providing for annexation of territory for school purposes); 153SC106, 149SE 760. **Statute held invalid as special.**–142 Okl 260, 286P774. **Statutes held unconstitutional.**–180Minn44, 230NW 115; 155Miss220, 124S319.

1010–50½–New. Statute providing for division of county into high school districts is not special legislation violative of constitution. 136SC345, 134SE380.

1010–51 217Ala458, 116S662; 89CalA 390, 265P325; 168Ga77, 147SE95; 48 Ida618, 284P203; Iowa 221NW364; 81 Mont423, 263P687; 86Mont58, 282P32; 31NM188, 242P683; 33NM633, 275P 95; 53ND278, 205NW880 (statute to reduce rate of interest on redemption of land sold for taxes); 56ND41, 216NW 212; 138 Okl 266, 280P797; 140 Okl 122, 282P674; 161Tenn236, 30SW(2d) 268; 143Wash326, 255P371; 149Wash 242, 270P816; 198Wis326, 223NW852.

1011–52 21AlaA483, 111S39; 102CalA 767, 283P385; 99Fla130, 125S912(1st case); 130Misc142, 223NYS660 (exemption from taxation must be granted by general law); TexCommnA 280SW567; TexCivA 285SW844.

1011–53 220Ala231, 124S523; 156SC 299, 152SE865; 161Tenn236, 30SW(2d) 268 (governmental or political capacity); TexCivA 285SW345; TexCivA 288SW875. **Constitutional prohibition against passage of local or special laws for assessment or collection of taxes** is inapplicable to exactions authorized to be made by irrigation districts. 35Wyo 73, 246P918. **Special act authorizing bond issue,** making no provision for assessment and collection of taxes, held not unconstitutional. 146Val, 135SE 693. **Applicability to county.**–161Tenn 236, 30SW(2d)268. **Necessity of designation for specific purpose.**–161Tenn236, 30SW(2d)268. **Power to tax** is governmental function. 161Tenn236, 30SW (2d)268. **So long as assessment and collection of county taxes** is by general law statute imposing taxes may be special. 99Fla628, 127S486(2dcase). **Statute conferring taking authority on county** must be dealt with as though county had been named. 161Tenn236, 30SW (2d)268. **Uniformity** does not apply to special legislation for levying taxes for special or general purposes. 161Tenn 236, 30SW(2d)268.

1011–53½–New. Prohibition against special and local laws for assessment and collection of taxes for "state and county purposes" does not forbid legislative authority by special or local law to county to levy tax for local county purposes. 90Fla398, 106S73.

1012–54 130Kan228, 285P542 (statute creating city courts held valid); 144 Miss125, 109S129 (statute creating county courts in counties of certain population); 105TexCr416, 289SW69; TexCr 289SW72(1stcase); TexCr 289 SW72(2dcase); TexCr 289SW72(3d case); TexCr 289SW72(4thcase); Tex Cr 289SW73(1stcase); TexCr 289 SW73(2dcase). But see Fla 130S444 (2dcase). **In Illinois.**–323 Ill 561, 154 NE474.

1012–55 191NC375, 131SE753; 114 Okl 193, 245P649. **Additional duties and powers given to judge in one district** make statute local or special, and therefore invalid in absence of required notice of intention to introduce act in legislature. 114 Okl 193, 245P649. **Private act conferring additional jurisdiction in criminal matters on mayor's court of certain town** held not unconstitutional. 191NC375, 131SE753. **Statutes held valid.**–213Ky445, 281SW 472; 308Mo 390, 272SW940. **Statutes not invalid.**–Cal 289P825.

1012–56 51SD432, 214NW838. **Statutes held valid as general.**–122 Okl 297, 255P150 (providing for increase of district judges in particular district and for manner of nomination and election).

1012–57 93CalA224, 269P573.

1012–58 196Cal 344, 238P88 (valid statute); 93CalA532, 269P934; 168Ga 81, 147SE569; 25 OhNPNS250; 123 Or571, 263P901. **Industrial accident commission** is not court within such provisions. 71CalA542, 235P748. **In South Carolina.**–144SE6. **Statutes held as not being special legislation.**–79CalA 650, 250P686. **Statutes held constitutional as not being special legislation.**–29Ariz582, 244P376 (regulating admission of attorneys to bar); 307Mo 307, 270SW318 (statute authorizing challenge of juror employed by client of attorney, in courts of counties with not less than sixty thousand nor more than

two hundred thousand inhabitants). Statutes held not invalid.–Cal 289P160. Statutes held not to relate to practice in courts.–Cal 284P209.

1012-58½–New. Statute, fixing venue of all actions to liquidate insolvent banking corporations in court of specified county of state, is general law. 52ND 231, 202NW391.

1012-58½–New. Statute prohibiting any act obstructing justice in federal courts held general. 38F(2d)584.

1013-61 310Mo 620, 276SW20.

1013-62 21AlaA483, 111839.

1013-63 99Fla333, 126S374; 168Ga81, 147SE569; 321 Ill 230, 151NE481; 321 Ill 431, 151NE884. In Alabama.–21AlaA 483, 111839.

1013-64 94CalA382, 271P568; 99Fla 333, 126S374; 208 Iowa49, 222NW548; 174Minn36, 218NW238. Illustrations.–195Cal 1, 231P34 (act providing that actions against irrigation district shall be brought in county where office of board of trustees is located); 71CalA 542, 235P748; 78CalA117, 248P272. Limitation of action. 79CalA46, 248P1035; 79CalA422, 249P835; 79CalA650, 250P686 (regulating appeals to superior courts). Application for judgment and sale of property for delinquent assessment. 321 Ill 230, 151NE481; 321 Ill 431, 151NE884 (requiring jury fee); 310Mo 116, 274SW 1058 (charter provision as to duration of liens for judgments for benefits); 116 Okl 131, 244P44 (enforcement of awards under Workmen's Compensation Act); 287Pa560, 135A295. Constitutional provision prohibiting special laws as to enforcement of judgments does not relate to liens. 310Mo 116, 274SW1058.

1014-65 99Fla333, 126S374; 171Minn 57, 213NW557, 59ALR404; 142 Okl 260, 286P774; Va 152SE382. Illustrations.–171Minn57, 213NW557, 59ALR404; 141 Okl 220, 284P875. See also 132SC241, 128SE172. Statute held valid.–145Va94, 133SE781.

1014-66 229Ky264, 17SW(2d)227, 63 ALR932; Mo 30SW(2d)447. Statutory distinction between felonies and misdemeanors not special legislation. Cal 292 P267.

1015-67 297Pa564, 147A826.

1015-68 78CalA685, 248P954; 335 Ill 136, 166NE451; Ind 166NE270; 169La 215, 124S832. Statutes were valid.–193 NC290, 136SE709 (limiting punishment for violation of prohibition law in five counties to fine). Act does not violate uniformity clause because penalties are prescribed for individuals and corporations, but none for partnerships. 74 CalA109, 239P418. Act relating to real estate brokers held not violative of uniformity clause because prescribing different penalty for individual than for corporation. 74CalA109, 239P413.

1015-69 170Ga800, 154SE388(2dcase); 334 Ill 465, 166NE100, 64ALR1006; 317 Mo 671, 296SW808; 319Mo 976, 58SW (2d)83; 105NJL57, 143A536; 105NJL 11, 143A806; 105NJL511, 146A428(2d case); 246NY140, 158NE51 (City Home Rule Law); 148SC118, 145SE695; Tex CommnA 288SW182; TexCivA 24SW (2d)464.

1016-70 122 Okl 4, 250P81 (statute extending tenure of county assessor in particular county).

1016-72 122 Okl 4, 250P81.

1016-74 218Ala274, 118S409; 181Ark 874, 31SW(2d)292; 99Fla1053, 128S 489; Fla 129S861; Ind 166NE270; 312Mo 157, 279SW33; 50Nev237, 255P1073; NJSup 135A678; 224 AppDiv115, 229NYS589; 160Tenn 148, 22SW(2d)355 (statute held without valid reason for discrimination between sheriff for particular county and sheriffs generally); 160Tenn109, 23SW(2d)239. Classifying salaries according to population, etc. 287Pa342, 135A308; 152 Tenn258, 277SW71; 152Tenn466, 278 SW660. Classification of salaries of circuit clerks by population held unconstitutional. 312Mo 157, 279SW33. Constitutional provisions prohibiting special laws regulating or increasing allowances of public officers do not apply to statutes regulating salaries of county officers. 218Ala71, 117S626. Laws relating to salaries of each county officer must be uniform in operation.–312Mo 157, 279SW33. Local or special legislation may be enacted covering appointment of solicitor to sheriff in counties of fourth class. 287Pa342, 135A308. Statute providing against repeal of local acts fixing salaries in certain counties held valid. 152Tenn258, 277SW71.

1016-74½–New. Statute prohibiting use of money or valuable thing to influence officer of United States in official function held special. 38F(2d)584.

1016-75 Iowa 231NW646(2dcase) (holding curative statute not local or special); 191NC648, 132SE657; 119 Or 141, 248P358.

1017-76 Nebr 229NW773; 160Tenn 109, 23SW(2d)239.

1017-77 99Fla333, 126S374; 99Fla 1311, 128S853(2dcase); 160Ga251, 127 SE856; 163Ga784, 137SE24; 322 Ill 232, 153NE354; 323 Ill 427, 154NE198; 198 Ind502, 154NE273; 86 IndA684, 158 NE526; Iowa 233NW147; 229Ky752, 17SW(2d)1031; 79Mont530, 257P465; 115Nebr827, 215NW114; 121 Okl 18, 247P15; 137 Okl 95, 278P311; 119 Or 141, 248P358; 8PaDist&Co 19; 157 Tenn295, 8SW(2d)366; 115Tex455, 283 SW475; TexCommnA 24SW(2d)389; 103WVa34, 136SE504. In Arkansas.–169Ark448, 275SW766. Provision is mandatory.–121 Okl 193, 249P381. General act may be restricted by title.–99 Fla333, 126S374. Where title of act deals substantially with subject matter of act, it is sufficient. Miss 130S287(1st case).

1017-78 279US429, 49SCt380, 73Led 781; 201Cal 414, 257P515; Cal 289P 160; 83Colo 43, 262P907; 91Fla1044, 109S94; 94Fla752, 114S435; 99Fla1070, 128S478; Ill 172NE47; Ind 166NE270; 207 Iowa851, 224NW41; 122Kan701, 253P251; 220Ky373, 295SW433; 73 Mont586, 238P585; 74Mont308, 240P 371; 74Mont428, 240P978; 116Nebr 249, 216NW828; 102NJL71, 130A805; 31NM220, 243P333; 136 Okl 191, 276P 769; 138 Okl 225, 280P568; OklCr 287 P835; Or 257P324; 50Philippine259; 48SD641, 205NW706; SD 225NW228; 152Tenn258, 277SW71; 154Tenn208, 285SW582; 158Tenn445, 14SW(2d)730; 115Tex455, 283SW475; TexCivA 280 SW843; 103WVa23, 136SE505. The purpose of these provisions was to prevent union in same act of incongruous matter and of objects having no connection or relation. 201 Iowa1, 206NW821; 31NM7, 240P482. In absence of constitutional provision subject of enactment may be as broad or restrictive as legislature may determine. 91Fla1044, 109S 94.

1018-79 21AlaA211, 106S875; 29Ariz 582, 244P376; 198Cal 23, 243P429, 430 [quotCyc]; 198Cal 308, 245P164; Cal 289P160; 86CalA558, 261P1080; 91CalA 168, 266P845; 103CalA698, 284P1070; 96Fla799, 119S376; Fla 130S699; 162 Ga641, 135SE84; 318 Ill 188, 149NE269; 318 Ill 272, 149NE275; 323 Ill 427, 154 NE198; 324 Ill 530, 155NE294; 329 Ill 453, 160NE836; 86 IndA684, 158NE 562; 308Mo 390, 400, 272SW940 [cit Cyc]; 313Mo 160, 282SW34; 323Mo 138, 198SW(2d)12; Mo 30SW(2d)447; 74 Mont308, 240P371; Nebr 209NW741; 114Nebr813, 210NW273; 116Nebr627, 218NW423; 50Nev125, 253P671; 33NM 553, 273P928, 62ALR296; 121 Okl 193, 249P381; 121 Okl 285, 249P959; 125 Okl 226, 257P324; 143 Okl 8, 286P883; 39 OklACR221; 286Pa283, 133A505; 287Pa376, 135A362; TexCommnA 118SW (2d)163; TexCivA 284SW624; TexCivA 8SW(2d)239; 111TexCr657, 13SW(2d) 689; TexCr 28SW(2d)537(2dcase); 68 Utah251, 249P1016; 103WVa23, 136SE 505. See also 205 Iowa1154, 213NW517. Insufficiency of title must be clear and unmistakable before act will be declared unconstitutional. 74Mont428, 240P978. It is sufficient if all the subjects are congruous, have a natural connection with, are germane to, and are reasonably necessary for, the accomplishment of object of statute. 144Va456, 132SE482. Statute will be upheld unless title is clearly insufficient.–137 Okl 59, 277P 918. Act will be liberally construed in testing sufficiency of title. TexCivA 23SW(2d)848.

1018-80 198Cal 23, 243P429, 430 [quot Cyc]; 8LaA291; 169Minn221, 211NW 3; 116Nebr137, 216NW171; 125 Okl 226, 257P324. Title fixes limit on scope of act.–Or 249P959.

1018-81 219Ala1, 121S696; 198Cal 23, 243P429, 430 [quotCyc]; 199Cal 308, 245P164; Cal 290P451; CalA 290P116; 229Ky264, 17SW(2d)227, 63ALR932; 160La237, 106S840; Nebr 209NW741; 33NM553, 273P928, 62ALR296; 137SC 266, 135SE60, 63 [citCyc]; 152Tenn451, 278SW417; 144Va456, 132SE482. Constitutional requirement is mandatory.–121 Okl 285, 249P959. Constitution presupposes reasonably inquiring state of mind in reading title of act. 291Pa216, 139A860. No standard of particularity can be formulated, legislative discretion having wide scope.–214Ala38, 106S231. Title of act need not specifically refer to previous statutes which are to be amended. 137SC496, 135SE538. Cure of uncertainty.–128Kan715, 280P773. Where title fairly indicates general subject and does not tend to mislead legislators, it is sufficient. 74Mont428, 240P 978; Nebr 231NW701.

1019-82 198Cal 23, 243P429, 430 [quot Cyc]; 124 Okl 228, 255P582.

1019-83 29Ariz582, 244P376; 198Cal 23, 243P429, 430 [quotCyc]; 95Fla345, 116S81; 326 Ill 230, 157NE195; Iowa 231NW646(2dcase); 319Mo 316, 48SW (2d)467; 78Mont1, 252P301; 31NM220, 243P333; 287Pa342, 135A308; 287Pa 376, 135A362; 97PaSuper328 (to give clear notice of its subject matter); 6 PaDist&Co 239; 152Tenn258, 277SW 71; 117Tex34, 297SW206; TexCivA 280 SW1070; 68Utah251, 249P1016. If details and particulars follow general purpose expressed in first sentence of caption, general purpose is not to be limited by any application of rule of expressio unius exclusio alterius. 152Tenn451, 278 SW417. If real object of statute is fairly indicated in caption, title is sufficient and provisions of act germane to object or purpose are not beyond title. 152 Tenn451, 278SW417. It is not essential that every provision be stated in title of statute, but it is sufficient if subject is single and all provisions are referable and cognate to general subject expressed in title. 21AlaA37, 104S885; 225Ky112, 7SW(2d)839. It is sufficient if object of bill be expressed in title. 144Va456, 132 SE482. Subject matter may be as brief as legislature may see fit provided several matters are germane to each other and properly connected. 95Fla 457, 116S878. Subject of act must be stated with substantial accuracy. 157 Tenn295, 8SW(2d)366. Subject of act not expressed in title.–7PaDist&Co 771. Title as index.–225Ky294, 8SW(2d)428. Unnecessary recitals in title of act are commonly regarded as surplusage. 152 Tenn451, 278SW417. Notice of penalties need not be given in title under constitutional provision. 97PaSuper288.

1019-84 196Cal 344, 238P88; 198Cal 23, 243P429, 430 [quotCyc]; 318 Ill 188; 149NE269; 318 Ill 198, 149NE294; Mo 23SW(2d)120; 152Tenn258, 277SW71; TexCommnA 118SW(2d)163; TexCivA 284SW624; 68Utah251, 249P1016.

1020-85 8F(2d)835 (subject and effect of law is required); 198Cal 23, 243P 429, 430 [quotCyc]; 162Ga641, 135SE 84; 322 Ill 232, 153NE354; 78Mont1, 252P301; 152Tenn258, 277SW71. "Subject" means matter to which act relates. 74Mont428, 240P978.

1020-86 198Cal 23, 243P429, 430 [quot Cyc]; 326 Ill 230, 157NE195.

1020-86½–New. Statute declaring that no law shall be invalid because of defective title is violative of such constitutional provision. TexCivA 280SW275.

1020-87 23F(2d)349; 91Fla1044, 109 S94; 91Fla815, 109S468; 328 Ill 512, 160NE60; 86 IndA684, 158NE526; 215 Ky196, 284SW1017; 137 Okl 95, 278P 311; 68Utah251, 249P1016.

1020-88 167La511, 119S532.

1020-89 67CalA328, 227P664; 48Philippine676; 50Philippine259; 48SD641, 205NW706. Misleading title renders statute invalid. 152Tenn329, 278SW967.

1021-90 86 IndA684, 158NE526; 163 La409, 111S889.

1021-91 214Ala38, 106S231 (by express constitutional provision); 149Md578, 132A73; 90PaSuper203, 207 [citCyc].

1022-96 218Ala277, 120S142; 200Cal 585, 254P946, 62ALR1341; 318 Ill 114, 149NE3; 323 Ill 427, 154NE198; 333 Ill 158, 164NE173, 61ALR649; 86 IndA684, 158NE526; 320Mo 332, 8SW(2d)887; 50Nev125, 253P671; 96PaSuper450 (purposes of statute do not constitute subject); 137SC266, 135SE60 (act held not to violate rule); 48SD641, 205NW 706; 50SD107, 208NW576; 152Tenn258, 277SW71; 158Tenn445, 14SW(2d)730; TexCivA 285SW345; 143Wash326, 255 P371. **Acts held not violative of inhibition.**–199Cal 506, 250P182 (statute providing for purchase of land and erection of buildings for agricultural school). **Distinction stated.**–TexCivA 284SW624. **Statute held not invalid.**–45 Ida676, 266 P665; 178Minn244, 226NW842 (establishing wild life preserve). **Act is void only where subject and body of act are duplicitous.**–214Ala38, 106S231. **Act relating to buying and selling foreign exchange** held not to embrace more than one subject. 323 Ill 427, 154NE198. **Codes.**–214Ala38, 106S231. **Agricultural code** held within rule, and not within constitutional exception as to codes generally. 214Ala38, 106S231. **Constitutional provision is complied with if** title expresses general subject and if body of act provided means, methods, and instrumentalities for carrying general purpose into effect. 137SC266, 135 SE60. **Law adopted by initiative method** must have single subject. 200Cal 585, 254P946, 62ALR1341. **Ordinance not void** as containing more than one subject. 163La409, 111S889. **Provision is violated** only when title has no connection with subject and is in concensus with it. 324 Ill 530, 155NE294. **"Subject"** signifies basis or principal objects of act and includes any matter warrantedly subservient to its general subjects or purpose. 324 Ill 530, 155NE 294. **Where act contains one subject and one title, severable provisions not germane** thereto may be stricken as surplusage. 214Ala38, 106S231. **Where provisions of act are necessary to carry act into effect,** it is not one embracing more than one object. 160La294, 107S 118. **Acts held not unconstitutional.**–207 Cal 657, 280P118; 168Ga723, 149SE37; 168Ga868, 149SE207. **Statutes held not to offend.**–Okl 292P841.

1022-97 35F(2d)232 (scope of application of statute); 235Mich344, 209NW 177 (act valid); 242Mich698, 219NW 648; 102NJL227, 131A902; TexCr 28 SW(2d)537(2dcase); 103WVa23, 136SE 505. See also 160Tenn403, 23SW(2d) 897. **One purpose** of constitutional provision is to challenge attention of those affected by act to its provisions. 242 Mich698, 219NW648. **Product of single object may be as diverse as object requires.** 102NJL227, 131A902. **Statute held not to violate such provision.**–162La202, 110S201. **Acts held not unconstitutional.**–168La761, 123S317, 69 ALR574; 248Mich272, 226NW899; 248 Mich150, 226NW910. **Incidental effect on other laws is not "object"** of statute. 170La986, 129S552. **That statute's provisions for carrying out object affects laws** on same or other subjects does not violate single object requirement. 170 La986, 129S552.

1022-97½-New. Prohibition against duplicity of subject applies only to body of act and not to title.–154Tenn412, 285 SW570, 47ALR971.

1022-99 162Ga195, 133SE847 (statute amending act incorporating school held not duplicitous); 205 Iowa1154, 213NW 517; 169Minn221, 211NW3 (statute amending statute punishing fraudulent removal, concealment, or sale of mortgaged property by bringing within it personal property held on conditional sale held valid).

1022-99½-New. Amendments must conform to constitutional restriction.–119 Or264, 240P233.

1022-99¼-New. Amendment held valid. 29Ariz582, 244P376 (amending act regulating admission of attorneys at law).

1022-99¼-New. Where title of act states purpose to amend and re-enact certain sections of former act and to add another section, it is not unconstitutional as embracing two subjects. 159 La199, 105S288.

1022-99½-New. Supplementary act may include any provision which could have been inserted in original act, though particular subject is not dealt with therein. 288Pa29, 135A645.

1022-1 214Ala38, 106S231; 23AlaA5, 120S140; 29Ariz582, 244P376; 180Ark 937, 23SW(2d)963; 195Cal 1, 231P34 (Irrigation District Act); 200Cal 637, 254P570; 97Fla749, 122S239; 99Fla1, 65, 115, 126S308; 163Ga849, 137SE264 (Banking Act); 164Ga336, 138SE767; 47 Ida74, 272P707; 318 Ill 188, 149NE 269; 318 Ill 198, 149NE294; 322 Ill 174, 152NE597; 322 Ill 232, 153NE354; 328 Ill 512, 160NE60; 86 IndA684, 158NE 526; Ind 170NE433; 202 Iowa753, 210 NW945; 205 Iowa1154, 213NW517; 122Kan701, 253P251; 220Ky603, 295 SW904; 229Ky752, 17SW(2d)1031; 158La853, 104S744; 160La269, 107S106 (manufacturing, sales, and transportation of liquor); 167La907, 120S593; 170La986, 129S552 (holding statute with single object, providing means for carrying it out is not invalid); 114Nebr 813, 210NW273 (civil administrative code); 50Nev125, 253P671; 102NJL71, 130A805; NJ 141A591; 33NM200, 263 P510; 33NM212, 263P515; 227AppDiv 345, 238NYS55; 112 ObSt590, 148NE95; 143 Okl 275, 288P938; 286Pa283, 113A 505; 48SD375, 204NW905; SD 228NW 179; 152Tenn217, 276SW867; 154Tenn 412, 285SW570, 47ALR971; TexCivA 284SW624; 117Tex34, 297SW206; 68 Utah251, 249P1016; 108WVa242, 150 SE725; 200Wis271, 228NW140. See also CalA 290P116; 96Fla799, 119S376. **Single main purpose.**–322 Ill 174, 152NE 597; TexCommnA 11SW(2d)163. **Statutes held valid.**–33NM200, 263P510. **Agricultural code enactment is valid** as all parts are germane to one general subject. 214Ala38, 106S231. **Statutes held valid.**–68Utah251, 249P1016. **Where title is duplicitous, but act is on only one subject,** other may be disregarded as surplusage and act upheld. 214Ala38, 106S231.

1022-1½-New. Statute may provide all means necessary for carrying out its object. 158La866, 104S744.

1022-1¼-New. Statute may provide all means necessary for carrying out its object. 161La988, 109S787.

1023-2 161Ga537, 131SE496, 498 [cit Cyc]; 323 Ill 427, 154NE198 (in regulating statutes); 50Nev125, 253P671; 150SC452, 148SE474; 154Tenn13, 285 SW589. **Penalty for violation of regulation is not prohibition** and does not render statute void for duplicity. 214 Ala38, 106S231. **Statute providing means** for enforcing principal object is not unconstitutional as having more than one object. 162La781, 111S162. **Where title of act gives no hint that it** is regulatory, portion thereof providing penalty held obnoxious. 323 Ill 427, 154 NE198.

1023-3 162La781, 111S162; 152Tenn 217, 276SW867.

1023-5 42 Ida169, 244P149.

1024-6 20AlaA450, 103S898 (statute held invalid); 168Ga81, 147SE569; 228 Ky168, 14SW(2d)405; 322Mo 746, 18 SW(2d)500; Wash 292P430. **Act held not unconstitutional.**–Wash 290P987.

1024-7 170Ga800, 154SE388(2dcase). **Act creating department of agriculture and industry,** and defining scope of its activities, held to have unity of subject. 214Ala38, 106S231.

1025-8 78CalA685, 248P954; 331 Ill 20, 162NE113; 199 Ind231, 156NE559; 160La237, 106S840 (part of statute held not germane to main purpose); 161 La988, 109S787; 169Minn221, 211NW 3; 109TexCr551, 6SW(2d)360; 146 Wash17, 261P796; Wash 292P430. **Statutes held valid.**–229Ky264, 17SW (2d)227, 63ALR932; 158La866, 104S 744 (masking); 165La989, 116S482; Mo 23SW(2d)11 (transportation of liquor); Mo 23SW(2d)122 (relating to punishment for robbery); OklCr 287P 835. **Different offenses of same general character** may be included in same statute. 317Mo 330, 296SW370. **Electrocution act held valid.**–164Ga204, 138SE 206. **Law making seduction a felony adopted as section of code** held not violative of constitutional provision. 160Ga 545, 128SE743. **Act held not unconstitutional.**–TexCr 28SW(2d)537(2dcase). **Statute permitting different statements of same offenses** under separate counts has been held valid. SD 232NW51.

1025-9 160Ga189, 127SE612; 142SC 202, 140SE468; 48SD375, 204NW905. **Primary Act held not invalid.**–328 Ill 512, 160NE60. **Statute assuming limited liability for injuries to student at state university** from negligence of servant in charge of dormitory buildings, and making incidental appropriations therefor, does not violate constitutional restriction. 76Mont429, 247P332, 47 ALR424.

1025-10 229Ky752, 17SW(2d)1031; 158Tenn445, 14SW(2d)730. **Statute held not violative of constitutional provision.**–242Mich247, 218NW766; 114 Okl 269, 247P20. **Statutes held valid.**–Ind 166NE270.

1025-11 216Ala469, 113S584. **County budget law** held not unconstitutional. 52SD516, 219NW122.

1026-13 86Mont595, 285P932 (organization of irrigation district); 116Nebr 373, 217NW607; TexCivA 28SW(2d)889. **Statutes held not to violate constitutional provisions.**–316Mo 398, 289SW925.

1026-15 119Kan861, 241P241; 162La 956, 111S341. **Statute held valid.**–199 Cal 506, 250P182.

1026-16 Iowa 233NW147 (title held not insufficient); 162La956, 111S341; Pa 151A801. **Act is held not within inhibition.**–122Kan701, 253P251; TexCivA 280SW1070; TexCivA 8SW(2d)239.

1026-17 162La956, 111S341; 175Minn 305, 221NW13; 75Mont429, 244P287; Nebr 227NW325; 159Tenn349, 19SW (2d)261; Wash 270P816 (valid). **Statute held not duplicitous.**–18F(2d)918; 154Tenn13, 285SW589. **Statutes held not to embrace more than one general subject.**–99Fla1174, 128S632. **Police power and taxing power** may be exercised by legislature in one statute. Iowa 232NW477.

1026-18 99Fla628, 127S486(2dcase) (financing and alternate payment for public improvements are one subject); 129Kan834, 284P618 (water plants). **Drainage statute held valid.**–127Kan207, 272P177. **Statute held valid.**–235Ky86, 29SW(2d)583.

1027-19 120Kan273, 243P311; 130Kan 464, 286P204 (both holding statute held valid); 160La237, 106S840 (part of statute held not germane to main purpose); 160La247, 106S844 (statute invalid in part relating to driving while intoxicated); 136 Okl 191, 276P769; 138 Okl 225, 280P568; 119 Or264, 240P 233 (statute held valid).

1027-20½-New. Act relating to county bridges and "joint county bridges" is not void for duplicity in title. 290Pa 427, 139A136.

1027-21 197 Ind179, 150NE50; 199 Ind 49, 155NE209; 119 Or613, 250P233; 82 PaSuper362; 96PaSuper450.

1027-22 32F(2d)669; 200Cal 585, 254P 946, 62ALR1341; 207Cal 657, 280P118 (liability of municipalities for injuries from defective streets); CalA 290P116; 97Fla710, 122S225; 163Ga784, 137SE 24; 201 Iowa1, 206NW821 (procedure in supreme court and qualification for admission to bar); 235Mich344, 209NW 177 (administration of absentee's estates); 321Mo 58, 12SW(2d)742; 288Pa 230, 136A213; 131SC511, 127SE574; TexCommnA 291SW868 (defining actionable fraud and prescribing damages).

1028-23 91CalA168, 266P845; 91Fla 1044, 109S94; 99Fla628, 127S486(2d case); Fla 130S699; 318 Ill 272, 149 NE275; 322 Ill 232, 153NE354; 326 Ill 230, 157NE195; 86 IndA684, 158NE 526; Ind 166NE270; 308Mo 390, 400, 272SW940 [citCyc]; Mo 30SW(2d)447; 31NM7, 240P482; 54ND49, 208NW949; 121 Okl 193, 249P381; 127 Okl 72, 259 P849; 116 Or310, 241P50; 50SD107, 208NW576 (title held apt); 111TexCr 657, 13SW(2d)689; 108WVa299, 150SE 738. **Failure of title to disclose that measure was emergency statute** held not

to affect validity. 152Md343, 136A754. **Title of act may mention matters germane to and properly connected with its general subject.** 91Fla118, 107S146.

1028-24 279US429, 49SCt380, 73Led 781; 29Ariz582, 244P376; 200Cal637, 254P570; Cal 290P451; 86CalA558, 261P1080; CalA 290P116; 91Fla1044, 109S94; 91Fla815, 109S468 (index to contents); 92Fla837, 110S533; 94Fla96, 113S677; 94Fla1056, 114S859; 99Fla496, 126S117 (means provided in body of act to accomplish its purpose); Ill 172NE3; 86IndA684, 158NE526; Ind 166NE270; 200Iowa1293, 206NW297; 152Md343, 136A754; 308Mo390, 272SW940; 313Mo693, 282SW702; 103NJL323, 136A741; 102NJL294, 132A503; NJSup 151A205; 121Okl193, 249P381; 127Okl72, 259P849; 136Okl113, 277P226; 143Okl8, 286P883; OklCr 288P390; 119Or141, 248P358; 125Or528, 266P238, 59ALR1436; 292Pa127, 140A858; 295Pa390, 145A430; 6PaDist&Co 239; 9PaDist&Co 339; 137SC288, 135SE153 (title need not be index of contents of statute); 152SC455, 150SE269; SD 229NW294; 152Tenn258, 277SW71; 154Tenn13, 285SW589; 160Tenn468, 26SW(2d)132; TexCivA 2SW(2d)889; 147Wash86, 265P167. See also 97Fla710, 122S225; 335Ill106, 166NE488. **Illustrations of titles held sufficient.**–45Ida676, 266P665; 68Utah251, 249P1016. **It is not necessary,** etc. 52SD516, 219NW122. **Emergency clause** need not be referred to in title. 49SD106, 206NW233. **Matters merely incidental to purpose of act** need not be stated in title. 290Pa427, 139A136. **Only subject of act** must be expressed in title. 118Or5, 244P512. **Primary purpose of title** is to inform lawmakers relative to proposed legislation. 119Or141, 248P358. **Reference to act to be amended with sufficient particularity to identify it** is all that is required. 74Mont428, 240P978. **Title expressing general subject of act** is sufficient. 78Mont1, 252P301. "**Title of act need not be an index.**"–324Ill55, 154NE430. **Title need not be index of act.** 74Mont428, 240P978. **Title need not go into details in** stating object of statute. 158La866, 104S744. **Stating subject matter in unnecessary detail** does not invalidate act. 235Ky86, 29SW(2d)583. **Title giving notice of subject-matter and object of act** is sufficient. 99Fla628, 127S486(2d case). **It is sufficient** if title directs mind to object of proposed law. 160Tenn468, 26SW(2d)132.

1029-25 16F(2d)90; 214Ala38, 106S231; 21AlaA211, 106S875; 23AlaA343, 125S385; 29Ariz582, 244P376; 31Ariz389, 254P225; 198Cal23, 243P429; 200Cal277, 252P1043; 200Cal637, 254P570; 67CalA328, 227P664; 82CalA610, 256P447; CalA 266P341; 77Colo289, 236P777; 91Fla815, 109S468; 96Fla799, 119S376; 97Fla710, 122S225; 97Fla749, 122S239; 99Fla1070, 128S478; 162Ga462, 134SE103; 163Ga239, 135SE912; 163Ga784, 137SE24; 164Ga336, 138SE767; 169Ga354, 150SE262; 170Ga800, 154SE388(2dcase); 319Ill66, 149NE580; 318Ill188, 149NE269; 318Ill198, 149NE294; 318Ill272, 149NE275; 322Ill232, 153NE354; 328Ill512, 160NE60; 329Ill120, 160NE163; 329Ill453, 160NE836; 331Ill544, 163NE355; 331Ill576, 163NE466; 333Ill606, 165NE217, 62ALR912; 337Ill469, 169NE265; 197Ind374, 151NE98; 198Ind502, 154NE273; 86IndA684, 158NE526; Ind 166NE270; 89IndA220, 166NE154; 207Iowa851, 224NW41; 126Kan811, 271P400; 231Ky490, 21SW(2d)804; 160La294, 107S115; 308Mo390, 400, 272SW940 [citCyc]; 313Mo693, 282SW702; 75Mont429, 244P287; 102NJL227, 131A902; NJSup 152A175(2d case); 31NM7, 240P482; 31NM427, 246P908; 49ND248, 191NW485; 54ND49, 208NW949; 121Okl193, 249P381; 127Okl72, 259P849; 143Okl8, 286P883; 44OklACR180; 118Or5, 244P512; 119Or613, 250P233; 125Or528, 266P238, 59ALR1436; 297Pa564, 147A826; 288Pa196, 135A717; 298Pa33, 148A37; 97PaSuper288; 152SC455, 150SE269; 52SD229, 217NW218; 152Tenn258, 277SW71; 153Tenn306, 283SW751; 154Tenn13, 285SW589; 155Tenn70, 290SW608; 160Tenn403, 23SW(2d)897; TexCivA 280SW1070; 103WVa23, 136SE505. **Title held sufficient.**–199Cal506, 250P182. **Title held insufficient.**–NJSup 142A350. **Any matter or thing reasonably subservient to general subject or purpose of statute** is properly included therein. 323Ill427, 154NE198. **Details provided for accomplishment of general purpose of act** are necessary incidents to general purpose stated in title. 86CalA558, 261P1080. **If provision tends to promote object** and purpose of act it is within title. 318Ill188, 149NE269. **It is germane to title of act to define terms** as used in act. 78Colo399, 242P49. **Matter reasonably subservient to general subject or purpose** is germane. 333Ill158, 164NE173, 61ALR649. **Object only, not diverse elements of its product,** must be expressed in the title. 102NJL227, 131A902. **Only general or ultimate object,** not details by which attained, need be stated in caption. TexCivA 285SW345. **Only subject and not matters properly connected therewith** is required to be expressed in title. 96Fla799, 119S376. **Provisions are germane to subject of title** where closely allied to it. 82Colo163, 258P223. **Reasonably intelligent reference to subject** to which legislation is to be addressed is sufficient. 203Cal106, 263P1017. **Statutes held valid.**–316Mo398, 289SW925; 75Mont429, 244P287. **That title does not state time when act will take effect** does not affect validity of act. 86CalA558, 261P1080. **That word "and" is used to join** two coördinate phrases does not alone indicate more than one purpose in view. 75Mont429, 244P287. **Title containing catalogue of subheads is good if subheads** are germane to general subject. 214Ala38, 106S231. **Title reasonably indicative of legislation contained in statute** is sufficient. 89CalA390, 265P325. **To be invalid as not embraced in title of act** provision thereof must be incongruous with title or have no proper connection with or relation to it. 323Ill427, 154NE198. **Unity of title is preserved** where two or more propositions therein may be logically viewed as parts or aspects of single plan. 75Mont429, 244P287. **Where all provisions of statute are fairly within object expressed in caption,** it is not obnoxious to constitution. TexCivA 285SW345. **Codes.**–Va 154SE477. **If words in title sufficiently cover provisions,** act will be sustained though meaning given words may not be most obvious or common. 159Tenn349, 19SW(2d)261. **Provisions tending to make effective object of, or necessary incidents to act as expressed in title** are properly connected with subject of act. 99Fla496, 126S117.

1029-25½-New. Where subject is sufficiently stated in title, manner of enforcement, administration, or accomplishment may be embraced in its body, though not recited in its title. 163Ga239, 135SE912; 135SC348, 132SE673 (supporting rule).

1029-26 See also 91CalA168, 266P845.

1029-27 91Fla1044, 109S94; 99Fla1070, 128S478; 201Iowa712, 208NW78; 229Ky752, 17SW(2d)1031; 162La846, 111S185 (act declaring lands uncovered by drying up of lake to be swamp lands held not broader than title relating to shallow lakes); 157Tenn295, 8SW(2d)366; Wash 287P883 (title too restricted); 103WVa23, 136SE505. **The title to an act may be so restrictive,** etc. 48SD375, 204NW905. **Title relating merely to matters incidental to subject matter of act** and not disclosing vital object of act is insufficient to satisfy constitutional requirement. 125Okl226, 257P324. **Law adopted by initiative method** must have apt title. 200Cal585, 254P946, 62ALR1341.

1029-27½-New. Defective caption of bills making rents and revenues from husband's separate land his separate property held cured by reënactment. TexCivA 292SW290.

1029-27¼-New. Title is sufficient if it fairly gives notice of subject so as to reasonably lead to inquiry into body thereof, and is not misleading. 91Fla815, 109S468.

1029-27¼-New. Where an act is mandatory, title must give notice of such fact. 85PaSuper228.

1029-27½-New. Provision of act must be fairly included in subject expressed in title or to matters properly connected therewith. 91Fla1044, 109S94.

1029-27⅜-New. Title should be sufficient to put interested person on notice as to contents of act. 91Fla1044, 109S94.

1029-27½-New. Elaborate title not a violation if but one subject expressed. 91Fla1044, 109S94.

1029-27⅝-New. Provisions necessarily incident to or tending to make effective or promote purposes of legislation expressed in title are proper. 91Fla1044, 109S94.

1029-27⅞-New. Court may look to history of particular legislation in determining whether title sufficiently embraces its subject matter. 92CalA646, 268P971.

1029-27⅞10-New. Violation must be plain before courts will declare act unconstitutional. 96Fla799, 119S376.

1029-27⅞11-New. Title need only be sufficient to put interested person on inquiry concerning provision attached as not embraced therein. 295Pa571, 145A797, 63ALR1086.

1029-27⅞12-New. Title must express object of law. 246Mich393, 224NW402.

1029-27⅞13-New. Title giving reasonable notice of matters dealt with and reasonably leading to inquiry as to its contents is sufficient. 96Fla799, 119S376.

1029-27¼14-New. General subject need not appear if clearly disclosed or readily inferred from details expressed. Cal 289P160.

1029-27¼15-New. Provisions broader and on essentially different subject not connected with title of act are inoperative. 99Fla496, 126S117.

1029-27¼16-New. If act is germane title is sufficient. Ill 172NE3.

1029-27¼17-New. Title need not disclose means and instrumentalities provided in body of act for accomplishing its purpose. 143Okl8, 286P883.

1029-27¼18-New. Court must look to act and give reasonable meaning to its words and context in determining whether or not body of act is germane to title. 160Tenn468, 26SW(2d)132.

1029-28 Rule that subject of supplemental act is covered by title specifically referring to original act, where provisions of supplement are germane to subject of original, is inapplicable where original act does not treat of matter covered by provisions of supplemental act. 88PaSuper216.

1029-29 8F(2d)835 (Tennessee); 200Cal637, 254P570; 77CalA404, 247P527; 94Fla752, 114S435; 220Ky373, 295SW433; 249Mich289, 228NW791; 115Nebr827, 215NW114; 117Nebr42, 219NW794; 9PaDist&Co 246. **New matter indicated in the title,** etc. 201Cal414, 257P515. **If title of original act is sufficient to embrace provisions of amending act,** it is sufficient. 46Ida646, 270P140. **It is sufficient if modification of original act** can be reasonably desired from title of amending act. 137SC496, 135SE538. **Title is insufficient.**–115Nebr827, 215NW114. **Title setting out title of amended act in full and stating objects of amendatory act** is not void for insufficient title. 159Tenn321, 17SW(2d)901. **Where act is in reality not amendatory,** such recital is not required. 50Nev289, 258P233. **Act held not supplementary or amendatory** as regards sufficiency of title. NJSup 151A205.

1030-30 31Ariz389, 254P225; 200Cal637, 254P570; 78Colo461, 242P634. Contra 91Fla667, 108S814 [citCyc]; 231Ky514, 21SW(2d)838; 149Md578, 132A73 (reference to code section sufficient); 169Minn221, 211NW3; 319Mo865, 68SW(2d)954; 78Mont1, 252P301; 31NM220, 243P333; 119Or613, 250P233; 158Tenn12, 11SW(2d)852; 101WVa178, 132SE504. See also 74Mont428, 240P978. **If the title of an original act is sufficient,** etc. 45Ida676, 266P665; 116Or310, 241P50. **Only the sections referred to,** etc. 231Ky514, 21SW(2d)838. **Act entitled "supplement"** to former act may be sufficient. 90PaSuper489; 90PaSuper495. **If the title of original act is sufficient**

for act as amended, then title of amending act is sufficient. 160La162, 106S731. **Matters treated in amending act must be germane to subject expressed in title of amended act** and such that they could have been properly included in such act. 29Ariz582, 244P376, 379 [citCyc]. **Reference to the title,** etc. If subject of original act is sufficiently expressed in its title and provisions of amendatory or supplemental act are germane to that subject, it is sufficient that title of amendatory or supplemental act contains specific reference to original by its title. **NJSup** 143A822(2dcase). **Title giving number of code section to be amended and indicating subject matter** with sufficient particularity to identify it satisfies constitutional requirements. 74Mont 428, 240P978. **Title of act amending code section** is sufficient where its sets forth purpose to amend section relating to given subject without setting forth nature of proposed amendment. 78Mont 1, 252P301; 116 Or310, 241P50. **Title of amendatory act** need not specifically name section amended. 101WVa178, 132 SE504. **Where apt reference is made to title of original act,** it is sufficient that body of amendatory act is covered by title of original act. 153Tenn393, 284SW 370.

1031–31 77CalA404, 247P527; 94Fla752, 114S435; 313Mo 693, 282SW702 (title of act relating to publication of public notices in cities of more than one hundred thousand inhabitants held sufficient); 320Mo 332, 8SW(2d)887. **Title held sufficient.**–29Ariz582, 244P376; 169Ark448, 275SW766; 50Nev302, 258P291. **Nature of the amendment.**–29Ariz582, 244P376. **Amendment held within title.**–29Ariz582, 244P376. **Title of amending act need not specify what amendment is.**–160La 162, 106S731. **Title of amendment held not sufficiently inclusive.**–173Minn221, 217NW108.

1031–32 29Ariz582, 244P376, 379 [cit Cyc]; 31Ariz389, 254P225; 77CalA404, 247P527; 163Ga784, 137SE24 (statute held valid); 44 Ida671, 258P1075 (sufficient); 320Mo 10, 6SW(2d)333; Mo 16S W(2d)44. 115Nebr711, 214NW647; 116 Nebr137, 216NW171; 126 Okl 80, 258P 861; 119 Or613, 250P233; 101WVa178, 132SE504. **Amending act held germane to original statute.**–169Ark448, 275SW 766; 121 Okl 193, 249P381; 119 Or264, 240P233. **Amendment held within title.**–81Colo 271, 256P310; 162Ga195, 133SE 847; NJL 142A559. **Amendatory statute is not broader than its title,** etc. 120 Or 90, 250P633, 251P307. **Provisions held not germane.**–126 Okl 80, 258P861. **Acts relating to one subject matter.**–234 Ky147, 27SW(2d)689. **Title held to indicate subject of act.**–234Ky147, 27SW (2d)689. **Title of amended act need not be changed** when amendment adds matters germane to and pertinent to original act. 170La326, 127S739(2dcase).

1031–32½–New. If title of original act treated as part of title of amendatory act which quotes title of original, and if provisions of amending act germane to subject of original act, it must be upheld. 286Pa283, 133A505.

1031–32½–New. Amendment held not violative of constitution as not being germane to title. 143 Okl 8, 286P883 (banking laws).

1031–33 313Mo 693, 282SW702. **Repeals by implication,** etc. 307Mo 137, 270SW339; 315Mo 1320, 289SW935.

1031–33½–New. Invalidity of proviso in original act because subject was not included in title is not cured by amendment, incorporating same proviso with no change in title of act. 322Mo 323, 15 SW(2d)346.

1032–34 226Ky640, 11SW(2d)710; 320 Mo 1320, 289SW935; Mo 1SW(2d)837; 152Tenn258, 277SW71.

1032–35 88PaSuper399; 8PaDist&Co 471.

1032–36 161Ga537, 131SE496; 163Ga 239, 135SE912; 44 Ida671, 258P1075, 1076 [citCyc]; 324 Ill 55, 154NE430; 12 PaDist&Co 98; 154Tenn13, 285SW589.

1032–37 But see 31NM220, 243P333, 338 [citCyc].

1032–38 Phrase "and related subjects" tends to render title indefinite and uncertain and subject to construction. 214 Ala38, 106S231.

1032–41 93Fla603, 112S556; 234Ky78, 27SW(2d)657; 158La203, 103S740; 313 Mo 693, 282SW702.

1033–42 200Cal 585, 254P946, 62ALR 1341; 94Fla752, 114S435; 161La628, 109 S146 (act broader than title, hence invalid); 114Tex535, 273SW799 (deceptive). **Rule applied to initiative elections for legislative measures.**–200Cal 585, 254 P946, 62ALR1341.

1033–42½–New. Act broader than title. Statute allowing supplementary remedy not invalid as an act broader than title. 159La831, 106S321.

1033–43 Improper designation of statute as supplement to certain act whereas it is supplement to another act, in that statute to which it is designated as supplement is simply amendment of such act, is not fatal to validity of statute. **NJSup** 142A350.

1033–45 84Colo 279, 269P894; 91Fla 815, 109S468; 93Fla603, 112S556; 96Fla 799, 119S376; 216Ky78, 287SW212; 162 La956, 111S341.

1033–47 75CalA323, 242P887; 200Cal 585, 254P946, 62ALR1341; 91Fla1044, 109S94; 98Fla1166, 125S813(1stcase); 198 Ind187, 152NE800; 225Ky294, 8SW (2d)428; 229Ky752, 17SW(2d)1031; 233 Ky266, 25SW(2d)390; 160La237, 106S 840; 160La247, 106S844; 169La785, 126 S61; 315Mo 1320, 289SW935; 135 Okl 291, 275P638; 285Pa464, 137A531; 295 Pa349, 145A437; 50Philippine259; 50 Philippine399. See also 48SD375, 204 NW905.

1034–48 229Ky752, 17SW(2d)1031; 169 La785, 126S61.

1034–49 328 Ill 512, 160NE60.

1034–50 35F(2d)232 (service of civil process against nonresidents); Ariz 289 P515; Cal 284P209; 77Colo 289, 236P 777; 91Fla815, 109S468 (title to statute as to suits to remove cloud from title as including provision for constructive service); 91Fla709, 109S677 (chancery suits to foreclose mortgage and other liens); 168Ga81, 147SE569; 333 Ill 158, 164NE173, 61ALR649; 338 Ill 583, 170NE664; Ind 168NE453 (where two sections together defined crime within meaning of title); Ind 172NE124; 232Ky 726, 24SW(2d)580; 159La698, 106S118; 13LaA91, 126S269; Mo 23SW(2d)120; 79Mont530, 257P465; 103NJL470, 136A 209; 49ND248, 191NW485; 285Pa241, 132A185 (title held sufficient); 295Pa 390, 145A430; 157Tenn592, 11SW(2d) 876. But see 74Mont308, 240P371. **Illustrations.**–91Fla824, 108S679; 159La 698, 106S118; 235Mich344, 209NW177; 79Mont530, 257P465; 31NM427, 246P 908 (construing "appeal" to mean "removal"); 285Pa241, 132A185 (procedure where two or more defendants are liable for specific cause of action); 288Pa 196, 135A717. **Statute held invalid.**–TexCivA 280SW275; TexCivA 280SW 843. **Statute pertaining to different subject than title** is void. 320Mo 932, 8SW (2d)903. **Acts held invalid.**–99Fla333, 126S374.

1035–51 25F(2d)930; 206Cal 400, 274P 538; 93CalA640, 270P249; 78Colo 461, 242P634; 230Ky365, 19SW(2d)983; NJSup 145A325(2dcase). **Title of original act relating to body attachment held sufficient.** 78Colo 461, 242P634. **Where act passed relating to counties of over 100,000** was amended by act relating to counties of 62,000 to 82,000 to hold that latter amended former would render it invalid as to title. 214Ala118, 107S47.

1035–52 214Ala47, 106S175; 218Ala 277, 120S142; 318 Ill 114, 149NE3; 329 Ill 453, 160NE836; 331 Ill 20, 162NE 113; Ill 172NE3; Ill 172NE47; 196 Ind569, 147NE918; 196 Ind509, 149NE 57; 196 Ind576, 149NE49; 197 Ind517, 151NE416; 199 Ind231, 156NE559 (statute relating to fraudulent checks held in part void); 89 IndA220, 166NE154; 232 Ky479, 23SW(2d)937; 234Ky523, 28SW (2d)768; 158La203, 103S740; 158La 866, 104S744 (masking); 159La872, 106 S364; 160La902, 107S616; 13LaA244, 126S587; 245Mich396, 223NW67; 249 Mich147, 228NW723; 176Minn249, 223 NW98(1stcase); 312Mo 27, 278SW725 (driving while intoxicated); 316Mo 596, 292SW32; Mo 1SW(2d)837; Mo 1SW (2d)841; Mo 23SW(2d)122; 50Nev125, 253P671; 52Nev10, 279P759(2dcase); OklCr 286P911; 292Pa277, 141A50; 34 PortoRico 809; 111TexCr657, 13SW(2d) 689; 103WVa34, 136SE504. But see 91 Fla1044, 109S94. **Illustrations.**–16F (2d)90; 214Ala47, 106S175; 196Cal 344, 238P88 (section denouncing speed trap testimony); 78CalA685, 248P954; 162 Ga239, 135SE912; 164Ga204, 138SE206; 165Ga55, 139SE377; 318 Ill 188, 149NE 269; 329 Ill 453, 160NE836 (statute relating to Illinois state farm); 158La 352, 104S112; 159La872, 106S364; 160 La902, 107S616; 164La940, 114S844; 169La215, 124S832; 173Minn322, 217 NW342; 308Mo 584, 274SW466; Mo 30 SW(2d)447; 285Pa289, 132A370; 34 PortoRico 439; 108WVa9, 150SE219. **Provision held not within title.**–198 Ind 187, 152NE800; 88PaSuper216. **Acts held invalid.**–169La785, 126S61; 225Ky 294, 8SW(2d)428; 246Mich393, 224NW 402. **Nature and character of penalty** provided in body of act need not be set forth in title. 143 Okl 8, 286P883. **Provisions held unconstitutional.**–Ind 168 NE453; 13PaDist&Co 688.

1036–53 214Ala47, 106S175.

1036–53½–New. Law making seduction a felony adopted as section of code not violative of constitutional provision. 160Ga545, 128SE743.

1036–54 103CalA698, 284P1070; 159La 872, 106S364; 155Md13, 141A383; 74 Mont428, 240P978 (statute increasing punishment for unlawful transportation or possession of intoxicating liquor); NJ 141A591; OklCr 274P684; OklCr 278P209(2dcase); 133 Or632, 290P1094; 150SC452, 148SE474; 159Tenn446, 19 SW(2d)279; Utah 289P100; 103WVa 34, 136SE504. **Amended act prohibiting sale of intoxicating liquors** held not broader than title. 160La162, 106S731. **Title of act prohibiting manufacturer of intoxicating liquors** held not made less indicative of object by amendment. 160La162, 106S731.

1036–55 5PaDist&Co 80; 8PaDist&Co 702; 8PaDist&Co 704.

1036–56 31F(2d)644; Cal 289P160; 160Ga189, 127SE612 (term of office); 248Mich272, 226NW899 (transfer of duties and powers from one department to another); 171Minn191 213NW904, 54 ALR495; 50SD293, 209NW545 (civil administrative code); 159Tenn321, 17 SW(2d)901.

1036–57 48SD375, 204NW905 (title of statute, consolidating land settlement board and rural credit board, held single, though expressed in separate items).

1036–58 Cal 290P451; 155Tenn70, 290 SW608; 157Tenn429, 7SW(2d)40. **Statute providing method of** financing new buildings by state educational institutions, though title is unnecessarily detailed, is not invalid. 225Ky205, 7 SW(2d)1046.

1036–59 199Cal 506, 250P182; 168La 1005, 123S655, 67ALR1183; 114 Okl 38, 241P178. **Appropriation acts cannot fix salaries.**–316Mo 272, 289SW338. **Statute injecting general legislation into appropriations act** held void. 316Mo 272, 289 SW338. **Statutory provision appropriating public money** to reimburse depositors for losses sustained held insufficiently expressed in title. Nebr 231 NW703.

1036–63 176Minn472, 223NW912; 52 SD229, 217NW218.

1037–64 See also 48SD375, 204NW905.

1037–65 Statutes held valid.–198Cal 23, 243P429 (statute providing for completion, construction and equipment of public buildings); 196Wis518, 220NW 816. **Statute not broader than title.**–170La851, 129S368.

1037–66 217Ala458, 116S662; 69CalA 347, 231P754; 129Kan834, 284P618; 121 Okl 18, 247P15; SD 225NW228.

1037–67 95Fla530, 116S449; 154Md620, 141A410; 121 Okl 18, 247P15.

1037–68 217Ala311, 116S695. **Statute held valid.**–235Ky86, 29SW(2d)583.

1037–69 200Cal 277, 252P1043 (title held sufficient); 95Fla530, 116S449; 152Md343, 136A754; 137Misc341, 242 NYS142 (holding title not to embrace more than one subject matter).

1038–70 220Ala286, 125S387; 23AlaA

343, 125S385; 201Cal 414, 257P515; 44 Ida671, 258P1075; 48 Ida514, 283P41 (invalid); Nebr 209NW741 (title held sufficient); 114Nebr813, 210NW273 (title of Civil Administrative Code held sufficiently comprehensive to include statutes relative to state highways); NJSup 152A79; 136 Okl 191, 276P769; 138 Okl 225, 280P568; 119 Or264, 240 P233 (statute held valid); 295Pa538, 145A600; 137SC288, 135SE153; 152SC 455, 150SE269; 152Tenn451, 278SW417 (validity of act upheld). **Statutes held valid.**–33NM200, 263P510; 33NM212, 263P515 (both cases holding that statute providing for licensing and regulating operation of motor vehicles on highways); 114 Okl 269, 247P20; Utah 282 785.

1038–71 208Cal 657, 284P218.

1038–72 21AlaA295, 107S727. **Illustrations.**–21AlaA295, 107S727.

1038–73 213Ala665, 106S170; 218Ala 636, 119S837(1stcase); 92CalA646, 268 P971; 226Ky501, 11SW(2d)133; 308Mo 390, 272SW940; 105NJL511, 146A428 (2dcase). **Illustrations.**–213Ala665, 106S 170; 20AlaA450; 103S898; 200Cal 215, 252P575; 94Fla96, 113S677; 116Nebr 137, 216NW171. **Titles insufficient.**–147 Wash1, 264P1005.

1038–74 323Mo 1241, 21SW(2d)767; 69 Utah10, 251P1070; Wash 290P987.

1038–75 322 Ill 174, 152NE597; 328 Ill 512, 160NE60; 333 Ill 606, 165NE 217, 62ALR912; 121 Okl 193, 249P381; 143 Okl 275, 288P938; 156SC77, 152SE 816.

1038–76 210Ky199, 275SW385 (restriction in title limited application of statute to cities of five thousand population or more); 313Mo 160, 282SW34.

1038–77 198Cal 308, 245P164 (street opening act held valid); Ga 155SE202; Ind 166NE270; Kan 289P955; 229Ky 752, 17SW(2d)1031; 231Ky490, 21SW (2d)804; 158La439, 104S200; 170La 326, 127S739(2dcase); 313Mo 693, 282 SW702; 136 Okl 113, 277P226; 123 Or 180, 261P895, 58ALR665; 291Pa216, 139A860; 155Tenn70, 290SW608 (regulating use of land). **Amending statute held invalid as not germane to original statute.** 115Nebr711, 214NW647. **Acts held invalid.**–TexCivA 23SW(2d)848.

1040–78 218Ky429, 291SW782. **Title of act "authorizing" city to provide by ordinance for payment of indebtedness** held not to give notice of mandatory character of act. 85PaSuper228.

1040–80 335 Ill 106, 166NE488.

1041–81 219Ala1, 121S696; 163Ga924, 137SE397; 250NY429, 165NE836; 159 Tenn16, 15SW(2d)739; 160Tenn403, 23 SW(2d)897 (annexing territory). **Particular area to be included within city** need not be indicated in title. 159Tenn 16, 15SW(2d)739.

1041–86 239Mich340, 214NW193 (village); 52SD516, 219NW122; 152Tenn 518, 279SW387 (section relating to improvements not within title held invalid); 153Tenn393, 284SW370 (amendatory act). **Agencies, instrumentalities, way and means for support of corporation and conduct of its affairs** and appropriate powers all of which are naturally and ordinarily appurtenant to municipal corporation may properly be included under such general title. 152 Tenn518, 279SW387.

1042–87 89Fla138, 103S418.

1042–89 73Mont586, 238P585 (act abolishing county not named in title held invalid).

1042–90 200Cal 277, 252P1043; 31NM7, 240P482 (irrigation districts); 153SC 217, 150SE691; TexCivA 285SW345. **Mere exclusion by subsequent act** of counties not mentioned in title does not affect validity of act creating poor relief districts. 293Pa398, 143A127. **Statutes held not unconstitutional.**–293Pa 398, 143A127.

1042–90½–New. Statute defining powers of county supervisors over roads and highways of county is held valid. 67 CalA328, 227P664.

1042–90½–New. "An act concerning townships" is notice that there may be in act something which affects interested persons, and ordinarily satisfies requirements. 294Pa569, 144A751.

1042–94 Ariz 288P1034; 206Cal 148, 273P797; 168Ga868, 149SE207 (tax assessors); 170Ga800, 154SE388(2d case); 335 Ill 123, 166NE526; 167La907, 120S593; 248Mich587, 227NW665(2d case); 309Mo 595, 274SW749 (creating county board of paroles); 287Pa 342, 135A308; 48SD375, 204NW905; 49 SD549, 207NW550 (statute authorizing employment of counsel by rural credit board held invalid); 50SD107, 208NW 576 (regulating deposit of public funds); 68Utah251, 249P1016, 1029 (cit Cyc). **Statutes held invalid.**–139 Okl 12, 280P1078 (provision authorizing removal). **Provision for nomination** of county commissioners is invalid where not within title of act relating to primary elections. 99Fla1070, 128S478.

1042–94½–New. their eligibility, 130 Misc124, 222NYS676.

1043–95 21AlaA37, 104S885; 225Ky 389, 9SW(2d)51; Nebr 231NW701; 130 Misc124, 222NYS676 (retirement on pension); 152Tenn258, 277SW71; 68Utah 251, 249P1016, 1029 [citCyc]. But see 119Kan861, 241P241.

1043–96 208Cal 770, 284P1105(2dcase). See also NJ 143A822(2dcase). **Acts held invalid.**–TexCommnA 24SW(2d)389.

1043–97 226Ky89, 10SW(2d)615; Tex CommnA 11SW(2d)163.

1043–98 200Cal 637, 254P570; 122Kan 701, 253P251; 245Mich285, 222NW761; 116Nebr249, 216NW828; 44 OklACR 180; Pa 151A801; 151SC99, 148SE726 (authorizing bond issue to pay school indebtedness); 153SC106, 149SE760 (creating high school district); 48SD 641, 205NW706 (title held not germane); 154Tenn105, 289SW363, 53ALR821 (statute forbidding teaching of evolution); TexCivA 280SW1070; TexCivA 286SW501 (annexation of school districts); TexCivA 2SW(2d)889.; TexCivA 8SW(2d)230. **Title held too restrictive.**–152Tenn59, 274SW551. **Acts held invalid.**–232Ky434, 23SW(2d)948; 157 Tenn295, 8SW(2d)366; TexCommnA 24 SW(2d)37.

1043–98½–New. Act providing for diversion of trust fund is invalid where title gives no hint of purpose. 218Ala 665, 120S145.

1044–99 279US340, 49SCt333, 73Led 729; 18F(2d)918; 35F(2d)386; Ariz 288 P1034; 99Fla1, 65, 115, 126S308; 99Fla 1174, 128S632; Fla 130S699; 168Ga868, 149SE207 (establishing board of tax assessors); 198 Ind356, 153NE777; Ind 172NE186; 202 Iowa1019, 210NW 139; 207 Iowa851, 224NW41; 216Ky 78, 287SW212; 116Nebr249, 216NW 828; Nebr 227NW325; 33NM633, 275 P95; 34NM250, 280P251 (transfer tax); 250NY429, 165NE836; 135 Okl 291, 275 P638; 138 Okl 295, 281P126 (invalid); 129 Or501, 278P580(2dcase); 130 Or73, 279P271; 286Pa283, 133A505; 294Pa 569, 144A751; 295Pa571, 145A797, 63 ALR1086; 297Pa44, 146A144; 14Pa Dist&Co 220; 135SC348, 132SE673 (county supply bill containing provision for expenditure for audit); 152Tenn243, 276 SW638; 159Tenn349, 19SW(2d)261; 160Tenn403, 23SW(2d)897. **Acts held invalid.**–Ida 290P714; 126Kan270, 267 P967; 137 Okl 222, 278P617; TexCivA 23SW(2d)848. **Issuance of bonds** for school purposes is broad enough as title, or part of title, to cover tax provisions to pay for bonds. 153Tenn306, 283SW 751.

1044–1 21AlaA211, 106S875 (Local Acts [1923] p 19, as amended); 22AlaA559, 118S235 [certiorari den 218Ala168, 118 S237]; 22AlaA537, 118S253 [certiorari den 218Ala2, 118S258]; 204Cal 297, 268 P352; 73CalA285, 238P780; 86CalA558, 261P1080; 89CalA390, 265P325; 99Fla1, 65, 115, 126S308; 127Kan271, 273P408; 127Kan859, 275P209; 162La956, 111S 341; LaA 129S224(2dcase); 171Minn191, 213NW904, 54ALR495; 175Minn305, 221 NW13; 319Mo 799, 6SW(2d)907; OklCr 288P390; 154Tenn412, 285SW570, 47 ALR971; 154Tenn13, 285SW589; 156 Tenn544, 3SW(2d)661. **Statute invalid.**–318 Ill 272, 149NE275. **Provision held unconstitutional.**–169La167, 124S769.

1044–2 162Ga462, 134SE103; Iowa 231 NW646(2dcase); 323Mo 138, 19SW(2d) 12 (inheritance tax); 143Wash326, 255 P371. But see 161Ga103, 129SE766. **Statutes held invalid.**–137 Okl 59, 277P 918.

1045–3 84Colo 576, 272P629.

1045–4 La 129S807; TexCivA 290SW 777. **Acts held valid.**–170Ga432, 153SE 19 (appointment of guardians and commitment of insane).

1045–5 200Cal 585, 254P946, 62ALR 1341; 168Ga723, 149SE37 (business of making loans); 331 Ill 576, 163NE466; 339 Ill 132, 171NE154 (title as to barbers not applicable to beauty shops); 196 Ind229, 147NE778; 207 Iowa65, 222NW 426; NJSup 151A205; 115Tex446, 283 SW479; 115Tex455, 283SW475. **Acts on the following subjects** were valid: Trapping, shipping, and transporting of furs (131SC511, 127SE574); billiard and pool rooms (131SC471, 128SE410); hop picking (116 Or310, 241P50); workmen's compensation (82CalA610, 256P 447; 78Colo 399, 242P49); money lenders (82Colo 163, 258P223); manufacture and sale of intoxicating liquor (318 Ill 198, 149NE294; 324 Ill 530, 155NE294); meat inspection (149Md648, 132A160); commission merchants in farm products (315Mo 823, 290SW416); authorizing commissioners of state bar to investigate charges against attorneys (45 Ida 676, 266P665); architecture and engineering (157Tenn157, 7SW(2d)47); giving state lien for unpaid industrial insurance premiums (147Wash86, 265P 167); attorneys (23AlaA5, 120S140); transportation by motor vehicles (SD 228NW179); licensing plumbers (168La 742, 123S310); loans (Ga 154SE780; 168 La761, 123S317, 69ALR574); barbering (161Tenn293, 30SW(2d)601). **Act purporting to regulate business cannot forbid business it purports to regulate.**–214Ala38, 106S231. **Act regulating business may validly provide penalty for violation of regulations.**–214Ala38, 106 S231. **"Govern and regulate" in title of act** creating department of agriculture and industries held broader than "regulate." 214Ala38, 106S231. **Title to act regulating public auctions of jewelry** held not to fail to express its subject where act is regulatory. 214 Ala236, 107S86. **Provision in Workmen's Compensation Act** providing for assignment by workman and suit by state held germane to title. 146Wash 305, 262P977.

1046–6 203Cal 106, 263P1017. **Statute purporting to give husband right to dissent from wife's will** and take as sole survivor is held invalid because of inaptness of title. 152Tenn329, 278SW 967.

1046–7 84Colo 279, 269P894; 116Nebr 137, 216NW171.

1046–7½–New. general landlord's crop liens, 160Tenn653, 28SW(2d)633.

1046–8 206Cal 148, 273P797 (act relieving littoral owners of onus of trespassers in entering on tide or submerged lands in prospecting for minerals); 75 CalA323, 242P887; 114Tex535, 273SW 799.

1046–9 104CalA528, 286P504 (provision for recording of mechanics lien held germane to Land Title Law).

1046–10½–New. right of eminent domain, 319 Ill 66, 149NE580.

1046–11 203Cal 106, 263P1017; 13Pa Dist&Co 704; 147Wash463, 266P723. But see 9PaDist&Co 5.

1047–12 31Ariz389, 254P225; 173Ark 464, 292SW693; CalA 290P116; 97Fla 749, 122S239; 177Minn398, 225NW435; 115Nebr435, 213NW578; 50Nev125, 253 P671 (title held to cover provisions as to watering cattle on range); 238Pa81, 135A651 (license on dogs). **Statutes held invalid.**–318 Ill 272, 149NE275; TexCivA 27SW(2d)340 (provision as to range of live stock not in title); 103WVa23, 136SE505 (prohibiting keeping of dog by unnaturalized foreign born resident).

1047–13 92Fla837, 110S533; 93Fla603, 112S556; Va 154SE477.

1047–14 Wis 231NW273.

1047–14½–New. Cemeteries.–Provisions of statute relating to cemeteries held germane to title. 160Tenn468, 26SW (2d)132.

1047–15 228Ky349, 14SW(2d)1098; Mo 31SW(2d)7; 108WVa299, 150SE738 (Uniform Conditional Sales Act).

1048–16 287Pa376, 135A362; 153Tenn 393, 284SW370 (may include power of eminent domain).

1048–17 200 Iowa1293, 206NW297; 126 Kan764, 271P270.

1049–18 279US429, 49SCt380, 73Led 731; 29F(2d)604; 97CalA138, 275P453; 42 Ida169, 244P149; 329 Ill 34, 160NE 160; 118 Or5, 244P512 (provision for punishment of persons aiding officers of bank in misapplication of its funds held authorized by title expressing as subject "regulating the business of banking"); 290Pa380, 138A915; 8Pa Dist&Co 709; SD 229NW294; 152Tenn 97, 275SW340 (compliance with statutory provisions as condition of doing business in state). **Title referring to carriers by motor vehicles** held to apply only to carriers for hire. 49SD197, 207 NW92. **Statutes authorizing merger and sale of properties** held to conform to title requirements. 287Pa376, 135A362.

1050–24 319Mo 865, 6SW(2d)954; 49 SD197, 207NW92 (title need not name tribunal authorized to determine whether corporation is carrier for hire). **Statutes held invalid.**–TexCivA 266SW809.

1050–25 16F(2d)100 (authorizing lease).

1050–25½–New. Dissolution of corporations.–Statute relative to dissolution of corporations, judgments of dissolution, and appeals therefrom, held sufficient and not misleading. 307Mo 137, 270SW339.

1050–26 Title of act held inapt.–200 Cal 585, 254P946, 62ALR1341.

1051–27 318 Ill 198, 149NE294; 324 Ill 55, 154NE430; 326 Ill 230, 157NE195; 196 Ind229, 147NE778; 196 Ind643, 148 NE146; 197 Ind463, 150NE365 (provision in statute declaring place where liquor is kept common nuisance held within title of act); 197 Ind374, 151NE98; 198 Ind718, 153NE765 (possession of still); 198 Ind502, 154NE273; 198 Ind541, 154 NE384; 199 Ind49, 155NE209; 225Ky 112, 7SW(2d)839; 159La888, 106S369; 161La296, 108S543; 162La938, 111S335; 318Mo 585, 300SW826; 321Mo 58, 12SW (2d)742; 115Nebr119, 211NW619 (bootlegging statute of 1925 held consistent with its title and with title and subject matter of original law of which it is an amendment); 31NM220, 243P333 (prohibiting all acts or omissions prohibited by National Prohibition Act and providing for enforcement of Eighteenth Amendment to federal constitution); 39 OklACR221; 120 Or90, 250P633, 251P 307 (possession); 292Pa127, 140A858; 82 PaSuper362. **Act "concerning intoxicating liquor"** and dealing with vehicle transportation thereof held to sufficiently express subject in title. 197 Ind374, 151NE98. **Statute prohibiting receiving intoxicating liquor from carrier and unlawfully possessing same** held within subject expressed in title. 198 Ind502, 154NE273. **Body including definitions** held not broader than title, so as to make act unconstitutional. 162La471, 110S723. **Title need not express intent to define intoxicating liquor.**–161La296, 108S543. **Use of term "bootlegging"** in title does not render statute indefinite or uncertain. 115Nebr119, 211NW619. **Act relating to maintenance of liquor nuisance** held within title prohibiting manufacture and sale. 198 Ind61, 152 NE274. **Title sufficient to cover reasonable method of accomplishing object of act.**–225Ky112, 7SW(2d)839. **Acts held not unconstitutional.**–297Pa498, 147A 527.

1052–28 324 Ill 55, 154NE430; 161La 296, 108S543; Wash 292P430.

1052–29 196 Ind384, 148NE412; 103 NJL323, 136A741; 35Wyo 430, 251P460.

1052–30 31F(2d)946(1stcase); 99Fla 1311, 128S853(2dcase).

1053–35 179Ark719, 18SW(2d)362; Tex CivA 272SW577, 581 [quotCyc]. **It is the effect,** etc. 113 OhSt482, 149NE405. **Act creating new offense,** complete in itself, is not amendment within provision requiring republication, though it gives to new offense name of old offense defined in other statute. 209Ky184, 272 SW430 (use of vehicle of another as grand larceny).

1054–37 7F(2d)628 (power of legislature to authorize commission to contract as to rates of public utility cannot control subsequent legislature); 31Ariz252, 252P515; 33Ariz76, 262P616.

1054–39 109TexCr261, 4SW(2d)43.

1054–40 31Ariz252, 252P515; 34Porto Rico 441; 157SC419, 154SE410.

1054–41½–New. Amendment of referendum measures.–Referendum measure "Within constitutional provision making such measures amendable only by popular vote" is one duly enacted by legislature and thereafter referred to and adopted by people. 50Nev302, 258P291.

1054–41½–New. Amendment of initiative acts.–Law enacted by people in conformity with Nevada constitutional provision for initiative and referendum cannot be amended by direct vote of people. 50Nev302, 258P291.

1054–41¼–New. Such acts are subject to amendment by legislature. 50Nev302, 258P291 (Nevada statutes [1923] c 214 held initiative and not referendum measure).

1054–41⅓–New. Statute held not void as not purporting to amend existing law but merely proposing initiative measure. 50Nev302, 258P291.

1054–41⅙–New. Legislative act may not be amended by resolution for amendment voted on at general election. 137Misc376, 241NYS675.

1054–42 TexCivA 19SW(2d)190. **Amendment by reference to Code section held proper.**–200Cal 550, 254P542.

1054–42½–New. No act may be amended unless new act contains section or sections amended in some states. 123 Kan378, 255P60.

1054–43 Amendment of law by general law.–195NC71, 141SE481. **Deliberate selection of language radically different from that used in earlier acts** indicates intention to change law. 39F (2d)338.

1055–44 14PaDist&Co 372; 101WVa 178, 132SE504.

1055–46 200 Ind307, 163NE225.

1055–47½–New. Legislative grant cannot be amended unless right to do so is clearly and explicitly reserved. 33 Ariz76, 262P616.

1055–47½–New. Acts submitted to people for approval under referendum are subject to amendment by legislature. 88CalA621, 264P298.

1055–48 35F(2d)43; 83Colo 43, 262P 907; 99Fla496, 126S117 (amending act void purporting to amend unconstitutional statute); Ind 154NE12; Ind 168 NE10. **Repealed statute** cannot be amended. 78Mont1, 252P301.

1055–50 152Tenn306, 278SW59 (statute held repealed by revising statute on same subject).

1055–51 171Ark427, 285SW20; 209Ky 815, 273SW500, 501 [citCyc]. **Amendment eliminating objectionable provisions.**–78Mont1, 252P301. **Objection to statute because of defect in title** is remedied by amendment avoiding constitutional objections. 241Mich464, 217NW1. **Amendment remedying defects in original act** is constitutional. 242Mich491, 219NW724.

1056–54 A statute amending a repealed statute "so as to read as follows," etc. 209Ky815, 273SW500.

1056–56½–New. Amendment supplying definitions previously defined by reference is not invalid as amending unconstitutional act. 162La471, 110S723.

1056–56¼–New. Effect of statute amending superseded statute is to reenact superseded statute. Wash 287P 675.

1056–56¼–New. Statute is not unconstitutional because it attempts to supplement statute previously repealed. NJ 151A869.

1056–57 47 Ida712, 278P214(2dcase); 48 Ida632, 284P259; 317 Ill 264, 148NE 7; 330 Ill 97, 161NE133; 201 Iowa1050, 205NW543 (unless it is very manifest that legislature would have abrogated entire statute had it foreseen unconstitutionality of amendment); 228Ky468, 15SW(2d)276; Mass 168NE536; 246 Mich393, 224NW402; 146Miss593, 111 S595; 224AppDiv100, 229NYS657; 57 ND310, 221NW883; 138 Okl 266, 280P 797; 50Philippine348.

1057–58 195Cal 91, 231P561 (amendment of 1923 to Alien Land Law held germane to original act).

1057–60½–New. Existing statute cannot be restricted by anything short of constitutional enactment. 278US515, 49 SCt235, 73Led483.

1057–61 Ill 173NE355; 154Tenn208, 285S582. **Amendatory act construed as new law.**–200Cal 637, 254P570.

1058–64 288Pa29, 135A645.

1058–64½–New. Amendment to statute authorizing imposition of tax will not be deemed material unless it broadens scope of amended act or materially affects its financial features. 190NC96, 129SE184.

1058–64⅓–New. Act amending statute so as to read as repeated in amendatory act repeals unrepealed portions, but portions retained are regarded as continuation of old law. 326 Ill 204, 157NE164.

1058–64¼–New. Amended section ceases to exist and section as amended becomes part of statute. 146Va46, 135SE 826.

1058–64½–New. Existing law must give way sufficiently to enable latest law to be effective, and must be regarded as amended by implication to that extent. 10LaA149, 119S558.

1058–65 200Cal 550, 254P542; 154Tenn 208, 285SW582; 155Tenn549, 296SW20. **Act amending another by implication** may so operate without reciting title or substance of former law and without reference thereto. 155Tenn549, 296SW 20. **Statutes held not to violate requirement.**–155Tenn549, 296SW20 (relating to driving while intoxicated). **Both title and substance of amended act need not be recited,** under constitutional provision, but recital of either is sufficient. 159Tenn435, 19SW(2d)249. **"Substance" is synonymous with word "subject,"** as used in constitutional provision requiring act amending former law to recite title or substance of law amended. 159Tenn435, 19SW(2d)249.

1058–66 29Ariz582, 244P376; 200Cal 550, 254P542; 205 Iowa154, 213NW 517; 159Tenn446, 19SW(2d)279; 104 TexCr384, 283SW807. **Titles of amendatory acts held sufficient.**–159Tenn435, 19SW(2d)249. **Substance sufficiently stated.**–160Tenn664, 28SW(2d)635.

1058–67 200Cal 550, 254P542; 116 Or 310, 241P50; 119 Or613, 250P233, 235 [citCyc] (reference to particular section).

1059–68 235Mich206, 209NW87; NJSup 143A822(2dcase); 116 Or310, 241P50; 119 Or613, 250P233, 235 [citCyc]; 286 Pa283, 133A505.

1059–72 101WVa178, 132SE504.

1060–73 An independent act, complete in itself, etc. 159Tenn699, 22SW(2d) 236.

1060–75½–New. Legislature's disregard of code provision requiring reference to amended statute held not to invalidate amendment. Iowa 232NW477.

1060–76 40F(2d)827; 29Ariz582, 244P 376; 69CalA347, 231P754; 163Ga374, 136SE207; 163Ga784, 137SE24; 163Ga 924, 137SE397; 318 Ill 198, 149NE294; 320 Ill 382, 151NE250; 329 Ill 120, 160 NE163; 334 Ill 256, 165NE602; 209Ky 101, 272SW43; 224Ky184, 5SW(2d) 1062; 146Miss66, 111S850; 146Miss351, 111S860; 309Mo 520, 528, 275SW36 [cit Cyc]; 117Nebr42, 219NW794; Nebr 227 NW325; 121 Okl 18, 247P15; OklCr 290 P197(2dcase); 290Pa380, 138A915; 299 Pa297, 149A490; 85PaSuper463; 5Pa Dist&Co 80. **Amendments held not invalid under this constitutional provision.**–23AlaA5, 120S140; 29Ariz582, 244 P376; Ariz 288P1034; 180Ark311, 22 SW(2d)41; 181Ark560, 26SW(2d)878; Ark 31SW(2d)427; 163Ga374, 136SE 207; 163Ga784, 137SE24; 163Ga924, 137SE397; 166Ga561, 144SE109; 320 Ill 382, 151NE250; 329 Ill 34, 160NE 160; 331 Ill 20, 162NE113; 126Kan166, 267P2; Ky 7SW(2d)827; Ky 9SW(2d) 1006; 148Miss384, 114S617; Nebr 228NW 852; 34NM217, 279P947; 133 Okl 228, 271P253; 136 Okl 191, 276P769; Wash 292P430. **The object of the provision,** etc. 29Ariz582, 244P376; 148Miss13, 113S898. **Mere reference to old act** for fine under new penal law held insufficient. 146Miss66, 111S850. **Statutes held not**

invalid.–318 Ill 230, 149NE297.

1061–77 29Ariz582, 244P376, 379 [cit Cyc]; Ark 31SW(2d)427 (applicable only where act strictly amendatory); 206Cal 480, 275P219; 237Mich481, 212 NW105; 114Nebr812, 210NW273. **Where one or more sections only are amended, they alone must be set forth in full as amended.** 29Ariz582, 244P 376. **Amendments held invalid under this constitutional provision.**–88PaSuper 321. **That act conflicts with previous acts does not bring it within constitutional inhibition.** Wash 290P987.

1062–78 29Ariz582, 244P376, 379 [cit Cyc]; 331 Ill 544, 163NE355; 225Ky 86, 7SW(2d)827. **Reference to sections of a code by number, etc.** See also 201 Iowa1, 206NW821.

1063–79 221Ala389, 128S776; 94Fla96, 113S677; 44 Ida671, 258P1075, 1077 [quotCyc]; 318 Ill 198, 149NE294; 210 Ky482, 276SW143; 148Miss13, 113S 898; 148Miss384, 114S617; 156Miss46, 125S563(2dcase); Mo 31SW(2d)7; 114 Nebr100, 206NW159; 33NM553, 273P 928, 62ALR296.

1064–80 Ark 31SW(2d)427; 44 Ida671, 258P1075, 1077 [quotCyc]; 321Mo 1015, 13SW(2d)1056; 131 Or57, 279P534. **Incorporation by reference of provisions of earlier act,** in so far as they are applicable to subject matter of new act, is not amendment within rule. 69CalA 347, 231P754.

1064–81 23AlaA553, 125S800(2dcase); 181Ark391, 26SW(2d)92; CalA 265P 879; 44 Ida671, 258P1075, 1077 [quot Cyc]; 329 Ill 120, 160NE163; 210Ky 482, 276SW143; 225Ky324, 8SW(2d) 392; 237Mich481, 212NW105; 114Nebr 813, 210NW273; 121 Okl 18, 247P15; 125 Okl 273, 257P785; 290Pa427, 139A 136; 290Pa573, 139A374; 149Wash242, 270P816. **Adoption of provisions of former statute by reference** does not constitute amendment within constitutional prohibition. 114Nebr813, 210NW 273.

1064–82 Ariz 289P515; 44 Ida671, 258 P1075, 1077 [quotCyc]; 248Mich150, 226 NW910; 133 Okl 228, 271P253, 255 [quotCyc]. **Supplementary statutes held not within provision.**–NJL 142A559.

1064–83 44 Ida671, 258P1075, 1077 [quotCyc]; 338 Ill 533, 170NE664.

1064–84 133 Okl 228, 271P253, 255 [quotCyc].

1064–85 32F(2d)338; 221Ala389, 128S 776 (holding Five Gallon Law original and not amendatory); 179Ark719, 18 SW(2d)362; 318 Ill 198, 149NE294; 320 Ill 382, 151NE250; 335 Ill 136, 166NE 451; 335 Ill 106, 166NE488; 210Ky482, 276SW143; 148Miss13, 113S898; 148 Miss384, 114S617; 307Mo 137, 270SW 339; 114Nebr100, 206NW159; Nebr 209 NW741 (reference to prior act held not amendment of latter); 138 Okl 225, 280 P568; 290Pa427, 139A136; Wash 292 P430. **But where the act,** etc.–329 Ill 120, 160NE163. **Acts held valid.**–318 Ill 198, 149NE294 (Prohibition Act). **Acts held not within provision.**–166Ga 561, 144SE109. **Statute not purporting to amend or repeal any law** is not within constitutional provision prohibiting amendment or repeal by reference to title or section. 166Ga561, 144SE 109.

1066–87 162Ga195, 133SE847; 248Mich 272, 226NW899; 124 Okl 228, 255P582; 83PaSuper463; 152Tenn166, 274SW544; 155Tenn184, 290SW977 (amending act void where from words used object to be accomplished not determinable). **Misdescription of act sought to be amended** will not vitiate amending act where means of identification of act sought to be amended, apart from erroneous description, are clear, certain, and convincing. 162Ga195, 133SE847.

1066–88 85PaSuper463.

1066–89 85PaSuper463.

1066–90 200Cal 637, 254P570. **Reference to code section with subject expressed held sufficient.** 200Cal 637, 254 P570.

1066–91 312Mo 157, 279SW33 (where article referred to bore no reference to subject of amendment). See also 155 Tenn184, 290SW977.

1066–93 Ariz 289P515.

1067–95 Ratification of action of code commissioners.–57ND768, 224NW680. **Mere codification of statutes** every ten years does not change applicability of statute as originally enacted. MoA 26 SW(2d)1011.

1067–96 154SC129, 151SE279; 114Tex 457, 270SW1011; TexCommnA 25SW (2d)610. **Codification implies compilation of existing laws and revision** to harmonize conflicts and to supply omissions and make complete laws designed to regulate subjects to which they relate. 214Ala38, 106S231. **New matter included in code is enacted** as law by adoption of code. 214Ala38, 106S231. **Where scheme of revision** is to continue existing laws together with changes necessary to make them more effective or to harmonize them, the revisal laws will not usually operate as a repeal. 192 NC202, 134SE651. **Mere act of dividing an existing section of law** and printing its parts in the code as separate sections works no change in meaning of law. 205 Iowa30, 215NW758.

1067–97 TexCivA 286SW531; 144Va56, 131SE437, 439 [quotCyc]. **Presumption is that revision was not intended to change old law,** unless contrary intention plainly appears. 143Va572, 130SE 383. **Special statute is not presumed to be amended** by subsequent general statute on same subject. 158La251, 103S 757.

1068–98 40F(2d)474; 128Me96, 145A 896, 64ALR790; 52SD352, 217NW542, 544 [citCyc]; TexCivA 286SW531; 99 Vt50, 130A756; 99Vt499, 134A700; 144 Va56, 131SE437, 439 [quotCyc].

1068–99 Adoption of change of codifying commission renders valid statute as so adopted. 109TexCr140, 3SW(2d)448.

1068–2 112TexCr152, 15SW(2d)650.

1068–3 98Fla66, 123S540; 75Mont369, 243P1093 (amendment relating to official bonds declared invalid, and included inadvertently in adopted revision of code not intended to be approved by legislature).

1068–4 315Mo 791, 287SW307; 114Tex 457, 270SW1011 (void law rendered valid).

1068–5½–New. Amendment not reproduced in revision incorporating original is ineffective. 148SC118, 145SE695.

1068–5¼–New. Statute adjudged repugnant to Organic Act held effective by inclusion in subsequent code under constitution. 144 Okl 231, 291P95.

1068–6 179Ark719, 18SW(2d)362.

1068–6½–New. Effect of repeal.–Where statute has been repealed it is as if it had never existed and is void for all purposes. 78Mont1, 252P301.

1069–7 31Ariz252, 252P515; 161Tenn 236, 30SW(2d)268; 144Va65, 131SE334 (power to enact is power to repeal).

1069–8 31Ariz252, 252P515; 33Ariz76, 262P616; Conn 151A518; 207 Iowa923, 223NW737; Iowa 232NW477; 225Ky 303, 8SW(2d)383; 232Mich255, 205NW 86; 117Tex516, 8SW(2d)655.

1069–11½–New. Statute providing that rights accrued under statute are not affected by repeal is not unconstitutional as attempt to limit or bind acts of future legislature. 31Ariz252, 252P515.

1069–11¼–New. Such statute is in full force and effect until repealed. 31Ariz 252, 252P515.

1069–11¾–New. Effect of repeal is as though statute had never existed. 81 Mont19, 261P876.

1069–14 21F(2d)226; 179Ark280, 16 SW(2d)581; 200Cal 522, 254P896; 52 ND120, 201NW856. **Repeal by express enactment** and not by implication. 29 OhA364, 163NE585. **No custom can effect repeal.**–135Misc796, 238NYS463.

1069–14½–New. Nullity needs no repeal. 125Misc678, 211NYS749.

1069–15 174Ark503, 295SW404; 200Cal 522, 254P896; 52ND120, 201NW856; 52 ND420, 203NW317; TexCommnA 274 SW127. **Even words of absolute repeal,** etc. TexCommnA 274SW127.

1070–16 88PaSuper399.

1070–18 Clerical error in inserting statute in schedule of repeals does not have effect of repealing such statute. 177 Ark249, 6SW(2d)283.

1070–20 Acts held not invalid.–166Ga 561, 144SE109.

1071–22 21F(2d)226; 196 Ind175, 147 NE711; 159Tenn446, 19SW(2d)279.

1071–24 168Ark174, 269SW567; 174 Ark503, 295SW404; 83Colo 43, 262P907; 127Kan166, 272P132; 241Mich457, 217 NW334; 167Minn286, 209NW9; 315Mo 1320, 289SW935; 52Nev379, 287P957; 217AppDiv213, 216NYS529; 190NC157, 129SE414; 52ND120, 201NW856; 114 Okl 163, 245P584. **Effect of implied repeal.**–83Colo 43, 262P907. **Equivalence of express and implied repeal.**–250Mich 349, 230NW202.

1071–25 8F(2d)439; 15F(2d)697; 19F (2d)35; 21F(2d)226; 24F(2d)619; 24 F(2d)622; 27F(2d)176; 31F(2d)583; 35F(2d)78; 36F(2d)309; 37F(2d)330; 12CustA121; 219Ala119, 121S398; 23 AlaA74, 121S693(3dcase); 7Alaska126; 30Ariz218, 245P677, 46ALR828; 33Ariz 1, 261P629; 35Ariz511, 281P207; Ariz 285P1034; 168Ark829, 274SW5, 279SW 366; 170Ark10, 278SW649; 170Ark880, 281SW678; 171Ark943, 287SW163 (Arkansas statutes relating to ferries and bridges construed); 173Ark1004, 293SW 1021; 177Ark157, 6SW(2d)23; 180Ark 387, 21SW(2d)867; 180Ark964, 23SW (2d)990; 200Cal 522, 254P896; 77CalA 404, 247P527; 80CalA533, 251P945; 87 CalA552, 262P348; 92CalA646, 268P971; 100CalA325, 279P1048; CalA 291P670; 84Colo 521, 272P3; 86Colo 249, 281P117; 164Ga336, 138SE767; 164Ga1, 137SE400; 43 Ida180, 250P239; 316 Ill 425, 147NE 449; 317 Ill 203, 148NE69; 324 Ill 243, 154NE896; 332 Ill 346, 163NE781; 332 Ill545, 164NE20; 198 Ind79, 151NE385; 198 Ind95, 151NE411; Ind 154NE12; 200 Ind307, 163NE225; Ind 173NE229; 87 IndA580, 158NE523; 200 Iowa261, 204NW439; 124Kan66, 257P971; 129 Kan1, 281P938; 129Kan601, 284P807; 215Ky573, 286SW793; 226Ky633, 11SW (2d)702; 229Ky186, 16SW(2d)1034; 229 Ky452, 17SW(2d)440; 235Ky24; 29SW (2d)619; 160La407, 107S286; 162La39, 110S81; 162La823, 111S177; 164La482, 114S104; 8LaA654; 151Md167, 134A317; Mass 169NE803; 241Mich457, 217NW 334; 248Mich297, 226NW907; 251Mich 528, 232NW375; 166Minn202, 207NW 309; 167Minn286, 209NW9; 174Minn 509, 219NW872; 142Miss1, 106S886; 142 Miss660, 107S881; 149Miss139, 114S 803; Mo 271SW992 (if it can be consistently avoided, courts will not adjudge statute repealed by implications); 312Mo 581, 280SW37, 42 [citCyc]; 315 Mo 791, 287SW307, 309 [quotCyc]; 319 Mo 976, 5SW(2d)83, 88 [citCJ]; 321Mo 378, 11SW(2d)268; 220MoA193, 282SW 498; 81Mont86, 261P885; 82Mont304, 266P1103; Mont 287P624; Nebr 230 NW503; 50Nev181, 254P1080; 52Nev 232, 286P119; 104NJL280, 140A683; NJCh 145A462; 224AppDiv58, 229NYS 140; 128Misc630, 219NYS662; 130Misc 217, 224NYS267; 217AppDiv213, 216 NYS529; 190NC732, 130SE861 (will be avoided if possible); 192NC202, 134SE 651; 195NC424, 142SE474; 49ND201, 190NW818; 51ND778, 201NW167; 52 ND120, 201NW856; 54ND220, 209NW 225; 114 Okl 163, 245P584; 121 Okl 190, 249P408; 132 Okl 152, 269P1084, 60ALR837; 119 Or141, 248P358; 120 Or134, 251P761; 121 Or4, 252P552; 287Pa251, 134A377; 288Pa152, 135A 908; 300Pa384, 150A638; 88PaSuper 250; 6PaDist&Co 163; 8PaDist&Co 378; 44Philippine1; 44Philippine138; 32PortoRico 5; 32PortoRico 442; 53SD 350, 220NW918; SD 232NW47; 160 Tenn403, 23SW(2d)897; TexCommnA 283SW146; TexCommnA 15SW(2d) 1033; 118Tex463, 16SW(2d)1063; Tex CivA 275SW719; TexCivA 16SW(2d) 968; TexCivA 26SW(2d)405; 142Va313, 128SE570; 146Va175, 135SE813; 144 Wash124, 257P231; Wash 286P89; 103 WVa634, 138SE199; 34Wyo 349, 244P 135. **Rule has no application to repugnant statutes.** 200 Iowa261, 204NW 439.

1072–26 8F(2d)439; 21F(2d)226; 171 Ark415, 285SW16; 180Ark96, 21SW(2d) 406 (acts passed at same session); 102 CalA635, 283P862; 224Ky730, 6SW(2d) 1114; 225Ky394, 9SW(2d)55; 164La 632, 114S494; 151Md167, 134A317; 233

Mich619, 207NW863; 312Mo 581, 280 SW37, 42 [citCyc]; 315Mo 791, 287SW 307, 309 [quotCyc]; 319Mo 976, 5SW (2d)83, 88 [citCyc]; 50Nev181, 254P 1080; 224AppDiv58, 229NYS140; 128 Misc31, 217NYS739; 49ND201, 190NW 818; TexCommnA 283SW146; 142Va 313, 128SE570; 146Va287, 135SE673.

1072–27 21F(2d)226; 36F(2d)309; 180 Ark387, 21SW(2d)867; 102CalA635, 283 P862; 87 IndA580, 158NE523; 315Mo 791, 287SW307, 309 [quotCyc]. **When both statutes can stand together,** prior statute is not repealed. Wash 286P89.

1072–28 8F(2d)90; 21F(2d)226; 170 Ark10, 278SW649; 180Ark96, 21SW(2d) 406; 200Cal 522, 254P896; 80CalA533, 251P945; 324 Ill 243, 154NE896; 124 Kan66, 257P971; 215Ky573, 286SW 793; 233Mich619, 207NW863; 166Minn 202, 207NW309; Mo 271SW992; 312Mo 581, 280SW37, 42 [citCyc]; 315Mo 791, 287SW307, 309 [quotCyc]; 321Mo 378, 11SW(2d)268; 217AppDiv213, 216NYS 529 (inconsistent); 52ND120, 201NW 856; 123 Or137, 260P231; 44Philippine 138; TexCommnA 283SW146 (manifest). **Legislative intent controls.**–156 Tenn85, 299SW799.

1072–29 273US202, 47SCt341, 71L ed 610; 23F(2d)719; 170Ark10, 278SW 649; 77CalA404, 247P527; 164Ga336, 138SE767; 198 Ind95, 151NE411; 124 Kan66, 257P971; 216Ky567, 288SW323; 166Minn202, 207NW309; 74Mont152, 240P812; 217AppDiv213, 216NYS529 (always question of intent); 123 Or137, 260P231; 287Pa251, 134A377; 44Philippine138; SC 155SE277. **Only a necessary and irresistible implication,** etc. 51ND778, 201NW167.

1072–29½–New. Legislative intent is to be gathered from comparison of both statutes, the language of later act, and facts and surrounding circumstances. 145Va776, 134SE710.

1072–29¼–New. Where different parts of code were both intended to be given effect, no repeal of one will be presumed by amendment to the other unless repugnant. 33Ariz1, 261P629.

1073–30 8F(2d)835, 837 [citCyc]. **Act not unconstitutional for failure to** mention repeal of certain other act. 287Pa 376, 135A362.

1073–31 166Ga561, 144SE109.

1073–35 8F(2d)439; 13F(2d)673; 19 F(2d)35; 31F(2d)801; 168Ark829, 279 SW366; 169Ark33, 273SW711; 170Ark 10, 278SW649; 170Ark880, 281SW678; 172Ark480, 289SW324; 173Ark1004, 293SW1021; 176Ark187, 3SW(2d)9; 177Ark1009, 8SW(2d)469; Ark 32SW (2d)430; 200Cal 522, 254P896; 69CalA 404, 231P371; 84Colo 521, 272P3; 90 Fla264, 105S446; 97Fla127, 120S361 (2dcase); 163Ga707, 137SE626; 28 Hawaii744; 316 Ill 425, 147NE449; 318 Ill 131, 149NE18; 326 Ill 602, 158NE 422; 198 Ind79, 151NE385; Ind 173 NE229; 200 Iowa261, 204NW439; 200 Iowa1293, 206NW297; 124Kan179, 257 P975; 126Kan51, 267P23; 214Ky838, 284SW95; 218Ky794, 292SW320; 233 Ky801, 26SW(2d)1045; 235Ky24, 29SW(2d)619; 159La1001, 106S544; 162La823, 111S177 (act authorizing granting of franchises by municipalities without referendum held repealed by later act); 151Md167, 134A317; 233 Mich619, 207NW863; 315Mo 1320, 289 SW935; 319Mo 976, 5SW(2d)83, 88 [quotCyc]; Mont 287P624; 114Nebr 100, 206NW159; 83NH551, 145A786; 102NJL314, 132A75; 104NJL312, 140A 440; 128Misc31, 217NYS739; 131Misc 657, 228NYS361; 218AppDiv273, 218 NYS361; 218AppDiv443, 218NYS370; 52ND120, 201NW856; 116 Oh441, 156 NE906; 117 Oh69, 158NE81; 114 Okl 163, 245P584; 118 Or105, 244P868; 287 Pa392, 135A225; 299Pa517, 149A733; 5PaDist&Co 104; 50Philippine490; 138 SC374, 136SE487 (Motor Vehicles License Law, dealing generally with subject of motor vehicles held repealed by Labor Act requiring annual license fees); 152Tenn306, 278SW59 (statute creating definite punishment repeals former mode); TexCommnA 274SW127; TexCommnA 283SW146; 118Tex463, 16 SW(2d)1063; TexCivA 276SW466; Tex CivA 11SW(2d)242; Utah 270P543; 135 Wash315, 237P722; 140Wash636, 250P 66; Wash 236P89; 41Wyo 119, 282 P1055. **While implied repeals of statutes are not favored, there is such repeal** where there is irreconcilable repugnance between two statutes or legislature appears to have taken up whole subject anew and covered entire ground of subject matter of former statute. 177 Ark1009, 8SW(2d)469.

1074–36 33Ariz1, 261P629; 164Ga336, 138SE767; 224AppDiv58, 229NYS140; 192NC202, 134SE651; 132 Okl 150, 270 P5; 154Tenn638, 290SW381 (later special act held neither exclusive nor repugnant so as to repeal general act).

1074–37 8F(2d)90; 24F(2d)622; 219 Ala119, 121S398; 33Ariz1, 261P629, 631 [citCyc]; 170Ark10, 278SW649; 176 Ark156, 2SW(2d)56; 87CalA552, 262P 348; CalA 290P522; 164Gal, 137SE 400; 41 Ida747, 242P314, 243P654; 43 Ida180, 250P239; 317 Ill 203, 148NE69; 332 Ill 346, 163NE781; 332 Ill 545, 164 NE20; 198 Ind95, 151NE411; 124Kan 66, 257P971; 126Kan9, 266P657; 226 Ky633, 11SW(2d)702; 166Minn202, 207 NW309; 312Mo 581, 280SW37; 315Mo 1100, 287SW644; 315Mo 1320, 289SW 935; 319Mo 976, 5SW(2d)83, 88 [quot Cyc]; 321Mo 1090, 13SW(2d)1061(2d case); MoA 14SW(2d)515; 81Mont86, 261P885; 82Mont304, 266P1103; 52 Nev379, 287P957; NJCh 150A774; 194 NC388, 139SE764; 197NC249, 148SE 250; 52ND120, 201NW856; 117 Oh69, 158NE81; 114 Okl 163, 245P584; 121 Okl 190, 249P408; 287Pa251, 134A377; 300Pa384, 150A638; 5PaDist&Co 662; 44Philippine138, 147 [citCyc]; 152Tenn 675, 280SW692; 160Tenn403, 23SW(2d) 897; 118Tex463, P8SW(2d)1063; Sask [1927] 3DomLR464. **"Conflict" causing repeal is not engendered** by mere fact that there may be cases where provisions of both statutes cannot be applied effectively. 323Mo 15, 18SW(2d)474.

1076–38 168Ark1108, 273SW707; 169 Ark33, 273SW711; 168Ark829, 274SW 5; 170Ark10, 278SW649; 170Ark880, 281SW678; 172Ark480, 289SW324; 174 Ark503, 295SW404; 179Ark984, 19 SW(2d)1020; 69CalA404, 231P371; 200 Ind307, 163NE225; Ind 173NE 229; 224Ky730, 6SW(2d)1114; 231 Ky514, 21SW(2d)838; 126Me111, 136A 662; 148Miss384, 114S617; Mo 271SW 992; 323Mo 15, 18SW(2d)474; 114 Nebr 100, 206NW159; 128Misc31, 217NYS 739; 190NC157, 129SE414; 191NC584, 132SE558; 192NC202, 134SE651; 51ND 778, 201NW167; 52ND120, 201NW856; 31 OhA495, 167NE488; 114 Okl 163, 245 P584; 290Pa573, 139A374; 44Philippine138; SD 232NW47; TexCivA 19 SW(2d)604; Utah 270P543; 142Va313, 128SE570; 146Va175, 135SE813 (statute held not to repeal prior statute); 149Wash242, 270P816.

1076–39 273US202, 47SCt341, 71L ed 610; 24F(2d)619; 26F(2d)530; 31 F(2d)583; 219Ala119, 121S398; 195 Cal 386, 233P972; 164Ga336, 138SE767; 41 Ida747, 242P314, 243P654; 316 Ill 452, 147NE494; 317 Ill 203, 148NE69; 332 Ill 346, 163NE781; 332 Ill 545, 164 NE20; 200 Ind165, 162NE234; 124Kan 66, 257P971; 215Ky573, 286SW793; 216Ky766, 288SW690; 226Ky633, 11 SW(2d)702; 229Ky452, 17SW(2d)440; 160La407, 107S286; 11LaA377, 122S 290; 168La642, 122S892; 166Minn202, 207NW309; 142Miss660, 107S881; 146 Miss66, 111S850; 149Miss139, 114S803; 312Mo 581, 280SW37; 82Mont304, 266P 1103; Nebr 230NW503; 130Misc821, 226NYS397; 218AppDiv273, 218NYS 361; 230AppDiv281, 243NYS697; 194 NC388, 139SE764; 51ND778, 201NW 167; 117 Oh69, 158NE81; 121 Okl 190, 249P408; 123 Or137, 260P231; 44Philippine138, 147 [citCyc]; 136SC439, 134 SE387; 53SD350, 220NW918; Tex CommnA 283SW146; TexCivA 300SW 656; Sask [1925] 3DomLR125. **Acts held not in conflict—both sustainable** see 71CalA352, 235P66; 41 Ida747, 242 P314, 243P654; 167Minn286, 209NW 9; 190NC732, 130SE861; 117 Oh69, 158 NE81; 160Tenn403, 23SW(2d)897; Tex CivA 10SW(2d)743; 101Vt391, 143A 677. **Where older law is particular and in negative terms, and later statute general,** rule that construction harmonizing seeming repugnancy will be sought is especially applicable. TexCommnA 283SW146. **Matters considered in determining question.**–168La291, 121S870. **That legislature amended statutes separately** is persuasive that it did not consider earlier act as impliedly repealed pro tanto by later act. 319Mo 976, 5 SW(2d)83.

1077–40 87CalA393, 262P474; 200 Iowa 261, 204NW439; 190NC157, 129SE414; Sask [1925] 3DomLR125.

1077–41 8F(2d)439; 43 Ida180, 250P 239.

1077–42 324 Ill 243, 154NE896; 332 Ill 346, 163NE781; 332 Ill 545, 164NE20; 125Kan92, 262P579; 158La251, 103S 757; 82Mont304, 266P1103; NJ 151 A869; 128Misc630, 219NYS662; Okl 260P453; 285Pa289, 132A370; 286Pa 137, 133A150. **Where a new remedy or mode of procedure is authorized,** etc. 166Minn202, 207NW309, 311 [quot Cyc]. **Where statute deals with only part of subject matter** of prior statute, prior statute is not impliedly repealed. Sask [1925] 3DomLR125.

1078–43 8F(2d)439; 21F(2d)226; Ariz 285P282; 170Ark10, 278SW649; 170 Ark880, 281SW678; 173Ark1004, 293 SW1021; 174Ark503, 295SW404; 174 Ark1166, 298SW876; 177Ark1009, 8SW (2d)469; 70CalA237, 232P1001; 97Fla 710, 122S225; 162Ga664, 135SE195; 164 Gal, 137SE400; 331 Ill 360, 163NE141; 335 Ill 136, 166NE451; 234 IllA15; IndA 166NE252; 125Kan92, 262P579; 231Ky396, 21SW(2d)480; 164La482, 114 S104; Mass 167NE268; 170Minn215, 212NW449; 142Miss660, 107S881 (statutes relative to sale of fertilizers); MoA 14SW(2d)515; 116Nebr249, 216NW828; 52Nev232, 286P119; NJ 143A822(2d case); NJCh 145A462; NJCh 146A 846; 128Misc31, 217NYS739; 131Misc 657, 228NYS361, 364 [citCyc]; 283Pa 126, 129A78; 285Pa289, 132A370; 286 Pa137, 133A150; 156Tenn85, 299SW 799; 160Tenn273, 23SW(2d)662; Tex CommnA 274SW127; TexCivA 276SW 466; TexCivA 21SW(2d)334; TexCivA 25SW(2d)264; 103WVa634, 138SE199; 35Wyo 430, 251P460, 465, [citCyc]. **Whole statute is repealed.**–170Ark880, 281SW678. **Presumption that legislature had in mind earlier statute when** it passed statute covering whole subject matter must be made. 164La482, 114 S104. **Consistent provisions of earlier statute** may be continued by express language. Ariz 285P282.

1079–44 30Ariz218, 245P677, 46ALR 828; 170Ark10, 278SW649; 234 IllA 15; 125Kan92, 262P579; 164La482, 114 S104; 166Minn202, 207NW309; 81 Mont86, 261P885; 128Misc630, 219NYS 662; Sask [1925] 3DomLR125.

1079–45 319Mo 976, 5SW(2d)83, 88 [quotCyc]; 285Pa289, 132A370; 13Pa Dist&Co 223.

1079–46 219Ala32, 121S35; 168Ark174, 269SW567; 92CalA646, 268P971; Fla 129S861; 28Hawaii744; 316 Ill 425, 147 NE449; 318 Ill 402, 149NE422; 234 IllA 15; 86 IndA676, 159NE556; 202 Iowa 753, 210NW945; 241Mich457, 217NW 334; Mo 276SW387; 49Nev172, 241P 1079; 192NC202, 134SE651; 57ND768, 224NW680; 152Tenn306, 278SW59; TexCivA 276SW466. But see Tex CommnA 283SW146.

1080–47 168Ark174, 269SW567; 98Fla 486, 123S834; 159Tenn314, 18SW(2d) 1; 160Tenn273, 23SW(2d)662.

1080–49 234 IllA15.

1080–51 318 Ill 402, 149NE422; 335 Ill 584, 167NE779.

1080–51½–New. But it has been held that, where no authority was given revising commission to repeal any existing law, it must be presumed there was no intention on part of commission, in revising all existing statutory law, to employ any existing law. Tex CivA 286SW531.

1080–51⅓–New. Where revision specifically exempts from repeal certain designated laws, such laws are not repealed. TexCivA 290SW769.

1080–52 8F(2d)439; 216Ala641, 114S 221; 208Cal 649, 284P217; 318 Ill 402, 149NE422; 200 Iowa687, 205NW522, 523 [citCyc]; 121Kan531, 247P881; LaA 129S563(2dcase); 50Nev237, 255 P1073; TexCivA 10SW(2d)239; Tex CivA 19SW(2d)190; 112TexCr290, 16 SW(2d)228(1stcase). **If the revising act does not legislate, etc.** See also 160 Ga480, 128SE669. **In Kansas.**–121Kan 531, 247P881.

1081–53 318 Ill 402, 149NE422; 317 Mo 1283, 300SW459; 52Nev232, 286P 119; TexCivA 21SW(2d)716 (local law); 145Va776, 134SE710. **Opinion of code revisors** in their annotation to particular section that section has been impliedly repealed is entitled to great weight. 8F(2d)439. **Statute held to have repealed omitted part of earlier statute,** in view of circumstances under which enacted. 145Va776, 134SE 710.

1081–55 37GaA581, 140SE910; 89Pa Super531. **Effect of statute ceding to United States exclusive jurisdiction over land** is not impaired by failure to carry it into later compilations. 31F(2d) 644.

1081–56 21AlaA635, 111S275; 154Tenn 279, 290SW22. See also 246Mich456, 224NW624. **Effect of omission.**–Ala 130 S807.

1081–56½–New. Where codification especially exempts from repeal certain designated laws, such laws are not repealed. TexCivA 290SW769.

1081–56½–New. Provision in code that certain laws should not be impliedly repealed by omission therefrom does not deprive code provisions on subject of legislative sanction. 220Ala458, 125 S906.

1081–59 285Pa289, 295, 132A370 [cit Cyc]; TexCivA 17SW(2d)841(2dcase); 108TexCr142, 299SW437. **Prior laws remain in force except so far as inconsistent** with repealing act, and in so far as inconsistent therewith are modified and amended to extent necessary to conform to such act so as to give it full force and effect. 165Minn268, 206NW396.

1082–63 248Mich297, 226NW907; 285 Pa289, 295, 132A370 [citCJ]; 143Wash 326, 255P371.

1082–64 136SC439, 134SE387 (acts dealing with same subject). **Misfortune resulting from failure to use saving clause** does not warrant abrogation of rule that amending act obliterates former section. 250Mich349, 230NW202.

1082–68 39F(2d)240; 297Pa369, 147A 64. See also 233Ky266, 25SW(2d)390. **Where statute changed in some respects** but intention is that it shall continue to operate, it is not strictly a repeal but continuation of former law as amended. 115Nebr287, 212NW 619.

1083–69 179Ark719, 18SW(2d)362; 128 Misc31, 217NYS739.

1083–70 11LaA562, 123S432; 128Misc 31, 217NYS739; OklCr 290P197(2dcase).

1083–70½–New. A second amendment omitting first amendment is repeal thereof. 8F(2d)439.

1083–71 9PaDist&Co 107.

1083–73 68CalA91, 228P549.

1083–74 68CalA91, 228P549; 323 Ill 389, 154NE117; 250Mich349, 230NW 202 (repugnancy unnecessary); 128 Misc10, 217NYS215. See also 37F(2d) 120.

1084–76 314Mo 684, 285SW496 (reënactment with modification is merely amendment and continuation as amended); 52ND420, 203NW317; 130 Or73, 279P271; 287Pa251, 134A377; 290Pa 573, 139A374; 93PaSuper267; 93Pa Super404; 10PaDist&Co 584; 14PaDist &Co 305; Va 155SE635. **In practical operation and effect,** etc. 200Wis434, 228NW502.

1084–77 174Ark298, 296SW729; 287 Pa251, 134A377, 378 [quotCJ]; 290Pa 573, 139A374, 378 [quotCyc]. **Rule held not controlling** where qualifying act and reënactment took effect at same time. 198 Ind127, 149NE350, 152NE 723. **There is repeal by implication** where there is reënactment in toto with proviso added. 197 Ind475, 151NE390.

1084–77½–New. Parts of former provision not contained in reënactment are repealed. 11LaA117, 119S774.

1085–78 **Amendatory statute operates as repeal of parts of amended statute not reënacted** where constitution prohibits amendment by reference to title and requires reënactment and publication at length. 68CalA91, 228P549.

1085–79 162La823, 111S177.

1085–80 122Kan114, 251P427; 129Misc 867, 223NYS432; TexCivA 3SW(2d) 947, 957 [quotCyc]; TexCivA 10SW (2d)151.

1086–82 80Mont515, 261P264. But see 98Fla1166, 125S375.

1086–85 128Misc630, 219NYS662. **Statutes approved on same day.**–142 Miss660, 107S881.

1086–86 328 Ill 512, 160NE60; 142Miss 660, 107S881 (statutes approved on same day).

1036–87 180Ark96, 21SW(2d)406; 328 Ill 512, 160NE60; 216Ky766, 288SW 690; 319Mo 1001, 5SW(2d)74.

1087–92 14F(2d)705; 19F(2d)35; 20 F(2d)5; 36F(2d)425; 23AlaA74, 121 S693(3dcase); 35Ariz511, 281P207; 208 Cal 770, 284P1105(2dcase); 75CalA274, 242P892; 77CalA404, 247P527; CalA 292P1065; 86Colo 249, 281P117; 323 Ill 498, 154NE226; Ind 154NE12; IndA 172NE569; 118Kan752, 236P823, 824 [citCyc]; La 130S46; 174Minn509, 219 NW872; 142Miss1, 106S886; 307Mo 576, 271SW365, 369 [citCyc]; 315Mo 791, 287SW307; NJ 148A622; 32NM178, 253 P20; 224AppDiv58, 229NYS140; 115 Okl 25, 241P744; 140 Okl 122, 282P674; 121 Or4, 252P552; 293Pa398, 143A127; 297Pa33, 146A113; 88PaSuper250; 44 Philippine138; 46Philippine8; 154SC55, 151SE218; 155Tenn524, 296SW10; 160 Tenn403, 23SW(2d)897; TexCivA 17 SW(2d)478; 143Va572, 130SE383; Alta [1927] 1DomLR199. **The special act and general laws must stand together,** etc. 115 Okl 25, 241P744.

1088–93 19F(2d)35; 102CalA635, 283P 862; 307Mo 576, 271SW365, 368 [citCJ]; 315Mo 791, 287SW307; 195NC71, 141 SE481; 288Pa152, 135A908; 44Philippine138. Contra Ind 154NE12.

1088–94 CalA 290P522; 307Mo 576, 271 SW365, 368 [citCJ]; 32NM178, 253P 20.

1089–95 Ind 154NE12.

1089–96 14F(2d)705; 19F(2d)35; 38 OklACR380; 121 Or4, 252P552; 7Pa Dist&Co 226.

1089–97 298Pa193, 148A77.

1089–98 168Ark829, 274SW5, 279SW 366; 52ND120, 201NW856; 143Va572, 130SE383 (dictum).

1089–99 19F(2d)35; 179Ark984, 19SW (2d)1020; 200 Ind307, 163NE225; 52 ND120, 201NW856.

1090–1 Mo 31SW(2d)7; 52ND120, 201 NW856.

1090–2 88PaSuper250.

1090–3 88PaSuper250.

1090–4 195NC71, 141SE481, 482 [quot Cyc].

1091–5 See also 75CalA274, 242P892.

1091–7 288Pa152, 135A908, 909 [cit Cyc]; 5PaDist&Co 126. **Act and amendment creating city police commission** not incorporated bodily in code became inoperative. 155SC520, 152SE700.

1092–9 115 Okl 25, 241P744.

1093–17 46Philippine8; 155Tenn524, 296SW10 (repugnancy must be plain and incapable of reconciliation).

1093–19 8F(2d)90; 77CalA404, 247P 527; 317Mo 671, 296SW808; 219App Div584, 219NYS348; 154Tenn638, 290 SW381.

1094–20 CalA 259P764; 133Misc464, 232NYS489; 191NC584, 132SE558; 117 Okl 158, 245P842; 40 OklACR690 [reh pending]; 122 Or19, 257P21; 103TexCr 437, 281SW551; 147Va355, 137SE458. See also OklCr 284P903.

1094–22 Mont 287P640 (statute relating to issuance of bonds by irrigation district).

1095–29 Ariz 285P282; 156Tenn85, 299 SW799.

1096–36 145Wash686, 261P795.

1097–38 326 Ill 145, 157NE225.

1097–41 326 Ill 145, 157NE225; 13Pa Dist&Co 223; TexCommnA 274SW127. But see IndA 172NE569.

1097–44 31F(2d)583; 56ND650, 219 NW105, 108 [quotCyc]; 57ND152, 220 NW834.

1098–46 56ND650, 219NW105, 108 [quotCyc]; 285Pa289, 132A370; 12Pa Dist&Co 703; TexCommnA 274SW127.

1098–48 165Ga55, 139SE877, 880 [cit Cyc]; TexCivA 273SW615.

1098–49 35F(2d)657; 93CalA299, 270P 280; 165Ga55, 139SE877, 880 [citCyc]; 165Ga447, 141SE306; 317 Ill 264, 148 NE7; 326 Ill 145, 157NE225; 228Ky 410, 15SW(2d)256; 53ND249, 205NW 684; 126 Okl 80, 258P861; 109TexCr 539, 6SW(2d)362. See also 226AppDiv 421, 235NYS517. But see 164GaA1, 137 SE400.

1098–50 165Ga55, 139SE877, 880 [cit Cyc]; Mo 274SW356; NH 146A511; 53ND249, 205NW684; 57ND310, 221 NW883.

1099–51 156Miss171, 125S96.

1099–52 53ND249, 205NW684.

1099–53 228Ky468, 15SW(2d)276. **Subsequent act must be totally void,** etc. TexCivA 273SW615.

1099–54½–New. Repealing act dependent upon another act rejected by referendum falls with rejection of latter. 307Mo 49, 269SW623.

1099–54⅓–New. Statute repealing earlier law conflicting with new law repeals earlier law only when conflicting with valid portions of new law. 220Ky373, 295SW433.

1099–54¼–New. Statutes repealing earlier law conflicting with new law held repealing section held not requiring republication of old laws. 220Ky373, 295 SW433.

1099–54⅕–New. Existing statute cannot be recalled by anything short of constitutional enactment. 278US515, 49 SCt235, 73L ed483.

1099–55 34PortoRico 809 (reënactment unnecessary to make statute again effective at end of fixed period of suspension).

1099–57 164Ga1, 137SE400. **Provision for revival held not operative.**–Mass 168 NE536.

1099–61 98Fla703, 124S44(2dcase); 335 Ill 136, 166NE451. **Rule is based on presumed legislative intent** and has no application where statute shows no intention of returning to prior acts. 287 Pa392, 135A225.

1100–64 156Md40, 143A666. But see 287Pa392, 135A225.

1100–66 **Special or local acts which have been repealed by general act** are not revived by passage of substitute or partial substitute for latter. 287 Pa392, 135A225.

1100–67 318 Ill 131, 149NE18; 198 Ind 79, 151NE385; 13PaDist&Co 223.

1101–68 CalA 259P764; 198 Ind79, 151 NE385; 13PaDist&Co 223.

1101–72 See also 202Cal 550, 262P1081. **Thus where an act merely creates exceptions,** etc. 84Colo 279, 269P894; Utah 270P543.

1101–74 TexCivA 299SW497.

1101–76 **Where there is no such express repeal,** etc. See also 16F(2d) 90.

1102–78 143Miss821, 107S659; 121 Okl 18, 247P15; 299Pa297, 149A490. **Such a constitutional provision,** etc. 148Miss 13, 113S898. **Statutes held not violative of rule.**–167La907, 120S593; 148 Miss13, 113S898. **Purpose of provision.**–148Miss13, 113S898. **Statute held not to violate constitution.**–23AlaA353, 125S800(2dcase).

1102–81 **Technical rules of construction** are sometimes properly disregarded. 67Utah15, 245P375, 57ALR786.

1102–87½–New. Well-known canons of statutory construction apply with equal force to initiative measures as to legislative enactment. 75Mont429, 244P287.

1102–87⅓–New. Where reason for rule relating to interpretation of statutes ceases, rule itself ceases. 78CalA173, 248P532.

1102–87¼–New. **All rules of construction should be considered** where rules of construction are invoked. 156Tenn 216, 300SW12.

1102–87⅕–New. Joint resolution of congress is construed by applying rules applicable to legislation in general. 281 US658, 50SCt444, 74L ed1098.

1102–87⅙–New. The number of a bill

is no part of the act. 98Fla1166, 125 S375.

1103–88 16CustA467; 34GaA103, 128 SE226; 216AppDiv391, 215NYS309. It is court's duty to declare law unconstitutional upon proper showing that matters in body of act do not relate to subject. 91Fla1044, 109S94. There are numerous rules of statutory construction to guide courts in ascertaining true meaning of statute. 79CalA726, 251P241. Necessity for construction.–Nebr 231NW840.

1103–89 34GaA103, 128SE226.

1103–90 28F(2d)189; 30F(2d)871; 68CalA522, 229P984; 217Ky123, 288SW1036; 219Ky739, 294SW494; 169Minn69, 210NW616; 308Mo265, 271SW786; 81Mont36, 261P616; Mont 293P294; 23OhA500, 155NE701; 116Or543, 241P386; 118Or260, 246P741; 192Wis524, 213NW479. Where meaning is clear, there is no room for construction. 204Iowa598, 215NW718. Recourse to interpretation is unnecessary where language of statute is plain, unambiguous, direct, and certain. 82Mont594, 268P558. It is prerogative of legislature to enact laws and duty of courts to construe and enforce them. TexCivA 299SW917. Court should not give statute forced construction unless necessary to give it vitality. 39F(2d)654.

1103–92 30Ariz36, 243P919; 68CalA522, 229P984; 81Mont36, 261P616; 193NC791, 138SE162; 118Or260, 246P741.

1103–93 16F(2d)937; 68CalA372, 229P891; 68CalA522, 229P984 (cannot supply omissions or omit parts thereof); 71CalA445, 235P464; 86IndA369, 158NE234, 235 [citCyc]; 202Iowa673, 210NW912; 204Iowa644, 215NW746; 217Ky123, 288SW1036; 155Md507, 142A593; 253Mass458, 149NE140; 237Mich367, 211NW636; 322Mo514, 17SW(2d)960; 193NC791, 138SE162; 118Or260, 246P741. There is no room for construction where statute is unambiguous. 207Iowa521, 221NW492.

1103–94 17F(2d)503; 124Kan350, 259P1068; 213Ky291, 280SW1081; 213Ky636, 281SW1039; 308Mo265, 271SW786; 313Mo693, 282SW702; MoA 26SW(2d)830; 68Utah251, 249P1016.

1103–95 17F(2d)503; 213Ky291, 280SW1081; 68Utah251, 249P1016.

1103–96 26F(2d)953; CalA 290P522; 92Fla187, 109S228; 86IndA369, 158NE234, 235 [citCyc]; 316Mo853, 293SW399; 78Mont308, 254P187 (must give effect to every statute if possible); 114Nebr734, 209NW497; 128Misc31, 217NYS739; 28OhA8, 162NE430; 127Okl234, 260P486, 487 [quotCJ].

1103–97 36F(2d)529; 199Cal21, 248P235; 92Fla187, 109S228; 242Mich491, 219NW724; 170Minn293, 212NW445; 122Okl297, 255P150; 125Okl170, 256P927; 127Okl234, 260P486, 487 [quot CJ].

1103–97½–New. Rules of statutory construction are never used to create, but only to remove, doubt. 30F(2d)871.

1103–98½–New. Federal courts will not construe doubtful state statute, unless necessary to proper disposition of case. 16F(2d)54.

1104–10 Where no cases are produced interpreting foreign law, statute will be construed in light of applicable common law. 136Misc863, 242NYS464.

1105–16 135Misc352, 238NYS313; 124Or261, 264P445.

1105–24 29F(2d)854; 199Cal263, 248P1017; 200Ind506, 165NE239; 314Mo33, 282SW1007; NJQuartSess 139A401, 403 [quotCyc]. "Executive departments" of government as used in statute relative to public printing are included in power of legislature to define. 314Mo33, 282SW1007. Rule applies, even though such definitions do not correspond with those of other statutes. 331Ill193, 162NE859. Statutory definition held not broader than act so as to require limitation thereof.–142Wash329, 253P448, 59ALR539.

1105–25 205Iowa141, 217NW809; NJQuartSess 139A401, 403 [quotCyc]; TexCommnA 283SW141.

1106–26 NJQuartSess 139A401, 403 [quotCyc]; 148Wash149, 268P167.

1106–27 14F(2d)553; 200Ind506, 165NE239; NJQuartSess 139A401, 403 [quotCyc]; 287Pa190, 134A455; TexCivA 16SW(2d)331(2dcase).

1106–28 218Ala90, 117S681, 61ALR938; 218Ala407, 118S583; 81CalA456, 255P281; NJQuartSess 139A401, 403 [quot Cyc].

1106–29 266US548, 45SCt188, 69Led435; 273US346, 47SCt389, 71Led676; 8F(2d)595; 11F(2d)895; 12F(2d)631; 12F(2d)978; 13F(2d)774; 18F(2d)223; 19F(2d)35; 22F(2d)591; 23F(2d)221; 25F(2d)13, 15 [citCyc]; 30F(2d)474(2d case); 35F(2d)439; 37F(2d)763; 38F(2d)28; 40F(2d)882; 15CustA291, 294 [citCyc]; 20AlaA665, 104S847 [citCyc]; 30Ariz218, 245P677, 46ALR828; 31Ariz224, 252P512; 31Ariz252, 252P515; 31Ariz297, 252P1011; 32Ariz293, 257P982; 34Ariz380, 271P865; Ariz 285P1034; 172Ark279, 288SW382; 174Ark1062, 298SW335; 177Ark260, 6SW(2d)281; 178Ark44, 9SW(2d)790; 181Ark974, 28SW(2d)1060; 195Cal605, 234P883; 200Cal585, 254P946, 62ALR1341; 200Cal609, 254P956, 53ALR725; 74CalA1, 239P702; 75CalA335, 242P756; 79CalA598, 250P703; 79CalA726, 251P241; 85CalA507, 259P970; 91CalA168, 266P845; 91CalA712, 267P561; 92CalA132, 267P713; CalA 273P587; 97CalA17, 275P255; CalA 289P199; 77Colo516, 238P44; 85Colo239, 275P896; 104Conn1, 132A25, 45ALR728; 104Conn238, 132A690; 111Conn231, 149A840; 3Del294, 136A280; 90Fla381, 106S741; 93Fla1018, 114S373; 95Fla345, 116S81; 96Fla131, 117S691; 97Fla710, 122S225; 163Ga849, 137SE264; 164Ga351, 138SE898; 168Ga1, 147SE80; 28Hawaii261; 29Hawaii1, 5 [quotCyc]; 48Ida240, 281P375; Ida 290P387; 319Ill403, 150NE290; 320Ill507, 151NE510; 321Ill552, 152NE495; 322Ill416, 153NE693; 324Ill314, 155NE332; 325Ill314, 156NE314; 326Ill566, 158NE211; 327Ill474, 158NE727; 329Ill34, 160NE160; 330Ill250, 161NE519; 331Ill459, 163NE396; 335Ill476, 167NE86; 338Ill385, 170NE280; 233IllA444, 448 [citCyc]; 234IllA141; 236IllA162; 241IllA117; 243IllA467; 244IllA370; 247IllA118; 200Ind506, 165NE239; Ind172NE911; 85IndA156, 149NE101; 85IndA523, 154NE501; IndA 168NE127; 206Iowa285, 220NW354; 207Iowa427, 223NW253; Iowa 232NW760; 122Kan647, 253P549; 127Kan443, 273P474; 209Ky101, 272SW43; 212Ky751, 280SW114; 228Ky168, 14SW(2d)405; 161La207, 108S417; 168La291, 121S870; Me 151A141; 148Md539, 129A670; 152Md474, 136A897; 155Md507, 142A593; 156Md94, 143A661; 158Md260, 148A434; 253Mass529, 149NE407; 267Mass430, 166NE758; 237Mich156, 211NW346; 141Miss356, 106S449; 143Miss726, 109S665; 146Miss369, 112S81; 147Miss885, 114S127; 152Miss17, 118S357; 156Miss46, 125S563(2dcase); 310Mo696, 276SW64; 312Mo373, 278SW1016; 314Mo390, 284SW455, 461 [quotCyc]; 315Mo485, 286SW371, 377 [quotCyc]; 322Mo514, 17SW(2d)960; Mo 25SW(2d)101(2d case); 221MoA17, 297SW470; MoA 10SW(2d)68; 222MoA831, 11SW(2d)81; MoA 16SW(2d)739; MoA 26SW(2d)830; 73Mont122, 235P422; 73Mont376, 237P486; 73Mont392, 236P1080; 75Mont122, 242P421; 77Mont316, 250P606; 78Mont1, 252P301; 78Mont308, 254P187; 78Mont301, 254P419; 82Mont304, 266P1103; 83Mont581, 273P1055; 86Mont58, 282P32; Mont 287P624; Mont288P188; Mont 289P566; 114Nebr194, 206NW765; 114Nebr734, 209NW497; 117Nebr102, 219NW811; 104NJL312, 140A440; NJCh 150A436 (holding statute should be applied to cause that can come within intent and spirit of it); 34NM306, 281P29; 242NY313, 151NE631; 242NY366; 152NE117; 243NY102, 152NE690; 221AppDiv86, 222NYS319; 125Misc511, 211NYS375 (and purpose); 127Misc224, 215NYS110; 128Misc58, 217NYS830; 128Misc630, 219NYS662; 129Misc845, 223NYS470; 133Misc110, 233NYS110; 226AppDiv434, 235NYS534; 136Misc443, 240NYS199; 138Misc259, 245NYS497; 193NC791, 138SE162; 197NC30, 147SE674; 52ND65, 201NW988 [quotCyc]; 52ND420, 203NW317; 113Oh526, 149NE871; 115Oh458, 154NE792; 117Oh337, 158NE748; 111Okl168, 240P604; 113Okl217, 242P173; 121Okl59, 247P366; 121Okl190, 249P408; 122Okl250, 254P72; 127Okl210, 260P452; 132Okl84, 270P311 (2dcase); 133Okl162, 271P672; 134Okl57, 272P883; 135Okl278, 276P468; 137Okl186, 279P319; 40OklCr421, 269P385; 116Or416, 241P390; 118Or629, 247P775; 119Or101, 248P146; 119Or127, 248P151; 119Or141, 248P358; 122Or515, 259P915; 123Or1, 260P1004; 124Or261, 264P445; 124Or351, 264P463; 130Or73, 279P271; 285Pa385, 132A347; 287Pa251, 134A377; 296Pa359, 145A916(2dcase); 300Pa242, 150A480; 44Philippine126; 46RI417, 133A653; 49RI491, 144A159; 132SC241, 128SE172; 143SC196, 141SE366; 154SC55, 151SE218; 49SD350, 207NW210; 152Tenn67, 274SW539; 154Tenn13, 285SW589; 154Tenn624, 288SW731; 154Tenn326, 289SW518; 155Tenn441, 295SW68; 159Tenn43, 15SW(2d)751; 161Tenn88, 28SW(2d)642; TexCommnA 274SW127; TexCommnA 283SW146; TexCommnA288SW409; 118Tex91, 11SW(2d)496; TexCommnA 26SW(2d)627; TexCivA283SW277; TexCivA 283SW929; TexCivA 286SW531; 68Utah388, 250P979; 70Utah156, 258P1016; 70Utah239, 259P408; 99Vt265, 132A40; 144Va56, 131SE437; 146Va175, 135SE813; 150Va562, 143SE756; 153Va383, 149SE494; 155Wash370, 284P788; 102WVa162, 134SE749; 103WVa519, 138SE97; 187Wis438, 204NW473; 194Wis437, 216NW493; 40Wyo57, 274P10; Can [1929] 4DomLR1028; BC [1926] 4DomLR834. See 187Wis180, 204NW803, 807 [cit Cyc]. Canons of construction are resorted to to aid in ascertaining meaning of legislature, and not to confine statute within narrower limits than is clearly intended. 57ND768, 224NW680. General and particular intention.–85CalA507, 259P970. Legislative intent is determined from words of statute, context, subject matter, consequences, and reason for the law. 176Ark26, 2SW(2d)53. Object of rules of construction is to discover intention of legislature. 156Tenn216, 300SW12. Rule applied.–236IllA162. Whether time specified in statute is of essence depends on intention. 176Ark1093, 5SW(2d)350.

1107–30 272US620, 47SCt200, 71Led443; 273US346, 47SCt389, 71Led676; 21F(2d)226; 26F(2d)288; 28F(2d)48; 38F(2d)925; 175Ark314, 299SW15; 177Ark260, 6SW(2d)281; 179Ark1082, 20SW(2d)124; 181Ark974, 28SW(2d)1060; 195Cal605, 234P883; 197Cal112, 239P850; 199Cal263, 248P1017; Cal292P124; 77Colo516, 238P44; 103Conn565, 131A560 (from words of act); 104Conn1, 132A25, 45ALR728; 104Conn238, 132A690; 110Conn36, 147A290; 15DelCh409, 138A347; 93Fla796, 112S630; 93Fla1018, 114S373; 317Ill203, 148NE69; 318Ill307, 149NE262; 331Ill459, 163NE396; 338Ill385, 170NE280; 233IllA444; 234IllA141; 208Iowa614, 226NW182; 219Ky739, 294SW494; 228Ky76, 14SW(2d)400; 9LaA727, 120S249; 169La394, 125S283; LaA 130S879; 250Mich349, 230NW202; 141Miss356, 106S449; 314Mo390, 284SW455, 461 [quot Cyc]; 315Mo485, 286SW371, 377 [quot Cyc]; 316Mo1008, 292SW1037; 319Mo602, 48SW(2d)816; MoA 18SW(2d)580; 75Mont429, 244P287; 77Mont316, 250P606; 85Mont532, 281P341; 86Mont58, 282P32; Mont 288P188; NJ 144A169; NJ 148A745; 126Misc418, 213NYS602; 128Misc31, 217NYS739 (court has duty to give effect to every expression of legislature); 132Misc848, 230NYS691; 52ND65, 201NW988 [quotCyc]; 56ND875, 219NW574; 32OhA382, 168NE210; 119Or127, 248P151; 49Philippine194; 46RI417, 133A653; TexCommnA 274SW127; TexCommnA 282SW791, 46ALR521; TexCivA 283SW277; 99Vt265, 132A40; 144Va56, 131SE437; 144Va456, 132SE482; 152Va903, 147SE249; Wash292P259; 192Wis524, 213NW479; 40Wyo57, 274P10; 41Wyo36, 282P27; Can [1929] 4DomLR1028. Intent of legislature not appropriately expressed has no legal existence. 250Mich349, 230NW202.

1107–31 8F(2d)595; 24F(2d)107; 26F(2d)646; 31Ariz224, 252P512; 34Ariz201, 269P501; Ariz 285P1034; Ariz292P1099; 201Cal1, 255P195; 201Cal

134, 255P808; 202Cal 569, 262P297; 73 CalA268, 238P787; 79CalA726, 251P 241; 85CalA507, 259P970; 77Colo 516, 238P44, 46 [citCyc]; 28Hawaii261; 127 Kan443, 273P474; 210Ky324, 275SW 795; 213Ky636, 281SW1039; 224Ky 136, 5SW(2d)910; 232Ky395, 23SW(2d) 584; 166Minn433, 208NW185; 175Minn 583, 222NW285; 141Miss356, 106S449; 314Mo33, 282SW1007, 1012 [quotCyc]; 314Mo390, 284SW455, 461 [quotCyc]; 315Mo485, 286SW371, 377 [quotCyc]; 319Mo 492, 5SW(2d)57; 82Mont63, 265 P1; 114Nebr797, 210NW275, 48ALR 728; 118Nebr218, 224NW272; Nebr 227 NW926; 51Nev192, 272P656; NJQuart Sess 139A401; NJCh 145A462; 34NM 650, 287P696; 52ND65, 201NW988 [quot Cyc]; 56ND875, 219NW574; 25 OhA53, 155NE233; 137 Okl 171, 278P621; 144 Okl 85, 289P759; 40 OklCr421, 269P P385; 37 OklACR650; 118 Or105, 244 P868; 118Or629, 247P775; 130 Or309, 274P118; 130 Or572, 281P125; 46RI 417, 133A653; Utah 277P206; 1s4Va56, 131SE437; 148Va220, 138SE474; 136 Wash610, 241P12; 41Wyo 36, 282P27. **Where intent is clear,** words should be given broad meaning to aid such intent. 119 Or1, 247P319. **Where language is not as broad as it might have been,** but nevertheless clear, court cannot give words new meaning to include what letter of law excludes. 152Va903, 147SE 249.

1107–32 278US269, 49SCt133, 73LEd 322; 8F(2d)595; 36F(2d)145; 40F(2d) 563; 31Ariz224, 252P512; 32Ariz54, 255 P598; 197Cal 112, 239P850; 199Cal 263, 248P1017; 201Cal 1, 255P195; 201 Cal 134, 255P808; 71CalA445, 235P464; 73CalA268, 238P787; 79CalA726, 251P 241; 82CalA210, 255P281; 77Colo 516, 238P44, 46 [citCyc]; 93Fla796, 112S 630; 28Hawaii261; 319 Ill 403, 150NE 290; 337 Ill 241, 169NE193; 234 IllA 137; 204 Iowa598, 215NW718; 210Ky 324, 275SW795; 213Ky636, 281SW 1039; 166Minn433, 208NW185; 314Mo 33, 282SW1007, 1012 [quotCyc]; 314Mo 390, 284SW455, 461 [quotCyc]; 315Mo 485, 286SW371, 377 [quotCyc]; MoA 10 SW(2d)680; MoA 18SW(2d)580; 86 Mont135, 282P855; Mont 293P294; 114 Nebr797, 210NW275, 48ALR728; NJ QuartSess 139A401; 193NC791, 138SE 162; 52ND65, 201NW988 [quotCyc]; 116 Or543, 241P386; 118 Or105, 244P 868; 46RI 417, 133A653; 49SD373, 206 NW576; 115Tex393, 283SW472; Tex CommnA 282SW791, 46ALR521; Tex CommnA 1SW(2d)587; TexCivA 274SW 265; 70Utah156, 258P1016; 144Va56, 131SE437; 136Wash610, 241P12.

1107–33 29Hawaii1, 5 [quotCyc]; 314 Mo 33, 282SW1007, 1012 [quotCyc]; 314 Mo 390, 284SW455, 461 [quotCyc]; 315 Mo 485, 286SW371, 377 [quotCyc]; 191 NC396, 131SE721; 52ND65, 201NW988 [quotCyc].

1107–34 Ariz 285P1034; 122Kan647, 253P549; 129Misc845, 223NYS470; 119 Or101, 248P146; 123 Or579, 263P896.

1107–35 Ariz 285P1034; 195Cal 605, 234P883; 204Cal 286, 268P347; 148Md 539, 129A670; 141Miss356, 106S449; 147Miss885, 114S127.

1107–36 32Ariz515, 260P435; Ariz 285 P1034; 179Ark1082, 20SW(2d)124; 195 Cal 605, 234P883; 204Cal 286, 268P347; 73CalA655, 239P56; 81CalA98, 252P 1075; 42 Ida169, 244P149; 317 Ill 203, 148NE69; 254 IllA445; 198 Ind148, 152 NE828; 148Md539, 129A670; 170Minn 293, 212NW445; 141Miss356, 106S449; 146Miss449, 111S600; 147Miss885, 114 S127; 313Mo 200, 281SW398, 402 [cit Cyc]; MoA 297SW150; MoA 7SW(2d) 392; 52Nev232, 286P119; 136Misc443, 240NYS199; 119 Or101, 248P146; Tex CivA 273SW1006; TexCivA 23SW(2d) 535; 70Utah441, 261P9; 187Wis471, 205 NW428; 38Wyo 47, 264P1023, 57ALR 675. **Construction against imposition of duties impossible of performance.**–146 Miss449, 111S600.

1108–37 Ariz 285P1034; 195Cal 605, 234P883.

1108–38 26F(2d)646; 79CalA726, 251 P241; 141Miss356, 106S449; 147Miss 885, 114S127; 129Misc845, 223NYS470; TexCommnA 288SW409.

1108–39 13F(2d)131; 32F(2d)454; 43 F(2d)406; 30Ariz392, 247P799; 97CalA 138, 275P453; 232Ky635, 24SW(2d) 259; 148Md539, 129A670; 147Miss885, 114S127; 313Mo 693, 282SW702; 129 Misc845, 223NYS470; 132Misc119, 228 NYS286; 119 Or101, 248P146, 148 [cit Cyc]; 118Tex91, 11SW(2d)496; 144Va 456, 132SE482.

1108–40 148Md539, 129A670; 147Miss 885, 114S127; 129Misc845, 223NYS470; 119 Or101, 248P146, 148 [citCyc]; Tex CivA 273SW1006.

1108–40½–New. Technical subtleties should not be resorted to to defeat obvious purposes of legislature. Tex CommnA 283SW146.

1108–40¼–New. Change of language indicates change of legislative intent. 291 Pa326, 139A826.

1108–40¼–New. Logic and sound economic principles may be looked to. Tex CommnA 15SW(2d)553.

1108–41 41F(2d)766; 152Md474, 136 A897.

1108–46 268US85, 45SCt437, 69LEd857; 270US349, 46SCt284, 70LEd624; 8F(2d) 279; 28F(2d)48 (purpose of law, indicated by its general terms, will prevail over literal import of particular words not clear and unambiguous); 195Cal 605, 234P883; 200Cal 598, 254P951; 79 CalA726, 251P241; 83Colo 476, 266P 213; 104Conn1, 132A25, 45ALR728; 111 Conn147, 149A410; 90Fla381, 106S741; 98Fla731, 124S279; 46 Ida175, 267P229; 329 Ill 528, 161NE110; IndA 159NE434; 121Kan109, 245P1019; 152Md474, 136A 897; 143Miss121, 108S433, 438, 45ALR 1348 [citCyc]; 143Miss726, 109S665; 146Miss449, 111S600; 147Miss885, 114 S127; 81Mont86, 261P885; 100NJEq 141, 134A660; NJSup 152A175(2dcase); 243NY102, 152NE690; 225AppDiv403, 233NYS368; 287Pa251, 134A377; 152 Tenn67, 274SW539; TexCommnA 288 SW409; 117Tex263, 1SW(2d)872; Tex CommnA 15SW(2d)553; TexCivA 293 SW845; 67Utah15, 245P375, 57ALR 786; 99Vt265, 132Va40; 144Va456, 132 SE482; 140Wash459, 249P977; 103WVa 519, 138SE97; 197Wis218, 221NW768; 40Wyo 57, 274P10. See also 282US55, 51 SCt49. **A thing within intention,** etc. 335 Ill 455, 167NE31, 63ALR1046. **Court may transpose enactment** in effort to arrive at an understanding thereof. 106 TexCr37, 289SW1072. **Statute will not be construed to allow to be done by indirection** what may not be done directly. 3Del 314, 136A279. **Consideration of reason and spirit should be discarded** and court should adhere to literal expression of enactment adhered to where will of legislature is clearly expressed. 179Ark1104, 20SW(2d)116.

1109–47 271US354, 46SCt513, 70Led 986; 25F(2d)531; 31F(2d)612; 16 CustA539; 195Cal 605, 234P883; 200 Cal 958, 254P951; 321 Ill 552, 152NE 495; 324 Ill 314, 155NE332; 170Minn 293, 212NW445; 146Miss449, 111S600; 147Miss885, 114S127; 137 Okl 186, 279 P319; 116 Or264, 240P418, 427 [cit Cyc]; 143SC104, 141SE180; 187Wis 438, 204NW473. See also 200Cal 550, 254P542. **Act held general.**–127Misc852, 217NYS609.

1109–48 25F(2d)531; 195Cal 605, 234 P883; 200Cal 598, 254P951; 320 Ill 507, 151NE510; 146Miss449, 111S600; 147 Miss885, 114S127; 318Mo 285, 300SW 274; 34NM306, 281P29; 248NY18, 161 NE315; 117Tex263, 1SW(2d)872; 118 Tex91, 11SW(2d)496; Man [1929] 4 DomLR154.

1109–49 153Tenn139, 281SW924.

1109–50 320 Ill 507, 151NE510; 335 Ill 455, 167NE31, 63ALR1046; 134Misc778, 236NYS250; 132 Okl 84, 270P311(2d case); 7PaDist&Co 302; 159Tenn647, 21SW(2d)620.

1109–52 195Cal 605, 234P883; 320 Ill 507, 151NE510; 147Miss885, 114S127; 116 Or264, 240P418, 427 [citCyc].

1109–53 146Miss449, 111S600; 116 Or 264, 240P418, 427 [citCyc]. **Exception may not be raised as matter not within spirit of statute** unless reason for exception is imperative or at least reasonably clear. 4HawaiiFed271.

1110–54 272US620, 47SCt200, 71Led 443; 272US713, 47SCt280, 71Led487; 276US431, 48SCt366, 72Led640; 6F(2d) 43; 12F(2d)978; 13F(2d)774; 14F(2d) 650; 17F(2d)623; 19F(2d)600; 20 F(2d)873; 25F(2d)773; 25F(2d)13; 29F(2d)52 [certiorari den 279US844, 49 SCt264 (8thcase), 73Led989]; 29F(2d) 468 [certiorari granted 279US829, 49 SCt346 (4thcase), 73Led980]; 29F(2d) 623; 30F(2d)471 [aff 30F(2d)474 (1st case)]; 34F(2d)30; 39F(2d)204; 41 F(2d)544; 219Ala328, 122S343; 35Ariz 403, 279P257; 171Ark427, 285SW20; 175Ark314, 299SW15; Ark 31SW(2d) 748; 195Cal 605, 234P883; 196Cal 161, 236P304; 197Cal 448, 241P264; 200Cal 754, 254P1105; 204Cal 305, 268P355; Cal 273P795; 75CalA335, 242P756; 75 CalA345, 242P885; 79CalA230, 249P29; 79CalA171, 249P46; 79CalA726, 251P 241; CalA 273P587; CalA 276P407; 84Colo 472, 271P627; 104Conn1, 132A 25, 45ALR728; 104Conn233, 132A690; 111Conn147, 149A410; 90Fla381, 106S 741; 93Fla1018, 114S373; 99Fla206, 126S283; 44 Ida385, 257P480; 46 Ida175, 267P229; 48 Ida240, 281P 375; 317 Ill 203, 148NE69; 319 Ill 403, 150NE290; 321 Ill 552, 152NE495; 326 Ill 82, 157NE28; 326 Ill 145, 157NE 225; 327 Ill 474, 158NE727; 327 Ill 644, 159NE225, 56ALR242; 330 Ill 250, 161 NE519; 335 Ill 476, 167NE86; 234 IllA 141; 241 IllA117; IndA 159NE434; 201 Iowa389, 207NW389; 202 Iowa1116, 211NW503; 207 Iowa41, 217NW477; Iowa 228NW320; 121Kan109, 245P 1019; 126Kan777, 781, 271P388 [quot Cyc]; 213Ky648, 281SW826; 10LaA72, 120S271; 7LaA659; 127Me528, 145A 243; 152Md474, 136A897; 157Md309, 145A876; Md 151A400; 267Mass430, 166NE758; 234Mich391, 208NW613; 173Minn57, 216NW789; 141Miss356, 106 S449; 142Miss1, 106S886; 144Miss24, 109S23; 143Miss726, 109S665; 146Miss 369, 112S1; 156Miss171, 125S96; 318 Mo 581, 300SW765; Mo 25SW(2d)101 (2dcase); 219MoA436, 274SW880; MoA 24SW(2d)224; 73Mont392, 236P1080; 75Mont429, 244P287; 76Mont429, 247 P332, 47ALR424 [citCyc]; 77Mont316, 250P606; 81Mont86, 261P885; 86Mont 58, 282P32; Mont 288P188; Mont 290P 252; Mont 293P294; 114Nebr194, 206 NW765; 116Nebr61, 215NW798; 82NH 327, 133A451, 47ALR218; NH 146A527; 242NY277, 151NE452; 245NY174, 156 NE656; 127Misc224, 215NYS110 (general spirit, purpose, and object of statute govern); 128Misc58, 217NYS830; 128Misc309, 219NYS335; 130Misc142, 223NYS660; 130Misc416, 224NYS251; 134Misc374, 235NYS461; 136Misc224, 241NYS127; 137Misc852, 244NYS616; 195NC811, 143SE841; 22 OhA457, 153 NE918; 117 Oh69, 158NE81; 20 OhA26, 153NE187; 32 OhA69, 167NE592; 36 OklACR362; 122 Or684, 260P220; 124 Or497, 264P856; 125 Or197, 266P1075; 296Pa359, 145A916(2dcase); 300Pa92, 150A165; 5PaDist&Co 84; 51Philippine 131; 143SC104, 141SE180; SD 225NW 661; 154Tenn624, 288SW731; 155Tenn 59, 290SW386; TexCommnA 274SW127; TexCommnA 282SW791, 46ALR521; TexCivA 283SW(2d)277; TexCivA 286 SW531; TexCommnA 288SW171; 118 Tex91, 11SW(2d)496; 111TexCr264, 12 SW(2d)796; TexCommnA 15SW(2d) 553; TexCivA 32SW(2d)496; 66Utah 272, 241P1051; 70Utah156, 258P1016; Utah 277P206; Utah 289P132; 99Vt 265, 132A40; Vt 150A68; 143Va187, 129 SE379; 149Va560, 140SE831; 151Va 426, 145SE352; 152Va736, 148SE803; 102WVa162, 134SE749; 103WVa519, 138SE97; WVa 153SE293; 187Wis438, 204NW473; 38Wyo 244, 266P109; Ont [1925] 2DomLR725. **Policy of the law is not controlling,** though it is persuasive. 73Mont122, 235P422. **Statutes are designed to meet new conditions and circumstances,** and are to be vitalized by practical utility, subject to organic limitations. 90Fla721, 106S576.

1110–55 272US713, 47SCt280, 71Led 487; 6F(2d)43; 8F(2d)279; 20F(2d) 972; 34F(2d)30; 104Conn1, 132A25, 45 ALR728; 121Kan109, 245P1019; 82NH 327, 133A451, 47ALR218; 130Misc416, 224NYS251 (reason for enactment); 136 Misc443, 240NYS199; 51Philippine131; 144Va456, 132SE482; Wis 232NW546; Ont [1925] 2DomLR725.

1110–56 271US354, 46SCt513, 70Led 986; 272US620, 47SCt200, 71Led443; 272US713, 47SCt280, 71Led487; 6F(2d)

43; 8F(2d)279; 13F(2d)131; 35Ariz 479, 281P46; 201Cal 405, 257P76; 203 Cal 553, 265P223; 77Colo 516, 238P44, 47 [citCyc]; 330 Ill 250, 161NE519; 202 Iowa753, 210NW945; 202 Iowa1116, 211 NW503; 206 Iowa111, 219NW49(2d case); 121Kan897, 250P268; 310Mo 696, 276SW64; 219MoA436, 274SW880; 224AppDiv576, 231NYS529; 138Misc 259, 245NYS497; 20 OhA26, 153NE187; 122 Or684, 260P220; 125 Or428, 266P 875; 99Vt265, 132A40; 145Wash146, 259P17, 54ALR393; 103WVa519, 138SE 97; 187Wis438, 204NW473; 197Wis 218, 221NW768; Ont [1925] 2DomLR 725. See also 72CalA649, 238P787.

1110–57 271US354, 46SCt513, 70L ed 986; 272US713, 47SCt280, 71L ed487; 8F(2d)279; 14F(2d)553; 203Cal 553, 265P223; 77Colo 516, 238P44, 47 [cit Cyc]; 84Colo 472, 271P627; 93Fla1018, 114S373; 121Kan897, 250P268; 310 Mo 696, 276SW64; 145Wash146, 259P 17, 54ALR393; 103WVa519, 138SE97; Ont [1925] 2DomLR725. See also 72 CalA649, 238P787.

1111–58 272US620, 47SCt200, 71L ed 443; 272US713, 47SCt280, 71L ed487; 13F(2d)774; 38F(2d)28; 39F(2d)58 (reasonable construction to carry out object); 41F(2d)544; 32Ariz235, 257P 648; 196Cal 161, 236P304; 199Cal 270, 248P917; 79CalA230, 249P29; 104CalA 276, 285P871(2dcase); 84Colo 409, 270 P875; 104Conn1, 132A25, 45ALR728; 106Conn423, 138A444; 97Fla710, 122S 225; 322 Ill 416, 153NE693; 243 IllA 67; 244 IllA370; 202 Iowa1116, 211NW 503; 210Ky453, 276SW137; 234Ky473, 28SW(2d)745, 70ALR1077; 234Ky546, 28SW(2d)757; 167La249, 119S37; 267 Mass145, 166NE558; 308Mo 314, 274 SW77; MoA 24SW(2d)224; 75Mont 122, 242P421; 114Nebr194, 206NW765; 116Nebr61, 215NW798; 30NM454, 236P 743; 133Misc280, 232NYS9; 113 Oh526, 149NE871; 135 Okl 278, 276P468; 36 OklACR362; 116 Or264, 240P418; 122 Or684, 260P220; RI 151A5; 154Tenn 624, 288SW731; TexCommnA 282SW 791, 46ALR521; TexCivA 275SW203; 99Vt265, 132A40; 99Vt255, 133A742; 143Va187, 129SE379; 143Wash385, 255 P360. See 187Wis180, 204NW803, 808 [citCyc].

1111–59 272US620, 47SCt200, 71L ed 443; 272US713, 47SCt280, 71L ed487; 195Cal 605, 234P883; 80CalA739, 252P 765; 103Conn21, 130A81; 104Conn1, 132A25, 45ALR728; 121Kan897, 250P 268; 126Kan777, 78I, 271P388 [quot Cyc]; 310Mo 696, 276SW64; 114Nebr 194, 206NW765; 101NJL393, 127A558; NJCh 150A436; 226AppDiv434, 235NYS 534; 119 Or1, 247P319, 322 [citCyc]; 125 Or197, 266P1075; 149SC178, 146SE 815(2dcuse); 114Tex516, 272SW1098; TexCivA 275SW203; TexCivA 8SW(2d) 249. See 187Wis180, 204NW803, 808 [citCyc].

1111–60 77Colo 516, 238P44, 48 [quot CycperAllen,CJ]; 317Mo 1216, 298SW 747, 55ALR773.

1111–61 204Cal 305, 268P355; 68CalA 592, 229P1020; 77Colo 516, 238P44, 48 [quotCycperAllen,CJ]; 146Miss369, 112 S1; MoA 296SW820. **Disregard of public policy not ascribed to legislature.**–13PaDist&Co 673.

1111–62 34F(2d)30; 20AlaA665, 104S 847 [quotCyc]; 30Ariz45, 243P916; 77 Colo 516, 238P44, 48 [quotCycperAllen, CJ]; 164Ga351, 138SE898; 121Kan109, 245P1019; 128Me256, 147A188; MoA 7 SW(2d)392; 114Nebr194, 206NW765; 154Tenn590, 288SW355; TexCivA 286 SW531.

1111–63 75CalA345, 242P885; 164Ga 351, 138SE898; 47 Ida473, 276P318.

1111–65 126Me537, 140A382, 389 [cit Cyc]; 161Tenn236, 30SW(2d)268 (ambiguity exists).

1111–66 7F(2d)566; 195Cal 605, 234P 883; 253NY49, 170NE489; 136Misc141, 239NYS568; 102WVa162, 134SE749. **Interpretation defeating purpose of statute cannot be accepted.** 154Tenn590, 288SW355.

1111–67 150Md592, 133A729, 46ALR 983; MoA 26SW(2d)830; 243NY102, 152NE690 (hardship); 118 Or15, 245P 732, 45ALR821; 124 Or112, 258P193, 60 ALR528; 136Wash610, 241P12. **That statute might cause difficulties to other litigants** is available only where two constructions of language are reasonably possible. 300Pa92, 150A165.

1111–68 30Ariz45, 243P916; 201Cal 1, 255P195; 254Mass28, 149NE628; 82 Mont543, 268P495; 66Utah272, 241P 1051 (possibility of abuse).

1111–69 25F(2d)13; 30F(2d)696; 199 Cal 270, 248P917; 75CalA335, 242P756; 79CalA171, 249P46; 323Mo 990, 20SW (2d)22, 66ALR1053 (results and consequences of proposed interpretation of statute properly considered); 119 Or 101, 248P146. **Consequences resulting from construction** should be considered. 117Nebr102, 219NW811. **Effect** may be considered where construction is doubtful. WVa 153SE293.

1111–70 104Conn1, 132A25, 45ALR728; 317 Ill 203, 148NE69; 234 IllA141; 152 Va649, 148SE794; 37Wyo 98, 259P520.

1111–71 7F(2d)566; 24F(2d)500; 30 Ariz357, 247P126; 195Cal 605, 234P 883; 199Cal 270, 248P917; 201Cal 1, 255P195; 83Colo 43, 262P907; 317 Ill 203, 148NE69; 332 Ill 192, 163NE546; 335 Ill 476, 167NE86; 200 Iowa1384, 206NW271; 170Minn293, 212NW445; 143Miss726, 109S665; Nev 291P311; 34 NM306, 281P29; 226AppDiv593, 236 NYS110; 116 Or264, 240P418, 427 [citCyc]; 119 Or101, 248P146; Or 285P 815; TexCommnA 15SW(2d)553; 104 TexCr432, 284SW574; 187Wis438, 204 NW473; 189Wis471, 205NW428; 40 Wyo 57, 274P10. See also 282US55, 51 SCt49.

1112–72 18F(2d)239; 26F(2d)646; 195 Cal 605, 234P883; 199Cal 270, 248P917; 201Cal 1, 255P195; 75CalA335, 242P 756; 104Conn1, 132A25, 45ALR728; 44 Ida385, 257P480; 317 Ill 203, 148 NE69; 196 Ind167, 147NE619; 146 Miss369, 112S1; 147Miss885, 114 S127; MoA 24SW(2d)224; Nev 291P311; 34NM306, 281P29; 132SC 427, 128SE865; 40Wyo 57, 274P10. **Doubtful language construed to avoid mischief.**–50Nev377, 262P935. **Legislative intent to produce inequalities** will not be presumed. NJCh 150A436.

1112–73 104Conn1, 132A25, 45ALR728 (public mischief avoided in construction); 34NM306, 281P29; 226AppDiv 593, 236NYS110. **Construction avoiding public mischief** is favored. 111Conn147, 149A410.

1112–74 119Kan605, 240P852.

1112–75 104Conn233, 132A690; 44 Ida 385, 257P480; 207 Iowa970, 221NW589; 210Ky453, 276SW137; 75Mont122, 242 P421; 30NM454, 236P743; 116 Oh549, 157NE13; 36 OklACR362; 132 Or660, 285P815; 152Tenn243, 276 SW638; TexCommnA 258SW(2d)804.

1112–76 195Cal 605, 234P883; 199Cal 270, 248P917; 205Cal 93, 269P1109, 61 ALR366; CalA 261P1053; Iowa 232NW 430; 221Ky106, 298SW185; 230Ky594, 20SW(2d)449; 319Mo 976, 5SW(2d)83; 51Nev420, 279P27; 116 Oh549, 157NE13; 132 Or223, 283P753; 132SC427, 128SE 865; 154Tenn590, 288SW355; 66Utah 272, 241P1051.

1112–79 100Vt387, 138A867. **Application of words in statute** may be limited by implication if necessary to make statute reasonable. 129Misc855, 223NYS733.

1113–80 126 Or417, 270P502.

1113–81 8F(2d)279 (general language may be construed to admit implied exceptions); 95Fla1010, 117S786; 99Fla65, 126S308; 29Hawaii1, 5 [quotCyc]; 115 Oh639, 155NE227; 126 Or417, 270P502. **Details to carry out purpose which is clearly expressed,** or is clearly apparent, may be supplied by implication. 310Mo 542, 276SW389. **Indefinite and vague terms** imply intention to vest wide discretion conferred by statute. 158Tenn498, 14SW(2d)716. **The question of implication is essentially a question of legislative intent.**–54SD482, 223NW600(2dcase). **Where statute limits a thing to be done in a particular way,** it includes a negative that it shall not be done otherwise. 21AlaA245, 107S 38.

1113–82 174Ark945, 298SW217; 200Cal 661, 254P564; CalA 258P625; 253Mass 529, 149NE407; 130Misc235, 223NYS 726; 191NC396, 131SE721; TexCommnA 283SW151; 100Vt387, 138A867; Sask [1927] 3DomLR626. **Contradiction of statute** cannot be permitted by interpretation by implication. TexCommnA 283 SW151. **Ulterior motives should not be imputed** to legislature unless necessary from circumstances and language. 137 Misc341, 242NYS142.

1113–83 200Cal 661, 254P564; 71CalA 445, 235P464; 29Hawaii1, 5 [quotCyc]. See also 32PortoRico 428. **Courts cannot substitute another remedy** for one provided by statute. 14F(2d)553. **Intent to legislate by implication** is not presumed. 204Cal 201, 267P703.

1113–84 95Fla1010, 117S786; Iowa 227 NW532; 312Mo 1, 278SW769; 31NM120, 241P1027, 1038 [citCyc]. **Must be practically indispensable and essential.**–Tex CommnA 283SW151.

1113–84½–New. Where legislature prescribes one mode of exercising express power or privilege, it implies inhibition to exercise given power in any other way. 55ND45, 212NW236, 51ALR296.

1113–85 173Ark970, 294SW74; 313Mo 114, 280SW697, 699 [citCyc].

1113–86½–New. Interpretation by implication is permitted only to supply obvious intent, not expressly stated, in order to effectuate major purpose of legislature. TexCommnA 283SW151.

1113–86¼–New. Legislative power granted then withdrawn cannot thereafter be implied except from clear legislative intent shown. 34 OhA424, 171NE 364.

1113–88 326 Ill 310, 157NE177.

1113–91 19F(2d)600; 28F(2d)205; 200 Cal 661, 254P564; 97CalA138, 275P453; 326 Ill 310, 157NE177; Iowa 233NW147; 159La872, 106S364; 11LaA77, 120S246; 117 Or566, 245P308, 45ALR527 (by statute); 8PaDist&Co 89.

1114–94½–New. General statutes applied to new cases as they arise. 5Pa Dist&Co 139.

1114–96 273US326, 47SCt368, 71L ed 663; 8F(2d)544; 14F(2d)552; 15F(2d) 626; 22F(2d)591; 24F(2d)722; 25F(2d) 13; 26F(2d)646; 27F(2d)413; 38F(2d) 28; 38F(2d)925; 214Ala640, 108S862; 215Ala655, 111S907; 214Ala640, 108S 862; 29Ariz446, 242P870; 32Ariz573, 261 P40; 172Ark279, 288SW382; 180Ark713, 23SW(2d)617; 180Ark989, 23SW(2d) 969; 200Cal 661, 254P564; 87CalA636, 262P465; 88CalA464, 263P555; CalA 293P144; 85Colo 289, 275P896; 98Fla 731, 124S279; 165Ga815, 142SE851; 43 Ida180, 250P239 (sense in which they were understood at time statute enacted); 325 Ill 72, 155NE850; 326 Ill 145, 157NE225; 337 Ill 483, 169NE218; 195 Ind620, 148NE602; 198 Ind45, 152NE 161 (unless such construction will defeat manifest intent of legislature); Ind 172 NE911; Iowa 196NW287; 205 Iowa495, 216NW284; 206 Iowa452, 221NW354; 207 Iowa427, 223NW253; 207 Iowa 621, 223NW512; 122Kan647, 253 P549; 224Ky136, 5SW(2d)910; 232 Ky479, 23SW(2d)937; 160La724, 107 S505; 162La902, 111S321; 127Me 428, 144A390; 128Me293, 147A212; 262Mass439, 160NE419; 265Mass428, 164 NE616; Mass 172NE643; 232Mich29, 204 NW747; 246Mich393, 224NW402; 171 Minn408, 214NW269; 173Minn57, 216 NW789; 143Miss726, 109S665; 151Miss 467, 118S293, 60ALR1155; 151Miss503, 118S606, 608 [citCyc] (2dcase); 153Miss 276, 120S450, 62ALR999; 310Mo 184, 274 SW827; 314Mo 55, 282SW715, 718 [quot Cyc]; 315Mo 485, 286SW371, 377 [quot Cyc]; 314Mo 390, 284SW455, 461 [quot Cyc]; 321Mo 969, 13SW(2d)628; 73Mont 376, 237P486; 83Mont540, 273P290; Mont 288P188; Mont 293P294; 114Nebr 797, 210NW275, 48ALR728; 116Nebr61, 215NW798; 251NY107, 167NE187, 64 ALR1066; 126Misc275, 213NYS206; 221 AppDiv77, 222NYS647; 130Misc124, 222 NYS676; 136Misc141, 239NYS568; 25 OhNPN885; 28 OhA248, 162NE647; 44 OklACR55; 137 Okl 95, 278P311; 287Pa 161, 134A404; 290Pa539, 139A156; 295 Pa461, 145A514; 297Pa5[illegible], 147A605; Pa 151A786; 8PaDist&Co 89; 46RI 417, 133 A653; 49RI 491, 144A159; 49SD496, 207 NW462 (preference); 155Tenn441, 295 SW68; 156Tenn168, 299SW770; Tex CommnA 288SW409; TexCivA 295

SW293; 67Utah15, 245P375, 57ALR 786; Utah 269P103; 144Va456, 132 SE482; 147Va202, 136SE666; 152Va903, 147SE249; 152Va649, 148SE794; Wis 228NW593; 36Wyo 460, 256P1039; Ont [1925] 2DomLR677; Sask [1927] 3DomLR188; Sask [1927] 3DomLR626. **Words of statute are to be taken in sense in which they will be understood by** that part of public on which they are to take effect. 13F(2d)997. **The meaning of the words at the time of passage governs** the execution of all laws. 300Pa 256, 150A471. **Literal reading of words used.**–136Misc224, 241NYS127.

1115-97 22F(2d)341; 34F(2d)812; 171 Ark450, 284SW30; 200Cal 598, 254P951; 201Cal 134, 255P808; 203Cal 731, 265P 947, 58ALR1500; 331 Ill 459, 163NE396; 234 IllA137; 208 Iowa614, 226NW182; 213Ky636, 281SW1039; 217Ky123, 288 SW1036; 229Ky325, 17SW(2d)210; 128 Me293, 147A212; 170Minn207, 212NW 190; 310Mo 184, 274SW827; 314Mo 55, 282SW715, 718 [quotCyc]; 314Mo 33, 282SW1007, 1012 [quotCyc]; 314Mo 390, 284SW455, 461 [quotCyc]; 73Mont 122, 235P422; 82Mont382, 267P499; Mont 293P294; 130Misc442, 223NYS716; 226AppDiv593, 236NYS110; 52ND65, 201NW988 [quotCyc]; 52ND420, 203 NW317; 114 Okl 240, 246P395; 134 Okl 186, 272P840; 120 Or600, 253P542; 133 Or541, 277P97; 46RI 417, 133A653; Tex CommnA 292SW174; 147Va720, 133SE 593; 133Wash681, 234P1042, 238P581; Can [1930] 4DomLR1031. **It is not permissible to interpret that which needs** no interpretation. 144Va56, 131SE437. **There is no room for construction where** language of statute is plain. 38F(2d) 608.

1115-98 278US41, 49SCt52, 73L ed170; 28F(2d)887; 201Cal 134, 255P808; 96 Fla495, 118S313; 326 Ill 145, 157NE225; 326 Ill 418, 158NE151; 170Minn207, 212 NW190; 310Mo 184, 274SW827; 310Mo 184, 274SW827; 314Mo 55, 282SW715, 718 [quotCyc]; 314Mo 33, 282SW1007, 1012 [quotCyc]; 314Mo 390, 284SW455, 461 [quotCyc]; 114Nebr734, 209NW497; 52ND65, 201NW988 [quotCyc]; 120 Or 600, 253P542; 67Utah15, 245P375, 57 ALR786; Ont [1925] 2DomLR677.

1115-99 310Mo 184, 274SW827; 314Mo 55, 282SW715, 718 [quotCyc]; 314Mo 33, 282SW1007, 1012 [quotCyc]; 314Mo 390, 284SW455, 461 [quotCyc]; 52ND65, 201 NW988 [quotCyc]; 125 Or428, 266P875; Sask [1927] 3DomLR188.

1115-1 310Mo 184, 274SW827; 314Mo 55, 282SW715, 718 [quotCyc]; 314Mo 33, 282SW1007, 1012 [quot Cyc]; 314 Mo 390, 284SW455, 461 [quotCyc]; 52 ND65, 201NW988 [quotCyc]; 144Va56, 131SE437 (effect must be given to plain language regardless of what courts think of its wisdom and policy).

1115-2 273US326, 47SCt368, 71L ed663; 15F(2d)626; 23AlaA239, 124S119; 200 Cal 522, 254P896; 75CalA247, 242P749 (court cannot look beyond face of statute); 81CalA98, 252P1057; 29Hawaii 830, 843 [quotCyc]; 234 IllA137; 225 Ky621, 9SW(2d)984; 233Ky767, 22SW (2d)256(2dcase); 162La902, 111S321; Me 151A141; 170Minn207, 212NW190; 310Mo 184, 274SW827; 314Mo 55, 282 SW715, 718 [quotCyc]; 314Mo 33, 282 SW1007, 1012 [quotCyc]; 314Mo 390, 284SW455, 461 [quotCyc]; 316Mo 1075, 292SW1028, 1030 [quotCyc]; MoA 25 SW(2d)147; 75Mont122, 242P421; 80 Mont515, 261P264; 114Nebr734, 209NW 497; 130Misc631, 225NYS185; 133Misc 95, 231NYS242; 52ND65, 201NW988 [quotCyc]; 46RI 417, 133A653; RI 151 A5; 115Tex393, 283SW472; Utah 289P 132; Wash 289P16. **There is no room for interpretation of a statute where the language leaves no doubt as to its meaning.**–86Mont200, 283P202, 67ALR 1020; 114Nebr797, 210NW275, 48ALR 728; 120 Okl 5, 249P910; 136Wash610, 241P12.

1116-3 30F(2d)421; 214Ala640, 108S 862; 75CalA335, 242P756; 319 Ill 51, 149NE538; 155Md507, 142A593; 157 Md576, 146A797; 170Minn207, 212NW 190; 78Mont308, 254P187; 52ND65, 201 NW988; 8PaDist&Co 89; 154Tenn590, 288SW355; 158Tenn264, 12SW(2d)951; Utah 289P92 (transposition of words, phrases and sentences); 102WVa162, 134SE749; Wis 232NW546.

1116-4 273US326, 47SCt368, 71L ed663; 200Cal 598, 254P951; 75CalA335, 242P 756; 170Minn207, 212NW190; 102WVa 162, 134SE749. **Different language used in same connection in different parts of statute shows legislature intended different meaning.** CalA 291P161. **Special meaning of word in general use does** not prevent ascertainment of legislative intent by its use in broad and general sense. 38F(2d)879.

1116-5 25F(2d)531; 41F(2d)859; 195 Cal 605, 234P883; 200Cal 598, 254P951; 42 Ida169, 244P149; 220Ky89, 294SW 815; 170Minn207, 212NW190; 172Minn 424, 215NW675; 316Mo 1075, 292SW 1028; 116Nebr61, 215NW798 (dictum); 104TexCr432, 284SW574; 189Wis471, 205NW428.

1116-6 25F(2d)531; 195Cal 605, 234P 883; 200Cal 598, 254P951; 220Ky89, 294SW815; 78Mont308, 254P187 ("vacant" not given literal meaning).

1116-7 195Cal 605, 234P883; 200Cal 598, 254P951; 97Fla916, 123S668(2d case) (transposition of words and phrases); 210Ky453, 276SW137; 220Ky89, 294SW815; 116Nebr61, 215NW798 (dictum); Utah 288P900; 197Wis578, 222 NW809; Wis 232NW546. **Words may be substituted for words inadvertently** used, where intention of legislature is clear. 221Ky106, 298SW185. **Where the courts have construed, etc.** 157Md 279, 145A770.

1116-7½-New. Words of statute must be taken in sense in which they were understood at time statute was enacted. 319 Ill 403, 150NE290.

1116-7⅓-New. That legislature used language advisedly will be assumed. 267Mass496, 166NE855.

1117-14½-New. In Porto Rico by local statute the English text of the penal code which is of American origin governs. 34PortoRico 5.

1117-15 8F(2d)544; 32Ariz293, 257P 982; 200Cal 598, 254P951; 74Mont332, 240P286; 75Mont429, 244P287; 8Pa Dist&Co 89; 8PaDist&Co 399.

1117-16 16CustA451; 16CustA518; 31 Ariz252, 252P515; 32Ariz293, 257P982; 195Cal 605, 234P883; 200Cal 598, 254P 951; 252Mass407, 147NE901; 8PaDist &Co 399; 67Utah15, 245P375, 57ALR 786; 142Va620, 128SE578 (will not be permitted to defeat purpose of act).

1117-17 268US85, 45SCt437, 69L ed 857; 5F(2d)971; 12F(2d)631; 16CustA 518; 195Cal 605, 234P883; 76CalA734, 245P1109; 81Colo 73, 253P1059; 164 Ga351, 138SE898; 123Kan576, 255P966; 124Kan546, 261P824, 826 [quotCyc]; 307Mo 185, 270SW110 (omission of comma); 75Mont429, 244P287 (great weight not given to position of comma); 125 Or34, 265P445; 142Va620, 128SE 578 (dictum). **Commas.**–78Mont301, 254 P419. **Punctuation will not be resorted to in absence of ambiguity.**–Ariz 288 P1.

1118-18 76CalA734, 245P1109; 328 Ill 262, 159NE194; 123Kan576, 255P966; 124Kan546, 261P824, 826 [quotCyc]; 155Md13, 141A383; Mass 168NE73.

1118-20 3Del 11, 129A510; 196 Ind167, 147NE619; 115 Oh458, 154NE792. **Where statute presents inconsistencies or ambiguities,** courts will undertake to reconcile them, giving words used their ordinary meaning, if possible. 134SC 402, 132SE680. **In an ambiguous statute,** subject matter will control to some extent on determining whether strict or liberal interpretation shall be adopted. TexCivA 283SW929.

1118-21 88CalA464, 263P555.

1118-22 148Miss268, 114S484.

1118-23 16CustA82; Cal 251P808, 49 ALR1377 (legal terms); 319 Ill 51, 149 NE538; 127Me428, 144A390.

1118-25 76CalA114, 243P898; 93Fla 5, 112S289, 293 [citCJ]; 28Hawaii232; 86Mont58, 282P32; 101NJL455, 130A 14; 56ND650, 219NW105; 46Philippine 827; 154Tenn105, 289SW363, 53ALR 821; 101Vt391, 143A677; 194Wis337, 216NW485; BC [1926] 4DomLR834; Ont [1927] 3DomLR163. **Doctrine of "noscitus a sociis"** is mere guide to legislative intent. 21F(2d)489.

1118-26 76CalA114, 243P898; 28 Hawaii232; 15CustA249; 77Colo 516, 238P44, 46 [citCyc]; 126Kan777, 781, 271P388 [quotCyc]; TexCivA 283SW 277.

1118-29½-New. unless manifest intention of legislature is to restrict or qualify them; TexCivA 283SW277.

1119-30 170Ark1155, 282SW1000; Idaho 293P322 (especially word "all"); 112 OhSt590, 148NE95; 99Vt17, 130A 701; 41Wyo 36, 282P27; [1926] Can SC246, [1926] 2DomLR8; BC [1928] 4 DomLR506.

1119-32 126Kan777, 781, 271P388 [quot Cyc].

1119-33 35F(2d)41 (specific words in succeeding sections); Ark 31SW(2d) 748; 76CalA639, 245P796; Colo 292 P594; 325 Ill 511, 156NE778; Ind 154 NE12; 247Mich616, 226NW684; 130 Misc151, 223NYS454; 193Wis232, 213 NW873, 52ALR1033; [1926] CanSC246, [1926] 2DomLR8. **Section of statute** which treats specially of matter will prevail over other sections which treat it only incidentally. 221Ky106, 298SW 185.

1119-35½-New. All words, if they are general and not precise, are to be restricted to fitness of matter. 170Ark 1155, 282SW1000.

1119-35¼-New. General words may be restrained to the intent, and those of narrower import may be expanded to effectuate the intent. 79CalA726, 251 P241.

1119-35⅓-New. Particular provisions prevail over general and if conflicting particular will be treated as exception to general. 111Conn281, 149A840.

1119-36 16F(2d)59; 25F(2d)1011; 26 F(2d)530; 218Ala407, 118S583; 172Ark 726, 290SW371; 76CalA114, 243P898, 900 [quotCyc]; 81CalA690, 254P671, 676 [quotCyc]; 91Fla60, 107S345, 44ALR 698; 93Fla5, 112S289; 322 Ill 70, 152 NE567; 200 Ind307, 163NE225; 89 IndA349, 166NE437; 89 IndA500, 167 NE147; 119Kan323, 239P989; 124Kan 546, 261P824; 237Mich156, 211NW346; 170Minn137, 212NW192, 50ALR1173; 142Miss574, 107S554; 316Mo 853, 293 SW399, 403 [citCyc]; MoA 26SW(2d) 818; 80Mont136, 259P825; 49Nev5, 234 P520; 221AppDiv77, 222NYS647; 219 AppDiv422, 219NYS390; 33 OklCr198, 243P260; 37 OklACR399; 117 Or399, 244P526; TexCommnA 14SW(2d)798; TexCommnA 17SW(2d)781; TexCivA 289SW428; TexCivA 4SW(2d)616, 618 [citCyc]; TexCivA 11SW(2d)254; 197 Wis552, 222NW731. See also 222MoA 1228, 3SW(2d)1046.

1120-37 76CalA114, 243P898, 900 [quot Cyc].

1120-38 76CalA114, 243P898, 900 [quot Cyc]; TexCivA 289SW428.

1120-39 76CalA114, 243P898, 900 [quot Cyc]; 142SC407, 141SE26, 39 [citCyc].

1120-40 76CalA114, 243P898, 900 [quot Cyc]. **The cases in which this rule has been applied, etc.:** 76CalA114, 243P898; 119Kan323, 239P989; 247Mich204, 225 NW622; 142Miss574, 107S554. **Restricted to other of class enumerated.**–126Misc140, 213NYS90.

1121-41 268US45, 45SCt440, 69L ed 841; 21F(2d)489; 209Ky318, 272SW 743; 210Ky150, 275SW630; 237Mich 156, 211NW346; 79Mont52, 255P337; 144Wash302, 258P1. See also 76CalA 114, 243P898, 904 [quotCyc].

1121-42 268US45, 45SCt440, 69L ed 841; 42F(2d)133; 33Ariz64, 262P489; 76CalA114, 243P898; 209Ky318, 272SW 743; 210Ky150, 275SW630; 237Mich 156, 211NW346; 222MoA1228, 3SW(2d) 1046; 79Mont52, 255P337; 57ND763, 224NW680; 19 OhA191; 126 Or268, 269 P853, 60ALR260; 144Wash302, 258P1; Alta [1927] 3DomLR804; BC [1925] 3 DomLR79 (where general words are sufficiently wide and explicit); 57 OntL 340, [1925] 3DomLR1196 (remedial statute conferring judicial discretion).

1122-43 76CalA114, 243P898, 904 [quot CycperCraig,J]; 209Ky318, 272SW 743; NS [1930] 1DomLR975.

1122-44 21F(2d)489; 33Ariz64, 262P 489, 492 [quotCyc]; 76CalA114, 243P 898, 904 [quotCycperCraig,J]; 209Ky 318, 272SW743; 144Wash302, 258P1.

1122-47 29Ariz164, 240P277; Ark 32

SW(2d)301; CalA 258P693; 124Kan 546, 261P824; 210Ky199, 275SW385; 151Md298, 134A332; 242Mich445, 219 NW721; 250Mich238, 230NW191 (inclusion by specific mention as excluding what is not mentioned); 317Mo 524, 297SW404; 323Mo 161, 18SW(2d)896; 77Mont62, 249P573; 78Mont1, 252P301; 116Nebr61, 215NW798; 21 OhA459, 153 NE215; 125 Okl 66, 256P704, 52ALR 1270; 8PaDist&Co 267; 132SC182, 128 SE36; 132SC241, 128SE172; 51SD190, 212NW869, 872 [quotCyc]; Tex CommnA 283SW141; 100Vt387, 138A 867. **Express exception from operations** of statute excludes all others. 153Tenn 498, 284SW61. **Specific exception may** make it plain that no other exceptions are permitted. 121Kan233, 247P114; 76 Mont239, 245P953. **Louisiana courts, however,** in absence of positive statute, apply principles of equity, appealing to natural law and reason; and the maxim "inclusio unius est exclusio alterius" is not always applied. 30F(2d)761. **Express enumeration of occupations or** businesses over which city or village is given control is exclusion of all others. 332 Ill 586, 164NE199.

1122-48 312Mo 581, 280SW37; 220MoA 575, 287SW861; 116Nebr61, 215NW798; 20 OhA375, 152NE393.

1122-49 26F(2d)646; 33F(2d)653; 93 Fla611, 112S768; Ind 172NE887; 120 Kan557, 245P143, 145 [quotCyc]; 166 Minn302, 207NW646; 322Mo 258, 14SW (2d)646; 323Mo 161, 18SW(2d)896; 220 MoA575, 287SW861; 116Nebr170, 216 NW182, 184 [citCyc]; 101NJEq227, 137 A429; 133Misc161, 231NYS85; 191NC 84, 131SE413 (express powers granted); 190NC732, 130SE861; 55ND45, 212NW 236, 51ALR296. **Maxim does not apply to permissive provision enlarging common** law. 103Conn138, 130A96. **Rule does not apply where there is another statute which expressly provides that** thing may be done in different way. 33 Ariz1, 261P629.

1122-51 34Ariz380, 271P865; 210Ky 199, 275SW385; 323Mo 161, 18SW(2d) 896; 135Wash109, 237P12, 13 [citCyc].

1122-52 277US189, 48SCt480, 72L ed 845; 34Ariz380, 271P865; 170La426, 127S890 [quotCyc]; 126Misc418, 213 NYS602 (where it conflicts with letter of statute); Utah 277P206; 135Wash 109, 237P12, 13 [citCyc]; Can [1929] 4DomLR1028.

1122-53½-New. Express exception in statute excludes all other exceptions. 74 Mont346, 240P837.

1122-53¼-New. Rule has not be applied to restrict title of act which contains general statement of purposes of act. 152Tenn451, 278SW417.

1123-54 77Colo 516, 238P44, 46 [cit Cyc]; 49Nev336, 245P941; 244NY105, 155NE65; 136Wash278, 239P834. **This rule is of no great force, and may be** overturned by slight indication of contrary intent. Ida 293P322. **Especially word "all."** Ida 293P322.

1123-55 77Colo 516, 238P44, 46 [cit Cyc]; 244NY105, 155NE65; 136Wash 278, 239P834. **Rule applied where no contrary intention appears.**–136Wash278, 239P834.

1123-56 77Colo 516, 238P44, 46 [cit Cyc]; 32Ariz293, 257P982.

1123-58 177Ark912, 9SW(2d)10; 114 Nebr341, 207NW664, 665 [citCyc], 44 ALR1172; 143SC104, 141SE180, 184 [cit Cyc]. **Where language is clear and nothing calls for substitution word** "and" cannot be substituted for "or." Utah 286P936.

1123-59 177Ark728, 7SW(2d)794; 170 Minn207, 212NW190; 114Nebr341, 207 NW664, 665 [citCyc], 44ALR1172; 143 SC104, 141SE180, 184 [citCyc].

1123-60 203Cal 553, 265P223; 322 Ill 120, 152NE555; 207 Iowa1077, 224NW 73; 219Ky410, 293SW965; 131Misc303, 226NYS608; 143SC104, 141SE180, 184 [citCyc].

1123-62 Ida 290P387; 127Misc886, 217 NYS300.

1123-63 69CalA106, 230P952 (rule by statute); 239Mich605, 215NW29 (under express provision of statutory rule of construction); 81Mont459, 264P127.

1124-65 "Ordinary meaning" of word means well established judicial interpretation, for long time past well understood. 206 Iowa1251, 222NW31. **Phrases having fixed meaning through judicial interpretation,** when bodily incorporated into statute, are given that meaning. 40F(2d)530.

1124-70½-New. any, 321Mo 461, 12SW (2d)64.

1124-79½-New. contain, 123 Or508, 262 P943.

1124-79¼-New. construction. 109Conn 422, 147A124.

1124-86½-New. frontage, 319 Ill 51, 149NE538.

1124-91½-New. heretofore, 12PaDist& Co 345.

1124-97 258Mass203, 154NE760.

1124-4 137 Okl 186, 279P319.

1124-5 Fla 130S699.

1124-7 316 Ill 345, 147NE248; 252Mass 331, 147NE866; 70Utah564, 262P105.

1125-14½-New. proof, NJSup 136A430.

1125-15 See also 114Nebr194, 206NW 765.

1125-16½-New. Provided has been construed as having same meaning that conjunction "and" or "but" would have if used in its place. 118Nebr189, 223 NW957.

1125-18 24F(2d)828.

1125-21½-New. Word "resided," in phrase, "in which the plaintiff resided at the time of the accrual of the cause of action," is construed in relation to venue in libel action. 118Tex433, 13SW (2d)358.

1125-29½-New. "Void" is frequently used in sense of avoidable. 241Mich6, 216NW476; WVa 153SE293.

1125-33½-New. "Claim." Ont [1925] 3DomLR870 (as used in Sales Act means claim to stop in transitu).

1125-33¼-New. "Fix" implies establishment of definite rate. 128Misc317, 218NYS571.

1125-33¼-New. "Regulate" involves adoption of rule to be followed in fixing wages. 128Misc317, 218NYS571.

1125-33⅓-New. "Prevailing rate" of wages means "market rate." 128Misc 317, 218NYS571.

1125-33⅓-New. "Existing laws," as used in statute, has been held to refer to laws existing at date of approval of act. 7PaDist&Co 477.

1125-35 153SC56, 150SE347, 66ALR 1264. **Whether "citizen" or "subject"** includes corporations depends upon intent gathered from contract and general purposes of whole legislation. 267 US42, 45SCt213, 69L ed504. **In revenue acts word "person"** does not include corporations unless such intent is clearly indicated. 297Pa522, 147A605.

1125-38½-New. Sense. 76Mont565, 248 P176.

1125-38⅓-New. Impending. 76Mont 565, 248P176.

1125-38¼-New. Vacant or vacancy. 78 Mont308, 254P187.

1126-39½-New. Word "resident" as used in statute ordinarily means individual or citizen, not corporation. 215 AppDiv15, 213NYS77.

1126-39⅓-New. Where a word has been defined by statute, subsequent legislation will be deemed to refer to the word in that sense. 95Fla345, 116S81.

1126-39¼-New. "Corporation" means private corporation. TexCommnA 288 SW409.

1126-33⅓-New. Word "valid," in statute providing that no judicial sale shall be valid till all state taxes have been fully paid, means legally sufficient or efficacious. 296Pa359, 145A916(2dcase).

1126-41 131 Or371, 283P751; 106WVa 322, 145SE606.

1126-42 30F(2d)22; 126Kan591; 14 PaDist&Co 341; 197Wis218, 221NW768.

1126-44 199 Ind78, 155NE193.

1126-45 8F(2d)544 (insertion of comma not warranted); 123Kan576, 579, 255P 966 [citCyc]; 220Ky89, 294SW815; 161 La889, 109S538.

1127-46 42 Ida169, 244P149 (word "less" changed to "more"); 218Ky794, 292SW320, 321 [quotCyc]; 220Ky89, 294SW815; NC 155SE724; 117 Oh345, 158NE868; 145Va825, 133SE753, 755 [quotCyc]. **Citizen has been held not** entitled to enjoin board of education from conducting public school in church owned premises. 136Misc921, 244NYS 38.

1127-47 80CalA533, 251P945; 103Conn 565, 131A560 (resort to eliminating words not favored); 177Minn398, 225 NW435. **Court cannot reject part of title of act** under guise of discarding surplusage. 242Mich698, 219NW648.

1127-48 122Kan508, 252P463; 172Minn 424, 215NW675.

1127-49 103Conn565, 131A560; 321 Ill 484, 152NE500; 126Kan591; 170La851, 129S368; 145Va825, 133SE753, 755 [quotCyc]; 197Wis218, 221NW768. **Words may not be rejected to change** legislative intent. 159La872, 106S364.

1127-51 3Del 294, 136A280; BC [1927] 2DomLR382.

1127-52 103Conn565, 131A560; 3Del 294, 136A280; 83Mont400, 272P525; 117Nebr397, 220NW688, 691 [quotCyc]; 137 Okl 186, 279P319; 152Tenn243, 276 SW638; 197Wis218, 221NW768; 39Wyo 345, 271P221, 223 [citCyc]; BC [1927] 2DomLR382.

1127-53 103Conn565, 131A560 (resort to adding words not favored); 319Mo 492, 5SW(2d)57; 322Mo 158, 16SW(2d) 190; 82Mont543, 268P495; 300Pa299, 150A466; 152Va649, 148SE794. **Court may not read into statute words not found therein.**–126Misc194, 213NYS583 (statute like city charter). **Omission must be clearly indicated.**–MoA 24SW (2d)224.

1127-53½-New. Words should not be read into a statute which would partially defeat its purpose. 242NY196, 151 NE205.

1128-54 276US233, 48SCt244, 72L ed 544, 56ALR379; 15F(2d)145; 18F(2d) 239; 18F(2d)366; 18F(2d)367; 20F (2d)179; 26F(2d)623; 27F(2d)366; 30 F(2d)700; 35F(2d)256; 35F(2d)713; 39F(2d)991; 215Ala640, 112S243; 177 Ark728, 7SW(2d)794; 180Ark989, 23 SW(2d)969; 195Cal 605, 284P883; 197 Cal 539, 241P879; 198Cal 667, 247P195; 200Cal 637, 254P570; 200Cal 522, 254P 896; 202Cal 569, 262P297; Cal 270P 968; 79CalA171, 249P46; 104CalA276, 285P871(2dcase); CalA 289P689; CalA 292P1065; 85Colo 72, 273P879; 109 Conn547, 147A144; 110Conn36, 147A 290; 111Conn281, 149A840; 99Fla206, 126S283; Ga 155SE34; 42 Ida169, 244 P149; 46 Ida403, 268P26; 322 Ill 416, 153NE693; 326 Ill 82, 157NE28; 332 Ill 346, 163NE781; 333 Ill 606, 165NE217, 62ALR912; 335 Ill 476, 167NE86; 239 IllA539; 240 IllA619; 196 Ind472, 149 NE69; 198 Ind216, 152NE833; Ind 172 NE911; 85 IndA156, 149NE101; IndA 156NE178; IndA 159NE434; 204 Iowa 1378, 215NW754; 207 Iowa427, 223NW 253; Iowa 228NW320; 118Kan659, 236 P819 (liquor law); 121Kan233, 247P 114; 126Kan9, 266P657; 208Ky422, 271 SW589; 210Ky324, 275SW795; 213Ky 30, 280SW456; 217Ky305, 289SW312; 219Ky554, 293SW1096; 229Ky186, 16 SW(2d)1034; 231Ky772, 22SW(2d)300; 234Ky78, 27SW(2d)657; 165La531, 115 S740; 167La249, 119S37; 167La399, 119 S405; 125Me426, 134A542; 127Me528, 145A243; 158Md260, 148A434; Mass 158NE898; 165Minn128, 206NW46; 142 Miss1, 106S886; 144Miss24, 109S23; 146 Miss422, 111S558; 321Mo 1126, 14SW (2d)990; 219MoA436, 274SW880; MoA 12SW(2d)523; MoA 26SW(2d)830; 78 Mont308, 254P187; 80Mont228, 260P 134; 114Nebr580, 208NW737; 127Misc 224, 215NYS110; 129Misc845, 223NYS 470; 137Misc852, 244NYS616; 198NC 440, 152SE165(2dcase); 52ND420, 203 NW317; 53ND140, 205NW17, 20 [quot Cyc]; 114 Oh126, 151NE51 (to determine whether statute imposing penalty also prohibits making of prohibited contracts makes examination of entire act necessary); 22 OhA457, 153NE918; 24 OhA237, 157NE418; 121 Okl 59, 247P 366; 132 Okl 84, 270P311(2dcase); 137 Okl 186, 279P319; 119 Or1, 247P319; 119 Or127, 248P151; 122 Or315, 259P 203; 122 Or515, 259P915; 125 Or197, 266P1075; 127 Or440, 270P478; 130 Or 99, 279P285; 130 Or669, 281P840, 67 ALR599; 13PaDist&Co 306; 48Philippine278; TexCommnA 290SW729; Tex CommnA 1SW(2d)587; TexCommnA 14

SW(2d)798; TexCommnA 298W(2d) 1009; TexCivA 293SW306; 105TexCr 586, 289SW682; 106TexCr37, 289SW 1072; 109TexCr244, 48W(2d)38; 99Vt 265, 132A40; 100Vt122, 135A492; 142 Va620, 128SE578; 145Va28, 133SE561; 150Va562, 143SE756; 152Va649, 148SE 794; Va 155SE635; 148Wash468, 269 P844; 153Wash647, 280P82; 194Wis 437, 216NW493.

1128-55 214Ala646, 108S761; 69CalA 310, 231P748; 326 Ill 82, 157NE28; 118 Kan659, 236P819 (liquor law); 316Mo 1188, 295SW123; 222MoA831, 11SW(2d) 81; 73Mont392, 236P1080; 53ND140, 205NW17, 20 [quotCyc]; 24 OhA237, 157NE418; 142Va620, 128SE578 (bearing in mind object sought to be attained).

1128-56 53ND140, 205NW17, 20 [quot Cyc].

1128-56½-New. Language of emergency clause has no significance as an aid to construction of statute. 320 Ill 507, 151NE510.

1123-57 19F(2d)999; 22F(2d)298; 80 CalA561, 251P925; 80CalA533, 251P 945; CalA 288P57 (holding words of statute should never be considered surplusage if they can be given force to, and can be preserved by, reasonable construction); 310Mo 184, 274SW827, 832 [citCyc]; 315Mo 485, 286SW371, 377 [quotCyc].

1128-58 278US101, 49SCt43, 73L ed202; 6F(2d)1000, 42ALR503; 18F(2d)367; 19F(2d)999; 26F(2d)66, 69 [citCyc]; 26 F(2d)646; 29F(2d)741(2dcase); 35F (2d)416; 36F(2d)386; 37F(2d)444; 38 F(2d)483; 39F(2d)204; 14CustA309; 35Ariz479, 281P46; 181Ark974, 28SW (2d)1060; 195Cal 1, 231P34; 195Cal 605, 234P883; 200Cal 637, 254P570; 200 Cal 522, 254P896; 208Cal 770, 284P1105 (2dcase); Cal 290P444; 75CalA84, 241 P935; 75CalA152, 242P115; 80CalA561, 251P925; 80CalA533, 251P945; 85CalA 507, 259P970; CalA 271P771; CalA 281 P660; 102CalA635, 283P862; 103CalA 683, 284P1053; CalA 288P57; CalA 289 P651; CalA 289P678; CalA 289P689; 81Colo 73, 253P1059; 85Colo 289, 275P 896; Colo 292P594; 332 Ill 346, 163NE 781; 196 Ind472, 149NE69; IndA 156 NE178; 200 Iowa1310, 206NW604; 205 Iowa495, 216NW284; 210Ky324, 275 SW795; 224Ky156, 5SW(2d)892; 162La 630, 110S884; 169La394, 125S283; 11 LaA45, 122S871(2dcase); 152Md521, 137 A344; 252Mass432, 147NE904; 253Mass 400, 149NE317; Mass 167NE321; 165 Minn128, 206NW46; 170Minn293, 212 NW445; 141Miss356, 106S449; 142Miss 574, 107S554; 310Mo 184, 274SW827, 832 [citCyc]; 315Mo 485, 286SW371, 377 [quotCyc]; 321Mo 1015, 13SW(2d)1056; 321Mo 1126, 14SW(2d)990; MoA 281SW 142; 221MoA911, 289SW19; MoA 18 SW(2d)580; MoA 25SW(2d)147; MoA 26SW(2d)830; 73Mont376, 237P486; 75 Mont122, 242P421; 77Mont290, 250P973 49ALR398; 81Mont86, 261P885; 83 Mont282, 272P543(2dcase); Mont 285P 172; 31NM120, 241P1027; 101NJL518, 129A138; 126Misc140, 213NYS90; 226 AppDiv165, 235NYS250; 230AppDiv281, 243NYS697; 189NC703, 128SE20; ND 229NW282; 113 OhSt526, 149NE871; 115 Oh458, 154NE792; 32 OhA382, 168 NE210; 117 Okl 31, 245P570; 119 Or 586, 250P740; 124 Or261, 264P445; 133 Or223, 286P520; 288Pa39, 135A724; 90PaSuper434; 13PaDist&Co 306; 49 SD350, 207NW210; 52SD497, 219NW 125; SD 227NW845; 152Tenn243, 276 SW638; 156Tenn216, 300SW12; 156 Tenn265, 300SW564; 157Tenn18, 5SW (2d)633; 115Tex201, 280SW161; 117 Tex357, 4SW(2d)541; TexCommnA 10 SW(2d)534(2dcase); TexCivA 280SW 325; 70Utah441, 261P9; Utah 263P78; Utah 270P543; Utah 279P893; 99Vt265, 132A40; 148Va585, 139SE478, 58ALR 193; 152Va649, 148SE794; 153Va332, 149SE541; 151Wash95, 275P66; 155 Wash443, 284P744; 191Wis538, 211NW 938. **Effect as generally understood should, if possible, be given every word.** 28 OhA248, 162NE647. **Every provision must be given effect.** MoA 18SW(2d) 580.

1129-59 18F(2d)367; 44F(2d)184; 32 Ariz235, 257P648; 35Ariz479, 281P46; 172Ark279, 288SW382; 195Cal 605, 234 P883; 200Cal 522, 254P896; 101CalA 479, 281P1057; 93Fla914, 124S461; 99 Fla206, 126S283; 161Ga366, 131SE88; 326 Ill 82, 157NE28; 204 Iowa1378, 215 NW754; 206 Iowa452, 221NW354; 210 Ky324, 275SW795; 224Ky156, 5SW(2d) 892; 234Ky78, 27SW(2d)657; 253Mass 400, 149NE317; 256Mass426, 152NE747; 235Mich700, 209NW920; 165Minn128, 206NW46; 142Miss1, 106S886; 307Mo 674, 271SW755; 318Mo 560, 300SW675; 321Mo 514, 11SW(2d)1045, 62ALR762; 321Mo 1126, 14SW(2d)990; MoA 18SW (2d)580; MoA 24SW(2d)224; MoA 29 SW(2d)730; 78Mont308, 254P187; 80 Mont228, 260P134; 82Mont594, 268P 558; 51Nev170, 271P689; NJSup 149 A57(2dcase); 126Misc140, 213NYS90; 130Misc217, 224NYS267; 52ND65, 201 NW988; 134SC251, 131SE421; 152Tenn 243, 276SW638; 156Tenn216, 300SW12; TexCommnA 290SW729; 105TexCr586, 289SW682; 106TexCr496, 293SW817; 70Utah441, 261P9; 143Va187, 129SE379. **No part should be stricken down unless in irreconcilable conflict.** 15F(2d)145.

1130-61 34F(2d)60 (conflicting construction required); 215Ala640, 112S 243; 200Cal 522, 254P896; Md 151A 409; 233Mich414, 206NW798; 52ND 420, 203NW317. **Change of language is justified to change clear import of a word in one provision to give effect to another provision of doubtful meaning which is inimical to general purpose and intent of whole act.** 198Cal 301, 245 P173. **Where legislative intent is clear,** words of particular section may be modified to obviate inconsistency. 324 Ill 314, 155NE332.

1130-62 127Misc224, 215NYS110.

1130-64 25F(2d)746; 46 Ida403, 268P 26, 30 [citCycperWm.E.Lee,CJ]; 127 Misc224, 215NYS110; 155Tenn285, 292 SW3.

1130-65 215Ala640, 112S243; 155Tenn 285, 292SW3; 156Tenn216, 300SW12; Man [1927] 3DomLR280. But see 117 Oh337, 158NE748. **This rule is to be applied only after exhausting every other effort at construction.**-TexCivA 21SW (2d)104.

1130-65½-New. But provision more in harmony with fundamental purpose of act will control over conflicting provision not so harmonious with such purpose, irrespective of relative positions of such provisions. 198Cal 301, 245P173.

1130-68 76CalA639, 245P796; 76Mont 239, 245P953; 31NM533, 249P106; 44 Philippine138; 155Tenn285, 292SW3.

1130-69 17F(2d)879; 25F(2d)66; 215 Ala640, 112S243; 219Ala476, 122S639; 76CalA639, 245P796; 332 Ill 571, 164NE 10; 198 Ind216, 152NE833; 245Mich585, 223NW359; 316Mo 524, 296SW90, 93 [citCyc]; 76Mont239, 245P953; 82Mont 304, 266P1103; Mont 286P133; 31NM 533, 249P106; 112 OhSt590, 148NE95; 118 Or39, 245P724; 294Pa569, 144A751; 44Philippine138; 155Tenn285, 292SW3; 161Tenn88, 28SW(2d)642 (particular intent subsequently expressed). **Words expressive, etc.**-133Misc741, 234NYS 220. **Specific provisions apply to specific class and general provisions to all other classes,** where there is conflict existing between specific and general provisions in same constitution, statute, or agreement. 294Pa562, 144A750.

1131-70½-New. Provision most in harmony with fundamental purpose of statute prevails as between inconsistent provisions. 117 Oh337, 158NE748.

1131-72 200Cal 598, 254P951; 77Colo 516, 238P44, 48 [citCycperAllen,CJ]; 32PortoRico 442.

1131-73 17F(2d)623; 20F(2d)179; 20 F(2d)873; 195Cal 605, 234P883; 200 Cal 598, 254P951; 73CalA655, 239P56; 75CalA335, 242P756; 81CalA98, 252P 1075; 77Colo 516, 238P44, 48 [citCyc perAllen,CJ]; 322 Ill 416, 153NE693; 338 Ill 385, 170NE280; 202 Iowa661, 210 NW809; 207 Iowa24, 222NW545; Mont 290P252; 244NY424, 155NE728; 136 Misc224, 241NYS127; 197NC30, 147SE 674; 32PortoRico 442; 155Tenn441, 295 SW68; 156Tenn411, 18W(2d)1011; 105 TexCr586, 289SW682; 66Utah272, 241P 1051; 67Utah15, 245P375, 57ALR786. 194Wis437, 216NW493; Wis 232NW546. **Particular words "cannot be torn from their setting and when thus isolated given a literal meaning utterly inconsistent with both the spirit and the letter of every other clause and provision in the same paragraph and subdivision."** 32PortoRico 442, 452. **Legislative intention disclosed by context to give effect to general words different from specific words will be carried into effect by court.** 209Ky318, 272SW743.

1131-74 77Colo 516, 238P44, 48 [citCyc perAllen,CJ]; 90Fla381, 106S714; 208 Ky422, 271SW589; 244NY105, 155NE 65; 105TexCr586, 289SW682.

1131-75 40F(2d)116; 175Ark314, 299 SW15; 197Cal 539, 241P879; 46 Ida 622, 269P993; 240 IllA619; 202 Iowa 661, 210NW809; 208Ky422, 271SW589; 146Miss422, 111S558; 310Mo 542, 276 SW389; Mo 31SW(2d)67; MoA 7SW (2d)474; 84Mont276, 275P278; 116Nebr 282, 216NW815; 244NY105, 155NE65; 115 Oh458, 154NE792; 122 Or515, 259 P915; 158Tenn423, 14SW(2d)728; 105 TexCr586, 289SW682; 106TexCr37, 289 SW1072; 142Va620, 128SE578 (related actions bearing on same subject). See also 222MoA831, 11SW(2d)81. **Each section and paragraph must be construed in light of other.** 27F(2d)366. **Part of sentence cannot be separated from qualifying words in another clause.** 37F(2d) 793.

1132-76 CalA 291P161.

1132-78 200Cal 598, 254P951; 78Mont 308, 254P187; 254NY305, 172NE516; 112 OhSt590, 148NE95; Wis 230NW 691.

1132-79 279US211, 49SCt308, 73L ed 665; 77Colo 516, 238P44, 48 [quotCyc perAllen,CJ]; 46 Ida622, 269P993; 252 Mass331, 147NE866; 123 Or615, 257P 822; 123 Or508, 262P943; Utah 277P 206.

1132-80 31F(2d)740(2dcase); 90Fla 381, 106S741; 322 Ill 416, 153NE693; 252Mass331, 147NE866; Mass 167NE 670.

1132-81 123 Or615, 257P822; 123 Or 508, 262P943; Sask [1926] 4DomLR 1126, [1926] 3WestWkly623.

1132-81½-New. Legislative intent should not be construed from independent and isolated passages, 24 OhA237, 157NE418.

1132-81¾-New. except where such passages reach entire subject matter of controversy. 24 OhA237, 157NE418.

1132-81¼-New. If context of statute taken literally conflicts with plain legislative intent, context must yield. Fla 130S710.

1132-84 322Mo 1024; 18SW(2d)394; 76 Mont429, 247P332, 47ALR424 [citCyc]. **The preamble has been termed, etc.** 76 Mont429, 247P332, 47ALR424.

1133-88 Enactment without resort to title must make law. 246Mich393, 224 NW402.

1133-91 41F(2d)962; 170Ark880, 281 SW678; 176Ark796, 4SW(2d)19; 79 CalA726, 251P241; Ida 290P387; 119 Kan368, 239P760; 124Kan486, 260P 972; 213Ky30, 280SW456; Mo 30SW (2d)149; MoA 7SW(2d)392; 191NC761, 133SE395; 56ND468, 217NW841; 123 Or579, 263P896; 152Tenn243, 276SW 638; 36Wyo 460, 256P1039; Sask [1930] 4DomLR664.

1134-93 271US554, 46SCt513, 70L ed 986; 12F(2d)631; 19F(2d)530; 21 F(2d)457; 42F(2d)743; 170Ark880, 281 SW678; 200Cal 637, 254P570 (dictum); 201 Iowa712, 208NW78 (statutes must be construed consistently with titles); 119Kan368, 239P760; 213Ky30, 280SW 456; MoA 24SW(2d)224; 190NC157, 129SE414; 191NC761, 133SE395; 197 NC30, 147SE674; NC 155SE165; 143SC 104, 141SE180.

1134-94 36F(2d)375; 42F(2d)743; 35 Ariz511, 281P207 (context of bill controlling); 200Cal 637, 254P570; 119 Kan368, 239P760; NC 155SE165; Sask [1930] 4DomLR664.

1134-95 173Ark464, 292SW693; 200 Cal 637, 254P570; 81Colo 271, 256P310; 85Colo 72, 273P879; 119Kan368, 239P 760; 142Miss756, 107S545; 75Mont429, 244P287; 127Misc852, 217NYS609; NC 193NC36, 136SE612.

1134-99 201 Iowa712, 208NW78. **Whether act contains more than one subject depends upon proper analysis of**

act itself. 76Mont429, 247P332, 47ALR 424.

1134-1 69CalA66, 230P462; 86CalA86, 260P582.

1134-2 35F(2d)586; 69CalA66, 230P 462. **Where number and title conflict in** journal entries, title must control. 98 Fla1166, 125S375.

1135-4 156Tenn1, 299SW792, 56ALR 496. See also 220Ala458, 125S906.

1135-6 162Ga826, 135SE78, 49ALR 1076.

1135-7½-New. File number is not legal part of title of bill and may be rejected as surplus. 160Tenn403, 23SW(2d)897.

1135-9 Legislature is presumed to know its own intention. 59 OntL199, [1926] 4DomLR44. **That legislature approved judicial construction** will be presumed under certain circumstances. 169La573, 125S621(2dcase). **Legislature is held to have intended all consequences** of act. Wash 289P536.

1135-10 216Ala514, 113S524; 324 Ill 530, 155NE294; 127Misc683, 217NYS 565.

1135-11 21F(2d)226; 168Ark829, 274 SW5, 279SW366; 108Conn371, 143A240, 65ALR943; 206 Iowa1217, 220NW333; 164La482, 114S104; 168La1057, 123S 711; Mo 30SW(2d)149; 49ND201, 190 NW818; 132SC182, 128SE36; Tex CommnA 286SW197; 68Utah251, 249P 1016; WVa 153SE293; 38Wyo 190, 266 P117. See also 206 Iowa285, 220NW 354.

1135-12 33F(2d)773; 43F(2d)383; 215Ala79, 109S377; 95CalA414, 273P 150; 168La1057, 123S711; Mass 173NE 524; MoA 17SW(2d)658; 51Nev114, 269P607; 113TexCr373, 22SW(2d)932. **Presumed that amendment passed in view of previous instruction of statute** by courts. 144Va831, 131SE1. **Legislature is presumed to know principles of statutory construction.**-250Mich349, 230 NW202.

1135-14 75CalA247, 242P749; 168La 1057, 123S711; 165Minn215, 206NW 166; 31NM120, 241P1027; 70Utah156, 258P1016; 144Wash687, 258P859.

1135-15 214Ala409, 108S231 (good faith is presumed).

1135-16 30F(2d)254 [certiorari granted 279US831, 49SCt352(2dcase), 73L ed 981]; 41 Ida776, 242P785 (it is presumed that no change in common law was intended); 132SC427, 128SE865 (common law). See also 134Misc741, 236NYS395. **It will be presumed that legislature knew of common-law rule** denying district court power to terminate criminal case without trial. Tex CommnA 26SW(2d)174. **It will be presumed that legislature intended law passed as part of existing system should** operate in harmony therewith. Tex CommnA 26SW(2d)627.

1135-17 26SUS29, 45SCt402, 69L ed828; TexCommnA 288SW801.

1135-17½-New. Legislature is presumed to know statutes of state and decisions of courts of state. 203 Iowa231, 212NW553.

1135-17⅓-New. There is no presumption that congress hastily enacted legislation nor that it omitted any subject or class of persons from provisions of its acts. 31F(2d)999.

1135-18 218Ala243, 118S281; Cal 290 P444; 94CalA109, 270P696; 98Fla731, 124S279; 204 Iowa598, 215NW718; 86 Mont58, 282P32; 54ND220, 209NW225; 59 OntL199, [1926] 4DomLR44. See also 86Mont135, 282P855. **Where word has been defined by statute,** it will be presumed that such word in new statute contemplates statutory definition. 133 Or252, 289P1057.

1135-19 86Mont58, 282P32; 251NY 380, 167NE506; 133 Or541, 277P97; 59 OntL199, [1926] 4DomLR44.

1136-21 233Mich414, 206NW798; 321 Mo 1126, 14SW(2d)990; TexCivA 280 SW325.

1136-21½-New. that legislature intended provision enacted to have some useful purpose; 95Fla1010, 117S786.

1136-23 233Mich414, 206NW798.

1136-23½-New. Legal terms are presumed to be used according to legal significance. 127Me428, 144A390.

1136-24 16F(2d)256.

1136-25 195Cal 605, 234P883; 49ND 597, 192NW977. **Legislature not presumed to intend gross injustice,** but most reasonable and just interpretation is to be placed upon its acts. 118Tex91, 11SW(2d)496.

1136-26 195Cal 605, 234P883; 221Ky 106, 298SW185; 143Miss726, 109S665; 49ND597, 192NW977; 8PaDist&Co 399.

1136-27½-New. against any conflicting intentions in same statute; 215Ala 640, 112S243.

1136-30½-New. When exercising police powers, legislative bodies are assumed, in commanding performance or forbidding commitment of certain acts, to do so with view of conserving public or individual safety. 126Misc838, 214 NYS787.

1136-30½-New. Presumption is that change in method of expression in statute indicates intention to give later words different meaning. 289Pa437, 137 A635.

1136-30¼-New. It will be presumed that legislature would not pass act with conflicting sections. 148Va220, 138SE 474.

1136-30½-New. Courts may not presume that purpose of statute was other than that expressed. TexCommnA 282 SW791, 46ALR521.

1136-30¼-New. It is not to be assumed that legislation is passed for benefit of persons outside territorial jurisdiction of state. 327 Ill 474, 158NE727.

1136-30½-New. Other presumptions.-It must be presumed that congress intended plain meaning of language used in statute. 26F(2d)953.

1136-30⅓-New. Material change in wording of statute raises presumption of change of legislative purpose. 94CalA 109, 270P696.

1136-30⅙-New. Supreme court will assume useless legislative enactment only when obliged to do so. 86Colo 364, 281 P740.

1136-30 1/10-New. Legislature is presumed to know the common law, in enacting statute. 253NY345, 171NE565.

1136-30 1/11-New. Sections of same statute are presumed not obvious duplication. 228AppDiv354, 239NYS501.

1136-31 180Ark713, 23SW(2d)617; 106Conn76, 137A17; 151Md298, 134A 332; 51Nev285, 274P194; 247NY290, 160NE374.

1136-32 Mass 172NE643; 250Mich227, 229NW911(3dcase) (rejection of amendment creating ambiguity); 307Mo 185, 270SW110; 135Misc796, 238NYS463; ND 231NW883; 99Vt265, 132A40.

1136-36 86 IndA462, 158NE583.

1136-38 103Conn565, 131A560 (prior legislation); 44 Ida385, 257P480; 232 IllA1; 307Mo 185, 270SW110; 218App Div392, 218NYS201 (history of legislation on subject); Utah 273P515; 99Vt 265, 132A40.

1137-40 273US346, 47SCt389, 71L ed 676; 6F(2d)43; 8F(2d)279; 17F(2d) 907; 34F(2d)30; 34F(2d)942; 38F(2d) 483; 40F(2d)882; 20AlaA665, 104S 847; 103Conn565, 131A560; 109Conn 547, 147A144; 111Conn281, 149A840; 99Fla206, 126S283; Fla 130S699; 319 Ill 403, 150NE290; 213Ky648, 281SW 826; 226Ky633, 118W(2d)702; LaA 130S879; 151Md167, 134A317; 82NH 327, 133A451, 47ALR218; 127Misc224, 215NYS110; 128Misc630, 219NYS662; 125 Or197, 266P1075; 287Pa251, 134A 377; SC 155SE277.

1137-41 17F(2d)907; 73Mont122, 235 P422; 49ND597, 192NW977; 53ND 140, 205NW17; 158Tenn264, 12SW(2d) 951.

1137-42 319 Ill 403, 150NE290; 202 Iowa1116, 211NW503; 121Kan897, 250 P268; TexCivA 299SW322.

1137-43 6F(2d)43; 8F(2d)279; 220 Ala297, 124SE870, 65ALR1313; 200Cal 522, 254P896; 3Del 294, 136A280; IndA 168NE127; 121Kan897, 250P268; 82NH327, 133A451, 47ALR218; 127 Misc683, 217NYS565; 53ND140, 205 NW17; TexCivA 288SW875; Wis 232 NW546.

1137-43½-New. Statutes are to be construed as they were intended to be understood when they were passed. 319 Ill 403, 150NE290.

1137-44 214Ala409, 108S231; 104Conn 238, 132A690.

1138-45 146SC225, 143SE796.

1138-46 103Conn565, 131A560. But see 321Mo 92, 11SW(2d)48.

1138-47 271US354, 46SCt513, 70L ed 986; 25F(2d)773; 28F(2d)222; 29 F(2d)623; 37F(2d)444; 16CustA191; CalA 292P1065; 111Conn281, 149A840; 99Fla206, 126S283; Fla 130S699; 319 Ill 403, 150NE290; 321 Ill 552, 152NE495; Ind 164NE715; IndA 156NE178; 254 Mass617, 151NE680; 261Mass445, 158 NE897; 141Miss356, 106S449; 307Mo 185, 270SW110; 219MoA436, 274SW 880; 73Mont122, 235P422; 74Mont332, 240P286; 77Mont316, 250P606; 86 Mont58, 282P32; 245NY174, 156NE656; 134Misc374, 235NYS461; 287Pa161, 134A404; 287Pa251, 134A377; 154SC 129, 151SE279; TexCivA 286SW531; 99Vt265, 132A40; 197Wis218, 221NW 768. But see Mass 172NE643. **Courts take judicial notice** of history of terms employed. 54ND220, 209NW225. **Where language is clear,** no resort to legislative history is necessary. 278 US269, 49SCt133, 73L ed322; 31F(2d) 740(2dcase); 37F(2d)493.

1138-48 History of parent statute cannot be allowed to override positive language of later enactment. 145Va225, 133SE800.

1138-49 82NH327, 133A451, 47ALR 218; 217AppDiv691, 217NYS67; 148 SC326, 146SE92. **Legislative reports may show statute should not be restrictively interpreted,** though it cannot give meaning not within its word. NC 154 SE69.

1138-50 82NH327, 133A451, 47ALR 218; 115 Oh458, 154NE792.

1138-51 107Conn312, 140A734; 247NY 290, 160NE374; 221AppDiv214, 223NYS 5. But see 217AppDiv691, 217NYS67.

1139-52 20F(2d)972; 35F(2d)78; 28 Hawaii38; 217AppDiv691, 217NYS67 (intent of legislature).

1139-53 7F(2d)247; 8F(2d)476; 20 F(2d)972; 23F(2d)477; 24F(2d)828; 28F(2d)30; 33F(2d)229 (reports cannot be taken as giving meaning not fairly within words of statute); 36F(2d)43; 37F(2d)965; 41F(2d)962; 42F(2d)235; 42F(2d)408; 43F(2d)836; 16CustA191; 194Cal 734, 231P28 (congressional committee); Mass 167NE670; 128Misc630, 219NYS662.

1139-57 22F(2d)341; 221Ky610, 299 SW582; 166La1, 116S572; 286Pa511, 134A392; 287Pa161, 134A404.

1139-58 30F(2d)413; 39F(2d)556 (interpretation by United States treasury department); 104Conn1, 132A25, 45 ALR728; 99Fla899, 128S21 (administrative department); 231Ky606, 21SW (2d)1010; 287Pa161, 134A404; 37Wyo 98, 259P520. **Doctrine held inapplicable for lack of construction.**-331 Ill 193, 162 NE859. **Views of profession** are entitled to much deference but are not controlling. 159Tenn349, 19SW(2d)261.

1139-60 104Conn1, 132A25, 45ALR 728; 221Ky610, 299SW582; 81Mont442, 264P108; NJ 144A169. **Determination of law as general or local.**-180Ark713, 23 SW(2d)617.

1140-61 74CalA580, 241P570 (rules of practice based on statute); 151Md298, 134A332.

1140-62 43F(2d)300; 74CalA580, 241 P570 (rules of practice based on statute); 150Md91, 132A430; 151Md298, 134A332; Nebr 262P935; 81NH522, 129 A768, 42ALR176; 54ND220, 209NW225 (meaning of "extraordinary outlays" as requiring vote of people); 120 Or134, 251P761; 197Wis578, 222NW809. **Statute is as susceptible of practical construction as contract.**-127Misc 224, 215NYS110. **Popular construction of National Prohibition Act over ten-year period.**-38F(2d)515. **Acts or omissions must be inconsistent with other construction** in order to establish practical construction. Va 154SE526.

1140-63 104Conn1, 132A25, 45ALR728; 150Md91, 132A430; 157Md127, 145A 355; 141Miss356, 106S449; 286Pa511, 134A392.

1140-64 269US422, 46SCt131, 70L ed347 (treasury decision permitting corporations to deduct accounts and reserves from gross income held correct inter-

pretation of statute); 280US327, 50SCt 115, 74Led457; 280US183, 50SCt143, 74 Led361; 282US101, 51SCt58; 289Fed 814; 4F(2d)529; 8F(2d)845; 8F(2d) 883; 12F(2d)978; 15F(2d)626; 16F (2d)805; 17F(2d)650; 18F(2d)239; 19 F(2d)346; 30F(2d)604; 30F(2d)655; 30F(2d)960; 31F(2d)583; 37F(2d)493; 38F(2d)515 (prosecuting attorneys' construction of National Prohibition Act); 40F(2d)479; 40F(2d)787; 43F(2d)322; 43F(2d)836; 44F(2d)186; 16CustA43; 31Ariz485, 254P1060, 53ALR258; 170 Ark895, 282SW9; Cal 290P25(2dcase); 94CalA160, 270P725; CalA 271P771; CalA 276P407; Colo 262P907; 55App DC318, 5F(2d)380; DC 41F(2d)111 (preference between constructions); 118 Kan412, 234P1009; 151Md167, 134A 317; 158Md285, 148A220; 262Mass555, 160NE532; Mass 172NE218; 241Mich497, 217NW902; 250Mich227, 229NW911(3d case); 168Minn385, 210NW105; 141 Miss356, 106S449; 316Mo 1075, 292SW 1028; 316Mo 853, 293SW399, 404 [quot Cyc]; 317Mo 579, 296SW787, 789 [quot Cyc]; 317Mo 671, 296SW808; 318Mo 560, 300SW675; 321Mo 461, 12SW(2d) 64; Mo 30SW(2d)149; Mo 32SW(2d) 281; MoA 30SW(2d)1039; 76Mont71, 245P267; 86Mont200, 283P202. 67ALR 1020; 31NM120, 241P1027; 127Misc886, 217NYS300; 137Misc594, 244NYS524; 219AppDiv233, 219NYS189; 219AppDiv 141, 219NYS259 (fifteen years); 50ND 708, 197NW770, 772 [citCyc]; 56ND650, 219NW105; ND 231NW883; 21 OhA 168, 152NE776; 26 OhNPNS375; 144 Okl 85, 289P759; 118 Or629, 247P775; 119 Or101, 248P146; 130 Or165, 279P 555; 286Pa137, 133A150; Pa 151A702; 116Tex288, 288SW1064; TexCivA 273 SW914; 149Va418, 141SE126; 144Wash 56, 256P330; 195Wis462, 218NW724; 37Wyo 189, 260P180. See also 28F(2d) 263. But see 278US269, 49SCt133, 73 Led322. **Construction adopted after statute has been in force** several years is entitled to little weight. 16F(2d)884. **Interpretation of federal homestead laws** by federal land department held persuasive. 170Ark895, 282SW9. **State courts should harmonize decisions** construing federal homestead laws with interpretation thereof by federal land department. 170Ark895, 282SW9. **Assignment of code number to law by attorney-general** is not significant in determining scope of law. 117 Oh512, 159NE559. **In determining questions of naturalization,** views of labor department, though not binding on court, are entitled to earnest consideration. 32F(2d)911. **Acts of officers must be within scope of authority.**—133Misc410, 233NYS49. **Failure of legislature to change law** with knowledge of attorney-general's views and course pursued by revenue department deserves great weight. 38F(2d) 642. **Interpretation of law by court, followed by executive construction** and change of administrative rulings, should be followed, if acceptable. 40F(2d)530. **Executive department regulation construing statute** has force of law if made pursuant to statutory authority. 42F (2d)408. **Contemporaneous construction** by executive department is that which statute receives soon after its enactment. 86Mont200, 283P202. 67ALR1020.

1141–65 26F(2d)131; 39F(2d)58 (internal revenue commissioner and secretary of treasury); 141Miss356, 106S449.

1141–66 270US349, 46SCt284, 70Led 624; 278US367, 49SCt163, 73Led426; 8F(2d)845; 27F(2d)176; 33F(2d)445; 37F(2d)275; 16CustA442; Iowa 216NW 742; 18Kan412, 234P1009; 168Minn 385, 210NW105; 141Miss356, 106S449; 316Mo 1075, 292SW1028; Mo 30SW(2d) 69; 219AppDiv233, 219NYS189; 133 Misc881, 233NYS553; 56ND650, 219NW 105; 114 Oh437, 151NE653; 21 OhA168, 152NE776; 139 Okl 292, 282P467; 51 Philippine131; 161Tenn67, 29SW(2d) 249 (not controlling); 116Tex288, 288 SW1064. But see Mass 172NE643. **Practical construction in single case** is not entitled to weight accorded to construction followed during course of years. 49SD106, 206NW233. **Long acquiescence by legislature in construction of tax statute by state department** as indicative of intent. TexCivA 26SW (2d)715.

1141–66½–New. or has been recognized or ratified by legislature, 127Misc886, 217NYS300.

1141–67 280US445, 50SCt202, 74Led 538, 67ALR1010; 281US580, 50SCt422, 74Led1051; 25F(2d)560; DC 33F(2d) 556; DC 42F(2d)346; 200 Ind178, 162 NE403; 169La666, 125S848; 316Mo 853, 293SW399, 404 [quotCyc]; 321Mo 749, 12SW(2d)751; 144Wash56, 256P 330.

1141–68 170Ark895, 282SW9.

1141–69 141Miss356, 106S449.

1141–70 33F(2d)75; 170Ark895, 282 SW9; 31NM120, 241P1027; 50ND708, 197NW770; 51Philippine131 (failure to repeal or change statute). But see 41F (2d)863.

1141–72 Courts look with disfavor on changes in construction given statute by executive department charged with its execution, followed for a number of years, where parties have contracted in reliance on such construction. 28F(2d) 200.

1142–73 278US269, 49SCt133, 73Led 322; 15F(2d)626; 22F(2d)341; 25F(2d) 560; 37F(2d)493; 43F(2d)300; CalA 288 P61; 87Colo 567, 290P271; 55AppDC 318, 5F(2d)380; 229Ky325, 17SW(2d) 210; 151Md298, 134A332; 237Mich390, 211NW665; 241Mich457, 217NW334; 319Mo 492, 5SW(2d)57; 76Mont71, 245P 267; 86Mont200, 283P202, 67ALR1020; 133Misc410, 233NYS49; 147Va202, 136 SE666. But see Mass 172NE643.

1142–74 270US245, 46SCt248, 70Led 566; 8F(2d)845; 18F(2d)239; 151Md 298, 134A332; 237Mich390, 211NW665; 216AppDiv391, 215NYS309 (wrongful construction of statute by commissioner of education not binding on courts); 127Misc886, 217NYS300 (not conclusive); 137Misc852, 244NYS616; 286Pa 511, 134A392; 287Pa161, 134A404; 116 Tex193, 292SW168; 199Wis368, 226NW 293. **Construction of statute by patent commissioner before senate committee considering amendment** is not binding on court in construing amendment nor will ambiguities be resolved against commissioner unless clearly justified. 32F(2d)295.

1142–75½–New. Court looks with disfavor on change in construction given statute by executive department, on faith of which parties have contracted, 22F(2d)81.

1142–75½–New. but administrative practice enlarging scope of unambiguous statute cannot be given force of law. 22F(2d)81.

1142–75¼–New. Wrongful departmental construction of statute must be so adjudged by court. 22F(2d)81.

1142–75⅙–New. Official statement to voters under election laws as to meaning of measures proposed for adoption should be considered in determining intent. 203Cal 553, 265P223.

1142–75⅙–New. Action must be within authority.—Acts of state officials to constitute practical construction of statute must be within scope of their authority. 133Misc410, 233NYS49.

1142–80 12F(2d)978; 213Ala426, 104S 851; Cal 290P25(2dcase); 76CalA519, 245P209; Iowa 216NW742, 745 [cit Cyc]; 118Tex397, 16SW(2d)804; 150 Md91, 132A430; 151Md167, 134A317; 241Mich457, 217NW334; 168Minn385, 210NW105; 316Mo 1075, 292SW1028; 321Mo 461, 12SW(2d)64; 75Mont429, 244P287 (respectful consideration); 195 NC62, 141SE289; 132SC314, 128SE712 (and courts should not adopt different view unless compelled to do so); 154SC 1, 151SE206; 48SD595, 205NW669; TexCommnA 276SW654; TexCommnA 283SW151; 37Wyo 98, 259P520. **Amendment may be regarded as legislative construction.** Iowa 216NW742. **Acquiescence by the legislature in a construction by the executive or the judiciary departments,** etc. 16CustA410; 121 Oh73, 166NE903; 197Wis578, 222 NW809. **Acquiescence by legislature in interpretation of statute by court** by failing to enact new legislation indicates satisfaction with interpretation. Wash 290P221. **Acquiescence by congress** in legislative construction of terms of trust established by Enabling Act. 34NM394, 281P456. **Only where language of statute is ambiguous or doubtful can** legislative construction be invoked. 319Mo 492, 5SW(2d)57.

1143–81 Ind 166NE270; 316Mo 1075, 292SW1028.

1143–82 122Kan114, 251P427, 428 [cit Cyc].

1143–84 32F(2d)714; 200 Ind506, 165 NE289.

1143–85 200 Ind506, 165NE239; 206 Iowa390, 220NW328, 331 [citCJ]; 86 Mont584, 284P1011 (adopted only when clearly expressed and when it will render statute construed valid).

1143–86 53ND140, 205NW17; 152Tenn 258, 277SW71.

1143–87 35F(2d)713; 76CalA519, 245P 209; 154Md438, 140A836; 157Md602, 146A805; 86Mont584, 284P1011; 53ND 140, 205NW17; 48SD595, 205NW669; 159Tenn349, 19SW(2d)261; Tex CommnA 283SW151 (not controlling on courts). **Refusal of legislature to amend act** held immaterial in construing act. 287Pa161, 134A404.

1143–89 200 Ind178, 162NE403; 86 IndA462, 158NE583; 307Mo 185, 270 SW110; NJ 151A843; 127Misc224, 215 NYS110, 114 [quotCyc]; 37Wyo 98, 259P520. **Failure of legislature to change statute after judicial construction** for long period amounts to legislative approval and ratification. 144 Okl 85, 289P759.

1144–90 127Misc224, 215NYS110, 114 [quotCyc].

1144–91 14F(2d)864; 16CustA15; 215 Ala619, 112S157; 151Md167, 134A317; 316Mo 1075, 292SW1028; TexCivA 283 SW929; 149Wash552, 271P820, 822 [citCyc]. See also 123 Or571, 263P901; 197Wis578, 222NW809.

1144–91½–New. Change of judicial construction is given prospective and not retroactive effect in its operation on contracts and existing contract rights. 143 Okl 147, 288P285.

1144–98 16CustA15. **Resort may be had to scientific facts** having bearing thereon. 115 Oh458, 154NE792.

1144–1½–New. Proof of custom is not proper method of construing law of foreign country. 153Wash427, 279P 585 (custom relating to presentment and protest of bills of exchange).

1144–1⅓–New. Testimony as to custom to stay collection of tax until abatement claim accepted or rejected by commissioner of internal revenue held admissible. 38F(2d)483.

1144–2 102NJEq50, 139A721.

1144–3 102CalA635, 283P862.

1144–4 180Ark96, 21SW(2d)406; 321 Mo 1126, 14SW(2d)990; 129Misc345, 223NYS470.

1145–6 219Ky579, 293SW1064; 222Ky 521, 1SW(2d)990; 267Mass430, 166NE 758; 315Mo 485, 286SW371; 318Mo 1068, 2SW(2d)589; 130Misc821, 226 NYS397; 25 OhNPNS85; 140Wash679, 250P456, 51ALR1088. See also 232 IllA 1; 51Nev420, 279P27.

1145–8 33NM370, 266P922, 925 [cit Cyc].

1145–9 126Misc247, 213NYS333, 336 [citCyc]; 49SD373, 206NW576; Can [1927] 1DomLR817.

1145–10 3Dcl 294, 136A280; 126Misc 247, 213NYS333, 336 [citCyc]; 285Pa 413, 132A355; 11PaDist&Co 129; 153 Tenn250, 283SW71; 104WVa617, 141SE 7 (legislative intent must be plainly manifest).

1145–11 See also 251Mich420, 232NW 239.

1146–13 30F(2d)915; 125Me319, 133A 738; 252Mass432, 147NE904; 248Mich 64, 226NW836(2dcase); 315Mo 485, 286 SW371, 379 [citCyc]; 218AppDiv273, 218NYS361. **It is not presumed that legislature intended to repeal earlier statutes or leave contradictory measures on statute books.** 314Mo 373, 284SW 464.

1146–14 Del 144A867; 151Md644, 135 A841, 50ALR232; 252Mass432, 147NE 904; 256Mass539, 152NE914; 315Mo 485, 286SW371, 379 [citCyc]; 74Mont 152, 240P812; 136SC439, 134SE387; 146SC225, 143SE796. See also TexCivA 8SW(2d)249.

1146–16 315Mo 485, 286SW371, 379 [citCyc]; 116 Oh1, 155NE791; 116 Or 464, 240P418.

1146–17 198Cal 23, 243P429; 168Ga 67, 146SE908; 319 Ill 403, 150NE290; 85 IndA156, 149NE101; 203 Iowa 610, 213NW401; 222Ky521, 18SW (2d)990; 151Md644, 135A841, 50ALR 232; 267Mass430, 166NE758; 315Mo 485, 286SW371, 379 [citCyc]; 222MoA 1200, 48SW(2d)861; TexCommnA 26 SW(2d)627; 144Wash668, 258P824. But see CalA 290P434.

1146–18 319 Ill 403, 150NE290; 73 Mont122, 235P422; NH 149A864.

1146–19 100CalA325, 279P1048; 321 Ill 552, 152NE495.

1146–20 79CalA230, 249P29; Ida 286 P366; 177Minn437, 225NW398. **Where law is itself complete,** all provisions capable of two meanings should be resolved in favor of self-sufficiency, without resort to other laws. 79CalA230, 249P29.

1146–22 23AlaA1, 121S9(2dcase); 33 Ariz1, 261P629; 86Colo 249, 281P117; 166Ga1, 141SE903; 158La370, 104S119, 125Me123, 131A305; 252Mass432, 147 NE904; 262Mass527, 160NE303; 157 Miss740, 128S503; 314Mo 373, 284SW 464; 315Mo 485, 286SW371, 379 [cit Cyc]; 33 OhA137, 168NE549; 32Porto Rico 5; 50SD457, 210NW723; Tex CommnA 276SW201; TexCommnA 283 SW146. See also 128Misc31, 217NYS 739.

1147–23 255 IllA294; 73Mont122, 235 P422.

1147–25 35F(2d)78; 30Ariz417, 248P 32; 202Cal 550, 262P1081; CalA 292P 656; 230Ky776, 20SW(2d)753; 175 Minn583, 222NW285; 142Miss1, 106S 886; 137Misc341, 242NYS142; 291Pa 326, 139A826; 191Wis538, 211NW938. See also 32PortoRico 5.

1147–25½–New. Statute may not be resorted to for matters dealt with in another. 206 Iowa1217, 220NW333.

1147–25¼–New. That construction of statute renders another statute redundant does not affect such construction. 204Cal 51, 266P532.

1147–25¼–New. Reference in adopting statute is to law generally upon subject, means law in force when statute is invoked. Pa 151A583.

1147–27 200Cal 598, 254P951; 75CalA 247, 242P749, 753 [quotCyc]; 124Kan 546, 261P824; 314Mo 373, 284SW464, 470 [quotCyc]; 315Mo 485, 286SW371, 379 [citCyc]; Mo 25SW(2d)791 (Federal Employers' Liability Act and Safety Appliance Act); 34NM378, 281P454; 190NC157, 129SE414; 191NC761, 133 SE395; 116 OhA441, 156NE906; 116 Oh 623, 157NE327; 121 Okl 59, 247P366; 107TexCr95, 295SW614; 141Wash110, 250P1090; 151Wash623, 276P870; BC [1927] 2DomLR491. **Statutes relating to different subjects, etc.**–191NC396, 131 SE721. **Acts providing greater punishment for second offenders** and acts punishing certain felonies as misdemeanors are held in pari materia and must be construed together. 168Ga699, 148SE 593(2dcase). **Statutes held in pari materia.**–155Md563, 142A723; 227AppDiv 560, 238NYS424.

1147–28 6F(2d)43; 16F(2d)387; 215 Ala640, 112S243; 216Ala178, 112S742; 30Ariz45, 243P916; 199Cal 147, 248P 521; 200Cal 598, 254P951; 75CalA247, 242P749, 753 [quotCyc]; 80CalA739, 252P765; CalA 290P648; 324 Ill 314, 155NE332; 326 Ill 82, 157NE28; 201 Iowa389, 207NW389; 202 Iowa638, 210 NW774; 203 Iowa610, 213NW401; 125 Kan92, 262P579; 217Ky644, 290SW 501; 164La482, 114S104; 126Mc287, 138A66; 151Md644, 135A841, 50ALR 232; 153Md523, 138A487; 239Mich204, 214NW316, 53ALR273; 156Miss251, 125S718; 157Miss114, 126S833; 307Mo 234, 270SW658; 312Mo 549, 279SW692; 314Mo373, 284SW464, 470 [quotCyc]; 315Mo 485, 286SW371; 220MoA193, 282 SW498; 81Mont86, 261P885; 129Misc 845, 223NYS470; 191NC584, 132SE558; 194NC91, 138SE420; 194NC22, 138SE 443; 49ND597, 192NW977; 54ND919, 212NW233; 113 Oh434, 149NE392; 24 OhA237, 157NE418; 132 Okl 84, 270P 311(2dcase); 137 Okl 186, 279P319; 116 Or416, 241P390; 117 Or338, 243P 104; 121 Or297, 254P798; 48RI 363, 138A215; 156SC77, 152SE816; 69Utah 102, 252P567; 69Utah484, 256P409; 144Va456, 132SE482; 147Va402, 137SE 463; 144Wash668, 258P824; 151Wash 623, 276P870; BC [1927] 2DomLR491.

1147–29 16F(2d)387; 16CustA191; 200Cal 598, 254P951; 75CalA247, 242P 749, 753 [quotCyc]; 326 Ill 82, 157NE 28; 126Me287, 138A66; 314Mo 373, 284 SW464, 470 [quotCyc]; 220MoA193, 282 SW498; TexCivA 299SW478, 481 [cit Cyc]; BC [1927] 2DomLR491. **To ascertain purpose, history of legislation on subject** may be traced. 314Mo 373, 284SW464.

1147–30 275US1, 48SCt12, 72L ed131; 12F(2d)631; 16F(2d)387; 16CustA467; 214Ala362, 107S834 (rule applied); 215 Ala640, 112S243; 220Ala30, 123S231, 241, 68ALR712 [quotCJ]; 32Ariz54, 255 P598; 171Ark197, 284SW53; 175Ark 652, 300SW377; 177Ark728, 7SW(2d) 794; 180Ark964, 23SW(2d)990; 181 Ark1029, 29SW(2d)267; Ark 30SW(2d) 845; 198Cal 23, 243P429; 199Cal 147, 248P521; 200Cal 598, 254P951; 207Cal 666, 279P805, 65ALR266; 195Cal 655, 235P438; 75CalA247, 242P749, 753 [quotCyc]; 102CalA299, 283P298; 86 Colo 249, 281P117; Colo 291P1024; 104 Conn238, 132A690; 90Fla381, 106S741; 97Fla916, 123S668(2dcase); 99Fla711, 127S317 (read with penalty statute); Fla 130S699; 165Ga782, 142SE111; 44 Ida700, 260P155; 45 Ida611, 264P665; 48 Ida485, 283P598; 329 Ill 453, 160NE 836; 232 IllA1; 198 Ind645, 154NE659 (holding law authorizing condemnation of railroad right of way should be construed with general law on railroads); 200 Ind165, 162NE234; 85 IndA156, 149 NE101; 201 Iowa389, 207NW389; 202 Iowa638, 210NW774; 202 Iowa661, 210 NW809; 203 Iowa610, 213NW401; 207 Iowa41, 217NW477; 207 Iowa427, 223 NW253; 207 Iowa1248, 224NW813; 124 Kan546, 261P824; 125Kan92, 262P579; 214Ky838, 284SW95; 216Ky766, 288 SW690; 217Ky644, 290SW501; 223Ky 1, 28SW(2d)1075; 231Ky269, 21SW(2d) 277; 164La482, 114S104; 167La249, 119S37; 126Me287, 138A66; 239Mich 204, 214NW316, 53ALR273; 175Minn 583, 222NW285; 178Minn540, 227NW 854; 143MissS21, 107S659; 154Miss 468, 122S737, 63ALR1161; 312Mo 549, 279SW692; 314Mo 373, 284SW464, 470 [quotCyc]; 315Mo 41, 285SW504; 315 Mo 276, 286SW3; 315Mo 485, 286SW 371; 317Mo 1235, 298SW363; 319Mo 976, 5SW(2d)83; 320Mo 1093, 9SW(2d) 612; 321Mo 345, 11SW(2d)38; 323Mo 742, 19SW(2d)642; 220MoA193, 282SW 498; 74Mont34, 237P523; 82Mont594, 268P558; 83Mont581, 273P1055; 84 Mont276, 275P278; 86Mont135, 282P 855; 48Nev108, 227P1018, 233P844, 236 P1101; 101NJEq540, 138A369; 129 Misc845, 223NYS470; 230AppDiv338, 245NYS44; 190NC157, 129SE414; 191 NC761, 133SE395; 194NC1, 138SE418; 194NC91, 138SE420; 194NC22, 138SE 443; 195NC26, 141SE539; 49ND597, 192NW977; 54ND919, 212NW233; 56 ND650, 219NW105, 109 [citCyc]; ND 229NW282; 115 Oh269, 152NE643; 22 OhA457, 153NE918; 116 Oh441, 156NE 906; 116 Oh623, 157NE327; 113 OhSt 434, 149NE392; 113 OhSt658, 150NE 36; 22 OhA457, 153NE918; 24 OhA237, 157NE418; 31 OhA452, 167NE474; 121 Okl 190, 249P408; 134 Okl 57, 272P883; 135 Okl 278, 276P468; 36 OklACR340; 44 OklACR172; 116 Or543, 241P386; 116 Or416, 241P390; 117 Or338, 243P 104; 119 Or127, 248P151; 121 Or297, 254P798 (all liquor laws construed together); 5PaDist&Co 172; 48RI 363, 138A215; 50RI 394, 148A186; 136SC 439, 134SE387; SC 147SE676(1stcase); SD 227NW71; 154Tenn88, 290SW20; 160Tenn594, 28SW(2d)47; Tex 26SW (2d)905 (statute as to time for filing motion for new trial and general procedural statutes); TexCommnA 276SW 654; TexCommnA 6SW(2d)348; Tex CivA 280SW238; TexCivA 300SW656; TexCivA 25SW(2d)264; 69Utah102, 252 P567; 69Utah484, 256P409; Utah 273P 515; Utah 284P108; 99Vt265, 132A40; 145Va476, 134SE717; 147Va402, 137SE 463; 150Va42, 142SE412; 141Wash110, 250P1090; 144Wash668, 258P824; Wash 291P721; 107WVa563, 149SE669; 197Wis218, 221NW768; 198Wis24, 223 NW89; 35Wyo 398, 250P1; BC [1927] 2DomLR491. **Rule is not limited to cases where there are ambiguous words** in one of several statutes dealing with same subject matter. 75CalA247, 242 P749. **Rule is not confined to ascertainment of ambiguous words.**–75CalA247, 242P749. **Use of same language in two statutes** covering different aspects of one subject shows legislative intent to have same language convey same idea. 221 AppDiv86, 222NYS319.

1148–31 16F(2d)387; 29F(2d)865; 200 Cal 598, 254P951; 195Cal 655, 235P438; 75CalA247, 242P749, 753 [quotCyc]; 98 CalA633, 277P372; CalA 289P668 (under statute); Del 144A867; 42 Ida48, 246P 12; 153Md523, 138A487; 155Md563, 142 A723; 156Md40, 143A666; 314Mo 373, 284SW464, 470 [quotCyc]; 222MoA1200, 48SW(2d)861; 81Mont86, 261P885; 86 Mont135, 282P855; NJCh 145A462; NJ Sup 143A736(2dcase); 191NC761, 133SE 395; 24 OhA237, 157NE418; 121 Okl 190, 249P408; 44 OklACR172; 136SC439, 134 SE387; TexCommnA 290SW729; 118Tex 463, 16SW(2d)1063; TexCivA 11SW(2d) 254; 146Va287, 135SE673; Va 152SE 537; 151Wash623, 276P870. **Rule held specially applicable to taxation statutes.** –75CalA247, 242P749.

1148–32 30Ariz218, 245P677, 46ALR 828 (history of legislation properly considered to show that legislature acted without knowing of amendment to constitution); 75CalA247, 242P749, 753 [quotCyc]; 109Conn547, 147A144; 163 Ga784, 137SE24; 201 Iowa931, 208NW 503; 205 Iowa495, 216NW284; 206 Iowa 285, 220NW354; 314Mo 373, 284SW464, 470 [quotCyc]; 74Mont332, 240P286; Mont 287P624 (actual proceedings of legislature may be looked at); Tex CommnA 283SW146.

1149–33 16F(2d)387; 75CalA247, 242P 749, 753 [quotCyc]; 324 Ill 314, 155NE 332; 235Ky763, 32SW(2d)334; 157Miss 482, 128S334; 314Mo 373, 284SW464, 470 [quotCyc]; 74Mont332, 240P286; 161 Tenn203, 30SW(2d)240; 101Vt441, 144A 200. See also 246NY237, 158NE315.

1149–34 75CalA247, 242P749, 753 [quot Cyc]; 314Mo 373, 284SW464, 470 [quot Cyc]; 74Mont332, 240P286. **Where one statute contains provisions omitted from the other,** the omitted provisions will be applied in proceeding under act not containing such provisions. 324 Ill 314, 155NE332.

1149–36 37F(2d)373; Ariz 285P1034; 75CalA247, 242P749, 753 [quotCyc]; DC 41F(2d)117; 319 Ill 403, 150NE290; 85 IndA156, 149NE101; 201 Iowa931, 208NW503; 314Mo 373, 284SW464, 470 [quotCyc]; 220MoA193, 282SW498; 86 Mont135, 282P855; 125Misc65, 210NYS 88; 99Vt265, 132A40. But see 328 Ill 440, 159NE797. **Acts relating to venue generally and to venue of actions against corporations,** though passed at different times, should be construed together. 314Mo 373, 284SW464. **Legislative meaning,** gathered from subsequent statute in pari materia, will amount to a legislative definition governing construction of prior statute. 28F(2d)106.

1149–37 75CalA247, 242P749, 753 [quot Cyc]; 99Fla206, 126S283; 85 IndA156, 149NE101; 170La851, 129S368; 314Mo 373, 284SW464, 470 [quotCyc]; 22 OhA 457, 153NE918; 151Wash623, 276P870.

1149–38 314Mo 373, 284SW464, 470 [quotCyc]; 44 OklACR172; TexCommnA 283SW146. **To extent that two different statutes cannot be harmonized, later prevails.**–137Misc719, 244NYS569.

1149–39 102CalA266, 282P1021; 102 CalA635, 283P862; 42 Ida357, 245P691; 326 Ill 602, 158NE422; Ill 173NE124; 125Kan92, 262P579; 215Ky573, 286SE 793; 125Me123, 131A305; 258Mass72, 154 NE561; 251Mich528, 232NW375; 156 Miss 46, 125S563(2dcase); 157Miss459, 128S331; 310Mo 542, 276SW389 [cit Cyc]; 314Mo 373, 284SW464, 470 [quot Cyc]; Mo 23SW(2d)96; Mo 29SW(2d) 716; 81Mont86, 261P885; 83Mont162, 271P446; 50Nev181, 254P1080; 130Misc 821, 226NYS397; 133Misc607, 232NYS 519; 137Misc768, 244NYS547; 198NC 325, 151SE718; 142 Okl 293, 286P891; 44 OklACR172; 116 Or543, 241P386; 138 SC374, 136SE487; 154Tenn88, 290SW20;

TexCommnA 283SW146; TexCommnA 29SW(2d)312; TexCivA 280SW238; 113 TexCr306, 21SW(2d)663; Utah 279P893; 146Va287, 135SE673.

1150-40 35Ariz511, 281P207; Ariz 285P 1034; 174Ark503, 295SW404; 324 Ill 314, 155NE332; Ind 154NE12; 206 Iowa1217, 220NW333; 156Miss46, 125S563(2d case); 314Mo 373, 284SW464, 470 [quot Cyc]; Mo 29SW(2d)716; 22 OhA457, 153 NE918; 121 Okl 190, 249P408; 44 Okl ACR172; 116 Or543, 241P386; 292Pa74, 140A615; SD 230NW282; TexCommnA 283SW146; TexCivA 8SW(2d)249; 146 Va215, 135SE823; 102WVa663, 136SE 195.

1150-41 314Mo 373, 284SW464, 470 [quotCyc]; TexCommnA 283SW146; TexCivA 280SW238.

1150-42 314Mo 373, 284SW464, 470 [quotCyc].

1150-43 39F(2d)204; 219Ala378, 122S 333; DC 33F(2d)805; 86Mont135, 282P 855; 54ND75, 208NW768; 300Pa29, 150 A86.

1150-45 180Ark96, 21SW(2d)406; 92 CalA656, 268P1083; 241Mich457, 217NW 334; 287Pa161, 134A404. Office of rule is construction and interpretation.–75CalA 247, 242P749. In case of ambiguity of language, rule is applied to ascertain legislative intent. 75CalA247, 242P749.

1150-45½-New. Where provisions of earlier statute are repugnant to strict letter of subsequent statute, latter will control. TexCommnA 283SW146.

1150-45¾-New. When legislature put construction on act, subsequent cognate enactment in same terms is prima facie understood in same sense. 151Wash 623, 276P870.

1150-45¼-New. Where legislature uses different language in same connection in subsequent statute, it will be presumed that change in law was intended. WVa 153SE293.

1151-47 216Ala257, 113S82; 199Cal 668, 251P207; 75CalA247, 242P749, 753 [quot Cyc]; 319 Ill 403, 150NE290; 328 Ill440, 159NE797; 198 Ind127, 149NE350; 200 Ind506, 165NE239; 207 Iowa461, 221NW 364; 125Kan92, 262P579; 129Kan601, 284P807; 216Ky766, 288SW690; 225Ky 123, 7SW(2d)833; 125Me123, 131A305 (passed on same day); 222MoA831, 11 SW(2d)81; 240NY379, 148NE556, 40 ALR792; 194NC412, 140SE34; 56ND650, 219NW105, 106 [citCyc]; 141 Okl 1, 283 P571, 67ALR1059; 297Pa369, 147A64; 5PaDist&Co 172. Special acts having different subject matter, dates of enactment, and applying to different territories cannot be construed together though adopted at same session. 173 Ark464, 292SW693.

1151-48 75CalA247, 242P749, 753 [quot Cyc].

1151-49 216Ala257, 113S82; 75CalA247, 242P749, 753 [quotCyc]; 129Kan1, 281 P938; 216Ky766, 288SW690; 256Mass 539, 152NE914; 194NC412, 140SE34; 143 SC196, 141SE366, 376 [quotCyc]; Tex CommnA 29SW(2d)1021; TexCivA 25 SW(2d)625. Especially if the two acts are passed or approved the same day.–199Cal 270, 248P917; 194NC412, 140SE 34. Statutes adopted at same time.–35 Ariz403, 279P257. Statutes relating to different subjects cannot be construed together. 208Cal 770, 284P1105(2dcase).

1151-50 220Ala458, 125S906; 75CalA 247, 242P749, 753 [quotCyc]; 98CalA 723, 277P745; 206 Iowa285, 220NW354; 216Ky766, 288SW690; 235Ky346, 31SW (2d)386; 125Me123, 131A305; 256Mass 539, 152NE914; 286Pa288, 133A501 (statutes dealing with same subject, passed at same session of legislature, should be construed together if possible); 294Pa376, 144A283; 154SC55, 151 SE218. Where act standing alone is unconstitutional, rule of pari materia is applied to aid validity where such result harmonizes acts. 75CalA247, 242P749.

1151-51 75CalA247, 242P749, 753 [quotCyc]; 328 Ill 512, 160NE60; 337 Ill 276, 169NE178; 216Ky766, 288SW 690; 225Ky123, 7SW(2d)833; 125Me123, 131A305 (must stand together in so far as not inconsistent); 256Mass539, 152 NE914; 240NY379, 148NE556, 40ALR 792; 117 Ohl512, 159NE559; 294Pa562, 144A750; Tex 293SW800. Acts passed at same session taxing gasoline two cents per gallon and imposing registration tax on electric vehicles held in pari materia, as part of one scheme of taxation. 75 CalA247, 242P749.

1151-52 154SC55, 151SE218; 153Wash 462, 279P724 (statute containing emergency clause held to prevail).

1151-53 198Cal 440, 245P422; 337 Ill 276, 169NE178; 216Ky766, 288SW690; 142Miss146, 105S774 (amendments of same statute); 142Miss660, 107S881 (statutes passed on same day); 34NM 378, 281P454. But see 208Cal 770, 284 P1105(2dcase); 235Ky346, 31SW(2d) 386.

1151-53½-New. Where two acts are passed in same session, one containing emergency clause will prevail. 216Ky 766, 288SW690.

1151-53¾-New. Under some circumstances it will be assumed that acts passed at same session were believed necessary to existing needs, and that no two of them were intended to apply to the same situation, and that no one will control the other. 320 Ill 507, 151NE 510.

1151-55 21F(2d)226; 220Ala94, 124S 225; Ariz 285P1034 (exception not readily implied); 118Kan752, 236P823, 824 [quotCyc]; 258Mass72, 154NE561; 157 Miss740, 128S503; Mo 271SW992 (unless legislative intent is expressed in terms, it will not be assumed if any other construction can be given latter act); 312Mo 581, 280SW37, 42 [citCyc]; 316Mo 1075, 292SW1028, 1030 [quot Cyc]; Mo 30SW(2d)68; MoA 3SW(2d) 256; 76Mont150, 245P962; 190NC732, 130SE861; 194NC37, 138SE339; 194NC 412, 140SE34; 115 Oh484, 154NE738, 739 [quotCyc]; 25 OhA214, 157NE794; 44Philippine138; TexCommnA 283SW 146; 99Vt265, 132A40, 43 [citCyc].

1151-56 26F(2d)530; 118Kan752, 236 P823, 824 [quotCyc]; 316Mo 1075, 292 SW1028 [quotCyc]; 76Mont150, 245P 962; 25 OhA214, 157NE794; 99Vt265, 132A40, 43 [citCyc]; 148Va661, 139SE 262. Where there is no conflict between provisions of general and special statutes, maxim "generalia specialibus non derogant" does not apply. Eng [1926] AC81; [1925] 3DomLR880.

1151-57 12F(2d)922; 14F(2d)326; 21 F(2d)226; 216Ala178, 112S742, 751 [cit Cyc]; Ariz 282P930; 196Cal 725, 239P 38; 197Cal 448, 241P264; 207Cal 134, 277P308; 208Cal 770, 284P1105(2d case); 102CalA635, 283P862; 93Fla921, 112S618; 96Fla494, 118S223; 320 Ill 491, 151NE372; 332 Ill 571, 164NE10; 198 Ind127, 149NE350, 353 [citCyc]; Ind 154NE12; IndA 172NE569; 118 Kan752, 236P823, 824 [quotCyc]; 124 Kan642, 261P838; 216Ky766, 288SW 690; 12LaA42, 152S135; 316Mo 1075, 292SW1028, 1030 [quotCyc]; 320Mo 691, 8SW(2d)1068; Mo 30SW(2d)68; 75Mont369, 243P1093; 76Mont239, 245 P953; 76Mont150, 245P962; 81Mont19, 261P876; Mont 289P566; 51Nev170, 271P689; 131Misc657, 228NYS361; 127 Misc852, 217NYS609; 133Misc661, 233 NYS217; 190NC732, 130SE861 (where not practical to apply doctrine of in pari materia); 115 Oh484, 154NE738, 739 [quotCyc]; 25 OhA214, 157NE794; 33 OhA137, 168NE549; 38 OklCr350, 261 P978; 143 Okl 252, 288P468; Okl 292 P42(2dcase); OklCr 293P273; 44 OklA CR35; 14PaDist&Co 370; 44Philippine 138; 138SC374, 136SE487, 488 [quot Cyc]; 144SC188, 142SE343; 50SD44, 208NW228; TexCommnA 12SW(2d)142; 118Tex463, 16SW(2d)1063; TexCivA 15 SW(2d)106; 99Vt265, 132A40, 43 [cit Cyc]; 148Va661, 139SE262. Repugnancy between general and special acts must be real, and not seeming, to work a pro tanto repeal. 190NC732, 130SE 861. In Florida.–93Fla921, 112S618.

1151-58 12F(2d)922; 104CalA528, 286 P504; 233Mich619, 207NW863; 175 Minn583, 222NW285; 307Mo 576, 271 SW365; 310Mo 542, 276SW389; 313Mo 307, 281SW702; 316Mo 1075, 292SW 1028, 1030 [quotCyc]; 81Mont36, 261 P885; 133Misc161, 231NYS85; 115 Oh 484, 154NE738; 32PortoRico 73 (in matters of insurance, Act [1921] No. 66 § 175 supersedes Civ. Code § 1721); SC 139SE387, 392 [quotCyc]; 99Vt265, 132 A40.

1152-59 5F(2d)330; 21F(2d)226; 26F (2d)530; 216Ala178, 112S742, 751 [cit Cyc]; CalA 290P522; 316Mo 1075, 292 SW1028, 1030 [quotCyc]; 190NC732, 130SE861 (general statute read as silently excluding cases provided for by special statute); 44Philippine138; Tex CommnA 283SW146. In New York.–132 Misc161, 231NYS85.

1152-60 5F(2d)330; 21F(2d)226; 316 Mo 1075, 292SW1028, 1030 [quotCyc]; 44Philippine138.

1152-62 69CalA347, 231P754.

1152-63 43F(2d)78; Mont 292P722.

1152-65 216Ala356, 113S67; 217Ala219, 115S308; 3Del 188, 133A235; 168Ga67, 146SE908; 119Kan770, 241P450; 253 Mass407, 147NE901; 250Mich227, 229 NW911(3dcase); 320Mo 236, 7SW(2d) 344 [quotCyc]; 116Nebr648, 218NW429. Provisions of act adopted by express reference are made part of adopting act to be given full force and effect except in so far as inconsistent therewith. 134SC251, 131SE421.

1152-67 69CalA347, 231P754.

1152-68 3Del 188, 133A235; Fla 125S 358(3dcase); 121 Okl 193, 249P381; 290 Pa573, 139A374; TexCivA 8SW(2d) 249.

1152-69 3Del 188, 133A235; 121 Okl 193, 249P381. See also TexCivA 8SW (2d)249. But see 331 Ill 576, 163NE 466.

1153-70 3Del 188, 133A235. Rule applied to repeal of particular statutes.–3Del 188, 133A235.

1153-72 Where statute adopts general law covering subject, reference will be regarded as including not only law in force at date of adopting act, but also law in force when action is taken or proceedings are resorted to. 121 Okl 193, 249P381.

1153-73 17F(2d)650; 215Ala79, 109S 377; 219Ala33, 121S42; 220Ala407, 125 S646; 23AlaA7, 121S907(2dcase); 197 Cal 112, 239P850; CalA 289P199; Iowa 216NW742; 234Ky500, 28SW(2d)509; 82NH313, 133A443; NH 151A481; 5Pa Dist&Co 114; Tex 28SW(2d)515; 118 Tex397, 16SW(2d)804; TexCommnA 22 SW(2d)1063; 149Wash552, 271P320; Wyo 291P314. Rule applies only when construction is not plainly erroneous and to cases presenting precise conditions passed on prior to reenactment. 278US269, 49SCt133, 73Led522.

1153-74 26F(2d)855; 215Ala79, 109S 377; 219Ala327, 122S340; Ind 164NE 715; Iowa 230NW865; 317Mo 719, 296 SW411; 21 OhA507, 153NE759; 289Pa 33, 137A111; 154Tenn590, 288SW355; TexCivA 2SW(2d)1018; 112TexCr152, 15SW(2d)650; 149Wash552, 271P320; [1926]CanSC163. [1926] 1DomLR161 [app dism [1926]AC715, [1926] 3DomLR545, [1926] 2WestWkly552].

1153-75 40F(2d)463; 43F(2d)78; 16 CustA15; 215Ala79, 109S377; 216Ala 60, 112S347; CalA 290P293; 317 Ill 203, 148NE69; 337 Ill 276, 169NE178; 231Ky637, 21SW(2d)1030; 141Miss370, 107S279; Mo 30SW(2d)750; 128 Or455, 275P21; 48SD554, 205NW654; Tex 26 SW(2d)908; Tex 30SW(2d)282; Tex 32 SW(2d)452; TexCommnA 25SW(2d) 290; TexCivA 294SW331; 113TexCr 535, 21SW(2d)503. Doctrine held not applicable to decisions of inferior or intermediate courts. 215Ala672, 112S 211.

1154-77 317 Ill 203, 148NE69; 162La 255, 110S413, 415 [citCyc]; 51Nev285, 274P194; 217AppDiv451, 216NYS367; 287Pa499, 135A219; 289Pa33, 137A111; 154Tenn590, 288SW355; Eng [1926]AC 715, [1926] 3DomLR545 [1926] 2West Wkly552; BC [1926] 4DomLR834. See also DC 37F(2d)818.

1154-78 275US475, 48SCt160, 72Led 381; 280US327, 50SCt115, 74Led457; 11F(2d)895; 29F(2d)695; 40F(2d)293; 42F(2d)83; 250Mich227, 229NW911(3d case); TexCommnA 24SW(2d)381. But see 86Mont200, 283P202, 67ALR1020.

1154-79 DC 37F(2d)798; DC 37F(2d) 801.

1154-81 41F(2d)766; 213Ala282, 104S 527; 215Ala79, 109S377, 379 [quotCyc]; 29Ariz138, 240P280; 30Ariz310, 246P 1036; 30Ariz436, 247P1099; 31Ariz324,

253P435, 59ALR625; 32Ariz182, 256P 1048; 33Ariz64, 262P489; 34Ariz556, 273P725; 200Cal 585, 254P946, 62ALR 1341; 71CalA2, 234P438; CalA 288P 124; CalA 288P845; 48 Ida240, 281P 375; 330 Ill 571, 162NE170; 85 IndA 523, 154NE501; 214Ky643, 283SW1015; 127Me110, 141A699; 235Mich555, 209 NW930; Minn 232NW331; Mo 318W (2d)7; 220MoA1165, 297SW415; 222 MoA738, 78W(2d)441; 76Mont375, 247 P328; 77Mont399, 251P524; 78Mont 308, 254P187; 78Mont301, 254P419; 78Mont254, 255P1067; 82Mont530, 268 P507; Mont 285P668; Mont 293P313; Mont 293P315; 113Nebr761, 204NW 788; 51Nev7, 267P49; 99NJEq825, 134 A646; 33NM35, 261P808; 198NC369, 151SE725; 115 Oh472, 154NE736; 117 Oh215, 158NE89 (rule stated); 25 Oh NPNS263, 276 [citCyc]; 143 Okl 147, 288P285; 40 OklACR97 [reh pending]; 118 Or77, 245P1074, 46ALR1173; 123 Or69, 260P1011; 126 Or651, 269P869; 44Philippine207; 49RI 339, 142A531, 59 ALR1501; 49SD68, 206NW423; 156 Tenn229, 299SW1039; 148Va220, 138 SE474; 148Va97, 138SE650; 145Wash 435, 260P990; 107WVa666, 150SE2(1st case) (standard form of insurance policy); 194Wis583, 217NW423; 200Wis5, 227NW234 (Negotiable Instruments Law); Wis 230NW691. **State statutes adopted by congress.**–29F(2d)694; 37 OklACR399. But see 38F(2d)833. **States which had adopted Uniform Sales Act followed.**–NJDistCt 150A1.

1155–82 215Ala79, 109S377, 379 [quot Cyc]; 214Ky643, 283SW1015. **Mexican laws should be given same efficiency in reserving title to river beds in sovereign as is given Texas statutes.** 117Tex53, 297SW202; Mass 170NE56; 25 OhNP NS263.

1156–83 32F(2d)300; 215Ala79, 109S 377, 379 [quotCyc]; 221Ala113, 127S 805; 29Ariz138, 240P280; 214Ky643, 283SW1015; 235Mich555, 209NW930; 77Mont572, 252P307; Mont 285P172; 117 Oh215, 158NE89; 25 OhNPNS263; 40 OklACR97 [reh pending]; 126 Or 651, 269P869; 47RI 64, 129A832; Tex CivA 271SW427; 148Va97, 138SE650. **Mere usage or practice, etc.** 38Wyo 481, 270P1081. **Such construction must be that of the highest court of the state, etc.** 77Mont399, 251P524. **Conflicting constructions.**–TexCivA 280SW238. **Authoritative interpretation of jurisdiction from which borrowed** is enacted with statute. 221Ala113, 127S805. **Where federal statute is adopted by state court,** federal construction is also adopted. 221Ala113, 127S805.

1156–84 99NJEq825, 134A646; 133 Or 171, 289P503. **Construction by federal court.**–276US58, 48SCt248, 72L ed467. **Rule applied by state court in construing statute modeled upon act of congress.** TexCivA 294SW681. **In Philippines.**–44Philippine207.

1156–85 16F(2d)79; 32PortoRico 336.

1156–86 129 Or602, 278P93.

1156–87 31Ariz324, 253P435, 59ALR 625; 84Colo 1, 267P191; 330 Ill 571, 162NE170; 40 OklACR97 [reh pending]; 145Wash435, 260P990. **Principle of interpretation is persuasive, if not controlling.** 115 Oh472, 154NE736.

1156–89 27F(2d)253; 31Ariz324, 253P 435, 59ALR625; 32Ariz182, 256P1048; 97Fla297, 120S556(2dcase); 117 Oh215, 158NE89; TexCivA 283SW624. See also 32PortoRico 442.

1156–90 32Ariz182, 256P1048; 77Mont 399, 251P524; 32PortoRico 336. See also 78Mont308, 254P187.

1156–90½–New. , or does not follow obvious meaning of words used. 32 PortoRico 336.

1157–91 38F(2d)199; 30Ariz546, 249P 549; 257Mass289, 153NE787.

1157–93 16F(2d)79, 82 [citCyc]. **The court of the jurisdiction in question, etc.**–68Utah388, 250P979. **Spanish and Mexican law.**–199Cal 318, 249P197.

1157–95 30Ariz310, 246P1036; Utah 289P92.

1157–96 38F(2d)199; 30Ariz310, 246P 1036; 32Ariz182, 256P1048; 32Porto Rico 442 (decisions of supreme court of Spain since change of sovereignty in Porto Rico).

1157–98½–New. Evidence held to show that state adopted federal statute as regards construction. 221Ala113, 127S 805.

1157–1 20 OhA135, 153NE155; 24 OhA 166, 156NE221; 291Pa550, 140A515. **Statute may be mandatory in some respects and not in others.** 20 OhA135, 153NE155. **Statute held mandatory.**–Iowa 231NW428.

1157–2 20 OhA135, 153NE155; 112 Okl 168, 240P604, 608 [citCyc]; 291Pa550, 140A515.

1157–2½–New. Under general classification, statutes are either mandatory or directory. 312Mo 1, 278SW769.

1157–3 44 Ida385, 257P480, 483 [cit Cyc]; 70Utah156, 258P1016, 1017 [quot Cyc].

1157–4 103Conn607, 132A30; 44 Ida 385, 257P480, 483 [citCyc]; Iowa 231 NW428; 121Kan109, 245P1019; 216Ky 827, 288SW764, 765 [quotCyc]; 225Ky 165, 7SW(2d)1056 [citCyc]; 227Ky 493, 13SW(2d)516; 52Nev17, 279P937; 226AppDiv165, 235NYS250; 112 Okl 168, 240P604; 122 Or684, 260P220; 291 Pa550, 140A515, 517 [quotCyc]; Tex CivA 292SW964; TexCivA 3SW(2d)576, 583 [quotCyc]; 70Utah156, 258P1016, 1017 [quotCyc]; 34Wyo 476, 245P298, 302 [citCyc]. **Statute may be mandatory in some respects and not in others.** 20 OhA135, 153NE155. **Mandatory.**–30 Hawaii899. **Where injustice or inconvenience would be imposed on individuals by construing statute as mandatory,** statute directing performance of public duty in imperative terms may be construed as merely directory. Sask [1929] 3DomLR73.

1158–7 215Ala66, 109S358 (provisions not relating to essence of thing to be done); 201 Iowa1050; 205NW543; 112 Okl 168, 240P604, 608 [citCyc]; 90 PaSuper489, 492 [citCyc]; 90PaSuper 495.

1158–8 44 Ida385, 257P480; 201 Iowa 1050, 205NW543; 210Ky205, 275SW 790; 128 Or339, 273P716; 147Va720, 129SE489.

1158–9 225Ky165, 7SW(2d)1056 [cit Cyc]; 100NJEq24, 134A904 (in absence of negative words); 116 OhSt16, 155NE 555; 112 Okl 168, 240P604, 608 [cit Cyc]; 147Va720, 129SE489.

1158–10 243 IllA310; 216Ky827, 288 SW764, 765 [quotCyc]; MoA 297SW 445, 447 [citCyc]; 112 Okl 168, 240P 604, 608 [citCyc]; 128 Or339, 273P716; 291Pa550, 140A515.

1159–13 Nebr 233NW452. **In construing tax law those provisions which are necessary to protection of the citizen shall be regarded as mandatory.** 117 Nebr102, 219NW811.

1159–14 54SD488, 223NW711.

1159–17 24 OhNPNS241 (negative words in grant of power are never construed as merely directory).

1159–18 24 OhNPNS241, 255 [quot Cyc]; 70Utah156, 258P1016, 1017 [quot Cyc].

1159–19 220Ala668, 126S132; 199Cal 270, 248P917; 103Conn607, 132A30; 146Miss727, 111S840; 24 OhNPNS241, 255 [quotCyc]; 122 Or684, 260P220; 70Utah156, 258P1016, 1017 [quotCyc].

1159–20 199Cal 270, 248P917; 44 Ida 385, 257P480; 209Ky682, 273SW473; 24 OhNPNS241, 255 [quotCyc]; 70Utah 156, 258P1016, 1017 [quotCyc].

1159–21 199Cal 270, 248P917; 137Misc 341, 242NYS142 (holding that to effect legislative intent words of permissive character may be given peremptory significance); 24 OhNPNS241, 255 [quot Cyc]; 70Utah156, 258P1016, 1017 [quot Cyc]. But see 228Ky80, 14SW(2d)398.

1159–22 24 OhNPNS241, 255 [quot Cyc]; 70Utah156, 258P1016, 1017 [quot Cyc].

1159–23 121Kan109, 245P1019; 122 Or 684, 260P220. **Statute authorizing board to elect clerk or secretary is directory.** 312Mo 1, 278SW769.

1160–24 44 Ida385, 257P480; 316Mo 721, 291SW457; 322Mo 1191, 18SW(2d) 464; 115Nebr230, 212NW437; 70Utah 156, 258P1016, 1017 [quotCyc]. See also 197Wis4, 220NW393.

1160–25 116 OhSt16, 155NE555, 557 [citCyc]; 70Utah156, 258P1016, 1017 [quotCyc].

1160–26 70Utah156, 258P1016, 1017 [quotCyc]. **Presence or absence of negative terms** in statute largely determines whether performance within time limited is mandatory or directory. 229 AppDiv397, 242NYS93.

1160–27 When statute provides what results shall follow failure to comply with its terms, it is mandatory and must be obeyed. MoA 12SW(2d)102.

1160–27½–New. Where statute, in addition to requiring certain acts, prescribes results that will follow if not done, it is mandatory; 312Mo 1, 278SW769.

1160–27¼–New. but if its terms are merely limited to what is required to be done, it is directory. 312Mo 1, 278 SW769.

1160–27¼–New. A statute, remedial in nature, has been held directory. 312 Mo 1, 278SW769.

1160–28 7Alaska126; 68CalA592, 229P 1020; 81CalA98, 252P1075; 37GaA439, 140SE386; 241Mich366, 217NW15; 147 Miss121, 112S865; 315Mo 681, 286SW 363; 114Nebr653, 209NW328; Nebr 228 NW114; 103NJL290, 136A718; 114 Oh 212, 151NE47; 122 Or684, 260P220; 154Tenn88, 290SW20. **Provision that every person accompanying illegal transportation of intoxicating liquor "may" be punished as accessory is not mandatory.** 103Conn138, 130A96. **"May" means "must" or "shall" only** where public interests or rights are concerned, or where public or third persons have claim de jure that power shall be exercised. 195Wis35, 217NW705.

1160–29 147Miss121, 112S865; 122 Or 684, 260P220; 154Tenn88, 290SW20.

1160–30 78CalA702, 248P960; 37GaA 439, 140SE386; 236 IllA1; 208 Iowa 614, 226NW182; Iowa 231NW428; 166 LaS14, 118S29; 241Mich366, 217NW15; Nebr 233NW452; 244NY451, 155NE 737; 192NC634, 135SE612; 114 Oh212, 151NE47; 122 Or297, 258P562; 53SD 174, 220NW618; TexCivA 297SW657. **"Shall" is presumed as mandatory phrase,** unless intention to contrary is clear. 81Colo 181, 254P440.

1160–31 202Cal 110, 259P730; TexCivA 297SW657.

1160–33 68CalA592, 229P1020; 208 Iowa614, 226NW182 (imperative in regard to right or benefit conferred); 241 Mich366, 217NW15; 179Minn337, 229 NW313; ND 230NW596; 114 Oh212, 151NE47; 122 Or684, 260P220 (dictum); 12PaDist&Co 165; 148SC326, 146 SE92; TexCivA 288SW518. **"May" will not be construed as imperative** where, by use in other provisions of statute of word "shall," legislature intended to distinguish between "shall" and "may." 114 Oh212, 151NE47.

1160–34 84CalA287, 258P130; 103Conn 607, 132A30; 251 IllA599; 75Mont240, 243P1073; 137Misc341, 242NYS142; 284Pa421, 131A253; RI 151A1.

1160–35 18F(2d)898, 902 [citCyc]; 199 Cal 270, 248P917; 68CalA592, 229P 1020; 98CalA585, 277P500; 103Conn 607, 132A30; 332 Ill 192, 163NE546; 257Mass43, 153NE33; 30 OhA419, 165 NE380; 122 Or297, 258P562.

1161–36 18F(2d)898, 902 [citCyc]; 199 Cal 270, 248P917; 98CalA585, 277P500; 74Mont54, 238P586; 75Mont240, 243P 1073; 122 Or297, 258P562; 284Pa421, 131A253 (governor's removal of officer must be with senate's consent).

1161–37 18F(2d)898, 902 [citCyc]; 199 Cal 270, 248P917; 68CalA592, 229P 1020; Fla 130S587; 323Mo 203, 19SW (2d)625 (removal or suspension of attorney or counselor at law from practice); 122 Or297, 258P562; 193Wis295, 214NW447.

1161–39 195Cal 404, 234P82; 81Colo 181, 254P440; 95Fla457, 116S78; 318 Mo 870, 2SW(2d)713; 100NJEq24, 134 A904, 905 [citCyc]; 122 Or297, 258P 562; RI 151A1. See also 96Fla91, 117 S863.

1161–40 195Cal 404, 234P82.

1161–44 19F(2d)504.

1161–45 121Kan109, 245P1019; RI 151 A1 (not mandatory). **Word "authorizing" contained in title held not to give** notice of mandatory character of enactment. 85PaSuper228.

1162–49 19F(2d)308; 35F(2d)78; CalA 289P689; 118Nebr189, 223NW 957; 126Misc418, 213NYS602 (something taken back from power first declared); 122 Or315, 259P203; 122 Or

615, 260P229; 6PaDist&Co 537, 539 [citCyc].

1162–50 19F(2d)308; 122 Or315, 259P 203.

1162–52 19F(2d)308; 197 Ind498, 150 NE413; 239Mich204, 214NW316, 53 ALR273. **Doubts are to be resolved in favor of rule.**–220Ala562, 126S626.

1162–54 279US12, 49SCt218, 73L ed 582; 239Mich204, 214NW316, 53ALR 273.

1162–54½–New. Proviso is strictly construed.–254Mass617, 151NE680.

1162–55 21F(2d)550; 24F(2d)784; 197 Ind498, 150NE413; Nebr 228NW 852; 122 Or315, 259P203; 294Pa25, 143A505. **Only those cases that are fairly within the terms of the proviso,** etc. 21F(2d)550; 197 Ind498, 150NE 413; 254Mass617, 151NE680; 122 Or 315, 259P203.

1162–56 310Mo 542, 276SW389; 122 Or 315, 259P203; 122 Or615, 260P229.

1163–59 312Mo 244, 279SW673, 677 [quotCyc].

1163–60 CalA 289P689.

1163–62 51Nev192, 272P656.

1163–63 279US12, 49SCt218, 73L ed 582; 197 Ind498, 150NE413.

1163–64 165Lal20, 115S407.

1163–65 157Tenn54, 6SW(2d)322.

1163–65½–New. Grant or enactment should be read as though no power was given other than that contained within bounds of proviso. 126Misc418, 213 NYS602.

1164–66 30F(2d)421; 98CalA523, 277 P354. **Express exception precludes any other exception by construction.** 121 Kan233, 247P114; 74Mont346, 240P 837; 76Mont239, 245P953. **Exceptions must be strictly construed.**–21F(2d)550; 219MoA587, 282SW149. **To make an exception, language must be clear.** 191 NC584, 132SE558. **Whether rule that exception excludes all other exceptions applies depends on whether in particular case it accords with reason and promotes justice.** 86Colo 364, 281P740. **Legislature must be deemed to include in exception all that it intended to except.** CalA 293P106.

1164–68 Exception to general statute is strictly construed, and does not take case out of general statute unless case falls fully within terms of exceptions. 158Tenn394, 13SW(2d)49. **Exemption or exception must be specific.**–78CalA 173, 248P532.

1164–68½–New. Exception will not be extended by implication. 161Tenn88, 28 SW(2d)642.

1164–69 TexCivA 273SW619 (saving clause restricted to subject matter of enacting clause and not as independent enactment).

1164–73 125Misc678, 211NYS749.

1164–75 170Ark1138, 282SW988 (drainage acts); 102CalA280, 282P990; IndA 156NE178; 87 IndA580, 158NE523; Mass 169NE806; 321Mo 1126, 14SW(2d) 990; 323Mo 138, 19SW(2d)12; 133Misc 741, 234NYS220; 154Tenn326, 289SW 518. **Of two constructions equally warranted,** etc. 74Mont332, 240P286. **Judicial decisions construing the original act,** etc. 321Mo 1126, 14SW(2d)990. **In case of conflict intent of amending clause will prevail.** 38Wyo 88, 264P 1030.

1164–76 178Ark346, 10SW(2d)854.

1165–78 237Mich156, 211NW346; 86 Mont58, 282P32; 50RI 440, 148A415. **Court may look to bodies, captions, and emergency clauses, and to facts existing at time of passage.** TexCivA 297 SW689, 691 [citCyc].

1165–79 295Pa280, 145A288.

1165–80 198Cal301, 245P173; Ind 168 NE865; Iowa 216NW742, 745 [citCyc]. But see Mont 286P125(2dcase). **Clause in statute is given no different meaning after amendment than before, if amendment relates to other matters.** 198 Cal649, 246P1044.

1165–81 38F(2d)28; 115Tex205, 281 SW837. See also 74CalA1, 239P702.

1165–82 75CalA345, 242P885; 316 Ill 452, 147NE494; 326 Ill 145, 157NE225; 335 Ill 584, 167NE779; 321Mo 1126, 14 SW(2d)990.

1165–84 201Cal 116, 255P792, 52ALR 811; 102CalA280, 282P990; 94Fla588, 115S315; 196 Ind472, 149NE69; IndA 156NE178; 86Mont58, 282P32; Mont 287P624; 221AppDiv527, 225NYS118; 127Misc224, 215NYS110. **Declaration in title of act that it is to amend existing law implies that it is only to add to or take therefrom some particular provision, and not entirely to destroy its vitals.** 68CalA522, 229P984.

1165–85 30F(2d)960; 84Colo 576, 272P 629; 87Colo 227, 286P273; 196 Ind472, 149NE69; 323Mo 234, 19SW(2d)740 (legislature presumed to have had knowledge of court's construction of previous statute); 85Mont532, 281P341; 86Mont200, 283P202, 67ALR1020; 296 Pa359, 145A916(2dcase); 49SD350, 207 NW210; TexCivA 10SW(2d)186. But see 86Mont58, 282P32.

1166–86 Mont 287P624.

1166–88½–New. Change in meaning will not be inferred merely from change in language, if it is apparent that change was made to obtain conformity with federal statute. 31NM404, 247P275.

1166–88½–New. Statutes are not to be construed as effecting any change beyond what is expressed or necessarily implied from language used. 126Misc 247, 213NYS333.

1166–88¼–New. Act amending particular section of general law is limited in scope to subject matter of section amended. OklCr 278P209(2dcase).

1166–88⅛–New. Amendment does not affect interpretation given to original act before amendment. Mass 167NE 670.

1166–90 162Ga664, 135SE195; 265Mass 585, 164NE459.

1166–91 Invalidity of statute because of defective title held cured by reënactment in revision. TexCommnA 291 SW868. **Reënactment in revised general statutes of Bulk Sales Act does not change or enlarge scope of law.** 89Fla 340, 103S615.

1166–92 TexCommnA 6SW(2d)80; Tex CivA 291SW660; TexCivA 1SW(2d)670. See also Va 153SE649.

1166–93 218Ala371, 118S746; 37GaA 581, 140SE910; 42 Ida164, 245P90; 130 Kan509, 287P262 (history of legislation or other rule of construction may be resorted to); 57ND768, 224NW680. **Construction provision of code should receive is construction proper when it was first written, as it is not changed by fact that older provisions with which it was incorporated have since been eliminated.** 144Va831, 131SE1.

1167–94 But see 135Misc124, 237NYS 54.

1167–95 TexCivA 283SW929.

1167–98 208Cal353, 281P394; 69CalA 66, 230P462; 87CalA393, 262P474; 36 GaA817, 138SE267; 201Iowa389, 207 NW389; 234Ky558, 28SW(2d)737; SC 155SE844.

1167–99 69CalA66, 230P462; 36GaA 817, 138SE267; 201Iowa389, 207NW 389; 307Mo 674, 271SW755; MoA 16 SW(2d)737; 26 OhNPNS546; 124 Okl 106, 254P34; 49SD554, 207NW662; Tex CivA 280SW238; Va 153SE649. **Sections of code adopted together must be construed in pari materia.** 221Ala 476, 129S48.

1167–1 69CalA66, 230P462; 83Colo 468, 266P501; 36GaA817, 138SE267; 201 Iowa389, 207NW389; Iowa 228NW279; 307Mo 674, 271SW755; 124 Okl 106, 254 P34; 49SD554, 207NW662; TexCivA 280SW238. **Code is to be construed as single statute.**–69CalA66, 230P462.

1167–2 165Ga782, 142SE111; 307Mo 674, 271SW755; TexCivA 280SW238; Vt 151A509; 145Va694, 134SE728.

1167–3 165Ga782, 142SE111; 307Mo 674, 271SW755; 49SD554, 207NW662; SD 228NW466; TexCivA 280SW238.

1167–4 205 Iowa141, 217NW809; 205 Iowa184, 217NW834.

1167–7 38F(2d)35.

1167–8 87CalA393, 262P474; 90CalA 759, 266P373; 85Mont310, 278P1002; Va 153SE649. **Amendment by revision may constitute new legislation.** Tex CivA 24SW(2d)440.

1168–9 CalA 286P1053.

1168–10 37GaA581, 140SE910; 42 Ida 164, 245P90; 244 IllA56; 170Minn475, 212NW911; 85Mont532, 281P341. See also Iowa 232NW279.

1168–11 42 Ida164, 245P90; 170Minn 475, 212NW911. **Unless intention to change effect of statutes is clearly expressed,** such is not to be inferred. 27 F(2d)296. **Intention to make radical change** is not to be implied in revision. 35F(2d)211.

1168–13 220Ala30, 123S231, 241, 68ALR 712 [quotCJ]; 220Ala448, 126S110; 221 Ala572, 130S173; 204CalA39, 266P518; 244 IllA16; Iowa 230NW865; TexCr 23 SW(2d)733. **Early statutes, as readopted in later codes,** carry with them judicial construction given prior to recodification. 23AlaA168, 123S237.

1169–19½–New. Parts of statutes incorporated into code without alteration are considered as having been law from time of enactment. 75CalA345, 242P 885.

1169–19⅓–New. Revision without changing statute judicially construed is presumed to show intent that construction remain same. 103TexCr439, 281SW857.

1169–19¼–New. Act providing substitute for and not amending preëxisting law does not require republication of preëxisting law. 220Ky373, 295SW433.

1169–19⅕–New. Intention to change meaning may appear from omission of language as well as by adding new language. 177Minn437, 225NW398.

1169–19⅙–New. Sections in codification taken or adopted from existing statutes are to be construed as continuations thereof. 33NM647, 275P90.

1169–19⅐–New. Sections dealing specifically with subject matter must prevail in case of conflict. 203Cal 753, 265P 924.

1169–19⅛–New. Various codes of California are to be construed with relation to each other as though all passed at same moment of time and were parts of same statute. 98CalA523, 277P354.

1169–19⅛–New. New provision in code must be construed with omitted sections, unless in conflict, because of statute against implied repeal. 220Ala458, 125S906.

1169–21 Ind 173NE229; 307Mo 49, 269 SW623.

1169–22 Intent must prevail over literal wording. 307Mo 49, 269SW623.

1169–23 252Mich14, 232NW746; 135 Misc796, 238NYS463.

1170–25 293Pa404, 143A105.

1171–35½–New. In arriving at legislative intent as to an act alleged to have been impliedly repealed or superseded another or other statutes various matters are proper for consideration. 43 Ida180, 250P239.

1171–37 199Cal 215, 248P676; Cal 288 P1080; 235Ky728, 32SW(2d)42; 117 Or 1, 242P823.

1172–38 199Cal 215, 248P676; 103CalA 354, 284P731; 198NC357, 151SE880, 67 ALR1304; 117 Orl, 242P823.

1172–39 199Cal 215, 248P676; 156Miss 306, 126S2.

1172–40 117 Orl, 242P823 (short statute of limitations upon rejection of claim by superintendent of banks). **Surety entitled to be substituted to rights of state** would be no more affected by general statute than state itself unless some clause or provision so indicated. 117 Orl, 242P823.

1172–41½–New. Senate and general assembly are subject to laws in common with all other bodies, officers, and tribunals within state. NJCh 147A220.

1173–50 126Kan368, 370, 268P94 [quot Cyc]. **Rule is not violated by giving words full meaning, or broader of two meanings.** 273US326, 47SCt368, 71L ed 663.

1173–51 126Kan368, 370, 268P14 [qubt Cyc]. **Liberal construction does not extend to supplying words or extending meaning of those used.** 204 Iowa644, 215NW746.

1173–52 33Ariz182, 263P5; 206 Iowa 111, 219NW49(2dcase); 221MoA257, 2 SW(2d)110; 125 Or428, 266P875.

1173–52½–New. School statute should be liberally construed to accomplish intended purpose. 192NC298, 135SE40.

1173–54 285Pa153, 131A707.

1173–56 22 OhA200, 153NE900.

1173–57 130Kan785, 288P749.

1173–61 14F(2d)668.

1173–63 221Ky610, 299SW582, 584 [cit Cyc].

1173-64 146Miss659, 1118752.
1173-66 44 Ida385, 257P480; 117 Or 566, 245P308, 45ALR527 (statutes conferring special ministerial authority).
1173-66½-New. By statute in some jurisdictions civil statutes must be liberally construed. TexCommnA 291SW214.
1173-68 204 Iowa644, 215NW746; 156 Tenn321, 300SW588.
1174-69 315Mo 166, 285SW729; 79 Mont52, 255P337; TexCivA 278SW893.
1174-70 TexCivA 278SW893.
1174-71 214Ala32, 106S182; 40GaA 427, 149SE711 (statute allowing amendment is remedial statute); 25 OhNPNS 211; TexCivA 278SW893.
1174-72 TexCommnA 26SW(2d)627 (relief from forfeiture).
1174-75 DelCh 139A454; 115 Oh524, 155NE127; 148Va20, 138SE502; 136 Wash467, 241P21 (statutes providing for recall); 103WVa519, 138SE97. **Statutes relating to regulation of insurance business** have been declared remedial in nature. 115 Oh607, 155NE138, 50ALR 473.
1174-76 79Mont52, 255P337; NJQuart Sess 139A401; 117 Or426, 243P558 (statute directing remission of interest, penalties, and costs incurred on taxes levied for certain years); TexCivA 296 SW970.
1174-77 4F(2d)872; 248NY445, 162NE 481; TexCivA 275SW203; 103WVa519, 138SE97; 187Wis506, 204NW907.
1174-78 US 13CustA273, 277 [citCyc]; 214Ala32, 106S182; 32Ariz293, 257P982; 200Cal 374, 253P148; 93CalA97, 269P 468; 103Conn1, 130A126; DelCh 139A 454; 165Ga422, 141SE188; 40GaA427, 149SE711; 119Kan420, 240P251; 171 Minn75, 213NW546; 172Minn424, 215 NW675; 173Minn57, 216NW789; 308 Mo 314, 274SW77; 312Mo 1, 278SW769; 315Mo 166, 285SW729; 78Mont357, 254 P174; 115Nebr177, 212NW39; NJCh 149A50; NJQuartSess 139A401; 220 AppDiv396, 221NYS646 (statute exempting supplemental mortgage from recording tax); 127Misc89, 216NYS884 (statute to restrain illegal tax); 128Misc 679, 220NYS773; 195NC508, 142SE767; 22 OhA457, 153NE918; 115 Oh524, 155 NE127; 115 Oh607, 155NE138, 50ALR 473; 22 OhA457, 153NE918; 25 OhNP NS211; 117 Or426, 243P558; 120 Or557, 251P263; 124 Or497, 264P856; 288Pa 585, 137A109 (election contest statute); 299Pa517, 149A733; 7PaDist&Co 787; 47RI 498, 134A1; 149SC185, 146SE815 (1stcase); TexCivA 275SW203; TexCivA 283SW277 (exemption statute); Tex CivA 283SW929; TexCivA 3SW(2d)947; 142Va301, 128SE447; 144Va1, 131SE 344; 148Va20, 138SE502; 103WVa519, 138SE97; 187Wis506, 204NW907, 914 [citCyc]; Can [1926] 4 DomLR339; [1926] 3WestWkly241 [app allowed on other grounds [1927] CanExch1, [1927] DomLR138; 57 OntL340, [1925] 3Dom LR1196. **"Ejusdem generis"** rule should not be applied. 57 OntL340, [1925] 3 DomLR1196. **Imaginary meaning** should not be given to language. DelCh 139A454. **Liberal construction means** construction in interest of those whose rights are to be protected. 132Misc95, 228NYS289. **Rule is limited** by principle that statute conferring authority on officer under police power should be strictly construed. 99Fla206, 126S283.
1175-79 173Minn57, 216NW789; 312 Mo 1, 278SW769; NJQuartSess 139A 401; 225AppDiv156, 232NYS217; 117 Or426, 243P558; TexCivA 275SW203; TexCivA 283SW277; TexCivA 287SW 152; 187Wis506, 204NW907, 914 [cit Cyc].
1175-80 199 Ind78, 155NE198; NJ QuartSess 139A401; 248NY445, 162NE 481; 115 Oh524, 155NE127; 6PaDist& Co 290; 8PaDist&Co 77; TexCivA 275 SW203; 187Wis506, 204NW907, 914 [cit Cyc].
1175-81 204 Iowa644, 215NW746.
1175-82 114Nebr194, 206NW765, 766 [quotCyc]; 115 Oh524, 155NE127; 98 Vt449, 129A311 (not extended to purposes beyond those mentioned).
1175-83 115 Oh524, 155NE127.
1175-84 121 Okl 115, 247P665, 666 [quotCyc].
1175-85 121 Okl 115, 247P665, 666 [quotCyc].
1176-86 165Minn295, 206NW461, 463 [citCyc]. **Abridging superfluities.**–Tex CivA 278SW893.
1176-87 165Minn295, 206NW461, 463 [citCyc].
1176-88 165Minn295, 206NW461, 463 [citCyc].
1177-90½-New. Without saving clause in remedial statute remedy and right therein are both lost. 118Tex397, 16 SW(2d)804.
1177-94 98Fla333, 126S374.
1177-95 21F(2d)538.
1177-97 38F(2d)871; Conn 152A210; 145Va266, 133SE888.
1177-98 21F(2d)538. **Right created solely by legislation** will be limited in its application to exact words of act creating right. 48Nev253, 240P925. **Statutes creating new rights** not derived from common law or equity will not be extended in their application which will be limited to exact words of act. 114Tex516, 272SW1098.
1177-99 39F(2d)583; 145Va28, 133SE 561; 145Va266, 133SE888. **If privilege extended to one class of citizens as on certain conditions** is subsequently conferred on another class, such conditions necessarily attach to subsequent class. 173Ark970, 294SW74. **Where statute provides no particular time for exercise of privilege,** law presumes that reasonable time was intended. Fla 130S615.
1177-1 Conn 152A210; 48Nev253, 240 P925. **Meaning.**–126Misc524, 214NYS 113.
1177-3 178Ark309, 10SW(2d)493; 221 Ky610, 299SW582, 584 [citCyc]; 126 Misc524, 214NYS113.
1178-5 Construction that would lead to false consequences or results not intended should be avoided. 126Misc524, 214 NYS113. **Intention of parties expressed in plain language cannot be ignored.** 126 Misc524, 214NYS113.
1178-11 TexCivA 3SW(2d)947; 145Va 266, 133SE888.
1179-14 Legislative enactments modifying common law should be clear.–221Ala 466, 129S21.
1179-15 204 Iowa644, 215NW746; 123 Kan447, 256P167; 225Ky394, 9SW(2d) 55; 314Mo 438, 284SW471, 47ALR25; MoA 24SW(2d)218; 114Nebr346, 207 NW522 (provisions of code must be liberally construed); 125 Okl 66, 256P704, 52ALR1270.
1179-16 18F(2d)727; DelCh 139A454; 93Fla5, 112SW289; 37GaA352, 140SE 385; 240 IllA195; 248 IllA279; 255 IllA558; 198 Ind45, 152NE161; 203 Iowa231, 212NW553 (according to legislative intent); 218Ky128, 290SW1028; 165La565, 115S752; 126Me84, 136A459; 126Me192, 137A56; Mass 173NE524; 237Mich202, 211NW626; 247Mich204, 225NW622; 166Minn363, 207NW736; 143Miss726, 109S665; 148Miss268, 114S 484; MoA 31SW(2d)218; 253NY345, 171NE565; 131Misc411, 227NYS142; 135Misc247, 238NYS765; 225AppDiv 137, 232NYS94; 225AppDiv162, 232 NYS454; 193NC519, 137SE431; 197 NC334, 148SE456, 64ALR1121; 49SD 373, 206NW576; TexCivA 28SW(2d) 573; 140Wash679, 250P456, 51ALR 1088; 145Wash277, 259P878; 103WVa 233, 136SE854; 103WVa519, 138SE97; BC [1929] 4DomLR1034. But see 125 Misc517, 211NYS741; 136Misc443, 240 NYS199. **Strict construction must not go to extent of sacrificing plain legislative intent.** 21F(2d)909. **Such adherence to letter as would defeat obvious legislative purpose is not required.** 281 US635, 50SCt440, 74Led1082. **Statute relating to defense of insanity** held not in derogation of common law. Md 151 A409.
1179-17 126Kan368, 370 [quotCyc], 268 P94; 287Pa224, 134A460 (act authorizing prothonotary to enter judgment by confession); 136Wash676, 241P290 (intention to effect change in common law must clearly appear); 58NS430, [1926] 2DomLR611.
1179-18 86 IndA462, 158NE583.
1180-22 CalA 280P706; 191NC84, 131 SE413; 136Wash676, 241P290.
1180-23 58NS430, [1926] 2DomLR611.
1180-27 41F(2d)12.
1180-28 13F(2d)131; 126Kan368, 370, [quotCyc] 268P94.
1180-30 126Kan368, 370 [quotCyc] 268 P94; 58NS430, [1926] 2DomLR611. See also 224AppDiv3, 229NYS492.
1180-30½-New. Creation, modification, or destruction of cause of action depends on legislative intent. TexCommnA 295SW588.
1180-30½-New. Legislature may not be presumed to make any innovation on common law further than is required by mischief to be remedied. 133Misc652, 233NYS309.
1180-31 12LaA486, 126S456; 225App Div162, 232NYS454; 133Misc652, 233 NYS309; TexCivA 283SW929.
1180-32 225AppDiv162, 232NYS454. **In order that liability be imposed,** meaning of statute must be clear, and resort to implication or to interpolation of words or phrases should not be required. 187 Wis161, 204NW773.
1180-35 79Mont52, 255P337; 108TexCr 142, 299SW437.
1181-36 15F(2d)942; 144Wash88, 256 P1030.
1181-38 Penal statutes include: One imposing penalty for cutting trees. 145 Miss713, 110S790. One which makes selling security without having it registered a felony. NC 153SE855. Act required real estate broker to be licensed. 144Wash88, 256P1030.
1182-41 Statute making one liable for debts of another is penal. 198Cal 652, 246P1049, 46ALR1156.
1183-46 272US1, 47SCt1, 71Led131; 272US620, 47SCt200, 71Led443; 279US 363, 49SCt374, 73Led739; 5F(2d)527; 14F(2d)749; 15F(2d)942; 17F(2d)623; 20F(2d)36; 26F(2d)646; 36F(2d)661; 42F(2d)937; 220Ala297, 124S870, 65 ALR1313; 171Ark1188, 286SW943; 173 Ark989, 294SW33; 175Ark86, 298SW 483; 177Ark1042, 9SW(2d)243; 100 CalA756, 281P89; 103Conn138, 130A96; Conn 151A325; 92Fla601, 109S538; 160 Ga570, 128SE759; 160Ga678, 128SE913; 37GaA495, 141SE63; 254 IllA576; 198 Ind216, 152NE833; 200 Ind575, 165NE 314; 84 IndA257, 151NE19; 89 IndA 254, 166NE28; 202 Iowa638, 210NW 774; 206 Iowa51, 220NW51, 54, 58ALR 1147 [citCyc]; 207 Iowa427, 223NW253; Iowa 228NW308; Iowa 230NW865; Iowa 231NW657; 122Kan734, 253P562, 563 [citCyc]; 218Ky128, 290SW1028; 162La902, 111S321; 169La144, 124S 673; 145Miss399, 110S782; 145Miss713, 110S790; 146Miss659, 111S752; 146 Miss369, 112S1; 147Miss226, 113S547; 154Miss646, 122S771; 321Mo 589, 12SW (2d)87; Nebr 232NW96; 48Nev436, 233 P531; 221NY138, 149NE330 (criminal statute); 221AppDiv77, 222NYS647; 127Misc244, 216NYS442; 131Misc657, 228NYS361; 133Misc517, 232NYS197; 227AppDiv356, 238NYS81; 230AppDiv 499, 245NYS523; 189NC549, 127SE629; 190NC605, 130SE305; 191NC809, 133SE 391; 198NC522, 152SE504; NC 153SE 855; NC 155SE249; 36 OhA107, 172NE 694; 25 OhNPNS564; 285Pa399, 132A 194; 85PaSuper270; 14PaDist&Co 170; 50RI 196, 146A624; 141SC207, 139SE 386; 155SC426, 152SE678; 156Tenn216, 300SW12; 158Tenn209, 12SW(2d)528 (2dcase); TexCivA 283SW929; TexCivA 4SW(2d)988; 106TexCr37, 289SW1072; 69Utah250, 253P900; 136Wash278, 239 P834; 144Wash88, 256P1030; 149Wash 479, 271P331; 151Wash623, 276P870; 105WVa570, 144SE409; 107WVa580, 149SE667; 33Wyo 387, 240P208, 213 [citCyc]; 36Wyo 406, 256P336, 337 [cit Cyc]; 58 OntL64, [1926] 1DomLR11 [app allowed on other grounds [1926] 4DomLR213, [1926] 3WestWkly193]. **Accumulative penalties.**–145Miss399, 110 S782. **Construction most favorable to accused** must be adopted, having due regard for other rules of construction. 242Mich491, 219NW724. **Highly penal statutes construed with reasonable strictness.**–136Wash278, 239P834. **Rule as to strict construction** applies only to doubtful cases. 3Del 353, 136A160. **Statute creating new offense** should be construed in light of ordinary sense of its words. 127Misc244, 216NYS442. **Unless plain mandate of statute permits no other construction** courts should not interpret statute so as to forfeit one citizen's property to another. 69Utah

41, 252P276. **Where statute contains patent ambiguity construction most favorable to accused must be adopted.** 242Mich491, 219NW724.

1185–47 272US620, 47SCt200, 71L ed 443; 17F(2d)623; 17F(2d)923; 267 Mass496, 166NE855; 48Nev436, 233P 531; 242NY453, 152NE259; 26 OhA7, 159NE585; 10PaDist&Co 584.

1185–48 270US512, 46SCt392, 70L ed 709; 272US620, 47SCt200, 71L ed443; 276US505, 48SCt400, 72L ed676; 17F (2d)623; 26F(2d)646; 42F(2d)937; 23 AlaA1, 121S9(2dcase); 103Conn138, 130 A96; 254 IllA7; 254 IllA445; 125Me 432, 134A561; 145Miss399, 110S782; 146Miss369, 112S1; 80Mont239, 260P 119; 242NY313, 151NE631; 189NC549, 127SE629; OklCr 279P968; 44Philippine278, 291 ("punitive and condemnatory laws must . . . be interpreted and enforced . . . in a way calculated to secure the object sought"); 69 Utah41, 252P276; 152Wash68, 277P 394; 198Wis201, 229NW48(2dcase). See also 191NC809, 133SE391. **Rule of strict construction of penal laws is subordinate to rule of reasonable sensible construction,** having in view effectuation of legislative purpose. 134SC251, 131SE 421. **Under statutes regulating acts in** themselves lawful and requiring no qualification, penalty is directed against person violating statute. 219MoA436, 274 SW880. **Courts may not search for intention** not suggested by words of law. 272US620, 47SCt200, 71L ed443.

1186–49 271US201, 46SCt476, 70L ed 904; 272US1, 47SCt1, 71L ed131; 272 US620, 47SCt200, 71L ed443; 17F(2d) 923; 19F(2d)773; 20F(2d)36; 41 Ida 251, 238P538; 46 Ida195, 267P452; 84 IndA257, 151NE19; 217Ky123, 288SW 1036; 218Ky128, 290SW1028; 158La 175, 103S730; 170Minn255, 212NW528; 146Miss659, 111S752; 147Miss226, 113 S547; 243NY113, 152NE693; 251NY 107, 167NE187, 64ALR1066; 127Misc 244, 216NYS442; 115 Oh340, 154NE244; 115 Oh350, 154NE728 (holding court will not depart from rule of strict construction because accused merits punishment); 285Pa399, 132A194; Tex CommnA 290SW727; 106TexCr37, 289 SW1072; 33Wyo 387, 240P208, 213 [cit Cyc]. **Criminal statutes,** etc. 147Miss 226, 113S547; 320Mo 236, 7SW(2d)344. **Statute creating new offense should not be construed to imply crimes.**–127Misc 244, 216NYS442.

1186–50 20F(2d)36; 40F(2d)472; 42F (2d)937; 87Colo 567, 290P271; 93Fla5, 112S289; 229Ky776, 18SW(2d)290; 162 La902, 111S321; 170Minn255, 212NW 528; 221AppDiv77, 222NYS647; NC 153 SE855; 21 OhA168, 152NE776; 11Pa Dist&Co 786; SC 139SE387, 391 [quot Cyc]. **General terms descriptive of class of persons** made subject to criminal statute must be limited where literal application leads to absurd results. 271 US354, 46SCt513, 70L ed986.

1187–51 CalA 260P384; 99Vt490, 134 A697, 48ALR985.

1187–52 272US1, 47SCt1, 71L ed131; 84 IndA257, 151NE19.

1187–53 272US1, 47SCt1, 71L ed131; 103Conn138, 130A96 (cannot be enlarged by construction to move effectually to suppress mischief); 84 IndA257, 151 NE19.

1187–55 Ga 155SE484.

1188–56 246NY106, 158NE38 (secretary to New York City Health commissioner is not "designated" in Penal L. art 170); 133Misc288, 232NYS187; 50SD394, 210 NW353.

1188–57 195Cal 605, 234P883; 86CalA 86, 260P582; 97CalA228, 275P489; 50 SD394, 210NW353. **Where language ambiguous,** interpretation acquiesced in for many years becomes established law. 108TexCr358, 300SW82.

1188–57½–New. In New York Inferior Criminal Courts Act is to be interpreted as providing complete system for disposition of cases in courts to which it applies. 216AppDiv223, 215NYS116.

1188–57¼–New. Objective of amendment thereto should first be resolved in construing provision thereof. 216App Div223, 215NYS116.

1188–57¼–New. That system is intended to be workable should be cardinal rule in construing and interpreting original provisions. 216AppDiv223, 215NYS 116 (as well as amendments).

1188–59 77CalA95, 246P82; 87 IndA 333, 158NE294; Md 151A409; 239Mich 569, 215NW11; 315Mo 166, 285SW729; 76Mont351, 246P956 (cross-examination); 125Misc517, 211NYS741 (civil practice act in New York is to be liberally construed); 127Misc224, 215NYS 110; 127Misc64, 215NYS176; 220App Div12, 221NYS63; 34 OhA558, 171NE 422; TexCommnA 3SW(2d)77; Tex CivA 3SW(2d)585; 147Va720, 133SE 593; 100WVa253, 130SE456. **Statute adding greatly to burdens and work of courts** is not for that reason invalid. 128Misc58, 217NYS830. **Where statute fixes definite period for performance of act,** compliance thereafter is ineffective. 289Pa200, 137A237. **Procedural statutes** will not be construed to favor negligent, and at same time penalize delinquent. party. 192NC788, 136SE113.

1188–60 127Misc64, 215NYS176 (alternative pleading and joinder of defendants); 291Pa556, 140A342. But see 300 Pa92, 150A165. **Statutes relating to trial by referees** must be liberally construed. 191NC535, 132SE563.

1188–61 MoA 274SW528; 155Tenn121, 290SW981; 100Vt366, 137A321. **Doubt resolved in favor of right of appeal.**– 155Tenn121, 290SW981.

1188–64 217Ala219, 115S308; 49SD373, 206NW576. **Statute will not be read** to take away long established remedy in absence of direct expression of intention to do so. 228AppDiv65, 239NYS 76.

1188–66 79CalA629, 250P702; 166Minn 363, 207NW736; 22 OhA165, 153NE316 (venue statutes).

1189–67 79CalA629, 250P702; 34NM 583, 286P422; 103WVa233, 136SE854. **Statute providing for arbitration of every dispute arising out of the affairs of an association** does not prohibit trial by regular courts of common-law dispute between parties. 36BC307 [1926] 1 DomLR748, [1926] 1WestWkly413. **Words use to prescribe action of courts are interpreted in legal and technical** sense but where words have different meanings and different applications other considerations may determine sense in which used. 127Me493, 144A652.

1189–67½–New. Where statute for long period of time has been given practical interpretation in court procedure, courts are reluctant to make any revolutionary change in interpretation so given, 127 Misc224, 215NYS110.

1189–67⅓–New. and will only do so when reasons and necessity therefor are clear and compelling. 127Misc224, 215NYS110.

1189–67¼–New. Illinois Practice Act held to have no reference to mode of procedure in chancery except in so far as language expressly or by clear implication refers to such procedure. 323 Ill 468, 154NE209.

1189–67⅕–New. Statute providing for equitable defenses in legal action is to be strictly construed. 126Me192, 137A 56.

1189–67⅙–New. Consistency with judicial system.–Procedural statutes must be given that construction, if possible, which will preserve essentials of harmony and consistency in judicial system. 153Miss489, 120S173.

1189–67½–New. Statute permitting wife to testify as to business transaction while acting as agent of husband is strictly construed as in derogation of common law. 254 IllA469.

1189–70½–New. Interpretation of Rule Day Act should give opportunity to make full defenses but should not be so construed as to defeat legislative intent. 151Md367, 134A349.

1189–71 36 OhA45, 172NE674.

1189–72 12F(2d)998; 39F(2d)849; 21 AlaA85, 105S437 [citCyc]; 164Ga143, 137SE766; 145Miss456, 110S865; 146 Miss422, 111S558; 147Miss279, 112S9; 157Miss482, 128S334; 308Mo 253, 271 SW770; 287Pa161, 134A404; 157Tenn 54, 6SW(2d)322. **Character of taxing statute** is determined by various incidents and attributes rather than particular name given to it. 168La547, 122 S845.

1189–73 12F(2d)998.

1189–74 12F(2d)998.

1189–75 273US346, 47SCt389, 71L ed 676; 274US501, 47SCt735, 71L ed1171; 280US204, 50SCt98, 74L ed371, 65ALR 1000; 282US55, 51SCt49; 6F(2d)964; 7F(2d)54; 8F(2d)529 (against government); 11F(2d)895; 12F(2d)998, 1003 [citCyc]; 14F(2d)984; 15F(2d)410; 15 F(2d)626; 17F(2d)181; 17F(2d)743; 18F(2d)239; 24F(2d)95; 24F(2d)882; 25F(2d)13; 30F(2d)440; 30F(2d)683; 30F(2d)789; 31F(2d)268; 33F(2d)229 (construed liberally in favor of taxpayer); 33F(2d)793; 34F(2d)128; 34F (2d)708 (construed liberally in favor of taxpayer); 34F(2d)795; 35F(2d)222; 36F(2d)49; 41F(2d)774; 21AlaA85, 105 S437 [citCyc]; 23AlaA239, 124S119; 23AlaA421, 125S401; 199Cal 270, 248P 917; 206Cal 486, 274P962; 207Cal 473, 279P447; CalA 271P518; 3Del 530, 140 A474; 94Fla588, 115S315; 164Ga143, 137SE766; 168Ga808, 149SE211; 328 Ill 440, 159NE797; 205 Iowa1, 213NW 597; 233Ky350, 25SW(2d)748 (retaliatory tax laws); 253Mass314, 149NE46; 261Mass134, 158NE539; 267Mass338, 166NE852; Mass 167NE757; 145Miss 456, 110S865; 146Miss422, 111S558; 147Miss279, 112S9; 151Miss100, 117S 370; 151Miss797, 119S310; 154Miss565, 122S393; 308Mo 253, 271SW770; 316 Mo 1075, 292SW1028; Mo 27SW(2d)1; 34NM479, 284P117; 243NY193, 153NE 45; 215AppDiv166, 213NYS181 (against government); 132Misc325, 229NYS578; 134Misc232, 236NYS21; 115 Oh458, 154 NE792 (Gasoline Tax Act); 26 OhNPNS 387; 124 Okl 16, 253P483; 124 Okl 256, 256P25; 287Pa161, 134A404; 287Pa 190, 134A455 (words must be clear and unambiguous); 290Pa7, 137A864; 47 RI 351, 133A342; 133SC383, 131SE37 (ambiguous tax laws construed in favor of tax payer); 152Tenn306, 278SW59; 155Tenn59, 290SW386; 157Tenn54, 6 SW(2d)322; 157Tenn261, 7SW(2d)994; 116Tex193, 292SW168; TexCivA 11SW (2d)560; TexCivA 26SW(2d)715 (doubts to be resolved against exaction); 145Wash193, 259P9; 40QueKB 133, [1926] 3DomLR91; Sask [1929] 2DomLR507. **Rule is applicable to doubt created by evidence** respecting character of interest sought to be taxed. 17F(2d)181. **Provisions in Tax Law are construed** in favor of taxpayer. 273 US346, 47SCt389, 71L ed676. **Doubt as to meaning** of taxing statute should be construed in favor of taxpayer. 27 F(2d)762. **In case of doubt,** such statutes are construed most strongly against government. 208Cal 677, 284P 663.

1189–76 274US501, 47SCt735, 71L ed 1171; 277US239, 48SCt472, 72L ed866; 279US211, 49SCt308, 73L ed665; 7F(2d) 189; 8F(2d)106; 12F(2d)998, 1003 [cit Cyc]; 13F(2d)655; 14F(2d)984; 17 F(2d)743; 27F(2d)296; 205Cal 677, 284P663; 164Ga143, 137SE766; 253 Mass314, 149NE46; 261Mass134, 158NE 539; Mass 158NE898; Mass 172NE605; 241Mich665, 217NW777; 146Miss422, 111S558; 149Miss843, 116S92; 316Mo 853, 293SW399, 401 [citCyc]; 243NY 193, 153NE45; 244NY114, 155NE68; 215AppDiv166, 213NYS181; 115 Oh458, 154NE792; 287Pa70, 134A452; 287Pa 190, 134A455 (in case of doubt, construction must be against government); 288Pa43, 135A610; 88PaSuper602; 155 Tenn59, 290SW386; 156Tenn265, 300 SW564; 157Tenn54, 6SW(2d)322; Tex CivA 17SW(2d)160; 145Wash193, 259 P9. **Intention of legislature to impose tax on business made unlawful** by another statute will not be imputed to it unless language of statute clearly requires such construction. 142Miss611, 107S760.

1189–77 12F(2d)998; 30F(2d)918; CalA 271P518; Del 152A117; 261Mass 134, 158NE539; 241Mich665, 217NW 777; 146Miss422, 111S558; 149Miss843, 116S92; 151Miss100, 117S370; 116Nebr 61, 215NW798; 285Pa60, 131A652; 287 Pa70, 134A452; 287Pa190, 134A455 (it is not enough to show that absence of tax would work injustice); 288Pa43,

135A610; TexCivA 17SW(2d)160; 145 Wash193, 259P9; Sask [1929] 2DomLR 507. **Language employed should not be enlarged so as to embrace subjects not specifically mentioned.** 115 Oh458, 154 NE792.

1189-78 12F(2d)998; 244NY114, 155 NE68; 132Misc325, 229NYS578; 128 Or 339, 273P716; 197Wis4, 220NW393.

1189-79 Ga 155SE765.

1190-80 12F(2d)998; 41F(2d)774.

1190-81 84CalA577, 258P991; 87CalA 636, 262P465; 316Mo 853, 293SW399, 401 [citCyc]; 83NH148, 140A163; 8Pa Dist&Co 709; 155Tenn59, 290SW386; TexCivA 3SW(2d)947. See also 274US 501, 47SCt735, 71L ed1171.

1190-82 34NM479, 284P117; TexCivA 3SW(2d)947.

1190-82½-New. Character of tax depends on legislative intent as expressed in statute. 13F(2d)227.

1190-83 21F(2d)252; 165Ga259, 140 SE860; Pa 151A786.

1190-84 11F(2d)895; 165Ga259, 140 SE860. **In ascertaining legislative intent, statute exempting from taxation** merchandise placed in storage in original packages as merchandise in transit must be read in connection with all other statutory provisions relating to taxation, as well as in light of report of interim committee which framed it. 198 Wis281, 224NW126.

1190-84½-New. Where ambiguity exists in a statute levying taxes, the doubt should be resolved in favor of person affected. 115 Oh458, 154NE792.

1190-84⅓-New. In construing tax statute simple method of calculation is preferred. 11F(2d)895.

1190-84¼-New. Each taxation act from year to year is a separate and distinct thing. 103NJL33, 134A669.

1190-84⅕-New. Revenue laws are to be construed reasonably, having regard to their substance rather than form. 22 F(2d)298.

1190-86 148Va661, 139SE262, 264 [quotCyc]. **Special act has been held not ambiguous.**-161Tenn236, 30SW(2d) 268.

1190-87 215Ky349, 285SW703; 152Md 419, 137A39; 148Va661, 139SE262, 264 [quotCyc]. **Special statute taking away from city discretion** granted to it by its charter will not be given wider construction in cutting down that discretion than is absolutely necessary. [1926]CanSC65, [1926] 1DomLR610.

1190-87½-New. Whether law is general or local is to be determined by its subject matter and substance rather than its designation. 152Md419, 137A 39.

1191-94 216Ala356, 113S67.

1191-95 216Ala356, 113S67.

1191-97 General and special laws.-146 Va1, 135SE693.

1192-99 317 Ill 150, 147NE788 (statute is in effect when governor has approved it and first day of July following its passage has arrived).

1192-1 202 Iowa773, 211NW413 (ninety days after adjournment of special session); Mass 169NE142.

1192-5 See also Can [1929] 4DomLR 1059.

1192-6 317 Ill 150, 147NE788; 202 Iowa30, 209NW401; 224Ky184, 5SW (2d)1062; 235Ky24, 29SW(2d)619. **Persons are not bound to govern conduct by statute** till it becomes operative as law. 317 Ill 150, 147NE788.

1192-9 318Mo 1004, 2SW(2d)796. **Statute, given immediate effect,** is not in violation of constitution, where it relates to state agencies having to do with preservation of public health, peace, and safety. 247Mich404, 225NW885.

1192-10 213Ala29, 104S135; 154Md 620, 141A410; 318Mo 1004, 2SW(2d) 796; TexCivA 274SW1011. **The time a particular statute,** etc. 310Mo 542, 276 SW389.

1193-11 Mass 169NE552 (under initiative amendment to constitution); Tex CivA 274SW1011. **In absence of provision to contrary,** legislative enactment takes effect on its passage. 196Cal 211, 237P538, 40ALR782.

1193-12 75Mont416, 244P485 (passage and approval); TexCivA 274SW1011.

1193-13 317 Ill 150, 147NE788 (July 1); 127Kan863, 275P205; TexCivA 274 SW1011 (deferred time being reasonable).

1193-17 46Philippine179.

1193-20 24F(2d)957; 180Ark387, 21 SW(2d)867; 99Fla206, 126S283; 251 Mich396, 232NW235; 121 Or538, 256P 395; 122 Or297, 258P562. **Statutes as to which emergency clause authorized.**-121 Or538, 256P395; 49SD106, 206NW 233. **Purpose of emergency clause stated.**-TexCivA 280SW342. **Statute creating water, sewer, and drainage district** held valid as not within exception as to measures creating an office. 152Md343, 136A754. **Where statute is not of class as to which emergency clause is authorized by constitution,** it cannot become effective at once notwithstanding emergency clause. 49SD106, 206NW233. **Conditions held not to require** emergency legislation. 99Fla206, 126S283.

1194-21 199 Ind436, 156NE394; 121 Or538, 256P395; 122 Or297, 258P562.

1194-22 121 Or538, 256P395; 122 Or 297, 258P562. See also 151Va672, 144 SE870.

1194-23 179Ark886, 19SW(2d)1000 (requiring statement of facts constituting emergency); 181Ark537, 26SW(2d) 581 (where no separate vote or roll call on bill, it did not become effective till ninety days after adjournment); 221 Ky16, 297SW931 (emergency provision held invalid where emergency did not exist); 318Mo 698, 300SW1066. **Referendum.**-179Ark837, 18SW(2d)359; 318 Mo 698, 300SW1066; 322Mo 1230, 18SW (2d)498; 121 Or538, 256P395; 152 Wash221, 277P837. **Where constitution requires that emergency clause shall be voted by two thirds of members of each house on separate roll call,** omission of separate roll call does not render act invalid. 168Ark1033, 275SW653. **Ground of emergency need not be stated.**-146Va1, 135SE693. **Reading legislative journals** held not to be hearing evidence to impeach emergency provision invalid on its face. 221Ky16, 297 SW931.

1194-24 Nature of emergency must be stated. Ill 173NE145(2dcase).

1195-25 179Ark886, 19SW(2d)1000 (on approval by governor); 121 Or538, 256 P395. **Emergency clause held valid.**-233Ky606, 26SW(2d)541.

1195-30 318Mo 1004, 2SW(2d)796.

1195-31 318Mo 1004, 2SW(2d)796.

1195-35½-New. Referendum legislation must facilitate enforcement of self-executing constitutional provision as to effective date and not curtail or limit rights created thereby. 318Mo 1004, 2 SW(2d)796.

1195-35⅓-New. Statute may fix time for counting referendum vote and proclamation of result without changing effective date which would make it unconstitutional. 318Mo 1004, 2SW(2d) 796.

1196-41 176Ark1130, 5SW(2d)346; 177 Ark982, 8SW(2d)501; 178Ark692, 11 SW(2d)479; 179Ark984, 19SW(2d) 1020; 96CalA204, 273P1097; 169La458, 125S447; 316Mo 1008, 292SW1037; 323 Mo 742, 19SW(2d)642; 31NM220, 243P 333. **How time computed.**-202 Iowa773, 211NW413.

1196-43 86CalA558, 261P1080.

1197-45 United States statutes.-114 Okl 64, 243P222.

1197-46 328 Ill 512, 160NE60; 74Mont 1, 238P316; 159Tenn16, 15SW(2d)739. **Retaining a bill in his hands without signature,** etc. 113 Oh618, 150NE81 (where neither approved nor disapproved by him, passage dates from ten days after presentation to governor). **In New Mexico.**-31NM220, 243P333.

1197-55 Statute has potential existence upon passage.-80Mont515, 261P264.

1198-59 214Ala471, 108S397.

1199-69 In New Mexico.-31NM220, 243 P333.

1200-81 Where statute provides that it shall become effective on stated date provided "California Vehicle Act" shall have been enacted, fact that latter act differs in final enactment from draft of act originally introduced does not prevent statute from taking effect. 86CalA 558, 261P1080.

1201-84 310Mo 542, 276SW389; Tex CivA 274SW1011. **United States statutes.**-114 Okl 64, 243P222.

1201-85 310Mo 542, 276SW389 [cit Cyc].

1201-87 Statute merely drawing upon antecedent facts is not retroactive. 273 US182, 47SCt315, 71L ed596.

1202-90 201Cal 428, 257P511; 25 Oh NPNS315. **Other definitions.**-198NC369, 151SE725. **Do not include** statute applying to future events merely because they relate to, and are founded upon, antecedent events. 126Misc753, 214NYS 643.

1203-96 170La871, 129S513.

1204-2 58 OntL158, [1926] 1DomLR 342.

1204-4½-New. or "immediately," 128 Misc10, 217NYS215 (excludes idea of retroactive operation).

1204-11 58 OntL230, [1926] 1DomLR 454.

1205-13 270US1, 46SCt182, 70L ed435; 280US327, 50SCt115, 74L ed457; 16 F(2d)256; 18F(2d)918; 25F(2d)642; 27F(2d)952; 32F(2d)830; 33F(2d) 875; 39F(2d)338; 42F(2d)127; 214Ala 646, 108S761; 219Ala558, 122S650; 176 Ark1130, 5SW(2d)346; 195Cal 1, 231P 34; 200Cal 132, 251P907, 49ALR1025; Cal 290P438; Cal 292P495; Cal 293P 62; 102CalA375, 283P81; CalA 285P 879; CalA 291P536; CalA 292P499; 111Conn65, 149A234; 169Ga534, 150SE 841; 28Hawaii462, 467 [quotCyc]; 326 Ill 204, 157NE164; 336 Ill 353, 168NE 264; 337 Ill 431, 169NE254; 237 IllA86; 255 IllA170; 204 Iowa473, 215NW761; 204 Iowa1052, 216NW956; 208 Iowa 873, 224NW36; 120Kan756, 244P862; 209Ky427, 273SW28; 210Ky179, 275 SW642, 646 [citCyc]; 216Ky611, 288 SW347; 11LaA117, 119S774; 256Mass 512, 153NE1; Mass 167NE335; Mass 169NE142; 166Minn433, 208NW185; 176Minn339, 223NW301; 144Miss614, 109S900; 146Miss642, 112S19; 151Miss 797, 119S310; Miss 130S486; Mo 271 SW992, 996 [citCJ]; 117Nebr98, 219 NW347; 118Nebr797, 226NW454; NJ Sup 133A420; NJCh 147A225; 33NM 303, 265P454, 456 [citCyc]; 128Misc 10, 217NYS215; 219AppDiv95, 219NYS 421; 225AppDiv606, 233NYS503; 230 AppDiv867, 245NYS138; 190NC638, 130 SE743 (presumption that intended to operate prospectively); ND 231NW883; Okl 291P513; 119 Or141, 248P358 (rule applied to initiative laws); 285Pa368, 132A181; 300Pa355, 150A658; TexCivA 284SW946; TexCivA 29SW(2d)493; 136 Wash437, 240P557; 143Wash326, 255P 371; 146Wash537, 264P12; 106WVa 687, 146SE825; 199Wis85, 225NW873.

1207-14 270US1, 46SCt182, 70L ed435; 18F(2d)918; 201Cal 428, 257P511; Cal 292P495; CalA 292P499; 28Hawaii462, 467 [quotCyc]; 316 Ill 410, 147NE492; 316 Ill 452, 147NE494; 326 Ill 204, 157 NE164; 204 Iowa473, 215NW761; 209 Ky427, 273SW28; 221Ky470, 298SW 1111; 166Minn433, 208NW185; 146Miss 642, 112S19; Mo 271SW992, 996 [citCJ]; 219AppDiv95, 219NYS421; 190NC638, 130SE743 (unless terms require it); 123 Or1, 260P1004; 285Pa368, 132A181; 187Wis380, 204NW612 (statute conferring new right). See also 276US160, 48 SCt236, 72L ed509. **Grant of judicial discretion in applying statute to pending litigation.**-Can [1925] 3DomLR729. **Statute will be construed as prospective entirely,** unless words thereof make retroactive operation imperative. 27F(2d) 952.

1207-15 276US160, 48SC236, 72L ed509 (plainly appears); 18F(2d)918; 22 F(2d)249; 28F(2d)30; 171Ark952, 287 SW199; 177Ark982, 8SW(2d)501; 201 Cal 428, 257P511; Cal 287P343; 28 Hawaii462, 467 [quotCyc]; 332 Ill 11, 163NE428; 120Kan756, 244P862; 209 Ky427, 273SW28; 127Me351, 143A272; 150Md380, 133A63; 166Minn433, 208NW 185; 144Miss614, 109S900; 154Miss565, 122S393; Mo 271SW992, 996 [citCJ]; NJ 151A850; NJCh 150A232(2dcase); 128Misc10, 217NYS215 (clearly indicated); 190NC638, 130SE743 (plain

expression of legislative intent necessary); 198NC369, 151SE725; 285Pa368, 132A181; 135SC190, 133SE709; 161 Tenn88, 28SW(2d)642. **Grant of judicial discretion in applying statute to pending litigation.–Can** [1925] 3DomLR729 [rev in part NB [1925] 3DomLR387].

1208–16 21F(2d)141; 195Cal1, 231P 34; 207Cal 443, 279P131; 170Ga487, 153 SE184; 28Hawaii462, 467 [quotCyc]; 208 Iowa873, 224NW36; 120Kan756, 244 P862; 157Md559, 146A752, 756 [quot Cyc]; Mo 271SW992 (when retrospective operation would result in injustice, presumption against such legislative intent is still stronger); 317Mo 172, 295SW86, 87 [quotCyc]; 190NC638, 130SE743; 194NC412, 140SE34; TexCivA 284SW 275; 136Wash437, 240P557.

1208–18 118Nebr797, 226NW454.

1208–19 16F(2d)256.

1208–20 237 IllA86 (statute as to filing of proof of loss held not to apply to existing policies renewed from year to year); Ont [1930] 1DomLR284.

1208–34 120Kan756, 244P862; 144Miss 614, 109S900. **Question is fundamentally one of legislative intent.–ND** 231NW883.

1209–35½–New. In some jurisdictions discretion is given to court by provisions of statute as to whether such statute should have retroactive application to pending litigation. NB [1925] 3DomLR 387.

1209–37 36F(2d)507; 255 IllA479 (requiring that judicial notice be taken of rules of inferior courts); Mass 167NE 335; 125 Or428, 266P875, 891 [quot Cyc]; Sask [1928] 1DomLR711. **General words in remedial statute may be applied to past transactions** if legislative intent so directs. 143Wash326, 255P 371. **Statute applied** to action where final judgment taken prior to effective date. 255 IllA479.

1209–38 Cal 290P438; 120Kan756, 244 P862.

1209–41 125 Or428, 266P875, 891 [quot Cyc].

1210–51 169Ga534, 150SE841; 166Minn 433, 208NW185; 225AppDiv606, 233 NYS503; 190NC638, 130SE743; 55ND 90, 212NW512 (statute requiring service of notice before proceeding to foreclose mortgage); 119 Or141, 248P358; 136Wash437, 240P557; 58 OntL158, [1926] 1DomLR342.

1210–52 93Fla849, 112S846; 251 IllA 506; 12PaDist&Co 614; 106WVa687, 146SE825.

1210–56 166Minn433, 208NW185.

1211–73 190NC638, 130SE743.

1212–79 58 OntL158, [1926] 1DomLR 342.

1212–84 200Cal 132, 251P907, 49ALR 1025; 249NY369, 164NE253.

1212–86 216Ala637, 114S295.

1212–94½–New. It applies to all statutes which, even in form of rules of evidence or procedure, substantially affect liability of parties. 245NY419, 157NE 515.

1212–96 CalA 291P698; 234Ky832, 29 SW(2d)548; 109TexCr414, 5SW(2d) 503. See also 317Mo 759, 297SW10.

1213–8 109TexCr320, 4SW(2d)971.

1213–10 285Pa241, 132A185; TexCivA 278SW893, 896 [citCyc]; 105WVa447, 143SE109, 110 [citCyc].

1213–11 TexCivA 278SW893, 896 [cit Cyc].

1213–12 25F(2d)930; 102CalA299, 283 P298; 234 IllA173; 135Misc670, 239 NYS616; TexCivA 278SW893, 896 [cit Cyc].

1213–13 TexCivA 278SW893, 896 [cit Cyc].

1213–14 TexCivA 278SW893, 896 [cit Cyc].

1214–15 TexCivA 278SW893, 896 [cit Cyc].

1214–16 TexCivA 278SW893, 896 [cit Cyc].

1214–17 Statute forbidding payment of seamen's wages in advance held not applicable to advancements in foreign ports. 275US463, 48SCt164, 72L ed374.

1214–18 TexCivA 278SW893, 896 [cit Cyc].

1214–19 TexCivA 278SW893, 896 [cit Cyc].

1214–22 332 Ill 611, 164NE216.

1214–26 163La1035, 113S366.

1215–33 43F(2d)999.

1215–34 113 Oh482, 149NE405 (pending proceeding not affected by amendment to statute under code).

1215–36 201Cal 428, 257P511.

1216–44 Can [1930] 4DomLR884.

1216–46 168Ark1033, 275SW653; 205 Cal 133, 270P196; 87PaSuper126.

1216–47 OhA 173NE206; NB [1925] 3 DomLR1184.

1216–50 168Ark1033, 275SW653; Tex CivA 290SW743; NS [1929] 1DomLR 777; 40QueKB414, [1926] 3DomLR462, 46CanCrCas238.

1216–52 61 OntL667, [1928] 2DomLR 210.

1216–53 168Ark1033, 275SW653.

1216–53½–New. Statute expressly directed to purpose of reënacting inoperative statutes with retroactive effect is applicable to pending case before final judgment. 149SC234, 147SE346.

1216–56 TexCivA 278SW893, 896 [cit Cyc].

1216–57 TexCivA 278SW893, 896 [cit Cyc].

1217–59 13F(2d)36.

1217–64 208 Iowa1354, 227NW400; 146Miss642, 112S19; 25 OhA175, 158 NE318.

1217–65 146Miss642, 112S19.

1217–68 6PaDist&Co 91 (where two or more defendants are liable).

1217–69 234 IllA173.

1217–70 255 IllA239 (as to amended pleadings relating back); 87PaSuper 265.

1217–72 234 IllA173; 195NC354, 142 SE320.

1217–73 234 IllA173.

1217–76 195NC832, 143SE857.

1218–77 Contra 245NY320, 157NE153.

1218–78 TexCivA 5SW(2d)1025.

1218–79 113 Oh8, 148NE360 (statute making certain speed of motor vehicle presumptive evidence of negligence creates rule of conduct, and hence such law is not applicable to trial of cause of action accruing before its effective date though suit was filed thereafter).

1219–98 Statute held unconstitutional which gives right to pursue contractor personally on judgment upon scire facias sur mechanics' lien. 6PaDist&Co 364.

1220–11 TexCivA 284SW275.

1220–22 195Cal 473, 234P80.

1221–33 195Cal 404, 234P82; Mont 292 P722; 123 Or501, 262P946; 9PaDist& Co 281; TexCivA 7SW(2d)648. **Defect in description of property taken** may be cured. Cal 289P850.

1221–41 100NJEq528, 135A809.

1221–46 164La1, 113S658; 100NJEq 528, 135A809.

1222–50 176Ark1093, 5SW(2d)350; 176 Ark1141, 5SW(2d)362; 107Conn697, 142A574.

1222–50½–New. The object of curative or confirmatory acts is to enable parties to carry into effect that which they have designed and attempted, but which failed of its expected legal consequences only by reason of some statutory disability or irregularity in their action. TexCivA 7SW(2d)648.

1223–64 128Misc10, 217NYS215.

1223–65 200Cal 132, 251P907, 49ALR 1025; 128Misc10, 217NYS215; 225App Div167, 232NYS437; ND 231NW883; TexCivA 17SW(2d)68. **Provision that "act shall take effect immediately"** excludes idea of retroactive operation. 128Misc10, 217NYS215. **Presumption is that amendment is prospective.–Tex CivA** 29SW(2d)493.

1223–67 200Cal 132, 251P907, 49ALR 1025.

1223–71 See also 7Alaska430.

1223–72½–New. , or that no part thereof is retroactive unless expressly so declared. 245NY419, 157NE515 (Code Cr. Proc. § 954).

1224–74 But see 329 Ill 543, 161NE108.

1224–79 Contra TexCivA 29SW(2d)476.

1224–80 318 Ill 131, 149NE18.

1224–82½–New. Repeal of statute of limitations does not impair bar perfected before repeal. 215Ala93, 109S745.

1224–87 103NJL98, 134A740, 741 [cit CJ].

1225–92 204 Iowa355, 213NW938, 940 [citCyc].

1225–93 204 Iowa355, 213NW938, 940 [citCyc]; 119 Or141, 248P358.

1225–94 204 Iowa355, 213NW938, 940 [citCyc]; 119 Or141, 248P358.

1225–95 Where bond election is declared carried but on afternoon of election day after most of votes have been cast governor approves repealing act, steps already taken will be deemed "a proceeding begun by virtue of such repealed statute" under constitutional provision declaring such proceeding unaffected by repeal. 126 Okl 300, 259P 635.

1225–97 128Misc10, 217NYS215 (statute).

1226–1 Cal 290P438.

1226–1½–New. A statute providing repeal shall not affect or impair rights acquired before it takes effect applies to all future legislation. 128Misc10, 217 NYS215.

1226–6 252Mich14, 232NW746; Tex CivA 273SW615, 617 [quotCyc].

1226–7 TexCivA 273SW615, 617 [quot Cyc].

1226–8 252Mich14, 232NW746; Tex CivA 273SW615, 617 [quotCyc].

1226–9 TexCivA 273SW615, 617 [quot Cyc].

1227–15 See also 61 OntL465, [1928] 1DomLR598.

1228–28 Cal 292P495; 318 Ill 131, 149 NE18.

1228–29 Cal 290P438.

1229–39 135Misc589, 239NYS20.

1229–41 Ont [1929] 3DomLR104. **Reason for rule.–293Pa404, 143A105.**

1229–47 156Tenn216, 300SW12, 14 [cit CJ].

1229–48 156Tenn216, 300SW12, 14 [cit CJ].

1231–60 31Ariz465, 254P477, 55ALR 436.

1231–61 Saving clauses which are inconsistent with body of act are rejected and disregarded. 145Va825, 133SE 753.

1231–64 NB [1925] 3DomLR1184.

1231–64½–New. So, a clause saving former practice and procedure cannot operate to preserve any practice or procedure which depends solely on a statute since repealed. NB [1925] 3DomLR 1184.

1231–66 203 Iowa437, 210NW476; Wis 229NW43.

1231–70 32Ariz407, 259P670, 55ALR 1059; 116Nebr223, 216NW803.

1235–25 34F(2d)30; 126Me111, 136A 662; 127Me418, 144A397; 314Mo 55, 282SW715, 719 [quotCyc]; 82NH327, 133A451, 47ALR218; 287Pa161, 134A 404; 295Pa461, 145A514. But see Ill 173NE484. **Laws establishing general practice are applicable to new statutes** when pertinent, whatever difference there may be in time of their enactment. 11LaA406, 122S915.

1236–31 220Ala94, 124S225; 74CalA1, 239P702.

1236–32 74CalA1, 239P702; 248NY293, 162NE84; 21 OhA231, 153NE295.

1237–46 50Nev99, 256P1058, 1060 [quotCyc].

1237–47 50Nev99, 256P1058, 1060 [quotCyc].

1237–48 50Nev99, 256P1058, 1060 [quotCyc].

1237–49 50Nev99, 256P1058, 1060 [quotCyc]; 248NY293, 162NE84; 26 OhNPNS161; 100Vt362, 137A334.

1233–51 See 214Ala236, 107S86.

1238–53½–New. Special laws and ordinances of city should be pleaded at least by substance. TexCivA 290SW 872.

1238–53¼–New. General allegations as to their effect are legal conclusions Tex CivA 290SW872.

1238–53¼–New. and subject to be stricken out on special exception thereto. TexCivA 290SW872.

1238–58 191NC677, 132SE660; Tex CivA 30SW(2d)532. **Demurrer.–191NC** 677, 132SE660.

1240–78 216AppDiv368, 214NYS353.

1240–81 17F(2d)121; 17F(2d)308; 25 F(2d)984; 85CalA323, 259P374; 252 IllA536; 307Mo 234, 270SW658; MoA 15SW(2d)912; 222MoA777, 9SW(2d) 865; 80Mont524, 261P283; 31NM400, 246P748; 216AppDiv368, 214NYS353; 216AppDiv234, 214NYS634; 130Misc

605, 224NYS130; 113 Oh546, 149NE 876; 28 OhA361, 162NE722; 116 Or 399, 241P393; 133 Or213, 287P224; TexCivA 8SW(2d)767. **Foreign statute are not admissible in evidence unless they have been specially pleaded.**–85 CalA323, 259P374; 222MoA825, 10SW (2d)344. **Presentation of foreign law in motion to amend findings and in brief** is not equivalent to pleading and proof. 203Cal 219, 263P1007.

1241–83 176Minn406, 223NW618; Tex CivA 15SW(2d)86.

1241–84½–New. Where state courts are required by statute to take judicial notice of statutes of other states, such statutes need not be pleaded. 103Conn503, 131A25.

1241–85 147Wash497, 266P688.

1241–86 220MoA1205, 299SW132; 220 MoA1213, 299SW145; 222MoA825, 10 SW(2d)344; 116 Or464, 241P976; 11 PaDist&Co 213. **Party pleading foreign statute** should allege that it was in effect at time of transaction involved. 221 AppDiv595, 224NYS555. **Foreign law must be set forth with adequate particularity** in pleadings, where effect of foreign law is to be raised by demurrer. Mass 169NE891.

1241–86½–New. Rule of pleading, requiring concise statement in petition without unnecessary repetition of facts constituting cause of action, applies. 222MoA825, 10SW(2d)344.

1242–90 220MoA1213, 299SW145.

1242–95 17F(2d)311. **Reliance on foreign statute needs averment.** 17F(2d) 308.

1242–96 But see 323Mo 662, 21SW(2d) 873.

1242–99½–New. Application of foreign statute need not be negatived in petition, though required to be negatived in action in jurisdiction wherein statute obtains. 322Mo 158, 16SW(2d)190.

1242–99¼–New. Pleader alleging applicability of certain foreign statute need not allege that another foreign statute does not apply, when such statute could not apply if pleaded statute did. 322Mo 158, 16SW(2d)190.

1242–99¼–New. General denial traversing averment that foreign statute was in effect puts in issue existence, force, and effect thereof. 322Mo 158, 16SW (2d)190.

1242–1½–New. Motion to dismiss for insufficiency of pleading and proof is sufficient notice of necessity to amend complaint to allege foreign statute, 216 AppDiv234, 214NYS634.

1242–1½–New. and supplement proof thereof. 216AppDiv234, 214NYS634.

1243–3 216Ala356, 113S67; 169Ark 448, 275SW766; 171Ark427, 285SW20; 181Ark547, 285SW2.

1243–4 216Ala356, 113S67; 181Ark547, 285SW2.

1243–5 216Ala356, 113S67; 181Ark547, 285SW2; 173Ark464, 292SW693; 89 Fla361, 104S577; 99Fla401, 126S781; 43 Ida519, 253P128 (yea and nay vote raises presumption of constitutional regularity as to procedure); 55ND239, 212NW843; 159Tenn16, 15SW(2d)739.

1243–6 154Tenn613, 290SW14. **Recital in senate journal as to substitution of another's name for that of road commissioner named in original bill will be presumed to be clerical error** where neither enrolled statute nor engrossed bill contains either name and indorsements on enrolled statute and engrossed bill shows that bill as amended was identical with enrolled bill. 169Ark 448, 275SW766.

1244–8 89Fla361, 104S577; 99Fla401, 126S781. **Conclusively presumed bill read by sections** on final passage in each house unless journals show to contrary. 89Fla361, 104S577.

1244–11 But see 169Ark448, 275SW766.

1244–12 43 Ida519, 253P128.

1244–17½–New. Concurrence of house in senate amendments will be presumed in absence of affirmative recital in house journals to contrary. 169Ark448, 275 SW766.

1244–17½–New. Rule is especially applicable where indorsement of clerk of oill so shows. 169Ark448, 275SW766.

1244–21½–New. All appropriate entries in legislative journals import verity, 89 Fla361, 104S577.

1244–21½–New. and no presumption will be indulged by court against their truth. 89Fla361, 104S577.

1244–21¼–New. Burden of proof.–One asserting that statute was not legally enacted has burden of showing it by legislative journals. 89Fla361, 104S 577.

1244–22 Slips of paper attached by rubber band to original bill at time it was engrossed and taken into custody of secretary of state after adjournment of regular session are incompetent for purpose of determining whether amendment to bill was material so as to require it to be reread. 194NC49, 138SE 433.

1245–26 213Ky291, 280SW1081.

1245–27 213Ky291, 280SW1081. **In North Carolina.**–194NC49, 138SE433.

1246–30 169Ark448, 275SW766.

1246–31 169Ark448, 275SW766; 92Fla 543, 110S343; 172Minn306, 215NW221; 323Mo 729, 19SW(2d)671; 55ND239, 212NW843; 154Tenn613, 290SW14. **In North Carolina.**–194NC49, 138SE433.

1247–32 99Fla401, 126S781; 172Minn 306, 215NW221; 154Tenn613, 290SW 14. **Recitals in senate journal as numbers of sections of original bill stricken out or amended** which are at variance with enrolled bill signed and filed in secretary of state's office may be considered in determining whether senate passed different bill from such enrolled bill, not to defeat legislative will, but to identify amendments in fact proposed and adopted. 169Ark448, 275SW766. **Where bill has been enrolled twice** and enrolled bills are directly contradictory, legislative journals may be examined to ascertain facts. 172Minn306, 215NW 221.

1247–33 98Fla1166, 125S375. See also NJCh 144A546.

1248–36 In Florida.–99Fla401, 126S781.

1248–37½–New. Legislative records should be construed as a whole. 216 Ala356, 113S67.

1248–37½–New. In absence of certificate signed by presiding officers of both houses of assembly journal is not competent to show passage by assembly in accordance with North Carolina Const. art 2 § 23 of bill introduced in either house and its enactment as law. 194 NC49, 138SE433.

1248–38 Recitals of senate journal import absolute verity and cannot be impeached even for mistake or fraud. 152 Tenn306, 278SW59.

1248–50 173Ark464, 292SW693; 152 SC455, 150SE269.

1249–56 Rule that courts may not look behind certificate of secretary of state to inquire whether legislature in passing public law has complied with constitutional requirements is inapplicable to joint resolution. NJCh 144A546.

1249–64 152Tenn306, 278SW59 (governor's message in senate journal held to show he received bill for approval five days before date on message).

1249–65 89Fla361, 104S577; 55ND239, 212NW843. **Evidence held sufficient** to show valid passage of bill. 181Ark547, 285SW2. **In North Carolina.**–194NC49, 138SE433.

1250–66 169Ark448, 275SW766; 171 Ark427, 285SW20; 89Fla361, 104S577; Fla 130S444(2dcase); 55ND239, 212NW 843. **Where journals state certain bill was read by sections on final passage,** such statement will be taken as true though entries of other facts show it may have been physical impossibility for all bills passed at same session to have been so read as required by constitution. 89Fla361, 104S577.

1250–67 169Ark448, 275SW766; 81 Colo 335, 255P463; 89Fla361, 104S577 (entry of yeas and nays in journal on final passage). **Rule applied.**–81Colo 335, 255P463.

1250–72½–New. Affirmative recital in senate journal that bill was returned to senate on certain day precludes presumption that it was returned earlier to clerk of senate or chairman of enrolled bills. 152Tenn306, 278SW59.

1251–82½–New. Statute relating to adoption of joint resolutions does not make copy of joint resolution filed in office of secretary of state conclusive evidence unless original thereof would have been such. NJCh 144A546.

1252–90 120Kan75, 242P123; 216App Div234, 214NYS634. **Foreign statutes must be proved.**–85CalA323, 259P374.

1252–93 But see 80Mont524, 261P283. Contra 66Utah161, 241P1058.

1252–94 33Ariz45, 262P11, 12 [citCyc]; 120Kan75, 242P123; 313Mo 448, 285SW 459; 31NM400, 246P748; 216AppDiv 368, 214NYS353 (law); 113 Oh546, 149 NE876; 116 Or399, 241P393.

1252–96 17F(2d)308; 203Cal 219, 263 P1007; 85CalA323, 259P374; 252 IllA 536; 120Kan75, 242P123; 307Mo 234, 270SW658; 313Mo 448, 285SW459; 322 Mo 158, 16SW(2d)190; 80Mont524, 261 P283; 31NM400, 246P748; 216AppDiv 368, 214NYS353; 113 Oh546, 149NE876; 116 Or399, 241P393. **Sufficiency of evidence.**–137Misc271, 242NYS486 (holding that statements in briefs, respecting foreign laws, are not proof of them).

1253–99 143SC445, 141SE688.

1253–1 IndA 168NE462.

1253–2 23AlaA416, 125S398; 221Ala24, 127S155.

1254–5 SD 232NW47.

1255–8½–New. Code provisions do not prescribe exclusive method of proof of foreign laws, in absence of seasonable objections. 87Colo 55, 284P1021.

1255–8½–New. Under some circumstances evidence of law of another state is admissible, though not pleaded. 133 Or213, 287P224.

1255–10 253Mass55, 147NE899; 252NY 127, 169NE112. **Burden is on claimant** to show that foreign law differs from law of forum. 25F(2d)984.

1256–18½–New. One claiming law of foreign country differs from local law has burden of proving foreign law. 126 Misc109, 212NYS722.

STAY

1257–12 133 Okl 173, 271P833.

STEAL OR STEALING

1258–20 CalA 291P698.

1259–25 92Fla262, 109S463.

1259–27 253NY359, 171NE569.

STEAM

1261–6½–New. Exercise of such power does not constitute impairment of obligation of contract. 308Mo 328, 275SW 940.

1261–6½–New. Exercise of such power does not constitute deprivation of property without due process of law. 308Mo 328, 275SW940.

1261–6¼–New. Regulation of rates.–Where corporation empowered to manufacture and furnish heat by electricity, heat by steam, electric light, and electric power applies for increase of rates, instrumentalities used in production or steam and electricity must be allocated and rate for each commodity must be apportioned so that there may be reasonable return on whole investment and users of one commodity may not be subjected to burden of supporting other. 308Mo 328, 275SW940.

1261–6½–New. No contract as to rates is of any force or effect in determining reasonableness of rates fixed by public service commission. 308Mo 328, 275SW 940.

1261–6½–New. Public service commission cannot be influenced or controlled by contracts between utility and consumers. 308Mo 328, 275SW940.

1261–6½–New. Power of state to regulate rates cannot be abdicated or bargained away. 308Mo 328, 275SW940.

1231–6½–New. Rule applies though public utility has central electrical plant and smaller plants from some of which certain consumers are supplied with electricity and steam or with one or the other and that some of local plants are not used for supply of electricity in summer. 308Mo 328, 275SW940.

1261–6½–New. Regulations of rates of

public utility engaged in furnishing steam is proper exercise of police power. 308Mo 328, 275SW940.

1261–6½₀–New. Rates must be fair both to public and to investors. 308Mo 328, 275SW940.

1261–6½₁–New. Purpose of Public Service Act is to require general public to pay such rates as will keep public utility plants in repair for effective public service and insure investors reasonable return on funds invested. 308Mo 328, 275SW940.

1261–6½₂–New. Court will be slow to interfere with experimental rates fixed by public service commission and will not vacate order without showing that it is unreasonable. 308Mo 328, 275SW 940.

1261–6½₃–New. Under statutes, burden is on company to show that increased rate is just and reasonable. 94PaSuper 228 (evidence sufficient to show increased rates necessary in proceeding before public service commission).

1261–6½₄–New. Corporations held public utilities.–Electric light and power company which has established large heating plant connected by steam pipes with large buildings and has taken over private plants of some consumers under agreements to furnish steam for heat and other purposes and electricity and power is public service corporation as to heating activities. 308Mo 328, 275 SW940.

1261–6½₅–New. Whether corporation furnishing steam is public utility depends largely on its charter powers and what is done under them. 308Mo 328, 275SW940.

1261–6½₆–New. Decree allowing corporation furnishing steam to surrender certain of its powers is proper where, unless allowed to surrender such powers, result would be to exhaust its assets. 295Pa228, 145A128.

1261–8 298Pa560, 148A851.

1262–11 Defendant as trespasser on adjoining lot.–261Mass348, 158NE769.

1264–33 298Pa560, 148A851. **Contributory negligence held for jury.**–298Pa 560, 148A851.

1266–43 Statute repealed.–16 U. S. St. at L. ch 100 § 71 p 459.

1266–43½–New. That accident was not one of frequent occurrence does not necessarily defeat recovery. 125Misc 815, 211NYS570.

1267–45 298Pa560, 148A851.

1268–48 298Pa560, 148A851; 148Wash 583, 269P838.

1269–52½–New. Negligence of defendant is for jury. 261Mass348, 158NE 769.

1269–52½–New. Whether defendant should have foreseen and guarded against injury is for jury. 261Mass348, 158NE769.

1269–52¼–New. Whether plaintiff, a child of five years, exercised commensurate care is for jury. 261Mass348, 158NE769.

STEAM-VESSEL

1271–9½–New. Under statute any vessel propelled by machinery. 44Philippine908.

STEEL

1272–15 See also 14CustA449.

STENOGRAPHER

1274–30½–New. Forfeiture or disallowance of fees.–Stenographer is not permitted to collect fees, and, if collected, required to refund them, where typewritten transcript of evidence is made by him in violation of rule imposing certain requirements. 209Ky451, 272 SW917.

1274–30¼–New. County's payment of court stenographer's salary to one not entitled to office does not affect right of improperly removed stenographer to reinstatement and salary. 221MoA987, 295SW821.

1274–30¼–New. Court reporter's delay for sixteen months before suing to compel reinstatement does not constitute laches estopping him from maintaining suit. 221MoA987, 295SW821.

1274–30½–New. Under some statutes court reporter is entitled to hold office during term for which judge appointing him was elected, notwithstanding death of judge before expiration of term and attempted appointment of another reporter by judge's successor. 221MoA 987, 295SW821.

1274–30½–New. Where two courts, though attached for some purposes, are really separate, they cannot be considered together for purpose of fixing salary of court reporter. MoA 23SW(2d) 1107 (statutes construed as to amount of salary).

1274–30½–New. Private stenographer chosen by agreement to record testimony in case is not official reporter or officer of court. 131 Or235, 282P1082.

1274–30½–New. Certificate to evidence by such stenographer cannot be given effect of authenticating evidence where it does not appear that he took statutory oath. 131 Or235, 282P1082.

1274–30½–New. Right of judge to appoint stenographer to assist in performance of duties of his office. 12PaDist& Co 471.

STERILITY

1276–43 Alta [1927] 2DomLR1137.

STIBNITE

1277–51½–New. Native antimony trisulphide. 11CustA3.

STILL

1277–56 168Ark167, 269SW355.

STIPULATIONS

1280–1 Other definitions.–187Wis1, 203 NW923. **Stipulation distinguished from contract.**–187Wis1, 203NW923.

1280–4 Discretion of court in regard to filing of stipulations. 41F(2d)177.

1281–6 200Cal 374, 253P148; 202Cal 15, 258P1094; CalA 287P149 (signed or assented to by attorney); 206 Iowa766, 221NW449; 51SD282, 213NW509.

1282–7 83Colo 207, 263P715.

1282–11 51SD282, 213NW509.

1282–12 TexCivA 294SW702.

1282–13 170Ga515, 153SE209.

1282–16 255Mass533, 152NE66.

1282–18 212Ala679, 103S848 (stipulation in open court not to seek to have injunction dissolved is binding). **Stipulation not shown.**–CalA 288P785.

1283–19 TexCivA 294SW702.

1283–26 248 IllA438 [citCyc]; TexCivA 289SW416 [citCyc].

1284–31 Coparty plaintiff with state in civil contempt proceeding may sign binding stipulation without consulting district attorney. Or 283P23.

1285–33b 32PortoRico 774.

1285–34 240NY341, 148NE543.

1285–35 75Mont99, 242P425, 426 [cit Cyc]; 225AppDiv515, 234NYS217.

1285–36a 75Mont99, 242P425, 426 [cit Cyc].

1285–37 Provision that parties do not admit legal effect of facts admitted is proper. 83Colo 43, 262P907.

1285–38 74CalA226, 239P859.

1285–40½–New. or construction of will; 129Misc78, 220NYS816.

1286–41 74CalA226, 239P859. **Court rule** providing that consent to instructions or waiver of written instructions shall be deemed waiver of exceptions or objections that otherwise might be taken thereto cannot be abrogated by stipulation. SD 228NW389.

1286–41a 74CalA226, 239P859; 104 Conn322, 133A99.

1286–44 8F(2d)500 (as to filing of amended answer containing exceptions to libel). **Special plea of waiver** is not required where pleadings are in short by consent of parties. 212Ala588, 103S 670.

1286–44½–New. as to joinder of causes of action, 136SC410, 134SE373.

1286–45 275US228, 48SCt45, 72L ed253; 215Ala17, 109S102; 102CalA299, 283P 298 (parties may stipulate as to fact of value in eminent domain proceedings); 240NY341, 148NE543.

1287–46 The admission of documentary evidence, etc. 172Ark421, 288SW908 (waiving improper authentication of transcript of foreign judgment).

1287–47 225Ky542, 9SW(2d)517.

1288–51 14F(2d)907; Vt 145A410. See also Iowa 232NW633. **Effect of the stipulation.**–108WVa589, 152SE3(2dcase). **Where new trial is granted on new issues made by amended pleadings,** parties may enter into new stipulation of facts. 51Philippine636.

1289–52 27F(2d)280 [certiorari den 278 US658, 49SCt187(3dcase), 73L ed566]; Okl 292P840. **Under stipulation that findings in action No. 2 should be considered findings in action No. 9,** possible errors in findings on negligence are immaterial as to No. 1, 21F(2d)396 (negligence not being an issue therein).

1290–54 Wis 229NW643(2dcase).

1290–56 Ark 32SW(2d)627; 224AppDiv 568, 232NYS26.

1290–57a 151Wash413, 276P98.

1291–60 Parties cannot stipulate as to meaning or effect of judgment.–339 Ill 356, 171NE548.

1291–61 Stipulation of facts.–279US306, 49SCt304, 73L ed704.

1291–62 75Mont99, 242P425 (extending time to prepare and present bill of exceptions for settlement).

1291–62½–New. Parties by consent may take testimony of any witness though none of statutory grounds therefor existed. 215AppDiv89, 212NYS628.

1291–62¼–New. Stipulation to hold in abeyance order directing defendant to answer interrogatories without consent of court is improper. IndA 168NE37.

1291–64 Mass 169NE146; 250Mich567, 231NW133(2dcase). **Particular stipulations construed.**–69CalA50, 230P472; 86 CalA532, 261P732; 43 Ida24, 248P868; 45 Ida427, 262P881, 56ALR317; 47 Ida 478, 276P969; 47 Ida595, 277P567; 204 Iowa911, 216NW276; 230Ky439, 20SW (2d)77; 11LaA345, 123S353; 165Minn 186, 206NW162; 148Miss219, 114S322; 316Mo 457, 290SW443; MoA 17SW(2d) 658; 227AppDiv1, 236NYS544; 111 Okl 234, 239P240; 129 Or281, 277P110, 64 ALR271; SD 229NW395; TexCivA 294 SW702; NS [1928] 2DomLR573. **Language of stipulations construed.**–320 Ill 454, 151NE271. **Where both plaintiffs attach to declaration agreement sued on,** court may refer thereto, though only part thereof appears in agreed statement. Mass 170NE69.

1291–65 31F(2d)969; 38F(2d)229; 29 Ariz334, 241P518 (construed as undoubtedly understood by court and counsel for plaintiff where stipulated physician would have testified as to amount of his bill for services); 101 CalA694, 282P429; 205 Iowa1341, 219 NW481; Iowa 226NW714; Iowa 231 NW448; Mass 169NW146; 240NY341, 148NE543; 48SD235, 207NW53 (stipulation construed to prevent objection to certificate on ground of lack of identification of signature). **Particular stipulation as to facts construed.**–201 Iowa 923, 208NW366; 203 Iowa1103, 212NW 559; 125Kan641, 266P65; 133 Or407, 291P387. **Stipulation in partnership accounting construed.**–72CalA468, 237P 833. **Stipulation as to facts is to be construed in connection with pleaded facts.**–201 Iowa923, 208NW366. **Stipulation consenting to sale construed** not to include liability for purchase money and expenses of defendant. 14F(2d) 586. **Matters not included.**–206Cal 508, 274P969; 95CalA307, 272P1068; 10LaA 553, 119S785. **Stipulation leaving jury with judge** does not authorize submission of new and different issue. Tex CivA 8SW(2d)267. **Unambiguous stipulation** given effect regardless of actual intention. TexCommnA 17SW(2d)457 (1stcase). **"Due time" construed.**–Tex CivA 10SW(2d)1011.

1292–66 33Ariz474, 266P3; 221AppDiv 180, 222NYS671; 40Wyo 411, 278P551. **Facts shown to be false.**–218Ky163, 291 SW6.

1292–67 329 Ill 528, 161NE110; 142 Miss502, 107S894 (stipulation as to agreed facts construed not to preclude introduction in evidence of mortgage); 221AppDiv180, 222NYS671.

1292–69 5F(2d)167 (stipulation that parties have each moved for directed verdict is conclusive as to court finding if supported by any evidence); 13F(2d) 6; 19F(2d)486; 23AlaA416, 125S398

(agreement that trial court take knowledge of decisions of court of another state will be given effect on appeal); 221 Ala24, 127S155 (evidence); 172Ark421, 288SW908; 172Ark485, 289SW321; Ark 328SW(2d)627; 71CalA393, 235P461 (stipulation that plaintiffs are entitled to recover if court awards judgment as claimed in their complaint); 72CalA468, 237P833; 77CalA716, 247P523; 81CalA 535, 254P310; 84CalA206, 257P907; 84 CalA567, 258P453; CalA 259P84; 95 CalA224, 272P760; 46 Ida717, 271P2; 47 Ida24, 271P935 (value); 161La417, 108S791; LaA 129S190; 151Md375, 135 A584; 256Mass246, 152NE379; 259Mass 465, 156NE885; Mass 169NE146 (agreement that suit be considered as on account annexed in nature of quantum meruit); 247Mich1, 225NW498; 247 Mich490, 226NW236 (stipulation regarding amount of decree); 149Miss671, 115 S780; 117Nebr125, 219NW956; Nebr 227NW455(2dcase); NJ 147A484 (agreed statement of facts); NJSup 147 A579 (agreed statement of facts); 125 Misc255, 210NYS504 (payments made in accordance with stipulation as to notes in suit and others enumerated must be applied in accordance with its terms and cannot be credited by note not therein referred to against will of one party); 218AppDiv701, 217NYS884; 135Misc 194, 237NYS378 (waiver of right to serve amended answer in consideration of opening defendant's default); 230App Div99, 243NYS414; 138Misc243, 245 NYS196; 58ND176, 225NW124; 44 Philippine248 (allegations in pleadings not denied nor in conflict with stipulations deemed admitted for purposes of trial); 136SC410, 134SE373 (waiver); 51SD315, 213NW720 (failure to include necessary items renders stipulations insufficient); SD 229NW395; 152Tenn 486, 279SW797 (objection to oral agreement as contradicting writing waived by stipulation); 153Tenn469, 284SW372; 155Tenn189, 291SW1064; TexCivA 287 SW100; TexCivA 6SW(2d)393; Tex CivA 24SW(2d)549; TexCivA 25SW(2d) 653; TexCivA 32SW(2d)227; 68Utah30, 249P121, 50ALR1303; Wis 230NW75. See also 151Va845, 145SE321. **Matters not necessarily included.**–220Ala444, 125 S608(1stcase) (agreement as to correctness of bill of exceptions is no agreement that it should be in improper form); 83Colo 411, 266P204; Mass 169 NE146 (agreement to permit auditor to consider case as one on account annexed does not entitle plaintiff to request rulings on questions outside agreement); TexCivA 274SW281; Tex CivA 22SW(2d)760 (agreement in suit on open account to pass case without prejudice cannot be construed to prevent filing of amended pleading); **Failure of party to secure object inducing stipulation** pursuant to which settlement was made will not invalidate his written ratification of settlement made. 309Mo 433, 274SW789. **Admission of material fact in defendant's answer is not ousted by** agreed statement of facts made for purpose of trial and silent as to fact so admitted in answer. 35GaA619, 134SE195. **Every material allegation of plaintiff's reply deemed denied** where court order was rendered recognizing agreement that such reply was traversed by record. 214Ky484, 283SW441. **Stipulation to determine question of fact by verdict and judgment in another case** is not conclusive of question without final judgment on verdict in other case. 125Kan725, 266P649. **In action for services,** parties' agreement that plaintiff's charge is reasonable does not bind jury. Mass 172NE 113.

1292–69a 13LaA73, 126S254 (agreement to try on merits held not tantamount to stipulation for injunction); Wis 230NW 715. See also 225Ky21, 7SW(2d)499.

1293–70½–New. Stipulation during trial is construed to cover situation then existing and not to control future conditions not in contemplation. 165Minn396, 206NW728.

1293–71½–New. Decree embodying terms of settlement agreed on and stated in open court by parties' attorneys, as provided by Circuit Court Rule No. 4, has been held warranted, though defendants afterward dispensed with services of their attorney and retained other counsel, who informed court that defendants could not meet terms of settlement and were not bound thereby. 245Mich 41, 222NW84.

1293–72 208Cal578, 283P67; CalA 277 P1107; Iowa 231NW366; 316Mo 658, 291SW472; 52Nev279, 286P120. **Effect on persons not parties to suit.**–254 IllA 136; 309Mo 433, 274SW789.

1293–75½–New. Where acceptance of process was not provided for in agreement, plaintiff's judgment is valid despite defendant's inability to serve process in action stipulated upon. NJSup 137A883.

1293–76 201Iowa480, 207NW337; 220 AppDiv237, 221NYS119; 13PortoRico Fed212. But see 230AppDiv538, 245 NYS675. **Court's jurisdiction of action is not divested** by mere fact that stipulation is signed by others than parties making it, that its performance is guaranteed, or agreement made to save party harmless. 187Wis1, 203NW923. **In acting under stipulation giving jurisdiction,** court is bound by consent and may not go beyond terms stipulated. 225App Div515, 234NYS217.

1293–77 180Ark170, 218W(2d)414; 204 Iowa911, 216NW276; 161La417, 108S 791. **Stipulation to abide by decision of appellate court in another pending case** will be given effect and judgment will be rendered accordingly. 140Okl 254, 282P 1096(2dcase).

1293–77½–New. Breaches.–Filing by plaintiff of notice of claim with insurance company for fourteen hundred dollars is in effect issuing execution and therefore breach of terms of stipulation wherein defendant confessed judgment for one thousand dollars and agreed to assign rights under insurance policy and plaintiff would stay execution. 214App Div266, 212NYS147.

1293–77⅓–New. Conclusions are not binding on court if contrary to facts stated in stipulation. 318Mo 225, 28W (2d)621.

1293–78 41Ida572, 240P597; TexCivA 287SW100.

1294–81½–New. Client's voluntary submission to physical examination by physicians renders their testimony competent, notwithstanding stipulation of counsel as to number of physicians who might make examination. MoA 17SW (2d)658.

1294–82 151Wash413, 276P98; 152 Wash104, 277P450.

1294–83 247 IllA325; 51SD315, 213NW 720. **Whether court will grant relief rests in its discretion.**–SD 229NW934.

1294–86 179Ark403, 16SW(2d)463(2d case); TexCivA 287SW100; 152Wash 104, 277P450.

1295–87 Party should not lightly or unnecessarily be relieved from stipulation where it will cast burden on other party. 228AppDiv737, 238NYS459.

1295–89 137Misc883, 245NYS142. **Failure to perform alternative stipulation** to convey land or suffer money judgment not excused though defendant made covenant under excusably mistaken belief that he had title. 187Wis1, 203NW 923.

1295–90 175Minn471, 221NW724.

1295–92 7F(2d)855; 206 Iowa179, 215 NW606.

1295–92½–New. , or where unauthorized by client. 32PortoRico 774.

1296–94 Affidavit is insufficient to set aside stipulation settling case for certain amount where it tends only to establish belief and information of affiant and not alleging facts as basis thereof. 151Wash413, 276P98.

1296–98 130Misc192, 223NYS710.

1296–1 152Wash104, 277P450.

1297–2 90Fla824, 107S257. See also 230AppDiv538, 245NYS675.

1297–6½–New. If stipulation is set aside on proper application action will stand as though stipulation had not been entered into. 151Wash413, 276P98.

1297–7 90Fla824, 107S257; 41 Ida572, 240P597; 204 Iowa782, 216NW27; Okl 291P967 (stipulation that pending cause shall abide result in another cause); Okl 291P968(1stcase). **Stipulation in previous suit disregarded.**–MoA 29SW(2d) 224.

1297–11 130Misc836, 225NYS360.

1298–17½–New. Specific performance will not be enforced under stipulation that defendant shall either convey land or suffer money judgment, where defendant elects not to convey. 187Wis1, 203NW923.

1298–30½–New. Where agreed statement of facts does not contain all facts, further facts are properly admitted. 221MoA960, 289SW352.

1299–31 Where attorney consented to amended complaint, equity will not presume fraud in failure to file evidence of consent thereto. 137Misc407, 244NYS 473.

1299–32½–New. Evidence held sufficient to show plaintiff's consent, ratification, and confirmation of counsel's stipulation and settlement made pursuant thereto. 309Mo 433, 274SW789.

1299–32⅓–New. Claim that counsel agreed not to question sufficiency of transcript of foreign judgment must be accepted as true in absence of denial. 172Ark421, 288SW908.

1299–34½–New. In view of trial agreement as to royalties accruing at time defendant ceased business jury held authorized to consider royalties accruing after date of writ. 256Mass478, 153 NE8.

1299–34⅓–New. Depositions have been held not to require conclusion that no agreement was made in open court as to validity of liens asserted. 111Conn 342, 149A851.

1299–34¼–New. Evidence has been held sufficient to show that amounts of mechanic's liens were agreed on by parties in open court. 111Conn342, 149A851.

1299–34⅓–New. Evidence held not to show that when attorneys signed stipulation for dismissal they agreed that defendant had no title to property attached. 133 Or407, 291P387.

STOCK

1300–11 Black L. D; Bouvier L. D. [both quot 127Misc338, 216NYS129, 132]. **Does not include fixtures.**–127 Misc338, 216NYS129.

STOCK or LIVE STOCK

1301–16 Does not include dogs.–213Ala 393, 104S754.

STOCK-HOLDER

1315–77 37GaA246, 139SE570, 572 [quotCyc].

STOCK OF A FARM

1323–91 See also 2LaA680.

STORE

1326–6 170Ark936, 282SW4; Tex CommnA 276SW170. **Harness repair shop for repairing and selling harness** held to be store. 170Ark936, 282SW4.

1328–10 49Philippine620.

STOREHOUSE

1329–25 "Storehouse" and "warehouse" are synonymous.–126Misc260, 213NYS 18.

STRAIGHTEN

1331–53½–New. Straighten.–As used in connection with railroads, word implies departure from original line, extent of which necessarily depends on local conditions. 289Pa6, 136A851.

STRAW

1334–75 See also 10CustA74.

STREET RAILROADS

1346–10 150Wash690, 274P791.

1348–23½–New. A public service corporation; 27F(2d)52.

1348–30 See also 27F(2d)52.

1350–40 107Conn312, 140A734.

1350–43 107Conn312, 140A734; 135 Misc497, 239NYS113.

1350–44½–New. Grant to street railway is in nature of lease. 224 IllA380.

1351–47 32F(2d)706.

1351–50 Under charter provision per-

mitting maintenance of depreciation fund, addition to system, connecting with lines using same operation methods, held extension so that fund may be used therefor, even though such use was not intended by creating ordinance. 204Cal 151, 267P97. **Municipality operating street railroad** acts in proprietary capacity. 86Colo 305, 281P355.

1355–74 Special charters.–142Va323, 128SE602.

1358–93 Ordinance adjusting franchise is not grant of new franchise. 225Ky 784, 10SW(2d)305. **Duty of city to protect investment** after term of grant. 39 F(2d)958.

1359–1 157SC1, 153SE537. **Acceptance as estoppel.**–335 Ill 388, 167NE61.

1361–20 32F(2d)706.

1363–28 32F(2d)706; 32NM397, 258P 573; 147Va951, 133SE565; Va 154SE 526.

1363–32 All documents constituting scheme of reorganization must be construed together. 325 Ill 16, 155NE773.

1363–33½–New. Acceptance of new franchises has been held equivalent to surrender of old. 42F(2d)377.

1364–37 In Indiana.–198 Ind9, 152NE 167, 46ALR1465.

1364–38 98CalA165, 276P629.

1364–40½–New. Acceptance of statute enlarging corporate authority may be implied from operation of vehicles. Ind 163NE489.

1364–44 23F(2d)287; 32F(2d)706; 126 Misc879, 216NYS2 (transferable independent of life of corporation).

1368–63 39F(2d)958 (various ways of exacting compensation). See also 245 IllA473. **Compensation is measured** by what, under ordinance and agreement, parties consider reasonable compensation, in absence of showing of method. 39F(2d)958.

1370–72 138Misc572, 245NYS514; 142 Va323, 128SE602. **Extension of lease to commonwealth held not violative** of constitutional provision. 261Mass523, 159 NE55.

1370–74½–New. Under constitutional provisions in some jurisdictions, after compliance with preliminary requirements of law, duties of state commission in granting amendment are purely ministerial, and it cannot refuse application for amendment. 142Va323, 128SE602.

370–74⅓–New. Street railway corporation has been held to have authority to operate motor vehicles for transportation of passengers and freight for hire without amendment of articles of incorporation. Ind 163NE489.

1370–77 98Vt508, 129A303.

1370–78 But see 231Ky820, 22SW(2d) 289, 66ALR1238. **Contract by city to purchase street railway property** and requiring it to pay specified portion of taxes assessed prior to conveyance renders city primarily liable, and seller, before payment, may maintain suit to compel payment. 5F(2d)393. **Contract to purchase street railroad lines** by municipality construed to require it to pay specified portion of taxes assessed for their current year of 1919. 5F(2d)393. **Franchise may be modified** by consent of all parties. 225Ky784, 10SW(2d)305. **Ordinance modifying franchise held not attempted abrogation** of franchise. 225 Ky784, 10SW(2d)305.

1371–79 198 Ind9, 152NE167, 46ALR 1465. **Street railway may surrender rights** to city and citizens cannot complain. 225Ky784, 10SW(2d)305. **Street railroad cannot terminate valid and binding contract with municipality** by surrendering its franchise or tearing up its tracks. 168Ga705, 149SE32. **Street railway cannot lawfully abandon or discontinue service** on certain streets without consent of city council. 199 Wis571, 227NW10.

1372–82 It is within state's constitutional power to refuse to permit partial abandonment of franchise. 281US537, 50SCt401, 74L ed1023.

1372–85 Rights may be lost by abandonment, waiver, or nonuser.–32F(2d) 706.

1373–92 98CalA165, 276P629. **Enjoining city from revoking consent.**–129Misc 428, 221NYS384.

1374–96½–New. Railway can only complain if ordinance imposes burden on it and not citizens of city. 225Ky784, 10 SW(2d)305.

1374–98 129Misc428, 221NYS384.

1374–99 32F(2d)706.

1375–5 Easement.–126Misc879, 216 NYS2.

1375–7 213Ala269, 104S517, 41ALR 872; 198 Ind9, 152NE167, 46ALR1465; 229AppDiv41, 241NYS569. **Franchise granted by township, after village by incorporation had acquired independent control over highways** within territory of village, conferred no rights on grantees or successors as against village. 32 F(2d)706.

1376–8 324 Ill 618, 155NE781.

1376–9 126Misc879, 216NYS2 (easement in nature of property).

1377–18 213Ala269, 104S517, 41ALR 872.

1378–28 In Indiana.–198 Ind9, 152NE 167, 46ALR1465.

1380–41 107Conn312, 140A734. **Proceedings to enforce conditions imposed.**–107Conn312, 140A734. **Requirement that railway pay to city percentage of gross earnings** is valid, based on good consideration, not ultra vires, or a tax. 107Conn312, 140A734.

1380–43 In Indiana.–198 Ind9, 152NE 167, 46ALR1465.

1380–43½–New. Grant is mere license which becomes contract when accepted and acted upon in substantial manner. 324 Ill 618, 155NE781.

1380–43⅓–New. Railroad is bound by conditions of ordinance. 5PaDist&Co 646.

1384–65½–New. Consent is not necessary where tracks used for freight under consent limiting use to passenger traffic. 331 Ill 360, 163NE141.

1388–3 5PaDist&Co 383 (relocation without consent of company must be paid for by city).

1389–7½–New. Where necessary for public convenience and safety, city can require relocation of tracks at expense of railroad company. 324 Ill 618, 155NE 781.

1389–7⅓–New. City is not estopped from requiring relocation of tracks by approval of old location. 324 Ill 618, 155NE781.

1389–7¼–New. State highway commission may compel company to remove tracks outside improved area at its own expense. 198 Ind456, 152NE806, 154 NE20.

1389–7⅕–New. Railroad may be compelled to locate tracks at its own expense in center of street. 198 Ind456, 152NE806, 154NE20.

1389–8 123Kan517, 256P128.

1391–14½–New. Ordinance requiring construction of additional lines is exercise of police power. 180Minn329, 230 NW809.

1391–14⅓–New. Such ordinance is presumptively valid as respects public necessity and reasonableness, and burden of showing contrary rests on railroad company. 180Minn329, 230NW809.

1391–14¼–New. Under franchise ordinance permitting city to require construction of additional lines on streets having sewers, construction of unnecessary sewer is not condition precedent to requiring new line. 180Minn329, 230 NW809.

1391–14⅕–New. In proceeding by city to compel railroad to build extension as required by ordinance company is entitled to show financial condition and earnings and effect thereon of requirement. 180Minn329, 230NW809.

1391–18 296Pa40, 145A686.

1391–19 296Pa40, 145A686 (embraces subsequent rebuilding of bridge).

1391–20 Commissioner of bridges held without power orally to contract for improvements on Brooklyn Bridge, city to pay excess costs over one hundred and ten thousand dollars. 244NY140, 155 NE77.

1394–38 198Ind9, 152NE167, 46ALR 1465.

1400–71½–New. Radiating lines, built at different times under separate bond issues and elections, constitute single system. 204Cal 151, 267P97.

1401–78 323 Ill 246, 154NE112. **Extensions.**–179Minn548, 229NW883.

1401–79 323 Ill 246, 154NE112. **Upon company's acceptance of ordinance granting rights** ordinance becomes binding on both parties. 323 Ill 246, 154NE 112.

1403–2 323 Ill 246, 154NE112; 290Pa 331, 138A849, 54ALR1285; 97PaSuper 366. See also 142Va255, 128SE606, 614, 43ALR752 [quotCyc]. **Reason for rule.**–See also 142Va255, 128SE606, 614, 43 ALR752 [citCyc]. **Duty to repair part of street occupied by tracks** unequivocally declared in ordinance is not subject to exceptions not declared in terms equally unequivocal. 323 Ill 246, 154NE 112. **Ordinance requiring street railway to keep streets occupied by tracks in repair** held to require company to repair pavement injured by city in laying sewer or water pipes. 323 Ill 246, 154NE 112.

1403–3 98Vt508, 129A303 (not relieved by unprofitable operation).

1404–5 Man [1930] 1DomLR499 (city not liable).

1404–6½–New. Trustee of insolvent railroad leaving possession in railroad and retaining ownership of property is liable with railroad for continuance of nuisance created by abandoned tracks. 229AppDiv41, 241NYS569.

1404–7 170Ga699, 154SE268; 135Misc 678, 240NYS744 (statute construed); 142Va255, 128SE606, 614, 43ALR752 [quotCyc]. But see 15 OhA405. **Municipal franchise held to impose duty.**–32 NM397, 258P573. **If ordinance authorizing laying of tracks requires street railway to repair pavement** destroyed by city's laying of sewer or water pipes, company has no cause of action for expenses in doing so. 323 Ill 246, 154NE 112. **Statute relating to paving** supersedes ordinance. NJSup 148A611(2d case).

1404–8 142Va255, 128SE606, 614, 43 ALR752 [quotCyc].

1404–9 142Va255, 128SE606, 43ALR 752.

1404–12 142Va255, 128SE606, 43ALR 752.

1405–14 101NJL341, 129A482.

1405–15 274US387, 47SCt595, 71L ed 1112; 213Ala269, 104S517, 41ALR872; 324 Ill 618, 155NE781.

1405–15½–New. Where no privilege was asked or granted by reason of street railway being originally built wholly on land owned by company outside city limits, city has no right to demand that company should pave between or beside its tracks. 142Va255, 128SE606, 43ALR 752.

1405–15⅓–New. Where subsequently city limits are extended to cover land over which such railroad operated, company became subject to city's police power but city acquired no right to require street improvements or repairs not caused by any improper act of company. 142Va255, 128SE606, 43ALR752.

1405–16 Where city accepts by ordinance dedication of part of highway including bridge as street on petition of land company to build bridge, occupy street, and construct street railway, it is held to have granted franchise in consideration of implied covenant by company to maintain part of bridge occupied by tracks in conformity with city's maintenance of rest of bridge. 142Va 255, 128SE606, 43ALR752.

1405–17 172Minn187, 215NW69; 6Pa Dist&Co 175. **Franchise duty to pave** has been construed as including repaving. 172Minn187, 215NW69. **Relocation of tracks** necessitated by statute for street improvements is not chargeable to street railroad under statute. DC 41 F(2d)424.

1405–18 8PaDist&Co 514.

1406–19 8PaDist&Co 514. **Rails and space between tracks** held meant by phrase "occupied by its tracks." 259 Mass564, 156NE734.

1406–20 Requirement construed.–147Va 951, 133SE565. **Statutes not applicable to municipally owned and operated street railways.**–71CalA649, 236P180.

1407–26½–New. Question of liability for expense of street railway in moving

tracks during repair of viaduct by railroad constituted merely question of law within jurisdiction of circuit court, "jurisdiction" being authority to hear and decide cause. 331 Ill 151, 162NE852.

1407-27 Va 154SE526.

1407-32 198 Ind 456, 152NE806, 154NE20.

1408-38 8PaDist&Co 514.

1408-40 135Misc497, 239NYS113 (repaving abandoned portion under franchise).

1409-44½-New. **Contracts for repair between companies; regulation.**-Contract between street railway company and railroad sharing expense of repair is not subject to control or enforcement by public service commission but is matter for the courts. 85PaSuper259.

1411-57½-New. Presumption does not exist that repeal of ordinance relating to maintenance and repair by street railroad was intended by ordinance authorizing construction of tracks. Va 154SE526.

1411-58 142Va323, 128SE602. See also 274US387, 47SCt595, 71Led1112.

1411-62½-New. State corporation commission has no power to relieve street railroad from duty of paving between rails. 144Va24, 131SE330.

1412-69 228Ky271, 14SW(2d)1068; 220AppDiv144, 221NYS276. But see NJSup148A611(2dcase).

1412-70 32NM397, 258P573; 5PaDist&Co 383; 142Va255, 128SE606, 43ALR752.

1413-77½-New. City is not necessarily estopped to assert claim for cost of repairs to portion of bridge occupied by street railway by reason of having previously on several occasions paid for repairs without demanding refund by railway company. 142Va606, 128SE606, 43ALR752.

1413-77½-New. Foreclosure of lien in same way as mortgages are foreclosed is authorized under some statutes. 32NM397, 258P573.

1413-77¼-New. Interurban company's failure to elect to improve portion of state highway occupied by its tracks under statute is an election to pay for improvement by state highway commission. Ind 167NE127.

1413-77½-New. Interurban company impliedly waived right under statute to elect to improve portion of state highway occupied by tracks rather than pay for improvement by denying liability and its conduct in failing to take advantage of right. Ind 167NE127.

1413-78 220AppDiv144, 221NYS276. **Reasonable charge for overhead expenses** based on percentage of actual cost of labor and material furnished for repairs is usually allowed in some jurisdictions. 142Va255, 128SE606, 43ALR752 (ten per cent held reasonable).

1413-80½-New. Allowance for items of cost for repairs not authorized by city council is properly refused. 142Va255, 128SE606, 43ALR752.

1414-82 170Ga699, 154SE268.

1414-83 170Ga699, 154SE268.

1414-83½-New. Street car company and railroad may be liable. Va 154SE526.

1424-59 **Contract between street and steam railroad** whereby street railroad bore greater part of maintenance expense held supported by implied obligation of steam railroad to maintain gates, notwithstanding statute providing that expense be shared. 15F(2d)374.

1424-61½-New. Municipality operating street railroad must construct crossings at its own expense. 164La1033, 115S136.

1426-75 296Pa61, 145A607.

1428-92 294Pa230, 144A97.

1430-14 **Contract between street railway and city** permitting substitution of motor busses for street car held not invalid. 231Ky820, 22SW(2d)289, 66ALR1238.

1431-21 244NY84, 155NE58.

1431-22 **In Massachusetts.**-261Mass556, 159NE70.

1432-25 **Particular conveyances construed.**-142Wash580, 253P1083.

1432-31 **City purchasing system** is not bound by seller's contract leasing advertising space notwithstanding acceptance of rent from lessees where charter requires ordinance and written contract. Ariz 291P1000.

1434-43 244NY602, 155NE914.

1435-52½-New. **Operation by receiver of lessee; disaffirmance.**-Where receiver of lessee, though at first paying rental under lease, later refuses to make further payments, and surrenders the property, his provisional operation of road is not for benefit of lessee; 6F(2d)547.

1435-52½-New. but such acts constitute disaffirmance of lease and receiver is liable to lessor for net profits of such operation from the beginning. 6F(2d)547.

1435-52¼-New. City transit commission's lease to traction company of use and occupation of subway may include sidewalk surrounding railway station. 262Mass18, 159NE501.

1436-57½-New. **New York statute prohibits** one street railway from operating over another company's route. 244NY602, 155NE914.

1436-60 331 Ill 360, 163NE141; Mass168NE781.

1437-65½-New. Railroad may contract for use of its tracks if authorized by statute. 331 Ill 360, 163NE141.

1438-79 226AppDiv299, 235NYS127. **Substation property purchased ten years after merger** held not subject to lien of mortgage of merged road covering after-acquired property. 226AppDiv299, 235NYS127. **Rights and liabilities under original and consolidated mortgages** of merged and merging corporations respectively. 253NY190, 170NE887.

1438-79½ Electric railway and electric power company were interdependent, operating under law authorizing consolidation, and they cannot be separated. 157SC1, 153SE537.

1439-87½-New. In contract under which city purchased street railway system and issued bonds therefor, express provision for periodic payments out of gross revenues of system into special fund for payment of said bonds and interest has been held exclusive. 29F(2d)254.

1439-87½-New. Ordinance requiring assent of city to issuance of securities did not make city guarantor of securities. 225Ky784, 10SW(2d)305.

1439-87¼-New. Right of renewal need not be reserved in obligation. 234Ky802, 29SW(2d)552.

1439-87½-New. Bondholder, not signing waiver agreement as to default in payment of principal, is not bound thereby though majority of holders waived default. Mass 168NE405.

1440-92 234Ky802, 29SW(2d)552 (statute construed).

1440-97 40F(2d)612. **Rules for construction of mortgages.**-234Ky802, 29SW(2d)552.

1440-99 248NY322, 162NE93 (property covered by after-acquired property clause).

1441-3½-New. **Construction.**-Mortgage providing that trustee "shall" release lien on property not necessary to operation of business, if other property of equal value is acquired, construed to be imperative. 214AppDiv506, 212NYS343.

1441-3½-New. Rule of "ejusdem generis" has no application here. 214AppDiv506, 212NYS343.

1441-3¼-New. Trustees under mortgages may properly participate in refinancing plan involving no default. 234Ky802, 29SW(2d)552.

1443-12 147Va33, 136SE769.

1443-13 147Va33, 136SE769.

1443-15 **Holders of certificates** of company in receivership may intervene as to existence of mortgage debt in foreclosure case but not as to priority of liens. 26F(2d)153.

1444-21 8F(2d)820; 8F(2d)826.

1444-22 **Receiver of purchaser of street railway property** on foreclosure held not entitled to retain proceeds of fire insurance policy taken for benefit of lessor to be used in rebuilding. 5F(2d)945.

1445-25 **Rights in special funds** of municipal corporation having option to purchase street railroad company in receivership. 40F(2d)612.

1445-27 331 Ill 360, 163NE141.

1445-28 204 Iowa1195, 213NW264.

1446-29 331 Ill 360, 163NE141; 219AppDiv95, 219NYS421; 5PaDist&Co646. **Public service commission** has been held not to have executive control of street railway companies with respect to general functions and activities. 85PaSuper259. **Public utilities commission.**-103Conn197, 130A169 (Gen. St. [1918] § 3621); 318 Ill 402, 149NE422. **Finding of state railroad commission** that street railway could be made to yield fair return is entitled to great weight. 157SC1, 153SE537. **Order issued by state railroad commission** in respect of street railway must be presumed to have been based on actual facts. 157SC1, 153SE537.

1446-29½-New. Where regulation of street railways is vested jointly in municipality and railroad commissioners, former's control is subject to that of latter. 103Conn197, 130A169 (in case where particular railway operates outside of municipality as well as within).

1446-35½-New. **Regulation of operation of street railways** is administrative function, not judicial function. 103Conn197, 130A169 (dictum).

1447-36 27F(2d)52; 331 Ill 360, 163NE141; 204 Iowa1195, 213NW264. **Interurban electric cars** are not within application of statute requiring drivers to give information at time of collision. 83CalA100, 256P567.

1448-46½-New. Law of the road does not apply to street cars. TexCivA 300SW100.

1450-70 254NY305, 172NE516. **Order fixing fares** held exercise of police power and not affecting contract with municipality. 16F(2d)763.

1450-72 254NY316, 172NE520.

1451-75 **Acts held to constitute abrogation of charter fare provision.**-246NY224, 158NE310.

1451-81½-New. **Regulation by public service commission.**-In Minnesota any street railway company operating under franchise from city by filing consent becomes subject to statute giving commission thereafter exclusive power to fix rates of fare. 167Minn311, 209NW10.

1451-81½-New. Appeal may be taken by the city or street railway to the district court from determination of commission. 167Minn311, 209NW10.

1451-81¼-New. Upon such appeal the matter involved is tried and determined by court without jury. 167Minn311, 209NW10.

1451-81½-New. District court is given jurisdiction to try whole matter in controversy, including fact and law, and make findings upon all material facts, 167Minn311, 209NW10.

1451-81½-New. and to affirm, modify, or reverse order of commission. 167Minn311, 209NW10.

1451-81½-New. Court must find fair value of street railway property and what is reasonable rate of return thereon. 167Minn311, 209NW10.

1451-81⅛-New. Judgment or order of court is required to be certified to commission which must thereupon conform its order or findings to judgment, order, and findings of court. 167Minn311, 209NW10.

1451-81½-New. Court is not authorized to fix or determine rate or fare, 167Minn311, 209NW10.

1451-81 1/10-New. but can only determine fair value of street railway property and what is present fair return thereon. 167Minn311, 209NW10.

1451-81 1/11-New. **Horse drawn street cars not subject to old rate** of fares after electrification. 214AppDiv122, 211NYS650.

1451-83 167Minn311, 209NW10 (reasonable and sufficient to yield reasonable return on fair value of property).

1452-87½-New. Street railroad company operating under special act of legislature is subject to regulation by public service commission as to its fares. 214AppDiv122, 211NYS650.

1452-87½-New. **Valuation investigation** not required but proper. 5PaDist&Co 265.

1452-87¼-New. **Commission's own investigation** only controlling factor. 5PaDist&Co 265.

1452-87⅛-New. **Testimony of commission's experts admissible** at valuation inquiry. 5PaDist&Co 265.

1452–87½–New. Court's decision no discharge of commission's rate fixing duty. 5PaDist&Co 265.
1453–99½–New. Public service commission has power to increase rate of fare of street railroad restricted by general laws under which street car companies were incorporated. 214AppDiv122, 211 NYS650.
1453–99½–New. Public service commission may be authorized by legislature to change street car fares. 214AppDiv 122, 211NYS650.
1453–99¼–New. Where public service commission issues order modifying street car rates, such modification is not repealed by repeal of statute granting authority to commission, where statute is not expressly made retroactive. 219 AppDiv95, 219NYS421.
1453–99½–New. Where authority of public service commission to fix street car rates under franchise agreement was repealed, commission's power stopped only as to such agreements and its general power to fix rates continued. 219 AppDiv95, 219NYS421.
1453–99½–New. Statute allowing commission to fix rates to supersede franchise agreement fixing the rates. 219 AppDiv95, 219NYS421.
1453–99½–New. Where grant of franchise is conditioned on compliance with statute in which state receives power to regulate rates, it was held that commission has power to regulate fares. 219 NYS423.
1456–18 Street railway company cannot change transfer point fixed by ordinance.–149Va882, 141SE829.
1456–21 21AlaA431, 109S890.
1457–25 Authority of municipality.–103 Conn197, 130A169. **Reasonableness of two-man crew ordinance** held to depend on fact of each case. 16F(2d)401.
1457–26 204 Iowa1195, 213NW264. **Validity of regulations of "one-man cars."**–227AppDiv568, 238NYS380. **Regulation by city requiring two-men street cars** exists as police power right only when necessary to public safety and convenience. 37F(2d)910.
1457–27½–New. Such regulation has been held to be within exclusive control of public utilities commission. 103 Conn197, 130A169 (in case of interurban railway).
1457–28 In Illinois.–318 Ill 402, 149NE 422.
1457–29 10LaA72, 120S271. **In North Carolina.**–191NC13, 131SE402. **Fenders are to protect life and limb of persons,** to protect animals, and should be "practical" to protect persons in vehicles. 191 NC13, 131SE402.
1458–33½–New. Enforcement of ordinance requiring two-men cars with rear entrances and exits at both ends held properly enjoined as unconstitutional. 38F(2d)945.
1458–34 Under vigilant watch ordinance street railroad's duty is ordinarily broader and stronger than common-law duty of ordinary care. 314Mo 158, 282 SW710. **Stopping on approach of fire apparatus.**–175Minn22, 220NW162 (Wisconsin statute held not unreasonable).
1458–36 But see 300Pa451, 150A746. **Statute compelling "vehicles" to yield right of way** to those on right at intersection does not apply to street cars. TexCivA 10SW(2d)397.
1459–42 94CalA748, 272P346. **Where franchise ordinance limits speed.**–77 Mont124, 249P1070.
1460–50 Duty imposed by such provision is continuous and breach thereof is no defense to suit. MoA 287SW803.
1461–60 NH 149A602 ("tracks" construed).
1462–38 NJSup 143A722.
1462–69 213Ala269, 104S517, 41ALR 872. **It is franchise or privilege tax** and not ad valorem tax or betterment tax assessable against abutting property. 213Ala269, 104S517, 41ALR872.
1462–70 Exempting from taxation.–228 Ky271, 14SW(2d)1068.
1467–15½–New. Street railroad not exempt from penalties for failure to pay percentage on gross receipts because operated by receiver. 219AppDiv90, 219 NYS399.
1467–15½–New. Not mandatory on city to apply deposits by street railroads to insure performance of its contracts toward defaulted penalties for failure to pay percentage of gross receipts. 219 NYS401.
1467–18 27F(2d)52; 143Miss371, 108S 901 (plaintiff in action for damages for discontinuing car service must introduce franchise in evidence); NJSup 144A623; 157SC1, 153SE537 (holding company without rights to benefits of franchise unless it performed street railway service). **Measure of damages** in suit by property owner for discontinuing car service is amount of loss and inconvenience during suspension. 143Miss371, 108S901. **Public service corporation cannot escape operation** of street railway on ground that patrons of their light and power might be required to contribute to maintenance of its operation. 157SC1, 153SE537.
1468–21 Excuse for failure to operate.–157SC1, 153SE537 (loss on branch line no excuse).
1468–24 154Wash475, 282P829. **Permission to abandon street car tracks held properly refused.**–169Ark519, 275 SW757. **State corporation commission may order discontinuance of street car line to avoid confiscation,** in exercise of police power. 144Va29, 131SE328. **State corporation commission need not order valuation of all property** of street railroad to determine whether it is operating at a loss over line sought to be discontinued. 144Va29, 131SE328.
1468–29 9LaA417, 121S250(1stcase).
1469–34 244NY84, 155NE58.
1469–38½–New. Where holding company, owning all stock of subsidiary company, actually controls and operates railroad of subsidiary company, holding company is liable for subsidiary company's negligence, 24F(2d)383.
1469–38½–New. but subsidiary company is not liable in such case except for its own misfeasance such as negligence in selecting subordinates. 24F(2d)383.
1472–68 245NY600, 157NE874.
1472–69 Vigilant-Watch Ordinance of city of St. Louis requires of street railroad higher degree of care than mere ordinary care as to persons and vehicles within or entering danger zone. 308Mo 142, 271SW773.
1472–71 TexCivA 272SW256.
1472–72 TexCivA 272SW256.
1473–77½–New. Street railway at fault may be liable for whole loss to parked automobile damaged by another automobile being hurled against it in collision with street car. 12LaA112; 124S691.
1473–80 258Mass257, 154NE546.
1473–81 Degree of care required in operation of trains at stations is same in both steam and interurban trains. 195 Cal 185, 232P131.
1473–82 218Ala586, 119S625, 63ALR1; 84CalA743, 258P1000; CalA 289P662; 153Md119, 137A484; 246Mich408, 224 NW333; 218MoA563, 267SW6; 144 Wash676, 258P832. But see 233 IllA 432.
1474–83 But see CalA 268P469.
1474–85 149Md443, 131A822.
1474–86 Negligence is relative and comparative, depending on circumstances of particular case. 149Md443, 131A822.
1474–88 Use of single track for cars going in both directions where street carries two tracks held to require extraordinary care. 146Wash383, 262P 961.
1476–95 119 Oh518, 164NE752.
1476–96 213AppDiv390, 210NYS553.
1477–8 231Ky141, 21SW(2d)236; 149 Md443, 131A822, 827 [quotCyc]; 317Mo 524, 297SW404; 124 Okl 233, 254P969.
1477–9 197Cal 148, 239P1061; CalA 289P662; 36GaA805, 138SE359; 200 Iowa597, 203NW705, 41ALR368; 223 Ky311, 3SW(2d)604; 126Me40, 136A 116; 149Md443, 131A822, 827 [quot Cyc]; 237Mich393, 212NW75; 310Mo 642, 276SW60; 131Misc170, 226NYS382; 124 Okl 233, 254P969; 299Pa79, 149A 104; Va 154SE550. **Ordinances.**–310Mo 696, 276SW64.
1478–10 126Me1, 135A248; 140Wash 534, 249P1059. **Duty does not include anticipation of carelessness by persons driving on street.**–235 IllA160.
1478–11 149Md443, 131A822, 827 [quot Cyc].
1478–12 A breach of such requirements, etc. 262Mass91, 159NE526.
1478–17 CalA 289P662 (customary at place); 149Md443, 131A822, 827 [quot Cyc]. **Car stopping within six or seven feet after accident** held not to have been going at excessive speed. 215AppDiv 189, 213NYS362.
1479–18 149Md443, 131A822, 827 [quot Cyc]; 290Pa303, 138A838.
1479–19 149Md443, 131A822, 827 [quot Cyc] (relative and comparative); 300 Pa451, 150A746. **Cars may run at fair rate of speed.** 97PaSuper295.
1480–20 36GaA805, 138SE359; 223Ky 311, 3SW(2d)604; 126Me1, 135A248; 149Md443, 131A822, 827 [quotCyc]; 157 Md464, 146A279; 290Pa303, 138A838. **Averment that trolley car was traveling at high and dangerous rate of speed** is negatived by evidence that car stopped within not more than 10 feet after accident. 293Pa428, 143A108.
1480–21 36GaA805, 138SE359; 126Me 1, 135A248; TexCivA 21SW(2d)97.
1480–22 126Me1, 135A248; 127Me387, 143A596; 293Pa472, 143A119.
1481–23 149Md443, 131A822, 827 [quot Cyc].
1481–26 243NY90, 152NE475. **Where street car, slowly approaching crossing, suddenly doubled speed without warning,** striking pedestrian, inference that motorman was negligent is permissible. 243NY90, 152NE475.
1481–28 75CalA129, 242P97.
1481–29 75CalA129, 242P97.
1481–30 75CalA129, 242P97; CalA 280 P154.
1482–31 See also 235 IllA160. **The mere fact that a car is running at a prohibited rate of speed,** etc. 135Wash290, 237P 737 (in absence of showing that speed was proximate cause of injury). **Unless shown to be proximate cause of injury,** speed in excess of ordinance is insufficient to create liability. 135Wash290, 237P737.
1482–33 126Me1, 135A248; 124 Okl 233, 254P969. **Motorman must stop if necessary to avoid collision.** 126Me1, 135 A248.
1482–37 85CalA69, 258P1006; 149Md 443, 131A822. **Where approach of car is seen,** no warning signal is necessary. Mo 271SW749. **Warning held not required.**–300Pa451, 150A746.
1483–38 82CalA141, 255P215. **Particular signals.**–253 IllA135.
1484–41 Man [1928] 2DomLR725.
1484–42 84CalA743, 258P1000.
1484–51 260Mass78, 156NE692; 265 Mass482, 164NE478(2dcase).
1487–68 214Ala310, 107S451; 32Porto Rico 707 (intoxicated person lying on track in unfrequented spot).
1487–70 214Ala310, 107S451; 37GaA 724, 141SE816; 131Misc170, 226NYS 382.
1487–73½–New. It has been held that there is no duty to extricate trespasser from perilous position. 221Ala91, 127 S519.
1490–95 218Ala586, 119S625, 63ALR1; Ala 130S413; 181Ark790, 27SW(2d)985; CalA 289P662; 157Md464, 146A279; 124 Okl 233, 254P969; 87PaSuper46; 88 PaSuper20.
1491–96 Ala 130S413; 201Cal 57, 255P 500; CalA 289P662 (statute); 254 IllA 362; 265Mass482, 164NE478(2dcase); 243NY249, 153NE64; 300Pa536, 151A 19; 97PaSuper447. **Street car has right of way** in center of plaza, not regular crossing. 215AppDiv189, 213NYS362. **It is not the law that under all circumstances a pedestrian must yield the right of way** upon observing an approaching car. 192Wis269, 212NW643.
1492–98 29Hawaii188; 237Mich393, 212NW75; 98PaSuper260. See also 201 Cal 57, 255P500. **Traveler does not become trespasser by placing himself or vehicle on tracks for legitimate use of street** where he does not unreasonably and unnecessarily obstruct use of tracks. 88PaSuper20.
1493–99 254 IllA362 (not trespassers); 87PaSuper46.
1493–2½–New. Under ordinance giving police patrol right of way, motorman of street car must stop if necessary to yield right of way. 322Mo 1103, 19SW(2d) 707, 65ALR129.

1493-3 237Mich393, 212NW75; 124Okl 233, 254P969. **Children.**–215AppDiv549, 214NYS268 (motorman may rely on natural inclination toward safety of even young children).
1494-4 81CalA772, 254P926.
1494-5 CalA 289P662.
1495-6 181Ark790, 27SW(2d)985.
1495-10 Where space reserved for street railroad, its only duty is to refrain from wanton or reckless conduct 260Mass78, 156NE692.
1495-11 243NY249, 153NE64.
1495-13 237Mich393, 212NW75.
1495-15 43F(2d)286; 203Cal 367, 264P 252; 75CalA129, 242P97; 200 Iowa597, 203NW705, 41ALR368; 103NJL583, 137 A526; 30 OhA143, 164NE429(2dcase); 144Wash676, 258P832; Wash 292P427. But see 97PaSuper533. **Street crossing or intersection,** within meaning of ordinance regulating speed and stops of street cars, includes meeting place of two streets, though one of the streets ends at such intersection. 285Pa399, 132 A194. **Fact that street car is confined to its tracks** makes it duty of vehicle driver to give way to its clear passage. 78CalA617, 248P741.
1496-16 Pedestrian having right of way is not relieved from using due care. 150 Va442, 143SE681. **Right of way of street car at street intersection** does not absolve motorman from duty of vigilance. 140Wash534, 249P1059.
1496-17 78CalA617, 248P741; 103NJL 583, 137A526; 144Wash676, 258P832.
1496-18 126Me40, 136A116; 167Minn 309, 208NW1007; 243NY90, 152NE475.
1497-19 RI 135A36.
1497-22 Man [1927] 2DomLR686.
1497-23 15 OhA346; Man [1926] 3DomLR557, [1926] 2WestWkly321; Man [1927] 2DomLR686.
1498-28 Where street railway is charged by agreement with city to maintain sidewalk crossing its tracks it is liable in damages for accident caused by its failure to maintain crossing in repair. Can [1928] 2DomLR420.
1499-30 Preferential right of way of street car arises only when tracks are in actual and lawful use. 181Ark1145, 28SW(2d)1077.
1499-31 259Mass564, 156NE734.
1499-33½-New. Street railroad is not liable for injuries to trolley pole climber repairing city's fire alarm wire attached without objection. 171Minn395, 214NW658.
1499-33¼-New. Where in doing so, he was not furthering the interests of the railroad company. 171Minn395, 214NW 658.
1499-33¼-New. Under facts of case street railroad held not liable to passenger injured by stepping into hole in street when alighting. 259Mass229, 156 NE22.
1499-34 262Mass86, 159NE528.
1501-42 98CalA189, 276P591.
1501-45½-New. Street railroad may be liable for negligence in failing to warn passenger of defect in street when alighting. 259Mass117, 156NE19.
1502-52 169Minn342, 211NW580.
1502-58 262Mass104, 159NE606.
1502-59 262Mass104, 159NE606.
1505-81 213Ala672, 106S147; 78CalA 617, 248P741; 88CalA354, 263P578; 245 NY635, 157NE889; 30 OhA389, 165NE 358; Or 289P369 (observe vehicles); 85 PaSuper275; 98PaSuper242; TexCivA 299SW507.
1506-83 36GaA805, 138SE359; 83 IndA 366, 147NE310; 85PaSuper275 (due warning given motorman); 9PaDist&Co 668. **Violation of ordinance** requiring street car to stop on taking up passengers is not negligence per se as to injury to person riding in auto truck struck by street car as ordinance was not passed for benefit of such person. 220MoA19, 273SW233.
1506-84 293Pa472, 143A119.
1507-86 See also 265Mass176, 163NE 752.
1507-87 298Pa223, 148A87.
1507-89 41GaA605, 154SE206(1stcase).
1507-91½-New. Street railway held liable for damage to parked automobile against which another automobile was thrown in collision with speeding street car. 12LaA112, 124S691.
1507-91⅓-New. Turning on headlights of street car standing on track along edge of highway when plaintiff driving automobile was within thirty-five feet of car is not negligence though proximate cause of collision and injury. 96 PaSuper442.
1507-92 223Ky311, 38SW(2d)604; 265 Mass176, 163NE752.
1508-93 Signal of traffic officer for car at intersection to proceed does not relieve motorman behind car from exercise of due care to avoid rear-end collision. 48RI 18, 134A642.
1508-95 36GaA805, 138SE359; 83 IndA 366, 147NE310; 298Pa223, 148A87.
Duties of operatives when passing parked vehicle.–88CalA354, 263P578.
1509-98 78CalA617, 248A741; Mo 16 SW(2d)100; 298Pa223, 148A87.
1509-99 218Ala586, 119S625, 63ALR1; 298Pa223, 148A87. **Presumption of motorist's care** cannot be indulged after danger becomes imminent. 221Ala139, 127S825.
1509-1 290Pa288, 138A830.
1509-3 85PaSuper275.
1510-4 Motorman is not required so to control car as to prevent possibility of accident. 298Pa223, 148A87.
1510-6½-New. Street car motorman may assume other travelers will use care only until he observes another's danger or lack of care. 143Wash541, 255P947.
1510-6½-New. Duty to put car under control arises when motorman realizes, or in exercise of ordinary care ought to realize that there is danger of collision. 130 Or267, 278P99.
1510-12 218Ala586, 119S625, 63ALR1; 223Ky311, 38W(2d)604; 126Me1, 135A 248; 298Pa223, 148A87.
1511-14 157Md464, 146A279.
1511-16 126Me1, 135A248.
1511-17 126Me1, 135A248.
1512-19 300Pa55, 150A153 (motorman of car and vehicle driver held concurrently negligent). **Where vehicle stalled on track** which motorman did, or could in exercise of due care, see in time to avoid collision, failure to stop is negligence. 102CalA199, 282P1005.
1512-20 Ont [1930] 1DomLR268.
1512-22 80CalA641, 252P628.
1512-23 Ind 154NE40.
1512-25½-New. That street car was running within maximum speed fixed by statute or ordinance does not relieve street car company nor prevent finding of excessive speed. 102CalA199, 282P1005.
1513-27 173Minn265, 217NW130.
1513-30 218MoA172, 265SW875.
1514-31 Space specially reserved for track location.–253Mass605, 149NE625.
1514-32 TexCivA 299SW325.
1515-39 Absence of stop by street car at switch and absence of warning or signal on turn was not want of care toward pedestrian who was in safety zone, requiring no signal. 246Mich408, 224 NW333.
1515-39 9LaA117, 118S847; 243NY249, 153NE64; 219AppDiv571, 220NYS434; 291Pa492, 140A547; 300Pa451, 150A 746; Pa 151A703 (sudden emergency); TexCivA 291SW619 (may assume adult person near track, apparently able to see, hear, and move, will draw back from portion of car projecting beyond track in passing curve). **It is not negligence** to assume that person standing on platform maintained in connection with city street car service and exercising ordinary prudence was bound to take notice of overhang of passing interurban car. 135Wash290, 237P737. **Overhang of car** passing platform is not of itself negligence. 135Wash290, 237P737. **Running street car at rapid speed between street intersections in daylight without sounding gong** held not negligence as to pedestrian killed when he stepped from automobile parked on other track. 243NY249, 153NE64.
1515-40 92PaSuper193.
1516-47 Warning of overhang to car in rounding curve.–136Wash544, 240P 903.
1517-52 78CalA617, 248P741.
1517-54 But see Can [1929] 2DomLR 197(1stcase).
1517-55 78CalA617, 248P741; 82Colo 47, 256P658; 102Conn676, 129A790; 200 Iowa597, 203NW705, 41ALR368; 50RI 190, 146A481. But see 75CalA129, 242 P97. **Where pedestrian passes in front of car,** motorman has right to assume she will proceed to opposite sidewalk, his duty being to see that she is accorded safe passage in front of car. 144Va210, 131SE200.
1518-56 88CalA648, 263P1039; 200 Iowa597, 203NW705, 41ALR368; MoA 10SW(2d)331.
1519-60 200 Iowa597, 203NW705, 41 ALR368; 92PaSuper105; 93PaSuper 206; Man [1928] 1DomLR159. **Car turning corner.**–200 Iowa597, 203NW705, 41ALR368.
1519-61 75CalA129, 242P97.
1519-62 286Pa536, 134A446.
1520-63 286Pa536, 134A446; 288Pa 189, 135A739.
1520-64 200 Iowa597, 203NW705, 41 ALR368; 318Mo 256, 300SW272; MoA 30SW(2d)176; 291Pa492, 140A547; 90 PaSuper155.
1520-65 But see CalA 290P924. **Question is not what motorman "could" have discovered,** but what he "would" have discovered. 224 IllA468.
1520-66½-New. Motorman of street car is not bound to keep watch of overhang zone in rounding curve. 244Mich293, 221NW278.
1521-67 285Pa320, 131A856 (extra care).
1521-70 103NJL690, 137A593.
1522-72 285Pa320, 131A856; 50RI 455, 149A19.
1522-73 33PortoRico 162.
1522-74 Where child is standing in street near curb, motorman need not slacken speed. 318 Ill 570, 149NE469.
1522-75 285Pa320, 131A856 (must keep car under such control as to stop it immediately).
1523-76 299Pa79, 149A104; 33Porto Rico 162 (doctrine of last clear chance applied).
1523-77 10LaA300, 120S483; 293Pa428, 143A108.
1523-78 318 Ill 570, 149NE469; 293Pa 428, 143A108. **Ordinary care** must be exercised by motorman to ascertain child's apparent purpose as to whether he is about to cross track. 318 Ill 570, 149NE469.
1524-79½-New. Proximate cause.–Motorman is not negligent in failing to see child. 215AppDiv549, 214NYS268.
1524-79½-New. or person of any age, 215AppDiv549, 214NYS268.
1524-79¼-New. between crossings, 215 AppDiv549, 214NYS268.
1524-79½-New. if he would have struck him in exercise of reasonable care, 215 AppDiv549, 214NYS268.
1524-79½-New. if some unusual event had not intervened between his beginning to cross tracks and being struck, such as tripping and falling, 215App Div549, 214NYS268.
1524-79½-New. or being caught in rails or pavement, 215AppDiv549, 214NYS 268.
1524-79⅛-New. or in some other manner having his progress impeded. 215 AppDiv549, 214NYS268.
1524-79½-New. Rule would vary at regular crossings where motorman is expected to be vigilant for travel of pedestrians who are expected to be in that part of highway. 215AppDiv549, 214 NYS268.
1524-81 Cal 290P22; 36GaA805, 138SE 359; 133SC335, 131SE592. **One who has dropped his property upon a street car track is not justified in hazarding his own life** by attempting to rescue it when he knews his peril to be imminent. 120 Oh197, 165NE737. **Overhanging of street car** in rounding curve is of such common knowledge that pedestrian will be presumed to know it. 244Mich293, 221NW278. **Pedestrian has right to make use of pavement** under ordinary conditions without fear of injury from street cars. 92PaSuper105. **Person seeing car approaching** needs no other warning or notice of danger. 97PaSuper 344.
1525-83 7LaA612; 9LaA117, 118S847; 308Mo 142, 271SW773; 11PaDist&Co 109.

1525–84 50RI 190, 146A481.
1526–87 135Wash290, 237P737 (overhang of car passing platform).
1526–90 290Pa303, 138A838.
1526–95 89CalA122, 264P538; 102CalA 199, 282P1005; NJSup 149A526; 94Pa Super509; 136Wash407, 240P354; 144 Wash668, 258P824. **Public has right to assume that at street crossings and regular stopping places cars will be under control.** 162Ga511, 134SE319.
1527–97 144Wash668, 258P824.
1527–99 241 IllA1; 133SC335, 131SE 592.
1527–2 43F(2d)286; 36GaA183, 136SE 285; 123Kan262, 255P83; 10LaA72, 120 S271; 10LaA339, 121S365; Mass 170NE 922; Mo 31SW(2d)1014; MoA 299SW 72; 119 Or528, 250P379; 32PortoRico 707.
1527–3 32PortoRico 707.
1528–4 32PortoRico 707.
1528–6 36GaA183, 136SE285; 246Mich 408, 224NW333.
1528–9 MoA 274SW939; 33PortoRico 162 (rule applied to failure of motorman to stop car or ring bell before reaching child standing near track with his back to it).
1529–10 35GaA273, 133SE57.
1529–12½–New. Cerebral thrombrosis as concurring proximate cause of injury. 110Conn615, 149A219.
1529–13 But see 237 IllA226.
1529–17½–New. **Automobile bus operated without authority to use streets is not precluded from recovering for collision with street car.** 126Misc180, 213NYS684 (even if operation of bus is trespass and nuisance, such fact not being proximate cause of collision).
1529–17½–New. Where automobile driver who passes around left side of street car in front of moving street car from opposite direction, and collision follows, he is negligent in view of ordinance providing that, when street car is overtaken, it shall be passed on street car's right. 315Mo 177, 285SW708.
1530–18 291Pa492, 140A547; 90Pa Super155; 32PortoRico 386. **Municipal employee working on water pipe near track held guilty of contributory negligence in not looking and listening for approaching cars.** 32PortoRico 386.
1530–19 See also 80CalA208, 250P1062, 1065 [citCyc]. **Continuous lookout for cars is not required of employee wrapping pipe in street.** 68CalA662, 230P 15. **Laborer in street not required to keep constant watch or look continually for approaching street cars.** 80CalA 208, 250P1062.
1531–25 260Mass404, 157NE356; 150 Wash61, 272P41.
1532–32 109Conn651, 145A30.
1533–40 218AppDiv218, 218NYS125 (five feet); 285Pa399, 132A194.
1533–41 But see 241 IllA1.
1533–42 235 IllA160; 205 Iowa1074, 215NW740; 127Me387, 143A596; 150 Md256, 132A629; Pa 151A703. **Car tracks in suburbs.**–150Md256, 132A629.
1534–43 235 IllA160; 205 Iowa1074, 215NW740; 30 OhA143, 164NE429.
1534–44 203Cal 367, 264P252; 323Mo 1170, 21SW(2d)762 (assumption that car will not be driven at unlawful speed); MoA 297SW193; 285Pa399, 132A194; 93PaSuper206; 144Wash668, 258P824. **Reasonably prudent man will not take chance of street cars slowing up to let him cross street.** 234Mich314, 207NW882.
1535–46 205 Iowa1074, 215NW740. But see 120Kan645, 244P1057.
1535–47 285Pa399, 132A194.
1536–55 235 IllA160; 240 IllA371; 205 Iowa1074, 215NW740; 179Minn172, 228 NW754; MoA 291SW520; 220MoA869, 295SW129; 219AppDiv571, 220NYS 434; 120 Oh197, 165NE737; 288Pa189, 135A739; 92PaSuper193.
1537–56 235 IllA160; 240 IllA371; 234 Mich314, 207NW882; 219AppDiv571, 220NYS434; 13PaDist&Co 24.
1537–57 240 IllA371; 205 Iowa1074, 215NW740; 262Mass66, 159NE498; 234Mich314, 207NW882; 240Mich637, 216NW439; 220MoA869, 295SW129; 154Wash66, 280P931.
1537–59½–New. **Though pedestrian is not subject to more stringent rule of law than other travelers, fact that he has nothing to control except his own locomotion is circumstance of material importance on issue of contributory negligence.** 82NH120, 130A213.
1537–59¾–New. Crossing street car tracks at other than street intersection held not negligence as matter of law. 144Wash668, 258P824.
1537–59¾–New. Rules applicable generally cannot be applied to cases where an officer or semaphore signal is directing traffic. 93PaSuper206.
1537–60 205 Iowa1074, 215NW740; 120Kan269, 243P284; 1LaA529; 8LaA 715; 126Me40, 136A116; 234Mich314, 207NW882; MoA 291SW520; 220MoA 869, 295SW129; 284Pa342, 131A245; 285Pa399, 132A194; 86PaSuper332; 33 PortoRico 236.
1538–61 120Kan269, 243P284; 86Pa Super332; 97PaSuper533. **Negligence for pedestrian to proceed without looking and not stopping after seeing car.**–215AppDiv189, 213NYS362 (particularly at place not regular crossing).
1538–62 205 Iowa1074, 215NW740; 36 OklACR573.
1538–64 220MoA869, 295SW129.
1538–65 205 Iowa1074, 215NW740; 284Pa342, 131A245; 286Pa463, 134A 376.
1539–67 205 Iowa1074, 215NW740; 120Kan269, 243P284 (attention drawn to car approaching from opposite direction on other track); 127Kan527, 274P205; 260Mass512, 157NE360; Mo 271SW62; 220MoA869, 295SW129; 284 Pa342, 131A245 (struck by plainly visible car, irrespective of having stopped, looked, or listened).
1539–68 Mo 271SW62.
1539–71 75CalA129, 242P97; Mo 271 SW62 (but need not stop in every case at all points in passage over crossing).
1539–72 220MoA869, 295SW129; 82 NH120, 130A213. **When view is obstructed, pedestrian is required to exercise increased vigilance.** 215AppDiv 189, 213NYS362.
1539–73 128Me274, 147A157 (strong evidence of negligence); 15 OhA508; 36 OklACR573. But see 33PortoRico 236. Contra 86PaSuper332.
1540–74 89CalA122, 264P538; Mo 271 SW62 (duty required depending on circumstances); 82NH120, 130A213; 33 PortoRico 236.
1540–75 205 Iowa1074, 215NW740; 120Kan269, 243P284; 262Mass485, 160 NE265; Mo 271SW62; MoA 291SW520; 105NJL264, 144A182(2dcase); 284Pa 342, 131A245; 288Pa189, 135A739; 33 PortoRico 236; 153Wash179, 279P570 (2dcase).
1541–77 126Me40, 136A116; Mo 271 SW62. **Stepping back after crossing track.**–88PaSuper263.
1541–78 220MoA869, 295SW129.
1541–79 220MoA869, 295SW129; 33 PortoRico 236.
1541–79½–New. or where he deliberately crosses in front of oncoming car which he sees. 260Mass512, 157NE360.
1542–80 284Pa342, 131A245 (looking on entering street but not on entering track insufficient); 286Pa463, 134A376; 13PaDist&Co 24.
1542–81 205 Iowa1074, 215NW740; 128Me274, 147A157; Mo 271SW62; 284 Pa342, 131A245 (irrespective of having stopped, looked, or listened).
1542–82 30 OhA143, 164NE429(2d case).
1542–82½–New. **Pedestrian is not entitled to assume car would not pick up speed while traveling through safety zone as he is crossing at place not regular crossing.** 215AppDiv189, 213NYS 362.
1543–87 150Md663, 133A598; 293Pa 472, 143A119; TexCivA 299SW507.
1543–88 Iowa 228NW270. **Imminent danger as relates to motorist's duty to be able to stop at street railway crossing is relative term, and must be considered with all surrounding circumstances.** 293Pa472, 143A119.
1544–89 36GaA805, 138SE359.
1544–91 213AppDiv537, 210NYS665; 296Pa212, 145A818.
1544–93 Mass 169NE484.
1545–94 293Pa472, 143A119.
1545–3 203Cal 116, 263P220; 95CalA 704, 273P95; 339 Ill 276, 171NE271. **Where plaintiff was mere trespasser, poor condition of roadway is insufficient excuse for using tracks, and his previous use of tracks is irrelevant.** 214 Ala310, 107S451.
1546–8 233 IllA384; MoA 256SW155; 30 OhA389, 165NE358; 10PaDist&Co 272.
1547–10 203Cal 116, 263P220.
1548–13 214Ala122, 106S799; 233 IllA 384; RI 129A593 (motorman may assume automobile driver will take ordinary care); RI 151A130 (automobile cutting in front of car).
1548–14 296Pa212, 145A818; 93Pa Super199.
1548–15½–New. Where automobile driver's view is obstructed, he must take other means. 214Ala122, 106S799.
1549–17 97PaSuper319.
1549–19 **Where vehicle cannot be driven off tracks in safety, driver is not contributorily negligent as matter of law for not driving off.** 97PaSuper319.
1549–20 25F(2d)579; 180Minn505, 231 NW246; 194NC617, 140SE298. **One leaving vehicle on track without necessity, knowing car is approaching, is guilty of contributory negligence.** 97 PaSuper447.
1550–22 254Mass204, 150NE5; 94Pa Super7.
1550–25 49RI 465, 144A154, 62ALR 305.
1550–28 But see 43F(2d)286.
1551–30 107Conn160, 139A647; NJSup 142A452; 290Pa288, 138A830; 293Pa 472, 143A119; 89PaSuper417; 92Pa Super332; 93PaSuper503; 97PaSuper 260.
1551–33 150Md663, 133A598; NH 146 A714; 127 Or518, 273P701 (crossing tracks of electric railroad requires same care as in crossing tracks of steam railroad); 290Pa288, 138A830; 97PaSuper 295; 133SC335, 131SE592.
1552–34 12LaA110, 124S692 (held contributory negligence); 150Md663, 133A 598. **Vehicles should be under absolute control of their operators in approaching public crossings.** 290Pa288, 138A 830.
1552–35 314Mo 158, 282SW710 (instruction that plaintiff crossing tracks could not rely on presumption that street car would run at ordinary speed held error); 290Pa288, 138A830. **Automobilist cannot rely on compliance by car driver with ordinance to extent of failing to make use of his own senses.** MoA 284SW845. **Truck driver cannot avail himself of ordinance requiring car to stop for passengers where he did not rely on belief that car would stop.** MoA 284SW845.
1553–38 78CalA617, 248P741; 82CalA 141, 255P215; 123Kan262, 255P83; Mo 31SW(2d)1014; MoA 284SW845; 290 Pa288, 138A830; 87PaSuper321; 92 PaSuper157; 133SC335, 131SE592.
1553–39 78CalA617, 248P741; 1LaA 275; 150Md663, 133A598; 127 Or518, 273P701.
1554–40 87PaSuper253; 93PaSuper262.
1554–41 266Mass141, 164NE803; 133 SC335, 131SE592; 153Va704, 151SE133; 153Va586, 151SE142.
1554–42 97PaSuper295.
1554–46 Utah 290P970.
1554–47 314Mo 158, 282SW710 (instruction requiring continuous looking by wagon driver in crossing tracks after seeing street car held erroneous); 103NJL583, 137A526.
1555–48 Iowa 227NW915; 120Kan645, 244P1057; 10LaA715, 123S172; 260 Mass404, 157NE356; 103NJL583, 137A 526; 285Pa362, 132A184; 296Pa212, 145A818; 90PaSuper232; 97PaSuper 477; 53SD649, 222NW270. **Extraordinary care is required if, as result of obstructions or angle of intersection of track with roadway, unusually hazardous situation is created.** 10LaA715, 123 S172.
1555–49 103NJL583, 137A526; 92Pa Super193; 35PortoRico 695; RI 129A 593; RI 136A17; 53SD649, 222NW270.
1555–51 213Ala672, 106S147; 150Md 663, 133A598; 285Pa362, 132A184. **Other vehicles.**–213Ala672, 106S147. **When driving over double line of tracks automobile driver has duty of looking for approach of cars at entrance of each**

track before attempting to cross. 290 Pa288, 138A830.

1555-52 123Kan262, 255P83; 150Md 256, 132A629; 90PaSuper232.

1556-53 150Md663, 133A598.

1556-57 150Md663, 133A598; 103NJL 583, 137A526; 213AppDiv537, 210NYS 665; 285Pa362, 132A184; TexCivA 19 SW(2d)416. **Where a driver fails to look at a point where the car could be seen,** etc. 95PaSuper461.

1557-58 150Md663, 133A598; 156Md 472, 144A819; MoA 299SW72.

1558-61 25F(2d)579.

1558-62 123Kan262, 255P83; 150Md 256, 132A629; 134Misc188, 234NYS722; 95PaSuper116; 95PaSuper286; 96Pa Super265; 97PaSuper260.

1559-63 95PaSuper461.

1559-65½-New. Driver alighting from automobile stalled near tracks to crank it, without looking for approaching car, is guilty of contributory negligence. 260Mass404, 157NE356.

1559-66 Police patrol wagons are not subject to ordinary traffic regulations. 218MoA172, 265SW875.

1560-74 202Cal 474, 261P465; 82Colo 51, 256P1088; 237 IllA226; 254 IllA 362; 201 Iowa1044, 207NW984; 120 Kan645, 244P1057; 167Minn144, 208 NW759; 173Minn402, 217NW377; 310 Mo 227, 274SW1025; 315Mo 177, 285SW 708 (where negligence of automobile driver and of motorman concurred); 116Nebr487, 218NW135; 283Pa533, 129 A571; 290Pa288, 138A830; 290Pa303, 138A838; 97PaSuper344; 133SC335, 131SE592; 193Wis105, 213NW666. But see RI 151A130. **Guest reading newspapers.**-290Pa288, 138A830.

1561-76 290Pa288, 138A830; Utah 290 P970. **Guest who undertakes to aid in driving automobile** at railroad intersection is responsible for result of his own acts. 290Pa288, 138A830.

1561-78 43F(2d)286; 233 IllA384; 237 IllA226; 254 IllA362; 259Mass415, 156 NE748; 310Mo 227, 274SW1025; MoA 16SW(2d)684 (degree of care in avoiding danger not same as driver's); MoA 26SW(2d)851; Utah 290P970. **Duty depends on circumstances.**-120Kan645, 244P1057. **Failure to caution driver** as to excessive speed held not contributory negligence per se. 193Wis105, 213NW 666. **Failure to look for cars** held not contributory negligence per se. 193 Wis105, 213NW666. **Guest is liable for action or failure to act** where he knew or must have realized the peril. 290 Pa288, 138A830. **Guest or invitee has no active duty** to discover street cars when with alert driver. Utah 290P 970. **Wife as guest of driver** need not exercise same care as driver. Utah 290 P970.

1561-79 Ark 31SW(2d)415; 233 IllA 384 (owner of truck has duty of due care to avoid injury as well as driver); Iowa 230NW387; 259Mass415, 156NE 748; 260Mass404, 157NE356; 310Mo 227, 274SW1025; 30 OhA21, 164NE59; 290Pa288, 138A830; 292Pa489, 141A 300; 295Pa203, 145A73; 97PaSuper 344; 97PaSuper533 (wife of driver with equal opportunity to see danger is contributorily negligent where she failed to protest). **Relying on driver.**-120Kan 645, 244P1057. **It must be shown that occupant saw danger and made no effort to avoid it** or joined driver in testing danger to impute negligence. 299 Pa163, 149A186.

1561-79½-New. If person in automobile was injured in collision between street car and automobile due to violation of city ordinance by driver of automobile, he cannot recover against street railway company if driver's negligence was sole and proximate cause of accident. 315Mo 177, 285SW708.

1562-88 299Pa79, 149A104.

1563-91 That the child was playing on the street, etc. See also 247NY111, 159 NE879.

1564-96 1LaA493, 496 [quotCyc].

1565-98 107Conn304, 140A751; 120 Kan269, 243P284.

1565-99 10LaA72, 120S271.

1565-2 107Conn304, 140A751.

1565-2½-New. Plaintiff, though negligent, may recover unless negligence was proximate cause of injury. 28 OhA183, 162NE614.

1565-2½-New. One incapable of reasonable care because of attack of cerebral thrombosis has been held not contributorily negligent. 110Conn615, 149 A219.

1565-3 203Cal 116, 263P220; 78CalA 617, 248P741 (elements of doctrine enumerated); 223Ky311, 3SW(2d)604; Mo 24SW(2d)633; 221MoA1071, 296SW167; 224AppDiv55, 229NYS162; 36 OklACR 573; 32PortoRico 707 [citCyc]; Tex CivA 280SW342; TexCivA 9SW(2d)185; 153Wash179, 279P570(2dcase); Alta [1930] 3DomLR539. See also 1LaA493. Contra 233 IllA384.

1566-4 MoA 278SW1087; MoA 17 SW(2d)392; MoA 19SW(2d)902; 32 PortoRico 707 (doctrine not applied). But see 224AppDiv55, 229NYS162; 132 Or648, 286P991. Contra 233 IllA384. **Care that must be exercised** by operator is that which ordinarily prudent and skillful motorman would exercise under same or similar circumstances. 218MoA563, 267SW6. **Driver of auto enters danger zone,** requiring motorman to stop, when driving steadily onward with attention fixed to car coming from other direction. MoA 278SW1087. **Doctrine of supervening negligence is applicable.**-108Conn133, 142A676. **Under ordinance requiring vigilant watch,** duty to discover peril begins when agents of company can see automobile, if they are looking. 310Mo 642, 276SW 60.

1567-6 197Cal 702, 242P703; 91CalA 752, 267P731; MoA 278SW1087.

1567-7 203Cal 116, 263P220.

1567-8 25F(2d)579; 78CalA617, 248P 741; 92CalA100, 267P758; 126Me40, 136A116; 128Me274, 147A157; 248Mich 403, 227NW736; 132 Or648, 286P991; 32PortoRico 707; 146Wash660, 264P 419. See also 224AppDiv55, 229NYS162. **Where injury was due to motorman's antecedent negligence** doctrine is inapplicable. MoA 17SW(2d)363.

1568-10 Contra 203Cal 116, 263P220.

1568-11 25F(2d)579; 81CalA772, 254 P926; 108Conn71, 142A406; 120Kan 269, 243P284; 8LaA277; MoA 297SW 193; NH 146A714; 32PortoRico 707. **Recovery for damages** on subsequent negligence must rest upon actual knowledge of peril. 214Ala310, 107S451.

1568-12 221Ala91, 127S519 (care required of motorman); 88CalA648, 263P 1039; CalA 285P409; 107Conn304, 140 A751; Iowa 227NW915; 213Ky590, 281 SW523; 7LaA127; 156Md472, 144A519; 224AppDiv55, 229NYS162.

1568-16 108Conn71, 142A406; 82NH 120, 130A213. **Where street car operator has good reason to believe that person is about to leave track,** doctrine of discovered peril is inapplicable. Tex CivA 280SW342.

1568-17½-New. Doctrine of last clear chance is inapplicable where person injured is incapable of contributory negligence. 149Md443, 131A822 (four-year-old child).

1569-18 250 IllA617; 224AppDiv55, 229 NYS162.

1569-21 102Conn676, 129A790; 224 AppDiv55, 229NYS162.

1570-27 Holders of several series of bonds may be proper parties to sue to determine validity of plan for refinancing. 234Ky802, 29SW(2d)552.

1570-28 105Conn94, 134A248.

1570-29 105Conn94, 134A248 (holding necessity of notice not obviated by Gen. St. [1918] § 6176, relating to new action against proper defendant); Mass 172NE80. **In Massachusetts.**-262Mass 104, 159NE606.

1571-33 Complaint, declaration, or petition held sufficient.-80CalA208, 250P 1062; 124 Okl 233, 254P969 (as against objection to introduction of evidence). **Complaint, declaration or petition held insufficient.**-13PaDist&Co 235.

1572-35 254 IllA362 (sufficient).

1573-40 29Hawaii188.

1573-44 36GaA183, 136SE285. **Petition held not demurrable as showing contributory negligence.**-TexCivA 21SW (2d)97.

1573-47 Allegations held sufficient to charge negligence.-102Conn676, 129A 790; 218MoA172, 265SW875 (collision of police patrol wagon with street car); TexCivA 272SW255. **Allegations held insufficient to charge negligence.**-24 OhA 82, 156NE248. **Allegation that agent of defendant negligently caused or allowed** street car to collide held sufficient, "negligently" applying to both alternatives. 214Ala122, 106S799. **Count alleging negligence in failure to maintain tracks** as prescribed by city ordinance not demurrable for failure to allege want of due care. 214Ala122, 106S799. **Allegations held sufficiently specific.**-TexCivA 299SW325. **When complainant intends to rely on application of doctrine of last clear chance,** he must allege necessary facts. 32PortoRico 707.

1574-49 219Ala324, 122S316. **Petitions held to charge general negligence.**-MoA 293SW89.

1575-60 214Ala310, 107S451.

1576-65 30 OhA389, 165NE358. But see 5PaDist&Co 783.

1576-68 Discovered peril.-240Mich637, 216NW439.

1577-77 21AlaA395, 108S651.

1577-80 Under allegation that automobile skidded on tracks, evidence that automobile stopped on street car tracks is admissible. 143Wash541, 255P947.

1578-81 221Ala91, 127S519.

1579-90 262Mass475, 160NE327; Tex CivA 11SW(2d)525(2dcase).

1580-95 MoA 30SW(2d)176. **The variance has been held immaterial** between allegation that car suddenly and without warning struck automobile and evidence that both vehicles were going in southerly direction and their paths crossed at acute angle. TexCivA 274SW 1008.

1580-96 91CalA448, 267P164; MoA 30 SW(2d)794; 47RI 334, 133A242; 48RI 18, 134A642.

1581-97 5LaA292; 213AppDiv390, 210 NYS553. **No presumption that lights were not burning** on electric car running in suburbs before daylight. 150 Md256, 132A629. **Where railroad company is under no duty to keep lookout for trespassers,** no presumption that motorman was looking ahead can arise. 214Ala310, 107S451.

1581-98 298Pa223, 148A87. **Street car motorman is presumed** to have been looking ahead and performing his duty in action for injuries resulting from collision. 293Pa428, 143A108.

1581-99 107Conn304, 140A751; 77Mont 124, 249P1070; 213AppDiv390, 210NYS 553; RI 136A17.

1581-1 203Cal 367, 264P252; 77Mont 124, 249P1070; 213AppDiv390, 210NYS 553.

1582-2 Actual knowledge that plaintiff was upon track under circumstances reasonably indicating peril may be inferred from proof that motorman was looking ahead. 214Ala310, 107S451.

1582-3 77Mont124, 249P1070.

1582-5 Upon showing that trolley ran into car ahead prima facie case is made out. 48RI 18, 134A642.

1582-7 48RI 18, 134A642.

1582-10½-New. As law does not specify kind of fenders to be used by railroads, one in use for many years will be considered compliance with law unless proved to be inefficient. 9LaA117, 118S 847.

1582-11 256 IllA569; 157Md464, 146A 279; 310Mo 227, 274SW1025; 213App Div390, 210NYS553; 24 OhA82, 156NE 248; 47RI 334, 133A242; TexCivA 272 SW256.

1583-13 MoA 293SW89. See also 294 Pa230, 144A97. **To run down child in daylight in unobstructed street** is evidence of negligence unless child darted into path of street car. 299Pa79, 149A 104.

1584-16 249NY236, 164NE36.

1584-16½-New. That interurban car overhung platform on which plaintiff's intestate was standing is not alone proof of negligence. 135Wash290, 237P737.

1584-17 107Conn304, 140A751.

1584-18 107Conn304, 140A751; 109 Conn481, 146A850; 126Me40, 136A116; 255Mass292, 151NE315; Mich 216NW 381; 299Pa79, 149A104; RI 136A17.

But see Mo 30SW(2d)445. **When plaintiff proves freedom from contributory negligence,** burden of proof thereof is on defendant. 299Pa79, 149A104.

1584-19 260Mass404, 157NE356; 323 Mo1170, 21SW(2d)762; 285Pa399, 132A194. See also 218AppDiv218, 218NYS 126. **It will be presumed** that injured person did what seemed to him necessary to protect his safety by looking and listening. 285Pa399, 132A194. **Presumption held rebuttable.**–285Pa399, 132A194. **Evidence on plaintiff's due** care wipes out presumption. Mass 169 NE484.

1584-20 Ala 130S413; 203Cal 367, 264 P252; 75CalA129, 242P97; 80CalA641, 252P628; 29Hawaii188; 261Mass318, 158NE670; 266Mass214, 165NE36; Mo 30SW(2d)445; 218AppDiv218, 218NYS 126; TexCommnA 11SW(2d)303. **Plaintiff not required to disprove contributory negligence.**–285Pa399, 132A194.

1584-20½-New. There is no presumption that guest, in automobile struck by street car, was negligent. 283Pa 533, 129A571.

1584-20¾-New. Burden of proof is on plaintiff to show application of last clear chance doctrine. 108Conn474, 143A527.

1585-23 NH 146A714.

1585-26 218MoA563, 267SW6 (evidence corroborating other testimony); 83NH 538, 145A263(2dcase).

1586-23 221Ala91, 127S519; 98CalA 189, 270P591; 123Kan128, 253P1090; 266Mass214, 165NE36. **Evidence held inadmissible.**–214Ala310, 107S451. **Rules of railroad** held immaterial. 256 Mass493, 152NE738.

1586-29 Evidence is inadmissible as to gasoline being ignited and deceased being burned, where proximate cause of death was collision. **TexCivA 9SW(2d)** 185.

1586-30 Evidence held admissible.–169 Minn342, 211NW580 (blindness from dazzling light of automobile driver may be established by circumstantial evidence). **Evidence as to conditions existing at crossing** fifty-six days after accident is inadmissible. 261Mass333, 158NE660.

1587-32 285Pa399, 132A194; 5PaDist&Co 783. **Ordinance authorizing railroad** company on parkway section of street, by placing alongside of rails a concrete curb, held admissible. 214Ala310, 107 S451. **Ordinance requiring equipment of motor cars** with sand boxes to facilitate stopping is admissible against street railroad. 202Cal 474, 261P465.

1588-33 See also 5PaDist&Co 783.

1588-36 Contra Ill 233A432. **Rules of company admissible on question of credibility of witnesses.**–233 IllA432.

1588-36½-New. Whether motorman neglected to perform duty to stop car quickly may be tested only by judgment of other motormen, or men having special knowledge of mechanism provided for that purpose, and of most efficient manner of applying it. 232Mich399, 205NW 124.

1588-37 NJ 131A624.

1589-45 Evidence of reputation of employee as reckless motorman is not admissible. 232Mich399, 205NW124.

1592-68½-New. Evidence of invalid ordinance requiring headlights is inadmissible. 318 Ill 402, 149NE422.

1592-69 290Pa303, 138A838.

1593-75 Distance traveled after collision admissible.–116Nebr487, 218NW135.

1594-76 Motorman may be examined as to speed which it was possible for similar street car to attain. 202Cal 474, 261 P465.

1594-78 181Ark145, 28SW(2d)1077; Mass 169NE484; 169Minn342, 211NW 580 (witnesses driving automobiles under substantially like circumstances may testify as to being blinded by light).

1594-80 NJSup 136A604; 213AppDiv 390, 210NYS553 (drinking by injured party and also by driver of automobile in which he was riding).

1594-82 241 IllA1.

1595-83 But see 89CalA122, 264P538.

1595-86 218MoA172, 265SW875 (driver of patrol wagon may testify he expected street car to stop as he approached narrow passageway).

1596-93 Evidence held to show disease and not accident was cause of amputation of leg. 214Ala104, 106S593, 46ALR 1459. **Evidence held sufficient.**–285Pa 399, 132A194; 299Pa163, 149A186.

1596-94 Evidence held sufficient.–CalA 268P469; 106Conn291, 137A750; 36 GaA805, 138SE359; MoA 16SW(2d) 1012; 30 OhA143, 164NE429(2dcase); 150Va442, 143SE681. **Evidence held insufficient.**–NJSup 142A425; 284Pa599, 131A475; 154Wash73, 280P928. **Evidence held to warrant nonsuit.**–47RI 334, 133A242.

1597-97 Evidence insufficient.–299Pa 163, 149A186.

1597-98 Evidence held sufficient.–CalA 265P1019; 82Colo 51, 256P1088. **Evidence held insufficient.**–256Mass493, 152 NE738; 246Mich408, 224NW333; 249 NY236, 164NE36.

1597-2 Evidence held sufficient.–197Cal 148, 239P1061; CalA 280P154; 82Colo 51, 256P1088; 218MoA172, 265SW875 (act of pedestrian stepping in front of police patrol causing it to swerve and collide with street car held not proximate cause of injury); 77Mont124, 249 P1070; 22 OhA413, 153NE274; 28 OhA 453, 162NE791; TexCivA 9SW(2d)185. **Evidence held insufficient.**–10LaA72, 120 S271. **Inferences** from evidence may be sufficient. 197Cal 148, 239P1061. **Direct evidence** is not necessary. 197Cal 148, 239P1061.

1598-3 MoA 30SW(2d)176.

1600-17 Evidence held sufficient.–197 Cal 148, 239P1061; 203Cal 367, 264P 252; 205Cal 73, 269P922; 95CalA704, 273P95; CalA 280P154; 82Colo 51, 256 P1088; 237IllA226; 85 IndA516, 151 NE742; 231Ky141, 21SW(2d)236; 12 LaA277, 124S706; 262Mass485, 160NE 265; Mass 170NE65; 176Minn377, 223 NW619; 103NJL690, 137A593; NJ Sup 146A460(1stcase); 21 OhA57, 152 NE773; 28 OhA183, 162NE614; 85 PaSuper434; 92PaSuper105; 92PaSuper386; 97PaSuper351; 44Philippine 165; RI 137A780; 49RI 430, 143A780; TexCivA 7SW(2d)934; TexCivA 23SW (2d)739. **Evidence held insufficient.**–123 Kan128, 253P1090; 7LaA615; 124Me 418, 130A273; 167Minn144, 208NW759; Mo 271SW749; NJSup 135A783; 298 Pa223, 148A87; 92PaSuper242; 92Pa Super442; 94PaSuper371; 97PaSuper 600. **Verdict for plaintiff not against evidence.**–RI 148A595.

1601-18 197Cal 148, 239P1061. **Evidence held sufficient.**–202Cal 474, 261P 465; 82CalA141, 255P215; 102CalA199, 282P1005; 237 IllA226; 103NJL690, 137A593; 215AppDiv549, 214NYS268; 86PaSuper234. **Evidence held insufficient.**–125Kan683, 265P1103; 257Mass 550, 154NE259; 167Minn144, 208NW 759.

1601-19 Evidence held sufficient.–197 Cal 702, 242P703 (to justify finding of negligence by defendant); 103NJL690, 137A593; 124 Okl 233, 254P969; 89Pa Super417; 92PaSuper105; 33PortoRico 162. **Evidence held insufficient.**–104CalA 89, 285P409; 108Conn71, 142A406. **Vigilant-Watch Ordinance.**–308Mo 142, 271SW773.

1602-20 Evidence held sufficient.–175 Minn22, 220NW162; 124 Okl 233, 254P 969; 87PaSuper46; TexCivA 28SW(2d) 906. **Evidence held insufficient** to show negligence. 253Mass494, 149NE148.

1603-21 MoA 19SW(2d)902; 144Va387, 132SE185 (evidence held insufficient). **Evidence held sufficient.**–92CalA100, 267 P758 (finding supported); 103NJL690, 137A593. **Evidence held to show** doctrine of last clear chance inapplicable. 12LaA277, 124S706.

1603-22 220Ala540, 126S847; 221Ala 325, 128S793 (holding evidence insufficient to show that motorman inflicted wanton injury).

1603-22½-New. Evidence sufficient to show unavoidable accident. TexCivA 272SW256.

1603-23 Evidence held insufficient.–135 Wash290, 237P737.

1603-23½-New. Finding that headlight of street car colliding with an automobile was red held insufficient and against weight of evidence. 218AppDiv 348, 218NYS599.

1604-24 Evidence held sufficient.–262 Mass485, 160NE265; TexCivA 274SW, 1008. **Evidence held insufficient.**–257 Mass550, 154NE259; 295Pa158, 145A 69; 135Wash290, 237P737.

1604-25 197Cal 148, 239P1061; 75CalA 129, 242P97.

1604-27 292Pa489, 141A300; 97Pa Super295.

1604-28 Evidence held sufficient.–75 CalA129, 242P97; 102CalA199, 282P 1005; 237 IllA226; 93PaSuper290. **Evidence held insufficient.**–167Minn144, 208 NW759; 295Pa158, 145A69; 298Pa223, 148A87. **Evidence that car stopped near place of accident** held to negative recklessness. 288Pa189, 135A739. **That street car moved fifty feet after colliding** with automobile did not prove excessive speed when rails were ice covered. 298 Pa223, 148A87.

1605-29 Evidence held sufficient.–197 Cal 148, 239P1061; MoA 278SW1071.

1605-30 Evidence held sufficient.–205 Cal 73, 269P922; 78CalA617, 248P741; 81CalA772, 254P926; 109Conn559, 147 A20; 240 IllA371; Iowa 230NW387 (guest riding in truck); 10LaA72, 120S 271; 9LaA117, 118S847; 11LaA338, 123 S373; 12LaA277, 124S706; 103NJL583, 137A526; 119 Or528, 250P379; 287Pa 586, 135A719; 93PaSuper369; 94Pa Super409. **Evidence held insufficient.**–201 Iowa1044, 207NW984; Mo 29SW (2d)50. **Verdict on issue held against weight of evidence.**–NJSup 135A783.

1605-31 Evidence held sufficient.–202 Cal 474, 261P465; 85 IndA516, 151NE 742; 259Mass557, 156NE532; 218App Div218, 218NYS126; 92PaSuper189; TexCivA 274SW1008. **Evidence held insufficient.**–109Conn481, 146A850.

1606-34 Evidence held sufficient.–253 IllA135; 123Kan262, 255P83; 10LaA 300, 120S483; 243NY249, 153NE64; 292Pa489, 141A300. **Evidence required finding of contributory negligence,** regardless of statutory presumption. Mass 171NE441.

1606-35 Evidence held sufficient.–197 Cal 702, 242P703 (to show plaintiff used reasonable care to escape danger, after becoming aware of it); 85 IndA350, 151 NE703; 245NY600, 157NE874; 218App Div218, 218NYS126.

1607-36 144Va387, 132SE185 (evidence held to show negligence). **Evidence held to establish contributory negligence.**–229AppDiv136, 241NYS135.

1607-38 Mich 216NW381. **Evidence** held insufficient to show contributory negligence as matter of law. 308Mo 142, 271SW773.

1607-38½-New. Evidence insufficient to prove that street car motorman had last clear chance. 143Va920, 129SE700.

1607-38¼-New. Evidence held sufficient to support allegations of discovered peril. TexCivA 21SW(2d)97.

1607-38¾-New. Evidence held insufficient to apply humanitarian doctrine. 109Conn559, 147A20.

1607-40 Loss of capacity to pursue profession because of personal injury is proper element of damage. 44Philippine 165.

1608-46½-New. Overruling demurrer to evidence on ground that it was unbelievable, contrary to nature and physical facts sustained, situation being peculiarly for jury. MoA 273SW777.

1603-48 226Ky739, 11SW(2d)930; 266 Mass424, 165NE393; 310Mo 227, 274SW 1025; MoA 1SW(2d)227; 103NJL690, 137A593; 124 Okl 233, 254P969; 92Pa Super386; 48RI 18, 134A642; SD 226 NW644. **Evidence held sufficient.**–201 Iowa1044, 207NW984; 200 Iowa597, 203 NW705, 41ALR368; 149Md443, 131A 822; 142Wash25, 252P164. **Liability of holding company** for negligent operation of railroad by subsidiary company is question for jury. 24F(2d)383. **Motorman's version of collision** between street car and truck at street intersection is not to be treated as conceded because not denied. SD 226NW644.

1608-49 CalA 290P924; 82Colo 47, 256 P658; 263Mass574, 161NE608; 77Mont 124, 249P1070; 9PaDist&Co 792; Tex CivA 30SW(2d)1108. **Evidence held sufficient.**–284Pa599, 131A475.

1609-51 NJSup 143A809; 121 Or519, 254P809.
1609-52 149Md443, 131A822 (child run over and killed); MoA 10SW(2d)331.
1609-55 Colo 291P1019; 36GaA805, 138SE359; 254 IllA362; 258Mass142, 154NE550; 237Mich393, 212NW75; 167 Minn309, 208NW1007; 87PaSuper273; RI 137A697; 49RI430, 143A780; SD 226NW644.
1610-59 MoA 273SW777.
1610-60 258Mass142, 154NE550; Mass 169NE484; 121 Or519, 254P809.
1611-62 284Pa599, 131A475 (holding proper setting aside verdict for plaintiff and entering judgment for defendant where evidence showed accident could not have occurred in manner claimed by plaintiff); 96PaSuper442; RI 129A593 (verdict properly directed).
1611-63 36GaA143, 136SE85; 317Mo 524, 297SW404. **Whether a pedestrian's act in stepping in front of police patrol wagon** was independent cause of its collision with street car is for jury. 317 Mo 524, 297SW404.
1611-64 214Ala122, 106S799 (defendant in control of car not entitled to affirmative charge on question of negligence); 206Cal 648, 275P785; 36GaA143, 136SE 85; 39GaA61, 146SE40; 265Mass125, 163NE862; 266Mass214, 165NE36; 167 Minn144, 208NW759; 224AppDiv623, 231NYS649.
1611-65 80CalA208, 250P1062; CalA 268P469; 149Md443, 131A822 (speed of car, and operation without warning or watchfulness); 153Md119, 137A484; 262Mass104, 159NE606; 265Mass176, 163NE752; 237Mich393, 212NW75; 173 Minn186, 217NW99; 173Minn402, 217 NW377; MoA 18SW(2d)518; MoA 23 SW(2d)193; 103NJL690, 137A593; NJ 141A1; 131Misc170, 226NYS382; 193NC 262, 136SE723; 30 OhA143, 164NE429 (2dcase); 285Pa362, 132A184; 286Pa 536, 134A446; 298Pa423, 148A520; 85 PaSuper275; 94PaSuper553; 97PaSuper 492; RI 145A310(1stcase).
1612-66 181Ark145, 28SW(2d)1077; MoA 287SW803; MoA 297SW193; MoA 32SW(2d)100; 30 OhA143, 164NE429; TexCivA 297SW534; TexCivA 30SW (2d)1108.
1612-67 TexCivA 30SW(2d)1108.
1612-71 43F(2d)286; 82Colo 47, 256P 658; 157Md464, 146A279; 244Mich293, 221NW278; 293Pa428, 143A108; Tex CivA 30SW(2d)1108.
1612-74 223Ky311, 38W(2d)604; 49 RI 375, 142A619.
1612-75 234Mich268, 207NW923.
1613-77 Mass 171NE425 (traffic policeman).
1613-79 221Ala139, 127S825; CalA 289 P662; 111Conn521, 150A520; 36GaA 805, 138SE359; MoA 24SW(2d)208; NJ Sup 138A690; 85PaSuper275 (stalled on tracks); 87PaSuper46; 88PaSuper 20; RI 150A259.
1613-80 265Mass344, 163NE860; 310 Mo 227, 274SW1025; 322Mo 1103, 19SW (2d)707, 65ALR129; 49RI 430, 143A 780.
1614-82 203Cal 427, 264P756.
1614-84 191NC13, 131SE402 (whether fender was "practical").
1615-87 197Cal 148, 239P1061; 110 Conn615, 149A219; 36GaA805, 138SE 359; 252Mass300, 147NE829; 259Mass 433, 156NE543; 261Mass318, 158NE 670; Mass 171NE662; 310Mo 642, 276 SW60; MoA 277SW585; NJSup 145A8; 22 OhA413, 153NE274; TexCivA 299SW 325. **Evidence insufficient to take question to jury.**–TexCivA 280SW342. **Whether view of motorman was obstructed was for jury.** 299Pa79, 149A 104.
1615-88 17F(2d)477; 107Conn160, 139 A647; 200 Iowa597, 203NW705, 41ALR 368; 167Minn309, 208NW1007; RI 132 A886 (overturned automobile on track).
1615-89 NJSup 130A727.
1615-91 17F(2d)477; 125Me229, 132A 521; 252Mass300, 147NE829; 257Mass 541, 154NE89; 167Minn309, 208NW 1007; NJSup 145A8; 21 OhA57, 152 NE773; 92PaSuper332; 50RI 455, 149 A19; 143Wash541, 255P947.
1616-94 TexCivA 299SW325.
1616-95 Mo 31SW(2d)1014.
1616-96 318 Ill 570, 149NE469; 200 Iowa597, 203NW705, 41ALR368 (pedestrian standing in safety zone struck by oversweep of car turning corner); 266Mass424, 165NE393; 247NY111, 159 NE879; 85PaSuper434; 93PaSuper206; 49RI 465, 144A154, 62ALR305; 136 Wash407, 240P354.
1617-97 36GaA805, 138SE359; MoA 17 SW(2d)363; 136Wash407, 240P354; 136Wash544, 240P903 (where, because of change of traffic signals and to avoid car, pedestrian stepped back and was struck by overhang as car rounded curve).
1617-98 318 Ill 570, 149NE469; 252 Mass300, 147NE829; MoA 17SW(2d) 363.
1617-99 173Minn265, 217NW130; 317 Mo 524, 297SW404; NJSup 143A740; RI 144A769(2dcase).
1618-1 175Minn615, 221NW244.
1618-3 107Conn160, 139A647; 252Mass 300, 147NE829; 283Pa533, 129A571; 285Pa320, 131A856. **Evidence insufficient to go to jury.**–TexCivA 280SW342.
1618-4 107Conn160, 139A647; MoA 272SW1064; MoA 273SW777; 21 OhA 57, 152NE773; 283Pa533, 129A571; 285Pa320, 131A856; RI 144A769; Tex CivA 299SW325; TexCivA 9SW(2d) 185; 143Wash541, 255P947. **Evidence held insufficient for jury.**–150Md256, 132A629. **Question properly taken from jury.**–TexCivA 280SW342. **Where there is no evidence of actual speed,** question cannot go to jury. 97PaSuper295.
1618-5 197Cal 148, 239P1061; 257 Mass541, 154NE89; MoA 273SW777; 286Pa536, 134A446.
1618-6 252Mass300, 147NE829.
1618-6½-New. or whether street car's violation of speed ordinance was proximate cause of collision, MoA 296SW 823.
1618-7 205Cal 73, 269P922; CalA 265 P1019; 254Mass302, 150NE156; Mass 171NE662; 170Minn35, 211NW955 (running at speed through fog); 310 Mo 642, 276SW60; Mo 16SW(2d)100; 193NC262, 136SE723; 285Pa320, 131A 856; RI 135A36. **Evidence held sufficient, etc.** 290Pa303, 138A838. **Evidence insufficient to go to jury.**–RI 136 A17.
1619-8 258Mass142, 154NE550.
1619-9 310Mo 642, 276SW60.
1620-12 85CalA69, 258P1006; TexCivA 299SW325; 142Wash25, 252P164. **Evidence held insufficient for jury.**–150Md 256, 132A629.
1620-13 213Ala672, 106S147; 85CalA 69, 258P1006; 214Ky36, 281SW1036; 259Mass433, 156NE543; MoA 17SW(2d) 363; MoA 32SW(2d)100; 290Pa303, 138A838; 141Wash23, 250P467; 142 Wash25, 252P164; 146Wash383, 262P 961.
1620-14 107Conn160, 139A647; Tex CivA 9SW(2d)185; 141Wash23, 250P 467. **Evidence held insufficient to go to jury.** 88CalA648, 263P1039.
1620-15 197Cal 148, 239P1061 (negative evidence); 75CalA129, 242P97; 214 Ky36, 281SW1036; MoA 22SW(2d)863; 153Va704, 151SE133.
1620-16 231Ky141, 21SW(2d)236; 257 Mass541, 154NE89; MoA 16SW(2d)684; 136Wash407, 240P354; 141Wash23, 250 P467; 146Wash383, 262P961.
1621-23 Iowa 228NW270; Mo 274SW 399; MoA 296SW1036; 105NJL196, 143 A442.
1621-24 Mass 169NE484.
1622-26 214Ala122, 106S799; Ala 130 S413; 203Cal 367, 264P252; 89CalA 122, 264P538; 111Conn521, 150A520; 36GaA143, 136SE85; 232 IllA246; 237 IllA226; 85 IndA350, 151NE703; 214 Ky36, 281SW1036; 252Mass300, 147NE 829; 254Mass302, 150NE156; 265Mass 344, 163NE860; 266Mass424, 165NE 393; Mass 169NE484; 310Mo 642, 276 SW60; MoA 273SW777; 82NH120, 130 A213; 243NY90, 152NE475; 217AppDiv 537, 216NYS558; 224AppDiv623, 231 NYS649; 30 OhA143, 164NE429(2d case); 85PaSuper275; 48RI 18, 134A 642; 142Wash25, 252P164; 144Wash 676, 258P832.
1622-27 17F(2d)477; Cal 290P22; 75 CalA129, 242P97; 78CalA215, 248P307; 88CalA354, 263P578; CalA 268P469; 232 IllA246; 85 IndA516, 151NE742; 200 Iowa597, 203NW705, 41ALR368 (pedestrian standing in safety zone struck by oversweep of car turning corner); Iowa 228NW270; 153Md119, 137A484; 257 Mass541, 154NE89; 259Mass433, 156 NE543; 262Mass104, 159NE606; 266 Mass214, 165NE36; 169Minn278, 211 NW462; 169Minn342, 211NW580; Mo 274SW399; MoA 273SW777; MoA 273 SW1092; 220MoA934, 296SW1031; MoA 296SW1036; MoA 19SW(2d)534; NJ 141A1; 21 OhA57, 152NE773; 92PaSuper105; RI 145A310; 136Wash407, 240 P354; 141Wash23, 250P467; 144Wash 676, 258P832. **Sudden peril.**–162Ga511, 134SE319. **Evidence held not to show contributory negligence** as matter of law. 36GaA805, 138SE359.
1623-29 136Wash407, 240P354.
1623-30 17F(2d)477; 200 Iowa597, 203 NW705, 41ALR368.
1623-30½-New. Contributory negligence is question of law only when court is compelled to say that reasonable men could draw only one inference from facts. 75CalA129, 242P97.
1623-31 25F(2d)579; 219Ala324, 122 SE316; 260Mass404, 157NE356; 234 Mich314, 207NW882; 247Mich634, 226 NW649; MoA 299SW72; 82NH120, 130 A213 (evidence held insufficient to go to jury); 102NJL644, 133A196; NJSup 143A809; 28 OhA183, 162NE614; 30 OhA389, 165NE358; 49RI 465, 144A154, 62ALR305; 143Wash541, 255P947. **Suicide.**–102NJL644, 133A196.
1623-32 102NJL644, 133A196; 146 Wash660, 264P419.
1623-33 259Mass415, 156NE748; 260 Mass404, 157NE356; 133SC335, 131SE 592.
1623-34 203Cal 427, 264P756; 232 IllA 246; 200 Iowa597, 203NW705, 41 ALR368; 252Mass300, 147NE829; Mass 171NE425; MoA 7SW(2d)749; 82NH120, 130A213; 85PaSuper275; 90PaSuper155; 92PaSuper105; 136 Wash544, 240P903 (pedestrian struck by overhang of car as it rounded curve); 144Wash676, 258P832. **Employee wrapping pipe in street** held not guilty of contributory negligence as matter of law. 68CalA662, 230P15. **Obligation of plaintiff to maintain rate of speed,** or to give notice of street car behind, is question of fact for jury. 48 RI 18, 134A642. **Whether driver of automobile stalled in path of approaching street car** remained too long with automobile held question of fact. 102CalA 199, 282P1005.
1624-35 80CalA208, 250P1062.
1624-35½-New. or in attempting to start his vehicle stalled on tracks instead of abandoning it; 85PaSuper275.
1624-36 108Conn133, 142A676. But see 128Me274, 147A157.
1624-36½-New. or in crossing from opposite side of street away from intersection but opposite car stop on other side. 245NY507, 157NE837.
1624-37½-New. or in attempting to cross in automobile in front of approaching street car; 165Minn41, 205NW433.
1624-40½-New. or in driving automobile at high rate of speed; TexCivA 274 SW1008 (not negligent as matter of law under evidence).
1625-41 217Ala272, 116S123; 203Cal 116, 263P220; 80CalA641, 252P628; 95 CalA704, 273P95; 39GaA61, 146SE40; 202 Iowa1299, 211NW854 (vehicle driver passing street car going same way and later driving on track and stopping one hundred feet ahead of car); 255 Mass292, 151NE315; 237Mich393, 212 NW75; 128 Or614, 275P667 (automobile stalled on track); 293Pa355, 143 A18; 93PaSuper503; 97PaSuper319; 97PaSuper477; 48RI 18, 134A642; 146 Wash383, 262P961.
1625-42 21 OhA57, 152NE773; 146 Wash383, 262P961.
1625-43 MoA 296SW823; TexCommnA 11SW(2d)303; TexCivA 9SW(2d)185.
1626-44 Ark 31SW(2d)415; 84CalA743, 258P1000; 35GaA273, 133SE57; 237 IllA226; 254 IllA362; 120Kan645, 244 P1057; 231Ky141, 21SW(2d)236; 255 Mass292, 151NE315; 310Mo 227, 274SW 1025; Mo 298SW806; MoA 17SW(2d) 392; 102NJL1, 131A92; 139 Okl 287, 282P327; 283Pa533, 129A571; 290Pa 288, 138A830; 299Pa163, 149A186; 144 Wash676, 258P832. **Evidence held insufficient to go to jury on negligence of**

wife as guest or invitee. **Utah** 290P970.

1626–45½–New. Verdict for defendant is properly directed where evidence shows plaintiff negligent in cranking automobile stalled near tracks. 260 Mass404, 157NE356.

1626–46 221Ala139, 127S825; 91CalA 752, 267P731; 232 IllA246; 128Me274, 147A157; 266Mass141, 164NE803; Mass 170NE65; MoA 273SW128; MoA 274 SW939; MoA 78W(2d)749; MoA 16 SW(2d)684; NH 146A714; 284Pa212, 130A411 (in view of evidence of obstruction of injured person's view); Tex CivA 274SW1008 (not negligent as matter of law in failing to look out for street car under evidence); Va 154SE 550; Wash 292P427.

1626–47 232 IllA246; 258Mass142, 154 NE550.

1627–48 136Wash407, 240P354; 140 Wash534, 249P1059.

1627–49 36 OklACR573; 136Wash407, 240P354.

1627–50 203Cal 116, 263P220.

1627–51 205Cal 153, 270P194.

1627–51½–New. Whether automobile driver looked for street car before leaving curb is question for jury on conflicting evidence. MoA 22SW(2d)863.

1627–52 260Mass404, 157NE356; Mich 216NW381; MoA 291SW520; 220MoA 869, 295SW129; MoA 299SW72; 103 NJL583, 137A526; 284Pa342, 131A245. But see 140Wash534, 249P1059.

1627–53 260Mass404, 157NE356; 284 Pa342, 131A245.

1627–54 103NJL583, 137A526.

1628–55 232 IllA246; 252Mass300, 147 NE829; 257Mass541, 154NE89; Mass 171NE662; 167Minn309, 208NW1007; 323Mo 1170, 21SW(2d)762; Mo 31 SW(2d)1014; MoA 278SW1071; MoA 297SW193; 243NY90, 152NE475; 218 AppDiv218, 218NYS126; 193NC262, 136 SE723; 285Pa399, 132A194; 92PaSuper189; 93PaSuper206; 98PaSuper260; 47RI 478, 134A7; RI 137A697; 50RI 190, 146A481; TexCivA 297SW534; 153 Wash450, 279P742.

1628–56 257Mass541, 154NE89; 261 Mass207, 158NE668; 308Mo 142, 271 SW773; MoA 278SW1071; 218AppDiv 218, 218NYS126 (five feet); 285Pa399, 132A194; 149Wash483, 271P264.

1628–58 169Minn278, 211NW462.

1629–60 CalA 265P1019; 240Mich637, 216NW439; 284Pa342, 131A245; 293 Pa472, 143A119.

1629–61 127Me387, 143A596; 128Me 274, 147A157; NH 146A714; 284Pa342, 131A245; 133SC335, 131SE592.

1629–62 92PaSuper193.

1629–63 Colo 291P1019; Mo 16SW(2d) 100; 220MoA934, 296SW1031; NJSup 130A727; 94PaSuper509 (where car had stopped); RI 149A379; RI 150A259 (turning left in front of car); 148Wash 122, 268P180.

1629–64 82CalA141, 255P215; 107Conn 160, 139A647; 249Mich431, 228NW763; 320Mo 536, 9SW(2d)632; 220MoA934, 296SW1031; MoA 24SW(2d)208; 193 NC262, 136SE723; 92PaSuper332.

1629–64½–New. It is question for jury whether plaintiff was negligent in backing automobile upon car track after seeing car standing short distance back as if taking in passengers. 252Mass300, 147NE829.

1629–64¾–New. It is question of fact for jury whether passenger on truck who observes trolley car approaching is under duty to warn driver and insist that he stop. 102NJL1, 131A92.

1630–65 106Conn291, 137A750; 149Md 443, 131A822; 153Md119, 137A484; 259 Mass557, 156NE532; TexCivA 28SW (2d)906.

1630–66 106Conn291, 137A750; 125Me 229, 132A521; TexCivA 7SW(2d)934.

1630–67 106Conn291, 137A750; 149Md 443, 131A822; 261Mass318, 158NE670.

1631–71 103NJL690, 137A593.

1631–71½–New. or whether child was negligent in running into side of street car. 149Md443, 131A822.

1631–73 86PaSuper234.

1631–75 203Cal 116, 263P220; 80CalA 208, 250P1062; 88CalA354, 263P578; 92 CalA100, 267P758; Mo 16SW(2d)100; Mo 24SW(2d)633; 168MoA172, 153SW 72; MoA 273SW777; MoA 277SW585; MoA 278SW1087; MoA 285SW522; MoA 285SW768; MoA 287SW803; 221 MoA279, 293SW71; 220MoA869, 295 SW129; 221MoA1071, 296SW167; MoA 14SW(2d)475; MoA 17SW(2d)363; MoA 17SW(2d)392; MoA 23SW(2d)193; MoA 30SW(2d)176; 30 OhA389, 165NE 358; 130 Or267, 278P99; 47RI 478, 134 A7; RI 151A130; TexCivA 280SW342; TexCivA 297SW534; TexCivA 9SW(2d) 185; Va 152SE373; 153Wash179, 279 P570(2dcase). See also 8LaA310, 312 [citCyc]. **Evidence held insufficient.**–214 Ala310, 107S451; 221Ala91, 127S519; 88CalA648, 263P1039; 82Colo 47, 256P 658; 108Conn474, 143A527; 213Ky590, 281SW523; 149Md443, 131A822 (death of child four years old); Mo 29SW(2d) 50; MoA 287SW775; MoA 297SW193; MoA 30SW(2d)794; 82NH120, 130A213; 105WVa362, 142SE521. **Liability under humanitarian doctrine for the jury.**–MoA 273SW777. **Instruction held not charge on last clear chance doctrine.**–22 OhA413, 153NE274. **Whether motorman used all means to prevent collision with automobile held for jury.** TexCivA 297 SW534.

1632–79 221Ala91, 127S519.

1632–80 Instructions held sufficient.–144Wash676, 258P832. **Instructions on burden and quantum of proof** held not erroneous. 318 Ill 570, 149NE469. **In construing the legal effect of an ordinance,** etc. 175Minn22, 220NW162. See also 322Mo 1103, 19SW(2d)707, 65ALR 129.

1633–81 Mo 31SW(2d)1014; Tex CommnA 15SW(2d)1022. **Instructions held sufficient.**–121 Or519, 254P809. **Instruction on doctrine of supervening negligence held erroneous.** 108Conn133, 142A676.

1633–82 318 Ill 570, 149NE469; MoA 24SW(2d)208; 293Pa472, 143A119; TexCivA 298SW314; TexCivA 7SW(2d) 934. **Instructions held proper.**–Ind 154 NE40; 201 Iowa1044, 207NW984; 102 NJL1, 131A92 (duty to act as reasonable "and" prudent man under circumstances held favorable to defendant as requiring double test). **Instructions held erroneous.**–318 Ill 570, 149NE469; 235 IllA160; 50RI 455, 149A19. **Instructions held not erroneous.**–224 IllA468. **No error in charge for failure to require liberal proof of condition constituting negligence in maintaining track.** 214Ala122, 106S800. **Instruction as to proof of due care by defendant on showing of damage held sufficient.** 40GaA336, 149SE 435. **Instruction requiring motorman to give reasonable warning held not erroneous.** MoA 19SW(2d)534.

1633–84 Instruction defining "proximate cause" held erroneous for omission of element of foreseeableness. Tex CivA 21SW(2d)97.

1633–85 Or 289P369.

1633–87 Instructions held misleading.–253 IllA135; 322Mo 1103, 19SW(2d)707, 65ALR129; 112 Oh500, 147NE910; 33 OhA311, 169NE480; 140Wash534, 249 P1059; 149Wash483, 271P264. **Instructions held not misleading.**–35GaA273, 133SE57 (as to proximate cause); 318 Ill 570, 149NE469; MoA 24SW(2d)208; TexCivA 290SW544.

1635–89 Mass 171NE662 (holding court not bound to discuss inferences from observance or nonobservance of statute); 286Pa536, 134A446.

1635–91 218MoA563, 267SW6. **Instructions not inconsistent.**–75CalA129, 242P 97.

1635–92 CalA 268P469; 35GaA273, 133 SE57; 176Minn377, 223NW619; 310Mo 227, 274SW1025; 193NC262, 136SE723.

1636–94½–New. Instruction on last clear chance doctrine omitting element of plaintiff's helplessness held erroneous. IndA 170NE617.

1636–95 IndA 170NE617 (holding that instruction imposing duty on motorman to stop and disregarding warning as qualification held erroneous). **Instructions held properly refused.**–181Ark 1145, 28SW(2d)1077.

1636–96 224AppDiv35, 229NYS537; TexCommnA 299SW220. **Instruction as to proximate cause held properly refused.**–221MoA1071, 296SW167.

1637–99 75CalA129, 242P97; 78CalA 617, 248P741; CalA 268P469; 98CalA 189, 276P591; 120Kan645, 244P1057; Mass 171NE425.

1637–3 Instruction properly refused under evidence as misleading. 150Va 442, 143SE681.

1638–5 213Ala672, 106S147; 78CalA 617, 248P741; 235 IllA160. **Instruction held not erroneous.**–318 Ill 570, 149 NE469; TexCivA 7SW(2d)934.

1638–7 213Ala672, 106S147; 235 IllA 160; 153Md119, 137A484; 26 OhA536, 160NE508. **Instructions held not erroneous.**–75CalA129, 242P97. **Instructions held not violative of rule.**–MoA 27SW (2d)733.

1638–10 78CalA617, 248P741; 235 IllA 160.

1638–13 95CalA704, 273P95; 235 IllA 160; 286Pa536, 134A446; 144Wash676, 258P832.

1639–14 235 IllA160. **Instruction based on indirect evidence held not erroneous.**–142Wash25, 252P164. **Instructions held proper or erroneously refused,** etc. 231Ky141, 21SW(2d)236; 317Mo 524, 297SW404; MoA 27SW(2d)733. **Instructions held erroneous,** etc. 173Minn 265, 217NW130. **Instruction held authorized.**–MoA 26SW(2d)851 (damages).

1639–15 235 IllA160.

1639–16 102Conn676, 129A790; 253 IllA135.

1640–17 181Ark1145, 28SW(2d)1077; 85CalA69, 258P1006; 82Colo 51, 256P 1088; 235 IllA160; 322Mo 1103, 19SW (2d)707, 65ALR129 (instruction of accident). **Instructions held erroneous or properly refused,** etc. 80CalA208, 250P 1062; 82Colo 51, 256P1088; 224 IllA 468; 231Ky141, 21SW(2d)236; 308Mo 142, 271SW773; MoA 17SW(2d)363; 218AppDiv218, 218NYS126; TexCivA 298SW314. **Evidence held sufficient.**–218MoA563, 267SW6; MoA 19SW(2d) 534; TexCivA 298SW314. **Evidence held insufficient to warrant instruction** on last clear chance doctrine. 130Kan 142, 285P621.

1640–18 75CalA129, 242P97; 102Conn 676, 129A790 (where negligence and willful striking both pleaded, instruction not permitting recovery on proof of defendant's negligence and plaintiff's freedom from contributory negligence, but requiring also proof of willfulness held error). **Instructions not violative of rule.**–88CalA354, 263P578.

1641–19 315Mo 177, 285SW708; 115 Oh 124, 152NE30. **Instructions held not erroneous.**–256 IllA569.

1641–20 75CalA129, 242P97.

1641–23 Ala 130S413; 181Ark790, 27 SW(2d)985 (holding instruction requiring motorman to stop if he could have discovered peril not prejudicial); 102 Conn676, 129A790; 110Conn615, 149A 219; 29Hawaii188; 30 OhA21, 164NE 59; 53SD144, 220NW451. **Charge on "last clear chance" rule held proper.** 144Wash676, 258P832. **Evidence held to entitle plaintiff to instruction on last clear chance doctrine.**–193NC262, 136 SE723. **Failure to charge on doctrine of last clear chance is not erroneous** where there is no evidence showing motorman could have discovered child's peril in time to have avoided accident. 149Md443, 131A822. **Imputed negligence.**–167Minn144, 208NW759. **Instruction held erroneous.**–203Cal 116, 263P220; MoA 16SW(2d)684; 112 Oh 500, 147NE910. **Instructions held not erroneous.**–237Mich393, 212NW75; Mo 25SW(2d)92. **Instructions held properly refused.**–153Md119, 137A484. **Instruction as to last clear chance held correct.**–CalA 288P690; 36 OklACR573; Va 154SE550.

1642–24 Instruction held correct.–120 Kan645, 244P1057. **Instruction not erroneous.**–MoA 26SW(2d)851 (guest). **Instruction requiring vehicle driver to use "all" reasonable care held erroneous.** 314Mo 158, 282SW710. **Refusal to instruct held erroneous.**–TexCommnA 25SW(2d)807.

1643–26 68CalA484, 229P867; 126Me1, 135A248.

1643–27 Instructions held erroneous or properly refused, etc. 82CalA141, 255P 215; 86CalA136, 260P588; 221MoA 1071, 296SW167; 218AppDiv218, 218 NYS126. **Instruction held proper or er-**

roneously refused.–Cal 290P22; Mo 271 SW749; 310Mo 227, 274SW1025. Instruction on last clear chance doctrine held warranted.–203Cal 116, 263P220. Instructions on last clear chance doctrine held not warranted.–123Kan79, 253 P1092; 108WVa490, 151SE698.

1644-28 221Ala139, 127S825.

1644-31 213Ala672, 106S147.

1645-35 320Mo 536, 98SW(2d)632. Instructions held erroneous, etc. 112 Oh 500, 147NE910 (instruction assuming that driving of automobile against side of defendant's car was negligent).

1645-36 35GaA273, 133SE57; 231Ky 141, 21SW(2d)236; 308Mo 142, 271SW 773.

1645-37 213Ala672, 106S147.

1646-39½-New. Instruction on humanitarian doctrine held not erroneous.–MoA 19SW(2d)534.

1646-39½-New. Instruction on doctrine of last clear chance held erroneous. 153 Wash179, 279P570(2dcase).

1646-39¼-New. Instruction on last clear chance held proper under conflicting evidence. 153Wash179, 279P570 (2dcase).

1646-39½-New. Instruction on last clear chance doctrine held authorized.–Wash 292P427.

1646-42 Findings held not to make case of "discovered peril."–TexCivA 23SW (2d)399.

1647-46 123Kan79, 253P1092; 123Kan 262, 255P83.

1647-50 TexCivA 297SW534 (findings held not inconsistent); TexCivA 299SW 507. Findings not in conflict.–120Kan 645, 244P1057. Findings held not inconsistent.–TexCivA 290SW544.

1648-53 213AppDiv390, 210NYS553; TexCommnA 11SW(2d)303.

1648-54 Mo 271SW749 (finding of no negligence on part of railroad sustained).

1648-56 120Kan645, 244P1057.

1648-57 35GaA273, 133SE57; 120Kan 645, 244P1057; 308Mo 142, 271SW773 (contributory negligence not considered on appeal where neither instructions given for plaintiff nor those asked by defendant referred to contributory negligence and there was no assignment that evidence was insufficient to support verdict).

STRIFE

37 Cyc—336-11½-New. Contention for superiority. 220MoA883, 295SW529.

STRUCTURAL SHAPE

337-21½-New. Shape of member specially adapted to structural purposes. 15CustA97.

STRUCTURE

337-22 22F(2d)731, 733 [citCyc].

337-25 15CustA97.

SUBDIVISION

340-53 31Ariz421, 254P230. School district is "municipal subdivision" within meaning of statute requiring contracts with such bodies involving employment of labor to contain provision for workmen's compensation. 289Pa75, 137A140.

SUBJECT

342-69½-New. One who owes permanent allegiance to government issuing certificate of identification required to admit Chinese under Exclusion Act. 275 US475, 48SCt160, 72L ed381.

342-72½-New. "Subject" when used with "to," "exposed to some agency or tendency," "liable to be affected." Also "actually placed or brought under." Standard D. [quot 24 OhNPNS145, 147].

342-72½-New. "Subject to" means "liable." 315Mo 485, 286SW371, 377 [quot Webster New Int. D.; Century D.].

342-72¼-New. Phrase means to qualify something substantial already created. 289Pa101, 137A132.

SUBLATO FUNDAMENTO, CADIT OPUS

344-83 Applied in: 164La225, 113S825.

SUBMISSION OF CONTROVERSY

348-14 216AppDiv773, 214NYS296.

348-18 216AppDiv773, 214NYS296; 191NC427, 132SE1. Requirement of statute must be strictly observed.–193NC 315, 136SE878. Statute authorizes parties to submit proceedings to remove graves from churchyard. 191NC427, 132 SE1.

349-21 193NC315, 136SE878.

350-25½-New. Court has no jurisdiction of controversy which is subject of special proceeding. 216AppDiv773, 214 NYS296.

350-25½-New. Where mortgage tax has not been paid, controversy on agreed facts may not be submitted, 216AppDiv 773, 214NYS296.

350-25¼-New. nor may it be submitted where tax has been paid. 216App Div773, 214NYS296 (where plaintiff is seeking to recover tax paid).

350-26 191NC427, 132SE1.

352-38 Where submission did not state whether explanation or excuse was possible where notice of accident was not given within required time, submission must be dismissed without prejudice. 251NY302, 167NE450.

352-40 205 Iowa261, 215NW724, 61 ALR851; 193NC315, 136SE878.

352-42 205 Iowa261, 215NW724, 61ALR 851.

353-49 205 Iowa261, 215NW724, 61ALR 851.

353-54 218AppDiv646, 219NYS222.

354-55 225AppDiv326, 233NYS160.

354-59½-New. Special judge has no authority to determine controversy without action at chambers when he is not holding term of court. 197NC472, 149SE685.

354-60 218AppDiv646, 219NYS222.

354-64 218AppDiv646, 219NYS222.

356-77 50RI 147, 146A406.

356-78 220AppDiv366, 221NYS371. Admitted facts not binding on third person not made party. 189NC703, 128 SE20.

357-84 219AppDiv256, 219NYS732.

357-83½-New. Findings and judgment control in case of conflict as against order providing for issuance of receiver's certificates. 47 Ida229, 273P933.

357-89½-New. Court was not authorized to include interest in amount awarded where it was stipulated that plaintiff should have judgment against defendant insurance company for amount which court should decide was defendant's proportion of fire loss sustained. 225AppDiv326, 233NYS160.

SUBPŒNA

360-9 191NC479, 132SE162.

SUBROGATION

363-1 17F(2d)942; DelSuper 151A822; 95Fla510, 116S639; 170Ga747, 154SE 234; 47 Ida636, 277P699; 336 Ill 178, 168NE277, 66ALR181; 205 Iowa1154, 213NW517; 206 Iowa869, 221NW668; 126Kan255, 261, 267P974 [quotCyc]; 149Miss750, 115S878, 879 [citCyc]; 117 Nebr6, 219NW583; 241NY418, 150NE 501, 43ALR1320; 190NC512, 130SE323; 55ND77, 212NW440; 40 OklACR161 [reh pending]; 135SC107, 133SE210; 136SC144, 134SE263; 154Tenn389, 285 SW558, 560 [quotCyc]. Equitable assignment, etc. In some jurisdictions right of subrogation of surety operates as equitable assignment. 114 Oh323, 151 NE177, 45ALR371. Other definitions.–Iowa 232NW504; MoA 20SW(2d)705; Nebr 230NW838; Nebr 232NW586; Tex CivA 297SW294. It is used synonymously with substitution.–17F(2d)942. There are two kinds of subrogation, one by operation of law and the other by contract. 148Va471, 139SE265.

364-2 18F(2d)430; 56AppDC353, 13 F(2d)959, 48ALR583; 166Ga274, 142SE 870; 205 Iowa1154, 213NW517; 119 Kan760, 241P259; 213Ky610, 281SW 834; 215Ky465, 284SW1094; Mo 289SW 550; 241NY418, 150NE501; 127Misc27, 215NYS269; 192NC221, 134SE490; 55 ND77, 212NW440; 23 OhA50, 154NE 358; 124 Okl 228, 255P582, 585 [quot Cyc]; 288Pa85, 135A858; 85PaSuper 537, 541 [citCyc]; 135SC107, 133SE210; 139SC597, 138SE146, 149 [quotCyc]; 154Tenn389, 285SW558, 560 [quotCyc]; TexCivA 276SW308; 141Wash440, 252 P147; 103WVa432, 137SE878; 192Wis 141, 212NW278. Origin and nature of right.–118 Okl 8, 246P406. It has been variously described as: Pure, unmixed equity founded on principles of natural justice. IndA 163NE236; 226Ky628, 11 SW(2d)698; 295Pa433, 145A520. Distinguished from legal assignment.–Del 151A822.

365-3 Del 151A822; 241NY418, 150NE 501; 40 OklACR161 [reh pending]; 154 Tenn389, 285SW558, 560 [quotCyc].

365-4 168Ark927, 271SW974; 47 Ida 636, 277P699; 205 Iowa1154, 213NW 517; 121Kan3, 245P1017; 213Ky610, 281 SW834; 215Ky465, 284SW1094; 226Ky 628, 11SW(2d)698; 118Nebr337, 224NW 868; 229AppDiv550, 242NYS149; 55ND 77, 212NW440; 85PaSuper537, 541 [cit Cyc]; 139SC597, 138SE146, 149 [quot Cyc]; 154Tenn389, 285SW558, 560 [quotCyc]; TexCivA 5SW(2d)162; 153 Va118, 149SE441.

366-5 168Ark927, 271SW974; 166Ga 274, 142SE870; 119Kan760, 241P259; 121Kan3, 245P1017; 123Kan329, 254P 1040; 239Mich575, 215NW13; 244Mich 577, 222NW207; 123 Okl 43, 251P985; 85PaSuper537, 541 [citCyc]; 139SC597, 138SE146, 149 [quotCyc]; 154Tenn389, 285SW558, 560 [quotCyc]. The doctrine is not a fixed and inflexible rule, etc. 96 Fla828, 119S394; 47 Ida636, 277P699. Subrogation includes every case where payment is involuntary and in justice and equity should be paid by another. 40F(2d)285.

366-6 5F(2d)11 (holding "subrogation does not arise from any contractual relation between parties, but is equitable doctrine designed to accomplish substantial justice"); 96Fla828, 119S394; 170 Ga747, 154SE234; IndA 160NE56; 205 Iowa1154, 213NW517; 119Kan760, 241 P259; 121Kan3, 245P1017; 230Ky482, 20SW(2d)71; 239Mich575, 215NW13; 244Mich577, 222NW207; 219MoA186, 269SW659; 118Nebr337, 224NW868; NJCh 147A113; 217AppDiv420, 217NYS 48; 127Misc27, 215NYS269; 131Misc 884, 227NYS514; 58ND134, 226NW476; 288Pa85, 135A858; 139SC597, 138SE 146, 149 [quotCyc]; 154Tenn389, 285SW 558, 560 [quotCyc]; TexCivA 14SW(2d) 88; 151Va644, 145SE245; 38Wyo 515, 269P45, 60ALR418. But see 190NC512, 130SE323.

367-7 170Ga747, 154SE234; 154Tenn 389, 285SW558, 560 [quotCyc].

367-8 135Misc774, 238NYS533.

367-10 43F(2d)539.

367-11 MoA 20SW(2d)705; 288Pa85, 135A858; 154Tenn389, 285SW558, 560 [quotCyc]. Its application is not controlled alone, etc.–154Tenn389, 285SW 558.

367-12 100NJEq403, 135A693; 229App Div550, 242NYS149; 288Pa85, 135A 858. Priority of equities is determined by nature of contracts whereby secondary liability was incurred. MoA 20SW (2d)705.

367-12½-New. Direct purchase of interest in real estate does not involve legal subrogation. 237Mich513, 212NW71.

367-12½-New. Party claiming through subrogation must claim through a derivative right which presupposes an original right. 223Ky32, 28W(2d)1048.

367-14 95Fla510, 116S639; 331 Ill 622, 163NE448; 239Mich575, 215NW13; 192 NC216, 134SE492; 192NC221, 134SE 490; 148Va471, 139SE265. Legal subrogation occurs where person pays debt of another by reason of relation of surety or because compelled to pay debt to protect his own rights or property. Utah 283P1055.

368-15 239Mich575, 215NW13; 244 Mich582, 222NW209; 52SD133, 216NW 876; 38Wyo 515, 269P45, 60ALR418. "Conventional subrogation" arises where one pays debt of another under agreement, express or implied, existing at time of payment, with either debtor or creditor, that person paying shall be subrogated to liens existing as security for debt. 118Nebr194, 224NW14; Utah 283P1055.

368-16 239Mich575, 215NW13; Tex CivA 3SW(2d)527. Doctrine applied to mortgages.–239Mich575, 215NW13. Agreement with debtor alone will not affect rights of creditor. 213Ky836, 281 SW1008. Agreement may be implied

where payment is made in presence of debtor and creditor is asked for assignment of securities. **Iowa** 229NW218.

369-17 95Fla510, 116S639; 331 Ill 622, 163NE448; 226Ky628, 11SW(2d)698; 239Mich575, 215NW13; 192NC216, 134SE492; **TexCivA** 3SW(2d)527; **Utah** 283P1055; 148Va471, 139SE265.

370-22 190NC512, 130SE323, 326 [quot Cyc].

370-23 194Cal 114, 228P11; 79CalA 387, 249P548; 336 Ill 178, 168NE277, 66ALR181; 213Ky610, 281SW834; 225 Ky375, 9SW(2d)113; 239Mich575, 215 NW13; 244Mich577, 222NW207; 240 NY37, 147NE351 (liberal construction for protection of its natural beneficiaries); 241NY418, 150NE501, 43ALR 1320; 190NC512, 130SE323, 326 [quot Cyc]; 155SC222, 152SE425; 153Va246, 149SE485. **Scope of remedy.**–79CalA387, 249P548; 317 Ill 625, 148NE384.

370-23½-New. so long as payment was made either under compulsion, 241NY 418, 150NE501.

370-23½-New. or for protection of some interest of party making payment, 241 NY418, 150NE501.

370-23¼-New. and in discharge of an existing liability. 241NY418, 150NE 501.

371-24 119Kan760, 241P259 (subrogation between persons primarily liable on note); 190NC512, 130SE323, 326 [quotCyc]. **Indorser paying note** is not purchaser and is subrogated only to rights of holders in collateral security. 5F(2d)902.

371-26 241NY418, 150NE501, 43ALR 1320; 153Va118, 149SE441.

371-27 168Ark927, 271SW974, 976 [quotCyc].

371-28 168Ark927, 271SW974, 976 [quotCyc]; 219MoA186, 269SW659; SC 155SE429. **One seeking subrogation** must show some ground for equitable intervention. 236Mich45, 209NW809.

371-29 123Kan329, 254P1040; 118Nebr 194, 224NW14; 118 Okl 8, 246P406; 123 Okl 43, 251P985. **Courts adopt or regret theory in accordance with equities of situation.**–141Wash440, 252P147.

371-32 213Ky610, 281SW834; Nebr 230NW838; 118 Okl 188, 247P392; 288 Pa85, 135A858; **TexCivA** 276SW308. **One claiming subrogation** has no greater rights than the one to whose rights he is subrogated. 219MoA186, 269SW659.

371-33 153Va484, 150SE403.

371-34 156Md200, 144A249, 62ALR546; 288Pa85, 135A858; **Utah** 283P1055; **Wis** 232NW877.

372-35 127Misc27, 215NYS269 (party must be free of fault).

372-36 127Misc27, 215NYS269.

372-37 223Ky54, 28W(2d)1027.

372-38 See also 174Minn583, 219NW 916. **Statute forbidding loan company from assigning its securities** does not apply to subrogation arising by operation of law, as right of subrogation of mortgagor upon payment of mortgage debt assumed by his grantee. 214Ala 362, 107S834.

372-39 56AppDC353, 13F(2d)959, 48 ALR583; 213Ky610, 281SW834; 223 Ky54, 28W(2d)1027; 131Misc884, 227 NYS514; 55ND77, 212NW440; 288Pa 300, 135A748; 136SC144, 134SE263; 149SC163, 146SE818; **TexCivA** 276SW 308.

372-40 56AppDC353, 13F(2d)959, 48 ALR583; 95Fla510, 116S639; 213Ky 610, 281SW834; 223Ky32, 28W(2d) 1048; 136SC144, 134SE263; **TexCivA** 276SW308. **As between surety on contractor's bond paying laborers and materialmen and lender of money used in contractor's business holding assignment of balance due on contract,** surety has superior equity. 168Minn202, 209 NW911. **Equity of bank advancing money to contractor is superior to that of contractor's surety** with respect to unpaid balance due to contractor. 167 Minn352, 209NW315. **Not to prejudice of creditors.**–Md 144A49. **Where operation would defraud other bona fide creditors and encumbrancers,** it will not be allowed. 152Wash262, 277P854.

372-40½-New. Right of subrogation does not extend beyond requirements of equity and justice. 217AppDiv420, 217 NYS48.

372-40⅓-New. Rights by reason of subrogation attach at time equities arise in favor of subrogee. 136Misc594, 240 NYS372.

373-42 79CalA387, 249P548; 170Ga 747, 154SE234; 154Tenn389, 285SW 558, 561 [citCyc]; **TexCivA** 21SW(2d) 17; 38Wyo 515, 269P45, 48 [citCyc], 60ALR418. **Subrogation is highly favored in equity.**–Utah 283P1055.

373-43 170Ga747, 154SE234; 154Tenn 389, 285SW558, 562 [quotCJ].

373-49 56AppDC353, 13F(2d)959, 48 ALR583.

373-50 170Ark703, 281SW14.

373-51 223Ky32, 2SW(2d)1048.

374-52 180Ark442, 21SW(2d)954; 217 AppDiv420, 217NYS48; 288Pa85, 135A 858; 52SD133, 216NW876, 878 [cit Cyc].

374-54 CalA 287P575; 205 Iowa1154, 213NW517, 520 [citCyc]; 124 Okl 223, 255P582, 585 [quotCyc]; 136SC144, 134 SE263, 267 [quotCyc]; 149Va267, 136 SE573.

374-55 CalA 287P575; 124 Okl 228, 255P582, 585 [quotCyc]; 120 Or626, 253P522; 136SC144, 134SE263, 267 [quotCyc]; **Wis** 232NW877.

374-56 124 Okl 228, 255P582, 585 [quot Cyc]; 120 Or626, 253P522; 136SC144, 134SE263, 267 [quotCyc]; **Wash** 286P 48.

374-57 104CalA99, 285P382; 124 Okl 228, 255P582, 585 [quotCyc]; 136SC 144, 134SE263; **Wis** 229NW85. **Where owner of barges expressly relieved charterer** from liability for damage covered by hull insurance, it could not hold towing vessel responsible for such damage, nor could insurer. 15F(2d)198.

375-59 24F(2d)836; 27F(2d)418; 179 Ark927, 19SW(2d)1105; 119Kan760, 241P259; 161La253, 108S472; Mo 289 SW550; 74Mont142, 238P594; 192NC 216, 134SE492; 40 OklACR161 [reh pending]; 136SC144, 134SE263; 146 Va357, 131SE803; 148Va471, 139SE265; 192Wis141, 212NW278; **Wis** 232NW 877. **Where creditor holds securities for other debts of principal debtor besides that on which surety is liable,** surety is not entitled to subrogation until such debts are paid. 119Kan760, 241P259. **Surety must fulfill contract of contractor** before question of subrogation arises. 43F(2d)418.

375-60 40 OklACR161 [reh pending]; 120 Or626, 253P522; **TexCivA** 30SW (2d)797.

375-61½-New. Appellate court will not pass on indorser's right to subrogation where note is not paid. 161La253, 108 S472.

375-61⅓-New. Where note was not paid, indorser's right to collateral will not be determined on appeal. 161La 253, 108S472.

375-61¼-New. Plaintiff held subrogated to lessor's right to rent from defendant where plaintiff was lessee's assignee and paid rent as obligated and defendant was assignee of plaintiff's lessee and in privity of estate with lessor. 21F(2d)385.

375-61½-New. Wife removing encumbrance from property, not with funds from separate estate, but from rents and profits of homestead, is not entitled to subrogation. 180Ark235, 21SW(2d) 157.

375-63 208 Iowa939, 226NW99, 64ALR 1292 (payment of judgment); 127Misc 27, 215NYS269; 118 Okl 239, 247P28; 139SC411, 138SE184, 189 [quotCyc]; Utah 283P1055. **Lender to mortgagor** through agent of mortgagee engaged to make loan by mortgagor is not subrogated to mortgage on conversion of funds by agent. 213Ala516, 105S644 (mortgagor bearing loss). **Bank lending money to contractor** on faith of assignment of funds to become due held mere volunteer. **IndA** 159NE3.

375-64 209Ky372, 272SW906; 139SC 411, 138SE184, 189 [quotCyc]. **Mortgagor having paid mortgage after destruction of property** held not entitled to subrogation to rights of mortgagee under standard mortgage clause in policy free from defense available against her in her own right. 136SC144, 134 SE263. **That payment of mortgage after destruction of property was for purpose of enabling mortgagor to sue insurer,** held not to change primary obligation of mortgagor thereon. 136SC 144, 134SE263.

375-65 160Ga894, 129SE433; 136SC 144, 134SE263; 139SC411, 138SE184, 189 [quotCyc].

375-66 176Ark401, 4SW(2d)912, 916 [citCyc]; 236 IllA464; 88 IndA189, 163NE602; 213Ky836, 281SW1008; 131Misc884, 227NYS514; 40 OklACR 161, 163 [citCyc, and reh pending]; 13 PaDist&Co 161; 136SC144, 134SE263; 149SC163, 146SE818; **Utah** 283P1055. See also 127Misc27, 215NYS269. **Bank paying depositor's note after notice of revocation** would not be entitled to subrogation. 127Misc27, 215NYS269. **Payment held not necessary** on land purchase contracts held as security, before maturity. **TexCivA** 4SW(2d)180. **One voluntarily paying claim against estate under agreement with widow,** who had no authority to speak for estate, is not entitled to subrogation. **Utah** 283P 1055.

376-67 170Ga747, 154SE234; 208 Iowa 939, 226NW99, 64ALR1292; 213Ky836, 281SW1008; 239Mich575, 215NW13; 244Mich577, 222NW207; 244Mich582, 222NW209; 323Mo 899, 20SW(2d)26; **NJ**Ch 145A625; 194NC281, 139SE456, 56ALR674; 55ND77, 212NW440; 40 OklACR161, 163 [citCyc, and reh pending]; 14PaDist&Co 153; 136SC144, 134 SE263; 139SC597, 138SE146; 139SC 411, 138SE184; **TexCivA** 281SW335; **Utah** 283P1055; 149Va267, 136SE573; 152Wash262, 277P854. See also **Tex CommnA** 258SW(2d)320. **A stranger, within the meaning of this rule,** etc. 213Ky836, 281SW1008.

378-68 139SC597, 138SE146; **TexCivA** 5SW(2d)162.

378-69 Person paying debt at request of debtor is not stranger or volunteer in transaction. 102WVa224, 135SE19.

378-73 139SC597, 138SE146.

379-75 139SC597, 138SE146, 149 [quot Cyc].

379-77½-New. Payment of debt of another under mistake of fact entitles person paying to subrogation to rights of payee where person paying was not guilty of culpable negligence and rights of third persons have not intervened. 154Tenn389, 285SW558.

379-77⅓-New. Person paying debt of another through mistake of fact will not be subrogated to rights of payee where he was guilty of culpable negligence. 154Tenn389, 285SW558.

379-77¼-New. One paying note of owner of most of stock of corporation in mistaken belief that it was corporation note is not entitled to subrogation against prior indorser. 215AppDiv343, 213NYS310.

379-78 5F(2d)34; 17F(2d)913; 17F (2d)942; 18F(2d)430; 26F(2d)944; 95 Fla510, 116S639; 47 Ida636, 277P699; 247NY389, 160NE650; 192NC407, 135 SE136; **TexCivA** 26SW(2d)708; 148Va 471, 139SE265, 266 [quotCyc]. **Illustrations.**–192NC407, 135SE136. **One to whom debtor gave bill of sale is not entitled to be subrogated** to rights of prior chattel mortgagee by payment of mortgage without also paying unsecured debt of mortgagee which was also lien on property. 47 Ida636, 277P699. **Mortgagor has been held entitled, after payment of part of debt** required to secure release of his remaining property from mortgagee, to recover amount of mortgage indebtedness from his grantee, under doctrine of subrogation, subject to payment by mortgagee of balance due. 83NH479, 144A265.

379-79 139SC597, 138SE146; 148Va 471, 139SE265, 266 [quotCyc].

379-80 18F(2d)430; 221Ala268, 128S 220; 218MoA98, 262SW450; 131Misc 884, 227NYS514; 148Va471, 139SE265, 266 [quotCyc]; 152Wash262, 277P854.

380-83 221Ala268, 128S220 (holding lender, paying only part, has right to subrogation if principal pays remainder). **Sureties on county's bonds and treasurer's official bond** held subrogated proportionally to insolvent bank's dividends where they paid loss proportion-

ally. 141Wash440, 252P147.

380-85 194Cal114, 228P11; 119Kan760, 241P259, 262, 263 [citCyc]. **Subrogation begins** when surety assumed obligation under which thing subrogated is deposited as security. 144Miss579, 109S1.

380-86 194Cal114, 228P11; OhA173NE443. **Release of record,** instead of transfer of first lien notes to mortgagee paying them, held not to affect latter's right to subrogation against second lienholder. TexCivA297SW294.

380-87 170Ga747, 154SE234; 119Kan760, 241P259, 262, 263 [citCyc]; 229AppDiv550, 242NYS149. **Surety's rights of indemnity and subrogation** relate back to date of surety contract. 53ND502, 207NW42, 42ALR1353.

380-88 14PaDist&Co153.

380-89 205Iowa1154, 213NW517; 252Mass432, 147NE904; 53ND502, 207NW42, 42ALR1353; 91PaSuper335.

381-96½-New. Subrogation cannot be used to recover money legally paid without notice to satisfy just claims prior to maturing of right of subrogation. 21F(2d)102.

381-96⅓-New. Landlord is not subrogated to rights of tenants against one collecting rents but not representing himself as acting for landlord. TexCivA8SW(2d)312.

381-97 219Ala150, 121S511; 202Iowa764, 211NW257; 217AppDiv26, 215NYS785 (junior mortgagee); 192Wis141, 212NW278. **One who parts with check through fraud** and immediately traces proceeds into satisfaction of mortgage is subrogated to rights thereunder against wrongdoer and all others who profit from satisfaction without parting with value. 202Iowa764, 211NW257.

382-99 161La949, 109S773; Minn231NW403.

382-9½-New. Where purchaser of land as part of consideration therefor agreed to pay an existing mortgage and did so with proceeds of mortgage executed by him in name of his grantor, his mortgagee foreclosing will be subrogated to rights of former mortgage. 203Iowa104, 212NW380.

382-9⅓-New. Payment by junior mortgagee.–Where junior mortgagee makes payments on account of prior mortgage to protect his own mortgage, his equities are superior to those of mortgagor's grantee and of one who purchased from her in reliance on statement in agreement between mortgagees as to amount due. 217AppDiv26, 215NYS785.

383-16 Admission of liability by principal debtor and sureties has no effect on lien of creditor and is not waiver by sureties of right to subrogation. 213Ala29, 104S135. **Right of subrogation may be waived** or barred by laches. 5F(2d)915. **Junior lienholder,** by selling under junior lien, waives rights acquired by payment of superior lien. 53ND526, 207NW144.

383-18 In respect of lien, waiver by implication arises only when surety does some act inconsistent with his right to have creditor's lien, as by acceptance of independent security. 213Ala29, 104S135.

383-21 Necessity of injury to others.–56ND851, 219NW776.

383-23½-New. Bank, applying deposit of contractor on note without knowledge of agreement that it was to be paid to materialmen, is not liable to contractor's surety. 21F(2d)102.

383-23⅓-New. Defenses.–Negligence of mortgagee in examination of mortgagor's title is not bar to his right to subrogation. NJCh147A113.

383-24 MoA32SW(2d)292; 198NC518, 152SE503 (subrogation is not contractual but solely to do justice).

384-26 39F(2d)25; 215Ala672, 112S211; 103WVa432, 137SE878. **Injunction.**–22AppDiv500, 231NYS169. **Right to maintain bill quia timet.**–83NH479, 144A265.

384-27 132Misc132, 229NYS81. **Subrogation is only right of action** which must be established by judicial proceedings. 39F(2d)25.

385-28 Statutory remedy of trial of right of property to protect possession may be resorted to by purchaser of pledged property where seized under process and taken possession of. Tex CivA19SW(2d)808.

385-29 194Cal114, 228P11 (plaintiff whose equity is founded on legal right or action may be dealt with as assignee by court of law).

385-31 221Ala268, 128S220.

385-32 Purchaser paying first mortgage lien, assumed by him, without notice of junior lien is not entitled to land, though present value is less than amount of first mortgage but right to subrogation is enforcible only in usual manner. 154Tenn389, 285SW558.

385-32½-New. Court has no right to decree subrogation where neither party nor fund is in court. 315Mo1155, 289SW571.

385-32⅓-New. Relief sought by mortgagee by way of subrogation, in revival of equitable lien of existing mortgage for protection against intervening statutory lien, has been held proper subject of cross bill. 218Ala379, 118S549.

385-33 119Kan760, 241P259, 262, 263 [citCyc] (three years from accrual of right); 120Kan555, 245P161; 50Nev383, 263P774. **Statute applicable.**–120Kan555, 245P161.

387-35 119Kan760, 241P259, 262, 263 [citCyc].

387-37 39F(2d)387 (suit held not barred by laches or estoppel); IndA163NE236; 119Kan760, 241P259, 262, 263 [citCyc]; 120Kan555, 245P161, 162 [citCyc]; 153Va484, 150SE403. **Relation of parties,** similar to that of parent and child, is to be considered on question of laches. 244Mich577, 222NW207. **Where denial of right to subrogation would be inequitable,** laches will not defeat it. 244Mich577, 222NW207. **Where plaintiff made many demands for security,** lapse of several years did not defeat right to subrogation. 244Mich577, 222NW207.

389-46 Payee of note secured by deed of trust, having acknowledged payment of note and made necessary affidavit for release, was not necessary party to subsequent action by one claiming to have paid balance on note. MoA14SW(2d)686.

389-47 95Fla510, 116S639.

390-50½-New. It has been held that insurer, seeking to enforce subrogation against wrongdoer, who has not taken assignment of policy is neither proper nor necessary party plaintiff, but must sue in insured's name. BC[1925]3DomLR734.

390-50⅓-New. Holder of part of debt is not necessary party to foreclosure sought under subrogation of another part. 99Fla1092, 127S323.

390-50¼-New. Right of subrogee to sue in own or creditor's name. 41GaA715, 154SE468.

390-50⅕-New. In law court suit must be brought in name of person whose real rights are being litigated. Del151A822.

390-52 245IllA596; 79Mont111, 255P722; 116Nebr713, 218NW744; SC155SE429. **Petitions and complaints held sufficient.**–213Ala29, 104S135 (petition by surety for subrogation to lien of county upon land of defaulting officer); 214Ala81, 106S496 (action for difference in value of shipments of cattle crossed in transit through mistake); 215Ala218, 110S24; 177Ark328, 6SW(2d)308; 180Ark63, 20SW(2d)307; 161Ga898, 132SE422; 168Ga836, 149SE126; TexCivA5SW(2d)162; TexCivA28SW(2d)1087. **Petitions and complaints held insufficient.**–177Minn194, 225NW11(2dcase). **Insufficient bills.**–160Ga894, 129SE433; 208Iowa939, 226NW99, 64ALR1292; TexCivA27SW(2d)890.

391-53 43OklACR413.

391-58 213Ala29, 104S135.

391-60½-New. Surety held entitled to directed verdict.–120Oh47, 165NE537.

391-62 82CalA342, 255P523; 252IllA290; TexCivA289SW709. **Assignment of mortgage after payment** by one entitled to subrogation is valid as evidence of title of subrogee. 100NJEq403, 135A693. **Evidence held sufficient.**–39F(2d)387; 179Ark290, 15SW(2d)403; 206Cal143, 273P565; 165Ga415, 140SE859; Minn231NW397. **Evidence held insufficient.**–131Misc884, 227NYS514. **Evidence held admissible.**–TexCivA28SW(2d)1087. **It is immaterial** in suit to enforce vendor's lien through subrogation by payment of notes that indorsements on back of notes were made at different time from date of payment. 180Ark63, 20SW(2d)307. **It is presumed** that payment by subcontractor of wages of laborers and subrogation of subcontractor to rights of laborers occurred at same time. 169La90, 124S182.

391-63 334Ill494, 166NE123; 207Iowa471, 220NW10. **Evidence held sufficient.**–201Iowa38, 206NW117; 116Nebr706, 218NW734; 56ND851, 219NW776. **Evidence held insufficient.**–170Ark703, 281SW14. **Finding that payments on prior mortgage were voluntary** held not warranted in face of undisputed evidence that payments were made to protect rights of junior mortgagee. 217AppDiv26, 215NYS785. **Evidence held to require finding** that notes were paid by plaintiff at defendant's request, in suit to enforce vendor's lien. 180Ark63, 20SW(2d)307. **Evidence held to sustain finding** that indorsers were entitled to subrogation to rights of judgment lienor against land. 153Va118, 149SE441.

391-64½-New. There is a presumption that a lender of money to pay lien relying on other security does not expect and is not entitled to subrogation. 221Ala268, 128S220.

391-64⅓-New. Findings in action for subrogation construed.–129Kan640, 284P380.

392-65 TexCivA7SW(2d)1103.

392-68½-New. In action against principal and surety refusal of subrogation in judgment is proper where recovery against principal denied because of discharge in bankruptcy; TexCivA30SW(2d)360.

394-79½-New. Bank taking mortgage on property from administrator who acquired it under void administrator's sale through third party purchaser was not entitled to subrogation by virtue of discharge of prior encumbrance with money loaned to administrator, in view of probate court records showing debt for which land was sold was debt claimed by administrator, and that land was homestead of minor children. 178Ark28, 9SW(2d)793.

394-80 31F(2d)759 [aff 31F(2d)761]; TexCivA5SW(2d)162; 191Wis576, 211NW756, 50ALR1106.

394-81 Erratum.–Strike out citation in 1926 Annotations.

394-83 21F(2d)313; 33GaA241, 125SE783, 785 [citCyc].

395-86 48Ida454, 282P868 (subrogated to rights of comaker of note under trust agreement).

395-93 See also TexCivA7SW(2d)1103.

396-99½-New. Plaintiff may not pay indebtedness, owed entirely by defendant and secured by mortgage on land owned by plaintiff and defendant, before due and then foreclose on theory of subrogation. TexCivA7SW(2d)1103.

396-99⅓-New. One purchasing lots subject to, but not agreeing to pay, mortgages thereon, not being liable for amount of mortgages as debt, another paying part of mortgage debt has no right of subrogation against him, though he redeemed from foreclosure. 150Wash494, 273P739.

398-17½-New. Partner paying partnership debt is not entitled to subrogation to lien of partnership creditor on partnership property as against other partnership creditors. Va154SE587.

398-17⅓-New. Creditor of partner from whose realty senior partnership judgment is paid is not entitled to priority in partnership realty over subsequent partnership judgment creditors by subrogation. Va154SE587.

398-18 45Ida724, 265P697.

399-28½-New. As between cotenants alone, one paying another's share of

taxes on common property to prevent sale of whole is subrogated to lien of taxing power on interest of defaulting cotenant. 56AppDC353, 13F(2d)959, 48 ALR583.

399-28½-New. No right of subrogation exists between husband and wife owning land jointly. 9PaDist&Co 197.

399-29 28F(2d)944; 176Ark401, 4SW(2d)912; 168Ga836, 149SE126; 197NC 253, 148SE253; 183Pa212, 129A56; 85 PaSuper480 (accommodation indorser). But see 82CalA342, 255P523.

400-30 179Ark253, 15SW(2d)327. **An accommodation indorser,** etc. 8F(2d) 338 (note indorsed and paid by stockholder). **Where defendant was bound on note with plaintiff** and paid such note, he was entitled to collateral security by subrogation, and there was nothing inconsistent in such transaction with his obligations to plaintiff as agent. 168La356, 122S64.

401-31 NJCh 151A107; 253NY41, 170 NE486 (mortgage bonds).

401-32 Indorser paying notes before maturity under agreement with bank to retire notes is not entitled to subrogation of depositor's rights. 39F(2d)14.

402-33 Where plaintiff pledged certificate of deposit with bank as collateral to note of another, it was not entitled to subrogation on ground that it was surety after bank cashed certificate. 11 LaA53, 123S185.

402-41½-New. Drawee bank paying check amounting to overdraft may be subrogated to rights of original holder against drawer bank in case of latter's insolvency in absence of knowledge thereof by drawee bank at time of payment. 114Nebr719, 209NW510.

402-41½-New. Offer by indorser to pay indebtedness on note on condition that creditor would deliver to indorser, the surety, stock deposited as collateral for payment of debt by coindorser did not entitle indorser to have collateral delivered to him. 156Md200, 144A249, 62ALR546.

402-41¼-New. Executor of maker of note, being primarily liable, cannot be subrogated to rights of defaulting payee against transferee. 198NC542, 152SE 628.

402-41½-New. Bank rediscounting forged note assigned by another bank which subsequently became insolvent is entitled to be subrogated to proceeds of life insurance policy held by assigning bank as security for indebtedness of person whose name was forged to note, where proper connection is shown between note and such indebtedness. 129Kan640, 284P380.

402-42 13F(2d)213; 20F(2d)951; 26F (2d)944; 34F(2d)419; 173Ark103, 291 SW1003, 51ALR1332; 176Ark401, 4SW (2d)912, 915 [citCyc]; 180Ark643, 22 SW(2d)381 (though statutory bond not filed); 72CalA550, 237P808 (lessee paying rent on his assignee's default is subrogated to rent reserved as security); IndA 159NE3; Iowa 229NW218; 120Kan555, 245P161; 1LaA24; Minn 232NW320; NJCh 146A196(2dcase); 253NY417, 171NE692; 217AppDiv420, 217NYS48; 292Pa354, 141A231; 85Pa Super480 (assignor of nonnegotiable note liable as surety); 136SC15, 134SE 209; TexCivA 285SW1115; TexCivA 28 SW(2d)1087; 153Va118, 149SE441; 192 Wis141, 212NW278 (guarantor); Alta [1926] 4DomLR951; Ont [1930] 3Dom LR851. But see 150Wash114, 272P34. **Trustee for benefit of creditors,** under Bulk Sales Act, who pays mortgagee of part of property sold, is subrogated to rights of mortgagee under mortgage as against purchaser of such property who assumed to pay mortgage. Alta [1925] 3DomLR750. **Guarantor of sight draft for accommodation of another** may maintain action thereon against drawee where he pays draft on drawee's default. 55ND454, 214NW33. **Receiver's surety paying judgment against receiver** misappropriating funds was subrogated to rights of new receiver. 334Ill494, 166 NE123. **Failure of principal to sign bond** does not affect surety's right to subrogation. 228Ky426, 15SW(2d)255.

405-43 Alta [1926] 4DomLR951.

405-44 120Kan555, 245P161. **The right of a surety to be subrogated to the rights of the creditor does not depend on contract,** etc. 119Kan760, 241P259.

406-54½-New. Surety, completing state improvement contract on default of contractor, is subrogated to rights and remedies of state, 217AppDiv420, 217NYS 48.

406-54½-New. and is not liable, since state itself would not be liable, to assignee of contractor's claims for amounts due on contract. 217AppDiv420, 217 NYS48.

406-56 205Iowa1154, 213NW517; 156 Md200, 144A249, 62ALR546; 192Wis 141, 212NW278. See also 246IlA355. **Payments by sureties plus dividend paid** by insolvent depositary, making county whole, entitle surety in county depositary bond to subrogation. 26F(2d)944.

407-57 40F(2d)577 (giving bond).

407-64 176Ark401, 4SW(2d)912, 916 [citCyc]; 180Ark643, 22SW(2d)381; 155Miss21, 119S357. **Charterer held justified** in paying claims of cargo owners and subrogated to their rights. 15 F(2d)203. **Surety in discharging obligation of principal for which surety is bound** is not volunteer. IndA 159NE3. **Doctrine of subrogation was not applicable as between two surety companies** so as to constitute basis for judgment over in favor of one against other, where no loss sustained by insured was committed during life of bonds issued by one of surety companies. TexCivA 14SW(2d)88.

407-65 Surety on county treasurer's bond is not volunteer where he pays deficiency on insolvency of depositary on commissioner's representation that treasurer violated duties. 26F(2d)944.

408-69 5F(2d)34, 36 [citCyc]; 17F(2d) 913; 17F(2d)942; 51ND105, 201NW 993; Wash 288P660. **Application.**-5F (2d)34.

409-74 83NH479, 144A265. **Sureties who pay debts as sureties in different capacities** are entitled to share dividends of insolvent bank in proportion to payments made. 141Wash440, 252P147.

409-76 52ND1, 201NW993.

409-77 52ND1, 201NW993.

409-78 17F(2d)913. But see Minn 232 NW320.

410-81½-New. Where claim to pro tanto subrogation is based on contract, it must be clear and certain before subrogation will be permitted thereunder to injury of obligee or creditor. 52ND 1, 201NW993.

410-84 TexCivA 285SW1115.

411-87 This was formerly the rule in Texas, etc. TexCivA 285SW1115 [foll 88Tex428, 31SW190, 28LRA528].

414-1 35F(2d)531; 176Ark401, 4SW (2d)912; 180Ark643, 22SW(2d)381 paid surety); Cal 285P851; CalA 280 P158; 41GaA715, 154SE468; 201 Iowa 38, 206NW117; 205 Iowa1154, 213NW 517; 205 Iowa203, 217NW857; Mo 30 SW(2d)71; 132Misc22, 227NYS746; 192 NC221, 134SE490; 56ND851, 219NW 776; 117 Okl148, 245P567; 133 Okl 23, 270P854; 85PaSuper480; 135SC107, 133SE210; 155SC222, 152SE425; Tex CivA 285SW1115; TexCivA 29SW(2d) 843(2dcase). **Public work.**-114 Oh323, 151NE177, 45ALR371. **Notice has been imputed** to bank dealing with highway contractor that there was surety. 23F (2d)378. **Rights accrue as of date of payment.**-205 Iowa1154, 213NW517.

414-2 190NC343, 130SE36; 85PaSuper 480. **Surety on bond for performance of construction contract** who pays for materials furnished subcontractor is entitled to residual value thereof if not completely worn out. 53SD646, 222NW 269.

415-4 37F(2d)326; 201 Iowa38, 206 NW117; 193Wis274, 213NW676.

415-5 217Ala520, 116S918; 201 Iowa 38, 206NW117; 114 Oh323, 151NE177, 45ALR371; 135SC107, 133SE210, 213 [quotCyc].

415-6 135SC107, 133SE210, 213 [quot Cyc].

415-8 205 Iowa1154, 213NW517.

415-9 35F(2d)376; 144Miss579, 109S 1 (surety for claims of materialmen and laborers on payment is subrogated to fund retained by county); 114 Oh323, 151NE177, 45ALR371.

416-10 4F(2d)810 (retained percentage due principal as contractor); Fla 130S 453.

416-11 41GaA715, 154SE468; 135SC 107, 133SE210, 214 [quotCyc].

417-16 135SC107, 133SE210, 214 [quot Cyc].

417-18 81Colo 241, 254P999.

417-24 144Miss579, 109S1; 114 Oh323, 151NE177, 45ALR371.

419-39 124Kan255, 259P791; 164La 1099, 115S283; 192Wis545, 213NW309 (judgment on note). **A surety on an appeal-bond,** etc. 224AppDiv500, 231NYS 169. **Active assertion of right is required** before subrogation takes place. 50Nev383, 263P774.

421-48 50Nev383, 263P774.

422-59 Alta [1925] 3DomLR750 (holding surety may recover full amount of mortgage not deducting payments made thereon by him). **Where joint owners of land execute notes secured by mortgage thereon, one as principal and one as surety,** and land is subsequently partitioned, surety is entitled to compel satisfaction of mortgage so far as possible out of lands assigned to principal and to be subrogated to all rights of mortgagee in case he is compelled to pay mortgage debt. 201 Iowa38, 206 NW117. **Mortgagor paying mortgage debt after transfer of property to assuming grantee** is entitled to subrogation to mortgagee's rights to foreclose and proceed personally against grantee. 8D 229NW925.

424-71 Such as statutory liens.-213 Ala29, 104S135.

425-73 206 Iowa577, 218NW920.

426-81 221Ala268, 128S220; 223Ky32, 2SW(2d)1048; 117 Orl, 242P823; Tex CivA 19SW(2d)329.

426-83 77Mont134, 251P151; 114 Oh 323, 151NE177, 45ALR371; 117 Orl, 242P823; 8PaDist&Co 93, 99 [citCyc]. See also 34Wyo 134, 241P1063, 42ALR 1290. But see 174Minn583, 219NW916; 295Pa433, 145A520.

427-86½-New. Surety's right to retained percentage is superior to right of bank advancing money under assignment from contractor taken subsequently and without notice to surety. 23 F(2d)378.

427-87 6F(2d)960 (subcontractor's sureties held subrogated to contractor's rights against his interest in payments normally to be made to contractor by railway); 32F(2d)48; Ark 31SW(2d) 140; 256Mass367, 152NE635. **Time when right takes effect.**-165Minn158, 206NW49. **Relation back to date of suretyship.**-165Minn158, 206NW49. **Subrogation of building contractor's surety attaches to entire earnings of principal** and not alone to reserved balance for which provision is made by contract. 165Minn158, 206NW49. **Failure of materialmen to file claims in time does not prevent subrogation of surety** as to retained fund. 40F(2d) 577.

428-91 35F(2d)376.

428-97 Alta [1926] 4DomLR951.

428-98½-New. Accommodation maker who signs under special agreement as cosurety does not by signing renewal note as indorser become entitled to recover full amount against former cosurety upon payment of note. TexCivA 274SW984.

428-99 14F(2d)411; 180Ark643, 22 SW(2d)381; 201 Iowa38, 206NW117; 139SC411, 138SE184. **Surety on contractor's bond** has right superior to bank as assignee of contractor to repay latter's debt to bank on loan where such assignment is subsequent to execution of bond on application agreeing that surety should be subrogated to all rights and property of contractor growing out of contract, since surety's right to equities attach on date of bond. 234 Mich375, 208NW446. **Assignees of principal.**-165Minn158, 206NW49. **Lien of surety paying mortgage indebtedness** is superior to that of subsequent mortgagee taking with notice of his claim. 56ND851, 219NW776. **Contractor's assignment of moneys to bank,**

which gave notice to highway commission; did not defeat right of surety to funds which completed contract at loss. 32F(2d)48. **Sureties on city treasurer's fidelity bond** cannot question right of sureties on depository bond to subrogation. Minn 232NW320.

428-1 201 Iowa38, 206NW117.

428-2 IndA 159NE3; 207 Iowa1071, 224NW72; 139SC411, 138SE184.

428-3 **Bank lending money to contractor under bond**, on faith of assignment of funds to become due, held under duty of not permitting moneys to be paid out to detriment of surety. IndA 159NE3.

428-4 21F(2d)102; 34F(2d)419; Ark 31SW(2d)140; Fla 130S453. See also 206 Iowa577, 218NW920. **Surety on public contractor's bond**, etc. 240Mich 213, 215NW394; 114 Oh323, 151NE177, 45ALR371. **Surety's equity of subrogation** arises when relation of principal and surety comes into existence. 4 F(2d)810. **Date of right of subrogation.**–136SC15, 134SE209.

429-6 154Miss412, 122S529(2dcase); TexCivA 26SW(2d)708. But see 180 Ark643, 22SW(2d)381.

429-7 8F(2d)443.

429-12½-New. Surety completing state improvement contract on contractor's default is entitled to payment from state superior to claim of assignee of contractor for amounts due on contract, 217AppDiv420, 217NYS48.

429-12¼-New. but is subject to superior claim of materialman who furnished material to contractor to extent of value of material furnished. 217 AppDiv420, 217NYS48.

429-12¼-New. Accommodation maker may be liable to one compelled to pay note. 181Ark590, 27SW(2d)507(1st case).

429-14 **Surety on contractor's bond.**–234Mich375, 208NW446.

429-15 177Ark181, 5SW(2d)929; 117 Nebr6, 219NW583. **Where bank had agreed to indemnify surety against loss** on its bond for payment of state treasurer's deposits up to amount which surety paid treasurer, only right which surety had, till general creditors were paid, was to be subrogated to treasurer's rights against bank's receiver. 30F(2d) 357 [certiorari den 279US852, 49SCt348 (3dcase), 73L ed995]. **Where county did not have lien or title to materials on contractor's default**, surety on his bond is not entitled to subrogation. 37F(2d) 326.

429-18 5F(2d)34, 37 [quotCyc]; 217 Ala520, 116S918.

430-19 15F(2d)198.

430-27 133Misc565, 233NYS432; Tex CivA 32SW(2d)660. **Where surety completed contract at profit**, it was not entitled to profit above that necessary to reimburse it because of loss on another contract completed for same contractor. 32F(2d)48.

431-28 **Receiver's surety was entitled to interest from date of judgment** against receiver, which surety paid and not before. 334 Ill 494, 166NE123.

431-30 38Wyo 88, 264P1030.

431-31 Contra 117 Or1, 242P823.

431-31½-New. Right of highway contractor's surety, completing contract on principal's default, by way of subrogation, extends to current estimates payable under contract as well as retained percentages. 32F(2d)48.

431-31⅓-New. Right of tax collector's surety to subrogation to lien of state and county, on collector's land for shortages, may be diminished by amount paid by others to reduce shortage. 221Ala268, 128S220.

431-32 **Where surety on mortgage** note, after judgment thereon, canceled mortgage, held that such cancellation did not destroy right of subrogation. 192NC262, 134SE643.

432-39 157Miss358, 128S93.

432-47 39F(2d)387 (surety for defalcating school treasurer); 165Ga415, 140SE859. **The sureties of a defaulting tax collector**, etc. 215Ala218, 110S24; 220Ala35, 123S229. **Surety on public depositary bond is not entitled to be subrogated to preferential rights of municipality when bond was given**, when at time of payment by surety statute granting rights had been repealed. 205 Iowa883, 213NW531. **Sureties on postmaster's bond**, who has defaulted, are entitled to be subrogated to government's claim against postmaster. 120 Oh47, 165NE537.

433-48 TexCivA 284SW977. **Sureties entitled to subrogation to rights of ward against insolvent bank**, where they paid to former guardian's successor amount of loss resulting from loan of ward's funds to bank by former guardian. TexCivA 18SW(2d)215. **Where there are coguardians**, surety for one guilty of wrongdoing cannot become subrogated to ward's right of indemnity against innocent guardian or have contribution against his sureties. 178 Minn495, 228NW326(2dcase), 66ALR 1136.

434-52 40F(2d)285.

434-58 CalA 273P822.

434-61 33NM473, 270P881, 882 [cit Cyc]; 153Wash33, 279P86.

434-63 229AppDiv550, 242NYS149.

435-65 TexCivA 12SW(2d)662.

435-67½-New. Surety company on successive bonds of warehouseman is entitled to be subrogated to his rights in property and money turned over to it by warehouseman, after application of sufficient of proceeds to payment of storage tickets representing grain converted by warehouseman during period of first bond. 53ND162, 204NW976.

435-73½-New. Insurer, indemnifying owner of premises against loss by reason of legal liability and becoming surety on appeal by owner from judgment for injuries, was entitled to be subrogated to all rights of owner of premises. 224AppDiv553, 231NYS494.

437-82 103WVa290, 137SE222 [cit Cyc].

440-5½-New. Where sheriff becomes liable to state for amount of execution issued on replevin bond and returned "no property found" and interest, and pays same, he is subrogated to rights of creditor on bond, his payment not discharging judgment debtor. 209Ky 372, 272SW906.

440-7 **Where widow completes payments on husband's contract of purchase**, she acquires, in addition to marital rights, right of vendor to enforce payment of balance due. 171Ark162, 283SW19. **Redeeming homestead from sale on foreclosure.**–57ND810, 224NW 220.

441-13 **Executors, held liable by remainderman**, are subrogated as against primary debtor, life tenant, and can resort to realty of life tenant, even though it is devised to remainderman and even though payment was made under mistake of law. 151Md59, 133A851.

442-20 **Executor, secondarily liable to** remainderman for losses of life tenant, is on same footing, as to limitations as remainderman. 151Md59, 133A851.

443-25½-New. Where note is charged back to trustee for failure to collect, title is automatically vested in trustee. 133SC43, 130SE550.

443-26 123Kan329, 254P1040; 2LaA 236; Minn 233NW12; 320Mo 580, 8 SW(2d)614; 217MoA451, 269SW1; 115 Nebr493, 213NW587, 591 [citCyc]; 23 OhA50, 154NE358; 51SD197, 212NW 876, 878 [quotCyc]; TexCivA 26SW(2d) 708; 144Wash358, 258P10; 38Wyo 515, 269P45, 49 [citCyc], 60ALR418. **A widow in possession**, etc. 117 Or125, 242 P616 (widow paying previously assessed taxes after assignment of dower is subrogated to lien of county or state on property so assigned). See also 315 Mo 872, 288SW54. **Inchoate right of dower** is sufficient interest to entitle wife to subrogation of mortgage paid. 100NJEq403, 135A693. **Lien for fees of** solicitor held sufficient interest to entitle him to subrogation of mortgage paid. 100NJEq403, 135A693. **Payment of taxes.**–79CalA387, 249P548. **Lessors of theater under lease and sublease giving lessors title to new organ** which should be installed have been held subrogated to rights of sublessee, as against conditional vendor of organ, and entitled to make good sublessee's default. 156Md368, 144A641, 62ALR 358. **Beneficiary of life policy**, on paying debt for which policy was transferred as collateral security, became subrogated, though payment was voluntary. TexCivA 12SW(2d)651. **One redeeming property from mortgage foreclosure by virtue of equitable interest**, under arrangement with trustees to whom creditors had assigned their claims pursuant to agreement for payment of percentage of claims out of profits, became substituted in equity in place of mortgagee, and was entitled to hold land as if mortgage existed till trustees or creditors for whom they were acting paid their respective shares. 151Wash134, 275P77.

444-27 51SD197, 212NW876, 878 [quot Cyc]; 38Wyo 515, 269P45, 49 [citCyc], 60ALR418.

445-32 **Purchaser of mechanic's lien**, paying into court amount due on foreclosed mortgage, under mistaken belief that he was entitled to be subrogated, may recover the money, but without interest. 236Mich45, 209NW809.

446-39 236Mich45, 209NW809; 9Pa Dist&Co 197.

446-39½-New. A covenantee against encumbrance who pays encumbrance before, 125Misc821, 211NYS585.

446-39¾-New. or after conveyance, is subrogated to rights of his grantee. 125Misc821, 211NYS585.

446-39¼-New. and becomes equitable assignee of grantee's cause of action. 125Misc821, 211NYS585.

446-40 217Ky258, 289SW275; 161La 949, 109S773; 2LaA602; TexCivA 19 SW(2d)808 (purchaser of pledged property).

447-41 214Ala608, 108S525, 47ALR 506; 217Ky258, 289SW275; 24 Oh NPNS401. See also Mich 233NW213. **One seeking to be subrogated** to lien of mortgage paid by him must show that owner of premises was in law bound to pay debt. 162Ga578, 134SE441.

448-48 **Purchaser of property** discharging encumbrance is subrogated to lien thereof as against holders of other encumbrances of which he had no notice, but not as to encumbrances of which he had notice. 162Ga578, 134SE 441.

448-50 179Ark927, 19SW(2d)1105.

449-57 95PaSuper346.

449-58 214Ala608, 108S525, 47ALR 506; 230Ky351, 19SW(2d)988; 159La 24, 105S87; 156Miss775, 125S826; 49 ND125, 190NW551 (purchaser of fee simple from owner of only one half thereof has been held entitled to subrogation to rights of holder of mortgage paid by him as against judgment creditor of owner of other half); 53SD585, 221NW674. **In Louisiana.**–159La620, 105S792. **Grantee of purchaser is subrogated to mortgagee.**–214Ala608, 108S 525, 47ALR506.

451-62 49ND125, 190NW551.

451-70 But see 154Tenn389, 285SW 558.

452-71 But see 214Ala608, 108S525, 47 ALR506.

452-78½-New. **Surety for contractor holding assignment of contractor's property under indemnity agreement** is not entitled as against second chattel mortgagee to subrogation to first chattel mortgage paid by him without claim of subrogation. 96Fla828, 119S394.

452-79 214Ala608, 108S525, 47ALR 506; 255Mass206, 150NE902.

453-86½-New. **Junior mortgagee purchasing property and releasing his mortgage on faith of forged release of prior mortgage** is not entitled to have his mortgage revived and to be subrogated to rights he would have had if he had not released same and purchaser from him has no greater rights. 127Kan405, 273P486.

453-87 TexCivA 278SW306, 309 [cit Cyc]. **Person paying money under mistake of protecting own rights** is not volunteer. TexCivA 278SW306.

454-88 TexCivA 278SW306, 309 [cit Cyc]; TexCivA 21SW(2d)17 (purchaser is subrogated to rights of holder of vendor's lien where loan was used to payment thereof).

454-90 TexCivA 278SW306.
454-95½-New. Where offer by purchaser to pay debt secured by trust deed is conditional and rejected by creditor, there can be no subrogation. 79CalA164, 249P43.
454-95¼-New. Offer to pay is conditional where purchaser expresses desire to be subrogated to creditor's rights and demands postponement of sale under trust deed and makes no denial when creditor rejects offer because conditional. 79CalA164, 249P43.
454-96 Iowa 206NW103, 105 [citCyc] (receiver's sale); 322Mo 654, 15SW(2d) 842. **In North Carolina.**-195NC339, 142 SE226.
456-99 96Fla50, 117S849. **Rights of purchaser against junior mortgagee** not joined in foreclosure sale. Fla 129S690.
458-9 TexCivA 281SW335.
458-10 317 Ill 625, 148NE384.
458-10½-New. Purchaser is not entitled in equity to be subrogated to claims of creditors paid with purchase money where title fails for want of jurisdiction in court ordering sale over persons of defendants. 317 Ill 625, 148NE 384.
458-10¼-New. Fact that money loaned by husband to his wife who was life tenant to complete purchase of property was applied by executor to payment of debts of estate does not entitle husband to claims of creditors. 317 Ill 625, 148 NE384 (husband merely lender and not purchaser).
459-11 221Ala683, 130S323; 94CalA 407, 271P367; 164Ga16, 137SE778; 154 Miss726, 123S847; NJCh 147A113; 55 ND94, 212NW515. 1. Subrogation § 17, Mortgagee held entitled to subrogation to first mortgage lien and municipal tax liens paid by it; so far as mortgage lienor was subrogated to first mortgage and municipal tax liens paid by it, its lien was prior to mechanic's lien. Mortgagors, on May 5, 1927, executed and delivered to complainant a real estate mortgage to secure payment of the sum of $8,500, which by agreement between the mortgagors, complainant, and a party having an existing second mortgage lien, was applied to the payment of an existing first mortgage lien then in default and about to be foreclosed, and to the payment of municipal tax liens. It was agreed that complainant's mortgage should be a first lien. Shortly prior thereto the mortgagors contracted for the erection of a garage upon the rear part of the mortgaged premises. On May 14, 1927, complainant caused to be canceled of record the first mortgage lien which it had satisfied, and caused the municipal tax liens to be discharged, and recorded its aforesaid second mortgage. On August 23, 1927, the contractor who erected the garage filed a mechanic's lien and instituted a suit thereon for work done and materials furnished in the construction of said garage, for which priority is claimed over that of said mortgages. Complainant, in examining mortgagors' title, failed to inspect the mortgaged premises, and thus failed to ascertain that a garage was being erected thereon. Held: Complainant is entitled to subrogation to the rights of the first mortgagee whose mortgage lien it paid, and to the rights of the city of Jersey City for municipal tax liens paid, to the extent of the moneys paid on account of said mortgage and tax liens. To that amount, with interest, complainant's lien is prior to that of the mechanic's lien claimant. 150SC75, 147SE 752; TexCommnA 18W(2d)857; Tex CivA 299SW917; 191Wis602, 211NW 795; 20SaskL564, [1926] 3DomLR261, [1926] 2WestWkly385. **Right extends to judgment lienholders.**-38Wyo 515, 269P45, 60ALR418. **In New Jersey.**-Ch 147A809. **Bank loaning money on third mortgage to pay first mortgage** has been subrogated to borrower's rights on redemption. 221Ala683, 130S323. **Effect of cancellation of first mortgage.**-221Ala683, 130S323.
461-12 NJCh 147A113 (priority over intervening mechanic's lien). **Mortgagee paying first lien** is subrogated to holder's rights, as against holder of second lien note, though ignorant of who held it. TexCivA 297SW294. **Where interest and installments on prior mortgages are paid by junior mortgagee,** latter is subrogated to rights of prior mortgagee to extent of payments made, superior to intervening mortgage. 131Misc446, 226NYS129.
461-18 Where mortgage note was assigned to plaintiff subject to rights of bank which held it as collateral for loan, and thereafter note was paid and proceeds applied to bank's indebtedness, plaintiff, on paying balance to bank, was entitled to subrogation to bank's right to other collateral. 152Wash47, 277P79.
461-22 164Ga16, 137SE778. **Where senior mortgagee is about to sell land under power of sale,** assignment is necessary for protection of junior mortgagee. 164Ga16, 137SE778.
462-32 Mechanic's lienholder cannot pay off and be subrogated to right of prior mortgagee who has purchased at foreclosure sale, since equitable title obtained can be defeated only by redemption. 236Mich45, 209NW809.
463-34 199 Ind687, 156NE552. **Money loaned on forged mortgage.**-119Kan358, 239P1110, 43ALR1387 (language in 66 Kan514, 72P228, so far as inconsistent with rule, disapproved).
464-46½-New. Where trust deed is defeated by property owner's successful repudiation of his representation that property was not homestead, holder of deed is entitled to subrogation to amount of mechanic's lien discharged by proceeds of loan. TexCivA 286SW 680.
465-48 128 Or684, 274P1104.
465-50 252 IllA290.
465-51 252 IllA290; 55ND94, 212NW 515.
465-53½-New. Junior mortgagee may pay interest accruing on prior mortgage and become subrogated pro tanto to rights of senior mortgagee. 116Nebr 25, 215NW462; 116Nebr713, 218NW744.
465-53¼-New. Second mortgagee, compelled to pay interest on first mortgage on property in order to protect own mortgage, did not acquire right to be subrogated to remedies of owners of first mortgage which provided that receiver might be appointed in case of default, since not paying, or discharge whole of prior mortgage, and hence order appointing receiver on foreclosure by second mortgagee was void. 128 Or684, 274P1104.
465-53¼-New. Holder of equity of redemption has no standing to object to subrogation of junior mortgagee making payment on first mortgage. 252 IllA290.
465-54 214Ala362, 107S834; 219Ala 161, 121S530(2dcase); CalA 287P575 (holding in absence of promise or assumption of obligation by indorser, that maker is not entitled to subrogation); 255Mass206, 150NE902; 83NH479, 144 A265 (though conveyance was of only part of mortgaged premises); NJCh 146 A379; NJCh 151A117; 221AppDiv405, 223NYS99; 281Pa572, 127A219 (vendor paying deficiency on foreclosure sale may recover from purchaser); 149SC 163, 146SE818; Va 152SE346. **Mortgagor need not be literally compelled to pay,** but can be subrogated if payment is voluntary or otherwise. 83NH 479, 144A265.
466-58 214Ala362, 107S834.
466-62½-New. Under provision of chattel mortgage applying surplus proceeds to redeem real estate purchased subject to mortgage, vendor is not entitled to such proceeds by subrogation to rights of mortgagee or foreclosure purchaser where redemption period expired without redemption. 47 Ida188, 273P950.
466-62⅓-New. Where grantee obtains extension of time to pay mortgage without knowledge of grantor, he cannot complain of permitting grantor to recover amount of mortgage paid as depriving grantee of benefit of extension. 106Conn339, 138A155.
466-62¼-New. Divorced husband paying mortgage and taxes on land awarded to wife subject to mortgage executed by him is entitled to be subrogated to liens of mortgagee and of municipality. 144Wash358, 258P10.
466-62⅕-New. Where purchaser assumed mortgage, vendor compelled to pay same may recover from purchaser where vendor had conveyed direct to purchaser's designee and where mortgagee had indorsed note without recourse and delivered it with assignment of mortgage to vendor. 50SD612, 211 NW456.
467-66 199 Ind687, 156NE552.
467-67½-New. Lumber company is subrogated to owner's rights against surety of contractor on furnishing labor and material to carry out contract after contractor's default. TexCivA 25SW (2d)176.
467-68 170Ga747, 154SE234; 202 Iowa 764, 211NW257.
468-69 Lender to mortgagor using more to pay mortgage not subrogated. See also 174Ark328, 295SW44.
468-70 23 OhA50, 154NE358.
468-72 170Ark703, 281SW14; 156Miss 597, 126S388; TexCivA 2SW(2d)911. **Lender to school district which had no authority to borrow subrogated to rights of holders of lawful liabilities** against trustees which were paid out of proceeds of illegal loan. 160Ga556, 128SE766. **Person advancing money to contractor to pay checks for labor and materials** is not entitled to be subrogated to rights of materialmen and laborers. 176Minn258, 223NW298(2d case). **Where bank had no claim to which she could be subrogated,** widow paying money loaned husband got no right of subrogation. 221Ala268, 128 S220.
469-73 221Ala268, 128S220; 23 OhA 50, 154NE358; WVa 135SE19. **Where lienor has improperly released security,** release may be treated in equity as invalid and lien restored for benefit of payor. WVa 135SE19. **Agreement with obligee.**-WVa 151SE324.
469-75 221Ala268, 128S220; 180Ark63, 20SW(2d)307; 100NJEq403, 135A693; 241NY418, 150NE501, 43ALR1320; 213 AppDiv338, 210NYS218; TexCivA 294 SW343; TexCivA 21SW(2d)92; Tex CivA 26SW(2d)708; TexCivA 30SW (2d)711; 151Va644, 145SE245; 102 WVa224, 135SE19.
470-76. Widow, not showing mortgagee loaned money to discharge lien on land, did not show right to subrogation by paying mortgage. 221Ala268, 128S220.
470-78 TexCivA 274SW662.
470-80 166Ga274, 142SE870; 123Kan 329, 254P1040; 100NJEq403, 135A693; TexCivA 274SW662. **Contractor advancing wages** due from subcontractor in order to carry on work is subrogated to lien of laborers against dredge of subcontractor. 5F(2d)227. **One compelled to pay debt of another** to save his own property is subrogated to rights of creditor. 6F(2d)779. **Mortgage creditor who pays borough taxes** is subrogated to rights of borough. 8 PaDist&Co 70. **Purchasers of receiver's certificates** proceeds of sale of which were used to pay creditors of bank are entitled to be subrogated to rights of former creditors to be paid through assessment on stockholders. 206 Iowa869, 221NW668.
470-82 221Ala268, 128S220.
470-84 166Ga274, 142SE870; 153Va 246, 149SE485.
471-85½-New. Buyer who has set-off against insolvent seller who is compelled to pay seller's assignor for goods purchased, is entitled to be subrogated to assignee's interest in seller's collateral. 241NY418, 150NE501.
471-85⅓-New. Taxes.-Where mortgagee advances money to receiver to pay taxes in case where mortgage debt was far in excess of value of land, and court could have directed receiver not to pay taxes, since there was no equity above mortgage to pay general creditors, mortgagee is not subrogated to state's right, for money loaned receiver without court's order. 5F(2d)11.
471-85¼-New. Person lending money secured by mortgage on land is mere volunteer not entitled to claim under prior mortgages where he failed to give any directions that money be applied to satisfaction of existing liens and encumbrances. 51SD197, 212NW876.

471-85½-New. Such person not being in position where loan is required to protect his interest is not entitled to be subrogated to rights of prior lienholders. 51SD197, 212NW876.

471-85¼-New. Party paying off materialmen's claims does not acquire superior lien unless claims are established as materialmen's liens under statute. 176Ark300, 2SW(2d)1093.

471-85½-New. Temporary arrangement to cancel corporation's indebtedness to obtain loan to pay it did not affect right of assignee of new note to subrogation. 198NC705, 153SE327.

471-85⅝-New. Constructive notice of record lien will not defeat subrogation rights of one furnishing money to pay senior lien in absence of prejudice to junior lienor. Me 151A420.

471-87 78Mont395, 255P1049; 223App Div784, 227NYS579; 23 OhA50, 154NE 358.

471-88 Wyo 291P812. See also 214Ala 608, 108S525, 47ALR506.

471-89 214Ala608, 108S525, 47ALR506.

471-91 226Ky137, 10SW(2d)636; 244 Mich309, 221NW338.

472-92 217Ala375, 115S864; 218Ala 379, 118S549; 221Ala268, 128S220; 199 Ind687, 156NE552; 316Mo 891, 292SW 702; 58ND134, 226NW476; 23 OhA50, 154NE358. **Mortgagee subrogated to rights of prior mortgagee** who was paid on loan induced by false representation as to nonexistence of encumbrances. IndA 163NE236. **One paying mortgage at mortgagor's request** held not volunteer. 181Ark733, 27SW(2d)509.

472-93 221Ala268, 128S220; 239Mich 575, 215NW13; 152Miss542, 120S195; 217MoA451, 269SW1; 116Nebr706, 218 NW734, 735 [quotCyc]; 23 OhA50, 154 NE358; 139SC597, 138SE146; 52SD 133, 216NW876, 877 [citCyc]; TexCivA 26SW(2d)708; **One who pays a mortgage debt under an agreement,** etc. 139 SC597, 138SE146. **Same rule applies to chattel mortgage.**-30Ariz505, 249P71. **Payment by person to whom property was conveyed as security** is ground for subrogation. 217MoA451, 269SW1.

473-94 52SD133, 216NW876.

473-95 219Ala150, 121S511; 168Ark 927, 271SW974, 976 [quotCyc]; 206Cal 143, 273P565; 253 IllA1; IndA 160NE 56; 123Kan329, 254P1040; Me 151A 420; 220MoA85, 279SW428, 431 [quot Cyc]; 225AppDiv290, 233NYS22; 23 OhA50, 154NE358; 128 Okl 165, 261P 913; TexCivA 297SW294. **Assignee of mortgage** securing loan from proceeds of which mortgagee, at mortgagor's request, paid off first liens, succeeded to mortgagee's right of subrogation against holder of second lien. TexCivA 297SW294. **Mistake of fact** does not interfere with equitable subrogation. Tex CivA 297SW294. **Priorities.**-23 OhA50, 154NE358. **That wife of person borrowing did not authorize or ratify husband's promise to give security** does not defeat right to subrogation. 244Mich 577, 222NW207.

474-96 168Ark927, 271SW974, 976 [quotCyc]; 220MoA85, 279SW428, 431 [quotCyc].

474-97 220MoA85, 279SW428, 431 [quotCyc].

474-98 220MoA85, 279SW428, 431 [quotCyc].

474-99 220MoA85, 279SW428, 431 [quotCyc].

474-3 Depreciation in value of property is immaterial as regards right of subrogation under first mortgage as against second mortgage. 206Cal 143, 273P565.

475-5 225Ky375, 9SW(2d)113; 139SC 597, 138SE146. **Right not affected by failure to search records,** where second mortgagee failed to disclose material facts when under duty to do so. 206Cal 143, 273P565.

475-6 As against bona fide purchasers of second mortgage person furnishing money to pay senior mortgage held not entitled to subrogation. Me 151A420 (assignee as collateral for loan held bona fide purchaser).

475-8 But see 88 IndA189, 163NE602; 152Miss542, 120S195.

475-10 55ND77, 212NW440.

475-11 55ND77, 212NW440.

475-13 52SD133, 216NW876; TexCivA 297SW294. **One paying mortgage at mortgagor's request and assurance of no other liens on land** may be subrogated to rights of mortgagee against execution purchaser. 181Ark733, 27SW(2d)509.

476-14 213Ky610, 281SW834.

476-14½-New. Grantor retaining title to part of premises, subject to mortgage assumed by grantee, held not volunteer in paying mortgage to protect own interest and is entitled to recover amount from grantee. 106Conn339, 138A155.

476-16 213Ky836, 281SW1008.

476-17 213Ky836, 281SW1008. **Where son loaned purchaser amount of purchase note and took mortgage from him on land inferior to vendor's lien,** he was not entitled to subrogation to vendor's lien so as to share pro rata with bank which loaned money to purchaser on mortgage to pay balance of purchase price secured by vendor's lien. 228Ky 242, 14SW(2d)762, 70ALR1392.

476-18 139SC597, 138SE146; 115Tex 193, 280SW153. **Where one advances money to pay off a vendor's lien upon a homestead,** etc. TexCivA 289SW709. **Priority of vendor's lien.**-226Ky628, 11 SW(2d)698.

477-20 228Ky242, 14SW(2d)762, 70 ALR1392.

477-23 TexCivA 18SW(2d)724. **Wife estopped to deny subrogation** where she knew husband had borrowed money by fraudulent representations and aided him in perpetrating fraud. TexCivA 18 SW(2d)724.

477-24 But see 153Va246, 149SE485.

478-31 167La301, 119S56; 168La645, 122S893. **Wages of laborers** paid by bank entitle bank to claim against contractor and its surety. 169La90, 124S182.

479-32 TexCivA 10SW(2d)786.

SUBSCRIPTIONS

483-8½-New. Contribution pledge for erection of nurses' home has been held valid. LaA 129S425.

483-9½-New. General rules as to definiteness of contracts apply to subscriptions. 242 IllA296 (contract held binding).

483-12½-New. One may authorize another to sign his name to subscription contract. 168Ark1167, 271SW964.

485-29 103CalA39, 283P949; 246NY 369, 159NE173.

485-30 133Misc723, 233NYS451.

486-32 225 Ky796, 10SW(2d)291. **Where deceased made written subscription for war memorial building for church as memorial for his wife,** and numerous other subscriptions were solicited and expenditures made prior to expiration of time for payment of decedent's gift, offer and acceptance of memorial pledge created agreement binding donor to pay pledge. 133Misc 723, 233NYS451.

486-32½-New. Only substantial deviation from proposed route of highway will avoid subscription to aid in securing and constructing road. 225Ky796, 10 SW(2d)291.

486-33 103CalA39, 283P949; 221MoA 285, 3SW(2d)264; NM 290P1020; 53SD 153, 220NW468; 54SD99, 222NW661; TexCivA 293SW916. **That work done by county was authorized to be done at** public expense does not prevent its performance from being good consideration where it is not required to be so done. 120Kan698, 244P866.

488-36 103CalA39, 283P949; 168Ga 291, 147SE390(2dcase); 124Kan430, 260P623.

489-38 133Misc903, 233NYS450. **Promise to issue bonds** for amount of subscription in addition to promise to carry out project has been held sufficient consideration. 121Kan124, 245P744.

490-41 246NY369, 159NE173.

491-44 Consideration for subscription to some public object need not be one beneficial to subscriber. 133Misc723, 233NYS451.

492-51 133Misc723, 233NYS451; 54SD 99, 222NW661.

493-55 103CalA39, 283P949.

493-56 Liability under subscription to hospital based on valid consideration held not terminated by death of subscriber. 133Misc903, 233NYS450. **Testator's death before due date of subscription** did not revoke gift. 133Misc 723, 233NYS451.

493-59½-New. Person making representations must have authority. 215Ky 27, 284SW119.

493-59¼-New. False representation by public speakers, alleged to have induced subscription to aid in securing construction of highway, are not available as defense, without showing that persons making representations had authority to speak for county or highway commission, or committee appointed to coöperate with fiscal court in securing roads. 225Ky796, 10SW(2d)291.

494-65 Party bound by terms of written subscription is unfettered by conditions and may not rely on unauthorized representations made by others. 233Ky 823, 27SW(2d)427.

494-68½-New. Subscription to pay county for improving county road has been held valid. 120Kan698, 244P866.

494-70 120Kan698, 244P866 [quotCyc].

494-71 103CalA39, 283P949.

495-72 121Kan124, 245P744, 745 [cit Cyc].

496-73 103CalA39, 283P949; 54SD99, 222NW661.

496-74 See also 224AppDiv396, 231NYS 176.

496-75 233Ky823, 27SW(2d)427.

496-80 220Ky187, 294SW1044; 233Ky 823, 27SW(2d)427.

497-82 See also 53SD153, 220NW468.

497-83 121Kan124, 245P744.

497-85 But see LaA 129S425.

498-90 But see LaA 129S425.

498-92½-New. Subscriber is bound by pledge in absence of showing injury by change of plans. LaA 129S425.

499-97 198NC622, 152SE797(2dcase).

501-11½-New. Enlargement of total of subscription will not release subscriber where additional amount is covered by further subscriptions. 50SD355, 210NW 200.

501-11¼-New. That one of syndicate managers gave little attention to affairs of syndicate and did not use his discretion but followed instructions of other manager, and that such delinquent manager retired as syndicate manager without consent of defendant has been held no defense to action to recover on defendant's subscription agreement. 224 AppDiv396, 231NYS176.

501-11¼-New. Any acts of mismanagement or other wrongful acts of syndicate managers constituted no defense to action against subscriber to syndicate for failure to pay for subscription. 224App Div396, 231NYS176.

501-11⅛-New. That reorganization plan was submitted to subscribers to syndicate, but was not approved by majority, would constitute no defense to action against subscriber for failure to pay subscription, so long as no action was taken under plan which failed of approval. 224AppDiv396, 231NYS176.

501-13 129Misc551, 222NYS182.

501-16½-New. Defenses.-224AppDiv 396 231NYS176.

501-17 215Ky27, 284SW119.

502-20 124Kan430, 260P623, 624 [cit Cyc].

502-24½-New. Action on agreement to raise funds to adjust claims of creditors of corporation may be brought by person who was both subscriber and creditor without joining as plaintiffs corporation, trustees, or other creditors where he undertook several liability. 84 CalA298, 257P901.

502-24½-New. Trustees under such agreement and subscribers are not so united in interest as to require joinder of trustees as plaintiffs in such action. 84CalA298, 257P901.

502-24¼-New. Other creditors who were not parties to such agreement are not necessary parties to action by subscriber and creditor for whose sole benefit certain provisions of agreement were made. 84CalA298, 257P901.

502-25 See also 124Kan430, 260P623.

503-28½-New. In action by subscriber and creditor on agreement to raise funds to adjust claims of creditors of corporation, trustees are not so united in interest as to be necessary defendants. 84 CalA298, 257P901.

503-28½-New. In such action other creditors are not necessary parties defendant where agreement contained provisions solely for benefit of plaintiff. 84 CalA298, 257P901.

503-28¾-New. In such action other subscribers need not be joined as defendants where agreement authorized suit by plaintiff against any defaulting party. 84CalA298, 257P901.

503-35½-New. Answer setting up failure of consideration is no defense if it fails to show this by sufficient facts. 215 Ky27, 284SW119.

503-35⅓-New. In absence of allegation that plan submitted was adopted or that assignment was made under such plan, defense of subscriber based on invalidity of plan is invalid. 224AppDiv396, 231 NYS176.

503-35¼-New Petition reciting subscription of others and expenditures stated case. 39GaA738, 148SE356.

503-35⅓-New. Where court erred in overruling demurrer to petition, subsequent proceedings were nugatory. 168 Ga291, 147SE390(2dcase).

503-36 221MoA285, 3SW(2d)264.

503-37 221MoA285, 3SW(2d)264.

503-41½-New. Where contract recites that it was made in consideration of subscriptions of others, it is prima facie supported by consideration, and defendant has burden of proving lack of consideration. 39GaA738, 148SE356.

503-41⅓-New. Where it was agreed that if necessary subscriptions for project were not obtained all payments should be returned except pro rata share of cost, subscriber, to avoid liability, must show insufficiency of subscriptions and that expense did not exceed subscription. 242 IllA296.

504-44 103CalA39, 283P949 (pleading and proof).

504-46 121Kan124, 245P744. **Parol contemporaneous evidence held inadmissible to show inducements for signing subscription,** valid and unambiguous on its face. 168Ga291, 147SE390(2dcase).

504-55 93PaSuper566. **Evidence held insufficient.**-168Ark1167, 271SW964.

SUBSEQUENT

504-2 8F(2d)544.

SUBSTANCE

505-9 202 Iowa450, 209NW468.

SUBSTANTIAL

506-13 241NY470, 150NE519. **Used in connection with other words,** "substantial performance." 220AppDiv10, 220 NYS634. **"Substantial copy"** of writing means copy of all material and essential elements, terms, and conditions thereof. 148Miss97, 114S145.

506-13½-New. As used in ordinance providing for erection of "substantial" shed over sidewalk, it is relative term depending on use shed is put to. 241 NY470, 150NE519.

SUBSTANTIAL PERFORMANCE

506-16½-New. "Substantial performance" has been defined as legal conclusion from fact which differs from other state of facts flowing from same obligation only in such trivial sense that difference is immaterial. 22 OhA282, 153 NE897.

SUBSTANTIVE

508-22 Substantive law, etc. 149Miss 455, 115S555.

SUBSTITUTE

508-23 129Misc309, 221NYS292. **"Substitute profit-sharing plan."**-129Misc309, 221NYS292.

SUCCESSION

511-41 In Porto Rico.-32PortoRico 793.

511-42 256Mass519, 153NE4.

SUCCESSOR

512-46 25 OhA415, 158NE554.

SUCH

513-55 16CustA19.

SUFFER

515-69 104Conn493, 133A671.

SUFFICIENT

516-75 241NY470, 150NE519.

516-76½-New. As used in permit for erection of shed over sidewalk, it is relative term depending on use shed is put to. 241NY470, 150NE519.

SUICIDE

518-2 17F(2d)963. See also 141Wash 55, 250P461. **Synonymous terms.**-17 F(2d)963.

519-5 Mere suspicion cannot be made basis for finding of suicide. 83Colo 89, 262P526.

520-8 In Alabama.-23AlaA205, 123S94 (2dcase).

SUIT

522-5 326 Ill 327, 157NE247.

522-6 17F(2d)733.

522-8 TexCommnA 292SW174; 117 Tex113, 298SW516.

523-21 326 Ill 327, 157NE247.

SUIT MONEY

526-30 90Fla824, 107S257.

SUMMARY PROCEEDINGS

530-20 152Md335, 136A648 (where no strict compliance, court has no jurisdiction).

SUMMONS

532-8 MoA 293SW524.

SUNDAY

539-2 8PaDist&Co 77.

539-4 128Misc39, 217NYS799.

539-6 8PaDist&Co 77.

540-14 152Md1, 136A41, 50ALR620; 134Misc529, 236NYS122.

540-18 128Misc39, 217NYS799, 800 [quot Cyc].

540-19 128Misc39, 217NYS799, 800 [quot Cyc].

541-22 29Ariz389, 242P340, 46ALR 284; 316Mo 9, 289SW838; 290Pa136, 138A497, 500 [citCyc], 53ALR1027; 143SC283, 141SE454; 143SC347, 141SE 610; 144Wash429, 258P328. **Law must have reasonable connection with public welfare.**-144Wash429, 258P328. **City held to have implied power** to legislate for Sunday closing of bakeries. 316Mo 9, 289SW838.

541-23 29Ariz389, 242P340, 46ALR 284; 322Mo 1129, 19SW(2d)1; 144 Wash429, 258P328.

542-24 Ordinance prohibiting certain places of business from keeping open, while permitting others to do so, held not invalid as class legislation. 144 Wash429, 258P328. **Unless the classification is manifestly arbitrary,** etc. 144Wash429, 258P328. **Ordinance prohibiting opening on Sunday of stores in certain lines of business and allowing opening of those in other lines is not** general Sunday closing ordinance with reasonable exceptions of works of necessity and charity but grants special privileges and immunities to certain classes while denying them to others. 29Ariz 389, 242P340, 46ALR284. **Statute imposing no burden on any person or class not imposed on all of same class is not** invalid as class legislation. 144Wash 429, 258P328.

542-27 56ND854, 219NW831; 149SC 52, 146SE686; 144Wash429, 258P328.

542-28 316Mo 9, 289SW838.

542-29 113Nebr761, 204NW788; 144 Wash429, 258P328. **Statute prohibiting, with certain exceptions, selling and exposing of goods for sale on Sunday** is not invalid as making arbitrary classification. 56ND854, 219NW831.

542-30 130Kan863, 288P729; 316Mo 9, 289SW838; 149SC52, 146SE686. **Ordinance requiring closing of bakeries after 9 a. m. on Sunday** held not discriminatory as to Jews. 316Mo 9, 289SW 838.

542-31½-New. or because not applying to corporations; 149SC52, 146SE686.

542-33 Sufficient titles.-161Ga537, 131 SE496.

542-33½-New. Demands of constitutional provision prohibiting special law where general law can be made applicable are satisfied if all similarly situated are included and none are omitted whose relationship to subject matter cannot by reason be distinguished from that of those included. 322Mo 1129, 19SW (2d)1.

543-38 Governor's veto of act of general assembly permitting sale of commodity on Sunday is evidence of intention that Sunday Law should remain in force. 143SC283, 141SE454.

543-40 But see 101Vt300, 143A284, 59 ALR1541.

543-42½-New. Word "county," in statute relating to fine for Sabbath breaking, includes Baltimore City. 156Md 459, 144A350.

544-53 Work in connection with golf.-143SC347, 141SE610.

544-54 But see 3Del 514, 139A257.

544-55 Labor of storekeeper is not "common labor" within meaning of statute. 113Nebr761, 204NW788. **Meetings of membership corporation** are not "labor," at least where corporation is not organized for profit. 125Misc217, 210 NYS541. **"Servile labor,"** as used in some statutes, means physical labor of menial nature performed with hands. OklCr 276P795 (does not include operation of public dance).

545-56 143SC283, 141SE454. **Sale of gasoline and motor oil** held not as matter of law work of necessity. 143SC283, 141SE454. **Appellate court will presume** in support of workmen's compensation claim that fireman claimant was engaged in Sunday work of necessity. TexCivA 25SW(2d)180.

546-68 Professional baseball is "trade" or "calling" within prohibition of statute. 147Va593, 136SE565.

546-71 Keeping or maintaining golf links on Sunday as business is violative of statute. 143SC347, 141SE610.

547-72½-New. Act prohibiting worldly employment on Sunday refers to employments of present existence, secular, not religious, spiritual, or holy. 290Pa 136, 138A497, 53ALR1027.

547-72⅓-New. Breach of peace is not necessary for violation of act prohibiting carrying on of worldly employment on Sunday. 290Pa136, 138A497, 53ALR 1027.

547-72¼-New. Violation of law prohibiting worldly employment on Sunday is crime. 290Pa136, 138A497, 53ALR 1027.

547-79 But see 35PortoRico 511.

548-86 Broadened construction.-14Pa Dist&Co 4.

548-87 22AlaA30, 111S759 (statute referring to merchants and shopkeepers held applicable to all persons alike).

550-11 8PaDist&Co 77. **Golf.**-143SC 347, 141SE610.

550-14½-New. Statute prohibiting operation of dance halls on Sunday has been construed as not limited to those where intoxicating liquor is sold. 74 Mont332, 240P286.

550-14⅓-New. In Delaware those selling tickets to football game to be held on Sunday violate statute prohibiting worldly employment, labor, or business on Sunday. 3Del 353, 136A160.

550-14¼-New. Participants in football games on Sunday, knowing that tickets thereto are being sold, violate statutes. 3Del 353, 136A160.

550-14⅕-New. Defendant's selling and **receiving tickets** and defendant's playing football game are guilty of violating statute prohibiting worldly business on Sunday except work of necessity. 3Del 514, 139A257.

550-14⅙-New. Exaction of fee for admission to place of amusement and instruction does not make operation of places unlawful where fee is exacted only as necessity to meet expenses of philanthropic project. 14PaDist&Co 4.

551-16 14PaDist&Co 4.

551-17 14PaDist&Co 4.

551-18 Games conducted for profit by professional players are unlawful. 14 PaDist&Co 4. **Mere collection of voluntary contributions at amateur ball** games is not necessarily commercialization of sport. 14PaDist&Co 4.

551-20½-New. Playing of professional

baseball for profit held "worldly employment and business" within statute. 290Pa136, 138A497, 53ALR1027.

551-26½-New. Privilege of playing professional baseball cannot override acts prohibiting worldly employment on Sunday. 290Pa136, 138A497, 53ALR 1027.

551-20¼-New. Conducting game of baseball on Sunday for profit is "worldly employment or business" within meaning of statutes in some jurisdictions. 8PaDist&Co 399.

551-21 163La409, 111S889, 891 [quot Cyc].

551-22 163La409, 111S889, 891 [quot Cyc].

551-23 129Kan849, 284P363(2dcase); 163La409, 111S889, 891 [quotCyc]. But see 124Misc822, 210NYS312. Showing operation of moving picture show with box for free will offering may support conviction. TexCr 25SW(2d)865.

551-24 Dancehall statute is not invalid as making arbitrary classification between dance halls and theaters by exemption of theaters from operation of statute. 75Mont88, 242P344.

552-27 See also 130Kan863, 288P729.

552-37 See also 10PaDist&Co 202.

552-39 Burden of showing necessity of sale rests on seller.-143SC283, 141SE 454. Guilt or innocence depends on facts of each case.-143SC283, 141SE454.

552-40 171Ark754, 286SW877, 47ALR 1104; 8PaDist&Co 77; 115Tex569, 285 SW293. Sale of gasoline to physicians, officers, and tourists held not emergency. 171Ark754, 286SW877, 47ALR1104. Reasonable necessity is sufficient to bring case within statutory exception. 101Vt300, 143A284, 59ALR1541. Conducting barber shop not necessity. 12 PaDist&Co 691.

552-42 8PaDist&Co 198. Other definitions.-TexCivA 14SW(2d)337.

554-48 See also 101Vt300, 143A284, 59 ALR1541.

554-56 38GaA684, 145SE483. See also 167Ga160, 144SE745(2dcase), 60ALR 747.

555-65 See also 153Miss880, 122S189 (2dcase).

555-66½-New. District attorney held entitled to fees for Sunday services in discharge of duties when necessity was certified by district judge. 115Tex569, 285SW293.

555-68 Use of motor vehicles is legal.-8PaDist&Co 198.

555-82½-New. Sale of gasoline is necessary on Sunday as on week days for use of automobiles. 8PaDist&Co 198.

556-89 8PaDist&Co 77, 85 [citCyc].

556-90 8PaDist&Co 77.

558-20 Sask [1930] 3DomLR1003. In Canada.-Sask [1929] 4DomLR289.

559-24 236Mich261, 210NW335.

559-24½-New. Contract made on Sunday is not validated by fact that some payments thereon were later made on secular days. 236Mich261, 210NW335.

559-29 286Pa17, 132A806, 807 [cit Cyc].

559-33 Agistment agreement has been held to be ordinary calling. 17SaskL 52, [1923] 2WestWkly600.

561-52 Miss 119S353; NJSup 139A894.

561-52½-New. Executing receipts subject to approval of contract held not to constitute binding contract. NJSup 137 A580.

561-52¾-New. Purchaser, making deposit subject to approval of contract, is not precluded from recovering deposit because made on Sunday. NJSup 137A 580.

562-53 177Ark183, 5SW(2d)936; 100 NJEq319, 134A665. See also 244Mich 466, 221NW613. Mailing on Sunday.-215Ala528, 112S102.

562-55 98NJEq184, 130A830.

562-57 175Ark274, 299SW11.

562-58 Guaranty for lease.-But see 200 Wis412, 228NW515, 67ALR875.

563-69 177Ark183, 5SW(2d)936.

563-70 252Mass552, 148NE105.

564-77 23AlaA31, 120S297.

565-89 180Ark750, 22SW(2d)386. But see 252Mass69, 147NE346.

565-94½-New. Contract executed on Sunday is not validated by delivery on next secular day. 100NJEq319, 134A 665.

565-94½-New. Where action based on tort and not contract.-Replevin to recover automobile taken possession of by defendant to whom plaintiff intrusted ticket entitling holder to participate in drawing for automobile is based on wrongful conversion and not on contract, and it is immaterial that ticket was delivered on Sunday. 192Wis212, 212NW261, 50ALR291.

566-96 173Ark60, 292SW393; 232Ky 503, 23SW(2d)945, 68ALR1481; 105 NJL427, 144A796; 114 Okl 87, 243P 722; 49RI 59, 139A790. Payment of interest on mortgage insufficient ratification of deed. 180Ark750, 22SW(2d) 386.

566-98 Antenuptial contract is ratified by parties marrying and continuing marital relations for several years. 177 Ark613, 7SW(2d)783. If some portion of contract made on Sunday is carried out on secular day, implied ratification results. 232Ky503, 23SW(2d)945, 68 ALR1481. Ordering broker to consummate deal on contract signed on Sunday may constitute ratification. 232Ky 503, 23SW(2d)945, 68ALR1481.

567-99 173Ark60, 292SW393; Iowa 229NW239.

567-1 Iowa 229NW239; 49RI 59, 139A 790.

567-6 114 Okl 87, 243P722.

567-12 Work subsequently done to consummate contract of sale may be sufficient consideration for ratification. 232Ky503, 23SW(2d)945, 68ALR1481.

567-15 Sale of purchase-money note to innocent purchaser for value does not excuse buyer from prompt notice that contract was void as Sunday contract. 173 Ark60, 292SW393.

567-16 Contra 236Mich261, 210NW335. In Michigan.-236Mich261, 210NW335.

568-17 128 Okl 299, 300, 263P107 [quot Cyc].

568-18 128 Okl 299, 300, 263P107 [quot Cyc].

568-19 128 Okl 299, 300, 263P107 [quot Cyc].

568-20 128 Okl 299, 300, 263P107 [quot Cyc].

568-22 127Kan86, 272P187.

568-23½-New. Nor does fact that work of preparing papers for sale was done on Sunday invalidate contract otherwise lawful. 188Wis200, 205NW798.

569-30 140Miss502, 106S97, 44ALR124; NJSup 146A672.

570-39 140Miss502, 106S97, 44ALR124.

571-54 208 Iowa1389, 227NW409; NJ Sup 137A580.

572-67 21AlaA679, 109S925; TexCivA 31SW(2d)669. Contract is not presumed illegal merely because it provides for work on Sunday. TexCivA 31SW(2d) 669.

572-70 23AlaA31, 120S297. Contra 252 Mass552, 148NE105.

572-75 Evidence held sufficient to prove delivery on secular day. 252Mass552, 148NE105. Evidence held not to show contract illegal as requiring labor on Sunday. TexCivA 14SW(2d)337.

572-75½-New. Allegations and testimony of oil field worker that his contract called for seven days' labor per week has been held not to show as matter of law that employment contract is illegal. TexCivA 18SW(2d)1102.

573-77 37GaA739, 141SE674.

574-95 NJ 147A511.

578-34 Accusations held sufficient.-161 Ga537, 131SE496. Complaint held sufficient.-TexCr 32SW(2d)191(1stcase). Information held insufficient.-8PaDist&Co 198; TexCr 29SW(2d)790(1stcase); TexCr 29SW(2d)791(1stcase). Indictment held sufficient.-156Md459, 144A350.

579-48 Sufficiency of information charging defendants as agents.-TexCr 28 SW(2d)820(2dcase).

579-49 8PaDist&Co 198.

580-64 Presumption of innocence obtains.-TexCivA 31SW(2d)669.

580-66 171Ark754, 286SW877, 47ALR 1104.

581-71½-New. In prosecution for sale of ice cream and beverages under Sunday Closing Law, which prohibits exercise of secular business or employment on Sunday except works of necessity or charity, evidence that other parties kept their respective places of business open on Sunday and sold ice cream has been held immaterial. 101Vt300, 143A284, 59 ALR1541.

581-79 147Va593, 136SE565, 50ALR 1043 (playing professional baseball).

581-82 22AlaA30, 111S759; 156Md459, 144A350.

582-83 See also 101Vt300, 143A284, 59 ALR1541.

582-89 147Va593, 136SE565, 50ALR 1043. Charges held subject to exception.-TexCr 28SW(2d)820(2dcase).

582-92½-New. Instruction on subterfuge in operating moving picture theater held called for by facts. TexCr 25 SW(2d)865.

583-8 128Misc39, 217NYS799; 144 Wash44, 257P837.

584-9 But see 27F(2d)892. Attempted ratification by board of education at special meeting held on Sunday of action of school director in discharging teacher was void and without effect. 198Wis 320, 224NW119.

584-10 134Misc604, 236NYS214 (legislature in its judgment may change common-law rule that no judicial act can be done on Sunday).

585-11½-New. By passing joint resolution designating particular Sunday as day for adjournment of legislative session, legislature expressly designated such Sunday as legislative day and impliedly authorized governor to sign bill on that day. 159Tenn379, 19SW(2d) 274.

585-11½-New. Restriction of official acts of government officers on Sunday is question of public policy and public morals within control of legislature. 159 Tenn379, 19SW(2d)274.

585-11¾-New. Office of member of general assembly is not a "common avocation" within statute prohibiting exercise of such avocations on Sunday. 159Tenn 379, 19SW(2d)274.

585-11½-New. Constitution does not prohibit person from voluntarily performing public service on day set apart by his religion as day of rest. 159Tenn 379, 19SW(2d)274.

585-11½-New. Governor's official exercise of power is not a "common avocation" of life within statute prohibiting such avocations on Sunday. 159Tenn 379, 19SW(2d)274 (approving or vetoing bill passed by legislature).

585-19 Police officer may file information for arrest of person on Sunday for illegal possession and furnishing of intoxicating liquors for beverage purposes. 13PaDist&Co 115.

585-21 OklCr 292P891; 144Wash44, 257P837. But see 23AlaA93, 121S448 (2dcase). In Oklahoma.-Cr 292P891.

586-25 See also 40F(2d)270.

587-33 92Fla875, 111S128 [citCyc]. But see 144 Okl 284, 290P1106.

587-34 228Ky691, 15SW(2d)444; 157 Tenn538, 11SW(2d)879. See also 27F (2d)892.

588-40½-New. Statute using words "commit and discharge" cannot be construed as permitting trial on Sunday. 128Misc39, 217NYS799.

588-40½-New. In some jurisdictions, by statute, service of legal process of any description upon Sunday, except in certain cases, is prohibited. OklCr 292 P891.

588-40¼-New. Search warrant is legal process within statute prohibiting service of legal process on Sunday. OklCr 292P891.

588-44 Person having duty to record has burden of seeing that memorandum of agreement is correctly transcribed. NH 150A739.

588-45 92Fla875, 111S128; 128Misc39, 217NYS799; 134Misc529, 236NYS122; 134Misc604, 236NYS214; 134Misc891, 236NYS586. Magistrate has power to receive plea of guilty for vagrancy on Sunday.-217AppDiv252, 217NYS763. It is matter of public policy that no court shall be held on Sunday except to preserve peace and arrest and detention of those charged with crime. 134Misc529, 236NYS122. Waiver of statute.-134Misc

529, 236NYS122; 134Misc604, 236NYS 214.
589-52 New York city magistrates.–134 Misc529, 236NYS122; 134Misc604, 236 NYS214; 134Misc891, 236NYS586.
589-52½-New. Hearing held valid for offense arrestable on Sunday. 5PaDist &Co 716.
589-54 128Misc39, 217NYS799. Though rendition of judgment was based upon plea of guilty, it is nevertheless void when rendered on Sunday. 128Misc39, 217NYS799. Conviction resulting from plea of guilty is same legally as conviction based on proof taken and is void if obtained on Sunday. 134Misc891, 236 NYS586. Court has no jurisdiction to convict, sentence, or commit defendants to imprisonment on Sunday on plea of guilty for crime of assault in third degree which is indictable offense at common law triable by jury. 134Misc604, 236NYS214.
589-58 128Misc39, 217NYS799; 94Pa Super491.
590-62 94PaSuper333; 94PaSuper491.
590-67 Appeal based on notice returnable on Sunday will be dismissed. 92 Fla875, 111S128.
591-70 158La471, 104S211.
591-71 222AppDiv626, 227NYS343.

SUN ROOM

591-3½-New. Not verandah or porch. 61 OntL545, [1928] 1DomLR1034.

SUPERINTEND

593-23 52ND26, 202NW391.

SUPERSEDE

595-35 Other, definitions.–Webster Int. D. [quot 73Mont456, 236P1093].

SUPERSEDEAS

597-2 TexCivA 30SW(2d)545.
597-3 Term is construed according to occasion of its use. 30NM505, 240P202.
597-8 213Ala592, 105S679.
599-32 50Philippine552. Discretion of court.–50Philippine552.
601-47 Admissions of evidence by sheriff as to what he really did in premises as to levy of attachment held not error. 213Ala592, 105S679. Evidence held insufficient to establish retaking of property by sheriff as to interfere with possession thereof by petitioners. 213Ala 592, 105S679.
602-61½-New. Writ of supersedeas will not be issued on chancellor's denial of injunction, which was only relief sought, where there is no court order in fieri to stay. 155Tenn242, 293SW996.

SUPPLY or SUPPLIES

607-24 79Mont111, 255P722.
607-29 79Mont111, 255P722.

SUPPORT

608-37 Does not include: Funeral expenses. 6PaDist&Co 785, 789 [citCyc].
609-38 122 Okl 268, 254P710, 711 [quot Cyc].
609-39 122 Okl 268, 254P710, 711 [quot Cyc].
609-39½-New. "To keep from failing." 133SC67, 130SE337.
609-40 122 Okl 268, 254P710, 711 [quot Cyc].

SUPPOSE

610-42 Mo 230SW48.

SURPLUS

613-62 "Surplus" constitutes excess in value of assets treated by corporation as part of permanent capital. 222Ky405, 300SW885.
613-63 123 Okl 245, 253P92.
613-63½-New. Surplus and undivided profits are increment of capital. 148 Md90, 129A22.

SURVEY

621-98 Survey distinguished from "plan."–213AppDiv259, 210NYS341.

SURVEYOR'S TRANSIT

626-15½-New. Surveying instrument resembling theodolite for measuring angles. 11CustA426.

SURVIVE

627-20 See also 1LaA129; 98NJEq242, 130A549.
627-21 98NJEq242, 130A549, 552 [quot Cyc]; 191NC203, 131SE575.
627-22 98NJEq242, 130A549, 552 [quot Cyc].

SURVIVOR

628-28 191NC203, 131SE575.
628-31 NJOrphans 134A284, 285 [quot Cyc].

SURVIVORSHIP

630-39 NJOrphans 134A284, 285 [quot Cyc].

SUSPECT

647-17½-New. To "suspect and believe" is not legal equivalent of belief on probable cause. 216Ala235, 113S49.

SUSPEND

647-19 13F(2d)527.
647-22 257Mass471, 154NE270; TexCivA 278SW939 (temporary cessation is ordinary meaning).
648-23 TexCivA 278SW939. Term "suspend" may mean permanent discharge of employee, permanent removal from office, discontinue or dispense with. TexCivA 278SW939.

SUSPENSION

649-30 257Mass471, 154NE270.
655-60 43F(2d)241.

SWEETMEAT

656-65 See also 11CustA127.

TAILOR

665-35½-New. One who makes clothes to order. 48Philippine764 (distinguished from "clothier").

TAKE

665-36 May mean "to be entitled to."–125Misc653, 211NYS621.
665-37 190NC568, 130SE161.
666-42 190NC568, 130SE161.
666-43 190NC568, 130SE161.

TAKING

667-51 Used in connection with other words.–"Taking in eminent domain." 219AppDiv114, 219NYS497. Not limited to obtaining by force.–130Kan630, 287P 233.

TARIFF

670-82 8F(2d)259 (system of rates and charges).

TAXABLE INHABITANT

671-99 13PaDist&Co 198.

TAXATION

706-1 Can be used instead of "assessment." 25 OhA301, 157NE817. "Tax" and "rate" are used as synonymous terms. 128Misc875, 220NYS281.
706-2 217AppDiv210, 216NYS699; 128 Misc875, 220NYS281, 285 [quotCyc]. Other similar definitions are: "A rate, or sum of money assessed upon the person, property," etc. 20 OhA236, 153NE 135. In absence of restricted meaning, word "taxes" includes all forms of contributions required by government. 221 Ky798, 299SW985.
706-3 107Conn312, 140A734; 94Fla347, 115S669; 128Misc875, 220NYS281, 285 [quotCyc]. Other similar definitions.–95Fla345, 116S81; 316Mo1075, 292SW 1028; 159Tenn619, 21SW(2d)628. In substantially the same language, etc. 95 Fla1003, 117S335.
706-4 32Ariz235, 257P648; 232Mich 255, 205NW86. Other similar definitions.–158La804, 104S722. In substantially the same language, etc. Fla 129S 904(2dcase).
707-6 Other definitions.–78Mont235, 253P1100.
707-9 124 Or261, 264P445.
708-10 107Conn312, 140A734, 743 [cit Cyc].
708-11 Can [1930] 4DomLR1027.
708-12 30F(2d)600; 217AppDiv210, 216NYS699; 5ND857, 204NW459. Contract.–52ND857, 204NW459.
708-13 24 OhA90, 155NE867.
708-16 Compulsory labor on the public roads, etc. AlaA 130S369.
709-17 8F(2d)424. Ad valorem tax does not depend on receipt of any special benefit by taxpayer. 277US157, 48 SCt438, 72L ed830.
709-18 8F(2d)424; 95Fla1003, 117S 385.
709-19 Taxes do not include water rents for water supplied by municipality. 85PaSuper548.
710-23½-New. Form of procedure to collect taxes cannot change their character. 30F(2d)600.
710-24 30F(2d)600; 329Ill189, 160 NE351; 190NC638, 130SE743.
710-25 6F(2d)752 (taxes do not rest on contract express or implied); 8F(2d) 424; 8F(2d)913; 16F(2d)233; 30F(2d) 600; 32F(2d)984; 217AppDiv210, 216 NYS699; 219AppDiv576, 220NYS337; 129Misc222, 220NYS334; 190NC638, 130 SE743; 8PaDist&Co 431; 141SC290, 139 SE633, 636 [quotCJ]; 159Tenn619, 21 SW(2d)628; TexCivA 273SW615; Alta [1930] 3DomLR638, 641 [quotCyc]. Contra Alta [1925] 3DomLR777. Tax is debt created by law and not one created by contract. 38F(2d)649.
710-26 70Utah509, 261P450.
710-29 82Mont98, 265P6.
711-34 Held property tax.–17F(2d)394.
711-39 35Wyo73, 246P918, 922 [cit Cyc].
712-40 160Tenn634, 28SW(2d)639.
712-41 159Tenn619, 21SW(2d)628; 35 Wyo73, 246P918, 922 [citCyc].
712-42 169Ark436, 276SW2; 43Ida 703, 255P638, 640 [citCyc]; 209Ky193, 272SW387; TexCivA 286SW670; 35 Wyo73, 246P918, 922 [citCyc]. Constitutional limitations on taxation are not applicable to special assessments. 232 Mich255, 205NW86.
712-43 TexCivA 286SW670 (charge for use of sewer); 35Wyo73, 246P918, 922 [citCyc]. Assessments are species of tax levied and apportioned under general police power. 153 OhA167.
713-44 232Mich255, 205NW86.
713-45 232Mich255, 205NW86.
713-48 48Ida632, 284P259.
714-53 82Mont98, 265P6.
714-54 154Tenn412, 285SW570, 47ALR 971. Direct tax defined.–154Tenn412, 285SW570, 47ALR971. Indirect taxes defined.–[1926] CanSC349, [1926] 1DomLR1106; 20SaskL481, [1926] 2DomLR 950, [1926] 2WestWkly230, 46CanCrCas 61. Direct and indirect taxes distinguished.–BC [1926] 4DomLR147, [1926] 3WestWkly154. Customs duties and internal revenue taxes are included, etc. 36BC551, [1926] 2DomLR674, [1926] 1 WestWkly837. Tax upon income of trustee held to be indirect tax. [1926] CanSC450, [1926] 2DomLR97. In Canada.–[1926] CanSC349, [1926] 1DomLR 1106.
715-56 Minn 232NW35.
715-58 69CalA347, 231P754.
715-60 20F(2d)202; 36F(2d)956; 214 Ala525, 108S568; 104Conn192, 132A561; 3DelSuper238, 134A694; 214Ky339, 283 SW119; 128Mel, 145A241; 148Md330, 129A370; 52ND857, 204NW459; 119 Or141, 248P358; 123 Or144, 261P694; TexCommnA 12SW(2d)130.
716-63 104Conn192, 132A561.
717-73½-New. Benefits of taxation should be directly received by those directly concerned in bearing burden. 203 Cal553, 265P223.
717-74 37F(2d)231 (adoption of any reasonable plan of measuring tax). Rules of state courts regarding property within its jurisdiction cannot limit federal government. 35F(2d)963.
717-78 269US514, 46SCt172, 70L ed 384; 34F(2d)263.
717-79 8F(2d)564.
717-81 272US713, 47SCt280, 71L ed 487; 87IndA103, 159NE19.
717-82 269US514, 46SCt172, 70L ed 384; 277US218, 48SCt451, 72L ed857, 56 ALR583; 17F(2d)40; 34F(2d)263. Foreign telegraph company deriving its validity in part from federal government does not exempt it from state taxation. 219AppDiv401, 220NYS8. In liquidating affairs of World War, federal government is entitled to same protection against illegal taxation as during war. 128Misc195, 217NYS803. National bank is not "public utility" under statute exempting from taxation income

from public utilities performing function of national government. 16F(2d) 990. **Presidential permit to operate cables** is negative license only, and does not prevent state from levying special franchise assessment. 219AppDiv401, 220NYS8. **States can tax national banks** only in manner prescribed by federal government. 20F(2d)416. **States have no power to tax constitutional means** employed by federal government to execute its constitutional powers. 128 Misc195, 217NYS803. **Taxable character of property** is to be referred to status of real owner. 17F(2d)40. **Where foreign telegraph company held license from federal government,** it may also enjoy special franchise from state. 219 AppDiv401, 220NYS8.

717-83 281US146, 50SCt310, 74L ed 775; 8F(2d)739; 16F(2d)990 (national bank shares); 181Ark609, 27SW(2d) 102; 208Cal 359, 281P389 (tax on gross receipts of automotive stage line carrying passengers, freight, and United States mail is tax on property and not direct levy on government contract); 104Conn192, 132A561; 48 Ida618, 284P 203; 214Ky339, 283SW119; 156Md133, 143A656; 316Mo 1075, 292SW1028; 80 Mont574, 261P356, 60ALR551; Nebr 231NW772; 156SC299, 152SE865; 101 Vt391, 143A677. **In Georgia.**–162Ga172, 132SE596. **Jurisdiction is not to be founded on multiplication of fictions.**–30F(2d)600. **Property of corporate agency or creature of government** may be taxed so long as tax is not on its franchise or operation. 8F(2d)739. **State may exact full amount of tax** without regard to manner in which private interests may be affected. 88Pa Super117. **Constitution contemplates that exclusively state purpose be accomplished by state taxation and exclusively county purpose by county taxation.** 99Fla1, 126S308.

718-84 216Ky59, 287SW209.

718-85½-New. Patent rights cannot be taxed by state. 257Mass572, 154NE182, 55ALR928.

718-85⅓-New. Royalties received from use of patent cannot be taxed by state. 257Mass572, 154NE182, 55ALR928.

718-85¼-New. But patented article where manufactured may be taxed by state. 257Mass572, 154NE182, 55ALR 928.

718-85½-New. General rules governing rights of local political subdivisions given taxing powers do not necessarily apply to state itself. 296Pa359, 145A916 (2dcase).

718-85¼-New. In exercising taxing power, legislative department of state is exercising purely governmental functions. 131 Or46, 280P873.

718-86 268US203, 45SCt477, 69L ed 916; 270US69, 46SCt256, 70L ed475, 43 ALR1374; 272US567, 47SCt202, 71L ed 413; 274US76, 47SCt542, 71L ed934; 280US83, 50SCt59, 74L ed180, 67ALR 386; 29F(2d)708; 30F(2d)600; 44 F(2d)64; 214Ky339, 283SW119; 80 Mont574, 261P356, 60ALR551; 58ND 776, 228NW192; 117 Okl 248, 246P403; 121 Or110, 254P196; 286Pa545, 134A 438, 48ALR992; 297Pa308, 146A903; Pa 147A242; 70Utah265, 259P921; 100 Vt217, 136A389; 148Va97, 138SE650; 151Va883, 145SE326; 147Wash630, 267 P506. But see 167Ark614, 269SW63. **Property not within jurisdiction** is not subject to direct taxation though excise tax may be justified. 256Mass419, 152 NE916. **Revenue laws of one state** have no force in another state. 30F(2d)600. **State cannot act as collector of taxes for another state.**–30F(2d)600. **Territory ceded to United States.**–135 Okl 183, 275 P303(4thcase). **In Massachusetts.**–254 Mass609, 150NE851. **Rent paid for use of realty situated outside state** cannot be taxed. NH 149A321.

718-87 272US567, 47SCt202, 71L ed 413; 274US76, 47SCt542, 71L ed934; 256Mass419, 152NE916.

718-88 214Ky339, 283SW119.

718-89 28F(2d)997; 117 Okl 248, 246P 403; 121 Or110, 254P196; 286Pa545, 134A438, 48ALR992. But see 35F(2d) 386.

718-90 Utah 284P328.

718-90½-New. Taxing power of Philippine Islands does not extend beyond its territorial limits. 51Philippine154.

719-92 274US76, 47SCt542, 71L ed934 (whole system considered).

719-94 27F(2d)410.

719-98 But see 281US647, 50SCt455, 74 L ed1091; Ark 31SW(2d)521(1stcase).

719-99 See also 27F(2d)586. **State cannot impose property tax** on property located within military reservation and having no situs for taxation outside of reservation. 180Minn241, 230NW572.

719-99½-New. After cession to United States of exclusive jurisdiction over Yellowstone National Park, state tax laws are inoperative. 31F(2d)644.

719-2 30Ariz218, 245P677, 46ALR828. 3Del 238, 134A694; 329 Ill 120, 160NE 163; Iowa 230NW373; 122Kan603, 252 P903, 904; 154Miss155, 122S195; 76 Mont429, 247P332, 47ALR424; NH 146 A511; 193NC496, 137SE669; 195NC 223, 141SE597; 152Tenn8, 275SW29. See also SD 232NW289. **Constitutional provision** that taxes shall be levied for public purposes only is general in its application to all taxes, whether state, county, or municipal. 118Tex207, 13 SW(2d)353. **Engaging in sale of gasoline.**–114Nebr243, 207NW172. **Object must be within purposes for which governments are established.**–195NC223, 141SE597. **Possibility of profits going into insular treasury** does not invalidate Porto Rico Water Power Act. 18 F(2d)918. **Right to tax depends on ultimate purpose for which fund is raised.**–195NC223, 141SE597. **Statute authorizing garnishment of state officers' and employees' wages** has been held as not authorizing levying and collection of tax for private purpose. Ariz 289P 515.

720-3 Term "public purpose," as used in constitution, means governmental purpose affecting inhabitants as community and not merely as individuals. 86Mont114, 284P134. **Test is whether purpose is public one,** and fact that money raised by tax will go to individual does not of itself violate constitutional provision. 86Mont114, 284P134.

720-4 Continuing use for public and reasonable degree of regulation and control is necessary to constitute public use. 152Tenn8, 275SW29.

720-6 97Fla1007, 122S570; 195NC223, 141SE597.

720-9 In determining this question, etc. 30Ariz218, 245P677, 46ALR828. **Climatic conditions** are often important consideration. 30Ariz218, 245P 677, 46ALR828. **Element of business for profit** does not determine whether purpose is public or private. 30Ariz218, 245P677, 46ALR828. **In New Hampshire.**–146A511. **Novelty** does not show that purpose is not public one. 30Ariz 218, 245P677, 46ALR828. **State cannot levy and collect taxes** to conduct business of selling gasoline. 48SD608, 205 NW614, 43ALR397. **That objects may be public in sense that their attainment will confer benefit or public convenience** is not alone sufficient to justify use of taxing power to accomplish them. 195 NC223, 141SE597.

721-12 168La1005, 123S655, 67ALR 1183 (purchase of free school books).

721-13 180Ark387, 21SW(2d)867 (construction of hospital).

722-19 281US370, 50SCt335, 74L ed 913 (free school books for school children); 53SD174, 220NW618. **Development of water resources** for domestic use, irrigation, light, and power is public use. 18F(2d)918.

722-19½-New. Municipal ice plant for sale of ice to inhabitants of municipality is public purpose. 30Ariz218, 245P 677, 46ALR828.

722-20 152Tenn8, 275SW29, 31 [quot Cyc]. **Plaintiff must allege and prove assumption of liability** or that liability was imposed by order of court or by reason of betterments to property. Tex CivA 288SW251.

722-21 195NC223, 141SE597; 152Tenn 8, 275SW29, 31 [quotCyc]. **The distinction which has been made,** etc. 152 Tenn8, 275SW29. **Taxation for purpose of purchasing box factory to be leased to private corporation** is not for public purpose. 152Tenn8, 275SW29.

723-24 99Fla1, 126S308; 323Mo 180, 19SW(2d)746.

723-25 18F(2d)918, 924 [citCyc]; 99 Fla1, 126S308; SD 232NW289. See also 220Ky89, 294SW815. **Public purpose may be for inhabitants of restricted locality** provided use and benefit are common and not for particular persons, interests, or estates. 195NC223, 141SE 597.

724-32 214Ala525, 108S568; 21AlaA 119, 106S61; 104Conn192, 132A561; 97 Fla1007, 122S570; 319 Ill 415, 150NE 247; 121Kan103, 245P1030; 318Mo 870, 2SW(2d)713; 103NJL608, 137A552, 553 [citCyc], 58ALR1137; 129Misc252, 221 NYS254; 52ND857, 204NW459; 114 Oh 658, 151NE760; 113 Okl 200, 241P124; 121 Or110, 254P196; 35PortoRico 842; 153Tenn306, 283SW751; 145Va644, 134 SE721. **Taxing districts.**–114 Oh642, 151NE752.

724-33 36F(2d)956; 43F(2d)385; 32 Ariz601, 261P49; Ariz 288P1034; 167 Ark557, 271SW720 (may select subject and classify them); 181Ark609, 27SW (2d)102; 254Mass232, 150NE234; 147 Miss244, 111S818, 56ALR926 (power held unlimited); 316Mo 1075, 292SW 1028; 86Mont114, 284P134; 118Nebr 725, 226NW327, 328 [citCyc]; 243NY 173, 153NE39; 116 Oh439, 156NE599 (legislature empowered to tax receivers); SD 232NW289 (form of tax and levy). **Authority to levy excise tax** in constitution 1875 not affected by constitution of 1901. 21AlaA119, 106S61. **Legislature may tax cities, towns, or districts, without their consent,** unless constitution forbids. 43 Ida233, 253P377. **Mode of assessment** and valuation may be prescribed by legislature under some constitution. 141Miss223, 106S636. **State may determine method of allocating tax** between state and its political subdivisions. 270US367, 46SCt234, 70 L ed635. **Tax on commissions** held within legislative power, whether excise or ad valorem tax. 21AlaA119, 106S61. **Tax on gross commissions** of dealers buying and selling property is within legislative authority. 21AlaA119, 106S 61. **Legislative declarations as to nature of tax** are not controlling on courts. Or 292P813.

724-34 114 Okl 38, 241P178; 101Vt 391, 143A677.

725-35 316Mo 1075, 292SW1028; 316 Mo 853, 293SW399; 129Misc252, 221 NYS254; Wis 232NW770(2dcase).

725-35½-New. Legislature has power to assess and collect tax on property omitted from assessment in past years, where there existed during such past years a statute by which such property might have been assessed. 8F(2d)883.

725-35⅓-New. But it cannot pass a law taxing for past years property which was not, by existing statute, taxable for such years. 8F(2d)833.

725-36 93CalA42, 269P630(1stcase); 166Ga232, 143SE119; 202 Iowa1019, 210 NW139; 52ND857, 204NW459; 137SC 496, 135SE538 (act construed not to be delegation of power of taxation); Tex CivA 21SW(2d)747. But see 97Fla1007, 122S570; 125Misc472, 211NYS334. **Advisory or ministerial duties may be delegated** to boards or individuals. Ind 172 NE186. **Statute providing for organization of irrigation districts with power to deny taxes** is not unconstitutional where such taxes are in nature of assessments for benefits. 35Wyo 73, 246P918.

725-36½-New. Statutes granting power to tax boards and commissions are liberally construed. 187Wis539, 204NW 481.

725-37 170Ga800, 154SE388(2dcase); 319 Ill 415, 150NE247; 317Mo 736, 296 SW415; 318Mo 870, 2SW(2d)713; 214 AppDiv40, 210NYS439, 446 [citCyc]; 134Misc810, 236NYS455; 52ND857, 204 NW459. **Counties.**–99Fla628, 127S486 (2dcase). **Grant is subject to control,** revocation, and modification by legislature. Ind 172NE186. **Legislature may withdraw** from municipality taxing power previously conferred. 161Tenn203, 30SW(2d)240 (special act). **Power delegated to irrigation district** may be changed or withdrawn. CalA 289P678. **Power to fix its tax rate at dates different from those fixed by general law**

may be conferred on municipality by legislature. NC 154SE85.

725-38 214AppDiv40, 210NYS439, 446 [citCyc].

725-40 317Mo 736, 296SW415; 323Mo 161, 188SW(2d)896.

725-41½-New. Order of commissioner of education requiring consolidated school district to provide transportation for pupils of district, and, if necessary to raise money by taxation, is invalid, even if authorized by statute. 214App Div40, 210NYS439.

726-42 153Va789, 151SE417. See also 31F(2d)644.

726-43 Mo 118SW(2d)30.

726-44½-New. Constitutional provision that power of taxation shall never be surrendered, suspended or contracted away is violated by statute abridging and restricting powers of state to levy and collect taxes. 38 OklACR289.

726-44¾-New. A contract limiting power to tax will not be implied in absence of firm indication of legislative purpose. 259Mass14, 156NE48.

726-44¼-New. Constitutional provisions in some states prohibit surrender of taxing power. 140 Okl 122, 282P674 (statute held not unconstitutional).

726-46 121Kan105, 245P1030.

726-48 323 Ill 536, 154NE468; 324 Ill 43, 154NE472; **Iowa** 231NW646(2d case). **Act curing failure to itemize road and bridge tax levy** held to validate lump sum levy. 324 Ill 43, 154NE472.

727-50 321 Ill 499, 152NE560; 323 Ill 536, 154NE468; **Me** 151A670; **Alta** [1929] 1DomLR360.

727-51 109Conn388, 147A9; 220App Div549, 222NYS96; **NC** 155SE553. **Due process.**-278US503, 49SCt191, 73L ed 477; 84CalA577, 258P991; **Fla** 129S904 (2dcase); **Ga** 155SE200; **GaA** 155SE 218; **Ida** 290P714; 213Ky445, 281SW 472; 317Mo 1298, 298SW732, 55ALR 489; **Nebr** 227NW452; 53SD174, 220 NW618. **Due process and equal protection requirements** are applicable to exercise of power of taxation by states. 281 US146, 50SCt310, 74L ed775. **Equal protection of laws.**-279US429, 49SCt380, 73L ed781; **Ida** 290P714; 58ND776, 228 NW192. **Provision that money arising from tax levied for one purpose shall not be used for any other** includes taxes from all sources. 181Ark609, 278SW(2d) 102. **State is not required to adopt best possible system of taxation.**-279US421, 49SCt377, 73L ed776, 65ALR1341. **Statute authorizing compromise of tax suits** does not deny due process of law or equal protection of laws. 30NM491, 239 P741. **Statute taxing mineral products** has been held not invalid. 102WVa272, 135SE582 (natural gas). **That better taxing system might be conceived** does not render existing law imposing taxes invalid. 278US484, 49SCt192, 73L ed 464.

727-52 Constitutional limits of taxing power protect artificial, as well as natural, persons. 78Mont62, 252P876.

727-53 108Conn246, 142A800; 264Mass 396, 163NE75; 149Wash294, 270P1025. See also 22AlaA622, 118S682; 156Md 133, 143A656. **Equitable distribution of taxes.**-203Cal553, 265P223. **Requirement of consent of people or legislature** is not violated by statute providing that county commissioners shall appropriate funds for agricultural extension work on petition of twenty-five per cent. of electors of county. 53SD174, 220NW 618. **Provision requiring municipal corporations to provide for collection of annual tax to pay principal and interest of indebtedness within twenty years** held not violated by statute authorizing reassessment. 339 Ill 28, 170NE728.

727-58 227Ky7, 12SW(2d)348.

728-59 La 130S46.

728-65 See also 218Ala125, 117S656.

728-65½-New. Constitutional limitations on power to tax must be disregarded if in conflict with amendments granting additional powers to tax. 82 NH126, 130A357.

728-65¼-New. Where obvious result of tax will be that person taxed will charge amount thereof to another, it is indirect taxation and such provincial legislation is ultra vires. Can [1925] 2DomLR691.

728-65¾-New. Mortgage registry tax is tax on privilege and not invalid as tax on debt. 48SD462, 205NW33.

728-65⅞-New. Tax may be intra vires and valid at present time, yet be bad as indirect tax when looked at prospectively. Can [1927] 2DomLR257.

728-65¼-New. Statute authorizing state tax commission to make original assessment on electric transmission lines has been held intended to confer on tax commission power of original assessment only over public utilities. 320Mo 1146, 9SW(2d)589.

728-65½-New. Amount demanded is unimportant in determining validity of tax, where basis of tax is inequitable. 30F(2d)322.

728-65¾-New. Statute entitling tax collector or surety to file affidavit of illegality stating all matters of defense provided them with due process of law. 168GaA228, 147SE386(2dcase).

728-65½-New. Effect and operation of constitutional amendment depend upon its terms and purposes. 96Fla740, 119 S130.

728-65¼-New. If tax law is constitutional otherwise, it cannot be said to be without due process, since taxes are absolute necessity to sovereignty. 198Wis 326, 223NW852.

728-66 32Ariz235, 257P648; 34Ariz 394, 271P867; 240Mich584, 216NW450; 122 Okl 109, 251P736; 130 Or73, 279P 271 (statute sufficient). But see 134 Okl 288, 273P352. **Reference to another statute.**-213AppDiv716, 211NYS85. **Detailed manner in which money is to be expended** need not be stated. 240Mich 584, 216NW450. **It is sufficient that purpose can be determined** from act without reference to other law. 240Mich584, 216NW450. **Provision is mandatory.**-34 Ariz394, 271P867. **Statement of object held sufficient.**-32Ariz235, 257P648.

729-68 32Ariz235, 257P648; 213App Div716, 211NYS85 (tax on moneyed capital competing with national banks); 140 Okl 194, 282P353. **Gasoline and mill taxes** held not within constitutional provision requiring law imposing tax to state object of tax. 32Ariz235, 257P 648.

729-69 Iowa 231NW646(2dcase).

729-72 Mass 168NE73; 178Minn244, 226NW633. **Statute not invalid as authorizing tax for private purpose.**-174 Minn305, 219NW172.

729-74 Statute providing for establishment and maintenance of zoölogical parks by cities is not violative of provision. 318Mo 910, 18SW(2d)1021.

729-77 40F(2d)944; 125 Me27, 130A507; **Md** 151A29; 141Miss701, 105S541 (statute held valid); 143Miss870, 108S288; 128 Okl 153, 261P928; 122 Or485, 259 P908; 5PaDist&Co 329; **TexCivA** 275 SW117; 101Va291, 143A677; 102WVa 272, 135SE582; **Wis** 232NW770(2dcase). **Organic Act in Porto Rico.**-12PortoRico Fed229. **Presumptions favor uniform operation of tax law.**-16F(2d)256. **Provision as to uniformity relates only to rate** where constitution requires assessment at fair cash value. 128 Okl 153, 261P923. **Revenue Act (1919) § 5** is not in conflict with Const. (1901) § 217 relating to uniformity of rates of taxation. 215Ala6, 109S105. **Basic principle of taxation** is equality. 227AppDiv 351, 238NYS577. **Requirement of uniformity does not protect invalid levy** merely because it is uniform. 299Pa 385, 149A653.

730-78 Cal 291P197; 109Conn388, 147 A9 (denial of rights secured by Constitution equal to all or seizure of property for benefit of another or uncompensated confiscation of property); 99Fla130, 125 S912(1stcase); 169La646, 125S841; 193 NC240, 136SE719; **TexCivA** 294SW313. **Provision violated** by assessment of delinquent taxes in other property. 322 Ill 150, 152NE575.

730-79 Act fixing order and priority of claims against insolvent banks held not invalid. Ga 155SE334.

730-82 Statute authorizing compromise of tax suits does not violate provision. 30NM491, 239P741.

731-84 263Mass255, 160NE788; 220 AppDiv549, 222NYS96.

731-85½-New. Unavoidable inequalities in result of excise statute, not originating in law but growing out of inequalities in business conditions and activities, is not ground of attack. 18 F(2d)550.

731-86 99Fla628, 127S486(2dcase); 131 Or563, 284P106, 68ALR422. **Not applicable to income tax.**-159Tenn349, 19 SW(2d)261.

731-87 273US407, 47SCt393, 71L ed709. **Fees not taxes.**-But see 31Ariz56, 250P 361.

731-89 217Ala311, 116S695; 115 Oh 458, 154NE792 (excise tax on gasoline). **Fees not taxes.**-But see 48 Ida632, 284P 259. **Bridge tolls.**-225Ky324, 8SW(2d) 392.

731-90 270US367, 46SCt234, 70L ed635 (tax on rolling stock of foreign corporations held not unconstitutional as lacking in uniformity); 28F(2d)441.

732-93 273US407, 47SCt393, 71L ed 709; 34F(2d)682; 35Ariz194, 276P1; 148Md330, 129A370; 196NC145, 144SE 701; 197NC604, 150SE190 (professions and franchises); **NC** 154SE838; 102 WVa272, 135SE582.

732-94 Classification of occupations.-102WVa272, 135SE582 (natural gas).

733-95 42 Ida169, 244P149. **Tax for recording securities of foreign corporation** is license tax not subject to constitutional provisions as to equality and uniformity. 219Ala513, 123S6.

734-97 Fla 130S21; **TexCommnA** 5 SW(2d)756.

734-6 18F(2d)918, 925 [cit Cyc]; 161 Tenn236, 30SW(2d)268 (special or general purpose); **TexCivA** 278SW877 (road district). **More designation of specific purpose** of county tax does not distinguish it fundamentally from authority to levy tax for general purpose. 161Tenn236, 30SW(2d)268.

735-7 18F(2d)918, 925 [citCyc]; 161 Tenn236, 30SW(2d)268; **TexCivA** 278 SW877 (road district).

735-8 18F(2d)918; **TexCivA** 278SW 877.

735-9 198NC114, 150SE813.

735-12 102CalA488, 283P303; **Mass** 168NE73 (taxpayer need not contribute more than his share); 161Tenn236, 30 SW(2d)268; **TexCivA** 278SW877; **TexCivA** 282SW905; **TexCivA** 18SW(2d) 940; **TexCivA** 238W(2d)431. **Levy held uniform.**-38GaA703, 145SE668. **Proceed tax for payment of principal and interest of bonds** for paving and improving sidewalks has been held in compliance with Constitution requiring uniformity. 168La111, 121S592.

735-13 16F(2d)545; 18F(2d)918, 925 [citCyc]; 167Ark557, 271SW720; 206 Cal486, 274P962; 48 Ida233, 253P377; 148Md330, 129A370 (method of imposition of tax must survive test of uniformity and equality); 246Mich149, 224NW 616; 287Pa161, 134A404; 135Wash517, 238P579, 580 [quotCyc]. **As otherwise stated.**-148Md330, 129A370. **Mortgage registry tax** applying alike to all mortgages according to amount of security and length of time they are to run is not invalid for lack of uniformity. 48SD 462, 205NW33.

736-14 43 Ida233, 253P377; 339 Ill 28, 170NE728; 148Md330, 129A370; 135 Wash517, 238P579, 580. See also 101 VA391, 143A677.

736-15 107Conn697, 142A574; 327 Ill 590, 158NE849; 287Pa161, 134A404; 135Wash517, 238P579, 580 [quotCyc].

736-16 135Wash517, 238P579.

736-17 18F(2d)918, 925 [citCyc]; 53 SD174, 220NW618; 135Wash517, 238P 579, 580 [quotCyc].

737-18 278US484, 49SCt192, 73L ed 464; 30F(2d)620; 169La831, 126S207; 120 Or80, 250P735; 198Wis368, 224NW 121. **Statute imposing tax on royalties from mining** which does not include stone quarries, gravel beds, and other wasting properties is not included. 13 F(2d)227. **Statute is not invalid** because property assessed as "money and credit" is in same year also taxed as "royalties from mining." 13F(2d)227. **Exemption of mining properties,** not being operated or depleted from royalty tax on mining imposed by L. (1923) c. 226, does not invalidate statute. 13 F(2d)227.

737-19 179Ark848, 18SW(2d)906; 148

Md330, 129A370 (inequality and discrimination in legal sense does not exist, where all those of same class are subject to same liability and enjoin same privileges). See also 218Ala125, 117S 656.

737-19½-New. Legislative classification of property may exercise wide discretion. 107Conn697, 142A574.

737-24 Discrimination must be intentional to overthrow action of assessing officers on ground of inequality. 17 F(2d)167.

738-29 NH 146A511. **Exemption held not unconstitutional as regards uniformity.**-NJSup 144A7. **Act fixing order and priority of claims against insolvent banks** held not invalid. Ga 155SE334.

739-30 274US284, 47SCt639, 71Led 1049; 38F(2d)652; 42F(2d)500; 219 Ala513, 123S6; 145Miss135, 110S231; 319Mo316, 4SW(2d)467; NH 146A511; NJSup 144A7; 153Va789, 151SE417; 198Wis281, 224NW126. **That certain persons are exempt from tax imposed on class** does not destroy uniformity if exemption is not arbitrary. Ga 155SE338.

739-31 145Miss135, 110S231. **Equality and uniformity between different exemptions.**-NH 149A321.

739-33½-New. Legislative power to tax or exempt property must not only be reasonable, but, under doctrine of equality, classification must be of general application. NH 146A511.

739-33¾-New. Validity of special exemption is not to be settled as question of taxation, but as exercise of protective power. NH 146A511.

741-44 18F(2d)918, 925 [citCyc].

741-45 83Mont418, 272P691; 152Va 353, 147SE468. But see 137Misc852, 244NYS616. **Tax on royalties** received from ore mines, being tax on land, neither owner's residence nor place fixed for payment is important. 271US577, 46SCt627, 70Led1093. **Test** is whether burden has been reasonably distributed without intentional discrimination against nonresidents. 137Misc852, 244 NYS616.

742-48 Statute held not discriminatory.-27F(2d)1005.

742-49 213AppDiv716, 211NYS85. **Tax on national bank stock** has been held discriminatory against national banks where no tax is laid on stock of state banks. 276US499, 48SCt331, 72Led673.

742-51 Exception as to foreign corporations.-246Mich174, 224NW653.

742-52 180Ark765, 22SW(2d)556; 198 Cal388, 245P189; 98Fla350, 123S745; Mass 168NE73 (assessment and rate held not disproportionate); 232Mich245, 205 NW106; 141Mass223, 106S636; 82NH 561, 138A284; 194NC117, 138SE715. **Apportionment of burden according to assumed ability** of those taxed to pay invalidates tax. 26F(2d)380. **Excise taxes.**-18F(2d)550; 18F(2d)926. **Imposition of liability to make up deficiency caused by failure of others to pay** does not violate requirement of equality and uniformity. Fla 129S904(2dcase). **Inequality is presumed** where property is appraised substantially in excess of its just value. 125Mc27, 130A507. **Lower assessments on adjoining property held** not sufficient to show inequality. 216App Div626, 215NYS710. **Material, systematic, and intentional, discrimination** in assessment of property violates due process of law clause. 146Va146, 135 SE669. **Practical equality in assessments** is all that is required. 223Ky 461, 3SW(2d)1067. **Tax on private car lines or companies** is not in violation of constitutional provision where imposed at average rate of levy for local taxing districts. 32Ariz601, 261P49.

742-53 Mode of assessment which disregards any element ordinarily determining values held invalid where actual discrimination resulted. 198Cal 388, 245P189.

742-54 31F(2d)587; 203Cal 553, 265P 223; 205 Iowa167, 217NW837; 319Mo 445, 3SW(2d)1021; 83NH148, 140A163; NH 149A321; TexCivA 15SW(2d)715; Wis 232NW770(2dcase). But see 130 Kan262, 286P673. **Tax levied on state bank shares according to value** as tangible personal property is valid in absence of proof that rate of tax is greater than that imposed on other moneyed capital in hands of individual citizens, competing with banks. 53SD82, 220NW152.

742-55 13F(2d)442; 88CalA82, 262P 788; 82NH561, 138A284. **Assessment of other properties not warranting reduction of assessment of particular property.**-88CalA82, 262P788. **Assessor's good faith** in making assessment will not validate it when discriminatory and lacking in uniformity. 198Cal 388, 245P189. **Fact that few taxpayers are assessed at half market value of their lands** is no reason for reducing assessment of other lands to similar valuation. 146Va146, 135SE669. **Where omission to assess other property or unequal valuation thereof** was caused by oversight or error of assessing officers, assessment of similar property is not invalidated. 97Fla426, 120S317. **Reduction of assessment** on proof of value of property and application thereto of percentage applied throughout taxing district held not violative of uniformity requirement. 299Pa385, 149A653. **Requirement of uniformity does not require classification of all property at true value.**-157Miss197, 127S686.

743-58 104CalA235, 285P896(2dcase).

743-58½-New. A statute authorizing life insurance companies to treat reserve as debt of company in making tax returns is valid. 28OhA107, 162NE466.

744-59 320Mo691, 8SW(2d)1068; Mo 8SW(2d)1073(1stcase).

744-63 129Kan601, 284P807.

744-64 85Mont329, 278P514; 284Pa 189, 130A413. **Different rules for different persons and objects** as manner of collection must be based on natural differences and should not unnecessarily impinge rights of others. 284Pa189, 130A413. **Law respecting manner of collection** should be of general application. 284Pa189, 130A413. **Leases on oil lands** may be subjected to same principles and methods as are applicable to assessment and collection of taxes on personal property. 196Cal 148, 236P 133.

744-65 158Tenn526, 148SW(2d)747.

745-66 218Ky259, 291SW32, 51ALR 281. **Inequality in distribution of proceeds** does not invalidate tax. Mont 286 P125(2dcase).

745-66½-New. Statute providing for auditing and supervising of public offices held not to conflict with constitutional requirement of equality and uniformity in taxation, as it is in no sense taxation statute. 141Miss701, 105S541.

745-66¼-New. Statute providing compromises for payment of delinquent taxes are not unconstitutional for violation of privileges and immunities clause. 53ND278, 205NW880.

745-66¼-New. Statute authorizing waiver or reduction of penalty or interest on delinquent taxes is not violative of constitutional provision that all taxes shall be levied and collected under general law operating uniformly throughout state. 131Or563, 284P166, 68ALR 422.

745-66½-New. Rule is true though penalties and interest are treated as part of tax. 131Or563, 284P166, 68ALR422.

745-68 53ND278, 205NW880. But see TexCivA 148SW(2d)1051. **Statute providing for six per cent interest on back income** is not unconstitutional on ground that by the Law of 1923 interest was provided for at rate of ten per cent per annum, so that different rates of interest applied to back taxes for same year. 198Wis368, 224NW121.

745-69½-New. Mandatory statutes for remission of interest penalty and costs accruing on taxes levied for certain years have been held constitutional. 117Or426, 243P558.

746-74 160Ga657, 129SE38, 44 [quot Cyc]; 197NC419, 149SE397. **Kansas Motor Vehicle Act of 1925** held not unconstitutional in providing that funds raised for building roads shall be distributed forty per cent equally among counties and sixty per cent in proportion to assessed valuation. 122Kan508, 252 P463.

746-77 268US137, 45SCt424, 69Led 884; 29F(2d)897; 36F(2d)159; 36F (2d)956; 40F(2d)540 (uniformity of burden); 42F(2d)500; 167Ark614, 269 SW63 (statute valuing no par value stock at twenty-five dollars per share held not discriminatory); 167Ark557, 271SW720; 75CalA247, 242P749; 162 Ga818, 135SE68; 168Ga808, 149SE211 (occupational or capitation tax); 129 Kan601, 284P807 (classification permitted by statute is applicable to property and not to owners); 230Ky182, 18 SW(2d)1009; 148Md330, 129A370 (classification according to use, location, description and character); 165Minn215, 206NW166; 315Mo424, 287SW427; 319 Mo810, 5SW(2d)22, 62ALR95; 192NC 161, 134SE403; 197NC604, 150SE190; NC 154SE838; 122Okl34, 252P408; 139 Okl189, 281P958; 120Or80, 250P735; 287Pa161, 134A404; 53SD82, 220NW 152; 98Vt343, 129A159, 39ALR1222 (constitutional provision requiring every member of society to contribute his share toward government expenses does not forbid classification); 100Vt 140, 135A705; 101Vt391, 143A677; 198 Wis281, 224NW126; Wis 232NW770(2d case); Wis 233NW100. **Banks and individuals,** etc. 53SD82, 220NW152. **Business or occupation taxes.**-102WVa 272, 135SE582. **Classification for purposes of inheritance or transfer taxation,** etc. 120Or80, 250P735. **All taxable property is in single class for purpose of taxation.** 318Mo373, 300SW778. **Classification of property for taxation is legislative function.**-122Okl34, 252P 408. **Different and more drastic method** may be provided for collection of taxes on oil leases than on land itself. 196Cal 148, 236P133. **Federal tax on gifts held** not unconstitutional as unreasonable and capricious classification. 16F(2d) 970. **In Minnesota.**-166Minn22, 206NW 942. **Intangible property.**-96Fla740, 119 S130. **Tax on royalties** reserved from ore mines held not invalid as imposing tax not extended to quarries, forests, or other property. 271US577, 46SCt627, 70Led1093. **Uniform increase in assessment within class** held proper. 315Mo 424, 287SW427. **Franchise to do public utility business may be taxed** though other franchises are not. NH 149A321. **Power of classification is within discretion of legislature.**-38F(2d)652. **Retailers taxed on gross sales while wholesalers and manufacturers not,** is not discrimination. NH 149A321.

747-78 267US442, 45SCt135, 348, 69 Led703; 268US137, 45SCt424, 69Led 884; 282US19, 51SCt15; 13F(2d)227; 38F(2d)652; 219Ala513, 123S6; 75CalA 247, 242P749; 169Ga354, 150SE262; 230Ky182, 18SW(2d)1009; 165Minn215, 206NW166; 319Mo810, 5SW(2d)22, 62 ALR95; 82Mont98, 265P6; 197NC604, 150SE190; NC 154SE838; NC 155SE 557; 53ND28, 204NW861, 42ALR1039; 116Or581, 242P621; 284Pa189, 130A 413 (there must be real distinction between objects with which law deals for it to be valid); 54SD429, 223NW342; 159Tenn349, 19SW(2d)261 (classification of incomes); 100Vt140, 135A705. **To justify judicial interference,** etc. 122 Okl34, 252P408. **Classification of motor vehicles according to type for taxation purposes** held not to violate Fed. Const. Amendm. XIV. 75CalA247, 242P749. **Classification of motor trucks engaged in commercial freighting on regular time or route schedules** in class separate from other trucks using highways cannot be held to be without basis. 165Minn215, 206NW166. **Legislature has wide range of discretion.**-159Tenn349, 19SW(2d) 261.

747-79 281US146, 50SCt310, 74Led 775; 13F(2d)227; 219Ala513, 123S6; 75CalA247, 242P749; 107Conn697, 142A 574; 109Conn388, 147A9; 82Mont98, 265P6; 128Misc195, 217NYS803 (must have same basis under federal constitution); 196NC145, 144SE701; 53ND28, 204NW861, 42ALR1039; 57ND1, 220 NW436; 48SD482, 205NW72. **Statute taxing moneyed capital competing with business of national banks held not** arbitrary and unjust classification. 242 NY277, 151NE452. **Owners of tracts of timber of less than five or more than five hundred acres** cannot be denied benefits of tax granted to others. NH 149A321.

747-80 38F(2d)652; 129Kan1, 281P

938; 230Ky182, 18SW(2d)1009; 193NC 240, 136SE719; 122 Okl 34, 252P408; 287Pa161, 134A404.

747-80½-New. Test of classification is whether it produces diversity in results or lack of uniformity in its operation, either on given subject of tax, 284Pa189, 130A413.

747-80⅓-New. or persons affected as payers. 284Pa189, 130A413.

747-80¼-New. Classification permitted under some constitutional provisions applies to property and not to owners thereof. 129Kan1, 281P938.

747-81 36F(2d)159; 32Ariz601, 261P 49; 30Hawaii685; 213AppDiv716, 211 NYS85; 287Pa161, 134A404. **Banking associations may be made separate class.** -122 Okl 34, 252P408. **Corporations and individuals.**-287Pa161, 134A404. **Railroads.**-Cal 290P25(2dcase).

748-83 53ND28, 204NW861, 42ALR 1039; 101Vt391, 143A677.

748-83½-New. Corporate franchise is property within constitutional provision that taxes shall be uniform upon same class of property. 53ND28, 204 NW861, 42ALR1039.

748-83⅓-New. Where state tax commission has equalized value of property of same kind at certain value assessment by county assessment, of property at different value violates equality and uniformity clauses of constitution. 171 Ark1188, 286SW968.

748-83¼-New. Provision of statute for listing of no par value stock without stating value thereof is not illegal discrimination as against holders of no par value stock where actual value is listed. 219Ala513, 123S6.

748-83⅕-New. Difference between par value and no par value stock is substantial enough for different classifications. 219Ala513, 123S6.

748-84 35F(2d)386; 326 Ill 18, 156NE 814; 327 Ill 590, 158NE849. **State tax on national bank stock** held not discriminatory where state bank stock is otherwise taxed. 78Mont62, 252P876. **Fixing value of no par value stock** at one hundred dollars for purpose of determining foreign corporation franchise tax is not violation of constitution. 318Mo 1020, 2SW(2d)790. **Constitutional provision that foreign corporations shall not be given greater rights or privileges than are given to domestic corporations** refers to granting of franchises and privileges rather than to taxation. Nebr 227 NW926. [disting 117Nebr832, 223NW 126].

748-84½-New. Classification of foreign corporations as ones doing business in commonwealth only is not irrational. 254Mass609, 150NE851.

748-84⅓-New. Statute providing for tax for recording securities of foreign corporations has been held valid. 219 Ala513, 123S6.

748-84¼-New. State can levy ad valorem tax on securities of domestic corporation owned by residents or exempt securities of foreign corporations owned by residents and levy excise tax in lieu thereof. 219Ala513, 123S6.

749-86 192NC161, 134SE403; 193NC 240, 136SE719; 194NC117, 138SE715; TexCivA 282SW905. **Assessment of same property for municipal taxation at** higher value than for state and county taxation is void. 141Miss497, 106S749 (property of railroad company taxed ad valorem).

749-88 18F(2d)918, 924 [citCyc]. **Legislature is not forbidden** to levy directly a tax on political subdivision. 137SC 496, 135SE538.

749-90 18F(2d)918, 924 [citCyc]; 117 Or140, 241P979; 292Pa269, 141A37; 53SD174, 220NW618. **Cost of public improvement** may be apportioned not only with reference to benefits to cities and towns affected, but also with reference to population, physical characteristics, and ability to bear burden. 254 Mass232, 150NE234. **Law authorizing county to impose general taxes and special assessments for road improvement** is not violative of uniformity requirement. 99Fla628, 127S486(2dcase).

749-91½-New. Municipalities of state have not same rights to trial and decision respecting obligations imposed upon them for support of strictly public burdens as have private corporations or individuals. 254Mass232, 150NE234.

749-92 254Mass232, 150NE234; 191NC 761, 133SE395, 397 [quotCyc]; 193NC 240, 136SE719.

749-92½-New. But it is not essential to a valid scheme of taxation that all people benefit from it in same degree. 254Mass232, 150NE234.

750-97 54SD429, 223NW342.

751-1 180Ark765, 22SW(2d)556; 82NH 561, 138A284; 53ND28, 204NW861, 42 ALR1039. **Bank property.**-204 Iowa 512, 211NW485.

751-2 NJSup 132A314.

752-7½-New. Tax against stockholders on bank stock in excess of levy on actual value of other moneyed capital of individuals used in competition with bank capital constitutes denial of equal protection of laws and is illegal and void. 18F(2d)269.

752-8 18F(2d)239; 172Minn263, 215 NW71; 82NH126, 130A357; 197NC85, 147SE736; 287Pa161, 134A404. **Constitutional provisions** permitting disproportionate taxes in sense of double taxation puts question of power beyond dispute. 82NH126, 130A357. **Federal constitution** does not forbid states from enacting laws for double taxation. 221 Ky100, 298SW189. **In Florida.**-129S904 (2dcase).

752-9 36F(2d)1013; CalA 262P355. **Assessment roll showing assessment of more acres than survey and patent show plot to contain** is void as double taxation of part. 125Misc453, 211NYS731. **Where fiscal court and city council** are authorized to tax sanitorium at different rates, such statute is invalid as imposing double taxation. 227Ky7, 12SW (2d)348. **Tax on gross sales and also on net profits of sales** is double taxation. NH 149A321.

753-11 220Ky116, 294SW1080; 256 Mass419, 152NE916; 93PaSuper165. **Taking into account favorable location** of building for business purposes is not double taxation. 198Cal 388, 245P189. **Where there was no duplicate tax on property for same purpose in same year,** no double taxation was involved. 45 Ida 406, 262P1048.

753-13 Ad valorem tax and special assessment may be imposed on same property at same time. Fla 129S904(2dcase). **Inadequacy in value of property assessed to pay assessment** does not unlawfully impose double taxation. Fla 129S904 (2dcase). **Liability of taxpayer to make up deficiency caused by failure or inability of others to pay** does not constitute double taxation. Fla 129S904(2dcase).

753-14 166La1, 116S572; 284Pa175, 130A412.

753-15 284Pa175, 130A412 (same taxing power); 35PortoRico 27 (excise tax by state and municipalities).

754-16½-New. , and of same kind. 284 Pa175, 130A412.

754-19 218AppDiv287, 218NYS185.

755-29½-New. Charge against land for actual cost of fire protection is not tax. 47 Ida74, 272P707.

755-29⅓-New. Ad valorem tax twice against same person or property for same purpose because of such ownership constitutes double taxation. Fla 129S 904(2dcase).

755-30 18F(2d)239; 320Mo 691, 8SW (2d)1068; Mo 32SW(2d)281; 220App Div396, 221NYS646; 147SC116, 144SE 846; 156Tenn96, 299SW807.

755-31 See also 32PortoRico 338. **What is property tax.**-32PortoRico 338.

755-34 106Conn525, 138A520; 153Md 25, 137A291 [citCyc]; 320Mo 901, 9SW (2d)621, 59ALR1041.

756-35 106Conn525, 138A520; 237Mich 464, 212NW78.

756-36 320Mo 691, 8SW(2d)1068. **Excess receipts earned by Pullman Company** on which it has paid gross earnings tax cannot be again taxed against railroad to which they were paid. Minn 232NW105.

757-37 114 Ohl479, 151NE685.

757-38 273US407, 47SCt393, 71L ed709.

757-39 273US407, 47SCt393, 71L ed 709; 42 Ida169, 244P149; 297Pa468, 147A98. **A tax exacted from foreign insurance companies, etc.** 35F(2d)386.

757-40½-New. State tax commission's assessment for taxes of real estate of telephone company, following statement of telephone company's real estate and its value as assessed for taxation, under statute, has been held valid, and order of tax commission was not rendered illegal by subsequent assessment added by county auditor for uncompleted building. 28 OhA398, 162NE756.

758-43½-New. Taxation of shares of capital stock of theater corporations, under statute, has been held not to result in double taxation of owners, because realty corporations owning tangible property operated by theater companies, whether as lessees or agents, paid taxes thereon, thereby exempting their stock. 101Vt391, 143A677.

758-44 308Mo 237, 271SW508, 39ALR 1199.

758-45 282US19, 51SCt15; 216Ky59, 287SW269; 221Ky100, 298SW189. See also Md 151A39.

759-47 221Ky100, 298SW189.

759-49 In New Hampshire.-82NH126, 130A357.

760-50 141Miss497, 106S749; 317Mo 1298, 298SW732, 55ALR489; 193NC 240, 136SE719; 198NC114, 150SE313; TexCivA 283SW674; 135Wash517, 238P 579, 580 [quotCyc]. **"Value"** means reasonable cash market value. TexCommnA 5SW(2d)756.

760-52 135Wash517, 238P579, 580 [quotCyc].

760-53 135Wash517, 238P579, 580 [quotCyc].

760-54 MoA 8SW(2d)1038; 135Wash 517, 238P579.

761-57½-New. nbr does it exempt operative or nonoperative property of public utilities; 78CalA173, 248P532.

761-58½-New. Constitutional provision requiring property to be assessed at true value will be sacrificed if necessary to provision requiring uniformity and equality where otherwise taxpayer would be deprived of equal protection of law guaranteed by federal constitution. 143Miss870, 108S288.

761-60 Collection of tolls held not to constitute levy or collection of taxes within constitutional provision. 217Ala 311, 116S695.

761-62 319Mo 799, 6SW(2d)907.

762-72 35F(2d)386; 327 Ill 590, 158 NE849; TexCivA 283SW674. **Adoption of fundamentally wrong scheme for determining value** is violative of constitutional provision. TexCommnA 5SW(2d) 756. **Arbitrary method of determining value** by multiplying amount of rental by ten and taking sixty-five per cent of product as value violates constitutional provision. TexCommnA 5SW(2d)756. **Matters to be considered in determining value.**-TexCommnA 5SW(2d)756. **Statutes prescribing assessment at actual value** are construed to mean value in market in ordinary course of trade. 117 Nebr214, 220NW241. **Making timber taxable according to its size** is proper basis for discrimination. NH 149A321. **Making volume per acre test of taxability of timber** is not valid. NH 149A321.

763-80 113 Okl 200, 241P124, 126 [cit Cyc]. **Provision fixing minimum limit that cannot be exceeded** held not to prevent legislature from passing laws levying taxes within such limit. 164Ga336, 138SE767. **Special rates of taxation on intangible property,** fixed by legislature, "cannot exceed five mills on dollar of assessed valuation of such intangible property." 96Fla740, 119S130. **Taxation to pay debts created for stated purpose** are within constitutional limitation of rate of taxation for such purpose. 232Mich255, 205NW86. **Under Alabama Const. (1901) § 214,** forbidding legislature to levy greater than prescribed tax in any "one year," means in any one tax year from Oct. 1st to Oct. 1st. 215 Ala6, 109S105.

764-81 161La272, 108S479.

764-83½-New. Constitutional amendment, fixing maximum limitation of five mills where legislature makes special tax rates on intangible property, does not apply where legislature does not make such rates. 96Fla740, 119S 519.

764-84 162Ga172, 132SE896. See also

290Pa7, 137A864, 865 [citCyc]. **Limitation on tax or assessment.**–310Mo 587, 275SW932. **Power of legislature to make further restriction.**–310Mo 587, 275 SW932.

765–87 162Ga172, 132SE896.

765–90 219Ky432, 293SW944 (provision must be uniform); 266Mass590, 165NE904. **Tax on intangible property of foreign corporation** is not excise tax. 171Ark209, 284SW33. **Tax for recording securities of foreign corporations** has been held not invalid because flat rate of one hundred dollars per share was assigned for no par stock regardless of its value. 219Ala513, 122S6. **Where beneficial interest is represented by transferable certificates,** excise tax cannot be levied on business of associations, partnerships, and trusts. 266Mass590, 165NE904. **Tax on gross sales made by retail merchants** is constitutional. NH 149A321. **Tax on net income** of certain corporations is not excise or corporate privilege tax. Wash 289P551.

765–92 112 OhSt166, 147NE302 (tax levied upon occupation and paid by the person, association, etc., engaged in occupation is tax not upon privilege of being, but upon privilege of engaging in occupation).

766–96 167Ark557, 271SW720 (statute subjecting all persons and corporation to a gross income tax, declared unconstitutional as in violation of art 16 § 5); 197NC604, 150SE190 (income tax must be uniform). **Classification of income** as to source from which it is derived between net business income and net income from intangibles held not violative of Massachusetts constitution. Mass 170NE800. **Constitutionality of Tax Law.**–179Ark886, 19SW(2d)1000. **Constitutional provision against tax in excess of five mills on each dollar of taxable property** is not violated by income tax, such tax not being property tax. 170Ga370, 153SE58. **Constitutional provision vesting legislative power in general assembly** held not violated by state income tax law adopting certain features of federal income tax law. 170 Ga370, 153SE58. **State income tax is not unconstitutional as levy of poll tax** for purposes forbidden by constitution. 170Ga370, 153SE58. **Uniformity.**–39 F(2d)104; 170Ga370, 153SE58. **That taxpayer's timber holdings were not assessed at same value** of other companies is not unconstitutional invasion of its rights. Wis 231NW865.

766–97 167Ark557, 271SW720 (only net income should be taxed); 179Ark886, 19SW(2d)1000 (constitution does not prohibit income tax under doctrine of expressio unius est exclusio alterius); 82NH561, 138A284; 196NC145, 144SE 701. **Income is not "property,"** etc. 179Ark886, 19SW(2d)1000. **Deductions allowable.**–240NY301, 148NE530. **Directors' declaration that distribution of stock should be made out of earliest earnings of corporation** is ineffective to transmute profits made after certain date into earnings of corporation prior thereto. 195Wis405, 218NW810, 61 ALR357. **Gross income.**–240NY301, 148 NE531. **Income of special partner, as interest** on capital invested, is taxable as "income from business." 255Mass546, 152NE34, 45ALR1379. **Income tax statutes do not violate constitution as to uniformity** because taxpayer against whom additional income tax is assessed is not permitted to offset against such assessment personal property taxes paid during years for which additional assessment is made. 198Wis377, 224NW 124(4thcase). **Individuals carrying on business in partnerships** are liable for income tax only in their individual capacity. 240NY301, 148NE531 (dictum). **In New Hampshire.**–82NH126, 130A357. **Net income.**–240NY301, 148NE530. **Review.**–122 Or337, 255P603. **Statute excluding stock dividends from computation as income under Tax Law and declaring same retroactive** held not unconstitutional as refunding scheme, being merely readjustment of public burdens. 243NY173, 153NE39. **Tax on net income of nonresident is constitutional,** as tax is laid on thing and not on person, where laid on income earned in business within state. 218AppDiv1, 217NYS669. **Tax rate may be different for different parts of year.**–316Mo 1008, 292SW1037. **Classification of incomes** for taxation is matter for determination of legislature. 170Ga370, 153SE58. **Delay in requiring railroad to pay income tax** on nonoperating property till after repeal of law permitting offset did not, therefore, work substantial injustice. 199Wis368, 226 NW293; 199Wis378, 226NW296. **Equality.**–NH 149A321. **Exemptions.**–NH 149 A321; 199Wis368, 226NW293; 199Wis 378, 226NW296. **"Income."**–Wis 230NW 64. **Income tax against grantor of revocable trust** held valid. 34F(2d)656. **Mere method pursued by commission** in determining value cannot constitute unconstitutional taking of taxpayer's property. Wis 231NW865. **Power is inherent without constitutional grant.**–170Ga370, 153SE58. **Retroactive effect of tax.**–179 Ark886, 19SW(2d)1000. **State income tax law requiring making of return similar to federal tax return** is not in conflict with federal act. 170Ga370, 153 SE58. **Statute depriving taxpayer of right to recover tax collected** after running of limitations held valid. 34F(2d) 328. **Statute levying tax on incomes derived from stocks and bonds** not taxed ad valorem and repealing ad valorem tax is not unconstitutional. 159Tenn 349, 19SW(2d)261. **Tax on annual increment of timber** must be laid at same rate and date as income taxes. NH 149 A321. **Where state attempts to tax income,** inquiry is allowed regarding sources from which income is derived. 161Tenn46, 29SW(2d)253. **Uniformity of taxation.**–NC 154SE838.

766–1 Wash 289P536; Wash 289P551.

766–1½–New. Where income tax to be effective must be disproportionate, the general rule of proportionality does not apply. 82NH126, 130A357.

766–1⅓–New. An income tax is not unconstitutional in not taxing corporations since legislature has right to make reasonable classifications, 82NH126, 130A 357.

766–1¼–New. nor is it unconstitutional in taxing residents and not nonresidents. 82NH126, 130A357.

766–1⅕–New. Assessment against full amount of commissions received is according to its value and not unconstitutional. 213Ala697, 106S63.

766–1⅙–New. In Manitoba only direct income taxes may be assessed, consequently statute imposing income tax on trustees who are expected to receive indemnity therefor from the beneficiaries is ultra vires province, as imposing indirect tax. Ont [1925] 3DomLR89.

766–1⅐–New. Where tax on certain proportion of profits derived from sales defines no method of apportionment for ascertaining such part, tax is unworkable and cannot be upheld. 6F(2d)526.

766–1⅛–New. Under New York Income Tax Law, payment in settlement of former partner's claim to interest in business is not deductible as "ordinary, and necessary expenses" or "loss incurred in trade or business" "profits" "damages" or "capital outlay." 219NYS 407.

766–1½–New. Repeal of personal property tax as offset on income taxes is not violation of due process. 192Wis523, 213NW285.

766–1⅒–New. Bequests to executors in lieu of compensation and held to be intended as gifts are not taxable as income from employment. 258Mass555, 155NE437, 50ALR1400.

766–1⅑–New. Income in form of allowance to retired professor from Carnegie Foundation is not "retirement allowance" under Massachusetts statute and is not taxable. 258Mass450, 155NE 440.

766–1⅓–New. It has been held that taxpayer denied right to offset personal property taxes paid during years for which additional income tax is assessed is not deprived of property without due process of law. 198Wis377, 224NW124 (4thcase).

766–1⅓–New. Income tax on amount received by stockholders in liquidation in excess of par value of stock is not violative of due process. 267Mass 115, 166NE575.

766–1¼–New. General court may, within federal constitution, authorize tax on gross income from interest on loans secured by realty mortgage in addition to tax on mortgagee's interest as realty. 266Mass583, 165NE900.

766–1⅕–New. Income tax must be proportional and reasonable. 266Mass583, 165NE900.

766–1⅙–New. General court has no authority to impose graded tax on income under constitutional amendment authorizing imposition of income tax. 266 Mass583, 165NE900.

766–1⅐–New. Graded income tax does not contravene federal constitution. 266 Mass583, 165NE900.

766–1⅛–New. Tax on stock dividends, under statute of Philippine Islands, does not infringe Organic Act, requiring taxation to be uniform. 279US340, 49 SCt333, 73Led729.

766–3 112 OhSt166, 147NE302.

767–5 214Ky339, 283SW119; TexCivA 275SW117 (levy permissive and not mandatory under statute). **Capitation tax on women** held not prohibited by constitutional restraint on power to levy such tax on male residents. 146Val, 135SE693.

767–7 112 OhSt166, 147NE302 (distinguishing feature between poll tax and every other variety of tax is that poll tax is sum levied upon persons without regard to property, occupation, or ability to pay and is a level assessment against all persons; whereas all other forms of taxation are based upon some process of computation such as occupation or earnings).

767–8 TexCivA 275SW117 (discrimination by levy not shown).

767–9 228Ky699, 15SW(2d)468; 241 Mich665, 217NW777.

767–11½–New. Mistake of law will lay basis of equity which lawmakers may heed. 243NY173, 153NE39.

767–11⅓–New. Alabama Revenue Act (1919) § 5, requiring assessment of property brought into state after Oct. 1, and before assessment is completed, was not repealed by Revenue Act of 1923, in view of §§ 2B, 8S of latter Act. 215Ala6, 109 S105.

768–13 239Mich26, 214NW150, 151 [quotCyc]; 308Mo 253, 271SW770; 137 Misc120, 242NYS726 (tax on transfer of corporate stock); 124 Okl 16, 253P 483; 287Pa190, 134A455; 88PaSuper 602; 138SC374, 136SE487; 145Wash 193, 259P9.

768–14 In determining whether ejusdem generis rule is applicable to tax statutes, object and purposes of law are to be considered, both constitutional and statutory, and rule is not applicable if general words were intended to go beyond particular ones. 316Mo 694, 294 SW1017.

769–16 219Ala558, 122S650; 85Mont 329, 278P514. **Taxing statute cannot be sustained** as prospective as to same and retroactive as to others. 209Ky427, 273SW28.

769–17½–New. Statute imposing a tax should be interpreted in light of purposes which led to its enactment. 242 NY277, 151NE452.

769–18 214Ky339; 283SW119; 149Miss 641, 115S786. **Presumptions favor equal operation of tax law.** 16F(2d)256. **Merchants.**–46Philippine260; 46Philippine492.

769–19 214Ky339, 283SW119.

769–19½–New. Tax can only be justified from one enjoying protection of government for himself or property. Wis 230NW37.

769–23 TexCivA 29SW(2d)849.

769–24 Married woman's estate subject to assessment against bank shares owned by her during coverture. Tex CivA 278SW869.

769–25 213AppDiv716, 211NYS85; 104 WVa391, 140SE344.

770–29 194NC265, 139SE446. **Where property was not legally taxable,** agreement of owner to pay taxes has been held unenforceable. 87Colo 275, 288P 408.

770-29½-New. Bank to which assets of insolvent bank were transferred in consideration of assuming liabilities is liable for payment of insolvent's capital stock taxes. Mo 26SW(2d)976.

770-30 208Cal 677, 284P663; 246Mich 440, 224NW639. **Nontaxable property so purchased is not taxable.**-NJSup 151 A364. **Reconversion of nontaxable property into money** does not recreate taxable fund. NJSup 151A364.

770-31 43F(2d)226.

771-32½-New. Contract between individuals cannot deprive state of any power of taxation belonging to it. 85Mont 329, 278P514.

771-34 Liability of owner of personal property, omitted from tax rolls, continues till tax is paid. 170Minn76, 211 NW945.

772-43 153Wash332, 280P3 (bank paying tax under protest is not estopped from questioning validity of tax).

773-44 171Minn29, 213NW45.

773-47 162Ga818, 135SE68; 322 Ill 562, 153NE669; 120Kan365, 244P233; 126Me537, 140A382; 316Mo 853, 293SW 399; Nebr 226NW810(1stcase); 116 Tex453, 294SW835; 198Wis377, 224NW 124(4thcase). **Effect of invalidity of exemption.**-NH 146A511.

774-48 287Pa190, 134A455; Sask [1929] 2DomLR507.

774-53 17F(2d)167.

774-58 214Ky339, 283SW119; 116Tex 453, 294SW835. **Homestead lands of** decedent are taxable to widow and minor children residing thereon. 173Ark 38, 291SW814. **Reservation of interest** in lessor of mine lease held taxable. 116 Tex453, 294SW835. **Taxes on minerals in place of fractions thereof** held taxable as real property. 116Tex453, 294SW 835.

775-63 Where surface of mining claim has acquired value for use other than mining and is used for such purpose, new estate is created and is taxable as such. 82Mont502, 267P1113.

775-64 13F(2d)227; 103CalA473, 284P 1072; IndA 156NE172; Minn 232NW 35; TexCivA 3SW(2d)559; Can [1927] 3DomLR1; 58 OntL453, [1926] 2Dom LR312. **Overriding royalties** carved out of working interest created by oil lease are taxable to owners of such royalties. 119Kan609, 240P957. **Reserved right to enter into lands conveyed to explore for minerals and to extract same when found** is taxable as interest in realty. 82Mont502, 267P1113. **Royalty interest reserved to landowners under oil and gas lease** is real property and taxable as part of land. TexCivA 18SW(2d)508.

776-63 280US306, 50SCt103, 74Led445.

776-72 280US363, 50SCt121, 74Led 478; 40F(2d)540; 7PaDist&Co184; Tex CivA 293SW318. **In Montana.**-82Mont 502, 267P1113.

776-73 But see 9PaDist&Co383. **Liability of lessee of oil properties for taxation of product.**-81Mont604, 264P388.

776-74 In Montana.-74Mont81, 238P 872.

776-74½-New. Royalty tax, under Minnesota statute, is tax on right, title, and interest of lessor in ore lands let for purpose of mining ore for royalty. 172 Minn263, 215NW71.

776-74⅓-New. Fractional part of oil production required to be delivered to lessor was held real estate and as such subject to taxation. TexCivA 299SW 660.

776-74¼-New. Real estate may be taxable on ad valorem basis though surface is occupied by mining operations subject to gross production tax. 130 Okl 3, 264P891.

776-74⅕-New. But in such case added value should not be given to land because of mineral value. 130 Okl 3, 264 P891.

776-74⅙-New. Royalty interest or right to receive accruing royalties is property under statutes and taxable under constitutional provision for taxation of mines and mineral interests. 85Mont329, 278 P514.

776-74½-New. Under constitutional provision for taxation of annual net proceeds of all mines, legislature has power to prescribe how net proceeds shall be ascertained. 85Mont329, 278P 514.

776-74⅛-New. Mineral contents of mine may not be taxed in situ, but taxation must be on annual net proceeds. 85 Mont329, 278P514.

776-74⅙-New. Statute authorizing mine operator to withhold from royalty interest tax paid by him does not violate constitutional provision making county treasurer collector of taxes. 85Mont329, 278P514.

776-74$\frac{1}{10}$-New. Where operating agreement covering oil well entitles operator to only seventy-five per cent of proceeds, he is not liable for net proceeds tax on twenty-five per cent going to landowners and royalty holders. 86Mont427, 284P145.

776-74$\frac{1}{11}$-New. Where two oil wells are operated under separate operating agreements with separate owners under separate leases, operator is not entitled to deduct losses sustained on one tract from profits of other in determining net proceeds tax on latter. 86Mont427, 284 P145.

777-76 Assessment and collection of tax on riparian lands at full cash value includes riparian water rights and exhausts taxing power. 88CalA157, 263P 318.

777-80 128Me486, 148A799.

777-81 128Me486, 148A799. **Water storage and flooding privileges** are easements, incorporeal, appurtenant to power plants for which benefit they are erected. 126Misc188, 213NYS623, 629 [citCyc].

778-90½-New. Water should be taxed as part of real estate to which it is incident. 17F(2d)55; 35Wyo 67, 246P 916.

778-90⅓-New. Water rights not appurtenant to land may constitute property subject to taxation. 35Wyo 67, 246P 916.

778-90¼-New. Water right when not appurtenant to land is assessable for taxation. 8F(2d)739.

778-90⅕-New. Water company's right in water stored by agency other than one to which right belonged though intended for use outside of state is properly subject to taxation in state. 8 F(2d)739.

778-90⅙-New. Land covered by water of river may be taxed as property separate from the water. MdA 151A29.

778-90⅐-New. That river constitutes highway does not prevent taxation of submerged land when used to impound water for power project. MdA 151A29.

778-92 247NY9, 159NE703.

778-96½-New. Toll bridge and approaches built on state lands by private corporation under statute reverting property to state after thirty years is not taxable as realty. 126Misc239, 213 NYS258.

778-96⅓-New. Roadway on state lands, by bridge company, used as approach to toll bridge is not taxable as realty, even though bridge may be. 126Misc 239, 213NYS258.

778-97 170La649, 129S117; 97PaSuper 267.

778-99 218AppDiv287, 218NYS185.

779-1 Building on land owned by another is taxable as realty to owner of building. 218AppDiv287, 218NYS185. **Buildings erected on another's land** become part of land and are taxable as realty unless right of removal is expressly reserved by agreement or implied in law. 126Misc239, 213NYS258.

779-1½-New. Building held taxable as completed structure. TexCivA 29 SW(2d)802.

779-2 166La1035, 118S125.

779-3 [1926]CanSC515, [1926] 3DomLR466.

779-5½-New. Theater chairs screwed to floor become part of realty and should be assessed as such. 150Wash524, 273 P959.

779-5⅓-New. In Canada, within meaning of assessment statutes, gasoline pumps and tanks at service station are structures, machinery, and fixtures, and assessable to owner of land, though property in them is vested in another. Ont [1929] 1DomLR479.

780-6 Wood and timber may be taxed when severed.-NH 149A321.

780-7 176Ark906, 4SW(2d)928; 7Pa Dist&Co661.

780-11 17F(2d)167.

781-12 214Ky339, 283SW119.

781-13 134 Okl 29, 272P393.

781-14 320Mo 901, 9SW(2d)621, 59 ALR1041; Sask [1929] 2DomLR507. **Futile conditional agreement** to assign land contract in future which created no lien is not taxable as mortgage or other instrument creating lien. Mich 207NW 886. **Machine erected for use as such and not with intent of improving property** is chattel property within Ontario statute exempting such property. Ont [1929] 2DomLR109. **Statute, declaring certain real property of railroad and telegraph companies to be personal property** for purpose of taxation, shows intent to exclude similar property of water companies such as pipe lines, by omitting it. 133SC383, 131SE37. **Statute providing when fee in soil belongs to one** structures belonging to another shall be taxed as personalty, refers to a complete fee and does not apply where owner of structures also owns easement. 133SC383, 131SE37.

782-17 265Mass333, 163NE901.

782-20 178Minn300, 227NW43 (new and unused automobiles in dealer's hands for sale).

782-22 In Saskatchewan.-[1929] 2Dom LR537.

783-25 Money in competition with national banks.-226AppDiv258, 234NYS 608. **To prohibit exemption of moneyed capital from state taxation,** substantial part of it must be used in competition with national banks. 215Ky262, 284SW 1089.

783-26½-New. Money invested in stock brokerage firm.-213AppDiv716, 211NYS 107.

783-26⅓-New. Held not competing with national banks and not subject to taxation as moneyed capital competing with national banks. 213AppDiv716, 211NYS885.

783-26¼-New. Money invested in private banking firm is competing with national banks and is subject to taxation as such under Tax L. (1923) c 897. 213 AppDiv716, 211NYS110.

783-26⅕-New. Investment company engaged in buying and selling of corporate bonds is not subject to statute taxing moneyed capital competing with national banks. 213AppDiv716, 211NYS114.

783-26⅙-New. Company purchasing from dealers conditional sales contracts, leases, chattel mortgages, and notes on pianos, etc., held not competing with national banks and not subject to tax as such. 213AppDiv716 211NYS120.

783-26⅐-New. Textile factories not subject to tax, under statute taxing money competing with national banks. 213AppDiv719, 211NYS122.

783-26⅛-New. Stock exchange seat has been held not taxable as invested capital competing with national banks. 213 AppDiv716, 211NYS85.

783-26⅑-New. Purpose of statute taxing moneyed capital competing with national banks is to subject moneyed capital used in competition with business of national banks to same taxation as is imposed on shares of national banks. 242NY277, 151NE452 (statute construed).

783-27 197NC470, 149SE680(2dcase) (solvent credit); Or 292P813; 287Pa 190, 134A455. **Accounts receivable** are in nature of credits under statute and are taxable. 316Mo 694, 294SW1017. **In Oklahoma.**-127 Okl 65, 259P869. **Enforceable, collectable demand against** another is "property" subject to taxation. 229Ky556, 17SW(2d)722. **Deposits with gas company as security.**-Pa 151A686.

784-29 287Pa190, 134A455.

784-30 Life annuity is not taxable. 122Kan229, 230, 252P193 [citCyc].

785-36½-New. Income is assessable only when actually received by person as profit, therefore dividends on stock held on margin by broker are not taxable as income. Ont [1927] 2DomLR 1100.

785-36½-New. Lien of corporation, where it conveyed property securing bonds to grantee assuming payment of dividends and redemption of stock, was not taxable. 229Ky556, 17SW(2d)722.
786-40 148Md234, 129A641. In Utah.-66Utah245, 240P161, 42ALR347.
786-41 In Montana.-80Mont574, 261P356, 60ALR551.
786-42 In Porto Rico.-32PortoRico 376.
787-43 148Md234, 129A641 (mortgage participation certificate is evidence of debt and taxable). Includes executory contract for sale of land where purchaser taxes possession, and every instrument evidencing lien covering debt. 164Minn235, 204NW874, 205NW375.
787-47 In New York.-244NY159, 155 NE84.
787-48 227AppDiv361, 238NYS27 (tax is measured by principal debt existing at time of execution and delivery of mortgage). Transactions subject to recording tax, etc. 214Ala89, 106S500; 245NY414, 157NE513; 245NY603, 157 NE875; 214AppDiv99, 210NYS263; 220 AppDiv396, 221NYS646. Evidence of payment.-235Mich481, 209NW576. Sublease giving sublessee right to assignment of original lease is not taxable as mortgage. 215AppDiv262, 213NYS142 (being "option" and not executory contract for sale of lease within statute). Tax is not on debt itself, but on written evidence of collateral security required to be recorded. 220AppDiv396, 221NYS 646. Refunding bonds of original bonds, tax paid, are not subject to mortgage recording tax. 227AppDiv361, 238 NYS27.
787-49 In Kentucky.-220Ky632, 295 SW976. In Oklahoma.-112 Okl 240, 240 P739. Grantee answering payment of bonds secured by mortgage as property conveyed held entitled to record deed without paying tax. 220Ky632, 295SW 976.
787-49½-New. Land contract, where purchasers not entitled to possession till final payment, is not subject to mortgage recording tax so is not inadmissible in evidence because tax was not paid. 128Misc275, 218NYS545.
787-50 In Kansas.-122Kan229, 252P 193.
787-51 122Kan229, 234, 252P193 [quot Cyc].
787-53 214Ky339, 283SW119; 220Ky 116, 294SW1080; 128Misc863, 220NYS 349.
788-58 21F(2d)586; 124Kan312, 259P 795; 315Mo549, 286SW355; 78Mont 235, 253P1100; 123Or370, 261P69. That title is in dispute is not sufficient reason for suspending taxation. 220 AppDiv595, 222NYS176.
788-59 12PaDist&Co 62.
788-60 119Kan492, 240P406 (owner of personal property on first of March liable for taxes thereon for year); 167 La 605, 120S23; TexCivA 3SW(2d)559. Reassessment due to enhanced value by discovery of oil does not permit imposition of tax at new rate on purchaser after statutory date on which prior owners paid tax. TexCivA 3SW(2d)559.
788-62 26F(2d)489; 315Mo549, 286 SW355; Va 155SE823. Property is properly assessed for taxation in name of one purchasing disputed interest with duly recorded deed. 170La927, 129S532.
789-66 124Kan312, 259P795. Assignee of lessor's interest in oil lease held subject to tax. 116Tex453, 294SW835.
789-67½-New. Ownership of real property to be liable to taxation implies perpetuity or at least possibility of perpetuity. 126Misc239, 213NYS258.
789-67¾-New. For purposes of taxation, who is ultimate owner of fee is immaterial. 83NH107, 139A294.
790-68 36F(2d)956; 40F(2d)540; 179 Ark848, 18SW(2d)906 (oil and gas lease); 172Minn263, 215NW71; 116Tex 453, 294SW835. Reservation of royalties in mine lease held to render lessor's interest taxable. 116Tex453, 294SW 835. Tenants of homestead estate must pay taxes accruing during term of estate. 323Mo899, 20SW(2d)26.
790-73 107Conn697, 142A574; 245 IllA 153; 116Tex453, 294SW835; 100WVa 422, 130SE663. In Montana.-74Mont81, 238P872. Where land leased is owned by state or municipality, tax falls on lessee. 104CalA235, 285P896(2dcase).
791-74 83NH107, 139A294, 296 [cit Cyc].
791-75 104CalA235, 285P896(2dcase); 116Tex453, 294SW835 (oil lease). Under Kentucky Statute, etc. 210Ky539, 276SW527.
791-78 315Mo549, 286SW355.
792-79 Prospector entering on land under operating agreement, whereby he was to receive seventy-five per cent of oil and gas obtained, held owner of, and taxable only on, seventy-five per cent of oil and gas produced. 86Mont367, 283 P769.
792-81 14PaDist&Co 143.
792-84 26F(2d)489. See Alta [1926] 4DomLR1037, [1926] 3WestWkly690. Property held under contract of sale by city.-122Kan252, 251P1114.
792-87 75CalA231, 242P509.
793-91 157Md542, 146A744; 151Va883, 141SE825; [1926] CanSC142, [1926] 1 DomLR29. Guardian of infant beneficiaries will not be charged with assessment and payment of tax on trust fund where, under terms of trust instrument, beneficiaries do not come into possession of fund till they attain age of twenty-five years. 151Va883, 141SE825. Statute authorizing taxation of property held in trust refers to technical trustees.-142Va107, 128SE528. Where trust property is held by different trustees for same beneficiaries, trustee under one instrument is not liable for assessment against other fund. 151Va883, 141SE 825.
793-92 Ont [1925] 3DomLR89 (where it was held that only direct income tax is valid). See also 151Va883, 145SE 326.
793-93 151Va883, 141SE825; 151Va 883, 145SE326.
794-3½-New. Poll tax assessed against trustee or estate held invalid. 215Ky 601, 286SW779.
794-4 96PaSuper467; Wis 230NW37. Credits of estate.-141 Okl 185, 284P287.
795-6 Mo 31SW(2d)788. Administrator's right to reimbursement does not make taxes debt of estate.-Mo 31SW(2d) 788.
796-11½-New. Tax on estate after distribution cannot result from construction of equivocal statutory provisions. Wis 230NW37.
796-14 115Ga184, 41SE680 [aff 197US 60, 25SCt403, 49LEd663]; NS [1929] 1 DomLR481. Nonprofit coöperative grain association, having no capital stock, which is organized to market for their benefit wheat grown by members, is not required to pay taxes on such wheat, growers being beneficial owners liable for whatever taxation ownership involves. 119Kan877, 241P466.
797-17 Payment into court by insurance company of sum less than insured recovered remains property of insurer to be taxed to it where insured refused to accept it. 87CalA473, 262P436.
797-23 Colo 291P1020.
797-24 18F(2d)731. Franchise taxes.-18F(2d)731.
798-25 6F(2d)324; 43F(2d)670. Federal Bankruptcy Act does not exempt property in hands of trustee in bankruptcy. 39F(2d)462(2dcase). In Ohio. -39F(2d)462(2dcase).
798-28 176Ark1181, 6SW(2d)12. Holder of permit to cut timber is no occupant. Sask [1928] 1DomLR436. Under Saskatchewan Rural Municipality Act holder of certificate of free grant entry under Canadian Soldier Settlement Act is taxable as occupant though he never went into occupancy of land. [1929] 3 DomLR365. Taxes on personalty may be assessed against either owner or holder or both.-Mo 31SW(2d)788.
798-31 NJCh 150A668.
798-31½-New. As between parties to conditional sale of personalty, purchaser in possession is one liable for taxes. 37 GaA537, 140SE902.
798-31¾-New. But public authorities may treat property as belonging indifferently to either purchaser or seller. 37GaA537, 140SE902.
798-32 TexCivA 278SW869 (assessment held proper under statute).
799-35 156Md133, 143A656; 142Va107, 128SE528 (corporation not partner with respect to property in its possession by virtue of contract with another corporation). Income tax on profits received by partners see 32PortoRico 649.
799-38 36F(2d)956; 214Ky339, 283SW 119. Mining royalties are taxable in state where mines are situated. 13F (2d)227.
800-40 115Ga184, 41SE680 [aff 197US 60, 25SCt403, 49LEd66]. Where nonresident coexecutor exercised control over decedent's property, assessment of tax on personalty held to be only one half of personalty belonging to estate. 219AppDiv576, 220NYS337.
801-41½-New. Nonresident trustee having temporary possession of securities, conveyed by trust deed for delivery with accumulated income to resident beneficiaries when they attained age of twenty five years, is properly directed to pay tax thereon after donor's death before time for delivery. 151Va 883, 145SE326.
801-43 153Md25, 137A291.
801-44 106Conn525, 138A520; 320Mo 702, 8SW(2d)1057, 59ALR1026; 40 Okl Cr413, 269P509. No allegation of failure to tax in other jurisdiction necessary. 199Ind262, 157NE275, 53ALR 1386. One residing in Indiana because of wife's health but conducting business in Michigan held not "inhabitant" of Indiana as to tax laws. 199Ind262, 157NE275, 53ALR1386.
802-49 Or 292P813.
802-50 270US69, 46SCt256, 70LEd475, 43ALR1374; Md 151A39.
802-51 106Conn525, 138A520. But see 82NH126, 130A357, 361 [citCyc].
803-53 120Kan365, 244P233. Taxation of solvent credits.-CalA 262P355.
803-54 106Conn525, 138A520; 120Kan 365, 244P233.
804-57 106Conn525, 138A520.
804-58 80Mont574, 261P356, 60ALR 551.
804-60 106Conn525, 138A520.
804-61 106Conn525, 138A520.
805-66 36BC299, [1926] 1DomLR783, [1926] 1WestWkly559. See also 44F (2d)64. Matters determining situs.-208 Iowa164, 225NW344.
805-67 214Ky339, 283SW119.
805-68 214Ky339, 283SW119; 58ND 776, 228NW192. See also 44F(2d)64.
805-69 280US83, 50SCt59, 74LEd180, 67ALR386.
805-70 134 Okl 133, 273P226; 141 Okl 174, 284P1.
805-70½-New. Legal or actual situs.-Personal property may have legal situs different from its actual situs for purposes of taxation. 208 Iowa164, 225NW 344.
805-70¾-New. Legal situs of personal property as fixed by constitutional statute is controlling as against its actual situs for tax purposes. 208 Iowa164, 225NW344.
805-70¼-New. Situs of personal property for purpose of taxation is domicile of owner, and intangible personal property, including credits, bonds, and other evidences of indebtedness are taxable at domicile of owner, with exception that rule as to bonds and notes may be modified by statute, and that bonds, notes, and other evidences of indebtedness may acquire business situs different from owner's domicile. 320Mo 702, 8SW(2d)1057, 59ALR1026.
805-70⅛-New. Assets owned by party and located in foreign state, though not taxable on constitutional grounds in foreign state, if there taxed, can nevertheless be taxed in state of owner's domicile. 320Mo 901, 9SW(2d)621, 59 ALR1041.
806-72 106Conn525, 138A520; 99Fla 1027, 128S264; 199 Ind262, 157NE275, 53ALR1386; 208 Iowa164, 225NW334; 223Ky612, 4SW(2d)417; 256Mass419, 152NE916; 241Mich665, 217NW777; 320Mo 702, 8SW(2d)1057, 59ALR1026; Mo 8SW(2d)1066; 320Mo 680, 8SW(2d) 1067(1stcase); 320Mo 680, 8SW(2d) 1067(2dcase); 320Mo 901, 9SW(2d)621,

59ALR1041; 121 Or110, 254P196 (accounts); 151Va883, 145SE326; 197Wis 71, 221NW376; 36BC299, [1926] 1DomLR783, [1926] 1WestWkly559 (succession duties). But see 246Mich174, 224 NW653; 78Mont62, 252P876. **Money on deposit, etc.**–320Mo 702, 8SW(2d) 1057, 59ALR1026. **Business situs.**–208 Iowa164, 225NW344; 241Mich665, 217 NW777. **Credits** by way of deposits in bank, accounts receivable, and payments to be received under land contracts are within rule. 241Mich665, 217NW777. **Domicile of owner is situs of personal property** for purposes of taxation, unless property has acquired actual situs elsewhere. 197Wis71, 221NW376.

806-74 106Conn525, 138A520; 246Mich 174, 224NW653.

806-75 280US83, 50SCt59, 74Led180, 67ALR386; 151Va883, 145SE326. **Bank deposits and negotiable bonds and notes** for purpose of ad valorem taxation have situs at domicile of creditor only. 281US 586, 50SCt436, 74Led1056. **Doctrine of business situs** has modified general rule as to intangibles. 129Misc625, 222 NYS515.

806-76 In Kentucky.–221Ky100, 298SW 189.

806-77 241Mich665, 217NW777; 129 Misc625, 222NYS515.

806-77½-New. That property is taxed in another jurisdiction will not prevent its being taxed in jurisdiction of owner. 106Conn525, 138A520.

806-77¾-New. Property may have a business situs separate from its theoretical situs. 256Mass419, 152NE916.

806-77¼-New. Intangible personal property may acquire taxable situs where permanently located, employed, and protected. 280US83, 50SCt59, 74 Led180, 67ALR386.

807-78 277US27, 48SCt422, 72Led767.

807-79 151Va883, 141SE825.

809-99 Freight cars of foreign railroads, sent into state temporarily for purpose of carrying freight on other freight lines for convenience of shipper, are not taxable in state. 214Ky339, 283 SW119.

809-1 214Ky339, 283SW119. But see 198Wis281, 224NW126. **Though state has jurisdiction over chattel temporarily within its territory** it may not subject it to ordinary property tax. 214 Ky339, 283SW119.

809-3 196Wis419, 220NW217. **Under statute, exempting from taxation merchandise placed in storage in original packages as merchandise in transit,** merchandise manufactured within state and stored in commercial warehouses is not exempted. 198Wis281, 224NW126.

810-6 266Mass590, 165NE904. **In Porto Rico.**–35PortoRico 27. **Statute imposing tax on motor vehicle fuels derived from petroleum strictly construed** as not intended to tax in their entirety all compounds in which petroleum product is an ingredient, but only so far as the petroleum ingredient is concerned. 115 Oh458, 154NE792.

810-7 219Ky432, 293SW944. **Assignment of conditional sale contract** and chattel mortgage not sale of personalty within statute requiring payment of license tax before registration. 215Ala 39, 109S106. **Failure to collect tax from purchaser** does not give state right to recover it from wholesaler where statute has made sales tax payable by purchaser. 36BC366, [1926] 1DomLR821. **Insurance money** received as result of destruction of goods held not to be assets of debtor so as to be subject to sales tax. 58 OntL255, [1926] 1DomLR 666. **Reliance by retailer on classification of business.**–Ont [1925] 3DomLR 291. **Sales by manufacturers.**–Can [1928] 3DomLR781. **Under Canadian Special War Revenue Act** booklet printed for Kodak Company and having for subject matter technical information relative to photography is "magazine" within exception. [1930] 2DomLR263.

810-13 146Miss422, 111S558. **Statutes authorize tax on incomes derived from stocks and bonds** that were lawfully not taxed ad valorem. 159Tenn349, 19 SW(2d)261. **Tax held not intended as tax on income.**–Or 292P813.

810-14 Ont [1925] 3DomLR89 (holding tax on trustees invalid as not direct tax). **Because income from trust fund is described as annuity** does not exempt it from income tax where payment to beneficiary is taxable as income. 214 AppDiv153, 211NYS746. **Beneficiary's income** from trust fund established by will is subject to income tax. 214App Div153, 211NYS746 (where payment to beneficiary is out of income and not corpus of fund). **Express exemption legal** of incomes of certain amount from intangibles. 82NH561, 138A284. **Foreign railroad company engaged in both intra-state and interstate commerce** was not subject to income tax prior to L. (1924) c 132. 146Miss422, 111S558. **Tax imposed in Massachusetts** on estates held in trust is valid tax on income received by trustee in bankruptcy from property of estate during administration. 6F(2d)324. **Income from trust estate accepted by widow in lieu of dower,** where not grossly disproportionate to value of property relinquished, is not taxable till return of capital investment. 228AppDiv861, 240NYS790. **Income of estates.**–Wis 230NW37. **Income earned outside of state.**–43F(2d)226.

811-15 Person becoming inhabitant during year held not liable for tax on income previously received from property outside state. 256Mass426, 152NE 747. **Income of nonresident,** earned in business conducted in state, may be taxed, but tax must be confined to such income. 218AppDiv1, 217NYS669.

811-16 262Mass1, 159NE536; Mass 167 NE677 (money received by estate of deceased partner is subject to payment of income tax); 187Wis539, 204NW481 (holding "income" means profit or gain derived from capital or labor or both combined in terms of money or that which is convertible into money); 195 Wis219, 217NW568; 195Wis324, 218 NW172; Wis 229NW546; Wis 231NW 160 (dividend subject to tax in year received); Wis 232NW843; Wis 233NW 72. **Accumulated profits of private corporation** declared as dividends in liquidation and received by stockholder are subject to state income tax. 262Mass 1, 159NE536. **Amount received in liquidation in excess of par value of stock** is subject to tax. 267Mass115, 166NE 575. **Annual payments** made by partners to retiring partner for duration of his life is an "annuity," subject to tax. 266Mass547, 165NE664. **Declaration of dividend** not gain within Income Tax Law. 258Mass379, 155NE177. **Excess value of stocks held taxable as "income."** 195Wis405, 217NW407, 61ALR357. **Income held not to have accrued from exchange** of patents for entire stock of corporation whose shares had value only on paper. 257Mass488, 154NE257. **Legislative determination.**–187Wis539, 204 NW481. **Meaning of "income" within statutes** is gain or profit as distinguished from corpus or principal. 194Wis126, 215NW936. **Money.**–187Wis539, 204NW 481. **No gain or loss takes place** until sale or exchange of newly-acquired property fixes it with value. 257Mass488, 154 NE257. **Ordinary meaning** of word "income" is one employed in statute. 187 Wis539, 204NW481. **Payment on account of credit balance to deceased partner's estate** is capital value of partnership interest and not income to estate or subject to additional income tax. 226 AppDiv108, 234NYS349. **Payments held corpus and not taxable income.**–194Wis 126, 215NW936. **Payment to deceased partner's estate** of share of profits accruing from his death to next settlement day in full satisfaction of his interest held not taxable as "income." 215App Div576, 214NYS484. **Profit or gain** derived from capital or labor, or from both combined, is income. 187Wis539, 204 NW481. **Sales on installment plan** secured by conditional sales contracts should be included in income tax report. 187Wis539, 204NW481. **Stock dividend,** for purpose of taxation, is "capital." 250NY1, 164NE723. Such dividends have been held income of trust and part of beneficiary's estate, but not taxable till disposed of. 226AppDiv41, 234NYS336. **Sums due and outstanding** at end of year are included in "income." 187Wis539, 204NW481. **To be assessable as income,** profits must have actually been earned. **Eng** [1926] AC140, [1926] 1DomLR785. **Transfer of patents, contracts, and rights for shares of stock in corporation owned by patentee** held sale within Income Tax Law. 257Mass488, 154 NE257. **Under statute excluding stock dividends from computation of gains, profits, and income subject to income tax,** stock dividend, though allocated by trustee to beneficiary of trust, is held by beneficiary as stockholder and is not taxable as income. 243NY173, 153 NE39. **Basis for determining gain or loss from sale of property acquired prior to effective date of income tax law** is fair market value of such date. Wis 230 NW64. **Corporate stock must be disposed of** by stockholder before either taxable income or deductible loss results. Wis 231NW865. **Gains derived from sales of rights to subscribe for new stock** are gains received from purchases or sales of intangible personal property within tax law. Mass 172NE643. **Income need not consist of money** but may consist of that which is convertible into money. 42F(2d)875. **Income of trust estates.**–Mass 172NE605. **In British Columbia.**–[1930] 2DomLR37; [1930] 3 DomLR609. **Right to subscribe to new stock,** when sold and realized in cash, has characteristics of income. Mass 172 NE643. **Selling price of property must exceed cost** in order for property to give rise to taxable income. Wis 230NW64. **Tax commission's allowing report of appreciation** of corporate stock does not defeat imposition of tax for year income is actually received from disposition of stock. Wis 231NW865. **Where taxpayer appreciates value of land** and carries appreciation into surplus, surtaxes are properly assessed on ascertained income. Wis 231NW865. **Refund as taxable income.**–Wis 232NW843.

811-16½-New. Tax on commissions of dealer in buying and selling justified as ad valorem tax. 213Ala697, 106S63.

811-16⅔-New. Royalties from use of patent in jurisdiction under license held taxable. [1926]CanExch17, [1926] 4 DomLR1152.

811-17 Deductions.–28Hawaii246; 132 SC466, 129SE429. **Income from business taxable.**–263Mass476, 161NE593. **Profit on sales of real estate** is not taxable as business income where deductions exceed such income. Mass 171NE 727. **Allowance for depletion** on leased oil lands. Del 151A663.

811-18 179Ark886, 19SW(2d)1000; 226 AppDiv593, 236NYS110. **In Hawaii.**–28Hawaii261. **Sums outstanding and due at end of year** are included in income. 187Wis539, 204NW481.

811-18½-New. Intent of legislature held to be ad valorem tax on gross commissions charged and received by dealer in buying and selling any kind of property. 21AlaA119, 106S61.

811-18⅔-New. Profit under contract for sale of oil calling for unsecured installment payments during two years are taxable as income in years in which payments were actually received. 217App Div619, 216NYS74.

811-18¼-New. Stock dividend valued as of time acquired. 258Mass379, 155NE 177.

811-18⅓-New. Market value for taxation is difference in market value when received and price obtained on its sale. 258Mass379, 155NE177.

811-18⅜-New. Under and by virtue of statute, taxpayer, in paying his income tax, is entitled to deduct under subdivision thereof three hundred dollars for each child under the age of eighteen years, and not engaged solely in acquiring education, and five hundred dollars under another subdivision for each child and every person for whose support taxpayer is legally liable, and who is actually and permanently domiciled with taxpayer, and engaged solely in acquiring an education, but he, taxpayer, is not entitled to deduction on same child under both subdivisions; and taxpayer, in making his income tax return, is not entitled to deduction of eight hundred dollars for each child under age of eighteen

years engaged solely in acquiring an education. 136 **Okl** 30, 275**P**1037.

811-18⅞-New. Under statute, providing that income of inhabitant of commonwealth from foreign trustee shall be taxable, income received by resident from foreign executor is taxable. 265 **Mass**585, 164**NE**459.

811-18⅞-New. Income derived from property or business situated within state is subject to taxing power of state. 58**ND**776, 228**NW**192 (income of foreign corporation).

811-18⅞-New. Money paid corporate officer as employee of federal shipping board is exempt. 229**AppDiv**353, 243 **NYS**156.

811-18⅞-New. Statute imposing income tax on average three-year income does not purport to tax every penny of income. **Wis** 230**NW**37.

811-18⅞-New. Statute regulating adjustment of corporation excise tax with reference to "net income" on which federal government bases its tax on corporation means net income returned to federal government and not that returned to state government. **Mass** 167**NE**670.

811-18⅞-New. Whether dividends received by corporate officer were taxable as salary depends on intention of parties. 229**AppDiv**353, 243**NYS**156.

811-20 214**Ky**339, 283**SW**119 (personal tax may be imposed on all domiciled within state).

811-21 214**Ky**339, 283**SW**119 (personal tax).

811-22 214**Ky**339, 283**SW**119 (persons not domiciled in state).

812-25 In Pennsylvania.-8**PaDist&Co** 714.

812-26½-New. Under Mortgage Tax Registry Law, where mortgage has been presented in one county and full amount of registry tax paid and certificate thereof recorded, mortgage may be recorded in other counties without payment of tax. 48**SD**462, 205**NW**33.

812-26½-New. Where supplemental mortgage is not executed to correct or perfect original mortgage or pursuant to any covenant therein nor to include additional security, it is not within exceptions of statute and is subject to registry tax. 48**SD**462, 205**NW**33.

812-26¼-New. Tax on transfers and registration of instruments.-Mortgage on leasehold interest for ninety-nine years is mortgage on real property, within meaning of mortgage tax statute, subject to tax therein imposed, words real property being equivalent to real estate. 244**Mich**182, 221**NW**111, 59**ALR** 698.

812-26½-New. Mortgagor's bonds and stocks in subsidiary corporations engaged in navigation, pledged as security held "tangible property" within statute. 229**AppDiv**289, 241**NYS**38.

812-26¾-New. Transfer of stock certificates to escrow agent has been held subject to taxation. 137**Misc**120, 242 **NYS**726.

812-27 214**Ky**339, 283**SW**119.

812-29 287**Pa**251, 134**A**377. **Repeal of statutes.**-315**Mo** 791, 287**SW**307; 195**NC** 424, 142**SE**474; 287**Pa**251, 134**A**377; 293**Pa**404, 143**A**105. **Lessor of cars, incorporated in another state, was not liable for taxes prior to enactment of such law** making property subject to assessment and taxation. 151**Miss**797, 119**S** 310.

812-30 8**F(2d)**883; 293**Pa**404, 143**A**105.

812-30½-New. Where combined value of property of corporation, that is enterprise for profit, is different from the aggregate value of several parts, then such property must be assessed separately as to each item thereof for its cash value. 27**Hawaii**604.

812-30½-New. Corporate entity will not be disregarded so as to permit taxation of property in its possession for manufacture merely because corporate owner of property owns more than one half stock of corporation sought to be taxed. 142**Va**107, 128**SE**528.

813-32 5**PaDist&Co** 585 ("companies" held to be included in statute).

813-33 See also 5**PaDist&Co** 585.

814-43 32**Ariz**601, 261**P**49; 148**Misc** 834, 114**S**873. **Corporate situs** will be considered situs of personal property till enactment of law fixing taxable situs within state. 151**Miss**797, 119**S**310.

815-55 NH 149**A**321; 220**AppDiv**1, 220 **NYS**467; 221**AppDiv**19, 221**NYS**613. **Corporation franchise taxable,** though assets distributed and stock certificates canceled and franchise not exercised during tax year. 221**AppDiv**471, 224**NYS** 140. **Liability for franchise tax not affected by declaration of intention to cease business,** as dissolution alone relieves from tax. 221**AppDiv**471, 224**NYS** 140. **Making income tax return and doing business for part of tax year** makes corporation liable for franchise tax for that year. 221**AppDiv**471, 224**NYS**140. **Corporation having no net income during year** liable for minimum franchise tax only. 221**AppDiv**471, 224**NYS**140. **What constitutes special franchise.**-248 **NY**97, 161**NE**432.

816-56 24**F(2d)**882; 76**CalA**519, 245**P** 209; 246**NY**322, 158**NE**884; 247**NY**9, 159**NE**703; 220**AppDiv**1, 220**NYS**467; 221**AppDiv**19, 221**NYS**613. **Tax held not applicable** to corporations which render no service to public in state. 76**CalA** 519, 245**P**209. **Corporation "doing business" within state** within excise tax law. **Mass** 169**NE**515.

816-57 Mass 158**NE**898. **Where business was to receive royalties** on patent from company doing business in another state, it was not subject to excise tax. 161**Tenn**46, 29**SW(2d)**253.

817-58 323**Mo** 765, 20**SW(2d)**51. See also 29**F(2d)**634 [certiorari den 278**US** 656, 49**SCt**185, 73**L ed**565].

817-59 29**F(2d)**634 [certiorari den **US** 49**SCt**185]; 245 **IllA**473; 232**Mich**574, 205**NW**102; **Nebr** 227**NW**926 (annual tax on domestic corporations computed upon paid up capital stock). **Such tax is, however,** a paramount lien. 17**F(2d)** 78.

817-60 Or 292**P**813. **Holding company** of other subsidiary corporations held not doing business within state, even though it indorsed notes of subsidiaries and therefore not subject to franchise tax under Tax L. § 182. 213**AppDiv**533, 211 **NYS**75.

817-60½-New. Fact that holding corporation was chartered to transact certain business, but in fact did not, did not make it subject to franchise tax. 213 **AppDiv**533, 211**NYS**75.

817-61 Tax based on value of stock after deducting value of real estate and personal property listed for taxation is tax upon franchise as property and not simply excess tax. 53**ND**28, 204**NW**861, 42**ALR**1039.

817-61½-New. To justify tax corporation should be exercising its corporate franchises. 215**AppDiv**48, 213**NYS**307.

817-61½-New. And as basis for computing tax, corporation should be employing all or some of its capital stock. 215**AppDiv**48, 213**NYS**307.

817-61¼-New. Thus corporation which had leased plant and equipment for long term, retaining no interest therein, and doing nothing but receive rent and distribute same is not employing its capital to be subject to tax. 215**AppDiv**48, 213 **NYS**307.

817-61½-New. Franchise tax accrues against corporation in hands of receiver if he continues business. 116 **Oh**95, 155 **NE**691.

817-61¼-New. Whether receiver is continuing business of corporation so as to make it liable for franchise tax is mixed question of law and fact. 116 **Oh**95, 155 **NE**691.

817-61⅞-New. Where receiver operates solvent corporation for profit and sells property as going concern, finding is warranted that receiver continued business so as to render corporation liable for franchise tax. 116 **Oh**95, 155**NE**691.

817-61¼-New. Tax on corporate privilege of doing business, measured in part by amount of nontaxable interest received, may be adjudged tax on interest, if that purpose be fairly inferable. 279 **US**620, 49**SCt**432, 73**L ed**874, 65**ALR**866.

817-61½-New. Statute allowing dissolution or retirement of corporation on payment of all "taxes due" does not include franchise tax which need not be paid where such dissolution or retirement is made between certain dates. 121 **Oh**73, 166**NE**903.

817-61¹⁄₁₀-New. Corporation substituting no par value common stock for par value stock is not liable for additional franchise tax. **Ill** 172**NE**705.

818-62 78**Mont**62, 252**P**876; 159**Tenn** 349, 19**SW(2d)**261. **Shares within state,** belonging to residents or nonresidents, are taxable. 78**Mont**62, 252**P**876. **Stocks of state banks** are "taxable property." 78**Mont**62, 252**P**876. **Shares are personal property of individual stockholders.**-**Ida** 290**P**714.

818-63 286**Pa**545, 134**A**438, 48**ALR**992. See also 245 **IllA**473. **What corporations taxable.**-317 **Ill** 547, 148**NE**273. **Tax may be on physical property plus increase** shown by value of capital stock. 148**Miss**834, 114**S**873.

818-64 "Authorized" maximum capital stock is determined by examining stock and bond statement. 147**Va**202, 136**SE** 666.

818-66 Requirement of uniformity.-144 **Miss**732, 106**S**113.

818-66½-New. Where the corporation has enjoyed the benefit of right to conduct business, it is subject to franchise tax, 8**F(2d)**304.

818-66½-New. and fact that its receiver has not carried on its business during period covered by tax is not ground for attack on validity of state's claim. 8**F(2d)**304.

818-66¼-New. Corporation charter is taken subject to liability under capital stock tax in existence at time of incorporation. 286**Pa**545, 134**A**438, 48**ALR** 992.

818-66½-New. Tax levied by statute or capital on capital stock falls on corporation unless legislature clearly expresses different intention. 35**PortoRico** 842.

819-67 297**Pa**308, 146**A**903 (stock owned by railroad company already taxed); **Pa** 147**A**242 (stock owned by railroad company already taxed). **Machinery and tools of stone crushing company,** operating leased property, held assessable as capital and not as machinery, etc., on mineral lands, in view of statutes. 145**Va**476, 134**SE**717.

819-70 12**PaDist&Co** 772 (property represented by stock in auxiliary company).

819-75 261**Mass**445, 158**NE**897.

820-78 73**Mont**210, 236**P**1090.

820-82 199**Cal** 428, 249**P**853 (conditional sales contracts held taxable as "solvent credits"); 320**Mo** 691, 8**SW(2d)** 1068; 83**Mont**418, 272**P**691; 290**Pa**526, 139**A**199. **Reservation of title** in conditional sales contracts does not prevent them from being taxable as "solvent credits" where purchaser is under absolute obligation to pay purchase price. 199**Cal** 428, 249**P**853.

820-83 41**F(2d)**183 (accounts receivable); **Or** 292**P**822(1stcase).

820-85 Mass 158**NE**898; **Can** [1930] 3**DomLR**417 (interest paid deductible from gross receipts in determining income). **"Entire gross receipts"** in statute imposing excise tax on public utility company means and includes entire receipts from intra-state business done under exercise of corporate powers whether derived from operation of utility or from other business. 114 **Oh**479, 151**NE** 685. **In California.**-196**Cal** 131, 236**P**307. **Statute held valid.**-114 **Oh**479, 151**NE** 685. **Tax on gross revenue invalid.**-**NB** [1928] 3**DomLR**657. **Tax on net income of corporations not unconstitutional.**-**NC** 153**SE**850. **Corporation conducting unitary business** should not place income beyond state's taxing jurisdiction. **NC** 153**SE**850. **Validity of tax on net income.**-**Wash** 289**P**536 (tax on net income of financial corporations denial of equal protection). **Wash** 289**P** 551 (tax on net income of financial corporations denial of equal protection and arbitrary classification).

821-87 Mass 158**NE**898.

821-92 For taxation, bank shares have distinct status. 78**Mont**62, 252**P**876.

822-94 81**Colo** 266, 254**P**996; 308**Mo** 237, 271**SW**508, 39**ALR**1199; 34 **OhA**

420, 171NE374; 35PortoRico 842. **Fact that owner of stock in ditch company was not using stock to irrigate land does** not make the stock subject to tax where company's unused water rights are used by other of its stockholders. 81Colo 366, 254P996.

8222-95½-New. Corporation is not stockholder's agent to bind stockholder regarding this individual property. Ida 250P714

8223-95½-New. Statute imposing tax on "shares of stock" or "capital stock" construed as intending direct taxation of individual shares of stockholders. Ida 250P714.

8224-97 Income.-32PortoRico 649.

8225-98 Mass 163NE742 (joint stock company)

8224-8 6PaDist&Co 748.

8225-15 287Pa161, 134A404. **That for eighteen years after advent of taxicab companies taxes were not assessed against them cannot prevail against** plain language authorizing tax. 287Pa 161, 134A404.

8225-17 In Montana.-73Mont210, 236P 1090. **Real estate, furniture and fixtures, and money capital constitute all state** bank's taxable property in Montana. 73 Mont210, 236P1090.

8226-19 But see 145Wash193, 259P9.

8226-28 In Montana.-73Mont210, 236P 1090.

8226-30 33Mont113, 272P691

8227-31 202 Iowa237, 207NW345 (county auditor cannot under guise of correcting assessment assess bills receivable, which had been rediscounted for full value)

8227-33 55ND670, 215NW163.

8227-34½-New. Shares of stock in state bank have been held not taxable under statute, covering shares of stock of national banking corporations and moneyed capital employed in conducting banking business. 33Mont418, 272P691.

8227-35 Mo 268SW(2d)976; 55ND670, 215NW163; 139 Okl 189, 281P958. **In Missouri.**-308Mo 253, 271SW770. **Shares of bank stock have value distinct from** bank's property. 78Mont62, 252P876. **Statutes held invalid as violation of constitutional rule of uniformity as to class.** 117Neb159, 220NW765.

8227-37 55ND670, 215NW163.

8228-41 In New Mexico.-31NM334, 245P 253. **No direct liability rests upon bank** in absence of funds out of which to pay dividends. 31NM334, 245P253. **Statute permitting bank or loan and trust company to have assessed against it amount of assessment against stockholders was** enacted for convenience of bank and stockholders by permitting bank to act as voluntary agent for purpose of tax and does not contemplate tax against capital stock. 55ND670, 215NW163.

8230-41½-New. Shares of capital stock of industrial bank loaning money on character and earning capacity of borrower are taxable. 85Colo 458, 276P988.

8231-46 See also 49Philippine413.

8232-54 253Mass121, 156NE536.

8239-55 Depositor's guaranty fund may be subject to taxation. 129 Okl 273, 264 P816.

8239-55½-New. Savings bank within commonwealth may deduct from deposits for purposes of taxation total amount of loans on land within commonwealth without regard to its assessed valuation. 255Mass130, 117NE569.

8239-55½-New. In Hawaii statutes as amended in 1923 provide that for taxation purposes in returning its cash balance, bank may deduct amount not greater than that represented by ratio that government deposits bear to total commercial deposits. 8F(2d)845.

8239-55¼-New. But prior to such amendment of 1923 bank was liable for taxation on all moneys on hand January 1st regardless of fact that on such date territorial deposits amounted to sum exceeding such moneys on hand. 8F(2d)845

8239-56 253NY85, 170NE502 (money employed in competition with national banks); 253NY93, 170NE505 (money employed in competition with national banks). **Corporation property consisting of United States bonds.**-308Mo 237, 271 SW508, 39ALR1199.

8239-60 269US341, 46SCt135, 70L ed295; 273US548, 47SCt462, 71L ed767, 59ALR 1; 8F(2d)883; 11F(2d)936; 16F(2d) 990; 21F(2d)85; 26F(2d)957; 37F(2d) 947; 97Fla411, 121S554; Iowa 232NW 445; 208Ky7, 270SW995; 164Minn235, 204NW874, 205NW375; 76Mont45, 245 P259; 83Mont418, 272P691; 130Misc 352, 224NY810; 55ND670, 215NW163; Wash 289P536. **Statutes construed.**-308 Mo 237, 271SW508, 39ALR1199. **Consent of congress held essential.**-78Mont 62, 252P876. **After amendment of federal statute relating to taxation of national bank stock** state statute held to be only valid statute relating to taxation. 16F(2d)990. **Surplus and undivided profits** cannot be assessed against bank as nominal. 97Fla411, 121S554. **Tax on net income valid.**-Wash 289P536.

8239-61 37F(2d)947 (taxation must conform to regulations attached to consent); 208Ky7, 270SW995; 76Mont45, 245P 259; 121 Okl 290, 249P918.

8239-64 97Fla411, 121S554; 130Misc352, 224NY810.

8239-66½-New. In Massachusetts statute (1923) c 487, permitting national bank to elect as to method of taxation, must be construed in relation to preexisting law and remedy. 259Mass14, 156NE648.

8239-66¾-New. Election of national bank under existing law held not affected by law subsequently passed. 259Mass14, 156NE648

8239-67 97Fla411, 121S554; 164Minn235, 204NW874, 205NW375; 76Mont45, 245 P259; 121 Okl 290, 249P918.

8239-68 273US561, 47SCt468, 71L ed774; 97Fla411, 121S554; 164Minn235, 204 NW874, 205NW375; 76Mont45, 245P259; 78Mont62, 252P876; 121 Okl 290, 249P 918. **Value is measured by value of shares** and not by assets of bank. 273US 561, 47SCt468, 71L ed774.

8239-69 97Fla411, 121S554; 76Mont45, 245P259.

8239-71 24 OhNPN537 (deduction for real estate should be amount listed on tax duplicate).

8239-74 273US561, 47SCt468, 71L ed774; 8F(2d)883; 94Fla427, 115S261; 164Minn 235, 204NW874, 205NW375; 78Mont62, 252P876; 55ND670, 215NW163; 121 Okl 290, 249P918. But see 97Fla411, 121S554. **What interest taxed.**-8F(2d) 883. **Amending act of 1922** (42 U. S. St. at L. 1499) construed. 76Mont45, 245P 259. **Grant to state conditional.**-8F(2d) 883. **States are required to choose one of three methods,** under federal statutes, of taxing shares of national banks which shall be in lieu of others. 8F(2d)883. **Under federal statutes prohibiting two taxes on national banks,** a tax on shares precludes tax on income from dividends on such shares, whether or not tax on income is regarded as tax on property. 8F(2d)883. **Validity of federal statutes.**-8F(2d)883. **State may tax shares of stockowners,** though bank's capital is invested in government securities. 78Mont 62, 252P876. **No election is shown by state statute which proceeds to assess** and collect tax on shares and thereafter continues to assess taxes on income derived on such shares. 8F(2d)883.

8239-75 97Fla411, 121S554; 164Minn235, 204NW874, 205NW375; 76Mont45, 245 P259; 55ND670, 215NW163; 121 Okl 290, 249P918. But see 130Misc352, 224 NY810. **In Oklahoma.**-121 Okl 290, 249P 918.

8239-76 130Misc352, 224NY810; 55ND 670, 215NW163.

8239-80½-New. Federal Land Bank loaning money under Federal Farm Loan Act is not doing banking business and shares of its stock are not taxable. 308 Mo 253, 271SW770.

8239-86 273US548, 47SCt462, 71L ed767, 59ALR1; 273US561, 47SCt468, 71L ed 774; 164Minn235, 204NW874, 205NW 375; 78Mont62, 252P876; 122 Okl 34, 252 P408; 140 Okl 266, 283P253; 161Tenn 676, 30SW(2d)243. See also 129Kan601, 284P807; 53ND82, 220NW152. **Effect of amendment.**-164Minn235, 204NW874, 205NW375. **Taxation statute of state** held not violative of provision. 38F(2d) 261. **What business is competitive is mixed question of law and fact.** 153 Wash351, 280P16.

8239-89 273US561, 47SCt468, 71L ed774; 97Fla411, 121S554; 76Mont45, 245P259; 78Mont62, 252P876. **Legislative intent.**-187Wis290, 203NW721. **That investment securities of national bank are not assessed** does not justify illegal discrimination in assessing shares in national bank. 97Fla411, 121S554.

8239-90 78Mont62, 252P876.

8239-91 269US341, 46SCt135, 70L ed295; 273US568, 47SCt467, 71L ed779; 97Fla 411, 121S554.

8239-94 Every clear discrimination violates act.-78Mont62, 252P876.

8239-96 273US548, 47SCt462, 71L ed767, 59ALR1; 273US561, 47SCt468, 71L ed 774; 122 Okl 34, 252P408. **Moneyed capital of state bank is ascertained by** deducting from monies and credits of bank amount of deposits and money borrowed for use of bank's business. 73 Mont210, 236P1090. **Term includes** money invested in private banking enterprises, investments of individuals in securities that represent money at interest, and other evidences of indebtedness such as normally enter into banking business. 122 Okl 34, 252P408.

8239-98 273US548, 47SCt462, 71L ed767, 59ALR1; 273US561, 47SCt468, 71L ed 774; 21F(2d)85; 26F(2d)957; 42F(2d) 30; 122 Okl 34, 252P408; 153Wash351, 280P16 (investment of savings and loan association in collateral loans).

8239-99 273US568, 47SCt467, 71L ed 779; 153Wash351, 280P16. **Capital employed in real estate and investment business** in making loans to individuals and corporations by company not authorized to conduct banking business is not in competition with national banks. 76Mont45, 245P259.

8239-2 273US568, 47SCt467, 71L ed779; 76Mont45, 245P259; 187Wis290, 203 NW721. But see 139 Okl 189, 281P958. **Brokers and dealers** in bonds, mortgages, and securities are not in competition. 187Wis290, 203NW721. **Moneyed capital** includes interest-bearing demands against persons and corporations and money loaned or invested in securities, including personal investments of surplus funds. 164Minn235, 204NW874, 205NW375.

8239-3 269US341, 46SCt135, 70L ed295; 273US548, 47SCt462, 71L ed767, 59ALR 1; 273US568, 47SCt467, 71L ed779; 18 F(2d)269; 37F(2d)947; 97Fla411, 121 S554; 76Mont45, 245P259; 122 Okl 34, 252P408; 153Wash351, 280P16; 187 Wis290, 203NW721. **Acceptance companies** are not in competition with national banks. 187Wis290, 203NW721. **Building and loan associations** are not in competition. 187Wis290, 203NW721. **Express companies** are not considered in competition. 187Wis290, 203NW721. **When moneyed capital is brought into** competition with national banks stated. 269US341, 46SCt135, 70L ed295. **Moneyed capital in competition** held to include capital of individuals seeking investment and reinvestment. 273US561, 47SCt468, 71L ed774. **"Moneyed capital is brought into competition** where it is invested in shares of state banks or in private banks or in private banking, and also where it is employed, substantially as in the loan and investment features of banking." 97Fla411, 121S554. **Small loan corporations** making loans of three hundred dollars or less on personal or chattel security are not in competition. 205 Iowa1400, 219NW534; 205 Iowa 1391, 219NW536.

8239-4 269US341, 46SCt135, 70L ed295; 38F(2d)279; Iowa 232NW445; 129Kan 1, 281P938; 78Mont62, 252P876; 139 Okl 189, 281P958. **Allegation of competition** with other moneyed capital held unaffected by assumed practice of banks of making firm loans as agents of customers. 269US341, 46SCt135, 70L ed 295. **Statute does not exempt real estate** of moneyed capital from further taxation. 129Misc787, 223NY579. **Assessment against capital stock of national bank including value of bank's** realty is not void because realty is also assessed. 129Misc787, 223NY579. **State statutes held violative of federal**

sct.–129Kan601, 284P807.

836–5 78Mont62, 252P876.

837–6 Iowa 196NW287; 78Mont62, 252 P876. In Iowa.–269US341, 46SCt135, 70 L ed295. Tax on shares of national bank stock at same "rate" as other moneyed capital is by law assessed, is not illegal. 259Mass1, 156NE42.

837–6½–New. Mere fact that purpose of taxing competing moneyed capital at lower rate than rate imposed on banks is to increase amount of revenue derived does not prevent rate from being discrimination. 164Minn235, 204 NW874, 205NW375.

837–7 273US548, 47SCt462, 71L ed767, 59ALR1; 18F(2d)269; 78Mont62, 252 P876 (clear discrimination).

837–8 Iowa 232NW445.

837–8½–New. That state bank shares are taxed equally with shares of national banks is immaterial. 97Fla411, 121S 554.

837–9 273US548, 47SCt462, 71L ed767, 59ALR1; 273US561, 47SCt468, 71L ed 774; 37F(2d)947; 129Kan1, 281P938; 129Kan601, 284P807.

837–10 273US548, 47SCt462, 71L ed767, 59ALR1; 273US561, 47SCt468, 71L ed 774. Sale of mortgages and other evidence of debt held competition with national banks under statute. 273US548, 47SCt462, 71L ed767, 59ALR1.

837–11 273US568, 47SCt467, 71L ed 779.

837–13½–New. Taxing shares of national banks against holders and moneyed capital of state banks against banks, thus allowing latter to deduct their tax-exempt securities in fixing taxable value of such moneyed capital is permissible. 164Minn235, 204NW874, 205NW375.

837–15 273US568, 47SCt467, 71L ed779 (amount held not material part of capital); 97Fla411, 121S554.

837–16 Iowa 196NW287; 78Mont62, 252P876.

837–17 Iowa 196NW287.

837–17½–New. Burden of proving discrimination rests on person alleging it. 122 Okl 34, 252P408.

837–17½–New. No discrimination results from error or misconduct of taxing officers. 78Mont62, 252P876.

837–17¼–New. Law exempting from taxation notes secured by mortgages and bonds issued for highway purposes is discrimination against national bank shares. 21F(2d)85.

837–19 320Mo 691, 8SW(2d)1068.

837–24½–New. Statutes providing for taxation of domestic insurance companies have been held not to have been repealed by subsequent acts. 315Mo 791, 287SW307.

837–25 Statute held not to authorize taxation of capital stock.–316Mo 1075, 292SW1028.

840–33 77Colo 243, 235P569.

841–35 320Mo 901, 9SW(2d)621, 59 ALR1041.

841–39 320Mo 901, 9SW(2d)621, 59 ALR1041.

841–45 In Iowa.–216NW742.

841–48½–New. Tax imposed on gross annual premiums does not apply to premiums refunded by mutual company under participating plan. 37Wyo 189, 260P180.

842–51 262Mass439, 160NE419.

842–55 NJ 151A75; 221AppDiv19, 221 NYS613. Right of railroad to erect bridge on private property across streams held not taxable as special franchise. 244NY596, 155NE911. Crossing built under railroad right of way long after railroad was constructed held not subject to special franchise tax. 129Misc811, 222NYS169. "Special franchise," under tax statute, is permission to operate railroad in, under, above, on, or through streets or public place. 129Misc811, 222NYS169.

842–56 221AppDiv19, 221NYS613.

842–57 Railroad property held not taxable.–13F(2d)442.

842–57½–New. Property not used for manufacturing new equipment, as repair shop, cannot be liable to local taxation. 6PaDist&Co 53.

842–57⅓–New. Private car lines and companies are subject to taxation under statutes in some jurisdictions. 32Ariz 601, 261P49.

842–57¼–New. Corporation engaged in business of leasing refrigerator cars along railway lines is private car line or private car company under statute. 32 Ariz601, 261P49.

842–59 102NJL576, 134A724 (user of elevator tract held for railroad purposes); 221AppDiv19, 221NYS613.

843–60 241NY364, 150NE145. Easement granted to railroad to operate on bridge over canal is not subject to franchise tax, where land was appropriated for canal from railroad. 241 NY364, 150NE145. Conveyance to railroad company of banks and prism of canal held to convey fee in such land and company was not liable to franchise tax thereon. 241NY364, 150NE145.

843–60½–New. Right to operate railroad over navigable stream is special franchise under Tax Law. 221AppDiv 19, 221NYS613.

843–61 114Nebr84, 206NW150 (roundhouse, machine shops, and office building have been held not subject to local taxation).

844–63 247NY9, 159NE703. Right to operate over navigable stream is taxable as special franchise in some jurisdictions. 248NY97, 161NE432.

845–67½–New. Easement included. 151 Md337, 135A579, 49ALR1470.

845–71½–New. Commissaries on ferry boats operated by railroad in transportation of suburban passengers is taxable as "operative property" of railroad. Cal 291P197.

846–80 But see 274US76, 47SCt542, 71 L ed934.

846–85 125Me350, 134A59; 287Pa70, 134A452. But see 278US503, 49SCt191, 73L ed477; 174Minn3, 218NW167.

846–86 278US503, 49SCt191, 73L ed 477; 29F(2d)634 [certiorari den 278US 656, 49SCt185, 73L ed565]; 174Minn3, 218NW167. Railroad company's property used exclusively in operating street and interurban railways held subject to tax on gross receipts of such railways. Cal 290P25(2dcase).

847–92½–New. That railroad company paid dividends and greatly increased its surplus is no basis for state tax on its property within state in absence of evidence that any part thereof was derived from transportation revenues in state. 13F(2d)442.

849–11 In Kansas.–127Kan208, 272P 135.

849–14 127Kan208, 272P135.

850–17 NJSup 147A724.

851–29 Transportation companies.–287 Pa161, 134A404.

851–31 287Pa161, 134A404. Tax held one upon gross earnings in lieu of property tax. 173Minn72, 216NW542.

854–52 Md 151A29. Gross earnings subject to tax under statute include interest and dividends from investments and rent from land, buildings, and equipment. 29F(2d)634 [certiorari den 278US656, 49SCt185, 73L ed565].

854–53 24F(2d)882.

855–60½–New. Gas distributing company is taxable of gross receipts from sales without deducting price paid by it for gas under statute authorizing tax on "entire gross receipts." 114 Oh479, 151NE685.

855–60¼–New. Statute authorizing excise tax of "entire gross receipts" has been held valid. 114 Oh479, 151NE685.

857–74 133SC383, 131SE37, 39 [citCyc] (at common law). Where water company owns easement, its pipe lines are not taxable as personal property under statute providing when fee in soil belongs to one structures belonging to another shall be taxed as personalty. 133 SC383, 131SE37.

857–77 Corporation formed by consolidation of gas and electric company and street railway company, with rights of those companies, held to be engaged in manufacturing within Manufacturer's Tax Act. 134SC319, 132SE611. Test under statute is not whether manufacture in which machinery is employed constitutes large or small part of business. 262Mass439, 160NE419. Corporation held not manufacturing corporation.–262Mass439, 160NE419.

857–78 Treasury stock not taxable. 8 PaDist&Co 30.

857–80½–New. Income tax in determining net taxable income if any, where there has been conversion of capital assets acquired by corporation before act took effect, amount sufficient to restore capital value is to be deducted from gross proceeds of conversion. 252Mass 193, 147NE594.

857–80⅓–New. Net business loss allowable in determining net income for taxable year. 252Mass193, 147NE594.

857–80¼–New. Pipe line companies.–Private corporation owning pipe line properties used for transporting crude oil purchased for its refinery but also transporting oil to its storage tanks for others for hire is common carrier whose property is assessable for taxation under Oklahoma statute as public service corporation. 129Okl 166, 264P160.

857–80⅕–New. That such company did not exercise right of eminent domain does not affect rule. 129 Okl 166, 264P 160.

857–80⅙–New. Exemption provided for by Comp. St. (1921) § 7943 does not exempt property of exemptee from assessment for taxation by state board of equalization. 129 Okl 166, 264P160.

857–80⅐–New. Small loan corporations.–Moneyed capital employed by small loan corporations in making loans of three hundred dollars or less on personal or chattel security is not taxable as moneyed capital coming in competition with national banks, but is taxable under statute providing for taxation of moneys and credits. 205 Iowa1400, 219NW534; 205 Iowa1391, 219NW536.

857–80⅛–New. Where two companies have interlocking directorates, sales tax is calculated on wholesale price of agency company to trade and not on price charged by manufacturing company to agency company. Que [1929] 1DomLR1004.

858–82 174Ark420, 295SW378; 214Ky 339, 283SW119; 249NY193, 163NE558; 252NY19, 168NE449 (tax commissioner has jurisdiction to levy tax on foreign corporation doing business in state).

858–84½–New. Personal tax may not be imposed on corporation not domiciled within territory of state. 214Ky 339, 283SW119.

859–93 Foreign corporation acquiring coal and coal rights in state is doing business therein. 40F(2d)540.

859–99 174Ark420, 295SW378; 244NY 114, 155NE68 (by means of subsidiary company).

859–2 221AppDiv19, 221NYS613.

860–3½–New. Reinsurance alone does not render foreign insurance company liable for tax on net receipts even where statute subjects foreign reinsurance companies to liability under state statutes, or provides for revocation of license on failure to pay such tax on net receipts. 330 Ill 608, 162NE178.

860–3⅓–New. That corporation licensed to do business within state continued to do so after adoption of statute taxing capital stock is not assent of stockholders to conditions imposed. Ida 290P 714.

860–4 173Ark234, 292SW98; 174Ark 420, 295SW378; 214Ky339, 283SW119; 241Mich665, 217NW777; 137Misc878, 244NY841. But see 161Tenn46, 29SW (2d)253. In Michigan.–232Mich330, 205 NW99. Tax cannot be gauged by all of authorized capital stock.–200Cal 667, 254 P551(3dcase).

860–6 318Mo 1020, 28SW(2d)790. See also 12PaDist&Co 78. Under Tax L. § 214, taxing "orders received or accepted by any officer or agent at any place of business in the state" does not subject to taxation orders accepted by salesmen in foreign countries. 213AppDiv493, 211NYS10.

860–6½–New. Foreign corporation, owning no property and doing no business within state, is not liable for franchise tax because its cars are frequently transported over railroads in state. 214 Ky339, 283SW119.

860–6⅓–New. Statute requiring payment of franchise tax has no applica-

tion until the foreign corporation has procured permit to transact business within state. TexCivA 290SW866.

860–6¼–New. Statute allowing dissolution or retirement of foreign corporation on payment of all "taxes due" does not include franchise tax which need not be paid where such dissolution or retirement is made between certain dates. 121 Oh73, 166NE903.

860–8 214Ky339, 283SW119.

860–10 Rolling stock of railroad companies.–See also 23F(2d)923.

860–11 See also 261Mass110, 158NE506. **Rolling stock of railroad companies.**–31F(2d)506; 214Ky339, 283SW119 (cars temporarily in state for purpose of carrying freight on other lines for convenience of shipper not taxable).

861–13 In Iowa.–208 Iowa164, 225NW344.

861–14½–New. Right to impose personal tax cannot be used as basis upon which to rest power to tax railroads not resident of or domiciled within state on freight cars used within state. 214Ky339, 283SW119.

861–15 173Ark234, 292SW98.

861–17 171Ark209, 284SW33; 173Ark234, 292SW98; 70Utah265, 259P921; 198Wis265, 224NW139. But see 40F(2d)944. **Tax on foreign corporation measured by total of capital stock** held invalid. 200Cal667, 254P551.

861–17½–New. Nor upon any part of the capital stock proper. 171Ark209, 284SW33.

861–17½–New. Franchise tax on capital stock must have some relation to privilege granted. 326 Ill 18, 156NE814.

861–18 40F(2d)944; 286Pa545, 134A438, 48ALR992; 297Pa468, 147A98. **Statutes inapplicable to "capital employed."**–51ND936, 201NW510.

861–19 5PaDist&Co 378.

861–20 252NY19, 168NE449 (entire amount on deposit, where no separation is made, is taxable).

861–21 42F(2d)712.

862–30 51ND936, 201NW510.

862–32 252NY19, 168NE449 (capital used in paying for oil located outside of state is taxable). **Foreign corporation having office and money on deposit in banks within state,** used in payment of extrastate business, would not be employing its capital in state. 252NY19, 168NE449.

863–37 In Massachusetts.–254Mass609, 150NE851. **As personal property tax.**–329 Ill 189, 160NE351.

864–39½–New. Under statute, allowing certain deductions when corporation is engaged in business wholly within state, corporation is not deprived of right to deductions by acts in another state which do not produce income, such as maintaining office, keeping certain records and holding annual meetings of stockholders. 73Mont392, 236P1080.

864–39⅓–New. Tax on such profits on sales by foreign corporation of Porto Rico products outside of Porto Rico as arise from acts or transactions in Porto Rico is invalid where, because method of ascertaining such proportion of profits is not defined, it is unworkable. 6F(2d)526.

864–39¼–New. Statute imposing tax on net income is invalid where it imposes tax on income arising entirely from doing business outside of state. 29F(2d)708.

864–40 286Pa545, 134A438, 48ALR992.

865–43 230Ky182, 18SW(2d)1009.

865–44½–New. Shares of stock without state, owned by nonresident stockholders in foreign corporation having statutory agent within state are beyond taxing jurisdiction of state. Ida 290P714.

865–47 174Ark507, 297SW822.

865–48 CalA 292P539; 47Ida131, 272P1008; 149Wash242, 270P816.

866–53 271US609, 46SCt592, 70L ed1112; 276US547, 48SCt371, 72L ed693; 20F(2d)202; 21F(2d)586; 22F(2d)483; 29F(2d)932; 238Mich423, 213NW713; 6PaDist&Co 411; TexCivA 286SW489. **In order that state tax invade province of federal government,** it must directly and immediately constitute burden on governmental functions of United States. TexCivA 286SW489. **Equitable interest of purchasers of government property** from instrumentality of federal government is subject to taxation by municipality. 276US547, 48SCt371, 72L ed693. **Incompleted sale.**–87 IndA103, 159NE19. **City insisting that legislature's consent was necessary** for purchase of land in state by United States for war purposes cannot press distinctions between kinds of structures. 29F(2d)932. **Property included in government projects** should be subject to state taxation unless projects necessitate use for government purposes. 29F(2d)393. **Railroad property taken from sovereign relation** and placed in private enterprise is not immune from taxation. 36F(2d)956.

866–53½–New. Date on which title must be considered depends on State law. 29F(2d)932.

866–54 Indian lands.–29F(2d)393; 31F(2d)520; 32F(2d)745.

866–55 202Cal581, 262P314; 152Miss731, 118S904. **Interest of purchaser under contract** of land, title to which is retained by United States as security for purchase money, is not subject to local taxation. 21F(2d)586. **All estates or interests less than fee** in land, legal title to which is in United States, are exempt from taxation under state statutes. 21F(2d)586.

867–57½–New. Indian stock not subject to taxation. 73Mont6, 235P334.

867–57⅓–New. Indian lands.–That United States directs Indian lands to descend, during restrictive period according to laws of state in which they are situated, does not make them pass under laws of such state so as to become subject to inheritance tax. 119 Okl300, 249P726.

867–57¼–New. By act of congress of March 3, 1921, congress authorized gross production tax laws of state of Oklahoma to be made applicable to minerals produced from lands and properties of Osage Indians. 121 Okl277, 249P914.

867–57⅙–New. Land owned by heirs of noncompetent Indian who purchased it from noncompetent Indian and which had never been owned by anyone in fee simple without any restriction on alienation is not subject to taxation. 192Wis177, 212NW283.

867–57⅙–New. Lands previously subject to taxation remain so when bought for noncompetent Indians with restricted fund, notwithstanding deed's restriction on alienation. 15F(2d)926.

867–58 268US45, 45SCt440, 69L ed841 (lessees of public lands producing crude petroleum); 174Ark507, 297SW822.

867–61 14PaDist&Co 143; 140 Okl122, 282P674. **Entry under Carey Act.**–40Ida638, 236P536.

868–63 40Ida793, 236P532; 52SD334, 217NW508. **Conditions precedent** under Carey Act to right to tax stated. 40Ida793, 236P531.

868–65 26F(2d)435. **Where United States retains title** as security for price, land is not taxable. 26F(2d)435.

868–66 Lands entered under homestead laws, etc. US 49SCt181; SD 227NW383. **Lands on government irrigation project on which homestead entry and proof has been made** but no reclamation proof made nor certificate of proof issued are not subject to taxation. 43Ida556, 253P839.

869–71 Sole method of assessing possessory interests is that provided by statute. 202Cal581, 262P314. **Statutory procedure for taxing possessory rights is exclusive.**–CalA 292P539.

869–72½–New. Building erected on tax exempt allotted lands of Indian are not subject to taxation. 127 Okl123, 260P15.

869–72⅓–New. Land purchased with funds held by Indian agency in trust for Indian.–Lands purchased by Indian from Indian holding certificate of competency out of funds held in trust by Indian agency are subject to taxation. 192Wis177, 212NW283.

869–72¼–New. Rule applies, though deed contains condition against alienation without consent of secretary of interior. 192Wis177, 212NW283.

869–72⅙–New. Neither secretary of interior nor Indian department has authority to place restrictions on alienation on land so purchased so as to prevent state from taxing property purchased. 192Wis177, 212NW283.

869–72⅙–New. Land so purchased from Indian holding certificate of competency is held by purchase within statute making taxable land held by purchase by Indians who are not citizens. 192Wis177, 212NW283.

870–73 Indian lands.–127 Okl123, 260P15. **Assignee of contract to purchase timber lands** from United States does not have a taxable interest. 44F(2d)28.

872–92 41F(2d)920; TexCivA 286SW489. **In order that federal tax invade province of state** it must directly and immediately constitute burden on state's governmental functions. TexCivA 286SW489.

872–93 114Nebr335, 207NW520.

872–94 197Cal470, 241P560; 238Mich423, 213NW713; 118Nebr725, 226NW327; 7PaDist&Co 355. See also 49Philippine466. **Public property** is not taxable unless there is express authority therefor. 197Cal470, 241P560. **In Oklahoma.**–41 OklACR131. **State property exempt under constitution.**–55ND38, 212NW513.

872–95 171Ark1111, 287SW388. **Foreclosure of mortgage.**–55ND1, 212NW217. **Ownership and not use or purpose for which property is acquired is test of** immunity from taxation of property under constitutional provision exempting property of state from taxation. 55ND1, 212NW217. **State ownership must be exclusive and free** from legal and equitable interest in others. 328 Ill 377, 159NE811. **Land repurchased from state by mortgagor under amortization plan.**–84Mont200, 274P854. **Land belonging to state by virtue of mortgagor's failure to repurchase under Montana Rev. Codes (1921) § 1938, as amended,** cannot be taxed. 84Mont204, 274P855.

873–97 Bank assets held by banking commissioner to reimburse depositors' guaranty fund for moneys paid out are not exempt from general taxation. 41OklACR131. **Depositors' guaranty fund** is not exempt from general taxation. 41OklACR131.

873–98 Reversionary interest of state under contract of sale is not taxable. 197Cal470, 241P560.

873–98½–New. Statute making bridges taxable as realty does not apply to bridge erected on state lands which reverts to state after thirty years. 126Misc239, 213NYS258.

873–98⅓–New. In South Dakota provision exempting state-owned property from taxation will not be held to exempt property to which state holds mere legal title under circumstances such that real beneficial interest is in third persons. 53SD609, 222NW583.

873–98¼–New. Where state, having loaned money on real estate security, acquired title on foreclosure, property was exempt from taxation. 53SD609, 222NW583.

873–3 41F(2d)483; 143 Okl18, 285P127 (school lands sold on deferred payments evidenced by note and certificate of sale). **Lease of state lands.**–162Ga818, 135SE68; 93PaSuper165.

874–11 TexCr 28SW(2d)837.

875–13 Fla 130S707; 263Mass255, 160NE788; 238Mich423, 213NW713; TexCr 28SW(2d)937.

875–14 Fla 130S707; 122Kan252, 251P1114; 170La8, 127S347(1st case); 150Miss306, 116S612; 315Mo549, 286SW355 (mortgage held by county); 198NC357, 151SE880, 67ALR1304; TexCivA 21SW(2d)747; 153Va768, 151SE143. **Grant owned by town** held taxable. 32NM124, 252P478.

875–15 75Mont304, 243P806 (towns). **Town's equitable estate in fund as cestui que trust** of which part has been temporarily and of necessity invested in land deeded to trustees of town by mortgagor in lieu of foreclosure by mortgagee who bequeathed mortgage to trustees of town in trust for term is exempt from taxation as property of town. 75Mont304, 243P806. **Irrigation district organized under state laws is not municipal corporation** within constitutional provision providing for exemp-

tion where it exercises no governmental function and is not supported by state. 85Mont466, 279P369; Wash 270P813.

876–18 126 Or293, 269P868; 287Pa70, 190, 134A452; 153Va789, 151SE417.

876–28½–New. That income from municipally owned property goes into public treasury does not establish public character of use. 83NH107, 139A294.

877–29 287Pa70, 190, 134A452.

877–30 35F(2d)326; 287Pa70, 190, 134A452.

878–37 35F(2d)326; TexCivA 28SW(2d)937; 153Va789, 151SE417.

878–38 TexCivA 28SW(2d)937; 153Va789, 151SE417.

878–41 122Kan252, 251P1114.

879–43 273US548, 47SCt462, 71L ed767, 59ALR1; 38F(2d)897; 6PaDist&Co741; TexCivA 286SW489. **National bank cannot be taxed by state** unless congress consents. 273US548, 47SCt462, 71L ed767, 59ALR1. **Ad valorem tax by state on ores** from restricted Indian lands, under lease providing for royalties, held attempt to tax agency of federal government. 271US609, 46SCt592, 70L ed1112. **Privilege tax on dealers in gasoline measured by amount sold** does not constitute direct tax against instrumentality of federal government as to gasoline purchased by government for operation of such instrumentality. 147Miss663, 112S584. **Gross production tax** held not tax on federal instrumentality. 134 Okl 29, 272P393. **Agencies created by congress to accomplish stated purpose** are public agencies not subject to state taxation. 38F(2d)897. **Power company developing project under federal license** is not federal agency entitled to exemption. Md 151A29. **Property of agency created by federal government which is acquired and owned by United States** is taxation of means employed by federal government. 38F(2d)897.

879–44 6PaDist&Co741.

879–45 Md 151A29; TexCivA 286SW489. **Occupation tax on gasoline sold is not,** as to sales made to federal government, tax on federal government or any agency or instrumentality thereof. TexCivA 286SW489.

879–46 208Cal359, 281P389 (one operating automotive stage, carrying passengers, freight, and United States mail is within scope of common carrier); Tex CommnA 3SW(2d)427.

879–48½–New. State tax on land of Creek Indian is not forbidden tax on federal instrumentalities. 276US575, 48SCt333, 72L ed709.

879–48⅓–New. Property of licensee of federal power commission is not exempt unless tax would interfere with its performance of federal duty or function. Md 151A39.

879–49 272US713, 47SCt280, 71L ed487; 275US136, 48SCt55, 72L ed202; 279US620, 49SCt432, 73L ed874, 65ALR866; 281US313, 50SCt326, 74L ed870; 29F(2d)132; 37F(2d)513; 123Kan246, 255P46; 232Mich245, 205NW106; 78Mont62, 252P876; 196NC704, 146SE861. See also 264Mass396, 163NE75. **Statutes held invalid as indirectly taxing exempt credits.**–232Mich250, 205NW106. **Tax exempt credits cannot be taxed indirectly.**–232Mich250, 205NW106. **Bonds purchased before tax listing date and sold thereafter.**–196NC704, 146SE861. **Taxable property of owner of tax exempt government securities** cannot be subjected to greater burden because of ownership of such exempt securities. 281US313, 50SCt326, 74L ed870 (taxation of insurance companies).

880–50 272US713, 47SCt280, 71L ed487; 277US508, 48SCt591, 72L ed968; 161Tenn50, 29SW(2d)662 (act failing to exclude United States securities held not unconstitutional). **State law taxing corporate dividends, obviously intended as attempt to tax United States bonds,** held invalid. 272US713, 47SCt280, 71L ed487.

880–57 123Kan246, 255P46; 73Mont210, 236P1090; 153Wash332, 280P3 (tax exempt securities cannot be taxed indirectly).

881–59 But bank holding stock in business corporation whose assets consist of nontaxable securities like United States bonds has been held not taxable on such stock. 308Mo237, 271SW508, 39ALR1199. **Having chosen alternative** of taxing property of banks, state cannot tax property invested in United States bonds. 73Mont210, 236P1090.

882–61 277US142, 48SCt463, 72L ed824; 41F(2d)395 (copyrights); 165La195, 115S457, 458 [citCyc].

882–63 41F(2d)395. **Franchise tax measured by corporations income derived from copyright** is "excise tax" not directly tax on income. 41F(2d)395.

883–69 29F(2d)132; 32F(2d)594; 41F(2d)920; TexCivA 286SW489. **That person has contract to perform service for state government** does not transform him into instrumentality of government. 32F(2d)594. **Lessee of state university lands under oil and gas lease** is not exempt as state agency. 41F(2d)483.

883–71 Ferry corporation all of whose stock was owned by town on island is not subject to federal income tax. 41F(2d)920.

883–75 Public corporations held not government agencies.–TexCivA 5SW(2d)614.

883–77 225Ky324, 8SW(2d)392; 235Ky86, 29SW(2d)583.

884–78 29F(2d)132.

884–78½–New. Obligations issued under authority of state are not subject to National taxation. 29F(2d)132.

884–79 100WVa166, 130SE426, 44ALR501 (holding bonds of political subdivision of state, unless expressly exempted, are not exempt from taxation).

884–81 Mass 170NE800; 6PaDist&Co741. **Receiver appointed by federal court** is "public officer." 319Mo423, 4SW(2d)433. **Word "constitution" includes both federal and state** in prohibiting computation of salaries of public officers when such computation would be repugnant to constitution. 319Mo423, 4SW(2d)433.

884–82 6PaDist&Co741.

885–92 118Nebr725, 226NW327.

885–94 Tax in lieu of all other taxes is not exemption but substituted tax. 32Ariz601, 261P49.

885–94½–New. There is never exemption from taxation unless it is provided for by law. 123 Or144, 261P694.

885–94⅓–New. Taxation is the rule and exemption from taxation the exception. 123 Or144, 261P694.

885–95 274US284, 47SCt639, 71L ed1049; 42F(2d)500; 48 Ida618, 284P203; 261Mass523, 159NE55; 156SC299, 152SE865; 151Wash43, 275P74; 198Wis281, 224NW126. **Sovereign power may, in certain conditions for public welfare,** make binding contract as to tax exemptions. 261Mass523, 159NE55. **Power may be exercised to encourage private initiative** and thereby further public welfare. 48 Ida618, 284P203.

885–96 83NH107, 139A294; 132Misc609, 230NYS364; 132Misc534, 230NYS653.

886–97 276US575, 48SCt333, 72L ed709.

886–98 Vt 144A680.

886–98½–New. Power of state to exempt cannot be surrendered to eleemosynary institution. 152Tenn82, 274SW536.

886–99 Ariz 289P157 (listing and valuation of property contemplated); 180Ark1090, 24SW(2d)324; 41 OklACR131.

886–1 217Ala311, 116S695; 220Ala309, 125S51; 48 Ida618, 284P203; 222Ky164, 300SW350; NH 146A511; 156SC299, 152SE865; 153Va789, 151SE417. **Exemption statute held not within limits fixed by constitution.**–NH 149A321. **Exemption for municipal purpose.**–156SC299, 152SE865.

886–3 Ariz 289P157.

887–6½–New. Exemptions are against public policy and those exempt must contribute toward some public service. 102NJL525, 133A886.

887–7 TexCivA 285SW844; 153Va71, 149SE632. **Statutes conforming to constitution.**–CalA 289P678.

887–8 129Kan601, 284P807; 113 Oh52, 148NE347; 39 OklACR184; 41 OklACR131; 152Tenn82, 274SW536.

888–12 320Mo691, 8SW(2d)1068 (statute which allows deduction for debts does not violate Constitution).

888–12½–New. In Oklahoma constitution prohibits legislature from exempting property from taxation except as provided in constitution. 41 OklACR131.

888–12⅓–New. Exemption statutes are held not to be in violation of state constitutional provisions prohibiting granting privileges and immunites, 123 Or144, 261P694.

888–12¼–New. nor are reasonable classifications relating to exemption violations of equal protection of laws under federal and state constitutions. 123 Or144, 261P694.

888–12⅕–New. Constitutional prohibition against relinquishment or suspension of power to tax corporations is not violated by suspension of particular tax of corporation. 48 Ida618, 284P203 (purpose of prohibition stated).

888–12⅙–New. Provision that income tax exemption shall be reduced by amount of nontaxable income required to be returned with exceptions held not invalid as levying tax on nontaxable income. Mass 170NE800.

888–12⅐–New. Income tax exemptions held not violative of due process provision of state constitution. Mass 170NE800.

888–12⅛–New. Income tax exemptions held not violative of income tax amendment to state constitution. Mass 170NE800.

888–13 316Mo694, 294SW1017. **But where the constitution itself exempts,** etc. See also 123 Or144, 261P694. **Provision in statute held declaratory of constitutional prohibition.**–316Mo1075, 292SW1028. **Statute permitting taxpayer to deduct certain debts** held not exemption within constitutional prohibition. 316Mo1075, 292SW1028. **Credits from taxation are not exempt** by constitution exempting certain property from taxation. La 129S722(2dcase).

888–14 261Mass523, 159NE55; 159Tenn349, 19SW(2d)261 (exemption of income from stock in corporations whose capital stock or corporate property was assessed under prior statutes held permissible). **Classification for purpose of exemption must not be arbitrary.**–48 Ida618, 284P203. **Exclusion from obligations described as bonds, ordinary commercial paper,** trade acceptances, and rent notes maturing within stated period is permissible under constitution levying tax on incomes from stocks and bonds not taxed ad valorem. 159Tenn349, 19SW(2d)261. **Exemption of income of religious, educational, and similar institutions** is permissible under constitutional provision for equality and uniformity. 159Tenn349, 19SW(2d)261. **Exemption of street railway company earning less than stated amount** is not unconstitutional as special. NH 150A14. **Statute permitting certain counties to exempt manufactories** is not violative of provision. 156SC299, 152SE865.

888–15 But see 156SC299, 152SE865.

889–19 219Ala558, 122S650. **Statutes held retroactive.**–160Tenn311, 23SW(2d)667 (so as to include tax on bonds for several years prior to enactment).

889–20 Result of tax exemption, creating contractual limitation so as to limit power of legislature to mould legislation to meet needs of varying circumstances of times and inevitably to produce inequalities in tax burdens, is to be avoided, if possible, by any reasonable intendment. 108Conn246, 142A800.

889–22 108Conn246, 142A800.

889–24 Later inconsistent section of same statute held controlling. 100Vt122, 135A492.

889–25 125Misc212, 210NYS527.

890–29 But see 125Misc212, 210NYS527.

890–29½–New. Statute providing that no person shall be required to list for taxation a share of capital stock does not create exemption from taxation. 34 OhA420, 171NE374.

890–30 153Va789, 151SE417.

890–31 Effect of saving clause.–162La31, 110S78.

890-33 13F(2d)814 (California statute and constitution); Cal 289P811 (constitutional provision); 155Miss498, 124 8658; 85Mont329, 278P514. **Failure to pay special tax.**–Ida 286P366. **Leased instruments of telephone company** paying gross earnings tax to state held exempt from local taxes under statute. 275U8393, 48SC180, 72L ed329. **Corporate stock may be exempted** from taxation in hands of stockholders if corporate property is taxed. 261Mass523, 159NE655. **Securities of corporation under public control and guaranteed by commonwealth** may be exempted. 261 Mass523, 159NE655. **Credits from loan business** are not exempt by act imposing license fee in lieu of all impositions. La 129S722(2dcase). **Excise tax not based on value of property** cannot be substituted. Or 292P813.

891-34 155Miss498, 124 8658 (exemption held not to include privilege taxes). See also Okl 291P10. **Company holding all stock and bonds of public utility corporation** is not exempted from payment of income tax on income from such stock and bonds because utility's property is assessed and taxes paid directly into state treasury. 198Wis259, 224NW130 (2dcase).

891-36 Ont [1920] 1DomLR711.

891-38 275U8333, 48SC65, 72L ed256; 8F(2d)529; 36F(2d)842, 39F(2d)162 (2dcase); 317 Ill 547, 148NE273; 322 Ill 562, 153NE669; 326 Ill 573, 158NE 213, 54ALR1376; 149Md251, 131A509 (unless clearly warranted); 157Md542, 146A744; 169Minn323, 211NW467; 153 Miss346, 120S839; 155Miss498, 124S 658; 126Misc661, 214NYS390 (taxation is rule, exemption exception); 225App Div356, 233NYS102; 227AppDiv351, 238 NYS377, 39OklACR256; 12Philippine 466; 32PortoRico 530 (exemption from tax of alcohols intended for use as fuel has been held to cover denatured alcohol used as substitute for gasoline notwithstanding tax imposed on "gasoline, imitation or substitute thereof"); TexCivA 28SW(2d)937. **Construction against exemption** if property is within general language of statute imposing tax. 284 Pa180, 130A405.

892-41 See also 32PortoRico 530.

892-42 125Misc618, 210NYS354.

892-43 23F(2d)283; 15DelCh331, 138A 620; 165Ga259, 140SE860; 322 Ill 120, 152NE555; 322 Ill 562, 153NE669; 323 Ill 68, 153NE726; 326 Ill 573, 158NE 213, 54ALR1376; 328 Ill 377, 159NE 811; 233Ky828, 27SW(2d)377; 164La 155, 113S801; 166La1, 116S572; 260 Mass129, 156NE743; 169Minn323, 211 NW467; 153Miss346, 120S839; Mo 11 SW(2d)30; 75Mont304, 243P806; 85 Mont466, 279P369; NJSup 151A753; 217AppDiv406, 216NYS248; 125Misc 625, 210NYS360; 125Misc212, 210NYS 527; 126Misc131, 213NYS56; 126Misc 661, 214NYS390; 130Misc142, 223NYS 660; 211AppDiv379, 212NYS263 (against claimant); 218AppDiv38, 217 NYS657; 225AppDiv356, 233NYS102; 135Misc75, 238NYS327; 135Misc823, 238NYS525; 227AppDiv351, 238NYS 577; 136Misc100, 241NYS328; 115 Okl 296, 242P1033; 130 Or165, 279P555; 284Pa180, 130A405; 293Pa390, 143A 111; TexCivA 58W(2d)614; Vt 144A 680; 153Va768, 151SE143; Ont [1927] 4DomLR1149. See also 198Wis349, 224 NW132. But see 280US363, 50SC121, 74L ed478. **Rule is inapplicable** in considering exemption of religious, scientific, literary, and educational institutions. 154Tenn469, 290SW36. **Statutory provision for annual account by exempted taxpayer held mandatory.**–48 RI 407, 137A783.

892-44 8F(2d)845; 23F(2d)283; 36 F(2d)966; 219Ala558, 122S660; 102 CalA488, 283P363 (permitting maintenance of school district library does not exempt property from county library tax); 165Ga259, 140SE860; 17Idaho66, 272P696, 62ALR323; 207Iowa24, 222 NW545; 161La155, 113S801; 166La1, 116S572; 157Md542, 146A744 (court is governed by rules of law and not by principles of equity and cannot allow exemption not within spirit or letter of law); 217AppDiv406, 216NYS248; 126 Misc661, 214NYS390; 135Misc275, 238 NYS327; 41OklACR131; TexCivA 283 SW929; 149Wash234, 270P815. **Language given ordinary meaning.**–47Ida66, 272P696, 62ALR323.

893-45 157Md542, 146A744; 155Miss 498, 124S658. **Where doubt exists as to total or only partial exemption,** latter alone should be recognized. 275US129, 48SC94, 72L ed196. **Illustrations and applications of rule.**–168La269, 121S707 (license).

894-49 280US363, 50SC121, 74L ed 478; 130Misc142, 223NYS660; 214App Div375, 212NYS253 (construction must not be so narrow as to defeat intention of legislature to encourage corporations of religious, literary, or educational character); 153Va789, 151SE417 (liberal construction). **Primary use to which property devoted** is controlling in determining exemption. 322 Ill 120, 152 NE555. **Statute exempting allotted land from taxation** may not be narrowed by any subsequently declared intention of Congress. 280US363, 50SC121, 74L ed 478.

894-50½-New. **Tax exempt credits cannot be taxed directly or indirectly.**–232 Mich250, 205NW106.

894-50½-New. Exemption statute must be construed in light of constitutional grant of power. TexCivA 58W(2d)614.

894-50½-New. Proviso giving exemption is to be construed with statute as whole. 219Ala558, 122S660.

894-50½-New. Exemptions from taxation are not favored. 247Mich542, 226 NW215.

894-54 **Indirect taxation.**–308Mo 237, 271SW508, 32ALR1199.

896-61½-New. Exemption of Indian land has been held not to be extended to personal property. 134 Okl 29, 272P393.

897-64 111LaA150, 123S363.

897-64½-New. Exemption of property purchased from municipality. 136Misc 757, 240NYS821.

897-65 Md 151A29; 152Tenn82, 274SW 536 (bonds); NH [1927] 2DomLR184. But see 167La757, 120S286. **Lease of land owned by state or municipality** does not pass exemption to lessee who may be taxed on his interest. 104CalA 255, 285P961(2dcase).

899-73 165SC299, 152SE865 (exemption of manufactories).

899-79 But see 180Ark1090, 248SW(2d) 324.

899-79½-New. Agreement between legislative commission and railroad company that railroad company shall not be responsible for any taxes assessed for stated calendar year or for any period after stated date in such year on property conveyed to state embraces tax imposed for year named, though assessed in previous year. 105NJL349, 144A629.

899-80 Ariz 289P157.

900-84 **Territorial exemption statute** is not impaired by change from territorial to state government. 39OklACR184.

900-86 39OklACR184.

900-87 See also 46Philippine807.

901-93 47Ida66, 272P696, 62ALR323; 12PaDist&Co 211.

901-97 Vt 144A680.

904-7 108Conn246, 142A800. **Estoppel.**–33F(2d)923. **Rebuilding of factory** and resumption of business was consideration for exemption from taxation. Vt 144A680.

905-15 NJSup 149A532(2dcase). But see Ariz 289P157; 204Cal 201, 267P703; CalA 258P825. **Statute has been held ineffective** to make failure of proof waiver of exemption. Ariz 289P157.

905-16 But see 136Misc757, 240NYS 821. **Claim for partial exemption must be made on grievance day** or courts will not consider question on review. 218 AppDiv38, 217NYS657. **Condition precedent.**–262Mass439, 160NE419.

905-17 CalA 285P1067. **Evidence insufficient** to show that property of boarding school was for public use. 105 Conn456, 136ASS.

905-18 220AppDiv49, 220NYS365. **Improper inclusion of exempt property** held not to make assessment illegal, but merely erroneous. 220AppDiv49, 220 NYS365.

905-19 136Misc757, 240NYS821.

905-19½-New. In determining whether corporation is entitled to exemption its by-laws and statute under which incorporated is as much law of corporation as certificate of incorporation. 216App Div1, 214NYS523.

905-19¾-New. Court may look to statute under which corporation is organized and its by-laws, in determining whether it is organized for exclusive purposes set forth in statute. 216AppDiv1, 214NYS 523 (not restricted to certificate of incorporation).

905-19¼-New. Use to which property claimed to be exempt is applied is question of fact to be determined from evidence. 144 Okl 57, 289P720.

905-20 217AppDiv406, 216NYS248 (certiorari to review assessment); 135 Misc823, 238NYS525; Wash 292P101. **Where taxing officers have jurisdiction,** they act judicially in making assessment, and overvaluation resulting from improper inclusion of exempt property does not make tax illegal but merely erroneous and subject to review by certiorari. 217AppDiv406, 216NYS248. **In mandamus to compel cancellation of assessment,** court cannot act till board of supervisors has acted on petition to cancel. CalA 258P449. **Failure to apply for exemption** does not prevent suit to enjoin illegal levy and collection of taxes. 32F(2d)639. **Mandamus will not lie against county treasurer** to compel allowance of tax exemption treasurer not being under duty to pass on exemption Ariz 289P157.

906-21 Ariz 289P157 (county assessor has been held not empowered to pass on question); 141 Okl 32, 283P984.

906-22 TexCivA 28SW(2d)927.

906-23½-New. On petition for abatement of taxes voted to plaintiff's mill but not made effective, plaintiff was entitled to only such relief as justice required. NH 146A511.

906-24 115Oh186, 152NE897 (proceeding under statute to file complaint with county board of revision is concurrent, not exclusive, remedy). **Federal court will restrain municipal taxation** of piers used by federal government during war, since appeal would only result in delay and increased expense, without different result. 29F(2d)932.

906-25 **Federal court will not determine question of exemption** where there is remedy at law under state laws. 29 F(2d)932.

907-26 TexCivA 285SW844.

907-29 Vt 144A680. **Sufficiency of allegations.** CalA 258P449.

907-29½-New. Where objection to assessment on grievance day was on ground of total exemption, it may not on review by certiorari claim partial exemption. 126Misc661, 214NYS390 (no amendment of objections allowed).

907-30 Ariz 289P157; CalA 284P506; 47Ida66, 272P696, 62ALR323; 326 Ill 573, 158NE213, 54ALR1376; 120Kan 496, 243P1055; Mo 118W(2d)30; 223 NY8102; 135Misc823, 238NYS525; 115 Okl 296, 242P1033; 54SD402, 223NW 330(2dcase); TexCivA 58W(2d)614; TexCivA 21SW(2d)747. **Corporation coming within general language of statute taxing capital stock** must clearly bring itself within exemption to be exempt as manufacturing corporation. 284 Pa180, 130A405. **Evidence held irrelevant.**–162Ga244, 133SE864.

908-31 82NH392, 131A15. **Evidence held sufficient.**–120Kan496, 243P1055; 54SD402, 223NW330(2dcase); TexCivA 58W(2d)614. **Evidence held insufficient** to show dedication to public use within exemption statute. 105Conn456, 136A 88. **On application for judgment for sale of real property for nonpayment of taxes,** where property owner filed objections based on special act incorporating it and exempting it from taxation, it has been held that judgment sustaining objection without any evidence in support thereof was erroneous, in view of prima facie case made by tax collector's showing. 331 Ill 559, 163NE313.

908-32 165Ga259, 140SE860. **Constitutional provisions prescribing exempt property** are construed as broad enough to include every kind of property, real, personal and mixed, capable of private ownership. 75Mont304, 243P806 (not limited to unqualified ownership of land under street construction contended for).

908-33 Corporation's investments in evidences of debt bearing not over six per cent interest held exempt. 146Miss 734, 111S871. **Notes are exempt when not bearing** over six per cent interest, though bought at discount. 146Miss 734, 111S871. **Notes bearing interest are construed as under contract** between original parties to determine if they are exempt. 146Miss734, 111S871. **Exemption of agricultural products from taxation when owned** by producer is personal to producer owning property. 166La 1, 116S572. **Merchandise of company engaged in mixing and blending syrups and molasses** held not exempt from taxation as agricultural products owned by producer. 166La1, 116S572.

908-36 251Mich525, 232NW377; 116 Oh1, 155NE791, 794 [citCyc].

908-37 225AppDiv356, 233NYS102. But see 322 Ill 562, 153NE669. **Exemptions apply to property that is not bearing an income** but is used solely for the purposes declared to be exempt. 323 Ill 68, 153NE725.

908-38 335 Ill 317, 167NE16; 157Md 279, 145A770; 320Mo 1146, 9SW(2d) 589; 136Misc100, 241NYS328; 141 Okl 32, 283P984; 144 Okl 57, 289P720.

908-40 See also 323 Ill 68, 153NE725. **City is not owner of land** under statute exempting city property from taxation where it had only ninety nine year lease on property. 335 Ill 450, 167NE79.

909-41 Sask [1929] 4DomLR1063(2d case).

909-42½-New. It is situation or character of beneficial owner or holder of equitable title or estate and not that of holder of legal title which determines question of exemption under constitutional provisions. 75Mont304, 243P806.

909-42¼-New. Application of rule.- Trust funds and trust property generally, while in hands of trustees for beneficial use and enjoyment of town, are free from taxation by virtue of constitutional provisions defining property to include all matters and things real, personal, or mixed, capable of private ownership. 75Mont304, 243P806.

909-42¼-New. Under Canada Special War Revenue Act, manufacturer is entitled to exemption from consumption or sales tax on ground that goods were exported only where goods were actually exported by him and not where they were sold to another under agreement that they should be exported. Can [1929] 2DomLR721.

909-42½-New. Manufactured articles.- Automobiles manufactured in other states and stored within state are exempt, but not those manufactured within state and similarly stored. 198Wis 281, 224NW126.

909-42⅛-New. Use of land alone does not determine whether it is taxable, but further element of application of proceeds arising therefrom must be considered. Ind 165NE908.

909-42½-New. Liquid fuels.-Under Pennsylvania statute exempting certain liquid fuels from tax unless used in motor vehicles, motor vehicles referred to are those defined in Vehicle Code. 13 PaDist&Co 296.

909-42⅛-New. Naptha and benzine used exclusively for dry cleaning are not exempt from tax on liquid fuels under Pennsylvania statute. 13PaDist&Co 296.

909-42⅛-New. Only liquid fuels exempt from tax under Pennsylvania statute are those used by United States or its agencies or by commonwealth and paid for out of state funds. 13PaDist&Co 296.

909-49 29Hawaii555.

909-50 Farm products in unmanufactured state, whether in hands of producer, purchaser, or manufacturer, are exempt from taxation for certain period after being harvested in some jurisdictions. 145Miss857, 111S373 (cotton seed owned by oil mill).

909-50½-New. State statute, exempting from taxation income derived from public utilities performing functions of national government, does not include national banks. 8F(2d)883.

909-50½-New. Hotels.-Under Mississippi statute providing that "all permanent hotels, and all permanent additions to existing hotels," shall be exempt from taxation five years from time of completion, at discretion of board of supervisors, words quoted do not cover furniture, fixtures, and equipment that may be necessary successfully to operate hotel. 153Miss346, 120S839.

910-56½-New. Legislative intent of congress was to exempt from all taxation payments made by government under war risk policies of insurance. 179 Minn450, 229NW781.

911-58 Exemption of Indians.-132 Okl 289, 270P565 (Choctaw Indian allotment); 140 Okl 178, 282P611 (vested rights).

911-61 In Canada.-58 OntL624, [1926] 3DomLR102.

911-66 90PaSuper170.

913-91 156SC299, 152SE865.

914-98 In Hawaii.-28Hawaii197.

915-3½-New. Bank assets in hands of banking commissioner to reimburse depositors' guaranty fund for moneys paid out are not exempt from general taxation. 41 OklACR131.

915-3½-New. Depositors' guaranty fund is not exempt from general taxation. 41 OklACR131.

915-9 See also 11PaDist&Co 383. **Reserves not proper subject of taxation.-** 315Mo 791, 287SW307.

915-10 Construction of statute.-9Pa Dist&Co 648.

915-11 Exemption from local taxation.- 201 Iowa208, 205NW758. **In New York.** -223AppDiv485, 229NYS10.

916-15 Railway Y. M. C. A. not restricted to railway employees but used also by others is not entitled to exemption since it is not used exclusively for railway purposes. Can [1925] 3DomLR810.

917-18 Effect of lease by railroad company.-Me 151A460.

917-22 But see Me 151A460.

920-54 Farm property within boundaries of irrigation district, title to which was acquired by district because of failure of owners to pay their assessments, has been held not exempt from taxation as "property of the state." 149Wash 234, 270P813.

921-57 158La337, 104S65 (exemption of canal company having fifty-year lease from state held not to terminate at expiration of that period).

921-58 Exported goods.-62 OntL218, [1928] 3DomLR109.

921-59 Vt 144A680. **Commencement of business condition precedent to exemption.-Can** [1929] 1DomLR6. **New manufactory.-**156SC299, 152SE865.

921-62 208Ky606, 271SW693; 149Md 251, 131A509, 513 [citCyc].

922-63 208Ky606, 271SW693; 149Md 251, 131A509, 513 [citCyc] (dealing in books published by others not manufacturing).

922-67½-New. Statute exempting from local taxation property of persons actually engaged in manufacturing, applies, though business of manufacturing of taxpayer is only incidental to taxpayer's real business. 228Ky65, 14 SW(2d)172.

922-69 Other manufactures.-222Ky 606, 1SW(2d)1050.

923-70 Miscellaneous.-297Pa305, 146A 896(1stcase); Pa 151A786. **Distillation of water for purifying purposes.-**284Pa 180, 130A405. **Generating electric light, heat, and power.-**156SC299, 152SE865.

923-71½-New. Manufacture within tax exemption statute is fabrication or composition of new article of which imported material is ingredient or part. 284 Pa180, 130A405.

924-73 Factory merely making paper bags from certain kind of paper manufactured by another from wood of pulp is not within statute exempting new factories, for making paper or paper products out of "wood pulp, cotton stalks or other material." 142Miss574, 107S554.

924-79 Exemption of enlargements of plant held not to include purchased existing warehouses. 165Ga259, 140SE 860. **Exemption not confined** to property owned by persons who only use in their manufacture raw materials of state. 228Ky65, 14SW(2d)172.

924-82½-New. Statute exempting from local taxation property actually engaged in manufacturing is applicable when manufactured goods are consumed by taxpayer as when they go into general trade as objects of barter and sale. 228Ky65, 14SW(2d)172.

925-83 But see Can [1929] 4DomLR 597.

925-90 212Ala556, 103S648 (exemptions of fairs are held not applicable to property of telephone company holding annual fairs). **Contract between association and members for delivery of tobacco** held one exempt from taxation under statute. 222Ky164, 300SW350.

925-91 NJSup 151A753 (building owned by holding company for non-profit associations).

926-95 23F(2d)283; Ind 151NE143; 232Ky191, 22SW(2d)597; 87PaSuper 231; 197Wis390, 222NW222; Can [1925] 3DomLR810. **Private academy** charging tuition held not exempt as charitable institution notwithstanding provision in by-law. 102NJL525, 133A887. **Use to which property is put** determines its immunity from taxation. 222Ky717, 28SW(2d)394. **"Purely public charity."-** 222Ky717, 28SW(2d)394. **Boy Scouts of America** is institution of purely public charity. 13PaDist&Co 213.

926-95½-New. or the exemption may be embodied in the corporate charter; 100Vt122, 135A492.

926-96 Can [1925] 3DomLR810 (to be entitled to exemption, institution must render service at public expense, or gratis). **Mortgage held in trust for charitable object** is exempt. 6PaDist& Co 748.

926-97 13PaDist&Co 213.

926-98 232Ky191, 22SW(2d)597.

926-99 235Ky790, 32SW(2d)343.

927-1 Corporation by-law reciting that its property is to be used exclusively for moral and mental improvement of persons engaged in artistic and creative work for benefit of humanity is entitled to exemption. 216AppDiv1, 214NYS 523 (under Tax L § 4 subd 7). **Word "benevolent,"** as used in statute of exemption, must be presumed to be used in same sense as used in other kindred statutes on cognate subjects. SD 228 NW238.

927-2 322 Ill 562, 153NE669; 92PaSuper514.

927-3 323 Ill 68, 153NE725; 157Md542, 146A744.

927-5 32F(2d)639; 232Ky191, 22SW (2d)597; 146Miss388, 111S590; 218App Div38, 217NYS657; 116 Oh1, 155NE791; 120 Oh139, 165NE709; 100Vt122, 135A 492; 197Wis390, 222NW222. **Y. M. C. A. charging for board and lodging** and receiving adequate return therefor is not charity entitled to exemption. Can [1925] 3DomLR810. **Question of primary use** is one of fact. 322 Ill 562, 153 NE669. **Idle or unused property** is not entitled to exemption as property used for charitable or benevolent purposes. 217AppDiv406, 216NYS248. **Uncultivated land** from which only few loads of wood are taken to be burned in hospital is not exempt. 146Miss388, 111S590. **Summer camp of Young Women's Christian Association,** though composed of separate tracts, is exempt from taxation as part of charitable institution. 92Pa Super514.

927-5½-New. In determining whether or not property is used for charitable purpose, policy of statute should be considered and have great weight. 126Misc 431, 213NYS35 (even though tax exemption statutes are strictly construed).

928-7 32F(2d)639; 232Ky259, 22SW (2d)622; 217AppDiv406, 216NYS248; 218AppDiv38, 217NYS657; 136Misc421, 240NYS763. But see 126Misc431, 213 NYS35. **That Y. M. C. A. sold small surplus of its electric power** does not affect its right to exemptions. 126Misc431, 213NYS35. **Y. M C. A. building containing rented stores** is not used exclusively for charitable, educational, or benevolent purposes and therefore is entitled only to partial exemption. 126Misc 431, 213NYS35.

928-9 216AppDiv1, 214NYS523.

928-9½-New. or if corporation's by-laws are changed so as not to comply with its original purpose. 216AppDiv 1, 214NYS523.

928-9½-New. Where statute requires exclusive use for charitable or benevo-

lent purposes, it must be so used to be entitled to exemption, that it is principally so used is insufficient. 217App Div406, 216NYS248.

928-11 162Ga244, 133SE864; 244NY 42, 154NE816; 217AppDiv406, 216NYS 248; 116 Oh1, 155NE791; 9PaDist&Co 51. **Young Women's Christian Association** using portions of building for restaurant where fifty six per cent of meals were served to public at profit which was used to carry out corporate purposes is not entitled to exemption for portions of building other than those exclusively used for boarders. 217AppDiv 406, 216NYS248.

929-12 244NY42, 154NE816.

929-13 Land leased by city for hospital at substantial rental is not exempt from taxation as being operated for charitable purpose. 323 Ill 68, 153NE725.

929-14 23F(2d)283; 47 Ida66, 272P 696, 62ALR323.

929-15 123 Or144, 261P694; 156Tenn 589, 38SW(2d)1059. **The fact that the percentage of charity patients is small,** etc. 156Tenn589, 38SW(2d)1059.

930-18 123 Or144, 261P694.

930-19 123 Or144, 261P694. **Nurses' home** maintained by hospital on separate grounds for nurses employed in hospital is not used exclusively for hospital purposes within statute exempting property so used. 140Miss485, 106S1.

930-20 But see 100Vt122, 135A492.

931-24 548D545, 223NW950. **Summer camps used exclusively as adjunct of home for indigent members** of fraternal order, their wives, widows, and orphans, are exempt from taxation. 130 Misc142, 223NYS660. **Masonic property has been held not totally exempt from taxation.**–135Misc275, 238NYS327. **Greek letter society held not benevolent society.**–130 Or165, 279P555.

931-26 Property of Masonic Temple was not used exclusively for purely public charity. TexCivA 14SW(2d)128.

932-27 218AppDiv38, 217NYS657. **Masonic corporation organized of several masonic bodies for lodge purposes,** and which had no indigency cases to support, held not entitled to exemption. 218AppDiv38, 217NYS657. **Where part of property of masonic corporation** was leased to masonic club for social purposes, such corporation is held not entitled to exemption. 218AppDiv38, 217 NYS657.

932-28 126Misc661, 214NYS390 (statute applies only to property used solely and distinctly for purposes of lodge and not as clubhouse for members); 136 Misc100, 241NYS328. **That certificate of incorporation of masonic corporation did not authorize** maintenance of social club is no answer to denial of exemption for use of property by masonic social club. 126Misc661, 214NYS390. **Use of portion of property** for other than lodge purposes forfeits right to exemption. 126Misc661, 214NYS390. **Test** is whether property is used exclusively or partially for purposes of association. 136Misc100, 241NYS328.

932-29 162Ga244, 133SE864; 207 Iowa 24, 222NW545. **Property of masonic corporation** substantial part of which is leased to masonic clubs for social purposes has been held not exempt from taxation. 126Misc661, 214NYS390.

932-29½-New. Social club cannot in effect be made charitable institution by providing that small net income shall annually be applied to charity. 126Misc 661, 214NYS390.

932-29¼-New. To entitle corporation, organized under Benevolent Orders Law, to exemption, resolution devoting income to charity should be passed by bodies composing corporation. 126Misc 661, 214NYS390 (not by corporation).

932-29¼-New. Social use of part of building of fraternal organization defeats right of exemption. 125Misc618, 210NYS353.

932-29½-New. Words "accumulations and funds," as used in statute exempting fraternal beneficiary funds from taxation connote personal property, such as money, notes, mortgages, and other forms of security. 207 Iowa24, 222NW 545.

932-29¾-New. Exemption of lots owned by lodge from taxation is not determined by whether national fraternity or state grand lodge is charitable society, but by whether such lodge is charitable society. 54SD402, 223NW330(2d case).

932-31 Ind 151NE143; 197Wis390, 222 NW222. **Construction of statutes.**–251 Mich528, 232NW375.

932-32 Particular institutions.–322 Ill 562, 153NE669.

933-36 232Ky259, 22SW(2d)622.

933-37 232Ky191, 22SW(2d)597.

933-38 251Mich528, 232NW375; 251 Mich525, 232NW377.

933-39 105Conn456, 136A88; 111Conn 203, 149A685.

933-40 Chance for making profit, not actual making, is test as to whether property is for public use. 105Conn 456, 136A88.

934-41 Held not "public institution devoted to public use."–108Conn136, 142A 678.

934-45 322 Ill 562, 153NE669.

934-45½-New. Exemption may extend to institutions which afford available substitute for public secondary education provided at municipal or state expense. 108Conn136, 142A678.

935-51 3Del 180, 133A88.

935-55 336 Ill 263, 168NE269 (dining halls); 120Kan496, 243P1055.

935-59 197Wis32, 221NW375; 198Wis 349, 224NW132.

936-60 108Conn136, 142A678; 328 Ill 377, 159NE811; 217AppDiv406, 216NYS 248 (exclusively used); 30 OhA446, 165 NE372; 197Wis390, 222NW222. But see 214AppDiv375, 212NYS253. **That property is principally used** for educational purpose, but not exclusively, is insufficient. 217AppDiv406, 216NYS248. **Idle or unused property** is not entitled to exemption. 217AppDiv406, 216NYS 248.

936-61 But see 214AppDiv375, 212NYS 253.

936-63 322 Ill 562, 153NE669; 120Kan 496, 243P1055; WVa 143SE353.

936-64 120Kan496, 243P1055.

936-64½-New. Exemption is operative from date of acquisition of property by educational institution and filing of its deed for record. 207 Iowa1238, 224NW 502.

937-65 Tract contiguous or separated.–323 Ill 68, 153NE725.

937-66 214AppDiv375, 212NYS253 (farm used for demonstration and instruction purposes).

937-68 120Kan496, 243P1055, 1056 [cit Cyc]; 214AppDiv375, 212NYS253. See also 11PaDist&Co 505.

938-70 130 Or165, 279P555.

938-71 336 Ill 263, 168NE269 (operated at loss); 214AppDiv375, 212NYS253.

938-72 326 Ill 573, 158NE213, 54ALR 1376; 130 Or165, 279P555.

938-73 217AppDiv406, 216NYS248. But see 198Wis349, 224NW132.

938-74 217AppDiv406, 216NYS248; 113 Oh52, 148NE347. **Young Women's Christian Association,** using portions of building for restaurant where fifty-six per cent of meals were served to public at profit which was used to carry out corporate purposes, is not entitled to exemption as to portions so used. 217App Div406, 216NYS248.

939-75 144 Okl 57, 289P720. See 196 Wis518, 220NW816.

939-76 WVa155SE542. But see 105 WVa600, 143SE356. **Trust property held not used for school and religious purposes.**–328 Ill 377, 159NE811.

940-80 258Mass326, 154NE846 (Massachusetts statute construed).

940-81 Library must be shown to be owner and holder of legal or equitable title. Iowa 229NW721.

940-85 49Nev124, 240P435; 131Misc37, 225NYS669; 197Wis390, 222NW222.

941-90 131Misc37, 225NYS669.

941-91 See also 136 Okl 99, 276P726.

941-91½-New. City authorities have no authority to go behind title records and make assessment against real property, title to which is in university board of regents. 198Wis349, 224NW132.

942-94 173Minn40, 216NW326 (dictum); 49Nev124, 240P435. **Lot used for free parking of automobiles during services and affording light and air for** church is exempt from taxation. 90 CalA176, 265P547. **Cemetery** no longer used as such but serving solely as lodging place for participants in religious festivities is exempt. 51Philippine352. **Exemption of convent** includes adjacent vegetable garden used by priest. 51 Philippine352.

942-95 322 Ill 120, 152NE555; 173Minn 40, 216NW326; 144Miss360, 109S864; 197Wis390, 222NW222.

942-96 But see 244NY42, 154NE816.

943-99½-New. Philippine Income Tax Law makes destination of income ultimate test of exemption. 50Philippine 618.

943-99¼-New. Income of Roman catholic bishop as corporation sole, used for carrying on religious, charitable, and educational work, is exempt under such statute. 50Philippine618.

943-1 TexCivA 285SW844.

943-2 135Misc823, 238NYS525.

943-5 135Misc823, 238NYS525; 10Pa Dist&Co 97; **Ont** [1927] 4DomLR1149 (parsonage on separate land).

944-12 Parsonage occupied before tax has become charge is exempt. 118Kan 742, 236P809.

944-13 322 Ill 120, 152NE555; 173 Minn40, 216NW326.

945-14 TexCivA 17SW(2d)130(2dcase).

945-19 Mo 11SW(2d)30; 217AppDiv 406, 216NYS248. Contra 137Misc321, 243NYS294. **Rooming and boarding house for working girls owned by Y. W. C. A.** and run on cost basis, and serving meals in restaurant to public as well as occupants, subject to tax. 245NY562, 157NE858.

945-20 7PaDist&Co 200; WVa 155SE 547.

945-22 Crypts and niches in mausoleum owned by nonprofit cemetery corporation is not taxable to such corporation. Wash 292P101.

946-28 317 Ill 547, 148NE273 (holding capital stock of cemetery company not exempt, though invested almost wholly in land that is exempt).

946-30 Hotel acquired whose income is used for improvement of cemetery has been held not exempt from taxation. CalA 284P506.

946-32 See also 43 Ida233, 253P377.

946-32½-New. County is limited in payment of taxes to property found within its boundaries. 30F(2d)600.

947-34 94Fla588, 115S315.

947-36 148Miss433, 114S269; 57ND1, 220NW436.

947-37 148Miss433, 114S269.

947-38 261Mass445, 158NE897. **Succession duty.**–36BC450, [1926] 1DomLR 1008, [1926] 1WestWkly271, [app dism 37BC336, [1926] 4DomLR139, [1926] 3 WestWkly265]. **In North Carolina.**–194 NC237, 139SE232.

948-44 199 Ind262, 157NE275, 277, 53 ALR1386 [quotCyc].

949-46 Personal property of attorney is properly taxed in county wherein he maintained office for practice of his profession, and actually lived and spent most of his time. 178Ark540, 11SW(2d) 455.

949-49 308Mo 237, 271SW508 (may change domicile for purpose of avoiding taxation).

950-65 273US113, 47SCt271, 71L ed 566; 57ND1, 220NW436. **A water right,** etc. 88CalA157, 263P318. **Flowage rights** are taxable where located. 235 Mich261, 209NW122; 126Misc188, 213 NYS623. **Lessor's realty interest in oil lease** held taxable in county where land was situated. 273US113, 47SCt271, 71 L ed566. **Portion of dam, dam site, and flowage** is assessable in town where situated though used in connection with mill on opposite side of river. 198Wis 590, 225NW177, 64ALR140.

951-68 88PaSuper562. But see 126Misc 239, 213NYS258.

952-69 94Fla588, 115S315. **Permanency of location** is not required to fix situs for purpose of taxation. TexCivA 1SW(2d)497. **Situs of personal property depends on character of use.**–TexCivA 1SW(2d)497.

952-70 94Fla588, 115S315; 118 Okl 268, 248P340, 341 [citCyc], 52ALR528;

284Pa1, 130A240 (it is against due process clause of constitution to tax personalty, already taxed in one state and situated there, to be taxed in state of owner's domicile). **In Utah.**–285P1006.

952–71 87Colo 275, 288P408.

953–72 76Mont214, 245P946. But see 116Nebr695, 218NW731.

953–76 Machinery held not within rule.–127Me51, 141A73.

955–84 199 Ind262, 157NE275, 277, 53 ALR1386 [citCyc]; 197NC470, 149SE 680(2dcase).

956–94 Boat used in connection with fish business conducted in township and generally kept there is not assessible in city where owner lived, though temporarily moved there when city assessments were made. 231Mich699, 204NW 718.

956–97½–New. Pleasure yacht is vessel within statute, making vessel taxable to owner in town where he is inhabitant. 265Mass333, 163NE901.

958–10 141 Okl 185, 284P287.

960–24½–New. Domicile of a corporation is place where it is incorporated. 256Mass419, 152NE916.

960–25 117 Oh436, 159NE823.

961–27 262Mass439, 160NE419.

961–28 Utah 285P1006. **In Oklahoma.**–135 Okl 15, 273P201.

961–31 328 Ill 413, 159NE794.

961–32 286Pa545, 134A438, 48ALR992. See also 244NY114, 155NE68.

961–37 Money is transitory property, considered with reference to taxation, and its mere presence on deposit in banks does not necessarily render it subject to taxation there. 89Fla514, 105S 115.

963–53 94Fla588, 115S315.

963–55 94Fla588, 115S315; 262Mass 439, 160NE419.

963–56 94Fla588, 115S315; Tex CommnA 16SW(2d)292.

964–60 6F(2d)504 (appointment of local agent to receive process does not have effect of creating domicile authorizing assessment of rolling stock). **Extent of taxation allowable.**–6F(2d)504.

965–4 316 Ill 410, 147NE492; 146Va1, 135SE693.

965–6 316 Ill 410, 147NE492. But see 114 Oh658, 151NE760.

965–7 316 Ill 410, 147NE492.

965–8 114 Oh658, 151NE760.

965–9 180Ark387, 21SW(2d)867; Utah 284P105. **In California.**–79CalA1, 248P 1049.

965–11 CalA 289P678 (legislature may determine whether levy shall be made by state or local authorities).

965–14 180Ark387, 21SW(2d)867. **State levy board** is not a purely ministerial body. 324 Ill 179, 154NE893. **Time of levy.**–Utah 284P105.

966–22 316 Ill 410, 147NE492 (directing that sum be raised constitutes levy); Utah 289P132. **County board has power to apportion** taxes on mines to districts within county. 69Utah204, 253P680. **General tax** levied by local government for general purpose of creation of such government need not be preceded by hearing on benefits derived by taxpayer. TexCivA 19SW(2d)186.

967–23 95Fla457, 116S78.

967–24 125 Okl 15, 257P284. **Auditor of Porto Rico** has no power. 27F(2d)13.

967–25 But see 321Mo 35, 10SW(2d) 918.

967–27½–New. Municipal corporations cannot delegate power to tax. 316 Ill 410, 147NE492.

967–30 Tax for road and bridge damage purposes held assessable under statute. 319 Ill 433, 150NE288.

968–33½–New. Taxes are levied because they are necessary to defray expenses of government, and not for purpose of enriching public treasury, and it is against policy of law to raise taxes faster than they are likely to be needed, but taxing authorities need not wait till money is actually needed before levying taxes. 331 Ill 544, 163NE355.

970–46½–New. Delinquent personal property tax can be considered item of loss where legal means of collection exhausted. 322 Ill 150, 152NE575.

970–48 316 Ill 410, 147NE492 (county clerk cannot levy taxes or determine whether they have been legally assessed); TexCivA 285SW345.

971–54 69Utah204, 253P680.

971–55 82Mont349, 267P305.

971–59 Liberal construction.–187Wis 539, 204NW481.

971–62 In Oklahoma.–142 Okl 54, 285P 100.

971–63 But see 83Mont380, 272P684.

971–64 204 Iowa1100, 216NW712; 142 Okl 19, 285P38; Va 154SE479.

972–65 316 Ill 410, 147NE492 (validity determined as of time tax is levied).

972–66 69CalA437, 231P598 (error in resolution fixing tax levy).

972–67 117Nebr102, 219NW811.

972–71 124 Okl 16, 253P483.

973–76 12PaDist&Co 211. **In Ohio.**–116 Oh294, 156NE134. **In Oklahoma.**–142 Okl 54, 285P100.

973–77 326 Ill 566, 158NE211.

974–83 In Illinois.–339 Ill 28, 170NE 728.

974–87 In making allowance for loss and cost of collection of tax, it is held proper to consider tendency to increase in percentage and adopt average of last three years. 324 Ill 179, 154NE893. **Levy of tax to cover loss and cost of taxation** must be small in proportion to entire tax. 324 Ill 179, 154NE893. **Reasonable allowance for loss and cost of collection** may be made in the sound business judgment of assessors. 324 Ill 179, 154NE893. **State levy board should fix tax rates** which will produce various amounts required for state tax. 324 Ill 179, 154NE893. **Last assessment completed governs** in fixing rate. 318 Mo 285, 300NW274. **Time of fixing rate.**–318Mo 285, 300SW274.

974–88 316 Ill 410, 147NE492 (extension of tax must be at rate authorized when levy was made); 316 Ill 452, 147 NE494 (amendments not retroactive and tax could not be extended by county clerk at amended rate).

975–89 137 Okl 222, 278P617; 142 Okl 19, 285P38 (levy in excess of amount necessary to produce funds required is illegal and void). **Provision that from total appropriation** for current expenses and sinking fund must be deducted surplus revenue from previous fiscal year or years does not authorize deduction of amount already expended. 39 OklACR 157. **Rate prevailing at time collecting officer is authorized to collect taxes** is rate which taxpayer must pay irrespective of actual dates of levy and assessment. 213Ky453, 281SW517. **Rate authorized at time levy is made** determines validity of tax. 336 Ill 330, 168NE275.

975–89½–New. Amendment to existing statute, authorizing levy of higher maximum rate, is not in absence of express words to that effect retrospective in its operation. 316 Ill 410, 147NE492.

975–90 164La257, 113S839. See also 321Mo 35, 10SW(2d)918.

975–90½–New. In Kansas shares of state bank stock assessed to stockholders are taxed at intangible rate of taxation. 130Kan262, 286P673.

975–90¼–New. Income taxes must be laid at common rate and as of common date. NH 149A321.

975–91 326 Ill 566, 158NE211. **Levy held valid,** under Forest Preserve Act § 11, as against contention that district did not pass annual appropriation ordinance within first quarter of fiscal year. 325 Ill 96, 155NE760.

975–95½–New. Levying of taxes is made for each calendar year, not for only part of year. 167La757, 120S286.

975–96 Record must show that quorum of taxing body was present and that proposition for levying tax was adopted. TexCommnA 290SW1083. **Amendments, by authority of Revenue Act,** on application for judgment and order of sale for delinquent taxes, cannot be allowed, where they add matter essential as basis for tax levy. 332 Ill 53, 163NE348.

976–97½–New. Delay in recording assessment does not invalidate assessment as against one who purchases property after assessment accrues but before it is recorded. 104WVa391, 140SE344.

976–98 See also 318Mo 285, 300SW274.

976–99 25GaA144, 132SE449; LaA 130 S642; LaA 130S877.

976–99½–New. It will not be presumed that legislature by amendment of existing statute intended to permit levy of higher rate of taxation and thereby increase taxes already levied for current year. 316 Ill 410, 147NE492.

976–3½–New. Legislature may validate tax levy not itemized. 324 Ill 43, 154 NE472.

976–3¼–New. Erroneous apportionment of taxes collected several years previous cannot be made basis of attack on tax levy of later year. 141 Okl 130, 284P27.

977–6 47RI 411, 133A796.

977–8 Application of reduction.–324 Ill 179, 154NE893.

978–12 Courts will not interfere with exercise of sound business judgment by taxing authorities except to prevent abuse of discretion. 324 Ill 179, 154NE 893. **It is incumbent on objector to** show abuse of discretion. 324 Ill 179, 154NE893.

978–18 149Va772, 141SE844.

978–19 Appointment of town tax assessor for period of less than year has been held nullity in view of statute providing three-year term. NJSup 146A 662.

979–21 NH 146A511.

979–23½–New. Office of county assessor becomes vacant at expiration of four-year term, even though no successor is elected and qualified. 50Nev145, 254P 147.

979–23⅓–New. Municipal officers in assessing taxes act as agents of state. 128 Me1, 145A241.

979–23¼–New. Contracts for performance of assessors' duties.–Where statute designates assessing officers and provides their compensation, neither board of assessors nor county board has power to contract with any other person to perform duty. 333 Ill 384, 164NE827.

979–23⅙–New. County tax commissioner is assessing officer of county. 235Ky 445, 31SW(2d)707.

979–24 Board of assessors with ineligible member cannot levy legal tax. Me 151A670.

979–25 Oath substantially complied with statute relating thereto.–207Cal 189, 277P333. **Board of assessors acting de facto** cannot levy legal assessments. Me 151A670.

979–26 104Conn579, 134A169.

980–32 Statute authorizing county court to grant assessor authority to employ additional deputies at salary fixed by him held void. 175Ark860, 3SW (2d)1. **In Illinois.**–333 Ill 384, 164NE 827.

980–33 Mont 285P195 (tax ferrets); 122 Okl 70, 250P1024. But see 50ND 788, 198NW116, 32ALR82. **Agreement for compensation of tax ferrets.**–Mont 285P195 (reasonable contingent fee valid).

980–34 220Ky160, 294SW1054; Tex CivA 284SW946. **Statute allowing assessors in counties percentage of amount received as unsecured taxes on personal property** is repealed as to particular county by special statute relating to fees of assessors in such county. CalA 259 P764.

981–36 Board of supervisors has power to fix maximum time for which per diem rate is to be allowed. 202 Iowa759, 210 NW242. **In Virginia.**–149Va772, 141SE 844. **Automobile hire.**–149Va772, 141SE 844. **Increase of compensation.**–149Va 772, 141SE844. **Law does not favor extension of term** of assessors for purpose of allowing compensation where continuance of duties is not clear. 149Va772, 141SE844. **Deputy assessors not entitled to higher per diem of clerks.**–333 Ill 384, 164NE827.

981–37 202 Cal 550, 262P1081 (salary and fees); IndA 165NE79. **Statutes held valid.**–IndA 165NE79.

981–38½–New. Compensation for assessment of special school and navigation district taxes, under special statute, is not recoverable from county by county assessor. 98Fla103, 122S222.

981–38⅓–New. Failure of appropriation to pay salary due to township assessor under statute does not render claim for such compensation invalid. IndA 165NE79.

981–39 County tax commissioner held not entitled to compensation based on

increased assessment by state tax commission. 220Ky160, 294SW1054.

981-44 Service of officers is gratuitous, unless their assessments are made under warrant of law. 146Va170, 135SE696.

981-44½-New. Where tax assessor performs material part of services under act, he is entitled to compensation under such act. TexCivA 284SW946.

981-44½-New. Requiring state to pay half of county assessor's salaries held not to make payment of expenses in excess of such salaries exceed constitutional limit. 175Ark860, 38W(2d)1.

981-44¼-New. Legislature had authority to require half county assessors compensation be paid by state and may repeal and modify such law. 175Ark 860, 38W(2d)1.

981-44½-New. It is competent for legislature to provide that compensation of county officers shall be confined to that allowed for assessing one class of taxes without allowance for assessing other classes of taxes. 98Fla103, 122S 222.

981-44½-New. County cannot recover excess fees from assessor for part of year where statute providing means for determining excess fees was repealed in midyear without saving clause. 118 Tex397, 16SW(2d)804.

981-44½-New. Some statutes providing for maximum salary do not apply to counties having stated population or less. 118Tex397, 16SW(2d)804.

981-44¼-New. Proceedings for allowance and certification of commissions due county tax commissioner. 232Ky 765, 24SW(2d)623 (answer held insufficient).

982-45 87CalA552, 262P348; 128Mel, 145A241; 146Va170, 135SE696. **Assessment of five hundred acres where patent and survey show fewer acres is** void as double taxation as to part. 125 Misc453, 211NYS731. **Board of assessors has no inherent power,** but derives all its authority from statute. 333 Ill 384, 164NE827.

982-46 246NY322, 158NE884. **Presumed that assessors performed their** duties and assessed railroad as realty and not personalty. 216AppDiv626, 215NYS710. **Commissioner of revenue** is constitutional officer, in Virginia, but duties are regulated by statute. 146Va 170, 135SE696.

982-47 155Miss498, 124S658; 106WVa 5, 144SE566. **Assessors have no power to devise new methods of taxation.**-244 NY114, 155NE668.

982-47½-New. Material duties of assessor include those under Rev. St. (1925) arts 7042-7045, 7201, 7218, 7222, and 7206 § 4. TexCivA 284SW946.

982-47½-New. Function of assessing board is to make findings of fact, and thereby furnish basis on which other officials are to act. 277US267, 48SC 523, 72L ed877.

982-47¼-New. Duty of board of tax survey. Ariz 288P1034.

982-49 Ariz 285P998; 175Ark375, 1 SW(2d)29; 331 Ill 495, 163NE403; 315 Mo 666, 286SW117; NJSup 149A632; 28 OhA398, 162NE756. **State tax committee and state equalization committee act for county as well as state** in assessing and taxing railroad property. 141Wash28, 251P103.

982-51 315Mo 666, 286SW117; 146Va 170, 135SE696.

983-55 22F(2d)973; 202Iowa1346, 212NW131. **Auditor of Porto Rico** has no power. 27F(2d)13.

983-56 35F(2d)785; Ariz 288P1034.

983-57 47RI 411, 133A796.

983-60 Ariz 285P998; 315Mo 666, 286 SW117. **Function cannot be transferred** from taxing officers to equity court by filing bill in chancery. 329 Ill 189, 160NE351.

985-67 94Fla427, 115S261.

987-84 Iowa 232NW445; 146Val, 135 SE693.

987-85 292Pa287, 141A34.

987-85½-New. Fixing of value of land is essentially judicial or quasi judicial. 167Minn304, 209NW18.

987-85½-New. Assessment does not of itself lay charge on either person or property, but is step preliminary thereto, which is essential to apportionment. 101Vt391, 143A677.

987-85¼-New. Use of amount paid for preferred and common stock in corporation as basis for determining loss from sale of common stock received on second reorganization has been held just and reasonable. Del 148A97.

987-87 24F(2d)29; 167La757, 120S 286; Mo 293SW378. **Absence of notice of assessment** not denial of due process. 21F(2d)333.

988-91 336 Ill 606, 168NE680; Mo 151 A670; 167Minn304, 209NW18; 82Mont 349, 267P305; 244NY114, 155NE668. **Constitutionality of particular statutes.**-23F(2d)923; 149Miss395, 115S 724; 149Miss641, 115S786; TexCivA 3 SW(2d)947. **In Porto Rico.**-32PortoRico 608. **If statute prescribes no method or an impossible method of** making assessment of corporate franchises, no tax can be levied. 315Mo 666, 286SW117. **Statute held inapplicable.**-204 Iowa512, 211NW485.

988-91 Where special laws are silent or obscure, authority may be found in general laws for assessment of property. 226AppDiv182, 234NYS457. **Construction of particular statutes.**-La 130 S46.

989-92 339 Ill 90, 170NE667. **Repeal of statutes.**-226AppDiv182, 234NYS457.

989-95½-New. Philippine Chinese Bookkeeping Act enacted to aid collection of taxes and prohibiting keeping of books of account in any language except English and other designated languages held unconstitutional as applied to Chinese merchants unable to speak, read, or understand such language. 271 US500, 46SC619, 70L ed1059.

989-96 213Ky445, 281SW472, 474 [cit Cyc]; 213Ky453, 281SW547.

989-96 Statute providing for assessment of property brought into county after regular assessment period has been held not unconstitutional. 87Colo 286, 288P413 (not discriminatory).

990-97 Ida 286P366; 167La757, 120 S286.

990-97 236Mich338, 210NW239; Utah 284P105. **Property not within state on certain date.**-Utah 284P105.

990-98 In Porto Rico.-32PortoRico 608.

990-99 TexCivA 38SW(2d)559; 141 Wash350, 251P575 (shares of bank, solvent on day of assessment, held assessable, though bank later became insolvent). **Effect of division of land and transfer by county auditor** is to require auditor to diminish valuation of whole by valuation of amount transferred. IndA 156NE172.

990-1½-New. In South Carolina, under statute, real estate can be assessed every four years only. 133SC383, 131 SE337.

990-1¼-New. Assessment is made for each calendar year not only for part of year. 167La757, 120S286.

990-2 70CalA438, 233P409; CalA 288 P146; 83Colo 82, 262P523; 104Conn 579, 134A169; 89Fla514, 105S115; 97 Fla426, 120S317; 34GaA88, 128SE234 (all presumptions in favor of legality and validity of tax); 323 Ill 574, 154 NE439; 120Kan365, 244P233; 161La 696, 109S391; 161La699, 109S393; 169 La905, 126S232; Md 151A39; 103NJL 33, 134A669; 221AppDiv248, 223NYS 168; SD 227NW461; 160Tenn403, 23 SW(2d)897; TexCivA 283SW674; Tex CivA 108SW(2d)1035; 154Wash212, 281 P494. **Assessment of two lots under one description** is presumed to have been made at request of owner as provided by statute. 323 Ill 574, 154NE 439. **Correct valuation of property presumed.**-TexCivA 283SW674.

990-5½-New. Assessment in name of plaintiff is assumed to have been made prior to his conveyance to another recorded subsequent to date when assessor was required to examine title. 161 La699, 109S393.

991-7 Under statute requiring warehousemen to furnish list of property stored and names and addresses of owners warehouseman cannot furnish books and records containing information instead of furnishing list. TexCivA 3 SW(2d)947.

991-11½-New. Where taxpayer has been evading payment by false returns, it may give new remedy for enforcing state's rights. 126Misc188, 213NYS 623.

991-13 Warehousemen's list of property stored.-TexCivA 38W(2d)947.

992-18 116 OhA439, 156NE599; 96Pa Super467 (executor).

992-21 Mimeographed copy of report of operative properties held substantial compliance with statute requiring "duplicate" to be sent to local assessor. 196Cal 131, 236P307.

992-22 Under some statutes real property must be listed each year. 103Conn 149, 130A84.

993-23 Report to local assessor of operative property, required by statute, need only inform him of intention to claim as operative. 196Cal 131, 236P 307.

993-27 Particular applications of text.-106Conn525, 138A620. **Money in control of receiver** on date fixed by statute must be listed by him in his name notwithstanding he has it for distribution only. 22 OhA258, 153NE295. **Choses in action held by banking corporation.**-128 Okl 82, 261P206. **Notes payable to taxpayer** must be listed under some statutes, though bills payable exceed bills receivable. 148Va494, 139 SE284.

994-32½-New. Income tax returns.-Committee of incompetent returning income according to cash "received" method is not required to return income received after incompetent's death, though earned prior thereto. 214AppDiv114, 211NYS617.

994-32½-New. Returns based on cash received method must include all items actually received during taxable year, 214AppDiv114, 211NYS617.

994-32¼-New. Irrespective of when they accrued. 214AppDiv114, 211NYS 617.

994-32½-New. Returns based on accrual method must include all items accrued during taxable year, 214AppDiv 114, 211NYS617.

994-32¼-New. Irrespective of when received. 214AppDiv114, 211NYS617.

994-33 321 Ill 247, 151NE867.

994-34 321 Ill 247, 151NE867.

994-34½-New. Statement that certain notes were up as collateral is not equivalent to listing of debts since collateral may exceed debt secured. 321 Ill 247, 151NE867.

994-36 Who may verify list.-47RI 420, 133A802.

994-36 Who may administer oath.-La 130S44.

994-37 47RI 420, 133A802.

994-38½-New. Officers before whom inventories may be sworn to are not limited to those specially empowered by statute. 83NH148, 140A163.

994-39 CalA 288P146; 128 Okl 153, 261P923. But see 150Wash524, 273P 959.

995-42 32PortoRico 608.

995-43 322 Ill 613, 153NE653; 261 Mass169, 158NE325; 32PortoRico 608. **Mode of service of notice.**-163Ga835, 137 SE255. **Notice to taxpayer is jurisdictional.**-163Ga835, 137SE255.

995-44½-New. Legislature may go behind annual tax return.-126Misc188, 213 NYS623.

995-46 174Ark507, 297SW822 (private property in military reservation); 22 OhA258, 153NE295; TexCivA 293SW 318 (assessor held to have right to assess royalty interest not rendered).

996-50 104Conn542, 133A683; 329 Ill 189, 160NE351; 315Mo 209, 286SW25; 22 OhA258, 153NE295; 32PortoRico 608. **Under some statutes** upon neglect or refusal to file sworn lists assessors are required to prepare list and assess actual value plus a penalty. 103Conn 149, 130A84. **Mode of assessment.**-104 Conn542, 133A683. **Action to compel warehouseman to furnish list of property stored.**-TexCivA 38W(2d)947. **Property of public service corporations.**-136 Okl 301, 278P271. **List taker has no authority** to list property of delinquent owner under statute requiring

them to look out for property not listed for taxation. 198NC252, 151SE259.

997-57 174Ark507, 297SW822; 221 AppDiv200, 223NYS367. **Burden of proof** is on taxpayer to show that certain property should not be taxed. 242 NY277, 151NE452.

997-58 221AppDiv200, 223NYS367.

997-59 Determination of state tax commission as to special franchise taxes is binding until set aside. 221AppDiv200, 223NYS367.

997-60 161La699, 109S393; 254Mass 516, 150NE433.

998-68 150Wash524, 273P959. **Determination of property subject to tax** held judicial act. 21F(2d)355. **Improvements made by lessee and removable on termination of lease** are assessable as personal property under some statutes. 119Kan733, 241P443 (statute applied to filling station). **Taxes assessable directly on real property itself.** 217AppDiv210, 216NYS699. **Where personal property is mortgaged** to one merely holding chattel mortgage without possession of the property, taxes cannot be legally assessed against mortgagee. TexCivA 276SW745.

999-69 Railroad belonging to manufacturing company in town held assessable as real property. 216AppDiv626, 215NYS711. **Tax on land as whole taxes surface and subsurface rights.**–81Colo 177, 254P438. **Possessory rights in land.**–202Cal 581, 262P314. **Mines and minerals.**–14PaDist&Co 54.

999-72½-New. Tax commission may require company selling on installment credit basis to report on accrual basis. 187Wis539, 204NW481.

999-72¼-New. Assessment of entire land in name of plaintiff conveying part thereof to another subsequent to date of assessment held valid. 161La696, 109 S391.

1000-77 Where **there is resident owner,** etc. 126Misc642, 214NYS418. **Lands having resident owner or agent** are resident lands. 126Misc642, 214NYS418.

1000-79½-New. Nonresident assessment of lands already assessed as resident lands is error. 126Misc642, 214 NYS418.

1000-79¼-New. Resident lands assessed as nonresident is jurisdictional defect. 126Misc642, 214NYS418.

1000-79¼-New. which cannot be cured by legislation. 126Misc642, 214NYS418.

1000-80 323 Ill 574, 154NE439.

1001-81 323 Ill 574, 154NE439. **Basis of apportionment of tax on separate tracts** is assessment of each tract. 323 Ill 574, 154NE439. **Valuation on each lot of defendant fixed by county court by dividing single assessment against both lots** held void. 323 Ill 574, 154NE 439.

1002-86 164Ga190, 138SE55.

1002-88 Md 151A29.

1003-90 215Ala20, 108S854; 95CalA 182, 272P313. **Assessment made in name of record holder** is proper. 159 La158, 105S274 (during year in which land was sold).

1004-94 123 Or377, 260P1002.

1005-1 Can [1928] 3DomLR887.

1008-20 26F(2d)489.

1008-21 198Wis349, 224NW132.

1008-22 See also 81Mont604, 264P388. **Land and standing timber, segregated into two estates,** separately assessed. 162La635, 110S886. **Owner of land and owner of building may each be assessed.** –218AppDiv287, 218NYS185. **Value of leasehold** is determined as personal property. 144Wash469, 258P473.

1008-24 Iowa 228NW28. **Annual revaluation not required** for city property, under charter provision requiring appeal tax court to make out and deliver to tax collector each year, statement showing valuation and assessment of all property subject to taxation. 156 Md590, 144A842.

1009-25 Fixing of values held administrative act.–21F(2d)355. **Courts** have no power to fix value of property for taxation. 332 Ill 467, 163NE769.

1009-27 Oh 170NE648.

1009-28 323 Ill 574, 154NE439; 320 Mo 1164, 9SW(2d)603; 299Pa385, 149A 653. **Assessor acts judicially** in fixing value of property for taxation. 332 Ill 467, 163NE769. **Assessor has wide administrative discretion** in valuation of property for purposes of taxation. 89 Fla514, 105S115. **Valuation must be result of honest judgment.** Ill 172NE772. **Value of capital stock** for purpose of taxation is not matter of strict formula but one of judgment. 297Pa308, 146 A903; Pa 147A242.

1009-29 Right to change assessment annually.–333 Ill 41, 164NE205.

1009-30 43F(2d)670; 161La669, 109S 351; Mass 170NE819 (consideration of periods of financial depression); Mass 172NE579; 128 Okl 153, 261P923; 35 PortoRico 842 (tangible price as value or valuation). **"Actual value."**–Nebr 226 NW810(1stcase) (defined, as used in statute, as value in market in ordinary course of trade). **Property to be assessed,** whatever may be its character, is to be taken and valued in actual condition in which owner holds it. 105 NJL99, 143A356. **Values must be put on property assessed as of time when assessment was made.** 137Misc603, 244 NYS508.

1009-31 144Wash469, 258P473. But see Mass 170NE819.

1010-32 104CalA235, 285P896(2dcase); Mass 170NE819; 137Misc603, 244NYS 508. **"Fair and proper legal assessment"** is such as places value in fair, equal, and uniform basis with other property of like character and value. 144Miss560, 108S907. **Scientific formulas** are of small value in making assessments. 299Pa385, 149A653. **Taxing authorities may use best evidence available** in arriving at determination of market value. 298Pa294, 148A301.

1010-34 See also 89Fla514, 105S115, 121 [citCyc]. **Judgment of taxing official as to fair market value of property** will not be disturbed by courts in absence of showing of gross overvaluation constituting fraud. 154Wash212, 281P 494.

1010-35 Taxpayer is not injured by error of assessor in computing valuation of property taxed, unless tax exacted is excessive, unjust, or discriminatory. 94CalA143, 270P726.

1010-36 Conclusiveness.–22F(2d)973.

1010-37 104CalA235, 285P896(2dcase). **Allegations that supervisors could not assess stock at actual value** because uniform valuation of property for year did not exceed seventy per cent held insufficient to afford relief. 221Ky100, 298SW189. **Officers must make fair and impartial valuations.**–Fla 130S21.

1011-38 221Ky100, 298SW189.

1011-40½-New. Erroneous assessment of class of personal property will not necessarily invalidate lawful assessment against other classes, particularly where complaining taxpayer is not shown to have been affected differently than other taxpayers similarly situated. 89Fla 514, 105S115.

1011-40¼-New. Valuation on theories resulting in assessments so excessive as to be constructively fraudulent is not permissible. 144Wash469, 258P473.

1011-41 235Ky445, 31SW(2d)707. **Taxpayer's report is not proper basis of assessment,** but is merely an aid in arriving at fair value of property. 161 La669, 109S351.

1011-43 40F(2d)540; 27Hawaii190; 205 Iowa161, 217NW837; 125Me138, 131A594; 83NH148, 140A163; 290Pa 187, 138A684; 298Pa294, 148A301; 7 PaDist&Co 615; 44Philippine383. **Valuation of coal lands.**–82Mont502, 267P 1113; 290Pa187, 138A684. **In Virginia.** –146Va146, 135SE669. **Reserved right of entering lands conveyed to explore for minerals and extract same when found** should be deducted from taxable value of acreage. 82Mont502, 267P 1113. **Inclusion of legal and illegal items.**–82Mont502, 267P1113.

1011-44 Book value or cost price or value at which taxpayer expects to sell is not proper basis of assessment. 161 La669, 109S351.

1011-45 221AppDiv193, 223NYS64; 298Pa294, 148A301. **Actual cash value of real or personal property** is price it would bring in cash in ordinary course of business, free from encumbrances otherwise than at forced sale. 158La 990, 105S39. **Cost of construction and reproduction** is element to be considered. 13F(2d)982. **Present "actual cash value" and not possible future value** is proper basis for assessment. 158La990, 105S39.

1011-46 205 Iowa161, 217NW837; 261 Mass169, 158NE325; 125Me138, 131A 594 (valuation in light of experience and knowledge of assessors held just); 128 Me486, 148A799; 83NH148, 140A163; 131Misc660, 227NYS733; 133Misc225, 231NYS451; 298Pa294, 148A301; Tex CivA 3SW(2d)559. But see Iowa 230 NW304. **Valuation of coal lands.**–290 Pa187, 138A684. **In valuation of timber deduction for nonapparent defects** should not be made and inaccessible dead timber should not be singled out for separate assessment considered in valuation. 164La971, 115S51. **"Plottage."**–223NYS448. **"Plottage value" under New York statute.**–249NY284, 164 NE100. **Under statute providing for valuation of lots except house lots at actual value of acre,** assessors may estimate acre value of land listed by parcel in view of its suitability for use as house lots. 103Conn149, 130A84. **Valuation is to be determined by method** which appears possible and practicable under circumstances. 221AppDiv193, 223NYS64. **Unit rule adopted by owners** should be applied in assessment of large tract of cut-over pine lands although owners have sold small tracts. 13LaA561, 128S191. **Use to which owner puts land** does not fix value. 128Me 486, 148A799. **Valuation of timber lands.**–153Wash133, 279P392.

1012-47 221AppDiv248, 223NYS168.

1012-48 27Hawaii190. See 132Misc 506, 230NYS134 (hotel). **In Kentucky.** –215Ky125, 284SW428. **Rental income from lease contract** not made at public auction after due advertisement is of little weight in determining value of land for taxation. 215Ky125, 284SW 428. **Where owner derives no net rental therefrom,** building cannot be assessed at more than gross rental. Man [1926] 3DomLR408, [1926] 2WestWkly358.

1012-49½-New. Addition of "plottage" to value of lots adequately improved by substantial department store buildings for taxation purposes is held unjustified. 220AppDiv326, 221NYS342.

1012-49¼-New. Whether "plottage" should be added in assessing land for taxation depends on facts, location of property, character of building, and use. 220AppDiv326, 221NYS342.

1012-49¼-New. In estimating present cash value of growing crops at taxation period it is proper to consider every factor which will thereafter reasonably contribute to the expense of production, harvesting, and delivery of such crops. 28Hawaii164.

1012-49½-New. Reserve or remote coal should be assessed as such distinct from many considerations affecting active coal or that close to active production. 298Pa294, 148A301.

1012-50 Shafts leading into coal vein. –91PaSuper506. **Water mains** are appurtenant to land on which water plant is located, and should be valued as part of real estate for purposes of taxation. 322Mo 94, 148SW(2d)554. **Right to overflow land forming natural basin** is appurtenant to land overflowed, and not to dam site, and for tax purposes value will be assessed against such land. 198 Wis590, 225NW177, 64ALR140. **Different contiguous tract of coal lands used for common purpose may be joined** as one for assessment purposes. 298Pa 294, 148A301.

1012-51 332 Ill 467, 163NE769; LaA 130S654; 221AppDiv248, 223NYS168. **Uncompleted fill of submarine land** held not improvement increasing value of land. 13F(2d)982. **In New Jersey.**–141 A23. **Fact that assessor in computing valuation of hotel for assessment purposes,** according to cubic content, included contents of light and air spaces without excluding portion of such spaces exceeding ten per cent of entire cubic contents of building, in accordance with alleged rule for computing value, did not render assessment illegal or void, where it was not shown that valuation arrived at was excessive, unjust, or discriminatory. 94CalA143, 270P726.

1013-52 261Mass169, 158NE325.

1014-59½-New. Where buildings are destroyed during periodical assessment, owners have right to reduction thereof. 10PaDist&Co 339.

1014-61 104CalA235, 285P896(2dcase) (lease).

1014-62 163La102, 111S614. See also LaA 130S877. **Average assessable value of merchandise.**-166La1, 116S572. **Dealer in new automobiles by paying motor vehicle tax** on cars sold after May 1 for use on highways and adding amount to price exacted from purchaser does not become entitled to reduction or abatement of ad valorem tax. 178 Minn300, 227NW43. **Where amount of merchandise on hand at time of listing is known,** assessors should take that for taxation basis. 163La102, 111S614. **Where company had permanently reduced merchandise on hand,** assessment based on average of preceding year erroneous. 163La102, 111S614. **Neither taxing authorities nor tax debtor is bound by inventory value** of average amount of merchandise. LaA 130S642. **Actual depreciation** is to be considered. LaA 130S877.

1014-62½-New. Oil and gas leases and rights conferred thereby are subject to taxation at their fair cash value, estimated at price they would bring at fair voluntary sale. 210Ky539, 276SW527.

1014-62⅓-New. Law providing for assessment of real property does not make improvements thereon personal property for purpose of assessment. ND 231 NW542.

1014-62¼-New. Valuation of store fixtures.-LaA 130S877.

1014-63½-New. In determining value of leasehold, necessary reserve funds for amortization of debt contracted to make leasehold productive and profitable may be considered as expenses. 144Wash 469, 258P473.

1014-64 Mortgage recording tax should be measured by value which property pledged within state bears to that without. 229AppDiv289, 241NYS38.

1015-69 321 Ill 247, 151NE867. **Right to deduction; compliance with statute.**-321 Ill 247, 151NE867.

1015-76 Value of notes, credits and accounts owed by taxpayer may be deducted under statute from valuation of notes, credits and accounts owned by taxpayer. Ark 30SW(2d)213(2dcase).

1016-78 Minn 232NW35. **"Fictitious debts"** which may not be deducted are feigned ones, not real or genuine, and arbitrarily invented and set up to accomplish ulterior object. 101WVa292, 132SE748. **Application to particular debts.**-219AppDiv576, 220NYS337 (attorney's fees).

1016-80 Federal inheritance tax held not deductible as "debt." 219AppDiv 576, 220NYS337.

1016-85 13LaA561, 128S191.

1017-87½-New. Deductions from income tax.-Deduction permitted under income tax statutes are in some instances allowable in favor of individual; 214AppDiv114, 211NYS617.

1017-87¼-New. and in other cases in favor of his estate. 214AppDiv114, 211 NYS617.

1018-92 169La537, 125S585.

1018-93 203 Iowa1099, 212NW335; 235Ky445, 31SW(2d)707; 34NM479, 284P117 (power of official to list real estate not limited to particular period); 135 Okl 186, 274P876; 136 Okl 301, 278 P271; 141 Okl 185, 284P287. But see 48RI 396, 137A694. **Roll on which omitted property listed.**-31NM114, 242P329. **Statute held mandatory.**-103Conn607, 132A30. **Time for addition.**-203 Iowa 1099, 212NW335. **Statute is applicable only** to property which was taxable and within state on date fixed by statute for assessment. Ida 286P366. **Recitals in order for additional assessment held to show jurisdiction.**-Miss 130S106.

1018-94½-New. Assessment of income tax.-Expenses of trust estate in excess of income therefrom proper deduction from income from individual estate. 240NY301, 148NE530.

1018-94¼-New. Property included in assessment roll, but not assessed, held omitted. 48RI 396, 137A694.

1018-96 But see 135 Okl 186, 274P876.

1018-97 235Ky445, 31SW(2d)707; 32 PortoRico 608.

1019-1 336 Ill 606, 168NE630 (notice not required). See also 102NJL314, 132 A75. **Reassessment by state tax committee** is not proper where state equalization board cannot meet to pass on it. 141Wash28, 251P103. **Reassessment of railroad property** on which taxes have been assessed and paid is not authorized because of mistake in sworn statement or schedule filed by railroad company in designating school districts in which certain property is located. 120 Okl 289, 251P604. **Statute authorizing state board of equalization to assess omitted property** confers no authority on such board to cause property which has been duly assessed and on which taxes have been paid to be reassessed on account of error in appropriation of taxes so paid. 120 Okl 289, 251P604. **Quadrennial assessment is no longer available** where tax commission orders reassessment. 339 Ill 28, 170NE728 (delay in making reassessment held not to render quadrennial assessment available).

1019-1½-New. Reassessment after substantial completion of building, not separately listing additional improvements, is void. 331 Ill 495, 163NE403.

1019-1⅓-New. Authority to assess omitted property does not include power to revalue property. ND 231NW542.

1019-3 331 Ill 495, 163NE403. **In Delaware.**-3Del 601, 141A64. **Who entitled to notice.**-333 Ill 41, 164NE205.

1019-4 30F(2d)700. But see 339 Ill 28, 170NE728.

1019-5 Statute requiring notice of addition of omitted property does not require notice of increased valuation, especially where increase is in nature of penalty for failure to file list prescribed by law. 103Conn149, 130A84.

1020-6½-New. Tax levied on commissions in form of ad valorem tax intended by legislature to be assessed by tax assessor and board of review and collected as such by tax collector. 21AlaA 119, 106S61. **Assessment of income tax.**-12F(2d)744 (property basis of allocation); Wis 233NW72.

1020-6¼-New. Sales made on installment plan should be included in income tax report since permission to deduct losses prevents working of injustice. 187Wis539, 204NW481.

1020-6¼-New. Under liberal construction of statute, tax commission had power to require company doing credit business to report on "accrual basis" rather than former "installment basis." 187Wis539, 204NW481.

1020-6⅓-New. "Accrued" in statute means matured. 215AppDiv166, 213 NYS181 (subject to and fixed for taxation).

1020-6⅙-New. Net losses for two years prior to payment of tax are not deductible from net income on which state profit tax is paid. 287Pa54, 134A408.

1020-6⅐-New. Statute authorizing tax commission to determine true taxable income of corporation concealing its true income is mandatory. 193Wis295, 214NW447.

1020-6⅛-New. Where corporation, in order to evade tax, distributed profits in kind instead of money to two sole stockholders at cost, it is proper for tax commission to assess income tax on basis of value of goods distributed. 193 Wis295, 214NW447.

1020-6⅑-New. Taxable income must be determined by rule of statute. 193Wis 41, 214NW64.

1020-6 1/10-New. Receipts and expenditures must be computed on same basis. 193Wis41, 214NW64.

1020-6 1/11-New. Profit from sale of oil property under contract calling for unsecured installment payments during two years are taxable as income in years in which payments were actually received. 217AppDiv619, 216NYS74.

1020-6 1/12-New. Under a statute empowering state tax commission to adopt rules and regulations for enforcement of Income Tax Law, commission cannot adopt rules which change direct language of the law. 217AppDiv619, 216 NYS74.

1020-6 1/13-New. Notice is waived where taxpayer appears before board of supervisors to protest against assessment. 22F(2d)973.

1020-6 1/14-New. Federal income tax on business throughout country paid by corporation should be deducted in computing income tax under statute of state in which it has its principal place of business. 316Mo 1075, 292SW1028.

1020-6 1/15-New. Taxpayer who has made no deduction for depreciation of property in his income tax returns will not be required to deduct depreciation in determining taxable profits derived from sale of property. 195Wis192, 217 NW685.

1020-6 1/16-New. Amount of partnership funds embezzled or stolen by one partner is deductible by another partner, as "loss" in computing income for year of embezzlement or theft rather than as bad debt. 249NY409, 164NE333.

1020-6 1/17-New. Trading account of retiring member of brokerage firm with firm is deductible by continuing partner as bad debt in year in which it was charged off rather than as loss in prior year. 249NY409, 164NE333.

1020-6 1/18-New. Tax commission regulation regarding property acquired from decedent or disposed of by executor does not apply, as respects assessment of additional income tax, to payment to estate of credit balance which was included in original value of estate. 226 AppDiv108, 234NYS349.

1020-6 1/19-New. Only gain in executors' hands after acquisition by sale or other disposition of property is deemed income to estate. 226AppDiv108, 234NYS 349.

1020-6 1/20-New. Receipt by estate of property, though of uncertain value, which was part of original estate, is not "sale or other disposition of property" for determining gain or loss subject to income tax. 226AppDiv108, 234NYS 349.

1020-6 1/21-New. Phrase "other disposition of property" in provision income tax law for determining gain or loss must be construed with subsequent sections dealing with exchanges, merger, etc. 226AppDiv108, 234NYS349.

1020-6 1/22-New. Failure to assess transfer tax against estate is no justification for assessing income tax on basis not supported by law. 226AppDiv108, 234 NYS349.

1020-6 1/23-New. Methods of allocating income of persons engaged in business within and without state, must be applied so as to subject to taxation only income earned within state. 197Wis 630, 223NW85.

1020-6 1/24-New. Rejection of "completed contract basis." Wis 233NW72.

1020-6 1/25-New. Contract between subsidiary and parent corporation respecting annual profits of former does not limit determination by tax body of amount of income). 43F(2d)385.

1020-6 1/26-New. Income must be reported for year in which earned. Wis 233NW72.

1020-6 1/27-New. Assessment of income taxes.-Former assessment of income taxes, to be conclusive in subsequent proceeding, must involve same identical facts and applicable legal principles. 43F(2d)385.

1020-6 1/28-New. Value placed on stock as of January 1, 1911, in inheritance tax proceeding was not controlling in imposing additional income tax. Wis 231 NW160.

1020-6 1/29-New. Where taxpayer delivered stock in trust to use to protect remaining stock, there was no sale and resulting loss deduction from income. Wis 231NW160.

1020-6 1/30-New. Additional assessment of income taxes can be made only where return of taxpayer is not correct. 198 Wis377, 224NW124(4thcase).

1020-6 1/31-New. Where tax commission was not advised by taxpayer's report of manner in which amounts claimed as deductions were arrived at, it may as-

sess additional tax. 198**Wis**439, 224 **NW**483.

1020–6½2–New. Allowance for depreciation of sawmill on theory that its value depreciates in proportion that timber sawed bears to total amount of timber available for sawing, is not proper. 198**Wis**439, 224**NW**483.

1020–6½3–New. In determining depletion charge for cutting timber claimed as deduction, fixing of valuation as of first of year based on taxpayer's books, is proper. 198**Wis**439, 224**NW**483.

1020–6½4–New. In determining depletion charge for cutting timber claimed as deduction, valuation placed upon timber by federal income tax authorities is not conclusive. 198**Wis**439, 224 **NW**483.

1020–6½5–New. In Porto Rico income to be taken as basis for excess profits tax is same as that which determines normal tax less ten per cent of capital and fixed sum of ten thousand dollars, in accordance with proportion between net income and capital. 33**PortoRico** 485.

1020–6½6–New. Foreign corporation paying entire federal income taxes in another state is not entitled to deduct any sum from its 1926 state income for taxes so paid. **Mo** 27**SW(2d)**1.

1020–6½7–New. Tax commission, under statute, is warranted in imposing tax on foreign bank which had previously paid franchise tax on money capital invested in state, measured by its net income in 1926. 226**AppDiv**593, 236**NYS** 110.

1020–6½8–New. Under statute imposing income tax on corporation doing business within state with respect to income derived within state, ownership of property used in connection with business within state as compared to entire property owned is legitimate factor to be employed in apportioning income. 58 **ND**776, 228**NW**192.

1020–6½9–New. Net income of foreign corporation from sales in United States through branch office in Philippines of products of Philippines held derived from sources within Philippines. 51 **Philippine**154.

1020–6¼0–New. Profits on molasses produced and sold outside of Porto Rico, although temporarily stored there, should not be considered in assessing Porto Rico income tax. 13**PortoRicoFed** 263.

1020–6¼1–New. Rights of corporation permitting imported molasses to be mixed with that produced in Porto Rico pending shipment held not violated by use of percentage system. 13**PortoRico Fed**419.

1020–6¼2–New. Deductions from gross income not allowed. **Wis** 229**NW**646.

1020–6¼3–New. Increased assessment resulting from application of accounting method substituted by tax commission for method of taxpayer is invalid. **Wis** 229**NW**646.

1020–6¼4–New. Any system of accounting by which income is arrived at on basis of cash receipts and disbursements is sufficient. **Wis** 229**NW**646.

1020–6¼5–New. Change in basis of assessment from yearly income to average three-year income held not to result in tax on one-third of income for current year. **Wis** 230**NW**37.

1020–6¼6–New. In Canada moneys deducted by coöperative association from proceeds of sales of milk for members and subsequently distributed as dividends on shares are assessable for income tax as profits of profit making business. **Can** [1929] 3**DomLR**19.

1020–6¼7–New. Under Ontario statute interest on money borrowed to buy bonds by company empowered to deal in land and securities is not deductible from gross receipts. **Ont** [1929] 4**Dom LR**784.

1020–6¼8–New. Taxable income of estate is determined under some statutes by averaging income during year of distribution with that of two preceding years. **Wis** 230**NW**37.

1020–6¼9–New. Dividends received by such a company from shares of building company held by it held not exempt as derived from rentals. **Ont** [1929] 4 **DomLR**784.

1020–6½0–New. Allowance for overhead expenses of such company should be determined in proportion which nontaxable income bears to gross income. **Ont** [1929] 4**DomLR**784.

1020–6½1–New. Effect of tentative assessment as regards reassessment. **Wis** 231**NW**865.

1020–6½2–New. Sale of stock passing beneficial interest permits assessment of income tax on profit from entire stock although only portion was paid for during year. 42**F(2d)**875.

1020–6½3–New. Controlling considerations for reassessment. **Wis** 231**NW**870.

1020–6½4–New. Determination of inventories at "cost" or "market," whichever was lower, is proper. **Wis** 231**NW**870.

1020–6½5–New. Method of inventory hold properly disallowed. **Wis** 231**NW** 870.

1020–6½6–New. Where tax commissioner's audit discloses new facts it is commission's duty to reassess in light of such facts. **Wis** 231**NW**870.

1020–6½7–New. Recapture by reassessment of lost amounts, by state, by application of excessive timber depletion rate is not authorized. **Wis** 231**NW**872.

1020–6½8–New. Stumpage value of timber for income tax. **Wis** 231**NW**872.

1020–6½9–New. Fixing value of assets and assets on hand at stated dates as object of reassessment. **Wis** 231**NW**873.

1020–6¼0–New. In reassessment for years following certain date, whether depletion rate prior to that was too high or low cannot be considered. **Wis** 231 **NW**873.

1020–6¼1–New. Commission's findings in reassessment held inconsistent. **Wis** 231**NW**873.

1020–6¼2–New. Same method of allocation of profits to installments in land sales must be made on reassessment as was used in assessment. **Wis** 231**NW** 865.

1020–6¼3–New. Basis for tax on income from sale of rights to subscribe for new stock is difference between market value of rights when received and market value for which sold. **Mass** 172 **NE**643.

1020–6¼4–New. City assessor acts judicially in assessing income taxes. **Mo** 27**SW(2d)**1.

1020–6¼5–New. City assesor's assessment of income tax becomes final unless changed by board of equalization and cannot be reopened thereafter. **Mo** 27 **SW(2d)**1.

1020–6¼6–New. City assessor cannot increase income tax assessments without notice to taxpayer. **Mo** 27**SW(2d)**1.

1020–6¼7–New. City assessor has no jurisdiction to assess taxes against foreign corporation for additional income earned in 1926 but erroneously deducted because of federal income taxes paid in another state. **Mo** 27**SW(2d)**1.

1020–6¼8–New. Where statute sets time for hearing aggrieved taxpayers, notice by listers fixing other than statutory date is defective, and taxes for time covered are invalid. 101**Vt**419, 144**A**203.

1020–6¼9–New. Statute limiting power to assess additional income taxes is applicable only to assessments to be made in future. **Wis** 229**NW**641.

1020–6½0–New. Taxpayer could not treat stock as loss in year when stockholders refused to waive rights of redemption when bonds were foreclosed. **Wis** 231**NW**160.

1020–6½1–New. Taxpayer owning stock in existing corporation cannot deduct as loss for income tax purposes depreciated value of stock. **Wis** 231**NW**160.

1020–6½2–New. Details of administering Income Tax Law held for tax commission which has large discretion. 193 **Wis**41, 214**NW**64.

1020–6½3–New. Tax is not "debt" before date on which fixed and paid, where extension of time to pay beyond one year after death was granted. 215**App Div**166, 213**NYS**181.

1020–6½4–New. Amount of taxable income is for assessor to determine. **Mo** 27**SW(2d)**1.

1020–6½5–New. "Due date" in statute, giving power to extend time of payment to period not exceeding three years from due date, refers to general provision that tax shall be paid within one year after date. 215**AppDiv**166, 213**NYS**181.

1020–6½6–New. Statute requiring corporation to report changes in net income returned to federal government, and authorizing to refund, if deduction is made, does not indicate that state profits tax is to be paid on net income on which federal tax is to be paid. 287**Pa** 54, 134**A**408.

1020–6½7–New. Income of company buying deferred payment paper held to be computed on basis of entire profit on all paper and not on percentage of discount on current payments. 193**Wis**41, 214**NW**64.

1020–8 202 **Iowa**1346, 212**NW**131; 320 **Mo** 1146, 9**SW(2d)**589. **Assessor's determination of whether corporate property shall be assessed** as moneys and credits or moneyed capital is not mere ministerial act. 202 **Iowa**1346, 212**NW**131.

1020–8½–New. Reassessment.–Statute authorizing reassessment of property for previous years where prior assessment has been stricken from rolls as being too indefinite is not unconstitutional as impairing vested rights. 126**Misc**188, 213**NYS**623.

1020–10 114 **Oh**479, 151**NE**685 (excise tax on gross receipts of public utility company). **Order** of tax commission certifying omitted portion of gross receipts held valid. 114 **Oh**479, 151**NE**685. **Railroads.**–141**Miss**223, 106**S**636. **Statutes held valid.**–114 **Oh**479, 151**NE**685. **Property held illegally assessed as omitted property.**–139 **Okl** 212, 282**P**622. **Value of omitted property** on date fixed by statute may be proved like value of other property. 139 **Okl** 212, 282**P**622.

1020–11 In California.–196**Cal** 131, 236 **P**307. **In Massachusetts.**–254**Mass**609, 150**NE**851. **Full disclosure** must be made. 114 **Oh**479, 151**NE**685.

1022–21 But see 3**Del** 530, 140**A**474.

1022–24 3**Del** 530, 140**A**474.

1022–25 In New York.–213**AppDiv**402, 210**NYS**92.

1022–25½–New. Furnishing required information to assessors does not estop bank from contesting validity of tax. 26 **F(2d)**957.

1023–32 Failure of local assessor in California to take steps to have claim that property, of which he has received notice, is operative property determined as provided by statute prevents him from assessing same. 196**Cal** 131, 236**P**307.

1023–35 202 **Iowa**1346, 212**NW**131. **Assessment held not justified.**–126**Misc**239, 213**NYS**258. **Valuation of three hundred and sixty thousand dollars is improper under St. § 4019a10 Revenue and Taxation Act of 1917,** in view of subsequent increase by board of supervisors and reduction by quarterly court. 216 **Ky**78, 287**SW**212.

1024–40 In Virginia.–143**Va**332, 130**SE** 421. **Replacement cost.**–**Mass** 172**NE**579. **Depreciation.**–**Mass** 172**NE**579.

1024–45 In New York.–221**AppDiv**200, 223**NYS**367.

1025–46 41**F(2d)**395 (net income as measure); 219**Ala**513, 123**S**6; 220**NYS** 9. **Assessor may ascertain franchise value** from corporation's report or other information, and such assessment is presumptively correct. 217**AppDiv**130, 216 **NYS**208. **Corporate franchise tax** need not be based solely on amount of business done or property owned within state but, so long as reasonable, it may rest on nature or form of business. 279 **US**421, 49**SCt**377, 73**L ed**776, 65**ALR** 1341.

1025–47 220**NYS**9.

1025–48 319**Mo** 799, 6**SW(2d)**907.

1025–49 176**Ark**187, 3**SW(2d)**9. **Amount of authorized capital stock** may be made a basis for franchise tax. 271**US**50, 46 **SCt**375, 70**L ed**827, 45**ALR**1495. **Value of franchise** may be measured by number of no par value stock shares which it may issue. 271**US**50, 46**SCt**375, 70 **L ed**827, 45**ALR**1495.

1026–50 Net earnings rule.–247**NY**281, 160**NE**371.

1026–51 See also 245**NY**581, 157**NE** 866. **Donations to civic organizations** properly included when estimating value of special franchise. 218**AppDiv**44,

217NYS722. **Income of subsidiary for franchise tax purposes** held amount which parent corporation would have received had it done business in state. 217AppDiv130, 216NYS208. **In determining value of franchise under net earnings rule.**–219AppDiv227, 219NYS445. **Mode of computation and items to be included and excluded** when determining value of special franchise see 218 AppDiv44, 217NYS707. **Payment for extensions of service and installation of special metering devices** if carried into special fund not considered part of gross earnings for estimating value of franchise. 218AppDiv44, 217NYS722. **Return of 6, 6½, 7 per cent** held proper under given set of facts. 218AppDiv44, 217NYS722. **Taxes** paid on income from investments without including the income itself are not permitted in estimating value of special franchise. 218App Div44, 217NYS722.

1026–51½–New. In North Dakota statute requires subtraction from market or actual value of shares of stock of personal property listed for taxation and taxes at rate of general property tax but does not permit deduction of moneys and credits. 53ND28, 204NW861, 42ALR1039.

1026–51⅓–New. Payments under franchise requiring electric company to furnish free lighting to village in named amount held not deductible from franchise tax. 219AppDiv531, 219NYS537.

1026–51¼–New. Under statutes in some jurisdictions franchise tax on state corporation doing business entirely within state and having outstanding both par and no par value stock should be computed on total gross assets, 115 Tex441, 282SW802.

1026–51⅙–New. and not on entire authorized capital stock, surplus, and undivided profits. 115Tex441, 282SW802.

1026–53 3Del 530, 140A474.

1026–54 17F(2d)167 (capitalization of net income in past years without regard to future held fundamentally wrong).

1026–55 123Kan246, 255P46 (value of assets less liabilities); Md 151A39 (expense of installation of machinery considered). **Valuation of capital stock held properly equalized** before deducting equalized value of tangible assets. 329 Ill 388, 160NE755.

1027–56 230Ky798, 20SW(2d)979. See also 41F(2d)183. **Capitalization of corporation** held unimportant, where stock was issued to members of preceding partnership only, and none put on market. 145Va476, 134SE717.

1028–58½–New. Sale price is evidence of value. 202 Iowa444, 208NW929.

1028–62 123Kan246, 255P46 (United States bonds); 129Misc222, 220NYS334.

1029–64 Accrued taxes held not deductible as "debt." 129Misc222, 220 NYS334. **Consumer's meter deposits** held not deductible as "debt." 129Misc 222, 220NYS334. **Debt represented by note held not bona fide** and not deductible. 101WVa292, 132SE748.

1030–69 In Nevada.–49Nev46, 235P643. **Basing tax on federal return.**–220App Div362, 221NYS683. **Salaries.**–220App Div362, 221NYS683. **The dividends paid by a corporation,** etc. But see Wash 289P536.

1030–70½–New. Under constitutional provision for taxation of net proceeds of mines and statutes providing for determination of net proceeds, depreciation of mining, milling and transportation plant and equipment, taxes and insurance, and cost of maintenance of offices outside of state are not deductible. 49Nev428, 248P835.

1031–73 230Ky182, 18SW(2d)1009 (daily stock market price). **Assessors must determine whether to tax securities of company as moneyed capital** or as part of value of shares. 202 Iowa1346, 212 NW131. **Interest of stockholders must be measured** by value of corporation's assets over its liabilities. 207 Iowa879, 223NW744. **Statute declaring no par stock** should, for purposes of franchise tax, be considered as of par value of one hundred dollars per share held not based on arbitrary or discriminatory classification. 271US50, 46SCt375, 70L ed 827, 45ALR1495. **Word "assessment" may mean either act of apportioning burden** of taxation among persons or properties chargeable or particular burden assigned to each, but more commonly means official valuation of taxpayer's property for tax purposes, and is synonymous with word "appraisal." 101Vt391, 143A677. **Valuation of unsold stock** having no par value. TexCommnA 24SW(2d)344.

1031–75 Value of mortgages held by corporation which contain provision for payment by mortgagor of tax levied on mortgage interest should not be deducted from full value of capital stock in determining value of shares for assessment. 116Nebr796, 219NW140.

1031–76½–New. Statute fixing value of nonpar stock held not repealed. 171Ark 415, 285SW16.

1031–76⅓–New. In determining value of capital stock of life insurance corporation for tax purposes, amount required for payment of corporation's taxes, as shown by verified statement, and annual statement, has been held deductible. 207 Iowa879, 223NW744.

1031–76¼–New. Corporation issuing no par value stock assumes burden of statute valuing such stock at one hundred dollars for purpose of franchise tax. 318Mo 1020, 2SW(2d)790.

1031–76⅙–New. Mercantile corporation may deduct from its return of capital stock for taxation investments in shares of stock created by other corporations required to list their stock for taxation. 128Kan740, 280P786.

1032–79 "Moneyed capital" is ascertained by deducting from moneys and credits of bank deposits and money borrowed for use in its business. 73Mont 210, 236P1090.

1032–80 317Mo 1298, 298SW732, 55ALR 489.

1032–81 State board of tax commissioners held to have no authority to assess surplus and individual profits of savings bank, where legislature expressly delegated such power to county board. IndA 150NE619.

1032–81½–New. Deduction of real estate in assessing capital stock.–In Mississippi true value of real estate is to be deducted from true value of all assets in determining value of capital stock. 155 Miss436, 124S482.

1032–81⅓–New. Change of classification and assessment by auditor has been held unauthorized and void. Iowa 232 NW445 (county treasurer not bound).

1032–82 257Mass43, 153NE333 (loans on mortgages held deductible as real estate); 113 Oh37, 148NE344 (valuation for purposes for deduction to be value fixed for purposes of real estate tax, not book value). **Mortgages in savings department** in excess of two thousand dollars held deductible as real estate. 257Mass43, 153NE333.

1032–83 308Mo 237, 271SW508 (nontaxable property is nontaxable under all conditions). **Part of bank's capital, surplus, and undivided profits invested in real estate** is assessed as real estate under some statutes. 149Miss835, 116S 88.

1032–83½–New. Franchise tax.–Burden is on taxpayer to show what part of his capital is exempt from franchise tax. 213AppDiv716, 211NYS110.

1032–83⅓–New. That bank owned majority stock in realty company investing in tax exempt securities did not show fraudulent purpose of escaping taxation. 308Mo 237, 271SW508.

1032–83¼–New. Assessment of bank stock which correctly arrives at value of bank credited is not subject to attack, though statute not strictly complied with or even violated. 202 Iowa 221, 210NW126.

1032–85 259Mass124, 156NE36.

1033–87 78Mont62, 252P876.

1033–88 78Mont62, 252P876; 125 Okl 257, 257P380. **Deductions.**–319Mo 1048, 58SW(2d)40; 125 Okl 257, 257P380.

1033–89 In Idaho.–43 Ida285, 251P619 (property acquired in satisfaction of prior indebtedness held actual investment of capital stock).

1033–90 144Miss533, 110S439 (assessment held proper, though manner of arriving at value was unnecessarily set forth).

1034–91 308Mo 237, 271SW508 (tax of national bank shares is in effect tax on privilege of issuing notes against bonds deposited in United States treasury).

1034–92 See also 78Mont62, 252P876. But see 164Minn235, 204NW874, 205NW 375.

1034–92½–New. Proceeding by state to tax national bank shares before taxing income therefrom is not an election to tax under first method only. 16F(2d) 990.

1034–94 150Md380, 133A63; 316Mo 1075, 292SW1028. **Constitutionality** of statute permitting deduction of reserve from gross taxable credits has been upheld. 116 Oh416, 156NE504. **In Kansas.**–128Kan343, 278P39. **Taxable assets of life insurance company** should be determined under statute by apportioning its total liabilities between its taxable and nontaxable assets according to their respective amounts, and then deducting from taxable assets so ascertained liability so apportioned to that class. 322Mo 339, 15SW(2d)334. **Tax on personal property.**–TexCivA 14SW (2d)897.

1034–95 316Mo 1075, 292SW1028; 320 Mo 702, 8SW(2d)1057, 59ALR1026.

1034–96 320Mo 691, 8SW(2d)1068. **Reserve constitutes debt** to policyholders and may be deducted from gross taxable credits. 116 Oh416, 156NE504.

1035–97 320Mo 702, 8SW(2d)1057, 59 ALR1026.

1035–99½–New. Assets taxable by different method under general revenue laws of state should be deducted from true value of capital stock paid up. 128 Kan343, 278P39.

1035–99⅓–New. Reserve.–Life insurance company is entitled to deduct "reserve" from its credits in making return for taxation. 25 OhNPNS409.

1035–3 In New Jersey.–105NJL349, 144A629.

1036–4 99Fla1027, 128S264; 141Miss 223, 106S636; 148Miss433, 114S269. **Power to assess all railroad property in state** held to be in tax commission. 148 Miss433, 114S269.

1036–5 See also 216AppDiv626, 215NYS 711. **Legislature has power to change franchise tax** of transit corporation at any time before assessment, even if tax is for preceding year. 226AppDiv149, 233NYS434. **New York transit corporation's franchise tax** is payable at rate fixed by amendatory statute effective at time of imposition of tax which is measured by previous earnings. 226AppDiv 149, 233NYS434.

1037–7 13F(2d)442.

1037–8 13F(2d)442; 26F(2d)617.

1037–9 26F(2d)617.

1037–10 13F(2d)442.

1037–11 13F(2d)442. **"Earning capacity" of railroad,** for purpose of determining valuation for taxation purposes, is amount which property should have earned, if efficiently managed, and not actual earnings under incompetent operation. 26F(2d)617; TexCivA 292SW 964.

1037–13 13F(2d)442; 26F(2d)617.

1033–15 Report or return, etc. 221App Div248, 223NYS168. **Adopting valuations fixed by state tax commission** and taking figures prepared by county clerk held improper. 120Kan610, 245P157. **Independent investigation** by assessors and drawing their own conclusion therefrom held essential. 120Kan610, 245P 157.

1038–17 Mileage basis for tax on franchise is invalid if result is arbitrary and excessive. 274US76, 47SCt542, 71 L ed934.

1033–18 Question of fixing value is one of fact. 103NJL33, 134A669.

1038–18½–New. Act creating public utility commissioners does not prevent railroad properties from being assessed at their true value. 103NJL33, 134A 669.

1038–18⅓–New. No property of interstate road located outside of state can be taken into account in fixing taxable

value unless it plainly enhances road and its rights within state. 31F(2d) 587.

1038-21½-New. Actual and not possible use to which machinery may be put determines classification under Classification Act. 76Mont596, 247P1096.

1038-21½-New. Machinery and appliances for transforming electric current in railway substation are taxable as "implements and machinery." 76Mont 596, 247P1096.

1038-21¼-New. Engine, pumps, and pipes in railway substation and used by employees for personal use are taxable as "implements and machinery." 76 Mont596, 247P1096.

1038-21½-New. Shop machinery, used for repairing railroad electrical equipment is taxable as "implements and machinery." 76Mont596, 247P1096.

1038-21¼-New. Movable shop tools in repair shop are "implements and machinery." 76Mont596, 247P1096.

1039-23 274US76, 47SCt542, 71L ed 934.

1039-25 Receipts from union depot checking room held taxable as part of gross earnings of railroad. **Minn** 232 NW105. **Notwithstanding tax on railroad's gross receipts,** receipts from commissaries on ferry boats operated by railroad is taxable as receipts from operative property. **Cal** 291P197.

1040-27 Where road fails to earn reasonable rate on tangible assets, no intangible value inheres to latter. 274US 76, 47SCt542, 71L ed934. **"Number of miles operated."**-125Me350, 134A59. **That two roads operated on same track** does not affect liability to tax. 125Me 350, 134A59.

1040-30 Tax-exempt and noncarrier property should be deducted from market value of securities, in ascertaining taxable value of properties. 31F(2d) 587.

1040-33 274US76, 47SCt542, 71L ed934. **Physical elements of road alone** are not basis of tax. 274US76, 47SCt542, 71 L ed934. **Outside property cannot be considered** where it does not fairly add to value of local property. 274US76, 47 SCt542, 71L ed934.

1041-36 But see 321 Ill 572, 152NE523.

1041-37½-New. Navigability of the stream is determined by state tax commission for special franchise purpose. 221AppDiv200, 223NYS367.

1041-38 321 Ill 572, 152NE523; 114 Nebr84, 206NW150.

1042-40 114Nebr84, 206NW150 (roundhouse, machine shops, and office building are held not subject to local taxation).

1043-46 80Mont12, 257P478. **Trolley poles are not fixtures** taxable as improvements under statute. 80Mont12, 257P478.

1044-53 Gross receipts.-12PaDist&Co 617 (from amounts received from directory advertising and sale of materials and appliances).

1044-54 Property of oil corporation, having separate plants situated in different states, is not to be assessed on unit system basis applicable to railroads and other public corporations. 171Ark209, 284SW33. **Plants engaged in utilizing waste materials.**-160La724, 107S505. **Hawaiian corporations.**-30Hawaii775.

1044-54½-New. Missouri statute requiring electric light and power companies to make return of property in like manner as railroad companies provides lawful manner of assessing property. 316Mo 853, 293SW399.

1044-54½-New. Board of equalization is authorized to apportion value of electric light and power company's property on a wire mileage basis. 316Mo 853, 293SW399.

1045-56 35F(2d)386; 214Ala539, 108S 343; 318Mo 1020, 2SW(2d)790. **Allowance for terminal value** held proper in apportioning intangible value of cable lines. 219AppDiv401, 220NYS8. **Computation of franchise tax** held proper. 171Ark415, 285SW16. **Franchise tax on foreign owned subsidiary selling corporation showing book loss** cannot be based on foreign corporation's income from local business. 244NY114, 155NE 68. **In Michigan.**-241Mich665, 217NW 777. **Leased wire mileage** properly excluded in fixing terminal value. 220 NYS9. **Preferential treatment** is not accorded foreign corporation. 318Mo 1020, 2SW(2d)790. **Stock ownership in** subsidiary does not bring owners into state for tax purposes. 244NY114, 155 NE68. **Sums to become due on land contracts** are intangible assets for purpose of fixing privilege tax. 241Mich 665, 217NW777.

1045-57 197Wis630, 223NW85. **Where thirty-nine per cent of business originated in New York office** arbitrary assumption that twenty five per cent of business was due to terminal value held not unfair. 220NYS9. **Court cannot direct accounting** by foreign insurance company. 329 Ill 189, 160NE351. **Entire business of corporation is properly included** in computing franchise tax where its offices and factories were located, its manufacturing was completed and all its shipments made from within state. 335 Ill 150, 166NE501.

1045-58 173Ark234, 292SW98.

1045-58½-New. Under statute imposing tax on foreign corporations doing business within state, foreign corporation which was not subject to franchise tax based on its net income is taxable on no par value capital stock as of its value on October 31 succeeding date it began doing business within state. 26 F(2d)716.

1045-59 35F(2d)386. But see 318Mo 1020, 2SW(2d)790. **Statute imposing annual license fee or franchise tax** is invalid where it imposes burden on basis of total capitalization including property without state. 30F(2d)322.

1045-60 35F(2d)386; 214Ala539, 108S 343.

1045-61 35F(2d)386.

1045-63 Where total sales subject to franchise tax is undisputed, maximum franchise tax should not be based on sum greater than amount of such sales, notwithstanding corporation's failure to allocate to this state monthly average of bills and accounts receivable, as required by law, thereby precluding tax commission from fixing tax with accuracy, and court has discretion to remit proceedings for readjustment. 213App Div493, 211NYS10.

1045-64½-New. Fixing value of no par stock at one hundred dollars for purpose of franchise tax is not confiscatory, 318Mo 1020, 2SW(2d)790.

1045-64¼-New. nor is taxing property without state. 318Mo 1020, 2SW(2d) 790.

1045-64¼-New. Provision, that for purpose of franchise tax no par value stock shall be equivalent to shares having par value of one hundred dollars, is not invalid as taxing property or business without state. 279US429, 49 SCt380, 73L ed781.

1045-64½-New. Tax on both assessment and level premiums of foreign insurance company collected under retaliatory provisions of Colorado statute have been held excessive, in view of statutes of such company's home state. 30F(2d)918.

1045-64¼-New. Statutes imposing retaliatory taxes on foreign insurance companies are intended to level taxes, not to levy penalty. 30F(2d)918.

1046-66½-New. D½. **Assessment of Income Taxes.**-Traders regularly dealing in securities on own account are carrying on trade or business, and losses are deductible from income tax. 220 AppDiv30, 220NYS405.

1046-66½-New. Nonresident's transaction in securities held not sufficiently regular to constitute carrying on trade or business and losses not deductible from income tax. 220AppDiv30, 220NYS 405.

1046-68 Statute relating to publication of assessment lists in pamphlet form has been held to apply only to real estate lists. Ill 173NE274.

1046-69 3Del 583, 140A701; Mont 285 P195.

1047-70 129Misc252, 221NYS254. **Auditor's duty is ministerial.**-Iowa 232NW 445.

1047-71 129Misc252, 221NYS254.

1048-78 Requirement that land and improvements be separately assessed does not refer to valuations to be placed on these two classes. 198Cal 388, 245P 189.

1048-82 Separate assessments upon land and upon improvements thereon is necessary to make effectual requirement that improved and unimproved real estate shall have uniform basis of valuation. 198Cal 388, 245P189.

1049-86 CalA 269P940; 34Wyo 304, 243P126 (statute requiring specification of name of person or corporation to whom property shall be taxable held to require specification of owner). See also 4LaA523. **Repealing name in connection with different properties.**-206Cal 742, 276P347 (where no one could have been misled as to name of person purporting to be owner); 98CalA557, 277P 741.

1050-99 But see Mo 26SW(2d)976. **Assessment for bank capital stock taxes** showing names of shareholders and shares owned by each without extension of value against names held not void. Mo 26SW(2d)976.

1051-1 8F(2d)739, 741 [quotCyc]; 198 Cal 667, 247P195; 216AppDiv626, 215 NYS710; 69Utah204, 253P680, 686 [cit Cyc]. **Descriptions held sufficient.**-140 Miss168, 105S494. **Description held insufficient.**-130Misc275, 223NYS137. **Description must be sufficient, unaided, to identify property.**-NM 290P214. **Water rights.**-8F(2d)739.

1051-2 8F(2d)739, 741 [quotCyc].

1051-3 8F(2d)739, 741 [quotCyc]; 48 RI 407, 137A783.

1051-4 8F(2d)739, 741 [quotCyc].

1051-5 8F(2d)739, 741 [quotCyc].

1051-5½-New. Description of property in assessment roll, erroneous as to number of school district, name of tract, number of lot, and name of owner and owners of land on north and west, though accurate as to quantity of land, boundary on east, and possibly boundary on south, is not sufficiently accurate to identify parcel of land intended to be assessed. 225AppDiv722, 231NYS361.

1052-13 179Ark553, 17SW(2d)281; 82 Colo 288, 259P1025; 32NM182, 253P22; 32NM431, 258P569; 33NM535, 271P95; 216AppDiv626, 215NYS710; 126Misc 188, 213NYS623 (by boundary or other sufficient description); 298Pa85, 148A 63; 34Wyo 304, 243P126. **Description insufficient.**-Wash 290P879; 34Wyo 304, 243P126. **Railroad, described as "Dexter Company, 9½ miles of railroad,"** held sufficient as to quantity and location. 216AppDiv626, 215NYS710. **Landowner is not required to compare** description of specific tract with descriptions of other tracts in assessment books in order to ascertain if his lands have been assessed. 179Ark553, 17SW (2d)281.

1053-15 68CalA393, 229P876; 83CalA 161, 256P464; CalA 288P146; 160Tenn 403, 23SW(2d)897 (description inapplicable to any other parcel of land). **Street lines and courses.**-68CalA393, 229 P876.

1053-18 332 Ill 370, 163NE825; 32NM 182, 253P22; 160Tenn403, 23SW(2d) 897.

1053-19 CalA 288P146; 332 Ill 370, 163 NE825; 155Miss580, 124S791.

1054-20 68CalA393, 229P876; 160Tenn 403, 23SW(2d)897 (under statute held not unconstitutional). But see 32NM 431, 258P569. **Contradiction of description.**-157Miss730, 128S69.

1054-22½-New. Assessment of city's "patent right" to land conveyed by patent from federal government does not include city's "possessory right" to land. CalA 292P539.

1054-23 149Miss641, 115S786; 150Miss 818, 117S265.

1055-25 32NM431, 258P569. **Error in giving range** is immaterial where land can be identified by other parts of description or competent proof aliunde. 170La226, 127S609.

1055-28 32NM182, 253P22 (description held sufficient); 137Misc603, 244 NYS508.

1055-29 68CalA393, 229P876; 96CalA

753, 275P225; CalA 288P146; Mo 25 SW(2d)83 (invalid unless lot number given); 88PaSuper61.

1056–32 96CalA50, 273P606.

1056–35 Mo 293S378.

1056–38½–New. Statutory requirements that number of certificate and number of survey be given must be observed. TexCivA 291SW576.

1057–44 179Ark553, 17SW(2d)281; 96CalA50, 273P606.

1058–46½–New. When return of property for purpose of taxation is capable of construction that it relates to tract of land as whole and not to subdivisions or lot of which it is constituted and all parties treat it as such, court of its own accord will not construe return as being return of individual lots separately. 27Hawaii190.

1058–47 137Misc603, 244NYS508.

1058–51 170La1057, 129S635.

1059–52 Applications of rule.–74CalA 322, 240P50.

1059–54 CalA 292P155(2dcase); 129 Misc252, 221NYS254. But see 98CalA 557, 277P741. **Effect of custom of taxing officers.**–129Misc252, 221NYS254. **County clerk in extending taxes** may add reasonable amount for loss and cost of collection. 322 Ill 150, 152NE575. **Fraction to be dropped** in extending tax is that resulting from multiplication of assessed value by rate. 89CalA145, 264 P310.

1060–56 Extension of tax by auditor was no part of assessment and lots were assessed separately, though total valuation and items of taxes were listed in one sum. CalA 288P882.

1060–57 316 Ill 458, 147NE457 (county clerk authorized to extend tax at rate of forty-three cents where it was certified at forty-two and one half cents).

1060–60½–New. Extension of tax must be at rate authorized when levy was made. 316 Ill 410, 147NE492.

1060–60⅓–New. County clerk extending city taxes at amended rate effective after taxes had been levied invalid where statute did not indicate intention to operate retrospectively. 316 Ill 452, 147NE494.

1061–66 But see 153Miss392, 121S113.

1062–67 323 Ill 261, 154NE97. **Court's permission to rectify failure of assessor to attach affidavit to assessment book** held proper. 323 Ill 261, 154NE97. **Where assessment roll is corrected and approved by board of supervisors,** failure of assessor to swear to assessment roll does not render tax title void. 147 Miss127, 113S200.

1062–68 104Conn579, 134A169. **Assessor's oath that abstracts were made** "according to our best knowledge and belief" held substantial compliance with statute. 104Conn579, 134A169. **Act validating assessment roll** where assessor fails to take oath held valid. 104 Conn579, 134A169.

1064–76 150Miss245, 116S593; 315Mo 209, 286SW25. **Assessment is complete** when assessment books as approved are returned. Iowa 232NW445.

1064–77 147Miss127, 113S200. See also 96CalA747, 275P223; 96CalA753, 275P 225.

1064–77½–New. After delivery, assessors cannot repossess tax roll, their authority then being exhausted. 48RI 396, 137A694.

1064–78 149Miss368, 115S204. **Authority of board of supervisors to grant an extention of time, etc.**–149Miss368, 115 S204.

1064–79 218AppDiv287, 218NYS185.

1065–83 Published notice not required under some statutes. 150Miss245, 116 S593.

1065–87 Mo 26SW(2d)976.

1065–93 Error in statement of number of feet in boundary lines will not deprive court of jurisdiction of action for sale of land to pay taxes where lines go to definite points which control and description is not such as will mislead owner or purchaser and owner has paid taxes on premises under same defective description. 20 OhA267, 153NE140.

1066–99 36F(2d)904; 323 Ill 261, 154 NE97; 309Mo 291, 292, 274SW456 [cit Cyc].

1066–2 309Mo 291, 292, 274SW456 [cit Cyc].

1067–6 226AppDiv182, 234NYS457. **In Iowa.**–196NW287. **Statutes authorizing correction** apply only to cases designated thereby. 142 Okl 19, 285P38.

1067–7 Iowa 196NW287 (correction of error in computation in statement furnished by taxpayer consisting of improper setting off of tax-exempt securities against assessment may be done without notice to person assessed); 204 Iowa1100, 216NW712. **Correction of errors in computation without notice** and opportunity for hearing is not violation of due process. Iowa 196NW287.

1068–11 In Oklahoma.–139 Okl 212, 282 P622.

1068–11½–New. In New York legislature may direct that property omitted from tax roll be placed on roll of any succeeding year. 126Misc188, 213NYS 623 (where taxpayers evade payment by false returns).

1068–12 96CalA753, 275P225; 323 Ill 261, 154NE97; Alta [1927] 3DomLR 354.

1068–13 Me 151A670; 129Misc252, 221 NYS254, 265 [citCyc]. **City charter as to tax deed evidencing regularity of proceedings assuming to cure jurisdictional defects** held invalid. 129Misc252, 221 NYS254.

1069–13½–New. Statute cannot act retrospectively so as to validate tax assessment which was void when made. 107 Conn697, 142A574.

1069–20 Ariz 288P1034; 69CalA437, 231P598; 98CalA557, 277P741; 97Fla 426, 120S317; 36GaA391, 137SE98; 332 Ill 346, 163NE781; 208 Iowa519, 223 NW884; 161La669, 109S351; 239Mich 536, 215NW38; 149Miss368, 115S204; 320Mo 1164, 9SW(2d)603; 217AppDiv 130, 216NYS208; 137Misc878, 244NYS 41; TexCivA 10SW(2d)1035.

1069–20½–New. No presumptions raised by payment. 5PaDist&Co 16.

1070–22 86Mont58, 282P32.

1071–26 Can [1927] 3DomLR1. **Descriptions by sections, townships, and ranges** cannot be disregarded. 157Miss 730, 128S69.

1071–31 170La1057, 129S635; 141Wash 28, 251P103. **Assessment of property** is conclusive against taxpayer as to ownership and against taxpayer and public as to valuation. 144Miss533, 110 S439.

1071–31½–New. Quadrennial assessment list is not official assessment list for ensuing four years, but it is only made basis for ensuing assessment lists of board of assessors. 332 Ill 346, 163 NE781.

1072–32 NH 151A709; 218AppDiv287, 218NYS185.

1072–34 That assessor did not promptly perform ministerial duty to return assessment rolls to county auditor, as required by statute, after laying them before board of review for correction, and making up books in duplicate therefrom, and county auditor was negligent in permitting them to be taken from his possession, so that they could not be found eight years afterward, has been held insufficient to invalidate tax. 208 Iowa519, 223NW884.

1073–41 44 Ida385, 257P480.

1073–42 35F(2d)386 (statute need not provide for equalization board where there is already ample machinery provided for); 336 Ill 606, 168NE630.

1074–46 Mich 233NW198; 141Wash 350, 251P575. **Time for equalization.**–Mich 233NW198.

1074–47 35F(2d)785. **Board of county commissioners sitting as board of equalization** has no power to raise or change individual assessment in taxing district having board of review which has reviewed and equalized assessments of taxpayers in such district. 53ND728, 207NW997.

1074–48 In Florida.–89Fla514, 105S 115.

1074–51 County board of tax equalization, has been held not to have power to assess; its duty being to equalize among separate tracts valuations fixed by assessor. 320Mo 1164, 9SW(2d)603.

1075–53½–New. In Idaho, county board of equalization may raise valuation after third Monday in July, provided final order is entered before fourth Monday. 44 Ida385, 257P480.

1075–54½–New. Sessions and adjournments.–Under some statutes jurisdiction of county board of equalization is limited to session of twenty days. 114Nebr 84, 206NW150.

1075–54⅓–New. Such board may adjourn from day to day or from time to time and its jurisdiction will continue until such time as will enable assessor to forward assessment to board on or before July 10 of each year and board will have jurisdiction within time limited to hear protest of taxpayer. 114 Nebr84, 206NW150.

1075–54¼–New. In Mississippi L. (1917) c 135 relative to equalizing assessment and publishing notice thereof supersedes all previous laws in conflict therewith as to assessment and equalization by state tax commission and board of supervisors and is controlling. 147 Miss127, 113S200.

1075–54⅓–New. In making extension by order of state board, the county board is limited to the ministerial act and cannot be authorized to select lands to be increased. 32Ariz532, 260P1023.

1075–54⅙–New. It is immaterial whether county board or state board completes discharge of duties first where duties of boards are independent. Mo 23SW(2d)108.

1075–55 14PaDist&Co 200.

1075–56 14PaDist&Co 200.

1075–61½–New. County equalization board's reduction of valuation of one or more pieces of property in particular class, which brings valuation of particular property below true value set by state equalization board, requires corresponding increase in value of some or all of remaining property in particular class. 321Mo 345, 11SW(2d)38.

1075–61⅓–New. Authority of county board of equalization is limited to equalizing valuations of property within class without changing aggregate valuation of class. Mo 23SW(2d)108.

1075–63 Mich 233NW198.

1076–66½–New. County board of equalization, whose order reducing assessment of state board is unauthorized, must adjust tax books to conform to order of state board. 321Mo 345, 11SW (2d)38.

1076–67 14PaDist&Co 200.

1076–74 35F(2d)785; 30Ariz27, 243P 907 (taxpayer entitled to hearing upon question of overvaluation under Civ. Code par 4970); 197 Ind498, 150NE 413; 199 Ind708, 160NE347; IndA 150 NE619; Mont 285P195. **Judicial proceeding.**–141Miss213, 106S635. **Where statute as to hearing and notice was not followed,** order of board increasing tax was held void. 199 Ind708, 160NE347.

1077–75 In Missouri.–323Mo 180, 19SW (2d)746.

1077–77 Statute fixing date for completion of investigation held to be merely directory. 199Cal 428, 249P853.

1077–78 30Ariz27, 243P907.

1077–80½–New. Statute fixing time for completion of equalization and certification of change is directory only and failure of board to complete equalization and certify change within time fixed does not invalidate assessment. 213Ky 445, 281SW472.

1077–80⅓–New. Assessment of property, though made by county officials, is made to afford basis for levy of state tax, and to that extent is state assessment subject to jurisdiction of state board of equalization. 323Mo 180, 19 SW(2d)746.

1077–80¼–New. Where work of county board is completed before state board acts, state board need not lay its report before county board. Mo 23SW (2d)108.

1077–81 In reassessment of real estate in state oftener than every four years under statute, it was held state-wide consideration of values only was intended. 197 Ind498, 150NE413. **Raising valuations in villages.**–169Minn381, 211NW329.

1078–83 Mo 23SW(2d)108.

1078-84 But see 169Minn381, 211NW 329.

1078-85 In Missouri.-23SW(2d)108.

1078-88½-New. Statute providing for reassessment of property in county.-Under statute state tax commission has power to cause reassessment of property in county in whole or in part where, in its judgment, county assessor has failed to properly assess such property. 31NM44, 240P988.

1078-88½-New. In such case state commission may employ its own agents in making reassessment. 31NM44, 240 P988.

1078-88¼-New. In such case cost of reassessment may be paid out of tax commission fund in first instance to be repaid out of general fund of county. 31NM44, 240P988.

1078-88½-New. Such statute is not violative of provision of New Mexico constitution carrying forward all territorial laws as state laws. 31NM44, 240P988.

1078-88¼-New. Certification of assessment.-Statute, requiring state tax commission to complete equalization and certify change to auditor of public accounts prior to June, is directory and not mandatory and failure to certify within such time does not invalidate assessment. 213Ky453, 281SW517.

1078-88½-New. Where final certification is not made until after such date, it relates back thereto. 213Ky453, 281 SW517.

1078-88¼-New. Statute, reducing rate taking effect between June first and date of actual certification of taxes, does not apply to such taxes. 213Ky453, 281 SW517.

1078-89 30Ariz27, 243P907; 318Mo 373, 300SW778; 320Mo 1164, 9SW(2d) 603.

1079-90 32Ariz532, 260P1023; MoA 8 SW(2d)1038; 128Misc474, 219NYS647 (review allowed where rate stated in notice was increased).

1079-93½-New. Though taxpayer does not tender issue of inequality he does not forfeit his right to adopt commission's rate of equalization. 218AppDiv 44, 217NYS707.

1079-93¼-New. Order directing increase of valuation should so describe property as to leave nothing for local board but ministerial act of making extensions. 32Ariz532, 260P1023.

1079-93¼-New. Order permitting local board to select lands on which valuation is to be increased is void for uncertainty. 32Ariz532, 260P1023.

1079-93½-New. Order of state tax commission supplemental to order of equalization board held not equalizing order. 32Ariz532, 260P1023.

1079-93¼-New. Where state board has fixed valuation of class of property, county board can neither increase nor reduce it. 321Mo 345, 11SW(2d)38.

1079-93½-New. If provisions of statute, requiring state board of equalization to assess property according to true money value, are violated, power of correction does not lie with county board, but taxpayer who is injured may find relief in court of equity. 321Mo 345, 11SW(2d)38.

1079-93½-New. Raise of certain percentage in valuation of all properties in county does not affect equalization of individual assessments determined by county board of equalization. Mo 23SW (2d)108.

1079-93½-New. Rehearing may be had on taxpayer's application through mediation of state tax commission at any time till books are delivered to collecting officers. Mo 23SW(2d)108.

1079-94 103CalA473, 284P1072 (boards of equalization are quasi-judicial bodies).

1079-95 333 Ill 333, 164NE702. **On proper application reduction will be allowed.**-163La102, 111S614. **State tax board of review has jurisdiction** on appeal from affirmance by tax commission of action of county board raising assessment made by town board of assessors, under statute providing for appeal where commission shall increase assessment. 134SC281, 132SE589. **Effective dates of parts of Pennsylvania Fiscal Code of 1929 stated.**-13PaDist& Co 341.

1079-97 In Oklahoma.-Okl 276P767.

1079-97½-New. Nonresident owner is not confined to abatement for relief where property is overvalued. Me 151 A460.

1080-98 15F(2d)637; 17F(2d)710; 31 F(2d)506; 32F(2d)142; 103CalA473, 284P1072; 104CalA235, 235P896(2d case); 89Fla514, 105S115; 336 Ill 645, 168NE627; 202 Iowa444, 208NW929; 235Ky445, 31SW(2d)707 (assessor adding property or increasing valuations); Mass 167NE227; 83Mont1, 268P555, 557 [quotCyc]; 114Nebr740, 209NW 621; 137Misc878, 244NYS41; 138Misc 32, 245NYS267; 24 OhNPNS78; 128 Okl 153, 261P923; 133 Okl 60, 270P 1105, 1106(2dcase) [quotCyc]; 136 Okl 146, 276P762; 136 Okl 150, 276P765; 38 OklACR181; 149Wash552, 271P820; [1926] CanSC155, [1926] 1DomLR20. But see Md 151A39; 11PaDist&Co 473. **In Massachusetts.**-252Mass345, 147NE 839. **On application for judgment against delinquent lands for taxes,** court is powerless to hear evidence and reduce assessment for overvaluation. 332 Ill 467, 163NE769. **Remedy for excessive taxation** by arbitration was held repealed by statute giving right to enjoin. 267US479, 45SCt431, 69Led745. **Resistance of tax in proceeding to collect.**-Alta [1925] 3DomLR222. **Resort to board of equalization** and appeal therefrom if dissatisfied afford adequate remedy. 128 Okl 153, 261P923. **Where valuation by assessor is in fact excessive,** presumption is that board of equalization will correct it if application is timely made. 89Fla514, 105S115.

1080-98½-New. Statutory remedy for determining validity of assessment is exclusive. 214AppDiv375, 212NYS253.

1081-1 38F(2d)261; 161Tenn676, 30 SW(2d)243.

1081-3 149Wash552, 271P820.

1081-4½-New. Taxpayer will be deemed to have abandoned his demand for arbitration by failure to attend hearing on date last fixed by arbitrators, La 137SE231.

1081-4½-New. even though under the facts he could have had a hearing after expiration of the ten days fixed by statute for such hearing. 163Ga771, 137 SE231.

1081-5 229AppDiv565, 242NYS357. **Errors held fundamental.**-129Misc252, 221NYS254. **Erroneous listing and assessment of property outside of taxing district.**-38 OklACR181.

1081-7½-New. Property owner appearing generally in suit to collect delinquent taxes against property becomes party from time bill filed so as to arrest statute. 160Tenn403, 23SW(2d)897.

1081-8½-New. Only total assessment may be reviewed not method of ascertainment. 229AppDiv565, 242NYS357.

1082-9 LaA 130S654; 229AppDiv565, 242NYS357; 24 OhNPNS78; 136SC439, 134SE387; TexCivA 283SW674. **Fraud, capriciousness, or want of the exercise of an honest judgment, etc.** TexCivA 283SW674. **Complaint as to method of ascertaining fair cash value of capital stock** raises question of valuation, for which remedy is by appeal to board. 252Mass345, 147NE839.

1082-10 TexCivA 9SW(2d)1051. **Where other property is assessed at less than value** while complainant's is assessed at value, he is wronged. 125Me138, 131A 594. **Excessive valuations may be so flagrant** as to amount to constructive fraud, calling for interference by courts, though there be no evidence of excessive comparative valuation. 149Wash253, 270P812.

1082-11 31F(2d)506; LaA 130S654; 230Ky182, 18SW(2d)1009 (unreasonable discrimination not shown); 229AppDiv 565, 242NYS357.

1082-12 318 Ill 395, 149NE418; 230Ky 182, 18SW(2d)1009; 315Mo 424, 287SW 427.

1082-12½-New. Mere errors in judgment in assessing other property do not establish discrimination requiring reduction of assessment below uniform basis. 175Ark956, 2SW(2d)25.

1082-12½-New. Assessment of corporation's lands on same basis as other lands is not undervaluation. 175Ark 956, 2SW(2d)25.

1083-13 30Ariz27, 243P907; 336 Ill 606, 168NE630; 85Mont329, 278P514; 122 Or337, 255P603.

1083-14½-New. Willful refusal of owner or his agent to appear for examination when summoned, or to answer proper inquiries is forfeiture of right to procure review of assessments. 134Misc487, 235 NYS578.

1083-15 Taxpayer may bring proper action to compel listing of omitted property.-103Conn607, 132A30.

1084-20 103Conn149, 130A84; 261Mass 432, 158NE667; 47RI 351, 133A342. **Owner cannot complain of non-compliance of assessor** with statute where owner failed to file schedule. 87Colo 275, 288P408. **Nonresident owner.**-Me 151A 460.

1084-21 261Mass432, 158NE667.

1084-23 47RI 351, 133A342.

1085-27½-New. Failure to show cause when cited held to preclude property owner from thereafter questioning value fixed by board of equalization in exercise of honest, intelligent judgment. TexCivA 283SW674.

1085-27½-New. Failure to file list of property, does not estop taxpayer from setting up absolute nullity in assessment in name of former owner. 10LaA667, 120S884.

1085-28 But see 332 Ill 599, 164NE170.

1085-30 169La905, 126S232; 156Md 590, 144A842; 127Misc13, 214NYS507 (waives right to review question of value); 13PaDist&Co 341. **Taxpayer who fails, after notice, to appear before board of relief as required by statute,** is not aggrieved by failure of board to consider requested reduction in valuation. 103Conn149, 130A84. **"Failure" of board to reduce assessment,** giving right of appeal, means failure to reduce after application by owner to appeal tax court asking that assessment be reduced. 156Md590, 144A842.

1086-32 127Misc13, 214NYS503.

1086-33 125 Okl 257, 257P380. **In Virginia.**-144Va194, 131SE445. **Under Pennsylvania Fiscal Code of 1929** jurisdiction to resettle taxes was transferred to department of revenue subject to approval of department of attorney general. 13PaDist&Co 341.

1086-34 136SC439, 134SE387.

1086-37 See also TexCivA 30SW(2d) 703.

1087-45 26F(2d)469; 202 Iowa1346, 212NW131; 125 Okl 257, 257P380; Okl 276P767; 142 Okl 293, 286P891; 136SC 439, 134SE387. **Auditor of Porto Rico not authorized** to revise decisions of board of equalization and review. 27 F(2d)13. **Board acts judicially** in equalizing income taxes. Mo 27SW(2d)1. **Board of equalization** has full power to inquire into evasions of taxation. 199 Cal 428, 249P853. **Board of relief perform ministerial duties.**-103Conn607, 132 A30. **Officers without power.**-16F(2d) 92. **In Mississippi.**-155Miss533, 124S 759.

1087-46 332 Ill 53, 163NE348; 331 Ill 495, 163NE403; 85Mont1, 268P555; 125 Okl 257, 257P380; Okl 276P767; 136SC 439, 134SE387 (construing together statutes relating to abatement of taxes); Sask [1928] 1DomLR436. But see Md 151A29. **In Indiana.**-199 Ind708, 160NE 347. **In Oklahoma.**-Okl 276P767; 143 Okl 115, 287P1043(1stcase). **Repeal of statutes.**-Okl 276P767. **Authority to review "erroneous" assessments** includes review of merely inequitable assessment as well as illegal assessment. 142 Okl 293, 286P891. **Income tax assessments** cannot be increased by board of equalization without notice to taxpayer. Mo 27SW(2d)1. **Method of acquiring jurisdiction.**-141Wash28, 251P103. **Under statute empowering tax commission to adopt rules and regulations** to enforce Income Tax Law rules may not be such as to change direct language of statute. 217AppDiv619, 216NYS74. **Examiner of records held to have power under exist-**

ing statutes to review assessments made by commissioners of revenue for years preceding creation of his office, under statutes existing at time. 144Va194, 131 NE445. **Statute creating office of examiner of records is not retroactive** to give examiner authority to review assessments made by commissioners of revenue for years preceding its enactment. 144Va194, 131SE445. **County supervisors have no discretion to deny city's petition for cancellation of invalid taxes** although statute uses word "may." CalA 292P559.

1093-49 Unless inequality or discrimination results from scheme adopted, board will not be held to have exceeded powers. TexCivA 297SW923.

1039-52 203 Iowa218, 212NW468; 320 Mo 680, 8SW(2d)1067(1stcase); Mont 285P195; 125 Okl 257, 257P380; TexCivA 293SW318 (board held to have right to correct owner's statement). **No moving party necessary to set statute in motion.**–103Conn607, 132A30. **Power to put omitted property on list is exercise of new power and** is reviewable in superior court. 103Conn607, 132A30. **Such statute may be independently invoked,** as it is complete in itself and is not connected with General Tax Law. 103Conn607, 132A30. **Auditor could make changes** so as to include items improperly omitted before last half of years' tax had become delinquent. 203 Iowa218, 212NW468. **Acceptance of first half of taxes assessed held no bar** to later addition of erroneously omitted items by auditor. 203 Iowa218, 212NW 468.

1090-57 101NJL458, 130A204.

1091-61 83Mont1, 268P555; 125 Okl 257, 257P380. But see Oh 170NE648. **In Mississippi.**–146Miss345, 111SS594. **Change of valuation between assessment periods.**–332 Ill 346, 163NE781. **Right to change assessment annually.**–333 Ill 41, 164NE205. **Tax on net receipts** is tax on personal property, and is subject to reduction, debasement, and equalization as other personal property within state. 330 Ill 608, 162NE178.

1092-64 142 Okl 180, 286P318.

1092-65 155Miss533, 124S759; 102NJL 36, 130A648 (source of information immaterial); TexCivA 18SW(2d)508. **Board may assess money deposited in savings** bank temporarily for purposes of evasion. 199Cal 428, 249P853. **Gross increase.**–332 Ill 599, 164NE170. **Increasing assessment only in part of city.**–333 Ill 333, 164NE702. **Increasing valuation of improvements.**–169Minn381, 211NW 329.

1093-66 208Cal 677, 284P663; 102NJL 36, 130A648 (after inspection and investigation).

1093-68½–New. Increase of valuations to correct discrimination.–Taxpayer cannot eliminate discrimination between assessment on real and personal property by securing increase of valuation in undervalued property since this is public remedy. 32F(2d)639.

1093-69 24F(2d)931; 170La251, 127S 618; 54ND919, 212NW233 (statute held applicable); 136SC439, 134SE387 (comptroller or tax commission); 153 Tenn332, 284SW64 (assignment on land of bank without allowance on assessment of capital stock is within jurisdiction of county board of equalization as excessive, not double, taxation). **Board's compromise is effective without approval** by state tax commissioner. 54ND919, 212NW233.

1093-71½–New. Act of county board of review in setting off against assessment of bank stock amount of federal tax exempt securities held by bank, thereby canceling assessment, is both error and nullity. Iowa 196NW287.

1094-73 125 Okl 257, 257P380.

1094-75 204 Iowa512, 211NW485. **For error in computation** remedy may be had through auditor. 203 Iowa444, 208NW 929.

1094-76 Assessment for taxation not ascertained on each tract separately as required by statute cannot be corrected. 323 Ill 574, 154NE439.

1095-79½–New. Where reassessment of certain taxing units is ordered by state board, it is unnecessary for board to change assessment throughout state in order to maintain equality. IndA 166 NE21(2dcase).

1095-82 Adjournment made necessary by refusal to furnish inventory held proper. 85 IndA615, 155NE215.

1096-88 149Miss368, 115S204.

1096-89 See also 85 IndA615, 155NE 215.

1097-90 Validity of provisions.–156Md 590, 144A842. **In Pennsylvania.**–13Pa Dist&Co 341.

1097-91 257Mass43, 153NE333.

1097-92 134Misc487, 235NYS578; 143 Okl 217, 289P352(1st case) (proceedings before court of tax review is special proceeding); TexCivA 297SW923. **Mere denial of application for review** held insufficient. 122 Or337, 255P603. **Proceedings for relief from double taxation** by different counties must substantially follow statute. 84CalA577, 258P991. **Nature of proceeding.**–142 Okl 1, 285P 72. **State tax commission required to state basis of assessment on demand** by taxpayer on hearing of objection to assessment. Md 151A39 (statement by chairman of commission held sufficient).

1097-94½–New. Right to hearing.–Taxpayer is not entitled to complain of want of hearing before board of review which raised assessment, where she declined to answer questionnaire and appeared before board by agent and failed to ask for hearing. 321 Ill 247, 151NE 867.

1097-94¼–New. In Massachusetts, petition for abatement is sole remedy for excessive valuation. 261Mass432, 158 NE667.

1097-94¼–New. Board of assessors should act within reasonable time on petition for abatement. 261Mass432, 158 NE667.

1097-94½–New. It has been held that taxpayers should make all objections they have. Iowa 232NW445 (objections may be made informally).

1098-96 322 Ill 613, 153NE633; 323 Ill 261, 154NE97; 325 Ill 33, 155NE859; 330 Ill 606, 162NE111; 335 Ill 211, 167 NE96(1stcase); 336 Ill 606, 168NE630; 339 Ill 90, 170NE667; 198 Ind417, 153 NE177; 208Ky7, 270SW995; 235Ky 445, 31SW(2d)707; 158La288, 103S771; 149Miss576, 115S716; Nebr 227NW 452; 192NC161, 134SE403; 54ND289, 209NW558 (notice of reassessment required by statutes held to refer solely to reassessments ordered by county commissioners and not to reassessments by order of tax commissioner); 141 Wash28, 251P103. But see 102NJL36, 130A648. **Failure to give notice.**–153 Tenn332, 284SW64 (one desiring to appeal must keep himself advised of board's conclusion). **Acceptance of taxpayer's schedule as correct** by assessors renders subsequent alteration without notice ineffective. 323 Ill 261, 154NE97. **Increase after reduction.**–332 Ill 346, 163 NE781. **Reassessment ordered by tax commissioner** held void for failure to give notice of time and place of meeting of county commissioners to review and equalize assessment. 54ND289, 209NW 558. **Exceptional cases.**–339 Ill 90, 170 NE667.

1099-97 336 Ill 606, 168NE630. **In Nebraska.**–118Nebr136, 223NW667.

1099-97½–New. After work of revision completed valuation cannot be increased without notice. 192NC161, 134SE403.

1100-99 215Kan139, 284SW1027. **Publication in newspapers of increased tax schedule** held sufficient. 323 Ill 261, 154 NE97. **Incorrect date in newspaper notice** corrected six days later held good notice. 192NC161, 134SE403.

1100-2 TexCivA 18SW(2d)508.

1101-5 215Ky139, 284SW1027.

1101-10½–New. Under Illinois statute, board of review need not give notice to every property owner in city of its intention to raise assessed value of real estate, but notice to fifty real estate owners therein is sufficient. 333 Ill 333, 164NE702.

1101-11 335 Ill 198, 167NE32.

1102-13½–New. Voluntary appearance to obtain reduction of valuation does not give board jurisdiction to increase valuation or waive right to notice of possible increase. 141Wash28, 251P103.

1102-15 Oral application made to chairman of board of assessors has been held sufficient though not brought to attention of other members. Mass 171 NE434.

1102-17 163Ga465, 136SE432; 195NC 62, 141SE289 (application held not in compliance with statute).

1103-18 134Misc487, 235NYS578.

1104-25 217AppDiv130, 216NYS208.

1104-26 321 Ill 247, 151NE867 (on final hearing); 217AppDiv130, 206NYS208; 219NYS407; 134Misc487, 235NYS578; 122 Okl 34, 252P408. **Where amended tax return is filed** by power company, listing hydroelectric properties as operative contrary to original report, burden is on it to prove such different fact. 206Cal 486, 274P962.

1104-27 TexCivA 297SW923. **Giving great weight to rental value** held not necessarily to lead to erroneous valuation. TexCivA 297SW923.

1104-27½–New. On appeal from county to state board being heard de novo there is no presumption that tax valuation of county board is true value of property. NJSup 139A604; NJSup 139A605.

1104-27¾–New. Burden is on city to establish that money in hands of bank did not truly represent sum available for taxation by reason of fraudulent conversion. NJSup 151A364.

1104-29 134Misc487, 235NYS578.

1104-30 Md 151A29 (opinion evidence on valuation of land).

1105-31½–New. Evidence of company's balance sheet held inadmissible, when it included property in other townships and property in defendant township was not allocated thereon. NJSup 133A 751.

1105-32 216Ala102, 112S348.

1105-33 TexCivA 299SW660.

1105-35 NJSup 139A606.

1105-33 Taking income from real property as factor in determining market value held not tantamount to tax on income. TexCivA 297SW923.

1105-39 Del 148A97; Del 151A663 (sufficiency of evidence as to particular facts); NJ 151A80 (valuation of state board sustained by evidence). **Evidence held insufficient.**–NJSup 151A364.

1105-39½–New. Evidence held insufficient to support state board's valuation and assessment of property. NJSup 139A604; NJSup 139A605.

1105-39¾–New. Taxpayers, in proceedings to reduce assessments of valuation of lands, were entitled to relief in spite of failure to show value of any particular section or part of section, where testimony was to effect that all land was of same character and was of substantially same value per acre. 178Ark32, 10SW(2d)32.

1105-39¼–New. It is for board to judge weight and value of evidence in proceedings before it. 104CalA235, 285 P896(2dcase).

1106-40 TexCivA 297SW923.

1106-42 Assessors need not apply rigid rules of evidence. 221AppDiv248, 223 NYS168.

1106-42½–New. Where evidence warranted increased assessment, action of board in considering personal knowledge of members was not prejudicial. TexCivA 299SW660.

1106-44 134Misc487, 235NYS578.

1106-45½–New. Where assessors did not object to answers to questionnaire or to incomplete data furnished by one of taxpayer's agents and did not require another agent to appear for examination, they are deemed to have waived such further information. 134Misc487, 235NYS578.

1107-46 Reduction of assessment.–Iowa 228NW28 (assessment held properly reduced).

1107-51½–New. In determining just value as compared with assessment of like property equalization boards consider question on view of taxpayer's entire assessment. 143Miss870, 108S288.

1107-53 Utah 280P1065.

1107-55½–New. Order of board of equalization, directing abatement of assessments, is not void on its face because not certified by county auditor,

where such certification is not required. Utah 280P1065.

1107-56 333 Ill 333, 164NE702. In Mississippi.–154Miss787, 122S762.

1107-57 149Miss576, 115S716. Failure of record to show giving of notice of filing of assessment rolls renders proceedings void. 149Miss576, 115S716.

1108-60 Giving of notice that assessment rolls had been filed and were open to objections may not be shown by copies of newspapers on file with chancery clerk. 149Miss576, 115S716.

1108-60½-New. In raising assessment to include property omitted by assessor, only record board is required to keep is to note additional assessment on tax books. 321 Ill 247, 151NE867.

1108-61 333 Ill 333, 164NE702. Amendment after board becomes functus officio, cannot be admitted in evidence without clear and satisfactory proof that amended record speaks truth. 333 Ill 333, 164NE702.

1108-61½-New. Amendment by court order.–Record of board of review may be amended by order of court on hearing on application for judgment for delinquent taxes, provided evidence of mistake in original record and of truth of amended record is clear and satisfactory. 333 Ill 333, 164NE702.

1108-62 30Ariz27, 243P907; 196Cal 131, 236P307 (decision of state board of equalization as to whether certain property of utility corporation is operative or nonoperative, given after hearing, is conclusive on all parties unless set aside by court of competent jurisdiction); 104CalA235, 285P896(2d case); 106Conn220, 137A741; Md 151A29 (final as to questions of fact under former statutes); 141Miss223, 106S636; 146Miss44, 111S739; 315Mo 424, 287SW427; 221AppDiv471, 224 NYS140; 54ND919, 212NW233; 153 Tenn332, 284SW64; TexCommnA 5 SW(2d)756; TexCivA 283SW674; Tex CivA 297SW923; TexCivA 299SW660; TexCivA 9SW(2d)1051; TexCivA 27 SW(2d)918. But see 319Mo 445, 3 SW(2d)1021. Decision is final unless appealed from.–125 Okl 257, 257P380. Rulings of state tax commission in exercise of powers legally delegated will not be disturbed when reasonable and within jurisdiction. 131SC466, 128SE8. Assessment of omitted property by county board of equalization is conclusive in absence of showing that property was exempt or some other valid reason. 118Nebr136, 223NW667.

1109-62 Assessment not rendered invalid by any informality or irregularity by board in execution of their duties. 235Ky445, 31SW(2d)707.

1109-63 104CalA235, 285P896(2dcase); 146Miss44, 111S739; 318Mo 373, 300SW 778, 780 [citCyc]; MoA 8SW(2d)1038; 14PaDist&Co 200; TexCivA 283SW 674; TexCivA 24SW(2d)517.

1109-64 See also 134SC281, 132SE589. Error which may be corrected.–Iowa 196NW287.

1110-66 53ND728, 207NW997. Disturbed only for abuse of discretion.–142 Okl 293, 286P891. Decision on application for abatement held not final where questions of law apparent on record are involved. 257Mass43, 153NE333.

1110-67 104CalA235, 285P896(2dcase); Md 151A29. Equalization by municipal board is exercise of administrative discretion, which court of equity will not control in absence of illegality or fraud. 89Fla514, 105S115. Fraud held only ground to set aside judgment.–315Mo 424, 287SW427.

1110-68 54ND919, 212NW233; 38 Okl ACR181. See also TexCivA 9SW(2d) 1051.

1110-69½-New. Decision will not be set aside, unless board abused its power or exceeded its jurisdiction. 206Cal 486, 274P962.

1110-69¾-New. Order increasing assessment, if void, should be disregarded, thereby leaving original assessment in force. Miss 130S683.

1110-70 125Me138, 131A594; 315Mo 430, 286SW360; 315Mo 424, 287SW427; 323Mo 180, 19SW(2d)746.

1111-71 332 Ill 599, 164NE170; Mont 285P185 (statute construed); Board of review must list property assessed, setting down assessed value opposite specific kinds of properties, and may not assess lump sum as value of all property. 332 Ill 599, 164NE170.

1111-72 County clerk's duty.–Mont 285 P185.

1111-74½-New. Board of review may properly raise assessment to include property omitted by assessor, without itemizing same as original assessment. 321 Ill 247, 151NE867.

1111-75 43F(2d)385; 30Ariz620, 249P 768; 317 Ill 547, 148NE273; 332 Ill 467, 163NE769; 336 Ill 645, 168NE627; 339 Ill 28, 170NE728; Md 151A39 (error of judgment not reviewable); 259 Mass1, 156NE42; 319Mo 445, 3SW(2d) 1021; 10PaDist&Co 139 (equity); Tex CivA 297SW923. Constitutionality of statutes allowing review of orders of state tax commission.–114 Oh658, 151 NE760. Review of decision of circuit court in action to review action of tax commission assessing income tax is unauthorized in some jurisdictions. 118 Or 92, 245P1085. Objection that valuation was raised without notice must be made to justify consideration by court. 318 Ill 395, 149NE418. Statute giving county courts jurisdiction to correct clerical errors in assessments does not give court jurisdiction to correct assessment by transferring fixtures listed as personalty to real property class. 218Ky259, 291SW 32, 51ALR281. In New Jersey.–103NJL 26, 135A61. Assessments become reviewable judicially only when they are translated into action as by levy of tax based on assessment. 277US267, 48SCt 523, 72Led877. Courts can only review, not make, assessments.–Ark 31SW(2d) 521(1stcase).

1112-76 30Ariz620, 249P768; 327 Ill 590, 158NE849; 246NY322, 158NE884. Hearing of two similar applications together held matter of discretion of trial court. 145Va476, 134SE717. Question whether taxing power has been exercised capriciously, arbitrarily, or on fundamentally wrong basis is within jurisdiction of courts to determine. 144Wash 469, 258P473.

1112-77 30Ariz620, 249P768; 198Cal 388, 245P189; 317 Ill 547, 148NE273; 332 Ill 467, 163NE769. Error in assessing same property twice could be corrected in supreme court. 223Ky461, 3SW(2d)1067. Irregularities and improprieties in procedure of board of equalization are within exclusive jurisdiction of law court. 156Tenn643, 4SW (2d)343.

1113-78 144Wash469, 258P473.

1113-78½-New. Equity has jurisdiction to set aside action of member of state board of tax commissioners, acting as board, in review of township assessment roll. 235Mich261, 209NW122.

1113-78¼-New. Record held to show that court affirmed order abating tax assessment on merits and did not dismiss appeal. 141Miss24, 105S751.

1113-78¾-New. Attempt to evade taxation will be closely scrutinized by courts. 193Wis295, 214NW447.

1113-78⅞-New. Taxpayer is not limited in securing review of assessment to procedure under statute limiting time for action for review conflicting with subsequent section relative thereto. 195 Wis226, 218NW438.

1113-78⅞-New. Validity of a statute imposing or authorizing tax or legality or equality of tax assessment as made may be judicially determined in adjudicating litigated rights as to tax. 97 Fla426, 120S817.

1113-80 In Connecticut.–109Conn358, 146A723.

1113-81 235Ky445, 31SW(2d)707 (appeal from board of supervisors to quarterly court); 32NM182, 253P22; 28 OhA 398, 162NE756.

1114-82 42F(2d)30; 83Colo 82, 262P 523; Iowa 196NW287; Iowa 228NW28 (lessees of long term held persons aggrieved); 125Me138, 131A594; 156Md 133, 143A656; 148Miss834, 114S873; 149Miss395, 115S724; 53ND728, 207NW 997 (decision denying application to correct illegal assessment); 122 Okl 70, 250 P1024; 125 Okl 257, 257P380; 288Pa 359, 136A239; 5PaDist&Co 329; 13Pa Dist&Co 341 (appeals from tax settlements); [1926]CanSC155, [1926] 1DomLR20; Ont [1929] 3DomLR480; PrEdw Isl [1930] 4DomLR61. In Arizona.–30 Ariz27, 243P907. In Canada.–[1926]Can SC155, [1926] 1DomLR20. Legislature may permit trial de novo.–148Miss334, 114S873. Effect of Pennsylvania Fiscal Code of 1929 on appeals from tax settlements.–13PaDist&Co 341. In Manitoba.–[1929] 4DomLR306. Remedy is adequate and exclusive.–Iowa 232NW445.

1114-84 See also 107Conn697, 142A574; 117Nebr507, 221NW433.

1115-88 58ND359, 226NW521 (record examined and held that application was made, hearing had, and notice of decision given). See also 225Ky246, 8SW (2d)401. Where notes of evidence before taxing officer were not taken, judge cannot review the taxation. BC [1927] 2 DomLR71. Necessity of petition in error.–143 Okl 96, 287P996; 143 Okl 96, 287P997(1stcase).

1115-89 But see Oh 170NE648.

1115-90 235Ky445, 31SW(2d)707; 157 Md279, 145A770. Appeal not writ of review is proper remedy to review decision of court of original jurisdiction on appeal from order of state tax commission. 144Wash469, 258P473.

1115-90½-New. If board is provided for hearing objections of taxpayer, hearing in court is not indispensable. 30 Ariz27, 243P907.

1115-90¾-New. Taxpayer must first exhaust remedies before administrative boards established to correct assessments. 192NC161, 134SE403.

1115-91 116Nebr282, 216NW815, 117 Nebr507, 221NW433; 125 Okl 257, 257P 380; 138 Okl 205, 280P574; 143 Okl 192, 280P577(1stcase); 143 Okl 41, 280 P577(2dcase) (statute mandatory); 12 PaDist&Co 48; 13PaDist&Co 341; 145 Va476, 134SE717. After approval of assessment.–146Miss101, 112S12.

1116-92 27F(2d)766; 58ND359, 226NW521 (where application for revision was heard and decision made, which was allowed to become final, no proceedings for review being had); 125 Okl 257, 257P380; 39 OklACR 271 (listing of omitted property); Pr EdwIsl [1930] 4DomLR61.

1116-93 Grantee of land may continue objections to assessment begun by grantor. 78Colo 387, 242P70. Appeal on behalf of others.–227Ky768, 14SW (2d)160.

1116-94 On appeal by county attorney from order refusing to add omitted property to tax rolls fact that state is not specifically mentioned as appellant is not fatal to appeal. 119 Okl 216, 249P 401.

1116-95 Town is proper and necessary party defendant. 107Conn697, 142A574.

1116-95½-New. Neither auditor of public accounts nor commonwealth is necessary party by name to proceeding under statute to correct alleged erroneous assessment, unless auditor deems it proper to intervene under provision providing for appeal by auditor. 144Va 194, 131SE445.

1116-95¾-New. Provision that auditor of public accounts shall be defendant in chapter of code prescribing mode of recovering claims against commonwealth has no application to motions under code to correct erroneous assessments of property for taxation. 144Va194, 131 SE445.

1116-97 78Colo 387, 242P70; Iowa 228 NW28 (appearance by board of review). Notice to city where taxpayer was taxable is unnecessary on appeal from order of state tax commission. 144Wash469, 258P473. Actual service does not cure insufficiency of notice. Iowa 231NW 459. Appearance of members is ineffectual to confer jurisdiction, where notice of appeal was not properly addressed, and insufficient. Iowa 231NW 459. Notice of appeal is sufficient if addressed to and served on presiding officer of reviewing board. Iowa 231NW 459. Notice is ineffectual for failure to name presiding officer of reviewing board. Iowa 231NW459.

1116-99 78Colo 387, 242P70 (striking of complaint held error); 84Colo 441, 271P183. **Bill of particulars.**–143Miss 870, 108S283 (petition on appeal from order approving assessment held sufficient bill of particulars).

1117-2 Failure to except to order entering conviction in proceeding for conviction of tax will preclude review. 144 Va194, 131SE445.

1117-3½-New. Injunction pending appeal.–Taxpayer is entitled to injunction against sheriff to restrain collection of taxes pending appeal in quarterly court. 227Ky768, 14SW(2d)160.

1117-4 See also 29Hawaii183.

1117-4½-New. Nor is tax commissioner's order for apportionment of valuation for taxation reviewable, only orders of commission determining valuation or liability of property for taxation being within statute. 28 OhA398, 162NE [illegible]

1117-5 21F(2d)355; **Iowa** 232NW445; 125Me138, 131A594; 148Miss834, 114S873; NJSup 139A413; 117 Oh345, 158NE868; 144Wash469, 258P473. But see 207Iowa876, 223NW744. **On review,** court has same powers as board. 148Miss834, 114S873. **In Connecticut.**–109 Conn[illegible], 146A[illegible].

1118-6 215Ala586, 112S193; 83Colo 82, 262P523; **Md** 151A29 (matter reviewable); 125 Okl 257, 257P380. **Taxpayer making oral instead of written objections as required by statute** is concluded by assessment. 157Miss249, 128 S110.

1118-7 Right of appeal from decision of board of review is restricted to cases in which it is claimed that property assessed is exempt from taxation, as distinguished from cases in which tax is alleged to be void. 330 Ill 608, 162NE 179.

1118-8 125Me27, 130A507; 148Miss44, 113S[illegible]; 217Mo424, 28[illegible]SW427; [illegible] NJL[illegible]; 104A844; 146 Okl 217, 290P [illegible]; 153Wash[illegible]. 279P392 (courts will not interfere because of mere difference of opinion as to value); [illegible] WVa[illegible], 35SE745; Wis 231NW [illegible]. **In Pennsylvania.**–300Pa564, 151A [illegible]

1118-9 41F(2d)[illegible]; 117Nebr214, 220 NW[illegible]; 142 Okl[illegible], 285P[illegible]; BC [1920] 4DomLR80. Determination of taxing officials affirmed by board of revision, state taxing commission, and court of common pleas will be affirmed by court of appeals in absence of showing of method used in assessing property at true value or that method used was different from that used in assessing other similar property. 27 OhA17, 160NE 635.

1118-9½-New. Scope of review on appeal from state tax commission stated.–114 Oh658, 151NE760.

1118-9½-New. Weight of evidence.–Judgment of circuit court valuing land should not be reversed unless clearly against weight of evidence. 215Ky125, 284SW428.

1118-9¼-New. Sale value is important consideration. 5PaDist&Co 507.

1118-9½-New. Supreme court will not undertake computation from mass of figures to determine whether levy is excessive. 142 Okl 8, 285P48.

1119-10 216Ala102, 112S348; **178Ark** 82, 10SW(2d)32; 83Colo 82, 262P523; 205 Iowa161, 217NW837; 125Me27, 130 A507; 125Me138, 131A594; **Md** 151A 29; 252NY19, 168NE449; **217AppDiv** 130, 216NYS208; 220AppDiv362, 221 NYS683; 223NYS448; 10PaDist&Co 205; 10PaDist&Co 546; 144Va194, 131 SE445 (assessment presumed correct and burden on applicant to show assessment beyond fair market value). But see NJSup 139A413. **Taxpayer claiming debt as deduction from assets** has burden of proving validity and good faith of indebtedness. 200 Iowa776, 205 NW341 (evidence insufficient). **Evidence held not to show illegal levy.**–315Mo 430, 286SW360. **Evidence held sufficient.**–205 Iowa161, 217NW837; 117Nebr214, 220 NW241 (bridge); 144Wash469, 258P 473. **Evidence held insufficient.**–223Ky 461, 3SW(2d)1067. **Valuation sustained by abundant evidence** cannot be interfered with. 83Colo 82, 262P523. **Appellate court assumes** appreciation was not reported and no tax paid where record does not disclose it was done. **Wis** 231 NW865. **Not assumed commission followed unconstitutional statute.**–**Md** 151A 39. **Taxpayer claiming that percentage of assessment to market value exceeded that applied in district** need not show value of other property throughout district. 299Pa385, 149A653.

1119-10½-New. Taxpayer must prove that valuation with reference to just value of property is manifestly wrong and he must establish indisputably that he is aggrieved. 125Me27, 130A507.

1119-10¾-New. Taxpayer has burden of proving that valuation is manifestly wrong. 125Me27, 130A507.

1119-11 221Ala230, 128S596; 78Colo 393, 242P635; 117 Oh345, 158NE868. But see 144Wash469, 258P473. **Circuit court may require production of books and papers.**–148Miss834, 114S873. **Court should instruct jury to disregard any statement in nature of opinion not made under oath.** 216Ala102, 112S348. **Entries in books of industrial company are not conclusive on assessing authority** as to fair market value of property to be taxed as capital. 144Va194, 131SE445. **Evidence held to sustain decision of commissioner of revenue** as to fair market value of property and assessments made by him as against book values reported by examiner of records. 144Va194, 131SE445. **Excluding tax sheet on other property** than that being assessed is not error. 216Ala102, 112S 348. **Instruction that jury in assessing property for taxation might consider assessment of adjoining property** is erroneous. 216Ala102, 112S348. **Evidence of mining operations on leased lands** has been held admissible in proceeding to assess lessor's adjoining lands. 221Ala230, 128S596. **Exclusion of evidence of protesting taxpayer is proper** where tax was computed by approved statutory methods. **NC** 153SE 850. **In considering tax appeals the weight of the evidence** is before the supreme court. 298Pa294, 148A301. **Recitals as to consideration in deeds of** other property are properly rejected. Iowa 228NW623(2dcase). **Sufficiency of evidence.**–**Iowa** 228NW623(2dcase); 299 Pa385, 149A653.

1119-11½-New. In determining whether taxpayer is overrated, with reference to actual value of buildings their character and original cost are of but little significance. 125Me127, 130A507.

1119-11⅔-New. Price paid at auction sale not true criterion of market value of property. 125Me27, 130A507.

1119-11¾-New. There is presumption that bargain price of real estate is somewhat less than its true market value. 125Me27, 130A507.

1119-13½-New. Taxpayer held not to have sustained burden of proving that his property was wrongly over-assessed. 125Me27, 130A507.

1119-13½-New. To sustain assessment there must be evidence in record of valuation of property assessed to amount necessary to support assessment. 101 NJL371, 129A189.

1119-13¼-New. Evidence held sufficient to justify finding as to market value of land. 215Ky125, 284SW428.

1119-14 230Ky798, 20SW(2d)979 (circuit court can increase value of shares of stock of bank for purposes of taxation); 320Mo 702, 8SW(2d)1057, 59ALR 1026; 5PaDist&Co 507. **Payment of commissions.**–146Miss101, 112S12. **Where on certiorari court has failed to weigh evidence and render its decision** according to its view, case will be remanded. 101NJL371, 129A189. **Costs** are usually allowed successful party, though they may be apportioned in court's discretion. 216Ala102, 112S348. **Findings on conflicting evidence cannot** be disturbed. 83Colo 82. 262P523. **Judgment should be that which board should have rendered.**–148Miss834, 114 S873. **Where record does not contain order of board of supervisors and tax commission showing approval of assessment roll,** supreme court will reverse judgment of circuit court and remand cause for perfection of record. 150Miss 329, 116S431. **State board may not dismiss appeal without regard to expert** witnesses' testimony. **NJSup** 139A415. **Judgment annulling action of board of review** extended only to board's action on increasing assessment of taxpayer's improvements and not to changes in assessment of its stock in trade. 199Wis 175, 225NW730. **In Ontario.**–[1929] 3 DomLR480. **Valuation has been held not excessive.**–221Ala230, 128S596.

1119-15 78Colo 393, 242P635; 83Colo 82, 262P523; 205 Iowa161, 217NW837; Iowa 230NW304. **Valuation must be so excessive as to amount to fraud.**–144 Wash469, 258P473.

1120-16 125Me138, 131A594. **Just value is property assessed** in absence of showing that taxes on other property were assessed on less than just value. 125Me138, 131A594. **To support claim of discrimination,** entitling petitioner to equalization with other property, something which in effect amounts to an intentional violation of essential principle of practical uniformity must be shown. 125Me138, 131A594.

1120-18 Contra 148Miss834, 114S873.

1120-21 58NS243, [1926] 1DomLR212.

1120-23 141Miss223, 106S636; 319Mo 1048, 5SW(2d)40; 103NJL28, 134A722 (holding supreme court has power to review questions of fact); 217AppDiv406, 216NYS248; 218AppDiv287, 218NYS 185; 220AppDiv49, 220NYS365; 156 Tenn643, 4SW(2d)343.

1121-26 Denial of due process.–**NJSup** 134A620.

1121-29 30Ariz620, 249P768; 235Mich 261, 209NW122. **Assessment of omitted moneys and credits** is not reviewable by certiorari. 166Minn414, 208NW181.

1122-31 217AppDiv123, 216NYS458; 217AppDiv406, 216NYS248 (improper inclusion of exempt property); 217App Div619, 216NYS74 (erroneous assessment of income tax); 218AppDiv287, 218NYS185 (irregularities in assessment of real property); 220AppDiv595, 222 NYS176 (unless assessment is void for lack of jurisdiction, certiorari is proper remedy); 219AppDiv68, 219NYS278; 219AppDiv401, 220NYS8; 134Misc487, 235NYS578. **The right of a taxpayer to review an assessment by certiorari is absolute,** etc. But see 134Misc487, 235 NYS578. **Evidence held insufficient** to prove that foreign corporation willfully refused or neglected to furnish assessors relevant information or to establish forfeiture of right to review by certiorari. 134Misc487, 235NYS578.

1122-33 166Minn414, 208NW181; 221 AppDiv200, 223NYS367. See also 194 Wis456, 216NW144.

1123-35 A failure to file, etc.–221App Div200, 223NYS367 (Tax L. §§ 37, 45a, 46, 290).

1123-36 30Ariz620, 249P768. **That state and tax commission were not parties** to suit in court below is immaterial. 30Ariz620, 249P768.

1123-38 322Mo 339, 15SW(2d)334.

1124-42½-New. Failure to object to void assessment on grievance day does not waive right to review. 127Misc13, 214NYS503.

1124-43 128Misc474, 219NYS647.

1124-48 On certiorari to circuit court state tax commission is not party. 141 Miss213, 106S635.

1125-52 133Misc499, 233NYS107; 226 AppDiv182, 234NYS457; 195Wis226, 218 NW438. See also 219AppDiv68, 219NYS 278. **Assessors failing to perform duty required by statute cannot set time running,** as regards review of assessment by certiorari, by referring to statutes indicating what they should have done. 226AppDiv182, 234NYS457. **Delinquency of petitioner.**–226AppDiv182, 234 NYS457. **While assessment roll remains with clerk,** taxpayer can maintain certiorari to review increase of assessment by village board of review. 199Wis175, 225NW730.

1125-53 NJSup 149A813.

1125-54½-New. Whether petition was timely filed can only be determined on sworn proof and statement in brief cannot be considered. 138Misc333, 245NYS 544.

1125-55 216AppDiv626, 215NYS710 (verified complaint filed on grievance day, attached to petition is part thereof). **Amendment not allowed where**

petition is fatally defective and motion to amend comes after statutory time to commence action. 219AppDiv68, 219 NYS278.

1125–57 216AppDiv626, 215NYS710. Petition should allege, where assessment was for realty, just what personal property was improperly included. 216App Div626, 215NYS710.

1125–58 Objection to sufficiency was waived by filing return before raising objections. 132Misc506, 230NYS134.

1126–59 216AppDiv626, 215NYS710 (where facts are not stated, petition is insufficient). Allegations as to insufficient verification and unsound basis for assessment held to raise question of illegality. 217AppDiv123, 216NYS458. Certiorari for illegality lies only where illegality is in irregular use of power to assess, and not where total tax roll is illegal. 217AppDiv123, 216NYS458. General allegations held immaterial.–217 AppDiv123, 216NYS458. Specific allegations as to history of preparation of rolls held material.–217AppDiv123, 216 NYS458.

1126–60 217AppDiv123, 216NYS458 (petition held sufficient). Certiorari does not lie to review constitutionality of charter provisions as to assessment and review, or want of officer's power to make new tax roll. 217AppDiv123, 216 NYS458.

1126–61 217AppDiv123, 216NYS458 (petition held sufficient); 219AppDiv 68, 219NYS278. Failure to allege extent of overvaluations is jurisdictional defect. 219AppDiv68, 219NYS278. Market values should be alleged to show overvaluation.–216AppDiv626, 215NYS 710. Petition failing to allege assessment over market value does not state overvaluation. 219AppDiv68, 219NYS 278.

1126–62 Requirement that petition show timely application to proper officers, is mandatory, even in cases of illegality. 221AppDiv200, 223NYS367 (Tax L. § 290).

1126–63½–New. Failure to object to unverified complaint waives objection. 138Misc333, 245NYS544.

1127–75 105NJL99, 143A356. See also 216AppDiv626, 215NYS710.

1128–76 NJSup 133A751 (such evidence can be brought before court only depositions taken under rule); 103NJL28, 134A722 (holding to sustain assessment record must show evidence of valuation to necessary amount); 249NY409, 164 NE333.

1128–78 NJ 141A23; 105NJL99, 143A 356; 247NY281, 160NE371; 213AppDiv 493, 211NYS10; 216AppDiv626, 215NYS 711; 221AppDiv248, 223NYS168; 220 AppDiv326, 221NYS342.

1128–79 105NJL99, 143A356; 246NY 322, 158NE884. Purchase price of lands paid by company is not conclusive as to value thereof at time of assessment. 137 Misc603, 244NYS508.

1128–80 221AppDiv193, 223NYS64 (exclusion of evidence held error). Owner's estimate of value of property, made nine years before assessment, held not unimportant. 221AppDiv248, 223NYS 168.

1129–81 Burden on telegraph company to show assessment excessive not sustained. 220NYS9. Evidence held sufficient.–221AppDiv193, 223NYS64. Evidence held insufficient.–221AppDiv248, 223NYS168.

1129–82 Findings of referee.–221App Div248, 223NYS168.

1129–82½–New. Alleged errors in city's levy of assessment on property on which state tax commission has imposed special franchise tax does not affect commission's decision and cannot be reviewed on proceedings against commission. 127Misc13, 214NYS507.

1129–82⅔–New. Assessor may raise constitutional questions upon filing of printed suggestions in opposition to petition for certiorari, 315Mo 791, 287SW 307.

1129–82¼–New. and in order to be considered such questions should be raised at that time. 315Mo 791, 287SW307.

1129–82½–New. Burden is on railroad to prove that its bridges were constructed over stream before dredging made it navigable as respects franchise tax. 220AppDiv1, 220NYS467.

1129–82⅝–New. Conclusions of law of board of equalization are not binding on court. 320Mo 702, 8SW(2d)1057, 59 ALR1026.

1129–83 103NJL28, 134A722; 102NJL 576, 134A724. In New York.–244NY42, 154NE816. Insufficient record held to require discharge of writ to tax commission, record showing only order with engineer's report. 172Minn605, 216NW 240.

1129–83½–New. Court was not justified in fixing value of land at lower amount than that sworn to by taxpayer. 221 AppDiv193, 223NYS64.

1129–83⅓–New. Court erred in disregarding evidence as to total value, and directing reduction of assessment, solely because land was overvalued. 221App Div193, 223NYS64.

1130–84 NJSup 139A413.

1130–85 217AppDiv619, 216NYS74; 218 AppDiv1, 217NYS669.

1130–86 246NY322, 158NE884.

1130–88 223NYS448.

1130–89½–New. Though, under statute, court is empowered to fix assessment and to determine disputed questions of law and fact, court will not, after setting aside assessment of state board, determine assessment except for special reasons. 103NJL26, 135A61.

1130–89½–New. In such case court will ordinarily not interfere with fact finding function of board. 103NJL26, 135A 61.

1130–89¼–New. On appeal from order quashing certiorari to review assessment, assessment roll is assumed not to have been completed and verified until required to be filed by law. 226AppDiv 182, 234NYS457.

1130–90 Final judgment.–141Miss213, 106S635. State tax commission cannot appeal from judgment on certiorari to circuit court as it is not party to litigation. 141Miss213, 106S635. On appeal from order quashing certiorari to review assessment, appellate division will give no consideration to facts and notices not presented in affidavits or printed in record. 226AppDiv182, 234 NYS457.

1130–92 220AppDiv326, 221NYS342. Appellate court must correct error in assessor's method of valuing realty. 220 AppDiv326, 221NYS342.

1130–93½–New. Where court reviewing assessments by writ of certiorari reduced assessment by amount less than one half amount claimed before assessing officers, it has no discretion as to award costs against relator; only statutory provision being that court in its discretion may award costs and disbursements against tax district. 249 NY150, 163NE132.

1131–95½–New. In New York by statute additional allowance for costs in proceedings to review assessment is discretionary with court. 218AppDiv44, 217NYS707.

1131–97 103Conn607, 132A30. Public officer may bring mandamus, as duty is public. 103Conn607, 132A30. Petition held insufficient.–326 Ill 124, 157NE186.

1131–98 In PortoRico.–32PortoRico 608. Mandamus to compel tax commission to renew and revise tentative assessments and approve tax rolls to board of assessors. La 130S46.

1131–2 103Conn607, 132A30; Mass 171 NE434.

1131–4½–New. Mandamus does not lie to compel state board to apportion tax where duty to do so as to mines in county is in county board. 69Utah204, 253P680.

1131–5 229AppDiv565, 242NYS357 (where not showing total assessment was excessive). But see 261Mass432, 158NE667. Jurisdiction of board of directors is quasi-judicial as regards right to mandamus to compel action on petition to cancel tax erroneously assessed. CalA 258P449. Difference between assessed value of land with improvement improperly assessed and land without improvement does not necessarily represent overvaluation. 229AppDiv565, 242 NYS357. Unauthorized assessment against improvement does not necessarily show total assessment of land including improvements, was excessive. 229AppDiv565, 242NYS357.

1132–6 84CalA577, 258P991.

1132–8½–New. Mandamus does not lie to correct errors in assessment after taxes are paid and expended. 69Utah 204, 253P680.

1132–8⅓–New. Where tax commission has directed county treasurer and county auditor to abate taxes, mandamus lies to compel compliance with order. 136SC439, 134SE387.

1132–11 122 Okl 70, 250P1024; 194Wis 456, 216NW144. Error to enjoin collection of tax where value fixed was supported by evidence, though court found that board's valuation was high. Tex CivA 297SW923. Court of equity will not interfere to prevent tax assessing officer from performing his statutory duty for fear he may perform it wrongfully and will not interfere prior to assessment. 11F(2d)967. Payment of tax held not condition precedent in suit to enjoin execution of void order of state board of equalization brought before tax roll was made up. 32Ariz532, 260 P1023.

1133–12 26F(2d)469; 315Mo 424, 287 SW427.

1133–13 21F(2d)355; IndA 166NE21 (2dcase); 235Ky755, 32SW(2d)338; 148 Miss433, 114S269; NH 151A705. Want of jurisdiction.–TexCivA 297SW923 (contestant has burden of showing board exceeded its authority). Decree lies to enjoin discriminatory assessment. –21F(2d)355. Conditions precedent.–21 F(2d)355.

1134–16 32Ariz532, 260P1023.

1134–17 26F(2d)469; 163Ga465, 136 SE432 (excessive tax); 122 Okl 70, 250 P1024. Legal remedy must be clearly adequate.–21F(2d)355. Statutory appeal from assessment held inadequate. 21F (2d)355.

1134–21 164La257, 113S839 (restrictions on contest of assessment held inapplicable in action to reduce tax levy). 263Mass476, 161NE593; 83 NH148, 140A163; NH 151A705. Attorney's fee.–164La257, 113S839; 9LaA405, 119S464. One seeking statutory relief must proceed strictly according to statute.–143Va332, 130SE421. Statutory requirements may be dispensed with by agreement of parties, where nothing in statute inhibits such action. 143Va332, 130SE421. Suit filed within 30 days after tax commission approved assessment and state auditor authorized collection of taxes has been held timely. 170La580, 128S522. Plea of prescription overruled.–La 130S44.

1135–22 149Wash253, 270P812.

1135–24 Interest on tax not paid when due should be included as part of tax abated. Mass 170NE819. Action begun after tax assessed and largely collected held not too late. NH 151A705. Issue in tax abatement appeal is tax liability and not validity of appropriation included in assessment. NH 151A705. Remedy is not by tax abatement appeal if error in assessment is common to all taxpayers. NH 151A705. Proper remedy if petitioner illegally taxed as between himself and other taxpayers. NH 151A705. Tax abatement appeal properly dismissed.–NH 151A705.

1135–25½–New. Technical objection to inventories is obviated by findings that they were made in good faith, and insufficient, if at all, through accident or mistake. 83NH148, 140A163.

1135–25⅓–New. Questions of law.–Whether there was error in determination of fair cash value by assessors is question of law open to complainant. Mass 170NE819.

1135–25¼–New. Suit must be brought within statutory time. 169La1194, 126 S919(2dcase).

1135–26 153Tenn332, 284SW64. See also NH151A705; NH 151A709.

1135–28½–New. Taxes must be shown to have been paid by taxpayer before court can grant abatement of tax. Mass 167NE227.

1135–28⅓–New. List of machinery re-

quired to be filed as prerequisite to granting abatement held sufficient though not containing detailed description and enumeration of each machine. Mass 170NE819.

1135-28¼-New. Spindle held proper unit of measure or of capacity of mill for purpose of list of property required to be filed. Mass 170NE819.

1135-29 83NH148, 140A163. **Petitioner held not entitled to relief.**-Miss 130S488.

1135-30½-New. Allegation that trust is administered by court of another jurisdiction under its laws held not to show taxing situs there. Mass 172NE605.

1135-30¼-New. Allegations held to show that laws of another state established taxing situs of trusts in such state. Mass 172NE605.

1135-30¼-New. That complaint to abate tax on realty and machinery was waived as to realty is not admission of correctness of assessment. Mass 172NE579.

1135-31 261Mass445, 158NE897. But see 83NH148, 140A163.

1135-32 LaA 130S877; 261Mass169, 158NE325; 83NH148, 140A163; Wash 293P279. **Evidence held to show that assessments were fanciful and speculative** and should be reduced to amount based on actual present values. 158La990, 105S39. **On appeal** judgment held to reflect reasonable valuation of property in question, in view of evidence. 161La669, 109S351. **Evidence held to show** that bank was solvent on day for assessing its shares. 141Wash350, 251P575. **Evidence held sufficient.**-10LaA480, 120S675; Mass 172NE579. **Evidence held insufficient.**-83NH107, 139A294. **Commissioner's finding of fair cash value** is prima facie evidence and must be followed unless tainted by error of law. Mass 170NE819. **Price received on sale** seven months after tax date is competent evidence of value on taxing date. Mass 170NE819. **Sufficiency of evidence in particular cases.** LaA 130S642.

1135-32½-New. Failure of court order to recite that city commissioners of revenue were examined as witnesses, and that attorneys for commonwealth for cities defended application for correction held not available to commonwealth where it appears from record that case proceeded by agreement and commonwealth only appellant was ably defended. 143Va332, 130SE421.

1135-32⅓-New. Commonwealth not having raised in trial court question of jurisdiction of city court to correct assessment of property in another city, is precluded from raising it in appellate court. 143Va332, 130SE421.

1135-32¼-New. Review.-Where plaintiff succeeds in reducing assessments more than twenty-five per cent of reduction claimed attorneys are not entitled to commission to be assessed as penalty under statute. 158La990, 105S39.

1135-32½-New. Tax Commission held not liable for costs of appeal where assessment reduced. 158La990, 105S39.

1135-32¼-New. Entry of default judgment does not preclude court from setting aside judgment on ground that taxpayer failed to comply with statutory provisions. 225Ky246, 8SW(2d)401.

1135-32½-New. Findings.-Finding construed as finding of fair cash value as required by statute. Mass 170NE819.

1135-32⅓-New. Reference to commissioner.-Mass 172NE579.

1135-32½-New. Motion to recommit commissioner's report. Mass 172NE579.

1135-32 1/10-New. Review.-Mass 172NE579.

1135-32 1/11-New. Findings of commissioner to whom case was referred are conclusive unless based on erroneous rulings of law. Mass 172NE579.

1136-33 MoA 8SW(2d)1038; 193Wis295, 214NW447 (action under Wisconsin statute is equitable in nature). **Question of situs of property** for purpose of taxation may be reviewed. 235Mich261, 209NW122.

1136-34 128Okl153, 261P923. **Though statute provides that action of state board of tax commissioners shall be final, suit will lie.** 235Mich261, 209NW122.

1136-37 New assessment not made where tax had been paid and prior assessment was not so insufficient as to require reassessment. 69Utah204, 253P680. **In Tennessee.**-156Tenn643, 4SW(2d)343.

1137-41 169La541, 125S587(1stcase).

1137-42½-New. Filing verified statement showing name of each stockholder of national bank is condition precedent to maintaining action for abatement of tax. 259Mass1, 156NE42.

1137-42⅓-New. Requirement that such verified statement be filed cannot be waived by assessors. 259Mass1, 156NE42.

1137-42¼-New. National bank under statute may petition for abatement of excessive taxes. 259Mass1, 156NE42.

1137-42⅕-New. Remedy provided by Gen. L. c 59 § 5474, for abatement of excessive tax, must be exhausted before tax can be challenged judicially. 259Mass1, 156NE42.

1137-42⅙-New. Offsetting taxes paid in previous years against reassessed taxes.-193Wis488, 214NW445.

1137-42⅐-New. Informality of taxing officers not resulting in injustice will not justify setting aside tax. 193Wis295, 214NW447.

1137-42⅛-New. Owner of property is not estopped to annul assessments of property assessed in names of individuals who did not own property. 166La786, 117S918.

1137-44½-New. Intervention by state and city is proper notwithstanding statute against making state defendant in state courts. 23F(2d)283.

1137-46 Evidence held insufficient to show lack of uniformity in assessment. 315Mo424, 287SW427. **Petition held insufficient.**-156Tenn643, 4SW(2d)343.

1137-46½-New. Attorneys for tax collector have been held entitled to commission on lowering of statutory rates where assessment is reduced more than twenty-five per cent. 164La971, 115S51.

1137-46⅓-New. Such commission held properly based on balance of tax due after payment of amount conceded to be due. 164La971, 115S51.

1138-49½-New. Corporate property inadequately assessed should be reassessed for back taxes on same basis as original assessment. 175Ark956, 2SW(2d)25.

1138-2 205Iowa1, 213NW597; 205Iowa723, 218NW526; Iowa 230NW528; 155Md665, 142A525, 58ALR1213; NJSup 139A800; 38OklACR107, 110 [quotCyc]; 299Pa325, 149A479 (lien does not constitute voluntary charge); SD 231NW948; TexCivA 296SW982; Utah 281P49; 150Va394, 143SE713; 40Wyo53, 274P12. **In Georgia.**-162Ga471, 134SE85. **Lien created by Hail Indemnity Tax Law** is created by implied contract between state and owner of land. 54ND184, 208NW966.

1139-3 205Iowa723, 218NW526, 527 [citCyc]; 38OklACR107, 110 [quotCyc]; SD 231NW948; Utah 281P49; 34Wyo199, 242P415. **Hail indemnity taxes constitute lien on land.** 53ND609, 207NW436. **Ambiguity** should be resolved to restrict lien to taxpayer's property rather than extending lien against buyer thereof. SD 231NW948.

1139-5½-New. Tax is not lien unless expressly made so by statute.-40Wyo53, 274P12.

1139-6 26F(2d)617; 129Misc252, 221NYS254. **Lien of state taxes is established by assessment of land.**-Mo 28SW(2d)650. **Where grain has already been removed from municipal warehouse** it cannot be assessed so as to make tax specific lien. Wash 286P648.

1140-9 But see 104WVa391, 140SE344.

1140-10 Forwarding in delinquent list of current year.-207Iowa53, 222NW392.

1140-11 124Okl256, 256P25. **Interest of corporation in real estate mortgaged** to another held to be property "within statute." 284Pa444, 131A356. **Tax on bank stock.**-Iowa 232NW648.

1140-12 134Ga861, 139SE674; TexCivA 5SW(2d)870; 34Wyo199, 242P415, 417 [quotCyc]. **All property held by taxpayer and subject to tax is subject to lien.** 164Ga861, 139SE674. **Gross production tax on royalty interest** is lien only on such interest. 124Okl256, 256P25. **County has been held to have no lien on all of taxpayer's property** for amount of taxes due, but only on each specific piece of personal property for taxes and levies due thereon, and lien is acquired only by distraining or levying on property. 150Va394, 143SE713.

1140-13 34Wyo199, 242P415, 417 [quot Cyc].

1140-14 34Wyo199, 242P415, 417 [quot Cyc].

1141-15½-New. Lien for taxes on bank stock extends only to dividends, capital stock, and assets belonging to stockholders of bank, that is, distributable assets. 55ND670, 215NW163.

1141-16 8PaDist&Co70. **That machinery** is movable property, subject to lien for taxes on mortgagor's personalty may be denied by mortgagees after tax return and application for reduction of assessment or by mortgagee trustee, paying taxes on machinery erroneously assessed as personalty. 166La1035, 118S125.

1141-17 56OntL364, [1926] 1DomLR752. **After-acquired personalty** is not subject to lien of tax levied on personalty. 34Wyo199, 242P415. **Personal property of same class as that assessed** is subject to lien of tax. 34Wyo199, 242P415.

1141-18 TexCivA 4SW(2d)247; TexCivA 5SW(2d)870; TexCivA 19SW(2d)99; TexCivA 27SW(2d)918.

1141-20½-New. Taxes assessed to individual stockholders on stock of state banking company are not lien on real estate holdings of corporation in hands of receiver. 205Iowa723, 218NW526.

1141-21 47Ida38, 272P498, 65ALR663; 237IllA328; 129Or602, 278P93. Contra 166La1035, 118S125. **Collector must select specific piece of realty** on which to charge lien of personalty tax. 237IllA328. **In Oregon.**-129Or602, 278P93.

1142-22 164Ga861, 139SE674. **In Georgia.**-162Ga471, 134SE85. **In Missouri.**-28SW(2d)650.

1142-23 164Ga861, 139SE674; 153Md674, 139A545; 258Mass4, 154NE190; 198NC342, 151SE869 (tax held not lien); Ont [1927] 1DomLR80. See also NS [1928] 1DomLR336. **Taxes assessed April 1, 1925** held lien from that date. 258Mass4, 154NE190. **In North Carolina.**-194NC1, 138SE418.

1143-25 191NC484, 132SE146; 149Wash530, 271P587; 149Wash538, 271P830.

1143-26 In Oregon.-129Or602, 278P93.

1143-27 274US630, 47SCt692, 71Led1243; 7F(2d)416; 14F(2d)267; 181Ark898, 28SW(2d)721 (not superior to state's tax lien); 85Colo61, 273P883; 98Fla176, 123S692; 164Ga861, 139SE674; 37GaA537, 140SE902; Iowa 230NW528; 320Mo341, 7SW(2d)1013; 38OklACR107; 52SD528, 219NW206; TexCivA 283SW188; 67Utah268, 247P486, 47ALR372; Utah 282P782; 146Wash671, 264P997; 147Wash176, 265P722, 62ALR139. See also Alta [1928] 4DomLR976. **Taxes and assessments.**-Utah 282P782. **In Idaho.**-5F(2d)955. **Tax lien of state is not superior to tax lien of municipality** which is subdivision thereof. 159La658, 106S22 (unless legislative intent is clear). **Priority over maritime lien.**-14F(2d)267. **Tax lien is prior to lien of execution levy** when former is prior in time. 164Ga190, 138SE55. **Hail indemnity tax lien** is subsequent to liens executed by owner of land prior to hail indemnity tax becoming permanent lien. 54ND184, 208NW966. **Debt secured by mortgagee as lien.**-284Pa444, 131A356. **To extent of interest of chattel mortgage acquired before levy,** under Consol. St. § 8006, it is not subject to levy and sale for taxes on real property of mortgagor. 191NC484, 132SE146. **General taxes** are superior and paramount to all other liens and claims, including local assessments. 150Wash33, 272P43. **County and city taxes** are of same priority as state taxes. 47Ida697, 280P227, 65ALR1372. **Priority question of legislative intent.**-CalA 289P678.

1144-28 85Colo61, 273P883; 199Wis

85, 225NW873. **Construction of statutes.**–67Utah268, 247P486, 47ALR372. **Legislative intent to give tax lien priority must appear expressly or by necessary implication.** 67Utah268, 247P486, 47ALR372.

1144–31 But see 104WVa391, 140SE344.

1145–34 150Va394, 143SE713. **Hail indemnity tax lien is not superior to prior real estate mortgage.** 54ND184, 208NW966.

1145–35 21F(2d)414; 98Fla176, 123S692; NJSup 139A800; 284Pa444, 131A356 (statute construed to extend to purchase-money mortgage); TexCivA 283SW188 (chattel mortgage); 67Utah268, 247P486, 47ALR372. **Indemnity hail tax** held not to carry lien paramount to antecedent real estate mortgage. 52ND857, 204NW459. **Reduction of lien of one of two secured creditors to judgment** and securing of sheriff's deed held not to affect rule for ratable apportionment of burden of tax lien. 164Ga364, 138SE794. **Mortgage creditors of two parcels** held subject to ratable apportionment for removal of lien of tax assessed on debtor's property generally. 164Ga364, 138SE794. **Hail indemnity taxes** are not taxes within meaning of constitutional provision giving priority to taxes over prior real estate mortgages. 54ND184, 208NW966. **Priority over attorney's fees stipulated in mortgage.**–284Pa444, 131A356. **Execution for taxes for year subsequent to execution of mortgage** is entitled to priority in proceeds of sale of land under foreclosure. 165Ga680, 141SE 04.

1145–37 52ND857, 204NW459 (Indemnity Hail Tax does not create lien paramount to antecedent mortgage).

1145–38 47 Ida33, 272P498, 65ALR663; 237 IllA328. But see 67Utah268, 247P486, 47ALR372. Contra 129 Or602, 278P93. **In Oregon.**–129 Or602, 278P93.

1145–39 TexCommnA 3SW(2d)416; 58 OntL364, [1926] 1DomLR752. Contra TexCivA 275SW745.

1145–40 107Conn133, 139A502.

1145–40½–New. In Oklahoma statute making mortgage lien prior to tax lien is unconstitutional. 38 OklACR107.

1145–40¾–New. Mortgage of personal property acquired after levy of assessment may lose prior right to such property by permitting it to be mingled with other property of like kind as assessed so as to be indistinguishable therefrom and burden does not rest on county treasurer seizing property under distress warrant to show that property seized was in fact part of property assessed. 34Wyo199, 242P415.

1145–41 162Ga471, 134SE85; 164Ga190, 138SE55; 170Ga734, 154SE247; 154Md135, 140A76; TexCivA 10SW(2d)1035; 104WVa391, 140SE344. See 106Conn542, 138A452. But see 13PaDist&Co497. **Sale of land in parcels; order of liability for taxes.**–163Ga83, 135SE431. **Taxes should be apportioned ratably** between debtor's separate properties. 170Ga734, 154SE247.

1146–45 ND 231NW548; SD 231NW943; 150Va394, 143SE713.

1147–46 149Wash538, 271P830. **Filling station** is within application of statute relating to lien for taxes on personal property sold in bulk without retention of sufficient to pay taxes. 119Kan735, 241P443. **Purchaser of stock of merchandise** sold in bulk, on which lien has attached, takes subject to lien, but lien does not extend to property other than that purchased. 122Kan325, 251P1106. **Purchaser of property of corporation at receiver's sale subject to personal taxes thereon** takes property free from taxes assessed against other property of corporation disposed of before receivership. 149Wash538, 271P830.

1147–47½–New. Where taxpayer in different parcels at different times sells all of his property which is subject to previous lien for state and county taxes, property last sold should bear burden of tax lien. 166Ga204, 142SE858.

1147–47¾–New. Canadian Special War Revenue Act of 1915 does not create general lien on all property of person liable for sales taxes which follows property after alienation. Man [1930] 4 DomLR441.

1147–48 166Ga689, 144SE313; 168Ga101, 147SE32; 38 OklACR107; 296Pa359, 145A916(2dcase); 14PaDist&Co143; TexCivA 278SW(2d)864. But see 296Pa359, 145A916(2dcase).

1147–49 117Nebr125, 219NW956; 34Wyo199, 242P415 (statute held to make tax lien on personalty perpetual till payment of tax).

1148–50 NJCh 147A199 (each year's assessment of taxes takes priority over all assessments for previous years).

1148–54 **Statute** providing for revival of tax liens which have lapsed has been held not to affect priority of last assessment of taxes. NJCh 147A199.

1148–54½–New. Commonwealth did not have a lien under statute against lands for previous taxes assessed against lessee, the lien acquired under such statute being on property assessed, which constituted limited estate, terminating on happening of condition on which it was dependent. 227Ky273, 12SW(2d)698.

1149–62 99NJEq748, 133A780.

1149–69 32NM314, 255P634 (statute discharging lien of taxes assessed).

1150–71½–New. Corporate franchise tax liens.–Lien on corporate real estate for nonpayment of franchise tax prior to April 1, 1917, which taxes have not been referred to attorney-general, cease to be liens after ten years as to such property in hands of purchasers in good faith but for such taxes. 246NY130, 158NE47 (Tax L. § 207).

1150–74 83Montl, 268P555.

1150–75½–New. Removal of vessel from county in admiralty proceedings held not to defeat lien for taxes. 14F(2d)267.

1150–75¾–New. Neither state treasurer nor auditor general have authority to release portions of land from lien of taxes duly settled. 9PaDist&Co7.

1150–75¼–New. Where bank inquired of auditor general's department as to right to make payment of taxes on capital stock for balance of year on certain basis, and was advised that matter was then under consideration, information as to which would be given later, failure to furnish further instructions as promised has been held not to prejudice rights of state to collect tax. 293Pa404, 143A105.

1150–77 87 IndA570, 162NE237(2dcase). See also 235Ky689, 32SW(2d)22; NJCh 147A199.

1150–78 235Ky689, 32SW(2d)22; 129Or602, 278P93.

1151–83 101Vt419, 144A203.

1151–85 194NC265, 139SE446.

1152–90 See also 104WVa498, 140SE485.

1152–93 176Ark906, 4SW(2d)928.

1152–94 180Minn283, 230NW654. **Subrogation.**–NJCh 145A625. **Moral obligation to pay taxes** does not inure to benefit of one voluntarily paying taxes on land to another. 180Minn283, 230NW654.

1153–97 170Ark791, 281SW21; 248NY374, 162NE287; TexCivA 28SW(2d)243.

1153–99 180Minn283, 230NW654. **Taxing unit cannot assign** its claim for taxes so as to substitute assignee to its collecting right unless statute so provides. 5F(2d)259.

1153–1 170Ark791, 281SW21. **Payment by holder of deed executed subsequent to recorded deed to another** does not give right to subrogation. NJCh 145A625.

1153–2 170Ark791, 281SW21; 175Ark437, 1SW(2d)1004; 38Wyo515, 269P45, 60ALR418. **Lienholder paying taxes in good faith belief that payment is necessary to protect his lien** is entitled to subrogation though there is in fact no necessity for self-protection by payment. 38Wyo515, 269P45, 60ALR418. **Right of subrogation should be liberally extended** to lienholders paying taxes on property. 38Wyo515, 269P45, 60ALR418. **Senior mortgagee paying taxes after judgment of foreclosure and before sale** is entitled to subrogation as against junior mortgagees though property could not have been sold for taxes at time of payment. 38Wyo515, 269P45, 60ALR418.

1154–3 246Mich585, 225NW1(2dcase); 247Mich153, 225NW489. **Evidence has been held sufficient** to support finding of good faith in plaintiff's purchase from purchaser. TexCivA 28SW(2d)243. **Good faith in purchase from purchaser** at tax sale is fact question. TexCivA 28SW(2d)243.

1154–5 180Minn283, 230NW654; 149Miss750, 115S878.

1154–6½–New. In Louisiana person becoming subrogated to rights of taxing bodies by payment of taxes for certain year may enforce rights notwithstanding sale for taxes of subsequent years. 170La115, 127S383.

1154–7 5F(2d)393; 40F(2d)841; 180Ark664, 22SW(2d)161 (amount of taxes limited to three years where limitations are pleaded); 79CalA387, 249P548. **Surface owner, paying all taxes on coal land assessed in fee against him,** is entitled to subrogation to rights of taxing power against coal. 106WVa312, 145SE575. **Trustee under mortgage paying taxes** did not acquire merely unpreferred claim against mortgagor's assets with unsecured creditors. 40F(2d)841. **Trustee for bondholders held not estopped** from insisting on right of subrogation and marshalling assets where bondholders agreed to prove only claims provable in bankruptcy. 40F(2d)841.

1155–8 24F(2d)644; 171Ark543, 284SW769; 176Ark1181, 6SW(2d)12; 180Ark664, 22SW(2d)161. See also 10PaDist&Co337. **Vendor paying taxes on portion sold, notwithstanding purchaser's protest,** cannot enforce lien against tract sold for taxes so paid. 180Ark664, 22SW(2d)161.

1155–8½–New. Lien of mortgagor is superior, under Crawford & M. D. § 1053. 171Ark543, 284SW769.

1155–10½–New. Person in possession of land who received rents and profits is not entitled to lien for taxes paid. 176Ark1181, 6SW(2d)12.

1155–10¾–New. Where vendees under contract for purchase of real estate were to pay all taxes and they assigned contract to defendant, the latter is not entitled to lien for such taxes as against vendor. 176Minn459, 223NW780(1st case).

1155–11 **"Registration" is not sufficient to warrant imposition on treasurer** of foreign corporation of duty of assessing and collecting tax on corporate loans. 294Pa99, 143A495, 60ALR737.

1156–12 **Fact that treasurer maintained private residence** in foreign state does not relieve corporation from answering for neglect of treasurer in failing to collect taxes on corporate loans. 294Pa99, 143A495, 60ALR737.

1156–14 See also 293Pa404, 143A105.

1156–15 **Duty of bank to pay if it has sufficient** assets is personal liability. Mo 26SW(2d)976.

1156–16 **Payment out of guaranty fund.**–114Nebr740, 209NW621.

1156–17 But see 164Ga190, 138SE55.

1156–19 **Mortgagee of surface rights cannot recover** whole tax paid. 81Colo177, 254P438. **Purchaser of surface rights under trust deed cannot recover** for taxes paid thereafter against owner of subsurface rights. 81Colo177, 254P438.

1157–22 149Wash538, 271P830.

1158–24 204Iowa965, 216NW122; 117Okl138, 245P612, 614 [quotCyc]. **Bank receiving payment** and transmitting same to county treasurer is agent of taxpayer. 49SD605, 207NW982. **Taxpayers are chargeable with notice** that taxes must be paid to county treasurer. 49SD605, 207NW982.

1158–25 204Iowa965, 216NW122; 117Okl138, 245P612, 614 [quotCyc]. **Bank.**–49SD605, 207NW982. **Failure of bank to forward money intrusted to it for payment of taxes.**–117 Okl138, 245P612. **Payment to authorized bank is legal payment though bank became insolvent** and county treasurer never received actual money. 204Iowa965, 216NW122. **Payment to bank designated as county depository** and authorized by county treasurer to receive taxes is sufficient payment. 127Kan135, 272P173.

1158–26 153Md674, 139A545; 317Mo579, 296SW787; 194NC1, 138SE418 (tax on property held not due till first Mon-

day in October); 26 OhNPNS431; 142 Okl 8, 285P48; 142 Okl 29, 285P59 (last two of which holding that taxpayer has constitutional right to reasonable time); 35 OklACR566; TexCommnA 294SW 848; 151Va143, 144SE606. **Failure to pay mortgage registry tax till after trial of foreclosure action** does not avoid instrument where tax is paid before submission of case. 172Minn149, 214NW 787. **Ordinarily taxes must be paid promptly.**–261Mass556, 159NE70. **Tax becomes "delinquent," within statute, or "in arrears," within acceleration clause of mortgage bond,** if not paid till after date on which payment is due, which date is June 1 and December 1. 103NJ Eq425, 143A548. **Where statute authorizing bank to pay tax of ten mills on** dollar of par value of shares to be paid before first day of March in following year was amended by act omitting such provision and taking effect Jan. 1, 1926, charge under prior act was apportionable, and entitled bank to proper adjustment of tax under earlier act prior to date of its repeal. 293Pa404, 143A 105. **Taxpayer has constitutional right to reasonable time to pay taxes** before they become delinquent. 140 Okl 233, 283P784; 140 Okl 242, 283P788; 140 Okl 255, 283P789.

1159–30½–New. Extension of time for payment of succession duties may be granted upon application. 36BC334, [1926] 1DomLR894, [1926] 1WestWkly 366.

1159–30⅓–New. Payment of tax within reasonable time.–Suit to recover money paid under land contract by infant disaffirming it should be dismissed unless plaintiff paid tax on contract required by statute, within reasonable time. 247Mich119, 225NW558(2dcase).

1159–31 See also 293Pa404, 143A105. **Time.–Alta** [1929] 2DomLR271. **Identification of lands.**–157Miss730, 128S69.

1159–32 267US479, 45SCt431, 69Led 745. **Voucher attached to check.**–322Mo 94, 14SW(2d)554.

1160–37 148Md324, 129A356 (taxes for two or more years are separate and severable). **Refusal to pay drainage district assessment** does not justify collector in refusing to accept general taxes tendered. 42 Ida284, 244P1099.

1160–42 141Miss531, 106S762, 763 [cit Cyc]; 49SD609, 207NW981, 44ALR 1231.

1160–42½–New. Failure of bank in which taxpayer has deposited money in collector's name before latter actually receives money does not excuse payment of tax. 49SD605, 207NW982.

1160–42⅓–New. Where tax warrant on its face discloses no illegality, resistance of payment is not permitted, 103 Conn249, 130A164 (dictum).

1160–42¼–New, notwithstanding illegalities lie in back of it. 103Conn249, 130A164 (dictum).

1160–42⅙–New. Auditor's illegal charge of assessment does not excuse payment of taxes legally imposed. Iowa 232NW445.

1160–43 TexCivA 280SW292, 294 [quot Cyc].

1161–47 49SD609, 207NW981, 44ALR 1231; 198Wis377, 224NW124(4thcase). **Money must actually come into possession and control** of county treasurer to constitute payment. 49SD605, 207NW 982.

1162–49 See also 148Md324, 129A356.

1162–50½–New. Depositing money in bank in name of county treasurer, with agreement that it shall be sent to latter, does not make it public money. 49SD 605, 207NW982.

1162–50⅓–New. Method of settling taxes provided for by statute providing alternative methods of taxation, has been held not ended by effective date of act, repealing method by omitting it, but continued until date provided by particular method for payment of tax. 293Pa404, 143A105.

1162–52½–New. Repeal of statutory offset of taxes.–Taxpayer failing to make true and correct returns of income, during which time statute was in force under which taxpayer might have offset personal property taxes paid against income tax assessed, cannot after repeal of statute claim right to offset such personal property taxes against additional income tax. 198Wis377, 224 NW124(4thcase).

1162–52⅓–New. Statutory right to offset personal property taxes against income taxes is privilege which legislature can take away at any time. 198 Wis377 224NW124(4thcase).

1162–53 44 Ida157 255P643, 53ALR191 (money); 204 Iowa965, 216NW122.

1162–55 204 Iowa965, 216NW122; 128 Mel, 145A241; 49SD609, 207NW981, 44 ALR1231; 49SD605, 207NW982; Tex CommnA 1SW(2d)601. **Liability of taxpayer persists** till acts amounting to payment of taxes are performed or till state or county ratifies transaction. TexCommnA 1SW(2d)601. **Private arrangements for payment of taxes,** between collector and taxpayer, are at risk of parties. TexCommnA 1SW(2d) 601. **State or county may adopt, or, through estoppel,** get benefit of private arrangements between collector and taxpayer for payment of taxes. TexCommn A 1SW(2d)601.

1164–62 44 Ida157, 255P643, 644 [cit Cyc], 53ALR191; Ida 290P399 (where bank failed before presentation of check); 207 Iowa725, 223NW483; 141 Miss531, 106S762; 99NJEq748, 133A 780; 117 Okl 138, 245P612. But see 165 Ga842, 142SE276. **Where check is paid by bank and charged to drawer's account and returned marked "paid,"** taxes are paid irrespective of drawee's subsequent disposition of check. 195NC161, 141SE543. **That county treasurer treats check as cash** will not operate to make check payment in fact. 207 Iowa725, 223NW483.

1164–63 49SD609, 207NW981, 44ALR 1231.

1164–64 128Mel, 145A241.

1164–68 Ida 290P399; 323 Ill 261, 154 NE97. **Acceptance of partial payment** held not complete discharge of tax obligation. 323 Ill 261, 154NE97.

1164–69 322Mo 94, 14SW(2d)554; Tex CivA 4SW(2d)247.

1165–72 131 Or563, 284P166, 68ALR 422.

1165–73 103NJEq425, 143A548. **Interest on tax invalidly levied** can be charged only after curative act became effective. 324 Ill 43, 154NE472.

1165–74 Interest has been held not waived by failure to institute litigation compelling payment until after settlement of dispute. Colo 291P1020.

1166–75 13PaDist&Co 555 (statute construed). **Payment of taxes without interest or penalties not permitted** when all prior taxes are paid under statute permitting payment for certain years without interest or penalties. 178Minn 404, 227NW209.

1166–76 13F(2d)982; 13F(2d)984.

1167–81 163La529, 112S405.

1167–85 104WVa498, 140SE485, 486 [citCyc].

1167–85½–New. Burden of proving payment of mortgage registration tax is upon party seeking to introduce in evidence exhibit, admissibility of which depends on payment of tax. 170Minn 430, 212NW908.

1167–85⅓–New. Tax records are only prima facie, and not conclusive, evidence of payment of taxes. 221Ala319, 128S 608.

1168–90½–New. Annexation of copy of contract to bill of complaint in suit for rescission constituted tender as evidence and court properly dismissed suit on motion where no certificate showing payment of tax was filed as provided by statute. 246Mich585, 225NW1(2dcase).

1168–91 204 Iowa965, 216NW122.

1169–98 Till draft for taxes is paid, receipt may not be demanded. 49SD 609, 207NW981, 44ALR1231.

1169–4 TexCivA 280SW292 (reliance on certificate by purchaser).

1169–4½–New. On completion of statutory proceedings to dissolve corporation before assessment of given year, payment of taxes assessed for current and previous years entitles corporation to certificate that all taxes have been paid. 26 OhNPNS463.

1169–5 296Pa359, 145A916(2dcase); 10 PaDist&Co 337; TexCivA 3SW(2d)559; 104WVa498, 140SE485, 486 [citCyc]; 198Wis368, 224NW121. See also Tex CivA 8SW(2d)790. **Objection in action to forfeit land contract** that failure to pay registration tax rendered contract inadmissible held without merit. 49SD 262, 207NW98. **In case of double assessment of property** to parties claiming interest, payment by either will discharge lien. 104WVa498, 140SE485. **Payment of taxes under assessment containing erroneous description** will defeat tax sale if description in assessment actually covers property sold. 170 La226, 127S609. **Release from tax lien of parcel of subdivision** upon payment of its fair proportion will not cancel lien as to unreleased parcels. NJCh 150A668.

1170–8 330 Ill 606, 162NE111; 69Utah 204, 253P680.

1170–9½–New. Where, under agreement to remit penalties and interest and to make subsequent valuation in particular manner, taxes were paid pending suit to enjoin collection on ground of erroneous valuation, payment rendered controversy moot. 8F(2d)209.

1170–9⅓–New. Second mortgage claimed to have been given to correct and perfect previous mortgage, but which involved change in method of mortgagor financing its indebtedness, has been held not void, but unenforceable without payment of mortgage tax thereon. 244Mich 403, 221NW322.

1170–9¼–New. Motion by defendant to action to foreclose mortgage on land to set aside decree of foreclosure because mortgage tax had not been paid has been held properly denied, where tax was paid by plaintiff before hearing on motion was had. 245Mich124, 222NW 118.

1170–9⅙–New. Contract for purchase of apartment building is not void, even though mortgage tax has not been paid. 244Mich220, 221NW177.

1170–9⅛–New. Law requiring payment of registration tax on mortgage is revenue measure, and nonpayment does not make instrument to which tax is applicable invalid. 180Minn550, 231NW 406(2dcase).

1171–11 Construction and application of particular statutes.–83Montl, 268P 555; 30NM491, 239P741. **Construction of act authorizing refund to hailstorm sufferers.**–SC 155SE287.

1171–12 83Montl, 268P555. **Constitutional provision that obligation owing to state or municipality shall not be diminished by legislature** is restriction on legislature itself and not upon taxing officers. 30NM491, 239P741.

1171–14 323 Ill 261, 154NE97. **In North Carolina.**–190NC638, 130SE743.

1171–16½–New. Statute providing for refund of unlawful or excessive income tax assessed and collected does not entitle taxpayer, against whom additional income tax for former years is assessed, to offset of personal property taxes paid during those years. 198Wis 377, 224NW124(4thcase).

1172–17 Legislature has no power to compel return of taxes legally collected. 190NC638, 130SE743. **Delinquent tax is liability to state** within constitutional provision against extinguishing liability to state. TexCommnA 292SW869. **Where there is no statutory authority allowing interest on refund of tax by state,** taxpayer is not entitled to interest upon such refund. 149SC219, 146 SE870.

1172–20 Construction of statutes.–SD 225NW711 (national bank held not "person against whom assessment has been made or tax levied" within statute providing for refund).

1172–22 County has no power to refund taxes assessed by state equalization committee on railroad property. 141Wash28, 251P103.

1173–23 Ark 30SW(2d)213(2dcase); 157 Miss482, 128S334. **Erroneous assessment includes listing of notes, credits,** and accounts not owned or controlled by taxpayer. Ark 30SW(2d)213(2d case).

1173–24 Ark 30SW(2d)213(2dcase). **Excessive assessment.**–That assessment exceeds fair value of property assessed is not in itself evidence of fraud so as to entitle one to refund. 104CalA235, 285P986(2dcase).

1173-26½-New. Refund of gross production tax where ad valorem tax has been paid.-Under Oklahoma statute fact that person paid ad valorem tax on equipment of oil and gas lease in Osage Indian Nation for fiscal year 1920-1921 does not entitle him to refund of gross production tax on oil and gas produced from such lease from March 3, 1921 to June 30, 1921 which was assessed under act of congress of March 3, 1921. 121 Okl 277, 249P914.

1173-26½-New. Words "erroneously paid," in statute relating to refund cannot be applied to payment of any tax for any reason invalid, but they mean "paid under misapprehension as to what was being paid." 52SD352, 217NW542.

1173-26¼-New. Tax paid on property knowingly listed as personal property instead of money and credits is not "erroneously paid" within meaning of statute. 52SD352, 217NW542.

1173-26⅓-New. Redemption from tax sale does not constitute payment entitling taxpayer to reimbursement for excessive assessment. Mass 167NE227.

1173-27 135Misc823, 238NYS525; 54 SD545, 223NW950.

1174-29 128Misc599, 219NYS566.

1174-30 216AppDiv773, 214NYS296.

1174-33 In New York.-216AppDiv773, 214NYS296. **Tax commission's refusal to consider claim for refund** on stamps erroneously canceled, because not filed within ninety days, held not "rejection" within statute reviewable by court of claims. 128Misc599, 219NYS566.

1174-35 In Massachusetts.-256Mass270, 152NE237.

1174-36 256Mass270, 152NE237.

1174-37 Stockholders of trust company held entitled to have refund and interest paid to them. 150Va244, 142 SE528.

1174-38½-New. Statute providing remedy for obtaining refund of excessive or illegal income taxes held to operate prospectively only. ND 231NW883.

1174-38⅓-New. Law according state absolute right to rehearing on petition to refund is constitutional. Va 155SE 823.

1175-39 276US499, 48SCt831, 72L ed 673; 30Ariz27, 243P907 (construing Civ Code [1913] par 4939); 174Ark847, 298 SW201; 103Conn249, 130A164; 121Kan 428, 247P442; 123Kan246, 255P46; 256 Mass270, 152NE237; 193NC248, 136SE 713; 131 Okl 292, 268P1106; 39 Okl ACR157; 136SC439, 134SE387; 141 Wash28, 251P103 (taxes paid under protest). **Action lies** where county has received taxes which in equity and good conscience it should return. 35Wyo 67, 246P916. **Defenses.**-35Wyo 67, 246P916. **Where it appears that entryman under Carey Act had no title, legal or equitable, and no possessory right,** and that legal and equitable title was in United States, it is error to permit county to retain taxes paid by entryman under protest. 35Wyo 67, 246P916. **In some jurisdictions** right to recover illegal taxes paid is statutory. 44 OklACR176. **Payment must have been made at time and in manner provided by statute.**-44 OklACR 176. **Statute prohibiting county treasurer and commissioners to contract to refund taxes illegally imposed** does not affect implied obligation of county to do so, so as to preclude action for recovery of same. 141Wash28, 251P103. **Tax assessed on increased assessed valuation made without notice of proposed increase** may be recovered when paid under protest. 141Wash28, 251P103. **Taxes on railroad property assessed by state officers and collected by county** may be recovered from county where illegal or excessive. 141Wash28, 251P 103. **Full compliance with statutory requirements is necessary.**-140 Okl 233, 283P784. **Statute barring right to recover** because tax not paid when due has been held unconstitutional. 280US 363, 50SCt121, 74L ed478.

1176-42 141Miss497, 106S749; 47RI 351, 133A342.

1176-43 Taxpayer seeking to recover additional taxes under order of board of supervisors showing jurisdiction must show that order contained untrue recitals. Miss 130S106.

1176-44 202 Iowa444, 208NW929 (right waived where corporation voluntarily submitted stock to taxation, as personal property subject to consolidated levy, made no objection before board of review, and made informal and inaccurate estimates of values to assessor); 225AppDiv417, 233NYS277.

1176-44½-New. Where consideration for levying of tax has wholly failed, absence of statute applying to subject matter will not deprive claimant of remedy for recovering assessment paid. 96CalA76, 273P839.

1176-44⅓-New. Refusal to return tax paid under statute declared unconstitutional is not violation of federal Constitution and no federal question is involved. 231Ky637, 21SW(2d)1030.

1177-46 256Mass142, 152NE375; 38 OklACR131; 13PaDist&Co 341; Wis 229NW546. But see 276US499, 48SCt 331, 72L ed673.

1177-47 153Tenn332, 284SW64. But see 141Miss497, 106S749.

1177-48 200 Iowa974, 205NW777.

1177-49 But see 136SC439, 134SE387.

1177-50½-New. Taxpayer who has made voluntary overpayment of tax cannot demand that excess shall be set off against taxes for succeeding year. 8Pa Dist&Co 481.

1177-50⅓-New. Exclusiveness of statutory remedy.-Some statutes providing for recovery of taxes paid under protest provide exclusive remedy. 124 Okl 256, 256P25.

1177-50¼-New. Excess tax paid due to improper listing of property cannot be recovered under statute relating to errors in valuation or extension. 52SD 352, 217NW542.

1177-51 That no trust fund is provided for taxes paid under protest would not prevent recovery, for existence or nonexistence of such trust fund does not affect remedy. 32PortoRico 604.

1177-52 336 Ill 645, 168NE627; 122 Kan662, 252P901, 902 [citCyc]. But see 123Kan246, 255P46. Contra 141 Wash28, 251P103.

1178-54 168Ark58, 268SW849; 172Ark 414, 288SW910; 172Ark1056, 291SW 1005; 108Conn47, 142A578; 43 Ida560, 256P92 [citCyc]; 331 Ill 330, 163NE15; 336 Ill 645, 168NE627; 198 Ind620, 154 NE380; 122Kan662, 252P901; 161La 272, 108S479; 244Mich403, 221NW322; 141Miss131, 106S277; 85Mont450, 279P 247 (noncompliance with statute requiring filing of claim for refund); NC 153 SE850; 11PaDist&Co 256; 48RI 407, 137A783; 148SC349, 146SE93; Va 155 SE823. **Taxpayer voluntarily paying tax and fees imposed by statute** held not entitled to recover them back in action against state. 198 Ind620, 154NE380. **Constitutionality of statute.**-168Ga309, 147SE555.

1179-55 198 Ind620, 154NE380; 52SD 334, 217NW508. **In Mississippi.**-141 Miss131, 106S277.

1179-55½-New. A volunteer collector of illegal taxes voluntarily paid him is estopped by his conduct from asserting a claim to recover them from one for whose benefit they are collected. 337 Ill 122, 168NE886.

1179-57 202 Iowa444, 208NW929 (payment of tax by insurance company held voluntary, where it was based upon informal estimated values given through its executive officer and accepted by assessor); 122Kan662, 252P901; 148SC 349, 146SE93.

1179-58 168Ark58, 268SW849 (payment without objection where collector would have had to sue for collection in which suit illegality could be set up as defense).

1179-60 337 Ill 122, 168NE886; 231Ky 637, 21SW(2d)1030.

1180-62 Payment to avoid liability for interest is not involuntary. 108Conn 47, 142A578.

1180-63½-New. Payments made before taxes were due in order to get certain discounts provided for are voluntary. 196Wis242, 219NW197.

1180-66 22F(2d)678; 43 Ida560, 256P 92 [citCyc]; 170Minn27, 211NW963 (person voluntarily paying another's taxes cannot recover from him); 250 NY29, 164NE732; 37BC130, [1926] 3 DomLR182, [1926] 2WestWkly440. But see 103Conn249, 130A164. **Ignorance of unconstitutionality of law under** which tax is levied is ignorance of law. 154Tenn462, 285SW587, 48ALR 1378. **Illustrations.**-43 Ida560, 256P92. **Action at law** will not lie to recover from owner of land taxes thereon voluntarily paid by plaintiff. 170Minn27, 211NW963.

1181-67 172Ark414, 288SW910. See also Sask [1925] 3DomLR738.

1181-68 224AppDiv659, 229NYS9. See also 45Philippine202. **Taxpayer under no duty** to examine books or conduct of officers to determine whether collectors have complied with law before paying tax bill presented. 103Conn249, 130A 164.

1181-69 198 Ind620, 154NE380.

1181-70 172Ark414, 288SW910 (recognizing rule); 331 Ill 330, 163NE15; 256 Mass270, 152NE237 (illegal franchise tax on foreign corporation doing only interstate business); 157Tenn241, 7SW (2d)803. **Any coercive step taken by authority having power to seize or levy** is sufficient to make payment involuntary. 141Miss131, 106S277. **Some form of coercion is necessary** to render payment involuntary. 196Wis242, 219NW 197.

1181-71 172Ark414, 288SW910.

1182-72 172Ark414, 288SW910; 196 Wis242, 219NW197. **Payment of assessment by means of forced sale** of property for delinquent taxes will be deemed to have been made by duress. 96CalA 76, 273P839.

1182-73 168Ark58, 268SW849 (though payment is made without objection, collector could and would have sold property, owner may pay to avoid cloud on title and sue for refund).

1183-76 Compare 14F(2d)784.

1183-77 103Conn249, 130A164 (dictum). But see 156Tenn579, 3SW(2d) 668, 60ALR393. **Penalty is more readily construed as coercion** where taxpayer has no opportunity to establish illegality of tax except in action to recover money paid. 196Wis242, 219NW 197.

1183-78 168Ga842, 149SE223.

1183-78½-New. Mere apprehension that nonpayment of tax would cause some legal trouble and expense does not constitute duress authorizing recovery back of taxes paid. 198 Ind620, 154NE 380.

1184-79 280US363, 50SCt121, 74L ed 478; 44F(2d)28; 87Colo 275, 288P408; 121Kan428, 247P442; 123Kan246, 255P 46; 256Mass270, 152NE237; 141Miss 131, 106S277; 141Miss497, 106S749; 156Miss227, 126S39; 131Misc37, 225 NYS669; 193NC248, 136SE713; 119 Okl 227, 249P416; 124 Okl 256, 256P25; Okl 258P38 (payment under protest after delinquency may be recovered under some circumstances); 128 Okl 153, 261P 923; 130 Okl 277, 267P270; 140 Okl 266, 283P253 (discriminatory taxes against national bank); 140 Okl 233, 283 P784; 140 Okl 242, 283P788; 140 Okl 255, 283P789; 142 Okl 29, 285P59 (payment under protest after delinquency may be recovered under some circumstances); 35 OklACR506; 39 OklACR 157; 32PortoRico 98; 52SD352, 217NW 542; 53SD82, 220NW152; TexCommnA 3SW(2d)416; 98Vt343, 129A159, 39ALR 1222; 148Wash699, 270P107; 194Wis 456, 216NW144; 199Wis631, 227NW 244. But see 38F(2d)261. **Taxes within application of statute.**-121 Okl 188, 249P 380. **In Oklahoma.**-140 Okl 233, 283P 784; 140 Okl 242, 283P788; 140 Okl 255, 283P789. **Whether void tax is paid by taxpayer under protest** is purely question of fact. 154Wash700, 281P 731(1stcase).

1184-80 See also 52SD352, 217NW542. But see 129 Okl 258, 264P605. **In Oklahoma.**-142 Okl 180, 286P318.

1184-81 20F(2d)202; 96CalA76, 273P 839; 331 Ill 330, 163NE15; 198 Ind620, 154NE380; 121Kan428, 247P442; 256 Mass142, 152NE375; Ont 4DomLR757. **Payment held involuntary.**-156Tenn96, 299SW807.

1185-83 194NC265, 139SE446.

1185-84 Protest held sufficient.-141 Wash28, 251P103; 141Wash47, 251P

110. **Notice of protest held sufficient.**–38 OklACR605.

1185–85 34PortoRico 33 (requirement of collector's signature mandatory as condition precedent to suit).

1185–85½–New. Where assessment is void, general protest is sufficient and need not be specific. 141Miss497, 106S 749.

1185–85⅓–New. Notice of grounds of complaint and that suit will be brought must be given at time taxes are paid to collecting officer. 114 Okl 76, 243P 726; 44 OklACR176.

1185–85¼–New. When statute prescribes no specific conditions in making protest, courts can require none. 141 Wash28, 251P103.

1185–86 38F(2d)261; 336 Ill 645, 168 NE627; ND 231NW883, 885 [citCyc]; 141Wash28, 251P103; 35Wyo 67, 246P 916. **Action is governed by equitable principles.**–35Wyo 67, 246P916. **In Massachusetts.**–259Mass1, 156NE42.

1185–87 253Mass529, 149NE407; 32 PortoRico 98 (statutory remedy exclusive); 34PortoRico 33 (statutory remedy exclusive). **Special remedy provided by statute.**–38 OklACR181; 45Philippine202; 52SD352, 217NW542. **Statutory remedy is exclusive.**–44 OklACR 176. **In Montana.**–76Mont596, 247P 1096. **Tax illegally levied under one section of statute cannot be retained under different section.** 45Philippine202. **Remedy under federal tax held inapplicable to refund under state act.** 144SC 234, 142SE509.

1185–89½–New. In action brought under Civ. Code (1913) par 4939, legality of taxes is only question to be litigated. 30Ariz27, 243P907.

1185–89⅓–New. In such action recovery is not allowed merely upon showing of overvaluation. 30Ariz27, 243P907.

1185–89¼–New. In proceeding under Civ. Code (1913) par 4939, recovery may be had, if any tax item is not for public purpose, or is authorized by invalid legislation, if taxpayer is assessed with property that is exempt or not owned by him, or overvaluation is result of adoption of rule of appraisement which conflicts with constitutional or statutory direction and operates unequally among large class. 30Ariz27, 243P907.

1185–89½–New. Appeal from judgment in action to recover taxes will be reviewed though assessment sheet first in evidence was not copied in bill of exceptions. 212Ala556, 103S648.

1185–89⅓–New. Function of trial court in reviewing decision of equalization board, in action to recover tax paid. 104CalA235, 285P896(2dcase).

1185–90 23F(2d)313; 32F(2d)142; 198 Cal 405, 245P196 (application to board of equalization necessary); 123Kan246, 255P46 (application to board of equalization not necessary where United States bonds were included in corporate tax); 196NC744, 147SE284; 25 OhA380, 158 NE9 (held condition precedent under Gen. Code §§ 5609, 5610); SD 227NW 461; 153Wash332, 280P3. **When city was without jurisdiction to assess property for taxation,** owner is not required to appear before board of review and exhaust such remedy as condition precedent to recovery of taxes paid under protest. 231Mich699, 204NW718. **Where tax is levied on exempt property,** application to board of equalization is not necessary. 123Kan246, 255 P46. **Where error is jurisdictional rendering assessment void,** resort to board of equalization is unnecessary. 123Kan 246, 255P46. **Where excessive assessment is made by assessor in good faith and in exercise of best judgment,** resort to board of equalization is necessary. 123Kan246, 255P46. **Must have taken appeal** from refusal of board of commissioners to refund. SD 228NW 238.

1185–91 23F(2d)313.

1185–92 87Colo 275, 288P408; 87Colo 286, 288P413 (presentation of verified claim); 241NY221, 149NE838. **Written demand within thirty days after payment of tax** is required by statute in some jurisdictions. 194NC265, 139SE 446.

1185–92½–New. Service of summons on county treasurer within thirty days after payment of tax is condition precedent under some statutes. 114 Okl 76, 243P 726.

1185–92⅓–New. Time for presenting claim.–141Wash47, 251P110.

1185–92¼–New. Claim for refund of taxes illegally assessed filed immediately after payment of taxes under protest is filed within reasonable time. 141 Wash28, 251P103.

1185–92½–New. Compliance with requirements prescribed by statute is condition precedent to recovery of illegal taxes paid. 44 OklACR176.

1185–92⅔–New. Payment of all taxes due and payable is necessary under some statutes before action can be maintained to recover any illegal portion of taxes paid. 127 Okl 242, 260P476.

1185–92⅞–New. Where all taxes remaining due are paid within time fixed by joint or concurrent house resolution extending time of payment and declaring time when last half of taxes will become delinquent, payment is in compliance with law. 127 Okl 242, 260P 476.

1185–92⅛–New. Payment of amount assessed is prerequisite under some statutes. 134 Okl 29, 272P393.

1186–93 36GaA47, 135SE223; 253Mass 529, 149NE407; 25 OhA380, 158NE9; 140 Okl 233, 283P784; 44 OklACR176; 32PortoRico 98; Wis 229NW546. **Limitation not tolled** by deferring presentation of claim. 36GaA47, 135SE223. **Effect of misinformation by county treasurer.**–120 Okl 8, 249P907. **In Massachusetts.**–256Mass270, 152NE237.

1187–96½–New. But where action is brought within reasonable time after discovery of mistake, laches cannot be claimed as defense where defendant was in no way injured. 103Conn249, 130A 164.

1187–97 National bank paying under protest taxes imposed on shares of stock therein, in violation of statute, is real party in interest in action to recover amount from county and its treasurer and commissioners. 26F(2d)890. **Bank is real party in interest** in suing to recover sum paid as taxes levied on bank's capital stock. 37F(2d)947.

1187–1 There is no authority for suit against sheriff in some jurisdictions. 194NC265, 139SE446.

1187–2 194NC265, 139SE446; 144SC 234, 142SE509.

1188–3 See also 32PortoRico 98.

1188–5 Action cannot be brought against state equalization committee which assessed taxes, but must be brought against county which collected same. 141Wash28, 251P103. **State tax committee** is not necessary or proper party to action against county to recover taxes illegally assessed. 141Wash 28, 251P103. **In Oklahoma.**–120 Okl 8, 249P907.

1188–5½–New. Bondholders and judgment creditors may be necessary parties. 36F(2d)652.

1188–6 22F(2d)678; 89CalA311, 264P 506; IndA 156NE172; 140 Okl 266, 283 P253 (allegations held sufficient); 199 Wis631, 227NW244. **Complaint held not to state cause of action.**–198 Ind620, 154 NE380. **Petition held sufficient.**–121 Okl 188, 249P380. **Complaint held insufficient.**–161Tenn676, 30SW(2d)243.

1188–7 130 Okl 1, 264P893. **Payment at time and in manner provided by law** must be alleged. 140 Okl 233, 283P784.

1188–8 170Minn27, 211NW963 (complaint to recover taxes voluntarily paid on defendant's land held demurrable). **Written notice of protest** must be alleged to have been given as required by statute. 194NC265, 139SE446. **Allegations held sufficient.**–26F(2d)890.

1189–9 194NC265, 139SE446.

1189–9½–New. Petition held to allege compliance with statutory requisites. –121 Okl 188, 249P380.

1189–9⅓–New. Petition showing noncompliance with any essential statutory requirement is demurrable. 44 OklACR 176.

1189–10 141Miss131, 106S277 (plea to declaration held sufficient to set up defense of voluntary payment without protest). **Matter of avoidance** should be pleaded as defense. IndA 156NE172.

1189–10½–New. Defenses.–It is not defense to action to recover for overpayment of taxes that money so paid has been mingled with other municipal funds and expended. 103Conn249, 130 A164.

1189–11 279US306, 49SCt304, 73Led 704; 76CalA267, 244P919; 104CalA235, 285P896(2dcase); 331 Ill 330, 163NE15; Iowa 232NW445; 49Nev46, 235P643 (valuations of property are presumed to be reasonable); 131Misc37, 225NYS 669; 129 Okl 258, 264P605. **Evidence held sufficient.**–76CalA267, 244P919; 88 CalA82, 262P788; 104CalA235, 285P 896(2dcase); 153Wash351, 280P16. **Evidence held insufficient.**–104CalA235, 285P896(2dcase); 87Colo 286, 288P413 (1stcase); 142 Okl 54, 285P100; TexCivA 29SW(2d)802. **Clear and convincing proof** is necessary to overcome presumption of reasonableness of valuation. 49 Nev46, 235P643. **Collection of tax** assumes its validity. 103Conn249, 130A 164. **On appeal general findings of law** and fact as to validity of Tax Law are not conclusive. 187Wis290, 203NW721. **Valuation of mining property** held not to be excessive. 49Nev46, 235P643. **Where it is admitted that described property was not taxable,** burden rests on county to introduce proof in support of defense. 35Wyo 67, 246P916. **Presumption favors validity of levy,** but it is not conclusive. 76CalA267, 244P919. **Exemption of property.**–127Kan208, 272 P135.

1189–12 Payment at time and in manner provided by law must be proved. 140 Okl 233, 283P784.

1190–13 331 Ill 330, 163NE15. **Proof that one party is under no legal obligation to pay taxes** sought to be recovered back by taxpayer, and that other has no right to receive them, is of no consequence, unless payment was compulsory in sense of depriving one making payment of exercise of free will. 331 Ill 330. 163NE15.

1190–15½–New. Taxability and value of water rights not shown.–35Wyo 67, 246P916.

1190–15⅓–New. Mere increase over last assessment does not prove latter to be excessive. 49Nev46, 235P643.

1190–16 As limited by protest.–86Mont 434. 284P147(1stcase).

1190–19 219AppDiv184, 219NYS878; 141 Wash28, 251P103. Contra 23F(2d)313; 86Mont367. 283P769; 35 OklACR506. **In South Dakota.**–229NW394.

1190–20½–New. Where county undertook to tax interest of entryman in lands including water rights, and entryman is shown to have no taxable interest in land, county should be permitted to retain portion of taxes based on water rights provided they are shown to be taxable property. 35Wyo 67, 246P916.

1190–20⅓–New. Right to rehearing and appeal from final order. Va 155SE828.

1190–21 148Md330, 129A370; 129 Okl 145, 264P190; 147SC116, 144SE846; 193Wis295, 214NW447. **Constitutional designation of duties of officials for assessing and collecting ad valorem taxes** covers entire field and is exclusive. Tex CivA 297SW1055. **Power to compel payment ends with payment.**–Iowa 232 NW445.

1191–22 35F(2d)386; CalA 289P678 (whether by state or local authorities); 121Kan105, 245P1030; 148Md330, 129A 370; MoA 284SW153; 226AppDiv182, 234NYS457 (authority for collection of taxes may be found in general laws where special acts are silent or obscure); 37Wyo 405, 263P698.

1191–23 148Md330, 129A370 (rule of uniformity does not apply to statutory provisions for collection of tax, penalties being imposed upon all persons similarly situated).

1191–24 119 Or141, 248P358 (summary remedy not violation of due process).

1191–26 In collecting tax on railway property, county acts for state and all taxation districts. 141Wash28, 251P 103.

1191–26½–New. Till payment state may

proceed by all proper means to compel performance of obligation to pay tax. 193Wis295, 214NW447.

1191-26½-New. Municipal officers in collecting taxes act as agents of state. 128Mel, 145A241.

1191-27 In Georgia.-162Ga592, 133SE624.

1191-29 In some jurisdictions repeal of statute under which taxes are levied puts end to right to collect same, unless repealing act contains provision preserving taxes and right of collection. 31Ariz252, 252P515.

1191-30 226AppDiv182, 234NYS457; 154SC55, 151SE218 (repeal by implication not favored).

1191-30½-New. Primary purpose of statutes authorizing state agencies to compromise taxes against bank stock is to facilitate collection from banks which had taken advantage of absence of any authority for levying or collecting capital stock tax. 53ND140, 205NW17.

1191-30¼-New. Referendum striking compromise feature from such statute removes primary purpose of statute leaving remainder self-contradictory and inconsistent and subverts express legislative purpose of effect to be given to what remains of statute. 53ND140, 205NW17.

1191-30¼-New. Statute permitting contract with sheriff, to pay percentage of delinquent taxes collected, held not repealed by later statutes. 53ND464, 206NW781.

1191-30½-New. Statute authorizing revision of commissions on revival of suits for unpaid taxes by successor to revenue agent is not unconstitutional as impairing obligation of contract, 144Miss614, 109S900.

1191-30¼-New. or as conferring judicial power on revenue agent. 144Miss614, 109S900.

1191-30½-New. Statutory provision requiring suretyship by surety company qualified to do business in Alabama held constitutional. 213Ala686, 106S143.

1191-30½-New. Statutory provision as to mode of collection must be followed. 24 OhA90, 155NE867.

1191-30½-New. Legislature has power to enact legislation extending time for collecting arrears of taxes. 194NC265, 139SE446.

1191-30 1/10-New. Act amending statute relating to tax collector's fees does not have retroactive effect. **TexCommnA** 27SW(2d)532.

1191-32 179Ark1104, 20SW(2d)116; 13PaDist&Co 757.

1192-37 179Ark1104, 20SW(2d)116 (by virtue of repealing statute); 56ND 41, 216NW212. **In Arkansas.**-168Ark 449, 270SW609.

1192-38 Designation of other office held void.-168Ark449, 270SW609.

1192-40 In Florida.-92Fla989, 111S 252.

1193-43 See also 13PaDist&Co 757.

1193-45 In Florida.-92Fla989, 111S 252.

1194-52½-New. Personal bond of tax collector held properly disapproved. 213Ala686, 106S143.

1195-59 13PaDist&Co 757 (appointee to fill vacancy).

1195-65½-New. Deputy county collector accepting appointment and qualifying as school tax assessor relinquishes former office. **TexCivA** 31SW(2d)659.

1195-66 22AlaA622, 118S682; 98Fla 103, 122S222; 328 Ill 262, 159NE194; **TexCivA** 19SW(2d)325. **In Texas.**-**CommnA** 298SW417.

1196-67 But see 50SD541, 210NW742.

1196-70½-New. Within law authorizing payment of premium on collector's bond where valuation exceeds $30,000,000, "total taxable valuation" includes only property assessed for state and county purposes as shown by official tax roll, and commissioner's court, in ascertaining such valuation for purpose of determining right to pay premium, is limited to valuation of tax roll. **TexCommnA** 2SW(2d)433.

1197-74½-New. Services rendered to third persons.-Collector making certified list from tax record showing taxes paid, and by whom, may recover from person requesting same where services were not within his legal duties. **Tex CivA** 281SW293.

1197-77 Revival by successor of suits for unpaid taxes.-144Miss614, 109S900. **Burden of proof.**-**TexCommnA** 27SW (2d)532.

1197-78 207Cal189, 277P333; 328 Ill 262, 159NE194; 231Ky587, 21SW(2d) 989; 157Miss114, 126S833 (statutes construed); 317Mo579, 296SW787; 197NC301, 148SE448; 287Pa392, 135A 225; **7PaDist&Co** 173. **Unlawful increase of compensation.**-**TexCivA** 19SW (2d)325.

1198-83 Recovery of commissions after payment to county.-**TexCivA** 29SW (2d)476. **Tax collector's payment of delinquent taxes collected** without deducting commission pursuant to invalid agreement has been held not involuntary. **TexCivA** 27SW(2d)649.

1199-84 99Fla358, 127S319 (words "audited and allowed" construed as meaning audited and paid if legal and correct); 127 Okl135, 260P20. **Tax ferret must itemize, verify, and file his claim.**-127 Okl135, 260P20. **County treasurer must set aside amount claimed by tax ferret** and hold same till he is authorized by county commissioners to make payment. 127 Okl135, 260P20. **Agreement between county judge and tax collector** covering payment of fees held invalid. **TexCivA** 27SW(2d)649. **Statute preventing plea of limitations as defense** in suit against county for delinquent tax fees held ineffective where limitation complete against cause prior to passage of act. **TexCivA** 29 SW(2d)476.

1199-85½-New. Compensation of attorneys.-Where state revenue agent of Mississippi collects money from persons sued by his predecessor in behalf of state, county, or levee board, it must be considered that there was merit in such suits, and attorneys employed by former revenue agent are entitled to their compensation under their contracts in such cases. 144Miss201, 109 S715.

1199-85½-New. To recover sums mistakenly included as delinquent tax collection commissions, it was not essential for tax collector to put himself in position of one entitled to maintain independent suit. **TexCommnA** 11SW (2d)163.

1199-87 103CalA473, 284P1072; 38 OklACR530; 297Pa526, 147A613 (county treasurer).

1200-91 Kentucky revenue agent cannot assign claim and subrogate assignee to rights of state. 5F(2d)259.

1200-91½-New. No imperative duty on collector to maintain office in courthouse. 177Ark474, 7SW(2d)13.

1200-92 CalA 269P964.

1200-95 32NM314, 255P634 (authority to collect taxes subsequent to certain date not restricted by statute discharging liens prior thereto).

1200-95½-New. Under statute city collector is entitled to demand payment of all municipal and state taxes on personalty due and in arrears for any one or more years. 148Md324, 129A356.

1200-96 191NC112, 131SE309 (sheriff bound to collect, though term has expired). **Sheriff is under no duty to collect taxes which his predecessor has failed to account for.**-191NC112, 131SE 309.

1200-97 But see 11PaDist&Co 262.

1201-1 But see **Ark** 30SW(2d)211. **Duty of outgoing sheriff to deliver tax list to successor.**-197NC301, 148SE448.

1201-2 294Pa562, 144A750.

1202-11½-New. Treasurer's warrant based on order of county board of equalization directing abatement of tax is fair on its face though abatement not authorized by state board. **Utah** 280P1065.

1203-15 328 Ill 262, 159NE194.

1204-20 Under statute, collector must send bill for taxes and accept and receipt for those tendered, and it is no defense that there is unpaid street assessment. **NJSup** 132A329.

1204-21 Tax bill for bank capital stock taxes showing names of shareholders and shares owned by each without valuation against names held not void. **Mo** 26SW(2d)976.

1204-22½-New. Mistake in tax bill did not invalidate corrected bills. 208Ky 7, 270SW995.

1204-22½-New. Tax bills may mean any assessments imposed by governmental authority, state, county, or municipal. 98Fla1103, 125S521.

1204-23 In Oregon.-131 Or563, 284P 166, 68ALR422.

1204-26 210Ky51, 275SW1 (settlement of sheriff's tax collection account can only be made with fiscal court). **Construction of statutes.**-210Ky51, 275 SW1. **Settlement and filing thereof.**-210Ky51, 275SW1. **Legality of settlements** held not affected by failure of county clerk to record before confirmation. 216Ky516, 287SW983. **Where valid settlement is confirmed without exceptions filed,** remedy of those aggrieved by error is suit to surcharge settlement. 216Ky516, 287SW983.

1204-26½-New. Sheriff's settlement with fiscal court declared not settlement required by statute. 210Ky51, 275 SW1.

1204-28 191NC112, 131SE309 (sheriff liable to county for whole amount of list, less lawful deductions). **Only lawful deductions are** amounts lawfully allowed as insolvent and uncollectable taxes, amounts which have been bid off at tax sales by county, and lawful commissions and fees. 191NC112, 131SE 309.

1205-30½-New. Title to moneys collected.-Moneys collected as personal property taxes by county assessor are public moneys belonging to county. 30Ariz36, 243P919.

1205-30½-New. Delinquent tax suit fees, allowed county tax collector, and mistakenly omitted from excess fees payable to county treasurer, and mistakenly included commissions on delinquent tax collections, were not separate debts of collector and county, so as to require mutual act to cancel them. **TexCommnA** 11SW(2d)163.

1205-30¼-New. Sheriff should be given notice before approval of settlement by county court where matter has gone on for several years. 233Ky719, 26 SW(2d)747.

1205-31 165Ga164, 140SE379. **Audit** of amount due from deceased collector may be corrected by supplemental report. 85PaSuper84 [aff 4PaDist&Co 62].

1205-32 190NC336, 130SE25.

1205-33 216Ky516, 287SW983; 228 Ky541, 15SW(2d)481. But see 231Ky 587, 21SW(2d)989. **Where audit of account is not filed properly,** there is no final, conclusive settlement. 85Pa Super84. **In Kentucky.**-233Ky719, 26 SW(2d)747.

1205-34 See also 78Mont156, 252P805.

1206-40 Neglect to pay over monthly all moneys in his hands is not "defalcation." Conn 152A285.

1207-41 See 177Ark990, 8SW(2d)466.

1207-42 County treasurer in office at time of payment held entitled under statute to taxes collected by sheriff on executions issued by former treasurer. 132SC355, 128SE45.

1207-44 Tax collector is permitted at his own risk to transmit anything he sees fit as representative of money.-**TexCommnA** 282SW211, 45ALR1483. **County clerk allowing debtor discount for depreciated value of scrip,** though not receiving scrip, must make settlement of tax due county "in kind." 181 Ark177, 25SW(2d)419.

1207-46 Conn 152A285; **TexCivA** 297 SW864.

1207-49 162Ga292, 133SE248.

1208-50 216Ky516, 287SW983.

1208-54 221Ala268, 128S220; 162Ga 292, 133SE248. **Judgment is unnecessary to establish lien.**-221Ala268, 128 S220.

1208-55 221Ala268, 128S220; 162Ga 292, 133SE248. **Amount of mortgage loan used in improving land is not superior to lien for shortages.** 221Ala268, 128S220.

1209-57 160Tenn403, 23SW(2d)897; 101Vt419, 144A203.

1209-58 177Ark784, 7SW(2d)977; 158 La288, 103S771 (evidence held to show that increase in assessment was made by assessor after original valuation had been made). **Enjoining of collection of tax before delinquency** may furnish sufficient reason for failure to report property and extend penalty. 174Ark847, 298SW201.

1209-59 Collector is not insurer of collectability of taxes. Conn 152A285.

1211-72 Collector extending time for tax payment is not subrogated to state's right of lien. 173Ark970, 294SW74.

1211-74 MoA 284SW153; 132Misc 325, 229NYS578; 149Wash530, 271P 587.

1213-85½-New. Auditor's report as fixing liability.-Filing in proper court of auditor's report is necessary step in fixing liability; 85PaSuper84.

1213-85½-New. and if defective or insufficient, supplemental report may be filed. 85PaSuper84.

1213-86 168Ga77, 147SE95. **Burden of proof.**-165Ga164, 140SE379. **Evidence held insufficient.**-165Ga164, 140SE379. **Execution against tax collector reciting** that tax collector has collected and fails to turn over to proper authorities certain sum has been held sufficient statement of facts to authorize issuance of execution against defaulting tax collector. 168Ga77, 147SE95.

1214-91 Under statute, county can recover from tax collector only such fees collected by him as exceed amount of his compensation and office expenses. TexCommnA 11SW(2d)163.

1214-93½-New. Sheriff, in suit to compel accounting, is estopped to question authority to levy taxes certified to him when he has received tax lists and acted under them. 190NC638, 130SE743.

1214-94 190NC638, 130SE743 (sheriff cannot counterclaim for overpayment in prior year in action to compel accounting for taxes collected). **Statute permitting counterclaim not retroactive** or applicable to pending action against sheriff for taxes collected. 190NC638, 130SE743.

1214-94½-New. County tax collector is entitled to have balance due him for certain year applied pro tanto in extinguishment of prior and subsequent balances in favor of county, suing him for residue of delinquent tax fees. Tex CommnA 11SW(2d)163.

1214-94¼-New. County tax collector sued by county for residue payable to county treasurer may recover such sums without having submitted claims to county authorities for auditing, allowance, etc. TexCommnA 11SW(2d)163.

1215-2½-New. In action against sheriff for accounting for taxes collected, order requiring deposit of tax list in vault of county registrar's office for protection held within power of court. 190NC638, 130SE743.

1216-16 180Ark29, 20SW(2d)322.

1216-17 168Ga77, 147SE95.

1216-18 110Conn319, 148A353 (bond leaving remainder without average has been held not requisite bond). **Conduct of surety is inequitable** if it intends to limit its liability and furnish bond and accept premiums, which does not comply with application. 110Conn 319, 148A353.

1217-21 Under statute, special school district has been held properly allowed to appeal from order approving bond of county collector though it was not party to county court proceedings approving bond. 180Ark29, 20SW(2d)322.

1217-22 Tax collector's bond not approved by circuit court or judge but only by county judge has been held not void. 40F(2d)395.

1217-29 155Md665, 142A525, 58ALR 1213. But see 181Ark161, 25SW(2d)417. **Where taxes already paid to tax collector's successor,** town could not collect on bond. Conn 152A285.

1218-31 Unlawful use of weapon by tax collecting deputy to sheriff creates liability on his bond whether or not he acted colore officii. 107WVa230, 148SE2.

1219-39 180Ark29, 20SW(2d)322; 181 Ark161, 25SW(2d)417. **Credits.**-233Ky 719, 26SW(2d)747.

1219-40 164Ga798, 139SE538 (twenty per cent).

1219-43 180Ark29, 20SW(2d)322.

1220-47 In Kentucky.-219Ky35, 292SW 495. **Lien to county for funds collected by sheriff** and not accounted for by him under statute exists as long as there is any money due by sheriff to county. 228 Ky541, 15SW(2d)481.

1220-48½-New. Payment by sheriff's surety of sheriff's debts to county in settlement of suits by county against sheriff did not bar surety's suit to enforce lien more than five years after approval of sheriff's settlement with county. 228Ky541, 15SW(2d)481.

1221-49 173Ark970, 294SW74. But see Conn 152A285.

1221-52½-New. Loss through private arrangement between collector and taxpayers is breach of bond. TexCommnA 1SW(2d)601.

1221-55 Conn 152A285.

1221-55½-New. Property conveyed is used in inverse order of alienation. 214 Ala608, 108S525, 47ALR506.

1222-56 See also 168Ga228, 147SE386 (2dcase). **Under statute authorizing comptroller general to issue execution** against defaulting tax collectors and their sureties with interest at twenty per cent per annum, surety on bond of tax collector shown to be insolvent was not liable for attorney's fees of solicitor general. 168Ga228, 147SE386(2dcase).

1223-68 214Ala608, 108S525, 47ALR 506. **In Alabama.**-215Ala218, 110S24.

1223-69 214Ala608, 108S525, 47ALR 506 (at time of execution).

1223-71 214Ala608, 108S525, 47ALR 506. **Improvements of subvendees** held subordinate to lien. 214Ala608, 108S525, 47ALR506.

1223-75½-New. Property of collector must first be exhausted to satisfy lien under bond; 214Ala608, 108S525, 47ALR 506.

1223-77½-New. Anyone injured by tax collecting deputy to sheriff by unlawful or careless use of firearms may maintain action thereon in sheriff's name where bond runs to him. 99WVa604, 130SE129.

1224-88 213Ky231, 280SW965 (sureties on deputy sheriff's bond held discharged from liability after seven years from accrual of cause of action for his failure to account). **Laches of board of education** in failing to notify surety of sheriff's failure to pay over taxes does not preclude recovery from surety. 222Ky 502, 1SW(2d)954.

1224-91 Where judgment had been recovered against collector for balance due without credit for moneys wrongfully allocated to balances for prior years, and sureties had taken no steps to secure reduction of award, they cannot interpret such credits as defense. 287Pa441, 135A214. **Superfluous reference** in bond to year for which recovery was not allowed held not to relieve surety from liability. 287Pa441, 135A215.

1225-93 40F(2d)395.

1226-2 231Ky587, 21SW(2d)989 (name of county).

1227-13½-New. Declaration in action on bond of tax collecting deputy to sheriff based on unlawful use of weapon has been held sufficient. 107WVa230, 148 SE2.

1227-13¼-New. Pleadings attacking settlements for fraud or mistake in failing to give certain credits destroy effect of settlement only to extent that such credits are proved. 233Ky719, 26 SW(2d)747.

1227-13¼-New. Where settlements are opened by pleadings of sheriff and his sureties, sheriff may be charged with additional sums disclosed by evidence. 233Ky719, 26SW(2d)747.

1228-19 Evidence of wrongful allocation of tax moneys without knowledge or connivance of county official held inadmissible. 287Pa441, 135A214.

1228-20½-New. In action for balance due from sheriff under two supplemental settlements, expert accountant cannot testify as to matters shown in other settlements. 233Ky719, 26SW(2d)747.

1229-31 167La605, 120S23.

1229-32 Mortgaged cattle may not be seized unless owned by taxpayer at time of levy of tax and situated in county assessing tax. 34Wyo 199, 242P415.

1229-33 34Wyo 199, 242P415, 417 [cit Cyc].

1230-35½-New. Where state has proceeded to collect taxes out of property liable for their payment, it cannot be forced to shift to other property and collect taxes piecemeal. 37GaA537, 140 SE902.

1230-36 132Misc325, 229NYS578. **Applications of rule.**-145Wash656, 261P 386.

1230-42 Taxes levied on real property are collectible only out of such property, whereas taxes levied on personal property become personal liability of person assessed. 167La605, 120S23. **Legislature cannot require assessor to collect taxes on migratory stock** out of such stock instead of extending them on real property assessment under statute. 47 Ida33, 272P498, 65ALR663.

1231-47 5F(2d)11.

1231-49 Statute held constitutional.-106Conn223, 137A742. **Statute held repealed.**-82Mont349, 267P305.

1231-50 82Mont349, 267P305.

1232-54½-New. Legislature can give state tax commission special remedies to compel payment of taxes in addition to ordinary suit. 136Misc104, 240NYS309.

1232-57½-New. Failure of corporation or its receiver to question franchise tax in manner provided by statute precludes attacking validity of tax when asserted by state as claim against corporation assets. 8F(2d)304.

1232-58 322 Ill 150, 152NE575; 20 OhA 101, 151NE793 (under statute); 47RI 438, 133A815; 160Tenn634, 28SW(2d) 639. **Cotenants are liable severally only** each for portion of tax chargeable to his undivided interest. 20 OhA101, 151 NE793. **Subsequent severance of ownership or absolute destruction of property** has been held not to relieve persons so assessed. NJSup 147A724. **In New York.**-39F(2d)574.

1232-59 172Minn567, 216NW250; 180 Minn283, 230NW654. See also 135Wash 669, 238P612. **Assessment against realty stands against property** owner's name being on roll only to identify property. 218AppDiv287, 218NYS185. **Holder of tax certificate** is not entitled to personal judgment against owner of land for amount represented thereby. 142 Okl 47, 285P89.

1232-61½-New. Statute held not to authorize personal judgment against corporation for back taxes on land. 175 Ark956, 2SW(2d)25.

1233-62 Statute authorizing suits for back taxes on corporate property inadequately assessed are not unconstitutional as denying equal protection or due process. 175Ark956, 2SW(2d)25.

1233-62½-New. Statutes purporting to discharge personal liability for taxes which have been duly assessed are unconstitutional in some jurisdictions. 32 NM314, 255P634.

1233-62½-New. If such statutes are construed merely as barring suit to enforce personal liability, they are held to be unconstitutional. 32NM314, 255P 634.

1233-62¼-New. Statutes held to have prospective operation. 160Tenn403, 23 SW(2d)897.

1233-64 160Tenn403, 23SW(2d)897 (statute providing limitations against taxes held not repealed).

1233-65 168Ga842, 149SE223.

1233-67 47 Ida712, 278P214(2dcase); 172Minn263, 215NW71; 74Mont346, 240 P837. But see Alta [1925] 3DomLR777.

1234-68 74Mont346, 240P837.

1234-69 83Mont380, 272P684.

1234-71½-New. Form of procedure in force at time proceedings are instituted and not when tax vests is to be used in collecting tax. 31Ariz252, 252P515.

1234-75 167Ga694, 146SE477(1stcase); 39GaA671, 148SE279(1stcase).

1234-77 154SC55, 151SE218 (collection of delinquent income tax). **Where law was inapplicable to county,** because not included by reason of its population, fieri facias issued and served was void.

35GaA744, 134SE801.

1234-78 Lien of fieri facias for taxes for 1922 held to attach to land of owner adjudicated bankrupt in December 1921 and not divested by trustee's quitclaim deed to holder of security deed. 162Ga 354, 133SE920. **Provision giving defendant** in fieri facias opportunity to point out property to be levied on does not apply to tax sales. 162Ga592, 133 SE624. **Levy held not excessive.**–166Ga 689, 144SE313. **Levy of tax execution on house and lot of much greater value than execution,** where lot is capable of being subdivided into parcels, is excessive. 168Ga101, 147SE32.

1235-79 101Vt419, 144A203.

1235-82½-New. Tax execution against debtor having two secured creditors should be apportioned between creditors by making separate properties liable ratably therefor. 170Ga734, 154 SE247.

1235-83 Property as security in place of bond.–TexCivA 276SW745.

1236-89 Personal service not necessary. –136Misc104, 240NYS309.

1236-90 Necessity of recording to preserve lien.–36GaA347, 136SE554. **Transfer held illegal and void.**–160Ga831, 129 SE546 (inadmissible in evidence in suit for specific performance). **Rights of purchaser under void transfer.**–166Ga 274, 142SE870. **By whom transfer made.** –166Ga274, 142SE870.

1236-93 Corporation is not "person" within statute authorizing distraint of property for taxes. 297Pa522, 147A605.

1236-94 Rights against purchaser of personal property who assumed payment of taxes thereon cannot be enforced by summary distraint proceedings. 142 Wash670, 253P1079.

1236-97 TexCommnA 3SW(2d)416.

1237-98½-New. In Saskatchewan second distress is not illegal where first distress was rendered ineffective by obstruction of debtor. [1929] 2DomLR 386.

1237-98½-New. In such case second distress need not be confined to goods previously distrained. **Sask** [1929] 2 DomLR386.

1237-99 Demand must be made in statutory manner.–MoA 284SW153 (not by mail).

1237-2 225Ky778, 10SW(2d)290; 149 Wash538, 271P830. **Taxpayer's perpetuity in mineral rights in ground** is not subject to sale. 103CalA473, 284P1072.

1237-4 Any property of class of personal property assessed may be seized to amount due on part assessed. 34Wyo 199, 242P415. **Proof that receiver of undissolved partnership received merchandise on which tax was levied is unnecessary** in order for claim for taxes to be preferred over creditors. 99NJEq97, 133 A190.

1237-5 99NJEq97, 133A190; 142Wash 670, 253P1079; 149Wash530, 271P587; **Ont** [1930] 4DomLR658. **Replevin by owner of goods.**–38Wyo 393, 267P512. **County treasurer,** having accounted to auditor of public accounts for taxes due from taxpayer, has statutory right within year to distrain goods and chattels of taxpayer in county, where goods are in taxpayer's possession notwithstanding encumbrances on goods so distrained, and is not subrogated to commonwealth. 150Va394, 143SE713.

1238-7 38Wyo 393, 267P512. **Scope and extent of rule.**–135Wash669, 238P 612. **Where purchaser of personal property from tax debtor has sold it,** personal property of such purchaser is not subject to distraint for such tax. 142Wash 670, 253P1079.

1238-13 Where distress is made for more taxes than actually due, replevin will not lie to recover property. **Sask** [1929] 2DomLR537.

1238-15½-New. Right to distress for personal property is not affected by failure to proceed forthwith as permitted by statute. 99NJEq97, 133A190.

1238-18 Wood, belonging to owner of mill on which tax was assessed as realty, may be sold under statute, for unpaid taxes. 218AppDiv287, 218NYS185.

1238-19 34Wyo 199, 242P415, 417 [cit Cyc].

1238-21½-New. Though personalty is mortgaged, sheriff is not relieved from subjecting it to tax. 215Ky601, 286 SW779.

1239-22 82Mont349, 267P305, 308 [quot Cyc].

1240-37 34F(2d)795.

1240-38 30F(2d)600; 34F(2d)795; 217 AppDiv210, 216NYS699; 141SC290, 139 SE633, 636 [quotCJ]. **Action or distress and sale.**–50SD130, 208NW717. **Statute construed to allow action at law.** Alta [1925] 3DomLR777. **Taxes on realty,** assessable directly, held not recoverable in action. 217AppDiv210, 216 NYS699. **In Tennessee.**–160Tenn634, 28 SW(2d)639.

1241-39 321Mo 35, 10SW(2d)918; 126 Or615, 268P1012. **Under statute empowering tax commission to adopt rules and regulations to enforce income tax,** law commission cannot adopt rules which change direct language of statute. 217AppDiv619, 216NYS74. **Time to sue** held controlled by statutory provisions. TexCommnA 294SW848.

1241-43 179Ark280, 16SW(2d)581; 47 Ida712, 278P214(2dcase); 172Minn263, 215NW71; 217AppDiv210, 216NYS699 (where statute provides for sale). But see Alta [1925] 3DomLR777.

1242-49 Equity will not take jurisdiction of suit to enforce tax lien where statutory method of enforcement and collection of taxes is adequate and complete. 47 Ida712, 278P214(2dcase).

1242-50 But see 47 Ida712, 278P214(2d case).

1243-52 179Ark280, 16SW(2d)581. **Prosecution by state revenue agent of actions instituted by predecessor.**–144 Miss201, 109S715.

1243-56 126 Or615, 268P1012; Alta [1927] 3DomLR755 (assignee held not liable for sales tax).

1244-61 30F(2d)600.

1244-64 Contra 160Tenn403, 23SW(2d) 897.

1244-66 101Vt419, 144A203. **Necessity of demand.**–101Vt419, 144A203. **In Texas.**–CivA, 25SW(2d)1113.

1245-73 In Texas.–CivA 24SW(2d)517.

1245-75 Estoppel.–TexCivA 280SW292.

1245-78½-New. Sheriff's settlement with county for taxes due in certain years does not extinguish delinquent taxpayer's liability. 194NC265, 139SE 446.

1245-79 Ont [1927] 3DomLR251 (defendant held bound by appeal from assessment); **Sask** [1928] 1DomLR436.

1245-80 90PaSuper262.

1246-81 Statute declaring that failure to give notice of delinquency shall not constitute defense must be given meaning terms legally and commonly imply. TexCivA 25SW(2d)1113.

1246-84 317 Ill 547, 148NE273; 323 Ill 261, 154NE97; 332 Ill 467, 163NE769; 114Nebr740, 209NW621; **Alta** [1925] 3 DomLR222.

1246-85 323 Ill 261, 154NE97. **In absence of acts rendering assessment so arbitrary or discriminating as to amount to fraud** or denial of equal protection of law, courts will not in general control discretion of assessor in making valuation for purposes of taxation. 89 Fla514, 105S115 (suit to enforce payment of taxes or denial of equal protection of law).

1246-87 174Ark507, 297SW822; 317 Ill 547, 148NE273; 328 Ill 53, 159NE 193; **Alta** [1925] 3DomLR222.

1247-90 309Ky193, 272SW387; 8Pa Dist&Co 481; 160Tenn403, 23SW(2d) 897.

1247-90½-New. This rule applies to special assessments if governmental purpose is delayed or hindered by permitting counterclaim. 209Ky193, 272SW 387.

1247-91 190NC332, 129SE808; 115Tex 258, 280SW732 (statute fixing duty of county officials in collection of delinquent taxes held to place no limitation on right of state to collect taxes); 193 Wis295, 214NW447. **Statute of limitation of actions by state to recover on taxes** held valid. 214Ala628, 108S756. **Claim of state or county against irrigation district for services and materials** is not tax within rule. 68Utah472, 251 P11.

1247-92 47 Ida712, 278P214(2dcase); TexCivA 7SW(2d)639. **Statute declaring that tax lien shall only be discharged by payment, cancellation, or rebate of taxes** does not operate to take enforcement of lien out of general statute of limitations. 47 Ida712, 278P214 (2dcase).

1247-93 160Tenn403, 23SW(2d)897.

1248-95 315Mo 209, 286SW25.

1248-97½-New. Laches held not defense where property owners not injured by delay. 160Tenn403, 23SW(2d)897.

1248-99 216AppDiv773, 214NYS296 (for unpaid mortgage tax).

1248-2 216AppDiv773, 214NYS296 (mortgagee); TexCivA 3SW(2d)559. **Mortgagees and others.**–315Mo 549, 286 SW355. **Taxpayer becomes party to suit** by reason of seizure of his land, though not named as party therein. 160Tenn 403, 23SW(2d)897.

1249-7 160Tenn403, 23SW(2d)897. **Statutory requirements for service by publication** must be strictly complied with. TexCivA 280SW616.

1249-7½-New. Where owner appeared and participated, fact that he was not served with notice or made defendant is immaterial. 160Tenn403, 23SW(2d)897.

1249-12 179Ark280, 16SW(2d)581.

1250-16 In suit against finance commissioner in charge of insolvent bank for capital stock taxes allegations of filing claim, lapse of sixty days, and disapproval are unnecessary. **Mo** 26SW (2d)976.

1250-17 TexCivA 10SW(2d)1035.

1250-19½-New. Inclusion of taxes due after action was instituted is not prejudicial, action being in nature of bill in equity to close lien, it is proper to dispose of all liens. 190NC332, 129SE808.

1250-19½-New. Amendment to conform pleading to proof held proper. 106Conn 220, 137A741.

1250-21 101Vt419, 144A203. **Plea held to constitute one of estoppel.**–TexCivA 280SW292.

1251-22½-New. Allegation by railway that city was demanding that it pay in proportion more than was charged or demanded of others owning similar property in same section of county, not excepted to, should be regarded as sufficient to attack assessment as discriminating against railway, in addition to objection that different basis was used in assessing railway property. TexCivA 9SW(2d)1051.

1251-25 In suit to collect levy cannot be amended to show purpose insufficiently shown. 326 Ill 354, 157NE472.

1251-25½-New. Want of tax bill may be taken advantage of under general issue. 101Vt419, 144A203.

1251-29 323 Ill 150, 153NE657; 265 Mass531, 164NE472; 160Tenn403, 23 SW(2d)897 (variance in description of property).

1251-29½-New. It is presumed that owner performed statutory duty of returning property, instead of assessor's having rendered it for taxation. Tex CivA 4SW(2d)247.

1252-30 114 Oh52, 150NE359 (only treasurer's duplicate for year preceding action was admissible). **Treasurer's delinquent personal book,** not prepared pursuant to statute and omitting entries for several years, was held incompetent evidence in suit to receive delinquent taxes. 114 Oh52, 150NE359.

1252-32 Matters omitted from such statement which would have been favorable to taxpayer if included are not admissible to show his insolvency at time statement was made. 171Minn29, 213 NW45.

1253-37 318Mo 285, 300SW274. **Introduction of tax bill without objection makes prima facie case** under statutes in some jurisdictions. 315Mo 209, 286 SW25. **Prima facie case made by introduction of tax bill** is not overcome by evidence of overvaluation, relief from which could have been had by appeal from assessment. 315Mo 209, 286SW25.

1253-40 265Mass531, 164NE472; **Ont** [1927] 3DomLR251 (evidence held sufficient to show residence). **Receipt in**

full is complete defense in absence of evidence in explanation or rebuttal. 323 Ill 109, 153NE603. **Defense of estoppel** based on tax collector's certificate of payment is not established in absence of showing of injury to defendant. Tex CivA 280SW292. **Only clear and satisfactory proof** justifies holding that property of corporation sued for back taxes was undervalued by assessing officers. 175Ark956, 2SW(2d)25. **Evidence held too uncertain** to justify finding of undervaluation. 175Ark956, 2SW(2d)25. **Evidence held sufficient** to warrant court's finding that defendant's domicile remained in state during years in question. 265Mass531, 164NE472. **Personal liability for taxes.**–Iowa 232NW501.

1253–43½–New. Request that, if purported change of defendant's home to another state was but ostensible change to escape from taxing jurisdiction of state, change of domicile did not in law occur, has been held properly allowed. 265Mass531, 164NE472.

1253–43¾–New. Evidence may warrant instructed verdict for plaintiff where no legal defense was offered. TexCivA 24 SW(2d)517.

1253–43¼–New. Existence of lien for taxes need not be passed on by jury as law gives lien. TexCivA 24SW(2d)517.

1253–44 31NM114, 242P329.

1254–50 32NM182, 253P22 (statutory penalties should be added regardless of lack of proof).

1254–51 326 Ill 354, 157NE472.

1254–54 32NM182, 253P22 (regardless of lack of proof).

1255–56 TexCivA 16SW(2d)331(2d case). **As dependent on number of tracts involved.**–TexCivA 14SW(2d)874.

1255–58 160Tenn403, 23SW(2d)897; TexCivA 16SW(2d)331(2dcase). **In Arkansas.**–23F(2d)283.

1255–59½–New. Statutory provision that laws for collection of state and county taxes shall be applied to collection of cities, towns, and school districts so far as applicable, does not extend exemption of county officers from accounting for fees in former suits to latter suits. TexCivA 291SW611.

1255–59¾–New. In suit for collection of delinquent taxes, no officer is permitted to collect fees or commissions unless they are expressly provided for and amount thereof declared by law. TexCivA 14SW(2d)874.

1255–61 323 Ill 261, 154NE97. **Void tax included in lower court's judgment** will be segregated and remainder of tax judgment will be undisturbed. 323 Ill 261, 154NE97.

1255–63 See also 318Mo 285, 300SW274.

1255–64½–New. Errors not urged at trial cannot be heard on appeal. 32NM 182, 253P22.

1255–64½–New. Time for taking appeal.–New Mexico statute relating to time for taking appeal from tax judgment applies to all judgments for taxes obtained under provisions of act. 33 NM633, 275P95.

1255–65 Such statutory power is personal to collector and cannot be delegated. 6PaDist&Co 446. **In Pennsylvania.**–7PaDist&Co 391; 7PaDist&Co 496.

1256–66 6PaDist&Co 446.

1256–68½–New. As tax is not a debt, right to arrest is not taken away by constitutional provisions abolishing or prohibiting imprisonment for debt. 112 Oh374, 147NE754, 40ALR73.

1257–87 156Tenn579, 3SW(2d)668, 60 ALR393. **Evidence held sufficient** to authorize conviction. 40GaA154, 149SE95 (sale of unstamped cigarettes).

1257–88 20F(2d)202; 122 Or337, 255P 603.

1258–89 275US56, 48SCt23, 72L ed152.

1258–91 36F(2d)956. **Certiorari, etc.**–100NJEq87, 135A271. **Relief in proceedings to collect tax** may be granted when disregard of statute results in unequal assessment. TexCivA 15SW (2d)715.

1258–93 Jurisdiction of federal courts.–26F(2d)668 [certiorari den 278US630, 49SCt30(2dcase), 73L ed549].

1258–93½–New. Amendment to Porto Rico Organic Act, prohibiting suits in federal district court to restrain assessment or collection of tax, is not applicable to pending suits. 18F(2d)918.

1258–93½–New. Action to test legality of tax under which mineral reserves are forfeited may be maintained under statutes in some jurisdictions. 57ND1, 220NW436.

1258–94 88CalA170, 263P323; CalA 271P518; 161Ga669, 131SE358; 330 Ill 608, 162NE178; 199 Ind262, 157NE 275, 53ALR1386; 11PaDist&Co 505; 150 Wash524, 273P959. **Statute held not to preclude injunctive relief.**–13F(2d)984. **Taxpayer can prevent by injunction** political corporation or board from entering into contract imposing financial burden on property of taxpayer in violation of law. 168La1037, 123S705.

1258–95 16F(2d)545; 89Fla514, 105S 115; 318Mo 373, 300SW778; 122 Or337, 255P603.

1258–96 162Ga354, 133SE920; 116Nebr 695, 218NW731; 130 Okl 1, 264P893.

1259–97 89Fla514, 105S115; 122 Or337, 255P603. **"Irregularity" as here used is not synonymous with either "illegal" or "unlawful,"** and contemplates only bona fide unintentional mistake of ministerial or administrative officers in performance of duties. 89Fla514, 105S115. **In absence of showing that assessment was excessive,** taxpayer cannot complain of irregularities. 85 IndA615, 155 NE215.

1259–98½–New. Injunction will issue to restrain collection of taxes on tax exempt property. 115 OhSt186, 152NE897.

1259–99 37F(2d)513; 163Ga835, 137SE 255; 330 Ill 608, 162NE178; 216Ky78, 287SW212; 116Nebr648, 218NW429; 193NC248, 136SE713; 25 OhA380, 158 NE9 (Gen. Code § 12075); 32PortoRico 338 (municipal ordinance imposing double taxation); 153Wash375, 280P 25. **Estoppel held not created.**–26F(2d) 957. **No defense.**–26F(2d)957.

1260–2 7F(2d)715; 16F(2d)545; 36 F(2d)904; 127Misc89, 216NYS84.

1261–4 127Misc89, 216NYS84; 216NYS 402.

1262–5½–New. Estoppel to assert illegality.–Bank is not estopped from suing to enjoin collection of taxes from stockholders in excess of taxes levied on actual value of other moneyed capital used in competition with bank capital because of having loaned money to competition. 18F(2d)269.

1262–6 311Mo 349, 278SW74 (injury to complaining party must be substantial).

1262–7 "Illegal assessment," wherein, independent of discretion, there is prejudicial and material error in matter of law, will usually constitute ground for equitable interference. 89Fla514, 105 S115.

1262–9 127Misc89, 216NYS84 (irregularities in proceedings leading up to levy); 32PortoRico 604 (assessment held valid and constitutional). **Injunction lies for insufficient description.**–69Utah204, 253P680. **Before taxpayer may resort to injunction suit** for insufficient description of property in assessment, he should endeavor to obtain correction of error from proper authorities. 8F(2d)739.

1263–11 94Fla427, 115S261.

1263–12 Oh 171NE90.

1263–13 203 Iowa1099, 212NW335 (dictum).

1263–14 163Ga835, 137SE255; 235Ky 445, 31SW(2d)707.

1263–15 89Fla514, 105S115 (equitable relief not granted on such ground); 97Fla476, 121S462(2dcase); 318Mo 373, 300SW778; TexCivA 1SW(2d)508.

1264–16 13F(2d)442; 89Fla514, 105S 115 (unless so obviously excessive as to amount to fraud, court will not control discretion). **Evil intent** held not essential. 13F(2d)442. **Necessity of exhausting legal remedy.**–339 Ill 245, 171 NE134.

1265–18 13F(2d)442; 13F(2d)982; 31 F(2d)606; 171Ark1188, 286SW968; 94 Fla427, 115S261; 97Fla411, 121S554; 98Fla350, 123S745. See also 318Mo 373, 300SW778. **Grounds of equitable relief against excessive tax valuation enumerated,** including denial of equal protection and due process. 89Fla514, 105S115. **In suit by railroad to restrain collection of excessive and discriminatory taxes,** it is no defense that other railroads are being discriminated against. 31F(2d)587.

1265–19½–New. Injunctive relief will not be granted merely on ground that as between plaintiff public utility and other public utilities, or as between it and certain other property, there is inequality in assessment. 50ND522, 197NW133.

1265–21 160Tenn311, 23SW(2d)667.

1266–22 88CalA170, 263P323.

1266–23 TexCivA 20SW(2d)332 (failure to notify taxpayer of amount of delinquent taxes). **Technical objections or hardships in particular case** are not sufficient to authorize injunction. 127 Misc89, 216NYS84.

1266–25 Where amount tendered was correct, injunction will lie to prevent collection of greater amount. 176Ark 187, 3SW(2d)9.

1266–26 20F(2d)202; 106Conn223, 137 A742; 127Misc89, 216NYS84; 50ND 522, 197NW133; 122 Or337, 255P603. **Substantial injury held grounds for relief.**–122 Or337, 255P603.

1266–28 20F(2d)202.

1266–29 317Mo 1298, 298SW732, 55 ALR489; MoA 8SW(2d)1038.

1266–30 See also 97Fla426, 120S317.

1267–33 6F(2d)523; 21F(2d)333; 32 F(2d)570; 44F(2d)28; 174Ark847, 298 SW201 (holding injunction not only remedy in case of delinquent tax on railroads); 87Colo 316, 287P849; 106 Conn223, 137A742; 50ND522, 197NW 133; 128 Okl 153, 261P923; 122 Or337, 255P603.

1267–34 267US479, 45SCt431, 69L ed 475; 275US393, 48SCt180, 72L ed329; 6F(2d)523; 6F(2d)526 (doubtful); 13 F(2d)814; 16F(2d)92; 18F(2d)581; 21 F(2d)333; 44F(2d)64; 168Ga238, 147 SE518; 199 Ind708, 160NE347; 317Mo 1298, 298SW732, 55ALR489; 122 Or 337, 255P603; 144SC234, 142SE509. **A national bank or stockholder,** etc. 18 F(2d)269. **Where there is doubt about taxpayer being "owner"** entitled to sue under statute, as where he is lessee, remedy at law is inadequate. 13F(2d) 814. **Legal remedy must be as practical, efficient, and prompt** as remedy in equity. 18F(2d)269. **Where only action is against state for recovery of taxes paid** it has been held inadequate remedy in federal court. 21F(2d)333. **That remedy in equity is more convenient** does not justify resort to equity. 281 US121, 50SCt270, 74L ed737.

1268–35 21F(2d)333; 130 Okl 1, 264P 893. But see 6F(2d)523; 6F(2d)526; 42F(2d)30. **But where no action lies to recover back the tax,** etc. 13PortoRico Fed157; 13PortoRicoFed393. **Existence or nonexistence of trust fund** into which taxes paid under protest covered does not affect remedy. 32PortoRico 604.

1268–35½–New. Where, however, interest on taxes paid cannot be recovered in such action at law, remedy is inadequate. 13F(2d)814.

1268–38 42F(2d)30; 322 Ill 613, 153NE 633; 332 Ill 467, 163NE769; 323Mo 180, 19SW(2d)746; Mo 23SW(2d)108; 128 Okl 153, 261P923.

1269–40 16F(2d)990; 236Mich338, 210 NW239 (assessment invalid because property not annexed to city till too late to make valid assessment under city charter); 28 OhA107, 162NE466. See also 32F(2d)639.

1269–41 122 Or337, 255P603 (where relief afforded was inadequate).

1269–42 149Miss395, 115S724.

1269–43 13F(2d)814; Ariz 288P1034; 32PortoRico 604 (danger of multiplicity of suits not shown). But see 32F(2d) 570.

1269–44 13F(2d)814.

1270–47 21F(2d)333; 163Ga835, 137SE 255; 127Misc89, 216NYS84 (construction contract, for cost of which tax levied, executed by committee of board instead of board itself). **Where cloud is removable by payment under protest,** injunctive relief will be denied. 21 F(2d)333. **Assessment held not to cast cloud** on title to realty. 44F(2d)28.

1270-51 Federal courts have jurisdiction of suit under bill alleging acts violative of federal constitution. 28F(2d) 5.

1271-54 267US479, 45SCt431, 69L ed 475 (action need not be brought within twenty days after notification of assessment, as in case of repealed statute relating to arbitration); 281US673, 50SCt 451, 74L ed1107; 311Mo 349, 278SW74 (question one of discretion of court); 128 Okl 153, 261P923. But see 18F(2d) 269.

1271-56½-New. Complainants seeking to enjoin collection of taxes on national bank shares need not seek relief from county and state authorities before resorting to federal courts. 21F(2d)85.

1271-56⅓-New. Where corporation, complaining that tax on its shares was fraudulent and discriminatory, waited till after taxes became due without seeking correction by state boards, it is guilty of laches preventing injunction. 323Mo 180, 19SW(2d)746.

1271-57 17F(2d)167; 32F(2d)639; 36 F(2d)904; 103CalA473, 284P1072; CalA 289P678; 163Ga835, 137SE255; 53ND372, 205NW731; 104WVa251, 139 SE743.

1272-58 20F(2d)202; 21F(2d)85; 97 Fla411, 121S554. **Where taxpayer denies that he owes any tax under fieri facias,** payment of amount of fieri facias is not necessary in order to permit him to test its validity. 163Ga835, 137 SE255.

1272-59½-New. Court is not warranted in retaining jurisdiction to inquire into legality of methods employed in valuing and assessing for succeeding year taxes. 8F(2d)209.

1272-60 TexCommnA 5SW(2d)756.

1272-61 32F(2d)639.

1272-61½-New. Offer in bill.-Where plaintiff in suit to enjoin illegal levy and collection of taxes makes offer in bill to pay any taxes legally due on ascertainment by court of true amount, court can hear evidence of extent of discrimination. 32F(2d)639.

1273-62 13PortoRicoFed24 (balance of convenience considered). **Generally merits of case will not be considered on** motion for preliminary injunction. 216 NYS402. **Where complaint alleged that prior lien was illegal levy,** temporary injunction against tax sale was properly granted and motion to dissolve was properly denied. 237 IllA328. **Order granting temporary injunction** conditioned on payment of legal taxes is not erroneous exercise of judicial discretion. 98Fla350, 123S745.

1273-65 TexCivA 10SW(2d)174. **Stockholder in corporation** has no right to enjoin collection of tax for benefit of other stockholders in same corporation pending appeal in quarterly court. 227Ky768, 14SW(2d)160.

1274-69 Ariz 288P1034 (board of tax survey has been held not indispensable party). But see 169La905, 126S232. **County auditor held proper defendant.**-28 OhA107, 162NE466.

1274-71½-New. Intervention by state and city is proper notwithstanding statute against making state defendant in state courts. 23F(2d)283.

1274-74½-New. National bank may sue in behalf of its stockholders to enjoin collection of taxes on shares claimed to be invalid. 97Fla411, 121S 554.

1274-75 Ariz 288P1034; 94Fla427, 115 S261; 332 Ill 467, 163NE769; 317Mo 1298, 298SW732, 55ALR489; 318Mo373, 300SW778 (sufficient and insufficient pleadings). **Applications of text.**-94Fla 427, 115S261; 166Minn22, 206NW942 (motor vehicles). **Averments sufficient.** -163Ga835, 137SE255. **Discrimination against national banks.**-21F(2d)85; 38 F(2d)261 (petition held sufficient). **Complaint held not to state cause of action.**-215Ky262, 284SW1089. **Petition held not defective** on ground of nonjoinder of parties. 168GaA238, 147SE518. **Pleading held sufficient** as against demurrer. 98Fla350, 123S745. **Bill held sufficient.**-Ill 172NE772.

1275-76 Complaint held demurrable.-Ark 32SW(2d)634.

1275-76½-New. Plaintiff must allege that tax or assessment is illegal or invalid, or levied or assessed for an illegal or unauthorized purpose. 194NC 265, 139SE446.

1276-83 But see 163Ga835, 137SE255.

1276-84 281US673, 50SCt451, 74L ed 1107.

1276-85 270US367, 46SCt234, 70L ed 635 (tax on rolling stock of nonresident corporation held not shown to exceed average of local taxes on domiciled corporations); 13F(2d)442; 13F(2d)982; 142 Okl 19, 285P38 (excessive levy); 154Wash212, 281P494. **Showing illegal discrimination.**-31F(2d)606; 38F(2d) 279 (evidence sufficient); 50ND522, 197 NW133 (evidence insufficient). **Evidence held sufficient.**-13F(2d)442. **Evidence held insufficient.**-37F(2d)513; 339 Ill 245, 171NE134; 154Wash212, 281P 494. **Assessed value.**-267US479, 45SCt 431, 69L ed475. **Burden of proving that notes of nonresident plaintiff held resident agent were within state for temporary purpose** rests on plaintiff. 120 Kan365, 244P233. **Prima facie case** held established. 21F(2d)333. **Showing fraudulent overvaluation.**-26F(2d)617. **Evidence that one insurance company was assessed too low** held not to establish that another was assessed too high. 339 Ill 245, 171NE134.

1277-88 MoA 8SW(2d)1038.

1277-89½-New. Evidence insufficient to show capital of individuals on competition with national banks. 208Ky7, 270 SW995.

1277-89⅓-New. Fact findings by commissioners of adjustment held not evidence of property values. 13F(2d)982.

1277-89¼-New. In action to enjoin collection of taxes, evidence has been held to show that assessor and board of equalization arbitrarily and intentionally assessed all wild land in county at flat rate of five dollars per acre, notwithstanding great differences in value thereof. MoA 8SW(2d)1038.

1277-90 Questions of fact.-88 IndA467, 164NE640.

1277-95 97Fla426, 120S317. **Injunction against invalid assessment** held no bar to assessment of same property as "omitted." 203 Iowa1099, 212NW335. **Where entire assessment is illegal as matter of law** because of failure to assess all property subject to assessment or because of assessment of different property at different rates, entire tax may be enjoined. 97Fla426, 120S317. **Where illegal portion of tax cannot be separated from balance,** equity cannot grant relief. 339 Ill 245, 171NE134.

1278-93½-New. Where proceedings have prevented assessment and collection within statutory time, court may extend time by order. 23F(2d)283.

1278-99 23F(2d)283. **Costs should not be taxed against county auditor,** acting officially, in good faith and on advice of counsel. 202 Iowa237, 207NW345.

1278-1 In Mississippi.-146Miss316, 111 S454.

1278-1½-New. Where decree reserves right to direct by further order disposition to be made of taxes already collected by county treasurer, subsequent decree in so far as it gives direction in this regard is not modification of former decree but final order of court. 201 Iowa476, 205NW847.

1278-1⅓-New. Remedy to determine amount of taxes legally payable by complainant if all property liable had been properly assessed is duly authorized and proper assessment of all property liable to assessment. 97Fla411, 121S554.

1279-7½-New. Action may be in replevin. 82Mont349, 267P305.

1279-10 In replevin, plaintiff, who is conditional seller, need not plead conditional sale and forfeiture where buyer is not party to action. 82Mont349, 267 P305.

1279-13½-New. In replevin by mortgagee to recover chattels seized under distress warrant.-Prima facie case is not met by showing only that property of mortgagor was assessed without indicating character of property or whether it was owned by taxpayer and in county at time of tax levy. 34Wyo 199, 242P 415.

1279-13⅓-New. Such prima facie case is overcome by showing that same class of property seized by collector was in fact in sufficient number lawfully assessed at time of tax levy and burden of producing further evidence is then on mortgagee. 34Wyo 199, 242P415.

1279-13¼-New. In order for doctrine of confusion of goods to apply so as to shift burden of evidence, there must be actual confusion. 34Wyo 199, 242P415.

1279-13⅙-New. To overcome such prima facie case of mortgagee it is necessary to show lawful assessment against property of mortgagor of class seized in sufficient quantity to satisfy tax lien. 34Wyo 199, 242P415.

1280-20 Remedies against former owner of property directly liable for tax need not be exhausted. 106Conn542, 138A452.

1280-21 201 Iowa208, 205NW758 (railroad property used exclusively in operation of railroad and assessed by state authorities); 194NC723, 140SE712; 53 ND609, 207NW436 (sale allowed for hail indemnity taxes). **Statute held not to affect general law relating to sale of tax certificates** held by state and issuance of deeds thereon. 90Fla837, 106S910. **Statutes relating to tax sales must be strictly construed.**-250Mich437, 230NW 507.

1281-24 82Mont502, 267P1113; Tex CivA 5SW(2d)870.

1281-24½-New. State cannot sell property of United States prior to payment of purchase price. 20F(2d)202.

1281-24⅓-New. Procedure in tax sales is sui generis and complete in itself. 131 Or290, 282P1084.

1281-27 Ark 30SW(2d)211; 12LaA531, 126S531; 145Miss456, 110S865; 114 Nebr858, 211NW184; NJCh 145A721 (1stcase); NJCh 147A541 (equity will seize on slightest flaw of substance in tax sales to restore property to owner); 129Misc252, 221NYS254; 140 Okl 131, 282P282 (statutory method of sale exclusive); 131 Or290, 282P1084; Tex CommnA 291SW214; TexCommnA 2SW (2d)431.

1282-23½-New. Requirements of some statutes are mandatory.-74Mont346, 240 P837.

1282-30 204Cal 78, 266P951; 87CalA 552, 262P348; 142Miss584, 107S673.

1283-35 10LaA227, 120S677; 10LaA 769, 123S189; 12LaA531, 126S531; 6 LaA242 (notice of delinquency); 7LaA 623; 8LaA101; 8LaA105; 8LaA362; NJCh 147A541. **Notice to tenants in common.**-10LaA227, 120S677. **Place of sending notice.**-10LaA227, 120S677. **Where owner assessed for taxes is dead,** notice of delinquency should be served on his heirs or legal representatives. 6 LaA242.

1284-40 121Kan606, 249P668; 123Kan 755, 256P813; 166La35, 116S585; 6LaA 439; 8LaA532.

1285-49 335 Ill 198, 167NE32. **Fact that personalty is mortgaged** does not change rules. 215Ky601, 286SW779.

1286-53 Return held sufficient.-88Pa Super01.

1287-55 47 Ida527, 277P1114.

1287-58 127 Okl 123, 260P15.

1287-59 4LaA410.

1288-60 TexCivA 22SW(2d)707.

1288-62 215Ky601, 286SW779.

1289-65 What taxes included.-53ND 609, 207NW436 (hail indemnity taxes). **Collector of Fulton County held** authorized to sell lot in Atlanta for taxes due city, state, and county. 162Ga592, 133 SE624.

1290-66½-New. Where land was sold for state, parish, and other taxes, as well as drainage taxes, due thereon, sale was valid, whether or not land was erroneously included in drainage district. 10 LaA2, 119S909.

1290-67 89CalA145, 264P310. **In Louisiana.**-11F(2d)967.

1290-73 121Kan606, 249P668; 3LaA 530.

1291-74 298Pa85, 148A63.

1291-78 121Kan105, 245P1030.

1292-80½-New. Under Pennsylvania statute land in city may be sold for

county taxes. 13PaDist&Co 169.

1292-81 But see 88PaSuper61.

1292-83 Severance of mineral from surface rights.-58 OntL453, [1926] 2DomLR 312.

1292-84 2LaA326.

1293-89 228AppDiv655, 238NYS307.

1294-91 194NC91, 138SE420.

1295-98 Explanatory note appended to list is no part of notice. 91CalA726, 267 P729. Misrecital of date in explanatory note is not misleading where correct date appeared in several places on face of notice. 91CalA726, 267P729.

1295-1 CalA 269P964; 96CalA747, 275 P223 (sufficient though not referring to any map); 194NC91, 138SE420, 422 [quotCyc] (description held insufficient). In California.-198Cal 667, 247P195.

1296-2 Property must be listed in name of real party in interest.-215Ky601, 286 SW779.

1296-3 CalA 269P940; CalA 292P155 (2dcase). Taxes, penalties, interest, and costs.-74CalA322, 240P50. Contra 206 Cal 742, 276P347.

1296-6½-New. Penalties.-Where proposed sale is conditioned upon nonpayment of penalties, a sale is void, if delinquent list, as published, fails to state amount of penalties. 71CalA717, 236P 371.

1297-11 That no record of return of unpaid taxes was kept in county commissioner's office prior to delivery to county treasurer does not render return ineffectual. 88PaSuper61.

1298-14 Sale for nonpayment is not invalid by advertising for sale before expiration of redemption period. 198Cal 667, 247P195. Statute providing that nonpublication is no defense to suit for taxes makes publication discretionary. TexCivA 292SW964. Where owner appeared and defended application of sale as to merits of taxes, defective notice by advertisement or whether there was any advertisement at all is immaterial. 332 Ill 370, 163NE825.

1298-15 96CalA753, 275P225.

1298-17 Certificate of publication has been held insufficient to confer jurisdiction to render judgment and order of sale. Mass 171NE672. Certificate has been held sufficient proof of publication of delinquent tax list. Mass 171NE672.

1300-23½-New. Newspaper should publish delinquent tax list in form submitted by county treasurer. 117Nebr324, 220NW280.

1300-25 TexCommnA 17SW(2d)801.

1301-30 TexCivA 27SW(2d)548.

1301-35 Wis 230NW57 (county held entitled to petition for sale of drainage land for general taxes and drainage assessment regardless of interest in drainage certificates).

1302-38 125 Or644, 266P1069.

1304-56 155Tenn169, 290SW973 (suit is one in rem); 154Wash617, 283P170.

1305-59½-New. State's laches cannot be taken advantage of by one who, though named as party, did not become such by service or seizure of lot which he sold when lien fastened and bill was filed and which he afterward repurchased. 155Tenn169, 290SW973.

1305-59⅓-New. One not party to suit who bought land when suit had been pending four years could assume suit abandoned, 155Tenn169, 290SW973.

1305-59¼-New. tax lien having been converted into lis pendens lien and rendered ineffectual by delay in prosecution of suit. 155Tenn169, 290SW973.

1305-61 154Wash617, 283P170 (failure to file original certificate of delinquency till after commencement of publication of summons does not deprive court of jurisdiction). Objection to jurisdiction cannot be made by owner of land who submitted himself to jurisdiction by objections which went to merits. 332 Ill 370, 163NE825.

1305-62 But see 20 OhA267, 153NE140.

1305-62½-New. Court acquires jurisdiction, though description is defective. 20 OhA267, 153NE140.

1306-63 161La392, 108S782; TexCivA 22SW(2d)688.

1306-66 161La392, 108S782; 154Wash 617, 283P170 (need not be by registered mail; posting of notice in three public places is sufficient).

1307-73 See also 160Tenn403, 23SW (2d)897.

1307-74 27 OhA125, 161NE23. Erratum.-Blodgett v. Schaffer "94Mo 562" should be "94Mo 652."

1307-75 TexCivA 22SW(2d)688.

1308-78 332 Ill 370, 163NE825; Tex CivA 22SW(2d)688. Immaterial departure from statute.-87CalA552, 262P348. Affidavit held insufficient.-20 OhA427, 152NE679 (publication against domestic corporation failing to show corporation has failed to elect officers, appoint agent, and that it has no place of business).

1308-79 332 Ill 370, 163NE825.

1309-81 87CalA552, 262P348.

1309-82 198NC733, 153SE323(1stcase).

1309-83½-New. Service by posting is sufficient under some statutes where all papers in county have refused publication for fees allowed by law. Tex CivA 284SW608.

1309-84 106Conn542, 138A452 (city held to have real interest in foreclosure of illegally released tax liens, though former owner financially able to pay).

1309-85 TexCivA 4SW(2d)117.

1310-86 TexCivA 16SW(2d)433; Tex CivA 27SW(2d)634; TexCivA 27SW (2d)864 (holder of vendor's lien). But see TexCivA 11SW(2d)212. Holders of liens not made parties are not bound by proceedings and property rights are not affected. TexCivA 12SW(2d)260.

1310-87 One named as party but not served with process and whose property was not seized is not party to suit. 155 Tenn169, 290SW973 (where he sold lot when lien fastened and bill was filed).

1310-88 See 106Conn542, 138A452. Attorneys.-106Conn542, 138A452.

1310-89 Motion to strike objections to tax raising constitutionality of tax and that questions raised have been adjudicated has been held insufficient. 336 Ill 506, 168NE294.

1310-93 But see 167Minn304, 209NW 18.

1310-96 332 Ill 370, 163NE825; Tex CommnA 291SW214.

1311-97 TexCivA 21SW(2d)703.

1311-2 173Ark295, 292SW130.

1311-7 325 Ill 497, 156NE292; 331 Ill 559, 163NE313; 332 Ill 370, 163NE825; 339 Ill 130, 171NE130. Amendment of its record by board of review is inadmissible where made after board had become functus officio where correctness of amendment is shown only by affidavit of clerk of board attached to amendment. 333 Ill 333, 164NE702. Before amended record is admitted in evidence, parties in interest are entitled to evidence of witnesses and opportunity to cross-examine. 333 Ill 333, 164NE702. County collector's unnecessary introduction in evidence of tax levy certificates and other proceedings held not to overcome case made by report and proof of notice. 339 Ill 130, 171NE130.

1311-8 325 Ill 370, 156NE289; 325 Ill 497, 156NE292; 326 Ill 179, 157NE200; 333 Ill 333, 164NE702; 338 Ill 335, 170 NE216 (lack of notice of proposed assessment); 339 Ill 130, 171NE130. Overvaluation.-167Minn304, 209NW18; 175Minn478, 221NW725. Evidence held sufficient to sustain trial court's findings of value. 167Minn304, 209NW18. Issues are only those raised by written objections filed. 322 Ill 120, 152NE555.

1312-11 Description of property held sufficiently definite for purposes of taxation under evidence. 332 Ill 370, 163 NE825.

1312-11½-New. Burden is on county collector to sustain motion to strike objections filed to tax. 336 Ill 506, 168NE 294.

1312-11⅓-New. Evidence held sufficient to show that no notice was given of proposed assessment of building on land assessed as vacant. 338 Ill 335, 170 NE216.

1312-11¼-New. Evidence offered in support of motion to strike objections on ground of constitutionality of tax and that questions raised have been adjudicated has been held insufficient. 336 Ill 506, 168NE294.

1312-13½-New. County tax collector is bound by ordinary rules of evidence on hearing. 322 Ill 99, 152NE526.

1312-13¼-New. County court should sustain taxpayer's objection to so much of tax as resulted from action of board of review in raising assessment after reduction by board of assessors, without notice to taxpayers. 332 Ill 346, 163NE 781.

1312-16 Judgment not void by default and final judgment entered two years and eight months after entry of default. TexCivA 285SW650.

1312-20 TexCommnA 296SW871.

1312-20½-New. Foreclosure in solido of lots for taxes does not render tax judgment void though lots were separately assessed. TexCivA 14SW(2d) 94.

1312-20⅓-New. Judgment cannot properly be rendered nunc pro tunc as of date of previous general judgment. 338 Ill 335, 170NE216.

1313-22 Judgment foreclosing tax lien is unauthorized where no indebtedness is established and no personal judgment was rendered. TexCivA 15SW(2d)665.

1313-23 Mo 29SW(2d)133; Tex CommnA 291SW214; TexCommnA 28W (2d)431. But see 33NM42, 261P810. Descriptions held insufficient.-Tex CommnA 291SW214.

1313-24 TexCivA 291SW576 (foreclosure on entire acreage when allegations of delinquency related to smaller number of acres held beyond power of court).

1313-25 TexCivA 5SW(2d)870. Judgment against part of property.-323 Ill 574, 154NE439.

1314-26 TexCivA 21SW(2d)703.

1314-27 33NM42, 261P810.

1314-30½-New. In suit to reinstate and enforce tax liens illegally released, cancellation of releases of record held sufficient adjudication. 106Conn542, 138A452.

1314-30⅓-New. Where personal liability is not adjudicated it is error to recite same in order of sale. TexCommnA 296SW871.

1315-33 TexCivA 15SW(2d)665; Tex CivA 18SW(2d)207; TexCivA 19SW (2d)99. But see TexCivA 285SW650.

1315-36 328 Ill 206, 159NE191.

1315-38 NJCh 144A330.

1315-40 TexCivA 11SW(2d)212.

1315-41 338 Ill 335, 170NE216.

1315-42 TexCivA 22SW(2d)688. Parties not joined as defendant.-155Tenn 169, 290SW973. Only those having interest in res are concluded by suit. 155 Tenn169, 290SW973. Failure to implead interested parties does not deprive court of power to render judgment against those actually impleaded. TexCivA 27SW(2d)634.

1316-44 TexCivA 22SW(2d)688.

1316-48 TexCivA 22SW(2d)688.

1317-49 Mass 171NE672; TexCivA 285 SW650; TexCivA 8SW(2d)790; Tex CivA 14SW(2d)94; TexCivA 22SW(2d) 688. Order of sale on foreclosure of tax lien regular on its face is immune from collateral attack. TexCivA 285SW 650. Excessiveness cannot be shown collaterally. TexCivA 295SW288.

1317-50 TexCivA 5SW(2d)870; Tex CivA 22SW(2d)688.

1317-51 Payment of decree sustaining tax as condition precedent to appeal see Mich 233NW348.

1318-54 325 Ill 497, 156NE292.

1318-58 332 Ill 370, 163NE825.

1319-64 88PaSuper61.

1319-65 See also 321Mo 654, 12SW(2d) 438.

1319-66 In Arkansas.-174Ark1005, 298 SW196. In Oregon.-131 Or290, 282P 1084. Execution cannot issue for taxes against wild lands not given in for taxes by owner in county where located in absence of assessment thereof by law. 167Ga671, 146SE314. Delay in delivery of warrant invalidating sale.-Ark 30SW(2d)211.

1320-73 Title of owner failing to return land for taxation cannot be divested by levy and sale as property of another person under tax execution issued against such other person. 163 Ga381, 136SE151.

1320-75 Certified copy of order directing sale for tax delinquence of stated year in which no delinquency is shown does not authorize sale for delinquency of another year. 131 Or290, 282P1084.

1320–78 162Ga592, 133SE624 (city marshal of Atlanta should levy, though tax fieri facias was transferred to third person).

1320–79 Levy cannot be made on real property in which person who owes personal taxes has no interest. 125Kan 661, 266P42.

1321–87 Where separate parcels assessed against common taxpayer have been sold by him at different times to different purchasers, injunction against sale for taxes of parcels first sold is properly granted. 166Ga206, 142SE 858.

1321–89½–New. Injunction is proper remedy to prevent sale on ground that large amounts of other like property subject to tax were not assessed at all. 97Fla426, 120S317.

1321–90 127 Okl 123, 260P15.

1322–92½–New. Bill alleging assessment at higher valuation than certain other agricultural lands in county, but not alleging assessment at more than actual value or at higher valuation than lands of like character and situation is insufficient to show right to relief sought. 97Fla476, 121S462(2dcase).

1323–94 Writ of error to judgment ordering tax sale does not provide adequate remedy where ground of relief is that neither plaintiff nor his attorney had notice of trial in tax suit. Tex CivA 1SW(2d)426.

1323–99 97Fla476, 121S462(2dcase). See also Fla 129S918(1stcase).

1323–2 Assignee of mortgage to execute power of sale has sufficient interest to seek to enjoin sale of mortgaged property for taxes. 149Md470, 131A753.

1324–7 TexCivA 1SW(2d)426. **Petition to enjoin tax resale** must designate particular land owned by plaintiffs and grounds for relief as applied to particular land. 115 Okl 16, 242P232. **Excuse for failure to attend trial in tax suit** is not shown by allegation that plaintiff employed attorney who filed answer but that case was called for trial without plaintiff's knowledge or consent and without notice to him or to his counsel. TexCivA 1SW(2d)426.

1324–8 167Ga119, 144SE899. **Burden of proving payment of taxes** rests on taxpayer. 195NC161, 141SE543.

1324–11½–New. Questions for jury.– Whether check for taxes was paid by drawee bank held question for jury. 195NC161, 141SE543.

1324–11½–New. Ex parte order will not be permitted. 166La786, 117S918.

1324–13 161La392, 108S782; 9LaA 112, 119S75; 1LaA46; 6LaA233; 154 Md550, 140A844; 192NC251, 134SE487; Okl 293P206 (insufficient notice and timely suit); Can [1927] 1DomLR1063; 22AltaL148, [1926] 2DomLR150, [1926] 1WestWkly561. **Statute sufficient as notice.–**51Nev7, 267P49. **No notice required in absence of statute.–**51Nev7, 267P49.

1325–14 4LaA567; 148Wash578, 269P 834.

1325–15 Notice addressed to and received by one of two owners and acted on by other held sufficiently served. 137Wash208, 242P43.

1325–16 159La158, 105S274 (purchaser at tax sale).

1325–17 Sale is not invalid for failure to mail copy of notice of sale where address of landowners does not appear on assessment roll and is not shown to have been actually known to collector. 198Cal 667, 247P195. **Tax collector in ascertaining address** need not go beyond examination of assessment roll during period of delinquency. 198 Cal 667, 247P195.

1325–18 29PortoRico 847 (no notice given to heirs).

1326–21 161La696, 109S391; 161La 699, 109S393. But see 83CalA161, 256P 464. **Notice by registered mail.–**161La 699, 109S393. **Requirement that notice be served on delinquent taxpayer is not complied with** where owner of recorded title was dead at time of assessment and sale and notice sent by registered mail was returned unclaimed to collector who made no further effort to notify actual owners. 158La596, 104S381. **Owner of property to be sold for taxes having received notice of sale** through mail within time provided by statute, and acknowledged receipt of it, though his name was spelled incorrectly on envelope, it has been held that notice conformed to requirements of statute. CalA 269P964.

1326–21½–New. Sheriff is chargeable with notice of address of grantee of property to be sold for taxes from recital thereof in last recorded deed, and must send notice of tax sale by registered mail to such address. 244Mich59, 221NW173.

1326–22 244Mich59, 221NW173.

1326–24 Publication of notice by six insertions seven days apart during successive weeks held sufficient compliance with statute. 130Misc275, 223NYS137.

1327–29½–New. Publication is also necessary to notify unknown owners and owners whose post-office address is unknown where registered letter to taxpayer is returned "unclaimed" because he has moved from city without knowledge of taxing authorities. 10LaA560, 121S628.

1327–30 198Cal 667, 247P195; 96CalA 747, 275P223. **Statutes providing that irregularity or informality in advertisements shall not affect legality of sale** do not authorize sales without notice but merely cure defects in notice. 34 Wyo 304, 243P126.

1327–31 91CalA726, 267P729. **Notice of tax sale mailed** to person whose property is assessed within less than twenty-one days before date of sale mentioned in notice has been held void under statute. 99CalA545, 279P217.

1327–32 83CalA161, 256P464.

1327–33 123Kan59, 254P404 (error in order of initials of county treasurer's name held to invalidate sale).

1327–35 117Nebr841, 223NW132; 53 ND609, 207NW436 (must include all delinquent hail indemnity taxes).

1328–37 CalA 292P155(2dcase).

1328–38 154Md550, 140A844.

1328–40 83CalA161, 256P464; 99CalA 545, 279P217.

1328–41 83CalA161, 256P464.

1329–45 163La764, 112S713; 170La 927, 129S532 (holding description by block and square numbers sufficient); 6LaA682; 154Md550, 140A844; 226 AppDiv770, 234NYS543; 137Wash208, 242P43; 34Wyo 304, 243P126. **Omission of words "to Ilwaco" after "replat of North Beach Add."** in summons and notice held not misleading. 137Wash 208, 242P43. **Description is held insufficient.–**34Wyo 304, 243P126. **Descriptions held sufficient.–**83CalA161, 256P464. **Effect of statutes curing defects.–**34Wyo 304, 243P126. **Description by block and lot** held insufficient. 154 Md550, 140A844.

1330–46 138 Okl 1, 280P278, 67ALR 885.

1330–47 34Wyo 304, 243P126.

1330–48 123Kan59, 254P404; 58ND 571, 226NW615 (description sufficient).

1331–51 But see 198Cal 667, 247P195.

1331–52 166La553, 117S588.

1331–53 166La553, 117S588. **In Louisiana.–**11LaA360, 123S363.

1331–56 123Kan59, 254P404.

1333–62 Affidavit sworn to before first publication of notice is insufficient. 123 Kan59, 254P404. **Failure to state year in which notice was published** is fatal defect. 123Kan59, 254P404.

1334–69 Sale in contravention of statute providing only method is not sale extinguishing tax. Me 151A670.

1335–75 117Nebr841, 223NW132.

1336–76½–New. Statutes directory as to choice of method for sale. Me 151A 670.

1336–77 145Miss456, 110S865; 111 Okl 251, 239P572.

1336–78 Sale for city, state, county taxes in front of city hall in city of Atlanta held valid. 162Ga592, 133SE 624.

1336–81 Me 151A670; 145Miss456, 110 S865.

1337–88½–New. Statute prohibiting sale during time title, arising out of former assessment delinquency still remains in village, has been held directory, not mandatory. 162La601, 110S 828.

1338–90 74CalA322, 240P50 (if sale commenced in time, tax deed executed after expiration of time not void).

1338–93 205Cal 413, 271P494.

1338–94 149Miss864, 116S95; 160Tenn 403, 23SW(2d)897 (only taxes which are lien on day of sale). But see CalA 292P155(2dcase).

1339–97 CalA 288P882; 147Wash550, 266P194.

1342–18 163Ga169, 135SE731; 168Ga 101, 147SE32; Mo 30SW(2d)986. **In absence of evidence that lot is capable of subdivision,** sale of house and lot is not void because their value was much greater than amount due on tax fieri facias. 168Ga101, 147SE32.

1342–19 162Ga592, 133SE624.

1343–22 125 Or644, 266P1069.

1344–27 In Massachusetts.–267Mass17, 165NE676. **That it is difficult to divide land into parcels** does not excuse failure to comply with statute. 155Miss 580, 124S791.

1344–28 CalA 277P909; 154Md550, 140 A844.

1345–29 88PaSuper61.

1345–31 See also TexCivA 19SW(2d) 109.

1345–34 Rule held not applicable.–168 Ga101, 147SE32.

1345–34½–New. Administrator and guardian ad litem of deceased's minor children at time of dower assignment may buy land assigned as dower at tax sale after administration is closed. 171 Ark594, 285SW363.

1345–34¼–New. After expiration of three years, commissioner to whom dower assigned may buy land at tax sale. 171Ark594, 285SW363.

1345–34¼–New. One having privilege of redeeming cannot purchase at tax sale. WVa 154SE768.

1346–35 87Colo 474, 289P365.

1347–36 57ND167, 220NW892.

1347–44 In Ontario.–61 OntL616, [1928] 2DomLR144.

1348–47 See also Sask [1927] 3DomLR 305.

1348–48 Tax deed to one permitted by life tenant to purchase at tax sale has no greater effect against remaindermen than tax receipt. 195Cal 132, 231P987.

1350–56 But see 107WVa1, 148SE566.

1353–76 "County employees" forbidden to purchase under statute. 147Wash 550, 266P194.

1354–81 168Ga101, 147SE32. **One cannot acquire** valid tax title through sale based on tax forfeiture during time he occupied and enjoyed premises. 173Ark 38, 291SW814.

1354–82 53ND278, 205NW880; 197Wis 218, 221NW768. **Validity of statutes.–** 198Wis326, 223NW852.

1354–83 149Miss864, 116S95; 53ND 278, 205NW880.

1355–84½–New. Sale to state for nonpayment of general taxes suspends enforcement of special road tax lien so long as title remains in state. 179Ark 305, 15SW(2d)990.

1356–87 176Ark625, 3SW(2d)694, 695 [citCyc]. **In Mississippi.–**156Miss396, 124S437, 66ALR614.

1356–90 159La658, 106S22.

1356–91 176Ark625, 3SW(2d)694, 695 [citCyc].

1356–91½–New. Effect on personal liability for taxes.–Where land has been sold to state for taxes, personal liability of taxpayer is discharged, and county cannot sue for personal debt. 156Miss396, 124S437, 66ALR614.

1356–91¼–New. County cannot maintain action against taxpayer alone, without joining state, in action to enforce personal liability on theory that sale to state was void. 156Miss396, 124S437, 66ALR614.

1356–93 Certificate written by another at direction of tax collector is valid. 153 Miss392, 121S113. **Signature of officer.–** 153Miss392, 121S113.

1357–95 159La658, 106S22; 148Miss13, 113S898; 160Tenn131, 22SW(2d)234. **Statute does not provide only and ex-**

clusive method of sale.–159La658, 106S 22. **Statute is not mandatory.**–159La 658, 106S22. **Statute forbidding resale** of land purchased by state for taxes does not apply where sale to state was void for defect in assessment. 144Miss529, 110S438. **Cost of publication of notices of resale of real estate** is imposed upon counties under some statutes. 129 Okl 145, 264P190. **Description.**–151Miss664, 118S346. **In California.**–91CalA549, 267 P340. **Sale of part of subdivision.**–151 Miss664, 118S346. **When tax sale complete.**–152Wash193, 277P839.

1357–98 But see 140 Okl 74. 282P679. **Publication of notice.–Mont** 292P722; 114 Okl 179, 244P766 (sufficient). **Posting.–Mont** 292P722. **Contents of notice.–** Mont 292P722 (terms of sale).

1357–99 Power to fix minimum price.– 57ND700, 223NW928.

1358–1 118 Okl 5, 244P37 (where land not vacant lots). **Where resale is for sum less than taxes,** penalties, interest, and costs, balance not covered by price at resale continues as lien on land. 118 Okl 5, 244P37.

1358–2 88CalA441, 263P870. **Sufficiency of deed on resale.**–111 Okl 251, 239P572 (necessary recitals). **Take title subject to redemption.**–159La658, 106S22. **Purchaser held entitled to decree quieting title.**–148Miss13, 113S898. **Where state school lands were sold on deferred payments,** resale deed thereof after tax sale to county is unauthorized and void. 143 Okl 18, 285P127.

1358–2½–New. Power to disaffirm sale. –Where real property of county acquired by tax deed is sold by county auditor, and statute has been fully complied with, board of county commissioners has no power to disaffirm sale and reject bid, if bid was highest made, and at time it was made auditor announced its acceptance and sale was completed in other respects. 57ND700, 223NW928.

1358–3 174Minn431, 219NW545. See also 267Mass17, 165NE676.

1359–4 10LaA2, 119S909.

1359–5 See also 267Mass17, 165NE676.

1359–6 10LaA2, 119S909.

1359–6½–New. Where county holds tax certificate under statute, property may not be again sold for delinquent taxes, 55ND1, 212NW217.

1359–6½–New. but as taxes become delinquent, lien of county is augmented by operation of law. 55ND1, 212NE217.

1359–6¼–New. Effect of sale to state on other taxes.–Under Mississippi statute, where land is sold to state for taxes, county and levee district taxes remain in abeyance till land is redeemed or sold by state. 156Miss396, 125S416.

1359–6½–New. In such case county cannot sue alone for taxes due to it. 156 Miss396, 125S416.

1359–6⅝–New. Such statute is not violative of constitutional prohibition against remission or postponement of obligations held by state, levee board, county, city, or town. 156Miss396, 125S 416.

1359–13 11LaA257, 123S463.

1361–21 47RI 1, 129A609 (sale on credit in violation of statute).

1361–20½–New. Resale to state on default.–New York statute providing for resale to state on default of successful bidder at tax sale does not apply retroactively to tax sales prior to enactment of statute. 215AppDiv97, 214NYS 104.

1362–41 8PaDist&Co 724. **Liability of owners as between themselves** does not affect rights of city or county. 8Pa Dist&Co 724.

1363–46½–New. Where original sale of land bought in by county was for both taxes and assessments, duty of officer is to distribute proceeds ratably between such tax and assessment liens. 140 Okl 131, 282P282.

1364–55 141 Okl 193, 284P648 ("return of sale" defined); 125 Or644, 266P1069.

1365–57 150Md291, 133A331.

1366–60 Omission by clerk to note on margin of original record of certificate of tax sale a reference to where recorded, held not chargeable to party seeking to bar redemption. 102NJL541, 133A 421.

1367–61 141 Okl 193, 284P648.

1368–75 But see 125 Or644, 266P1069.

1368–76 Nebr 230NW838.

1369–78 176Ark1204, 299SW998.

1370–88 123 Okl 207, 253P41; 124 Okl 18, 253P489; 142 Okl 47, 285P89. **Equitable title.**–123 Okl 207, 253P41. **Holder of certificate has lien on land.**– 124 Okl 18, 253P489. **Certificate issued by state which acquired no title** conferred no color of title to purchaser. 181Ark914, 28SW(2d)697.

1370–91½–New. Assignment of certificate.–Valid assignment of certificate can be made only by owner thereof by executing and acknowledging assignment before officer having power to take acknowledgment of deeds. 123 Okl 207, 253P41.

1370–91¼–New. Mere agent of such owner without power of attorney in fact duly acknowledged in manner prescribed for conveyance of real estate cannot assign certificate and acknowledge execution of same. 123 Okl 207, 253P41.

1370–96 192NC251, 134SE487. **Tax sale certificate not complying substantially with statute** is void and of no effect as predicate for title. 94Fla649, 114S502.

1371–97 57ND793, 224NW198. **Failure of officer to sign certificate** does not invalidate sale. 57ND793, 224NW198.

1371–1 192NC251, 134SE487; Utah 269 P138. **Description held insufficient.**–191 NC429, 131SE764.

1372–5 99NJEq748, 133A780. **Evidence as to amount of taxes due.**–167 Minn286, 209NW9. **Evidence of payment of purchase price by tax purchaser.**–58ND388, 226NW549.

1372–6 Defective proof of service.–103 NJEq170, 142A566.

1372–11 47 Ida527, 277P1114; 99NJEq 748, 133A780; 53ND609, 207NW436 (including hail indemnity taxes).

1373–13 125 Or644, 266P1069.

1373–14 258Mass253, 154NE844.

1373–15 125 Or644, 266P1069; 125 Or 662, 268P60.

1373–16 NJCh 147A541. **Jurisdiction of court out of which execution issued.–** Mo 30SW(2d)986.

1373–20½–New. In some jurisdictions a motion to set aside a sale filed and determined at term in which sale was made is a proceeding on the law side of the court. 315Mo 549, 286SW355.

1374–22 Mo 31SW(2d)1002.

1374–23 58ND571, 226NW615 (sale in excess of amount allowed by law held not ground).

1374–24 125 Or409, 267P530.

1374–25 158La596, 104S381; 2LaA196; 9LaA41, 118S852(1stcase); 20 OhA427, 152NE679 (court without jurisdiction because proper service not obtained by publication); 126 Or525, 270P491.

1374–29 TexCivA 29SW(2d)849. **Gross inadequacy of price is a circumstance to be considered,** etc. See also **Mo** 30SW (2d)986; **TexCivA** 29SW(2d)849. **Gross inadequacy of price may justify court in setting aside sale.**–315Mo 549, 286SW 355.

1374–31 In Alberta.–[1927] 1DomLR 394.

1374–31½–New. Sale is not invalidated by fact that purchaser abstracted title for collector and that his fee was taxable as costs in the suit for taxes. 315Mo 549, 286SW355.

1375–33 161La392, 108S782. But see 8 LaA116. **In California.**–68CalA393, 229 P876. **Penalties and interest.**–161La392, 108S782.

1375–35 161La392, 108S782; 165La57, 115S366; 1LaA664; 7LaA667. **Remedy held coextensive with ejectment** as to time in which suit might be started. 99 NJEq527, 133A875. **Four-year statute barring direct attack on tax sale order** begins to run upon entry of judgment precluding collateral attack. **TexCivA** 28SW(2d)688.

1375–36½–New. Nor is refusal to review because of laches ground for equitable interference. 99NJEq527, 133A 875.

1375–38 Payment of inheritance tax and recognition of parties plaintiff as heirs of deceased owner not prerequisite to right to bring action to annul sale. 158La596, 104S381.

1376–39 137Wash208, 242P43.

1376–43 Petition held sufficient.–166La 35, 116S585. **In Ohio.**–21 OhA507, 153 NE759. **Defense to tax lien need not be shown** on petition based on ground court had no jurisdiction because proper service by publication was not made. 20 OhA427, 152NE679. **Court could not annul tax sale** where there was no allegation nor proof of fraud. 170La654, 129S118.

1376–45 Failure of plaintiff to allege and of his deed to show that property was described in deed held not fatal where evidence identified property. 166 La35, 116S585.

1376–50½–New. If sale is void, remedy is by ejectment, or bill to remove cloud, or bill to quiet title. 98NJEq31, 129A 622.

1377–51 98NJEq31, 129A622; 99NJEq 527, 133A875.

1377–52 126Kan667, 271P287.

1377–56 174Ark1005, 298SW196 (presumption held insufficient to deprive one of property where proceedings are ex parte and jurisdictional); 204Cal 78, 266P951; 128Me412, 148A143.

1378–57 98NJEq31, 129A622; **TexCivA** 188SW(2d)786. **Sales subject to collateral attack.–TexCivA** 188SW(2d)786.

1378–60 But see **Mo** 31SW(2d)1002.

1378–61 100NJEq87, 135A271.

1378–63½–New. If owner, instead of standing on his legal rights, asks relief quieting his title, he is not entitled to judgment, without offering to pay taxes justly chargeable against property. 68CalA393, 229P876.

1378–64 22AltaL148, [1926] 2DomLR 150, [1926] 1WestWkly561.

1379–67 226AppDiv416, 235NYS655; 197Wis218, 221NW768.

1379–68 Mont 285P185; 132Misc632, 230NYS448.

1379–69 129Misc252, 221NYS254; 131 Or290, 282P1084 (sale for delinquency of one year under order for sale for delinquency of another year not shown to exist).

1380–70 194NC91, 138SE420; 22AltaL 148, [1926] 2DomLR150, [1926] 1West Wkly561 (failure to send written notice to those interested in redeeming).

1380–71 Sale in violation of statute requiring collector to strike off land to state if proper amount not bid by any person is not cured by other statutes. 149Miss864, 116S95.

1380–73 Mont 292P722.

1380–74 152Miss605, 120S562.

1380–75 One who knows that his name has been wrongly omitted from assessment roll and fails to take proper steps to rectify error cannot complain when his land was sold for taxes. **Alta** [1927] 2DomLR484.

1380–77½–New. Town receiving nothing at collector's illegal sale is not estopped from maintaining suit for taxes. **Me** 151A670.

1381–78 Ark 32SW(2d)445.

1381–80 208 Iowa519, 223NW884; 159 La658, 106S22 (as party in interest); 86Mont58, 282P32 (person seeking redemption must bring himself within provisions of statute); 227AppDiv230, 237NYS180; 56ND712, 219NW223; **TexCivA** 208SW(2d)148 (statute held not to violate constitutional provision); **TexCivA** 27SW(2d)550.

1382–83½–New. Owner of only one of two lots assessed in solido and sold together is entitled to redeem it alone from individual purchaser at tax sale. 141Miss515, 106S775.

1382–84 178Ark632, 118SW(2d)447; 98 NJEq209, 130A17; 101NJEq395, 138A 376; **NJCh** 145A625; **NJCh** 145A869 (2dcase); **NJCh** 149A543(1stcase); **NJCh** 151A212. **Statute reducing rate of interest on redemption of land sold to county held constitutional.**–53ND278, 205NW880.

1383–85 NJ 151A850. **Act held to have retroactive effect.**–143Wash326, 255P 371. **Statutes held retroactive.–TexCivA** 208SW(2d)148.

1383–88 Provision that such repealing act shall operate retrospectively is not rendered meaningless by refusal to apply it to previous sales as it properly applies to taxes levied before its passage. 98NJEq209, 130A17. **Statute remedying tax laws** held not to repeal law as to redemption by city of prop-

erty bought by county on sale for general taxes. 143Wash326, 255P371.

1383-88½-New. Legislature may provide for statutory foreclosure of equity of redemption otherwise than by judicial process and may regulate or abolish administrative duties of public officers therein in so far as they are not basic or jurisdictional. 189NC757, 128SE161.

1383-88½-New. Requirement of notice to defaulting landowner of statutory proceedings to foreclose equity of redemption may be regulated by legislature but may not be dispensed with. 189NC757, 128SE161.

1383-89 152Miss171, 119S166; 86Mont 58, 282P32; 227AppDiv340, 238NYS345. See 243Mich318, 220NW792. But see 85 Mont435, 279P246, 66ALR1033. **Phrases "in equity and good conscience" and "good cause,"** used in statute, mean that, if in equity and good conscience one is entitled to redeem, good cause is shown. **Mass** 169NE669. **Statute construed as conferring additional right of redemption where original owner is in possession.**–220Ala631, 127S202.

1383-89½-New. Provisions of statute must be followed in order to cut off right of redemption.–234Mich301, 207 NW849.

1383-89½-New. Statute requiring county treasurer to permit redemption and to compute and apportion tax against realty sought to be redeemed as if properly assessed is not unconstitutional. 86Mont58, 282P32.

1383-90 159La658, 106S22 (any person interested personally); 320Mo 341, 7SW (2d)1013; **TexCivA** 12SW(2d)260; **Man** [1926] 1DomLR1005, [1926] 1WestWkly 873. **Record owner held not to have redeemed** where he was properly assessed for taxes after unrecorded conveyance to another and, thereafter purchased tax title from purchaser at tax sale. 254Mass516, 150NE433. **Grantee in quitclaim deed** from persons holding undivided two-thirds may redeem whole of land as "party in interest" under statute. 83CalA516, 257P131.

1384-93 159La658, 106S22; 320Mo 341, 7SW(2d)1013.

1384-93½-New. , and legatees. 159La 658, 106S22.

1384-94 Possessor in Louisiana.–159La 658, 106S22. **Notice by tax sale purchaser to lessee of coal mining rights in possession** held not to divest owners of possession as regards redemption. 220Ala641, 127S212. **Statute making right of redemption available to owner at time of sale when sued** held applicable to lessor of coal mining rights against whom purchaser filed cross bill. 220Ala641, 127S212.

1384-95 159La658, 106S22.

1384-97 10PaDist&Co 565; **WVa** 153 SE515.

1384-99 Mass 169NE669. **Right of owners of lots in subdivision to enforce building restrictions** does not extend to them right to redeem from tax sale on another lot. 243Mich318, 220 NW792.

1384-1 See also **TexCivA** 18SW(2d) 244.

1385-2 87Colo 474, 289P365.

1385-2½-New. In Louisiana purchaser of property at tax sale subsequent to adjudication to state is entitled to redeem. 159La658, 106S22 (redemption does not enure to benefit of heirs of original owner).

1385-2½-New. Under a statute which allows "any person who has some interest in the land" to redeem, it was held that son of owner of land who died intestate had not such interest as to be able to compel assignment of tax sale certificate. **Man** [1926] 1DomLR 1005, [1926] 1WestWkly873.

1385-2¼-New. Corporation declared defunct for nonpayment of taxes had right to redeem corporation's property from tax sale. 84Colo 476, 271P623.

1385-2½-New. In some jurisdictions city has right to redeem from county sales for taxes at any time before resale. **Wash** 287P675.

1385-3 93CalA695, 270P394; 315Mo 549, 286SW355; 227AppDiv230, 237 NYS180. (mortgagee's right of redemption has been held not affected by subsequent statute limiting period of redemption); **TexCivA** 18SW(2d)736; **Utah** 287P926. See also 86Mont58, 282 P32. **Mortgagee's acquiring fee owner's deed whose right to redeem had expired** has been held not to extinguish mortgagee's right to redeem as mortgagee under doctrine of merger. 227 AppDiv230, 237NYS180.

1386-7 103NJEq252, 143A219.

1386-12 101NJEq227, 137A429 (assignee of tax certificate covering prior sale for taxes).

1387-20 But see 49TexCivA365, 108SW 489.

1387-21 Ark 32SW(2d)445; 135 Okl 296, 275P628, 65ALR573.

1388-27 220Ala631, 127S202 (two-year limitation held not applicable to right conferred by Code [1923] § 3108); 103 NJEq170, 142A566; 31NM331, 245P249 (three years from date of recording certificate); 59ND1, 228NW233; 134 Okl 57, 272P883. **Assignee of state** takes subject to redemption law in existence at time of assignment. 176Ark 625, 3SW(2d)694. **In Nebraska.**–118 Nebr651, 225NW773. **Redemption of land sold to county.**–57ND793, 224NW 198; 134 Okl 57, 272P883. **Right exists and continues till barred by decree of** court in suit to foreclose right. **NJCh** 147A498.

1389-28 11LaA9, 122S295; 56ND712, 219NW223. See also **Alta** [1928] 4Dom LR802.

1389-28½-New. Commencement of suit to redeem against individual purchaser within redemption period stops running of statute. 141Miss515, 106S775.

1389-28¼-New. Owner may redeem at any time before issuance of deed, though issuance delayed by temporary injunction, later abandoned. 94Fla746, 114S 511.

1389-28¼-New. Purchaser from owners during pendency of foreclosure of tax lien must take notice of time allowed by law or court order within which to redeem. **NJ** 147A474(2dcase).

1389-29 In Nebraska.–230NW838.

1389-30 Statute relating to sales, contracts, and judgments does not apply to tax deeds. 159La244, 105S305 (in Louisiana).

1389-31 In Michigan.–237Mich361, 211 NW634.

1390-35 Statute held not to extend time for redemption when tax certificate is bought from state. 90Fla837, 106S910.

1391-39 Statute is notice to all world of minor's right to redeem. 180Ark797, 22SW(2d)1005.

1392-47 Land bid in by county.–34NM 86, 278P206.

1392-49 34NM86, 278P206.

1392-54 98NJEq31, 129A622; 189NC 757, 128SE161; 151Wash474, 276P555. **Judgment of foreclosure of right of redemption void** where record shows lack of jurisdiction by failure to comply with prerequisite required by statute. 136Wash63, 238P992.

1393-56 118Nebr218, 224NW272.

1393-57½-New. Certificate holder may redeem from subsequent taxes by paying amount of unpaid taxes subsequent to certificate. **NJCh** 147A201.

1393-57½-New. Where by his replication plaintiff shows readiness to pay subsequent taxes before decree, payment thereof is not condition precedent to maintenance of action. **NJCh** 147A199.

1393-58 All bondholders of drainage district are not required to join in redemption. 169La674, 125S850.

1393-60 125 Or644, 266P1069; 136 Wash63, 238P992.

1393-62½-New. Under some statutes an affidavit that the owner is unknown and that the land is therefore made party confers jurisdiction. **Nebr** 230NW249.

1393-63 Facts held insufficient to establish legal notice to record owner. 136Wash63, 238P992.

1393-64 151Wash474, 276P555; **Wash** 290P879.

1394-65 151Wash474, 276P555.

1394-75 101NJEq227, 137A429.

1395-78 Discretion of court.–99NJEq 511, 134A354. **Procedure for opening.**–99NJEq511, 134A354.

1395-78½-New. Township is estopped from taking advantage of failure of its collector to list lapsed taxes. **NJCh** 147A199.

1395-78¾-New. Purchaser during pendency of suit to foreclose tax lien who failed to make tender is barred from right of redemption by decree foreclosing equity of redemption and tender after decree is too late. **NJ** 147A474 (2dcase).

1395-79 100NJEq87, 135A271; **NJCh** 147A498; **NJCh** 147A541; 227AppDiv 340, 238NYS345 (occupant of land). **Statutory proceedings for foreclosure of equity of redemption are in derogation of common law** and unless provisions for notice are liberally construed in favor of land owner injustice may result. 189NC757, 128SE161. **Statute is mandatory.**–242Mich537, 219NW673.

1395-82 Knowledge of tax deed by former owner does not dispense with necessity of notice. 237Mich361, 211 NW634. **Quitclaim deed executed by owner to holder of tax deed** after issue of tax deed cannot be substituted for service required by law. 59ND1, 228 NW233.

1395-83 208 Iowa519, 223NW884; 234 Mich301, 207NW849; 59ND1, 228NW 233. **Comptroller must publish notice** that land was unredeemed from tax sale. 125Misc453, 211NYS731.

1396-84 77Colo 578, 238P40; 100NJEq 87, 135A271; **NJCh** 135A273; 126Misc 642, 214NYS418 (tax deed and record thereof held void); 132Misc387, 229 NYS731; 133Misc823, 233NYS223; 134 Misc329, 235NYS271; 227AppDiv230, 237NYS180; 227AppDiv340, 238NYS 345; 229AppDiv7, 240NYS452; 58ND 388, 226NW549. See also 132Misc632, 230NYS448. But see 155Miss580, 124 S791. **Failure of grantee in tax deed to serve notice to redeem on grantee under tax deed** issued for latest taxes appearing of record, as required by Michigan statute, renders his title void. 242 Mich537, 219NW673.

1396-85 250Mich546, 230NW940; 59 ND1, 228NW233.

1396-86 100NJEq87, 135A271.

1397-94 250Mich546, 230NW940; 55 ND634, 214NW904, 54ALR752. **Record owner without title.**–Mich 206NW98. **Grantee of easement** is not entitled to notice. 243Mich318, 220NW792. **Heirs of grantee of easement** are not entitled to notice. 243Mich318, 220NW792.

1397-95 250Mich546, 230NW940.

1397-97½-New. Persons whose interest in real estate has been barred by tax sale proceedings are not entitled to notice to redeem under subsequent tax sale. **NJ** 148A890.

1398-98 201 Iowa208, 205NW758. **That name of person is indicated on tax books by letter abbreviations** is immaterial when tax certificate holder knows exactly who was intended by abbreviations. 201 Iowa208, 205NW758. **After service of notice on resident** in whose name lands are assessed other service need not be made. 53ND319, 206NW 411.

1398-7 223AppDiv626, 229NYS315. **If only part of land is occupied,** notice must be given. 126Misc642, 214NYS 418. **If party in possession is resident,** personal service of notice on him is mandatory under statute. 201 Iowa208, 205NW758. **Lands, within large tract** used for factories, tanneries, and lumbering, not visibly separated from rest on which were also residences of owner's agent and other is occupied, are within statute requiring notice. 126 Misc642, 214NYS418. **Mere squatters and the like.**–126Misc642, 214NYS418. **Mere erection of signboard on premises** by plaintiff advertising products without address or indication of ownership is insufficient to show occupancy. 133 Misc823, 233NYS223. **Nonoccupancy during redemption period is immaterial** as to necessity of giving notice where it was actually occupied at time of giving deed. 133Misc823, 233NYS223.

1399-8 223AppDiv626, 229NYS315; 133 Misc823, 233NYS223; 227AppDiv340, 238NYS345 (occupancy does not constitute adverse possession which will ripen

into title in twenty years). **Erection of sign forbidding trespass** and bearing plaintiff's name as owner is insufficient to establish actual occupancy by plaintiff within statute. 215AppDiv718, 212 NYS425.

1399-9 227AppDiv340, 238NYS345. See also 132Misc632, 230NYS448. **One may be occupant** without residing in tax district. 227AppDiv340, 238NYS345.

1399-10 Nonresident life tenant in possession through tenants cultivating land on shares held in actual occupancy so as to be entitled to notice. 229AppDiv 7, 240NYS452.

1399-11 Mich 206NW98. **Presence of signs on property** may imply merely license, not interest in land. **Mich** 206 NW98.

1399-13 Lessees entitled to notice.–Mich 206NW98.

1400-19½-New. Where land was unoccupied during redemption period, deed is not invalid for failure to give notice to occupant. 229AppDiv21, 241NYS17.

1400-20 141 **Okl** 246, 284P882.

1400-21 227AppDiv230, 237NYS180; 53ND319, 206NW411.

1400-22 227AppDiv230, 237NYS180; 57ND101, 220NW839; 58ND388, 226 NW549. **Notice prepared by public officer.**–57ND101, 220NW839. **Signature.**–250Mich437, 230NW507.

1401-27 131Misc422, 226NYS255.

1401-29 Notice to executor of deceased owner is insufficient where it fails to disclose that it is served on recipient as executor or that land involved belongs to estate. 242Mich537, 219NW673.

1401-30 131Misc422, 226NYS255.

1402-32 242Mich537, 219NW673; 98 NJEq31, 129A622; **NJCh** 145A320; 131 Misc422, 226NYS255. **Designation of** state, etc. 235Mich47, 209NW175. **Test of adequacy of description** is whether extrinsic proof is required to identify property, or to convey to mind of owner that proceedings affecting it are pending. 235Mich47, 209NW175.

1402-33 250Mich437, 230NW507. **Adding delinquent taxes.**–85Mont398, 279P 231. **Interest.**–178Minn404, 227NW209. **Penalty.**–178Minn404, 227NW209.

1403-34 58ND388, 226NW549.

1403-37 77Colo 578, 238P40.

1404-40 48 Ida284, 281P748. **Notice held sufficient** under Pub. L. (1918) § 46. 102NJL541, 132A421.

1404-41 Mailing notice in single envelope addressed to husband and wife is not statutory service on either. 103NJ Eq170, 142A566. **Mailing notice.**–102 NJEq154, 139A896; 59ND42, 228NW 451 (diligence not shown).

1405-43½-New. Notices mailed to incorporators are of no legal effect as notices to corporation. **NJCh** 147A541.

1405-44 Domestic corporation.–201 Iowa208, 205NW758.

1405-46 Insufficient diligence.–234Mich 301, 207NW849.

1405-49 Upon a doubtful construction of statute, court, upon certiorari, will not set aside proceeding. 102NJL541, 132A421.

1405-52 59ND1, 228NW233. But see **NJ** 148A729. **Failure to record service,** etc. 126Misc642, 214NYS418. **Proof of service of mailing notice** is defective if it fails to state that address to which notice was sent is post-office address of sendee. 103NJEq170, 142A566. **Recorded defective proof** is not presumptive evidence of its contents pro tanto. 103NJEq170, 142A566.

1406-53 Mich 206NW98.

1406-55 Mich 206NW98; 237Mich361, 211NW634; 243Mich318, 220NW792; 59ND1, 228NW233. **Evidence held insufficient** to establish that defendant did not receive notice, as against return of officer. **Mich** 206NW98.

1407-58 Affidavit held insufficient.–208 Iowa519, 223NW884.

1407-60 Tax deed invalid for want of proper affidavit of proof of service is not validated by filing subsequent affidavit in proper statutory form. 114 Nebr858, 211NW184.

1403-62 "Foreman" of paper authorized to make affidavit means chief of set of workmen, superintending rest. 114Nebr858, 211NW184. **"Manager"** of paper authorized to make affidavit is one who manages, conductor or director. 114Nebr858, 211NW184. **"Publisher"** authorized to make affidavit is one who issues and offers for sale printed matter. 114Nebr858, 211NW184. **Under statute requiring proof of publication** of notice affidavit by publisher, manager, or foreman of newspaper affidavit by editor is not sufficient. 114Nebr858, 211NW184.

1408-65 See 243Mich318, 220NW792.

1408-66 NJCh 145A869(2dcase).

1408-66½-New. Allowance of counsel fees on redemption from tax sale is within discretion of court. **NJCh** 145A 869(2dcase).

1408-66⅓-New. Where purchaser of tax sale certificates by mistake mailed notices to wrong address and could have avoided foreclosure by exercise of reasonable diligence, he was not entitled to counsel fees on redemption. **NJ Ch** 145A869(2dcase).

1408-67 99Fla899, 128S21 (redemption after first publication of notice of application for deed); 78Mont235, 253P 1100; 56ND712, 219NW223. **In Nebraska.**–118Nebr651, 225NW773.

1409-68 But see 85Mont398, 279P231. **On redemption by purchaser at foreclosure of mortgage,** lien of which was superior to that of certain taxes for which land was sold, redemptioner is entitled to certificate or tender of taxes except those constituting lien inferior to mortgage. 54ND184, 208NW966.

1409-69 208 Iowa519, 223NW884; **Tex CivA** 27SW(2d)550.

1409-71 78Mont235, 253P1100 (publication charges).

1409-72 180Ark797, 22SW(2d)1005 (prior to offer of redemption).

1409-73 180Ark797, 22SW(2d)1005.

1410-76 Owner cannot redeem under earlier sale for later tax without paying earlier taxes for which land was sold after first sale. 87Colo 474, 289P365.

1410-76½-New. Where land was sold for both personal property and realty taxes, holder of mortgage on realty which was antecedent to lien of personal property tax may redeem without paying such tax. 40Wyo 53, 274P12.

1410-77 Ark 31SW(2d)953. **Ten per cent premium** payable on redemption is in addition to amount of purchase money without regard to time elapsing between sale and redemption. 161Ga378, 131SE55. **Interest provisions** in statute apply to redemption from county which purchased at sale. 53ND278, 205NW 880.

1410-78 78Mont235, 253P1100.

1410-80 78Mont235, 253P1100. **Penalty provision** in statute applies to redemption from county which purchased at sale. 53ND278, 205NW880. **In Florida.**–99Fla899, 128S21.

1410-81 99Fla899, 128S21.

1410-83½-New. Under some statutes purchaser cannot claim interest on any greater sum than that at which property is assessed. 219Ala411, 122S401.

1410-84 180Ark797, 22SW(2d)1005; 169La666, 125S848; 56ND712, 219NW 223. But see 41 Ida126, 238P305. Contra 153Wash476, 279P741. **Where lands were sold to county,** redemptioner must pay subsequent assessments, costs, fees, and interest. 85Mont398, 279P231.

1411-87 180Ark797, 22SW(2d)1005.

1411-88 See also 163La154, 111S659. **Where payment unnecessary.**–201 Iowa 208, 205NW758. **Where purchaser is nonresident and cannot be located,** amount may properly be deposited with sheriff and tax collector. 167La653, 120S40.

1412-90 Where no certificate of sale was issued on sale to county, one entitled to redeem may tender amount due at any time in action brought against him to determine adverse claims, when validity of tax sale and subsequent proceedings is involved in such action. 57 ND793, 224NW198.

1412-93 85Mont435, 279P246, 66ALR 1033 (holding no valid redemption where county treasurer advanced personal funds); 101NJEq227, 137A429.

1412-95 159La244, 105S305 (claim that redemption period is passed excuses tender).

1412-96 Tender of certificate of deposit is sufficient if accepted by person designated to receive payment. 237 Mich361, 211NW634. **Acceptance of owner's check instead of cash, by county clerk acting for county treasurer,** does not invalidate redemption. 175 Ark856, 300SW445.

1412-97 Payment to holder of certificate of sale by lienholder's attorney is payment of taxes though attorney took assignment of certificate and payment did not appear of record. **SD** 230NW 282.

1413-98 208 Iowa519, 223NW884.

1413-3 Receipt of redemption money by county clerk acting for county treasurer instead of by county treasurer does not affect validity of redemption where tax purchaser was not prejudiced. 175Ark856, 300SW445.

1414-20½-New. That county treasurer inserted in tax redemption certificate name of corporation which owned property at time of tax sale, and which subsequently ceased to exist, instead of name of new corporation to which property had been deeded by directors acting under statute, has been held of no concern to assignee of tax certificate. 84Colo 476, 271P623.

1414-20⅓-New. Construction of certificate.–Certificate of redemption will be construed as applying to tax sale which was legal rather than to one which was illegal. 152Miss171, 119S166.

1415-26½-New. Payment by county treasurer's check becomes absolute upon failure of purchaser to present check within reasonable time notwithstanding statute requiring holding of redemption money. **SD** 229NW298.

1416-32 59 **OntL**323, [1926] **4DomLR** 223.

1417-40 70Utah509, 261P450.

1417-42 124 **Okl** 18, 253P489.

1417-44 Owner is entitled to possession.–124 **Okl** 18, 253P489.

1418-47 Creditor or other person who redeems land from tax sale is subrogated by operation of law to privilege securing taxes for which land was sold. 169La674, 125S850.

1418-47½-New. Rights of purchaser at tax sale.–40Wyo 53, 274P12.

1418-47⅓-New. County treasurer's erroneous inclusion of poll taxes as lien on lands in selling property for taxes, makes it duty of county, on allowing redemption of land and thus placing it beyond its power to give deed to purchaser at tax sale, to reimburse purchaser for amount of poll taxes, penalty, and interest thereon, paid by him. 40Wyo 53, 274P12.

1418-48 161La392, 108S782; 88PaSuper61.

1418-49 248Mich187, 226NW850; **NJ Ch** 147A498.

1418-52 34NM86, 278P206. **Where county treasurer requires time to ascertain amount necessary for redemption of lands bid in by county** when taxpayer offers to redeem and taxpayer is not negligent, treasurer cannot sell certificate to third person, and redemption, when made, relates back to first offer. 34NM 86, 278P206.

1419-56 Owner of only one of two lots assessed in solido and sold together may maintain suit in equity against individual purchaser to determine amount necessary to redeem complainant's lot where purchaser insists that it cannot be redeemed alone. 141Miss515, 106S775.

1419-60 145Miss456, 110S865, 868 [cit Cyc].

1419-62 See also 6LaA568.

1420-64 In Alabama.–220Ala641, 127S 212.

1420-64½-New. Bill to redeem raises question of regularity of proceedings alleged to bar right of redemption. 100 NJEq87, 135A271.

1420-67 107WVa628, 149SE831 (grantor of land forfeited for tax delinquency of his grantor).

1420-68 Facts sufficiently established by undenied allegations of bill.–141Miss 515, 106S775.

1420-71 98NJEq31, 129A622. **Bill held**

sufficient to excuse delay precluding defense of laches. Ala 130S795.

1420-72 Evidence insufficient to prove constructive fraud. 83Mont1, 268P555.

1421-85 201 Iowa208, 205NW758 (notice of expiration of period of redemption).

1421-86 Evidence held sufficient to establish plaintiff's title. 201 Iowa208, 205NW758. **Noninterested party** may not maintain action. 201 Iowa208, 205 NW758.

1421-87 Plaintiff need not show payment of taxes in action to redeem from void tax deed. 201 Iowa208, 205NW 758. **Tender and offer by plaintiff** to pay all taxes found due is equivalent to payment under statutes. 201 Iowa208, 205NW758.

1422-90 114Nebr858, 211NW184 (where tax deed of county treasurer is unauthorized, owner has right to redeem); TexCivA 285SW650. But see TexCivA 22SW(2d)688.

1422-93 198Cal 667, 247P195 (deed may run directly to purchaser on resale by state). See also 204Cal 78, 266P951.

1423-96 Tax sale purchaser of state school lands sold on deferred payments is not entitled to issuance of tax deed but is substituted in place of purchaser. 143 Okl 18, 285P127.

1423-2 93Fla124, 111S504. **Warranty deed by holder of certificate** operates as assignment of certificate and entitles grantee to apply for and obtain tax deed after expiration of period of redemption. 31NM331, 245P249.

1423-3½-New. Bid and payment of purchase money constitute purchaser's right. TexCivA 272SW277.

1423-5 189NC757, 128SE161 [citCyc] (statutory proceedings to foreclose equity of redemption); 120 Okl 5, 249P 1109.

1423-6 120 Okl 5, 249P1109. **Affidavit held not to show that notice complied with requirements of statute** that it state in whose name lands were taxed. 189 NC757, 128SE161. **Affidavit of compliance with provisions of statute as to notice is necessary prerequisite** to validity of tax deed. 189NC757, 128SE161. **Where affidavit does not include copy of published notice,** it must state date at which period of redemption expires. 189 NC757, 128SE161. **Service of notice to redeem.**-59ND1, 228NW233 (proof of service).

1424-8 31NM331, 245P249; 117 Or125, 242P616. **In Alabama.**-212Ala542, 103 S580.

1424-9 31NM331, 245P249.

1425-14 93Fla124, 111S504; Mont 285 P185 (must state correct amount due); 189NC757, 128SE161 [citCyc] (notice by purchaser of election to pursue statutory method of foreclosure of equity of redemption); 120 Okl 5, 249P1109; 138 Okl 280, 282P365. **Requirement that notice state in whose name land was taxed** is mandatory, though listing in wrong name does not make sale void. 189NC757, 128SE161. **Statute declaring common law in force** must be construed as part of statute requiring notice. 189 NC757, 128SE161. **Purpose of notice.**-82Mont502, 267P1113. **Statute requiring notice applies where county is purchaser.**-82Mont502, 267P1113. **Sufficiency of notice.**-82Mont502, 267P1113. **Incorrect statement of amount due** renders notice invalid. 85Mont398, 279P231. **Notice is rendered invalid** by inclusion of tax not levied and assessed as required by law. Mont 285P185. **Sales to county.**-85Mont398, 279P231. **Failure to make affidavit of ignorance of owner's residence or to mail publication notice** requires setting aside of tax deed. Okl 292P58.

1426-18 See also 84Colo 203, 269P14.

1427-27½-New. Where taxes illegally levied were included in notice given to owner prior to application for deed, injunction restraining county treasurer from issuing deed is proper remedy. 82 Mont502, 267P1113.

1427-27½-New. In such case owner need not first apply for relief to county board of equalization. 82Mont502, 267P 1113.

1427-32 86Mont595, 285P932.

1428-42 But see 93Fla124, 111S504.

1429-47 86CalA736, 261P1092; 148Md 318, 129A364.

1429-49 113 Okl 195, 240P1045.

1430-53 MoA 18SW(2d)203.

1432-64 But see 132Misc632, 230NYS 448.

1432-68 88 IndA487, 164NE711. **Necessity of minutes reciting deeds acknowledged.**-98PaSuper316.

1432-70 TexCivA 289SW1021.

1433-73 256Mass340, 152NE355. **Statute** does not allow thirty days after delivery of deed within which to record it. 256Mass340, 152NE355.

1433-74 58ND351, 226NW529, 65ALR 1009.

1433-78½-New. Publication of notice of conveyance to state after notice to redeem is required. 125Misc453, 211NYS 731.

1433-79 117 Or125, 242P616.

1434-84 126Misc642, 214NYS418.

1434-92 Utah 269P138.

1434-93 Legislature has power to prescribe form of tax deed.-36 OklACR340.

1434-94 71CalA717, 236P371; 36 Okl ACR340. **Legislature has power to prescribe form.**-125 Okl 108, 256P755.

1434-95 Deed substantially in statutory form is not void on its face.-125 Okl 108, 256P755.

1435-96 134 Okl 193, 272P830; Utah 269P138.

1435-98 77Colo 56, 234P1054, 1055 [quotCyc]; 36 OklACR340, 343 [quot Cyc]; 125 Okl 108, 256P755.

1435-2 CalA 291P688.

1436-4½-New. Rule that recitals in tax deed control where contradicting return, has no application where return shows departure from requirements of law sufficient to invalidate officer's act. Tex CivA 272SW277.

1436-16 259Mass94, 156NE68; 133 Okl 128, 271P669. But see 36 OklACR340 [overr 93 Okl 283, 220P652 and other decisions so far as they announce contrary rule]; 43 OklACR100 [reh pending].

1437-17 But see 125 Okl 108, 256P755; 36 OklACR340; 43 OklACR100 [reh pending].

1437-22 49ND653, 193NW317.

1437-23½-New. Recitals of resale tax deed held sufficient. 121 Okl 25, 246P 1100.

1437-24 134 Okl 193, 272P830. **Sufficiency of recital.**-71CalA717, 236P371.

1438-29 133 Okl 128, 271P669.

1439-38 100CalA567, 280P706.

1439-40 100CalA567, 280P706.

1439-41 141 Okl 110, 283P995 (resale tax deed held not void on its face); 144 Okl 44, 289P306. **Where recitals show that tax sale was illegal,** deed is void on its face. 49ND653, 193NW317.

1440-43 Deed showing county a competitive bidder, etc. Utah 291P493.

1440-44 Several tracts in same deed.-127Kan72, 272P106.

1441-46 Where deed shows sale was nine days late and contains no explanation, it is void. 85Colo 381, 276P332.

1441-47 Tax deed held to recite all necessary steps to valid deed.-81Colo 528, 256P636. **Deeds showing on face that sales were not commenced on date required by law** and showing no reason for failure are void on face. 87Colo 193, 286P280.

1441-48 That deed does not recite that sale was continued from first to following day does not render it void on its face. 140 Okl 74, 282P679.

1441-50½-New. Positive affirmative recitals of date of tax sale in correcting tax deed must prevail over recitals in first deed. 81Colo 528, 256P636.

1443-59 113 Okl 195, 240P1045.

1443-60 CalA 291P688.

1444-66 93Fla124, 111S504.

1445-75 181Ark914, 28SW(2d)697; CalA 291P688; 166Ga689, 144SE313; 163La529, 112S405; 5LaA74; 5LaA635; 147Miss802, 111S838 (description held insufficient); TexCommnA 291SW214. **Description held sufficient.**-159La658, 106S22; La 130S350; 140Miss168, 105 S494. **Description held insufficient.**-123 Kan755, 256P813. **Describing property by reference to map** is sufficient, though there are on record two maps, practically identical, except that one bears no title. 96CalA50, 273P606.

1446-77 162Ga592, 133SE624.

1447-86 96CalA50, 273P606; 82Colo 288, 259P1025, 1026 [citCyc]. **Improvements not described are not included** in such deed. 82Colo 288, 259P1025.

1448-87 178Ark699, 11SW(2d)488.

1449-91 TexCommnA 291SW214.

1449-92 92CalA708, 268P959; 147Miss 802, 111S838.

1449-94 Utah 269P138, 141 [cit Cyc].

1450-96 96CalA747, 275P223; 96CalA 753, 276P113(1stcase); 167La137, 118 S865.

1450-98 96CalA753, 275P225.

1450-99½-New. Corrective deed, invalid because unauthorized by record, is not rendered valid by testimony in action to have deed declared void showing correctness of recitals. SD 229NW304.

1450-2 87CalA552, 262P348; 121 Or 413, 255P466. **Statute not repealed.**-87 CalA552, 262P348.

1450-3 82Colo 288, 259P1025 (description rendering deed void); 135Misc796, 238NYS463 (void instrument). See also Cal 289P817.

1451-11½-New. Deed wipes out interest of tax sale certificates and mortgages. 84Colo 203, 269P14.

1451-13 TexCivA 12SW(2d)260.

1452-22 TexCivA 12SW(2d)249.

1452-22½-New. Second sale will not extinguish title under first sale where neither purchaser at first sale or any of his purchasers were parties to subsequent tax foreclosure sale. TexCivA 19 SW(2d)109.

1452-25 No presumption arises from tax deed that proper notice was given to landowner by purchaser as required by statute, in view of requirement of affidavit. 189NC757, 128SE161.

1452-26 214Ala591, 108S534; 100CalA 567, 280P706; 102NJEq154, 139A896; TexCommnA 296SW871.

1454-30 104CalA30, 285P391; 96Pa Super180.

1456-36 36 OklACR340.

1456-39 126Misc642, 214NYS418 (does not cure defect of failure to give notice of redemption); 227AppDiv230, 237NYS 180. **Statute applies only** to conveyances consummating actual sale at public auction. 215AppDiv97, 214NYS104. **Statute does not apply** so as to prevent assailing invalid resale to state of lands after failure of successful bidder to pay amount of tax. 215AppDiv97, 214NYS 104. **Statute held not to preclude** assertion of ownership on ground that comptroller's conveyance to state was invalid. 215AppDiv97, 214NYS104. **Statute is curative** and not statute of limitations. 126Misc642, 214NYS418 (when applied to part tax sales).

1457-43 89CalA145, 264P310.

1457-46 74CalA322, 240P50; 89CalA 145, 264P310.

1457-47½-New. "Sold to the state" is conclusively presumed to have been stamped on tax statements issued after sale. 89CalA145, 264P310.

1457-48 New York statute attempts to cure defects up to point of sale. 126 Misc642, 214NYS418.

1457-50½-New. Deed to state is conclusive evidence of regularity of extension of tax by auditor. CalA 288P882.

1457-51 DelCh 147A250; 206 Iowa336, 218NW292; 58ND571, 226NW615; 125 Okl 108, 256P755, 756 [citCyc]; 144 Okl 44, 289P306 (resale tax deed); 36 Okl ACR340, 342 [quotCyc]; 125 Or644, 266 P1069.

1458-52 36 OklACR340, 342 [quot Cyc]; TexCivA 284SW608. **Construction and application of statutory language.**-36 OklACR340.

1459-57 DelCh 147A250.

1459-59 81Colo 528, 256P636; 332 Ill 620, 164NE186; 162La601, 110S828; 267Mass17, 165NE676; 125 Okl 108, 256 P755.

1460-60 Ga 155SE183 (deed erroneously excluded); 53ND319, 206NW411; 123 Okl 163, 252P418 (resale tax deed); 134 Okl 57, 272P883.

1461-64 DelCh 147A250; 223Ky478, 3SW(2d)1064; 53ND319, 206NW411; 125 Okl 108, 256P755; 36 OklACR340. **Where validity of deed is put in issue** by answer to cross bill, cross complainants have burden of proving its valid-

ity. 332 Ill 620, 164NE186.

1461–64½–New. In Kentucky while tax deed is prima facie evidence of regularity of vote, it is always incumbent on claimant to show lands claimed are included within lands conveyed by tax deed. 214Ky722, 283SW1038.

1461–65 208 Iowa519, 223NW884.

1462–66 TexCivA 272SW277.

1462–69 198NC252, 151SE259 (listing of property); 140 Okl 74, 282P679 (that contiguous tracts described in deed were assessed as one tract).

1463–72 198Cal 667, 247P195; 204Cal 78, 266P951; 74CalA322, 240P50; 226 AppDiv416, 235NYS655; 134 Okl 57, 272P883; 144 Okl 44, 289P306 (resale tax deed); 36 OklACR340. **Notice by advertisement of resale will be presumed** by reason of recital in resale tax deed that it was "duly and legally advertised for sale at resale for taxes, costs, penalty and interest accrued on same." 136 Okl 8, 275P1060. **Presumed that property was duly advertised.**–125 Okl 108, 256P755.

1463–74 But see 332 Ill 620, 164NE186; 57ND101, 220NW839.

1464–80 88 IndA487, 164NE711.

1464–81 10LaA369, 120S902.

1464–83 206Cal 225, 273P786; 96CalA 747, 275P223. **Acknowledgment.**–NM 290P214.

1465–87 135Misc796, 238NYS463 (tax deed based on no law is ineffective to convey title). **Evidence insufficient** to show fraud in obtaining decree. 168Ark 718, 271SW970.

1466–91 But see 125 Okl 108, 256P755.

1467–96 Clerk's testimony that he does not remember giving notice does not overcome presumption. Fla 130S603.

1468–7 59ND1, 228NW233; 96PaSuper 180; 149Wash294, 270P1025.

1468–8 228AppDiv390, 240NYS8; 58 ND351, 226NW529, 65ALR1009.

1468–8½–New. Record owner's title to land having never been divested by tax sale without actual notice or personal service, his title was not divested by statute, repealing former statute after commencement of action to set aside tax deed. 148Wash578, 269P834.

1468–8½–New. Legislature has power to provide that writ of possession shall issue within prescribed time from date of sale in absence of constitutional inhibition. TexCivA 20SW(2d)148.

1469–9 21 OhA507, 153NE759, 760 [quotCyc]. **Statute whereby rights of purchaser are barred if not perfected within stated time after he is entitled to deed** is inapplicable to tax deed issued prior to its enactment. 242Mich 537, 219NW673.

1469–10 21 OhA507, 153NE759, 760 [quotCyc].

1469–12 Improvements.–Wash 287P658.

1469–13 7LaA530; 315Mo 442, 286SW 385; 298Pa85, 148A63.

1469–14½–New. Rights of purchaser are statutory rather than equitable. 123Kan755, 256P813.

1469–14¼–New. Purchaser is not bailee of chattels left on land where owner has been given notice to remove them. Man [1929] 1DomLR971.

1470–23½–New. Delinquent owner cutting trees before expiration of redemption period and intending to redeem in time allowed is not willful trespasser subjecting him to statutory penalty. 145Miss713, 1108790.

1470–24 168Ga382, 148SE98. **Purchasers of timber entitled to damage** for cutting of timber by subsequent tax purchaser of land. 168Ga382, 148SE98.

1470–25 145Miss713, 1108790. **Tax sale certificate** does not entitle owner or holder to possession of land. 142 Okl 47, 285P89.

1471–26 145Miss713, 1108790.

1471–28 214Ala591, 108S534. **Purchaser held entitled to sue for possession** six months after tax sale. 214Ala591, 108 S534.

1471–32½–New. No right of entry is conferred by void tax sale. 214Ala591, 108S534.

1471–35 180Ark156, 208W(2d)639.

1472–37½–New. Holder of tax title may not recover statutory penalty for cutting trees on premises by delinquent owner intending to redeem before expiration of redemption period. 145Miss 713, 110S790.

1472–38 Statutes construed to require holder of tax certificate to take necessary steps to cut off right of redemption to entitle him to rents and profits at expiration of three years from date of certificate. 54ND524, 210NW1. **But if the statute gives the right of possession, etc.**–But see 102NJEq290, 140A 390.

1472–39½–New. In New Jersey, purchaser at tax sale to recover rents, in addition to recording certificate, must assert right to possession and serve notice on tenants, statute giving purchaser right to rents not being self-executing. 104NJL106, 139A28.

1472–40 See also 214Ala591, 108S534.

1472–45 CalA 289P922 (all prior claims to property extinguished).

1473–46½–New. State acquires title subject to right of redemption by former owner or other person in interest on adjudication of property to it for unpaid taxes. 159La658, 106S22.

1473–46½–New. Purchaser at tax sale acquires no title to oil reserved by original vendor. 159La810, 106S313.

1473–46¼–New. If rights of corporation whose powers were suspended for nonpayment of taxes, were not acquired by purchaser under tax deed, purchaser acquired them in subsequent action to quiet title against corporation, commenced after corporation's license tax had been paid and corporate powers revived. 205Cal 413, 271P494.

1473–46½–New. Life tenants, and those who own and enjoy property, are chargeable with tax thereon. 166Ga689, 144SE313.

1473–46¼–New. Quitclaim deed subsequently delivered does not affect title. 84Colo 203, 269P14.

1473–46½–New. Purchaser at tax sale holds title merely as security for repayment of purchase price and such status continues after expiration of statutory period. Mass 169NE669.

1473–46½–New. Purchaser at tax sale does not acquire title of any person not a party to that proceeding and not embraced within term "unknown owners." TexCivA 22SW(2d)688.

1473–47 70Utah509, 261P450.

1473–47½–New. Conveyance under Virginia Statute by officers of literary fund conveys no title as officers were not vested with any title. 11F(2d)971.

1473–50 214Ala591, 108S534. **Owner of land taking tax deed** of his own land acquires no better title than before he possessed. 201 Iowa760, 206NW88.

1473–52 87 IndA570, 162NE237(2d case); 148Md318, 129A364; 155Md665, 142A525, 58ALR1213; 58ND351, 226 NW529, 65ALR1009.

1474–53 228AppDiv390, 240NYS8 (possibility of reverter is cut off when land sold for taxes).

1474–58 228Ky538, 158SW(2d)454; 315 Mo 442, 286SW385; 143 Okl 18, 285P 127. **Under rule,** interests of remaindermen are not affected by sale of delinquent life tenant's estate. 315Mo 442, 286SW385.

1475–61 315Mo 442, 286SW385.

1475–63 332 Ill 620, 164NE186; 83Mont 111, 270P638; 58ND351, 226NW529, 65 ALR1009; Man [1927] 3DomLR280. **Building restrictions are not extinguished.**–128 Or229, 274P306.

1476–64 169La573, 125S621(2dcase) (vendor's lien); TexCivA 27SW(2d)634 (mechanic's lien).

1476–66 254Mass516, 150NE433; 132 Misc639, 230NYS585; 53ND319, 206NW 411. **Where person assessed buys from purchaser at tax sale before period of redemption has expired,** he is regarded as having performed duty to pay tax, and, therefore, mortgage on premises is not cut out by tax sale and failure of mortgagee and owner of equity to redeem from tax titles. 254Mass516, 150 NE433. **Mortgagee becoming such after tax sale** acquires no lien on premises sold for taxes till redemption. NJ 148 A729.

1477–67 132Misc639, 230NYS585.

1477–68 Lien of purchaser of delinquent tax sale certificate is secondary to lien of commissioners of land office arising from loan of trust funds. 139 Okl 134, 281P579.

1477–70½–New. In Oklahoma lien of commissioners of land office under mortgage securing state's loan of trust funds is superior to lien of purchaser of tax sale certificate. Okl 292P11.

1477–71 121Kan105, 245P1030; 101 NJEq227, 137A429.

1477–72 121Kan105, 245P1030; 167La 354, 119S254.

1477–73 318Mo 963, 2SW(2d)616; Tex CommnA 17SW(2d)801; TexCivA 9 SW(2d)271.

1477–74 121Kan105, 245P1030 (rule cited by statute held to govern); NJCh 147A199; NJCh 147A201 (sale to township held not to give county prior lien as against holder of certificate for subsequent taxes); 55ND1, 212NW217; TexCivA 9SW(2d)271.

1477–74½–New. Statute, directing cancellation and abatement by county board of taxes remaining unpaid upon issuance of sheriff's deed upon foreclosure of state farm loan mortgage, does not operate on tax certificate. 55ND1, 212NW217.

1477–74½–New. Under constitutional provision exempting state property from taxation, acquisition of property by state through foreclosure of mortgage does not operate to cancel outstanding liens based upon tax sales. 55ND1, 212 NW217.

1478–75 87Colo 474, 289P365.

1478–76½–New. Holder of trust deed bidding in land at sale cannot assert estoppel of state to sell for taxes for preceding year. WVa 154SE768.

1478–77 41 Ida126, 238P305; 45 Ida 764, 267P234; 149Wash294, 270P1025. **Purchaser from county of lands deeded to county for taxes of certain year** takes subject to lien of taxes of subsequent year prior to conveyance to him. 47 Ida 680, 277P1111.

1478–78½–New. Lien of purchaser of delinquent tax sale certificate is junior and inferior to lien of holder of delinquent tax sale certificate issued for delinquent taxes for years subsequent to that for which certificate was issued. 139 Okl 134, 281P579.

1478–79 146Wash671, 264P997. But see 320Mo 341, 7SW(2d)1013.

1478–80 181Ark898, 28SW(2d)721; 150 Wash33, 272P43. **Liens for local improvements are not discharged by tax sale** where they attached subsequent to assessment for taxes on account of which property was sold. 44 Ida700, 260P155.

1478–80½–New. Drainage district taxes.–Under Missouri statute purchaser at sale for state and county taxes takes subject to lien of drainage district for future installments of estimated total tax. Mo 28SW(2d)650.

1478–80½–New. Tax deed is subject to special improvement assessments subsequently levied under some statutes. 86Mont387, 284P128.

1479–83 NJCh 147A541; 227AppDiv 230, 237NYS180. **Description of land in notice of sale has been held sufficient** to satisfy requirements of statute. IndA 169NE67. **Description of land in notice of sale has been held insufficient** under statute to pass title. IndA 169NE 67.

1479–85 Statute making tax deed conclusive evidence of prior proceedings held not curative of jurisdictional defects. 129Misc252, 221NYS254.

1479–88 174Ark287, 294SW996; 180 Ark671, 22SW(2d)553; Ark 30SW(2d) 211; 198Cal 667, 247P195 (arbitrary memorandum, not tending to mislead, placed on assessment roll by assessor, will not invalidate assessment); 202Cal 581, 262P314; 204Cal 78, 266P951 (deed not void); 206Cal 225, 273P786; 206 Cal 742, 276P347; 77CalA558, 247P244 (deed valid, though land assessed to one not record owner); 83CalA161, 256P 464; 86CalA664, 261P497; 87CalA552, 262P348; 88CalA379, 263P819; CalA 269P940; CalA 269P964; 95CalA727, 273P147; 96CalA50, 273P606; 99CalA 545, 279P217; 102CalA488, 283P363; CalA 291P688; 82Colo 128, 257P359;

170Ga557, 153SE366; 121Kan105, 245P1030; 123Kan59, 254P404; 215Ky601, 286SW779; 221Ky619, 299SW551; 223Ky478, 38SW(2d)1064; 163La583, 112S494; 163La764, 112S713; 256Mass340, 152NE355; 145Miss456, 110S865 (as to fixing date of sale); 149Miss368, 115S204; 149Miss864, 116S95; 150Miss245, 116S593; Mo 300SW469; 51Nev7, 267P49; 98NJEq31, 129A622; 100NJEq87, 135A271; NJCh 135A273; NJCh 135A274; NJCh 147A559(2dcase); 33NM535, 271P95; 223AppDiv70, 227NYS580; 131Misc422, 226NYS255; 129Misc252, 221NYS254; 132Misc387, 229NYS731; 226AppDiv416, 235NYS655; 227AppDiv230, 237NYS180; 194NC91, 138SE420; 198NC252, 151SE259; 140Okl74, 282P679 (resale tax deed not void); 131Or290, 279P553; 131Or290, 282P1084 (where suit is brought within statutory time); 53SD330, 220NW870; Tex CivA 19SW(2d)109 (tax sale held valid); TexCivA 27SW(2d)634; TexCivA 27SW(2d)864; 148Wash578, 269P834; 37Wyo405, 263P698. See 103NJEq170, 142A566. **Tax sale is not invalidated** because in computing penalties assessor added on a half cent. 198Cal667, 247P195. **Where statute prohibits sale,** deeds following are void. 125Misc453, 211NYS731 (lands having been withdrawn from sale). **Withdrawal of lands from sale** makes deeds following void. 125Misc453, 211NYS731. **Tax sale valid to pass title,** though held twenty-eight days after last day for publication of notice where designated day of sale was within stipulated time and sale continued from day to day. 77CalA558, 247P244. **Where person assessed was not owner of whole tract,** tax sale and deed is invalid. 256Mass340, 152NE355. **Failure of assessor to swear to assessment roll** does not render tax title void where board of supervisors corrected and approved roll. 147Miss127, 113S200. **Assessor's failure to apportion taxes against separate parcels** will invalidate tax sale. 129Misc252, 221NYS254. **Validity of tax title depends** upon judgment foreclosure, valid order of sale, and proper deed of conveyance. Tex CivA 285SW650. **Immaterial defects.**–206Cal742, 276P347. **Notice of sale to state of delinquent property** reciting taxes, "percentage," and costs after property, without referring to penalties, was defective. CalA 269P940. **Purchaser of seated lands acquires good title** where he shows tax lawfully levied and assessed by proper officers, return by collector in compliance with statute, insufficiency of personal property to pay tax, nonpayment of tax for two years after assessment, sale regularly conducted and failure to redeem for two years thereafter. 88PaSuper61. **Sale for tax in excess of authorized amount** is not actionable in proceeding to register lands. 91CalA726, 267P729. **Destruction of original affidavits filed with county clerk** reciting performance of statutory requirements does not invalidate tax deed. Wis 229NW532. **Failure of county clerk to obey directory requirement** as to recording affidavits does not defeat tax deed. Wis 229NW532. **Insufficiency of description in assessment** is defense to tax title. NM 290P214. **Publication and posting of notice of tax sale** and list of land is essential to validity of tax deed. Wis 229NW532. **In Pennsylvania.**–13PaDist&Co 169. **If order increasing taxes was void,** tax sale is valid where taxpayer did not tender taxes due under original assessment. Miss 130S683.

1481–90 TexCivA 285SW650.

1481–94 215Ala20, 108S854; 123Kan755, 256P818.

1481–96½–New. Buyer at tax sale is not invested with equities extended to one who recovers judgment on debt due him. 131Or290, 282P1084.

1481–98 131Misc422, 226NYS255.

1482–7 **Tax certificate is assignable and** passes from hand to hand. 167Minn286, 209NW9.

1482–9 99NJEq748, 133A780.

1483–18 99NJEq748, 133A780.

1484–20 52ND176, 201NW694 (tender by assignee of holder of tax certificate held not compliance with contract between assignor and purchaser of his interest in properties covered by certificates). **Failure of assignee of tax certificate** substantially to comply with contract between assignor and purchaser of land is not waived by purchaser's refusal to give reason for not accepting tender. 52ND176, 201NW694.

1484–21 See also 197Wis218, 221NW768.

1484–22 **Assignment by clerk** held not to make tax deed void. 81Colo528, 256P636.

1484–25 **That person demanding tax certificate is speculator** has been held not to affect demand. 80Colo408, 252P351. **Under statute, single tender and demand for certificates** held sufficient, though land was sold in different years and there were seventy certificates. 80Colo408, 252P351.

1484–26½–New. Tax deed held not invalid because assignee of certificate paid no subsequent taxes where volunteers paid them. 81Colo528, 256P636.

1484–26¾–New. Tax deed held not defective for inadequate consideration for transfer of certificate in view of statute allowing county commissioners to decide amount. 81Colo528, 256P636.

1485–29 179Ark553, 17SW(2d)281; 169La365, 125S273 (purchaser from assignee); Mo 300SW469.

1485–32 10LaA369, 120S902; 254Mass516, 150NE433.

1486–38 150Miss366, 116S612.

1486–38½–New. **Where no certificate of sale was issued on sale to county,** subsequent deed to property executed and delivered by county to purchaser is in effect assignment of interest of county in tax lien, but does not convey title to land. 57ND793, 224NW198.

1486–45 191NC824, 131SE764.

1486–46 **Payment as defense to purchaser's suit.** 34NM10, 275P92. **Proving prior proceedings.**–13PaDist&Co 169.

1487–57½–New. **In Ohio** owner must first set aside judgment in tax sale and deed before he may maintain ejectment. 20OhA267, 153NE140.

1487–57¾–New. Purchaser entering under void sale is liable in damages for detention. 214Ala591, 108S534.

1487–57¼–New. Commissioners of land office may recover possession in ejectment of land as to which purchaser fails to take title as against state because of nonpayment of past-due deferred payments. 140Okl122, 282P674.

1487–58 94Fla1087, 114S767, 768 [cit Cyc]; NJ 148A890.

1487–59 121Kan467, 123Kan16, 254P694 (purchaser in possession); 98NJEq31, 129A622.

1488–60 See also Fla 129S501.

1488–61 220Ala641, 127S212; 126Kan667, 271P287; 148Miss13, 113S898; 149Miss368, 115S204. See also 87CalA552, 262P348. **Suit cannot be maintained solely to quiet title** without alleging attempted assertion of title attacked. Fla 130S603.

1488–66 **Purchaser not having performed all statutory requirements** for barring right of redemption cannot maintain bill to quiet title against owner. NJCh 145A721(1stcase).

1483–69½–New. In Florida, there is no proceeding known as bill to declare validity of tax deed only, as validity thereof may be established incidentally by removal of claims constituting cloud on title. 91Fla345, 108S173.

1488–70 193Wis14, 213NW286.

1489–72 See also 331Ill80, 162NE119.

1489–77½–New. **Landowner sued by holder of tax title for possession** is treated as admitting validity of tax title on motion to ascertain amount necessary for redemption. 220Ala631, 127S202.

1489–77¾–New. Motion to ascertain amount necessary for redemption is improper where possession as well as validity of tax title is in issue. 220Ala631, 127S202.

1489–78 163La764, 112S713.

1490–82 **Ejectment or statutory action in nature of ejectment** is proper remedy by claimant under register's deed out of possession against claimant under tax title in possession to determine paramount title and right to possession. 217Ala14, 114S360.

1490–84 NJ 148A890.

1490–86½–New. Bill in equity cannot be maintained for sole purpose of testing validity of tax deed. 98Fla117, 123S567(1stcase).

1490–89 206Cal749, 276P1013; 201Iowa857, 208NW286. **Plaintiff is not estopped** in suit to quiet title from disputing validity of tax deed pleaded in answer, under statute providing that when written instrument is pleaded in answer plaintiff is deemed to admit genuineness and due execution unless controverted. 77CalA558, 247P244. **Matters not amounting to estoppel.**–317Mo15, 295SW772, 53ALR884.

1490–90 38OklACR132. **Owner's grantee purchasing with knowledge of facts** is also estopped. 38OklACR132.

1491–93 82Colo128, 257P359.

1491–94 **Petitioner has been held not estopped** from recovering bottom lands because of expenditures made on land by defendant. 169Ga766, 151SE369.

1491–97 329Ill382, 160NE745; 198NC252, 151SE259 (statute does not apply where deed does not conform to statute); 121Or413, 255P466. **In North Carolina.**–189NC757, 128SE161. **One in possession under claim of ownership** or who claims lands which are unimproved or unoccupied may sue to remove tax deed as cloud on title. 329Ill382, 160NE745. **Statute is applicable** not when deed is void, but when conveyance passes title. 198NC252, 151SE259.

1492–1 **Holder of quitclaim deed** from former owner may sue to cancel tax deeds. 162Ga592, 133SE624.

1492–6½–New. In a suit to set aside tax title, it is unnecessary for claimant to deraign title back to the source. 136Wash63, 238P992.

1493–9 139Okl195, 281P807 (failure of county treasurer to file return of tax sale).

1493–10 149Miss641, 115S786.

1493–13 123Kan59, 254P404; 69Utah204, 253P680 (for defects in description). **Applications.**–149Miss576, 115S716; 138Okl1, 280P278, 67ALR885; 141Okl193, 284P648.

1494–15 151Wash474, 276P555.

1494–18 **Landowner in possession does not admit validity of tax sale** by filing statutory bill against holder of tax title to quiet title. 220Ala631, 127S202.

1495–21 88CalA379, 263P819. **Landowner's statutory bill to quiet title.**–220Ala631, 127S202.

1495–23 130Misc409, 224NYS22.

1496–26 217Ala14, 114S360. **In Ohio.**–20OhA267, 153NE140.

1496–27 105WVa503, 143SE231.

1496–29 93Fla124, 111S504; 327Ill412, 158NE723; 121Or413, 255P466. **To what parties statutes apply.**–327Ill412, 158NE723. **Sufficiency of tender.**–327Ill412, 158NE723. **Defendant's offer, in his pleadings, to pay amount found by court** to be necessary to redeem property from tax sale, is sufficient tender of payment in equitable action to quiet title; offer to do equity being all that is required. 208Iowa519, 223NW884. **Waiver.**–331Ill80, 162NE119. **Effect of tender** is not to pass title of amount deposited to holder of tax deed nor to admit liability in any particular amount. 327Ill412, 158NE723. **Excessive, joint tender** of more than required for reimbursement, by persons having several interests, is not prejudicial where amount greater than that due is tendered by one of parties in interest. 327Ill412, 158NE723. **Deposit in court of amount including delinquent taxes prior to sale as erroneously required by court** does not operate as waiver of right to contest liability to pay such taxes. 85Mont398, 279P231. **Time of tender.**–SD 229NW304.

1497–30 327Ill412, 158NE723. **Withdrawal of excess over amount necessary** to reimburse holders of tax deeds by complainant is proper on principle of doing equity. 327Ill412, 158NE723.

1498–31 181Ark914, 28SW(2d)697; 38OklACR132. **Resale tax deeds to state school lands sold on deferred payments** are not within application of statute. 143Okl18, 285P127.

1498-31½-New. Where purchaser's affidavit was defective for failure to show that published notice stated in whose name lands were taxed or date of expiration of period of redemption, landowner not precluded from prosecuting action to remove tax deed or cloud on title. 189NC757, 128SE161.

1498-37½-New. or where there is material irregularity in tax deed and its issuance; 93Fla124. 111S504.

1498-39 In North Carolina.-189NC757, 128SE161.

1498-40 TexCivA 27SW(2d)550.

1499-43½-New. Personal property irregularly sold for taxes may not be replevined till lien for taxes has been discharged. 119Kan733. 241P443.

1499-44 161La694, 109S391; 163La529, 112S405; 5LaA541; 133 Okl 128, 271P669; 134 Okl 57, 272P883. See 166La786, 117S918. **After three year prescription period for** attacking tax sale, it is immaterial that sale could have been attacked on ground that taxes were prescribed. 163La529, 112S405.

1500-47½-New. Statute requiring claimant, adverse to state, to file claim within six months or else be barred is unconstitutional since it might arbitrarily deprive owner in possession of title without notice of state's claim. 215App Div97, 214NYS104.

1500-52 Tax deed void on its face does not set statute in operation against action to inforce deed. 100 Okl 215, 229P232.

1501-55 85Colo 381, 276P332.

1501-56 Constitutional limitation operates retrospectively unless suit is brought within one year from adoption of constitution. La 130S350 (three years' limitation held inapplicable in absence of assessment).

1501-57 NJSup 133A420.

1502-67 220Ala182, 124S217.

1503-70 150Miss704, 116S599.

1503-73½-New. Time does not begin to run until proper notice is given to owner. 131Misc422, 226NYS255.

1503-73¾-New. Attack on validity of tax deed by one in adverse possession is not barred by statute of limitations as not applicable to pure defense. 37F (2d)635.

1503-76 But see 12LaA499, 126S97.

1504-78 7LaA647. **In Louisiana.**-159 La158, 105S274 (in absence of dual assessment and antecedent payment of taxes).

1504-80 150Miss818, 117S265.

1504-84½-New. Tax judgment reciting proper service is only voidable and time begins to run at once. TexCivA 285SW650.

1504-85 212Ala542, 103S580; 121Kan467, 123Kan16, 254P694; 9LaA112, 119S75; 134 Okl 57, 272P883; 136 Okl 8, 275P1060; 138 Okl 280, 282P365 (statute not applicable to jurisdictional or vital defects); 36 OklACR340; 121 Or 413, 255P466; 145Wash282, 259P720. **Where tax deed is void,** statute has no application to action to void deed. 38 OklACR132.

1505-87 34Wyo 304, 243P126.

1505-88 161La694, 109S391; 165La419, 115S641; 138 Okl 280, 282P365; Okl 293P206; 34Wyo 304, 243P126, 129 [citCyc].

1506-89 212Ala542, 103S580; 34Wyo 304, 243P126, 129 [citCyc].

1506-90 212Ala542, 103S580; 218Ala525, 119S236(2dcase); 161La694, 109S391; 150Miss818, 117S265. **Where two tracts of land are contiguous** and all of one and part of other have been in adverse occupation of tax title claimant, statute operates as to both tracts. 150 Miss818, 117S265. **Vendee from purchaser at tax sale** can show purchaser's possession in connection with his own to establish adverse possession for statutory period. 212Ala550, 103S646.

1506-90½New. Where state fails to give statutory notice, possession by publication will not require owner or occupant to sue within statutory period. 134 Misc329, 235NYS271.

1507-91 226AppDiv416, 235NYS655.

1507-92 Special statute held not bar to landowner's suit to quiet title where no one is in actual possession and defects in affidavit prevented tax deed from drawing constructive possession. 189 NC757, 128SE161. **Where there is no actual possession by claimants under tax title for statutory period or by anyone at time of landowner's suit to quiet title,** constructive possession follows the better title. 189NC757, 128SE161.

1507-93 111 Okl 251, 239P572; 143 Okl 18, 285P127 (resale tax deed of state school lands sold on deferred payments); 36 OklACR340. See also 181 Ark914, 28SW(2d)697.

1508-94 121Kan467, 123Kan16, 254P694; MoA 18SW(2d)203; 36 OklACR340.

1508-96 121Kan467, 123Kan16, 254P694; 145Wash282, 259P720. See also 6LaA536. **Period does not run where owner was in actual possession** during entire period. 163La764, 112S713. **Persons protected.**-168La657, 123S114.

1509-97 174Ark1005, 298SW196.

1509-1½-New. Statute of limitations will cut off rights based on jurisdictional defects if reasonable time to enforce such rights is given. 125Misc453, 211NYS731.

1509-1¼-New. Regularity of sale and all proceedings prior thereto is conclusive where no action based on jurisdictional defects is taken within reasonable time fixed by statute. 125Misc453, 211NYS731.

1509-1¾-New. Six months provided by statute for claimant to assert rights in lands held by state is reasonable time. 125Misc453, 211NYS731.

1509-3 88PaSuper61.

1510-6 Failure to attach to tax book warrant authorizing collection of taxes assessed held not mere irregularity cured by statute. 174Ark1005, 298SW196.

1510-9 88PaSuper61.

1511-11 166La35, 116S585.

1511-16 Claimant failing to file claim within reasonable time fixed by statute is barred, if not barred before. 125Misc453, 211NYS731.

1512-18 107WVa1, 148SE566.

1512-19 LaA 130S228; Mo 31SW(2d)1002; TexCivA 12SW(2d)249. **Where original owner is dead,** suit to confirm tax title should be against his widow and heirs and not against him. 6LaA242.

1512-20 136Wash63, 238P992; 37Wyo509, 263P711.

1512-21 All parties claiming under tax sale could be joined, in discretion of court, as defendants in action to annul such sale. 159La158, 105S274.

1513-25½-New. Intervener claiming title submitting himself to jurisdiction of court cannot object to adjudication of his claim in suit to quiet title. 98Fla438, 124S32.

1513-25¾-New. Suit to quiet tax title must be brought against former owner or some one claiming to be his successor in title. 168La920, 123S620.

1513-26 6LaA242. **Record held to show process which gave court jurisdiction** to enter decree quieting title to land. 235 Mich47, 209NW175.

1513-27 2LaA726. **Affidavit of plaintiff** describing land as "land of Fred S. Jones" not sufficient description of land. 192NC251, 134SE487. **Abstract of title showing chain of title antedating tax deed** need not be attached to petition of holder of tax deed in action to recover property. 206 Iowa336, 218NW292. **Bill must also allege** that there has been some tangible attempt subsequent to tax deed to assert record title. 98Fla438, 124S32.

1513-29 227AppDiv230, 237NYS180 (statute making deed conclusive).

1514-30 See also 98Fla438, 124S32.

1514-30½-New. Plea of tax title held no plea in bar to ejectment, but statutory retirement for refund on failure of tax title. 214Ala591, 108S534.

1514-30¾-New. Where suit in slander of title is changed into petitory action by defendants, they must give notice to plaintiff in order to have their tax title confirmed. 168La914, 123S618.

1514-32 162Ga471, 134SE85 (petition held insufficient). **Amendment.**-131 Or 290, 282P1084.

1515-34 168La920, 123S620.

1515-36½-New. Under statutes of some states, where copy of tax deed is annexed to pleading, and genuineness and due execution are not denied by affidavit, they are deemed admitted. 71CalA717, 236P371.

1515-36¼-New. Failure to deny by affidavit such facts is not admission of ownership by grantee at time suit was brought. 71CalA717, 236P371.

1515-36¼-New. or of legal effect of deed. 71CalA717, 236P371.

1515-36½-New. By failing to deny by affidavit genuineness and due execution of such deed, party is not precluded from introducing evidence reestablishing his title. 71CalA717, 236P371.

1515-36¾-New. In suit to settle title by holder of register's deed against holder of tax deed, bill alleging that respondent is in possession and refuses to deliver up property is demurrable for failure to show peaceable possession by plaintiff. 217Ala14, 114S360.

1515-36⅞-New. Amendment in suit to cancel tax deed not showing reason for assessing land against true owner is properly refused. 168Ga112, 147SE115.

1515-36⅞-New. Petition to cancel tax deed has been held not demurrable for failure to show tender of amount paid by county and taxes. 167Ga694, 146SE477(1stcase).

1516-41½-New. Under statutes, issues can be decided only if defendant consents, where fraud charged is not established. RI 147A669.

1516-41¾-New. Where holder of tax title filed bill to quiet title which was met by cross bill claiming through sheriff's deed, defendant can have state of title adjudicated whether in possession or not. 220Ala631, 127S202.

1516-46 Claimant of lands held by state has burden of overcoming such presumption. 125Misc453, 211NYS731. **There is presumption that comptroller transferred title to state** after attempt to issue certificate to one willing to pay bid of purchaser who did not pay. 125Misc453, 211NYS731.

1516-47 178Ark821, 12SW(2d)397.

1517-48 TexCivA 296SW939. **Burden of proof on issue of possession** is on holder of tax deed. 220Ala631, 127S202.

1517-49 Ark 30SW(2d)211; 208 Iowa519, 223NW884; 163La154, 111S659 (purchaser presumed to be acting for himself); La 130S350 (constitutional presumption of validity); 148Md318, 129A364; 58ND571, 226NW615; Tex CivA 284SW608.

1517-54½-New. Person claiming under tax deed title from that vested in person in whose name land was sold has burden of showing that taxes were not paid on outstanding title or estate for year, for delinquency of which property was returned. 100WVa429, 130SE913.

1517-55 TexCivA 22SW(2d)688.

1517-56 See also 4LaA61.

1517-57½-New. Purchaser relying on statute of limitations must establish facts to bring statute in operation. 34 Wyo 304, 243P126.

1517-57⅓-New. Tax deed does not prove the recital contained therein. Tex CivA 296SW939.

1517-57¼-New. Presumption of validity of tax sale yields to denial by owner of receipt of notice of delinquency. 10 LaA769, 123S189.

1517-57⅝-New. Demand for prior rent by one having deed does not show conclusively ownership prior to taking of tax title. Colo 269P14.

1517-57⅞-New. Burden is on one attacking tax deed to show occupancy of land requiring notice to occupants to redeem. 133Misc823, 233NYS223.

1518-59 TexCivA 295SW288. But see TexCivA 14SW(2d)94. **Unless infirmity appears** on documents they are admissible. TexCivA 285SW650. **Tax sale list** must be signed by tax collector or his lawful deputy in order to be admissible in evidence. 148Miss206, 114S349.

1518-60 96Fla620, 119S333.

1518-61 Where description is ambiguous, parol evidence is admissible. 140 Miss168, 105S494.

1518-62 To determine enhanced value resulting from improvement, evidence of cost of improving and fencing adjoining land admissible. 171Ark594, 285SW365. **To prove value of improvements,** though witness not party to action but once

claimed title to land. 171Ark594, 285SW 365.

1518-64 98Fla913, 124S820. See also TexCivA 14SW(2d)94. **Evidence held insufficient.**-157Miss730, 128S69; 144 Okl 44, 289P306.

1518-65 La 130S350 (evidence insufficient to overcome constitutional presumption of validity); 298Pa85, 148A 63.

1518-66 Mo 31SW(2d)1002. **Redemption.**-158La94, 103S522; 103NJEq252, 143A219. **Notice to taxpayer.**-10LaA 769, 123S189; 147Miss127, 113S200; TexCivA 285SW650. **Payment of taxes.**-165La419, 115S641; Utah 286P633. **Identification of lands in controversy.**-191NC429, 131SE764. **Possession of property.**-165La419, 115S641. **Ownership of property.**-88CalA379, 263P819; 148Miss206, 114S349; 145Wash656, 261 P386. **Evidence held conclusive of wrongful detention.**-214Ala591, 108S534. **Evidence held sufficient** to show that lands in controversy were not included in tax deed. 214Ky722, 283SW1038. **Notice evidence insufficient.**-192NC251, 134SE487. **Compliance with statutory provisions.**-191NC429, 131SE764. **Adverse possession.**-212Ala550, 103S646 (evidence held to show that purchaser at tax sale and his vendee had occupied land for more than three years after purchaser was entitled to demand tax deed). **Recitals of tax deed** are not overcome by statement of witness that lots were sold separately and as a whole on same day. 140Miss168, 105S494. **Dual assessment.**-158La94, 103S522 (evidence held to show no dual assessment on which contention that taxes were paid before sale depended). **Attachment of warrant to tax book.**-174Ark1005, 298 SW196. **Evidence held insufficient** to show defendant had, in taking mortgage, agreed to pay tax sale certificate under which he later took tax deed. 205 Iowa 127, 215NW593. **Refusal of tender.**-317 Mo 1133, 298SW773. **Notice of sale to owner of portion of land.**-95CalA182, 272P313. **Acquisition of tax deeds as agent for owner.**-NM 289P996(2dcase). **Evidence held to sustain finding** that notice of delinquent taxes was served on owner. 170La927, 129S532. **Fraud.**-RI 147A669. **Notice of delinquency.**-11LaA 360, 123S363. **Payment of purchase price by tax purchaser.**-58ND388, 226 NW549. **Performance of procedural requirements.**-Wis 229NW532. **Service of notice to redeem.**-59ND42, 228NW451.

1519-67 Finding that plaintiff's claims are without merit has been held inferential finding of invalidity of tax deed. Cal 291P835.

1519-70 85Colo 381, 276P332.

1520-72 163Ga169, 135SE731. **In equitable proceedings to set aside tax sale** and cancel tax deeds, refusal to instruct jury that market value was to be determined by what land would bring, based on sale for cash consideration or equivalent thereof is not error. 167Ga 340, 145SE448. **Instruction that "fair market value" of property** is what property would bring when offered for sale by owner who does not have to sell, but who is willing to sell to party able and willing to buy, but who does not have to buy, was proper. 167Ga286, 145SE 448.

1520-72½-New. Unless question as to validity of documents is raised, purchaser entitled to peremptory instruction. TexCivA 285SW650.

1520-72⅓-New. To determine whether purchaser has raised any issue of fact as to validity of his tax title, his status as a bona fide purchaser must first be determined; TexCivA 285SW650.

1520-73 Under statutes in some states, if proceedings were fair on their face, and no proceedings have been taken by defendants or their representatives within seven years thereafter, they are barred from testing validity of decree, though there was no service upon them except by publication. 235Mich47, 209NW175.

1520-78½-New. It is court's duty to protect right of redemption by minors by the decree, where those representing minors failed to raise issue of their right to redeem. 180Ark797, 22SW(2d)1005.

1520-80 But see 135 Okl 296, 275P628, 65ALR573.

1520-80 Owners held entitled to recover rents collected after sale. 153La583, 112S494.

1520-80½-New. Unpaid balance of war risk policy, distributed from insured's estate, is not exempt from transfer tax. 131Misc125, 225NYS543.

1520-83 229AppDiv7, 240NYS452. See also Utah 286P633.

1520-84 The court may award a writ of possession, etc. 123Kan59, 254P404.

1521-87½-New. Before defendants in suit in trespass to try title, wherein plaintiff claimed title pursuant to tax sale, would be entitled to affirmative judgment, proceedings must be set aside with proper pleading as basis of recovery to be exhibited and presented and supported by evidence. TexCivA 8SW (2d)790.

1521-87⅓-New. In view of right of redemption, court may properly deny purchaser decree of absolute title and immediate possession. TexCivA 16SW(2d) 433.

1521-90 86CalA712, 261P1086.

1521-92 86CalA712, 261P1086; 99CalA 545, 279P217; 10LaA769, 123S189; 189 NC757, 128SE161 (must pay or offer to pay). **Where claimant under tax title received rents in excess of taxes, penalties, and costs paid** and had refused tender of such items, judgment quieting title in plaintiff not conditioned on payment of such items is proper. 88CalA 379, 263P819.

1523-96 189NC757, 128SE161 (taxes, interest, and costs as prescribed by statute). **Amount payable not dependent on validity of statute** prescribing penalties or right to impose them. 99CalA545, 279 P217.

1524-3 74CalA322, 240P50.

1524-5 87CalA552, 262P348. **Sufficiency of delinquent list and proper filing assumed** on appeal in absence of contention to contrary. 37Wyo 405, 263P698.

1524-8½-New. In a case involving a tax title, findings that respondent held nothing under his tax title was held authorized. 254Mass516, 150NE433.

1525-10 Attorney's fee.-219Ala411, 122 S401.

1525-11 Costs will be taxed against tax purchaser where he prolongs litigation without meritorious defense. 327 Ill 412, 158NE723.

1525-12 123Kan755, 256P813; 5LaA 336; 174Minn431, 219NW545. **Public policy** does not require that illegal attempt to discharge taxes should be rebuked by ratifying illegal acts of others. 87Colo 193, 286P280.

1526-18 174Minn431, 219NW545; 152 Wash193, 277P839.

1526-20 In Minnesota.-174Minn431, 219NW545.

1527-21 Purchaser who has not paid taxes, penalties and costs cannot recover amount paid for land belonging to federal government under statutes applying only when land has been sold and conveyed. 90CalA602, 266P291.

1528-26 114Nebr124, 206NW736.

1528-28 Where loss arose through foreclosure of mortgage held by land office commissioners statute is inapplicable. Okl 292P11.

1528-29 IndA 169NE67; 114Nebr124, 206NW736.

1528-31 IndA 169NE67.

1529-34 114Nebr124, 206NW736 (fifteen per cent from date of payment to date of judgment); 47 Ida527, 277P 1114. **In Kentucky.**-221Ky248, 298SW 714.

1530-46 Evidence has been held sufficient to show invalidity of certificate. 144 Okl 14, 289P347. **Presumptions.**-144 Okl 14, 289P347.

1530-54 47 Ida527, 277P1114.

1530-52 241NY221, 149NE838 (action barred in six years); 129 Okl 117, 263 P672.

1530-53 Action barred after six years from delivery of deed. 241NY221, 149 NE838. **Statute of limitations applies to all actions,** whether levy was illegal because of nature of ownership, as where tax was void on face. 241NY 221, 149NE838.

1531-67 174Minn431, 219NW545; NJCh 135A274; NJCh 135A273; 100 NJEq87, 135A271; ND 229NW3; 21 OhA507, 153NE759; TexCommnA 291 SW214. But see IndA 169NE86.

1533-73 100NJEq87, 135A271; NJCh 135A273; NJCh 135A274; 139 Okl 101, 281P255; TexCommnA 291SW214. **With interest, penalty and cost.**-215Ky 601, 286SW779.

1533-76 139 Okl 101, 281P255.

1534-79½-New. Payment of taxes, after recording of certificate of sale as mortgage made by executors who purchased land to which their decedent had no title because of prior conveyance, does not entitle them to repayment. NJCh 145A625.

1536-97½-New. All remedy upon the tax certificate including acquisition of title by tax deed is suspended during time property is owned by state. 55 ND1. 212NW217.

1536-97¼-New. But such lien may be asserted and enforced against subsequent purchaser from the state. 55ND 1. 212NW217.

1536-97¼-New. Lien of county draws interest while land is held by state. 55ND1, 212NW217.

1536-97⅓-New. Where county holds tax certificate issued to it after purchase and representing lien of taxes for which property was sold or which had become delinquent prior to time when state acquired title to property through mortgage, foreclosure lien of county is unenforceable. 55ND1, 212NW217.

1537-4 21 OhA507, 153NE759.

1537-6 331 Ill 308, 163NE1.

1537-7 126 Or525, 270P491. See also 131 Okl 282, 268P1100.

1538-9 87Colo 193, 286P280; 130Kan 26, 285P548; Mo 31SW(2d)1002.

1538-12½-New. Evicted purchaser at tax sale may retain possession until reimbursed for taxes and expenses. 9 LaA112, 119S75.

1538-13 25F(2d)794; 332 Ill 620, 164 NE186.

1539-15 206Cal 225, 273P786.

1539-17 25F(2d)794; 171Ark594, 285 SW365; Mo 31SW(2d)1002. **Color of title is shown** when deeds from purchaser at tax sale to whom tax deed had not been issued is proved. 171Ark 594, 285SW365. **Where part of land had been assigned as dower,** tax should be computed on dower interest by reference to part retained. 171Ark594, 285SW365.

1539-18½-New. Profits to purchasers at illegal sale will be denied. 87Colo 193, 286P280

1540-24 25F(2d)794; 171Ark594, 285 SW365; 9LaA112, 119S75; 113 Okl 195, 240P1045 (void tax deed).

1540-27 123Kan59, 254P404.

1540-28 113 Okl 195, 240P1045 (void tax deed).

1540-28½-New. In Texas, purchaser at void tax sale may not recover for improvements, under statute, where he had not held possession for one year. TexCommnA 2SW(2d)431.

1540-28⅓-New. Purchaser at void tax sale may recover for improvements on equitable ground though he cannot recover under statute. TexCommnA 2 SW(2d)431.

1540-28¼-New. Some statutes providing for reimbursements do not include expenditures for betterments or improvements. Cal 289P817.

1540-29 But see 10LaA369, 120S902; TexCommnA 2SW(2d)431.

1540-30 171Ark594, 285SW365.

1541-31 Good faith is determined from all facts in evidence. TexCommnA 2 SW(2d)431.

1541-32 83CalA161, 256P464.

1541-33 25F(2d)794. Contra 83CalA 161, 256P464.

1542-43 316Mo 398, 289SW925, 931 [quotCyc].

1542-45 170Ark22, 278SW627; 316Mo 398, 289SW925; 78Mont235, 253P1100; 100WVa166, 130SE426, 44ALR501.

1542-46 316Mo 398, 289SW925, 931 [quotCyc]; 198Wis368, 224NW121.

1543-50 But see 78Mont235, 253P1100.

1543-51 Penalties become liability to state, nonremissable under constitu-

tion. 78Mont235, 253P1100.

1543-56 See also 226Ky192, 108SW(2d) 602. **In Oklahoma.**-128 Okl 82, 261P 206; 133 Okl 294, 272P1021; 134 Okl 133, 273P226; 135 Okl 96, 274P480; 39 OklACR33. **Statute making failure to list note for taxation defense in action on note.**-210Ky338, 275SW803; 148Va494, 139SE284. **Where list described real estate entirely by reference to previous list,** assessors were justified in refusing it and properly imposed penalty as for failure to furnish list prescribed by statute. 103Conn149, 130A84. **Statute rendering certain choses in action inadmissible in evidence where not registered with county treasurer and tax paid thereon** does not apply to chose in action maturing in less than eight months, though not in form of note. 127 Okl 65, 259P869. **Only penalty imposed** is forfeiture of right to contest in court correctness of assessment. 170La1057, 129S635. **Trial court has authority** before judgment in action on note, to allow plaintiff to list note and pay tax and penalty under statute. 196NC654, 146SE 705.

1543-53½-New. Penalty is exacted under Kentucky statute only when taxpayer is at fault or to blame for failure to assess property. 226Ky192, 10 SW(2d)602.

1544-64 170Ark22, 278SW627; 121 Kan737, 250P260; **Iowa** 232NW445 (notwithstanding pendency of appeal); 178Minn404, 227NW209 (statute permitting payment without interest construed not to permit payment without interest when prior taxes paid); 36 OhA45, 172NE674; 141 Okl 174, 284P1 (failure to register bills and notes for taxation and pay taxes thereon renders them inadmissible in evidence). **In computing penalties,** auditor cannot reject fractions of a cent. 69CalA437, 231P598. **Penalty for nonpayment of tax invalidly levied** cannot be assessed prior to validating act. 323 Ill 536, 154 NE468. **Penalty on tax invalidly levied** can be charged only after curative act became effective. 324 Ill 43, 154NE472. **In case of delinquent taxes on railroads,** report and filing of delinquent list by collector and charging of penalty by county clerk is not condition precedent to collection of penalty. 174Ark847, 298SW201. **In Pennsylvania.**-9PaDist &Co 132. **In Oklahoma.**-134 Okl 107, 272P380.

1544-66 In Mississippi.-155Miss512, 124S497.

1544-67 158Tenn526, 148SW(2d)747. By wrongfully obtaining injunction against collection of taxes before delinquency, taxpayer could not prevent attaching of property for failure to pay when due. 174Ark847, 298SW201.

1544-68 Plea of ultra vires held demurrable in action against corporation carrying on business subject to tax. 214Ala628, 108S756. **Penalty tax not enforceable** with respect to decedent's property not taxable locally or by state during his lifetime. 106Conn525, 138 A520. **Charitable institutions.**-32F(2d) 639.

1545-79 TexCivA 208SW(2d)332; 100 WVa166, 130SE426, 44ALR501; 199 Wis368, 226NW293.

1545-84 Mandatory statutes.-117 Or 426, 243P558. **In Oregon.**-131 Or563, 2[illegible], 6[illegible]ALR422.

1545-85 Entry on property book before end of assessment year after delayed return renders taxpayer not liable for statutory penalty for failure to return. 100WVa166, 130SE426, 44ALR 501.

1546-88 Subsequent entry on property book of omitted property and levy against it with interest does not relieve from penalty for failure to make return. 100WVa166, 130SE426, 44ALR 501.

1546-90 Action for penalty for failure to make return may be brought against administrator of defaulting taxpayer. 100WVa166, 130SE426, 44ALR501.

1546-92 214Ala628, 108S756. **Plea of statute of limitations** held not demurrable, though penalty not payable until notice of delinquency. 214Ala628, 108 S756.

1546-94 TexCivA 208W(2d)332 (defenses limited by statute not including limitations).

1546-96 170Ark22, 278SW627.

1546-98 157Miss482, 128S334. But see 96CalA753, 275P225.

1548-13 107WVa1, 148SE566. **In Kentucky.**-213Ky37, 280SW453. **That private alley was not charged integrally on land books** is not ground for forfeiture where taxes were assessed and paid. 105WVa395, 142SE841, 58ALR 231.

1548-16 Payment of taxes pursuant to merely irregular entries of land on land books for taxation prevents forfeiture of title. 102WVa290, 135SE282.

1548-17 Payment by one of two adverse claimants of land, both claiming from same original owner, will prevent forfeiture. 103WVa180, 136SE780.

1549-21 Relator is unnecessary in proceeding in name of state to forfeit claims under old patents. 213Ky37, 280SW453. **Jurisdiction.**-213Ky37, 280 SW453.

1549-24 Time of accrual of action.-213 Ky37, 280SW453.

1549-26½-New. Tender of taxes due after institution of proceeding to forfeit claims under old patents for failure to assess and pay taxes due need not be accepted by commonwealth. 213 Ky37, 280SW453.

1549-26¾-New. Presumption is against forfeiture.-103WVa180, 136SE780.

1550-30 In Arkansas.-171Ark939, 287 SW196.

1550-31 234Ky64, 27SW(2d)382; 107 WVa1, 148SE566.

1550-38 In West Virginia.-100WVa103, 131SE249.

1551-41½-New. Estoppel to deny redemption.-Where state has received taxes in arrears on account of omitted acreage, and order has been entered releasing land from alleged forfeiture, state is estopped to deny redemption however defective proceeding may have been. 100WVa103, 131SE249.

1552-55 Rural land, though surveyed into lots, may be sold, being valuable only for timber, pasturage, or agriculture. 140Miss808, 106S748. **Upset bids.**-WVa 153SE149.

1552-56 102WVa189, 134SE737.

1553-57 178Ark300, 10SW(2d)885; 24 OhA90, 155NE867. **Purchaser failing to acquire title** because statutory provision was not followed could recover taxes paid with interest. 24 OhA90, 155NE 867.

1553-58 140Miss808, 106S748.

1553-58½-New. Certificate of state auditor is insufficient as prima facie evidence of fact and time of return of alleged delinquency and sale thereunder where certificate fails to state date of sale or time when delinquency was returned. 100WVa103, 131SE249.

1553-58¾-New. Where title has vested through forfeiture in purchaser state cannot proceed against the forfeited title. 102WVa189, 134SE737.

1553-58¼-New. nor can former owner sue to cancel tax deed on ground that taxes for which sale was made were not in arrears. 102WVa189, 134SE737.

1553-58¼-New. In West Virginia decree of circuit court in suit by state to sell delinquent and forfeited lands, unappealed from and unreversed, is final and conclusive of rights of all claimants impleaded or appearing. 104WVa27, 138 SE458.

1553-58¾-New. Rule applies although some of claimants are infants. 104WVa 27, 138SE458.

1553-58½-New. There is no exception in favor of infants against whom decree is pronounced in such suit unless upon bill of review after removal of disability filed within time prescribed by statute in such cases. 104WVa27, 138SE458.

1553-58¾-New. Where at time of alleged forfeiture land was not subject to taxation because owned by state, deed purporting to convey same as forfeited for nonpayment of taxes is ineffectual, 175Ark559, 299SW1012.

1553-58¼-New. and another person receiving deed of such land from state as having been granted to state by United States, has title superior to person claiming under said forfeiture deed. 175 Ark559, 299SW1012.

1553-58½-New. Purchaser becomes quasi party and is bound by all decrees affecting his rights. WVa 153SE149.

1553-58¾-New. Statute respecting sale of lands forfeited by school land commissioner contemplates sale of all tract forfeited. WVa 155SE122.

1553-58½-New. Order directing sale need not designate date to redeem. WVa 155SE122.

1553-60 277US1, 48SCt410, 72Led749; 25F(2d)763; **Cal** 225P195; 196Cal 525, 238P367; 105Conn192, 134A778; 108 Conn715, 145A56; 48 Ida485, 283P598 (number of transfers immaterial); 327 Ill 547, 158NE861; 338 Ill 145, 170NE 276; 200 Iowa89, 204NW424; 204 Iowa 355, 213NW938; Me 137A50 (held excise tax); 258Mass253, 154NE844; Minn 232 NW331; 317Mo 986, 296SW778; 323Mo 138, 198SW(2d)12 (excise and not property tax); 75Mont186, 243P589, 44ALR 1470; 80Mont574, 261P356, 60ALR551; 114Nebr335, 207NW520; 114Nebr517, 208NW665; 129Misc625, 222NYS515; 131Misc451, 227NYS120; 134Misc232, 236NYS21 (are special, not general, taxes); 228AppDiv549, 240NYS301; 195NC 811, 143SE841; 26 OhNPNS387; 119 Okl 300, 249P726; 284Pa200, 130A426; 134SC261, 132SE37; **TexCivA** 290SW 244; 100Vt217, 136A389; 148Va97, 138 SE650; 152Va353, 147SE468. See also 11PaDist&Co 621. But see **Ont** [1923] 2 DomLR754. **"A 'succession tax,'" etc. Del** 152A124; 190NC358, 130SE22. **Such taxes are very ancient in origin,** etc. 190NC358, 130SE22. **"The fundamental thought** was to levy a toll against the passing of property of citizens going, by reason of death, to others in whatever light the taking may be viewed." 284Pa200, 130A426. **State may impose such taxes** or conditions on distributive shares of property of decedent as it deems proper, or take all of such property. 75Mont186, 243P589, 44 ALR1470. **Succession tax is not an ad valorem tax** but privilege or excise tax. 105Conn192, 134A778. **Tax on transfer operating instantly on death.**-84Colo 1, 267P191. **But inheritance tax is "taxation" and a "tax"** and is governed by many of rules applied to property taxes. 179Minn450, 229NW781. **Inheritance Tax Act is purely taxation statute.**-CalA 289P892. **Inheritance tax** is not property tax but excise tax or tax upon succession. 323Mo 207, 198SW(2d)732. **Tax imposed held not inheritance tax.**-48 Ida 632, 284P259.

1554-61 100Vt217, 136A389.

1554-62½-New. State may permit inheritance tax to be levied on its subdivisions or governmental agencies. 114 Nebr335, 207NW520.

1554-62¾-New. It is within legislative power to enact statute levying tax which has incident of both estate tax and inheritance tax. 120 Or80, 250P735.

1554-62¼-New. Estate or succession duty.-Ontario Succession Duty Act imposes probate or estate duty as opposed to succession duty. **Ont** [1929] 2Dom LR754.

1554-64 276US260, 48SCt225, 72Led 565; 277US1, 48SCt410, 72Led749; 111 Conn165, 149A750; 200 Iowa89, 203NW 424; 205 Iowa324, 218NW149; Me 137A 50; 267Mass240, 166NE729; Mass 167 NE757 (does not violate due process clause of constitution); 323Mo138, 19 SW(2d)12 (not unconstitutional as attempted unconstitutional regulation or taxing of transfer of part of estate beyond territorial jurisdiction of state); 31NM250, 243P251; 127Misc206, 216 NYS523; 133Misc334, 234NYS119; 136 Misc635, 242NYS204; 219AppDiv656, 220NYS325; 130Misc298, 224NYS287; 130Misc312, 224NYS582; 195NC111, 143 SE341; 117 Ohio215, 158NE89; 120 Or80, 250P735; 187Wis161, 203NW742. **Inheritance as a commodity.**-Mass 167NE 757. **Due process clause** of constitution held violated by statute authorizing inheritance tax on shares of stock owned by nonresidents of foreign corporation owning property and doing business in state. 30Ariz307, 246P770. **Transfer**

tax on nonresident decedent's interest in partnership including good will held valid. 127Misc206, 216NYS523. **Tax on transfer of contingent estates** at highest rate possible on happening of any contingency without deduction for any intervening estate or interest, but providing for return on account thereof on happening of contingency reducing rate, is not unconstitutional as taking property without just compensation or due process of law since additional amount is deposited as mere security. 127Misc 211, 216NYS321. **Transfer tax on resident decedent's bank deposits in another state** is unconstitutional in so far as it makes no deduction for transfer taxes paid in that state. 129Misc625, 222NYS 515. **Statute discriminating against nonresidents** as to rate of taxation held unconstitutional. 245NY486, 157NE753. **Reciprocity.**–245NY486, 157NE753. **Power to enforce tax tests validity of law.**–148Va97, 138SE650. **In Ontario.**–[1927] 1DomLR1105 [dism app 59 OntL181, [1926] 3DomLR928]. **Law imposing tax on property passing prior to its enactment under trust instrument reserving power of appointment** held valid since power of succession could be reached by tax as long as not fully exercised. 276US260, 48SCt225, 72L ed 565. **Statute held unconstitutional** as discriminating between residents and nonresidents. 152Va353, 147SE468. **Statute held unconstitutional** as denial of due process. 253NY49, 170NE489. **Statutes not violation of due process.**–323Mo 138, 19SW(2d)12. **Statute held valid.**–Can [1930] 1DomLR859 (statute prohibiting transfer of property before payment of succession duty). **Statute purporting to tax exercise of power of appointment over property without state created by foreign will** violates due process provison of federal constitution. 111Conn594, 151A252. **Statutes not impairing obligation of contracts.**–323Mo 138, 19SW(2d)12. **Statute providing for additional tax** when federal tax is determined is tax on privilege of transmitting property and not unconstitutional. 323 Mo 138, 19SW(2d)12.

1555–65 323Mo 138, 19SW(2d)12 (power in state inherent); **TexCivA** 290SW 244.

1555–66 Double taxation.–128Misc307, 219NYS309.

1555–69½–New. State revenue act, in form of estate tax law, but having express purpose of obtaining benefit of credit allowed under federal act is constitutional. Me 137A50.

1555–69¼–New. and legislature has power to provide that, upon repeal of such federal revenue act, such state revenue act shall become void. Me 137A50.

1555–69¼–New. State is unauthorized to tax bank deposit in Ohio of nonresident decedent domiciled in other state documentary evidence of deposit being there. 36 OhA45, 172NE674.

1555–70 268US137, 45SCt424, 69L ed 884; 323Mo 138, 19SW(2d)12 (statute held not unconstitutional); 190NC358, 130SE22; 11PaDist&Co 621; TexCivA 290SW244 (Rev. St. [1925] art 7117 held valid). But see 234Ky415, 28SW (2d)491. **Discrimination between resident and nonresident aliens** is permissible. 205 Iowa324, 218NW140. **Statute taxing succession under power of appointment.**–137Misc852, 244NYS616.

1556–71 190NC358, 130SE22 (legislature may fix value for purpose of taxation); 120 Or80, 250P735.

1556–72 268US137, 45SCt424, 69L ed 884; 120 Or80, 250P735.

1556–73 See also 33NM347, 267P55; 192Wis580, 213NW477.

1556–74 Discrimination between residents and nonresidents held unconstitutional as discrimination. 245NY649, 157 NE894 [foll 245NY486, 157NE753]. **Reasonable basis for classifying testamentary gifts** for higher taxation than inheritances is found in purpose to discourage testamentary gifts. 33NM347, 267P55.

1556–74½–New. Tax valid although it imposes different rates on nonresidents. 220Ky373, 295SW433.

1556–74¼–New. Court has no authority to restrict succession statute to particular class. 108Conn715, 145A56.

1556–76 193Cal 386, 233P972; 332 Ill 608, 164NE137; 235Mich555, 209NW 930, 933 [citCyc]. 243NY193, 153NE45; 131Misc451, 227NYS120; Utah 269P103. See also Del 152A117. But see 228App Div549, 240NYS301. **Exemption is to be strictly construed.**–114Nebr335, 207 NW520. **Statutes exempting charitable foundations** should be construed liberally so as to favor and encourage such institutions and not to burden property devoted to such uses. 196Cal 366, 237P 1074.

1556–77 201Cal 1, 255P195; 256Mass 519, 153NE4; 116Nebr196, 216NW558. **"Possession"** as used in California Inheritance Tax Act of 1921 indicates character of ownership falling short of seizure, and not mere "corporeal having." 196Cal 525, 238P367. **"Succession" as subject of taxation** includes the entering into possession and enjoyment of property of beneficiary. 256Mass519, 153NE 4.

1557–79 157Md87, 145A350; 127Misc 211, 216NYS321.

1557–80 Statute should be given an interpretation, if possible, which lays burden of taxation uniformly upon those who bear burden, and like rule applies to exemptions from burden of tax. 195Cal 386, 233P972.

1557–80½–New. In construing inheritance tax laws, rule that estate in possession is estate in present enjoyment is generally recognized. 235Mich555, 209 NW930.

1557–80¼–New. In construing a law taxing transfer of corporate stocks and bonds, stockholders will not be considered as owners of corporate property. 243NY193, 153NE45.

1557–80¼–New. Words of statute relating to inheritance tax presumed used for purpose and given effect. 100Vt217, 136A389.

1557–80½–New. Courts must follow controlling statutory provisions regardless of whether results are equitable. 108Conn715, 145A56.

1557–81 199Cal 369, 249P515 (status of husband's property, whether community or separate, not affected); 163Ga309, 136SE83; 164Ga14, 137SE549 (exemption statute); 226Ky392, 11SW(2d)84; 149Miss785, 115S893; 253NY49, 170NE 489; 133Misc42, 231NYS191; Utah 269 P103; 187Wis101, 203NW742. **Bequest may be rendered exempt** by statute enacted before payment. 204 Iowa1067, 216NW772. **Wife's succession to joint bank account** upon husband's death subsequent to statute is subject to tax though account antedates statute. 120 Oh361, 166NE352. **Statutes held to operate prospectively.**–157Md559, 146A 752. **Statute imposing tax on gifts or transfers to take effect in possession or enjoyment after donor's or transferor's death** applies to gifts or transfers made before statute took effect by persons dying thereafter. 131 Or597, 282P760.

1558–84 But see Del 152A117.

1558–85½–New. Trust fund under revocable deed of trust is subject to tax under statute in force at time of trustor's death rather than that in force at time of execution of deed. 8PaDist&Co 164.

1558–85½–New. Right of survivorship of joint tenant vesting before effective date of inheritance tax statute is not subject to tax on death of the cojoint tenant. 210Ky779, 276SW802.

1558–85¼–New. Statutes relating to transfer tax procedure apply to estate of decedents dying before enactment. 129Misc825, 223NYS694.

1558–85½–New. Statute providing that estates vesting in certain beneficiaries before taking effect of act should not be subject to tax does not destroy right to tax accruing prior to taking effect of such act where statute passed shortly thereafter provides that taxes accruing under repealed act shall continue in force. 31Ariz252, 252P515.

1558–85¼–New. Law taxing transfers of joint tenancies is inapplicable to joint tenancies existing before date of its enactment. 246NY498, 159NE410.

1558–85½–New. Statute imposing tax where grantor retains right to alter trust, has been held not retroactive. 134 Misc241, 234NYS304; 134Misc242, 234 NYS305; 133Misc762, 234NYS307.

1558–85½–New. Law in effect at time of transfer governs. 135Misc658, 240 NYS706.

1558–85½–New. Trust created before amendment taxing transfers by trust containing provision for revocation by testator held not subject to tax. 138 Misc73, 244NYS361.

1558–85½₀–New. Succession of beneficiaries is subject to tax under statute enacted after execution of trust deed. Mass 167NE757 (retroactive rule of construction inapplicable).

1558–85½₁–New. Statute exempting intangible property of nonresident from inheritance tax has been held applicable to estate of decedent dying before amendment. 41F(2d)774.

1558–85½₂–New. Tax on succession to property subject to power of appointment happening on donee's death because of failure to execute power is constitutional although power was created before statute. Minn 232NW331.

1558–86 204 Iowa355, 213NW938, 940 [citCyc]; Va 155SE635. See also 31 Ariz252, 252P515. **Machinery for collection of tax accrued under repealed statute held provided by later statute.**–31 Ariz252, 252P515. **Amendments construed.**–323Mo 138, 19SW(2d)12 (amendment providing for additional tax held not attempt to levy tax on interest of widow). **Validity of amendments.**–323 Mo 138, 19SW(2d)12 (held not objectionable as seeking to adopt portions of federal statute).

1558–87 Only inconsistent parts of former statute are repealed by amending statute. Va 155SE635.

1558–88 163Ga309, 136SE83. **Provisions of Tax L. §§ 230, 241,** relating to present payment of tax on contingent remainder at highest rate, were not modified by L. (1911) c 800. 128Misc 159, 218NYS387. **Particular provisions not impliedly repealed.**–163Ga309, 136 SE83. **Statutes not conflicting with prior acts.**–163Ga309, 136SE83. **Statutes not expressly repealed.**–163Ga309, 136SE83. **Statutes reducing taxes** do not repeal earlier statutes. Miss 130S 473.

1559–91 Estate must be subject to federal estate tax in order to be subject to state tax. Del 152A117.

1559–92 270US69, 46SCt256, 70L ed475, 43ALR1374 (state must have jurisdiction of property devolved or transferred); 280US204, 50SCt98, 74L ed371, 65ALR1000. But see 108Conn715, 145A 56. **Allotment of land to Indian woman** is not subject to state inheritance tax. 270US555, 46SCt387, 70L ed730. **Lands allotted to Indian** remain subject to control of congress and cannot be taxed by states unless federal government assents. 270US555, 46SCt387, 70L ed730.

1559–93 256Mass519, 153NE4; 6Pa Dist&Co 687. **Whether stock held by resident decedent** under her deceased nonresident husband's will is part of assets of her estate, subject to transfer tax, is to be determined by construction of husband's will under laws of state of his residence. 130Misc522, 224 NYS477 (will held to pass life estate only to widow under laws of Ohio and subject to taxation).

1559–94 See also 10PaDist&Co 65.

1559–95 235Mich555, 209NW930; 133 Misc249, 232NYS318.

1559–95½–New. Statutes regulating taxation of life estates and remainders refer to such interests when, and as, created by will of decedent whose estate is being appraised. 127Misc8, 214NYS 572.

1559–95¼–New. Where liabilities exceed assets except for insurance policy, property is not taxable. Alta [1927] 2 DomLR1020.

1559–95¼–New. Property taken by right of survivorship under joint tenancy is by statute not taxable. 289Pa 509, 137A661.

1559–95½–New. Interest of children under trust indenture liable to tax although trustees may change it at death of donor. 256Mass519, 153NE4.

1559–95¼–New. It is intention of inheritance tax acts to impose tax only

on transfer of excess over exemptions and tax is to be paid upon remainder of property after deducting exemptions. 201Cal 1, 255P195.

1559-95½-New. Under Kentucky statute classifying beneficiaries of inheritances, cousins of intestate fall within class C, not class B. 225Ky75, 7SW(2d) 848.

1559-95⅛-New. So far as statute imposes tax on tenancy by entirety, it is void as taxing property belonging to surviving spouse, and therefore arbitrary and capricious and in violation of due process clause of constitution. 28F(2d) 888.

1559-96 80Mont574, 261P356, 60ALR 551; 128Misc307, 219NYS309.

1559-98 7PaDist&Co 73.

1560-1 253Mass130, 148NE593. **Interest in partnership** organized under Limited Partnership Act of New York held intangible personal property subject to tax at domicile. 105Conn192, 134A778. **Land which partnership owns and has contracted to convey** is not subject to transfer tax because of death of one partner after making of contract. 227 AppDiv666, 236NYS210. **Transfer of deceased partner's undivided interest** as cotenant in common land they contracted to convey would not be taxable because he died after making contract. 227AppDiv666, 236NYS210.

1560-3 256Mass512, 153NE1; 80Mont 574, 261P356, 60ALR551; 130Misc436, 224NYS305. See also 218AppDiv278, 218NYS131. **The good-will of a business,** etc. NJPrerog 149A257. **Award to passenger on steamship sunk by German submarine** for personal injuries made before his death but paid after death to executor is subject to transfer tax. 228AppDiv549, 240NYS301. **Interest on mortgages** received by executors after decedent's death is not taxable. 240NYS842. **In California.**-196 Cal 525, 238P367. **Stock in joint names of husband and wife taxable** to extent of being donative, on husband's death, except shares she paid for. 218AppDiv 278, 218NYS131. **Intangible property** is covered by inheritance tax law. 317Mo 986, 296SW778.

1560-4 270US69, 46SCt256, 70Led475, 43ALR1374; 105Conn192, 134A778 (holding mortgage bonds due resident decedent from resident or domestic corporations taxable though kept in another state); 323Mo 207, 19SW(2d)732; 218AppDiv278, 218NYS131. **Bonds in name of both husband and wife** which husband acquired at death of wife are not taxable. 111Conn165, 149A790. **Interest husband acquired at wife's death** in bonds on deposit in names of both is taxable. 111Conn165, 149A790. **Statute respecting taxable transfers** is inapplicable to transfer of property under trust deed. 136Misc859, 241NYS360.

1560-6 105Conn192, 134A778; 243NY 199, 153NE47; 130Misc436, 224NYS 305; 134Misc741, 236NYS395 (proceeds payable to named individuals not taxable); 138Misc347, 244NYS741 (proceeds passing to widow under will). But see 131Misc451, 227NYS120. **Proceeds of insurance policies, carried by corporation on life of its president,** held erroneously excluded from valuation of president's stock for transfer tax purposes. 243NY199, 153NE47. **Unpaid balance of war risk insurance policy** held taxable. 130Misc436, 224NYS305. **Unmatured installments of war risk insurance** have been held exempt from state inheritance tax. 295Pa419, 145A512; 152Wash459, 278P414.

1560-6½-New. Property of husband acquired in another state where it constituted his separate property remains so on removal to state having community property laws and is subject on his death to inheritance tax as such. 199Cal 369, 249P515.

1560-6⅓-New. Proceeds of adjusted service certificate issued to decedent as war veteran by federal government are not subject to state inheritance tax although certificate is made payable to estate. 8PaDist&Co 639.

1560-6¼-New. Commuted value of war risk policy turned over to estate of deceased soldier for distribution was not subject to state inheritance tax. 106 WVa626, 147SE876.

1560-6½-New. Succession to joint bank account accruing subsequent to statute is subject to tax. 120 Oh361, 166NE352.

1560-6⅚-New. Income claimed by decedent under trust agreement exceeding that produced by her contribution is not taxable. 136Misc859, 241NYS360.

1560-6⅞-New. It is not necessary that trust in property pass directly from settlor at time of his death. Mass 167NE 757 (interest not previously enjoyed bearing relation to death of settlor).

1560-6⅛-New. Statute taxing decedent's interest in property of tenants by entirety is not denial of due process. 281US497, 50SCt356(2dcase), 74Led991, 69ALR758.

1561-7 152Md94, 136A66, 60ALR558; 80Mont574, 261P356, 60ALR551; 125 Misc373, 211NYS541; 127Misc206, 216 NYS523; 129Misc625, 222NYS515; 20 OhA8, 153NE118; 287Pa49, 134A427; 297Pa335, 147A71; 152Va353, 147SE 468. But see 281US586, 50SCt436, 74 Led1056; 12PaDist&Co 633. **Payment of tax in several jurisdictions.**-But see Iowa 228NW638. **Corporation shares on books of partnership credited equally to partners but not used as business assets** not taxable to deceased nonresident partner's estate as part of interest in firm. 127Misc206, 216NYS523. **Statute making lodging in state for greater part of twelve consecutive months** in twenty-four months preceding death residence for purpose of inheritance tax does not require lodging for greater part of each of twelve months. 84Colo 1, 267P191 (creates conclusive presumption of residence). **Reciprocity provision of Tax Law is ineffective** where foreign jurisdiction imposes transfer tax upon nonresident's personalty. 253NY 49, 170NE489.

1561-9 148Va97, 138SE650.

1562-10 84Colo 1, 267P191; 36 OhA45, 172NE674. **Intangible personal property of nonresident** is not taxable within state. 285Pa60, 131A652. **In Ohio.**-27 OhNPNS323 (notes belonging to deceased non-resident not subject to tax).

1562-11 See also 32 OhA503, 168NE390 (mortgage notes held for collection held not subject to tax). **Transfer tax on bonds and notes physically within state** but owned by nonresident is denial of due process. 281US586, 50SCt436, 74 Led1056.

1562-12 175Minn310, 221NW64; 323 Mo 207, 19SW(2d)732 (liberty bonds); 243NY193, 153NE45; 36 OhA45, 172NE 674. **Taxation of bond at place where situated.**-243NY193, 153NE45. **Loan by nonresident deceased to copartnership** within state of which he was not member is not taxable, since not "doing business" in state as member or partner. 125Misc373, 211NYS541. **Public securities.**-175Minn310, 219NW153.

1562-13 168Minn508, 210NW389; 80 Mont574, 261P356, 60ALR551. **Secured debts.**-168Minn508, 210NW389.

1562-14 84Colo 1, 267P191; 323Mo 207, 19SW(2d)732. But see 36 OhA45, 172 NE674. **Succession to bank deposit in Ohio bank** of decedent domiciled in New York is governed by laws of New York. 36 OhA45, 172NE674.

1562-15 323Mo 207, 19SW(2d)732; 80 Mont574, 261P356, 60ALR551.

1562-17½-New. Statute not imposing tax on nonresidents except in specified instances cannot be extended to embrace other property of decedent. 285Pa60, 131A652.

1562-17⅓-New. Domicile of nonresident.-Where nonresident did not in fact die domiciled within state, fiction that he did, for purpose of ascertaining tax, will not be given judicial sanction. 285 Pa60, 131A652.

1562-17¼-New. Government bonds exempt from taxation while owned by nonresident alien are subject to taxation where bequeathed to resident executor. 152Va100, 146SE296.

1562-18 103NJEq209, 142A753; 20 OhA8, 153NE118; 297Pa335, 147A71; 148Va97, 138SE650; Can [1929] 1 DomLR315; Can [1930] 1DomLR859; BC [1928] 3DomLR311. But see 61 OntL507, [1928] 1DomLR739. **Stock of corporation incorporated in several states.**-152Md94, 136A66, 60ALR558. **Under Tax Law (Consol. Law c 60) § 220** subd 2, stock of domestic corporation within state at time of nonresident testator's death can be taxed only when property represented by stock consists of real property located wholly or partly within state of New York. 243NY 193, 153NE45. **Stocks may be taxed as of situs of state of incorporation.**-127 Misc799, 217NYS700. **Shares in nonresident corporation doing business in state not taxable** to nonresident owners who received stock under will of nonresident testator. 195NC291, 141SE733. **In Ontario.**-63 OntL469, [1929] 2 DomLR754 [app dism [1930] 1DomLR 859]. **In Quebec.**-[1930] 2DomLR 297.

1563-19 36 OhA45, 172NE674; 148Va 97, 138SE650. Contra 161La649, 109S 344.

1563-20 280US204, 50SCt98, 74Led 371, 65ALR1000; 119 Oh410, 164NE 423, 60ALR546; 66Utah245, 240P161, 42ALR347.

1563-21 See also Can [1930] 1DomLR 868.

1563-22 105Conn192, 134A778; 163La 673, 112S525; 256Mass519, 153NE4. **Statutes held not applicable to estates of resident decedents.**-149Miss785, 115S 893.

1563-23 270US69, 46SCt256, 70Led 475, 43ALR1374; 243NY193, 153NE45; 20 OhA8, 153NE118; 285Pa60, 131A652. **Transfer tax on nonresident's shares of stock** in foreign corporation cannot be sustained on ground corporation is domiciled therein. 270US69, 46SCt256, 70Led475, 43ALR1374.

1563-23½-New. Government bonds.-Statute, taxing succession to property of nonresident within state, and providing that phrase "within the state," when predicated of intangible property, means that succession thereto is for any purpose subject to, or governed by, law of state, does not place tax on bonds of federal government or municipal corporation of another state. 84 Colo 1, 267P191; 20 OhA8, 153NE118.

1564-28 285Pa308, 132A127; 287Pa49, 134A427; 288Pa184, 135A626. **Domicile of decedent determines taxable situs** for purpose of succession tax. 105 Conn192, 134A778.

1564-29 But see 285Pa308, 132A127; 14PaDist&Co 251 (exception inapplicable under contract to sell land). Contra BC [1927] 1DomLR602.

1564-30 268US473, 45SCt603, 69Led 1058, 42ALR316; 277US1, 48SCt410, 72 Led749; 84Colo 1, 267P191; 105Conn 192, 134A778 (cash, bank notes and federal bonds and treasury certificates); 161La649, 109S344; NJ 150A443; 127 Misc820, 216NYS522; 285Pa308, 132A 127; 286Pa545, 134A438, 48ALR992; 6PaDist&Co 205; 66Utah245, 240P161, 42ALR347; 100Vt217, 136A389; 148Va 97, 138SE650. **Tangible property is synonymous with goods, wares and merchandise.**-127Misc820, 216NYS522. **Failure of foreign state to tax tangible property** located there does not give state right to tax it. 100Vt217, 136A 389. **In Canada.**-Alta [1929] 1DomLR 923.

1564-31 286Pa545, 134A438, 48ALR 992.

1564-32 277US1, 48SCt410, 72Led749; 105Conn192, 134A778; 48 Ida485, 283 P598 (stocks and bonds); 163La673, 112S525 (bonds of foreign corporation held taxable); 256Mass519, 153NE4; 175Minn310, 221NW64; 317Mo 986, 296 SW778; 105NJL89, 143A757; NJ Prerog 149A257 (good will in partnership); 127Misc820, 216NYS522; 148Va 97, 138SE650; BC [1927] 3DomLR250; 59 OntL181, [1926] 3DomLR928 [dism app [1927] 1DomLR1105]. See 37BC 336, [1926] 4DomLR139, [1926] 3West Wkly265]. See also 282US1, 51SCt54; 127Misc206, 216NYS523. **Savings bank account.**-277US1, 48SCt410, 72Led749. **Savings bank account** held debt and taxable at domicile of decedent. 105 Conn192, 134A778. **Money of resident, in France,** taxable as money, is not tangible property. 127Misc820, 216 NYS522. **Stock of foreign corporation.**-277US1, 48SCt410, 72Led749. **Stock in foreign corporation** is intangible property. 317Mo 986, 296SW778.

Stock in foreign corporation owned by resident is subject to inheritance tax at owner's domicile though certificates are in another state. 317Mo 986, 296SW778. **Life insurance policy.**–277US1, 48SCt410, 72Led749. **Securities conveyed by trust agreement** are held taxable at donor's domicile. 105 NJL89, 143A757.

1564–32½–New. The maxim is not a fixed law but a legal fiction resorted to as matter of convenience and to prevent injustice. 6PaDist&Co 205.

1565–34 200 Iowa89, 204NW424; 80 Mont574, 261P356, 60ALR551.

1565–35½–New. Fact that tax was levied in foreign state on transfer to legatee in Idaho does not affect right of Idaho to levy tax on different transfers of same property. 48 Ida485, 283 P598.

1565–35⅓–New. Transfer by will of unpaid legacy to legatee's wife is taxable. 48 Ida485, 283P598.

1565–35¼–New. Where donor of power of appointment resides in state and donee is nonresident, property at time of exercise of power alone is within jurisdiction. 137Misc852, 244NYS616.

1565–36 Transfer held not subject to tax.–NJSup 152A185.

1565–37 196Cal 525, 238P367 (evidence held to show testator "possessed" at time of death stock held in trust and transfer of it to her executor); 136 Misc859, 241NYS360; 10PaDist&Co 494. See also 83 IndA371, 147NE297, 148NE 427. **Equitable life tenant's interest under trust deed** revocable or alterable by grantor is taxable. 102NJEq45, 139 A318.

1565–38 327 Ill 547, 158NE861; 128 Misc258, 219NYS311; 133Misc637, 233 NYS678; 133Misc762, 234NYS307. **Gift or transfer must be in præsenti** to escape tax. 75Mont186, 243P589, 44 ALR1470. **Property transferred to decedent's divorced husband** on her death, under trust agreement, held not taxable. 128Misc258, 219NYS311.

1565–39 31Ariz272, 252P521 (devolution by descent or by will recognized by inheritance tax act as all inclusive); 327 Ill 547, 158NE861; NJPrerog 148A 731; 128Misc258, 219NYS311; 287Pa 334, 135A262; 8PaDist&Co 443; 8Pa Dist&Co 494; 8PaDist&Co 705. **The surviving wife's share of community property,** etc. Contra TexCommnA 5SW (2d)973. **Undrawn salary of corporation president, waived by death under agreement,** held not subject to tax. 219App Div5, 219NYS239. **Consumable property passes under wife's will and not husband's** where her devise was to husband and, if any left, to her sister. 287Pa 334, 135A262. **Property held by two joint-tenants** is not subject to tax upon death of one of them. 8PaDist&Co 443. **Property held by entirety.**–122 Or620, 260P206, 59ALR707. **Community property which on death of wife belongs to husband** without administration under code is within application of statute imposing tax upon estates passing by will or inheritance or by other statutes. 34NM258, 280P241.

1565–41 26 OhNPNS387; 124Tenn528, 137SW924, 34LRANS1161, AnnCas 1913 A165.

1565–41½–New. or the year's support for the widow given to her by statutes, 124Tenn528, 137SW924.

1565–42 See also 83 IndA371, 147NE 297, 148NE427. But see TexCommnA 5SW(2d)973. **Interest of surviving wife in community property** held not subject to tax, where husband willed specific property in lieu thereof, but one-half interest in specific property which wife elected to take under will was subject to tax. TexCivA 290SW244. **Community property.**–TexCivA 290SW244.

1565–43 131Misc451, 227NYS120.

1565–44 127Misc773, 216NYS620 (where widow took stock in joint names of both to bequeath husband's children).

1566–45 31Ariz272, 252P521. But see 40GaA295, 149SE321(1stcase).

1566–46 128Misc258, 219NYS311. **Note for services rendered** held not evasion of tax. 188Wis4, 205NW486.

1566–49 Whether renunciation of executory devises by strangers to testator's blood was mere device to evade payment of inheritance tax, and amounted merely to assignment of their interests is immaterial, in absence of evidence that they received anything for executing instrument. 331 Ill 203, 162NE848, 60ALR305.

1566–49½–New. Devises or bequests pursuant to prior contract.–Persons taking property by virtue of will devising or bequeathing it to them are liable for inheritance tax though devises or bequests were made for purpose of carrying out previous contract between testator and third person who formerly owned such property. 114 Nebr517, 208NW665.

1566–49⅓–New. In such case it is immaterial that devisees and legatees might have otherwise established their right to property through such contract. 114Nebr517, 208NW665.

1566–49¼–New. Successive transfers.–Under Iowa statute, where daughter, who had paid inheritance tax on amount in excess of exempted fifteen thousand dollars received under father's will, died within two years after his death leaving entire property received from him to brother, fifteen thousand dollars upon which she paid no tax is not exempt from inheritance tax on transfer to brother. 201 Iowa1033, 204NW244.

1566–49⅕–New. Stock in joint names of husband and wife passes as whole to wife on death of husband and is taxable as transfer of whole property. 246NY 498, 159NE410.

1566–49⅙–New. Bequests to wife and adopted child in accordance with separation agreement held not exempt from transfer tax. 131Misc509, 226NYS 759.

1566–49⅐–New. Legatee or devisee being under no obligation to accept testamentary gift, though it may reasonably be presumed, in absence of evidence, that estate has been accepted, especially where it is beneficial in character, renunciation of executory devises by devisees renders transfer to them void, and hence not subject to tax. 331 Ill 203, 162NE848, 60ALR305.

1566–49⅛–New. Succession of widow to share of estate on election to take against will is subject to tax. 26 OhNP NS387.

1566–49⅑–New. Where devisee rejects property devised on condition succession tax thereon is not collectible. 119 Oh389, 164NE425.

1566–49 1/10–New. Statute imposing tax where change in use of property or enactment may occur in grantor's lifetime by reason of reserved power to alter transfer is intended to apply only where portion of trust res is employed in life of grantor. 134Misc741, 236NYS 395 (proceeds of life policy transferred under trust agreement held not subject to tax).

1566–49 1/11–New. Transfer of trust fund under will taxable though suit against testator compromised and part of compromise deducted from widow's trust. NJSup 151A742.

1566–50 By statute in New York, etc. 221AppDiv116, 222NYS645.

1566–51 272US567, 47SCt202, 71Led 413; NJSup 134A185; 221AppDiv116, 222NYS645; 127Misc782, 216NYS519; 130Misc806, 224NYS604; 85PaSuper123 (inheritance tax laws at time of donor's death govern). See also 10PaDist&Co 255. **Exercise of power in North Carolina held not taxable** there, where original will was that of Massachusetts resident. 272US567, 47SCt202, 71Led413. **Stocks in New York corporation, passing by power of appointment of decedent donee,** held taxable to estate even if such donee was nonresident. 127Misc 799, 217NYS700. **Test of blending of estates for transfer tax purposes.**–285Pa 326, 132A175. **Reservation of power of appointment** leaves will incomplete as to dower and subject to tax on property passing to beneficiaries thereunder. 276US260, 48SCt225, 72Led565. **Intent to blend estate subject to power with individual estate was not disclosed** by possibility that residuary bequests might have exceeded individual estate. 297Pa99, 146A453, 64ALR737. **Where remaindermen elect to take under will of donor transfer for tax purposes passes under will.** 137Misc666, 244NYS198. **Property passing by appointment is not part of donee's estate** for inheritance tax purposes. Del 152A 117.

1567–52 272US567, 47SCt202, 71Led 413; 248NY171, 161NE459. See 49RI 379, 142A671. **Fact that transfer tax law was not enacted until after execution of wills creating power of appointment** held immaterial to liability of donee's estate for tax, though powers were exercised by latter. 127Misc799, 217NYS700.

1567–53 But see 134Misc242, 234NYS 305.

1567–53½–New. Where donee of general power of appointment over trust estate exercised such power by blending trust estate with own estate, then entire estate passing is liable to transfer tax. 284Pa 135, 130A324.

1567–53⅓–New. Property held to have been blended so as to subject it to inheritance tax. 287Pa61, 134A429.

1567–53¼–New. That donee of power of appointment over property without state under foreign will provided for payment of debts from property does not subject transfer to taxing power. 111Conn594, 151A252.

1567–54 71CalA324, 235P54; 330 Ill 238, 161NE525; 234Ky415, 28SW(2d) 491; La 129S801; 116Nebr196, 216NW 558; 103NJEq543, 143A764; 98NJEq 638, 129A393; NJSup 130A660 (transfer made two years prior to death presumed in contemplation of death); 105 NJL85, 143A807; NJPrerog 129A393; NJPrerog 149A257; 33NM347, 267P55; 134Misc868, 237NYS290; 134Misc741, 236NYS395 (proceeds of life policy transferred under trust agreement held not taxable); 135Misc258, 237NYS101; 135Misc256, 237NYS102; 131 Or597, 282P760; 151Va883, 145SE326. See also 218AppDiv278, 218NYS131. **Evidence sufficient** to show transfer in contemplation of death. NJSup 130A660. **In Alberta.**–[1925] 2DomLR647. **Burden of proof** is on state to prove transfer is subject to collateral inheritance tax. 71CalA324, 235P54. **Constitutionality.**–187Wis101, 203NW742. **Effect of statutory definition** of "in contemplation of death" in California Act of 1911 stated. 196Cal 100, 235P1024, 41ALR 980. **When there is a finding that transfer was without consideration and subject to inheritance tax under statute,** further finding that transfer was gift is immaterial. 71CalA324, 235P54. **In Montana.**–75Mont186, 243P589, 44ALR 1470. **Law in force at time of transfer** determines taxability. 196Cal 100, 235 P1024, 41ALR980. **Phrase "in contemplation of death"** does not mean transfer must be made with sense of impending death. 71CalA324, 235P54. **Statutes construed.**–196Cal 100, 235P1024, 41 ALR980. **Evidence held to rebut statutory presumption that transfer was subject to tax.**–219AppDiv418, 219NYS158. **Statutory presumption that transfers made within two years of death** are in contemplation of death held rebuttable. 219AppDiv418, 219NYS158. **In Ohio.**–117 Oh215, 158NE89 (Gen. Code § 5332). **"Contemplation of death"** does not mean apprehension of final dissolution. 116 Nebr196, 216NW558. **Burden of proof** is on state to prove transfer is subject to collateral inheritance tax. Utah 269 P103. **Test** is whether death of transferor makes difference in rights of parties. 246Mich440, 224NW639. **Promise without consideration to pay money on promisor's death** is subject to inheritance tax as beneficent and donative. Nebr 228NW861. **Subscription contract payable on subscriber's death,** reciting consideration of subscriber's interest in christian education and promises of like tenor of other subscribers, is subject to inheritance tax. Nebr 228NW861. **Whether promise to pay money on death of promisor is taxable** depends on character and consideration of promise. Nebr 228NW861. **Construction of statutes.**–La 129S801 (as to retroactive application). **Transfers within specified time prior to death** of material part of estate without adequate valuable con-

sideration are deemed made in contemplation of death under statute. NJSup 151A743.

1567-54½-New. Burden of proof is on state to show gift in contemplation of death. 24 OhNPNS33.

1567-54½-New. Burden of proof.-In Ohio transferee of property, without consideration within two years prior to transferor's death, has burden to show same not made in contemplation of death. 117 Oh215, 158NE89.

1567-55 71CalA324, 235P54; 156Md94, 143A661; 116Nebr196, 216NW558, 559 [citCyc]; NJSup 130A660 (it is immaterial whether grantor intended to evade tax law or not); 219AppDiv418, 219 NYS158; 187Wis101, 203NW742.

1567-56 71CalA324, 235P54 (evidence sufficient to sustain inference that gift of mother to son was in contemplation of death); 324 Ill 625, 155NE768; 116 Nebr196, 216NW558, 559 [citCyc]; 26 OhNPNS57; 8PaDist&Co 569. **Evidence held sufficient.**-196Cal 100, 235P1024, 41ALR980; 71CalA324, 235P54. **Evidence held insufficient.**-228AppDiv834, 240NYS591; 136Misc690, 241NYS766; 117 Oh215, 158NE89; Utah 269P103. **When gift is in nature,** etc. Whether gift was in contemplation of death depends on whether it was in nature of distribution of property or a favor to donee. 117 Oh215, 158NE89. **Agreement by stockholder** not to dispose of stock but to hold it for benefit of other stockholders and to sell at par to them at their election on his severance with corporation, as on his death, is not transfer agreement or deed made in contemplation of death. 241NY277, 149NE857. **Evidence** held not opposed to finding that transfer was in contemplation of death see 196Cal 100, 235P1024, 41 ALR980. **In Alberta.**-[1925] 2DomLR 647. **On appeal,** finding that gift was in contemplation of death held not assailable for insufficiency of evidence. 196Cal 100, 235P1024, 41ALR980. **That deed was delivered vesting present title** without retention of any control and without any reservations does not show transfer not in contemplation of death. 196Cal 100, 235P1024, 41ALR980. **That there was no mention of death in connection** with making of transfer does not show it was not made in contemplation of death. 196Cal 100, 235P1024, 41ALR 980. **Transferor need not be in fear of immediate death** from existing malady to make transfer taxable. 196Cal 100, 235P1024, 41ALR980. **"Contemplation of death"** under Ohio statute means "that expectation of death which actuates the mind of a person on the execution of his will." 117 Oh215, 158NE89. (Gen. Code § 5331). **That aged decedent had in mind situation at time of her death** when making gift held not to make transfer one within statute. 219 AppDiv418, 219NYS158. **Statute construing gifts** within six years of death as made in contemplation of death held invalid as arbitrary classification. 270 US230, 46SCt260, 70Led559, 43ALR 1224. **Evidence held to rebut presumption** that father's gifts to son were in contemplation of death. 101NJEq709, 139A53. **Gifts are deemed in contemplation of death,** unless shown to contrary, under some statutes, when made within certain time before death without substantially equivalent valuable consideration. 26 OhNPNS57 (evidence sufficient to overcome presumption). **Phrase "in contemplation of death"** does not refer to general expectation commonly entertained by all persons but rather to apprehension arising from some existing condition of body or some impending peril. Utah 269P103. **Whether donor intended to avoid provisions of inheritance tax law** is immaterial on question whether transfer was subject to tax. Utah 269P103. **Controlling consideration** is whether giving of property was in nature of distribution or bestowal of favor on donee. 27 OhNPNS366. **Disposition of money held in contemplation of death** though donor apparently enjoying good health. 27 OhNPNS366. **Evidence held admissible.**-179Minn233, 228NW920. **Evidence held not to justify finding** that transfers in trust were intended to take effect in possession and enjoyment at or after transferror's death. 179Minn233, 228NW920. **Gift made within two years of death** is presumed to have been made in contemplation of death. NJPrerog 148A731. **Proof held not to overcome statutory presumption** that decedents' transfer of all her property was in contemplation of death. 230AppDiv729, 243NYS394.

1567-57 196Cal 100, 235P1024, 41ALR 980; 116Nebr196, 216NW558. See also BC [1927] 3DomLR250. **Gifts in contemplation of death not confined to gifts causa mortis.**-196Cal 100, 235P1024, 41 ALR980. **To escape liability for succession duty** there must be a bona fide transfer of the possession and enjoyment of property twelve months before death. BC [1927] 2DomLR717.

1567-58 Consideration must be adequate in order for tax to be avoided on ground that transaction was sale. NJ 141A579. **Evidence held insufficient** to show that yearly payments to be made by transferees to transferors were consideration for personalty transferred. NJ 141A579. **Consideration of substantially equal financial value** received by transferor is necessary to avoid tax. 103NJEq543, 143A764. **Transfer in exchange for life estate.**-Where husband in contemplation of death, and knowing himself afflicted with probably fatal illness, transfers to normally healthy wife, life interest in his estate, in exchange for transfer to him of life interest in her estate, his transfer is taxable, notwithstanding their ages be substantially same and two estates are of substantially equal value. 103NJEq543, 143A 764.

1568-60 324 Ill 625, 155NE768 (statute held to contemplate apprehension of death arising from existing disease or infirmity such as prompts one to dispose of property); 327 Ill 547, 158NE861; Ill 173NE132; 235Mich555, 209NW930; 116Nebr196, 216NW558; NJ 141A579; 98NJEq638, 129A393; 133Misc762, 234 NYS307; 133Misc152, 231NYS408; 228 AppDiv171, 239NYS390; 137Misc107, 243NYS232; 131 Or597, 282P760; 8 PaDist&Co 569; Utah 269P103. See also 134Misc242, 234NYS305. **Advanced years and poor health** are not alone sufficient to prove transfer was made in contemplation of death. 71CalA324, 235 P54. **Finding that transfer by mother** to son was "gift deed" is immaterial if evidence warranted finding that conveyance was without adequate consideration. 71CalA324, 235P54. **Transfer not subject to tax** if interests relating to ordinary affairs of life rather than death are controlling consideration. 71CalA 324, 235P54. **Evidence held to show nontaxable transfer.**-116Nebr196, 216 NW558. **Motives of donor conveying property are immaterial** as regards transfer tax if transfers are absolute and not in contemplation of death. 136 Misc690, 241NYS766. **Transfers held to vest immediately.**-179Minn233, 228NW 920.

1568-61 NJSup 151A279; 136Misc579, 240NYS403; 10PaDist&Co 375; Wis 231NW271. But see Ill 173NE132 (absolute donation in consideration of annuities not taxable); 157Md87, 145A 350. **Where husband creates tenancy by entirety in himself and wife,** transfer on death of husband is taxable as if whole property belonged absolutely to deceased. 126Misc590, 214NYS793. **Understanding that aged grantor should live with grantee held not to make transfer** conditional and subject to tax. 219 AppDiv418, 219NYS158. **Reservation and accumulation of income during life of grantor** held not of itself to render transfer subject to tax. 330 Ill 238, 161 NE525. **Postponement of enjoyment held not to make transfers subject to tax** where interests were vested in beneficiaries at dates of execution of deeds. 330 Ill 238, 161NE525. **Control necessary must be by lawful right** and opportunity to misappropriate property will not be sufficient. 246Mich440, 224 NW639. **Gift with return of ten year lease at nominal rental.**-NJPrerog 146A 361. **Transfer of trust corpus on failure to exercise power** of appointment has been held subject to transfer tax. 134 Misc464, 234NYS713. **Gift inter vivos of corporate stock** is subject to inheritance tax on donor's death where donor organized corporation and transferred his lands to it in full payment of all of its corporate stock except two shares retaining life estate in property conveyed. 131 Or597, 282P760. **Stock transferred in trust for donor's children with reservations only of right to vote** it has been held not subject to inheritance tax. Wis 231NW271. **Transfer not taxable** though grantor reserved life income to himself. 136Misc201, 240NYS524. **Transfers under deed of trust** with reservation by grantor takes effect as of date of deed. 136Misc579, 240NYS403. **Execution deed of trust before amendment of tax law** regarding reservation of control renders transfer not taxable. 136Misc335, 240NYS405. **Power to revoke or amend trust declaration** brings transfer within tax law. NJSup 151A 279. **Transfer under trust to pay income to donor's daughters after donor's death** and to pay corpus to donor, if living, on daughters' death is effective on delivery of deed. 230AppDiv371, 244 NYS588.

1568-61½-New. Nature of agreement, its intention, and purposes determine its classification and whether or not it is taxable transfer. 241NY277, 149NE857.

1568-61½-New. Evidence sufficient to sustain finding of transfer in contemplation of death. 71CalA324, 235P54.

1568-62 226Ky301, 108SW(2d)1095; 103 NJL608, 137A552, 58ALR1137; 9PaDist&Co 804.

1568-64 129Misc825, 223NYS694. But see 133Misc428, 232NYS672. **Gift to wife** held taxable where payable after decedent's death. 75Mont186, 243P589, 44ALR1470. **Transfer under deed of trust taxable** as against contention transfer not taxable because made for valuable consideration. 136Misc859, 241 NYS360.

1568-65½-New. Provision for compensation of executor does not make bequest to executor subject to taxation under Inheritance Tax Law. 332 Ill 608, 164NE137.

1568-65½-New. Failure to bequeath property as promised and recovery thereof pursuant to action has been held not subject to tax as not being bequeathed by will. NJPrerog 148A12(2dense).

1568-65¼-New. Husband's bequest made in accordance with separation agreement is transfer for valuable consideration not subject to tax under statute. 226AppDiv632, 236NYS570.

1569-66 327 Ill 547, 158NE861; 128 Misc307, 219NYS309; 129Misc825, 223 NYS694; 136Misc859, 241NYS360; 137 Misc741, 244NYS470. **In Pennsylvania.**-9PaDist&Co 180.

1569-67 NJPrerog 129A393; 98NJEq 638, 129A393; 133Misc428, 232NYS672.

1569-68 100Vt217, 136A389. **Under testamentary trust providing income shall be paid to beneficiary for life and on her death entire corpus of trust shall be paid to her executor,** beneficiary's estate is taxable as equitable owner of property before executor is appointed and receives corpus. 206Cal 240, 273P 1066.

1569-68½-New. Estate subject to contingency of beneficiary dying before age of twenty-five years without having heirs of his body should be taxed by temporary order at highest amount subject to estate of refunds. 112 OhSt233, 147NE509.

1569-69 136Misc859, 241NYS360; Wis 230NW691. But see 7PaDist&Co 519.

1569-71 128Misc307, 219NYS309; 129 Misc825, 223NYS694; 134Misc573, 237 NYS282. **Assumption that remainder would not vest** by termination of prior estate on happening of contingency is proper. 125Misc373, 211NYS541 (to determine transfer tax). **Transfers to beneficiary held contingent remainders,** not deferred legacy. 125Misc787, 211 NYS537. **Deed of trust** has been held to create contingent remainder taxable at highest rate assessable under any contingency. 133Misc637, 233NYS678.

1569-73½-New. Taxation of possibility of reverter should be suspended. 125 Misc373, 211NYS541.
1569-75 164Ga14, 137SE549; 192Wis 580, 213NW477 (no exemption where corpus of estate passed to trust company intact in perpetuity and sums were paid to beneficiaries of trust only from income). **Exemptions are important as affecting** inheritance tax to be computed only when bases of computation of such tax upon remainder of property are to be affected by their deduction. 193Cal 386, 233P972. **Estates probated but not closed prior to statute** exempting estates totaling less than would make them liable to federal estate tax are not exempted by such statute. 164Ga14, 137 SE549. **No exemptions allowable** where gross estate exceeded in value sum of ten thousand. 135Misc658, 240NYS706.
1569-76 327 Ill 547, 158NE861. **In Iowa.**-201 Iowa1033, 204NW244.
1570-77 Amendment of 1917 to California Tax Inheritance Act permitting joinder of independent vested transfers for purpose of fixing tax applies only where all such transfers become effective after its passage. 196Cal 114, 236 P144. **Transfers of property** by one since deceased, which are separate, distinct, and completed transactions are each entitled to exemption fixed by statute in force when made. 196Cal 114, 236P144.
1570-78 Debts for necessaries deducted. 5PaDist&Co 523.
1570-80½-New. Under statutes allowing deductions where inheritance taxes have been paid on property inherited within two years prior to death of heir, it has been held that exemption is only to extent of amount taxed under first succession. 201 Iowa1033, 204NW244.
1570-80½-New. Where property of decedent, sought to be subjected to collateral inheritance tax, was acquired from his brother who died before act took effect, but collateral inheritance tax thereon was paid after act took effect, it has been held that such tax was paid "under this act" within meaning of statute, and having been paid within two years of decedent's death, property was not subject to second inheritance tax. 200 Iowa89, 204NW424.
1570-80¼-New. Appointee under power may take under donor's will as remainderman to escape transfer tax. 130 Misc804, 224NYS606; 13PaDist&Co 691. Contra 148Wash422, 269P339.
1570-80⅓-New. War risk insurance is exempt. 119 Oh83, 162NE390 [aff 27 OhA516, 162NE398].
1570-80⅓-New. Transfers under trust deed becoming effective at different times than those under will should be separately exempted. 135Misc658, 240 NYS706.
1570-81 286Pa149, 133A29 (funeral expenses of deceased married woman, who leaves husband surviving, may be deducted under such exemption, though primary liability for such expenses rests on him); 5PaDist&Co 523. But see 9 PaDist&Co 654.
1570-84 Widow.-187Wis88, 203NW914.
1570-85 Exemption provisions of Inheritance Tax Law are construed liberally in favor of state. 193Cal 386, 233 P972. **In California.**-193Cal386, 233P 972.
1571-89½-New. Under statutes in some jurisdictions all property transferred by a decedent to any person not more than five years prior to his death by another decedent, where tax was paid thereon, is exempt. 201Cal 1, 255P195.
1571-89⅓-New. There is no warrant in law for allowance of more than one exemption to each beneficiary in any one individual estate. 26 OhNPNS57.
1572-96½-New. Estate of child legally adopted in another state, under laws similar to state of probate, is taxable under same provisions as if adoption were in this state. 129Misc396, 222NYS 265.
1572-96½-New. Adoptive father, inheriting from adopted daughter, is entitled to statutory exemption and classification of "father." 129Misc396, 222 NYS265.
1572-99 Legacy to governmental agency created by state is subject to tax under some statutes. 114Nebr335, 207NW520 (legacy to trustees of cemetery).
1572-1 24 OhNPNS33.
1572-2½-New. Transfer of money to executrix of estate from teachers' retirement fund is exempt from transfer tax. 132Misc204, 229NYS826.
1572-2⅓-New. Payments by federal government under war risk insurance policy to estate of deceased soldier or of his deceased beneficiary are not subject to tax. 179Minn450, 229NW781.
1572-3 83 IndA371, 148NE427; 235Ky 731, 32SW(2d)19; 114Nebr335, 207NW 520, 521 [citCyc]. **Statute held not to exempt religious society.**-114Nebr335, 207NW520.
1572-4 235Ky731, 32SW(2d)19; 147 Wash216, 265P466. **Where trust fund created by will is exempt from inheritance tax as public charity** must be determined as of time of death of testator. 33 OhA323, 169NE579.
1572-5 204 Iowa1067, 216NW772. **It is not necessary that beneficiary should be corporation** other than unincorporated association under some statutes in order to be entitled to exemption. 196 Cal 366, 237P1074. **Unincorporated associations and societies.**-196Cal 366, 237 P1074. **Fund has been held not exempt** since trustees might give fund to any private charity. 33 OhA323, 169NE579.
1573-8 135Misc22, 237NYS521; 117 Oh443, 159NE570; 118 OhSt36, 160NE 468; 192Wis580, 213NW477 (corpus bequeathed in perpetuity to trust company income to go to needy children selected by it). **Corporations held to be charitable or educational,** etc. 235Ky 731, 32SW(2d)19; 223AppDiv491, 228 NYS591 (city). **Masonic lodge** held not charitable organization. 193Wis415, 214NW347. **Gift to cemetery for chapel** suitable for burial services held not charity within meaning of statute. 260 Mass129, 156NE743. **Exemption is improperly disallowed** where opportunity not allowed to show whether organization is within exempted class. 223App Div491, 228NYS591. **Corporation held exempt** within meaning of statute. 133 Misc568, 233NYS319. **Corporation held charitable and benevolent within statute.**-133Misc768, 234NYS299. **Corporation held not charitable, educational or benevolent corporation.**-133Misc768, 234 NYS299.
1573-10½-New. Gift to cemetery of chapel suitable for burial services is not a "Charity" exempt from succession tax. 260Mass129, 156NE743.
1573-10⅓-New. Such gift does not create a "trust for charitable purpose." 260Mass129, 156NE743.
1573-10¼-New. And is not exempt from taxation. 260Mass129, 156NE743.
1573-10⅕-New. Admissibility of evidence.-133Misc568, 233NYS319.
1573-11 105Conn192, 134A778; 327 Ill 474, 158NE727; 192NC604, 135SE527; 41Wyo 36, 282P27. **Reason for rule** not exempting bequests to foreign corporations is that state is not compensated for loss of revenue by being relieved from burden it would otherwise have to carry. 327 Ill 474, 158NE727.
1574-14 199Cal 369, 249P515; 327 Ill 547, 158NE861; 330 Ill 238, 161NE525; 338 Ill 145, 170NE276; 204 Iowa355, 213 NW938, 940 [citCyc]; 226Ky393, 11 SW(2d)84 (charitable beneficiaries not unknown); 149Miss785, 115So893, 896 [citCyc]; Miss 130S473; 247NY307, 160 NE380; 128Misc159, 218NYS387; 131 Misc451, 227NYS120; 133Misc718, 233 NYS681; 134Misc232, 236NYS21; **Absolute gift under deed** held governed by transfer tax in effect as of date of trust deed. 135Misc658, 240NYS 706; 137Misc844, 244NYS640; 138 Misc213, 245NYS310; 284Pa200, 130A 426; 285Pa60, 131A652 (as to liability and amount); 287Pa49, 134A427; 9Pa Dist&Co 654; Va 155SE635. See also 331 Ill 203, 162NE848, 60ALR305. **Compromise agreement** giving contestant of probate portion of legacy, though approved by court, does not affect lien of tax accruing on testator's death. 31 Ariz272, 252P521. **Where taxable estates vest at different times** by reason of one being taxable trust transfer before death assessments must be separate and deduction of exemptions made on each. 128Misc306, 219NYS317. **Applies to gifts** in lifetime of testator. 256 Mass512, 153NE1.
1574-15 108Conn715, 145A56; Va 155 SE635.
1574-16½-New. Where at date of enactment of statute estate was in custody of law for purposes of settlement in future, commodity of succession still existed so as to be subject to excise. 256 Mass512, 153NE1.
1574-16⅓-New. Income earned but not due till after effective date of act requiring payment of tax before payment or distribution is not taxable where decedent died before effective date of act. 157Md559, 146A752.
1574-18 136Misc318, 242NYS436. **In British Columbia.**-[1928] 3DomLR253.
1575-20 267Mass240, 166NE729.
1575-22 89PaSuper496.
1575-23 135Misc580, 240NYS102; 240 NYS856. **Purpose of legislature in requiring present taxation at highest rate** was to insure prompt payment. 128 Misc159, 218NYS387.
1575-25½-New. Increase in value during life tenancy.-284Pa583, 131A361.
1575-25⅓-New. Tax on transfer under power of appointment is determined when title passes to appointee on death of donee, whether donee is resident or nonresident. 137Misc852, 244NYS616.
1575-26 331 Ill 203, 162NE848, 60ALR 305; 134Misc871, 237NYS288; 135Misc 580, 240NYS102; 137Misc789, 244NYS 763 (tax conditionally assessed for five per cent class); 133Misc42, 231NYS191; 134Misc769, 236NYS437 (remainders held taxable at highest rate); 31 OhA 325, 167NE400; Va 155SE635. **Gifts in contemplation of death** are properly assessed for taxation according to rate fixed by law at time of donor's death rather than date of gift. 187Wis101, 203NW742. **Method of computation of** tax on property transferred to widow stated. 187Wis88, 203NW914. **Tax on contingent estates at "highest rate"** means rate which beneficiary would pay under any contingency, and not amount paid to state, and where life estate was highest which beneficiaries could have, under any contingency, their interests should be taxed as life estate. 127Misc 542, 217NYS312. **Transfer of contingent remainder** is taxable at highest rate contingency subject to refund if ultimate succession be taxable at lower rate. 24 OhA331, 157NE423. **Rate where devise of fee conditioned on event of issue** governed by statute. 134SC261, 132SE37. **What law governs.**-339 Ill 333, 171NE183; 156Md94, 143A661. **Remainder should be taxed at highest rate** which on happening of any contingencies would be possible. 135Misc 658, 240NYS706.
1575-27 Relative who is both legatee and beneficiary of trust.-124Misc672, 209NYS686.
1575-28 117Nebr854, 223NW633; 128 Misc4, 217NYS583; BC [1928] 3DomLR 253. **Comptroller held to have mandatory duty to segregate difference between rates on contingent estate** from transfer tax and credit estate with interest pending occurrence of contingency fixing final disposition. 128Misc4, 217 NYS583. **Statute providing for refunds of erroneously paid taxes held not to apply** to cases of deferred refunds on difference between rates on contingent remainders. 128Misc4, 217NYS583. **When interest not collectable.**-NJ 131A 289.
1575-28½-New. Noninterest-bearing portion of tax on a contingent remainder should be amount represented by minimum tax rate applicable to any contingencies. 218AppDiv436, 218NYS551.
1576-31 248NY280, 162NE79; 137Misc 844, 244NYS640. **Annuitant and remaindermen.**-125Misc321, 209NYS684. **Method of deducting exemption** and computing tax payable by widow and daughter of deceased person under California Inheritance Tax Law stated. 193 Cal 386, 233P972. **Transfer tax on legacies of annuities** is payable out of corpus of trust. 125Misc782, 212NYS 351. **Residuary legatees are taxable for**

sum paid by them to one agreeing not to contest will and not one receiving money. 338 Ill 145, 170 NE276.

1576-33 137 Misc741, 244 NYS470; 29 OhA352, 163 NE605.

1576-34 160 Tenn170, 23 SW(2d)229 (contingent remainders). **Under the New York statute,** etc. 124 Misc672, 209 NYS686.

1576-34½-New. Tax on remainder left to four children of nephew of testatrix should be assessed against one child on value of remainder passing to children. 338 Ill 145, 170 NE276.

1576-34¾-New. Under Quebec Succession Duty Act usufructuary who personally pays whole succession duty is entitled to reimbursement out of estate for duty over duty on his share. Can [1930] 3 DomLR545.

1576-34¼-New. Transfer tax on property passing under power of appointment may be enforced against donee's estate if he is resident. 137 Misc552, 244 NYS616.

1576-34½-New. , but only against donor's estate if donee is nonresident. 137 Misc552, 244 NYS616.

1576-36 99 NJEq825, 134A646; NJPrerog 149A257. **Liability arises from executor's breach of duty to collect.**-204 Iowa355, 213 NW938. **Court presumed to have found no tax due where** executor is discharged without accounting for tax. 204 Iowa355, 213 NW938. **Executor is not personally liable** where state allows settlement of estate and discharge of executor without application to open accounts to ascertain tax. 204 Iowa355, 213 NW938. **Court is designated as state's agent** to refuse discharge till payment of tax, and upon discharge by court state cannot deny presumption of "no tax due." 204 Iowa 355, 213 NW938. **Remedy for erroneous discharge of executor before payment** is by application to open account or appeal. 204 Iowa355, 213 NW938. **Charging tax against distributive shares.**-131 Or597, 282 P760. **That certificates of stock are in possession of donees beyond control of executor** does not preclude judgment against him for amount of tax on transfer. 131 Or597, 282 P760.

1577-40 As dependent on assets.-137 Misc844, 244 NYS640.

1577-41½-New. Liability between executor and trustee. Where mother had life interest in residuary estate and had life interest in trust fund, assessment of tax on mother's remainder should be upon executor, not trustee. 133 Misc 834, 234 NYS119.

1577-42 130 Misc37, 224 NYS891. See also Sask [1928] 4 DomLR51. **Tax on legacy bequeathed "free and clear of inheritance tax"** which was directed to be paid from residue of estate is tax on amount which, after paying inheritance tax, would net specific legacy to legatee. 196 Cal 366, 237 P1074. But tax out of such residue of estate should be computed after and not before payment of tax on legacy. 196 Cal 366, 237 P1074. **Tax on exercise of power of appointment** held payable by appointee though will provided for payment of inheritance taxes from residue. 248 NY171, 161 NE 459.

1577-43 8 PaDist&Co 263; 10 PaDist& Co 89.

1577-43½-New. That will of nonresident decedent provided for deduction of debt of resident from amount bequeathed, debtor does not avoid or reduce tax. 168 Minn508, 210 NW389.

1577-43¾-New. Provisions of will, and not compromise agreement transferring property to contestant, determine inheritance tax on property transferred by will. 31 Ariz272, 262 P631.

1577-45 327 Ill 547, 158 NE861. **"Limitations on power of surrogate" defined.**-128 Misc159, 218 NYS589. **Proceeding for determination of transfer tax** is purely statutory. 128 Misc159, 218 NYS 389. **Jurisdiction to determine inheritance tax on gifts made in contemplation of death** is vested in county court under some statutes. 196 Wis242, 219 NW 197. **Where estate has been closed** district court has jurisdiction to reopen case for purpose of determining whether property transferred by deceased during his lifetime is subject to inheritance tax. Utah 269 P103.

1578-47½-New. If no provision has been made for ascertaining tax, mere announcement of intention to tax will burden the state. 281 Pa200, 130 A126.

1578-47¾-New. County judge and circuit court held without jurisdiction to review refusal of county court clerk to appoint appraisers. 156 Tenn131, 299 SW805.

1578-47¼-New. Probate court must make amount of inheritance tax on bequest part of final decree of distribution. 161 Va151, 144 A457.

1578-47⅝-New. No power is conferred by statute on county court to grant rehearing of inheritance tax where application not filed within prescribed time after entry of judgment. 199 Wis347, 226 NW314.

1578-48 338 Ill 145, 170 NE276. **Strict compliance with inheritance tax procedure** is required, it being a special procedure not in ordinary course of law. 70 Utah409, 260 P859.

1578-49 La 1298801. **Sufficiency of inventory. La** 1298801.

1578-51 See also 10 PaDist&Co 239.

1578-53½-New. Time of appraisement. Transfer tax is arbitrarily imposed on value computed as of date of death unaffected by any subsequent contingency. 226 AppDiv105, 233 NYS349.

1578-54 Mass 169 NE139. **Asset deliberately omitted** by appraiser cannot subsequently be taxed. 13 PaDist&Co 300.

1578-55 286 Pa575, 134 A451 (evidence held sufficient to show that corporate stock held in decedent's name was not part of her estate, so as to be taxable under inheritance tax statute). **Finding that partnership had good will subject to transfer tax** held supported by evidence. 127 Misc706, 216 NYS523. **Deduction from market value** is matter for court to compute and determine and not for appraiser. 70 Utah409, 260 P859.

1578-55½-New. Property transferred in contemplation of death and remainder of estate are not to be taxed separately, there being only one rate. NJSup 130 A660.

1578-55¾-New. Highest tax to which surviving life estate may be subjected should be ascertained by taking expectancy of contingent life tenant from date of appraisal rather than from decedents' death. 129 Misc825, 223 NYS694.

1578-55¼-New. Widow's life estate is properly valued on her expectancy at date of decedent's death and not on actual duration. 129 Misc825, 223 NYS 694.

1578-55⅝-New. Endowments payable to grandchildren on reaching certain age should be considered in fixing value of transfers to them for tax purposes. 129 Misc895, 223 NYS694.

1578-55½-New. As prerequisite to valid assessment in some jurisdictions tax commission is required to prepare and forward to the beneficiaries copies of certificate of assessment. 104 WVa414, 140 SE138.

1578-55¾-New. The certificate is required to show amount of property liable to tax, rate of tax thereon, names of beneficiaries thereof, their degree of relationship to decedent, and amount of tax. 104 WVa414, 140 SE138.

1578-55⅞-New. Original of certificate is recorded in office of clerk of county court. 104 WVa414, 140 SE138.

1578-55⅛-New. Before tax can be considered as having been imposed and as having become due and payable, requirements of statute must be complied with by service of proper certificate on all beneficiaries. 104 WVa414, 140 SE 138.

1578-55 1/16-New. Gifts under trust deeds and under will are properly considered as whole in fixing rate of tax and in allowing exemptions. 330 Ill 238, 161 NE525.

1578-55 1/16 New. Executor's attorneys, having consented to filing of amended transfer tax report, could not deny authority to file, or to grant order thereon. 131 Misc580, 226 NYS758.

1578-55½-New. Appraisement in case of non-resident decedent must be made by proper state official with right of appeal under statutes. 12 PaDist&Co 633.

1578-55¾-New. Value of good will is usually computed on basis of profits in normal years. NJPrerog 149A257.

1578-56 327 Ill 547, 158 NE861.

1579-59½-New. Burden of showing that transfer is subject, etc. 131 Misc 451, 227 NYS120.

1579-59¾-New. Burden on state to show gift made in contemplation of death. 324 Ill 625, 155 NE768.

1579-59¼-New. Evidence held sufficient to show gift not made to avoid tax nor in contemplation of death. 324 Ill 625, 155 NE768.

1579-59⅝-New. Filing of exceptions within sixty days of date of final appraisal held timely. 156 Tenn131, 299 SW805.

1579-59⅛-New. Grounds of exceptions held sufficiently specific. 156 Tenn131, 299 SW805.

1579-59 1/16-New. Burden of proof is on state to clearly prove right to tax. 297 Pa99, 146 A453, 64 ALR737.

1579-59¾-New. Evidence held sufficient to support finding that transfer was made in contemplation of death. 98 CalA714, 277 P759; NJPrerog 146 A361.

1579-59¼-New. Instruction as to conveyance made in contemplation of death is properly refused where unsupported by evidence. 98 CalA714, 277 P759.

1579-59⅝-New. Where court stated that transfers made for any other reason than in contemplation of death would not be taxable court did not have to enumerate all conditions under which transfers would not be taxable. 98 CalA 714, 277 P759.

1579-59 1/16 New. Statutory presumption that transfer within two years prior to death without consideration is in contemplation of death, may be rebutted. 136 Misc690, 241 NYS766.

1579-59 1/32-New. That decedent made transfers to effect substantial reduction in her income did not prove transfers were in contemplation of death. 136 Misc690, 241 NYS766.

1579-60 7 PaDist&Co 281, 7 PaDist&Co 613. **Nonresident's inheritance tax properly determined** by using valuation of estate subject to taxing laws treated as estate of resident decedent deducting debts owing within state and then distributing according to will and calculating net taxable shares of beneficiaries after deducting personal exemptions. 133 SC406, 131 SE142.

1579-62 338 Ill 145, 170 NE276; 208 Iowa795, 225 NW378; 127 Misc8, 214 NYS 572; 133 Misc718, 233 NYS681; 134 Misc 232, 236 NYS81; 136 Misc318, 242 NYS 436. But see 133 Misc637, 233 NYS875; 136 Misc322, 242 NYS441. **When value cannot be fixed with reasonable accuracy** at time of appraisal, value when ascertained is subject to adjustment to make it applicable to time of decedent's death. 127 Misc8, 214 NYS572. **In Vermont.**-100 Vt217, 136 A389. **Time of valuation of estate in remainder or estate created by exercise of power of appointment.** See 133 Misc718, 233 NYS681, 133 Misc834, 234 NYS119. **Value of remainder interest** bequeathed to life tenant by remainderman was determinable as of date of remainderman's death. 136 Misc318, 242 NYS436. **Value of trust fund** is to be ascertained as of date of execution of deed. 135 Misc658, 240 NYS 706. **Time of valuation of estate in remainder or estate created by exercise of power of appointment** see 137 Misc 852, 244 NYS616.

1579-63 117 Nebr854, 223 NW638; 127 Misc8, 214 NYS572 (clear market value); 27 OhA156, 161 NE617; 27 OhPPNS333 (interest of lessor in ninety nine year lease renewable forever). See also 123 Or286, 261 P893, 57 ALR1155. **Appraisement at "actual market value"** is required under some statutes and means appraisement at actual value. 20 OhA 166, 151 NE780. **Good will of partnership measured by normal earnings** for two years preceding partner's death. 127 Misc206, 216 NYS523. **Partner's in-**

terest.–127Misc206, 216NYS523. **Undivided half interest in realty** incumbered by leases for eighty years should be valued as real and corporeal property and not as annuity and incorporeal property. 27 OhA156, 161NE17.

1580–64 190NC358, 130SE22 (revenue department not bound by local assessors' valuation); 27 OhA156, 161NE17. **Partner's interest.**–127Misc206, 216NYS523. **In determining the value of the good-will,** etc. See also 134Misc232, 236NYS21.

1580–64½–New. Tax list valuation is not competent evidence for inheritance tax purposes. 190NC358, 130SE22.

1580–64½–New. Where statute is silent, state tax commission should follow policy outlined by decisions of courts. 133SC406, 131SE142.

1580–64¼–New. Objections to appraisement must be made at time and in manner provided by statute or are waived. 26 OhNPNS362.

1580–64½–New. Under some statutes, in determining value from rentals, rate is fixed at five per cent notwithstanding business usage. 26 OhNPNS57.

1580–64¼–New. Fact that assets of business may be greater at one time of year than at another has no bearing on subject of taxation in determining amount of tax. 134Misc232, 236NYS21.

1580–65 338 Ill 145, 170NE276; 125Misc321, 209NYS684; 130Misc312, 224NYS383; 27 OhA156, 161NE17. **Direction, that out of net income trustee pay** one thousand dollars per month to designated person, does not provide annuity, and method of amortizing transfer tax against annuitant is not applicable thereto. 124Misc672, 209NYS686. **Deductions.**–130Misc312, 224NYS383.

1580–65½–New. and should not be based on actual duration of life tenant's life; 130Misc312, 224NYS383.

1580–66 136Misc318, 242NYS436. But see 130Misc312, 224NYS383; 133Misc834, 234NYS119. **Where right, estate, or interest** depends upon condition or contingency, tax should be imposed at highest rate. 327 Ill 72, 158NE373.

1580–66½–New. Where person to whom income of testamentary trust estate was given for life was also given such part of principal as trustees might deem necessary for her comfortable support, whole of principal and of income was properly regarded as basis of security required to be given for payment of ultimate tax on transfer of both income and principal as against executor's contention that principal and life estate should be taxed separately, on theory that it was impossible for life tenant to use up all of both life income and principal. 133Misc12, 231NYS46.

1580–67 130Misc298, 224NYS287; 136Misc322, 242NYS441.

1580–67 In valuing property transferred to beneficiary, appraiser should report value of temporary life estate till age of twenty five, as against such beneficiary. 125Misc787, 211NYS537. **Remainder over to life tenant's issue, or, if no issue, then to named church,** is taxable at full undiminished value under statute imposing tax on transfer of contingent estates. 223AppDiv407, 228NYS458. **Secondary life estate** has been held taxable without deduction of value of primary life estate subject to modification and revaluation. 133Misc834, 234NYS119. **Present value of contingent life estates** should be computed as of date of appraisal. 240NYS842.

1580–67½–New. Where owner of vested remainder predeceased life tenant, remainder is taxable on basis of clear market value as of date of remainderman's death. 127Misc8, 214NYS575.

1580–67⅓–New. Tax on remainder based on happening of "contingency or condition" as of date of appraisal refers to estate which would accrue if precedent estates terminated and remainder accrued on that date. 126Misc695, 215NYS315.

1580–67¼–New. Value of remainder interest, for purpose of determining collateral inheritance tax on testator's transfer of remainder interest subject to life estate, is determinable as of time of termination of life estate, when devisees came into possession, and not as of time of testator's death. 156Md94, 143A661.

1580–67½–New. Where will left residuary estate in trust during lives of testator's son and grandson, and directed that income be paid to son during life, and on his death to said son's issue until termination of trust, and that on death of son and grandson principal should be paid to such persons as son should by his will appoint, and in default of such appointment to issue of son per stirpes, it has been held that transfer tax, computed on remainder interest as though remainder were added to value of surviving life estate of grandson, was excessive, since division of principal was to be made after death of both son and grandson. 132Misc180, 229NYS804.

1581–67¼–New. Valuation for transfer tax of life estate by deducting present value of annuities and specific bequest has been held improper, where testator's widow elected to accept benefits under separation agreement. 133Misc428, 232NYS672.

1580–67½–New. Certificate of superintendent of insurance respecting value of life estates and annuities is conclusive on appraiser and surrogate. 137Misc80, 243NYS121.

1580–67¼–New. Order assessing against trustee tax on contingent temporary life estate in entire residue held erroneous. 240NYS842.

1580–67½–New. Personal estate **not** otherwise disposed of, descends as intestate property and is improperly taken into account in determining tax. 338 Ill 145, 170NE276.

1580–67 1/10–New. Value of remainder should be found by deducting value of life estate from value of corpus of trust. 135Misc658, 240NYS706.

1580–68 23 OhA74, 155NE395.

1581–70 125Misc787, 211NYS537 (in case of closely held corporation, bank value of stock is prima facie controlling element in its valuation); 20 OhA166, 151NE780; 123 Or286, 261P893, 57ALR1155. **"Actual market value" means actual value** where stock of corporation is closely held and is fixed only for purpose of taxation by authority vested with power to appraise it. 20 OhA166, 151NE780. **Cash dividends on stock not criterion** by which property should be valued. 20 OhA166, 151NE780. **Earning capacity of corporation** whose stock is closely held is not proper basis for determining value of stock. 20 OhA166, 151NE780. **In case of closely held corporation,** isolated sales of shares of stock are not conclusive evidence that selling price was market value of stock. 125Misc787, 211NYS537; 211NYS540. Isolated sale more than five months after decedent's death does not establish market value. 125Misc373, 211NYS541. Resort to books held proper. 211NYS540. Shares should be appraised at book value, where sales are infrequent. 125Misc373, 211NYS541. **Where stocks are closely held,** proof of actual sales before decedent's death for one hundred and seventy five dollars per share will authorize reduction from two hundred and nineteen dollars to lower amount. 128Misc353, 219NYS487. **Elements to be considered in determining market value.**–23 OhA74, 155NE395. **"Book value"** cannot be taken as marked value. 23 OhA74, 155NE395. Book value is prima facie true value and best basis for determining value unless it would lead to unreasonable inequitable result. 123 Or286, 261P893, 57ALR1155. **Method of computation.**–123 Or286, 261P893, 57 ALR1155. **Corporate assets** of unlisted stock has been held proper basis for determining value. NJPrerog 145A727 (2dcase).

1581–71½–New. That stock was quoted at two and one-half seven years before decedent's death, without further sales thereof, does not show that it was valueless. 222AppDiv69, 225NYS339.

1581–71½–New. Dividends and interest accruing after decedent's death should not be included in value of stock for transfer tax. 222AppDiv69, 225NYS339.

1581–72 126Misc695, 215NYS315; 131Misc778, 228NYS651; 137Misc107, 243NYS232; 136Misc843, 244NYS139; 298Pa405, 148A496. **Amounts due wife under antenuptial agreement,** to be paid within period of five years after husband's death, held not deductible. 75Mont186, 243P589, 44ALR1470. **Debts of deceased nonresident** due to resident creditors are deductible in full from New York assets pro rated between taxable and nontaxable assets. 125Misc373, 211NYS541. **Nonresidents.**–133SC406, 131SE142. **Allowance of joint and several claim** is not conclusive as judgment and only amount due from deceased payor is deductible. 199Cal 107, 248P248. **Discharged portion of joint and several note** of deceased and her brother, who before assessment had paid one half thereof, should not be deducted. 199Cal 107, 248P248. **In New York.**–126Misc695, 215NYS315. **No deduction allowed where estate of nonresident passed by power of appointment in his ancestor's will,** as such special estate cannot be charged with general debts of estate in any case, as title never vested in deceased. 127Misc782, 216NYS519. **Only debts in actual existence** are deductible. 199Cal 107, 248P248. **Tax-free bonds not deductible.**–Alta [1928] 3DomLR106. **Parol evidence** has been held admissible to show debts of estate. 12LaA2, 1248843. **Taxes not due and payable** at time of decedent's death did not constitute debts of decedent. 136Misc690, 241NYS766. **General debts and administration expenses are not deductible** from subsequent assessment of after-appraised assets coming to estate. 13PaDist&Co 355. **Law prohibiting deduction for liability for use of property outside state** from transfer tax does not apply to life tenant whose interest terminated at death. 136Misc843, 244NYS139.

1581–73 In New York.–125Misc373, 211NYS541.

1581–74 137Misc107, 243NYS232 (so much as could not be paid from estate); 298Pa405, 148A496. But see 133SC406, 131SE142. **Family allowance** paid during administration is proper deduction. 33Wyo 317, 239P286. **Expense of continuing decedent's business** under authorized order of court, including salary of manager and extraordinary fee under statute, is proper deduction. 37Wyo 313, 261P130. **Amount due on real property outside state** properly disallowed as deduction. 135Misc728, 241NYS91. **Construction of statute** prohibiting deduction with respect to property without state. 241NYS90. **Expenses on real property outside state** improperly disallowed as deduction. 241NYS90.

1582–75 338 Ill 145, 170NE276. **Payments in compromise of litigation** not allowed as expense. 338 Ill 145, 170NE276. **Sum paid to settle will contest** is not deductible. 84Colo 1, 267P191. **Where executor is sole legatee,** fees as executor are not deductible. 84Colo 1, 267P191.

1582–77 NJ 147A860 (reasonable sum as commissions); 98NJEq318, 129A258 (commission not deductible); 125Misc321, 209NYS684; 135Misc256, 237NYS102 (trustee's commissions); 135Misc435, 237NYS628; 136Misc335, 240NYS405. But see 137Misc80, 243NYS121. **Trustee's commissions on several trust funds deductible.**–125Misc787, 211NYS537 (in determining transfer tax).

1582–78½–New. In computing proportionate deductions nonresident decedents' realty should be included for transfer tax purposes. 215AppDiv202, 213NYS266.

1582–78½–New. Decedent's interest in vested remainder received by executor several years after death should be dis-

counted at six per cent per annum for period between its accrual and payment. 127Misc8, 214NYS572.

1582-78¼-New. Statute taxing transfer of contingent remainders without deduction for intervening estate held to require assessment of contingent remainders without deduction of life estate. 219AppDiv656, 220NYS325.

1582-78½-New. Federal inheritance taxes should be deducted before assessment of legatees and devisees under Inheritance Tax Law. 134SC261, 132SE 37.

1582-78¼-New. Fractional interest.-Under statute taxing property passing under power of appointment as though devised by donee's will, deduction because interest transferred is fractional should be made. 221AppDiv116, 222 NYS645.

1582-78½-New. Exemption allowed to widow improperly disallowed as deduction. 135Misc728, 241NYS91.

1582-78¼-New. No deduction allowed for sales commission from value of lessor's estate in ninety-nine year lease. 27OhNPNS333.

1582-78½-New. Transferee's exemption should be deducted from aggregate after totaling net value of assets. 137Misc 107, 243NYS232.

1582-78 1/10-New. Widow's dower interest in property decedent had contracted to convey allowable as deduction. 135 Misc728, 241NYS91.

1582-79 327Ill 547, 158NE561.

1582-80 But see 268US473, 45SCt603, 69Led1058, 42ALR316. **In California.**-268US137, 45SCt424, 69Led884. **In Minnesota.**-175Minn310, 219NW153.

1582-81 258Mass253, 154NE844 (the same rule is applied to present federal tax on estates).

1582-82 In California.-268US137, 45SCt 424, 69Led884. **Federal estate tax** is deductible. 267Mass338, 166NE852; NJ Prerog 146A361. Contra 134Misc203, 234NYS297.

1582-82½-New. In Wyoming federal estate tax is proper deduction. 33Wyo 317, 239P286.

1582-82½-New. In Massachusetts it is held that revenue tax of United States is charge upon net estate and not on succession resulting from death therefore state inheritance tax is levied upon succession only after deduction of federal tax. 258Mass253, 154NE844.

1582-82¼-New. Under statute imposing estate tax, in addition to inheritance tax, equal to percentage of federal tax allowed as credit, estate tax is equal to full credit allowed by statute without deduction on account of inheritance tax, though inheritance tax exceeds such credit. 195NCS11, 143SE841.

1582-83 Amendment.-70Utah409, 260P 859. **Ambiguity in appraisement** held not ground for setting it aside where explainable and without prejudice. 70 Utah409, 260P859.

1582-84 267Mass338, 166NE852; 132 Misc890, 230NYS722; 5PaDist&Co 540; 13PaDist&Co 355. **Failure of state tax commission to contest issue clearly presented in tax proceeding** does not change conclusive effect of order. 220AppDiv 34, 220NYS439. **Where part of federal estate tax deducted is refunded,** additional legacy tax on part refunded is not authorized. 267Mass338, 166NE852. **Proceedings are not conclusive** on questions other than taxation. CalA 289P 892.

1582-85½-New. Proceeding in county court held not conclusive on construction of will except for payment of tax. 194 Wis428, 216NW840.

1582-86 207Iowa100, 222NW361; Mass 169NE139; 220AppDiv34, 220NYS 439; 132Misc204, 229NYS826; 130Misc 806, 224NYS604. See also 11PaDist&Co 573. **Evidence held to justify** modification of appraiser's valuation of stock. 211NYS540. Valuation of stock in closely held corporation at less than appraiser's valuation. 125Misc787, 211 NYS537. **Appeal from tax assessed by comptroller** held not limited to questions of computation but includes questions of jurisdiction and liability. 100NJEq273, 134A552. **Mistake of law.**-220AppDiv 34, 220NYS439. **Error of fact or clerical error** in imposition of tax. 220AppDiv 34, 220NYS439. **Pro forma tax order, appealed from only by executor, held res judicata on tax commissioner.** 219App Div5, 219NYS239. **Property omitted from appraisement.**-127Misc799, 217NYS 700 (modification allowed). **Statute held not to entitle commissioner of public accounts** to rehearing. 148Va97, 138SE 650. **Voluntary payment** held no bar to proceedings. 148Va97, 138SE650. **Order temporarily taxing surviving life estate** must be modified on death of primary life tenant. 133Misc334, 234NYS 119.

1583-87 98CalA714, 277P759; 8PaDist &Co 443. **In absence of statute,** no right of review of acts of tax officials involving discretion exists. 220AppDiv549, 222 NYS96. **In Pennsylvania.**-13PaDist&Co 106.

1583-88 But see 14PaDist&Co 77. **Executrix has right to move to vacate pro forma order** fixing transfer tax, and is not compelled to appeal from order. 132 Misc204, 229NYS826.

1583-89 100NJEq273, 134A552 (appeal from assessment by comptroller dismissed where not taken in time); 300 Pa299, 150A466; 13PaDist&Co 106; 196 Wis260, 219NW203. **Notice of appeal failing to specify grounds thereof** raises no question for review. 218AppDiv278, 218NYS131. **Tax commission which failed to raise question of insufficiency of notice of appeal below** held in no position to raise question on appeal from order amending notice. 218AppDiv278, 218NYS131. **Failure to object to insufficient notice of appeal** waives objection thereto. 246NY498, 159NE410. **Dismissal of appeal** because tax had been paid before appeal was taken has been held error. 300Pa299, 150A466. **Order amending nunc pro tunc notice of appeal** from order assessing transfer tax is erroneous as extending time for appeal. 228AppDiv522, 240NYS448.

1583-90 219AppDiv5, 219NYS239 (questions raised in notice of appeal only are reviewable); 133Misc42, 231NYS 191; 134Misc868, 237NYS290 (surrogate is not limited to evidence which was before appraiser nor is he bound to consider additional evidence before him); 148Va97, 138SE650. See also 133Misc 152, 231NYS408; 298Pa405, 148A496. **Appellate court will not reverse** finding that transfer was in contemplation of death where evidence and inferences therefrom justify conclusion. 71CalA 324, 235P54. **Courts review acts of taxing bodies** only when they transcend jurisdiction. 220AppDiv549, 222NYS96. **Timely filing of application for reduction** assumed on appeal where no objection appears on records. 148Va97, 138SE 650. **Where defect appears on record,** question of timely appeal may be first raised on appeal. 148Va97, 138SE650. **Chancery court may determine and fix true value of estate** to ascertain correct amount of tax. 149Miss785, 115S893. **Burden is on objectors** to prove by clear preponderance of evidence that appraisement is too high. 70Utah409, 260P859. **Finding, upholding appraisement,** held supported by evidence. 70Utah409, 260 P859. **Propriety of court's order for continuance of decedent's business** cannot be questioned on appeal from order determining tax. 37Wyo 313, 261P130. **Sufficiency of record.**-37Wyo 313, 261P 130. **Only grounds specified in notice of appeal** may be considered. 133Misc 768, 234NYS299; 134Misc203, 234NYS 297. **Comptroller's appraisal of corporate stock will not be disturbed** unless he erred as to facts or in point of law. NJPrerog 148A731.

1584-92½-New. Acts of tax commission may not be pronounced invalid, unless they amount to patent abuse of discretion. 133SC406, 131SE142.

1584-92½-New. On appeal from decision of state tax commission assessing inheritance tax court is only concerned with whether acts of commission may be pronounced invalid as matter of law. 133SC406, 131SE142.

1584-92¼-New. Transfer tax assessment set aside where clearly against weight of evidence. 98NJEq318, 129A 258.

1584-92½-New. Question on appeal is merely whether securities transferred are taxable as part of estate and not as to title. 6PaDist&Co 520.

1584-92½-New. By statute tax proceeding is before ordinary and subject to review on certiorari. 99NJEq825, 134A 646.

1584-92½-New. Petition in equity to set aside appraisal and for reappraisal is not authorized in some jurisdictions. 208 Iowa295, 225NW378.

1584-92½-New. Costs of appeal.-Where beneficiaries under will of decedent obtain substantial reduction in tax assessed on appeal to district court from assessment of inheritance taxes by county court, they should not be taxed with costs in district court. 117Nebr854, 223 NW633.

1584-92½-New. Evidence held to sustain finding of appellate court as to value of land for inheritance tax purposes. 117Nebr854, 223NW638.

1584-92 1/10-New. Affidavit of executors as to purpose of corporation is admissible in evidence on appeal on issue of exemption. 133Misc768, 234NYS299.

1584-92 1/11-New. Statute fixing time for filing objections to appraisal is statute of limitations. 208 Iowa295, 225NW378.

1584-92 1/12-New. Judgment of county court fixing amount of tax can be declared erroneous only by county court itself on rehearing or by appellate court. 197Wis549, 222NW805.

1584-92 1/13-New. Interest.-Where tax is paid promptly upon levy, no interest upon tax is collectible, notwithstanding delay, if delay in levy is not attributable to executors or estate. 103NJEq543, 143 A764.

1584-92¼-New. Petition for reassessment of inheritance taxes on remainder warranted hearing. 339Ill333, 171NE 183.

1584-92 1/16-New. Commissioner of taxation after having made certification of amount of succession tax due is not required to make further determination or certification. Mass 169NE139.

1584-92 1/16-New. Certiorari will not lie to review disallowance of claims claimed to be deductible from estate for purpose of tax. 179Minn233, 228NW920.

1584-93 La 129S801; 227AppDiv554, 238NYS678. **Direction to pay transfer tax out of trust income set up after testator's death** is illegal. 227AppDiv554, 238NYS678. **Liability of executor to refund taxes erroneously paid out of funds.**-137Misc844, 244NYS640.

1584-94 See also 11PaDist&Co 311.

1584-95 Computation of interest where payment made before amount determined.-198Cal 77, 243P436.

1584-95½-New. Statutes relating to paying inheritance tax before distribution are primarily for protection of executor or administrator. 100Vt217, 136 A389.

1584-95½-New. In action on bond value of estate and amount of duty held conclusive. Alta [1926] 4DomLR874, [1926] 3WestWkly461.

1584-95¼-New. State treasurer may petition for appointment of special administrator to determine whether gift made before death was taxable, where no application for administration is made within sixty days after death. 31Ariz 252, 252P515.

1584-95½-New. Failure of personal representative of deceased nonresident mortgagee to obtain statutory certificate of attorney-general and pay tax does not deprive court of jurisdiction to render judgment of foreclosure. 170Minn383, 212NW905.

1584-95½-New. In New York comptroller is without authority to deposit tax in bank to credit of estate till order assessing tax is framed in compliance with statute. 245NY88, 156NE625.

1584-95½-New. Where life estate of trust is created with gift over, tax is payable out of principal of fund with no recoupment from income. 133Misc 812, 234NYS99.

1584-95½-New. Direction in will to pay tax does not override statutory provi-

sion for payment out of legacy. Sask [1928] 1DomLR182.

1584-95½-New. Where estate of transferee who predeceased transferor in transfer to take effect in possession or enjoyment after death paid tax on transfer, amount should be credited in determining amount to be paid on transferor's death. 131 Or597, 282P760.

1584-95½-New. Provision in will for payment of tax out of residue inapplicable to real estate conveyed prior to death of testator. 14PaDist&Co 77.

1584-96 204 Iowa1067, 216NW772; 132 Misc527, 229NYS516; 225AppDiv782, 232NYS70; 26 OhNPNS362; 148Va97, 138SE650. See also 8LaA741. **What law governs.**-132Misc527, 229NYS516. **Voluntary payment.**-196Wis242, 219NW 197. **In California.**-196Cal 114, 236P 144. **Application for refund** of alleged excess of inheritance tax paid construed to be application under Tax Inheritance Acts. (1917 & 1921) § 11 subd 3. 196 Cal 114, 236P144. **Complaining party alleging amount** of order fixing inheritance tax was erroneous does not have election of remedies between Tax Inheritance Acts (1917 & 1921) § 11 subds 3 & 4. 196Cal 114, 236P144. **County treasurer** should not pay refund without court order. 196Cal 114, 236P144. **Taxes voluntarily paid without protest** may not be recovered back, though illegally assessed. 21 OhA412, 153NE225. **Procedure fixed by statute.**-148Va97, 138SE 650. **Voluntary payment** held no bar to recovery. 148Va97, 138SE650. **Irregularity** in taxing solvent creditors of estate instead of beneficial interest is not ground for recovering taxes. 206Cal 240, 273P1066. **Statute authorizes recovery of excess only** and not entire tax. 226AppDiv395, 235NYS520. **Remedy provided by Inheritance Tax Law** is exclusive. 198Wis381, 223NW856. **Where executors fail to seek refund,** county is not liable in conversion action brought six years later. 42F(2d)21. **Letter reserving right of refund** must be construed with statutes in determining liability of county for conversion. 42F (2d)21. **Legislature can recognize moral obligation to repay tax previously collected** where statute relating thereto was held unconstitutional. Wis 230NW698. **In Pennsylvania.** 13PaDist&Co 106. **Statute held valid.**-Wis 230NW698. **Executor voluntarily paying estimated tax in advance of transfer tax proceeding** cannot recover amount by which payment exceeded amount payable. 137 Misc844, 244NYS640. **Necessity of enabling statute.**-Pa 151A692 (decedent of another state). **Burden on claimant** to show state exacted taxes which were illegal. Va 155SE635.

1584-97 111Conn594, 151A252; 127 Misc659, 217NYS210 (on deposit made for tax on contingent remainder); 128 Misc4, 217NYS583 (general statute as to refund without interest held not to apply to refunds on difference in rates on contingent estates); 218AppDiv436, 218 NYS551. But see 195Wis366, 218NW 440, 57ALR352; 198Wis381, 223NW856. **Difference between highest and lowest rate on contingent remainders draws interest on refund,** despite statute that no interest is to be paid on refunds on illegal collection. 219AppDiv141, 219NYS 259. **Interest is not allowed on voluntary payment** without court order to secure benefit of five per cent discount and avoid ten per cent interest penalty when such payment is refunded after delay not caused by state. 127Misc659, 217NYS 210. **Interest is not allowed on recovery of deposit** made for tax on remainders subject to power of appointment. 219 AppDiv184, 219NYS878. **Interest is not recoverable** where tax order on contingent remainder did not fix tax at lowest rate, in proceedings to recover difference between highest and lowest rates. 219 AppDiv141, 219NYS259.

1585-98 Time of pendency of appeal from order fixing inheritance act is not counted in determining time under Tax Inheritance Acts (1917 & 1921) § 11 subd 3 within which modified order may be made. 196Cal 114, 236P144. **In California.**-196Cal 114, 236P144.

1585-99½-New. Questions considered on application.-21 OhA412, 153NE225.

1585-99½-New. Estate held entitled to interest on deposit on contingent remainders. 130Misc88, 222NYS529.

1585-99¼-New. County, not state, must refund part of inheritance tax collections retained by county under illegal statute. 195Wis366, 218NW440, 57 ALR352.

1585-99½-New. Statute providing for refund of inheritance taxes illegally or erroneously collected applies to voluntary payments if refund is applied for within year. 195Wis366, 218NW440, 57 ALR352.

1585-99½-New. Under statute allowing refund for debts proved against estate after payment of tax, difference between appraised value and sale value is not debt and cannot be allowed. 26 OhNP NS362.

1585-99½-New. Difference between estimated and actual cost of administration is such debt. 26 OhNPNS362.

1585-1 See also 230NYS71. **Statutory prohibition of transfer of personalty prior to payment of tax** held applicable only to property within state. 148Va 97, 138SE650. **Tax held enforceable only in rem or** in personam on subjects within state. 148Va97, 138SE650. **Comptroller cannot deposit transfer tax** in depositary to credit of estate taxed till order assessing tax is framed. 245 NY88, 156NE625.

1585-3 160Tenn170, 22SW(2d)229 (where taxpayer fails to pursue remedy to determine liability). **Parties.**-Utah 269P103. **Burden of proof.**-NJSup 134 A118; Utah 269P103. **In suit to collect taxes against executor,** beneficiaries in remainder need not be joined. 99NJ Eq825, 134A646. **Sufficiency of evidence.**-NJSup 134A118; Utah 269P103. **Jurisdiction.**-Utah 269P103. **Complaint.**-Utah 269P103. **Matters which should be determined include** question of apportionment of tax between life tenant and remainderman and present liability of executors for entire tax as well as tax on contingent remainder. 160Tenn170, 22 SW(2d)229.

1585-4½-New. Tax laws of one state cannot be enforced in another state. 136Misc51, 240NYS393.

1585-5 247NY307, 160NE380. See also 227AppDiv554, 238NYS678. **Lien of state transfer tax is not released on specific property** by testator's direction that all taxes be paid out of residuary estate. 252NY159, 169NE124.

1586-6 See also 284Pa200, 130A426.

1586-7 See also 284Pa200, 130A426. But see 252NY159, 169NE124.

1586-7½-New. Lien is not enforceable in state to which property is removed. 136Misc51, 240NYS393.

1586-7½-New. Under statutes, alienation of property prior to payment of tax is not prohibited, but title acquired is subject to tax. 169La75, 124S150(2d case).

1586-13 Statutes expressly provide in some jurisdictions that no undertaking shall be required from or costs charged against state controller in proceeding. 197Cal 67, 239P718. Under such statute costs of appeal cannot be recovered against controller. 197Cal 67, 239P718.

1586-14 13LaA371, 128S66.

1586-15 In Pennsylvania.-289Pa33, 137 A111.

1586-16 158La911, 105S10. **Delay in payment due to error in office of comptroller** held not to warrant recovery of interest. 103NJL600, 134A776.

1586-18 NJ 137A562.

1586-19 196Cal 366, 237P1074; 158La 911, 105S10; NJ 137A562; 218Misc159, 218NYS389 (unavoidable). **Under some statutes courts are vested with discretion** relative to interest on inheritance tax. 158La911, 105S10. **Discretion vested in courts relative to interest on inheritance tax is mere legal discretion** to determine course prescribed by law which must be followed. 158La911, 105 S10. **Refusal to impose statutory penalty on heirs of wife** who did not pay inheritance tax on wife's interest in community property until death of surviving husband who had exercised his right to retain possession is not abuse of discretion. 158La911, 105S10. **What is necessary litigation.**-196Cal 366, 237P1074, 1078. **Delay caused by error in comptroller's** office not attributable to executors or estate is excused so that interest is not collectable. NJ 131A289. **Failure of comptroller's office to make property statement.**-NJ 137A562. **Procedure.**-128Misc159, 218NYS387. **Power of surrogate, under Tax L. § 223,** is limited to reducing penalty to six per cent for delay specified. 128Misc159, 218NYS389. **Necessary litigation includes good faith appeal** from order fixing inheritance tax. 196Wis242, 219 NW197.

1587-21½-New. Disposition of taxes. Legislature is empowered to control disposition of tax funds, unless appropriated by Constitution to particular uses. 181Ark609, 27SW(2d)102.

1588-30½-New. Statute rendering inadmissible stock certificate at time of transfer of which no tax was paid applies only where person seeking to introduce same is guilty of failure to pay. 129Misc424, 222NYS348.

1588-30½-New. 129Misc424, 222NYS 348.

1588-30¼-New. Thus donor of stock, not donee, is required to pay tax, and on his failure to do so, donee may nevertheless introduce same in evidence notwithstanding tax was not paid at time of transfer. 129Misc424, 222NYS 348.

1588-30½-New. Where decedent, in making gift to his widow of securities in safety deposit box by delivery of keys of box, failed to affix stock transfer stamps to certificates as required by statute, his widow should not be penalized for such failure. 133Misc758, 234NYS311.

1588-30½-New. 129Misc424, 222NYS 348.

1588-32 Money raised to create special fund should not be expended for any other or different charge. 143Wash385, 255P360. **In South Dakota.**-48SD608, 205NW614 [citCyc], 43ALR397.

1589-33 NM 290P1017; 194Wis464, 215NW902. See also 11PaDist&Co 35. **Powers to tax and to apportion taxes are inseparable.**-181Ark609, 27SW(2d) 102.

1589-37 99Fla65, 126S308 (legislature has wide discretion in apportionment and application of proceeds).

1589-37½-New. Appropriation of state taxes to be distributed to towns as reimbursement for tax loss by exemption of timber within town from taxation is not unconstitutional. NH 149A321.

1589-37½-New. State tax may be appropriated to state educational department for aid of poorer towns. NH 149 A321.

1589-39 Compensation.-Utah 285P1001.

1589-40 In Mississippi.-148Miss384, 114S617.

1590-44 103NJL60, 134A757.

1591-49 Proximate cause of loss of deposit in insolvent bank held to be the wrongful payment by county treasurer to city treasurer. Iowa 231NW428.

1591-57 155Md217, 141A554; 194Wis 464, 215NW902.

1592-62½-New. Where property is sold to satisfy delinquent taxes and struck off to county in absence of bidders, county is not accountable to taxing districts for amount of taxes till redemption or till tax certificate is assigned, 55ND1, 212NW217.

1592-62½-New. but as to tax debtor and property liable by operation of law tax is paid. 55ND1, 212NW217.

1592-66 State tax collector cannot maintain suit against county to recover amount due city for ad valorem taxes collected. 157Miss404, 128S348. **Statute did not confer right to maintain suit for city** against county to recover taxes collected. 157Miss404, 128S348.

1594-76 148Miss384, 114S617; 78Mont 156, 252P805, 807 [quotCyc]; 56ND41, 216NW212. **Where county treasurer collected city tax** under statute, city held entitled to full amounts collected. 78Mont156, 252P805. **Statutes held valid.**-56ND41, 216NW212.

1594–77 148Miss384, 114S617; 78Mont 156, 252P805, 807 [quotCyc].
1594–78 78Mont156, 252P805, 807 [quotCyc].
1594–78½–New. Statutory provisions as to disposition of penalties control those of city charter. 105 Okl 271, 232 P438.

TAXPAYER

1597–8 NJSup 143A73.

TELEGRAPHS AND TELEPHONES

1610–50 20F(2d)103.
1610–51 55AppDC23, 299Fed890. **Public service corporation.**–199Cal 185, 248 P669, 47ALR811.
1610–52 **Telephone business** is impressed with public use. 315Mo 1056, 287SW466.
1610–54 Me 151A440.
1610–57 Okl 287P706 (physical connection to permit continuous transmission of messages). **Property used in telephone business** is dedicated to public use. 315Mo 1056, 287SW466.
1611–58 Me 151A440.
1611–61 20F(2d)103; 38F(2d)511; 192Wis464, 213NW469. **Farmers' mutual telephone company organized as private corporation** may be treated as public utility, required to obtain certificate of public convenience and necessity, before invading field of another under statute, notwithstanding noncompliance with provisions of public utility act. 192Wis464, 213NW469.
1611–65½–New. Constitutional requirement for transmission by all telephone and telegraph lines of each other's messages is mandatory. Okl 287P706.
1611–66 116Nebr633, 218NW583. See also 155Tenn455, 294SW1099, 1101 [quotCyc].
1611–67 20F(2d)103. See also 155Tenn 455, 294SW1099, 1101 [quotCyc].
1611–68 See also 155Tenn455, 294SW 1099, 1101 [quotCyc].
1611–69 155Tenn455, 294SW1099, 1101 [quotCyc].
1611–70 155Tenn455, 294SW1099, 1101 [quotCyc].
1612–71 155Tenn455, 294SW1099, 1101 [quotCyc].
1612–72 155Tenn455, 294SW1099, 1101 [quotCyc].
1613–73 155Tenn455, 294SW1099, 1101 [quotCyc].
1613–78 **Franchise is subject to forfeiture for nonpayment of tax.**–200Cal 546, 253P1108. **Statutes granting franchise are sufficiently accepted** by telegraph company building its lines within state. 200Cal 463, 254P258.
1614–79 **Rights acquired by acceptance of statute are vested rights.**–200Cal 463, 254P258. **Grant resulting from acceptance of statute** constitutes contract between telegraph company and state secured against impairment by state legislation. 200Cal 463, 254P258.
1615–94 200Cal 546, 253P1108.
1615–2 229Ky843, 18SW(2d)305.
1616–13½–New. **Telegraph company operating under valid franchise** from state cannot be forced to take out new franchise from city and become obligated to such city for large sums of money as such franchise is void for duress. 213AppDiv578, 211NYS262.
1616–13⅓–New. **Existing line no ground for refusal** to sell purchase. 220 Ky297, 295SW146.
1616–13¼–New. Franchise ordinance may not be reformed to correspond to agreement of parties for fraud or mistake in absence of pleading and proof of preëxisting agreement. 229Ky843, 18 SW(2d)305.
1616–13⅕–New. Telephone company can serve only territory embraced in certificate of convenience and necessity. 336 Ill 158, 167NE860.
1616–13⅙–New. Petition in action to compel acceptance of bid for franchise on expiration of prior franchise held to allege arbitrary action in rejecting bid. 235Ky234, 30SW(2d)960.
1617–24½–New. Contract for sale of telephone business does not embrace certain line, not included in delivery of property accepted, and apparently not contemplated in sales contract. 220Ala 127, 124S294.
1617–30 TexCivA 282SW912.
1618–31 129Misc591, 222NYS104.
1618–33 **Franchise to local company not void for want of consideration** because of statute authorizing another company to erect long distance poles and wires in city subject only to municipal authority under statute. TexCivA 282SW912. **In absence of express grant of exclusive right** by franchise ordinance to telephone company to use streets, any such grant must be ascertained by implication from ordinance. TexCivA 282SW912. **Local franchise to copartnership not void for want of consideration** where authority to set poles and wires in streets is subject to consent of town. TexCivA 282SW912. **Assignees of franchise contract** are also bound thereby. TexCivA 282SW912.
1618–39½–New. **In Canada,** where telegraph company enters upon right of way of railway owned by crown and erects poles and wires with consent of responsible minister of crown and officers of railway who acquiesce in occupation, it is licensee and cannot be ejected as trespasser. [1929] 2DomLR641.
1618–39⅓–New. Penal ordinance making it unlawful to maintain telephone poles in street without city franchise held invalid as to telephone company whose franchise had expired. 235Ky 234, 30SW(2d)960.
1618–39¼–New. Construction of deed conveying exclusive right to erect and maintain poles. Mass 173NE502.
1618–41 6PaDist&Co 470.
1619–48 315Mo 1056, 287SW466, 469 [citCyc]. **Knowledge of rule or regulation.**–CalA 291P445.
1619–50 TexCivA 281SW877; TexCivA 28SW(2d)207.
1621–68½–New. Finding that mortgagor did not contract with party paying taxes to divide land or proceeds if tax title were canceled held not clearly against evidence. 171Ark543, 284SW 769.
1621–79 See also Wis 231NW184.
1621–80 33F(2d)770.
1621–85 33F(2d)770 (no public interest involved). **Construction of lease.**–163Ga 254, 135SE740 (provisions as to compensation to be paid by lessor for lines constructed or acquired by lessee and as to duty and liability of lessee as to maintenance).
1621–85½–New. Lease making no reference to franchise of telephone system or to change of possession of any property except switchboard loaned to telephone company does not establish relation of landlord and tenant nor right to recover telephone system from company as tenant holding over. 84 IndA486, 151 NE431.
1621–85⅓–New. Remedy in such case on expiration of contract is in replevin and not against telephone company as tenant holding over. 84 IndA486, 151 NE431.
1621–85¼–New. Fact that one telephone company or its stockholders had acquired majority of stock of another telephone company would not have effect of consolidating or unifying two companies. 227Ky778, 14SW(2d)162.
1621–85⅕–New. The rule is otherwise where public interest or convenience is impaired. 33F(2d)770.
1623–94 200Cal 463, 254P258. **Statute including telegraph companies within act to regulate commerce** held not to modify scope of Post Roads Act as to special government rates for service. 275US415, 48SCt198, 72Led345.
1623–3 200Cal 463, 254P258.
1623–4 200Cal 463, 254P258.
1625–19 200Cal 463, 254P258.
1625–19½–New. By act of congress and its acceptance by telegraph company latter becomes instrumentality of United States in carrying out its governmental functions. 200Cal 463, 254P258.
1625–21 209Ky756, 273SW481 (cables not obstructing ordinary navigation must not be negligently broken as by dredgor, and if so broken by one knowing its location owner may recover damages).
1626–29 220Ky297, 295SW146 (statute held not repealed).
1629–61 199Cal 185, 248P669, 47ALR 811; Ind 171NE65 (Public Service Commission's jurisdiction over telephone company's petition to purchase competitor's stock); 87 IndA59, 160NE48; 315 Mo 1056, 287SW466 (statute merely declaratory of common-law obligations). **Telephone business is not defined** by statutes in some jurisdictions. 315Mo 1056, 287SW466. **In fixing valuation,** refusal of department of public works to add going concern value is not deprivation of property without due process of law. 148Wash395, 269P6. **Telegraph companies cannot be regulated by same rule,** mode, or prescription that railroads and other common carriers are regulated. 96Fla392, 118S478(2dcase). Denial of fair hearing in issuing certificate to competing telephone exchange is not established by denial of certificate to other companies. 38F(2d)511 (omission of word "public" does not invalidate certificate).
1629–63 116Nebr633, 218NW583; 192 Wis464, 213NW469. **Powers of railroad commissioners.**–199Cal 185, 248P669, 47 ALR811; 96Fla392, 118S478(2dcase); Okl 287P706; 93PaSuper373; 192Wis 464, 213NW469. **Review of action of public service commission by courts.**–116 Nebr633, 218NW583; 102WVa296, 135 SE833. **Commission supervising public utilities department** has jurisdiction to consider complaint against telephone company for refusal of service. 262 Mass137, 159NE743, 56ALR784. **Appeals from orders of public utilities department.**–262Mass137, 159NE743, 56 ALR784. **Commerce commission,** assigning territory to be served by two companies, must protect each from invasion by others. 336 Ill 158, 167NE 860. Commerce commission acted within proper scope in ordering company to desist from invading another's territory. 336 Ill158, 167NE860. **Valuation of property** not including value as going concern may be sufficient though going concern value is not considered. 148 Wash395, 269P6. **Corporation commission.**–143 Okl 76, 291P3.
1629–65 **Court's jurisdiction as to regulation is suspended** till railroad commission designated by legislature to exercise such control has acted. 192Wis 464, 213NW469.
1629–66 200Cal 463, 254P258. **Subject to reasonable control.**–262Mass137, 159 NE743, 56ALR784. **Whether order is reasonable** is question of law. 262Mass 137, 159NE743, 56ALR784. **Order held unreasonable.**–262Mass137, 159NE743, 56 ALR784. **Mutual companies.**–323Mo 818, 19SW(2d)1048.
1630–71 **In fixing reproduction value** deductions should be made for wear and tear, obsolescence or inadequacy of plant units. 147Va43, 136SE575.
1630–72 200Cal 463, 254P258.
1630–73 200Cal 463, 254P258.
1630–74 200Cal 463, 254P258 (powers regulatory and not prohibitory); 96Fla 392, 118S478(2dcase). **Order of state commission in effect entirely suspending doing of intra-state business** over extension of company's line is attempt to exercise power to prohibit and invalid. 200Cal 463, 254P258.
1630–75 200Cal 463, 254P258.
1630–75½–New. **Telephone directories.** –Telephone directory is essential instrumentality in connection with particular service which telephone company offers for public benefit and convenience. 199 Cal 185, 248P669, 47ALR811.
1630–75⅓–New. Railroad commission has jurisdiction to regulate form, content and cost to subscribers of directories used by telephone companies. 199 Cal 185, 248P669, 47ALR811.
1630–75¼–New. It also has power to regulate insertion of advertising matter in telephone directories. 199Cal 185, 248P669, 47ALR811.
1630–75⅕–New. Refusal of radio commission to renew license except as modified as to time of operation should be sustained if time limitation is reasonable. 31F(2d)630 (refusal held unreasonable).
1630–75⅙–New. Refusal of commission

to renew license except as modified is refusal giving applicant right of appeal. 31F(2d)630.

1630-75½-New. Commission, in making orders relative to licenses, is subject to following rule: Administrative orders, quasi judicial in character, are void, if hearing was denied, or if that granted was inadequate or manifestly unfair, if finding is contrary to indisputable character of evidence, or if facts found do not as matter of law support order; it may not capriciously make findings by administrative fiat, as this would be inconsistent with rational justice, and come within constitution's condemnation of arbitrary exercise of power. 29F(2d) 113.

1630-75⅙-New. Order of commission denying license to radio broadcaster, under Radio Act, has been held not void, as arbitrary or against evidence, in view of application of other stations in zone and granting of same frequency to another station. 31F(2d)448.

1630-75⅛-New. Order of commission refusing license for radio broadcasting station, cannot be void, unless arbitrary or contrary to evidence. 31F(2d)448.

1630-75 1/10-New. Radio Act is not invalid, in whole or part, by reason of requirement that applicant for license shall sign waiver of any claim to use of any particular frequency or wave length, or of ether, as against regulatory power of United States, because of previous use of same, whether by license or otherwise. 29F(2d)113.

1630-75 1/11-New. Act, as amended, which requires licenses for radio broadcasting, regulates number of broadcasting stations, limits licenses, and requires renewal thereof, has been held not void as denying due process, or as confiscatory. 31F(2d)448.

1630-75 1/12-New. Operator of radio broadcasting station has burden to show he is entitled to license under Radio Act. 31F(2d)448.

1630-75 1/13-New. Remedy of applicant for radio license from order of commission denying license is by appeal therefrom. 31F(2d)448.

1630-75 1/14-New. Remedy, under Radio Act providing method of review where it is claimed that commission has improperly exercised its power in refusing licenses, should be exhausted by one refused such license as he sought. 29 F(2d)113.

1630-75 1/15-New. Construction of radio plant, and its operation under licenses obtained prior to Radio Act, did not create any property rights which may be asserted against regulatory power of United States, if properly exercised. 29 F(2d)113.

1630-75 1/16-New. Granting of licenses to radio broadcasters under Radio Act does not detract from regulatory power of congress to control broadcasting in public interest, since regulatory power cannot be bargained away. 31F(2d)448.

1630-75 1/17-New. Adequacy of service is determined by public service commission, and courts may not pass on question. MoA 283SW456.

1630-75 1/18-New. Right of appeal from decisions of Federal Radio Commission is statutory. DC 41F(2d)113.

1630-75 1/19-New. Particular orders of Federal Radio Commission held not appealable. DC 41F(2d)113.

1630-75 1/20-New. Applicant has been granted extension of time to complete broadcasting station where not at fault and all circumstances were known to Radio Commission. DC 35F(2d)883.

1630-75 1/21-New. City operating broadcasting station is subject to regulation by Radio Commission even if station is partly used for governmental purposes. 36F(2d)115.

1630-75 1/22-New. Contention of lack of notice of hearings is without merit where applicant for renewal of radio broadcasting license appeared and participated in hearings. 36F(2d)111.

1630-75 1/23-New. Order of Radio Commission denying original or renewal licenses to, and requiring cessation of operation of, portable broadcasting stations, after specified date, is authorized under Radio Act. 36F(2d)117.

1630-75 1/24-New. Questions reviewable on appeal from decision of commissioners denying application for renewal of broadcasting license. 36F(2d)111.

1630-75 1/25-New. Radio broadcasting privileges are subject to reasonable regulatory power of United States, public convenience, interest and necessity being paramount considerations. DC 41 F(2d)422.

1630-75 1/26-New. Rules, burden of proof, admissibility and sufficiency of evidence in hearing of application for renewal of broadcasting license. 36F(2d) 111.

1630-75 1/27-New. There is no fixed right in frequency as against regulatory power of United States. DC 37F(2d)993 (evidence establishing allocation of operating time).

1630-75 1/28-New. Where commissioner, on being charged with prejudice, retired with consent of applicant for renewal of radio broadcasting license, latter's objection to decision by remaining commissioners cannot be sustained. 36 F(2d)111.

1630-76 5F(2d)77 (or through some other agency); 5F(2d)221 (telephone company held entitled to charge temporary rates fixed by federal court without filing schedule as required by state statute); TexCivA 282SW912. **No vested rights are created** by establishment of rates, and they may be changed from time to time at discretion of body having power to fix them. 164Minn279, 204 NW873. Separation of interstate and intrastate business for rate making purposes permissible. 38F(2d)77.

1630-77 116Nebr633, 218NW583; Okl 287P706. **Under the Oklahoma constitution,** etc. See also 143 Okl 76, 291P3. **Minnesota railroad and warehouse commission** may fix reasonable rates for particular localities without making state-wide adjustment of rates. 164Minn 279, 204NW873. **Commission may base findings** and orders on own investigation. 147Va43, 136SE575. **Commission in determining telephone rates** may make its own deductions from facts and need not accept deductions of witnesses. 147Va43, 136SE575. **Court on appeal from order** fixing telephone rates must consider commission's opinion as part of record. 147Va43, 136SE575. **Cost of land** purchased by telephone company for ultimate use, not a financial burden because of increase in value, held not to be included in rate base. 147 Va43, 136SE575. **Salvaged second hand material** should not, in estimating reproduction values, be listed as new material. 147Va43, 136SE575. **Going concern value** of telephone company must be estimated in determining rates. 147 Va43, 136SE575. **All relevant facts** must be considered in determining "gross value" of telephone company for rate purposes. 147Va43, 136SE575. **Ownership by foreign corporation** in stock of local telephone company is relevant in determining rates. 147Va43, 136SE575. **Public service commission.**–317Mo 724, 296SW998; 96PaSuper42. **Review of test rates.**–317Mo 815, 296SW790. **Right to appeal from decision.**–317Mo 815, 296 SW790. **Parties to proceeding to establish rates.**–317Mo 815, 296SW790. **Order of corporation commission** held not to fix rates for services between connecting telephone companies. Okl 287P706. **Powers of commission.**–Okl 287P706. **Suit to enjoin enforcement of rates** imposed by State Public Service Commission is not an invasion of its powers. 36F(2d)54. **Orders of corporation commission.**–143 Okl 76, 291P3. **Determination and refund of excess rate.**–143 Okl 76, 291P3.

1631-79 TexCivA 282SW912.

1631-80 227Ky768, 14SW(2d)162; Tex CivA 282SW912.

1631-83 TexCivA 282SW912.

1632-87 TexCivA 282SW912.

1632-88 6F(2d)663; 36F(2d)54 (seven per cent held reasonable rate of return); 227Ky768, 14SW(2d)162; 120 Oh12, 165NE354. **Power of courts.**–6F(2d) 663; 101WVa378, 133SE144. **Actual depreciation** should be deducted in rate fixing. 5F(2d)77. **Allowance for depreciation.**–6F(2d)663. **Apportionment of overhead of public utility operating interstate** to several states in proportion to direct expenses in those states held not objectionable, in view of expert testimony. 5F(2d)77. **Basis for calculating reasonableness of rates** is fair value of property used by corporation for convenience of public. 5F(2d) 77. **Board of public utility commissioners** after failing for ten years to correct excessive depreciation charges cannot say with retroactive effect that past charges were excessive. 5F(2d)245. **Capital honestly and prudently invested** is not basis on which to figure fair return. 5F(2d)77. **Contracts between public utility and company owning its stock held reasonable and fair.**–5F(2d) 77. **Depreciation for rate purposes** is better shown by physical examination of competent witnesses than by theoretical "straight line method" or "curved line rule." 5F(2d)77, 78. **Depreciation found by physical examination held to be true depreciation.**–5F(2d)77. **"Depreciation reserve fund"** on books of company not actual depreciation for rate fixing. 5F(2d)77. **Equipment for future growth of municipality** is proper item to be included in value of property for rate fixing, where not planned unreasonably in future. 5F(2d)77. **Evidence held to sustain** cost of reproducing manholes, in view of expert testimony. 5 F(2d)77 (in determining rate basis). **Evidence sufficient.**–5F(2d)77. **Expenditures for future needs held not to have been planned unreasonably in future.**–5 F(2d)77. **Expenditures under contract with company owning stock of public utility** may be considered for rate purposes, if reasonable. 5F(2d)77. **Fixing value of property** is not controlled by artificial rules; "it must be reasonable judgment having its basis in a proper consideration of all the relevant facts." 5F(2d)77, 91. **Historical cost in sense of what normally should have been paid** for property is not necessary showing in proving actual cost as element of rate basis. 5F(2d)77. **Inadequate rates cannot be fixed** on theory that past excessive charges for depreciation must be absorbed. 5F(2d)245. **Increase in value of property** is item which should be figured in fixing reasonable rate. 5F(2d)77. **In determining whether rates are reasonable** court should determine proper capitalization after proper allowance for depreciation and expenses. 6F(2d)663. **Just compensation,** safeguarded by 14th Amendment, is reasonable return on value of property used at time it is used for public service. 271US23, 46SCt363, 70L ed 808. **Present value of property** can be determined without evidence of capitalization and bond issue of public utility. 5F(2d)77. **Property used jointly in intra-state and interstate business** should be apportioned between them according to use actually made of it. 5F(2d)77. **Protection against confiscation** does not depend on source of money used to purchase property, it being enough that it is used to render service. 271US23, 46 SCt363, 70L ed808. **Public utility company** cannot be compelled to apply part of property represented by excessive depreciation reserve to overcome defects in earnings and sustain rates otherwise inadequate. 271US23, 46SCt363, 70L ed 808. **Reasonable compensation** is fair return on value of property at time of use for public. 5F(2d)77. **Regulation by public service commission.**–101WVa 378, 133SE144. **Reproduction cost,** less depreciation, is only one of elements considered in determining present value of property for rate fixing and is not controlling factor in deciding whether rate statute confiscatory. 5F(2d)77. **Statute held confiscatory.**–5F(2d)77. **Subscribers to telephone company** are bound by decree enjoining state commission from enforcing rates. 270US 587, 46SCt408, 70L ed747. **Telephone company is entitled** to fair return on present fair value of its property used and useful in public service. 5F(2d) 245; 101WVa378, 133SE144. **Telephone rates permitting six per cent return** in addition to benefits recovered by owner of stock in way of service held

not confiscating. 147Va43, 136SE575. **Valuation of plant.**–6F(2d)663. **Valuation of property in fixing rates.**–101WVa 378, 133SE144. **Determination of reasonableness of rates.**–282US133, 51SCt 65. **Error in arriving at one item of valuation** of telephone company's property does not invalidate rate fixed so as to authorize judgment as confiscatory. 39F(2d)157. **Matters considered in determining whether rates are unreasonable or confiscatory.**–38F(2d)77. **Only concern of court** is whether all rates imposed by state public service commission are confiscatory. 36F(2d)54. **Rates held confiscatory** where return was less than six per cent on present fair value of property. 36F(2d)54. **Who may maintain suit to enjoin enforcement of order.**–282US133, 51SCt65.

1632–89 5F(2d)77; 5F(2d)245 (on application for injunction from enforcing order denying increase of rates findings of commission as to value of property and amount of depreciation where affidavits are conflicting will be presumed to be correct); 36F(2d)54 (company must show actual depreciation of property); 164Minn279, 204NW873 (increased telephone rates held reasonable); 147Va43, 136SE575. **That determination was based on history of utility** instead of from testimony of expert witnesses is not ground for disturbing it. 102WVa296, 135SE833. **Definition, ascertainment, and weight of factors determinative of value** of property of telephone company for rate making purposes. 36F(2d)54.

1632–89½–New. In fixing rates actual depreciation in value of property should be considered under some statutes. 113 OhSt259, 148NE817 (determination of depreciation).

1632–89⅓–New. Classified service schedule fixing different rates for unlimited subscriber, and for limited subscribers, has been held reasonable and not discriminatory. 113 OhSt259, 148 NE817.

1632–89¼–New. Injunction against enforcement of rates.–6F(2d)663.

1632–89⅙–New. Rate established by state department order abrogates franchise rate and establishes statutory rate. 276US97, 48SCt223, 72Led483.

1632–89⅛–New. Any invalidity in act relative to authority of fourth class cities to pass rate fixing ordinance for telephones was cured by act, conferring additional powers on legislative body or governing authority of fourth class cities. 227Ky778, 14SW(2d)162.

1632–89⅛–New. Agreement under which company agreed to render itself amenable to reasonable ordinances, would not include rate ordinance under which it would be impossible to realize profit. 227Ky778, 14SW(2d)162.

1632–89⅛–New. Franchise rate does not forbid higher rate for improved service desired by subscriber. 229Ky 843, 18SW(2d)305.

1632–89⅛–New. Franchise ordinance held not to impose obligation to furnish free service outside city. 229Ky843, 18 SW(2d)305.

1632–89 1/10–New. State telephone company has been held ousted of right to have credit in computation of rates for payments to foreign company under contract, under evidence showing that state company was controlled by, and was mere instrumentality of, foreign company. 246Mich198, 224NW438.

1632–89 1/11–New. Division of rates between companies is primarily for interstate commerce commission and state commerce commission. 38F(2d)77.

1632–91 112 OhSt493, 147NE806.

1633–97½–New. As to telephone company which had not obtained franchise in manner required, city has been held to have right to enact ordinance imposing license fee in lieu of all franchises and intangible taxes. 227Ky768, 14 SW(2d)162.

1633–97⅓–New. Uniformity as to payment in advance is not essential. MoA 283SW456.

1633–97¼–New. Telephone company to secure license to serve citizens within corporate limits of town having licensed company must itself be public utility. 38F(2d)511 (under collateral attack action of commission presumed proper).

1636–26 Company has no property right in existing location.–OhA 173NE 45.

1636–29 Company is protected against unwarranted acts under police power resulting in destruction of conduits. OhA 173NE45.

1636–31 87CalA44, 261P1107, 1111 [cit Cyc].

1638–57 87Colo 369, 287P866 (telephone company cannot create unnecessary peril).

1639–60 7LaA78. **Railroad company liable for negligence in maintenance of poles** to employees of company engaged to remove cable, where railroad failed to give warning. 217AppDiv532, 216 NYS629.

1639–61 1LaA752. **Care required.**–88 CalA174, 263P255. **Person moving household goods on highway** is not trespasser or licensee as to person in control of telephone wire across highway. 88CalA174, 263P255.

1640–68 TexCivA 20SW(2d)236 (leaving spools of wire near traveled portion of highway and frightening horse).

1640–69 214Ky822, 284SW104.

1641–76 49SD22, 205NW713.

1642–80½–New. Neither builder of telephone company nor its grantee is liable for personal injuries while property is in control of federal government. 243 NY351, 153NE444.

1642–80⅓–New. United States government when in control of wires owned by private company is under duty to use reasonable care to prevent injury. 243 NY351, 153NE444.

1642–80¼–New. Builder of telephone system is under duty to public to use care in constructing wires. 243NY351, 153NE444.

1642–80⅙–New. United States government, on taking over telephone system has duty to use reasonable care to discover and remedy dangerous conditions. 243NY351, 153NE444.

1642–80⅙–New. Telephone company is not liable for injuries sustained while in control of federal government. 39 GaA443, 147SE423.

1642–80⅛–New. Company is liable for accidental killing of boy by foreman firing pistol intending to frighten boys carrying away property on ground his act was one for protection of property under his charge. MoA 24SW(2d)1072.

1644–97 35F(2d)465 (complaint held sufficient). **Complaint held sufficient.**–87Colo 369, 287P866.

1644–4½–New. Issues proof and variance.–Failure of evidence to show defendants were joint owners of telephone line causing injury is not fatal variance. 35GaA560, 133SE924.

1645–10 See also 87Colo 369, 287P866. **Burden rests on owner to show that line** was not under his control. 88CalA174, 263P255.

1645–12 Evidence held admissible.–35 GaA560, 133SE924 (that after injury from fallen wire defendant removed wire admissible on question of control of wire).

1645–21 178Ark111, 10SW(2d)503. **Evidence held sufficient.**–88CalA174, 263 P255; 35GaA560, 133SE924. **Evidence held insufficient.**–170Ark942, 281SW901. **Evidence held to warrant** finding of absence of contributory negligence. 217 AppDiv532, 216NYS629.

1646–24 Instruction on negligence in maintaining rotten telephone pole held correct.–213Ky458, 281SW478. **Instructions held proper.**–88CalA174, 263P255.

1646–26 87Colo 369, 287P866 (instruction held to require modification).

1647–32 35F(2d)465; TexCivA 16SW (2d)935.

1647–36 35GaA560, 133SE924.

1647–37 178Ark111, 10SW(2d)503; 88 CalA174, 263P255; 92PaSuper445; Tex CivA 20SW(2d)236 (whether injury to mule could have been foreseen).

1647–38 178Ark111, 10SW(2d)503; 92 PaSuper445; TexCivA 20SW(2d)236.

1647–39 35F(2d)465; 88CalA174, 263P 255; MoA 274SW876.

1649–53 217Ky762, 290SW684; 129 Misc591, 222NYS104 (telegraph company held entitled to reimbursement for expense incurred because of interference). **Contractor grading highway** under contract with highway commission is not liable for damage done to telephone line without negligence. 49SD 251, 207NW72. **Evidence that contractor grading state highway** was not negligent in damaging telephone lines is admissible. 49SD251, 207NW72. **Where plaintiff had no right to maintain telephone line on highway** it could not in suit for damages for destruction of line require road contractor grading county road to bear expense of removing telephone line. 217Ky762, 290SW684.

1650–64 55AppDC23, 299Fed890; 315 Mo 1056, 287SW466. **Finding that school district was place of dual telephonic development held proper** and authorized commission's order to furnish service. 121 Oh533, 170NE173.

1651–65 315Mo 1056, 287SW466.

1651–66 315Mo 1056, 287SW466.

1652–74½–New. Recovery cannot be had against telephone company for failure to make proper connection whereby buying of cotton futures was prevented, where there was to be no delivery, since such transaction is gambling transaction. 178Ark876, 12SW(2d)782, 62ALR 177.

1652–74⅓–New. Company may not discontinue type of service for which rate is fixed in franchise and require subscribers to accept different type at higher rate. 229Ky843, 18SW(2d)305.

1652–74¼–New. Free county service to city subscribers does not impose obligation on company to continue such free service. 229Ky843, 18SW(2d)305.

1652–74⅙–New. Allegation that account rendered by telephone company "is inaccurate and grossly excessive," with offer to pay amount admitted due or pay such sum as would reasonably and fairly represent proper charges for services rendered, has been held insufficient to support bill for injunction against discontinuance of telephone service for refusal to pay charges. 156 Md510, 144A495.

1652–83 MoA 283SW456.

1653–88 MoA 283SW456.

1654–97 Company cannot be required to furnish service which it does not hold itself out as undertaking to furnish. 262Mass137, 159NE743, 56ALR784. **Discontinuance of service** is done at company's peril if bill is incorrect. 157 SC320, 154SE217.

1654–2 157SC320, 154SE217.

1654–4½–New. Denial of connection attempted through subscriber's instrument would constitute prima facie case of discrimination under statute. 82 IndA603, 147NE291.

1654–4⅓–New. Refusal to connect plaintiff through instrument of another not statutory discrimination. 82 IndA 603, 147NE291.

1654–4¼–New. Where county refuses to pay for service in accordance with schedule on file, discontinuance of service will not be enjoined. 129Kan733, 284P368.

1655–9 84 IndA257, 151NE19.

1655–13½–New. Whether notice need be given as to enforcement of rules is immaterial in replevin action for telephone. MoA 283SW456.

1656–22 55AppDC23, 299Fed890; 6Pa Dist&Co 257; 199Wis552, 227NW30, 68 ALR1320 (failure held actionable breach).

1656–24½–New. There is no discrimination in providing extra facilities for extra pay so long as all subscribers under same conditions are treated alike and franchise obligations are performed. 229Ky843, 18SW(2d)305.

1657–30 143 Okl 76, 291P3. **Commission without power to order connection between lines outside state.**–143 Okl 76, 291P3. **Continuance of service required** regardless of dispute between operators of connecting lines. 143 Okl 76, 291P3. **Power of commission to order connecting companies to make settlements.**–143 Okl 76, 291P3. **Power of commission to order refund of amount collected** in excess of agreement between connecting

companies. 143 Okl 76, 291P3.
1658–37 33F(2d)770 (connection cannot be compelled merely to avoid loss).
1658–38 Me 151A440. **Parties to proceeding for connection.**–144Wash383, 258P313. **Evidence held not to show** that switching rate fixed by commission was less than cost. 53SD121, 220 NW475. **Imposition of entire cost of** connection with farmer's telephone association on telephone company is not abuse of discretion where association has constructed several miles of line on each of ends prepared for connection between telephone of nearest subscriber and corporate limits. 53SD121, 220 NW475. **Order of commission fixing switching rate** held not to compel discrimination against rural subscribers. 53SD121, 220NW475. **Questions determinable on certiorari to review order of commission directing connection.**–53SD 121, 220NW475. **Power of public utilities commission.**–Me 151A440.
1658–40½–New. Conduct of companies under toll pro rata agreement on through messages declared practical construction. 142Va529, 129SE389.
1658–40¼–New. Where public necessity requires it, Public Service Commission may order telephone company to permit additional facilities for toll service through connecting company, 87 IndA59, 156NE469.
1658–40¼–New. and such order will not be set aside by court for insufficiency of compensation for such service since public should not suffer while companies quarrel over division of moneys to be collected in future. 87 IndA59, 156NE469.
1658–40½–New. Courts should not interfere with toll service rates or division thereof between companies, as established by commission, unless complaining party suffers irreparable loss. 87 IndA59, 156NE469.
1659–43 Directed verdict for defendant held erroneous. 55AppDC23, 299Fed 890.
1659–48 20F(2d)103.
1659–49 20F(2d)103; **TexCivA 4SW (2d)**666, 667 [citCyc].
1661–69 36Wyo 66, 252P1021.
1663–88 175Ark167, 299SW377.
1665–9 TexCivA 4SW(2d)666, 667 [cit Cyc]. See also **TexCivA** 30SW(2d)497.
1666–16 133SC55, 130SE119, 42ALR 286 (liability extends to both sender and addressee); **TexCivA** 28SW(2d)207.
1666–20 It is duty of telephone companies to transact business with promptness.–315Mo 1056, 287SW466.
1666–22 TexCivA 28SW(2d)207 (telegram held not to have been delivered under special contract relieving company of diligence till following morning).
1667–34 104WVa150, 139SE638, 639 [citCyc], 55ALR636.
1668–40 TexCivA 281SW877.
1668–43 TexCivA 281SW877.
1668–46 TexCivA 281SW877.
1670–59 TexCivA 25SW(2d)661. **It is duty of telephone companies to transact business with accuracy.**–315Mo 1056, 287 SW466.
1671–67 Fla 129S743(3dcase). **Telegraph operator must inquire of sender** if in doubt as to legibility of message. **TexCivA** 25SW(2d)661.
1671–70 147SC423, 145SE294; **Tex CommnA** 291SW193. **Delivery to another than addressee without reason** amounts to gross negligence rendering company liable to addressee for damages proximately resulting. 34GaA42, 128SE229.
1671–72 TexCivA 28SW(2d)207. **Money orders.**–146Miss703, 111S750.
1672–75 TexCivA 4SW(2d)633.
1675–12 See also 219Ala636, 123S76, 63 ALR805.
1676–19 215Ala282, 110S399 (message held to show on its face necessity for prompt transmission); 6LaA83 (message held not to inform company of necessity for unusual haste in making delivery).
1676–22 6LaA83. **That messenger boy knew addressee** held not evidence of company's negligence in failing to deliver telegram. **TexCivA** 283SW604.
1677–29 219Ala636, 123S76, 63ALR805.
1678–42 22 OhA420, 154NE52.
1680–56 39GaA152, 147SE151.
1680–62 See also **TexCivA** 15SW(2d) 207.
1680–64½–New. Evidence sufficient to sustain finding that addressee's city was over five thousand population requiring free delivery within one mile. **TexCivA** 271SW650.
1680–64½–New. Burden to ascertain whether addressee was within or without free delivery limits was on company accepting message. **TexCivA** 271SW 650.
1680–64¼–New. That addressee lived beyond free delivery limits, no excuse for failure of prompt delivery in absence of demand for extra compensation. **TexCivA** 271SW650.
1680–64½–New. Provision as to free delivery limits is waived where company undertakes to deliver telegram for reward upon learning addressee lived beyond free delivery limits. 214Ala577, 108S578.
1681–76½–New. In action against telegraph company by one transmitting money for breach of contract in failing to deliver it to proper person, defendant has been held not liable, where no negligence was shown and money was paid to person who sent messages requesting it, after such person had answered inquiries and produced documents apparently identifying himself as payee. 22AlaA597, 118S228.
1683–87 TexCivA 12SW(2d)256.
1683–88 265Mass544, 164NE463.
1683–95 Replication alleging custom of delivering messages by phone, held not demurrable. 215Ala282, 110S399.
1683–96½–New. Where telegraph company accepted telegram, stating sender needed some money and asking addressee to call, at dictation, from woman, without learning her address, with instructions not to phone it, and left telegram under door at sendee's house in violation of telegraph company's rule, and addressee's wife saw telegram, telegraph company was not liable for tort. 265Mass544, 164NE463.
1684–6 93PaSuper128. **Limitation of liability contained in rates filed with interstate commerce commission** are valid as to interstate messages. 173Minn 424, 217NW486.
1684–6½–New. Public service commission may determine reasonableness of limitation. 220MoA956, 272SW1058.
1684–6⅓–New. Public Service Commission Law does not prohibit graduating rates. 220MoA956, 272SW1058.
1684–6¼–New. Rates may be graduated by liability assumed. 220MoA956, 272SW1058.
1685–7 220MoA956, 272SW1058; 190 NC45, 128SE500, 501 [citCyc] (referring to rule in North Carolina prior to act of congress).
1686–11½–New. Interest may not be allowed so as to increase recovery allowed by contract.–170Ark506, 280SW 977.
1686–11⅓–New. Particular limitations applicable.–115Tex240, 280SW733 (limitation of fifty dollars held applicable to change of word in unrepeated message).
1686–11¼–New. Under tariff clause authorized by interstate commerce commission, telegraph company is not liable in excess of charge for unrepeated message, such limitation being lawful condition in contract. 276US252, 48SCt 234, 72L ed555.
1686–11½–New. In action for damages for delay, interest is recoverable from date of accrual of liability. **TexCivA** 2 SW(2d)505.
1686–11⅓–New. Under stipulation in contract for transmission of interstate telegram limiting liability for delay of unrepeated message to five hundred dollars, interest was not recoverable as part of damages in addition to sum. **TexCommnA** 11SW(2d)777.
1686–12 21AlaA587, 111S199; 129Misc 431, 221NYS525.
1687–13 129Misc431, 221NYS525.
1687–18 MoA 18SW(2d)535.
1688–22 148Md210, 129A14 (message declared not obscure).
1688–24 190NC45, 128SE500.
1688–27 153Md329, 138A233; **TexCivA** 288SW541. **Claim filed more than sixty days after filing message is barred.**–126 Misc182, 212NYS682. **Stipulations based on rate or classification have** binding effect of law. 218MoA364, 275 SW570.
1689–31 In Texas.–**CivA** 288SW541 (ninety-five days held valid).
1690–34 See also 147SC423, 145SE294.
1690–35 180Ark422, 21SW(2d)964, 66 ALR195. **Provision allows reasonable time** for presentation after error becomes known. 180Ark422, 21SW(2d) 964, 66ALR195 (claim presented immediately after knowledge held presented within reasonable time).
1690–41 153Md329, 138A233 (letter held not "claim"); 141Miss580, 106S 819 (claim insufficient failing to state damages would be complained of).
1690–44 But see 195NC258, 141SE592.
1691–58–59 But see 153Md329, 138A 233. **Estoppel.**–129Misc431, 221NYS525.
1692–61 153Md329, 138A233 (waiver not shown).
1692–68 But see 221MoA616, 287SW 806.
1693–70 24F(2d) 569, 572 [quotCyc].
1693–74½–New. 6½. **Stipulations That Employees May Not Vary Terms and Conditions of Transmission of Messages.** Stipulations on back of message that no employee was authorized to vary the terms and conditions of transmission of message was held to render void a telegraph operator's agreement to notify sender of nondelivery of message. 22 OhA420, 154NE52.
1693–74½–New. Company may not contract against its own negligence relative to transmission and delivery of intra-state messages. **TexCivA** 4SW(2d) 633.
1693–75 115Tex240, 280SW733 (conditions on back of blank held binding on sender of interstate message).
1693–76 TexCivA 288SW541.
1694–73 TexCivA 288SW541.
1694–85 TexCivA 285SW866.
1695–88 TexCivA 282SW661.
1695–91 190NC45, 128SE500; 116Tex 497, 295SW598; **TexCivA** 288SW541. **Addressee bound by interstate commerce determination** of reasonableness of regulations governing telegraph companies. 116Tex497, 295SW598.
1696–1½–New. Transmission of libelous message over wires of company from agent to agent in ordinary course of business is privilege imposing no liability. 199Wis124, 225NW742, 63 ALR1113.
1697–4 CalA 291P445.
1700–42 Carmack Amendment, making initial carrier liable for loss, does not apply to telegraph companies. 24F(2d) 569.
1701–55 315Mo 1056, 287SW466, 469 [quotCyc].
1701–56 315Mo 1056, 287SW466. **Such duty is not imposed by statute** regulating telephone business in some jurisdictions. 315Mo 1056, 287SW466.
1702–60 315Mo 1056, 287SW466, 469 [quotCyc]. **Telephone company contracting to send messages in nature of telegrams** are under same obligations and subject to same liabilities as telegraph company. 315Mo 1056, 287SW 466.
1702–62½–New. Telephone company negligently delaying making connection with fire department to enable plaintiff to report fire is not liable for loss since it is highly speculative whether loss would have been less if connection had been made promptly. **NJ** 131A221.
1702–62½–New. Liability for failure to publish correct numbers in telephone directory. 253NY468, 171NE710.
1702–64 315Mo 1056, 287SW466.
1702–67 84 IndA257, 151NE19.
1703–69 315Mo 1056, 287SW466.
1703–70 315Mo 1056, 287SW466, 470 [quotCyc].
1703–71 315Mo 1056, 287SW466, 470 [quotCyc].
1703–72 315Mo 1056, 287SW466, 470 [quotCyc].

1703-73 315Mo 1056, 287SW466, 470 [quotCyc].
1703-74 315Mo 1056, 287SW466, 470 [quotCyc].
1703-75 315Mo 1056, 287SW466, 470 [quotCyc].
1703-77 84 IndA257, 151NE19; MoA 18SW(2d)535.
1703-78 315Mo 1056, 287SW466.
1703-79 84 IndA257, 151NE19.
1704-98½-New. Where telephone company had no rule or custom to receive, transmit, and deliver written messages, sender tendering such message to telephone company cannot recover penalty under statute for refusal to send message. 315Mo 1056, 287SW466.
1705-99½-New. Statute imposing penalty for lack of diligence in delivering messages "without material alterations promptly" is applicable to error in transmitting money though message was delivered, where only part of money was delivered. MoA 18SW(2d)535.
1705-1 Statute held to prevent telephone companies from discrimination as to facilities, but not as to rates. 84 IndA257, 151NE19.
1710-49 245NY284, 157NE140; Tex CivA 2SW(2d)505.
1710-50 153Tenn59, 281SW778, 48ALR 301; TexCommnA 288SW175 (cause of action may be ex delicto).
1710-51 TexCivA 4SW(2d)666. **Federal act placing telegraph companies engaged in interstate commerce** under commission does not change common-law rule of liability nor prevent suit in state courts. 129Misc431, 221NYS525.
1710-57 127 Or500, 272P895.
1710-60½-New. Consignee pleading contract consummated by telegram cannot sue telegraph company for damages resulting from error in shipper's telegram. TexCivA 16SW(2d)315.
1710-62 149SC214, 146SE873.
1711-67 But see 3LaA754.
1715-9 TexCommnA 291SW193.
1715-13½-New. Agreement of sender that company might mail message to addressee is no defense to liability for failing to make effort to find addressee. TexCivA 4SW(2d)633.
1716-14 20F(2d)103.
1716-18 TexCivA 17SW(2d)467.
1716-19 TexCivA 284SW278.
1717-23 20F(2d)103; MoA 296SW252; 153Tenn59, 281SW778, 48ALR301.
1719-30 127 Or500, 272P895.
1720-39 170Ark506, 280SW977; MoA 287SW1064, 1067 [citCyc].
1720-42 Fla 129S743(3dcase).
1721-51 Fla 129S743(3dcase).
1722-54 But see 176Ark495, 3SW(2d) 345, 57ALR39.
1722-60 215Ala282, 110S399 (complaint held not defective for failure to allege undertaking by defendant to transmit message "promptly"). **Petition held sufficient.**-TexCivA 278SW278.
1722-61 Allegations sufficient to show negligence, etc. MoA 18SW(2d)535.
1723-63 190NC197, 129SE602. **Petition for failure to deliver message accepting offer to contract held sufficient.**-TexCivA 278SW278.
1723-64 190NC197, 129SE602.
1725-89 See also 37GaA36, 138SE591.
1725-91 81CalA258, 253P333. **In absence of such allegation,** plaintiff's rights are ascertained from face of message. 81CalA258, 253P333.
1726-97 TexCivA 4SW(2d)666.
1727-8 Sufficiency of allegation.-191NC 356, 131SE762.
1727-12 214Ala577, 108S578 (plea of failure to present claim within time stated on back of message defective under statute for failure to allege that matter of plaintiff's claim was peculiarly within his knowledge); TexCivA 8SW(2d)544.
1727-12½-New. Striking from answer allegation of plaintiff's ability to procure postponement of funeral declared error. TexCivA 271SW650.
1727-13 Defendant must plead and prove matters mitigating damages. Tex CivA 2SW(2d)505.
1728-22 TexCivA 4SW(2d)666, 667 [cit Cyc].
1728-23 127Misc5, 214NYS555; 199 Wis552, 227NW30, 68ALR1320 (in action for failure to list in telephone directory, burden is on plaintiff to show that sales fell off).
1728-26 20F(2d)103.
1729-29 194NC188, 138SE608.
1729-30 104WVa150, 139SE638, 55 ALR636.
1730-31 129Misc431, 221NYS525; 104 WVa150, 139SE638, 55ALR636. **Telegraph company must show connecting reason** for routing message through point outside state. 138SC281, 136SE 218.
1730-32 175Ark167, 299SW377; 190 NC700, 130SE728; 104WVa150, 139SE 638, 55ALR636.
1731-44 TexCivA 2SW(2d)505; Tex CivA 25SW(2d)661. **Plaintiff's failure to make claim within time** specified in blank must be proved by defendant. 218MoA364, 275SW570.
1731-45½-New. In action for injuries received by plaintiff while using telephone because of deafening noise or explosion transmitted through receiver, doctrine of res ipsa loquitur, has been held inapplicable. RI 145A14.
1731-45¾-New. Telephone company, having proved that its equipment did not cause excessive noise, was not required to explain source of unusual noise. RI 145A14.
1732-54 TexCivA 4SW(2d)666; Tex CivA 20SW(2d)232 (even without other proof).
1733-63 MoA 287SW1064.
1733-64 TexCivA 4SW(2d)666; Tex CivA 5SW(2d)567.
1733-65 215Ala282, 110S399.
1734-79 104WVa150, 139SE638, 55ALR 636.
1735-83 194NC188, 138SE608. **Evidence held admissible.**-21 OhA360, 153 NE228.
1737-2 Custom and usage cannot be resorted to to show knowledge of special purpose for which unambiguous telegram was sent. 81CalA258, 253P 333.
1737-4 MoA 13SW(2d)1088; 194NC 188, 138SE608. **Evidence held inadmissible.**-TexCommnA 7SW(2d)520.
1737-5 180Ark422, 21SW(2d)964, 66 ALR195; MoA 13SW(2d)1088; 194NC 188, 138SE608.
1739-20 Method of travel.-TexCivA 283 SW259.
1740-23 TexCivA 12SW(2d)256.
1740-26 175Ark167, 299SW377. **Evidence held sufficient.**-127Kan245, 273P 418; 153Tenn59, 281SW778, 48ALR301; TexCivA 2SW(2d)505. **Evidence held insufficient.**-315Mo 1056, 287SW466.
1740-27 Evidence held sufficient.-176 Ark495, 3SW(2d)345, 57ALR39; 196NC 516, 146SE209; 120 Okl 285, 251P48. **Evidence held insufficient.**-6LaA83.
1740-28 127Kan245, 273P418; Tex CivA 300SW218. **Evidence held sufficient.**-196NC516, 146SE209; TexCivA 282SW661. **Evidence held insufficient.**-240 IllA559; 199Wis552, 227NW30, 68 ALR1320.
1740-29 Evidence held sufficient.-176 Ark192, 2SW(2d)23; MoA 287SW1064; 196NC516, 146SE209. **Evidence held to sustain findings.**-173Minn424, 217NW 486.
1741-31 Evidence held sufficient.-Tex CivA 282SW923; TexCivA 4SW(2d)666.
1741-32 TexCommnA 15SW(2d)210; TexCivA 15SW(2d)207.
1742-39 194NC188, 138SE608. **Evidence as to damages held insufficient to go to jury.**-84Colo 93, 267P1068.
1742-40 215Ala282, 110S399 (court did not err in refusing general charge); 190NC700, 130SE728 (failure to transmit and deliver telegram as written).
1742-43 93PaSuper128; RI 145A14.
1743-44 149SC214, 146SE873.
1743-45 178Ark933, 12SW(2d)887.
1743-47 171Ark325, 284SW783; 175 Ark167, 299SW377; TexCivA 283SW 604.
1743-48 175Ark167, 299SW377; 148Md 210, 129A14 (alteration of message); TexCivA 28SW(2d)207.
1743-49 219Ala636, 123S76, 63ALR 805; 171Ark325, 284SW783 (whether defendant accepted message with agreement to deliver outside free delivery limits); 21 OhA360, 153NE228; Tex CivA 283SW604. **Whether a failure to notify the sender, etc.**-TexCivA 282SW 661. **Whether message was sent directly** to delivery place within state, or relayed through another state, so as to constitute interstate commerce, is question for jury. 138SC281, 136SE218.
1744-50 176Ark495, 3SW(2d)345, 57 ALR39.
1744-58 176Ark495, 3SW(2d)345, 57 ALR39.
1744-59 TexCivA 8SW(2d)544.
1744-59½-New. , as to filing of message for transmission and delivery. TexCivA 285SW866.
1744-60 Whether stipulation is reasonable which limits time to ninety-five days within which plaintiff must give notice in order to be able to sue is for jury. TexCivA 282SW661.
1745-66 214Ala577, 108S578.
1745-72 196NC516, 146SE209. **Evidence on punitive damages** for failure to deliver death message held for jury. 138SC281, 136SE218.
1746-74 175Ark167, 299SW377.
1746-77 TexCivA 282SW923 (negligence in failing to attend funeral).
1746-78 196NC516, 146SE209.
1746-78½-New. , or whether sender was guilty of contributory negligence in addressing telegram. TexCivA 283 SW259.
1746-80 Charge permitting recovery for mental anguish held erroneous. 194 NC188, 138SE608. **Instructions held sufficient.**-176Ark495, 3SW(2d)345, 57 ALR39 (of agent); 196NC516, 146SE 209 (on duty of plaintiff in death message case).
1746-81 MoA 18SW(2d)535.
1747-83 TexCivA 284SW279 (failure of court to instruct jury as to necessary character of grief or mental pain held reversible error).
1748-85 TexCivA 280SW598.
1748-85½-New. Refusal of instruction that jury may not consider evidence of humiliation or disappointment arising from inability to attend funeral declared error. TexCivA 271SW650.
1748-86 TexCivA 284SW279 (instruction requiring suffering of mind and body held properly refused in action to recover for mental anguish).
1748-87½-New. Findings held not inconsistent.-TexCivA 281SW877.
1748-88 36Wyo 132, 253P658 (on request).
1748-91 175Ark167, 299SW377.
1749-97 39GaA152, 147SE151; 127Misc 5, 214NYS555.
1749-98 120Kan258, 242P1015; 127 Misc5, 214NYS555.
1749-1 127Misc5, 214NYS555.
1750-3 241 IllA172.
1750-5 127Misc5, 214NYS555; 194NC 188, 138SE608; TexCivA 21SW(2d)39 (company not liable for delay where contract for exchange of properties failed because of such delay).
1750-6 81CalA258, 253P333, 335 [cit Cyc]; 127Misc5, 214NYS555.
1750-7 81CalA258, 253P333, 335 [cit Cyc]; 127Misc5, 214NYS555.
1750-8 181Ark209, 25SW(2d)448; 81 CalA258, 253P333; 245NY284, 157NE 140; 194NC188, 138SE608; Tex CommnA 20SW(2d)759 (company charged with notice that message contained offer of employment for specific period). **General notice** of importance of message is all that is required and details need not be set out. 153Tenn59, 281SW778, 48ALR301.
1751-9 81CalA258, 253P333; 153Tenn 59, 281SW778, 48ALR301.
1751-9½-New. But no notice is necessary to entitle sendee to recover direct and actual damages as result of violation of statute requiring transmission without unnecessary delay. 153Tenn59, 281SW778, 48ALR301.
1751-13 153Tenn59, 281SW778, 48ALR 301.
1752-14½-New. Addressee is not limited to nominal damages for mistake in message by reason whereof he made purchase for resale at higher price than he otherwise would have done because actual damages might have been recovered against sender for breach of contract. 170Ark506, 280SW977.

1752-16 81CalA258, 253P333, 336 [cit Cyc]; 148Md210, 129A14; 245NY284, 157NE140.
1752-20 81CalA258, 253P333, 336 [cit Cyc]; 148Md210, 129A14.
1753-22 148Md210, 129A14.
1753-23 148Md210, 129A14. **Notice of business in telegram** must be sufficient to give notice of risk. 245NY284, 157NE140. **Lengths and cost of** cipher radiogram is not sufficient to suggest importance of business making company liable for special damages. 245NY284, 157NE140.
1753-25 148Md210, 129A14; MoA 13SW(2d)1088; TexCivA 2SW(2d)505. **Must show damages likely to follow nondelivery.**–MoA 13SW(2d)1088 (sufficiency of particular language).
1753-27 TexCivA 300SW218.
1754-31 22AlaA207, 114S179; 170Ark506, 280SW977 (damages to addressee because of mistake in message whereby he purchased cotton for resale at higher than market price held proximate result of mistake); 37GaA36, 138SE591; MoA 287SW1064; NJ 131A221; 190NC700, 130SE728; 114 Okl 161, 245P39, 47ALR156; 127 Or500, 272P895. **Where sender ratified purchase by broker in accordance with altered message,** and error in transmission not proximate cause of loss resulting from transaction, there is no ground for recovery. 190NC700, 130SE728.
1755-32 TexCivA 275SW620 (where damage shown not result of alleged negligence).
1755-33 37GaA36, 138SE591.
1755-35 120Kan258, 242P1015; MoA 296SW252.
1756-36 81CalA258, 253P333.
1756-37 81CalA258, 253P333; 120Kan258, 242P1015.
1756-38 37GaA36, 138SE591.
1756-39 37GaA36, 138SE591; 39GaA158, 146SE560; 120Kan258, 242P1015; NJ 131A221 (delay in making telephone connection with fire department).
1756-40 37GaA36, 138SE591.
1756-42 153Tenn59, 281SW778, 48ALR301.
1757-51 But see 176Ark495, 3SW(2d)345, 57ALR39.
1757-52 219Ala636, 123S76, 63ALR805; MoA 287SW1064; TexCivA 8SW(2d)544.
1757-53 114 Okl 161, 245P39, 47ALR156; 133SC55, 130SE119, 42ALR286.
1758-54 MoA 287SW1064.
1758-55 See also TexCivA 25SW(2d)661.
1758-56 See also NJ 131A221.
1758-58 **Telephone companies.**–199Wis552, 227NW30, 68ALR1320.
1759-68 22AlaA207, 114S179; 129Misc431, 221NYS525.
1759-69 176Ark192, 2SW(2d)23; MoA 18SW(2d)535.
1760-72½-New. Sender paying unrepeated-message rate on interstate message is limited to five hundred dollars damages for failure to deliver. 38F(2d)838.
1760-75 TexCommnA 291SW193. **Ordinary prudence** is criterion. 176Ark495, 3SW(2d)345, 57ALR39.
1760-77 176Ark495, 3SW(2d)345, 57ALR39.
1760-79 176Ark495, 3SW(2d)345, 57ALR39.
1761-83 109Conn371, 146A501.
1761-90 TexCivA 27SW(2d)325.
1762-92 21 OhA360, 153NE228 (delay in delivery of offer to sell); 147SC423, 145SE294.
1763-4 See also TexCivA 299SW279.
1763-6 TexCivA 1SW(2d)378.
1765-25 21 OhA360, 153NE228 (delay in delivery). **Plaintiff need not have purchased other goods** in order to be entitled to damages for delay in delivery of offer to sell. 21 OhA360, 153NE228.
1765-26 21 OhA360, 153NE228.
1766-33 TexCivA 299SW279, 281 [cit Cyc]; TexCivA 2SW(2d)505. But see TexCommnA 7SW(2d)520.
1766-34 81CalA258, 253P333, 335 [cit Cyc].
1766-38 TexCivA 299SW279, 281 [cit Cyc].
1767-45½-New. **Loss of wages** cannot be recovered in absence of proof that failure to deliver message caused loss. 127Misc5, 214NYS555.
1768-46 34GaA42, 128SE229, 230 [cit Cyc]. **In absence of proof that failure to deliver caused loss** of expense for trip, there is no recovery therefor. 127Misc5, 214NYS555.
1769-55 218MoA364, 275SW570.
1770-61 153Tenn59, 281SW778, 781 [citCyc], 48ALR301.
1770-62 176Ark495, 3SW(2d)345, 57ALR39; 153Tenn59, 281SW778, 781 [cit Cyc], 48ALR301.
1772-67 MoA 287SW1064.
1773-75 **Where shipper resold slightly above contract price,** claim of excess freight charges to place of resale, less profit on resale, held properly allowed. MoA 296SW252, 254 [citCyc].
1773-80 **Message to physician to call sender on telephone** at once puts company **on notice.** 153Tenn59, 281SW778, 48ALR301.
1773-82½-New. Loss of fee by physician sendee resulting from delay in delivery of message may be recovered. 153Tenn59, 281SW778, 48ALR301.
1775-1 127 Or500, 272P895. **Only such damages as could reasonably have been anticipated** by parties would result from wrongful act may be recovered. 127 Or500, 272P895.
1775-2 **Under federal rule.**–194NC188, 138SE608.
1775-2½-New. Telegraph company is not liable for loss which it could not anticipate, or of which it had no notice at time duty arose or expired. TexCommnA 7SW(2d)520.
1775-6 194NC188, 138SE608.
1775-7 **Punitive damages** and damages for mental anguish are not recoverable for failure to deliver interstate message. 138SC281, 136SE218.
1777-13 TexCivA 283SW237 (recognizing rule); TexCivA 283SW259; TexCivA 8SW(2d)544; TexCivA 28SW(2d)207.
1777-14 196NC516, 146SE209.
1777-15 171Ark325, 284SW783; 120 Okl 285, 251P48; 140SC244, 138SE673. **Constitutionality of statutes.**–140SC244, 138SE673.
1778-16 18F(2d)650.
1780-38 TexCivA 280SW598, 600 [quot Cyc]; TexCivA 284SW279.
1780-45 **In Oklahoma.**–120 Okl 285, 251P48.
1781-48 191NC356, 131SE762.
1782-51 Fla 129S743(3dcase); TexCommnA 283SW175 (notice held sufficient though given subsequent to filing of telegram).
1782-52½-New. It is immaterial whether telegraph company had notice that person whose illness caused sending of message lived in place other than where message was filed. TexCivA 285SW866.
1782-54 191NC356, 131SE762; TexCivA 283SW237; TexCivA 28SW(2d)207.
1783-56 175Ark167, 299SW377.
1783-61½-New. But where failure to deliver message caused plaintiff's inability to reach father before death, whether possible for him to do so after second message sent is immaterial. TexCivA 285SW866.
1784-67½-New. Telegraph company is not liable for increased mental suffering, caused by delay in delivering telegram sent by plaintiff who is already suffering mental anguish because of erroneous information as to mother's death. TexCivA 283SW237.
1785-76 TexCivA 20SW(2d)232 (relationship must be by blood or marriage, not mere affinity).
1785-83 120 Okl 285, 251P48 (rule under Oklahoma statute).
1786-87 120 Okl 285, 251P48; TexCivA 20SW(2d)232 (ambiguity in telegram held not to charge company with notice of affectionate relations).
1786-90 TexCivA 282SW923.
1786-91 TexCivA 30SW(2d)497.
1787-99 **Rule not applicable.**–TexCivA 8SW(2d)544.
1788-7 18F(2d)650; TexCommnA 288SW175; TexCivA 283SW259; TexCivA 284SW279; TexCivA 8SW(2d)544. **Action may be brought in federal court** sitting in Louisiana, to recover for mental anguish caused by delivery of telegram notifying plaintiff of sick father's critical condition. 18F(2d)650.
1792-43 140SC244, 138SE673.
1793-52 TexCivA 283SW259 (holding seven hundred and fifty dollars damages for failure to deliver death message not excessive); TexCivA 4SW(2d)666.
1795-53 171Ark325, 284SW783; TexCivA 282SW923 (one thousand dollars reduced to one hundred dollars).

TENANCY IN COMMON

38 Cyc—3-1 22AlaA1, 113S651; 200 Cal 776, 254P1108; 165Ga853, 142SE450; 126Me84, 136A459; 67Utah553, 248P496. **Where no division of cotton is made** between farmers raising it, there is tenancy in common. 216Ala120, 112S447.
4-2 331 Ill 437, 163NE327, 62ALR511.
4-3 88CalA441, 263P870.
4-6 See also 90Fla372, 106S79.
5-13 147Va1030, 133SE581.
6-25 219Ala89, 121S67; 220Ala443, 125S811; 162Ga735, 134SE771; 325 Ill 229, 150NE306; 325 Ill 253, 156NE352; 132Misc764, 230NYS605; TexCivA 6SW(2d)136. But see 331 Ill 437, 163NE327, 62ALR511. **Tenancy in common in crop** is created by lease or cropping contract whereby use of land is given to person to cultivate and return to owner specified portion of crop produced. 15F(2d)181. **Presumption** that persons to whom conveyance is made without designation of portion are intended to take equally may be rebutted. 325 Ill 229, 156NE306. **Conveyance to parties as husband and wife** may create tenancy in common. 133Misc24, 230NYS590. **Deed to two grantees, reciting "survivor to take,"** conclusively showed that grantees did not intend conveyance of property to them as tenants in common, but showed intention to establish tenancy by entirety or joint tenancy, and overcame presumption of tenancy in common under Real Property Law. 133Misc69, 231NYS165. **That special duty or obligation rests on one joint owner which does not rest on other** will not of itself prevent them from being tenants in common. 125Kan797, 266P98. **Persons agreeing to lease,** paying installments into trust fund and receiving proportionate interests, are tenants in common among selves and successors. 39F(2d)800. **Tenancy in common held not sustained.**–300Pa428, 150A620.
7-27 168Ark718, 271SW970 (heirs of widow tenants in common with other heirs of husband or those claiming under them); 173Ark788, 294SW21; 200 Cal 776, 254P1108.
8-28 162Ga735, 134SE771; 166Minn153, 207NW311 (conveyance); 49RI 144, 141A77; TexCivA 16SW(2d)377. **A purchaser of the share of a tenant in common,** etc. 69CalA50, 230P472. **Landowner's conveyance of undivided interest in oil and gas** creates tenancy in common between grantee and owner. 82Mont222, 266P406. **Purchaser of entire interest of tenant in common** is not tenant in common with vendor thereof or with vendee thereof under sheriff's sale. 289Pa184, 137A254. **Title to pairs of foxes** passed to purchasers of fractions thereof as owners in common. 28F(2d)7 [certiorari den 278US653, 49SCt178(11th case), 73L ed563]. **Where certain heirs of deceased disclaimed right to be bound** by executor's contract to sell land and refused to sign deeds thereto, purchaser's possession was not illegal, but as cotenant, and he was entitled to proportionate refund from other cotenants for advances made for taxes and assessments. 149Wash221, 270P823. **Where trustee purchases for himself and as trustee,** estate becomes tenancy in common. 162Ga735, 134SE771. **Third person paying part of purchase price** of realty, without agreement as to interest, is entitled to proportionate undivided interest. CalA 287P988.
8-28½-New. Ratification of lease executed by agent without written authority by one of coöwners thereof does not transfer to lessees undivided interest of coöwner ratifying lease so as to make lessees tenants in common with other

owners of property. 293Pa513, 143A 227.

11-32 Divorce.–29PortoRico 909.

12-35 Evidence held sufficient to sustain finding that defendant was not holding land as cotenant of plaintiff. 209Ky362, 272SW878. Contract by which rival claimants agreed to divide land and do all possible to perfect title constituted merger of interests. 218Ky 657, 291SW1049.

12-37 70CalA70, 232P744 (lease of land and livestock construed to create tenancy in common of lessor and lessee in natural increase of live stock at termination of lease). Widow's children held not cotenants holding homestead property after sale subject to homestead rights to satisfy judgment. 220Ky717, 295SW1016.

12-39 336 Ill 594, 168NE666; TexCivA 38W(2d)592. Surface and mineral rights.–125Kan797, 266P98.

13-42 90Fla372, 106S79.

13-43 59 OntL506, [1926] 4DomLR822.

13-49 All coöwners must participate in division.–33PortoRico 567. All cotenants must participate in division.–33Porto Rico 436.

14-55 Where one of two tenants in common devises his undivided interest, his executor and surviving cotenant are tenants in common, in some jurisdictions, till executor assents to devise. 165Ga 853, 142SE450.

14-60½-New. Failure of parties to accept agreement for fund to lease property did not work forfeiture of their interests in favor of cotenant. 39F(2d) 800.

15-61 100NJEq396, 135A780 (dictum).

15-62 100NJEq396, 135A780 (dictum). Partners become equitable owners and equitable tenants in common where land is bought wholly or partly with money of one member and legal title taken in name of other member under agreement to hold for use of firm. 161Ga711, 132 SE547.

15-63 250Mich387, 230NW144.

15-64 133 Okl 145, 271P643. Purchase and sale.–250Mich387, 230NW144.

15-65 100NJEq396, 135A780. See also NJCh 144A446(2dcase).

16-66 100NJEq396, 135A780; 99NJEq 243, 132A291.

16-67 100NJEq396, 135A780; 132 Okl 217, 270P54.

16-69 82Mont222, 266P406.

17-75 39F(2d)800; 202 Iowa472, 210 NW558; 126 Or76, 268P989; 105WVa 491, 143SE155. Timber.–133SC395, 131 SE18.

18-76 21F(2d)388; 126 Or76, 268P989; 105WVa491, 143SE155. Owner of undivided interest in mining claim, etc., cannot by large expenditure obliterate coowners' title. 43F(2d)27.

19-78 15F(2d)192 (tenant in common in fishing property held not entitled to exclusive use by mere fact of having fishing license).

20-84 161Ga448, 131SE154 (tenants have equal rights of possession); 191 NC517, 132SE276.

21-86 88CalA441, 263P870; 191NC517, 132SE276. See also TexCivA 10SW(2d) 1043.

21-87½-New. Shares of two tenants in common are presumed to be equal in absence of evidence to contrary. 125 Misc851, 213NYS4.

21-88 32F(2d)779; 220Ala152, 124S 237; 176Ark225, 3SW(2d)11; 69CalA 50, 230P472; 80CalA393, 252P337; 88 CalA441, 263P870; 213Ky696, 281SW 832; 228Ky538, 15SW(2d)454; 148Md 165, 129A21; 76Mont175, 246P773; 117 Nebr671, 222NW49; 117 Okl 68, 245P 34; 121 Okl 80, 247P677; TexCivA 281 SW1111; TexCivA 294SW633; TexCivA 295SW679. Cotenant out of possession cannot rely on possession of another cotenant for adverse possession against another cotenant out of possession. 80 CalA393, 252P337.

23-90 Effect of lease.–214Ala382, 107S 841.

23-95 216Ala595, 114S196; 80CalA 393, 252P337; 88CalA441, 263P870; 163Ga698, 137SE50; 170Ga135, 152SE 466; 205 Iowa1285, 217NW852; Miss 130S101; 192NC679, 135SE784; 117 Okl 68, 245P34; 123 Okl 26, 252P1093, 1095 [citCyc]; TexCommnA 273SW819; Tex CivA 281SW1111; TexCivA 295SW679; 39Wash70, 75, 80P1005 [citCyc]; Eng LR 20Eq84; 42NS220. The burden of proof.–148Md165, 129A21. In absence of disseizin possession of one tenant in common is not adverse to his cotenants. 317 Ill 625, 148NE384. Title by adverse possession not reopened at time of execution of mortgage by cotenant held no bar to mortgagee's rights. 203 Iowa320, 211NW389. Other statements of rule.–232Ky741, 24SW(2d)560.

24-96 176Ark225, 3SW(2d)11; 163Ga 698, 137SE50; 117 Okl 68, 245P34; Tex CivA 281SW1111; TexCivA 293SW690; TexCivA 5SW(2d)232. Void power of attorney to sell common property made to one cotenant by others constitutes color of title. WVa 153SE577.

25-98 148Md165, 129A21. Surviving cotenant cannot acquire title against deceased's unrepresented estate at least for period allowed for representation. 163Ga698, 137SE50.

25-98½-New. Finding that cotenants had "adverse possession" was necessarily finding that other cotenants had knowledge of adverse claims. Tex CommnA 296SW486.

25-99 76Mont175, 246P773; 123 Okl 26, 252P1093, 1095.–[citCyc]; TexCivA 291SW597; TexCivA 297SW334; WVa 153SE577 (cotenants barred as against purchaser from cotenant under void power of attorney). Facts held sufficient to prove ouster or adverse holding as between cotenants.–213Ala23, 104S 133; TexCivA 281SW1111. Facts held insufficient to prove ouster or adverse possession as between cotenants.–213Ala 670, 106S194; 170Ark758, 281SW17; 69 CalA50, 230P472; 88CalA441, 263P870; 202 Iowa472, 210NW558; 148Md165, 129A21; Mo 300SW497; 117Nebr671, 222NW49; 114 Okl 5, 242P766; 133 Or 78, 283P25; TexCommnA 273SW819. Taking and recording deed. TexCivA 4SW(2d)262; 187Wis232, 202NW34. Erection of house on land which cotenant believed to belong to himself is evidence that he did not intend erection to constitute hostile act. 88CalA441, 263P870. Mere refusal to recognize rights of cotenant is insufficient to raise presumption of ouster. 80CalA393, 252 P337. Evidence held insufficient to show continuous and uninterrupted possession.–88CalA441, 263P870. Evidence must be clear and satisfactory.–133 Or 78, 288P213.

25-99½-New. Mere silence following unequivocal acts of ouster does not constitute recognition of cotenant's rights. TexCivA 291SW597.

27-1 220Ala152, 124S237; 80CalA393, 252P337; 163Ga698, 137SE50; 140 Okl 16, 282P122. Grantor's widow holding in privity with grantor without repudiating cotenancy of grantor's divorced wife does not hold hostile to latter. Tex CivA 8SW(2d)327. To keep hostile cotenant from acquiring title by limitation, judicial action is necessary. TexCivA 295SW679. There must be complete ouster and absence of pending litigation before cotenant can acquire title by adverse possession against cotenants. 42 F(2d)927.

27-2 220Ala152, 124S237; 170Ark758, 281SW17; 173Ark788, 294SW21; 178 Ark625, 11SW(2d)440; 80CalA393, 252 P337; 88CalA441, 263P870; 163Ga698, 137SE50; 202 Iowa472, 210NW558; 211 Ky761, 278SW107; 213Ky696, 281SW 832; 215Ky57, 284SW410; 228Ky538, 15 SW(2d)454; 234Ky817, 29SW(2d)573; 117Nebr671, 222NW49; 117 Okl 68, 245P 34; 121 Okl 80, 247P677; 150SC351, 148 SE190; TexCivA 276SW324; TexCivA 291SW597; TexCivA 294SW633; Tex CivA 16SW(2d)154; TexCivA 16SW(2d) 874. Facts held sufficient to prove ouster or adverse holding as between cotenants. –213Ky696, 281SW832. Notice of adverse holding may be actual or constructive.–213Ky696, 281SW832.

30-3 117Nebr671, 222NW49.

30-4 202 Iowa472, 210NW558; 117 Nebr671, 222NW49. Improvements made by cotenant's husband may be presumed to be made for benefit of all cotenants. 88CalA441, 263P870.

31-5 80CalA393, 252P337; 202 Iowa 472, 210NW558; 114 Okl 5, 242P766. See also TexCommnA 15SW(2d)234; TexCivA 16SW(2d)154. Payment of taxes and exclusive possession will not alone establish title by adverse possession. 88CalA441, 263P870. Possession and improvement of part of land and payment of taxes thereon do not entitle tenant in common to claim title by adverse possession. 88CalA441, 263P 870.

32-6 117Nebr671, 222NW49.

32-7 117Nebr671, 222NW49.

32-8 123 Okl 26, 252P1093, 1095 [cit Cyc]. See also 211Ky761, 278SW107.

33-11 76Mont175, 246P773; 123 Okl 26, 252P1093, 1095 [citCyc].

33-12 158La915, 105S11 (ownership not acquired by prescription, where no exclusive occupancy and coöwner had collected and accounted for rents to all coöwners).

33-13 See also 178Ark625, 11SW(2d) 440.

34-15½-New. Agreement for settlement of partition suit, report of sale, and decree held not color of title as against party when showing payment only to different party. 192NC422, 135SE127.

34-16 212Ala681, 103S889; 173Ark788, 294SW21; 76Mont175, 246P773; 49Nev 124, 240P435; 121 Okl 80, 247P677, 679 [citCyc]; 140 Okl 16, 282P122; Tex CivA 294SW633.

35-17 214Ky793, 284SW75; 49Nev124, 240P435; TexCivA 294SW633.

36-19 See also 117Nebr671, 222NW49.

36-20 TexCivA 294SW633. The registration of such a deed, etc. TexCivA 294 SW633.

37-31 117 Okl 68, 245P34, 36 [citCyc]; 121 Okl 80, 247P677, 679 [citCyc]; Tex CommnA 296SW486.

37-32 173Ark788, 294SW21; 76Mont 175, 246P773; 117 Okl 68, 245P34, 36 [citCyc]; TexCommnA 14SW(2d)1009; TexCommnA 15SW(2d)234; TexCivA 16SW(2d)154; TexCivA 16SW(2d)874; WVa 153SE577 (exercise of void power of attorney to sell executed by cotenants and their receipt of purchase price). Conversely notice must be actual or act or acts relied on as ouster must be of such open and notorious character as to be notice of themselves or reasonably sufficient to put disseized cotenant on inquiry which if diligently pursued will lead to notice or knowledge of fact. 117 Okl 68, 245P34.

37-33 168Ark718, 271SW970 (recording tax title); 121 Okl 80, 247P677; Tex CommnA 14SW(2d)1009; TexCivA 291 SW597 (registration of deed conveying entire tract to claimant); TexCivA 16 SW(2d)154. Recording of deed conveying land in severalty and by metes and bounds is such constructive notice. 214 Ky793, 284SW75. Cotenant's registration of deed conveying entire tract to him is notice to other cotenant that he claims entire tract adversely. TexCivA 5SW(2d)232.

38-34½-New. Evidence sufficient under statute of prescription to give title. Tex CivA 276SW324.

38-35 TexCommnA 273SW819.

38-36 Business of buying cotton seed, to be crushed and manufactured into oil, in state, does not constitute interstate commerce. 220Ala605, 127S178.

39-47 211Ky761, 278SW107; TexCivA 294SW633. Evidence of adverse possession sufficient to warrant finding of notorious adverse claim of ownership. 211Ky761, 278SW107.

39-49 Evidence held to sustain finding that claim of cotenant was barred by other's adverse possession. TexCivA 293SW690.

40-50 176Ark225, 3SW(2d)11. Burden of proof is on cotenant to show adverse possession which he claims constitutes sole seizin. 194NC406, 139SE772.

40-51 175Ark50, 297SW1022. Duties on purchase of mortgage.–164Minn160, 204NW958. Fact that tenant in common also has life estate in property does not prevent him from acquiring title of purchaser at foreclosure sale for his own benefit, after expiration of redemption period and extinction of relation of life

tenant and remaindermen. 164Minn160, 204NW958.

40-55 100NJEq396, 135A780; NJCh 144A446(2dcase); TexCivA 4 SW(2d) 218.

40-56 42F(2d)927; 125Kan797, 266P 98; 220Ky717, 295SW1016; 170Minn 268, 212NW453; 141Miss124, 106S269; 99NJEq243, 132A291, 292 [citCyc]; 132 Okl 217, 270P54; TexCivA 4SW(2d)218. **Purchase at execution sale.**–TexCivA 276 SW324. **Basis of rule.**–202 Iowa1094, 211NW488.

42-57 **An unreasonable delay, etc.** Tex CivA 276SW324.

42-58 Cal 290P577; NJCh 144A446(2d case).

43-65½-New. Tenant taking out oil and gas must pay cotenants usual royalty for oil or gas in place, or, if taking was wrongful, he must pay value of cotenants' proportion at mouth of well as their share. TexCivA 288SW619.

43-67 TexCivA 295SW679.

44-68 100NJEq396, 135A780.

46-80½-New. Tenant in common who purchases at mortgage foreclosure sale holds title impressed with trust in favor of incompetent cotenant. 215AppDiv 361, 213NYS690 (such tenant cannot pass good title, even though by sale in good faith to straighten out title).

46-80¼-New. **Purchase of lease by tenant in common of fee.**–Where one of several tenants in common of fee to land purchases on his own behalf outstanding lease and buildings erected and owned by lessee, his cotenants may not demand right to make contribution and become tenants in common of building. 202 Iowa1094, 211NW488.

46-80¼-New. In such case cotenant's acquisition of lease cannot operate to oust or undermine estate of his cotenants. 202 Iowa1094, 211NW488.

46-81 161La949, 109S773 (under agreement by tenants in common as to amount of interest of each in property, as between themselves, each owes like proportion of mortgage debts and taxes).

46-82 125Kan797, 266P98; 220Ky717, 295SW1016; 317Mo 544, 297SW54; Tex CivA 276SW324; TexCivA 4SW(2d)218. **Acquisition of lease and buildings erected and owned by tenant in common of fee** does not entitle him to contribution from his cotenants for his outlay. 202 Iowa1094, 211NW488. **Where tenant purchased mortgage at discount,** cotenants are entitled to share in benefit on payment of proportionate share of amount actually paid. 170Minn268, 212 NW453. **Claimant required to contribute to purchase of outstanding title** in mineral bonds can set off value of his surface rights given in part consideration for outstanding title. 218Ky657, 291SW1049.

47-85 45 Ida724, 265P697; 207 Iowa 1248, 224NW813; 218Ky657, 291SW 1049; 54SD261, 223NW64. **Where cotenant redeeming entire estate from foreclosure sale held his interest free from obligation of common grantor and his cotenant did not,** latter, in order to enjoy privilege of contribution, must pay redeeming tenant entire amount paid by him and interest. 125Kan797, 266P 98.

48-92 TexCivA 276SW324.

48-92½-New. Restraint upon acquisition and assertion of paramount adverse title by tenant in common does not continue after termination of cotenancy. 164Minn160, 204NW958.

48-92½-New. Recording laws do not apply to equities of cotenants inter sese or to their consequent right to liens. 208 Iowa62, 224NW831.

48-93 98NJEq487, 131A129.

48-94 168Ark718, 271SW970.

48-95 But see 96Fla423, 118S209.

49-97 228Ky538, 15SW(2d)454; 98NJ Eq487, 131A129 (upon reimbursement); Utah 287P926; 107WVa418, 148SE131. **The grantee of a cotenant** in deed to secure indebtedness cannot set up tax title against other tenants in common. Utah 287P926. **Acquisition of title by husband of cotenant.**–107WVa1, 148SE566.

51-9 TexCivA 278SW937; 149Wash 221, 270P823.

51-10 98NJEq487, 131A129.

52-13 107WVa1, 148SE566.

52-14 98NJEq487, 131A129 (redemption from tax sale).

53-21 But see 100NJEq396, 135A780. **Mortgagee.**–203 Iowa320, 211NW389.

53-24 Mont 286P133. **Tenant in common has right to make improvements upon** common property if honestly made. 44 OklACR239.

53-26 **Accounting for advances** is properly required where cotenant advances money for repairs to be made by other cotenant. 169La35, 124S137.

54-27 181Ark736, 27SW(2d)523 (holding that cotenant's husband could not charge entire property with taxes paid at wife's, but not other cotenant's, request); CalA 288P110; 154Md135, 140 A76. **Improvements by grantee of cotenant.**–317 Ill 625, 148NE384.

54-28 216Ala448, 113S501.

55-29 26F(2d)970; 216Ala448, 113S 501; 154Md135, 140A76; Mont 286P 133; 7PaDist&Co 717; TexCivA 278SW 937. **Contribution permitted for amounts paid** on encumbrances. Tex CivA 278SW937.

56-30 214Ky267, 283SW111; 129Misc 617, 221NYS508; TexCommnA 292SW 178; TexCivA 278SW937. **Award to tenant for improvements** made in good faith is proper in trespass to try title by cotenant. TexCommnA 292SW178.

56-32 181Ark736, 27SW(2d)523; CalA 259P502; 228AppDiv19, 238NYS443; 95 PaSuper174; 54SD261, 223NW64. See also 228Ky780, 15SW(2d)528. **Excessive expenses.**–223Ky59, 28W(2d)1073.

57-33 **Remedy giving contribution** between tenants in common does not apply between tenants or owners in severalty of separate properties as in separate part of same property. 54ND 346, 209NW784.

58-34 See also 24 OhNPNS101.

58-36½-New. **Maintenance of widow.**–Where there is no agreement among cotenants to use proceeds for maintenance of their mother, a widow, tenant paying therefor is not entitled to contribution from cotenants, though they acquiesced therein. 214Ky267, 283SW 111.

58-36¼-New. No duty rests on tenant in common to insure property for benefit of remainderman or cotenant. 219 Ala319, 122S318.

58-36¼-New. Cotenants of mining claims are not required to contribute towards expense of working claims by one cotenant until latter proves account. 42F(2d)927.

58-37 But see 117Tex474, 8SW(2d)633, 66ALR916.

59-41 117Tex474, 8SW(2d)633, 66ALR 916.

60-42 CalA 259P502.

61-52 See also 147SC12, 144SE586, 62 ALR533. **In Arkansas.**–173Ark788, 294 SW21.

61-53 173Ark788, 294SW21.

61-56 204Cal231, 267P1081; 45 Ida 724, 265P697, 698 [citCyc]; 147Wash 29, 264P983.

62-62 **Recovery by cotenant** for use and occupation of land should be limited to interest shown. 22AlaA1, 113S 651. **Grantee of heirs of lessor holding interest** in land held entitled to sue for use and occupation against lessee and subtenant. 22AlaA1, 113S651.

62-63 204Cal231, 267P1081.

63-66½-New. Tenant in exclusive possession of land, where cotenants have not sought possession for themselves, is entitled to all profits. TexCivA 6SW (2d)430.

63-67 214Ala382, 107S841; 99CalA293, 278P454(2dcase); 129Misc617, 221NYS 508; TexCivA 278SW937; TexCivA 4 SW(2d)218. **Cotenant need not account for profits** till he has refused formal demand for joint possession from cotenant. TexCivA 278SW937.

65-68 TexCivA 278SW937. **It is presumed** that rental value is sufficient to pay taxes, as regards right to charge interest of cotenant. 181Ark736, 27SW (2d)523.

66-71 39F(2d)800; 317 Ill 625, 148NE 384 (rents and profits less taxes paid by tenant in possession); 145Miss543, 111S577; 129Misc617, 221NYS508 (holding denial in pleading of liability to account equivalent to ouster as to commencement of action); 24 OhNPNS101 (tenant in common may set off taxes and assessment against cotenant's action for rents and profits); 131 Okl 217, 268P 193, 194 [citCyc]; TexCivA 4SW(2d) 218; 150Va414, 143SE688. **Conduct constituting ouster.**–131 Okl 217, 268P 193.

67-72 TexCivA 6SW(2d)136.

67-73 See also 266Mass462, 165NE485; 125Misc849, 211NYS507. **Tenant in common of oil under land** may develop and sell oil to prevent loss by drainage, accounting only for net proceeds. Tex CivA 3SW(2d)592.

69-75 But see 99CalA293, 278P454(2d case).

70-77 CalA 288P110; 214Ky267, 283 SW111.

71-78½-New. **Where cotenant in possession was entitled to fractional part of land absolutely under decree,** tenant out of possession is not entitled to recover rents and profits where he made no offer of allotment but denied right under decree. 170Ark758, 281SW17.

71-79 266Mass462, 165NE485.

71-80 161La378, 108S777.

71-81 39F(2d)800 (interest to date of decree).

71-82½-New. Interest is not allowed in absence of allegation or prayer for such item. 168La573, 122S854.

72-84 145Miss543, 110S789, 790 [cit Cyc]; 145Miss543, 111S577, 578 [cit Cyc].

72-86 26F(2d)970; 162Ga735, 134SE 771 (by statute); 231NYS635.

72-87 162Ga735, 134SE771 (by statute).

72-88½-New. And lien of deed of trust given to secure indebtedness of tenant in common to his creditor is superior to lien subsequently by court in partition proceedings. 145Miss543, 110S789.

72-89 162Ga735, 134SE771. **In Georgia.**–162Ga735, 134SE771.

72-90½-New. **Lien for use and occupation of adverse cotenant** does not arrive till impressed by decree. 145Miss 543, 111S577.

72-91 TexCivA 6SW(2d)136; 59 OntL 506, [1926] 4DomLR822. **Conveyances.** –51Nev226, 273P657.

73-92 154Md135, 140A76. **Cotenant of deceased taking no part** in family arrangement between heirs of deceased is not bound thereby. 117Nebr671, 222 NW49.

73-93 206 Iowa1394, 220NW121; 154 Md135, 140A76. **Leasing tenant in common can have no lien on produce** raised on undivided interest of premises belonging to maker of rent note which embodies provision to give payee first claim on all farm produce raised on entire premises for ensuing year. 35GaA 461, 133SE347. **Where deed divides tract of land between tenants in common,** each taking fee in particular tract with respective reservations of mineral interest for life, but giving each full power to lease mineral interest in his tract, one of such owners cannot compel execution of lease of mineral rights. 87PaSuper369.

73-93½-New. Contract for purchase of cotenant's interest by other cotenants is construed to grant to cotenant or his heirs privilege of selling and not to impose on heirs liability to sell after his death. 99Vt294, 131A794.

74-3 161La949, 109S773 (in such case cotenants may agree among themselves by parol as to their respective interests). But see TexCivA 9SW(2d)203. **Permission** to use water at all times does not justify cotenant in selling water contrary to agreement. TexCivA 3SW (2d)1113.

74-4 208 Iowa62, 224NW831; 133Misc 24, 230NYS590.

74-6 **When will in favor of husband of testatrix declared children were provided for by his will,** executed on same date, it was held, in absence of evidence that husband induced her to make will or agreement with children, that no trust was created. 258Mass511, 155NE 643.

75-7½-New. Where parties' intent to

take as tenants by entirety has been frustrated by fact that they could not contract legal marriage, because one of them had former spouse living, court of equity, in partition, may take into account amounts invested in property by respective tenants in common, in determining shares thereof to which they are entitled. 133Misc24, 230NYS590.

75-11 259Mass515, 156NE701.

75-14 163Ga37, 135SE487.

77-27½-New. Tenant selling water has burden of proving expenses incurred in such sale. **TexCivA** 3SW(2d)1113.

78-30 **TexCivA** 3SW(2d)1113. **Cotenant in possession** is entitled to deduct from rents or profits received cost of all proper expenditures made in working property and developing it or in protecting common estate. **CalA** 259P502.

80-47½-New. Evidence held to sustain finding of amount allowable for improvements and amount received as rents. 168La573, 122S854.

80-48 169Ark622, 276SW371; 163Ga222, 136SE52; 45Ida724, 265P697; 138Okl245, 280P826. **Petition for accounting for rents of farm** held sufficient. 119Kan348, 239P751.

80-49 **Allegations held insufficient.**-169Ark622, 276SW371.

80-51 169Ark622, 276SW371.

81-56½-New. In action against cotenants for accounting, answers to interrogatories held insufficient to overcome general verdict. 85IndA636, 154NE288.

83-71 **Parties.**-215Ala646, 112S219. **Variance.**-215Ala646, 112S219. **Credit allowed** for necessary hospital expenses paid by defendant for plaintiff cotenants. **TexCivA** 6SW(2d)136.

84-75 **TexCivA** 3SW(2d)1113. **Amount of recovery.**-See **TexCivA** 3SW(2d)1113. **Burden of proof.**-See **TexCivA** 3SW(2d)1113.

86-76 191NC517, 132SE276.

88-78 **MoA** 17SW(2d)597.

89-84 220Ala443, 125S811.

89-88 220Ala443, 125S811.

90-91 218Ala593, 119S631.

90-93 218Ala593, 119S631. **Mining.**-218Ala593, 119S631.

92-1 152Miss572, 120S568.

92-2 **Acts of ouster to support action.**-152Miss572, 120S568.

94-13 161Ga448, 131SE154.

95-23½-New. Lessor under oil lease as tenant in common with lessee may maintain action against trespasser and recover possession of whole estate in minerals. **TexCivA** 2SW(2d)288.

96-25 See also **TexCivA** 271SW116.

96-27½-New. Tenant in common may maintain action to recover whole of land from person having no title. **TexCivA** 2SW(2d)288.

96-29 15F(2d)192.

96-30 **Equitable rights** of complainant and cotenant resulting from redemption may be determined in suit to set aside foreclosure, where complainant was allowed to redeem. 221Ala371, 129S81.

96-33 **Excluded cotenant** is entitled to money judgment against defendant cotenant. 39F(2d)800.

97-41 See also **TexCivA** 4SW(2d)218 (2dcase).

97-42½-New. **Equity has jurisdiction in case where joint tenant seeks to recover** his just proportion of rent where tenant sued has received more than his just share. 125Misc849, 211NYS507.

97-42⅓-New. This jurisdiction is concurrent with remedy at law, not exclusive. 125Misc849, 211NYS507.

97-44 21F(2d)388, 394 [quotCyc].

100-65½ **Tenant is guilty of laches** on failing for twelve years to assert claim to lapsed shares of cotenant. 39F(2d)800.

101-66 165La57, 115S366. **Contribution.**-202Iowa866, 211NW410.

101-67 224AppDiv647, 232NYS143. **Statutes held applicable.**-202Iowa866, 211NW410.

101-69 But see 266Mass462, 165NE485.

101-70 See also **TexCivA** 118SW(2d)329.

101-70½-New. Statutes of limitation do not begin to run until facts are discovered by cotenant. 24OhNPNS101.

101-70¼-New. **Laches.**-In action to declare interest in land redeemed by wife of cotenant from tax sale, failure to assert claim for many years, during which time wife while compos mentis remained in open and hostile possession, is such laches as bars equitable relief. 98NJEq487, 131A129.

101-70¼-New. Suit by cotenant to quiet title is not barred by laches where no laches are shown since defendant refused to recognize his interest. 170Ark758, 281SW17.

101-71 103CalA203, 284P472; 166Minn153, 207NW311; 128Misc184, 218NYS55; 289Pa519, 137A670; 65Utah435, 238P253; 67Utah553, 248P496; 101WVa57, 131SE870. **Timber.**-133SC395, 131SE18. **Mortgage or lien.**-But see **TexCivA** 218SW(2d)92. **Attorney's claimed employment by cotenant** does not bind another cotenant as partner. 235Ky372, 31SW(2d)610.

104-74 **Contract with broker for commissions.**-210Ky229, 275SW639.

104-76 But see **TexCivA** 4SW(2d)262.

104-78½-New. Where one cotenant deals with property of all cotenants without their consent, ratification applies. **TexCivA** 288SW619.

105-79 164Ga64, 137SE773; 128Misc184, 218NYS55; 293Pa513, 143A227. **Unauthorized lease** by one tenant creates mere tenancy at will. 164Ga64, 137SE773. **Evidence held not to show essential authority or ratification.**-128Misc184, 218NYS55.

105-82 **Where lease gives lessors option to terminate lease and purchase buildings,** one coöwner has no right to exercise option and compel conveyance to him of proportionate interest without consent of other owners. 202Iowa1094, 211NW488.

105-83 82Mont222, 266P406; 139Okl68, 281P286.

105-87½-New. Lessor's cotenant could either take share of oil produced by lessees less share of expenses or ratify lease and take share of royalty. **TexCivA** 288SW619.

105-87⅓-New. One tenant in common cannot, unless authorized by others, release forfeiture of lease. 289Pa519, 137A670.

106-3 126Misc777, 215NYS549; 50SD463, 210NW663 (evidence held sufficient); **TexCivA** 288SW619, 622 [cit Cyc]. **Acceptance of rent from lessee** under void lease held mere acceptance of rent of tenant at will and not ratification of lease. 164Ga64, 137SE773. **Mere acceptance of rent** by cotenant who had not authorized lease held not ratification. 164Ga64, 137SE773. **Royalty division orders** held evidence of tenant's ratification of cotenant's lease. **TexCivA** 288SW619. **Where tenancy is under seal,** ratification must be under seal. 164Ga64, 137SE773.

107-4 **TexCivA** 288SW619.

107-5 See also 148Md165, 129A21.

107-13½-New. Where only one joint owner executed contract, its effect is to estop such owner from claiming more than his pro rata share of contract price. 229Ky254, 16SW(2d)1041.

107-13½-New. Subsequent transferees of tax title not bound to assume instrument from heir of deceased cotenant to surviving cotenant who purchased at tax sale was null in so far as it purports to transfer interest in land, but was recognition of heir's interest. 168La657, 123S114.

107-13¼-New. Instrument signed in behalf of heir of deceased cotenant without authority subsequent to surviving cotenant's acquisition of tax title is not acknowledgment by him of heir's interest after tax sale. 168La657, 123S114.

107-13⅓-New. Deed from cotenant's heir to owner of other part of premises purporting to transfer grantor's interest in estate is not acknowledgment of grantor's interest in land by surviving cotenant after tax sale. 168La657, 123S114.

107-13⅙-New. Assignees of heirs of deceased tenant in common are estopped after twenty years from claiming part interest in property brought in by cotenant on tax sale after sale to third party. 168La657, 123S114.

107-13⅐-New. That part owner holding tax title obtained signature of heirs of deceased cotenant to grant of right of way did not constitute acknowledgment by holder of tax title of heirs' interest. 168La657, 123S114.

108-16½-New. Tenant in common may assign his share of rents and profits without consent of cotenant. **SD** 230NW282.

108-17 **TexCivA** 3SW(2d)1113; 105WVa491, 143SE155.

109-20 221Ala209, 128S396 (sale not executed by one cotenant binds others to their interests); 97Fla885, 122S521; 221Ky91, 297SW1109; 307Mo218, 270SW653. **Sale by cotenants,** one of whom was under disability, is binding on others. 221Ala209, 128S396.

110-21 **Evidence held to support finding.**-**TexCivA** 283SW874. **Specific performance** lies against two cotenants, on abatement of purchase price, where third tenant's joinder was void for disability. 221Ala209, 128S396.

111-25 **TexCivA** 288SW619, 623 [quot Cyc]; **TexCivA** 3SW(2d)1113.

111-26 **TexCivA** 288SW619, 623 [quot Cyc].

111-29 307Mo218, 270SW653; **TexCivA** 3SW(2d)1113. **In Porto Rico.**-6F(2d)106.

112-37 25F(2d)570; 179Ark661, 17SW(2d)877; 147SC259, 145SE113; **TexCommnA** 291SW532; 67Utah553, 248P496. See also 334Ill539, 166NE118, 65ALR887. **Right of cotenants to redeem.**-33PortoRico436. **Lien of joint mortgage given by tenants in common** attaches to their moieties in property as entirety. **TexCommnA** 27SW(2d)130. **Mortgagee of interest of one tenant in common** is entitled to lien on increase in value of cotenant's interest caused by improvement. **NJCh** 151A766.

112-37½-New. or may lease the same, **TexCommnA** 291SW532.

113-38 See also **TexCommnA** 291SW532.

114-44½-New. Rights of purchaser at mortgage foreclosure sale to improvements by grantee of tenants where another tenant executed mortgage foreclosed. 198NC466, 152SE161.

114-44⅓-New. Joint mortgagor cannot resist separate foreclosure against his moiety in common property, where estate of other joint mortgagor is being administered under probate court. **TexCommnA** 27SW(2d)130.

114-44¼-New. Tenant in common giving joint mortgage with other cotenants is entitled in foreclosure suit to demand joinder of other cotenants. **TexCommnA** 27SW(2d)130.

116-55 **TexCivA** 27SW(2d)612.

117-57 **Excluded cotenant** is entitled to money damages against successors of defendant cotenant. 39F(2d)800.

117-61 70CalA70, 232P744; 154Tenn167, 289SW513, 515 [citCyc].

117-63½-New. Finding that measure of damages for timber cut and removed under grant from cotenant is stumpage value of timber held erroneous. 133SC395, 131SE18.

117-63⅓-New. Builder of railroad for removal of timber under grant from one cotenant is liable to other for damage to his timber and property resulting from unauthorized act. 133SC395, 131SE18.

117-63¼-New. Measure of damages for unauthorized building of railroad for removal of timber under grant from one cotenant under honest mistake of right is value of timber of other cotenant on stump and interest from date of appropriation. 133SC395, 131SE18.

117-63⅕-New. Grantee of cotenant chargeable with profits on timber of other cotenant converted will be charged with profits which could have been made by man of ordinary business capacity in absence of showing that no profits actually accrued. 133SC395, 131SE18.

117-63⅙-New. Where title of tenants in common to land from which timber is cut and removed by one of them is

superior to title of adverse claimant, tenant so cutting and removing timber is entitled to proceeds of timber as against adverse claimant, 163Ga37, 135SE487.

117-63½-New. though such tenant cutting and removing timber in proceeding against adverse claimant for recovery of such proceeds alleges ownership of land and timber in severalty. 163Ga37, 135SE487.

117-63½-New. If such tenant got more of profits of joint property than he was entitled to, his cotenant can compel him to account for any excess of his share of such profits. 163Ga37, 135SE487.

117-63½-New. But the adverse claimant cannot avail himself of such fact to defeat cotenant from recovering proceeds of timber so cut and removed. 163Ga37, 135SE487.

118-64 220Ala443, 125S811; 154Tenn167, 289SW513, 515 [citCyc]; 106WVa296, 145SE601.

118-66 Plaintiff proceeding under statute for benefit of cotenants must allege facts bringing parties within statute. 67Utah553, 248P496. **Statute permitting joint or several action** does not give individual tenant in common any other hold or additional right not enjoyed prior to its enactment. 67Utah553, 248P496.

119-67 154Tenn167, 289SW513, 515 [citCyc].

119-68 220Ala242, 124S528; 172Ark108, 287SW1019. **Trespass to try title as to whole.**–TexCivA 283SW324.

119-69 Mines and minerals.–17F(2d)71.

120-72 100WVa368, 130SE461, 463 [quotCyc].

120-73½-New. Separate claims of exemption interposed by joint owners of cotton held not to operate as severance of joint interest precluding joint action. 216Ala120, 112S447.

120-74 TexCivA 290SW872. **In absence of plea in abatement** for defect of parties, tenant in common suing alone may recover damages in amount proportionate to his interest in property. TexCivA 290SW872. **Injuries to realty.**–TexCivA 290SW872. **Plea in abatement is necessary** to take advantage of failure of all tenants in common to join in petition. TexCivA 290SW872. **In Massachusetts.**–168NE78.

121-80 191NC517, 132SE276 (personal property).

121-81 191NC517, 132SE276.

121-82½-New. All tenants in common should join in action for damages to land owned by them. TexCivA 16SW(2d)166.

121-86 See also TexCivA 283SW324. **At common law** assignee of cotenant cannot join with other cotenants in action of trespass. 100WVa368, 130SE461.

121-92 But see TexCivA 283SW324.

123-7½-New. Tenant in common of chattel, selling it without consent of other cotenant, and buyer may be sued jointly or severally. 169Ark622, 276SW371.

123-11½-New. Judgment.–Where judgment debtor owned undivided half interest in coal rights in separate tracts, court could order sale of enough of debtor's interest to satisfy debt. 230Ky129, 18SW(2d)946.

TENDER

131-1 42Ida121, 244P407, 409 [quot Cyc]. See also 214AppDiv429, 212NYS336. **Other definitions are:** Offer by debtor, or other person who is under obligation to pay debt or perform obligation, actual payment or performance being prevented by refusal of creditor, or person entitled to performance, to accept same. 138SC435, 136SE762.

132-2 98Fla1004, 124S751; 42Ida121, 244P407, 409 [quotCyc].

132-4½-New. It is no longer tender when payment has been made. 214AppDiv429, 212NYS336.

134-11½-New. Statutes relating to tender by debtor to creditor do not conflict with statute on reciprocal duties under cumulative contract. 163La853, 113S123.

134-14 TexCivA 4SW(2d)581, 583 [cit Cyc].

135-15 86IndA53, 155NE709.

135-17 136SC40, 134SE147, 148 [quot Cyc]; NB [1928] 4DomLR214.

135-18 84CalA526, 258P429; 101CalA741, 282P399; 15DelCh9, 130A39; 160Ga638, 128SE807; 167Ga176, 145SE71; 84Mont521, 277P14; 86Mont530, 284P264; 86Mont500, 284P267; 155Tenn486, 290SW988; 38Wyo427, 267P1060. **Offer to pay interest on note was unnecessary,** where payee repudiated extension agreement and demanded payment of entire note immediately. TexCivA 16SW(2d)553.

136-19 33Ariz374, 265P84; NJ 144A585(2dcase); 189NC610, 127SE706; TexCivA 274SW323; Alta [1928] 4DomLR606. **Tender of smaller amount is unnecessary,** where evidence conclusively showed that insurer would not have accepted anything less than increased amount. TexCivA 11SW(2d)523.

136-25 159La244, 105S305.

136-30½-New. Waiver of defects in tender generally.–Provisions of civil code and code of civil procedure relative to tender, construed together, make it incumbent upon person to whom tender is made to specify at time of tender any objections which he has opportunity to make to terms thereof and to specify terms which may require and which may be obviated by other or be precluded thereafter from making such objections. 195Cal655, 235P438.

136-30½-New. Principle of estoppel embodied in such code provisions is generally recognized. 195Cal655, 235P438.

136-30¼-New. Formal tender may be waived.–204Iowa103, 214NW877.

136-30½-New. Law does not require vain or useless thing in matter of tender. 204Iowa103, 214NW877.

137-31 68CalA226, 228P681; 233Mich215, 206NW483; 85Mont293, 279P236; 105NJL324, 144A605; TexCivA 282SW926.

137-32 TexCivA 6SW(2d)186. **The insignificance of the deficiency,** etc. TexCivA 282SW926, 930 [citCyc].

138-38½-New. Right of holder of paper to refuse payment and insist on payment of interest to future date according to terms should be expressly evidenced on face of paper and cannot be implied. 207Iowa1351, 224NW793.

138-39 15DelCh9, 130A39; NJ 135A696.

138-41 101Vt356, 143A276; Sask [1925] 3DomLR501.

140-52 154Wash282, 282P65.

141-63 Mere readiness to tender is not equivalent to tender.–204Iowa103, 214NW877.

141-64 72CalA393, 237P751. **Inability to perform** and knowledge thereof by tenderer is indubitable evidence that offer is not made in good faith. 72CalA393, 237P751.

141-65 42Ida121, 244P407, 409 [cit Cyc].

141-66 42Ida121, 244P407, 409 [cit Cyc].

142-69½-New. A tender not objected to is good under statute providing that objections to mode of offer of performance which person making offer might obviate are waived by creditor if not then stated. Ida 286P920.

142-70 42Ida121, 244P407, 409 [cit Cyc]; 204Iowa103, 214NW877.

142-74 72CalA393, 237P751; 42Ida121, 244P407; 221MoA789, 287SW1075, 1079 [quotCyc].

143-78 72CalA393, 237P751.

143-80 221MoA789, 287SW1075, 1079 [quotCyc].

143-80½-New. Tenderee's inability to perform does not offset tenderer's inability to perform so as to make such tender good. 72CalA393, 237P751.

143-81 204Iowa103, 214NW877; 252Mass563, 148NE136. But see TexCivA 12SW(2d)655.

144-87 221MoA789, 287SW1075, 1078 [citCyc]; TexCivA 12SW(2d)655.

144-88 3LaA572; 105NJL324, 144A605.

145-97 221MoA789, 287SW1075, 1079 [citCyc].

145-98½-New. Deposit of money to credit of other party to contract and notice to him of deposit do not constitute tender. 136Wash84, 238P924.

146-99 Statute construed.–72CalA393, 237P751.

146-1 Ability or readiness to make tender good is not dispensed with. 72CalA393, 237P751.

146-3 151Md181, 135A139.

147-7 151Md181, 135A139. **Tender of check on bank in which drawer has not sufficient funds to pay** it is not legal tender. GaA 155SE43.

147-8 98CalA257, 276P1071; 221Ky573, 299SW193. See also 116Or433, 240P549. **A certified check** is not, etc. 151Md181, 135A139.

147-18 116Or433, 240P549, 550 [quot Cyc].

148-24 54SD90, 222NW607.

149-30 Acceptance of face of note cannot be compelled by debtor by tender thereof where payable in installments, some of which are not due. 253Mass486, 149NE149.

149-33 MoA 282SW78, 80 [citCyc].

150-38½-New. Where check was element in case, it was not error for court to permit tender thereof after ruling on demurrer to evidence. MoA 271SW1029.

150-39 215Ala412, 111S427, 430 [cit Cyc]; 144Okl259, 291P74.

150-42 But see TexCivA 271SW653.

150-43 But see 45Ida541, 263P1002. **Note payable in named city is not payable "at a special place,"** within statute making ability and willingness to pay note payable at special place equivalent to tender of payment. TexCivA 13SW(2d)174.

150-44 45Ida541, 263P1002.

152-55 34Ariz68, 267P794, 798 [cit Cyc]; 68CalA383, 229P710; 160Ga638, 128SE807; 119Kan811, 241P446; 221MoA789, 287SW1075, 1078 [citCyc].

152-57 166Minn472, 208NW186, 48ALR710 (tender of money not property of one who makes tender); 221MoA789, 287SW1075, 1078 [citCyc]; 85Mont293, 279P236.

152-59 NH 148A28(1stcase); 286Pa263, 133A374.

154-68 See also 26F(2d)796.

154-74½-New. Tender of full amount of note, on condition that mortgage given to secure payment of such note and others be satisfied, does not discharge such note. 85Mont293, 279P236.

154-75 Mo 281SW686, 689 [citCyc].

155-80 123Or651, 262P263. **Stranger must make known authority.**–204Iowa103, 214NW877. **Tender held not to be by stranger and thus valid.**–123Or651, 262P263(2dcase).

156-92 42Ida121, 244P407.

157-5 221Ky573, 299SW193.

158-15 68CalA383, 229P710; 45Ida541, 263P1002, 1005 [citCyc]; 221MoA789, 287SW1075; TexCivA 284SW717. But see 98CalA257, 276P1071.

159-16 TexCivA 272SW317.

159-16½-New. Equity will not require tenderer to keep tender good where creditor has wrongfully refused it. TexCivA 272SW317.

159-17 224AppDiv433, 231NYS365; 123Or651, 262P263.

159-18½-New. Tender need not be kept good in order to discharge lien when third parties are concerned. TexCivA 293SW226.

160-23 245IllA473.

160-25 But see 245IllA473.

161-29½-New. Even though tender has been refused, equity may require it to be kept good. 202Iowa246, 210NW91.

161-32 88CalA20, 263P538.

161-35 21OhA390, 153NE212 (refusal in open court to complete tender).

162-43 245IllA473. **Tender renders proof of payment unnecessary** when payment is proper or necessary defense to action. 34Ariz68, 267P794.

163-59 15F(2d)937; 4LaA374; 128Okl288, 262P1059, 1062 [citCyc].

164-63 15F(2d)937.

164-64 15F(2d)937.

164-63½-New. Tender before suit of amount less than that sued for is not admission of liability on ground declared. 15F(2d)937.

165-69 46Philippine81 (acceptance of court deposit held waiver of contract claim).

165-75 Assent is inferred by silence of

tenderer after learning of conditions. 225Ky472, 9SW(2d)206.

165-78½-New. Right to object to tender because of some infirmity therein arises independent of statute and is available to tenderer. 72CalA393, 237P751.

165-78½-New. Statute requiring objection to tender to be made at time of tender or objection will be considered waived does not apply to objection that tenderer cannot make tender good. 72CalA393, 237P751.

165-78¼-New. Debtor has right to treat tender as refused if not accepted within reasonable time. TexCivA 293SW226.

165-78½-New. Acceptance of payment tendered unconditionally binds person by payment as tendered till conditions, if any, sought to be imposed, are assented to by other interested party. 225Ky472, 9SW(2d)206.

165-78½-New. Suing for goods sold and delivered, short time after receiving checks which plaintiff did not cash. is sufficient objection to claim of tender. 100CalA330, 279P1016.

166-85 NJ 135A696. **Averment of tender, unsupported by proof,** held not to establish that fact. 214Ky560, 283SW424. **Defendants,** by failure to deny tender, were precluded from first questioning during trial plaintiff's ability to pay money offered or failure to keep tender good, and hence could not cross-examine witnesses on subject. 98CalA257, 276P1071. **Plea of tender must be expressly denied,** or will be deemed to have been admitted. 98CalA257, 276P1071.

166-89 **In equity, it is sufficient to tender,** in pleadings and at trial, restoration of status quo. 206Iowa206, 214NW718.

167-92½-New. **Plea of tender is admission of indebtedness.**-219Ala607, 122S814.

167-93 12PaDist&Co 442 (manner, terms, and conditions).

168-98 12PaDist&Co 442.

168-99 12PaDist&Co 442. **Averment of tender "about" time of expiration of certain period** is insufficient to show tender before expiration of such period. 215Ala412, 111S427.

169-10 202Cal 643, 262P755; 98Fla 1004, 124S751.

170-16 **Mere denial of right to possession of cattle** did not amount to sufficient denial of alleged tender of amount due for pasturage. 98CalA257, 276P1071.

171-22 98CalA257, 276P1071.

171-25 321MoA448, 282SW459.

174-51 **Allegation that greater sum was due than tendered** obviated necessity of tender in court. 98CalA257, 276P1071.

175-68½-New. Payment of certified check into court is good tender where tenderer subsequently asks court's permission to pay cash into court in lieu thereof. 151Md181, 135A139.

175-69 **Where defendant fails to give statutory notice,** plaintiff can regard tender as common-law tender. 137Misc512, 241NYS637 (statutes held not to affect common law tenders).

176-85½-New. **Money tendered and paid into court** is applied as credit to money judgment obtained by plaintiff. TexCivA 282SW617.

176-87 123Or651, 262P263; 127Or393, 272P265.

178-97 137Misc512, 241NYS637.

178-6 **Evidence held sufficient.**-312Mo694, 281SW725. **Evidence held to show tender kept open.**-172Minn349, 215NW781.

178-7 **Evidence held sufficient.**-72CalA393, 237P751.

179-16½-New. Evidence has been held insufficient to show tender of attorney's fees necessary. TexCivA 299SW921.

179-17 42Ida121, 244P407.

179-22 But see 34Ariz68, 267P794.

180-24 42Ida121, 244P407.

180-26 But see 123Or651, 262P263.

TENEMENT-HOUSE

181-5 **For other definitions see NJCh** 136A801.

TENURE

183-30 See also 4HawaiiFed198.

TERM or TERMS

184-35 191NC291, 131SE757.

184-36 49ND414, 191NW493.

184-38½-New. term of court at which verdict was rendered or trial had within meaning of rule of court relating to making bill of exceptions. 90Fla571, 107S183.

185-39 242NY28, 150NE591. **Term unless qualified is "interest" or "estate."**-242NY28, 150NE591. **Context may show "term" as synonymous with "time."**-242NY28, 150NE591.

TERMINAL

187-41 **Terminal of railroad** means end or terminus of road, and, as applied to divisional terminal, includes superintendent's and train dispatcher's offices. TexCivA 275SW673.

TERRITORIES

195-14 12PortoRicoFed262.

196-17 24F(2d)989 (Porto Rico and Philippine Islands). **Woman's suffrage** is not recognized in Porto Rico. 33PortoRico 201.

196-18 **Nineteenth amendment** is not in force in Porto Rico. 33PortoRico 76.

196-21 7Alaska147.

197-27 **In Philippines.**-51Philippine 596.

197-28 **Naturalization in Philippines.**-45Philippine289.

199-35 50Philippine259. **The territorial legislature cannot pass a valid act inconsistent with the organic law.**-18F(2d)918.

199-36 **Rule of common law under Spanish sovereignty** was changed by ordinance of 1787 for government of territory of United States. 213Ala494, 106S150.

199-37 **Foraker and Jones Acts** held to give Porto Rico autonomy similar to that of states. 16F(2d)545.

200-38 **Prohibition against use of public property or funds for religious purposes.**-44Philippine292 (grant of free use of municipal water system to catholic convent, construed as barter or exchange of property, and not in conflict with prohibition). **Functions of branches of government can be exercised only in manner prescribed by organic law** and laws which conform thereto. 50Philippine259.

201-41 33Ariz76, 262P616; 50Philippine259. **Effect of failure to annul.**-28F(2d)820.

201-42 272US640, 47SCt229, 71L ed454. **Conflict not presumed.**-272US640, 47SCt229, 71L ed454.

201-43½-New. Failure of congress to annul act of territorial legislature is not equivalent of adoption. 18F(2d)918.

201-44 But see 50Philippine259. **Failure of congress expressly to disapprove invalid territorial statute** does not validate it. 50Philippine259.

202-48 30F(2d)620; 33PortoRico 76. **Nineteenth amendment** is inoperative in Porto Rico. 33PortoRico 76. **Jury trial.**-33PortoRico 554.

202-49 But see 97Fla577, 121S886(2d case).

202-51 12F(2d)761. **In Philippines.**-51Philippine34; 51Philippine71.

203-55 29Hawaii7. **United States did not adopt statutes of limitation** of either Spain or Mexico in taking over Alta California. Cal 278P840. **United States in taking over territory of Alta California** did not take over statutes of limitation applicable to lands or waters. Cal 287P475.

203-56 **In Philippines.**-44Philippine292.

203-57 46Philippine22, 25 [citCJ]; 46Philippine83; 50Philippine259. **No department of government can exercise functions of another.**-50Philippine259. **In Philippines.**-51Philippine370.

203-59 50Philippine259. **Exercise of executive functions by legislature.**-50Philippine348; 50Philippine259 (statute purporting to vest voting power of government stock in National Coal Company in president of senate and speaker of house is unconstitutional). **In Philippines.**-50Philippine259.

203-60 50Philippine259. **The legislature cannot take the power away,** etc. 50Philippine259.

204-65 **Power to grant or withdraw permit to sell speculative securities** not disturbed except when abuse of discretion shown. 44Philippine233.

204-66 16F(2d)92; 32PortoRico 841 (Organic Act § 20).

204-67 **In Philippines.**-51Philippine596.

204-69 **In the Philippines,** etc. 50Philippine259 (incorporation held not to have disconnected company and stock owned by government from executive control).

205-70 **Mandamus** against insular auditor see 32PortoRico 841. **Auditor of Porto Rico is required** to make annual report of fiscal concerns of government. 16F(2d)92. **In execution of duties, auditor is authorized** to summon witnesses and take evidence. 16F(2d)92. **Auditor may investigate as to competency and efficiency** of tax-administering officials. 16F(2d)92. **Rejection of contract bids.**-29Hawaii641.

205-75 43F(2d)86; 50Philippine259. **In Philippines.**-51Philippine370.

206-76 22F(2d)377; 36F(2d)309; 7Alaska522. **Legislation not within scope of Organic Act.**-12PortoRicoFed397. **Enacting clause.**-50Philippine259. **That law has been passed sub silentio** does not create conclusive presumption that it was within legislative powers. 50Philippine259. **Acts of Philippine legislature** are not final till either expressly or tacitly approved by either congress or president. 50Philippine259. **Inquisitorial power of Philippine legislature.**-50Philippine259. **Method of selecting grand and petit juries.**-43F(2d)86.

206-78 **In Philippines.**-50Philippine259.

207-81 29F(2d)900.

207-82½-New. appropriate money for payment of claims based on moral obligation, 29Hawaii343.

208-87½-New. **Civil Service Law.**-Ruling of department head that service of employee was satisfactory held not to be disturbed. 46Philippine256.

208-90½-New. Auditor is justified in refusing certification of contract entered in violation of law. 30Hawaii789.

213-30½-New. In territory, district court has probate jurisdiction under federal law, but territorial courts have exclusive jurisdiction as to matters under territorial laws. 32NM419, 258P817.

216-41 46Philippine44.

231-29 11F(2d)860.

TESTAMENTARY

246-8 **A paper, instrument, docket, gift, appointment, etc., is said to be testamentary** when it is written or made so as not to take effect till after death of person making it, and to be revocable and to retain property under his control during his life though he may have believed that it would operate as instrument of different character. 125Okl151, 256P912, 62ALR935.

TESTAMENTARY TRUSTEE

246-9 128Misc798, 220NYS395.

TESTIFY

247-23 214Ky84, 282SW762.

248-29 Oh 171NE26.

TESTIMONY

248-35 **Distinguished from evidence.**-24OhA66, 156NE616.

TEXT-BOOK

249-45 **Broad enough to include dictionaries** as administratively defined by state school authorities. 16F(2d)137.

TEXTILE

249-46 See also 13CustA656.

TEXTURE

250-48 See also 13CustA126.

THE

250-56 **Context** may require "the" to be construed as "all of the." 156Tenn284, 300SW9.

THEATERS AND SHOWS

253-3 Other definitions, etc. "An edifice used for the purpose of dramatic, or operatic, or other representations, plays, or performances, for admission to which entrance money is received." 85 **IndA**476, 152**NE**183, 184.

255-21 323 **Ill** 138, 153**NE**667, 49**ALR** 499 (statute protecting civil rights held valid); 167**La**511, 119**S**532; 133 **Or**95, 285**P**1105 (dance halls). **Prices.**–273**US** 418, 47**SCt**426, 71**L ed**718, 58**ALR**1236.

257-34 Prices.–273**US**418, 47**SCt**426, 71 **L ed**718, 58**ALR**1236. **Statute exempting ex-service men** from certain requirements is not thereby void. 85**Colo** 125, 274**P**831.

257-37 State regulation of dance halls does not violate constitutional provision giving cities power to enact and amend charters. 133 **Or**95, 285**P**1105.

257-39 109**TexCr**474, 6**SW(2d)**353.

258-50½-New. Location of building relative to churches.–That religious services are conducted in building used for maternity hospital is insufficient to classify property as church within ordinance providing that permit to operate theater within three hundred feet of church may be refused. 22 **OhA**159, 153**NE**277.

258-51 68**CalA**763, 230**P**225; 236 **IllA** 281. **Refusal of application for exhibition of fight film based on general knowledge of censor** and not on examination of film is not compliance with statute and is unlawful. 118 **OhSt** 91, 160**NE**625. **Review.**–118 **OhSt**91, 160**NE**625.

258-52 236 **IllA**281. **Picture held immoral,** where it showed repeated scenes of shooting not connected with war or preservation of law and order. 236 **IllA** 281.

259-53 236 **IllA**281. See also 339 **Ill** 595, 171**NE**742; 11**PaDist&Co** 45; 11**Pa Dist&Co** 120. **Statute requiring registration of films** before exhibition held enacted under police power. 7**F(2d)** 715.

259-54 68**CalA**763, 230**P**225. **Ordinances held not invalid as discriminatory.**–68**CalA**763, 230**P**225.

259-55 Statute authorizing revocation without opportunity to be heard is unconstitutional. 136**Misc**353, 239**NYS** 706.

259-55½-New. Language accompanying spoken motion picture film, and recorded thereon, must be submitted for examination to state board of censors, under statute requiring censorship of all films, and, on failure or refusal of film company to submit spoken language, board may refuse its approval of film. 295**Pa**461, 145**A**514; 295**Pa**471, 145**A**518.

259-55¼-New. Statute providing for censorship of films should be given wide application and interpreted according to spirit as well as letter of law. 295**Pa**461, 145**A**514.

259-55¾-New. Discretion reposed in state board of censors is not judicial discretion, but such discretion as may be expected from persons qualified by education and experience to know common standards of morality. 295**Pa**471, 145**A**518.

259-56 160**Ga**307, 127**SE**751 (refusal to enjoin tax on moving picture show held not abuse of discretion); 334 **Ill** 431, 166**NE**115. **Statute construed.**–153**SC**76, 150**SE**352.

259-65½-New. Corporation engaged in exhibition of motion pictures in leased theater buildings was liable for excise tax on gross receipts under statute, money received from sale of tickets being "profits derived from use of tangible personal property," within meaning of statute. 265**Mass**210, 163**NE**747.

260-67 44**Philippine**792.

260-69½-New. Ordinance requiring licenses for moving picture shows repealed as to such shows ordinance requiring payment of license fee by owners of opera houses or halls used for theatrical purposes in lieu of all license fees for shows or amusements given therein. 334 **Ill** 431, 166**NE**115.

260-70 Delegation by city to officer of power to prohibit certain class of pictures held not delegation of legislative or judicial power. 236 **IllA**281.

261-75 Mandamus is proper remedy where ordinance is valid. 236 **IllA**281. **Where ordinance is invalid,** remedy for refusal of license is by injunction. 236 **IllA**281. **Permit for showing motion picture.**–242 **IllA**1.

261-76 See also 224**AppDiv**311, 230 **NYS**137.

261-81 21**AlaA**530, 109**S**617.

261-84 New license granted after expiration of old license is not renewal of former license. 288**Pa**312, 136**A**240.

262-93 109**TexCr**474, 6**SW(2d)**353.

262-94½-New. Business conducted in several places.–Person operating moving picture shows in several places is liable to tax on business conducted in each place. 139 **Okl** 162, 282**P**128.

263-98 Arbitrary powers held not to have been delegated by authorizing commissioner to revoke registration of any motion picture film which he finds to be immoral or offensive to social or religious sensibilities of society. 7**F(2d)** 715.

263-99 7**F(2d)**715.

264-19½-New. Effect of deposit of check tendered for tickets.–Proprietor of baseball park does not become liable as contractor for delivery of tickets for ball game where orders for tickets far exceed supply and are filled by lot and applicant's number is not drawn till supply of tickets is exhausted. 91**Pa Super**241.

264-21 91**PaSuper**241. **Theater owes patron respectful treatment** and on breach of contract is liable for admission paid and damages. **TexCivA** 21 **SW(2d)**592.

265-26 91**PaSuper**241.

268-52 216**Ala**138, 112**S**633, 53**ALR** 840; 85 **IndA**476, 152**NE**183; 218**Ky** 761, 292**SW**341; 125**Me**334, 133**A**905; 248**NY**286, 162**NE**82; 286**Pa**376, 133**A** 568; **TexCivA** 25**SW(2d)**695 (ordinary care).

268-53 126**Me**186, 137**A**58, 53**ALR**834; 286**Pa**376, 133**A**568; **TexCivA** 25**SW(2d)** 695 (duty to maintain aisle around balcony).

268-54 216**Ala**138, 112**S**633, 53**ALR** 840; 125**Me**334, 133**A**905; 126**Me**186, 137**A**58, 53**ALR**834; 126**Misc**550, 214 **NYS**182 (to withstand strain of expected rough usage); 286**Pa**376, 133**A**568.

268-55 40**F(2d)**235; 216**Ala**138, 112**S** 633, 635, 53**ALR**138, [citCyc]; 107**Conn** 735, 139**A**690; 242 **IllA**524, 529 [quot Cyc]; 251 **IllA**342; 85 **IndA**476, 152**NE** 183; 88 **IndA**616, 164**NE**304; 210**Ky**92, 275**SW**16 (stairway of theater); 125**Me** 334, 133**A**905; 169**Minn**443, 211**NW**678; 220**MoA**854, 294**SW**751; **MoA** 280**SW** 444; 252**NY**97, 169**NE**101; 126**Misc**550, 214**NYS**182; 131**Misc**824, 228**NYS**229; 26 **OhA**261, 160**NE**99; 130 **Or**93, 279**P** 277; 286**Pa**376, 133**A**568; 87**PaSuper** 355; **TexCivA** 300**SW**183, 184 [citCyc]; 68**Utah**546, 251**P**360; 187**Wis**626, 205 **NW**556. **Amusement device.**–148**Md**524, 130**A**340, 44**ALR**193. **As to one from whom operation of amusement device is concealed,** maintenance and operation thereof may constitute actionable negligence, though not so as to one with full knowledge. 204 **Iowa**922, 216**NW** 262. **Complaint held sufficient.**–38**GaA** 581, 144**SE**680. **Inspection of complicated amusement device** must be adequate according to circumstances to be reasonably careful. 148**Md**524, 130**A** 340, 44**ALR**193. **Maintaining steps of theater in glazed and slippery condition** so as to make them inherently dangerous will render theater owner liable, though they are otherwise constructed in approved manner. 210**Ky**92, 275**SW** 16. **Particular conditions held negligent.**–85 **IndA**476, 152**NE**183. **Proprietor of amusement park** is liable for negligence of concessionaires. 84**CalA**259, 257**P**871. **Sliding chute.**–126**Me**186, 137 **A**58, 53**ALR**834. **Statutory provisions.**–20 **OhA**470, 152**NE**684. **Instruction defining ordinary care** held proper in theater patron's action for injuries. **TexCivA** 25**SW(2d)**186. **Promoters of public spectacle** are not responsible for negligence of private individuals to spectators viewing spectacle from private premises. 101**CalA**769, 282**P**820. **Duty of owner of public bathing resort to use due care extended to visitors** whether they paid or not. 110**Conn**593, 149**A** 201. **Questions whether defendant's witnesses knew pleasure device was secondhand held proper** in action for personal injuries. 23**AlaA**595, 129**S**489.

269-56 216**Ala**138, 112**S**633, 53**ALR**840; 68**Utah**346, 251**P**360. See also 319**Mo** 275, 3**SW(2d)**1025, 61**ALR**1269. But see 225**AppDiv**808, 232**NYS**296.

269-56½-New. or because he did not foresee precise injury, 126**Me**186, 137**A** 58, 53**ALR**834 (boy suddenly checking speed on sliding chute with rubber soled shoes).

269-57 88 **IndA**616, 164**NE**304.

269-57½-New. , or because there was inspection of premises by building and fire departments, 126**Misc**550, 214**NYS** 182.

269-57¼-New. or that permit by boxing commission was issued. 126**Misc** 550, 214**NYS**182.

269-58 85 **IndA**476, 152**NE**183; 210**Ky** 92, 275**SW**16 (patron an invitee); 219 **Ky**1, 292**SW**341; 286**Pa**376, 133**A**568; 130 **Or**93, 279**P**277; 68**Utah**546, 251**P** 360.

269-59 55**AppDC**323, 5**F(2d)**538; 110 **Conn**593, 149**A**201; 203 **Iowa**1107, 212 **NW**163; 210**Ky**92, 275**SW**16; 218**Ky** 761, 292**SW**341; 126**Me**186, 137**A**58, 53 **ALR**834; **Minn** 231**NW**716; 319**Mo** 275, 3**SW(2d)**1025, 61**ALR**1269; **MoA** 280 **SW**444; 220**MoA**854, 294**SW**751; 83**NH** 64, 139**A**86; 286**Pa**376, 133**A**568; 187 **Wis**626, 205**NW**556. But see 23**AlaA** 595, 129**S**489. **Lighting of theaters.**–20 **OhA**470, 152**NE**684. **Care required** is dependent upon circumstances. **MoA** 280**SW**444.

269-60 241 **IllA**199; 319**Mo** 275, 3**SW** **(2d)**1025, 61**ALR**1269; 286**Pa**376, 133**A** 568. But see 23**AlaA**595, 129**S**489. **Highest degree of care** must be exercised by owner of roller coaster. 173 **Minn**331, 217**NW**374.

269-61 241 **IllA**199, 204 [citCyc]; 203 **Iowa**1107, 212**NW**163; 210**Ky**92, 275 **SW**16; 148**Md**524, 130**A**340, 44**ALR**193; 319**Mo** 275, 3**SW(2d)**1025, 61**ALR**1269; 286**Pa**376, 133**A**568; 130 **Or**93, 279**P** 277.

270-62 148**Md**524, 130**A**340, 44**ALR** 193; 35 **OhA**336, 172**NE**394. See also 130 **Or**93, 279**P**277. But see 204 **Iowa** 922, 216**NW**262. **One accepts inherent dangers of stepping on moving belt** of amusement park, so far as they are obvious and necessary. 250**NY**479, 166 **NE**173. **Fair association was under no duty to warn patron,** where it did not know there was danger of wheel flying off racing automobile. **TexCivA** 12**SW** **(2d)**599(2dcase).

270-65 180**Ark**844, 22**SW(2d)**1020; 218 **Ky**761, 292**SW**341; 287**Pa**583, 135**A**629; **LaA** 130**S**817(2dcase). **Contributory negligence not shown.**–126**Me**186, 137**A** 58, 53**ALR**834. **Person injured by foul ball struck from baseball park held not guilty of contributory negligence.** 187 **Wis**626, 205**NW**556. **Contributory negligence held not shown as matter of law.**–Boy checking speed under stress of freight while descending sliding chute by using rubber soled shoes as break. 126**Me**186, 137**A**58, 53**ALR**834. **One drowned while attempting to rescue another held not negligent.** 110**Conn**593, 149**A**201. **Patron of movie theater has been held free** from contributory negligence. 137**Misc**387, 244**NYS**43.

270-65½-New. If structure made by individual operating a public place such as theater be according to recognized principles and of proper material, one who falls and injures himself thereon cannot recover damages unless structure when made according to plans was unsafe and dangerous for use intended. 210**Ky**92, 275**SW**16.

270-65¼-New. Theater owner, maintaining private alleyway as exit, cannot justify dangerous step because alley is used by vehicular traffic. 220**MoA**854, 294**SW**751.

270-65¼-New. General invitation by circus to public includes invitation to all parts of the ground. 125**Me**334, 133 **A**905.

270–65⅓–New. 125Me334, 133A905.
270–65¼–New. Circus held liable for injury caused in ball game, though it did not know about, nor permit, game by its employees. 125Me334, 133A905.
270–65½–New. Care required of proprietor to warn invitees of dangers from instrumentalities is commensurate with risk involved. 126Me186, 137A58, 53 ALR834.
270–65¼–New. That Ferris wheel operator purchased standard device is no defense to action for negligence. 83NH 64, 139A86.
270–65⅙–New. Lessee's duty to see that amusement park, including concessions, is safe for invitees is nondelegable. 83 NH64, 139A86.
270–65 1/10–New. It is error to refuse instruction that test of negligence of Ferris wheel operator was conduct of average man. 83NH64, 139A86.
270–65 1/11–New. Person injured by fall from moving belt is not entitled to recover on ground that it was not in repair, where case went to jury on theory that negligence was dependent on sharp and sudden jerk. 250NY479, 166NE 173.
270–65 1/12–New. Petition of child stating that plaintiff was impliedly invited into defendant's park, and was ordered therefrom in threatening manner which put him in great fear, and in attempting to escape sustained injuries, stated cause of action. 30 OhA367, 165NE109.
270–65 1/13–New. Where boy, after purchasing ticket for admission to theater, was induced to return ticket, and thereafter entered theater without paying admission for purpose of going on stage and participating in vaudeville act, he was entitled to recover against theater for injury resulting from his participation therein. 248NY286, 162NE82.
270–65¼–New. Facts constituting negligence in restraint of wild animal by exhibitor must be alleged in action for injury caused thereby. WVa 153SE289.
270–66 180Ark844, 22SW(2d)1020; 101 CalA769, 282P820 (complaint held insufficient); 218Ky761, 292SW341; 148 Md524, 130A340, 44ALR193 (it must affirmatively appear that injury complained of was result of failure of defendant to use reasonable care); 258 Mass269, 154NE761; TexCivA 258SW (2d)695 (res ipsa loquitur inapplicable to falling of person from balcony on plaintiff). **Evidence held sufficient.**–84 CalA259, 257P871; 233Ky1, 24SW(2d) 942; 173Minn331, 217NW374; MoA 287 SW661. **Sufficient allegation of negligence.**–36GaA352, 136SE478. **Evidence held insufficient.**–241 IllA199. **On proof of injury due to defective seat,** burden shifts to proprietor to show due care. 286Pa376, 133A568. **Evidence as to lights** held admissible on issue of contributory negligence. NJSup 135A670. **Proof that similar accident had never occurred** does not absolve proprietor from liability where dangerous condition and duty to anticipate accident are shown. 84CalA259, 257P871. **Allegations held to permit proof** of negligent construction and operation of coaster, jerk, and lack of warning. 173Minn331, 217NW374. **Evidence held not to show negligence as matter of law.**–95CalA162, 272P591. **Testimony held insufficient** to show that moving belt was trap for unwary. 250NY479, 166NE173. **Complaint insufficient** for insufficiency of allegation of negligence. 37P(2d)902. **Failure to strap or warn occupant of roller coaster to use strap** held not proximate cause of injury. 87Colo294, 287P 650.
270–67 110Conn593, 149A201; 262Mass 120, 159NE611. **Owner of theater held not guilty of negligence** in operation of ticket chopper which fell on child. 287 Pa583, 135A629. **Evidence held sufficient.**–262Mass120, 159NE611; NJSup 149A343; TexCivA 32SW(2d)676(1st case).
270–68 319Mo275, 3SW(2d)1025, 61 ALR1269; 87PaSuper355. **Evidence held admissible.**–175Minn153, 220NW 418.
270–69 5LaA386; 173Minn331, 217NW 374; 319Mo275, 3SW(2d)1025, 61ALR 1269; 102NJL411, 132A670; 252NY97, 169NE101. See also 286Pa376, 133A568. **Presumption of negligence** held to arise from nature of accident and surrounding circumstances. 148Md524, 130A340, 44ALR193. **Doctrine of res ipsa loquitur** was applicable, where sole negligence relied upon was defective construction of roller coaster. 95CalA162, 272P591. **Evidence held insufficient.**–251 IllA342.
270–69½–New. Thus proprietor of amusement is not exonerated just because injured patron cannot specify particularly cause of injury. 148Md524, 130 A340, 44ALR193.
270–69¼–New. Evidence as to time of erection of theater is admissible to show statutes regulating construction of theater not applicable to moving picture house where accident occurred. 20 OhA 470, 152NE684.
270–69¼–New. Verdict for death of passenger thrown out of roller coaster held not against weight of evidence. NJSup 135A56.
270–69⅙–New. Payment of admission fee may be inferred from circumstances in absence of evidence to contrary, in action for injury to patron. 85 IndA476, 152NE183.
270–69¼–New. Evidence whether there were other complaints concerning pleasure device is inadmissible in action for personal injuries. 23AlaA595, 129S489.
271–71 242 IllA524; 85 IndA476, 152NE 183; 204 Iowa922, 216NW262; 210Ky 92, 275SW16 (whether steps slippery or not); 218Ky761, 292SW341; 173Minn 331, 217NW374; 175Minn153, 220NW 418; 220MoA854, 294SW751; MoA 280 SW444; MoA 28SW(2d)440; 83NH64, 139A86; 102NJL411, 132A670; NJSup 135A56; NJSup 136A337; 252NY97, 169 NE101; 131Misc824, 228NYS229; 137 Misc387, 244NYS43; 26 OhA261, 160NE 99; 286Pa376, 133A568; 87PaSuper355; 93PaSuper485; 95PaSuper150; 68Utah 546, 251P360. But see 110Conn593, 149 A201. **Whether baseball park was properly located** so as to safe-guard invited persons from injury has been held question for jury. 187Wis626, 205NW556. **Evidence held sufficient.**–148Md524, 130A 340, 44ALR193. **Occurrence of accident** on amusement device is sufficient to take question of negligence as cause of injury is for jury. 148Md524, 130A340, 44ALR193. **Submitting case to jury held not error.**–148Md524, 130A340, 44ALR 193. **Unsafe steps.**–210Ky92, 275SW16. **Evidence held not to show contributory negligence.**–125Me334, 133A905. **Proximate cause** held for jury. 220MoA854, 294SW751. **Instruction to jury held proper** as based on evidence. MoA 280 SW444. **Contributory negligence.**–262 Mass120, 159NE611. **Instruction to jury held to conform to issues** in case. MoA 280SW444. **Instruction to jury held to submit issues** made by evidence for their consideration. MoA 280SW444. **Knowledge of owner of harassment** of patrons held for jury. MoA 280SW444. **Standard of care** is jury question. MoA 280 SW444. **Whether defective condition of roller coaster proximately caused injury** held for jury. 95CalA162, 272P591. **Contributory negligence** held for jury. 175Minn153, 220NW418; 175Minn563, 222NW335. **Verdict properly directed for defendant.**–242 IllA56. **Evidence held to present jury issue** on negligence. Tex CivA 25SW(2d)695.
296–72 Iowa 233NW66; NJ 130A443; 102NJL411, 132A670.
271–72½–New. Instructions held correct.–20 OhA470, 152NE684.
271–72⅓–New. Instructions held sufficient. 204 Iowa922, 216NW262.
271–72¼–New. Whether employee who directed patrons to toilet was acting within scope of authority is question for jury. 93PaSuper485.
271–73 216AppDiv558, 215NYS502.
271–74 216AppDiv558, 215NYS502.
271–80½–New. Lessor of amusement park owning lessee's stock and granting concession for Ferris wheel is not liable for injury to patron. 83NH64, 139A86.
272–86 Giving public dance within prohibited hours.–Restaurant owner permitting guests to dance to music of phonograph obtained by placing nickel in slot is guilty of giving public dance. 179 Minn308, 229NW88(2dcase).
272–88½–New. In prosecution for operating dance hall in town of less than stated population in violation of statute, state must prove allegation as to population. 133 Or95, 285P1105.

THEFT

272–4 245NY111, 156NE632. **Taking of auto with intent to return held not theft under insurance policy** though taking was wrongful and larceny under code. 127Misc751, 217NYS504.
272–5 See also 127Misc353, 216NYS149.
272–8½–New. Theft is fraudulent taking of corporeal personal property belonging to another from his possession. 101Tex Cr79, 273SW860.
272–8⅙–New. As used in policy of insurance term given its usual meaning and understanding as employed by persons in ordinary walk of life. 113 Oh 153, 148NE923.

THEFT INSURANCE

275–7½–New. Where policy excluded liability for property abstracted from show window by breaking of glass, and provided for liability for robbery occasioned by violence inflicted on custodian, loss of jewelry taken through broken window after robber knocked pistol from proprietor's hand held not covered by policy. 226AppDiv560, 235NYS420.
275–12½–New. Requirement of transmission lock on car held warranty. 164 La260, 113S840.
275–12⅙–New. Robbery clause of insurance policy covering robbery of insured or his employees while transporting money or property to or from described premises does not cover robbery of insured while going from theater to his home and alleged new place of business not described in policy. 127Misc 283, 215NYS801.
275–14 221AppDiv184, 223NYS373.
275–16 Felonious taking held essential under auto theft policy.–127Misc751, 217 NYS504. **Taking of car held not theft under policy,** though larceny under code. 127Misc751, 217NYS504. **Gardener employed by wife of corporation stockholder** held not employee of insured under exception in auto theft policy. 127 Misc751, 217NYS504.
276–17 Limitation as to place of loss.–Under insurance against "statutory larceny" fraudulent representations elsewhere than where securities located, held not covered. 221AppDiv184, 223NYS373.
276–20 256Mass358, 152NE370; 266 Mass543, 165NE682.
277–24 255Mass528, 152NE345. **Insured has burden of proving material allegations by preponderance of evidence,** and must prove every element of crime of larceny under code. 127Misc751, 217 NYS504.
277–25½–New. Question for jury. Evidence held insufficient for jury. 195NC 374, 142SE233.

THEN

278–17 "Then be living" in will held to create contingency. 257Mass586, 154NE 191.
279–18 106Conn267, 137A737. See also 10PaDist&Co 109.
279–19 106Conn267, 137A737.
279–20 106Conn267, 137A737.

THEREBY

280–80 208Ky721, 271SW1074 (by that, or by that means); 208Ky820, 271SW 1097.

THING

284–63 "This word," etc. 202 Iowa450, 209NW468 (used in contradistinction to person). **"Thing used"** held to include use of patent under license. [1926] CanExch17, [1926] 4DomLR1152.

THINK

285–70 285Pa317, 132A122.

THREATS

290–1 Other definitions.–To alarm or attempt to alarm, as with promise of something evil or disagreeable. 209Ky

15, 272SW24. **Threaten to utter**; threats against; to menace; to inspire with apprehension; to warn. 209Ky15, 272SW24. Expressed intention to work injury. 25F(2d)160.

290–1½–New. To alarm or attempt to alarm, as with promise of something disagreeable. 209Ky15, 272SW24.

291–3 252Mass465, 148NE123.

291–7 See also Utah 284P108.

291–7½–New. Offense is complete without necessity of accused intending to extort money for himself. 3Del 229, 134A 630.

291–8 Actual guilt of person threatened is not necessary to convict of extortion by means of threats of prosecution for forgery. 192Wis612, 213NW295.

292–20 Mass 169NE542; 32OhA124, 167NE609 (oral accusation of crime made to extort money).

293–28 264Mass221, 162NE308.

296–61 102TexCr561, 278SW842. **Anonymous letter, requesting illicit relationship**, held to reflect on female's virtue. 102TexCr561, 278SW842.

296–71 Statutory language held sufficient.–36GaA266, 136SE333. **Indictment held sufficient.**–31F(2d)908; 118Nebr 169, 223NW955.

297–78 Iowa 233NW66.

297–81 Technical accuracy, etc. 192 Wis612, 213NW295.

298–82 Variance.–179Minn439, 229NW 558 (not material).

298–84 252Mass465, 148NE123 (evidence of investigation made by defendant of financial standing of selected victim of conspiracy to extort is admissible; this includes contract with credit reporting agency and request thereon for ratings); 264Mass221, 162NE308; Utah 284P108 (declaration by complaining witness as to threat against his life). **That victim was kidnapped on certain day**, and telephoned on another is admissible against defendant caught at designated place for payment of money. 170La954, 129S541.

298–87½–New. That threats were made to extort money for another than accused is immaterial. 13Del 229, 134A 630.

298–89 32OhA124, 167NE609.

299–96 Evidence held sufficient, etc. 252Mass465, 148NE123; OklCr 291P 145. **Evidence held to support conviction** for blackmail. 31F(2d)908; 38GaA 358, 144SE15.

299–99 252Mass465, 148NE123 (holding that legal effect of language used, that is whether it constituted threat or not, is for court); 264Mass221, 162NE 308.

299–4 Instruction held proper, see 252 Mass465, 148NE123 (holding that, where exact language in which threat was couched is not pleaded in indictment nor set out in bill of particulars instruction that state is not limited to proof of exact words therein set out, but may prove substance of matters alleged is correct); 179Minn439, 229NW 558. **Instructions held correct or proper.**–128Kan726, 280P777 (in prosecution for attempt to rob by extortion). **In prosecution for attempt to rob by extortion**, refusal to instruct requiring overt act by defendant is not erroneous. 128Kan726, 280P777.

300–8 Threat to sue and foreclose lien will not support damage suit where threatener had right to sue and foreclose. TexCivA 19SW(2d)124.

300–9 174Minn535, 219NW908.

300–10 Threat to put rope around plaintiff's neck unless he left community is actionable. 181Ark137, 25SW(2d) 428.

TIMBERHEAD

305–39½–New. Wooden standard twelve to fourteen inches square, standing above top of barge, which has twelve to fifteen timberheads. 229Ky685, 17 SW(2d)753.

TIME

309–1 242NY28, 150NE591.

309–7 Where a statute, etc. 51ND210, 199NW590. **In computing time courts** carry out intention of legislature and parties. Mont 268P558 (language and context considered).

310–11½–New. Massachusetts Daylight Saving Law held not violative of federal standard time statute. 272US525, 47 SCt189, 71L ed387.

310–11½–New. Day of month controls where day of week does not correspond thereto. NJCh 148A195(1stcase).

310–11¼–New. In Pennsylvania Eastern standard time is sole and uniform standard of time and daylight saving time is not recognized. 14PaDist&Co 53.

310–13 101NJL419, 129A191 (two years equivalent to twenty-four calendar months).

311–20 173Ark459, 293SW30. **Fiscal year, under Revenue Act** and departmental regulations, is accounting period of twelve months ending on last day of any month except December. 17F(2d) 109. **In Kentucky.**–208Ky464, 271SW 549 ("current" means then running).

311–22 143Okl 4, 286P888.

311–25½–New. Presumption is that reference to certain year in statute means calendar year. 143SC51, 141SE 103.

311–28 In the civil law, etc. 194NC423, 140SE24.

312–33 79CalA119, 249P15; 101CalA 172, 281P503(2dcase); 118Nebr373, 224 NW860; 101NJL419, 129A191 (twenty-four calendar months equivalent to two years); 88PaSuper586; 142Va596, 128 SE638.

313–34 194NC423, 140SE24, 25 [quot Cyc].

313–35 194NC423, 140SE24, 25 [quot Cyc].

313–36 194NC423, 140SE24. **Where material was last furnished on March 23**, suit on mechanics' lien commenced July 23 was not commenced within four months' period required by statute, since four full months expired on July 22. NJCir 145A733(1stcase).

314–41 222AppDiv676, 225NYS19.

314–42 Provision in deed for giving four weeks notice of time and place of sale is complied with by advertisement once a week for four weeks, including week preceding sale. 170Ga75, 152SE 85.

314–43 220MoA232, 283SW712. See also 76CalA290, 245P444. **Publication of notice of sale under judgment**, required by statute for three successive weeks, does not expire until twenty-one days after first publication. 215 AppDiv 361, 213NYS690.

314–43½–New. Six days constitutes a working week. 8LaA132.

314–46 Hours for conduct of official business.–82Mont594, 268P558.

314–46½–New. Statutory four days for moving for new trial means four calendar, not judicial days. Mo 31SW(2d) 1002.

315–47 169Ark627, 276SW361; 201Cal 629, 258P955; 215Ky440, 285SW250; 146Miss565, 111S571; 153Miss53, 120 S180; 157Miss495, 128S338; 157Miss 495, 128S338; Mo 30SW(2d)69; 126 Misc266, 214NYS139; TexCommnA 286 SW197 (rule applied in determining expiration of term of court). **Process.**–126 Misc266, 214NYS139. **The effect of the rule**, etc. 335 Ill 11, 166NE504. **Where accident and disability policy taking effect at noon on stated day provides that it shall take effect fifteen days from delivery in case of disease date** of policy is counted as day. 153Miss53, 120S180. **Where "in vacation" includes adjournment of court for more than one day** adjournment from one day to nine o'clock on next day but one thereafter is included. Mo 30SW(2d)69. **Day is indivisible point of time** when considered in computing time. Mo 30SW(2d)69.

315–48 125Kan818, 834, 266P85 [cit Cyc].

315–49 215Ky440, 285SW250.

315–50 11CustA24; 50SD147, 208NW 781.

316–53 195Wis509, 218NW814.

316–56 DelCh 141A271; 162Ga446, 134 SE107.

317–59 125Kan818, 834, 266P85 [cit Cyc].

317–60 68Utah388, 250P979, 980 [quot Cyc].

317–61 11CustA24; 68Utah388, 250P 979, 980 [quotCyc].

317–62 15DelCh333, 138A74; 160Ga 104, 127SE609. See also 68Utah388, 250 P979, 980 [quotCyc].

317–63 8PaDist&Co 56; 13PaDist&Co 82 (statute giving "at least" stated number of days to do act); 68Utah388, 250 P979, 980 [quotCyc].

317–64 94Fla943, 114S521; NJCir 133 A76; 68Utah388, 250P979, 980 [quot Cyc]. But see 16 F(2d)54. **Laws defining open season for game as including first and last days** is applicable to laws for killing of elk "between" certain days. 151Wash623, 276P870.

318–65 213Ala547, 105S691; 196Cal 686, 239P324; 15DelCh333, 138A74; Del 141A191; 94Fla943, 114S521; 36Ga A511, 137SE298; 237 IllA456; 161La18, 108S110; 80Mont53, 257P1034; 50 ND781, 197NW879 (filing nominating petitions); TexCivA 278SW239 (first day not included); 32PortoRico 790 (Pen. Code § 388). See also 68Utah388, 250P979, 980 [quotCyc]. **The word "within,"** etc. 68Utah388, 250 P979 (act may be done on last day). **"In which" and "within which" are equivalent.** 80Mont53, 257P1034. **"Time in which"** imports something to be done within certain period after, not before, an event or date. 80Mont53, 257P1034. **Statute so providing is legislative enactment** of common law, 80 Mont53, 257P1034; 29F(2d)281; 41F(2d)299; 338 Ill 67, 170NE1; 12LaA428, 126S242; 118Nebr373, 224NW860; NJSup 149A 49; 88PaSuper586; 154SC1, 151SE206; Ont [1929] 4DomLR232.

318–66 80Mont53, 257P1034; 68Utah 388, 250P979, 980 [quotCyc]. **Act to be done not less than stated number of days before fixed day** must be done without, and not within, such period. 68Utah388, 250P979. **Filing certificates of nomination.**–68Utah388, 250P979.

318–67 26F(2d)666; 44F(2d)161; 15 DelCh333, 138A74; 85 IndA404, 154NE 295; 210Ky215, 275SW794; Mass 171NE 81; 194NC423, 140SE24; NJSup 150A 214(1stcase); 50RI 375, 147A891; Tex CivA 278SW239.

319–69 36F(2d)49; 210Ky215, 275SW 794; 210Ky299, 275SW866; 220Ky15, 294SW822; 229Ky565, 17SW(2d)718; 231Ky244, 21SW(2d)291.

319–71 But see 210Ky68, 275SW23. **Contra.**–197NC107, 147SE684(1stcase).

320–73 202Iowa773, 211NW413; 234 Ky781, 29SW(2d)34; 234Ky846, 29SW (2d)567.

320–76 Iowa code of 1924, effective ninety days after adjournment on July 30, did not become effective till midnight of Oct. 27, 1924. 208Iowa879, 226NW159.

320–78 36GaA511, 137SE298 [citCyc].

320–80 180Ark610, 22SW(2d)31 (days of grace); 36GaA511, 137SE298 [cit Cyc]; 85IndA404, 154NE295; 261Mass 322, 158NE846; 33OhA108, 168NE749; 142Va559, 129SE242.

321–81 36GaA511, 137SE298 [citCyc]; 210Ky68, 275SW23. ("up to" construed to mean "until" and be inclusive unless context shows different intention); 261 Mass322, 158NE846.

321–83 TexCommnA 299SW225.

321–84 322Mo1064, 18SW(2d)1043 (held to include date). **"Up to" or "until" is held to be inclusive** in some jurisdictions, unless contrary shown to be intended by context. 210Ky68, 275 SW23.

321–85½–New. Period provided in deed for cutting timber excludes first day and includes last day. 136SC40, 134SE147.

321–86 206Iowa1164, 221NW777; Mo 274SW28; TexCivA 278SW239. **Computation backward**, etc. Under bankruptcy act, day of petition is excluded and time counted backward toward day of judgment. 29F(2d)281.

322–88 237IllA456; TexCivA 278SW 239 (statutory injunction to stay execution of judgment).

322–89 13LaA30, 127S95(2dcase) (answer by garnishee).

322–93 201Cal 629, 258P955; 103Conn 744, 131A736; 158La123, 103S532 (ten days' notice of filing of administrator's account before it may be legally homolo-

gated requires notice to be published on three different days within period of ten days and at least ten days must intervene between day of first advertisement and day on which account is homologated); 250Mich548, 231NW66; MoA 285SW104; 130Misc680, 225NYS417; 133SC472, 131SE22 (notice of cancellation of fire policy); 50SD147, 208NW781.

323-94 206 Iowa1150, 221NW835; Mass 167NE672 (day of hearing excluded); 7PaDist&Co 35.

323-96 82CalA586, 256P229.

323-97 Mo 24SW(2d)125. **Statute with reference to computation of time has no application.**–142Va559, 129SE242. **Requirement that sale be made after advertising for ten days** not complied with by advertising on ten consecutive dates including day of sale. 142Va559, 129SE 242.

323-97½-New. sales in bulk, 103Conn 744, 131A736.

323-98 Mo 16SW(2d)44; Nev 292P617.

324-2 50SD147, 208NW781.

324-4 160La223, 106S835.

324-5 230Ky753, 20SW(2d)719; 230Ky 716, 20SW(2d)723.

324-6 201Cal 629, 258P955; 210Ky215, 275SW794.

325-11 80Mont53, 257P1034, 1037 [quot Cyc]; 8PaDist&Co 56.

325-12 See also 36F(2d)388.

325-12½-New. Mechanic's Lien Act, providing that summons shall issue within four months from date on which last work was done, does not exclude last day of four months' period. NJCr 143A81.

325-13 164La239, 113S833. **Default judgment was premature,** where rendered on Oct. 11 and service was had on Sept. 11, thirty days being required. 219Ala444, 122S682.

325-15 TexCivA 278SW239.

326-20 TexCivA 278SW239.

326-23 79CalA119, 249P15.

326-24 231Ky99, 21SW(2d)124 (unless unavoidably prevented); 235Ky701, 32 SW(2d)57.

326-27 181Ark788, 27SW(2d)1024; 336 Ill 439, 168NE346; 168La736, 123S308; 265Mass374, 164NE238; 156Miss1, 124 S432(2dcase); 156Tenn544, 3SW(2d) 661. Contra 156Miss1, 123S853(2dcase).

327-28 170La839, 129S364.

327-29 41F(2d)299; 32PortoRico 790. See also 12CustA28. But see 12LaA21, 124S853.

327-30 **Appeal bond.**–334 Ill 510, 166NE 60.

328-32 161La18, 108S110.

328-33 Mo 24SW(2d)1042.

328-35 218Ala512, 119S238(2dcase); 108TexCr463, 1SW(2d)629; Utah 266P 267. Contra 149Va464, 141SE125. **Exceptions held too late.**–168Ga469, 148SE 165(1stcase); 111TexCr561, 15SW(2d) 7.

329-43 14F(2d)245; 15F(2d)765; 16 F(2d)13; 21F(2d)588; 216Ala232, 113 S40; 89CalA253, 264P562; 81Colo 269, 254P999; 239 IllA398; 13LaA706, 129 S175; 248Mich144, 226NW836(1stcase); 172Minn162, 215NW200, 54ALR333, (return of bill by governor to house); 315 Mo 525, 289SW825; NJ 129A410; NJ Sup 150A214(1stcase); 88PaSuper586; 10PaDist&Co 456; 50SD249, 209NW341; TexCommnA 276SW887; 66Utah360, 242P945. But see 36F(2d)5.

329-45 Mass 171NE81 (when time limited by statute is less than 7 days); TexCivA 8SW(2d)772.

330-46 253NY298, 171NE62 (notice of cancellation under contract held insufficient); 227AppDiv733, 236NYS565; 49 SD502, 207NW463.

330-47 Ind 172NE887.

330-48 66Utah360, 242P945.

330-51 230Ky566, 20SW(2d)458; 230 Ky599, 20SW(2d)464 (election contest filed August 12, where returns were certified on August 7, held timely, where August 11, otherwise last day of five-day period, fell on Sunday). **In California.**–206Cal 88, 273P579.

330-55 146Va747, 132S694 (signing bill of exceptions).

331-59 264Mass475, 163NE162; 50SD 249, 209NW341 (time for taking appeal). See also 315Mo 525, 289SW825.

331-60 127Me5, 140A378.

331-64 But see NJCir 143A81.

331-68 89CalA253, 264P562; 91CalA 621, 267P565; 226Ky152, 10SW(2d) 629; La 113S833; LaA 130S662; NJ Sup 143A834(1stcase); 105NJL573, 147 A449(2dcase); 5ND210, 199NW590 (affidavit and application for reinstatement of insurance required to be filed prior to July 5 timely on July 5); 28 OhA205, 161NE563; 32PortoRico 790 (Pol. Code § 388). But see CalA 292P536; GaA 155SE786(1stcase); 154Md673, 141A 345. **Option** is within statute extending time of performance of contract to next day. 216AppDiv133, 214NYS692. **Governor's proclamation ordering public offices closed,** which prevented party from perfecting appeal, has been equivalent to declaration of holiday. 32PortoRico 790. **New trial cannot be granted** after expiration of two months, even though last day was holiday. 97CalA126, 274P1037. **Saturday half-holiday.**–133Misc393, 233 NYS36.

332-70½-New. Saturday afternoon has been held "holiday" within provision of bill of lading giving consignee forty-eight hours after notice to take delivery. 21F(2d)396.

332-72 91Fla42, 107S266; 4HawaiiFed 84; 161La18, 108S110; LaA 130S662; 133SC249, 130SE755 (time limit in building contract). **Erratum.**–In 1926 Annotations, "52ALR289" should read "52AppDC259."

333-73 12LaA428, 126S242; SC 130SE 755 (time limit in building contract).

333-74 230Ky566, 20SW(2d)458 (day election result is reached and day notice of election contest is served are both counted, but Sunday is excluded); 230 Ky716, 20SW(2d)723 (statute requiring election contest notice to be given within five days requires inclusion of day result is ascertained and also day notice is served, but excludes Sunday); 170La 839, 129S364; Mass 171NE81; Mo 31 SW(2d)1002; 35Wyo 300, 249P81 (statute not applicable to intervening holiday).

333-76 91Fla42, 107S266; 210Ky215, 275SW794; 210Ky299, 275SW866; 231 Ky244, 21SW(2d)291; Mass 167NE672. **In Florida.**–91Fla42, 107S266.

334-80 Mo 274SW28.

334-83½-New. Where due date of note is day between Sunday and legal holiday, statute of limitaitons begins to run from such date. TexCivA 290SW790.

335-93½-New. Telegram accepting offer to lease, required to be delivered before 6 P. M. and received before 6 P. M. standard time, but after 6 P. M. daylight saving time, is received in time. 131 Misc340, 225NYS767.

TITLE

336-19 254Mass292, 150NE95.

TITLE INSURANCE

346-15 Suppression by insured that grantor when making deed, was of unsound mind held to void policy. 218Ky 714, 292SW333.

347-21½-New. Insurer cannot deny liability on ground no survey was furnished where it discovered error in deed and by mistake carried it into policy. 219Ky256, 292SW817.

347-29 Title company not entitled to reformation of misdescription due to its own mistake. 219Ky256, 292SW817.

348-39 222MoA918, 9SW(2d)668.

348-40 Failure of title company to report to plaintiff proposed changes in grade of street did not constitute breach of policy as to defects causing title to be unmarketable. 227AppDiv5, 236NYS 553.

348-41 Assessment for local improvement made lien by ordinance approved before date of policy is covered by policy insuring against liens or incumbrances. GaA 155SE364.

348-42 Iowa 230NW381. **Effect of waiver of right to defend.**–Iowa 228NW 98. **Failure to defend suit against insured** does not relieve insurer from liability on policy. Iowa 228NW98. **Insurer waives right to defend** where it refuses to defend. Iowa 230NW381. **Refusal to defend suit against insured** does not relieve insurer from liability for defect insured against. Iowa 230NW381. **It is duty of insurer to defend suit against insured** based on defect not within exception of policy, and refusal to do so constitutes breach of contract. Iowa 228NW98. **Refusal to defend suit against insured** subjects insurer to liability for breach of contract. Iowa 230 NW381. **Settlement by insured.**–Iowa 230NW381.

348-43 222MoA918, 9SW(2d)668.

349-44 Rule as to eviction does not apply where insured never had possession. 219Ky256, 292SW817.

351-62 Defenses.–Iowa 228NW98.

352-73 Petition held sufficient though not alleging eviction. 219Ky256, 292SW 817.

352-80½-New. Presumptions.–Where insurer refuses to defend suit against insured as required by policy, settlement by insured is presumptive evidence of liability and amount thereof. Iowa 230 NW381.

352-80½-New. Entire record of suit resulting in judgment against insured may be considered. 152Va698, 148SE815.

352-80¼-New. Settlement of suit against insured.–Settlement of cancellation suit by insured in good faith, under circumstances not raising inference of imprudence, is presumptive evidence of title insurer's liability and amount thereof. Iowa 228NW98.

352-80½-New. Settlement of such suit is not conclusive evidence of good faith or reasonable prudence of insured. Iowa 228NW98.

352-80½-New. Instructions.–Instruction that settlement by insured of action against him must have been made in good faith and defining good faith held proper. Iowa 230NW381.

352-80½-New. Questions for jury.–Whether insured's settlement of cancellation suit was made and decree thereon was entered in good faith is question of fact for jury. Iowa 228NW98.

352-80½-New. Question whether insured's settlement of suit against him was made in good faith and in exercise of reasonable prudence is one of fact. Iowa 230NW381.

352-80½-New. Weight to be given to testimony as to value of land, part of which was covered by policy, is question for jury. Iowa 228NW98.

352-80 1/10-New. Weight to be given testimony regarding value of land part of which is covered by policy is for jury. Iowa 230NW381.

352-80 1/11-New. Instructions held proper.–Iowa 228NW98 (defining "good faith" required of insured in settling cancellation suit).

353-82 Plaintiff is entitled to recover present value rather than cost of property. 219Ky256, 292SW817. **Damage measured as of date of bona fide contract of sale** by person guaranteed. 102NJL 405, 132A493.

353-87½-New. Where insurer declines to defend suit against insured, it is bound by judgment therein against insured as if it had been formally impleaded. 152Va698, 148SE815.

353-88½-New. Liability for attorney's fees.–Title insurer refusing to defend suit against insured based on defect not within exceptions as required by policy is liable for reasonable value of attorney's services in conducting defense. Iowa 228NW98.

353-88⅓-New. Title insurer refusing to defend suit against insured as required by policy is liable for reasonable value of attorney's services in conducting defense. Iowa 230NW381.

353-88¼-New. whether they have been paid or not. Iowa 228NW98.

353-88½-New. In such case insurer is liable for such fees whether paid by insured or not. Iowa 230NW381.

354-93 Corporation must be organized under provisions of statute.–12PaDist &Co 719 (minimum capital required before exercise of any power conferred).

354-95½-New. Title insurance company issuing policy of title insurance to purchaser was not agent of purchaser, and any knowledge it may have possessed regarding condition of title was not imputable to purchaser who claimed

that she had no notice of defendants' prior contract for purchase of same real property. 206Cal396, 274P517.

355-1½-New. Where company pays taxes assessed while vendors were owners and not discovered until after insurance affected it is subrogated to rights of insured under terms of some policies. 95PaSuper597 (rights enforcible in separate actions in name of insured to use of company).

355-5½-New. Effect of settlement certificate.-Agreement of clerk of company to hold money paid by purchaser, made subsequent to settlement certificate signed by parties, does not affect rights of grantor fully performing to balance in company's hands. 87PaSuper507.

TOLL

359-33 99Fla1174, 128S632 (mileage tax held not "toll").

TOLL ROADS

363-16 286Pa351, 133A495.

372-80½-New. Where, before foreclosure of mortgage thereon, land was sold at tax sale for default in paying assessment against it in favor of turnpike company, but tax deed was not given until after foreclosure sale, tax title was superior to title acquired by state under mortgage foreclosure proceedings. 132Misc639, 230NYS585.

379-39 Statute empowering fiscal court of county to provide for good condition of highways in county, refers to public highways established by county courts, and does not apply to toll turnpikes not established by county court. 226Ky640, 118SW(2d)710.

385-80 Statute held not to authorize purchase of turnpikes.-226Ky640, 118SW(2d)710.

386-82 226Ky640, 118SW(2d)710.

388-1 149Md484, 132A64.

391-20 133 Okl115, 271P846, 848 [quotCyc]; 286Pa351, 133A495. See also 149Md484, 132A64.

392-30 143Va572, 130SE383 (code provision for additional power over tolls on county roads not retroactive to disturb existing conditions).

392-31 143Va572, 130SE383 (special statute for establishment of toll gates by county on county road not repealed by general revision).

392-35½-New. Ordinance establishing toll gates on county roads pursuant to statute are valid regardless of whether roads were built by county alone or with state aid. 143Va572, 130SE383.

393-46½-New. Statute providing for county road system and state aid for county roads does not prevent right of county to maintain toll gates as provided in special statute. 143Va572, 130SE383.

398-52 Actual fraud or wrongful intent.-42F(2d)488.

404-29½-New. Ordinance prescribing penalty for failure or refusal to pay tolls is authorized by statute giving supervisors authority to enact local laws and provide fines and other punishments for their violation. 143Va572, 130SE383.

404-31 Grantee of lot abutting highway conveyed to turnpike company by grantor, holding under contract reserving right to dedicate road to public use, commits trespass in attempting to use highway, after notice, without payment of tolls. 133SC139, 130SE514. **Grantee of abutting lot waives right of ingress and egress by joining in establishing turnpike for use of which** all are required to pay toll. 133SC139, 130SE514.

TON

405-5½-New. By statute in some jurisdictions a ton contains two thousand pounds. 104WVa458, 140SE323.

TOOL

406-15 Webster D. [quot 52ND746, 204NW669, 671].

406-18 52ND746, 204NW669.

406-21 Webster D. [quot 52ND746, 204NW669, 671]; 22 OhA516, 154NE62. **Motor car** held to be tool of debtor's trade. Sask [1926] 1DomLR216, [1926] 1WestWkly38.

406-21½-New. Instrument employed by burglars, as referred to in insurance policy. 105Conn402, 135A388, 54ALR463.

TORTS

415-1 33Wyo249, 238P654, 656 [quot Cyc]. **Other definitions are:** 191NC182, 131SE633, 43ALR1072. Violations of legal right or omission of legal duty. TexCommnA 292SW187. **It is actionable tort intentionally to cause loss** to another for sake of injuring him, unless some legal excuse for course pursued exists. 258Mass172, 154NE583.

419-4 220Ala270, 124SS889; 162La671, 111S55; 265Mass544, 164NE463; 154Miss89, 121S487; 82NH157, 131A141; 104NJL557, 142A337, 60ALR102; 244NY331, 155NE662; 155Tenn611, 299SW775. **Other illustrations.**-83Colo272, 263P723. **Three elements of every tort** action are the existence of legal duty by defendant to plaintiff, breach of duty and proximate damage. 221Ala51, 127S832. Duty to refrain from injury. 221Ala419, 129S74.

419-5 23F(2d)98; 219Ky539, 293SW1078; 104NJL557, 142A337, 60ALR102.

421-18 Person unlawfully deprived of social relations with friends and neighbors is entitled to redress. 162La671, 111S55. **Cause of action exists** where defendant maliciously, with intent to injure plaintiff's social standing, prevented defendant's employee from visiting and associating with plaintiff and his family. 162La671, 111S55.

424-22 See also 5LaA751.

425-25 See also 248NY339, 162NE99.

426-30 DelSuper 148A291.

428-35 117 Okl245, 246P426.

429-42½-New. Nonfeasance in performance of contract cannot constitute basis of action sounding in tort. 241Mich478, 217NW565.

429-43 IndA 163NE109.

433-59 35GaA94, 132SE454, 459 [cit Cyc]; 219Ky528, 293SW1091; 169La427, 125S437; 143Wash547, 255P939, 52ALR851. **Other illustrations.**-143Wash547, 255P939, 52ALR851.

434-60 143Wash547, 255P939, 52ALR851.

435-65 85IndA659, 155NE520; 216AppDiv268, 214NYS42 (malicious motive does not make lawful act unlawful); 220AppDiv584, 222NYS66; 189NC494, 127SE545; 156Tenn273, 300SW563; TexCommnA 23SW(2d)287; TexCivA 271SW172; 194Wis110, 216NW140. **Motive is immaterial where there is no privilege** but is relevant where conduct is privileged. 30F(2d)247 [certiorari den 279US847, 49SCt345(6th case), 73Led991].

440-82 Wrongful invasion of legal right causing injury to body or mind is actionable, though there is no visible hurt. 167Minn203, 208NW814, 46ALR772.

442-86 76Mont24, 245P958, 46ALR906.

442-88 35GaA276, 133SE59; 35GaA526, 133SE875; 234Ky757, 29SW(2d)26.

443-91 Other definitions and tests.-86CalA269, 260P952.

447-97 Where distinct causes are successive and unrelated in operation, law regards proximate cause as efficient cause and disregards remote cause. 129Kan229, 282P708.

447-98 35GaA526, 133SE875.

449-2 155Tenn611, 299SW775. See also 37GaA516, 140SE794.

452-5 52ND335, 202NW648.

456-16 See also 8LaA310, 312 [citCyc]. [a] **Doctrine applies** only where injured party fails to exercise ordinary care and qualifies general rule that negligent plaintiff cannot recover. 83NH99, 138A544.

458-20 32PortoRico155 (negligence).

461-25 129Kan229, 282P708.

462-35 Vt 139A441. **That single wrongful act causes injury to several** does not authorize one to sue for injuries to another. 159Tenn582, 21SW(2d)389 (rule that person can maintain but one action for single tort does not authorize one to sue for injuries to another).

466-3 190NC833, 131SE42 (in absence of special arrangement hospital's engagement implies that physicians, nurses, and attendants possess requisite degree of learning, skill, and ability and which others similarly situated ordinarily possess).

469-94½-New. Intoxicated persons.-Voluntary drunkenness cannot be interposed as shield to protect person from liability for injuries sustained by reason of his misconduct or neglect. 120 Okl20, 250P109.

469-95 236 IllA295.

470-99 236 IllA295.

481-70 136Wash645, 241P19, 20 [cit Cyc].

483-90½-New. One cannot be held liable for tort of a third person having no relation with one being charged. 231Ky564, 21SW(2d)990.

483-91 221Ala5, 127S534 (joint liability need not be proved but verdict may be rendered against one to whom proof is sufficient); 83Colo147, 263P26, 56ALR814; 37GaA198, 139SE429; 120Kan21, 245P734; 123Kan620, 256P1019; 229Ky830, 18SW(2d)280; 170La290, 127S631 (joint tort-feasors are solidarily liable); 259Mass528, 156NE859; 311Mo49, 277SW562; 115Nebr557, 213NW809; 103NJL416, 135A868; 127MiscS18, 216NYS745; 22 OhA220, 153NE924; 32PortoRico155; 150SC210, 147SE870; TexCivA 10SW(2d)250; 99Vt91, 130A758; 146Va789, 132SE844; 143Wash229, 255P123; 194Wis311, 216NW33. **Liability in tort is joint and several.**-21 OhA486, 153NE223. **Liability in tort** is not joint, but joint and several. 21 OhA314, 153NE221. **General doctrine is that liability arising from torts committed by two or more is joint and several** and resembles joint and several liability. 133SC326, 131SE265. **Joint and several liability.**-178Ark1011, 13SW(2d)314; TexCommnA 12SW(2d)118; TexCivA 15SW(2d)1081. **Where injury results from act of joint servant of two persons,** liability is joint and several. 39GaA264, 146SE794. **Where wrong is jointly participated in or contributed to by each defendant** they are joint tort feasors. 23AlaA574, 129S318.

484-93½-New. Persons are not liable as joint tort-feasors where act of one is not act of others, and they did not concur in performance of wrongful act. 123Kan104, 254P343.

484-93½-New. Where several persons are engaged in lawful mission, one committing tort not directed or countenanced by others is alone liable. 102WVa415, 135SE395.

484-94 178Ark103, 10SW(2d)894; 94Fla664, 114S503; 36GaA554, 137SE646; 256 IllA63; 233Ky238, 25SW(2d)381; 115Nebr557, 213NW809; 102NJL517, 133A81, 83 [citCyc]; 221AppDiv371, 223NYS418; 127Misc457, 216NYS498, 499 [quotCyc]; 290Pa331, 138A849, 54ALR1285; TexCommnA 23SW(2d)713. But see 221AppDiv301, 223NYS415. **Damages for joint wrong may be recovered** though proof of conspiracy alleged in petition is absent. 207 Iowa208, 223NW529.

484-95½-New. If, in contemplation of law single tort cannot be committed by two or more, but only different tort by each, separate action must be brought against each wrongdoer. 133SC326, 131SE265.

485-98 37GaA198, 139SE429; 39GaA608, 147SE911(1stcase); 171Minn260, 214NW754; NJSup 135A64. **Persons aiding one contracting party in unlawful violation of rights** of other held parties to tort for which each, all, or any, may be liable. 194Wis311, 216NW833. **In Louisiana.**-170La212, 127S604.

486-2 See also 31F(2d)51.

487-8 6F(2d)191; 212Ala644, 103S573; 103CalA260, 284P719; 36GaA554, 137SE646; 204 Iowa297, 213NW794; Oh172NE659; 140 Okl45, 282P157. **Rule applied.**-192NC102, 133SE421. **If tort committed by two or more in combination** injured party may sue all wrongdoers, any number or bring separate actions against any. 133SC326, 131SE265. **Basis of liability of one associate in a joint enterprise for tort of another**

is equal privilege to control method and means of accomplishing common design. 120Kan77, 242P131. **Common intent not indispensable.**–207 Iowa1293, 224 NW320, 62ALR1419.

482-9 Liability of joint tort-feasors is several, and either or both may be sued. 22 OhA220, 153NE924.

482-10 TexCivA 268W(2d)922. But see 16F(2d)288.

482-12½-New. Husband and wife not liable jointly for injuries by wife while driving car, husband not being present. 236 HIA295.

482-14 24F(2d)[illegible] Ala [illegible]416; 37 GaA198, 1298E[illegible]; 40GaA[illegible] 137SE 646; 120Kan21, 243P[illegible]; [illegible]52Md536, 127A299; 114Nebr142, 2[illegible]NW752 [illegible] NJL[illegible] [illegible]A[illegible] 127Misc[illegible] 218NYS [illegible] 50ND812, 1[illegible]NW[illegible] 36 OklACR [illegible]; 143 Okl 181, 288P[illegible] 12Porto Rico Fed[illegible] [illegible]8E265, 257 [illegible]Cyc]; **TexCivA** 297SW918; 6[illegible]Utah [illegible] 249P1032; 143Wash22[illegible] 255P122. See also 221AppDiv301, 223NYS415. But see 221AppDiv371, 223NYS418. **Party injured can sue any or all of joint tort-feasors.**–190NC611, 130SE502. **Joint tort-feasor** may be sued separately though judgments obtained are regarded as unit and satisfaction by one releases all. **TexCivA** 297SW244.

489-15 21F(2d)858. **Mere facts** that acts of several are somewhat related to structure in street to which accident was due does not make them joint tort-feasers. 112 Oh138, 148NE689.

489-21 Railroad company and dealers participating in conversion of shipment are jointly and severally liable. 120 Kan21, 245P734.

490-22 Md 151A21. **That proportional contribution cannot be accurately measured** will not relieve one who contributes to damage. **Cal** 285P688.

490-23 Md 151A21 (damages not apportionable).

490-24 36 OklACR432. But see 165La 1[illegible]. 115S447.

490-25 26F(2d)284; **CalA** 271P338; 103Conn41, 130A86; 207 Iowa1293, 224 NW820, 62ALR1419; 120Kan21, 245P 734; 9LaA375, 119S445(2dcase); 152 Md536, 137A299; **Md** 151A21; 144Miss 252, 110S666, 50ALR357; 311Mo 49, 277 SW562; 318Mo 292, 300SW1108; **MoA** 278SW(2d)28; 105NJL232, 142A322; 221 AppDiv301, 222NYS415; 127Misc818, 216NYS745; 22 OhA220, 153NE924; 131 Okl 25, 267P641; 130 Or424, 278P981; 87PaSuper126; 10PaDist&Co 400; 133 SC226, 131SE265, 267 [citCyc]; **Tex CivA** 274SW179; 146Va789, 132SE844; 143Wash229, 255P123; **WVa** 155SE658. See also 221AppDiv371, 223NYS418. **Joinder of two or more tort-feasors in one action necessarily implies election to recover on theory of joint liability** and involves relinquishment of right to raise separable controversy with any one defendant or to recover upon theory of several liability in any sense other than plaintiff is not bound to recover against all. 133SC326, 131SE265.

491-26 172Ark428, 289SW2, 4 [quot Cyc]; 311Mo 49, 277SW562; 131 Okl 25, 267P641; 143Wash229, 255P123. See also 143SC120, 141SE265, 267 [cit Cyc]. **Satisfaction a discharge.**–**MoA** 19 SW(2d)557; 68Utah298, 249P1032.

491-27 TexCivA 108W(2d)250.

491-28 70CalA52, 232P715.

492-30 74CalA621, 241P567. **On allegation of joint tort, where evidence** shows only one defendant committed tort, court should hold such party and dismiss as to other. 74CalA621, 241P 567.

492-32½-New. Court may exercise liberal hand in determining contribution to injury between several tort-feasors from evidence. **CalA** 292P651(2dcase).

492-33 219MoA673, 284SW828; **NJSup** 135A64; 216AppDiv86, 214NYS600, 604 [quotCyc] (joint tort-feasors generally liable for whole sum found as damages); **Ont** [1927] 1DomLR1091.

492-34 219Mo 214, 68W(2d)39; 216 AppDiv86, 214NYS600, 604 [quotCyc].

492-35 216AppDiv86, 214NYS600 [quot Cyc] (negligence cannot be apportioned).

492-36 216AppDiv86, 214NYS600, 604 [quotCyc]. But see 176Ark592, 3SW (2d)698.

492-37 216AppDiv86, 214NYS600, 604 [quotCyc].

493-41 140SC123, 138SE675, 703 [quot CyclperCothran,J].

493-42 140SC123, 138SE675, 703 [quot CyclperCothran, J].

493-44 131 Okl 25, 267P641.

494-45 292Pa354, 141A231, 233 [quot Cyc].

496-67½-New. Vaccination of one person by another without his consent, or if person is so young as to be incapable of understanding consequences, creates liability. 155Miss1, 119S50, 62ALR 191.

496-68 Ga 155SE194 (petition in suit for injunction sustained); 136Misc833, 241NYS29 (newspaper may be liable for publishing picture of plaintiff without authority). **Customer is exclusive owner of all proprietary rights** in photographs and conception thereof. 225App Div360, 233NYS153. **Single reference to plaintiff in novel** has been held not violation of plaintiff's rights under Civil Rights Law §§ 50, 51, prohibiting use for advertising purposes, or for purposes of trade, of name or picture of living person without his consent. 133Misc302, 231 NYS444. **Right of privacy held not invaded.**–230Ky227, 18SW(2d)972.

496-68½-New. Right of privacy is right to be free from unwarranted publicity. 221Ky765, 299SW967, 55ALR 964.

496-68½-New. Petition alleging publication of notice respecting plaintiff's indebtedness states cause of action for invasion of such right. 221Ky765, 299 SW967, 55ALR964.

497-70 False charge of unchastity made to school girl in presence of another causing mental or bodily injury is actionable otherwise than by action for slander. 167Minn203, 208NW814, 46 ALR772.

498-77½-New. Injury to credit resulting from change of date of post dated check may give cause of action. 156SC 397, 153SE473 (waiver).

498-81 Ont [1930] 2DomLR286.

499-84 35GaA241, 132SE650.

499-91 MoA 48W(2d)477(2dcase).

500-93 MoA 48W(2d)477(2dcase).

501-9 Spreading of false reports of injunction issuance sustaining plaintiff's patent held to give defendant good counterclaim in tort. 16F(2d)496.

502-10 12F(2d)963; 164Minn457, 206 NW396 (defendant liable for maliciously preventing one from securing employment in its stockyards). **Since parents have right to advise their children to breach contract to marriage** when in their judgment marriage ought not to take place, their motive in acting cannot of itself make act wrongful. **NJ** 143 A512. **Federal Packers and Stockyards Act** does not limit one whose employment as salesman at stockyards had been wrongfully interfered with to application for redress to secretary of agriculture. 164Minn457, 205NW630. **Third party, not standing in relation of parent** to one of parties to contract of marriage, would be liable for malicious interference with contract of marriage. **NJ** 143A512. **Complaint, by discharged employee** to recover damages because employer unlawfully prevented him from obtaining employment, stated a cause of action. 196NC478, 146SE131. **Interference with business** see **Mont** 288P612 (rule of cemetery corporation excluding use of manufacturer's vaults held to give manufacturer no cause of action).

503-11 103Conn708, 131A497; 162La 671, 111S55; 171Minn260, 214NW754. **Employer is not liable to competing merchant** for inducing employees to discontinue patronage by appeals, persuasion, and threats of discharge. 162La 671, 111S55.

504-12 4F(2d)932; 150Md677, 133A 843.

504-13 171Minn260, 214NW754.

505-14 103Conn708, 131A497. **Preventing completion of negotiation.**–Where broker deprives another broker of opportunity to complete negotiations with purchaser by means of fraudulent representations to owners, he is liable to latter for damages. 103Conn708, 131A 497.

505-14½-New. Fraudulent misrepresentations cannot be resorted to. 150 Md677, 133A843.

507-23 150Md677, 133A843; 171Minn 260, 214NW754; 224AppDiv11, 229NYS 159. **Advice to owner as to contract for sale of property** does not create liability to broker for owner's breach of contract to pay him commissions on sale. **TexCivA** 294SW699.

507-24 171Minn260, 214NW754. **Evidence insufficient.**–**TexCivA** 294SW699.

507-25 219Ala697, 123S223 (employee has no right of action against one wrongfully notifying employer that he holds assignment of employee's wages due).

508-26 200Wis153, 228NW123, 66ALR 1085.

508-26½-New. Where agreement between union and employer terminated and was not renewed, it was unlawful for union to call strike to prevent members from working for less rate or to compel employer to restore union rates. **Mass** 167NE323.

508-28 DelSuper 148A291; 234Ky757, 29SW(2d)26; 165La169, 115S447; 191 NC515, 132SE274; 34 OhA52, 170NE 178. **Inducing breach of contract of sale.**–**TexCivA** 297SW279.

509-29 24F(2d)378; 39GaA710, 148SE 279(2dcase); 41GaA673, 154SE379; 41 GaA685, 154SE298; **Mass** 169NE491 (except in case of equal or superior right); 171Minn260, 214NW754; 130 Misc23, 223NYS537; 218AppDiv291, 218 NYS197; 225AppDiv241, 232NYS443; 137Misc888, 244NYS82. **Rule held inapplicable.**–24F(2d)378. **Inducing debtor not to pay money due under contract** does not make one liable for such amount due. 225AppDiv241, 232NYS 443. **Intent necessary.**–34F(2d)649.

509-30 85Colo 232, 274P932; 150Md 677, 133A843; 76Mont24, 245P958, 46 ALR906; 218AppDiv291, 218NYS197. **Pleading.**–218AppDiv291, 218NYS197. **Evidence held insufficient to go to jury** on issue that defendant induced vendor to break contract to convey. 218AppDiv 291, 218NYS197.

510-32 150Md677, 133A843.

510-33 76Mont24, 245P958, 46ALR906.

510-36 171Minn260, 214NW754. **Rule applied.**–117 Or455, 244P509, 46ALR245.

511-37 LaA 129S381; 171Minn260, 214 NW754.

511-39 171Minn260, 214NW754.

511-39½-New. Interfering with contractual relation is a tort. 191NC515, 132SE274.

511-39½-New. Alienation of affections of fiancee, thereby causing breach of contract to marry plaintiff, is not actionable tort. 34 **IndA**383, 68NE197, 107AmSR252; 114Misc181, 186NYS147. Contra 28QueSuper58.

511-40 31F(2d)932; **TexCivA** 12 SW(2d)648.

511-41 105NJL345, 144A715(2dcase). **One fraudulently procuring transfer** to bona fide purchaser of notes known to have been procured by payee by fraud is liable to maker in damages. 165Minn 87, 205NW696.

511-42 164Minn457, 205NW630; 165 Minn87, 205NW696; 171Minn260, 214 NW754; 218AppDiv291, 218NYS197.

513-45 Contra 165La169, 115S447.

515-59 126Me14, 135A522; 129Misc212, 221NYS117.

516-61½-New. Remedy is by motion for new trial or petition for review.–126Me14, 135A522.

517-68½-New. Proponents of will are not entitled to damages against contestant for assertion of claim under will. 220Ky388, 295SW445.

522-2½-New. Tort-feasor has to compensate person wronged. 12F(2d)963.

522-2½-New. Notice is not generally an element of tort liability. 28F(2d)617.

523-12 Damages, if any are recoverable for unjustly obtaining judgment by defendants against plaintiffs in courts of foreign country, are recoverable by action at law, not in equity. 33F(2d) 667.

523-14 NJ 143A512; 156SC397, 153SE

473 (complaint held to state action in tort and not ex contractu). **Causing breach of contract.**–117 Or455, 244P 509, 46ALR245. **In action against stranger to contract** for interference with performance plaintiff need not allege performance of conditions precedent. 76Mont24, 245P958, 46ALR906. **Unlawful interference with performance of contract.**–76Mont24, 245P958, 46ALR 906. **Petition held insufficient** to show that defendant's act was proximate cause of injury. 35GaA276, 133SE59. **Rule illustrated.**–14F(2d)957. **Where statute allowed civil suit against false witness,** complaint is insufficient which contains no allegation that witness was introduced by adverse party. 126Me14, 135A 522. **Petition held to constitute action in tort.**–126Kan6, 266P655. **Complaint against stockholders for preventing performance of contract** did not state cause of action. 105NJL345, 144A715(2d case). **Complaint, alleging use of plaintiff's picture** for purposes of trade by selling it to newspaper in connection with news article, was sufficient. 225 AppDiv360, 233NYS153. **Complaint charging conspiracy** to prevent broker from earning his commissions stated case against only owner and purchaser. 225AppDiv241, 232NYS443. **Complaint stated case** for causing breach of broker's contract. 225AppDiv557, 234NYS27. **Fright causing miscarriage of plaintiff.**–Complaint held sufficient. TexCivA 12 SW(2d)811. **Allegation of conspiracy in tort action which may be committed without conspiracy** of tort feasors is mere matter of inducement. 39F(2d) 297. **Variance not shown.**–156SC397, 153SE473. **Petition held sufficient** to state case against defendant in representative and individual capacity. 41 GaA673, 154S379.

524–16 Declaration for inducing breach of contract held insufficient. 234 IllA 276. **Where act complained of is not wrongful** per se and is consistent with good faith and fair dealing, pleader must allege facts giving it different character. 81Mont527, 264P122.

525–21 Truth or lack of malice is no defense to action for invasion of right of privacy by publication of notice respecting plaintiff's indebtedness. 221Ky 765, 299SW967, 55ALR964.

529–46 Illegal conduct induced by defendant's fraud.–129Kan224, 282P697 (1stcase).

529–49 Participation.–135 Okl 249, 274 P1082.

530–53 IndA 163NE610.

533–62 But see 244 IllA458.

534–66 32PortoRico 208.

537–92 123Kan420, 256P155.

538–93 123Kan420, 256P155.

538–95½–New. c½. **Issues, Proof, and Variance.** Allegations in declaration in tort, not descriptive of cause of action for tort, need not be proved. 257Mass 512, 154NE335.

538–96 Rule applied.–14F(2d)957. **Damages.**–117 Or455, 244P509, 46ALR 245. **Burden of proof** is on person alleging misfeasance. 291Pa531, 140A522. **In action for wrongful interference by parent preventing marriage,** burden is on plaintiff to prove defendant was actuated by malice. 266Mass498, 165NE 513(1stcase).

538–97½–New. Person charged with wrongdoing is not required to prove anything until his adversary charging tort has proved it. 89PaSuper422.

539–98 323 Ill 138, 153NE667, 49ALR 499. **Evidence held sufficient.**–117 Or455, 244P509, 46ALR245. **Evidence held insufficient.**–52ND335, 202NW648. **Where act complained of is not wrongful per se** and is consistent with good faith and fair dealing, plaintiff must prove facts showing otherwise. 81Mont527, 264P 122.

540–2 196NC478, 146SE131; 149Va882, 141SE829.

540–3½–New. Evidence of similar tort many months later is inadmissible. Kan 289P412.

540–3½–New. Evidence held admissible.–LaA 130S648.

540–4 Character of duty which law, under facts, imposed on defendant must be determined by court. 104NJL557, 142A337, 60ALR102. **Where, on conceded facts, no legal duty has been transgressed,** case should not be submitted to jury. 104NJL557, 142A337, 60ALR102.

540–5 267Mass541, 166NE713; MoA 14 SW(2d)46. **Rule applied.**–164Minn457, 205NW630 (on proof of interference with employment of plaintiff as salesman at stockyards granting motive of dismissal held error); 134SC466, 133SE 98.

540–5½–New. Verdict in action against several for single wrong should be joint against all found guilty. 48Va573, 139 SE275.

540–5¼–New. Instruction held erroneous.–267Mass541, 166NE713.

540–5¼–New. Instruction held improperly refused.–267Mass541, 166NE713.

540–5½–New. Refusal of instruction that jury may find against defendants jointly or against either of them, as evidence may justify, is proper where, under evidence, defendants are liable as joint tort-feasors or not at all. 140 Okl 45, 282P157.

541–8 204 Iowa983, 216NW112.

545–36 25F(2d)134; 103Conn390, 130 A794; 108Conn333, 143A163, 61ALR 846; 110Conn528, 148A330; NJCh 151 A546; 135Misc165, 237NYS267.

547–41 103Conn390, 130A794; 38GaA 619, 144SE827. **In Georgia.**–168Ga710, 148SE741, 744 [citCJ]; 40GaA288, 149 SE306(2dcase).

549–49 Contributory negligence.–32 OhA363, 168NE143.

TOTAL

552–5 "Total disability."–217Ky371, 289SW270. **"Total incapacity."**–217Ky 371, 289SW270.

TOWAGE

554–2 273US326, 47SCt368, 71L ed663.

555–10 Contract to transport goods held affreightment contract, though some towage was involved. 273US326, 47SCt368, 71L ed663.

555–11 8F(2d)166.

556–13 Particular contracts construed, etc. 14F(2d)1006.

556–13½–New. Limitation in tariff schedules is binding on owner of vessel aware thereof. 27F(2d)162.

558–33 Railroad administration's notice of nonliability for tow held not to inure to tug owner on termination of federal control. 16F(2d)507.

559–38 Tug not entitled to demurrage for delay due to its own breach of contract. 17F(2d)871.

559–40 Tug not chargeable with detention before time tow was ready to proceed. 17F(2d)871. **Limitation in tariff schedules** to one hundred dollars per day for delay is reasonable. 27F(2d)162. **Evidence** held to establish seaworthiness of tug and that delays were due to weather conditions. 34F(2d)570.

559–40½–New. Tug held not entitled to recover of tow for loss of tow rope parted during storm. 21F(2d)47.

559–40½–New. Tug is entitled to towage notwithstanding delay due to storm and stranding of barge. 21F(2d)47.

559–40¼–New. Tariff limitation on claim for delay is applicable to claim and not to amount of recovery. 27 F(2d)162.

560–48 Even though claimants knew nothing of charter party, they are not entitled to lien. 30F(2d)890.

561–52½–New. That libelant obtained pro confesso decree for towage does not give him priority over mortgage for unpaid purchase price. 26F(2d)964.

562–64 17F(2d)366.

562–65 35F(2d)294.

562–66 Barges are expected to be strong enough to withstand strains of towing. 6F(2d)959.

562–67 Defense of inevitable accident is not sustained if it is shown that there was lack of display of nautical skill on part of master of tug. 30F(2d)452 [aff 30F(2d)454(1stcase) (certiorari den US 49SCt265(2dcase)].

562–69 8F(2d)166; 15F(2d)667; 16 F(2d)154; 19F(2d)12.

563–70 5F(2d)998; 15F(2d)667; 16 F(2d)154; 17F(2d)366; 19F(2d)12; 21 F(2d)47; 21F(2d)982; 33F(2d)272.

563–71 19F(2d)12. But see 36F(2d)821.

563–72 16F(2d)154; 35F(2d)1006.

563–73 14F(2d)482; 17F(2d)366; 19 F(2d)12; 37F(2d)934; 43F(2d)852; 43 F(2d)858.

563–73½–New. Tug's task is completed when it has brought barge to place designated and moored her safely. 42 F(2d)1005.

564–74 8F(2d)166; 19F(2d)12; 21 F(2d)47.

564–75 8F(2d)166.

564–77 21F(2d)982; 43F(2d)858.

565–82 43F(2d)852.

565–83 19F(2d)12.

565–84 But see 36F(2d)821.

565–87 14F(2d)482.

566–99 14F(2d)196; 14F(2d)447; 15 F(2d)377; 40F(2d)588 (proximate cause); 43F(2d)858. **Tug is liable for injury to tow by storm** where negligent stranding caused delay. 17F(2d)253. **Risk from falling tide** is not on tug after delivery to berth. 20F(2d)357. **Tug owner voluntarily leaving "channel"** with tow does so at his peril. 19F(2d) 285. **Tug is held at fault** in turning windward so that libellant's scow lost protection of wind and was damaged by fire, which was on adjacent scow in same tow. 29F(2d)783.

567–1 13F(2d)891; 14F(2d)482 (failure to stand by anchored tow held proximate cause); 29F(2d)495.

567–1½–New. Private owners should not be compelled to bear loss incurred by effort of government to get coal towed to New York during war period when there was urgent demand therefor. 13F(2d)481.

567–1½–New. Tug master, in taking charge of steamship for docking, held acting as employee and representative of tug owner. 14F(2d)1006.

567–3 15F(2d)882; 19F(2d)663; 35 F(2d)294.

567–5 In order to be seaworthy etc. See also 43F(2d)858.

569–14 Negligent manner in which tug executes proper order of pilot in charge of movement aiding steamship in leaving her berth renders tug liable. 8 F(2d)324.

569–15 19F(2d)923.

571–30 14F(2d)196; 19F(2d)923.

571–31 33F(2d)215 (tug master negligent in approaching dam); 43F(2d) 401.

571–32 13F(2d)891; 41F(2d)166; 42 F(2d)666; 43F(2d)401.

571–33 13F(2d)891; 40F(2d)638.

571–35 14F(2d)1006; 19F(2d)285; 43 F(2d)858.

571–35½–New. Forced removal to sea of grounded ship by orders of harbor master does not excuse liability for damage at sea. 14F(2d)244.

571–36 Permitting tow to drift while landing another barge is negligence on part of captain. 5F(2d)64. **Collision with drawbridge.**–14F(2d)263. **Duty of tug captain in sudden emergency.**–42 F(2d)422.

572–37 8F(2d)324; 23F(2d)528.

572–39 30F(2d)452 [aff 30F(2d)454 (1stcase) (certiorari den 279US844, 49 SCt265(2dcase), 73L ed989)].

572–41 42F(2d)422. **Duty of tow's officer.**–42F(2d)422.

573–46 6F(2d)877; 7F(2d)119; 14F (2d)897; 16F(2d)651. See also 16F(2d) 126.

573–47 5F(2d)998; 14F(2d)897; 16 F(2d)611; 39F(2d)183 (tug master's negligence held cause of damage to tow); 41F(2d)166. **Towing through drawbridge at excessive speed** is negligence. 14F(2d)897. **Negligence of bridge operator,** and not of tug, held cause of collision of lighter with bridge. 21F(2d)80.

573–50 19F(2d)285.

573–52½–New. Where tug master placed scow at dock by direction of watchman thereon tug is not liable for damage from unsafe condition of berth. 38F(2d)990.

573–54 29F(2d)115.

574–56 42F(2d)827.

575–63 11F(2d)986.

575-69 40F(2d)304.

575-73 42F(2d)482. **Putting to sea in** face of storm signals held negligence, not error of judgment. 6F(2d)982.

576-75 17F(2d)253.

576-76 13F(2d)891. **Delay not amounting to deviation** is not proximate cause of subsequent injury from sudden and unexpected storm. 13F(2d)891. **Stranding causing delay, though negligent**, held not proximate cause of injury to tow from wind later in voyage. 13F(2d)891.

576-80 35F(2d)294; 42F(2d)561.

576-80½-New. **Tug held not liable to tow anchoring after hawser broke because of violence of storm** or necessity of casting off anchor. 21F(2d)47.

577-82 14F(2d)447.

577-87 **Tug has been held not negligent in failing to cast anchor from barge** of reinforced concrete, which was beached when bargee believed her to be sinking, notwithstanding that she did float again. 29F(2d)491.

577-88 **Tug is at fault in fastening barge to flotilla** which swung around and brought barge against pier when lines fastening inner barge to next pier parted. 19F(2d)527. **Tug assumed risk** from injury from ordinary conditions and danger in moving barge to flotilla near pier. 19F(2d)527. **Towing company held not negligent** in mooring tow. 26F(2d)70. **Consignee of scow was bound to exercise reasonable diligence** to ascertain condition of berth and to provide safe berth. 31F(2d)112(2dcase) [aff 31F(2d)115(1stcase)]. **Mooring scow in dangerous berth without warning** captain of danger to be avoided was implied assurance that berth was good. 31F(2d)112(2dcase) [aff 31F(2d)115(1stcase)]. **Vessels must be moored sufficiently** not only to meet existing conditions, but those which might reasonably be anticipated. 25F(2d)170.

578-89 14F(2d)482; 22F(2d)665; 31F(2d)112(2dcase) [aff 31F(2d)115(1st case)]. **Tug is not insurer of safe mooring of flotilla, and is not responsible** for breaking adrift of boats through some latent defect or unexpected condition which could not have been anticipated in exercise of reasonable foresight. 29F(2d)495. **Tugmaster is under duty to inspect lines**, in adding his tow to moored flotilla, with reference to their ability to bear added weight under conditions of tide and weather which are to be anticipated. 29F(2d)495. **Where captain of scow was unfamiliar with dangerous condition** of berth or of any necessity for breasting off scow, he was not negligent in leaving scow unattended in such berth. 31F(2d)112(2dcase) [aff 31F(2d)115(1stcase)].

578-89½-New. Ordinarily, after tug has brought its tow to safe berth, it is duty of bargee to see that his mooring is proper, though, if this requires more nautical skill than boatman can be expected to have, tug may be held at fault for not seeing that better fast was made. 29F(2d)491.

578-89¾-New. Tug is not liable for negligence unless it is proximate cause of injury to tow. 25F(2d)170.

578-89¾-New. although barge was consigned to designated place, tug may not leave it in unsafe place without doing all that is reasonably necessary. 42F(2d)1005.

578-90 **Tug whose officer takes charge of navigation of steamer** while taking her to dock assumes towage duties. 43F(2d)401.

578-92 15F(2d)377. **Towage contract is no defense** against negligence by one in charge of tow. 39F(2d)183.

578-93 39F(2d)183 (master of barge negligent).

578-94 42F(2d)827. See also 26F(2d)710.

579-98 8F(2d)324.

579-1 14F(2d)482 (failure to anchor held not proximate cause).

579-2 **Tow held not negligent.**-40F(2d)588.

579-3½-New. **Consignee of vessel** is bound to use reasonable care as to safe berth. 20F(2d)357.

579-3½-New. **Consignee of barge held** at fault. 20F(2d)357.

580-4 21F(2d)47; 21F(2d)982.

580-5 25F(2d)126. **Absence of anchor** found to render barge unseaworthy. 5F(2d)64. **Absence of anchor from barge** held proximate cause of injury sustained in collision, even though tug captain was negligent in permitting barge to drift. 5F(2d)64.

580-8½-New. Tug is not liable to tow not properly manned and equipped for losses from drifting and stranding after anchoring during storm. 21F(2d)47.

580-9 **Failure to drop anchor** by barges when tug became disabled does not release tug owner from liability. 33F(2d)272.

581-17. 8F(2d)166. **Exemption from liability for negligence.**-8F(2d)166. **Deviation.**-26F(2d)70.

581-18 13F(2d)533.

581-19 Contra 14F(2d)488; 40F(2d)638. **Notice by director general of railroads** that towing would be at risk of tow held not to continue in effect after federal control ceased so as to enter into contract by railroad company. 14F(2d)488. **Though towing company gave notice** that it would take ships through bridge at their own risk, it was not relieved from liability for negligent operation of its own vessels. 29F(2d)115.

582-22 14F(2d)196. **Provision on card containing schedule of rates** did not relieve towing company of liability, where it was not shown that owner of vessel knew of existence of such provision. 31F(2d)885.

582-26 **Intervening negligence resulting in sinking of tow cannot be charged to** tug on ground of merger. 39F(2d)183.

583-35½-New. Barge and steamer under charter to same party and under common dominion and control are one vessel as affects liability to damages by one to other. 16F(2d)1003.

583-35½-New. Owner of steamship, damaged while being towed, is entitled, in case accident was not unavoidable, to recover against party or parties to whose negligence accident should be attributed. 29F(2d)115.

583-35¼-New. Where it was consignee's duty to move scow up canal and its custom to pay captains of scows for such services, captain, if he assisted in moving scow, did so as consignee's servant or agent. 31F(2d)112(2dcase) [aff 31F(2d)115(1stcase)].

583-35½-New. Consignee, being solely at fault for dumping cargo and damages to scow because moored in unsafe berth, was liable to consignor for value of cargo, and primarily liable to owner of scow for damages to scow; and consignor, under charter party, was secondarily liable for damages to scow. 31F(2d)112(2dcase) [aff 31F(2d)115(1stcase)].

583-35¼-New. Operating agreement has been held to accomplish same purpose as demise charter and to impose on operator liability for negligence of tug. 42F(2d)229.

583-38 But see 42F(2d)229.

584-50½-New. Charterer of steamers acquires no lien against steamers for damages to barge owned by it. 16F(2d)1003.

584-50¼-New. Where charterer of steamer by reason of ownership pro hac vice of steamers and barge acquires no lien against steamer for damages to barge, owner of barge, on resuming possession has no lien. 16F(2d)1003.

584-50¼-New. Barge charter requiring that charterer take out tower's liability insurance does not make steamers demised to same charterer subject to lien for damages to barge, 16F(2d)1003.

584-50½-New. such requirement being personal agreement by charterer. 16F(2d)1003.

584-53 **Variance held fatal.**-15F(2d)695.

585-62 **Tow sinking under normal conditions** is presumed unseaworthy unless mishandled. 21F(2d)982.

585-63 8F(2d)166; 13F(2d)925; 14F(2d)482; 15F(2d)667; 15F(2d)882; 19F(2d)285; 21F(2d)47; 29F(2d)495; 43F(2d)852.

585-64 35F(2d)1006; 42F(2d)827; 43F(2d)401; 43F(2d)858. **Illustrations.**-14F(2d)1006.

586-65½-New. **To sustain defense of inevitable accident**, tug must point out precise cause of accident and show that it was not negligent, or it must show that it was not at fault in connection with any possible causes thereof. 30F(2d)452 [aff 30F(2d)454(1stcase) (certiorari den US 49SC1265(2dcase)].

586-70 11F(2d)986; 13F(2d)925; 20F(2d)357. **Evidence held sufficient.**-6F(2d)982; 13F(2d)481; 14F(2d)263; 14F(2d)1006; 15F(2d)198; 16F(2d)611; 16F(2d)651; 33F(2d)272, 36F(2d)821. **Evidence held insufficient.**-6F(2d)959; 8F(2d)166; 8F(2d)281; 13F(2d)925; 14F(2d)1013; 15F(2d)667; 15F(2d)882; 17F(2d)85; 20F(2d)728; 29F(2d)495; 32F(2d)684; 42F(2d)229.

587-72 42F(2d)666. See also 42F(2d)375. **Evidence held insufficient.**-25F(2d)170.

587-73 **Sinking of tow held due to her unseaworthiness.** 21F(2d)982. Sinking of tow held to be due to its unseaworthiness. 19F(2d)12.

587-73½-New. Where negligence of tug in respect to damage to tow is plain, faults alleged on part of another tug must be clearly and convincingly shown. 42F(2d)666.

587-73½-New. Sufficiency of evidence to show incompetency of master. 43F(2d)858.

587-73¼-New. Sufficiency of evidence of inevitable accident. 43F(2d)858.

588-82 42F(2d)561. **Liability of tug not limited to amount regularly received by towboat company.**-43F(2d)401.

589-87 16F(2d)126; 38F(2d)844. **Owner of cargo held entitled to recover full damages against tug.**-16F(2d)126.

589-89 **Charterer of barges cannot acquire lien** on towing steamer of which it was owner pro hac vice, nor can owner of barges on resumption of possession. 15F(2d)198. **Lien not allowed** where libellant was owner pro hac vice of offending ship. 16F(2d)506.

591-7 16F(2d)25; 35F(2d)543. **Collision of tow with pier.**-16F(2d)25. **Tying barge to flotilla.**-42F(2d)1003; 42F(2d)1005 (tug held negligent in overloading tier of barges).

591-9 **Where vessel having no motive power and incapable of being steered is towed by competent tug** owner of tow is not liable for damage done in course of movement. **Can** [1929] 2**DomLR**42.

591-10 16F(2d)154.

TOWARD or TOWARDS

591-1 122 Or444, 259P893, 898 [quot Cyc].

TOWNS

596-1 175Ark645, 300SW380, 382 [cit Cyc]. **Other definitions.**-75Mont304, 243P806.

597-2 135Wash32, 236P790.

597-3 48RI189, 136A437, 54ALR512; 135Wash32, 236P790.

598-11 253Mass391, 149NE322.

598-14 253Mass391, 149NE322; **Mo** 30SW(2d)32 (organized township).

591-14½-New. Fact that several barges are navigated in tandem under common direction of tug and engaged by same charterer in joint service does not render them jointly liable as single vessel. 16F(2d)154.

599-18 6PaDist&Co 284.

599-19½-New. Municipal township grows out of law by reason of decrease in population as well as growing into law by reason of increase in population. 222MoA782, 9SW(2d)867.

599-21 205 Iowa74, 217NW551. See also 191NC761, 133SE395. **It is often used in nonliteral and comprehensive sense**, to include all municipal divisions. 8PaDist&Co 89. **"Township" in school statute** denotes civil township. **Ind** 172 NE911.

601-33½-New. Recital in order of county judge for election for incorporation that there were more than two hundred inhabitants in territory involved was not inconsistent with there being five hundred as required by statute, in view of presumption supporting validity of judgment which fails to state sufficient facts to support it. **Tex** CivA 188SW(2d)202.

601-33¼-New. **Fraud necessary to in-**

validate action of county judge in ordering election on question of incorporation must be such as to be chargeable to him, and not merely fraud of others by which he is led into error. **TexCivA** 18SW(2d)202.

601–40 Incorporation after creation.–TexCivA 18SW(2d)202.

601–41 NJ 142A550.

601–46 Statute construed.–Vt 148A412.

602–49 126Misc239, 213NYS258 (boundary given as river or middle thereof).

602–50 Boundary line "along the shore" or "along bank" of river does not extend grant to middle of stream. 126Misc239, 213NYS258.

602–60 101Vt41, 140A156.

603–30 Town refusing to agree to division line is taxable with costs under some statutes. Vt 148A412.

604–84 197Cal529, 241P869 (board of supervisors of county).

604–94 County board of supervisors has power to change boundaries of townships. 197Cal529, 241P869. **Discretion of board of supervisors as to division.**–Board of supervisors is without discretion to refuse to divide township containing city of fifteen hundred inhabitants on proper presentation of required statutory petition. 201 Iowa 794, 208NW291.

604–95 Mo 28SW(2d)1026.

605–5 Reference in petition to wrong statute held surplusage.–245Mich537, 222NW705.

606–26 Lack of funds is no excuse for refusal of township board to hold election ordered by board of supervisors. 245Mich537, 222NW705.

607–47 284Pa287, 131A281.

608–49 Board of adjustment making incomplete report must reassemble and complete adjustment or it will be required to do so. 54SD307, 223NW200. **Statute does not apply to newly incorporated village** within township. 248 Mich483, 227NW787.

608–53 Where township is completely divided, new unit in which public property is located will as rule take legal title thereto. 19 OhA60.

609–70 SD 227NW488 (roads and bridges not included in property for purpose of adjustment of indebtedness).

611–5 230AppDiv228, 243NYS686.

611–6 293Pa364, 143A10.

611–7 103Conn418, 130A707; 293Pa 364, 143A10; 300Pa108, 150A293; 188 Wis501, 205NW423.

611–7½–New. Construction and repair of highways is within corporate powers of township. 239Mich569, 215NW11.

611–9 Towns cannot change statutory provisions after accepting statute. 253 Mass408, 149NE152.

612–19½–New. Town can act legally only in meeting duly warned and holden. 108Conn145, 142A807.

612–26 130Misc734, 225NYS24. **Warrant held sufficient.**–259Mass478, 156NE 727.

612–27 125Me370, 134A164. **Article in warrant held sufficient.**–262Mass214, 159 NE630.

612–31 111Conn338, 149A890. **Number of grand jurors to be elected** need not be stated in warning of town meeting. 111Conn338, 149A890.

612–32 Place need not be specified where by custom, meetings were held at town hall. 111Conn338, 149A890.

613–36 See also 108Conn145, 142A807 (votes of meeting, of which notice has been given for less than period required by statute, though it be only for single day, are not binding).

614–60 125Me370, 134A164.

616–2 Vote by voice and show of bonds held sufficient. 253Mass400, 149NE317.

616–6 259Mass478, 156NE727.

616–9 Majority vote held sufficient on appropriation for specific road repair, in absence of statutory requirement to contrary. 258Mass139, 154NE555.

616–12½–New. Moderator has no authority to interpret, as matter of law, effect of vote. 258Mass139, 154NE555.

616–12½–New. Erroneous ruling by moderator as to vote required is not binding and amounts to no more than would declaration by meeting itself of its view of legal effect of vote. 258 Mass139, 154NE555.

617–23 260Mass594, 157NE700 (record held sufficient to identify by-laws adopted).

617–26 Typewritten sheets, officially signed and dated, and firmly attached to page of record, constitute part thereof. 239Mich536, 215NW38.

617–27 297Pa369, 147A64 (omission in minutes not conclusive since they might be corrected).

619–61 Erection of township house.–13PaDist&Co 133.

619–62½–New. Town councilmen, whose successors' certificates of election were not based on declaration of election following count of ballots by town council as required, constituted town council de jure, with sole authority to count ballots cast for town and district officers. 49RI 458, 144A54.

619–63 164Minn358, 205NW258.

619–66 11PaDist&Co 224.

619–69 101NJL461, 129A757.

620–75 326 Ill 354, 157NE472.

620–77 283Pa126, 129A78 (failure to keep record does not invalidate actions of supervisor).

620–80 239Mich536, 215NW38.

620–83 137Misc78, 242NYS635 (abolished indirectly as well as directly).

620–86 NJSup 129A432 (town committee may abolish office before termination of term appointed).

621–7 262Mass127, 159NE539.

621–10 253Mass400, 149NE317 (police). **Suspension of functions of town officers** declared elected is not required by Massachusetts statutes during recount. 253 Mass400, 149NE317. **Power to appoint.**–253Mass408, 149NE152. **Statute construed to give power** to appoint police chief. 253Mass408, 149NE152.

621–11 Ind 172NE119.

622–19 11PaDist&Co 224.

622–19½–New. Defense of fraud cannot be predicated on lawful act of county commissioners appointing township officer before expiration of regular session. Ind 172NE119.

622–24 See also 200 Ind319, 163NE263.

622–26½–New. In some jurisdictions, though marshal is by force of statute tax collector, separate oath for each office is required, as well as separate bond for performance of duties of each office. 142Miss1, 106S886 (construing Mississippi statutes).

623–40 142Miss1, 106S886.

623–45 142Miss1, 106S886.

624–55 NJSup 132A341; 291Pa46, 139 A623.

624–64 Grounds for removal.–13PaDist &Co 143.

624–66 12PaDist&Co 433 (supervisor removed for refusing to obey order of court to open road necessary as approach to school). **In proceedings for removal of township officers for neglect of duty,** insertion in petition of names of two other supervisors without consent of signers of petition, if error, has been held not prejudicial to officer originally proceeded against, where no steps were taken except as against him. 294Pa45, 143A415. **Civil service laws** must be complied with where applicable. 253 Mass400, 149NE317. **Statute authorizing removal by court of officers** elected for definite terms, on petition of twenty five property owners, held not to apply to employees, including township policemen. 289Pa86, 137A166. **Petition for recall of township treasurer held sufficient.**–246Mich312, 224NW384. **Petitioners** need not give security for costs. 294Pa45, 143A415.

624–67 Ministerial officers or employees may be removed at pleasure of appointing officer. 289Pa86, 137A166. **In Pennsylvania.**–291Pa46, 139A623.

625–75½–New. Whether plumbing inspector was reduced in position, contrary to statute, by township committee is reviewable by certiorari. 101NJL442, 139A247.

625–77 Mo 23SW(2d)83; 49SD424, 207 NW221. **In New York.**–218NYS52.

625–78 49SD424, 207NW221; 187Wis 405, 204NW478. See also 10PaDist&Co 535.

625–80 187Wis405, 204NW478 (appointment properly made).

626–83 50Nev237, 255P1073. **In Louisiana.**–6LaA572.

626–84 298Pa471, 148A846 (township not entitled to dismissal of action by treasurer for compensation).

626–85 10PaDist&Co 708. See also 230 AppDiv281, 243NYS697.

626–94 142Miss1, 106S886 (one who has not qualified not entitled to recover fees and perquisites of office from another who has not been legally elected to office).

627–3½–New. Town treasurer is not entitled to recover on quantum meruit for services in absence of statute or ordinance duly enacted. 148Va675, 139SE 270.

627–3½–New. Town treasurer, suffering no diminution in compensation under segregation acts, is not entitled to compensation thereunder. 148Va675, 139SE270.

627–3¼–New. Statute making fees payable to town supervisor construed to include fees from duties relating to water and sewer districts. 230AppDiv281, 243 NYS697.

627–6 IndA 169NE887; IndA 171NE 224. **Supervisors have power to employ men and teams** for repairs on township roads. 97PaSuper144.

627–8 196Wis171, 218NW842. **Officers cannot bind town where they transcend lawful powers.**–196Wis171, 218NW842.

627–11 See also 11PaDist&Co 227.

627–13½–New. Selectmen, in absence of statute, may organize police force into convenient and efficient force. 253Mass 408, 149NE152.

627–13¼–New. Power of selectmen to systematize and supervise work of police officers is not affected by fact that latter are public officers for whose acts municipality is not responsible. 253 Mass408, 149NE152.

627–13¼–New. Acts of selectmen authorized by statute are not rendered invalid because they followed to some extent another statute not adopted by town. 253Mass408, 149NE152.

629–36½–New. Responsibility for proper distribution and disbursement of township funds is in officers controlling and paying out funds. 293Pa364, 143 A10.

629–38½–New. Failure of supervisor to perform his duty as member of town board which by law was constituted custodian of voting machine, was dereliction of duty by him in his capacity of town supervisor, where he was member of board in consequence of his being supervisor. 225AppDiv474, 233NYS471.

629–39 205 Iowa74, 217NW551.

29–40 IndA 170NE346(2dcase). **Township treasurer keeping funds on deposit in bank of which he is president** with knowledge of its precarious condition is liable for loss through its failure. SD 229NW935.

629–41 In Pennsylvania, etc. 13PaDist &Co 729.

629–42 IndA 168NE488; 13PaDist&Co 729 (mandamus to file reports). **Where town funds are invested by treasurer in certificates** of deposit, he is liable therefor to the town where they are lost through failure of bank issuing certificates. 127 Okl 246, 260P470.

629–44 95PaSuper401.

630–50 13PaDist&Co 729 (matter not ground for appeal). **Accounts investigated de novo.**–13PaDist&Co 729.

630–53 127 Okl 246, 260P470.

631–73 As between sureties for successive terms of principal sureties for first term are liable for shortage shown at end of such term where, notwithstanding certain irregularities of principal as to discharge of town orders during second term, no replacement on payment of such shortage was made. 187Wis410, 204NW576.

631–77 187Wis410, 204NW576 (holding that if amount of default in first term was made up out of money received in second term, sureties for second term are liable).

631–83 But see SD 229NW935 (where bond expressly excluded liability for loss of funds through failure of banks).

631–86½–New. for any misapplication of funds, 293Pa364, 143A10.

632–6½–New. Where treasurer had con-

verted funds, acceptance of orders during second term in payment of taxes does not bring defalcation within latter term so as to relieve bondsmen for first term from liability. 187Wis410, 204NW576.

633-31½-New. Testimony of town treasurer held sufficient to support finding of embezzlement. 187Wis410, 204NW576 (evidence insufficient to meet burden).

633-31⅓-New. There is presumption that officer has on hand amount for which he is chargeable, but his presumption is rebuttable. 187Wis410, 204NW576.

633-31¼-New. Presumption that principal had on hand, on certain date, amount of moneys with which he was chargeable is not conclusive. 187Wis410, 204NW576.

633-31⅕-New. Burden of proof.–Where it is established that defalcation occurred in first term, burden is on bondsmen for such term to prove payment or replacement during second term in order to relieve themselves from liability as against bondsmen for second term. 187Wis410, 204NW576.

633-31⅙-New. As between sureties for two successive terms of principal, where defalcation in first term is established, burden of showing payment on replacement by principal is on sureties for first term. 187Wis410, 204NW576.

633-31⅐-New. Evidence held insufficient to show that treasurer made up prior shortage during second term so as to relieve bondsmen for first term from liability. 187Wis410, 204NW576.

633-34 Employment of firm in which member of town board was member, as counsel to commissioners of water district, held not interest in sale, lease, or "contract" which he was authorized to take part in making within prohibition of statute. 242NY453, 152NE259. **Fact that member of town board did not participate in formal proceedings of board** held not to exempt him from criminal liability if he voluntarily became interested in contract, sale, or lease which he was authorized to take part in making within prohibition of statute. 242NY453, 152NE259. **Right of member of town board to compensation for services as counsel to commissioners of water district** held not to give him any interest in contract for sale of bonds for construction of water supply system within prohibition of statute. 242NY453, 152NE259.

633-36 168Minn359, 209NW941 (supervisor wrongfully interested in payment voted by town board). **Interest of official in public contract.**–Statute prohibiting such interest prevents town supervisor from using his own automobile for town business and collecting from town for upkeep, maintenance, and expenses thereof while so used. 168Minn363, 209NW943.

633-37 Indictment held good as charging malfeasance in office.–NJ 146A335. **Indictment held good as charging neglect of duty.**–NJ 146A335.

634-41 Agreement of trustees to terms of devise of park land held binding on town where devise was conditioned on maintenance. 128Misc292, 217NYS849. **Devise of land for town park subject to trustee's** acceptance held presumed made with state law in mind, permitting such acceptance by trustees. 128Misc292, 217NYS849. **Resolution of trustees to accept** devise of park land made on condition of maintenance held to make devise effective. 128Misc292, 217NYS849. **Village trustees held empowered to accept devise of land** for park and to agree to maintain it forever. 128Misc292, 217NYS849.

634-53½-New. Where at death of one bequeathing property to town for library purposes method of accepting donation was not provided by law but enabling statute was enacted after decree of distribution of estate became final in absence of appeal therefrom, trust could not be attacked on ground of town's former inability to accept. 75Mont304, 243P806.

634-53⅓-New. Land previously held for parochial purposes on incorporation of parish as a town was held by town. 256Mass550, 152NE921.

634-60½-New. Commissioners of fire district, have no authority to lease lots purchased for purpose of building fire house to one agreeing to build such fire house and enter into long-term lease. NJ 142A646.

635-70½-New. Town may let town hall for reasonable period if it does not interfere with town needs. 83NH124, 139A359.

635-70⅓-New. and determination as to term and public requirements is vested in town. 83NH124, 139A359.

635-70¼-New. In dealing with proprietary matters, such as leasing town hall, town has powers of, and is subject to, same rule as individual. 83NH124, 139A359.

635-71 221Ky566, 299SW197.

635-74 256Mass550, 152NE921.

635-79½-New. Notice submitting proposition for acquiring town hall is not objectionable in not submitting alternative methods. 130Misc734, 225NYS24.

636-88 May employ workmen to remove brush from town road. 164Minn358, 205NW258.

636-91½-New. Statute, conferring power to make contract necessary to carry into execution provisions of act, merely restates law. 293Pa364, 143A10.

636-93 Selectmen, under statute, have no authority to hire automobile for use of police. 256Mass37, 152NE315.

636-94 83NH124, 139A359.

636-95 74CalA378, 240P523 (hire of truck).

636-96 255 IllA97 (no authority to contract for improvement of highways).

636-97 256 IllA3.

637-2 297Pa369, 147A64.

637-2½-New. Only limitation on authority granted selectmen to lease town hall held to be to act in good faith and execute lease reasonable as to time and consideration. 83NH124, 139A359.

637-2⅓-New. Selectmen cannot, by contract, bar themselves and their successors from exercising judicial function conferred on them by statute. 83NH124, 139A359.

637-3 169Minn413, 211NW477; 297Pa358, 147A62 (purchase requiring deliberation and judgment is invalid unless supervisors met as board). **Resolution passed at special meeting** without notice to members not present is insufficient to authorize signing of contract binding on town. 74CalA378, 240P523.

637-11 132Misc62, 229NYS62.

637-12 Competitive bidding held not necessary where lighting company which received contract was only one having connection to town. 192Wis93, 212NW402. **Approval by state highway department,** before contract is entered into, is necessary, in township's purchase of road machinery. 297Pa358, 147A62. **Consultation with state highway engineer** is necessary, and supervisors' failure to comply renders contract for purchase of tractor void. 297Pa369, 147A64. **Supervisors' authority is statutory** and their contracts violating statute are void. 297Pa369, 147A64.

638-13 97PaSuper144 (need not be written).

638-14 Disadvantageous contracts.–188Wis501, 205NW423.

638-15½-New. Contract held not invalid because extending beyond term of one selectman. 83NH124, 139A359.

638-15⅓-New. Selectmen held unauthorized to make lease of town hall for moving picture show, waiving advance payment and binding themselves and successors to refuse license to others. 83NH124, 139A359.

638-15¼-New. and subsequent approval by town meeting of such lease does not cure invalidity. 83NH124, 139A359.

638-16 Enforcement of contract may be restrained if void because ultra vires. 192Wis93, 212NW402.

638-17 297Pa369, 147A64 (contract violating statute is unenforceable though not expressly made void). See 192Wis93, 212NW402 (enforcement of illegal contract may be restrained). **In Pennsylvania.**–95PaSuper401 (statute applicable to engineer of highways).

638-20 239Mich569, 215NW11 (contract for work and material furnished for road purposes); 297Pa358, 147A62 (township obligations are always open to defense that execution was separate action of supervisors).

639-24 196Ind167, 147NE619.

639-25 125Me370, 134A164; 239Mich536, 215NW38; 164Minn358, 205NW258; 192Wis93, 212NW402. **Qualified electors** can ratify what they could have authorized. 239Mich536, 215NW38. **After ratification, money paid** to install lighting system in village cannot be recovered. 192Wis93, 212NW402. **Sufficiency of ratification.**–262Mass214, 159NE630.

639-26 83NH124, 139A359.

639-28 83NH124, 139A359. **By auditing and paying for work** done under unauthorized contract, town ratifies contract. 164Minn358, 205NW258.

639-30 256Mass37, 152NE315. **Town vote at special** meeting held not ratification. 256Mass37, 152NE315.

639-34 In Michigan.–239Mich536, 215NW38. **Assignee of note executed to payee as collateral to obligation owed by it to payee** cannot claim recovery on ground that town received benefit of money represented by note. 196Wis171, 218NW842.

639-37½-New. Use of truck hired under invalid contract renders town liable on implied contract for value of use. 74CalA378, 240P523.

640-48½-New. Contract not specifying time for completion of work must be performed within reasonable time. 192NC135, 133SE402.

640-48⅓-New. In determining reasonableness of time taken in performance of contract for complete audit of books of town, mistakes and inaccuracies go to value thereof and are not to be considered only as circumstance as to amount of time devoted to work. 192NC135, 133SE402.

640-48¼-New. Return of property received under void contract.–Where contract for rent of truck is void, town may return it at any time and avoid further liability for use. 74CalA378, 240P523.

640-48⅕-New. Town may have invalid lease canceled, but cannot recover as to past, both parties being at fault. 83NH124, 139A359.

640-51 196Ind167, 147NE619 (rent for business office); 125Me370, 134A164.

641-62 131Misc555, 227NYS305.

641-64 214AppDiv345, 212NYS410 (negligence of superintendent of highways). See also NJ 151A603(2dcase) (injuries caused by slide of gravel pit).

641-66 224AppDiv290, 230NYS43.

641-67 214AppDiv345, 212NYS410; 130Misc37, 223NYS611.

641-68 131Misc555, 227NYS305. **Establishment and maintenance of parks.**–131Misc555, 227NYS305.

641-69 165Minn34, 205NW634 (disposing of surface water on highway).

641-69½-New. Where injuries result from negligence of one working under supervision of superintendent of streets who is "public officer" wholly independent of towns, town is not liable. 261Mass407, 158NE800.

642-84 See also 293Pa364, 143A10.

642-85 293Pa364, 143A10. **Statute placing liability on county** for township road bonds is, to that extent, unconstitutional. 191NC761, 133SE395.

642-92 267Mass567, 166NE754.

643-3 217AppDiv213, 216NYS529. **Lease, instead of purchase beyond limit,** and fact that lease contains option of purchase at end of term by paying stated sum additional, does not change contract to one of sale or vitiate lease as such. 85PaSuper281. **Bonds issued by towns for water supply.**–217AppDiv213, 216NYS529. **Contract for purchase of chattel postponing payment beyond fiscal year** is violative of "pay as you go" provision of constitution. 74CalA378, 240P523. **Contracts in violation of "pay as you go" provision of constitution** are void. 74CalA378, 240P523.

643-6 293Pa364, 143A10. **Statute exempting certain bonds** modifies earlier statute on same subject. 217AppDiv 213, 216NYS529.

643-6½-New. Determination of net indebtedness.–In determining town's net indebtedness to ascertain whether it is within prescribed constitutional limit, proceeds of loan authorized for express purpose and awaiting expenditure for such purpose should be considered in accounting and deducted. 284Pa287, 131A281.

643-6¼-New. For such purpose, also, township may deduct sum directed to be paid to it by decree fixing amount owed it by county as latter's share of cost of reconstructing road. 284Pa287, 131A281.

643-6¼-New. Special tax, which township may legally and in good faith levy for contract pertaining to ordinary expenses within limits of current revenue, does not constitute "incurring of indebtedness" within constitutional provision limiting amount. 293Pa364, 143A10.

643-6½-New. Debt may be incurred by resolution of township supervisors without electoral approval for any lawful purposes up to two per cent of property valuation. 293Pa364, 143A10.

643-6¾-New. Act, authorizing special tax for contracted debt exceeding revenues which supervisors may collect by taxation, does not authorize debts beyond present revenues except in cases of extraordinary emergencies and those provided for by act. 293Pa364, 143A 10.

643-6⅞-New. Debts created by township for permanent improvements must not exceed constitutional limits. 293Pa 364, 143A10.

643-9 Statute authorizing town to exempt corporation from taxation is unconstitutional. NH 146A511.

644-17 243 IllA587. **Temporary advancement** by township treasurer in town's behalf to pay for stone crusher was not outright loan to township, and obligation was proper if within current revenues. 297Pa68, 146A448.

644-19 Legislative authority, express or implied, must exist before money may be borrowed. 293Pa364, 143A10.

644-20½-New. Town may borrow money by resolution of supervisors without electoral vote up to two per cent of property valuation. 293Pa364, 143A10.

644-21 7PaDist&Co 607. See also 293 Pa364, 143A10.

644-24½-New. Money borrowed or debts created by township for permanent improvements, must not exceed constitutional limit of indebtedness. 293 Pa364, 143A10.

644-24⅓-New. Authority of second-class towns is equal to that of other municipalities within specific functions. 293Pa364, 143A10.

644-24¼-New. Repair and improvement of public roads is proper purpose for borrowing of money. 293Pa364, 143A10.

644-24⅕-New. Money borrowed by township for current expenses must be sum within current revenues. 293Pa 364, 143A10.

644-24⅙-New. Current revenues, limiting amount borrowed for current expenses, include taxes for ensuing year and all liquid assets, collectible in judgment of authorities. 293Pa364, 143A 10.

644-24½-New. Authorization to borrow when highway funds are exhausted in anticipation of taxes for current year, does not appropriate all future revenues, thereby extending borrowing power, but such revenues taken should be specifically named. 293Pa364, 143A10.

645-28 Equity will not aid such recovery where neither party gained or lost through irregularity, and act was within town's power but irregularly done. 192Wis93, 212NW402. **Equity will not act to order recovery if no damage is shown.**–192Wis93, 212NW402. **Recovery permitted only if act** is ultra vires or taxpayers suffered. 192Wis 93, 212NW402. **Taxpayer's action to recover expenditures** cannot be basis for recovery of statutory penalty. 192Wis 93, 212NW402. **Wrongful act causing damage to town** must be shown to base recovery. 192Wis93, 212NW402.

645-29 192Wis93, 212NW402.

645-29½-New. In Massachusetts, statute, providing remedy against unauthorized expenditure or obligation, is preventive and not applicable to wrongs wholly executed and completed. 252 Mass258, 147NE878.

645-30 In Oklahoma.–127Okl 246, 260P 470.

645-40 In Oklahoma.–127 Okl 246, 260 P470.

645-43 Effect of payment by treasurer with individual funds.–297Pa68, 146A 448.

645-43½-New. Township supervisors will not be surcharged with money expended for hauling cinders for roads in absence of fraud or gross abuse of discretion. 13PaDist&Co 133.

645-45 Current moneys in general road fund may be used for erection of township house when there is sufficient money for purpose above proper road requirements. 13PaDist&Co 133. **Delay beyond fiscal year in payment** for road repairs does not change obligation from charge on current expenses into item of indebtedness. 97PaSuper144.

645-46 Relief funds for firemen.–13Pa Dist&Co 65.

646-47½-New. Current expenses have first claim on ordinary revenue and contemplate operating expenses, such as repair and maintenance of highways, lighting of streets, etc. 293Pa364, 143 A10.

646-47⅓-New. If tax levy is within purpose fixed by law, balance of current revenues over expenses and lawful loans may be used for permanent improvements. 293Pa364, 143A10.

646-47¼-New. Tradesmen, workmen, or employees dealing with township respecting matters ordinarily within current expenses are not charged with duty of ascertaining whether there is appropriation to cover service, or whether they are being paid from proper appropriation. 293Pa364, 143A10.

646-47⅕-New. Town vote to appropriate money for purpose of settling claim arising out of administration of municipal affairs is binding, even if it is ascertained subsequently that claim could not have been successfully maintained. 267Mass567, 166NE754.

646-52 243 IllA587. **Money lawfully due,** paid without order and signed as provided by statute is not invalid. 293 Pa364, 143A10. **Orders held sufficient.**–Minn 233NW236.

646-54 Payment of imperfect order may be ratified by supervisors. 293Pa 364, 143A10.

646-55½-New. Any writing properly signed directing treasurer to pay money, or agreeing to pay presently or in future, for road work, is "order," and payment would not be invalid merely because made on blank not issued by state highway commissioner. 293Pa 364, 143A10.

646-60½-New. Coupon bonds or other securities, by which debt incurred for permanent improvements may be evidenced, include certificates of indebtedness. 293Pa364, 143A10.

646-61 But see 239Mich536, 215NW38. **Orders held not negotiable.**–Minn 233 NW236. **Title of assignee** of order given in exchange for prior valid order. Minn 233NW236.

647-76 293Pa364, 143A10. **For loan within current revenues** to repair roads, notes given are valid. 293Pa364, 143A 10. **Renewal of notes** does not invalidate them if prior notes are lawful. 293Pa364, 143A10. **Where contract is invalid** because of noncompliance with statute, note in payment of consideration is invalid. 297Pa358, 147A62. **Township may be estopped by laches to assert invalidity of notes.**–13PaDist&Co 539.

647-77 Personal interest of officers.–196 Wis171, 218NW842.

647-79 196Wis171, 218NW842. **Notes executed without levying tax for repayment,** as required by statute, are void. 196Wis171, 218NW842.

647-80 196Wis171, 218NW842. **Constructive notice.**–196Wis171, 218NW842.

647-81½-New. Burden is on town asserting invalidity of notes clearly to establish invalidity. 293Pa364, 143A10.

647-82 Bonds given without legislative authority are void.–196Wis171, 218NW 842.

647-84 191NC761, 133SE395. **Curative statute** purporting to validate previous bond issue held valid. 197NC419, 149SE 397.

647-85 Payments from proceeds of water bonds for laying water pipes in private roads to supply water to taxpayers held not expenditure of public moneys for private purposes. 217AppDiv146, 216NYS391. **Ordinary running expense** in excess of current revenues may not be cared for by bonds. 293Pa364, 143A 10.

648-87 County board of road commissioners authorized to issue township bonds has discretion as to time of bonds, payment, and rate of interest. 191NC 761, 133SE395.

648-88 Bonds shall be issued in order in which judgment establishing respective roads are rendered. 196 Ind281, 148 NE198. **Notice of submission to voters** of question of raising money for town hall need not state that bonds will be sold at par. 130Misc734, 225NYS24.

648-89 Not required for necessary expense.–191NC761, 133SE395.

648-90 Discretion of board to fix.–191 NC761, 133SE395.

648-93½-New. Board of commissioners did not lose jurisdiction to issue bonds for construction of roads because prices went up while matters were pending. 196 Ind281, 148NE198.

648-93⅓-New. In New York, in issuing bonds, town is held to act merely as fiscal agent of district commissioners with power to compel reimbursement in time to pay bonds given to secure money advanced. 242NY453, 152NE259.

649-96 197NC419, 149SE397.

650-1 197NC419, 149SE397.

650-11 197NC419, 149SE397.

652-38 191NC761, 133SE395; 300Pa 108, 150A293.

652-40 130 Okl 277, 267P270. **When statute limits amount which may be raised in one year for erection of town hall,** township having voted sum for such purpose in one year may raise further sum in following year. 239Mich536, 215NW38. **To exceed tax fixed by commonwealth,** township as agent must point to enabling statute permitting increase. 300Pa108, 150A293.

653-46½-New. Township board is under duty to levy tax to pay assessment against township, authorized by statute. 49SD360, 207NW164.

653-46⅓-New. Tax levied for contingent miscellaneous expenses must be small in proportion to entire tax. 326 Ill 179, 157NE200.

653-46¼-New. Levy of three hundred dollars of total town levy of six hundred fifty dollars held for unitemized town purposes held invalid as disproportionate. 326 Ill 179, 157NE200.

653-54 In Oklahoma.–124 Okl 16, 253P 483.

653-56 Annual expenses required for interest and sinking fund of township's outstanding bonds constitutes debt to be provided for in total yearly estimate. 300Pa108, 150A293.

653-57 Special purposes, etc. 239Mich 569, 215NW11; 130 Okl 277, 267P270; Wis 232NW770(2dcase) (installation and maintenance of street lights within village). **Special levy** for liquidating interest and principal of outstanding bonds cannot be assessed where tax allowed is adequate. 300Pa108, 150A293.

654-65 In Illinois.–316 Ill 403, 147NE 455; 317 Ill 53, 147NE459 (both cases referring to amendment under Revenue L. § 191).

654-71 124 Okl 16, 253P483.

655-82½-New. Levy for unitemized, contingent, or miscellaneous expenses must be very small proportion of entire tax. 319 Ill 415, 150NE247.

655-83 Levy of tax to pay for bridges held not to impose greater rate than permitted by constitution and statutes. 216NYS402.

655-91½-New. Where road bonds are for exclusive benefit of township, taxes to pay therefor cannot be assessed against county but must be paid by township. 191NC761, 133SE395.

655-91½-New. Authority of county clerk to extend town tax is town clerk's certificate, without which attempt to extend tax is illegal and void. 332 Ill 53, 163NE348.

655-91¼-New. Valid levy of town tax is prerequisite to issuance of town clerk's certificate and extension of tax by county clerk. 332 Ill 53, 163NE348.

655-94 In Mississippi.-106S886 (construing Code [1906] § 3375).

656-8½-New. Tax lien is not lost because of failure to file in time in receivership proceedings. 28F(2d)331.

657-21 104NJL280, 140A683. **Statute held valid.**-194Wis464, 215NW902. **Portion of fund set aside** and necessary for interest and sinking fund of outstanding bonds must be paid before appropriating balance for other purposes. 300Pa 108, 150A293.

657-25 218AppDiv643, 219NYS139 (illegal act).

657-26 218AppDiv643, 219NYS139 (illegal act).

657-28 127Me18, 140A689; 218AppDiv 643, 219NYS139 (to prevent waste or injury of corporate funds, property, or estate).

657-29 218AppDiv643, 219NYS139 (to compel restitution of "wasted" property or funds). **If town has no right of action** for money alleged to have been received in violation of law, taxpayer of town has no right of action. 132Misc666, 230NYS 464.

657-30½-New, Laches is no defense to complaint of ultra vires act of commissioners. NJ 142A646.

657-30½-New. In certiorari to review ultra vires acts of commissioners, prosecutor is held to have acted with reasonable dispatch. NJ 142A646.

657-32 Parties.-223Ky490, 3SW(2d) 1090.

658-53½-New. Where tax assessed and expenditure begun, proceeding to restrain illegal assessment is too late. NH 151A705.

658-33 218AppDiv643, 219NYS139 (where there was ratification by proper authorities and no showing of waste or injury).

658-38½-New. In suit to restrain salary payment to town officers, in which defendants alleged that payment had been made, testimony by town treasurer as to money borrowed by town, taxes collected, and funds from which salaries had been paid has been held properly excluded as irrelevant. 266 Mass503, 165NE660.

658-48 Allegations and prayers as to expenditures in years prior to that of suit to restrain further expenditures for police force will not be considered. 253 Mass408, 149NE152.

658-53½-New. In taxpayer's suit to restrain enforcement of judgment against town on ground that indebtedness exceeded constitutional limitation, town or officer or agent must be party. 127Me18, 140A689.

658-53⅓-New. Such suit cannot be maintained in absence of allegations that town had done acts enumerated in statute or that agent was attempting to misappropriate town's money. 127Me18, 140A689.

658-53¼-New. In suit to restrain payment of certain amounts as salaries of town officers, allegations as to illegal payments in past with prayers for return thereof will not be considered, since proceeding was for prevention of wrongs immediately impending. 266Mass503, 165NE660.

658-53½-New. In such suit plea in bar that salaries had been paid, that court had no jurisdiction, and that there was remedy at law as to overpayments for previous years, has been held sufficient. 266Mass503, 165NE660.

658-53⅓-New. Plaintiffs must allege and prove by fair preponderance of evidence that such payments or some of them were about to be made. 266Mass 503, 165NE660.

658-53⅐-New. Defendants did not have burden of proof on plea that payments had been made before suit was brought, since such plea was negative plea. 266Mass503, 165NE660.

658-53⅛-New. Where in such suit plea that payment had been made did not touch allegations of bill concerning tax collector, testimony of tax collector that he had not been paid any increases was irrelevant upon such plea. 266Mass503, 165NE660.

658-53⅙-New. Plea that payments had already been made was properly sustained under evidence. 266Mass503, 165NE 660.

658-53 1/10-New. Taxpayer who protests payment of tax levied by exercise board upon return by township board must show failure to include in report to excise board assets for previous fiscal year. 136 Okl 50, 275P617.

659-55 178Minn411, 227NW358 (presentation without itemizing or verifying claim held sufficient compliance with statute in view of subsequent presentment).

662-4½-New. Town board has right to bring action against superintendent of highways to recover moneys claimed to have been received in violation of law. 132Misc666, 230NYS464.

662-4½-New. Where town settled action against superintendent to recover money alleged to have been unlawfully received, and discontinued action under order of court, town could bring action to set aside settlement on lawful grounds, and recover on setting aside settlement. 132Misc666, 230NYS464.

662-21½-New. Town board may settle and discontinue action brought by it to recover moneys received by town officer. 132Misc666, 230NYS464.

662-21⅓-New. In Illinois statute vests authority for disposition of litigation with town in town electors at annual meeting. 255 IllA97.

662-21¼-New. Authority of attorney to settle claim is not implied from employment as attorney for town and filing plea in defense of action. 255 IllA97.

663-31 131Misc555, 227NYS305.

664-61 10PaDist&Co 687.

665-79 255 IllA97 (insufficient service).

666-85 196Wis176, 218NW845.

666-91 Failure to allege filing of claim with town clerk or laying thereof before town board for audit renders complaint insufficient to state cause of action for money received or upon account stated. 196Wis176, 218NW845.

666-2 260Mass594, 157NE700 (evidence contradicting record of vote held inadmissible); 148Va675, 139SE270. **In action by town to recover money collected** by treasurer, town has burden of proving amount of delinquent taxes collected. 148Va675, 139SE270. **Burden of proving that town received benefit of funds raised by loan on note** rests on plaintiff seeking to recover on note on such ground. 196Wis171, 218NW842. **Evidence held sufficient** to warrant finding that laborer employed by town was not entitled to overtime. 267Mass567, 166NE754.

666-2½-New. Burden of proof of fact showing ordinance not duly enacted, want of notice and opportunity to object, is on party relying thereon. 101NJL 461, 129A757.

666-3 297Pa358, 147A62 (evidence of noncompliance with statute is admissible).

667-15½-New. Instruction as to validity of levy and assessment of special taxes held proper. 239Mich536, 215NW 38.

TRADE

670-18 98NJEq256, 130A618.

670-20 98NJEq256, 130A618.

671-21 98NJEq256, 130A618.

671-30 98NJEq256, 130A618.

671-31 98NJEq256, 130A618.

671-33½-New. business of any kind; 220AppDiv30, 220NYS405.

671-33½-New. dealing; 220AppDiv30, 220NYS405.

671-33¼-New. any occupation or employment pursued as a calling; 220 AppDiv30, 220NYS405.

671-33½-New. business which person has learned and which he engages in for procuring subsistence or profit. 220 AppDiv30, 220NYS405.

672-36½-New. "Trader" within statute does not include selling by hotelkeeper. NB [1927] 2DomLR242.

TRADE-MARKS, TRADE-NAMES, AND UNFAIR COMPETITION

678-1 273US629, 47SCt481, 71L ed810; 91Fla60, 107S345, 347, 44ALR698; 25 OhNPNS243. **Other definitions.**-18 F(2d)639; 27F(2d)531 [aff 27F(2d) 538].

679-3 24F(2d)878. **Trade-mark is not subject of property,** except when it is used in connection with existing business. 248NY272, 162NE76. **Trade-mark cannot be made to perform function of design patent,** and vice versa. 18F(2d) 639.

680-6 Standing and reputation of business is vital part of "good will" of which trade-mark is symbol or part. CalA 289 P668.

680-7 Trade-mark or name not unlawful in itself, not against public policy, and of pecuniary value or business advantage, is property right entitled to protection. 17F(2d)196.

680-8 4F(2d)924; CalA 289P668. **Injury to standing and reputation of business is injury to good will,** and therefore infringement. CalA 289P668. **Where trade-mark indicates secret recipe,** good will entitled to protection is rightful manufacture and sale of articles made pursuant to secret recipe. 38F(2d)287. **Trade-mark, name, or sign is auxiliary to, and inseparable part of, "good will"** of possessor. CalA 289P668. **Where public mind is brought to associate trade name with manufacturer,** trade-mark will be protected by courts. 138 Misc34, 244NYS657.

681-9 40F(2d)736; CalA 289P668.

681-10 91Fla60, 107S345, 347, 44ALR 698.

682-14 TexCivA 299SW512.

683-18 Name of natural product cannot be withdrawn from general use by trade-mark. TexCivA 299SW710.

683-19 CalA 289P668; 22 OhA400, 154 NE352.

684-26½-New. Owner of trade-mark is entitled to natural extension of business legitimately to extend use of trade-mark. 34F(2d)1002.

684-27 269US372, 46SCt160, 70L ed317; 216Ala551, 114S37.

684-28 31F(2d)992; 41F(2d)637.

685-29 216Ala551, 114S37. **Property right is expectancy of future business.**-39F(2d)186.

685-31 5F(2d)524; 22F(2d)191; 29 F(2d)799; Can [1930] 4DomLR877.

686-32 5F(2d)524.

686-34 18F(2d)554, 555 [citCyc]; 40 F(2d)106 (holding words "class" and "same descriptive qualities" synonymous). **Goods in same class.**-7F(2d)304; 40F(2d)106 (coffee and other groceries); 40F(2d)1017. **Goods in different classes.**-18F(2d)554. **Converse of rule** is also true. 18F(2d)554 (beverages). **Goods of same descriptive properties.**-29F(2d)959; 40F(2d)99.

687-36 Priority of invention alone does not entitle manufacturer to monopoly. 137Misc429, 242NYS294.

687-37 Proprietor of trade-mark cannot monopolize markets that his trade has not appropriated. 4F(2d)924.

687-38 273US629, 47SCt481, 71L ed810. **Extinguishment of good will** held not to affect owner's right to use of mark. 273 US629, 47SCt481, 71L ed810.

687-39 51Philippine115.

687-40 273US541, 47SCt451, 71L ed762. See also 41F(2d)637. **Extraterritorial validity** depends on law of foreign jurisdiction. 273US541, 47SCt451, 71L ed 762.

688-43 Seller of gasoline under trade-name is entitled to exclusive use of name in state, in view of fact that modern transportation may reasonably expect to so expand business. 27F(2d) 205. **Though business is operated in units in remotely separated localities,** appropriation and registration of trade-mark is permissible. CalA 289P668.

688-44 Owner of registered trade name and design is entitled to injunctive relief against infringement by owner of similar restaurant forty miles distant. **CalA** 289P668.

688-45½-New. Subsequent user and appropriator in good faith adopting and using mark of first appropriator in territory into which goods of first appropriator has not penetrated will not be enjoined, 15F(2d)920.

688-45¾-New. but where first appropriator has expanded its business to include territory of second appropriator by catalogues and advertisements, second appropriator will be enjoined. 15 F(2d)920.

688-45¼-New. Owner of "arbitrary, strange and fanciful" trade-mark is entitled to monopoly of use in wider field than owner of ordinary trade-mark. 28 F(2d)283.

688-45½-New. Whether first trade-mark adopter may be restricted to smaller territory than state must be decided on particular facts of case. 41F(2d)637.

688-47 15F(2d)920.

689-48 22F(2d)512.

689-49 Mark need not indicate particular person as maker of article to give property therein. 26F(2d)941.

689-51 15F(2d)920; 26F(2d)941.

690-55 Exclusive distributor of foreign manufacturer had special ownership in trade-marks used on products. 39F(2d) 269.

690-55½-New. Defendant's registration of trade-mark within one week after abandonment of joint venture in which it was used with owner's consent, held unlawful and ineffective. 34F(2d)125.

690-56 15F(2d)920.

691-60 13F(2d)417; 15F(2d)920; 41 F(2d)637. **Failure to project mark into rightful territory** cannot preëmpt such territory forever. 41F(2d)637.

691-61 24F(2d)898.

691-62 7F(2d)753; 41F(2d)637.

692-63 15F(2d)920.

693-69 15F(2d)920.

693-73 24F(2d)878. But see 41F(2d) 785.

694-79 15F(2d)920; 23F(2d)74.

694-80 5F(2d)355; 19F(2d)797; 42 F(2d)513; **Can** [1928] 1**DomLR**89. **Purchaser of store with knowledge of permissive use by seller of trade name and device of another operating stores in other cities** cannot claim priority of adoption and use against such other. **TexCommnA** 280SW177.

695-81 40F(2d)668.

695-83 CalA 289P668. But see 21F(2d) 467. **That original place of business of trade name owner was lunch counter** does not preclude injunction of infringement by another restaurant. **CalA** 289 P668.

695-87 One adopting and using representation of single cat's head has been held prior user, notwithstanding previous use by another of representation of three cats as trade-mark for similar goods. 29F(2d)874.

695-89 But see **Can** [1925] 2**DomLR** 844.

695-90 26F(2d)941; 11**PaDist&Co** 722. **One may appropriate trade-mark, name, symbol or design to designate ownership of business. CalA** 289P668.

696-93 22F(2d)930.

696-96 16F(2d)349; 22F(2d)930; 84 **CalA**485, 258P630; 8**PaDist&Co** 487; [1926] **CanExch**114, [1926] 2**DomLR** 291.

698-1 40F(2d)991 (holding registration statute not concerned with invention).

699-5 "Same class" and "same descriptive properties" in statute are to be construed according to whether use of similar trade-marks would cause confusion. 40F(2d)99.

699-6 34F(2d)1002; 40F(2d)108; 40 F(2d)116; 40F(2d)119; 40F(2d)121 (held not confusing); 40F(2d)124 (held not confusing); 40F(2d)125 (held not confusing); 40F(2d)997; 40F(2d)1009; 40F(2d)1013 ("Citrofume" not confusing with "Citrus Dust"). **Confusion is controlling factor** in determining right to trade-mark. 40F(2d)99.

699-7 7F(2d)753. **Word "sun" and representation of sun** cannot be exclusively appropriated. 18F(2d)831; 84 **CalA**485, 258P630. **Name "Palais Royal"** for ladies' ready-to-wear store has been held not subject to registration as trade-mark, being name in common use for such purpose. 179**Ark**222, 14**SW** (2d)1109.

700-8 Restriction on actions for infringement contained in Trade-Mark Act is confined to cases where unlawfulness of plaintiff's business is established fact. 37F(2d)393.

705-27 Can [1930] 3**DomLR**22.

708-43 5F(2d)469; 6F(2d)643 (descriptive either as to quality or purpose); 11F(2d)834; 13F(2d)528; 14 F(2d)158; 16F(2d)349; 16F(2d)490; 16F(2d)598; 18F(2d)554; 20F(2d)284; 22F(2d)930; 23F(2d)490; 25F(2d)370; 26F(2d)322; 34F(2d)43; 203**Cal** 286, 263P810; **DelCh** 150A174; 250 **IllA**353; 22 **OhA**400, 154**NE**352; **Oh** 154**NE**355 note; 8**PaDist&Co** 439, 440 [quotCyc]; **TexCivA** 31**SW**(2d)325; 154**Wash**455, 282P914; [1926] **CanExch**114, [1926] 2**DomLR**271. **Where manufacturer adopts descriptive term** as trade-mark, he himself is to blame for ensuing confusion by adoption of similar terms by other manufacturers. 25F(2d)370.

709-44 14F(2d)158; 27F(2d)531 [aff 27F(2d)538]; 8**PaDist&Co** 439, 440 [quotCyc]. **Use of term "black narcissus"** as arbitrary and fanciful name of perfume does not prevent use of word "narcissus" as descriptive of perfume resembling odor of narcissus flower. 126**Misc**676, 213**NYS**735. **Term "fancy word" may embrace** such word as "quinseptikons." 5F(2d)750.

711-46 22F(2d)930.

711-52 22F(2d)930; 25F(2d)370; 84 **CalA**485, 258P630.

711-53 But see 16F(2d)598.

711-55 22F(2d)415. See also 148**Md** 609, 130A57, 43**ALR**206. **Words and marks held to be descriptive,** etc. 5 F(2d)469 ("Red" or "Red Leaf" descriptive of grade of tobacco); 5F(2d) 750 ("Aseptikons" applied to vaginal suppositories); 6F(2d)875 ("Vogue Hats"); 13F(2d)528 ("Bug"); 16F(2d) 349 ("speed wagon"); 16F(2d)490 ("V-Bar"); 16F(2d)598(2dcase) (Nervine); 17F(2d)159 ("Jell-Well" as applied to gelatine product); 18F(2d)554 ("snap" as applied to ginger ale); 18 F(2d)639 (band of diamond shaped figures constituting tread of automobile tires); 24F(2d)496; 25F(2d)524; 26 F(2d)322; 26F(2d)1011 ("just-right" as applied to poultry food); 27F(2d) 948 ("Ashless Ashstand"); 31F(2d)255; 37F(2d)437 ("fashion"); 22 **OhA**400, 154**NE**352; **Oh** 154**NE**355 note; 154 **Wash**455, 282P914 ("whole grain wheat"). **Language descriptive of method of curing** grapes or other products is not protected by law as trade-mark. 84**CalA**485, 258P630.

712-56 See also 148**Md**609, 130A57, 43 **ALR**206. **Trade-marks held to be non-descriptive, etc.**-15F(2d)920 ("Sweet Sixteens" as applied to sixteen dollar dresses); 16F(2d)88; 134**Misc**288, 235 **NYS**93 ("Certified" as applied to bread).

713-57 16F(2d)349; 16F(2d)490; 16 F(2d)598; 25F(2d)370; 26F(2d)941; 28F(2d)957; 35F(2d)555.

714-58 22F(2d)930; 84**CalA**485, 258P 630. **Words "Pig Sandwich"** as applied to variety of meat and cheese sandwiches are descriptive. **TexCivA** 31**SW**(2d) 325.

716-60 16F(2d)349; 16F(2d)598.

716-61 16F(2d)349; 16F(2d)598; 24 F(2d)726. But see 41F(2d)167.

717-64 40F(2d)1003. **Adoption of suggestive mark** by one trader will not preclude another from adopting an equally suggestive mark which is not deceptively similar. 55**App(DC)**307, 5 F(2d)268.

718-65 20F(2d)298; 84**CalA**485, 258P 630; 100**NJEq**385, 136A203; [1926] **CanExch**114, [1926] 2**DomLR**291 (use of obsolete and unknown word held valid as trade-mark though descriptive). **Illustrations of arbitrary or fanciful words, etc.**-5F(2d)750 ("quinseptikons" applied to vaginal suppositories); 15 F(2d)920 ("Sweet Sixteens" as applied to sixteen dollar dresses); 16F(2d)88; 24F(2d)285; 33F(2d)985; **TexCivA** 31 **SW**(2d)325.

719-67 See also 15F(2d)920.

720-73 "H-O" as name for oat food is held valid trade-mark. 31F(2d)794.

721-76 But see 28F(2d)979.

722-86 24F(2d)726.

722-87 Coined words phonetically spelled will be treated as synonymous with phrase from which taken. 39F(2d) 684.

722-88 16F(2d)347; 20F(2d)284; 26 F(2d)322; 28F(2d)613(2dcase); 241**NY** 560, 150**NE**555; 22 **OhA**400, 154**NE**352; **Oh** 154**NE**355, note; 8**PaDist&Co** 439, 440 [quotCyc]; **TexCivA** 299**SW**512; **TexCivA** 299**SW**710. **"America"** held not subject to appropriation as trade name. 16F(2d)347. **Geographic name "Mammoth Cave" cannot be claimed by** reason of extension of Mammoth Cave over privately owned land. 26F(2d)322.

723-91 28F(2d)613. **Words held geographical.**-22 **OhA**400, 154**NE**352.

724-93 Every one has inherent right to use his own name provided he uses it honestly and not with purpose of infringing on others. 25 **OhNPNS**549.

725-95 286**Pa**372, 133A561, 47**ALR** 1186.

725-96 286**Pa**372, 133A561, 47**ALR** 1186.

726-6 7F(2d)753; 15F(2d)578; 20 F(2d)282; 20F(2d)298; 29F(2d)877; 40F(2d)991; 84**CalA**485, 258P630; 8 **PaDist&Co** 487. **Use of color governed by same rule as use of geographical names.**-**TexCivA** 12**SW**(2d)1098.

726-7 20F(2d)282; 20F(2d)298.

726-8 13F(2d)417; 20F(2d)298; 29 F(2d)877; 125**Misc**764, 211**NYS**886 (as general rule).

726-9 Arrangement of colors.-151**Md** 449, 135A177.

727-10½-New. Color combination used as distinguishing mark for his goods may not be used by competitor on same class goods with design to market them as his competitor's. 125**Misc**764, 211 **NYS**886.

727-11 7F(2d)753; 15F(2d)578; 23 F(2d)74; 34F(2d)43; 84**CalA**485, 258P 630; 8**PaDist&Co** 487.

728-15 18F(2d)639; 20F(2d)279; 34 F(2d)43; 39F(2d)720 (configuration of article having utility).

729-22 27F(2d)531 [aff 27F(2d)538].

731-29½-New. Injunction will issue to restrain infringement upon expression of idea by means of label or picture as well as by use of ordinary language. 84 **CalA**485, 258P630.

731-37 6F(2d)643; 16F(2d)88; 84 **CalA**485, 258P630; 8**PaDist&Co** 487.

732-40 The following combinations of words will be protected: "Golden Dove," trade-mark for flour. 8**PaDist&Co** 487.

733-43 15F(2d)578. **Copyright of label** does not give any trade-mark rights. 37F(2d)393.

733-48 34F(2d)749; 41F(2d)641; 84 **CalA**485, 258P630. But see **TexCivA** 273 **SW**874.

737-60 13F(2d)528; 19F(2d)496; 23 F(2d)763; 41F(2d)641.

740-74 19F(2d)718 [citCyc].

741-82 23F(2d)219; 222**AppDiv**359, 226**NYS**293.

741-83 15F(2d)920.

741-85 15F(2d)920. **Infringing use is not authorized** by fact that name of owner of trade-mark is not given in advertisements of product. 28F(2d)283. **Whether owner of trade-mark has sustained damages** is immaterial. 36F(2d) 767.

742-86 25F(2d)154 ("Eskimo Pie" and "Pie" not infringed by "Honeymoon Pie").

742-88 18F(2d)700; 22F(2d)512; 30 F(2d)16; 36F(2d)767 (export to foreign country); 224**AppDiv**497, 231**NYS** 107.

742-89 DC 40F(2d)811.

742-90 33F(2d)397.

743-92 33F(2d)302.

743-93 8F(2d)49; 15F(2d)920; 84**CalA** 485, 258P630; 220**AppDiv**569, 222**NYS** 61; 125**Misc**764, 211**NYS**886. See also 25F(2d)284. **Colorable imitation sufficient.**-8F(2d)49. **Use of dominating word** may constitute infringement,

though other marks are dissimilar. 25 F(2d)284.

744-94 Similarity between first words of two trade-marks is more likely to constitute infringement than where similarity occurs between last words. 43 F(2d)101.

744-96 25F(2d)284, 287 [citCyc]; 27 F(2d)531 [aff 27F(2d)538]; 33F(2d) 397; 41F(2d)353 ("Auto-tow-line" on tow rope is infringement of trade-mark "Autowline"); DC 40F(2d)811 ("University Clothes, Inc." is sufficiently deceptively similar to "University Shop"). **Combination of color** with dress and display may be considered on issue of colorable imitation. 25F(2d)976. **"Dux-Bak" and "Rex-All."**-30F(2d) 392.

744-97 24F(2d)599; 28F(2d)613(2d case); Can [1930] 3DomLR22. **Name "Conde" held different from "Caron."** -126Misc676, 213NYS735 (that defendant used name "Paris" when he had no office or factory there is of no concern to plaintiff). **Part taken must identify owner's product without rest.**-24F(2d) 698.

744-98 5F(2d)355 ("Nucoa" on vegetable butter held infringed by "Milcoa" on nut margarine); 16F(2d)88 ("Worm-X" is colorable imitation of "Wormix"); 18F(2d)774 ("Cuticlean" and "Cutex"); 24F(2d)122; 25F(2d) 284; 27F(2d)205 ("Super-Flash" and "Silver Flash"); 28F(2d)957; 30F(2d) 16 ("Buddy" and "Buddy-L"); 31F (2d)794 ("H-O" infringed "Hofood"); 37F(2d)622 (mark "1857" on silverware infringes trade-mark "1847 Rogers Bros."); 40F(2d)303 ("Tetterine" and "Tetterrem"); 41F(2d)167 (Glo-Ray held not to infringe Hyglo); 220App Div569, 222NYS61 ("Every fine nut that grows" and "Every good nut that grows"). But see 43F(2d)101. **"Palais-Royal" not infringement of "Jack Fine's Palais-Royal."**-179Ark222, 148SW(2d) 1109. **"Sonny" and "Buddy-L" are not confusing.**-30F(2d)16. **"Community Brand" on coffee packages held not infringed by words, "Community House,"** on defendant's packages. 167La560, 119 S873. **Trade-marks held not infringed.**-34F(2d)43.

745-99 15F(2d)578; 15F(2d)920; 25 F(2d)284; 25F(2d)976; 34F(2d)445; 35F(2d)784; 41F(2d)167; 43F(2d)101; 84CalA485, 258P630; 129Misc648, 222 NYS487; 224AppDiv187, 229NYS692; Can [1929] 1DomLR449; NS [1929] 2DomLR791. **"G. & G" held infringement of "G. G. G."** where "&" sign is so enlarged as to give impression of "G G. G." 125Misc737, 211NYS868, 211NYS872. **Word-mark "Black and White" held not deceptively similar to "Red and White."**-55AppDC294, 5F(2d) 117. **Rule applied and trade-mark held not deceptively similar.**-24F(2d)698; 56 AppDC347, 13F(2d)318; 56AppDC348, 13F(2d)319; 56AppDC349, 13F(2d) 320. **"Hyfrax" held infringement of "Hy-Tex."**-15F(2d)312. **Devices and symbols held deceptively similar.**-27F (2d)531. **Neither subtractions from,** nor additions to, trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains on defendant's use of part of identical trade-mark. 27F(2d)531 [aff 27 F(2d)538]. **Where there is possibility of deception or misleading public,** trade-mark is entitled to protection. 39F(2d)186.

746-1 23F(2d)775; 28F(2d)515; 42F (2d)513; 203Cal 286, 263P810; 224App Div187, 229NYS692. **Labels held not confusingly similar.**-34F(2d)43.

746-2 84CalA485, 258P630.

746-3 18F(2d)607; 42F(2d)427.

747-6 15F(2d)578; 25F(2d)976; 34F (2d)43; 43F(2d)101; 68CalA348, 229P 863; 256Mass456, 152NE712; 220App Div569, 222NYS61.

748-7 18F(2d)774; 27F(2d)205; 43F (2d)119 (casual observer); 220AppDiv 569, 222NYS61; Can [1930] 2DomLR 975 (held not infringed).

749-14 18F(2d)774.

750-15 5F(2d)355; 129Misc648, 222 NYS487.

750-16 15F(2d)578.

750-16½-New. Descriptive registered trade-mark.-Use of alleged trade-mark which is merely descriptive of quality or purpose of article constitutes no infringement. 6F(2d)643.

750-16½-New. and fact that trade-mark has been registered affords no protection since it was not entitled to registration. 6F(2d)643.

750-17 43F(2d)119; 55AppDC294, 5F (2d)117.

750-19 16F(2d)470; 25F(2d)284; 36F (2d)767; 41F(2d)668; 43F(2d)101; CalA 289P668 (holding actual knowledge or prior appropriation immaterial); 212Ky262, 278SW562; 125Misc737, 211 NYS872.

752-24 That substantial use of another's trade-mark might be oversight might affect punishment but does not entirely excuse infringer's conduct. 41 F(2d)353.

752-25 33F(2d)978 (defendant must show that his article is not that of complainant's).

752-26 15F(2d)920; 16F(2d)88 (fraudulent intent).

752-28½-New. Intent to adopt mark as nearly alike as another's as possible without violating law is immaterial in trade-mark case. 25F(2d)976.

752-29½-New. Where two parties in widely separated states have in good faith and independent of one another used same trade-mark, neither can maintain an action against the other. 25 Oh NPNS155.

752-29¾-New. In absence of showing of bad faith, patentee may notify those whom he believes to be infringers that he will hold them responsible. 41F(2d) 668.

752-30 28F(2d)283.

753-31 23F(2d)682 [citCyc]; 28F(2d) 283.

753-33 Corporation, packing in cartons preparation in which trade-mark product is used, may use such trade-mark collaterally to show ingredient but use as part of name of preparation constitutes infringement, where proportion of ingredient was small. 28F(2d)283.

754-37 269US372, 46SCt160, 70Led317; 5F(2d)524; 22F(2d)73; 55AppDC293, 4 F(2d)960; Can [1930] 4DomLR877. See 23F(2d)219. **Contra** 21F(2d)453. **To establish infringement of trade-mark,** owner must show use on same class of goods as put out by alleged infringer, though not necessarily on same species of goods. 22F(2d)73. **Trade-mark proprietor may not exclude use** on goods so different as to preclude possibility of misleading purchasers concerning source. 28F(2d) 283. **Use on same species not necessary,** but must be on same class. 26F(2d) 941.

754-38 5F(2d)355; 27F(2d)336; 27F (2d)339; 28F(2d)283.

754-39 15F(2d)312.

754-42 Trade-mark has been held not infringement.-43F(2d)101.

755-46½-New. Use by customer of complainant's trade-mark in its corporate name held infringement. 14F(2d)235.

755-47 21F(2d)419; 73CalA412, 238P 950; 220AppDiv569, 222NYS51; 25 Oh NPNS549. **May use own name** with explanation that they are not connected with others of same name. 25 OhNPNS 549.

755-47½-New. That letters of infringing mark represent initials of infringers' last names does not necessarily permit infringement of a trade-mark. 125Misc 737, 211NYS872.

755-48 55AppDC307, 5F(2d)268.

755-49 20F(2d)713. **Component parts of protected combination of words** may be open to all. 126Misc676, 213NYS 735.

756-50 21F(2d)419.

756-51 8F(2d)49; 20F(2d)298; 39F(2d) 247; 132Misc690, 230NYS82; 23 OhA281, 154NE171. **Other definitions.**-27F(2d) 756; 173Minn342, 217NW339.

756-52 15F(2d)920; 16F(2d)598; 132 Misc690, 230NYS82; 23 OhA281, 154NE 171. **Inducing county superintendents of schools** in which defendant's dictionary was listed instead of complainant's dictionary which had been legally adopted as exclusive textbook in schools is unfair competition. 16F(2d)137.

756-53 7F(2d)603; 16F(2d)598; 22F (2d)512; 25F(2d)196; 25F(2d)284; 27 F(2d)948; 33F(2d)580 (wrongful conduct necessary); 35F(2d)555; 36F(2d) 410; 37F(2d)393; 40F(2d)736; DelCh 150A174; 164Ga437, 138SE908; 86 IndA 686, 159NE697, 698 [quotCyc]; 156Md 699, 145A338; 100NJEq385, 136A203; 23 OhA281, 154NE171; 123 Okl 3, 251P 745; 132 Or448, 286P152; 11PaDist&Co 722; 13PaDist&Co 37. **The general rule,** etc. 31F(2d)157. **Sale of patented machine** carries no implied promise that seller would refrain from use of machine in competition with buyer. 23F(2d) 848. **Damage to sales is not only injury which courts will consider** in determining whether defendant should be restrained. DelCh 150A180.

756-53½-New. Law of unfair competition is for protection of general public. 14F(2d)614.

758-54 148Md609, 130A57, 43ALR206; TexCivA 10SW(2d)124.

758-56 TexCivA 31SW(2d)325.

758-57 5F(2d)370; 8F(2d)49; 15F(2d) 920; 20F(2d)298; 21F(2d)467; 29F(2d) 972; 204 Iowa619, 215NW668; 27 Oh NPNS337.

759-59 148Md609, 130A57, 43ALR206 (courts are solicitous to encourage fair competition); TexCivA 10SW(2d)124. **Lottery,** used as means of attracting business, being illegal, may be restrained as unfair competition. TexCivA 10 SW(2d)124.

759-60 273US132, 47SCt314, 71Led 578; 22F(2d)596; 22F(2d)950; 41F(2d) 167; 19 OhA388; TexCivA 31SW(2d) 325. **Manufacturer of picture post cards** cannot be restrained from selling coin-operated vending machines and post cards in competition with plaintiff. 5 F(2d)370. **Wrongful conduct must be** shown and at least probable substantial injury. 11F(2d)834.

760-62 42F(2d)430. But see 42F(2d) 488. **Lawful publication and distribution** of "Black and White Dream Book and Almanac" causing falling off in sales of another "Dream Book" does not of itself give ground for legal or equitable relief. 22F(2d)73.

760-62½-New. Competition may be restrained for public good. 20F(2d)87.

760-62⅓-New. Confusion of origin and not of goods controls question of infringement or unfair competition. 8F (2d)49.

760-62¼-New. Claim of unfair competition because particular bank was chosen as depositary of funds arising from thrift system introduced into public school fails where it appears that complainant was given full opportunity to be such depositary. 202 Iowa701, 210NW947, 49ALR705.

760-62½-New. Radio manufacturer is not entitled to preliminary injunction against removal of serial numbers from sets by price-cutting dealer. 14F(2d) 175.

760-62⅙-New. Private trader may exercise own pleasure as to parties with whom he will deal. 24F(2d)378.

760-63 4F(2d)932; 14F(2d)614; 171 Ark722, 286SW806, 48ALR1254; 171 Ark831, 286SW967.

761-64 8F(2d)872; 23F(2d)98; 85Pa Super265 (confusion of customers).

761-65 8F(2d)872; 14F(2d)614; 22 OhA400, 154NE352; Oh 154NE355, note.

762-66 84CalA485, 258P630.

762-67 15F(2d)920. **Price of article sold is unimportant** in determining question of unfair competition. DelCh 150A174.

762-67½-New. Where defendant manufactured soap under name and wrapper similar to plaintiff and sells for less it is no basis for interference by court. 13F(2d)417.

762-68 17F(2d)581. **Similarity of candy labels** held to constitute unfair competition. 17F(2d)581. **Trade-mark infringement suits** arise out of ownership of trade-mark, while unfair competition suits are founded on damage to trade by fraudulently passing off goods of one manufacturer for those of another. 28F(2d)613(2dcase).

762-69 4F(2d)924; 7F(2d)753; 15F

(2d)920. **Clear distinction exists between unfair competition and infringement,** former may be included in latter, but latter must exist independently of former. CalA 289P668.

763-75 15F(2d)920. **Where trade-mark is employed in connection with established business,** it should be protected by equity courts. 39F(2d)186. **Trade-mark rights rest in user.**–DelCh 150A 180.

763-76 22 OhA400, 154NE352; Oh 154 NE355, note.

764-81 91Fla60, 107S345, 347 [citCyc], 44ALR698.

764-82 269US372, 46SCt160, 70L ed 317; 16F(2d)598; 91Fla337, 107S623. **A trade-name is of a different character from a trade-mark.**–91Fla60, 107S345, 44ALR698.

764-83 22AltaL92, [1926] 1DomLR26, [1926] 1WestWkly1 (trade-name held not exclusive).

764-84 15F(2d)920; 217AppDiv555, 217NYS106.

765-85 15F(2d)920; 217AppDiv555, 217NYS106. **User through agent.**–22F (2d)512.

765-87 15F(2d)920; 22F(2d)512; 26F (2d)108; 217AppDiv555, 217NYS106 (exclusive use of hotel name for eight years); 85PaSuper265.

765-88 217AppDiv555, 217NYS106 (abandonment held not shown).

765-89 15F(2d)920; 25F(2d)284, 288 [citCyc]; 37F(2d)393; 42F(2d)488; DelCh 150A174; DelCh 150A180; 164 Ga437, 138SE908; 217AppDiv555, 217 NYS106; 85PaSuper265; 12PaDist&Co 429. **Circulation of report that plaintiff's use of trade-name was unlawful** held invasion of plaintiff's legal right to its use. 160LaS336, 107S130.

766-90 204 Iowa619, 215NW668; 125 Misc780, 212NYS288; 22 OhA400, 154 NE352; Oh 154NE355, note; 85PaSuper 265. **Purchaser of trade-mark covering preparation manufactured under secret formula,** producing preparations nearly identical with original formula, is entitled to protection in use of trade-mark. 38F(2d)287.

767-91 34F(2d)774 (use by others of trade-name is no justification of defendant's use).

768-93 15F(2d)920; 24F(2d)751; 39F (2d)186; DelCh 150A180 ("American Radio Stores" and "American Radio and Television Stores"); 164Ga437, 138SE 908; 246NY459, 159NE397.

768-94 15F(2d)920; 37F(2d)59; 38F (2d)677 ("Standard" in "Standard Oil Company"); 123 Okl3, 251P745; 85Pa Super265. **"American Radio Stores, Inc."** held entitled to word "American" but not to use of words "radio" and stores." DelCh 150A180.

769-95½-New. Though details of scheme which one uses to distinguish his goods are not original he is nevertheless entitled to protection in its use against unfair competition. 125Misc 764, 211NYS886.

769-96 16F(2d)598; 22F(2d)415; 91 Fla337, 107S623; TexCivA 31SW(2d) 325. **Judicial statements of doctrine of secondary meaning.**–8F(2d)49. **"Dancing school" is generic,** and does not have acquired secondary meaning. 87Colo, 394, 288P178.

770-97 273US132, 47SCt314, 71L ed 578; 16F(2d)598; 23F(2d)615; 35F(2d) 555; DelCh 150A174; 148Md609, 130A 57, 43ALR206 (phrase "drive it yourself" in corporate name held not to have acquired secondary meaning by use for eighteen months in serving small fraction of city's population); Mass 168 NE735; TexCivA 31SW(2d)325; 154 Wash455, 282P914. **Prohibiting snuff company from using word "dental"** and depiction of tooth may be unlawful where purchaser could not be misled. 38F(2d)547.

770-98 27F(2d)756.

771-6 7F(2d)746; 16F(2d)598.

773-9 35F(2d)555; 135SC282, 133SE 706.

773-11 TexCivA 297SW573.

773-12 5F(2d)355; 13F(2d)417; 15F (2d)920; 16F(2d)598; 18F(2d)607; 21 F(2d)607; 23F(2d)253; 23F(2d)615; 25F(2d)284, 288 [citCyc]; 28F(2d)515; 35F(2d)555; 93CalA252, 269P755; 212 Ky262, 278SW562, 565 [citCyc]; 223 AppDiv260, 228NYS9; 125Misc752, 211 NYS241; 132Misc158, 229NYS219; 132 Misc654, 230NYS343; 227AppDiv591, 237NYS614; 137Misc429, 242NYS294; 138Misc34, 244NYS657; 22OhA400, 154NE352, 353 [citCyc]; 117 Or678, 686, 245P324 [citCyc]. **That unfair means induce purchasers to consider defendant's goods is sufficient,** though purchaser learns whose goods he is buying before he purchases. 24F(2d)751.

775-13 273US132, 47SCt314, 71L ed 578; 15F(2d)920; 16F(2d)598; 20F (2d)632; 25F(2d)196 ("Feralite" and "Thermit"); 33F(2d)580; 35F(2d)403; 39F(2d)247. **Wrongful appropriation of business of plaintiff by defendant is** necessary to give cause of action. Mass 168NE735.

775-16 20F(2d)632; NS [1929] 2Dom LR791.

776-17 16F(2d)598; 23F(2d)615; 33 F(2d)302 (damage to plaintiffs' legitimate business); 110Conn13, 147A22; 156Md183, 143A799; 213AppDiv237, 210NYS38; 138Misc426, 245NYS11; 135Wash60, 236P785. **Where purchaser by exercise of ordinary care** can readily ascertain sources of manufacture of goods, seller is not guilty of unfair competition. 29F(2d)697.

777-19 20F(2d)298; 26F(2d)108; 86 IndA686, 159NE697, 699 [quotCyc].

778-24 212Ky262, 278SW562.

778-25 **It is not sufficient to show that by trick or device,** etc. 22F(2d)596.

778-25½-New. Interests of public are paramount in determining infringement. 125Misc764, 211NYS886.

779-27 8F(2d)49; 21F(2d)607; 39F (2d)247; 110Conn13, 147A22; 204 Iowa 619, 215NW668; 22 OhA400, 154NE 352; 25 OhNPNS548, 550 [quotCyc]; Oh 154NE355, note.

780-28 34F(2d)802.

780-29 37F(2d)900.

780-30 110Conn13, 147A22; 204 Iowa 619, 215NW668; 246NY459, 159NE397; 138Misc124, 245NYS14.

780-31 21F(2d)467; 21F(2d)607; 151 Md449, 135A177; 100NJEq385, 136A 203; 138Misc426, 245NYS11. **Similarity held sufficient,** etc. 25F(2d)976; 33F (2d)397 ("Raindrops" infringes "Rain Water Crystals" as applied to water softening compound); 22 OhA400, 154 NE352.

782-32 273US132, 47SCt314, 71L ed 578; 5F(2d)750 ("Aseptikons" applied to vaginal suppositories not infringed by "Quinseptikons"); 16F(2d)598; 37 F(2d)900 ("High Grade Food Products" is not deceivingly similar to name "Hygrade Food Products Corporation"); 164Ga437, 138SE908; 204 Iowa619, 215 NW668; 212Ky262, 278SW562; Tex CivA 31SW(2d)325. **Similarity held insufficient,** etc.–21F(2d)470; 33F(2d) 118 (packages dissimilar though using word "White Cross"); 33F(2d)302 ("Par-Lock" is not infringed by "Ply-Rite" as applied to process for applying plaster to walls).

783-33 20F(2d)632; 25F(2d)284.

784-35 129Misc648, 222NYS487.

784-37 23F(2d)615; 27F(2d)756; 33 F(2d)801; 34F(2d)802; 39F(2d)247; 43F(2d)767; 84CalA485, 258P630; 212 Ky262, 278SW562; 223AppDiv260, 228 NYS9; 125Misc752, 211NYS241; 227 AppDiv591, 237NYS614. **Express intent to injure trade need not be shown where evidence shows harmful result in** fact. DelCh 150A180.

785-40 15F(2d)920.

785-41 6F(2d)875.

785-42 21F(2d)577.

785-43 15F(2d)920; 22AltaL 92 [1926] 1DomLR26, [1926] 1WestWkly1. **Imitation of cab design and color, and calls of chauffeurs,** will be enjoined where there is intent to deceive public and injure plaintiff. 125Misc780, 212NYS288.

787-46 25F(2d)284; 28F(2d)283.

788-48 35F(2d)555.

789-54 8F(2d)49; 14F(2d)614; 16F(2d) 598; 21F(2d)419; 132Misc654, 230NYS 343; 22 OhA400, 154NE352. **Failure of junior manufacturer to stamp name on product** is evidence of conscious imitation. 137Misc429, 242NYS294.

790-58 22 OhA400, 154NE352.

790-60 21F(2d)607; 289Pa152, 137A 175.

791-61 138Misc426, 245NYS11.

791-62 151Md449, 135A177; 22 OhA400, 154NE352.

791-63 16F(2d)598; 21F(2d)607. **Whole label must be inspected.**–16F(2d) 598.

791-64 **Erratum.**–Strike out citation "Bell v. Locke, 8 Paige (NY) 75, 34AmD 371."

793-71 7F(2d)753. See also 43F(2d) 767.

793-79 **Use of word "association" held indistinctive.**–22 OhA400, 154NE352. **Use of word "incorporated" held indistinctive.**–22 OhA400, 154NE352.

793-81½-New. **"Adams-White Brush Co." held not infringement of "Adams" and "Whiting."**–260Mass137, 156NE880.

793-81½-New. **Similarity must be such as to mislead** person of average intelligence to constitute violation. 260Mass 137, 156NE880.

794-82 132Misc158, 229NYS219; 137 Misc429, 242NYS294; 13PaDist&Co 37; 135SC282, 133SE706. **That other lighters resemble plaintiff's** is no defense. 137Misc429, 242NYS294. **Manufacturer must distinguish articles** to prevent deception, when entering field occupied by competitor. 137Misc429, 242NYS294. **Action insufficient to prevent public deception.**–137Misc429, 242NYS294.

794-83 8F(2d)49 (viewed with suspicion by courts); 21F(2d)467; 26F(2d) 108; 33F(2d)801; 86 IndA686, 159NE 697, 699 [quotCyc]; 213AppDiv160, 210 NYS246; 132Misc654, 230NYS343; 22 OhA400, 154NE352. **Manufacture of cigar lighter, similar to one widely advertised,** is unfair competition, though subsequent manufacturer's sketch and models were prior. 137Misc429, 242 NYS294.

795-84 213AppDiv160, 210NYS246; 22 OhA400, 154NE352.

795-86 151Md449, 135A177.

796-86A 7F(2d)603 (defendant's false representation that safes contained explosive chamber held unfair competition).

796-96½-New. Use of similar corporate name will be enjoined though organization of defendant corporation has not yet been completed. 22 OhA400, 154NE 352.

796-1 41F(2d)668; 19 OhA388. **Where stores in different lines of business have been rightfully using same trade name,** addition by one of them of department selling same line of goods as the other does not constitute unfair competition where it does not appear that dealer adding such department, by his advertisements or practices, intentionally or unnecessarily interferes with business of the other. 19 OhA388.

797-3 **That defendant's product is cheaper** is no defense. 137Misc429, 242 NYS294.

797-6 26F(2d)108. **Slot machines.**–294 Pa498, 144A540.

798-8 **Payment by taxicab company of commissions** to hotels held not to give rise to disqualification under statute prohibiting rebates by common carriers. 151Md449, 135A177.

799-14 **Use by taxicab corporation of additional descriptive title** "Yellow Cab Company" in advertising held not to bar relief as misleading to customers or creditors. 155Md449, 135A177.

799-15 **Defendant held not entitled to damages** by reason of letters to trade sent by plaintiff in good faith asserting his supposed rights. 7F(2d)753.

799-16½-New. Plaintiff, manufacturer of fly spray for cattle, is entitled to enjoin defendant, engaged in competing business, from carrying on campaign of disparagement against plaintiff's product by having his salesmen make false statements as to efficacy thereof, telling prospective purchasers that plaintiff's product was subject to seizure by government inspectors, and using spurious government bulletins referring severely to plaintiff's product. 224AppDiv187, 229NYS692.

800-17 31F(2d)255 ("ashless ash stand").

800-19 16F(2d)598; 23F(2d)253; 29F(2d)474; 35F(2d)555; 204 Iowa619, 215NW668; 227AppDiv591, 237NYS614; 22OhA400, 154NE352.

801-23 137Misc429, 242NYS294 ("perfumay" imitation of "Perfu-mist" is unfair competition).

801-24 21F(2d)641; 25F(2d)370. See also 132 Or448, 286P152.

801-26 25F(2d)524. **Distinguishing place of business** may be accomplished by means other than use of proprietor's name. 25F(2d)524.

802-28 22AltaL92, [1926] 1DomLR26, [1926] 1WestWkly1.

802-32 **User's name in connection with mark designating common line of business** held sufficient to distinguish its use from others in same business and using same name. 25F(2d)524.

802-34 91Fla337, 107S623.

802-35 91Fla337, 107S623; 204 Iowa619, 215NW668; 8PaDist&Co 439.

803-36 29F(2d)697.

803-37 204 Iowa619, 215NW668; TexCivA 299SW512.

803-38 137Misc429, 242NYS294 ("New Yorker" cigar lighter imitating one of same name).

803-39 246NY459, 159NE397.

803-40 42F(2d)488; 91Fla337, 107S623; 22 OhA400, 154NE352; 8PaDist&Co 439. **Persons not doing business in same geographic limits** may be prevented from using names acquiring secondary geographical significance. 40F(2d)736.

805-46 91Fla337, 107S623.

805-47 91Fla337, 107S623.

807-54 73CalA412, 238P950; 230AppDiv716, 243NYS472; 25 OhNPNS549; 286Pa372, 133A561, 47ALR1186; TexCivA 6SW(2d)400.

807-55 73CalA412, 238P950; 87Colo394, 288P178; 132Misc213, 229NYS210; 19 OhA388; 25 OhNPNS549; 123 Okl 3, 251P745; 286Pa372, 133A561, 47ALR1186; TexCivA 2SW(2d)510. **Cross complaint is proper** to enjoin plaintiff from doing business under defendant's family name. 73CalA412, 238P950.

808-56 286Pa372, 133A561, 47ALR1186.

809-59 73CalA412, 238P950; 87Colo394, 288P178; 125Misc737, 211NYS872; 218AppDiv427, 218NYS442; 130Misc358, 224NYS9; 19 OhA388; 25 OhNPNS549; 123 Okl 3, 251P745; 141 Okl 58, 283P1013. **Equity will not allow a person** to resort to artifice in use of his name to deceive public. 73CalA412, 238P950.

809-59½-New. In such case to warrant injunction, unfair competition must be clearly established. 125Misc737, 211NYS872.

809-59¾-New. Rule however does not extend to use of initials as distinguished from names. 125Misc737, 211NYS872.

810-60 21F(2d)419; 218AppDiv427, 218NYS442; 130Misc428, 224NYS144; 25 OhNPNS549; 123 Okl 3, 251P745. **Absolute injunction** to use name alone or with symbols in manufacture and sale of hair tonics and barber's supplies in New York and elsewhere held not too broad. 216AppDiv53, 215NYS4. **Neither individual nor corporation has right to use proper name** to represent his or its goods as those of another. 21F(2d)419.

810-61 25 OhNPNS548; 25 OhNPNS549.

811-62 286Pa372, 133A561, 47ALR1186 (dictum). **Initials of a name,** etc. 138Misc224, 245NYS535.

811-63 286Pa372, 133A561, 47ALR1186 (dictum).

812-64 8F(2d)49; 43F(2d)767; 125Misc752, 211NYS241; 138Misc426, 245NYS11; TexCivA 6SW(2d)400.

813-65 286Pa372, 133A561, 47ALR1186.

814-66 8F(2d)49.

815-71 TexCivA 6SW(2d)400.

815-73 125Misc752, 211NYS241.

816-74 28F(2d)807.

816-75 73CalA412, 238P950 (plaintiffs enjoined from deceptive use of defendant's name).

817-77 **Thus** one may not give his name to corporation and thereby take from another concern its good will and rights acquired by use of such name, even where family names are involved. 216AppDiv53, 215NYS4.

817-77½-New. Person may permit use of his name by corporation with which he is connected. 123 Okl 3, 251P745.

817-79 218AppDiv427, 218NYS442.

817-80 But see 218AppDiv427, 218NYS442.

818-83 See also 245Mich243, 222NW82.

819-84 **Second carriers should avoid confusion** of their product with that of another. 13F(2d)417. **Courts should be cautious** in interfering with individuals using their own names. 13F(2d)417.

819-84½-New. Right of corporation to use family name of founder of its business as part of corporate name through intermediate assignments from founder does not entitle it to monopoly of use of such name as against another corporation which previously purchased assets of business of corporation entitled to use such name from alien property custodian. 127Misc119, 215NYS387.

819-84¾-New. Person's right to use his name in business may be lost by estoppel. TexCivA 2SW(2d)510.

819-85 15F(2d)920; 28F(2d)807; 34F(2d)802; 110Conn13, 147A22; 91Fla60, 107S345, 44ALR698; IndA 165NE84; 117Nebr121, 219NW848; 103NJEq380, 143A515; 246NY459, 159NE397; 129Misc648, 222NYS487; 132Misc156, 229NYS3; 218AppDiv427, 218NYS442; 133Misc676, 233NYS286; 10PaDist&Co149; TexCivA 2SW(2d)510. **Injury or fraud must be shown.**-37F(2d)99.

820-86 91Fla60, 107S345, 44ALR698; 117 Or678, 685, 245P324 [quotCyc].

820-86½-New. That right to use corporate name emanates from state does not legalize wrongful choice of name. 15DelCh369, 138A634.

820-87 24F(2d)751; IndA 165NE84; 230AppDiv716, 243NYS472; 123 Okl 3, 251P745; 117 Or678, 686, 245P324 [quotCyc]. **After knowledge of tendency to deceive** use of corporate name may become unlawful. 246NY459, 159NE397.

820-88 15F(2d)920; 22F(2d)721; 73CalA412, 238P950; 83Colo262, 264P653; 15DelCh369, 138A634; 240NY113, 147NE546 (court of equity not warranted in assuming as matter of law that names were calculated to deceive or there existed confusion of identity to prejudice of plaintiff); 246NY459, 159NE397; 218AppDiv427, 218NYS442; 224AppDiv497, 231NYS107; 226AppDiv372, 235NYS422; 117 Or678, 686, 245P324 [quotCyc]. **Corporate names held calculated to deceive.**-24F(2d)751.

821-89 24F(2d)751; 83Colo262, 264P653; 148Md609, 130A57, 43ALR206 (right to exclusive use exists at common law); 218AppDiv427, 218NYS442; 224AppDiv497, 231NYS107; 117 Or678, 686, 245P324 [quotCyc].

821-89½-New. Successful conduct of business for brief period in particular locality will not alone give exclusive right in that locality to use descriptive corporate name by which business is generally known elsewhere. 148Md609, 130A57, 43ALR206.

821-89¾-New. Existence of valuable good will identified with descriptive corporate name will not alone give exclusive right to use of such name. 148Md609, 130A57, 43ALR206.

821-90 32F(2d)1009; 37F(2d)99; 83Colo262, 264P653; 164Ga437, 138SE908; 204 Iowa619, 215NW668; 148Md609, 130A57, 43ALR206 (injunction only granted where public deceived or likely to be); 240NY113, 147NE546; 246NY459, 159NE397; 223AppDiv17, 227NYS277; 117 Or678, 686, 245P324 [quotCyc].

821-90½-New. It must be assumed that public will use reasonable intelligence and discrimination with reference to names of corporation with which they are dealing same as with individuals having same or similar names. 240NY113, 147NE546.

821-91 15F(2d)920; 138Misc124, 245NYS14; 117 Or678, 686, 245P324 [quotCyc]. **Corporation first using name in connection with sale of furnaces** is entitled to priority as to use of name as against previously organized corporation formed to manufacture farm machinery. 24F(2d)751.

821-92 See also 224AppDiv497, 231NYS107.

821-93 141 Okl 58, 283P1013.

822-95 15DelCh369, 138A634.

822-98 83Colo262, 264P653; 148Md609, 130A57, 43ALR206. **Test in determining whether particular words are descriptive stated.**-148Md609, 130A57, 43ALR206. **Phrase "drive it yourself" included in corporate name is descriptive of business of renting automobiles** without driver. 148Md609, 130A57, 43ALR206.

822-99½-New. Foreign corporation which is first appropriator and user of name and has expanded business to include territory of domestic state may restrain use by domestic corporation of similar descriptive name. 15F(2d)920.

822-1 15F(2d)920; 24F(2d)577; 217AppDiv555, 217NYS106; 132Misc690, 230NYS82; 85PaSuper265; 13PaDist&Co 37. **Names not confusingly similar.**-Mass 170NE47 ("Highland Dye House" and "Highland Dye Works"). **Trade names held so dissimilar as not to cause confusion and deception.**-132 Or448, 286P152 (as used in same kind of collection business).

824-2 217AppDiv555, 217NYS106. **Apartment hotel held not apartment house.**-217AppDiv555, 217NYS106.

824-6 15DelCh369, 138A634.

824-9 217AppDiv555, 217NYS106; 132Misc690, 230NYS82; 136Misc276, 240NYS545; 85PaSuper265; 13PaDist&Co 37; 13PaDist&Co 374. **Injunction will not be denied because defendant has not started business.**-38F(2d)677 (defendant cannot complain that plaintiff proceeded too soon where selection of name was willful trespass).

825-11 But see 33F(2d)801.

825-13 15F(2d)920; Mass 168NE735; TexCommnA 280SW177, 178 [quotCyc]. But see 33F(2d)801.

825-14 15F(2d)920; TexCommnA 280SW177, 178 [quotCyc].

826-15 TexCommnA 280SW177, 178 [quotCyc]. But see 34F(2d)201; 34F(2d)774.

826-16 TexCommnA 280SW177, 178 [quotCyc].

826-16½-New. Where plaintiff has built up business under defendants' name with defendants' consent and cooperation, defendants cannot establish similar competitive business under like name. 85PaSuper265.

826-16¾-New. Owners of hotel name may have registration of such name by another with secretary of state canceled and revoked. 217AppDiv555, 217NYS106.

826-16¼-New. Test is whether resemblance is calculated to produce confusion as to identity. 132Misc690, 230NYS82.

826-18 118Kan731, 236P825.

831-38 224AppDiv374, 231NYS185.

832-39 28F(2d)613(2dcase).

832-40 4F(2d)924 (use of name "St. Louis Post-Dispatch" for newspaper published in St. Louis and of general circulation and registration of name "Post-Dispatch" as trade-mark held not to exclude use of name "Houston Post-Dispatch" by newspaper in Houston where there was no unfair competition in intent or result).

833-41 14F(2d)158.

835-56 33F(2d)985; 37F(2d)393 ("Budweiser" and "Budd-Wise").

836-61 8F(2d)49.

837-70 14F(2d)614; 16F(2d)598; 26F(2d)941; 30F(2d)688; 36F(2d)410; 166Ga261, 142SE736; 213AppDiv237, 210NYS38. **Equity will protect consumer's interest** even in absence of active element of deception. 125Misc764, 211NYS886. **Courts look with suspicion on one who dresses his goods so nearly like his competitor** as to be likely to cause deception. 14F(2d)614. **Use of word "Sonny" on toy truck** in same place that name "Buddy-L" is put on competitor's toy truck is not unfair practice, where no facts showing resemblance appear. 30F(2d)16.

840-73 **Burden of proof of priority.**-30F(2d)688.

842-80 **Unfair competition not shown.**-154Wash455, 282P914.

842-82 166Ga261, 142SE736; 213App Div237, 210NYS38.
843-83 213AppDiv237, 210NYS38.
843-84 21F(2d)577.
843-85 16F(2d)598.
843-90 26F(2d)941. **Taxicab using uniform design, color combination, and shield emblem,** to distinguish its cars at glance, is entitled to enjoin use of same color combination and similar design by other cabs bearing different name, but tending to cause confusion. 125Misc764, 211NYS886. **Regard must be had to circumstances under which intending users hire cabs** to determine likelihood of deception. 125Misc764, 211 NYS886.
844-95 Substituting "16" for "Sixteen" in expression "Sweet Sixteen" held infringement. 15F(2d)920.
844-96 21F(2d)577 (toys); 32F(2d) 875; 33F(2d)412; 34F(2d)672; 35F(2d) 279; 35F(2d)403; 41F(2d)462. **Rule applied to furnaces.**-24F(2d)751.
845-2 32F(2d)79; 43F(2d)607.
845-4 23F(2d)253; 30F(2d)16; 32F (2d)79. **Trade-mark held not infringement or colorable imitation.**-23F(2d)74. **Similarity of name and label held not unfair competition.**-23F(2d)98.
846-5 33F(2d)411 (placing trade-mark of automobile maker on hub caps is unfair competition).
846-6 8F(2d)872; 23F(2d)615; 41F (2d)462. **Relief refused** where not asked for in petition for injunction. 118Kan 731, 236P825.
846-7 Copying of advertisements not shown.-35F(2d)403.
847-10½-New. Propaganda through press and letters misrepresenting scope of patent decisions is actionable unfair competition. 24F(2d)530.
847-10½-New. False statements concerning competitor.-Injunction may issue prohibiting mailing or otherwise sending of false and misleading circulars concerning competitor and his business which would take away plaintiff's business by unfair means and deceive public. 133Misc213, 232NYS245.
847-10¼-New. Court's rulings are not proper subjects of promiscuous commercial advertising, and should be inserted in advertisements only after special leave of court, and should be restricted to purposes of giving notice to those concerned. 26F(2d)821.
849-24 33F(2d)412.
849-27 33F(2d)302 (defendants using cheaper materials).
850-32 Color used on taxicabs.-151Md 449, 135A177; 103NJEq392, 143A533; NJCh 144A11; 135Wash60, 236P785; **Malicious acts by way of litigation in courts** not founded on good faith but to harass and injure rival. 23 Oh281, 154NE171. **Advertising that repair on renewal parts** will fit general commodity, produced by several, is proper. 26F (2d)108. **Sending reports to salesmen, showing filing of bankruptcy petition against competitor,** is not unfair competition, even if salesmen use information. 29F(2d)49. **Rôle, garb and mannerisms of actor** may be protected against adoption for purpose of deceiving public. 93CalA358, 269P544. **Use of peculiar and characteristic script,** which another had long employed for display of trade-name "Tecla," calculated to emphasize unduly similarity of name, and forcibly to suggest to public identity of origin or management, will be enjoined. 249NY157, 163NE134 [motion to amend remittitur den 249NY 513, 164NE565(7thcase)]. **Placing by defendant of its service signs on complainant's installations** and obliterating complainant's name thereon held properly enjoined. 33F(2d)412. **"Duraleather" as trade-name for imitation leather** enjoined as misleading. 34F (2d)733.
850-33 Cases under state statutes.-145 Wash176, 259P28.
851-36 CalA 289P668 ("White Spot" held not descriptive, and subject to registration). **Exclusive use of trade name** of enterprise may be reserved to owner by registration. CalA 289P668. **Mark, symbol, name, or design to designate ownership** may be registered. CalA 289P668. **Name of place, also referring to location of business, is not subject to registration as trade name.** CalA 289P 668.
851-39 Registration of trade names.-TexCommnA 280SW177.
851-41½-New. Cancellation of registration.-Where persons have acquired valuable property right in trade name by exclusive use, they are entitled to have registration of such name by another with secretary of state canceled and revoked. 217AppDiv555, 217NYS 106 (name of hotel).
852-47 244NY278, 155NE124.
852-48 Knowledge of falsity by defendant must clearly appear. 244NY 278, 155NE124.
854-57 230AppDiv252, 243NYS644. **Evidence insufficient** to show violation. Mass 172NE789. **Statute penalizing unauthorized use of milk bottles is not invalid** because making penalty recoverable in civil action by attorney-general. 230AppDiv252, 243NYS644.
854-61 230AppDiv252, 243NYS644.
855-68 Congress cannot enact law affecting trade-marks except such as are used in interstate commerce. 55AppDC 277, 4F(2d)944.
855-70 119Oh151, 162NE425. **Trade-mark statute should be construed** in harmony with general principles of equity that are applicable. 40F(2d)99.
855-71 Transferee of registered trade-mark may reregister mark in his own name. 39F(2d)496.
855-80½-New. Bill does not lie to prevent federal trade commission from enforcing orders. 274US160, 47SCt553, 71 Led978.
855-80⅓-New. Only circuit court of appeals can enforce orders of federal trade commission. 274US160, 47SCt553, 71Led978.
855-80¼-New. Federal trade commission. Findings of federal trade commission on conflicting evidence held conclusive. 14F(2d)40.
855-80⅕-New. Findings of federal trade commission as to price maintenance held to show unfair trade practices. 14F(2d)40.
855-80⅙-New. Federal trade commission's order to desist from unfair practice held not in excess of authority. 14 F(2d)40.
855-80⅐-New. Order of federal trade commission should not be too indefinite. 14F(2d)40.
855-80⅛-New. Federal trade commission is without authority to issue cease and desist order prohibiting slight pictorial exaggeration. 16F(2d)962.
855-80⅛-New. Former owner of business is improperly joined in proceedings charging unfair competition. 16F(2d) 962.
855-80 1/10-New. Slight pictorial exaggeration of qualities of articles is not misrepresentation or unfair competition under Federal Trade Commission Act. 16F(2d)962.
855-80 1/11-New. Pictorial representation of process of manufacture of mattress exaggeration expansion in case of completed mattress left open is not unfair competition. 16F(2d)962.
855-80 1/12-New. Federal trade commission cannot require defendant to dispose of property acquired. 274US619, 47SCt 688, 71Led1238.
855-80 1/13-New. Federal trade commission exercises administrative functions. 274US619, 47SCt688, 71Led1238.
855-80 1/14-New. Review by circuit court of appeals of federal trade commission orders is limited to questions of proper exercise of administrative authority. 274 US619, 47SCt688, 71Led1238.
855-80 1/15-New. Purposes of Federal Trade Commission Act and enforcing power of commission are to prevent fraud on purchasing public. 38F(2d) 790.
855-81 24F(2d)878; 24F(2d)898.
855-82 17F(2d)684; 17F(2d)688; 24F (2d)898; 27F(2d)205; 41F(2d)785. **Ownership is condition precedent to registration. Court is not inclined to grant registration of trade-mark confusingly similar** to mark which claimant knew had been adopted and was being used by another in connection with goods of same general character and properties. 30F(2d) 996. **Mark on labels attached by service corporation** to goods returned to their owners after service is not entitled to registration. 24F(2d)898. **Mark confusing** by similarity to another as to prevent registration. 38F(2d)692 ("Seal O Meter" and "Mail-O-Meter"); 38F (2d)696 ("Michigander" and "Blue Goose"); 39F(2d)269 ("Fraisy" and "Fraise"); 39F(2d)272 ("American Lady" and "The American Girl").
856-83 16F(2d)347; 23F(2d)763; 41 F(2d)785. **Descriptive words may be registered,** etc. 27F(2d)531 [aff 27 F(2d)538]. **Construction of proviso** has reference to nontechnical trade-marks, and where mark consists of a surname, person having same name using it on similar goods would not be infringer. 13F(2d)314. **Registrant of nontechnical trade-mark** is not entitled by new application to convert it into technical mark for use on goods on which similar mark was used by opposer. 13F(2d) 314. **Exclusive use must be shown** or registration is not effective. 11F(2d) 834. **Evidence held insufficient to show exclusive use.**-41F(2d)785.
857-90 23F(2d)764; 37F(2d)960.
857-91 6F(2d)643; 6F(2d)717; 22 F(2d)522; 25F(2d)833; 32F(2d)1009; 39F(2d)269 ("Fraise" not descriptive of color); 39F(2d)684; 39F(2d)718; 40F(2d)303; 40F(2d)1006; 40F(2d) 1013 (held not descriptive). **Trade-mark held not so descriptive** that registration is to be refused. 6F(2d)720 ("Lazona"). **Words descriptive either as to quality or purpose of article** are not subject to registration. 6F(2d)643.
857-92 But see 16F(2d)347. **Trade-marks held not within inhibition against geographical term.**-6F(2d)720.
857-94 55AppDC307, 5F(2d)268.
858-96½-New. Fact that patent has been obtained on machine does not preclude registration of trade-mark thereof. 6F(2d)717.
858-96⅓-New. Opposer's intended use of trade-mark cannot avail him in trade-mark opposition meeting. 17F(2d)677.
858-96¼-New. Doubt whether confusion would result should be resolved against newcomer in field. 17F(2d)677.
858-96⅕-New. Registration may be refused for prior use of mark on other goods in same field. 25F(2d)551.
858-96⅙-New. Where applicant for registration of trade-mark had been using labels with words "Trade-Mark Reg. U. S. Pat. Off.," patent office would be justified in refusing application without regard to opposition by prior user. 29F(2d)959.
858-96½-New. Application to register urn-shaped figure forming patch for tag properly rejected. 39F(2d)720.
858-97 Function of commissioner of patents in administering Trade-Mark Act is administrative in character. 40 F(2d)121.
858-99 Application regular in form entitles applicant prima facie to registration. 41F(2d)785.
859-9½-New. Disclaimer as to designated words in application for registration operated as estoppel from later claiming them by prior exclusive use. 39F(2d)274.
859-9⅓-New. Applicant for registration of trade-mark has burden of establishing right to registration by fair preponderance of testimony. 41F(2d) 785.
859-10 269US372, 46SCt160, 70Led317; 16F(2d)347; 16F(2d)544; 22F(2d) 1006; 40F(2d)991 (question of confusion is considered in light of legal rights of parties); 55AppDC288, 4F(2d)955 (holding that where priority is conceded only question is liability to cause mistake in minds of public). **Boiler valves held not of same descriptive qualities as oil.**-23F(2d)894. **Doubts are resolved** in favor of party first in field. 25 F(2d)551. **Mark "Selco" held not deceptively similar to mark "Dysco."**-16 F(2d)352. **Oral testimony** is sufficient to establish priority in use and ownership. 55AppDC277, 4F(2d)944. **Proof in interference proceedings** may be made by parol or documentary evidence. 55 AppDC277, 4F(2d)944. **Registration of part of name.**-23F(2d)893; 23F(2d)894.

Right of registration of part of corporate name depends on whether public could be deceived to injury of corporation. 269US372, 46SCt160, 70L ed317. **Trade-mark held not deceptively similar to prior mark.**–16F(2d)348. **User of mark may oppose registration** thereof by another for use on product used for substantially same purpose. 6F(2d)717. **Water bottles, ice bags, and syringes** held not of same descriptive qualities as oil. 23F(2d)893. **Any question relating to proposed registration,** properly arising in ex parte case, may be disposed of by patent office tribunals in opposition case. 40F(2d)1003. **Applicant cannot complain** of opposer's right to monopoly. 40F(2d)1917. **Complete record** on which issue is determined should be presented to examiner. 40F(2d)997. **Mark must be considered as whole.**–37F(2d)957. **One claiming use of mark need not have it registered,** to oppose registration of another mark alleged to be nonregistrable. 40F(2d)1013. **Patent office proceedings not res judicata.**–41F(2d)785. **Prior registrations cannot be relied on** to secure registration if confusion will likely result with opposer's mark. 40F(2d)997. **Prior registrations may be looked to** in considering whether trade-mark use of word has become common as regards confusion by additional registration. 41F(2d)295. **Proof of actual confusion unnecessary.**–40F(2d)116. **That others used similar mark** before opposer is immaterial. 40F(2d)108.

860–12 Right of one opposing registration under ten-year clause of Trade-Mark Act of 1905 (33 U. S. St. at L. 724) to be heard depends on showing of damage. 56AppDC347, 13F(2d)318. **Motion to reopen case for taking additional testimony** is addressed to sound discretion of commissioner. 56AppDC347, 13F(2d)318. **Overruling motion to reopen opposition proceedings** for taking of further testimony made after assistant commissioner rendered decision is not abuse of discretion. 56AppDC347, 13F(2d)318. **Earliest date to which registrant is entitled is filing date** in absence of testimony. 23F(2d)896. **Fifteen years' delay** in objecting held to bar opposition by reason of laches. 26F(2d)564. **Notice.**–30F(2d)566. **Right to oppose** is not dependent on exclusive ownership of similar mark. 40F(2d)1003; 40F(2d)1006. **Probable damage** need not be established by opposer. 40F(2d)1003. **Patent office tribunals are not limited** to precise questions presented in notice of opposition. 40F(2d)1006.

860–13 "At any time" in statute excludes defense of mere laches in cancellation proceedings. 41F(2d)94.

861–14 24F(2d)276; 24F(2d)899. **Whether mark was originally merely descriptive** held not question for inquiry in interference proceeding. 16F(2d)542.

861–16 23F(2d)759; 23F(2d)764. **Doubt resolved in favor of prior user.**–24F(2d)276. **Applicant for registration of trade-mark has burden of proof** as to mark registered theretofore. 36F(2d)1007. **Similarity or lack of similarity** should be considered in determining whether confusion or mistake in mind of public is liable to occur by registration. 37F(2d)437. **Applicant for registration has no right to assert rights of others,** as against opposer's mark in proceeding. 37F(2d)960. **In cancellation proceedings,** doubt as to confusion is resolved against later user. 40F(2d)1009. **Petitioner has burden of proof** in proceedings for cancellation. 41F(2d)406.

861–17 40F(2d)991 (registration of "Red End" did not prevent subsequent registration of "Blue End"); 40F(2d)1006 ("Peroxogen" confusing with "Dioxogen"); 40F(2d)1017 (registration properly denied for prior use); 41F(2d)94 (holding collar buttons of same descriptive property as shirts and collars); 41F(2d)99 ("Roto Verso" washing machine held not confusing with "Rotarex"); 41F(2d)101 ("Enzo Jel" and "Jell-O" held not confusing); 41F(2d)295 ("Hexol" held confusing with "Hexcide"); 41F(2d)408 ("Tex" held likely confused with "Lux"); 41F(2d)414 (mouth lotion is of same descriptive property as hair and toilet goods used in beauty culture). **Registration for one class of goods.**–269US372, 46SCt160, 70L ed317. **Refusal of registration.**–4F(2d)953 (cancellation); 16F(2d)347; 16F(2d)544; 18F(2d)826; 19F(2d)718; 19F(2d)720; 23F(2d)896; 24F(2d)285; 24F(2d)286; 24F(2d)901 ("Wheat-Nut" and "Grape-Nut"); 26F(2d)563; 26F(2d)1012; 29F(2d)872; 29F(2d)874; 29F(2d)972; 30F(2d)996; 55AppDC238, 4F(2d)955. **Similarity not sufficient** to warrant refusal of registration. 23F(2d)764; 23F(2d)773; 23F(2d)774; 23F(2d)776. **Absence of direct evidence of confusion by similar trade-marks is not determinative of issue,** but court will view marks with reference to goods to which applied, and arrive at conclusion from its own observation as to likelihood of confusion. 30F(2d)996. **Mark held not to infringe on existing mark.**–26F(2d)1011. **Matters considered.**–30F(2d)996. **Registration of word "sunlight," superimposed on portion of sun for use on hosiery,** is not prevented by opposer's use of rising sun in connection with name of person or firm on gloves. 18F(2d)831. **"Samoline" and "Little Sammy Samoline"** for cleaning material held not similar to "Sanoline" on paints and enamels. 26F(2d)564. **Trade-marks held not deceptively similar.**–29F(2d)799. **Cancellation.**–26F(2d)567; 40F(2d)99. **Colored horizontal bands with words "Old Mission"** is dissimilar from varicolored horizontal bands and pictorial representation of globe. 26F(2d)1014. **Damages need not be established by opposer** of registration in order to succeed. 24F(2d)285. **Doubt as to confusing similarity** will be resolved against mark last filed. 24F(2d)901. **Doubt is resolved against newcomer.**–40F(2d)99; 40F(2d)108; 40F(2d)991; 41F(2d)295; 41F(2d)414. **Evidence held sufficient** to warrant finding of prior use on part of applicant. 36F(2d)1007. **Liquid medicinal preparations** are not of same descriptive properties as toilet preparations. 37F(2d)435. **Trade-marks held dissimilar.**–36F(2d)1005 ("Durock" and "Duro"); 37F(2d)437 ("Fashion Lane" and "Fashion Park Clothes"); 37F(2d)957. **Word "Nadsco" within diamond** built up by initials of corporate name is dissimilar from "Mansco" arranged above electric fan. 26F(2d)1013. **Word arbitrarily taken and designated descriptive** must in itself be descriptive of something as respects registration. 41F(2d)99. **Words "College Park" are not so likely to be confused with "Fashion Park"** as to prevent registration as trade-mark. 37F(2d)962. **Motive of later applicant** in adopting mark cannot affect right to registration. 41F(2d)408. **Prior registrations of marks resembling his and opposer's** is not complete defense by applicant to opposition. 41F(2d)295. **Prior registration may be shown** to prove that word or symbol has so frequently been used as to make it public property. 41F(2d)408. **Registration must be denied for confusion,** where goods are of same descriptive properties, irrespective of other legal rights between parties. 40F(2d)108. **Trade-mark must be used on articles offered for sale,** to be effective. 36F(2d)1007. **Unregistered trade-mark practically identical with registered trade-mark** used on goods of same descriptive properties cannot be registered. 37F(2d)960. **Whether confusion will be likely** is question to be determined under statute relating to registration. 41F(2d)99. **Commissioner must register** trade-mark if there will be no confusion. 40F(2d)121. **Confusable conflict** between words generally requires rejection of registration. 41F(2d)295. **Consideration should be given to whole word** in determining whether trade-name will be confusing. 41F(2d)99. **Boots, shoes, and overshoes are not of same descriptive properties as wardrobe bags,** as respects right to registration of trade-mark. 37F(2d)436. **Question as to whether opposer's mark is confusingly similar** to mark of prior registrant cannot be raised in opposition proceedings. 41F(2d)408.

861–17½–New. Decision as to prior opposition proceeding is conclusive as to all issues which might have been presented in proceeding to cancel. 39F(2d)693.

861–17⅓–New. Bill in equity authorized on refusal of application is original action triable de novo. 41F(2d)785.

861–17¼–New. Appeal to appellate court of District of Columbia has been held not to bar suit to cancel trade-mark though pending when suit making appeal operate as bar was enacted. 41F(2d)785.

862–18 40F(2d)121 (commissioner and court on appeal merely determine if application meets requirements of statute); 40F(2d)997 (assistant commissioner, on appeal from examiner, erroneously admitted registrations, presented for first time on appeal). But see 23F(2d)772.

862–19 41F(2d)785. **On appeal,** erroneous order should be reversed, although agreement was made to discontinue use of interfering mark. 26F(2d)563. **Findings of patent office** on issue of confusion are accepted on appeal unless evidence to contrary is altogether convincing. 29F(2d)972. **Certified copies of decree** and mandate of district court, not showing issues or when suit was instituted, are insufficient to reverse decision of commissioner. 40F(2d)1018. **Appellate court has right to consider motive of applicant** adopting mark, in determining likelihood of confusion. 41F(2d)408. **District of Columbia appellate court** becomes tribunal of patent office, and its decisions can be collaterally attacked. 41F(2d)785.

862–19½–New. Error of commissioner in referring to fact that applicant for registration was not entitled to benefit of ten-year clause in statute does not require reversal. 39F(2d)718.

862–19⅓–New. Concurring decisions of both tribunals of patent office are entitled to great weight, particularly on technical questions. 39F(2d)684.

862–19¼–New. Jurisdiction of court of customs and patent appeals is purely statutory, on trade-mark appeals from commissioner. 40F(2d)121.

862–19½–New. Court, in absence of testimony, has right to conclude that business as respects trade-mark registration is limited to particular territory. 40F(2d)1009.

862–20 4F(2d)924; 37F(2d)393. **Registration under invalid act of Congress** held to confer no rights. 16F(2d)598.

862–21 4F(2d)924.

862–23 4F(2d)924; 41F(2d)167; 41F(2d)295.

862–24 248NY272, 162NE76.

863–25 38F(2d)287.

863–26 217AppDiv555, 217NYS106 (name of hotel). **Priority of use in interstate commerce** does not entitle to registration as against actual owner who had also used mark in interstate commerce. 55AppDC277, 4F(2d)944.

863–27 22F(2d)512; 40F(2d)99; 217AppDiv555, 217NYS106 (name of hotel). **Registration by distributor of products** inures to benefit of owner as owner and to distributor as licensee. 38F(2d)287.

863–29 18F(2d)826; 23F(2d)759; 41F(2d)406; 84CalA485, 258P630; 129Misc796, 222NYS624. **Presumption is not limited to date of registration.**–18F(2d)826. **Evidence held insufficient** to overcome prima facie case of registrant's ownership. 41F(2d)406.

863–31 But see 6F(2d)643. **Registered trade-mark consisting of descriptive term** does not confer exclusive use to such term. 37F(2d)900.

863–36 28F(2d)957. But see 40F(2d)736.

864–38½–New. Registration of proper name as trade-mark raises presumption that name has acquired secondary meaning. 8F(2d)49.

864–38⅓–New. Registrant of trade-mark under act has no remedy for infringement of his trade-mark within

limits of state and not affecting interstate commerce, and statute does not enlarge common-law rights within state where mark has not been used. 279 US156, 49SCt267, 73L ed650.

864-38¼-New. Rights extend throughout states regardless of actual extension of trade. 119 Oh151, 162NE425.

864-42 [1926]CanExch26, [1926] 1DomLR505; Can [1930] 3DomLR437 (discretion of officer to register industrial design). **Registration of design under Trade-Mark and Design Act** (Rev. St. [1906] c 71, with intention only of protecting mode of construction, held void. [1926]CanExch26, [1926] 1DomLR505. **Restriction to goods answering trade description.**-Can [1929] 3DomLR241.

864-43 Ordinary English words which are also descriptive of goods to which they are attached held not registrable. [1926] CanExch31, [1926] 1DomLR687. **Prior user by another** vitiates registration. Can [1928] 2DomLR819. **Design must be original in fact** in order to be registrable, and not merely original as to particular class of articles. Can [1929] 3DomLR11.

865-44 Trade union using particular label or mark held entitled to oppose its registration though it, itself, would not be entitled to register such label or mark. [1926] CanExch20, [1926] 1DomLR18.

865-45 Can [1930] 2DomLR981 (mark registered but which has expired is not registered trade-mark preventing registration of similar mark). **Bare numerals** standing alone are not registrable as trade-mark. Can [1930] 2DomLR540.

865-48 Can [1927] 3DomLR160.

866-49½-New. Validity of registered industrial design may be attacked by defendant in action by registered owner for its infringement. Can [1929] 3DomLR11.

865-49⅓-New. Mere user of mark adopted for convenience in manufacture, sale, and repair does not make it registrable trade-mark. Can [1930] 2DomLR540.

866-52 When good will is sold by trustee in bankruptcy trade-mark goes with it. 25 OhNPNS243.

867-55 28F(2d)515; 31F(2d)992; 38F(2d)287; 25 OhNPNS243; Can [1930] 4DomLR877.

868-57 34F(2d)125; 25 OhNPNS243.

868-58 24F(2d)288.

870-65 68CalA348, 229P863 (construing Civ. Code § 992).

872-72 34F(2d)125 (oral assignment of trade-mark is ineffective to transfer title). **Four-year delay in use of transferred trade-mark** held not to destroy right. 273US629, 47SCt481, 71L ed810. **Where article is product of secret receipt,** knowledge of such receipt by assignee is essential to validity of assignment of trade-mark on such article. 43F(2d)937.

872-73 34F(2d)125; 217AppDiv555, 217NYS106; 25 OhNPNS243. See also 167Ga463, 146SE19. **Trade name.**-68CalA348, 229P863. **Absolute conveyance of hotel by metes and bounds "with appurtenances and all grantor's rights and interest therein"** though not specifically including name of hotel, in absence of reservation, conveys exclusive right to use such name. 217AppDiv555, 217NYS106. **Formal assignment unnecessary.**-42F(2d)987.

873-74 Mass 168NE106.

873-75 Sale by abstract company of ascertain enumerated things "and all assets of every kind and description" includes its trade name. 171Ark722, 286SW807.

873-78½-New. Consent of stockholders is not prerequisite to validity of assignment of trade-mark, which constitutes entire assets of corporation, where charter of corporation had theretofore been repealed and corporation dissolved. 31F(2d)992.

874-79 39F(2d)272 (use of trade-mark only with name of manufacturer and word "makers"). **Under language of bill of sale,** purchaser held to acquire use of trade name. 160La336, 107S130.

874-80 Sale of articles bearing name of seller.-68CalA348, 229P863. **License for exclusive use of mark in given locality** held no transfer of title thereto. 16F(2d)723.

874-83 167Ga463, 146SE19. **Assignee's title does not date back** to earliest use of mark by assignor. 16F(2d)542. **Assignee of trade-mark owner may enjoin prior purchaser** from sale of product under similar name and not included in contract. 38F(2d)448.

874-84 38F(2d)448 (use of synonyms of trade-name as violation of sales contract).

875-86 12F(2d)919. **Where assignee's exclusive right to use assignor's name is restricted** by contract to inside furnace ovens, assignor's long use of such name in connection with continuous ovens gives it exclusive right thereto entitling it to enjoin assignee's subsequent use of such name on continuous ovens. 12F(2d)919.

875-87½-New. Sale of rights for United States to patents and of good will and contracts relating thereto does not convey exclusive use of seller's name or monopoly to conduct business thereunder. 127Misc119, 215NYS387.

875-87⅓-New. Sale of business to corporation embodying seller's name in its corporate title does not prevent seller from entering into same kind of business under own name, 127Misc119, 215NYS387.

875-87¼-New. but seller may not so employ such name as to lead consumers to believe that they are purchasing corporation's products. 127Misc119, 215NYS387.

875-87⅕-New. Under lease of hotel giving lessee exclusive right to use hotel name, right to use same to revert to lessors on termination of lease, right to use name is mere temporary license which expires and reverts to owners of premises on termination of lease. 217AppDiv555, 217NYS106.

875-87⅙-New. Contracts authorizing use for limited period.-13F(2d)700.

875-87⅐-New. Transferee of right to use trade name cannot, by expending large sums of money in advertising such name, enlarge its rights. 13F(2d)417.

875-87⅛-New. Contract, by which inventor of grocery store self-serving system, conveyed business with trade-marks, trade-names, patents, inventions, etc., may preclude inventor from using his own name in connection with self-serving stores so as to deceive public in depriving plaintiffs of benefits and good will of business sold to them. 30F(2d)385.

875-87⅑-New. Such contract has been held not to preclude inventor from using other methods of self-serving stores in common use in any retail stores that inventor might operate thereafter. 30F(2d)385.

875-87 1/10-New. Instrument acknowledging that business and trade-mark of plaintiff had been abandoned was not assignment of trade-mark, which, together with good will, was alleged to constitute sole asset of plaintiff, and hence did not constitute transfer of all assets without consent of stockholders. 31F(2d)992.

875-87 1/11-New. Provision in contract of sale for continuance of existence of vendor company for purpose of winding up its business would not have effect of postponing enjoyment by purchaser of right to name of vendor corporation. 167Ga463, 146SE19.

875-87 1/12-New. Agreement obligating defendant to desist from using word as trade-mark has been held not to entitle plaintiff to enjoin its use in defendant's corporate name. 137Misc506, 243NYS319.

875-88 42F(2d)987; 91Fla60, 107S345, 348 [citCyc], 44ALR698. **Purchaser of trade-mark from trustee in bankruptcy** has better title thereto than owner of bankrupt corporation, not individual owner thereof. 34F(2d)158. **Right to use corporate name passes on sale of corporate business** where essential feature of name was words of trade-marks. 42F(2d)987.

876-95 Purchaser of store with right to use trade name from one using such name by permission of another, who immediately repudiated sale of right to use such name, acquires no right to use such name to purchase. TexCommnA 280SW177.

877-1 NJCh 145A621.

877-1½-New. Word "use" in contract granting laundry privilege of using union label means right to circulate facsimile and not mere right of physical possession. 148Wash75, 268P161.

877-6½-New. , and an assignee of such remaining partner has the right to register the firm's trade-mark. 55AppDC305, 5F(2d)128.

879-10 42F(2d)987.

879-13 Infringement by others is no excuse for defendant's misconduct. 125Misc764, 211NYS886.

879-14 41F(2d)641. **Purchaser from alien property custodian** of trade-mark on imported water was held not to have so used same as to deceive public. 5F(2d)506. **Misrepresentation** in trade-mark, or its being copied from another, will prevent its being protected. Alta [1930] 3DomLR114.

879-15 Slight variations will not defeat trade-mark. 38F(2d)287. **Variation in formula resulting in highly inferior or wholly different product** does not justify continued protection of trade-mark. 38F(2d)287.

879-16 41F(2d)637; 171Ark722, 286SW806, 48ALR1254.

879-16½-New. Use of color combination abandoned by one and adopted by another will be protected against unfair competition by later users of same combination. 125Misc764, 211NYS886.

879-17 5F(2d)355; 22F(2d)73; 248NY272, 162NE76; 217AppDiv555, 217NYS106 (abandonment of hotel name not shown).

880-18 227AppDiv404, 238NYS11.

880-19 273US629, 47SCt481, 71L ed810; 171Ark831, 286SW967. **Discontinuance of use in domestic commerce** and continuance only in foreign commerce does not show intention to abandon. 24F(2d)286.

880-22 But see 273US629, 47SCt481, 71L ed810.

881-26 34F(2d)125; 132Misc156, 229NYS83.

881-30 User of trade-mark did not, by reason of intermission during which manufacture was suspended, abandon trade-mark, in absence of actual or imputed purpose to abandon same. 29F(2d)874. But see 34F(2d)125.

881-31 5F(2d)355 (evidence held insufficient to prove abandonment).

881-32 5F(2d)355; 12F(2d)919; 29F(2d)972; CalA 289P668; 117Nebr121, 219NW848, 850 [citCyc]; 125Misc737, 211NYS872; 125Misc764, 211NYS886; 211NYS868; 135Misc282, 238NYS62; 8PaDist&Co 487; TexCivA 273SW874, 881 [citCyc].

882-33 34F(2d)802; CalA 289P668; TexCivA 273SW874, 881 [citCyc].

883-34 TexCivA 273SW874, 881 [cit Cyc].

883-35 TexCivA 273SW874, 881 [cit Cyc].

883-36 13F(2d)850.

883-37 42F(2d)513; 43F(2d)101.

883-38 7F(2d)304; 24F(2d)893; 35F(2d)631; 41F(2d)637; 73CalA412, 238P950 (laches not shown); Mass 168NE106; 223AppDiv260, 228NYS9; 25OhNPNS155; Utah 269P1020.

885-49 135Misc282, 238NYS62.

888-67 Jurisdiction of circuit court of appeals to review orders of federal trade commission is original rather than appellate. 4F(2d)910. **Relief against unfair competition** must be afforded in first instance by federal trade commission. 270US593, 46SCt367, 70L ed750, 45ALR1370.

888-69½-New. Statutory jurisdiction of circuit court of appeals depends on terms of act, not on rank of court. 23F(2d)615.

888-69⅓-New. Jurisdiction granted must be strictly pursued. 23F(2d)615.

888-69¼-New. Jurisdiction of circuit court of appeals is original and court, in correcting Trade Commission's order, recognizes commission is fact-finding body. 23F(2d)615.

888-70 But see 18F(2d)607.

888-70½-New. Federal trade commission is no part of judicial system and does not exercise judicial powers. 13 F(2d)673.

888-70⅓-New. It is for courts, not commission, to determine as matter of law what is unfair method of competition within Trade Commission Act. 23 F(2d)615.

888-70¼-New. Commission's fact findings, supported by any evidence, are conclusive on courts. 26F(2d)340.

888-70½-New. Federal trade commission may resort to process of subpœna to secure attendance and testimony of witnesses and production of documentary evidence. 34F(2d)323.

888-70⅙-New. Order of commission prohibiting lawful methods of merchandising cannot stand. 37F(2d)59.

888-70⅙-New. Federal trade commission must be presumed acting in good faith in ordering respondent to desist from practices constituting unfair methods of competition. 41F(2d)474.

888-70⅛-New. Commission is administrative body created by statute, with only duties and powers granted expressly or by fair implication. 13F(2d)673.

888-70⅛-New. Sale of wood not in mahogany family as "Philippine mahogany" is unfair competition within jurisdiction of federal trade commission. 26F(2d)340.

888-70 1/10-New. Use of infringing trade-mark on goods shipped abroad. District court has jurisdiction to enjoin use of infringing trade-mark affixed in United States to wholesale containers shipped abroad. 31F(2d)794.

888-70 1/11-New. Use of name with secondary meaning may deceive public where such use is confined to limited trade. 26F(2d)340.

888-70 1/12-New. Action of federal trade commission in matter involving private controversy held unauthorized. 280US19, 50SCt1, 74L ed138, 68ALR838.

888-70 1/13-New. Any misrepresentations that product distributed in interstate commerce was radium is matter of public interest with which commission is empowered to deal. 35F(2d)160.

888-70 1/14-New. False labeling and advertisements constitute unfair competition placed within cognizance of federal trade commission. 35F(2d)160.

888-70 1/15-New. Federal Trade Commission Act providing that complaint may be filed only if proceeding by it would be to interest of public is not satisfied by proof of misapprehension and confusion on part of purchasers. 280US 19, 50SCt1, 74L ed138, 68ALR838.

888-70 1/16-New. In determining whether proceeding will be in public interest, federal trade commission exercises broad discretion. 280US19, 50SCt1, 74 L ed138, 68ALR838.

888-70 1/17-New. In proceeding to enforce federal trade commission's order, question of violation should be referred to commission. 41F(2d)474.

888-70 1/18-New. Jurisdiction of circuit court of appeals to enforce federal trade commission's order depends on failure to obey order and whether it is valid. 38F(2d)547.

888-70 1/19-New. Jurisdiction of federal trade commission limited. 42F(2d)430.

888-70 1/20-New. Jurisdiction of federal trade commission to issue cease and desist orders. 42F(2d)430.

888-70 1/21-New. Person deeming himself aggrieved by use of unfair method of competition may bring matter to commission's attention and request it to file complaint. 280US19, 50SCt1, 74L ed 138, 68ALR838.

888-70 1/22-New. Registration of trade-mark in patent office is no protection against proceedings under federal trade commission. 35F(2d)160.

888-70 1/23-New. Resolution declaring that federal trade commission had reason to believe defendant was violating act and that proceeding would be to interest of public held sufficient to confer jurisdiction on commission. 280US19, 50SCt1, 74L ed138, 68ALR838.

889-74 87Colo 379, 287P868 (holding incorporated exchange of milk dealers authorized to enjoin nonmembers from using their bottles). **Registration of trade name by originator thereof and infringer** does not prevent corporation purchasing business before originator's bankruptcy from restraining use of name by infringer. Mass 168NE106.

890-76 Purchaser of trade name from alien property custodian may enjoin its use on imported water on which it was formerly used. 5F(2d)506.

890-82 28F(2d)283. **One making nothing but chassis** of taxicab infringing plaintiff's design will not be enjoined. 125Misc764, 211NYS836. **If complainant can stop person for whom acts were done,** he can stop one who does the acts. 13F(2d)417.

891-84 Dealers may be proceeded against, though manufacturers cannot be gotten into jurisdiction. 26 F(2d)284.

891-85 28F(2d)807.

891-88 Effect of abandonment of attempts to manufacture. 137Misc429, 242NYS294.

892-94½-New. Petition to expunge registered trade-mark cannot be amended by addition of claim for infringement of trade-mark. [1925]CanExch225, [1926] 1DomLR74.

892-94½-New. Charge has been held erroneous, as withdrawing from jury issue of infringement of patent. 121 Oh 53, 166NE892.

892-95 Five hundred dollars held not excessive. 160La336, 107S130.

893-6 5F(2d)524 (damages are limited to those sustained since beginning of suit where there was no willful infringement).

893-7½-New. Lump sum verdict not erroneous as including attorney's fees where not apparent that such fees were included. 160La336, 107S130.

893-8 87Colo 379, 287P868 (holding exchange without adequate legal remedy). **"The theory upon which a court of equity,"** etc.-246NY459, 159NE397.

894-12 24F(2d)577.

894-13½-New. Parties.-In suit for unfair competition by unfair advertising devices used by dealer in secondhand automobiles, leading public to believe defendant was dealer of manufacturer, manufacturer, rather than its dealer, is proper party plaintiff. 8F(2d)872.

894-13⅓-New. Where, immediately upon becoming aware of unfair competition, plaintiff called attention thereto and there was no undue delay, suit is not barred by laches. 24F(2d)577.

894-13¼-New. Dismissal on ground of unusual hardship to defendant to produce evidence because of necessity of bringing books of record from another state will not be granted where it does not appear that all pertinent entries may not be shown by depositions. 24 F(2d)726.

894-13⅓-New. Defendants failing to bring patent infringement suit on plaintiff's suggestion will be enjoined from threatening plaintiff and customers with suit. 25F(2d)303.

894-14 Laches to bar relief must amount to assent or acquiescence. 17 F(2d)581. **Complaint held not chargeable with laches.**-17F(2d)581.

894-16 Allegations of complaint held sufficient.-CalA 289P668.

894-17 Bill held sufficient precluding bill of particulars.-33F(2d)991.

894-18 Bill held sufficient.-26F(2d)284.

894-19 148Wash75, 268P161. **Previous** invalidity of trade-mark is immaterial where it is valid at time of suit. 27 F(2d)531 [aff 27F(2d)538]. **Bill not alleging distinction of plaintiff's goods** when sold on individual order held not to be dismissed. 26F(2d)284. **Trade-mark must be marked by statement giving notice of registration.** 27F(2d)531 [aff 27F(2d)538].

895-26 See also 23F(2d)615. **Allegations held insufficient.**-91Fla337, 107S 623. **Bill held sufficient as against demurrer to take case to trial.**-110Conn13, 147A22.

895-29 Bill held insufficient.-273US132, 47SCt314, 71L ed578.

896-30 26F(2d)284; 39F(2d)213 (allegations of complaint sufficient); 156 Md699, 145A338. **Bill held insufficient.**-273US132, 47SCt314, 71L ed578. **Allegations held insufficient.**-91Fla337, 107 S623.

896-33½-New. Refusal to permit amendment of complaint after evidence completed has been held not error. 35 F(2d)403.

896-34 In suit to revise order of federal trade commission under cross petition asking enforcement of order circuit court of appeals may grant such relief. 4F(2d)910.

896-36½-New. Counterclaim for damages for fraud in procuring trade-mark registration is sufficient though not repeating allegations of fraudulent acts in answer. 19F(2d)496.

896-37 But see 289Pa152, 137A175.

897-46 26F(2d)284.

897-47 37F(2d)393. See also 127Misc 119, 215NYS387.

897-48½-New. Proceedings before federal trade commission.-That specimens are tested for radioactivity and not to determine whether they are radium is no answer to charge of falsely marketing product as radium. 35F(2d)160.

897-48⅓-New. Issues in suit to enjoin for infringement of recorded label are plaintiff's asserted right and whether defendant's label may deceive. Mass 171 NE491.

897-50 Misrepresentations must be both intentional and material, so as to constitute deliberate fraud on public. 33F(2d)302. **Misrepresentations discontinued before commencement of suit cannot be availed of as defense** but must be based on conditions existing at time relief is sought. 33F(2d)302. **Unclean hands not shown.**-33F(2d)302; 34F(2d) 445.

897-50¼-New. Unlawful use of trade-mark can give no license to general public to infringe trade-mark. 37F(2d)393.

897-50½-New. Estoppel.-Defendant held estopped from denying plaintiff's claim to trade-mark. 40F(2d)668.

897-51 Inference from stipulated facts may be considered by federal trade commission. 273US52, 47SCt255, 71L ed534.

898-52 20F(2d)281; 20F(2d)298; 34 F(2d)802 (doubt whether confusion will result from use of similar name will be resolved against person last in field); 43F(2d)101. **Burden of proof.**-8F(2d) 570; 38F(2d)287; 87Colo 379, 287P 868; Utah 269P1020. Burden of justifying use of another's trade-mark or trade-name is on user, who must show that his right is reasonably exercised as to owner's rights. 28F(2d)283. **Burden of showing exclusive right to use trade name in locality** rests on party asserting it. TexCommnA 280SW177. **Deception and secondary meaning.**-21 F(2d)428; 83Colo 262, 264P653. **Deception in case of unfair competition must rest on proof** that defendant has appropriated something peculiarly belonging to plaintiff and associated in public's mind with plaintiff's business. 8F(2d)872 (advertising). **Degree of proof.**-22 OhA400, 154NE352. **Doubts of deceptive similarity are resolved against defendant if he knew of registered mark before using his trade-mark.** 25F(2d)976. **Evidence held sufficient.**-24F(2d)577; 35F(2d)403; 39 F(2d)89(2dcase); 41F(2d)637; DelCh 150A180; 47 Ida766, 278P1015; 216 AppDiv53, 215NYS4; 222AppDiv359, 226NYS293; 130Misc428, 224NYS144. **Evidence held insufficient.**-20F(2d)632; 87Colo 379, 287P868. **Evidence held to warrant finding** that plaintiff never used "Stillson" as trade-mark. 19F(2d)496. **Evidence of specific cases of confusion or deception** is not required on issue whether trade-marks would probably cause confusion. 24F(2d)751. **Facts held to show** that local union had right to contract for use of union label. 148 Wash75, 268P161. **Fraudulent intent and misleading of public is presumed** where defendant has refused, on notice, to cease use of infringing device. 16 F(2d)88. **Reasonable doubt should be resolved in favor of party who first appropriated idea** intended to be conveyed by picture trade-mark and exclusively

used it and succeeded in registering mark in United States patent office and advertised it. 84CalA485, 258P630. **Sale of defendant's product on request for plaintiff's is insufficient to show unfair competition.** 25F(2d)154. **Situation of parties and subject of sale may be shown.** 68CalA348, 229P863. **Unfair competition shown.**–223AppDiv260, 228NYS9. **Weight and sufficiency of evidence.**–27F(2d)948; 28F(2d)979; 31F(2d)157; 33F(2d)580; 33F(2d)978; 38F(2d)287; 40F(2d)668; 40F(2d)736; 203Cal 286, 263P810; 132Misc654, 230NYS343; 33PortoRico 540. **Weight of facts and inferences is for federal trade commission.** 273US52, 47SCt255, 71 L ed534. **Defendant claiming he used plaintiff's product in cough drops has burden of proving justification for using** plaintiff's trade-name. 39F(2d)89(2d case). **Defendant has burden to justify use of plaintiff's trade name.**–33F(2d) 985. **Plaintiff held entitled to injunction under evidence.**–40F(2d)187. **Presumptions.**–37F(2d)393. **Proceedings before federal trade commission.**–34 F(2d)733; 35F(2d)160; 35F(2d)163. **Evidence held not to show prior use.**–40F(2d)668. **That defendant copied complainant's character is of no significance in determining whether there is unfair competition. DelCh** 150A174. **Evidence of unclean hands not connected with matter in controversy is inadmissible. CalA** 290P534. **First impressions as to appearance should be given weight, in unfair competition cases.** 43 F(2d)607. **Secondary meaning.–Tex CivA** 31SW(2d)325. **Admissibility of evidence as to deception. TexCivA** 31 SW(2d)325.

899–53 14F(2d)158. **Suit should be decided on facts existing at time of commencement of suit.** 13F(2d)417.

899–54 269US372, 46SCt160, 70L ed317 (judicial interference will depend on facts of case); 248NY272, 162NE76.

899–55 256Mass456, 152NE712 (findings in label infringement suit approved).

899–55½–New. In proceedings to enforce order of federal trade commission, circuit court of appeals has jurisdiction to determine whether there has been failure or neglect to obey such order; 14F(2d)947.

899–55⅓–New. hence motion to strike answer denying violation is properly overruled, 14F(2d)947.

899–55¼–New. and evidentiary portion of respondent's answer may be properly stricken on court's own motion. 14F (2d)947.

899–55⅙–New. Where it is clear that, under no state of evidence, can plaintiff make case of infringement of trade-mark, motion to dismiss should be granted. 28F(2d)957.

899–55⅙–New. Facts as of time suit was begun rather than at earlier time must be considered in determining whether change in label deceived public. 38F(2d)547.

899–60½–New. Order of federal trade commission held not invalid as being indefinite where it forbids chamber of commerce conducting grain market to publish misleading information relative to competitor, or to institute unfounded suits, or to obstruct its business or to engage in conspiracy to boycott competitor. 13F(2d)673.

899–60⅓–New. On review of orders of federal trade commission, issuing cease and desist orders, proceedings in circuit court of appeals are of equitable nature. 13F(2d)673.

899–60¼–New. On such review, findings of commission are conclusive if supported by substantial evidence. 13F(2d) 673.

899–60⅕–New. Decree affirming, modifying, or setting aside order of federal trade commission depends on violation of law, not on violation of commission's order. 23F(2d)615.

899–60⅙–New. Order of federal trade commission not warranted by evidence not showing unfair competition. 42F (2d)427.

899–60⅐–New. Order of federal trade commission should be appropriate to avoid existing evil. 42F(2d)427.

899–60⅛–New. Order of federal trade commission against false labeling warranted by deceptive tendency. 42F(2d) 427.

899–60⅑–New. Order of federal trade commission restraining use of word "lighthouse" and pictorial representation thereof in advertising rugs held proper. 35F(2d)163.

899–60⅒–New. Delay of several years between filing of original findings by commission and order modifying findings did not deprive commission of right to make such modification. 35 F(2d)160.

899–60⅓–New. Questions not raised before federal trade commission disregarded on review of order. 42F(2d)430.

899–60½–New. Findings in proceeding before federal trade commission not required to be included in record on petition to review. 42F(2d)430.

899–60⅓–New. Action of federal trade commission in authorizing filing of complaint is subject to judicial review. 280 US19, 50SCt1, 74L ed138, 68ALR838.

899–60¼–New. Duces tecum subpœnas of federal trade commission requiring officer of interstate carrier of electricity to produce operating expense ledgers and other papers held not sustainable. 34F(2d)323.

899–60⅕–New. Construction of findings on appeal. Mass 168NE106.

899–63 Preliminary injunctions denied in miscellaneous cases.–13F(2d)850; 20 F(2d)909; 36F(2d)954(2dcase); 38F (2d)287; 38F(2d)885; 125Misc764, 211 NYS886 (taxicab's shield design where no confusion would result if used on different background); Alta [1929] 4 DomLR413. **Preliminary injunctions granted in miscellaneous cases.**–24F(2d) 924; 26F(2d)322; 84CalA485, 258P630; 133Misc676, 233NYS286; 229AppDiv 313, 241NYS105; TexCivA 12SW(2d) 1098. **Laches,** etc. 13F(2d)859. **On abandonment in good faith of use of** similar package, injunction will be denied, especially where its use was minor point in issue. 126Misc676, 213NYS735.

900–64 Good faith of defendant charged with unfair competition precluded temporary injunction. 39F(2d)213.

900–65 13F(2d)850.

900–66 13F(2d)850; 28F(2d)807; 129 Misc796, 222NYS624; TexCivA 12SW (2d)1098. **Temporary injunction not warranted.**–39F(2d)315.

900–67 43F(2d)607; 213AppDiv237, 210NYS38; 130Misc428, 224NYS144; 135Misc282, 238NYS62; 138Misc34, 244 NYS657; 138Misc224, 244NYS535; 138 Misc426, 245NYS11.

901–69 8F(2d)872 (motion properly denied based merely on affidavits in suit for unfair competition); 31F(2d)282.

901–72 Where damage would be irreparable.–133Misc676, 233NYS286.

902–79½–New. On motion for injunction pendente lite no question of ownership of merchandise will be settled. 125Misc752, 211NYS241.

902–79⅓–New. In cases of unfair competition, preliminary injunctions are sometimes granted. NJCh 144A11.

902–79¼–New. Whether defendants were using plaintiffs' lists of customers will not be determined on appeal from order granting injunction pendente lite, but only after trial on merits. 31F(2d) 282.

902–79⅕–New. Order directing marshal to take from defendant possession of machines to which he was entitled unless he had procured possession by fraud, has been held erroneous. 31F (2d)282.

902–79⅙–New. Preliminary injunction enjoining defendants from using plaintiffs' lists of customers will not be dissolved, where defendants deny using lists, and therefore cannot be injured by injunction. 31F(2d)282.

902–80 269US372, 46St160, 70L ed317; 137Misc429, 242NYS294 (holding sole stockholder of guilty corporation should be individually enjoined from sale or manufacture of infringing product); 148Wash75, 268P161. See also 224 AppDiv187, 229NYS692. **Parties may modify decree by agreement.**–16F(2d) 470. **When right to permanent injunction determined.**–133Misc676, 233NYS 286. **Use of trade-marked bottles.**–Utah 269P1020. **Deliberate use of complainant's trade name justifies injunction restraining such use for five years.** 33 F(2d)978. **Permanent injunction granted on condition.**–38F(2d)287.

902–80½–New. And rule is same where suit is brought to enjoin use of trade name to which plaintiff has exclusive right. 217AppDiv555, 217NYS106 (name of hotel).

902–81 See also 224AppDiv187, 229 NYS692.

902–82 24F(2d)751; 27F(2d)531 [aff 27F(2d)538].

902–83 27F(2d)531 [aff 27F(2d)538].

903–86 31F(2d)794; CalA 289P668. But see 33PortoRico 540.

903–89 11F(2d)834; Alta [1930] 2Dom LR656. See also 132 Or448, 286P152.

903–90½–New. Long delay in commencing suit for infringement of trade-mark is laches and will bar injunctive relief. 25 OhNPNS155.

903–90¼–New. Injunction does not lie to restrain enforcement of federal trade commission's order to make reports and furnish information as to business. 22 F(2d)873.

903–90⅓–New. Estoppel.–Purchaser who adopted as name of new corporation name similar to that of firmly established and extensively advertised corporation so as to mislead customers could not invoke doctrine of estoppel to defeat second corporation's right to injunction. IndA 165NE84.

903–90⅕–New. Proceedings under federal trade commission.–False trade name that has capacity and tendency to deceive ordinary purchaser will be enjoined. 34F(2d)733.

903–90⅙–New. Where defendant has no reasonable opportunity to answer or go into question properly, motion to amend decree to prohibit defendant from using certain word will be denied. 33 F(2d)978.

904–94 18F(2d)700; 134Misc288, 235 NYS93; Utah 275P9.

904–95 29F(2d)972. **Injunction held not too broad.**–34F(2d)774; 93CalA358, 269P544.

904–96 21F(2d)419.

904–98 21F(2d)419; 132Misc158, 229 NYS219.

904–2 Enjoining use of one's own name, alone or in combination with symbols, in sale and manufacture of hair tonics or other barber's supplies in New York and elsewhere held not too broad. 216 AppDiv53, 215NYS4.

906–16 Decree may be reformed to conform with agreement of parties. 16 F(2d)470.

906–17 Defendant held guilty of civil contempt.–16F(2d)470. **Determination of likelihood of confusion between similarly painted taxicabs** should not await demonstration by experience, where fact is sufficiently clear to court on appeal from order holding imitator in contempt for violating injunction. 156Md183, 143 A799. **Mere use of forbidden name by defendant's clerks may mitigate offense.** 16F(2d)470. **Placing of name on taxicab, without changing color combination,** has been held insufficient compliance with decree enjoining use of cab till so changed in appearance as to make it distinguishable from competitor's cabs. 156Md183, 143A799. **Violation of decree on advice of counsel** is no defense but may be considered in mitigation of punishment. 33F(2d)978.

906–19 Decree adjudging word to be valid trade-mark enjoins use of any word of close resemblance misleading public. 41F(2d)353.

907–26 Defendant may show label unobjectionable compared to one already enjoined. Mass 171NE491.

907–26½–New. Difference in issues and evidence in unfair competition suit leaves no room for doctrine of res judicata. 21F(2d)419.

907–27 Mass 171NE491. **Due protection of trade-mark rights requires** that competitive business, convicted of unfair competition, thereafter be required to maintain safe distance. 41F(2d)353.

908–32 Decision on motion for injunction pendente lite is binding on court where evidence does not differ in any material respect from that presented on motion. 223AppDiv260, 228NYS9.

908–33 Damages are rarely allowed for

aggravation under theory of unfair competition unless clearly inseparable from violation of trade-mark involved in suit for infringement. 27F(2d)531 [aff 27 F(2d)538].

909-37 Accounting for trade-mark infringement.–8F(2d)570. **Deliberate infringer is not entitled to deduct federal income and excess profits tax from profits.** 277US97, 48SCt449, 72L ed800. **Accounting should not extend to profits of corporation organized in Canada** in good faith, constituting distinct entity, and not party to action. 20F(2d)830.

909-38 17F(2d)581; 41F(2d)462.

910-39 12F(2d)919; 17F(2d)581. **Profits are allowed** as damages as equitable measure of compensation for unfair competition. 5F(2d)731.

910-40 132Misc654, 230NYS343.

910-41 17F(2d)581; 18F(2d)700; 224 AppDiv187, 229NYS692.

910-42 132Misc654, 230NYS343.

911-45 Unfair competition held not so wanton as to warrant imposing of treble damages.–33F(2d)302.

911-47 See also 8F(2d)570.

911-48 5F(2d)731. **Accounting held not limited to sales in competing territory** in view of forestalling and oppressive tactics employed to eliminate competitor. 20F(2d)830.

912-51 Interest on good will cannot be deducted from gross profits. 5F(2d)731.

912-53 Interest on capital employed is deductible as expense. 5F(2d)731. **Cost of patents** necessary to manufacture held to be capital invested and interest thereon may be deducted. 5F(2d) 731.

913-54 20F(2d)830. **Advertising expenses incurred in good faith** should be deducted in fixing net profits. 20F(2d) 830. **Contingent liability for unredeemed profit-sharing coupons.**–Allowance to defendant based on forty-five per cent of redemption held proper. 20 F(2d)830. **Depreciation of patents.**–20 F(2d)830. **Income and profits taxes** held deductible in proportion to amount injured party would have paid. 20 F(2d)830. **Interest on invested capital** should be allowed. 20F(2d)830.

913-58 See also 20F(2d)830. But see 5F(2d)731.

913-61 134Misc288, 235NYS93. **Accountant's fees.**–20F(2d)830.

913-62 8F(2d)570. **Where no specific amount of damages are proved,** no recovery will be allowed. 13PaDist&Co 374.

914-63½-New. Under Trade-Mark Act § 19, court has power in its discretion to triple or otherwise increase damages. 8F(2d)570.

914-63¾-New. Under such act, profits and damages are distinct items of recovery. 8F(2d)570.

914-63¼-New. In a case involving profits only, court has held denial of increased damages was not error under facts, regardless of whether it is ever permissible to triple or increase recovery of profits. 8F(2d)570.

914-63⅓-New. Necessity of allegation of computable damage.–Where it is not alleged in suit for infringement of trade-mark that plaintiff has already suffered any computable damages, right to accounting may be denied. 30F(2d)16.

914-65 Immaterial matter not subject for interrogatories. 38F(2d)671.

914-67 6F(2d)876; 118Kan731, 236P 825.

914-71 41F(2d)637; 118Kan731, 236P 825.

914-73½-New. Review.–Refusal of court to order accounting for profits and damages has been held not to present matter for consideration on appeal, where trial court dismissed supplemental bill. 29F(2d)474.

914-73¼-New. District court's finding of unfair competition should be accepted on appeal, unless evidence decidedly preponderates against it. 31F(2d)522.

916-77 Evidence held not to warrant conviction.–244NY278, 155NE124.

916-79½-New. Evidence insufficient to show unauthorized use of union label. MoA 272SW1062.

TRADER

916-9 258Mass353, 155NE10.

TRADESMAN

918-12 151Miss503, 118S606(2dcase).

TRADING STAMPS

924-20½-New. Contract for sale of jewelry to retailer, providing for scheme whereunder retailer's prospective customers are given credit checks, redeemable by him, is not violation of Wisconsin Trading Stamp Act nor void as against public policy. 199Wis518, 227 NW22.

926-30 One who redeems trading stamps for cash is liable for license fee under statute imposing license fee on person redeeming trading stamps in "valuable personal property." 224Ky 136, 5SW(2d)910.

TRADITIONIBUS ET USUCAPIONIBUS NON NUDIS PACTIS, TRANSFERUNTUR RERUM DOMINIA

934-21 See also 5LaA137.

TRAFFIC

934-25 20F(2d)924. **"Traffic" synonymous with "transportation,"** see 85Pa Super188.

934-27 State and interstate traffic distinguished.–20F(2d)924.

934-29 85PaSuper188.

TRAIN

935-42 Several cars coupled together and moved by a locomotive. 203 Iowa 623, 213NW259, 51ALR1327.

TRANSACT BUSINESS

937-50 273US359, 47SCt400, 71L ed 684.

TRANSACTING BUSINESS

937-50½-New. Sale of gas daily and recurring transaction. TexCivA 273SW 946.

TRANSACTION

937-51 49SD442, 207NW449, 450 [quot Cyc].

937-52 49SD442, 207NW449, 450 [quot Cyc].

TRANSFER

939-68 Transfer is to be distinguished from chattel mortgage.–323 Ill 232, 154 NE139.

939-69 Term includes voluntary and involuntary transfers.–26F(2d)455.

940-71 46 OklACR26 [quotCyc].

940-72 117 Or244, 243P767. **What constitutes transfer under Bankruptcy Act.**–219AppDiv193, 219NYS541.

940-72½-New. Conveyance of right, title, or property, either real or personal, from one person to another, whether by sale, by gift or otherwise. 117 Or244, 243P767.

940-74 312Mo 373, 278SW1016, 1021 [citCyc].

940-76 312Mo 373, 278SW1016, 1021 [citCyc].

TRANSIENT

944-84 Man [1925] 3DomLR570.

TRANSIT

944-88½-New. As used in indemnity bond covering loss of goods while in transit, it is act or process of causing to pass from one place to another. 217 AppDiv63, 216NYS109.

TRANSPORT

946-11 273US326, 47SCt368, 71L ed 663; 198 Ind45, 152NE161; 162La496, 110S732; 235Mich206, 209NW87.

946-11½-New. to carry over or across; 198 Ind45, 152NE161.

946-12 273US326, 47SCt368, 71L ed 663; 109TexCr521, 5SW(2d)993.

947-14 273US326, 47SCt368, 71L ed 663; 198 Ind45, 152NE161.

TRANSPORTATION

947-15 24F(2d)804; 69Utah441, 256P 107.

TRANSVERSE

947-16½-New. "Transverse" means lying or being across or in crosswise direction. 40F(2d)573.

TRAP

948-17 104CalA733, 286P752 (absence of nut from steering wheel held not "trap").

TRAVELING

949-30 "Traveling expenses" include not only means of locomotion or transportation, but room rent and meals. 75 CalA680, 243P697.

TRAVELING SALESMAN

950-32 46Ark210, 55AmR577; 81 Ill 413; 34Mich247; 58Mich385, 25NW377, 55AmR697; 51Mo 89; 55Mo 505; 58C 465.

TRAY

950-35½-New. Shallow, wooden trough or bowl, or basket, for domestic uses. 11CustA69.

TREATIES

964-17 21F(2d)214 (rule stated).

964-19 21F(2d)214.

964-20 21F(2d)214.

964-27 21F(2d)214.

965-35 5F(2d)191 (treaty does not affect rights between signatory and its own nationals).

965-42 118Nebr174, 224NW18.

966-60 202Cal 267, 259P1094.

967-62 202Cal 267, 259P1094.

967-65 By treaty between United States and Mexico, United States acquired jurisdiction over region ceded, territorial and marine, embracing all ports, harbors, bays, and inlets along coast of California and for considerable distance into sea and including islands adjacent to coast. 200Cal 235, 252P722.

967-66 21F(2d)214 (patents).

969-2 19F(2d)925.

970-4 279US47, 49SCt223, 73L ed607; 24F(2d)649. **Particular treaties construed.**–32F(2d)495 [rev 25F(2d)146].

970-5 12CustA110; 202Cal 267, 259P 1094.

970-7 Conformity to principles of international law.–24F(2d)649. **Construction of particular treaties.**–281US449, 50 SCt363, 74L ed956.

970-8 Foreign text of treaty may be consulted to ascertain meaning. 25F (2d)146 [rev on other grounds 32F(2d) 495].

970-9 200Cal 434, 253P718. See also 279US47, 49SCt223, 73L ed607.

970-10 278US123, 49SCt47, 73L ed214; 200Cal 434, 253P718. **Treaty of Commerce and Navigation with Japan has been held to confer rights of native citizens on foreign subjects to extent of provisions of treaty.** 201Cal 236, 256P 545, 53ALR1279.

970-11 200Cal 434, 253P718 (in light of supplemental treaties).

970-12 24F(2d)649; 119Kan603, 240P 586.

970-13 119Kan603, 240P586.

970-16 24F(2d)649. **Reserving agricultural lands** for use, occupancy, benefit, and enjoyment of citizens of this country or those eligible to citizenship does not violate treaty rights of citizens of Japan. 195Cal 71, 231P554.

970-18 281US449, 50SCt363, 74L ed 956; 24F(2d)649; 195Cal 522, 234P 102; 201Cal 236, 256P545, 547, 53ALR 1279 [quotCyc]; 117Nebr750, 223NW 13.

971-19 278US123, 49SCt47, 73L ed214; 279US47, 49SCt223, 73L ed607; 201Cal 236, 256P545, 547, 53ALR1279 [quot Cyc]; 119Kan603, 240P586.

971-20 279US47, 49SCt223, 73L ed607.

971-22 201Cal 236, 256P545, 53ALR 1279.

971-25 Construction of the "most favored nation" clause, etc. 202Cal 267, 259P1094 (Danish commercial treaty). **American-British liquor conventions of May 22, 1924** do not extend United States criminal laws beyond three mile limit. 13F(2d)74. **Ashburton treaty of 1842** in protecting rights of government of New Brunswick to regulate navigation of St. John River within province did not preclude imperial parliament from transferring that right to Dominion under British North America Act. Can [1925] 2DomLR732. **"Trade" and "commerce,"** as used in treaties, include practically every business occupation carried on for procuring subsistence or

profit and into which elements of bargain and sale, barter, exchange, or traffic enter. 195Cal 522, 234P102. **Under American British Treaty of 1924** authorizing seizure of vessel endeavoring to bring liquor into United States from not greater distance from coast than can be traversed in one hour by vessel, speed of conveying boat determines distance. 5F(2d)838.

971-25½-New. Treaty-making power may affect operation of laws of several states with respect to inheritance of land. 281US449, 50SCt363, 74L ed956.

972-42 21F(2d)214.

972-43 6F(2d)943 (treaty with Germany of 1921 as relates to patents is not self-executing); 32F(2d)495. **Particular treaties held not self-executing.**–32F(2d)495 [rev 25F(2d)146].

973-46 32F(2d)495. **Words of futurity** do not necessarily indicate executory as distinguished from self-executing contract. 21F(2d)214.

973-57 120Kan614, 245P158.

973-59½-New. Notice of desire to revive treaty abrogated by war, as provided for by Versailles treaty, is not required in case of treaty not abrogated by war. 120Kan614, 245P158.

974-76 279US231, 49SCt274, 73L ed677; 117Nebr750, 223NW13. But see 24F(2d)649. **Treaty right of nonresident alien to inherit lands in United States** is not abrogated by state of war. 117Nebr750, 223NW13.

975-82 See also 279US231, 49SCt274, 73L ed677. **Termination of treaty by war, etc.** 120Kan614, 245P158. **Right of inheritance of land by citizen of enemy country,** provided for by treaty, is not abrogated or suspended by declaration of war. 120Kan614, 245P158.

975-82½-New. Obligations which are promissory or prospective are discharged. 279US231, 49SCt274, 73L ed677.

976-93 24F(2d)649.

976-94 18F(2d)250; 24F(2d)649; 29F(2d)999.

976-98 23F(2d)949; 29F(2d)999.

976-4 21F(2d)214; 24F(2d)649.

977-13 279US47, 49SCt223, 73L ed607; 118Nebr105, 223NW664.

977-15 Statutes construed in conflict with treaties.–279US47, 49SCt223, 73L ed607. **Treaty protecting rights of subjects to dispose of goods** cannot give alien right to disregard reasonable local regulations applying equally to aliens and citizens. 281US449, 50SCt363, 74L ed956. **Rights granted by treaty are subordinate to succession statutes of state** in determining distribution of property of decedent. 135Misc733, 240NYS691.

978-17 Statutes construed as not in conflict, etc.–205 Iowa324, 218NW140.

978-24. 19F(2d)925.

979-29 6F(2d)237 (state statute prohibiting commercial fishing within state limits by aliens held not to violate treaty with Italy).

979-32 19F(2d)925.

980-44 Provisions not violated.–106TexCr58, 290SW170.

TRESPASS

994-1 92Fla347, 109S424; TexCivA 274SW162, 163 [quotCyc]; TexCivA 4SW(2d)574, 575 [citCyc]. **Other definitions.**–191NC182, 131SE633, 43ALR1072. **Trespass is generally injury to property** by one without authority. 92Fla347, 109S424.

994-2 TexCivA 274SW162, 163 [quot Cyc].

994-2½-New. Recovery for trespass may be had with or without negligence. 229Ky716, 17SW(2d)1008.

995-4 215Ala78, 109S362; Cal 268P626; Vt 139A441.

995-13½-New. Trespass to realty may be committed by consequential and indirect injuries as well as by direct and forcible injuries. 206Cal22, 272P1045.

995-14 10LaA355, 120S526; 265Mass559, 164NE470, 62ALR780; 77Mont451, 251P527, 528 [citCyc]. **Entry on land.**–213Ala649, 651, 106S44 [citCyc]. **Entry into a dwelling-house,** etc. 33OhA488, 169NE716. **Entry on private land to fish from pond thereon** constitutes trespass. 74Mont587, 241P328. **Entry upon unfenced land** by owner of cattle for purpose of driving them off is not trespass. Ont [1927] 1DomLR235. **Going upon banks of navigable stream above ordinary water mark** while hunting or fishing constitutes trespass. 74Mont587, 241P328.

995-15 213Ala649, 651, 106S44 [cit Cyc]; 128 Or363, 274P509.

996-17 213Ala649, 651, 106S44 [cit Cyc]; 77Mont451, 251P527. **Going upon banks of nonnavigable stream** while fishing, thereby destroying grasses or willows, constitutes trespass. 74Mont587, 241P328.

996-18 223Ky230, 3SW(2d)623.

996-27½-New. Accidental slipping of child's arm through fence held no trespass, lacking essential element of force. 82NH440, 136A259.

996-28 94PaSuper321 (dust from limestone crusher). **By blasting.**–20OhA261, 151NE798.

997-29 Mass 170NE385 (flight of aircraft at low altitude over land adjacent to airport). **Shooting over land.**–74Mont587, 241P328.

998-34 169Ga313, 150SE158(2dcase) (servant retaining possession after expiration of term of service); 10PaDist&Co 350.

998-36 Or 268P757; TexCivA 286SW612. See also TexCivA 12SW(2d)655.

999-37 11LaA613, 124S592.

999-45 180Ark684, 22SW(2d)408 (imprisonment); TexCivA 290SW808 (collision of automobile with motorcycle).

999-47 Thus, unlawful entry or invasion of homes producing physical injury whether by direct physical violence or nervous excitement, proximate result of wrongful act is wrong for which remedy may be had. 213Ala637, 105S899.

1000-49 Officers executing search warrant not liable for trespass to person ab initio for picking owner up from floor and holding her. 213Ala649, 106S44 (by way of assistance).

1001-56 Applications of rule.–213Ala649, 106S44.

1001-57 Omitting to restore property to former places is not trespass ab initio by officers conducting search under warrant. 213Ala649, 106S44 (no malfeasance, gross misconduct, or malicious injury).

1001-59 104Conn54, 132A553.

1002-60 Rule applied to the person.–213Ala649, 106S44 (where his acts were mere kindness to helpless woman requiring help).

1002-67 235 IllA387. **Innocent trespass** is one committed through inadvertence or in good faith. 100WVa472, 131SE152.

1003-69 But see 8LaA788.

1003-70 235 IllA387.

1003-71 235 IllA387.

1003-72 One appropriating timber under circumstances implying that his ignorance is because he chose not to know is trespasser. LaA 127S425.

1004-74 149Miss188, 115S211.

1005-84 131SC387, 127SE841. Contra 12PaDist&Co 195.

1005-86 109Conn158, 145A884.

1005-87 12LaA76, 125S485; 86Mont218, 283P219; 131SC387, 127SE841; 153SC179, 150SE683. **Title** cannot be inquired into. LaA 129S218.

1005-89 286Pa251, 133A262.

1005-90 138SC31, 136SE13. **Where land is improved,** more than implied holding must appear. 286Pa251, 133A262.

1006-91 LaA 129S218.

1006-94 Mo 30SW(2d)471 (mortgagee); 138SC31, 136SE13 (plaintiff must prevail either on his title or his possession).

1006-95 12LaA162, 125S293; 12PaDist&Co 195.

1007-96 109Conn158, 145A884.

1007-96½-New. In Georgia plaintiff must show either actual possession or that he is true owner, in order to maintain trespass. 35GaA689, 134SE796.

1007-96⅓-New. Grantee held not entitled to make up deficiency of depth of lot called for in deed by trespass on other lots of grantor. 134SC77, 131SE594.

1007-96¼-New. Premises or property of railroad company is private property, as between it and trespassers. 178Ark1146, 13SW(2d)610.

1008-6 219MoA90, 266SW492.

1009-13 216Ala416, 113S35.

1009-14 292Pa519, 141A479.

1012-24 216Ala416, 113S35.

1013-35 216Ala416; 113S35; 216Ala604, 114S206; 286Pa251, 133A262 (right to possession follows from undisputed ownership); NB [1929] 1DomLR168.

1013-37 213Ala217, 104S390; 286Pa251, 133A262, 264 [citCyc].

1014-39 286Pa251, 133A262.

1014-41 216Ala604, 114S206.

1015-49 150Miss245, 116S593.

1016-59 Possession by tenant, etc.–37GaA737, 141SE914.

1017-68 216Ala604, 114S206; 217Ky87, 288SW1045; 217MoA342, 275SW67; NJ 141A25; NJSup 132A295; 138SC31, 136SE13; Utah 280P1042.

1019-71 138SC31, 136SE13. **Rule applied in case of land,** etc. 217Ky87, 288SW1045 (recognizing rule).

1022-88 216Ala416, 113S35; 164La502, 114S112; 86Mont218, 283P219; 138SC31, 136SE13 (constructive possession sufficient against defendant not in actual possession).

1022-89 39GaA295, 147SE189; 162La319, 110S489; 292Pa519, 141A479; 138SC31, 136SE13.

1024-92 Purchaser of school land from state land commissioner has sufficient interest to support action for trespass before issuance of certificate of sale. Utah 280P1042.

1027-11 225Ky722, 9SW(2d)1076.

1028-21 Fishing in nonnavigable stream bed of which is privately owned constitutes trespass where without consent of owner. 74Mont587, 241P328.

1028-22 41F(2d)929.

1029-29 213Ala494, 106S150. **Source of title.**–213Ala494, 106S150.

1031-55 TexCivA 283SW224, 228 [cit Cyc]; TexCivA 286SW612.

1031-57 22AlaA250, 114S420.

1033-66 Seller entering house unlawfully during absence of husband and wife to retake furniture sold is liable for taking wife's furniture. 220Ala542, 126S844.

1036-87 138SC31, 136SE13.

1036-88 See also 85Colo202, 274P827.

1036-1 Vt 139A441.

1038-19½-New. Servant of city cannot, upon being removed from public property by city officers after discharge, recover damages for trespass. 9LaA545, 120S102.

1038-19¼-New. One in possession as bona fide tenant of homestead claimant who has filed application as entryman may maintain trespass against one who is stranger to possible illegality in landlord's application. 129 Or648, 278P991.

1038-24 171Ark561, 285SW29.

1038-25 168Ark853, 272SW353; 35GaA689, 134SE796; 219MoA673, 284SW828.

1038-26 102WVa415, 135SE395.

1039-27 215Ala609, 112S156; 168Ark853, 272SW353; 35GaA689, 134SE796 (defendant moving cause of injury).

1040-37 215Ala609, 112S156.

1040-41 215Ala609, 112S156.

1040-41½-New. Rule applies to acts done by all others for benefit of defendant and assented to by him. 219MoA673, 284SW828.

1041-46 TexCivA 275SW285.

1041-47 But see 39GaA295, 147SE189.

1042-48 TexCivA 275SW285.

1042-49 TexCivA 275SW285.

1042-50 215Ala609, 112S156; 168Ark853, 272SW353 (act of defendant must ordinarily and naturally produce act of trespassers to render him liable); 35GaA689, 134SE796.

1042-63½-New. No justification that trespass committed by lessee was by lessor's instruction. 286Pa251, 133A262.

1042-63⅓-New. That defendant's employee thought trees outside defendant's fence on plaintiff's land ought to be cut, without reasonable and prudent foundation for thinking so, was no defense for cutting trees. 153Miss9, 120S200.

1043-83 82NH304, 133A16, 45ALR1409.

1044-86 Defendant's knowledge acquired by past experience must be considered in determining reasonableness of defense of property. 82NH304, 133 A16, 45ALR1409.

1044-87 82NH304, 133A16, 45ALR1409.

1044-89½-New. Owner of cattle entering neighbor's land through insufficient boundary fence may enter to retake them. 105Conn342, 135A397, 53ALR 481.

1045-99 216Ala604, 114S206; 138SC31, 136SE13. **Sufficiency of title.**-82Colo 288, 259P1025.

1047-19 See also 153Miss9, 120S200.

1047-22½-New. One in actual possession of land on one side of line mistakenly supposed to be true line may cut timber therefrom without being guilty of trespass. 213Ala217, 104S390.

1047-22½-New. Landowner pointing out dividing line as one pointed out by adjoining owner to same person is estopped to claim damages from adjoining owner for cutting of timber on latter's side of line so pointed out. 213Ala 217, 104S390.

1049-33 329Ill382, 160NE745.

1050-34 153Miss549, 120S434(2dcase).

1050-37 NC 155SE726. **Timber purchaser is not liable for damage,** by clearing land, for tram railway to remove timber. La 129S649.

1050-38 219MoA90, 266SW492 (landlord not entitled to recover in trespass for bare entry by sublessee on land to which lessee was entitled to possession).

1051-45 Right to hunt on another's land.-71Mont587, 241P328.

1056-76 22AlaA250, 114S420; **TexCivA** 283SW224, 228 [citCyc].

1056-37 TexCivA 286SW612.

1056-93 MoA 296SW239, 242 [citCyc].

1057-1 105Conn374, 135A396 (entry for purpose of asking for property is lawful).

1058-4 22AlaA250, 114S420 (where buyer's door was open, conditional vendor held justified in entering to repossess chattel sold).

1058-7 22AlaA250, 114S420.

1058-9 Rule applied in case of realty.-217Ky87, 288SW1045 (recognizing rule); La 130S337.

1059-12 217Ky87, 288SW1045.

1059-13 Rule applied in case of realty.-217Ky87, 288SW1045.

1059-14 150Miss750, 117S122.

1059-18 213Ala217, 104S390.

1064-52 TexCivA 278SW925. **Lessee of wrongful lessor has no defense against true owner.**-TexCivA 278SW925.

1067-79 78Mont477, 254P427 (otherwise conduct is trespass ab initio).

1067-82½-New. Parties claiming right to graze on public land are required to ascertain where lines of land are and remain within them. Ida 236P603.

1068-85 MoA 18SW(2d)137.

1069-89 Irregularities in proceedings in forcible detainer action give defendant no right of action against plaintiff, his sureties or sheriff for wrongful ejectment in absence of showing of malice or arbitrary action. **TexCivA** 274SW277.

1070-95 164Ga858, 139SE666.

1071-5 But see 5PaDist&Co 231.

1072-15 50RI 424, 148A315.

1072-17 125Me114, 131A204 (unlawful breaking and entry).

1073-26½-New. For seizure of goods under execution issued on irregular judgment which was subsequently set aside, trespass lies without proof of actual damage. Alta [1929] 3DomLR401.

1074-39 31NJL309; 6HillNY82; 86Tex 571, 26SW599, 607, 25LRA52; 17Utah 267, 54P121; 58Vt727, 6A648. **Trespass to real property is a "local action,"** and the suit must be brought in the county or place where the cause of action arose. 104Md351, 65A35.

1074-40 61Md510.

1074-43 164La502, 114S112.

1076-54 To constitute trespass within meaning of Rev. St. (1925) art 1995, subd 9, wrongful act from which injury flowed must have been willfully or negligently committed. **TexCivA** 289SW 1035.

1078-84 219Ala75, 121S57; 41GaA598, 153SE611; 5PaDist&Co 5. **Sufficiency of complaint considered in various actions.**-219Ala75, 121S57; 130Ark46, 20 SW(2d)317; 91CalA382, 267P181; 82 Colo 288, 259P1025; 30Hawaii17; 5 LaA720. **Complaint held to state cause of action** for trespass in taking topsoil by road board. 191NC147, 131SE277. **Petition held sufficient.**-164La502, 114 S112; La 130S337. **Petition held insufficient.**-TexCivA 289SW1035. **Acts indicating willfulness, malice, and wantonness** need not be alleged where complaint in trespass quare clausum fregit alleges that trespass was committed forcibly, willfully, maliciously, and in wanton disregard of plaintiff's rights. 30Hawaii17.

1079-96 164La502, 114S112.

1079-98 164La502, 114S112.

1079-2 Description held sufficient.-164 La502, 114S112. **Realty.**-164La502, 114 S112.

1080-4 196NC724, 146SE857(1stcase).

1080-11 128 Or363, 274P509.

1081-15 213Ala649, 106S44.

1081-16 213Ala649, 106S44 (wrongful entry). **Complaint held to state cause of action.**-259Mass113, 156NE30.

1081-18 Complaint sufficient without use of word "trespass." 213Ala649, 106 S44.

1081-19 30Hawaii17.

1081-23 213Ala649, 106S44 (ownership); 39GaA728, 148SE355. **In trespass for cutting timber** owner of timber unlawfully cut from his land need not allege possession in order to recover value of timber cut. 164La787, 114S 654.

1082-28 213Ala649, 106S44; 150Miss 245, 116S593; 98PaSuper162.

1082-31½-New. Plaintiff claiming possession of whole tract may allege and prove trespass on whole or any part thereof. 164La502, 114S112.

1082-32 213Ala649, 106S44.

1082-33 On or about.-164La502, 114S 112.

1084-58 252Mass238, 147NE580.

1084-59 128 Or363, 274P509.

1084-63 Allegation of damages not necessary. 213Ala649, 106S44 (conclusively presumed from fact of unlawful entry); Mo 30SW(2d)471 (permanent injury to realty).

1084-66 252Mass238, 147NE580; 6Pa Dist&Co 269; **TexCivA** 48W(2d)574. See also 219Ala75, 121S57.

1085-68½-New. Punitive damages may be recovered where there are allegations sufficient as predicate therefor. 219Ala 75, 121S57.

1085-68½-New. That only nominal damages are sought does not render complaint defective. 219Ala75, 121S57.

1085-70 6PaDist&Co 269.

1086-82½-New. Court rule providing specific and final passing of ownership in trespass may be availed of by general plea or affidavit of defense. 286Pa251, 133A262.

1086-82½-New. There can be no counterclaim when plaintiff's right of action is denied. 6PaDist&Co 230.

1087-95 199Ind33, 154NE6; LaA 129 S218 (intention of pleader held to be negation of plaintiff's right).

1088-8 104Conn54, 132A553.

1090-23½-New. Evidence of equitable defense inadmissible under general issue. RI 151A893.

1090-32 Failure to plead justification based on court order for survey held unimportant, where plaintiff's proof brought out facts. 163La623, 112S508.

1091-35 218Ala216, 118S395.

1092-36 218Ala216, 118S395.

1098-2 215Ala609, 112S156.

1101-42 10PaDist&Co 461.

1101-44 34GaA162, 128SE816.

1101-45 1LaA695.

1101-46 252Mass238, 147NE580.

1102-49 291Pa536, 140A503. **Damages.**-128 Or363, 274P509.

1102-50½-New. That evidence material to trespass supports issue of negligence does not justify court's declaring case tried on negligence. 91CalA382, 267P 181.

1104-70 101CalA167, 281P428; 228Ky 156, 148SW(2d)418; 228Ky310, 148SW (2d)1075; 162La139, 110S489; 13LaA 686, 123S711; 153Md449, 138A331; 154 Md34, 139A529; 150Miss750, 117S122. **Applications of rule.**-162La319, 110S 489; 153Md449, 138A331; **MoA** 188SW (2d)559. **Damages.**-**TexCivA** 188SW(2d) 1089(2dcase). **Defendant's admission** that he removed timber from plaintiff's land does not place on him burden of proving removal in good faith. **TexCivA** 188SW(2d)1089(2dcase). **Plaintiff in actual possession as owner under recorded title** need not show perfect title where defendant merely denies plaintiff's title. La 130S337. **Rule that plaintiff is not required to prove title against world is inapplicable** where defendant sets up title in itself. LaA 126S541.

1104-71 The place of trespass must be proved as alleged.-102WVa382, 135SE 279. **Unlawful breaking and entry** must be proved by plaintiff. 125Me114, 131A 204.

1104-72 20F(2d)67.

1104-73 20F(2d)67; 171Ark561, 285 SW29. **Regularity of proceedings** under which commissioner's deed was executed must be shown by purchaser. 217Ky15, 288SW758.

1105-75 Proof of title, etc. 213Ala217, 104S390. **Owner is presumed to know boundaries of his own land.** 294Pa47, 143A474.

1105-75½-New. Damages are presumed from mere fact of unlawful entry. 213 Ala649, 106S44.

1105-75½-New. Burden of proving mistake warranting mitigation of damages is on defendant. 105Conn366, 135 A391.

1106-76 194NC139, 138SE595 (other boundaries held not relevant). **Applications of rule.**-**TexCivA** 188SW(2d)1089 (2dcase).

1106-77 215Ala266, 110S389; 221Ala 319, 128S608.

1108-3½-New. Admission in evidence of deed by grantor not connected with title to land derived either from plaintiff or plaintiff's predecessor in title, was error, where objected to on ground that it did not authorize defendants to enter on land and remove property, and no evidence appeared connecting defendants with grantees in deed. 39GaA295, 147SE189.

1108-3½-New. Plaintiff may exhibit his title.-168La881, 123S606.

1109-8 Evidence that land intended to be leased to plaintiff was included in lease to defendant is inadmissible in absence of fraud, accident, or mistake. 87 PaSuper501.

1111-39 212Ala515, 103S549.

1112-51 82NH304, 133A16, 45ALR1409.

1112-53 316Ill529, 147NE380 (evidence of agreement with defendant not admissible where defendant claimed land became public highway prior to erection of fence).

1113-59 220Ala284, 124S868.

1113-68 Evidence as to amount of damage having no relation to decrease in market value of land caused by acts done by defendant is inadmissible. 219 MoA90, 266SW492.

1113-72 212Ala515, 103S549 (in trespass for unlawfully cutting logs on plaintiff's land evidence of amount and value of lumber sawed from logs on plaintiff's land).

1114-79 MoA 285SW788.

1114-81 220Ala284, 124S868.

1114-91 214Ala341, 107S903.

1115-93 220Ala145, 124S204.

1115-95 220Ala145, 124S204; 154Md 34, 139A529.

1115-2 156SC370, 153SE342.

1115-4 20F(2d)67; 12LaA541, 124S 783 (evidence held to support judgment for plaintiff); LaA 129S218; 150Miss 750, 117S122. **Weight of evidence considered as to whether it justified a verdict for defendant.**-162La319, 110S489; 91PaSuper176. **Evidence sufficient.**-LaA 127S425.

1115-5 11LaA82, 120S221; **TexCivA** 15 SW(2d)66. **Sufficiency of evidence considered in particular cases:** Consent to removal of articles. 11LaA613, 124S 592.

1116-10 See also **MoA** 188SW(2d)137.

1116-11 10LaA590, 121S339.

1116-11½-New. That defendant was without title to timber is alone insufficient to prove bad faith. 10LaA590, 121 S339.

1116-12 The sufficiency of evidence of plaintiff's title, etc. 162La319, 110S489;

10LaA290, 120S428; TexCivA 15SW(2d) 66.
1117-15 29Hawaii587; 228Ky310, 14 SW(2d)1075.
1117-17 211Ky847, 278SW154.
1117-18 211Ky847, 278SW154. Where both parties claim under common grantor, title need not be proved back to state. 211Ky847, 278SW154.
1118-23 Consideration sufficient to support simple contract is valid. 44 Ida 347, 257P30.
1118-28 LaA 129S218. Evidence held to show defendant's knowledge of weakness of title. 164La502, 114S112. Weight of evidence considered in. LaA 126S541.
1118-40 See also 164La502, 114S112.
1119-45 Utah 280P1042.
1120-46 164La502, 114S112.
1120-47 164La502, 114S112.
1121-64 Sufficiency of evidence, etc. 10LaA355, 120S526.
1121-65 13LaA686, 128S711. Sufficiency of evidence to connect defendant with act considered.-TexCivA 3SW(2d)827.
1121-66 Circumstantial evidence may be sufficient. 219MoA673, 284SW828.
1121-67 Utah 280P1042.
1122-70 13LaA667, 128S698. Evidence held sufficient to justify award.-174Ark 428, 295SW52. Sufficiency of evidence to sustain, etc.-179Ark592, 17SW(2d) 293; 39GaA295, 147SE189; 10LaA290, 120S428; TexCivA 7SW(2d)665.
1122-74 12PaDist&Co 722 (payment to laborers for services in cleaning up débris must be sufficiently definite to afford defendant opportunity to check it up).
1122-78 Evidence insufficient to justify award of damages. 174Ark428, 295 SW52.
1122-80 168La881, 123S606; 165Minn 65, 205NW701.
1122-84 Utah 280P1042.
1122-85 LaA 127S425 (accuracy of measurement).
1123-89 213Ala649, 106S44 (damage presumed from allegation of wrongful entry); 220Ala284, 124S868; 226Ky 258, 10SW(2d)825; MoA 297SW435.
1123-91 213Ala649, 106S44; 231Mich 585, 204NW768.
1124-92 213Ala649, 106S44 (absence of allegation of damage); NJ 151A477.
1124-94 213Ala494, 106S150; 33 OhA 488, 169NE716 (wanton trespass). Evidence held sufficient.-171Ark561, 285SW 29.
1124-97½-New. Furniture seller taking forcible possession of, removing, and disposing of, entire contents of buyer's house, including articles paid for and not purchased from such seller, during buyer's absence from city, is liable for humiliation, inconvenience, and trouble caused buyer, though house was dilapidated and furniture of little value. 9 LaA155, 119S375.
1125-99 95 Okl 29, 217P1041.
1125-4 But see Or 268P757.
1125-11 9LaA416, 121S239.
1126-12 20F(2d)67; 219MoA90, 266 SW492; 220MoA141, 281SW93; MoA 297SW435; 128 Or363, 274P509; Tex CivA 7SW(2d)665.
1127-14 91PaSuper176; 94PaSuper199.
1127-15 84CalA42, 257P573.
1127-19½-New. Where trespass consisted of driving heavy teams in plaintiff's land and piling stone thereon, recovery may not be limited to nominal damages. 259Mass113, 156NE30.
1127-21 128 Or363, 274P509.
1128-22 Right to bring successive actions.-70CalA772, 234P423.
1129-32 See also 179Ark592, 17SW(2d) 293. In trespass for removal of house, recovery is allowed for its value standing on lot. 214Ala341, 107S903.
1129-33 See also 179Ark592, 17SW(2d) 293.
1130-34 214Ala341, 107S903.
1130-35 220Ala284, 124S868.
1130-37 213Ala494, 106S150; 216Ala 416, 113S35. Value of stumpage not loss of profits, is liability of one cutting timber in good faith. 12LaA76, 125S485.
1130-38 216Ala416, 113S35; 13LaA667, 128S698; 2LaA310; 2LaA568; 4LaA319, 6LaA284; 8LaA555; MoA 285SW788. Humilation, grief, and worry are not legitimate items. La 129S649.
1130-39 Where trespasser removes timber in bad faith, measure of damages is value of manufactured timber without deduction. LaA 127S425.
1131-48½-New. "Willful severance" means severance with knowledge that timber is property of another. 216Ala 416, 113S35.
1131-48½-New. Person guilty of willful trespass is liable for value of lumber into which logs were made. 216Ala416, 113S35.
1131-48¼-New. Landowners, suing for value of timber cut and removed from land by defendant and manufactured into lumber in good faith, have been held entitled to recover damages for diminution in value of timber left uncut by defendant. 10LaA590, 121S339.
1131-48½-New. But he is not entitled to recover cost of establishing boundaries of their land or expense of having timber estimated in board measure. 10 LaA590, 121S339.
1131-48½-New. Landowners' recovery, for timber cut and removed and manufactured into lumber without authority but in good faith, has been held stumpage value of timber plus net profit on manufactured value thereof. 10LaA590, 121S339.
1131-48½-New. Defendants, who obtained permission to cut timber on plaintiff's land from third person, and who made no effort to ascertain who was true owner, are liable for value of lumber manufactured from lumber removed from premises. TexCivA 15SW(2d)66.
1131-49 220MoA141, 281SW93, 95 [citCyc].
1132-50 220MoA141, 281SW93, 95 [citCyc].
1132-51 220MoA141, 281SW93, 95 [citCyc].
1132-52 125Kan33, 262P577; 220MoA 141, 281SW93, 95 [citCyc]. For injury to land by removal of shade trees, damages are measured by difference in land value before and after cutting. 220MoA 141, 281SW93. Treble damages not allowed under statute where cutting was under claim of right. 220MoA141 281 SW93.
1132-53 220MoA141, 281SW93, 95 [citCyc].
1132-55 188Wis82, 204NW582.
1132-56 Though mistake is shown, it is not available where no affidavit served, or offer of judgment made. 188Wis82, 204NW582.
1132-57 Defendant does not bring himself within exception where he was simply mistaken as to boundary of land which he actually owned. 188Wis82, 204 NW582.
1137-85 213Ala637, 105S899 [quotCJ].
1137-86 213Ala637, 105S899 [quotCJ].
1137-87 213Ala637, 105S899 [quotCJ].
1137-88 213Ala637, 105S899 [quotCJ]; 9LaA155, 119S375.
1137-89 213Ala637, 105S899 [quotCJ]; 9LaA155, 119S375.
1137-90 213Ala637, 105S899 [quotCJ].
1137-91 Interest on amount allowed for misappropriation of timber may be calculated from average or mean date of appropriation. 133SC395, 131SE18.
1138-93 299Pa503, 149A702 (damage for delay in payment).
1138-98 TexCivA 7SW(2d)665.
1139-4 12LaA76, 125S485; 2LaA23.
1142-24 215Ala231, 110S31; 214Ala 341, 107S903; 33 OhA488, 169NE716. See also Sask [1928] 1DomLR820.
1143-26 52Nev191, 284P310; 102WVa 415, 135SE395. Intentional disregard of rights is equivalent to legal malice. 213 Ala649, 106S44.
1143-27 213Ala306, 104S765.
1143-28 213Ala306, 104S765; 213Ala 649, 106S44; 102WVa415, 135SE395. Wanton disregard of plaintiff's rights is sufficient. 213Ala649, 106S44 (malice need not be ill will, hatred, or vindictiveness of purpose).
1144-29 MoA 18SW(2d)137; 102WVa 415, 135SE395. Malice need not amount to ill will, hatred, or vindictiveness of purpose. 213Ala649, 106S44. Legal malice is wanton or conscientious disregard of another's rights justifying punitive damages. 213Ala649, 106S44. Wanton disregard of rights is equivalent to legal malice. 213Ala649, 106S44.
1145-31 213Ala306, 104S765.
1145-33 213Ala306, 104S765.
1146-41 2LaA23.
1146-44 12LaA76, 125S485; 220MoA 141, 281SW93 (for cutting shade trees). Claim of title to land.-210Ky28, 275SW 371. "Probable cause," as used in statute, held to mean existence of facts leading reasonable man to believe existence of lawful right to do act. 220MoA141, 281SW93.
1147-48 MoA 18SW(2d)137. But see 35 OhA405, 172NE420.
1147-50 105Conn366, 135A391; 10LaA 355, 120S526. Amounts held not excessive.-9LaA155, 119S375; Me 151A429 (1stcase); MoA 18SW(2d)137; 33 OhA 488, 169NE716.
1147-52 245 IllA400; 30 OhA268, 164 NE779.
1148-60 In action for damages for trespass by pasturing sheep on land, plaintiff is entitled to costs irrespective of amount of recovery. 77Mont451, 251P 527.
1151-72 20F(2d)67; 216Ala416, 113 S35; 170Ark1192, 281SW909; 104Conn 54, 132A553; NJSup 132A295; NC 155 SE726; 286Pa251, 133A262; 97PaSuper 62 (conflicting testimony warranting submission); 12PaDist&Co 195. Damages, etc., 215Ala92, 109S750; MoA 285 SW788; MoA 297SW435. Liability for trespass held for jury.-213Ala494, 106S 150. Possession is question for jury.-218Ala176, 118S330. Title.-211Ky847, 278SW154. Whether timber was on land at time of transfer, held for jury. 213 Ala494, 106S150. Amount of damages is largely discretionary with jury. Me 151 A429(1stcase). Whether there was breaking and entering held for jury. 33 OhA488, 169NE716.
1152-75 171Ark561, 285SW29; 211Ky 847, 278SW154 (evidence of title held sufficient to go to jury); 259Mass113, 156NE30.
1152-77 131SC387, 127SE841.
1152-78 Evidence held sufficient.-219 MoA673, 284SW828.
1152-80 TexCivA 12SW(2d)597. Nonsuit or direction of verdict.-228Ky310, 14 SW(2d)1075. Where there is no proof of damages alleged, judgment of nonsuit will be affirmed. 9LaA608, 121S669; 231Mich585, 204NW768; 87PaSuper501. Affirmative charge for defendant held proper. 22AlaA250, 114S420.
1153-82 TexCivA 7SW(2d)665.
1153-84 TexCommnA 23SW(2d)294. Applications of rule.-154Md34, 139A529.
1153-84½-New. Existence of license is mixed question of law and fact. 104 Conn54, 132A553.
1153-86 247Mich322, 225NW548; Mo 270SW977; MoA 285SW788; 153SC179, 150SE683 (instruction not erroneous). Charges held proper.-104Conn54, 132A 553. Instructions as to burden of proof of justification held not erroneous. 171 Ark561, 285SW29. Instruction in language of statute as to presumption of possession in holder of legal title held properly given. 138SC31, 136SE13. Instruction on measure of damages held incorrect.-160Ga697, 128SE801. Given charges held proper.-213Ala494, 106S150. Instructions held not erroneous.-170Ga 123, 152SE222.
1153-87 104Conn54, 132A553 (refused charges held bad because unqualified).
1153-88 104Conn54, 132A553 (charge as to damages held proper); 138SC31, 136SE13.
1153-89 104Conn54, 132A553 (charge held not misleading); MoA 285SW788.
1153-91 104Conn54, 132A553 (instructions held proper under pleadings); MoA 285SW788.
1153-92 154Md34, 139A529; MoA 285 SW788.
1154-93 104Conn54, 132A553 (charge held proper).
1154-5 218Ala216, 118S395.
1155-6 104Conn54, 132A553.
1155-7 Refusal of instruction that only nominal damages may be recovered is proper where value of timber cut is shown. 215Ala231, 110S31.
1155-8 160Ga697, 128SE801.
1155-16 104Conn54, 132A553; MoA 18 SW(2d)137.

1155–18½–New. , issues fully submitted by instruction. Mo 270SW977.
1156–25 70CalA752, 234P426.
1157–44 231Mich585, 204NW768.
1158–51 231Mich585, 204NW768.
1159–70 One believing himself owner who sued person who cut timber is at least cotrespasser. 159La1057, 106S564.
1159–72 159La1057, 106S564.
1159–73 TexCivA 31SW(2d)457.
1162–6 RI 133A439.
1162–13 215Ala609, 112S156.
1164–41 105Conn366, 135A391; 125Kan 33, 262P577; 217MoA567, 272SW1014.
1164–46 145Miss713, 110S790; 219MoA 90, 266SW492 (not applicable to mere digging of soil).
1164–48 In Alabama.–213Ala494, 106S 150.
1166–64 Under statute giving a penalty, etc.–Miss 118S376(3dcase).
1166–65 Under statute giving a penalty, etc. Miss 118S376(3dcase).
1166–66 125Kan33, 262P577.
1166–70 Penalty for cutting trees.–150 Miss245, 116S593.
1167–71 105Conn366, 135A391; 217 MoA567, 272SW1014.
1167–73 217MoA567, 272SW1014.
1167–74 Penalty for cutting trees.–217 MoA567, 272SW1014.
1167–77 Connection with wrongful act essential.–213Ala494, 106S150.
1167–78 125Kan33, 262P577.
1167–79 In Alabama statutory penalty for cutting trees is preventative and aimed at intentional wrongdoer, and not one whose relation is that of employer and liable as such for actual damages under doctrine of respondeat superior. 213Ala627, 105S869.
1168–83 218Ala216, 118S395.
1169–3 Petition in statutory language is sufficient. MoA 278SW1044.
1169–5 69Utah204, 253P680 (payment under invalid assessment bars later valid assessment and tax).
1169–10 In action for double damages defendant's lack of interest need not be alleged. MoA 278SW1044.
1171–33 105Conn366, 135A391.
1172–57 Evidence held insufficient.–MoA 278SW1044.
1172–72 Cutting trees.–Okl 291P114.
1173–77 125Kan33, 262P577.
1173–78 125Kan33, 262P577.
1173–82 But see 125Kan33, 262P577.
1174–92 Treble damages, etc. 105Conn 366, 135A391.
1174–93 Where no evidence to establish liability of employee for statutory penalty for cutting trees by employees, refusal of affirmative charge for employer on count on statutory penalty held error. 213Ala627, 105S869.
1175–12 Conversely, trespass on real or personal property constitutes crime at common law where it amounts to breach of peace or tends to or threatens breach of peace. 153Va228, 149SE619.
1176–26 164La405, 114S76, 55ALR309. **In Louisiana.**–161La461, 109S31.
1176–27 199 Ind146, 155NE819. **Rule which forbids prosecution to try title** does not protect one who maliciously injures property under questionable right. 199 Ind146, 155NE819.
1176–28 Under statute authorizing entry of land in possession of another in peaceful manner, and not with strong hand, nor with multitude of people, three or more constitute "multitude," and is calculated to overawe resistance. 196NC 164, 145SE23.
1176–30 Taking vehicle.–199 Ind397, 155NE609. **"Force" necessary** to constitute forcible trespass, under statute, should be such as is calculated to intimidate or tend to breach of peace. 196NC 164, 145SE23.
1177–51 In prosecution for trespass by destroying outstanding crops, proof of warning held not required. 22AlaA81, 112S537.
1178–64 196NC164, 145SE23.
1178–66 One having exclusive right to take oysters can invoke statute punishing trespass after warning. 220Ala359, 124 S915(1stcase) (such person has no right to warn defendant off water).
1179–77 252Mass241, 147NE552.
1180–80½–New. One uses machine if he rides in it, though he rides as passive invited guest. 252Mass241, 147NE552.
1180–80½–New. Wrongful intent not part of offense. 252Mass241, 147NE552.
1181–94 13PaDist&Co 401 [citCyc]; NS [1927] 2DomLR558.
1182–97 NS [1927] 2DomLR558.
1183–18½–New. One who aids and abets in acts calculated to intimidate or lead to breach of peace is guilty of trespass. 192NC559, 135SE451.
1183–20 That defendant was former employer, not paid in full, does not justify the trespass. 97PaSuper223.
1185–53 162La265, 110S416.
1186–58 Information that defendant took possession of railroad right of way held sufficient. 162La265, 110S416.
1186–59 152Miss220, 119S189. But see 199 Ind146, 155NE819.
1187–71½–New. "Maliciously and mischievously" sufficient though "unlawfully" not used. 199 Ind146, 155NE819.
1187–72 Possession and ownership.–152 Miss220, 119S189.
1188–77 199 Ind146, 155NE819.
1189–82 196NC164, 145SE23. **Evidence held sufficient to sustain conviction.**–37 GaA805, 142SE311. **Evidence held sufficient to support conviction.**–97PaSuper 223.
1189–84 IndA 173NE233.
1189–84½–New. Prosecution under statute has burden to prove not only use by defendant but also that it was without authority. 252Mass241, 147NE552.
1189–85 39GaA406, 147SE536(3dcase); 252Mass241, 147NE552 (possession and defendant's story with reasonable inferences to be drawn therefrom for jury).
1189–86 199 Ind146, 155NE819; 196NC 164, 145SE23.
1189–87 199 Ind146, 155NE819. **Instruction that defense depended upon defendant showing color of title** erroneous. 199 Ind146, 155NE819.
1189–90 That malice may be implied from deliberate act held proper instruction. 199 Ind146, 155NE819.
1189–93 199 Ind397, 155NE609.
1190–98½–New. Motion for directed verdict properly denied. 252Mass241, 147NE552.
1190–98⅓–New. In prosecution, under statute, for forcible trespass, motion to dismiss or for judgment of nonsuit was properly refused, under evidence tending to show that prosecuting witness was in actual possession of stables and barn, which had been locked by him, and that defendants forcibly, with hammer, opened door of stable and turned out prosecuting witness' mules, over protest of prosecuting witness. 196NC164, 145SE23.

TRESPASS TO TRY TITLE

1193–1 TexCommnA 4SW(2d)961; **Tex CivA** 10SW(2d)132.
1193–2 It is possessory in its nature.–TexCivA 274SW323.
1194–6 TexCivA 283SW1073; **TexCivA** 291SW580; **TexCivA** 292SW912; **Tex CivA** 2SW(2d)288; **TexCivA** 2SW(2d) 895. See also **TexCommnA** 286SW173; **TexCivA** 17SW(2d)174. **Void judgment** in chain of title defeats a recovery. **Tex CivA** 22SW(2d)707.
1194–8 TexCivA 25SW(2d)221.
1194–8½–New. Plaintiffs, whose ancestor was recognized in deed from defendants' ancestor and who made equitable partition with grantee under such deed, had fee simple title to property received under partition, which sustains action of trespass to try title. **TexCivA** 13SW (2d)743.
1194–9 Title acquired after ouster is inadmissible in suit to recover land. **Tex CivA** 298SW154.
1195–22 TexCommnA 1SW(2d)571, 572 [citCyc].
1195–25½–New. Lessor under oil lease may maintain trespass to try title against anyone entering land except lessee. **Tex CivA** 2SW(2d)288.
1196–29 17F(2d)472. **Disclaimer does not reinvest plaintiff with title** sufficient to sustain action. **TexCivA** 2SW(2d) 288.
1199–44 TexCivA 10SW(2d)1043. See also **TexCivA** 14SW(2d)926.
1199–45 TexCivA 274SW281; **Tex CivA** 8SW(2d)327; **TexCivA** 25SW(2d) 221.
1199–46 TexCivA 274SW281; **TexCivA** 274SW1015; **TexCivA** 289SW79; **Tex CivA** 14SW(2d)926. **Plaintiff undertaking to sustain claim by proof of common source** must show title superior to that claimed by defendant. **Tex CommnA** 280SW185.
1200–47 TexCivA 289SW79; **TexCivA** 14SW(2d)926. **Outstanding title anterior to common source is presumed to be merged** in common source, unless defendant shows contrary. **TexCivA** 274 SW1015.
1200–48 TexCivA 289SW79. **Common source a question of evidence and not of estoppel,** etc. **TexCivA** 289SW79.
1200–49 Defendant filing abstract claiming title from common source will not ordinarily be heard to attack chain of title back of it. **TexCivA** 274SW281.
1201–54 TexCivA 283SW1073; **Tex CivA** 292SW912; **TexCivA** 8SW(2d) 790; **TexCivA** 19SW(2d)175; **TexCivA** 21SW(2d)594; **TexCivA** 22SW(2d)688.
1201–55 TexCivA 19SW(2d)68; **Tex CivA** 29SW(2d)416.
1202–57½–New. Such possession must be so exclusive and clearly defined as to give claimant exclusive dominion over the property. **TexCivA** 291SW580.
1202–57⅓–New. And must have existed against a trespasser at time of his entry. **TexCivA** 291SW580.
1202–60½–New. Defendants were not naked trespassers where they held as assignees of contract of purchase which they had transferred as security to plaintiff, who paid balance due. **Tex CivA** 4SW(2d)180.
1202–68½–New. Where defendants may implead grantors on their general warranty of title, they must urge available defense of limitation or any other sufficient defense under title warranted to them. **TexCivA** 8SW(2d)301.
1202–69 But see **TexCivA** 16SW(2d) 154.
1202–70 TexCivA 25SW(2d)942; **Tex CivA** 29SW(2d)500.
1204–80½–New. Title acquired by defendant after suit brought is available to defeat plaintiff's claim of ownership. **TexCivA** 290SW866 (defendant foreign corporation).
1204–80⅓–New. Title by limitation is sufficient link in chain to sustain plea of statute of limitations. **TexCivA** 12 SW(2d)1811.
1205–98 TexCivA 2SW(2d)907.
1206–1 TexCivA 272SW296; **TexCivA** 2SW(2d)907.
1207–9½–New. In suit by tenants in common, one or more may sue for benefit of all. **TexCivA** 283SW324.
1207–9⅓–New. Conveyance pendente lite does not render grantee necessary party to grantor's suit in trespass to try title. **TexCivA** 10SW(2d)1043.
1207–10 TexCivA 13SW(2d)220.
1208–14 Persons claiming adverse possession of land are not necessary parties to action to recover title and possession against another. **TexCivA** 274SW 260.
1208–17 TexCivA 13SW(2d)220 (dismissal of mortgagee not in possession from suit to recover title and possession of land has been held not error, where neither his answer nor subsequent petition in intervention contained any prayer for affirmative relief).
1208–19 TexCivA 290SW560; **Tex CivA** 8SW(2d)301.
1209–30 TexCivA 27SW(2d)254 (rents and profits as damages).
1209–31 TexCivA 19SW(2d)577 (petition held to state cause of action not necessarily involving trespass to try title, but sufficient to entitle plaintiff to temporary injunction). **Where unknown parties are defendants,** petition must set out chain of title. **TexCivA** 22SW(2d)707.
1209–34½–New. Facts to aid recovery of additional relief in alternative may be alleged. **TexCivA** 274SW323.
1209–34⅓–New. Rule applies especially to facts of equitable nature. **Tex CivA** 274SW323.
1209–34¼–New. Allegations showing cloud in plaintiff's title by reason of defendant's asserted claim are inciden-

tal to main action and are proper. **Tex CivA** 274SW220.

1209–36 **TexCivA** 8SW(2d)782.

1210–39 **TexCivA** 299SW310.

1210–40 **TexCivA** 299SW310; **Tex CivA** 8SW(2d)782.

1210–41 **TexCivA** 272SW296 (where petition alleged execution of bond for title and failed to allege delivery thereof, it was subject to special exception); **TexCivA** 299SW310; **TexCivA** 28SW (2d)885. **Plea held insufficient.–Tex CivA** 299SW310.

1210–42½–New. Where parties agree to common source of title, it is not necessary to plead limitation title in common source. **TexCivA** 274SW1015.

1210–44 Sufficiency of particular descriptions.–TexCivA 275SW494; **Tex CivA** 5SW(2d)872 (description of lands in city addition by metes and bounds).

1211–48 **TexCivA** 286SW953.

1211–49 Defense held imperfect and partial.–TexCommnA 1SW(2d)571.

1211–54 Warrantor may plead res adjudicata. **TexCivA** 289SW1060.

1211–57½–New. In Kentucky, answer alleging ownership in third person from whom defendants claim as agents and tenants sufficiently alleges interference under statute. 217Ky87, 288SW1045.

1211–57½–New. Affirmative relief cannot be granted to defendant unless specifically pleaded. **TexCommnA** 4SW (2d)961.

1211–57¼–New. Purchaser's answer alleging certain payments by him under contract and payment of taxes and improvements on premises has been held sufficient, as against general demurrer, to present case for recovery of value of improvements, though judgment for improvements was not specifically requested. **TexCivA** 11SW(2d) 551.

1212–60½–New. Disclaimer of defendant could not rest his title in another but would merely prevent affirmative decree for him. **TexCivA** 293SW604.

1212–70½–New. Amended answer in which plea of limitations is specifically urged to certain strip of land has effect to withdraw disclaimer thereof. **TexCivA** 18SW(2d)925.

1212–72 **TexCivA** 289SW119.

1213–74 **TexCivA** 293SW644.

1213–75 **TexCommnA** 16SW(2d)255; **TexCivA** 15SW(2d)1085; **TexCivA** 19 SW(2d)140 (plea held sufficient to authorize evidence as to whether defendant executed deed as alleged).

1213–78 **TexCivA** 292SW585; **TexCivA** 293SW644; **TexCivA** 299SW310; **Tex CivA** 13SW(2d)735(2dcase); **TexCivA** 16SW(2d)154.

1214–79½–New. Issue whether, in deed tainted with fraud, property was community or separate, is immaterial. **Tex CivA** 2SW(2d)907.

1214–81 **TexCivA** 285SW340; **TexCivA** 297SW609.

1214–82 **TexCommnA** 4SW(2d)961; **TexCommnA** 6SW(2d)350; **TexCommnA** 16SW(2d)255; **TexCivA** 282SW874; **TexCivA** 285SW340; **TexCivA** 289SW 431; **TexCivA** 297SW609.

1215–87 **TexCommnA** 16SW(2d)255.

1216–92 **TexCivA** 2SW(2d)288.

1216–94 **TexCommnA** 280SW185; **Tex CivA** 290SW556. **Prior possession held to raise presumption of title in plaintiff.–TexCommnA** 290SW1086.

1216–95 **TexCommnA** 280SW185.

1216–97 **TexCivA** 299SW450.

1216–99 **TexCivA** 21SW(2d)17 (plaintiffs must prove invalidity of trust deed executed by them under which defendant claims). **Identifying land.–TexCivA** 2SW(2d)288.

1217–1 **TexCivA** 286SW322; **TexCivA** 290SW556; **TexCivA** 298SW154.

1217–4 **TexCivA** 14SW(2d)926. **Grantee held to have made prima facie case** by introducing deed containing restrictive clause regarding possession. **Tex CivA** 293SW628.

1217–5 **TexCivA** 293SW628; **TexCivA** 8SW(2d)327.

1218–10½–New. Defendant failing to prove title in person under whom he claims must prove title from common source in order to prevail. **TexCivA** 289 SW721.

1218–10½–New. Burden of proof rests upon holder of an equitable title to show that purchaser of legal title had notice of equitable title and was not purchaser for value. **TexCivA** 285SW900.

1218–10¼–New. Presumption that common source owns all titles relates to title as distinguished from mere claim. **TexCivA** 14SW(2d)926.

1218–10⅕–New. Plaintiff has burden of showing that defendant's disclaimer included specific lands. **TexCivA** 18SW (2d)925.

1218–10⅙–New. Voluntary intervener is not required to prove title as against plaintiff. **TexCivA** 19SW(2d)175.

1218–13 **TexCivA** 292SW912; **TexCivA** 8SW(2d)782. **Evidence held admissible.–TexCivA** 282SW935; **TexCivA** 298 SW154. **Evidence held inadmissible.–TexCivA** 283SW1073; **TexCivA** 298SW 154.

1219–14½–New. or, purchase-money note that had not been paid. **TexCivA** 272SW296.

1219–15½–New. And admissions by defendant's husband, where property was purchased with community funds and deed taken by third person to defraud defendant, are admissible. **Tex CivA** 285SW837.

1220–20 Statutory requirements as to evidence of abstract of title are mandatory. **TexCivA** 288SW598.

1220–22 **TexCivA** 281SW321; **TexCivA** 291SW580. **Evidence inadmissible.–Tex CivA** 282SW819.

1221–23 Tax deed more than thirty years old excluded where no proof that collector posted notices. **TexCivA** 296 SW939.

1221–24 **TexCivA** 282SW935; **TexCivA** 18SW(2d)297. **Admissibility of judgment and order.–TexCivA** 273SW1016 (execution).

1223–27 **TexCivA** 11SW(2d)327(1st case); **TexCivA** 21SW(2d)540 (issuance of order of sale sufficiently shown). **Evidence held sufficient.–TexCommnA** 280SW736; **TexCivA** 272SW587; **Tex CivA** 282SW844; **TexCivA** 282SW874; **TexCivA** 289SW431; **TexCivA** 290SW 866; **TexCivA** 1SW(2d)683; **TexCivA** 1SW(2d)950; **TexCivA** 2SW(2d)895; **TexCivA** 6SW(2d)396; **TexCivA** 8SW (2d)782; **TexCivA** 13SW(2d)743. **Evidence held insufficient.–TexCivA** 291SW 650; **TexCivA** 292SW912; **TexCivA** 9 SW(2d)363; **TexCivA** 27SW(2d)254; **TexCivA** 32SW(2d)254. **Evidence held to show title from common source.–Tex CivA** 289SW721. **Corroboration** of plaintiff's testimony is not essential to verdict for plaintiff. **TexCivA** 8SW(2d) 782.

1224–29 Burden of proof not sustained.–TexCivA 285SW264.

1225–33½–New. Directed verdict for defendant is proper where plaintiff does not prove title or right of possession. **TexCommnA** 293SW1100.

1225–36 116Tex325, 273SW1109 (sufficiency of proof of title from common source); **TexCivA** 8SW(2d)301; **Tex CivA** 20SW(2d)366(2dcase).

1225–37 **TexCivA** 289SW79.

1225–38 **TexCivA** 286SW958; **TexCivA** 291SW597.

1225–39 **TexCivA** 283SW908 (verdict for plaintiff held properly directed); **TexCivA** 10SW(2d)1043.

1225–40 **TexCivA** 289SW79.

1225–41 **TexCommnA** 280SW185; **Tex CommnA** 293SW1100; **TexCivA** 289SW 88; **TexCivA** 21SW(2d)17.

1226–42 195NC708, 143SE644; **Tex CivA** 287SW1101 (directed verdict held error); **TexCivA** 298SW154.

1226–43 **TexCivA** 281SW321.

1227–53 **TexCivA** 18SW(2d)821.

1227–61 **TexCivA** 289SW431 (findings held not inconsistent).

1228–63 Setting aside findings was reversible error where they constituted holding that plaintiff did not hold in trust but that defendant held adversely for period of limitations. **TexCivA** 8 SW(2d)203.

1228–70½–New. Court may not arbitrarily set aside finding by jury and substitute for it its own judgment contrary to finding. **TexCivA** 8SW(2d)203.

1228–70⅓–New. Grantee under conveyance from purchaser at void judicial sale having pleaded no equitable rights, nor prayed subrogation to rights under purchase, and having made no objection to jury's finding that she held it for her brother, is concluded by such finding. **TexCivA** 15SW(2d)77.

1228–76 Judgment with reference to writ of possession held improper.–Tex CivA 27SW(2d)862.

1228–77 **TexCivA** 274SW323; **TexCivA** 282SW874; **TexCivA** 287SW100. **Pleadings held sufficient** to warrant relief sustained by evidence, and not to restrict defendants to particular title pleaded. **TexCivA** 2SW(2d)971.

1229–79 **TexCivA** 282SW874; **TexCivA** 291SW26; **TexCivA** 26SW(2d)286 (judgment against evidence). **No equitable relief may be granted** unless specifically pleaded and proved. **TexCivA** 282SW874.

1229–82½–New. Where several have intervened, judgment must define interest of plaintiffs and of each intervener. 27F(2d)156.

1229–84 **TexCivA** 282SW874. **Judgment construed** as giving defendants whatever title plaintiff acquired by judgment in another suit. **TexCivA** 29SW (2d)911.

1230–92½–New. Unrestricted judgment for title and possession carries all fixtures permanently attached to realty. **TexCivA** 275SW401.

1230–92⅓–New. Personal property on land not affected by judgment and provision in decree is wholly alien to such judgment. **TexCivA** 275SW401.

1230–92¼–New. Where defendant fails to connect himself with title, affirmative decree in his favor is unwarranted. **TexCivA** 283SW611.

1230–92⅕–New. Successful party in trespass to try title recovers adversary's title as fully as if by voluntary conveyance. **TexCivA** 2SW(2d)288.

1230–92⅙–New. Judgment can have no support unless issue is raised by pleadings. **TexCivA** 2SW(2d)288.

1230–92⅐–New. Plaintiffs suing for entire land are entitled to judgment therefor for benefit of themselves and cotenants since defendant stranger cannot claim benefit of cotenant's title as heir while cotenant is still alive. **TexCivA** 16SW(2d)154.

1230–92⅛–New. Judgment entry adjudicating that plaintiff take nothing leaves no room for implication of voluntary nonsuit. **TexCommnA** 29SW(2d) 967.

1230–93 Inserting field notes in judgment.–TexCivA 284SW318.

1230–95 **TexCivA** 2SW(2d)288.

1230–96 **TexCivA** 280SW918.

1230–99½–New. In action by former wife against husband finding on sufficient evidence that property was community property requires judgment in favor of plaintiff for undivided interest. **TexCivA** 280SW918.

1231–14 **TexCommnA** 288SW817.

1232–22½–New. Where amount was allowed by judgment to attorneys for certain defendants as compensation, taxable as costs against all parties, and plaintiffs were also allowed general recovery of all costs, including such amount, allowance of costs to plaintiffs has been held unwarranted. **Tex CommnA** 12SW(2d)175.

1232–22⅓–New. Allowance to attorneys for services rendered in behalf of adult defendants, against whom no personal judgment could be rendered, should have been taxed against plaintiffs. **Tex CommnA** 12SW(2d)175.

1233–29½–New. Plaintiffs are not entitled to recover any part of lease money received by defendants, where no drilling or other work was ever done under lease which was forfeited by lessees and had never been ratified by plaintiffs. **TexCivA** 11SW(2d)329.

1233–30 **TexCommnA** 298SW409.

1234–40 **TexCivA** 8SW(2d)267.

1234–42 **TexCivA** 17SW(2d)1109.

1234–44 **TexCivA** 297SW482 (award for improvement cannot be made in absence of evidence); **TexCivA** 2SW(2d) 288; **TexCivA** 27SW(2d)862 (measure

of benefits). But see TexCivA 38SW(2d) 822.

1234-45 TexCivA 8SW(2d)782.

1234-45½-New. By disclaiming title and surrendering possession defendants do not lose right to recover for expenditures and improvements in good faith. TexCivA 17SW(2d)1109.

1236-51½-New. Willful trespassers expending money for development of oil cannot recover expenditures. Tex CivA 2SW(2d)288.

1236-62 Evidence held insufficient to show value.-TexCivA 27SW(2d)862.

1237-73½-New. Grantees under forged deed are not compelled by statute to set up claim in owner's action to try title. TexCivA 17SW(2d)1109.

1237-75 See also TexCivA 17SW(2d) 1109.

TRIAL

1267-1 165Ga296, 140SE886; 221MoA 308, 273SW169, 170 [quotCyc]; MoA 299SW74, 78 [citCyc]; 54ND925, 212NW215; 130 Okl 241, 266P1106; 37Wyo 282, 261P126. Other definitions.-81CalA396, 253P961; 123 Kan533, 255P969; TexCivA 30SW(2d) 911; 37Wyo 282, 261P126. Statutory definitions.-37Wyo 282, 261P126. Taking of testimony in divorce case after default is not, strictly speaking, trial. 195Cal 364, 233P337.

1267-3 TexCivA 295SW216.

1268-6 220Ky226, 294SW1073, 1075 [quotCyc].

1268-7 See also 104NJL387, 140A397.

1268-9 332 Ill 334, 163NE662.

1268-10½-New. Court's proceeding with damage suit against contractor without closing issues as to independent contractor held not error in absence of showing that action was commenced against latter or that request was made to close issues. 86 IndA699, 159NE763.

1268-10⅓-New. Amendment of pleadings after issues have once been fully made up by filing of pleadings, or by failure to file them, does not necessarily delay trial under statute providing that cause stands for trial whenever issues have been made up for period of ten days. 133 Okl 294, 272P1021.

1268-10¼-New. Assignment of case for trial before issues are fully made up does not constitute error. 208 Iowa1199, 227NW108.

1268-13 150Va82, 142SE373. Separate trial not allowed where two lengthy trials would result in action for cancellation of release and for fraud, on issue of validity of such release. 219AppDiv 41, 219NYS289. Separate trial on plea of privilege held properly refused. Tex CivA 25SW(2d)979.

1268-15 82 IndA377, 149NE377; 130 Misc28, 223NYS582. Purpose of statute authorizing separate trial of certain issues is to provide speedy trial of pleas in bar and matters not involving merits. 130Misc28, 223NYS582. Separate trial of validity of release will be denied where serious injuries involved and small amount paid for release. 130Misc28, 223NYS582.

1269-18 198Cal 525, 246P39. Separate parties may litigate their controversy separately if court in its discretion so directs. 198Cal 525, 246P39. New York Civ. Pract. Act § 96 authorizes such segregation of issues as makes possible two or more separate judgments. 134 Misc827, 236NYS449.

1269-18½-New. Main demand and reconvention should be disposed of in same suit. 159La796, 106S308.

1269-18⅓-New. Where there are several and distinct causes between the parties to a suit, separate trials may be had. TexCivA 282SW608.

1269-18¼-New. Where cancellation of release is sought in separate count in law action, equity action should be separately tried. MoA 285SW1015.

1269-18⅙-New. After trial of res judicata issue, defendant is not entitled to trial by jury. 35F(2d)273.

1269-20 162Ga556, 134SE303; 118Kan 370, 235P126 (inherent differences must not be overlooked); TexCivA 300SW 148. But see 125 Okl 230, 257P288.

1269-21 Cal 288P781; 213Ky1, 280SW 452; 214Ky36, 281SW1036; 152Wash 437, 278P157; Wis 231NW252. Court held not warranted in trying cases together.-Mo 24SW(2d)125.

1269-22 214Ky36, 281SW1036.

1269-24 Effect on allowance of set-offs and counterclaims.-Where actions to foreclose mechanic's lien and to recover on note are tried together on separate pleadings, defendant's recovery under counterclaim in action on note is not limited by amount claimed as set-off in mechanic's lien action. 90CalA382, 265P968.

1270-27 49RI 146, 141A331.

1270-28½-New. Court possesses no power independently of statute to hear law case with chancery suit. 146Va357, 131SE803.

1270-30 74CalA674, 241P900; 197 Ind 62, 147NE771; 132SC410, 129SE629 (within discretion of judge); Tex CommnA 12SW(2d)963. But see Tex CivA 26SW(2d)687. Plea in bar should be tried at time of determination of general issue and not as matter preliminary to trial on merits. 34Ariz43, 267P421. Plea of release need not be tried separately where release is alleged to have been obtained by fraud. 34Ariz 292, 271P406. In New York.-226App Div272, 235NYS122; 134Misc827, 236 NYS449. Equitable issues held to be first tried.-16F(2d)395. Accord and satisfaction may be tried first. 74CalA674, 241P900.

1270-31 35F(2d)945; 43F(2d)163; 47 Ida58, 272P704; 47 Ida217, 273P943; 138SC169, 136SE209. See also 230App Div661, 245NYS492. Effect of special statutory provisions.-Iowa 227NW526 (3dcase). In absence of request court need not determine whether equitable issue should be decided first. 14F(2d) 24. Where counterclaim is for damages to action for rescission of insurance policy, latter issue must be first tried before submission of former to jury, if at all. 127Misc68, 215NYS277. When question of premature submission not presented.-234Ky335, 28SW(2d)465. Equitable issues are determinable in advance of legal issues.-Oh 171NE399. Suit to cancel life policy should be first presented to, and determined by, court, notwithstanding pending law action on policy. 41F(2d)392.

1270-32 213AppDiv326, 210NYS482; 134Misc827, 236NYS449. Equitable defensive issue which is virtually controlling and determinative of law issues should be tried first. 200 Iowa1, 201NW 787. Determination of any issue which will speed controversy may be disposed of before hearing evidence on other issues. 300Pa92, 150A165.

1270-33 But see 148SC133, 145SE692.

1271-35½-New. Trial should generally be completed in one comprehensive hearing as to all disputed matters. Mass 167NE327.

1271-38 TexCivA 18SW(2d)938.

1271-40 117 Oh546, 159NE565.

1271-42 214Ky705, 283SW1047. Issue of law on demurrer held "trial" requiring ten days notice. 54ND925, 212NW 215.

1271-43½-New. In summary proceeding to eject intruder on land in absence of statutory provision as to time of trial of issue formed upon counter-affidavit, trial of issue may be had at term of court during which counter-affidavit is filed. 35GaA93, 132SE107.

1271-43⅓-New. Trial by jury.-It is not error for court to decline to try case without jury where there are questions of fact to be submitted to jury. 43 Ida327, 251P757.

1271-45 220Ala113, 124S291; 32Porto Rico 155; 32PortoRico 621. But see 219 Ky517, 293SW1081. Where proper process has issued, parties and attorneys are in court, and chargeable with notice of all orders affecting pending causes. 20AlaA531, 104S895. Neither clerk nor court is required to issue notice to parties or attorneys of setting of cases. 20AlaA531, 104S895. In Porto Rico.-32PortoRico 155. Surrogates are without power to fix particular term of supreme court for trial. 125Misc158, 210NYS727.

1271-46 98Fla970, 124S729. Notice held sufficient.-221Ala387, 129S37(2d case). When setting for trial made at time of reading docket, notice of trial is not necessary. 34PortoRico 321.

1271-47 220Ky226, 294SW1073; 125 Misc158, 210NYS727.

1271-47½-New. In absence of rules of court as to disposition or carrying over of cases once begun but not finished, order by court from bench is notice and binding on all parties. 11LaA22, 122 S143.

1272-50 74CalA473, 241P409; 82CalA 586, 256P229. Where notice of substitution of defendant's attorneys was not given to plaintiff, service of notice on attorneys who acted for defendant before substitution is sufficient. 70CalA 458, 233P415. Statute is inapplicable.-101CalA411, 281P714.

1272-51½-New. Code of civil procedure provides that, when attorney dies, is removed, suspended, or ceases to act as such, party for whom he was acting as attorney must before further proceedings are had against him be required by adverse party by written notice to appoint another attorney or appear in person. 197Cal 787, 242P936, 42ALR1342.

1272-51⅓-New. This statute does not apply where attorney of record for defendant while continuing practice of law withdraws from case on eve of trial. 197Cal 787, 242P936, 42ALR1342.

1272-51¼-New. Where counsel for defendant on evening of day preceding date of trial served plaintiff's attorney with notice of resignation as attorney for defendant and on following day filed copy of notice and resignation with clerk of court, trial court did not abuse its discretion in proceeding to trial at time set. 197Cal 787, 242P936, 42ALR 1342.

1272-57½-New. In Kentucky, trial without notice to intervener is premature, though intervening petition is demurrable. 219Ky517, 293SW1081.

1273-73½-New. In New Mexico Code (1915) § 4186 does not require five days' notice of final hearing of equity cause during term. 31NM599, 248P1096.

1274-81 230AppDiv719, 243NYS570 (service of notice nunc pro tunc by plaintiff not permitted).

1275-9 Court cannot permit plaintiff to file note of issue nunc pro tunc. 230 AppDiv719, 243NYS570.

1276-12 54ND925, 212NW215.

1276-18½-New. In Porto Rico statute does not require notice to parties or their attorneys. 32PortoRico155.

1276-18⅓-New. In Porto Rico code of civil procedure does not require clerk to notify parties of day set for trial, for law presumes that they are always advised of course of pending cases. 32 PortoRico 621.

1278-51 137Misc382, 244NYS23.

1278-57 137Misc382, 244NYS23.

1278-61 128 Okl 102, 261P549.

1279-63 Where statute provides that actions shall stand for trial at first term, failure to docket does not prevent court from setting case for trial. 216Ky819, 288SW749.

1279-72½-New. In purchaser's action to recover down payment, vendor's counterclaim for specific performance is triable as of right at equity term. 230 AppDiv661, 245NYS492.

1279-78 Consent to placing case on docket.-In discussing consolidation of cases and announcing themselves ready for trial, defendant's attorneys may be treated as consenting to placing case on docket, though consolidation is refused. 235Mich521, 209NW667.

1279-78½-New. Courts must see that litigation is disposed of with reasonable dispatch. 223AppDiv149, 227NYS 666.

1279-78⅓-New. There is no limitation on time case may remain pending on docket, or in which stale action may be reinstated on proper notice. 234Ky199, 27SW(2d)959.

1279-78¼-New. Cause of action in ejectment is properly in trial term. 137 Misc122, 241NYS386.

1279-78⅙-New. Fact issue arising on counterclaim is triable as if it arose in

action by defendant against plaintiff for cause stated in counterclaim. 230 AppDiv661, 245NYS492.

1280-80 128 Okl 102, 261P549; 40 Okl Cr413, 269P509. **Continuous session.**–215Ky514, 283SW241.

1280-81 Fixing case for trial on same day it is called for confirmation of default is not abuse of discretion where answer was filed after default was taken and issues are simple. 169La75, 124S 150(2dcase). **When judgment has been set aside,** court may set day for retrial of case. 34PortoRico 491.

1281-82 35Ariz78, 274P776; 128 Okl 102, 261P549. **In Oklahoma.**–38 OklACr 483. **Trial before appearance day.**–Tex CivA 198SW(2d)795.

1281-83 The filing of amended pleadings, etc. 126 Okl 133, 258P891. **Neither party can force cause to trial on** merits prior to term to which it is brought. 201 Iowa912, 208NW505.

1281-84 130 Okl 131, 265P761.

1282-87½-New. Trial may be had before proper term where no issue is made or parties do not desire or are unable to submit proof. 223Ky713, 4SW(2d) 721.

1282-87⅓-New. Ends of justice are promoted by speedy trial. 226AppDiv 701, 234NYS136.

1282-87¼-New. Failure to allow plaintiff time to amend complaint before setting case for trial after overruling demurrer to answer is not error where it is not shown that amendments could not be made at trial. 33PortoRico 13.

1282-90 272US701, 47SCt286, 71L ed 481; Iowa 220NW338; TexCivA 298 SW631. **Review of discretion.**–TexCivA 298SW631.

1283-4½-New. Circuit court should have set case, transferred from quarterly court, for trial on convenient day, if impossible to try on first day of term. 220Ky226, 294SW1073.

1283-4½-New. Court in setting case for immediate trial cannot ignore provisions of Practice Act and rules providing for notice of trial. 222AppDiv 652, 225NYS374.

1283-4¼-New. Where case is not reached for trial on one calendar before another is made up, and is placed on latter, it should not thereafter be called on former. 242 IllA228.

1283-4½-New. In absence of rule of court, attorneys cannot rely on clerk for notice of setting of their cases. Utah 281P200.

1283-4⅓-New. Right of defendant in nonjury case to depend upon compliance with rule governing setting cause for trial. TexCivA 30SW(2d)395.

1285-34½-New. Court has power in exercise of discretion to deny motion to restore case to day calendar where there is pending appeal from order denying defendant's motion for jury trial. 125 Misc895, 213NYS53.

1285-34⅓-New. This is so, even though it has been held that such order denying jury trial is not appealable to appellate term. 125Misc895, 213NYS53.

1285-34¼-New. In Pennsylvania.–Uniform Declaratory Judgments act provided for purpose of having issues speedily determined, which otherwise would be delayed to the possible injury of those interested, if they were compelled to await ordinary course of judicial proceedings. 283Pa255, 129A64.

1285-34½-New. For certain reasons court decided this case on its merits, but hereafter does not propose to allow statute to be used in cases clearly aside from its obvious purpose. 283Pa255, 129A64.

1285-34⅙-New. In California.–Placing cause on short cause calendar is within discretion of trial court where jury trial not demanded and testimony and argument will not exceed one hour. 102 CalA230, 282P819.

1285-35 98Fla970, 124S729. **Granting preference on sole ground that some of issues already adjudicated** held unauthorized. 135Misc212, 237NYS435.

1286-41½-New. On denial of preliminary injunction in patent infringement suit plaintiff is entitled to preference of trial on merits. 44F(2d)226.

1286-43½-New. Where in a suit on notes court ordered a jury trial, plaintiff is not entitled to preference. 159 La789, 106S305.

1286-46 Court cannot grant preference until case is properly on calendar. 230 AppDiv719, 243NYS570.

1290-90 226AppDiv244, 235NYS17.

1290-91 Notice held sufficient.–230App Div590, 245NYS425.

1290-94½-New. In cases where state is party or in interest, it has right to speedy hearing in behalf of public it represents. 103NJEq505, 143A836.

1290-95 26F(2d)100; 30F(2d)193; 180 Ark492, 22SW(2d)21; 240Mich156, 215 NW350; 241Mich91, 216NW393; 247 Mich279, 225NW566; 148Va610, 139SE 273. **Actions in which complex accounts involved.**–See also 179Ark954, 18SW(2d) 916. **Where diversity of questions and lack of clarity in presentation** made transfer of no practical efficacy, it was held dismissal in proper course. 99NJ Eq843, 133A387.

1291-96 14F(2d)956; 15F(2d)993; 35F(2d)227; 170Ark1016, 282SW358; 208 Iowa625, 226NW144; 297Pa33, 146 A113. **Common-law suit "equitable rather than legal" only in sense** of differing from ordinary law suit in that it is to be tried by application of broad principles of equity rather than technical rules of law should not be transferred to the chancery side of court. 238Mich308, 213NW167. **Effect of equitable defense.**–204 Iowa881, 216NW258. **Action by insane buyer's guardian to recover price paid for property not delivered** based on ground that there was no contract because of buyer's insanity is properly placed on law calendar. 204 Iowa881, 216NW258. **Where action cannot be maintained at law because former judgment is res judicata** of issues involved, transfer to equity side of court is not authorized. 241Mich15, 216NW407. **Fact that money judgment is claimed** does not require that case be tried at law. 208 Iowa625, 226NW 144, 149 [citCJ]. **Plaintiff's disclaimer of any equitable relief** does not require trial at law of action for purely equitable relief. 208 Iowa625, 226NW144. **Defendant must plead equitable defense** by way of brief statement to secure transfer. 128Me528, 149A149 (truth of allegations in brief statement must be established in Supreme Judicial Court).

1291-99 15F(2d)993 (on appeal); NJCh 133A172; 119 Or237, 243P548.

1291-1 15F(2d)993; 30F(2d)625; 219 Ala431, 122S421; 220Ala413, 125S649 (statute applying to such bonds fixing rights of parties went with case into equity and justified damages); 175Ark 220, 298SW1001; 175Ark979, 18SW(2d) 1000; 176Ark303, 3SW(2d)342; 178 Ark906, 12SW(2d)893; 226Ky290, 10 SW(2d)1101; 152Miss201, 119S299; 148Va610, 139SE273. **Form of motion.**–216Ala393, 113S397. **In Virginia.**–146 Va357, 131SE803. **Motion for transfer is sole remedy.**–204 Iowa881, 216NW 258. **Transfer of law action to equity docket on plaintiff's motion with defendant's consent** does not make action at law suit in equity. 38F(2d)561. **Cross bill filed by minor plaintiff's guardian ad litem after removal of action to chancery court** has been held defensive measure, not institution of suit. 220 Ala422, 125S661. **Allegations of plaintiff's complaint determine** whether case is triable in equity or at law. 208 Iowa 625, 226NW144 (complaint held to present equitable issues).

1291-2 15F(2d)993; 220Ky610, 295 SW903; NJ 133A172. But see 33 F(2d)997. **Court has discretion to extend time for pleading upon transfer.** 148Miss164, 114S268.

1291-3 178Ark906, 12SW(2d)893; 200 Iowa979, 205NW784. **In Virginia.**–146 Va357, 131SE803. **Refusal to transfer not erroneous.**–208 Iowa933, 226NW43 (from law to equity).

1291-4 15F(2d)993; 204 Iowa15, 214 NW562. **Failure to move to transfer cause to chancery** is waiver of claim that creditor's sole remedy is in chancery. Va 154SE514.

1291-5 222Ky332, 300SW861; Mass 171NE713; 102NJEq497, 141A582. See also 127 Or399, 272P668. **Where same defenses were available on law side as on equitable** denial of motion to transfer to equity is not erroneous. 221Ala 75, 127S505.

1291-6 Plaintiff consented to trial by circuit court by failure to move for retransfer. 181Ark755, 27SW(2d)1020.

1292-8 31F(2d)806(1stcase); 217Ala 180, 115S230; 220Ala155, 124S208 (transfer of detinue action held properly refused where defendant, claiming retention of title under contract of sale, did not show that he was beneficial owner of instrument); 169Ark73, 272SW 843 (answer to suit on note alleging want of consideration and release); 172 Ark317, 288SW715; 173Ark1148, 294SW 6; 200 Iowa1363, 206NW268; Ark 31 SW(2d)963; Cal 292P970; 216Ky819, 288SW749; 218Ky210, 291SW36; 234 Mich277, 207NW890; 247Mich553, 226 NW241 (action of assumpsit); 150Miss 864, 117S245. See also 219Ala431, 122 S421. **Transfer to equity side of court improper** where it does not appear as matter of law from declaration or proofs that no recovery can be had in action as brought and that verdict must be directed against plaintiff. 234Mich277, 207NW890.

1292-9 178Ark1011, 13SW(2d)314; 234 Mich277, 207NW890. See also 175Ark 271, 299SW13.

1292-10 Where action on note and mortgage is erroneously transferred to equity court, such court cannot enter judgment for plaintiff on note and direct law court to enter judgment accordingly. 102NJEq497, 141A582.

1292-11 Subject matter within equity jurisdiction.–168Ark88, 269SW367.

1292-14 278US509, 49SCt220, 73L ed 480; 28F(2d)118; 37F(2d)572 (issue of damages in foreclosure suit by trustee); 205 Iowa1203, 219NW517; Iowa 228NW 293; 226Ky794, 11SW(2d)943; 99NJEq 717, 134A298.

1292-15 217Ky320, 289SW253. But see 203 Iowa257, 212NW555.

1292-17½-New. Under statute court is authorized to direct transfer only where it has no jurisdiction of whole case. 98NJEq183, 129A183.

1292-17⅓-New. Transfer to law court of case brought in equity, has been declared error. 98NJEq183, 129A183.

1292-17¼-New. Some statutes provide that equitable defenses may be set up in legal actions by pleading defense supported by affidavit whereupon action shall be transferred to equity court. 126Me192, 137A56 (statute construed).

1292-17½-New. Retransfer of cause.–Where defendant fails to plead within statutory time after he obtains transfer to equity side of court, cause should be retransferred to law side on plaintiff's motion. 214Ala197, 107S448.

1292-17⅙-New. When amended petition in action at law states case for equitable relief, case is properly transferred to equity on plaintiff's motion. 203 Iowa364, 212NW705.

1292-17½-New. Statute regulating transfer held not to authorize transfer of purely legal action because of nonresidence of plaintiff, so that defendant may assert equitable set-off. 147Va758, 133SE788.

1292-17⅙-New. By defendant's filing cross petition to bring other claimant into court action at law became one practically triable in equity. 19F(2d) 866.

1292-17⅙-New. In Arkansas under statute, action commenced at law must be transferred to equity only when answer presents same defense exclusively cognizable in equity, or when all issues are cognizable in equity, though not exclusively so. 171Ark7, 283SW3.

1292-17⅒-New. Right to transfer is waived by failure to move therefor. 204 Iowa881, 216NW258.

1292-17⅓-New. Where cause was transferred from chancery court to circuit court on ground of failure of bill to state cause of action for discovery and accounting and that case was one of exclusive land jurisdiction, circuit court has jurisdiction whether cause is one

of equity or law cognizance. 148Miss 562, 114S347.

1292-17½-New. As regards right to transfer cause from equity to law side of court, evidence has been held sufficient to take to jury question whether insured committed suicide. 178Ark906, 12SW(2d)893.

1292-17½3-New. Question of right to proceed in equity must be determined on averments of bill only. 297Pa33, 146A 113.

1292-17½4-New. Where bill states cause of action within color of equity jurisdiction, defendant may waive right to have case tried on law side of court. 33F(2d)997.

1292-17½5-New. Right to transfer is waived by failure to move to transfer and proceeding to hearing. 39F(2d)25.

1292-17½6-New. Under some statutes action at law by insured and mortgagee on fire insurance policy, under which loss to personalty is payable to owner and loss to realty to mortgagee as interest may appear, may be transferred to chancery at suit of insurer to permit complete remedy. Vt 147A267(2dcase).

1292-18 203 Iowa1385, 214NW576; 206 Iowa794, 221NW455. In Iowa.-206 Iowa794, 221NW455.

1293-19 207 Iowa515, 221NW205; **Pleadings held insufficient** to permit court to treat demurrer as motion to transfer to equity. 169Ark622, 276SW 371. **In ejectment,** where defendant was entitled to compensation for improvements, case held transferred to chancery court. 173Ark788, 294SW21. **Defendant is not entitled to severance and jury trial** on issue of damages upon his offer to confess judgment relating to equitable relief sought. 223AppDiv634, 229NYS157. **Plea alleging fraud and collusion in delaying of enforcement of note** until collateral became worthless held not to require transfer to equity. 220Ala452, 125S903(2dcase). **Ejectment suit properly transferred to equity** to enable defendant claiming under will to show decree annulling will obtained by fraud. 220Ala666, 127S154. **In action on hail insurance policy** insurer held entitled to have transferred to equity only issues raised by plea of arbitration. Iowa 229NW221. **Motion properly overruled.**-231Ky626, 21SW (2d)1001.

1293-23 214Ky705, 283SW1047.

1293-26 173Ark788, 294SW21; 178Ark 1184, 13SW(2d)826; 180Ark355, 22SW (2d)12; 180Ark596, 22SW(2d)32; 231 Ky577, 21SW(2d)994. **Discretion not abused.**-231Ky264, 21SW(2d)281. **In Alabama.**-220Ala452, 125S903(2dcase).

1294-31 **Nature of case** is not to be judged by prayer of complaint. 191 Wis550, 211NW771.

1294-31½-New. Transfer of cause from circuit to chancery court results in discontinuing action in former court and continuing it in chancery court. 174 Ark224, 294SW1010.

1294-31⅓-New. Motion to transfer cause from equity to law docket must be established under usual rules of evidence. 24F(2d)602.

1294-31¼-New. On transfer of cause to equity docket, chancellor may try both legal and equitable issues. 26F (2d)33.

1294-31½-New. Motion to transfer action of forcible entry and detainer to equity docket properly denied under code. 216Ala76, 112S458.

1294-31⅙-New. Right to transfer cause to law court is waived by not insisting on ruling on motion to transfer before final determination of case. 175Ark708, 18W(2d)43.

1294-31⅐-New. Act, providing that right of appeal conferred does not cover questions of jurisdiction going to form of action alone as between law and equity, does not render statute applicable to determination of law or fact issues. 297Pa33, 146A113.

1294-32 210Ky121, 275SW513.

1294-34 217Ala180, 115S230; 173Ark 862, 293SW746; 204 Iowa881, 216NW 258; 234Ky252, 27SW(2d)978; 236Ky 18, 32SW(2d)542. **Transfer rests in discretion of court** where excuse for delay is offered. 240Mich156, 215NW 350. **Delay does not deprive court of jurisdiction to transfer cause** where delay is satisfactorily excused. 240Mich 156, 215NW350.

1294-38 22F(2d)957.

1294-42 216Ky819, 288SW749.

1294-43½-New. or after court submitted cause for judgment, 220Ky230, 294SW1088.

1294-44 208 Iowa397, 224NW592.

1294-44½-New. Discretion of court where motion made after decree announced.-Whether motion to transfer suit from chancery to law court will be entertained after cause has been submitted and decree announced is in discretion of chancery court. 172Ark721, 291SW57.

1294-44⅓-New. In such case refusal of transfer is not abuse of discretion. 172 Ark721, 291SW57.

1294-44¼-New. Motion not made till after issues were formed has been held to come too late. 226Ky794, 118SW(2d) 943.

1294-44⅕-New, Permitting amendment of pleading and transfer of cause to equity side of court after defendant's motion for directed verdict has been held not abuse of discretion, where no unfairness, arbitrariness, or irregularity appeared. 208 Iowa397, 224NW592.

1294-45 19F(2d)824; 174Ark224, 294 SW1010. See also 181Ark260, 25SW (2d)429. **Failure to object in court where cause is transferred** waives objection to jurisdiction. 180Ark892, 23 SW(2d)253.

1294-47 168Ark88, 269SW367.

1294-48½-New. Defendant participating in hearing on motion to transfer case to equity side does not waive error in overruling demurrer to motion. 219Ala 431, 122S421.

1295-51 Iowa 227NW536.

1295-67½-New. Order that cause be stricken from docket if not referred to master in ten days held not to cause case to be automatically dropped at expiration of such time. 339 Ill 540, 171 NE632.

1295-67⅓-New. Proper method of bringing up question whether action is as law or in equity is by motion to put on right, or strike from, wrong calendar. 200Wis429, 228NW497.

1296-70½-New. Where counsel has moved to postpone all cases without specifying any particular case, because actively engaged in another court, it is not error to retain on calendar and set for trial case in which counsel not known to judge is to be engaged. 34GaA283, 129SE294.

1296-76 When trial commences.-37Wyo 282, 261P126. **When trial ends.**-37Wyo 282, 261P126.

1296-77 272US701, 47SCt286, 71L ed 481; 173Ark970, 294SW74; 11LaA22, 122S143; 317Mo 782, 297SW20; 220 MoA452, 276SW105 (refusal to discharge jury because plaintiff wept while on witness stand); MoA 285SW151; MoA 27SW(2d)733; 117Nebr636, 222NW57; 114 Oh178, 151NE56; 300Pa92, 150A 165; 44Philippine30, 37 [quotCyc]; 150 SC130, 147SE834. **Court owes duty to all litigants and to public** in conduct of its business and not to one litigant alone. 83Colo 587, 267P792. **Granting of motion for mistrial** rests in trial court's discretion. NJSup 140A881. **Length of time that elapses** from commencement of trial to its determination where not limited by statute rests in sound discretion of court. 37Wyo 282, 261P126. **Delays should be avoided** as much as is consistent with proper administration of justice. 206 Iowa328, 218NW568. **Refusal to discharge jury** for improper conduct of plaintiff in weeping while testifying is not abuse of discretion. Mo 293SW386; 317Mo 782, 297SW20.

1296-78 CalA 290P916; Iowa 231NW 453; 226AppDiv388, 235NYS246; 198 NC346, 151SE729; 113 Okl 224, 241P 173; 116 Okl 40, 243P157. See also 148 SC419, 146SE237. **Court must keep improper extraneous influences from jury** as far as possible. 221Ala5, 127S554.

1297-79 NJ 151A754. See also 204 Iowa762, 216NW2, 55ALR745. **Presiding judge has adequate power** and duty to see that in ordinary case fair trial is had. 253Mass152, 148NE461.

1297-80 33F(2d)657.

1297-81 Trial must be confined to issues presented, with prejudicial matter excluded. 41F(2d)542.

1297-83 123Kan356, 255P81.

1297-91 Rule held not violated where will proponent's attorneys examined each other when testifying. 217Ala506, 116S686.

1297-91½-New. Ordering defendant and plaintiff's witness to stop talking and leave court room held proper discharge of court's duty to maintain decorum during trial. 77CalA164, 247P 212.

1297-91⅓-New. Trial court has full and complete control of proceedings in counselroom. 48RI 244, 137A2.

1297-91¼-New. After cause has gone to judgment as to the only party defendant no procedure exists which will permit the reopening of the case by service of an original notice on a new party and trying a new case on the old pleadings. 202 Iowa1008, 209NW744.

1297-91½-New. Court cannot restrict right to be heard by denying to one of defendant's attorneys right to object to evidence. 217Ala139, 115S98.

1297-91⅙-New. Rule restricting examination of witness to one attorney means that examination of particular witness begun by one attorney cannot be shifted without court's permission, 217Ala139, 115S98.

1297-91⅐-New. but does not preclude associate attorney from objecting to adversary's evidence. 217Ala139, 115S 98.

1297-91⅛-New. Courts and juries in decision of issues of fact and law should be immune from every extraneous influence. 193Wis602, 216NW127, 55ALR 1355.

1297-91⅑-New. No harsh, technical rule should be applied to deny party right to fair hearing and trial on facts. TexCivA 8SW(2d)296.

1297-91⅒-New. Trial court should always be alert to see that jurors are not subject to any unfair or improper influences, and that all testimony which tends to affect their conclusion shall be produced in open court. 151Va363, 144 SE477.

1297-91⅑-New. Where court at once instructed jury to leave room as epileptic plaintiff was about to have fit, it is within court's discretion to overrule motion to discharge jury. MoA 284SW815.

1297-91½-New. Court should conduct trial with utmost impartiality and fairness. Vt 150A132.

1297-93 227AppDiv736, 236NYS577 (summation held material part of trial); SD 231NW521; 194Wis149, 216NW165. **Directing summation in absence of presiding judge** and official stenographer is error. 224AppDiv667, 229NYS201.

1298-97 CCA 17F(2d)28, 32 [citCyc].

1298-8 204Cal 485, 268P905.

1299-20 77CalA164, 247P212; 101NJEq 9, 137A151. **Where party takes advantage of right to attend trial** to stage a scene for sympathy of jury, matter must be dealt with by evidence and argument. 231Ky211, 21SW(2d)272.

1299-20½-New. Every litigant is entitled to be heard in court by counsel of his own selection, and unwarranted denial of this valuable right is "fundamental error," where litigant without negligence or default on his part is deprived of such right and ex parte judgment has been rendered against him. TexCivA 8SW(2d)298.

1299-21 9LaA5, 118S773(1stcase); 12 LaA158, 125S163; 8LaA728; NJ 143 A822(1stcase); 113 Okl 97, 239P254; TexCivA 274SW161. **It is duty of defendant who has answered to be present by counsel** when case is called for trial. TexCivA 20SW(2d)383.

1299-25 Striking pleading.-36GaA528, 137SE101.

1299-28 IndA 169NE60 (reasonable time where juror temporarily ill); Mo 31SW(2d)201. **Refusal of postponement** to enable defendant to prepare

motion attacking reply is not abuse of discretion. Iowa 231NW651. Discretion not abused.–NJ 150A393.
1299–32 40 OklACR122.
1299–34 117 Okl 300, 246P220.
1300–35 32F(2d)195.
1300–36 Va 153SE832.
1300–37 214Ala8, 106S49 (refusal held harmless). Suspension of trial and ordering production of bills for materials furnished is in discretion of court. 214 Ala8, 106S49.
1300–48 Mo 286SW27; 40 OklACR122.
1300–49 101WVa337, 132SE887.
1300–53½–New. It is within discretion of court to adjourn case to permit plaintiff to file amended petition and defendants to join issue thereon; 37Wyo 282, 261P126.
1300–53½–New. and resumption of case by court will be treated as continuance of trial upon which it may consider the evidence taken at former hearing. 37Wyo 282, 261P126.
1300–55 114Nebr420, 207NW673; Tex CivA 294SW641.
1300–56 125Misc876, 212NYS393; 124 Okl 84, 253P1017.
1301–57 204 Iowa456, 215NW767.
1301–58 216AppDiv260, 214NYS533 (substantial right); TexCivA 278SW 462.
1301–59 IndA 171NE202 (error held not cured); TexCivA 278SW462.
1301–60 IndA 171NE202 (reversible error in jury trial).
1301–61 170Ark84, 278SW963; 91Fla 434, 108S846; 166Ga39, 142SE150; 204 Iowa456, 215NW767; 114Nebr420, 207 NW673; 117Nebr636, 222NW57; 124 Okl 84, 253P1017; TexCommnA 298SW 538; TexCivA 278SW462; TexCivA 297 SW238.
1302–62 177Ark136, 5SW(2d)943.
1302–63 170Ark84, 278SW963; 91Fla 434, 108S846; 35GaA236, 133SE519; 206 Iowa328, 218NW568; 226Ky594, 11 SW(2d)415; 226Ky597, 11SW(2d)417; 230AppDiv559, 245NYS649; GaA 155 SE510(2dcase); TexCivA 294SW641; TexCivA 25SW(2d)642 (under statute). Party having burden of proof entitled to open and close. 170Ark84, 278SW 963.
1304–66 226Ky594, 11SW(2d)415.
1304–67 201 Iowa263, 207NW117; 114 Nebr420, 207NW673; TexCivA 274SW 286; TexCivA 278SW462; TexCivA 295 SW932. Such admission does not preclude affirmative defenses. TexCommnA 27SW(2d)125. Admission of plaintiff's cause of action does not include matters of defense. TexCivA 295SW932. Establishment of defenses of accommodation and no consideration to action on note held not barred by admission. TexCivA 7SW(2d)915.
1304–69 35GaA595, 134SE355; Tex CivA 278SW462.
1304–70 163Ga23, 135SE427; 34GaA 190, 128SE922; 35GaA595, 134SE355; TexCivA 278SW462. That defendant pleads affirmative defense does not change rule. 219MoA519, 282SW535. Admission must be made before plaintiff begins to offer proof.–34GaA190, 128 SE922.
1305–72 TexCommnA 6SW(2d)105; TexCivA 278SW462. Effect of filing admission in action on note is to admit facts shown by note itself and fact of nonpayment pleaded. TexCommnA 288 SW826.
1305–74 TexCivA 278SW462.
1305–77 170Ga847, 154SE251; Tex CommnA 6SW(2d)105.
1305–82 91Fla434, 108S846; Tex CommnA 298SW538.
1306–85½–New. Where there are several parties whom judgment would go against if no evidence were introduced, it is in court's discretion as to which shall first produce evidence and open and close. 117Nebr636, 222NW57.
1306–87 124 Okl 84, 253P1017, 1021 [citCyc].
1306–88 124 Okl 84, 253P1017, 1021 [citCyc].
1306–92 But see 226Ky739, 11SW(2d) 930.
1307–1 IndA 171NE202.
1307–3 40GaA289, 149SE323.
1307–3½–New. Where defendant offers to admit that note was executed and induced by fraud and introduced evidence, he does not come within court rule giving defendant right to open and close where he introduces no evidence. 190NC617, 130SE306.
1307–4 204 Iowa456, 215NW767; 125 Misc876, 212NYS393 (real burden of proof).
1307–5 In Georgia.–35GaA595, 134SE 355.
1307–9 204 Iowa456, 215NW767.
1307–13 204 Iowa456, 215NW767. But see SD 226NW757.
1307–18 165Minn82, 205NW699.
1308–21 170Ark84, 278SW963.
1308–36½–New. Instruction in action to disaffirm contract held not to fix burden on defendant to give him right of closing argument. 231Ky626, 21SW (2d)1001.
1309–53½–New. Where plaintiff's prayer for injunction is granted before parties rest, defendant is entitled to open and close argument on cross action for money judgment. TexCivA 294 SW641.
1309–54 53SD337, 220NW855; Tex CivA 281SW257.
1310–57 125Misc876, 212NYS393; Tex CivA 278SW462; TexCivA 294SW285.
1310–60 TexCommnA 298SW538.
1310–66 124 Okl 84, 253P1017.
1311–70 124 Okl 84, 253P1017.
1311–71½–New. Where error required new trial, occurrence at trial subsequent to refusal was nugatory. 39GaA400, 147 SE397.
1311–72 124 Okl 84, 253P1017.
1311–74 49Nev375, 247P545, 47ALR 569.
1311–75½–New. Right to open and close is waived by parties moving for consolidation of different causes. 216 AppDiv260, 214NYS533.
1311–76 240Mich352, 215NW337; 102 NJL94, 131A292; 106WVa99, 144SE881, 60ALR570. Place of experiment or test. –106WVa99, 144SE881, 60ALR570.
1311–77 TexCivA 28SW(2d)611.
1312–80 151Md456, 135A189. Permission to demonstrate talking machine for which notes sued on were given held within discretion of court. Ark 30SW (2d)817(2dcase).
1312–88 , 245Mich425, 222NW774. Pricking injured person with needle improper. 215Ky283, 234SW1068.
1313–95 215Ala47, 109S278; 84CalA 211, 257P584; 147Miss428, 112S594 [cit Cyc]; MoA 293SW500; NJ 138A705; 103WVa64, 136SE602. See also 99Vt 227, 131A16. Court need not be present at view conducted under supervision of sheriff duly instructed. 215Ala47, 109S278.
1313–97 221Ky505, 299SW176.
1313–99 155Wash167, 283P1085.
1314–3 215Ala47, 109S278 (view of land alleged to have been damaged by flowage in presence of representatives held proper).
1314–4 219Ala101, 120S914; 246 IllA 334; Miss 112S607; NJSup 149A345 (1stcase); 107WVa440, 148SE496. See also 33PortoRico 98. Exercise of discretion.–151SC164, 148SE839. Denial of view held improper. 103WVa64, 136SE 602.
1314–4½–New. or machinery causing injury. MoA 293SW500.
1314–5 210Ky92, 275SW16; 147Miss 428, 112S594 [citCyc].
1314–6½–New. View taken by court not consented to by parties and not made in presence of plaintiff so as to give latter opportunity to explain matter revealed by view is error. 125Misc820, 211 NYS613.
1314–6⅓–New. View by court is not erroneous in mandamus proceeding. 87 CalA594, 262P477(3dcase).
1314–6¼–New. Judge may view premises on own motion or either party's request, after notifying parties. 267 Mass490, 167NE233.
1314–6⅓–New. Permitting plaintiff and witness to occupy vehicles with jurors going to and from view is error. 96Fla 422, 117S898.
1314–7 29PortoRico 843 (view by court).
1314–7½–New. Results of ocular inspection by court made with notice and in presence of both parties need not be reduced to writing if such results are stated in findings. 29PortoRico 843.
1314–8 206 Iowa338, 220NW341; 147 Miss428, 112S594 [citCyc].
1315–9 Iowa 220NW338; 125Kan199, 263P778; 210Ky92, 275SW16; 221Ky 505, 299SW176; 267Mass501, 167NE 235; RI 137A467. Application of rule. –RI 137A467.
1315–11½–New. Demonstrations at place of view.–153Miss362, 121S111.
1315–12 Ark 31SW(2d)421 (should not permit browbeating or insulting of witness). In action for wrongful death brought by widow for benefit of self and minor children, it is not error to permit plaintiff to point out her children while she is testifying concerning family situation. 319Mo 619, 5SW(2d) 447.
1315–13 161Ga93, 129SE778; NH 147 A898(2dcase); 190NC133, 129SE410 (court may correct inadvertent statement of witness on stand).
1316–23½–New. , or exclude witnesses from court room. 161Ga93, 129SE778.
1316–24 256 IllA401; Mo 278SW412; TexCommnA 276SW426, 428 [citCyc].
1316–25 35PortoRico 908 (court held not under duty to cross-question witness).
1316–28 109Conn117, 146A17.
1316–29 TexCommnA 276SW426, 428 [citCyc].
1316–31 SC 155SE231.
1316–31½–New. Where counsel declines offer to rule out examination and states that he merely wants exception and asks for no instruction in reference to it, examination by court will not be held prejudicial error. 19 OhA272.
1316–31⅓–New. Objection to examination by judge is too late when made after examination is concluded. MoA 294 SW747.
1316–33 35Ariz205, 276P322; 47 Ida 542, 277P554(2dcase); 220Ky808, 295 SW1064; MoA 4SW(2d)875; 48RI 244, 137A2 (incompatible with fair and impartial trial); TexCommnA 276SW426; TexCivA 281SW306.
1316–34 MoA 25SW(2d)133 (erroneous statement as to right to comment on absence of witness); 48RI 244, 137A2; TexCommnA 276SW426.
1316–35 103CalA490, 284P694; 164Ga 201, 138SE78; 165Ga349, 141SE74; 119 Kan576, 240P970; 128Kan603, 278P 737; 255Mass519, 152NE107; 249Mich 626, 229NW617; 170Minn191, 212NW 530; 172Minn250, 215NW181; MoA 6 SW(2d)984; NJCh 142A308; 151SC309, 149SE14; TexCivA 281SW306; Vt 150A 128(2dcase).
1317–37 90CalA764, 266P606; MoA 28 SW(2d)391.
1317–39 Remarks as to what instruction would be held not erroneous. Me 149A618.
1317–39½–New. In view of defendant's counterclaim court's remarks as to issues in case held error. 220Ky454, 295 SW455.
1317–39½–New. Trial judge is not mere umpire between opposing counsel.–Tex CivA 281SW306.
1317–41 339 Ill 426, 171NE514; 323Mo 1, 18SW(2d)438; 221MoA403, 277SW 938; MoA 296SW235; 151SC44, 148SE 648; TexCivA 281SW306; TexCivA 27 SW(2d)363; 100WVa394, 130SE478; 102WVa386, 135SE274. Statement held not comment on evidence.–Mo 274SW26. Presumption that statement or admission of party against interest is true is not proper subject for comment by court. 221MoA403, 277SW938. Ruling on objection held not intimation of opinion.–169Ga832, 152SE103. What is not an opinion on weight of evidence.–GaA 155SE51.
1319–44 132SC254, 128SE715 (that matters referred to were questions of fact to be decided by jury).
1319–45 99CalA17, 277P1053; 142SC 125, 140SE443.
1319–46 MoA 293SW79; 295Pa168, 145A81.
1320–48 165Ga408, 140SE844; MoA 283 SW732.
1320–49 120 Or666, 253P527.

1320-52 165Ga408, 140SE844; 165Ga 349, 141SE74; 40GaA328, 149SE713.
1320-54 MoA 285SW155; 296Pa568, 146A153; 135Wash248, 237P708 (protecting witness against unwarranted reflection of counsel).
1320-54½-New. Trial judge is warranted in using language sufficiently emphatic to stop wrongful practice of offering testimony which has been ruled out. 21 OhA17, 152NE908.
1320-54⅓-New. Exclusion of answer held not erroneous as intimating opinion on counsel's bona fides. 40GaA633, 151SE42.
1320-56 CalA 292P192; Nebr 227NW 321; 134SC412, 132SE811; TexCivA 281 SW306; TexCivA 25SW(2d)283; 102 WVa386, 135SE274.
1321-60 132SC476, 129SE833 (objection without merit).
1321-61 Observation of court that it was material to consider good faith of tenant in trying to get out of house after notice is erroneous where good faith of either party immaterial. Va 129SE229.
1321-63 151SC309, 149SE14.
1321-64 MoA 285SW155. **Remarks held not to show bias.–MoA** 18SW(2d) 520.
1322-65 298Pa588, 148A864.
1322-67 Mo 29SW(2d)39; 120 Or666, 253P527; 48RI 244, 137A2; 49RI 209, 141A609, 59ALR1241. But see 126Kan 188, 268P119. **Court's remarks that both counsel had exceeded scope of legitimate cross examination** is not objectionable as comment on testimony. **MoA** 248W(2d)682.
1322-69 154Md204, 140A48; 21 OhA17, 152NE908.
1322-74 48RI 244, 137A2. **Remarks not objectionable.–MoA** 27SW(2d)733.
1323-75 48RI 244, 137A2.
1323-76 48RI 244, 137A2.
1323-76½-New. Court's private warning to attorney that, if he asked questions of plaintiff to show he was strike breaker, he would be held in contempt of court, is not improper. **TexCommnA** 285SW1053.
1324-88½-New. Statement to jury that he was doubtful about given instruction. 142Va425, 128SE732.
1324-90½-New. or amendments to petition, MoA 296SW1036.
1324-10½-New. Asking jury if they were prepared without argument of counsel or instructions from court to pass on facts and law is prejudicial error requiring new trial, 197Cal 290, 240 P785.
1324-10⅓-New. and error is not cured by later consent of counsel to waive argument. 197Cal 290, 240P785.
1324-10¼-New. Not error for judge, in chambers, to warn counsel that it would be held contempt for counsel to ask witnesses improper questions. **TexCivA** 278 SW490.
1324-10⅕-New. Statement of trial judge as to affirmative charge directed to attorneys, though in presence of jury, held without reversible error, 216Ala 605, 114S6.
1324-10⅙-New. and fact that court reconsidered and declined to give charge for plaintiff held to show no error. 216 Ala605, 114S6.
1324-10⅐-New. Where counsel fails to develop fact showing that contract which is basis of suit is illegal, it is duty of court to further examine the witnesses, develop the facts and submit the issues thus made under proper instructions. 116 ObSt205, 156NE124.
1324-10⅛-New. It is not prejudicial error for trial judge to telegraph judge of another court who was not subject to subpœna and ask him to testify in case in which latter was a material witness. 194NC583, 140SE193.
1324-10⅑-New. Permitting counsel in good faith to ask if prospective jurors were interested in insurance company interested in defense is no abuse of discretion. 38F(2d)599.
1324-10⅒-New. Requiring retirement of jury during reading of opinion in another case held not erroneous. 221 Ala29, 127S188.
1324-10⅓1-New. Court's examining juror who had conversed with excused member of panel is not abuse of discretion.–37F(2d)455.
1324-10½2-New. Court's statement that certain fact would have to be proved by some one who knew of it not error. SC 155SE231.
1325-11 CalA 292P192; 37GaA45, 138 SE588; MoA 4SW(2d)875; 83NH586, 144 A263(1stcase); 86PaSuper266.
1325-13 See also TexCivA 17SW(2d) 835(2dcase). But see 241Mich383, 217 NW329, 57ALR262.
1325-14 29Hawaii750. **Failure to except promptly may waive objection.–NC** 153SE845.
1325-14½-New. Presiding justice should allow exceptions only when they relate to ruling, direction, or judgment of court. 83NH586, 144A263(1stcase).
1325-17½-New. It is not an abuse of discretion to refuse to grant mistrial because plaintiff in midst of his examination on witness stand proceeded to act hysterically. 32Ariz479, 260P191, 57 ALR55.
1325-19½-New. Where plaintiff's husband became ill in presence of jury, refusal to order mistrial held not abuse of discretion. 126Me99, 136A354.
1325-20 211Ky16, 276SW989. **Waiver of improper argument.–MoA** 17SW(2d) 363.
1325-21 Consenting to continuance of trial held waiver of exception by defendant to denial of motion for finding in his favor at close of plaintiff's evidence. 99Vt45, 130A580.
1326-26 Statement of counsel arguing admissibility of evidence is not evidence of fact stated. **Mo** 7SW(2d)387.
1326-28 Considerable latitude is shown in personal injury cases in admitting evidence as to extent of damages. 41 Ida285, 238P891.
1327-37 TexCivA 288SW271.
1327-39 See also 83NH397, 142A695.
1327-42½-New. Sufficiency of evidence need not be determined in determining its admissibility. 170Ark809, 281SW 366.
1327-42⅓-New. No evidence need be given except that which tends to prove some point put in issue by the parties. 155Tenn486, 290SW988.
1327-42¼-New. Cumulative evidence need not be introduced where, because matters to be proved thereby have already been proved by adversary, its introduction would be useless. 6F(2d) 585.
1327-42⅕-New. Statement of counsel in arguing admissibility of certain testimony is not evidence of fact stated. **MoA** 7SW(2d)387.
1327-42⅙-New. Refusal to compel claim agent of street railway, called as witness by defendant, to disclose names and addresses of passengers on street car at time of accident, as reported to him in his official capacity by conductor and motorman, has been held not error, especially where evidence sought to be elicited was not shown to be relevant. 49RI 498, 144A443.
1327-42⅐-New. Defendant need not offer evidence where court, when plaintiff rested, indicated that it deemed plaintiff's evidence insufficient. **Mo** 24SW(2d) 1011.
1327-47 36F(2d)865; 91CalA664, 267 P578; **Iowa** 228NW305; 229Ky823, 18 SW(2d)288; 74Mont385, 240P391; 192 NC87, 133SE427.
1327-49 234Mich98, 207NW848; 192NC 87, 133SE427. **Consent that issues be answered as contended by adverse party** is in effect an admission. 192NC87, 133 SE427. **Admission unintentionally made** is not conclusive. 316Mo 333, 289SW 939.
1328-50½-New. by affirmative admissions made in his pleadings, **TexCivA** 283SW298.
1328-52 See also **TexCivA** 13SW(2d) 459.
1328-54½-New. Error for court to refuse withdrawal of admission the scope of which was misconstrued by court. 289Pa516, 137A667.
1328-54⅓-New. Error in not permitting withdrawal of admission not cured by permission to withdraw juror. 289Pa 516, 137A667.
1328-54¼-New. Excluding evidence as to fact admitted is not error. 267Mass 361, 166NE879.
1328-55 146Miss581, 111S836; **TexCivA** 289SW416 (proof of stipulated fact held unnecessary). **Affidavit containing matters admitted by stipulation** of parties to be true is properly rejected. 104 CalA499, 286P177.
1328-57 Witnesses cannot be called to establish matters already agreed to. 290 Pa331, 138A849, 54ALR1285.
1328-60 146Miss581, 111S836.
1328-62½-New. Admission by counsel that he had not charged plaintiff with attempt to bribe witnesses held not intended as agreement that testimony of witnesses sought to be bribed was incompetent. 137SC319, 135SE473.
1328-62⅓-New. In equitable actions affidavits may be used as depositions by agreement of parties. 222Ky173, 300 SW346.
1328-62¼-New. Defendant submitting affidavits of witnesses on final hearing for injunction waived statutory requirements of depositions. 222Ky173, 300 SW346.
1328-63 Iowa 209NW435; 239Mich485, 214NW402; **ND** 232NW300.
1328-64 6F(2d)585 (party need not introduce evidence as to matters proved by adversary's evidence); 83CalA666, 257P538; 200 Iowa272, 204NW301; 127 Kan122, 272P138; 172Minn250, 215NW 181; MoA 30SW(2d)196; 80Mont40, 257 P1022; 54SD575, 223NW831. See also 35PortoRico 840.
1329-66 132 Or290, 285P825 (object of formal offer stated); **TexCivA** 283SW 938; 99Vt191, 130A697 (favorable opportunity should be given court to rule correctly on evidence whether direct or cross-examination).
1329-67½-New. While it is counsel's duty to accept court's ruling, counsel is not, as matter of law, precluded from asking reconsideration to enable court to correct ruling believed erroneous. 99 Vt191, 130A697.
1329-67⅓-New. Where witness is not permitted to answer question objected to unless question plainly shows that answer would be relevant, party propounding question should make sufficient proffer of what he intends to prove by answer to question. 91Fla1, 109S 448.
1329-68 12CustA15; 215Ala11, 109S 103; 215Ala548, 112S120 (court not required to cast about for reasons for which evidence offered); 21AlaA252, 107 S228; 91Fla1, 109S448; 40GaA659, 150 SE865(1stcase); 44 Ida272, 257P35; 47 Ida211, 273P757; 265Mass494, 163NE 255; Mass 167NE273; 236Mich290, 210 NW321; 309Mo 498, 512, 274SW734; [citCyc]; MoA 275SW358; Pa 151A676.
1330-69 205 Iowa752, 218NW499.
1330-70 82CalA12, 254P914.
1330-71 Cross-examination.–84Mont141, 274P844.
1331-76 100Vt443, 138A782.
1331-77 212Ala56, 101S673.
1331-78 MoA 28SW(2d)121 (interpleading chattel mortgagee).
1331-87 266Mass224, 165NE1; Contra 220MoA1294, 290SW1014, 1016, [cit Cyc].
1333-89 CalA 288P437; **MoA** 7SW(2d) 442.
1332-91½-New. Though it is not necessary on cross-examination to disclose purpose of excluded question, counsel may urge reconsideration of ruling, where error in mistake or failure to group situation is apparent or confidently believed. 99Vt191, 130A697.
1332-91⅓-New. Where court indicates that offer would be unavailing, formal offer is not required. 80Colo 355, 251P 1049.
1332-91¼-New. It is not error for trial court to sustain objection to evidence offered by defendant on issue raised by affirmative allegation of plaintiff's answer to defendant's cross complaint before plaintiff tendered any testimony thereon where court offers to receive evidence if it becomes material and de-

fendant does not renew offer. 83CalA 666, 257P538.

1332-91½-New. Where court indicates that offer would be unavailing, formal offer is not required. 46 Ida622, 269 P993.

1332-92 40 Ida726, 236P538, 542 [cit Cyc]; 21 OhA143, 153NE95; 52SD43, 216 NW601.

1332-93 Ida 290P552; 323Mo 953, 19 19SW(2d)1049 (forgery of signature); Vt 147A352.

1332-95 77CalA78, 246P130; 208 Iowa 1265, 227NW129(2dcase) (testimony offered for limited purpose held properly excluded).

1333-3 77CalA164, 247P212; 97CalA87, 275P456; 48 Ida405, 283P519; Iowa 233 NW51; Mass 168NE78.

1333-4 Competency of document against all defendants must be shown where it is offered against all defendants. 41 Ida538, 240P600.

1333-5 94PaSuper56; 99Vt446, 134A 603.

1333-6 214Ala239, 107S98; CalA 287P 509; 40 Ida726, 236P538, 542 [citCyc]; Wash 290P847.

1334-8 73CalA252, 238P742 (offer sufficient); 40 Ida726, 236P538.

1334-13 Vt 152A41.

1334-13½-New. The offer must be comprehensive enough to cover all of the issues not admitted by answer or supported by testimony of a witness. 55 ND722, 214NW897.

1334-16 Refusing long offer of proof has been held not error where court told counsel to call witnesses and rulings would be made on offered evidence as questions were asked. CalA 291P879.

1334-17 Offer held sufficient.-80Colo 355, 251P1049.

1334-18 Vt 147A352.

1335-23 See also 86PaSuper396.

1335-25½-New. Offer of proof which plaintiff was permitted to make to shorten record, though in general terms and substantially covering all allegations of complaint, has been held sufficient to put in issue question of adjuster's election not to take over or replace damaged merchandise. 29F(2d)988.

1335-25½-New. Offer of proof is properly rejected where very statement of the proposition refutes fact to be proved. NJSup 137A842.

1325-26 Reading of so much as is relevant.-158Tenn407, 15SW(2d)1.

1335-30 21 OhA93, 153NE106.

1335-33 118Nebr678, 225NW758. Contra MoA 14SW(2d)966.

1335-37 165Ca534, 141SE653; 258Mass 145, 154NE577; 221MoA748, 286SW412, 416 [citCyc]; 220MoA367, 286SW445; 81 Mont382, 263P967; 55ND722, 214NW 897; 86PaSuper477; 12PaDist&Co 639; Utah 290P367; Vt 148A481; 38Wyo 190, 266P117. **Evidence admissible for any purpose** is admissible though offered for wrong purpose. 103NJL419, 136A 176.

1336-38 MoA 31SW(2d)238; 55ND722, 214NW897; 86PaSuper477.

1336-40 That jury heard discussion and exceptions to ruling on evidence is of no consequence where evidence competent and finally admitted. 220Ala194, 124S 423.

1336-41 266Mass310, 165NE127.

1337-43 233 IllA262; 266Mass310, 165 NE127.

1337-48 249Mich391, 228NW687.

1337-49½-New. Where matter in deposition is read to court but not to jury, there is sufficient offer of proof. 322Mo 218, 14SW(2d)590, 62ALR835.

1337-51 84 IndA643, 151NE734.

1337-54 But see 133Misc703, 233NYS 339. **Special statutory provision.**-Tex CivA 290SW187; TexCivA 290SW276.

1337-55 323 Ill 468, 154NE209. **Where signature was disputed,** admitting checks with signature for comparison without first submitting them to opposing counsel held error. 323 Ill 468, 154 NE209.

1338-58 TexCivA 297SW258 (refusal to require witness to read to jury his statement of circumstances at time of accident held not error). **In Philippines.**-51Philippine1.

1338-60 See also 1LaA359.

1338-66 241Mich129, 216NW438.

1338-67 202 Iowa1270, 211NW860.

1338-69 85 IndA221, 152NE864; Md 150A797.

1338-73½-New. Offer to read document into record amounts to offer of secondary evidence and is properly rejected. 135 Wash614, 238P629.

1338-73⅓-New. Where interrogatories were introduced and answers to interrogatories were read, it was held they were evidence in action. 214Ala279, 107 S751.

1338-73¼-New. Where court desires further proof than clerk's identification of genuineness of file papers which had been out of clerk's office, it should point out what further proof it requires. 51SD 365, 213NW950.

1338-73⅓-New. and court's rejection of such documentary evidence on general objection is error. 51SD365, 213NW 950.

1338-73⅙-New. Where note is offered in evidence, indorsement appearing on back thereof must be held to have constituted part of exhibit, notwithstanding offer did not in terms include indorsement. MoA 14SW(2d)966.

1338-73⅐-New. Rescript of trial justice in former action, opinion of supreme court, transcript of testimony in such case, and jacket with entries thereon showing travel of case, have been held properly excluded in later case where counsel offered whole document. 49RI 449, 144A158.

1338-73⅛-New. In absence of showing that certified copy of mortgage was filed in court prior to announcement of readiness for trial, exclusion of copy from evidence is proper. TexCivA 16SW(2d) 941.

1338-73⅑-New. Judge should examine written contract and, if it contains prejudicial evidence on which jury are not required to pass, should exclude it from jury. 221MoA1212, 299SW103.

1338-73⅒-New. Introduction in evidence at trial of instruments whose execution is alleged and not denied by affidavit under statute is not necessary. 139 Okl 278, 281P977.

1338-73⅓-New. Admission of document signed by plaintiff alone to rebut defendant's testimony held prejudicial error since self serving and absent notice required by court rule. 50RI 400, 148A 314.

1338-73½-New. Document in record cannot be considered unless formally offered. LaA 130S883.

1339-76 104CalA232, 285P910; 252Mass 311, 147NE739 (ruling admitting testimony means, even in case where statute requires preliminary finding of facts, that all findings of facts required for determination of its competency have been made). See also 21 F(2d)298; OhA 173NE197.

1339-77 334 Ill 23, 165NE175. See also 163Ga742, 137SE69. **Exclusion of evidence under undue prejudice rule** rests in discretion of court. 83NH23, 136A 751.

1339-78 Evidence properly excluded where not tending to prove or disprove any issue. 144 Okl 216, 291P107.

1339-80 But see 178Ark951, 12SW896.

1339-82 See also 163Ga742, 137SE69.

1339-85 See also TexCivA 278SW490.

1339-94 36GaA149, 136SE319 (should be admitted and weight left to jury).

1340-96 TexCommnA 24SW(2d)363.

1340-97½-New. Where letters are competent in part but contain incompetent and irrelevant matter, their admission in evidence should be confined to such portion as is relevant and competent. 44 Ida491, 258P362.

1340-97⅓-New. Answer of plaintiff to question in action under Employers' Liability Act disclosing incidentally and unintentionally that he had a wife is not error. 32Ariz479, 260P191, 57ALR 55.

1340-97¼-New. Evidence otherwise admissible is not inadmissible because inflammatory. 203Cal 291, 264P246.

1340-98 26F(2d)574; 215Ala209, 110S 306; 174Ark1030, 298SW337; Cal 292P 645 (rule held particularly applicable to cross-examination); 35GaA560, 133SE 924; 319Mo 1169, 8SW(2d)580; 322Mo 514, 17SW(2d)960; 217MoA354, 266SW 992; MoA 272SW105; 221MoA1212, 299 SW103; 222MoA43, 299SW622; 222MoA 1003, 7SW(2d)470; MoA 17SW(2d)658; MoA 21SW(2d)890; NC 154SE674(2d case); OhA 173NE197. See also 222MoA 201, 297SW151.

1340-99 But see TexCivA 12SW(2d)811.

1340-1 319Mo 1169, 8SW(2d)580; 82 NH236, 133A9 (admission of expert testimony properly in evidence for one purpose is not error because no facts justify another use).

1340-2 219Ala16, 121S16; 221MoA999, 295SW847; 39Wyo 141, 270P537. **Evidence of circumstances justifying allowance of leading questions on taking of deposition** is properly admitted for such purpose when deposition is offered and leading questions are objected to. Iowa 228NW886.

1340-3 Time for instruction.-222MoA 43, 299SW622.

1340-4 Cal 292P645; 103Conn647, 131 A408 (court's own motion); 44 Ida491, 258P362; TexCivA 11SW(2d)371. But see 39GaA429, 147SE768. **Necessity for request.**-86CalA591, 261P313. **Refusal to limit purpose and effect of evidence at close of evidence** is not error where court states that it will instruct later. 222MoA43, 299SW622.

1341-5 319Mo1169, 8SW(2d)580; Mo 19SW(2d)1033; 222MoA43, 299SW622.

1341-6 106Conn468, 138A438; 217Ky 235, 289SW308; Mo 32SW(2d)605; MoA 277SW969. See also 143Va36, 129SE239. **Evidence properly admissible** for specific purpose held not ground for exception. 253Mass99, 148NE463.

1341-8 58ND881, 228NW217; TexCivA 10SW(2d)1051. But see 208 Iowa1020, 226NW777.

1341-9 88CalA67, 262P1106.

1342-12½-New. Admissible evidence is not made inadmissible by carrying with it some collateral fact which could not be put in proof. 256Mass66, 152NE347.

1342-12⅓-New. In automobile negligence case admission of liability is equivalent to direct evidence in considering whether greater prejudice rule is applicable, 83NH143, 139A367.

1342-12¼-New. and evidence of declaration admitting fault, containing reference to insurance, cannot be excluded under greater prejudice rule. 83NH143, 139A367.

1342-13 214Ala239, 107S98; 107Conn91, 139A639; IndA 173NE330(2dcase); 226 Ky770, 11SW(2d)909; 258Mass331, 155 NE18; MoA 274SW917; 83Mont194, 271 P444; NH 147A398(2dcase); NJ 141A 584; 120 Or160, 249P363; 44Philippine 30, 36 ("considerable discretion is necessarily left with the trial court in determining the quantum of evidence required to prove a particular fact"); TexCivA 31SW(2d)496 (exclusion not error). See also MoA 289SW970. But see 124 Or219, 263P891. **Exclusion of testimony, etc.** TexCivA 286SW901. **Facts already testified to,** etc. GaA 155SE51; Mo 278SW361. **Facts admitted.**-MoA 274SW532.

1342-14 See also TexCivA 298SW305.

1343-17 102CalA221, 282P1009; 103 CalA718, 284P1056; 90Fla1, 107S441; 97Fla350, 121S95(2dcase); 44 Ida320, 256P760, 761 [quotCyc]; 11LaA244, 123 S405; 219MoA162, 272SW108 (court's discretion not abused); MoA 21SW(2d) 219; 124 Okl 97, 254P75; TexCivA 5SW (2d)829; TexCivA 15SW(2d)1053; 69 Utah557, 257P658; 144Wash528, 258P 323. **Admission is within discretion of court.**-106Conn665, 138A790. **What is proper rebutting testimony illustrated.**-32 OhA207, 167NE701.

1343-18 220Ala385, 125S403; 173Ark 1104, 295SW16; 90Fla1, 107S441; 44 Ida 320, 256P760, 761 [quotCyc]; 217Ky148, 289SW215; 49RI 430, 143A780; TexCivA 28SW(2d)288. **What is new matter illustrated.**-49RI 430, 143A780. **What is proper rebutting testimony illustrated.**-33F(2d)60; Ala 130S807; 168Ark943, 272 SW663; 315Mo 1181, 289SW913; NJSup 135A670. **What is not proper rebutting testimony illustrated.**-213Ala494, 106S 150; 97CalA768, 276P351; 128Me124, 145 A747; 148Md628, 129A915; 172Minn250,

215NW181(2dcase); TexCivA 289SW 159. **For cases in which rebuttal testimony was held unauthorized** see Tex CivA 289SW159. **Rebuttal testimony held inadmissible.**–TexCivA 289SW159. **Rejection of irrelevant rebuttal evidence** held not abuse of discretion. 233 IllA 262.

1344–19 44 Ida320, 256P760, 761 [quot Cyc].

1344–21 295Pa168, 145A81.

1344–22 252Mass311, 147NE739.

1344–23 252Miss311, 147NE739. **Cannot introduce evidence in rebuttal** which was not previously brought out. 214Ala 187, 106S809.

1344–24 95CalA162, 272P591; Md 183A 601.

1344–26 Testimony of party at variance with his testimony in chief.–119Kan735, 241P451.

1344–26½–New. Refusal to permit testimony in surrebuttal, not abuse of discretion. MoA 272SW117.

1344–26⅓–New. Permitting defendant in partition suit to testify under general denial as to matter of defense held erroneous as not being in rebuttal of plaintiff's case. TexCivA 282SW261.

1344–26¼–New. Parties should not be permitted to prolong testimony endlessly. TexCivA 289SW159.

1344–26½–New. Reception of rebuttal testimony rests in sound discretion of trial court. 225AppDiv129, 232NYS103.

1345–27 83NH160, 139A750.

1345–28 33F(2d)449.

1345–31 161Ga978, 133SE512; 41GaA 791, 154SE704; 47 Ida542, 277P554(2d case).

1345–32 104NJL133, 139A5. **Where evidence is objected to** its admission "subject to objection" is improper. MoA 272SW1049.

1345–33 44Philippine30.

1345–35 44Philippine30.

1345–37 Ont [1925] 3DomLR45 (as to allowing more than statutory number). **Under Canada Evidence Act** number of witnesses who may be called without leave of court is limited. [1930] 4Dom LR902 (statute construed).

1346–48½–New. By statute in Ontario number of expert witnesses to be called by party without leave of court is limited. [1926] 3DomLR45.

1346–48⅓–New. Statute applies throughout whole case and does not permit calling maximum number upon each issue of fact arising. [1925] 3Dom LR45.

1346–50½–New. Generally party may present to court such witnesses as he desires to offer. 141SC238, 139SE459.

1347–55 49SD225, 207NW108 (if part of exhibit is admitted, though hearsay, defendant seeking to prove anything by it admits authenticity of whole exhibit).

1347–57 213Ala256, 104S506; 105Conn 350, 135A289; 202 Iowa1270, 211NW 860 (insurance policy).

1347–58 213Ala256, 104S506.

1347–62½–New. Objection to admission of documentary evidence held without merit where court admitted it with statement that it was for his own information and not for jury. 254 IllA289 (federal census bulletin).

1347–63 83NH23, 136A751; 36Wyo 473, 257P484, 491 [citCyc]. **Construction of rulings.**–239Mich404, 214NW195. **Particular statements of court held to constitute rulings on evidence.**–77CalA 125, 245P1098.

1347–64 36Wyo 473, 257P484, 491 [quot Cyc]. But see MoA 7SW(2d)383.

1347–65 36Wyo 473, 257P484, 491 [quot Cyc]. **Failure to rule on objection and permitting evidence to go to jury** is equivalent to overruling of objection. 34GaA203, 128SE915. **Where irresponsive answer was withdrawn by counsel,** failure of court to rule on objection is not ground for mistrial or new trial. 34 GaA203, 128SE915. **Where no ruling is obtained on objection to testimony,** it is properly in record for consideration. 51Nev125, 269P913.

1347–66 228Ky512, 15SW(2d)303; 36 Wyo 473, 257P484, 491 [quotCyc].

1348–71 Comment of court on whether offered evidence is material qualified by words "but let us see what it is" did not amount to exclusion of evidence. 103 CalA409, 284P680.

1348–72 180Ark128, 20SW(2d)866 (showing that court expressed doubt as to admissibility of evidence after having held it admissible held insufficient to show that court held testimony inadmissible).

1348–74 83NH370, 142A700.

1348–76½–New. Correction of erroneous rulings.–At all times during trial and even after opening argument it is duty of court to correct an erroneous ruling, Iowa 209NW435.

1348–76⅓–New. even though counsel is embarrassed by having predicated argument thereon. Iowa 209NW435.

1348–76¼–New. Where court grants defendant's motion to strike portion of copy of records introduced in evidence and directs his attorney to make erasure, it is duty of attorney to comply with direction. 23AlaA20, 122S467(2dcase).

1348–76⅙–New. Ruling excluding cross-examination as to effect of intoxicating liquor is not rendered erroneous by later introduction of similar evidence. Vt 152A41.

1348–77 167Ga94, 144SE759; 34GaA 203, 128SE915.

1348–80 34GaA203, 128SE915. **By objecting to the admission of evidence,** etc. 34GaA203, 128SE915.

1348–81 But see 167Ga94, 144SE759.

1348–82 34GaA203, 128SE915.

1349–83 34GaA203, 128SE915; 52SD 302, 217NW383.

1349–84 34GaA203, 128SE915.

1349–89½–New. Check on file in court cannot be withdrawn without court's order. MoA 29SW(2d)205(2dcase).

1349–89⅓–New. Refusal to permit defendant's medical witness to take X-ray photograph introduced by plaintiff to witness' office for examination held not abuse of discretion. SC 155SE136.

1349–93 287Pa505, 135A223. **In action for personal injuries** plaintiff may introduce evidence as to amounts paid for medical attention and like expenditures without first showing that charges were reasonable and necessary. 237Mich264, 211NW661. **Material evidence should not be rejected** simply because offered out of regular order. 49RI 430, 143A 780.

1350–97 Exclusion of mortgage instrument as evidence of mortgagee, held proper, before proof of mortgagor title. 99Vt75, 130A585.

1350–98 263Mass295, 160NE889; MoA 28SW(2d)121. **Whether judge will require that testimony of party be taken before testimony of his witnesses** rests in discretion of court. 40GaA415, 149SE 805(2dcase).

1350–3 16F(2d)459; 179Ark910, 18 SW(2d)903; 68CalA153, 228P726; 70 CalA614, 234P121; 82CalA116, 255P 257; 37GaA216, 139SE591; IndA 169 NE82; 209Ky451, 272SW917; 222Ky 454, 18W(2d)767; 315Mo 927, 288SW20; MoA 277SW588; 283Pa480, 129A569; SD 226NW761; TexCivA 3SW(2d)911; Vt 148A481. But see 105NJL602, 147A 402. **After proof that accident caused injury,** mortality table is properly admitted, and motion to strike all testimony as to permanent injury properly denied. 243Mich454, 220NW722.

1351–4 249Mich63, 227NW789; 94 PaSuper564; TexCivA 23SW(2d)404. **In general assumpsit,** plaintiff may not introduce evidence of express contract till proof of what services were rendered. 96Fla151, 117S853.

1351–5 221Ala629, 130S398; 106Conn 302, 138A147; 161Ga517, 131SE483; 255 IllA127; 238Mich242, 213NW158; 152Miss466, 119S203; MoA 16SW(2d) 687(2dcase); MoA 28SW(2d)121; 116 Or554, 240P1113, 241P1009; Wash 292 P416; TexCivA 31SW(2d)850.

1351–6 35Ariz302, 277P68.

1351–6½–New. Where defendant testifies that only contract made was trust receipt and notes, trust receipt may be introduced without proof of contract referred to therein. 35GaA34, 132SE 123.

1352–7 238Mich242, 213NW158; 131 Okl 101, 267P847.

1352–10 109Conn616, 145A31; 174Minn 131, 218NW455.

1352–12 214Ala678, 108S610; 83Colo 225, 263P728; 220Ky758, 295SW1046; 117 Okl 25, 245P624; Utah 266P1033. **In Kentucky.**–233Ky1, 24SW(2d)942.

1352–14½–New. Testimony of plaintiff constituting proper matter of defense may be brought as well as part of defendant's case as by cross-examination when first on stand. 99Vt227, 131A 16.

1352–14⅓–New. Law relative to order of trial is not mandatory, but only directory. 9LaA248, 120S123.

1352–14¼–New. Taking of testimony before cause is at issue has been held error. 221Ala163, 128S170.

1352–14⅕–New. Introduction of new witnesses in rebuttal of defendant's testimony is under trial court's discretion. TexCivA 26SW(2d)394.

1352–15 75CalA462, 242P1075; 91CalA 405, 267P114; 109Conn616, 145A31; Del 143A27; 47 Ida542, 277P554(2d case); 152Md536, 137A299; 154Md63, 139A564; 256Mass66, 152NE347; MoA 296SW1036; 116Nebr18, 215NW556; 198NC698, 153SE254; 300Pa569, 151A 362; 85PaSuper5; 49RI 430, 143A780; 153Va437, 150SE389; 151Wash245, 275 P559.

1353–16 12PaDist&Co 454 (material evidence not rejected because not offered at right time).

1353–17 35Ariz302, 277P68; 75CalA 462, 242P1075; 107Conn91, 139A639; 3Del 245, 138A277; 203 Iowa628, 213 NW274; 124Kan261, 259P788; 256 Mass57, 152NE236; 156Miss182, 125S 529(4thcase); 322Mo 573, 16SW(2d)63; 322Mo 813, 18SW(2d)467; Mo 24SW (2d)116; MoA 16SW(2d)687(2dcase); 116Nebr18, 215NW556; 125 Okl 202, 257P298; Or 292P93; 139 Okl 95, 281 P259; 86PaSuper477; Utah 266P1033; Vt 147A352; 148Va699, 139SE328; 104 WVa12, 138SE749; 38Wyo 151, 265P 446. **In case of doubt as to admissibility** of rebuttal evidence better rule is to admit material evidence and allow defendant to rebut any new matters therein. 214Ala678, 108S610. **But in cases of conspiracy** it is said to be better rule to first require prima facie proof of conspiracy to be made. 203 Iowa628, 213 NW274.

1354–18 75CalA462, 242P1075; 205 Iowa51, 217NW557; 124Kan261, 259P 788; 152Md536, 137A299; 125 Okl 202, 257P298; Vt 147A352.

1354–19 84Mont304, 275P281; 49RI 430, 143A780.

1354–21 Del 143A27; 125 Okl 202, 257 P298; 296Pa462, 146A122; 49RI 53, 139A916.

1355–23 72CalA736, 238P110; 76Mont 105, 245P523, 526 [citCyc].

1355–24 72CalA736, 238P110.

1355–25 72CalA736, 238P110; 76Mont 105, 245P523, 526 [citCyc].

1355–26 76Mont105, 245P523.

1355–27 221Ala629, 130S398.

1355–28 256Mass5, 152NE236; 85Pa Super5 (no prejudice).

1355–29 85PaSuper5.

1355–30 34Ariz230, 270P629, 634 [cit Cyc]; 72CalA736, 238P110; 55AppDC 323, 5F(2d)538 (plaintiff relying on res ipsa loquitur cannot offer in rebuttal evidence of specific negligence); 44 Ida 320, 256P760; 124Kan261, 259P788; Md 183A601; 33NM117, 263P504; 21 OhA93, 153NE106; 126 Or532, 270P521; 49SD442, 207NW449; TexCivA 27SW (2d)292; Vt 146A67.

1356–31 9LaA568, 121S642; 296Pa568, 146A153.

1356–32 72CalA736, 238P110; 128Me 124, 145A747; TexCivA 289SW159.

1357–36 214Ala678, 108S610; 84Colo 511, 272P6; 93Fla387, 112S264; 241 IllA124; 120Kan474, 244P2; 244Mich 319, 221NW318; 149Miss42; 115S115; 322Mo 813, 18SW(2d)467; 219MoA162, 272SW108 (plaintiff's mother permitted in rebuttal to show physician took plaintiff to X-ray specialist in contradiction of his and others' testimony that no X-ray photograph was taken); 124 Okl 97, 254P75; Or 292P93; 12PaDist&Co 454 (when defense is new matter conflicting inferentially with plaintiff's

case); TexCivA 289SW159; TexCivA 10 SW(2d)1040; Vt 147A352; 148Va699, 139SE328; 151Wash245, 275P559; 104 WVa12, 138SE749. **Evidence held properly admitted in rebuttal.**–Va 153SE 832.

1358–39 See also 95CalA162, 272P591.

1359–43½–New. After testimony that ward and another were incapable of giving checks was introduced evidence of checks held admissible. TexCivA 295 SW646.

1359–47 Del 143A27.

1360–48 120Kan474, 244P2.

1360–50 49SD442, 207NW449.

1360–51 71CalA197, 234P926; 82CalA 356, 255P537; Ida 292P220; 202 Iowa 778, 211NW228; 203 Iowa447, 212NW 684 (right is not absolute); 204 Iowa 1046, 216NW952; 206 Iowa328, 218NW 568; 124Kan261, 259P788; 166Minn 308, 207NW644; 179Minn99, 228NW 447; NJSup 130A823; 128Misc275, 218 NYS545 (in action to foreclose a vendor's lien); 23 OhA438, 155NE145; 139 Okl 1, 281P234; 142 Okl 194, 286P1 (permitting plaintiff to open case held not abuse of discretion); 143 Okl 140, 287P1003; 43 OklACR213; 44 OklACR 225; 117 Or231, 242P821; 132 Or641, 285P819; TexCommnA 7SW(2d)872; TexCivA 289SW79; TexCivA 26SW(2d) 299; 152Wash681, 279P107; 33Wyo 457, 240P449. **Refusal to allow additional proof held proper.** TexCivA 289 SW88.

1360–52 202 Iowa778, 211NW228; 124 Kan261, 259P788; 232Ky702, 23SW(2d) 564; 166Minn308, 207NW644; 128Misc 275, 218NYS545; 44 OklACR225; 120 Or286, 249P627; 33Wyo 457, 240P449.

1361–53 202 Iowa778, 211NW228; 124 Kan261, 259P788; 235Mich665, 209NW 818; 166Minn308, 207NW644; 43 Okl ACR213; 44 OklACR225; 33Wyo 457, 240P449. **Discretion abused.**–23 OhA 438, 155NE145. **Discretion not abused.**–232Ky702, 23SW(2d)564.

1361–56 Offer of evidence which was available at original hearing held properly refused. 235 IllA401. **Reception in absence of counsel** held not prejudicial, where notice given and objections noted. 260Mass102, 156NE735.

1361–57 235Mich665, 209NW818; 78 Mont199, 253P260.

1361–58 203 Iowa447, 212NW684; 235 Mich665, 209NW818.

1361–59 206 Iowa328, 218NW568; 78 Mont199, 253P260 (disclosure of evidence unknown before trial ended); 296Pa449, 146A119; 33Wyo 457, 240P 449, 452 [citCyc].

1362–60 222MoA153, 28SW(2d)815.

1362–63 78Mont199, 253P260.

1362–67 TexCivA 292SW953.

1362–68 136Wash160, 239P1. **No error to refuse reopening** where new evidence could not change result. 136 Wash160, 239P1.

1362–69 136Wash160, 239P1.

1362–70 151Miss1, 117S336.

1363–81 150Miss105, 116S441.

1363–82 See also 235Mich665, 209NW 818.

1363–85 203 Iowa447, 212NW684. See also 14F(2d)705.

1363–86 11F(2d)967; 89CalA594, 265 P580; 120Kan474, 244P2; 122Kan533, 253P578; 149Misc766, 115S897; 54SD 421, 223NW338; TexCivA 281SW331; Utah 290P954; 197Wis374, 222NW239.

1364–87 33Wyo 457, 240P449, 452 [cit Cyc].

1364–91 33Wyo 457; 240P449, 452 [cit Cyc].

1364–92 197Wis374, 222NW239.

1364–94 33Ariz374, 265P84; 68CalA 367, 229P873; 48 Ida447, 282P864; Mo 30SW(2d)77; 82NH105, 129A873; 33 PortoRico 895; TexCivA 10SW(2d) 1040.

1365–95 234Ky385, 28SW(2d)465; 9 LaA248, 120S123; 260Mass102, 156NE 735; MoA 272SW117; 123 Or661, 263 P890; 132 Or641, 285P819; TexCivA 289SW79; TexCivA 293SW835 (held not abuse of discretion); TexCivA 21SW(2d) 326. **Discretion not abused.**–TexCivA 289SW79. **In Texas.**–TexCivA 21SW(2d) 305.

1365–96 239Mich663, 215NW8. **Discretion is abused** by refusal to reopen case to allow defendant to introduce competent evidence necessary to his case where no delay is requested and no prejudice can result. 239Mich663, 215NW 8. **Failure to receive additional testimony held error** where issue upon which it was presented had not, in lower court's opinion, been proved. TexCivA 284SW 318.

1365–97 Documentary evidence received in defendant's absence is not prejudicial where court had announced intent to open case to receive it. 260Mass102, 156NE735.

1366–2 TexCivA 281SW331.

1366–6 101CalA625, 281P1054.

1366–6½–New. It is not error to refuse to open case to permit witness to testify as to conclusion from facts already testified to by him. Va 154SE526.

1366–7 30F(2d)586; 179Minn19, 228 NW440; 23 OhA438, 155NE145; 294Pa 474, 144A430; RI 133A811; 139SC139, 137SE434; 154Tenn241, 290SW39, 50 ALR1369; TexCivA 12SW(2d)1042. **What is an abuse of discretion.**–239Mich 663, 215NW8; 125Misc319, 211NYS547. **Refusal of court to reopen case held error.**–146Va789, 132SE844. **Amendment after agreement of motion.**–296Pa449, 146A119.

1366–8 137Wash254, 242P19 (denial of right to make further proof held abuse of discretion). But see TexCivA 291SW 639.

1367–9 139SC139, 137SE434.

1367–10 94Fla1165, 115S505; NH 150 A905 (after granting motion for nonsuit).

1367–14 240 IllA247; TexCivA 282SW 940; 152Wash681, 279P107 (refusal to reopen case held not abuse of discretion).

1367–15 48 Ida550, 283P606.

1368–17 213AppDiv746, 210NYS96.

1368–19 94PaSuper346 (offer properly refused).

1368–24 Failure to reopen case after directed verdict held error where evidence offered would have precluded result. 203 Iowa447, 212NW684.

1368–26 260Mass102, 156NE735; 33 Wyo 457, 240P449, 452 [citCyc].

1369–30½–New. After demurrer to evidence, court may permit order of check that was element in case. MoA 271SW 1029.

1369–33 117 Or231, 242P821.

1369–35 But see 144 Okl 144, 289P706.

1369–36½–New. Denying other party privilege of introducing evidence of different matters held not abuse of discretion. Ida 292P220.

1369–38 46 Ida294, 267P828. **Due diligence must be shown.**–206 Iowa328, 218NW568.

1369–40 219Ala465, 122S448; 160Ga 872, 129SE532; 310Mo 655, 276SW36; 57ND447, 222NW476.

1370–41 RI 148A595 (refusal to exclude either husband or wife has been held not error).

1370–43 160Ga872, 129SE532; 102WVa 491, 135SE578.

1370–44 160Ga872, 129SE532; 102WVa 491, 135SE578.

1370–46 219Ala465, 122S448; 160Ga 872, 129SE532 (husband of caveatrix in will contest permitted to remain to aid her counsel and required by court to be sworn as first witness); 102WVa491, 135SE578.

1370–49 40GaA415, 149SE805(2dcase).

1371–50 88CalA272, 263P339; 319Mo 275, 3SW(2d)1025, 61ALR1269. Contra 310Mo 655, 276SW36.

1371–60 119 Or450, 249P173; TexCivA 283SW927; TexCivA 28SW(2d)622.

1371–61 219Ala23, 121S24.

1372–64 57ND447, 222NW476. See also 35GaA436, 133SE348.

1373–79 22F(2d)403; 212Ala515, 103S 549; 220Ala220, 124S516; 21AlaA44, 104S887.

1373–79½–New. Codefendant cannot object to cross-examination of plaintiff because not proper cross-examination. 84CalA736, 258P627.

1373–81 121Kan91, 245P1044.

1374–85 Mass 173NE436.

1374–88 NJSup 132A245; NC 154SE 674(2dcase).

1374–89 86 IndA641, 159NE164. **Where the answer of a witness is objected to,** etc. 99Vt91, 130A758.

1375–90 99Vt91, 130A758 (improper part of answer excluded, remainder permitted to stand).

1375–91 NC 154SE674(2dcase).

1375–91½–New. Excluding part of answer permissible where part left is not changed. 99Vt91, 130A758.

1375–91⅓–New. All related testimony properly stricken on motion to exclude testimony leading to particular answer. 99Vt91, 130A758.

1375–91¼–New. Question enumerating acts, excluded; did not give succeeding questions false reference. 99Vt91, 130A 758.

1375–91½–New. Excluding answer, declared not to affect succeeding questions based thereon. 99Vt91, 130A758.

1375–94 TexCivA 290SW846.

1375–95 216Ala663, 114S182.

1375–95½–New. Overruling objection to weight, and not competency, of evidence is not reversible error. 21 OhA314, 153 NE221.

1375–95⅓–New. Objection to single question goes only to that question and is not objection to other testimony on same general subject. 103NJL589, 137 A549.

1375–96 200Cal 348, 254P532; 43 Ida 661, 254P528; 140Miss537, 106S445; MoA 27SW(2d)1036; 116Nebr729, 218 NW753; 126 Or26, 268P750.

1375–97 43 Ida661, 254P528.

1375–98 43Ida661, 254P528. **Objections not sufficiently specific.**–221Ala381, 129S50.

1376–99 212Ala614, 103S682; 213Ala84, 104S3; 213Ala695, 106S37; 214Ala102, 106S607; 215Ala465, 111S22; 218Ala 201, 118S393; 218Ala609, 119S647; Ark 294SW707; 177Ark177, 6SW(2d) 10; 181Ark818, 28SW(2d)68; 160Ga 497, 128SE66; 160Ga634, 128SE903; 164Ga552, 139SE31; 169Ga243, 150SE 76; 34GaA36, 128SE213; 37GaA472, 140SE780; 40GaA834, 151SE665(2d case); GaA 155SE370; 43 Ida661, 254 P528; 203 Iowa1392, 214NW592; 228 Ky652, 15SW(2d)452; 263Mass427, 161 NE616; 318Mo 28, 298SW817; 218MoA 660, 267SW445; MoA 296SW1036; MoA 26SW(2d)807 (hypothetical question); MoA 27SW(2d)438; 128 Or263, 274P 322; 52SD324, 217NW393; TexCommnA 276SW647; TexCivA 285SW920; Tex CivA 286SW661; TexCivA 287SW127; TexCivA 289SW169; TexCivA 290SW 292; TexCivA 5SW(2d)824; TexCivA 8 SW(2d)705; TexCivA 12SW(2d)811; TexCivA 18SW(2d)942; TexCivA 20SW (2d)266; TexCivA 22SW(2d)971; Tex CivA 24SW(2d)786; TexCivA 31SW(2d) 673. **Letter admissible in part** held properly admitted over general objection. Ark 294SW707.

1378–2 214Ala204, 106S858; 216Ala 547, 114S41; 220Ala242, 124S528; 21 AlaA130, 106S214; Ala 130S401; 83Colo 225, 263P728; 36GaA543, 137SE299; 36 GaA767, 138SE244; 203 Iowa1392, 214 NW592; 153Md188, 137A902; 74Mont 293, 240P384; 53ND621, 207NW1003; 117 Okl 181, 245P594; 126 Or26, 268P 750; 54SD639, 224NW185; TexCivA 289 SW159. **Motion to exclude evidence must be specific.**–21AlaA130, 106S214. **Purpose of rule** is to enable opposite party to obviate objection if possible. TexCivA 289SW159.

1378–3 214Ala102, 106S607; 21AlaA 130, 106S214; 321Mo 840, 12SW(2d)747; 323Mo 64, 18SW(2d)445; 104NJL397, 140A419; 189NC644, 127SE688; 92Pa Super458; 91CalA333, 266P1009; 36GaA 543, 137SE299; Nebr 227NW319; 117 Okl 181, 245P594.

1380–6 Mo 298SW51; MoA 19SW(2d) 559; MoA 27SW(2d)739; TexCivA 27 SW(2d)556; 152Va38, 146SE353.

1381–7 216Ala645, 114S308; 165Ark 273, 262SW681; 175Ark43, 295SW13; Ark 32SW(2d)162; 198Cal 32, 243P423; 104Conn54, 132A553; 203 Iowa1392, 214 NW592; Mo 32SW(2d)86; MoA 14SW (2d)506; TexCivA 286SW1001 (letter objected to as a whole parts being ad-

missible); TexCivA 293SW584; 101WVa 1, 131SE869. But see 220Ala683, 127S 500(2dcase). Restricting purpose of evidence.–198Cal 32, 243P423. Court may exclude on general objection evidence partly incompetent where it is offered without proper restriction or limitation. 212Ala614, 103S682. Unless evidence is manifestly illegal, irrelevant and apparently incapable of being admissible with other evidence general objection cannot be sustained. 220Ala328, 124 S892. Where part of evidence objected to is competent, general objection is not available. 40GaA439, 150SE447(2d case); Mass 169NE495.

1383–18 228Ky652, 15SW(2d)452.

1384–29 See also 153Md188, 137A902. Objection that evidence was "incompetent, irrelevant, immaterial, vague, and indefinite" held too general to go to variance. 337 Ill 241, 169NE193.

1384–30 23 OhA104, 154NE747.

1384–34 26F(2d)574.

1384–35 216Ala642, 114S298; 117 Okl 181, 245P594.

1384–36 See also 51SD365, 213NW950.

1385–43 216Ala642, 114S298.

1385–44 244 IllA264; MoA 296SW1036.

1385–46 49ND777, 193NW481; 53ND 621, 207NW1003.

1385–47 84 IndA446, 151NE342.

1385–48 221MoA345, 273SW176; 53 ND621, 207NW1003; 38Wyo 285, 267 P92.

1386–49 167Ga340, 145SE448; 53ND 621, 207NW1003; 38Wyo 285, 267P92.

1386–50 49ND777, 193NW481.

1386–56 36GaA767, 138SE244.

1387–57 94CalA48, 270P704.

1387–58 200 Ind298, 163NE89.

1387–60 Objection on ground of immateriality adds nothing to objection on ground of irrelevancy.–Utah 263P 495.

1387–62 36GaA767, 138SE244.

1387–63 39GaA93, 146SE323(3dcase).

1387–64 But see 222MoA307, 297SW 129.

1387–70 84Colo 234, 269P19; 205 Iowa 51, 217NW557; 219MoA211, 269SW665; MoA 298SW254; MoA 7SW(2d)298; 38 Wyo 285, 267P92. Hearsay or self-serving.–165Minn342, 206NW645.

1387–72½–New. , or is insufficient. 36 GaA767, 138SE244.

1387–72½–New. Objection held untenable and too general.–Irrelevant, immaterial, and not binding on defendant. 125Misc390, 211NYS195.

1388–75 Mo 256SW222.

1388–80 MoA 17SW(2d)658.

1388–81½–New. Objection to exhibit held sufficiently specific. Iowa 233NW 51.

1388–82 6F(2d)844; 18F(2d)934; 215 Ala507, 111S235; 216Ala97, 112S454; 219Ala53, 121S47; 33Ariz128, 262P995; 173Ark322, 292SW359; 73CalA252, 238 P742; 164Ga696, 139SE333; 36GaA543, 137SE299; 219MoA211, 269SW665; Mo 318SW(2d)792; 83NH143, 139A367; 21 OhA124, 152NE911; TexCivA 294SW 641; 152Va38, 146SE353.

1389–83 164Ga696, 139SE333.

1389–95½–New. Where objection went only to admission of execution in evidence, it did not raise question that on its face it was erroneous and voidable. TexCivA 273SW1016.

1389–95½–New. Objection that judgment debtor had no title to land did not render inadmissible execution constituting claim in plaintiff's title. Tex CivA 273SW1016.

1390–98½–New. Objections to hypothetical question as assuming facts not in evidence and omitting certain proved facts is properly overruled where such assumed or omitted facts were not called to court's attention. 323Mo 929, 20 SW(2d)34.

1390–98½–New. Objection as incompetent and immaterial held sufficient to exclude evidence as irrelevant. Iowa 233NW51.

1390–2 214Ala561, 108S367.

1390–2½–New. If any part of evidence, to all of which objection is interposed, is admissible, objection will be overruled. TexCivA 283SW271.

1390–4 216Ala321, 113S495; LaA 130 S846.

1390–8 106Conn119, 137A241; 246 IllA 69; 202 Iowa837, 211NW361; 233Ky383, 25SW(2d)1046; MoA 294SW426; MoA 27SW(2d)1036; 97PaSuper178.

1391–11 216Ala321, 113S495; 202 Iowa 837, 211NW361.

1392–12 216Ala321, 113S495; 23AlaA 227, 124S115; 200 Ind298, 163NE89; 319Mo 8, 4SW(2d)762; Mo 318SW(2d) 792; MoA 283SW732; MoA 291SW525; MoA 296SW243; MoA 7SW(2d)383; MoA 25SW(2d)491; MoA 298SW(2d)726; 116 Or18, 240P225.

1392–14 262Mass13, 159NE459.

1392–15 MoA 277SW596; 51Nev125, 269P913; 116 Or18, 240P225.

1392–16 219Ala162, 121S543; 198Cal 1, 242P939.

1393–21 133 Or663, 291P1017(1stcase).

1393–22 115 Or656, 239P825.

1393–24 202 Iowa837, 211NW361.

1393–30 15F(2d)790.

1393–35 320Mo 371, 8SW(2d)11.

1393–39 37GaA240, 139SE686; 211Ky 16, 276SW989; Mich 233NW420; 21 OhA 124, 152NE911; TexCivA 278SW(2d) 363. Appellant objecting and excepting to incompetent testimony does not waive error to admission by subsequent contradictory testimony. 168Ark1019, 273 SW1. Acts not constituting waiver.–35F(2d)587.

1393–40 Mo 31SW(2d)1010; 219MoA 121, 272SW79; 192NC144, 134SE407; 116 Or18, 240P225, 227 [quotCyc]; TexCivA 28SW(2d)871. Facts not excusing failure to make proper objection.–MoA 27SW(2d)739.

1393–41 83CalA689, 257P211; 86Colo 293, 281P366, 66ALR1166; GaA 155SE 85; 211Ky16, 276SW989; Md 150A263; Mass 172NE240; 318Mo 1190, 3SW(2d) 241; 319Mo 87, 5SW(2d)388; 219MoA 121, 272SW79; MoA 292SW1054; 192 NC144, 134SE407; 116 Or18, 240P225, 227 [quotCJ]; SD 224NW951. Presence of evidence not objected to does not show that case was tried on wrong theory. 220MoA502, 274SW888.

1394–42 177Ark271, 6SW(2d)15; 140 Miss294, 105S513; MoA 7SW(2d)304; 84Mont597, 277P620; 192NC144, 134SE 407; 116 Or18, 240P225, 227 [quotCyc]. See also 219Ala201, 121S704, 64ALR 553 (2dcase). Where not made till jury has been charged, objection is waived. 115 Or656, 239P825.

1394–43 25F(2d)398; 34Ariz230, 270 P629; 93CalA775, 270P382; 76CalA635, 245P432; 80CalA609, 252P733; CalA 259P973; 90CalA429, 265P1021; CalA 288P79; CalA 290P519(2dcase); 170Ga 135, 152SE466; 201 Iowa502, 207NW 563; 234Ky207, 27SW(2d)950; 170La 392, 127S879; 8LaA417; Md 151A400; 265Mass295, 164NE85; Mass 171NE 474; Mo 298SW(2d)1090; 221MoA345, 273SW176; MoA 294SW426; MoA 9 SW(2d)681; MoA 19SW(2d)297; 84Mont 158, 274P489; 56ND87, 215NW921; 114 Oh523, 151NE645; 116 Or18, 240P225, 227 [quotCyc]; 156SC322, 153SE168 (1stcase); TexCivA 272SW597; TexCivA 282SW903; 38Wyo 346, 266P1058. But see 265Mass182, 163NE740, 62ALR506. Contra TexCivA 290SW800. Testimony which is without probative value, even though admitted without objection, will not support or sustain verdict. 34GaA 72, 128SE237. Evidence received without objection or exception must be considered whether competent or not. 253 NY1, 170NE471.

1395–44 34Ariz230, 270P629, 634 [cit Cyc]; 98CalA101, 276P389; 201 Iowa 502, 207NW563; 150Miss857, 117S244; MoA 294SW758; MoA 6SW(2d)988; MoA 15SW(2d)964; NJ 145A637; 197 NC689, 150SE334; 116 Or18, 240P225, 227 [quotCJ]. Instruction as to law of another state is proper where such law was introduced in evidence, without objection, as law governing matter in issue. 219MoA121, 272SW79. Instructions held proper which stated legal effect of ordinance introduced in evidence without objection. 40GaA827, 151SE685.

1395–46 80CalA609, 252P733; 5LaA66; 266Mass329, 165NE410; MoA 286SW 157, 159 [quotCyc]. But see 70Utah95, 258P216.

1395–46½–New. Admission of evidence on apparently related matters without objection does not bar objection at close of case for failure of proof. 230AppDiv 197, 243NYS207.

1395–50 203 Iowa62, 212NW314; MoA 7SW(2d)1018; MoA 10SW(2d)665. Conclusion held some evidence of fact sought to be proved, where admitted without objection. MoA 7SW(2d)1018.

1395–53 246 IllA69; TexCivA 282SW 903.

1395–54 195Cal 533, 234P317; 232Ky 622, 24SW(2d)265; 219MoA211, 269SW 665; MoA 22SW(2d)61; 193NC122, 136 SE289.

1396–56 83Colo 78, 262P919; 140Miss 294, 105S513. In case of conflict between primary evidence of contents of official record and secondary evidence, inadmissible if objected to primary evidence prevails. TexCivA 297SW900.

1396–57 25F(2d)398; 83CalA689, 257 P211; 226Ky776, 11SW(2d)956.

1396–58 211Ky16, 276SW989; 226Ky 286, 10SW(2d)1091; 228Ky512, 15SW (2d)303.

1396–59 228Ky512, 15SW(2d)303.

1397–71½–New. That party permitted admission of illegal testimony without objection will not authorize admission of similar irrelevant and immaterial testimony in rebuttal of former irrelevant matter. 160Ga732, 129SE57.

1397–72 TexCivA 10SW(2d)746.

1397–76 Mo 23SW(2d)130; 83NH501, 144A787; TexCivA 290SW800. But see 218Ala201, 118S393; 320Mo 371, 8SW (2d)11.

1397–77 Mo 23SW(2d)130. Contra Tex CivA 276SW765.

1397–77½–New. Failure to object to admission of parol evidence to vary writing does not alter legal rights of parties but its incompetency to vary writing may be considered as matter of law. TexCommnA 280SW521.

1397–77½–New. Even though parol agreement not to partition is admitted without objection, partition will be decreed, where such agreement is unenforceable and will not be considered. 214AppDiv383, 212NYS196.

1397–77¼–New. Failure to object to question immediately preceding one to which objection was made does not waive latter objection. 129 Okl 265, 264 P628.

1397–77⅓–New. Defendant's failure to object to evidence showing building's actual value when taken does not authorize testimony as to replacement value. 291Pa252, 139A848.

1397–77⅓–New. Party is not required to interrupt cross examination of his witness and interpose objection, his failure to do so not implying consent that such immaterial matter may become issue. 219Ala392, 122S349.

1397–78 214Ala132, 107S73; 21AlaA44, 104S887; 34Ariz230, 270P629, 634 [cit Cyc]; 6LaA216; 81Mont281, 264P132; 83NH143, 139A367; 21 OhA124, 152NE 911.

1398–80 241 IllA320; 122Kan620, 253 P245, 248 [citCyc]; 219MoA222, 269 SW942; 220MoA791, 277SW58.

1399–81 122Kan620, 253P245, 248 [cit Cyc].

1399–82 174Ark1025, 298SW198; 219 MoA222, 269SW942; 221MoA1029, 295 SW816; MoA 27SW(2d)467; 193NC 670, 139SE232; 49ND777, 193NW481; TexCommnA 25SW(2d)813. But see Wash 290P232.

1399–83 4F(2d)888; 213Ala99, 104S25; IndA 169NE354; 219Ky51, 292SW476; 222Ky454, 1SW(2d)767; MoA 27SW(2d) 467; 49ND777, 193NW481; 26 OhA420, 160NE520. But see SD 233NW281.

1399–88 295Pa368, 145A431.

1400–91 95CalA617, 273P165; 37GaA 240, 139SE686; IndA 149NE79; 230Ky 49, 18SW(2d)873; TexCivA 273SW932 (interrogatory and answer in deposition became competent against party, waiving objection by reading them in evidence). Documentary evidence.–Tex CivA 13SW(2d)995. It is assumed that document originally incompetent is rendered competent by use thereof by objecting party.–39F(2d)933.

1400–92 21F(2d)701; 167Ga843, 146 SE835; 93PaSuper314.

1400-98 168Minn93, 209NW867.
1400-98½-New. , or by stipulation for its introduction. 25F(2d)441.
1400-99 Contra MoA 281SW97.
1400-1 See also TexCivA 20SW(2d)266.
1401-8 IndA 152NE177.
1401-13½-New. Party cross-examining witness testifying as to market value for purpose of determining basis of his opinion does not thereby forfeit right to move to exclude testimony on ground that opinion was based on element of damage not recoverable. TexCivA 13 SW(2d)416.
1401-15 152Md321, 136A644 (evidence objectionable for unresponsiveness); 319Mo 1169, 8SW(2d)580; 224AppDiv 492, 231NYS417; 50ND494, 196NW953; 134 Okl 66, 272P874; 133 Or663, 291P 1017(1stcase). **Where expert's qualifications are not challenged** motion to strike out his testimony was properly denied. Mo 28SW(2d)1008.
1401-16 36F(2d)934; 31Ariz39, 250P 356; 218MoA563, 267SW6; MoA 273SW 764; MoA 272SW117; MoA 288SW974; 51Nev125, 269P913; 102NJL186, 130A 542; 122 Or579, 260P444; 129 Or32, 275P913(2dcase); 285Pa260, 131A858; 85PaSuper164; 148SC152, 145SE699; TexCivA 275SW430. See also TexCivA 284SW983.
1401-17 93CalA401, 269P972; 94CalA 48, 270P704; 220MoA102, 278SW806. **Motion essential when evidence proper originally becomes incompetent.**-220MoA 102, 278SW806.
1402-18 36F(2d)922; 255 IllA21.
1402-19 If such evidence is later ruled out without objection by party offering it he is deemed to have acquiesced in the ruling. 32NM5, 250P21.
1402-20 319Mo 1169, 8SW(2d)580.
1402-21 MoA 272SW704; TexCivA 17 SW(2d)835(2dcase).
1402-24 But see 149Md318, 131A444.
1402-25½-New. Failure to make motion to strike abstract of title not filed in time does not preclude objection to introduction of evidence of title. Tex CivA 288SW598.
1402-25¾-New. No motion to exclude answer is necessary when question is objected to. 219Ala201, 121S704, 64ALR 553(2dcase).
1402-26 319Mo 1040, 6SW(2d)591. See also MoA 19SW(2d)297. But see 220 Ala284, 124S868.
1402-27 40F(2d)894; 33Ariz474, 266P 3; 93Fla698, 112S547; 152Md321, 136 A644 (as assuming facts not in evidence, in expert's answer to hypothetical question).
1402-27½-New. Answers of witness which are his conclusions may be stricken on motion. TexCivA 284SW983.
1403-28 IndA 171NE302. But see 99 Vt227, 131A16.
1403-29 Ida 290P200.
1403-30 48 Ida789, 285P676 (motion properly denied); 48RI 144, 136A308. See also MoA 256SW1088.
1403-31 108Conn191, 142A742; 336 Ill 11, 167NE807; 85 IndA450, 150NE31.
1403-31½-New. Incompetent evidence.-Testimony of jurymen as to basis of their judgment is properly stricken out. 109Conn460, 146A847.
1403-32 21F(2d)309.
1403-33 Where reasons in support of opinion tend to weaken it it is not subject to be stricken. 158Md481, 148A 814.
1403-34 197NC556, 150SE40; 134 Okl 1, 272P436. But see 91CalA752, 267P 731.
1403-36 Mo 28SW(2d)1008.
1403-39 218Ala90, 117S681, 61ALR938; MoA 296SW833; 298Pa423, 148A520. But see Mont 290P259.
1403-40 21F(2d)309.
1403-42 97CalA166, 275P478.
1403-42½-New. Court may withdraw incompetent testimony from jury. 189 NC813, 128SE345.
1403-43½-New. Evidence beyond issue is properly stricken. 91CalA752, 267P 731.
1403-44 21F(2d)309; 180Ark106, 20 SW(2d)633 (evidence held not subject to be stricken out as opinionative); 155 Md173, 141A556.
1403-46 Parol evidence that insurance premium was paid should be stricken out where such evidence has no probative value. IndA 148NE505.
1404-47½-New. Incompetent evidence received over objection should be stricken out on motion. 49ND119, 190NW 269.
1404-47¼-New. Objections going to weight of evidence.-In action for damages to pianos from water testimony as to examination made month after date of injury should not be stricken out as remote. 115 Or608, 239P105, 43ALR 1285.
1404-47¼-New. Motion to strike out evidence immaterial to pleaded issues should be granted. 43 Ida327, 251P 757.
1404-47⅓-New. That question was suggestive is not ground for striking out answer. 144Wash375, 258P314.
1404-47⅙-New. In action for malpractice, refusal to strike answer to plaintiff's hypothetical question assuming facts not in evidence has been held error where plaintiff did not establish such facts. 98CalA358, 276P1052.
1404-47½-New. Plaintiff's evidence may be stricken out where appellate court would be compelled to set aside any verdict found in accordance with plaintiff's evidence. Va 148SE683.
1404-47⅛-New. That question was suggestive is no ground for striking out answer. 86CalA704, 261P536.
1404-47⅛-New. Court's striking out on its own motion answer of witness on cross examination not relevant to direct is not error. 158Md424, 149A4.
1404-47 1/10-New. Evidence of indorser's indebtedness to indorsee in action of note held properly stricken out. 155 Wash127, 283P665.
1404-48 13F(2d)361; 79CalA485, 249 P1092; 156Md680, 145A177; MoA 16 SW(2d)672. **Motion to strike testimony as "not responsive and irrelevant, incompetent and immaterial"** held properly denied as too broad. 104CalA679, 286 P474.
1404-49 89 Ind361, 166NE301; 173 Minn501, 217NW601; 124 Or691, 265P 433.
1404-50 79CalA485, 249P1092; MoA 282SW752; 20 OhA191, 151NE802.
1405-51 29Ariz334, 241P518; 148Md 279, 129A348; TexCivA 291SW681. **Omnibus motion to strike testimony as irrelevant, incompetent and immaterial** is properly overruled if any of evidence pertinent. 87Colo 55, 284P1021.
1405-52 13F(2d)361; CalA 291P444; MoA 277SW578.
1405-53 90CalA740, 266P362.
1406-58 22F(2d)554; 219Ala24, 121S 30; 35Ariz226, 276P521; 81CalA176, 253P191; 85 IndA342, 154NE39; 154 Md34, 139A529; 267Mass402, 166NE 867; Mass 169NE797; 248Mich593, 227 NW720; 174Minn115, 218NW464; 307 Mo 500, 271SW55; MoA 277SW578; 165 Minn241, 206NW393; 50Nev234, 255P 1014; 101NJL526, 129A485; 105NJL 602, 147A402; NJSup 138A510; NJSup 149A39; 33NM64, 260P849; 33NM176, 262P931; 118 Okl 113, 247P87; 125 Okl 144, 256P903; Or 289P369.
1407-62 19F(2d)781; 85 IndA450, 150 NE31; TexCivA 294SW347.
1407-63 49PhilippineS94, 897 [citCyc].
1407-64 36F(2d)563; 33PortoRico 6; TexCivA 290SW832. **Motion too late** after witness has answered. 218MoA 253, 267SW431. Motion too late when made after witness testified to facts other than particular one objected to. 33PortoRico 6.
1407-65 TexCivA 290SW832.
1407-66 NJ 146A38; 290Pa43, 138A 217; 33PortoRico 6; TexCivA 290SW 832.
1407-67 Mo 28SW(2d)1008; Mo 32SW (2d)86; 290Pa43, 138A217.
1407-68 Motion to strike testimony at end thereof came too late. 104CalA679, 286P474.
1407-68½-New. or long after witness had testified concerning other facts, 33 PortoRico 6.
1407-69 MoA 19SW(2d)297.
1408-71 NJ 146A38; TexCivA 290SW 832.
1408-75 103Conn436, 130A668 (evidence admissible against one defendant).
1408-87 Iowa 228NW98 (motion to strike testimony on cross-examination held within discretion of court where testimony was too ambiguous to require all to be stricken); Iowa 230NW381; 180Minn310, 230NW826. **Court may temporarily overrule motion** for purpose of asking further questions where testimony is not clear. 48RI 144, 136A308. **Motion held addressed to court's discretion.**-33NM176, 262P931.
1408-88 TexCivA 9SW(2d)374. **Where there is conflict in evidence presenting jury question** court should not strike out testimony. 149Md425, 131A754.
1409-90½-New. In considering motion to strike out plaintiff's evidence all fair inferences favorable to plaintiff must be given evidence. 153Va675, 151SE 282.
1409-93½-New. Motion is waived by both parties' admonishing witness and proceeding with examination without waiting for ruling on motion. 80CalA 208, 250P1062.
1409-95 85PaSuper164.
1409-1 Overruling exceptions to all oral questions for variance from pleadings is not error where part of testimony not subject to objection. Tex CivA 24SW(2d)768. **Necessity of writing.**-235Ky741, 32SW(2d)327.
1409-2 100Vt161, 135A702.
1410-7½-New. Exception to evidence that certificates of deposit where indorsed over admits they were delivered and therefore negotiated in same manner as demurrer to pleading alleging indorsement of note sued on. 32Ariz588, 261P45.
1410-7½-New. Exceptions taken during trial are unavailing, where there was no compliance with requirements of statute. 264Mass337, 162NE689.
1410-9 87 IndA371, 161NE567; 196NC 666, 146SE598.
1411-18 Where judge, after excluding evidence, rules such evidence admissible, failure to call witness again constitutes waiver of exception to exclusion. 263 Mass220, 160NE388.
1411-22½-New. Exception to overruling of motion to strike out all of plaintiff's evidence in chief is waived by defendant by going on with trial and introducing evidence. 105WVa118, 141SE 631.
411-22½-New. Excepting party waives exception if he thereafter introduces similar evidence admitted over objection. Me 151A537.
1415-31 MoA 295SW495.
1416-32 119 Or395, 248P1088 (admission in automobile collision case that defendant was insured is prejudicial error); 7PaDist&Co 121.
1419-43 CalA 266P312.
1423-57 214Ky729, 283SW1052.
1423-58 214Ky729, 283SW1052.
1429-92 148Miss583, 114S387.
1432-9 46Philippine167, 169 [quot Cyc].
1433-11 215Ala47, 109S278.
1440-60 120Kan139, 242P120.
1441-61 MoA 27SW(2d)722.
1441-63 126Kan675, 271P282.
1442-69 233Ky211, 25SW(2d)363; 319 Mo 644, 5SW(2d)413.
1443-71 34GaA203, 128SE915.
1444-80 50ND494, 196NW953. **Instruction to disregard improper argument** is insufficient. 329 Ill 288, 160NE 559.
1444-81 318 Ill 445, 149NE507; 202 Iowa1386, 212NW161; 213AppDiv616, 211NYS25 (admission of self-serving letter does not preclude opposing party from having jury correctly instructed thereon).
1449-22 TexCivA 25SW(2d)639.
1449-23½-New. Evidence of agency held to authorize court's refusal to strike testimony referring to one as agent. 260Mass225, 157NE347.
1449-23¼-New. Omitting expressly to withdraw incompleted evidence is reversible error, though general charge in effect forbade its consideration. 193NC 605, 137SE721.
1449-23¼-New. Striking out plaintiff's evidence, because no verdict could be properly rendered thereon, does not

constitute direction of verdict. 152Va 604, 148SE683.

1450–30 163Ga734, 137SE260.

1450–31 259Mass113, 156NE30. **Exclusion of testimony** has been held not reversible error, where adverse party shortly thereafter withdrew objection. TexCivA 10SW(2d)136.

1453–35 170Ark1131, 282SW961; 120 Kan474, 244P2.

1458–62 MoA 283SW456.

1461–79 91CalA428, 267P127.

1466–1 125Me44, 130A737.

1470–24 197Cal 290, 240P785; 32NM 162, 252P1001; TexCivA 17SW(2d)182. **Where affirmative charge with hypothesis** was given, refusing leave to defendant's counsel to argue case to jury on issue of credibility of witnesses was held reversible error. 215Ala56, 109S 291.

1471–29 Mo 281SW420.

1471–31 215Ala56, 109S291.

1471–34 157Cal 534, 108P499.

1471–38 **Right to argue case is not waived** by stating, after ten jurors had indicated they did not desire to hear argument, that jury should be instructed as to law of case. 197Cal 290, 240P 785.

1471–41 50ND538, 196NW755; 48RI 244, 137A2; TexCivA 289SW93; Tex CivA 9SW(2d)65. **Counsel should conform conduct to law.**–118Nebr1, 223NW 637. **Lawyer should be allowed large latitude** with respect to his argument. 29 OhA145, 163NE218. **What action should be taken as regards improper remarks** is discretionary with trial court. MoA 27SW(2d)714.

1471–45 83NH407, 143A469.

1472–49½–New. Judge is entitled to respectful treatment by counsel and disrespect from counsel cannot be tolerated. 48RI 244, 137A2.

1472–49⅓–New. Improper conduct by counsel is incompatible with fair and impartial trial. 48RI 244, 137A2.

1472–49¼–New. Only in extreme cases will jury be discharged because of improper remarks of counsel. MoA 4SW (2d)1104.

1472–50 MoA 300SW301; 222MoA370, 3SW(2d)256; MoA 17SW(2d)376; MoA 27SW(2d)733; MoA 31SW(2d)596 (correcting errors); 48RI 244, 137A2; Tex CivA 287SW120; TexCivA 3SW(2d)568; TexCivA 7SW(2d)926; TexCivA 22SW (2d)753; TexCivA 23SW(2d)522. **Remarks of counsel during trial of case** are within discretion of court. 220Ala237, 124S519.

1472–51 95Fla991, 117S391; 45 Ida636, 264P377; 222MoA128, 2SW(2d)824; 23 OhA535, 156NE231; 283Pa485, 129A 566; 48RI 244, 137A2; TexCivA 13SW (2d)909. **Counsel may argue unmolested** while not transgressing rules of propriety. MoA 27SW(2d)714.

1472–52 329 Ill 288, 160NE559; 171 Minn219, 213NW890; NJ 151A754; 195 NC350, 142SE19; 48RI 244, 137A2; TexCivA 18SW(2d)688; 149Va82, 140 SE314, 57ALR490. **Limitation of proper argument is error.**–237 IllA570.

1472–53 MoA 31SW(2d)105; MoA 31 SW(2d)117; 48RI 244, 137A2; TexCivA 283SW699. **Court must preserve its dignity** by compelling obedience to its orders and rulings. MoA 24SW(2d) 166.

1472–54 TexCivA 283SW699.

1472–55 TexCivA 272SW256 (or to answer question of defendant's counsel).

1472–59 218Ky378, 291SW776.

1473–60 CalA 284P499; 34GaA151, 128 SE781.

1473–63 Vt 148A750.

1473–65 48RI 244, 137A2.

1473–65½–New. Court should recognize counsel's right to call attention to questions of law which are not frivolous and are urged with sincerity, 48RI 244, 137A2.

1473–65⅓–New. but if court considers that no help would be received by arguments it need not listen thereto. 48 RI 244, 137A2.

1473–66 32 OhA512, 168NE386 (permitting two attorneys to make arguments within allotted time held not abuse of discretion).

1473–70 73CalA189, 238P719; 102CalA 230, 282P819; CalA 293P115; Mo 281 SW951; 321Mo 378, 118W(2d)268; 191 NC297, 131SE735; 150SC130, 147SE 834; TexCivA 15SW(2d)123; TexCivA 30SW(2d)509.

1473–75 Mo 296SW128, 132 [citCyc].

1473–76 Mo 281SW951.

1474–79 224Ky837, 7SW(2d)502.

1474–89½–New. Where counsel has had ample time to prepare and present instructions, refusal to give additional time for argument on instructions is not of itself reversible error. 144Va154, 131 SE245.

1475–9½–New. No change in order of argument should be allowed unless court in its discretion thinks it necessary. 289 Pa381, 137A665.

1475–11 321Mo 378, 11SW(2d)268. **Statement by counsel for plaintiff in action** on life insurance policy as to defendant's guessing at age of insured is not improper. 22AlaA72, 112S365. **Scope of opening statement** may be very broad. 148Va413, 139SE254.

1475–12 214Ala172, 106S692; 218Ala 464, 118S741; 221Ala319, 128S608; 125 Kan431, 264P1036; Mass 169NE662 (opening statement may be supplemented); 323Mo 224, 19SW(2d)630; MoA 293SW66, 117Or153, 241P977. **Counsel cannot debate legal questions** in opening statement to jury. 33 OhA311, 169NE 480.

1475–13 148Va413, 139SE254. **In a personal injuries case,** etc. MoA 14SW(2d) 506 (statement held not improper).

1475–15 Mo 279SW415, 424 [citCyc]; 148Va413, 139SE254. **Opening argument of plaintiff's attorney vigorously arraigning defendant** but without supplementing testimony warranting different conclusion is not improper. Tex CivA 24SW(2d)786.

1475–16 Mo 289SW877; TexCivA 9 SW(2d)367; 148Va413, 139SE254. **Court in its discretion can order mistrial** for improper opening statement. NJSup 130A547.

1475–17 214Ala172, 106S692.

1475–18 249Mich16, 227NW539; 319 Mo 660, 4SW(2d)819. See also 222MoA 346, 300SW845.

1475–20 214Ala172, 106S692; 22AlaA 38, 111S762 (reprimand for reference to result of former trial held proper); 243 IllA438; 220MoA791, 277SW58; 135 Wash248, 237P708 (cured by instruction on objection and request). **Failure to object** to statement does not operate to enlarge or change pleadings. 220 MoA791, 277SW58.

1476–25 22AlaA38, 111S762; Mo 289 SW877; 148Va413, 139SE254. **Statement held not error.**–148Va413, 139SE 254.

1476–40½–New. It is not error to permit plaintiff's counsel to read petition in jury's presence. MoA 290SW630.

1476–43 But see Mass 168NE785. **Petition and opening statement held not to allege or state sufficient consideration** moving to defendant for oral contract alleged. 129Kan132, 281P902(2dcase).

1476–44 105NJL345, 144A715(2dcase).

1476–44½–New. Reference to written policy dated subsequent to accident cannot deprive plaintiff of proving oral contract. 24 OhA357, 157NE311.

1476–44⅓–New. Trial court's ruling, after counsel's opening statement placing burden of proof on buyer, asserting inferiority of goods delivered as defense, held not erroneous. 223Ky420, 3SW(2d) 1071.

1476–44¼–New. Disclaimer of accident at opening of trial by plaintiffs suing on life policies was properly construed as withdrawing entire allegation that insured died by his own hand in view of defense of suicide. 32F(2d)567.

1476–44⅕–New. Defendants, moving for directed verdict after plaintiff's opening statement, assented to facts stated therein. 266Mass93, 164NE813.

1476–44⅙–New. Trial courts must necessarily rely upon good faith of counsel in making their opening statements to jury as to material facts and circumstances which they expect to prove. 320 Mo 839, 8SW(2d)873.

1476–44⅐–New. Trial court held to have committed no error in refusing to render judgment for plaintiff on opening statement. 129Kan256, 282P595.

1476–44⅛–New. Opening statement and evidence of plaintiff held not to show clearly what negligence of bus driver caused collision to preclude presumption of negligence. MoA 22SW(2d)199.

1476–44⅑–New. Admissions in opening statement. Kan 292P935 (consideration for note).

1476–45 24 OhA82, 156NE248; 135 Okl 131, 275P1040; 54SD350, 223NW308. See also 262Mass534, 160NE278; 119 Oh 367, 164NE358. **Construction of opening statement.**–31 OhA1, 166NE240. **Direction of verdict held erroneous.**–39F(2d) 798.

1477–46 130Kan349, 286P211; 222 AppDiv836, 226NYS748; 123 Okl 248, 253P84; 31 OhA1, 166NE240; Wash 286P657.

1477–47 24 OhA82, 156NE248; 54SD 350, 223NW308.

1477–49 **Where evidence is admitted without objection** on ground of recovery omitted by plaintiff's counsel in opening, such ground is not waived. 94CalA289, 271P129.

1477–50½–New. Before taking case from jury on opening statement, trial judge should ascertain definitely if statement embraces entire proof. 83NH370, 142A700.

1477–53½–New. Counsel should not make declarations of fact during introduction of evidence. Nebr 228NW531.

1477–54 Nebr 228NW531.

1477–56 CalA 293P78; CalA 293P80; 332Mo 469, 17SW(2d)337; 144Wash 553, 258P497.

1478–57 127 Or320, 272P273.

1478–58 29Ariz334, 241P518; MoA 272 SW105; MoA 286SW428. **Attempt to introduce clearly inadmissible evidence obviously made to influence jury** held reversible error. TexCivA 274SW991. **Good faith in asking question** does not make it proper. 75CalA516, 243P43. **Permitting argument on admissibility of testimony** before jury has been held improper. CalA 288P675.

1478–59 175Minn341, 221NW62; Nebr 228NW531; 21 OhA17, 152NE908. **Where ground for reversal.**–221Ala225, 128S389(2dcase).

1478–62 200 Iowa495, 203NW794; MoA 7SW(2d)456.

1478–63 118Nebr1, 223NW637.

1478–64 75CalA516, 243P43 (good faith may relieve imputation of desire to prejudice jury); MoA 20SW(2d)540 (failure to reprimand counsel after sustaining objection held not abuse of discretion); NJ 151A869 (where jury charged to disregard question); TexCommnA 284SW539.

1478–64½–New. Asking improper question on cross-examination does not ordinarily require discharge of jury where objection to question was sustained. 218Ky59, 290SW1044.

1478–65 88CalA627, 264P564; TexCivA 280SW234; 101WVa337, 132SE887.

1479–72 See also 204Cal 136, 266P954; 88CalA1, 262P1100; Iowa 229NW667. But see CalA 290P80. Contra 115Nebr1, 211NW190, 56ALR1403 [citCJ]. **Reference to insurance incidental to examination of defendant** as to matters admissible for any purpose is not erroneous. CalA 260P337. **Conversation relating to insurance may be called for** if part of material admission made by party properly charged. Iowa 229NW667.

1479–72½–New. Admission of evidence that defendant had no liability insurance warranted setting aside verdict. 82 NH429, 135A534.

1479–73 237Mich612, 213NW128 (answer stricken and jury cautioned); Mo 31SW(2d)792 (jury instructed to disregard testimony); 124 Or691, 265P433; 148Wash93, 268P145. See also 222MoA 346, 300SW845. **As to other insurance.**–236Mich1, 209NW918. **In discretion of court** to discharge jury after admonishing jury to disregard objectionable testimony. Mo 31SW(2d)792.

1479–73½–New. Where plaintiff does not raise question, it is not proper for defendant to offer evidence that he is not indemnified by insurance. Nebr 228 NW528.

1479–74 **Whether mere asking of im-**

proper questions is prejudicial is largely within trial court's discretion. 322Mo 737, 16SW(2d)85.

1479–74½–New. Argument on questions arising during trial.–74CalA427, 240P 790.

1479–74¼–New. Refusal to permit or hear objections to evidence introduced by associate counsel for defendant, holding that all objections to evidence must come through its leading counsel, who examined the witnesses, has been held error. 218Ala541, 119S672.

1479–74¼–New. Refusal to permit showing that defendant carried no insurance after jurors were questioned as to interest in insurance company is not erroneous. Mo 26SW(2d)969.

1479–74½–New. It is within court's discretion to admonish the jury and deny new trial for question referring to liability insurer in employee's action against employer. NC 154SE626.

1479–76 21F(2d)278; 217Ala140, 115S 28; Ark 32SW(2d)305; 85Colo 419, 276 P972; 106Conn153, 137A721; 227Ky 690, 13SW(2d)1022; 317Mo 782, 297SW 20; 217MoA312, 269SW688; MoA 271 SW851; MoA 7SW(2d)456; MoA 27SW (2d)714; MoA 28SW(2d)1044; 55ND 580, 214NW855; 112 Okl 3, 239P582; 48RI 244, 137A2; 154SC366, 151SE608; TexCommnA 298SW526; TexCivA 281 SW318; TexCivA 283SW232; TexCivA 283SW568; TexCivA 286SW565; Tex CivA 1SW(2d)688; TexCivA 3SW(2d) 568; TexCivA 26SW(2d)435; 151Va694, 144SE638. **Argument based on pleadings and evidence is proper.** TexCivA 25SW(2d)979. **Argument held proper.**– 104CalA621, 286P456; TexCivA 28SW (2d)578. **Argument must be confined to evidence actually admitted.**–TexCommnA 24SW(2d)363. **Argument on law of case** is proper. 41GaA214, 152SE291. **Inviting jury to put themselves in plaintiff's place** in assessing damages for personal injuries is erroneous. TexCivA 26SW (2d)435. **Remark in argument** that plaintiff was running insurance business in action on insurance policy held within evidence. 221Ala138, 127S840. **Counsel cannot draw deductions not based on evidence.**–MoA 31SW(2d)596.

1479–77 219Ala465, 122S448; 328 Ill 610, 160NE226; MoA 25SW(2d)536; 125 Misc288, 210NYS712; 113 OhSt164, 148 NE641, 643 [citCyc]; TexCivA 283SW 232; TexCivA 283SW568; TexCivA 297 SW596. **Reference to plaintiff as "this widow"** where she had divorced husband living and had not remarried held improper. 214AppDiv680, 213NYS6 (in action for death of son).

1479–78 TexCivA 283SW568.

1479–78½–New. , or it has been held, whether objected to by opposite party or not. TexCivA 283SW232.

1479–79 32F(2d)23; Va 155SE683.

1479–80 83NH498, 144A784.

1479–84 MoA 9SW(2d)541.

1479–85 See also MoA 292SW1054.

1479–85½–New. In determining its propriety statement by counsel must be construed in connection with remainder of his argument. 30Ariz204, 245P673.

1479–85⅓–New. Mere expression of opinion is not prejudicial argument. 171 Ark561, 285SW29.

1479–85¼–New. Court must prevent arguments which will improperly influence jury in its deliberations. TexCivA 283SW232.

1479–85½–New. Whether arguments are improper depends on issues, parties, and general atmosphere of case. 86CalA 288, 260P833.

1479–85⅔–New. Test of meaning of any enigmatical statement in argument is, not what language used might mean on technical analysis, but what jury would naturally understand it to mean. 83NH 477, 144A263(2dcase).

1480–87 MoA 9SW(2d)650; MoA 14SW (2d)478.

1480–88 222MoA801, 11SW(2d)65; 191 NC500, 132SE468. But see MoA 17SW (2d)363.

1480–89 TexCivA 281SW1106; Tex CivA 4SW(2d)569.

1480–90 222MoA801, 11SW(2d)65; NH 149A81.

1480–91 335 Ill 164, 166NE530.

1480–95 174Ark194, 295SW38; 104 WVa110, 139SE469, 54ALR785. **Reading correct and relevant law to jury** is not ground for reversal. 104WVa110, 139SE469, 54ALR785.

1480–96 151Md133, 134A37; TexCivA 28SW(2d)1088.

1481–1 35GaA425, 133SE264 (authorities from foreign jurisdictions); 83NH 10, 138A315.

1482–10½–New. Statement by counsel for street railroad in argument that there was evidence to carry case to jury on railroad's negligence is not concession of negligence. 293Pa472, 143A119.

1482–10½–New. Court erred in permitting defendant's counsel to read to jury decision of United States supreme court which did not represent law as it exists in South Carolina. 150SC29, 147SE625.

1482–12 See also 175Ark891, 1SW(2d) 11.

1482–13 168Ga156, 147SE106; 86 IndA 473, 158NE579; 319Mo 644, 5SW(2d) 413. See also 10PaDist&Co 209. But see 175Ark891, 1SW(2d)11. **Agreement that plea of limitation** was unethical held improper. TexCivA 297SW596.

1483–15 But see 264Mass530, 163NE 165.

1483–18 TexCivA 272SW501.

1483–23 Reading to jury materially inaccurate copy of testimony held ground for new trial, though no fraud appeared. TexCivA 294SW295.

1483–29 Utah 270P349.

1483–30 Mo 298SW806; 222MoA238, 296SW860; TexCivA 281SW1106; Tex CivA 28SW(2d)853.

1484–33 218Ala227, 118S283.

1484–46 102NJL94, 131A292, 295 [citCyc].

1485–52 TexCivA 23SW(2d)522. But see TexCommnA 25SW(2d)302. **Arguments held not objectionable.**–TexCivA 28SW(2d)941.

1485–55 TexCivA 295SW234.

1485–58 118Tex314, 15SW(2d)213. **It is improper for counsel** to tell jury how to answer certain question if they want to find for his client. TexCivA 286SW 241.

1485–59½–New. Stating to jury legal effect of their findings is improper. Tex CivA 6SW(2d)408.

1485–59⅓–New. It is reversible error for attorney to tell jury legal result of answers and appeal to them to frame answers so as to accomplish such result. 118Tex314, 15SW(2d)213.

1485–59¼–New. It is error to tell jury what result of answers to certain issues would be. TexCivA 20SW(2d)833.

1485–59½–New. Argument advising jury to answer issues in affirmative so that verdict would be for client held error. TexCivA 29SW(2d)831.

1485–59⅔–New. Counsel should not tell jury legal effect of their answers when case submitted on special issues. Tex CivA 28SW(2d)1114.

1485–59½–New. Advising jury to make evasive answers is improper. Kan 293 P407.

1485–61 215Ala216, 109S877; 218Ky26, 290SW1034, 1035 [citCyc]; MoA 300SW 301; 55ND580, 214NW855.

1485–62 200 Iowa1100, 205NW956 (comment proper); 216Ky504, 287SW 977; 218Ky26, 290SW1034, 1035 [cit Cyc]; 225Ky480, 9SW(2d)220; MoA 284SW815; 143 Okl 196, 288P309; Tex CivA 272SW501.

1485–63 195NC350, 142SE19; TexCivA 272SW501.

1485–64 216Ala248, 112S737 (error to limit argument on evidence); 23AlaA67, 120S577(2dcase); 220Ala68, 124S199; 180Ark980, 23SW(2d)972; 232 IllA430; 212Ky149, 278SW573; 212Ky310, 278 SW1095 (comment held not erroneous under evidence); 218Ky26, 290SW1034; 218Ky59, 290SW1044; 180Minn298, 230 NW823; Mo 282SW38; 317Mo 1010, 297 SW50; 318Mo 318, 300SW283; MoA 5 SW(2d)689; 83NH407, 143A469; 195 NC350, 142SE19; 55ND580, 214NW855; TexCommnA 25SW(2d)290; TexCivA 278SW488; TexCivA 290SW1108; Tex CivA 9SW(2d)1049; TexCivA 31SW(2d) 850. **Reference to different kinds of paper on which by-laws of insurance association were written** held not improper. TexCivA 289SW93. **Counsel need not point out testimony** favorable to other side. NH 151A262. **Argument held relevant.**–TexCivA 30SW(2d)911.

1486–65 Argument leaving matter of usual speed of cars to resident juror, though improper, does not call for discharge of jury. Mo 298SW806.

1486–66 213Ala14, 104S130; 217Ala 292, 116S142; 219Ala392, 122S349; 29 Ariz121, 239P795; 174Ark1083, 298SW 849; 232 IllA430; 255 IllA305; 212Ky 149, 278SW573; 212Ky310, 278SW1095; 218Ky26, 290SW1034, 1035 [citCyc]; 218Ky59, 290SW1044; 219Ky201, 292 SW777; 224Ky274, 6SW(2d)264; 232 Ky670, 24SW(2d)570; 235Ky121, 29SW (2d)637; 316Mo 1104, 295SW757; Mo 298SW806; MoA 284SW815; MoA 26 SW(2d)843; 82NH253, 132A682; 83NH 407, 143A469; 83NH518, 144A845; NH 149A81; NH 151A262; 55ND580, 214 NW855; Or 292P1094(2dcase); Tex CommnA 25SW(2d)290; TexCivA 272 SW501; TexCivA 278SW488; TexCivA 290SW1108; TexCivA 291SW681; Tex CivA 298SW631; 98Vt449, 129A311; Vt 148A484; 151Va934, 145SE833. But see Vt 148A484. **May comment on law widened** in case by statute. 116Tex427, 293 SW808. **Court's refusal to reprimand attorney for insured for argument as to affect of decision for defendant** held not abuse of discretion. 154SC366, 151SE 608.

1486–67 216Ala455, 113S403; 163Ga 37, 135SE487; 123Kan533, 255P969; 212Ky149, 278SW573; 218Ky26, 290 SW1034, 1035 [citCyc]; MoA 27SW(2d) 714; MoA 31SW(2d)596; 82NH533, 136 A364; 83NH498, 144A784; 83NH518, 144A845; TexCivA 275SW463; Tex CivA 278SW488; TexCivA 7SW(2d)926; TexCivA 19SW(2d)193; 98Vt449, 129A 311; 151Va934, 145SE833. See also Okl 291P38.

1486–68 Counsel may disregard explanatory testimony of other party. NH 151A262.

1486–70 But see 153Va14, 149SE517.

1486–72 89CalA653, 265P357; 232Mich 399, 205NW124; TexCivA 298SW631.

1487–73 NH 151A262.

1487–79½–New. Counsel's argument does not constitute evidence.–203Cal 26, 263P240.

1487–79⅓–New. Where objectionable evidence once excluded was brought back into case by defendant's cross-examination, there was no error in refusing to exclude argument of plaintiff's counsel with reference thereto. 219Ala 162, 121S543.

1487–81 219Ala208, 122S23; Ala 122S 25; 219Ala392, 122S349; 216Ky504, 287SW977; 179Minn127, 228NW552; 130 Or440, 279P631; TexCivA 273SW 666; TexCivA 25SW(2d)283. **In action against town comment on presence of selectmen at defendant's counsel table** before but not after recess is not improper. NH 149A81.

1487–82 MoA 24SW(2d)166 (derogatory remarks on adverse attorney's tactics or methods).

1487–83 83NH477, 144A263(2dcase).

1487–85 168Ark795, 271SW460; 123 Kan533, 255P969; TexCivA 283SW699; TexCivA 291SW681; TexCivA 19SW (2d)829; 152Va773, 148SE678. But see TexCommnA 298SW526. **Remarks held not prejudicial.**–Vt 150A128(2dcase).

1487–86 See also 219Ala336, 122S351.

1488–87 168Ark795, 271SW460; Tex CivA 273SW666; TexCivA 283SW699; TexCivA 29SW(2d)831.

1488–88 216Ky504, 287SW977.

1488–95 219Ky201, 292SW777; MoA 24SW(2d)166.

1489–6½–New. that witness, insurance agent testifying by deposition, was in another state trying to defeat some other policy. 168Ark795, 271SW460.

1489–7 328 Ill 610, 160NE226; Mo 298 SW806; 222MoA296, 297SW163.

1489–8 MoA 17SW(2d)983; 83NH136, 139A370. **That witnesses went to defendants' office** to await trial is not improper. MoA 7SW(2d)749.

1489–9 219Ky201, 292SW777; 224Ky 837, 7SW(2d)502; 322Mo 271, 18SW (2d)494.

1489–14 218Ky59, 290SW1044; MoA 19SW(2d)500.

1490-17 TexCivA 28SW(2d)611.
1490-20 120Kan119, 242P449, 451 [cit Cyc]; TexCommnA 298SW526.
1490-22 299Pa79, 149A104. **Counsel may remark that method of questioning** by adverse counsel shows coaching. 172 Ark151, 287SW738.
1490-24½-New. Counsel for plaintiff stating in argument that witness is honest man held not unfair inference where testimony undisputed. NH 147A898(2d case).
1490-24½-New. Permitting argument by plaintiff as to his credibility as witness is erroneous. TexCivA 26SW(2d) 435.
1490-24¼-New. Counsel may argue that inferences that may or should be drawn from evidence demonstrate that witness willfully testified falsely. 153 Wash14, 279P94.
1490-26 GaA 155SE370; 315Mo186, 285SW986; 323Mo224, 19SW(2d)630; 219MoA590, 282SW141; MoA 272SW 1068. See also MoA 31SW(2d)596 (evidence more accessible to adverse party). **That party took deposition of witness** does not affect rules where deposition was not signed and was not read to jury. 219MoA590, 282SW141.
1490-29 Mo 30SW(2d)445; MoA 17SW (2d)376; MoA 32SW(2d)118; 83NH 498, 144A784.
1491-32 See also Ida 287P944.
1491-36 Md 151A240; 168Minn423, 210 NW161.
1491-39 Mo 26SW(2d)760; MoA 31 SW(2d)596; MoA 32SW(2d)118; Tex CivA 272SW308. See also 321Mo27, 10 SW(2d)649.
1491-41½-New. Stating that defendant's counsel might read testimony of absent witnesses at former trial is improper. 197Cal148, 239P1061.
1491-43 169Ga770, 151SE381(2dcase); 239Mich390, 214NW172.
1492-47 NH 149A81.
1492-50½-New. Plaintiff cannot comment to jury on defendant's failure to produce certain witnesses, where defendant introduced no evidence. 32F (2d)208.
1492-50½-New. In action for seduction, permitting plaintiff's counsel to comment on defendant's failure to call witness, where defendant sought to introduce her evidence given on another trial, requested leave to take her deposition, and sought postponement to procure her, is error. 88Ind693, 165NE 526.
1492-50¼-New. In actions on fire insurance policies, it is error to allow defendants' counsel to argue to jury that plaintiff could have offered evidence of his good character, and by failing to do so prevented defendants from introducing proof of his bad character. 224Ky 837, 7SW(2d)502.
1492-50 ¼-New. Permitting defendant to comment on plaintiff's failure to produce witnesses held prejudicial error where plaintiff denied similar right. MoA 26SW(2d)807.
1492-50⅛-New. It is error for counsel to repeatedly refer to fact that his client was deprived of testimony of his wife who is incompetent to testify. 143 Okl 196, 288P309.
1492-50½-New. Argument referring to difficulty in getting dentists to testify in malpractice action is improper. SD 231NW521.
1492-50⅛-New. As against objection plaintiff never intended to subpœna witness argument that plaintiff found witness was dead held proper. Or 292P 1094(2dcase).
1492-52 218Ala416, 118S662.
1492-55 Circumstances held not to justify comment.-218Ala416, 118S662.
1492-61 NJSup 147A379. But see Tex CivA 28SW(2d)902.
1494-77½-New. Where opinion of appellate court on prior appeal is part of stipulation of facts, it is not error to permit attorney to read parts thereof to jury. 252 IllA298.
1494-79 21F(2d)278; 220Ala61, 124S 296; 20AlaA555, 103S713; Ariz 291P 1005; CalA 292P1006; 45 Ida636, 264 P377; 219Ky201, 292SW777; 155Miss 765, 125S340; 157Miss452, 128S336; Mo 282SW423; 319Mo1040, 6SW(2d) 591; NH 146A862; 113 OhSt164, 148 NE641 [citCyc]; TexCommnA 298SW 526; TexCivA 273SW886; TexCivA 283 SW232; TexCivA 293SW869; TexCivA 295SW929; TexCivA 4SW(2d)169.
1494-80 21F(2d)278; 329 Ill 308, 160 NE588; 339 Ill 426, 171NE514; 338 Ill 11, 170NE10; Mich 206NW609; 317Mo 782, 297SW20; Mo 26SW(2d)760; MoA 19SW(2d)507; MoA 22SW(2d)185; TexCommnA 1SW(2d)868; TexCivA 273 SW886; TexCivA 28SW(2d)565. **Arguments held not erroneous.**-MoA 27SW (2d)52.
1495-87 172Minn591, 216NW537; Tex CommnA 1SW(2d)868.
1496-91 21F(2d)278.
1496-93 153Miss860, 121S825; 103 TexCr451 281SW861.
1496-94 108Conn191, 142A742; 243 IllA337. **Suggesting what excluded evidence would show** is improper. Tex CommnA 24SW(2d)363.
1496-98 136Wash202, 239P205. But see 21AlaA591, 111S200.
1497-4 105Conn436, 135A570 (comments on defendant's business experience); 172Minn591, 216NW537; MoA 287SW661.
1497-6½-New. References to large fees of opposing counsel are improper. 30 Ariz347, 247P122.
1497-6½-New. Prior agreement to exclude from case certain issue has been declared not violated by counsel's argument. 99Vt91, 130A758.
1497-6¼-New. Statement of plaintiff's counsel that vilest defense in case was that plaintiff had syphilis, and his enlargement thereon over defendant's objections, is improper, where defense put no witnesses on stand to controvert plaintiff's evidence that she did not have syphilis, and only evidence justifying plaintiff's argument was cross-examination of some of plaintiff's witnesses. 27 F(2d)699.
1497-7 NJSup 130A441.
1497-8 224Ky419, 6SW(2d)491; 5Pa Dist&Co 783.
1497-13 224Ky419, 6SW(2d)491. See also 30Ariz204, 245P673.
1497-15½-New. Argument that jury would regret it if they did not award damages in full is not improper. 224 Ky419, 6SW(2d)491.
1497-15½-New. Statement of plaintiff's counsel that defendant objected because plaintiffs had not asked enough damage is not sufficiently prejudicial to necessitate withdrawal of juror. 32F (2d)261 [aff 32F(2d)264(1stcase)].
1497-16 20AlaA620, 104S835; 215Pa 219, 64A405.
1498-19 86CalA288, 260P838; 34GaA 203, 128SE915; 233 IllA526; IndA 169 NE60; 202 Iowa663, 210NW916; 203 Iowa661, 213NW428; Iowa 229NW667; 231Ky346, 21SW(2d)452; 246Mich130, 224NW636; MoA 272SW105; 221MoA 966, 281SW973; MoA 286SW428; MoA 280SW79; MoA 291SW508, 511 [citCJ]; MoA 298SW259; MoA 298W(2d)215 (bad faith presumed); 118Nebr533, 225 NW462; NJSup 130A439 (holding that no error exists unless discretion of court was abused); 118 Or248, 246P723; 50 RI 509, 149A795; TexCivA 7SW(2d) 661; TexCivA 12SW(2d)1067; TexCivA 26SW(2d)373; 99Vt275, 131A788 (reversible error); 100Vt268, 137A97; 101 WVa35, 131SE867 (asking on voir dire to have jury qualified as to intent in company in which defendant carried insurance); 199Wis315, 225NW935(2d case). See also 178Ark1007, 13SW(2d) 14; Mo 278SW361; NJ 130A448; 90 PaSuper596, 608. But see 242Mich497, 219NW665; Mo 31SW(2d)792; MoA 18 SW(2d)528. **Remarks not within rule.**-220Ala201, 124S740. **Fact that dentist carried liability insurance** or notified insurer is inadmissible in suit for malpractice. 218MoA210, 265SW859. **Refusal to order mistrial held not error** where counsel disclaimed implication and asked to withdraw reference in cross-examination. 189NC783, 128SE 158. **Where no willful misconduct is** shown by making such reference, case will not be reversed. 115 Or656, 239P 825. **Extending cross-examination to bring out evidence of insurance** held reversible error. 203 Iowa661, 213NW 428. **Request to purge jury may not be in bad faith as a matter of law.** 41 GaA120, 152SE278. **Refusal to declare mistrial** after plaintiff's counsel questioned jurors regarding interest in insurance company is erroneous. NJ 151 A754.
1498-20 But see 86CalA288, 260P838; 118 Or248, 246P723.
1498-21 42F(2d)18; 80CalA590, 252P 739; CalA 286P1097; 223Ky731, 4SW (2d)739; 125Me36, 130A512; 236Mich1, 209NW918 (cured by instruction); MoA 17SW(2d)994; 137Wash326, 242P372. See also Wis 229NW860.
1498-22 312Mo173, 279SW89. See also 180Ark1144, 24SW(2d)960; 222MoA 370, 3SW(2d)256.
1498-22½-New. Evidence of liability insurance not incompetent where it tends to prove some material issue. MoA 272SW105.
1498-22⅛-New. Insurance company cannot demand that its connection with case be suppressed where plaintiff's attorney acts in good faith. 222MoA370, 3SW(2d)256.
1498-22¼-New. In automobile negligence case reference to insurance should be excluded from case, where possible, without affecting force of admission. 83 NH143, 139A367.
1498-22⅕-New. Driver's statement that he had insurance held incompetent as admission in view of his statement that he did not make admission. 83NH143, 139A367.
1498-22⅙-New. That automobile driver was insured held immaterial in action against him and railway. 83NH190, 139A753.
1498-22½-New. Trial court may refuse to permit counsel in argument to comment on fact that defendant carried indemnity insurance, though evidence was received without objection of such fact. 218Ala227, 118S283.
1498-22⅛-New. It rests in sound discretion of trial court to grant new trial where it is shown that defendant has indemnity. 196NC213, 145SE169.
1498-22⅛-New. Where insurance company's interest is admitted and jury questioned on voir dire as to connection with company, reference by counsel to such interest is not ground to discharge jury, nor can company demand that its connection with case be suppressed so long as attorney acted in good faith. 222MoA370, 3SW(2d)256.
1498-22 1/10-New. Testimony of plaintiff was held to indicate good faith of counsel in addressing jury with respect to insurance. MoA 18SW(2d)528.
1498-22 1/11-New. Reference by plaintiff's counsel to insurance has been held not error, since it was injected into case by defendant. 225AppDiv129, 232 NYS103.
1498-22 1/12-New. Where motion for mistrial overruled after court had instructed jury to disregard reference to insurance, denying motion for new trial is not reversible error. 220Ala549, 126S869.
1498-22 1/13-New. Cross-examination as to whether defendant selected place for repairing damaged automobile held not prejudicial as suggesting insurance. 101CalA503, 282P10(2dcase).
1498-22 1/14-New. Sustaining motion of plaintiff to forbid defendant making reference to interest of insurance company is erroneous where recovery depended on verdict for more than amount due insurer. SD 226NW644.
1498-22 1/15-New. Inadvertent reference by plaintiff's witness to insurance is not prejudicial error. TexCivA 26SW(2d) 373.
1498-25 Argument held not improper.-258Mass127, 154NE563.
1498-26 104CalA621, 286P456; 235 Mich53, 209NW118. **Improper appeals to sympathy.**-235Mich53, 209NW118. **Counsel's reference to physical conditions of claimant** held not prejudicial where claimant was in court. TexCivA 292SW925. **Disclosing that plaintiff, suing railroad company carried no insurance** by permitting reading of deposition to jury is erroneous. NH 149A70.
1498-27 279US310, 49SCt300, 73L ed 706; 104CalA621, 286P456; 328 Ill 610, 160NE226; 254 IllA192; 200 Iowa495,

203NW794; 202 Iowa1180, 211NW696 (not prejudicial error); 227Ky690, 13 SW(2d)1022; 140Miss375, 105S770; 316Mo 1058, 293SW770; MoA 31SW (2d)105; 118Nebr1, 223NW637; Tex CivA 283SW568; TexCivA 290SW825; TexCivA 48W(2d)169; TexCivA 29SW (2d)831; 100Vt210, 136A388; 136Wash 202, 239P205, 207 [citCyc]. **Arguments held not objectionable on this ground.**–TexCivA 289SW93. **That jury should give a big verdict in order to make people sit up and take notice when interfering with married people held prejudicial error.** TexCivA 22SW(2d)514.

1499–28 TexCivA 274SW991 (argument held reversible error).

1499–29 279US310, 49SCt300, 73L ed 706; 233Ky464, 26SW(2d)20; MoA 272 SW1080; 151Va694, 144SE638; 136 Wash202, 239P205. See also TexCivA 17SW(2d)471. **Remarks held improper.** –TexCivA 30SW(2d)911.

1499–30 Remarks held not to warrant reversal.–Mo 298SW806.

1500–31 Remarks held to authorize reversal.–36GaA11, 135SE105; 117Nebr 813, 223NW4; 136Wash202, 239P205 (repeated comments).

1500–32 279US310, 49SCt300, 73L ed 706; 170Ga317, 154SE243; 41GaA705, 154SE385; 336 Ill 11, 167NE807; 224 Ky837, 7SW(2d)502; TexCivA 4SW(2d) 169. **Motion to discharge jury, sufficiently raised question when made immediately after argument appealing to race prejudice though there was no exception to such argument at time.** 224 Ky837, 7SW(2d)502.

1500–33 213Ala99, 104S25.

1501–34 105Conn436, 135A570; Tex CivA 25SW(2d)994.

1501–35 219Ala208, 122S23; 86CalA 288, 260P838; 200 Iowa495, 203NW794; 210Ky792, 276SW800; 217Ky235, 289 SW308; 219Ky201, 292SW777; 82NH 472, 136A261; 117 Or598, 243P787; Tex CivA 271SW281; TexCivA 272SW291; TexCivA 273SW886; TexCivA 297SW 596; TexCivA 1SW(2d)921; TexCivA 4SW(2d)169. **Intervention by court on its own motion is not required where counsel referred to poverty of defendant.** 221Ala190, 128S139.

1501–36 210Ky792, 276SW800; 117 Or 598, 243P787.

1501–39½–New. Refusal to discharge jury for such improper statements, after objection thereto is sustained, is not abuse of discretion. MoA 293SW84.

1501–43 Argument aligning corporation's assets against poor employee held error. 82NH472, 136A261.

1501–45 279US310, 49SCt300, 73L ed 706; 214Ala174, 110S152; 208 Iowa 1157, 225NW346; 140Miss597, 105S747, 748 [citCyc]; Mo 271SW500; 315Mo1181, 289SW913, 919 [quotCyc]; Mo 2SW(2d) 760; 321Mo 697, 12SW(2d)735; 322Mo 271, 18SW(2d)494; 323Mo 826, 20SW (2d)906; MoA 271SW851; 220MoA102, 278SW806; 222MoA128, 2SW(2d)824; NH 151A262; 226AppDiv388, 235NYS 246; 20 OhA349, 152NE208; 26 OhA 536, 160NE508; 283Pa485, 129A566 (it will not always avail counsel to say that he was justified in improper remarks because of atmosphere of trial); 95Pa Super537; TexCommnA 25SW(2d)290; TexCivA 272SW536; TexCivA 281SW 306; TexCivA 290SW226; TexCivA 291 SW681; TexCommnA 12SW(2d)558; TexCivA 28SW(2d)611; 99Vt91, 130A 758; 195Wis19, 216NW522. See also 322Mo 765, 18SW(2d)42. But see Tex CivA 7SW(2d)661.

1502–46 315Mo1181, 289SW913, 919 [quotCyc]; Mo 289SW877 [quotCyc]; Mo 24SW(2d)633.

1502–47 315Mo1181, 289SW913, 919 [quotCyc].

1502–49 315Mo1181, 289SW913, 919 [quotCyc]; Mo 289SW877 [quotCyc].

1502–50½–New. Party may not complain of remark of adversary's counsel reflecting on his veracity when his own irresponsive and impertinent answer to question provoked such remark. 99Vt 275, 131A788.

1502–50⅛–New. Retaliatory remarks induced by improper inquiry on examination of witness do not constitute ground for reversal. 239Mich485, 214 NW402.

1502–52½–New. Where defendant in opening statement referred to fact that other defendants had been dismissed, it is not error to permit plaintiff to show that no payment had been received from them. MoA 299SW121.

1502–54 216Ala326, 113S79; 20AlaA 620, 104S835; 22AlaA279, 114S791; 205 Cal 519, 271P1055; 223Ky230, 3SW(2d) 623; 177Minn261, 225NW111(2dcase); 221MoA837, 286SW125; NH 146A161; TexCivA 275SW224; TexCivA 10SW (2d)739; TexCivA 24SW(2d)491; 99Vt 340, 132A39; 100Vt268, 137A97. See also TexCivA 25SW(2d)994.

1503–55 Spirit and manner of retracting remark.–TexCivA 275SW224.

1503–56 214Ala15, 106S239; 214Ala 174, 110S152; 216Ala138, 112S633, 53 ALR840; 216Ala326, 113S79; 216Ala 52, 112S442; 20AlaA620, 104S835; 168 Ark795, 271SW460; 205Cal 153, 270P 194; 105Conn436, 135A570; 44 Ida560, 260P150; 267Mass501, 167NE235; 321 Mo 798, 12SW(2d)476; MoA 22SW(2d) 73; 27 OhNPN548; 291Pa141, 139A 743; TexCivA 9SW(2d)478; 99Vt340, 132A39. **Large discretion** must be exercised by court in determining action to be taken. 172Ark330, 288SW709.

1503–57 214Ala15, 106S239; 171Ark 647, 286SW816; 319Mo 432, 3SW(2d) 1004; 321Mo 697, 12SW(2d)735; MoA 1SW(2d)252; TexCivA 15SW(2d)46(2d case).

1503–58 197 Ind62, 147NE771; 224Ky 419, 6SW(2d)491; 225Ky480, 9SW(2d) 220; 116Tex427, 293SW808; 99Vt340, 132A39.

1503–59 291Pa141, 139A743; TexCivA 291SW681; 99Vt340, 132A39.

1503–60 99Vt340, 132A39.

1503–61 214Ala15, 106S239; 168Ark 795, 271SW460; 202 Iowa1180, 211NW 696; MoA 293SW77; MoA 300SW1048; MoA 7SW(2d)456.

1503–62 210Ky792, 276SW800; Tex CivA 4SW(2d)320; Wis 229NW860.

1504–63 MoA, 300SW1000; Utah 266P 1033.

1504–64 21AlaA50, 105S697; 210Ky792, 276SW800; 214Ky272, 283SW96; 225 Ky480, 9SW(2d)220; MoA 280SW60; MoA 283SW732; 136Wash332, 239P 1009. **Court did not abuse discretion in failing to rebuke counsel where objection to improper remarks was sustained.** MoA 21SW(2d)907.

1504–65 21AlaA50, 105S697; 217Ala 301, 116S154; Ala 130S413; 102CalA 405, 283P148; CalA 293P80; 45 Ida 636, 264P377; 119Kan864, 241P442; 210Ky792, 276SW800; 214Ky272, 283 SW96; 224Ky419, 6SW(2d)491; 229Ky 284, 17SW(2d)233; Md 151A240; Mo 6SW(2d)843; MoA 280SW60; MoA 17 SW(2d)372; MoA 17SW(2d)983; MoA 22SW(2d)58; 55ND580, 214NW855; Or 292P89; 298Pa77, 148A41; TexCommnA 298SW526; TexCivA 272SW536; Tex CivA 290SW1108; TexCivA 291SW674; TexCivA 295SW947; TexCivA 12SW (2d)625; TexCivA 13SW(2d)909; 136 Wash332, 239P1009. **Court should act immediately on objection.**–329 Ill 288, 160NE559.

1505–66 218Ala619, 119S833; 88CalA 601, 263P1031; 101CalA503, 282P10(2d case); CalA 282P508; 26 OhA392, 160 NE495; 129 Or321, 276P687; Tex CommnA 298SW526; TexCivA 281SW 306; TexCivA 21SW(2d)546; TexCivA 22SW(2d)704.

1505–68 109Conn324, 146A735; 144 Okl 236, 291P104; TexCivA 28SW(2d) 611. **What should be done when counsel makes improper remarks is generally matter for court's discretion.**–299Pa79, 149A104.

1505–69 172Ark177, 288SW709; 95 CalA370, 272P797; 247Mich357, 225NW 529; 218MoA563, 267SW6 (not ground for discharge of jury); MoA 280 SW79; MoA 9SW(2d)655; MoA 27SW (2d)733; TexCivA 9SW(2d)382. **Court should rebuke counsel on request.**–MoA 286SW428.

1506–70 22AlaA279, 114S791; CalA 290P1062; 108Conn191, 142A742; MoA 275SW358; MoA 279SW438; 221MoA 1158, 298SW125; 289Pa456, 137A606; Vt 147A352 (statements by party as attorney for himself); Wash 290P996.

1506–71 229Ky113, 16SW(2d)761.

1506–72 218Ala227, 118S283. See also MoA 31SW(2d)596. **Where the remarks are presumptively prejudicial.**–99Vt191, 130A697.

1506–73 82NH408, 135A27; 292Pa575, 141A495. **What course to pursue after sustaining objection is within discretion of court, but if objection is not sustained action of trial court will be reversed.** MoA 282SW507.

1506–74 221Ky442, 298SW1091; 291Pa 141, 139A743; TexCommnA 298SW526; TexCivA 13SW(2d)909; 151Va694, 144 SE638; 136Wash202, 239P205 (repeated remarks). **Instruction held not to cure error.** 195Wis498, 218NW832. **In California.**–284P1111.

1506–75 36GaA11, 135SE105; 136Wash 202, 239P205 (repeated remarks).

1507–77 MoA 24SW(2d)166; 113 OhSt 164, 148NE641; Utah 270P349.

1507–79½–New. Withdrawal of improper remarks is within discretion of trial court.–220MoA102, 278SW806.

1507–79⅓–New. There is no error where court instructs jury to take its own recollection of evidence and it appears more probable than otherwise that arguments were harmless. 82NH225, 131A 601.

1507–79¼–New. Permitting counsel to cross-examine medical experts as to examinations for casualty companies and compensation received has been held proper, where court fully instructs jury as to inadmissibility of evidence that defendant carries liability insurance. 88 CalA1, 262P1100.

1507–79⅓–New. Improper argument is not prejudicial in view of instructions that jury were exclusive judges of facts proved, credibility of witnesses, and weight of testimony. TexCommnA 12 SW(2d)558.

1507–79⅙–New. It is not duty of court to reprimand counsel in presence of jury. 220Ala127, 124S294.

1507–79½–New. Argument as to excessive rate of speed though no evidence thereof is not erroneous where court instructed jury counsel was stating theory of case. 158Md463, 149A1.

1507–79⅛–New. Instruction that jury could consider as law only that given in court's instructions is sufficient to correct argument of counsel to jury as to applicable law during absence of judge from court room. Iowa 227NW608.

1507–79⅛–New. What action should be taken regarding prejudicial remarks of counsel is within trial court's discretion. MoA 31SW(2d)394.

1507–82 123Kan533, 255P969; 171 Minn219, 213NW890; TexCommnA 13 SW(2d)334; TexCivA 283SW232; Tex CivA 297SW596; TexCivA 26SW(2d) 435. See also MoA 272SW1080.

1507–83 238Mich198, 213NW112.

1507–84 238Mich198, 213NW112; Mo 271SW500; MoA 4SW(2d)1104; MoA 14SW(2d)478; NJSup 130A206; 50ND 538, 196NW755; 142SC284, 140SE560, 57ALR634; TexCommnA 13SW(2d)334; TexCivA 271SW281; TexCivA 13SW(2d) 909; 195Wis19, 216NW522. **One objecting to argument** should request instructions that jury should not consider it. TexCivA 297SW474.

1507–84½–New. Objection at time argument is made is not necessary where clearly erroneous, uncalled for, and outside of record. TexCivA 290SW825.

1508–86 MoA 17SW(2d)363.

1508–87 117 Or598, 243P787.

1508–89 MoA 17SW(2d)983.

1508–90 MoA 29SW(2d)215.

1508–93 214Ala174, 110S152; TexCivA 17SW(2d)471.

1508–94 77Colo 56, 234P1054 (action barred after five years); TexCivA 20 SW(2d)351.

1508–97½–New. Request for discharge of jury. Party aggrieved by improper argument should request discharge of jury and continuance at cost of adverse party. 316Mo 1058, 293SW770.

1508–97⅓–New. Objection to reading to jury contract attached to answer showing insurance against liability is properly taken by objection before contract was read and by motion to discharge

jury after it was read. 221MoA1212, 299 SW103.

1508–98 MoA 293SW77.

1509–8 MoA 293SW77.

1509–10½–New. Objection to opening statement of counsel ineffective where proper practice is to request for instruction to jury to disregard. NJSup 130A547.

1509–12 213Ala252, 104S433; 213Ala 494, 106S150; 72CalA757, 238P143; 75 CalA516, 243P43; 106Conn119, 137A 241; 27Hawaii399 (where court instructed jury to disregard remarks); 123Kan533, 255P969; 82NH225, 131A 601; TexCivA 292SW925; TexCivA 6 SW(2d)408.

1509–13 Ala 130S786; Ark 32SW(2d) 305; 218Ky59, 290SW1044; TexCivA 292SW612; TexCivA 13SW(2d)909; TexCivA 32SW(2d)278; 136Wash295, 239P831. **Finding that it was "more probable than otherwise" that arguments were harmless** cannot be attacked as not absolute or affirmative since question was one of probabilities. 82NH225, 131A601. **Where court, on exception calls attention to error of counsel's remarks,** they are not considered prejudicial. 136Wash 295, 239P831.

1510–14 CalA 292P1006; 328 Ill 610, 160NE226; Mich 206NW609; 283Pa485, 129A566; TexCivA 283SW920.

1511–20 104Conn23, 131A744; 233Ky 549, 26SW(2d)503; 10LaA237, 120S783; 322Mo 737, 15SW(2d)775; 104NJ557, 142A337, 60ALR102; 196NC649, 146SE 571; 29 OhA67, 162NE777; 38 OklACR 598 (unless referred); 134SC435, 132SE 828; TexCivA 11SW(2d)621. **Instruction withdrawing issue of contributory negligence from jury** is proper, where parties stipulate that it is not jury question. 176Minn331, 223NW605. **If issues of law are raised** trial court should instruct jury peremptorily thereon or determine issues on motion for judgment on verdict. TexCivA 29SW(2d) 500.

1511–23 Ala 130S807; 80Colo 412, 252 P348; 104Conn23, 131A744 (enforceability of contract); 34GaA103, 128SE226 (submission of question of possibility of substantial compliance with statute); 252 IllA68; 202 Iowa273, 209NW393 (as to what facts are material in hypothetical question); 204 Iowa231, 213NW 380; 217Ky265, 289SW231; 224Ky303, 6SW(2d)237; 228Ky197, 14SW(2d)757; 241Mich396, 217NW62; Mo 282SW423; MoA 15SW(2d)912; MoA 15SW(2d)923; Mo 31SW(2d)14; 220MoA1112, 296SW 257; MoA 285SW520; MoA 16SW(2d) 604; 24 OhA374, 157NE708; 102WVa 432, 135SE386; 103WVa97, 136SE691; 103WVa408, 137SE656. See also 316Mo 278, 290SW429; MoA 288SW369. **Instruction held not to submit question of law.**–170Ark842, 281SW910; MoA 298 SW254. **Instructions held to involve questions of fact.**–132SC398, 129SE199. **Instructions not violative of rule.**–136 Wash632, 241P26. **Where allegations of negligence include omission of acts whose performance is enjoined by law,** it is error to instruct generally on negligence without qualification. 34GaA103, 128SE226.

1512–24 86CalA507, 261P747. **Instructions held not to submit question of law to jury.**–Md 150A866.

1512–25 213Ala494, 106S150; 220Ala 35, 123S229; 172Ark932, 290SW966; 176Ark1204, 3SW(2d)979; 176Ark705, 3SW(2d)988; 83Colo 204, 263P713; 84 Colo 342, 270P659; 103Conn683, 131A 420; 93Fla30, 111S525; 35GaA563, 134 SE510; 28Hawaii404; 203 Iowa960, 211 NW238; 208 Iowa767, 226NW174; 122 Kan653, 253P611; 130Kan333, 286P219; 130Kan743, 288P766; 229Ky293, 16SW (2d)1046; 234Ky276, 27SW(2d)980; 161La653, 109S345; 126Me261, 137A773; Mass 173NE524; 148Miss575, 114S396; 153Miss597, 121S292; 118Nebr318, 224 NW687; NJ 130A367 (questions of fact are properly submitted to jury); 102 NJL374, 131A886; 103NJL440, 135A897 ("jury is the arbiter of disputed questions of fact"); 104NJL557, 142A337, 60ALR102; NJ 150A412; 193NC845, 137SE657; 193NC849, 138SE123; 195 NC365, 142SE230; 196NC649, 146SE 571; 198NC719, 153SE335 (prima facie showing); 25 OhA157, 157NE825; 29 OhA67, 162NE777; 31 OhA525, 166NE 698; 112 Okl 1, 239P599; 115 Okl 31, 241P121; 115 Okl 280, 242P565; 120 Okl 279, 251P56; 134 Okl 65, 272P850; 136 Okl 271, 277P591; 40 OklACR83; 298Pa244, 148A105; 134SC185, 132SE 47; 134SC435, 132SE828; 117Tex34, 297SW206; TexCivA 288SW627; TexCivA 3SW(2d)501; TexCivA 10SW(2d) 422; 147Va522, 137SE614; 147Va509, 137SE620, 52ALR213; 194Wis159, 215 NW829. **Instruction invading province of jury** is error. TexCivA 7SW(2d)934. **Prima facie showing carries case to jury** absent fatal admission or confession. 198NC777, 153SE397.

1512–25½–New. In a proper case court has jurisdiction to determine relevant questions of disputed fact and to apply law thereto when fact is so determined. 116Nebr359, 217NW610.

1512–25½–New. Refusal to withdraw from jury question not in issue either in pleadings or evidence is not erroneous. 132 Or328, 285P261.

1512–25¼–New. Withdrawal of ground of recovery does not prevent its consideration on issue of contributory negligence. Mo 32SW(2d)580.

1512–25½–New. Charge of negligence abandoned by plaintiff and not alleged as element of other negligence is properly withdrawn. Mo 32SW(2d)580.

1513–26 220Ala35, 123S229 (proposed amendment); 36 OklACR722. See also 246 IllA550.

1513–31 Instructions which leave to the jury the determination of what are the material allegations of a pleading, etc. TexCommnA 13SW(2d)63; TexCommnA 15SW(2d)210; TexCivA 14SW(2d)872.

1513–34 MoA 4SW(2d)478.

1513–35½–New. Pleadings are not for consideration of jury, except when offered by opposite party as admissions. MoA 290SW630.

1513–36 296Pa400, 145A909.

1513–37 214Ala107, 106S599; 231Ky 550, 21SW(2d)983; 82NH225, 131A 601; 132 Or290, 285P825.

1513–37½–New. Where court has submitted to jury, for purpose of comparison with disputed writing, a writing proved to be genuine to its satisfaction, question of genuineness of disputed writing becomes one for jury. 104WVa 547, 140SE534, 58ALR207.

1513–37½–New. and if there be no other evidence, it is error to take case from jury by peremptory instruction. 104 WVa547, 140SE534, 58ALR207.

1514–38 203 Iowa5, 212NW348; 130 Misc456, 224NYS210.

1514–39 240Mich677, 216NW391; 80 Mont431, 261P253; 130Misc456, 224NYS 210.

1514–40 36GaA257, 136SE164; 82NH 304, 133A16, 45ALR1409; 21 OhA143, 153NE95. **Sufficiency of foundation laid** for impeaching testimony is for court. 50ND91, 194NW917.

1514–41 5PaDist&Co 410.

1514–42 Instructions not violative of rule.–218MoA625, 267SW73.

1514–46 270US280, 46SCt253, 70L ed 585; 30F(2d)905; 173Ark937, 294SW 353; 28Hawaii404; 321 Ill 168, 151NE 573; 327 Ill 339, 158NE724; 149Md140, 131A82; 156Md81, 143A648; 78Mont97, 252P382 (on motion for nonsuit); 192 NC475, 135SE339; 58ND109, 224NW 915; 23 OhA304, 154NE361; 21 OhA 143, 153NE95; 133 Okl 252, 271P839; 288Pa389, 135A860; 134SC462, 133SE 99, 45ALR1112; TexCommnA 16SW (2d)262; TexCivA 272SW291; TexCivA 296SW939; TexCivA 1SW(2d)476; Tex CivA 30SW(2d)673; Utah 289P146. **Sufficiency of evidence to go to jury is for court.** 233Ky576, 26SW(2d)491. **Coparties.**–139SC139, 137SE434.

1514–47 149Md140, 131A82; 135 Okl 196, 274P889; TexCivA 286SW673. **Contradictory statements of plaintiff** may go to jury for sifting to discover truth in some instances, but rule is not lax enough to admit a positive statement, establishing contributory negligence, being rendered affirmative showing of due care by subsequent testimony that first statement may or may not be true. 232 Mich322, 205NW104.

1515–49 174Ark296, 295SW53 (evidence confined to credibility); 135 Okl 196, 274 P889; TexCivA 285SW1118. **Where issue is joined on replication,** and replication is proved without dispute, plaintiff is entitled to verdict on issue presented. 22AlaA467, 116S898.

1515–50 40F(2d)21; 41F(2d)542 (standards of conduct are for court, where facts are undisputed); 80Colo 412, 252P348 (error to submit undisputed facts to jury); 35GaA777, 134SE813 (issues properly submitted); 237 IllA 86; 222MoA586, 292SW1079; MoA 297 SW87; TexCommnA 3SW(2d)425; Tex CivA 32SW(2d)492.

1515–51 32F(2d)567; 237 IllA86; 105 NJL183, 143A375.

1515–52 190NC833, 131SE42; TexCivA 285SW1118; TexCivA 22SW(2d)533.

1515–53 215Ala244, 110S20.

1515–54 300Pa159, 150A384 (where physical facts govern).

1516–55 CalA 292P987; 36GaA433, 137 SE79; Me 151A422; Mass 173NE524; 154Md204, 140A48; TexCivA 273SW 690; TexCivA 275SW96. **Submission of question supported by undisputed evidence** would be erroneous. 222MoA260, 296SW183. **Negative testimony although opposed by positive testimony** is sufficient to go to jury. Utah 290 P970.

1516–55½–New. Where intelligent and fair-minded men may reasonably differ in conclusion to be drawn from evidence, case should be submitted to jury. 99 Vt39, 130A578.

1516–56 215Ky184, 284SW1022. **Evidence held sufficient to submit to jury.**–221MoA960, 289SW352.

1516–57 281US90, 50SCt231, 74L ed 720; 13F(2d)794; 25F(2d)588; 33F (2d)904 [aff 33F(2d)905]; 36F(2d)912; 43F(2d)557; 213Ala256, 104S506; 214 Ala107, 106S599; 214Ala530, 108S373; 215Ala666, 112S129; 219Ala24, 121S30; 221Ala542, 130S63; 29Ariz405, 242P 436; 32Ariz154, 256P503; 35Ariz226, 276P521; 170Ark842, 281SW910; 170 Ark1193, 282SW999; 172Ark1177, 288 SW892; 172Ark729, 290SW942; 174 Ark1, 294SW414; 176Ark375, 3SW(2d) 38; 177Ark60, 5SW(2d)729; 177Ark 217, 6SW(2d)26; Ark 30SW(2d)840(2d case); 181Ark1146, 30SW(2d)853; Ark 31SW(2d)304; Ark 31SW(2d)750; 199 Cal 759, 251P778; 200Cal 396, 253P134; 204Cal 387, 268P345; 74CalA10, 239P 429; 75CalA129, 242P97 (negative testimony); 75CalA737, 243P686; Cal 292 P970; 79CalA55, 248P1065; 84CalA599, 258P616; CalA 280P154; CalA 289P 673; 104Conn355, 132A913; 105Conn 366, 135A391; 3Del 450, 139A66; 92 Fla292, 109S597; 163Ga553, 136SE526; 36GaA149, 136SE319; 41GaA586, 154 SE190(1stcase); 335 Ill 164, 166NE530; 235 IlA146; 203 Iowa5, 212NW348; 204 Iowa174, 214NW529, 62ALR432; 208 Iowa1157, 225NW346; Iowa 231NW665 (conflicting evidence); 123Kan515, 255 P1115; 226Ky290, 10SW(2d)1101; 228 Ky90, 14SW(2d)392; 179Ark248, 15 SW(2d)310; 126Me498, 139A675; 127 Me377, 143A466; 158Md424, 149A4; Md 152A114; 258Mass93, 154NE848; 260Mass210, 157NE339; 261Mass435, 158NE782; 144Miss643, 110S118; 153 Miss467, 121S143; 307Mo 307, 270SW 318; 310Mo 367, 276SW869; 319Mo 1169, 8SW(2d)580; 323Mo 346, 19SW (2d)285; Mo 30SW(2d)462; Mo 31SW (2d)998; 218MoA625, 267SW73; 220 MoA160, 281SW121; MoA 293SW791; MoA 7SW(2d)1018; 222MoA1146, 15 SW(2d)970; MoA 21SW(2d)211; 76 Mont288, 246P536; 77Mont110, 250P 819; 84Mont84, 724P293; Mont 290P 255; 115Nebr589, 214NW1; 117Nebr 34, 219NW798; NH 148A582; NJSup 136A416; NJSup 151A448(1stcase); 243 NY34, 152NE456; 243NY118, 152NE 695; 189NC744, 128SE344; 191NC291, 131SE757; 191NC359, 131SE729; 191 NC401, 132SE14; 193NC485, 137SE430; 194NC188, 138SE608; 194NC273, 139 SE434; 194NC346, 139SE696; NC 146 SE570; NC 154SE12; 51ND158, 199 NW480; 51ND784, 200NW909; 23 OhA 304, 154NE361; 21 OhA143, 153NE95; 21 OhA143, 153NE95; 31 OhA229, 166 NE916; 111 Okl 230, 239P222; 115 Okl

76, 241P794; 115 Okl 280, 242P565; 116 Okl 291, 244P775; 118 Okl 159, 247P 413; 120 Okl 116, 251P989; 126 Okl 117, 258P902; 134 Okl 1, 272P436; 120 Or181, 250P628; 121 Or15, 253P877; 121 Or628, 257P16; 123 Or50, 260P 1012; 131 Or415, 282P542; 285Pa34, 131A588; 293Pa45, 141A631; 299Pa 163, 149A186; 85PaSuper108; 8PaDist &Co 343; 47RI 478, 134A7; 49RI 430, 143A780; RI 144A769(2dcase); RI 145 A310(1stcase); 134SC545, 133SE433; 136SC496, 134SE505; 157SC359, 154SE 645; 48SD477, 205NW38; 51SD214, 213 NW19; TexCommnA 292SW518; Tex CommnA 29SW(2d)944; TexCivA 273 SW666; TexCivA 274SW643; TexCivA 275SW96 (under statute); TexCivA 278 SW488; TexCivA 282SW819; TexCivA 286SW241; TexCivA 286SW307; Tex CivA 294SW645; TexCivA 294SW883; TexCivA 294SW948; TexCivA 295SW 633; TexCivA 300SW201; TexCivA 2 SW(2d)939; TexCivA 5SW(2d)582; Tex CivA 6SW(2d)211; TexCivA 23SW(2d) 771; TexCivA 26SW(2d)298; TexCivA 28SW(2d)238; TexCivA 29SW(2d)891; TexCivA 30SW(2d)350; TexCivA 31SW (2d)350; 67Utah171, 246P535; 142Va 857, 128SE367; 146Va574, 131SE841; 145Va334, 133SE657; 145Va489, 134SE 576; 147Va208, 136SE591; 136Wash 624, 241P1; 136Wash624, 241P1; 145 Wash383, 260P245; 152Wash1, 277P74; Wash 287P658; 99WVa568, 130SE677; 99WVa718, 130SE679; 100WVa679, 131 SE563; 104WVa547, 140SE534, 58ALR 207; 105WVa171, 141SE788. **Circumstantial evidence.**–222MoA1146, 15SW (2d)970. **Mere preponderance in number of witnesses does not deprive jury of its function.** 233Ky276, 25SW(2d) 398.

1516–58 180Ark757, 22SW(2d)387; 13 F(2d)794; 213Ala494, 106S150; 214Ala 373, 108S5; 21AlaA545, 109S895; 173 Ark937, 294SW353; Cal 291P184; 84 CalA599, 258P616; 80Colo 420, 252P 346; 105Conn366, 135A391; 321 Ill 168, 151NE573; 235 IllA146; 233Ky105, 25 SW(2d)54; 234Ky788, 29SW(2d)557; 235Ky637, 32SW(2d)1; 125Me506, 131A 5; 158Md243, 148A216; 260Mass210, 157NE339; 263Mass147, 160NE821; Mich 233NW221; 145Miss683, 110S237; 220MoA160, 281SW121; MoA 278SW 95; MoA 280SW85; 221MoA644, 283 SW705; MoA 294SW426; MoA 22SW (2d)858; MoA 23SW(2d)193; 115Nebr 589, 214NW1; 241NY385, 150NE302; 190NC874, 130SE164; 191NC153, 131SE 670 (when testimony insufficient to support different finding); 194NC346, 139 SE696; 197NC724, 150SE503; 21 OhA 143, 153NE95; 123 Or50, 260P1012; 85 PaSuper108; RI 148A184; TexCommnA 16SW(2d)262; TexCivA 272SW291; TexCivA 275SW96; TexCivA 278SW 488; TexCivA 282SW819; TexCivA 289 SW152; TexCivA 289SW164; TexCivA 294SW883; TexCivA 295SW633; Tex CivA 296SW939; TexCivA 300SW201; TexCivA 4SW(2d)159; TexCivA 22SW (2d)157; TexCivA 32SW(2d)225; 145 Va334, 133SE657; 136Wash624, 241P1. **Negative evidence alone** is sufficient to take to jury question of train crew's negligence in failing to give statutory signals. Mont 289P580. **Although some of testimony conflicts with physical facts** evidence may be sufficient to take case to jury. MoA 30SW(2d)1094.

1517–59 33F(2d)449; 213Ala534, 105S 901 (scintilla of evidence unfavorable to party requesting general affirmative charge warrants refusal); 20AlaA555, 103S713; 94Fla272, 114S240; Fla 129 S575; 170Ga892, 154SE449; 321 Ill 168, 151NE573; 219MoA211, 269SW665; MoA 4SW(2d)478; 76Mont105, 245P 523; Mont 291P1042; 117Nebr178, 220 NW247, 60ALR658; NC 154SE12 (unless evidence reasonably tends to show all essential facts, action should be dismissed on motion); 133 Okl 43, 271P 158; 285Pa34, 131A588; 47RI 478, 134 A7; 157SC352, 154SE424; TexCivA 272 SW291. See also 235 IllA146; MoA 298 SW1065. **Court is required to submit issue to jury** where there is any material evidence to decide it. TexCivA 276SW 961. **Issues of fact raised by evidence cannot be withdrawn from jury.**–TexCivA 274SW1023. **Where there is more than a scintilla of evidence** its credibility and probative force is for jury. 190NC 722, 130SE630. **Where evidence is so slight** as to leave no more than mere conjecture, court will not leave issue to jury. 191NC722, 133SE12. **Where there is any evidence to support material issue,** case must be left to decision of jury. 192NC 597, 135SE610. **Where evidence is uncontroverted,** it becomes matter of law for court. TexCivA 288SW627. **When testimony and all inferences jury could justifiably draw would be insufficient** to support different verdict, court must direct verdict. 41F(2d)542.

1517–59½–New. If facts are not in dispute, it is for court to declare their legal effect. 287Pa403, 135A124.

1517–59⅓–New. Where facts in case are simple, and evidence by which they are presented is involved in no uncertainty, legal value of facts is for court to determine. 296Pa61, 145A607.

1517–59¼–New. Generally it cannot be ruled as matter of law that one on whom burden of proof rests as to facts has sustained that burden. 264Mass414, 163NE 63.

1517–60 NJSup 148A170.

1517–61 17F(2d)889; 32F(2d)567; 35 F(2d)563; 41F(2d)586; 43F(2d)557; 214Ala23, 106S242; 214Ala601, 108S 575; 216Ala102, 112S348; Cal 291P184; 102CalA272, 282P1019; CalA 286P761; 95Fla31, 116S2; 97Fla869, 122S270; 170Ga892, 154SE449; 335 Ill 164, 166 NE530; 85 IndA510, 154NE508; 201 Iowa1334, 208NW213; Iowa 222NW 890; 130Kan333, 286P219; 223Ky707, 48SW(2d)716; 232Ky702, 23SW(2d)564; 252Mass430, 147NE894; 259Mass272, 156NE254; 153Miss809, 122S755; 219 MoA121, 272SW79 (court may require jury to find ultimate facts); 221MoA 478, 282SW97; 82NH94, 129A882; 102 NJL374, 131A886; NJSup 150A574; 240NY144, 147NE616 (and till such inference is drawn verdict has no basis); 242NY251, 151NE442; 192NC475, 135 SE339; 122 Or579, 260P444; 298Pa522, 148A693; 93PaSuper503; 134SC185, 132SE47; 143SC238, 146SE15; 157SC 381, 154SE221; TexCommnA 15SW(2d) 562; TexCivA 272SW291; TexCivA 275 SW96; TexCivA 289SW164; TexCivA 8SW(2d)271; 146Va574, 131SE841; Wis 228NW741; Wis 232NW550. **Where more than one inference can be drawn,** court must submit case to jury. 157SC154, 154SE95.

1517–62 105Conn366, 135A391; 222 MoA226, 297SW112; 83NH210, 140A 176; 102NJL374, 131A886; 121 Or628, 257P16; TexCivA 275SW96. **Reasonable foundation necessary.**–153Miss570, 121S119. **Ocular evidence is for jury.**–214Ala23, 106S242.

1518–63 203 Iowa960, 211NW238; 154 Md204, 140A48; Mo 248SW(2d)143 (should not indulge in arbitrary deductions from physical law and fact unless clear); 242NY251, 151NE442; TexCivA 25SW(2d)695 (inferences from established facts). Contra 103NJL383, 135A894. **Instructing jury not to consider** that there was any evidence of negligence in character of tools and appliances furnished employees held error. 137SC468, 135SE877.

1518–64 212Ala325, 104S808; 85 IndA 510, 154NE508.

1518–64½–New. Where inferences from facts are not in dispute, legal effect of facts is for court. 287Pa403, 135A 124.

1518–65 216Ala312, 113S59; 125Me460, 134A628; 242NY251, 151NE442. **Jury must make deduction which law directs.** CalA 290P497.

1518–66 Md 151A400; 156Miss330, 126 S4; 323Mo 929, 20SW(2d)34; 290Pa 21, 137A867. **Assessment to right or wrong person.**–34Wyo 304, 243P126. **Payment of taxes.**–212Ala542, 103S580. **Court may say as matter of law that presumption is rebutted** where evidence to rebut it is conclusive. Md 151A 400.

1518–67 240NY144, 147NE616 (where appellate court held that presumption did not exist).

1518–67½–New. Presumptions do not make case for jury where they are against oral testimony and indisputable physical conditions. 290Pa21, 137A867.

1518–69 281US90, 50SCt231, 74Led720; 25F(2d)588; 33F(2d)904 [aff 33F(2d) 905]; 43F(2d)557; 213Ala534, 105S 901 (apparent conflict in statements of witness does not authorize disregard of rule); 214Ala23, 106S242; 214Ala 107, 106S599; 214Ala530, 108S373; 214 Ala601, 108S575; 216Ala455, 113S403; 218Ala505, 119S11; 21AlaA545, 109S 895; 22AlaA483, 118S170; AlaA 129S 705(2dcase); 29Ariz405, 242P436; 32 Ariz154, 256P503; 34Ariz230, 270P 629; 35Ariz226, 276P521; 170Ark842, 281SW910; 170Ark1193, 282SW999; 172Ark314, 288SW723; 172Ark1177, 288 SW892; 172Ark729, 290SW942; 172 Ark947, 291SW66; 174Ark1, 294SW414; 174Ark6, 294SW416; 174Ark603, 299SW 2; 175Ark944, 1SW(2d)83; 176Ark375, 3SW(2d)38; 176Ark616, 3SW(2d)692; 177Ark60, 5SW(2d)729; 177Ark217, 6 SW(2d)26; 178Ark241, 10SW(2d)377; 178Ark1199, 10SW(2d)900; 180Ark298, 21SW(2d)430; 180Ark757, 22SW(2d) 387; 181Ark1037, 28SW(2d)1073; Ark 30SW(2d)840(2dcase); 181Ark1146, 30 SW(2d)853; Ark 31SW(2d)304; Ark 31SW(2d)750; 200Cal 396, 253P134; 75CalA737, 243P686; 79CalA55, 248P 1065; 83CalA655, 257P447; 93CalA370, 269P710; 94CalA48, 270P704; 97CalA 87, 275P456; CalA 280P154; 102CalA 272, 282P1019; 103CalA386, 284P477; 80Colo 420, 252P346; 87Colo 552, 290 P276; 104Conn355, 132A913; 111Conn 261, 149A772; 3Del 450, 139A66; 92 Fla292, 109S597; 98Fla720, 124S180; 163Ga796, 137SE64; 164Ga311, 138SE 580; 169Ga734, 151SE506; 35GaA379, 133SE272; 36GaA241, 136SE167; 35 GaA350, 133SE282; 37GaA240, 139SE 686; 37GaA272, 139SE830; 39GaA163, 146SE566; 41GaA586, 154SE190(1st case); 27Hawaii109; 28Hawaii458; 45 Ida604, 264P384; 335 Ill 164, 166NE 530; 246 IllA334; 253 IllA450; IndA 148NE505; 85 IndA450, 150NE31; 201 Iowa1044, 207NW984; 202 Iowa1229, 211NW875; 203 Iowa5, 212NW348; 203 Iowa676, 213NW431; 204 Iowa174, 214NW529, 62ALR432; 207 Iowa862, 224NW28; Iowa 228NW45; Iowa 229 NW321; Iowa 233NW23; 123Kan515, 255P1115; 125Kan189, 263P1058; 209 Ky442, 272SW912; 215Ky639, 286SW 693; 216Ky674, 288SW301; 218Ky26, 290SW1034; 218Ky59, 290SW1044; 218Ky600, 291SW1027; 219Ky119, 292 SW765; 224Ky383, 6SW(2d)480; 224 Ky659, 6SW(2d)1084; 225Ky645, 9SW (2d)993; 226Ky179, 10SW(2d)846; 227 Ky490, 13SW(2d)496; 227Ky841, 14 SW(2d)174; 179Ark248, 15SW(2d)310; 228Ky669, 15SW(2d)499; 229Ky37, 16 SW(2d)489; 229Ky330, 17SW(2d)249; 229Ky830, 18SW(2d)280; 230Ky64, 18 SW(2d)879; 231Ky282, 21SW(2d)451; 231Ky591, 21SW(2d)985, 66ALR1526; 232Ky56, 22SW(2d)446; 232Ky630, 24 SW(2d)263; 233Ky781, 26SW(2d)757; 163La1083, 113S463; 164La529, 114S 122; 125Me506, 131A5; 126Me607, 139 A499; 126Me498, 139A675; 127Me377, 143A466; 127Me554, 144A677; Me 150 A120; 156Md81, 143A648; 158Md424, 149A4; 253Mass603, 149NE599; 256 Mass256, 152NE52; 260Mass110, 156 NE838; 261Mass121, 158NE350; 261 Mass435, 158NE782; 262Mass335, 159 NE913; 263Mass500, 161NE596; 267 Mass447, 166NE711; 233Mich400, 206 NW309; 234Mich11, 207NW856; 235 Mich616, 209NW850; 241Mich383, 217 NW329, 57ALR262; 244Mich208, 221 NW314; 142Miss542, 107S369; 144 Miss643, 110S118; 148Miss456, 114S35; 153Miss437, 121S118; 314Mo 305, 284 SW488 (truth of testimony); Mo 298 SW51; 317Mo 1096, 298SW795; Mo 300SW465; 318Mo 723, 300SW769, 778 [citCyc]; 319Mo 1169, 8SW(2d)580; 320Mo 916, 9SW(2d)912; 321Mo 1190, 18SW(2d)433; Mo 28SW(2d)1008 (whether expert was discredited); Mo 31SW(2d)4; Mo 31SW(2d)998; 218 MoA625, 267SW73; MoA 273SW221; MoA 278SW95; 220MoA160, 281SW121; MoA 284SW815; 220MoA1312, 293SW 453; MoA 296SW437; 222MoA128, 2 SW(2d)824; MoA 7SW(2d)429; MoA 18SW(2d)137; 80Mont214, 260P711; 80Mont431, 261P253; 84Mont84, 274P

293; Mont 290P259; 115Nebr589, 214 NW1; 103NJL49, 134A776; 105NJL 363, 144A593; NJSup 132A243; NJSup 136A416; NJSup 149A337; NJCh 147A 559(2dcase); 241NY460, 150NE516; 242 NY251, 151NE442; 218AppDiv749, 218 NYS115; 221AppDiv569, 224NYS510; 222AppDiv82, 225NYS317; 126Misc749, 215NYS428; 127Misc20, 215NYS761; 227AppDiv208, 237NYS235; 191NC153, 131SE670; 191NC176, 131SE587; 191 NC359, 131SE729; 191NC401, 132SE14; 194NC188, 138SE608; 196NC742, 146 SE860; 197NC724, 150SE503; 198NC 760, 153SE405; 51ND158, 199NW480; 51ND784, 200NW909; 115 Okl 84, 241P 758; 115 Okl 280, 242P565; 116 Okl 291, 244P775; 118 Okl 159, 247P413; 120 Okl 116, 251P989; 126 Okl 117, 258 P902; 129 Okl 118, 263P645; 36 Okl ACR129; 121 Or236, 252P400; 121 Or 15, 253P877; 121 Or628, 257P16; 127 Or326, 266P254; 131 Or282, 282P108; 286Pa359, 133A566; 287Pa403, 135A 124; 292Pa106, 140A622; 293Pa9, 141 A623; 295Pa523, 145A531; 299Pa163, 149A186; 94PaSuper145; 95PaSuper 150; 97PaSuper467; 5PaDist&Co 410; 8PaDist&Co 343; 8PaDist&Co 623; 47 RI 193, 131A695; 47RI 478, 134A7; RI 136A845; RI 137A697; 49RI 50, 139A 664; 49RI 83, 140A355; 49RI 430, 143 A780; RI 144A769(2dcase); RI 145A 310(1stcase); RI 148A184; 134SC185, 132SE47; 134SC435, 132SE828; 134SC 545, 133SE433; 136SC496, 134SE505; 157SC381, 154SE221; 49SD619, 208NW 170; 51SD214, 213NW19; 53SD491, 221 NW93; SD 226NW274; TexCivA 290 SW283; TexCommnA 292SW518; Tex CivA 271SW108; TexCivA 275SW96 (under statute); TexCivA 281SW339; TexCivA 282SW317; TexCivA 282SW 819; TexCivA 286SW241; TexCivA 286 SW307; TexCivA 294SW225; TexCivA 294SW645; TexCivA 297SW534; Tex CivA 297SW544; TexCivA 298SW154; TexCivA 299SW321; TexCivA 300SW 201; TexCivA 2SW(2d)866; TexCivA 2SW(2d)939; TexCivA 4SW(2d)222; TexCivA 4SW(2d)227; TexCivA 5SW (2d)582; TexCivA 6SW(2d)211; Tex CivA 6SW(2d)418; TexCivA 8SW(2d) 271; TexCivA 8SW(2d)819; TexCivA 10SW(2d)397; TexCivA 10SW(2d)574; TexCivA 13SW(2d)965; TexCivA 16SW (2d)867; TexCivA 19SW(2d)373; Tex CivA 22SW(2d)157; TexCivA 25SW(2d) 961; TexCivA 26SW(2d)298; TexCivA 28SW(2d)238; TexCivA 31SW(2d)350; TexCivA 32SW(2d)254; TexCivA 32SW (2d)502; Utah 263P495; 142Va857, 128 SE367; 146Va574, 131SE841; 146Va 747, 132SE694 (holding jury proper tribunal to settle contradictory statements); 145Va334, 133SE657; 145Va 489, 134SE576; 147Va208, 136SE591; 153Va468, 143SE625; Va 143SE629; 136Wash534, 240P902; 136Wash624, 241P1; 137Wash326, 242P372; 145 Wash383, 260P245; 152Wash1, 277P74; 153Wash14, 279P94; 99WVa677, 129SE 752; 105WVa171, 141SE788; 105WVa 555, 144SE100. **If evidence is solely from witnesses of party having burden of proof,** court must give affirmative charge with hypothesis, if at all, and allow argument on credibility. 215Ala 56, 109S291. **Parol evidence** held for jury. 286Pa359, 133A566. **Statute permitting refreshing of memory** held to be rule of evidence, and not to affect probative value thereof. 37GaA240, 139SE 686. **Use of memorandum to refresh memory** held not to go to probative value, which is jury question. 37GaA 240, 139SE686. **Expert testimony.**–CalA 291P903.

1520–70 203Cal 26, 263P240; 75CalA 737, 243P686; Conn 152A72(2dcase); 164Ga311, 138SE580; 27Hawaii109; 201 Iowa1202, 203NW284; 207 Iowa 1278, 224NW815; Iowa 229NW237; 126Me600, 138A568; 241Mich383, 217 NW329, 57ALR262; 179Minn147, 228 NW554; Mo 318SW(2d)792; MoA 294 SW1021; MoA 10SW(2d)962; 225App Div829, 232NYS564; 196NC314, 145SE 555; TexCivA 290SW283; TexCivA 8 SW(2d)819; TexCommnA 14SW(2d) 812; TexCivA 282SW317; TexCivA 286 SW483; 145Wash383, 260P245; Wash 292P99; 200Wis110, 227NW246. **As between party and his witness,** it is for jury to say which was testifying correctly to facts. 140Wash412, 249P780.

1520–71 75CalA737, 243P686; 83CalA 655, 257P447; 126Misc749, 215NYS428; TexCivA 282SW317.

1520–72 Cal 287P343; 167Minn509, 209NW325; 241NY460, 150NE516; 224 AppDiv761, 229NYS756; 285Pa299, 132 A350; TexCivA 281SW339; TexCivA 294SW645; TexCivA 4SW(2d)159; TexCivA 7SW(2d)625; TexCivA 8SW (2d)683; TexCivA 15SW(2d)123; Tex CivA 19SW(2d)445; Wash 287P658; 195Wis264, 218NW174. See also Tex CivA 278SW278. **Verity of testimony** is for jury, not court. 241NY460, 150NE 516.

1520–73 168Minn319, 210NW75.

1520–74 75CalA737, 243P686 (apparent inconsistencies in testimony); 158Md 292, 148A536; Mo 318SW(2d)998; MoA 278SW95; MoA 10SW(2d)965; 286Pa 344, 133A508; TexCivA 5SW(2d)582; 197Wis538, 222NW821.

1520–75 214Ala601, 108S575; 75CalA 737, 243P686 (apparent inconsistencies in testimony); 86CalA595, 261P481; 215Ky639, 286SW693; MoA 278SW95. **If there is inconsistency in testimony of plaintiff's witnesses,** jury is authorized to believe ones who testified most favorably to plaintiff. MoA 14SW(2d) 701.

1520–76 174Ark1180, 298SW195; 36 GaA518, 137SE282; 201Iowa1202, 203 NW284; 208 Iowa246, 225NW242; Iowa 233NW23; 171Minn250, 213NW918; MoA 278SW95; MoA 298SW1053; 286 Pa344, 133A508; 134SC185, 132SE47; TexCivA 274SW242; TexCivA 19SW (2d)373. **Rule does not apply** where former testimony is corrected and explained. 239Mich97, 214NW166.

1521–77 43F(2d)675; 93CalA601, 269P 972; 103CalA757, 284P1062; 316Mo 1266, 296SW105; MoA 1SW(2d)252; MoA 7SW(2d)719; 194NC273, 139SE 434; 119 Okl 55, 248P319; 126 Or532, 270P521; 285Pa299, 132A350; 286Pa 344, 133A508; TexCivA 29SW(2d)524; 135Wash248, 237P708. But see NJ 148 A605(1stcase).

1521–78 MoA 297SW171; 189NC744, 128SE344.

1521–79 286Pa344, 133A508.

1521–80 286Pa344, 133A508.

1521–81 172Ark335, 288SW712; 164Ga 311, 138SE580; 171Minn250, 213NW 918; 148Miss871, 114S807; MoA 288 SW369; 286Pa344, 133A508; TexCivA 286SW483; TexCivA 295SW274; Tex CivA 10SW(2d)213. But see NH 149A 746. **Rule applies also to affidavits of interested party.** TexCivA 292SW958.

1521–82 170Ark594, 280SW625; 201 Cal 610, 258P88; NJSup 146A476; 126 Misc749, 215NYS428; TexCivA 292SW 958.

1521–83 220MoA160, 281SW121; MoA 292SW1062; 126Misc749, 215NYS428; 8PaDist&Co 623.

1521–83 TexCivA 276SW302.

1521–84 22AlaA483, 118S170; 21AlaA 545, 109S895; AlaA 129S705; 174Ark 603, 299SW2; 178Ark241, 10SW(2d) 377; 36GaA241, 136SE167; 123Kan515, 255P1115; 225Ky645, 9SW(2d)993; 156Md81, 143A648; 238Mich181, 212 NW960; 319Mo1169, 8SW(2d)580; 220 MoA1312, 293SW453; 77Mont110, 250 P819; 189NC744, 128SE344; 194NC 188, 138SE608; 115 Okl 84, 241P758; 118 Okl 159, 247P413; 126 Okl 117, 258 P902; 134SC435, 132SE828; 51SD214, 213NW19; TexCivA 282SW317; Tex CivA 284SW983; TexCivA 290SW283; TexCivA 294SW645; TexCivA 8SW(2d) 271; TexCivA 10SW(2d)397; TexCivA 10SW(2d)574; TexCivA 10SW(2d)760; 142Va857, 128SE367. **Jury may disregard evidence** they do not believe. 143 Va46, 129SE219. **Jury may accept or reject, in whole or in part, testimony of any witness.**–121 Or628, 257P16.

1521–85 170Ark594, 280SW625; 36 GaA241, 136SE167; 236Mich471, 210 NW478; MoA 287SW852; 136Wash534, 240P902.

1521–86 315Mo 713, 290SW135.

1521–88 315Mo 713, 290SW135.

1521–89 36GaA518, 137SE282; 119 Okl 55, 248P319.

1521–90 Claim or demand for reimbursement is necessary where defendant tax purchaser in suit against him maintains validity of deed. 40 Ida638, 236P 536.

1521–91 208 Iowa228, 225NW268.

1522–96 34Ariz87, 267P947; 163Ga796, 137SE64; 169Minn399, 211NW471; 169 Minn397, 211NW472.

1522–97 127Me11, 140A608; 293Pa343, 143A5. **Clarification of ambiguous testimony** held to create no issue of fact for jury. 238Mich181, 212NW960. **Conclusions stated by witness held eliminated by inconsistent facts subsequently testified to by him.**–238Mich181, 212 NW960. **Weight of inconsistent and contradictory testimony** held for jury. 238Mich181, 212NW960.

1522–98 Mo 300SW465. **Testimony held not unbelievable or impossible.**–319 Mo 432, 3SW(2d)1004.

1522–1 36F(2d)628; 220Ala216, 124 S514; 23AlaA416, 125S398; 221Ala24, 127S155; 206Cal 273, 274P57; CalA 266 P307; 80Colo 412, 252P348; 111Conn 200, 149A838; 232 IllA102; 252 IllA 366; 253 IllA190; 122Kan423, 251P 1080; 126Kan544, 268P833; 210Ky121, 275SW513; 148Md438, 129A650; 220 MoA160, 281SW121; 220MoA1112, 296 SW257; 242NY134, 151NE155; 218App Div411, 218NYS457; OhA 153NE859; TexCommnA 280SW742; TexCivA 288 SW656; TexCivA 295SW653; TexCivA 11SW(2d)621; TexCivA 15SW(2d)194; 148Va413, 139SE254; 150Va17, 142SE 405; Va 153SE667; 106WVa437, 146 SE525. See also 152Va460, 147SE203. **The rule has been applied:** In case of separation agreements. 218AppDiv411, 218NYS457. In case of contracts. OhA 153NE859. In case of letters and telegrams. 322Mo 1064, 18SW(2d)1043. In case of financial statement and estimate of municipal board. 142 Okl 8, 285P48.

1523–2 5F(2d)439; Ind 169NE843; OhA 153NE859; 127 Or612, 271P600, 61ALR1441.

1523–4 28F(2d)145; 86CalA591, 261P 313; 80Colo 412, 252P348; 220MoA 1112, 296SW257; 21 OhA444, 153NE 313; TexCivA 11SW(2d)621; Va 139 SE254; 100WVa331, 130SE447. **Instructions not obnoxious to rule.**–110 Conn217, 147A673.

1524–6 TexCivA 288SW656.

1524–7 16F(2d)54; 100WVa331, 130 SE447.

1524–8 16F(2d)54; TexCivA 16SW (2d)901.

1524–8½–New. When jury determines issue of fact as to title which depends upon existence or genuineness of particular document or fact, court will determine legal weight and effect of finding of fact upon title under consideration. TexCivA 15SW(2d)194.

1524–8¾–New. If title depends upon existence or genuineness of particular document or fact, question of fact is presented for jury. TexCivA 15SW(2d) 194.

1524–9 260Mass202, 156NE875; 115 Nebr327, 212NW762; 252NY127, 169 NE112; 227AppDiv378, 237NYS668.

1524–10 23AlaA416, 125S398; 82CalA 255, 255P543; 264Mass414, 163NE63; Mo 282SW423; 82NH297, 133A21; 252 NY127, 169NE112.

1524–11 260Mass202, 156NE875; 264 Mass414, 163NE63; 115Nebr327, 212 NW762. **Whether invitee could recover for negligence** under law of foreign state held for jury. 260Mass202, 156 NE875.

1525–13 82CalA255, 255P543. But see 221Ala24, 127S155.

1525–19 18F(2d)193; 128Me240, 147A 151; 200Wis220, 228NW121. **Construction or application of contract.**–81NH 451, 130A145.

1525–21 105Conn502, 136A98.

1525–21½–New. Good faith in joining parties defendant is for jury. 219MoA 99, 268SW706.

1526–25 264Mass414, 163NE63; 127 Okl 44, 259P643; TexCivA 288SW656. But see 294Pa518, 144A529, 63ALR297.

1526–26 NC 154SE743.

1526–27 35F(2d)273.

1527–58½–New. Whether election contest was judicial proceeding within rule of privilege and whether charges were relevant is for court where circum-

stances are undisputed. 149Va618, 140 SE664.

1527-59 20F(2d)757; 232Ky548, 24 SW(2d)292; 260Mass541, 157NE698.

1527-61 200 Iowa961, 205NW838.

1527-61½-New. whether document in evidence had been written by defendant, 99Vt337, 131A845.

1527-71 **Questions of value** are for jury when there is data in evidence on which they may exercise own knowledge. 41GaA672, 154SE378.

1528-74 19F(2d)486; 196NC802, 144 SE925.

1528-88½-New. Question of applicability of ordinance in action for personal injuries was held for jury. 243NY118, 152NE695.

1528-90½-New. Whether user of way was under claim of right. has been held question of fact. 105Conn722, 136A 684.

1528-90½-New. Whether letter is mailed and received in due course becomes jury question when its receipt is denied. 219Ala81, 121S66.

1528-90¼-New. Negligence and contributory negligence is fact question for jury. 41GaA53, 151SE837.

1528-91 220MoA1050, 279SW723; MoA 285SW803; TexCivA 294SW913 (question held properly submitted); TexCivA 11SW(2d)621. But see NJSup 146A345.

1529-94 TexCivA 300SW949 (contributory negligence).

1529-96 285Pa241, 132A185.

1530-5 285Pa241, 132A185.

1530-9 104Conn23, 131A744; 220MoA 1112, 296SW257; 103WVa408, 137SE 656.

1530-10 104Conn23, 131A744 (correctly holds no enforceable agreement entered into).

1531-17 42 Ida458, 246P304.

1531-19 220MoA1112, 296SW257.

1531-21 309Mo683, 274SW802; 21 OhA444, 153NE313.

1532-23 20F(2d)317; 214Ala174, 110S 152; 107Conn160, 139A647; 167Ga214, 144SE735; 35GaA488, 134SE116; 227 Ky423, 13SW(2d)254; 228Ky802, 16 SW(2d)452; 229Ky293, 16SW(2d)1046; 153Md586, 139A285; 259Mass100, 156 NE33; 75Mont36, 241P617; 103NJL 690, 137A593; NJ 147A196; NJSup 137A881; 193NC538, 137SE580; 127 Or256, 270P784; 48RI 473, 139A212; 49RI 430, 143A780; 149SC89, 146SE 663; TexCivA 278SW943; TexCivA 280 SW348; TexCivA 284SW973; TexCivA 11SW(2d)350; TexCivA 11SW(2d)399; TexCivA 11SW(2d)618; 101Vt322, 143 A299; 136Wash39, 238P902. **Where evidence has gotten into record sufficient to entitle litigant to jury's determination,** he cannot be deprived of that right, unless his adversary in some way destroys in toto effect of that evidence. TexCommnA 10SW(2d)381. **Where there is any evidence** on question, question must be submitted to jury. 226 Ky367, 10SW(2d)1115. **Case should not be withdrawn from jury** unless recovery cannot be had on any reasonable view of evidence or court would be compelled to set aside verdict. Mont 290P261.

1532-24 216Ala625, 114S292; 20AlaA 617, 104S559; 35GaA488, 134SE116; 324 Ill 479, 155NE287; 335 Ill 164, 166 NE530; 201 Iowa687, 207NW748 (court need not submit to jury unless evidence introduced by party having burden of proof warrants jury in finding verdict for him); 210Ky432, 276SW129; 225 Ky480, 9SW(2d)220; 227Ky841, 14SW (2d)174; 317Mo 919, 298SW789; 222 MoA1146, 15SW(2d)970; NJSup 137A 881; 196NC160, 144SE693; 48RI 18, 134A642; 49RI 159, 141A182; 135SC 155, 133SE553; TexCivA 275SW96; TexCivA 4SW(2d)1019; TexCivA 5SW (2d)582; TexCivA 8SW(2d)683; Vt 147A352; 107WVa390, 148SE379. But see TexCivA 7SW(2d)601.

1533-25 120Kan158, 242P149; NJSup 137A881; Tex 12SW(2d)589. See also 214Ala433, 108S248. **Negative evidence,** in conflict with positive evidence, is insufficient to take case to jury. 232Mich 19, 204NW722.

1533-26 215Ala68, 109S148; 216Ala 299, 113S28; 216Ala625, 114S292; 208 Ky672, 271SW1040 (scintilla rule means something of substance); 283Pa533, 129 A571 (where not clear beyond peradventure); 293Pa9, 141A623; TexCivA 271SW422. See also 218Ala453, 118S 807. **Scintilla of evidence unfavorable to party requesting general affirmative charge** warrants its refusal. 213Ala534, 105S901. **Under scintilla rule,** evidence must be relevant and substantial to take case to jury. 220Ky256, 294SW1085.

1533-27 See also Ark 31SW(2d)421.

1533-28 288Pa140, 135A903 (where there is strong, but not conclusive, evidence to rebut presumption).

1533-29 251 IllA364; TexCivA 275SW 96 (weight for jury). **Weight of evidence** could not on motion to direct be considered by trial court. 48RI 18, 134 A642. **Credibility of witnesses** cannot be considered on motion to direct verdict. 48RI 18, 134A642.

1533-30 233Ky112, 25SW(2d)44 (numerical preponderance).

1533-31 213Ala692, 106S145; 38GaA 414, 144SE35; 225Ky480, 9SW(2d)220; 75Mont36, 241P617; 78Mont97, 252P 382; 194NC354, 139SE611; 148Wash 155, 268P177. **Where evidence does not warrant punitive or exemplary damages,** issue should be withdrawn from jury on motion. 90Fla188, 105S818. **Mere corrective testimony** held not to raise issue of fact. 238Mich289, 213NW169. **Direction of verdict** cannot be sustained for incompetency of witness permitted to testify without giving opportunity to supply evidence by competent witness. 220Ky626, 295SW900.

1534-32 216Ala55, 112S336, 52ALR 838; 28Hawaii404; 321 Ill 168, 151NE 573; 194NC354, 139SE611. **Motion to strike** plaintiff's evidence may be used when trial court would be compelled to set aside verdict for plaintiff. 153Va 675, 151SE282. **Extent of failure of proof.**-144 Okl 244, 291P86.

1534-33 36F(2d)628; 205Cal 292, 270 P961; 28Hawaii404 (what constitutes more than scintilla); 244 IllA505; 205 Iowa1369, 219NW399; Iowa 233NW28; 213AppDiv526, 210NYS651 (negative evidence as against positive evidence as to signal presented no question for jury); 296Pa313, 145A820; TexCivA 11 SW(2d)399; Sask [1927] 3DomLR514. Contra 214Ala633, 108S600. **Mere scintilla of evidence** is not enough to require submission of issue to jury. 281US90, 50SCt231, 74Led720.

1534-34 20F(2d)71; 22F(2d)718; 43 F(2d)675; 169Ark23, 273SW15; 204Cal 31, 266P522; 36GaA433, 137SE79; 87 IndA11, 158NE636; 212Ky83, 278SW 532 (error to submit case to jury, where there is uncontradicted evidence, admitting but single conclusion); 232Ky285, 23SW(2d)272; 244Mich208, 221NW314; 180Minn6, 230NW120; 78Mont415, 258 P236; NH 148A466; 101NJL546, 129A 209; NJ 136A415; 104NJL557, 142A 337, 60ALR102; 227AppDiv585, 238 NYS419; 194NC354, 139SE611; 53ND 291, 205NW722; 33 OhA214, 168NE 853; 113 Okl188, 240P702; 126 Okl 185, 259P234; Okl 293P197 (single decisive issue); 121 Or628, 257P16; 290 Pa21, 137A867 (documentary evidence); 293Pa131, 141A734; 115Tex222, 280SW 499, 44ALR627; TexCommnA 293SW 811; TexCommnA 16SW(2d)262; TexCivA 271SW441; TexCivA 275SW96; TexCivA 278SW488; TexCivA 284SW 237; TexCivA 286SW529; TexCivA 10 SW(2d)422; TexCivA 14SW(2d)922; TexCivA 18SW(2d)938; TexCivA 25SW (2d)944; TexCivA 30SW(2d)902; 149 Va235, 141SE260; 136Wash369, 240P 14; 107WVa658, 150SE9. See also 169 Ark1054, 278SW31. **Court is not required to submit case to jury solely on question of credibility of unimpeached witness.** 18F(2d)875. **Uncontradicted positive testimony.**-48RI 166, 136A443. **Where testimony is in conflict with undisputed physical facts,** no question is presented for jury. 108Conn474, 143A 527. **Where evidence is all so overwhelming on one side as to leave no doubt,** court should give peremptory instruction. 281US90, 50SCt231, 74Led 720. **Particular issue** is properly withdrawn from jury where evidence is uncontradicted and permits of but one inference. Iowa 230NW356.

1536-35 215Ala678, 112S230; 21AlaA 546, 109S893; 204Cal 31, 266P522; NJ Sup 137A567; 23 OhA453, 155NE171; 285Pa257, 132A342; TexCivA 286SW 894.

1536-36 20F(2d)71; 22F(2d)136; 94 CalA765, 271P918; 84Colo 342, 270P 659; 36GaA433, 137SE79; 46 Ida334, 268P19; 85 IndA591, 155NE179; 212 Ky83, 278SW532; 127Me24, 140A827; 156Miss463, 125S819; NJ 136A415; 53 ND291, 205NW722; 38 OklACR193; 54 SD446, 223NW585; TexCommnA 293 SW554; TexCommnA 298SW554; TexCommnA 1SW(2d)878; TexCivA 270SW 1101; TexCivA 278SW488; TexCivA 286SW529; TexCivA 300SW985; 100 Vt460, 139A252.

1536-37 194NC354, 139SE611; 131 Or 57, 279P534.

1536-38 22F(2d)136; 97CalA643, 275P 998; 194NC354, 139SE611; 196NC620, 146SE533; 293Pa355, 143A18; TexCivA 1SW(2d)476; TexCivA 11SW(2d)385; TexCivA 31SW(2d)332 (suspicion); 36 Wyo 166, 255P3, 52ALR91.

1536-38½-New. But this rule does not abrogate function of jury to reconcile contradictory evidence. 293Pa355, 143 A18.

1536-39 271US472, 46SCt564, 70Led 1041; 125Me519, 134A544; MoA 282SW 161; 78Mont97, 252P382; 222AppDiv 350, 225NYS722; 194NC354, 139SE611; TexCivA 2SW(2d)288.

1536-40 But see TexCivA 278SW278. **Uncontradicted testimony of party.**-TexCivA 2SW(2d)481.

1536-42 321 Ill 168, 151NE573; 152Md 694, 137A514; Nebr 230NW662; 142SC 457, 141SE20.

1536-43 321 Ill 168, 151NE573; 154Md 360, 140A601; 75Mont36, 241P617; NJ Sup 136A416; TexCivA 9SW(2d)193.

1536-44 103NJL340, 135A890.

1536-44½-New. Where default of certain defendants leaves only equitable issues arising on answer and cross petition of answering defendant to be tried, it is proper for court to withdraw case from consideration of jury at close of evidence. 116 Okl 192, 244P198.

1536-44¼-New. Where evidence affords unfavorable inference to one requesting instruction, affirmative instruction should be refused. 216Ala111, 112S424.

1536-44¼-New. Practice of entertaining defendant's motion, at conclusion of plaintiff's evidence, to exclude all evidence, is improper. 221Ala305, 128S 602.

1536-44½-New. Mistrial does not necessarily follow when theory of recovery or defense is withdrawn because of insufficient evidence. 251Mich92, 230NW 922.

1536-44½-New. Case should not be withdrawn from jury unless recovery cannot be had on any view reasonably deducible from evidence. Mont 289P 580.

1536-44¼-New. Doubtful cases, especially those involving intricate relations demanding inquiry into facts in controversy, should go to trial. 299Pa51, 149 A87.

1536-44½-New. Where plaintiff's evidence is entirely circumstantial, in order to make case for jury plaintiff's conclusion from facts offered must be most probable hypothesis. Vt 147A352.

1537-45 20F(2d)317; 37F(2d)711; 43 F(2d)999; 214Ala239, 107S98; 214Ala 545, 108S362 (not error to refuse general affirmative charge); 214Ala601, 108 S575; 215Ala464, 110S817; 215Ala554, 112S122 (where reasonable tendencies of evidence conflicting); 215Ala630, 112 S159; 215Ala678, 112S230; 216Ala431, 113S277; 217Ala140, 115S28; 218Ala 140, 117S647; 220Ala224, 124S863, 66 ALR1454; 20AlaA596, 104S349; 21 AlaA401, 108S636; 22AlaA51, 112S95 (if slightest conflict); 29Ariz405, 242P 436; Ariz 293P16; 173Ark1181, 294SW 994; 174Ark282, 295SW713; 175Ark 442, 299SW765, 55ALR1039; 178Ark 417, 10SW(2d)867; Ark 31SW(2d)304; 83CalA655, 257P447; 97CalA87, 275P 456; CalA 280P1026; CalA 291P597; 103Conn683, 131A420; 104Conn297, 132 A405; 93Fla30, 111S525; 98Fla920, 124

S814; 164Ga557, 139SE55; 37GaA695, 141SE511; 41 Ida653, 240P932; 43 Ida 327, 251P757; 45 Ida313, 262P873; 46 Ida334, 268P19; 244 IllA505; 85 IndA 591, 155NE179; 201 Iowa481, 207NW 562; 203 Iowa1395, 214NW685; Iowa 232NW724; 220Ky330, 295SW164; 223 Ky444, 3SW(2d)1073; 225Ky645, 9SW (2d)993; 228Ky5, 14SW(2d)216; 228 Ky201, 14SW(2d)755; 229Ky37, 16SW (2d)489; 235Ky425, 31SW(2d)701; 155 Md178, 141A550; 157Md437, 146A275, 65ALR641; 158Md367, 148A543; 253 Mass424, 149NE159; 256Mass30, 152NE 35, 47ALR1100; 266Mass264, 165NE 122; 244Mich226, 221NW168; 248Mich 516, 227NW750; 221MoA644, 283SW 705; MoA 285SW803; MoA 296SW437; MoA 8SW(2d)1035; MoA 17SW(2d)615; MoA 19SW(2d)531; MoA 21SW(2d)883; 113Nebr739, 204NW784; 118Nebr634, 225NW869, 64ALR1299; Nebr 230NW 109; Nebr 230NW662; 101NJL507, 129 A136 (negative testimony rule not applicable); 103NJL49, 134A776; 103 NJL340, 135A890; NJ 142A420; NJ 147 A383; NJSup 136A597; 189NC783, 128 SE158; 193NC485, 137SE430; 194NC 203, 139SE224; 194NC649, 140SE302; 196NC624, 146SE584; 118 OhSt131, 160 NE610; 26 OhA392, 160NE495; 120 Okl 17, 250P119; 134 Okl 169, 272P835; 142 Okl 116, 285P962; 43 OklACR450; 121 Or519, 254P809; 121 Or628, 257P16; 129 Or321, 276P687; 284Pa555, 131A 470; 297Pa199, 146A551; 298Pa158, 148A90; 137SC40, 134SE912; 53SD 363, 220NW905; TexCommnA 148SW (2d)812; TexCivA 275SW96; TexCivA 278SW488; TexCivA 285SW686; Tex CivA 285SW835; TexCivA 285SW922; TexCivA 286SW894; TexCivA 290SW 858; TexCivA 5SW(2d)230; TexCivA 9SW(2d)193; TexCivA 28SW(2d)926; Utah 283P160; 142Va857, 128SE367; 146Va641, 132SE840; 149Va235, 141SE 260; 136Wash624, 241P1; 143Wash 168, 254P1091; 146Wash699, 264P422; 150Wash278, 272P736; 102WVa320, 135 SE185. But see 283Pa356, 129A99. **When evidence considered conflicting.**–297Pa436, 147A55. **Evidence held not conflicting.**–198Wis542, 224NW479. **Principle of reconciliation of testimony by jury** is by far most important doctrine in our jurisprudence. 284Pa555, 131A470. **In federal courts** view that scintilla or modicum of conflicting evidence, irrespective of character and measure of that to which it is opposed, requires submission to jury has been disapproved. 12F(2d)658.

1537–45½–New. But it has been said that, where evidence is so contradictory in material parts that any verdict given thereon would be mere guess, jury should not be permitted to consider it. 284Pa555, 131A470.

1539–46 20F(2d)317; 215Ala464, 110 SS17; 221Ala674, 130S394; AlaA 130S 162(1stcase); 32Ariz457, 259P884; 176 Ark430, 3SW(2d)42; 84CalA112, 257P 544; 97CalA354, 275P881; CalA 287P 529; 94Fla998, 114S849; 97Fla869, 122 S270; 164Ga557, 139SE55; 34GaA27, 128SE12 (where no exception was taken to overruling of demurrer to plea); 43 Ida327, 251P757; 129Kan256, 282P595; Mass 167NE289; MoA 12SW(2d)95; 117Nebr786, 222NW633; 128Misc677, 219NYS654; 192NC700, 135SE788 (conflicting evidence does not warrant taking case from jury); 196NC294, 145SE 396; 121Or628, 257P16; RI 144A769 (2dcase); TexCivA 297SW534; Tex CivA 8SW(2d)271. **Where there is issuable fact for jury,** preëmptory direction of verdict is error. TexCivA 278 SW501. **Refusal of general affirmative charge for defendant** held not error, where evidence is conflicting. 21AlaA 51, 105S716. **Directed verdict or general charge properly refused.**–30F(2d) 669; 23AlaA67, 120S577(2dcase); 219 Ala623, 123S27; 228Ky201, 14SW(2d) 755.

1540–47 19F(2d)134; 31F(2d)35; 43 F(2d)675; 215Ala464, 110S817; 215 Ala676, 112S216; 197Cal 82, 239P709, 41ALR1027; 203Cal 367, 264P252; CalA 290P497; 82Colo 189, 257P1094; 93Fla387, 112S264; 45 Ida313, 262P 873; 46 Ida334, 268P19; 336 Ill 175, 168NE315(2dcase); Iowa 227NW833; 224Ky292, 6SW(2d)239; 127Me335, 143A261; 128Me287, 147A208; 318Mo 363, 18SW(2d)99, 57ALR615; MoA 285 SW141; MoA 7SW(2d)438; 82Mont 185, 266P394; Nebr 230NW495; 103 NJL690, 137A593; NJSup 136A416; 216AppDiv247, 214NYS713; 194NC203, 139SE224; NC 155SE163; 23 OhA453, 155NE171; 23 OhA185, 155NE174; 30 OhA389, 165NE358; 121 Or628, 257P 16; 131SC382, 127SE724; 117Tex277, 298SW523; TexCommnA 298SW554; TexCivA 276SW448; TexCivA 288SW 236; TexCivA 296SW939; TexCivA 4 SW(2d)189; TexCivA 18SW(2d)804; 69Utah284, 254P781; 100Vt464, 139A 210; 101Vt379, 143A643; Vt 147A352.

1540–48 33F(2d)231; 94CalA765, 271 P918; NJ 147A442; 23 OhA453, 155 NE171; 34 OhA207, 170NE607; Tex CivA 292SW599; TexCivA 297SW294.

1540–49 135SC155, 133SE553.

1541–50 MoA 256SW114; MoA 282 SW752; 250NY170, 164NE894; 228 AppDiv851, 240NYS660; 191NC548, 132SE462; 196NC516, 146SE209.

1541–56 In Alabama.–21AlaA414, 109S 123.

1541–57 TexCivA 1SW(2d)688.

1541–58 MoA 30SW(2d)1094.

1541–59 219MoA389, 271SW829 (remark amounting to opinion).

1541–59½–New. Motion for finding and judgment upon evidence adduced operates as demurrer to evidence. IndA 154NE682.

1541–60 106WVa651, 146SE723. **Evidence in support of counterclaim** may be demurred to without losing right to object to counterclaim. 134 Okl 169, 272P835. **If evidence offered by plaintiff defeats his right of recovery,** defendant can take advantage thereof. MoA 295SW833.

1542–63½–New. Demurrer is properly overruled when inconsistent with prayer of adverse party which demurrant has conceded. 150Md511, 133A 322.

1542–64 Mo 31SW(2d)14; MoA 296 SW838; 114 Okl 220, 245P879. **All testimony must be considered** in determining whether there is sufficient evidence for jury. 150Md511, 133A322. **Issues held not reached by demurrer.**–MoA 299SW74.

1542–65 In Virginia and West Virginia.–144Va65, 131SE334; 146Va789, 132SE844.

1542–66 Mo 28SW(2d)1023; Mo 30 SW(2d)989; 221MoA626, 287SW1053; 220MoA728, 293SW521; MoA 297SW79; MoA 297SW996; MoA 8SW(2d)1023; MoA 24SW(2d)249; 112 Okl 251, 240P 612; 119 Okl 278, 249P715; 43 OklACR 450; 146Va366, 131SE815; 147Va1, 136SE570; 108WVa456, 152SE3(1st case) (where not clearly preponderant). But see 318Mo 50, 298SW827.

1543–67 120Kan158, 242P149; 121 Kan51, 245P740; 149Md189, 131A343; 219MoA211, 269SW665; 307Mo 607, 271 SW788; 308Mo 48, 271SW983; 308Mo 31, 271SW997; Mo 282SW38; 313Mo 527, 282SW425; 316Mo 782, 291SW475; 317Mo 919, 298SW789; 322Mo 787, 16 SW(2d)85; 322Mo 592, 17SW(2d)945; 323Mo 307, 19SW(2d)865(2dcase); Mo 28SW(2d)97; 219MoA112, 268SW675; 219MoA34, 269SW955; 219MoA405, 271 SW880; MoA 272SW117; MoA 272SW 1095; MoA 274SW917; MoA 275SW 575; MoA 275SW769; 220MoA791, 277 SW58; MoA 277SW356; MoA 281SW 71; 220MoA175, 282SW515; 220MoA 337, 286SW434; 220MoA303, 286SW 709; MoA 287SW803; MoA 289SW965; MoA 291SW180; 220MoA728, 293SW 521; 221MoA823, 293SW460; MoA 296 SW1036; MoA 297SW79; MoA 300SW 993; MoA 1SW(2d)252; MoA 9SW (2d)812; MoA 14SW(2d)488; MoA 16 SW(2d)607; MoA 24SW(2d)249; MoA 28SW(2d)433; 101NJL561, 129A139; 190NC382, 130SE1; 190NC444, 130SE 116; 113 Okl 94, 239P242; 116 Okl 151, 243P723; 117 Okl 6, 244P770; 120 Okl 17, 250P119; 120 Okl 193, 250P119; TexCivA 294SW953; Va 155SE714; 142Wash419, 253P657 (on motion challenging sufficiency of evidence); 104 WVa150, 139SE638, 55ALR636; 104 WVa174, 139SE654 (verity of opponent's testimony is not discredited by demurrer); WVa 153SE248. **Adverse party is entitled to have drawn all inferences of fact which jury might draw from evidence.**–IndA 154NE682. **When demurrer is renewed at close of case,** plaintiff is entitled to benefit of favorable evidence introduced by defendant. MoA 25SW(2d)122.

1543–68 120Kan637, 245P119; 149Md 189, 131A343 (all adversary's evidence and evidence of moving party corroborating same taken as true); 307Mo 607, 271SW788; 312Mo 30, 278SW747; Mo 282SW441; 315Mo 1068, 287SW474; 315Mo 883, 289SW540; 317Mo 1255, 298 SW69; 317Mo 1096, 298SW795; 318Mo 350, 300SW515; 320Mo 819, 8SW(2d) 884; 323Mo 363, 19SW(2d)476; 323Mo 826, 20SW(2d)906; 323Mo 662, 21 SW(2d)873; Mo 23SW(2d)162; 219MoA 405, 271SW880; MoA 276SW93; MoA 283SW461; 221MoA748, 286SW412; 220 MoA728, 293SW521; 220MoA1099, 297 SW108; MoA 1SW(2d)252; MoA 7 SW(2d)460; MoA 8SW(2d)1023; 222 MoA1146, 15SW(2d)970; MoA 16SW(2d) 659; MoA 18SW(2d)131; MoA 18 SW(2d)541; MoA 19SW(2d)518; MoA 20SW(2d)577; MoA 20SW(2d)941; MoA 24SW(2d)249; MoA 24SW(2d)686; MoA 25SW(2d)122; 101NJL561, 129A 139; 190NC444, 130SE116; 112 Okl 251, 240P612; 116 Okl 30, 243P243; 119 Okl 233, 249P398; 119 Okl 278, 249P715; 120 Okl 17, 250P119; 126 Okl 246, 259 P219, 54ALR1237; 127 Okl 44, 259P 643; 134 Okl 169, 272P835; 139 Okl 243, 282P139; 143 Okl 49, 287P399; 143 Okl 260, 288P483; 43 OklACR450; 44 OklACR52; 142Va96, 128SE538 (demurrant is required to admit truth); 146Va366, 131SE815; 142Wash419, 253 P657 (on motion challenging sufficiency of evidence); 104WVa150, 139SE638, 55 ALR636; 104WVa174, 139SE654. **Evidence offered by either party** in favor of plaintiff is to be deemed true on defendant's demurrer to plaintiff's evidence. MoA 26SW(2d)50. **Unless impossible,** defendant's demurrer admits truth of evidence favorable to plaintiff. MoA 26SW(2d)802.

1543–69 34Ariz482, 272P918; 122Kan 453, 251P1093; 122Kan595, 253P595; 122Kan775, 253P409; 130Kan719, 288 P584; 149Md189, 131A343; 155Md178, 141A550; 307Mo 607, 271SW788; 310 Mo 184, 274SW827; 312Mo 30, 278SW 747; 312Mo 342, 278SW1000; 315Mo 1068, 287SW474; 315Mo 883, 289SW 540; 318Mo 64, 298SW842; 318Mo 341, 300SW475; 318Mo 723, 300SW769; 320 Mo 95, 6SW(2d)617; 323Mo 929, 20 SW(2d)34; 323Mo 601, 20SW(2d)509; Mo 23SW(2d)162; Mo 23SW(2d)993; Mo 24SW(2d)143; Mo 26SW(2d)988; Mo 28SW(2d)97; 217MoA302, 261SW340; 219MoA19, 267SW964; 219MoA405, 271 SW880; MoA 275SW561; 219MoA471, 275SW775; MoA 278SW95; MoA 278 SW1087; MoA 281SW71; MoA 282SW 484; MoA 283SW461; MoA 284SW195; MoA 284SW831; MoA 284SW848; MoA 285SW155; MoA 285SW170; 221MoA 715, 285SW524; 220MoA367, 286SW 445; MoA 287SW835; MoA 287SW852; MoA 288SW91; 221MoA93, 290SW91; MoA 295SW833; 220MoA1099, 297SW 108; MoA 297SW996; MoA 297SW 1003; 220MoA1152, 299SW90; 222MoA 907, 6SW(2d)630; MoA 6SW(2d)636; MoA 6SW(2d)983; MoA 6SW(2d)1023; MoA 8SW(2d)1035; MoA 9SW(2d)248; MoA 9SW(2d)534; MoA 15SW(2d)876; MoA 16SW(2d)633; MoA 16SW(2d)643; MoA 17SW(2d)563; MoA 18SW(2d)131; MoA 18SW(2d)520; MoA 28SW(2d) 433; MoA 28SW(2d)687; MoA 32 SW(2d)296; 101NJL561, 129A139; 190 NC24, 128SE485 (most favorable view of evidence and circumstances it tends to establish); 190NC382, 130SE1; 113 Okl 106, 239P463; 112 Okl 251, 240P 612; 115 Okl 176, 241P781; 122 Okl 31, 242P239; 115 Okl 233, 242P535; 115 Okl 280, 242P565; 116 Okl 1, 243P150; 115 Okl 294, 243P167; 116 Okl 30, 243 P243; 116 Okl 151, 243P723; 117 Okl 6, 244P770; 116 Okl 180, 244P813; 114 Okl 220, 245P879; 119 Okl 278, 249P

715; 120 Okl 17, 250P119; 120 Okl 193, 250P119; 126 Okl 246, 259P219, 54ALR 1237; 127 Okl 44, 259P643; 129 Okl 195, 264P151; 129 Okl 240, 264P172; 132 Okl 18, 269P279; 133 Okl 160, 271P 649; 134 Okl 169, 272P835; 137 Okl 74, 278P286; 137 Okl 280, 279P335; 139 Okl 243, 282P139; 143 Okl 49, 287P399; 143 Okl 260, 288P483; Okl 291P569; 38 OklACR61; 43 OklACR450; 44 OklACR 52; 44 OklACR217; TexCivA 291SW 639; TexCivA 294SW953; TexCivA 28 SW(2d)1102; 142Va96, 128SE538 (demurrant also waives inferences from own evidence though not conflicting); 146Va366, 131SE815; 147Va1, 136SE 570; 104WVa150, 139SE638, 55ALR 636; 104WVa174, 139SE654; 106WVa 651, 146SE723. **Every reasonable inference that fair minded jury** might properly draw from proved facts is indulged in in favor of other party. 312Mo 342, 278SW1000.

1543-69½-New. Motion for finding and judgment presents single question.-Whether evidence offered by adverse party, assuming as proved all facts which it proves or by legitimate inference tends to prove, establishes case as laid. IndA 154NE682.

1544-70 MoA 6SW(2d)983.

1544-72 IndA 154NE682.

1544-73 Exhibits, admission of which in evidence is prohibited by statute, cannot be considered on demurrer to evidence. 124 Okl 284, 255P1101.

1544-75 34F(2d)889; 122Kan215, 252 P459 (defendant may demur to evidence without demurring to petition); 126Kan 173, 267P1003; 220MoA493, 274SW501. But see 39 OklACR356.

1544-76 Right to object to counterclaim is preserved by demurrer at close of defendant's evidence, though no demurrer or other pleading was directed thereto where pleading on its face discloses proper counterclaim. 134 Okl 169, 272P 835. **Where it is conceded that plaintiff is entitled to at least nominal damages,** demurrer does not reach issue as to plaintiff's right to substantial damages. MoA 299SW74.

1544-76½-New. Where defendant refuses to stand on demurrer to evidence at close of plaintiff's case and takes affirmative, adducing proof, demurrer to evidence at close of whole case searches all evidence introduced to determine whether plaintiff has made submissible case. 320Mo 819, 8SW(2d)884.

1544-76¾-New. In action for injuries sustained in fall of elevator, in which owner of building, sued for negligence, claimed express company was liable on account of negligent manner of loading elevator, express company's demurrer to evidence did not prevent plaintiff's recovery from owner of building on ground defective condition of elevator was result of defendant's negligence in failing to inspect and make repairs. TexCivA 8SW(2d)527.

1544-76¼-New. Court cannot draw inferences most favorable to defendant from ambiguous answers to material questions. 323Mo 601, 20SW(2d)509.

1544-76½-New. Evidence brought out on cross-examination of witness produced by party against whom demurrer was interposed and unfavorable to him may be considered where cross examination was proper and developed no conflict in testimony of witness. 120 Okl 179, 250P906.

1545-78 39 OklACR314. But see 220 MoA948, 7SW(2d)403.

1545-81 221MoA121, 293SW789.

1545-82 Demurrer to prayer is bad in form where it refers only to plaintiff's testimony. 150Md511, 133A322.

1545-87 219MoA389, 271SW829 (statement of defendant's counsel at close of plaintiff's evidence "I do not think plaintiff has got a case" held insufficient as demurrer).

1546-90 Where petition contains only one assignment of negligence, general demurrer attaches to that issue and necessity or possibility of singling out or separating issues is precluded. 222 MoA1220, 5SW(2d)101.

1546-90½-New. Demurrer in action for negligence is specific though general in form where petition states only one ground of negligence. 316Mo 865, 293 SW783.

1547-9 117 Okl 164, 246P855 (demurrer to evidence under cross petition); 133 Okl 249, 271P424. **Where defendant's evidence is insufficient to entitle him to affirmative relief prayed for,** plaintiff's demurrer to defendant's evidence should be sustained. 114 Okl 220, 245P879.

1547-11 MoA 23SW(2d)1066; 113 Okl 106, 239P463; 122 Okl 31, 242P239; 119 Okl 41, 247P670; 125 Okl 215, 257P282; 130 Okl 87, 265P113; 37 OklACR428; 38 OklACR61; 38 OklACR580; 39 OklACR 210; 106WVa651, 146SE723.

1547-12 116 Okl 106, 243P224; 129 Okl 176, 264P159; 130 Okl 175, 266P444.

1547-13 113 Okl 94, 239P242; 125 Okl 215, 257P282; Okl 291P22; 38 OklACR 61; 38 OklACR580. **If there is any evidence to sustain judgment for plaintiff,** demurrer to evidence should not be sustained. MoA 23SW(2d)1098.

1547-14 190NC24, 128SE485 (only when evidence in no aspect is sufficient in law to warrant verdict for plaintiff); 125 Okl 215, 257P282.

1547-15 38 OklACR483.

1547-17 313Mo 527, 282SW425.

1547-18 124 Okl 284, 255P1101; 127 Okl 53, 259P642; 140 Okl 277, 282P 1091; 44 OklACR52.

1547-19 111 Okl 260, 239P620; 40 Okl ACR465 [reh pending].

1547-20 123Kan286, 255P48; 128 Okl 14, 261P142; 137 Okl 90, 278P281.

1547-22½-New. only where there is no substantial evidence on material issue, as negligence, 312Mo 342, 278SW 1000.

1547-22¾-New. or when facts and legitimate inferences therefrom leave no room for reasonable minds to differ. Mo 24SW(2d)143.

1548-23 120Kan297, 243P300; 122Kan 595, 253P595; 122Kan627, 253P237 (evidence with admissions in answer making prima facie case); 126Kan586; 149Md189, 131A343; MoA 275SW769; 220MoA686, 293SW517 (demurrer held properly overruled); 190NC366, 129SE 816; 112 Okl 251, 240P612; 115 Okl 280, 242P565; 125 Okl 282, 257P793; 126 Okl 150, 259P125; 127 Okl 44, 259P643; 128 Okl 215, 262P208; 137 Okl 74, 278P 286; 144 Okl 56, 289P703; 39 OklACR 356; 43 OklACR340; 44 OklACR52; 104 WVa150, 139SE638, 55ALR636. **Instruction of defendant in nature of demurrer to evidence** must be considered in view most favorable to plaintiff. MoA 24SW(2d)644. **Court must accept most favorable view of case from plaintiff's standpoint** on defendant's demurrer to evidence. MoA 24SW(2d)1054.

1548-23½-New. Question for determination is whether evidence determines in minds of ordinary persons facts on which finding depends. Mo 30SW(2d) 118.

1548-24 121Kan18, 245P1041; 127Kan 708, 275P201; 126Kan596; MoA 284 SW195; 221MoA683, 285SW161; 221 MoA837, 286SW125; MoA 25SW(2d) 562; 119 Okl 233, 249P398; 122 Okl 194, 253P481; 129 Okl 176, 264P159.

1548-25 104WVa150, 139SE638, 55ALR 636 (dictum). See also 323Mo 601, 20 SW(2d)509.

1548-26 123Kan566, 256P1018; 125 Kan252, 264P59; 126Kan188, 268P119; 311Mo 249, 278SW368; Mo 281SW41; MoA 275SW769; MoA 24SW(2d)686; MoA 32SW(2d)296; 115 Okl 233, 242P 535; 126 Okl 246, 259P219, 54ALR1237; 128 Okl 215, 262P208; 129 Okl 195, 264 P151; 36 OklACR467; 146Va10, 135SE 685; 148Va148, 138SE658. See also 37 OklACR354; WVa 153SE248.

1548-27 122Kan595, 253P595; 116 Okl 149, 243P723; 117 Okl 6, 244P770; 134 Okl 25, 272P414; 137 Okl 280, 279P 335; 139 Okl 26, 280P1083; 141 Okl 133, 284P21; 43 OklACR340.

1548-27½-New. where fair-minded men may differ on issues raised by evidence. Va 131SE816.

1548-31½-New. Where answer states good defense and allegations are sustained by evidence, it is reversible error to sustain demurrer to such evidence. 114 Okl 147, 244P793.

1548-31½-New. Where evidence reasonably tends to support allegations of petition that states cause of action, demurrer to evidence will be overruled. 37 OklACR324.

1548-31¼-New. In determining cause of accident resulting in plaintiff's injury, fact that no other theory is more plausible than plaintiff's may be considered in passing on demurrer to evidence. 221MoA93, 290SW91.

1548-31½-New. General demurrer to plaintiff's evidence offered at close of case may be overruled without regard to election by plaintiff of issues to be submitted. MoA 297SW180.

1549-35 146Va10, 135SE685.

1549-37 119Kan545, 240P856.

1549-38 34Ariz482, 272P918.

1549-39 34Ariz482, 272P918.

1549-45 35F(2d)791; 154Md213, 140A 95; Mo 278SW361; 318Mo 1233, 3SW (2d)365; 322Mo 787, 16SW(2d)85; MoA 256SW1088; MoA 272SW1049; MoA 273SW1078; MoA 278SW1084; MoA 279SW177; MoA 282SW110; 219MoA 506, 282SW113; MoA 282SW484; MoA 282SW490; MoA 285SW127; MoA 285 SW170; MoA 285SW522; 220MoA542, 287SW865; MoA 291SW180; 220MoA 869, 295SW129; MoA 295SW491; MoA 7SW(2d)370; MoA 10SW(2d)75; MoA 16SW(2d)716; MoA 17SW(2d)563; MoA 28SW(2d)433. Contra 220MoA948, 7SW(2d)403.

1550-46 Kan 293P385; MoA 284SW 848; MoA 20SW(2d)577; 122 Okl 208, 253P485; 143 Okl 290, 288P981.

1550-47 Mo 287SW634; 317Mo 614, 296SW739; 317Mo 647, 296SW1017; Mo 298SW51; Mo 26SW(2d)946; MoA 278 SW1087; MoA 288SW1004; MoA 19 SW(2d)306; MoA 28SW(2d)417. **Final demurrer permits search of all testimony.**-316Mo 916, 292SW1039.

1550-47½-New. Where defendant fails to stand on demurrer and introduces testimony, plaintiff is entitled to most favorable inferences from all testimony. Mo 30SW(2d)37.

1550-48 313Mo 527, 282SW425; 316Mo 865, 293SW783; 318Mo 666, 300SW795; Mo 18SW(2d)382; MoA 274SW97; MoA 284SW824; 220MoA948, 7SW(2d)403; MoA 7SW(2d)1032. But see 218MoA84, 262SW686; MoA 9SW(2d)534. Contra MoA 273SW428. **Right to invoke assignment of error is waiver** by defendant requesting given instructions submitting issues after general demurrer refused. 220MoA367, 286SW445. **Where new trial must be had on specifications of negligence sufficiently supported to go to jury,** assignment of error on demurrer will be ruled on, though defendant requested given instructions submitting issues after demurrer refused. 220MoA 367, 286SW445. **Where there is more than one ground sufficient to sustain action or defense,** overruling general demurrer to evidence is waived by requesting instructions submitting issues. MoA 279SW160. **Where several specifications of negligence charged merely make one ground of action,** request for instructions submitting issues does not constitute waiver of overruling of general demurrer to evidence. MoA 279SW160. **Defendant does not waive demurrer to evidence** by asking instructions relative to theory based on sole assignment of negligence. 313Mo 527, 282SW425. **Refusal to give instruction in identical language requested** does not prevent operation of rule that offer of instruction waives general demurrer to evidence where instruction given is substantially same as one requested. 222MoA1220, 5 SW(2d)101. **Where petition contains only one assignment of negligence,** defendant may offer instructions submitting question of negligence without waiving general demurrer to evidence. 222MoA1220, 5SW(2d)101. **Demurrer not waived** by asking instructions on both of two issues presented by plaintiff's petition. Mo 31SW(2d)14. **Where there is one assignment of negligence,** demurrer is not abandoned by defendant's offering instruction on such theory. Mo 31SW(2d)14.

1550-48½-New. When plaintiff's case is based on only one ground of negligence, defendant does not waive his objection to overruling of his demurrer to evidence by requesting instructions submitting issues. MoA 290SW649.

1550-48½-New. Where employee alleged three acts of negligence, general demurrer to evidence being overruled, employer's submitting negligence precluded contention that evidence was insufficient. MoA 27SW(2d)765.

1550-50 115 Okl 294, 243P167.

1551-56 37Wyo 282, 261P126. **In action at law against several defendants,** statutes authorize dismissal as to defendant on ground of misjoinder where evidence at trial fails to establish his liability. 94Fla998, 114S849.

1551-58 Question of existence of substantial evidence is one of law for court. 78Mont97, 252P382. **Coparties.**-285Pa 241, 132A185.

1551-59 27F(2d)377; 75CalA44, 242P109; 81CalA142, 253P357; 101CalA566, 281P1091; 44 Ida235, 256P93; 75Mont 1, 241P631; 49ND658, 193NW658; 116 Or18, 240P225; 133 Or1, 288P192; 133 Or14, 288P200; TexCivA 299SW660. **Motion for finding and judgment upon evidence** has same effect and is governed by same rules as motion for nonsuit, under former justice. IndA 154NE682.

1551-61 75CalA44, 242P109; 81CalA 142, 253P357.

1551-62 22F(2d)718; 27F(2d)377; 197 Cal 256, 240P16; 73CalA114, 238P166; 73CalA379, 238P723; 73CalA229, 238P 736; 75CalA44, 242P109; 76CalA58, 243 P869; 77CalA193, 246P136; 79CalA190, 249P39; 80CalA271, 251P697; 87CalA 262, 262P61(2dcase); 94CalA230, 270P 993; CalA 285P879; CalA 290P114; 104 Conn741, 134A171; 40 Ida726, 236P538; 43 Ida371, 252P489; 44 Ida235, 256P93; 80Mont431, 261P253; 103NJL459, 135A 776; 103NJL424, 135A866; NJSup 149 A826(1stcase); 190NC449, 130SE171; 191NC473, 132SE160; 192NC522, 135SE 522; 193NC805, 138SE173; 194NC146, 138SE616, 53ALR626; 194NC293, 139SE 604; 195NC788, 143SE861; 116 Or18, 240P225; 133 Or14, 288P200; 33Porto Rico 931; 48RI 473, 139A212; 142Wash 419, 253P657; Wis 233NW91. **On denial of motion,** defendant is entitled to submit proofs on denials and affirmative matter set up in answer. 44 Ida235, 256 P93.

1551-63 19F(2d)288; 204Cal 679, 269P 529(2dcase); 73CalA229, 238P736; 76 CalA58, 243P869 (or against plaintiff seeking nonsuit of cross complaint); 81 CalA142, 253P357; 93CalA252, 269P 755; 94CalA243, 271P127; CalA 285P 879; CalA 290P114; 104Conn741, 134A 171; 43 Ida371, 252P489; 84Mont1, 273 P1051; 103NJL459, 135A776; 103NJL 645, 137A419; 103NJL639, 137A426; NJ Sup 142A431; 190NC449, 130SE171; 191NC473, 132SE160; 194NC146, 138SE 616, 53ALR626; 194NC293, 139SE604; 196NC213, 145SE169; 196NC262, 145SE 283(2dcase); 142Wash419, 253P657.

1551-64 35F(2d)142; 169Ga511, 150SE 842(2dcase); 103NJL424, 135A866; 198 NC107, 150SE716; 50Philippine198.

1551-64½-New. Nonsuit, where granted, does not necessarily end issue which may again be presented to court. 104 Conn693, 133A669.

1551-64¾-New. Where motion to dismiss petition for failure to state cause of action is erroneously overruled, all further proceedings are nugatory. 38GaA 660, 145SE100(2dcase).

1552-65 98CalA133, 276P424; 99CalA 579, 278P927; 102CalA723, 283P833; CalA 291P848; 43 Ida142, 249P890; 213 AppDiv587, 210NYS816 (motion to dismiss on grounds applicable to action for price held inapplicable to action for damages); 116 Or18, 240P225; 124 Or 89, 262P948; 125 Or111, 265P1094. **In California.**-103CalA599, 284P984.

1552-66 CalA 291P848.

1552-67 98CalA198, 276P1064; 101 CalA186, 281P514.

1552-68 98CalA415, 277P190.

1552-71 But see 224AppDiv41, 229NYS 547.

1552-80 104Conn693, 133A669.

1552-81 In Pennsylvania.-285Pa241, 132A185.

1553-82 29Hawaii587; 33NM295, 265P 35.

1553-85 195NC231, 141SE586.

1553-89 194NC146, 138SE616, 53ALR 626; 23 OhA453, 155NE171.

1553-90 25F(2d)596; 33F(2d)690; 198 Cal 290, 244P1077; 206Cal 571, 275P 430; 207Cal 772, 279P778; 68CalA171, 228P873; 73CalA114, 238P166; 73CalA 229, 238P736; 76CalA58, 243P869; 77 CalA193, 246P136; 78CalA189, 248P 537; 79CalA190, 249P39; 81CalA76, 253 P158; 88CalA372, 263P564; 89CalA122, 264P538; 89CalA741, 265P337; 89CalA 602, 265P374; 91CalA715, 267P741; 96 CalA283, 273P1088; 98CalA138, 276P 424; 100CalA685, 280P1024; 101CalA 453, 281P712; 101CalA566, 281P1091; 102CalA744, 283P850; CalA 283P886; CalA 288P698; 82Colo 189, 257P1094; 108Conn697, 145A158; 43 Ida371, 252P 489; 46 Ida334, 268P19; 316Mo 1266, 296SW105; MoA 279SW433; 78Mont 97, 252P382; 80Mont431, 261P253; 84 Mont84, 274P293; 84Mont338, 275P753; 84Mont494, 276P946; Mont 289P580; Mont 291P1042; 82NH506, 136A128, 50 ALR973; 83NH573, 145A665; 103NJL 459, 135A776; NJ 141A1; 104NJL218, 141A92; NJ 150A333; NJ 150A334; NJSup 150A574; 214AppDiv216, 212 NYS889; 189NC634, 127SE634; 189NC 744, 128SE344; 190NC24, 128SE485 (most favorable view of evidence and circumstances it tends to establish); 190 NC722, 130SE630; 190NC742, 130SE705 (evidence construed most favorably for plaintiff); 191NC42, 131SE380 (and entitled to benefit of every reasonable intendment); 191NC549, 132SE598; 192 NC612, 135SE463; 192NC728, 136SE5; 192NC784, 136SE9; 193NC831, 136SE 722; 193NC805, 138SE173; 194NC98, 138SE424; 194NC146, 138SE616, 53ALR 626; 194NC250, 139SE369; 194NC293, 139SE604; 194NC663, 140SE612; 195 NC165, 141SE577; 195NC190, 141SE 550; 195NC258, 141SE592; 195NC864, 142SE320; 195NC867, 142SE475; 195 NC699, 143SE536; 196NC821, 146SE 143; 198NC578, 152SE688; 198NC705, 153SE327; NC 154SE9; NC 154SE12; NC 154SE752; 117 Or188, 243P96, 45 ALR812; 120 Or536, 252P973; 133 Or 581, 291P1009; 291Pa564, 140A496; RI 144A672; RI 149A861 (weight of evidence irrelevant); 153SC339, 150SE769; 153SC401, 151SE67; 155SC507, 152SE 707; SC 155SE136; 142Wash419, 253 P657.

1554-91 30F(2d)30; 198Cal 290, 244P 1077; 81CalA142, 253P357; 134Misc 250, 234NYS705. **Incompetent evidence admitted over objection** will not be considered in some jurisdictions. 118 Or 111, 244P71. **Court should consider entire evidence,** weighing both favorable and unfavorable portions. Wash 289P1.

1554-92 97CalA354, 275P881; 101CalA 566, 281P1091; 80Mont431, 261P253; 86Mont150, 282P494 (plaintiff's contradiction of own witness held available); 103NJL459, 135A776; 194NC293, 139SE 604. But see 55ND686, 215NW158.

1554-94 26 OhNPNS347.

1554-95 CalA 253P357; 35PortoRico 801 (court cannot decide any question of conflict in plaintiff's testimony). **Evidence in behalf of defendant** controverting plaintiff's evidence cannot be considered. 154Wash241, 281P991.

1554-97 194NC656, 140SE598; 196NC 583, 146SE233.

1555-98 189NC790, 128SE404.

1555-99 196NC820, 146SE87(2dcase). **Rule does not apply** unless all evidence offered by plaintiff, with all permissible inferences therefrom, sustains only affirmative of issue involving defense. 192 NC236, 134SE647.

1555-1 5F(2d)952. See also 168Ga792, 149SE201. **Decision on motion may be reserved till after verdict** of jury by consent of parties. 41F(2d)382.

1555-6 But see Cal 292P495.

1555-6½-New. On motion for nonsuit only office of trial court is to determine whether material allegations of complaint are supported by substantial evidence. 73CalA695, 239P54.

1555-6⅝-New. On motion for nonsuit burden does not rest on plaintiff to eliminate all causes favorable to defendant, but defendant must eliminate all those favorable to plaintiff. 82NH408, 135A 27.

1555-6¾-New. Validity of judgment of nonsuit held not affected by finding therein that defendant was entitled to reconveyance of property involved. 82 Mont295, 267P289.

1555-6⅞-New. Where findings are unnecessarily made when nonsuit is granted, defendant must show that on undisputed evidence he is entitled to judgment. 224AppDiv303, 230NYS289.

1555-6⅞-New. Dismissal on merits for failure to prove damages, after verdict for plaintiff is rendered, is error, though granting nonsuit is proper. 27F(2d) 791.

1555-6⅞-New. Testimony in conflict with testimony supporting plaintiff's contention must be disregarded in determining motion for nonsuit. CalA 284 P977.

1555-7 274US65, 47SCt491, 71Led929; 77Mont505, 252P310; TexCommnA 283 SW489.

1555-8 70CalA309, 233P76; 162Ga758, 134SE620, 50ALR412; 36GaA191, 136SE 182; 36GaA635, 137SE918; 78Mont97, 252P382; 78Mont389, 254P417; 117 Or 455, 244P509, 46ALR245; 134SC435, 132SE828. **Where evidence is all one way.**-25F(2d)596.

1556-9 162Ga758, 134SE620, 50ALR 412 (where plaintiff failed to prove case as laid in petition); 164Ga450, 139SE 27; 36GaA635, 137SE918 (where plaintiff fails to prove his case, as laid); 37 GaA410, 140SE400; 41GaA453, 153SE 440; 48 Ida789, 285P676; 166Minn507, 208NW408; 78Mont97, 252P382; 117 Or 11, 242P830. **Where plaintiff's evidence conclusively establishes a defense,** etc. 35GaA243, 132SE918.

1556-10 104Conn693, 133A669; 164Ga 450, 139SE27; 165Ga813, 142SE151; 166 Ga818, 144SE381; 43 Ida198, 252P865; 81Mont527, 264P122; 116 Or18, 240P 225.

1556-11 167Minn417, 209NW1; 78Mont 97, 252P382; 78Mont389, 254P417; Mont 289P580; 288Pa9, 135A623. **In Pennsylvania.**-285Pa241, 132A185.

1556-12 203Cal 427, 264P756; 164Ga 450, 139SE27; 165Ga813, 142SE151; 78 Mont97, 252P382; 117 Or188, 243P96, 45ALR812; 288Pa221, 135A624.

1556-13 78Mont389, 254P417.

1557-14 40 Ida726, 236P538; 78Mont 97, 252P382; 224AppDiv438, 231NYS 306; 190NC24, 128SE485 (only when evidence in no aspect is sufficient in law to warrant verdict for plaintiff); 195NC 231, 141SE586; 121 Or531, 255P606 (rule conversely stated); 155SC63, 152 SE18.

1557-17 But see CalA 292P698.

1557-18½-New. Nonsuit is properly awarded where plaintiff fails to prove his case as laid. 36GaA190, 136SE178.

1557-18¾-New. Where party having burden of affirmatively proving issue introduces no substantial evidence, nonsuit is proper. 199Cal 257, 248P1015.

1557-20 NJSup 135A803 (to extent of part of damages). See also Cal 292P624.

1557-21 198Cal 290, 244P1077; 77CalA 193, 246P136; 86CalA244, 260P927; 161 Ga448, 131SE154; 36GaA565, 137SE 301; 35GaA132, 132SE244; 36GaA812, 138SE247; 43 Ida198, 252P865; 105NJL 415, 144A604; 50ND583, 197NW150; 118 Or357, 246P214.

1557-24 75CalA382, 242P739; 77Colo 326, 236P783; 160Ga705, 129SE31; 161 Ga831, 132SE63; 36GaA565, 137SE301; 36GaA815, 138SE286; 189NC783, 128SE 158; 117 Or286, 243P778; 117 Or278, 243P785; 285Pa362, 132A184.

1558-25 77CalA193, 246P136; 81CalA 76, 253P158.

1558-26 77CalA193, 246P136; 86CalA 193, 260P605; 164Ga810, 139SE542; 117 Or188, 243P96, 45ALR812; 124 Or585, 265P417; 154Wash241, 281P991.

1558-27 7F(2d)583; 204Cal 679, 269P 529; 81CalA76, 253P158; 77Colo 326, 236P783; 163Ga31, 135SE409; 36GaA 815, 138SE286; NJSup 147A460(1st case); 116 Or18, 240P225.

1558-28 86Mont150, 282P494.

1558-30 164Ga810, 139SE542; 39GaA 739, 148SE421. **Where pleading defective.**-40GaA172, 149SE82.

1558-31 214Ala268, 107S746; 214Ala 279, 107S751; 204Cal 679, 269P529; 94 CalA576, 271P559; 84Mont338, 275P 753; NJSup 137A881; RI 149A861; 148 SC511, 146SE534; Wis 233NW91.

1559–32 146Va594, 131SE850, 46ALR 186. Contra 40 Ida726, 236P538.
1559–33 105NJL232, 143A322.
1559–34 88CalA372, 263P564; Can [1929] 4DomLR1071(1stcase).
1559–35 77CalA193, 246P136; 82CalA 503, 255P868; 98CalA568, 277P529(2d case); 100CalA685, 280P1024; 36GaA 565, 137SE301; 168Ga742, 149SE30(2d case); 39GaA61, 146SE40; 103NJL645, 137A419; NJ 151A633; NJSup 150A 557.
1559–36 144Va473, 132SE179.
1559–37 75CalA382, 242P739; 38GaA 343, 143SE909; NJ 141A566; NJSup 135A803.
1559–38 133Misc832, 234NYS78.
1560–44½–New. Court may reserve decision on motion to dismiss complaint till case is submitted and passed on by jury. 215AppDiv333, 213NYS342.
1560–44½–New. Nonsuit denied where court merely would not permit verdict to stand. 164Ga450, 139SE27.
1560–44½–New. Insufficiency of complaint to state cause of action is not ground for nonsuit where answer tendered issues upon which trial proceeded. 81CalA76, 253P158.
1560–44½–New. Misnomer of plaintiff not ground for nonsuit if defendant has not been deceived. 126 Or76, 268P989.
1560–44½–New. Evidence held to justify denial of motion for nonsuit where defendants failed to testify in own behalf or on cross-examination. 84Colo 572, 272P623.
1560–44½–New. Action cannot be dismissed merely because of defective pleading. CalA 289P245.
1560–44½–New. Where variance is immaterial and not misleading, motion may properly be refused. 51Nev150, 271P 467.
1560–44½–New. Denying dismissal is not erroneous where evidence as most favorable to plaintiff was sufficient to go to jury. 198NC389, 151SE877.
1560–44½–New. Motion to dismiss as distinguished from motion for nonsuit is improper where petition alleges case, though evidence insufficient. GaA 155SE 221.
1560–45 See also 29Hawaii18; 8LaA 792. **Fact that plaintiff makes prima facie case** does not preclude dismissal. 204 Iowa1216, 216NW728.
1560–46 Evidence held sufficient to support judgment.–29Hawaii539. **Complaint erroneously dismissed** where plaintiff's evidence and defendant's admissions make prima facie case. 34Porto Rico 211.
1560–49 127Me91, 141A321; Me 150A 535.
1560–51½–New. Exception to refusal of nonsuit remained in full legal force and effect, though after nonsuit was refused. 105NJL152, 143A434.
1560–52 75CalA382, 242P739; 101CalA 186, 281P514; 84Colo 572, 272P623; 169 Minn457, 211NW673; 82Mont295, 267P 289; 84Mont549, 276P948; Mont 291P 1042; 224AppDiv63, 229NYS201.
1561–53 7 F(2d)583; 36F(2d)907(2d case); 40 Ida402, 233P516; 42 Ida645, 247P1069; 43 Ida441, 252P870; 46 Ida 680, 271P464; 76Mont24, 245P958, 46 ALR906; 48Nev181, 228P588, 232P782; 189NC783, 128SE158; 153Wash119, 279P 391. **Defendant does not, by cross-examination of plaintiff's witness,** waive motion for nonsuit at close of plaintiff's evidence. 43 Ida441, 252P870.
1562–54 30F(2d)642; 43 Ida441, 252P 870; NC 146SE521.
1562–55 91Fla99, 107S340; 82Mont295, 267P289.
1562–57 101NJL561, 129A139; 143 Wash401, 255P134.
1563–68 17F(2d)371; 199Cal 750, 251 P637; 89CalA55, 264P766; 91Fla99, 107S340; 98Fla920, 124S814; 35GaA 124, 132SE247; 35GaA368, 133SE314; 255 IllA30 (where counsel for plaintiff declines to proceed when case reached for trial); 254Mass268, 150NE3 (where no motion was made); 227AppDiv369, 237NYS552. **Directed instruction in favor of party having burden of proof is** forbidden by familiar principle of practice. NC 131SE417. **Verdict under direction** is action of court, not of jury. 21 OhA282, 152NE757. **In exceptional cases.**–103Conn675, 131A322. **Direction of verdict in effect denying plaintiff right to offer further evidence** is error. 142Wash565, 253P785. **Court may give peremptory instruction without motion therefor.** TexCivA 18SW(2d)432. **Court may overrule motion for directed verdict** and permit amendment to pleading so that it may conform to proof. 121 Oh 478, 169NE566. **Refusal to direct verdict is never reversible error.**–Ga 155SE 476.
1564–69 36GaA561, 137SE296; 191NC 153, 131SE670 (when testimony insufficient to support different finding); 54 SD446, 223NW585. **Duty of court to direct verdict arises:** First, when evidence is undisputed; second, when even conflicting evidence is so conclusive, that it would nevertheless require setting aside any verdict opposed hereto. 25 F(2d)423. **Where questions involved are peculiarly those of fact,** they are properly left to jury. 232 IllA430. **Where evidence is all one way.**–25F(2d) 596. **It is never reversible error** to refuse to direct verdict. 168Ga112, 147 SE115; 39GaA490, 147SE420.
1564–70 36GaA561, 137SE296. **In North Dakota.**–50ND71, 194NW900; 200ND 533, 200NW790 (motion for directed verdict denied in view of statute).
1564–71 317Mo 221, 295SW116, 117 [citCyc].
1564–72½–New. Court may not direct verdict on setting aside contrary verdict by jury, in jury's absence. 215App Div333, 213NYS342.
1564–72½–New. At what time verdict may be directed.–Till report of jury is accepted, judge has power to direct verdict. 256Mass320, 152NE354.
1564–72¼–New. Motion for directed verdict is justified only in exceptional cases. 109Conn158, 145A884.
1564–72½–New. Direction of verdict unsupported by evidence is necessarily erroneous. 41GaA60, 151SE813.
1564–72½–New. Right to verdict on evidence should be raised by motion instead of request for ruling. Mass 170 NE115.
1565–78 77CalA709, 247P597; 86 IndA 358, 158NE248; 126Me244, 137A689; 241Mich383, 217NW329, 57ALR262; 75 Mont1, 241P631; 75Mont516, 244P494; 76Mont105, 245P523; 80Mont524, 261P 283; 49ND838, 193NW658; 114 Okl 220, 245P879; 116 Or18, 240P225; 117 Or652, 244P665; 133 Or14, 288P200; TexCivA 10SW(2d)213. See also 205 Iowa1300, 217NW803. **Motion for dismissal distinguished.**–49ND838, 139NW 658. **Rule applicable to motion for new trial** is not applicable on motion for directed verdict. 82CalA503, 255P868. **Motion presents only question of law.**–29 OhA513, 163NE918.
1565–77 170Ark342, 281SW910; 205 Cal188, 270P364; Cal 291P184; 77 CalA709, 247P597; 93Fla698, 112S547; 95Fla31, 116S2; 99Fla448, 126S749; 42 Idal, 243P355; 233 IllA598; 243 IllA 251; 246 IllA538; 250 IllA16; 86 IndA 358, 158NE248; 150Md663, 133A598; 152Md553, 137A339; 264Mass364, 162 NE735; 235Mich240, 209NW124; 140 Miss410, 105S864; 76Mont105, 245P 523; 77Mont572, 252P307; 80Mont431, 261P253; 103NJL459, 135A776; 103 NJL645, 137A419; 228AppDiv168, 239 NYS461 (motion by defendant for directed verdict for plaintiff for nominal damages); 28 OhA208, 162NE610; 114 Okl 277, 246P859; 118 Okl 135, 247P65; 38 OklACR188; 116 Or18, 240P225; 117 Or652, 244P665; RI 133A624; 138 SC241, 136SE234; 155SC507, 152SE707; TexCivA 294SW948; TexCivA 25 SW(2d)695.
1565–77½–New. Court cannot discharge jury over objection of parties. TexCivA 295SW198.
1565–78 35F(2d)142; 244 IllA434; 205 Iowa1369, 219NW399; Iowa 229NW 244; 232Ky24, 22SW(2d)278 (motion by defendant); 75Mont516, 244P494; 28 OhA208, 162NE610; 117 Or231, 242 P821. But see 230Ky333, 19SW(2d) 980; 34 OhA464, 171NE346. **By requesting direction of verdict as to one issue,** defendant does not waive right to have different question submitted to jury. 25F(2d)837. **Where answer fails to state a defense,** verdict may be directed. 33NM28, 262P182. **Motion for directed verdict is proper practice** for testing sufficiency of evidence. 34Ariz482, 272 P918. **Competency of evidence** is not triable on motion for instructed verdict. 31Ariz39, 250P356. **Court in passing on motion** for directed verdict may disregard incompetent evidence, especially where received over objection. 22 OhA 216, 153NE299. **Court should consider question of claim being against estate** of deceased person. 204 Iowa363, 213 NW779. **Allegation of answer, unsupported by evidence,** cannot be considered. 218Ky761, 292SW341.
1565–79½–New. Such motion is proper method to raise question on all evidence. 253Mass499, 149NE208.
1565–80 Cal 291P184. But see 104 Conn693, 133A669.
1565–82½–New. Withdrawal of motion.–It has been held error for court to refuse to permit defendant to withdraw his motion. 18F(2d)193.
1565–82½–New. Motion for directed verdict cannot take place of motion for nonsuit. 104Conn693, 133A669.
1565–82¼–New. Directed verdict which is granted finally determines issues which cannot again be presented to court while judgment stands. 104Conn 693, 133A669.
1565–82½–New. Defendant requesting directed verdict waives right to have defense submitted to jury. TexCivA 5 SW(2d)559.
1565–82½–New. Materialman suing to recover sum of money and to foreclose lien note does not, by request for directed verdict relative to note, waive right to have controverted issues relative to agreements with owners submitted to jury. TexCivA 20SW(2d)1076.
1565–82½–New. Defendant's motion for directed verdict does not preclude him from receding from motion and requesting submission of fact questions to jury. 230AppDiv855, 245NYS18.
1565–83 164Ga845, 139SE668; 37GaA 409, 140SE766; 121Kan469, 247P631; 122Kan423, 251P1080 (construction of writings); 267Mass381, 166NE628; 267 Mass557, 166NE822; 148Miss173, 114S 262, 56ALR681; Nebr 230NW673.
1565–84 12F(2d)658; 17F(2d)699; 22 F(2d)718; 38F(2d)462 (duty of court to declare conclusion to jury); 41F(2d) 479; 41F(2d)586; 43F(2d)675; 214Ala 166, 106S689; Cal 291P184; 77CalA 709, 247P597; CalA 287P529; 83Colo 118, 263P18; 103Conn675, 131A322; 107Conn393, 140A760, 56ALR1127; 109 Conn158, 145A884; 111Conn584, 150A 500; 165Ga362, 141SE55; 165Ga407, 141SE76; 169Ga602, 150SE910; 36GaA 433, 137SE79; 37GaA350, 140SE390; 37GaA347, 140SE392; 37GaA355, 140 SE427; 37GaA361, 140SE524; 234 IllA 267; 250 IllA481; 204 Iowa322, 213NW 798; 204 Iowa490, 215NW607, 608 [cit Cyc]; 226Ky597, 11SW(2d)417; 125Me 507, 131A308; 148Miss173, 114S262; 56ALR681; 78Mont415, 258P236; 80 Mont431, 261P253; 116Nebr776, 219NW 145; NJSup 150A574; 113 Okl188, 240P702; 127 Or235, 271P734; 140SC 123, 138SE675; 155SC63, 152SE18; 51 SD288, 213NW507 (reasonable inferences); TexCivA 13SW(2d)469; 66Utah 539, 244P906; 136Wash369, 240P14; 142Wash642, 253P1088; 104WVa144, 139SE645. **A verdict demanded by the evidence,** etc. 162Ga178, 132SE643; 163Ga357, 136SE137; 165Ga651, 141SE 646; 165Ga882, 142SE267; 166Ga69, 142SE536; 166Ga71, 142SE543; 34GaA 329, 129SE560; 35GaA595, 134SE355; 37GaA198, 139SE366; 37GaA537, 140 SE902.
1566–85 84Colo 298, 269P900; 319Mo 250, 38W(2d)352(2dcase); Nebr 230 NW673. **But in Maryland,** under statute, question of variance between pleading and proof cannot be raised by direction "that there is no legally sufficient evidence in this case under the pleadings." 149Md140, 131A82. **Immaterial variance held not to warrant direction of verdict.** 80Mont492, 261P 261.

1566–86 267US248, 45SCt300, 69L ed 597; 13F(2d)972; 17F(2d)371; 26F (2d)26; 41F(2d)479; 214Ala166, 106S 689; 218Ala505, 119S11; 22AlaA24, 111 S755; CalA 289P673; 163Ga843, 137 SE550; 165Ga362, 141SE55; 234 IllA 267; 204 Iowa490, 215NW607; 124Kan 604, 261P840; 125Me507, 131A308 (as matter of law); Mass 171NE435; 145 Miss578, 110S845 (where no conflict in material evidence); 148Miss173, 114S 262, 56ALR681; MoA 278SW784; 80 Mont431, 261P253; NJSup 133A513; 103NJL217, 135A821; 37 OklACR428; 8PaDist&Co 623 (uncontradicted testimony of witnesses corroborated by independent documentary evidence which there is no reason to doubt); 140SC123, 138SE675; TexCivA 13SW(2d)956; TexCivA 17SW(2d)1083; 200Wis40, 227 NW256. **To authorize direction of verdict for plaintiff,** allegations relied on must be shown by uncontradicted evidence giving weight to all reasonable deductions to be drawn therefrom. 160 Ga801, 129SE49.

1566–87 215Ala56, 109S291 (affirmative charge without hypothesis may be given, and court need not allow argument by counsel to jury); 37GaA350, 140SE 390; 204 Iowa490, 215NW607, 608 [cit Cyc]; SD 225NW385; WVa 153SE245.

1567–88 8F(2d)30; 164Ga845, 139SE 668; 233 IllA353; 234 IllA267; 256 Mass5, 152NE236 (no contradictory evidence and facts alleged practically admitted); 145Miss578, 110S845; 149 Miss105, 115S196; Nebr 230NW680; 115 OhSt247, 153NE289, 48ALR1176; 125 Okl 81, 256P894; TexCivA 285SW 667. **Defendant's motion for direction of verdict** should be sustained where there is no conflict in evidence and it is susceptible of but one inference favorable to defendant. IndA 168NE465.

1567–89½–New. Where evidence introduced to prove material issue was erroneously admitted, TexCivA 286SW673.

1567–90 20F(2d)317; 162Ga350, 133 SE637; 162Ga327, 133SE743; 204 Iowa 490, 215NW607, 608 [citCyc]; 256Mass 493, 152NE738; 21 OhA282, 152NE757; 52SD116, 216NW868; TexCivA 31SW (2d)350; 104WVa144, 139SE645.

1567–94½–New. Direction of verdict is proper where verdict to contrary should be set aside. 17F(2d)371.

1567–94⅓–New. Trial court is not warranted in directing verdict in accordance with what he thinks is preponderance of evidence. RI 144A105.

1567–94¼–New. Test for determining whether verdict should be directed on circumstantial evidence is whether conclusion is consistent with known circumstances and whether circumstances are inconsistent with other conclusion. Ariz 286P817.

1567–94½–New. Where evidence and reasonable inferences, taken as true, fail to establish case, then directed verdict is proper. 233Ky797, 26SW(2d)1031.

1567–95 25F(2d)705, 706 [citCyc]; 164Ga96, 137SE833; 72Mont356, 233P 600; 83NH60, 138A541; 127 Okl 44, 259 P643; 116 Orl8, 240P225, 226 [quot Cyc]; 14PaDist&Co 21; TexCivA 299 SW520; TexCivA 300SW641; Vt 147A 352. **Where evidence on two of three counts** was for jury, general verdict should not be directed. 259Mass238, 156NE55. **Evidence held to preclude peremptory instruction** in favor of plaintiff. TexCommnA 12SW(2d)983. **Where there is any competent evidence which would reasonably support verdict in favor of party against whom motion is leveled,** motion should be overruled. 136 Okl 197, 277P231. **Where tendencies of evidence supportive of complaint,** affirmative charge is properly refused. 221Ala18, 127S668. **If competent evidence supporting allegations is sufficient for jury,** admission of incompetent evidence does not warrant directed verdict. Md 150A856.

1567–96 37F(2d)666; 177Ark1194, 291 SW441; 180Ark505, 21SW(2d)851; CalA 288P1099; 241 IllA35; IndA 168 NE483; 125Kan491, 264P735; 231Ky 346, 21SW(2d)452; 259Mass272, 156NE 254 (only when no other decision is legally possible); 260Mass210, 157NE 339; 236Mich425, 210NW488; 103NJL 645, 137A419; 125 Or343, 267P523; 5 PaDist&Co 613; RI 148A184. See also 28 OhA208, 162NE610. **Affirmative instruction should not be given, if scintilla of adverse evidence** is developed by cross-examination of any witness thus presenting jury question. 218Ala 176, 118S330.

1567–97 170Ark842, 281SW910; 77 CalA709, 247P597; 97CalA654, 275P 980; CalA 287P529; 35GaA333, 132SE 922; 42 Ida1, 243P355; 45 Ida39, 260P 689; Iowa 213NW442; 125Me507, 131A 308; Mass 173NE517; 72Mont356, 233 P600; 77Mont572, 252P307; 78Mont 415, 258P236; Nebr 229NW337; NJ Sup 149A526; 22 OhA395, 153NE857; 116 Okl 137, 243P929; 130 Okl 51, 265 P141; 116 Or18, 240P225; 50RI 118, 145A448; TexCivA 278SW943 (evidence held sufficient to preclude error in refusing to direct verdict); TexCivA 12 SW(2d)824; TexCivA 13SW(2d)469. **Where there is material issue of fact,** verdict should not be directed. NJSup 140A881. **Other statements of rule.**–Fla 129S917.

1568–98 215Ala607, 111S642; 218Ala 176, 118S330; 220Ala127, 124S294; 221 Ala292, 128S383; 21AlaA414, 109S123; AlaA 130S520; 173Ark135, 292SW386; 177Ark60, 5SW(2d)729; 68CalA171, 228 P873; CalA 283P886; CalA 285P879; 162Ga323, 133SE861; 163Ga326, 136SE 403; 164Ga655, 139SE529; 35GaA247, 132SE778; 37GaA49, 138SE857; 37GaA 805, 142SE190; 204 Iowa322, 213NW 798; 205 Iowa1009, 218NW903; 232Ky 44, 22SW(2d)435; 125Me507, 131A308; Mass 171NE662; 232Mich271, 205NW 122; 239Mich270, 214NW84; 174Minn 297, 219NW180; 141Miss762, 105S762; 141Miss55, 105S858; 141Miss110, 106S 82; Miss 125S345(2dcase); 75Mont36, 241P617; NJSup 147A233; NJSup 147 A460(1stcase); NJSup 149A345(1st case); NM 289P593; 194NC203, 139SE 224; 126 Okl 270, 259P528; Okl 292P 12; 38 OklACR185; 116 Or18, 240P225; 119 Or55, 248P158; 91PaSuper588; RI 135A855; 49RI 53, 139A916; RI 147 A624 (verdict should not be directed for one party if there is legal evidence to support contention of opposite party); RI 150A258(1stcase); 153SC168, 150SE 652(2dcase); 154SC43, 151SE107; Tex CommnA 283SW779; TexCivA 7SW(2d) 1110; TexCivA 21SW(2d)1079; 141 Wash422, 251P868; 101WVa440, 133SE 114. See also 163Ga464, 136SE422. **Conflict in evidence must be substantial** in order to deprive court of power to direct verdict where there is conflict. 199Cal 750, 251P637. **When judge feels there is evidence of fact upon which a verdict for other party is sustainable,** he must deny motion for directed verdict. 128Me417, 149A23.

1569–99 217Ala23, 114S406; 98Fla920, 124S814; RI 135A855, 856 [citCyc]; TexCivA 5SW(2d)785.

1569–1 203 Iowa676, 213NW431 (from indirect evidence); RI 135A855, 856 [cit Cyc].

1569–2 213Ala31, 104S232; 221Ala292, 128S383.

1569–3 96Fla666, 118S917; 97Fla533, 121S802; 46 Ida680, 271P464; 47 Ida 780, 279P418; 126Me35, 135A825; 83 NH60, 138A541 (request properly refused); 83NH489, 144A848; 130 Okl 51, 265P141; RI 133A624; TexCivA 274SW259.

1569–3½–New. Where evidence presents fact issue for jury. 220AppDiv 263, 221NYS420.

1569–4 203 Iowa676, 213NW431; 194 NC203, 139SE224. **When uncontroverted evidence is in parol,** directed verdict by peremptory instruction without hypothesis may not be given. 218Ala505, 119S11.

1569–6 25F(2d)705, 706 [citCyc]; 215 Ala607, 111S642; 77CalA709, 247P597; 78CalA378, 248P749; 97CalA654, 275P 980; 163Ga815, 137SE240; 164Ga655, 139SE529; 235 IllA146; 202 Iowa412, 210NW455; 203 Iowa676, 213NW431; 204 Iowa322, 213NW798; 126Me244, 137A689; 148Miss60, 114S259; 76Mont 105, 245P523; 116 Okl 149, 243P723; RI 133A624.

1570–7 179Ark842, 19SW(2d)1013. **Trial justice disbelieving defendant's uncontradicted testimony** which defeated presumption relied on by plaintiff, did not err in refusing to direct verdict for defendant, but was required to grant defendant's motion for new trial after jury returned verdict for plaintiff. 50 RI 68, 145A101.

1570–8 98PaSuper481.

1570–9 Contra 54SD630, 224NW189.

1570–10½–New. or upon testimony alone of expert witnesses on handwriting, 73Mont219, 236P250.

1570–13½–New. In North Dakota, motion for direction of verdict is denied on objection of other party, and issues must go to jury. 53ND273, 205NW672.

1570–13¾–New. Where determination of issue involves credibility of witnesses, peremptory instruction in favor of defendant will be denied. 85 IndA450, 150NE31.

1570–13¼–New. Verdict should not be directed on motion of one party where there are questions of fact and adversary asks to go to jury. 128Misc22, 217 NYS153.

1570–13⅓–New. Refusing peremptory instruction not ground for reversal where omitted facts later supplied by contestant. 220Ky388, 295SW445.

1570–13⅙–New. **Where evidence is conflicting,** directed verdict is not warranted. TexCivA 283SW341.

1570–13⅛–New. Verdict is not directed ordinarily for party having burden of proof. 203 Iowa676, 213NW431.

1570–13⅛–New. Denial of directed verdict motion is proper where there is substantial evidence to support verdict. 32F(2d)23.

1570–13⅛–New. Statute providing for direction of verdict, is not applicable, if evidence of party who seeks direction of verdict is such as need not be accepted. 133Misc507, 231NYS654.

1570–13⅒–New. **Directed verdict is proper only** where there is no question of fact for jury. 47 Ida646, 277P575.

1570–14 26F(2d)26; 30Ariz144, 245P 274; 207Cal 600, 279P664, 64ALR1412; CalA 289P673; 98Fla920, 124S814; 173 Minn402, 217NW377; MoA 278SW784; 34NM92, 278P200; 126 Okl 270, 259P 528; TexCivA 275SW732; 106WVa270, 145SE436.

1571–16 267US248, 45SCt300, 69L ed 597; 281US90, 50SCt231, 74L ed720; 8F(2d)30; 8F(2d)680; 13F(2d)972; 16 F(2d)120; 17F(2d)4; 20F(2d)635; 23 F(2d)324; 28F(2d)563; 28F(2d)718 [certiorari den 278US654, 49SCt179(5th case), 73L ed564]; 32F(2d)974; 34 F(2d)63; 38F(2d)462; 42F(2d)208; 43F(2d)45; AlaA 130S171(2dcase); Cal 269P657(2dcase); Cal 276P338; 79 CalA339, 249P533; 84CalA519, 258P 683; 89CalA55, 264P766; CalA 289P 218; CalA 293P95; 82Colo 373, 260P 112; 35GaA573, 134SE187; 204 Iowa 635, 215NW634; 205 Iowa929, 218NW 912; 205 Iowa1369, 219NW899; 208 Iowa1, 221NW820; Iowa 229NW753; Iowa 233NW28; 234Ky276, 27SW(2d) 980; 127Me387, 143A596; 238Mich658, 214NW138; 174Minn339, 219NW185; 80Mont214, 260P711; 85Mont571, 281P 348; 118 OhSt106, 160NE629; 111 Okl 286, 239P564; 116 Okl 149, 243P723; 125 Okl 81, 256P894; 132 Okl 64, 269P 347; 132 Okl 64, 269P347(2dcase); 38 OklACR188; 45 OklACR454; 12Porto RicoFed71; 48SD534, 205NW379; 51 SD288, 213NW507; TexCivA 16SW(2d) 907; 101WVa582, 133SE325; 104WVa 144, 139SE645. See also 156Tenn479, 3 SW(2d)1053. **Court should be guided** on defendant's motion by what its action would be if jury had returned verdict for plaintiff and motion was made to set it aside because not warranted by evidence. 101WVa440, 133SE114.

1573–17 238Mich658, 214NW138.

1573–18 214Ky552, 283SW1026; 225 Ky480, 9SW(2d)220.

1574–21 215Ala562, 112S145; 29Ariz 346, 241P601; 170Ark1131, 282SW961; 96CalA455, 274P566; 164Ga573, 139SE 13; 164Ga845, 139SE668; 35GaA131, 132SE233; 37GaA350, 140SE390; 37 GaA347, 140SE392; 37GaA355, 140SE 427; 37GaA361, 140SE524; 37GaA409, 140SE766; 38GaA790, 145SE888; 30 Hawaii784; 234 IllA267; 204 Iowa490.

215NW607; Mont 288P614; 116 Okl 297, 244P739; 121 Okl 31, 246P623; 117 Okl 164, 246P855; 118 Okl 142, 247P85; 126 Okl 185, 259P234; 128 Okl 215, 262P208; 130 Okl 247, 266P1107; 133 Okl 75, 271P166; 133 Okl 158, 271P842; 134 Okl 282, 273P892; 143 Okl 42, 287P392; 38 OklACR188; 48RI 221, 137A149, 150 [citCyc].

1575-22 29Ariz346, 241P601; 29Ariz 468, 242P1009, 43ALR1181; 93Fla903, 112S615; 36GaA694, 137SE842; 37GaA 350, 140SE390; 37GaA347, 140SE392; 40GaA499, 150SE431(1stcase); 89 IndA 625, 167NE623; 119Kan807, 241P131; 127 Okl 215, 260P497; 137 Okl 1, 278P 1096; 139 Okl 256, 281P974; 141 Okl 275, 285P8 (cross' petition); 51SD288, 213NW507; 104WVa144, 139SE645. But see 121 Okl78, 169NE566.

1575-23 36GaA561, 137SE296; 164Ga 845, 139SE668; 36GaA682, 137SE841 (rule applied even where evidence is introduced without objection). See also 299Pa311, 149A471. **Verdict not directed on admission of plaintiff's cause of action,** subject to answer, to give latter right to open and close. TexCivA 278SW924.

1575-23½-New. Where evidence is documentary, unimpeached, and uncontradictory, and defendant does not tend to overthrow plaintiff's case directed verdict is proper. MoA 78W(2d)732.

1575-23⅓-New. Plaintiff is entitled to instructed verdict where evidence establishes clear right to recover and defendant offers insufficient evidence in support of answer. 142 Okl 254, 286P771.

1575-24 Iowa 227NW114 (failure to plead performance or excuse for nonperformance of contract sued on).

1575-25 165Ga170, 141SE203.

1575-27 37GaA49, 138SE857; 39GaA 600 148SE316; 203 Iowa676, 213NW431; 128Misc22, 217NYS153 (and defendant asks to go to jury).

1575-29 161Ga739, 132SE683; 37GaA49, 138SE857; 203 Iowa676, 213NW431; 87PaSuper378; 94PaSuper435.

1575-30 37GaA49, 138SE857; 38 Okl ACR55.

1575-31 13F(2d)105; 35GaA114, 132 SE396; 38 OklACR55.

1575-32 242Mich683, 219NW613; 105 WVa147, 141SE634.

1576-33 21AlaA609, 110S561; Ariz 286 P186; 28Hawaii180; 42 Ida1, 243P355; 47 Ida646, 277P575; 203 Iowa676, 213 NW431; 153Miss597, 121S292; Nebr 228NW253(1stcase); 130 Okl 210, 266P 441; 142 Okl 184, 286P304; 145SC393, 143SE9.

1576-34½-New. Where pleadings and proofs are sufficient to sustain verdict for defendant, peremptory instruction against him is erroneous. Nebr 230NW 487(2dcase).

1576-34⅓-New. Where there is substantial evidence to support defendant's counterclaim verdict should not be directed for plaintiff. 34NM509, 285P 494.

1576-35 Cal 291P184; CalA 290P510; 227Ky486, 138W(2d)497; 231Ky678, 22 SW(2d)115; 235Mich240, 209NW124; 74Mont176, 240P529; 80Mont214, 260 P711; SC 155SE839; 155Tenn403, 293 SW752; TexCivA 295SW289 (held valid means of questioning meaning of cause of action sued on); 107WVa406, 148SE 382.

1577-36 173Ark956, 293SW1015; 177 Ark1193, 78W(2d)327; 82CalA503, 255 P868; 93Fla698, 112S547; 94Fla998, 114S849; 97Fla350, 121S95(2dcase); 165Ga107, 141SE76; 169Ga784, 151SE 501; 233 IllA20; 233 IllA353; 235 IllA 569; 84 IndA192, 149NE651; 224Ky 292, 68W(2d)239; 232Ky56, 22SW(2d) 446; 75Mont36, 241P617; 76Mont105, 245P523; 80Mont431, 261P253; 84Mont 225, 271P1062; 85Mont270, 278P521; Mont 292P577; 103NJL217, 135A821; 43 OklACR208; SC 155SE842; TexCivA 293SW349; 101WVa440, 133SE114. **Evidence cannot be weighed** on defendant's motion for directed verdict. 24 OhA62, 156NE531. **Where substantial evidence sustains recovery on either of alternative theories,** verdict should not directed. 25F(2d)247.

1578-37 212Ala602, 103S586; 164Ga 661, 139SE519; 165Ga416, 141SE51; 321 Ill168, 151NE573; 76Mont201, 245 P949; 220MoA941, 278SW1075; 34NM 26, 275P378; 197NC724, 150SE503; 124 Okl 247, 255P696; 128 Okl 215, 262 P208; 118 Or357, 246P214.

1578-38 76Mont105, 245P523; 82Mont 52, 264P933.

1578-39 172Ark494, 289SW465; 208 Cal 350, 281P66; 35GaA552, 133SE744; 234 IllA234; 235 IllA146; 231Ky502, 21 SW(2d)806; 168Minn19, 209NW487; 128 Okl 215, 262P208; 141 Okl 133, 284 P21; 43 OklACR340; 49RI 364, 124A 621; RI 144A769(2dcase); 50RI 62, 145A12; 99Vt208, 130A679. **If there is any evidence supporting plaintiff's case,** peremptory instruction should be denied. 232Ky493, 23SW(2d)919.

1578-40 22F(2d)530; 24F(2d)262; 214 Ala282, 107S801 (holding refusal of general charge correct where evidence tended strongly to support plaintiff's case on one count); 215Ala68, 109S118; 23AlaA12, 121S437(2dcase) [certiorari den 219Ala139, 121S441(1stcase)]; 22 AlaA605, 118S498; 78CalA378, 248P 749; 162Ga527, 134SE164; 164Ga96, 137SE833, 321 Ill168, 151NE573; 233 IllA553; 234 IllA234; 235 IllA146; 239 IllA583; 243 IllA129; 243 IllA251; 244 Ky107, 218W(2d)140; 151Md422, 135 A185; 261Mass102, 162NE4; 146Miss 440, 111S562; 80Mont214, 260P711; 82Mont185, 266P394; Nebr 230NW102; 102NJL186, 130A542; 19 OhA64; 19 OhA374; 21 OhA127, 152NE146; 24 OhA62, 156NE531; 126 Okl 150, 259P 125; 128 Okl 215, 262P208; 130 Okl 60, 265P137; 36 OklACR387; 36 OklACR 567; 43 OklACR340; 122 Or547, 259P 902 (evidence sufficient to support complaint and carry case to jury); 122 Or 547, 259P902; 124 Or585, 265P417; 132 Or16, 284P567; RI 133A624; 50RI 153, 146A618, 65ALR375; 151SC164, 148SE 889; TexCivA 280SW348; TexCivA 289SW164; TexCivA 289SW712; Tex CivA 298SW642; Utah 274P856; 141 Wash122, 251P868; 148Wash122, 268 P180; 101WVa440, 133SE114; 105WVa 60, 141SE440. **Failure to prove cause of action stated** warrants direction of verdict. 153Minn231, 190NW65. **If defendant's evidence supplies deficiencies** in that offered by plaintiff, defendant's motion at close of evidence should not be granted. 75Mont1, 241P631. **Where defendant admits part of plaintiff's cause of action,** refusal of motion for direction of verdict against plaintiff's entire cause of action is proper. NJ 141 A566.

1579-41 80CalA444, 251P952; 116 Or 18, 240P225; 117 Or278, 243P785.

1579-43 See also 214Ky552, 283SW1026. **Where plaintiff made out prima facie case from either aspect of testimony,** motion properly denied. 289Pa560, 137 A731.

1579-45 91Fla99, 107S340; 29Hawaii 459; 43 Ida273, 251P293; 233IllA353; 235 IllA469; 204 Iowa1229, 210NW451; 80Mont214, 260P711; 117Nebr186, 220 NW240; 192NC494, 135SE331; 141 Okl 267, 284P855; 39 OklACR274; 48RI 183, 136A763; TexCivA 11SW(2d)392. **Peremptory instruction for insurer in** action on life insurance policy held not authorized because incompetent testimony by beneficiary was admitted, without giving opportunity to supply evidence by competent testimony. 220Ky 626, 295SW900. **Where evidence does not tend to prove plaintiff's cause of action,** verdict may be directed for defendant. 220Ala661, 127S230.

1579-46 233 IllA20 (error not to direct verdict in such case); 235 IllA469; 116 Or18, 240P225. **Rule in Georgia.**—35GaA 245, 133SE271. But see 166Ga222, 142 SE857.

1579-47 327 Ill362, 158NE678; 200 Iowa1353, 206NW613; 208 Iowa759, 225NW939; 267Mass166, 166NE550(2d case); 232Mich352, 205NW108; Miss 117S264; 117Nebr411, 220NW590; 23 OhA304, 154NE361; 127 Okl 106, 260P 26; TexCivA 282SW302. **Directing verdict for defendant held proper where** plaintiff failed to establish negligence. 23 OhA304, 154NE361.

1580-48 162Ga238, 133SE263; 154Md 91, 140A82; 103NJL217, 135A821; 36 Okl ACR590; 127 Okl 106, 260P26. **Plaintiff's testimony held insufficient** to carry question to jury as against positive testimony to contrary by other witnesses. 152Md492, 137A306.

1580-49 105WVa362, 142SE521. **Where all reasonable men** would draw same conclusion from evidence which would require verdict for defendant, verdict should be directed for defendant. 66 Utah539, 244P906.

1580-50 327 Ill362, 158NE678; 210Ky 600, 276SW515; 254Mass204, 150NE5; 98PaSuper554.

1580-52 TexCivA 283SW895.

1580-53 141Miss881, 106S110; 145Miss 768, 111S146; 136 Okl 290, 277P939; 118 Okl 135, 247P65.

1580-54 137SC468, 135SE567.

1580-54½-New. or court would be entitled to set aside verdict for plaintiff, 17P(2d)371.

1580-55 222Ky415, 300SW906. **If the defect in the complaint,** etc. 22AlaA 199, 114S15. **Where complaint is not subject to general demurrer,** verdict should not be directed for defendant. TexCivA 5SW(2d)862.

1580-55½-New. **Where hopeless variance** between declaration and proof. 91 Fla1071, 109S198.

1580-56½-New. Where new party defendant is introduced by amendment, and no recovery can be had against original defendants, new party is entitled to affirmative charge. 214Ala32, 106S182.

1580-56¼-New. Where after evidence is stricken out because unsupported by pleading and nothing left to support verdict, court should direct for defendant. 215Ky487, 284SW1107.

1580-56¼-New. Defendant is entitled to directed verdict on cross petition, where he is entitled to recover thereon, unless affirmative defenses set up by plaintiff are sustained and no evidence is produced reasonably tending to support such defenses as ordered. 122 Okl 58, 251P69.

1580-56⅙-New. If defendant is not entitled to directed verdict at close of plaintiff's case, only uncontradicted evidence of affirmative defense will justify directed verdict for him. 321 Ill168, 151NE573.

1580-56¼-New. Where witnesses' testimony sustaining defense was not impeached or discredited, direction of verdict for defendant has been held proper. 39GaA774, 148SE345(2dcase).

1580-56½-New. Question of variance being properly raised, verdict should be directed if plaintiff fails to amend. 333 Ill368, 164NE657.

1580-56⅛-New. Plaintiff not amending pleading to conform to proof, motion for peremptory instruction should be sustained. 226Ky834, 11SW(2d)961.

1580-56⅛-New. **Failure of original answer to deny essential allegations of petition,** does not affect defendant's right to peremptory instruction where amended answer, traversed by reply, put all questions in issue. 230Ky11, 18SW(2d) 311, 69ALR1135.

1580-56 1/10-New. Where court is without jurisdiction of cause, verdict will not be directed for defendant. TexCivA 14SW(2d)342.

1580-56 1/11-New. **Motion for directed verdict should not be granted for insufficiency of complaint** unless essential averment has been omitted misleading defendant to his prejudice and defendant has not supplied necessary facts by his evidence. 86Mont228, 283P226.

1580-56 1/12-New. Verdict cannot be directed for defendant on issue not within scope of pleadings though matters claimed to constitute defense appear from evidence necessarily introduced to make out case. Vt 147A352.

1581-58 106WVa119, 145SE596. But see 25 OhA411, 158NE206.

1581-61 MoA 24SW(2d)200.

1581-62 MoA 24SW(2d)200. See also 134SC114, 132SE163.

1581–63½–New. where both defendants are liable as tenants in common, refusal to direct verdict for one has been held proper. Mass 169NE495.

1582–64 218Ala227, 118S283; 218Ala 607, 119S638; 21AlaA130, 106S214; 21 AlaA306, 107S722; 22 OhA21, 153NE 240 (where petition contains causes of action for conversion of coal and for injury to real estate by removal of coal, and motions are made to take such from jury when first is overruled, second should be sustained); 101Vt322, 143A 299. But see 255 IllA106. **Motion for directed verdict which is general** is properly denied, if case should be submitted to jury on either count. 252Mass314, 147NE863. **Withdrawal of issue** from jury equivalent to directed verdict as to that issue. 126Me244, 137A689.

1582–65 See also 145Wash624, 261P 399. **Error held not predicated on refusal to exclude by charge certain count.** –214Ala62, 106S396.

1582–65½–New. Court may direct verdict as to uncontroverted issues and at same time submit all controverted issues for determination of jury. Tex CommnA 18SW(2d)599, 63ALR1528.

1582–67 19F(2d)177; 112 OhSt321, 147 NE336; 5PaDist&Co 27. **Court not bound to direct verdict, etc.** 80Mont524, 261P283. **There is no error in sending cause to jury** where facts admit of opposing inferences. 80Mont524, 261P283.

1582–68 43 Ida279, 251P615; 125Me 108, 131A138; NH 149A498; 102NJL 635, 133A389 (rule stated but held not applicable); 112 OhSt321, 147NE336; 32 OhA374, 168NE221; 140 Okl 125, 282 P290; TexCivA 291SW639; TexCivA 294SW331. Contra 130 Or252, 279P630.

1582–70 8F(2d)389; 15F(2d)913; 16F (2d)39; 17F(2d)46; 17F(2d)881; 22 F(2d)881; 24F(2d)3; 25F(2d)398; 27 F(2d)633; 28F(2d)463; 28F(2d)755; 30F(2d)901; 34F(2d)751; 36F(2d)617; 42F(2d)807; 75Mont516, 244P494. But see 32F(2d)7. **Where supported by any substantial evidence,** etc. 16F(2d)39; 41 Ida4, 237P281. **When trial court finds facts openly in dispute,** it may submit them to jury for decision. 13F(2d)585.

1582–71 17F(2d)881; 33F(2d)89; 128 Misc166, 217NYS862; 112 OhSt321, 147 NE336; TexCivA 128SW(2d)589.

1582–72 112 OhSt321, 147NE336.

1583–73 18F(2d)223; 169Ark363, 275 SW748; 174Ark1179, 297SW841; 175 Ark482, 300SW927; 177Ark875, 8SW (2d)452; 81Colo 66, 255P452; 85Colo 87, 273P1030; 87 IndA431, 155NE185; 235Mich399, 209NW182; 238Mich508, 213NW867; 242Mich472, 219NW610, 611 (court may determine question as on law); 83Mont573, 273P635; 116 Nebr387, 217NW615, 57ALR1022; Nebr 229NW334; 216AppDiv647, 216NYS102; 223AppDiv306, 228NYS241; 136Misc 195, 240NYS663; 131Misc541, 227NYS 266; 19 OhA137; 33 OhA371, 169NE 315; 118 Or62, 245P1083; 120 Or381, 250P717; 122 Or523, 259P900; 127 Or 276, 263P907; 127 Or302, 272P271; 10 PaDist&Co 75; 54SD581, 223NW826; 154Wash450, 282P838; 40Wyo 274, 276 P532. See also 80Colo 412, 252P348; 214AppDiv504, 212NYS296. But see 31 OhA6, 165NE856. **Inferences from evidence** are for court. 41 Ida4, 237P281. **All questions of law and fact** are left to court where plaintiff and defendant move for directed verdict on complaint and counterclaim. 125Misc850, 211NYS 508. **Only questions of law are presented** where both parties request directed verdict. 252 IllA17. **Right of submission of specific questions to jury** is waived where counsel move for directed verdict without asking submission. 229AppDiv433, 242NYS273.

1583–74 18F(2d)223; 18F(2d)369; 18 F(2d)957; 42F(2d)399; 179Ark600, 17 SW(2d)305; 238Mich508, 213NW867; 216AppDiv647, 216NYS102; 116 Okl 169, 243P743; 122 Or523, 259P900; Tex CivA 271SW653 (question resolved in favor of judgment).

1583–75 169Ark363, 275SW748; 125 Misc850, 211NYS508; 19 OhA137; 116 Okl 169, 243P743; 118 Or32, 245P508; 54SD581, 223NW826; TexCivA 298SW 154; TexCivA 10SW(2d)1012. See 87 IndA431, 155NE185. But see 112 OhSt 321, 147NE336. **Direction of verdict for plaintiff without giving defendant opportunity** to request submission of issues to jury held error. 128Misc166, 217 NYS862. **In Colorado.**–85Colo 87, 273P 1030. **Loss of right to go to jury.**–54 SD581, 223NW826. **Duty to afford opportunity to move to go to jury.** 228App Div502, 240NYS355. **Waiver of right** to have issues submitted to jury. 228 AppDiv502, 240NYS355.

1584–76 TexCivA 294SW331, 337 [quot Cyc]. But see 125Misc850, 211NYS508.

1584–77 **It is duty of court to afford opportunity** to make motion. 19 OhA 137.

1584–78 245Mich179, 222NW157.

1584–83 But see Minn 233NW14.

1584–84 39F(2d)7; 20AlaA616, 104S 559 (variance made ground of request for affirmative charge must be pointed out under court rule); 213Ala494, 106 S150; 97CalA354, 275P881; 86Colo 350, 281P746; Iowa 213NW442; 151Md68, 134A33; 153Md449, 138A331; 154Md 204, 140A48; 155Md351, 142A253; 116 Or18, 240P225; 48SD648, 205NW703; SD 230NW754 (defendant's motion in personal injuries case held to raise question of contributory negligence); Vt 150A148. **Applications of rule.**–153Md 449, 138A331; 101Vt427, 144A194. **Waiver of grounds not specified.**–86Colo 350, 281P746. **Court may disregard absence of specific grounds** of motion to direct and direct verdict on its own motion. Iowa 227NW833.

1585–87 219Ala136, 121S399; 267Mass 402, 166NE867; 267Mass361, 166NE879.

1585–90½–New. Where amended bill of exceptions showed that defendant moved for directed verdict, independently of that part of his motion for directed verdict in accordance with leave reserved, as provided by statute, he was held to have properly reserved his rights. 257 Mass525, 154NE253.

1585–90¾–New. In Massachusetts, question whether court should order verdict must be raised by motion and not by request for instructions. 257Mass413, 153NE881; 263Mass409, 161NE612.

1585–90¼–New. Request to instruct verdict not covering all issues has been held not request for directed verdict contrary to court rules. Mass 171NE435.

1585–91 91Fla99, 107S340; 237 IllA 135; 261Mass91, 158NE335. But see 104Conn693, 133A669.

1585–92 104Conn693, 133A669; 91Fla 99, 107S340; 237 IllA135. **Statute held not to change rule** not requiring motion at end of plaintiff's case. 247Mich141, 225NW625.

1585–93 **Effect of failure to renew.**–262 Mass317, 159NE728.

1586–97 82NH405, 134A719.

1586–99 101WVa194, 132SE198. **On renewal of motion after discharge of jury,** it is improper for court to direct verdict on ground other than that previously urged. 157Tenn455, 9SW(2d) 1026.

1586–2 104Conn693, 133A669; 35 OhA 152, 171NE865 (before hearing evidence on counterclaim). But see 41GaA389, 153SE88.

1586–3 104Conn693, 133A669, 671 [cit Cyc]; 236Mich471, 210NW478.

1586–5 104Conn693, 133A669, 671 [cit Cyc].

1586–6½–New. Denial of motion for nonsuit does not prevent subsequent prevention of verdict for defendant. 97 CalA654, 275P980.

1586–6¼–New. **Withdrawal of motion.**–Refusal to permit withdrawal of motion has been held not abuse of discretion. 85 Colo 87, 273P1030.

1586–8 281US90, 50SCt231, 74Led720; 8F(2d)128; 14F(2d)24; 28F(2d)563; 29F(2d)71; 36F(2d)210; 41F(2d)319; 42F(2d)387; 44F(2d)119; 33Ariz206, 263P584; Ariz 286P186; 172Ark1176, 291SW72; 77CalA709, 247P597; 79CalA 339, 249P533; 97CalA654, 275P980; CalA 287P529; CalA 289P218; 97Fla 869, 122S270; 46 Ida680, 271P464; Ida 290P200; 321 Ill 168, 151NE573; 327 Ill 339, 158NE724; 336 Ill 482, 168NE514 (where movant offers no evidence); Ill 173NE394; 252 IllA151; 256 IllA471; 87 IndA11, 158NE636; 89 IndA139, 164 NE859; IndA 168NE483; Iowa 228NW 886; 222Ky409, 300SW853; 227Ky841, 14SW(2d)174; 228Ky11, 14SW(2d)214; 232Ky726, 24SW(2d)580; 232Ky734, 24 SW(2d)585; 233Ky797, 26SW(2d)1031; 153Md586, 139A285; 158Md131, 148A 426; 266Mass192, 165NE20; Mass 170 NE65; Mass 171NE662; 237Mich264, 211NW661; 240Mich536, 215NW317; 241Mich652, 217NW787; 243Mich470, 220NW798; 248Mich416, 227NW547; 249Mich281, 228NW778; Mich 233NW 343; 180Minn252, 230NW776; 140Miss 375, 105S770; 149Miss889, 116S601; 156Miss463, 125S819; MoA 18SW(2d) 1038; 72Mont356, 233P600; 76Mont105, 245P523; 78Mont415, 258P236; 80 Mont431, 261P253; 84Mont1, 273P1051; Mont 290P261; Mont 291P1042; 82Nb 506, 136A128, 50ALR973; 103NJL459, 135A776; NJ 141A1; 104NJL215, 141 A2; NJ 150A334; 193NC262, 136SE 723; 26 OhA225, 158NE559; 127 Okl 44, 259P643; 129 Okl 32, 263P440; 38 OklACR188; 128 Or614, 275P667; 133 Or581, 291P1009; 300PaS5, 150A163; 14PaDist&Co 21; RI 133A624; 48RI 478, 139A302; 50RI 163, 146A403; RI 147A624; RI 148A184; 50RI 394, 148A 186; 134SC31, 131SE777; 135SC155, 133SE553; 143SC395, 141SE607; 145 SC393, 143SE9; 147SC487, 145SE400; 151SC1, 148SE633; SC 148SE701(2d case); 151SC164, 148SE889; 153SC 276, 150SE763; 155SC63, 152SE18; 157 SC154, 154SE95; 157SC381, 154SE221; SC 155SE136; SC 155SE747; 53SD491, 221NW93; SD 230NW754 (court properly considered contributory negligence in directing verdict for defendants) TexCivA 282SW334; TexCivA 286SW 901; TexCivA 294SW948; TexCivA 296 SW620; TexCivA 300SW641; TexCivA 11SW(2d)652; TexCivA 13SW(2d)469; TexCivA 16SW(2d)901; TexCivA 29 SW(2d)461; TexCivA 29SW(2d)937; Utah 291P926; 99Vt512, 134A710; 101 Vt285, 143A394; Vt 147A352. **Limitations of rule.**–8F(2d)128; 22 OhA216, 153NE299; TexCivA 17SW(2d)1087; 34 Wyo 495, 245P304, 51ALR13. **Court not bound by counsel's theory** in giving requested affirmative charge. 214Ala57, 106S180. **Explanation by witness of general statements calling for elucidation** governs in considering direction of verdict. 238Mich181, 212NW960. **Question for court to decide** is sufficiency of evidence to sustain verdict in favor of party against whom motion is directed. 38 OklACR188. **That burden of proof is on party against whom direction of verdict is requested** does not change rule. 240Mich536, 215NW317. **Court must view testimony as whole.**–TexCivA 25SW(2d)642. **Every reasonable inference** must be resolved in applicant's favor. TexCivA 25SW(2d)695. **On plaintiff's motion for directed verdict** allegations of answer must be taken as true. SC 155SE149.

1587–9 Ida 290P200; 321 Ill 168, 151 NE573; 327 Ill 339, 158NE724; 89 IndA 139, 164NE859; Iowa 227NW114; 257 Mass6, 153NE97; Mo 29SW(2d)710; 86 Mont562, 284P539; NH 149A498 (only probative character and conclusiveness are passed on); 103NJL459, 135A776; 127 Okl 44, 259P643; 50RI 62, 145A12; 50RI 394, 148A186; 50RI 455, 149A19; 141SC238, 139SE459; 157SC154, 154SE 95; 54SD521, 223NW726; TexCivA 289 SW712; TexCivA 294SW948; TexCivA 295SW320; TexCivA 11SW(2d)601; 69 Utah284, 254P781; 99Vt512, 134A710; 101Vt285, 143A394. But see 143Wash 308, 255P365. **Strength of defendant's testimony** is immaterial in determining whether evidence is sufficient to go to jury. 284Pa209, 130A432.

1587–9½–New. Verdict for defendant should not be directed where deposition of plaintiff, though inadmissible, was admitted but was subsequently rejected without giving plaintiff opportunity to prove same matters otherwise. Tex CivA 7SW(2d)922.

1588–10 16F(2d)39.

1588–11 16F(2d)39; 201 Iowa129, 206 NW672, 674 [cit Cyc].

1588–15 242Mich589, 219NW713. Contra 53SD34, 219NW892. **In denying**

nonsuit, court may properly state reasons for ruling though reason does not justify action. **NJSup** 139A388.

1588–18 **Ida** 290P211.

1588–21 See also **SD** 230NW754.

1589–31 224AppDiv672, 229NYS491; 226AppDiv746, 233NYS601. See also 133 Or196, 289P491. But see 85Colo 87, 273P1030.

1589–34 142SC102, 140SE307.

1589–35½–New. Direction of verdict on defendant's motion is in effect finding by court that, admitting all evidence of plaintiff to be true and giving effect to all reasonable inferences which may be drawn from testimony, plaintiff has not made issue of fact to go to jury. 118 **Okl** 135, 247P65.

1589–35⅓–New. Under New York statute, court should direct such verdict that, if found by jury, would not be required to be set aside as being against weight of evidence. 127Misc508, 217NYS39.

1589–35¼–New. On motion for directed verdict, question for decision is whether there was substantial evidence which would take question to jury. 143 **Wash**308, 255P365.

1589–35⅙–New. On motion for directed verdict, burden is not on plaintiff to eliminate all causes favorable to defendant, but on defendant to eliminate all causes favorable to plaintiff. 82NH408, 135A27.

1589–35¼–New. Directed verdict determines all issues of fact necessary to support verdict. 28F(2d)755.

1589–35½–New. Though court might direct verdict, it cannot withdraw case from jury and render judgment. 227Ky 682, 13SW(2d)1007.

1589–35⅚–New. Trial court may reserve decision on motion for directed verdict and may direct verdict after setting aside judgment inadvertently entered on verdict. 245Mich58, 222NW163.

1589–35½–New. Competency of testimony cannot be raised by motion for peremptory instruction. 234Ky670, 28 SW(2d)988.

1589–35 1/10–New. While evidence conflicted, plaintiff has been held entitled to have sufficiency of her testimony determined independently of contradiction. 158Md189, 148A457.

1589–35 1/11–New. Uncontradicted testimony of movant must be taken as true. 156Miss604, 126S402.

1589–35 1/12–New. Issue presented on plaintiff's motion for directed verdict must be found by presiding justice as fact. **NH** 149A498.

1589–38 97CalA264, 275P533.

1589–41 140 **Okl** 125, 282P290 (error waived by failure to except).

1590–46 Exceptions held sufficiently definite.–170Ga550, 153SE424.

1590–48 Party objecting to motion for directed verdict does not waive such objection by thereafter moving for directed verdict in his favor. 50ND71, 194 NW900.

1590–48½–New. Not waived by motion for new trial prosecuted in general law court. 126Me244, 137A689.

1590–49 5F(2d)949; 16F(2d)459; 16 F(2d)734; 21F(2d)830; 30F(2d)905; 36F(2d)907(2dcase); 39F(2d)826; **DC** 40F(2d)803; 237 **IllA**95; 237 **IllA**135; 86 **IndA**92, 156NE181; 204 **Iowa**426, 213 NW230; **Iowa** 219NW398; 150Md511, 133A322; **MoA** 273SW749; 105NJL317, 144A720, 64ALR304; 50ND400, 196NW 102; 50ND558, 197NW146; 50ND583, 197NW150; 114 **Oh**572, 151NE747; **Tex CivA** 4SW(2d)320; **TexCivA** 21SW(2d) 54(2dcase); **TexCivA** 23SW(2d)879; 98 **Vt**486, 129A299; **Vt** 150A70. But see 244Mich695, 222NW145.

1591–50 16F(2d)734; 21F(2d)830; 34 F(2d)889; 237 **IllA**95; 237 **IllA**135; 204 **Iowa**426, 213NW230; 205 **Iowa**346, 217 NW877; 50ND400, 196NW102; 50ND 558, 197NW146; 50ND583, 197NW150; 114 **Oh**572, 151NE747; 28 **OhA**464, 162 NE705; 98Vt486, 129A299.

1591–51 237 **IllA**95; 237 **IllA**135; **Tex CivA** 4SW(2d)320.

1591–51½–New. But defendant does not waive motion by subsequently recalling plaintiff's witness whose testimony is immaterial, where defendant at all times denies liability and record shows question is intended to be preserved for review. 15F(2d)899.

1591–54 181Ark886, 28SW(2d)710; 222 **MoA**1022, 9SW(2d)688; **TexCivA** 299 SW342.

1592–56½–New. Waived by motion for new trial addressed to presiding judge. 126Me244, 137A689.

1592–56⅓–New. Plaintiff requesting instructions which are given is estopped to urge error in refusing peremptory instruction. **MoA** 27SW(2d)762.

1592–56¼–New. Error in overruling motion for directed verdict is waived by movant's introduction of defense evidence thereafter. 34NM509, 285P494.

1592–57 163Ga755, 137SE57 (refusal to direct never reviewed); **MoA** 273SW 749 (where plaintiff abandoned contention so alleged and proposition was not vital to his cause); **NJ** 145A629. **In Georgia.**–34GaA190, 128SE922. **Refusal to embody in charge reason** for directing verdict held not reversible error. **Tex CivA** 290SW302.

1593–68 219Ky510, 293SW1079.

1593–69 206 **Iowa**1263, 222NW16.

1593–71 161Ga414, 131SE158; 35GaA 200, 132SE917; 38GaA440, 144SE140 (2dcase).

1593–75 210Ky108, 275SW363 (error to refuse discharge of jury where harmful effects of statement are not cured by admonition of court); 20 **OhA**79, 153 **NE**191 (unexpected testimony of facts requiring amendment justifies withdrawal of juror).

1593–76 87Colo 126, 285P775; **NJSup** 130A634; 189NC783, 128SE158; 121 **Oh** 478, 169NE566; 289Pa65, 137A127; 292Pa543, 141A491. **Refusal to withdraw juror held justified.**–292Pa543, 141 A491. **It is question for trial judge** whether witnesses crying while giving testimony from witness stand were attempting to influence jury. 255 **IllA**375.

1594–85 That plaintiff in action for personal injuries wept while testifying is not ground for withdrawal of juror. 252 **IllA**238.

1594–85½–New. Discharge of jury because of prejudicial remarks in argument of counsel is in discretion of court. 218MoA563, 267SW6.

1594–85⅓–New. Particular instances of argument of counsel held not ground for discharge of jury. 218MoA563, 267SW6.

1594–85¼–New. Where, during second trial of negligence case, article commenting on case and giving result of previous trial appears in newspaper, matter of dismissing jury and having another one drawn lies largely in discretion of trial court. 176Minn377, 223NW619.

1594–87 75Mont493, 244P298.

1594–88 139SC299, 137SE734. **Explanation reconciling previous instructions** does not constitute part of court's charge. 86CalA595, 261P481.

1594–88⅓–New. General charge is instruction on law pertaining to case or any phase thereof. **TexCommnA** 280SW 557.

1594–88½–New. Office and purpose of instruction to jury is to enlighten them and aid them in arriving at correct verdict. 28 **OhA**508, 162NE810.

1595–90 200**Cal** 161, 252P587; 104**Conn** 355, 132A913 (must be correct in law); 106Conn383, 138A130; 163Ga742, 137SE 69 (instructions held proper); 120**Kan** 591, 244P867; 153Md264, 138A1; 83**NH** 29, 137A445; 192NC607, 135SE531; **NC** 155SE863; 25 **OhA**233, 157NE823; 28 **OhA**508, 162NE810; 128 **Okl** 106, 261P 551; 40 **OklACR**562 [reh pending]; 43 **OklACR**482; 118 **Or**568, 247P815; 49 **RI** 50, 139A664, 665 [citCyc]; 134**SC** 412, 132SE811; 155**SC**356, 152SE646; **TexCivA** 3SW(2d)109. **General charge should not be given** in case submitted on special issues. **TexCivA** 293SW688. **Correct declaration of legal principles involved should be given.** 28 **OhA**508, 162NE810. **Instructions erroneously stating law.**–**MoA** 296SW235. **Court need not charge on what ordinary juror would know.**–**Ga** 155SE321.

1595–91 119**Kan**786, 241P113; 74**Mont** 385, 240P391; 79**Mont**158, 255P5; 25 **OhA**233, 157NE823; 120 **Okl** 279, 251P 56.

1595–94 Mo 282SW423; 102**NJL**708, 133A303. **Instruction may submit whether party made material agreement** without using exact words expressing agreement. **MoA** 26SW(2d)1020.

1595–94½–New. Not valid ground for exception that judge struck desk by way of emphasis. 256Mass10, 152NE97.

1595–95 204**Cal** 387, 268P345; 33**GaA** 733, 127SE898; 234 **IllA**28; 208**Ky**820, 271SW1097; **MoA** 287SW848; 28 **OhA** 508, 162NE810; 283Pa395, 129A112 (use of figure not error where jury are permitted to determine amount); 137SC75, 134SE514. **Giving instruction out of its due order** is not error if no complaint was made that subsequent charges did not sufficiently present contentions to jury. 170Gal,-152SE65.

1595–97 318 **Ill** 570, 149NE469; 234 **IllA**28; 200 **Iowa**434, 204NW298; 221 **MoA**311, 273SW148. **The mere phraseology,** etc. 154Miss707, 123S871 (failure to use "proximate cause," where equivalent language was used, is not error). **Failure to charge other correct principles of law** does not invalidate other correct charge. 161Ga55, 129SE769. **Written instructions before argument** must fully state law. 26 **OhA**536, 160NE 508.

1595–99 MoA 275SW555. **Use of Latin term "prima facie"** held proper. 78**Mont** 402, 254P422.

1595–1 MoA 271SW1029; 121 **Or**236, 254P1022 (clear and simple language should be used).

1595–2 CalA 260P337; 207 **Iowa**585, 223NW397; 77**Mont**205, 250P445.

1595–3 35GaA743, 134SE837; 37**GaA** 458, 140SE431; 40GaA99, 148SE772 (requested charge); 170Minn250, 212NW 413; 34 **OhA**183, 170NE604.

1595–4 35GaA769, 134SE808 (not error to refuse to read extracts from prior appellate opinion in same case, in charge); 35GaA743, 134SE837; 37**GaA** 458, 140SE431; 170Minn250, 212NW 413; 136 **Okl** 174, 276P707.

1595–5 85CalA535, 259P958; 100**CalA** 775, 281P95; 160Ga287, 127SE762; 83 **IndA**73, 147NE718 (use of word "should," where words "might" or "could" would have been better); 247 **Mich**329, 225NW504; **Minn** 231NW829; 155Miss765, 125S340; 310**Mo** 204, 274 SW1049; 221**MoA**311, 273SW148; 221 **MoA**1158, 298SW125; **MoA** 6SW(2d) 676; **MoA** 26SW(2d)863; **MoA** 27SW (2d)739; 37 **OklACR**354; 131**SC**488, 127 SE565; 150**Wash**459, 273P178. But see 219**Ala**427, 122S416, 65**ALR**1097.

1597–6 212**Ala** 602, 103S586 (error to instruct to find for plaintiff if they "believe" instead of "are reasonably satisfied"); **Ala** 130S401; 85 **IndA**332, 154 **NE**44; 223**Ky**505, 3SW(2d)1093. **Instruction to consider plaintiff's "acquaintance with railroad crossing in determining whether defendant was guilty of contributory negligence"** held error. 85 **IndA**332, 154NE44. **Conjunctive instructions erroneous.**–215**Ala**612, 111S 901.

1597–7 TexCivA 12SW(2d)1082. **Omission of some words not necessary to meaning** and intent of charge. 214**Ala** 282, 107S801.

1597–10 40GaA341, 149SE657.

1597–11 TexCivA 22SW(2d)324.

1597–12 See also **MoA** 231SW83.

1597–14 319**Mo** 214, 6SW(2d)39.

1597–15 208**Cal** 105, 280P522; **MoA** 15 SW(2d)923.

1597–17½–New. , or containing initials, instead of written name, of railroad company. 222**MoA**954, 10SW(2d)967.

1598–18 327 **Ill** 207, 158NE380; 78 **Mont**402, 254P422; 105NJL477, 144A 566. See also 37GaA34, 138SE584.

1598–18½–New. Instructions in disjunctive may be given. 215**Ky**428, 284 SW1104.

1598–18⅓–New. Requested charge that is elliptical held properly refused. 21 **AlaA**547, 109S894.

1598–18¼–New. Statements of law found in judicial opinions are not always proper for instructions in other cases. 216**Ala**85, 112S418.

1598–18⅕–New. Court should adhere to use of well established words. 80**CalA** 590, 252P739.

1598–18⅙–New. Instruction that "contract must be definite enough to enforce, and that will be for you to decide" not

improper as submitting question of law. 141SC56, 139SE182.

1598-18½-New. Mere adjectives in charge is not correct practice. 116Tex 253, 288SW425.

1598-18⅝-New. If one of two hypotheses presents clear defense, addition of another inadequately stated would not render charge bad. 221Ala247, 128S 233.

1598-20 220Ala595, 127S168; 221Ala3, 127S538; Ark 32SW(2d)436; 68CalA 334, 229P351; 160Ga865, 129SE528; 40 GaA103, 149SE71; Ida 28SP421; 321 Ill 341, 151NE886; 240 IllA165; 241 IllA 124; 244 IllA47; 169Minn313, 211NW 311 (reading statute to jury held not error); 20 OhA380, 152NE673; 34 OhA 563, 171NE424; 129 Okl 288, 264P824; 133 Okl 168, 271P835. But see Iowa 228NW880. **Failure to do more than read statute** held error. 107Conn476, 141A106. **Court is not required to** give instruction in language of statute. 154 Wash588, 283P447.

1598-21 169Ga799, 151SE484; 321 Ill 341, 151NE886. But see 172Ark498, 289 SW474.

1598-21½-New. Instructions must cover construction of statutes by courts. 224 IllA519.

1598-21⅝-New. Giving of instructions containing abstract statements of statutory law is not error where facts are few and simple. 86Mont314, 283P427.

1598-21¾-New. Text of decision is not necessarily sound as instruction for jury. CalA 290P75.

1598-22 72CalA57, 236P319; 203Cal 390, 264P237; Cal 290P438; 80CalA667, 252P773; 88CalA354, 263P578; 96CalA 236, 273P1080; 103CalA173, 284P681; CalA 290P108; CalA 291P444; CalA 293 P115; 160Ga497, 128SE66; 160Ga865, 129SE528; 162Ga457, 134SE87; 162Ga 664, 135SE195; 170Ga349, 153SE11; 37 GaA310, 140SE46; 166Ga159, 142SE681; 39GaA529, 147SE778(2dcase); GaA 155 SE51; 318 Ill 445, 149NE507; 124Kan 375, 260P635; 320Mo 791, 9SW(2d)972; MoA 15SW(2d)923; 219MoA121, 272SW 79 (instruction submitting that plaintiff's theory need not embrace defendant's theory); MoA 276SW81; MoA 281 SW116; MoA 282SW125; MoA 285SW 783; MoA 12SW(2d)95; MoA 16SW (2d)678; 116Nebr827, 219NW189; 113 Okl 188, 240P702; 114 Okl 30, 243P206; 126 Okl 219, 260P78; 129 Okl 27, 263P 152; 138 Okl 176, 280P804; 139 Okl 287, 282P327; Okl 291P962(2dcase); 43 Okl ACR347; 44 OklACR13 [reh pending]; 131NC488, 127SE565; 145SC196, 143SE 31, 56 [citCyc]. **Charge embracing abstractly correct and applicable principle** is not rendered erroneous by failure to charge some other applicable principle. 34GaA203, 12SSE915; 34GaA207, 12SSE 918. **Failure to give some other appropriate instructions is not good assignment of error** on portion of charge stating correct principle of law applicable to case. 34GaA40, 128SE210. **Charge, which correctly states complete proposition of law,** is not error by reason of failure of court to give additional charge in immediate connection therewith. 39GaA371, 147SE163(2dcase).

1598-23 Instructions held not improperly qualified by reference to previous instruction. 258Mass26, 154NE334.

1598-24 171Ark379, 284SW781; 81CalA 270, 253P776; 160Ga865, 129SE528; 46 Ida214, 267P222; 318 Ill 445, 149NE 507; 219MoA121, 272SW79; 84Mont141, 274P844; 113 Okl 188, 240P702; 114 Okl 30, 243P206; 126 Okl 219, 260P78; 129 Okl 27, 263P152; 131 Okl 98, 267P 629; 43 OklACR347; 44 OklACR13 [reh pending]. **Reference to other instructions.**–324 Ill 207, 155NE28.

1598-25 34GaA207, 128SE918. **Main instruction covering whole case** must contain all necessary elements to recovery. 220MoA9, 285SW123.

1598-26 161Ga55, 129SE769 (a charge stating the correct principle of law involved is not erroneous because it failed to state other principles pertinent to issues); 34GaA207, 128SE918; 212Ky 819, 280SW137; 23 OhA176, 155NE566 (holding all charges should state law). **Instruction not erroneous.**–37GaA722, 141SE670; 200 Iowa434, 204NW298.

1598-26½-New. Though complete charge is not rendered erroneous by failure to charge in connection therewith other applicable principle, 36GaA143, 136SE85; 37GaA722, 141SE670; 37GaA 779, 142SE176; 37GaA780, 141SE922.

1598-26¼-New. rule is not applicable where charge as given on account of its incompleteness is thereby rendered inherently incorrect. 36GaA143, 136SE 85.

1598-26¼-New. Reference to other instructions.–Instruction that plaintiff should recover if jury found facts as set out in another instruction is not erroneous if such other instruction is correct. MoA 19SW(2d)766.

1598-28 204Cal 387, 268P345; 235 IllA 49; 202 Iowa1338, 212NW154; 148Md 188, 129A31; MoA 271SW1029; NC 153 SE607; 25 OhA233, 157NE823; Tex CivA 275SW181; 102WVa415, 135SE 395. **Instructions should be so simplified** as to enable jury of ordinary men to reach conclusion. 234Ky794, 29SW (2d)545.

1598-29 235 IllA49; 202 Iowa1338, 212 NW154; 219MoA249, 272SW90; 25 OhA 233, 157NE823; 24 OhA466, 155NE804; 108WVa342, 150SE904. **Charge calling for explanatory instruction** may be properly refused. 221Ala139, 127S825. **Explanatory instructions held proper.**–Ala 130S552.

1598-30 25 OhA233, 157NE823.

1598-31 227Ky587, 13SW(2d)753; Mo 282SW423; MoA 278SW84; MoA 14SW (2d)972; MoA 17SW(2d)376; TexCivA 283SW938; TexCivA 291SW590. **Indefinite instruction held properly refused.**–173Ark1181, 294SW994. **Instructions held not indefinite.**–91CalA448, 267 P164.

1599-33 213Ala672, 106S147; 20AlaA 554, 103S603; 168Ga510, 148SE264; Mass 171NE662; Mo 271SW500 (nature of argument made to jury is not relevant to question of correctness of action of court in giving instruction); 299Pa248, 149A495 (charge held inadequate); Tex CivA 275SW181; Vt 150A132. **Substantial accuracy.**–164Ga552, 139SE31; MoA 271SW540. **Instruction containing no complete proposition of law** cannot be held to be incorrect statement of law. 160Ga497, 128SE66.

1599-34 235 IllA49.

1599-35 235 IllA49.

1599-36 206 Iowa70, 220NW17; 192 NC661, 135SE776 (instruction leaving amount of recovery to arbitrary judgment of jury is erroneous).

1599-37 Iowa 213NW442.

1599-37½-New. Juries should not be expected nor required to indulge in process of legal reasoning to find qualification of statement of rule of law which court had omitted. TexCivA 275 SW181.

1599-37¾-New. Instruction was erroneous which did not define term "trade review" when it was used. 224 IllA597.

1599-37¼-New. It is not error to refuse requested instruction too general in its terms. 148Md524, 130A340, 44 ALR193.

1599-37⅝-New. Instruction requiring jury to return verdict for amount plaintiff was entitled to recover against both or either of defendants did not allow recovery of one amount against one defendant and different amount against other. 229Ky538, 17SW(2d)422.

1599-39 MoA 285SW788, 790 [citCyc]; MoA 285SW1028; 25 OhA233, 157NE 823; 102WVa415, 135SE395.

1599-40 CalA 287P354; Mo 278SW 361.

1599-42 25 OhA233, 157NE823.

1599-43 27Hawaii745; 318 Ill 570, 149NE469.

1599-45 212Ala608, 103S658; 20AlaA 617, 104S559; 168Minn319, 210NW75; MoA 20SW(2d)540 (instruction meaningless); 243NY118, 152NE695. **Instructions held defective.**–243NY118, 152NE695. **Instructions held not defective.**–160Ga497, 128SE66; MoA 279 SW761. **Refusal of abstract instruction** is not error. 21AlaA51, 105S716.

1600-46 161Ga55, 129SE769; 33GaA 684, 127SE665; 27Hawaii745 (word "accordingly" used in an instruction held not ambiguous or misleading); Iowa 213NW442; 168Minn319, 210NW 75.

1600-47 215Ala407, 110S818.

1600-51 19F(2d)202; 41F(2d)508; 41 F(2d)511; 21AlaA281, 107S716; 22 AlaA218, 114S284; 168Ark94, 269SW 372 (failure to answer letters as admission of liability); 169Ark957, 278SW 357; 171Ark647, 286SW815; 175Ark 43, 295SW13 (instruction held not argumentative); 175Ark699, 300SW412; 177Ark953, 9SW(2d)33, 60ALR1493; 162Ga657, 134SE751; 339 Ill 276, 171 NE271; 256 IllA425; 153Md621, 139A 353; 165Minn28, 205NW639 (held not argumentative); 171Minn516, 213NW 537; 179Minn94, 228NW442; 143Wash 541, 255P947. **Instructions held argumentative.**–36F(2d)926; 21AlaA281, 107 S716; 177Ark953, 9SW(2d)33, 60ALR 1493; 94CalA562, 271P532; 35GaA87, 132SE106; 334 Ill 315, 166NE50; 321 Mo 952, 13SW(2d)547; 131 Or694, 284 P280; TexCivA 281SW331; 143Wash 541, 255P947. **Instructions held not argumentative.**–318 Ill 445, 149NE507; 321Mo 887, 13SW(2d)648; Mo 24SW (2d)116; Mo 30SW(2d)83; 218MoA 122, 262SW396 (blind pedestrian falling into sewer ditch); MoA 285SW516; MoA 8SW(2d)110; MoA 27SW(2d)448; 123 Or193, 261P422.

1601-52 24F(2d)676; 213Ala125, 104 S403; 215Ala311, 110S396; 215Ala402, 110S705; 215Ala612, 111S901; 217Ala 506, 116S686; 218Ala619, 119S833; 218 Ala603, 119S841; 218Ala674, 120S153; 219Ala238, 121S722; 220Ala158, 124S 205; 221Ala399, 129S878; 20AlaA554, 103S603; 20AlaA555, 103S713; 21AlaA 281, 107S716; 169Ark95, 278SW357; 172Ark562, 289SW761; 173Ark1181, 294SW994; 178Ark1046, 13SW(2d)306; 74CalA10, 239P429; 96CalA236, 273P 1080; 87Colo 401, 288P633; 109Conn 87, 145A659; 162Ga657, 134SE751; 163 Ga899, 137SE561; 164Ga311, 138SE 580; 168Ga156, 147SE106; Iowa 226 NW922(2dcase); 223Ky525, 4SW(2d) 410; 169Minn386, 211NW306; 170 Minn250, 212NW413; Mo 31SW(2d) 792; MoA 19SW(2d)544; 39 OklACR 274; TexCommnA 276SW900; Tex CommnA 295SW577; TexCivA 272SW 597; TexCivA 283SW912; TexCivA 291 SW590; TexCivA 295SW283; TexCivA 20SW(2d)396; 143Wash541, 255P947.

1602-54 171Minn516, 213NW537.

1602-57 117 Or286, 243P778.

1602-58 212Ala630, 103S689; 213Ala 494, 106S150; 213Ala626, 106S172; 214 Ala297, 107S849; 215Ala143, 110S372; 216Ala102, 112S348; 216Ala85, 112S 418; 216Ala542, 113S910; 23AlaA67, 120S577(2dcase); 219Ala238, 121S722; 219Ala298, 122S41; 221Ala1, 127S204; 221Ala247, 128S233; Ala 130S416; 20 AlaA554, 103S603; 21AlaA547, 109S 894; AlaA 114S177; 22AlaA180, 114S 288; AlaA 130S520; 168Ark94, 269SW 372 (instruction misleading as to burden of proof); 178Ark1046, 13SW(2d) 306; 78CalA526, 24SP930; 162Ga457, 134SE87; 162Ga664, 135SE195; 163Ga 899, 137SE561; 39GaA74, 146SE793; 319 Ill 326, 150NE242; 237 IllA145; 121Kan392, 247P446 (instruction not misleading); 127Me290, 143A61; 152 Md241, 136A615; 152Md536, 137A299; 153Md274, 138A235; 158Md273, 148A 244; 322Mo 787, 16SW(2d)85; Mo 28 SW(2d)1023; 217MoA312, 269SW688; MoA 272SW984; MoA 294SW758; MoA 32SW(2d)109; 25 OhA233, 157NE823; 33 OhA142, 168NE566; 125 Or389, 266P 900; 152Va715, 148SE511. **Instructions held misleading.**–47 Ida542, 277P 554(2dcase); 319 Ill 326, 150NE242; 263Mass67, 160NE264; 319Mo1015, 5 SW(2d)59. **Instructions held not misleading.**–161Ga414, 131SE158; 162Ga 664, 135SE195; 41GaA287, 152SE592; 310Mo 184, 274SW827; MoA 299SW74.

1603-59 212Ala325, 104S808; 215Ala 407, 110S818; 221Ala360, 128S452; 200 Cal 410, 253P697; CalA 284P499; 85 Colo 327, 275P908; 103Conn553, 131A 426; 91Fla695, 109S223; 339 Ill 276, 171NE271; 233 IllA584; 247 IllA207; 307Mo 607, 271SW788; 308Mo 406, 275 SW32; 322Mo 787, 16SW(2d)85; 219 MoA222, 269SW942; MoA 272SW1017; MoA 273SW135; MoA 273SW213; MoA

273SW741; MoA 290SW119; 220MoA 902, 296SW228; MoA 297SW175; 20 OhA497, 152NE761; 148Va437, 139SE 308, 55ALR1376; 149Va344, 141SE231; 101WVa621, 134SE204, 47ALR800. **Instructions held misleading.**–217Ala119, 115S99; 218Ala619, 119S833; 218Ala 603, 119S841; 21AlaA358, 108S400; 73 CalA748, 239P373 (on amount of damages); 101CalA153, 281P415 (though containing correct definition of word "capacity" which, unexplained, was misleading); 87Colo 401, 288P633; 160 Ga824, 129SE95; 169Ga678, 151SE349; 170Ga349, 153SE11; 151Miss351, 117S 881; 313Mo 213, 281SW682; 322Mo158, 16SW(2d)190; 323Mo 363, 19SW(2d) 476; 322Mo 955, 19SW(2d)721; MoA 273SW415 (in action against maker and indorsers of promissory note, instructions to effect that defense, alteration by striking out indorsements, which might be good as to one or more of the defendants must be overcome by proof of consent of all or plaintiff cannot recover against any, is misleading); TexCivA 281SW331; TexCivA 281SW350; 187 Wis67, 203NW739. **Instructions held not misleading.**–171Ark469, 284SW724; 72CalA57, 236P319; 75CalA462, 242P 1075; 102CalA422, 283P353; 35GaA302, 133SE42; 35GaA622, 134SE198; 35GaA 648, 134SE344; 36GaA8, 135SE315; 39GaA529, 147SE778(2dcase); 40GaA4, 148SE757; 40GaA332, 149SE582 (held not to confuse two legal propositions); IndA 170NE548; 206 Iowa328, 218NW 568; 123Kan1, 253P561; 130Kan566, 287P255; 208Ky597, 271SW689; 208 Ky820, 271SW1097; 151Miss532, 118S 541; 317Mo 1010, 297SW50; MoA 274 SW871; MoA 17SW(2d)621; 26 OhA79, 159NE843; 128 Or609, 275P603; 294Pa 425, 144A416; 153Wash514, 280P46.

1604–60 233 IllA584.

1604–62 237 IllA145.

1604–65 175Ark442, 299SW765, 55ALR 1039; 77Colo 60, 234P1059; 102Conn 735, 130A102 (should not contain contradictory statement of law); 103Conn 553, 131A426; 91Fla695, 109S223; 42 Ida369, 246P311; 223Ky505, 3SW(2d) 1093; 233Ky238, 25SW(2d)381; 238 Mich390, 213NW453; 307Mo 607, 271 SW788; 308Mo 406, 275SW32; Mo 276 SW636; 312Mo 643, 281SW44; Mo 300 SW280; Mo 26SW(2d)962; MoA 256SW 555; MoA 273SW749 (not inconsistent); MoA 274SW524; MoA 274SW871; MoA 274SW963; MoA 27SW(2d)1066; MoA 28SW(2d)375; MoA 28SW(2d)408; MoA 30SW(2d)647; 79Mont91, 254P1070; 114Nebr106, 206NW19; 190NC845, 130 SE833; 195NC236, 141SE750; 25 OhA 233, 157NE823; 118 Okl 118, 247P42; 118 Okl 300, 248P610; 120 Okl 279, 251 P56; 123 Okl 7, 251P738; 124 Okl 13, 253P496; 124 Okl 64, 253P1021; 134 Okl 206, 273P346; 43 OklACR190, 204 [quotCyc]; 116 Or317, 241P40; Tex CivA 24SW(2d)471; 142Va425, 128SE 732; 147Va1019, 133SE495; 149Va344, 141SE231; Wash 290P831; 40Wyo 498, 280P98. **Instructions held not conflicting.**–104CalA770, 286P1078; 169Ga678, 151SE349; 44 Ida478, 258P931; 318 Ill 445, 149NE507; 203 Iowa985, 213NW 567.

1605–66 215Ala143, 110S372; 21AlaA 555, 110S53; 39GaA457, 147SE411; Miss 114S630; 149Miss849, 116S104; 312Mo 643, 281SW44; Mo 31SW(2d) 1026; 220MoA452, 276SW105; 221MoA 559, 285SW134; MoA 285SW1028; 103 NJL683, 137A591; 25 OhA233, 157NE 823; 43 OklACR190, 204 [quotCyc]; 153Va348, 149SE453.

1605–67 120 Okl 279, 251P56; 124 Okl 13, 253P496; 124 Okl 64, 253P1021; 43 OklACR190, 204 [quotCyc].

1605–68 114Nebr106, 206NW19; 195 NC236, 141SE750; 120 Okl 279, 251P 56; 124 Okl 13, 253P496; 43 OklACR 190, 204 [quotCyc].

1605–69 171Ark1122, 287SW396; 85 Colo 327, 275P908; MoA 273SW415; MoA 274SW871; 118 Okl 118, 247P42; 120 Okl 279, 251P56; 123 Okl 7, 251P 738; 124 Okl 13, 253P496; 124 Okl 64, 253P1021; 130 Okl 51, 265P141; 43 Okl ACR190, 204 [quotCyc]; 121 Or552, 255 P477; 145Va605, 134SE573; 150Wash 459, 273P178. **Instructions held contradictory.**–168Ark191, 269SW576; 181 Ark925, 29SW(2d)676; 72CalA63, 236P 344 (in action for damages for fraud in sale of realty); 202 Iowa328, 208NW 374; 206 Iowa753, 221NW508; 233Ky 238, 25SW(2d)381; 313Mo 213, 281SW 682; 317Mo 141, 296SW428; Mo 300 SW280; MoA 286SW133; 120 Okl 279, 251P56; 121 Or552, 255P477; Utah 270 P349. **Instructions held not contradictory.**–172Ark534, 289SW490; 172Ark 927, 291SW58; 173Ark810, 294SW401; 180Ark844, 22SW(2d)1020; 180Ark 1144, 24SW(2d)960; Ark 32SW(2d)162; Cal 287P449; Cal 288P784; 84CalA750, 258P673; 86CalA595, 261P481; 97CalA 77, 275P257; 98CalA373, 277P156; 99 CalA557, 279P183; 167Ga737, 146SE 739; 39GaA246, 146SE776; 47 Ida430, 276P306; IndA 168NE34(2dcase); 209Ky803, 273SW472; 310Mo 184, 274 SW827; 310Mo 72, 274SW1031; 314 Mo 438, 284SW471; Mo 285SW482; 317 Mo 647, 296SW1017; 320Mo 916, 9SW (2d)912; 322Mo 218, 14SW(2d)590, 62 ALR835; Mo 24SW(2d)116; Mo 28SW (2d)1035; Mo 31SW(2d)1014; MoA 273 SW749; MoA 285SW516; MoA 294SW 758; MoA 300SW315; MoA 13SW(2d) 562; MoA 14SW(2d)972; MoA 19SW (2d)534; MoA 20SW(2d)971; MoA 27 SW(2d)52; MoA 30SW(2d)784; 129 Or 435, 277P291; Va 154SE526. **Instructions held not conflicting.**–202 Iowa837, 211NW361; MoA 27SW(2d)709. **Instructions held not inconsistent.**–234Ky 427, 28SW(2d)479; Mo 274SW26.

1607–70 11F(2d)924; 43 OklACR190, 204 [quotCyc].

1607–71 118 Okl 118, 247P42; 70Utah 398, 260P855.

1607–72 74CalA598, 241P422; 170Ga 203, 152SE474; 219MoA211, 269SW665; MoA 276SW1035; 23 OhA176, 155NE 566.

1607–75 74CalA598, 241P422 (error slight); TexCommnA 288SW823, 825 [quotCyc].

1608–76 198Cal 157, 244P338; 135 Wash21, 236P799.

1608–77 198Cal 157, 244P338; 169Ga 678, 151SE349.

1608–77½–New. Instruction is not erroneous because in conflict with instruction not supported by evidence. MoA 27SW(2d)762.

1608–78 161Ga55, 129SE769; 163Ga 899, 137SE561; 22 OhA520, 155NE151.

1608–80 215Ala548, 112S120; 216Ala 43, 112S360; 219Ala24, 121S30; 219 Ala112, 121S404, 64ALR640; 219Ala 399, 122S359; MoA 16SW(2d)637; 105 NJL477, 144A566; 193NC849, 138SE 123.

1608–83 108Conn544, 143A886; 167Ga 843, 146SE835; 168Ga259, 147SE513(2d case); 256 IllA425; 201 Iowa376, 207 NW328; 202 Iowa787, 211NW364, 202 Iowa1251, 211NW898; 202 Iowa1338, 212NW154; 217Ky227, 289SW305; 223 Ky681, 4SW(2d)679; 231Ky160, 21SW (2d)250; 307Mo 607, 271SW788; Mo 28SW(2d)1023; 217MoA312, 269SW 688; 217MoA104, 273SW418; MoA 274 SW926; MoA 280SW1048; MoA 284SW 857; MoA 290SW119; MoA 297SW435; MoA 28SW(2d)631; MoA 13SW(2d)560; MoA 17SW(2d)684; MoA 26SW(2d)52; 114Nebr353, 207NW669; 115Nebr601, 213NW971; 58ND154, 225NW74; 25 OhA233, 157NE823; 27 OhA341, 161NE 342; 32 OhA492, 168NE237; 115 Okl 202, 242P212 (where pleadings are voluminous and involved); 38 OklACR 172; TexCivA 4SW(2d)169; Vt 150A 132. See also MoA 290SW647; Okl 292 P335(2dcase). But see 40GaA814, 151 SE541; MoA 293SW66. **Where there is but one controverted issue, etc.** 85Colo 471, 276P982. **To leave it to the jury to determine the material issues, etc.** 256 IllA425. **Instruction not in violation of rule.**–217MoA104, 273SW418. **In Illinois.**–327 Ill 207, 158NE380; 251 IllA299. **Necessity of request for more specific instructions.**–163Ga899, 137SE 561.

1610–84 Iowa 230NW327; 38 OklACR 172. See also 204 Iowa357, 216NW33.

1610–85 201 Iowa376, 207NW328; 38 OklACR172.

1610–86 201 Iowa376, 207NW328; 114 Nebr353, 207NW669; 58ND109, 224NW 915; 51SD424, 214NW816.

1610–88 164Ga265, 138SE231.

1610–90 164Ga265, 138SE231; Mo 26 SW(2d)988; MoA 256SW1088; 221MoA 715, 285SW524; 32 OhA451, 168NE230; 147Va542, 137SE493. **Use of word "alleged"** several times is not an erroneous reference to pleadings. MoA 277SW593.

1610–91 34GaA276, 129SE125 (additional instruction referring jury to pleadings to learn all issues); 233 IllA 320; 123Kan651, 256P809; MoA 21SW (2d)496; 58ND154, 225NW74; 147Va 542, 137SE493. **Such instruction is not erroneous** where facts pleaded are admitted. MoA 297SW435. **Court may state evidentiary weight of allegations in pleadings.**–233 IllA320. **Concise and clear pleadings may be used in charge.**– 204 Iowa857, 216NW33.

1610–92 147Va542, 137SE493.

1610–94 169Ga678, 151SE349; 37GaA 358, 140SE395; 207 Iowa862, 224NW28; 323Mo 531, 19SW(2d)679 (need not follow exact language of petition); 24 OhA466, 155NE804; 27 OhA341, 161NE 342; 35 OhA16, 171NE352; 128 Okl 106, 261P551; 38 OklACR172; 134SC541, 133SE436. See also 35GaA668, 134SE 350. **Where case is submitted to jury upon two causes of action,** it is error not to instruct jury clearly and definitely upon each cause of action. 118 Nebr125, 223NW649(2dcase). **Court's charge cannot change issues.**–221Ala58, 127S847. **Instructions inapplicable to issues.**–111Conn313, 149A782.

1610–95 35GaA538, 134SE134 (court need not deal separately with two counts, both of which refer to same transaction); 200 Iowa490, 203NW293 (instruction on plea of fraud held proper); 208 Iowa70, 221NW941; MoA 292 SW443; 220MoA31, 4SW(2d)871. **Where court has instructed that jury will find contentions** of parties in pleadings, such reference will suffice unless special facts require statement of actual issues to prevent misapprehension. 34GaA276, 129SE125. **That jury did not hear complaint read** does not show that they were not aware of material issues alleged therein. 202Cal 474, 261P465. **It is improper** to copy pleadings in stating issues. 208 Iowa24, 221NW197.

1610–96 86Colo 326, 281P358 (statement of issues not erroneous as statement of facts); 162Ga295, 133SE257; 36GaA767, 138SE244; 242 IllA166; 252 Mass78, 147NE567. **Form and number of issues** are immaterial. 252Mass78, 147NE567. **Statement of plaintiff's contentions** narrating only one of several grounds of negligence is not error where contentions are not expressly limited but jury are invited to inspect petition to ascertain contentions of parties. 35GaA87, 132SE106. **Reference to pleadings held proper without statement that allegations need proof.**–233 IllA278. **Reference in charge to negligence as set out in other instructions** is not prejudicial though no other instruction set out negligence. MoA 277SW593.

1610–97 233 IllA545 (reference to pleadings proper).

1611–1 105Conn49, 134A151; 125 Okl 239, 257P314. See also MoA 12SW(2d) 95.

1611–3 164Ga311, 138SE580.

1611–5 28 OhA508, 162NE810.

1611–5½–New. Jury should not be referred to pleading.–204 Iowa231, 213NW 380.

1611–5⅛–New. Issues which may be briefly condensed should not be presented to jury by copying long, invalid, and complicated pleadings. 203 Iowa628, 213NW274.

1611–5¼–New. Preliminary statement of issues does not operate as submission thereof.–203 Iowa1194, 212NW354.

1611–5⅙–New. Instruction narrating all allegations denied by defendant is not objectionable as holding defendant up as having made frivolous defense though some of such allegations are conclusively established by evidence. 37 GaA733, 141SE818.

1611–5⅛–New. Designating count by wrong number is not prejudicial where jury is not misled. Iowa 213NW442.

1611–5⅐–New. Court must, on request,

submit issue both affirmatively and negatively. TexCivA 68SW(2d)435.

1611 5½ New. Court should separate and definitely state issues of fact made in pleadings, accompanied by such instructions on each issue as nature of case requires, and distinguish between and call jury's attention to material allegations of fact admitted and denied. 23 OhAs68, 162NE619.

1611 7 36P(2d)923(2dcase); 102Conn 676, 129A790; 324 Ill 207, 155NE28; 202 Iowa1336, 212NW164. **Instructions held not improper.**–323Mo 64, 18SW(2d) 445.

1611 8 212Ala566, 119SE107(2dcase); 151Md195, 140A79; 214Mo 283, 284SW 463 (Instructions broadening issues); Wash 237P41.

1611 9 35GaA769, 134SE208 (Inaccuracy in stating defendant's contentions in pleadings). Iowa 226NW116.

1611 11 205 Iowa1240, 219NW107.

1612 13 5P(2d)273; 41P(2d)1; 170 Ark573, 280SW22; 172Ark423, 288SW 907. 197Cal 290, 240P785; 47Colo 60, 234P1059. 101Conn35b, 122A913; 163 Ga29, 137SE561. 170Ga135, 152SE 466. Ga 155SE321; 36GaA612, 137SE 232. 37GaA812, 142SE201; 42Jdn738, 244P156, 49ALR1067; 36 IndA324, 157 NE111; IndA 179NE548; 203 Iowa1194, 212NW354. 210Kys, 273SW533, 212 Ky56, 273SW149; 215Ky113, 291SW 407, 223Ky184, 148SW(2d)768; 223Ky 221, 148SW(2d)1063, 223Ky239, 258W (2d)370, 223Ky232, 258W(2d)381; 252 Mass270, 147NE522. 256Mass5b, 152NE 236, 165Minn38, 206NW639 (Instructions held not favorable to successful party), Mo 256SW66. Mo 293SW80; 321Mo724, 12SW(2d)520; 321MoA614, 322SW705; 321MoA733, 283SW779; 322MoA153, 28W(2d)815; MoA 308W (2d)1054, 114Nebr12, 205NW937; 114 Nebr106, 206NW19; 114Nebr375, 215 NW120, 82NH387, 131A244; 103NJL 351, 135A786, 104NJL87, 135A419; 52 ND786, 204NW822; 52ND904, 202NW 236, 57ND221, 221NW881; 117 Ok13, 152NE833, 29 OhA293, 162NE677; 128 Ohl 106, 261P561, 131 Or236, 254P1022; 132 Or160, 282P1073; TexCivA 278W (2d)619. But see 39GaA216, 146SE776. **No instruction necessary on issue not presented** 31GaA243, 129SE115 (failure to charge statute relative to defenses not relied on is not error); 206 Iowa 730, 221NW483; 217MoA171, 274SW 391; 295Pa213, 145A300. **Instruction held erroneous** as embracing extraneous issues 212Ky60, 278SW149. **Courts cannot, by instruction, change** issue made by pleadings. 217MoA171, 274SW391. **Failure of court to charge of its own motion upon question not presented by pleadings or requests and not necessarily required by evidence** held not error 162Conn735, 130A102. **Instructions not violating rule.** Utah 269 P1003. **It is error not to instruct jury** that act of negligence not pleaded or litigated by consent should not serve as ground of recovery. 175Minn96, 220 NW423.

1612 14 212Ala515, 105SE867; 214Ala 633, 108S596; 179Ark151, 178SW(2d) 209, 96Cal161, 273P875, 79CalA106, 249P237; 36CalA459, 261P315; 107 CalA174, 281P634; 107CalA333; 282P 397; CalA 256P1091, 161Ga111, 132SE 517, 165Ga437, 141SE201, 167Ga718, 146SE160, 36GaA513, 137SE283; 40 GaA410, 151SE32(2dcase), 316 Ill 357, 147NE255, 323 Ill 493, 154NE326; 339 Ill 276, 171NE271; 237 IllA145; 237 IllA570; 201 Iowa253, 207NW119; 214 Ky729, 232SW1052; 214Ky833, 234SW 54; 219Ky539, 293SW473; 221Ky367, 68W(2d)463; 223Ky130, 158SW(2d)254; 230Ky157, 18SW(2d)933; 253Mass64, 149NE264; 216Mich423, 221NW617; 172Minn134, 215NW198; 311Mo309, 279 SW13; 322Mo1103, 19SW(2d)707, 65 ALR139; MoA 272SW704; MoA 281 SW139; 321MoA614, 283SW705; 320 MoA902, 256SW275; MoA 300SW311; MoA 38W(2d)1044, MoA 78W(2d)448; MoA 178W(2d)359; MoA 288W(2d)375; MoA 308W(2d)1091; 74Mont549, 241P 613, 111Nebr105, 206NW19, 82NH558, 133A116, 82NH587, 131A311, 103NJL 351, 135A786, 190NC135, 130SE515, 193 NC750, 133SE131, 53ALR1404; 196NC 354, 145SE673(inscase); 24 OhA391, 156 NE619; 34 OhA133, 170NE604; 137 Okl 153, 278P632; 144 Okl 293, 291P1; 38 OklACR172; 118 Or568, 247P815; 121 Or236, 254P1022; RI 147A620; 152SC 265, 149SE742; TexCivA 275SW184; TexCivA 278SW270 (Instruction held not too general); 151Va964, 145SE732; 140Wash427, 249P778; 101WVa621, 134 SE204, 47ALR800. See also 228Ky219, 148SW(2d)780; 156Md524, 144A505. But see 53Mont452, 272P938. **Instructions not violating rule.**–172Ark767, 290 SW367. **Statement of contentions accompanied by bare enunciation of legal principle not sufficient.** 190NC840, 130 SE333.

1613 15 34GaA304, 129SE292 (Instruction not adjusted to issues); 237 IllA 145; 214Ky729, 283SW1052; 220MoA 902, 296SW228; 121 Or236, 254P1022; 132SC293, 129SE199. See also 227Ky 527, 138W(2d)753.

1613 16 217Ala255, 115SE171; 217Ala 566, 116SE656; 23AlaA67, 120SE577(2d case); 219Ala384, 122SE322; 220Ala205, 124SE661(2dcase); 20AlaA54, 103SE603; 20AlaA555, 103SE713; 21AlaA547, 109S 891; 22AlaA211, 114SE273; 22AlaA218, 114SE344; 22AlaA226, 114SE285; 30Ariz 435, 249P64, 169Ark35, 275SW921; 172Ark423, 288SW905; 172Ark562, 289 SW761; 172Ark1046, 13SW(2d)306; 87 CalA44, 261P1107; 87CalA371, 262P 459; 164Ga665, 139SE335; 169Ga237, 149SE750; 31GaA343, 129SE794; 37 GaA355, 140SE294; GaA 155SE51; 45 Ida143, 260P1035; 318 IllA415, 149NE 507; 237 IllA145; 237 IllA570; 213Ky 346, 251SW174; 234Ky133, 28SW(2d) 493; 255Mass486, 152NE332; 258Mass 127, 154NE563; 172Minn284, 214NW 890; 154Miss711, 118S441; 322Mo1103, 19SW(2d)707, 65ALR139; MoA 272SW 1047; 221MoA683, 285SW161; MoA 24 SW(2d)157; 74Mont549, 241P613; 76 Mont366, 245P871; 116Nebr208, 216NW 659; 116Nebr827, 219NW183; 82NH91, 129A876; 103NJL351, 135A786; NJ 151 A95(2dcase); NJSup 146A786(2dcase); 34NM509, 285P494; 190NC617, 130SE 306 (it must be directed to one of issues submitted); 52ND786, 204NW828; 117 Ok43, 158NE83; 21 OhA156, 152NE 781; 24 OhA391, 156NE619; 34 OhA 133, 170NE604 (portion unsupported by evidence); 145 Okl 84, 241P758; 131 Okl 77, 267P618; 132 Okl 72, 269P250, 59 ALR554; 133 Okl 272, 281P251; Okl 232P225; 36 OklACR467; 39 OklACR 274; 119 Or69, 247P1081; 121 Or236, 254P1022; 137SC40, 134SE912; Tex CivA 300SW118; TexCivA 12SW(2d) 1102; TexCivA 198SW(2d)102; 136Wash 410, 240P255; 143Wash511, 255P947. See also 39GaA371, 147SE163(2dcase). **Instructions properly refused.**–213Ala 538, 105SC672 (misleading on view of evidence); 190NC617, 130SE306.

1614 17 213Ala507, 119S318; 84Mont 141, 274P544; 217AppDiv637, 216NYS 558; 118 Or568, 247P815.

1614 17½ New. Judge, having given appropriate instructions as to issue involved, may, but is not required to, take parts of evidence and instruct as to them. 255Mass235, 151NE302.

1615-19 24P(2d)53; 40P(2d)235; 215 Ala638, 112S339; 216Ala43, 112S360; 218Ala429, 118S640; 218Ala350, 118S 656; 36CalA591, 261P313; 36CalA236, 273P1080; 103CalA260, 284P719; CalA 293P115; 107Conn156, 139A688; 162Ga 667, 134SE751 (instruction held not to create extraneous issue); 39GaA217, 146 SE795; 335 Ill 164, 166NE530; 85 IndA 301, 154NE24; 85 IndA332, 154NE414; 86 IndA324, 157NE444; 203 Iowa127, 203NW497; 206 Iowa925, 221NW577; 206 Iowa1134, 221NW802; Iowa 229NW 331; 214Ky604, 283SW364; 216Ky314, 287SW894; 217Ky43, 288SW1020; 220 Ky303, 295SW1064; 225Ky447, 9 SW(2d)212; 228Ky184, 14SW(2d)768; 229Ky716, 17SW(2d)1008; 116Minn161, 133NW558; 307Mo607, 271SW785; 313 Mo384, 282SW46 (Instruction should neither enlarge nor restrict issues); Mo 282SW131, 314Mo352, 283SW499, 319 Mo711, 8SW(2d)38; MoA 272SW984; 221MoA345, 273SW176; MoA 278SW 368, MoA 277SW581, 221MoA644, 283 SW705; 221MoA823, 293SW460; MoA 300SW311; MoA 78W(2d)424; MoA 32 SW(2d)296; 74Mont549, 241P613; 49 ND867, 194NW113; 25 OhA233, 157NE 823; 29 OhA241, 163NE568; 113 Okl 254, 241P789; 134 Okl 210, 273P252; 38 OklACR580; 119 Or691, 250P1101; Or 293P422; TexCivA 275SW858; Tex CivA 28W(2d)495; 66Utah394, 243P114, 44ALR1348. **Instructions held proper.**–70CalA652, 234P107; MoA 294SW740; MoA 299SW74. **Instructions held within pleadings.**–310Mo 1, 274SW1079. **Sufficiency of charge.**–204 Iowa426, 213NW 239. **Instructions held not objectionable.**–Mo 328SW(2d)288.

1615-20 37GaA299, 139SE828; Mo 278 SW79; 315Mo367, 286SW106 (Instructions held not to broaden issues).

1615-21 37F(2d)296; 40F(2d)228; 40 F(2d)235; 40F(2d)897(2dcase); 219 Ala238, 121S722; 176Ark690, 38SW(2d) 996; 195Cal655, 235P438; 75CalA609, 243P41; 43 IdaS27, 251P757, 759 (fraud); 320 Ill 577, 151NE526; 324 Ill 207, 155NE28; 332 Ill 592, 164NE177; 243 IllA479; 85 IndA332, 154NE44; Ind 168NE864; 86 IndA324, 157NE444; IndA 163NE622; 200 Iowa728, 205NW 331; 202 Iowa1386, 212NW161; 205 Iowa279, 218NW54; 128Kan688, 280P 891; 212Ky763, 280SW123; 215Ky452, 284SW1097, 47ALR347; 217Ky43, 288 SW1020; 219Ky106, 292SW762; 223 Ky6, 28W(2d)1030; 224Ky367, 6SW (2d)453; 225Ky280, 8SW(2d)408; 229 Ky173, 16SW(2d)759; 229Ky716, 17 SW(2d)1008; 150Miss673, 116S534; 311Mo369, 279SW43; 314Mo352, 284 SW499 (instruction not based on averments in petition is erroneous); Mo 285 SW482; 319Mo52, 3SW(2d)387; Mo 258W(2d)96; 221MoA644, 283SW705; 220MoA419, 286SW837; MoA 78W(2d) 407; MoA 24SW(2d)712; Mont 288P 614; 115Nebr875, 215NW120; 117Nebr 411, 220NW590; 33NM529, 270P896; 131Misc50, 225NYS663; 49ND364, 191 NW783; 25 OhA233, 157NE823; 27 OhA341, 161NE342; 136 Okl 214, 277P 274; 117 Or598, 243P787; 121 Or1, 252 P962; 100Va455, 138A739; 136Wash 554, 240P913; 100WVa319, 130SE483. **Instructions as to negligence or contributory negligence,** etc. 218Ala55, 117S634; 218Cal55, 240P785; 313Mo 213, 281SW682; 221MoA644, 283SW 705; MoA 10SW(2d)322; 116 Or317, 241P40. See also 323Mo531, 198W(2d) 679. **An instruction presenting a defense not pleaded,** etc. 220MoA924, 296 SW452. **Instructions held improper.**–213Ala588, 105S672. **Instructions to allow damages not requested by pleadings** held erroneous. 85 Ind332, 154NE 44. **Instruction on rescission has been** held error where defense to action on note for furnace was merely breach of warranty. 28 OhA38, 162NE616.

1615-22 213Ala260, 104S509; 215Ala 143, 110S372; 215Ala420, 110S895; 219 Ala162, 121S543; 219Ala238, 121S722; 220Ala649, 127S216; 168Ark157, 269SW 361; 172Ark423, 288SW908; 177Ark 195, 5SW(2d)939; Cal 290P22; 98CalA 268, 276P1055; 103Conn520, 131A501; 106Conn511, 138A432; 109Conn206, 145 A300; 163Ga580, 136SE785; 163Ga899, 137SE561; 170Ga495, 153SE37; 244 IllA330; 85 IndA301, 154NE24; Iowa 228NW268; 209Ky451, 272SW917; 210 Ky407, 276SW117; 217Ky594, 290SW 487; 252Mass552, 148NE105; 260Mass 566, 157NE702; 267Mass70, 165NE871; 314Mo282, 284SW463; 316Mo1094, 295 SW663; MoA 19SW(2d)943; MoA 274 SW849; MoA 274SW911; MoA 279SW 761; MoA 23SW(2d)1100; MoA 24SW (2d)717; 78Mont273, 254P165; 84Mont 357, 276P437; 83NH236, 141A136; NJ Sup 150A192; 191NC493, 132SE282; NC 140SE307; 20 OhA349, 152NE208; 25 OhA233, 157NE823; 29 OhA443, 163 NE629; 30 OhA328, 165NE363; 31 OhA 8, 166NE145; 34 OhA188, 170NE604 (issue eliminated in general charge); 115 Okl 84, 241P758; 116 Or538, 241P 69; 117 Or598, 243P787; 121 Or1, 252P 962; 124 Or585, 265P417; 127 Or490, 272P670; 295Pa120, 144A912; Tex CivA 272SW811; TexCivA 273SW622; TexCivA 274SW263; TexCivA 275SW 430; TexCivA 68W(2d)432; TexCivA 118W(2d)559; 143Va875, 129SE339;

104WVa335, 140SE51. **Refusal of charge as to defendant as to whom plaintiff dismissed action held proper.** 78Mont273, 254P165.

1615-22½-New. Instruction on specific issue of estoppel is erroneous where estoppel is not pleaded. TexCivA 282 SW651.

1615-22½-New. Instruction authorizing jury to determine damages recoverable in case of finding that defendant was negligent and that plaintiff was free from contributory negligence has been held not erroneous. NJSup 145A 238.

1616-23 221Ala652, 130S396; 223Ky 497, 4SW(2d)407; 321Mo 840, 12SW (2d)747; MoA 277SW368.

1616-25 31Ariz39, 250P356; 172Ark 584, 289SW759; 170Ga123, 152SE222; 35GaA786, 134SE800; 35GaA767, 134 SE831; 200 Iowa434, 204NW298; 201 Iowa502, 207NW563; MoA 15SW(2d) 923; 323Mo 1, 18SW(2d)438; 135SC 163, 133SE550, 553 [citCyc]; 143Wash 61, 254P461.

1617-27 94CalA66, 270P719; 35GaA 273, 133SE57; 35GaA786, 134SE800; 48 Ida424, 282P943; 121 Okl 5, 247P58; 88PaSuper231; 135SC163, 133SE550, 553 [citCyc]; 143Wash61, 254P461. **In Iowa.**-201 Iowa502, 207NW563.

1617-28 In action between three parties to automobile accident, instruction inapplicable as between plaintiff and one defendant is proper if applicable to issues between defendants. 141Wash 139, 250P955.

1617-29 110Conn540, 148A377.

1617-30 84CalA337, 258P397; 88Pa Super231.

1617-32½-New. Sense in which terms used in charge need not conform to sense used in pleading. 221Ala592, 130 S203.

1617-34 20F(2d)619; 26F(2d)594; 215 Ala426, 111S214; 218Ala429, 118S640; 218Ala416, 118S662; Ala 130S548; AlaA 114S177; 170Ark346, 280SW354; 172 Ark252, 288SW900; Ark 31SW(2d)947; Ark 32SW(2d)154; 84CalA721, 258P 686; 85CalA571, 259P968; 104Conn645, 133A913; 105Conn373, 135A388; 99 Fla1246, 128S839(2dcase); 163Ga666, 136SE904; 164Ga311, 138SE580; 164Ga 810, 139SE542; 169Ga734, 151SE506; 35 GaA126, 132SE414; 35GaA648, 134SE 344; 36GaA527, 137SE127; 36GaA546, 137SE294; 37GaA237, 139SE580; 37 GaA314, 140SE396; 45 Ida58, 260P691; 327 Ill 207, 158NE380; 245 IllA291; 201 Iowa253, 207NW119; 201 Iowa376, 207 NW328; 201 Iowa311, 207NW386; 202 Iowa663, 210NW916; 203 Iowa1194, 212 NW354; 203 Iowa443, 212NW888; 210 Ky38, 275SW7; 213Ky8, 280SW153; 213Ky432, 281SW519; 218Ky286, 291 SW375 (time of injury); 219Ky839, 294 SW472; 220Ky499, 295SW429; 220 Ky808, 295SW1064; 227Ky599, 13SW (2d)755; 149Md152, 131A151; 151Md 679, 135A827; 257Mass559, 154NE70; Mass 170NE77; 251Mich630, 232NW 360; 145Miss172, 110S244; 147Miss530, 113S205; 307Mo 10, 269SW395; 307Mo 607, 271SW788; 314Mo 282, 284SW463; 218MoA597, 265SW993; MoA 270SW 129; MoA 273SW764; 220MoA518, 276 SW1030; MoA 9SW(2d)655; 115Nebr 875, 215NW120; Nebr 231NW153; 103 NJL410, 135A803; 194NC172, 138SE 595; 51ND580, 199NW1017, 1020 [cit Cyc]; 53ND904, 208NW236; 25 OhA 233, 157NE823; 105 Okl 74, 231P532; 115 Okl 199, 242P201; 120 Okl 164, 251 P97; 51SD424, 214NW816; TexCommnA 292SW536 (instruction held not erroneous as not limiting recovery to damages proved); TexCivA 281SW331; Tex CivA 294SW873; 99Vt91, 130A758; 146 Va488, 131SE810; 147VaA885, 133SE488; 152Va312, 147SE275; Va 153SE727; 140Wash459, 249P977; 143Wash653, 255P1037; 100WVa49, 129SE760. See also 228Ky184, 14SW(2d)768. **Instructions held proper.**-162Ga556, 134SE303. **Where undisputed evidence showed measure of damages,** failure to instruct that purchaser must show damages is not error. 34GaA383, 129SE794. **Court use of proper illustration outside of evidence** does not necessarily transgress bounds of permissible comment. 107 Conn17, 139A270.

1618-35 213Ala393, 104S754 (action for killing dog; defendant's charges properly refused where plaintiff's prima facie case not controverted); 215Ala94, 109S 749; 217Ala144, 115S31; 29Ariz468, 242P1009, 43ALR1184; 176Ark728, 3 SW(2d)982; 90Fla188, 105S818 (where evidence does not warrant punitive or exemplary damages, court should not give charges on that subject); 161Ga 517, 131SE483; 35GaA767, 134SE831; 36GaA276, 136SE469; 36GaA527, 137 SE127; 36GaA518, 137SE282; 38GaA 556, 144SE506; 40GaA522, 150SE457 (3dcase); IndA 167NE721; 216Ky366, 287SW927; 217Ky594, 290SW487; 232 Ky825, 24SW(2d)588; 148Md257, 129A 214; 149Md152, 131A151; 158Md189, 148A457; 263Mass228, 161NE240; 314 Mo 282, 284SW463; Mo 298SW717; MoA 256SW1038; MoA 294SW747; MoA 30 SW(2d)646; 115Nebr749, 214NW635; 105NJL218, 143A330; NJ 147A461(1st case); 32 OhA451, 168NE230; 116 Okl 142, 243P959; 293Pa329, 148A474; TexCivA 272SW510; TexCivA 291SW 929; TexCivA 292SW917; TexCivA 24 SW(2d)786; TexCivA 28SW(2d)611; Vt 147A346; 143Va36, 129SE239; 134 Wash636, 236P276. See also 38GaA414, 144SE35. **It is not error to refuse to charge** that seller making false representation acted with knowledge of falsity. 34GaA383, 129SE794. **If essential fact in issue is not proved,** affirmative instructions, if requested, should be given to that effect. 216Ala138, 112S633, 53 ALR540.

1618-35½-New. Instructions should not submit as issues in controversy matters not disputed. 35GaA777, 134SE 813 (instructions held proper).

1618-36 29F(2d)78; 219Ala162, 121S 543; 219Ala623, 123S27; 221Ala629, 130S398; 21AlaA547, 109S894; 22Ala A336, 115S689; 28Ariz581, 238P389; 29Ariz96, 239P787; 29Ariz405, 242P 436; 170Ark346, 280SW354; 171Ark 1122, 287SW396; 172Ark423, 288SW 908; Ark 31SW(2d)526; 70CalA381, 233P346; 73CalA748, 239P373; 75CalA 161, 241P941; 75CalA609, 243P41; 86 CalA136, 260P588; CalA 278P263(2d case); 100CalA409, 279P1083; 77Colo 603, 237P1113; 82Colo 51, 256P1088; 87Colo 401, 288P633; 105Conn373, 135 A388; 162Ga502, 134SE112 (instructions held authorized by evidence); 163Ga37, 135SE487; 166Ga220, 142SE868; 167Ga 386, 145SE651; 169Ga741, 151SE495; 34GaA240, 129SE118 (issue not supported by evidence); 35GaA87, 132SE106; 35GaA126, 132SE414; 35GaA648, 134SE 344; 36GaA546, 137SE294; 36GaA626, 137SE856; 37GaA237, 139SE580; 37 GaA314, 140SE396; 37GaA686, 141SE 326; 40GaA117, 149SE91(2dcase); GaA 155SE370; 43 Ida327, 251P757(estoppel); 47 Ida542, 277P554(2dcase); 318 Ill 445, 149NE507; 198 Ind79, 151 NE385; 84 IndA463, 151NE349; 200 Iowa728, 205NW331; 200 Iowa1063, 205NW979; 201 Iowa376, 207NW328; 202 Iowa663, 210NW916; 202 Iowa787, 211NW364; 203 Iowa1194, 212NW354; 203 Iowa476, 212NW682; 207 Iowa990, 222NW1; 208 Iowa275, 225NW406; 208 Iowa361, 225NW862; Iowa 226NW 915; 207Ky776, 271SW71; 210Ky38, 275SW7; 212Ky736, 281SW980; 215Ky 218, 284SW993; 218Ky652, 291SW 1030; 224Ky367, 6SW(2d)453; 225Ky 625, 9SW(2d)1011; 149Md152, 131A 151; 151Md679, 135A827; 154Md213, 140A95; 158Md555, 149A283; 235Mich 80, 209NW95; 235Mich633, 209NW807; 142Miss476, 107S517; 147Miss530, 113 S205; 150Miss715, 116S820; 150Miss 502, 117S267; 307Mo 607, 271SW788; 310Mo 419, 276SW614; 311Mo 369, 279 SW43; Mo 284SW141; Mo 286SW120; 318Mo 50, 298SW827; 217MoA418, 266 SW758; MoA 270SW129; 220MoA452, 276SW105; MoA 277SW368; MoA 279 SW168; 220MoA251, 284SW167; 221 MoA733, 285SW779; 220MoA419, 286 SW837; MoA 293SW428; MoA 293SW 481; MoA 300SW1028; MoA 11SW(2d) 1084; MoA 16SW(2d)749; MoA 24SW (2d)712; MoA 27SW(2d)31; MoA 30 SW(2d)1094; 74Mont549, 241P613; 77 Mont124, 249P1070; 86Mont545, 284P 542; 114Nebr106, 206NW19; 115Nebr 875, 215NW120; 118Nebr449, 225NW 238; Nebr 230NW769; 103NJL683, 137 A591; NJSup 137A528; NJSup 145A 623(1stcase); 218AppDiv222, 218NYS 146 (damages); 225AppDiv68, 232NYS 139; 51ND580, 199NW1017, 1020 [cit Cyc]; 53ND904, 208NW236; 58ND109, 224NW915; 29 OhA241, 163NE568; 115 Okl 199, 242P201; 124 Okl 120, 254 P45; 133 Okl 196, 271P1026; 116 Or 237, 240P891; 289Pa356, 137A603; 51 SD424, 214NW816; SD 224NW949; SD 226NW341; TexCommnA 12SW(2d) 163; TexCivA 281SW331; TexCivA 286 SW541; TexCivA 10SW(2d)441; Tex CivA 13SW(2d)929; TexCivA 14SW (2d)867; 143Va903, 129SE493, 45ALR 280; 151Va694, 144SE638; 143Wash 653, 255P1037; 150Wash640, 274P702; 100WVa49, 129SE760; 102WVa409, 135 SE388; 102WVa489, 135SE604; 104 WVa308, 140SE12; 105WVa201, 141SE 779. **Instruction about material matter not based on sufficient evidence** held erroneous. 190NC783, 130SE842. **Instructions held not abstract.**-172Ark 671, 290SW953; 161Ga414, 131SE158; MoA 14SW(2d)694; 144 Okl 1, 288P975.

1619-37 5F(2d)549; 22F(2d)22; 169 Ark230, 275SW519, 41ALR379; 170Ark 1192, 280SW662; 172Ark252, 288SW 900; 208Cal205, 281P50; 34GaA383, 129SE794; 35GaA260, 132SE923; 202 Iowa1386, 212NW161; Mo 29SW(2d) 76; 103NJL410, 135A803; 222AppDiv 837, 226NYS688; 194NC172, 138SE595; 53ND904, 208NW236; 25 OhA233, 157 NE823; TexCivA 12SW(2d)625; 143Va 802, 129SE491; 102WVa489, 135SE604. **Instruction that relation of master and servant exists** between plaintiff and defendant held erroneous in view of contract and evidence to contrary. 240NY 474, 148NE650.

1619-38 25F(2d)666; 212Ala590, 103S 894; 213Ala545, 105S867; 215Ala311, 110S396; 215Ala426, 111S214; 215Ala 612, 111S901; 218Ala55, 117S634; 218 Ala390, 119S4; 221Ala242, 128S211; 21 AlaA547, 109S894; 22AlaA211, 114S 273; AlaA 130S516; 28Ariz581, 238P 389; 31Ariz206, 251P550; 168Ark606, 271SW15; 169Ark235, 275SW329; 170 Ark346, 280SW354; 170Ark1192, 280 SW662; 172Ark423, 288SW908; 174Ark 447, 295SW357, 60ALR241; 70CalA381, 233P346; 75CalA161, 241P941; 78CalA 526, 248P930; 80CalA109, 250P693; 81CalA40, 252P1078; 85CalA419, 259P 496; CalA 261P1021; 92CalA513, 268P 379; 98CalA568, 277P529(2dcase); CalA 290P916; CalA 293P115; 82Colo 51, 256P1088; 82Colo 351, 260P101; 84 Colo 511, 272P6; 87Colo 401, 288P633; 103Conn267, 130A571; 109Conn221, 146 A494(2dcase); DC 33F(2d)370; 160Ga 831, 129SE546; 161Ga319, 130SE559; 163Ga580, 136SE785; 167Ga94, 144SE 759; 168Ga510, 148SE264; 168Ga678, 148SE659; 170Ga495, 153SE37; 35GaA 648, 134SE344; 36GaA546, 137SE294; GaA 155SE85; 45 Ida58, 260P691; 316 Ill 513, 147NE419; 318 Ill 445, 149NE 507; 233 IllA566; 234 IllA9; 197 Ind 263, 149NE643; 86 IndA324, 157NE444 (not drawn so as to be applicable to evidence); IndA 164NE307; 212Ky736, 281SW980; 215Ky682, 286SW1078; 217 Ky594, 290SW487; 219Ky715, 294SW 149; 225Ky846, 10SW(2d)456, 60ALR 1374; 228Ky156, 14SW(2d)418; 229Ky 284, 17SW(2d)233; 232Ky825, 24SW (2d)588; 234Ky639, 28SW(2d)956; Me 149A618; 148Md257, 129A214; 149Md 152, 131A151 (incorrect and abstract proposition); 150Md429, 133A601; 151 Md679, 135A827; 158Md1, 147A718; 158Md60, 148A124; 252Mass47, 147 NE564; 252Mass113, 147NE347; 254 Mass474, 150NE206; 254Mass501, 150 NE326; 256Mass195, 152NE630; 257 Mass559, 154NE70; Mass 170NE115; 235Mich633, 209NW807; Miss 130S 493; 310Mo 469, 276SW607; Mo 281 SW441; 314Mo282, 284SW463; 316 Mo 1094, 295SW563; Mo 10SW(2d)651; Mo 29SW(2d)64; MoA 274SW849; MoA 274SW1100; 220MoA452, 276SW105; MoA 279SW160; MoA 282SW150; MoA 284SW850; MoA 285SW549; 221MoA 727, 285SW772; MoA 294SW747; MoA 3SW(2d)254; MoA 7SW(2d)1018; MoA 13SW(2d)560; MoA 14SW(2d)511; 76 Mont254, 246P168; Nebr 230NW769;

102NJL131, 130A612; 103NJL410, 135A803; 103NJL683, 137A591; NJ 147A445; NJSup 129A204; NJSup 137A428; NJSup 137A528; NJSup 140A240; NJ Sup 147A433; 240NY474, 148NE650; 218AppDiv218, 218NYS126; 22 OhA440, 153NE860; 23 OhA540, 156NE151; 25 OhA233, 157NE823; 105 Okl 74, 231P532; 117 Okl 25, 245P624; 120 Okl 164, 251P97; 124 Okl 120, 254P45; 129 Okl 195, 264P151; 130 Okl 237, 266P763; 130 Okl 272, 267P274; 138 Okl 272, 281P251; 37 OklACR543; 116 Or237, 240P891; 128 Or83, 262P939; 124 Or71, 263P66; 133 Or246, 289P1055; 286Pa536; 134A446; 289Pa356, 137A603; 86PaSuper364; 87PaSuper58; 88PaSuper20; 47RI 35, 129A602; TexCivA 272SW597; TexCivA 275SW430; TexCivA 291SW590; TexCivA 294SW873; TexCivA 4SW(2d)222; TexCivA 13SW(2d)452; TexCivA 16SW(2d)1100; 143Va802, 129SE491; 148Va488, 131SE810; 147Va576, 137SE500; 148Va601, 139SE288; Va 154SE499; 150Wash514, 273P732; 153Wash538, 280P15; 100WVa49, 129SE760; 104WVa308, 140SE12. **Where case is submitted on special issues,** refusal of special instruction on issue for submission of which there is no request is not error. TexCivA 272SW597. **Requests held properly refused as immaterial.** 254Mass501, 150NE326. **Instruction on conflicting perils** properly refused where not issue on facts. 28 OhA88, 162NE623.

1620–39 214Ala633, 108S596; 215Ala143, 110S372; 215Ala311, 110S396; 23AlaA12, 121S437(2dcase) [certiorari den 219Ala139, 121S441(1stcase)]; 22AlaA226, 114S285; 105Conn476, 136A93; 36GaA626, 137SE856; 320 Ill 577, 151NE526; 128Kan584, 278P758; 323Mo 64, 18SW(2d)445; MoA 7SW(2d)1018; 76Mont254, 246P168; 85Mont270, 278P521; 82NH558, 133A446; 118 Or568, 247P815; 286Pa536, 134A446; 154Wash588, 283P447.

1621–40 Fla 129S333; 114Nebr353, 207NW669; TexCivA 4SW(2d)165. But see 37GaA358, 140SE395.

1621–41 317 Ill 401, 148NE274. But see 152Wash657, 279P114.

1621–42 220Ky791, 295SW1012; 149Md152, 131A151. **Instruction limiting jury to testimony produced and submitted** does not necessarily constitute reversible error. 204 Iowa922, 216NW262.

1621–43 218MoA597, 265SW993 (roving commission). See also 228Ky310, 14SW(2d)1075.

1621–44 41F(2d)738; 172Ark252, 288SW900; 73CalA748, 239P373; 36GaA626, 137SE856; 114Nebr353, 207NW669; 51ND580, 199NW1017, 1020 [cit Cyc]. See also 319Mo 233, 3SW(2d)371.

1622–45 73CalA748, 239P373; 164Ga810, 139SE542; 205 Iowa271, 215NW649; 220Ky758, 295SW1046; Mo 271SW500 (instruction not erroneous where defendant admitted liability for injury, but did not admit plaintiff's injury).

1622–46 73CalA748, 239P373; 81CalA690, 254P671, 673 [quotCyc]; 163Ga807, 137SE45; 164Ga810, 139SE542; 167Ga737, 146SE739; 205 Iowa271, 215NW649; 122Kan695, 253P233; Mo 274SW377; 99Vt227, 131A16.

1623–47 214Ala606, 108S532; 107Conn68, 139A649; 99Fla483, 126S784; 164Ga311, 138SE580; Iowa 209NW435; 154Md195, 140A70; Mass 169NE789; 321Mo 140, 9SW(2d)929; MoA 278SW84; NJSup 130A639; 43 OklACR208; 117 Or598, 243P787; TexCivA 28SW(2d)865. **Where counsel for each defendant conceded** that plaintiff in action for personal injuries received in collision was entitled to recover from other defendant, charge that plaintiff was entitled to recover and that jury should say from whom held authorized. 103NJL118, 134A738.

1623–48½–New. Charge authorizing recovery in case material averments of either one of two counts had been proved has been held not erroneous. 23AlaA67, 120S577(2dcase).

1623–49 215Ala216, 109S877; 256Mass195, 152NE630; 260Mass225, 157NE347. **Evidence held sufficient.**–162Ga413, 134SE76; 162Ga457, 134SE87; 37GaA265, 139SE924; TexCivA 290SW1108. **Evidence held not to authorize charge.**–168Ga156, 147SE106.

1623–50 214Ala545, 108S362; 102CalA221, 282P1009; 158Md243, 148A216; 117Or598, 243P787 (evidence held sufficient); 48RI 478, 139A302. **Instruction not erroneous if whole evidence justifies it** though plaintiff's own testimony excludes theory. 34NM146, 278P361.

1624–51 37GaA358, 140SE395. But see Va 153SE711.

1624–52 30 OhA389, 165NE358. **Circumstantial evidence** constitutes proper basis for charge. NC 154SE667.

1624–53 41GaA667, 154SE375.

1624–54 144 Okl 67, 289P714.

1624–55 Vt 147A346 (refusing instruction on perilous situation of decedent with reference to his contributory negligence was not error, where only evidence was inferential).

1624–57 RI 134A11.

1624–57½–New. Trial court is warranted in submitting case to jury on basis of claims of parties as made on trial. 105Conn49, 134A151.

1624–57¾–New. Instruction on false testimony should not be given unless basis furnished and then it is discretionary with court. MoA 26SW(2d)863 (instruction on false testimony unwarranted and prejudicial).

1624–57¼–New. Presence of infant plaintiff in courtroom is sufficient to justify instruction based on his age. 115 Okl 139, 241P772.

1624–59 168Ga259, 147SE513(2dcase); 247 IllA283; 202 Iowa1251, 211NW898; Iowa 213NW815; 251Mich630, 232NW360; Mo 284SW803; 115 Okl 199, 242P201; 119 Or69, 247P1081. Contra 80CalA109, 250P693.

1625–60 But see 107Conn681, 142A455; 38GaA583, 144SE824; 231Ky745, 22SW(2d)131; 321Mo 108, 15SW(2d)762.

1625–61 169Ark62, 272SW873; 84 IndA463, 151NE349; 251Mich630, 232NW360; 223AppDiv312, 228NYS113.

1625–62 93CalA560, 269P959; 257Mass272, 153NE784; MoA 26SW(2d)52; TexCivA 294SW873.

1625–64 NJ 130A444.

1625–65 172Ark1088, 291SW795; 104Conn355, 132A913; 111Conn313, 149A782; 170Ga788, 154SE325; 41 Ida129, 238P308 (if jury could find in favor of some and against other defendants, they should be so instructed); 335 Ill 164, 166NE530; 336 Ill 11, 167NE807; 154Md195, 140A70; 170Minn250, 212NW413; 313Mo 213, 281SW682; 219MoA519, 282SW535; 216AppDiv439, 215NYS587; 190NC1, 128SE471 (not compliance with statute); 190NC819, 130SE834 (instructions held not sufficient compliance with statute); 190NC840, 130SE833; 191NC500, 132SE468; 191NC690, 132SE788; 197NC12, 147SE435; 115 Oh589, 155NE143; 27 OhA341, 161NE342; 294Pa69, 143A482; TexCivA 286SW680 (applicable to special issues submitted); TexCivA 294SW873; Utah 270P349; 153Va204, 149SE448 (where facts undisputed); 101WVa621, 134SE204, 47ALR800; 107WVa440, 148SE496. **Statute requiring court to state evidence and apply law thereto** creates substantial legal right. 190NC819, 130SE834. **It is duty of court to give additional instructions** relative to application of law to facts of case. 111Conn253, 149A673.

1625–66 See also 142Va454, 129SE277.

1625–67 205 Iowa271, 215NW649; MoA 158SW(2d)923.

1625–67½–New. Extent of application of law to parties' claims and evidence is in sound discretion of court, provided jury are fully and correctly instructed. 83NH303, 142A688.

1626–69 19F(2d)781; 216Ala111, 112S424; 204Cal 387, 268P345; 85CalA385, 259P494; 110Conn255, 147A841(2dcase); 164Ga655, 139SE529; 33GaA701, 127SE670; 40GaA814, 151SE541; 41GaA472, 153SE444; 45 Ida427, 262P881, 11, 167NE807; 199 Ind660, 161NE251; 204 Iowa70, 214NW486 (on issues not formally pleaded); 206 Iowa1134, 221NW802; 126Kan538, 268P801; 219Ky106, 292SW762; 233Ky756, 26SW(2d)1035; 234Ky427, 28SW(2d)479; 256Mass5, 152NE236; 146Miss440, 111S562; 313Mo 169, 281SW422; 320Mo 536, 9SW(2d)632; 322Mo 787, 16SW(2d)85; Mo 31SW(2d)1010; 221MoA355, 273SW240; MoA 290SW119; Nebr 229NW771; 51ND533, 200NW790; 28 OhA508, 162NE810; 128 Okl 29, 261P189; 133 Okl 159, 271P671; 38 OklACR493; 115 Or672, 239P112; 116 Or222, 240P873; 117 Or598, 243P787; 121 Or236, 254P1022; 133 Or160, 289P1073; Or 293P430; TexCivA 271SW281; TexCivA 281SW350; TexCivA 16SW(2d)550; TexCivA 18SW(2d)740; TexCivA 19SW(2d)605; TexCivA 28SW(2d)312; Utah 283P160; 142Va789, 128SE268; 147Va885, 133SE488; 148Va437, 139SE308, 55ALR1376. But see 228Ky219, 14SW(2d)780. **Affirmative submission of defenses** is required on proper request. TexCommnA 276SW900. **Instructions not violating rule.**–35GaA622, 134SE198 (as ignoring documentary evidence). **Manner of submission.**–Mo 30SW(2d)83. **Where there was substantial evidence** supporting finding for plaintiff, refusal of instruction on conjecture, being insufficient, was properly refused. 37F(2d)666.

1627–71 MoA 25SW(2d)551.

1627–72 250NY170, 164NE894.

1627–73 160Ga865, 129SE528; 219MoA121, 272SW79. But see Okl 292P37; 148Va437, 139SE308, 55ALR1376.

1627–74 33GaA733, 127SE898; 255 IllA322; 219MoA121, 272SW79; 148Va437, 139SE308, 55ALR1376.

1627–75 219MoA121, 272SW79; MoA 277SW50; 148Va437, 139SE308, 55ALR1376.

1627–75½–New. Where case is tried on special issues, giving of special instructions is improper. TexCivA 272SW597.

1627–75¾–New. Court may grant defendant's request for instruction embodying plaintiff's theory on which case was tried. 294Pa464, 144A404.

1627–78½–New. Where one count of complaint is defective, it is error to authorize jury to find guilt of negligence on negligence charged in any count. 318 Ill 402, 149NE422.

1627–79 If instruction is not limited to those counts as to which it is proper, it should be refused if it is not good as to some counts. 251 IllA364.

1627–80½–New. Where plaintiff in action for services declares specifically on contract and upon common counts and fails to elect trial court may properly submit case on quantum meruit. 231Mich628, 204NW746.

1627–80¾–New. Submission of one count of petition may in effect work withdrawal of all other counts. 203Iowa1392, 214NW592.

1627–80¼–New. Instruction is not erroneous because two phases of contributory negligence as defense are given in one paragraph. TexCivA 19SW(2d)930.

1627–82 213Ala626, 106S172; 214Ala122, 106S799; 214Ala597, 108S511; 215Ala68, 109S148; 216Ala326, 113S79; 216Ala642, 114S298; 216Ala645, 114S308; Ala 130S807; 172Ark117, 288SW377; 176Ark690, 3SW(2d)996; Cal 292P970; 162Ga664, 135SE195; 166Ga887, 144SE655; 169Ga264, 149SE579 (charge to determine truth from testimony as coming from witness stand held inapt as tending to exclude documentary evidence, though not reversible error in view of whole charge); 170Ga349, 153SE11; 170Ga788, 154SE325; 198 Ind79, 151NE385; IndA 163NE517; IndA168NE198; 201 Iowa621, 207NW767; 223Ky262, 3SW(2d)649; 232Ky548, 24SW(2d)292; 149Md152, 131A151; 153Md586, 139A285; 155Md384, 142A515; 158Md131, 148A426; 158Md424, 149A4; 263Mass147, 160NE821; Mass 168NE923; Mass 173NE436; 146Miss440, 111S562; 156Miss540, 126S201; Mo 256SW1031; Mo 284SW803; MoA 272SW1042; MoA 282SW522; MoA 295SW495; MoA 7SW(2d)370; MoA 19SW(2d)534; MoA 27SW(2d)31; MoA 28SW(2d)375; MoA 31SW(2d)592; MoA 32SW(2d)130; 115Nebr490, 213NW515; NJSup 137A890 (as to damages); 19 OhA284; 25 OhA546, 159NE484; 33 OhA512, 169NE704; 50RI 351, 147A882; 145Va448, 134SE588; Va 154SE558; 102WVa643, 136SE199; 188Wis30, 205NW407. **Instruc-**

tions held not objectionable.–CalA 292 P186; CalA 293P80; 162Ga664, 135SE 195; 170Ga135, 152SE466; 40GaA332, 149SE582; MoA 271SW1029. **Instructions not violating rule.**–135Wash260, 237P711, 241P969 (that contributory negligence must be proved by one alleging it). **Instructions held not to exclude evidence for any purpose, but to** state proper rule of damages as to prior infirmity. TexCivA 286SW536. **Charge held not to authorize exclusion of evidence.**–MoA 274SW917. **Instructions held not erroneous.**–Iowa 244NW69.

1628–84 30F(2d)682; 35F(2d)563; 213 Ala21, 104S228; 213Ala260, 104S509; 213Ala617, 105S805; 213Ala494, 106S 150; 214Ala122, 106S799 (requested instructions ignoring testimony on question of negligence of automobile driver properly refused); 214Ala232, 107S801; 214Ala597, 108S509; 215Ala343, 110S 718; 215Ala547, 112S124; 216Ala642, 114S298; 216Ala645, 114S308; 217Ala 411, 116S113; 218Ala609, 119S647; 218 Ala619, 119S833; 218Ala603, 119S841; 219Ala223, 121S716; 219Ala623, 123S 27; 219Ala692, 123S215; 20AlaA614, 104S446; AlaA 130S516; 171Ark1127, 287SW371; 176Ark802, 4SW(2d)22; 181Ark1147, 29SW(2d)674; 89CalA653, 265P557; 103Conn520, 131A501; 168 Ga429, 148SE152; IndA 169NE352; 202 Iowa1229, 211NW875; 148Md524, 130 A340, 44ALR193; 149Md152, 131A151; 150Md52, 132A381 (prayer attempting to raise question of legal insufficiency of evidence held bad in form where it confined itself to evidence of adversary); 152Md241, 136A615; 155Md384, 142A 515; 256Mass5, 152NE236; 259Mass 383, 156NE739; 260Mass566, 157NE 702; 263Mass427, 161NE616; 266Mass 424, 165NE393; Mass 173NE436; Mo 284SW794, 46ALR1220; MoA 15SW (2d)370; MoA 16SW(2d)678; MoA 28 SW(2d)391; 105NJL608, 146A191; 103 NJL537, 138A119; NJSup 147A233; 24 OhA391, 156NE619; TexCivA 291SW 590; TexCivA 9SW(2d)382; TexCivA 26SW(2d)327; Wash 292P424; 108 WVa204, 151SE178.

1629–85 215Ala407, 110S818 (instruction amounting to affirmative charge erroneous).

1629–86 75CalA609, 243P41; 96CalA 236, 273P1080; 96CalA697, 274P761; 98 CalA92, 276P422; 102CalA333, 282P 997; 103Conn520, 131A501 (contributory negligence); 318 Ill 345, 149NE 284. **Application of rule.**–215Ala547, 112 S124; 255 IllA21; 220MoA1294, 290SW 1014; 143Va36, 129SE239. **Instruction directing verdict on partial view of evidence** is erroneous. 142Va425, 128SE 732; 151Wash279, 275P713. **Instructions held not violative of rule.**–Vt 146A 5.

1630–90 Ida 289P74.

1630–90½–New. Charge that jury must discover truth from evidence on stand alone is not erroneous as excluding documentary evidence where such evidence was identified by witnesses on stand. 35 GaA777, 134SE813.

1630–90¼–New. Cure by other instructions.–Error in giving instruction which excludes evidence from consideration of jury is cured by subsequent instruction that jury "look to all the evidence and circumstances of the case and seek the truth." 35GaA777, 778, 134SE813.

1630–91 220Ala116, 124S288 (verbal claims and representations have no bearing where contract is in writing); 92 CalA656, 268P1083; 29Hawaii 750; 86 IndA201, 156NE574 (instruction withdrawing issue but not evidence held proper); Minn 231NW829; 157Miss759, 128S750; 198NC389, 151SE877; NC 154 SE667; 289Pa51, 137A104. **Where jury believing claim of one party must disregard inconsistent claim of other party.** MoA 29SW(2d)181.

1630–91½–New. and failure so to do is reversible error. 289Pa51, 137A104.

1630–92 99Vt464, 134A588.

1631–96 Instruction sufficient within the rule.–See also 315Mo1181, 289SW 913. **Instruction sufficient within rule.**–MoA 31SW(2d)238.

1632–5 But see 198NC389, 151SE877.

1632–6 35GaA94, 132SE454.

1632–8 170Ga530, 153SE415.

1632–10 5F(2d)549; 15F(2d)660; 40 F(2d)235; 214Ala122, 106S799; 214Ala 373, 108S5; 214Ala577, 108S578; 215 Ala612, 111S901; 216Ala299, 113S218; 216Ala547, 114S41; 216Ala645, 114S 308; 218Ala566, 119S610(2dcase); 218 Ala619, 119S833; 219Ala15, 121S34; 21 AlaA281, 107S716; 22AlaA605, 118S498; AlaA 130S520; 171Ark1122, 287SW396; 172Ark69, 287SW595; 172Ark498, 289 SW474; 172Ark562, 289SW761; 174 Ark146, 294SW395; 174Ark1179, 296SW 709; 175Ark398, 299SW383; 176Ark 690, 3SW(2d)996; 177Ark136, 5SW(2d) 943; 180Ark695, 22SW(2d)562; 180Ark 877, 23SW(2d)268; 181Ark272, 25SW (2d)1052; 181Ark925, 29SW(2d)676; 196Cal308, 237P1066; 68CalA484, 229P 867; 72CalA494, 237P565; 75CalA129, 242P97; 86CalA136, 260P588; 91CalA 26, 266P597; 95CalA228, 272P810; 103 CalA531, 284P1086; CalA 289P662; 86 Colo 166, 279P51; 104Conn355, 132A 913; 107Conn68, 139A649; 162Ga233, 133SE254; 162Ga664, 135SE195; 163Ga 899, 137SE561; 165Ga228, 140SE497; 170Ga270, 152SE248; 170Ga530, 153SE 415; 170Ga349, 153SE11; 35GaA508, 133SE648; 29Hawaii188; 47 Ida395, 276P47; 318 Ill 345, 149NE284; 329 Ill 11, 160NE197; 224 IllA519; 247 IllA 207; 197 Ind206, 150NE101; 199 Ind 405, 155NE826; 86 IndA209, 156NE522; IndA 163NE517; 200 Iowa1059, 205NW 863; 201 Iowa621, 207NW767; 205 Iowa 809, 218NW566; 208 Iowa767, 226NW 174; Iowa 227NW518; 212Ky802, 280 SW107; 217Ky227, 289SW305; 217Ky 738, 290SW677; 218Ky750, 292SW297; 219Ky765, 294SW487; 226Ky472, 11SW (2d)131; 148Md188, 129A31; 149Md443, 131A822; 152Md371, 136A825; Md 150 A34; 260Mass225, 157NE347; 249Mich 350, 228NW766; 143Miss5, 108S181; 147Miss843, 112S788; 220MoA135, 281 SW148; Mo 275SW949; Mo 276SW387; Mo 276SW636; Mo 278SW79; Mo 281 SW441; 313Mo 50, 298SW827; 320Mo 946, 8SW(2d)832; 320Mo 623, 8SW(2d) 858; 322Mo 633, 17SW(2d)270; Mo 31 SW(2d)1065; MoA 256SW520; 218MoA 84, 262SW686; 217MoA528, 269SW404; MoA 271SW1029; MoA 272SW980; MoA 276SW1044; MoA 279SW155; MoA 280 SW83; MoA 280SW1048; 219MoA519, 282SW535; MoA 283SW729; MoA 286 SW133; MoA 286SW745; MoA 287SW 650; MoA 294SW1021; 222MoA51, 299 SW604; 222MoA633, 300SW834; 222 MoA1098, 14SW(2d)81; MoA 14SW(2d) 46; MoA 18SW(2d)564; MoA 24SW(2d) 1068; MoA 27SW(2d)501; MoA 27SW (2d)1066; 73Mont407, 236P1069; 82NH 225, 131A601 (leaving out of consideration disputed question); NJSup 135A 59; 217AppDiv532, 216NYS629; 220 AppDiv582, 222NYS46; 222AppDiv413, 226NYS479; 229AppDiv437, 242NYS1; 191NC340, 132SE21; 192NC171, 134SE 406; 194NC298, 139SE440; 194NC696, 140SE730; 194NC742, 140SE733; 194 NC745, 140SE732; 197NC426, 149SE 548; 22 OhA44, 153NE919; 19 OhA284; 21 OhA486, 153NE919; 128 Okl 106, 261 P551; 38 OklACR172; 39 OklACR200; 115 Or222, 240P873; 284Pa260, 131A 181; 49RI 155, 141A180; 133SC249, 130 SE755 (limiting recovery to negligence where contracts made specific provisions not depending upon contractor's negligence); 48SD554, 205NW654; SD 226 NW341; TexCivA 274SW284; TexCivA 283SW920; TexCivA 286SW495; Tex CivA 299SW927; TexCivA 1SW(2d)688; TexCivA 1SW(2d)740; 68Utah85, 249P 437; 147Va263, 137SE465; 100WVa319, 130SE483. **Instructions held not violative of rule.**–34GaA361, 129SE554. **Instruction held not erroneous** as ignoring issue. 141SC56, 139SE182. **Instructions held not objectionable.**–126Kan736, 271P 398.

1633–11 214Ala577, 108S578; 69CalA 770, 232P491 (ignoring admissions on pleadings); 35GaA508, 133SE648; 217 Ky738, 290SW677; 147Miss843, 112S 788; MoA 27SW(2d)1052; NJ 141A 165; 217AppDiv532, 216NYS629 (contributory negligence); 128 Okl 106, 261 P551; RI 130A497; TexCivA 274SW 284; 108WVa365, 151SE326. **Where there is evidence supporting two defenses,** court in referring to them as stated in pleading should not leave upon jury impression that defendant relied solely on one of them. 34GaA276, 129SE125. **Although the evidence in support of an issue be slight,** etc. 127 Kan722, 275P150.

1633–12 35F(2d)298; 212Ala608, 103S 658; 212Ala614, 103S682; 212Ala630, 103S689; 212Ala585, 103S860; 212Ala 590, 103S894; 213Ala672, 106S147; 214 Ala204, 106S858; 214Ala364, 107S821; 214Ala561, 108S367; 216Ala111, 112S 424; 216Ala312, 113S59; 216Ala547, 114S41; 217Ala506, 116S686; 219Ala 623, 123S27; 221Ala190, 128S139; 221 Ala247, 128S233; 221Ala589, 130S213; Ala 130S401; Ala 130S416; Ala 130S 545; 20AlaA617, 104S559; 21AlaA130, 106S214; 21AlaA281, 107S716; 21AlaA 412, 109S168; 31Ariz206, 251P550; 32 Ariz463, 259P1049; 169Ark535, 275SW 921; 171Ark1127, 287SW371; 172Ark 498, 289SW474; 174Ark41, 294SW1002; 176Ark1203, 6SW(2d)4; 201Cal701, 258P596; 75CalA129, 242P97; 78CalA 617, 248P741; 89CalA653, 265P357; 93 CalA1, 268P1061; 93CalA370, 269P710; CalA 286P1097; CalA 293P126; 162Ga 457, 134SE87; 168Ga429, 148SE152; Ga 154SE891; 39GaA74, 146SE793; 45 Ida 662, 264P869; 198 Ind376, 153NE761; 85 IndA350, 151NE703; 200 Iowa1258, 206NW90 (instruction that defendant alleged to be of unsound mind might dispose of his property as he wished, omitting words "if of sound mind"); Me 151A537; 148Md188, 129A31; 149 Md86, 131A34; 153Md274, 138A235; 158Md646, 149A543 (requested prayers properly refused); 256Mass187, 152NE 305; 177Minn441, 225NW389; 315Mo 713, 290SW135; Mo 18SW(2d)401(2d case); 323Mo 64, 18SW(2d)445; 322Mo 551, 18SW(2d)481; 323Mo 799, 20SW (2d)888; 323Mo 913, 23SW(2d)142; Mo 26SW(2d)988; 219MoA405, 271SW880; MoA 274SW484; MoA 277SW50; 222 MoA490, 280SW724; 221MoA644, 283 SW705; MoA 285SW183; MoA 290SW 642; MoA 300SW1000; MoA 28SW(2d) 391; MoA 29SW(2d)726; MoA 30SW (2d)777; NH 146A641; 104NJL519, 140A408; 105NJL134, 143A366; 190 NC231, 129SE580; 194NC692, 140SE 610; NC 155SE856; 22 OhA44, 153NE 919; 24 OhA391, 156NE619; 116 Or 222, 240P873; 128 Or83, 262P939; 124 Or71, 263P66; 132 Or332, 285P823; Or 292P89; Or 293P430; 284Pa260, 131A 181; 47RI 35, 129A602; 145SC53, 142 SE828; 54SD81, 222NW598; TexCommn A 295SW577; TexCivA 290SW844; Tex CivA 290SW846; TexCivA 291SW590; 147Va263, 137SE465; 150Va442, 143SE 681; 142Wash240, 252P915; 104WVa 835, 140SE51. **Instruction properly refused.**–213Ala588, 105S672 (where it ignores question of revival). **Instructions held obnoxious to rule ignoring issues.**–213Ala672, 106S147.

1634–13 220Ala43, 124S86; 168Ark 1063, 272SW670; 196Cal308, 237P 1066; 70CalA148, 232P1010; 70CalA 624, 234P113; 103CalA703, 284P1041; 107Conn91, 139A639; 324 Ill 346, 155 NE343; 236 IllA426; 253 IllA437; Ind 168NE864; 219Ky675, 294SW165; 127 Me91, 141A321; 143Miss5, 108S181; 219MoA519, 282SW535; 222MoA490, 280SW724; MoA 285SW544; MoA 2 SW(2d)631; MoA 28SW(2d)127; 52 ND343, 202NW814 [quotCyc]; 142Va 789, 128SE268; 144Va330, 132SE320; 100WVa319, 130SE483; 105WVa505, 143SE232; 106WVa287, 145SE388(1st case); 106WVa494, 145SE817, 63ALR 271; 107WVa338, 148SE206. **Instructions held not obnoxious to rule.**–70CalA 148, 232P1010

1634–14 Mo 294SW80; 219MoA519, 282 SW535; MoA 256SW520; MoA 297SW 982; MoA 30SW(2d)1044; NJSup 130 A225; 198NC39, 150SE667.

1634–15 109Conn324, 146A735; 318 Ill 345, 149NE284; 319Mo 401, 4SW(2d) 438; MoA 9SW(2d)681. **Instructions held obnoxious to rule ignoring defenses.**–219Ala191, 121S706; 219Ala546, 122S 677; 220Ala43, 124S86; 220Ala587, 127 S148; 168Ark1063, 272SW670; 69CalA 770, 232P491 (instruction that plaintiff had not proved rule requiring motorman in case of trouble to assist conductor, such rule being admitted by failure to

deny allegation on complaint, held erroneous as withdrawing issue whether in committing assault motorman was within scope of employment); 85Colo 488, 277P469; 85Colo 491, 277P470; 160 Ga283, 127SE870; 318 Ill 345, 149NE 284; 197 Ind206, 150NE101; 86 IndA 297, 157NE106; IndA 171NE212; 208 Ky488, 271SW583; 231Ky31, 20SW(2d) 1023; MoA 256SW555; 220MoA791, 277 SW58 (in action for money lent); MoA 16SW(2d)659; NJSup 135A59; 221App Div490, 224NYS648; 22 OhA44, 153NE 919; 284Pa260, 131A181; 68Utah85, 249P437; 136Wash554, 240P913; 198 Wis163, 223NW408(2dcase). **Instructions held not obnoxious to rule.**–17F (2d)963; 38F(2d)636; 217Ala144, 115S 31; 221Ala540, 130S66; 221Ala616, 130 S318(2dcase); 169Ark1054, 278SW31; 179Ark742, 18SW(2d)345; 180Ark106, 20SW(2d)633; 70CalA624, 234P113; 81 CalA690, 254P671 (contributory negligence); 92CalA127, 267P736; 97CalA 377, 275P840; 102CalA405, 283P148; 162Ga457, 134SE87; 163Ga149, 135SE 721; 170Ga242, 152SE445; 38GaA581, 144SE680; 168Ga259, 147SE513(2d case); 41GaA62, 151SE672; 41GaA203, 152SE581(3dcase); 333 Ill 90, 164NE 224; 236 IllA426; 253 IllA190; IndA 163NE616; 209Ky12, 272SW12; 226Ky 561, 10SW(2d)1064; 156Md88, 143A651; 147Miss603, 111S578; 308Mo 31, 271SW 997; 315Mo 353, 287SW341; Mo 287SW 634; 318Mo 139, 1SW(2d)127; 318Mo 421, 1SW(2d)791; Mo 9SW(2d)159; 322 Mo 514, 17SW(2d)960; Mo 26SW(2d) 988; Mo 30SW(2d)1077; 219MoA162, 272SW108 (in action for injuries from being struck by automobile, plaintiff's instruction covering entire case and directing verdict held not erroneous as ignoring defendant's theory that plaintiff ran into automobile); MoA 272SW 704; 217MoA171, 274SW891; 217MoA 691, 275SW62; MoA 276SW1044; MoA 277SW969; MoA 285SW141; MoA 285 SW544; 220MoA419, 286SW837; MoA 288SW369; MoA 293SW500; 221MoA 1022, 298SW250; MoA 3SW(2d)740; MoA 9SW(2d)644; MoA 9SW(2d)664; MoA 17SW(2d)658; MoA 21SW(2d)195; MoA 30SW(2d)1044; MoA 31SW(2d) 117; ND 232NW897; 123 Or215, 261P 691; 296Pa389, 145A920; TexCivA 283 SW687; TexCivA 8SW(2d)561; 143Va 656, 129SE687; 152Wash122, 277P398; 100WVa154, 130SE125; 105WVa156, 141SE622. **Insurer admitting some liability on policy** is properly refused instruction that jury find for defendant if assured misrepresented age. 177Ark865, 8SW(2d)446. **Instruction that defendant was not liable if unprecedented storm caused damage** has been held erroneous for failure to state that storm must have been sole cause. 85Colo 488, 277P469; 85Colo 491, 277P470. **Instructions not erroneous.**–181Ark1145, 27SW(2d)520. **Instructions not objectionable.**–181Ark1145, 27SW(2d)520.

1636–16 70CalA148, 232P1010; 80CalA 667, 252P773; 98CalA759, 277P894; 160Ga381, 128SE187 (excerpt from charge held not to misstate defense in view charge as whole); 170Ga242, 152 SE445; Ga 155SE513; 127Kan673, 275 P181; MoA 273SW429; 220MoA575, 287 SW861; MoA 256SW1076; MoA 287 SW1061; MoA 27SW(2d)709; 132SC 212, 128SE423; 104WVa335, 140SE51. **In action against officer who acted under writ,** instruction that writ was lawfully issued is not required. TexCivA 286SW276.

1636–17 169Ga304, 150SE146; 41GaA 203, 152SE581(3dcase); 157SC320, 154 SE217.

1636–18 MoA 31SW(2d)234.

1636–20 86 IndA505, 158NE631.

1636–21 215Ala143, 110S372.

1636–22 311Mo 77, 277SW566; 316Mo 1143, 295SW751.

1636–22½–New. Separate issues.–Instruction on extreme cruelty held not erroneous because precluding consideration of question of condonation since two issues were separate. 324 Ill 207, 155NE28.

1636–22¾–New. Instructions need not anticipate every possible defense. 236 IllA426.

1636–22¼–New. Instruction summarizing plaintiff's theory and elements essential to recovery need not include defenses. 236 IllA426.

1636–22⅓–New. Instruction as to issues of fact involving common experience or understanding of average man need not be given. 222MoA153, 2SW (2d)815.

1636–22⅔–New. Rule that instructions must not restrict issues only means that instructions must not ignore essential elements of plaintiff's case nor essential elements of defense. MoA 17SW(2d)608 (3dcase).

1636–23 310Mo 227, 274SW1025, 1027 [citCyc]; 105NJL134, 143A366.

1636–24 310Mo 642, 276SW60; 316Mo 1246, 295SW89; 322Mo 158, 16SW(2d) 190; 220MoA924, 296SW452; MoA 30 SW(2d)196. **On plaintiff's abandonment of assignment of negligence** pleaded in petition, court may properly give withdrawal instruction relating to abandoned assignment, provided it does not affect assignment of negligence properly submitted to jury. 320Mo 791, 9SW(2d) 972.

1636–25 214Ala551, 108S357 (refusal of plaintiff's request for general charge as to pleas not proved, held error); 178 Ark1007, 13SW(2d)14; 88 IndA237, 157 NE111; TexCivA 7SW(2d)902; 140 Wash459, 249P977. **Express withdrawal.**–322Mo 1039, 17SW(2d)518; MoA 17 SW(2d)363. **Where plaintiff strikes one of two defendants as party,** court may properly instruct jury not to consider charges of petition against such party though petition was not amended. 40 GaA336, 149SE435 (instruction held not objectionable as authorizing jury to disregard admissions in petition). **Refusal of instructions withdrawing unsupported allegations** is erroneous. MoA 26SW(2d)823.

1636–26 324 Ill 207, 155NE28; 315Mo 713, 290SW135; 82NH350, 134A574.

1636–27 107Conn126, 139A511; 320Mo 536, 9SW(2d)632; Mo 29SW(2d)76; MoA 300SW1028; MoA 26SW(2d)823; 149Wash638, 272P36. But see 156SC 370, 153SE342. **Instruction withdrawing issue** not objectionable for failure to withdraw evidence relating to another issue. 86 IndA201, 156NE574.

1637–29 37GaA254, 139SE573; 153Md 264, 138A1; MoA 294SW758; MoA 22 SW(2d)887.

1637–30 34F(2d)616.

1637–31½–New. Omission to charge on immaterial issue is not erroneous. 233 Ky763, 26SW(2d)753.

1637–33 215Ky114, 284SW1015; 317Mo 181, 296SW755; TexCivA 18SW(2d)693; TexCivA 19SW(2d)98. **It is error to refuse to give instruction covering defense** to sustain which testimony has been offered. 136 Okl 177, 276P747.

1637–39 Mo 289SW591 [quotCyc].

1638–41 285Pa251, 132A120, 122 [quot Cyc].

1638–42 285Pa251, 132A120, 122 [quot Cyc].

1638–43 217Ky43, 288SW1020; Mo 31 SW(2d)1065.

1638–44 168Ark884, 271SW967.

1639–49 200 Iowa705, 205NW351.

1640–61 165Ga437, 141SE201; 220Ky 454, 295SW455; MoA 14SW(2d)664; 217AppDiv532, 216NYS629 (contributory negligence); 128 Okl 106, 261P551; 38 OklACR648; TexCommnA 12SW(2d) 1009.

1640–62 166Ga683, 144SE258; 202 Iowa791, 211NW405; 147Miss603, 111 S578. **Failure to charge on jurisdictional fact,** which is not contested, is not reversible error. 39 OklACR378.

1640–63 202 Iowa791, 211NW405.

1640–65 202 Iowa791, 211NW405.

1640–67 202 Iowa791, 211NW405.

1640–70 215Ky114, 284SW1015.

1641–80½–New. Where case is submitted on special issues, it is improper to request general instructions further than necessary to explain legal terms to enable jury to pass upon such special issues. TexCommnA 288SW169.

1641–80⅓–New. Rule that court is required to submit correct instructions upon its attention being called thereto applies only in case of omission in court's charge and not to submission of special issues. TexCommnA 288SW169.

1641–82 25F(2d)240; 42F(2d)611; 103 Conn267, 130A571; 108Conn115, 142A 812; 109Conn87, 145A659; 161Ga55, 129SE769; 321Mo 168, 9SW(2d)960; NJ Sup 137A842.

1643–89½–New. Charge on presumption that all available evidence was presented held not objectionable. NH 151 A457.

1643–90 108Conn115, 142A812.

1643–92 But see 103NJL383, 135A894.

1643–95 103NJL383, 135A894.

1644–2 108Conn115, 142A812; 110 Conn358, 148A371.

1644–6 Jury not bound because judge said he had no recollection of any testimony on certain point. 288Pa114, 135 A541.

1645–8 50RI 455, 149A19.

1645–9 Comment held not unfair.–110 Conn230, 147A671(2dcase).

1645–10 Illustrations.–294Pa425, 144A 416.

1645–10½–New. Charge regarding presumption that each side had produced all available evidence favorable to it held not to evidence prejudice of judge. NH 151A457.

1646–12 15F(2d)660; 31F(2d)961; 214 Ala396, 108S26; 215Ala688, 112S239; 216Ala73, 112S437; 217Ala124, 115S13; 218Ala609, 119S647; 218Ala603, 119S 841; 219Ala136, 121S399; 219Ala238, 121S722; 219Ala265, 122S29; 219Ala 291, 122S173; 219Ala340, 122S354; 219 Ala427, 122S416, 65ALR1097; 220Ala 328, 124S892; AlaA 114S177; AlaA 129 S799; 34Ariz458, 272P647; 169Ark192, 273SW1028; 171Ark505, 284SW743; 177 Ark899, 8SW(2d)468; 203Cal 116, 263 P220; 77CalA462, 247P236; 85CalA419, 259P496; 86CalA136, 260P588; 90CalA 249, 265P839; 107Conn670, 142A461; 170Gal, 152SE65; 170Ga530, 153SE 415; 35GaA767, 134SE831 (charge held on weight of evidence); 35GaA763, 134 SE833; 39GaA217, 146SE795; 47 Ida 542, 277P554(2dcase); 339 Ill 426, 171 NE514; 237 IllA309; 256 IllA425; 85 IndA510, 154NE508; 206 Iowa753, 221 NW508; 227Ky369, 13SW(2d)271; 262 Mass22, 159NE449; Mo 276SW387; Mo 284SW141; 317 Mo 141, 296SW428; 319 Mo 1015, 5SW(2d)59; MoA 274SW1102; 222MoA455, 281SW54; 221MoA585, 283 SW464; 221MoA644, 283SW705; MoA 297SW175; MoA 16SW(2d)730; MoA 16SW(2d)749; 82NH253, 132A682; NJ 1s0A371; 191NC378, 131SE743; 193NC 775, 138SE129; 25 OhA89, 157NE402; 143 Okl 260, 288P483; 133SC458, 131SE 620; 134SC412, 132SE811; 150SC459, 148SE478; TexCivA 285SW634; Tex CivA 278SW270 (instruction held not charge on weight of evidence); TexCivA 286SW1116; TexCivA 12SW(2d)1102; TexCivA 13SW(2d)144; TexCivA 18SW (2d)829; TexCivA 28SW(2d)902; 102 WVa386, 135SE274; 106WVa672, 146 SE726, 63ALR101. **Instruction suggesting that jury return certain verdict** is error unless directed verdict is proper. 143 Okl 260, 288P483. **Charge held not objectionable.**–Ark 32SW(2d)162.

1647–13 214Ala561, 108S367; 214Ala 633, 108S595; 219Ala427, 122S416, 65 ALR1097; 220Ala107, 124S231; 220Ala 125, 124S286; 220Ala130, 124S300 (invasive of jury's province); 221Ala626, 130S391; 33Ariz474, 266P3; 173Ark 1181, 291SW419; 173Ark937, 294SW 353; 77CalA462, 247P236; 109Conn484, 147A18; Del 143A27; 265Mass189, 163 NE906; 218MoA679, 267SW70; 219MoA 112, 268SW675; 219MoA162, 272SW 108; 220MoA542, 287SW865; MoA 294SW747; MoA 19SW(2d)295; 82 NH253, 132A682; NJSup 146A786 (2dcase) (no legal proposition presented leaving fact question to be found by court); 190NC617, 130SE306; 195 NC328, 142SE27; 25 OhA89, 157NE402; 19 OhA94; 32 OhA451, 168NE230; 128 Okl 96, 261P211; 36 OklACR467; 135 SC89, 133SE215, 45ALR1172; 138SC241, 136SE234; 145SC53, 142SE828; 151SC 309, 149SE14; TexCommnA 276SW900; TexCivA 275SW423; TexCivA 283SW 912; TexCivA 289SW152; TexCivA 290 SW844; TexCivA 20SW(2d)396; Tex CivA 26SW(2d)718; 148Va762, 139SE 483. See also 213Ala617, 105S805; 143 Va36, 129SE239. **Instructions invading province of jury** held properly refused. 21Ala51, 105S716. **Instructions held**

properly refused.–Ala 128S145; 221Ala 273, 128S228.

1647–14 TexCommnA 295SW577.

1647–15 TexCivA 10SW(2d)597.

1647–17 102CalA405, 283P148; IndA 169NE352; Mass 168NE802(2dcase); MoA 218W(2d)195; MoA 22SW(2d)185; 153SC179, 150SE683; 153SC371, 150SE 900.

1647–20 198NC771, 153SE457; 133SC 458, 131SE620.

1647–22 30Ariz491, 249P66; 203Cal 116, 263P220; 158Md544, 149A290; 133 SC458, 131SE620. In Maine, etc. 125 Me44, 130A737.

1648–24 161Ga55, 129SE769.

1648–27 180Ark729, 22SW(2d)1007; 312Mo 458, 278SW759; 314Mo 305, 284 SW488; 221AppDiv376, 222NYS737; 191NC378, 131SE743; 133SC458, 131SE 620; TexCommnA 295SW577; TexCivA 289SW152; TexCivA 299SW653.

1649–31 214Ala396, 108S26; 219Ala238, 121S722; 220Ala127, 124S294 (instruction properly refused); 220Ala645, 127 S213; Ala 130S786; Mo 29SW(2d)76.

1649–32 181Ark925, 29SW(2d)676 (violation of traffic law as evidence of negligence); 42 Ida522, 247P740; 319Mo 233, 3SW(2d)371; Mo 4SW(2d)426; 196NC 649, 146SE571; 151SC309, 149SE14 (instruction properly refused). Instructions held erroneous.–224 IllA468.

1649–34 237 IllA309.

1649–35 That proof of delivery of auto and nonreturn constitutes prima facie case of theft is erroneous. 177Ark899, 8SW(2d)468.

1649–36 Positive and negative evidence. –74CalA10, 239P429.

1649–42 216Ala1, 110S283.

1649–43 314Mo305, 284SW488.

1649–47 241 IllA124.

1650–49 35GaA763, 134SE333 (whether or not plaintiff was permanently disabled); 202 Iowa1251, 211NW898 (that contract claimed by plaintiff was made in name of defendant alone).

1650–50 34 OhA244, 170NE661.

1650–51 15F(2d)660; 212Ala602, 103 S586; 213Ala494, 106S150; 82NH253, 132A682; 193NC775, 138SE129.

1650–52 213Ala494, 106S150.

1650–54 212Ala602, 103S586; 78CalA 617, 248P741; 158Md424, 149A4; 322 Mo787, 16SW(2d)85.

1650–56 135SC89, 133SE215, 45ALR 1172.

1650–60 41F(2d)508; 41F(2d)511.

1650–61 35GaA528, 134SE126; 219Ky 595, 294SW135; 141 Okl 256, 284P866; TexCommnA 12SW(2d)552; TexCivA 295SW283.

1651–62 Ark 31SW(2d)947.

1651–63 Ala 130S786.

1651–68 35GaA763, 134SE333 (damages for injury by motor car); MoA 277SW 368; 102WVa386, 135SE274; 199Wis 24, 225NW195, 63ALR886. Amount of interest calculated by court.–Mo 282SW 414.

1651–78½–New. Other illustrations of instructions on weight of evidence.–Ala 130S552; 23AlaA258, 123S275(2dcase) (charge that physical injury may be produced by mental emotion invades jury's province); 169Ark192, 273SW 1028; 87Colo 369, 287P866; 163Ga774, 136SE901; 169Ga246, 149SE876; 40GaA 397, 149SE814; 202 Iowa1251, 211NW 898 (that it is conceded that contract was one for quitclaim deed to certain land); 213Ky540, 281SW510; 219Ky 839, 294SW472; 315Mo 1025, 288SW 59; 218MoA679, 267SW70; 240NY144, 147NE616; 25 OhA89, 157NE402; 32 OhA301, 168NE52; 292Pa537, 141A496; 151SC433, 149SE226; TexCivA 272SW 340; TexCivA 272SW597; TexCivA 275 SW410; TexCivA 281SW331; TexCivA 291SW343; TexCivA 291SW590; Tex CivA 20SW(2d)141; 101Vt111, 141A593, 63ALR396; 136Wash410, 240P355; 105 WVa321, 142SE430; 105WVa341, 142 SE436.

1651–78½–New. Charge that photographs "cannot exaggerate" has been held error. 126Misc372, 213NYS601.

1651–78¼–New. Charge as to right of truck to travel over pavement covered with ice held properly refused. 25 OhA 89, 157NE402.

1651–78½–New. Other instructions held properly excluded as commenting on evidence.–Mo 23SW(2d)1053.

1651–78½–New. Other instructions held erroneous as invading province of jury.–Mo 23SW(2d)1034.

1651–80 167Ga54, 145SE45; 40GaA4, 148SE757 (remark that probative value of certain evidence is for jury).

1651–81 144SC437, 142SE722.

1651–83 83CalA508, 257P114; 163Ga 87, 135SE433; 166Ga850, 144SE665; 170Ga495, 153SE37; GaA 155SE500; 83 IndA500, 149NE137; 311Mo 92, 277 SW908; 323Mo 929, 20SW(2d)34; MoA 26SW(2d)869; 139SC299, 137SE734; TexCivA 290SW844; TexCivA 292SW 966. See also TexCivA 286SW495.

1651–83½–New. or in effect that verdict should be for defendant; Mo 23SW (2d)1053.

1652–84 218Ala453, 118S807; 152Va 411, 147SE251. See also 321Mo 887, 13 SW(2d)648.

1652–84½–New. that there is no dispute as to certain facts, when statement is correct, 232Mich25, 204NW701.

1652–86 215Ala282, 110S399; 70CalA 415, 233P366; MoA 14SW(2d)664; 136 Okl 271, 277P591; 152Va411, 147SE251. Expression of opinion as to fact established by evidence without dispute is not error. 35GaA59, 132SE399.

1652–88 167Ga54, 145SE45.

1652–93 TexCommnA 283SW777 (due care as to stopping street car to allow passengers to alight).

1652–98 116 Or210, 240P877.

1652–99 218Ala489, 119S13; 200Cal 299, 252P1049. See also Iowa 231NW 323.

1652–2 212Ala590, 103S894; 177Ark 1193, 8SW(2d)471; 168Ga650, 148SE 585; 41GaA115, 151SE834; 40GaA78, 149SE60 (particularly where court clearly instructed that it did not mean to intimate or insinuate as to which party should prevail); 190NC468, 132SE151; TexCivA 1SW(2d)760.

1652–3 221Ala190, 128S139; Ark 294 SW707; TexCivA 5SW(2d)170.

1652–4 CalA 291P884; Mo 24SW(2d) 116; 218MoA138, 262SW403 (instruction as to duty of electric company as to insulation of wires held not erroneous as directing verdict); TexCivA 287SW81.

1652–5 CalA 286P1091; 166Ga713, 144 SE262; 136SC34, 134SE220; 150SC130, 147SE834; TexCivA 286SW495 (instruction held not based on false hypothesis).

1652–6 214Ala282, 107S801; 41GaA 721, 154SE386; Mo 31SW(2d)1014; 119 Or691, 250P1101; TexCivA 286SW495; 140Wash693, 250P351.

1652–7 AlaA 129S799; 310Mo 184, 274 SW827 (comment on uncontroverted evidence held not prejudicial); 101NJL 561, 134A896 (charge pointing out material and uncontradicted fact held no error); 134SC435, 132SE828; 136SC 423, 134SE390 (fact which court judicially notices); TexCivA 19SW(2d)930.

1653–8 Mo 9SW(2d)159; MoA 30SW (2d)196.

1653–9 176Ark879, 4SW(2d)536; 83 CalA508, 257P114; 138SC318, 136SE 297 (charge that husband's insolvency was immaterial in wife's action against him on note held not erroneous as change on facts); 138SC318, 136SE297.

1653–11 104Conn121, 132A399; 256 Mass10, 152NE97; MoA 23SW(2d)209; 47RI 378, 133A618; TexCivA 22SW(2d) 1080. Instruction held not misleading as comment on evidence. Wash 287P 206.

1653–11½–New. Other illustrations of instructions not on weight of evidence.– 31Ariz239, 251P891; 33Ariz474, 266P3; 170Ark842, 281SW910; 173Ark937, 294 SW353; 178Ark241, 10SW(2d)377; Cal 290P22; 195Cal 655, 235P438; 75CalA 462, 242P1075; 78CalA353, 248P737; 81CalA690, 254P671; 88CalA354, 263P 578; 90CalA144, 265P558; 97CalA452, 275P1005; 98CalA257, 276P1071; 161 Ga413, 131SE159; 162Ga413, 134SE76; 162Ga457, 134SE37; 162Ga664, 135SE 195; 163Ga295, 136SE58; 166Ga176, 142SE667; 35GaA202, 133SE42; 36GaA 33, 134SE820; 37GaA254, 139SE573; 37GaA265, 139SE825; 40GaA4, 148SE 757; 40GaA99, 148SE772; 41GaA178, 152SE293; 41GaA205, 152SE298; 41GaA 746, 154SE706; GaA 155SE356(2dcase); 207 Iowa862, 224NW28; 207 Iowa1278, 224NW815; 125Me44, 130A737; 267 Mass501, 167NE235; 310Mo 1, 274SW 1079; 318Mo 318, 300SW283; 322Mo 11, 16SW(2d)212; Mo 19SW(2d)1033; Mo 26SW(2d)957 (defining ordinary care); 219MoA121, 272SW79; 217MoA613, 274 SW969; 220MoA429, 276SW96; MoA 279SW438; 221MoA727, 285SW772; 221MoA691, 288SW977; 221MoA160, 290SW78; MoA 5SW(2d)709; 222MoA 1003, 7SW(2d)470; MoA 13SW(2d)560; MoA 17SW(2d)658; MoA 18SW(2d) 137; MoA 19SW(2d)505 (directing jury law to calculate interest, where amount of principal undisputed); MoA 19SW(2d)902; MoA 20SW(2d)570; MoA 25SW(2d)499; MoA 27SW(2d)448; 34NM146, 278P361; 197NC545, 149SE 852 (referring to document as "the will" in will contest); 57ND864, 224 NW313; OhA 173NE16; 119 Or682, 250 P1098; 133 Or663, 288P1003; 296Pa 568, 146A153; 132SC212, 128SE423; 143SC386, 141SE602; 144SC437, 142SE 722; 145SC196, 143SE31; 150SC29, 147 SE625; 151SC366, 149SE119 (not constituting charge on facts); 151SC417, 149SE162; TexCivA 293SW842 (stating terms of original contract in action thereon); TexCivA 1SW(2d)490; 150 Wash157, 272P723, 63ALR200; 150 Wash459, 273P178.

1653–11½–New. Instruction is not open to objection that it indicates opinion of judge, because it restricts jury only to disputed question in case. 232Mich 25, 204NW701.

1653–11¼–New. Instructions enumerating ultimate facts necessary to be found before verdict can be rendered for part is not improper. 219MoA121, 272SW 79.

1653–11½–New. Instruction that testimony of witness by deposition is legal evidence to be given same consideration as other testimony is not instruction to effect of evidence. 213Ala631, 105S886.

1653–11½–New. Using masculine pronouns is not objectionable in referring to witnesses, though some were females. 318 Ill 445, 149NE507.

1653–11½–New. It is not error to give instruction explaining municipal ordinance. 217Ala144, 115S31.

1653–11½–New. Defining words necessary for determination of issues is not error. TexCivA 2SW(2d)939.

1653–11½–New. Reciting what facts constitute nuisance, when those facts are in evidence, is not instruction on weight of evidence. TexCivA 26SW(2d) 327.

1653–12 Contra 105Conn482, 136A95; 220MoA175, 282SW515.

1653–14 311Mo 92, 277SW908.

1653–18 But see 133 Or160, 289P1073.

1654–19 298Pa313, 148A300.

1654–20 88CalA740, 264P270; 267Mass 501, 167NE235.

1654–21 125Me44, 130A737.

1654–22 In North Carolina.–191NC690, 132SE788.

1654–24 49RI 3, 139A500.

1655–26 153SC179, 150SE683. Court's statement in charge that issues were simple and counsel so thoroughly presented claims review unnecessary is not erroneous. 111Conn313, 149A782.

1655–27 249Mich127, 227NW707.

1655–28 111Conn253, 149A673; 82NH 94, 129A882. Court should state evidence plainly and correctly and explain law applicable to facts. 98NC771, 153 SE457.

1655–29 82NH94, 129A882.

1656–37 247Mich164, 225NW566; 82 NH94, 129A882; 48RI 79, 135A481.

1656–39 82NH94, 129A882.

1656–41 NJSup 135A335.

1657–47 20F(2d)19; 214Ala297, 107S 849; 216Ala663, 114S182; 217Ala30, 114 S412; 22AlaA218, 114S284; Ala 130S 807; 30Ariz491, 249P66; 173Ark472, 292SW663; Cal 292P966; 77CalA709, 247P597; 33GaA733, 127SE898; 35GaA 57, 132SE103; 37GaA716, 141SE513; 245 IllA248; 202 Iowa791, 211NW405; 206 Iowa753, 221NW508; Iowa 230NW 314; 217Ky738, 290SW677; 218Ky412, 291SW405; 153Md119, 137A484; Md 150A856; 146Miss565, 111S571; 314Mo

305, 284SW488; Mo 284SW141; Mo 24 SW(2d)154; MoA 273SW429; 218MoA 314, 274SW90 (on measure of damages); MoA 279SW205; 221MoA1089, 295SW501; MoA 1SW(2d)205; MoA 2 SW(2d)631; MoA 8SW(2d)81; 115Nebr 1, 211NW190, 56ALR1403; 115Nebr490, 213NW515; Nebr 229NW771; 194NC 679, 140SE608; 54ND845, 211NW436; 21 OhA486, 152NE223; 15 OhA484; 22 OhA330, 154NE527; 117 Okl 30, 245P 611; 116 Or222, 240P873; 49SD563, 207 NW539; TexCivA 282SW954; TexCivA 296SW683; 100WVa159, 130SE127; 103 WVa514, 138SE93.

1657-48 222Ky332, 300SW861.

1657-51 TexCivA 1SW(2d)688.

1657-52 77CalA727, 247P597; 217Ky 292, 289SW247; 146Miss565, 111S571; TexCivA 300SW949; TexCivA 2SW(2d) 495.

1657-53 20F(2d)19; 36F(2d)943; 39 F(2d)900; 213Ala672, 106S147; 214Ala 122, 106S800; 214Ala639, 108S620; 215 Ala402, 110S705; 215Ala407, 110S818; 216Ala472, 113S529; 218Ala619, 119S 833; 219Ala623, 123S27; 220Ala107, 124 S231; 220Ala284, 124S868; 31Ariz206, 251P550; 175Ark487, 299SW750; 74 CalA10, 239P429; 78CalA617, 248P741; 95CalA131, 272P299; 104Conn83, 132A 467; 37GaA310, 140SE46; 87 Ind693, 166NE677(1stcase); 227Ky203, 12SW (2d)287; 228Ky473, 15SW(2d)265; 148 Md140, 129A7; 148Md188, 129A31; 148 Md628, 129A915; 150Md494, 133A458; 153Md119, 137A484; 156Md329, 144A 363; Md 149A562; 256Mass478, 153NE 8; 262Mass22, 159NE449; 177Minn270, 224NW839; 146Miss440, 111S562; 147 Miss843, 112S788; 219MoA112, 268SW 675; 220MoA686, 293SW517; 221MoA 535, 283SW464; MoA 299SW80; 222 MoA740, 9SW(2d)824; MoA 16SW(2d) 749; 76Mont288, 246P536; NJ 147A 445; NJSup 146A344; NJSup 147A336 (assuming lawfulness of possession of premises); 243NY34, 152NE456; 22 OhA330, 154NE527; 31 OhA340, 167NE 469; 116 Or222, 240P873; 128 Or609, 275P603; TexCommnA 285SW607; Tex CivA 274SW185; TexCivA 288SW276; TexCivA 296SW683; TexCivA 1SW(2d) 661; TexCivA 13SW(2d)944; 149Va 235, 141SE260; 152Va453, 147SE265; 103WVa514, 138SE93.

1659-54 20F(2d)19; 215Ala363, 110S 801; 217Ala30, 114S412; 21AlaA609, 110S561; 22AlaA605, 118S498; 77CalA 709, 247P597; CalA 285P369; 106Conn 302, 138A147; 107Conn670, 142A461; 170Ga530, 153SE415; 235 IllA440; 199 Iowa1375, 203NW796; 200 Iowa1063, 205NW979; 230Ky194, 18SW(2d)1006 (that illegally pleaded and stricken defense was established); 314Mo 305, 284 SW488; 318Mo 50, 298SW827; 320Mo 598, 8SW(2d)924; Mo 25SW(2d)96; MoA 274SW876; 222MoA455, 281SW54; MoA 281SW450; 221MoA585, 283SW 464; MoA 287SW783; MoA 8SW(2d) 81; 222MoA740, 9SW(2d)824; 115Nebr 490, 213NW515; 243NY34, 152NE456; 198NC640, 152SE894; 54ND845, 211NW 436; 144 Okl 18, 288P1072; TexCivA 2 SW(2d)312; TexCivA 27SW(2d)331.

1661-56 See also 116Nebr553, 218NW 397, 59ALR728. But see 37F(2d)666; Iowa 213NW442; 316Mo 1196, 295SW 98.

1661-59 314Mo 305, 284SW488 (that evidence for either party is true).

1661-60 261Mass26, 158NE341.

1661-62 221Ala652, 130S396; 161Ga 711, 132SE547; 202 Iowa1251, 211NW 898.

1661-63 219MoA112, 268SW675.

1661-65½-New. validity of mortgage; 21AlaA609, 110S561.

1661-65¾-New. the existence of a certain trust company; 115Nebr490, 213NW515.

1661-66 219Ala298, 122S41; 78CalA 617, 248P741; 107Conn670, 142A461; 37GaA310, 140SE46; 116Nebr553, 218 NW397; TexCommnA 12SW(2d)552. **Instructions erroneous for assuming negligence.**–156Miss758, 126S836; Tex CivA 26SW(2d)722.

1661-67 MoA 19SW(2d)902 (instruction not objectionable as assuming proof of negligence); MoA 22SW(2d) 897; TexCivA 15SW(2d)1098.

1661-68 20F(2d)19; Mo 24SW(2d) 143.

1661-69 103CalA531, 284P1086; 153 Md119, 137A484; 141 Okl 108, 283P 999.

1661-69½-New. that method of work ordered by employer was not reasonably safe; MoA 296SW446.

1662-70 TexCommnA 285SW607.

1662-71 MoA 29SW(2d)197 (instruction held not to assume perilous position).

1662-76½-New. that issue of servant's authority was not controverted; MoA 294SW114.

1662-99½-New. that plaintiff was in possession of land and had never been dispossessed; 54ND845, 211NW436.

1662-7 194NC745, 140SE732. **Other applications of rule.**–316 Ill 513, 147NE 419.

1663-8 254 IllA192.

1663-9½-New. failure to limit punitive damages to circumstances of aggravation or malice; 215Ala363, 110S 801.

1663-21½-New. Other applications of rule.–215Ala407, 110S818; 37GaA716, 141SE513; 220MoA497, 274SW517; 222 MoA417, 7SW(2d)307.

1663-21½-New. Question of intent in case of alleged gift should not be withheld from jury. 191NC493, 132SE282.

1663-21¼-New. Held error to assume release of insane patient due to plaintiff's efforts. 48RI 79, 135A481.

1663-21⅛-New. That, in an action on an accident policy, injury was sustained. 217Ala282, 116S164.

1663-21⅛-New. ; that testator's name was on paper when it was subscribed by attesting witnesses. 219Ala265, 122 S29.

1663-22 22AlaA629, 118S680; 200Cal 628, 254P256 (damages "necessarily" resulting); 163Ga169, 135SE731; 209 Ky37, 272SW56; MoA 281SW71. **Instructions held not erroneous.**–MoA 290 SW638.

1663-23 Mo 31SW(2d)1014.

1663-24 212Ala608, 103S658; 176Ark 966, 4SW(2d)926; 154Md55, 139A548; 252Mass552, 148NE105; 220MoA525, 259SW811; MoA 280SW444; MoA 30 SW(2d)784; 141SC56, 139SE182. See also 321Mo 887, 13SW(2d)648.

1663-27 76Mont288, 246P536.

1663-28 216Ala26, 112S307; 317 Ill 561, 148NE293; Mo 26SW(2d)957; Mo 31SW(2d)770; 219MoA405, 271SW880; 219MoA234, 271SW1023; MoA 273SW 429; MoA 25SW(2d)491; MoA 20SW (2d)570; MoA 25SW(2d)499; MoA 27 SW(2d)709. **Instructions held not erroneous.**–MoA 25SW(2d)499. **Phrase "if you so find"** placed in instruction after recital of facts is not objectionable as assuming facts recited preceding such phrase. MoA 25SW(2d)491.

1664-29 MoA 24SW(2d)200.

1664-31 218MoA31, 260SW490.

1664-32 8F(2d)731.

1664-33 MoA 30SW(2d)196.

1664-34 174Ark463, 295SW727; MoA 30SW(2d)196.

1664-35 Instruction that plaintiff is guilty of contributory negligence if she permits self to be driven against street car is not erroneous for assuming negligence. MoA 26SW(2d)851.

1664-38 40GaA332, 149SE532 (instruction on computation of damages for permanent injury does not assume permanent injury); 319Mo 432, 3SW(2d) 1004.

1664-40 33GaA778, 127SE821; 323 Ill 498, 154NE226.

1664-42 97CalA377, 275P840.

1665-45½-New. that every pedestrian, walking or standing in public highway, has right to presume that all persons know law and will obey it; 68CalA326, 229P351.

1665-50 Mo 31SW(2d)1014.

1666-70 204Cal 4, 266P273.

1666-70½-New. Instruction held not to assume defendant railroad was negligent in crossing accident. 311Mo 92, 277SW908.

1666-70¾-New. Instructions held not to assume that railroad engine was operated at unreasonable speed. 311Mo 92, 277SW908.

1666-83 Instructions held not to assume material facts.–68CalA326, 229P 348; 68CalA334, 229P351; 75CalA129, 242P97; 161Ga55, 129SE769; Mo 282SW 441; 317Mo 1010, 297SW50; 317Mo 1061, 297SW968, 54ALR644. **For other decisions,** etc. 168Ark330, 270SW956; 86CalA474, 260P957; 92CalA127, 267 P736; 93CalA601, 269P972; 97CalA 87, 275P456; CalA 293P129; 160Ga 287, 127SE762; 33GaA778, 127SE821; 40GaA633, 151SE42; Iowa 230NW401; 130Kan565, 287P255; 217Ky491, 290 SW333; 231Ky211, 21SW(2d)272; Miss 130S151; 314Mo 438, 284SW471; Mo 287SW634; 319Mo 1169, 8SW(2d) 580; Mo 12SW(2d)433; 321Mo 840, 12 SW(2d)747; MoA 14SW(2d)453; 322 Mo 813, 18SW(2d)467; Mo 31SW(2d) 770; MoA 32SW(2d)100; MoA 32SW (2d)296; MoA 285SW516; MoA 288SW 869; MoA 294SW439; 221MoA1022, 298SW250; MoA 9SW(2d)644; MoA 10SW(2d)327; MoA 19SW(2d)902; MoA 21SW(2d)932; MoA 22SW(2d)73; 137 Okl 153, 278P632; 141 Okl 108, 283 P999; 147SC58, 144SE579; TexCivA 8 SW(2d)527; Utah 283P160. **Other instructions held not erroneous as assuming facts in issue.**–80CalA444, 251 P952; 86CalA595, 261P481; 89CalA 477, 265P268; 98CalA759, 277P894; 101CalA426, 281P723 (contributory negligence held not assumed); IndA 167NE721; IndA 168NE34(2dcase); 154Miss475, 122S735; 310Mo 1, 274SW 1079; 219MoA81, 268SW645; 220MoA 429, 276SW96; 221MoA181, 299SW 150; MoA 1SW(2d)247; MoA 15SW (2d)363; MoA 17SW(2d)608(3dcase); MoA 17SW(2d)658; MoA 20SW(2d) 971; NJSup 145A238; 197NC429, 149 SE399; ND 230NW6; Mo 30SW(2d) 1065.

1667-85 215Ala489, 111S210; 32Ariz 381, 259P397; 173Ark769, 293SW1030; 173Ark1181, 295SW23; 174Ark463, 295 SW727; 176Ark341, 2SW(2d)1113; 85 CalA535, 259P958; 106Conn447, 138A 365; 106Conn677, 138A788; 33GaA702, 127SE808; 35GaA83, 132SE138; 37GaA 218, 139SE581; GaA 155SE500; 338 Ill 347, 170NE295; IndA 163NE240; 202 Iowa1338, 212NW154; 222Ky332, 300SW861; 228Ky201, 14SW(2d)755; 232Ky702, 23SW(2d)564; 230Ky157, 18 SW(2d)983; 158Md525, 149A275; 155 Miss893, 125S552; 208Mo 513, 273SW 401; 310Mo 184, 274SW827; 316Mo 1246, 295SW89; 317Mo 1061, 297SW 968, 54ALR644; MoA 271SW1005; 219MoA121, 272SW79; 218MoA433, 277 SW62; MoA 256SW531; MoA 271SW 1005; MoA 279SW205; 222MoA483, 280SW720; 222MoA483, 280SW720; MoA 282SW507; MoA 287SW783; MoA 290SW616; MoA 295SW509; MoA 18 SW(2d)552; MoA 22SW(2d)73; MoA 22SW(2d)215; MoA 30SW(2d)196; NJ 130A448; 50ND455, 196NW307; 119 Okl 87, 248P585; 284Pa267, 131A260; RI 147A751; 136SC423, 134SE390; 149 SC303, 147SE333; TexCivA 283SW 1104; TexCivA 294SW900; TexCivA 12SW(2d)811; TexCivA 26SW(2d)327; TexCivA 26SW(2d)732; TexCivA 28 SW(2d)622. See also Miss 129S599. **Court may omit all references to facts which are undisputed.** MoA 18SW(2d) 552. **Court may instruct jury in accordance with undisputed evidence** showing liability, leaving only to jury the amount of liability. ND 231NW604.

1669-88 TexCivA 294SW900.

1669-89 37GaA218, 139SE581; TexCivA 294SW900.

1669-92 MoA 30SW(2d)196.

1669-95 But see 190NC244, 129SE623.

1670-96 Where undisputed evidence demonstrates the falsity of certain testimony court may instruct jury to disregard it. 97PaSuper344.

1670-2 173Ark1181, 295SW23.

1670-3 215Ala489, 111S210; 202 Iowa 1338, 212NW154; 172Minn574, 216NW 237; 315Mo 400, 286SW74; MoA 16 SW(2d)678; 27 OhA13, 160NE640; 48 SD554, 205NW654; TexCivA 293SW 835.

1670-4 106Conn677, 138A788; IndA 163NE240; MoA 282SW507; 52ND 439, 203NW192; 140Wash693, 250P351.

1670-5 29Ariz112, 239P792; 200 Iowa

1094, 205NW966; 315Mo 400, 286SW 74; 217MoA171, 274SW891. But see 315Mo 883, 289SW540.

1671-12 219Ky106, 292SW762; 171 Minn516, 213NW537; 222MoA973, 6 SW(2d)664; 115Nebr490, 213NW515; 117 Okl 30, 245P611; 132 Or115, 284P 565. **Instructions held not violative of rule.**–MoA 17SW(2d)621.

1671-13 255Mass285, 151NE302; 191NC 493, 132SE282.

1671-14 77Colo 289, 236P777.

1671-15 255Mass285, 151NE302; 191 NC493, 132SE282.

1671-18 202 Iowa1338, 212NW154.

1671-19 202 Iowa1338, 212NW154; 197 NC215, 148SE175.

1672-24 217Ala46, 114S465; 314Mo 305, 284SW488 (instruction minimizing evidence).

1672-27 78CalA526, 248P930; Iowa 213NW442; 261Mass26, 158NE341.

1672-30 NJ 130A448.

1672-32 Mass 170NE836; 148Va413, 139SE254.

1672-33 36F(2d)917; 217Ala46, 114S 465; 314Mo 305, 284SW488. **Instruction that jury should "reckon" solely with evidence is not erroneous.** Mo 289 SW591.

1673-34 319Mo 573, 5SW(2d)33.

1673-35 32Ariz381, 259P397.

1673-36 But see TexCivA 28SW(2d) 902.

1673-40 170Minn250, 212NW413.

1673-41 RI 131A200. **Instructions held not erroneous.**–161Ga615, 131SE 535.

1673-42 170Minn250, 212NW413; 219 MoA222, 269SW942; 219MoA162, 272 SW108.

1674-53 Instruction in negligence case held not expression of opinion.–157SC 174, 154SE118.

1674-61½-New. In action for trespass, to stigmatize defendant's act as "trespass" is improper. 219MoA90, 266SW 492.

1674-61½-New. Court may not express opinion on any branch of case, including that of damages, 25 OhA89, 157NE 402.

1674-61¼-New. and requested charge, that court's giving of instruction on damages does not mean court is of opinion that plaintiff should recover, is properly refused. 25 OhA89, 157NE402.

1674-61½-New. Comments on evidence may be made by judge so long as he leaves jury to determine facts and draw their own conclusions therefrom. 102 NJL374, 131A886.

1674-61½-New. Statement by court to attorneys of reasons for rulings upon objections to admission of testimony is not comment on evidence. 143Wash127, 254P1086.

1674-61½-New. Statement by court that he doubted that anyone knew cause of certain fact is not unlawful comment on testimony of witness who stated he did not know cause. 143Wash127, 254 P1086.

1674-61½-New. Argumentative comment against appellant on effect of his calling witness who was not permitted to testify is prejudicial error. 171Minn516, 213NW537.

1674-61½-New. Charge that acts of negligence were stated in petition, is not opinion of their negligence. 41GaA98, 152SE485(2dcase).

1674-63 215Ala368, 110S700; 215Ala 612, 111S901; 176Ark690, 3SW(2d)996; 318 Ill 445, 149NE507; 324 Ill 339, 155 NE284; 339 Ill 276, 171NE271; 203 Iowa721, 211NW430; 153Md221, 138A 25; MoA 273SW741; 220AppDiv582, 222NYS46; 126 Okl 157, 259P242, 55 ALR1014; 131 Or694, 284P280 (statute as defense); 115Tex263, 280SW532; TexCommnA 280SW557; TexCivA 281 SW331, 335 [citCyc]; TexCivA 281 SW577; TexCivA 20SW(2d)833. **Instructions held not objectionable to rule.**–161Ga414, 131SE158; 40GaA633, 151SE42; 41GaA392, 153SE106; GaA 155SE85; 214Ky36, 281SW1036; 152 Md216, 136A609; 173Minn250, 217NW 127; 320Mo 946, 8SW(2d)832; 321Mo 168, 9SW(2d)960; 322Mo 718, 17SW (2d)511; Mo 31SW(2d)1014; MoA 1 SW(2d)205; MoA 19SW(2d)500; MoA 27SW(2d)448; 129 Or435, 277P291; TexCivA 278SW270; Utah 273P515. **Instruction that "heart of hearts" of question of right to commission** by broker was amount of cash payment required in contract broker was negotiating, unduly emphasized cash payment as most important provisions, notwithstanding subsequent reference to other terms. 215AppDiv348, 213NYS401.

1675-64 212Ala585, 103S860; 110Conn 685, 149A140; 111Conn253, 149A673; 203 Iowa721, 211NW430; 216Ky648, 288SW289; 148Md628, 129A915; 262 Mass377, 160NE268; 219MoA249, 272 SW90. See also 253Mass594, 149NE630.

1675-65 35GaA622, 134SE198; 36GaA 552, 137SE414; 256Mass10, 152NE97; 248Mich118, 226NW832.

1675-66 36GaA552, 137SE414; Utah 272P229. **Charge on mental capacity** is necessary to make deed and will held not erroneous. 161Ga55, 129SE769.

1675-68 54ND336, 209NW547.

1675-70 174Ark639, 297SW1027, 59 ALR1128; 258Mass127, 154NE563; 259 Mass383, 156NE739; 263Mass252, 160 NE792; 265Mass444, 164NE448; 169 Minn386, 211NW306. **Instruction held not objectionable as giving undue prominence to plaintiff's testimony.** 168Ark 943, 272SW663.

1676-71 214Ala204, 106S858; 216Ala 30, 112S313; 216Ala645, 114S308; 217 Ala120, 115S16; 171Ark604, 285SW32; 172Ark117, 288SW377; 172Ark423, 288 SW908; 175Ark699, 300SW412; 92CalA 740, 268P934; 247 IllA207; 249 IllA 249; 216Ky326, 287SW889; 220Ky388, 295SW445; 153Md221, 138A25; 259 Mass401, 156NE538; Mass 171NE662; MoA 256SW520; 118 Or32, 245P508; 145Va549, 134SE550; 188Wis30, 205NW 407. **Instructions held not objectionable to rule.**–82CalA660, 256P457; 323Mo 929, 20SW(2d)34; 285Pa350, 132A174. **Singling out evidence and commenting thereon is erroneous.** 28 OhA133, 162 NE439.

1676-72 87Colo 401, 288P633; Tex CivA 291SW590.

1676-74 36F(2d)912; 172Ark1177, 288 SW892; 164Ga552, 139SE31; 262Mass 477, 160NE427; 153Miss467, 121S143; 321Mo 887, 13SW(2d)648; 220MoA518, 276SW1030; MoA 18SW(2d)541.

1677-75 214Ala15, 106S239; 217Ala 120, 115S16; 219Ala191, 121S706; 171 Ark315, 284SW20; 171Ark604, 285SW 32; 172Ark423, 288SW908; 174Ark639, 297SW1027, 59ALR1128; 177Ark104, 5 SW(2d)737; 202 Iowa1229, 211NW875; 257Mass21, 152NE3; 267Mass196, 166 NE736; 267Mass501, 167NE235; 169 Minn386, 211NW306; 220MoA518, 276 SW1030; MoA 16SW(2d)730; NH 146 A865; 50ND959, 198NW544; 118 Or32, 245P508; 123 Or253, 261P413; Tex CivA 291SW590; TexCivA 2SW(2d)347.

1678-78 Or 261P422.

1678-79 39 OklACR292, 293 [quotCyc].

1678-80 209Ky84, 272SW12; 249Mich 281, 228NW778; Mo 31SW(2d)1014.

1679-91 217Ala280, 116S125; 315Mo 760, 287SW346.

1679-92 Cal 289P614.

1679-97½-New. Instructions properly limiting purpose for which evidence may be considered is not objectionable. 318 Ill 445, 149NE507.

1679-97½-New. Instructions that irregularity of distribution alone raises no presumption against validity of will held not objectionable. 318 Ill 445, 149 NE507.

1679-97¼-New. Court may charge that if plaintiff's witness knowingly gave false testimony jury could reject entire testimony. 217Ala33, 114S468.

1679-2 40GaA158, 149SE73 (though instruction inapt, not reversible error, in view of record).

1679-2½-New. Where instruction singling out evidence is not misleading or prejudicial in view of other instructions given, it does not violate rule. 172Ark 1177, 288SW892.

1679-2½-New. Other instructions not violating rule.–255 IllA375; 318Mo 318, 300SW283; 57ND864, 224NW313.

1679-2¼-New. Court did not err in drawing jury's attention to fact that there was no evidence that insured ever withdrew schedule listing property below true value, where contrary was not claimed. 105NJ477, 144A566.

1679-2½-New. Instruction cannot be said to comment on evidence unduly if it requires finding of specific facts alleged, unless overly great prominence is given to facts and jury are directed as to weight to be attributed thereto. MoA 14SW(2d)529.

1630-4 36F(2d)936; 34Ariz458, 272P 647; 257Mass21, 152NE3; 221MoA403, 277SW938; TexCivA 19SW(2d)394. But see 221Ala131, 127S829. **Instructions in violation of rule.**–36F(2d)929; 179Minn94, 228NW442; TexCivA 19SW (2d)394. **Expert testimony.**–34Ariz458, 272P647.

1681-8 40GaA814, 151SE541.

1681-10 MoA 22SW(2d)65; 122 Or162, 257P809; TexCivA 278SW350.

1681-11 72CalA57, 236P319; 216Ky 237, 287SW706; TexCivA 278SW350. **General charge is unauthorized after special issues submitted on same issue.**–Tex CivA 26SW(2d)366.

1681-12 175Ark43, 295SW13; 72CalA 57, 236P319 (that negligence referred to must be "the proximate cause of the injury sustained"); 104CalA138, 285P918; 35GaA538, 134SE134; 42 Ida522, 247P 740; 336 Ill 11, 167NE807; 243 IllA298; 153Md119, 137A484; Mich 233NW395; MoA 296SW235; 193NC73, 136SE257; TexCivA 278SW270; TexCivA 278SW 350; TexCivA 283SW860; 140Wash 693, 250P351. **What does not amount to repetition.**–256 IllA569; 231Ky630, 21 SW(2d)1006.

1681-13 104Conn229, 132A451; 318 Ill 445, 149NE507.

1682-15 But see Mo 30SW(2d)1018.

1682-18 172Ark169, 287SW1000; Tex CommnA 277SW1050 (definition of negligence in preliminary part of charge sufficient); TexCivA 278SW350.

1682-19 221Ky622, 299SW556; 242 Mich228, 218NW698. But see TexCivA 24SW(2d)471.

1682-21 TexCivA 18SW(2d)829.

1683-24½-New. Correction of instructions.–Court may correct instructions given by defining words used therein, though after charge and arguments have been concluded. TexCivA 286SW526.

1683-28 221Ala139, 127S825 (charge requiring jury to "believe" instead of to be "reasonably satisfied" properly refused); MoA 22SW(2d)1058.

1683-29 40GaA571, 150SE561. **Instructions held proper.**–233Ky383, 25 SW(2d)1046.

1684-36 Instructions held not erroneous.–57ND864, 224NW313.

1684-38 214Ala204, 106S858; 214Ala 297, 107S849; 219Ala291, 122S173; 35 GaA767, 134SE831 (such instruction based on evidence, not erroneous); 219 MoA121, 272SW79. But see 219Ala636, 123S76, 63ALR805. **Charge contemplating finding contra to uncontradicted evidence** is properly refused. 83NH303, 142A688. **Use of word "believe" in instruction hypothesizing defense** has been held not reversible error. 221Ala626, 130S391. **There need be no hypothesis of fact** where charge is one of law made relevant by evidence adduced. Ala 130 S557.

1685-39 219MoA121, 272SW79. **Instruction that jury's belief in evidence would "probably" warrant finding** held equivalent to saying that they might find it. 106Conn119, 137A241.

1685-40 IndA 147NE726 (where verdict is directed on hypothesis of facts, facts included within hypothesis must be all facts necessary to warrant recovery). **Where prima facie case was made** and no evidence was offered by defendant, affirmative charge with hypothesis in favor of plaintiff was proper. 214Ala209, 106S852.

1686-42½-New. Instruction is erroneous which states legal conclusion which would result from establishment of certain facts when evidence is to contrary, and is properly refused. 85 IndA516, 151NE742.

1686-42½-New. Refusal of charge that, if purchaser took warehouse receipt in good faith, verdict must be for defendant is proper as invading province of jury. 218Ala90, 117S681, 61ALR938.

1686-43 MoA 148W(2d)529.

1686-48 TexCivA 286SW526; TexCivA 291SW667; TexCivA 296SW683; Tex CivA 28W(2d)939. **Court may read from standard text writers in defining terms.** 153SC179, 150SE683.

1686-50 171Ark469, 284SW724 ("without recourse"); 68CalA494, 229P885; 81CalA86, 253P178; Conn 152A157; 170 Ga349, 153SE611; Ga 155SE513; Ga 155 SE185; 231Ky631, 28SW(2d)961 (procure and furnish); 167Minn502, 210NW 62; 311Mo 92, 277SW908; Mo 281SW 951, 960 [citCyc]; 322Mo 514, 17 SW(2d)960; Mo 26SW(2d)957 ("credible evidence"); MoA 271SW1029; MoA 276SW81; MoA 276SW1047; MoA 2 SW(2d)172; 198NC137, 150SE874; 131 Or261, 282P556; TexCivA 285SW920; TexCivA 299SW321, 322 [quotCyc]; Tex CivA 78W(2d)657; TexCivA 148W(2d) 104; TexCivA 148W(2d)872 ("subterfuge"); TexCivA 198W(2d)77 ("present cash value" and "paid in cash"); Tex CivA 19SW(2d)166 ("unrestricted," "external control," and "dependent on any other cause" held not technical); Tex CivA 208W(2d)342(2dcase) (natural and continued sequence); TexCivA 20SW(2d) 833 (total permanent incapacity); Tex CivA 278W(2d)574; TexCivA 29SW(2d) 524 (manifest hardship and injustice); TexCivA 30SW(2d)375; TexCivA 30 SW(2d)921; TexCivA 30SW(2d)930; TexCivA 31SW(2d)669; TexCivA 32 SW(2d)363; TexCivA 32SW(2d)396; 69 Utah340, 255P416. **"Contract"** need not be defined in absence of request. 29 Ariz285, 240P1033. **"Reasonable man"** is understood by average person and does not require further explanation. 197Cal 598, 242P76. **"Man of ordinary prudence"** is understood by average person and need not be amplified. 197Cal 598, 242P76.

1686-52 TexCivA 299SW321, 322 [quot Cyc].

1686-53 73CalA467, 238P825 (term "marketable lettuce" held correctly defined); 321Mo 140, 9SW(2d)929 (instruction held correct); 33 OhA311, 169 NE480 (definition held proper); 144 Okl 49, 289P335; TexCivA 19SW(2d)784 (defining "apartment house" instead of "private dwelling house" held not reversible error). See also TexCivA 27 SW(2d)556. **Explanation held sufficient** where it followed statute, though legal definition not given. TexCivA 20 SW(2d)328.

1686-55 MoA 68W(2d)676.

1686-61 MoA 68W(2d)676.

1686-63 MoA 277SW50.

1686-64 See also MoA 148W(2d)46.

1686-65 78CalA353, 248P737; Mo 281 SW141.

1686-67 MoA 58W(2d)682.

1687-69 MoA 58W(2d)682.

1687-73 222MoA31, 48W(2d)871.

1687-77 But see TexCivA 286SW598.

1687-80 But see MoA 208W(2d)941.

1687-84 221MoA644, 283SW705; Tex CivA 275SW468 (properly defined in general charge).

1687-85½-New. Wrongful touching of person. 69Utah340, 255P416.

1687-85¾-New. Indecent familiarity. 69Utah340, 255P416.

1687-86 Other words not required to be defined.-170Ga135, 152SE466 (ouster); 167Minn502, 210NW62 (imminent peril).

1687-86½-New. "Timely" warning to person at railroad crossing need not be defined where meaning is plain. 311Mo 92, 277SW908.

1687-86¾-New. Other words required to be defined.-MoA 286SW738 ("acting within scope of their authority"); Tex CivA 18W(2d)353.

1687-87 107Conn568, 141A652; 215Ky 77, 284SW405, 47ALR483; 315Mo 883, 289SW540; TexCommnA 299SW854; TexCivA 18W(2d)688; TexCivA 4 SW(2d)599; TexCivA 21SW(2d)305; TexCivA 22SW(2d)1080. See also 213 Ala534, 105S901. But see TexCivA 32 SW(2d)363. **"Apoplexy" should be defined.**-TexCommnA 276SW900. **Failure to define held error.**-TexCivA 28SW(2d) 207.

1687-90 221MoA644, 283SW705; Tex CivA 12SW(2d)829(2dcase); TexCivA 20SW(2d)260; TexCivA 20SW(2d)342 (2dcase) (refusal to define "efficient intervening cause" held erroneous); Tex CivA 20SW(2d)369 (failure to define "natural continuous sequence unbroken by any new independent cause" held erroneous); TexCivA 21SW(2d)24 (failure to define "new or independent cause" held erroneous); TexCivA 23SW(2d) 516 (unnecessary to define proximate cause by defining other terms in charge). **Failure to define "independent cause"** in charging on proximate cause has been held error. TexCivA 17SW(2d)184.

1687-91 TexCivA 287SW81.

1687-99 TexCivA 5SW(2d)1010.

1687-3 TexCivA 11SW(2d)224.

1687-4½-New. partnership, 178Ark 997, 13SW(2d)21.

1687-4¾-New. unsoundness of mind or mental incapacity, TexCommnA 18 SW(2d)595, 63ALR1009.

1687-6½-New. Failure to define "fellow servant" or "licensee." 189NC653, 127 SE834.

1688-7 Failure to define mental condition necessary to sustain action to set aside conveyances of alleged incompetent held error. 218Ky765, 292SW301.

1688-7½-New. proximate result, Tex CommnA 285SW302.

1688-10½-New. in paying quantities, and due diligence. TexCivA 7SW(2d) 878.

1688-18 107Conn709, 142A397; 315Mo 883, 289SW540; 150Wash443, 273P527 (2dcase).

1688-19 30Ariz204, 245P673; 315Mo 883, 289SW540; 320MoA38, 285SW757; 195NC861, 142SE630; 122 Okl 282, 254 P725; TexCivA 5SW(2d)181.

1689-20 215Ala494, 111S237; 68CalA 326, 229P351; 165Ga413, 141SE667; 170Ga349, 153SE611; 201 Iowa1249, 207 NW132; 322Mo 514, 17SW(2d)960; 322 Mo 991, 18SW(2d)487; MoA 271SW 1029; MoA 279SW761; 220MoA38, 285 SW757; MoA 68W(2d)676; MoA 24 SW(2d)686; MoA 31SW(2d)262; 193 NC262, 136SE723; 122 Okl 282, 254P 725; TexCivA 27SW(2d)616. But see 215Ky77, 284SW405, 47ALR483; Tex CivA 8SW(2d)560.

1689-21½-New. Charge leaving to jury, unaided by explanation or definition, as to what would constitute revival and requirements of sufficient tender is erroneous. 213Ala588, 105S672.

1689-21¼-New. Instruction defining "epilepsy" is proper where defense was that accident was caused by epileptic fit of plaintiff, 30Ariz491, 249P66.

1689-21¼-New. and fact that court in giving such definition stated that it was taken from certain medical dictionary named by court, though better omitted, is not prejudicial error. 30Ariz491, 249 P66.

1689-21½-New. Where insurer sought to avoid double liability for accidental death on ground that deceased was drunk under clause providing that he must have been sane and sober, instruction defining sanity or insanity held unnecessary. 192NC580, 135SE456.

1689-21¾-New. Special issues, where necessary, should be accompanied by necessary definitions and explanations. TexCivA 28W(2d)495.

1689-21½-New. Legal terms having distinct fixed meaning which ordinary person would not readily understand should, upon proper request, be defined in trial on special issues. TexCommnA 18W(2d)570.

1689-21¾-New. Instruction defining term not used in charge nor involved in special issues is unnecessary and properly refused. TexCivA 18SW(2d)720.

1689-21½-New. Where meaning of words is fully explained by witness, requested instruction containing such words is not objectionable. MoA 28W (2d)172.

1689-25 47 Ida542, 277P554(2dcase); 323 Ill 498, 154NE226; 243 IllA298; Mo 282SW423.

1689-26 Mo 248W(2d)143 (court should exercise caution to prevent instructions from being misleading or confusing).

1689-28 168Ark580, 271SW330; 310Mo 1, 274SW1079; 311Mo 92, 277SW908; 320Mo 916, 9SW(2d)912; Mo 26SW(2d) 957 (instruction not objectionable); MoA 279SW160; MoA 26SW(2d)52.

1690-30 256 IllA425.

1690-32 254 IllA289.

1690-41 In Mississippi.-141Miss655, 107S195; 153Miss327, 121S144.

1691-42 48 Ida424, 282P943; 209Ky 33, 272SW41; 221Ky527, 299SW162.

1691-43 Failure to ask instructions on theory of defense does not show abandonment of it. MoA 272SW85. **Plaintiff is not required to offer instructions,** as statutory provision is permissible only. 321Mo 697, 12SW(2d)735.

1691-45 214Ala376, 108S43; 104CalA 671, 286P729; 111Conn313, 149A782; 169Ga734, 151SE506; 209Ky593, 273 SW449; 216Ky237, 287SW706; 218Ky 1, 290SW688; 234Ky400, 28SW(2d)477; 148Md188, 129A31 (function of prayer is so to instruct jury that it may intelligently apply law to facts in particular case); Mo 282SW38; Mo 289SW591; MoA 276SW81; MoA 285SW127; 220 MoA542, 287SW865; MoA 58W(2d)709; MoA 19SW(2d)510; MoA 19SW(2d)522; MoA 26SW(2d)851; MoA 28SW(2d) 379; MoA 28SW(2d)1044; 116 Okl432, 156NE599; 144Va154, 131SE245 (except where court deems it necessary to prevent failure of justice). **Peremptory instruction.**-214Ala376, 108S43.

1691-46 Specific acts of negligence alleged in plaintiff's pleading and not included in his specific requested instructions are deemed abandoned. 309 Mo560, 274SW703. **It is not error to omit instructions on subject not embraced in written offers** submitted by complaining party. 234Ky639, 28SW (2d)956.

1691-49 228Ky197, 14SW(2d)757.

1691-51 197Cal290, 240P785; 169Ga 665, 151SE343; 34GaA276, 129SE125 (error to omit to charge in main ground of defense); 36GaA143, 136SE85; 116 GaA4, 152SE116 (court required to charge as to care of invitee); 41GaA 564, 153SE924(2dcase); 203 Iowa1107, 212NW163; 172Minn131, 215NW195; MoA 272SW85; 117Nebr813, 223NW4; Nebr 227NW321 (contributory negligence); Nebr 232NW777; 82NH350, 134A574; 191NC523, 132SE273; NC 154 SE48 (holding sole proximate cause to be substantive feature as regards necessity of charge); 120 Okl 279, 251P56; 124 Okl 64, 253P1021; 124 Okl 286, 255 P1015; 43 OklACR482; 300Pa457, 150A 622 (damages); TexCivA 18W(2d)703; 101Vt1, 139A776; Vt 147A346. **Failure to charge on question not presented by pleadings or requests** and not necessarily required by evidence held not error. 102Conn735, 130A102. **Charge as to measure of damages.**-152SC265, 149 SE742. **In North Carolina.**-154SE48.

1692-52 169Ga665, 151SE343; 170Ga 447, 153SE841; 36GaA143, 136SE85; 120 Okl 279, 251P56; 124 Okl 286, 255P 1015.

1692-53 In North Carolina.-190NC1, 128SE471.

1693-55 4F(2d)818; 26F(2d)933; 42F (2d)611; 212 Ala503, 103S569; 212Ala 325, 104S808; 216Ala495, 113S531; 216 Ala605, 114S6; 22AlaA226, 114S285; 29 Ariz112, 239P792; 29Ariz285, 240P 1033; 32Ariz39, 255P494; 171Ark103, 283SW31; 171Ark604, 285SW32; 173 Ark729, 293SW9; 174Ark153, 294SW 705; 178Ark199, 10SW(2d)5; 197Cal 176, 239P1090; 200Cal628, 254P256; Cal 290P571; 70CalA115, 233P366; 83 CalA307, 256P570; CalA 288P841; CalA 292P186; 103Conn520, 131A501; 104 Conn528, 133A586; 106Conn119, 137A 241; 109Conn206, 145A890; 160Ga824, 129SE95 (charge not error in absence of special timely request); 162Ga428, 134SE72; 163Ga807, 137SE45; 164Ga 696, 139SE333; 164Ga811, 139SE716; 165Ga381, 140SE761; 165Ga413, 141SE 67; 166Ga453, 143SE902; 170Ga1, 152 SE95; 170Ga135, 152SE466 (not charging opposite contention, in absence of request, not error); 34GaA217, 129SE8; 35GaA174, 132SE239; 35GaA704, 134SE 623; 36GaA28, 134SE822; 36GaA377, 136SE924; 36GaA527, 137SE127; 36 GaA518, 137SE282; 36GaA546, 137SE 294; 37GaA321, 140SE383; 40GaA4, 148SE757; 40GaA336, 149SE436; 41

GaA62, 151SE672; 41GaA98, 152SE485 (2dcase) (diminution of damages); GaA 155SE500; 198 Ind633, 154NE485; 88 IndA176, 156NE594; 201 Iowa1083, 205 NW972; 201 Iowa1249, 207NW132; Iowa 209NW135; 203 Iowa1232, 210 NW770; 203 Iowa430, 212NW751; Iowa 213NW442; 208 Iowa24, 221NW 197; Iowa 226NW928; 120Kan591, 244 P867; 122Kan438, 252P223; 124Kan 252, 259P801; 125Kan66, 262P587; 126 Kan538, 26NP801; 209Ky33, 272SW 41; 213Ky164, 280SW949; 214Ky36, 281SW1036; 218Ky1, 290SW688; 218 Ky59, 290SW1044; 220Ky576, 295SW 890; 223Ky262, 3SW(2d)649; 224Ky 274, 6SW(2d)264; 232Ky825, 24SW(2d) 588; 125Me44, 130A737; 262Mass437, 160 NE249; 265Mass382, 163NE251(2dcase); Mass 169NE74; 238Mich242, 213NW 158; 239Mich260, 214NW96; 248Mich 399, 227NW691; 249Mich431, 228NW 763; 251Mich688, 232NW353; Mich 233 NW321; Mich 233NW352; 170Minn49, 212NW8; 172Minn591, 216NW537; 173 Minn617, 216NW944; 307Mo480, 270 SW633; 310Mo 227, 274SW1025; 315 Mo 1136, 287SW1031; 316Mo 278, 290 SW429; 316Mo 1143, 295SW751; 321 Mo 140, 9SW(2d)929; 321Mo 798, 12SW (2d)476; 321Mo 920, 13SW(2d)548; 322 Mo 1039, 17SW(2d)518; Mo 31SW(2d) 50; 219MoA336, 271SW834; MoA 271 SW1005; 219MoA234, 271SW1023; MoA 280SW444; 221MoA1231, 300SW531; 222MoA1036, 7SW(2d)398; MoA 19SW (2d)510; MoA 23SW(2d)1100; MoA 30 SW(2d)784; 83Mont452, 272P998; 115 Nebr795, 215NW122; 116Nebr18, 215 NW556; Nebr 230NW662; 82NH236, 133A9; 83NH29, 137A445; NJ 130A4; 104NJL306, 140A422; 105NJL123, 143 A330; NJ 147A461(1stcase); NJSup 139A427; NJSup 148A154; 190NC303, 130SE29; 193NC73, 136SE259; 193NC 849, 138SE123; 194NC250, 139SE369; 194NC784, 140SE721; 195NC409, 142SE 483; 52ND925, 204NW889; 20 OhA385, 153NE238; 25 OhA183, 158NE497; 28 OhA318, 162NE699; 113 Okl 188, 240P 702; 115 Okl 31, 241P121; 137 Okl 27, 277P665; 140 Okl 185, 282P345; 285 Pa166, 131A668; 285Pa260, 131A858; 292Pa293, 141A41; 89PaSuper428; 132 SC448, 129SE457; 136SC21, 134SE234; 139SC299, 137SE734; 141SC182, 139SE 395; 151SC366, 149SE119; 152SC265, 149SE742; Vt 130A758; Vt 147A346; 133Wash622, 234P456; WVa 154SE769. See also 35GaA273, 133SE57. **If more specific charge desired,** request should be made. 34GaA29, 128SE67. **Instructions.**–110 Iowa462, 81NW703. **Request for instruction may be dispensed with only** where statute or positive rule of law requires instruction. Nebr 230NW 662. **Issue is waived by failure to request instruction thereon.** MoA 24SW (2d)191.

1694–56 219MoA234, 271SW1023; MoA 271SW1029.

1694–57 30Ariz204, 245P673; 171Ark 103, 283SW31; 174Ark463, 295SW727; 200Cal 628, 254P256; 104Conn528, 133A 586; 163Ga807, 137SE45; 164Ga696, 139SE333; 166Ga713, 144SE262; 170 Ga135, 152SE466; 170Ga349, 153SE11; 41GaA392, 153SE106; IndA 168NE585; 203 Iowa430, 212NW751; Iowa 232NW 421; 125Kan66, 262P587; 172Minn591, 216NW537; 118Nebr634, 225NW869, 64 ALR1299; 103NJL372, 137A555, 54ALR 623; 215AppDiv308, 213NYS743 (where counsel thinks instructions insufficient, he should request specific charge that he thinks more adequately presents question involved); 118 Okl 113, 247P 87; 122 Okl 282, 254P725, 728 [citCyc]; TexCivA 295SW211.

1694–58 32Ariz39, 255P494; 174 Ark 153, 294SW705; 200Cal 628, 254P256; 102CalA272; 282P1019; 104Conn528, 133A586; 161Ga55, 129SE769; 164Ga 696, 139SE333; 165Ga413, 141SE67; 166Ga713, 144SE262; 169Ga294, 150SE 164; 35GaA668, 134SE350; 40GaA103, 149SE71; 202 Iowa643, 210NW761; 203 Iowa1232, 210NW770; 203 Iowa430, 212 NW751; Iowa 213NW442; 124Kan252, 259P801; 213Ky164, 280SW949; 241 Mich652, 217NW787; Mo 281SW951; 316Mo 278, 290SW429; 218MoA660, 267 SW445; 219MoA336, 271SW834; 219 MoA234, 271SW1023; MoA 294SW762; MoA 296SW239; 221MoA1110, 298SW 121; MoA 299SW74; MoA 19SW(2d) 510; 116Nebr18, 215NW556; 193NC73, 136SE259; 34 OhA244, 170NE661; 34 OhA563, 171NE424; 118 Okl 113, 247P 87; 122 Okl 282, 254P725, 728 [citCyc]; 151SC417, 149SE162; TexCivA 291SW 343.

1695–59 40GaA103, 149SE71; 118 Okl 113, 247P87; 122 Okl 282, 254P725.

1695–60 122 Okl 282, 254P725, 728 [cit Cyc].

1695–61 164Ga811, 139SE716.

1695–62 203 Iowa1232, 210NW770; MoA 276SW81; MoA 22SW(2d) 876; MoA 23SW(2d)1100.

1695–63 36GaA546, 137SE294; 127 Okl 106, 260P26. **Jury may not be allowed to find defendant guilty of negligence charged in declaration but not mentioned** in instructions, where all plaintiff's requested instructions given. 142 Va711, 125SE751, 128SE242.

1696–64 30Ariz204, 245P673; 171Ark 103, 283SW31; 160Ga697, 128SE801; 161Ga587, 131SE362; 164Ga811, 139 SE716; 166Ga220, 142SE868; 35GaA 273, 133SE57; 35GaA376, 133SE288; 205 Iowa666, 216NW733; 232Ky630, 24 SW(2d)263; 239Mich260, 214NW96; 165Minn346, 206NW441; 175Minn449, 221NW715; MoA 282SW525; 20 OhA 385, 153NE238; 35 OhA532, 172NE637; TexCivA 290SW844. See also 50ND 612, 197NW590.

1696–65 212Ala608, 103S658; 22AlaA 226, 114S285; 37GaA722, 141SE670; 220Ky576, 295SW890 (failure to request instruction limiting purpose of evidence held waiver); 318Mo 453, 300SW758; MoA 16SW(2d)219; MoA 17SW(2d)658; MoA 31SW(2d)117; TexCivA 281SW 234.

1696–66 CalA 284P499; 219MoA234, 271SW1023; 116Nebr18, 215NW556.

1696–67 215Ala693, 112S305; NJ 150 A354; TexCivA 281SW234.

1696–68 35GaA668, 134SE350; 243 IllA 479; 218Ky59, 290SW1044; MoA 31SW (2d)546; Nebr 231NW837(2dcase); 54 SD435, 223NW354.

1696–69 34GaA217, 129SE8; TexCivA 28SW(2d)232.

1696–70 Ida 290P405; TexCivA 25SW (2d)717 (limiting testimony to impeachment).

1696–76 208 Iowa361, 225NW862.

1697–81½–New. , or to give detailed instructions as to damages, 35GaA704, 134SE623; 36GaA546, 137SE294.

1697–82 TexCivA 19SW(2d)355 (that contract referred to was between contractor and defendants).

1697–92 220Ky576, 295SW890.

1697–98 Mass 169NE797.

1697–2 See also 316Mo 1266, 296SW 105.

1698–7 108Conn115, 142A812.

1698–10 170Ga123, 152SE222 (actual possession).

1698–12 34GaA217, 129SE8.

1698–14½–New. In absence of request for more specific instruction, instruction to assess damages if jury finds "for plaintiff" sufficiently submits issue of railroads' liability. 171Ark103, 283SW 31.

1698–16 219Ky765, 294SW487; MoA 23SW(2d)209; 124 Okl 64, 253P1021, 1024 [quotCyc]; TexCivA 4SW(2d) 599. **In Oklahoma.**–115 Okl 199, 242P 201.

1698–17 163Ga807, 137SE45. But see 215Ala191, 110S137.

1698–18 201 Iowa502, 207NW563; 219 Ky765, 294SW487. But see NH 146A 865.

1698–20 161Ga319, 130SE559; 167Ga 20, 144SE780; 35GaA770, 134SE639; 315Mo 883, 289SW540; 82NH350, 134A 574; NJSup 131A134 (discretion not abused where nothing appears except refusal and grounds thereof). **Requested instructions held too late.**–150Wash 640, 274P702.

1699–23 221MoA577, 284SW156; MoA 285SW127; 116Nebr18, 215NW556; Nebr 230NW662; Nebr 231NW837(2d case); NJSup 131A134; 103NJL23, 135 A270; 133 Or442, 288P401. **If request is made at any time before argument,** etc. 36 OhA204, 172NE836. **In Ohio.**– 114 Oh303, 151NE127.

1699–25 NJSup 131A134 (abuse of discretion not shown); 289Pa31, 132A800 (refusal held not error irrespective of any court rule).

1700–27 103NJL23, 135A270.

1700–28 255Mass486, 152NE332; 179 Minn46, 228NW342; NJ 147A461(1st case) (where instruction sought was not applicable to evidence). But see 38F(2d) 599.

1700–29 166Minn29, 206NW950; 179 Minn428, 229NW867. **It must affirmatively appear that refused written requests were submitted before jury retired** to consider verdict. 34GaA165, 128 SE589.

1700–33 103NJL23, 135A270.

1700–35 Giving or refusing instructions at last stage of case is in sound discretion of court, and ruling thereon will not be disturbed unless it has caused failure of justice. 144Va154, 131 SE245. **Where no excuse is offered for failure to present instructions at proper time** after ample opportunity, appellate court cannot say trial court abused its discretion in refusing them. 144Va154, 131SE245. **Where court waives rule,** requested instructions should be clear and definite. 83NH236, 141A136.

1701–40 See also MoA 285SW127.

1701–50 Requests to charge should consist of separate statements of single propositions of law. 111Conn253, 149A 673.

1701–51 21 OhA486, 153NE223 (involved changes of unreasonable length properly refused); 22 OhA129, 153NE 345. But see TexCivA 292SW588. **General request for instruction on entire law of case** does not require particular instructions. 235Ky204, 30SW(2d)900.

1702–52 113 Okl 188, 240P702; Tex CivA 3SW(2d)545. **Requested instructions held sufficient.**–TexCivA 28SW (2d)865.

1702–55½–New. It is not defendant's duty to cover facts in avoidance of defense of contributory negligence in his instruction thereon. 218Ky1, 290SW 688.

1702–55⅓–New. Defendant's requested instructions were held sufficient to require instruction on matters covered by request. TexCivA 2SW(2d)493.

1702–55¼–New. Exception, taken after jury had retired, to court's failure to instruct on measure of damages, is not equivalent of request for instruction. 151Wash430, 276P89.

1702–55⅕–New. Request for additional instructions not complying with rules of court is properly refused. 133 Or442, 288P401.

1702–57 219Ala206, 121S736; 160Ga 831, 129SE546; 162Ga428, 134SE72; 166Ga159, 142SE681; 166Ga220, 142SE 868; 167Ga20, 144SE780; 167Ga537, 146SE170; 168Ga439, 148SE81; Ga 155 SE513; 35GaA174, 132SE239; 35GaA 595, 134SE355; 35GaA770, 134SE639 (failure to instruct further, in absence of timely written request, not error); 168Ga259, 147SE513(2dcase); 39GaA 594, 147SE915; 220Ky451, 295SW467; 228Ky197, 14SW(2d)757; 231Ky346, 21 SW(2d)452; 234Ky347, 28SW(2d)3; 179Minn46, 228NW342; Nebr 230NW 662; Nebr 231NW837(2dcase); 82NH 387, 134A344; 103NJL23, 135A270; 22 OhA129, 153NE345; 113 Okl 188, 240P 702; 129 Okl 148, 264P182; 132SC420, 129SE160 (when court responds to oral request for instructions, it is subject to all rules applicable to formal request); TexCivA 298SW140. **In Connecticut.**– 108Conn544, 143A886.

1702–58 116Nebr18, 215NW556.

1702–59 82NH387, 134A344; 103NJL 23, 135A270.

1703–62½–New. Where special charges, intended as separate propositions of law, were not presented on separate sheets, the court is not justified in refusing to give them. 23 OhA104, 154 NE747.

1703–62½–New. Request contained in body of written objections and exceptions is sufficient. TexCivA 7SW(2d) 878.

1703–70 81NH520, 129A270; 149SC89, 146SE663.

1703–72½–New. Under statute giving

reasonable time for examination of charge allowance of two hours to counsel for examination and preparation of exceptions and special issues was not reasonable where trial had consumed three days, statement of facts consisted of seventy-nine pages, and charge four pages submitting issues. **TexCivA** 272 SW826.

1703–72½–New. Requested instruction need not be given unless it appears that it is sufficiently supported by facts admitted or proved, that it is correct, and not misleading, that it is not covered by charge, and that refusal to give it would be prejudicial to party. 127Me 290, 143A61.

1703–74 234Mich693, 209NW138; 21 OhA210, 153NE115.

1703–75 275US133, 48SCt49, 72L ed 200; 214Ala606, 108S532; 215Ala47, 109S278; 217Ala255, 115S171; Ala 130 S807; Ariz 290P152; 106Conn95, 136A 867; 163Ga899, 137SE561; 166Ga261, 142SE736; 37GaA686, 141SE326; 29 Hawaii188; 245 IllA127; 234Mich693, 209NW138; 307Mo 307, 270SW318; 220MoA497, 274SW517; 220MoA1161, 297SW137; 78Mont415, 258P236; 115 Nebr875, 215NW120; 118Nebr200, 224 NW11; 82NH350, 134A574; NJSup 137 A793; 49ND867, 194NW113; 21 OhA 210, 153NE115; 25 OhA89, 157NE402; 27 OhA47, 160NE734; 28 OhA303, 162 NE678; 29 OhA340, 163NE581; 31 OhA 154, 166NE140; 105 Okl 52, 233P179; 115 Okl 76, 241P794; 128 Okl 29, 261P 189; TexCivA 280SW598; TexCivA 290 SW806; 140Wash663, 250P64.

1704–76 214Ala606, 108S532; 163Ga 899, 137SE561; 37GaA240, 139SE686; 41GaA70, 151SE690; 237 IllA386 (as to credibility); 80Mont431, 261P253; 83 NH29, 137A445; 103NJL23, 135A270; 113 OhSt164, 148NE641; 21 OhA210, 153NE115; 25 OhA89, 157NE402; 115 Okl 76, 241P794; 128 Okl 29, 261P189; TexCommnA 24SW(2d)28; TexCivA 290SW806.

1704–77 237 IllA145; 21 OhA210, 153 NE115.

1705–82 19F(2d)186; 89CalA721, 265 P541; 105Conn436, 135A570; 165Ga 408, 140SE844; 123Kan651, 256P809; 125Me31, 130A509; 127Me91, 141A321; 234Mich693, 209NW138; MoA 15SW (2d)923; 83NH29, 137A445; NJ 135A 692; NJ 144A186; 190NC617, 130SE 306; 195NC453, 142SE473; 195NC697, 143SE513; 198NC539, 152SE493(1st case); 198NC771, 153SE457; 134 Okl 266, 274P1085; 116 Or554, 240P1113, 241P1009; 119 Or481, 250P238; 121 Or 232, 253P529; 124 Or197, 264P362; 126 Or135, 268P1002, 59ALR1062; 47RI 395, 133A621; 137SC40, 134SE912; Wash 290P984; 199Wis320, 226NW392.

1706–84 215Ala47, 109S278 (remarks of court held to be explanation, not modification, of requested charge); 137 SC40, 134SE912.

1707–91½–New. Precise language of statute is unnecessary. 217Ala304, 116 S158.

1707–96½–New. In Ohio it is duty of trial court either to give or refuse request for instructions without change, modification, or comment. 30 OhA528, 165NE865; 31 OhA154, 166NE140.

1707–98 30F(2d)882; 42F(2d)152; 212 Ala325, 104S808; 214Ala324, 107S862 (requested affirmative charges requiring jury to "find for defendant in count one" and that jury "must find for defendant on count two" held defective); 215Ala68, 109S148; 219Ala299, 113S28; 216Ala326, 113S79; 216Ala472, 113S529; 217Ala280, 116S125; 218Ala90, 117S681, 61ALR938; 218Ala354, 118S644; 219 Ala101, 120S914; 219Ala298, 122S41; 221Ala589, 130S213; AlaA 130S520 (misleading); 31Ariz161, 251P458, 460 [citCyc]; 175Ark1170, 18W(2d)54; 180 Ark616, 22SW(2d)19; 181Ark145, 28 SW(2d)1077; 77CalA125, 245P1098; 77 CalA462, 247P236; 79CalA406, 249P837; 81CalA690, 254P671; 87CalA44, 261P 1107; 92CalA127, 267P736; 95CalA617, 273P165; 81Colo 370, 256P1; 83Colo 147, 263P26, 56ALR814; 84Colo 511, 272P6; 161Ga319, 130SE559; 162Ga457, 134SE87; 162Ga657, 134SE751; 162Ga 664, 135SE195; 164Ga311, 138SE580; 164Ga552, 139SE31; 164Ga575, 139SE 34; 164Ga665, 139SE335; 164Ga682, 139SE421; 165Ga228, 140SE497; 168Ga 566, 148SE399; 169Ga678, 151SE349; 35GaA648, 134SE344; 36GaA805, 138SE 359; 37GaA310, 140SE46; 37GaA358, 140SE395; 40GaA99, 148SE772; 41 Ida 98, 238P296; 45 Ida58, 260P691; 233 IllA545; 235 IllA198; 245 IllA142; 120 Kan645, 244P1057; 126Kan188, 268P 119; 126Kan538, 268P801; 217Ky594, 290SW487; Me 149A618; 148Md309, 129A654; 150Md429, 133A601 (request too general); Md 135A287; 253Mass37, 148NE101; 252Mass552, 148NE105; 260 Mass202, 156NE875; 261Mass233, 158 NE668; 262Mass22, 159NE449; 241 Mich343, 216NW927; 241Mich349, 217 NW18; 178Minn465, 227NW493; 308 Mo 31, 271SW997; 310Mo 48, 274SW764; 308Mo 406, 275SW32; 315Mo 987, 288SW 777; 319Mo 401, 4SW(2d)438; 321Mo 199, 9SW(2d)901, 60ALR639; MoA 15 SW(2d)923; 322Mo 765, 18SW(2d)42; 322Mo 1103, 19SW(2d)707, 65ALR129; Mo 31SW(2d)1010; MoA 271SW1029; MoA 285SW127; MoA 285SW183; MoA 294SW758; MoA 5SW(2d)709; MoA 12 SW(2d)95; MoA 16SW(2d)712; MoA 17SW(2d)613; MoA 24SW(2d)191; 80 Mont431, 261P253; 104NJL389, 140A 325; 104NJL385, 140A450; NJSup 132 A242; NJSup 134A116; NJSup 148A 400; 190NC617, 130SE306 (must be correct in law); 21 OhA486, 153NE223; 26 OhA447, 160NE493; 31 OhA8, 166NE 145; 118 Okl 124, 247P92; 127 Okl 106, 260P26; 128 Okl 96, 261P211; 132 Okl 196, 270P58; 134 Okl 266, 274P1085; 140 Okl 147, 282P306; 27 OklACR354; 43 OklACR482; 116 Or222, 240P873; 133 Or442, 288P401; 49RI 364, 142A 621; TexCivA 272SW266; TexCivA 285 SW866; TexCivA 289SW414; TexCivA 292SW964; TexCivA 294SW978; Vt 148 A484; 147Va960, 133SE685; 136Wash 410, 240P355; 143Wash541, 255P947; 144Wash700, 257P1119; 144Wash409, 258P39; 150Wash565, 273P957; 155 Wash609, 285P663; 103WVa301, 137SE 747. **Party cannot complain of refusal** of special requests inconsistent with main charge not objected to. 116Tex 522, 295SW920. **Requests embodying inaccurate statements of law** properly refused. 162Ga657, 134SE751. **Instructions on wrong theory of law** are properly refused. 88 Ind518, 162NE372.

1708–99 31Ariz161, 251P458, 460 [cit Cyc]; 30 OhA528, 165NE865; TexCivA 16SW(2d)380. Contra 161Ga480, 131SE 283.

1709–3 **In Kentucky.**–232Ky98, 22SW (2d)448. **In Nebraska.**–118Nebr200, 224 NW11. **In Utah.**–279P893.

1709–4 167Ga94, 144SE759; Mo 2SW (2d)760; MoA 277SW50; 220MoA542, 287SW865; MoA 16SW(2d)712; 118 Okl 124, 247P92; 49RI 3, 139A500; 103WVa 301, 137SE747. But see TexCivA 18SW (2d)762.

1710–5 310Mo 665, 276SW49; TexCivA 288SW276; 152Wash1, 277P74.

1710–6½–New. Though requests to charge are not full and correct statements of law they are enough to call court's attention thereto so that failure to charge thereon is error. 107Conn126, 139A511; 82NH350, 134A574.

1710–6⅓–New. **In New Hampshire,** requested instruction in action for trainman's death from washout is sufficient fairly to call for instruction as to defendant's duty to ascertain general situation. 82NH350, 134A574.

1710–7 TexCivA 284SW279; TexCivA 292SW964. **Request held sufficient to direct attention to point.**–222AppDiv179, 225NYS486; TexCivA 292SW964. **Refusal of charge not strictly correct may** be error. TexCivA 292SW964.

1710–9½–New. and Kentucky. 233Ky 224, 25SW(2d)366.

1711–19 7F(2d)428; 8F(2d)321; 13F (2d)991; 16F(2d)240; 16F(2d)578; 18 F(2d)831; 23F(2d)395; 24F(2d)262; 26F(2d)594; 28F(2d)933; 30F(2d)811; 34F(2d)927; 35F(2d)142; 35F(2d)587; 35F(2d)634; 36F(2d)330; 37F(2d) 320; 37F(2d)710; 42F(2d)816; 212Ala 602, 103S586; 212Ala608, 103S658; 212 Ala576, 103S678; 212Ala614, 103S682; 212Ala630, 103S689; 212Ala585, 103S 860; 212Ala590, 103S894; 213Ala15, 104S222; 213Ala242, 104S418; 212Ala 325, 104S805; 213Ala588, 105S672; 21 AlaA118, 105S713; 21AlaA51, 105S716; 213Ala617, 105S805; 213Ala494, 106S 150; 213Ala672, 106S147; 214Ala204, 106S858; 214Ala301, 107S857; 214Ala 378, 108S3; 214Ala479, 108S344; 214 Ala510, 108S604; 214Ala545, 108S362; 214Ala633, 108S600; 214Ala639, 108S 620; 214Ala663, 108S575; 215Ala68, 109S148; 215Ala47, 109S278; 215Ala 94, 109S749; 215Ala109, 110S7; 215Ala 143, 110S372; 215Ala166, 110S13; 215 Ala311, 110S396; 215Ala368, 110S700; 215Ala612, 111S901; 216Ala102, 112S 348; 216Ala97, 112S454; 216Ala248, 112 S737; 216Ala326, 113S79; 216Ala400, 113S401; 216Ala547, 114S41; 216Ala 616, 114S218, 61ALR400; 217Ala255, 115S171; 217Ala287, 116S139; 217Ala 432, 116S520; 217Ala506, 116S686; 218Ala209, 118S396; 218Ala328, 118 S552; 218Ala384, 118S565; 218Ala 445, 118S647; 218Ala493, 119S21; 219Ala101, 120S914; 219Ala24, 121S 30; 219Ala53, 121S47; 219Ala136, 121 S399; 23AlaA12, 121S437(2dcase) [certiorari den 219Ala139, 121S441(1st case)]; 219Ala162, 121S543; 219Ala 197, 121S714; 219Ala427, 122S416, 65 ALR1097; 219Ala546, 122S677; 220Ala 116, 124S288; 220Ala242, 124S528; 220 Ala385, 125S403; 220Ala690, 127S171; 220Ala645, 127S213; 221Ala18, 127S 668; Ala 128S145; 221Ala242, 128S 211; 221Ala247, 128S233; 221Ala296, 128S239; 221Ala240, 128S433; 221Ala 489, 129S88; 221Ala424, 129S276; 221 Ala501, 129S466; 23Ala595, 129S489; Ala 130S413; Ala 130S416; Ala 130S 788; 20AlaA555, 103S713; 20AlaA535, 103S906; 20AlaA596, 104S349; 20AlaA 614, 104S446; 20AlaA620, 104S835; 21AlaA280, 107S716; 21AlaA281, 107S 716; 21AlaA547, 109S894; 21AlaA555, 110S53; 23AlaA132, 122S184; 23AlaA 479, 127S257; 28Ariz581, 238P389; 29 Ariz112, 239P792; 30Ariz569, 249P751; 31Ariz403, 253P1113; 32Ariz13, 255P 486; 34Ariz230, 270P629; 168Ark572, 271SW333; 168Ark943, 272SW663; 170Ark346, 280SW354; 170Ark801, 281 SW8; 170Ark1037, 282SW370; 171Ark 464, 284SW533; 171Ark647, 286SW815; 171Ark1029, 287SW168, 49ALR316; 172Ark169, 287SW1000; 172Ark423, 288SW908; 172Ark937, 290SW933; 172 Ark1088, 291SW795; 173Ark84, 291SW 1001; 173Ark455, 292SW662; 173Ark 1136, 294SW69; 174Ark41, 294SW1002; 173Ark1104, 295SW16; 174Ark262, 295 SW20; 175Ark1091, 1SW(2d)560; 176 Ark375, 3SW(2d)38; 176Ark1203, 6 SW(2d)4; 177Ark359, 6SW(2d)296; 177Ark953, 9SW(2d)33, 60ALR1493; 178Ark1200, 11SW(2d)492; 178Ark 1046, 13SW(2d)306; 179Ark71, 14SW (2d)240; 179Ark186, 14SW(2d)547; 179Ark225, 15SW(2d)391; 179Ark742, 18SW(2d)345; 180Ark19, 20SW(2d) 614; 180Ark1167, 21SW(2d)161; 181 Ark1145, 28SW(2d)1077; 181Ark1132, 29SW(2d)683; Ark 31SW(2d)421; Ark 31SW(2d)951; Ark 32SW(2d)174; 200Cal 299, 252P1049; 204Cal 387, 268 P345; 205Cal 181, 270P210; 96CalA 169, 273P866; 208Cal 364, 281P380; Cal 283P66; Cal 288P784; 195Cal 655, 235P438; 72CalA494, 237P565; CalA 238P954; 74CalA10, 239P429; 75CalA 129, 242P97; 75CalA462, 242P1075; 77CalA481, 246P1086; 78CalA526, 248 P930; 79CalA406, 249P837; 79CalA 572, 250P575; 82CalA369, 255P760; 82 CalA542, 255P858; 85CalA440, 259P 774; 85CalA535, 259P958; 86CalA474, 260P957; CalA 261P1021; 87CalA684, 263P353; 88CalA601, 263P1031; 88 CalA698, 264P259; 89CalA477, 265P 268; 89CalA511, 265P318; 89CalA721, 265P541; 90CalA144, 265P558; 90CalA 151, 265P574; 91CalA448, 267P164; 92CalA127, 267P736; 92CalA145, 267P 887; 92CalA513, 268P379; CalA 269P 459; 93CalA370, 269P710; 94CalA66, 270P719; 94CalA303, 271P134; 94CalA 562, 271P532; 96CalA236, 273P1080; 97CalA87, 275P456; CalA 275P840; 98 CalA92, 276P422; 98CalA759, 277P894; 99CalA240, 278P476; 99CalA583, 278P 912; 99CalA557, 279P183; CalA 280P 154; 100CalA775, 281P95; 102CalA 615, 283P358; 102CalA656, 283P823; 103CalA465, 284P1083; 104CalA138, 285P918; CalA 286P1097; CalA 290P

48; CalA 290P895; CalA 290P1062; CalA 291P215; 76Colo 586, 233P624; 77Colo 386, 236P1016; 77Colo 603, 237P1113; 77Colo 574, 238P58; 78Colo 235, 242P45; 80Colo 420, 252P346; 81Colo 370, 256P1; 82Colo 146, 257P364; 84Colo 507, 271P625; 84Colo 511, 272P6; 85Colo 409, 277P299; 85Colo 530, 277P306; 85Colo 498, 277P467; 87Colo 401, 288P633; 102Conn684, 129A721; 103Conn547, 131A415 (instruction as to statute included in instruction covering applicable parts thereof); 103Conn678, 131A838; 105Conn49, 134A151; 105Conn453, 135A554; 107Conn17, 139A270; 107Conn156, 139A688; 108Conn436, 143A568; 111Conn99, 149A399; 98Fla720, 124S180; 160Ga281, 127SE848; 160Ga497, 128SE661; 160Ga732, 129SE57; 162Ga428, 134SE72; 162Ga598, 134SE316; 162Ga657, 134SE751; 163Ga580, 136SE785; 164Ga421, 138SE902; 164Ga575, 139SE34; 164Ga682, 139SE421; 165Ga451, 141SE306; 166Ga159, 142SE681; 167Ga766, 146SE754; 170Ga495, 153SE37; 170Ga426, 153SE46; Ga 155SE5; 35GaA94, 132SE454; 35GaA350, 133SE282; 35GaA465, 134SE120; 35GaA438, 134SE122; 35GaA528, 134SE126; 35GaA496, 134SE327; 36GaA28, 134SE322; 35GaA763, 134SE833; 36GaA527, 137SE127; 37GaA34, 138SE584; 37GaA244, 139SE579; 39GaA74, 146SE793; 39GaA529, 147SE778 (2dcase); 40GaA239, 149SE424; 41GaA746, 154SE706; GaA 155SE51; GaA 155SE85; 29Hawaii188; 41Ida98, 238P296; 41Ida697, 243P647; 41Ida703, 243P649; 42Ida696, 247P789; 45Ida636, 264P377; Ida 290P724; 317Ill165, 147NE785; 318Ill445, 149NE507; 331Ill277, 162NE865; 339Ill94, 170NE845; Ill 173NE390; 234IllA9; 234IllA234; 237IllA145; 243IllA129; 246IllA334; 251IllA320; 254IllA261; 197Ind475, 151NE390; 85IndA301, 154NE24; Ind 154NE40; 88IndA126, 147NE288; 82IndA667, 147NE294; 83IndA61, 147NE716; 83IndA73, 147NE718; 85IndA327, 151NE346; 85IndA516, 151NE742; 86IndA294, 157NE101; 88IndA301, 157NE458; 88IndA52, 163NE231; 88IndA122, 163NE526; 89IndA100, 163NE534; IndA 169NE352; IndA 171NE10; IndA 171NE212; 200Iowa723, 205NW343; 201Iowa871, 208NW297; 202Iowa273, 209NW393; 203Iowa897, 209NW432; 202Iowa1386, 212NW161; 203Iowa1194, 212NW354; 203Iowa985, 213NW567; 206Iowa328, 218NW568; 207Iowa585, 223NW397; 207Iowa1278, 224NW815; 208Iowa1157, 225NW346; Iowa 228NW880; 118Kan332, 234P990, 40ALR1305; 120Kan572, 245P114; 123Kan88, 254P348; 125Kan66, 262P587; 125Kan760, 266P73; 126Kan188, 268P119; 127Kan109, 272P101; 128Kan127, 276P74; 129Kan82, 281P857; 129Kan766, 284P427; 130Kan336, 286P236; Kan 292P939; 209Ky730, 273SW555; 209Ky92, 275SW16; 210Ky508, 276SW133; 210Ky792, 276SW800; 213Ky235, 280SW966; 213Ky661, 281SW1005; 215Ky401, 285SW245; 216Ky95, 287SW239; 216Ky648, 288SW289; 217Ky594, 290SW487; 218Ky535, 291SW785; 219Ky44, 292SW491; 220Ky493, 295SW426; 223Ky544, 48SW(2d)368; 224Ky303, 6SW(2d)237; 224Ky460, 6SW(2d)454; 225Ky15, 7SW(2d)487; 225Ky542, 9SW(2d)517; 226Ky706, 11SW(2d)968; 227Ky423, 13SW(2d)254; 227Ky690, 13SW(2d)1022; 229Ky444, 17SW(2d)231; 230Ky132, 18SW(2d)954; 230Ky806, 20SW(2d)991(2dcase); 231Ky346, 21SW(2d)452; 234Ky307, 28SW(2d)6; 125Me494, 135A198; 126Me261, 137A773; 148Md363, 129A359; 148Md628, 129A915; 153Md119, 137A484; 153Md680, 139A557; 156Md329, 144A363; 156Md558, 144A705; 157Md551, 146A755; 158Md481, 148A814; Md 150A854; Md 151A400; 252Mass270, 147NE882; 253Mass37, 148NE101; 252Mass552, 148NE105; 253Mass85, 148NE371; 253Mass99, 148NE463; 253Mass433, 149NE142; 254Mass308, 150NE151; 254Mass501, 150NE326; 254Mass599, 150NE874; 255Mass243, 151NE91; 256Mass217, 152NE239; 256Mass358, 152NE370; 256Mass600, 153NE19; 257Mass272, 153NE784; 258Mass213, 154NE757; 259Mass232, 156NE26; 260Mass102, 156NE735; 260Mass210, 157NE339; 260Mass566, 157NE702; 262Mass13, 159NE459; 262Mass348, 159NE922; 263Mass228, 161NE240; 265Mass189, 163NE906; 265Mass301, 164NE89; 266Mass381, 165NE492; 267Mass402, 166NE867; 267Mass501, 167NE235; Mass 169NE805; 232Mich276, 205NW134; 233Mich53, 206NW547; 235Mich236, 209NW63; 234Mich693, 209NW138; 234Mich679, 209NW141; 238Mich198, 213NW112; 239Mich682, 214NW969; 241Mich343, 216NW927; 241Mich361, 217NW32; 241Mich534, 217NW909; 244Mich108, 221NW121; 244Mich226, 221NW168; 244Mich208, 221NW314; 244Mich649, 222NW91; 249Mich127, 227NW707; 164Minn76, 204NW921; 172Minn284, 214NW890; 173Minn186, 217NW99; 177Minn270, 224NW839; 180Minn391, 231NW10(2dcase); Minn 232NW38; 143Miss277, 107S868; 149Miss319, 115S772; 149Miss849, 116S104; 155Miss104, 124S66; 156Miss182, 125S529(4thcase); 157Miss439, 128S327; Miss 130S151; 309Mo 638, 274SW815; Mo 278SW361; 312Mo 30, 278SW747; 312Mo 458, 278SW759; 314Mo 515, 284SW439; 315Mo883, 289SW540; 316Mo 1094, 295SW563; 319Mo 744, 8SW(2d)38; Mo 9SW(2d)947; MoA 15SW(2d)923; 322Mo11, 16SW(2d)212; Mo 23SW(2d)993; Mo 26SW(2d)969; Mo 26SW(2d)988; Mo 29SW(2d)64; Mo 30SW(2d)471; 219MoA90, 266SW492; 218MoA253, 267SW431; MoA 271SW1029; MoA 273SW209; MoA 273SW428; MoA 273SW764; MoA 274SW849; 219MoA451, 274SW906; MoA 275SW358; 220MoA518, 276SW1030; MoA 281SW98; 221MoA537, 282SW1037; 221MoA577, 284SW156; 221MoA251, 284SW167; 220MoA9, 285SW123; MoA 285SW516; 221MoA715, 285SW524; MoA 285SW1028; MoA 286SW157; MoA 287SW787; MoA 288SW941; MoA 288SW948; 221MoA160, 290SW78; MoA 290SW647; MoA 293SW483; MoA 294SW747; MoA 294SW762; MoA 296SW243; MoA 297SW435; MoA 299SW85; 221MoA181, 299SW150; 222MoA138, 1SW(2d)1030; MoA 4SW(2d)501; MoA 6SW(2d)640; MoA 7SW(2d)448; MoA 8SW(2d)1082; MoA 11SW(2d)1096; MoA 14SW(2d)511; MoA 15SW(2d)884; MoA 16SW(2d)742; MoA 19SW(2d)295; MoA 20SW(2d)537; MoA 20SW(2d)540; MoA 20SW(2d)574; MoA 23SW(2d)225; MoA 24SW(2d)644; MoA 25SW(2d)122; MoA 25SW(2d)499; MoA 26SW(2d)869; MoA 27SW(2d)52; MoA 27SW(2d)1052; MoA 29SW(2d)221; MoA 30SW(2d)1090; MoA 31SW(2d)113; MoA 31SW(2d)580; MoA 31SW(2d)590; 75Mont384, 243P1089; 75Mont493, 244P298; 78Mont273, 254P165; 78Mont551, 254P866; 83Mont185, 271P452; Mont 286P415; 114Nebr88, 206NW155; 114Nebr266, 207NW31; 115Nebr795, 215NW122; 117Nebr238, 220NW262; Nebr 228NW601; Nebr 230NW769; 49Nev375, 247P545, 47ALR569; 82NH555, 130A740; 83NH29, 137A445; 83NH99, 138A544; 83NH236, 141A136; 102NJL347, 131A919; 102NJL708, 133A303; 104NJL389, 140A325; 104NJL209, 141A14; 105NJL193, 143A435; 105NJL477, 144A566; 105NJL363, 144A593; 105NJL391, 144A805; NJ 147A445; NJ 151A99(2dcase); NJSup 129A204; NJSup 129A396; NJSup 130A225; NJSup 130A439; NJSup 130A561; NJSup 132A242; NJSup 132A294; NJSup 135A274; 103NJL351, 135A786; NJSup 136A300; NJSup 137A432; NJSup 139A246; NJSup 140A881; NJSup 145A751; NJSup 147A400; NJSup 150A192; 31NM616, 249P1010; 225AppDiv391, 233NYS252; 135Misc42, 237NYS515; 190NC617, 130SE306; 191NC493, 132SE282 (where instructions given more favorable than requested); 49ND478, 191NW772; 59ND59, 228NW456; 30OhA300, 165NE47; 21OhA12, 153NE102; 24OhA48, 156NE157; 24OhA136, 156NE609; 26OhA96, 159NE487; 26OhA392, 160NE495; 31OhA379, 166NE645; 35OhA291, 172NE425; OhA 173NE16; 105Okl 74, 231P532; 112Okl 1, 239P599; 112Okl 86, 240P110; 112Okl 188, 240P743; 115Okl 88, 241P1099; 113Okl 291, 241P1105; 117Okl 96, 245P571; 118Okl 42, 246P615; 114Okl 277, 246P859; 121Okl 5, 247P58; 118Okl 113, 247P87; 121Okl 53, 247P97; 120Okl 3, 249P724; 121Okl 288, 249P905; 120Okl 116, 251P989; 124Okl 235, 254P962; 126Okl 64, 258P918; 126Okl 157, 259P242, 55ALR1014; 126Okl 238, 259P257; 127Okl 106, 260P26; 126Okl 219, 260P78; 128Okl 96, 261P211; 128Okl 146, 261P931; 130Okl 23, 264P912; 130Okl 51, 265P141; 130Okl 213, 266P775; 133Okl 14, 270P838; 133Okl 260, 272P363; 134Okl 1, 272P436; 135Okl 249, 274P1082; 136Okl 51, 275P640; 136Okl 271, 277P591; 139Okl 142, 281P565; 140Okl 147, 282P306; 139Okl 287, 282P327; 142Okl 184, 286P304; 143Okl 128, 287P411; Okl 291P573; Okl 292P37; Okl 292P39; 36OklACR432; 38OklACR429; 39OklACR114; 39OklACR331; 43OklACR208; 43OklACR347; 44OklACR28; 116Or237, 240P891; 116Or554, 240P1113, 241P1009; 117Or306, 244P75; 117Or411, 244P313; 119Or55, 248P158; 119Or481, 250P238; 119Or682, 250P1098; 121Or1, 252P962; 123Or253, 261P413; 124Or71, 263P66; 123Or632, 263P400; 126Or105, 268P982; 126Or135, 268P1002, 59ALR1062; 126Or532, 270P521; 127Or490, 272P670; 127Or497, 272P673; 128Or526, 274P1097(2dcase); 131Or631, 284P183; 132Or106, 284P579; 133Or14, 288P200; 133Or246, 289P1055; Or 291P380; Or 292P89; Or 292P93; 285Pa320, 131A856; 289Pa356, 137A603; 295Pa301, 145A303; 297Pa576, 147A830; 298Pa329, 148A474; RI 128A574; 46RI 87, 129A602; 47RI 44, 129A605; 47RI 186, 131A643; RI 132A886; 47RI 395, 133A621; 49RI 18, 139A466; 49RI 53, 139A916; RI 140A912; 49RI 364, 142A621; 50RI 226, 146A484; RI 147A751; 50RI 345, 147A877; RI 150A497; 137SC40, 134SE912; 138SC241, 136SE234; 142SC284, 140SE560, 57ALR634; 145SC196, 143SE31; 147SC58, 144SE579; 148SC392, 146SE245; 150SC459, 148SE478; 48SD554, 205NW654; 54SD325, 223NW208; SD 226NW731; 159Tenn130, 17SW(2d)13; TexCivA 270SW1101; TexCivA 272SW597; TexCivA 273SW979; TexCivA 274SW263; TexCivA 274SW295; TexCivA 275SW430; TexCivA 275SW463; TexCivA 281SW275; TexCivA 281SW295; TexCivA 283SW681; TexCivA 285SW698; TexCivA 288SW275; TexCivA 289SW416; TexCivA 290SW846; TexCivA 291SW590; TexCivA 293SW901; TexCivA 294SW905; TexCivA 295SW283; TexCivA 295SW326; TexCivA 298SW627; TexCivA 299SW913; TexCivA 299SW933; TexCivA 300SW118; TexCivA 300SW196; TexCivA 2SW(2d)347; TexCivA 4SW(2d)257; TexCivA 6SW(2d)432; TexCivA 9SW(2d)69; TexCivA 10SW(2d)739; TexCivA 11SW(2d)659; TexCivA 13SW(2d)452; TexCivA 13SW(2d)929; TexCivA 19SW(2d)930; TexCivA 21SW(2d)43; TexCivA 21SW(2d)563; TexCivA 23SW(2d)516; TexCivA 23SW(2d)818; TexCivA 24SW(2d)457; TexCivA 25SW(2d)969; TexCivA 27SW(2d)323; TexCivA 27SW(2d)621; TexCivA 29SW(2d)835; 67Utah242, 247P476; Utah 272P229; Utah 280P327; 100Vt268, 137A97; Vt 147A346; Vt 147A771; Vt 150A128(2dcase); 143Va36, 129SE239; 142Va454, 129SE277; 144Va154, 131SE245 (refusal not reversible error); 144Va330, 132SE320; 144Va358, 132SE316; 144Va496, 132SE334; 145Va489, 134SE576, 50ALR1425; 145Va681, 134SE692; 146Va64, 135SE683; 147Va304, 137SE507; 148Va331, 138SE637; 149Va235, 141SE260; 150Va108, 142SE393; 150Va452, 143SE683; Va 143SE887; 151Va706, 144SE635; 151Va964, 145SE732; 151Va345, 146SE363; 152Va411, 147SE251; 152Va453, 147SE265; Va 154SE485; Va 154SE558; Va 154SE687; 135Wash260, 237P711, 241P969; 137Wash177, 242P2; 140Wash

693, 250P351; 141Wash369, 251P585; 141Wash504, 252P526; 142Wash128, 252P683; 142Wash240, 252P915; 143 Wash570, 255P930; 143Wash653, 255P 1037; 144Wash272, 257P835; 144Wash 700, 257P1119; 144Wash399, 258P317; 145Wash77, 258P839; 146Wash251, 262 P643; 147Wash345, 265P1082; 147 Wash260, 265P1085; 147Wash330, 266 P156; 149Wash312, 270P811; 149Wash 316, 270P1029; 149Wash409, 271P85; 150Wash640, 274P702; 151Wash486, 276P542; 152Wash492, 278P178; 153 Wash538, 280P15; 154Wash588, 283P 447; 155Wash133, 283P1076; 155Wash 526, 285P446; Wash 288P258; Wash 290P816; Wash 290P831; Wash 290P 864; Wash 292P427; 99WVa677, 129 SE753; 100WVa452, 130SE810; 100 WVa540, 131SE6; 101WVa341, 132SE 751; 101WVa411, 132SE870; 101WVa 602, 133SE333; 104WVa335, 140SE51; 107WVa236, 148SE70; WVa 154SE769; 34Wyo 415, 244P637. See also 214Ala 472, 108S242.

1717-19a 83NH501, 144A787.

1717-20 102Conn735, 130A102 (and requested instruction contains matter on which court is not bound to instruct); 234 IllA9.

1717-21 MoA 294SW758.

1117-24 8F(2d)321; 16F(2d)54; 38F (2d)159; 41F(2d)640; 220Ala385, 125 S403; 74CalA10, 239P429 (measure of damages); 78CalA617, 248P741; 80CalA 667, 252P773; 87CalA440, 262P380; 104CalA400, 285P1053; 82Colo 258, 259 P1042 (instruction of specific statute of limitations); 108Conn191, 142A742; 160Ga872, 129SE532; 35GaA94, 132SE 454; 202 Iowa1008, 209NW744 (failure to state that plaintiff claimed shipment was not frozen when received for transportation); 203 Iowa985, 215NW567; 210Ky92, 275SW16 (contributory negligence, assumed risk, and notice); 255 Mass340, 151NE317; 314Mo 515, 284SW 439 (on humanitarian rule); Mo 28SW (2d)1023; MoA 284SW857; MoA 25SW (2d)558; 20 OhA380, 152NE673 (failure to charge on traffic ordinance or violation held not error where court read statutes applicable to legal speed of automobiles); TexCivA 282SW884; 68 Utah85, 249P437; 100Vt268, 137A97 (care of prudent person); 148Va879, 139SE480; 148Va762, 139SE483; 104 WVa238, 139SE737. **Instruction on last clear chance doctrine**, given by court, has been held sufficient, though less clear than refused instruction. 72 CalA736, 238P110. **Refusal to instruct that clear and convincing evidence is essential to establish fraud** held proper where court charged on need of preponderance of evidence. 80Colo 420, 252 P346. **Refusal of instructions requested by defendant railroad** affecting giving of crossing signals, and willfulness or gross negligence of plaintiff, held not error in view of instructions given. 137SC 40, 134SE912. **In action against dock owner for loss by fire**, charge that defendant's adjustment with insurance company had nothing to do with its liability held properly refused in view of charge given. 13F(2d)991.

1718-25 38F(2d)431; 22AlaA231, 115S 80; 176Ark551, 3SW(2d)315; 69CalA 9, 230P958; 94CalA361, 271P503; 103 Conn598, 131A437 (instruction as to ordinary proximate cause held not to include requested instruction as to sole proximate cause essential in actions against municipalities); 36GaA492, 137 SE107; 38GaA617, 144SE921(2dcase); 67Utah242, 247P476; 70Utah385, 260 P415. **Applications of rule.**–168Ark884, 271SW967.

1719-26 34F(2d)738; 36GaA492, 137 SE107; 29Hawaii188; 29Hawaii524; 41 Ida98, 238P296; 85 Ind301, 154NE 24; 83NH29, 137A445; 24 OhA15, 156 NE155; 70Utah385, 260P415; 101WVa 621, 134SE204, 47ALR800.

1719-29 215Ala420, 110S895.

1719-29½-New. Where statute provides that charge is to be given after argument, refusal to give requested charge is erroneous, though fully covered in special charge given, without request, before argument. 31 OhA154, 166NE 140.

1719-29½-New. Refusal to give requested instruction, if it is in writing and contains correct proposition of law applicable, is erroneous, even though its substance is covered by general charge. 120 Oh400, 166NE364.

1719-30 21 OhA486, 153NE223.

1719-31 21 OhA186, 152NE781; 24 OhA 509, 156NE608; 24 OhA374, 157NE708 (refusal held error though covered in charge). See also MoA 9SW(2d)685.

1719-31½-New. In Ohio specific instructions as to law may be given at close of evidence and before argument. 24 OhA48, 156NE157.

1720-33 Court need not designate disposition of each instruction. CalA 290 P114.

1720-37 IndA 168NE585.

1720-38 Calling special attention of jury to language of given charge in explanation of its meaning is not such qualification of charge as is forbidden by statute. 213Ala617, 105S805.

1720-39 170Ark346, 280SW354; 172 Ark169, 287SW1000; 178Ark845, 12SW (2d)779; 96CalA204, 273P1097; 98CalA 92, 276P422; 105Conn436, 135A570; 165Ga408, 140SE844; 234 IllA234; 237 IllA95; Miss 130S479; 309Mo 638, 274 SW815; 323Mo 64, 18SW(2d)445; Mo 23SW(2d)142; MoA 273SW128; 220 MoA429, 276SW96; MoA 286SW720; 190NC859, 129SE592; 130 Okl 104, 265 P108; 121 Or519, 254P809; 127 Or523, 272P890; 47RI 395, 133A621; 155SC 356, 152SE646; Utah 273P963. **Striking part of instruction** is not error. Va 143SE887.

1721-40 237 IllA95; 125Me31, 130A 509; 255Mass473, 152NE81; Mo 289SW 877; 133SC353, 131SE146; 155Wash 133, 283P1076. **Modification giving charge "as a general proposition" is** mere surplusage and not error. 133SC 353, 131SE146.

1721-41½-New. Modification asked by party and the giving of instruction by court as modified makes it the court's instruction. 315Mo 883, 289SW540.

1721-41½-New. Where requested instructions are incorrect court should give correct instructions. TexCivA 295 SW633.

1721-41¼-New. Error in failing to give part of instruction may be available though other part of instruction was given. Wash 289P19.

1721-42 152 Md105, 136A50; MoA 15 SW(2d)923; 190NC859, 129SE592; 138 SC31, 136SE13.

1721-46 201Cal 701, 258P596; MoA 20 SW(2d)950; MoA 20SW(2d)952; 190 NC859, 129SE592.

1721-47 170Ark346, 280SW354; MoA 288SW369; 121 Or519, 254P809; 133 SC353, 131SE146 (modification stating correct proposition of law not error). **Additional explanation in no way contravening previous charge** is not error. 133SC353, 131SE146. **Modification of requested instruction by substitution of word "if" in place of "for"** held not erroneous. 152SC178, 149SE753.

1721-48 MoA 12SW(2d)930; MoA 30 SW(2d)784 (reference to other instructions). See also 221MoA559, 285SW134.

1721-49½-New. or strike out requirement to find for defendant, where instruction precludes finding for plaintiff, MoA 12SW(2d)930.

1721-50 237 IllA95; 155Md173, 141A 556; Mo 29SW(2d)64; 151Va345, 146 SE363. **Elimination of phrase which detracts nothing of consequence** is not error. 144Va795, 130SE788.

1721-50½-New. **Matter having no basis in evidence** may properly be eliminated in giving requested instruction. 152 Miss747, 118S437.

1721-52 323Mo 64, 18SW(2d)445.

1721-52½-New. **Eliminating part of requested charge.** Failure to charge was not error on ground that court magnifies defendant's duties and minimizes plaintiff's duties. 39GaA371, 147SE163 (2dcase).

1721-53 234 IllA234.

1722-54½-New. Substitution of words having same meaning is not erroneous modification. 320 Ill 577, 151NE526.

1722-57 MoA 273SW761.

1722-68 172Ark117, 288SW377; 81NH 520, 129A270.

1723-69 172Ark562, 289SW761.

1723-70 179Ark214, 148SW(2d)1107; Ark 32SW(2d)160; MoA 278SW1094.

1723-73 220MoA791, 277SW58.

1724-82½-New. Error not available, where party's own full instruction was given as requested. 104CalA228, 285 P905.

1724-83 See also 207 Iowa576, 223NW 375.

1724-88 36GaA149, 136SE319; 47RI 378, 133A618. **Failure to charge upon weight of documentary evidence** held not error. 165Ga379, 140SE759. **Charge omitting code provision** for refreshing of recollection by witness held not error. 37GaA240, 139SE686.

1724-90 85 IndA301, 154NE24. **Evidence relative to pleadings.**–103Conn 267, 130A571. **Extent of trial judge's discussion of testimony** is discretionary. 299Pa469, 149A717.

1724-90½-New. **Instruction that statements of experts are not to be considered as evidence of facts, but merely of advisory nature**, is erroneous as not confined to opinions of experts, where evidence includes facts comprehended from personal observation. 322Mo 218, 14SW (2d)590, 62ALR835.

1724-93 236 IllA386; Mo 274SW369; 312Mo 643, 281SW44; MoA 282SW125; 283Pa307, 129A112. **Refusal to instruct on credibility is error.**–236 IllA386. **Charge that witnesses are not seen** when depositions are used held proper. 37 GaA213, 139SE583. **Discrimination should be used** in instructing on weight of opinion evidence and, ordinarily, usual instruction that jury are judges of credibility of witnesses and weight to be given their testimony is only warranted one. Mo 293SW375.

1725-94 285Pa251, 132A120.

1725-95 **Instruction to put that construction on evidence** that shall make all witnesses speak truth if reasonably possible is proper. 20AlaA617, 104S559. **Jury should not be invited to indulge in presumptions against testimony by deposition** because they have not benefit of appearance of witness, or because witness is nonresident and cannot be prosecuted in state for perjury. 213Ala631, 105S886. **Refusal to instruct held proper.**–Cal 289P614.

1725-96 74CalA10, 239P429; 251Mich 696, 232NW397(2dcase); MoA 6SW(2d) 640 [quotCJ]; 126Misc342, 215NYS170; 27 OhA412, 160NE873. **Instruction not objectionable** because of use of masculine pronouns referring to witnesses where some were females. 318 Ill 445, 149NE507.

1726-97 TexCivA 32SW(2d)216.

1726-98 See 24 OhA66, 156NE616.

1726-1 See also 74CalA10, 239P429.

1726-5½-New. **Under statute requiring corroboration where adversary cannot testify** instruction misleading where it stated law did not require corroboration in every particular but such as would confirm and strengthen belief of jury, testimony requiring corroboration being inconsistent and contradictory. 142Va500, 129SE356.

1726-6 IndA 148NE505.

1726-15½-New. Court should require jury to believe "from the evidence" and not merely to believe that defendant was guilty of certain acts before they can find him guilty of such acts. 217 Ky738, 290SW677.

1726-15⅓-New. **Instructions as to evidence bearing on credibility held not erroneous.**–208 Iowa228, 225NW268.

1726-15¼-New. **Instructions as to evidence bearing on credibility held erroneous.**–208 Iowa228, 225NW268.

1726-15⅕-New. Refusing charge merely stating rule for measuring credibility of witnesses is not erroneous, being within judge's discretion. NJ 151A99 (2dcase).

1726-17 256 IllA569; 285Pa251, 132A 120 (court may define "credible witness"); 294Pa425, 144A416; 99Vt191, 130A697. **Instructions held not erroneous.**–MoA 290SW119.

1727-20 40GaA328, 149SE713. **Usual instruction as to credibility of witness**

is sufficient, where further instructions thereon were not requested. 208 **Iowa** 361, 225NW862.

1727-23 285Pa251, 132A120; 299Pa 469, 149A717.

1727-28 It is error to refuse charge for jury to scan certain testimony with care. 37GaA240, 139SE686.

1728-45 See also 315Mo 367, 286SW106.

1729-47 27Hawaii109; **Mo** 293SW375; **MoA** 27SW(2d)739. **Instruction has been held unduly restrictive.**–169Ga665, 151SE343.

1729-54 **MoA** 6SW(2d)640 [quotCJ].

1730-57 198Wis122, 223NW427.

1731-80 285Pa251, 132A120 (court may call jury's attention to tainted character of evidence).

1731-83 322 Ill 426, 153NE600. **Court may properly charge that conviction of crime has no effect on right to contract.**–285Pa251, 132A120.

1732-94 167Ga588, 146SE320. But see 43 **Ida**540, 253P854. **Instructions held** proper.–206 **Iowa**925, 221NW577.

1733-2 **NH** 146A862. **Requested instructions properly refused.**–242Mich 326, 218NW673.

1733-4 **NJSup** 134A282 (request on fourth trial of personal injury action to charge on effect of material change held properly refused in view of other testimony).

1733-8 **Cal** 292P451. **That the giving or refusing of such instructions lies largely in the discretion of the trial** court see **MoA** 277SW581; **MoA** 28SW (2d)1044. **Discretionary.**–83Mont452, 272P998.

1733-9 156Miss758, 126S836; 126Misc 342, 215NYS170.

1734-11 126Misc342, 215NYS170 (not an imperative rule of law).

1734-13 Instructions held not erroneous on ground that explanation of false statement was uncontradicted. 322 Ill 426, 153NE600.

1734-16 **Mo** 279SW415; 312Mo 643, 281 SW44; 319Mo 1015, 5SW(2d)59; **MoA** 15SW(2d)868(2dcase); 79Mont91, 254P 1070. **Instruction in words of statute** held proper. 79Mont91, 254P1070.

1735-23 219Ala228, 121S521, **64ALR** 1022; **Miss** 130S478.

1735-24 245 IllA248.

1736-28½–New. It is proper to instruct the jury that if they believe that any witness is honestly mistaken as to any material fact about which such witness gave testimony they are at liberty to disregard that part of such witness' testimony. 321Mo 643, 281SW44.

1736-33 207 **Iowa**585, 223NW397; **235 Ky**429, 31SW(2d)709.

1736-33½–New. An instruction that if willfully false testimony was given by both sides and scales were evenly balanced, verdict must be for defendant, is erroneous. 126Misc342, 215NYS170.

1736-33½–New. Instruction that jury may disregard testimony of witness believed to have testified falsely should not intimate court's opinion. **MoA** 28SW (2d)1044.

1736-35 **NJSup** 130A639.

1736-36 **NJSup** 130A639. See also 159 **Tenn**86, 16SW(2d)20.

1737-43 Mo 28SW(2d)84(2dcase).

1737-46 Mo 31SW(2d)21.

1737-48 221Ala580, 130S87; **171Ark** 505, 284SW743; 317Mo 492, 297SW353. See also 90**Cal**A764, 266P606.

1737-52 203 **Iowa**5, 212NW348.

1738-55½–New. Instruction that only one witness could be classed as expert, if an expert at all, held not error, in absence of specific objection. **171Ark** 505, 284SW743.

1738-64 164Ga265, 138SE231; **284Pa** 555, 131A470. **Instructions held proper.**–221MoA1250, 300SW321.

1738-65 284Pa555, 131A470.

1738-66 164Ga265, 138SE231.

1738-68 164Ga265, 138SE231; **284Pa** 555, 131A470.

1739-72½–New. It is error to charge that improbabilities in evidence may be treated as defense. 204 **Iowa**231, 213NW 380.

1739-75 **TexCivA** 293SW859.

1739-76 205 **Iowa**291, 217NW880. **Instructions held proper.**–117 Or411, 244P 313. **Where law makes no distinction between direct and circumstantial evidence, failure to charge that fact may** be proved by circumstantial evidence is not error. 105**Conn**49, 134A151. **Requested instructions may be refused where too indefinite.**–87**Colo** 479, 288P 1050.

1739-84½–New. Instruction on circumstantial evidence is inapt where all witnesses to an accident were eyewitnesses. 255 IllA465.

1739-86 **Del** 143A27.

1740-87 245 IllA248.

1740-93 149**Va**318, 141SE228.

1742-9 But see 80**CalA**444, 251P952. **Instructions obnoxious to rule.**–**Iowa** 230 NW421.

1743-19 Instructions held not erroneous.–104**NJL**387, 140A397.

1743-21½–New. Instruction as to probative force of unanswered letter should be carefully drawn. 188**Wis**30, 205NW 407.

1743-22 314Mo 305, 284SW488.

1743-23 Instruction held entirely within trial court's discretion, to be exercised carefully. 170Minn332, 212NW 533.

1743-24 178Ark250, 11SW(2d)774, 61 **ALR**1348; 238Mich198, 213NW112; 295 Pa120, 144A912. **Instruction held erroneous** as placing burden of proof on defendant. 36F(2d)912.

1744-25 314Mo 305, 284SW488.

1744-29 167Minn437, 209NW317.

1745-33 **NJSup** 134A116.

1745-35 154Wash57, 280P932.

1745-45 Instructions held not erroneous.–101**WVa**535, 133SE131 (explaining statutory restraint upon party's testimony as to transaction with deceased).

1745-47 315Mo 478, 286SW36. **Such instruction held not erroneous** but of kind not to be encouraged. 315Mo 478, 286SW36.

1746-56 But see 330 Ill 264, 161NE486.

1746-58 318Mo 1155, 6SW(2d)947.

1747-70 322Mo 765, 18SW(2d)42. See also 152**Wash**5, 277P81.

1747-71½–New. Where number of witnesses introduced by opposing parties is same, instruction that jury may consider relative number of witnesses is inapplicable. 35**GaA**622, 134SE198.

1747-74 But see 89**CalA**721, 265P541.

1748-75½–New. Where testimony on issue whether defendant held notes indorsed by deceased without restriction for express purpose of keeping them for deceased's heirs after his death or whether he was given such notes in consideration of his past and future services in caring for deceased was conflicting and facts bearing on that question were fully testified to by witnesses for both parties, it was error to instruct jury that defendant was presumed to be owner of notes. **Mo** 11SW(2d)1026.

1748-77 **TexCivA** 296SW961. **Instructions held not erroneous.**–39F(2d)376.

1748-80 **TexCivA** 19SW(2d)69 (instruction held properly refused).

1748-84 Instruction that death certificate stating cause of death is presumably true properly refused when not inconsistent with claim by opponent. 221 Ala399, 129S78.

1748-84½–New. Instruction following statute that death certificate is presumptive evidence properly refused for omitting to state presumption prima facie. 221Ala399, 129S78.

1748-86 120**Kan**591, 244P867; **225App** Div300, 233NYS196. **Instructions stating merely elementary principles,** as to burden of proof are insufficient. 216 AppDiv439, 215NYS587.

1748-87 **TexCivA** 22SW(2d)986.

1748-88 37GaA221, 139SE734; **Tex** CivA 275SW410; 200Wis255, 227NW 873.

1748-89 37GaA221, 139SE734; **197NC** 385, 148SE432. **Error to place burden of proof on plaintiffs** to establish affirmative of issues, in action on notes. **Tex** CivA 293SW916.

1748-90 37F(2d)472; 120**Kan**591, 244 P867; **TexCivA** 16SW(2d)869.

1748-91 See also **TexCivA** 32SW(2d) 216.

1748-92 120**Kan**591, 244P867; **Tex** CivA 286SW680. **Where case is submitted on special issues,** proper practice is to point out to jury where, and not upon whom, burden of proof lies. **TexCivA** 286SW680. **Instruction held sufficient.**–**MoA** 26SW(2d)863.

1748-93 177Ark60, 5SW(2d)729; **Tex** CommnA 298SW(2d)995 (on submission of special issues); **TexCivA** 283SW860 (fraud in exchange of lands); **TexCivA** 291SW681; **TexCivA** 297SW894 (suit for money expended on cotton brokerage contract); **TexCivA** 24SW(2d)786; **Tex** CivA 32SW(2d)216.

1748-94 **TexCivA** 271SW228 (case submitted on special issues court's instruction would not require reversal, but on objection and request of instruction presenting court rule, cause is reversed); **TexCivA** 291SW583 (not necessary to charge in all cases); **TexCivA** 291SW 681; **TexCivA** 22SW(2d)1077; **Tex** CivA 32SW(2d)216.

1749-97 41GaA205, 152SE298; 44 **Ida** 729, 262P152; 208 **Iowa**24, 221NW197; 208 **Iowa**325, 223NW763; 178Minn471, 227NW491; **Mo** 298SW717; **MoA** 15 SW(2d)943; 221MoA600, 283SW65; **MoA** 283SW729; **MoA** 300SW993; **Tex** CivA 208SW(2d)363; **TexCivA** 258W (2d)176.

1749-98 20F(2d)619; 21AlaA118, 105 S713 (request properly refused); 180 Ark596, 22SW(2d)32; 161Ga636, 131SE 361; 41 **Ida**707, 243P650 (instructions held not incorrect); 205 **Iowa**291, 217 NW880; 208 **Iowa**174, 225NW342; 120 **Kan**591, 244P867; 128Kan97, 276P61; 128Kan500, 278P718; 175Minn414, 221 NW639; 155Miss719, 125S120; 221MoA 537, 282SW1037; 227AppDiv324, 237 NYS563; **TexCivA** 289SW726; **TexCivA** 14SW(2d)116; **TexCivA** 25SW(2d)913; **Vt** 150A128(1stcase). **Instructions held not erroneous.**–**Iowa** 213NW442; 315 Mo 760, 287SW346 (in action on policy of accident insurance). **Instructions held proper.**–**MoA** 28SW(2d)117. **Instructions are not objectionable within rule.**–35GaA126, 132SE414. **Instructions held correct.**–117 Or236, 243P778.

1749-99 161Ga636, 131SE361.

1749-3 120Kan591, 244P867; 129**Kan** 700, 284P599; **Md** 150A34; 316Mo 1104, 295SW757; **MoA** 17SW(2d)658; **TexCivA** 289SW726; **Instruction held proper.**–35GaA648, 134SE344; 136 **Okl** 298, 277P658. **Instruction's held properly refused.**–39F(2d)376.

1749-4 111Conn178, 149A774 (negotiable bonds); 160Ga287, 127SE762; **Mo** 30SW(2d)1015; **MoA** 30SW(2d)781.

1749-6 **MoA** 271SW540.

1749-8 35GaA126, 132SE414. See also 323Mo 1089, 20SW(2d)494. **General charge, including statement as to burden,** sufficient and no special charge is necessary. **TexCivA** 278SW350.

1749-9 35GaA126, 132SE414; **Tex** CivA 299SW665.

1750-10 40GaA291, 149SE438 (failure to instruct on original burden of proof is not error where, by defendant's admission, prima facie case was made out).

1750-13 **MoA** 271SW540.

1750-14 **MoA** 271SW540.

1750-15 **MoA** 271SW540; 189NC482, 127SE593 ("burden of proof" should be used in sense of "burden of the issue").

1750-16 161Ga319, 130SE559; 33GaA 773, 127SE830; 34GaA253, 129SE115; 35GaA174, 132SE239; 37GaA321, 140 SE383; 39GaA265, 147SE160; 45 **Ida** 662, 264P869; **TexCivA** 291SW681. **Objection** that instruction not specific not available in absence of request for more specific instruction. 112 **Okl** 114, 240P74.

1750-18 212Ala608, 103S658. **In Alabama,** etc. 20AlaA614, 104S446.

1750-19 176Ark616, 3SW(2d)692; **Ark** 31SW(2d)963; 97CalA377, 275P840; 160Ga799, 129SE99; 167Ga537, 146SE 170; 37GaA221, 139SE734; 40GaA291, 149SE438 (affirmative defense); 233 IllA216; 202 **Iowa**1338, 212NW154; 204 **Iowa**231, 213NW380; 245Mich661, 224NW397; **MoA** 14SW(2d)511; 190 NC108, 129SE181; 24 **OhA**374, 157NE 708 (instruction held erroneous); 31 **OhA**525, 166NE698; **TexCivA** 24SW (2d)786; 155Wash133, 283P1076. See also 148SC152, 145SE699. **Charge that preponderance must be by evidence "offered by defendant"** held erroneous. 37GaA221, 139SE734. **Instruction ignoring fact that number of witnesses**

should be considered by jury is erroneous. 254 IllA192. **Testimony and evidence** are not the same and charge that preponderance of evidence means greater weight of testimony is error as ignoring exhibits admitted. 24 OhA 15, 156NE155. **"Slight" preponderance.**–335 Ill 164, 166NE530; 254 IllA68 (preponderating "although but slightly"); 254 IllA192. Contra 256 IllA33; 256 IllA425. **Instructions on "preponderance of evidence"** held not erroneous. 181Ark674, 27SW(2d)516; **MoA** 27SW(2d)455. **Instructions held proper.**–GaA 155SE85.

1751–20 TexCivA 16SW(2d)295.

1751–21 161Ga319, 130SE559; 35GaA 174, 132SE239; 40GaA328, 149SE713.

1751–22 MoA 296SW1057.

1751–24 160Ga799, 129SE99 (instruction erroneous in relieving defendant of burden). See also 97Fla648, 122S2(1st case).

1751–25 233 IllA216; MoA 290SW119.

1752–29 254 IllA445; 123 Or253, 261P 413.

1752–32 Instruction held erroneous.–MoA 290SW119.

1752–35 167Ga821, 146SE851. See also 319Mo 744, 8SW(2d)38; 118 Oh257, 160NE710; 31 OhA248, 166NE909; 148 SC152, 145SE699.

1752–37 Instructions held erroneous.–316Mo 1104, 295SW757. **Other instructions held not erroneous.**–136Wash369, 240P14 (as to what is meant by preponderance of evidence).

1752–39 24 OhA66, 156NE616.

1753–41 Instructions held proper.–Wash 287P206.

1753–42½–New. "If you believe from the evidence" is equivalent to "if you believe from a preponderance" of evidence. 224 IllA597.

1753–42⅓–New. Charge that jury should permit recovery upon belief of defendant's negligence is not erroneous. 216Ala495, 113S531.

1753–42¼–New. Charge calling for answers to issue according to preponderance of evidence does not impose burden of proof on either party. TexCivA 291SW583.

1753–42½–New. It is error for court to charge that if testimony is such that jury cannot determine where preponderance of testimony is they should find for defendants. 163Ga553, 136SE 526.

1753–42¾–New. Instruction to find for party in whose favor preponderance of evidence lies is not erroneous although it fails to state that if evidence is equally divided in weight defendant should prevail. 36GaA359, 137SE100.

1753–42⅞–New. Instruction that finding must be reasonable and probable from evidence, and not speculative or conjectural, is not erroneous. 176Ark 879, 4SW(2d)536.

1753–42⅞–New. Instruction requiring defendant to establish fraud by mere preponderance of evidence held error. 43F(2d)668.

1753–44 215Ala666, 112S129; 262Mass 437, 160NE249; MoA 290SW119; 199 Wis220, 225NW735. See also 163Ga755, 137SE57. But see 316Mo 1094, 295SW 563. **Instructions held not obnoxious to rule.**–262Mass437, 160NE249. **Instructions held not objectionable under rule.**–MoA 14SW(2d)453.

1753–46 216Ala400, 113S401; 219Ala 223, 121S716; 25 OhA116, 157NE500. Contra 78CalA353, 248P737; 238Mich 126, 213NW127. **Instruction requiring proof to jury's satisfaction** means proof beyond reasonable doubt. TexCivA 30 SW(2d)921.

1754–47 88CalA67, 262P1106; Mo 274 SW369.

1754–51 But see 320Mo 946, 8SW(2d) 832. Contra 123 Or253, 261P413.

1754–52 But see Mo 289SW591.

1754–54 131 Or694, 284P280.

1754–58 204 Iowa231, 213NW380; 127 Kan469, 274P203, 62ALR1446.

1755–62 220Ala158, 124S205. **Using word "believe."**–220Ala125, 124S286.

1755–62½–New. In drawing such charge, defendant can assume that jury will fully consider evidence. 220Ala 158, 124S205.

1755–63 220Ala678, 126S859 (that entire jury must concur for recovery); AlaA 130S516; 175Ark839, 1SW(2d) 3; 252 IllA253 (use of word "show"); 204 Iowa231, 213NW380; TexCivA 16 SW(2d)1100; TexCivA 26SW(2d)463.

1755–66 See also 81NH522, 129A768, 42ALR176.

1755–75 25 OhA116, 157NE500. But see 135Wash614, 238P629. **Instruction that parol evidence in contravention of prima facie right of another under written instrument should be clear, unequivocal, and convincing** is improperly refused. 144Va795, 130SE788.

1755–80 200Cal 628, 254P256.

1755–81 169Ga678, 151SE349.

1755–85 233 IllA216.

1755–85½–New. , or that inevitable business conclusion must show transaction to be as alleged. 285Pa131, 131 A710.

1755–86½–New. Charge that finding of suicide must be reasonable and probable from evidence and not merely speculative or conjectural does not require too high degree of proof. 173Ark937, 294 SW353.

1755–86⅓–New. Instruction requiring jury to "believe" certain facts rather than to be "satisfied" is not erroneous because requiring belief. 217Ala255, 115S171.

1755–86¼–New. Charges containing hypothesis, "if you believe," are properly refused. 218Ala619, 119S833.

1755–86⅙–New. In Alabama instruction is properly refused for use of term "believe." 219Ala291, 122S173.

1756–88 37GaA239, 139SE590.

1756–89 Charge that slight evidence is sufficient held error. 37GaA239, 139SE 590.

1756–91 165Ga142, 139SE867; 204 Iowa857, 216NW33; 316Mo 728, 293SW 105; 28 OhA453, 162NE791. **Illustration.**–47RI 44, 129A605.

1756–92 165Ga142, 139SE867; 318 Ill 445, 149NE507; Nebr 230NW669; 283 Pa331, 129A109; TexCivA 275SW430; TexCivA 294SW873; TexCivA 299SW 325; 147Wash251, 265P727.

1756–93 172Minn598, 216NW333.

1756–94 227Ky369, 13SW(2d)271; 235 Mich80, 209NW95; 251Mich597, 232NW 371; 220MoA260, 285SW791; 136SC337, 134SE385 (repair after injury).

1756–95 220MoA260, 285SW791.

1756–99 Ala 130S557; Cal 292P645; 235Mich80, 209NW95; 117Nebr809, 223 NW663; 103NJL419, 136A176.

1756–1 213Ala78, 104S250; 213Ala260, 104S509; 178Ark111, 10SW(2d)503; CalA 279P1032; 88 IndA301, 157NE458; 120Kan565, 244P844; 121Kan180, 246 P976; MoA 14SW(2d)701; MoA 21SW (2d)890; 82NH429, 135A534; 29 OhA 457, 163NE728; 122 Or24, 256P770; TexCommnA 17SW(2d)805; TexCivA 286SW307; TexCivA 12SW(2d)265; TexCivA 14SW(2d)296; TexCivA 22SW (2d)331. **If the request is refused,** etc. But see 197NC515, 149SE846.

1757–3 TexCivA 286SW307.

1758–6 202 Iowa1386, 212NW161 (such instruction cures error).

1758–9½–New. But no request for instruction to limit connection is necessary if evidence is wholly inadmissible and has been excepted to. 82NH429, 135A534.

1758–9⅓–New. Request to limit exhibits and testimony without specifying either is properly refused. 118 Oh508, 161NE540.

1758–13 101NJL561, 134A896 (charge that no inference is to be drawn from fact that attorney for plaintiff in this case was also same plaintiff's attorney in another case, held proper).

1758–22 TexCivA 293SW938.

1759–27½–New. Charge to disregard colloquy between court and counsel is proper. 315Mo 1181, 289SW913.

1759–30 41 Ida129, 238P308; Mo 289 SW829 [citCyc]; NJ 151A99(2dcase); 154Wash588, 283P447.

1759–31 253Mass527, 149NE320.

1759–34 177Ark60, 5SW(2d)729; 35 GaA126, 132SE414; 36GaA33, 134SE 820; TexCivA 32SW(2d)216. **Instructions should confine jury to evidence.**–200 Iowa728, 205NW331.

1759–36 191NC500, 132SE468 (holding instruction to disregard erroneous statement by counsel as to law of case proper); TexCivA 297SW258; TexCivA 299 SW325. **Charge attempting to instruct jury what to do** if they found certain facts is not a statement of principle of law. 23 OhA176, 155NE566.

1760–44 See also Mo 278SW79.

1760–47½–New. Admonitory charge not intimating what jury's decision should be and containing no prejudicial matter is not erroneous. TexCivA 296 SW950.

1760–47⅓–New. It is improper to direct jury not to consider time elapsed between trials or that case had been tried before unless necessary for party's protection. MoA 24SW(2d)191.

1760–47¼–New. Charge to consider all evidence is not erroneous as imposing impossible burden on jury. TexCivA 19SW(2d)77.

1760–47⅙–New. Instructing jury not to bring in verdict of no cause of action is proper. NJSup 147A625(2dcase).

1760–47⅙–New. Offered instruction held erroneous as containing argument and advice to jury, relative to consideration of evidence of conversations with deceased. 86Mont260, 283P423(2d case).

1760–47⅐–New. Judge must instruct jury that after ascertaining amount of damages they should add interest. Mass 172NE590.

1760–49 29Ariz121, 239P795 (instruction to judge credibility and weight of testimony from any reason appearing in case held proper).

1761–54 217Ala32, 114S414; 170Ga349, 153SE11 (look at case from own standpoint). **Opinion evidence.**–MoA 24SW (2d)183.

1762–66½–New. Trial court may in its discretion admonish jurors to give due consideration to opinions of each other to the end that they may reach agreement. 171Ark505, 284SW743.

1762–68 TexCivA 32SW(2d)216.

1762–69 30Hawaii163.

1762–70½–New. It is prejudicial error for trial court to indicate that minority should yield to opinion of majority. 171Ark505, 284SW743.

1762–71 79Mont144, 255P20, 52ALR33 (quotient verdicts).

1762–72 125 Or251, 266P229.

1762–72½–New. Instruction permitting verdict against all defendants is not erroneous where complementary instruction permits verdict in favor of certain defendants and against others. MoA 15SW(2d)868(2dcase).

1762–72⅓–New. Instruction, as to how nine jurors may make verdict, should be given in assault and battery action. 233Ky238, 25SW(2d)381.

1762–72¼–New. That court, when submitting case, failed to state nine jurors could return verdict, but gave jury such information later, is not error. Ark 31 SW(2d)297.

1763–74 TexCivA 299SW325. See also TexCivA 295SW283.

1763–83½–New. Charge that verdict for one claiming negligence of other disposes of counterclaim of other is proper. 110Conn685, 149A140.

1764–87 Ark 294SW707.

1764–89 323 Ill 498, 154NE226; 236 IllA520; Nebr 231NW747; TexCivA 32 SW(2d)216.

1765–92 121Kan91, 245P1044.

1765–93 121Kan91, 245P1044; 135 Wash248, 237P708.

1765–5 Ark 294SW707.

1765–6 Ark 294SW707; 235Ky197, 30 SW(2d)882.

1766–24 236 IllA520 (where court told jury to base verdict on evidence, after objection to remarks of counsel being out of evidence).

1766–33 Contra 201 Iowa621, 207NW 767.

1766–34½–New. Court's ruling on objections to arguments of counsel is not within statute requiring instructions in writing. MoA 14SW(2d)478.

1767–36 In Ohio.–33 OhA311, 169NE 480.

1768–56 Ark 294SW707. **Request that instructions be reduced to writing** after given is not request that written instructions be given. 121Kan91, 245P 1044. **General objection held not re-**

quest under constitution. Ark 294SW 707.
1769-63 118 Okl 274, 247P985.
1769-64 113 Okl 188, 240P702.
1770-70 113 Okl 188, 240P702.
1770-73½-New. In Idaho instructions should be numbered. 47 Ida542, 277P 554(2dcase).
1770-81 254 IllA372.
1770-82 254 IllA372.
1771-89½-New. Charge should be submitted to counsel for exception before reading to jury. TexCivA 32SW(2d) 216.
1771-93 Nebr 228NW528 (in open court).
1772-8½-New. Asking views of counsel as to instructions being given is not error. 47 Ida542, 277P554(2dcase).
1772-8⅓-New. Time for giving instructions.-Ark 31SW(2d)297.
1773-17 38GaA617, 144SE921(2dcase).
1773-25 See also 41GaA712, 154SE464. Statute should be given in entirety if pertinent. TexCivA 21SW(2d)347.
1774-27 134SC412, 132SE811. Court may properly illustrate law applicable by use of previously decided cases.-134 SC412, 132SE811.
1774-31 129 Or321, 276P687.
1774-39 TexCivA 270SW1101; Tex CivA 27SSW350.
1774-40 TexCommnA 287SW902; Tex CivA 271SW205; TexCivA 272SW266; TexCivA 272SW340; TexCivA 273SW 350; TexCivA 283SW288 (special issue); TexCivA 283SW903; TexCivA 295SW204; TexCivA 1SW(2d)493; Tex CivA 4SW(2d)169; TexCivA 4SW(2d) 205; TexCivA 19SW(2d)207; TexCivA 25SW(2d)1001; TexCivA 27SW(2d) 616; TexCivA 28SW(2d)611; TexCivA 28SW(2d)839; TexCivA 28SW(2d)902; TexCivA 28SW(2d)1100.
1774-41 TexCivA 270SW1101 (request for special charge for general verdict denied); TexCivA 271SW205; TexCivA 271SW228 (where not requested as explanation of special issue submitted it is not error to refuse general charge); TexCivA 272SW266; TexCivA 272SW 340; TexCivA 275SW410; TexCivA 275 SW423; TexCivA 275SW463; TexCivA 278SW350; TexCivA 281SW577; Tex CivA 291SW317; TexCivA 293SW890; TexCivA 299SW668; TexCivA 22SW (2d)492; TexCivA 22SW(2d)514. Instructions held not violative of rule.-52 ND721, 204NW614; TexCivA 1SW(2d) 490. Instructions as to legal effect of answers to questions submitted are improper. 52ND721, 204NW614. Instructions not objectionable as general charge.-TexCivA 22SW(2d)986. In Texas.-CivA 26SW(2d)327.
1774-42 TexCivA 291SW317; TexCivA 293SW890.
1774-42½-New. Instruction not to answer other issues if affirmatively answering controlling issue held not erroneous. TexCivA 27SW(2d)897.
1774-44 123 Or193, 261P422.
1775-45 TexCivA 293SW890. But see TexCivA 19SW(2d)343. Burden of proof.-TexCivA 19SW(2d)207.
1775-47 TexCivA 27SW(2d)612. Instructions as to burden of proof and ordinary care held proper. TexCivA 299SW668. Instruction as to measure of damages is proper when submitting special issue as to amount of damages. TexCivA 299SW668. Court submitting special issues should give jury necessary definitions and explanations. Tex CivA 299SW668.
1775-47½-New. It is improper to group facts and special issues and so submit them as to call for general verdict. TexCommnA 299SW854.
1775-47⅓-New. Court in submitting special issues should confine instructions to explanations of legal terms necessary to enable jury to render verdict on issues presented. TexCommnA 299 SW854.
1775-47¼-New. General or special charges in connection with special issues are improper, except as to necessary explanations and definitions of legal terms. TexCivA 299SW933.
1775-48 TexCivA 11SW(2d)335; Tex CivA 19SW(2d)69 (requested charge authorizing verdict if certain facts are found is properly refused). Where counts ex contractu and ex delicto are joined, jury should be asked to say on which count or counts they found. 212 Ala515, 103S549. Instruction to find negligence was proximate cause of injury, before answering issue as to negligence, held improper. TexCivA 290 SW283.
1775-49 197NC12, 147SE435; TexCivA 281SW577. Special charge on exemplary damages properly refused as neither definition nor explanation of case submitted on special issues. TexCivA 26SW(2d)426.
1775-49½-New. Where case is submitted on special issues, charge calling for general verdict is properly refused. Tex CivA 293SW233.
1775-49⅓-New. Where case is submitted on special issues, special instructions should not be given except where necessary to guide jury. 115Tex263, 280SW 532.
1775-49¼-New. Where case is submitted on special issues, special instructions should not be given except where necessary for jury to understand legal terms. TexCivA 19SW(2d)394.
1775-50 242Mich402, 218NW795; Tex CivA 3SW(2d)106; TexCivA 3SW(2d) 109. Failure to place burden of proof of special issues in action for death held error. TexCivA 3SW(2d)106.
1775-52 242Mich402, 218NW795; 115 Tex263, 280SW532; TexCommnA 280 SW557; TexCivA 293SW184 (requested instruction held in effect general charge); TexCivA 31SW(2d)319; Tex CivA 32SW(2d)240. Refusal to give general instructions, etc. TexCivA 274 SW305. Instructions as to law arising on facts with direction as to answer to be returned are improper. TexCivA 298 SW642. Charge that plaintiff has burden of proving material allegations of petition is erroneous as general charge in case submitted on special issues. Tex CommnA 15SW(2d)210; TexCivA 16SW (2d)399; TexCivA 27SW(2d)363. Charge that burden of proof is not rendered proper by facts. TexCivA 16SW (2d)399. Charge as to which party has burden of proof on issue is proper where evidence on issue is conflicting. Tex CivA 16SW(2d)557. Proper charge on burden of proof on particular issue has been held not objectionable as general charge. TexCivA 16SW(2d)557. Charge that burden of proof is on one party or other should not be given, where case is submitted on special issues. TexCivA 16SW(2d)869.
1775-52½-New. or to give general instructions, the application of which to the special issues would require jury to know effect on rights of parties of each issue submitted. TexCivA 286SW 680.
1776-54 TexCivA 25SW(2d)276 (refusing charge on burden of proof on each of special issues, not error).
1776-55 TexCivA 281SW577; TexCivA 286SW680. But see TexCivA 15SW(2d) 194. General charge not proper, etc. 115Tex263, 280SW532; TexCommnA 280SW557; TexCommnA 1SW(2d)273; TexCivA 284SW650.
1776-59 TexCivA 281SW577; TexCivA 294SW349; TexCivA 26SW(2d)340 (definition).
1776-61½-New. Charge instructing jury as to law arising on facts should not be given in case submitted on special issues. TexCommnA 280SW557; TexCivA 284SW650; TexCivA 289SW 414.
1776-61⅓-New. Charge instructing jury as to law pertaining to any phase of case excepting explanation and definitions is not permissible. TexCommnA 280SW557.
1776-61¼-New. General charges on different phases of special issue, which was submitted not in form of definition of terms or explanatory of such issue held properly refused where case was submitted on special issues. Tex CivA 283SW542.
1776-61⅕-New. Refusal to give special issues on matters merely evidentiary to matter submitted by a special issue is proper. TexCivA 283SW542.
1776-61⅙-New. Charge on special issue must limit jury to pleadings in answering issues. TexCivA 296SW639.
1776-61⅐-New. Refusal to submit interrogatories held proper where they call for conclusions based on mingled question of law and fact. IndA 152NE 288.
1776-61⅛-New. Instruction submitting circumstances for affirmative answer to three issues and negative answer to one only is subject to exception as failing to state circumstances wherein issues were to be answered in negative. 194 NC717, 140SE716.
1776-61⅑-New. Where special issues were submitted, refusal to charge on burden of proof held not error. Tex CivA 300SW256.
1776-61⅒-New. Where case submitted on special issues, it is error to give general charge. 118Tex314, 15SW(2d)213 (court can only give jury necessary explanations and definitions of legal terms); TexCommnA 15SW(2d)218; TexCivA 10SW(2d)1040; TexCivA 13 SW(2d)416; TexCivA 14SW(2d)872; TexCivA 16SW(2d)869; TexCivA 18SW (2d)829.
1776-61 1/11-New. Charging both alternatives.-Instruction, that special issue can be answered yes only if jury find facts to be as contended by defendants, is not erroneous, for failure to instruct jury to answer no if they do not so find facts. 197NC64, 147SE683.
1776-61 1/12-New. Charge that plaintiff has burden of proving material allegations of petition should never be given, in case submitted on special issues. TexCommnA 15SW(2d)210.
1776-61 1/13-New. Charge regarding carrier's liability, involving issue and affecting partial defense, should be submitted as issue and need not be submitted as explanation and definition of terms. TexCivA 11SW(2d)335.
1776-61 1/14-New. Requested instructions constituting general charge are properly refused. TexCivA 12SW(2d) 552.
1776-61 1/15-New. General charges inapplicable to specific issues submitted are properly refused. TexCivA 12SW(2d) 592.
1776-61 1/16-New. Charge on burden of proof is unnecessary, where court asks jury if they find certain facts on preponderance of evidence. TexCivA 14 SW(2d)296.
1776-61 1/17-New. Charging on burden of proof is error where cause is submitted on special issues. TexCivA 14SW (2d)867.
1776-61 1/18-New. Refusal of requested charge upon issue not submitted to jury is not error. TexCivA 14SW(2d)1049.
1776-61 1/19-New. General charge is improper when case is submitted on special issues. TexCommnA 23SW(2d)295.
1777-63 Express mention of one thing implies exclusion of another.-99Vt499, 134A700.
1777-64 33F(2d)876; 202Cal 626, 262P 740; 104CalA671, 286P729; 253 IllA 176; MoA 9SW(2d)1070; 195NC76, 141 SE460; 118 Or111, 244P71; TexCivA 19SW(2d)216; TexCivA 27SW(2d)928; Utah 275P582; 146Va594, 131SE850, 46 ALR186; 152Va715, 148SE811. Charge correctly stating law is not erroneous because incomplete. 163Ga755, 137SE 57. Particular instructions construed.-208Cal 105, 280P522.
1777-65 102NJL374, 131A886; 50ND 330, 196NW303.
1777-66 243 IllA298; 148Miss871, 114 S807; MoA 284SW197.
1777-68 TexCivA 273SW694 (construction unduly limiting scope of special finding avoided).
1777-69 102Conn735, 130A102 (will not be examined with legal miscroscope).
1777-70 40GaA341, 149SE657. Courts will not hold instruction erroneous as assuming facts or comment on facts unless language employed is clearly objectionable on such ground. TexCivA 280SW342. Construction to uphold judgment.-98CalA257, 276P1071.
1778-71 Charge must be examined as jury would view it.-TexCivA 28SW(2d) 906.
1778-71½-New. Instruction should be fairly interpreted, Iowa 213NW442.
1778-71⅓-New. and will be upheld

where correct though not as clear, lucid, and concise as it might be. **Iowa** 213 NW442.

1778-72 164Ga811, 139SE716; 315Mo 367, 286SW106; MoA 277NW969; 192 NC480, 135SE292; 124 Okl 64, 253P 1021; 125 Okl 239, 257P314; 126 Okl 219, 260P78; 129 Okl 27, 263P152; 43 OklACR347; 44 OklACR13 [reh pending].

1778-73 16F(2d)240; 17F(2d)963; 32 F(2d)974; 213Ala115, 104S28; 214Ala 122, 106S800; 214Ala268, 107S746; 214 Ala297, 107S849; 214Ala435, 108S250; 215Ala402, 110S705; 215Ala407, 110S 818; 29Ariz334, 241P518; 35Ariz302, 277P68; Ariz 287P440; Ariz 290P152; 172Ark1177, 288SW892; 172Ark255, 288SW897; 172Ark353, 289SW6; 173 Ark810, 294SW401; 174Ark122, 294SW 714; 180Ark453, 21SW(2d)858; 180Ark 1168, 22SW(2d)38; Ark 31SW(2d)304; Ark 32SW(2d)162; 200Cal 265, 252P 1045; 68CalA334, 229P351; 70CalA415, 233P366; 72CalA57, 236P319; 73CalA 712, 239P344; 76CalA293, 244P923; 76 CalA569, 245P468; 78CalA526, 248P 930; 79CalA234, 249P223; 199Cal 545, 250P565; 80CalA590, 252P739; 82CalA 369, 255P760; 85CalA55, 258P988; 85 CalA385, 259P494; 86CalA136, 260P 588; 86CalA355, 260P894; 88CalA67, 262P1106; 89CalA267, 264P526; 89 CalA477, 265P268; 93CalA601, 269P 972; 93CalA666, 270P263; 94CalA303, 271P134; 96CalA236, 273P1080; 100 CalA775, 281P95; CalA 282P388; 102 CalA58, 282P525; 102CalA464, 283P 88; 102CalA405, 283P148; 102CalA615, 283P358; 103CalA59, 283P885; CalA 290P48; CalA 290P108; CalA 290P 895; CalA 293P80; 76Colo 586, 233P 624; 81Colo 370, 256P1; 103Conn520, 131A501; 109Conn324, 146A735; 111 Conn219, 149A671; 92Fla903, 110S536; 160GaS65, 129SE528; 160GaS86, 129SE 539; 161GaS87, 131SE362; 35GaA289, 133SE55; 162GaS57, 134SE751; 162Ga 664, 135SE195; 163Ga254, 135SE740; 164Ga696, 139SE333; 164GaS10, 139SE 542; 164GaS59, 139SE549; 164GaS11, 139SE716; 165Ga176, 140SE356; 165 Ga379, 140SE759; 165Ga333, 140SE558; 165GaS412, 141SE76; 35GaA126, 132SE 414; 35GaA350, 133SE282; 35GaA622, 134SE198; 35GaA668, 134SE350; 35 GaA762, 134SE787; 36GaA8, 135SE315; 36GaA359, 137SE100; 37GaA34, 138SE 584; 37GaA265, 139SE825; 37GaA358, 140SE395; 37GaA314, 140SE396; 37 GaA472, 140SE780; 38GaA763, 145SE 473(1stcase); 40GaA633, 151SE42; 41 Ida285, 238P891; 43 Ida661, 254P528; 44 Ida478, 258P931; 318 Ill 445, 149NE 507; 237 IllA86; 252 IllA5; 253 IllA 176; 255 IllA263; 83 IndA500, 149NE 137; IndA 170NE92; 200 Iowa705, 205 NW351; 202 Iowa643, 210NW761; Iowa 213NW442; 204 Iowa857, 216NW33; 205 Iowa666, 216NW733; 208 Iowa458, 223NW521; 207 Iowa843, 223NW895; Iowa 229NW321; 119Kan391, 239P770; 119Kan389, 239P968; 121Kan648, 249 P599; 123Kan58, 252P223; 125Kan563, 264P1075; 219Ky389, 293SW155; 224 Ky274, 68SW(2d)264; Me 139A475; 158 Md243, 148A216; 260Mass399, 157NE 364; 262Mass13, 159NE459; 264Mass 530, 163NE165; Mass 172NE349; 232 Mich276, 205NW134; 233Mich407, 206 NW374; 233Mich23, 206NW491; 234 Mich693, 209NW138; 235Mich633, 209 NW807; 238Mich5, 213NW152; 238 Mich447, 213NW710; 239Mich440, 214 NW419; 246Mich91, 224NW343; 248 Mich516, 227NW750; 249Mich76, 227 NW759; Mich 233NW365; 165Minn117, 205NW885; 167Minn502, 210NW62; 172Minn98, 214NW795; 176Minn377, 223NW619; 177Minn60, 224NW466; 178Minn131, 226NW409; 141Miss573, 106S826; 142Miss806, 108S156; 144 Miss106, 109S849; 144Miss643, 110S 118; 149Miss5, 115S36; 152Miss377, 118S828; 152Miss569, 120S444(2dcase); 156Miss410, 124S786; 156Miss540, 126 S201; 307Mo 194, 270SW113; 308Mo 142, 271SW773; 308Mo 453, 273SW95; Mo 273SW110; 310Mo 227, 274SW1025; 310Mo 1, 274SW1079; 314Mo 438, 284 SW471, 47ALR25; 315Mo 367, 286SW 106; 315Mo 1214, 289SW639, 50ALR 268; 316Mo 728, 293SW105; 319Mo 1028, 5SW(2d)6; Mo 5SW(2d)395; 320 Mo 655, 8SW(2d)918; 323Mo 64, 18SW (2d)445; Mo 19SW(2d)1033; 323Mo 1089, 20SW(2d)494 (word "reasonably" used in instruction held not erroneous when construed with context); Mo 29 SW(2d)39; 219MoA336, 271SW834; 219MoA121, 272SW79; MoA 272SW984; MoA 273SW1078; 220MoA429, 276SW 96; MoA 277SW969; MoA 281SW82; MoA 284SW857; 220MoA9, 285SW123; 220MoA355, 286SW718; MoA 287SW 850; MoA 291SW180; MoA 294SW758; MoA 298SW254; 220MoA1229, 298SW 1069; MoA 299SW74; MoA 299SW85; MoA 11SW(2d)1060; MoA 19SW(2d) 531; MoA 22SW(2d)65; MoA 22SW (2d)185; MoA 31SW(2d)546; MoA 32 SW(2d)145; 85Mont270, 278P521; 114 Nebr42, 205NW937; 116Nebr827, 219 NW189; Nebr 230NW453; Nebr 230 NW495; Nebr 230NW588; NJ 130A4; 102NJL374, 131A886; 105NJL193, 143 A435; NJSup 132A237; NJSup 137A 432; NJSup 142A431; 105NJL21, 144 A118; 190NC256, 129SE595; 190NC301, 129SE822; 190NC573, 130SE313; 190 NC877, 130SE610; 191NC13, 131SE402 (must be construed conjunctively as whole and not disjunctively or in parts); 191NC1, 131SE407 (and not disconnectedly); 191NC685, 132SE787; 192NC638, 135SE614; 192NC647, 135SE 791; 193NC262, 136SE723; 194NC98, 138SE424; 195NC76, 141SE460; 198 NC180, 151SE94; 198NC518, 152SE503; 49ND761, 193NW605; 50ND400, 196 NW102; 52ND786, 204NW828; Oh 171 NE857; 19 OhA1; 19 OhA272; 26 OhA 392, 160NE495; 32 OhA333, 168NE543; 33 OhA47, 168NE619; 113 Okl 190, 240 P621; 113 Okl 257, 241P746; 116 Okl 62, 243P172; 116 Okl 194, 244P785; 118 Okl 118, 247P42; 118 Okl 113, 247P 87; 121 Okl 53, 247P97; 119 Okl 87, 248P585; 120 Okl 279, 251P56; 120 Okl 253, 252P41; 124 Okl 64, 253P1021; 124 Okl 71, 254P14; 126 Okl 139, 258P274; 126 Okl 219, 260P78; 129 Okl 27, 263P 152; 129 Okl 207, 264P156; 129 Okl 288, 264P824; 130 Okl 51, 265P141; 130 Okl 122, 265P768; 131 Okl 132, 268 P221; 134 Okl 206, 273P346; 135 Okl 206, 275P345; 138 Okl 176, 280P804; 142 Okl 74, 285P84; 142 Okl 195, 285P 983; 144 Okl 18, 288P1072; Okl 291P 962(2dcase); 36 OklACR467; 43 Okl ACR347; 44 OklACR13 [reh pending]; 117 Or411, 244P313; 119 Or682, 250P 1098; 121 Or519, 254P809; 122 Or579, 260P444; 123 Or215, 261P691; 126 Or 105, 268P982; 126 Or135, 268P1002, 59 ALR1062; 126 Or602, 268P1009; 126 Or532, 270P521; 126 Or694, 270P759; 128 Or409, 272P1027; 129 Or169, 276P 1094; 133 Or663, 288P1003; 285Pa251, 132A120; 49RI 99, 140A3; 132SC59, 128SE849; 134SC412, 132SE811; 136 SC95, 134SE247; 138SC318, 136SE297; 141SC64, 139SE176, 53ALR1119; 145SC 196, 143SE31; 152SC287, 149SE750; 154SC366, 151SE608; 157SC174, 154SE 118; 157SC352, 154SE424; 157SC469, 154SE855; SC 155SE231; TexCommnA 276SW162; 116Tex253, 288SW425; Tex CivA 293SW901; TexCivA 295SW211; TexCivA 10SW(2d)191; TexCivA 16SW (2d)900; TexCivA 25SW(2d)994; Tex CivA 28SW(2d)865; Utah 269P1008; Utah 275P582; 99Vt191, 130A697; 100 Vt268, 137A97; 144Va330, 132SE320; 147Va542, 137SE493; 148Va437, 139SE 308, 55ALR1376; 150Va452, 143SE683; 135Wash455, 237P1018; 143Wash46, 254P459; 144Wash676, 258P832; 150 Wash459, 273P178; 154Wash547, 283P 186; Wash 292P424; 101WVa411, 132 SE870; 105WVa118, 141SE631; 107 WVa220, 148SE9; 108WVa204, 151SE 178; WVa 155SE125; 192Wis269, 212 NW643; 34Wyo 415, 244P637; Sask [1926] 4DomLR1017, [1926] 3West Wkly709. **Rule is not to be construed as holding that one or two detached** general statements are sufficient to overcome force of direct instruction on particular facts. 82CalA369 255P760.

1779-74 174Ark122, 294SW714; 76 CalA569, 245P468; 308Mo 142, 271SW 773; 310Mo 1, 274SW1079; 315Mo 367, 286SW106; Mo 30SW(2d)1077; 219MoA 336, 271SW834; 220MoA973, 272SW 1021; 220MoA429, 276SW96; MoA 277 SW969; MoA 297SW435; MoA 27SW (2d)709; 134SC412, 132SE811; 151SC 309, 149SE14.

1779-75 16F(2d)240; 212Ala590, 103S 894; 29Ariz334, 241P518; 33Ariz64, 262 P489; Ariz 290P152; 171Ark379, 284 SW781; 172Ark877, 291SW426; 180Ark 1067, 23SW(2d)980; 181Ark1037, 28SW (2d)1073; 200Cal 265, 252P1045; 203 Cal 390, 264P237; 71CalA34, 234P860; 73CalA712, 239P344; 76CalA569, 245P 468; 78CalA526, 248P930; 79CalA234, 249P223; 199Cal 545, 250P565; 80 CalA590, 252P739; 82CalA369, 255P 760; 83CalA204, 256P848; 88CalA354, 263P578; 97CalA87, 275P456; 98CalA 268, 276P1055; CalA 289P218; CalA 290P48; CalA 290P497; 76Colo 586, 233 P624; 103Conn520, 131A501; 105Conn 533, 136A90; 106Conn447, 138A365; 107 Conn91, 139A639; 111Conn219, 149A 671; 92Fla903, 110S536; 160GaA865, 129SE528; 160GaS86, 129SE539; 162 GaS664, 135SE195; 163Ga32, 135SE314; 163Ga254, 135SE740; 163Ga370, 136SE 163; 164Ga696, 139SE333; 164GaS10, 139SE542; 164GaS11, 139SE716; 165 Ga176, 140SE356; 165Ga379, 140SE759; 165Ga333, 140SE858; 165GaS412, 141SE 76; 165GaS446, 141SE212; 163GaS682, 142 SE98; 34GaA178, 128SE694; 35GaA 126, 132SE414; 35GaA289, 133SE55; 35 GaA350, 133SE282; 35GaA496, 134SE 327; 35GaA668, 134SE350; 36GaA28, 134SE822; 36GaA168, 136SE89; 36GaA 163, 136SE178; 36GaA428, 136SE830; 36GaA359, 137SE100; 37GaA22, 138SE 527; 37GaA34, 138SE584; 37GaA265, 139SE825; 37GaA358, 140SE395; 37Ga A314, 140SE396; 37GaA524, 141SE77; 40GaA78, 149SE60; 41 Ida129, 238P 308; 43 Ida661, 254P528; 44 Ida478, 258P931; 45 Ida28, 260P426; 46 Ida 355, 267P611; 47 Ida542, 277P554(2d case); 318 Ill 570, 149NE469; 83 IndA 366, 147NE310; 200 Iowa705, 205NW 351; 202 Iowa1180, 211NW696; Iowa 213NW442; 204 Iowa857, 216NW33; 204 Iowa922, 216NW262; 205 Iowa666, 216NW733; 207 Iowa1293, 224NW820, 62ALR1419; 208 Iowa1157, 225NW346; Iowa 232NW500; 119Kan389, 239P968; 121Kan648, 249P599; 123Kan58, 252P 223; 216Ky838, 288SW741; 218Ky535, 291SW785; 224Ky274, 6SW(2d)264; 234Ky427, 28SW(2d)479; 125Mel78, 132 A132; 232Mich276, 205NW134; 233Mich 407, 206NW374; 233Mich23, 206NW491; 234Mich693, 209NW138; 235Mich633, 209 NW807; 238Mich5, 213NW152; 238Mich 447, 213NW710; 239Mich53, 214NW85; 239Mich440, 214NW419; 243Mich638, 220NW737; 165Minn117, 205NW885; 167Minn502, 210NW62; 170Minn49, 212 NW8; 172Minn98, 214NW795; 177Minn 13, 224NW259; 141Miss55, 105S858; 141Miss573, 106S826; 143Miss277, 107 S868; 142Miss806, 108S156; 144Miss 106, 109S849; 144Miss643, 110S118; 149 Miss345, 115S586; 150Miss506, 117S 345; 151Miss852, 119S827; 152Miss293, 120S178; 307Mo 194, 270SW113; 308 Mo 142, 271SW773; 310Mo 227, 274SW 1025; 310Mo 1, 274SW1079; Mo 282 SW441; 314Mo 438, 284SW471, 47ALR 25; 315Mo 367, 286SW106; 315Mo 1214, 289SW639, 50ALR268; 319Mo 619, 5SW (2d)447; 322Mo 11, 16SW(2d)212; 323 Mo 64, 18SW(2d)445; MoA 256SW1088; 219MoA336, 271SW834; 219MoA121, 272SW79; 220MoA973, 272SW1021; 220 MoA429, 276SW96; MoA 282SW487; MoA 284SW815; MoA 284SW857; MoA 296SW437; MoA 14SW(2d)972; MoA 19SW(2d)766; MoA 20SW(2d)587; MoA 30SW(2d)441; 83Mont452, 272P 998; 114Nebr42, 205NW937; Nebr 230 NW588; 34NM509, 285P494; 190NC 573, 130SE313 (afford in ground for reversal); 193NC262, 136SE723; 194NC 98, 138SE424; 196NC383, 145SE774; 49ND761, 193NW605; 50ND400, 196NW 102; 51ND225, 199NW961; 52ND786, 204NW828; 58ND937, 228NW432; 19 Oh A272; 22 OhA520, 155NE151; OhA 172 NE637; 113 Okl 257, 241P746; 113 Okl 291, 241P1105; 116 Okl 62, 243P172; 116 Okl 194, 244P785; 119 Okl 87, 248P 585; 120 Okl 253, 252P41; 124 Okl 71, 254P14; 125 Okl 239, 257P314; 126 Okl 139, 258P274; 126 Okl 219, 260P78; 129 Okl 27, 263P152; 130 Okl 51, 265P141; 135 Okl 206, 275P345; 136 Okl 226, 277

P219; 136 Okl 298, **277P658; 137 Okl** 153, 278P632; 138 **Okl** 182, 280P834; 139 **Okl** 142, 281P565; 139 **Okl** 287, 282 P327; 141 **Okl** 282, 285P17; 43 **OklACR** 347; 44 **OklACR**13 [reh pending]; 119 **Or**69, 247P1081; 119 **Or**682, 250P1098; 121 **Or**492, 256P197; 124 **Or**197, 264P 362; 125 **Or**375, 264P865; 129 **Or**435, 277P291; 132 **Or**46, 284P567; 285**Pa** 251, 132A120; 285**Pa**332, 132A177; 294 **Pa**425, 144A416; 33**PortoRico**478; 50 **RI** 496, 149A612; 132**SC**59, 128SE849; 136**SC**21, 134SE234; 136**SC**95, 134SE 247; 151**SC**391, 149SE111; **SC** 155SE 136; **SC** 155SE231; **TexCommnA** 276 SW162; **TexCivA** 285SW854; **TexCivA** 13SW(2d)929; **Utah** 269P1008; **Vt** 150 A128(4th case); **Vt** 151A568; 148Va437, 139SE308, 55**ALR**1376; 149**Va**500, 140 SE674; 140**Wash**427, 249P778; 144 **Wash**676, 258P832; 152**Wash**5, 277P 81; 101**WVa**411, 132SE870; 34**Wyo** 415, 244P637. But see **MoA** 16SW(2d)659.

1779-76 16F(2d)240; 23F(2d)745; 37 F(2d)254; 213**Ala**15, 104S222; 218**Ala** 158, 117S668; 22**AlaA**195, 114S21; 29 **Ariz**334, 241P518; 171**Ark**469, 28SSW 724; 173**Ark**27, 291SW816; 180**Ark**844, 22SW(2d)1020; 180**Ark**980, 23SW(2d) 972; **Ark** 30SW(2d)817(2dcase); 200 **Cal** 265, 252P1045; 202**Cal** 359, 260P 869; 202**Cal** 714, 262P313; 202**Cal**626, 262P740; 94**CalA**303, 271P134; 208**Cal** 652, 284P443; **Cal** 290P438; 70**CalA**415, 233P366; 71**CalA**82, 234P863; 72**CalA** 712, 239P344; 76**CalA**569, 245P468; 78 **CalA**526, 248P930; 79**CalA**234, 249P 223; 199**Cal**545, 250P565; 85**CalA**455, 259P455; 90**CalA**151, 265P574; 91**CalA** 440, 267P158; 92**CalA**35, 267P721; 95 **CalA**428, 273P76; 103**CalA**173, 284P 681; **CalA** 290P57; 76**Colo** 586, 233P 624; 108**Conn**9, 142A385; 110**Conn**540, 148A377; **Conn** 152A157; 160**Ga**612, 128SE803; 160**Ga**865, 129SE528; 160**Ga** 886, 129SE539; 162**Ga**664, 135SE195; 163**Ga**138, 135SE734; 163**Ga**254, 135SE 740; 163**Ga**370, 136SE163; 164**Ga**696, 139SE333; 167**Ga**537, 146SE170; 169**Ga** 264, 149SE879; 34**GaA**178, 128SE694; 35**GaA**126, 132SE414; 35**GaA**289, 133SE 55; 35**GaA**350, 133SE282; 35**GaA**496, 134SE327; 35**GaA**668, 134SE350; 36**GaA** 8, 135SE315; 36**GaA**168, 136SE89; 36 **GaA**163, 136SE178; 36**GaA**428, 136SE 830; 36**GaA**359, 137SE100; 37**GaA**314, 140SE396; 38**GaA**368, 144SE56; 40**GaA** 739, 151SE536; 40**GaA**814, 151SE541; 41**GaA**70, 151SE690; 41**GaA**115, 151SE 834(2dcase); 41 **Ida**129, 23SP308; 42 **Ida**522, 247P740; 43 **Ida**661, 254P528; 45 **Ida**28, 260P426; 318 **Ill** 570, 149**NE** 469; **IndA** 168NE585; **IndA** 169NE57; 200 **Iowa**922, 205NW779; **Iowa** 213NW 442; 205 **Iowa**446, 214NW692; 204 **Iowa** 922, 216NW262; 207 **Iowa**862, 224NW 28; 119**Kan**389, 239P968; 123**Kan**58, 252P223; 209**KyS**03, 273SW472; 218**Ky** 535, 291SW785; 233**Ky**309, 25SW(2d) 733; 125**Me**178, 132A132; 267**Mass**196, 166NE736; 232**Mich**399, 205NW124; 232**Mich**276, 205NW134; 233**Mich**407, 206NW374; 235**Mich**633, 209NW807; 238**Mich**198, 213NW112; 238**Mich**5, 213 NW152; 238**Mich**447, 213NW710; 239 **Mich**53, 214NW85; 239**Mich**440, 214NW 419; 242**Mich**326, 218NW673; **Mich** 233 NW381; 165**Minn**117, 205NW885; 172 **Minn**98, 214NW795; 177**Minn**270, 224 NW839; **Minn** 231NW244; **Minn** 232NW 712; **Miss** 101S153; 140**Miss**397, 105S 854; 141**Miss**55, 105S858; 141**Miss**573, 106S826; 142**Miss**806, 108S156; 144 **Miss**643, 110S118; 153**Miss**228, 120S 458; 156**Miss**802, 126S906(2dcase); 307 **Mo** 194, 270SW113; 310**Mo** 227, 274SW 1025; 314**Mo** 438, 284SW471, 47**ALR**25; 320**Mo** 623, 15SW(2d)333; **Mo** 19SW (2d)1033; **Mo** 271SW531; 220**MoA**973, 272SW1021; 220**MoA**429, 276SW96; **MoA** 277SW969; **MoA** 281SW82; **MoA** 287SW850; **MoA** 290SW638; 221**MoA** 1089, 295SW501; **MoA** 15SW(2d)899; **MoA** 16SW(2d)673; **MoA** 20SW(2d)587; **MoA** 20SW(2d)971; **MoA** 22SW(2d)185; **MoA** 22SW(2d)881; **MoA** 24SW(2d)722; **MoA** 32SW(2d)145; 84**Mont**141, 274P 844; 114**Nebr**42, 205NW937; **NJSup** 149A67; 215**AppDiv**603, 214**NYS**410 (instructions held erroneous but not prejudicial in view of preceding part of instructions); 190**NC**573, 130SE313; 193 **NC**262, 136SE723; 194**NC**98, 138SE424; 198**NC**207, 151SE246; 49**ND**761, 193**NW** 605; 30**ND**341, 195**NW**555; 51**ND**225, 199**NW**961; 52**ND**786, 204**NW**828; **ND** 230NW17; 19 **OhA**1; 21 **OhA**486, 153**NE** 223; 113 **Okl** 190, 240P621; 113 **Okl** 291, 241P1105; 116 **Okl** 62, 243P172; 116 **Okl** 194, 244P785; 124 **Okl** 71, 254P14; 126 **Okl** 139, 258P274; 126 **Okl** 219, 260P 78; 129 **Okl** 27, 263P152; 130 **Okl** 122, 265P768; 131 **Okl** 132, 268P221; **Okl** 291P38; 43 **OklACR**347; 44 **OklACR**13 [reh pending]; 118 **Or**111, 244P71; 117 **Or**411, 244P313; 119 **Or**450, 249P173; 121 **Or**492, 256P197; 122 **Or**579, 260P 444; 125 **Or**375, 264P865; 131 **Or**123, 282P99; 298**Pa**546, 148A354; **RI** 147A 664; **RI** 148A581; 132**SC**59, 128SE849; 136**SC**95, 134SE247; 145**SC**196, 143SE 31; 151**SC**164, 148SE889; 155**SC**356, 152SE646; **SC** 155SE136; **TexCivA** 16 SW(2d)380; **TexCivA** 16SW(2d)900; **Utah** 267P1011; **Utah** 275P582; **Utah** 275P592; 148**Va**437, 139SE308, 55**ALR** 1376; **Va** 154SE526; 140**Wash**427, 249P 778; 144**Wash**676, 258P832; 155**Wash** 647, 285P666; 200**Wis**601, 229NW74; 34**Wyo** 415, 244P637. But see 156**Miss** 540, 126S201. **Where a statement in an instruction which is objected to is a part of a compound sentence,** etc. 169**Ark** 774, 276SW603; **MoA** 282SW507. See also 203 **Iowa**5, 212NW348.

1781-77 172**Ark**1177, 288SW892; 196 **Cal** 308, 237P1066; 163**Ga**370, 136SE163 (instruction not misleading); 318 **Ill** 445, 149NE507; 243**Mich**638, 220NW 737; 314**Mo** 438, 284SW471. See also 20 **OhA**483, 152NE681.

1781-78 72**CalA**57, 236P319; **Nebr** 230 NW495; 121 **Okl** 53, 247P97; 125 **Okl** 239, 257P314; 130 **Okl** 122, 265P768; 131 **Okl** 132, 268P221. **Incompleteness will not render instruction prejudicial** if from inspection and comparison with others meaning is clear. 181**Ark**1037, 28SW(2d)1073.

1781-79 214**Ala**268, 107S746; 218**Ala** 354, 118S644; 172**Ark**273, 288SW901; 72**CalA**57, 236P319; 85**CalA**55, 258P 988; **CalA** 284P499; 103**Conn**520, 131A 501; 167**Ga**287, 145SE455(2dcase); 40 **GaA**341, 149SE657; 40**GaA**831, 151SE 689; 237 **IllA**86; **IndA** 170NE92; **Iowa** 213NW442; **Me** 149A618; 149**Miss**5, 115 S36; **Mo** 30SW(2d)1018; **MoA** 272SW 984; **MoA** 277SW969; **MoA** 284SW857; **MoA** 285SW165; **MoA** 108SW(2d)334; **MoA** 24SW(2d)200; 192**NC**638, 135SE 614; 116 **Okl** 142, 243P959; 121 **Okl** 53, 247P97; 147**SC**58, 144SE579. But see 30**Mo** 142, 271SW773. **Failure to instruct that statutory negligence** must have caused accident is cured by other instructions in regard thereto. **Va** 143 **SE**887. **Instruction as to knowledge of marriage** of plaintiff's husband, warranting verdict for plaintiff, followed by charge as to burden of proof, is not objectionable. 243**Mich**638, 220NW737.

1782-81 196**Cal** 308, 237P1066; 155 **Miss**674, 125S93; 314**Mo** 438, 284SW 471; 221**MoA**345, 273SW176.

1782-82 220**Ala**649, 127S216; 176**Ark** 182, 28SW(2d)3; 180**Ark**729, 22SW(2d) 1007; 181**Ark**925, 29SW(2d)676; 72 **CalA**63, 236P344; 102**CalA**333, 282P 997; 103**CalA**531, 284P1086; **CalA** 288 P89; **CalA** 288P716; 169**Ga**678, 157SE 349; 36**GaA**8, 135SE315; 41**GaA**203, 152 SE581(3dcase); 339 **Ill** 276, 171NE271; 244 **IllA**47; **Iowa** 226NW116 (instruction referring to another matter); 122 **Kan**520, 253P598, 599 [citCJ]; 124**Kan** 375, 260P635; 209**Ky**3, 272SW3; 233 **Ky**129, 25SW(2d)38 (error not cured by other instruction); 314**Mo** 305, 284SW 488; **Mo** 31SW(2d)21; **MoA** 15SW(2d) 884; **MoA** 23SW(2d)209; **MoA** 24SW (2d)712; **MoA** 27SW(2d)501; 77**Mont** (2d)715; **MoA** 27SW(2d)501; 77**Mont** 205, 250P445; **NJSup** 135A59; **NJSup** 146A344; 217**AppDiv**301, 216**NYS**656 (as to contributory negligence); 228 **AppDiv**194, 239**NYS**200; 191**NC**416, 131 **SE**723; 32 **OhA**177, 166**NE**396; 118 **Okl** 118, 247P42; 285**Pa**131, 131A710 (undue burden of proof); 50**SD**502, 210**NW** 739; **TexCommnA** 15SW(2d)210; **Tex CivA** 4SW(2d)159; 144**Va**330, 132**SE** 320; 36**Wyo** 132, 253P658. **Correct general instruction will not cure erroneous specific instruction.** 32F(2d)173; **TexCommnA** 288SW823. **Correct oral charge will not cure erroneous written instruction.**–219**Ala**546, 122S677; 22 **AlaA**195, 114S21. **Rule subject to qualification** that instruction complained of must be on material issue and calculated to mislead jury. 36**GaA**8, 135SE 315. **Insufficient reference to other instructions** to cure erroneous instruction. **Mo** 31SW(2d)14. **Necessity of reference to other instructions** to cure erroneous instructions. **Mo** 31SW(2d)14.

1783-83 175**Ark**167, 299SW377; 178 **Ark**795, 12SW(2d)411; 178**Ark**917, 13 SW(2d)26; 69**CalA**770, 232P491; 72 **CalA**63, 236P344; 29**Hawaii**188; **MoA** 256SW555; 217**MoA**528, 269SW404; 221**MoA**373, 273SW130; **MoA** 274SW 1103; **MoA** 15SW(2d)899; 114**Nebr**106, 206NW19; **Nebr** 232NW616; 191**NC** 416, 131SE723; 118 **Okl** 118, 247P42; 129 **Or**169, 276P1094; 285**Pa**131, 131 A710; 108**WVa**365, 151SE326. See also **MoA** 273SW135.

1784-84 76**CalA**569, 245P468; 85**CalA** 55, 258P988; 77**Mont**205, 250P445; **NJ Sup** 135A59.

1784-85 216**Ala**495, 113S531; 169**Ark** 95, 278SW357; 171**Ark**103, 283SW31; 174**Ark**146, 294SW395; 74**CalA**598, 241 P422; 76**CalA**569, 245P468; 33**GaA**733, 127SE898; 40**GaA**834, 151SE665(2dcase); 118**Kan**251, 240P395; 125**Me**44, 130A737; 261**Mass**26, 158NE341; **Mass** 170NE619 (cured by further instructions); 170**Minn**191, 212NW530; 171 **Minn**321, 214NW52; 219**MoA**234, 271 SW1023; 220**MoA**518, 276SW1030; 220 **MoA**102, 278SW806; **MoA** 278SW826; 220**MoA**175, 282SW515; **MoA** 287SW 850; 221**MoA**691, 288SW977; **NJSup** 130A639; **NJSup** 135A274; **NJSup** 149 A117; 190**NC**301, 129SE822; 198**NC**39, 150SE667; 115 **Or**656, 239P825; 132**SC** 420, 129SE160; 142**SC**492, 141SE90; 154**SC**366, 151SE608; **TexCivA** 275SW 463; **TexCivA** 293SW901; 143**Va**12, 129 SE374; 135**Wash**99, 237P14. See also 144**Va**154, 131SE245.

1784-86 169**Ark**95, 278SW357; 171**Ark** 103, 283SW31; 172**Ark**177, 288SW892; **Ark** 31SW(2d)415; 200**Cal** 299, 252P 1049; 74**CalA**598, 241P422; 77**CalA**481, 246P1086; 92**CalA**100, 267P758; 72 **CalA**44, 267P918; 106**Conn**200, 137A 749; 106**Conn**506, 138A442; 37**GaA**216, 139SE591; 39**GaA**217, 146SE795; 40 **GaA**341, 149SE657; 317 **Ill** 561, 148NE 293; 324 **Ill** 339, 155NE284; 84 **IndA** 542, 149NE361; **Iowa** 213NW442; 229 **Ky**53, 16SW(2d)505, 64**ALR**648; 261 **Mass**26, 158NE341; 238**Mich**447, 213NW 710; 170**Minn**191, 212NW530; 171**Minn** 321, 214NW52; **Mo** 274SW369; 312**Mo** 173, 279SW89; 315**Mo** 367, 286SW106; 320**Mo** 95, 6SW(2d)617; 321**Mo** 105, 9 SW(2d)939; 220**MoA**518, 276SW1030; **MoA** 276SW1035; 220**MoA**102, 278SW 806; **MoA** 281SW82; 220**MoA**175, 282 SW515; 220**MoA**720, 293SW468; **MoA** 28SW(2d)107; **MoA** 13SW(2d)1079; **NJ Sup** 135A274; 28 **OhA**468, 162**NE**826; 35 **OhA**291, 172**NE**425; 121 **Or**492, 256 P197; 285**Pa**131, 131A710 (instruction, in connection with other instructions, held harmless); 142**SC**492, 141SE90; 145**SC**196, 143SE31; 148**Va**331, 138SE 637; 135**Wash**21, 236P799. See also 134 **SC**114, 132SE163. **Illustration.**–284**Pa** 59, 130A398. **Where judge has correctly stated contentions of parties,** further instruction that they ought to learn all issues from pleadings given them is not ground for reversal. 34**GaA**276, 129SE 125. **Charge as a whole** could not have misled jury. 192**NC**480, 135SE292. **Rule applied.**–312**Mo** 173, 279SW89. **Erroneous instructions held harmless.**–111**Conn**317, 150A17.

1784-87 36**GaA**8, 135SE315; 36**GaA** 143, 136SE85; **IndA** 168NE198; **IndA** 173NE330(2dcase); 315**Mo** 713, 290SW 135; **NJSup** 135A59.

1784-88 83 **IndA**366, 147NE310. See also 253**Mass**85, 148NE371.

1785-89 43F(2d)499; 22**AlaA**629, 118 S680; 181**Ark**674, 27SW(2d)516; 181 **Ark**946, 28SW(2d)728; 199**CalA**545, 250 P565; 83**CalA**290, 256P576; 85**CalA** 535, 259P958; 88**CalA**354, 263P578; 89 **CalA**477, 265P268; 89**CalA**721, 265P541; 90**CalA**144, 265P558; 93**CalA**202, 269P 682; 93**CalA**666, 270P263; 94**CalA**703, 271P789; 95**CalA**428, 273P76; 97**CalA** 112, 274P1009; **CalA** 291P854; 164**Ga** 696, 139SE333; 166**Ga**784, 144SE246; 35**GaA**528, 134SE126; 38**GaA**637, 144 SE810; 40**GaA**302, 149SE422; 83 **IndA**

500, 149NE137; 207 Iowa1278, 224NW 815; 209Ky442, 272SW912 (containing general erroneous statement of law but not requiring jury to find for either party); 260Mass202, 156NE875; 236 Mich412, 210NW211; Mich 233NW365; 172Minn98, 214NW795; 146Miss565, 111S571; Mo 298SW806; 322Mo 718, 17SW(2d)511; 322Mo 271, 18SW(2d) 494; MoA 285SW783; 222MoA740, 9 SW(2d)824; MoA 13SW(2d)560; MoA 20SW(2d)952; MoA 31SW(2d)242; Mont 288P181; Mont 291P1042; 105 NJL477, 144A566; 196NC237, 145SE 235; 30 OhA184, 164NE644; OhA 173 NE16; 293Pa326, 142A867; 152SC265, 149SE742 (limited instruction held not erroneous in view of general instruction); Va 154SE687. **Charge concerning unsworn witnesses** in language of stipulation held not error where properly qualified. 102NJL624, 133A417. **Charge authorizing recovery without negligence** is cured by unequivocal charge predicating recovery on negligence. 38GaA395, 144SE46. **Misleading instruction held cured.**–100CalA775, 281P95; 151SC164, 148SE889.

1785–90 219Ala189, 121S708; 170Ark 842, 281SW910; 171Ark103, 283SW31; 172Ark273, 288SW901; 180Ark106, 20 SW(2d)633; 181Ark1145, 27SW(2d) 520; 181Ark768, 27SW(2d)990; 197 Cal 598, 242P76; 198Cal 16, 243P21; 200Cal 299, 252P1049; 203Cal 374, 264 P485; 96Cal 169, 273P866; 208Cal 105, 280P522; Cal 291P173; 68CalA494, 229P885; 69CalA669, 232P169; 82CalA 542, 255P858; 82CalA660, 256P457; 89 CalA721, 265P541; 92CalA35, 267P721; 94CalA66, 270P719; 94CalA303, 271P 134; 104CalA671, 286P729; CalA 287 P110; CalA 290P497; 106Conn200, 137 A749; 163Ga149, 135SE721; 164Ga552, 139SE31; 164Ga541, 139SE68; 165Ga 412, 141SE76; Ga 155SE5; 35GaA528, 134SE126; 36GaA605, 137SE636; 40 GaA332, 149SE582; 40GaA341, 149SE 657; 42 Ida789, 248P438; 42 Ida738, 248P456, 49ALR1057; 46 Ida214, 267 P222; 48 Ida789, 285P676; 252 IllA68; Ind 169NE673; IndA 148NE337; 80 IndA 556, 148NE643; 83 IndA541, 149 NE184; 86 IndA297, 157NE106; IndA 172NE576; IndA 171NE10; IndA 171 NE212; 205 Iowa666, 216NW733; 205 Iowa291, 217NW880; 207 Iowa843, 223 NW895; Iowa 229NW321; 122Kan375, 252P208; 219Ky389, 293SW155; 224 Ky274, 6SW(2d)264; 153Md312, 138A 269; 260Mass202, 156NE875; 235Mich 633, 209NW807; 239Mich53, 214NW85 (omission of proximate cause); 171 Minn321, 214NW52; 172Minn574, 216 NW237; Miss 101S153; 144Miss643, 110S118; 155Miss207, 124S325; 307 Mo 194, 270SW113; 310Mo 72, 274SW 1031; 314Mo 438, 284SW471; 315Mo 1214, 289SW639, 50ALR268; 316Mo 728, 293SW105; 316Mo 1094, 295SW 563; 319Mo 1028, 5SW(2d)6; 320Mo 946, 8SW(2d)832; 320Mo 1011, 8SW (2d)982; Mo 9SW(2d)156; 217MoA 171, 274SW891; 220MoA518, 276SW 1030; 220MoA251, 284SW167; MoA 273SW1078; MoA 275SW592; MoA 281SW452; MoA 285SW768; MoA 297 SW706; MoA 297SW982; MoA 299SW 74; 222MoA1003, 7SW(2d)470; MoA 9SW(2d)534; MoA 9SW(2d)644; MoA 9SW(2d)672; MoA 11SW(2d)1060; MoA 20SW(2d)537; MoA 21SW(2d)201 (omitting issue of usury); MoA 24SW (2d)712; MoA 26SW(2d)851; MoA 26 SW(2d)869; MoA 30SW(2d)441; MoA 30SW(2d)1044; MoA 31SW(2d)265; 85Mont270, 278P521; Nebr 232NW616; NJSup 132A237; NJSup 147A233; NC 154SE847; 56ND276, 217NW173; 58 ND634, 227NW59; ND 231NW283; 23 OhA458, 155NE252; 28 OhA303, 162 NE678; 34 OhA244, 170NE661; 113 Okl 190, 240P621; 141 Okl 256, 284P 866; 298Pa546, 148A854; 150SC130, 147SE834; 155SC356, 152SE646; Tex CivA 12SW(2d)604; TexCivA 14SW (2d)919; TexCivA 15SW(2d)207; Tex CivA 25SW(2d)969; 68Utah85, 249P 437; 69Utah340, 255P416; Vt 147A346; Vt 147A352; Vt 147A687; 144Va330, 132SE320; 147Va542, 137SE493; 148 Va331, 138SE637; 148Va437, 139SE 308, 55ALR1376; 136Wash295, 239P831; 148Wash93, 268P145; 150Wash514, 273 P732; Wash 290P831; Wash 291P336; 101WVa411, 132SE870; 108WVa607, 152SE3; 200Wis26, 227NW282; 34 Wyo 415, 244P637; 38Wyo 151, 265P 446. But see TexCivA 21SW(2d)97. **Defendant cannot complain** that plaintiff's instruction on measure of damages was insufficient where his own instruction on the subject was given. 219MoA336, 271SW834. **Omission of issue of contributory negligence,** etc. 172Ark219, 288SW717; 78CalA526, 248 P930; 86CalA474, 260P957; 88CalA 354, 263P573; 92CalA100, 267P758; 101CalA174, 281P634. **Definition of terms.**–81CalA86, 253P178; MoA 294 SW103; MoA 300SW1034; MoA 25SW (2d)499; MoA 31SW(2d)234; 69Utah 340, 255P416. **In action on fidelity bond, instruction, not telling jury what facts they must find** to find embezzlement as to each item claimed by plaintiff, has been held not erroneous, in view of instruction telling jury that they could find against defendant only for loss caused by embezzlement and properly defining such word. 321Mo 140, 9SW(2d)929. **Omission of defense of assumption of risk.**–Mo 26SW(2d)929. **Omission of matters of defense.**–MoA 20SW(2d)592. **Omission of issue of contributory negligence.**–But see Ark 31SW(2d)415.

1786–91 22AlaA180, 114S288; 207Cal 438, 278P1044; CalA 292P192; 81Colo 370, 256P1; 170Ga349, 153SE11; 198 Ind376, 153NE761; 207 Iowa862, 224 NW28; 232Mich399, 205NW124; 171 Minn321, 214NW52; Mo 298SW51; Mo 31SW(2d)50; MoA 296SW216; MoA 17SW(2d)658; 83Mont452, 272P998; Nebr 228NW601; 135SC307, 133SE545; 192Wis269, 212NW643.

1786–93 212Ala608, 103S658; 215Ala 548, 112S120; 35Ariz285, 276P846; 169 Ark95, 278SW357; 84CalA743, 258P 1000; CalA 292P192; 106Conn200, 137 A749; 162Ga302, 133SE239; 170Ga426, 153SE46; 35GaA93, 132SE107; 84 IndA 542, 149NE361; IndA 167NE551 (use of word "the" instead of article "a"); 204 Iowa456, 215NW767; 208 Iowa458, 223 NW521; Mo 29SW(2d)39; Mo 29SW (2d)64; MoA 282SW181; MoA 296SW 243; MoA 296SW1057; 194NC227, 139 SE242; 26 OhA79, 159NE843; 34 OhA 327, 171NE318; 115 Or656, 239P825; 137SC433, 135SE563; 36Wyo 473, 257P 484; 38Wyo 190, 266P117.

1786–94 155Md681, 142A501; Vt 150A 128(1stcase).

1786–95 29Ariz121, 239P795; 176Ark 1204, 4SW(2d)523 (misleading); Cal 288P784; 68CalA334, 229P351; MoA 28 SW(2d)113; SC 155SE588; 147Va802, 128SE46.

1786–96 38GaA556, 144SE506; 220MoA 355, 286SW718; MoA 276SW1035; MoA 287SW848; MoA 294SW731; MoA 29 SW(2d)197 (lack of clearness); 131 Or 415, 282P542; 147Va542, 137SE493.

1786–97 14F(2d)299; 33F(2d)876 (custom of other companies as test of due care); 216Ala495, 113S531; 22AlaA629, 118S680; 172Ark1177, 288SW892; 172 Ark255, 288SW897 (assumption of fact); 172Ark353, 289SW6; Ark 30SW(2d)840 (2dcase); 200Cal 299, 252P1049; 195Cal 655, 235P438; 199Cal 545, 250P565; 85 CalA535, 259P958; 90CalA151, 265P 574; 104CalA400, 285P1053 (instruction held not invading province of jury in view of other instructions); 164Ga696, 139SE333; 166Ga220, 142SE868; 37 GaA216, 139SE591; 336 Ill 390, 168NE 370 (disregarding testimony ruled out as incompetent); IndA 167NE721; IndA 168NE34(2dcase); 207 Iowa862, 224NW28; 208 Iowa1157, 225NW346; 232Mich486, 205NW596; 146Miss565, 111S571; 147Miss603, 111S578; 219 MoA234, 271SW1023; NJSup 145A238; 286Pa536, 134A446; TexCivA 289SW 146; TexCivA 297SW238; 135Wash99, 237P14. See also 168Ark943, 272SW663; 160Ga381, 128SE187.

1787–98 203Cal 390, 264P237; 243 IllA 298; 244 IllA451; IndA 168NE198; 323 Mo 299, 19SW(2d)472; 217MoA528, 269 SW404; MoA 279SW155; 221MoA1071, 296SW167; MoA 287SW848; MoA 295 SW495; 222MoA51, 299SW604; MoA 22 SW(2d)855; 107WVa275, 148SE78; 108 WVa365, 151SE326. See also 308Mo 142, 271SW773. But see MoA 20SW(2d)971.

1787–98½–New. Erroneous instruction held not cured by ruling given at conclusion of evidence. 170Ga349, 153SE11.

1787–99 14F(2d)299; 180Ark60, 20SW (2d)309 (not reversible error especially where no substitutionary instruction was requested); 90CalA249, 265P839; 107Conn201, 139A782; 166Ga156, 142SE 673; 201 Iowa1186, 207NW247; Mo 293 SW127; NJSup 130A439; 192NC638, 135SE614; 299Pa79, 149A104; Vt 151 A568; 144Va330, 132SE320. **An erroneous statement,** etc. 285Pa489, 132A575 (where court told jury to disregard charge objected to, if not supported by evidence). **Striking part of instruction and calling stricken part to jury's attention** held not error. 315Mo 1136, 287 SW1031.

1787–1 192NC638, 135SE614.

1787–2 267Mass75, 165NE897; Mo 293 SW127, 128 [citCyc].

1787–4 189NC482, 127SE593.

1788–6 315Mo 883, 289SW540. **Effect of taking exceptions** is notice that attorney thinks error has been committed, and gives opportunity to correct error. 128Misc614, 219NYS556. **Instructions tendered by codefendant.**–107WVa440, 148SE496.

1788–10 69CalA9, 230P958.

1788–11 Instruction given in another form cannot be complained of. 69CalA9, 230P958.

1789–13 TexCommnA 27SW(2d)153.

1789–17 69CalA9, 230P958; 150Miss 715, 116S820. **Request for submission of particular defense** and exception to court's refusal are not precluded by court's prior ruling out of particular defense. 131SC498, 127SE570.

1789–18½–New. Party is estopped to object to instruction predicated on his pleadings.–226Ky338, 10SW(2d)1086.

1790–19 29 OhA457, 163NE728; Okl 293P188.

1790–20 87 IndA371, 161NE567; 129 Okl 176, 264P159; Okl 291P38. **Erroneous statement of fact by court** must be called to its attention at or before conclusion of charge. 166Minn7, 206 NW934. **In Texas.**–CivA 298SW618.

1790–21 203 Iowa721, 211NW430; 164 Minn425, 205NW286. **In New York.**–128Misc614, 219NYS556.

1790–21½–New. In Texas where plaintiffs establish right to recover hospital and funeral expenses, but do not object to charge omitting such elements, when charge is submitted to them for that purpose, and before charge is read to jury, they waived objections to charge. TexCivA 15SW(2d)129.

1790–21½–New. Statute relating to taking of exceptions and time when same shall be reduced to writing applies to term time appeals as well as to vacation appeals. 87 IndA670, 162NE 417.

1790–21¼–New. In some jurisdictions exception to court's expression of opinion may be taken after verdict. NC 154 SE674(2dcase).

1790–21½–New. In some jurisdictions exception to court's inadvertence in failing to instruct jury not to consider insurer must be taken before verdict. NC 154SE674(2dcase).

1792–24 TexCommnA 3SW(2d)77.

1792–31 Manner of making notation.–129 Okl 176, 264P159. **Exceptions must be noted on instruction.**–111 Okl 263, 239P576.

1793–32 86 IndA59, 155NE833.

1793–33 111 Okl 263, 239P576; 117 Okl 233, 245P850; 129 Okl 176, 264P159; 143 Okl 190, 288P300.

1794–38 90PaSuper382.

1794–40 In Texas.–CivA 19SW(2d)784.

1796–41 30F(2d)80 [certiorari den 279 US852, 49SCt348(5thcase), 73L ed995]; 160Ga497, 128SE66; Iowa 213NW442; 165Minn210, 206NW400; 129 Or169, 276P1094; TexCivA 298SW631; 151Va 985, 144SE624. **Statement to court in chambers by attorney,** that he desired to request instruction to preserve record, held not sufficient as exception to refusal to charge as requested. 141 Wash689, 252P131. **Exceptions held**

not sufficiently specific.–262Mass437, 160NE249.
1796–44 Iowa 213NW442.
1796–45 84Colo 376, 270P656. But see 219Ala206, 121S736.
1796–46 TexCivA 18SW(2d)740.
1796–49 170Ark842, 281SW910 (objection held general); 172Ark1177, 288SW 892; 172Ark273, 288SW901; 172Ark 877, 291SW426; 34GaA203, 128SE915; Mass 172NE101; 103NJL313, 136A729; 49ND1119, 194NW691; TexCivA 26SW (2d)327. **General exception to charge** immediately after refusal of requested charge is exception both to charge given and to refusal. 23 OhA167, 155NE 414. **Where the exception is not to a statement of a rule of law, but only to an error in the statement of facts,** etc. 87PaSuper365.
1798–50 36F(2d)939; 36F(2d)948(2d case); 213Ala534, 105S901 (general objection and exception by way of reference only held insufficient); 216Ala495, 113S531; 180Ark1067, 23SW(2d)980; 160Ga612, 128SE803; 204 Iowa857, 216 NW33; 111 Okl 263, 239P576; Tex CivA 24SW(2d)786. But see NH 150A 540. **In Iowa.**–219NW398. **The following exceptions.**–TexCivA 29SW(2d)883; TexCivA 29SW(2d)911. **Instructions held not too general.**–170Ga530, 153SE 415.
1800–50a 172Ark937, 290SW933; Tex CivA 4SW(2d)641.
1800–51 172Ark877, 291SW426; 172 Ark937, 290SW933; 285Pa251, 132A 120; TexCivA 31SW(2d)319. But see 28 OhA318, 162NE699. **Unless instruction is inherently wrong.**–181Ark1132, 29SW(2d)683.
1800–52 30F(2d)316; 173Ark729, 293 SW9; 167Ga588, 146SE320.
1803–58 216Ala495, 113S531; 83Colo 136, 263P23.
1803–59½–New. Where error is one of commission, general exception is sufficient. 28 OhA318, 162NE699.
1803–61 160Ga497, 128SE661; 111 Okl 263, 239P576; 87PaSuper365.
1803–62 172Ark937, 290SW933; 207 Iowa605, 223NW480.
1804–63 33F(2d)876; NJSup 144A628.
1805–71½–New. Exception, so far as defendant's requests for rulings have not been given, is irregular. 266Mass 214, 165NE36.
1806–73 179Ark225, 15SW(2d)391; 76 Mont288, 246P536; TexCivA 298SW 642; TexCivA 32SW(2d)703. **Exception should be taken to modification of request,** where it is given, though effect is destroyed by giving of other instructions. 36F(2d)937. **In Iowa.**–232NW 421 (under statute).
1806–75 222AppDiv413, 226NYS479.
1806–77 TexCivA 298SW642.
1806–78 101Vt477, 144A380.
1807–81 101Vt477, 144A380.
1807–83 168Ark330, 270SW956.
1807–87 178Ark943, 12SW(2d)916.
1807–90 172Ark729, 290SW942. See also 34GaA68, 128SE215. **Argument held outside exception to charge.**–39 F(2d)443. **Objection that charge on burden of proof** is misleading in case submitted on special issues includes objection that charge submitted question of law. TexCivA 31SW(2d)319.
1807–90½–New. Objection that notation on bill of lading was not shown to be act of plaintiff or anyone authorized by him has been held to raise issue of want of authenticity. TexCivA 3SW (2d)109.
1807–93 179Ark461, 16SW(2d)463(1st case).
1808–1 178Ark513, 11SW(2d)1.
1808–3 172Ark1177, 288SW892; 82 Colo 369, 260P108; 161Ga55, 129SE769; 203 Iowa721, 211NW430; 203 Iowa 1361, 214NW591; 126Kan736, 271P398; 83NH29, 137A445; 115 Okl 31, 241P 121; TexCivA 285SW866; TexCivA 298 SW631; 99Vt446, 134A603. See also TexCivA 7SW(2d)1099.
1809–16 102NJL374, 131A886; 194NC 809, 140SE300; 39 OklACR274; Tex CivA 275SW303 (instruction requested).
1810–17 33F(2d)60; 180Ark980, 23SW (2d)972; Ark 32SW(2d)633; 92CalA 100, 267P758; 102Conn676, 129A790; 37GaA237, 139SE580; 122Kan69, 251P 184; 320Mo 946, 8SW(2d)832; 217MoA 104, 273SW418; 194NC809, 140SE300; Or 289P369; TexCivA 286SW526; Wis 232NW593. **Where court neutralizes erroneous instructions by other instructions,** giving of erroneous instructions held not prejudicial error. 215Ala126, 110S143.
1811–19 25 OhA116, 157NE500.
1811–20 39 OklACR274.
1813–21 132SC63, 128SE850.
1813–22 44 Ida620, 258P555, 557 [cit Cyc].
1814–24 209Ky803, 273SW472; 239 Mich270, 214NW84.
1814–25 38GaA276, 143SE784(2dcase).
1815–26 181Ark946, 28SW(2d)728; 103 CalA173, 284P681.
1815–27 141SC56, 139SE182.
1816–30 Instruction ignoring defense of contributory negligence is not cured by thereafter submitting special issue on contributory negligence. TexCivA 18SW (2d)740.
1816–32 Conn 152A148; TexCivA 18 SW(2d)821.
1817–33 16F(2d)578.
1819–44 Better practice is that doubtful questions of evidence and procedure should not be discussed in presence of jury. TexCivA 286SW1107.
1819–56 But see NJSup 144A115.
1820–64 221Ala614, 130S379.
1820–71 218Ala493, 119S21; 103Conn 267, 130A571.
1820–73 103Conn267, 130A571; 53SD 162, 220NW458.
1820–74 53SD162, 220NW458.
1822–95 5PaDist&Co 531.
1822–97½–New. For jury foreman to suggest to bailiff that jury desired further instructions from court does not constitute misconduct vitiating verdict. 58ND812, 228NW212.
1822–1 20 OhA93, 153NE151.
1822–2 81CalA772, 254P926.
1822–5 263Mass427, 161NE616.
1822–7 See also 30 OhA184, 164NE644.
1823–13 Jurors should avoid mingling intimately with witnesses on whose testimony case must be determined. Utah 267P188.
1823–16 See also TexCivA 4SW(2d)222.
1823–17½–New. That some jurors read newspaper account of case does not require court to withdraw juror where article was not very damaging and was not inspired by party. 295Pa168, 145 A81.
1823–19½–New. It is duty of jury under admonition of court not to form or express opinion with respect to merits of facts or law of case until it is finally submitted to them. 197Cal 290, 240P 785.
1823–19⅓–New. Failure to comprehend countercharge is not misconduct. Tex CivA 294SW905.
1823–19¼–New. Giving illogical reasons for verdict is not misconduct. Tex CivA 294SW905.
1823–19½–New. Deliberations are to be kept secret. 5PaDist&Co 531.
1823–19⅚–New. Filing letter with court asking that defendant aid plaintiff's family does not constitute misconduct. 73CalA605, 238P1087.
1823–19½–New. Consideration of evidence admitted without objection does not constitute misconduct. TexCivA 17 SW(2d)494.
1823–19⅛–New. It is improper for jurors to discuss case prior to its submission to them. 102CalA477, 283P132.
1823–19½–New. Answering special issues in attempt to necessitate judgment for plaintiff may be misconduct in view of statute. TexCommnA 24SW(2d)372.
1824–30 201 Iowa1044, 207NW984.
1824–35 235 IllA440.
1825–44 235 IllA440; 112 OhSt506, 148 NE82.
1825–48 Verdict must be free from outside influence.–195NC502, 142SE779.
1825–54½–New. Verdict rendered by jury any of whose members has been entertained by litigant, his agent, or attorney must be set aside. Va 154SE483.
1827–88 220Ala207, 124S737; 102NJL 1, 131A92 (publication of former trial and review thereof).
1828–93 191NC500, 132SE468; 120 Okl 279, 251P56; TexCivA 30SW(2d)503. **Where there is no real conflict,** jury should decide questions of fact in accordance with testimony submitted. 151 Va302, 144SE424.
1828–94 TexCivA 272SW283 (verdict will not be permitted to stand where affected by extraneous matter); Tex CivA 19SW(2d)930 (court is expected to exclude from jurors evidence they should not consider during deliberations). **Stricken evidence** should not be considered. 318 Ill 445, 149NE507.
1828–95 TexCivA 17SW(2d)110; Tex CivA 32SW(2d)696.
1828–96 20AlaA617, 104S559 (should construe evidence to make all witnesses speak truth if reasonably possible).
1828–99½–New. Discussion of attorney's fees by jury is flagrant wrong, for which there is no excuse. TexCivA 9 SW(2d)146.
1828–2 TexCivA 30SW(2d)503. **Statement by juryman in course of deliberations** that he had been "approached" by litigant in attempt to "influence" him held prejudicial error. 202 Iowa837, 211NW361. **Improper argument of juror during deliberation** that plaintiff would get nothing out of judgment, as defendant would appeal and finally win case, held reversible error. TexCivA 20SW(2d)324. **Statement of juror that he once suffered from blood poison,** and jury's discussion as to compensation stopping if employee was able to go back to work, held error. TexCivA 20 SW(2d)833.
1828–7½–New. Apportionment of damages among joint tort-feasors is ordinarily not matter for consideration of jurors. TexCommnA 280SW753.
1828–7⅓–New. That jury considered such apportionment does not constitute misconduct where all agreed on amount of damage suffered by plaintiff and consideration of apportionment was invited by special issue submitted. Tex CommnA 280SW753.
1828–7¼–New. Verdict should be deliberate conclusion of mind of each and every juror. 261Mass431, 158NE776.
1828–7⅓–New. Jury should find facts from evidence without regard to their effect on judgment. TexCivA 3SW(2d) 563.
1828–7⅙–New. Effect of verdict on parties should not be considered. TexCivA 15SW(2d)1064.
1828–7⅐–New. Agreement by jury before answering questions that plaintiff should not recover and determination to answer questions accordingly may be prejudicial misconduct. TexCommnA 29SW(2d)989.
1828–7⅛–New. Justice can only be accomplished when jury are guided solely by pleadings and evidence. MoA 31 SW(2d)596.
1829–11 39F(2d)297; 43 Ida337, 252P 186; 199 Ind290, 157NE433. **In Oklahoma.**–36 OklACR722. **Complaint containing charge not proved.**–129 Or321, 276P687.
1829–13 128Kan174, 277P54, 64ALR 606; 38 OklACR172.
1829–14½–New. It is discretionary with court as to whether or not jury shall be permitted to have pleadings during deliberation. 30 OhA300, 165NE47.
1829–15 204 Iowa335, 213NW762.
1830–22 MoA 281SW137.
1830–30½–New. Rule of court requiring that jury retiring have written instructions of court is not jurisdictional. SD 227NW193.
1831–36 Statutes excluding from jury room papers relating to evidence do not apply to plaintiff's statement of claims based on evidence and submitted by court in charging jury. 58ND727, 227 NW222 (considered part of instructions).
1831–38 321 Ill 305, 151NE911, 45ALR 1457 (letters); 194NC675, 140SE749.
1831–40 Applications of rule.–329 Ill 445, 160NE752. **Evidence not within rule,** etc. 200 Iowa1059, 205NW863. **Deed containing objectionable recital** as to which introducing party was questioned without objection is properly given to jury. TexCivA 7SW(2d)1106.
1832–42 224Ky659, 6SW(2d)1084; 196 Wis191, 218NW835.

1832-44 230Ky465, 19SW(2d)1078.
1832-47 202 Iowa837, 211NW361. **Permitting document to go to jury with eliminated portions still legible** held not error in view of signer's cross-examination. 26 OhA536, 160NE508.
1833-50 202 Iowa837, 211NW361 (where only signature on paper was admitted in evidence).
1833-56 3Del 450, 139A66.
1834-68 130Misc667, 224NYS694. **That law reports covering cases similar to that under consideration were in jury room during deliberations** is not ground for predicating error where it does not appear that jury examined them. 114 Nebr593, 208NW961.
1834-70 202 Iowa837, 211NW361; Tex CivA 9SW(2d)501; TexCivA 272SW283.
1835-76 32F(2d)261 [aff 32F(2d)264 (1stcase)]; 131SC498, 127SE570.
1836-91 204 Iowa762, 216NW2, 55ALR 745.
1838-98 TexCommnA 5SW(2d)765. But see 153Miss228, 120S458. **Applications of rule.–TexCivA** 291SW658.
1838-2 6F(2d)644 (place of circulation of newspaper); 32GaA241, 136SE167; 119Kan307, 239P993; 144Miss194, 109S704; 150Miss857, 117S244; 31 OhA 237, 166NE237; 130 Okl 51, 265P141; TexCivA 294SW905. **What are matters of common knowledge.–85PaSuper275;** TexCommnA 298SW554.
1839-5 MoA 300SW559.
1840-6 119Kan307, 239P993; 144Miss 194, 109S704; 318Mo 17, 298SW777.
1840-12 Iowa 213NW221.
1840-14 204 Iowa762, 216NW2, 55ALR 745.
1841-18 70CalA77, 232P505; 94CalA 463, 271P509.
1842-21 Iowa 213NW221.
1842-25 But see TexCivA 15SW(2d)57.
1842-28 261Mass431, 158NE776; Tex CivA 289SW134. **Evidence held not to show misconduct of jury** in first deciding what kind of judgment they wanted rendered and then framing answers to special issues with view of accomplishing result desired. TexCivA 16SW(2d) 925. **That jury first considered whole case** and found for defendant and answered special issues accordingly was not misconduct. TexCivA 30SW(2d) 416.
1843-30 221Ala585, 130S199; Ala 130 S552; 136SC21, 134SE234; Tex 32SW (2d)637. **Definition.–219Ala399,** 122S 359. **Evidence held not to show quotient verdict.–228Ky90,** 14SW(2d)392.
1843-31 136SC21, 134SE234.
1844-32 136SC21, 134SE234.
1844-33 136SC21, 134SE234.
1844-36 261Mass431, 158NE776; Tex CivA 32SW(2d)703. **Evidence insufficient to show quotient verdict.–Kan** 289 P427(2dcase).
1844-39 261Mass431, 158NE776.
1845-45 219Ala399, 122S359; 200 Iowa 864, 205NW515; 261Mass431, 158NE 776; 322Mo 514, 17SW(2d)960; 125 Okl 157, 256P921; 136SC21, 134SE234; Tex CivA 270SW199; TexCivA 10SW(2d) 397.
1845-46 136SC21, 134SE234; TexCivA 276SW460; TexCivA 292SW577.
1845-47 125 Okl 157, 256P921.
1846-49 MoA 13SW(2d)1088.
1846-57 TexCivA 289SW134.
1846-59½-New. Agreement to determine prevailing party and then form answers to accomplish purpose constitutes misconduct. TexCivA 17SW(2d) 494.
1846-61 217AppDiv614, 216NYS161. See also 246 IllA178.
1846-62 217AppDiv614, 216NYS161.
1846-63 245NY558, 157NE856; 217App Div614, 216NYS161. **Verdict held not compromise.–119Kan307,** 239P993.
1847-65 125 Okl 157, 256P921. But see 113 Okl 168, 240P716.
1847-67½-New. Nor is it compromise verdict as may be set aside where jury fixes value different than that given by expert witnesses of both parties. 125 Misc791, 211NYS433.
1847-70½-New. Evidence that jury set apart $1,000 for time lost at trial, $500 for medical expenses, $450 for lessened value of automobile, and balance for diminished earning capacity, held proper method in arriving at verdict. TexCivA 19SW(2d)77.
1847-71 That verdict is for less than amount to which plaintiff is entitled under evidence does not show that verdict was reached by compromise. 246Mich 689, 225NW580.
1848-79 220Ala190, 124S418. **Trial court's refusal to have all testimony of witness read to jury,** as requested by defendant, is not error, since defendant should have pointed out portions of such testimony which it deemed important, and requested those portions to be read to jury. TexCivA 9SW(2d)284.
1849-89 104Conn229, 132A451; Mo 281SW951; 143 Okl 134, 288P283.
1849-94½-New. Verdict was held product of constraint where court sent jury back twice to reconsider its verdict. 213AppDiv735, 211NYS411.
1850-97 CalA 290P540; 126 Or694, 270P759; TexCivA 294SW905. **Advising jury law to answer special issue** is not error where issue needed clarification. TexCivA 7SW(2d)1112. **Written instruction must first be submitted to attorneys** under Texas statute. Tex CivA 22SW(2d)720.
1850-1 Court may properly refuse to answer improper questions of jury. 38 GaA443, 144SE143(2dcase). **That court must comply with request** see CalA 283 P977; CalA 290P540; 199Wis24, 225 NW195, 63ALR886. **Court answering oral request of juror held error** where statute requires requests to be made in writing. TexCivA 19SW(2d)144.
1850-1½-New. Legislature may require jury to appear in body in open court. TexCommnA 15SW(2d)1033.
1851-5 TexCivA 18SW(2d)821.
1852-21 TexCivA 16SW(2d)910.
1852-22 Additional instructions held erroneous.–NJSup 149A826(2dcase).
1852-27 Instructions held improper.– TexCivA 19SW(2d)948.
1853-31 Answer to question held not equivalent to an affirmative charge.–92 Fla903, 110S536. **Instructions held confusing.–26 OhA408,** 159NE578. **Answer that tendency of court is to "follow spirit of law" held erroneous.** 110Conn 367, 148A139.
1853-32 167Ga657, 146SE485.
1853-33½-New. Request that would necessitate answer upon weight of evidence is properly denied. TexCivA 18SW(2d) 821.
1853-34 TexCivA 19SW(2d)948. But see 198Wis586, 225NW197. **Matters held not to constitute instruction by court required to be in writing** see 198 Wis586, 225NW197.
1853-36½-New. Additional instruction given after plaintiff's counsel had left town instructing plaintiff to engage other counsel if necessary held proper. 214 Ala187, 106S809.
1853-36½-New. Instruction erroneous under Texas statute, that told jury they could have any of testimony read to them. TexCivA 22SW(2d)720.
1853-38 Ark 31SW(2d)297; 238Mich 5, 213NW152; Mo 281SW951, 960 [cit Cyc].
1854-42 But see TexCivA 19SW(2d) 948.
1854-44 238Mich5, 213NW152.
1854-51 Iowa 224NW49; 238Mich5, 213NW152.
1854-52 172Ark898, 291SW431.
1854-54 238Mich5, 213NW152.
1855-57 194NC615, 140SE300.
1855-59 128Kan174, 277P54, 64ALR 606.
1855-61½-New. Giving of general affirmative charge and stating it was jury's duty to take law from court is not coercion. 214Ala666, 108S583.
1856-66 MoA 293SW66.
1859-92½-New. Supplemental instruction, after disagreement of jury, in which court read extract from United States supreme court case relative to desirability of reaching agreement, has been held reversible error as tending too strongly to coerce minority of jury to surrender honest opinions. 5F(2d)31 (where jury returned verdict in short time thereafter).
1860-2 219AppDiv54, 219NYS170.
1860-3 127Misc577, 217NYS484; 219 AppDiv54, 219NYS170.
1861-9 219AppDiv54, 219NYS170.
1861-14 TexCivA 295SW308.
1862-17 NJSup 134A283 (dictation of instructions to clerk and delivery in absence of judge held reversible error); 219AppDiv54, 219NYS170.
1862-19 TexCommnA 25SW(2d)290.
1862-21½-New. Withdrawing special issue from jury after retirement has been held improper communication. TexCivA 27SW(2d)363.
1862-30½-New. Language used by jury in inquiry to court should not be tested by strict rules of construction. 83NH 99, 138A544.
1863-34 219AppDiv54, 219NYS170 (in absence of consent, it is error for judge to communicate with jury).
1863-40 85 IndA691, 155NE613.
1863-41 85 IndA691, 155NE613.
1864-49 Instruction that jury may return verdict for plaintiff for less than demand does not vitiate verdict for defendant. 38GaA397, 144SE123.
1865-52 IndA 163NE517. See also 126 Or694, 270P759.
1865-53 127Misc577, 217NYS484; 219 AppDiv54, 219NYS170 (ground for new trial); TexCivA 8SW(2d)267. **Communications not in violation of rule.–Tex CivA** 22SW(2d)737.
1865-54 TexCivA 8SW(2d)267.
1866-57 TexCivA 32SW(2d)363.
1866-57½-New. That counsel may not have heard communication made in their presence does not affect validity of verdict. 68CalA604, 229P1015.
1866-61 TexCivA 18SW(2d)732.
1866-67 125Kan493, 495, 264P741 [cit Cyc].
1867-73 TexCivA 3SW(2d)468.
1868-82 319Mo 1015, 5SW(2d)59. **Other definitions.–191NC319,** 131SE641. **Only verdict** is that orally announced, received, and recorded. 5F(2d)233.
1869-88 115 Okl 298, 243P137; 145Va 489, 134SE576. **Other definitions.–Mass** 172NE590.
1869-89 68CalA171, 228P873; 120Kan 572, 245P114; 38 OklACR35.
1869-91 52ND721, 204NW614; 115 Okl 298, 243P137; TexCivA 299SW336. **Separate findings on separate causes of actions,** etc. 117 Or637, 244P531. **Answer to interrogatory in equity** propounded to jury is special verdict. 115 Okl 298, 243P137. **Other definitions.–** MoA 29SW(2d)170.
1870-97½-New. In will cases, nine or more jurors could make valid verdict provided those agreeing signed verdict. 220Ky388, 295SW445.
1870-99 155Miss804, 125S338.
1870-1 208 Iowa228, 225NW268.
1870-7 Ill 172NE765.
1870-9 38GaA430, 144SE149.
1870-12 205 Iowa1300, 217NW803.
1871-17½-New. Defendant cannot complain that verdict was not signed by all jurors agreeing thereon where nine agreed on verdict signed by foreman and court took care to verify verdict as that of at least nine. 130 Or375, 280P 329.
1871-19 163Ga774, 136SE901.
1872-29 229AppDiv413, 242NYS174; 194NC638, 140SE604. **Mistrial** should be declared where it appears that only eleven jurors concurred in verdict and one voted blank. 13PortoRicoFed26.
1872-32 20 OhA191, 151NE802. See also 151Miss145, 117S521. **Under Five-Sixths Jury Law** at least ten jurors were required to agree in finding that one defendant conspired with the other to defraud plaintiff, and also in fixing amount of damages sustained by plaintiff because of such fraud. 198Wis222, 222NW231. Under Five-Sixths Jury Law, same ten jurors must agree to all answers that are essential to establish defendant's liability to warrant entry of judgment against him. 198Wis222, 223 NW839. **Verdict held violative of Five-Sixths Jury Law.–198Wis222,** 222NW 231. **Where same ten jurors did not find for plaintiff on all issues,** verdict was defective. 198Wis160, 223NW426. **That jury were not instructed that concurrence of nine jurors was sufficient** does not prevent court from entering judgment on verdict concurred in by

nine jurors or more. 155Miss459, 124S 495.

1873-42 102NJL50, 130A514, 515 [cit Cyc].

1873-43 102NJL50, 130A514; 229App Div413, 242NYS174. **Receipt of verdict by clerk,** though judge is present, held not irregular. NJSup 138A511.

1873-46½-New. Refusal to permit clerk to read verdict, while not best practice, is not reversible error. 105Conn528, 136 A76.

1873-46¼-New. Deputy clerk may receive verdict in absence of clerk. 104 NJL26, 138A699.

1873-46¼-New. Clerk receiving verdict cannot determine responsiveness to issue since this is judicial function. 103NJL 628, 139A12.

1873-46½-New. Power of substitute judge receiving verdict held limited to instructing clerk to refuse void verdict and advising jury to reconsider. 229 AppDiv413, 242NYS174.

1873-46½-New. Substitute judge authorized to receive verdict has been held unauthorized to require jury to modify verdict. 229AppDiv413, 242NYS174.

1873-54 154SC220, 151SE438. **Purpose of polling jury** is to ascertain whether verdict is unanimous. 195NC502, 142SE 779.

1874-56 26F(2d)950; NJSup 138A511; 195NC502, 142SE779; TexCivA 1SW (2d)925. **Parties may have jury polled** where verdict is special as well as general. TexCivA 1SW(2d)925.

1874-60 162Ga161, 132SE769.

1874-63½-New. Where jury gave two separate verdicts to clerk, one for plaintiff and one for defendant, court properly polled jury. MoA 18SW(2d)564.

1874-64 37GaA86, 139SE99.

1874-67½-New. Right to poll jury may be waived. 195NC502, 142SE779.

1874-67¼-New. Right is waived where party, but not counsel, is in court on return of verdict and no request is made. 26F(2d)950.

1874-68 See also 26F(2d)950 (right may be exercised any time before verdict is recorded). **Poll of jury must be had immediately on return of verdict in open court** and before debate or discussion thereof or of merits of case on motion to set aside verdict or otherwise. 195NC502, 142SE779.

1874-69 37GaA86, 139SE99.

1874-70 27OhA52, 160NE740.

1875-72 Motion to have jury polled as to special issues only held substantial compliance with statute giving party right to have jury polled. TexCivA 1 SW(2d)925.

1875-74 TexCivA 1SW(2d)925. **Right of polling jury may not be refused** because of form of request. TexCivA 1SW (2d)925.

1875-83 194NC615, 140SE300.

1875-85 141Wash18, 250P450, 49ALR 1297.

1875-88 154SC220, 151SE438.

1876-92 5F(2d)233 (new trial warranted where immediately after filing of verdict and separation of jury, one juror satisfied trial judge that on poll he dissented from verdict).

1876-93 154SC220, 151SE438.

1876-2 261Mass431, 158NE776. But see 154SC220, 151SE438. **What jury found on issue** raised by answer and submitted may be inquired into. 266 Mass286, 165NE416.

1876-5 261Mass431, 158NE776.

1876-7 In absence of request for special findings submitted to jury, no error was committed in refusing to poll jury as to specific elements entering into general verdict. 50RI 210, 146A621.

1877-14½-New. Verdict on issues, should establish facts sufficient to enable court to proceed to judgment. 198 NC111, 150SE713(1stcase).

1877-15 169Ark88, 272SW853; 161Ga 594, 131SE478; 165Ga228, 140SE497; Mo 281SW951; 315Mo 1136, 287SW 1031; 221MoA505, 282SW128; 296Pa 91, 145A718(2dcase); TexCivA 286SW 637; 146Va695, 132SE853; 141Wash18, 250P450, 49ALR1297. **Verdict will not be avoided unless from necessity.**–161 Ga587, 131SE362; 161Ga594, 131SE478. **Substantial certainty to common and reasonable intent is sufficient.** 161Ga 587, 131SE362.

1878-16 161Ga594, 131SE478.

1878-17 161Ga594, 131SE478; 165Ga 228, 140SE497; TexCivA 286SW637. But see TexCivA 270SW1066.

1878-18 169Ark88, 272SW853 (admitted facts); 165Ga228, 140SE497.

1878-19 169Ark88, 272SW853 (answers to interrogatories and general verdict); 93Fla387, 112S264; 161Ga594, 131SE 478; 165Ga228, 140SE497.

1878-20 161Ga587, 131SE362.

1878-22 198NC356, 151SE732; 153SC 309, 150SE789.

1878-25 NJSup 148A17; 135Misc270, 238NYS888; 289Pa424, 137A796; 142 Wash344, 253P457. **Verdict as to damages held not inconsistent.**–178Ark736, 11SW(2d)473. **Verdict of one dollar held not inconsistent in itself.**–264Mass533, 163NE251(1stcase).

1879-27½-New. Verdicts must be certain, definite, intelligible, unambiguous, consistent, and unconditional. 50ND 651, 197NW766.

1879-28 264Mass533, 163NE251(1st case). **Costs.**–238Mich253, 213NW150. **Damages** may be found by verdict. 238 Mich253, 213NW150. **Verdicts held not ambiguous.**–36Wyo 436, 256P665. **Verdict by jury in exact amount of largest sum claimed as damages to minor children** for death of father showed jury awarded largest sum claimed without reducing it to present worth, correspondence of figures being evidence of identity. 101Vt285, 143A394.

1879-32 TexCivA 275SW505; 200Wis 261, 227NW857. But see 38GaA641, 144 SE804. **Verdict for two thousand five hundred dollars in action on contract for services at one hundred fifty dollars per month, amounting to eight thousand five hundred dollars,** held compromise and bad, as recovery must be all or nothing. 217AppDiv614, 216NYS161.

1879-33 318Mo 64, 298SW842.

1880-35 39OklACR143, 145 [citCyc]; TexCivA 286SW637.

1880-36 71CalA479, 235P673; 126 Or 694, 270P759.

1880-37 38GaA430, 144SE149; NJSup 131A87. But see 144Va358, 132SE316. **Improper allowance of attorney's fees** in suit on note because not properly proved will not render whole judgment void. 35GaA5, 131SE524. **If recovery is based on value of services,** verdict not in excess of ad damnum of writ, is not erroneous because larger than total claimed in account annexed, or in count in quantum meruit. 252Mass526, 147NE887. **Verdict in excess of amount claimed** held unwarranted. TexCivA 16SW(2d)855. **Verdict held authorized by demand.**–Ariz 286P186.

1880-38 34GaA298, 129SE562; NJSup 131A87 (corrected by plaintiff's remitting excess). **Verdict for less than amount shown by evidence** should be set aside. 127Kan267, 273P437.

1880-43 153Miss72, 117S881; MoA 24 SW(2d)1072.

1880-44½-New. Where jury do not disapprove of clerk's statement of amount of their verdict, they will be held to have returned such verdict. 24F(2d) 262.

1880-44½-New. Verdict is not indefinite because it provides that each party should pay own costs. 224Ky254, 6SW (2d)234.

1880-44¼-New. Where damages are not liquidated or capable of being reduced to certainty by mathematical calculation, verdict is not manifestly wrong because not for amount claimed. 128Me 131, 145A741(2dcase).

1880-44½-New. Where there exists a fixed standard or scale by which damages may be calculated, jury will not be permitted to depart from it. 128Me 131, 145A741(2dcase).

1880-44½-New. Verdict for plaintiff for "none dollars" is verdict for defendant. 177Minn408, 225NW291.

1880-44½-New. Verdict attempting generally to somewhat equalize financial conditions cannot be sustained. 104CalA 753, 286P718.

1880-44½-New. Reduction to less than shown by pleadings is unauthorized under some circumstances. 156Miss136, 125S545.

1881-49 201Iowa1186, 207NW247; 126 Kan395, 267P1100; TexCivA 16SW(2d) 910.

1882-55½-New. Verdict held not erroneous for failure to allow interest on excess of plaintiff's account over defendant's on which his interest exceeded plaintiff's. 41GaA392, 153SE106.

1882-55½-New. Statute requiring jury to compute interest and include same in money judgment contemplates ordinary jury trial and rendition of general verdict. MoA 29SW(2d)170.

1882-56 94Fla60, 113S736, 739 [cit Cyc]; 167Minn84, 208NW546.

1882-57 243IllA129.

1882-62 34GaA223, 128SE818.

1883-65 But see 148Va601, 139SE288.

1883-72 Mo 31SW(2d)50.

1883-74 NJ 130A444; NJSup 136A332 (verdict against injured infant and father, held self-contradictory). **Verdict held sufficient to support judgment for one plaintiff.**–83CalA204, 256P848.

1883-80 32F(2d)145; 32Ariz39, 255P 494; 42Ida738, 248P456, 49ALR1057; MoA 10SW(2d)327; 194NC98, 138SE 424; TexCivA 294SW873. See also NJ Sup 130A639. **Verdict inconsistent as to two defendants** held not to affect propriety as to third defendant. 135Misc 270, 238NYS88.

1884-82 205Cal402, 271P198, 62ALR 235; 142SC125, 140SE443. But see 178 Ark103, 10SW(2d)894; NJSup 138A 383; 216AppDiv86, 214NYS600; 128 Or 310, 274P915. Contra RI 133A439. **It is proper practice for court to set aside one of the verdicts** entered against two joint tort-feasors and permit plaintiff to dismiss as to him. 255IllA465. **Where defendants in libel action were impleaded jointly,** separate verdicts in different amounts against each of them cannot be had. 130Or119, 279P267, 65 ALR1042.

1884-83 201Iowa709, 207NW794 (verdict against two of three defendants not inconsistent where evidence less persuasive against exonerated defendant); NJ 144A327.

1884-85 167Minn84, 208NW546. Contra 79CalA406, 249P837.

1884-90 Verdict not preserving separate rights of plaintiffs in amount recovered is illegal and cannot stand. 105NJL 575, 146A212.

1884-90½-New. Under Workmen's Compensation Act where insurer and insured are joined, better practice requires direction for special verdict to amount of policy and general verdict against insured; but if damages do not exceed amount of policy general verdict against both is sufficient. 46RI 478, 129A339.

1884-90⅓-New. In action by father and son for injuries to son, preliminary verdict in favor of son cannot be construed as verdict against father, where it is manifest that no verdict had been rendered either for or against father at the time. 285Pa320, 131A856.

1884-90¼-New. Verdict in favor of two of occupants of automobile for injuries under both common-law count and statutory count has been held not inconsistent with verdicts for one of other occupants individually and as administrator for deceased occupant, which allowed recovery on common-law counts only, where there was material evidence to sustain each verdict. 158Tenn407, 15 SW(2d)1.

1884-91 21AlaA589, 110S697 (court may reject verdict); 95Fla90, 116S23; 316Mo 1094, 295SW563; MoA 279SW 230. **But the verdict need not find an amount due** either plaintiff or defendant. NJSup 147A815. **Where jury rejected plaintiff's theory that transaction was loan,** he could recover under defendant's version that transaction contemplated interest in realty. 245Mich 93, 222NW183.

1885-92 180Ark980, 23SW(2d)972; 160 Ga896, 129SE287; 37GaA24, 138SE797; 220AppDiv17, 220NYS465; 142SC125, 140SE443; 153SC309, 150SE789.

1885-93 106Conn506, 138A442; 126Kan 648; 208Ky507, 271SW570, 39ALR919; 220AppDiv17, 220NYS465; TexCivA

293SW627. **Verdict for part of amount concededly due, if any was due,** cannot be sustained. **MoA** 279SW168. **Verdict held inconsistent with pleadings and proof.**–97Fla679, 122S107(2dcase).

1885–95 IndA 171NE202; 208Ky507, 271SW570, 39ALR919 (immaterial allegation); **TexCivA** 271SW186. **The jury are limited to the amounts,** etc. **TexCivA** 293SW627. **Admissions of the pleadings must not be contradicted** by verdict. 153SC309, 150SE789.

1885–98 221MoA505, 282SW128; 139SC139, 137SE434. **Verdict not expressly mentioning counterclaim** is responsive where whole record shows that counterclaim was considered. 317Mo125, 295SW109.

1885–3 81Colo121, 253P1066; 235IllA572; 244IllA441.

1886–5 263Mass409, 161NE612; **NJSup** 132A666.

1886–8 AlaA 114S177; **MoA** 18SW(2d)535; 117Or637, 244P531.

1886–9 81Colo121, 253P1066; 155Tenn235, 291SW452.

1886–13 127Me377, 143A466; 155Tenn235, 291SW452.

1887–17 Overruling of motion is not reversible error where motion is made after settlement of instructions at chambers and in absence of opposing counsel. 81Colo121, 253P1066.

1887–18 81Colo121, 253P1066.

1887–23 218Ala410, 118S755.

1887–26 But see 296Pa91, 145A718(2dcase).

1887–26½–New. Where case is submitted to jury on two separate issues, general verdict cannot stand if one of issues is against weight of evidence. 215AppDiv402, 213NYS713.

1887–26¼–New. Where defendant moves for directed verdict on each count, general verdict for plaintiff can only be sustained if there is evidence to go to jury on each count. 255Mass297, 151NE320.

1887–26¼–New. Mortgagor's defenses in action for deficiency that mortgagee sold property without foreclosure and gave general release are not inconsistent so as to require separate verdicts. **Ida** 290P405.

1887–27 But see **CalA** 272P600.

1887–28 See also 110Conn108, 147A370.

1888–29 Verdict of no cause of action where one of several defenses was not established held not entitled to stand. 218AppDiv259, 218NYS135.

1888–33 229AppDiv361, 241NYS414.

1888–34 Verdict against injured passenger of automobile, suing drivers of two cars in tripartite collision, held inconsistent with verdict favoring owner of car in which she was riding and set aside. 217AppDiv819, 217NYS761.

1888–37 337Ill469, 169NE265.

1889–44 105Conn640, 136A681; 83NH10, 138A315.

1889–45½–New. Plaintiff's failure to require election between inconsistent defenses does not mean verdict on both defenses should stand. **MoA** 31SW(2d)552.

1889–46 29Ariz112, 239P792; 127Misc44, 215NYS213. **Verdict should show amount allowed on each item of set-off.**–145Va681, 134SE692.

1889–48 50ND651, 197NW766, 768 [cit Cyc].

1890–54 134SC191, 132SE173, 174 [quotCyc]. But see **MoA** 256SW134.

1890–55½–New. Verdict for plaintiff for certain sum "and allow no counterclaim," in absence of request for more precise formulation of verdict, is equivalent of net verdict for plaintiff and not statement that jury did not allow any counterclaim. 127Misc44, 215NYS213.

1890–55¼–New. Verdict of no cause of action on counterclaim does not indicate prejudice in finding for defendant in determining action. **NJSup** 150A216.

1890–56 83IndA385, 148NE486; **Miss** 105S449; 56ND116, 216NW209; 19OhA370; 20OhA108, 153NE116; 25OhA197, 158NE282, 285 [quotCyc]; 154Wash588, 283P447; 106WVa155, 145SE165. **Court may disregard award of costs by jury.** 220Ky451, 295SW467. **Apportionment of damages** is unwarranted and may be treated as surplusage. 29F(2d)1. **Ten per cent treated as surplusage,** where jury did not indicate what it was for. **MoA** 16SW(2d)712.

1891–61 19OhA370 (where jury returned amount in damages against joint tort-feasors, apportionment in separate amounts rejected as surplusage); 141Wash18, 250P450, 49ALR1297. **Attempt to apportion damages** between two of three defendants, though surplusage, will be considered in construing verdict as in favor of other defendant and against two mentioned. 167Minn84, 208NW546.

1891–65 221Ala101, 127S518; **AlaA** 130S163(2dcase); 200Cal161, 252P587; 110Conn367, 148A139; 207Iowa1278, 224NW815; 208Iowa752, 226NW161 (whether instructions right or wrong); **Mass** 170NE924; 178Minn471; 227NW491 (instructions followed by jury); 144Miss861, 110S683; **Mo** 274SW1046; 75Mont16, 241P611; 79Mont158, 255P5; 85Mont27, 277P417; **NJSup** 138A305; 216AppDiv439, 215NYS587; 50ND651, 197NW766, 768 [citCyc]; 136Okl51, 275P640; **Okl** 293P264; 157SC359, 154SE645; **TexCivA** 278SW507; **TexCivA** 285SW330; **TexCivA** 24SW(2d)99; 150Va17, 142SE405; 154Wash536, 282P827. **Jury's consideration of items of damages not submitted by court** held improper. **TexCivA** 285SW330. **Finding held not contrary to instruction.**–226Ky421, 11SW(2d)93. **Verdict held contrary to charge.**–**NJ** 146A42(1stcase).

1891–66 215Ala185, 110S281; 102NJL161, 130A539; 190NC859, 129SE592; 138SC157, 135SE881 (where court rejected verdict, and after second verdict equally defective dismissed jury, held there was no verdict in which judgment could be rendered).

1891–67 201Iowa712, 208NW78; 209Ky3, 272SW3 (even though verdict was correct); **MoA** 274SW522; **NJSup** 140A417; **TexCivA** 286SW1001.

1891–68 200Cal161, 252P587; 201Iowa712, 208NW78; 209Ky3, 272SW3; 209Ky315, 272SW718; 229Ky538, 17SW(2d)422; 75Mont16, 241P611; 83Mont252, 272P245.

1891–70 CalA 238P954; 95CalA781, 273P630.

1892–77 212Ala608, 103S658; 216Ala138, 112S633, 53ALR840 (where instruction requiring verdict for defendant was inadvertently given).

1892–80 130Kan385, 286P203. **Verdict held not contrary to instructions.**–167Ga657, 146SE485, 41Ida697, 243P647; 207Iowa1278, 224NW815; 214AppDiv205, 212NYS20; 298Pa256, 148A102.

1892–83 Vt 150A128(2dcase). **Action of jury is not final** till verdict is reached and jury discharged. 141Wash18, 250P450, 49ALR1297. **Where jury separated after sealing verdict** resubmitting case to assess damages held proper. 252NY208, 169NE280(1stcase). **In the case of a sealed verdict,** etc. **Mo** 31SW(2d)50.

1893–85 102NJL50, 130A514, 515 [cit Cyc].

1893–87 But see **TexCivA** 281SW293.

1893–88 5F(2d)233.

1893–88½–New. Though verdict not recorded, it may not be amended or altered by jury, with or without consent of court, after they have been discharged and have left presence of court. 101WVa711, 133SE695.

1893–89 216Ala321, 113S495; 105Conn528, 136A76; 131Misc598, 227NYS568; 285Pa320, 131A856; 153SC309, 150SE789; 155SC340, 152SE652; 141Wash18, 250P450, 49ALR1297; 146Wash50, 261P645. **Court can send out jury to find damages specifically.** 95CalA370, 272P797. **Jury can reconsider issues,** where they are sent out to find damages specifically. 95CalA370, 272P797. **Under statute** it is duty of court to remand jury to render verdict in proper form and in conformity with issues submitted. 98CalA223, 276P1080(2dcase).

1894–90 216Ala321, 113S495, 499 [cit Cyc]; 218Ala375, 118S561; 131Misc598, 227NYS568. **Court held warranted in permitting amendment.**–98CalA223, 276P1080(2dcase).

1894–91 216Ala321, 113S495, 499 [cit Cyc]; 144Miss861, 110S683.

1894–92 216Ala321, 113S495, 499 [cit Cyc]; 200Cal161, 252P587; 106Conn153, 137A721; 229Ky538, 17SW(2d)422; 240Mich306, 215NW422; 310Mo469, 276SW607; **TexCivA** 13SW(2d)965. **Where judge was under impression that jury did not understand charge,** he could give additional instructions and direct jury to retire for further consideration. 197NC171, 148SE30.

1894–92½–New. or contrary to evidence. 106Conn153, 137A721.

1894–93 216Ala321, 113S495, 499 [cit Cyc]; 229Ky538, 17SW(2d)422; 261Mass431, 158NE776; 240Mich306, 215NW422 (inconsistent verdict exonerating servant and holding master liable); **MoA** 299SW53; 285Pa320, 131A856 (direction in verdict that sum awarded be held in trust for plaintiff); **TexCivA** 10SW(2d)426. **Interest.**–**MoA** 299SW53; 153Va156, 149SE473. **Where jury return same verdict,** it is error for court to receive it. 34Ariz489, 272P921. **Where it appears that jury misconceived evidence or law,** court may return jury for further consideration. 108Conn549, 143A855, 63ALR139.

1895–94 216Ala321, 113S495. **Giving jury plaintiff's calculation of damages** with cautionary instructions is not error. 28F(2d)145.

1895–95 102NJL50, 130A514, 515 [cit Cyc].

1895–96½–New. Reduction of verdict by jury under compulsion to conform to instructions after court's refusal of verdict first returned is amendment properly made before verdict recorded and jury discharged. 200Cal161, 252P587.

1895–97 216Ala321, 113S495; **IndA** 166NE257. See also **Mo** 31SW(2d)50.

1895–98 153SC309, 150SE789. **Sealed verdict, not computing amount may be refused** by court, and jury may be sent back to compute amount. 32F(2d)261 [aff 32F(2d)264(1stcase)].

1896–1 50RI207, 146A617, 66ALR533; **TexCivA** 281SW293.

1896–4 155Miss600, 125S89 (adding interest); 144Va220, 132SE326. But see 315Mo1091, 287SW610. **Error in apportioning** damages between joint tort-feasors may be amended by court by directing judgment against both for greater amount found against either. 216AppDiv86, 214NYS600. **As to mere form** verdict may be amended. 101WVa711, 133SE695. **Where court might have directed verdict,** amendment of verdict may not be prejudicial error. 52SD82, 216NW854. **Adding interest** where entitled thereto as matter of law. 207Cal727, 279P795. **After discharge of jury** court can amend only as to matters of form or clerical errors. **MoA** 22SW(2d)854.

1897–5 283Pa200, 129A52 (as where binding instruction would have been warranted).

1897–8 Mo 31SW(2d)50. But see 233Ky112, 25SW(2d)44; **Mass** 172NE590.

1897–9 245NY156, 156NE649 (amendment after term of trial court held error). **Verdict may be molded after expiration of term** in which rendered. **NJSup** 136A736.

1897–12 130Or32, 273P711.

1898–15 34Ariz489, 272P921; 200Cal161, 252P587; 315Mo1091, 287SW610; 50ND651, 197NW766, 768; 153SC309, 150SE789; **TexCommnA** 13SW(2d)59; 144Va220, 132SE326 (after trial has terminated); 101WVa711, 133SE695; **Wis** 228NW741. **Allowing motion that interest be added to "verdict" is improper** under statute requiring jury to compute interest. **Mass** 172NE590.

1898–19 But see 245NY156, 156NE649.

1899–26 Lottery verdict cannot be amended but may only be set aside. **Miss** 105S449.

1899–27 246IllA467; 27OhA133, 160NE881; 52SD82, 216NW854. But see 25OhNPNS612. **Jury's finding less than amount sued for** does not warrant court in amending it as to award full amount where conflicting evidence authorized award for any amount up to amount sued for. **Miss** 105S449.

1899–28 MoA 22SW(2d)854; 245NY156, 156NE649; **SD** 229NW521; **Tex CommnA** 280SW574; **TexCivA** 275SW423. But see **TexCommnA** 292SW860; **TexCivA** 294SW252.

1899–28½–New. After jury brings in

verdict on note and is discharged, court cannot amend verdict by adding attorney's fees. 144Va220, 132SE326.

1899-29 But see 156Miss326, 126S14.

1899-30 230AppDiv740, 244NYS109. **Where there is no conflict in evidence,** court may render judgment for correct amount on failure of jury to bring in verdict for amount shown by uncontradicted evidence. 149Va809, 141SE834. **Court will assume verdict was properly molded.**-13PaDist&Co 552.

1900-31 133SC23, 130SE552, 557 [quot Cyc].

1900-34 6F(2d)990; Iowa 230NW302; 127Kan399, 273P458; 114Nebr194, 206NW765.

1900-35½-New. In jurisdictions permitting three-fourths verdicts, court could consider explanation made by nine jurors to remove ambiguity in verdict as to amount of damages awarded plaintiff. 128 Or165, 273P702.

1900-36 130 Or32, 273P711. **Remedy for excessive verdict** is either to set aside and award new trial or to put successful party upon terms to release excess or submit to new trial. 145Va175, 133SE759, 47ALR308.

1901-37 43F(2d)537.

1901-41 319Mo1169, 8SW(2d)580; 194NC760, 140SE807. **In action for money received under contract** court cannot determine value of property received by plaintiff under contract and require remittitur. MoA 24SW(2d)238.

1901-42 41F(2d)960; 165Ga228, 140SE497; 40GaA768, 151SE654; 44 Ida 283, 256P368, 369 [citCyc]; 128 Or526, 274P1097(2dcase); 103WVa346, 137SE530; 104WVa12, 138SE749. **Verdict against two defendants showed intent to relieve third defendant,** against whom no legal judgment could be entered, even though verdict was contrary to law and evidence. 39GaA49, 145SE913. **Finding for plaintiff established** that accident was due solely to negligence of defendant, but did not establish that witnesses, who testified damage resulted in excess of one dollar, were trustworthy or stated accurately damages caused. 264Mass533, 163NE251(1st case). **Verdict of one dollar held finding that no greater amount** was shown to be due by trustworthy testimony, and may be proper though all witnesses testified to facts which, if believed, would prove larger damages. 264Mass533, 163NE251(1stcase). **General verdict dismissing complaint** and giving defendant costs imports that jury found defendant was not owner of car striking truck. 109Conn460, 146A847. **Particular findings of jury construed.**-TexCivA 19SW(2d)808. **Particular verdicts construed.**-IndA 173NE330(2dcase); 155Wash141, 283P707.

1901-43 165Ga228, 140SE497; 44 Ida 283, 256P368, 369 [citCyc]; 132 Okl 272, 270P329; 126 Or245, 269P230; TexCivA 32SW(2d)369. **Verdicts should have reasonable intendment.**-37GaA210, 139SE357. **Jury's verdict for seller carried with it implied finding** that shortage of cars was not sufficient to warrant buyer in declaring that contract for purchase of grapes was ended. 97CalA784, 276P374. **General verdict for plaintiff** implies finding that suit was brought within statutory time. Ark 30SW(2d)825.

1901-43½-New. General verdict equivalent to finding against plaintiff on each count. 106Conn153, 137A721.

1901-46 264Mass533, 163NE251(1st case); 190NC423, 130SE49. **Court will not assume** that general verdict was rendered on one of several different or permissible grounds. 201 Iowa1283, 207NW238. **Where there is no evidence to support allegations in pleadings,** rule that general verdict imports finding on those issues cannot be sustained. CalA 274P587.

1902-48 79CalA234, 249P223; 95Fla90, 116S23; 37GaA210, 139SE357; 165Ga228, 140SE497; 40GaA556, 150SE563; 230Ky64, 18SW(2d)879; MoA 4SW(2d)831; Mont 286P415 (together with evidence); 192NC154, 134SE425; 126 Or245, 269P230; 144SC89, 142SE39; TexCivA 286SW919; TexCivA 22SW(2d)322. **Reference is had to issue as found therein** in determining effect of verdict, not to manner in which jury reached conclusion. 335 Ill 274, 167NE23. **Rule of construction is to be resorted to only** when intent of jury is not reasonably apparent from verdict itself. 39GaA49, 145SE913. **Where defendant admits part of claim** verdict in favor of defendant is construed as merely denying recovery in excess of amount admitted due. Mont 286P415.

1902-49 93Fla387, 112S264; 165Ga228, 140SE497; 191NC319, 131SE641; Tex CivA 286SW919. **Verdict must be construed in light of evidence.**-TexCommnA 276SW162. **Verdict finding "the deed" invalid** will be construed as referring to both deeds involved in, and relating to, same transaction where validity of both is involved in controversy. 161Ga587, 131SE362.

1902-49½-New. Court may not look into evidence. TexCivA 286SW919.

1902-50½-New. Verdicts are to be given reasonable intendment.-161Ga587, 131SE362; 161Ga594, 131SE478.

1902-50⅓-New. Verdict on cross complaint for defendant without assessment of any damages is not construed as finding that alleged false representations had caused no damages, but as finding that injury equalled amount of plaintiff's claim. 140Wash650, 250P59.

1902-50¼-New. Verdict fixing recovery in cause submitted on theory of permanent injury will be held to be for such injury. 137 Okl 168, 278P640.

1902-50⅕-New. Verdict for plaintiff on specified count is in effect finding for defendant on other counts. 253 IllA450.

1902-50⅙-New. Where plaintiff waived interest, judgment should be upheld on appeal for amount named disregarding interest. 86Colo 350, 281P746.

1902-57 Va 143SE887. **Motion to set aside verdict** presents question of law only. 174Minn339, 219NW185. **Where evidence presents jury question,** jury's finding is binding on trial court. Tex CivA 3SW(2d)882.

1902-62 196 Ind379, 148NE410; 220Ky388, 295SW445; 144Miss861, 110S683; NJSup 147A589; 198NC536, 152SE499; 29 OhA145, 163NE218; 126 Or694, 270P759; TexCivA 272SW283; TexCivA 294SW905; TexCivA 14SW(2d)304; 151Va363, 144SE477. **Competency of jurors to impeach verdict** must be determined in each jurisdiction according to own rules. 39F(2d)297.

1903-64 70CalA108, 232P986; NJSup 147A589 (where jury were instructed that they could not apportion damages, verdict cannot be impeached by showing that they intended to do so); Tex CivA 294SW905.

1903-65 70CalA108, 232P986; 125 Or251, 266P229.

1903-67 TexCivA 272SW283 (testimony of mistake by one juror does not render verdict void).

1903-69 215Ala494, 111S237; Mo 281SW951; 126 Or694, 270P759.

1903-71½-New. Affidavits of jurors are admissible for purpose of showing that their verdict was arrived at by improper influence. 151Va363, 144SE477.

1903-71⅓-New. Juror's affidavits cannot be considered for purpose of establishing that judgment in rape case included obligations to support child, since instructions of court did not authorize such consideration on their part. 198 Wis197, 223NW449.

1904-75 207Cal8, 276P1017(2dcase); 234Ky389, 28SW(2d)474; 134SC191, 132SE173; TexCommnA 30SW(2d)489.

1904-76 Instructions after jury retired, in absence of counsel. 127Misc577, 217NYS484.

1904-77 24F(2d)262; 93Fla387, 112S264; 139SC139, 137SE434; 104WVa12, 138SE749.

1904-79 134SC191, 132SE173.

1904-80 Ida 290P405, 407 [citCyc].

1904-81½-New. Defect in verdict in that it does not comply with Five-Sixths Jury Law is not waived by failure to ask poll of jury, since verdict shows on its face that it does not comply with requirements of such law. 198Wis222, 222NW231.

1904-81⅓-New. Objection to form of verdict is waived by failure to interpose it before case submitted to jury. Wis 231NW257.

1905-86½-New. Exception to verdict, which is conclusion of law and fact, held not permissible. 5PaDist&Co 746.

1905-87 216Ala321, 113S495.

1907-8 168Ark1167, 273SW363; 173Ark903, 294SW14; 198Cal407, 245P197; 85Colo87, 273P1030; 267Mass501, 167NE235; 75Mont493, 244P298; 136Okl51, 275P640; 142 Okl194, 286P1; 38 OklACR35; 288Pa518, 137A171; Tex CivA 32SW(2d)396; 155Wash133, 283P1076; Wash 288P265; 197Wis538, 222NW821; 35Wyo358, 249P799. But see 24F(2d)676. **Discretion.**-38 OklACR35. **The action of the court is subject to review,** etc. 100WVa154, 130SE125. **When the issues are not complicated,** etc. 35 Wyo358, 249P799. **Cases under Federal Employees' Liability Act** held especially fitted for submission to jury on written questions. 217AppDiv301, 216NYS656. **It is court's duty to give effect to legislative purpose** of statute providing for submission of cases on special issues, if such purpose can be ascertained. 118Tex314, 15SW(2d)213. **Necessity of argument and instructions as to questions.**-252Mass523, 147NE887. **Purpose of special verdict stated** and contrasted with general verdict. Tex CivA 6SW(2d)410. **Purpose of submitting special questions stated.**-242Mich310, 218NW769. **Whether particular issue of fact shall be submitted** is within discretion of trial judge. 100WVa154, 130SE125. **Interrogatories should, on proper request of counsel, be submitted,** where complaint or answer relies on grounds of action or defense which are distinct. 110Conn108, 147A370.

1908-9 See also TexCivA 278SW943.

1908-13 115 OhSt91, 152NE753; 117Tex34, 297SW206; TexCommnA 291SW868 (if, in action for fraud, false representations and false promises are pleaded, both issues should be submitted); TexCommnA 4SW(2d)964; Tex CommnA 29SW(2d)989 (purpose of statute); TexCivA 294SW286; TexCivA 294SW295. See also TexCivA 288SW1092. **Refusal to submit** on special issues in condemnation proceedings held error. 117Tex34, 297SW206. **In Texas.**-CivA 22SW(2d)508.

1909-14 Evidence held insufficient to warrant submission of special issues.-TexCivA 22SW(2d)504. **Submitting special issue on matter neither pleaded nor supported by proof** held improper. TexCivA 22SW(2d)508.

1909-14½-New. One of prime purposes of special issue verdict is to have jury findings on facts uninfluenced, as far as possible, by their effect on judgment to be rendered. TexCivA 286SW680.

1909-14⅓-New. Judge may often submit special issue on own motion with benefit to public interest. 22F(2d)69.

1909-15 107Conn242, 140A105.

1909-16 In Ohio.-115 Oh91, 152NE753. **Statute providing for submission, on request, of special interrogatories to be answered if general verdict is returned** is mandatory. 233Mich23, 206NW491.

1909-19 153Md253, 138A33, 53ALR669; 52ND688, 204NW344; TexCommnA 280SW557. **In Iowa.**-219NW324 (special verdict returned without general verdict held erroneous).

1909-20½-New. Where jury return general verdict for plaintiff in case where issues of performance and estoppel are both pleaded as grounds for recovery and there is failure of proof as to performance, defendant has right to request court to submit to jury special findings which may elicit fact that their verdict was based solely on issue of performance. 120 Oh72, 165NE579.

1909-20⅓-New. Where there are controlling questions in cause, they should be submitted for jury's answer in addition to general finding. 295Pa408, 145A578.

1909-21 108Conn622, 144A468; 166Ga523, 143SE761; 319 Ill344, 150NE276; IndA 172NE198; 122Kan653, 253P611; 244Mich649, 222NW91; 190NC343, 130SE36; 192NC798, 136SE118; 196NC44, 144SE517; 196NC55, 144SE523; 55ND353, 213NW841; 115 Oh91, 152NE753;

23 OhA176, 155NE566; 134 Okl 1, 272P 436; 116Tex538, 295SW922; 117Tex 34, 297SW206; TexCommnA 276SW 222; TexCommnA 278SW186; Tex CommnA 285SW607; TexCommnA 291 SW850; TexCommnA 291SW1101; Tex CommnA 292SW518; TexCommnA 296 SW500; TexCommnA 299SW220; Tex CommnA 2SW(2d)276; TexCommnA 23 SW(2d)295; TexCommnA 23SW(2d) 300; TexCommnA 24SW(2d)26; Tex CommnA 24SW(2d)28; TexCommnA 25 SW(2d)330 (pleadings held to justify submission of issue); TexCommnA 26 SW(2d)199; TexCommnA 27SW(2d) 116; TexCommnA 29SW(2d)1011; Tex CommnA 30SW(2d)489; TexCivA 270 SW199; TexCivA 271SW247; TexCivA 272SW250; TexCivA 272SW256; Tex CivA 272SW308; TexCivA 273SW663; TexCivA 273SW979 (erroneous refusal to submit special issue); TexCivA 275 SW171 (no submission of special issue not raised by testimony); TexCivA 275 SW218; TexCivA 275SW242; TexCivA 276SW790; TexCivA 278SW270; Tex CivA 278SW298; TexCivA 278SW337; TexCivA 278SW943; TexCivA 280SW 598; TexCivA 283SW341; TexCivA 283SW694; TexCivA 283SW938; TexCivA 284SW624; TexCivA 288SW 560; TexCivA 288SW627; TexCivA 289 SW125; TexCivA 289SW169; TexCivA 289SW696; TexCivA 291SW299; Tex CivA 291SW664; TexCivA 293SW932 (submission of issue warranted by evidence); TexCivA 294SW699; TexCivA 295SW301; TexCivA 295SW323; Tex CivA 295SW929 (want of consideration for note); TexCivA 296SW987; Tex CivA 297SW545; TexCivA 297SW875; TexCivA 297SW1091; TexCivA 299SW 272; TexCivA 299SW507; TexCivA 299 SW534; TexCivA 300SW142; TexCivA 1SW(2d)760; TexCivA 1SW(2d)938; TexCivA 2SW(2d)495; TexCivA 2SW (2d)939; TexCivA 4SW(2d)599; Tex CivA 4SW(2d)1029; TexCivA 5SW(2d) 170; TexCivA 6SW(2d)192; TexCivA 6SW(2d)410; TexCivA 8SW(2d)957; TexCivA 9SW(2d)501; TexCivA 10SW (2d)441; TexCivA 10SW(2d)739; Tex CivA 15SW(2d)36; TexCivA 16SW(2d) 399; TexCivA 17SW(2d)474; TexCivA 18SW(2d)267; TexCivA 20SW(2d)388; TexCivA 21SW(2d)9; TexCivA 22SW (2d)737; TexCivA 22SW(2d)991; Tex CivA 24SW(2d)99; TexCivA 25SW(2d) 176; TexCivA 25SW(2d)207; TexCivA 25SW(2d)276 (refusal to submit issues of negligence and proximate cause held error); TexCivA 25SW(2d)916; Tex CivA 27SW(2d)921; TexCivA 27SW(2d) 917; TexCivA 27SW(2d)838; TexCivA 28SW(2d)173; TexCivA 28SW(2d)312; TexCivA 28SW(2d)565; TexCivA 28SW (2d)861; TexCivA 29SW(2d)828; Tex CivA 30SW(2d)685; TexCivA 31SW (2d)355; TexCivA 31SW(2d)879; Wis 228NW746. But see TexCivA 4SW(2d) 84. **As affected by pleadings and evidence**, submission of special issue held proper under pleadings in view of evidence. TexCivA 285SW1100. **Each independent group of facts supported by pleadings and evidence** which, if found, would authorize or defeat recovery must be submitted on request. TexCivA 288 SW1092. **Evidence held sufficient.**–Tex CommnA 12SW(2d)163; TexCivA 275 SW218 (from spread of Johnson grass seed); TexCivA 11SW(2d)344; Tex CivA 11SW(2d)601; TexCivA 16SW(2d) 367; TexCivA 16SW(2d)1100; TexCivA 18SW(2d)821; TexCivA 19SW(2d)102; TexCivA 20SW(2d)847. **Evidence held insufficient.**–TexCivA 275SW171 (whether employee was to receive his salary only from proceeds of business); Tex CivA 20SW(2d)847. **Evidence held to warrant issue.**–TexCivA 276SW460 (future earnings of plaintiff if injury had not occurred); TexCivA 290SW1108 (discovered peril). **Failure to submit issue held error** under pleadings. Tex CivA 17SW(2d)187. **Issue held erroneous.**–TexCivA 17SW(2d)68. **Issue held not authorized by pleadings.**–TexCivA 16SW(2d)969; TexCivA 17SW(2d)150. **Issue held raised by evidence.**–TexCivA 274SW210; TexCivA 27SW(2d)621. **Issue not based on evidence** is properly refused. TexCivA 286SW616. **Issue not supported by evidence** need not be **submitted.** TexCivA 274SW200; Tex CivA 274SW210; TexCivA 280SW887; TexCivA 294SW633; TexCivA 3SW(2d) 534; TexCivA 3SW(2d)535; TexCivA 3 SW(2d)545; TexCivA 27SW(2d)571. **Issue placing too great burden on party** should not be submitted. TexCivA 3 SW(2d)545. **Issues held improperly submitted.**–TexCivA 299SW297. **Issue not raised by pleadings** should not be submitted. 129Kan772. 284P404; Tex CivA 276SW460; TexCivA 276SW470; TexCivA 289SW1040; TexCivA 294SW 633; TexCivA 300SW653. **Limiting issue of warranty** to that written in contract held proper. TexCivA 16SW(2d) 871. **Only ultimate issues raised by evidence** should be submitted. TexCivA 11SW(2d)231. **Pleading held sufficient to authorize submission of issue.**–Tex CommnA 16SW(2d)285; TexCivA 11 SW(2d)344; TexCivA 12SW(2d)843. **Refusal to submit issue held not error under evidence.**–TexCivA 16SW (2d)357. **Refusal to submit special issue held error.**–TexCommnA 278SW 186; TexCivA 278SW298; TexCivA 11 SW(2d)338; TexCivA 17SW(2d)116; TexCivA 18SW(2d)679(1stcase). **Request for submission of special issues** is not waiver of jury trial on unsubmitted issues raised by opponent's evidence. TexCivA 294SW331. **Requests improperly refused.**–TexCivA 276SW770. **Special charge bearing directly on weight of evidence** is properly refused. TexCivA 281SW295. **Special finding not submitted** where no evidence to support it. TexCivA 296SW950. **Special issue, having no foundation in pleadings,** is properly refused. TexCivA 288SW1092. **Special issue held not to give undue prominence** to one issue. TexCivA 292 SW953. **Special issues held proper.**–104NJL122, 139A58; TexCivA 300SW 975; TexCivA 1SW(2d)725; TexCivA 1SW(2d)754; TexCivA 3SW(2d)921. **Submission of special issue not raised by pleadings and unsupported by evidence** held error. 85 IndA654, 155NE 532. **Where evidence is insufficient to justify finding,** refusal to submit issue is proper. TexCommnA 276SW185. **Where evidence on issue comes from interested source,** especially where vague, inconsistent, and conflicting in some respects, or where parties are antagonistic, issue should be submitted to jury. Tex CivA 11SW(2d)549. **Where evidence tends to support legal defense** presented by defendant, he is entitled to have issue submitted to jury for determination. TexCivA 11SW(2d)601. **Where sickness is not proximate result of defendant's acts,** submitting issue as to same is error. TexCivA 3SW(2d)545. **Evidence held not to authorize submission.**–Tex CivA 15SW(2d)661. **Both parties are entitled to have their theories of case** and facts constituting cause of action on one hand and matters pleaded in defense on other affirmatively submitted for determination of jury. TexCivA 11 SW(2d)338; TexCr 12SW(2d)1228. **Submission properly refused.**–TexCivA 19 SW(2d)404; TexCivA 19SW(2d)816; TexCivA 20SW(2d)260; TexCivA 20SW (2d)369; TexCivA 20SW(2d)388. **Defendant is entitled to affirmative submission of facts** which, if found true, would exculpate him from liability. TexCivA 19SW(2d)144. **Issues held not improper** as relating to evidential rather than ultimate facts. TexCivA 21SW (2d)694. **Issues properly submitted.**–TexCivA 29SW(2d)524; TexCivA 29SW (2d)534. **Pleadings held sufficient to raise issue** of sale and submission under evidence showing sale. TexCivA 22SW (2d)504. **Questions held proper for submission.**–TexCivA 29SW(2d)534. **Refusal of special issue regarding ability to work held error.** TexCivA 21SW(2d) 8. **Refusal to submit held erroneous.**–TexCivA 26SW(2d)722. **Right to submission of issues relied on as defense** depends on whether group of facts tendered by answer, if true, would constitute defense. TexCivA 20SW(2d)369. **Special issue held not erroneous** as excluding consideration of evidence. Tex CivA 28SW(2d)941. **Special issue held raised by pleadings and evidence.** Tex CivA 30SW(2d)685. **Submission of issues properly refused.**–TexCivA 28SW (2d)1108(1stcase). **Submission of issues improperly refused.**–TexCivA 29SW (2d)534. **Refusal to submit issue of contributory negligence** held proper. TexCivA 32SW(2d)703. **Special issue of compensation** held not objectionable in personal injury action. TexCivA 32SW (2d)703.

1910–22 Ala 130S681; 157Md571, 146 A748; Mass 172NE597; 190NC162, 129 SE453 (issue submitted not presenting question of failure of consideration of note for failure to deliver article bought); 194NC275, 139SE435; Tex CommnA 292SW518; TexCommnA 29 SW(2d)1011; TexCivA 270SW199; Tex CivA 270SW1083 (issue of fact); Tex CivA 273SW979 (each group of facts relied on by defendant); TexCivA 278SW 337; TexCivA 284SW683; TexCivA 299 SW336; TexCivA 299SW507; TexCivA 15SW(2d)170; TexCivA 19SW(2d)153; TexCivA 19SW(2d)829; TexCivA 20SW (2d)369; TexCivA 22SW(2d)514 (good faith of defendant in alienation of affection suit); TexCivA 25SW(2d)959 (submission of issue of permission of possession, without submitting issues of repudiation, and time thereof, is error). **Where specific acts of negligence,** etc. TexCivA 273SW647; TexCivA 275SW 423; TexCivA 276SW770. **All material issues made for pleadings and evidence** must be submitted when case is submitted upon special issues. TexCivA 299SW272. **Erroneous refusal.**–197NC 348, 148SE438. **It is function of jury** to make findings on contested issues of material facts. TexCivA 10SW(2d) 1028. **Issue of unavoidable accident** need not have been specially pleaded to require its submission when raised by evidence. TexCivA 290SW1108. **No question of preponderance** is involved in determining whether issue of fact is raised by evidence. TexCivA 299SW 272. **Refusal of special issues held error.**–TexCivA 278SW337. **Special issues on each ground relied on** should be submitted for compensation claimant in suit to set aside award. TexCivA 2SW(2d) 495. **Submission of issue of negligence in general terms** is improper where petition alleges specific grounds of negligence. TexCivA 1SW(2d)464. **Submission of special issue not raised by pleadings** constitutes reversible error. Tex CivA 273SW638. **Vital issues should not be withheld** and decided by court. Tex CivA 5SW(2d)792. **Special interrogatory is properly refused,** where issue is not in case. TexCivA 27SW(2d)323. **Special issues held properly submitted.**–TexCivA 28SW(2d)312.

1910–23 37GaA237, 139SE580; 158Md 349, 148A452; TexCommnA 14SW(2d) 1015; TexCivA 281SW244; TexCivA 284SW683; TexCivA 290SW544; Tex CivA 290SW1108; TexCivA 291SW299; TexCivA 300SW142; TexCivA 4SW(2d) 649; TexCivA 10SW(2d)168; TexCivA 15SW(2d)46(2dcase); TexCivA 16SW (2d)363; TexCivA 23SW(2d)488; Tex CivA 23SW(2d)489; TexCivA 23SW(2d) 491; TexCivA 23SW(2d)542; TexCivA 24SW(2d)99; TexCivA 26SW(2d)377; TexCivA 28SW(2d)282; TexCivA 30SW (2d)685 (holding special issue properly refused where proper connection between plaintiff and transaction was not shown); 100WVa154, 130SE125. **If there is no evidence,** etc. 121Kan648, 249P599; 125Kan252, 264P59; 125Kan 324, 264P65; 128Kan46, 275P1096; Tex CommnA 280SW198; TexCommnA 292 SW536; TexCivA 276SW790; TexCivA 292SW638; TexCivA 297SW534; Tex CivA 297SW894; TexCivA 298SW145; TexCivA 298SW642; TexCivA 18SW (2d)1089(2dcase). **Approval of question by attorneys** is not binding on court so as to require submission. 166Ga105, 142SE559. **Evidence held sufficient to raise issue.**–TexCivA 10SW(2d)767. **Evidence held to warrant question submitted.**–253Mass523, 147NE887. **In action by miner for injuries sustained when entering mine as invitee to negotiate for removal of débris,** requested question for submission to jury whether ordinarily prudent man under circumstance would have entered working

place on occasion of injury did not confine jury to facts alleged in pleadings to constitute contributory negligence, and was properly refused. TexCivA 10SW(2d)441. Interrogatory properly refused where there is no evidence to support it. TexCivA 9SW(2d)182. Issue not raised by evidence should not be submitted. TexCommnA 1SW(2d) 263. Issue of seller's good faith is pertinent on question of exemplary damages in action for fraud in sale of stock and should be submitted. TexCivA 284 SW624. Questions held clearly and fully presenting issues.–163Ga755, 137SE 57. Requested issues held not pertinent to issues of fact made by evidence. Tex CivA 18SW(2d)707. Special issue held supported by evidence.–TexCommnA 276 SW162. Special issue neither pleaded nor raised by evidence is properly refused. TexCivA 1SW(2d)743. Submission of issue as to negligently placing step on uneven ground for passenger to alight held warranted by evidence. Tex CommnA 292SW536. Issue must be raised by both pleadings and evidence to authorize submission of issue of fact to jury. TexCivA 8SW(2d)552. Under alternative petition claiming damages for fraud in sale of stock or rescission and return of purchase price, all material issues under both theories should be submitted. TexCivA 284SW624. Determination of sufficiency of evidence to raise issue.–118Tex607, 23SW(2d)343. Issue must be warranted by pleading and evidence.–TexCivA 22SW(2d)737.

1910–24 37GaA237, 139SE580; 125Kan 324, 264P65; 192NC330, 135SE141 (issues not raised by pleading or evidence); 193NC665, 137SE868; 196NC 484, 146SE204; 50RI 134, 145A442(1st case); TexCommnA 298SW267; Tex CivA 283SW880; TexCivA 286SW307; TexCivA 288SW545; TexCivA 294SW 290; TexCivA 295SW283 (issues held sufficiently definite); TexCivA 296SW 639; TexCivA 297SW232; TexCivA 297 SW244; TexCivA 297SW524; TexCivA 297SW534; TexCivA 3SW(2d)563; Tex CivA 4SW(2d)320; TexCivA 6SW(2d) 372; TexCivA 6SW(2d)410; TexCivA 7SW(2d)926; TexCivA 10SW(2d)397; TexCivA 10SW(2d)1015; TexCivA 11 SW(2d)187; TexCivA 11SW(2d)533; TexCivA 12SW(2d)1220; TexCivA 13 SW(2d)929; TexCivA 14SW(2d)81; TexCivA 14SW(2d)935; TexCivA 16SW (2d)869; TexCivA 16SW(2d)880; Tex CivA 18SW(2d)253; TexCivA 20SW(2d) 388; TexCivA 20SW(2d)803; TexCivA 21SW(2d)694; TexCivA 23SW(2d)516; TexCivA 25SW(2d)276; TexCivA 26SW (2d)1091; TexCivA 27SW(2d)918; Tex CivA 28SW(2d)941; TexCivA 30SW(2d) 930; TexCivA 30SW(2d)934; TexCivA 31SW(2d)199; TexCivA 31SW(2d)669; TexCivA 31SW(2d)839. See also Tex CivA 4SW(2d)169; TexCivA 18SW(2d) 727. Questions are immaterial, etc. 120 Kan139, 242P120. It is error to submit issues which do not arise under pleadings.–191NC422, 131SE765. Special issue is justified only when raised by both pleadings and evidence. Tex CivA 292SW264. Where there is no evidence to justify submission of issue, it is properly refused. TexCivA 283SW 1095. Refusal to submit issue whether other than assignee owned claim sued on held not error where no evidence of prior assignment. TexCivA 22SW(2d) 504. Issue held supported by pleading.–TexCivA 29SW(2d)835. Special issues submitted held not immaterial.–TexCivA 28SW(2d)282.

1910–24½–New. When jury are asked to find particular fact, without being informed as to relevancy thereof to claim of either party, their conflicting claims, raised by evidence, need not be affirmatively submitted to jury. Tex CivA 14SW(2d)935.

1911–25 164Ga552, 139SE31; 37GaA 237, 139SE580; 319 Ill 344, 150NE276; 190NC368, 129SE818 (issues between co-defendants); 136 Okl 51, 275P640; Tex CivA 283SW1104; TexCivA 284SW650; TexCivA 286SW598; TexCivA 295SW 274; TexCivA 295SW301; TexCivA 300 SW142; TexCivA 3SW(2d)535; Tex CivA 3SW(2d)545; TexCivA 4SW(2d) 93; TexCivA 4SW(2d)1013; TexCivA 7SW(2d)963; TexCivA 9SW(2d)470; TexCivA 24SW(2d)447; TexCivA 27SW (2d)921; TexCivA 29SW(2d)885; 105 WVa321, 142SE430.

1911–26 319 Ill 344, 150NE276; 236 IllA386; 122Kan653, 253P611; OhA 173 NE298; TexCommnA 285SW607; Tex CommnA 290SW526; TexCommnA 291 SW1085; TexCommnA 29SW(2d)967; TexCivA 274SW260; TexCivA 275SW 410; TexCivA 276SW790; TexCivA 280SW914; TexCivA 281SW244; Tex CivA 283SW880; TexCivA 284SW683; TexCivA 285SW1100; TexCivA 287SW 91; TexCivA 288SW588; TexCivA 291 SW667; TexCivA 294SW290 (issues held not erroneous as on weight of testimony); TexCivA 1SW(2d)743; Tex CivA 1SW(2d)754; TexCivA 1SW(2d) 760; TexCivA 6SW(2d)432; TexCivA 9SW(2d)470; TexCivA 9SW(2d)765; TexCivA 10SW(2d)441; TexCivA 11SW (2d)533; TexCivA 18SW(2d)838; Tex CivA 19SW(2d)153. See also TexCivA 14SW(2d)286. Interrogatory held to relate to ultimate facts.–120Kan119, 242 P449; TexCivA 1SW(2d)725.

1912–27 TexCivA 297SW534. Issues in suit for injuries to passenger alighting from train held not erroneously submitted as not embracing ultimate fact issue. TexCommnA 292SW536.

1912–28 TexCivA 275SW423.

1912–31 52ND688, 204NW344; 115Tex 222, 280SW499, 44ALR627; Tex CommnA 24SW(2d)32; TexCivA 288SW 545; TexCivA 2SW(2d)939; TexCivA 13SW(2d)966; TexCivA 20SW(2d)388 (submission not objectionable as question of law); TexCivA 23SW(2d)771; TexCivA 25SW(2d)653 (issues of law properly refused); TexCivA 25SW(2d) 927 (mixed questions of law and fact are improper); TexCivA 31SW(2d)879. Mixed questions of law and fact, etc. TexCivA 283SW243; TexCivA 1SW(2d) 725; TexCivA 4SW(2d)1029; TexCivA 24SW(2d)99. Interrogatory held not to submit question of law.–33Ariz128, 262P 995. Issue based on erroneous construction of ordinance held erroneous. Tex CivA 298SW145. Issue submitted held not question of law.–TexCivA 283SW 240. Question held not to submit issue of law.–TexCivA 29SW(2d)911. Special issues held not issues of law.–TexCivA 27SW(2d)616.

1913–32 TexCivA 291SW299.

1913–33 TexCivA 14SW(2d)935.

1913–33½–New. Special issues submitted in suit for personal injuries or death in railroad crossing collision have been held not objectionable as comment on the evidence or as on weight of evidence. TexCivA 282SW884.

1913–33½–New. Submission of issue not raised in case by pleadings is properly refused. TexCivA 285SW1100.

1913–33¼–New. Issues not authorized by evidence are erroneously submitted. TexCivA 286SW541.

1913–33⅛–New. Special issue as to damages is erroneously submitted when it is not accompanied with instruction properly limiting extent thereof. Tex CivA 286SW483.

1913–33½–New. Issue whether defendant executed note because of threat is erroneous where it omits essential element of unlawful agreement at time note was executed. 194NC298, 139SE440.

1913–33½–New. Issue presenting question not raised by answer is erroneous. 194NC298, 139SE440.

1913–33⅛–New. Instruction that, if jury answered one special issue affirmatively, they need not answer following issue, held not error. TexCivA 4SW(2d) 1023.

1913–33⅛–New. Refusal to submit special issue requested by defendant on question of two weeks' extension of contract time for completion of building has been held proper, where defendant, by his cross action, alleged that building as whole was to be completed within time as extended, and in his testimony stated that extended period related only to original five stories of structure. Tex CivA 13SW(2d)747.

1913–33⅒–New. That question is not submitted to jury on particular issue does not preclude court from rendering judgment on its own finding on such issue. TexCivA 16SW(2d)321.

1913–33 1/11–New. Defendant may have affirmatively submitted any defense created by pleadings and supported by evidence. TexCivA 29SW(2d)534.

1913–34 115Tex222, 280SW499, 44ALR 627; TexCommnA 291SW857; TexCivA 278SW343; TexCivA 285SW908; Tex CivA 288SW545; TexCivA 288SW560; TexCivA 293SW580; TexCivA 295SW 223; TexCivA 297SW238; TexCivA 297 SW563; TexCivA 299SW325; TexCivA 4SW(2d)205; TexCivA 12SW(2d)633; TexCivA 14SW(2d)106; TexCivA 16SW (2d)321; TexCivA 22SW(2d)1085; Tex CivA 25SW(2d)205; TexCivA 25SW(2d) 916; TexCivA 31SW(2d)196. See also TexCivA 13SW(2d)929. Issues held controverted and requests to submit improperly refused. TexCivA 275SW242 (amount of mutual mistake shown in note and deed of trust).

1913–35 168Ark1167, 272SW848; 115 Tex515, 280SW499, 44ALR627; Tex CommnA 2SW(2d)422; TexCivA 294SW 282; TexCivA 294SW290; TexCivA 294 SW873; TexCivA 4SW(2d)93; TexCivA 8SW(2d)247; TexCivA 10SW(2d)1015; TexCivA 17SW(2d)861; TexCivA 23SW (2d)820; TexCivA 25SW(2d)237; Tex CivA 25SW(2d)961. See also TexCivA 4SW(2d)140. Assumption of fact as to which testimony is uncontradicted is not error. TexCivA 4SW(2d)165.

1913–36 TexCommnA 27SW(2d)129; TexCivA 297SW232; TexCivA 297SW 1063; TexCivA 20SW(2d)388 (presumption of law as to answer); TexCivA 24 SW(2d)501; TexCivA 26SW(2d)327; TexCivA 31SW(2d)154. Evidence held sufficient to raise issue.–TexCivA 4SW (2d)1016; TexCivA 4SW(2d)1023. Evidence held insufficient to raise issue.–TexCivA 4SW(2d)1013.

1913–37 TexCivA 10SW(2d)763.

1913–38 TexCivA 272SW308; TexCivA 282SW954; TexCivA 283SW341; Tex CivA 286SW483; TexCivA 291SW343; TexCivA 293SW688; TexCivA 294SW 282; TexCivA 294SW290; TexCivA 298SW145; TexCivA 1SW(2d)493; Tex CivA 3SW(2d)568; TexCivA 6SW(2d) 439; TexCivA 11SW(2d)533; TexCivA 15SW(2d)62; TexCivA 15SW(2d)170; TexCivA 16SW(2d)321; TexCivA 17SW (2d)68; TexCivA 18SW(2d)246; Tex CivA 18SW(2d)810; TexCivA 19SW(2d) 355; TexCivA 20SW(2d)388. See also TexCivA 276SW444; TexCivA 4SW(2d) 140; TexCivA 13SW(2d)450. Issues submitted held improper as invading, etc. TexCivA 276SW444. Interrogatory construed as not assuming fact in dispute.–237 IllA570. Interrogatory held not to assume fact.–33Ariz128, 262P995; TexCivA 298SW631. Special issue on damages held not on weight of evidence.–TexCivA 299SW277. Issue assuming fact testified to on both sides is not objectionable. TexCivA 27SW(2d)571. Special issue assuming undisputed facts is not erroneous. TexCivA 28SW(2d) 622. Issue assuming issuable facts on contingency that jury find existence of such facts is not error. TexCivA 28SW (2d)861. Issue held on weight of evidence in assuming controverted fact.–TexCivA 29SW(2d)534.

1913–38½–New. , and error in submitting such issue is not cured by subsequent question as to existence of fact previously assumed. TexCivA 286SW 483.

1913–39 236 IllA386; 119Kan307, 239 P993; 153Md274, 138A235; 193NC814, 138SE169; 196NC72, 144SE537; Tex CommnA 298SW542; TexCommnA 14 SW(2d)58; 118Tex607, 23SW(2d)343; TexCivA 271SW205; TexCivA 274SW 200; TexCivA 278SW457; TexCivA 278 SW488; TexCivA 280SW914; TexCivA 281SW259; TexCivA 281SW295; Tex CivA 282SW949; TexCivA 283SW299; TexCivA 283SW681; TexCivA 283SW 1104; TexCivA 284SW683; TexCivA 284SW983; TexCivA 286SW276; Tex CivA 286SW307; TexCivA 286SW661; TexCivA 290SW1108; TexCivA 291SW 667; TexCivA 293SW580; TexCivA 293 SW650; TexCivA 295SW939; TexCivA 296SW599; TexCivA 297SW534; Tex CivA 1SW(2d)369; TexCivA 1SW(2d)

493; TexCivA 1SW(2d)732; TexCivA 1SW(2d)754; TexCivA 4SW(2d)117; TexCivA 4SW(2d)649; TexCivA 4SW (2d)985; TexCivA 4SW(2d)1013; Tex CivA 5SW(2d)183; TexCivA 6SW(2d) 143; TexCivA 7SW(2d)963; TexCivA 8SW(2d)527; TexCivA 8SW(2d)569; TexCivA 9SW(2d)185; TexCivA 10SW (2d)196; TexCivA 10SW(2d)263; Tex CivA 12SW(2d)625; TexCivA 13SW(2d) 481; TexCivA 14SW(2d)104; TexCivA 14SW(2d)939; TexCivA 16SW(2d)557; TexCivA 18SW(2d)730; TexCivA 19SW (2d)151; TexCivA 20SW(2d)388; Tex CivA 20SW(2d)833; TexCivA 22SW(2d) 502; TexCivA 22SW(2d)737; TexCivA 24SW(2d)447; TexCivA 25SW(2d)196; TexCivA 30SW(2d)934. See also Tex CivA 18SW(2d)740. **Issues on instructions** presented en masse should be refused, if any one has been substantially given, or if any one is improper. TexCivA 297SW875. **Where substance of special issue is embodied in court's charge,** refusal of issue is not error. TexCivA 1SW(2d)743. **Issue held improperly submitted.**–TexCommnA 18SW (2d)595, 63ALR1009.

1914–40 193NC814, 138SE169; Tex CommnA 291SW216; TexCivA 271SW 205; TexCivA 293SW311 (question held not to submit issue of contributory negligence); TexCivA 10SW(2d)756. **Special issue held not duplicitous.**–TexCivA 7SW(2d)906.

1914–42 88CalA740, 264P270; Tex CommnA 285SW607; TexCivA 291SW 667; TexCivA 294SW873. **Question of liability** should not be submitted where cause submitted for special verdict. 52 ND688, 204NW344.

1914–44 223Ky581, 4SW(2d)380; Tex CivA 286SW307; TexCivA 15SW(2d) 66.

1914–45 44F(2d)24; 106Conn153, 137 A721; 117Tex242, 1SW(2d)1084; Tex CommnA 285SW607; TexCommnA 4SW (2d)31; TexCommnA 13SW(2d)59; Tex CommnA 14SW(2d)1009; TexCommnA 14SW(2d)1020(1stcase); TexCommnA 15SW(2d)234; TexCommnA 18SW(2d) 609; TexCommnA 30SW(2d)489; Tex CivA 274SW667; TexCivA 278SW943; TexCivA 280SW235; TexCivA 284SW 989; TexCivA 285SW1100; TexCivA 290SW784; TexCivA 290SW858; Tex CivA 291SW674; TexCivA 297SW875; TexCivA 299SW520; TexCivA 299SW 687; TexCivA 1SW(2d)363; TexCivA 1SW(2d)1117; TexCivA 2SW(2d)352; TexCivA 2SW(2d)980; TexCivA 4SW (2d)636; TexCivA 5SW(2d)783; Tex CivA 9SW(2d)458; TexCivA 9SW(2d) 494; TexCivA 10SW(2d)388; TexCivA 11SW(2d)549; TexCivA 11SW(2d)567; TexCivA 12SW(2d)1106; TexCivA 13 SW(2d)895; TexCivA 14SW(2d)337; TexCivA 15SW(2d)72; TexCivA 15SW (2d)77; TexCivA 15SW(2d)150; Tex CivA 15SW(2d)1079; TexCivA 16SW (2d)969; TexCivA 17SW(2d)163; Tex CivA 17SW(2d)187; TexCivA 18SW(2d) 267; TexCivA 18SW(2d)692; TexCivA 18SW(2d)707; TexCivA 19SW(2d)104; TexCivA 19SW(2d)156; TexCivA 19SW (2d)858; TexCivA 20SW(2d)388; Tex CivA 20SW(2d)803; TexCivA 20SW (2d)847; TexCivA 20SW(2d)1070(3d case); TexCivA 21SW(2d)45; TexCivA 22SW(2d)346; TexCivA 22SW(2d)508; TexCivA 25SW(2d)653; TexCivA 25SW (2d)689; TexCivA 25SW(2d)916 (issue abandoned by failure to have submitted); TexCivA 26SW(2d)327; TexCivA 26SW(2d)1095; TexCivA 27SW(2d) 842; TexCivA 27SW(2d)880; TexCivA 28SW(2d)906; TexCivA 28SW(2d)1095 (waiver for failure to request); Tex CivA 29SW(2d)500 (waiver for failure to request); TexCivA 29SW(2d)905 (waiver); TexCivA 29SW(2d)927 (effect of failure to request submission); TexCivA 30SW(2d)487; TexCivA 30SW (2d)711 (failure as waiver); TexCivA 31SW(2d)355; TexCivA 31SW(2d)465; TexCivA 31SW(2d)519; TexCivA 32SW (2d)264; Wis 230NW81(2dcase); Wis 230NW630. See also TexCivA 291SW 583. **In Texas.**–CivA 283SW642. **Insufficient requests.**–TexCommnA 276SW 162. **Court cannot find on issue not requested to be submitted.** TexCommnA 23SW(2d)708. **Defenses not requested to be submitted are waived.** Tex CommnA 24SW(2d)351; TexCommnA 24SW(2d)354. **Issue held sufficient.**–Wis 232NW595. **Failure to request submission of issue as to attorneys fees** waives any right to recover. Tex CommnA 24SW(2d)810; TexCivA 274 SW1002.

1915–46 TexCommnA 4SW(2d)964; TexCivA 270SW1081 (issue waived where not submitted); TexCivA 275SW 487; TexCivA 278SW943; TexCivA 280 SW235; TexCivA 285SW1100; Tex CivA 292SW917; TexCivA 17SW(2d) 1095; 198Wis34, 223NW425. **Issue not requested** is treated as abandoned. TexCivA 294SW331.

1915–46½–New. Failure to require submission of question of interest to jury is waiver thereof. TexCivA 299SW687.

1915–47 Single request for several issues, some of which were improper, held properly refused. TexCivA 297SW 875.

1915–48 TexCivA 270SW1081 (special issue declared improper because ambiguous); TexCivA 272SW250 (request refused, not error where finding under instructions was sufficient); TexCivA 275SW214 (issue waived by failure to request submission thereof); TexCivA 296SW950. **Requested issue** of contributory negligence held sufficient to require proper submission. TexCivA 293 SW311.

1915–50 121Kan47, 246P181; TexCivA 286SW599; TexCivA 292SW953. **On separate sheets of paper.**–TexCivA 286 SW599.

1915–51½–New. Party held entitled to proper submission of issue though requested charge was broader than pleading. TexCivA 289SW125.

1915–51⅓–New. Not incumbent on court to reconstruct erroneous special issue tendered. TexCivA 296SW950.

1915–51¼–New. In some jurisdictions, each request must be separately signed by counsel. TexCivA 286SW599.

1915–51⅕–New. Refusal of whole charge held proper, where one of five requested issues embraced in special charge was improper. TexCivA 293SW 580; TexCivA 5SW(2d)224.

1915–51⅙–New. Trial court, having correctly presented issues, was not required to reform defendant's special issues. TexCivA 296SW683.

1915–51⅐–New. Where submission of special issue did not prevent jury from answering other issues, no duty devolved on court to redraft defendant's issues. TexCivA 296SW683.

1915–51⅛–New. Refusal to submit issue is not error where not applicable to facts of case. 194NC446, 140SE20.

1915–51⅙–New. Trial court cannot make finding on issue where requested special issue covering same matter was refused. TexCommnA 299SW895.

1915–51 1/10–New. Authority of trial judge and court of civil appeals to supply findings as to particular issue is cut off by request for submission of that issue of fact to jury. TexCivA 13SW (2d)78.

1915–51 1/11–New. In absence of request for submission of issue, court was justified in making findings to sustain judgment. TexCivA 14SW(2d)286.

1915–51½–New. Where plaintiffs in action for death conclusively established right to recover for hospital and funeral expenses, such items were recoverable as matter of law, and trial court should have incorporated them in judgment, where they were omitted from special issue on measure of damages submitted to jury. TexCivA 15SW(2d)129.

1915–51 1/13–New. Under statute, refusal of defendant's request that jury be instructed to make numerous special findings is not error when request contains no condition that questions submitted shall be answered in case general verdict shall be rendered. 32 OhA26, 167 NE589.

1915–51 1/14–New. Court should determine issue not submitted nor requested. TexCivA 30SW(2d)921.

1915–52 121Kan47, 246P181; 238Mich 689, 214NW247. **In Michigan.**–238Mich 689, 214NW247.

1915–55 126Kan188, 268P119.

1915–56½–New. They should be submitted before argument. 100WVa733, 132SE746.

1915–57 239Mich266, 214NW206.

1915–61 But see 252Mass523, 147NE 887.

1915–66 TexCivA 281SW1106.

1916–68 TexCivA 281SW1106.

1916–71 190NC432, 130SE15; 197NC 526, 150SE34; NC 155SE564; Tex CommnA 273SW831 (erroneous and insufficient); TexCivA 271SW126; Tex CivA 272SW601 (issue in leading form not erroneous if court does not intimate answer desired); TexCivA 273SW 640; TexCivA 273SW886; TexCivA 276 SW790 (interrogatories not erroneous in failing to restrict issue to particular acts of negligence alleged); TexCivA 278SW950; TexCivA 284SW650; Tex CivA 291SW583; TexCivA 291SW681; TexCivA 291SW692; TexCivA 3SW(2d) 1113; TexCivA 9SW(2d)185; TexCivA 12SW(2d)604; TexCivA 22SW(2d)502; TexCivA 28SW(2d)282; TexCivA 28SW (2d)842; TexCivA 29SW(2d)828 (issue correctly submitted); 191Wis618, 211 NW762; 199Wis320, 226NW392. But see TexCivA 9SW(2d)65. **Special issues held sufficient.**–TexCivA 294SW625; TexCivA 21SW(2d)574. **Assumption of facts.**–TexCivA 10SW(2d)229. **Defense of contributory negligence should be affirmatively submitted.**–TexCommnA 290SW526. **Form of issues is sufficient** if they allow both parties to introduce all pertinent evidence and apply it fairly. 190NC62, 128SE730. **Immaterial issues should not be submitted.**–TexCivA 3SW(2d)106. **Interrogatory need not be limited where issue made by answer** is general. 33Ariz128, 262P995. **Issue as to shrinkage in weight** and staleness of cattle held not erroneous, though assuming such facts where uncontroverted testimony showed both. TexCivA 294SW290. **Issue should not be submitted** in negative form, since burden of proof was thereby shifted. TexCivA 297SW894. **It will be presumed** on review that trial court submitted issues as specifically as they were alleged on petition. 308Mo 597, 274SW416. **Not error to submit issue which follows allegations** if allegations otherwise sufficient in law to raise issue. 190NC62, 128SE730. **Same rules of law govern** respecting right to have defenses submitted to jury on general as on special charge. TexCivA 295SW633. **Special issue in nature of general charge** is objectionable. TexCivA 300SW949. **Special issue on weight of evidence and assuming facts** is erroneous. TexCivA 300SW949. **Submitting issue held proper** and not assuming a fact required to be found. TexCivA 288SW244. **Special issues sufficiently submitted.**–TexCivA 22SW(2d)698. **Special interrogatories held not objectionable.**–TexCivA 27SW (2d)296. **Submission of special issues held erroneous.**–TexCivA 28SW(2d)207. **In Texas.**–CivA 29SW(2d)500. **Incidental question of fact** need not be submitted in separate issue. NC 155SE856.

1916–72 TexCivA 283SW328; TexCivA 2SW(2d)917; TexCivA 10SW(2d)140; TexCivA 26SW(2d)682; TexCivA 32SW (2d)363. **Issue held objectionable as casting burden of proof on defendant.**–TexCommnA 7SW(2d)521. **Number and form of issues** are in court's discretion. 189NC482, 127SE593. **Party objecting to questions must at least account for failure to suggest questions** he deems proper. 163Ga755, 137SE57. **Submission of issue out of logical order** held not to constitute charge upon weight of evidence in view of qualification. Tex CivA 287SW87. **Submission of special issue calling for general verdict** was erroneous in case submitted on special issues. TexCivA 10SW(2d)763. **Special issue in language of statute** held not error. TexCivA 30SW(2d)921.

1916–73 189NC482, 127SE593; Tex CommnA 15SW(2d)218; TexCivA 271 SW126; TexCivA 286SW483; TexCivA 291SW667; TexCivA 1SW(2d)688; Tex CivA 3SW(2d)545; TexCivA 6SW(2d)

432; TexCivA 11SW(2d)533; TexCivA 15SW(2d)170; TexCivA 19SW(2d)394 (issue held properly refused); TexCivA 24SW(2d)457; TexCivA 25SW(2d)186 (held proper). Affirmative allegations of complaint must be submitted by court on trial on special issues. TexCivA 1 SW(2d)743. Defenses should be separately and affirmatively submitted.–TexCivA 1SW(2d)740. Interrogatory held answerable yes or no.–233Mich23, 206 NW491. Interrogatory held sufficient.–TexCivA 300SW975. Issues held not indefinite.–TexCivA 299SW325. Issues which are indefinite are improper. TexCivA 1SW(2d)667. Question held not uncertain, etc. TexCivA 15SW(2d)170. Special issue held unintelligible.–TexCivA 1SW(2d)408. Two interrogatories held properly submitted as one.–TexCivA 3SW(2d)1113. Special issues held not too vague, general, and indefinite upon weight of evidence. TexCivA 23 SW(2d)522.

1916–74 190NC819, 130SE834 (issue adopting allegations of complaint "and answer" which were at variance not proper form); TexCivA 5SW(2d)185; TexCivA 25SW(2d)176 (issue not raised by evidence should be refused). Pleading of both parties must be considered to determine if issues or judgment is supported by pleadings. TexCivA 22 SW(2d)504.

1916–75 241Mich534, 217NW909; 190 NC397, 130SE40 (issue of fraud in factum or fraud in treaty submitted in single question required new trial); 197NC171, 148SE30; 197NC738, 150SE 355(1stcase); TexCommnA 276SW162; TexCommnA 12SW(2d)972; TexCivA 13SW(2d)78; 118Tex314, 15SW(2d) 213; TexCommnA 15SW(2d)218; Tex CommnA 29SW(2d)989 (statute construed); TexCivA 281SW887; TexCivA 282SW850 (separate defenses); Tex CivA 283SW341; TexCivA 286SW599; TexCivA 288SW545; TexCivA 293SW 838 (issue not objectionable as embodying two questions in one); TexCivA 297SW894; TexCivA 298SW145; Tex CivA 299SW933; TexCivA 300SW949; TexCivA 1SW(2d)688; TexCivA 3SW (2d)545; TexCivA 4SW(2d)599; Tex CivA 5SW(2d)618; TexCivA 6SW(2d) 151; TexCivA 6SW(2d)439; TexCivA 10SW(2d)441; TexCivA 11SW(2d)191; TexCivA 11SW(2d)335; TexCivA 12SW (2d)263; TexCivA 12SW(2d)592; Tex CivA 12SW(2d)604; TexCivA 13SW (2d)993; TexCivA 15SW(2d)1098; Tex CivA 16SW(2d)151; TexCivA 16SW (2d)935; TexCivA 17SW(2d)150; Tex CivA 18SW(2d)246; TexCivA 19SW(2d) 211 (grouping questions held not erroneous); TexCivA 19SW(2d)343; Tex CivA 19SW(2d)622; TexCivA 20SW (2d)260 (question held not improper); TexCivA 24SW(2d)99; TexCivA 25SW (2d)180 (held not duplicitous); TexCivA 25SW(2d)207; TexCivA 25SW(2d)916 (where two issues are embraced in one question, but one of them is admitted, there is no error); TexCivA 25SW(2d) 994 (no multifariousness where combined issues were submitted in other special issues); TexCivA 26SW(2d)327; TexCivA 26SW(2d)741; TexCivA 30SW (2d)681; TexCivA 31SW(2d)684; Tex CivA 31SW(2d)879; 198Wis34, 222NW 304 (question submitted, whether plaintiff was guilty of want of ordinary care which contributed to produce injury, has been held erroneous for failing to separately submit three alleged grounds of negligence); 199Wis 320, 226NW392 (submission held proper); Wis 232NW595. See also TexCivA 272SW597; TexCivA 18SW(2d)722. But see 156Md535, 144A708; TexCivA 1SW(2d)400; TexCivA 12SW(2d)604; TexCivA 13SW(2d)481; TexCivA 13SW (2d)993. Interrogatories held not subject, etc.–TexCommnA 5SW(2d)494; TexCivA 270SW187; TexCivA 290SW 784; TexCivA 4SW(2d)165; TexCivA 22SW(2d)989; TexCivA 22SW(2d)1107; TexCivA 23SW(2d)401; TexCivA 28SW (2d)282; TexCivA 30SW(2d)921. Issue held not double.–233Mich23, 206NW 491. Each group of facts raising issue of contributory negligence should be separately submitted on issues of negligence and proximate cause. TexCivA 300SW949. In absence of objection, grouping all grounds of negligence in one issue is not error. TexCivA 7SW (2d)1099. In action for damages caused by fire from locomotives separate issues as to each engine of defendant are not required. TexCommnA 276 SW162. In personal injury case submission of contributory negligence in general way is error, especially where court submitted specifically different issues of defendant's negligence. Tex CivA 282SW850. Issue as to proximate cause.–TexCivA 294SW625. Issue of contributory negligence should be submitted in connection with proximate cause.–TexCommnA 290SW526. Issue submitted held not multifarious.–Tex CivA 283SW240. Issues held not duplicitous.–TexCivA 299SW325. Limitation to pleadings.–TexCivA 284SW624. Special issue held objectionable as intermingling issues. TexCivA 298SW 314. Special issue held not objectionable as being too broad and not limited to facts. TexCivA 283SW1104. Where defendant pleaded specific acts of contributory negligence he is entitled to have each act submitted separately and affirmatively. TexCivA 282SW850. All facts necessary to establish cause of action or defense may be grouped and submitted as single issue. TexCivA 19 SW(2d)211. Special issues properly grouped.–TexCivA 27SW(2d)357. Interrogatories held proper.–TexCivA 31 SW(2d)669.

1917–76 Tex 12SW(2d)599(2dcase); TexCommnA 292SW536 (issue whether ground on which brakeman placed stool for alighting passenger was "uneven, rough, or unlevel" held not erroneous, though only testimony was that ground was "unlevel"); TexCommnA 1SW(2d) 868; TexCivA 275SW430; TexCivA 278 SW950 (issue not raised by pleading or evidence properly refused); TexCivA 284SW683; TexCivA 291SW343; Tex CivA 291SW667; TexCivA 295SW211; TexCivA 299SW336; TexCivA 3SW(2d) 501; TexCivA 4SW(2d)117; TexCivA 11SW(2d)191; TexCivA 16SW(2d)321; TexCivA 17SW(2d)68; TexCivA 17SW (2d)471; TexCivA 17SW(2d)473; Tex CivA 18SW(2d)246; TexCivA 18SW(2d) 833; TexCivA 26SW(2d)377 (issue as presented by pleadings); TexCivA 32 SW(2d)264; TexCivA 32SW(2d)396; 200Wis87, 227NW284; 200Wis504, 228 NW126 (issue too narrow). See also TexCivA 31SW(2d)879. Assumption of admitted and undisputed fact held not error. TexCivA 290SW292. Assumption of fact of negligence held error. TexCivA 290SW292. Issue held not too broad.–TexCommnA 276SW162. Issues held proper.–TexCivA 299SW325. Issues held too restricted.–TexCivA 276SW347. Illustration.–TexCivA 289SW125. Interrogatories held not erroneous in view of instruction. 203 Iowa672, 213NW219. Pleadings and testimony determine manner of submitting issue.–TexCommnA 276SW162. Special issue not objectionable as on weight of evidence.–TexCivA 280SW342; TexCivA 298SW631. Special issue held not too general where consideration of jury was confined to pleading and evidence. TexCivA 299SW 277. Special issue should be confined to acts of negligence alleged.–TexCivA 280SW882. Submitting issue of negligence in general terms held not error where inference of negligence arose from collision between two street cars. Tex CivA 292SW638. Special issue not erroneous as not confining jury to consideration of particular evidence. Tex CivA 27SW(2d)616. Submissions held proper under evidence.–TexCivA 29SW (2d)524.

1917–76½–New. Interrogatories should not be based on assumption of fact. Tex CivA 5SW(2d)181.

1917–77 153Md274, 138A235; 193NC 665, 137SE868; TexCommnA 280SW 557; TexCivA 273SW886; TexCivA 275SW430; TexCivA 280SW342; Tex CivA 284SW683; TexCivA 291SW343; TexCivA 291SW667 (not ordinarily necessary or proper to submit questions which invite contradictory answers); TexCivA 295SW939; TexCivA 297SW 894; TexCivA 300SW181; TexCivA 6 SW(2d)151; TexCivA 14SW(2d)286; TexCivA 24SW(2d)471. But see Tex CivA 26SW(2d)451. Interrogatories containing legal terms not defined are properly refused. TexCommnA 276SW 162. Issues held not confusing, uncertain, or complex. TexCivA 293SW650. Submission held erroneous as placing burden of proof on defendant. TexCivA 21SW(2d)24. Special issue held not misleading.–TexCivA 28SW(2d)622.

1917–79 TexCivA 22SW(2d)514.

1917–80 197NC793, 150SE14 (question not objectionable); TexCivA 270SW 1083; TexCivA 6SW(2d)410; Wis 229 NW533. See also TexCommnA 12SW (2d)963.

1917–81 TexCivA 272SW308.

1917–82½–New. , or so drawn as to limit jury to consideration of a part only of evidence properly in case. TexCivA 285SW859.

1917–82½–New. Special issue as to whether driver kept lookout held error as failing to submit failure to keep proper lookout. TexCommnA 300SW41.

1917–83½–New. Issues not arising on pleadings or evidence properly refused. 190NC432, 130SE15.

1917–83½–New. Interrogatory held not argumentative.–233Mich23, 206NW491.

1917–83¼–New. Issue not raised by evidence held erroneously submitted. TexCivA 296SW500.

1917–83⅓–New. Submission of issue not raised by pleadings is not error and may be treated as surplusage where evidence shows it to be immaterial. TexCivA 286 SW633.

1917–83⅓–New. Under some statutes defendant has right to have each separate group of facts sufficient to make a defense separately presented free of intermingling. TexCommnA 6SW(2d)111.

1917–83½–New. Under such statutes general submission of defense which is presented by several separate groups of facts is erroneous. TexCommnA 6 SW(2d)111.

1917–83⅓–New. Interrogatory held properly refused under evidence. Tex CivA 300SW136.

1917–83⅓–New. Both affirmative and negative submission is not required. TexCivA 6SW(2d)439.

1917–83 1/10–New. Issue defectively submitted, with acquiescence of parties is not waived. TexCommnA 13SW(2d)59.

1917–83 1/11–New. Issue in effect peremptory charge is error. TexCivA 16 SW(2d)390.

1917–83 1/12–New. Trial court should adopt same form of questions in submitting issues of proximate cause as to plaintiff's negligence that it uses in submitting that issue with reference to negligence of defendant. 198Wis34, 222NW 304.

1917–83 1/13–New. Where there are two or more causes of action or grounds of defense, interrogatory as to each should contain briefly essential elements of cause of action to which it is addressed. 110Conn108, 147A370.

1917–83 1/14–New. Requested issues dependent upon each other must be given or refused as entirety. 118Tex607, 23 SW(2d)343.

1917–83 1/15–New. Whether striking of plaintiff by automobile was proximate cause of injuries held improper submission of issue. TexCivA 22SW(2d)508.

1917–83 1/16–New. Issue may be defective for not requiring affirmative specific finding. TexCivA 29SW(2d)534.

1917–84 TexCivA 290SW274.

1917–86 TexCivA 273SW886; TexCivA 281SW577; TexCivA 15SW(2d)170; TexCivA 18SW(2d)246. Special issues held not to indicate view of court where direction appended to "answer yes or no, as you may find." TexCivA 21SW (2d)694. Special issues held not suggestive.–TexCivA 28SW(2d)622.

1917–87 TexCommnA 280SW557; Tex CommnA 292SW536 (issues held not prejudicial to defendant as indicating judge's opinion); TexCivA 11SW(2d)

529; TexCivA 13SW(2d)966; TexCivA 18SW(2d)727; TexCivA 18SW(2d)810; TexCivA 18SW(2d)833. See also Tex CivA 18SW(2d)730. **Converse of issues** presented for plaintiff should be presented for defendant. TexCivA 294SW 349. **Issue on contributory negligence** properly refused when in such form as to assume absolute duty to stop automobile. TexCommnA 285SW607. **Issue properly refused where presented in such a way as to assume negligence.**–Tex CommnA 285SW607. **Issue submitted held not to assume facts.**–TexCivA 294 SW873. **Issues held not on weight of evidence.**–TexCivA 299SW325; TexCivA 30SW(2d)921. **Submitted issue held not erroneous.**–TexCivA 294SW873. **Undue prominence should not be given to particular matters.**–TexCommnA 280SW557. **Submission of three special issues** has been held not erroneous. TexCivA 26 SW(2d)1091. **Special issue held not upon weight of evidence.**–TexCivA 31SW (2d)669.

1917–87½–New. Questions held not objectionable as foreshadowing effect of answers. 55ND353, 213NW841.

1918–88 TexCivA 289SW662 (qualification of interrogation to furnish guide by which to determine legal effect of answer); TexCivA 291SW667; TexCivA 13SW(2d)895.

1918–90 110Conn108, 147A370 (duty of court where defect slight).

1918–91 129Kan766, 284P427.

1918–92 195NC370, 142SE217.

1918–93 TexCivA 27SW(2d)363.

1918–2½–New. Where statement made on trial that issues of undue influence were withdrawn is unchallenged, instruction that such issues were withdrawn is not error. 88 IndA237, 157NE111.

1918–2⅓–New. And further instruction that unsoundness of mind is sole issue is proper. 88 IndA237, 157NE111.

1918–2¼–New. Court is not authorized to pass on issue abandoned by agreement of parties. TexCivA 299SW928.

1918–3 87 IndA110, 158NE487.

1919–7 206Cal 286, 274P351.

1919–12 208 Iowa404, 226NW79 (finding of all facts in answer to special interrogatories treated as special verdict); 50ND163, 195NW157; 130 Or32, 273P 711; TexCivA 284SW620; TexCivA 293 SW221; TexCivA 294SW331. **Mistrial should be ordered** where it is doubtful whether answers to special issues support judgment. TexCivA 284SW629. **Judgment held supported by findings answering special interrogatories.**–Tex CommnA 27SW(2d)116. **Jury must answer each special issue** without regard to effect. TexCommnA 29SW(2d)989.

1920–17 TexCommnA 29SW(2d)989. **Finding is meaningless** if a contract which is foundation of case was not considered in submitting and determining this issue. TexCivA 284SW339.

1921–25½–New. Jury must determine facts under submission of special issues without reference to consequences of answers thereto. TexCivA 6SW(2d)439.

1921–25⅓–New. Where submitted issue is ambiguous, judgment cannot be rendered on the verdict. 198NC356, 151 SE732.

1921–25¼–New. Court may ignore jury's findings on immaterial issues. TexCivA 26SW(2d)665.

1921–26 CalA 230P135 (findings properly refused where special findings of jury are uncertain); 122Kan69, 251P 184; 198NC356, 151SE732; 34 OhA464, 171NE346; TexCivA 294SW349. **Answers sufficiently definite.**–TexCivA 299 SW687.

1921–27 TexCivA 292SW925. **"We do not know"** has the effect of finding against party having burden of proof. 122Kan69, 251P184. **"Doubtful"** held insufficient finding on controlling issue. 119Kan339, 239P984. **"Do not know."**–124Kan492, 260P643.

1921–23 122Kan69, 251P184. **Court's disregard of special issue to which jury answered "yes"** is not error where it amounted to finding of no fact. Tex CivA 26SW(2d)441.

1921–29 TexCivA 25SW(2d)909.

1921–32½–New. Reversal of judgment will not be based on indefinite answer to special question submitted to jury, though more definite answer was requested, where answer to question could not be conclusive of fact toward which it was directed and could be used only as evidence in argument to establish that fact. Kan 241P456.

1921–33 TexCivA 15SW(2d)194; Tex CivA 27SW(2d)331. **Finding held sufficient.**–121Kan47, 246P181.

1922–34 120Kan712, 244P840; 116Tex 412, 292SW875.

1923–46 TexCivA 284SW620; TexCivA 286SW919; TexCivA 26SW(2d)311. **Mistrial should be ordered** where jury fails to agree on answers to material issues. TexCivA 284SW620. **Court cannot make any finding** on verdict leaving material question unanswered. TexCivA 17SW(2d)68.

1923–47 TexCivA 284SW334 (held reversible error); TexCivA 286SW919. **Judgment held erroneous where jury failed to answer material issue.**–TexCivA 286SW919. **Failure of jury to answer interrogations** constituted mistrial under Texas statutes. TexCivA 288SW545. **Where special issue as to damages** is held material failure to answer constitutes mistrial. TexCivA 288SW545.

1923–48 TexCivA 273SW640.

1923–49 TexCivA 276SW770 (error to render judgment where jury fails to answer only interrogatory submitting defense of nonliability); TexCivA 296 SW964.

1923–58½–New. Failure to agree on special findings is equivalent to failure to answer. 38 OklACR35.

1923–58⅓–New. Where court approves general verdict returned by jury without answering special interrogatory, it is equivalent to withdrawing interrogatory. 38 OklACR35.

1923–58¼–New. Judgment which on face of record is based on verdict not finding all material issues is on face of record erroneous. TexCivA 22SW(2d) 508.

1924–61 76CalA530, 245P451; Tex CommnA 18SW(2d)1090; TexCivA 282 SW876; TexCivA 20SW(2d)833. See also TexCivA 12SW(2d)230. **As to damages** see 76CalA530, 245P451.

1924–63 Court may ignore answer to unauthorized issue and base judgment on finding on issues properly submitted. TexCivA 292SW264.

1924–64 52ND688, 204NW344; TexCivA 273SW640; TexCivA 283SW903; Tex CivA 297SW555.

1924–65½–New. Failure to find upon subject of counterclaim is immaterial where no evidence was introduced in support thereof. 12PortoRicoFed39.

1924–65⅓–New. Where jury answer one special issue decisive of facts, it is not error to receive verdict without other questions being answered. TexCivA 20SW(2d)324.

1924–66 123Kan356, 255P81.

1925–67 120Kan594, 244P1046.

1925–70 208 Iowa404, 226NW79.

1925–71½–New. Where jury could not agree on main issue, that jury inferentially found existence of evidentiary facts incidental thereto is not basis for final judgment. TexCommnA 16SW(2d) 262.

1925–72 120Kan119, 242P449 (findings responsive); 122Kan438, 252P223 (answer held responsive); 125Kan252, 264 P59; 222MoA322, 296SW828; TexCivA 270SW1083; TexCivA 3SW(2d)545. **Findings not responsive.**–120Kan594, 244 P1046. **Findings held responsive.**–87 IndA110, 166NE672(2dcase); 120Kan 645, 244P1057. **Answer held responsive.** –121Kan47, 246P181.

1925–73 Finding will be disregarded where unsupported by evidence. Tex CommnA 17SW(2d)803; TexCivA 16SW (2d)132(2dcase). **Findings outside issues are nugatory** and cannot be used to impeach judgment. CalA 290P617(2d case).

1925–74 120Kan594, 244P1046; Tex CivA 299SW520. **Issues insufficient to support judgment.**–198NC111, 150SE 713(1stcase).

1926–75 But see TexCivA 270SW1083.

1926–76 TexCivA 289SW436; TexCivA 10SW(2d)1023.

1926–77 198 Ind633, 154NE485; 130 Or32, 273P711; TexCivA 300SW123. **Answers held not fatally inconsistent or irreconcilable** see 120Kan123, 241P 1090; 120Kan712, 244P840; 123Kan 470, 255P1109. **Finding should be reconciled if possible.** 120Kan645, 244P 1057. **Findings held not inconsistent.**–Wis 228NW509.

1926–79 119Kan339, 239P984 (findings inconsistent); 124Kan375, 260P635; TexCommnA 299SW852; TexCommnA 276SW216; TexCommnA 283SW154; TexCommnA 300SW41; TexCommnA 1 SW(2d)273; TexCivA 271SW247; Tex CivA 283SW689; TexCivA 284SW339; TexCivA 289SW705; TexCivA 293SW 259; TexCivA 294SW349; TexCivA 294 SW625; TexCivA 5SW(2d)869; Tex CivA 11SW(2d)567; TexCivA 19SW(2d) 193; 141Wash451, 252P123, 126 [cit Cyc]. **Mistrial is properly declared** where essential findings are in such conflict that one destroys other. TexCivA 5SW(2d)782. **Special findings held not inconsistent.**–119Kan307, 239P993. **Sufficiency of conflict to prevent judgment.**–TexCivA 5SW(2d)782. **Test of inconsistency.**–115Tex537, 285SW296. **Findings held not inconsistent.**–129Kan135, 281P921; TexCivA 26SW(2d)1095.

1927–80 TexCommnA 276SW216; Tex CivA 283SW689; TexCivA 289SW705. **Court cannot make additional findings of fact,** though findings of jury are conflicting. 30F(2d)521.

1927–81 117 Or637, 244P531, 534 [cit Cyc].

1927–81½–New. Where plaintiff elects to have judgment entered on finding of gross negligence though evidence did not warrant such finding but only of ordinary negligence, plaintiff stands on judgment as whole, forfeiting only punitive damages. 197Wis601, 222NW826.

1927–81⅓–New. Court has duty of reconciling apparent conflicts in answers to special issues if it can reasonably be done. TexCivA 28SW(2d)264.

1927–82 197NC66, 147SE672(2dcase); 35 OklACR515; 117 Or637, 244P531, 534 [citCyc]; TexCivA 273SW886. **Special findings held not inconsistent with general verdict.**–123Kan470, 255P1109. **Findings held not inconsistent with general verdict.**–120 Oh72, 165NE579. **No presumption of inconsistency.**–54SD14, 222NW500.

1927–83 IndA 172NE198; 120Kan415, 243P1023; 120Kan712, 244P840; 121 Kan322, 246P497; 123Kan290, 255P32; 124Kan804, 262P571; 128Kan537, 278P 749; 129Kan475, 283P620 (general verdict set aside); 233Mich64, 206NW313; 172Minn171, 215NW225; 33 OhA475, 170NE27; 128 Okl 222, 262P205; 117 Or 637, 244P531, 534 [citCyc]; TexCivA 281SW877; TexCivA 18SW(2d)938; TexCivA 19SW(2d)216 (may set aside verdict and order new trial). See also 124Kan751, 262P496; 130 Or32, 273P 711; 128 Or359, 274P116(2dcase). **Findings held not inconsistent with general verdict.**–119Kan738, 241P246. **Special verdict held not inconsistent with general verdict.**–117 Or637, 244P531.

1928–85 Verdict should be set aside where special findings inconsistent with general verdict. 120Kan594, 244P1046.

1928–86 34NM146, 278P361; 117 Or 637, 244P531, 534 [citCyc]. **Special finding on issue which should not have been submitted** cannot control general verdict. 122 Or519, 259P1063. **Findings should show verdict is based on performance** alone in order to control general verdict, where issues of performance and estoppel are both pleaded, and there is failure of proof as to performance. 120 Oh72, 165NE579.

1928–88 117Nebr630, 222NW63; 117 Or637, 244P531, 534 [citCyc]; 130 Or 32, 273P711.

1928–90 117 Or637, 244P531, 534 [cit Cyc].

1928–91 319 Ill 344, 150NE276; 240 IllA165; 117 Or637, 244P531, 534 [cit Cyc].

1928–92 319 Ill 344, 150NE276; 240 IllA165; 121Kan322, 246P497; 117 Or 637, 244P531, 534 [citCyc].

1929–93 120Kan123, 241P1090; 121 Kan322, 246P497; 127Kan40, 242P120; 127Kan34, 272P155; 129Kan435, 283P 651; 130Kan707, 288P582; 117 Or637, 244P531, 534 [citCyc].

1929-94 319 Ill 344, 150NE276; 85 IndA611, 155NE218; 87 IndA6, 159NE767; 120Kan123, 241P1090 (consistent with general verdict); 120Kan139, 242P120; 120Kan712, 244P840; 121Kan322, 246P497; 127Kan564, 274P243; 119Oh360, 164NE345; 27 OhA279, 161NE230; 128 Okl 165, 261P913; 128 Okl 222, 262P205; 117 Or637, 244P531, 534 [cit Cyc]. **Special findings held not inconsistent with special verdict.**–121Kan431, 247P640. **Every conclusion, authorizing recovery** by party in whose favor general verdict is found, must be excluded by answers to interrogatories. IndA166NE18.

1930-95 121Kan322, 246P497; 117 Or637, 244P531, 534 [citCyc]. **Answer of "doubtful"** on controlling special issue of negligence will prevent entry if judgment in general verdict where there is competent testimony on that issue. 119Kan339, 239P984.

1930-96 85 IndA611, 155NE218; 117 Or637, 244P531, 534 [citCyc]. **Sufficiency of evidence to support special findings** is conceded for purpose of motion for judgment on special findings notwithstanding general verdict. 120Kan123, 243P331.

1930-98 87 IndA253, 157NE460 (finding on improperly submitted interrogatory is mere surplusage); 263Mass181, 160NE668, 57ALR944; 117 Or637, 244P531, 534 [citCyc].

1930-99 117 Or637, 244P531, 534 [cit Cyc]. **Where special findings of jury are upon immaterial issues,** action of court in rendering judgment presents no question of judgment notwithstanding verdict. TexCivA 283SW283.

1930-99½-New. Trial court has no power to disregard jury finding merely because it is defective in some particular. TexCivA 19SW(2d)216.

1930-1 117 Or637, 244P531, 534 [cit Cyc]. **The verdict must be construed as a whole,** etc. 130 Or32, 273P711. **Finding "we do not know"** has been held to mean "no." 118Kan673, 236P831. **Special findings construed.**–120Kan434, 243P1014; 120Kan712, 244P840. **Court may examine pleadings, evidence, and charge** to determine intention of verdict when findings are ambiguous. TexCivA 22SW(2d)753. **Findings held to embrace other findings.**–TexCivA 27SW(2d)616.

1930-2 TexCommnA 276SW162; Tex CommnA 277SW1050; TexCivA 15SW(2d)150; TexCivA 25SW(2d)642. **Special findings construed.**–205Cal 193, 270P443 (error in one finding held immaterial); 119Kan307, 239P993; 120Kan354, 241P1090 (not showing contributory negligence as matter of law); 120Kan139, 242P120; 120Kan645, 244P1057; 120Kan689, 244P1059; 197NC93, 147SE701; TexCommnA 12SW(2d)556; Tex CommnA 26SW(2d)189; TexCivA 273SW640; TexCivA 289SW705; TexCivA 289SW1023; TexCivA 18SW(2d)363; Tex CivA 16SW(2d)1100; 197Wis601, 222NW826.

1930-3 119Kan307, 239P993; 120Kan712, 244P840; 126Kan470, 268P809; 117 Or637, 244P531, 534 [citCyc]; Tex CivA 273SW694; TexCivA 10SW(2d)756. **Immaterial finding on issue improperly submitted** may and should be disregarded. TexCivA 299SW297.

1930-5 122Kan69, 251P184 ("We do not know," construed against party having burden); 117 Or637, 244P531, 534 [citCyc].

1930-6 117 Or637, 244P531, 534 [cit Cyc].

1931-7 TexCivA 10SW(2d)1028.

1931-11 166Ga523, 143SE761.

1931-11½-New. Finding that defendant did not cause or permit grain, refuse, or other substances to go from its premises upon or about property of plaintiff is not finding that plaintiff was not made sick nor suffered pain or mental anguish as proximate result of accumulation of grain, refuse, and other substances on or about his property. Tex CommnA 276SW426.

1931-11⅓-New. **Specific finding is not neutralized** by a finding introducing another factor. TexCivA 284SW339.

1931-11¼-New. Special findings by jury of fraud in sale held to become immaterial on issue of fraud being eliminated by court's finding of waiver of right to rescind. TexCivA 283SW642.

1931-11⅙-New. Special findings upon questions of primary negligence and discovered peril held not contradictory as issue of discovered peril does not eliminate issue of primary negligence. Tex CommnA 288SW150.

1931-11⅙-New. Issue must be read with explanatory part of charge to jury. TexCommnA 12SW(2d)556.

1931-12 TexCivA 293SW221. **Party failing to submit** issues on which he relies waives trial thereon. TexCivA 294SW331.

1931-14½-New. Special finding that notes were given to liquidate preëxisting debt does not conclusively show lack of consideration. TexCivA 293SW916.

1931-16½-New. Under statutes, special verdict is not dependent on jury first returning general verdict. 208 Iowa404, 226NW79.

1931-18 TexCivA 9SW(2d)468. **Court cannot change jury's finding** where it is supported by evidence. 200Wis26, 227NW282. **Verdict should not be disturbed** if there is any evidence to support it. 200Wis312, 227NW240.

1931-19½-New. Court may add the legal interest.–TexCivA 293SW869.

1931-20 191NC319, 131SE641; Tex CivA 284SW620; TexCivA 284SW705; TexCivA 288SW545; TexCivA 288SW627; TexCivA 292SW925; TexCivA 294SW331; TexCivA 300SW253; TexCivA 25SW(2d)636 (judgment cannot be rendered contrary to jury's findings); 187 Wis270, 202NW665 (evidence conflicting); Wis 228NW746. **Plaintiff's failure to request issues** raised by defense does not empower court to find on such omitted issues. TexCivA 294SW331. **Finding held not subject to remittitur.**–TexCivA 27SW(2d)608.

1932-21 194Wis149, 216NW165; 195 Wis153, 217NW717; 198Wis89, 223NW429.

1932-22 Trial court can set aside verdict and grant new trial. TexCivA 300SW253.

1932-24 187Wis616, 205NW397; 196 Wis625, 220NW651.

1932-25½-New. Court cannot cure error in submitting special interrogatories by ignoring answers.–TexCivA 280SW347.

1932-25⅓-New. Immaterial findings may be disregarded and court may render judgment based on findings of his own not in conflict with jury findings. TexCivA 18SW(2d)804.

1932-27 TexCivA 284SW983. **Where answers to special interrogatories are conflicting** court should inform jury of fact and that answers do not warrant any judgment and should retire jury for further consideration. TexCommnA 291SW216. **Where answers are sufficiently specific to show basis of verdict and which party is entitled to recover,** it is not error to refuse to ask jury to give more specific answers. 125Kan206, 263P1079.

1932-28 114Nebr593, 208NW961.

1932-31 114Nebr593, 208NW961. **Failure to require jury to answer certain issues** submitted to them is not error where answers would have been contradictory, and finding on issues answered disposed of issues. TexCivA 19SW(2d)821.

1932-33½-New. Refusal of trial court to require jurors to return more definite answer than "We don't know," to a question submitted to them may be proper or improper according to the circumstances, 121Kan665, 249P678.

1932-33⅓-New. but not so prejudicial as to require reversal. 121Kan665, 249P678.

1932-34 195NC328, 142SE27; TexCivA 270SW187; TexCivA 5SW(2d)618; Tex CivA 22SW(2d)508; TexCivA 28SW(2d)173. **In Texas.**–CivA 291SW272. **Objection held sufficient.**–TexCivA 4SW(2d)641.

1933-39 120Kan645, 244P1057.

1933-40 120Kan712, 244P840; 120Kan645, 244P1057; TexCivA 30SW(2d)711. **Failure to sign answers.**–87 IndA110, 166NE672(2dcase).

1933-41 50ND163, 195NW157. **Exception to taking special verdict is not request for general verdict.**–223AppDiv186, 228NYS63.

1933-42 Contra MoA 274SW911; Tex CivA 7SW(2d)1110. **Submission of immaterial question** by agreement is a waiver of right to object thereto unless verdict is thereby rendered equivocal and indefinite. 50ND163, 195NW157.

1933-42½-New. Motion for judgment upon answer to special questions, notwithstanding general verdict, concedes that answers are sustained by evidence. 120Kan712, 244P840.

1933-43½-New. Objection to submission of special issue in court's charge is waived by subsequent submission of instruction given by court and practically adopting such issue. TexCivA 285SW1115.

1933-43⅓-New. Objection to absence of general verdict is waived by failure to object when trial court announced only special issues would be submitted. CalA286P1050.

1933-43¼-New. Undisputed fact issues are not waived by failure to request their submission to jury. TexCivA 29SW(2d)500.

1933-43⅙-New. Defense established as matter of law is not waived by failure to request submission or peremptory instruction. TexCivA 29SW(2d)500.

1933-45 TexCivA 275SW295. **Court may determine circumstances of case, weight and sufficiency of evidence and may draw upon common knowledge.**–81 Colo 413, 255P989. **Inspection of premises involved by judge** held not improper. 173Minn61, 216NW535.

1934-48 80CalA342, 251P818. **Limitation of argument** is within discretion of trial court. 80CalA342, 251P818.

1934-49 Argument.–40Wyo 89, 275P101.

1934-49½-New. Discretionary for court to inspect premises without consent of parties and not in their presence. 214Ala53, 106S338.

1934-49⅓-New. Commended as a rule of judicial propriety that court when inspecting premises should do so in presence of parties. Ala 106S339.

1934-49¼-New. Court, as trier of fact, may consider mere estimates of value especially where made by interested party, in light of circumstances, common knowledge and experience. 27F(2d)852.

1934-50 76Mont320, 246P953, 48ALR1425 (agreed statement of facts not existing when action begun). **It is common practice** for judge to accept statements of counsel not disputed. 259Mass259, 156NE424.

1934-50½-New. Refusal of judge to allow rescission of agreed statement of facts has been held not abuse of discretion. 147SC27, 144SE592.

1934-51 328 Ill 431, 159NE780. **Insufficient description of property in broker's agency contract** is cured by agreed statement of facts giving adequate description. 90CalA512, 265P1016. **Construction of admission.**–TexCivA 15SW(2d)25.

1934-56 MoA 285SW110.

1934-57 288Pa383, 135A635; TexCivA 291SW276. **Admission of evidence on matter beyond terms of agreement** as to facts held error. TexCivA 293SW243.

1934-59 TexCivA 291SW276. But see Mass 169NE142. **Only questions of law** are made for decision of court. 115 Okl 44, 241P480.

1935-60 Vt 148A408(2dcase).

1935-61 34F(2d)786; TexCivA 291SW276, 278 [citCyc].

1935-62 143SC422, 141SE683. **A conclusion of law contradictory of the agreed statement,** etc. 82Mont115, 265P676.

1935-63 TexCivA 291SW276, 278 [cit Cyc].

1935-72 See also 10PaDist&Co 436.

1936-74 MoA 283SW714.

1936-76½-New. Stipulation permitting decision by court with same force and effect as though on motion for judgment on pleadings by party on dismissal of original pleading. 215AppDiv637, 214NYS386.

1936-76⅓-New. Stipulated statement of facts held not to justify finding of un-

fair competition by defendant. 38F(2d) 790.

1936-76¼-New. Right to determine admissibility of evidence, where case is presented on stipulation for determination upon evidence legally admissible, is not vested in the parties. 128Me544, 148A687(1stcase).

1936-78 170Ga523, 153SE213; 171Minn 475, 214NW469; 174Minn241, 219NW76; 138SC169, 136SE209.

1936-79 171Minn475, 214NW469; MoA 18SW(2d)203; Wash 291P1085. **If evidence is in substantial conflict and matter not otherwise covered,** interrogatory should be submitted. 32Ariz135, 256P 507. **The orphans' court,** etc., upon certification of issues to common pleas from orphans' court in form of questions, court cannot enter general verdict. 8PaDist&Co 160. **Equitable issues may be submitted to jury.** 25 OhA426, 158NE279. **Constitutional right to trial by court** is not violated by submission of certain questions to jury for advisory verdict. 52SD448, 218NW597. **Proceeding for enforcement of attorney's lien is special proceeding,** not action, and court cannot order framing of issues for jury. 138Misc6, 245NYS28.

1936-80 129Kan140, 281P919; 234Ky 227, 27SW(2d)940; 166Minn328, 207NW 641; 167Minn494, 210NW66; 176Minn 550, 224NW237; 132SC360, 128SE172 (within discretion under court rule); 134SC207, 132SE620; 140SC107, 138SE 622; 141SC232, 139SE465. **Cases held proper for exercise of discretionary power of court.**-138SC169, 136SE209. **Broker waived right to recover commission** on theory of contract by failing to object to court's submitting issue solely on theory of quantum meruit. TexCivA 297SW1096. **That judge's son is attorney for one of parties** is not ground for submission of issue to jury. 177Minn 169, 225NW109. **Where complaint is fatally defective or, on undisputed evidence, action is barred by limitations or laches,** verdict of jury is not essential, though plaintiff offers evidence which standing alone would call for intervention of jury. 195NC498, 142SE776. **Proceeding for enforcement of attorney's lien is in equity,** and issues should not be framed for jury even if court has discretion. 138Misc6, 245NYS28.

1936-81 But see 232Ky1, 22SW(2d)411. **Denial of issue under counterclaim** not error under evidence. 233Ky682, 26SW (2d)519.

1936-82½-New. Where complaint contains legal and equitable causes court should submit framed issues to jury. 216AppDiv552, 215NYS494.

1936-83 But see 137Misc18, 242NYS118.

1936-84 Single question of fact.-32Ariz 135, 256P507.

1936-85 Time for application.-See also 235Ky810, 32SW(2d)401.

1937-86½-New. Where parties take position that all questions of fact are for court except that plaintiff asks special verdict of jury on a single issue, all other questions are for court. 127Misc 344, 216NYS97.

1937-88 32Ariz135, 256P507. **Instructions held sufficient.**-32Ariz135, 256P 507.

1937-89 214Ky63, 282SW760; 74Mont 420, 240P821; 42 OklACR70 [reh pending]; 138SC169, 136SE209; 195Wis203, 217NW416; 200Wis429, 228NW497 (where case gets on jury calendar and is tried without objection). **Essential character of litigation** held not changed by fact that case was tried to jury. 25 OhA 426, 158NE279. **Acceptance of verdict is discretionary** with chancellor. 234Ky 227, 27SW(2d)940.

1937-90 214Ky63, 282SW760; MoA 300 SW1004.

1938-92 32Ariz135, 256P507; 214Ky63, 282SW760. **Findings of court contrary to verdict of jury** held to be warranted by evidence. 74Mont420, 240P821.

1938-93½-New. Court makes findings of jury its own where it approves and adopts them. 121Kan622, 249P675.

1938-93½-New. Under stipulation of parties, court may inspect subject matter before decision. 228AppDiv872, 240NYS 445.

1938-95 MoA 288SW970; TexCivA 25 SW(2d)907(2dcase).

1938-98½-New. Court has power to pass on both law and fact in deciding on admission of evidence. 256Mass329, 152 NE363.

1938-98½-New. Evidence received before another judge.-On motion to set aside referee's report and decide issues, evidence introduced before another judge who rendered interlocutory decree dissolving partnership cannot be considered. 96CalA365, 274P405.

1938-1 See also TexCivA 282SW940.

1939-4 7F(2d)855; 28F(2d)463; 202 Cal 279, 260P291; CalA 291P886; 107 Conn380, 140A724; IndA 168NE613; 125Kan154, 264P77; 217Ky106, 288SW 1041 (after court indicated intention to overrule exceptions to commissioner's report); 12LaA612, 125S781; Minn 231 NW397; 317Mo 544, 297SW54; 318Mo 1031, 4SW(2d)1072; 34NM526, 284P 761; 52ND112, 202NW280; 130 Or612, 280P344; SD 230NW759; 148Wash274, 268P883. Contra 216Ala272, 113S240. **Motion to substitute one set of certified documents** for another introduced at trial held properly denied two months after trial. Mont 286P140.

1939-6 88CalA192, 263P325 (discretion held not abused); Iowa 231NW479; 217 Ky106, 288SW1041; 52ND112, 202NW 280. **Refusal to reopen case held proper exercise of discretion.**-181Ark1089, 29 SW(2d)294; 125Kan154, 264P77; 223 Ky710, 4SW(2d)701; 160La12, 106S658 (to prove date in variance with pleadings); 319Mo 149, 3SW(2d)1008; Tex CivA 2SW(2d)929; 39Wyo 141, 270P 537. **Cumulative evidence.**-130Kan641, 287P245; 12LaA612, 125S781.

1939-9½-New. Refusal of court to submit check in evidence after submission of case is error where check had been already introduced without objection or exception. 214AppDiv296, 212NYS230.

1939-11 126Me254, 137A692, 693 [quot Cyc].

1940-12 125 Or515, 266P1067, 1069 [quotCJ].

1943-16 NS [1929] 1DomLR702. **Testimony admissible to impeach held improperly considered to permit recovery** on issue not pleaded or proved. 227App Div299, 237NYS425.

1943-21 117 Okl 300, 246P220.

1944-31½-New. Plaintiff does not waive objection to consideration of evidence before another judge by relying on parts of transcript. 96CalA365, 274P405.

1945-32 200Cal 152, 252P325; 68CalA 244, 228P865; 69CalA16, 230P181; 81 CalA715, 254P909; 83CalA655, 257P447; 120Kan135, 242P131; 124Kan423, 260P 609; 173Minn529, 217NW933; 101NJEq 664, 139A33; 134 Okl 70, 272P857; 123 Or69, 260P1011; 86PaSuper529; 33 PortoRico 201; TexCivA 275SW232; TexCivA 275SW295; TexCivA 286SW 292; TexCivA 288SW840 (holding party not entitled to judgment as matter of law on own uncorroborated testimony); 148Va479, 139SE295. **Court may give credence to testimony** which is not inherently incredible or improbable and is in large part corroborated by other evidence. 195Cal 354, 233P330.

1945-33 31Ariz169, 251P446; 69CalA16, 230P181; 91CalA654, 267P572; 122Kan 771, 253P225; 124Kan382, 260P627; 104 NJL34, 139A322; 123 Or69, 260P1011; 48SD474, 205NW47; TexCivA 275SW 232; TexCivA 275SW295; TexCivA 286 SW292; TexCivA 19SW(2d)107.

1945-34 Mass 167NE228; 34PortoRico 153 (evidence ignored not affecting result).

1945-35 68CalA244, 228P865; 71CalA 534, 235P745; 75CalA44, 242P109; 221 MoA568, 282SW1033; 35PortoRico 118 (aged woman); 144Wash609, 258P493.

1945-36 172Ark527, 290SW43; 71CalA 534, 235P745; 75CalA44, 242P109; 101 NJEq664, 139A33; 144Wash609, 258P 493. **Court may accept part only of witness' testimony** and reject other parts. 90CalA443, 265P971.

1945-37 124Kan423, 260P609; 81Mont 393, 264P115; TexCivA 286SW292. But see SD 225NW385. **Interested witness.**-144Wash609, 258P493. See also 166Minn 153, 207NW311.

1945-37½-New. In case jury trial is waived in law case, party wishing to challenge generally sufficiency of evidence should move just as though trial were had before jury. 30F(2d)46.

1945-37½-New. Where neither petition nor facts proved constitute cause of action, court must render judgment against plaintiff. Oh 171NE108.

1945-39 MoA 28SW(2d)368; 134 Okl 70, 272P857; 136 Okl 5, 275P618. **In Oklahoma.**-119 Okl 168, 249P302. **In equity,** etc. 138 Okl 4, 280P263. But see 134 Okl 70, 272P857; 134 Okl 86, 272P 865.

1945-40 Prayer for instruction that evidence is insufficient for recovery held to amount to demurrer to evidence. 153Md 188, 137A902. **Failure of defendant to offer any evidence** partakes of nature of demurrer to evidence. 46 Ida153, 266P 795.

1946-42 MoA 30SW(2d)203.

1946-43 320 Ill 317, 150NE911; 153Md 188, 137A902. **Error in overruling motion for judgment at close of plaintiff's case is waived** where defendant puts in his own case and fails to renew motion at close of all of evidence. 39Wyo 141, 270P537. **Motion for judgment at close of plaintiff's case** is in nature of demurrer and admits its truth. 39Wyo 141, 270P537.

1946-44 121Kan745, 250P328 (demurrer properly overruled). **Motion is properly overruled** where evidence justifies findings for plaintiff. 33NM440, 270P 794, 63ALR237.

1946-45 123Kan405, 256P147; 123Kan 415, 256P141; MoA 289SW356; MoA 11SW(2d)1101. **If there is any substantial evidence,** demurrer should be overruled. MoA 14SW(2d)29. **Demurrer is properly overruled** where, in action for cancellation of deed alleged to have been procured by fraud, plaintiff produces evidence in support of all material allegations of his petition sufficiently clear and satisfactory to overcome presumption in favor of deed. 135 Okl 208, 275P331.

1946-46 15F(2d)672; 320 Ill 317, 150 NE911; 123Kan405, 256P147; MoA 9 SW(2d)89; 119 Okl 278, 249P715. **In equitable proceedings,** etc. 79Mont 198, 255P737. **In Oklahoma.**-138 Okl 212, 281P265.

1946-46½-New. In equitable case, error cannot be predicated upon giving, or refusal to grant, demurrer to evidence. MoA 15SW(2d)382.

1946-46½-New. By presenting evidence in support of his own case petitioner waives error in overruling motion for judgment at close of respondent's case. 34NM587, 286P828.

1947-50 67Utah90, 245P977 (to prevent nonsuit plaintiff must prove case by clear and convincing evidence).

1947-53 See also 32PortoRico 674.

1947-54 Directing verdict on agreed facts is error where different inferences might reasonably be drawn. 189 NC546, 127SE531. **Motion to dismiss at close of whole case is properly denied** where findings for plaintiff are sustained by substantial evidence. 33 NM414, 269P56.

1947-55 34F(2d)245; 67Utah90, 245P 977.

1947-55½-New. Until both sides have rested and evidence is closed, trial court cannot ordinarily determine sufficiency of plaintiff's evidence for nonsuit. CalA 275P500(2dcase).

1947-55½-New. Refusal to dismiss when plaintiff rested is not reversible error. where evidence, when both parties rested, justified finding for plaintiff. 33NM414, 269P56.

1947-55¼-New. Motion for dismissal of petition in equitable case at close of plaintiff's evidence is tantamount to announcement that defendant rests. Iowa 229NW257.

1947-57 Mo 282SW392; Mo 14SW(2d) 444; 220MoA564, 287SW856; MoA 15 SW(2d)382. **Reasons for declining to give requests for rulings need not be stated by trial judge.** 262Mass191, 159 NE735.

1948-58 252Mass535, 147NE895. **In Illinois,** etc. 323 Ill 90, 153NE732. **When not essential**-176Ark1206, 3SW

(2d)297. **Substitution of trustee in bankruptcy** for plaintiff buyer before finding has been held to render request as to burden of proof nugatory. 253 Mass368, 149NE118.

1948-59 Mo 300SW497.

1948-61 315Mo 442, 286SW385; 318 Mo 408, 300SW506. But see 243 IllA 263. **Refusal proper** where assumption as basis of request is not supported by evidence. 253Mass368, 149NE118. **Ruling held proper** under evidence. 265 Mass322, 163NE743.

1948-62 Mo 300SW497; MoA 2SW(2d) 178.

1949-63 252Mass535, 147NE895.

1949-63½-New. Rulings may be refused where rendered unnecessary by finding of certain facts. 253Mass548, 149NE413.

1949-67 **Entry of judgment for plaintiff** improper where there remains open issue. 265Mass322, 163NE743.

1949-67½-New. Rulings on questions of law not applicable to issues may properly be refused, 124Me411, 130A 242.

1949-67½-New. as may be rulings requested which are contradicted by facts supported by evidence. 124Me411, 130 A242.

1949-67¼-New. Requested ruling on all evidence is matter for motion under rule of court. Mass 170NE52.

1949-67⅛-New. Peremptory declaration for plaintiff is error where there is substantial evidence supporting defendant's case. MoA 30SW(2d)774.

1949-68 **Technical accuracy held** not required. 315Mo 442, 286SW385.

1949-70 Mass 169NE419.

1949-76 265Mass322, 163NE743.

1950-77 253Mass200, 148NE441; 253 Mass586, 149NE620; 265Mass322, 163 NE743; Mass 170NE52; Mass 173NE 429; MoA 25SW(2d)1075. **Declarations held not erroneous.**-MoA 15SW(2d)909.

1950-81½-New. Request based on assumption contrary to finding by court is properly refused. 253Mass586, 149 NE620.

1950-81⅓-New. Prayer may be modified where it contains matter not based on evidence. 149Md474, 132A70.

1950-81¼-New. Refusal to submit declarations of law in accordance with request has been held not to constitute error, where some of propositions propounded were sound and some were not. 321Mo 1104, 14SW(2d)425.

1950-81⅕-New. **Declarations of law amounting to demurrers to evidence** held properly refused. MoA 20SW(2d) 944.

1950-85 **Refusal by implication.**-252 Mass535, 147NE895. **Request for ruling rendered immaterial by finding of fact,** properly refused. 255Mass480, 152NE240.

1950-90 222AppDiv479, 226NYS611. **Opinions of judge** during the course of trial are not binding. 73CalA441, 238 P1104. **Trial judge must render firm decision** on issues of fact and cannot escape responsibility by mere statement that his mind is confused or unsettled. 15F(2d)258.

1951-91 49ND64, 189NW681; 49SD 587, 207NW659. **Where only single issue is submitted to jury,** court should give written decision of issues not submitted. 49SD587, 207NW659. **Clerk's minutes of decision of court** do not constitute written decision. 49ND64, 189 NW 681.

1951-93 **Statute providing that visiting judge may transmit decision by mail** refers only to cases where visiting judge does not return to county of trial. Ariz 284P353.

1951-95 49SD587, 207NW659.

1951-96 **Statement of grounds held sufficient.**-29Hawaii548.

1951-96½-New. Before judgment judge may reconsider and correct erroneous decision. Mass 172NE884.

1951-97 204 Iowa1037, 216NW622. **Duty to decide promptly** and within reasonable time after submission under surrounding circumstances. 329 Ill 528, 161NE110. **Failure to file decision within statutory time does not invalidate decree.**-123 Or639, 263P385. **When case is entered with court** at final adjournment of term, but purpose is not effected within succeeding vacation, the case stands on docket of new term for trial or other disposition. 100Vt 387, 138A867. **Entry with court.**-100 Vt387, 138A867.

1951-98 31Ariz284, 252P190; 74Mont 558, 241P636.

1952-99 31Ariz284, 252P190; IndA 167NE535 (delay attributable to party claiming error); 74Mont558, 241P636.

1952-99½-New. Judge should not reach final conclusion upon issue till he has heard all evidence bearing upon it. Mass 171NE54.

1953-11 27Hawaii20.

1953-12 72CalA426, 237P557; 130 Okl 79, 262P1067; TexCivA 286SW647. **Finding that depositor received full value for certificate of deposit** held to be a finding of fact. 84 IndA334, 150 NE662.

1953-13 238Mich253, 213NW150; 116 Nebr880, 219NW390, 391 [quotCyc]; NH 151A452.

1954-16 17F(2d)337; 72CalA426, 237 P557; CalA 291P659; CalA 291P877; 41 Idal, 236P870; 89 IndA714, 166NE 775(1stcase); 121Kan490, 247P449; 122Kan771, 253P225; 125Kan286, 264 P75; 172Minn217, 214NW892; 175 Minn252, 220NW951; 75Mont416, 244P 485; 30NM431, 236P735; NM 290P 1022; 19 OhA23 (provision is mandatory); 112 Okl 212, 239P989; 127 Okl 132, 260P22 (statute mandatory); 121 Or28, 253P879; 121 Or482, 256P190 (absence of findings and conclusions rendered judgment inoperative); Tex CivA 275SW196 (limited to cases tried without jury); TexCivA 24SW(2d)65 (1stcase); 70Utah1, 257P673; 70Utah 57, 257P1060; 99Vt65, 130A749; 149 Wash663, 271P893; 150Wash510, 273 P533(4thcase). See also 138Misc241, 245NYS442. **Partial requirement.**-35 F(2d)272; 36F(2d)37. **Failure to make findings upon all material issues** is ground for reversal in some states. 42 Ida48, 246P12. **In Connecticut.**-106 Conn503, 138A367. **In federal courts** refusal of findings of fact in law action is not error, it being discretionary. 32 F(2d)66. **In trial with jury,** court need not file. TexCivA 286SW307. **It is duty of trial court to find facts.**-190NC 599, 130SE498. **Requirement is mandatory** on trial of questions of fact unless findings are waived. 88CalA607, 263P1038. **In Massachusetts.**-167NE 228. **Finding held not necessary.**-CalA 292P1000.

1954-16½-New. **Notice of findings.**-In Michigan notice of filing of court's findings in trial without jury need not be given. 233Mich523, 207NW14.

1954-17 103Conn41, 130A86 (finding to support judgment to be made on motion of either party).

1954-18½-New. In Massachusetts findings of fact are not required in law case though requested. 253Mass472, 149NE110.

1955-21 121Kan490, 247P449; 168Minn 50, 209NW533.

1955-22 TexCivA 281SW270 (where testimony raised only one issue of fact and judgment showed decision thereof). See also 103Conn41, 130A86.

1955-22½-New. **Where judgment is rendered on pleadings,** there is no necessity for finding. 166Minn323, 207 NW632.

1955-22⅓-New. Findings are properly made where court dismisses plaintiff's case on merits at close of plaintiff's case. 215AppDiv617, 213NYS468.

1955-22¼-New. Whatever is within range of reasonable deduction from all evidence is legitimate inference and conclusion, and if evidence on each side is partly discounted with mesne result it is proper exercise of fact finding function. 32NH105, 129A873.

1955-22⅕-New. **Right to findings of fact may be waived.**-44 OklACR98.

1955-22⅙-New. Finding held necessary to combat plaintiff's finding. 100Vt439, 138A735.

1955-22⅐-New. Where judgment is decided upon question of law, no findings are necessary, and failure to file them does not postpone running of sixty-day period for appeal. 98CalA267, 276P 1119.

1955-23 73CalA421, 238P1096.

1955-24 198Cal 490, 246P324. See also TexCivA 275SW196. **When judgment on pleadings is granted,** no findings of fact will be made. 180Minn9, 230NW118.

1955-25 198Cal 641, 246P1041; 86CalA 553, 261P1041; 94CalA511, 271P514; CalA 290P304; TexCivA 291SW276. **The court may nevertheless make findings,** etc. 99CalA723, 279P464.

1955-25½-New. where both parties move for directed verdict; 220AppDiv 160, 221NYS11.

1955-26 39F(2d)940; 96CalA130, 273P 598; CalA 274P572; 101CalA669, 282P 26. **Where judgment is by default,** findings of fact and conclusions of law are unnecessary. 84CalA434, 258P405. **Where there is no conflict in evidence,** it is only necessary for court to make conclusions of law without making findings of fact. 46 Ida153, 266P795.

1956-28 Mo 282SW392; 222MoA268, 296SW205; Or 282P119; 155Wash101, 283P678(2dcase); Wash 286P62; Wash 289P1013. **In North Carolina.**-193NC 35, 136SE193.

1956-29 Utah 269P103. But see MoA 15SW(2d)382. **Where a case is tried partly by the court,** etc. In action for recovery of real property and accounting where right to trial by jury of possession was not waived, findings on that branch of case were unnecessary. 205Cal 782, 272P1048.

1956-29½-New. Where verdict is directed findings of fact and conclusions of law are unnecessary. Ida 290P211.

1956-32½-New. **Surrogate not required to make findings of fact,** but he may do so. 213AppDiv395, 211NYS128.

1956-32¼-New. **Provision is applicable to municipal courts.**-19 OhA23.

1956-32¾-New. Where judgment is decided on question of law findings are not required. 98CalA267, 276P1119; 98CalA267, 276P1119(2dcase).

1956-32⅞-New. In some jurisdictions, if one party requests court to submit controverted question to jury, court is without authority to make finding thereon. TexCivA 20SW(2d)797.

1957-33 217Ala374, 115S877; 121Kan 490, 247P449; 122Kan771, 253P225; 247Mich620, 226NW658; 172Minn217, 214NW892; 172Minn110, 215NW192; 220MoA1067, 279SW727; 75Mont416, 244P485; NH 151A452; NM 289P596; 117 Okl 181, 245P594; 126 Okl 162, 259 P209; 127 Okl 132, 260P22; 286Pa119, 133A217; TexCivA 15SW(2d)702. **In Kansas.**-122Kan544, 253P205. **In Oregon.**-119 Or473, 249P1052. **Insufficient request.**-TexCivA 28W(2d)470. **Party failing to request finding** abandons that ground of recovery. TexCivA 24SW(2d) 542.

1957-34 75Mont416, 244P485; NH 151 A707; 34 OhA192, 170NE592; TexCivA 2SW(2d)470.

1957-36 TexCivA 30SW(2d)797.

1958-37 122Kan755, 253P556.

1958-38 122Kan755, 253P556; 32NH 105, 129A873 (insufficient as request to find). **Oral request for special finding without specifying finding desired** presents no question of law. 30F(2d) 642.

1958-43 **Request bad in part may be refused as whole.**-103Conn285, 130A387. **Requested finding held not supported** by evidence and properly refused. 103 Conn285, 130A387. **Requests for rulings inconsistent with findings of fact** held properly refused. 254Mass534, 150NE 866.

1958-45 **Application for specific findings negatives waiver of compliance with statute.**-34NM121, 278P197. **Rejected request for specific findings** amounts to request for compliance with statute relative to findings. 34NM121, 278P197.

1959-47 34F(2d)883; Ariz 283P287; Ariz 284P353; 75Mont416, 244P485 (at close of argument); 19PortoRico 111. **Where findings were not requested till three days after argument,** court did not err in failing to make findings. 75 Mont416, 244P485. **Requests may be**

filed after entry of judgment, in discretion of court, under some code provisions. 129Misc127, 220NYS526. **Request must be made just before or at close of argument** under general rule of practice followed in some jurisdictions. 126 Okl 162, 259P209 (filing of request several days before trial insufficient when not called to court's attention at trial).

1959-48 214Ala427, 108S564, 565 [quot Cyc]; TexCommnA 5SW(2d)135; Tex CivA 283SW591. **A request made on the last day, etc.** But see TexCivA 3SW(2d)585. **Conclusions of fact and law filed more than ten days after adjournment of term rendering judgment** held not considered on appeal. TexCivA 283SW591. **Request made after decision is announced** is too late. 127Kan100, 272P149.

1959-49 214Ala427, 108S564, 565 [quot Cyc]; 22AlaA476, 116S508; Ariz 283P287; 121Kan490, 247P449; 249Mich16, 227NW539; 82NH105, 129A873; 117 Okl43, 246P873 (because court announces what its judgment will be). **Request made after court has indicated its decision is not in apt time.** 131 Okl 249, 268P276.

1959-50 214Ala427, 108S564, 565 [quot Cyc].

1959-50½-New. Defendants failing to file proposed findings before judgment should in court's discretion be permitted to do so thereafter nunc pro tunc. 224 AppDiv694, 225NYS38.

1959-50⅓-New. Court does not lose jurisdiction because delaying findings and judgment until after end of term. 88 IndA432, 164NE414.

1959-50¼-New. Request for findings must be made in proper time.-Ariz 284 P353.

1960-56½-New. Where statute provides that either party may submit written propositions upon which court shall write "refused" or "held," it is reversible error for court to refuse to pass thereon. 224 IllA559.

1960-56⅓-New. On rejecting all specific findings tendered, court should make findings in conformity with statute. 34NM121, 278P197.

1960-57 73CalA421, 238P1096.

1960-58 80Colo 536, 252P815. **Marking of each statement of fact and conclusion of law** has been held not to destroy effect of court's signature. 224AppDiv 568, 232NYS26.

1961-59 37F(2d)896(1stcase); 30Ariz 505, 249P71; 80Colo 536, 252P815; 106 Conn287, 137A751 (memorandum of decision should not be made part of finding); 192Wis214, 212NW266; 194Wis 82, 215NW818. But see 17F(2d)337; 232Mich680, 206NW307; 251Mich155, 230NW920. **Findings of fact and judgment** based thereon may be included in same document. 69CalA1, 230P208. **Oral decision** at close of testimony is not finding of fact. 135Wash338, 237P732. **Court's statement at conclusion of testimony directing judgment** cannot be construed as findings of fact. 90CalA 601, 265P1025. **Statement of judge at time of judgment** cannot take place of findings of fact or conclusions of law. Ariz 284P353.

1961-60 124 Okl 260, 256P727. **A submission to the adverse party,** etc. See also 130 Or612, 280P344. **Service of finding is not required** where record does not show court directed preparation of findings. 102CalA445, 283P112.

1961-63 Utah 271P31. See also 171 Minn29, 213NW45.

1961-64 91CalA715, 267P741.

1961-65 130 Okl 79, 262P1067; 70Utah 409, 260P859. **Finding need not be in language of request.**-130 Okl 79, 262P 1067. **Decision as finding of fact.**-121 Or92, 254P800, 51ALR1200. **Stating conclusions in judgment** constitutes sufficient conclusions of law and fact. Tex CivA 284SW296. **In New York.**-135Misc 724, 238NYS310.

1962-66 But see TexCivA 31SW(2d) 1090.

1962-67 TexCivA 278SW282; TexCivA 286SW614. **What constitutes filing.**-TexCivA 284SW296.

1962-68 TexCivA 278SW282.

1962-69 TexCivA 30SW(2d)797. But see TexCivA 278SW282; TexCivA 286 SW614; TexCivA 5SW(2d)836; Tex CivA 11SW(2d)608; TexCivA 16SW (2d)982; TexCivA 27SW(2d)873; Tex CivA 31SW(2d)1090. **In Texas.**-CivA 3SW(2d)585. **When findings and conclusions are filed after ten days from adjournment of term,** they cannot be considered. TexCivA 294SW653; Tex CivA 28SW(2d)892.

1962-69½-New. Refusal to find facts in language requested and facts not affecting result is not error. 107Conn32, 139A348.

1962-69⅓-New. As to parties.-Where complaint is laid against two defendants court should make findings as to each. 92CalA203, 268P396.

1962-69¼-New. Absent prejudice to adverse party error in not serving copy of findings will be disregarded. 102 CalA445, 283P112.

1962-69⅕-New. Only one finding on matters common to all causes of action should be made. 104CalA715, 286P733.

1962-69⅙-New. Memorandum of decisions should not be made part of finding. 111Conn537, 150A509.

1962-70 103Conn624, 131A420 (general statement to contrary, but suit appearing to be in equity); 86 IndA484, 156 NE589; 216Ky652, 288SW299; 172Minn 72, 214NW783; 179Minn381, 230NW257 (2dcase) (statement held not to comply with statute); 112 Okl 212, 239P989. **Object of provision** is to make decision self-interpreting. 171Minn276, 214NW 45.

1962-71 226Ky773, 11SW(2d)915; 172 Minn72, 214NW783; NH 151A452; 40 OklACR479 [reh pending].

1963-72 226Ky773, 11SW(2d)915; 29 OhA233, 163NE502.

1963-75 103Conn624, 131A420.

1964-80 70CalA432, 233P394; 92CalA 360, 268P459; 93CalA27, 268P1093; 66 Utah612, 245P329.

1964-80½-New. Conclusions of law not impaired because findings of fact are stated therein, where same facts are also stated in separate findings of fact. 86IndA411, 157NE446.

1964-83 17F(2d)337; 196Cal 768, 239P 309; 72CalA757, 238P143; 83CalA441, 257P112; 104CalA128, 284P1047; Ind 168NE185; 123Kan393, 254P366; 127 Kan227, 273P398; 169Minn231, 211NW 9; MoA 31SW(2d)86; 33NM303, 265P 454; 119 Or473, 249P1052; 86PaSuper 256; 50Philippine380; TexCivA 284SW 989; TexCivA 8SW(2d)693; TexCivA 17SW(2d)182; TexCivA 31SW(2d)1090; 70Utah1, 257P673; Utah 278P529; Wash 290P704. **Findings sufficient to sustain judgment.**-84CalA430, 258P407; 89CalA43, 264P292; 90CalA213, 265P 876. **Entry of decree imports finding of subsidiary facts** to support it. 259Mass 259, 156NE424. **Making further subsidiary findings** held unnecessary. 262 Mass191, 159NE735.

1965-84 92CalA598, 268P659; TexCivA 15SW(2d)1095.

1966-86 68CalA270, 228P1057; 80CalA 284, 251P810; 82CalA174, 255P222; 84 CalA567, 258P453; 91CalA213, 266P 956; 92CalA598, 268P659; 97CalA597, 275P994; 99CalA759, 279P491(2dcase); 102CalA361, 282P1017; CalA 288P1096; 41 Ida257, 239P522; 47 Ida507, 276P 966; MoA 30SW(2d)186; TexCivA 1SW (2d)738; Wyo 259P185. **Construction in connection with the pleadings,** etc. 34NM127, 279P72; 101Vt147, 141A682. **Finding must be read as whole.**-88CalA 405, 263P573.

1966-88 68CalA270, 228P1057; CalA 264P1104; CalA 265P957; 91CalA333, 266P1009; 100CalA173, 279P1057; Tex CivA 1SW(2d)738; TexCivA 27SW(2d) 897.

1966-89 195Cal 354, 233P330; 70CalA 778, 234P435; 88CalA192, 263P325; 175Minn115, 220NW551; TexCivA 20SW (2d)236.

1966-91½-New. Effect of denial of judgment.-TexCivA 9SW(2d)1046.

1967-92 15F(2d)585; 69CalA384, 281 P567; 75CalA779, 243P713; 77CalA727, 247P594; 86CalA248, 260P834; 101 CalA20, 281P518(2dcase); 102CalA160, 282P981; 104CalA 608, 286P747; 83 Colo 374, 265P694; 83Colo 451, 266P 204; 102Conn501, 129A274 (need not always be supported by direct evidence); 107Conn312, 140A734; 110Conn449, 148 A370; 44 Ida403, 258P370; 125Me249, 132A742; 112 Okl 212, 239P989; 129 Or 58, 276P260; 52SD58, 216NW587; 52 SD443, 218NW151; TexCivA 275SW190. **Incompetent or rejected evidence.**-85 CalA764, 260P361. **Evidence held to sustain findings.**-163Ga440, 136SE436. **Finding based on inadmissible evidence** held erroneous. 200Cal 310, 253P145; TexCivA 15SW(2d)120. **Finding based on incompetent evidence** is erroneous. 126Kan544, 268P833. **Finding supported by evidence.**-TexCivA 10SW(2d)149.

1968-95 94CalA119, 270P751. See also 82CalA710, 256P279.

1968-96 Refusal to make requested finding held not error in view of evidence.-98Vt405, 130A137.

1968-96½-New. Motion to modify special findings of fact.-Motion to strike out parts of special findings of fact is not sustained by any rule of practice, but remedy is by motion for new trial for same cause that facts are not sustained by sufficient evidence. 195 Ind118, 147NE524.

1968-97 13F(2d)999; 70CalA778, 234P 435; 73CalA421, 238P1096; 76CalA33, 243P707; 77CalA727, 247P594; 95CalA 505, 273P39; CalA 291P276; 41 Ida1, 236P870 (findings held insufficient); 44 Ida663, 258P541; 47 Ida507, 276P 966; 125Me249, 132A742; 74Mont558, 241P636; 114Nebr563, 208NW669; 30 NM431, 236P735; 217AppDiv31, 216 NYS434; 130 Or612, 280P344; 66Utah 487, 243P798 (case remanded for failure to find on material issue as to which there was evidence); 70Utah1, 257P673; 70Utah57, 257P1060; Utah 271P31; Utah 278P529. **Finding based on immaterial issue.**-96CalA76, 273P839. **Rule applicable to equity cases.**-Utah 278P529. **Failure to find on requested material issue** is error. 149Wash663, 271P893.

1969-98 41 Ida1, 236P870; Ida 288P 897; TexCommnA 296SW509.

1969-99 198Cal 566, 246P69; 200Cal 204, 252P599; 200Cal 192, 252P602; 208Cal 1, 279P996; 71CalA51, 234P329; 75CalA779, 243P713; 79CalA458, 250P 188; 80CalA427, 251P929; 83CalA137, 256P484; 82CalA728, 256P557; 85CalA 184, 259P110; 87CalA344, 262P403; 88 CalA10, 263P269; 89CalA499, 264P 1102; 41 Ida225, 238P306; 43 Ida93, 251P167; 169Minn231, 211NW9; 49ND 768, 193NW733; 117 Okl 276, 246P232; 116 Or102, 239P812; 130 Or612, 280P 344; 286Pa213, 133A229; TexCivA 274 SW319; 67Utah166, 246P367; 142Wash 474, 253P646. See also 111Conn537, 150 A509. **Decision on boundary dispute between cities need not state findings as to legal effect of statutes** where such findings are unnecessary. 198Cal 566, 246P69. **Where location of boundary line is ultimate fact to be determined,** issue on location of boundaries on maps is immaterial, and needs no finding. 198Cal 566, 246P69. **Special findings requested by both parties may be refused** where opinion embodies court's view on all essential issues. 23F(2d) 936.

1969-1 200Cal 222, 252P593; 72CalA 757, 238P143; 75CalA779, 243P713; 81 CalA347, 253P947; 84CalA228, 257P 895; 87CalA344, 262P403; 99CalA17, 277P1053; IndA 172NE549; 175Minn 374, 221NW428; TexCivA 300SW116.

1969-2 79CalA458, 250P188; 80CalA 427, 251P929; 175Minn374, 221NW428. See also CalA 290P1080.

1970-3 70CalA47, 232P498; 70CalA778, 234P435; 71CalA308, 235P76; 73CalA 476, 238P1062; 76CalA29, 243P877; 87 CalA1, 261P524; 87CalA721, 262P779; 88CalA716, 264P265; CalA 288P149; 85 IndA663, 155NE516; 171Minn116, 213NW542; Mont 237P629; 217AppDiv 31, 216NYS434; TexCivA 271SW441. **Conclusion of law on issue not necessary to decide under pleadings** is surplusage. SD 232NW89.

1970-5 23F(2d)287; 70CalA778, 234P 435; 76CalA33, 243P707; 84CalA154, 258P111; 198 Ind429, 153NE890; 114 Nebr563, 208NW669; 121 Or28, 253P 879; TexCommnA 299SW857; TexCivA

274SW238. But see 87CalA92, 261P 763; 32 OhA379, 168NE216.

1970-6 121 Or28, 253P879.

1970-6½-New. Trial court is not at liberty to set aside part of material findings and render judgment on remaining ones. TexCivA 271SW441.

1970-6½-New. Findings on material matters put in issue by pleadings and evidence should be made on request. 125Kan154, 264P77.

1970-6¼-New. Finding wholly outside of issues is nugatory, and judgment based thereon must be reversed. CalA 274P383.

1970-6⅛-New. Requests for findings of fact, not within issues raised by pleadings, will be refused. 133Misc229, 231NYS544.

1970-7 198Cal 645, 246P1043; 69CalA 291, 231P563 (failure to find rental value of premises, claimed to be offset to amount due to plaintiff for services, held not error, if answer does not allege any rent or rental value due or unpaid); 70CalA778, 234P435; 77CalA727, 247P 594; 93CalA21, 268P974; 41 Ida225 238P306; 117 Or173, 242P1114. Findings held responsve to issues.–73CalA 732, 239P350; 80CalA377, 252P647; 82 CalA289, 255P553; 88CalA264, 263P 302; 89CalA594, 265P580; 92CalA203, 268P396; CalA 279P188; 100CalA325, 279P1048; Mo 30SW(2d)77; 57ND117, 220NW645; 117 Or173, 242P1114. Findings held responsive to issues.–73CalA CalA504, 239P51; 99CalA759, 279P491 (2dcase); 100CalA173, 279P1057; Utah 268P562. Finding on defense eliminated on demurrer is of no force and effect. 82CalA215, 255P755. Conclusion of law based on findings wholly without issue has been held without force. IndA 165NE68.

1971-8 CalA 287P151; 41 Ida1, 236P 870; Mass 172NE641; 135SC33, 133SE 222; TexCivA 270SW1052. Findings held not at variance with complaint. TexCivA 287SW291. Variance; waiver.–104Conn17, 131A742.

1972-9 171Minn305, 214NW47.

1972-10 254Mass486, 150NE326. Findings supported by one of two counts in pleading held warranted. 254Mass 486, 150NE326.

1972-11 41 Ida1, 236P870; 69Utah460, 256P400. Findings held sufficiently responsive to answer or counterclaim.–82CalA249, 255P529.

1972-12 Pleadings stricken out.–68 CalA189, 228P673. Adjudication unnecessary on abandoned claim for damages in answer. Mo 248SW(2d)108.

1973-13 95CalA352, 272P805. Finding on affirmative defense has been held not necessary. 205Cal 776, 272P1039.

1973-15 204Cal 258, 268P364; 204Cal 251, 268P367; 80CalA377, 252P647; 83CalA48, 256P489.

1973-16 200Cal 318, 253P726; 71CalA 77, 234P839; 76CalA726, 245P800; 79 CalA347, 249P545; 79CalA728, 250P 1109; 80CalA717, 252P786; 89CalA107, 264P776; 91CalA664, 267P578; 102 Conn529, 129A527; 70Utah1, 257P673.

1973-17 200Cal 318, 253P726; 82CalA 116, 255P257; 84CalA567, 258P453. Remarks of judge at close of evidence as to reason for entering verdict for plaintiff do not constitute findings of case. 130 Or612, 280P344.

1973-18 95CalA106, 272P307; 95CalA 117, 272P614; CalA 276P583; 10LaA 506, 121S341; 69Utah15, 251P1073.

1973-19½-New. Court may treat facts as admitted where cause is so conducted that court and counsel may rightly and do infer that such facts are conceded or admitted. 80CalA377, 252P647.

1973-20 Finding contemplated by statute is written expression by trial judge as to what facts are in his opinion established by evidence within, and responsive to, issues. 20AlaA648, 104S891. Special findings should contain no comment.–80Colo 536, 252P815.

1973-22 24F(2d)180; 20AlaA648, 104 S891 (on every issue essential to recovery); 72CalA426, 237P557; 107Conn1, 138A905. Effect of single disconnected fact need not be ruled on. 253Mass368, 149NE118. Court's fact findings must be reasonably interpreted as a whole. CalA 288P702.

1974-23 195Cal 354, 233P330; 75CalA 44, 242P109; 88CalA607, 263P1038; CalA 289P922 (finding void for uncertainty); CalA 291P688; 125Kan154, 264 P77; 220MoA743, 276SW409; 34NM121, 278P197; 217AppDiv31, 216NYS434 (findings should be stated clearly and briefly in legal language); Utah 271P 31. Findings held indefinite and uncertain.–72CalA288, 236P937 (in action for deceit in exchange of property, finding that, if property, given in exchange by defendant, had been as represented, without finding compensative values of properties exchanged, "it would have been of the value of" a specified sum held too indefinite for award of damages); 88CalA607, 263P1038; 101CalA58, 281P 407; 99Vt65, 130A749. Findings held sufficiently definite and certain.–75CalA 44, 242P109; 87CalA758, 262P764; 88 CalA481, 263P826; 137Wash299, 242P 37. If facts found are clearly set out and show liability and amount of damage, finding is deemed sufficient. 20 AlaA648, 104S891. Findings of fact liberally construed.–48 Ida37, 279P410. Findings held defective as evasive.–Ida 288P897. Construction of particular findings.–TexCivA 30SW(2d)797. Finding on issue of repudiation has been held finding that they did not rescind transaction; "rescind" being used as synonym of "repudiate." 93CalA209, 269P 731.

1975-25 34NM127, 279P72. Favorable construction.–16F(2d)106; 85CalA1, 258 P690.

1975-26 20AlaA648, 104S891 (directly and affirmatively); 3Del 259, 138A392. Findings held not to involve negative pregnant.–CalA 265P957.

1975-27 20AlaA648, 104S891 (judgment cannot be aided by intendment or reference to extrinsic facts).

1975-28 72CalA39, 236P154; 72CalA 426, 237P557; Ida 288P897. Finding of negligence of defendant's servant in operating taxicab within line and scope of employment which was proximate cause of damage to plaintiff's truck, stating amount, is sufficient to support judgment for plaintiff. 20AlaA648, 104S891. Where answer contains same allegation of fraud in affirmative defense and cross complaint, single finding on issue of fraud is sufficient. 90CalA432, 265P 991.

1975-30 116 Or102, 239P812 (use of word "barge" instead of "cargo" where subject of action was load on barge).

1976-33 But see 88CalA481, 263P826.

1976-33½-New. Though conclusions of law are not appended to findings of fact, language of judgment entered on findings of fact may constitute conclusions of law upon which mandate of judgment could properly depend. 196Cal 439, 238 P357.

1976-34 30F(2d)580; 195Cal 354, 233P 330 (special finding responsive to proposed interrogatories need not be made); 202Cal 601, 262P29; 75CalA44, 242P109; CalA 288P823; CalA 288P866; IndA 167NE535 (covers both facts and law); Mass 167NE228; 171Minn305, 214NW 47; MoA 274SW856; 43OklACR173. Under statutes requiring, etc. 31NM 457, 247P270. General finding for plaintiff embraces finding in his favor on every material issue. 121Kan291, 246P 1017. Findings in negative language of answer which set up general issue or general denial are sufficiently clear. 75 CalA44, 242P109. Finding that all material allegations are true has been held uncertain and inadequate. CalA 288P 823.

1976-35 204Cal 342, 268P342, 58ALR 1176; 75CalA44, 242P109; 132 Okl 230, 270P41.

1977-37 44F(2d)31; 95CalA327, 272P 772; 101CalA436, 281P692; 82Colo 204, 257P1079; 38GaA276, 143SE784(2d case); 260Mass541, 157NE698; 265Mass 295, 164NE85; Mass 167NE229; Mass 167NE762; Mass 169NE142; 83NH91, 138A428; NH 146A172; 116 Okl 113, 243P749; 136 Okl 302, 276P730; 139 Okl 35, 280P1075; 140 Okl 16, 282P122; 43 OklACR173; 37Wyo 78, 259P185. But see 102CalA160, 282P981. Where special findings are also made, etc. 93 CalA27, 268P1093.

1978-44 202Cal 606, 262P31; 208Cal 476, 281P1010; 84CalA567, 258P453; CalA 269P764; 83Colo 533, 266P713; 123Kan290, 255P32; 116Nebr880, 219 NW390.

1978-45 Ind 168NE185. Findings held sufficiently specific.–17F(2d)337.

1978-45½-New. Where on issue involved finding adopted is adverse specific finding is unnecessary. 102CalA160, 282P981.

1978-45½-New. General finding which would deny liability cannot be disregarded although specific findings conclusively establish liability. TexCivA 27SW(2d)897.

1978-47 TexCivA 286SW647. Proper and improper conclusions.–46 Ida153, 266P795.

1978-48 TexCivA 286SW647. Court's findings held immaterial variance from complaint. 84 IndA636, 150NE319.

1978-49 90CalA213, 265P576; 93CalA 27, 268P1093; 238Mich253, 213NW150, 151 [citCyc]; TexCivA 17SW(2d)113 (2dcase); Vt 148A867. Issues sufficiently covered by conclusion of law.–IndA 168NE717(2dcase).

1979-50 208Cal 476, 281P1010; CalA 291P659; 103Conn750, 131A593 (holding conclusion proper and only one possible under findings); 110Conn528, 148 A330; 45 Ida303, 262P149; IndA 171 NE304; 173Minn529, 217NW933; 220 MoA743, 276SW409; TexCommnA 14 SW(2d)1024; TexCivA 286SW647; Tex CivA 17SW(2d)841(2dcase); 65Utah 605, 238P647. Amount of recovery is based upon, and must follow, conclusions of law where there is special finding. IndA 167NE535.

1979-53 71CalA723, 236P322; 70Utah 1, 257P673. Ownership, etc. 78CalA 141, 248P303. Finding held to be of ultimate facts.–86 IndA484, 156NE589. Possession is statement of ultimate fact. 78CalA141, 248P303.

1980-54 75CalA96, 241P902; MoA 14 SW(2d)12. Statements held to be conclusions of law.–32Ariz90, 255P991; 202 Cal 23, 259P38; 205Cal 46, 269P660; 71CalA723, 236P322; 72CalA426, 237P 557; 79CalA685, 250P705; 85CalA624, 260P347; 93CalA722, 269P1114; CalA 289P950; Ind 171NE381(2dcase); 238 Mich253, 213NW150; NH 151A452; 49 SD130, 206NW691; 66Utah612, 245P 329; 135Wash338, 237P732; 155Wash 673, 286P57. Statements held to be findings of fact.–73CalA435, 238P1102 (findings following allegations of complaint); 104CalA562, 286P498; CalA 288P702; 103Conn88, 130A75; 111Conn297, 149A 687(1stcase); 147 Ida478, 276P969; 48 Ida37, 279P410; Ida 288P897; Ind 172 NE119 (ultimate fact); 83NH91, 139 A366; TexCivA 30SW(2d)797; 135Wash 338, 237P732 (ultimate conclusion or deduction from previous findings). Finding may be treated as finding of fact, though under heading of conclusions of law. 71CalA611, 235P742. Finding of fact stated as conclusion of law is finding of fact. 50SD645, 211NW 691. Where conclusion of law made by court is also inadvertently made part of findings of fact, it should be disregarded in connection with findings of fact. 85CalA624, 260P347. Determination of credit to be given to testimony is finding of fact. Mass 167NE228. Whether findings of fact are conclusions depends on nature of evidence. 102CalA 342, 283P312. Finding of fact is not changed by being designated as declaration of law. MoA 27SW(2d)495. Finding held not conclusion of law.–TexCivA 27SW(2d)897. Distinction pointed out.–200Wis616, 229NW194.

1980-55 Fact finding described as conclusion of law still stands as finding of fact. CalA 288P702.

1980-55½-New. Where conclusion of court was supported by sufficient evidence it is immaterial that specific findings of fact were not supported by allegations and evidence. 81Colo 244, 255 P989.

1980-55⅞-New. Circuit Court of Appeals cannot treat as a statutory finding, a conclusion in general opinion. 35F(2d)862.

1980-56 17F(2d)337; 195Cal 354, 233 P330; 198Cal 71, 243P420; 96CalA130, 273P598; CalA 287P510; 121Kan745, 250P328; 132 Or92, 284P832; TexCivA 286SW307; TexCivA 5SW(2d)160; Utah 283P435; 142Wash474, 253P646. But see 107Conn1, 138A905; 107Conn 716, 142A466. **Evidence tending toward opposite finding.**–121Kan745, 250 P328. **Requests for findings of evidentiary facts will be refused.** 133Misc 229, 231NYS544.

1981-57 17F(2d)337; 75CalA44, 242P 109; 106Conn423, 138A444; 86 IndA 484, 156NE589; 50Philippine380; Tex CivA 274SW319.

1981-58 199Cal 286, 249P188, 51ALR 1380, 75CalA44, 242P109; 82CalA675, 256P301; 86 IndA484, 156NE589; 261 Mass456, 158NE846; TexCivA 298SW 654; 66Utah507, 243P790; 142Wash 474, 253P646. **In action for return of money or property** obtained by fraud, finding of demand and refusal to return will be construed as finding of inability or impracticability of return and finding of indebtedness to amount of money, and contract value of property will be construed as trial court's alternative of awarding substantial justice. 71CalA77, 234P839. **Ownership.**–199Cal 286, 249P188, 51ALR1380.

1981-59 17F(2d)337; 195Cal 354, 233P 330; 198Cal 71, 243P420; 199Cal 286, 249P188, 51ALR1380; 73CalA421, 238P 1096; 75CalA44, 242P109; 103CalA32, 283P946; 107Conn1, 138A905; 42 Ida 270, 245P98; Ida 288P897; 241 IllA189 (refusal or request for special finding on evidentiary fact held proper); Ind 168NE185; 220MoA743, 276SW409; 30 NM431, 236P735; 217AppDiv31, 216 NYS434; 117 Or173, 242P1114; 66Utah 507, 243P790; Vt 134A853; 142Wash 474, 253P646. **Fraud.**–195Cal 354, 233P 330 (in petition for restoration of probate of will for fraud and undue influence, existence of fiduciary relations is evidentiary fact); 117 Or173, 242P 1114. **Findings held to be of ultimate facts.**–17F(2d)337 (not mere general conclusions); 82CalA675, 256P301; 84 IndA636, 150NE319. **Amount of damages.**–198Cal 71, 243P420. **Ultimate facts** are essential and determining facts on which court's conclusion is reached. 34NM121, 278P197.

1982-61 81CalA387, 253P752; 81CalA 678, 254P644. **If different inferences may be drawn from probative facts,** inference so drawn is finding of fact to be made by court. 81CalA678, 254P644.

1982-63 198Cal 641, 246P1041; 96CalA 219, 274P93; IndA 171NE304.

1982-64 198Cal 641, 246P1041 (facts in agreed statement held to be ultimate and not evidentiary facts).

1983-66 171Minn305, 214NW47. **Reference to an answer,** etc. 92CalA203, 268P396.

1983-67 76CalA91, 243P877; 171Minn 29, 213NW45.

1983-70 84CalA401, 258P120; CalA 288P823 (where allegations are specific); 171Minn305, 214NW47. **Insufficient reference.**–180Minn9, 230NW118. **Such finding supports no facts beyond such as are clearly and directly alleged in complaint.** CalA 279P1011.

1984-73½-New. Court may refuse to make requested findings not showing ultimate facts and may make his own findings in accordance with his own idea of testimony without reciting testimony as finding. 132 Or92, 284P832.

1984-74 Arguments, citations of authority and other extraneous matter should not be incorporated in findings. 199Wis147, 225NW695.

1984-75 Practice criticized.–30F(2d)97.

1984-78 198Cal 261, 244P325, 45ALR 781; 68CalA121, 228P740; 68CalA554, 229P1002; 75CalA44, 242P109; 75CalA 205, 242P746; 81CalA387, 253P752; 97 CalA597, 275P994; 102CalA160, 282P 981; 108Conn704, 145A29; 206 Iowa39, 218NW56; 126Kan527, 268P839; MoA 278SW(2d)495; 48Nev181, 228P588, 589, 232P782 [citCyc]; TexCivA 21SW(2d) 586; Vt 148A867. **When no implication exists.**–3Del 259, 138A392. **Finding affirming or negativing common count sued on affirms or negatives such issues** of fact as come within purview of that common count. 70CalA778, 234P435. **Findings that all allegations of complaint and answer of two defendants are true** and that third defendant proximately caused injury held to imply general finding that first two defendants are not negligent. 75CalA205, 242P746. **Sufficient negation.**–94CalA104, 270P742.

1985-79 CalA 287P515; MoA 279SW 751; TexCivA 25SW(2d)221 (finding for plaintiff disposed of cross-action of defendant). See also 75CalA44, 242P 109.

1985-79½-New. Where judgment silent on reconventional demand, rejection thereof followed. 13LaA222, 127S47.

1985-80 29Ariz23, 239P290, 294 [cit Cyc].

1985-81 29Ariz23, 239P290, 294 [cit Cyc]; 197 Ind62, 147NE771; Ind 168 NE185; 84 IndA144, 149NE647; IndA 151NE336; IndA 151NE337; IndA 154 NE780; 87 IndA588, 162NE248; IndA 165NE68. But see 87 IndA462, 151NE 735. **Failure to find facts showing contributory negligence may be regarded as legal equivalent of finding that plaintiff was not at fault.** 20AlaA648, 104S891. **Finding on point as to which defendant has burden** imports finding as to all facts necessary and permissible from any view of evidence. 264Mass414, 163 NE63.

1986-82 68CalA218, 228P715; 80CalA 284, 251P810; 80CalA513, 252P630; 88 CalA238, 263P362; 220MoA743, 276SW 409, 414 [quotCyc]; TexCivA 274SW 319; TexCivA 27SW(2d)897; TexCivA 30SW(2d)797. **Findings held inconsistent.**–202Cal 215, 259P947; 68CalA218, 228P715; 89CalA427, 264P799; 123Kan 290, 255P32; Mass 167NE298; Utah 269P147. **Findings held not inconsistent.**–81CalA629, 254P622; 101CalA164, 281P432. **Finding discredited and nullified by its own terms** will be disregarded. TexCivA 284SW615.

1986-83 71CalA723, 236P322; 220MoA 743, 276SW409, 414 [quotCyc]. **Conclusions of law justified by findings of fact.**–165Minn181, 206NW390.

1986-84 96CalA31, 273P849; 68CalA 270, 228P1057; 70CalA98, 232P763; 83CalA441, 257P112; 84CalA567, 258P 453; 87CalA344, 262P403; 95CalA545, 272P1100; CalA 292P157; 171Minn39, 213NW543. **Memorandum of trial judge will be resorted to** to construe and throw light on seemingly inconsistent findings. 171Minn39, 213NW543.

1986-85 31Ariz73, 250P367; 70CalA98, 232P763; 72CalA94, 236P346 (between parts of same finding); 95CalA772, 273 P613; 96CalA390, 274P386; 97CalA 420, 275P471; 171Minn39, 213NW543; 85Mont389, 278P836; NH 151A452; 246NY174, 158NE64.

1986-86 84CalA220, 257P898; 95CalA 545, 272P1100. But see 202Cal 601, 262 P29; IndA 170NE788.

1987-88 70CalA98, 232P763; 195Cal 354, 233P330; 71CalA611, 235P742; 76 CalA29, 243P877 (immaterial inconsistent findings disregarded).

1987-89½-New. Conclusion inconsistent with petition is immaterial where subordinate facts found agreed with complaint and supported judgment. 108 Conn58, 142A572.

1987-93 4F(2d)821; 181Ark1089, 29 SW(2d)294 (as overruling motion to dismiss); 94CalA349, 271P343; Ida 288P 897. **Findings not necessary to judgment or inferentially contrary thereto** are not conclusive as to matters found. 94CalA349, 271P343.

1987-94½-New. Facts proved and found by court take place of evidence which becomes immaterial. NH 151A 452.

1987-94½-New. [5½] **Defects and Errors.** Finding of trial court, in suit to recover property converted, of value at time property was delivered, held inadvertent clerical error to be construed as finding of value at time it should have been delivered. TexCivA 282SW267.

1987-95 84 IndA636, 150NE319; 73 Mont451, 236P1076. **In Montana.**–73 Mont451, 236P1076. **Motion to make special findings more specific is not authorized by Indiana procedure, and denial of such motion is not error.** IndA 152NE177.

1988-96 197Cal 649, 242P725; 70CalA 336, 233P374; 100CalA33, 279P672 (proposed findings and judgment followed by proposed amendments); 102 Conn511, 129A539 (trial judge's practice in passing on errors relating to findings should not be pursued where ruling is likely to be reviewed); Ind 155NE55; IndA 167NE731; 300Pa522, 150A885. But see 107Conn109, 139A508, 57ALR 331. **Notice to parties should be given.**–85CalA80, 258P1003. **Restating conclusions of law.**–Ind 155NE55. **Refusal to strike from finding certain statements** held not erroneous. 110Conn234, 147A 709. **Amendment after time for filing findings has expired is too late.** Tex CivA 31SW(2d)192.

1988-97 CalA 289P905(2dcase) (unnecessary findings should be stricken).

1988-99 197Cal 649, 242P725; 70CalA 336, 233P374; 85CalA80, 258P1003; 84 IndA636, 150NE319; Ind 155NE55; 87 IndA440, 159NE11; 73Mont451, 236 P1076. **After entry of judgment, only** remedy is by appeal in some jurisdictions. 73Mont451, 236P1076. **Court may act on its own motion.**–70CalA336, 233P374.

1988-1 85 IndA621, 155NE221. **Contra, in California.**–68CalA709, 230P218. **In Montana.**–73Mont451, 236P1076.

1988-4 107Conn1, 138A905; 108Conn 19, 142A452. **A request for corre ted findings is properly refused** where findings were made in response to evidence which sustained them. 121Kan745, 250 P328.

1989-7 But see 4HawaiiFed193. **After judgment,** etc. 42 OklaCR296. **It is court's power and duty even after term** in divorce action to recite in its findings fact of appearance of district attorney for state at trial so that court's jurisdiction in case may appear of record. 120 Or439, 251P303.

1989-9 125Kan154, 264P77.

1990-10 94CalA511, 271P515; 121Kan 490, 247P449.

1990-12 IndA 167NE731.

1990-15 Uncertainty in an unnecessary finding, etc. IndA 167NE731. **If findings taken as whole are so indefinite and uncertain** that no valid conclusion of law may be stated, venire de novo is proper remedy. IndA 167NE731.

1990-17½-New. In passing on motion entire finding is to be considered and not merely finding as to some particular fact. IndA 167NE731.

1990-18 TexCivA 9SW(2d)292. **Motion to make finding more specific** is not proper practice in Indiana. IndA 149 NE79. **In Massachusetts.**–253Mass368, 149NE118; 255Mass480, 152NE240.

1991-19 82NH105, 129A873; 142Wash 184, 252P925 (plaintiff is not required to file exceptions to findings until they have all been made).

1991-20 251Mich149, 230NW938; 82 NH105, 129A873.

1991-21 82NH105, 129A873.

1991-22 84Colo 369, 270P649.

1992-27 Ind 168NE185; Ind 172NE 119.

1992-23½-New. Valid exception to denial of motion to direct verdict for defendant exists only when as matter of law, plaintiff cannot prevail. 258Mass 13, 154NE263.

1992-28½-New. Right to additional exceptions is not acquired under court law allowing exceptions to rulings in counsel's absence. 258Mass13, 154NE 263.

1992-28¼-New. Defendant introducing testimony after denial of directed verdict at close of plaintiff's case, waived exception. 38F(2d)972.

1992-28½-New. Deficiencies in proof or defects in evidence may be supplied at later stage of trial thereby obviating objections. NH 149A746.

TROVER AND CONVERSION

2005-1 102Conn612, 129A718; 217Ky 211, 289SW263; 245NY102, 156NE629; 228AppDiv321, 239NYS16; 135Misc757, 239NYS574; 152Tenn476, 279SW793;

Utah 269P132, 134 [citCyc]. **See also** 146SC257, 143SE820. **A similar definition.**–84Mont579, 277P805. **Other definitions.**–Cooley Torts (2d ed.) p 524 [quot **TexCivA** 282SW832, 833]; 102**Conn** 612, 129A718; 46 **Ida**231, 266P659; 203 **Iowa**897, 209NW432; 206 **Iowa**277, 220 NW77; 221**MoA**577, 284SW156; 73 **Mont**139, 235P767, 40**ALR**590; 80**Mont** 426, 260P709; 124 **Okl** 249, 255P688; 126 **Okl** 172, 259P253, 54**ALR**1152; 127 **Okl** 195, 260P44; 129 **Okl** 211, 264P194; 132 **Okl** 121, 270P9; 143 **Okl** 42, 287P 392; 143 **Okl** 75, 287P1017; 144 **Okl** 284, 290P1106; 117 **Or**306, 244P75; **TexCommnA** 270SW1008; **TexCivA** 16 SW(2d)345; 200**Wis**194, 227NW940.

2005–2 214**Ala**268, 107S746; 21**AlaA** 136, 106S220; 21**AlaA**363, 108S402 (destruction or interference with property amounting to disregard of owner's rights); 102**Conn**612, 129A718; 40**GaA** 820, 151SE678(2dcase); 217**Ky**211, 289 SW263; 150**Md**671, 133A625; 86**Mont** 150, 282P494; 115**Nebr**255, 212NW540; 250**NY**370, 165NE814; 195**NC**5, 141SE 343; 117 **Okl** 120, 245P638; **TexCivA** 273SW903; **TexCivA** 288SW1095, 1097 [quotCyc]; **TexCivA** 23SW(2d)851. **Other definitions.**–124 **Okl** 64, 253P1021. **"Direct conversion" defined.**–**TexCivA** 23 SW(2d)851.

2006–3 41 **Ida**767, 244P404; **Utah** 269 P132.. **Distinguished from trespass.**–**Or** 268P757. **Trover is possessory action.**– 236 **IllA**347. **Trover is not exclusive remedy for conversion.** 40**GaA**820, 151 SE678(2dcase).

2008–4 **MoA** 10SW(2d)334; 79**Mont**468, 257P469; 52**ND**553, 203NW903 [cit Cyc]; 124 **Okl** 249, 255P688; **Or** 268P 757; **TexCivA** 288SW1095, 1097 [quot Cyc]; 149**Wash**679, 272P75. **Slight interference with ownership of chattel constitutes conversion.** 245**NY**102, 156NE 629.

2008–5 217**Ky**211, 289SW263; 80**Mont** 426, 260P709; **TexCivA** 288SW1095, 1097 [quotCyc].

2008–6 **TexCivA** 288SW1095, 1097 [quotCyc].

2008–7 217**Ky**211, 289SW263; 52**ND** 553, 203NW903; 129 **Okl** 7, 263P121 (must be without consent of owner). See also 225**Ky**77, 7SW(2d)853.

2008–8 124 **Okl** 249, 255P688.

2008–9 21**AlaA**136, 106S220; 52**ND**553, 203NW903 [quotCyc]; 124 **Okl** 249, 255 P688.

2009–10 21**AlaA**136, 106S220; 52**ND** 553, 203NW903 [quotCyc].

2009–11 213**Ala**108, 104S33; 148**SC**511, 146SE534.

2009–12 **TexCivA** 288SW1095, 1097 [quotCyc].

2009–13 **TexCivA** 288SW1095, 1097 [quotCyc].

2009–14 **TexCivA** 288SW1095, 1097 [quotCyc].

2009–15 **TexCivA** 288SW1095, 1097 [quotCyc].

2009–15½–New. Mere words will not in themselves alone amount to a conversion. 21**AlaA**363, 108S402.

2009–16 170**Minn**43, 211NW947, 948 [citCyc]; 320**Mo** 623, 8SW(2d)858; 116 **Nebr**499, 218NW130, 134 [citCycper Good,J]; **TexCommnA** 270SW1008 (defendant's exercise of acts of ownership or dominion over plaintiff's property does not constitute conversion if it is not inconsistent with plaintiff's right or title or if plaintiff consents or acquiesces therein). **Pipe line company** delivering oil pending outcome of suit in accordance with specific agreement cannot be held for conversion. **TexCivA** 3SW(2d)524.

2010–20 120**Kan**21, 245P734, 739 [cit Cyc]; 124 **Okl** 249, 255P688.

2010–23 **Wash** 290P813.

2011–24 99**CalA**762, 279P666; 124 **Okl** 249, 255P688; 200**Wis**194, 227NW940. **Implied knowledge.**–217**Ky**211, 289SW 263.

2011–25 21**AlaA**136, 106S220; 124 **Okl** 249, 255P688.

2011–27 87**CalA**282, 262P43 [quotCyc]; **CalA** 293P168. **Intangible property—trade secret.**–87**CalA**282, 262P43 (unlawful interference with laundry route by agent attempting to sell it); 73**Mont**139, 235P767, 40**ALR**590. **Action lies only for wrongful appropriation of personal property specific enough to be identified.** 87**CalA**282, 262P43. **Character of personal property subject to action of trover is not governed by statute.** 87 **CalA**282, 262P43. **No application to real estate.**–**TexCivA** 16SW(2d)969.

2012–29½–New. Action will not lie for any interest in realty. 102**NJL**206, 130 A835.

2012–29¾–New. Trover does not lie for conversion of architect's plans where ideas only were used. 288**Pa**207, 135 A613.

2012–29¼–New. There is no property right in patronage of specific list of customers in definite laundry route which will authorize damages in suit at law for conversion or trover. 92**CalA**575, 268P 939.

2012–30 But see 339 **Ill** 426, 171NE514.

2012–31 126 **Okl** 172, 259P253, 54**ALR** 1152; **TexCivA** 13SW(2d)708.

2012–32 126 **Okl** 172, 259P253, 54**ALR** 1152.

2012–37 116**Nebr**499, 218NW130.

2014–52 81**CalA**192, 253P172.

2015–53 81**CalA**192, 253P172; 234**Mich** 258, 207NW884; 228**AppDiv**321, 239**NYS** 16; **TexCivA** 284SW331, 332 [quotCyc]; 146**Wash**137, 262P123. **Partnership or employer has no title** to money of debtor partner or employee and cannot maintain conversion against person receiving money. **TexCivA** 284SW331.

2016–58 86**Mont**150, 282P494.

2016–59 88 **IndA**257, 148NE427.

2016–63 40**Me**247, 63**AmD**661; 34**Me** 563.

2016–65 85**Colo** 140, 274P737, 63**ALR** 227.

2017–74 **Property may have value though there is no market for it.**–84 **Mont**225, 274P1062.

2017–75 213**Ala**108, 104S33; 214**Ala** 268, 107S746; **Wash** 290P813.

2017–79½–New. error, 255**Mass**45, 150 NE864.

2018–81½–New. A debtor, who advises bank to cable to his creditor money deposited for him, is not liable in conversion for loss thereof. 255**Mass**45, 150 NE864.

2018–83½–New. Cancellation of stock certificates without knowledge or consent of owner constitutes conversion. 124 **Okl** 106, 254P34.

2018–85 246**Mich**334, 224NW643.

2018–86 213**Ala**108, 104S33.

2018–87 241**Mich**379, 217NW10.

2018–88 245 **IllA**531. **Without violation of possessory right** wrong to property cannot be "conversion." 253**NY** 477, 171NE749.

2018–89½–New. Act of shipping agent giving instruction to draw up bill of lading to cover property belonging to another as property of principal is conversion. 214**AppDiv**541, 212**NYS**589.

2018–89½–New. Fundamental test of conversion is assumption and exercise of dominion, whether actual interference is involved or not. 214**AppDiv**541, 212 **NYS**589.

2018–89¾–New. Wrongful intent is not necessary element of conversion. 214 **AppDiv**541, 212**NYS**589.

2018–89⅞–New. Unlawful dominion over property of another is conversion though party may not know true ownership and acts in good faith when law charges him with duty to know. 213**Ala** 125, 104S403.

2018–89¼–New. To constitute conversion of property there must be some repudiation of owner's right or exercise of dominion over it wrongfully in denial of or inconsistent with owner's right. **TexCivA** 11SW(2d)589.

2018–89½–New. There must be illegal assumption of ownership to charge one with wrongful conversion of property. **TexCivA** 16SW(2d)345.

2019–90 158**Md**189, 148A457; **MoA** 10 SW(2d)334; 86**Mont**150, 282P494 (actual possession not necessary).

2019–91½–New. It is not necessary that one take actual physical possession of property since any wrongful exercise of dominion by one other than owner is sufficient. 214**AppDiv**541, 212**NYS**589.

2019–94 124**Kan**171, 172, 257P955 [cit Cyc].

2019–95 124**Kan**171, 172, 257P955 [cit Cyc].

2019–95½–New. Generally action lies only for conversion of part taken. 124 **Kan**171, 257P955.

2020–1 73**Mont**139, 235P767, 40**ALR** 590.

2020–4 **TexCivA** 9SW(2d)1049.

2020–7 102**Conn**612, 129A718; 124**Kan** 171, 172, 257P955 [citCyc]; 148**SC**511, 146SE534; **TexCivA** 23SW(2d)851. **Embezzlement** is conversion. 188**Wis**121, 205NW808, 42**ALR**873.

2021–9 148**Wash**274, 268P883.

2021–10 153**Wash**345, 279P595.

2021–12 **CalA** 291P681.

2021–13 **CalA** 291P681.

2022–15 **Mont** 289P561.

2022–19 39**GaA**384, 146SE918; 50**RI** 50, 144A883. **Trover will not lie, etc. TexCivA** 16SW(2d)345. **Taking property under attachment issued by consent** is not conversion. 133**SC**369, 131SE 32. **Purchaser under conditional sales contract is guilty of conversion** where he allows property to be taken from him by judicial process without notifying seller. 39**GaA**384, 146SE918. **In action for conversion brought during pendency of attachment** attachment can be found wrongful only as to exempt property. **Mass** 172NE347.

2022–20 **SD** 228NW807.

2023–22 9**LaA**519, 119S435; 127 **Okl** 195, 260P44.

2023–23 **TexCivA** 10SW(2d)1023.

2023–30 36**GaA**57, 135SE316.

2024–32 120**Kan**21, 245P734; **LaA** 129 S243; 128**Me**472, 148A687(2dcase); 180 **Minn**447, 231NW408; 321**Mo** 212, 9SW (2d)957; 79**Mont**468, 257P469; 116**Nebr** 499, 218NW130; 137**Misc**888, 244**NYS** 82; 127 **Okl** 195, 260P44; **TexCivA** 11 SW(2d)815.

2024–34 102**Conn**612, 129A718 (retention after notice is conversion); 45 **Ida** 229, 261P673, 676 [citCyc]; 241 **IllA**517, 528 [quotCyc].

2025–35 40**GaA**820, 151SE678(2dcase); 241 **IllA**517, 528 [quotCyc]; 120**Kan**21, 245P734; 245**NY**102, 156NE629.

2025–36 241 **IllA**517, 528 [quotCyc].

2025–37 102**Conn**612, 129A718.

2025–39 102**Conn**612, 129A718.

2026–40 214**Ala**268, 107S746; 21**AlaA** 136, 106S220 (conversion to use of defendant of property received under mistake); 41**GaA**407, 153SE234 (unloading of car by purchaser showed sufficient dominion over property for liability in trover); 158**Md**189, 148A457; 137**Misc** 888, 244**NYS**82. **Lessee of steel rails, permitting use by railroad preventing recovery by lessee or owner,** held to have converted rails. **TexCivA** 282SW267. **Lessee's refusal to bring suit against railroad permitted to use leased rails held inconsistent with rights of lessor** and with lessee's contract to return rails on termination of lease and constitutes conversion. **TexCivA** 282SW267. **Railway using rails with knowledge and recognition of ownership of another held to acquire no title** and lessee's permitting such use is not in itself conversion. **TexCivA** 282SW267.

2026–41 **Making authorized repairs to automobile** does not constitute conversion, if there is no substantial change in form and nature. 200**Wis**194, 227NW 940.

2026–43 120**Kan**21, 245P734, 739 [cit Cyc]; 49**ND**207, 190NW815; 114 **Okl** 251, 246P837; 129 **Or**534, 277P1005; **TexCivA** 286SW925; **TexCivA** 25SW (2d)170. **Lienholder may maintain action** for injury from sale of property by possessor. **Ida** 286P923.

2027–44 102**CalA**53, 282P519.

2028–48 240 **IllA**607, 613 [citCyc].

2028–50 **Cancellation of plaintiff's stock by officer of corporation and issuance to officer's sister** constitutes conversion though plaintiff had not indorsed nor signed certificate. 78**Colo** 254, 241P 541.

2029–54 150**Md**671, 133A625; 38**Wyo** 329, 266P1062, 1064, 61**ALR**615 [cit Cyc]. **Detention, after contract is rescinded,** to enforce restoration of thing given, is no conversion. **TexCivA** 21SW (2d)341.

2029–55 214**Ala**268, 107S746; 215**Ala**

407, 110S818; 21AlaA136, 106S220; 102Conn612, 129A718; 236 IllA187; 150 Md671, 133A625 (recognizing rule); Mass 168NE800; 195NC5, 141SE343; 38 Wyo 329, 266P1062, 61ALR615.

2029–57 83Mont477, 272P992.

2030–58 121Kan478, 247P850; **TexCivA** 275SW410; 100WVa154, 130SE125, 127 [citCyc].

2030–59 **TexCivA** 275SW410.

2030–61 117 Or306, 244P75; 100WVa 154, 130SE125, 127 [citCyc].

2030–62 121Kan478, 247P850; **Tex CivA** 275SW410.

2030–67 150Md671, 133A625.

2030–68 150Md671, 133A625.

2031–69 213Ala125, 104S403.

2031–70 150Md671, 133A625 (recognizing rule); 221MoA789, 287SW1075; 32 OhA310, 166NE912; **TexCivA** 272SW 507; 37Wyo 282, 264P91.

2031–71 150Md671, 133A625; 290Pa43, 138A217.

2031–72 150Md671, 133A625; **TexCivA** 282SW267. **Demand must be absolute and unequivocal.**–154Wash344, 282P 218.

2032–74 **TexCivA** 282SW267. **In replevin action time of conversion** is immaterial in respect to whether conversion occurred prior or subsequent to commencement of action. 129 Okl 211, 264P194.

2032–75 102Conn612, 129A718; **Ida** 288P1071; 150Md671, 133A625; 255 Mass273, 151NE305, 45ALR788 (action against executor); 86Mont150, 282P 494; 223AppDiv476, 229NYS24; 131 Misc336, 225NYS756; 147Wash104, 265 P159; Wash 290P813; 38Wyo 329, 266 P1062, 1064, 61ALR615 [citCyc]; Sask [1929] 4DomLR323.

2033–76 321Mo1229, 16SW(2d)82; 50 ND141, 195NW6; 53ND551, 207NW37; Vt 146A248; 134Wash101, 234P1023; 198Wis461, 224NW702.

2033–78 102Conn612, 129A718; 105 NJL121, 143A333; 195NC5, 141SE343; 53ND291, 205NW722.

2033–79 165Minn282, 206NW446.

2033–80 217AppDiv38, 216NYS490; 50 RI 50, 144A883.

2033–81 32Ariz342, 258P304, 305 [quot Cyc].

2033–82 217AppDiv38, 216NYS490.

2033–84½–New. Demand and refusal is necessary only to save plaintiff costs in case defendant disclaims title. 40GaA 563, 150SE572.

2034–86 Mass 172NE347.

2035–87 150Md671, 133A625 (recognizing rule). **Taking held not wrongful.**–150Md671, 133A625.

2035–88 143 Okl 42, 287P392.

2038–4 150Md671, 133A625.

2038–5 150Md671, 133A625 (reasonable exactness).

2038–6 **Demand by prior owner.** But see 53ND447, 206NW795.

2039–15 223AppDiv476, 229NYS24.

2039–16 See also 150Md671, 133A625.

2039–17 33F(2d)202; 150Md671, 133A 625. **Conditional refusal** held to amount to full refusal. Mo 281SW686. **Plaintiff's knowledge** of defendant's custom to demand release is no excuse for conditional refusal to surrender stock due plaintiff. Mo 281SW686.

2039–19 150Md671, 133A625. But see Mo 281SW686. **Arbitrary refusal of insurer to deliver up** stolen damaged car unless insured would accept its terms of settlement is conversion. 85Colo 565, 277P779.

2040–25 117 Or306, 244P75 (title not involved). **Where lessor's right to occupy land is involved,** action to determine right to remove building is improperly brought in trover. 83NH270, 141A304.

2041–35 **Where treasurer of school district disposes of such bonds** and same can be identified, they may be recovered in action for recovery of specific personal property. 136 Okl 14, 275P1042.

2043–49½–New. **Nature of remedy.**–Action for conversion is one in tort unless tort is waived, in which case cause may be predicated on implied contract. 86 Mont150, 282P494.

2043–50 **In Michigan.**–234Mich258, 207 NW884.

2043–53½–New. Negotiable Instruments Law has no relation to action for conversion of negotiable bonds. 111Conn 178, 149A774.

2044–56 AlaA 114S177; 88CalA308, 263P545; 94CalA557, 271P540; 36GaA 57, 135SE316; 36GaA237, 136SE175; 45 Ida217, 261P679; 246 IllA385; 246 IllA533; 125Me131, 131A307 (must prove title); MoA 279SW205; 221MoA 420, 279SW764, 767 [citCyc]; 245NY 152, 156NE647; 128Misc208, 218NYS 98; 228AppDiv321, 239NYS16; **Tex CivA** 22SW(2d)743. See also 214Ala 324, 107S862. **Legal title unnecessary.**–95CalA33, 272P306.

2044–57 35F(2d)129; 216Ala546, 114S 140; AlaA 114S177; 198Cal 365, 245P 184; 81CalA317, 253P757; 83Colo 193, 265P682; 91Fla958, 109S209; 128Misc 208, 218NYS98. **Possession or right of possession** is generally necessary. 82 CalA749, 256P213.

2044–58 213Ala89, 104S17; 213Ala108, 104S33; 216Ala252, 112S907; 216Ala 546, 114S140; 220Ala86, 124S234(2d case); 91Fla958, 109S209; 79Mont468, 257P469; 128Misc208, 218NYS98.

2045–59 214Ala341, 107S903; 98Vt486, 129A299.

2045–60 265Mass372, 164NE373; MoA 299SW1116.

2046–61 81CalA317, 253P757; MoA 299SW1116; 116 Or83, 240P229. **Plaintiff must have right to possession** at date of conversion. 81Colo 241, 254P 999.

2047–62 81CalA317, 253P757.

2047–63 81CalA317, 253P757; 40GaA 820, 151SE678(2dcase).

2048–66 125Kan245, 263P1077; 128Me 472, 148A687(2dcase) (qualified interest).

2048–67 99CalA762, 279P666 (conditional vendor).

2048–68 **Person having lien** may have damages for injuries to his security though having neither possession nor right to possession. **Ida** 286P923.

2048–71½–New. Incomplete contract of sale of automobile which left consideration for future determination will not support action for conversion. 68Utah 65, 249P133.

2048–71½–New. Owner of truck in exclusive possession has sufficient title to maintain conversion, though sale to him was not registered as required by law. 95CalA33, 272P306.

2048–72 125Me131, 131A307; MoA 11 SW(2d)1084; 83Mont477, 272P992; 52 ND707, 204NW338, 340 [citCyc]; 55ND 292, 213NW359; 148Wash542, 269P842.

2049–73 29F(2d)383; 100CalA669, 280 P1034; 253NY477, 171NE749.

2050–78 216Ala546, 114S140. **Where plaintiff's title gives him right to possession,** rule that one relying on title cannot recover possession against another's paramount title is inapplicable. 41GaA 436, 153SE233(2dcase).

2050–81 40GaA27, 148SE626(2dcase); 266Mass74; 164NE817. **Joint adventurers are real parties in interest** in action to recover proceeds of property converted by another. 56ND215, 216NW891. **Joint adventurers may recover from one having knowledge** property withheld for personal indebtedness of another joint adventurer, but not the amount of remittance to such joint adventurer, though he may have converted such remittance. 56ND215, 216NW891.

2054–23 216Ala546, 114S140.

2054–30 41GaA685, 154SE298; 86Mont 150, 282P494; 115Nebr255, 212NW540, 542 [citCyc]; **TexCivA** 285SW1115, 1118 [quotCyc].

2055–31 174Minn264, 219NW155; 86 Mont150, 282P494; 115Nebr255, 212NW 540, 542 [citCyc]; 105NJL121, 143A 333; 132 Okl 121, 270P9, 11 [quotCyc]; **TexCivA** 285SW1115, 1118 [quotCyc]; **TexCivA** 288SW1095; 146Wash137, 262P123.

2055–32 128Kan132, 276P70; 176Minn 449, 223NW780, 62ALR799(2dcase); 86 Mont150, 282P494; 115Nebr255, 212 NW540, 542 [citCyc]; 132 Okl 121, 270 P9, 11 [quotCyc]; **TexCivA** 285SW 1115, 1117 [citCyc]; **TexCivA** 288SW 1095.

2055–33 31Ariz137, 250P995; 219MoA 419, 271SW854, 855 [quotCyc]; MoA 10SW(2d)334. **Joint tort-feasors** are all liable. 120Kan21, 245P734. **Shipper and railroad** held liable as joint tort-feasors by diverting shipment to other than consignee. 219MoA419, 271SW 854. **Payment of money by trustee to one not entitled to receive it** with recipient's full knowledge of facts and active participation in payment is breach of trust rendering both liable in conversion. 31Ariz137, 250P995.

2056–34 120Kan21, 245P734. **Fact that no recovery was obtained against one of joint tort-feasors** does not bar recovery against others. 120Kan21, 245 P734. **Where various chattels were converted pursuant to conspiracy between different defendants** judgment against all is proper. 134 Okl 70, 272P857.

2056–37 **DC** 39F(2d)512 (liability of corporation through authority of vice president in directing employee to seize automobile).

2056–38 214AppDiv541, 212NYS589, 605 [quotCyc]; 52ND721, 204NW614, 616 [citCyc]; 124 Okl 249, 255P688; 105WVa26, 141SE443, 444 [citCyc]. But see 40GaA835, 151SE682. **Receiver's agent.**–Iowa 225NW865.

2057–39 Mont 289P561.

2058–48 134Wash101, 234P1023 (retention not justified).

2059–57 47 Ida263, 274P627. **Such as nonexistence of property.** 52ND553, 203NW903, 40ALR377.

2059–59 **Equity will not prevent restoration of specific personal property** to municipal subdivision by reason of money had and received by unauthorized agent, where such municipal subdivision did not profit by transaction, and where funds so received cannot be identified and followed. 136 Okl 14, 275 P1042.

2060–61 117 Or306, 244P75; **TexCivA** 9SW(2d)490.

2060–61½–New. Where conversion is not complete, as where plaintiff fails to pay defendant's lien on goods when making demand, subsequent tender of goods on payment of lien relieves defendant from liability for conversion. 150Md671, 133A625.

2060–64 178Ark845, 12SW(2d)779.

2061–65 124 Okl 249, 255P688.

2063–76 40GaA598, 151SE59; 137Misc 332, 244NYS455.

2063–79 213Ala213, 104S394. **Assignee of landlord who acquired cotton crop tortiously** cannot interpose equitable title of landlord based on lien in mortgagee's action for conversion of crop. 213Ala213, 104S394.

2063–81 See also 213Ala213, 104S394.

2063–82 196NC38, 144SE297(1stcase). **Venue in trover is county residence of defendant.**–163Ga872, 137SE268.

2064–83½–New. Joint tort feasors may be properly joined as defendants. 41 GaA407, 153SE234.

2064–84 81CalA317, 253P757. **Reasonable diligence shown** in commencement and prosecution of action. 53ND621, 207NW1003.

2065–87 37GaA267, 139SE909.

2066–94 23AlaA290, 124S395; 86CalA 640, 261P493; 102CalA452, 283P321; 169Ga595, 151SE5; 39GaA16, 145SE892 (2dcase); 230Ky784, 20SW(2d)991(1st case); 79Mont136, 255P25; 116 Or549, 240P879; SD 227NW487; Utah 269P 132; 194Wis569, 217NW404; 198Wis 461, 224NW702. **Amendments.**–39GaA 16, 145SE892(2dcase). **Form of declaration, complaint, or petition,** etc. 213 Ala425, 104S843; 33PortoRico 102; Utah 269P132. **Complaints held insufficient.**–116 Or549, 240P879. **Anticipating defenses.**–SD 227NW487. **Petition held sufficient.**–41GaA407, 153SE234.

2068–2 See also 39GaA15, 145SE907 (1stcase).

2068–3 **TexCivA** 12SW(2d)242. **Complaint not defective,** etc. **TexCivA** 19 SW(2d)130.

2068–5 310Mo158, 274SW774; MoA

278SW1057; 221MoA789, 287SW1075; 35 OklACR492; 116 Or549, 240P879; 153Wash345, 279P595 (allegation as to time held sufficient). **Cross petition by lessee** showing right of possession in such lessee held properly stricken. 310 Mo 158, 274SW774. **Conversion of mortgaged property.**–117 Or47, 242P833, 43 ALR374. **Where plaintiff is not claiming as absolute owner of property** in question, complaint must disclose character and extent of interest at time of conversion. 75Mont466, 244P277. **Pleading held defective** for not alleging right of possession. MoA 278SW1057. **Complaint held sufficient.**–IndA 169NE884.

2069–7 35GaA159, 132SE644 (allegation that plaintiff claims title held sufficient); 218AppDiv773, 218NYS604. **As against general demurrer,** petition describing property, consisting of different items, and stating that all of them were in plaintiff's possession at time of conversion and alleging ownership of part of items described is sufficient. 35 OklACR492.

2069–10 233Ky485, 26SW(2d)11; 116 Or549, 240P879. **Allegations of conversion held sufficient.**–TexCivA 23SW(2d) 527.

2070–11 128Kan676, 280P771; Tex CivA 288SW1095. But see 102CalA452, 283P321. **Manner of conversion** need not be alleged. TexCivA 288SW1095.

2070–13 130 Or385, 280P497.

2071–17 218AppDiv773, 218NYS604; 117 Or47, 242P833, 43ALR374. **Failure to allege demand and refusal,** etc. 143 Okl 42, 287P392.

2071–19 28 OhA477, 162NE717.

2071–20½–New. Plaintiff may elect to take money verdict in lieu of property in some cases. 40GaA820, 151SE678(2d case).

2071–20½–New. Petition for conversion of securities held bad because not alleging plaintiff could not realize from his securities. TexCivA 25SW(2d)184.

2072–24 155Tenn486, 290SW988, 989 [quotCyc]. **In action against administrator,** plea of not guilty denies taking, damaging, and converting by deceased. 90Fla524, 106S350.

2072–27 That petition indicated valid contract of sale does not entitle defendant to plead extrinsic matters invalidating contract. MoA 296SW239.

2073–28 Cross action allegations held sufficient. TexCivA 271SW433.

2073–29 In action for conversion of note answer failing to allege purchase before maturity fails to state facts constituting defendant holder in due course. 115Nebr490, 213NW515.

2073–30 Allegations held sufficient.–82 Mont497, 267P802.

2074–36 Amendment to answer properly allowed.–38GaA274, 143SE781.

2074–42 132 Okl 121, 270P9. **Amendment to answer after first term so as to set up tender of property,** tender of reasonable hire or allegation of no value for hire, and disclaimer of title, must be made prior to election by plaintiff to take money judgment. 37GaA642, 141 SE327.

2074–43 See also TexCivA 16SW(2d) 856. **Under allegation of damage,** plaintiff may prove value of property converted. TexCivA 282SW267.

2075–49½–New. Only issues before court are those not admitted by defendant. 37Wyo 282, 264P91.

2075–50 SD 227NW487.

2075–51 Release is not put in issue under plea of general issue. 213Ala89, 104S17.

2075–54 145Wash372, 260P251.

2076–64 But see 124 Okl 64, 253P1021.

2076–67 Where stock was valueless at time of conversion.–124 Okl 106, 254P 34.

2076–68 But see 213Ala108, 104S33.

2077–71 290Pa43, 138A217.

2077–73 148Wash542, 269P842.

2077–74 Presumption cannot arise that defendant converted entire amount of many tons of coke lost because insignificant portion was seen to be taken away by its employees. 29F(2d)111.

2078–75 32Ariz70, 255P595 (securities sold by bank to directors and afterward converted by bank).

2078–75½–New. Bonds converted are presumed to be worth face value. 206 Iowa277, 220NW77.

2078–77 35F(2d)129 (proof of title); 216Ala546, 114S140; 219Ala478, 122S 652; 220Ala302, 125S36; 21AlaA136, 106S220 (title); 21AlaA363, 108S402; 111Conn178, 149A774; 90Fla524, 106S 350 (action against administrator); 236 IllA347; 86 IndA73, 156NE164; 79Mont 468, 257P469; 253NY477, 171NE749 (violation of possession); 49ND793, 193 NW311; 56ND491, 217NW658 [citCyc]; 35 OklACR492; 290Pa43, 138A217 (ownership); TexCivA 22SW(2d)743; 68Utah65, 249P133. **Demand need not be proved** where conversion is shown. 117 Or47, 242P833, 43ALR374. **Not required to prove solvency of maker of note converted** in absence of evidence of his insolvency. 213Ala125, 104S403. **Plaintiff claiming under contract whereby defendant was to make monthly payments until property was paid for** has burden of showing price to be paid and that entire amount has not been paid. 37GaA795, 141SE181. **Where possession is admitted,** demand and refusal need not be proved. 40GaA563, 150SE 572. **When plaintiff relies upon demand and refusal** as basic evidence of conversion, he has burden to show that defendant at that time had control. Mass 172 NE347.

2078–79 28F(2d)463; 253 IllA320. But see 111Conn178, 149A774.

2078–82 87Colo 169, 285P941.

2078–82½–New. , or that he did not possess or illegally dispose of goods received by mistake. 21AlaA136, 106 S220.

2078–83 220Ala302, 125S36; 221Ala 319, 128S608; 111Conn178, 149A774; 73Mont219, 236P250; 117 Or306, 244P 75; 53SD574, 221NW597. **Contract to saw plaintiff's lumber** admissible. 216 Ala299, 113S28.

2079–84 220Ala302, 125S36; Ida 290P 200; MoA 282SW507; 79Mont468, 257 P469; TexCivA 278SW1107; TexCivA 25SW(2d)170. **Evidence held too remote.**–TexCivA 278SW1107 (financial capacity of defendant to purchase or not purchase automobile alleged converted).

2079–85 111Conn178, 149A774; 116 Nebr499, 218NW130.

2079–86 82Colo 328, 259P1028.

2080–88½–New. Testimony of plaintiff as to making search for converted property is admissible. 215Ala407, 110S818.

2080–88½–New. Testimony as to time allowed plaintiff for removal of converted property is admissible. 215Ala407, 110S818.

2080–96 203 Iowa485, 210NW767 (inventories).

2081–97 98Fla6, 122S787; 203 Iowa485, 210NW767 (inventories).

2081–98 203 Iowa485, 210NW767 (inventories).

2081–99 40F(2d)67; 203 Iowa485, 210 NW767 (insurance policy); 116 Or83, 240P229, 232 [quotCyc].

2081–1 49ND207, 190NW815; 116 Or 83, 240P229, 232 [quotCyc].

2081–2 116 Or83, 240P229, 232 [quot Cyc].

2081–3 116 Or83, 240P229, 232 [quot Cyc].

2081–4 116 Or83, 240P229, 232 [quot Cyc].

2081–5 116 Or83, 240P229, 232 [quot Cyc].

2082–6 229AppDiv147, 241NYS341; 116 Or83, 240P229, 232 [quotCyc]. **Exclusion held not error.**–TexCivA 25SW (2d)283.

2082–7 88 IndA267, 163NE613.

2082–8 215Ala231, 110S31; 111Conn 178, 149A774; 80Mont480, 261P273; TexCommnA 25SW(2d)290. **Value.**–49 ND793, 193NW311.

2083–10 213Ala125, 104S403.

2083–13 252 IllA298; 53ND291, 205 NW722; TexCivA 10SW(2d)600; Tex CivA 25SW(2d)170. **General knowledge of witness.**–53ND291, 205NW722. **Facts material to issue of value.**–131 Misc336, 225NYS756. **Testimony of experts is not binding** on court or jury. 134Wash682, 236P279. **Where evidence of value is immaterial,** refusal to admit same below held not error. 79CalA458, 250P188.

2084–14½–New. In trover for value of household furniture, inquiry of dealer in musical instruments as to what he would give for piano second-hand, and what he would get for it at time of conversion, has been held properly limited to what it would cost to purchase piano of same kind in market at such time, where it was conceded that piano was of ordinary type obtainable in market. 83NH411, 143A524.

2084–16 127Kan568, 274P225. **The evidence in the following cases** was considered sufficient, etc. 79CalA458, 250 P188; 39GaA187, 146SE350(2dcase); 218Ky550, 291SW744; 177Minn240, 225 NW84; 114Nebr522, 208NW630; 55ND 449, 214NW251; 145Wash372, 260P251. **Evidence held insufficient.**–174Minn133, 218NW546; 125Misc457, 211NYS342.

2084–18 Positive evidence is not required, etc. 203 Iowa897, 209NW432. **Evidence sufficient to show demand.**–131Misc336, 225NYS756.

2084–18½–New. In action in conversion involving rights of innocent purchasers, intentions of parties must be learned from what they did, and not from what they may later detail on witness stand. 148Wash542, 269P842.

2084–18½–New. Where case tried upon theory of conversion judgment in trover must be supported by same proof necessary under common law. 253NY477, 171NE749.

2084–19 86CalA636, 261P324; 126Me 362, 138A553; 50ND813, 197NW854 (evidence of identity of grain alleged to have been converted held sufficient); 53ND447, 206NW795 (evidence of identification held sufficient).

2085–20 21AlaA136, 106S220 (evidence as to title must reasonably satisfy jury); 290Pa43, 138A217.

2085–21 Evidence sufficient, etc. 23 AlaA19, 121S699(2dcase) [certiorari den 219Ala197, 121S700]; 125Kan245, 263P 1077; Minn 232NW622; 53ND551, 207 NW37; Sask [1930] 1DomLR278. **Evidence of title and right of possession insufficient.**–178Ark1200, 10SW(2d)33; 76CalA594, 245P441; 37GaA795, 141SE 181; 38GaA462, 144SE338(1stcase); 236 IllA347; 168La736, 123S308; 128 Me472, 148A687(2dcase); 49ND793, 193 NW311; TexCivA 22SW(2d)743.

2085–21½–New. Same character of evidence will suffice as suffices in other actions in which question of title or right to possession is involved. 116 Or 83, 240P229.

2085–21½–New. Evidence held sufficient to show that corporation allowed officers to assume apparent ownership of securities for purpose of transfer. CalA 291P684.

2086–25 220Ala443, 125S811; 86CalA 636, 261P324; 107Conn712, 142A458; 251 IllA166 (evidence insufficient to show malicious conversion); 11LaA161, 123S183; 127Me553, 144A217; 80Mont 426, 260P709; 49ND207, 190NW815 (evidence held sufficient); 117 Or306, 244P75; TexCivA 9SW(2d)490; Tex CivA 10SW(2d)1023. **Evidence held sufficient.**–87Colo 169, 285P941; 49ND 626, 193NW144; 52ND721, 204NW614. **Evidence held insufficient.**–236Mich696, 201NW81; 241Mich379, 217NW10; 152 Tenn476, 279SW793; Wash 290P813. **Jury should be reasonably convinced** that defendant assumed ownership illegally or detained goods wrongfully, 21AlaA136, 106S220. **Possession by defendant at time of suit** held not essential of proof. 36GaA548, 137SE302. **Evidence of demand** held sufficient. 55 ND449, 214NW251. **Conversion may be established by indirect evidence.**–131 Or 653, 284P163.

2087–26 Evidence held sufficient to show demand. 50ND813, 197NW854; 53ND447, 206NW795.

2087–27 43F(2d)689; 135Misc757, 239 NYS574; TexCivA 14SW(2d)311; Tex CivA 16SW(2d)345; 38Wyo 329, 266P 1062, 61ALR615. **Evidence held sufficient to show conversion.**–52ND553, 203 NW903, 40ALR377. **Evidence held insufficient.**–6LaA21; 223AppDiv476, 228 NYS24; SD 225NW56.

2087–30 86CalA636, 261P324. **Evidence held insufficient.**–21AlaA363, 108S

402; Miss 114S829 (to warrant finding by jury that plaintiff refused to deliver). **Evidence held sufficient.**–DC 39 F(2d)512; LaA 129S243; 156SC480, 153SE462.

2087–30½–New. Good faith of defendant.–General rules of evidence apply. TexCivA 272SW582 (evidence sufficient to show want of good faith).

2087–30¼–New. Justification under attachment.–Evidence has been held sufficient to show valid attachment. 47 Ida519, 277P562.

2087–30¼–New. Evidence has been held sufficient to show that sheriff was in possession under attachment. 47 Ida 519, 277P562.

2088–31 Evidence of value of converted property was held to be sufficient.–CalA 291P681.

2088–32 218AppDiv282, 218NYS284. **Evidence insufficient.**–53ND375, 206NW 797. **Evidence held sufficient.**–6F(2d) 137; Ark 31SW(2d)541; 101CalA479, 281P1057; 131Misc336, 225NYS756; 49 ND867, 194NW113; TexCivA 23SW(2d) 851. **Evidence of value of converted property was held to be sufficient** in 86 CalA636, 261P324; 33GaA745, 127SE 805; 252 IllA298; 206 Iowa277, 220NW 77 (bonds worth face value); 50ND813, 197NW854; 52ND721, 204NW614; 53 ND447, 206NW795; 128 Or476, 274P 903(2dcase); TexCivA 282SW267; TexCivA 10SW(2d)600; TexCivA 10SW (2d)1023; 134Wash101, 234P1023; 134 Wash682, 236P279.

2088–33 215Ala231, 110S31; 124Kan 171, 257P955; 9LaA519, 119S435; Mo 281SW686; 102NJL347, 131A919; 136 Misc837, 241NYS68; 53ND697, 208NW 104, 44ALR1315; TexCivA 21SW(2d) 341. See also CalA 293P168.

2088–34 320Mo 623, 8SW(2d)858; 124 Okl 106, 254P34. **Evidence of value of corporate stock at date other than that of conversion** is sufficient where it appears that value remained same without fluctuation. 78Colo 254, 241P541.

2089–35 Evidence held to warrant treble damages for conversion of lumber.–165Minn358, 206NW443.

2089–39 166La497, 117S568; 128Me 472, 148A687(2dcase). **Estimation of value of plaintiff's qualified title.**–128 Me472, 148A687(2dcase).

2089–39½–New. Creditor who has retained title to secure indebtedness can recover for conversion against one not a wrongdoer but purchaser from debtor only to extent of unpaid debt. 34GaA 254, 129SE114.

2090–40½–New. Measure of damages against bank for conversion of warehouse receipts for cotton impressed with equitable lien is limited by amount of debt which lien secures. 219Ala478, 122S652.

2090–46 TexCivA 272SW582. See also 265Mass549, 163NE711.

2090–47 TexCivA 282SW635. **Where owner of property is deprived of its use for a long time** he cannot recover damages bond on its daily, weekly, or monthly hire. TexCivA 282SW635.

2090–49 265Mass549, 163NE711; 114 Okl 135, 244P42; TexCivA 297SW634; TexCivA 38SW(2d)534. **Customary value of use** must be proved where there is custom. 111 Okl 239, 239P623.

2090–50 TexCivA 10SW(2d)600.

2090–52 24F(2d)206 (California statute); 168Ark853, 272SW353; Cal 292P 495; 252 IllA298; Miss 130S151; 80 Mont420, 260P709; 118Nebr601, 225 NW759; 214AppDiv541, 212NYS589, 605 [quotCyc]; 126 Okl 172, 259P253, 54 ALR1152; 33PortoRico 102; TexCivA 272SW582; TexCivA 285SW1115; Utah 269P132; Utah 287P175. But see 37 GaA461, 140SE773; 128Me472, 148A687 (2dcase); Wash 290P839. **Where plaintiff elects to recover highest market value of property between dates of conversion and verdict,** interest is not recoverable. 126 Okl 172, 259P253, 54ALR 1152. **Whether interest runs from conversion or judgment** depends in effect on whether damages are liquidated or unliquidated. Wash 290P839.

2092–55 128Me472, 148A687(2dcase); 221MoA448, 282SW459; 198NC511, 152 SE501.

2092–56 215Ala407, 110S818; 21AlaA 549, 110S57; 33GaA745, 127SE805; 252 IllA298; 124Kan171, 257P955; 226Ky 322, 10SW(2d)1104; 166La497, 117S 568; 80Mont426, 260P709; 86Mont150, 282P494; 118Nebr792, 226NW444; 50 ND141, 195NW6; 52ND721, 204NW614; 52ND786, 204NW828; 53ND291, 205 NW722; 53ND697, 208NW104, 44ALR 1315; 111 Okl 239, 239P623; 114 Okl 135, 244P42; 126 Okl 172, 259P253, 54 ALR1152; 117 Or306, 244P75; 126 Or 43, 268P757; TexCivA 282SW267; Utah 269P132; 144Wash390, 257P390. **No damage occurs for conversion of bond without value.**–13F(2d)40. **In action for conversion of house,** value of house only is recoverable. Trespass to lot is disregarded. 214Ala341, 107S903.

2093–57 215Ala407, 110S818; 109Conn 117, 146A17; 323Mo 64, 18SW(2d)445; 111 Okl 239, 239P623; 126 Or602, 268P 1009; 13PaDist&Co 215; TexCivA 285 SW1115 (market value); TexCivA 10 SW(2d)1012; TexCivA 14SW(2d)292; Utah 287P175. But see Md 152A114.

2093–58 53ND291, 205NW722 (reasonable value); 111 Okl 239, 239P623.

2093–59 107Conn117, 146A17.

2094–60 124Kan171, 257P955; 265Mass 549, 163NE711; 52ND721, 204NW614; 52ND786, 204NW828; 53ND697, 208 NW104, 44ALR1315; 54ND322, 209NW 379; 117 Or47, 242P833, 43ALR374; 126 Or43, 268P757; 126 Or602, 268P 1009; TexCivA 285SW1115. **Value at place may be determined** by taking price at market and deducting cost of shipment thereto. 145Wash624, 261P399.

2094–61 215Ala407, 110S818; 220Ala 306, 124S880; CalA 290P116; 109Conn 117, 146A17; 48 Ida217, 281P4; 206 Iowa277, 220NW77; 124Kan171, 257P 955; 262Mass348, 159NE922; Miss 130 S151; 80Mont426, 260P709; 102NJL 347, 131A919; 230AppDiv509, 245NYS 367; 50ND141, 195NW6; 52ND721, 204 NW614; 52ND786, 204NW828; 53ND 291, 205NW722 (reasonable value); 53 ND447, 206NW795; 53ND697, 208NW 104, 44ALR1315; 54ND322, 209NW379; 114 Okl 135, 244P42; 126 Okl 172, 259P 253, 54ALR1152; 117 Or47, 242P833, 43 ALR374; 126 Or602, 268P1009; 50SD 590, 211NW457; TexCivA 272SW582 (unless special reason for different rule); TexCivA 282SW267; TexCivA 285SW 1115; Utah 269P132; Utah 287P175; 144Wash390, 257P390. **Conversion of wheat by warehouseman is complete** when shipped and sold by him. 144 Wash206, 257P390. **Measure of damages for conversion for unshelled corn** is market value of shelled corn less expense of shelling and hauling. 50SD 590, 211NW457. **Sale price 50 days before conversion** is not safe criterion of value of machinery. 220Ala306, 124S 880.

2095–62 But see 215Ala407, 110S818.

2096–63 89CalA551, 265P551. See also 265Mass549, 163NE711.

2096–64 But see TexCivA 282SW267.

2096–65 213Ala108, 104S33; 215Ala 231, 110S31; 37GaA461, 140SE773; 53 ND697, 208NW104, 44ALR1315; 56ND 347, 217NW515; 126 Okl 172, 259P253, 54ALR1152 (where action prosecuted with reasonable diligence). 148SC511, 146SE534; TexCivA 272SW582 (where conversion is wilfull). **A verdict for the highest value,** etc. 50ND141, 195NW6; 53ND551, 207NW37.

2096–66 Mo 281SW686.

2097–68 See also 230AppDiv509, 245 NYS367.

2097–70 69Utah557, 257P658, 667 [quot Cyc].

2097–71 13F(2d)40; 213Ala125, 104S 403; 321 Ill 431, 151NE884; 203 Iowa 897, 209NW432 (face value of government bonds); 32NM384, 257P680; 129 Or534, 277P1005; 69Utah557, 257P658, 667 [quotCyc].

2098–72 See also 220MoA1273, 290SW 82.

2098–73 213Ala125, 104S403; 129 Or 534, 277P1005.

2099–80 TexCommnA 11SW(2d)778. **Willful converter** will not be allowed profit or expenses in respect of converted property. 115 Oh298, 152NE641.

2099–80½–New. Measure of damages for conversion of casing head gas is value thereof when converted and not value of commercial product into which it is made. 114 Okl 251, 246P837.

2099–80¼–New. Defendant rebuilding engine converted has been held not entitled to profits for rebuilding, being wrongdoer. Ark 31SW(2d)541 (court could not consider notes given for repairs previously made).

2100–89 In trover for property sold by plaintiff to defendant at a fixed price, etc. See also 168La317, 122S51.

2100–91½–New. Measure of damages for conversion of irrigation district bonds is ninety per cent of their face value plus accrued interest, where ninety per cent of face value was lowest amount for which bonds could be sold in accordance with statute. 129 Or534, 277 P1005.

2100–92 117 Or306, 244P75; TexCivA 10SW(2d)1012. But see Utah 269P132.

2100–93½–New. Evidence held sufficient to show that defendant had knowledge of the use of the mules and equipment for his profit. TexCivA 282SW635.

2100–95 See 117 Or306, 244P75.

2101–96 50ND141, 195NW6.

2101–99 21AlaA549, 110S57; 117 Or47, 242P833, 835, 43ALR374 [citCyc] (recognizing general rule).

2101–99½–New. Where facts alleged in complaint are insufficient to constitute cause of action, alleged expenditures in ascertainment of facts and employment of counsel to ascertain and protect plaintiff's rights cannot be recovered, though allegations indicate intent to state such cause of action. 94CalA557, 271P540.

2102–3 33GaA745, 127SE805 (defendant claiming good faith in mitigation must show facts establishing it).

2102–4 See also 53ND697, 208NW104, 106, 44ALR1315 [citCyc].

2102–6½–New. Where officer in good faith shocks and threshes grain and hauls it to market plaintiff cannot recover value of threshed grain without deducting actual and reasonable cost of threshing and hauling to market. 53ND 697, 208NW104, 44ALR1315.

2102–8 236 IllA187.

2102–11 6F(2d)137 [citCyc]; 219MoA 419, 271SW854 (restitution in whole or in part by one of two joint tort-feasors enures to benefit of both). **Condition, that return of goods** was without prejudice to action, meant only rights to damages were not waived. 136Misc837, 241 NYS68.

2103–12 126 Or43, 268P757.

2103–13 219MoA419, 271SW854.

2103–15 TexCivA 18W(2d)456, 459 [cit Cyc].

2104–16 47 Ida726, 278P224(3dcase); 48 Ida217, 281P4; 52ND721, 204NW614 (lien for storage charges); 52ND786, 204 NW828. **In action for conversion of oil alleged to belong to plaintiff under royalty agreement,** judgment should be for defendant where he had erroneously delivered to plaintiff quantity of oil which plaintiff had disposed of at prevailing market price in amount equalling damages sustained by reason of alleged conversion. 114 Okl 135, 244P42.

2104–18 215Ala231, 110S31; 21AlaA 369, 108S632; 85Colo 565, 277P779; Miss 130S151; 80Mont480, 261P273; 53 ND697, 208NW104, 44ALR1315. **Exemplary damages denied** where there was temporary appropriation of an automobile. 21AlaA369, 108S632.

2104–19½–New. Such damages should bear some reasonable proportion to actual damages sustained. MoA 296SW 239.

2104–20 Amounts held not excessive.–89 IndA393, 166NE615; 232Mich370, 205NW196. **Amounts held excessive.**–MoA 296SW239; Wash 290P813. **Damages for conversion of lumber held not excessive.**–165Minn358, 206NW443.

2104–20½–New. Mental anguish is not ordinarily element of actual damage in action for wrongful and malicious conversion of property. TexCivA 14SW (2d)311.

2105–21 147Wash104, 265P159.

2105–24½–New. Direction of verdict held warranted.–143 Okl 42, 287P392.

2105–25 Where defendant admitted plaintiff's title and that defendant had been paid for property, court will not

search for technical reasons for defeating plaintiff's right to value of property. 130 Or385, 280P497.

2105–27½–New. Where defendant admitted fact amounting to conversion, only question at issue is amount plaintiff may recover. 50RI 50, 144A883.

2105–35 215Ala231, 110S31; 87Colo 169, 285P941; 203 Iowa485, 210NW767 (identity of property); 216Ky119, 287 SW353; Miss 130S151; MoA 279SW 205; 73Mont219, 236P250; 79Mont100, 255P8; NH 148A582; 116 Or83, 240P 229; 290Pa43, 138A217; Vt 148A750.

2106–37 35F(2d)129 (unambiguous contract vesting absolute title held not to require construction by jury).

2106–38 205 Iowa379, 218NW39; 121 Kan478, 247P850; 124Kan200, 257P 929; 158Md189, 148A457; Mo 281SW 686; TexCivA 297SW634 (evidence held insufficient for issue to jury). **Evidence held insufficient for submission to jury.**–TexCivA 22SW(2d)955.

2106–39 220Ala86, 124S234(2dcase); 121Kan478, 247P850; 124Kan200, 257P 929; 84Mont195, 274P501. **Whether taking of parts of machine amounts to conversion of whole** is generally question of fact for court on trial without jury. 124Kan171, 257P955. **Nonsuit held properly denied.**–195NC5, 141SE343. **Where attached goods are in constable's custody,** verdict should be directed for defendant, notwithstanding his control of building in which they are locked. Mass 172NE347.

2106–40 124Kan200, 257P929.

2107–41 Colo 259P1028; 253 IllA320. But see TexCivA 25SW(2d)170. **Whether purchase of note and trust deed for much less than value is suspicious circumstance** is for consideration of jury on question of good faith. 253 IllA320.

2107–45 Evidence insufficient to go to jury.–50SD590, 211NW457.

2107–47 216Ky119, 287SW353; Md 152 A114; 80Mont480, 261P273. **Where prima facie showing of value of property** converted is not met by any evidence, question of value is not for jury. 35GaA34, 132SE123. **Sufficiency of evidence to raise jury question.**–111 Okl 239, 239P623. **That plaintiff's testimony was only evidence of value** at place of conversion does not authorize withdrawal of such issue from jury. Tex CivA 10SW(2d)1012.

2107–49 124Kan200, 257P929. **Instruction defining "malice"** held not erroneous in omitting words "without just cause or excuse." 307Mo 480, 270SW 633. **Instruction held inapplicable to issue.**–37GaA781, 141SE917. **Instructions held erroneous.**–MoA 16SW(2d) 742. **Instructions held not erroneous.**–158Md189, 148A457.

2107–50 124Kan200, 257P929.

2107–51 22AlaA612, 118S596; MoA 15 SW(2d)865(1stcase). **Evidence held sufficient** to justify submission of issue of conversion. 217Ky594, 290SW487.

2107–53 117 Or306, 244P75.

2107–59 174Ark268, 295SW26.

2108–60 222MoA51, 299SW604.

2108–62 33GaA745, 127SE805.

2108–62½–New. Instruction that defendant, converting books in its possession, owed no duty to prevent injury thereto by rain and dampness is properly refused. 215Ala407, 110S818.

2108–62½–New. Instruction that no bailment existed between parties is properly refused as immaterial. 215Ala 407, 110S818.

2108–63 21AlaA136, 106S220.

2108–65 Affirmative instruction for defendant is properly refused where evidence warrants finding for plaintiff. 21 AlaA136, 106S220.

2109–77 Instructions held proper.–252 IllA298.

2109–78 35GaA767, 134SE831 (instruction, amounting to opinion as to act of conversion, held erroneous).

2109–80 215Ala407, 110S818.

2109–84 215Ala407, 110S818 (request properly refused); 117 Or306, 244P75 (request properly refused).

2109–88 102NJLaw347, 131A919 (charge that burden on plaintiff to show value of property and damages suffered by its conversion held correct). **Instructions as to time, etc.**–214Ala427, 108S257. **Instruction held erroneous.**–Mo 281SW686. **Instruction on punitive damages** held supported by evidence of aggravating circumstances and not misleading in failing to define term "wantonly, without legal cause or excuse." MoA 296SW239.

2110–89 RI 144A769(1stcase).

2110–93 82Colo 328, 259P1028 (verdict for $1 upheld where jury possibly found proof of damage insufficient).

2110–95½–New. Verdict for value of certain property, based on evidence from which inference that it belonged to plaintiff and was converted by defendant could be drawn, is authorized. 35GaA 763, 134SE806.

2110–96 Implied finding by court held supported by pleadings and jury's finding on special issue. TexCivA 288SW 1095.

2110–97½–New. Submission of issue failing to require finding as to market value of property at time, and place of conversion will not support judgment for recovery of certain amount. TexCivA 12SW(2d)242.

2111–3 Particular judgments construed.–TexCivA 21SW(2d)341.

2111–16 Judgment for value of property must be awarded in case property cannot be had. TexCivA 21SW(2d)341.

2112–18 134 Okl 70, 272P857.

2112–23½–New. Judgment in action by pledgee for conversion of stock pledged as collateral for notes aggregating, amount of such judgment is collateral security for payment of such notes and payment of notes by maker entitles him to satisfaction of judgment at least upon payment of costs. 307Mo 417, 270SW 691.

2112–25 41 Ida767, 244P404; 248 IllA 145, 149 [quotCyc]; 161Minn135, 201 NW537, 202NW71, 39ALR1094; 52ND 553, 203NW903, 40ALR377 [citCyc]; 147Wash240, 265P158, 159 [citCyc]. **Assignee of such defendant** cannot be held further responsible. MoA 9SW(2d) 531. **By payment of judgment in suit** for cutting and removing timber, defendant became vested with title to timber converted. MoA 9SW(2d)531.

2112–26 52ND553, 203NW903, 40ALR 377 [citCyc].

TRUSTEE

2116–20 Life tenant held not "trustee" within terms of statute. 128Misc577, 219NYS619.

TRUSTS

39 Cyc—17–1 205 Iowa1064, 217NW 250; 316Mo 129, 289SW814, 818 [cit Cyc]; 114Nebr664, 209NW249; 40Wyo 524, 281P190. **Similar definitions.**–165 Minn446, 206NW723; 220MoA1081, 279 SW746. **Other definitions.**–220Ky43, 294SW767. **Trusts are always imperative and obligatory on conscience** of person intrusted. 136SC1, 134SE230.

17–2 316Mo 129, 289SW814, 818 [cit Cyc]; 316Mo 483, 291SW132. **A similar definition is:** Any arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit. CalA 288P884.

17–3 222MoA990, 6SW(2d)655, 656 [quotCyc].

17–4 75Mont304, 243P806.

18–7 Lord Coke's definition, etc. 90 Fla343, 106S408.

18–8 219Ky1, 292SW338; 220Ky43, 294SW767.

18–9 See also 125Misc376, 211NYS629. **"It is one of the essential elements,** etc." 46 Ida481, 269P86, 59ALR443. **Essential to valid trust** that legal estate be vested in trustee. 218AppDiv317, 218 NYS325.

18–10 97CalA1, 275P248; MoA 17SW (2d)357.

18–11 75Mont304, 243P806; 287Pa205, 134A422.

18–12 90Fla343, 106S408.

19–17 114Nebr664, 209NW249; Tex CivA 293SW599. **Other definitions.**–103 NJEq487, 143A771.

19–21 75Mont304, 243P806.

20–24½–New. Equitable interest may be in persons differently related and one subservient to other. 287Pa205, 134A 422.

20–24½–New. Stockholders to creditor.–287Pa205, 134A422.

20–29 As meaning income.–15DelCh84, 131A529.

22–44 TexCivA 7SW(2d)107, 108 [quot Cyc].

22–45 TexCivA 7SW(2d)107, 108 [quot Cyc]. **Director or manager of corporation** is not trustee of funds of company in his hands. 40QueKB362, [1926] 2 DomLR900.

22–48 Power distinguished.–136SC1, 134SE230.

23–49 50Philippine810. **Gifts, etc.**–237 IllA500.

23–51 43F(2d)589.

23–53 154Md660, 141A405; Utah 280P 1046.

24–56 41 Ida776, 242P785 (in establishment of trust, ordinary relation of debtor and creditor does not exist).

24–63 158La54, 103S440.

24–65 248NY54, 161NE417; 116 Or593, 240P883, 242P605; 47RI 263, 132A527.

24–66 94Fla171, 114S225; 130 Okl 67, 264P811; 116 Or593, 240P883, 242P605; 154Tenn602, 290SW402; 134Wash560, 236P285.

25–67 314Mo 175, 282SW1022; 130 Okl 67, 264P811.

25–68 130 Okl 67, 264P811.

25–71 175Ark763, 300SW437; 178Ark 1200, 13SW(2d)585; 130 Okl 67, 264P 811; 134Wash560, 236P285.

25–72 78Mont457, 254P432 (voluntary trusts); 130 Okl 67, 264P811; 134Wash 560, 236P285.

25–73 78Mont457, 254P432 (involuntary trusts); 130 Okl 67, 264P811; 47 RI 263, 132A527; 134Wash560, 236P 285.

25–74 78Mont457, 254P432; 130 Okl 67, 264P811

25–75 93Fla849, 112S846, 857 [quot Cyc]; 47RI 263, 132A527.

25–76 93Fla849, 112S846, 857 [quot Cyc].

26–77 93Fla849, 112S846, 857 [quot Cyc].

26–78 93Fla849, 112S846, 857 [quot Cyc]. But see 47RI 263, 132A527. **To constitute "implied trust"** there must be unequivocal acts and conduct of settlors, beneficiary must be unequivocally named, and purpose must be established by unequivocal implications. Ind 169 NE843.

26–82 175Ark763, 300SW437; 93Fla 849, 112S846, 857 [citCyc]; 116 Or593, 240P883, 242P605.

26–83 208Ky702, 271SW1064; 130 Okl 67, 264P811; 147Va921, 133SE614.

26–85 130 Okl 67, 264P811; 130 Or577, 281P178; 47RI 263, 132A527.

27–87 CalA 265P263, 266 [quotCyc]; 323 Ill 510, 154NE235; 208Ky702, 271 SW1064; Utah 290P161; 147Va921, 133 SE614.

27–88 208Ky702, 271SW1064; 130 Okl 67, 264P811.

27–89 130 Okl 67, 264P811.

27–90 90Fla7, 105S134, 136 [citCyc].

27–93 171Ark192, 283SW377; 90Fla7, 105S134, 136 [citCyc]; 323 Ill 510, 154 NE235; 147Va921, 133SE614.

27–94 171Ark192, 283SW377; 90Fla7, 105S134, 136 [citCyc]; 208Ky702, 271 SW1064.

27–95 171Ark192, 283SW377; 90Fla7, 105S134, 136 [citCyc]; 323 Ill 510, 154 NE235; 208Ky702, 271SW1064; 147Va 921, 133SE614.

27–96 171Ark192, 283SW377; 90Fla7, 105S134, 136 [citCyc]; 323 Ill 510, 154 NE235; 208Ky702, 271SW1064.

28–98 208Ky702, 271SW1064.

28–1 208Ky702, 271SW1064; 56ND41, 216NW212, 215 [citCyc].

28–2 88CalA515, 263P1033.

28–10 171Minn237, 213NW893, 895 [cit Cyc]; 316Mo 483, 291SW132.

29–11 316Mo 483, 291SW132.

29–13 316Mo 483, 291SW132.

30–15 163Ga478, 136SE517.

30–20 198Cal 352, 246P48; 88 IndA309, 152NE609; 289Pa341, 137A461; Tex CivA 284SW289.

31–22 198Cal 352, 246P48; 289Pa341, 137A461, 463 [citCyc].

31–23 Rule limiting liability of passive trustees must be strictly construed. 130 Misc590, 224NYS391.

32–28 319Mo 633, 5SW(2d)1100, 1102 [citCyc]; NJCh 145A462.

32–29 NJCh 145A462; RI 150A819.

33–41 Spendthrift trust.–7F(2d)461; 98 NJEq554, 131A302; 289Pa542, 137A802, 52ALR1251.

34-43 TexCivA 2728SW202.

34-45½-New. Massachusetts trusts or common-law business associations. General features of such associations are that "property is transferred to trustees, who hold the legal title to all the assets belonging to the trust and exercise the exclusive management and control of it under the terms of the agreement. Certificates of part ownership, resembling shares of stock in a corporation, are issued to those who are the ultimate owners of the property." 86 IndA196, 156 NE584.

34-45½-New. Such associations have been held not to fall under any familiar conception of joint stock associations. [illegible] 2728SW[illegible].

34-45¼-New. Massachusetts trust held to be corporation within constitutional definition of corporation. 120Kan557, 245P143; 238Mich508, 212NW867.

34-45½-New. Members are jointly and severally liable for debts incurred in conduct of business under declaration of trust. TexCivA 2828SW958.

34-45½-New. Such associations are distinguished from corporations, though there are appearances of similarity in forms of organization. 121Kan784, 250 P[illegible].

34-45½-New. Liability of trustees. TexCivA 2728SW958.

34-45¼-New. Trustees of business trust constitute board and can only act as unit in disposition of any business of trust requiring exercise of judgment or discretion and not through individuals composing board. 75Mont261, 242P540.

34-45⅛-New. One trustee cannot vote as such upon approval of claim of his own against trust. 75Mont261, 242P540.

34-45/10-New. Hence, where but two of three trustees composing board were present at board meeting at which individual claim of one of the two against trust was presented for allowance, and alleged account stated agreed upon, such action was void for want of competent representation of trust. 75Mont261, 242 P540.

34-45/11-New. Where minutes of meeting are silent as to any ratification of prior action, it cannot be contended that illegal action of two trustees in agreeing to account stated in favor of one of them had been ratified at subsequent meeting at which entire board was present. 75 Mont261, 242P540.

34-45/12-New. In some jurisdictions Massachusetts trust can transact business within state only by conforming to regulations imposed by statute on corporations. 120Kan557, 245P143; 238 Mich508, 212NW867.

34-45/13-New. Under articles of association in form of declaration of trust, trustees and stockholders are individually liable for association's debts notwithstanding attempted limitation of liability, where they fail to organize as corporation. 120Kan557, 245P143; 123 Kan409, 255P1105.

34-45/14-New. In some jurisdictions organization of Massachusetts trusts or business trusts is limited to purposes for which private corporations may be formed under general laws. 120Kan557, 245P143.

34-45/15-New. Stockholders of joint stock association, formed by trust agreement, are liable for debts of association contracted without agreement with creditor that he shall look alone to property of associations. TexCivA 2728SW622.

34-45/16-New. Even if evidence failed to show certain defendants were members of association, this would not justify peremptory instruction in favor of association and other stockholders. TexCivA 2728SW622.

34-45/17-New. Creditor's release of lien against certain property did not estop him as matter of law from asserting claim against association and members where there was evidence of agreement by members to take care of such claim. TexCivA 2728SW622.

34-45/18-New. Contract between common-law trust at meeting of board of trustees attended by only two of its three trustees and company of which one of such two was virtual owner is nullity. 77Mont30, 248P219.

34-45/19-New. Such contract is not validated by subsequent written approval of third member of board of trustees. 77 Mont30, 248P219.

34-45/20-New. Board of trustees of common-law trust can act only as board when assembled as such and not through individuals composing it. 77Mont30, 248 P219.

34-45/21-New. Where two of three trustees of common-law trust were officers of oil company to which trustees granted extension of drilling lease on lands owned by trust under circumstances showing lack of good faith and interests of such trustees were adverse to those of trust, it will be presumed that agreement was entered into without consideration and through undue influence. 77 Mont30, 248P219.

34-45/22-New. In some jurisdictions association for conducting mercantile business under declaration of trust is unauthorized. 86 IndA196, 156NE584.

34-45/23-New. Common-law trust has none of the attributes of limited liability or freedom from personal liability which attach to limited partnerships or ordinary business corporations. 123Kan409, 255P1105.

34-45/24-New. Business trust has none of attributes of freedom from personal liability attached to corporations or limited partnerships. 123Kan665, 256P803.

34-45/25-New. Trust is within statute requiring foreign corporations to obtain license to do business within state. 277US537, 48SCt577, 72LEd978 [aff 238 Mich508, 212NW867].

34-45/26-New. Trustees and stockholders of business trust are personally liable for debts of association, regardless of attempt to limit liability. 123Kan665, 256P803.

34-45/27-New. Where trust agreement provided for annual valuation of shares as basis for payment on member's death, and current year's valuation had not been made, surviving members not entitled to deceased's shares on tender of arbitrarily fixed valuation. 256Mass205, 152NE231.

34-45/28-New. Where annual valuation of shares as basis for payment on death of member not made, court will determine value in suit by administrator. 256 Mass205, 152NE231.

34-45/29-New. Provision that whole estate should vest in last survivor on payment for deceased member's share, within specified time after death, did not require representative of deceased member to wait until there was but one survivor. 256Mass205, 152NE231.

34-45/30-New. Offer to purchase shares and other property held separable, where subject matter of each item and price therefor were separate. 258Mass540, 155 NE639.

34-45/31-New. Where prescribed conditions with respect to voluntary transfers of shares are complied with, and trustees do not exercise option to purchase, they are bound to make transfer. 258Mass 540, 155NE639.

34-45/32-New. By accepting shares in business trust in part payment for goods delivered, creditor is not bound to accept provision of declaration of trust that partners were not personally liable where debt was created prior to acceptance of shares. TexCivA 2918SW350.

34-45/33-New. Execution of contract whereby seller of goods agreed to accept shares in business trust as part payment does not make seller partner in association. TexCivA 2918SW350.

34-45/34-New. Trustee sued for balance due on transfer of trust contract held liable under contract despite plea of no consideration, where evidence showed defense of prior obligation unfounded because of lack of authority in officer of trust company to make same. 169Ark 1211, 2788SW19.

34-45/35-New. Trustees held precluded from contending no consideration to executed agreement. 169Ark1211, 2788SW 19.

34-45/36-New. Trustees held liable as copartners despite exception from personal liability in trust declaration. 169 Ark1211, 2788SW19.

34-45/37-New. Assignment of trust obligation, on which trustee is personally liable, held not to avoid such liability. 169Ark1211, 2788SW19.

34-45/38-New. Trustee of business trust cannot acquire obligation against trustee running to himself. 169Ark1211, 2788SW 19.

34-45/39-New. Trustee may acquire right of action against trust from stranger, after release of all interest on trust and indemnification agreement from other trustees. 169Ark1211, 278 SW19.

34-45/40-New. Where common law trust exists and is assuming to exercise powers and functions of corporation, state is only one that can complain. 140Wash 596, 249P1057.

34-45/41-New. Purchaser of bond in open market from one to whom it had been issued years before cannot complain that association of bondholders, as created, is common-law trust and illegal. 140Wash596, 249P1057.

34-45/42-New. Where owner of property transferred it to another in trust and trustee sold bonds or units amounting to more than cost of property, such sale does not constitute fraud on purchaser of bond or unit. 140Wash596, 249P1057.

34-45/43-New. Subsequent purchaser of such bond or unit cannot claim fraud in transfer of property or claim fraud in trust, where there was no attempt to assign to him any action for fraud. 140 Wash596, 249P1057.

34-45/44-New. Violation of trust deed providing for sale of bonds or units by paying compensation for management of property held in trust is not ground for appointment of receiver and sale of properties at instance of minority bond or unit holder. 140Wash596, 249P1057.

34-45/45-New. Articles of association may be considered by court to determine plaintiff's claim, if any, against business trust for investment claimed by him to be loan. TexCivA 2788SW932.

34-45/46-New. Associates in business trust held liable as partners to third parties, unless relieved by express agreement with creditors. TexCivA 2788SW 932.

34-45/47-New. Associate in business trust, holding "full-paid preferred stock" certificate is member, not creditor. TexCivA 2788SW932.

34-45/48-New. Rights of stockholders in corporations held to govern rights of equitable stockholders in business trust. TexCivA 2788SW932.

34-45/49-New. Voting rights of associates or absence of such rights immaterial in determining whether they are members or creditors. TexCivA 2788SW932.

34-45/50-New. Petition as to amount of stock in business association sold and paid is held sufficient, in action to rescind membership for fraud. TexCivA 2788SW932.

34-45/51-New. Accounting and dissolution held not required relief in action to rescind contract of membership in business trust. TexCivA 2788SW932.

34-45/52-New. Whether or not the trustees are an association of persons acting as a corporation without being legally incorporated is a mixed question of law and fact to be determined from the evidence and construction of declaration of trust. 23 OhA21, 155NE147.

34-45/53-New. They have been held not to be an association of persons acting as a corporation without being incorporated. 23 OhA21, 155NE147.

34-45/54-New. The natural right exists in them to buy and sell real estate which is protected under state laws. 23 OhA 21, 155NE147.

34-45/55-New. Subscribers to syndicate agreement are liable for loans obtained by syndicate manager who was authorized in his discretion to manage affairs. 258Mass573, 155NE606.

34-45/56-New. In suing business trust all members must be joined. TexCivA 2918SW350.

34-45/57-New. Burden of proof is on trustees to show fraud on part of person making offer to purchase shares from stockholder. 258Mass540, 155NE 639.

34-45/58-New. Evidence held to show

no breach of trust by trustee's resignation and sale of personal interests. 169 Ark1145, 278SW355.

34-45½9-New. The question of good faith of party offering to purchase shares is one of fact where evidence is conflicting. 258Mass540, 155NE639.

34-45½0-New. Business trust held not violative of spendthrift's statute because trust certificates were by their terms assignable. 194Wis233, 216NW147, 58 ALR462.

34-45½1-New. That words "trust" or "trustee" are not used in agreement does not determine question whether agreement creates common-law trust. 318Mo 784, 1SW(2d)163, 58ALR493.

34-45½2-New. Trustee is principal and not agent for common-law trust. 318Mo 784, 1SW(2d)163, 58ALR493.

34-45½3-New. Trustee and not cestui que trust is personally responsible for indebtedness growing out of transactions of common-law trust. 318Mo 784, 1SW (2d)163, 58ALR493.

34-45½4-New. Intention of parties to form common-law trust is to be ascertained from whole contract and from relation it creates. 318Mo 784, 1SW(2d) 163, 58ALR493.

34-45½5-New. Test to determine whether organization formed by agreement is trust or partnership is controlled by trustees. 318Mo 784, 1SW(2d)163, 58 ALR493.

34-45½6-New. Agreement vesting entire management of railroad in five managers holding title to property and exclusive control over it does not violate legislative policy concerning corporations and limited partnerships. 318Mo 784, 1SW (2d)163, 58ALR493.

34-45½7-New. Under such agreement managers may be both trustees and cestius que trust. 318Mo 784, 1SW(2d) 163, 58ALR493.

34-45½8-New. Stockholders, under common-law trust agreement, are exempted from individual liability for debts contracted by trustees where they have no management or control of business. 318 Mo 784, 1SW(2d)163, 58ALR493.

34-45½9-New. Business trust adopting trade or fictitious name may be sued in such name. 137 Okl 116, 278P294.

34-45½0-New. Judgment against trust in trade or fictitious name adopted by it is lien against property of trust to same extent as judgments against partnership property. 137 Okl 116, 278P294.

34-45½1-New. Where trust agreement provides for manager and that service of process on manager shall be notice to members and that judgment rendered on such service shall be conclusive as to all parties, service of process on manager gives court jurisdiction of parties. 137 Okl 116, 278P294.

34-45½2-New. Judgment rendered after such service is lien against property of trust to same extent as judgments against partnership property. 137 Okl 116, 278P294.

34-45½3-New. Trustees are owners of trust property with power to handle, dispose of, and reinvest it without consulting cestius que trustent. Ariz 283P 284.

34-45½4-New. Trustees are not personally liable for debts contracted by them as such. Ariz 283P284.

34-45½5-New. Trust company cannot sue on notes payable on their face to individual in whose name it does business, title to notes being in trustees of such individual and not in trust company. Ariz 283P284.

34-45½6-New. Where action on notes payable to name presumably that of individual is brought in such name by plaintiff alleging that it is trust company, it must be shown by pleading and proof that name is collective name under which trustees carry on trust business. Ariz 283P284.

34-45½7-New. Massachusetts or common-law trusts suing on notes payable on face to individual in whose name it does business should have trust indenture authenticated by its custodians. Ariz 283P284.

34-45½8-New. Denial of allegations of complaint held sufficient to put plaintiff to proof of allegations that it was trust company doing business in name of individual to whom notes sued on were payable on face. Ariz 283P284.

34-45½9-New. Trustee of business trust cannot be held liable on notes signed in name of trust by its president merely because president executed them in way that would impose personal liability on himself. 252 IllA487.

34-45½0-New. Trust declaration by property owners constituting themselves trustees to carry on business without personal liability held ineffectual before acquisition of certificates by others. MoA 30SW(2d)635.

34-45½1-New. Such declaration held validated by acquisition of beneficial interest certificates by third person. MoA 30SW(2d)635.

34-45½2-New. Persons not trustees acquiring beneficial interests in business trust held not partners as between themselves. MoA 30SW(2d)635.

34-45½3-New. or as regards personal liability to persons dealing with trust. MoA 30SW(2d)635.

34-45½4-New. Only interest acquired by purchasers of such interests is right to share in profits and to distributive share on dissolution. MoA 30SW(2d) 635.

34-45½5-New. Creation of relation of trustee. CalA 293P162.

34-45½6-New. Limitation of liability of trustee. CalA 293P162.

34-45½7-New. Massachusetts or business trusts, with limited liability, are lawful. Cal 292P624.

34-45½8-New. Common-law trust, in effect corporation, having filed annual report or paid statutory fee cannot maintain suit. 251Mich673, 232NW202.

34-45½9-New. Common-law trust established pursuant to statutory authority has been held in effect corporation. 251Mich673, 232NW202.

34-45½0-New. Where stockholders are empowered to remove or elect trustees, organization is partnership and not true Massachusetts or business trust. Cal 292P624.

34-45½1-New. Massachusetts or business trust is generally created wherever trustees are given legal title with complete power of management, and, in their discretion, share profits with creators of trust. Cal 292P624.

34-45½2-New. Agreement giving trustees full control with power to elect successors held to create Massachusetts or business trust, not partnership. Cal 292P624.

34-45½3-New. Stockholders are not personally liable on obligations incurred by trustees or trustees' managing agents. Cal 292P624.

34-45½4-New. In absence of express or implied agreement with creditors to contrary, trustees are personally liable. Cal 292P624.

34-45½5-New. Agreement creating trust authorizing trustees to stipulate in contracts against personal liability will not be enforced unless creditors had clear understanding thereof. Cal 292P624.

34-45½6-New. Business trusts.-Holders of certificates of stock in business trust are liable as partners for unpaid debts incurred by trust before dissolution. TexCivA 7SW(2d)644.

34-45½7-New. One inheriting stock in partnership is personally liable for debts incurred after he participated in business of partnership and claimed benefits accruing. TexCivA 7SW(2d) 644.

34-47 151Md536, 135A376; 129Misc 119, 221NYS604.

34-48 202Cal215, 259P947; 124Kan 730, 262P558; 151Md536, 135A376, 381 [quotCyc]; 238Mich282, 213NW85; 314Mo175, 282SW1022; 191NC769, 133 SE93; 296Pa474, 146A107. No particular form of words necessary to create a trust. 219AppDiv220, 220NYS59. Words "trustee or trust" not necessary to create a trust. 219AppDiv220, 220 NYS59.

34-50 151Md536, 135A376, 381 [quot Cyc]. In absence of definite res there can be no executed trust.-124Kan730, 262P558.

34-51 93Fla849, 112S846; 124Kan730, 735, 262P558 [citCycperJohnson,CJ]; 227Ky169, 12SW(2d)319; 151Md536, 135A376, 381 [quotCyc]; 128 Or115, 268P1014.

35-53 129Misc119, 221NYS604.

35-55 93Fla849, 112S846; 121Kan619, 249P608, 609 [quotCyc]; 135Misc774, 238NYS533.

35-55½-New. Trust is not void because income might be directed to private persons where condition of trust is that beneficiary to be selected by trustee is limited to use of fund to promote research in agricultural chemistry. 125Misc381, 211NYS635.

35-55½-New. Trust must require act on part of trustee inuring to benefit of beneficiary. CalA 267P151.

35-62 203Iowa409, 212NW688.

35-66 202Cal215, 259P947; 314Mo 175, 282SW1022. In Quebec.-137Misc 795, 243NYS418.

36-75 In Georgia.-162Ga767, 135SE90.

36-76 16F(2d)700. Contra Fla 129S 857.

36-78 220Ky43, 294SW767.

36-79½-New. Sole trustee cannot at same time be beneficiary of private trust. 99Fla152, 126S135.

36-80 154Md660, 141A405; 222MoA 307, 297SW129, 135 [citCyc]; 135Misc 774, 238NYS533; TexCivA 284SW253. Defeasible leasehold estates, may be impressed with a trust. TexCivA 284 SW253.

37-87½-New. Trust may exist in future earnings, 220Ky43, 294SW767.

37-87½-New. or in money. 216Ala435, 113S306.

37-87¼-New. Permit to prospect for sodium on public lands, being mere privilege personal in character, cannot be subject of trust. 51Nev344, 276P11.

37-87½-New. Beneficiaries under attempted assignment in trust of such permit cannot have lease to mine on public lands subsequently granted permittee impressed with trust in their favor on that part of leased land embraced in permit without showing that sodium was discovered by permittee or his assignee on land covered by permit. 51Nev344, 276P11.

37-89 Illegal contract between county judge and tax collector for repayment of fees for collection cannot be enforced against county on theory of express trust. TexCivA 278W(2d)649. Purpose to be accomplished by trust must be lawful one. 230Ky429, 20SW(2d) 83.

37-90 325Ill16, 155NE773; 248IllA 57; 137Misc582, 244NYS244; 296Pa 348, 145A824, 66ALR1342; 9PaDist&Co 209; 99Vt56, 130A687; 154Wash34, 280P939. Trust must manifest its nature and conditions to be valid. 192NC 732, 135SE870.

38-97 125Or598, 268P63.

38-99½-New. to have trustee convey tract to purchaser; 207Cal290, 277P 1047.

39-7½-New. of carrying out sales contract; Cal 270P212.

39-8½-New. Trust created by declaration of trust held express trust to sell real property and dispose of proceeds of sale pursuant to civil code. 72CalA 713, 237P821.

39-8½-New. Trust may be created to conserve property pending exercise of appointment power after life estate. 296Pa348, 145A824, 66ALR1342.

39-9 133Misc812, 234NYS99.

40-10½-New. Trust must have purpose and require some act on part of trustee inuring to beneficiary. Cal 274 P342.

40-14 26F(2d)543; 37F(2d)304; 200 Iowa1155, 206NW248; 121Kan57, 245 P1039; Mo 22SW(2d)813; MoA 273 SW759; 127Misc197, 216NYS334; 137 Misc77, 243NYS126; 288Pa348, 135A 626; 292Pa407, 141A247; 296Pa185, 145A806; 8PaDist&Co 475 (prior to act of 1921); 144Va297, 132SE351 (by statute). Purpose of statute authorizing trust stated.-137Misc77, 243NYS 126.

40-15 8PaDist&Co 475.

41-23 204Cal166, 267P104; 171Minn 237, 213NW893, 895 [citCyc].
42-25 328 Ill 76, 159NE229; 227Ky 544, 138W(2d)502; 231Ky801, 228W (2d)285; 171Minn237, 213NW893, 895 [citCyc]; 52ND182, 201NW861; Utah 290P161; 99Vt56, 130A687.
42-25½-New. Voluntary deed conveying estate in trust is binding contract between settlor and trustee acting for cestuis que trust supported by consideration, consisting of benefits to settlor and beneficiaries. 227Ky544, 138W (2d)502.
42-26 What constitutes sufficient consideration.-231Ky795, 228W(2d)249; TexCivA 58W(2d)831.
43-30 Provision that principal is to go to beneficiaries upon death of settlor does not vest present interest in beneficiaries. NB [1926] 2DomLR224. **As affected by statute of wills.**-267Mass 397, 166NE709.
43-33 In Minnesota.-171Minn237, 213 NW893.
44-40½-New. Agreement that vendor in making improvements was to have one half of profits made on resale of property is not in violation of statute. 246Mich219, 224NW428.
44-42 30Ariz96, 245P360; 94Fla171, 114S225; 99NJEq14, 131A683; NJCh 148A167; 130 Okl 57, 264P811 (recognizing rule).
44-43 208 Iowa1338, 220NW47; 99 NJEq14, 131A683; 116 Or593, 240P 883, 242P605; 288Pa16, 135A254; 134 Wash560, 236P285.
45-44 14F(2d)933; 213Ala609, 105S 800; 259Mass546, 156NE841; 238Mich 282, 213NW85 (instrument must be signed by party to be charged); 221 AppDiv341, 223NYS424; 126MiscS20, 215NYS607 (defense not available in view of relationship of parties); 141SC 265, 139SE625, 54ALR964. **In Iowa.**-204 Iowa1167, 216NW621.
45-45 165Ga245, 140SE376; TexCivA 273SW900.
45-46 214Ky278, 283SW83; 160Tenn 1, 228W(2d)1; 147Va323, 137SE526; 101WVa407, 132SE876; 107WVa394, 148SE378.
46-47 101WVa407, 132SE876.
46-53 221Ala578, 130S194; 30Ariz96, 245P360; 175Ark763, 300SW437; 88 CalA515, 263P1033; 93Fla849, 112S846, 854 [citCyc]; 94Fla171, 114S225; 163 Ga178, 136SE517; 327 Ill 500, 159NE 38; 123Kan566, 256P158; 228Ky374, 138W(2d)216, 66ALR139; 254Mass429, 150NE200; 235Mich195, 209NW160; 238Mich282, 213NW85; 245Mich108, 222NW119; 248Mich8, 226NW669; 319 Mo 660, 48W(2d)819; 320Mo 804, 9SW (2d)1066; 252NY366, 169NE612; 193 NC478, 137SE424; 195NC268, 142SE 10; 128 Or101, 269P221; 288Pa16, 135 A254; 141SC265, 139SE625, 54ALR964. See also 56ND152, 217NW150. **Where deed given to extinguish mortgage is absolute and grants fee simple title,** grantor is not permitted to show parol agreement to sell property and give anything realized in excess of mortgage to him. 213Ala609, 105S800. **Express trust cannot be engrafted by parol on** conveyance to wife on payment by husband. 238Mich282, 213NW85.
47-54 TexCivA 276SW795. **In Virginia and West Virginia.**-But see 101 WVa407, 132SE876.
47-55 288Pa16, 135A254.
47-60 171Ark626, 286SW822; 169Ga 199, 149SE788; 333 Ill 327, 164NE662; 208 Iowa1338, 220NW47; 267Mass397, 166NE709; 221AppDiv341, 223NYS424 (not illegal but voidable); 190NC284, 129SE721; 128 Or101, 269P221; Tex CivA 58W(2d)831. Contra 147Va323, 137SE526. **In Kentucky.**-209Ky375, 272SW897. **In Oklahoma.**-136 Okl 129, 276P753, 66ALR143. **Essentials of trust** on lands enumerated. 73CalA421, 238P1096.
48-61½-New. ,except in those jurisdictions where the statute does not obtain. 214Ky278, 283SW83 (holding valid parol agreement to hold land in trust for father and after father's death to sell and divide proceeds among plaintiffs).
48-63 221AppDiv341, 223NYS424.
48-65 14F(2d)933; 47RI 263, 132A 527.
49-66 14F(2d)933.
49-69 254Mass429, 150NE200 (agreement to purchase land and then to convey it to another); 128 Or542, 274P914.
50-70 259Mass546, 156NE841; 99NJEq 14, 131A683. **Agreement and advance money** for purchase of coal mine in return for exclusive agency of its output, imposing trust and partaking of nature of partnership, held not within statute of frauds. 20F(2d)647.
50-72 107WVa27, 147SE29.
51-75 31F(2d)843; 30Ariz96, 245P360, 363 [citCyc]; 179Ark7, 138W(2d)819; 202Cal 215, 259P947; CalA 290P52; 48 Ida454, 282P868; 209Ky375, 272SW 897; 152Md654, 137A378; Mass 167NE 638; 235Mich195, 209NW160; 86Mont 322, 283P1110; 252NY366, 169NE612; 12PaDist&Co 44; Utah 282P1034; 99Vt 56, 130A687; 196Wis301, 220NW379.
52-82 IndA 149NE360; 267Mass397, 166NE709; 99Vt56, 130A687.
53-83 208 Iowa1338, 220NW47; 218 AppDiv149, 218NYS31 (under oral agreement to purchase realty for one furnishing price); 115Tex193, 280SW 158; 99Vt56, 130A687. **The trustee may recognize a parol trust,** etc. 208 Iowa1338, 220NW47.
53-84 213Ala609, 105S800 (receipt of purchase money for sale of land by grantee under absolute deed given to extinguish mortgage has been held not to take out of statute alleged parol agreement that grantor was to receive anything in excess of mortgage).
53-85 30Ariz96, 245P360; 93Fla849, 112S846, 854 [citCyc]; 163Ga478, 136 SE517; 325 Ill 529, 156NE802; 135 Misc774, 238NYS533; 134Wash560, 236 P285, 287 [quotCyc]. See also 244Mich 403, 221NW322. **Writings held insufficient.**-325 Ill 529, 156NE802. **Deed retaining vendor's liens** has been held sufficient compliance with statute with respect to subsequent agreement between vendee and others that such others should become owners on paying purchase money notes. 115Tex193, 280SW 158. **Where memorandum is not signed,** it is insufficient. 141SC265, 139SE625, 54ALR964. **Contract held not to declare trust in patents.**-Mass 168NE804.
53-86 134Wash560, 236P285, 287 [quot Cyc].
53-87 30Ariz96, 245P360.
53-88 163Ga478, 136SE517; 248NY 206, 161NE472; 130 Or644, 275P55.
54-90 30Ariz96, 245P360; 248NY206, 161NE472.
54-91 99Vt56, 130A687.
54-94 30Ariz96, 245P360; 325 Ill 529, 156NE802; 238Mich282, 213NW85, 86 [quotCyc] (dictum); 252NY168, 169NE 127.
54-95 238Mich282, 213NW85, 86 [quot Cyc] (dictum).
55-96 238Mich282, 213NW85, 86 [quot Cyc] (dictum).
55-97 238Mich282, 213NW85, 86 [quot Cyc] (dictum).
55-98 110Conn516, 148A358; 325 Ill 529, 156NE802; 238Mich282, 213NW85, 86 [quotCyc] (dictum).
55-99 238Mich282, 213NW85, 86 [quot Cyc] (dictum).
55-1 238Mich282, 213NW85, 86 [quot Cyc]; 90PaSuper51.
55-2 238Mich282, 213NW85, 86 [quot Cyc] (dictum).
55-3 238Mich282, 213NW85, 86 [quot Cyc] (dictum).
55-4 238Mich282, 213NW85, 86 [quot Cyc] (dictum).
55-6 See Alta [1926] 4DomLR958. [1926] 3WestWkly481.
55-9 93Fla849, 112S846.
56-11 There is no sufficient declaration of trust where memorandums are mere promise that property was to belong to donee in future. 130Misc865, 226NYS1.
56-12 215Ky57, 284SW410; 130Misc 865, 226NYS1. **Mere production in evidence,** after declarant's death, of papers relied on as declaration of trust is insufficient proof of delivery. 130Misc865, 226NYS1.
56-15 Agreement setting up trust limited to rents issuing from lands is subject to recording statute, and filing thereunder gives constructive notice to all persons. 214Ala334, 107S818.
57-18 Statutes requiring conveyances of land to be recorded as against creditors and subsequent purchasers do not apply to mere written acknowledgment or agreement executed same day as deed that grantee holds naked title to land as trustee for grantor. 114Tex516, 272 SW1098.
57-20 34F(2d)390; 202Cal 215, 259P 947; Cal 274P342; 93Fla849, 112S846, 854 [citCyc]; 327 Ill 28, 158NE366; 328 Ill 76, 159NE229; 151Md536, 135A 376; 150Miss864, 117S245; 128Misc 718, 221NYS205; 226AppDiv561, 235 NYS424; 130 Okl 67, 264P811 (recognizing rule); Can [1927] 2DomLR1076. **To create a spendthrift trust,** etc. 113 Nebr745, 226NW316 (clear language required). **Intention of grantor not revealed at time he executes conveyance, and not known to grantee,** does not create trust upon land conveyed. 90Fla 7, 105S134. **Trust held sufficient** as spendthrift trust. 8PaDist&Co 231.
57-21 24F(2d)459; 26F(2d)543; 31F (2d)843; 198Cal 352, 246P48; 204Cal 399, 268P647; 75CalA569, 243P445 (letters); 104CalA1, 285P365; Del 147A 165; 93Fla849, 112S846, 855 [citCyc]; 98Fla1103, 125S521; 325 Ill 529, 156NE 802; 253 IllA288; 203 Iowa345, 212NW 745, 51ALR906 (express words or technical language held not necessary); 150Md557, 133A472; 151Md536, 135A 376; Mass 167NE417 (some words in connection with attendant factors must point to trust or none is established); Mass 168NE804; 238Mich282, 213NW 85; 318Mo 784, 18W(2d)163, 58ALR 493; 98NJEq415, 129A251; 98NJEq 109, 130A717; 226AppDiv142, 234NYS 635; 134Misc558, 236NYS218; 135Misc 774, 238NYS533; 299Pa217, 149A157; 13PaDist&Co 103; TexCivA 284SW253; 145Va742, 123SE673; 134Wash560, 236 P285; 101WVa407, 132SE876; 193Wis 286, 214NW438; Alta [1929] 4DomLR 710. **Spendthrift trust.**-98NJEq554, 131 A302.
57-21½-New. Trust may be inferred from facts and circumstances. 31F(2d) 843.
58-22 204Cal 399, 268P647; 327 Ill 28, 158NE366; 238Mich282, 213NW85; 323 Mo 964, 20SW(2d)670. See also 296Pa 474, 146A107. **Parties to contract are presumed to use term "trustee" advisedly** and to have notice of what it implies, and to be bound thereby. 104 WVa640, 141SE1. **Where deed or contract implies** some active duties with respect to others involved or to be involved, a trust is created thereby. 104 WVa640, 141SE1.
58-23 198Cal 352, 246P48; Me 149A626 (2dcase); 158Md69, 148A121; 238Mich 282, 213NW85; 248NY54, 161NE417. **Word "trustee"** after grantee's name evidences existence of trust. Mo 282SW 1022.
58-24 Me 149A626(2dcase); 34NM298, 280P254.
58-25 158Md69, 148A121; 130Misc865, 226NYS1; 128 Or115, 268P1014.
58-25½-New. Declaration of trust not invalid because settlor reserved right to dispose of property by gift or marriage. 151Md536, 135A376.
58-25½-New. Declaration of trust not invalid because no portion of trust property may remain for ultimate beneficiaries to receive. 151Md536, 135A376.
58-25¼-New. To be effective, declaration of trust must be made at time settlor owns property which is subject-matter of trust. 130Misc865, 226NYS1.
58-25½-New. Where declaration is made after settlor conveys property to corporation, though all stock of corporation is owned by settlor, declaration is ineffectual. 130Misc865, 226NYS1.
58-25¾-New. Whether trust has been created is largely question of fact.-179 Ark494, 16SW(2d)591.
58-27 325 Ill 529, 156NE802; 222MoA 307, 297SW129, 135 [citCyc]; 147Va 323, 137SE526.
58-28 336 Ill 366, 168NE349 (trust deed held void for uncertainty); 137Misc

449, 243NYS751. **Provision of will directing trustee to assist testator's cousins** in any legitimate business necessary for their support has been held invalid and unenforceable for uncertainty and indefiniteness. 230Ky429, 20SW(2d)83.

59–29 325 Ill 529, 156NE802.

59–30 24F(2d)459; 93Fla849, 112S846; 230Ky429, 20SW(2d)83; 148Md603, 129 A908; 171Minn237, 213NW893; 321Mo 235, 11SW(2d)278, 62ALR858; 82NH 281, 133A166, 45ALR1433; 137Misc449, 243NYS751. **Class of beneficiaries.**–82 NH281, 133A166, 45ALR1433. **Designation of beneficiaries held sufficiently certain.**–171Minn237, 213NW893; 129 Misc290, 221NYS473. **Bequest to indefinite person** is invalid. 82NH281, 133A 166, 45ALR1433. **Beneficiaries of trust** do not require that they be specifically named, as it is sufficient if they be members of class. 230Ky429, 20SW(2d)83.

60–31 325 Ill 529, 156NE802; 230Ky 429, 20SW(2d)83.

60–32 325 Ill 529, 156NE802; 209Ky 212, 272SW3S4 (check on bank where drawer has no funds is insufficient); 230 Ky429, 20SW(2d)83; 238Mich282, 213 NW85. **Sufficient description.**–238Mich 282, 213NW85.

60–33 325 Ill 529, 156NE802.

60–35 230Ky429, 20SW(2d)83.

60–36 242Mich301, 218NW779; 226 AppDiv601, 236NYS185; 121 Oh159, 167 NE389 (instrument need not be executed in conformity with law of wills); 136 Okl 158, 275P649, 651 [quotCJ].

61–39 99Vt56, 130A687.

61–40 242Mich301, 218NW779.

61–42 CalA 290P509; 110Conn22, 147 A139; 126Me521, 140A189; 133Misc 647, 233NYS667. **Conveyance held to be in trust.**–136Wash63, 238P992. **Instrument transferring property to trustee with reservation of life use to settler,** with provision for payment to designated persons at her death, reserving power of revocation, creates valid trust. 110Conn22, 147A139. **Special charge in mayorazgo** has been construed as family trust in which trustor is founder, and each first-born possessor of entail is successively trustee, and beneficiaries are descendants of founder in indefinite succession. 50Philippine888.

62–43 325 Ill 296, 156NE294; 327 Ill 28, 158NE366.

62–44 99Vt56, 130A687 (description personal).

62–46 325 Ill 296, 156NE294.

62–48 43F(2d)27; 196Cal 260, 237P 542; 201Cal 518, 258P55; 83CalA1, 256 P294; 169Ga576, 150SE835; 325 Ill 253, 156NE352; 222Ky584, 1SW(2d)1079; 151Md536, 135A376; 247Mich372, 225 NW573; 190NC102, 129SE419; 198NC 263, 151SE252; 57ND128, 220NW625; 136 Okl 129, 276P753, 66ALR143; Okl 291P43; 115Tex193, 280SW158; 99Vt 56, 130A687; 154Wash34, 280P939; 107 WVa27, 147SE29; 199Wis162, 225NW 831, 64ALR180. **Where the person acquiring title pays no consideration,** etc. 101WVa407, 132SE876. **Where grantee in deed reserving vendor's lien agrees to hold in trust for person paying purchase money notes,** trust is created though agreement is made after execution of deed. 115Tex193, 280SW158. **Agreement of grantee to devise property transferred to grantor** creates trust for grantee for life with remainder to grantor. 235Ky164, 30SW(2d)876.

63–49 50Philippine810; 115Tex193, 280 SW158.

63–50 151Md536, 135A376; 266Mass 462, 165NE485; 56ND899, 219NW784.

64–52 101NJEq466, 138A385.

64–53 48SD521, 205NW71; 40Wyo 524, 281P190. **Assignment of part of net rentals** to become due, with covenant by assignor to deliver and account, held to create trust relationship between assignor and assignee. TexCivA 284SW253.

65–54 See also NJCh 129A177.

65–55 138 Okl 156, 280P616 (share in profits from mining location).

65–56 90Fla533, 106S421. **Executory agreement without consideration** to hold one's land in trust cannot be enforced. 90Fla533, 106S421.

65–65½–New. Lack of knowledge in defaulting heirs immaterial, where action taken was in fraud of no right of theirs. TexCivA 273SW900.

66–67 97CalA1, 275P248; Ind 147NE 635; 151Md536, 135A376, 382 [quot Cyc]; MoA 258SW(2d)566; NJ 147A863 (2dcase); 252NY366, 169NE612; 56ND 152, 217NW150; 99Vt56, 130A687. **Agreement held to create trust.**–135Misc 774, 238NYS533.

67–77 Gift of bank deposit in trust for both donor and beneficiary held not objectionable for informality. 152Md654, 137A378.

68–79 202 Iowa265, 209NW422 (bank receiving proceeds of loan from either lender or borrower for specific purpose of discharging incumbrances on property is trustee thereof); 158Md69, 148 A121; 86Mont331, 283P420; 131Misc 611, 228NYS270.

69–80 Tender of bank books to defendant, which was declined, does not transform tentative trust of savings bank account into irrevocable trust. 134 Misc174, 235NYS747.

69–81 127Misc288, 216NYS430 (will bequeathing "moneys which remain at the time of my decree" in savings bank held to revoke trusts created by opening account for niece and cousin); 134Misc 868, 237NYS290; 134Misc507, 236NYS 237. **Revocation.**–148Md620, 129A898; 134Misc174, 235NYS747. **Evidence has been held admissible** to show revocation of tentative trust of bank account. 134 Misc174, 235NYS747.

69–82 179Minn430, 229NW865; 134 Misc868, 237NYS290.

70–84 56ND152, 217NW150.

71–89 13F(2d)887; 196Cal 260, 237P 542; 104Conn169, 132A902 (funds turned over by wife to husband to invest); 48 Ida454, 282P868; 204 Iowa 243, 213NW925, 56ALR521 (deposit of funds with bank agreeing to keep funds invested and pay interest to named beneficiary); 205 Iowa1311, 217NW441; 220 Ky43, 294SW767; 150Md557, 133A472 (loan of assets to insurance company in form of securities and reported to state as guaranty fund held impressed with trust as to those subsequently dealing with company, in reliance thereon); 262 Mass509, 160NE337; Mont 289P388; NJCh 148A155; 223AppDiv86, 226NYS 510; 135Misc774, 238NYS533; 289Pa 341, 137A461, 463 [citCyc]; Tex CommnA 271SW891. **Payment to trustee in trust deed by purchaser of land subject to trust,** though purchaser does not assume payment, constitutes trust fund in hands of trustee. 13F(2d)887. **Promissory notes.**–48 Ida454, 282P868.

72–94 Business turned over as condition of loan is held in trust, making holder liable for loss resulting from mismanagement. 215AppDiv427, 213NYS 606. **Person in possession and control of another's property** is trustee required to exercise control with due regard to owner's interest. 215AppDiv427, 213 NYS606.

72–94½–New. Sheriff taking sum as security for bail bond holds as trustee. TexCivA 7SW(2d)949.

72–96 Ind 169NE843 (letters and telegrams soliciting contributions to pay corporate indebtedness and adopted by donors held to give rise to implied trust); 323Mo 964, 20SW(2d)670 (where bank accepts deed with written instructions to deliver to grantee on grantor's death); 136Misc893, 242NYS417; 136 Okl 158, 275P649; 195Wis477, 218NW 726.

72–97 45 Ida217, 261P769; 193Wis 286, 214NW438.

73–1 One recovering judgment for personal injuries is not trustee for payment of physician from amount of judgment. 153SC146, 150SE655, 66ALR703.

73–1½–New. Where husband conveys property bought with wife's money and takes reconveyance as wife's executor, trust in favor of wife's estate is created. 101WVa374, 132SE716.

73–1¾–New. Instrument executed by owner of cemetery declaring that certain persons shall be interred therein, binding on owner and heirs held declaration of trust. 219AppDiv573, 220NYS 379.

73–1¼–New. Attorney, to whom client assigned judgment as security for fee and money advanced, is trustee for himself and assignor according to respective interests. 157Md36, 145A220.

73–2 124Kan730, 735, 262P558 [citCyc perJohnston,CJ]. See also 33F(2d)162. **Mere declaration of trust in proceedings of insurance policy** held revocable, being purely executory. 124Kan730, 262P558.

73–4½–New. Agreement whereby wife was to procure policy and husband assume its cost and be named sole beneficiary amounts to declaration of trust. 83NH547, 145A269.

74–6 83CalA782, 257P560; 98CalA306, 277P123; 228Ky374, 15SW(2d)246, 66 ALR139. **Trust not created.**–134Wash 560, 236P285.

75–8½–New. That declaration of trust took form of undertaking to make provision by will does not affect its validity. 110Conn516, 148A358.

75–10 35Ariz488, 279P253; Cal 274P 342; 98CalA306, 277P123; 259Mass515, 156NE701. **Held special account and not trust.**–222MoA307, 297SW129.

75–11 Deposit of proceeds of sale of personalty in bank to await determination of ownership in replevin suit does not create trust. SD 227NW469.

75–12 45 Ida217, 261P679.

75–14 OhA 161NE548. **Contract authorizing subdivision of land into lots and sale** has been held not to create trust. CalA 267P151.

75–18 248NY76, 161NE425; 131 Or481, 283P39; 146Va73, 135SE714.

75–18½–New. Fact that proceeds of notes deposited for collection are to be applied in particular manner does not create trust. 225AppDiv541, 233NYS 577.

76–20 214Ky785, 284SW83; 154Md660, 141A405, 410 [citCyc]; 225AppDiv541, 233NYS577; 121 Oh159, 167NE389; 23 OhA315, 155NE565.

76–22 Delivery.–99NJEq878, 133A381.

76–24 151Md536, 135A376; NJCh 148 A155; 193Wis286, 214NW438.

76–25 151Md536, 135A376; 193Wis286, 214NW438.

76–26 34F(2d)899; 121 Oh159, 167NE 389 (at common law).

76–27 23 OhA315, 155NE565. **Placing jewelry in envelopes** marked with name of beneficiary and placing envelopes in safe deposit box to which another had access under agreement as to disposition on donor's death held to create voluntary trust and not gift causa mortis. 68CalA448, 229P993. **Placing money in bank** in joint account of donor and another under agreement as to disposition on donor's death, held to create voluntary trust and not gift causa mortis. 68 CalA448, 229P993.

77–30 213AppDiv281, 210NYS497; 193 Wis286, 214NW438.

77–31 252NY366, 169NE612; 213App Div281, 210NYS497; 193Wis286, 214NW 438.

77–32 52ND182, 201NW861.

77–33 267Mass584, 166NE744; 221App Div341, 223NYS424 (acceptance of conveyance for use and benefit of grantor sufficient). **Recognition of existence of trust by trustee** must be found in writing and not elsewhere. 248NY206, 161 NE472.

77–35 195NC405, 142SE493. **Acceptance of trust deed by trustee** is not necessary to validity of trust. CalA 290P 86.

78–37 220Ala319, 125S28; 221AppDiv 341, 223NYS424 (wife of decedent holding title to property for his benefit, under oral agreement, sufficient to show trust).

79–39½–New. Effect of conditional acceptance by substituted trustee. 12Pa Dist&Co 273.

79–40 72CalA713, 237P821; 252NY366, 169NE612; 213AppDiv281, 210NYS487. **Persons claiming under trust** also are bound. 72CalA713, 237P821.

79–41 See also Ont [1928] 1DomLR501. **In Philippines.**–50Philippine810.

80–47 Ark 30SW(2d)820; 204 Iowa771, 212NW733; Iowa 232NW655; Mass 171.

NE721; 222AppDiv619, 226NYS557; 190NC102, 129SE419; TexCivA 270SW 265; TexCivA 299SW310. Donee must show that property or legal title thereto passed beyond dominion or control of donor. 23 OhA315, 155NE565. Grantor conveying property to grantee by deed absolute on its face has burden of establishing express trust. 153Va165, 149 SE467.

80–47½–New. Burden of proving existence of trust rests on person asserting it. 179Ark494, 16SW(2d)591.

80–48 19F(2d)857.

81–52 179Ark494, 16SW(2d)591; 201 Cal 518, 258P55; TexCivA 293SW577; TexCivA 3SW(2d)555.

81–53 But see 158Md69, 148A121.

81–54 244Mich403, 221NW322.

81–57 TexCivA 274SW215; TexCivA 5 SW(2d)831; 101WVa407. 132SE876. See also 235Ky705, 32SW(2d)54. Parol evidence that consideration for deed did not pass is admissible in action to establish parol trust. 105WVa385, 142SE845.

81–58 176Ark1009, 4SW(2d)953; Ark 30SW(2d)820; 84Colo 456, 271P191; 93 Fla849, 112S846, 855 [citCyc]; 206 Iowa 445, 220NW832; 235Mich195, 209NW160; 130 Or230, 279P870; 134Wash560, 236P 285; 145Wash561, 261P86; 152Wash 448, 277P988. Rule not applicable in actions to set aside fraudulent conveyances. 145Wash561, 261P86.

82–60 216Ala435, 113S306; 179Ark7, 13SW(2d)819; 235Mich195, 209NW160; 296Pa474, 146A107; TexCivA 294SW 921 (trust in judgment claim).

82–61 323 Ill 73, 153NE735; 171Minn 237, 213NW893. Claim of trust in land held not contradiction of deed to which complainant was a party only to release dower. 147Va323, 137SE526. Purpose of trust may be proved by parol.–262 Mass294, 159NE915.

83–62 Ark 30SW(2d)820; Ark 31SW (2d)738; 93Fla849, 112S846, 855 [cit Cyc]; Iowa 229NW844; 122Kan244, 252P205; 170Minn479, 213NW38; 130 Or230, 279P870. But see 229Ky116, 16 SW(2d)782.

83–63 56ND899, 219NW784; 160Tenn 381, 25SW(2d)583; 147Va323, 137SE 526; 101WVa407, 132SE876. But see TexCivA 11SW(2d)844.

83–63½–New. In proceedings under bill in nature of bill of interpleader to determine rights of parties under lease for mining of coal land, evidence of creation of trust for lessor to aid him in collection of royalties may be shown as between parties by parol. 218Ala296, 118 S513.

84–64 Iowa 229NW819 (trust wholly or partially performed).

84–66 But see TexCivA 22SW(2d)155.

84–67 Ark 30SW(2d)820; 83CalA782, 257P560; 83Colo 387, 265P901; DelCh 147A249; 214Ky278, 283SW83; 156Md 221, 144A257; 296Pa474, 146A107; 147 Va323, 137SE526; 153Va165, 149SE467.

84–68 219Ala312, 122S314; 179Ark7, 13SW(2d)819; 179Ark494, 16SW(2d) 591; 202Cal 215, 259P947; 337 Ill 267, 169NE168; 339 Ill 108, 170NE841; 214 Ky278, 283SW83; Mo 31SW(2d)28; 98 NJEq343, 129A199; 98NJEq415, 129A 251; 99NJEq75, 132A755; 137Misc576, 243NYS88; 50Philippine110; TexCivA 296SW963; Utah 282P1034; 187Wis 629, 205NW386; 196Wis301, 220NW379. Evidence held insufficient.–NJCh 148A613 (oral agreement in consideration of not contesting will).

85–69 214Ky278, 283SW83; TexCivA 26SW(2d)463.

85–74 30Ariz96, 245P360; 201Cal 322, 256P1099; 68CalA448, 229P993; 83CalA 684, 257P171; 83CalA782, 257P560; 87 CalA654, 262P438; 88CalA515, 263P 1033; 337 Ill 520, 169NE324; IndA 167 NE535; 214Ky278, 283SW83; 158La 61, 103S443; 262Mass294, 159NE915; 232Mich71, 205NW130; 251Mich132, 231 NW96; 172Minn83, 214NW771; Mo 32 SW(2d)605; 114Nebr50, 205NW1000; 99NJEq878, 133A381 (evidence held to show that trust property was to be turned over to beneficiary upon happening of event); 126Misc820, 215NYS607; 191NC539, 132SE290; SD 226NW560; TexCivA 296SW963; TexCivA 2SW(2d) 281; 107WVa27, 147SE29; WVa 155SE 657 (parol trust); 187Wis629, 205NW 386. Evidence held sufficient to show intentions of trustor to make present gift in trust of securities. 34F(2d)899.

86–75 118Kan286, 234P840 (evidence insufficient to show acceptance); 214Ky 278, 283SW83; 244Mich403, 221NW322; 246Mich1, 224NW370; NJCh 147A43 [aff NJ 147A44]; 226AppDiv142, 234 NYS635; TexCivA 26SW(2d)463.

86–76 216Ala435, 113S306.

86–78 212Ala506, 103S543; 219Ala 312, 122S314; 221Ala578, 130S194; 179 Ark7, 13SW(2d)819; Ark 30SW(2d) 820; 202Cal 215, 259P947; 73CalA539, 238P1081; DelCh 147A249; 329 Ill 148, 160NE117; 339 Ill 108, 170NE841; 200 Ind298, 163NE89; 204 Iowa771, 212NW 733; Iowa 232NW655; 121Kan619, 249 P608; 130Kan453, 286P221; 235Ky 582, 31SW(2d)890; 156Md221, 144A 257; 262Mass568, 160NE402; Mass 167 NE638; 174Minn180, 218NW889; 320 Mo 804, 9SW(2d)1066; Mo 31SW(2d) 28; Nebr 230NW254; 98NJEq415, 129 A251; 99NJEq75, 132A755; 133Misc 795, 234NYS366; 135Misc686, 238NYS 262; 56ND152, 217NW150; 127 Or551, 272P914; Or 291P785; 296Pa474, 146 A107; TexCivA 299SW310; TexCivA 3 SW(2d)555; TexCivA 5SW(2d)831; TexCivA 23SW(2d)414; TexCivA 26SW (2d)420; Utah 282P1034; 153Va165, 149SE467; 150Wash620, 274P186; 196 Wis301, 220NW379. See also 244Mich 532, 221NW618.

87–79 169Ark1, 272SW864; 204Cal 441, 268P635; 92CalA270, 267P911; 167Ga386, 145SE651; 221AppDiv369, 223NYS150; Okl 293P245; TexCivA 270SW265.

87–79½–New. Evidence held to show that no trust was created.–120 Or327, 250P749.

88–81 See also 27F(2d)773. In action to set aside deed of trust on ground of undue influence, evidence did not sustain burden on defendants to clear up suspicion growing out of circumstances of gifts, and did not show that no deception or undue influence was practiced on creator. 132Misc294, 230NYS 226. Violation of corporation commissioner's escrow provision against assignment has been held to prevent stock from being held in trust though other trust elements were present. 87CalA 654, 262P438. Evidence held sufficient.–157Md648, 147A662(2dcase); 297Pa252, 146A896(2dcase). Undue influence shown.–Or 291P1017(2dcase).

88–82 256 IllA291; 157Md287, 145A 773; 288Pa527, 136A796.

88–83 Mich 214NW178.

88–87 34F(2d)899; 221Ala663, 130S 209; 336 Ill 366, 168NE349; 248 IllA 57; 256 IllA291; 206 Iowa1121, 221NW 851; 151Md536, 135A376; 157Md287, 145A773; 150Miss1, 115S598; 99NJEq 878, 133A381; 137Misc679, 244NYS274 (unlawful direction for accumulation); 152Wash82, 277P385, 68ALR753.

89–91½–New. Where opposed to public policy directions of creator of testamentary trust will be disregarded. 105 Conn261, 135A555.

89–91½–New. Trust agreement between mortgagor and mortgagee that property be sold at public auction and proceeds delivered to bank to hold for application in certain manner is valid. 53SD556, 221NW268.

89–91½–New. Court of equity will not countenance right asserted by life insurance company to be considered as passive trustee of proceeds of policies after insured's death. 27F(2d)773.

89–91½–New. After repeal of statute against perpetuities, settlor's ratification of previously invalid trust by amendment of terms of trust agreement has been held to create good and valid trust. 34F(2d)488.

89–93 160Tenn1, 22SW(2d)1.

89–95 99NJEq238, 132A206.

90–97 196Cal 260, 237P542; 150Miss1, 115S598; 133Misc152, 231NYS408; 228 AppDiv171, 239NYS390 (provision for illegal accumulation of income held separable); 137Misc679, 244NYS274; 284Pa94, 130A315, 317 [citCyc]; 11Pa Dist&Co 90, 93 [citCyc]. See also CalA 270P219. Invalid disposition of corpus after expiration of trust term does not nullify valid trust. 144SC18, 142SE50.

90–98 Provision in will that cestui que trust be reared in certain faith held void as against public policy. 284Pa11, 130A238. Invalidity of trust for wife renders void remainder interest of children, as provisions are inseparable. 137Misc795, 243NYS418. Provision suspending ownership of remainder during minorities of children born after certain date destroys trust for children living at time of its creation. 137 Misc795, 243NYS418.

90–5 Where donor represents conditions to exist between himself and donee which, if true, constitute him in equity the trustee of donee, he is estopped to deny such relation as against anyone having a right to rely on, and in fact acting on, such representation. 150Md557, 133A472. Deed of trust may be ratified by trustor under statutory provision. CalA 270P219.

91–7 196Cal 260, 237P542; 193NC254, 136SE612.

91–13 Equity will relieve against omission of power of revocation only on application by settlor to extent trust not acted on and that parties may be placed in statu quo. 102NJEq454, 141A267.

91–15 154Md229, 140A59.

91–16 12PaDist&Co 519.

92–17 156SC346, 153SE349.

92–21½–New. Evidence held sufficient to show mental incompetency of creator of trust. 198Cal 46, 243P657.

92–23 34F(2d)488 (settlor can give up any privileges retained by him under trust agreement by cutting down income of trust); 220Ky43, 294SW767; 227Ky444, 13SW(2d)502; 260Mass19, 156NE745 (holding appointment of individual trustee a nullity); 133Misc647, 233NYS667; Ont [1928] 4DomLR679. Agreement whereby employee as settlor delivered money to employer to be used in purchase of stock by third person with power in employee to name beneficiary on his death held reservation of power in settlor and not in trustee. 220 Ky43, 294SW767. Upon reservation of right, settlor held empowered to change beneficiaries. 220Ky43, 294SW767. On express reservation of power to amend, consent of all trustees held essential where instrument so provides. 193Wis 89, 213NW673, 52ALR681.

92–24 34F(2d)488.

92–26 227Ky444, 13SW(2d)502. But see 328 Ill 462, 159NE799. Perfection by court.–130Misc865, 226NYS1.

92–27 See also 220Ky43, 294SW767.

92–29 34F(2d)899; 328 Ill 76, 159NE 229; 256 IllA291; 124Kan730, 735, 262 P558 [citCyc,perJohnston,CJ]; 220Ky 43, 294SW767; 227Ky444, 13SW(2d) 502; 260Mass19, 156NE745; 262Mass 294, 159NE915; 222AppDiv92, 130Misc 890, 225NYS476; 224AppDiv50, 229 NYS166; 131Misc611, 228NYS270; 52 ND182, 201NW861; 13PaDist&Co 503 (consent of beneficiary); 193Wis286, 214NW438. See also 250NY298, 165NE 454(2dcase). But with the consent and concurrence, etc. 229AppDiv570, 242 NYS638. Unexecuted trust, being mere declaration of intention, held revocable. 124Kan730, 262P558. Trust for sole benefit of settlor for life was revocable at any time without anyone's consent. 134Misc618, 235NYS642. Declaration of trust held to constitute "voluntary trust" revocable at pleasure as to all except nephew. 197NC292, 148 SE313. Grantor and living beneficiaries cannot revoke trust in derogation of contingent interests of unborn beneficiaries. 40F(2d)794. Where settlor is only person beneficially interested, he has power to revoke under statute. 230 AppDiv192, 243NYS573. Statutory provisions.–230AppDiv192, 243NYS573.

93–30 219AppDiv573, 220NY379.

93–34 102NJEq454, 141A267; 52ND 182, 201NW861. Trust to be revocable must be voluntary, created for trustor's benefit, or person in esse, with future contingent interest. NC 155SE614.

94–35 288Pa527, 136A796.

94–38 29F(2d)14; 110Conn22, 147A 139; 220Ky43, 294SW767; 193Wis89, 213NW673, 52ALR681. Power of revocation not exercised before donor's

death is not fatal to gift in trust. 34 F(2d)899.

94-37 227Ky444, 13SW(2d)502; 193 Wis89, 213NW673, 52ALR681. **Substantial compliance insufficient.**-193Wis 89, 213NW673, 52ALR681. **Failure of one trustee to sign amending instrument** held to invalidate all but the final trust. 193Wis89, 213NW673, 52ALR681.

94-38 222Ky654, 1SW(2d)1071; 213 AppDiv281, 210NYS497 (in order to hold valid trust containing power of revocation to have been revoked by settlor's will, intention to revoke must be expressed therein directly or indirectly); Pa 10WklyNC48 [aff 9WklyNC30]. **Acts held to effect revocation of trust.**-225AppDiv238, 232NYS238; 134Misc 618, 235NYS642. **Mere general or residuary bequest,** in absence of any further feature, will not effect revocation of tentative trust. 134Misc174, 235NYS747. **Instrument of revocation must be recorded,** if instrument creating trust was. NC 155SE614.

95-40 34F(2d)899; 213AppDiv281, 210 NYS497 (residuary change of will held not revocation of voluntary declaration wherein settlor declared himself trustee of personal property for benefit of son with power of revocation); 52ND 182, 201NW861, 866 [quotCyc].

95-42½-New. Realty in trust for settlor's benefit revests in settlor on revocation of trust, without reconveyance by trustee, though trust agreement stated trust was irrevocable. 222AppDiv31, 225NYS355.

95-42⅓-New. Power to revoke trust is not transferable or descendible, nor may it be alienated or passed by will, since it is personal to holder. 29F(2d)14.

95-42¼-New. Absolute and unconditional power to revoke trust is treated as equivalent to general power to appoint. 29F(2d)14.

95-42⅕-New. Power to revoke trust is not property right. 29F(2d)14.

95-42⅙-New. Statute allowing revocation of trust of personalty on consent of beneficiaries is not inconsistent with statute forbidding transfer of beneficiary's interest. 225AppDiv238, 232NYS 238.

95-42½-New. Statute relating to revocation of voluntary trusts has been held not invalid as retroactive. 197NC292, 148SE313.

95-43 203 Iowa667, 213NW207; 220Ky 43, 294SW767. **Periods of trusts for creditors are limited under some statutes.**-136Misc118, 238NYS749.

95-44 203 Iowa667, 213NW207; 220Ky 43, 294SW767.

95-45 203 Iowa667, 213NW207; 220 Ky43, 294SW767.

95-46 104CalA782, 286P741; 8PaDist &Co 375 (spendthrift trust); 9PaDist& Co 209. **Active trusts held not to terminate at end of stated ten-year period** where trustee had discretionary powers thereafter. 203 Iowa667, 213NW207. **In absence of fraud or misconduct or abuse of discretion** on part of trustee cestui que trust cannot demand termination of trust. 8PaDist&Co 179.

95-47 9PaDist&Co 209.

96-51 96Fla455, 118S216; 126Me521, 140A189; 100NJEq37, 136A738.

97-57 76CalA655, 245P803.

97-58 Illustrations.-137SC11, 134SE 859.

97-63 126Me521, 140A189; 137Misc 679, 244NYS274; Va 155SE802. **Trust terminates** when beneficiary acquires present rights to corpus as well as entire income. 130Misc856, 225NYS407.

98-65 242Mich551, 219NW653; 50RI 369, 147A884 (life tenant acquiring remainder in fee).

98-69 150Md322, 133A110, 47ALR467.

99-74 127Me104, 141A188. **On petition to dissolve trust** and distribute proceeds because of dissolution of corporation, to which corporation is not made party, court will not review corporate management. NJCh 145A327. **Intention of creator of trust** is important factor when question of its termination is presented. DelCh 151A712.

99-76 319Mo128, 3SW(2d)726, 729 [citCyc]; 26 OhNPNS249.

99-77 84CalA678, 258P622; DelCh 151 A712; 328 Ill 76, 159NE229; 126Me 521, 140A189; 242Mich551, 219NW653; NJCh 150A338. **Object of trust held not to have failed.**-328 Ill 462, 159NE 799. **Court, in exercise of discretion,** may not arbitrarily deny beneficiaries' desire for termination of trust. 84CalA 678, 258P622.

100-78 227Ky444, 13SW(2d)502. **Ultimate beneficiaries are not represented by contingent beneficiary after whom they are to take,** where contingent beneficiary has only antagonistic right to income from estate, and not right to estate in fee. 227Ky444, 13SW(2d)502.

100-79 319Mo128, 3SW(2d)726; NJCh 150A338; 35 OhA526, 172NE629; 284 Pa90, 130A314; 49RI 93, 139A793; 50 RI 242, 146A628. **Trust giving beneficiary life estate in dividends or income of proceeds** will not be dissolved on petition of life tenant because of liquidation of corporation, where testator's intent can be carried out by continuing life estate. NJCh 145A327.

100-80 Trust deed directing that on settlor's death income should be paid to named beneficiary for life so long as she should remain unmarried, and subsequently settlor married beneficiary, it has been held that trust continued after settlor's death, since at that time beneficiary was unmarried. 133Misc552, 233NYS232.

100-81 CalA 290P86; 40Wyo 524, 281 P190.

101-84 73CalA204, 238P727; 222Ky 584, 1SW(2d)1079; Mont 289P388.

101-86 99NJEq585, 134A546; 24 Oh 525 (trust terminated on death of one beneficiary and coming of age of the other).

102-87 248 IllA57. See also 255 IllA 428.

102-87½-New. Spendthrift trust is not terminated in favor of equitable life tenant by bequest to him of remainder by deceased remainderman. 6PaDist&Co 260.

102-88 98NJEq362, 129A141; 12Pa Dist&Co 553. **Agreement by adopted daughter to accept real estate** instead of bank account held in trust, real estate being thereafter conveyed to her waived right to bank account. RI 136 A12.

102-89 See also 96Fla455, 118S216. **Transfer of all trustee's right, title, and interest in trust property to life beneficiary who has acquired rights of living contingent remaindermen** does not terminate trust where other contingent remaindermen may yet be born. 76CalA 655, 245P803. **Delivery of savings bank books by trustee to beneficiary** held to terminate tentative trust in account opened by trustee in his name for benefit of beneficiary. 229AppDiv269, 241 NYS712.

102-91 328 Ill 76, 159NE229; 7PaDist &Co 475; 12PaDist&Co 553; 144Va375, 132SE347, 45ALR738. See also 10Pa Dist&Co 291. **Where parties agree** consent of equity court not essential. 144 Va375, 132SE347, 45ALR738.

102-92 A release by the remaindermen, etc. But see 76CalA655, 245P803. **Where purpose of testamentary trust has been accomplished by conveyance by all beneficiaries of their interests to others,** trust should be terminated on application of assignees of beneficiaries and conveyance made to owners of equitable estate. 202 Iowa1094, 211NW 488.

103-94 87CalA654, 262P438; 137Misc 420, 242NYS308 (payment in contravention of trust); 190NC119, 129SE149 (termination must be by clear unequivocal act or words brought to notice of cestui que trust). **Relation of confidence,** when once established, continues till terminated by some positive act or some complete case of abandonment. 70 CalA336, 233P394. **Delay or failure of trustee to sell trust property as directed** does not destroy trust. CalA 290P 86.

103-96 328 Ill 76, 159NE229.

103-97 Sale under executor's general power held not to terminate trust, but trust continues in proceeds. 284Pa26, 130A298. **Proceeds of stock held in trust were required to be distributed rather than reinvested** by trustee where stock had been placed in trust for principal purpose of continuing trustor's son in control of corporation and for further purpose of dividing dividends between trustor's children on sale of corporate business and dissolution of corporation. 21 OhA257, 153NE125.

103-98 The failure of the trustee to dispose of the property, etc. See also 40 Wyo 524, 281P190.

103-99 90Fla343, 106S408; 163Ga478, 136SE517 (conveyance held not to vest in settlor all of contingent remainder interest created under trust); 227Ky 169, 12SW(2d)319.

103-1½-New. Filing of pleading for trustee adverse to interest of beneficiaries constitutes renunciation of trust. 157Tenn78, 6SW(2d)323.

103-1⅓-New. Institution of suit to enforce lien for street assessments does not constitute abandonment of property and cessation of trust use. 157Tenn78, 6SW(2d)323.

103-1¼-New. Where cestui que trust had title without beneficial interest, beneficial owner could terminate trust at any time. 229Ky116, 16SW(2d)782.

103-1⅕-New. Under deed of trust giving use of property to "present wife," naming her, after death of husband wife is entitled to such use notwithstanding they were divorced and she had remarried. 265Mass339, 163NE902.

103-1⅙-New. Voluntary deed in trust can be canceled only with consent of all parties. 227Ky444, 13SW(2d)502.

103-1⅐-New. Trust deed providing for termination of trust on death or marriage of beneficiary did not terminate by marriage of beneficiary to settlor. 133 Misc552, 233NYS232.

103-1⅛-New. Under findings of master that undergraduate organization had so repudiated principles of national fraternity and changed in character that it ceased to be chapter thereof, within meaning of trust instrument in form of subscription agreement creating building fund for such chapter, it was not entitled to order enjoining interference with possession and management of premises or trust fund. 264Mass343, 162NE691.

103-2 21 OhA257, 153NE125. **Owner of equitable life estate** upon assigning her estate to remainderman cannot maintain action against trustee. 144Va 375, 132SE347, 45ALR738. **Trust property held to revert to settlor at end of trust period** on death within period of persons to whom it was to be paid. 137 Misc679, 244NYS274.

104-3 148Md603, 129A908 (subject to resulting trust). But see Mass 168NE 96. **Trustee's payment of income to beneficiary under invalid trust** is not recoverable by settlor. 137Misc795, 243 NYS418.

104-5½-New. Where testamentary trust had ceased, grantees were held to acquire fee-simple title to land conveyed. 191NC198, 131SE581.

104-7 89Fla457, 105S106; 93Fla849, 112S846, 854 [citCyc]; 47 Ida93, 272P 700; 334 Ill 30, 165NE227; 83Mont68, 271P695; 100NJEq143, 134A657 [quot Cyc]; 130 Okl 67, 264P811; 116 Or593, 240P883, 242P605.

104-8 89Fla457, 105S106; 93Fla849, 112S846, 854 [citCyc]; 323 Ill 161, 153 NE643; 323 Ill 122, 153NE718; 333 Ill 208, 164NE405; 334 Ill 30, 165NE227; 334 Ill 211, 165NE641; Ill 173NE402; 267Mass533, 166NE876; 319Mo 591, 4 SW(2d)807; 320Mo 804, 9SW(2d)1066; 31NM366, 246P910; 248NY54, 161NE 417; 130 Okl 67, 264P811.

104-9 93Fla849, 112S846, 854 [citCyc].

104-12 89Fla457, 105S106; 161Ga711, 132SE547; 162Ga735, 134SE771; 323 Ill 24, 153NE753; 78Mont457, 254P432; 145Va370, 133SE659.

104-13 130 Okl 67, 264P811.

104-14 89Fla457, 105S106 (where it appears or is inferred that beneficial interest is not to be enjoyed with legal title conveyed).

104-15 130 Okl 67, 264P811.

105-17 Resulting trust and constructive trust distinguished.-31NM366, 246 P910.

105-19 216Ala260, 113S231; 90Fla7, 105S134, 136 [citCyc] (intention is im-

plied); 157Md147, 145A370; 78Mont 457, 254P432; 43 OkiACR221, 228 [cit Cyc].

105-20 175Ark763, 300SW437; 205Cal 496, 271P898; 89Fla457, 105S106 (intention is essential element); 90Fla7, 105S134, 136 [citCyc] (element of intention must exist); 338 Ill 400, 170NE 208(2dcase); 78Mont457, 254P432; 248 NY54, 161NE417; 30 OhA345, 165NE 101; 130 Okl 67, 264P811; TexCivA 296SW925. **No resulting trust arises in favor of executory devisees** as to land purchaser mistakenly thought was not covered by contract but was trespasser thereon. 135SC446, 134SE1. **No resulting trust is shown** by testimony based on faulty recollections, as to the consideration for a deed twenty years old, especially where the parties asserting the trust have signed carefully drawn lease terms of which are inconsistent with their claims. 145Va370, 133SE659. **No resulting trust arises contrary to express terms of conveyance** in favor of grantor in absence of fraud. 23F(2d) 32. **Where conveyance is made upon valuable consideration,** there can be no resulting trust in favor of grantor. 99 Fla152, 126S135.

105-21 83Mont68, 271P695.

106-24 Where mortgagor unduly depleted security by exchange of timber for other lands, trust in favor of mortgagee will be impressed on land so acquired. 216Ala349, 113S291.

106-25 229Ky666, 17SW(2d)733. **Funds received by owners of whaling vessel as damages for interference with sealing by United States vessels** are charged with trust for payment of claims of officers and crew to agreed shares in profits of voyage. 24F(2d)683.

106-26 323 Ill 24, 153NE753; 319Mo 591, 4SW(2d)807; 98NJEq109, 130A 717; 12PaDist&Co 544; 50RI 86, 145A 312. **Where transaction is such that at moment title passes resulting trust would arise in absence of parol agreement** and agreement will not prevent trust arising. 323 Ill 510, 154NE235.

106-28 Where trust is created by deed to trustee who furnished cash payment mortgage for balance of purchase money executed by trustee contemporaneously with deed is not impressed with trust. 144SC70, 142SE36.

106-29 128 Or211, 274P312.

106-31 116 Or593, 240P883, 242P605. **Intention of grantor that grantee shall have beneficial interest** is inconsistent with creation of resulting trust. 90Fla 7, 105S134.

106-32 307Mo 682, 271SW489 (conveyance to defraud creditors).

106-32½-New. Money collected by arbitrators is not connected with controversy by them as trustees. 215AppDiv 130, 213NYS369.

106-32½-New. Resulting trust does not arise in favor of husband where conveyance had its origin in fraudulent purpose of defeating creditor. 307Mo 682, 271SW489.

106-32¼-New. Where widow continues business of decedent with stock constituting community property in which minor children have undivided interest, resulting trust therein exists in favor of children. 15F(2d)940.

106-32½-New. Resulting trust cannot be declared if violating positive rule of law or statute. TexCivA 278SW(2d)649.

107-34 323 Ill 24, 153NE753; TexCivA 271SW417, 421 [citCyc].

107-35 252Mass354, 147NE885.

107-36 323 Ill 24, 153NE753.

107-37 12PaDist&Co 544; TexCivA 271 SW417, 421 [citCyc].

108-39 TexCivA 271SW417, 421 [cit Cyc].

108-40 CalA 287P988; 323 Ill 24, 153 NE753; 116 Or593, 240P883, 242P605 (agreement between parties will not destroy trust if equity can say it would be fraud on cestui que trust to allow grantee of legal title to retain possession of property).

108-41 319 Ill 35, 149NE588.

108-42 IndA 149NE360; 217Ky749, 290SW705; 130 Okl 67, 264P811.

108-43 218Ala364, 118S739(2dcase); 219Ala273, 122S816, 65ALR110; 219Ala 461, 122S432; 220Ala85, 123S895(3d case) (loaning money to redeem land from mortgage foreclosure); 176Ark 1107, 5SW(2d)923; 201Cal 754, 258P 1099; CalA 287P988; 93Fla849, 112S 846, 854 [citCyc]; 319 Ill 35, 149NE 588; 323 Ill 510, 154NE235; 205 Iowa 1264, 216NW278, 219NW318; 207 Iowa 430, 223NW154; 124Kan155, 257P926; 217Ky749, 290SW705; 222AppDiv285, 226NYS124; 218AppDiv149, 218NYS31; 130 Okl 67, 264P811; 116 Or593, 240P 883, 242P605; 288Pa16, 135A254; 13 PaDist&Co 240; 47RI 263, 132A527; TexCivA 19SW(2d)193; BC [1925] 2 DomLR784. But see 90Fla7, 105S134; 219Ky329, 292SW824.

109-45 IndA 149NE360; 130 Okl 67, 264P811.

110-46 Intention of grantor not revealed at time he executes conveyance and not known to grantee does not create trust in land conveyed, where circumstances are not of such character that intention of parties to create trust may be presumed. 90Fla7, 105S134.

110-47 24F(2d)459; 93Fla849, 112S 846; 148Md226, 129A28; 314Mo 175, 282SW1022; Mo 32SW(2d)605; 82NJE 281, 133A166, 45ALR1433; 100NJEq65, 135A145 (deed by wife to intermediary but not joined in by husband held sufficient to create trust in his favor); 137 Misc795, 243NYS418; 190NC411, 130SE 45. **Equity will enforce** actual settlement made for vesting estate in trustee where intention so to do clearly and unequivocally appears. 52ND182, 201NW 861. **In Maryland.**–19F(2d)604.

111-52 121Kan619, 249P608, 610 [quot Cyc]; 314Mo 175, 282SW1022 (conveyances to "A, Trustee" without naming beneficiary or nature of trust creates resulting trust to grantor).

111-53 221AppDiv697, 224NYS609; 52 ND182, 201NW861; 56ND152, 217NW 150. See also 219MoA51, 266SW750.

112-54½-New. Failure of document to operate as will cannot add materially to its force as evidence of trust. 56ND152, 217NW150.

112-54¼-New. Where husband made life insurance policy payable to trustee without declaring trust, trustee held fund upon resulting trust for estate of insured. NJCh 145A735.

112-54¼-New. Resulting trust does not arise in favor of heirs at law of donor of public trust by reason of abuse of such trust. NJCir 146A881(2dcase).

112-55 33F(2d)162; 201Cal 754, 258P 1099; 31NM366, 246P910; 190NC411, 130SE45; 150Va386, 143SE702.

113-60 See also 32PortoRico 235.

113-61 Mo 278SW382.

113-67 Ga 132SE547; 116 Or593, 240P 883, 242P605 (equitably, purchasers are tenants in common and holder of title is their common trustee). **Purchase made by one as substituted bidder** held not to create trust in purchaser. 164 Ga609, 139SE61. **Agreements between debtors and creditors.**–MoA 16SW(2d) 626.

114-71 Alta [1926] 4DomLR958, [1926] 3WestWkly481.

115-81 84CalA90, 257P581; 225Ky648, 9SW(2d)988.

115-82 TexCivA 292SW958; Sask [1926] 1DomLR148, [1926] 1WestWkly 494 [app dism [1926] 4DomLR489, [1926] 2WestWkly730] (gratuitous transfer of property); Sask [1926] 4 DomLR489, [1926] 2WestWkly730.

116-85 130 Or230, 279P870. **In Texas.**–CivA 292SW958.

116-88 323 Ill 161, 153NE643.

117-91 148Wash176, 268P155.

118-3½-New. Resulting trust has no application to enforce illegal agreement by which one of parties was to obtain by perjury, and did obtain, homestead patent fraudulently. 85Colo 52, 273P 644.

118-5 219Ala273, 122S816, 65ALR110; 176Ark1203, 6SW(2d)8; 76CalA232, 245 P235; 101CalA330, 281P531(2dcase); 84Colo 64, 268P526; 162Ga735, 134SE 771; 166Ga523, 143SE761; 37GaA229, 139SE822; 319 Ill 35, 149NE588; 322 Ill 236, 153NE363; 323 Ill 161, 153NE 643; 334 Ill 30, 165NE227; 334 Ill 211, 165NE641; 335 Ill 494, 167NE117; 337 Ill 267, 169NE168; 339 Ill 606, 171NE 617; IndA 168NE500; Iowa 229NW 147; 262Mass61, 160NE403; 267Mass 533, 166NE876; Mo 292SW12; 320Mo 864, 9SW(2d)1066; MoA 30SW(2d)870; 81Mont311, 263P683; 101NJEq241, 137 A541; 98NJEq274, 130A816; 190NC 411, 130SE45; 116 Or593, 240P883, 242 P605; 10PaDist&Co 104; 151Va603, 144 SE613; 101WVa522, 133SE154; Sask [1926] 4DomLR489, [1926] 2WestWkly 730. **Resulting trust arises** at instant of taking title. 322 Ill 236, 153NE363.

119-6 Resulting trust will not be declared in favor of one who has not paid the price or portion of it with his own money. 8PaDist&Co 227.

119-8 323 Ill 24, 153NE753; 323 Ill 122, 153NE718.

119-9 37GaA229, 139SE822.

121-14 47 Ida93, 272P700; 237 IllA 500 (where transaction was shown to be executed gift).

121-16 46Philippine193.

121-19½-New. Time at which trust arises.–Resulting trust arises from original transaction and at instant when deed is taken. 319 Ill 35, 149NE588.

121-20 198Cal 465, 245P1091; 216Ky 688, 288SW672; 224Ky289, 6SW(2d) 253; 166Minn464, 208NW193; 125Misc 851, 213NYS4; 130Misc12, 223NYS626. **Such a statute applies only to absolute deeds** for land, and not to personal property. IndA 168NE500. **Statute cannot be used to perpetuate fraud.**–218AppDiv 149, 218NYS31. **Where agreement under which property bought with plaintiff's money and taken in defendant's name** could not be performed because of zoning law, held court would not permit deprivation of plaintiff's beneficial ownership under statute. 218App Div149, 218NYS31.

122-21 216Ky688, 288SW672.

122-22 216Ky688, 288SW672.

123-23 218AppDiv149, 218NYS31.

124-37 78Mont457, 254P432. **Statute held declaratory of common law** and to include personalty. 78Mont457, 254P 432.

125-47 98NJEq274, 130A816.

125-48 IndA 168NE500; 78Mont457, 254P432; 98NJEq274, 130A816.

127-73 168Ark613, 271SW347; Tex CivA 271SW417.

128-76 254Mass429, 150NE200.

128-77 168Ark613, 271SW347; 254 Mass429, 150NE200; TexCivA 271SW 417. **Where two persons agree to buy land together,** etc. 168Ark613, 271SW 347 (alleged partner paying no money); Wash 289P53 (notwithstanding agreement to contribute).

128-78 168Ark613, 271SW347; TexCivA 271SW417.

128-79 74CalA714, 241P905; 323 Ill 161, 153NE643; 85 IndA369, 152NE280; 321Mo 414, 11SW(2d)729; 78Mont457, 254P432; TexCivA 26SW(2d)463.

129-81 217Ala374, 115S877; 175Ark 767, 300SW437; Ark 32SW(2d)155; 91 CalA88, 266P836; 170Ga495, 153SE37; 47 Ida93, 272P700; 323 Ill 161, 153NE 643; IndA 170NE90; 129Kan278, 282P 697(2dcase); 157Md147, 145A370; 78 Mont457, 254P432; 83Mont68, 271P695; 116 Okl 266, 244P182; 12PaDist&Co 544; Wash 289P53. See also 10PaDist &Co 104. **Resulting trust arising from exchange of lands.**–83Mont68, 271P695.

130-82 4HawaiiFed547; 323 Ill 161, 153NE643.

130-83 Payment of purchase money on purchaser's account by one taking title in his own name, under arrangement for refund in subsequent accounting with purchaser, creates enforceable resulting trust. 296Pal, 145A587.

131-86 47 Ida93, 272P700; 322 Ill 236, 153NE363; 8PaDist&Co 227.

131-88 322 Ill 236, 153NE363.

131-92 30Ariz552, 249P745; 106Conn 287, 137A751; Ga 135SE771; 163Ga666, 136SE904; 166Ga523, 143SE761; 124 Kan155, 257P926; 122 Or691, 259P913; 145Wash322, 260P532; 100WVa671, 131 SE469. **Joint tenant held entitled to interest in property purchased** by other tenant from proceeds of sale of jointly owned property. 75CalA540, 243P487.

132-93 CalA 287P988 (payment for leasehold interest in property Dur-

chased in name of another); 106Conn 287, 137A751; 124Kan155, 257P926; 122 Or691, 259P913; TexCivA 258SW (2d)961.

132-95 323 Ill 122, 153NE718; 334 Ill 30, 165NE227; 130 Or577, 281P178.

133-96 323 Ill 161, 153NE643; 253Mass 110, 148NE380.

133-99 124Kan155, 257P926; TexCivA 98SW(2d)203.

134-3 74CalA714, 241P905 (partners).

134-6 157Md147, 145A370; 253Mass 110, 148NE380 (no resulting trust under facts).

135-10½-New. Purchase by debtor of land in name of creditor in application on indebtedness does not create trust. Ida 292P590.

135-11 87 IndA544, 150NE378; 315Mo 872, 288SW54, 57(2dcase) [quotCyc]; 98NJEq109, 130A717; 38Wyo 400, 267P 514, 517, 60ALR1233 [quotCyc]. **A loan of money without fraud by the borrower merely creates the relation of debtor and creditor,** etc. 315Mo 872, 288SW54.

136-17 81Mont311, 263P683; 194NC 312, 139SE601; 116 Or593, 240P883, 242 P605.

136-18 194NC312, 139SE601.

136-20½-New. Employer's purchase with firm money of land taken in name of employee sharing in net profits of business as compensation creates resulting trust. 292Pa532, 141A446.

136-22 170Ark877, 281SW660; 90Fla7, 105S134, 136 [citCyc]; 322 Ill 236, 153 NE363; 235Ky658, 32SW(2d)8; 238 Mich282, 213NW85; 240Mich627, 216 NW415; 319Mo591, 4SW(2d)807; 81 Mont393, 264P115; 194NC312, 139SE 601; 116 Or593, 240P883, 242P605; 122 Or620, 260P206, 59ALR707; 130 Or577, 281P178; NS [1930] 4DomLR18 (2dcase). **Principles pertaining to trusts do not apply** to transactions of husband and wife in deciding question of ownership of furniture in home. 130 Or577, 281P178.

137-23 322 Ill 236, 153NE363; 116 Or 593, 240P883, 242P605.

137-25 267Mass397, 166NE709.

137-26 322 Ill 236, 153NE363; 256Mass 308, 152NE80; 238Mich282, 213NW85; 322Mo 1219, 18SW(2d)77. **Where presumption is rebutted,** there is resulting trust in favor of husband. 322 Ill 236, 153NE363. **Character of transaction at its inception** determines whether advancement was intended or trust results. 221Ala337, 128S593. **Where husband paid for property but took conveyance to self and wife** with no intention of conveying interest to her, resulting trust rose. MoA 30SW(2d)870.

138-29 **Intention of purchaser and grantee that property should be held in trust** must be established by clear and satisfactory evidence. 116 Or593, 240P 883, 242P605.

138-30 43F(2d)497; 180Ark596, 22SW (2d)32; 36GaA537, 137SE119 (personalty); 319 Ill 35, 149NE588; 201 Iowa722, 207NW745; Mo 291SW485; 43 OklACR 221, 227 [citCyc]. But see 190NC411, 130 SE45. Contra 81Mont393, 264P115. **Where property held jointly,** etc. 105 WVa270, 142SE65. **Where husband invests wife's money according to her direction,** and takes title in own name, he will be held to be trustee for her benefit. 144Val, 131SE344. **Husband is trustee of wife** to extent of use with her consent of her separate property in his business in absence of her intention to make gift. 83CalA283, 256P832.

139-31 MoA 6SW(2d)961.

140-33 36GaA537, 137SE119.

140-37 234 IllA183.

140-38 338 Ill 428, 170NE428.

141-42½-New. That wife paid purchase price for property conveyed to herself and husband is insufficient to create trust in her favor. 222Ky427, 300SW 894.

142-47 194NC312, 139SE601.

142-47½-New. **Title taken in name of husband and wife** of property purchased with her money creates no resulting trust in wife's favor. 166Minn435, 208 NW184.

142-47½-New. **Resulting trust in favor of husband and wife** is created by purchase of land with community funds though deed taken by third person to defraud wife. TexCivA 285SW837.

142-48 TexCommnA 12SW(2d)146 (land purchased for benefit of community estate); TexCivA 300SW123. But see 224Ky289, 6SW(2d)253; 175Minn549, 221NW908.

143-50 **Where mother purchased land with funds owned by her and children jointly,** resulting trust arose in their favor. 163Ga551, 136SE528.

143-54 198Cal465, 245P1091; 82CalA 657, 255P1099; CalA 292P518; 98NJEq 728, 130A628; 98NJEq218, 130A222; 283Pa168, 129A53; TexCivA 276SW444. Contra 91CalA88, 266P836.

144-59 198Cal465, 245P1091; 202Cal 648, 262P319; 98NJEq218, 130A222; 96PaSuper177; TexCivA 276SW444.

145-63 220Ala360, 125S228; 237 IllA 500; 87 IndA544, 150NE378. **Facts held not inconsistent with a gift** by lender to purchaser. 87 IndA544, 150NE378.

146-68 217Ky749, 290SW705; 137SC 11, 134SE859, 865 [citCyc].

146-69 217Ky749, 290SW705.

146-71 220Ala85, 123S895(3dcase); 160 Ga261, 127SE776; TexCivA 292SW572.

147-72 220Ala85, 123S895(3dcase). **Rule that deed cannot be shown** by parol to be a mortgage when accompanied by possession is not applicable to case of one not party to deed. 160Ga261, 127SE 776.

148-81 100NJEq143, 134A657 [quot Cyc].

148-82 78Mont457, 254P432; 31NM366, 246P910; 190NC411, 130SE45; 137SC 11, 134SE859, 865 [citCyc]; Utah 290 P161. **Oil well driller commissioned to buy rig in employer's name with employer's money** committed breach of trust in purchasing in own name, and title obtained enured to benefit of employer. La 105S791. **Where one receives from his wife funds of estate** of her deceased husband to purchase interest in land contract which he takes in his own name, his equitable title is chargeable with resulting trust in favor of children of decedent. 31NM366, 246P910. **Trust does not arise where part of purchase money used is trust funds** intrusted for that purpose. 164Ga609, 139SE61. **Lender of money taking title to realty as security** becomes trustee of resulting trust. 219Ala273, 122S16, 65ALR110.

149-85 154Miss713, 123S865.

150-86 **Where father purchased partly with his own funds and partly with daughter's,** of which he was trustee, and took deed to equal shares in each, trust is implied in daughter to proportionate share of his half where trust money exceeded his own investment. 162Ga735, 134SE771.

150-89 152Wash336, 277P849.

150-91 100NJEq143, 134A657 [quot Cyc].

152-4 163Ga698, 137SE50; 170Ga495, 153SE37; 207 Iowa430, 223NW154.

152-8 IndA 168NE500. **Where wife and husband deposited their savings for purpose** of going into business for mutual benefit, inference could not be drawn therefrom that their interests are equal, or that they deposited equal amounts. Mass 167NE638.

152-9 216Ala519, 113S535; 218Ala659, 119S643; 338 Ill 400, 170NE208(2dcase); 222Ky427, 300SW894; 157Md147, 145 A370; Mo 291SW485; 78Mont457, 254P 432, 438 [citCyc]; 122 Or691, 259P913; 295Pa398, 145A436. **Presumption from conveyance is of truth of its contents.**–216Ala519, 113S535.

153-10 23F(2d)825; 216Ala519, 113S 535; IndA 168NE500; 221MoA510, 282 SW83; 78Mont457, 254P432 (claimant must at least make prima facie showing that money was not intended as loan or gift); TexCivA 276SW444, 445 [citCyc].

153-12 **To establish resulting trust in decedent in amount of notes** made payable to third party for purchase of property, it is necessary to show that decedent had equitable interest in notes. IndA 168NE500.

153-13 78Mont457, 254P432; 116 Or 593, 240P883. **Intention presumed.**–31 NM366, 246P910.

153-14 104CalA551, 286P486.

153-15 214Ala692, 108S752; 78Mont457, 254P432; 286Pa575, 134A451 (presumption that husband held stock in trust for wife, where she had transferred it to him without consideration, held rebutted).

153-17 IndA 168NE500; 98NJEq274, 130A816; 116 Or593, 240P883. **Presumption that conveyance from husband to wife was not intended as trust is not overcome** by mere allegation that conveyance was not intended as gift coupled with allegation that conveyance was to provide home for wife and children. 90Fla7, 105S134. **Where husband conveys land to wife with whom he is living,** presumption arises from relation of parties that no trust in favor of grantor was intended. 90Fla7, 105 S134.

154-19 334 Ill 211, 165NE641; 116 Or 593, 240P883; 130 Or577, 281P178.

154-20 134Misc607, 235NYS661.

154-21 But see 110Conn314, 148A345.

154-22 98NJEq274, 130A816.

154-23 336 Ill 337, 168NE316; 98NJEq 218, 130A222.

154-24 336 Ill 337, 168NE316 (intention); 98NJEq218, 130A222; 283Pa168, 129A53 (proof which satisfies conscience of chancellor).

154-26 Mass 171NE651; Mo 291SW485. **Evidence of payments** to purchaser after foreclosure sale by former owner, offered as defense against purchaser's claim of title, held properly refused. 73CalA421, 238P1096.

155-29 323 Ill 24, 153NE753. **But evidence that does not tend to prove a trust** held properly excluded. 100NJEq534, 135A874.

155-30½-New. In suit to establish trust based on contract to collect claim on contingent fee, correspondence between parties plaintiff relative to disposition of case many years thereafter held inadmissible. 171Ark1188, 283SW356.

155-31 290Pa566, 139A450.

155-32 214Ala692, 108S752; 175Ark 763, 300SW437; 97CalA759, 276P356; 104CalA551, 286P486; 36GaA537, 137 SE119; 319 Ill 35, 149NE588; 333 Ill 208, 164NE405; 335 Ill 494, 167NE117; 217Ky507, 289SW1105; 81Mont311, 263 P683; 83Mont68, 271P695; 30NM517, 239P865; 114 Okl 302, 247P67; 130 Okl 67, 264P811; 290Pa566, 139A450; TexCivA 28SW(2d)281; 101WVa522, 133SE 154; BC [1925] 2DomLR784.

156-33 322 Ill 236, 153NE363.

156-34 47RI 263, 132A527; TexCivA 276SW444.

156-35 245Mich205, 222NW176.

156-36 47 Ida93, 272P700.

157-37 36GaA537, 137SE119.

157-39 290Pa566, 139A450.

158-46 192NC642, 135SE778.

158-49 36GaA537, 137SE119 (rule applied to contract of sale of automobile).

159-51 130 Or230, 279P870.

159-52 214Ala692, 108S752; 69CalA 399, 231P375. But see 158Md677, 149A 462.

159-53 214Ala692, 108S752; Mo 291 SW485.

159-54 But see 130 Or230, 279P870.

160-56 97CalA759, 276P356; 81Mont 311, 263P683.

160-57 319 Ill 35, 149NE588.

160-60 145Wash322, 260P532.

160-62 Mo 32SW(2d)605. **Evidence held sufficient.**–175Ark763, 300SW437; 181Ark454, 26SW(2d)109; 201Cal 754, 258P1099; 81CalA678, 254P644; 160Ga 261, 127SE776; 166Ga60, 142SE534; 319 Ill 35, 149NE588; 322 Ill 236, 153 NE363; Iowa 232NW729; 124Kan155, 257P926; 216Ky688, 288SW672; 217 Ky749, 290SW705; 227Ky665, 13SW (2d)1019; 157Md147, 145A370; Mo 292 SW12; 321Mo 414, 11SW(2d)729; 81 Mont330, 263P421; 81Mont311, 263P 683; 101NJEq241, 137A541; 248NY54, 161NE417; 134Misc607, 235NYS661; 114 Okl 302, 247P67; 130 Okl 67, 264P 811; 43 OklACR221; 116 Or593, 240P 883, 242P605; TexCivA 276SW444; Tex CivA 292SW958; 101WVa639, 133SE 361. **Evidence held insufficient.**–170Ark 1193, 280SW7; 171Ark1188, 283SW356; Colo 285P109; 91Fla969, 109S89; 164 Ga609, 139SE61; 166Ga523, 143SE761; 334 Ill 30, 165NE227; 338 Ill 400, 170 NE208(2dcase); 85 IndA369, 152NE 280; 204 Iowa727, 215NW963; 208

Iowa1004, 224NW583(2dcase); 130Kan 85, 285P584; 157Md147, 145A370; 158 Md677, 149A462; 317Mo 207, 294SW 723; 78Mont457, 254P432; 98NJEq274, 130A816; 138 Okl 163, 280P609; 87Pa Super153; TexCivA 26SW(2d)463; 68 Utah575, 251P371; 148Va779, 139SE 495; Wash 289P53. **Evidence must be viewed most favorably to plaintiff** in determining sufficiency. 77CalA525, 247P 240. **Presumption of right** in favor of one holding title by deed can be overcome only by clear, satisfactory evidence. 290Pa566, 139A450.

161-63 216Ala519, 113S535; 208 Iowa 298, 225NW453; 307Mo 682, 271SW489.

161-64 Ill 173NE402; Iowa 229NW 147; 130 Or577, 281P178. **Evidence held sufficient.**–214Ala692, 108S752; 101 CalA402, 281P698; 92Fla401, 109S465; 323 Ill 161, 153NE643; 333 Ill 208, 164 NE405; 335 Ill 494, 167NE117; 339 Ill 606, 171NE617; Iowa 229NW147; NJ Ch 135A330; 129 Or138, 276P1086. **Evidence held insufficient,** etc. 170Ark 877, 281SW660; Ark 32SW(2d)155; 92 Fla401, 109S465; Ida 292P590; IndA 168NE500; IndA 169NE362; 217Ky 507, 289SW1105; Mo 292SW12; 321Mo 414, 11SW(2d)729; 221MoA510, 282SW 83; 295Pa398, 145A436; 68Utah575, 251P371.

161-65 129 Or138, 276P1086. **Evidence held sufficient.**–216Ala519, 113S535; 122 Or691, 259P913. **Evidence held insufficient.**–208 Iowa298, 225NW453.

162-67 Evidence held sufficient.–25 F(2d)588.

162-68 Evidence held sufficient.–134 Misc631, 235NYS593; 116 Or593, 240P 883, 242P605; 130 Or577, 281P178. **Evidence held insufficient.**–176Ark12, 2 SW(2d)41; 324 Ill 211, 165NE641; 337 Ill 267, 169NE168.

162-69 Evidence held sufficient.–154 Miss713, 123S865. **Evidence held insufficient.**–Mass 167NE638; 221MoA510, 282SW83; 98NJEq274, 130A816.

163-70 Evidence held sufficient.–283Pa 168, 129A53; 145Wash322, 260P532. **Evidence held insufficient.**–82CalA657, 255P1099; 89CalA674, 265P520; 50RI 86, 145A312. **Direct testimony of interested parties that no gift or advancement was intended by father to son,** though competent, is not conclusive. CalA 292P518.

163-71 Evidence held insufficient.–122 Or691, 259P913.

163-72 47 Ida93, 272P700. **Evidence held sufficient.**–335 Ill 494, 167NE117; Iowa 229NW147 (plaintiff's testimony corroborated by financial condition of grantee); 123Kan116, 254P322; 116 Or 593, 240P883, 242P605. **Evidence held insufficient.**–216Ala260, 113S231; 328 Ill 564, 160NE140; 236Mich317, 210NW 318; 68Utah575, 251P371; NS [1930] 4DomLR18(2dcase).

164-73 Evidence held sufficient.–Mo 291SW485. **Evidence held insufficient.**–MoA 6SW(2d)961; 98NJEq274, 130A 816.

164-74 130 Or577, 281P178 (funds expended must be followed or identified).

164-77 83CalA283, 256P832.

164-78 130 Or577, 281P178. **Exact portion paid should be clearly shown.**–IndA 170NE90.

165-84 216Ala519, 113S535; 7PaDist&Co 453; 101WVa639, 133SE361.

165-85 216Ala519, 113S535 (proof of imposing circumstances); 101WVa639, 133SE361.

166-87 Evidence held sufficient to show purchase by husband and conveyance to wife on her promise to deed undivided half interest to him. 240Mich627, 216Mo 415.

166-88 Evidence held sufficient to sustain finding that deceased and law firm of which he was member did not act for defendant in purchase of property. 68 Utah575, 251P371.

166-88½–New. Purpose for which payment was made must also be established. 151Va603, 144SE613.

166-89 23F(2d)825; 216Ala519, 113S 535; 217Ala374, 115S877; 221Ala337, 128S593; 168Ark981, 272SW869; 170 Ark877, 281SW660; 171Ark1188, 283 SW356; 175Ark763, 300SW437; 176 Ark1009, 48W(2d)953; Ark 32SW(2d) 155; 84Colo 64, 268P526; 161Ga711, 132SE547; 317 Ill 441, 148NE308; 323 Ill 161, 153NE643; 335 Ill 494, 167NE 117; 85 IndA369, 152NE280; IndA 168 NE500; Iowa 232NW729; 216Ky688, 288SW672; 217Ky507, 289SW1105; Mo 292SW12; 317Mo 207, 294SW723; 321 Mo 414, 11SW(2d)729; 221MoA510, 282 SW83; 78Mont457, 254P432; 81Mont 311, 263P683; 98NJEq101, 130A376 [citCyc] (circumstances tantamount to positive proof must be adduced); 190 NC411, 130SE45; 116 Okl 266, 244P 182; 138 Okl 163, 280P609; 116 Or593, 240P883, 242P605; 129 Or138, 276P 1086; 130 Or577, 281P178; 86PaSuper 112; 86PaSuper508; 87PaSuper426; 88PaSuper196; 144Va1, 131SE344 (where husband takes title to investment made with wife's money, trust must be clearly established). **Evidence held insufficient** to warrant impressing of trust. 96NJEq101, 130A373. **Evidence, so as to leave question free from any reasonable doubt,** is not necessarily required. 116 Or593, 240P883, 242P 605. **To establish resulting trust in favor of husband of grantee,** evidence must be clear, cogent, and altogether convincing. 307Mo 682, 271SW489. **Rule requiring clear, cogent, and convincing proof** to establish resulting trust does not apply where intention to separate legal and equitable estates appears on face of instrument and resulting trust arises because of indefiniteness and uncertainty. 314Mo 175, 282SW1022.

167-91 78Mont457, 254P432; 116 Or 593, 240P883, 242P605. **Evidence to rebut presumption of gift** of money by wife to husband where he buys and takes title to property need not be as strong as when husband is seeking to establish trust under similar circumstances. 101WVa639, 133SE361. **Slight evidence** is sufficient to overcome presumption that money with which husband bought and took title to property was gift to husband by wife. 101WVa 639, 133SE361.

167-93 217Ala374, 115S877. **Fact that suit is brought after death of person sought to be charged as trustee** is strong circumstance for refusing to establish resulting trust. 130 Or577, 281 P178.

167-94 317 Ill 441, 148NE308; 323 Ill 161, 153NE643; 78Mont457, 254P432.

167-95 216Ala260, 113S231; 334 Ill 211, 165NE641; 157Md147, 145A370; 6 PaDist&Co 235.

168-99 90Fla7, 105S134; 91Fla425, 108S169; 319 Ill 35, 149NE588; 334 Ill 30, 165NE227; Mo 291SW485; MoA 6 SW(2d)961; 78Mont457, 254P432.

168-1 216Ky688, 288SW672.

168-2 216Ky688, 288SW672; 222Ky 427, 300SW894. **The presumption that a conveyance by a parent to a child,** etc. 98NJEq728, 130A628. **Evidence held insufficient.**–98NJEq274, 130A816. **Evidence held to sustain finding that** no trust resulted in favor of wife furnishing consideration for property conveyed to her and her husband. 222Ky 427, 300SW894.

168-3½–New. Facts and circumstances sufficient to create resulting trust need not be same in all cases. 130 Okl 67, 264P811.

168-6 190NC411, 130SE45.

169-7 TexCivA 28SW(2d)584. **In Pennsylvania.**–86PaSuper508.

169-10 171Ark192, 283SW377; 88CalA 515, 263P1033; 93Fla805, 113S419, 54 ALR1173; 47 Ida93, 272P700; Ill 158 NE138; 221Ky33, 297SW942; 235Ky 658, 32SW(2d)8; 245Mich108, 222NW 119; 78Mont457, 254P432; RI 150A 760; TexCommnA 293SW563; Tex CommnA 12SW(2d)169; TexCivA 17 SW(2d)1102. See also 84Colo 456, 271P 191. **Constructive trust is created by construction of court.**–Ill 173NE402.

169-11 168Ark306, 270SW94; 171Ark 192, 283SW377; 181Ark597, 27SW(2d) 88; 96CalA23, 273P600(2dcase); Fla 128S876; 323 Ill 510, 154NE235; 333 Ill 327, 164NE662; 334 Ill 168, 165NE 605; IndA 151NE336; 122Kan244, 252 P205; 130Kan240, 285P626; 209Ky375, 272SW897; Md 150A267; 267Mass533, 166NE876; 245Mich108, 222NW119; 251 Mich557, 232NW211; 80Mont593, 261P 278; 81Mont1, 261P288; 81Mont322, 263P689; 31NM366, 246P910; 130 Or 577, 281P178; RI 150A760; TexCivA 282SW302. **Positive fraud must exist** in order to raise trust ex maleficio. 122 Kan244, 252P205.

169-12 218Ala420, 118S912; CalA 265 P263, 267 [citCyc]; 207Ky790, 270SW 47. But see IndA 168NE500.

169-13 93Fla805, 113S419, 54ALR1173; 323 Ill 510, 154NE235; IndA 151NE 336; 207Ky790, 270SW47; Md 150A 267; 79Mont566, 257P427; 122 Okl 81, 251P591 (representations by devisee inducing heirs to refrain from contesting will); 143 Okl 220, 289P315; TexCivA 26SW(2d)463. **Sum recovered by either mortgagor or mortgagee for injury to, or conversion of, mortgaged property** is held in trust to be applied according to respective rights. 190NC480, 130 SE319.

169-14 323 Ill 510, 154NE235; 144Va 113, 131SE217, 220 [quotCyc].

169-15 173Ark123, 292SW409; 144Va 113, 131SE217, 220 [quotCyc].

169-16 208Ky702, 271SW1064; 220 MoA1081, 279SW746; TexCivA 282SW 302.

170-17 171Ark192, 283SW377; 208Ky 702, 271SW1064; 78Mont457, 254P432.

170-17½–New. Fundamental theory in creating involuntary trust is restoring defrauded party primarily and fraudulent party to positions which they occupied before fraud was committed. 97CalA264, 275P533.

170-18 208Ky702, 271SW1064; 144Va 113, 131SE217, 220 [quotCyc]. **Public funds deposited** by treasurer of drainage district in bank which knew deposit was in violation of order of board of supervisors and of statute and impressed with trust ex maleficio. 220MoA 1081, 279SW746.

170-19 171Ark192, 283SW377; 84CalA 1, 257P545; 326 Ill 398, 158NE138; 208 Ky702, 271SW1064; Mo 282SW392, 413 [citCyc]; 144Va113, 131SE217, 220 [quotCyc].

170-19½–New. Where transaction is such that at moment title passes construction trust would arise, in absence of parol agreement, such agreement will not prevent trust arising. 323 Ill 510, 154NE235.

170-20 161La1051, 109S834, 49ALR 274; 78Mont457, 254P432 (such trusts are constructive). **Effect of statutes.**–68CalA198, 228P734.

170-20½–New. Statute abolishing resulting trusts for benefit of individual paying consideration merely from fact of payment has no effect on constructive trusts. 251NY237, 167NE428.

170-21 168Ark306, 270SW94; 172Ark 851, 291SW77; 176Ark1107, 5SW(2d) 923; 181Ark597, 27SW(2d)88; 93Fla 849, 112S846; 323 Ill 510, 154NE235; 205 Iowa1264, 216NW278, 219NW318; 204 Iowa1167, 216NW621; NJCh 148A 167; 251NY237, 167NE428; 228AppDiv 510, 240NYS232; 128 Or115, 268P1014; 286Pa393, 133A632; 288Pa16, 135A254; 13PaDist&Co 240; 47RI 493, 134A18; RI 150A760; TexCivA 19SW(2d)193; BC [1930] 2DomLR117. **Rule held not applicable** where attempt is to create express trust. 14F(2d)933. **Procurance of conveyance by daughter** with oral promise to reconvey raises constructive trust. 150Md626, 133A825.

171-22 286Pa17, 132A806.

171-23 168Ark306, 270SW94; 228App Div510, 240NYS232. See also 251NY 237, 167NE428.

171-24 168Ark306, 270SW94; 329 Ill 148, 160NE117; 252Mass354, 147NE 885; 170Minn479, 213NW38; 117 Okl 227, 245P831; 286Pa17, 132A806; RI 150A760.

171-27 86CalA454, 260P925; 136 Okl 129, 276P753, 66ALR143. **Mutuality of mistake.**–235Mich195, 209NW160.

172-28 But see 86CalA454, 260P925.

172-29 ND 230NW600. See also 108 Okl 241, 236P399.

172-31½–New. Property conveyed in fraud of creditors is held in trust for them. TexCivA 296SW658.

172-32 14F(2d)284; 26F(2d)884; 31 F(2d)994; 218Ala420, 118S912; 168Ark 306, 270SW94; 172Ark851, 291SW77; 69CalA198, 231P375; 70CalA336, 233P 394; 77CalA525, 247P240; 77CalA535, 247P261; 85CalA656, 259P1104; DexCh

146A296; 161Ga403, 131SE75 (matters creating constructive trust); 318 Ill 500, 149NE495; 323 Ill 510, 154NE235; IndA 151NE336; 202 Iowa764, 211NW257; 206 Iowa445, 220NW82; 207Ky790, 270SW47, 48 [citCyc]; 221Ky33, 297SW942; 235Ky658, 32SW(2d)8; 232 Mich505, 205NW583; Mich 233NW372; 165Minn396, 206NW728; Mo 282SW392, 413 [quotCyc]; MoA 27SW(2d)757; 79Mont566, 257P427; 84Mont424, 276P16, 63ALR528; 34NM387, 281P461; 240NYS250; 230AppDiv577, 245NYS389; 194NC312, 139SE601; 136 Okl 129, 276P753, 66ALR143; 125 Or507, 265P420; 290Pa586, 139A450; 54SD131, 222NW946(2dcase); TexCommnA 290SW522; TexCommnA 296SW871; Tex CommnA 10SW(2d)707; TexCivA 283SW1085; 147Va921, 133SE614. **Lien of grantee, who took conveyance to secure debt** of one who induced transfer by fraud with knowledge of fraud, held inferior to equity of grantor. 202 Iowa764, 211NW257. **Positive fraud** is essential element. 329 Ill 148, 160NE117. **Necessary elements of fraud.**–205 Iowa244, 216NW551. **Facts not showing constructive trust within rule.**–129Kan493, 283P497. **Where funds of one person are wrongfully used by another in purchasing realty,** constructive trust arises whether or not parties occupied fiduciary relation at time. 232Ky622, 24SW(2d)265. **That money was paid when title passed** need not be shown. Mass 172NE871.

175–33 318 Ill 500, 149NE495; 79Mont566, 257P427; 229AppDiv555, 242NYS883; 47RI 263, 132A527.

175–34 22F(2d)627; 26F(2d)884; 38F(2d)195; Cal 289P821; 85CalA656, 259P1104; 96CalA549, 274P597; IndA 169NE869; 221Ky55, 297SW938 (bank fraudulently selling special deposits and converting proceeds held constructive trustee); 222MoA1194, 4SW(2d)864; 135 Okl 243, 275P335; 290Pa566, 139A450; 47RI 215, 132A439 (husband or wife is under no duty of disclosing to spouse use proposed to be made of individual property); TexCommnA 290SW522. **Illustrations.**–202 Iowa764, 211NW257; 79Mont566, 257P427; 243NY439, 154NE303; 116 Ohl44, 156NE193, 52ALR761. **Facts held not to establish constructive trust.**–25F(2d)570.

176–35 168Ark306, 270SW94; 178Ark1056, 14SW(2d)219; 154Md660, 141A405; 253Mass110, 148NE380.

176–36 168Ark306, 270SW94; 178Ark1056, 14SW(2d)219; 286Pa17, 132A806; 12PaDist&Co 374.

176–38 But see 77CalA535, 247P261.

176–38½–New. Positive fraud accompanying promise as means of acquiring land must be shown by more than verbal promise in view of statute of frauds. 171Ark626, 286SW822.

176–38¾–New. Agreement which is personal in its nature cannot form basis of constructive trust for public purposes. 94Fla1176, 115S508, 57ALR370 (agreement to keep adjoining lot open as public park).

176–38¼–New. Third party, not participating in fraud, may not hold property as transferee, if he takes with knowledge of facts. 26F(2d)884.

177–40 204 Iowa1167, 216NW621; 158La537, 104S318; 165Minn396, 206NW728; NJCh 151A766; TexCivA 17SW(2d)89. **One obtaining vendor's lien note, given as collateral to vendor's note, at constable's sale under judgment against vendor,** asserting it as valid obligation, and collecting it as such through recovery of land, is in no position to claim conspiracy between vendor and purchaser to borrow money on homestead, with intent to assert homestead character of land when collection of vendor's lien notes should be attempted. TexCivA 17SW(2d)89.

177–42½–New. Purchase at foreclosure by husband with separate funds of wife and her wards vested equitable title in wife and her wards, and husband was trustee of legal title. TexCivA 271SW272.

177–42¾–New. Purchaser at foreclosure sale is not constructive trustee for mortgagor, in absence of express authorization or ratification of attorney's promise to hold land for mortgagor. DelCh 146A296.

177–43 207Cal534, 279P444(2dcase); 91CalA232, 267P105; 160Tenn381, 25SW(2d)583.

178–43½–New. Property devised in violation of promise to leave it to promisee is charged with constructive trust. TexCommnA 29SW(2d)334.

178–43¾–New. Where son fraudulently induces mother to devise entire estate to him with knowledge that one half thereof is impressed with trust in favor of another, he takes as constructive trustee. 160Tenn1, 22SW(2d)1.

178–43¼–New. Where wife fraudulently induced husband to transfer property to her in joint tenancy to defeat contract to make will she holds under constructive trust. 249Mich558, 229NW481.

178–49 221Ala578, 130S194; 168Ark306, 270SW94; 334 Ill 168, 165NE605; 84 IndA319, 151NE343; 158Md207, 148A531; 252Mass354, 147NE885; 235Mich195, 209NW160; 47RI 263, 132A527, 45ALR847; 134Wash560, 236P285. But see 68CalA448, 229P993; 235Ky164, 30SW(2d)876. **Grantee must have promised something of advantage to grantor** in order to induce him to part with legal title. 168Ark306, 270SW94.

178–50 14F(2d)116; 77CalA525, 247P240; Ida 238P160; 329 Ill 148, 160NE117; 209Ky375, 272SW897; 248NY206, 161NE472; 138Misc117, 244NYS713; 122 Okl 81, 251P591; 130 Or230, 279P870 (promise to reconvey); 47RI 493, 134A18. See also 245Mich108, 222NW119; 130 Okl 67, 264P811.

179–51 77CalA525, 247P240; 79CalA55, 248P1065; 207Ky790, 270SW47. See also 130 Okl 67, 264P811.

179–54 254Mass429, 150NE200; 117 Okl 227, 245P831; 288P16, 135A254. **No trust results** from parol agreement to convey or reconvey at future time. 120Kan510, 243P1045.

180–59 323 Ill 510, 154NE235; 133 Okl 264, 271P1042.

180–61 137Misc710, 244NYS293; 286Pa393, 133A632. **Fact that third party is nominal trustee under trust agreement** to whom owner conveys property in trust does not prevent subsequent purchaser thereof at judicial sale for benefit of owner from being constructive trustee. 286Pa393, 133A632.

181–63 Oral agreement of executrix to convey land purchased at execution sale does not render her liable as trustee though subvendee dismissed motion to vacate order confirming sale. Okl 292P60.

182–64 147SC259, 145SE113.

182–64½–New. Violation of illegal agreement stifling competition at judicial sale does not give rise to constructive trust. 136Wash598, 241P7.

182–64¾–New. That purchaser of land at master's sale subsequently agreed to reconvey insufficient to establish constructive trust, which must exist where provable by parol, at time deed is taken. 321 Ill436, 152NE217.

182–64¼–New. An oral agreement between a competitor and other competitors at a judicial sale providing that he should not bid, but after a bid made by such competitors, to pay such bid plus a certain expense was held not to create a constructive trust in favor of the competitor. 136Wash598, 241P7.

182–66 15F(2d)523; 16F(2d)911; 31F(2d)994; 215Ala195, 110S278; 70CalA336, 233P374 (grantee of land as security who agreed to reconvey and attend to renting); 79CalA55, 248P1065; 85CalA656, 259P1104; 82Colo416, 260P1017; 93Fla805, 113S419, 54ALR1173; 323 Ill 510, 154NE235; 326 Ill 398, 158NE138 (advantage gained by abuse of confidence cannot be retained); Ill 173NE87; 154Md660, 141A405; MoA 6SW(2d)961; 78Mont457, 254P432; 79Mont566, 257P427; 81Mont1, 261P288; 137Misc576, 243NYS88; 117 Okl 227, 245P831; 5PaDist&Co 387; TexCommnA 293SW563; 147Va921, 133SE614; 194Wis275, 215NW584; Can [1927] 3DomLR128. **Another statement of the rule.**–19 OhA165. **General interests of justice forbid party from profiting** by contract wherein he occupied inconsistent characters of buyer and seller, or donor and donee. 144Va727, 130SE794. **Doctrine rests upon general principle that purchase or reception of gift is inconsistent** with legal duties to seller or donor. 144Va727, 130SE794. **Acquisition of antagonistic rights by assignee of oil lease under agreement for development for benefit of both parties** gives rise to constructive trust in favor of assignor. 19 OhA165. **Time of payment held not material.**–78Mont457, 254P432. **Employee securing lease on premises of employer,** without his knowledge, holds as constructive trustee for employer. 267Mass256, 166NE640. **Officers and agents of corporations.**–243Mich578, 220NW699. **Grantee obtaining deed.**–Ill 173NE87.

184–67 195Cal354, 233P330; CalA265P263, 267 [citCyc].

185–68 323 Ill 510, 154NE235 (betrayal of confidence reposed); 334 Ill 168, 165NE605; 148Md242, 129A218; 150Md677, 133A843. **Rule of universal application to purchases by fiduciaries** is that no party can be permitted to purchase interest where he has duty to perform which is inconsistent with character of purchaser. 144Va727, 130SE794. **If no trust is reposed by one party so as to** create duty of other to observe it, general rule cannot be invoked. 68Utah407, 250P986.

185–70 Origin of confidence is immaterial and relation may be legal, moral, social, domestic, or personal. 93Fla805, 113S419, 54ALR1173; **Existence of friendship not alone sufficient.** 321 Ill436, 152NE217. **Relationship of debtor and creditor** not sufficient of themselves to show existence of fiduciary relationship. 321 Ill 436, 152NE217. **Relationship of building and loan association to lender** held not fiduciary one. 150Md677, 133A843. **Community of duty exists between persons** having community of interest. 85CalA656, 259P1104. **Transactions held not to create fiduciary relations.**–175Minn115, 220NW551.

185–70½–New. A fiduciary relationship may exist when a person gains undue influence or superiority over another. 318 Ill 500, 149NE495.

185–71 49ND354, 191NW622; TexCivA 29SW(2d)805. See also 87CalA549, 262P73; CalA 269P944; 138 Okl 120, 280P600.

185–72 Brokers selling property to corporation of which one of brokers is managing officer is breach of duty putting corporation and brokers in position of trustees of property or proceeds and profit for principal. 215AppDiv196, 213NYS351.

186–74 218Ala207, 118S389; 176Ark1107, 5SW(2d)923; 74CalA714, 241P905; 91CalA554, 267P375; 316Mo129, 289SW814; 240NYS250; 26 OhA177, 159NE838; 297Pa551, 147A657; 194Wis275, 215NW584.

186–75 32F(2d)756; Cal 265P929. **Executor surrendering vendor's lien notes of estate on repurchase of property sold by estate** takes title in trust for beneficiaries. TexCommnA 14SW(2d)1009.

187–76 330 Ill 74, 161NE97; 330 Ill 548, 162NE191; 207Ky790, 270SW47; 209Ky375, 272SW897; 216Ky688, 288SW672; 156Md516, 144A647; NJCh 148A167; 251NY237, 167NE428. But see 266Mass180, 165NE14. **That contract for joint purchase by husband and wife was read to wife** held not notice to her of ultimate conveyance of title. 216Ky688, 288SW672. **Where husband in wife's presence stated** that he wanted title with survivorship clause, she may assume that title was taken in that manner. 216Ky688, 288SW672.

187–77 326 Ill 398, 158NE138; 334 Ill168, 165NE605; 158Md207, 148A531; 117 Okl 227, 245P831; TexCommnA 290SW522; TexCivA 17SW(2d)1102. **Parent and adult child.**–175Ark763, 300SW437.

188–79 93Fla805, 113S419, 428 [citCyc]; 54ALR1173; 78Mont457, 254P432 (officer of corporation); NJCh 135A285 (dictum); SD 225NW661. **Agent selling principal's property to himself through third person** becomes trustee

for principal. TexCivA 1SW(2d)343. **Innocent third person producing customer under agreement for interest in property** can take good title from purchaser by gift or purchase where he did not act jointly or as partner with owner's broker. TexCivA 1SW(2d)343. **Where third person acts jointly or as partner with broker to obtain title to part of principal's property** equity will raise trust against both. TexCivA 1SW (2d)343.

188–79½–New. Director of trustee corporation held allowed to purchase. 5 PaDist&Co 426.

189–86 Man [1930] 2DomLR870.

189–87 NJCh 135A285 (dictum).

189–88 93Fla805, 113S419, 54ALR1173; 216Ky51, 287SW226; Utah 290P161.

190–90 CalA 265P263.

190–92 CalA 265P263, 266 [citCyc]; 170La233, 127S611(2dcase).

190–93 CalA 265P263, 267 [quotCyc].

190–96½–New. Agent who loans money for principal and takes note in own name holds same in trust for principal. 77Colo 438, 237P149.

190–97½–New. Any violation of agent's trust must defeat or prevent accomplishment of purpose of trust before principal can follow property derived therefrom by agent. 180Ark416, 21SW (2d)615.

190–98 216Ala504, 113S609, 54ALR 1413; 84Colo 266, 269P997; 80Mont593, 261P278; 119 Oh66, 162NE277; 127 Or 147, 271P57. **Possession and control of an estate by a widower.**–208Ky702, 271 SW1064. **Proceeds of sale of property covered by chattel mortgage** may be impressed with trust in favor of mortgagee in hands of person who had full knowledge of mortgage and source of such proceeds. 200 Iowa1186, 206NW107. **Money collected by second assignee** may be recovered by first assignee in equity as impressed with trust. 214AppDiv 525, 212NYS473.

191–99 28F(2d)37; 171Ark192, 283SW 377; 91CalA56, 266P840; 161Ga403, 131 SE75; 168Ga876, 149SE213. Trusts §§ 91, 104. Third person for whose benefit contract is made may sue thereon in own name to recover money or property wrongfully obtained by party; bank to which cotton buyer pledged planters' warehouse receipt for cotton purchased to secure money to pay planters held cotton in trust for planters, where it refused payment of checks; bank which sold to third persons cotton purchased by cotton buyer without paying checks to planters held proceeds in trust for purchasers (Civ. Code 1910 § 5516). As a general rule, an action on a contract must be brought in the name of the party in whom the legal interest in such a contract is vested and against the party who made it in person or by agent. (a) But where a contract is made for the benefit of a third person as well as for the benefit of the parties thereto, and where one of the parties to the contract obtains money or other property which rightfully belongs to such third person, he may sue thereon in his own name for such money or property, as the law creates both the privity and the promise. (b) Where a cotton buyer, in pursuance of an agreement between him and a bank, bought cotton from planters for cash, took their warehouse receipts for the cotton purchased, gave to the planters his checks on the bank for the payment of the cotton so bought, and pledged such warehouse receipts with the bank to secure it for money to be paid by it on such checks, and where the bank refused payment of such checks, in equity it held the cotton so purchased and pledged to it, and the proceeds thereof, in trust for the purpose of paying the planters the purchase price of the cotton; and, where the bank, before paying such checks for the purchase price, sold the cotton to third persons, received the proceeds thereof, and still failed to pay such checks, in equity, it held such proceeds in trust for the benefit of the persons to whom it sold such cotton, and to hold them harmless in the event the planters should recover from them the cotton or its value in actions of trover brought against them by the planters upon the ground that no title passed to the bank or its vendees by reason of the fact that the sales by the planters to the cotton buyer were for cash. 221Ky55, 297SW938; Mo 8SW(2d)944; 98NJEq9, 130A281 (holding that, where property is left to two brothers and is managed by one of brothers, trust is created in favor of second brother, especially where it is shown that second brother is not mentally strong); 127Misc399, 216NYS 267 (retention by estate of life tenant, entitled only to income, of corpus); 219 AppDiv425, 219NYS166 (devise to B, after contract to devise to A, makes owner of legal title constructive trustee to extent of A's beneficial interest); TexCivA 20SW(2d)229; TexCivA 22SW (2d)520 (bank depositing to agent's personal credit on his unauthorized indorsement of checks payable to principal). But see 101CalA20, 281P518(2d case). **Corporation, obtaining land from trustee of owner,** must account to landowner for profits of resale of it. 243NY 439, 154NE303. **Claimant under mining laws of oil land withdrawn from entry** having preferential right to lease by relinquishing to United States, but who does not do so, has no right to impose trust on another. 22F(2d)663.

191–2 218Ala659, 119S643; 200 Ind298, 163NE89; IndA 151NE336; 84 IndA319, 151NE343; 78Mont457, 254P432; 79 Mont566, 257P427; 116 Okl 266, 244P 182; 136 Okl 129, 276P753, 66ALR143; 36 OklACR401; 129 Or138, 276P1086; 194Wis275, 215NW584. **Fraud not presumed** in first instance. IndA 151NE336. **Fiduciary relationship** between parties must be shown. 22F(2d)663. **To establish constructive trust in decedent in amount of notes** made payable to third party for purchase of property, it is necessary to show that decedent had equitable interest in notes. IndA 168NE 500.

192–3 33F(2d)278; 208Cal 134, 280P 531; CalA 259P102; 326 Ill 398, 158NE 138; 334 Ill 168, 165NE605; Ill 173NE 87; 78Mont457, 254P432; 198NC460, 152SE157.

192–3½–New. Where grantor was fraudulently induced to part with title to third party who gave nothing, legal presumption arises that grantee took title in trust for grantor. 202 Iowa764, 211NW257.

192–3½–New. Burden is on defendant grantees of plaintiff's coadventurer to show correctness of items they desired to have added to items shown by grantor's false statement. 79Mont566, 257 P427.

192–4 130 Or230, 279P870 (testimony showing no consideration, in conjunction with other evidence of fraud, admissible). **Will of grantor** held admissible to show state of mind and intent to establish constructive trust. 173Minn 314, 217NW115.

192–6 168Ark306, 270SW94; 171Ark 626, 286SW822; 172Ark132, 288SW376; 175Ark763, 300SW437; 93Fla805, 113 S419, 54ALR1173; 321 Ill 436, 152NE 217; 323 Ill 510, 154NE235; 206 Iowa 445, 220NW82; 116 Okl 266, 244P182; 136 Okl 129, 276P753, 66ALR143; 36 OklACR401; 47RI 263, 132A527; Tex CommnA 12SW(2d)169. **Evidence to engraft parol trust** on lands on absolute deed must be clear and convincing and contemporaneous with deed. 22 OhA121, 153NE229.

193–7 172Ark132, 288SW376. But see TexCivA 6SW(2d)393. **Evidence held insufficient to establish constructive trust.**–321 Ill 436, 152NE217; 263Mass 248, 160NE799. **Words should not be treated as surplusage** as long as any other course is reasonably possible. 298Pa 540, 148A843.

193–8 172Ark132, 288SW376; 176Ark 1203, 6SW(2d)8; 178Ark1200, 13SW(2d) 585; 178Ark1056, 14SW(2d)219; 80 CalA729, 252P757; CalA 269P944; 93 Fla805, 113S419, 429 [citCJ], 54ALR 1173; 321 Ill 436, 152NE217; 330 Ill 160, 161NE515; 334 Ill 168, 165NE605; Ill 173NE402; 200 Ind298, 163NE89; 78Mont457, 254P432; 79Mont566, 257P 427; 99NJEq195, 138A195; 116 Okl 266, 244P182; 122 Okl 81, 251P591; 136 Okl 129, 276P753, 66ALR143; 138 Okl 163, 280P609; 36 OklACR401; 129 Or138, 276P1086; 286Pa17, 132A806; 47RI 263, 132A527; 47RI493, 134A18. **Evidence held sufficient to establish constructive trust.**–176Ark1203, 6SW(2d)87; 178Ark1056, 14SW(2d)219; 201Cal 155, 255P825; 208Cal 134, 280P531; 80CalA 729, 252P757; 85CalA656, 259P1104; 91CalA554, 267P375; CalA 269P944; 93 Fla805, 113S419, 54ALR1173; Ida 288 P160; 318 Ill 500, 149NE495; 202 Iowa 764, 211NW257 (to show grantee knew of frauds inducing conveyances); 206 Iowa445, 220NW82; 235Ky658, 32SW (2d)8; 128Me324, 147A415; 150Md626, 133A825; 313Mo 27, 281SW445; 79 Mont566, 257P427; 226AppDiv858, 137 Misc89, 241NYS178; 299Pa257, 148A25 (money misappropriated by agent); RI 148A313; 49SD256, 207NW102; Tex CivA 6SW(2d)393; TexCivA 25SW(2d) 642. **Evidence held insufficient to establish constructive trust.** 215Ala465, 111S22; 219Ala234, 121S528; 168Ark 306, 270SW94; 171Ark626, 286SW822; 172Ark11, 287SW1022; 173Ark1180, 292SW670; 179Ark494, 16SW(2d)591; 180Ark416, 21SW(2d)615; 88CalA515, 263P1033; CalA 265P263; 203Cal 766, 265P941; 101CalA20, 281P518(2dcase); DelCh 146A296; 164Ga609, 139SE61; Ga 155SE764; 334 Ill 168, 165NE605; 330 Ill 160, 161NE515; 199 Ind582, 159 NE428; 200 Ind298, 163NE89; 84 IndA 319, 151NE343; IndA 168NE500; 205 Iowa244, 216NW551; 223Ky79, 28W (2d)1067; Me 151A146; Md 150A267; 253Mass110, 148NE380; 251Mich557, 232NW211; 173Minn314, 217NW115; 175Minn115, 220NW551; 78Mont22, 252 P316; 78Mont457, 254P432; NJCh 135 A285; 99NJEq195, 138A195; 137Misc 576, 243NYS88; 22 OhA121, 153NE229; 138 Okl 120, 280P600; 36 OklACR401; TexCommnA 298SW545; TexCivA 26 SW(2d)463; 147Va921, 133SE614. **Sufficiency of evidence to establish fiduciary relation.**–215Ala465, 111S22; 208 Cal 134, 280P531; 330 Ill 160, 161NE 515; 251 IllA240; 175Minn115, 220NW 551. **Sufficiency of evidence as to particular matters.**–79Mont566, 257P427. **Evidence sufficient to show fiduciary relation** between owner and one obtaining property from him. 318 Ill 500, 149NE 495. **Evidence sufficient to sustain finding of absence of fraud.**–122Kan244, 252 P205. **Evidence held not to show trust ex maleficio.**–165Ga245, 140SE376. **Beyond reasonable doubt not required.**–TexCivA 6SW(2d)393. **Evidence held sufficient** to justify finding that executor received proved rental value of land. TexCommnA 14SW(2d)1009. **Evidence held insufficient** to justify decree giving mother lot daughter purchased with money given by parents. 247Mich32, 225 NW505. **Evidence need not be more convincing than that required to convert deed into mortgage.** 85CalA656, 259P 1104. **Subsequent conduct of grantee** may be of such character as to warrant inference that at time of promise he never intended to perform. 158Md207, 148A531.

193–8½–New. Trust agreement, taking effect at donor's death will be construed in light of its own language, surrounding circumstances, and common experience of mankind. 215AppDiv73, 213 NYS277.

193–8¼–New. Every intendment of law is toward protection of cestuis que trust under valid trust. 252Mass37, 147 NE272.

193–8¼–New. Evidence which may be explained on any other theory than existence of constructive trust is insufficient to support decree declaring and enforcing such trust. 321 Ill 436, 152 NE217.

194–1 126Me521, 140A189. **Donor must be held to intend obvious and necessary result of his deed and,** where there is no ambiguity, there is no room for interpretation. 14F(2d)616. **Trust in nature of postnuptial settlement** will be liberally construed. 150Md322, 133 A110, 47ALR467. **Trust relates back to time of creation,** no matter when proof

is made. 24F(2d)459. **Rules pertaining to construction of deeds, and not those applicable to construction of wills,** apply to deed conveying land in trust for separate benefit of married woman and her children. 329 Ill 235, 160NE605. **Construction as to estate granted.**–329 Ill 235, 160NE605. **Construction in favor of validity.**–137Misc679, 244NYS274.

194-3 158Md69, 148A121. **Agreement** held not to constitute trust. 92CalA302, 267P1091.

194-5 248 IllA57; 206 Iowa1121, 221 NWS51; 230Ky429, 20SW(2d)83; 264 Mass343, 162NE691; 102NJEq502, 141A 567, 568 [quotCyc]; 250NY298, 165NE 454(2dcase); 125Misc32, 210NYS24; 134Misc618, 235NYS642; 50Philippine 888; 192Wis486, 213NW320. **Trust legally made will be upheld, but it must stand as made.**–128Misc505, 219NYS125. **Motive of creator in use of language or effect on parties** held not to preclude proper interpretation. 193Wis89, 213 NW673, 52ALR681. **Technical rules or artificial analysis** may not defeat grantor's intention manifest in language of deed. 246NY481, 159NE405. **General scheme of disposition** is more significant than forms or phrases. 137Misc679, 244 NYS274.

194-6 29F(2d)412; 336 Ill 366, 168NE 349; 102NJEq502, 141A567, 568 [quot Cyc]. **Primary or dominant intent must prevail** over secondary intent, where two are inconsistent. 336 Ill 366, 168NE349. **Where language is susceptible of different constructions,** words of inferior import and questionable meaning will be disregarded. 336 Ill 366, 168NE349.

194-7 76CalA655, 245P803; 336 Ill 366, 168NE349; 133Misc152, 231NYS408; 192Wis486, 213NW320. **Control of granting clause by subsequent provision.**–76CalA655, 245P803. **Inconsistent clauses must be construed** to give effect to intent of parties as collected from whole instrument. 336 Ill 366, 168NE 349.

194-8 336 Ill 366, 168NE349; NJ 147 A506. **Power of sale held repugnant** to other provisions of deed of trust unless construed as only a power to sell during lifetime of settlor. Ont [1926] 2 DomLR749. **Strict and literal meaning of language** will not be considered when such construction will frustrate intention of parties gathered from whole instrument. 336 Ill 366, 168NE349. **That trust deed provides for division of land only in case of contingency** does not invalidate deed where contingency anticipated happened. 336 Ill 366, 168NE 349. **Trust deed should be construed without consideration** of void provisions therein. 336 Ill 366, 168NE349. **Unnecessary and superfluous words** may be disregarded. 336 Ill 366, 168NE349.

194-8½-New. Where terms of trust, as written, were in violation of statute, with regard to validity of directions for accumulation of income, and terms of written trust were at variance with recital clause of instrument, court must construe deed of trust, and arrive at its legal import. 133Misc152, 231NYS 408.

194-8⅓-New. Keeping four trusts in one fund for purpose of investment does not make one trust. 229AppDiv356, 243 NYS328.

194-9 25F(2d)493; NJCh 149A50; 130 Misc856, 225NYS407; 137Misc795, 243 NYS418 (holding trust void under laws of matrimonial domicile void in local jurisdiction).

194-9½-New. That suit is brought after death of alleged trustee is strong circumstance for refusing to establish constructive trust. 130 Or577, 281P178.

194-11 Other questions for jury.–Tex CivA 18SW(2d)343.

194-11½-New. Pleadings and evidence in vendor's suit to establish equitable lien on land have been held to raise issue of innocent purchaser for jury. Tex CivA 17SW(2d)89.

195-14½-New. Trust deed must be construed in accordance with laws in force when executed and delivered. 127 Misc332, 215NYS374; TexCivA 2SW (2d)281.

195-14½-New. Authorities at domicile of trustee and situs of trust property control in construing trust agreement. 136Misc416, 241NYS398.

195-16 Utah 290P161.

196-17 171Minn237, 213NW893.

196-22 228AppDiv579, 240NYS260; ObA 161NE548; TexCivA 238SW(2d) 392; 107WVa141, 147SE490. **Insurance policy and trust agreement** are construed together to ascertain beneficiaries at death of settlor where trust was for those named in policy. 220Ky43, 294SW767. **Declaration of trust** need not be contained in instrument transferring legal title but may be set forth in separate instrument provided that when construed together they establish trust. 34F(2d)390. **Where trust deed incorporates will by reference,** will becomes part of deed except where inconsistent therewith. TexCommnA 29 SW(2d)949.

197-24 101CalA330, 281P531(2dcase).

197-26 110Conn516, 148A358 (court cannot regard any unexpressed intent but only that which in documents find expression); 129Misc784, 223NYS488.

197-27 93Fla849, 112S846.

197-30 93Fla849, 112S846; 263Mass 114, 160NE309; 218AppDiv67, 217NYS 769 (trust held ambiguous); 192Wis 486, 213NW320. **Circumstances** which tended to show that legal title was to remain in wife subject to right of support by husband. 218AppDiv67, 217 NYS769.

198-31 129Misc784, 223NYS488.

198-35½-New. Interpretation of deed creating trust may be based on presumptions. 246NY481, 159NE405.

198-36 50Philippine888 (trust forming part of mayorazgo construed). **Trust for maintenance and support** of all or any one or more, exclusively of other or others, of testatrix's son, his wife, and children or other issue in discretion of trustees, requires trustee to distribute income to some or all of possible beneficiaries mentioned annually or oftener. 241NY401, 150NE 496. **Permitting wrong persons to take** under insurance policy containing names of cestuis under agreement held no bar to ascertainment of intended cestuis. 220Ky43, 294SW767. **Trust for support of family does not include** son or daughter after he or she reaches twenty one. 146Miss308, 111S829. **Gift to certain persons and their issue taking per stirpes** excludes after-born brothers of named beneficiaries. NJ 147A506.

199-43 136Misc518, 240NYS24 (not grandchildren).

199-45 171Minn237, 213NW893. **Trustee under will held to have duty** to distribute income of trust estate among some or all of the persons mentioned as possible beneficiaries. 241NY401, 150 NE496.

199-50 A child en ventre sa mere is included as beneficiary in conveyance in trust for a married woman "and her children." 163Ga520, 136SE551, 50ALR 615.

200-51 102NJEq502, 141A567.

200-55½-New. Beneficiary must comply with conditions precedent prescribed by trust instrument to acquire any rights under it. 171Minn237, 213NW893.

200-55⅓-New. Trust deed providing for payment of income to wife for support of herself and children gives children beneficial interest not limited to minority. 220AppDiv307, 221NYS572.

200-55¼-New. Where settlor provided that on her death, proceeds of trust be divided among employees of certain corporation, distribution was limited to employees at time of her death. 134 Misc618, 235NYS642.

200-56 Particular instruments construed.–252NY168, 169NE127.

201-66½-New. Order appointing trustee for property bequeathed to sole and separate use of testator's wife during lifetime did not appoint trustee for remainder interest. 167Ga448, 145SE875 (2dcase).

201-68 193Wis286, 214NW438.

201-76½-New. Trust agreement providing for income for life beneficiaries equivalent to specified sum on each share of stock has been construed as minimum instead of maximum allowance. 134 Misc281, 235NYS883.

201-78 See also Md 152A258. **Trusts construed as one to sell real property** and distribute proceeds under Civil Code of California. 72CalA713, 237P821.

202-79 96Fla455, 118S216. **Trust fund cannot be divested from purpose of** trust. 200 Iowa1155, 206NW248.

202-85 75Mont304, 243PS06. **The interest of a cestui que trust,** etc. 75Mont 304, 243P806; Utah 286P638.

203-90 100NJEq37, 136A738.

203-93 240Mich661, 216NW446, 447 [citCyc].

203-96 75Mont304, 243P806, 808 [cit Cyc].

203-97 96Fla455, 118S216.

203-98 99NJEq514, 133A705 (deemed to rest in cestui que trust).

203-98½-New. In determining when successor trustees are vested with discretionary powers granted to those first named, intention of testator is determining factor. 135Misc377, 238NYS559.

204-2 Trust created by deed in favor of married woman and her children was not executed by statute of uses. 329 Ill 235, 160NE605.

204-4 137SC11, 134SE859.

204-7 129Kan24, 281P888; 100NJEq 37, 136A738. **Statute executes use only, if at all, at time when use is created.**–329 Ill 235, 160NE605.

206-10 100NJEq37, 136A738.

206-11 187Wis629, 205NW386.

206-15 316 Ill 583, 147NE446.

207-16 94Fla171, 114S225.

207-18 121Kan619, 249P608, 610 [quot Cyc].

207-19½-New. Testamentary trust for son after death of wife, with limited power of appointment in son, giving trustee discretion to invade corpus held valid. 129Misc290, 221NYS473.

207-22 214Ala467, 108S327; 72CalA 713, 237P821; 83CalA707, 257P866; CalA 269P944; 206 Iowa1121, 221NW 851; 137Misc226, 243NYS366; 46Philippine642. See also 109Conn268, 146A 727. **Reservation by trustor of right to call for conveyance to himself** or another does not affect trust or title of trustee till right was exercised. 206 Iowa1121, 221NW851.

208-23 Ill 173NE479; Me 149A623. **Deed held to make grantee trustee for** life tenant and remaindermen. 164Ga 71, 137SE782.

208-24 336 Ill 366, 168NE349. **Rule that first of two repugnant clauses shall prevail** is not applicable to trust deed in which words of inheritance are not so used. 336 Ill 366, 168NE349.

208-26 72CalA713, 237P821; 76CalA 655, 245P803; 89Fla457, 105S106 (trustee under will); 93Fla849, 112S846; 328 Ill 76, 159NE229; 206 Iowa1121, 221NW851.

209-27 72CalA713, 237P821; 76CalA 655, 245P803; 89Fla457, 105S106 (trustee under will); 96Fla455, 118S216; 328 Ill 76, 159NE229. **Although the devise be expressly to the trustees and their heirs,** etc., But see 206 Iowa1121, 221NW851.

210-28 206 Iowa1121, 221NW851; 242 Mich551, 219NW653. **Where parents deeded property to daughter who redeeded to them under agreement that property should go to survivor** title vests in surviving mother on daughter's death. Ariz 286P930.

210-29 93Fla849, 112S846; 96Fla455, 118S216; 206 Iowa1121, 221NW851.

211-31 But see 328 Ill 76, 159NE229.

211-32 96Fla455, 118S216.

211-34 93Fla849, 112S846; 328 Ill 76, 159NE229. But see 156Tenn417, 1SW (2d)1017. **Trust under will may be continuing with power to sell and manage estate** equivalent to fee simple absolute. 89Fla457, 105S106. **In New York.**–127 Misc332, 215NYS374.

212-36 72CalA713, 237P821.

213-45½-New. Where defendant was trustee of real estate for plaintiff, possession of trustee was possession of plaintiff beneficiary, and trustee could defeat beneficiary's claim by showing that beneficiary's title passed to third person, not party to action, on ground that every action must be prosecuted in

name of real party in interest. CalA 269P944.

213-45½-New. Title to property devised by will is in executor or trustee thereunder, while title to ward's property is in ward, and guardian has only custody and management of it, with power to change investment. 151Va773, 145SE317.

213-47 332 Ill 280, 163NE692; 289Pa 341, 137A461.

213-48 325 Ill 212, 156NE364; 206 Iowa680, 218NW575; 206 Iowa1121, 221NW851; 10PaDist&Co 665.

215-50 217Ala167, 115S153.

215-52 215Ala664, 112S133; TexCivA 284SW253.

217-57 215Ala664, 112S133; 320 Ill 547, 151NE539; 333 Ill 643, 165NE208.

217-59 72CalA713, 237P821; 332 Ill 280, 163NE692; 49ND653, 193NW317; 141SC32, 139SE196.

219-64 72CalA713, 237P821.

219-63 89Fla457, 105S106 (trust under will may be dry passive trust or mere resting place for legal title); 28 Hawaii329 (trust held not passive); 128Me546, 149A297; 118Nebr745, 226 NW316; 135Misc516, 238NYS554; 131 Or71, 278P586.

220-69 170Ga662, 153SE759; MoA 25 SW(2d)566 (declaration of dry trust held as good conveyance as quitclaim or warranty deed); RI 144A671; 143SC 277, 141SE448.

222-70 148Md226, 129A28 (trust declared not so passive as to be executed by statute of uses).

222-73 118Nebr745, 226NW316.

223-75 229Ky116, 16SW(2d)782.

223-79½-New. Estate of express passive trust is liable for debts of trustor. 131 Or71, 278P586.

223-83 14PaDist&Co 245.

225-88 228AppDiv579, 240NYS260 (revocation of trust). **Effect of conveyance of interests by all beneficiaries.**–202 Iowa1094, 211NW488.

225-89 141SC32, 139SE196. **Duty of trustee to convey.**–202 Iowa1094, 211NW 488.

226-92 126Me521, 140A189.

226-93 NS [1929] 1DomLR599.

226-95 TexCivA 29SW(2d)438.

226-96 98CalA306, 277P123.

226-98 162Ga664, 135SE195; 35GaA 34, 132SE123.

226-98½-New. Administrator is not estopped from testifying to decedent's promise to convey farm to plaintiff because of trust. 168Ga156, 147SE106.

226-99 49ND653, 193NW317.

227-2 137Misc795, 243NYS418; 49ND 653, 193NW317.

227-4 133Misc647, 233NYS667; 101 WVa374, 132SE716 (in absence of fraud). **A resulting trust,** etc. 190NC 411, 130SE45.

228-7 See also 91CalA88, 266P836.

228-8 Where trustee is interested in the trust property and assigns his interest the assignee takes subject to equities in favor of trust estate as against trustee, and if trustee converts funds subsequent to assignment exceeding in amount interest in estate, assignee is not entitled to share. 129 Misc106, 221NYS598. **Fee simple estate, vested in grantee** by conveyance to grantee as trustee without declaration of trust, subjected estate to execution by creditor of grantee. 97Fla626, 121S 884.

228-8½-New. Where husband, holding property as trustee for wife, conveyed property to her after having injured plaintiff, latter was not entitled to take property to satisfy judgment against husband, because no declaration of trust was filed, since plaintiff was not "lien creditor" under statute declaring trust void as to judgment or other creditors unless declaration of trust is filed. 294Pa512, 144A667.

228-10 192Wis486, 213NW320. **Particular provisions construed.**–15F(2d) 706; 214Ala334, 107S818; 200 Iowa 1155, 206NW248; 245NY447, 157NE 739; 125Misc579, 211NYS606; 127 Misc332, 215NYS374; 107WVa559, 149 SE611; 192Wis486, 213NW320. **Creation of revocable trust** vests in beneficiary **present estate valid till power of revocation is exercised.** 30F(2d)135. **Execution of will vested no inheritable property interest** in wife or son or testator's two daughters. 98CalA306, 277 P123.

228-11 246NY481, 159NE405.

228-14 99NJEq514, 133A705 (deemed to vest in cestui que trust).

229-16 See also 131 Or71, 278P586.

229-18 Beneficiary has vested interest in income of trust where trustees are not authorized to add all of income to principal. 49RI 27, 139A657.

230-25½-New. Holding and every right of trustee is that of cestui que trust. TexCivA 29SW(2d)438.

230-27 155Md43, 141A422.

230-28 Mother and children as tenants in common.–220AppDiv307, 221NYS572. **Trust held not to provide for after-born children.**–215AppDiv73, 213NYS277. **Trust on trust is not created** by provision of will directing trustee to pay bequests to certain persons for benefit of their minor sons. 315Mo 627, 287SW 316. **Trust agreement** as to property held by husband and wife by entirety has been construed as intending such property to go to all children at death of survivor. 27F(2d)35.

230-30 The rule does not operate, etc. 336 Ill 137, 168NE116(2dcase). **Rule in Shelley's Case held inapplicable.**–208 Iowa586, 226NW8.

231-35 227Ky773, 14SW(2d)183; 192 Wis486, 213NW320.

232-36 76CalA655, 245P803.

233-37 76CalA655, 245P803 (where trustee was appointed for life tenant alone); 164Ga71, 137SE782.

233-41 IndA 168NE500.

234-48 243Mich279, 220NW801.

235-58 220Ala319, 125S28; 202 Iowa 1094, 211NW488; Iowa 228NW655; 127 Me104, 141A188; 169Minn273, 211NW 465. **Consideration for assignment.**–102 NJEq371, 140A795. **Where beneficiaries of testamentary trust are given power to request trustee to sell property,** separate conveyances by all beneficiaries should be given same effect in equity as conveyance by trustee made at their request. 202 Iowa1094, 211NW488. **Trustee may acquire beneficiary's interest** for benefit of remaining beneficiaries. 127Me104, 141A188 (approval of court). **By will.**–240Mich661, 216NW446, 447 [citCyc].

236-60 169Minn273, 211NW465.

236-62 202 Iowa1094, 211NW488; Mo 22SW(2d)813 (agreement of beneficiary to promptly pay over to trustees of residuary estate under mother's will stated proportion of income he might receive under trust created by father's will held void); 102NJEq371, 140A 795.

236-63 137Misc451, 244NYS115. **Income from spendthrift trust** may not be alienated by beneficiary. 127Misc197, 216NYS334. **In New York.**–25F(2d)493.

236-64 Mo 22SW(2d)813; 102NJEq 371, 140A795. **Assignee is not entitled to accounting** of income of trust attempted to be assigned, but ineffectual as valid assignment. 102NJEq371, 140 A795. **Assignor may have alleged assignment declared invalid** and assignee restrained from further proceedings thereon, where assignment is ineffectual as such. 102NJEq371, 140A795.

237-65 72CalA713, 237P821; 28Hawaii590, 702, 705 [citCycperPeters,CJ]. See also 102NJEq371, 140A795. **Conveyance by cestui que trust does not affect title of trustee.**–49ND653, 193NW 317. **Rights of assignees.**–202 Iowa1094, 211NW488. **Operation of conveyance.**–329 Ill 235, 160NE605.

237-65½-New. Lessee of beneficiary of trust with power in trustee to hold title to realty for sale and distribution of proceeds acquires no interest in trust property as against trustee or his grantee despite grantee's notice of lease. 72CalA713, 237P821.

237-65⅓-New. Ratification by trustee with legal title to sell real property and distribute proceeds of lease made by beneficiary after conveyance by trustee does not affect grantee's rights, though he knew of lease before conveyance. 72CalA713, 237P821.

237-65¼-New. After certificate of units of common-law trust have been presented to trustees for transfer and receipted for, they cannot be attached or garnished as against transferees. 77Colo 377, 237P155.

237-65⅓-New. Estoppel of beneficiary to deny validity of assignment.–Where beneficiary, after assignment of interest, ratifies assignment by receiving benefits thereunder and delaying action to set aside assignment for five years, he is barred from asserting claim that assignment was fraudulently procured. 138SC491, 136SE744.

237-65⅙-New. In such case beneficiary cannot recover amount paid by him for reassignment. 138SC491, 136SE744.

237-65½-New. Where a decedent, by will, provided that his daughter should receive her allotted share of income as cestui que trust, but that upon her death her allotted share of principal should be transferred and distributed as she might, by will, direct, upon her death her devisee became tenant in common with trustee. 200Cal 776, 254P 1108.

237-65⅔-New. Beneficiary of income of trust cannot transfer corpus. 102NJ Eq371, 140A795.

237-66 Mass 167NE757; 49RI 27, 139 A657.

237-67 130Misc635, 224NYS599; 226 AppDiv580, 235NYS324. **Income of trust for testator's wife, brother, and sister** held inalienable because of provisions of Personal Prop. L. § 15. 130 Misc635, 224NYS599. **Income from trust fund received by operation of law** is assignable. 130Misc635, 224NYS599.

237-68 107Conn9, 139A305.

237-71 223Ky238, 3SW(2d)636; 169 Minn273, 211NW465; 118Nebr745, 226 NW316; 98NJEq188, 130A811; Tex CommnA 26SW(2d)179 (passive trust). **Set-off.**–77Colo 302, 236P774. **Under devise creating passive dry trust** vesting absolute title in beneficiary, creditor may levy attachment against his interest. 118Nebr745, 226NW316.

238-73 169Minn273, 211NW465.

238-73½-New. Where trust is active one, judgment creditor of beneficiary has no lien thereon. TexCommnA 26 SW(2d)179.

238-74 Minn 232NW337; 98NJEq188, 130A811. **Judgment lien of creditors of beneficiary.**–200 Iowa1155, 206NW 248.

239-80 98NJEq188, 130A811 (under statute creditor could reach funds in legatee's hands only by impressing trust thereon); 132Misc651, 230NYS382.

239-80½-New. Creditor may subject trust property to payment of judgment on note given by trustee for benefit of cestui que trust. 168Ga448, 148SE100 (2dcase).

239-80⅓-New. Creditor of beneficiary cannot maintain garnishment proceeding against purchaser of trust estate. Cal 290P290.

239-80¼-New. Attachment creditors cannot complain of beneficiary's acceptance of premature payment from trustee. Cal 290P290.

239-80½-New. Creditors have no better claim to trust fund than beneficiary. Cal 290P290.

239-80⅚-New. Unless beneficiary may maintain action against trustee for trust fund, creditor cannot maintain garnishment. Cal 290P290.

240-81 107Conn9, 139A305. **Trust of income and capital payable at trustee's discretion** does not pass vested interest that can be reached by judgment creditor. 35 OhA394, 172NE540.

240-83 137Misc451, 244NYS115.

240-84 43F(2d)762.

240-85½-New. Allowance of thirty dollars a month from income of trust estate of husband beneficiary is warranted for requirements of wife and children. 230Ky56, 18SW(2d)859(2dcase).

241-87 7F(2d)461; 26F(2d)543; 200 Iowa1155, 206NW248; 204 Iowa314, 213

NW608; Minn 232NW337; 82NH210, 132A10; 127Misc197, 216NYS334; 292 Pa407, 141A247; 5PaDist&Co 470 (assignment for benefit of his children not valid). **Not liable for alimony.**–82NH 216, 132A10. Contra 254 IllA552. **Trust for benefit of creator.**–12PaDist&Co 181. **Construction of trust instrument.**–254 IllA552 (will construed in light of testator's knowledge of son's character and habits). **Liable for support and maintenance of minor child** claimed by wife in action for divorce. 254 IllA552. **Rights of creditors to reach testamentary spendthrift trust** depends on intention of testator. 253 IllA400.

242-88 Provision in deed intending to create spendthrift trust is ineffective to exempt property from demand of grantees' creditors. 153Va20, 149SE497.

242-89 Upon renunciation by cestui, creditors cannot reach benefits. 204 Iowa314, 213NW608.

242-90½-New. Under a statute precluding destruction of spendthrift trusts and prohibiting assignment of beneficiary's income, judgment creditor of beneficiary is limited to special garnishee execution or to action in equity to impound surplus income; 127Misc 197, 216NYS334.

242-90¼-New. and foreign trustee in bankruptcy is not entitled to have greater rights recognized on ground of equity but is subject to same limitation as domestic trustee in bankruptcy whose rights are same as judgment creditors. 127Misc197, 216NYS334.

242-90¼-New. Portion of income of spendthrift's trust estate may be applied in discharge of beneficiary's legal obligation to support children. 230Ky 56, 18SW(2d)859(2dcase).

242-92 43F(2d)762; 200 Iowa1303, 206 NW266, 267 [quotCyc]. **Creditor may attach proceeds of sale** of realty made under irrevocable trust, but can acquire no lien on realty. 83CalA707, 257 P866. **Enforcing decree for alimony.**–230Ky56, 18SW(2d)859(2dcase).

243-95½-New. Remaindermen under will establishing trust are necessary parties. 223Ky238, 3SW(2d)636.

243-95½-New. Complaint must state good cause of action. 132Misc651, 230 NYS382 (held sufficient).

243-1 Creditor must also show that he is judgment creditor with execution returned unsatisfied. 43F(2d)762.

243-1½-New. Plaintiff, seeking to reach surplus income of trust under statute, providing that surplus beyond sum necessary for beneficiary's education and support shall be liable to claims of his creditors, has burden of establishing existence of surplus beyond needs of beneficiary, in accordance with his station in life, previous education and habits, and means of support. 132Misc651, 230NYS382.

244-4½-New. Question of amount reasonably necessary for education and support of beneficiary of trust fund, within statute providing that surplus income, beyond sum necessary for beneficiary's education, shall be liable to claims of his creditors, is peculiarly subject of investigation on trial, and should not be determined on motion attacking sufficiency of pleadings. 132Misc 651, 230NYS382.

244-5½-New. Judgment creditor by commencing suit under statute for surplus income liable to creditors' claims acquires lien superior to general creditors. 43F(2d)762.

244-9 151Md536, 135A376; 247NY97, 159NE875. But see 336 Ill 366, 168NE 349.

245-12 72CalA713, 237P821, 824 [quot Cyc]; 99NJEq878, 133A381 (agreement held not to indicate that interest in land which was part of trust property should go to grantor).

245-13 72Cal 713, 237P821, 824 [quot Cyc]; 83CalA707, 257P866.

246-17½-New. Grantor in trust deed may subsequently waive in favor of beneficiaries named in it all or part of reserved interest in trust estate. 235 Mich555, 209NW930.

246-17½-New. A deed, conveying all grantor's interest in realty to trustee for benefit of wife for life and on death of wife to grantor, his heirs and "assigns," leaves no seizin in grantor which is devisable since possibility of reverter to grantor is mere naked right contingent upon wife's predeceasing grantor, 216AppDiv675, 216NYS37.

246-17¼-New. and on wife's death after death of grantor, property goes to grantor's heirs, and not the residuary devisees under his will since word "assigns" does not indicate substituted gift after grantor's death to devisees but merely a limitation of a fee to be conveyed to grantor in contingency specified. 216AppDiv675, 216NYS37.

246-18 24F(2d)459; 93FlaS49, 112S 846; 101NJEq803, 139A18. But see 151Md536, 135A376; NH 151A81(1st case). **New York statutes construed.**–126Misc616, 214NYS461. **Where same person possesses both legal estate and beneficial interest,** trust fails. 121Kan 619, 249P608.

246-19 Mass 167NE757.

246-19½-New. Trust for beneficiary until arrival at certain age or becoming widow held indestructible by merger of income in remainder. 137Misc77, 243 NYS126.

247-23 237 IllA289.

247-27 But see 82NH81, 129A492.

247-27½-New. Naming president and secretary of bank as trustees does not make bank trustee, and such trust is valid. 198Cal 352, 246P48.

247-28 Va 155SE129.

248-33 See also 46Philippine642.

248-33½-New. Commercial bank may be trustee. 131Misc188, 226NYS415.

248-33½-New. Probate court, before appointing executor, administrator, trustee, or other fiduciary, must inquire carefully as to his character, integrity, soundness of judgment, and general capacity, and make appointment only after favorable finding, regardless of whether fiduciary is individual trust company, or national bank. 263Mass 444, 162NE217.

248-34 TexCivA 284SW253.

248-35 90Fla343, 106S408; 93Fla849, 112S846; 154Md660, 141A405; 130 Or 644, 281P169. **Where legal and beneficial interest is in same person,** trust cannot exist. 49RI 308, 142A605.

248-37 93Fla849, 112S846; 135Misc 726, 238NYS271.

248-38 16F(2d)700.

248-39 16F(2d)700; 127Misc579, 217 NYS323.

249-40 Me 149A626(2dcase) (should not be given right to expend entire trust fund); NJ 145A110(2dcase).

249-42 103NJEq487, 143A771. **Executors named in codicil will act as trustees** in preference to those named in original will. 291Pa304, 139A839.

249-43 204Cal 399, 268P647; 131Misc 495, 227NYS682.

250-45 291Pa304, 139A839.

250-49 291Pa304, 139A839, 840 [cit Cyc].

250-52 291Pa304, 139A839, 840 [cit Cyc].

251-57 NJ 129A429 (under will imposing trust on property appointment of trustee would have been proper procedure); SD 227NW568.

252-62 83NH422, 144A523. **Statute relating to appointment of testamentary guardian** of minor is inapplicable where trust continued till beneficiary became twenty six years old. Nebr 233NW456.

252-64 195NC405, 142SE493.

252-65 296Pa348, 145A824, 66ALR 1342; 8PaDist&Co 231.

254-87 213Ky330, 280SW1099, 1100; [quotCJ]. NJCh 129A712 (nonresident trustee). **Matter rests in sound discretion of chancellor.**–213Ky330, 280SW 1099.

254-87½-New. Foreign trustee of high and long record is not required to furnish security on delivery of trust fund. NJCh 129A712.

254-87½-New. Foreign trustee is required to execute irrevocable power of attorney to secretary of state before delivery of trust fund, so that state may maintain jurisdiction over funds for benefit of resident beneficiaries. NJCh 129A712.

254-88 213Ky330, 280SW1099, 1100 [quotCJ]. See also 242 IllA495.

254-89 213Ky330, 280SW1099, 1100 [quotCJ]; 227Ky364, 13SW(2d)268; Nebr 233NW456.

255-91 227Ky364, 13SW(2d)268.

256-96½-New. Oaths of trustee. Failure of trustee to file oaths in surrogate's court does not invalidate acts in administration of trusts but inadvertence may be cured by subsequent filing. 136Misc 122, 238NYS753.

256-5½-New. Decree providing for joint bond in amount considerably less than remaindermen's interests was modified to provide bond separate as to each interest at election of owners of such interests. 27F(2d)101.

257-12½-New. Stranger to trust has no right to maintain action to compel trustee to give bond as such. 123Kan 254, 255P62.

261-50 130Misc527, 224NYS466; 5Pa Dist&Co 727. **Cotrustee held not to be removed** for refusal to join in deed or be active in duties. 130Misc319, 224 NYS320.

261-51 130Misc527, 224NYS466.

261-52 130Misc527, 224NYS466.

261-53 130Misc527, 224NYS466.

261-54 130Misc527, 224NYS466. **Refusal of fiduciary to file oath** in surrogate's court is ground for removal or revocation of letters. 136Misc122, 238 NYS753.

262-55 130Misc527, 224NYS466.

262-56 130Misc527, 224NYS466.

262-58½-New. Abuse of discretion is ground for removal. 318 Ill 585, 149NE 489.

262-66 See also TexCivA 15SW(2d) 1090. **The mere absence,** etc. 323 Ill 73, 153NE735.

263-69½-New. Where testamentary trustee became alien not inhabitant of state, his removal was discretionary and not mandatory. 136Misc459, 241NYS 520.

263-70 8F(2d)792, 45ALR328; 78CalA 251, 248P310; 130Misc378, 224NYS49; 43 OklACR464. **Where trustee of certain corporate stock holds, in his own name, sufficient stock to control the corporation,** his dual relations are antagonistic and the court should remove him. 78CalA251, 248P310. **It is not sufficient ground for removal** that testamentary trustee occupied position of trustee, president, director, and advertising agent of newspaper corporation constituting main asset of estate. 130Misc527, 224NYS466.

263-71 8F(2d)792, 793, 45ALR328 [quotCyc].

263-72 8F(2d)792, 793, 45ALR328 [quotCyc]; 78CalA251, 248P310; 5Pa Dist&Co 727; TexCivA 15SW(2d)1090. **Friction and hostility** between the trustees, etc. 78CalA251, 248P310.

264-73 106WVa228, 145SE588.

264-75 293Pa497, 143A209.

264-78 RI 149A799 (coupled with improper investment). But see 34F(2d) 353.

265-79 167Ga1, 144SE787.

265-80 32F(2d)397; 167Ga1, 144SE 787; 130Misc378, 224NYS49 (complaint held sufficient); 129Misc293, 221NYS 305.

265-83½-New. Mismanagement cannot be predicated on trustee's decision to sell real estate thus relieving estate from taxes, where will expressly authorizes sale. 258Mass228, 154NE833.

265-83½-New. Mere loss of money in conducting business left by testator does not constitute waste, 130Misc527, 224 NYS466.

265-83¼-New. and hence depreciation of assets of newspaper corporation during administration of trust is not cause for removal under statute. 130Misc527, 224NYS466.

265-84 34F(2d)353; 78CalA251, 248P 310; 206 Iowa562, 218NW306. **Trust property situated in another state.**–49ND 653, 193NW317.

266-85 134Misc146, 235NYS22. **Statute relating to removal of trustees** does not give surrogate's court power to remove trustee because he is unable to agree with his fellow trustees as to

administering fund or estate. 134Misc 146, 235NYS22.
268-3 242 IllA495.
268-4 242 IllA495.
268-8 167Gal, 144SE787. Petition insufficient.-Ga 155SE337.
269-11 Evidence held insufficient to establish misconduct requiring removal. 130Misc527, 224NYS466. Removal of trustees appointed by will requires more proof than of trustees appointed by court. 13PaDist&Co 455.
269-12½-New. Charge of hostility or unfairness on part of trustee to beneficiary held not established in proceedings for removal. 258Mass228, 154NE 833.
269-12½-New. Charge that trustee was not exercising a sound discretion is not established where trustee is authorized to perform the acts complained of. 258 Mass228, 154NE833.
269-12¼-New. Facts shown held not sufficient to require removal of trustees. 13PaDist&Co 455.
269-18 8F(2d)792, 45ALR328.
269-20½-New. Remaindermen not entitled under statute to attorney's fees and expenditures incurred in suit for removal of executor and trustee. Wis 230 NW715.
270-22 200Cal 776, 254P1108.
270-24 243Mich279, 220NW801.
270-25½-New. Right of reverter or of reentry on condition broken passes to heirs. 243Mich279, 220NW801.
270-26 All rights and interests of trustee as such in the trust property come to end upon his death and do not descend to his devisee. 200Cal 776, 254P 1108.
271-29 Application will be denied when opposed by life tenant and residuary legatee and convincing reasons for appointment are not shown. 135Misc423, 239NYS591.
271-30½-New. Consolidation of trust company.-Where trust company, appointed trustee and conservator by state court under will, is absorbed and consolidated with national bank, bank is not fiduciary under original appointment, 261Mass217, 158NE780.
271-30½-New. notwithstanding federal statute requires state courts to appoint national banks as fiduciaries under same conditions as state trust companies, 261 Mass217, 158NE780.
271-30¼-New. In such case trust company has no such property interest in appointment as trustee and conservator as passed to national bank as successor. 261Mass217, 158NE780.
271-31 16F(2d)645, 648 [citCyc]; 24 F(2d)951, 954 [citCyc]; 30F(2d)505.
271-32 83NH422, 144A523. Necessity for resort to court.-144Miss281, 109S 713.
272-35 9PaDist&Co 196.
272-37 TexCivA 291SW568 (attorney appointed by will under whose advice executor should act could not appoint trustee where executor declined to act and there was no necessity for executor).
272-39 68Utah49, 249P128, 130 [cit Cyc]. Time of exercise of power.-68 Utah49, 249P128. Whether power so granted was unconditional will be gathered from will as construed in light of circumstances at time of execution. 68 Utah49, 249P128.
272-40 NJCh 146A419; 133Misc601, 233NYS418.
273-46 133Misc647, 233NYS667.
275-57 260Mass19, 156NE745.
275-59 206Iowa1121, 221NW851.
275-60 Appointment of substituted trustee by beneficiary confirmed in absence of showing that he is incompetent or likely to jeopardize interests of other beneficiaries. 68Utah49, 249P128.
276-76 68Utah49, 249P128. See also 135Misc833, 238NYS398.
277-81 97CalA138, 275P453; 106Conn 602, 138A795. Jurisdiction of objections to substitution.-97CalA138, 275P453.
277-82 23F(2d)257; 30F(2d)754; 204 Cal 399, 268P647; 95CalA270, 272P779; 106Conn602, 138A795; 96Fla194, 117S 887; 320 Ill 50, 150NE337; 323 Ill 309, 154NE120; 86 IndA565, 155NE222; 206 Iowa988, 221NW585; Iowa 229NW691; 259Mass539, 156NE724; 145Miss449, 112S585; 129Misc394, 222NYS271 (will not mentioning trustee held to create valid trust none the less); 22 OhA487, 153NE909; 8PaDist&Co 231; 49RI 289, 142A374, 375 [citCJ]; 154Tenn513, 290 SW31; 145Va742, 134SE673.
278-84 181Ark235, 25SW(2d)431; 126 Me521, 140A189.
279-85 293Pa497, 143A209.
279-87 204Cal 399, 268P647. In New York.-133Misc647, 233NYS667.
279-88 5PaDist&Co 709 (a discretionary power survives to new trustee). In Massachusetts.-260Mass19, 156SE745. In Pennsylvania.-13PaDist&Co 396 (statute construed).
280-89 263Mass444, 162NE217.
280-91 154Tenn513, 290SW31, 33 [cit Cyc].
280-93 260Mass19, 156NE745.
281-95 In Massachusetts.-260Mass19, 156NE745.
281-2 22 OhA487, 153NE909.
281-3 104CalA1, 285P365; 334 Ill 448, 166NE70; NH 148A21; 22 OhA487, 153 NE909; 101Vt464, 144A457.
281-4 260Mass19, 156NE745 (inadequate provision).
281-6 96Fla194, 117S887; 323 Ill 309, 154NE120; 203 Iowa409, 212NW688; 22 OhA487, 153NE909.
282-8 106Conn602, 138A795; 110Conn 516, 148A358; 96Fla194, 117S887; 195 NC405, 142SE493; 22 OhA487, 153NE 909.
282-9 156Miss885, 127S581; 222App Div643, 228NYS165; 22 OhA487, 153 NE909.
282-10 106Conn602, 138A795.
282-11 318 Ill 585, 149NE489.
282-12 181Ark235, 25SW(2d)431; 96 Fla194, 117S887; 206 Iowa562, 218NW 306; 145Miss449, 112S585; 22 OhA487, 153NE909.
283-13 96Fla194, 117S887; 154Tenn 513, 290SW31.
283-14½-New. Proceedings in which authorized.-In order to authorize appointment of substitute trustee, trust must be part of subject matter of proceedings in which petition therefor is made. NJCh 131A103.
283-14½-New. Thus, appointment of substituted trustee for property of children of divorced parents will be refused when requested in cross petition by husband to petition of wife for increased alimony, especially since children are necessary parties as beneficiaries. NJ Ch 131A103.
283-15 262Mass287, 159NE618.
283-16 293Pa497, 143A209.
283-17 262Mass287, 159NE618; 293Pa 497, 143A209.
283-18 293Pa497, 143A209.
283-20 293Pa497, 143A209.
286-43 16F(2d)645; 30F(2d)505; 137 SC11, 134SE859, 865 [citCyc].
286-47 Court's mere knowledge of trustee's unauthorized contract to transfer trust to trust company held no implied appointment of transferee. 141 Wash676, 252P91, 50ALR207.
287-48½-New. One denying existence of trust cannot question competency of proposed substituted trustee or assert that substitution will defeat trust. 27 F(2d)773.
287-49 293Pa497, 143A209. Tenant in common of property held not entitled, as matter of right, to maintain proceeding against cestui que trust for appointment of new trustee. 200Cal 776, 254P1108.
287-51 NJCh 131A103; 154Tenn513, 290SW31, 33 [citCyc]. Increase in number of trustees divests, pro tanto, power and rights of those previously provided for and serving, who must therefore be made parties to proceeding. 209Ky811, 273SW531.
287-52 Corporation holding mortgages on trust property to secure indebtedness created by order of court by trustee is not entitled to notice of, or participation in, proceeding. Cal 245P1108. Tenants in common of property remaining, undivided interest in which is held in trust, are not entitled to notice of, or participation in, proceedings. 200 Cal 776, 254P1108. Creditors not entitled to notice of, or participation in, proceedings. 200Cal 776, 254P1108.
288-59½-New. Intervention.-One attacking validity of trust may not intervene in proceedings for appointment of trustee to succeed deceased trustee. 241Mich146, 216NW472.
288-61 15F(2d)719, 724 [citCyc].
289-62 31Ariz137, 250P995 (complaint insufficient).
289-71 See also 293Pa497, 143A209.
290-73 Trustee whose honest efforts in behalf of estate precipitated removal proceedings should not be required to pay for his attorney's services. 130Misc 400, 223NYS598.
291-84 35Ariz457, 281P38; Cal 290P 290; 109Conn187, 145A648, 63ALR783; 245 IllA20; NJCh 148A713; NJCh 151 A874; 136Misc122, 238NYS753. But see 82NH81, 129A492; TexCivA 5SW (2d)816. It is beyond competency of legislature to enlarge powers of trustees under a will. 197Wis327, 222NW235.
292-96 72CalA713, 237P321.
292-97 15F(2d)719; 27F(2d)193; 315 Mo 627, 287SW316.
292-99 See also 27F(2d)193.
292-1 315Mo 627, 287SW316.
292-1½-New. Where trustees have no present duty to perform as to excise on corpus of trust fund they are not entitled to present instructions on the subject. 256Mass519, 153NE4.
292-1½-New. As general rule, trustee is principal and not agent for cestui que trust. 97CalA1, 275P248.
292-1¼-New. Trustees in their official capacities are not same persons as they are in their private capacities. 265Mass 249, 163NE848.
292-1½-New. Trustee is principal, not agent, in management and control of property. 318Mo 784, 1SW(2d)163, 58 ALR493.
292-1½-New. Trustee charged with building road not permitted to supervise public authorities as to materials for public highways within testator's route. Ill 173NE110.
293-3 31F(2d)997; 78CalA638, 248P 754 (held to strict accountability); 330 Ill 11, 161NE150; 235Ky705, 32SW(2d) 54; 316Mo 129, 289SW814; 130Misc110, 222NYS532; 130Misc590, 224NYS391; WVa 155SE546. Failure to divide estate as directed by will is violation of duty. 126Misc54, 213NYS286. Should be held to strict accountability.-130 Misc590, 224NYS391.
294-8 NJCh 150A844. Trustee must strictly conform to directions of instrument.-106WVa228, 145SE588.
294-9 265Mass563, 164NE475; Mo 28 SW(2d)1001 (impartial performance of duties); MoA 14SW(2d)669; 123 Or108, 261P75. Liability for misappropriation.-106WVa228, 145SE588. Duty to act impartially as to beneficiaries in same class.-220Ala524, 126S409(2dcase).
295-10 24F(2d)187; 76CalA58, 243P 869; 77CalA219, 246P143; 78CalA310, 248P764; 84Colo 300, 269P886; 202 Iowa 7, 209NW447; 262Mass287, 159NE618; 267Mass274, 166NE763; 315Mo 627, 287 SW316; 99NJEq638, 133A712; 136 Misc881, 242NYS210; 86PaSuper222; TexCivA 28W(2d)980; 196Wis10, 219 NW361.
295-11 35Ariz457, 281P38; 78CalA638, 248P754; 330 Ill 11, 161NE150; 259Mass 578, 157NE334; Mass 170NE73; 135 Misc674, 238NYS375; 136Misc881, 242 NYS210; 137Misc226, 243NYS366; 230 AppDiv149, 243NYS630; 9PaDist&Co 757; RI 150A819; 115Tex222, 280SW 499, 44ALR627; 196Wis10, 219NW361. See also 130Misc590, 224NYS391. Acting upon the advice of counsel, etc. 136Misc881, 242NYS210. Trustee should consult counsel in important matters involving doubt. 28Hawaii590. Equity holds trustee liable for every violation of duty laid upon him though such violation arises from oversight. TexCivA 288SW609. Trust company accepting position of testamentary trustee is bound to higher degree of duty than individual executor or trustee. 136Misc881, 242NYS210.
295-12 78CalA310, 248P764. Trustees are not insurers.-137Misc226, 243NYS 366.
295-13 BC [1930] 2DomLR582.
296-15 136Misc881, 242NYS210. Au-

thority of trustee to act contrary to directions of trust instrument can be exercised only when necessity of situation requires and not because advantageous to beneficiaries. 109Conn187, 145A648, 63ALR733.

296-16 Trustee liable because of negligent loss of cause of action. TexCivA 288SW609.

296-17½-New. Trustee's primary duty is to preserve trust fund, make suitable investments, and procure safe and just incomes therefrom. 126Misc54, 213NYS 286.

296-17½-New. Trustee who negligently permits cotrustee to waste estate when having power to prevent it is liable to beneficiaries for resulting loss. 126Misc54, 213NYS286.

296-17¼-New. Trustee actively participating in management of estate and supporting cotrustee's policies is equally liable for their mismanagement and in permitting cotrustee to dominate management. 126Misc54, 213NYS286.

296-17½-New. Cestui cannot be held liable as principal of his trustee merely because he occasionally confers with his trustee about affairs of trust. 252Mass 37, 147NE272.

296-17¼-New. Trustee must not hold position in conflict with his duties as trustee or which will embarrass him in performance of such duties. 28Hawaii 590.

296-17½-New. Recovery by community creditors from trustee should not exceed their pro rata share of community debts. TexCivA 288SW609.

296-17¼-New. Testimony of trial judge admissible to show negligence of trustee in failing to recover community creditor's claim. TexCivA 288SW609.

296-17½-New. Statute relating to settlements by trustees and fiduciaries do not require filing of inventory or appraisement by testamentary trustee. 227Ky364, 13SW(2d)268.

296-19 19F(2d)751, 753 [citCyc]; 23 F(2d)357; 175Ark300, 299SW619; 78 CalA251, 248P310; 167Ga1, 144SE787; 323 Ill 283, 154NE105; 201 Iowa236, 207NW228; 202 Iowa7, 209NW447; Mass 167NE338; Mass 172NE647; NJ 130A219; 99NJEq638, 133A712; 135 Misc4, 237NYS635; 226AppDiv858, 137 Misc89, 241NYS178; NC 154SE828; 125 Or38, 263P54; TexCivA 271SW272; Tex CivA 28W(2d)980; WVa 155SE546.

296-20 19F(2d)751, 753 [citCyc]; 200 Cal 132, 251P907, 49ALR1025; 78CalA 251, 248P310; 167Ga1, 144SE787; 323 Ill 283, 154NE105; 201 Iowa236, 207NW 228; 256Mass351, 152NE707; NJCh 138A388; 125 Or38, 263P54; SD 227 NW62. **Trustee cannot take part in transaction in which he is personally interested.**–77Mont30, 248P219. **End or result accomplished by trustee** is not determinative of right of parties. 323 Ill 283, 154NE105. **Trustee's method of executing trust** must be free from individual interest. 323 Ill 283, 154NE 105. **Trustee in corporate mortgage** held not debarred from acquiring ownership of bonds secured. 22F(2d)627. **Trustee acting as both vendor and vendee.**–178Minn209, 224NW235.

297-22 325 Ill 612, 156NE785; Mass 167NE338; NJ 130A219; 135Misc4, 237 NYS635; TexCivA 271SW272; Sask [1930] 2DomLR6. See also 126Misc54, 213NYS286.

298-23 See also Mass 167NE338.

298-29½-New. Where beneficiaries agreed to payment of commission for sale of property prior to appointment of trustee, and such trustee received part of such commission before he became trustee, it is not recoverable by trust estate. 32F(2d)397.

298-29⅓-New. Trust company cannot buy from itself securities which it owns for estate which it holds in trust. 178 Minn215, 226NW696.

298-30 175Ark300, 299SW619; 48 Ida 291, 281P1114 (selling trust property and taking mortgage for part of purchase price); Nebr 233NW249; 49ND 653, 193NW317; 124 Okl 188, 255P566, 569 [quotCJ]; 86PaSuper222; 44Philippine343; 137SC450, 135SE558; Tex CivA 273SW900. See also 104Conn169, 132A902. **Purchase of land at sheriff's sale,** with agreement to transfer to debtor's wife, who, on repayment of purchase price, conveyed only life estate, held to pass no claim to right of reversion. 137SC450, 135SE558. **Disturbance of equal balance of holdings of stock** by trust and by trustee as individual is not in itself unconscionable. Mass 172NE647.

298-31 Ida 293P326; 143 Okl 220, 289 P315; 86PaSuper222; TexCivA 273SW 900.

300-33 Trustee may not foreclose thereon after purchasing bonds secured by trust deed superior to claims of his beneficiaries. Ida 293P326.

300-37 Ida 293P326.

300-38½-New. Attempt to acquire title to land.–Where property is placed in hands of trustees for sale at best terms obtainable, it is fraud for them to cancel advantageous contract and attempt to obtain title for themselves. 213Ky403, 281SW178.

300-40 Alta [1926] 4DomLR1080, [1926] 3WestWkly609.

301-41 195Cal 354, 233P330; Cal 289 P613; 253 IllA238; IndA 169NE678; 202 Iowa7, 209NW447; 207 Iowa386, 221NW954; 208 Iowa300, 225NW419; 256Mass351, 152NE707; 99NJEq638, 133A712; 39 OklACR363; 125 Or38, 263 P54. **Deed from cestui que trust to trustee's wife** is presumptively invalid and burden rests on her of proving fairness by clear and convincing evidence. Va 153SE807.

301-41½-New. , and that it was well understood by cestui que trust. 99NJ Eq638, 133A712.

302-44 87 IndA407, 158NE826; 243NY 499, 154NE538.

302-45 222MoA768, 8SW(2d)98; WVa 155SE658. But see 115Tex222, 280SW 499, 44ALR627. **Indemnity from trust estate.**–137Misc226, 243NYS366. **Where will makes trust estate liable for liabilities incurred by trustee,** estate is liable for negligence. 222MoA768, 8 SW(2d)98.

302-46 123Kan646, 650, 256P1012 [quotCJ]; 256Mass78, 152NE71; 106 WVa228, 145SE588; 107WVa141, 147 SE490.

303-47 123Kan646, 650, 256P1012 [quotCJ].

303-48 123Kan646, 650, 256P1012 [quotCJ].

303-49 123Kan646, 650, 256P1012 [quotCJ].

303-50 123Kan646, 650, 256P1012 [quotCJ].

304-51 123Kan646, 650, 256P1012 [quotCJ].

304-55 255 IllA78; 141Wash676, 252P 91, 93 [quotCyc], 50ALR207. **Trustee's transfer of property to trust company for administration held unauthorized delegation of discretionary power.** 141Wash676, 252P91, 50ALR207. **Trustees held liable to cestui for her net interest in estate** with interest from date of unauthorized transfer. 141Wash 676, 252P91, 50ALR207. **Trustees who made unauthorized transfer cannot complain of inexactness** in measuring liability to cestui. 141Wash676, 252P91, 50ALR207.

306-67 264Mass181, 162NE356. **Facts held not to warrant finding of fraud** in receipt of property other than as agent for trustee absolving liability as constructive trustee. 264Mass181, 162 NE356.

307-71 213Ala205, 206, 104S396 [cit Cyc]; 220Ala319, 125S28; 250 IllA299; 255 IllA78; 77Mont30, 248P219; NJCh 146A419; 130Misc590, 224NYS391 (discretionary duties); TexCivA 24SW(2d) 480. **Decision on appointment of taxes between income and corpus of estate** must be made by all trustees. 80Colo 499, 252P816. **Where trustee under will is competent,** he cannot be deprived of his interest in direction of trust by fellow trustee. 267Mass185, 166NE568.

307-73 267Mass584, 166NE744.

307-75 213Ala205, 206, 104S396 [cit Cyc].

308-77 Estoppel.–255 IllA78.

308-82 220Ala274, 124S871.

309-84 130Misc590, 224NYS391.

309-85 259Mass578, 157NE334.

310-87 130Misc590, 224NYS391.

310-88 223AppDiv393, 228NYS466; 130 Misc590, 224NYS391. **Extent of liability.**–130Misc590, 224NYS391. **Though two of three testamentary trustees never possessed or controlled assets,** they will be held responsible for embezzlement by cotrustee where all signed inventory and accounting. 130Misc590, 224NYS391 (not relieved by right of beneficiaries to inspection of trust securities).

312-91½-New. That trustee has acquired interest of cotrustee in trust property does not relieve him from obligation to comply with trust. 50 Philippine810.

312-93 96Fla194, 117S887. See also 27 F(2d)193.

312-94 15F(2d)719; 27F(2d)193; 133 Misc647, 233NYS667; 134Misc182, 236 NYS143; 135Misc377, 238NYS559. **Discretionary powers** do not remain in original trustee. 15F(2d)719. **Successor trustee cannot ratify illegal investments made by predecessor.**–GaA 155SE 73.

313-96 See also 13F(2d)887. **Duty to recover trust property misapplied by predecessor.**–13F(2d)887.

314-98 133Misc647, 233NYS667; 137 SC11, 134SE859. **The trustee's oldest son** takes title, etc. 137SC11, 134SE 859.

314-4 133Misc647, 233NYS667.

315-6 NJPrerog 145A110(2dcase).

315-8½-New. Rights under trust deed of persons succeeding to trustee's interest under will or otherwise are not enlarged or changed by reason of trustee's death. 133Misc647, 233NYS667.

315-11 226Ky483, 11SW(2d)123; 293 Pa497, 143A209; 49RI 162, 141A326; 49RI 504, 144A669. **Equity has power to award advancement** to beneficiary before time fixed by creator of trust. 220 Ala356, 125S222.

316-20 31F(2d)469; 155Md456, 142A 587. See also 167Ga1, 144SE787. **Intention of testator governs courts in direction of trustee's actions.**–219AppDiv 216, 219NYS129. **Ratification of trustee's act** done without application for approval is proper if court is convinced that consent would have been given. 155Md 456, 142A587.

316-21 245 IllA20; 127Me104, 141A 188; 128Misc798, 220NYS395; 197Wis 327, 222NW235. **Statute defining "testamentary trustee"** held not to extend statute empowering surrogate to direct executors and administrators to testamentary trustees. 128Misc798, 220NYS 395. **In case of emergency** court of chancery may, for preservation of trust and protection of beneficiaries, authorize and direct trustee to depart from terms of trust instrument. NJCh 148A 713.

316-22 27F(2d)773; 197Wis327, 222 NW235.

316-23 219Ala293, 122S36.

316-24 31F(2d)469; 196NC4, 144SE 372.

316-25 219Ala497, 122S824; 78CalA 638, 248P754; 318 Ill 585, 149NE489; 320 Ill 547, 151NE539; 149Md608, 131 A829; NJCh 146A466; 125Misc901, 212 NYS267; 193NC678, 137SE875; 8Pa Dist&Co 179; 14PaDist&Co 189. **Trustee of spendthrift trust** with authority to make payments needs no court order to act. 82NH216, 132A10. **Court order for payments to cestui of spendthrift trust error** if trustee has reasonable discretion by trust as to such payments. 82NH216, 132A10. **Trustee alone has power to act** where trust authorizes reasonable discretion. 82NH216, 132A10. **Discretion of court** is exercised only to approve or disapprove acts of trustee who retains management of estate under court's direction. 155Md456, 142A587.

317-26 167Ga1, 144SE787; 193NC678, 137SE875; 8PaDist&Co 179. **Action contrary to direction of testator** may be prevented on application of beneficiaries of testamentary trust. 80Colo 499, 252 P816. **Bad faith not shown.**–318 Ill 585, 149NE489.

317-27 27F(2d)193; 80Colo 499, 252P 816; 320 Ill 547, 151NE539; Iowa 230 NW353; 149Md608, 131A829 (want of reasonable or ordinary skill or judgment); 125Misc901, 212NYS267; 8Pa Dist&Co 179; 9PaDist&Co 209. In-

stances of discretion held properly exercised.–78CalA638, 248P754; 8PaDist &Co 179. **Where trustee is so administering trust that it fails to accomplish purpose intended,** court should intervene. Iowa 230NW353.

317–23 193NC678, 137SE875. **Where the trustees delay an unreasonable time,** etc. 320 Ill 547, 151NE539. **Bad faith not shown.**–149Md608, 131A829.

317–28½–New. Wisdom of testator's policy as to administration of trust is not within province of court to determine. 170Ark679, 280SW993.

317–28⅓–New. Testamentary trustees appointed by will may petition equity court to assume jurisdiction of trust. 31F(2d)469.

317–29 109Conn187, 145A648, 63ALR 783; 30Hawaii 246, 257 [quotCyc]; 256 IllA291 (defending appeal from decree sustaining trust); 127Mel04, 141A188; 149Md608, 131A829 (on request of trustee or beneficiary with his consent); 150Md322, 133A110, 47ALR467; NJCh 138A388; 293Pa497, 143A209; Ont [1927] 3DomLR558 (instruction on purely business details refused); Sask [1930] 3DomLR314. But see 7PaDist& Co 289. **Questions determined.**–180Minn 134, 230NW575.

319–32 80Colo 499, 252P816; 109Conn 187, 145A648, 63ALR783; 30Hawaii 246, 257 [quotCyc]; Mass 167NE294. **While a certain person is still alive,** etc. 12F(2d)896. **Unless necessary for decision of immediate relief** to be granted and enforceable, equity will not declare future rights or determine contingencies which may never arise. 12F (2d)896. **Speculative question involving rights of persons in esse** and not necessary for present guidance of trustee will not be answered. 12F(2d)896. **Declaration.**–80Colo 499, 252P816.

319–34 Costs.–12F(2d)896. **Parties and process.**–336 Ill 137, 168NE116(2dcase); 201 Iowa1226, 207NW362 (court will not construe testamentary trust in absence of interested parties). **Discretion given to trustees.**–80Colo 499, 252P816. **Provision of decree that interest on money borrowed to meet emergencies of trust estate is payable out of income** is erroneous where nature of emergencies is not specified and emergencies have not arisen. 80Colo 499, 252P816.

319–34½–New. Judicial advice is unavailable as protection to trustee unless treated as final and binding on all concerned. 83NH225, 140A708.

319–34⅓–New. Trustees' action for approval of contract with testator's widow is not premature because trustees have not come into possession and control of property. 180Minn134, 230NW575.

320–36 See also 82NH216, 132A10.

320–37 Provisions of will should be given effect where court can carry out testator's wish by executing trust. 215 AppDiv506, 213NYS723.

320–39 221Ala663, 130S209; 106Conn 602, 138A795; 255 IllA78.

321–42½–New. Court's sole object in exercising power in trust contained in will is to carry out intention of testator. 98CalA306, 277P123.

321–45 28Hawaii 590, 702, 705 [citCyc perPeters,CJ].

321–48 9PaDist&Co 757; 133SC43, 130 SE550.

322–47 218Ala415, 118S764.

322–49 Compromise agreement beneficial to infant beneficiaries and approved by chancellor is binding on them. 210 Ky725, 276SW818.

324–58 133SC43, 130SE550 (trustee liable for failure to secure reasonable rental).

326–70½–New. Managers of common-law trust have complete control of organization and its property and power to do everything necessary to effect that control, but have no power to control sale of units or to refuse their transfer. 77Colo 377, 237P155.

326–70⅓–New. Intention that trustee carry on business must appear in direct and unequivocal language of will. 126 Misc54, 213NYS286.

326–70¼–New. Corporation may be formed to hold land held in common, stock being delivered to trustee. 26 Oh NPNS17.

326–70⅙–New. Where executor is named testamentary trustee, fund bequeathed in trust will be treated as in possession of trustee for use of beneficiary as soon as executor obtains possession of sufficient assets to justify application to trust of sum fixed by will. 160Tenn57, 22SW(2d)6.

326–71 115Nebr413, 213NW512.

327–72 80CalA377, 252P647; 255 IllA 78 (duty to prevent waste); 115Nebr 413, 213NW512; 134Misc160, 235NYS 705. **Measure of accountability for safe-keeping** of trust money is not trustee's own conceptions of duty if they conflict with fundamental principles of justice. 115Nebr413, 213NW512. **Trustee of two trusts** cannot enlarge one by impoverishing other. 25F(2d)412.

327–74 230Ky401, 19SW(2d)1088; 115 Nebr413, 213NW512; 141Wash676, 252 P91, 50ALR207 (for unauthorized surrender of control of property).

328–75 334 Ill 96, 165NE165; SD 227 NW62 (loaning money of estate to corporation of which executor and trustee is secretary). **Defenses.**–131Misc129, 226NYS162. **When trustee not liable.**– TexCivA 11SW(2d)589. **Measure of damages** for conversion of property is difference between debt of beneficiary to trustee and market value of property at time of trial. TexCivA 11SW(2d) 589. **Purchase of grain options** on board of trade with trust funds is violation of duties of trustee. SD 227NW 62.

329–76 A person aiding in the conversion, etc. SD 227NW62 (indorsers on notes accepted by trustee are not released from liability by fact they were not given notice of dishonor or nonpayment). **Trustee appropriating corporate funds to payment of claim under ultra vires contract** is guilty of conversion. Minn 232NW327.

329–78 137Misc226, 243NYS366.

329–79 16F(2d)215; 214Ala243, 107S 210; 205Cal 619, 272P296; 94Fla1174, 115S540; 206 Iowa680, 218NW575; 252 NY168, 169NE127; 131Misc800, 228NYS 323; 134Misc160, 235NYS705; 136Wash 243, 239P546, 549, 241P684 [citCyc]. **Trustee held not justified** in paying more than usual broker's commission in sale of trust property. 254Mass464, 150NE220.

330–81 255 IllA78.

330–83 Where will authorized trustee to invade corpus of trust for beneficiary's comfort trustee was held entitled to credit for beneficiary's funeral expenses. 128Misc14, 221NYS319.

330–84 224Ky71, 5SW(2d)269.

330–86 78CalA638, 248P754 (agent's charges for collection of rents). **Employment of broker** held not unwarranted. 254Mass464, 150NE220. **Facts held insufficient** to warrant trustee paying broker more than usual commission for sale of trust property. 254Mass464, 150 NE220.

331–90 136Wash243, 239P546, 549, 241 P684 [citCyc].

331–93 205Cal 619, 272P296; 233Mich 499, 206NW979 (carrying charges); 237 Mich143, 211NW46; 170Minn134, 212 NW182. **Expense of fixing value of realty for transfer tax and proposed sale** is chargeable to corpus. 126Misc 54, 213NYS286. **Interest on money borrowed for general expenses of estate** is payable out of general income. 80Colo 499, 252P816. **Discretion of court** determines who shall bear expense of trustee's bond, expense being usually on trust estate. 27F(2d)101. **Proceeds of sale of unproductive realty** cannot be apportioned to reimburse life tenant for loss of income used in paying carrying charges on such realty. Mass 172NE106.

331–94 Whether loss on sale of securities is chargeable to principal or income depends upon intention of trust. 129Misc784, 223NYS488.

331–95 205Cal 619, 272P296; 130Misc 339, 224NYS435. **Cost of additional bond required for protection of remainderman** is properly on remainderman so protected. 27F(2d)101.

331–95½–New. In absence of personalty in testator's estate, except specific bequests, items payable out of corpus of trust for testator's life include funeral expenses, administration expenses, debts, and inheritance taxes where income was made payable after his death to wife and daughter for one year and then reverted to estate. 130Misc339, 224 NYS435.

331–95⅙–New. No part of trust fund naming husband and wife as creators was subject to deceased wife's debts or administration expenses. 135Misc256, 237NYS102.

331–96 But see 156SC346, 153SE349.

332–97 221Ky783, 299SW958.

332–98 156SC346, 153SE349; TexCivA 22SW(2d)313(2dcase) (valid claims).

333–3 80CalA377, 252P647. **A contract of agency,** etc. 222Ky243, 300SW617. **Trustee cannot bind cestuis que trust for commissions on sale of real estate** in absence of authority conferred by trust instrument. 222Ky243, 300SW 617.

333–5½–New. In matters in which trustee cannot be expected to be experienced he may, when necessary, employ agents and skilled persons. 115Tex222, 280SW499, 44ALR627.

333–6 317 Ill 348, 148NE19. **One who deals with trustee with notice** of limitations of his authority is bound thereby. 219Ky374, 293SW150, 151 [citCyc].

333–8 317 Ill 348, 148NE19 (holding that fact that had trustee made certain payment he could look to trust funds for reimbursement does not give right of action to third person seeking to have such payment made); 244 IllA345; 117 Oki 300, 246P220, 221 [quotCyc]; Tex CivA 293SW599.

334–9 6F(2d)196; 94CalA218, 270P 1003; 317 Ill 348, 148NE19; 330 Ill 42, 161NE62; 252 IllA487; 222Ky243, 300 SW617, 619 [citCyc]; MoA 297SW468; 117 Oki 300, 246P220, 221 [quotCyc]; TexCivA 293SW599. **Where trustee negligently contracts for passing commission** on sale of trust property, though agreement approved by court said nothing as to commission, estate is not liable. 217Ala290, 116S141.

334–9½–New. Implied obligation against trust estate cannot be spelled out of fact that estate has benefited from contract made by trustee personally. 317 Ill 348, 148NE19.

334–11 Under power to invest and reinvest and to do what testator if alive might, trustee is authorized to execute promissory notes for purchase of lands. 203 Iowa552, 213NW270. **Where trustee has authority to execute promissory notes** for land it is no defense between parties thereto in action thereon that purchase of land proved an unprofitable investment. 203 Iowa552, 213NW 270.

334–12½–New. Testamentary trustee's contract which is beneficial to trust and in aid of testator's purpose should be approved. 180Minn134, 230NW575.

334–12⅓–New. Trustee cannot deal to own advantage with matters connected with trust estate, and contract made to that end is void. 135Misc4, 237NYS 635.

334–12¼–New. Normal expectancy of life to testator's widow is immaterial in determining whether trustee's contract with her is beneficial to trust where she suffers from cancer. 180 Minn134, 230NW575.

334–14 109Conn187, 145A648, 63ALR 783. **Trustee must use ordinary business prudence** in making improvements. 105Conn261, 135A555. **Trust instrument imposing duty of making repairs and improvements on trustee.**–255 IllA 78.

335–15 109Conn187, 145A648, 63ALR 783.

335–17 109Conn187, 145A648, 63ALR 783.

336–24 224Ky71, 5SW(2d)269.

336–26 126Misc54, 213NYS286 (ordinary repairs); 135Misc329, 239NYS362. **Ordinary repairs and maintenance,** even though under compulsory order. 126 Misc54, 213NYS286.

336–27 237Mich143, 211NW46; 170 Minn134, 212NW182; NS [1930] 2Dom LR897. **Expenses of improvements and alterations to realty not of permanent character** are chargeable to income. 126

Misc54, 213NYS286 (even though made under compulsory order).

337-28 Repairs and improvements of permanent nature ordered by state or municipal departments should be apportioned equally between income and corpus. 126Misc54, 213NYS286 (where made to enhance income).

337-29 NS [1930] 2DomLR397.

337-30 135Misc329, 239NYS362. **Expense of improvements is proper charge against corpus of estate** of which life tenant is trustee by deed. 233Mich499, 206NW979.

337-31½-New. Insurance.-Expenditures for fire insurance are charges against principal. 135Misc329, 239NYS 362.

338-35 237Mich143, 211NW46; 170 Minn134, 212NW182. **Taxes and carrying charges on real estate** held by trustees for life beneficiaries is chargeable against income. 126Misc54, 213 NYS286.

338-37 135Misc329, 239NYS362; 12Pa Dist&Co 243 (taxes on unproductive real estate payable from income of productive personalty). **When unproductive real estate is sold,** life tenant cannot require that out of proceeds of sale payment shall be made to him of amount of taxes paid out of income of estate generally. 12PaDist&Co 243.

338-38 149Va597, 140SE810.

339-44 214Ala243, 107S210; 91CalA 483, 267P327; 224Ky71, 5SW(2d)269; 227Ky364, 13SW(2d)268; Miss 126S18 (will construed as empowering trustee to employ counsel); 241NY374, 150NE 148. **What part of trust estate is chargeable with counsel fees.**-135Misc 661, 240NYS703. **Trustee is not entitled to allowance for legal services** if he acts as his own attorney in absence of statute. 200Cal 132, 251P907, 49ALR 1025. **Testamentary trustee who is also attorney** may properly employ another attorney to render necessary legal services for estate and receive allowance therefor. 200Cal 132, 251P907, 49ALR 1025. **Evidence as to reasonable value** of services should be received. Miss 126 S18. **Fees as charge against estate.**-Miss 126S18.

340-47 231Ky219, 21SW(2d)258. **Defense of trust which has become legally dry.**-Trustee may not employ attorneys at expense of estate to defend trust which has become legally dry. 202 Iowa 1094, 211NW488.

340-48 Allowance of attorneys' fees in trust proceedings limited to such as inure to common benefit.-214Ala243, 107 S210.

340-50 323 Ill 283, 154NE105; 243 Mich570, 220NW795.

340-51 202 Iowa1094, 211NW488.

340-53 Reasonableness of fee is question for court.-231Ky219, 21SW(2d) 258.

340-53½-New. Payment to attorney in good faith and reasonable in amount, though under mistaken belief that account had been settled, will be upheld. 134Misc212, 236NYS149.

340-55 43F(2d)589; 224Ky71, 5SW (2d)269; 227Ky364, 13SW(2d)268; 136 Wash243, 239P546, 241P684. **Estate not liable for damages recovered by purchaser** in action against trustee for his expenses in perfecting title. 136 Wash243, 239P546, 241P684. **Losses incurred in action to quiet title to property sold without court order chargeable to estate** where beneficiary appeared and sale was set aside. 136Wash 243, 239P546, 241P684. **Attorney's fees collectable out of estate where beneficiary was party to action.**-136Wash243, 239P546, 241P684.

341-58 Prosecuting criminal case to protect estate.-126Misc54, 213NYS286. **Legal expenses in defending dower claim against estate,** even though trustees were not parties. 126Misc54, 213 NYS286.

341-59 See also 83NH564, 145A666.

342-65 105US527, 26Led1157.

342-66½-New. Where trust estate recovers large money judgment, proceeds of which in part represent principal and in part income, legal expenses of action are proportionately distributable between income and principal. 130Misc 590, 224NYS391.

342-70 IndA 163NE109; 244Mich532, 221NW618.

343-71 214Ala243, 107S210. **Test of good faith** is whether litigation was undertaken in due and vigilant performance of duties of his trust such as court would have sanctioned on full presentation of conditions. 214Ala243, 107S210.

344-74 Prosecuting criminal case to protect estate held chargeable to corpus. 126Misc54, 213NYS286.

344-75 The costs of litigation, etc. 27 F(2d)101.

344-77½-New. Where party rendering services for common interest has sought to preserve fund from waste and destruction arising from neglect and misconduct of trustees, such party may recover compensation for services payable out of fund. 205Cal 111, 270P201.

344-79 If policy designates trustee and remainderman as beneficiaries, insurance on property should be paid for by both. 233Mich499, 206NW979.

345-81½-New. In determining whether charges should be made against income or principal, court will assume that trust estates were established at proper time. 126Misc54, 213NYS286.

345-81¼-New. And thereafter expenses are considered those of trustee and not executors. 126Misc54, 213NYS286.

345-81¼-New. Ordinary expense of administration by trustees is chargeable to income. 126Misc54, 213NYS286.

345-82 177Minn252, 225NW14. **Necessity of claim for compensation.**-Ida 293 P326.

345-83 220Ky441, 295SW415.

345-90 220Ky441, 295SW415.

345-91 220Ky441, 295SW415.

346-97 246Mich272, 224NW432; 9 PaDist&Co 415; Ont [1928] 4DomLR 564.

347-1 Mining stock is regarded as a wasting investment which it is the duty of trustee to sell. 313Mo 552, 281SW 744. **Trustee is not justified** in retaining speculative mining stock, though purchased by testator. 313Mo 552, 281 SW744.

347-7 Will made after passage of statute authorizing sale of trust estate is subject to such statute. 214Ky586, 283 SW969. **Trustee having general power of sale** except as provided and further providing that trustee should hold until termination of trust may sell under approval of court as provided by statute. 214Ky586, 283SW969.

347-8 247NY137, 159NE888. **Statute permitting sale by trustee unless "expressly" prohibited by instrument** should be liberally construed. DelCh 147A231. **Will authorizing trustee to dispose of any portion of property except specified farm held** not expressly to prohibit sale of such farm within meaning of term in statute. DelCh 147 A231.

348-9 105Conn261, 135A555; 134Misc 296, 235NYS308; 196NC4, 144SE372. **Will granting full power to determine securities in which estate shall be invested** grants trustees power of sale over securities purchased by testator or by trustees. 134Misc296, 235NYS308.

348-10 29Hawaii73; 169Minn273, 211 NW465; 24 OhNPN589.

348-11 220Ala524, 126S409(2dcase); 134Misc296, 235NYS308; 24 OhNPNS 589. **Power of substituted trustee under foreign will** to convey lands is derived from will, not statute, and therefore need not be confirmed by court. 101NJEq167, 137A318.

348-12 220Ala524, 126S409(2dcase); 135Misc387, 238NYS109; 290Pa107, 138 A81; TexCivA 20SW(2d)366(2dcase). See also Mo 3SW(2d)706. **Consent of cestuis held essential** where trust instrument so provides. 290Pa107, 138 A81. **Authority of trustee depends on terms of trust deed.**-CalA 290P86.

349-13 A surviving trustee, etc. 220 AppDiv126, 220NY645. **Substituted or successive trustees.**-220AppDiv126, 220 NY645.

349-15 Cal 290P290.

349-16 Mo 3SW(2d)706; 290Pa107, 138A81.

350-17 230Ky514, 20SW(2d)278 (consent of devisees held unnecessary); 313 Mo 552, 281SW744 (sale of zinc mining stock at advanced price owing to war conditions held proper).

350-20 155Miss188, 124S321; NJCh 151A874. **Limitations as to time within which power may be exercised,** imposed by will, must be observed by trustees. 190NC37, 128SE477. **Limitation as to time for sale of one parcel,** imposed by will, is not affected by codicil changing similar limitation as to others, on theory of inadvertent omission from codicil. 190NC37, 128SE477. **Trustee held to be authorized to complete sale** after one of devisees reached majority, though subsequent provision in will required division of estate at that time. 155Miss 188, 124S321. **Waiver of provision as to time.**-NJCh 151A874.

351-22 320 Ill 547, 151NE539; 155 Wash308, 284P89.

351-23 127Misc821, 216NYS593; 190 NC37, 128SE477 (will held to give trustees discretion).

351-23½-New. Where sale is authorized for purpose of division, trustee held to have discretionary power to sell any part of estate necessary in making division. 230Ky514, 20SW(2d)278.

351-23¼-New. Will empowering trustee to sell principal of trust estate and reinvest proceeds of sale in securities gives implied power to retain as part of trust fund securities of which testator died possessed. 135Misc387, 238NYS 109.

351-24 95Fla1010, 117S786; 98Fla 1103, 125S521; NJCh 139A513; 127 Misc773, 216NYS620; 125 Or598, 268P 63, 72 [citCyc].

351-26 TexCivA 23SW(2d)392.

351-27 229Ky726, 17SW(2d)1007; 134 Misc296, 235NYS308; 49RI 40, 139A 659.

352-32 105Conn261, 135A555.

352-34 105Conn261, 135A555; 226Ky 483, 11SW(2d)123; 190NC37, 128SE 477 (order made held not valid under power conferred). **Trustee making sale of land acts as agent of court.**-156Md 565, 144A836(2dcase), 927(2dcase). **Though will authorized trustee to sell without license,** probate court can authorize sale. Mass 172NE865.

352-35 24F(2d)187; 220Ala524, 126S 409(2dcase); 325 Ill 500, 156NE758; NJCh 138A388; 130Misc378, 224NYS 49; 137SC11, 134SE859. **Where testamentary trustees consider time opportune for exercise of discretionary power of sale but beneficiaries object,** trustees should apply to court for instructions. BC [1930] 2DomLR582.

353-36 26F(2d)530.

354-38 See also 190NC37, 128SE477.

354-44 136Misc282, 240NYS783 (sale of stock to corporation itself).

355-45 328 Ill 462, 159NE799.

355-47 TexCivA 284SW289 (to foreclose vendor's lien).

355-51½-New. By statute in New York trustee may apply to court for an order permitting sale on ground of necessity. 127Misc773, 216NYS620.

355-51⅓-New. Mere fact that testamentary trustee made a contract for sale will not warrant the court in ordering such a sale. 127Misc773, 216NYS620.

355-51¼-New. Trustee may be compelled to proceed with execution of trust imposing duty to sell real estate if he fails unreasonably to act. 320 Ill 547, 151NE539.

355-51½-New. or another may be appointed in his place. 320 Ill 547, 151 NE539.

355-51⅓-New. If there has been no abuse of trust imposing duty to sell and distribute or no refusal for unreasonable time to execute it court will not interfere with trustee's execution of trust. 320 Ill 547, 151NE539.

355-51¼-New. Court may authorize sale of real estate after beneficiaries' formal abandonment of right to occupy it as home. 108Conn259, 142A796.

355-52 43 Ida243, 253P833, 834 [cit Cyc]; 154Miss726, 123S847.

355-53 251Mich132, 231NW96. **Failure to obtain consent** of beneficiaries to sale not evidence of bad faith, where consent is not required as condition of sale. 313Mo 552, 281SW744.

356-61 NS [1930] 4DomLR42 (trustee is not liable to minority of beneficiaries

where receiving consent of majority); **Ont** [1930] 2**DomLR**702 (trustees selling mining claims under advice of majority of beneficiaries as authorized in trust instrument held not guilty of breach of trust).

356–62 92**Fla**414, 109**S**580; **NJSup** 138 **A**305.

356–63 **NJSup** 138**A**305.

356–63½–New. Duty of trustee to sell on request.–Where testamentary trust gives beneficiaries power to petition trustee for sale of property, it is duty of trustee to sell when all beneficiaries desire it. 202 **Iowa**1094. 211**NW**488.

357–66 146**Va**33. 135**SE**707.

357–67 Evidence held sufficient.–328 **Ill** 462, 159**NE**799.

358–69 Decree for sale within six months construed as directory and not mandatory.–136**Wash**243, 239**P**546, 241 **P**684.

358–71 Decree held sufficiently specific.–328 **Ill** 462, 159**NE**799.

358–72 198 **Ind**207, 151**NE**610.

358–73 Petition and decree held to authorize sale of every interest testator had.–**Mass** 172**NE**865.

358–76½–New. License granted by probate court to sell real estate issued under statute requiring notice to persons interested is void if no notice is given. 258**Mass**348, 154**NE**920.

358–76½–New. Such decree has no binding effect upon persons not before court. 258**Mass**348, 154**NE**920.

358–76¼–New. Paragraphs of petition relating to forty shares of stock transferred by testator to defendant, and paragraph of prayer for decree requiring these defendants to transfer to trustees these shares of stock, are not subject to special demurrers. 167**Ga**1, 144 **SE**787.

358–76½–New. Beneficiaries under deed of trust cannot defeat proper sale by interposition of leases by them of mineral rights in land. **TexCivA** 23 **SW(2d)**392.

358–76½–New. Decree authorizing sale cannot be attacked in purchaser's proceedings for registration of land. **Mass** 172**NE**865.

359–79 Time of sale.–110**Conn**516, 148 **A**358.

359–81 156**Md**565, *144**A**836(2dcase), 927(2dcase). See also 132**Misc**150, 229 **NYS**631.

360–83½–New. Where offers are below probable price obtainable, court may order auction sale. 149**Va**597, 140**SE** 810.

360–84 35**Ariz**457, 281**P**38 (sales of stock sustained though for unsecured obligation where trustee actually collected purchase price); 313**Mo** 552, 281 **SW**744 (trustee held justified in giving short time option for purchase of speculative mining stock).

360–85 The beneficiaries have power to fix, etc. 198 **Ind**207, 151**NE**610.

360–87 25**F(2d)**412.

361–91 136 **Okl** 252, 277**P**653, 63**ALR** 997. **Trustee is accountable for reasonable market value of property accepted in part payment** where no bad faith is shown. 127 **Okl** 203, 260**P**481. **Securities received in part payment** in sale on credit should be legal for investment of trust funds. 137**Misc**56, 243**NYS**204.

361–93½–New. Sale of four hundred and ninety eight shares with par value of twenty dollars for three hundred and fourteen dollars was sale for value and not in violation of such agreement. 154 **Wash**34, 280**P**939.

361–95 208**Cal** 185, 280**P**959.

361–96 See also 218**Ala**207, 118**S**389.

362–2 Failure to make trustee party to petition for sale, where petition was filed in suit in which trustee was party complainant, held not to invalidate sale. 146**Va**33, 135**SE**707. **That trustees for life tenant and remainderman designated themselves as trustees for remainderman only** does not invalidate sale. 156**SC**346, 153**SE**349.

362–3 Sale under power in trust, without consent of beneficiary, in good faith some years before trust was declared void is not a void sale. 312**Mo** 552, 281**SW**744.

362–4 146**Va**33, 135**SE**707.

362–5 Unborn children of beneficiaries cannot attack validity of judicial sale asked for by such beneficiaries. 146 **Va**33, 135**SE**707.

362–8 230**Ky**514, 20**SW(2d)**278.

362–9 156**SC**346, 153**SE**349; 146**Va**33, 135**SE**707.

363–15½–New. Prima facie title, under statute, of one named in deed as trustee, where no beneficiary is indicated, may be defeated if, within five years of recording deed, it is shown that grantor did not own property but merely acted as trustee for beneficiaries with equitable interest. 130 **Or**644, 281 **P**169.

363–17 215**Ala**67, 109**S**363; 108**WVa** 701, 152**SE**790.

363–19 149**Va**597, 140**SE**810. **Purchaser's tax payments** should be refunded. 149**Va**597, 140**SE**810.

363–25 Petition held sufficient.–170**Ga** 633, 153**SE**747.

364–27 198 **Ind**207, 151**NE**610.

364–29 Where trustee failed to exercise reasonable skill, prudence, and judgment, he may be held liable for larger sum than he received. **Mass** 170 **NE**73.

364–30 89**CalA**314, 264**P**556, 559 [quot Cyc]. **Obtaining from holder of option** to purchase trust property higher price than named therein is not proof of bad faith of trustee. 313**Mo** 552, 281**SW** 744. **Inclusion by president of trust company of small amount of outside stock** in giving option to purchase trust stock is not proof of bad faith in selling trust stock. 313**Mo** 552, 281**SW**744.

364–30½–New. Court of equity will not condemn trustee for doing without compulsory order that which it could have compelled him to do at stated time. 28**Hawaii**590.

364–30½–New. Nor will court exact damages from trustee for having done voluntarily what he would have been judicially compellable to do. 28**Hawaii** 590.

364–30¼–New. Trustee with power of sale under will could not assent to sale by custodian of alien property of interest of beneficiaries of trust who were American citizens although children of alien testator jointly with alien interest without segregation at sale sufficient to identify proceeds of separate interest. 28**Hawaii**590.

364–30½–New. Agreement by trustee to accept liberty bonds below par at the time as part payment in sale of trust property is not breach of trust. 28**Hawaii**590.

364–30½–New. Trustee to sell land under restrictions is liable for violation of trust though purchaser was bona fide purchaser. 130 **Or**644, 281**P**169.

364–32 205**Cal** 658, 272**P**567. **Deed made by trustee to estate** of which she was executrix, in form executed as deed of executrix, and not joined in by coexecutor, held ineffective to pass title. 25**F(2d)**412.

365–35 192**NC**732, 135**SE**870. See also 205**Cal** 658, 212**P**567.

365–36 205**Cal** 658, 272**P**567.

365–42 Conveyance in trust.–124 **Okl** 188, 255**P**566.

365–44½–New. Court may direct trustee to execute proper deed of conveyance in proper case even after termination of trust. **Mo** 271**SW**815.

366–46 Mo 271**SW**815. **Private offers** to purchase trust property, made in proceeding for sale, held not to give offerors any equity till approved by court. 149 **Va**597, 140**SE**810.

366–48 149**Va**597, 140**SE**810.

366–53½–New. Subsequent ratification of trustee's act has same effect as previous authority. 156**Md**565, 144**A**836.

366–53½–New. Court can ratify sale it would have authorized if application for authority had been made. 156**SC** 346, 153**SE**349.

366–54 32**Ariz**560, 261**P**35, 39 [citCyc]; 34**Ariz**245, 270**P**1044; 323 **Ill** 283, 154 **NE**105, 109 [citCyc]; **Iowa** 232**NW**807; **NJ** 129**A**429; 116 **Oh**327, 156**NE**450; 124 **Okl** 188, 255**P**566, 569 [quotCJ]; 122 **Or**84, 253**P**1048; 300**Pa**68, 150**A**90; **TexCivA** 286**SW**642; **Va** 152**SE**350.

367–55 323 **Ill** 283, 154**NE**105; 124 **Okl** 188, 255**P**566, 569 [quot CJ].

367–56 Iowa 232**NW**807; 124 **Okl** 188, 255**P**566, 569 [quotCJ].

367–57 Iowa 232**NW**807; 124 **Okl** 188, 255**P**566, 569 [quotCJ].

367–58 122 **Or**84, 253**P**1048.

368–61 Option to purchase trust property given by trust company, three of whose directors were stockholders in optionee, a brokerage company and two other related to members thereof held not to render option fraudulent or voidable. 313**Mo** 552, 281**SW**744.

368–62 35**Ariz**457, 281**P**38; 169**Ark** 1132, 278**SW**26; **TexCivA** 2**SW(2d)**980; **Wis** 230**NW**715 (full and complete disclosure). **Burden is on trustee who buys trust property** to show good faith. 169 **Ark**1132, 278**SW**26. **Finding that trustee acted in good faith held supported by evidence.**–169**Ark**1132, 278**SW**26. **Test of good faith.**–169**Ark**1132, 278 **SW**26.

368–63 TexCivA 286**SW**642.

369–64 TexCivA 286**SW**642.

369–65½–New. Trustee may purchase remainderman's interest, 128**Misc**588, 219**NYS**569.

369–65½–New. but burden of overcoming presumption of fraud is on trustee. 128**Misc**588, 219**NYS**569.

369–65¼–New. Assignments to trustee of remainderman's interests in trust can be set aside only by judgment for fraud. 128**Misc**588, 219**NYS**569.

369–65½–New. Rule is inapplicable where purchase by fiduciary is permitted under a power conferred by will. 116 **Oh**327, 156**NE**450.

369–65½–New. In action by grantees to quiet title, under which trustee would be given option to repurchase individually, beneficiaries should be made parties to action. 110**Conn**208, 147**A** 675.

369–67 323 **Ill** 283, 154**NE**105.

370–71 Full knowledge of all material facts and of applicable law is essential to ratification by cestui que trust. 34 **Ariz**245, 270**P**1044.

371–72 The trustee may be compelled to pay the difference, etc. 122 **Or**84, 253 **P**1048.

371–78 32**Ariz**560, 261**P**35, 39 [citCJ]. But see 155**Wash**280, 284**P**80. **Agreement to convey realty construed.**–299**Pa** 359, 149**A**658.

372–79 32**Ariz**560, 261**P**35, 39 [quot Cyc]; 99**NJEq**638, 133**A**712; 39 **OklACR** 363.

372–79½–New. , and was well understood by beneficiary. 99**NJEq**638, 133 **A**712.

372–80 39 **OklACR**363.

372–81½–New. A cestui que trust having no title in trust property cannot vest trustee in individual capacity with title to any part thereof as against other cestuis. 323 **Ill** 283, 154**NE**105.

373–85 **Man** [1928] 1**DomLR**189.

373–90 220**Ala**524, 126**S**409(2dcase); 339 **Ill** 568, 171**NE**618. **That sale of part of homestead inured to benefit of purchasing widow** in obviating her mistake in building thereon held not detrimental to other beneficiaries. 220**Ala**524, 126 **S**409(2dcase).

373–91 See also **Mo** 3**SW(2d)**706.

373–93½–New. Trustees cannot sell trust property to husband of one of trustees. **Iowa** 232**NW**807.

373–95 43 **Ida**243, 253**P**833.

374–97 31**Ariz**104, 250**P**766, 768 [cit Cyc]; 70**CalA**41, 232**P**489, 491 [citCyc]; 43 **Ida**243, 253**P**833.

374–98 CalA 290**P**86; 251**Mich**132, 231 **NW**96; **MoA** 275**SW**970, 972 [citCyc].

374–99 31**Ariz**104, 250**P**766, 768 [cit Cyc]; 163**Ga**551, 136**SE**528; 98**PaSuper** 494. See also 96**Fla**455, 118**S**216. **One who takes security deed for loan without notice of resulting trust** stands as bona fide purchaser. 163**Ga**551, 136 **SE**528.

375–1 96**Fla**455, 118**S**216; 163**Ga**551, 136**SE**528 (dictum); 37**GaA**229. 139**SE** 822; 43 **Ida**243, 253**P**833, 834 [citCyc]; **MoA** 275**SW**970, 972 [citCyc]; **TexCivA** 23**SW(2d)**865 (trustee's deed held not to pass title of minor beneficiaries); 137**Wash**214, 242**P**32.

375–6 146**Va**33, 135**SE**707.

375–8½–New. In action to determine rights under contract of sale by trustee, purchasers would be required to accept deed where record owner was designated in deed to him as trustee and it appeared that only beneficial owners were such trustee and his grantor. 209Ky439, 272SW905.

375–8½–New. One to whom wife executed a joint deed creating vendor's lien securing notes can convey only naked legal title. TexCivA 288SW525.

75–8¼–New. Statutory presumptions.– Oregon statute declaring presumption conclusive after five years from recording of deed from grantee in trust deed indicating no beneficiary, that he is trustee for himself only, and prima facie title, absolute after such time, in his grantee, is remedial in its nature, and should be liberally construed to effectuate its purpose. 130 Or644, 275 P55.

375–8½–New. Rules that deed is valid without consideration, and that delay in selling does not destroy trust, apply where third party purchases in reliance on trustee's authority. CalA 290 P86.

376–11 246Mich272, 224NW432. **Where the trust appears on the face of the deed to the trustee,** etc. 209Ky439, 272 SW905.

377–22 83CalA707, 257P866; 163Ga551, 136SE528.

377–25 In case of purchase by beneficiaries payment in cash need not be shown. 78Colo 464, 242P636.

378–30 Statute permitting foreign trustee under will of nonresident to execute deeds gives authority to enforce payment of purchase price. 95Fla1010, 117S786.

378–33 Trustee determines what portion of fund is to be paid annuitants and what part retained subject to control of court. 105Conn261, 135A555.

379–37 339 Ill 568, 171NE618 (proceeds held applicable to investment in homestead without restriction regarding character or location); 196NC4, 144SE372; 5PaDist&Co 573 [quotCyc].

379–37½–New. Where real estate devised in trust as home for beneficiaries was sold by reason of change of circumstances, pursuant to authority of statute, proceeds of sale are to be invested for benefit of party beneficially interested in trust in such manner to secure object for which trust was originally created. 108Conn259, 142A 796.

379–38 148Md226, 129A28; 251Mich 132, 231NW96 (purchaser held not responsible for application of proceeds to beneficiary estopped to question validity of conveyance); 307Mo 336, 270 SW638, 641 [citCyc]; 191NC198, 131 SE581; Va 135SE707. **Beneficiaries must assert their rights** against funds arising from sale. 146Va33, 135SE707.

381–43 32F(2d)397; 223AppDiv393, 228 NYS466.

381–51½–New. Liens acquired by creditors of beneficiaries may be divested by sale made by trustee, 169Minn273, 211NW465.

381–51½–New. and in such case the liens are transferred from interest in land to interest of debtors in proceeds of the land. 169Minn273, 211NW465.

382–53 105Conn261, 135A555.

382–55 220Ala319, 125S28 (act of trustee as individual); 217Ky171, 289SW 250; Mass 173NE437.

383–56 109Conn187, 145A648, 63ALR 783.

383–58 219Ky731, 294SW499, 501 [quot Cyc].

384–59 219Ky731, 294SW499, 501 [quot Cyc].

384–60 219Ky731, 294SW499, 501 [quot Cyc].

384–61 But see 217Ky171, 289SW250.

384–64 See also 191NC769, 133SE93.

384–65 Land in which remainderman has vested remainder in fee under deed of trust cannot be mortgaged by trustee in aid of other land in which remainderman has only contingent remainder under will of trustor. 233Mich 499, 206NW979.

385–73½–New. Under statute, trustees may use money secured by mortgage for improvement of principal as well as statutory investment. 109Conn187, 145A648, 63ALR783.

386–78 137 Okl 204, 279P310. **Where mortgage was not properly authorized,** sale thereunder could not vest indefeasible title. 191NC769, 133SE93.

387–85 232 IllA60 (trustee of deed for security may lease premises); 33NM 275, 265P713. **Provision giving power to let does not broaden trustee's life estate into fee.**–76CalA655, 245P803. **Length of term** proper is determined by authority granted and surrounding circumstances. 225Ky168, 7SW(2d)1062, 61ALR1365. **Construction trust giving power to lease.**–138Misc90, 245NYS173.

387–86 109Conn187, 145A648, 63ALR 783; 195NC434, 142SE585; 197Wis327, 222NW235.

388–88 217AppDiv443, 217NYS15 (in absence of statutory or specific authority in will creating trust); 197Wis327, 222NW235. See also Md 152A258. But see 195NC434, 142SE585. **Time for which premises may be leased.**–76CalA 655, 245P803. See also 196Wis383, 220 NW175. **Trustees may be impliedly given authority to execute leases which may run beyond term of lease.**–109Conn 187, 145A648, 63ALR783.

388–89 Md 152A258. **Trustee having power of sale** is authorized to give ninety-nine-year lease where necessary to protect interest of beneficiary. 225 Ky168, 7SW(2d)1062, 61ALR1365. **Lease with option to purchase** under will requiring consent of testator's widow to any sale made by trustee is not invalid where widow did not join in lease and lessee is entitled to exercise option after widow's death. NJCh 146A460(3dcase).

389–92 Inadequate rental working hardship on cestui prevents approval of renewal of lease. 155Md456, 142A 587.

389–96½–New. Negotiations for lease failed, there being no meeting of minds. 148Md638, 129A911.

389–96½–New. Trustees are not under duty to offer property at auction for lease to highest bidder, it being sufficient to lease to highest bidder then known. 148Md638, 129A911.

389–96¼–New. Where property was leased to highest offer, trustees had reason to expect that lease should be allowed to stand despite increased offer subsequently made. 148Md638, 129 A911.

389–96½–New. Where no improvidence or unfairness was shown, and property was leased to highest bidder, lease allowed to stand. 148Md638, 129A911.

389–96⅓–New. Rule that sale till approval is only offer to purchase is true in qualified sense, but court is not always engaged in auction till moment of ratification, and under circumstances bid for full price fairly made in all prospects will not be rejected to give another bidder second opportunity. 148 Md638, 129A911.

389–96⅙–New. Trustee's lease has been treated as provisional for purposes of saving beneficiaries of trust from improvidence, unfairness, or fraud. 148 Md638, 129A911.

389–96⅛–New. Any ambiguity in will giving trustee power to lease property must be resolved in light of circumstances existing when will was made, including condition of property. 217AppDiv443, 217NYS15.

389–96½–New. Lease not beneficial to cestui que trust will not be approved. 155Md456, 142A587.

389–96 1/10–New. Proposed renewal under option terms of lease may be considered by court as new proposition submitted for approval. 155Md456, 142 A587.

389–96 1/11–New. Approval of lease nunc pro tunc is proper where rental far exceeds what cestui had received, even though for longer than customary term. 155Md456, 142A587.

389–96 1/12–New. Power expressly given trustees in instrument to hold, manage, and care for property, collect and expend income, implies power to make leases. 109Conn187, 145A648, 63ALR 783.

389–96 1/13–New. Power of trustee under will to collect rent and lease property must be limited by statutory five-year term, and required application to court beyond such term. 134Misc634, 235NYS595.

389–96 1/14–New. That trustee was to be paid fee by lessee on court's approval did not invalidate compromise agreement with lessee. 336 Ill 137, 168NE 116(2dcase).

389–96 1/15–New. Statute held not to prevent court from authorizing trustee to permit lessee to replace old building with larger one. 336 Ill 137, 168NE116 (2dcase).

390–98 126Misc54, 213NYS286; 138 Misc90, 245NYS173. **Fund as entirety.**– 131Misc495, 227NYS682.

390–98½–New. Power of trustee to retain investment is same as power to make investment, in absence of contrary provision. 167Ga1, 144SE787.

390–99 256Mass78, 152NE71; 134Misc 296, 235NYS308; 287Pa499, 135A112. **Measure of accountability for investment** of trust money is not trustee's own conceptions of duty if they conflict with fundamental principles of justice. 115Nebr413, 213NW512. **Equity court will subject trustee's diligence and judgment to searching inquiry.**–106WVa228, 145SE588. **Abuse of discretion not shown.**–297Pa537, 147A606.

391–3 135Misc387, 238NYS109; 287Pa 499, 135A112.

391–4 106WVa228, 145SE588. **Safety is the primary object,** etc. 287Pa499, 135A112.

391–5 129Misc393, 222NYS351; 106 WVa228, 145SE588. **Though authorized to invest in nonlegal securities,** trustee must exercise diligence and alert judgment. 129Misc393, 222NYS351.

391–6 256Mass78, 152NE71; 126Misc 54, 213NYS286; 136Misc881, 242NYS 210 (primary duty to procure safe income).

392–7½–New. Trustee has duty to report his fiduciary transactions to beneficiary. 115Nebr413, 213NW512.

392–9 249 IllA617, 629 [citCyc].

392–14 134Misc212, 236NYS149 (first mortgage loan on property in another state).

394–30 NJ 130A219 (trust fund must be invested as directed by statute). **In New York.**–129Misc393, 222NYS351; 135Misc220, 237NYS409; 135Misc387, 238NYS109; 135Misc674, 238NYS375. **In New Jersey and Pennsylvania,** etc. See also 9PaDist&Co 335.

395–31 127Me104, 141A188. **In Georgia.**–A 155SE73.

395–32 105Conn261, 135A555; 167Ga1, 144SE787.

397–40 218Ky508, 291SW718. **Trust funds may be invested** in farm loan bonds. 167Ga1, 144SE787.

399–52 219Ky731, 294SW499.

401–62 261Mass158, 158NE530; Mass 172NE647.

402–65 GaA 155SE73.

402–66 Purchase by trustees, under power to reinvest proceeds, where stock owned by estate carries right to purchase additional stock, is proper, where power is prudently and diligently exercised. 132Misc150, 229NYS631.

402–68 106WVa228, 145SE588.

402–69½–New. Trustee must, within reasonable time invest proceeds of stock in securities authorized by law or become liable for depreciated value of stock. 167Ga1, 144SE787.

402–69⅓–New. Where bonds are purchased at premium, there should be such proportionate deduction from nominal interest as will make good premium paid, at maturity of bonds. 126Misc 54, 213NYS286 (so as to preserve principal fund intact).

403–75 129Misc393, 222NYS351 ("Mining or kindred pursuits").

403–77 129Misc393, 222NYS351.

404–80 NJ 130A219. See also 178Minn 209, 224NW235.

404–83 TexCivA 273SW609 (option

taken instead of title is breach of trust). 405-96 109Conn187, 145A648, 63ALR 783.

405-98 170Ark879, 280SW993.

406-5 126Misc54, 213NYS286. **Reasonable degree of diligence** and exercise of good faith is standard of trustees' duty. 6PaDist&Co 121.

406-6 **Discretion to invest in other than court securities** does not authorize use of discretion for personal interest or authorize financing of railroads or speculation in future values thereof, on theory of carrying out testator's policy. 126Misc54, 213NYS286.

406-6½-New. Discretionary powers of trustees are not enlarged by provision giving designated trustee deciding voice in determining that low stock should be voted as unit in case of difference of opinion among trustees. 126Misc54, 213NYS286.

406-7 **Power to manage estate to best advantage** does not authorize trustee to retain or invest in securities not authorized by law without court's sanction. GaA 155SE673.

408-16 See also 190NC558, 130SE166.

408-21 256Mass78, 152NE71.

409-24 37Wyo 107, 259P815, 55ALR 941.

409-25 115Nebr413, 213NW512.

409-28 6PaDist&Co 121 (trustees held not liable). **Duty as to investments retained.** 136Misc881, 242NYS210.

409-29 **The trustee must exercise a reasonable degree of diligence,** etc. 136 Misc881, 242NYS210. **Retaining securities on falling market.**-136Misc881, 242NYS210.

410-32 GaA 155SE673. **Retention of securities which offend judgment of prudent men** warrants surcharge of trustee's accounts with resulting loss. 136 Misc881, 242NYS210 (Cuban sugar stock8). **Power to retain is same as power to make investments.**-GaA 155 SE673.

410-33 **Trustee holding speculative securities** must exercise highest degree of diligence and prudence. 136Misc881, 242NYS210.

410-34 9PaDist&Co 125. But see 136 Misc881, 242NYS210.

410-35 **It is violation of trust to substitute secured notes of trust estate for uncertain claims of bank of which trustee is cashier.** 323Mo1000, 208W (2d)502.

411-37 **Court of equity is authorized to change investments** in its discretion from personal estate into real and vice versa. 146Va33, 135SE707.

411-39 203 Iowa552, 213NW270.

413-48 9PaDist&Co 125.

413-49 **Life tenant actively participating in large loan of trust funds** and strongly advising trustees to make loan is estopped from challenging propriety of loan. 126Misc54, 213NYS286.

413-50 219Ky731, 294SW499.

414-53 **Beneficiaries receipt of periodical statements from trustees** does not estop them from challenging propriety of trustee's acts. 126Misc54, 213NYS 286. **Life tenant not having authority to use independent judgment,** though having equal authority with trustees to countersign checks and withdraw estate funds, is not estopped from challenging propriety of trustee's acts, where signing checks was merely clerical, not amounting to ratification. 126Misc54, 213NYS286. **Ratification of trustee's acts** must be shown to have been with full knowledge of all material facts and effect thereof. 126Misc54, 213NYS 286.

415-57 Mass 167NE338; 115Nebr413, 213NW512; TexCivA 273SW609.

415-58½-New. Beneficiaries are not entitled to both profits and interest on such profits where no settlement was demanded and misuse of funds continued for years without objection. Mass 167NE338.

416-61½-New. Cestui entitled to reimbursement for money paid in taxes on unproductive property where trustee empowered to sell such property. 149 Va597, 140SE810.

416-63 287Pa499, 135A112. **Test of trustees' responsibility.**-6PaDist&Co 121. **Under agreement requiring payment of interest collected, trustee need not pay** interest which it did not collect due to borrower's failure. 218Ky508, 291 SW718.

416-64 259Mass578, 157NE334; 115 Nebr413, 213NW512; 129Misc393, 222 NYS351; 106WVa228, 145SE588. **Testamentary trustee cannot continue investment in corporate stock,** though made by testator. 167Ga1, 144SE787.

417-65 130Misc296, 224NYS283; Wis 230NW715. **Trustee must reimburse estate for loss following unauthorized** cause of conduct irrespective of motive. 126Misc54, 213NYS286.

418-71 300Pa355, 150A658.

418-71½-New. Trustee appointed after loss of funds invested held not liable. 259Mass578, 157NE334.

418-71½-New. **Set-off of profits from nonlegal investments** not allowed. 5PaDist&Co 317.

418-71¼-New. Where securities had depreciated in value before they were turned over to trustees at appraised value, revaluation by trustees held not to justify surcharging depreciation against trustees. 299Pa32, 148A912.

418-73 **Loss caused by unduly holding securities** is not chargeable to trustee in absence of bad faith, under will expressly exempting them from such liability. 136Misc54, 213NYS286.

418-75 259Mass578, 157NE334.

418-78 135Misc329, 239NYS362 (**loss** on sale of property accepted to save foreclosure expense).

419-79 **Methods of apportionment.**-129 Misc784, 223NYS488 (losses from sale of securities held properly chargeable against income in view of evidence).

420-87 204 Iowa878, 216NW1; 205 Iowa1248, 218NW24; 76Mont173, 243 P569.

421-89 75Mont173, 243P569; 151Va 1040, 145SE725. But see 173Ark197, 292SW140.

421-91 37Wyo 4, 257P345, 53ALR560 (bank not trustee but deposit creates usual relation of debtor and creditor). **Bank's knowledge** that fund credited to trustee individually is trust fund does not affect legal character of deposit. 173 Ark197, 292SW140.

421-93 **In Massachusetts.**-172NE111.

422-96 167Ga1, 144SE787.

422-96½-New. Order directing trustee to deposit funds in bank without notice of hearing to cestui que trust is void. 208 Iowa392, 226NW73.

422-97 78CalA638, 248P754, 757 [quot Cyc]; 89 IndA79, 147NE724; 259Mass 578, 157NE334; 40Wyo 524, 281P190 (interest not recoverable). **Circumstances may be such that mere restoration of property or its value without any interest would be all that justice may require.** 78CalA310, 248P764.

422-98 78CalA638, 248P754, 757 [quot Cyc]. **Trustees not chargeable on sum** received on resale of property which they were authorized to convey to son as advancement where he refused to pay interest. 256Mass113, 153NE395.

422-99 104Conn169, 132A902; 89 IndA 79, 147NE724; 256Mass113, 153NE395. **Trustee mingling trust and personal funds** is chargeable with six per cent interest, with semiannual rests. 126 Misc54, 213NYS286.

422-1 89 IndA79, 147NE724; 128 Or 317, 272P906; Wis 230NW715. **Where profits retained by trustee from use of trust funds could not be ascertained,** estate should be credited with legal interest thereon, with semiannual rests. 126Misc54, 213NYS286. **Trustee unable to loan funds** after due diligence is not liable for interest. 218Ky508, 291SW 718.

423-2 78CalA638, 248P754; 224Ky71, 58W(2d)269.

423-4 78CalA638, 248P754; 78CalA310, 248P764. But see NB [1929] 4DomLR 15.

423-8 Imp [1930] 3DomLR673.

423-9 213AppDiv395, 211NYS128; Tex CivA 285SW911. **Fact that depositary pays no interest on sums awaiting distribution** will not relieve trustee from depositing trust funds in another interest paying bank in case of delay in making distributions. 78CalA638, 248P 754.

424-14 115Nebr413, 213NW512.

424-15 78CalA310, 248P764; 115Nebr 413, 213NW512.

424-16 57ND412, 222NW459.

425-20 5PaDist&Co 317. **Current rate of interest allowed by banks acting as depositaries** where trustee acted in good faith in making payment to wrong persons. 241NY374, 150NE148.

426-21 323Mo 1043, 20SW(2d)517 (where minimum imposed by statute).

426-22 78CalA638, 248P754; 233Mich 494, 207NW1 (seven per cent not allowable on amount found unaccounted for). **Although guilty of a technical breach of trust,** etc. See also 37Wyo 107; 259P815, 55ALR941.

426-24 5PaDist&Co 727.

426-26 115Nebr413, 213NW512.

427-29 5PaDist&Co 317 (legal rate is limit of obligation); TexCivA 285SW 911. See also 115Nebr413, 213NW512.

428-40 MoA 288SW963.

429-41 78CalA310, 248P764 (imposition of compound interest with annual rests held inequitable).

429-43 78CalA310, 248P764.

429-44 78CalA310, 248P764. **Conflict of authority.**-37Wyo 107, 259P815, 55 ALR941.

430-50 See also 37Wyo 107, 259P815, 817, 55ALR941 [citCyc].

430-52 **Annual.**-78CalA310, 248P764 (under statute). **Semiannual rests,** etc. 13F(2d)158.

430-52½-New. Trustees cannot complain that because of lapse of years judgment allowing interest compounded annually will tax their ability to pay where evidence justifies such result. 78 CalA310, 248P764.

430-53 115Nebr413, 213NW512; 134 Misc160, 235NYS705. **Time of executing trust, and presumptions.**-137Misc226, 242NYS366.

431-55 78CalA310, 248P764 (payments authorized under trust to provide for minor beneficiaries if father failed to support them). **Provision authorizing trustee to reserve part of income payable to life tenant and thereafter distribute it** did not authorize distribution of principal. 263Mass114, 160NE309. **Where funds are deposited with trust company for payment of specific claims,** they cannot be applied to other claims against depositor until specified claims have been paid. 298Pa582, 148A902.

431-56 **Fund is treated as still in hands of trustee** where trustee under express trust has received fund and has not spent it for trust purposes. 118 Okl 167, 247P692. **Personal liability to trustor** is simple contract equitable debt. 118 Okl 167, 247P692.

433-63½-New. **Advances to pay life insurance premiums.**-Proceeds of life insurance policy, of which infant life beneficiaries of trust were sole beneficiaries, are chargeable with advancement out of trust estate for premium on policy. 226AppDiv771, 234NYS249.

433-67 220Ky441, 295SW415; 33NM 55, 263P758; 137SC450, 135SE558. **At expiration of trust period** beneficiaries are entitled to full possession of their interests in gross. 240Mich661, 216NW446.

435-71½-New. Where money was loaned beneficiary by trustee, loan being secured by mortgage, beneficiary was held liable to account to trustee. 221 AppDiv317, 223NYS164.

435-72 **Apportionment of proceeds of unproductive realty between life tenant and remainderman.**-136Misc116, 238 NYS763.

436-75 **Where beneficiary whose consent was required for expenditure of corpus becomes insane,** necessary expenditures from corpus for her care thereafter will be approved. 133SC43, 130SE550.

436-76½-New. **Premature payment in fraud of judgment creditor of cestui que trust** renders trustee personally responsible to creditor if sale of interest of cestui que trust in estate does not bring sufficient to satisfy creditor's judgment. 120 Or338, 250P617.

438-84 38F(2d)195.

438-85 **If trustee sells real estate under power,** in absence of directions to convert it into personalty, the proceeds re-

tain character of real estate. 100NJEq 37, 136A738.

438-87 128Misc732, 219NYS449.

439-92 286Pa368, 133A562; TexCivA 9SW(2d)269; 149Va597, 140SE810. Defenses and excuses.–170Minn134, 212NW 182. Surplus income held not asset of grantor's estate but to pass under trust deed in installments without amortization. 245NY447, 157NE739. Duty of trustee.–131Misc526, 227NYS470. Overpayment to beneficiaries of testamentary trust must be repaid from interest subsequently accruing. 137Misc325, 243NYS 535.

440-93 156Tenn284, 300SW9.

440-94 108Conn412, 143A416, 61ALR 663; 156Tenn284, 300SW9. Payment by trustee of income under trust deed is not required to be paid to ultimate beneficiaries named in grantor's will appointing same trustee to receive income on trusts named in will, and duty of trustee under deed is complied with upon payment to trustee under will. 28Hawaii329.

441-95 108Conn412, 143A416, 61ALR 663. Division of dividends.–99NJEq141, 132A751. "Maintenance" and "support" in will creating spendthrift trust contemplated every expenditure necessary or incidental to maintenance of testator's son and his family in luxury accompanying one in his station in life. 108Conn 412, 143A416, 61ALR663. New decision as to amount each time payment is made is not necessary under spendthrift trust. 108Conn412, 143A416, 61ALR663. Presumption of proper exercise of discretion in determining income suitable for beneficiary's maintenance will be made. 108Conn412, 143A416, 61ALR663. Trustees have duty under spendthrift trust to familiarize themselves with situation in order to determine income to be paid beneficiary. 108Conn412, 143A416, 61 ALR663.

442-2 108Conn412, 143A416, 61ALR 663.

442-3 133Misc152, 231NYS408.

442-4 286Pa368, 133A562. Stock dividend on corporate stock representing merely enhanced value of corporate asset goes to corpus of estate and is not classed as income. NJ 130A220.

442-5 228Ky73, 14SW(2d)397; 130 Misc296, 224NYS283 (life tenant); 283 Pa185, 129A74 (stock dividend). Provisions in trust prescribing conditions under which income should go to cestui will be enforced by courts. Iowa 231 NW444. Where trust gives income to cestui "as she may elect," she alone has right to elect, and cannot be forced. Iowa 231NW444.

443-6 The right of a beneficiary to income ceases upon his death, etc. But see 156Tenn284, 300SW9. Accumulated income may not be paid under provisions of beneficiary's will where trust was for support during lifetime of beneficiary. 156Tenn284, 300SW9.

443-8 128Misc732, 219NYS449.

443-8½-New. Extraordinary stock dividends should be apportioned between capital and income as of date when stocks were delivered by executor to trustee and not as of date of testator's death. 213AppDiv303, 210NYS226.

443-12½-New. Under trust for benefit of minor providing for accumulation of income for minor's benefit and payment of net income after reaching majority, "accumulation" could be applied for infant support and education, and payment thereof need not be deferred. 133Misc 152, 231NYS408.

444-14 What is income and what is corpus.–99NJEq141, 132A751.

444-15 198Cal204, 244P348, 48ALR 677; 331Ill182, 162NE888; NJ 130A 220; 127Misc399, 216NYS267. Leaseholds are part of capital of trust estate.–126Misc54, 213NYS286. Whether declaration of stock dividend is from income or capital is to be decided from the facts. 128Misc732, 219NYS449. Corporate stock, and not its value at any particular time, constitutes corpus of trust estate. 317Mo1028, 298SW91, 56 ALR1276. Increased value of corporate stock through accumulation of earnings belongs to corpus if no dividends are declared. 317Mo1028, 298SW91, 56 ALR1276. Increment of land value should, when declared as dividends, be appropriated to corpus of trust. Md 150 A15(2dcase). Securities acquired by corporation before testamentary trust was set up belong to capital. 135Misc899, 241NYS500.

444-16 221AppDiv612, 224NYS727. Subscription rights held part of principal. 99NJEq141, 132A751. Dividends received in liquidation of corporation are capital, not income. Mass 172NE647. Distribution of stock of another corporation as step in liquidation of distributing corporation is capital. Mass 172 NE647.

444-17 290Pa457, 139A200, 56ALR 1303; 10PaDist&Co 335. See also 138 Misc216, 245NYS201. But see 135Misc 899, 241NYS500.

444-18 Under separation agreement any deficiencies in income to be paid to wife are chargeable to principal of estate. 127Misc821, 216NYS593.

444-18½-New. Discount at which bonds are purchased is part of corpus. 198 Cal204, 244P348, 48ALR677.

444-19 256Mass78, 152NE71; NJCh 149A590 (rule for ascertaining income). Extraordinary stock dividend.–127Misc 701, 217NYS605. Whether income from rents should be allowed as net rents to cestui que trust or should be charged with expenses is for determination of probate judge. 256Mass78, 152NE71. That beneficiary for life allowed stock dividend certificate to remain in original form does not debar his estate from receiving portion of dividend which represented earnings accruing after testator's death. 285Pa186, 131A714. Net income.–317Mo1028, 298SW91, 56ALR 1276. Profits realized from improvements on land are earnings. Md 150A 15(2dcase). Securities purchased from earnings belong to life beneficiary. 135 Misc899, 241NYS500. Distribution of stock of another corporation acquired by distributing corporation as part of surplus is income. Mass 172NE647.

445-20 109Conn268, 146A727 (dividends declared during life of tenant but payable subsequent to her decease); Ill 173NE491; Mass 168NE102; Mass 172 NE647. But see NJ 130A220. Extraordinary dividends.–NJOrphans'Ct 148A 193; 224NYS77. Extraordinary stock dividend held by trustee, paid out of accumulated earnings, presumptively belongs to life tenant if not impairing value of stock. 290Pa457, 139A200, 56ALR 1303. Life tenants are entitled to proceeds of stock sold by trustee representing income earned during trust agreement. 290Pa457, 139A200, 56ALR1303. Life tenants, on sale of stock by trustee representing, in part, accumulated earnings, are entitled to part thereof in excess of intact value of stock. 290Pa 457, 139A200, 56ALR1303. On sale by trustee of stock, wherein profits represented accumulation of income, court will treat sale as distribution of accumulated earnings. 290Pa457, 139A 200, 56ALR1303. Ordinary dividend received by trustee belongs to life tenant, regardless of how soon received after creation of trust. 290Pa457, 139A200, 56 ALR1303. Right of trustee to subscribe for new stock in corporation must be apportioned between life tenant and remaindermen according to ratio of accumulated earnings. 290Pa457, 139A 200, 56ALR1303. Stock dividends payable in stock of another company are treated in same way as dividends payable in stock of same company. 99 NJEq141, 132A751. Stock dividends from securities held in trust go to corpus of trust. NJCh 150A5. Premiums received for sale of right to purchase new stock belong to corpus of estate. NJCh 151A545.

445-20½-New. Net income means all income remaining after paying expenses of trust and operating property thereunder including trustee's compensation, reasonable attorney's fees, taxes, insurance, ordinary repairs, and all other necessary expenses as trustee in order to preserve corpus of trust property intact for remainderman. 283Pa185, 129A74 (stock dividend distributed to make good reduction of actual value of capital and remainder to those entitled to accruing income).

445-20⅓-New. Stock dividend apportioned by giving corpus enough to keep it intact and balance to those entitled to income. 283Pa311, 129A85.

445-20¼-New. Ratio of apportionment of profits on sale of securities taken for debt is determined by ratio which principal sum bears to interest due on debt at time when securities realized on. 98 NJEq55, 130A22.

445-20⅓-New. Where extraordinary dividend is declared on shares of stock in trust, they will be distributed by giving to corpus sufficient to keep intact value of shares as at time trust began, and balance to those entitled to income of estate. 285Pa186, 131A714.

445-20⅙-New. Mere adoption of resolution by board of directors cannot change accumulated earnings into capital so as to affect right of life tenant and beneficiary. 128Misc732, 219NYS449.

445-20½-New. Where resolution of board of directors is not arbitrary but based on facts, its determination as to capital and income will be given effect by the courts. 128Misc732, 219NYS449.

445-20⅛-New. Ordinary dividends as distinguished from extraordinary dividends go to the life tenant. 128Misc 732, 219NYS449.

445-20⅑-New. Extraordinary dividends where they come out of income go to the life tenant. 128Misc732, 219NYS449.

445-20⅒-New. Sufficient income should be retained to maintain trust estate unimpaired. 128Misc732, 219NYS449.

445-20⅑-New. Where there is a division of the corporate property, part consisting of profits go to life beneficiary and balance to remainderman. 128Misc 732, 219NYS449.

445-20½-New. Until there is some division in the nature of a dividend payable out of accumulated earnings there can be no payment to beneficiaries. 128Misc 732, 219NYS449.

445-20⅓-New. Where corporation buys shares of subsidiaries and distributes them in kind, they should go to life beneficiary. 128Misc732, 219NYS449.

445-20¼-New. Where on revaluation after corporation had bought stock of subsidiary out of earnings a surplus is shown, surplus goes to life beneficiary. 128Misc732, 219NYS449.

445-20⅕-New. Size of income as a result of a stock dividend is not to be considered in distinguishing capital from income. 128Misc732, 219NYS449.

445-20⅙-New. Where directors revalued subsidiaries, stock revaluation will not be questioned if made in good faith and exercise of business judgment. 128Misc732, 219NYS449.

445-20⅐-New. Where corpus is in form of corporate stock, undeclared earnings resulting from increase in value of stock are part of corpus and belong to remaindermen. 127Misc399, 216NYS 267.

445-20⅛-New. Rights to purchase additional stock in corporation constitute part of corpus of estate. 27F(2d)101.

445-20⅑-New. Stock dividends on stock are part of corpus, 27F(2d)101.

445-20⅒-New. life tenant being entitled only to income from such stock purchased. 27F(2d)101.

445-20⅓-New. Cestui que trust entitled both to one twelfth of corpus and one twelfth of income is not prejudiced by payment to another cestui from income instead of corpus where no double credit was allowed trustee. 35Ariz457, 281P38.

445-20½-New. Claimant seeking to depart from ordinary method of distribution must show facts warranting departure. 299Pa39, 148A907.

445-20⅓-New. Date of declaration of stock dividend governs date of apportionment of stock dividend between life tenant and remaindermen. 135Misc899, 241NYS500.

445-20¼-New. Ordinary dividends representing earnings prior and subsequent to commencement of life estate are to be apportioned between corpus of trust and income. NJCh 150A5.

445-20⅕-New. Ratio for apportion-

ment of stock dividends. **NJCh** 150 A5.

445-20½8-New. Stock dividends declared subsequent to death of life tenant, but representing capital and earnings prior to testator's death, go to corpus. **NJCh** 150A5.

445-20½7-New. Where, with consent of life tenants and remaindermen, trustees used part of income as principal, interest on advances held not allowable on sale of principal to pay such advances. **Mass** 171**NE**717.

445-20½8-New. Assets do not change their character by investment beyond general powers of directors to alter them. **Mass** 168**NE**102.

445-20½9-New. Prima facie standard of measurement of intact value of trust estate is book value. 299**Pa**39, 148**A** 907.

445-20½0-New. Such value is fixed as of date of testator's death in case of testamentary trust. 299**Pa**39, 148**A** 907.

445-20½1-New. Whether declaration of dividends payable at future time is income or capital depends on law of state in which corporation is domiciled. 109 **Conn**268, 146**A**727.

445-20½2-New. Law of trust domicile determines status of trustee and beneficiaries in determining whether dividends are distributable as income or principal. 109**Conn**268, 146**A**727.

445-20½3-New. Such value includes par value of corporate stock plus accumulations of income before death of testator. 299**Pa**39, 148**A**907.

445-20½4-New. In determining intact value of estate consisting of stock, corporation's method of changing various items will ordinarily be accepted as correct. 299**Pa**39, 148**A**907.

445-20½5-New. Money received by trustee under resolution authorizing exchange of par value stock for stock with no par value and certain amount in money held to constitute income. 32 **OhA**69, 167**NE**592.

445-20½6-New. Cash dividends are regarded as "income" and stock dividends as "capital." **Mass** 168**NE**102.

445-20½7-New. For such purpose good will of corporation should not be added to book value when corporation had not included it. 299**Pa**39, 148**A**907.

445-20½8-New. For such purpose correction on books of corporation of depreciation charge should ordinarily be accepted. 299**Pa**39, 148**A**907.

445-20½9-New. Burden of showing that such correction was made in bad faith rests on party contesting it. 299 **Pa**39, 148**A**907.

445-25½-New. Trust fund required to be set aside to pay fixed annual income may be increased or decreased so as to carry out testator's intention. 229 **AppDiv**574, 243**NYS**165 (trust fund which had increased in value held properly reduced by surrogate).

445-25⅓-New. Where trust fund set aside for purpose of conferring annuity was excessive, surrogate had power to direct transfer of part of fund to residuary legatee. 134**Misc**574, 236**NYS**316.

445-25¼-New. In setting aside property sufficient to produce certain income, trustees must fix value at time funds are set aside. 251**NY**458, 167**NE**586.

446-35 83**CalA**627, 257**P**163. **Action against trustee** is unknown to court of law. 330 **Ill** 42, 161**NE**62.

447-38½-New. One may have an action against trustees individually and at same time against trustees in their representative capacity. 222**MoA**768, 8**SW(2d)**98.

447-45 Use and occupation.-171**Minn**98, 213**NW**549.

448-55 136**Wash**63, 238**P**992. **Trustee is not barred by estoppel** from asserting claim in land conveyed by her in deed ineffective for want of consideration and proper execution. 25**F(2d)**412.

449-59 11**F(2d)**854.

449-60½-New. Actions by third persons.-Action to establish equitable right to charge trust estate with reasonable value of legal services rendered for its benefit may be maintained, though payment is not yet due. 80**CalA**377, 252**P** 647.

449-60⅓-New. Beneficiaries have **no** power to avoid conveyance by trustee on breach of condition subsequent. 243 **Mich**279, 220**NW**801.

449-63½-New. By third persons.-Remedy of third persons is in general against trustee only, but where estate is either indebted to trustee or would be if he should pay demand and trustee is insolvent or nonresident, trust estate may be reached directly by proceeding in equity. This is not changed by fact that trustee has expressly bound himself for benefit of estate, describing himself as trustee. 317 **Ill** 348, 148**NE**19.

449-67 75**CalA**212, 242**P**518.

450-77 83**CalA**627, 257**P**163.

450-80 203 **Iowa**552, 213**NW**270, 271 [citCyc].

452-93 100**NJEq**55, 134**A**738.

452-94½-New. Action to annul express trust is barred by laches where there was unexcused delay of fifteen years. 176**Minn**274, 223**NW**294.

452-95 99**Vt**329, 132**A**37.

452-96½-New. In action at law to enforce claim against trust estate, trustees are only necessary parties. 37**GaA**647, 141**SE**426.

452-98 Power of assignee as trustee to defend alone suit involving title to trust estate. **TexCivA** 23**SW(2d)**421.

453-4 11**F(2d)**854; 43 **OklACR**464, 472 [quotCyc]; **TexCivA** 284**SW**289; 105 **WVa**503, 143**SE**231.

454-5 43 **OklACR**464, 472 [quotCyc].

454-6 43 **OklACR**464, 472 [quotCyc]. **Trustee cannot represent cestui qui trust** in case of conflicting interests among them. 11**F(2d)**854.

455-7 43 **OklACR**464, 472 [quotCyc]; 35**Wyo** 496, 252**P**499, 504 [citCyc].

455-8 43 **OklACR**464, 472 [quotCyc].

456-15½-New. Nonresidents of indispensable party in suit relating to trust not excuse for failure to make such person party. 11**F(2d)**854. **Where plaintiff has definite aliquot interest in trust estate and is suing therefor,** trustees are only necessary parties defendant. 43 **OklACR**464.

456-16 75**CalA**212, 242**P**518.

456-19 76**CalA**232, 245**P**235; 329 **Ill** 334, 160**NE**597.

457-20 Substituted trustee may sue on guaranty executed to original trustee where name of beneficiary was not disclosed therein. 154**SC**401, 151**SE**571.

457-22 But see 239 **IllA**1.

458-33 213**Ala**205, 104**S**396 (allegations insufficient to show fraud by trustees signing contract by failure to inform plaintiff of existence of third trustee or that he would refuse to sign); 252 **IllA** 487 (declaration held insufficient to show personal liability of trustee); 222**Ky** 243, 300**SW**617; 193**NC**678, 137**SE**875 (petition to compel apportionment of income held sufficient); 51**SD**151, 212**NW** 866, 867 [citCyc]. **Complaint in action by heir of settlor of trust to annul trust and reach trust property** is insufficient where it shows that settlor died testate and it does not show that plaintiff is executor or devisee in will. 176**Minn**274, 223**NW**294. **Petition held sufficient** against demurrer. 222**MoA**768, 8**SW(2d)** 98.

458-34 99**Vt**329, 132**A**37. **Trustee suing must show representative character** by more than use of word "trustee." 99**Vt** 329, 132**A**37.

458-35 51**SD**151, 212**NW**866, 867 [cit Cyc]; 99**Vt**329, 132**A**37. **Trustee must show he sues for designated cestui.**-99**Vt** 329, 132**A**37.

459-36 51**SD**151, 212**NW**866, 867 [cit Cyc].

459-37 51**SD**151, 212**NW**866, 867 [cit Cyc].

459-42 80**CalA**377, 252**P**647; 267**Mass** 274, 166**NE**763.

459-43 89 **IndA**79, 147**NE**724; 130 **Or** 644, 281**P**169; **TexCivA** 5**SW(2d)**816.

460-45 80**CalA**377, 252**P**647. **Evidence held sufficient.**-230**Ky**401, 19**SW(2d)** 1088; 128**Misc**588, 219**NYS**569.

460-49 Recovery for breach of trust is limited to amount claimed in pleadings. 213**Ky**403, 281**SW**178.

461-54 Limitation of judgment to trust estate is authorized under some statutes where oil lease entitles lessor to royalties derived from gas produced and lessee assigned lease to trustees for syndicate. 203**Cal** 583, 265**P**218.

461-55 Decrees held proper.-50**RI** 263, 146**A**774.

461-55½-New. Claims becoming due during pendency of action.-Decree may require payment for legal services in suit brought before payment was due where part of claim became due during pendency of suit. 80**CalA**377, 252**P**647.

461-55⅓-New. Amount of lien on trust fund held within discretion of trial court. 50**RI** 263, 146**A**774.

461-58 Execution for personal injuries caused by defective condition of trust property should run against trustee as an individual. 267**Mass**274, 166**NE**763.

461-61 Order directing payment out of trust fund.-80**CalA**450, 252**P**652.

462-70 244 **IllA**89, 102 [quotCyc]; 256 **Mass**125, 152**NE**328. See also 247 **IllA** 98.

464-83 18**F(2d)**462; 37**F(2d)**259; 176 **Ark**1203, 6**SW(2d)**8; 323 **Ill** 283, 154**NE** 105; 115**Nebr**413, 213**NW**512; 130**Misc** 110, 222**NYS**532; 125 **Or**598, 268**P**63; 86 **PaSuper**222; **Imp** [1930] 3**DomLR**673. **Difficulty in making proof of expenses and disbursements by trustee** held no reason why rule of strict accountability should be relaxed. 323 **Ill** 283, 154**NE** 105. **Repudiation of obligation to account on demand of beneficiary** constitutes breach of trust. **Mass** 171**NE**721.

464-84 Good faith in selection of agent is not defense where trustee contended throughout litigation that no trust was created. **Mass** 171**NE**721.

465-86 115**Nebr**413, 213**NW**512; **Tex CivA** 15**SW(2d)**1090.

465-87 TexCivA 15**SW(2d)**1090.

465-87½-New. In Quebec testamentary provision, relieving a fiduciary legatee from any duty to account, is valid. **Can** [1929] 3**DomLR**801.

465-89 Action to compel account held not prematurely brought, after accounting demanded. 264**Mass**181, 162**NE**356.

465-91 TexCivA 15**SW(2d)**1090. **At expiration of trust period** beneficiaries are entitled to have estate settled. 240**Mich** 661, 216**NW**446.

465-92 Beneficiaries have right to demand accounting. 323 **Ill** 283, 154**NE** 105. **Where beneficiary is not absolute taker of property at time proceedings are brought,** beneficiary is not entitled to compulsory general accounting by trustees. **TexCivA** 15**SW(2d)**1090.

466-93½-New. Court may direct accounting on its own motion, where serious charges against trustee's execution of trust are made. 134**Misc**618, 235**NYS** 642.

466-94 123**Kan**254, 255**P**62; **Tex CommnA** 25**SW(2d)**826. **Where lands are devised in trust to maintain an infant, etc.**-**TexCommnA** 25**SW(2d)**826.

466-96 287**Pa**416, 135**A**252. But see 240 **Mich**661, 216**NW**446.

467-5 Pa 151**A**796.

467-8 NJ 129**A**429 (administrator with will annexed required to account).

467-10 Invalidity of contract under which property was delivered because of uncertainty does not relieve trustee from duty to account. **Mass** 171**NE**721. **Trustee's reliance on assurance from its agent that no trust was created** does not relieve it from duty to account. **Mass** 171**NE**721. **Trustee repudiating trust** held liable to account to beneficiary for proceeds of trust property with interest from date of receipt of funds. 251**Mich**132, 231**NW**96.

468-13 264**Mass**181, 162**NE**356 (merely because of knowledge of trust).

468-18 133**Misc**647, 233**NYS**667.

468-21 115**Nebr**413, 213**NW**512 (investments and interest); **RI** 149**A**799 (on removal of trustee). **Accounting upon continuance of trust after distribution.**-Notes and bonds sold in course of administration for amount fully accounted for with interest form no part of account under Code Civ. Proc. § 1699. 78**CalA** 638, 248**P**754.

469-22 115**Nebr**413, 213**NW**512.

469-24 Trustee's account of proceeds is not deficient for failure to disclose expenses, commissions, and fees paid where sale was handled by agents who

paid trustees net amount. **NJOrphans' Ct** 148A193.

469–30 104**Conn**169, 132A902.

469–31 104**Conn**169, 132A902; 323 **Ill** 283, 154**NE**105; 265**Mass**249, 163**NE**848; 287**Pa**416, 135A252 (courts should be alert to require accounting); 108**WVa** 194, 151**SE**700; 196**Wis**10, 219**NW**361. **In South Carolina.**–149**SC**227, 146**SE**869.

470–33 In **Kansas.**–121**Kan**57, 245**P** 1039.

470–34 **Imp** [1930] 3**DomLR**673. **In Michigan.**–233**Mich**499, 206**NW**979. **In New York,** etc. 135**Misc**661, 240**NYS** 703 (surrogate's court has complete jurisdiction). **Trust created by deed** is subject to supervision of probate court, where stipulation in trust deed subjected trustee to supervision of district court, which functions as equity court and as probate court, and parties mutually invoked probate jurisdiction. 207 **Iowa** 109, 222**NW**356.

471–36 **Court has jurisdiction** of subject matter of accounting, though trustee is not made party defendant as such. 80 **Colo** 434, 252**P**883.

471–39½–New. **Trustee of trust of personalty** created inter vivos may be called to account in jurisdiction of situs of trust although he resides in another jurisdiction. **NJCh** 149A50.

471–40 141**Wash**676, 252**P**91, 93 [cit Cyc], 50**ALR**207. **Doctrine of laches and not limitation statute** governs suits for accounting. 40**F(2d)**508.

472–43 **Where an express trust is established,** etc. 253 **IllA**288.

472–47 **Intervention by creditors of beneficiary of spendthrift trust.**–127**Misc** 197, 216**NYS**334.

473–51½–New. **Injunction.**–Executors may be restrained from delivering property to trustee pending accounting where he has dissipated or misapplied property previously received. **NJPrerog** 148A744.

473–52 **Action by administrator.**–44 **Philippine**343.

474–56 **Failure to make cestuis que trust parties** does not require dismissal of bill. 80**Colo** 434, 252**P**883, 884 [cit CJ]. **Failure to make defendant** party as trustee does not require dismissal of bill. 80**Colo** 434, 252**P**883. **Nonresident cestuis.**–80**Colo** 434, 252**P**883.

474–58 38**F(2d)**195.

474–60½–New. **Notice.**–Notice of petition to restrain distribution by foreign trustee legatee and delivery of further assets may be served on his proctor in intermediate accounting of executors. **NJPrerog** 148A744.

474–61 **Complaints held sufficient.**–196 **Wis**10, 219**NW**361. **Complaints held insufficient.**–**TexCivA** 15**SW(2d)**1090.

475–71½–New. Decree for accounting may be had under prayer for general relief without allegation of breach of trust. 264**Mass**181, 162**NE**356.

476–78 **TexCivA** 6**SW(2d)**393, 395 [cit Cyc]; 149**Wash**618, 272**P**55. See also 161**Ga**864, 132**SE**65. **If a trustee claims allowances of credits,** etc. 149**Wash**618, 272**P**55.

476–79 **TexCivA** 6**SW(2d)**393, 395 [cit Cyc].

476–84 233**Mich**494, 207**NW**1.

477–89 **Evidence held sufficient.**–123**Kan** 646, 256**P**1012.

477–89½–New. **Evidence held insufficient** to show payment of note by deceased trustee to whom land was conveyed in trust to pay note and other indebtedness. 161**Ga**864, 132**SE**65.

477–89½–New. Evidence held to sustain denial of prayer for accounting of rents. 323 **Ill** 73, 153**NE**735.

477–89¼–New. Evidence held to show absence of cestui's assent to unauthorized transfer for administration. 141 **Wash**676, 252**P**91, 50**ALR**207.

477–89½–New. Evidence held sufficient to show right to accounting. **TexCivA** 28**W(2d)**885.

477–89¾–New. Evidence held sufficient to warrant judgment for specific property or its value. 201**Cal** 322, 256**P**1099.

477–89½–New. Evidence held sufficient to show necessity for accounting by trustee to widow's executrix. 157**Md**287, 145 **A**773.

477–91 **Complaint for accounting, alleging conversion, justified judgment in personam.** 80**Colo** 434, 252**P**883.

477–92 100**WVa**272, 130**SE**444 (decree continuing trust to secure payment of bequests and annuities held proper). **Decree continuing trust** to secure payment of bequests and annuities held not to preclude heir from receiving distribution share or preventing sale of his interest by his trustee in bankruptcy. 100**WVa**272, 130**SE**444.

477–95½–New. Where court directed that interest be charged against trustee, plaintiff is entitled to interest on balance found at end of accounting period and on annual intermediate balances. 100 **CalA**416, 280**P**181(2dcase).

477–97 233**Mich**494, 207**NW**1; 149**Wash** 618, 272**P**55.

477–98 **Mass** 167**NE**338; 233**Mich**494, 207**NW**1 (fraud or embezzlement not shown in sale of stock belonging to cestui que trust).

478–5 35**Ariz**457, 281**P**38; 115**Nebr**413, 213**NW**512; **Imp** [1930] 3**DomLR**673.

478–6 158**La**537, 104**S**318 (in suit to annul sale to agent latter is liable for monthly rentals to date of restoration of property).

478–10 **Difference between inventory value and actual value** may be allowed as a loss. 256**Mass**78, 152**NE**71.

478–11½–New. Surcharge against trustees must be based on proved items of improper disbursement and not upon excess over reasonable cost of maintaining beneficiary of trust, and surcharge based on excessive payment cannot be allowed. 133**Misc**72, 230**NYS**774.

478–12 16**F(2d)**215; 35**Ariz**457, 281**P** 38 (amount held not unreasonable); 44 **OklACR**225. **Where testamentary trustee's appointment is void** because will not legally established, he is not entitled to allowance for premiums on bond. 224**AppDiv**31, 229**NYS**523.

478–13 158**La**537, 104**S**318.

479–14 See also 149**Wash**618, 272**P**55. **Payments to beneficiary.**–35**Ariz**457, 281 **P**38 (facts held to show no double credit to trustee). **Maintenance of cestui que trust.**–121 **Or**351, 255**P**333. **Reimbursement of expenses or losses** cannot be made out of trust property in absence of good faith and common prudence on part of trustee. 317 **Ill** 348, 148**NE**19. **Unusual expenses** enhancing value of capital of trust should be paid out of corpus and not income. 196**Cal** 29, 235**P** 725.

479–15 16**F(2d)**215; 136**Wash**243, 239**P** 546, 241 **P**684.

479–21 But see 149**Wash**618, 272**P**55.

480–23 35**Ariz**457, 281**P**38; 256 **IllA**291 (for services by members of trustee's law firm); 313**Mo** 552, 281**SW**744; 136**Wash** 243, 239**P**546, 241**P**684 (where beneficiary was party to action). **Nature of services must be shown.**–202 **Iowa**1094, 211**NW**488. **Allowance held insufficient.**–**MoA** 290**SW**644. **Reasonable attorney's fee determined.**–**NJ** 150A561.

481–30 23**F(2d)**357; 227**Ky**364, 13**SW** **(2d)**268. **In Illinois.**–323 **Ill** 283, 154**NE** 105.

482–32 16**F(2d)**805, 807 [citCyc].

482–34 313**Mo** 552, 281**SW**744.

482–37 **NJ** 130A733.

483–39 132**Misc**150, 229**NYS**631; 7**Pa Dist&Co** 135.

484–42 222**MoA**230, 297**SW**115, 117 [citCyc].

484–44 267**Mass**185, 166**NE**568. See also 133**Misc**72, 230**NYS**774.

484–45 267**Mass**185, 166**NE**568.

484–47½–New. In Saskatchewan, in absence of express prior stipulation with cestui que trust, trustee will not be allowed remuneration for personal trouble or loss of time. **Sask** [1930] 2**DomLR**6.

485–51 But see 102**NJEq**41, 139A801.

485–53 100**CalA**87, 280**P**176(2dcase).

485–54 **Compensation of trustee fixed by will** is chargeable to corpus for first year and thereafter to income. 126**Misc** 54, 213**NYS**286.

486–55 121 **Or**351, 255**P**333.

486–56 213**AppDiv**318, 210**NYS**379; 121 **Or**351, 255**P**333. **Attorney's fees and executor's commissions,** being expenses of administration, are payable out of corpus as distinguished from income of estate. 196**Cal** 29, 235**P**725.

486–58½–New. **Premiums on trustee's bond are payable only out of income.** 9**PaDist&Co** 125.

486–59 198**NC**562, 152**SE**625(1stcase) (trustee is not entitled to commission as legal right).

486–60 9**PaDist&Co** 125. **Trustee is not entitled to percentage of funds** handled as matter of right. **MoA** 290**SW**644.

486–62 **NJ** 150A561 (trustee practically managing manufacturing corporation held entitled to commission on corpus and income). But see 132**Misc**150, 229 **NYS**631. **Personal property.**–**NJPrerog** 145A110(2dcase). **Real estate.**–251**NY** 39, 166**NE**797; 136**Misc**122, 238**NYS**753.

487–63 **NJPrerog** 145A110(2dcase); 254 **NY**292, 172**NE**513.

487–64 **NJCh** 150A5 (expense of preparing account).

487–65½–New. Computation of commissions of trustees dying after amendment to statute relating to fees. 136**Misc**122, 238**NYS**753.

487–65¼–New. Trustees cannot claim commissions on real estate which vested in remaindermen, since there was no distribution or delivery of real property. 136**Misc**122, 238**NYS**753.

487–65¼–New. Mutual releases executed between trustees and beneficiaries cannot be construed to defeat allowance of commissions on principal. 136**Misc**122, 238**NYS**753.

487–68 **Trustee's commissions on principal are to be based** on value of principal at termination of trust. 9**PaDist& Co** 125.

487–70 256**Mass**113, 153**NE**395; 135 **Misc**899, 241**NYS**500 (commissions on stock paid life beneficiary); 135**Misc**118, 236**NYS**685. **Where taxes are paid by trustee of landowner and recovered by him from lessee,** under lease requiring tenant to pay taxes, they are part of rent and trustee may have commission thereon under statute. 28**Hawaii**502. **Trustees collecting taxes from lessees and paying them to authorities,** though not required to do so, are not entitled to commissions thereon. 136**Misc**442, 243 **NYS**239.

489–83 29**Hawaii**73; 136**Wash**243, 239 **P**546, 241**P**684. **In Hawaii.**–27**Hawaii** 780. **Order striking commission for sale from final account** reversed in absence of evidence of mismanagement. 136**Wash**243, 239**P**546, 241**P**684.

490–87 **Joint trustee could not receive entire compensation allowable,** where he did very little or none of work, after other trustee insisted on managing everything himself. 267**Mass**185, 166**NE** 568.

490–87½–New. **Reasonable compensation for services of joint trustees under will** is question for probate court. 267 **Mass**185, 166**NE**568.

490–89 **Where trust for life beneficiary terminated on his death,** substituted trustee appointed thereafter is not entitled to commissions on corpus. 228**App Div**203, 239**NYS**604.

490–91½–New. **Consolidated trust company.**–Where trust company appointed trustee and conservator is absorbed by national bank, bank is not entitled to allowance as fiduciary under original appointment but must account only de son tort. 261**Mass**217, 158**NE**780.

491–95 See also 78**CalA**638, 248**P**754.

491–99½–New. **Renunciation of executor's fees.**–Executrix, renouncing right to designate compensation as executrix, and electing to take compensation allowed her by law in lieu thereof, is nevertheless, entitled to compensation fixed by will for trusteeship. 96**CalA**637, 274**P** 612.

491–99½–New. Where will fixes one payment for both services of executor and trustee, renunciation of payment for executor's fees should not be allowed, unless it carries with it renunciation of whole payment, with all consequences thereof. 96**CalA**637, 274**P**612.

492–4 **CalA** 290**P**897; 267**Mass**185, 166 **NE**568; 313**Mo** 552, 281**SW**744, 761 [cit Cyc]. **In New York.**–242**NY**240, 151**NE** 439.

492–5 28**Hawaii**329.

492–7 7**PaDist&Co** 405.

493–9 267**Mass**185, 166**NE**568. **Five thousand dollars held reasonable com-**

pensation for services in making valueless oil lease worth seventy-five thousand dollars, and also usual price of such services or amount reasonably contemplated. 219Ky180, 292SW794. **Increase in value of property and increase of receipts** as result of trustee's efforts may be considered in fixing compensation. 219Ky180, 292SW794.

493-10 78CalA310, 248P764 (amount held reasonable); 219Ky180, 292SW794; MoA 290SW644; 121Or351, 255P333; NB [1929] 4DomLR15; Ont [1926] 4 DomLR776. **Trustee held not entitled to further allowance on appeal.**–78CalA 251, 248P310.

494-11 78CalA638, 248P754. **Acceptance of the trust constitutes agreement** to receive such compensation as instrument directs. 78CalA638, 248P754. **Commissions held not inadequate.**–78 CalA638, 248P754 (ten percent of estate). **Court is without authority to allow** greater amount than fixed by instrument. 78CalA638, 248P754.

494-15 In absence of contract trustee is entitled to reasonable compensation. 219Ky180, 292SW794.

494-17 130Misc527, 224NYS466. **No extra compensation allowed** for holding auction sale. 149Va597, 140SE810. **Trustee is not entitled to extra compensation** for services in respect of his general duties as trustee. MoA 290SW644.

495-19½-New. Trustee not entitled to extra compensation for running testator's business. 213AppDiv395, 211NYS 128.

495-20 41F(2d)547; 28Hawaii590; 253 IllA288; Mass 167NE338; 115Nebr413, 213NW512 (no agreement for compensation); 86PaSuper222, 133SC43; 130SE 550 (from date of failure to discharge duty); Sask [1930] 2DomLR6. **A trustee who makes a sale in violation of his trust,** etc. 28Hawaii590. **Necessity of fraud or bad faith.**–In some jurisdictions, etc. 241NY374, 150NE148.

496-22 78CalA310, 248P764; 136Misc 122, 238NYS753 (failure to file oaths in surrogate's court).

496-24 115Nebr413, 213NW512 (lending to self and conversion).

496-27 115Nebr413, 213NW512.

497-29 See also 44 OklACR239.

497-34 35Ariz457, 281P38 (allowance of compensation held proper in view of manner in which estate handled).

497-37½-New. Generally application for allowance of trustee's claims may be presented informally by petition or motion and without process. 100WVa612, 131SE455.

498-40½-New. Allowance for transportation expenses discretionary and not subject to review. 259Mass578, 157NE 334.

498-41 86PaSuper222.

498-43 Imp [1930] 3DomLR673.

498-44 78CalA638, 248P754 (items of rent collected held sufficient).

498-45 Where court had assumed jurisdiction of administration of trust, declaration by trustee in report as to fidelity of his administration was irrelevant. 149Md15, 130A62.

498-48 35Ariz457, 281P38 (absence reasonably accounted for by fact of destruction by fire).

499-51 255 IllA78 (presumption of approval from failure to object).

499-55 35Ariz457, 281P38 (cestui que trust).

499-57 134Misc212, 236NYS149. **For example,** beneficiary not questioning correctness of testamentary trustee's settlements, on trial of exceptions, cannot avail himself of such right in suit to surcharge final settlement. 227Ky364, 13SW(2d)268. **Circumstances not amounting to estoppel.**–Mass 167NE338; 134Misc212, 236NYS149. **Objections that trustee borrowed money and made loans at low rate of interest** were without merit where life tenant approved such acts. 134Misc212, 236NYS149.

499-58½-New. Authorization of particular investment by decree of court does not preclude beneficiaries of trust estate from contesting accounts. Mass 167NE 338.

500-59 RI 149A799 (on removal of trustee).

500-60 Account stated by master must stand if warranted by findings, in absence of objection or discussion as to items. 264Mass181, 162NE356.

500-62 Questions relating to distributions under testatmentary trust when confined to past and not seeking future guidance may be considered. Mass 172 NE647.

500-68 158La61, 103S443 (amounts drawn by daughter during mother's lifetime on account in mother's name with authority to daughter to draw are presumed to have been drawn for another's benefit).

500-70 Beneficiary seeking to surcharge trustee for loss of securities has burden of showing negligence. 136 Misc881, 242NYS210.

500-71½-New. , or with neglect and mismanagement. 133SC43, 130SE550.

500-72 35Ariz457, 281P38; 110Conn208, 147A675; 207Iowa109, 222NW356; 254 Mass464, 150NE220 (where court held that burden of proving amount paid to broker was reasonable was on accountant); Mass 167NE338; NJCh 150A5; 300Pa280, 150A599; Imp [1930] 3Dom LR673. **Burden of proof is on trustee to render accounting.**–133SC43, 130SE 550. **Trustee destroying evidence of transaction** will be held responsible for full amount for which he is presumptively liable in absence of proof of expenses. 300Pa280, 150A599.

501-76 256Mass78, 152NE71.

501-77 35Ariz457, 281P38.

501-79 35Ariz457, 281P38; 207Cal 676, 279P775 (as to doubling of credits, honesty, and accuracy of trustee's account); 207Iowa109, 222NW356; 138Misc149, 245NYS147. **Evidence held sufficient.**–254Mass464, 150NE220; Mass 167NE 338; 134Misc212, 236NYS149. **Evidence held insufficient** to warrant decree including mortgage in fund for which trustees were chargeable. Mass 167NE338. **Evidence held not to sustain beneficiaries' exceptions for mismanagement.**–136 Wash243, 239P546, 241P684.

502-83 Sufficient amount may be reserved out of share of remainderman to cover ultimate amount with costs, involved in another action between trustee and remainderman. 125Misc354, 211 NYS626.

502-84½-New. Question of procurement of funds to pay commissions of trustees and expenses of accounting allowed is determined on settlement of decree. 136 Misc122, 238NYS753.

502-85 Testamentary trustee's final settlement, accounting for every cent due beneficiaries, after cross-examination of trustee and his coexecutors, and confirmed without objection by county court, found correct by special commissioner in suit to surcharge it, and approved by chancellor, held correct. 227 Ky364, 13SW(2d)268.

503-89 Mass 172NE647.

503-90 33 OhA532, 170NE31 (settlement of accounts held not conclusive as to construction of will); 288Pa337, 135 A751 (holding that adjudication must properly call attention to specific matters objected to).

503-91½-New. Provision as to disbursements from principal or income.–That probate court on approval of testamentary trustee's account provided for payment of his and attorney's fees from income bequeathed to annuitants did not bind court to charge such fees to income instead of corpus of estate on settlement on subsequent account. 205Cal 619, 272P296.

503-94 Petition to surcharge testamentary trustee's final settlement and recover for violations of trust, should definitely and specifically point out errors in settlements complained of. 227Ky 364, 13SW(2d)268. **In Pennsylvania.**–299Pa32, 148A912.

504-95 In Pennsylvania.–288Pa337, 135 A751.

504-97 299Pa32, 148A912 (refusal to allow bill of review to surcharge account for depreciation held not abuse of discretion).

504-5 Statute permitting appeal must be liberally construed.–35 OhA224, 172 NE383. **Surety on trustee's bond can appeal from finding of probate court** that error had been made in previous account approved by court. 35 OhA 224, 172NE383.

505-8 Presumption that trustee acted in good faith from finding by probate court that he was not liable for loss because of sale of property. 254Mass 464, 150NE220.

505-9 Appellate court held to decide case on evidence after giving due weight to decision of trial court. 254Mass464, 150NE220. **Finding of probate court** not reviewable when supported by evidence. 254Mass464, 150NE220. **Questions of fact.**–207 Iowa109, 222NW356. **Executors' failure to file inventory and make settlements with county court** cannot be considered on appeal from judgment for testamentary trustee in action to surcharge latter's final settlement, where executors are not parties. 227Ky 364, 13SW(2d)268. **Proceedings pursuant to rescript.**–Mass 167NE258. **Where evidence is not reported as agreed to,** statement of court in written decision as to correction of mathematical errors and agreement of parties as to correctness of figures is to be taken as true. Mass 167NE258.

505-13 37F(2d)259; 35Ariz457, 281P 38 (settlement held good against collateral attack when approved by court).

506-16 37F(2d)259. **Beneficiary's hostility because of trustee's exorbitant charge** is not defense to charge of duress where consent to charge was procured by threat of withholding property. 37F(2d)259. **Release in form of judgment of dismissal of action** without judicial injury may be disregarded as release if procured by trustee in violation of duties. 37F(2d)259. **Releases exacted by coercion or duress or induced by fraud** will be set aside in equity. 37F(2d)259.

507-19 Imp [1930] 3DomLR673.

507-20 135Misc899, 241NYS500; 6Pa Dist&Co 793.

507-21 NJCh 150A5.

507-21½-New. Court's discretion in regard to costs will not be interfered with unless abused. 224Ky71, 5SW(2d) 269.

507-22 256 IllA291 (fees of guardian ad litem); NJCh 150A5; 136Misc122, 238NYS753.

508-25 28Hawaii590; 152Md289, 136A 269 (where accounts of trustee were incomplete, necessitating further audits).

509-30½-New. Estate of deceased trustee held not liable for expenses of cestui in collecting evidence and preparing exceptions, based on trustee's mismanagement, to successor's report. 87IndA407, 158NE826.

509-34 Trustee making premature accounting, before decree was decided on appeal, held chargeable with costs. 152Md289, 136A269.

509-35 262Mass509, 160NE337.

510-42 Right of beneficiary under will to enforce trust is dependent on peculiar facts in particular case. TexCivA 15 SW(2d)1090.

511-46 321 Ill 436, 152NE217; 252Mass 569, 147NE835.

512-56½-New. Claim for breach of trust agreement is in nature of general demand for damages. Iowa 231 NW311.

513-67 274US640, 47SCt714, 71Led 1270; 198Cal 129, 243P439, 443 [cit Cyc], 43ALR1235; IndA 163NE109. **Evidence insufficient to show breach of trust.**–120 Or658, 252P89. **In case of wrongful conversion by trustee,** cestui que trust may have accounting in equity against trustee alone, or may join for such accounting purchaser in bad faith from trustee with notice of trust. 218Ala207, 118S389. **Third person, who has aided and abetted trustee of express trust** in defrauding cestui que trust of trust property, may be joined as defendant, in cestui que trust's action against trustee individually in tort for damages. IndA 163NE109.

514-69 101CalA402, 281P698. **Person securing registration in his name of land belonging to another,** under agreement to convey to latter after regis-

tration, is liable for breach of trust where he conveys to bona fide purchaser in violation of agreement. 50Philippine 193.

514-70 Any diversion of use of funds to purpose other than that for which fund was delivered to trustee renders trustee accountable to owner therefor. 75CalA44, 242P109. **Though money appropriated by trustee to payment of debts of trustor** is diversive from purpose for which fund was delivered to trustee, he is accountable to owner therefor. 75CalA44, 242P109.

514-77 198Cal 129, 243P439, 443 [cit Cyc], 43ALR1235.

519-5 Pa 151A796.

519-6 255 IllA78; Iowa 229NW844; Can [1929] 3DomLR91. **Beneficiary not estopped by conduct,** unless it was duty to speak or act and he has intentionally misled another. 101WVa522, 133 SE154.

520-10 246Mich1, 224NW370.

522-25 190NC520, 130SE189 (parties to enforce trust must be either cestui que trust or trustee or have some legal interest in subject matter of trust).

522-27½-New. In order to declare trust by appointment of trustee, party claiming right to trusteeship must have legal or equitable right in præsenti in property. 28 OhA227, 162NE627.

522-28 42F(2d)1; 196Cal 260, 237P542. **Creditor not party to declaration of trust** under seal cannot sue thereon. 255Mass537, 152NE623, 47ALR1.

523-29 Death of life tenant does not preclude personal representatives from establishing tenant's rights vested in his life time. Mass 172NE106.

523-30 20 OhA400, 152NE394 (purchaser of lot part of tract conveyed by owner to trust company to be conveyed in lots as sold to third persons). **Trust agreement is valid** as contract made for benefit of third person and is not invalid as to such third person for want of mutuality. 20 OhA400, 152 NE394.

524-35 20 OhA400, 152NE394 (purchaser of lots held in trust under agreement to convey to purchasers as sold).

524-37 In case of trust resembling testamentary trust, special administratrix may maintain action for benefit of heirs of settlor. 73CalA204, 238P727.

524-39 290Pa566, 139A450.

525-46 44Philippine343; Utah 290P 161. **Fact that conveyance is in fraud of creditors of plaintiff's husband** is no defense to action to impress trust in property transferred to attorney or adviser of plaintiff. 222AppDiv285, 226 NYS124.

526-20 253 IllA288. **Where trustee leaves solvent estate and no creditor,** his heirs and personal representatives stand in no other or better relation to trust and properties thereof than trustee would have occupied if living. 198Cal 129, 243P439, 43ALR1235.

526-51 253 IllA288; 251NY237, 167NE 428; 138Misc117, 244NYS713. **Children of deceased devisee, who acquiesced in unauthorized sale by executors,** hold legal title in trust for purchasers. 144 Va113, 131SE217.

526-52 253 IllA288; 202 Iowa764, 211 NW257; 80Mont174, 259P1060; RI 148 A319 (wife); 48SD521, 205NW71, 72 [citCyc].

527-53 202 Iowa764, 211NW257; 252 NY366, 169NE612; 48SD521, 205NW71, 72 [citCyc]. **Trust is enforceable as lien against property** where money fraudulently obtained was used to pay mortgage and mortgagee parted with nothing. 202 Iowa764, 211NW257.

527-54 IndA 168NE488; IndA 170NE 346(2dcase); 222AppDiv285, 226NYS 124; 196Wis10, 219NW361, 365 [cit Cyc].

527-55 196Wis10, 219NW361.

527-56 208Ky702, 271SW1064 (husband appropriating wife's estate without administration).

527-58 80Mont174, 259P1060. **Money fraudulently obtained and used to pay mortgage** cannot be recovered from holder of mortgage who took for value without notice of fraud, though money was paid by reason of mortgagor's fraud. 202 Iowa764, 211NW257.

528-60½-New. Intermediary of sale of corporate assets to another corporation is not liable as trustee where under trust agreement he parted with title to such assets by conveying title to other corporation. 29Ariz357, 241P514.

528-62 14F(2d)494; 15F(2d)940; Del Ch 141A223; 161Ga698, 132SE626; 204 Iowa497, 215NW728; 232Mich221, 205 NW81; 169Minn209, 210NW889, 48ALR 1266 (injured party has trust in house built by trustee with embezzled funds); 221MoA329, 273SW772; 190NC520, 130 SE189 (only one interested in trust can maintain action to recover funds); 194NC312, 139SE601; ND 230NW18; 22 OhA487, 153NE909; 297Pa406, 147 A86; 48SD521, 205NW71, 72 [citCyc]; TexCommnA 290SW522; TexCommnA 6SW(2d)108; TexCivA 17SW(2d)1102; Wash 291P1077.

529-66 169Minn209, 210NW889, 48ALR 1266. See also 36GaA787, 138SE262 [citCyc].

529-67 169Minn209, 210NW889, 48ALR 1266.

529-68 15F(2d)940 (stock in trade); 114Nebr664, 209NW249.

529-76 See also 36GaA787, 138SE262 [citCyc].

529-77 TexCivA 284SW331.

529-78½-New. Rule applies to property as well as money. 15F(2d)940.

529-78¼-New. A trust fund wholly depleted cannot be treated as reappearing in subsequent accumulations. 38 F(2d)455.

530-79 15F(2d)940; 161Ga698, 132SE 626; Iowa 231NW311; 169Minn209, 210 NW889, 48ALR1266; 117Nebr358, 220 NW593; NJCh 149A636(2dcase); Tex CivA 6SW(2d)393; 198Wis9, 223NW82. **Impressing trust on assets in hands of trustee's administrator.**–41 OklACR 93.

530-80 205 Iowa1064, 217NW250.

530-81 Iowa 231NW311.

530-82 218Ala559, 119S676; 32Ariz 444, 269P886; 195Cal 132, 231P987 (proceeds of sale of property purchased at tax sale and willed by purchaser to his relatives may be recovered from them, though proceeds cannot be traced to any specific fund held by purchaser at his death and though no claim was presented against his estate); 48 Ida 291, 281P1114; 48 Ida454, 282P868; 252Mass358, 148NE224; 169Minn209, 210NW889, 48ALR1266; 221MoA329, 273SW772; MoA 4SW(2d)856; 251NY 1, 166NE783; 126Misc479, 214NYS167 (where bona fide purchasers do not intervene); NC 154SE623; 9PaDist&Co 740. **Trust can be impressed on building** built by use of embezzled funds, though land was owned by embezzler and wife. 169Minn209, 210NW889, 48 ALR1266.

531-83 219Ala478, 122S652.

531-84 198Wis9, 223NW82.

531-86 96Fla834, 119S140; 161Ga698, 132SE626; 205 Iowa114, 213NW414; 221MoA329, 273SW772; TexCivA 17SW (2d)1102. **That changes in form of moneys render pursuit difficult** does not render it unavailing. 230AppDiv88, 243 NYS299.

532-88½-New. Stock in trade.–Beneficiaries having undivided interest in stock in trade may enforce trust therein or its proceeds, though original goods have been sold or substituted where stock at all times exceeded their interest. 15 F(2d)940.

532-89 32Ariz444, 259P886; 44 Ida514, 258P544, 545 [citCyc]; 115Nebr444, 213 NW745; 230AppDiv88, 243NYS299; TexCivA 275SW498.

532-90 TexCivA 275SW498; TexCivA 6SW(2d)393.

532-92 TexCommnA 6SW(2d)108.

533-99 48 Ida291, 281P1114; 232Mich 221, 205NW81. **Where a trustee makes an unauthorized sale, etc.**–232Mich221, 205NW81.

534-3 81CalA678, 254P644.

534-4 268US121, 45SCt451, 69L ed876; TexCivA 23SW(2d)414 (specific property or value thereof).

535-9 52Nev372, 287P272 (following property or holding trustee personally liable); TexCommnA 6SW(2d)108.

535-10 232Mich221, 205NW81, 82 [cit Cyc]. **Effect of judgment taken against trustee before sale.**–232Mich221, 205NW 81.

536-14 198Cal 129, 243P439, 43ALR 1235.

536-16 14F(2d)284; 21F(2d)993; 29 F(2d)776; 36F(2d)732; 198Cal 129, 243 P439, 43ALR1235; 104Conn169, 132A 902; Iowa 213NW414; 219Ky731, 294 SW499; SD 227NW568; TexCivA 281 SW264, 268 [citCyc]; TexCivA 6SW (2d)393; TexCivA 17SW(2d)1102. See also 115Nebr444, 216NW302. **The executors of a deceased trustee, etc.**–198 Cal 129, 243P439, 43ALR1235.

536-17 TexCivA 17SW(2d)1102.

536-18 104Conn169, 132A902; 205 Iowa114, 213NW414; Mo 8SW(2d)944; TexCivA 281SW264, 268 [citCyc].

536-19 198Cal 129, 243P439, 43ALR 1235; 221MoA329, 273SW772; 247NY 52, 159NE720; 298Pa388, 148A493; TexCivA 281SW264, 268 [citCyc].

536-19½-New. Trustee is presumed to make disbursements from his own money. 15F(2d)582.

536-19⅛-New. There is strong presumption that fiduciary is not to deal, for his own profit, with money of trust. 247NY52, 159NE720.

537-20 218Ala559, 119S676; 96Fla834, 119S140; 161Ga698, 132SE626; 219Ky 731, 294SW499. **Administrator de bonis non held not entitled to establish trust on property purchased by deceased executor** as to part of deposit representing sum borrowed by executor upon pledge of property belonging to estate. 218Ala559, 119S676.

538-21 Lien on theory of tracing trust funds cannot be impressed on property which is not shown to have been enhanced or augmented by unlawful application. 31F(2d)50.

538-24 96Fla834, 119S140.

538-25 195Cal 132, 231P987; 221Ky 55, 297SW938; MoA 6SW(2d)961; 115 Nebr444, 216NW302; 298Pa388, 148A 493; TexCommnA 10SW(2d)707; Tex CivA 281SW264, 268 [citCyc]; TexCivA 6SW(2d)393, 395 [quotCyc]. But see Can [1929] 3DomLR91.

539-26 TexCommnA 10SW(2d)707; TexCivA 281SW264, 268 [citCyc]; Tex CivA 6SW(2d)393, 395 [quotCyc].

539-27 TexCivA 6SW(2d)393, 395 [quotCyc]; TexCivA 17SW(2d)1102.

539-28 TexCivA 6SW(2d)393, 395 [quotCyc].

539-32 16F(2d)911; 25F(2d)599; CalA 28SP29; DelCh 151A217; 96Fla834, 119 S140; 98Fla1126, 125S360; 205 Iowa 114, 213NW414; 221Ky55, 297SW938; 221MoA329, 273SW772; 220MoA1019, 278SW793; 79Mont233, 255P733; 128 Misc25, 217NYS611; 130 Okl 206, 266 P472; 38 OklACR570; 52SD342, 217 NW512; TexCivA 275SW498; 37Wyo 4, 257P345, 53ALR560.

540-37 Ariz 287P292; 205 Iowa114, 213NW417; 252Mass358, 148NE224; 221MoA329, 273SW772; 220MoA1019, 278SW793; 38 OklACR570. **Presumption that trustee has preserved cash trust fund in his cash balance** applies solely to lowest cash balance subsequent to creation of trust and prior to insolvency. 205 Iowa114, 213NW 417. **Presumption is rebuttable.**–204 Iowa1317, 217NW438.

541-41½-New. Rule for proving dissipation of trust fund.–In order to show dissipation of trust fund it must be shown that fund can be traced and has been dissipated without augmenting funds of trustee, or that general fund has been dissipated and estate of trustee has arisen from other sources. 220MoA1019, 278SW793.

541-44 14F(2d)284; 74CalA714, 241P 905; 104Conn169, 132A902; 221Ky55, 297SW938; MoA 6SW(2d)961.

542-45 TexCommnA 6SW(2d)108.

542-46 TexCommnA 6SW(2d)108.

542-49 221MoA329, 273SW772.

543-50 52SD342, 217NW512.

543-53 84Colo 157, 268P523; IndA 173 NE460; 205 Iowa114, 213NW414; 322 Mo 29, 14SW(2d)597. **Cestui que trust must clearly prove** that trust property or its proceeds went into specific identified property coming into hands of receiver. 15F(2d)175.

544-55 205 Iowa114, 213NW414; 221 Ky55, 297SW938.

544-56 14F(2d)494 (holding undivided interest of children in community property not traceable into bankrupt stock); 15F(2d)175; IndA 173NE460; 23 OhA 409, 155NE163.

545-60 13F(2d)887; 27F(2d)657; IndA 149NE360; 235Ky658, 32SW(2d) 8; TexCivA 6SW(2d)393. **Rights of mortgagor or mortgagee in sum recovered by other for conversion of property** and held in trust may be enforced by appropriate remedies. 190NC480, 130SE319. **Where trust fund was commingled with funds belonging to trust company,** and commingled fund was invested in securities authorized by statute to be subject of investment of trust funds, cestui que trust was not limited to satisfaction of claim from lowest amount of cash on hand after trust was created, but he could follow trust fund into securities. 96Fla834, 119S140.

547-67 TexCommnA 2SW(2d)422.

547-68 Proceedings to impress trust on funds withdrawn by depositor before bank's insolvency must fail where funds were used in improvement of property subsequently transferred to bank. 20F(2d)693.

548-69 83NH417, 143A468; TexCivA 295SW646; TexCivA 298SW170, 176 [quotCyc].

548-74 13F(2d)887, 890 [citCyc]; 48 SD521, 205NW71, 72 [citCyc].

548-75 13F(2d)887, 889 [citCyc]; 32 F(2d)368; 217Ala167, 115S153; 172Ark 521, 289SW488; 169Ga576, 150SE835; 41 Ida776, 242P785; 223Ky238, 3SW (2d)636; 256Mass302, 152NE342; 266 Mass337, 165NE119; 232Mich221, 205 NW81; 323Mo 1000, 20SW(2d)502; 115 Nebr444, 213NW745; NJCh 151A126; 198NC433, 152SE34; 124 Okl 193, 255 P577; 128 Or115, 268P1014; 297Pa406, 147A86; 297Pa551, 147A657; 48SD521, 205NW71, 72 [citCyc]; 54SD131, 222 NW946(2dcase); SD 227NW568; 160 Tenn1, 22SW(2d)1; TexCivA 284SW 253; TexCivA 293SW632; TexCivA 22 SW(2d)520. But see TexCivA 23SW (2d)414. **Fraudulent purchasers from guardian** of oil and gas lease must account for proceeds of its sale regardless of whether their title to leasehold is doubtful and uncertain. 268US121, 45 SCt451, 69Led876. **It is immaterial so far as surviving tenant is concerned** that husband and wife were named tenants by entireties in deed of conveyance. 297Pa406, 147A86.

550-76 13F(2d)887, 889 [citCyc].

550-86 13F(2d)887, 889 [citCyc]. **Where trustee misappropriated trust funds** in paying off mortgage for which he was personally liable, cestui can have debt charged against lands. NJCh 151 A126.

551-92 172Ark521, 289SW488; CalA 288P29; 161Ga698, 132SE626; 41 Ida 776, 242P785; 115Nebr444, 213NW745, 747 [citCyc]; 23 OhA409, 155NE163; 138 Okl 19, 280P273.

552-93 274US304, 47SCt635, 71Led 1060; 115Nebr444, 213NW745; NJCh 149A636(2dcase); 23 OhA409, 155NE 163. **Trust fund deposited in individual bank account,** where mingled fund has at any time been wholly depleted, cannot be treated as reappearing by subsequent deposits. 5F(2d)143.

552-98 115Nebr444, 213NW745.

555-4 Where surviving partner of administrator who misapplied assets of estate by turning them over and mingling them with firm funds continued business after administrator's death till insolvency and receivership of firm, trust will be impressed on from assets in favor of beneficiary if trust funds remained among assets when receiver took charge. 161Ga698, 132SE626.

555-6 268US121, 45SCt451, 69Led876. **Stock issued to guardian** for purchase of ward's oil and gas lease and later purchased by fraudulent grantees held impressed with trust in ward's favor. 268 US121, 45SCt451, 69Led876. **Vendor executing deed to ward** held charged with notice of breach of trust by guardian in making purchase in manner not authorized by court, and assignee of vendor with notice became trustee in invitum of ward's funds used in making purchase. 218Ala530, 119S220. **Funds of ward used in purchasing property by guardian for ward in breach of trust** may be followed into property and lien fastened thereon for its repayment. 218Ala530, 119S220.

556-7½-New. Guardian using funds for individual debts does not render bank liable where guardian amply supported ward for whom funds were to be applied. 180Ark118, 21SW(2d)421.

558-17 NC 154SE623; 135 Okl 243, 275 P335. **Reacquisition by trustee** from innocent purchaser renders former liable to make restitution. 274US640, 47SCt 714, 71Led1270.

558-22 37Wyo 4, 257P345, 53ALR560. **In order to have this effect,** etc. But see 230AppDiv88, 243NYS299. **Surety, having paid shortage of county trustee,** is entitled to recover from bank any trust funds traced into its hands. 29F(2d)662.

559-24 266Mass337, 165NE119; 267 Mass301, 166NE833. See also 150Va336, 143SE881.

559-25 26F(2d)884. See also 230 App Div88, 243NYS299. **Certification of checks** does not prevent tracing proceeds through deposit account. 230AppDiv88, 243NYS299.

559-27 274US304, 47SCt635, 71Led 1060; 256Mass285, 152NE365; 198Wis 9, 223NW82; 37Wyo 4, 257P345, 53ALR 560.

559-29 268US121, 45SCt451, 69Led 876; Ariz 286P930; 74CalA714, 241P 905; 80CalA20, 251P232; 89CalA314, 264P556; 162Ga735, 134SE771; 170Ga 662, 153SE759; 48 Ida291, 281P1114; 222AppDiv251, 225NYS750; 194NC312, 139SE601; 145Va669, 134SE707; Alta [1927] 1DomLR577.

560-30 334 Ill 168, 165NE605; 194NC 312, 139SE601 (dictum); Pa 151A796; SD 231NW933; 160Tenn381, 25SW(2d) 583; 145Va669, 134SE707.

561-31 163Ga551, 136SE528.

561-33 Plaintiff not suggesting by his pleadings or evidence in ejectment that he had any right, if his vendor had none, but testifying that he bought subject to defendant's occupancy, held not protected by statute, declaring resulting trusts in realty because of payment of price by one person and taking of legal title in another's name void as to bona fide purchasers from holder of legal title. 296Pa1, 145A587.

561-33½-New. Transferee of nonnegotiable receipt takes it subject to trust impressed thereon. 48 Ida454, 282P868.

561-34 Corporation taking property subject to resulting trust, from one incorporator to knowledge of other, is not bona fide purchaser. La 105S791.

561-35 162Ga735, 134SE771; 317 Ill 126, 147NE793; 145Va669, 134SE707.

562-43 8F(2d)65; 232Mich221, 205NW 81; 297Pa551, 147A657 (applies to constructive as well as express trusts); 50 RI 363, 147A886; Utah 290P161; 145 Va669, 134SE707. **Statute protecting purchaser** in case of trust not declared by conveyance does not protect purchaser with notice. TexCivA 7SW(2d)922.

562-46 Deed to remote purchaser is not constructive notice to immediate purchaser. 170Ga662, 153SE759. **Payee depositing check for collection** is chargeable with bank's knowledge of conversion of county funds in payment. 180 Ark994, 23SW(2d)624.

563-47 CalA 290P86; 297Pa551, 147 A657.

564-56 297Pa551, 147A657 (that securities were sold below face value). **Coverture alone** is not sufficient to charge purchaser from wife with notice. 297Pa551, 147A657. **That purchaser obtained securities with other securities** which he knew had been purchased with embezzled money is not sufficient notice. 297Pa551, 147A657. **That purchaser's son-in-law was connected with fraud** held not sufficient notice. 297Pa551, 147A657.

564-56½-New. Purchaser from trustee clothed with legal title and power to convey is not charged with notice of other conditions of trust. CalA 290P86.

565-60 162Ga735, 134SE771.

566-63 TexCivA 292SW958.

566-68 162Ga735, 134SE771. **Deed of part of same tract, reciting trust,** to another person, does not constitute notice. 162Ga735, 134SE771.

567-71 226AppDiv601, 236NYS185.

567-73 145Va669, 134SE707.

567-76 30Ariz96, 245P360, 365 [citCyc]; 181Ark454, 26SW(2d)109; 124 Okl 193, 255P577; 50RI 363, 147A886; 48SD521, 205NW71, 72 [citCyc]; 160 Tenn1, 22SW(2d)1; Utah 290P161. **Devisee or legatee.**-195Cal 132, 231P987 (heirs of holder of trust funds to whom he has given or denied same are not protected against claims of true owners of fund).

568-77 30Ariz96, 245P360, 365 [cit Cyc].

568-79 30Ariz96, 245P360, 365 [cit Cyc]; 145Va669, 134SE707.

569-80 45 Ida444, 262P1051; 39Wyo 238, 270P1082.

569-82 217Ala167, 115S153; 170Ga662, 153SE759.

569-83 274US640, 47SCt714, 71Led 1270.

569-88 Evidence considered and held to establish good faith, etc. 222AppDiv 251, 225NYS750. **Evidence held to establish** that contract to purchase from trustee was induced by fraud of beneficiary in representing that trustee was owner. 222AppDiv251, 225NYS750. **Evidence held not to warrant finding** that record owner's contract to sell was without knowledge or consent of real owner. 222AppDiv251, 225NYS750.

570-89 Circumstances held to show purchaser's knowledge of trust. Tex CivA 7SW(2d)922. **Evidence held sufficient to show notice.**-180Ark994, 23SW (2d)624.

570-94½-New. That remote purchaser subsequently acquired deed from beneficiary's children who were beneficiaries of trust is not admission of knowledge that property was purchased with trust funds. 170Ga662, 153SE759.

570-97 CalA 288P29; 137SC450, 135 SE558.

571-1 43F(2d)23; 262Mass509, 160NE 337.

571-2 201Cal 754, 258P1099; 154Md 660, 141A405; 116 Oh144, 156NE193, 52ALR761 (holding suit to declare trust proper where defendant obtained property through probate of forged will).

572-10½-New. Equity action for accounting on theory of trust is proper method by prior assignee to recover funds collected by subsequent assignee. 214AppDiv525, 212NYS473.

572-10⅓-New. Remedy against trustee for actionable conduct collateral to trust and not in breach of trust is at law. NJCh 150A844.

572-11 158Md207, 148A531. **Where trust stock** has been transferred to third party by trustee, cestui may sue in equity for accounting of dividends and recovery of stock. 215AppDiv336, 213NYS 389 (remedy at law being inadequate). **Action may be brought in equity** in behalf of insolvent bank to impress funds withdrawn by depositor with trust. 20 F(2d)693.

574-19 Any recovery of trust property wrongfully diverted by trustees must be for benefit of trust estate as such, and not for benefit of beneficiary personally. 176Minn280, 223NW296(1stcase).

574-25 Nebr 233NW456.

585-10 190NC520, 130SE189 (equity will not enforce trust so as to require violation of law).

585-12 19F(2d)589.

585-15 18F(2d)652 (owners held not entitled to recover in equity for alleged profits by note holders' committee involving purchase of property at judicial sales at which receiver should have been represented). **Where husband purchases property in name of wife** under circumstances showing intent to defraud creditors, court will not grant him relief in suit to establish trust in his favor. NB [1925] 3DomLR866.

587-22 160Tenn1, 22SW(2d)1.

587-24 131Misc129, 226NYS162.

587-25 131Misc129, 226NYS162.

587-25½-New. Foreign trustee.-Equity will entertain suit against foreign testamentary trustee, although similar suits against foreign executor would be declined, 131Misc129, 226NYS162.

587-25⅓-New. such as an action in-

volving breach of trust in wrongfully transferring property, proceeds of which are within state. 131Misc129, 226NYS162.

588–27 22F(2d)323; 214Ala467, 108S327; 76CalA232, 245P235 (resulting trust); 104Conn169, 132A902; 149Md608, 131A829; 156Md516, 144A647; 242Mich301, 218NW779; 103NJEq487, 143A771; 131Misc129, 226NYS162. **Complaint, alleging that defendant, by fraud,** induced his mother to turn over her property to him, and that he intended to deprive her of her property, and to prevent other sons from securing portion thereof, held to state equitable cause of action. 97CalA264, 275P533. **Equity may review** exercise of good faith and honesty of decision of trustee of testamentary trust. 246Mich288, 224NW425.

589–29 149Md608, 131A829.

590–48 297Pa406, 147A86.

591–53 14F(2d)284, 295 [quotCyc].

592–58 219Ala478, 122S652; DelCh141A223.

592–59 See also 131Misc129, 226NYS162.

593–63 In New Jersey.–Prerog 149A352.

595–76 48 Ida291, 281P1114.

595–80 NB [1925] 3DomLR866 (holding that court will not grant relief where plaintiff purchased property sought to be impressed with trust in wife's name with intent to defraud creditors).

595–81 In action by administrator to impress trust on money received from property obtained from intestate by undue influence plaintiff is not required to offer to restore anything of value which decedent may have received. 83CalA638, 257P137. **Rules of rescission do not apply** in suit to impose trust on moneys received and to require accounting. 83CalA638, 257P137.

596–82 Wife suing to declare trust and establish title to part of land on ground that part of price was paid from her separate estate is not required to pay or tender into court amount of judgment on vendor's lien notes assumed by husband or her pro rata share thereof where she was not party to action on notes. TexCivA 280SW228.

596–88½–New. Equitable action to establish trust can be maintained where property is attached, though claim against principal defendant is not reduced to judgment. Cal 292P632.

596–89 TexCivA 22SW(2d)313(2dcase).

596–90 101CalA402, 281P698.

597–97 164Ga609, 139SE61.

597–99 164Ga609, 139SE61; 128 Or292, 274P318.

598–1½–New. Where defendants, wrongfully selling land purchased for plaintiff, became liable for mere money demand, no tender of amount paid by defendant is required. 101CalA402, 281P698.

598–2 Defenses held insufficient.–43F(2d)27; 214Ala334, 107S818; 196Cal260, 237P542; 296Pa26, 145A682.

598–4 But see 99NJEq414, 131A918.

599–9 In suit to impress trust on interest in government lands, defendant cannot avail himself of regulation of the general land office requiring assignments of permits to be approved. 11F(2d)943.

599–13½–New. It is good defense to suit by husband to establish trust in his favor in property purchased by him in wife's name that transaction was made with intent to defraud creditors. NB [1925] 3DomLR866.

599–13½–New. Offer to accept less than rightful interest in property held not waiver of right to establish resulting trust. 216Ala439, 113S296.

599–16 221AppDiv341, 223NYS424.

600–22 214Ala467, 108S327.

600–23 220Ky441, 295SW415. **Cause of action accrues on repudiation of trust by trustee.–**235Ky164, 30SW(2d)876.

601–26 40F(2d)508; 104Conn169, 132A902; 169Ga576, 150SE835; 195NC498, 142SE776; 296Pa26, 145A682.

601–27 270US227, 46SCt214, 70L ed556; 37F(2d)332; 204Cal501, 269P169(2dcase); 168Minn242, 209NW875; 49Nev55, 235P637; 291Pa574, 140A552, 554 [quotCyc].

602–29 99CalA492, 278P918; 291Pa574, 140A552. **Trustee held not barred** by laches from asserting title to property allegedly conveyed by her, where deed of such conveyance showed want of consideration and improper execution. 25F(2d)412. **Matters considered.–**99CalA492, 278P918.

602–33 29F(2d)1010; 204Cal454, 268P622; 99CalA492, 278P918; 168Minn242, 209NW875; 291Pa574, 140A552, 554 [quotCyc].

603–35 43F(2d)27. But see 32F(2d)756.

603–37 101CalA402, 281P698; 232Mich71, 205NW130.

603–38 101CalA402, 281P698; TexCivA29SW(2d)438.

604–43 168Ark1098, 272SW836; 79CalA55, 248P1065; 118 Okl167, 247P692; 291Pa574, 140A552; TexCivA 26SW(2d)463. **Repudiation of trust** entitles beneficiaries to immediate relief and opens door to defense of laches. 168Ark1098, 272SW836. **There is repudiation of trust** between corporation and officer thereof holding lease for it in trust when he demands of corporation that it transfer lease to himself as individual. 168Ark1098, 272SW836.

604–44 79CalA55, 248P1065; 101CalA20, 281P518(2dcase); 198NC460, 152SE157.

604–46 196Cal260, 237P542; 246Mich1, 224NW370; 118 Okl167, 247P692.

604–47 168Ark1098, 272SW836.

605–50 214Ala293, 107S908; 334 Ill193, 165NE616; 31NM366, 246P910; 195NC498, 142SE776; 101WVa374, 132SE716. **Evidence must indisputably show negligence or absence of excuse** for delay to make defense of laches available. TexCivA 292SW958. **That son regarded stepfather as tenant by curtesy of land purchased with money belonging to mother** is immaterial as regards laches as defense to action by son after mother's death to have stepfather declared trustee. 195NC498, 142SE776. **Whether plaintiff was informed as to legal effect of delay** is immaterial. 195NC498, 142SE776.

606–52 See also 333 Ill461, 165NE172.

606–54 322 Ill236, 153NE363; 333 Ill208, 164NE405. **Mere lapse of time.–**TexCivA 276SW444. **One claiming benefit** from breach of trust cannot complain of laches in proceeding for accounting in absence of showing of injury from delay. 268US121, 45SCt451, 69L ed876.

606–55 15DelCh363, 138A619; 322 Ill236, 153NE363. See also 181Ark454, 26SW(2d)109.

606–56 91CalA232, 267P105; 98NJEq274, 130A816; 101WVa522, 133SE154.

606–57 83Mont68, 271P695; 101WVa522, 133SE154.

606–59 292Pa532, 141A446; 101WVa522, 133SE154.

606–60 240Mich627, 216NW415.

606–61 83Mont68, 271P695.

607–65 214Ala467, 108S327.

607–66 24F(2d)42. **Where plaintiff's delay does not operate to injure defendant,** etc. 156Md516, 144A647.

608–69 79CalA55, 248P1065.

608–71 128 Or292, 274P318.

608–72 334 Ill168, 165NE605.

609–76 15DelCh363, 138A619. **Donors of schoolhouse** in suit to enforce lien. 220Ky441, 295SW415.

609–81 Bondholders of property involved are not necessary parties in action to set aside conveyance thereof. 135Misc482, 238NYS344.

610–82 TexCivA 17SW(2d)84. **Creditors.–**158La537, 104S318 (seizing creditor is not necessary party in debtor's suit to annul sale because his agent was purchaser). **Secretary of interior** is not proper party in suit to enforce trust as to public lands. 11F(2d)943.

611–84 13F(2d)887 (recognizing rule); 221Ala150, 128S149; 252Mass354, 147NE885; 265Mass563, 164NE475; TexCivA 23SW(2d)421.

611–85 214Ala692, 108S752.

611–86 MoA 68SW(2d)961.

611–87 221Ala150, 128S149; 246NY133, 158NE48; TexCivA 297SW586.

612–92 In an action against a third person, etc. 176Minn280, 223NW296(1st case).

612–94 252Mass354, 147NE885 (person to whom property was wrongfully conveyed necessary party in action to enforce constructive trust).

614–4 All persons directly interested in subject matter are proper parties. TexCivA 28SW(2d)316.

614–5 202Cal612, 262P34.

614–6 13F(2d)887; 239 IllA61.

614–7 13F(2d)887.

616–20 220Ky441, 295SW415.

616–26 Minor children, who take remainder subject to trust creating life estate, have no antagonistic interest in proceeding to require trustees to set up trust in accordance with terms of will, so as to necessitate their being joined in proceeding. 293Pa570, 143A214.

616–27 135 Okl243, 275P335.

618–38 218Ala559, 119S676. **Bill, complaint, or petition held sufficient.–**217Ala112, 114S913; 336 Ill337, 168NE316; 262Mass509, 160NE337; 81Mont311, 263P683; 230AppDiv88, 243NYS299; 160Tenn381, 25SW(2d)583; 153Wash247, 279P591(2dcase). **Bill, complaint, or petition held insufficient:** 18F(2d)652; 31Ariz137, 250P995; 175Ark220, 298SW1001.

619–41 96CalA415, 274P610. **Bill held not to show complainant guilty of laches.–**15DelCh363, 138A619.

620–42 Allegations held sufficient.–TexCivA 280SW228. **Allegations held insufficient.–**CalA 290P86.

620–46½–New. Character of relief asked.–Petition failing to make clear quantum and particular character of relief to which plaintiff is entitled is not subject to general demurrer where it contains prayer for "such other relief, special and general, as in law or equity she may be entitled to." TexCivA 280SW228.

620–47 80CalA377, 252P647, 650 [cit CJ]; 201 Iowa488, 207NW606; 158Md69, 148A121 (allegations of non-existence of trust). **Allegations held sufficient,** etc. 217Ala112, 114S913; 218Ala364, 118S739(2dcase); 218Ala420, 118S912; 218Ala559, 119S676; 101CalA402, 281P698; 84Colo266, 269P997; 221Ky685, 299SW571; 158Md207, 148A531; 31NM366, 246P910; 222AppDiv619, 226NYS557; TexCivA 273SW609. **Allegations held insufficient,** etc. 34F(2d)730; 73CalA504, 239P51; 74CalA714, 241P905 (complaint attempting to plead express trust resting in parol); 130Misc658, 224NYS260; TexCivA 2SW(2d)885. **Evidence held sufficient,** etc. TexCivA14SW(2d)886.

621–51 32F(2d)756.

621–53 But see 116 Or593, 240P883, 242P605.

622–54 235Ky705, 32SW(2d)54; 141Miss66, 105S854 (in suit to recover money deposited in bank and paid on check to third person, it is necessary to allege that deposit was special deposit or that specific trust funds deposited were paid in kind to defendant). **Allegations held insufficient.–**73CalA421, 238P1096; 323 Ill122, 153NE718. **Allegations held sufficient,** etc. 217Ala112, 114S913; 219Ala461, 122S432; 15DelCh363, 138A619; Mo 28SW(2d)1030; TexCivA 280SW228. **Ultimate facts alleged in bill to declare resulting trust** must show unequivocally that intention to create trust existed between parties at time of conveyance. 90Fla7, 105S134.

622–55 217Ala112, 114S913; 219Ky329, 292SW824; **Claimant must allege and prove payment** at or before time for taking title. 78Mont457, 254P432.

622–58 221Ala337, 128S593.

622–58½–New. Absence of fraudulent intent must be alleged to establish trust in land deeded to parent and paid for by children. 85 IndA369, 152NE280.

623–59½–New. It is not necessary in action to establish resulting trust between parent and child specially to plead any act or agreement of parties showing that transaction was not in nature of gift or advancement. 198Cal465, 245P1091.

623–60 CalA 259P102. **Allegations held sufficient,** etc. 69CalA399, 231P375; 80CalA729, 252P757; 83CalA638, 257P137; 91CalA232, 267P105; 96Fla366, 117S885; 333 Ill327, 164NE662; 79Mont566, 257P427; 228AppDiv510, 240

NYS232; 116 Oh144, 156NE193, 52ALR 761. **Allegations held insufficient,** etc. 154Md660, 141A405; RI 150A760. **Intention needs no allegation as it needs no proof.**–78Mont457, 254P432. **Payment at time of taking title** need not be alleged or proved. 78Mont457, 254P 432. **Payment of consideration by cestui** need not be alleged, mere use of cestui's funds being sufficient. 78Mont457, 254 P432. **Undue influence.**–83CalA638, 257 P137.

623–61 Allegations of fraud held sufficient.–230AppDiv577, 245NYS389; 143 Okl 268, 288P481; TexCivA 28SW(2d) 316. **Allegations of fraud held insufficient.**–CalA 290P86.

623–64 CalA 259P102.

623–65 73CalA504, 239P51.

623–66 Me 150A535.

624–68½–New. Defendant's exceptions to commissioner's report of vendor's lien foreclosure sale to vendee held properly treated, as complaint against vendees and defendant's immediate grantors to establish trust. 171Ark192, 283 SW377.

625–79 Mo 31SW(2d)28.

626–84 248NY206, 161NE472.

626–85 248NY206, 161NE472.

626–86½–New. Under statute, chancellor should have required testamentary trustee, sued for income from trust estate, to make issue by its answer. 229 Ky101, 16SW(2d)799.

627–91 123Kan566, 256P158; 253Mass 110, 148NE380.

628–93 NJCh 152A245.

628–97½–New. Sufficiency of amended complaint claiming that trust was filed after death of alleged trustee is not affected by fact that such claim was not made in original complaint filed prior to death of said trustee. 31NM366, 246 P910.

628–1 Mass 167NE638. **Sufficiency of pleading to admit evidence of implied trust.**–175Ark763, 300SW437.

629–2 85Colo 419, 276P972; 116 Or 593, 240P883, 242P605.

629–4 208Cal 185, 280P959; 85Colo419, 276P972; 266Mass180, 165NE14; Me 150A535. **Under general denial.**–79Mont 566, 257P427.

630–5 97CalA759, 276P356.

630–8 87CalA654, 262P438; 194NC11, 138SE345.

630–9 32Ariz444, 259P886; 196Cal 260, 237P542 (knowledge of law); IndA 173 NE460; 297Pa406, 147A86 (presumption of payment from trust fund). **The presumption is that a trustee has acted in good faith and has done his duty,** etc. 138 Okl 19, 280P273. **Burden of proof is on children** suing for community property used by father to acquire other property. TexCommnA 28SW(2d) 422. **Failure to find trust money in assets of insolvent trustee** shows prima facie that trust fund had been dissipated. 117Nebr358, 220NW593. **Nondissipation of fund** may be shown by actual proof or by presumptions. 204 Iowa497, 215NW728. **There is no presumption trustee will convert funds** or otherwise breach trust. Iowa 231NW 311.

631–11 8F(2d)241 (knowledge of agreement under which plaintiff claims); 74 CalA714, 241P905; 98Fla1126, 125S 360; 48 Ida34, 279P413; 323 Ill 468, 154NE209; TexCivA 29SW(2d)438; 145 Va669, 134SE707. **In suit to compel conveyance of property,** it is not necessary for plaintiffs to show inadequacy of remedy at law. 101CalA402, 281P698.

631–12 Mass 171NE721; 297Pa406, 147A86.

631–13 239 IllA453; 255 IllA428; Tex CivA 289SW79.

631–14 221MoA329, 273SW772 (presumption that depositor drew his own money before withdrawing trust fund); TexCivA 17SW(2d)1102.

631–15 31F(2d)50; 38F(2d)455; 32 Ariz444; 259P886; 84Colo 157, 268P 523 (that trust fund is present in insolvent estate); 115Nebr444, 213NW 745; TexCivA 17SW(2d)1102.

631–15½–New. Burden is on receiver to overcome presumption that trust funds came into his hands. 89 IndA611, 167NE564.

631–15⅔–New. Lowest balance remaining at any time subsequent to commingling will be presumed to contain trust fund. 98Fla1126, 125S360.

632–17 Unsigned papers and letters.–TexCivA 23SW(2d)414 (unsigned will is admissible).

632–18 Evidence held admissible.–204 Cal 501, 269P169(2dcase); Ind 169NE 843; 218Ky508, 291SW718 (in general); 248NY206, 161NE472 (signed declaration of trust). **Evidence held inadmissible.**–35Ariz488, 279P253; 218Ky508, 291SW718; 222MoA307, 297SW129.

633–19 116 Or593, 240P883, 242P605. **Husband's remarriage is immaterial** on right of children by first wife to trace community property of first marriage into property acquired by husband. TexCommnA 28SW(2d)422. **It is a circumstance bearing on his intention** to pay therefor out of common property of himself and children. TexCommnA 2 SW(2d)422.

633–20 Mont 289P388.

633–21 Evidence held sufficient.–73CalA 627, 239P71. **Evidence held insufficient.**–73CalA627, 239P71. **To establish claim for value of interest** in trust estate, it is necessary to show amount of claim. TexCivA 23SW(2d)414.

633–22 48 Ida34, 279P413 (clear and satisfactory evidence required); 81Mont 311, 263P683 (evidence sufficient to satisfy conscience of chancellor). **Evidence held sufficient.**–14F(2d)586; 83CalA283, 256P832; 89CalA314, 264P556; 255 IllA428; Ind 169NE843; 89 IndA611, 167NE564; 122Kan65, 251P411 (to establish trust); 228Ky746, 15SW(2d) 491; Me 150A535; 252Mass569, 147NE 835; 232Mich71, 205NW130; 167Minn 126, 208NW532; 169Minn389, 211NW 822; MoA 274SW510; NJCh 145A725; 221AppDiv341, 223NYS424; 51ND58, 199NW135; Okl 291P538; 297Pa551, 147A657; TexCivA 271SW272. **Evidence held insufficient.**–8F(2d)241; 168 Ark613, 271SW347; 204Cal 391, 268P 637; 204Cal 501, 269P169(2dcase); 83 CalA283, 256P832; CalA 265P263; 48 Ida34, 279P413; 323 Ill 468, 154NE 209; 119Kan811, 241P446; 130Kan453, 286P221; Me 150A535; 167Minn126, 208NW532; 83NH417, 143A468; 128 Misc827, 219NYS580; 147Va921, 133SE 614; TexCivA 29SW(2d)438. **Entry in books of corporation** that property belonged to beneficiary of trust held to be some evidence that company recognized trust. 252NY366, 169NE612. **Prima facie** money deposited by public officer was held by him as trustee. 297 Pa406, 147A86.

634–23 239 IllA453. **Evidence held sufficient.**–171Ark162, 283SW19; 114 Okl 302, 247P67.

635–26 TexCivA 17SW(2d)1102.

635–27 74CalA714, 241P905 (insufficient to show knowledge); 334 Ill 168, 165NE605. **Evidence held to sustain finding** that creditor took money without notice of trust. 45 Ida444, 262P 1051.

635–27½–New. Statute declaring plaintiff's affidavit in action on itemized account prima facie evidence of indebtedness is inapplicable in beneficiary's action against trustee for money received. Me 150A535.

635–28 99CalA492, 278P918.

635–33 TexCivA 8SW(2d)714.

635–35 254Mass584, 150NE866; Tex CommnA 15SW(2d)234; TexCivA 17 SW(2d)1102; 145Wash477, 260P664. **Whether defendant was mere agent or depositary or whether he was trustee** is question of fact. 254Mass584, 150NE 866.

636–37 254Mass584, 150NE866. **Quitclaim deed in claim of title** precludes directed verdict on theory grantee was bona fide purchaser. TexCivA 292SW 958. **Where suit to establish resulting trust was brought within time limited,** directed verdict for defendant is improper. TexCivA 292SW958. **Whether transfer was gift** held for jury. 194NC 312, 139SE601. **Evidence held to warrant submission of issue to jury.**–145 Wash477, 260P664.

636–38 193NC254, 136SE612 (nonsuit properly denied).

636–40½–New. Claim for value of interest in trust estate must be established by special issue verdict. TexCivA 23 SW(2d)414.

636–40⅓–New. Rule requiring evidence ingrafting parol trust upon deed to be clear and satisfactory is one of law. TexCivA 23SW(2d)414.

636–42 218Ky508, 291SW718. **Instructions held erroneous.**–163Ga551, 136SE 528 (as to notice). **Instructions held proper.**–194NC331, 139SE604. **Refusal of court to rule that finding must be for plaintiff** held proper where evidence, as matter of law, did not require finding for plaintiff in suit to apply trust funds in payment of debts of intestate. 254 Mass584, 150NE866. **Charge held proper.**–170Ga495, 153SE37.

637–45 169Ga294, 150SE164.

637–48 Particular findings construed.–198Cal 129, 243P439, 43ALR1235. **Findings held sufficient** in form and substance to sustain enforceable trust. 79 CalA55, 248P1065. **Court's finding in double negative, in addition to positive finding,** has been held to sustain conclusion of law that no resulting trust was created. CalA 292P518.

637–50 Finding that plaintiff had failed to establish will involves finding against plaintiff on every issue required to be proved. 258Mass511, 155NE643.

637–51 TexCivA 26SW(2d)463 (finding sufficient).

637–54 220Ky441, 295SW415; 221App Div317, 223NYS164; ND 230NW18; 44 OklACR239; TexCivA 17SW(2d)84; TexCivA 26SW(2d)463. **Adjustment of equities in suit to enforce a resulting trust:** In general. TexCivA 280SW 228. **The relief granted by courts of equity, where a trust ex maleficio is raised,** etc. See also 102NJEq307, 140A 426 (true value of undivided interest recoverable).

638–56 83CalA283, 256P832 (not purpose of law to punish trustee in establishing trust for wife in divorced husband's realty purchased with proceeds of business in which he used her money). **Where divorced wife's money was invested in husband's business,** she is entitled to principal of her separate property so invested during marriage and fair proportion of profits. 83CalA283, 256P832.

639–57 106Conn287, 137A751; Tex CivA 293SW632. **Court should not determine** whether trust agreement extended to other property not transferred to defendant. 48 Ida34, 279P413.

639–58 MoA 6SW(2d)961.

639–65 83CalA283, 256P832; MoA 6 SW(2d)961. **Where mortgagor exchanged timber on land for other lands,** mortgagee's measure of recovery is extent to which mortgage security was depleted. 216Ala349, 113S291.

640–70 106Conn287, 137A751 (dictum); 221Ky33, 297SW942.

640–72 TexCivA 292SW572.

641–80 106Conn287, 137A751.

641–81 106Conn287, 137A751 (damages).

641–82 106Conn287, 137A751 (dictum).

641–87 Decree in suit to enforce and construe trust deed for sale of land held not to direct trustee to sell subject to encumbrance on land described. 309Mo 669, 274SW745.

641–89 135 Okl 243, 275P335; 44 OklA CR239.

642–92 Trustee of resulting trust not chargeable with expenses of sale where cestui ratified sale and money was put in escrow pending litigation. 218App Div149, 218NYS31.

642–93 44 OklACR239; RI 149A380(1st case).

642–94 265Mass563, 164NE475; 44 OklACR239. **Interest.**–44 OklACR239.

642–95 Taxes.–TexCivA 26SW(2d)463 (taxes proportioned equitably).

642–95½–New. Where claim for resulting trust in burial lot was denied, purchaser's estate is entitled to proportionate cost paid of part not used by purchaser. 138 Okl 163, 280P609.

643–96 In suit to enforce lien upon land or rents therefrom, where subsequent mortgagees asked no affirmative relief, court committed no error in failing to decree status of their claim, hav-

ing expressly retained jurisdiction. 214 Ala334, 107S818. **Mortgage given to trustee for part of purchase price** may be directed to be foreclosed and bond given grantee for his protection. 48 Ida291, 281P1114.

643–97½–New. Cestui taking decree against trustee vesting in former entire trust estate and setting aside deed of trust property to another waives right to impress trust on lands conveyed to trustee by such third party in exchange for trust property. 115 Okl 41, 242P 157.

643–98 135 Okl 243, 275P335.

643–99 See also RI 148A319.

643–5 Where proceeds of sale of property in which trust funds had been invested have been used in purchase of property in name of third person, cestui que trust is limited as to trust impressed on such property to amount of trust fund with interest. 232Mich221, 205NW81.

643–6 215Ala195, 110S278 (decree giving constructive trust held erroneous in that it cast cloud on title of stranger to suit); 204 Iowa1167, 216NW621 (accounting); 123 Or406, 262P833; SD 227NW568 (judgment for amount of trust fund held properly rendered against trustee's wife to whom trust fund, mingled with other securities, was transferred in contemplation of death and made charge on securities so received). **Judgment against trustee who makes assignment** for benefit of creditors should be against him personally in addition to being made preferred claim against fund, where claim based on trustee's wrongful use of fund. 134 Wash668, 236P564. **Beneficiary entitled to credit** for amount intrusted to trustee. Utah 290P161.

644–7 A judgment in personam for wife's separate property received by husband which could not be traced into specific property may be had in suit by wife. 83CalA283, 256P832.

644–14½–New. Provision of decree requiring son to convey property to father because of fact that father had furnished purchase money therefor, requiring father to furnish a bond conditioned to save son harmless from liability by reason of having signed note and bond evidencing indebtedness secured by mortgage, adequately protects son from any liability he may have incurred on account of such debt. 151Va603, 144 SE613.

645–17 Failure to order sale held not error where trust created lien limited to rents, and provided that in case of sale unpaid installments shall constitute charge on land. 214Ala334, 107S 818.

645–20 215Ky5, 284SW101; 258Mass 511, 155NE643. **Where there is substantial evidence,** findings are not disturbed. 122Kan65, 251P411. **Where there is sufficient evidence to sustain findings,** judgment will be upheld. 83 CalA782, 257P560.

646–25 Costs of action involving defendant's income from trust should be paid from income of trust fund set aside for defendant. 107Conn9, 139A 305. **Cost of photographs incurred in will contest case** cannot be taxed in subsequent action between same parties. 208Cal 134, 280P531.

647–34 102NJEq307, 140A426 (costs and attorney's fees).

648–35½–New. Trustor's administrator trying to defeat trust is not entitled to attorney's fee out of trust estate. 91 CalA483, 267P327.

648–38 152Md71, 136A274, 277 [citCyc], 50ALR308.

648–42½–New. Whether beneficiary affirms sale by trustee and seeks recovery of purchase price or disaffirms sale does not concern surety. Iowa 226NW 918.

649–56 267Mass86, 165NE881.

650–69 Iowa 226NW918; 35 OhA224, 172NE383.

651–75 104Conn169, 132A902.

653–12½–New. It cannot be presumed that fraud was perpetrated against surety company in probate court in opening up trustee's account. 35 OhA224, 172NE383.

654–17½–New. Findings.–Requests by defendant in action on trustee's probate bond held properly denied under evidence. 267Mass86, 165NE881.

654–17⅛–New. Damages to other beneficiaries have been held not recoverable in action which petitioning beneficiary is authorized by court to bring on trustee's bond for damages for his maladministration. 267Mass86, 165NE881.

654–17¼–New. Evidence held sufficient to establish that trustee did not faithfully discharge duties imposed on him by law as required by bond. Iowa 226 NW918.

654–17½–New. In action on bond of deceased trustee against his executor affidavit that notice of defendant's appointment was given within three months held admissible. Mass 170NE 451.

654–17⅚–New. Evidence held insufficient to sustain finding that beneficiary acquiesced in, or ratified, wrongful act of trustee. Iowa 226NW918.

TRY

654–4 "Trying" and "heard" synonymous.–48Philippine645.

TUBING

654–8½–New. A series of tubes. 15 CustA175.

TUCKING

654–8⅓–New. A tuck or tucks collectively. 15CustA60.

TURPITUDE

657–36 19F(2d)722. **In its ordinary sense,** etc. 162Ga246, 134SE42. **In its legal sense,** etc. 162Ga246, 134SE42.

TWELVE-MONTH BOND

657–47½–New. Creature of statute effective Jan. 26, 1839 and found in Hartley Dig. art 1277. The statute provided that bond with good and sufficient security should be made payable to plaintiff and returned to clerk's office from which execution issued. TexCivA 273 SW993.

657–47⅓–New. This bond had double character: (1) as obligation known to the Spanish civil law. (2) It was summary statutory judgment. TexCivA 273SW993.

657–47¼–New. It had by force of statute "all the force, effect and incidents of any other judgment of a court of competent jurisdiction," and it continued to have these characteristics after the adoption of the common law in Texas. TexCivA 273SW993, 1002.

657–47⅙–New. It was also held that such twelve-month bond was, in effect, consent judgment. TexCivA 273SW 993.

657–47⅙–New. Upon maturity of bond if it shall not be punctually paid, execution shall issue thereon against principal and sureties. TexCivA 273SW993.

UBERRIMA FIDES

659–65 Applied to security or fidelity bond.–Sask [1925] 3DomLR341. **The prevailing maxim,** etc.–NS [1925] 3DomLR832.

UBI JUS, IBI REMEDIUM

660–84 Applied in: 116 Or310, 241P 50.

UNAVOIDABLE ACCIDENT

666–47 149Md281, 131A350.

666–48 149Md281, 131A350 (inevitable occurrence).

667–50 149Md281, 131A350.

UNCONDITIONAL

669–62 150Md211, 132A635, 45ALR582.

UNCONSCIONABLE CONTRACT

669–64 Illustrations.–NC 154SE50.

UNDER

671–76 Used in connection with other words.–91Fla214, 107S360; 159La872, 106S364.

UNDERTAKINGS

679–45 132Misc193, 229NYS296.

680–53½–New. Recovery does not depend upon discretion of court. 169 Minn15, 208NW952.

UNDUE INFLUENCE

681–7 Statutory definitions.–83CalA 638, 257P137.

681–8 323 Ill 380, 154NE149; 202 Iowa807, 211NW495; 147Va473, 137SE 511. **Consists in destruction of free agency.**–323 Ill 380, 154NE149; 147Va 478, 137SE511.

682–10 252 IllA575. **"Undue influence" means wrongful influence.**–323 Ill 380, 154NE149. **Mere advice, persuasion, or entreaty,** etc. 323 Ill 380, 154NE149.

682–10½–New. That degree of importunity which deprives testator of his free agency, which is such as he is too weak to resist and instrument executed under its influence is not his free and unconstrained act. 148Md584, 129A 896.

682–10⅓–New. "Undue influence is that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist." Words and Ph. 2d Series [quot 116 Or467, 241P996, 998].

UNDULY

683–14 "Unreasonably" not synonymous.–BC [1928] 4DomLR659.

UNEQUAL

683–19 See also MoA 274SW1103.

UNIFORM

685–36 "Uniform operation," etc. 67 CalA328, 227P664.

UNITED STATES

693–5 22F(2d)993.

693–7 43F(2d)222. **State cannot make its officers** immune from responsibility to supreme authority of United States. 19F(2d)634.

694–8 United States has all attributes of sovereignty except as restricted by constitution. 6F(2d)752.

694–9 28F(2d)846.

694–10½–New. Law of United States is to be found in Constitution, acts of Congress, treaties and judicial rulings. 35F(2d)602.

695–14 Acts of congress ostensibly enacted under constitutional power, not naturally and reasonably adopted to effective exercise of such power, but solely to achievement of something plainly within powers reserved to states, are invalid and unenforceable. 268US5, 45 SCt446, 69L ed819, 39ALR229. **Congress cannot regulate practice of medicine** by provisions of tax measure unnecessary to enforcement of revenue statute. 268US5, 45SCt446, 69L ed819.

696–20 Constitutional provision that Congressmen shall not be questioned for any speech or debate in either house should be liberally construed. 42F(2d) 783.

696–28 Senate investigating committee.–277US376, 48SCt531, 72L ed924. **Senate may conduct inquiry** through judicial forms to determine qualifications of one claiming membership. 25F(2d) 733. **Senate may enforce attendance** of witnesses to aid in determining fitness of members. 25F(2d)733.

696–30 170Minn406, 212NW604.

696–30½–New. Senate has authority to take appropriate steps to secure information necessary to decide concerning elections. 279US597, 49SCt452, 73L ed 867.

696–30⅓–New. Senate has authority to investigate into corrupt practices at senatorial primary election. 279US597, 49SCt452, 73L ed867.

696–30¼–New. Senate may dispense with services of committee for purpose of investigation and itself take testimony. 279US597, 49SCt452, 73L ed867.

696–30⅕–New. Senate may determine claim to office without admitting claimant to seat. 279US597, 49SCt452, 73 L ed867.

696–30⅙–New. Pending adjudication

of right to seat senate has discretion to determine whether claimant shall be accorded right to participate in business. 279US597, 49SCt452, 73L ed867 (refusal to seat claimant pending inquiry not illegal).

696–30½–New. Senate has power to require attendance of witnesses as judicial tribunal in judging elections, returns, and qualifications. 279US597, 49 SCt452, 73L ed867 (without aid of statute).

696–30⅓–New. Senate has authority to issue warrant of arrest to compel attendance of witness in its investigation as to corrupt practices in senatorial primary election. 279US597, 49SCt452, 73L ed867 (without subpœna where difficulty had been encountered in locating witness who had previously refused to answer questions).

697–45 Senate may conduct inquiry through judicial forms, as aid to legislation. 25F(2d)733. **Senate has no inquisitorial powers** as to citizen's private affairs, nor to compel disclosures relating thereto. 25F(2d)733.

698–49 Congressional legislation controls whenever it conflicts with acts of Philippine commission or legislature. 272US640, 47SCt229, 71L ed454.

698–50 Distinction exists between appropriation of money by congress and use of government property incidental to administration under adequate grant of authority. 14F(2d)705.

698–50½–New. Congress has all powers of proprietor, and is authorized to deal with public domain as private individual may deal with lands owned by him. 279US263, 49SCt268, 73L ed692.

699–51 273US135, 47SCt319, 71L ed580, 50ALR1; 21F(2d)144.

700–55 273US135, 47SCt319, 71L ed580, 50ALR1. **Inquiry power is essential** to legislative function. 273US135, 47SCt319, 71L ed580, 50ALR1. **Subpœnas of committee are treated as if issued by senate.**–273US135, 47SCt319, 71L ed580, 50ALR1. **Warrant of senate for attachment of witness** held not void because investigating committee was not sworn. 273US135, 47SCt319, 71L ed580, 50ALR1.

700–55½–New. Neither investigation authorized by senate resolutions as to subject of leases on naval oil reserves, nor question propounded to witness concerning contract made with him touching government oil lands, related merely to private or personal affairs of witness. 279US263, 49SCt268, 73L ed692.

700–55⅓–New. Senate resolution, authorizing continuation of senate committee for investigating subject of leases on naval oil reserves, specifically mentioning subject of investigation, has been held sufficient authority for committee to pursue inquiries, summon witnesses, and administer oaths, regardless of failure to mention original resolution, or refer to date of its adoption. 279US263, 49SCt268, 73L ed692.

700–56 25F(2d)733; 26F(2d)272 (for failure to answer investigation committee's questions); 29F(2d)817 [certiorari granted US 49SCt253(6thcase)].

700–63 279US263, 49SCt268, 73L ed692.

700–64 273US135, 47SCt319, 71L ed580, 50ALR1; 29F(2d)817 [certiorari granted 279US827, 49SCt253(6thcase), 73L ed979].

701–68 279US263, 49SCt268, 73L ed692.

701–68½–New. Question of pertinency of question propounded to witness before senate committee is held properly decided by court as one of law. 279US263, 49SCt268, 73L ed692.

701–68⅓–New. Good faith of witness in refusing to answer question on advice of competent counsel constitutes no defense, in prosecution, for refusal to answer question. 279US263, 49SCt268, 73L ed692.

701–70 273US135, 47SCt319, 71L ed580, 50ALR1 (deputy sergeants at arms).

701–75 272US52, 47SCt21, 71L ed160.

701–76 272US52, 47SCt21, 71L ed160.

702–79 272US52, 47SCt21, 71L ed160. **Executive orders construed valid where two possible meanings are open.** 272US1, 47SCt1, 71L ed131.

703–88 Regulations of treasury department made in pursuance of act of congress have force of law. 11F(2d)895. **Departmental regulation has force of law,** if addressed to and reasonably adapted to enforcement of an act of congress, the administration of which is confided to such department, and if it is not in conflict with express statutory provision. 17F(2d)522. **Department rules in effect as law.**–281US599, 50SCt412, 74L ed1063; 35F(2d)256; 36F(2d)568; 42F(2d)879; CalA 278P1046; 100CalA66, 279P831; 179Minn402, 229NW344.

705–91 28F(2d)63.

705–91½–New. Questions of fact, raised by criticisms as to credibility of witnesses and force of testimony before Secretary of Agriculture, are foreclosed by findings of such official. 28F(2d)63.

705–91⅓–New. Powers and duties of Secretary of Interior are not affected by change in person holding office. 281US206, 50SCt320, 74L ed809.

705–92 That national home for disabled volunteer soldiers is corporation created by congress does not imply that such entity is part or representative of United States government. CalA 259P762.

705–94 Term "officer of the United States" is usually construed to apply only to those appointed by president and senate, president alone, courts of law, or heads of departments. 267US505, 45SCt417, 69L ed761.

705–96 34F(2d)15 (appointment of "officer of the United States").

705–99 8F(2d)360 (office of assistant to prohibition agent does not exist).

705–99½–New. A merchant coöperating with governmental officers and agents, under an act of congress authorizing the president to create any agency or coöperate with any agency or person, and to coördinate their activities, is not an agent notwithstanding federal board subsequently liquidates and adjusts the transaction. 218AppDiv322, 218NYS301.

706–1 Sergeant-at-arms deputies held amply provided for by law. 273US135, 47SCt319, 71L ed580, 50ALR1.

706–6½–New. State police officers have no special powers in enforcement of laws of United States under federal statutes, and when they coöperate with federal officers in enforcement of federal statute, they must, for some purposes at least, be regarded as federal agents. 250NY336, 165NE518.

706–6⅓–New. Physical absence from state of minor son of federal employee in District of Columbia during year preceding examination did not defeat his right to enter examination as bona fide resident of state actually domiciled therein for prescribed period. DC 37F(2d)818.

706–7 6F(2d)937.

706–8 Regulations of internal revenue department cannot create or enlarge a taxing statute. 12F(2d)978.

706–9 28F(2d)681 [certiorari den 279US839, 49SCt253(1stcase), 73L ed986]. **Whether payment by officer is illegal** is for court to determine and decisions of executive officers are not binding on court. 13F(2d)658.

707–10 27F(2d)389.

707–12 Government is bound by notice to one of its agents. 4F(2d)829. **Executive officers appointed by war department for sale of surplus war material** have discretionary authority to settle disputes and to make new contracts. 24F(2d)840.

707–14½–New. Public officer can bind government only within just exercise of official powers. 21F(2d)99.

707–16½–New. Treasury decisions inconsistent with statutes have no validity. 16F(2d)98.

707–16⅓–New. Agency of Emergency Fleet Corporation for United States held not untenable as matter of law. 247NY211, 160NE13.

707–16¼–New. Enforcement of interior secretary's rules made pursuant to statutory authority is within his discretion. 32F(2d)371.

707–16⅕–New. Regulations by Secretary of Commerce under authority of Congress have force of law. Mass 170NE385.

708–19½–New. In action to recover percentage of tax reduction secured for defendants, defense that plaintiff violated statute, prohibiting employee of United States government from assisting in prosecuting claim against United States, pending while he was employed, for period of two years after cessation of employment, is not sustained, under evidence failing to show claim by defendant was pending when plaintiff left government's employ. 133Misc220, 231NYS235.

710–44 See also 27F(2d)863 [certiorari den 278US656, 49SCt185, 73L ed565].

712–54½–New. Compensation of employees of Emergency Fleet Corporation and Shipyards Corporation.–Right to part in division of cost saved in construction of vessels held determinable by the two corporations under contract. DC 37F(2d)811.

714–79 13F(2d)607 (Fleet Corporation). **United States Emergency Fleet Corporation** is not liable for contracts entered into as agent for government. 26F(2d)116.

715–86 271US536, 46SCt613, 70L ed1074. **Proper remedy against superintendent of national park** is to enjoin his exercise of unauthorized jurisdiction. 268US228, 45SCt505, 69L ed927.

715–89½–New. Liability of contractor for transportation of mails for negligence of employees.–Contractor for carriage of mails is liable for negligence of driver of mail truck as against contention that he is exempt from liability as agent of government. 154Tenn260, 290SW33, 51ALR193.

725–67 272US1, 47SCt1, 71L ed131. **Congress may make state corporations federal instrumentalities and may make** frauds punishable as crimes. 274US256, 47SCt629, 71L ed1036. **National Prohibition Act.**–276US505, 48SCt400, 72L ed676.

726–74 31F(2d)774.

727–79 272US52, 47SCt21, 71L ed160. **Congress has no power to provide for removal of officers** with consent of senate. 272US52, 47SCt21, 71L ed160. **No restriction on president's power of removal is to be implied** from Const. art 2. 272US52, 47SCt21, 71L ed160. **Power of removal, incident to power to appoint,** held not inconsistent with republican form of government. 272US52, 47SCt21, 71L ed160. **Prior legislation construed** (3 U. S. St. at L. 582) to show conformity with presidential power to remove. 272US52, 47SCt21, 71L ed160.

727–85½–New. Secretary of War having power to appoint employees has power to remove appointees in absence of statute to contrary. CalA 278P1046.

727–85⅓–New. Department head of Veterans Bureau and not civil service commission determines when records prove cause for removal. 255IllA409.

727–85¼–New. Under federal statutes no trial or hearing is required in removal of employee of Veterans Bureau except in discretion of removing officer. 255IllA409.

727–88 See also CalA 278P1046. **Surplus employee may be discharged without filing charges.**–16F(2d)653.

728–3 150Md592, 133A729, 46ALR983 (acceptance of session is assumed).

728–3½–New. Corporations controlled by United States.–Emergency Fleet Corporation, though private corporation in form, held entitled to government rate on telegraph messages. 275US415, 48SCt198, 72L ed345.

728–3⅓–New. Agreement between United States Shipping Board Emergency Fleet Corporation and shipping company for operation of cargo vessel subject to corporation's orders and for deposit of moneys collected as trust fund creates agency for performance of special duties. 84CalA413, 258P409.

728–3¼–New. Shipping company operating under such agreement acts solely as agent of United States in employing captain so that captain is not company's employee. 84CalA413, 258P409.

728–3⅕–New. Emergency Fleet Corpo-

ration is entitled to such government rate notwithstanding contract on own behalf since it has no separate credit. 275US415, 48SCt198, 72L ed345.

728-3⅙-New. And rule giving Emergency Fleet Corporation such rates applies, although there be competition with private shipping. 275US415, 48SCt 198, 72L ed345.

728-3½-New. And Emergency Fleet Corporation, being federal department within Post Roads Act, is entitled to such rates. 275US415, 48SCt198, 72 L ed345.

728-3⅓-New. Officers of United States Emergency Fleet Corporation necessarily have power to make effective its work within scope of corporate creation. 28 F(2d)373.

728-3⅓-New. Corporations controlled by United States.-United States Spruce Production Corporation could bind United States by contract for sale of railroad property. 36F(2d)956.

728-3 1/10-New. State courts are without jurisdiction of tort action by seaman against United States Shipping Board Emergency Fleet Corporation. 253NY 17, 170NE477.

728-3 1/11-New. State courts have no jurisdiction of action by stevedore injured on vessel owned by United States Shipping Board Emergency Fleet Corporation. 228AppDiv115, 239NYS323.

729-4 7F(2d)838 (property constructed by government for war use held to come under control of secretary of war).

730-19½-New. Conveyance of land to government pursuant to Act of Congress, June 4, 1897, and application to select land in lieu thereof, does not rest title on rejection of selection. 19F(2d) 695.

730-19⅓-New. Provision of act ceding land to United States requiring recordation of map held complied with by recording authenticated copy of military map. 22F(2d)437.

730-19¼-New. United States owns property only in governmental capacity. 31F(2d)535 (not private).

730-20 278US439, 49SCt227, 73L ed 447.

730-21 278US96, 49SCt38, 73L ed200; 278US439, 49SCt227, 73L ed447; 281 US138, 50SCt284, 74L ed761; 281US647, 50SCt455, 74L ed1091; 19F(2d)634; 22 F(2d)669. **State game laws** are inapplicable to killing of surplus deer in national forest. 19F(2d)634. **Interference by state officers** with carrying out of regulation relating to national forest and game reserve may be enjoined. 19 F(2d)634. **Fort Snelling military reservation.**-180Minn241, 230NW572.

730-22 170Ark440, 280SW20; 111Tex Cr264, 12SW(2d)796. But see CalA 259 P762.

731-23 170Ark440, 280SW20; 150Md 592, 133A729, 46ALR983; 246NY467, 159NE400. See also 27F(2d)586. **Jurisdiction of state courts.**-170Ark440, 280SW20. **State statute limiting liability of innkeepers** is inapplicable to causes of action arising in territory ceded to United States by Arkansas for reservation at Hot Springs. 170Ark440, 280 SW20. **State's reservation of a right of occupancy of highways** on land ceded to United States is not reservation of political dominion. 246NY467, 159NE 400.

731-24 See also 111TexCr264, 12SW (2d)796. **Necessity of ownership by United States.**-CalA 259P762.

731-25 27F(2d)586; 29F(2d)932; CalA 259P762. **Maintenance of national soldiers' home** is not one of purposes for which lands when taken come ipso facto within exclusive jurisdiction of United States. CalA 259P762.

731-26 150Md592, 133A729, 46ALR983. See also 152Va484, 147SE461.

731-27 22F(2d)669; 246NY467, 159NE 400; 111TexCr264, 12SW(2d)796. **Maintenance of national soldiers' home** is not within purpose of law providing for cession of exclusive jurisdiction to lands held by United States for military purposes or defense. CalA 259P762. **Statute ceding jurisdiction over military reservation** construed applicable to future and not limitation on cession. 281 US138, 50SCt284, 74L ed761.

731-28 281US138, 50SCt284, 74L ed 761; 27F(2d)586; 150Md592, 133A729, 46ALR983; 135 Okl 183, 275P303(4th case); 111TexCr264, 12SW(2d)796. **Fort Sill military reservation.**-135 Okl 183, 275P303(4thcase). **Rights of way across federal military reservations** for various purposes may be entirely compatible with exclusive jurisdiction ceded to United States. 281US138, 50SCt284, 74L ed 761. **Terms of cession determine extent of federal jurisdiction** to extent they may lawfully be prescribed. 281US 138, 50SCt284, 74L ed761.

731-29 281US647, 50SCt455, 74L ed 1091; 22F(2d)669; 27F(2d)586; 176 Ark613, 4SW(2d)7. Contra 150Md592, 133A729, 46ALR983.

731-29½-New. But laws subsequently enacted by state do not apply. 176Ark 613, 4SW(2d)7.

732-31 Attempt of state to repeal act ceding to United States exclusive jurisdiction over land in national park long after acceptance of cession by United States is ineffectual. 31F(2d)644.

732-31a½-New. Acceptance by congress of state's cession to United States of exclusive jurisdiction over land in national park may be implied from other legislation by Congress. 31F(2d) 644.

732-31a½-New. Necessary acceptance by congress of grant to United States by state may be implied from the sufficient recognition of grant and claim of title by United States. 29F(2d)91.

732-31a¼ Purpose of grant by state.-Grant by state to United States absolute in form, without limitation or condition, cannot be treated as for military or naval purposes only, though prior to grant island had by order of president been set apart or reserved for military purposes, especially in view of contrary construction of parties. 29F(2d) 91.

732-31a½-New. Summons is not invalid because served upon nonresident army officer while at military reservation for military duty within state. Iowa 230NW548.

732-32 Purchaser at auction of surplus war material, having opportunity to measure quantities, not entitled to damages for government's failure to deliver amount erroneously listed in catalogue. 271US15, 46SCt386, 70L ed803.

732-36 271US136, 46SCt458, 70L ed872 (government sale of airplane linen held without guaranty of quality). **Purchaser must pay assessment for improvement** made prior to federal ownership but will be relieved from penalties. 27 OhNPNS39.

733-41. 26F(2d)746.

733-46 Deputy quartermaster, whose authority to execute contract for packing house products had been recognized, is not deprived of authority by appointment of officer as purchasing officer with authority to sign contract. 270 US124, 46SCt308, 70L ed497. **Emergency Fleet Corporation** has power to contract on behalf of United States for construction of ships. 13F(2d)581. **United States Inspector** could not arbitrarily reject material. 17F(2d)693. **The secretary of war,** etc. 32F(2d)141. **War Industries Board** not authorized to contract for government. 39F(2d)851.

734-47 Secretary of navy held to have authority to contract to pay government contractor increased cost due to wage increases put into effect at his instance. 275US509, 48SCt136.

734-48 27F(2d)389; 32F(2d)141.

734-53 31F(2d)838; 32F(2d)141.

734-55 29F(2d)257 [certiorari den 279 US843, 49SCt264(5thcase), 73L ed988].

735-56 Clandestine receipt by governmental officer of substantial sum of money, whether as loan, gift or bribe, concurrently with negotiations for public contract, justifies annulment of such contract as against public policy. 6F (2d)43. **Where officer making government contract receives pecuniary favor from other party,** entire transaction is tainted with fraud, notwithstanding government is subjected to no pecuniary loss or that contract might be advantageous to it. 14F(2d)705.

735-56½-New. Emergency Fleet Corporation.-Liability incurred by Emergency Fleet Corporation under carriage contract may be enforced by suit in personam. 14F(2d)141.

735-56⅓-New. Suit in personam against Emergency Fleet Corporation held not barred by limitation. 14F(2d)141.

735-56¼-New. Where action against Emergency Fleet Corporation it as a private corporation, defense that it was acting as agent of United States properly struck out. 14F(2d)248.

735-56⅙-New. Shipping board is liable for tort and breach of contract as any other private corporation. 20F(2d)56.

735-56⅙-New. United States Shipping Board Emergency Fleet Corporation may be sued on its contract. 22F(2d)398.

735-56½-New. Contract of emergency Fleet Corporation does not bind United States as a joint party. 22F(2d)398.

735-56⅛-New. Fleet Corporation is not relieved from liability for deviation on ground of United States agency. 26F (2d)337.

735-56⅛-New. One contracting with United States Emergency Fleet Corporation, acting as agent for shipping board, was chargeable with knowledge that shipping board was principal and Emergency Fleet Corporation merely its agent therein. 31F(2d)247.

735-56 1/10-New. United States Shipping Board Emergency Fleet Corporation, having authority as agent to make contracts for shipping board as its disclosed principal, will not be held liable thereon, on principle that it acted without authority, or in excess of authority, as agent. 31F(2d)247.

735-56 1/11-New. Fleet Corporation, though exercising powers under executive orders, is principal and responsible as such on contracts for construction of vessels. 32F(2d)680.

735-58 270US124, 46SCt308, 70L ed497. (offer of packing company to supply bacon with allotment by food administration, accepted by packing company, held binding contract); 270US124, 46 SCt308, 70L ed497 (contract for bacon held sufficient). **Leases.**-6F(2d)43 (leases given in pursuance of fraudulent contract are also infected with fraud; 27 F(2d)863 [certiorari den 278US656, 49 SCt185, 73L ed565]. **Acceptance of proposals** and award of contract for construction of storage facilities and delivery of fuel oil in exchange for royalty oil in consideration of preferential right to oil leases creates enforceable contract, and government is under no obligation to give specific leases to secure execution of formal contract. 6F(2d) 43. **Wartime contracts.**-21F(2d)673. **United States** not bound by contract to which its name was typewritten by person unknown. 22F(2d)398. **United States shipping board** has not statutory authority to sign name of United States to contract. 22F(2d)398.

735-59 270US124, 46SCt308, 70L ed497. **Contract to pay government contractor increased cost** due to wage payments held based on adequate consideration. 275US509, 48SCt136, 72L ed399.

735-60½-New. Promise to return to government excess profits not forbidden by some rule of public policy may be binding whether or not government had right to require it. 15F(2d)823.

735-60⅓-New. Where contracting official immediately upon retiring from office accepts employment from other contracting party, contract should be closely scrutinized. 14F(2d)705.

735-62 Quartermaster's signature by authorized officer held sufficient. 270US 124, 46SCt308, 70L ed497. **Writings as evidence** of army contract for bacon held single contract and not preliminary memoranda. 270US124, 46SCt308, 70 L ed497. **Accepted orders for bacon** signed by representatives of quartermaster's department and food administration held to be authorized in writing. 270US124, 46SCt308, 70L ed497.

736-66 13F(2d)658.

736-73 Alternative bids called for on government contracts should be defined. 6F(2d)43. **Bidders on government contracts** must be given same information and be treated without discrimination

or partiality. 6F(2d)43. **Letting of contract giving preferential right** to leases of naval petroleum reserves, without informing other bidders of secret agreement as to construction of storage facilities at cost, justifies cancellation of contract. 6F (2d)43.

738-85 Lease for term of years, contingent on appropriation, held not continued for subsequent year, after surrender, by appropriation with no reference to such lease. 271US204, 46SCt 477, 70L ed906. **Lease of office space** for federal agencies for term of years held in violation of law so far as terms extended beyond existing appropriation. 271US204, 46SCt477, 70L ed906.

738-87 Lease to the government, etc.–271US204, 46SCt477, 70L ed906.

738-89 126Misc690, 214NYS433. **Statute applies** to persons supplying labor or materials to subcontractors. 126 Misc690, 214NYS433.

739-90 18F(2d)203; 149Md207, 131A 323; 126Misc690, 214NYS433. **Bond held for benefit of merchandise owners** where given by one carting goods from wharf to appraiser's stores. 26F(2d) 191. **Bond held to cover loss** before its execution, but within contract period. 26F(2d)191. **Burden is on contractor** in suit against it for failure to give bond to show reduction of damages by others' claims. 245NY48, 156NE92. **Corresponding personal obligation** is imposed on part of contractor by requirement that bond be given. 126Misc 690, 214NYS433. **Failure of government to exact or contractor to execute** bond does not waive or affect corresponding personal liability of contractor. 126Misc690, 214NYS433. **Recovery where contractor failed to give bond is** limited to amount of bond required and if total claims exceed such amount each claimant receives pro rata share only. 245NY48, 156NE92. **Where contractor fails to furnish bond as required,** he is under no statutory liability to pay for material and labor to extent of penal bond required. 245NY48, 156NE92 (construing U. S. Comp. St. § 6923).

740-91 149Md207, 131A323; 245NY48, 156NE92 (construing U. S. Comp. St. § 6923). See also 28F(2d)777. **Action on bond of contractor** for public work may be brought against surety alone. 5F (2d)412. **Petition of intervening creditors** in action on bond need not allege date of completion of work. 270US349, 46SCt284, 70L ed624. **Provision of contract that contractors shall at their own risk and expense construct barges** held not in effect obligation to pay for labor and materials authorizing recovery on bond by laborers and materialmen. 20 F(2d)803. **Where neither bond nor contract required payment** for labor and material, no recovery on bond could be had under statute. 15F(2d)449 [aff 15 F(2d)450]. **Where neither bond nor contract contains obligation guaranteeing payment of claim of laborers and materialmen,** recovery by them is not authorized by Hurd Act of 1905 requiring such obligation. 20F(2d)803.

741-94 18F(2d)203; 149Md207, 131A 323.

741-95 Intervening creditors in suit on contractor's bond may file claims within same time that suit may be brought. 270US349, 46SCt284, 70L ed624.

741-96 245NY48, 156NE92 (construing U. S. Comp. St. § 6923).

741-98½-New. Failure of government contracting officer to approve change in contract has been held no defense where change was approved by officer whom contracting officer could nominate to act for him. 28F(2d)777.

741-98¼-New. If subcontractor's work is unduly delayed beyond specified time or is defective, contractor who is damaged as a result has a right of set-off in subcontractor's action against contractor and his surety, and has burden of proving damages sustained. 28F(2d) 777.

741-98¼-New. For weight and sufficiency see 28F(2d)777.

741-98⅓-New. In action by United States on behalf of subcontractor, against contractor and his surety, contractor is not entitled to set off claim for loss of materials in course of transportation, where subcontractor had nothing to do with transportation under its contract. 28F(2d)777.

741-99 25F(2d)44. **Liability of sureties** is measured by conditions of bond as prescribed by statute. 18F(2d)203. **Provision in contract that contractor shall be responsible for all damages to person or property in connection with work** does not impose any liability to which he would not otherwise be subject nor give right of action on bond. 18F(2d)203. **Interest.**–28F(2d)777.

742-2½-New. That subcontract let by one contracting on government work was let without written approval of contracting officer of government as required by original terms of contract, and did not expressly relate to general contract, and contained no provision for assignment of its unperformed portion to United States, has been held no defense to contractor's surety in action in behalf of subcontractor to recover for labor and materials furnished under Materialmen's Act. 28F(2d)777.

742-3½-New. Provisions as to enforcing contractor's rights on bond do not apply to action enforcing personal obligation of principal. 126Misc690, 214 NYS433 (applies only to action against fund represented by bond).

742-3½-New. Contractor may recover on subcontractor's bond for payments made to third person furnishing labor to subcontractor which subcontractor failed to pay. 149Md207, 131A323.

742-3¼-New. Statute limiting time for suit by United States for benefit of laborers and materialmen.–Excuse for not bringing action within statutory time not shown. 18F(2d)556.

742-3⅕-New. Statute does not constitute limitation on United States. 18F (2d)548.

742-3⅙-New. Appropriate and administrative determination of amount due as indicated by public record or official act is final settlement for purpose of suit on hand. 18F(2d)548.

742-3⅐-New. Date on which United States authorized and directed final payment to contractor is final settlement for purpose of suit on bond. 18F(2d)556.

742-3⅛-New. Compliance with statute is essential to assertion of rights thereunder. 18F(2d)548.

742-3⅑-New. Materialman cannot assert claim by intervening in action of United States on bond which does not depend on statute, more than year after completion of work. 18F(2d)548.

742-3 1/10-New. Hire of boats and labor for hauling sand entering into construction work for federal government comes within terms of contractor's bond required by Act Febr. 24, 1905. 15F(2d) 21.

742-3 1/11-New. Allowance for agreed rental for tug during time tug was idle because of low water held reasonable and covered by bond. 15F(2d)21.

742-3 1/12-New. Evidence held to support finding that action on bond was not instituted within year after final settlement. 20F(2d)803.

742-3 1/13-New. Payments which have been made are properly applied on unsecured claims, leaving bond as security unimpaired. 25F(2d)44.

742-5 268US186, 45SCt469, 69L ed907; 270US124, 46SCt308, 70L ed497; 18F (2d)585. **Particular contracts and clauses and phrases therein construed.**–4F(2d)829; 6F(2d)43 (contract for exchange of royalty oil for fuel oil and storage facilities); 13F(2d)607; 16F (2d)895; 20F(2d)803 (phrase "final settlement" as relates to time of materialmen to use on bond); 22F(2d)113 (bill of lading to which government is party); 28F(2d)373. **Ambiguities in act** providing for recovery on bond of public contractor must be so resolved as to accomplish intention. 270US349, 46SCt 284, 70L ed624. **Authority of officer, as respects government contract,** depends on his authorized act not on his title. 16F(2d)894. **Contracting officer's approval and payment of expenses** under cost plus construction contract are binding in absence of fraud or gross mistake. 16F(2d)895. **Lease and contract** held in effect equitable mortgage. 273US571, 47SCt515, 71L ed781. **Reference in contract to contractee's agreement with another company** held not notice to United States of rights thereunder of latter company. 273US571, 47SCt515, 71L ed 781. **Sale by United States not subject to inspection** held to render specifications in advertisement not warranties. 273US67, 47SCt274, 71L ed540.

742-6 4F(2d)829 (government cannot acquire title to land purchased with notice of its grantor's agreement to reconvey); 6F(2d)43 (contract to exchange royalty oil for fuel oil and storage facilities held not vitiated because of government's option to take payment in cash); 27F(2d)389.

742-8 But see 31F(2d)838.

743-9½-New. If government contract was illegal as a whole or in substantial part it is not binding on either party, 197Ind527, 151NE420.

743-9⅓-New. and the government cannot enforce certain provisions while rejecting others. 197Ind527, 151NE420.

743-9¼-New. Transferring contract to United States does not change its nature or its legal effect. 19F(2d)1009.

743-16 268US186, 45SCt469, 69L ed907. **Upon abandonment of dredging contract** by contractor, government held justified in reletting. 270US251, 46SCt218, 70 L ed570. **Government applying reserve due contractor** on loss occasioned by abandonment held to have shown that loss exceeded reserve. 270US251, 46SCt 218, 70L ed570. **Date of "final settlement" held date of approval by chief engineer** under contract. 16F(2d)456.

743-17 267US281, 45SCt239, 69L ed613 (contract for letting of tugs to United States construed to be demise for charter period and not one for service entitling United States to deductions covering time when tugs were not at its disposal). **Company held not to have waived** claim for damages. 17F(2d)693. **Damage determined** by evidence and not by complaint. 17F(2d)693.

743-18 Acts held to constitute breach of contract by United States.–268US186, 45SCt469, 69L ed907. **Acts held not to constitute breach of contract by United States.**–271US121, 46SCt448, 70L ed864. **Notice in contract for purchase of land** of grantor's contract to reconvey to his seller will be imputed to government. 4F(2d)829.

744-19 7F(2d)161.

744-21 37GaA797, 142SE210.

744-26 270US4, 46SCt184, 70L ed438 (contract construed not to render government liable for damages for delay).

745-31 Seller entitled to depreciation on termination by government of wartime contract held entitled only to difference between cost and value as determined by appraisers. 266US537, 45SCt 158, 69L ed428.

745-31½-New. Government may terminate agreement without accounting for prospective profits, if terms so provide. 273US324, 47SCt352, 71L ed662.

745-31⅓-New. Supplemental contract controls liability for alleged breach. 273US324, 47SCt352, 71L ed662.

745-31¼-New. However, supplemental agreement may be such as not to preclude recovery for expenditures under original contract. 273US227, 47SCt409, 71L ed621.

745-31⅕-New. Extra expenditures may be recovered on building contract. 273 US227, 47SCt409, 71L ed621.

745-31⅙-New. But prospective profits on war contract cannot be recovered. 273US227, 47SCt409, 71L ed621.

745-31⅐-New. Contractor may recover for increased cost resulting from entrance of United States into war. 26F (2d)549.

745-31⅛-New. Evidence has been held not to show that United States Shipping Board Emergency Fleet Corporation unlawfully interfered with and prevented plaintiffs' performance of their contract with shipbuilding company to furnish anchor chains for hulls under construction, requisitioned by Emergency Fleet Corporation, together with contracts for equipment. 28F(2d)798.

745-31⅑-New. Act transferring to shipping board, President's powers and duties under emergency fleet fund legislation does not destroy remedies on con-

tract liabilities of Merchant Fleet Corporation. 281US519, 50SCt372, 74L ed 1011.

745-31 1/10-New. Merchant fleet corporation's liability on contract is not curtailed by presumption individual is not bound on contracts made in government's behalf. 281US519, 50SCt372, 74 L ed1011.

745-32 271US43, 46SCt389, 70L ed822 (modified contract executed during war time held not without consideration); 30F(2d)941.

745-33 30F(2d)941. **Duress as ground to avoid modification** of contract made under government threat to disregard original contract must show that probable injury to individual complaining rather than to industry generally was threatened and that fear of such result induced signing of modified contract. 271US43, 46SCt389, 70L ed822.

745-34 271US536, 46SCt613, 70L ed 1074 (lease of towboats held properly terminated). **Award by government** based on canceled contract held properly credited on amount due government as of date of award, rather than date of cancellation of contract. 270US 375, 46SCt211, 70L ed639. **Accepted award** based on canceled contract for war supplies held not to bar counterclaim for balance due on note given pursuant to another subsequent contract. 270US375, 46SCt211, 70L ed639.

745-36. 27F(2d)389.

745-37 1/2-New. Fleet Corporation held to have power to suspend and cancel contract for ship construction, upon making just compensation. 13F(2d) 581.

745-37 1/3-New. Just compensation for cancellation of ship construction contract held not to include loss of profits. 13F(2d)581.

745-37 1/4-New. Subcontractor held not entitled to recover loss of profits from contract canceled by Fleet Corporation. 13F(2d)581.

745-37 1/5-New. Rights and remedies of subcontractors, laborers, and materialmen.-28F(2d)777.

745-37 1/6-New. By terms of government's lease of shipyard contract may be construed as one of sale. 28F(2d) 373.

745-37 1/7-New. Authority to make original contracts does not imply authority to cancel them or relinquish rights thereby acquired. 32F(2d)141.

745-37 1/8-New. Recovery of payments upon cancellation of contract between United States Shipping Board Emergency Fleet Corporation and shipbuilding company. 35F(2d)889.

746-42 154Miss215, 122S485.

746-49 1/2-New. Subcontractor cannot defend breach of contract on ground that it was not assignable without having attempted to secure approval of assignment. 154Miss215, 122S485.

746-52 31F(2d)211; 40F(2d)937 (assessment liens). See also 276US287, 48 SCt306, 72L ed575.

747-58 271US140, 46SCt457, 70L ed 874; 281US385, 50SCt343, 74L ed921.

747-59 Subcontractor of mills selling Khaki to government cannot recover money exacted by government and paid in compromise settlement under Dant Act on showing of fraud practised by mills on subcontractor. 267US338, 45 SCt278, 69L ed643. **Tucker Act does not give right of action** against United States in cases where, if transaction was between private parties, recovery could be had upon contract implied in law. 267US338, 45SCt278, 69L ed642.

747-61 26F(2d)746. **No contract of government is implied** where oil company moved its storage tanks to provide storage for army transport fuel oil. 270 US65, 46SCt219, 70L ed473.

747-63 1/2-New. Where there is nothing to indicate withholding of credits for any public purpose, contract will not be implied, so that government is not liable on implied contract for loss to coal shipper due to his failure to get timely credits for coal consigned to exchange as directed by fuel administrator. 275 US188, 48SCt90, 72L ed229.

748-65 271US536, 46SCt613, 70L ed 1074; 7F(2d)676; 14F(2d)98; 32F(2d) 789; 12PortoRicoFed223. **Ownership of stock by United States** in Emergency Fleet Corporation does not exempt latter from liability for torts. 5F(2d)234.

748-68 14F(2d)98.

748-69 267US423, 45SCt240, 69L ed694 (Tucker Act gives no remedy in tort against United States). **Under Act March 9, 1920** United States is liable in personam for negligent delay in delivery of goods on ship owned by it, where the ship, if privately owned, would be liable in rem. 7F(2d)501.

748-76 1/2-New. Under Negotiable Instruments Law, coupon liberty bonds are negotiable promissory notes, but registered liberty bonds are not negotiable. 73Mont219, 236P250.

748-76 1/3-New. Treasury regulations relative to registration and negotiation of war savings certificates are authorized under statutes providing for issuance of such certificates. 24F(2d)392.

748-76 1/4-New. Where liberty bonds, lost by plaintiff bank's messenger in delivering other bonds to defendant, came into defendant's possession after it had notice of loss through act of its dishonest employee in substituting such lost bonds for other bonds belonging to defendant, it has been held that defendant was not holder in due course. 27F (2d)633 [certiorari den 278US653, 49SCt 179(1stcase), 73L ed563].

748-76 1/5-New. Under statute, subsequent holder of stolen liberty bonds has burden of proving that it is lawful holder by showing, among other things, that it took bonds in good faith and for value, and that at time it acquired them it had no notice of defect in title of person from whom it acquired bonds. 27 F(2d)633.

748-76 1/6-New. Bank held holder in due course of negotiable liberty bond unlawfully pledged by owner's agent. 90 PaSuper341.

748-76 1/7-New. Where government, after discovering forgery of indorsements on victory notes for which it had theretofore exchanged coupon bonds, failed to notify bank effecting exchange of such forgeries, resulting in injury to bank, failure to give timely notice of forgery constituted defense, notwithstanding right of action rested on implied warranty. 30F(2d)334.

748-76 1/8-New. Liberty bonds.-United States Liberty bonds, payable to bearer and negotiable by delivery are commercial paper. **Ariz** 283P926.

748-76 1/9-New. Where corporate officers, by ultra vires act, turned over Liberty bonds of corporation to bank for deposit as collateral for deposits of public funds and state treasurer took bonds without knowledge of transaction, state is holder in due course although state treasurer had knowledge thereof. **Ariz** 283P926.

749-89 1/2-New. Taxpayer cannot sue to enjoin execution of federal statute of public concern as invalid. 23F(2d)997.

749-92 28F(2d)373. **United States must prove claims** of taxes against insolvent corporation like any other creditor. 237 IllA405.

750-95 1/2-New. Government advising indorsee bank of forgery of payee's signature on notes exchanged for bonds entitled to recover against bank on implied warranty of genuineness. 43F (2d)665.

750-96 267US387, 45SCt338, 69L ed672 (contract construed to give government equitable lien on advance payments to contractor deposited in special accounts as against right of banks to set off accounts against amounts due them from contractor); 6F(2d)752; 30F(2d)525; 85Mont532, 281P341.

750-97 17F(2d)437; 24F(2d)139 (right of priority not governed by state laws). **Statute must be construed liberally.**-24F(2d)139.

750-98 279US80, 49SCt321, 73L ed621; 17F(2d)437; 19F(2d)541; 22F(2d)483 (note for price of vessel requisitioned by shipping board); 30F(2d)525; 40 F(2d)935 (cannot be impaired by state law); 237 IllA405; 208 Iowa1248, 224 NW499; 85Mont532, 281P341 (priority limited to particular cases specified in statute). **Applies only** to funds available to pay creditors. 19F(2d)239. **Claim of director general of railroads for transportation charges against insolvent corporation** held not entitled to priority. 271US236, 46SCt511, 70 L ed924. **Debt of railroad company to United States** is entitled to priority in payment by receiver over claims, incurred prior to receivership, of employees, persons furnishing materials and persons injured, having statutory liens. 30F(2d)525. **"Debts"** in priority statute includes taxes. 269US492, 46 SCt180, 70L ed373. **Emergency Fleet Corporation.**-26F(2d)503. **Rights of director general of railroads** as to priority of claims arising out of operation rests on statutory provisions. 271US 236, 46SCt511, 70L ed924. **Rule applies after proof and allowance of claim.**-237 IllA405. **Statute giving debts due United States** priority is to be liberally construed. 269US483, 46SCt176, 70L ed368. **Statutory lien on gross income of railroad in receiver's hands for injuries to person and property by operation of railroad** is subject to prior payment of debt due to United States. 30F(2d)525. **Priority extended to acts of bankruptcy.**-40F(2d)935.

751-1 33F(2d)533 (claims under Transportation Act).

751-4 8F(2d)859; 30F(2d)525. **Matters constituting acts of bankruptcy.**-24F(2d)139 (closing of bank by majority of directors and liquidation by state officers).

751-7 24F(2d)139 (enforceable by injunction against prior payment of other claims).

752-9 That payments were made by government under cost plus contract more frequently than required does not lessen binding effect of payment as approval and acceptance of work. 16F(2d) 894.

752-11 1/2-New. Priority given against decedent's estate exists only in favor of debts due United States. 126Misc715, 215NYS134 (U. S. Rev. St. § 3466).

752-11 1/3-New. Statutes giving priority are presumed to be for public good and are to be liberally construed. 17F(2d) 437; 126Misc715, 215NYS134.

752-11 1/4-New. Persons claiming exemption from operation of statute giving United States preference have burden of proof. 17F(2d)437.

752-14 13F(2d)658 (holding increased payment under amended contract not illegal).

752-16 Allegation in petition for breach of cost plus contract that construction quartermaster had immediate charge of work thereunder establishes that he was contracting officer's representative. 16F(2d)894.

752-21 Statute held not to authorize compulsion of compromise offer by United States by state court as condition of allowance of claim. 237 IllA405.

752-21 1/2-New. Settlement between government and war contractor in the absence of fraud or gross mistake is binding on government. 16F(2d)859.

753-26 24F(2d)933 (interference with sealing voyage). **Government held not bound to pay** for lost unregistered war saving stamp certificates. 270US7, 46 SCt185, 70L ed448. **Claims of Sisseton and Wahpeton Indians.**-277US424, 48 SCt536, 72L ed939. **Construction.**-275 US331, 48SCt194, 72L ed303.

753-32 Buyer of silk sold to him through salvage board cannot recover under Tucker Act damages for delay in delivery caused by embargo placed on shipments by government. 267US 458, 45SCt344, 69L ed806. **Under Tucker Act** no recovery can be had for destruction of business incidental to taking of land or for intentional unauthorized taking. 267US341, 45SCt293, 69 L ed644. **No recovery allowed on expenditures** and losses based on negotiations not ripening into contract. 273US200, 47SCt339, 71L ed608. **No recovery may be had on unauthorized contracts for military uniforms.**-273US200, 47SCt339, 71L ed608.

753-34 28F(2d)669; 28F(2d)865.

753-41 Recovery of compensation for claim not provided for by statute is not precluded by acceptance of compensation for land taken. 267US341, 45

8Ct293, 69L ed644. **That under act of Oct. 6, 1917** secretary of war might consider loss due to destruction of business in purchasing land for military purposes does not entitle owners to damages for loss of business in absence of agreement. 267US341, 45SCt293, 69 L ed644.

754-44½-New. In action for additional compensation due from United States under requisition charter for steamship owned and operated by plaintiff for account of United States, which provided that United States would reimburse owner for increases in wages and bonuses over standard prevailing, proper basis for reimbursement was standard wage scale prevailing generally on ships in Atlantic coastwise and West Indian trade, in which plaintiff's steamship was engaged. 29F(2d)1013(2dcase).

754-44½-New. Claim arising out of government's contract for construction of vessels for government was not required to be presented to comptroller general, but was properly presented to shipping board. 28F(2d)373.

754-44¼-New. United States before recognizing claims may adopt such form of procedure or require such evidence of liability as it sees fit. 33F(2d)664.

754-46 Assignee of patent held to have licensed government use thereof.-273US 236, 47SCt366, 71L ed625.

754-49 16F(2d)272.

754-52 16F(2d)272.

755-66 Railroads held to have claims for war transportation service before government control. 270US320, 46SCt 267, 70L ed606. **Land grant railroad** stating bills without protest with land grant reduction held not entitled, after payment, to recover full rates. 270US 320, 46SCt267, 70L ed606.

758-77 But see 268US169, 45SCt472, 69 L ed899.

759-84 273US321, 47SCt365, 71L ed661. **Transportation of troops under land grant** held not on cash basis to secure party rates. 273US321, 47SCt365, 71 L ed661

760-87 US 30F(2d)871.

762-14 See also 16F(2d)537.

763-24 197 Ind527, 151NE420 (not open to collateral attack). See also 30 F(2d)941.

763-25 21F(2d)673 (decision of accounting officer in settlement of contract held final); 197 Ind527, 151NE420 (not open to collateral attack). **Compromise and settlement of war-time contracts.**-21F(2d)673

763-26 Acquiescence by claimant in payment of less than due will not discharge claim, unless there is something more than acceptance without protest. 268US169, 45SCt472, 69L ed899. **Protest at payment of part of claim** or appeal is not condition precedent to right to resort to court of claims. 268US169, 45SCt472, 69L ed899.

765-42 40F(2d)72 (interest in liquor under federal seizure). **Claim against alien property custodian** held unassignable. 17F(2d)321. **Infringement of patent claim.**-275US331, 48SCt194, 72L ed 303.

765-44 Employment of subcontractor.-39Wyo 238, 275P128.

765-46 An attorney's agreement to prosecute for a contingent fee, etc. 128 Kan174, 277P54, 64ALR566.

766-47 39Wyo 238, 270P1082.

766-48 268US271, 45SCt503, 69L ed951. **Statute prohibiting assignments** does not apply to assignment of claim against director general on reparation award to corporation into which assignor merged. 6F(2d)305.

766-51½-New. Statute does not apply to claim credited by act depriving patent owner of remedy against government's infringing private contractor and making government indemnitor for such infringement. 275US331, 48SCt194, 72 L ed303.

766-52 17F(2d)321.

766-53 40F(2d)544.

767-58½-New. Reassignment to patentee, government employee, of patent with claim against United States for infringement, vests patentee with rights for infringment which his assignor had. 37F(2d)111.

768-69 270US476, 46SCt428, 70L ed 694; 271US298, 46SCt524, 70L ed953; 278US427, 49SCt183, 73L ed439; 281US 339, 50SCt291, 74L ed887; 7F(2d)293 (property wrongfully held by alien property custodian); 19F(2d)744; 25F(2d) 673; 29F(2d)1014; 31F(2d)297; 32 F(2d)827; 34F(2d)241; 37F(2d)918; 43F(2d)80. **Interest as damages** cannot be adjudged against the United States. 270US476, 46SCt428, 70L ed694. **Decision of supreme court of 1906** upholding claim of Cherokee Nation under former treaties due in 1895 held not to hold that there was breach of contract by government in failing to make appropriations so as to justify claim for interest as on a new default. 270US 476, 46SCt428, 70L ed694. **Interest on sum alleged to have been taken** out of trust fund held by United States for benefit of Cherokees held not to be compounded as though held in trust. 270 US476, 46SCt428, 70L ed694. **Interest on deposits of court funds** collected by United States cannot be recovered by depositor unless collection was made for his benefit. 271US212, 46SCt501, 70 L ed911.

768-70 270US476, 46SCt428, 70L ed 694; 25F(2d)673; 40F(2d)14. **Articles of agreement and for purchase from Cherokee Nation,** allowing interest on sums voluntarily left in treasury, held to refer only to new money consideration, not to amounts to be determined as due under former treaties, not fixed in amount at such time. 270US476, 46 SCt428, 70L ed694. **Interest may be recovered as part of "legal damages."** 16F(2d)945.

768-71 270US476, 46SCt428, 70L ed 694; 278US41, 49SCt52, 73L ed170; 11 F(2d)981; 16F(2d)945; 19F(2d)744; 19F(2d)774 (suits in Admiralty Act); 25F(2d)673. **Governments cannot recover** overpayments in judgments by errors embodied in legislation. 270US 476, 46SCt428, 70L ed694. **Under statute authorizing suit against United States** interest on award is recoverable. 16F(2d)945; 16F(2d)948.

768-71½-New, or where it is required as part of just compensation. 278US 41, 49SCt52, 73L ed170.

769-76 270US476, 46SCt428, 70L ed694.

769-77 Mistake of treasury department and of congress in increasing interest amounts payable under judgment in favor of Cherokee Indians cannot be complained of by them. 270US476, 46SCt 428, 70L ed694.

769-77½-New. Interest liability on claim against United States, in case amount recovered on counterclaim was less than amount withheld by secretary of the treasury, attaches to offsets made by general accounting office. 31F(2d) 297.

769-77¾-New. Where claim is admitted but payment withheld because of set-off claim found against government, interest from conclusion of services to time of judgment is allowed. 32F(2d) 887.

769-78 Obtaining possession of nondutiable merchandise from collector is not obtaining approval of claim upon or against government. 270US339, 46SCt 251, 70L ed616. **Wrongfully obtaining possession** of nondutiable merchandise by withholding fact of arrival of bill of lading is not "defrauding" government within meaning of criminal statute. 270 US339, 46SCt251, 70L ed616.

773-9 40F(2d)214 (on contract of agents). **United States in litigation** assumes either character of sovereign or of contractor. 7F(2d)161. **Action on assigned claims.**-40F(2d)214.

774-11 Suit on contract or covenant made by officer.-5F(2d)708 (United States can sue on contract made by Emergency Fleet Corporation, acting for it).

774-12 Emergency Fleet Corporation may sue.-247NY211, 160NE13.

774-13 5F(2d)708 (may sue for overpayments made by Emergency Fleet Corporation).

774-16 273US456, 47SCt416, 71L ed734 (dictum); 4F(2d)829; 5F(2d)320; 7 F(2d)161; 28F(2d)265; 30F(2d)334; 197 Ind527, 151NE420. **Government cannot recover** voluntary overpayment to contractor. 6F(2d)879. **In action to recover overpayments** made by Emergency Fleet Corporation latter is not necessary party. 5F(2d)708. **Principles of equity** are not applied to frustrate purpose of laws or thwart public policy. 273US456, 47SCt416, 71L ed734. **United States can only enforce strictly legal demands through actions at law** subject to legal defenses the same as other suitors. 197 Ind527, 151NE420. **United States takes position of private suitor by filing** claim for value of government vessel sinking after collision. 24F(2d)657.

775-18½-New. United States, suing to recover overpayment made by Emergency Fleet Corporation, is real party in interest. 247NY211, 160NE13.

775-18¼-New. United States is **real** party in interest and may recover overpayment made by Fleet Corporation in carrying out shipbuilding program. 31 F(2d)226.

775-18¼-New. Money improperly paid by government officers to persons not entitled thereto may be recovered by government. 35F(2d)765.

775-18⅓-New. United States held entitled to maintain action for recovery of amounts advanced upon uncompleted ships. 35F(2d)889.

775-19 272US675, 47SCt289, 71L ed472; 5F(2d)658; 6F(2d)752; 16F(2d)306; CCA 17F(2d)34; 19F(2d)695; 20F(2d) 245; 24F(2d)836; 32F(2d)454; 34F (2d)367; 37F(2d)918; 41F(2d)415; 43 F(2d)150; 43F(2d)773; 103Conn36, 130 A162; 215Ky216, 2848W1049; NJCh 149A353(2dcase); 127Misc834, 217NYS 534 (without express authority of congress). See also 28F(2d)265; 28F(2d) 917. **Action against director general of railroads.**-103Conn36, 130A162. **Suit held not to be against United States.**-275US1, 48SCt12, 72L ed131 (United States Fleet Corporation); 14F(2d)321; 32NM460, 259P629. **Action on counterclaim against director general of railroads** after federal control of railroads has ceased cannot be brought where statute permits such actions only against agent designated by president. 103Conn36, 130A162. **Actions under Transportation Act against agent designated by president** are in legal effect against United States. 24F(2d)610. **Emergency Fleet Corporation** may be sued by libel in personam under Suits in Admiralty Act. 276US202, 48SCt256, 72L ed531; 247NY211, 160NE13. Emergency Fleet Corporation held not immune from suit because its entire stock was owned by United States. 7F(2d) 676. **Injunction cannot issue to restrain employees of United States** from maintaining depot for storing high explosives as alleged nuisance, such being discretionary in executive of government. 27 F(2d)262. **Sovereignty of United States** raises presumption against inability. 272US675, 47SCt289, 71L ed472. **Suit against agent of president** as provided in Transportation Act of Febr. 28, 1920, is a suit against United States. 215 Ky216, 2848W1049. **Suit against alien property custodian** to collect debt out of seized property is "suit against United States." 22F(2d)491. **Suits in Admiralty Act affords exclusive remedy** against Fleet Corporation for causes of action for damages for which libel could be filed. 30F(2d)946. **United States Shipping Board Emergency Fleet Corporation** may sue and be sued in state or federal courts, and its employees are not subject to criminal code as agents of United States, and it has no attributes of sovereignty. 28F(2d)373. **When, where and how the government shall be sued** is for determination of legislative branch of government. 36 F(2d)529. **Where agent of government is party defendant,** courts treat case as one in fact against government. 34F (2d)367. **Suit against Fleet Corporation may be maintained under Suits in Admiralty Act** notwithstanding liability is in personam with nothing on which re-

covery in rem could be based. 42F(2d) 222. **Effect of withdrawal of consent.**–43F(2d)836.

775–20 279US73, 49SCt260, 73L ed619; 8F(2d)80; 17F(2d)530; 24F(2d)108; 29F(2d)631; 56AppDC46, 8F(2d)907. **Act of congress of March 3, 1925** (Comp. St. Suppl. [1925] §§ 1251¾–1 to 1251¾–10) authorizing suit in admiralty against the United States for damages caused by vessels belonging to the United States does not permit a suit by a seaman on a coast guard ship for injuries by explosion of a shell but his remedy is under the act creating United States employees compensation commission. 11F(2d)869. **Under judicial code** United States or its agents can be sued outside of court of claims only in cases not exceeding ten thousand dollars. 12PortoRicoFed223.

776–21 5F(2d)885.

776–22 7F(2d)838; **NJCh** 149A353(2d case).

776–23 But see 12PortoRicoFed223.

776–27 7F(2d)676; 41F(2d)58(2dcase).

776–29 **NJCh** 149A353(2dcase); 225 AppDiv423, 233NYS383.

776–30 **Emergency Fleet Corporation** is liable for injuries to employee engaged in repairs to vessel in district where it maintained office and place of business. 5F(2d)234. **United States, when sued as contractor,** cannot be held liable for its acts as sovereign. 7F(2d) 161.

776–31½–New. Shipping board not subject to damages for delay as "agency of United States." 20F(2d)56.

776–31⅓–New. United States Shipping Board Emergency Fleet Corporation is not entitled to immunities of a sovereign. 15F(2d)600.

776–31¼–New. Action against agent designated by president is in legal effect against United States. 139SC101, 137SE442.

776–31⅕–New. Condition imposed by congress in authorizing action against United States must be strictly followed. 139SC101, 137SE442.

776–31⅙–New. Neither director general of railroads nor attorneys may waive exemption of United States from judicial process. 139SC101, 137SE442.

776–31⅐–New. Rule as to effect of election to sue undisclosed principal has no application in suit against United States shipping board. 128Misc345, 217 NYS883.

776–31⅛–New. Tucker Act provides a remedy for imposition on the government of contract liability not sounding in tort. 8F(2d)80.

776–31⅑–New. United States is not proper party defendant in suit to set aside settlement of Fleet Corporation. 32F(2d)680.

776–31 1/10–New. Bill to cancel income tax waiver cannot be maintained against collector of internal revenue without joining United States as party defendant. 32F(2d)892.

776–31 1/11–New. In suit by surety on corporation's bond for extension of time for payment of tax, to be exonerated United States is necessary party in interest. 24F(2d)836.

776–31 1/12–New. Action brought against agent of Fleet Corporation held maintainable only against United States under Suits in Admiralty Act. 40F(2d) 590.

776–31 1/13–New. In action to enjoin construction of levees, United States held not proper party defendant where condemnation of land could not be asked. 35F(2d)235.

776–31 1/14–New. Suits in Admiralty Act applicable to suits under Public Vessel's Liability Act merely substitutes right of action in personam against United States for action in rem. 43F (2d)401.

776–32 16F(2d)702; 17F(2d)34; 20F (2d)245; 24F(2d)529 (act of congress held not to consent to suit in admiralty for death of or injury to naval officer in collision); 24F(2d)610; 26F(2d)746; 28F(2d)744; 30F(2d)254 [certiorari granted 279US831, 49SCt352(2dcase), 73 L ed981]; 32F(2d)454; 32F(2d)687; 33F(2d)224; 40F(2d)965 (congress may name conditions). **Congress may impose terms** deemed necessary in giving consent for suit. 16F(2d)702. **Consent cannot be enlarged beyond statutory language.**–272US675, 47SCt289, 71L ed 472. **Emergency Fleet Corporation** is liable to injured seaman as operator of vessel, though it, at time of accident, was operated and managed by shipping company as agent for Fleet Corporation. 55AppDC300, 5F(2d)123 (under Admiralty Act). **Government ownership of vessel causing injury must be shown,** in action against United States under congressional consent. 272 US675, 47SCt289, 71L ed472. **Letter of statute giving consent must be strictly pursued.**–24F(2d)610. **Liability of Emergency Fleet Corporation** cannot be avoided on ground that it was acting as public agent. 55AppDC300, 5F(2d) 123. **Right to sue federal government** can be exercised only as prescribed by law. 217Ala75, 114S680. **Law authorizing suits by certain seamen and other judgment creditors of steamship company** held not to entitle claimant of fund deposited with shipping board to sue United States. 41F(2d)962.

777–33 24F(2d)108; 42F(2d)313; **NJ Ch** 149A353(2dcase). See also 28F(2d) 917.

777–34 34F(2d)881. **In suit for personal injuries** against Emergency Fleet Corporation service on resident director in charge of business within district is sufficient. 5F(2d)234. **Remedies provided by Admiralty Act** relating to suits against United States arising out of ownership and operation of vessels are exclusive in all cases where libel might be filed. 280US320, 50SCt118, 74L ed 451.

777–36 8F(2d)90 (Tucker Act not repealed by Admiralty Act).

777–38½–New. Congress may impose such restrictions upon the right to sue as it deems necessary. **CCA** 17F(2d) 34.

777–38⅓–New. That United States creates right against itself in certain class of individuals does not imply obligation to provide remedy for enforcement. 32 F(2d)415.

777–38¼–New. Government's immunity is waived only as expressed in statutes and orders of director general of railroads. 32F(2d)454.

777–38⅕–New. Death of officer of unseaworthy submarine does not give rise to cause of action, statute authorizing liability for damages by public vessel referring to damages to third persons, not to ship's company. 27F(2d)807 [certiorari den 278US653, 49SCt179(2dcase), 73L ed563].

777–40 35F(2d)400.

778–44½–New. Procedure generally.–Court procedure prevailing in actions between private parties applies where government subjects itself to such on contracts with individuals. 18F(2d)585.

778–45 14F(2d)147; 19F(2d)1009; 41 F(2d)354 (execution on judgment); 237 IllA405 (action against receiver appointed in state court); 7PaDist&Co 137. **Principle has no application** where equitable persuasion is involved. 14F(2d) 391. **Immunity does not apply** where remedy is sought in enforcement of right for benefit of private party. 19 F(2d)1009.

778–46 Government officer cannot waive statutory limitations on suit against United States. 19F(2d)251.

778–47 8F(2d)90 (time for action at law under Tucker Act not affected by limitation under Admiralty Act); 32 F(2d)687. But see US 41F(2d)863. **As condition of liability.**–139SC101, 137SE 442. See also US 41F(2d)863.

780–59½–New. Bill of lading provision requiring suits for loss to be brought within two years and one day barred recovery by government after that time. 22F(2d)113.

780–60 7F(2d)728; 14F(2d)784; 17 F(2d)28; 19F(2d)1009; 21F(2d)211 (claim of United States is not released by laches of officer to whom assertion of claim is intrusted); 22F(2d)113; 31 F(2d)535; 32F(2d)789; 40F(2d)214; 40F(2d)925; 237 IllA405; 50Philippine 975. **Principle has no application** where equitable persuasion is involved. 14F(2d)391. **Cannot be used as instrument of positive injustice.**–19F(2d)1009.

781–64½–New. Where government enters into ordinary business outside of strict governmental matters, plea of laches will be entertained against it. 13 F(2d)925.

781–67 13F(2d)658.

782–73 16F(2d)307.

782–74 But see 18F(2d)752.

783–81½–New. State statutes as to set-off do not apply when federal government sues. 17F(2d)232.

783–84 229AppDiv805, 242NYS522. **Under Suits in Admiralty Act** exclusive remedy of employee on vessel leased from United States through Shipping Board injured in employment is in admiralty in federal courts. **Wash** 286P 66.

783–90⅓–New. Commencement of suit against the United States may be by service of summons and complaint instead of petition. 8F(2d)83.

783–90⅓–New. Parties.–United States is necessary party to suit to enjoin maintenance of naval mine depot pursuant to act of congress. 27F(2d)262.

783–90¼–New. United States, being real party in interest, has been held entitled to sue shipbuilding corporation to recover overpayments made by United States Shipping Board Emergency Fleet Corporation under contracts for construction of vessels, which reserved right in United States to cancel them. 28 F(2d)373.

783–90⅕–New. United States has been held proper party to bring libel against charterer of vessel to recover demurrage for delay in loading cargo. 28F(2d)142.

783–90⅙–New. Owners of vessel have right and duty to bring action for damages for government's unlawful interference with proposed seal-hunting voyage in Bering Sea, under statute, and are trustees of any money recovered for payment of claims of officers and crew of vessel, though crew received share of value of skins as wages. 28F(2d)29.

783–90⅐–New. United States held necessary party defendant in suit to cause removal of building occupied by federal government as post office under lease. **NJCh** 149A353(2dcase).

783–90⅛–New. Parties. Necessity of appearance by attorney general, subordinate, or district attorney. 43F(2d) 969.

783–92 Libel for supplies furnished vessel owned by United States under statute must state that vessel was employed as a merchant vessel. 8F(2d) 61.

783–92½–New. Parties. United States is proper party libelant in proceedings on charter party executed by duly authorized agent of Fleet Corporation. 35 F(2d)395.

783–93 Libel in personam for personal injuries against Emergency Fleet Corporation is not exclusive remedy but action at law will be. 5F(2d)234. **Petition under Tucker Act** to recover for buildings recovered at expiration of lease held insufficient in failing to show relation of landlord and tenant with United States. 267US423, 45SCt240, 69 L ed694.

784–94 16F(2d)307.

784–95 40F(2d)544.

784–96½–New. Petition in tort by government for negligence of contractor in causing excessive cost of construction under cost plus contract held not to state cause of action, remedy being on contract. 6F(2d)879.

784–99 Compelling production, etc. 15 F(2d)133.

785–11 29F(2d)1014.

786–19 18F(2d)752; 28F(2d)373; 28 F(2d)669; 28F(2d)865. **Company accepting settlement** after notice to suspend operations under contract held not entitled to recover for profits on deliveries which under contract it might have made during thirty days following notice. 271US96, 46SCt440, 70L ed852. **Evidence held sufficient.**–271US96, 46SCt

440, 70L ed852; 4F(2d)829. **Evidence held insufficient.**–33F(2d)241. **Shipbuilding company held not entitled** to recover for loss from use of shipway held open at request of government officers. 271US96, 46SCt440, 70L ed852.
787-25 Evidence held insufficient to go to jury.–14F(2d)316.
788-32 Marketable title.–Ga 136SE795.
788-35½–New. Court can ascertain amount due defendant in action by United States to recover overpayments to shipbuilding corporation. 28F(2d)373.
788-35¼–New. Railroad need not pay any judgment secured against government through its agent for personal injury sustained in operation of railroad. 32F(2d)454.
788-35¼–New. Decree quieting defendant's title as against United States and Indians held not decree against sovereign. 40F(2d)882.
788-37 6F(2d)879; 42F(2d)331.
789-38 15F(2d)872; 37F(2d)918.
789-41 Damages for refusal to receive bacon, especially prepared for army use, held difference between contract price and amount actually realized, there being no market value. 270US124, 46SCt 308, 70L ed497. **On revocation of contract for bacon** government is liable for difference between contract price and sale price received abroad there being no market value. 270US124, 46SCt308, 70L ed497. **Contractor performing work,** after unjustifiable delay by government cannot recover as damages for delay amount by which market value of work done exceeded contract price. 271US263, 46SCt503, 70L ed938. **Contractor furnishing materials,** already purchased, under contract, which he might have refused to perform, cannot recover as damages for delay increased value of such materials. 271US263, 46SCt503, 70L ed938.
789-47 272US1, 47SCt1, 71L ed131; 300Pa355, 150A658 (dismissal of appeal).
790-48 267US86, 45SCt238, 69L ed527 (holding that under statutes authorizing suits in admiralty costs are recoverable against United States); 272US 1, 47SCt1, 71L ed131; 281US339, 50 SCt291, 74L ed887.

UNITED STATES COMMISSIONERS

791-3 28F(2d)898.
792-4 22F(2d)837; 27F(2d)892. **Decisions of commissioner are not conclusive judgments.**–22F(2d)837.
793-20 Cannot be enlarged without statutory authority.–38F(2d)833.
795-38 Review of commissioner's decisions.–Decisions on questions of law will be reviewed by district court. 8 F(2d)512. **District court may issue summary rule** to its commissioners. 22 F(2d)837. **District court has power to** reach forward to control preliminary proceedings. 22F(2d)837.
795-41 See also 28F(2d)898.
795-42 See also 8F(2d)512. **Commissioner has no authority to order return of intoxicating liquor** found by him to have been seized under search warrant improvidently issued, but should order it held to be otherwise disposed of according to law. 8F(2d)512.

UNITED STATES MARSHALS

805-15 Governor of Canal Zone has power to appoint deputy marshal on recommendation of marshal. 18F(2d) 690.
806-24 18F(2d)690.
806-25½–New. Governor of Panama Canal zone may appoint deputy marshal where necessary, and remove him for cause. 26F(2d)161.
806-25½–New. Governor of Canal Zone may validly remove deputy for refusal to obey order of court. 26F(2d)161.
806-25¼–New. After such removal, civil action is maintainable to oust removed deputy. 26F(2d)161.
806-25⅛–New. Status of deputy in civil service does not affect power of Canal Zone governor to remove him. 26F(2d) 161.
808-53 But see 4HawaiiFed646.
823-52 TexCivA 32SW(2d)674.
824-55 7Alaska519.
825-62 26F(2d)161.

UNKNOWN

829-16 Unknown heirs, etc. 317 Ill 535, 148NE317.

UNLAWFUL ASSEMBLY

831-1 123Kan362, 255P57, 59 [citCyc]. **Other definitions are:** 187Wis448, 204 NW486, 40ALR945. Intention to commit crime by force or unlawful purpose are not, at common law, essential ingredients of unlawful assembly. 104 NJL43, 139A161. **Parade of Ku Klux Klan** held not unlawful assembly. 187 Wis448, 204NW486, 40ALR945.
832-4 In New Jersey.–104NJL43, 139 A161. **Purpose of statute stated.**–86 CalA542, 261P756.
833-7 209Ky299, 272SW748, 750 [quot Cyc].
833-8 209Ky299, 272SW748, 750 [quot Cyc]; 187Wis448, 204NW486, 40ALR 945. **Proposed peaceful assembly in vacant lot to hear unobjectionable speech** held not unlawful assembly under statute which would authorize its prevention, or dispersing in advance of some overt act. 209Ky299, 272SW748. **Not every meeting at which violent, boisterous, tumultuous conduct occurs** constitutes unlawful assembly. 86CalA542, 261P756.
833-9 86CalA542, 261P756; 209Ky 299, 272SW748; 104NJL43, 139A161, 162 [citCyc].
833-12½–New. Elements of offense of remaining at place of riot or unlawful assembly. CalA 292P1068.
834-17 Evidence held sufficient to sustain conviction.–104NJL43, 139A161.
834-23 104NJL43, 139A161.
835-24 The mode of dispersing an unlawful assembly, etc. 123Kan362, 255P 57, 59 [quotCyc].
835-25 123Kan362, 255P57, 59 [quot Cyc].

UNLAWFUL DETAINER

835-1 32PortoRico 254 [quotCyc]; 143 Wash622, 255P945.

UNLAWFULLY

836-9 It is not synonymous with: "Knowingly." 209Ky191, 272SW378.

UNLESS

836-12 See also 7LaA680.

UNLIQUIDATED

836-13 See also 129Misc845, 223NYS 470. **Claim is unliquidated** if it is certain bankrupt is liable to pay it. 263 Mass57, 160NE437.

UNNECESSARY

838-21 140SC123, 138SE675. **"Unreasonable" distinguished,** etc. 140SC123, 138SE675.

UNREASONABLE

839-30 140SC123, 138SE675.

UNTIL

841-45 53ND887, 207NW987; 137 Okl 16, 278P273. See also 7LaA680.
842-46 53ND887, 207NW987.
842-47 231Ky244, 21SW(2d)291; 53 ND887, 207NW987. **Used in an inclusive sense.**–210Ky68, 275SW23.
842-47½–New. Ordinarily word "until" is inclusive in its meaning and will be so construed unless it is shown by context or otherwise that contrary is intended. 210Ky68, 275SW23.
842-47⅓–New. "Until" and "up to."–One expression is synonymous with other. 210Ky68, 275SW23.

UPHOLSTER

844-62½–New. To furnish with hangings, coverings, cushions, etc. 15CustA 228.

UPHOLSTERY

844-62⅓–New. Furniture or interior fittings covered or made with textile materials, leather, and the like. 15CustA 228.

UPLAND

844-63 93Fla535, 112S274.

UPPER

844-64½–New. that part of a boot or shoe above the sole and welt. 14CustA 392.

UP TO

844-66½–New. "Up to" means "until;" one expression is synonymous with other. 210Ky68, 275SW23.

USE

845-72 149Miss435, 115S563, 566 [quot CycperEthridge,J,disop].
845-73 164Ga811, 139SE716.
845-78 It is the ancient definition for every form of beneficial or equitable ownership.–There, etc. 149Miss435, 115 S563, 566 [quotCycperEthridge,J,disop]. **Synonymous with "enjoyment" and "occupancy."**–MoA 284SW197.
846-85 "Used" construed as meaning "employed."–44 OklACR55.
846-88 "Used" in connection with other words.–233Mich279, 206NW545.

USE AND OCCUPATION

851-9 130Misc403, 223NYS668. **Mere occupation insufficient.**–130Misc620, 224 NYS404.
851-10 86PaSuper502.
852-12 73CalA229, 238P736; 248 IllA 525; 308Mo 406, 275SW32; 81Mont1, 261P288 (action lies on lessee's refusal to give up possession to foreclosure purchaser); 130Misc403, 223NYS668; 124 Okl 52, 254P59. **Statutory remedy, being specific,** held to be exclusive. 81Mont 1, 261P288.
854-13 16F(2d)836; 22AlaA1, 113S651; MoA 29SW(2d)224; NJ 139A703; 105 NJL408, 144A812; 130Misc620, 224NYS 404.
855-14 124 Okl 52, 254P59.
856-19 Implied promise to pay for land appropriated does not include promise to pay rental value between date of occupation and appropriation. 37GaA788, 142SE170.
858-29 23F(2d)369; 105NJL408, 144A 812.
859-37 Right of vendor depends upon law of state where property is situated. 23F(2d)369.
859-42½–New. Where party in possession of land under contract for exchange fails to perform, other party is entitled to recover fair sum for rent less reasonable amount for permanent improvements. 193NC665, 137SE368.
860-46 230Ky553, 20SW(2d)286; MoA 29SW(2d)224.
869-47½–New. Nonsuit held properly granted where there was no evidence of reasonable value of use and occupation of building. CalA 261P661.
860-48 247 IllA496; 187Wis55, 203NW 910.
861-54 236Mich545, 211NW37.
863-71 In Oklahoma.–40 OklACR23 [rehpending].
865-84 See also 89PaSuper120.
865-94 Sufficient allegation of permission by plaintiff to occupy.–33Wyo 249, 238P654, 661 [citCyc].
866-96 Sufficient allegation of an implied contract.–197Cal 716, 242P483; 130 Misc620, 224NYS404; 33Wyo 249, 238P 654. **Insufficient allegation.**–37GaA788, 142SE170.
866-7 51SD62, 212NW50.
867-15 248 IllA525; 51SD62, 212NW 50. **Exclusion of evidence held not error.**–171Minn98, 213NW549. **Notice that defendants would vacate premises** held admissible. 267Mass143, 166NE622 (1st case).
867-16 51SD62, 212NW50. **Evidence held sufficient.**–171Minn98, 213NW549. **Evidence held insufficient.**–NJ 145A104.
867-19 MoA 296SW1057.
868-29½–New. No physical and violent ejectment is necessary to prove ouster. 129Misc10, 220NYS469.
868-29⅓–New. But ouster may be inferred from circumstances. 129Misc10, 220NYS469.
869-37 43 Ida306, 251P630.
870-49 206 Iowa39, 218NW56 (ten dollars a month proper rental value); 81 Mont1, 261P288; 130Misc620, 224NYS 404; 137Misc182, 243NYS526; 36Wyo 392, 256P80, 57ALR578.
870-49½–New. Interest on investment

is matter to be considered in fixing value of use and occupation. 233Ky430, 25 SW(2d)1019.

USUAL

873-9 TexCommnA 291SW197.

USUALLY

873-11 143Va133, 129SE341.
873-12 143Va133, 129SE341.
873-12½-New. Frequent. 143Va133, 129SE341.
873-12½-New. Usual wear and tear construed to cover deterioration resulting from all causes usual in mining industry. 143Va133, 129SE341.

USUFRUCT

874-17 131Misc305, 226NYS630, 635 [quotCyc].

USURY

883-2 256Mass293, 152NE633.
883-4 218MoA68, 262NW425; 219MoA 74, 266SW327, 329 [citCyc]; 220MoA 483, 280SW720; 220MoA483, 280SW720; 222MoA984, 6SW(2d)661; 103NJL98, 134A740, 742 [quotCyc]; 218AppDiv11, 216NYS305; 50Philippine558. **Other definitions.**–29F(2d)969; 219MoA74, 266 SW327; 115Nebr211, 212NW31, 53ALR 739.
889-5½-New. , a money lender who exacts excessive or inordinate interest from the needy or extravagant. 218AppDiv11, 216NYS305.
891-30 45Philippine256.
891-36 174Minn241, 219NW76 (question immaterial where issue of usury found against plaintiff).
895-57 174Ark609, 297SW1031; 174 Ark578, 297SW1039.
896-58 174Ark609, 297SW1031; 180 Minn326, 230NW812; 137Misc396, 241 NYS76.
897-61 274US403, 47SCt626, 71L ed 1123.
897-64 274US403, 47SCt626, 71L ed 1123; 14F(2d)50; 248 IllA99; 174Minn 68, 216NW778.
897-65 274US403, 47SCt626, 71L ed 1123.
899-69 174Ark547, 297SW1035; 44 Ida 599, 258P522; 174Minn68, 216NW778.
899-72 174Minn68, 216NW778; 246NY 194, 158NE70.
900-74 43F(2d)724; 274US403, 47SCt 626, 71L ed1123. **Loan in New York for repayment in Pennsylvania** held not evasion of New York law. 274US403, 47SCt 626, 71L ed1123.
901-75 274US403, 47SCt626, 71L ed 1123; 47 Ida287, 274P630.
902-77 43F(2d)724 (contract to be partly performed in both states); 227 AppDiv85, 237NYS858.
902-78 174Minn68, 216NW778.
905-93 179Ark674, 17SW(2d)882.
910-10 78CalA759, 248P1068; 218App Div11, 216NYS305, 309 [quotCyc]. **Exemption of corporation from usury laws.**–149Md223, 131A332, 43ALR1. **Discriminatory usury law** held invalid. 200Cal 585, 254P946, 62ALR1341; 200 Cal 598, 254P951.
910-11 218AppDiv11, 216NYS305, 309 [quotCyc].
910-12 218AppDiv11, 216NYS305, 309 [quotCyc].
910-12½-New. Usury statutes are held not to discriminate against makers of individual loans in violation of federal and state constitutional provisions. 78CalA 759, 248P1068.
910-13 **Matters included outside of normal scope of usury laws** held surplusage. 200Cal 598, 254P951. **Usury law may not be converted into engine of injustice and deceit.**–CalA 289P236.
910-14 167Ga347, 145SE505; Mass 168 NE810; 135SC190, 133SE709. **In Utah.** –285P304.
910-14½-New. Laws enacted to guard against unreasonable rates of interest should be favorably regarded. 78CalA 759, 248P1068.
910-14⅓-New. Usury Act is intended to prevent excessive rate of interest, and it may not be used to perpetrate injustice. 98CalA604, 277P538; 98CalA 796, 277P541.
910-14¼-New. Statute which modifies or repeals usury statutes is restorative of common law and should be liberally construed. 245Mich558, 222NW752.
911-15 202 Iowa524, 210NW612. **Contracts held not usurious.**–MoA 271SW 842.
911-16 MoA 271SW842.
912-24 246 IllA14.
912-27 **Bona fide of mortgage within exception to Connecticut usury statute** is unaffected by collateral agreement for services as cloak for additional interest. 7F(2d)51. **In Connecticut.**–7F(2d)51. **In Utah.**–285P304.
913-30 149Md223, 131A332, 43ALR1 (not unconstitutional); 174Minn68, 216 NW778 (Illinois statutes applied to contract by foreign corporation).
913-31 **Makers of small loans.**–82Colo 163, 258P223.
913-34 200Cal 598, 254P951. But see 82Colo 163, 258P223.
913-35 78CalA759, 248P1068.
914-41 24 OhA475, 156NE606.
915-42 118Nebr797, 226NW454; 135SC 190, 133SE709 (construing South Carolina Statute).
915-42½-New. Renewal note, executed by guarantors, being simply agreement to fulfill contract evidenced by original note, was not usurious because of fact that, before execution of renewal note and subsequent to original note, legal rate of interest had been reduced by statute. 54SD291, 223NW193.
915-44 329 Ill 34, 160NE160.
917-52 MoA 271SW842. **Contracts held not usurious.**–44Philippine105. **Substance of contract is examined.**–200Cal 585, 254P946, 62ALR1341.
917-53 30F(2d)832; 103CalA140, 284P 241; TexCommnA 285SW305.
918-54 **Contract containing usurious provision** is not usurious until usurious interest has actually been collected. Tex CivA 18SW(2d)672. **Contract is not usurious** where alleged usurious provisions had not become operative at date of default. TexCivA 18SW(2d)672.
918-56 35GaA340, 133SE307; 170Minn 175, 212NW408.
918-57½-New. **Contract not usurious in its inception** is not rendered usurious by subsequent transaction liquidating loan, though sum in excess of what would be paid for interest is paid by borrower. 35 OklACR415.
918-58 216Ala171, 113S11; 169Ark277, 275SW520; 200Cal 609, 254P956, 53 ALR725; 165Ga492, 141SE206; 35GaA 340, 133SE307; 218MoA68, 262SW425; Wash 286P76; 59 OntL471, [1926] 4 DomLR866. **Provision that note is not to be construed in violation of statute** does not save transaction from illegality. NJSup 147A401.
918-59 200Cal 585, 254P946, 62ALR 1341; 200Cal 609, 254P956, 53ALR725; CalA 288P23; DC 41F(2d)982; 169Ga 495, 150SE828; 35GaA340, 133SE307; 149Md223, 131A332, 43ALR1; 256Mass 293, 152NE633; 218MoA68, 262SW425; 219MoA74, 266SW327, 329 [quotCyc]; MoA 271SW842, 844 [citCyc]; MoA 7 SW(2d)484; TexCivA 299SW939; 142 Wash213, 252P699, 701 [citCyc].
919-60 7F(2d)51; 35GaA340, 133SE 307; 167Minn319, 209NW21; 219MoA 74, 266SW327, 329 [quotCyc]; 218App Div11, 216NYS305 (money or its equivalent); 35 OklACR415; 124 Or272, 264 P438 [quotCyc].
919-61 149Md223, 131A332, 43ALR1 (shift or device disregarded).
919-62 **Agreement whereby lender is authorized to sell borrower's bonds at discount for borrower's benefit** is not usurious. 195NC183, 141SE575. **Intention to take usurious amount** without taking is not "usury." 35F(2d)443.
919-64 29F(2d)969; 41F(2d)60 (corrupt purpose); Cal 292P474; CalA 290 P892; 35GaA340, 133SE307; 48 Ida153, 279P716 (excessive interest must be knowingly taken or charged); Ida 286P 618 (knowingly charging unlawful rate necessary); 202 Iowa524, 210NW612, 615 [citCyc]; 149Md223, 131A332, 43 ALR1 (usury question of intention); 239 Mich1, 214NW113; 242Mich314, 218NW 685; MoA 271SW842; 33NM176, 262P 931; 116 Okl 3, 243P160. But see 50RI 342, 147A880. **Knowingly charging interest in excess of legal rate** is usury. 189NC690, 128SE2.
919-65 170Ark1020, 282SW359.
920-66 256Mass293, 152NE633; NJCh 149A47; 69Utah41, 252P276.
920-66½-New. Corrupt intent and knowledge on part of lender must exist at inception of contract. 41F(2d)60.
921-68 178Ark921, 12SW(2d)890; 97 CalA193, 275P503(2dcase); TexCivA 16 SW(2d)954.
922-73 48 Ida153, 279P716; 202 Iowa 524, 210NW612, 615 [citCyc].
922-74 174Ark1025, 298SW198; 178 Ark355, 11SW(2d)465; 35GaA340, 133 SE307; 135Misc628, 238NYS158 (excess of sixty seven and one-half cents disregarded as error in computation).
923-75 47RI 227, 132A728 (holding mistake of law no excuse).
924-79½-New. Contract between mortgagors in default and mortgagee whereby mortgagee agrees to aid in sale of lots covered by mortgage for share of profits is not usurious. 127Misc571, 217 NYS22.
925-83 215Ala123, 110S39, 40, 48ALR 1437 [citCyc]; 202Cal 557, 261P1017; 97CalA193, 275P503(2dcase); 35GaA 340, 133SE307; 235 IllA180; 251 IllA 414; 124Kan393, 260P659; 124 Or272, 264P438; 50Philippine558. **Applications of rule.**–232Mich446, 205NW169 (insurance policy adding ten per cent first month and five per cent for each month thereafter, if assessments are not paid when due, is not usurious).
926-84 **In Missouri.**–217MoA466, 268SW 683.
926-85 216Ala632, 114S211; 35GaA340, 133SE307; 218MoA68, 262SW425 (making note payable to one person who immediately indorses it to third person, who advances money, is not sufficient to evade usury statute); 220MoA791, 277 SW58, 60 [citCyc]; NJDist 136A711. **For transactions held not to be loans** see 50Philippine558.
926-86 32F(2d)433; 202Cal 557, 261P 1017, 1019 [quotCyc]; 96CalA111, 273 P856; 90CalA19, 265P515, 516 [quot Cyc]; 164Ga781, 139SE552; 235 IllA 180; 124Kan393, 260P659; 218MoA68, 262SW425; 130Misc659, 224NYS297; 38 OklACR455; 130 Or189, 279P633 (transaction held sale and not loan). **Credit sales.**–217MoA466, 268SW683. **Note for purchase price** is usurious if calling for more interest than law permits. 218MoA68, 262SW425.
927-87 137 Okl 248, 278P1115 (conditional sale contract construed as loan contract). **Purchase of wages earned** held usurious loan. NJDist 136A711.
927-88½-New. Conveyance at exhorbitant price because of deferred payment where grantee refused to accept deed held not usurious. 170Ark1020, 282SW 359.
927-89 215Ala123, 110S39, 40, 48ALR 1437 [quotCyc]; 171Ark529, 284SW776; 173Ark875, 293SW1026, 57ALR877; 173 Ark1180, 294SW386; 175Ark1126, 2SW (2d)1111; 202Cal 557, 261P1017; 92 CalA468, 268P480; 95CalA541, 273P48; 97CalA193, 275P503(2dcase); 110Conn 255, 147A841(2dcase); 164Ga781, 139 SE552; 39GaA297, 147SE175; 235 IllA 180; 251 IllA414; 124Kan393, 260P659; 10LaA207, 120S683; 245Mich3, 222NW 147; 247Mich82, 225NW585; 130Misc 659, 224NYS297, 298 [quotCyc]; 131 Misc272, 227NYS427; 12PaDist&Co 405. **Original purchase of automobile on credit** being valid action of finance company in soliciting contracts from dealers and furnishing schedules is immaterial. 215 Ala123, 110S39, 48ALR1437. **Dealer in automobiles may sell at cash or credit price** and bona fide purchase at credit price does not create a loan or forbearance of a debt to which usury attaches. 215Ala123, 110S39, 48ALR1437.
927-90 110Conn255, 147A841(2dcase).
927-91 111Conn84, 149A209 (transaction held not within statute providing that installment payments on investment certificate should not be construed as part payment of loan).
928-93 215Ala648, 112S237; 175Ark 1126, 2SW(2d)1111; 202Cal 557, 261P 1017; 222AppDiv381, 226NYS379; 135 Misc341, 238NYS81.
928-94 164Ga781, 139SE552 (dictum).
929-96 216Ala632, 114S211.
929-97 **Transactions not usurious.**–Miss 130S157.

929-2 134SC207, 132SE620, 622 [cit Cyc].
930-3 207Cal 414, 278P1038; 242Mich 314, 218NW685; 250Mich31, 229NW433 (2dcase). **In case of sale with right to repurchase at higher figure,** increase will not be interpreted as premium on loan to vendor, if some other possible or reasonable interpretation can be made. 73CalA44, 238P177.
931-3 246 IllA14; 213AppDiv791, 210 NYS737.
932-10 215Ala123, 110S39, 48ALR1437; CalA 289P236; 251 IllA414; 218MoA68, 262SW425. **It is not usurious** for private individual to discount commercial paper and deduct interest at time of discount. 151Va81, 144SE602.
932-10½-New. **Mortgages** executed for purpose of discount at usurious discount is void, even though purchaser did not know of such fact. 126Misc654, 214NYS 244.
932-10½-New. Bank's discount charge, representing compensation for use, forbearance, or detention of money is "interest" within usury statutes. TexCivA 299SW939.
932-11 215Ala123, 110S39, 48ALR1437.
934-19 See also 102NJL560, 134A296.
935-21 **Note usurious at inception** is unenforceable even by holder without notice. 216AppDiv734, 214NYS252.
935-26 149Md223, 131A332, 43ALR1. But see 1LaA18.
936-28 149Md223, 131A332, 43ALR1 (loan consummated by issue and delivery of bond issue held usurious and not actual sale and purchase thereof in good faith).
936-29 200Cal 598, 254P951, 955 [quot Cyc]. **Loan made on security of municipal bonds may be usurious.**-200Cal 598, 254P951.
936-30 29F(2d)969; 175Minn468, 221 NW720.
938-38 30F(2d)832.
941-51 50Philippine558 (contract of lease distinguished from contract of loan).
941-52 **Provision giving privilege of prepayment** is not contract for forbearance, unless lender is entitled to demand prepayment of money loaned. Tex CommnA 12SW(2d)1007.
941-54 TexCivA 293SW312, 313 [cit Cyc].
943-62 170Minn175, 212NW408.
944-63 170Minn175, 212NW408.
944-64 83CalA187, 256P825; 170Minn 175, 212NW408.
944-65 **Claim that advancement of full amount of mortgage would have been in excess of prudent mortgage** on property has been held no defense to charge of usury. 156Md26, 143A587.
945-67 219Ky113, 292SW750.
945-75 163Ga671, 137SE36; 252 IllA 390; 256Mass293, 152NE633; 218MoA 68, 262SW425; 141Wash392, 251P770. **Rule for computing interest to determine usury.**-TexCommnA 280SW181. **Application of proceeds and interest of collateral note** to indebtedness does not constitute usury. MoA 17SW(2d)591.
946-76 30F(2d)832; TexCivA 19SW (2d)923. **Where contract requires payment of interest in excess of legal rate for any year of term of loan** rate is usurious. TexCommnA 280SW181.
946-79 205Cal 133, 270P196; 91CalA 590, 267P372; DelCh 152A130; Ga 154 SE780; 35GaA340, 133SE307; 202 Iowa 524, 210NW612; 11LaA418, 123S516 (cash advances); 115Nebr211, 212NW 31, 53ALR739; 254NY319, 172NE521; 127Misc19, 215NYS279; 131Misc272, 227NYS427; 196NC294, 145SE396; 99 WVa407, 129SE482. **Trifling excess.**-239Mich1, 214NW113. **Excessive "thrift fee"** to be paid lender rendered contract void for usury, in absence of showing that "thrift fee" included payment for anything other than advance. 134Misc 91, 234NYS592. **Profit must have been charged or received for full period of loan,** and interest allowed at excessive rate for short period does not constitute usury. 48 Ida153, 279P716. **Statutes prohibiting usurious agreements** to pay interest apply only to unmatured contracts where obligation of borrower is definitely fixed. 48 Ida153, 279P716.
947-80 177Ark243, 6SW(2d)305; NJCh 149A47; 141Wash392, 251P770. But see Wash 288P226.
947-81 170Minn175, 212NW408; NJCh 149A47; TexCivA 18SW(2d)462.
948-82 135SC190, 133SE709 (contract to pay eight per cent interest to bank and two per cent to its president is usurious).
948-86 202 Iowa524, 210NW612. **Discount in addition to agreement to pay legal rate of interest** shows usury as matter of law. 170Minn153, 212NW1.
948-88 Tex 30SW(2d)289.
949-91 178Ark921, 12SW(2d)890; MoA 281SW134; 118 Okl 23, 246P478 (not exceeding one year); TexCivA 19SW (2d)923; 151Va81, 144SE602. But see 10 Ida30, 76P1010, 109AmSR192; 50RI 342, 147A880. **In Rhode Island.**-47RI 227, 132A728. **Under note providing for discount before and maximum interest after maturity,** payable annually, collection of interest in advance is usury. 150SC311, 148SE60.
950-94 118 Okl 23, 246P478 (by statute).
950-95 70Minn380, 73NW165 (interest in advance for five years slightly exceeding legal rate held not usurious).
951-96 134 Okl 19, 272P418; Tex CommnA 280SW181. But see 171Ark 744, 286SW813. **Payment of interest in part in advance** on bank certificate of deposit payable on demand will not be declared usurious in absence of evidence tending to show express or implied agreement for payment of usurious interest. 202 Iowa524, 210NW612.
951-96½-New. **Payment of maximum interest before maturity** does not constitute usury when payment is made to induce lender to accept repayment of his debt before maturity. 147Miss401, 113S209.
951-96⅓-New. Principal sum loaned will be held to be face amount of loan less interest or commission deducted in advance. CalA 288P23.
951-97 46Philippine539; 132SC276, 129 SE44, 46 [citCyc]; 133SC129, 129SE 156; TexCommnA 12SW(2d)1007; Tex CivA 18W(2d)672, 674 [citCyc].
951-1 **Semiannual interest drawing interest.**-85CalA291, 259P355.
952-3 212AppDiv756, 210NYS366.
952-4 91CalA590, 267P372, 374 [cit Cyc]; 97CalA193, 275P503(2dcase); 170 Minn175, 212NW408, 410 [citCyc].
953-9 35F(2d)443 (acceleration of payment); 48 Ida153, 279P716. **Application and extent of rule.**-CalA 277P538; CalA 277P541; TexCommnA 12SW(2d) 1007; TexCivA 18W(2d)672; TexCivA 19SW(2d)923.
954-14 48 Ida153, 279P716.
954-16 48 Ida153, 279P716; 135Misc 341, 238NYS1.
955-22 Tex 30SW(2d)282; Tex 30SW (2d)287; Tex 30SW(2d)289.
956-23 124Kan393, 260P659. **In Louisiana.**-12LaA39, 124S604.
956-25 TexCommnA 285SW305 [cit Cyc].
957-32 45Philippine256.
958-35½-New. **Subsequent agreement for payments of sums in additional to legal interest** made to compensate lender for greater rate of interest paid by him, after extending time of payment of loan, is violative of usury statute. 147Miss401, 113S209.
958-36 GaA 155SE779; 255 IllA489; 149Md223, 131A332, 43ALR1; MoA 7 SW(2d)484; 127Misc19, 215NYS279; TexCommnA 13SW(2d)667(2dcase), 70 ALR684; TexCivA 23SW(2d)542; 59 OntL471, [1926] 4DomLR866.
959-42 35GaA340, 133SE307.
959-43 See also 246 IllA457.
961-50 163Ga671, 137SE36.
962-59 200Cal 609, 254P956, 53ALR 725; 163Ga671, 137SE36; TexCivA 19 SW(2d)923. **In Philippines.**-46 Philippine539.
964-68½-New. Unlawful for bank to charge corporation interest compounded monthly on advances. Ark 30SW(2d) 215.
964-69 38GaA784, 145SE495(2dcase).
965-71 200Cal 609, 254P956, 53ALR 725; 163Ga671, 137SE36; 46Philippine 277. **In California.**-200Cal 609, 254P956, 53ALR725.
966-73 **In California.**-204Cal 439, 268P 630.
966-74 TexCommnA 286SW173.
968-79 200Cal 609, 254P956, 53ALR 725; Ida 286P618; TexCivA 272SW568. See also 163Ga671, 137SE36.
969-86 Tex 30SW(2d)289.
970-90 91CalA246, 266P981.
971-98 200Cal 585, 254P946, 951 [quot Cyc], 62ALR1341; 200Cal 609, 254P956, 958 [quotCyc], 53ALR725; 163Ga671, 137SE36; 35GaA340, 133SE307; 38GaA 552, 144SE357; 127Misc19, 215NYS279 ($4,000 note given to secure $2,000 debt, additional sum being alleged as commission to payee's husband for inducing her to make loan held usurious). **That maker of note required to enter into unprofitable contract, as condition to loan,** does not itself make loan usurious. Cal 292P474.
971-4 169Ark277, 275SW520; 174Ark 609, 297SW1031; 200Cal 585, 254P946, 62ALR1341; 200Cal 609, 254P956, 53 ALR725; 102CalA400, 283P117; CalA 293P141; 163Ga671, 137SE36; 35GaA 340, 133SE307; 219Ky748, 294SW502; 223Ky386, 3SW(2d)786; 156Md26, 143 A587; 308Mo 607, 274SW79; 222MoA 984, 6SW(2d)661; 127Misc19, 215NYS 279; Ont [1929] 4DomLR565. **Lender cannot divest transaction of taint of usury by thereafter selling security to another** and claiming illegal exaction as commission for services as broker. 169 Ark277, 275SW520. **Where all of stock issued as bonus to purchasers of bonds had been ordered surrendered and canceled,** as having been issued without consideration, claim of usury in transaction cannot be sustained. 29F(2d)457. **Provision for bonus held not to make note usurious.**-97CalA193, 275P503(2d case). **Separate agreement for bonus for mortgage loan not usurious** at common law or under statute. Can [1930] 2 DomLR849. **Effect of special statutory provisions.**-Ont [1930] 4DomLR671.
972-5 174Ark609, 297SW1031; 174Ark 547, 297SW1035; 174Ark1179, 297SW 1038.
972-6½-New. **Unconscionable sum extorted from necessitous borrower** may not render notes voidable for usury. 255 Mass359, 151NE744.
973-10 219Ky748, 294SW502; 127Misc 19, 215NYS279 (one hundred per cent bonus paid to husband for securing loan for wife); Wash 286P76. But see Wash 288P226.
974-13 219Ky748, 294SW502.
974-17 196NC433, 146SE66(2dcase).
976-29 219Ky748, 294SW502 (where borrower knows extent of agent's authority). **Lender's knowledge or consent may be implied.**-Lender's knowledge of, or consent to, his agent's charging of commission or bonus in excess of legal rate of interest for procuring loan may be implied from circumstances, such as blood relationship between lender and agent and fact that lender paid agent no compensation for services. 246Mich296, 224NW325.
978-37 29F(2d)969; 219Ky748, 294SW 502; 227Ky79, 11SW(2d)988; 231Ky 844, 22SW(2d)270; 174Minn241, 219NW 76; 219MoA74, 266SW327; MoA 271 SW842, 844 [citCyc]. **Whether broker borrower's agent.**-219MoA74, 266SW327.
978-38 195NC459, 142SE477.
978-40½-New. Where broker is agent of borrower and not of lender, principle of liability of agent of undisclosed principal has no application. 219MoA74, 266 SW327.
978-40½-New. In absence of collusion or fraud there is no usury where borrower's agent gives lender consideration paid to agent by borrower as inducement to lender to extend loan to borrower, though at agent's request consideration passes direct from borrower to lender. 117 Okl 43, 246P873.
979-42 90CalA13, 265P370; 319 Ill 392, 150NE272; 231Mich653, 204NW705. **Facts held not to show** loan transaction usurious. 319 Ill 392, 150NE272.
979-45 151Va220, 144SE430.
979-46 200Cal 609, 254P956, 53ALR 725. See also 140Wash466, 249P776.
980-47½-New. It is not usury to withhold a commission for a loan provided

the total amount of interest charged, together with the commission, does not exceed the legal rate of interest. 319 Ill 392, 150NE272.

980-48 167Minn1, 208NW191, 192, 209 NW39 [citCyc].

981-56 69Utah41, 252P276.

981-58 14F(2d)859; 30F(2d)832; 35 F(2d)443; DelCh 152A130; 88 IndA 222, 162NE27; 219Ky748, 294SW502; 167Minn1, 208NW191, 192, 209NW39 [citCyc]; 174Minn474, 219NW878; MoA 271SW842. **Reasonable charge for services in financing building proposition** does not amount to usury. 242Mich314, 218NW685. **Services necessary to protect security.**–242Mich314, 218NW685. **Services must be confined to specific service or expense incidental to loan.**–CalA 288P23.

982-60 Cal 292P474; 242Mich314, 218 NW685. **In Louisiana.**–39F(2d)14.

982-63 231Ky844, 22SW(2d)270; 167 Minn1, 208NW191, 192, 209NW39 [cit Cyc]; 33NM176, 262P931.

982-64 167Minn1, 208NW191; 33NM 176, 262P931. But see 241Mich46, 216 NW448.

982-65 174Minn241, 219NW76.

982-66 153Md624, 139A351; TexCivA 299SW939.

982-69 DelCh 152A130.

983-71 See also 88 IndA222, 162NE27.

983-73 41F(2d)60.

984-77 26 OhNPNS365, 367 [citCyc].

984-79 115Nebr211, 212NW31, 53ALR 739 (taxes on mortgagee's interest in mortgaged premises); 116Nebr84, 215 NW796; 116Nebr485, 218NW140; 116 Nebr727, 218NW737; 118Nebr797, 226 NW454.

985-85 227Ky79, 11SW(2d)988.

985-86 39GaA712, 148SE309(3dcase); 39GaA714, 148SE311(1stcase); 99WVa 407, 129SE482.

985-87½-New. **Requiring borrower to indorse note of another held by lender in** addition to contracting for highest rate of interest renders loan usurious. 143 Miss146, 108S424, 47ALR45 (construing Louisiana statute).

985-88 44Philippine105 (penalty for nondelivery of purchased goods within specified time).

985-89 232Mich210, 205NW165; 45 Philippine256. **Collection of interest in advance** held proof that usurious rate, not penalty, stipulated for. 45Philippine256.

985-90 See also 44Philippine105.

986-92 NJSup 150A390.

986-93 Contra 38GaA784, 145SE495(2d case).

986-94 148Miss507, 114S326; 126Misc 114, 212NYS718; 124 Okl 120, 254P45; 45Philippine256; 48Philippine463; RI 150A610 (purpose to protect obligee from expense of collecting); TexCivA 272SW 568. **When amount stipulated for attorney's fees,** exorbitant excess should be considered as indirect or simulated interest. 45Philippine256.

988-5 **Where borrower required to pay notarial fee,** loan held usurious, notwithstanding custom and that third person received such fee. LaA 129S413.

988-12 14F(2d)50; 127Misc19, 215NYS 279 (usury defeats recovery on note or original debt); 129 Okl 148, 264P182. **Contract is not rendered void** where statute permits recovery of three times usurious interest as penalty. 33F(2d) 356(2dcase).

989-13 274US403, 47SCt626, 71L ed 1123; 14F(2d)50; 200Cal 609, 254P 956, 53ALR725; CalA 259P363; 98CalA 604, 277P538; 98CalA796, 277P541; 103CalA621, 284P970; CalA 286P1071 (1stcase); CalA 291P458; Ida 292P 243; LaA 129S384; 155Miss91, 124S 69; NJDist 136A711 (statute relating to workmen held not to void contract which under general law forfeits interest); 45 Philippine256; 148Va479, 139SE295. See also 7LaA129; Mont 289P555(3d case).

989-14 274US403, 47SCt626, 71L ed 1123; 200Cal 609, 254P956, 53ALR725; LaA 129S384.

989-15½-New. In New York, when original note is usurious, the taint attaches to all notes in renewal or growing out of original note. 14F(2d)50.

989-16 CalA 274P1031.

990-18 216Ala632, 114S211; 200Cal 609, 254P956, 53ALR725; 201 Iowa20, 206NW680.

990-22 146Miss142, 110S115.

991-28½-New. Usurious note is not made void by usury statute which merely renders provision as to usurious interest void. CalA 289P236.

992-37 200 Iowa877, 205NW525 (subsequent contract, by which forbearance of mortgagee to insist upon accelerated maturity of original obligation was secured, does not render original note and mortgage usurious).

993-39½-New. Usurious interest charged on notes partly made up of balance on former notes does not taint first transaction with usury. 146Miss142, 110S 115.

993-40 TexCivA 286SW680, 684 [quot Cyc].

993-41 TexCivA 286SW680.

993-42 102CalA400, 283P117.

994-43 **Payment of premium for mortgage extension does not render it usurious,** but premium should be credited on principal as of its date. NJCh 152 A8.

994-47 180Minn358, 230NW819; MoA 78SW(2d)484.

994-47½-New. **Rule that entire debt is** not usurious is inapplicable to renewal mortgage with interest on whole debt figured therein. 216Ala632, 114S211.

995-48 222MoA984, 6SW(2d)661. **In Missouri.**–308Mo 607, 274SW79; 218MoA 68, 262SW425.

995-49 **Transfer by borrower** to maker of his interest in note given to secure usurious loan operates as payment and requires surrender of note and setting aside deed of trust securing same. 308 Mo 607, 274SW79.

995-52 154Md682, 141A398; MoA 9SW (2d)848. **Mortgagee is not entitled to accelerate payment of unearned interest** where notes secured were not usurious if debt should be paid in accordance with their terms and acceleration would result in imposing penalty and rendering entire loan usurious. 170Ark568, 280SW654.

997-57 Contra 115Nebr101, 211NW608.

997-57½-New. Transferee of note as collateral security for usurious loan is not deprived of status for bona fide holder by reason of usurious contract, under statute making forfeiture of interest only penalty. 34GaA244, 129SE 109.

997-58 99WVa407, 129SE482.

997-60 149Md223, 131A332, 43ALR1.

997-61 149Md223, 131A332, 43ALR1; 99WVa407, 129SE482.

997-62 149Md223, 131A332, 43ALR1.

998-66 149Md223, 131A332, 43ALR1.

998-69 41GaA206, 152SE587.

998-71 149Md223, 131A332, 43ALR1 (guarantor of original usurious loan becoming principal debtor of renewal note).

999-74 226Ky282, 10SW(2d)1098.

999-77 173Ark875, 293SW1026, 57ALR 877; 238Mich261, 213NW120 (mortgagor); 96NJEq608, 131A526; 69Utah 41, 252P276, 279 [quotCyc]; 104WVa 471, 140SE330.

1000-79 69Utah41, 252P276, 279 [quot Cyc].

1000-80 70Minn380, 73NW165. **Right of mortgagor to set up usury.**–98NJEq 608, 131A526. **On reconveyance to mortgagor** by assignee who did not assume mortgage, mortgagor may interpose usury in foreclosure suit. 126Misc654, 214NYS244.

1000-83 173Ark875, 293SW1026, 57 ALR877; 130Misc582, 224NYS332. **Application of rule.**–130Misc582, 224NYS 332.

1000-87 22F(2d)920; 38F(2d)40; 149 Md223, 131A332, 43ALR1; 149Md385, 131A815; 251Mich279, 231NW619 (constitutional); 254NY319, 172NE521; 218AppDiv11, 216NYS305; 130Misc582, 224NYS332; 127Misc526, 217NYS76; 116 Oh643, 157NE374. **Effect of statute** prohibiting corporation from interposing defense of usury is to leave lenders and corporate borrowers free to agree upon any rate of interest above regular limit. 149Md223, 131A332, 43ALR1. **In Ohio.**–24 OhA475, 156NE606. **Where mortgagor corporation was unaware that stock bonus had been given to mortgagee by some stockholders,** intervening stockholders who had not participated in transaction and had given nothing held not entitled to raise defense. 69Utah41, 252P276. **Statute held applicable to grantee** of mortgaged property conveyed by corporate mortgagor. 243Mich694, 220NW748. **In action for breach of contract to make usurious loan to corporation,** defendant lender cannot interpose defense that he rescinded contract on learning that loan would be usurious. 130Misc582, 224NYS332. **Note maturing after statute in effect** is within statute. 248Mich502, 227NW543(1stcase). **Statute is not unconstitutional** because based on unreasonable classification. 251Mich 279, 231NW619. **Where lender loans to corporation formed by borrower to avoid usury,** transaction is valid. 254NY319, 172NE521.

1001-88 24 OhA475, 156NE606.

1001-89 22F(2d)920; 251Mich279, 231 NW619 (corporations may bind selves to pay more than legal interest).

1001-89½-New. If it were not for express statutory prohibition, usury might be interposed as a defense by a corporation. 218AppDiv11, 216NYS305.

1001-90 22F(2d)920.

1001-92½-New. , and likewise assignee of corporation for benefit of creditors. 116 Oh643, 157NE374.

1001-93 NJCh 149A586; 150Va515, 143SE741.

1001-95 103NJL98, 134A740.

1001-98 243Mich694, 220NW748.

1002-5 98NJEq608, 131A526.

1002-7 173Minn524, 218NW102.

1003-8 98NJEq608, 131A526. **Judgment providing for legal interest compounded annually** does not free note from taint of usury because it provided for maximum rate compounded semi-annually. 85CalA291, 259P355.

1003-10½-New. Where both interest and usury waived, whether interest was usury or additional compensation becomes immaterial. 102CalA148, 282P 800.

1003-16 216Ala632, 114S211; 149Md 223, 131A332, 43ALR1; 177Minn321, 225NW115; 143Miss146, 108S424, 47 ALR45; 98NJEq608, 131A526.

1004-17 98NJEq608, 131A526 (substitute mortgage).

1004-19 **Warehouse receipts bought in settlement of substituted note** are not affected by usury in original note. 230 Ky538, 20SW(2d)173.

1005-22 149Md223, 131A332, 340, 43 ALR1 [citCyc] (guarantor of original loan, principal debtor of note).

1005-25 216Ala632, 114S211.

1007-34 See also 45Philippine256.

1007-35 **In Philippine.**–45Philippine 256.

1007-37 235Mich581, 209NW926.

1007-38 CalA 274P1031.

1007-39 35GaA340, 133SE307; 189NC 690, 128SE2; 45Philippine256 [quot Cyc]; TexCivA 22SW(2d)494. **Attorney's fees** are recoverable. 102CalA148, 282P800.

1008-46 200Cal 609, 254P956, 53ALR 725; 216Ky69, 287SW225.

1010-62 Mass 168NE810; 126Misc792, 215NYS602 (affirmative ruling voiding usurious note, directing surrender for cancellation, and restraining enforcement under statutes is confined to proceedings in equity).

1010-63 CalA 284P466; MoA 293SW 81; 223AppDiv770, 227NYS630; 127 Misc748, 217NYS501; 131Misc774, 227 NYS351; TexCommnA 280SW181.

1011-66 169Ga495, 150SE828; 165 Minn396, 206NW728; TexCommnA 280 SW181.

1013-78 See also TexCivA 48W(2d) 293.

1014-84½-New. Borrower need not make payment or tender of money loaned in suing to cancel usurious loan. Mass 168NE810.

1014-85 215Ky739, 286SW1055.

1015-86a **Answer not amounting to action on usurious mortgage.**–Mich 214 NW430.

1015-88 Ida 292P243; 89PaSuper479. **Court may temporarily enjoin sale** under trust deed securing usurious loan, where borrower sues to recover usurious

interest paid. TexCommnA 13SW(2d) 667(2dcase), 70ALR684. **Where no money has been paid on account,** usurious charge cannot be recovered. 208 Cal 376, 281P496.

1015-89½-New. Mortgagor suing to cancel is not required to pay principal and all of usurious interest and then bring separate action for recovery of usurious interest. Ida 292P243.

1018-99½-New. It appears that usurious instruments included amounts of two valid first liens which defendant held and discharged so that first mortgages might be placed on premises ahead of second mortgages. When latter are canceled for usury, court should grant defendant relief by reviving liens he had discharged, subject, however, to first mortgages obtained with defendant's consent. 176Minn427, 223NW777.

1018-4 127Misc526, 217NYS76. But see 10PaDist&Co 378.

1019-12 Mortgagor's grantee.-252 IllA 390.

1019-13 MoA 9SW(2d)848.

1020-15 SC 155SE291 (action must be on principal sum).

1021-24 But see Cal 291P182.

1022-36 143Miss146, 108Ss424, 47ALR 45. See also Wash 286P76.

1022-38 Where estoppel certificate was executed nearly three years after mortgage was placed on record by holder thereof, it cannot prejudice rights of mortgagee. 103NJEq363, 143A444.

1022-39 But see 227AppDiv53, 236NYS 643.

1022-42 177Ark832, 9SW(2d)310; 170 La598, 128S528. **Defense held barred by limitations.**-39GaA449, 147SE593. **Where borrower is cognizant of facts** creating usury when executing notes, he is estopped to set up defense of usury. 39GaA449, 147SE593.

1022-43 85Colo 334, 276P678, 63ALR 959.

1023-47½-New. Makers may be estopped by warranty before purchase by holder stating makers received full face value. CalA 289P236.

1023-47¼-New. Participant in scheme may be estopped to plead usury. 40 F(2d)260.

1023-48 250 IllA446. **Usury in loan secured by mortgage** is waived where mortgagor sells property, deducting amount of obligation from price, and grantee assumes payment of debt. 252 IllA330.

1023-49 154Md682, 141A398.

1023-51 154Md682, 141A398; 24 OhA 475, 156NE606.

1024-58 180Ark955, 23SW(2d)616.

1024-62 When any of original debt is unpaid, usury may be deducted. 255 IllA489.

1026-75½-New. Payments on mortgage account from mortgage security are applied first to interest. 216Ala632, 114 S211.

1026-75¼-New. On interest unpaid interest should be allowed only to such time as payments made suffice to satisfy them. 216Ala632, 114S211.

1026-75¼-New. In absence of express stipulation, payments on note will be applied to principal. CalA 288P23.

1026-76 Ida 292P243; 174Minn68, 218 NW451. **Court will adopt agreement of parties** as to application of payments. 200Cal 609, 254P956, 53ALR725. **Court should settle accounts between parties as to payments.**-200Cal 609, 254P956, 53ALR725.

1027-77 146Miss142, 110S115.

1027-78 But see 177Ark832, 9SW(2d) 310.

1028-80½-New. Where debtor sues to recover statutory penalty of double interest, he may not apply interest payments as credit on principal. TexCivA 286SW680.

1028-83 189NC690, 128SE2.

1030-90½-New. Usury charged on notes is ordinarily barred by lapse of time, 146Miss142, 110S115.

1030-90¼-New. but may properly be pleaded as offset as debt due maker by holder where notes were still in existence. 146Miss142, 110S115.

1030-93 274US403, 47SCt626, 71L ed 1123; Ga 154SE780; 227Ky823, 14 SW(2d)135; 104WVa471, 140SE330. See also CalA 293P141.

1031-94 CalA 288P36.

1031-95 CalA 290P892; Ont [1929] 4 DomLR565. **In California.**-A 288P36. **Right of corporations to recover usury.**-43F(2d)724.

1032-96 CalA 288P36; NJCh 151A471.

1032-99 249 IllA230.

1033-3 In Philippines.-45Philippine 256.

1034-11 MoA 293SW81.

1035-18 DC 41F(2d)982; 147Miss401, 113S209.

1035-21 Legal representatives of creditor.-129 Okl 37, 263P443.

1035-23½-New. There must be privity of contract between parties to action to permit recovery of excess of legal rate of interest. 89PaSuper479.

1036-27 TexCivA 18SW(2d)675.

1036-30 249NY196, 163NE607(2dcase).

1037-37 147Miss401, 113S209.

1038-44 129 Okl 37, 263P443. **Personal representative of deceased borrower** may recover usurious interest paid by decedent. 129 Okl 37, 263P443.

1038-50 Miss 130S739.

1039-52½-New. Allegation that lender was not subject to usury law is affirmative allegation requiring proof. CalA 288P23.

1040-60 Ark 31SW(2d)307; Cal 292 P1069; CalA 284P466; 250 IllA446; NJSup 150A212(1stcase); 197NC234, 148SE244(2dcase); 46Philippine539.

1040-61 NJSup 150A212(1stcase) (Florida note sued on in New Jersey).

1040-61½-New. Plea of usury does not raise issue of breach of contract for failure to pay amount called for by note or partial failure of consideration. TexCivA 286SW680.

1040-62 200Cal 585, 254P946, 62ALR 1341; 204Cal 439, 268P630; Cal 292P 474; 85CalA291, 259P355; Ida 282P 943; 115Nebr211, 212NW31, 53ALR739 (shown by petition); 151Va220, 144 SE430.

1041-65 NJCh 145A641.

1041-71 127Misc748, 217NYS501.

1042-72 NJCh 145A641; 127Misc748, 217NYS501. **Answer held insufficient.**-136Misc342, 240NYS654.

1042-73 251 IllA414; NJCh 148A195 (2dcase); NJCh 149A47; 127Misc748, 217NYS501; 136Misc342, 240NYS654; 135 Okl 130, 276P207. **Plea held sufficient.**-226AppDiv244, 235NYS17.

1043-74 127Misc748, 217NYS501; 135 Okl 130, 276P207.

1043-75 124 Or272, 264P438.

1043-81 Mont 289P555(3dcase).

1044-82 110Conn255, 147A841(2dcase) (pleading not demurrable); 35GaA340, 133SE307.

1044-83 NJCh 148A195(2dcase). **Pleadings held defective.**-35GaA340, 133 SE307.

1044-84 35GaA340, 133SE307.

1045-93 See also 127Misc748, 217NYS 501.

1046-99 48Philippine451.

1046-1 Plea without verification held subject to exception.-TexCivA 16SW (2d)856.

1047-9 When corrupt intent to take more than law allows is denied and circumstances pleaded attempting to show mistake and inadvertence, issuable question of fact is raised. 44 OklACR250.

1048-17 Discretion held not abused in denying such amendment. 173Minn14, 216NW314.

1049-24 CalA 293P141.

1049-29 Complaint in action to recover payments on usurious contract is demurrable where it shows voluntary payment. 180Ark955, 23SW(2d)616.

1049-30 160Tenn390, 25SW(2d)578; TexCivA 272SW568 (petition held not sufficiently definite).

1049-31½-New. Unverified petition charging defendant with collecting usury is held insufficient. TexCivA 272 SW568.

1050-35 Complaint held sufficient.-177Ark55, 5SW(2d)742; Ida 292P243. **Complaint held insufficient.**-CalA 278P 469(2dcase).

1050-36 Where contract is usurious on its face, reception of evidence is not erroneous even if complaint does not state cause of action. Ida 292P243.

1050-37 147Wash300, 265P738.

1050-38½-New. Complaint in action to declare note and mortgage void alleging making of note and mortgage to defendant is not at variance with proof that they were made to third person as subterfuge. 82Colo 163, 258 P223.

1051-41 218MoA68, 262SW425; 213 AppDiv791, 210NYS737 (usurious agreement not presumed from facts equally consistent with lawful purposes); 130 Misc659, 224NYS297. **Parties presumed to have stipulated lawful interest** as between two states where contract was to be performed, in one of which interest stipulated was unlawful. 43F(2d)730.

1051-42 29F(2d)969; 30F(2d)832; 216 Ala171, 113S11; 170Ark1020, 282SW 359; 178Ark1199, 10SW(2d)354(2d case); 178Ark355, 11SW(2d)465; 178 Ark921, 12SW(2d)890; 98CalA604, 277 P538; 98CalA796, 277P541; CalA 289 P236; 35GaA340, 133SE307; 231Mich 653, 204NW705; 239Mich1, 214NW113; 243Mich353, 220NW732; 167Minn1, 208 NW191, 209NW39 (must negative every fact which if true would render transaction lawful); 218MoA68, 262SW425; MoA 271SW842; 222MoA984, 6SW(2d) 661; 130Misc659, 224NYS297; 142Wash 213, 252P699. **Party claiming usury must negative** every reasonably supposable fact which, if true, would render transaction lawful. 179Minn381, 230 NW258.

1051-42½-New. Delivery of less than amount of loan.-In absence of any evidence the presumption is that lender delivered full amount of principal called for by note. TexCivA 286SW680.

1051-42¼-New. Where, however, evidence shows that borrower received less than face amount of rate, there is a presumption that such payment was in accordance with agreement, rendering contract usurious; TexCivA 286 SW680.

1051-42¼-New. and lender has burden of showing money was withheld in violation of agreement in order to prove contract nonusurious. TexCivA 286SW 680.

1051-43 Usurious intent will be presumed from fact that parties intentionally did what was in fact forbidden by statute. MoA 7SW(2d)484.

1052-44 CalA 290P892.

1052-46 14F(2d)859; 216Ala171, 113 S11; 219MoA74, 266SW327; TexCivA 293SW223; TexCivA 3SW(2d)519; Tex CivA 16SW(2d)954. **Before inference can be drawn that corporate form** is used to conceal usury, there must be proof that there is individual transaction. 254NY319, 172NE521.

1052-47 216Ala171, 113S11.

1052-51 Evidence held sufficient.-13 LaA318, 127S758.

1052-53 Cal 292P474.

1052-54 148Va479, 139SE295.

1053-58 After proof of general loan agency and exaction of commission or bonus exceeding legal rate of interest, burden shifts to lender to prove that he had no knowledge of, or consented to, agent's taking fee. 246Mich296, 224NW325.

1053-60½-New. Burden of proof is on plaintiff in action on note payable in another state, to prove that rate of interest is not usurious under law of that state. 218Ala563, 119S605.

1053-64 CalA 290P892; 217MoA466, 268SW683. **Evidence held admissible to show corrupt intent.**-97CalA193, 275 P503(2dcase). **Testimony on intent to charge illegal interest** held admissible. 167Ga766, 146SE754.

1054-66 Intention of lender not to exact usurious interest is immaterial. Ida 292P243.

1054-69 171Ark1023, 287SW203; Cal 292P474; 98CalA604, 277P538; 98CalA 796, 277P541; 103CalA140, 284P241; CalA 289P236; 169Ga495, 150SE828; 35GaA266, 133SE60; 219MoA74, 266SW 327 (evidence that note was given for commission); 151SC474, 149SE254.

1054-71 246 IllA14; 256Mass293, 152 NE633; 218MoA68, 262SW425; 49 Philippine257; 151Va81, 144SE602. See also 26 OhNPNS365, 367 [citCyc]. **Evidence held sufficient.**-Ida 292P243; IndA 172NE550; 165Minn396, 206NW

728; 176Minn427, 223NW777; 130 Or 189, 279P633. **Evidence held insufficient.**–170Ark1020, 282NW359; 217MoA 466, 268SW683; 134SC207, 132SE620; TexCivA 293SW223. **Usury should be established by clear and satisfactory evidence.**–178Ark921, 12SW(2d)890. **Evidence held to sustain finding** that bonus was not paid for forbearance or loan of money. 97CalA193, 275 P503(2dcase). **Existence of usury must affirmatively appear** from evidence adduced. 98CalA604, 277P538; 98CalA 796, 277P541. **Evidence held not to show mortgagee** refused tender for purpose of collecting usurious interest. 155 SC187, 152SE189. **Existence of illegal agreement must affirmatively appear** from evidence. CalA 289P236.

1054–72 Evidence held sufficient to authorize finding that charge was due to mistake of fact. 178Ark355, 11SW(2d) 465.

1055–73 7F(2d)51; 174Ark578, 297SW 1039; 134SC502, 133SE465 (finding that mortgage note was not tainted with usury and draughtsman made mistake held correct). **Evidence held sufficient** to justify finding that there was no usury. 165Minn342, 206NW645. **Evidence held insufficient to prove usury.**–243Mich353, 220NW732. **Agreement transferring bond worth ten thousand dollars for fifteen thousand dollars secured note** held to be sale. TexCivA 27 SW(2d)293.

1055–77 29F(2d)969; 169Ark277, 275 SW520; 178Ark1199, 10SW(2d)354(2d case); 239Mich1, 214NW113; 222MoA 984, 6SW(2d)661. **Evidence held sufficient.**–177Ark55, 5SW(2d)742; 39GaA 297, 147SE175; 175Minn560, 222NW 278; 126Misc654, 214NYS244; 45Philippine256. **Evidence held insufficient.**–170Ark1193, 280SW661; 239Mich1, 214 NW113. **Evidence held to support verdict.**–164Ga781, 139SE552. **Evidence held not to show usury.**–124Kan393, 260P659.

1055–78 169Ark277, 275SW520; 82Colo 163, 258P223 (evidence held sufficient to prevent nonsuit); 40GaA525, 150SE 462 (recovery on notes authorized by evidence); 174Minn204, 219NW86; 218 MoA68, 262SW425 (evidence held insufficient); 99NJEq692, 133A756; 48Philippine451. **Evidence held sufficient.**–169 Ark277, 275SW520; 177Minn321, 225 NW115. **Evidence held insufficient.**–167 Minn319, 209NW21; 227AppDiv53, 236 NYS643. **Evidence held to show that amount paid was not usurious.**–TexCivA 19SW(2d)919.

1055–78½–New. Evidence has been held sufficient to show that usurious loan, for renewal of which mortgage sought to be foreclosed was given, was based on credit of corporation and not on personal credit of mortgagors. 149Md223, 131A332, 43ALR1.

1055–78⅓–New. Evidence has been held sufficient to support finding that defendant paid money to plaintiff's agent procuring loan. 174Minn474, 219NW878.

1055–78¼–New. Evidence has been held sufficient to support finding that deduction for appraising security was not intended to evade usury law. 174Minn 474, 219NW878.

1055–78⅕–New. Evidence has been held sufficient to support finding that deducting one hundred dollars from loan for appraising security was reasonable. 174 Minn474, 219NW878.

1055–78⅙–New. Evidence has been held sufficient to sustain finding that person receiving commission for procuring loan was plaintiff's agent. 174Minn474, 219 NW878.

1056–79 CalA 288P23; IndA 171NE512. **Evidence held not to show usury.**–167 Minn1, 208NW191, 209NW39 (part of loan retained to pay expense of making it). **Sale of automobile on credit not shown to be usurious.** 215Ala123, 110 S39, 48ALR1437.

1056–79½–New. Where evidence showed that sum borrower would have paid at completion of contract was less than sum payable at highest legal rate there is no usury. 171Ark744, 286SW813.

1056–81 TexCivA 299SW939.

1056–82 170Minn8, 211NW828.

1056–83 231Mich653, 204NW705; 239 Mich1, 214NW113. **Evidence held sufficient.**–246Mich296, 224NW325.

1056–84 231Mich653, 204NW705; 239 Mich1, 214NW113. **Evidence held sufficient** to show loan broker was agent of lender as well as of borrower. 140 Wash466, 249P776 (usurious loan on note).

1056–84½–New. Evidence held to show that no bonus was paid.–231Mich653, 204NW705.

1056–85 216Ala171, 113S11; 102CalA 400, 283P117 (evidence sufficient to show usury); 219MoA74, 266SW327. **Evidence held sufficient.**–165Ga492, 141 SE206; 41GaA216, 152SE289; 177Minn 321, 225NW115; 45Philippine256. **Evidence held insufficient.**–175Ark1126, 2 SW(2d)1111; 98CalA604, 277P538; 98 CalA796, 277P541; 239Mich1, 214NW 113 (payment of tax); TexCivA 16SW (2d)954.

1057–87 Finding that transaction was not loan or forbearance but was purchase at discount negatives usury. 175 Minn468, 221NW720.

1057–90 31NM76, 239P862.

1057–91 31NM76, 239P862.

1057–92 14F(2d)50; 220MoA483, 280 SW720; 213AppDiv791, 210NYS737; TexCivA 5SW(2d)175; 153Va156, 149 SE473. **Jury** determine as to which state controls contract. 14F(2d)50. **Evidence held insufficient to raise issue** for jury as to agreement to loan sum exceeding sum actually loaned so as to make nonusurious contract. TexCivA 286SW680.

1058–93 161Ga919, 132SE535, 45ALR 559 (whether underwriting contract usurious held question for jury); 35GaA 340, 133SE307; 219MoA74, 266SW327 (for court where jury waived); 116 Okl 3, 243P160; 134 Okl 19, 272P418.

1058–94 134 Okl 19, 272P418.

1058–98 TexCivA 19SW(2d)102.

1059–3 215Ky739, 286SW1055, 1057 [quotCyc].

1059–7 Instructions held proper.–164 Ga791, 139SE552. **Charge held not warranted under evidence.**–219Ala607, 122S 814. **Charge held sufficient.**–167Ga766, 146SE754.

1059–9 213AppDiv791, 210NYS737.

1059–11 Finding that borrower received less than face amount of note carries with it prima facie finding of usury. TexCivA 286SW680. **Inconsistent findings.**–TexCivA 286SW680.

1060–13 CalA 288P36 (interest on amount of usurious interest recovered from date of making usurious payment). **Judgment held not contrary to evidence.**–155SC187, 152SE189.

1062–35 33F(2d)356(2dcase); Cal 287 P973; 97CalA406, 275P509; CalA 284P 466; 200 Iowa877, 205NW525; 202 Iowa524, 210NW612 (not available to stranger to contract); 238Mich261, 213 NW120 (mortgagor); 180Minn358, 230 NW819; 116Nebr713, 218NW744; 98 NJEq608, 131A526; 127Misc748, 217 NYS501; 104WVa471, 140SE330. **Except with consent and concurrence of debtor** defense of usury may not be interposed by third person while debtor lives. 98NJEq608, 131A526. **Defense of usury is available to mortgagor, though relieved from liability through** consolidation with later mortgage, where he might still have some secret or latent interest in equity. 226App Div244, 235NYS17. **Defense is not available** to wife of borrower. 226App Div272, 235NYS122.

1064–36 CalA 289P872 (assignee).

1064–39 MoA 7SW(2d)484; 127Misc 748, 217NYS501. **Corporation formed by borrower** has been held to be such a representative of and privity to borrower as to be able to raise defense of usury. Cal 290P574.

1065–40 127Misc748, 217NYS501.

1065–41 127Misc748, 217NYS501.

1065–41½–New. One standing quo ad hoc in shoes of debtor may set up defense of usury. 98NJEq608, 131A526.

1065–41⅓–New. Assignability of borrower's rights.–Right of borrower to recover usurious interest paid and right of defense of usury to a suit on usurious contract may be assigned. 98NJEq 608, 131A526.

1066–48½–New. Assignee of corporation for benefit of creditors is precluded from making defense of usury under statute precluding corporation. 116 Oh 643, 157NE374.

1067–55 232Mich548, 205NW592 (where it was understood when obligation assumed that property would be reconveyed to former owner); 98NJEq 608, 131A526.

1068–58 207Cal 570, 279P423; Cal 291 P182; 238Mich261, 213NW120, 122 [quotCyc]; 98NJEq608, 131A526; 127 Misc748, 217NYS501. But see 251 IllA 32. **Reason for rule.**–238Mich261, 213 NW120, 122 [quotCyc].

1069–60 238Mich261, 213NW120, 122 [quotCyc].

1069–61 238Mich261, 213NW120, 122 [quotCyc].

1069–61½–New. Where mortgagor consents to interposition of defense of usury by grantee taking expressly subject to the usurious mortgage, the grantee is not estopped. 98NJEq608, 131A526.

1069–63 127Misc748, 217NYS501.

1070–70 101Conn555, 126A725.

1071–74 116Nebr713, 218NW744. But see 127Misc748, 217NYS501; 136Misc 342, 240NYS654.

1071–75 47 Ida287, 274P630; 103NJEq 363, 143A444. **Junior lienors held to have waived** right to relief by taking lien with knowledge of prior lien and alleged usury and not bringing suit before running of statute. Cal 287P973.

1072–78 Cal 287P973; 153Md624, 139 A351.

1075–3 180Minn358, 230NW819. **Sureties not paying usurious interest for principal** not entitled to attorney's fees in suit to recover it. 45Philippine256.

1076–10 40F(2d)260.

1077–15 329 Ill 34, 160NE160; 127Misc 526, 217NYS76.

1077–15½–New. Individual maker of joint and several note with corporate maker may set up usury though corporation is denied such right unless facts pleaded by him cut down effect of face of note and make principle inapplicable: 127Misc526, 217NYS76.

1077–15⅓–New. that is, whether such individual comaker may invoke defense of usury depends on nature and character of his obligation and circumstances under which he assumed it; 127Misc 526, 217NYS76.

1077–15¼–New. and where it appears that such comaker was an accommodation party and had no beneficial interest in note or transaction in which given, he may not set up defense of usury, though he is primarily and absolutely bound. 127Misc526, 217NYS76.

1078–21 TexCivA 4SW(2d)293.

1078–28 45Philippine256.

1078–30 174Ark547, 297SW1035 (in Oklahoma forfeiture of interest does not extend to bona fide purchasers before maturity); 174Ark578, 297SW1039; CalA 284P466; CalA 289P236; 148Va 479, 139SE295.

1079–31 See also Cal 292P1069.

1079–32 Mass 168NE810.

1081–41 131Misc233, 226NYS371.

1081–42 Innocent holder may recover amount paid plus interest. 131Misc233, 226NYS371.

1082–49½–New. Where contract shows usury on its face defendant has been held not to be estopped to plead usury. 102CalA400, 283P117.

1083–54 112 Okl 177, 240P311.

1083–55 112 Okl 177, 240P311.

1083–56 112 Okl 177, 240P311.

1083–57 47 Ida287, 274P630. See also CalA 293P141.

1083–58 112 Okl 177, 240P311.

1083–61 Contra 112 Okl 177, 240P311.

1083–63½–New. Right of third person to accounting from custodian of fund for payment of usurious items.–Where grantee of mortgagor had notice of facts he cannot compel custodian of construction fund provided by mortgages to account for payments of claimed usurious items whose status was fixed by mortgagor when deed was made. 238Mich 261, 213NW120.

1084–74 150Va515, 143SE741. See al-

so 131Misc646, 227NYS647.
1084-76 Complaints held insufficient.–131Misc646, 227NYS647.
1086-93½-New. Intervener, in action to recover back usurious interest on note, has burden of issue. 196NC318, 145SE621.
1086-95 Bankruptcy proceeding involving borrower may be admissible as bearing on motive and good faith and as affecting credibility of witnesses. 180Minn358, 230NW819.
1086-99 Evidence held sufficient.–180 Minn358, 230NW819.
1086-3 See also 232Mich548, 205NW 592.
1088-25 CalA 289P872 (statute construed); CalA 293P141.
1088-26 174Ark547, 297SW1035 (Oklahoma contract); 189NC690, 128SE2; TexCommnA 280SW181; TexCommnA 13SW(2d)667(2dcase), 70ALR684. **In Washington.**–144Wash652, 258P467.
1089-27½-New. In some states penalty is amount of interest. 34GaA244, 129 SE109 (no penalty other than entire interest).
1089-27¼-New. In Georgia under act (1916) p 48 sole penalty for usury is forfeiture of interest. 161Ga919, 132 SE535, 45ALR559.
1089-27¼-New. Amount recoverable is amount loaned less interest and bonus. Wash 286P76.
1089-28 TexCivA 1SW(2d)462.
1089-31 33F(2d)356(2dcase) (guarantor held not entitled to recover); CalA 288P23. **Where borrower receives interest from another** which he transmits to lender, he cannot recover penalty, since he is merely transmitter of funds. CalA 274P1031. **Borrower held not entitled to treble damages** where third person supplied money for payment. 208 Cal 376, 281P496.
1089-35½-New. In absence of statute prescribing penalty, usury in certificate of deposit will not defeat claim of depositor against receiver of bank. 202 Iowa524, 210NW612.
1090-40 142Wash500, 253P802.
1090-43 TexCivA 18SW(2d)253. But see CalA 290P892.
1090-47½-New. Filing disclaimer of bonus before trial has been held not to relieve from consequences of usury. Wash 286P76.
1090-48 200Cal 609, 254P956, 53ALR 725; 208Cal 376, 281P496; 71CalA381, 235P465; CalA 274P1031; CalA 288P 23; TexCommnA 13SW(2d)667(2dcase), 70ALR684; TexCivA 1SW(2d)672. **Action based on rescission** of usurious transaction by person of unsound mind is inconsistent with proceeding at same time to recover treble damages. 71CalA 381, 235P465.
1090-51 200Cal 609, 254P956, 53ALR 725. **Borrower need not tender principal sum.**–200Cal 609, 254P956, 53ALR725. **In absence of agreement or direction to apply payments on interest,** penalty is not recoverable. TexCivA 22SW(2d) 495.
1091-53 CalA 291P161. **Deed of trust** given as security for usurious note is not "thing of value" for payment of which recovery of treble damages is allowed. 71CalA381, 235P465.
1091-54 CalA 288P23 (mere signing and delivery of usurious instruments).
1091-61 Action held subject to lender's set-off or counterclaim.–200Cal 609, 254 P956, 53ALR725.
1092-62 44 OklACR205. **Counterclaim of penalty may be pleaded,** etc. 44 OklACR205. See also 142Wash500, 253 P802.
1092-66 205Cal 138, 270P199.
1093-68 Cal 291P182; NC 154SE729. **In North Carolina.**–189NC690, 128SE2. **Right must be asserted within one year,** under some statutes. 205Cal 133, 270P 196.
1093-68½-New. In North Carolina under later statute cause of action accrues and statute begins to run from date of usurious transactions. 189NC690, 128 SE2.
1093-69 Series of successive yearly usurious payments each contemporaneous with agreement to extend payment of note are distinct and statute begins to run immediately **upon date of each.** 189NC690, 128SE2.
1093-70 33F(2d)356(2dcase); 33F(2d) 358 (claims for interest paid prior to one-year limitation before filing bill are barred).
1093-71½-New. If penalties accrued more than statutory period before plea of usury is filed, they may not be recovered. TexCivA 286SW680.
1093-71⅓-New. Statutory period of one year is not affected by general rules as to tolling of statute of limitations. 33 F(2d)358.
1093-72 Maker of usurious note need not file cross complaint for treble interest, but may recover by counterclaim. Cal 292P474.
1093-73 TexCivA 22SW(2d)495; Tex CivA 30SW(2d)487. **Copy of note** need not be attached to pleading in action for usury based on note as action is not one on note. 116 Okl 194, 244P785. **Allegation that usury was knowingly taken** is not necessary in cross complaint for recovery of twice amount of interest paid. 44 OklACR205. **Cross petition held sufficient.**–44 OklACR205. **Complaint held sufficient.**–198NC339, 151SE626. **Particular elements which must be pleaded.**–33F(2d)356(2dcase).
1094-77½-New. Plaintiff cannot make claim antagonistic to his complaint. CalA 274P1031.
1094-78 Burden of proving payee's application of payments on interest is on maker. TexCivA 22SW(2d)494. **Borrowers only required to establish that payment was received as interest.**–Tex CommnA 30SW(2d)489.
1094-79 TexCivA 22SW(2d)494. **Evidence held insufficient.**–44 OklACR205.
1094-80 TexCivA 18SW(2d)253.
1094-81½-New. Instructions held sufficient.–Okl 244P785.
1094-81⅓-New. Jury finding plaintiff paid defendant designated sum as interest is insufficient to show unlawful intent to violate usury law. TexCivA 30SW(2d)487.
1094-81¼-New. Burden of proof on plea of limitation. NC 154SE729.
1094-81⅕-New. Defendant entitled to specific finding on whether amendment constituted new cause of action within statute of limitations. NC 154SE729.
1096-98 Repeal of statutes.–32NM458, 259P820.
1096-99 200Cal 609, 254P956, 53ALR 725; CalA 291P161.
1096-4 That defendant was secretary of corporation when it received usurious interest did not make defendant liable. CalA 291P161.
1096-5½-New. Taking chattel mortgage as security for usurious loan covering press equipment is not violation of statute, such chattels not being "tools or implements of trade." 251NY107, 167 NE187, 64ALR1066.
1097-14 CalA 291P161. **Evidence held insufficient.**–46Philippine502.

UT RES MAGIS VALEAT QUAM PEREAT

1100-19 103WVa216, 137SE1, 52ALR 83. **Applied in:** 103WVa341, 137SE 744; Can [1927] 3DomLR1. **Maxim held not applicable.**–278US429, 49SCt 196, 73Led441.

VACANCY

1102-38 126Or630, 270P768; 144Va 320, 131SE784. **Distinguished from:** "Term." 144Va320, 131SE784.
1102-39 197Cal 539, 241P879.
1103-48½-New. Not filled by occupant or incumbent. Webster New Int. D. [quot 78Mont308, 254P187].

VAGRANCY

1109-7 76CalA216, 244P634.
1109-8 37GaA126, 138SE913; 103Tex Cr416, 281SW209 (illegal sale of intoxicating liquor).
1110-17½-New. In the Philippine Islands keeper of house of prostitution may be punished as vagrant. 50Philippine499.
1112-25 92PaSuper169. **Evidence held sufficient to support conviction.**–82Colo 304, 259P834; 103TexCr416, 281SW209. **Evidence held insufficient to support conviction.**–23AlaA130, 122S183(2dcase); 36GaA88, 135SE512; 37GaA126, 138SE 913; 39GaA589, 147SE796; 137Misc 205, 244NYS462; 135Misc39, 237NYS 513; 138Misc130, 245NYS568; 103Tex Cr218, 280SW804; 111TexCr527, 15SW (2d)10; 112TexCr408, 16SW(2d)1070 (1stcase). **Shifting burden of proof.**–23 AlaA130, 122S183(2dcase).
1112-26 Ont [1930] 1DomLR540. **Where want of visible means of support is made an ingredient of the offense,** etc. 103TexCr218, 280SW804; 111TexCr527, 15SW(2d)10. **Where ability to work is an ingredient of the offense,** etc. 111 TexCr527, 15SW(2d)10. **Mere proof of immoral conduct and transportation of whisky** is not sufficient to sustain conviction of vagrancy. 36GaA88, 135SE 512. **State's negative testimony cannot prevail** over evidence that accused did work. 36GaA88, 135SE512. **Defendant has burden** of rebutting prima facie case. 23AlaA451, 127S791(3dcase).
1112-27½-New. If witness knows it to be fact, he may testify that defendant is able to work. 23AlaA127, 123S263.
1112-29 In prosecution for vagrancy based on nonsupport of wife and child, evidence of acts of sexual intercourse of wife with other men before marriage is inadmissible. 154Miss621, 122S769. **Evidence of habits and conduct and associates** of defendant is admissible. 23 AlaA451, 127S791(3dcase).
1112-29½-New. Evidence held admissible.–23AlaA127, 123S263.
1112-31 109TexCr240, 3SW(2d)806. **Ruling that jury may draw inferences from defendant's acts** held not error. 257Mass479, 154NE95. **Refusal of instruction held not erroneous.**–23AlaA37, 121S435(2dcase) [certiorari den 219Ala 155, 121S436(1stcase)].
1112-31½-New. Evidence held sufficient to take case to jury. 23AlaA37, 121S435(2dcase) [certiorari den 219Ala 155, 121S436(1stcase)].
1112-31⅓-New. Where evidence is conflicting, defendant's guilt is question for jury. 23AlaA451, 127S791(3dcase).
1113-43 Punishment held not excessive.–23AlaA37, 121S435(2dcase) [certiorari den 219Ala155, 121S436(1st case)].

VALID CONTRACT

1115-12½-New. As used in statute refers to contracts for future deliveries and not for present sales. 252Mass306, 147 NE740.

VALUE

1117-19 Value is used in United States constitution giving congress power to coin and regulate value of money means to determine and maintain coinage composed of certain coins within certain limitations at certain specified composition and weight. 114Nebr18, 205NW 577.
1118-20 233 IllA64.
1118-22 With reference to the taxation of property, "value" means real value. TexCivA 283SW674.
1118-23 104CalA313, 285P877.

VEAL

1125-45½-New. Flesh of calf used for food. 13CustA542.

VENDOR or VENDEE

1128-72 204 Iowa901, 216NW292.

VENDOR AND PURCHASER

1174-1 Agreement to sell lands is contract to be performed in future and if fulfilled results in sale. 316 Ill 318, 147 NE266. **Sale of land** is actual transfer of title from grantor to grantee by appropriate conveyance. 316 Ill 318, 147 NE266.
1175-4 201Cal 248, 257P49; 163Ga434, 136SE317. **Agreements held to be contract of sale and not of lease.**–161Ga672, 132SE442.
1176-5 168Ark912, 271SW966.
1178-10 327 Ill 261, 158NE568; 329 Ill 637, 161NE118. **Agency to sell and not an option.**–Va 153SE722. **Contract giving exclusive sale of realty for unpaid**

consideration with option to purchase amounted to continuing offer of sale. 327 Ill 261, 158NE568.

1178-11 Contract giving authority to sell land and agreeing to furnish sufficient title on sale for amount specified net held not mere creation of agency but option. 190NC726, 130SE624.

1179-13 168Ark213, 269SW585; CalA 290P304; IndA 169NE686(2dcase); 202 Iowa549, 210NW593, 59ALR983; 207Ky21, 268SW592; 164La175, 113 S808; 79Mont166, 255P340, 60ALR1; 46Philippine893; TexCivA 297SW287 (sale contract providing for liquidated damages held sale, not option); Tex CivA 23SW(2d)858; TexCivA 25SW (2d)879; TexCivA 32SW(2d)380; Wash 291P1109. **Provision for forfeiture on non-payment.**-168Ark213, 269SW 585. **Particular instruments construed to be executory contracts of sale.** -168Ark213, 269SW585; 242Mich73, 218 NW789. **That notes given pursuant to contract recite that they are given for** rent of land does not change contract for sale to option to purchase during life of lease. 168Ark213, 269SW585. **Test is whether both parties are bound.**-242 Mich73, 218NW789. **Agreement construed as contract of sale.**-95CalA456, 273P50; 96Fla379, 118S205; NJ 146A 200. **Particular instruments construed to be not final contracts for sale.**-NJSup 142A824. **Agreement held contract for sale of real property.**-103CalA183, 284 P250.

1180-15 168Ark213, 269SW585 (option does not bind party holding option); 74CalA564, 241P408; 160La131, 106S 720; 160La175, 106S735; 100Vt204, 136 A379, 50ALR1309; 152Va173, 146SE 254.

1180-15½-New. Option to purchase is neither sale nor agreement to sell but merely contract giving optional right to buy property at fixed price within time certain. 316 Ill 318, 147NE266.

1180-15¾-New. Whether instrument is option or contract of sale is determined by parties' intention. NJ 146A200.

1182-22 Use of word "bequeath" does not necessarily render instrument a will. 2LaA39.

1182-28 12F(2d)625.

1183-30 160La68, 106S677 (contract held valid).

1183-37 90Fla357, 106S77 (no contract of sale in absence of mutual understanding or meeting of minds); 124Kan754, 262P541; 3LaA73; 249Mich603, 229NW 417; 103NJEq275, 143A346; 90Pa Super252. See also NJ 151A613. **Contract subsequently changed by vendors** by substituting different mortgagee has been held not legally made. 103NJEq 275, 143A346. **Contract conditioned on purchaser's procurement of loan held invalid** as being on potestative condition. 13LaA564, 125S160(2dcase); 12LaA28, 125S161; 12LaA172, 125S167(2dcase).

1184-39 165La266, 115S482; NJSup 137A784.

1185-40 220AppDiv138, 221NYS284; 133Misc312, 232NYS171.

1185-41 22F(2d)889; 127Misc88, 215 NYS305.

1185-43 22F(2d)889; 127Misc88, 215 NYS305. **Instructions to selling agent.**-322Mo 1064, 18SW(2d)1043.

1187-52 244Mich267, 221NW171.

1187-56 Colo 293P345. **Transaction leaving terms unsettled** held not to create enforceable contract. 124Kan652, 261P574. **Errors held sufficiently definite.**-244Mich267, 221NW171.

1187-57 Can [1929] 4DomLR247.

1188-64 Alta [1929] 1DomLR458.

1189-67½-New. Proposal of sale for cash which stated "offer good ten days" requires acceptance but not payment within the limited period. 168Minn441, 210NW586.

1189-68 316Mo 989, 292SW65.

1190-73 94Fla403, 114S431; 9LaA492, 121S207; 191Wis624, 211NW757, 758 [citCyc].

1190-75 168Ark713, 271SW345; 74 CalA564, 241P408; 144Miss384, 109S 859. **Revocation at same time as acceptance.**-168Ark713, 271SW345.

1192-78 No formal notice, etc. 144Miss 384, 109S859.

1192-80 221Ala209, 128S396; 86Colo 101, 278P611; 94Fla403, 114S431; 167 La540, 119S701; 169La1120, 126S679 (purported agreement signed by purchaser only held mere offer not binding on vendor till he signed); Va 153SE705 (acceptance by court for transfer of infant's interest). **Acceptance of written offer is complete** when acceptance is signed by proper person and oral notice thereof communicated to plaintiff. 29OhA123, 163NE57. **Acceptance shown.** -135Misc146, 236NYS633. **Owner held not to have tacitly accepted terms of contract** in absence of showing that he had actual knowledge of all its terms. 169La1120, 126S679.

1193-81 86Colo 101, 278P611; 167La 540, 119S701. **Correspondence held to show a definite and unequivocal acceptance.**-TexCivA 280SW225. **Demand to perform** does not operate as acceptance of offer to sell. 86Colo 101, 278P611.

1194-83 CalA 291P585; 327 Ill 261, 158 NE568; Va 153SE705.

1195-90 361Mo 989, 292SW65.

1195-93 22F(2d)889; 219Ala450, 122S 424; 92CalA258, 267P914; 217Ky839, 290SW675; 168Minn447, 210NW588 (requiring abstract); 144Miss841, 110S 793; 24 OhNPNS501; 138 Okl 67, 280P 427(2dcase); 191Wis624, 211NW757.

1196-94 168Minn447, 210NW588 (offer requiring immediate closing of deal and acceptance calling for abstract and time to examine it).

1196-95 217Ky839, 290SW675. **Acceptance of amount offered subject to broker's commission.**-169La1120, 126S679.

1198-99 22F(2d)889; 135Misc146, 236 NYS633. **Payment or tender in cash.**-33F(2d)415.

1201-8 135Misc146, 236NYS633.

1201-9 29 OhA123, 163NE57; 155Wash 70, 283P458.

1201-10 86Colo 101, 278P611.

1202-13½-New. Law requires no particular form of notice of acceptance and its form is determined by offer. 29 OhA 123, 163NE57.

1203-24 22F(2d)889; 126Kan497, 500, 268P794 [citCyc]. **Acceptance of offer by widow of testator and acceptance of subsequent offer by executor** cannot be read together to make out contract. 231 Ky122, 21SW(2d)153.

1204-27 232Mich630, 206NW359; Tex CivA 280SW225.

1205-30 162La362, 110S559.

1205-32 217Ala511, 116S681; 89CalA 764, 265P351; 3LaA145.

1206-37 217Ala511, 116S681; 163La 1065, 113S456 (contract held not potestative); Va 153SE705. **Contracts held not to lack mutuality.**-153Tenn380, 284SW 354 (bond for title not containing express requirement of deed to purchaser). **Potestative condition.**-10LaA749, 122S 880; 11LaA155, 123S133. **Agreement not identifying vendor as legal entity** but describing vendor as trust bearing stated date is lacking in mutuality. 253 IllA333. **Proposed contract for sale and purchase of land** held bilateral. 33F(2d) 415

1207-39 74CalA591, 241P897 (where vendee accepted offer to sell subject to restrictions, after fifteen days given him for investigation).

1208-43 119 Or297, 247P761 (painting of three houses in consideration for lot of land); 128 Or292, 274P318.

1209-45 203 Iowa62, 212NW314; 151 SC85, 148SE699.

1210-46 71CalA45, 234P334. **Agreement to reconvey.**-But see 100CalA373, 280P191.

1212-54 Ill 172NE32.

1212-56 Failure of vendor of land to comply with agreement, to oust certain persons occupying land with knowledge of purchaser has been held not failure of consideration of note. 38GaA426, 144 SE142(2dcase).

1212-57 Partial failure of consideration, etc. 94CalA410, 271P367. **Unfulfilled agreement of vendor to resell at** profit after purchase does not render notes given for balance of purchase price void for failure of consideration. 97Fla50, 119S788. **Breaches of contract** do not constitute failure of consideration. 99CalA610, 279P205.

1212-58 309Mo 276, 288, 274SW699 [cit Cyc].

1213-63 78Mont122, 252P796 (defective title).

1213-64 Expectancy of heir apparent may be subject of contract in equity. TexCivA 286SW315.

1213-66 42F(2d)9; 203Cal 693, 265P 920, 58ALR430; Cal 287P102 (sufficient if title in vendor when performance of contract sought); CalA 268P455; CalA 274P572; 94Fla895, 114S666, 667 [cit Cyc]; 98Fla604, 124S30; 99Fla179, 126 S362; 7LaA395; 125Me402, 134A539; 78Mont122, 252P796; 128Misc148, 218 NYS369; Vt 146A254. See also 152Va 173, 146SE254. **Contract held binding.**-Cal 287P102.

1214-67 13LaA94, 126S84. But see 32 PortoRico 836.

1214-68 In Porto Rico.-32PortoRico 836.

1215-74 Violation of Alien Land Law.-206Cal 782, 276P345.

1215-75 54ND141, 208NW840. **Contract of sale providing for giving mortgages as part of purchase price** held legal. 324 Ill 77, 154NE426.

1215-75½-New. Partial illegality of consideration.-Where one of considerations for purchase of land is illegal and forbidden, whole contract is tainted with illegality and is void. 54ND141, 208NW 840.

1215-75¾-New. Provision of contract requiring mortgage to be executed by purchasers' wives does not render contract void under statute provided such stipulation cannot be specifically enforced. Cal 287P102.

1216-81 But see 98CalA650, 277P519; 99CalA230, 278P459. **That purchaser had knowledge** that plot is not recorded is no defense to action to recover money paid. 204Cal 334, 267P1087. **Burden of showing nonrecordation of map identifying property** is on party alleging invalidity of contract by reason thereof. 97CalA462, 276P141.

1217-89 47 Ida188, 273P950.

1218-94 54ND141, 208NW840 (contract for purchase of land induced by promise of vendor, who was mayor of city, that he would get city to buy certain amount of gravel from land). **Contract conditioned on securing municipal permit** held legal. 101NJEq536, 138A 371.

1219-99 196Cal 753, 239P34 (restriction as to use or occupancy by any person not of white or Caucasian race has been held valid).

1219-6 Husband cannot make valid offer where wife is title holder, in absence of authority to do so. 144Miss841, 110 S793.

1220-15½-New. Contract for conveyance, signed by president of corporation named as purchaser, is made by corporation, though not signed by him in its name. 248NY538, 162NE516.

1220-17½-New. Vendor not showing that purchaser had knowledge that it was only trustee prior to execution of contract, is bound by its contract. CalA 274P572.

1220-17¾-New. Wife, having signed agreement of sale, is party thereto regardless of masculine use of term. 98 CalA338, 276P1033.

1220-17¼-New. Corporation is not liable under second contract where purchaser entered into contract with agent of corporation as individual. 169Ga44, 149SE559.

1220-18 Where parties to oral contract have understanding that terms shall be reduced to writing and signed, assent must be evidenced by written contract. 85CalA746, 259P1115. **Evidence to establish parol contract** must be clear, satisfactory, unequivocal, definite, and convincing. Iowa 227NW911 (insufficient).

1220-19 254Mass339, 150NE90; NJSup 133A178.

1221-23 98NJEq617, 130A829 (meeting of minds not shown); 127Misc327, 215NYS709; 285Pa212, 131A733. **Memorandum of sale of realty,** though calling for execution of formal contract held valid where making of formal contract was not a term of agreement. 58 OntL 375, [1926] 1DomLR1153. **Terms held not sufficiently definite.**-221AppDiv67, 222NYS659. **Stipulation as to purchase-**

money mortgage is not rendered indefinite by provision that it is to be drawn in usual way and under usual conditions. 133Misc312, 232NYS171.

1221-24 127Misc327, 215NYS709. **Offer directed to broker.**–240Mich89, 214NW946. **Writing held sufficient.**–127Misc327, 215NYS709 (containing statement of receipt of deposit, price and description of property).

1221-25 285Pa212, 131A733; **Ont** [1927] 2DomLR287. **Contract not void for uncertainty.**–220Ala657, 127S227.

1221-29 215Ala209, 110S306; 29 OhA130, 163NE51. **Writings held sufficient.**–89CalA620, 265P346; 127Misc164, 215NYS322; 285Pa212, 131A733. **Writing held insufficient.**–83CalA771, 257P185. **Fact that contract is styled "conference agreement"** does not invalidate it where otherwise possessing all details necessary for completion of transaction. 285Pa212, 131A733. **Provision that contract be followed by more formal writing** which was not executed does not render it invalid where it possesses all details necessary for completion of transaction. 285Pa212, 131A733.

1222-30 128Kan769, 280P747 (correspondence insufficient to show existence of contract); 168Minn441, 210NW586; 223AppDiv853, 229NYS215; 135Misc146, 236NYS633. But see 128Kan244, 276P815(1stcase). **Letters held not to constitute binding contract.**–98Fla710, 124S44(1stcase).

1222-31 68CalA657, 229P998; CalA 290P304; 163La1065, 113S456; 218App Div809, 218NYS276. **Receipt held insufficient,** etc. 221AppDiv67, 222NYS659 (smallness of deposit and provision for return thereof if contract not signed).

1223-39 168Ark713, 271SW345 (must define identity and fix locality); 91CalA640, 267P384, 386 [quotCyc]; CalA 290P64; Colo 293P345; 92Fla560, 109S580; 36GaA176, 136SE326 (sufficient); 210Ky237, 275SW691; 252Mass172, 147NE560 (description insufficient); 127Misc327, 215NYS709. **Description held sufficient.**–13PaDist&Co 299.

1224-40 162La319, 110S489, 492 [quot Cyc].

1224-41 162La319, 110S489, 492 [quot Cyc].

1224-42 162La319, 110S489, 492 [quot Cyc].

1224-43 197Cal 43, 239P401; 200Cal 348, 254P532; CalA 290P64.

1224-44 216Ala9, 112S151 (description by street number and existing mortgage and amounts); 217Ala511, 116S681; 168Ark713, 271SW345; 197Cal 43, 239P401; CalA 290P64; 161Ga468, 131SE510; 235Mich253, 209NW68; MoA 29SW(2d)230; 127Misc327, 215NYS709; 119 Or297, 247P761. See also CalA 274P572. **Sufficient descriptions.**–Ga 131SE150; 29 OhA123, 163NE57. **Slight inaccuracy in description** is not fatal where intention clearly appears. 13Pa Dist&Co 299.

1225-45 168Ark713, 271SW345; 173Ark1033, 294SW17; 200Cal 348, 254P532; 161Ga468, 131SE510; 86 IndA632, 155NE712 (contract drawn with reference to notice of sale); 222Ky602, 1SW(2d)1054; 98NJEq602, 131A585; 119 Or297, 247P761.

1226-46 83CalA720, 257P452. **Description in optional land contract** as "about 20 acres on the s. e. corner of Telegraph Road and Wick Road in Taylor Township" is sufficient. 235Mich253, 209NW68.

1226-47 119 Or297, 247P761.

1226-49 216Ala9, 112S151; 127Misc327, 215NYS709; 119 Or297, 247P761 (on recorded plot of tract known by distinguishing name).

1227-51 119 Or297, 247P761.

1227-51½-New. the street number, street, and city by which the property is known, 98NJEq602, 131A585.

1227-52½-New. or existing mortgages and their amounts, 216Ala9, 112S151.

1227-54 41F(2d)76.

1227-56 216Ala9, 112S151.

1227-58 97CalA462, 276P141.

1227-64 91CalA640, 267P384.

1227-64½-New. Exception of well sites and right of way in contract for sale of desert land with agreement to furnish water to irrigate it is not void for uncertainty where well site has been selected. 30Ariz82, 244P1022.

1227-64⅔-New. Negotiation between men not dealing in real estate for sale of lot authorizes inference, as identifying land, that seller intends to deal with land owned by him. 49RI 78, 139A791.

1228-67 221AppDiv67, 222NYS659.

1228-69 103CalA183, 284P250; 235Mich253, 209NW68 (signature by optionee of optional land contract not necessary); 239Mich216, 214NW245 (contract signed by vendor and orally accepted by purchaser); TexCivA 276SW947.

1229-70 222Ky602, 1SW(2d)1054.

1229-73 Purchaser insisting on vendor's agent signing contract and at whose request clause requiring vendor's signature was stricken out cannot complain that it was not signed by vendor at its headquarters in another state. 82 Colo 121, 257P355.

1229-74 241Mich129, 216NW438; 144 Wash224, 257P627. **Executory contract.**–98Fla604, 124S830.

1230-76 But see 92CalA178, 267P898. **Sufficient delivery.**–157Md504, 146A579.

1230-77 210Ky429, 276SW115; 151SC354, 149SE12 (contract for sale of land and check connected with it may be subject to conditional delivery). But see 239Mich216, 214NW245. **Evidence held sufficient** that delivery was not conditional. 128Misc275, 218NYS545.

1230-78 But see 105NJL595, 146A208.

1230-81½-New. Delivery of duplicate originals.–Though it was agreed that contract should be executed in duplicate and that each party should have copy, failure of purchasers to receive copy does not invalidate contract where it was properly executed in writing. 238Mich700, 214NW61.

1230-83 7LaA375 (recording required by statute). **Recordation must be made in correct names of parties** to contract under statute in some jurisdictions. 7LaA375.

1231-86 Contract not invalid for failure to affix sufficient amount of stamps. 75CalA698, 243P889.

1231-88 Equivalent in equity to sale by conveyance with purchase money secured by mortgage or trust deed. 153Tenn380, 284SW354. **Bond for title is muniment of title.**–163Ga471, 136SE440.

1231-89 163Ga471, 136SE440.

1231-92 137SC366, 135SE363.

1231-93 163Ga471, 136SE440.

1232-95 TexCivA 25SW(2d)879.

1232-97 168Ark213, 269SW585, 587 [quotCyc in part]; 128Misc794, 220NYS1; NC 154SE37 (option not a sale); TexCivA 23SW(2d)858. **Option does not bind offeree to purchase.**–TexCivA 23SW(2d)858.

1232-99 217Ala27, 114S409; CalA 277P525; 94Fla403, 114S431; 93Fla1106, 114S464; 327 Ill 564, 158NE806; 335 Ill 524, 167NE864; 338 Ill 575, 170NE695; 237Mich548, 213NW137; 238Mich52, 213NW175, 177 [quotCyc]; 79Mont166, 255P340, 60ALR1; 128Misc794, 220NYS1; 189NC610, 127SE706; 191NC619, 132SE593 (contract held to be option); 118 Or649, 245P505; 8PaDist&Co 67; 100Vt204, 136A379, 50ALR1309. **Contract is one of agency and not of sale** where it is intended merely to lend agent appearance and character of purchaser for its effect on other persons with whom agent may negotiate. 238Mich52, 213NW175, 177 [quotCyc]. **Effect of option** is to bind owner to hold property in condition it is in when option is made. 38GaA408, 144SE47. **Remedies.**–38GaA408, 144SE47. **Vendor may waive claim** that purchaser without ability or willingness to perform. 208Cal 753, 284P926. **Where optionee's offer is to deal with natural persons sui juris** he will not be compelled to submit to substitution of parties in representative capacity whose authority is open to grave doubt. 108WVa308, 151SE183. **Construction of option to purchase land** containing no agreement to purchase crop. Wash 291P1109.

1233-1 94Fla403, 114S431; Alta [1927] 1DomLR244.

1233-2 56ND698, 219NW112.

1233-4½-New. Not necessary for optionee to sign optional land contract. 235Mich253, 209NW68.

1233-4⅓-New. Provision of deed of right of way and log landing for extension of term on notice and payment of stipulated sum is in nature of option. 191NC425, 131SE741.

1233-4¼-New. Present conveyance of land and sale of an option are executed contracts. 327 Ill 564, 158NE806.

1233-4½-New. Agreement to sell land is executory contract. 327 Ill 564, 158NE806.

1233-4⅙-New. Sum paid to keep offer open is not partial payment on price but consideration for option. 327 Ill 564, 158NE806.

1233-4½-New. "Deposit" not synonymous with "option." 327 Ill 564, 158NE806.

1233-4⅛-New. Instrument relating to sale of lot reciting receipt of sum as part payment and that deposit was good until certain date is contract, not option. 327 Ill 564, 158NE806.

1233-5 14F(2d)171; 102NJEq73, 139A709.

1234-6 94Fla403, 114S431; 129Kan72, 281P927 (contract not lacking consideration); 160La175, 106S735; 144Miss384, 109S859; 128Misc794, 220NYS1. **Option to repurchase.**–335 Ill 524, 167NE864. **Option to purchase land, given without consideration,** is nudum pactum and unenforceable. 237Mich548, 213NW137. **Provision that purchaser may inspect and make survey** is insufficient consideration for promise to hold option open for stated time where making of inspection and survey is not obligatory. 144Miss384, 109S859. **Option confers no rights without all elements of contracts.**–94Fla403, 114S431. **Provision for forfeiture of amount paid.**–TexCivA 10SW(2d)1043.

1235-7 Consideration sufficient.–87IndA628, 160NE105; 235Mich253, 209NW68; 236Mich531, 211NW62. **Payment.**–235Mich253, 209NW68.

1235-8 87 IndA628, 160NE105; 189NC610, 127SE706; 152Va173, 146SE254.

1236-11 128Misc794, 220NYS1.

1236-13 217Ala27, 114S409; 335 Ill 524, 167NE864; 128Misc794, 220NYS1; 292Pa343, 141A146; TexCivA 23SW(2d)858. See also 235Mich253, 209NW68.

1236-16 214Ala651, 108S763. But see 171Ark626, 286SW822. **Death of purchaser (lessee)** held to lapse option. 94Fla403, 114S431.

1237-18 85CalA119, 259P52; 94Fla403, 114S431; 237Mich548, 213NW137; 118 Or649, 245P505; 100Vt204, 136A379, 50ALR1309; Wash 291P1109.

1238-19 38GaA408, 144SE47 [citCyc]; 246Mich659, 225NW620; 118 Or649, 245P505; 100Vt204, 136A379, 50ALR1309. **Only possible equity holder of option to purchase has in property** is possible right to specific performance. 85CalA119, 259P52.

1238-20 93Fla954, 113S100; 189NC610, 127SE706. **Sufficiency of communication.**–233Mich210, 206NW351. **Notice of exercise of option, when communicated,** completes contract. 128Misc79, 217NYS737.

1238-21 Communication prevented by vendor.–99CalA140, 277P1086.

1238-22 205 Iowa248, 216NW73; 236Mich440, 210NW485; 236Mich453, 210NW486; 237Mich548, 213NW137; 189NC610, 127SE706 (evidence held to show acceptance); 118 Or649, 245P505. **Particular plot** must be designated. 93Fla954, 113S100. **Right under option is lost for failure to accept** strictly under its terms. 237Mich548, 213NW137. **Vendors' refusal to perform contract granting option to purchase real estate,** on ground that they did not want to sell, has been held not to relieve purchaser from accepting option in writing according to its terms, and constituted neither waiver of rights thereunder nor an estoppel to insist thereon. 245Mich49, 222NW79.

1239-24 339 Ill 504, 171NE494; 237Mich548, 213NW137; 191NC425, 131SE741; TexCivA 297SW347. **Discharge of mortgage as condition.**–236Mich453, 210NW486. **Waiver of written notice.**–192Wis130, 212NW253.

1239-25 326 Ill 556, 158NE216; 205 Iowa248, 216NW73; 236Mich440, 210 NW485; 191NC619, 132SE593. **Tender held not invalid** for being coupled with demand for deed. 326 Ill 556, 158NE 216. **Optionee must tender price and necessary papers before time expires** in order to protect his rights, even in absence of any agreement. 237Mich548, 213NW137. **Where optionee sent money and papers to bank other than one agreed upon,** with directions to forward, and bank failed to do so there was not sufficient tender. 237Mich548, 213NW 137. **Unless payment of purchase price or tender thereof is condition precedent,** it is not essential to convert option into contract but only element of performance. 88 IndA5, 163NE112. **Payment need not accompany acceptance** where no amount is stated in contract. 244 Mich688, 222NW80.

1241-27 **Acceptance not implied.**–Wash 291P1109. **Filing of bill for specific performance.**–236Mich440, 210NW485.

1241-27½-New. Vendor sufficiently ratifies assignment of option as notice of acceptance by handing deed executed in favor of assignee of option to escrow holder. 99CalA140, 277P1086.

1241-29 14F(2d)171; 203Cal 693, 265P 920, 58ALR430; 68CalA83, 228P717; 93CalA516, 269P751 (time for exercise of option held not extended by judgment); 327 Ill 261, 158NE568; 126Kan 63, 266P735; Mass 168NE783; 236Mich 440, 210NW485; 237Mich548, 213NW 137; 136Wash84, 238P924; 192Wis130, 212NW253. See also 53SD26, 219NW 883.

1243-31 86 IndA33, 155NE709 (vendor estopped by acceptance of payment for extension from asserting forfeiture). **Failure of seller's broker to pay over to principal money received on extension of option** is not ground of complaint in behalf of defaulting purchaser under option contract. 234Mich1, 208NW31. **Oral notice by broker of extension by his principal** is sufficient. 234Mich1, 208 NW31. **Parol extension.**–234Mich1, 208 NW31. **No extension.**–236Mich440, 210 NW485. **Waiver of time limit.**–192Wis 130, 212NW253.

1243-33 CalA 277P525; 93Fla954, 113 S100; 93Fla1106, 114S464; 234Mich 478, 208NW436; 217AppDiv150, 217 NYS145; 128Misc79, 217NYS737; 128 Misc794, 220NYS1; 189NC610, 127SE 706; 10PaDist&Co 261; TexCivA 297 SW347. See also 48Philippine996.

1244-34 128Misc79, 217NYS737; Tex CivA 23SW(2d)858. **Optionee cannot complain** time was shortened if he accepted before option expired. 128Misc 79, 217NYS737.

1244-37 100Vt204, 136A379, 50ALR 1309.

1244-38 **Where option is exercised,** title of optionee relates back to date of option and his interest is to be regarded as real estate from that time. 6Pa Dist&Co 770. **Doctrines of relation and after-acquired title** are in effect same so far as question as to when title is acquired under exercise of option is concerned. 85CalA119, 259P52.

1244-38½-New. It is also held that interest of optionee does not by fiction date back from granting of option, where option is exercised. 38GaA408, 144SE47.

1245-44 40F(2d)583 (consideration for assignment); 128Misc794, 220NYS1.

1245-45 128Misc794, 220NYS1.

1245-45½-New. Mere fact that option contains no clause making it binding upon assigns or authorizing transfer is of no importance. 128Misc794, 220 NYS1.

1246-47 191NC425, 131SE741.

1247-51 86Colo 77, 278P800; 93Fla 954, 113S100; 98Fla1253, 121S792.

1247-53 **Contract signed only by lessee,** held at most lease showing lessee's understanding that he was to have option. 91Fla969, 109S89.

1248-56 200Cal 434, 253P718; 163Ga 917, 137SE396; 208 Iowa982, 221NW 472. **Agreements extending option may** show intent of purchaser to pay interest and taxes irrespective of whether he purchases or not. 199Cal 218, 248P678.

1249-63 Fla 129S497; 204 Iowa1096, 216NW768; 177Minn415, 225NW290. **In Louisiana.**–158La137, 103S537.

1249-65 98CalA245, 276P1037. **Mistake to be available in equity must not have arisen from negligence,** etc. See also 83CalA720, 257P452.

1249-69 51SD73, 212NW507.

1249-71 158La137, 103S537 (sale of marsh and swamp land held to be speculative and rescission not allowed on ground of sale for less than half value); 70Utah175, 259P196.

1250-73 70Utah175, 259P196. **Under Cal. Civ. Code § 1577,** etc. 98CalA245, 276P1037.

1250-74 **Vendee is not bound to accept title** subject to restriction he had no notice of. 98NJEq64, 130A546.

1250-74½-New. Purchaser, who was induced to purchase land by representations that certain street would be opened with certain width and with certain improvements, is not entitled to cancellation of contract on ground of mutual mistake, where street of such width with such improvements is not opened. Tex CivA 14SW(2d)894.

1250-76 45Philippine296 [quotCyc].

1250-77 45Philippine296 [quotCyc].

1251-78 45Philippine296 [quotCyc]. **The use of the words, etc.**–45Philippine 296. **"More or less"** may relieve from exactness but not from gross deficiency. 45Philippine296.

1251-79 45Philippine296 [quotCyc].

1251-80 45Philippine296 [quotCyc].

1251-81 45Philippine296 [quotCyc].

1251-82 71CalA272, 235P465; 94Fla 1010, 114S769; 333 Ill 636, 165NE205; 204 Iowa1096, 216NW768.

1252-85 94Fla1010, 114S769; Fla 129 S497 (where vendor points out boundaries). **Where vendor points out to purchaser location and boundaries** and represents that stated description covers lands so designated, he does so at his peril, and is accountable for his mistake. 94Fla1010, 114S769. **Equity will cancel deed by mistake conveying land not contracted for by purchaser,** regardless of lack of fraudulent intent of grantor. 94Fla1010, 114S769.

1252-89 79CalA45, 248P1035 (executed contract); 202 Iowa993, 210NW133 (though plaintiff alleged and failed to prove fraud); 51SD73, 212NW507; TexCivA 281SW616.

1252-91 250 IllA174; 221Ky593, 299 SW201; 232Ky73, 22SW(2d)442.

1253-99 163Ga815, 137SE240; 164Ga 581, 139SE56; 166Ga71, 142SE543; 259Mass159, 156NE23; 241Mich392, 217 NW22; 57ND674, 223NW808(2dcase); 131 Or185, 282P546; 136Wash32, 238P 979.

1254-4 92CalA216, 267P933; 114 Okl 48, 242P772, 773 [quotCyc]; TexCivA 8SW(2d)230. **Rule requiring injury to amount to specified sum for equity suit** does not apply to suit to set aside conveyance for fraudulent misrepresentations, for as long as there is appreciable pecuniary damage, extent of damage will not be inquired into. 127Me269, 143 A58. **Some pecuniary loss or injury** must be caused to establish fraudulent misrepresentations. 127Me269, 143A 58.

1255-5 114 Okl 48, 242P772, 773 [quot Cyc]; 136Wash32, 238P979.

1255-5½-New. For purchaser to rescind, it is not essential that he should be able to show that the property purchased was worth less than he paid for it, 72CalA124, 238P126.

1255-5½-New. but it is enough that he was induced by false representations to buy property, which if the representations had been true, would have been worth more than it actually was worth. 73CalA124, 238P126.

1255-6 164Ga581, 139SE56; Md 150A 28. **Misrepresentations not shown.**–LaA 126S246.

1256-8 37BC188, [1926] 2DomLR374, [1926] 1WestWkly878. **Extent of duty** to facts material to contract. 37BC188, [1926] 2DomLR374, [1926] 1WestWkly 878.

1256-9 104Conn650, 134A62, 63 [cit CJ].

1256-11 **Where condition was not false past or present fact,** there was no misrepresentation warranting rescission. Md 150A28.

1257-12 92CalA216, 267P933; 169La 833, 126S209; 242Mich572, 219NW658.

1257-13 Md 150A28; 242Mich572, 219 NW658. **Statement as to improvements, etc.**–NC 155SE238(2dcase). **Statement held not guaranty of future income of business.**–Ill 173NE343.

1257-14 196NC624, 146SE584.

1258-18 247Mich109, 225NW562; Miss 110S772. **Statements held not to be expressions of opinion.**–97Fla392, 121S475. **Representations** held not expressions of opinion. 103CalA448, 284P697.

1259-20 73CalA124, 238P126; DelCh 139A457; 149Md336, 131A568; 54ND 141, 208NW840, 843 [citCyc]. **Material variance in descriptions** in deed and contract of sale may constitute misrepresentations. 126Misc702, 214NYS1. **Representation** that all but two lots in block were sold when only two lots were sold held material representation. DelCh 139A457. **Where false statement was as to condition of house** which was in fact so defective as to materially affect value of property, purchaser could have conveyance set aside. 127Me269, 143A58. **Representation held material.**–157Md411, 146A221.

1259-21 Mich 233NW159; Va 154SE 565; Man [1930] 3DomLR647. **Fraud must be affirmation of fact affecting value of property or causing loss.**–97Fla 1085, 119S326.

1260-24 164Ga581, 139SE56.

1260-25 71CalA272, 235P455; Miss 105 S449.

1260-26 **Without evidence of vendor's belief or reasonable grounds for belief** misrepresentation of condition of building is not ground for rescission. Md 150A28.

1260-29 162Ga457, 134SE87; 178Minn 238, 226NW702.

1261-30 204 Iowa1011, 216NW765; 204 Iowa1096, 216NW768.

1261-31 175Ark1170, 18SW(2d)811.

1261-32 162Ga457, 134SE87 (false statement as to boundaries).

1262-35 17F(2d)971; 164Ga581, 139 SE56; 259Mass159, 156NE23; Miss 110 S772; TexCivA 280SW329. **The fraudulent representations need not have been the sole inducement,** etc. 251Mich501, 232NW219.

1262-36 Fla 129S759; Md 150A28; Miss 110S772; TexCivA 16SW(2d)325 (2dcase). **Facts as to which purchaser is charged with knowledge.**–333 Ill 41, 164NE205.

1263-37 242Mich139, 218NW664; Miss 110S772; Va 154SE565.

1263-38 NJ 130A447. **Investigation will not prevent buyer availing himself of false representations** unless of character to fully acquaint him with essential facts. 3Del 259, 138A392.

1263-39 54ND141, 208NW840, 843 [cit Cyc].

1264-41 TexCommnA 276SW174.

1264-43 42F(2d)9; 97Fla444, 121S 470.

1265-45 TexCivA 285SW832.

1265-48 See also NJCh 145A330.

1265-49 **Representations as to city's title other than those of agent** delegated to sell cannot be relied on to establish fraud. 128Me412, 148A143.

1265-49½-New. Vendor's statement that he had good title is, in effect, representation that facts constituting good title existed. TexCivA 285SW832.

1266-51 164Ga581, 139SE56.

1266-53 99CalA283, 278P462; 162Ga 457, 134S87. **Evidence held to show** misrepresentation. 72CalA725, 238P150.

1267-58 204 Iowa1011, 216NW765.

1267-60 175Ark1170, 18SW(2d)811; 203Cal 419, 264P759; 70CalA279, 233P 354; 73CalA124, 238P126; 149Md336, 131A568; TexCivA 29SW(2d)877.

1268-66 206Cal 526, 275P440; 73CalA 124, 238P126 (productive quality of soil); 80CalA724, 252P770; Miss 110 S772; 54ND141, 208NW840; 195Wis 241, 218NW184. **Misrepresentation as to adaptability of the land for certain purposes,** etc. 35GaA668, 134SE350 (farming). **Evidence held insufficient to show misrepresentation.**–TexCivA 280 SW329.

1269-68 Miss 110S772; 117 Or362, 243 P1114.

1269-69 54ND141, 208NW840. **Obviously exaggerated assurance of safety**

of a roof to experienced architect is not ground for rescission. Md 150A28.

1269-70 54ND141, 208NW840; Man [1930] 3DomLR647.

1269-71 206Cal 526, 275P440.

1270-74 Fact that arable land is in such difficult situation that its profitable cultivation is doubtful, does not make representation of arable land false. Can [1925] 3DomLR1108.

1270-76 False statements as to cause of damp condition of cellar and future condition held ground for rescission. 100NJEq389, 135A681. **Evidence held to justify conclusion** that repairs needed to make building comply with false statement cost more than thirteen dollars. 127Me269, 143A58.

1270-80 247Mich109, 225NW562; 170 Minn259, 212NW457; Miss 110S772; 117 Or362, 243P1114; 92PaSuper550. **False statement of value of crop cut but not threshed** held not ground for rescission. Man [1930] 3DomLR647.

1271-82 242Mich139, 218NW664.

1271-83 Miss 110S772.

1271-86 80CalA724, 252P770; Mo 282 SW392.

1271-86½-New. Where person making misrepresentation stands in fiduciary relation to vendee and secretly represents vendor representations as to value are actionable. 170Minn259, 212NW457.

1272-89 False representation as to value of crop already cut entitles purchaser of farm to rescind. Man [1929] 4DomLR809.

1272-89½-New. Contract describing premises by metes and bounds and by street and number held one for sale of three family house in view of vendor's representations. 243NY445, 154NE305.

1272-91 227AppDiv65, 237NYS51 (that houses similar to houses on pictures shown to defendant were being constructed on property in question).

1272-92 97Fla392, 121S475.

1273-98 222AppDiv152, 225NYS570. **Evidence held sufficient** to show fraud as to nature of loan which was placed on property and which purchaser assumed. 161Ga877, 132SE81.

1273-1 259Mass608, 156NE842; 228App Div138, 239NYS178.

1274-2 Wash 290P842(2dcase).

1274-7 SD 224NW937.

1274-8½-New. Selling at excessive price and turning excess back to purchaser's agent in conjunction with secret plan known to vendor is fraud on purchaser. Wash 286P95.

1275-17 90CalA291, 265P873; 163Ga 815, 137SE240 (as to abandonment of restrictive plan); Md 150A28 (holding that, where nothing was omitted, there was no fraud).

1275-18 99NJEq115, 131A916. See also 97Fla1085, 119S326. **In absence of inquiry by purchaser,** there is no fraud warranting rescission by vendor because of his nondisclosure of fact that buildings were separated by party wall. 99NJEq115, 131A916.

1276-19 NJCh 131A916.

1276-23 163Ga815, 137SE240.

1277-31½-New. Party wall separating buildings.-Where adjoining buildings sold are separated by party wall, there is no fraud by vendor in failing to disclose such fact in absence of inquiry by purchaser. 99NJEq115, 131A916.

1278-37 250 IllA174; 128Me412, 148A 143 (purchase from municipality); 99N JEq115, 131A916; NY 128Misc16, 217NY S185. **Doctrine applies in equity** as well as at law. 99NJEq115, 131A916. **Bargaining.**-Fla 130S605 (representations as to best price held not material).

1278-33 Lacking evidence of custom or agreement, vendor is not bound by implied warranty that house conforms to plans. Md 150A28.

1278-39 152Md13, 136A48; TexCommn A 18W(2d)271; Wash 290P842(2dcase); Wis 232NW875. See also 206Cal 526, 275P440.

1279-40 83CalA720, 257P452; 166Ga71, 142SE543; NJ 130A447.

1279-41 169Ark491, 276SW588; CalA 291P879; 160Ga612, 128SE803; 164Ga 581, 139SE56 (dictum); 321 Ill 354, 151 NE871; 335 Ill 524, 167NE864 (signing contract to repurchase without reading); 99NJEq115, 131A916; 195NC685, 143SE 525; 118 Or347, 246P349; 92PaSuper 422; TexCivA 296SW620; TexCivA 16 SW(2d)325(2dcase); 70Utah175, 259P 196; Man [1930] 3DomLR647. See also 152Wash149, 277P445. **There can be no fraud** where complaining party had knowledge of all facts. TexCivA 296SW 620.

1279-43 321 Ill 354, 151NE871; 162La 59, 110S88; 99NJEq115, 131A916.

1279-44 169Ark491, 276SW588; 321 Ill 354, 151NE871; 205 Iowa657, 216NW60.

1280-45 Dictum. 164Ga581, 139SE56; 321 Ill 354, 151NE871; 162La59, 110S 88; 262Mass573, 160NE426; 118 Or347, 246P349.

1280-46 81Colo 202, 254P764; 160Ga 612, 128SE803.

1280-47 136Wash32, 238P979.

1280-48 81Colo 202, 254P764.

1281-50 164Ga581, 139SE56; 234 IllA 516, 524 [citCyc]; 251Mich501, 232NW 219. **Law sees what purchaser saw through, vendor's representations so** that contract describing premises by metes and bounds was held one for sale of three story tenement house because of representations by vendor. 243NY 445, 154NE305.

1281-53 234 IllA516, 524 [citCyc]; 204 Iowa1096, 216NW768. **Contract providing for sale free from incumbrances,** and deed and mortgage made subject to restrictions, held fraudulent allowing purchaser to rescind. NJCh 146A876.

1282-56½-New. , or makes unhindered examination of records. 150SC493, 148 SE554.

1282-64 CalA 291P879; 162Ga457, 134 S87; 164Ga581, 139SE56; 204 Iowa1096, 216NW768; TexCivA 275SW90.

1282-65 162Ga457, 134SE87; 164Ga581, 139SE56; TexCivA 275SW90. **Vendor purchasing land adjoining his own** is presumed to know the boundaries of his own land. 70Utah175, 259P196.

1283-68 70CalA279, 233P354; CalA 291 P879; 234 IllA516.

1283-69 75CalA212, 242P518 (as to amount of water).

1283-71 128Misc16, 217NYS185. Contra TexCivA 285SW670. **Misrepresentations must be shown to be such at time of sale** and not at time of suit for cancellation of contract. 162La59, 110S88.

1284-75 Purchaser is entitled to rely on representation that land subject to overflow. TexCivA 285SW670.

1285-84 Vendor's contention that he was induced to enter into contract by agent's fraudulent representations as to owner's purchase price will not avail him where he does not pretend value of land was less than purchase price. 169Ark491, 276SW588.

1285-85 42 OklACR59, 61 [citCyc].

1285-86 42 OklACR59.

1285-87 42 OklACR59, 61 [citCyc].

1285-88 99Fla795, 128S408.

1285-89 99Fla795, 128S408; 133 Okl 137, 271P632, 634 [quotCyc].

1285-89½-New. That other lands in same vicinity could have been purchased for much less is not cause for rescission of contract to purchase. 162La59, 110S 88.

1285-89⅓-New. That farm used for demonstration purposes was operating at a loss is not ground for rescission of contract to purchase. 162La59, 110S 88.

1285-89¼-New. Connection between false representation and land value as affected thereby must appear to warrant rescission of contract. 99Fla795, 128S 408.

1286-93 70Utah175, 259P196.

1286-94 162Ga457, 134SE87 (false statement as to boundaries); 132Misc48, 228NYS824.

1286-96 99NJEq115, 131A916; Utah 269P1035. **Where agent in confidential relationship fails to disclose identity of prospective buyer** agreement is vitiated. 162La949, 111S339. **In absence of hidden defects in construction or condition of building,** vendor is under no obligation to explain to vendee details or plan of construction; 99NJEq115, 131A916.

1286-98 249Mich603, 229NW417; 168 Minn414, 210NW149, 48ALR913 (misrepresentations as to financial responsibility of purchasers on installment contract). **Reliance on representation.**-CalA 291P441; 81Colo 358, 255P627. **Evidence held insufficient to show fraud.**-239Mich81, 214NW160. **Damage.**-CalA 291P441. **Materiality of representation.**-CalA 291P441.

1287-2 101NJEq723, 139A178.

1287-4 See also 332 Ill 484, 163NE828.

1288-6 Bonds.-26 OhA531, 160NE103.

1289-8 But see 101NJEq723, 139A178.

1289-10½-New. Vendor is presumed to know the law. 101NJEq723, 139A178.

1289-15 101NJEq723, 139A178.

1290-22 If in addition to suppressing fact that he has prospective purchaser he affirmatively misrepresents, contract will be avoided. NJCh 151A277.

1291-26 101NJEq723, 139A178.

1291-30 131 Or185, 282P546. See also 214Ala313, 107S864.

1292-37 103CalA448, 284P697; 131 Or 185, 282P546.

1292-43 100CalA302, 279P1024 (retaining possession of property and treating contract as in effect, notwithstanding failure of covendee to sign contract). **Acts constituting ratification.**-331 Ill 107, 162NE375.

1293-46 Mere whim or prejudice of vendor will not justify avoidance of contract by her where indorsing purchase money check and other acts show ratification. 331 Ill 107, 162NE375.

1293-48½-New. Acceptance of deed from intervening purchaser may waive contract with original vendor. 169La 978, 126S444.

1293-49 80CalA561, 251P929; 157Md 411, 146A221; 251Mich476, 232NW213 (1stcase); TexCivA 28W(2d)899.

1293-51 33Ariz101, 261P969, 57ALR 107; 81Colo 399, 255P627; TexCivA 285SW700.

1294-52 81Colo 399, 255P627 (partial payment and extension of time on interest payments); 223Ky510, 4SW(2d) 403; Wash 288P916. See also 295Pa 492, 145A586.

1294-53 80CalA561, 251P929; 81Colo 399, 255P627; 243NY295, 153NE79.

1294-57 80CalA561, 251P929.

1294-58 Vendor does not ratify purchase by accepting payment of one of several notes indorsed by purchaser without recourse, some of which were worthless, where he alleged facts in amended petition and offered to bring money into court. 37Wyo 282, 261P 126.

1294-60 215Ala297, 110S391 (outlining of street did not per se give notice to buyer that his lots were shorter than specified); 33GaA676, 127SE663; 127 Kan614, 274P221.

1295-61 But see 127Kan614, 274P221.

1295-64 215Ala161, 110S10; 229App Div126, 241NYS302.

1296-65 230AppDiv436, 245NYS219; 55ND905, 215NW484.

1296-66 205 Iowa248, 216NW73; 170 La389, 127S878 (holding graveling road not to be "hard surfacing" within contract); 131 Or509, 283P2; 155Wash70, 283P458. **Particular contracts construed.**-131 Or509, 283P2.

1296-67 205 Iowa248, 216NW73; 195 NC165, 141SE577; 32PortoRico 12.

1296-70 217Ala511, 116S681; 175Ark 1161, 1SW(2d)801. **Construed most strongly against party preparing it.**-TexCommnA 25SW(2d)808. **Particular contracts construed.**-299Pa148, 149A 199.

1296-71 44Philippine94.

1296-72½-New. Strictly construed against drawer. 290Pa237, 138A756.

1296-72⅓-New. Fair and reasonable construction of land contracts will be preferred to one which would lead to harsh and unreasonable results. TexCommnA 25SW(2d)808.

1296-73 30Ariz82, 244P1022; 86CalA 324, 260P890; 35GaA698, 134SE633; 234Mich1, 208NW31; 51SD73, 212NW 507. **Particular instruments.**-35GaA 698, 134SE633; 250Mich379, 230NW 145. **Evidence held to show three writings for sale of separate tracts were one** transaction. 51SD73, 212NW507.

1297-76 Md 150A28 (holding that building plans could not be read into a

contract of sale under seal); 51SD73, 212NW507.

1297-77 175Ark1161, 18SW(2d)801; 80 CalA609, 252P733; 3LaA584; 229App Div593, 243NYS548. **But mere fact that vendor** referred to writing as contract, in letter to bank holding it in escrow, has been held not to show that it was contract to go into immediate effect as such. 116 Or376, 239P818. **Written contract for sale of land cannot be altered to option** by referring to it as such. 242Mich 73, 218NW789.

1297-79 Particular contracts and provisions.–234Mich233, 207NW803 (contract for sale of corner lot requiring vendor to pave all streets "before" and lay sidewalks "in front of" such lot obliges vendor to make such improvements on both streets abutting lot).

1297-80 Particular contracts and provisions.–35GaA698, 134SE633; Ill 172NE 32; 205 Iowa248, 216NW73; NJ 151A 613.

1298-81 But see 123Kan711, 256P1008.

1298-83 35F(2d)818; 164Ga777, 139SE 549; 203 Iowa1270, 212NW134.

1299-98 LaA 128S546.

1299-2 Instrument construed as contract to sell and not contract of sale.–160La400, 107S239. **Agreement to sell land upon condition that vendor furnish merchantable abstract of title** held to amount to sale only in sense that contract gave parties right to specific performance. 160La400, 107S239.

1300-3 168Ark213, 269SW585 (holding actual transfer of title on executed contract and contract to be performed in future, which, if fulfilled results in sale, executory), **Anything short of passing title** is contract to sell not sale. 215 AppDiv371, 214NYS91. **Contract to sell land on installment plan** is not "sale" but "agreement to sell" or "agreement to sell and buy" under Montana code. 76Mont150, 245P962. **Contract to sell passes equitable title.**–215AppDiv371, 214NYS91. **Passing of equitable title** does not make contract to sell a sale. 215AppDiv371, 214NYS91. **Sale transfers absolute title.**–215AppDiv371, 214 NYS91.

1300-4 Sale and promise to sell in Louisiana distinguished.–160La400, 107S 239.

1300-6 161La618, 109S142 (instrument construed as conveyance with right of redemption). **Instrument construed as a contract of sale,** etc. Vt 146A254.

1300-7 Agreement construed as agreement of sale and not sale.–167La97, 118S 817. **Transaction construed as promise to sell and deposit put up as earnest money.**–167La540, 119S701.

1301-11 Where contract provides that purchaser shall deliver mortgage to secure notes for unpaid part of purchase price, contract is executory on part of purchaser until mortgage is delivered though vendor delivers deed and purchaser makes part payment and delivers notes for unpaid part of price. 40 Okl ACR317 [reh pending].

1301-13½-New. "Agreement to sell" is contract to be performed in future, and, if fulfilled, results in sale. 84Mont263, 275P273.

1301-14½-New. Where agreement provides for execution of deed concurrently with agreement to sell and for delivery when purchaser makes down payment, and that, if vendor furnished deed to certain parcel of land within stated time purchaser will reconvey certain portion of land purchased, title in property originally conveyed vests in purchaser on vendor's failure to deposit deed. 97CalA 462, 276P141.

1301-15 214Ala580, 108S509 (in absence of delivery and any payment by purchaser); 172Ark783, 290SW361; 318 Ill 350, 149NE247; 1LaA498; 144 Okl 150, 289P721; 98PaSuper604; Tex CivA 38SW(2d)932; 142Wash411, 253P 640; 146Wash543, 264P705; Wash 291 P705. **Mere unperformed contract to convey upon payment** is not deed of conveyance within purview of statute. Tex CivA 282SW1115. **Purchaser's right under executory contract** rests solely in action. 34 OhA123, 170NE368. **Vendor's undivided interest in contract to** sell land is personal property. Iowa 231 NW470.

1302-16 214Ala580, 108S509; 142Wash 372, 253P113 (until full performance); 142Wash411, 253P640.

1302-17 37F(2d)499; 174Ark362, 295SW 370; 78CalA334, 248P526, 530 [citCyc]; 150Md211, 132A635, 45ALR582; 249Mich 485, 229NW411; 167Minn453, 209NW 323, 324 [citCyc], 46ALR816; 99NJEq 669, 134A120; 223AppDiv28, 227NYS 85; 126Misc309, 212NYS572 (purchaser under contract of sale in possession is equitable owner); 128Misc275, 218NYS 545; 129Misc190, 220NYS689; 218App Div519, 218NYS644; 36 OhA19, 172NE 698; 132 Okl 183, 270P69; SD 230NW 219; TexCivA 38SW(2d)932; TexCivA 27SW(2d)639. Contra 318 Ill 350, 149 NE247. **Vesting of equitable title in vendee does not require** deposit of deed in escrow until full compliance of conditions in contract of sale. 78CalA334, 248P526. **Equitable title of vendees is not destroyed** by subsequent agreement respecting the interests of the several vendees in land. 78CalA334, 248P526. **After exercise of option to purchase realty and before execution of conveyance,** purchaser is deemed in equity to be owner, vendor merely retaining legal title as security. MoA 20SW(2d)946.

1303-18 37F(2d)499; 150Md211, 132A 635, 45ALR582; 128Misc275, 218NYS 545; 129Misc190, 220NYS689.

1303-19 128Misc275, 218NYS545. But see Cal 268P1050; 323Mo 404, 19SW(2d) 287; 323Mo 776, 20SW(2d)899.

1303-19½-New. Vendee's interest is not a fixed or determinable undivided interest. 32NM5, 250P21.

1303-20 26F(2d)489; 37F(2d)499; 33 Ariz128, 262P995; 78CalA334, 248P526; Ill 172NE32; 247 IllA265; 126Me49, 136 A121; 150Md211, 132A635, 45ALR582; 167Minn453, 209NW323, 324 [citCyc], 46ALR816; 99NJEq669, 134A120; 128 Misc275, 218NYS545; 218AppDiv519, 218NYS644; 122 Or230, 257P801; Wash 291P705. **The vendor cannot terminate the trust,** etc. 78CalA334, 248 P526. **Trust by implication of law** is not created by parol contract to convey land at future time. 120Kan510, 243P1045. **Vendor's trusteeship of land** is not passive where large part of purchase price is unpaid. 126Me49, 136A 121.

1303-21 27F(2d)64; 37F(2d)499; 79 CalA443, 249P886; 167Minn453, 209NW 323, 324 [citCyc], 46ALR816; 223App Div28, 227NYS85; 129Misc190, 220NYS 689; 34 OhA230, 170NE580; TexCivA 258W(2d)246.

1303-22 78CalA334, 248P526, 530 [cit Cyc]; 79CalA443, 249P886; 121Kan3, 245P1017; 167Minn453, 209NW323, 324 [citCyc], 46ALR816; Mo 23SW(2d) 1006; 218AppDiv519, 218NYS644; 50 ND616, 197NW595; 142Wash411, 253P 640 (where purchaser performed his part of agreement until forcibly ousted). **Purchaser must have made payment** and taken possession under binding contract in order to be regarded as owner. 27F(2d)64.

1303-23 79CalA443, 249P886; 167Minn 453, 209NW323, 324 [citCyc], 46ALR 816. **Rights and liabilities.**–79CalA443, 249P886; 169Ga395, 150SE584; 131 Misc912, 229NYS301.

1304-24 78CalA334, 248P526; Ill 172 NE32; Wash 291P705.

1304-25 200 Iowa44, 204NW235, 40 ALR603; 150Md211, 132A635, 45ALR 582; 167Minn453, 209NW323, 324 [cit Cyc], 46ALR816.

1304-26 167Minn453, 209NW323, 324 [citCyc], 46ALR816.

1304-27 Purchaser's promise to reconvey held not to constitute sale with right of redemption. 160La175, 106S 735. **Sale with right of redemption defined.**–160La175, 106S735.

1304-27½-New. Joint and several liability. Statute making parties jointly bound severally liable is inapplicable where cotenant does not become jointly liable with defendant to convey. 216 Ala564, 114S135.

1304-27½-New. Purchaser in executory contract retaining title in vendor cannot have legal title adjudged in himself without complying with conditions of contract. 144 Okl 150, 289P721.

1304-28 216Ala564, 114S135.

1304-29 Provision for installation of sidewalks, sewer, water, and electricity is not separable from provision for sale of lots. 21 OhA429, 152NE323.

1304-30 Mich 233NW339; 21 OhA429, 152NE323. **Entire contracts.**–53SD341, 220NW852.

1305-31 TexCivA 6SW(2d)445.

1305-34 TexCivA 6SW(2d)445.

1305-37 236Mich294, 210NW231.

1306-39 220Ala455, 126S113; 98Fla 1103, 125S521; 236Mich294, 210NW231; 248Mich601, 227NW783; 248Mich606, 227NW784.

1306-40 249Mich662, 229NW604.

1306-46 236Mich294, 210NW231.

1307-48 50SD203, 208NW981; SD 230 NW219.

1307-49 51SD91, 212NW500. **Dependent covenants.**–48SD493, 205NW239 (in contract where defendant is to pay on furnishing by plaintiff abstract showing good and merchantable title, covenants are "dependent covenants").

1307-52 122 Or230, 257P801.

1308-53 98Fla1103, 125S521; 122 Or 230, 257P801. **Furnishing abstract of title.**–234Mich478, 208NW436.

1308-57 Vt 146A254.

1309-62 See also 152Wash457, 277P 993. **Particular contracts construed.**–223AppDiv57, 227NYS418.

1309-63 219AppDiv498, 220NYS457 (marketable title).

1309-64 TexCivA 273SW897. **Agreement to sell all right, title, and interest** held to embrace only what seller had and did not imply warranty of ownership. 254Mass292, 150NE95. **Contract to sell interest of vendor does not represent that he has any interest** but conveys what he has, if any. 228AppDiv 91, 238NYS322.

1309-66½-New. Statement that premises and title are same as were conveyed by a third party does not change contract to convey in fee simple free of all incumbrances. 131Misc422, 226NYS255.

1309-67 33F(2d)415; CalA 290P64; 100NJEq350, 134A844. **Particular contracts construed.**–GaA 155SE206; 228 Ky275, 14SW(2d)1056; 195NC165, 141 SE577; 122 Or74, 257P690; WVa 153 SE915; 195Wis69, 217NW700. **Effect of use of word "approximately."**–195 Wis485, 218NW854.

1310-71 "Property Mill A . . . grounds measuring . . . together with lot bounded."–168La50, 121S188.

1311-74 100NJEq350, 134A844.

1311-77½-New. Words in contract of sale "however otherwise bounded" refers to name of adjoining owners negativing alleged intention not to describe property lines. 103Conn285, 130A387.

1311-77¼-New. and justifying construction that parties intended conveyance of entire fee owned by defendant. 103Conn285, 130A387.

1311-78 99NJEq619, 133A516. But see Wash 289P520.

1311-79 99NJEq619, 133A516.

1311-80 99NJEq619, 133A516.

1311-80½-New. Where contract containing no reservation refers to another contract, under which vendor claims title, which does contain reservations, such reservations become part of contract. Alta [1925] 3DomLR329.

1311-81 163Ga505, 136SE524.

1311-82 170Ark58, 278SW645. **"Sale in bulk" rule** does not apply to sale of city lot. 218AppDiv545, 218NYS601. **Other definitions.**–Va 153SE897.

1312-83 See also 170Ark58, 278SW645. **Effect of mistake** as to acreage in contracts of hazard. Va 153SE897.

1312-88 214Ala187, 106S815.

1312-91 Evidence sufficient to show contract of hazard. Va 153SE897.

1312-96½-New. Sale is not by acre because deed mentions certain number of acres. TexCivA 13SW(2d)997.

1312-97 214Ala187, 106S815; 170Ark 58, 278SW645 (where "more or less" or boundaries are used).

1313-98 170Ark58, 278SW645; Va 153 SE897 (risk as to acreage assumed by purchaser).

1313-5 214Ala187, 106S815; 100NJEq

350, 134A844. **The words "more or less" ordinarily mean,** etc. 203 **Iowa**880, 210 **NW**566.

1313–6 37**GaA**458, 140**SE**431.

1314–7 37**GaA**458, 140**SE**431.

1314–9 Mich 233**NW**179. **Discrepancy of four and one half acres out of eighteen held not included in term "more or less."** **MoA** 278**SW**830.

1314–11 20**SaskL**8, [1925] 3**DomLR** 1199.

1314–13 215**Ala**297, 110**S**391 (dimensions of lot held of essence of contract).

1314–15 163**Ga**505, 136**SE**524; 41**GaA** 808, 154**SE**822.

1315–27 160**La**40, 106**S**667.

1316–35 291**Pa**387, 140**A**148.

1317–49 102**CalA**232, 282**P**965 (purchaser estopped by acts to deny after-acquired property included in option).

1317–50 122 **Or**285, 258**P**205, 58**ALR** 339.

1317–52 234**Ky**73, 278**W(2d)**432.

1318–55 Reference to other contract.–Alta [1925] 3**DomLR**329.

1319–60 See also 49**ND**867, 194**NW**113.

1319–66 Particular contracts construed. –42**F(2d)**496; 168**La**57, 121**S**301; 168 **La**335, 122**S**57. **Under contract for conveyance to purchaser or nominee** and execution of mortgage by purchaser or grantee, there is no implied promise by purchaser to pay nominee's notes. 179 **Minn**574, 229**NW**871.

1319–67 Price based upon cost.–218Ky 5, 290**SW**671.

1320–69 TexCommnA 274**SW**125 (purchaser held not required to pay balance of price unless oil should be found, though deed reserved vendor's lien to secure note not executed).

1321–77½–New. Contract providing for payment, part in cash and part by purchaser assuming mortgages, held not to require vendor to procure mortgage loans or assist in procuring them. 324 **Ill** 77, 154**NE**426.

1324–12½–New. Agreement in land contract to give mortgage implies that mortgage shall contain fair and reasonable provisions for security. 17**F(2d)** 865 (evidence to aid construction).

1324–12¼–New. Statement in contract providing for payment of principal in fixed period of years shows that amortization clause was not intended. 133 **Misc**312, 232**NYS**171.

1324–12¼–New. Under agreement, providing that purchase-money mortgage is to be drawn in usual way under usual conditions, statutory form of mortgage will satisfy agreement. 133**Misc** 312, 232**NYS**171.

1326–27 TexCivA 286**SW**241 (nonresident vendor may contract for payment of notes in county other than where property is located).

1326–41 Contract construed not to be effective until purchaser had accepted title, notice thereof to bank, and payment to vendor by bank of purchaser's deposit. 116 **Or**376, 239**P**818.

1326–42½–New. Party held not entitled to delay to perform commutative contract as matter of right under statute. 160**La**131, 106**S**720.

1326–42¼–New. Where settlement is to be made on or before certain date, performance before such date cannot be required by either party but must be agreed to voluntarily by both parties. 98**NJEq**458, 131**A**574.

1327–43 Reasonable time is time necessary under circumstances. **Mo** 278 **SW**395.

1327–47 Particular provisions construed.–217Ala511, 116**S**681.

1328–55 98**NJEq**458, 131**A**574.

1328–62 CalA 263**P**532.

1328–62½–New. or upon giving of guaranty of title. **CalA** 263**P**532.

1328–64 48 **Ida**295, 282**P**84 (payment as soon as money available out of sale of bonds, but not later than day named). **Payment by purchaser in advance of** time fixed for payment does not entitle him to demand deed. 73**Mont**529, 237**P** 521. **Accelerative provision** that, if proceedings shall be taken to enforce contract in equity after default by purchaser, entire amount shall be due and owing forthwith, is valid. **242Mich**660, 219 **NW**643.

1329–68 But see 244**NY**395, 155**NE**683. **Particular contracts construed.–132 Or** 345, 285**P**259 (payments determinable from date and not from delivery of contract); **BC** [1928] 2**DomLR**894.

1329–76½–New. In completed sale, purchase price may be paid as matter of right until judicial demand under statute. 160**La**131, 106**S**720.

1329–76¼–New. In sale of property, right of purchaser to pay continues until judicial demand, whether contract dissolves sale of right or not, under statute. 160**La**131, 106**S**720.

1329–76¼–New. Fact that judge cannot grant delay in actions to rescind lease for nonpayment of rent does not give purchaser in default in other cases right to tender performance without being granted delay. 160**La**131, 106**S**720.

1330–78 214**Ala**481, 108**S**385, 387 [cit Cyc]; 98**Fla**1103, 125**S**521 (where vendor cannot, or will not, perform).

1330–79 See also 169**La**838, 126**S**209.

1331–90 35**F(2d)**818; 43 **Ida**292, 252**P** 494 (furnishing abstract). **Delivery of abstract of title** necessary before cash payment by purchaser. 92**Fla**458, 109 **S**641.

1331–91 42 **Ida**555, 247**P**451. **Payment of amounts due under contract under which vendor purchased property.–42 Ida**349, 245**P**95.

1331–95 234**Ky**508, 28**SW(2d)**780.

1332–2 336 **Ill** 168, 167**NE**790; 128 **Misc**618, 219**NYS**99; 134**Misc**598, 236 **NYS**255; 135 **Okl** 237, 275**P**341; 50**SD** 463, 210**NW**663; 103**WVa**733, 138**SE** 449.

1332–3 98**Fla**1103, 125**S**521; 128**Misc** 618, 219**NYS**99.

1332–4 223**Ky**302, 3**SW(2d)**601.

1332–5 88**CalA**430, 263**P**846; **Mo** 278 **SW**395; 139 **Okl** 35, 280**P**1075. **Reasonable time means as much time as is necessary, under circumstances,** to do what contract requires. **Mo** 278**SW**395.

1332–6 88**CalA**430, 263**P**846.

1333–7 95**CalA**456, 273**P**50. See also 74 **CalA**591, 241**P**897.

1333–10 NJ 151**A**56 (vendee's rescission held unjustified).

1333–14 179**Ark**678, 18**SW(2d)**323.

1334–24 LaA 130**S**828; 51**SD**91, 212 **NW**500.

1334–25 220**Ala**455, 126**S**113; 226**App Div**391, 235**NYS**243; 51**SD**91, 212**NW** 500.

1335–27 96**Fla**379, 118**S**205; 51**SD**91, 212**NW**500.

1335–32 See also 95**CalA**195, 272**P**333.

1335–33 See also 226**AppDiv**391, 235 **NYS**243.

1336–36 95**CalA**456, 273**P**50; 96**Fla** 379, 118**S**205; 128 **Or**292, 274**P**318.

1336–41 Particular provisions construed.–80CalA609, 252**P**733; 258**Mass** 537, 155**NE**420; 259**Mass**79, 156**NE**32; 291**Pa**335, 140**A**139.

1336–42 Particular provisions construed.–84CalA499, 258**P**438. **Where memorandum is silent** as to intent, law implies six per cent. 219**AppDiv**455, 220**NYS**104. **Where purchaser takes possession before paying purchase price,** he is prima facie liable for interest. 59 **OntL**73, [1926] 3**DomLR**629.

1337–49 Where memorandum is silent as to terms of mortgage, law implies it is payable on demand. 219**AppDiv**455, 220**NYS**104. **Where all installments matured pending appeal,** purchaser was entitled to reasonable time to complete payment. **Wash** 286**P**662.

1337–50 NJSup 140**A**244.

1338–52 255**Mass**542, 152**NE**41, 51**ALR** 391; 255**Mass**563, 152**NE**321 (action at law time is of essence); 133**Misc**626, 233**NYS**136; 135**Misc**603, 238**NYS**651; 33 **OhA**452, 169**NE**836. See also 133**Misc** 755, 233**NYS**133. But see 27**F(2d)**64. **Law day specified in contract** is of essence in action at law. 132**Misc**699, 230 **NYS**150.

1338–55 NJSup 140**A**244. **Law day specified in contract** is not of essence in action in equity. 132**Misc**699, 230**NYS** 150.

1338–58 84**CalA**499, 258**P**438; 86**Colo** 479, 282**P**1067; 242**Mich**73, 218**NW**789; 323**Mo** 1156, 20**SW(2d)**650; **NJ** 147**A** 539; 101**NJEq**176, 137**A**849; 130**Misc** 625, 225**NYS**106; 189**NC**434, 127**SE**521; 10**PaDist&Co** 473; **Va** 153**SE**681. **In California.–84CalA**499, 258**P**438.

1339–59 165**Ga**799, 142**SE**134; 230**Ky** 307, 19**SW(2d)**976.

1339–62 165**Ga**799, 142**SE**134. **Burden of proof** is on party claiming time was impliedly of essence. 101**NJEq**176, 137 **A**849.

1339–64 165**Ga**799, 142**SE**134.

1339–65 Time of essence, etc. **NJCh** 134**A**571.

1340–66½–New. Whether time is of essence of contract is material only where defaulting party has, after expiration of time limit, made tender which was refused by other party. 84**Mont**238, 275 **P**267.

1340–67 222**Ky**443, 1**SW(2d)**540; **NJ** 147**A**539; 122 **Or**230, 257**P**801; 291**Pa** 503, 140**A**500; 51**SD**91, 212**NW**500. **Provision giving ten extra days for payment** held not to affect clause that time is of essence. 51**SD**91, 212**NW**500.

1340–68 202**Cal** 665, 262**P**304; 51**SD**91, 212**NW**500.

1340–69 But see **NJ** 144**A**808.

1340–71 97**CalA**462, 276**P**141.

1341–75 202 **Iowa**1128, 211**NW**367; **NJ** 147**A**539; 98**NJEq**502, 130**A**595; 251**NY** 224, 167**NE**424 (notice held insufficient); 223**AppDiv**848, 228**NYS**182. **Clear and unequivocal evidence** is necessary to establish that time was of essence of contract by notice. 223**App Div**842, 228**NYS**374.

1341–76 202 **Iowa**1128, 211**NW**367.

1341–77 Time held reasonable.–NJCh 134**A**571.

1341–78 NJCh 129**A**242; 189**NC**434, 127**SE**521; 10**PaDist&Co** 473.

1341–80 NJCh 129**A**242.

1341–80½–New. Where stipulation making time of essence of contract has been waived, time will again be made of essence of contract by notice requiring performance within reasonable time. 202 **Iowa**1128, 211**NW**367.

1342–83 189**NC**434, 127**SE**521.

1342–85 Purchase for building purposes.–101NJEq512, 139**A**484.

1343–93 The general rule, etc. 139 **Okl** 35, 280**P**1075.

1343–1 Construction of provision as to default of "payments heretofore made." **Can** [1930] 4**DomLR**21.

1343–2 Such agreement is valid.–159La 981, 106**S**536.

1344–3 Option provisions not inconsistent.–27F(2d)64.

1344–8 27**F(2d)**64.

1345–15 Mont. 287**P**629 (provision not waived by vendor); 99**NJEq**634, 134**A** 353. **Held not to constitute waiver.–** 335 **Ill** 278, 167**NE**74.

1345–16 234**Mich**74, 208**NW**47.

1345–17 234**Mich**74, 208**NW**47 (repeated acceptances of payments by vendors after default is waiver).

1345–18 234**Mich**74, 208**NW**47, 48 [quotCyc].

1345–19½–New. Doctrine of estoppel will be applied where time of performance has been waived under circumstances rendering it inequitable to literally enforce contract. 240**Mich**23, 214 **NW**951.

1345–24 167**Minn**384, 209**NW**22; 131 **Misc**488, 226**NYS**275.

1346–29 76**CalA**541, 245**P**476; 32**Porto Rico** 12.

1346–30 76**CalA**541, 245**P**476.

1346–32 10**LaA**712, 120**S**808; 265**Mass** 540, 164**NE**451. **Particular provisions construed.–97CalA**462, 276**P**141; **Tex CivA** 3**SW(2d)**822.

1346–33 Particular provisions.–11LaA 99, 120**S**900; 10**LaA**725, 122**S**600.

1347–34 141**Wash**496, 251**P**849. **Particular provisions.–167Minn**384, 209**NW** 22; **NJCh** 144**A**881.

1347–36 Particular provisions.–191NC 619, 132**SE**593.

1347–41½–New. Letter by vendor to purchaser after making of contract promising to make improvements did not create dependent covenant, performance of which was condition precedent to purchaser's performance. 97**Fla**236, 122**S**708.

1347–42 41**F(2d)**76. But see 32**Porto Rico** 12.

1348–45 Particular provisions construed.–32PortoRico 12. **Construction against vendor.–Sask** [1929] 3**DomLR**64. **Restrictions binding vendor** held not to bind vendee in memorandum agreement. 98**NJEq**64, 130**A**546.

1348-45½-New. Restriction against occupancy of land by colored people is valid. 233Mich373, 206NW532.
1349-59 189NC434, 127SE521.
1349-61 Condition of contract considered fulfilled under Civ. Code art 2040, when fulfillment prevented by party bound to perform. 163La1065, 113S 456.
1349-62 255Mass563, 152NE321.
1350-67 TexCivA 1SW(2d)400.
1350-72 98Fla1253, 121S792. **Evidence held insufficient** to show modification of plan of payment. 291Pa335, 140A 139. **Modification of contract to create artificial lake not shown.**-248Mich 128, 226NW824.
1350-73 163Ga917, 137SE396; 222Ky 206, 300SW590; 248Mich606, 227NW 784; 251Mich191, 230NW943; 167Minn 384, 209NW22. **Prior contract held not superseded** by subsequent agreement executed to aid in fulfillment first contract where parties were not same and there was no intention to extinguish prior obligation. 135Wash139, 237P17. **Original contract held not to have been superseded.**-73CalA114, 238P166.
1350-74 Burden is on purchaser to prove agreement by vendor to cure defect in title and hold papers in escrow until defect cured where such alleged agreement is denied by vendor in action by purchaser for specific performance. 116 Or376, 239P818. **Original contract stands** except in so far as modified by the parties. 325 Ill 38, 155NE 784. **Extent to which contract is modified** depends on nature of change and intention of parties. 325 Ill 38, 155NE 784. **Parol agreement held new contract** and not modification of written contract. 40GaA385, 149SE791.
1350-75 255Mass563, 152NE321 (evidence held to warrant such finding). **What does not amount to extension of time.**-TexCivA 16SW(2d)553.
1351-77 85PaSuper1.
1351-78 98NJEq602, 131A585.
1351-81 171Ark529, 284SW776 (evidence held sufficient to show substitution).
1351-82½-New. Where new contract merges previous one but contains new terms, stranger to contract whose rights subsequently attach to subject matter cannot attack contract for want of consideration. 167Minn384, 209NW22.
1351-82½-New. Merger.-Letter of prospective purchaser to vendor that he would remove barn if he became owner of property is merged in final contract whether considered as mere expression of intention or preliminary negotiation. 152 OhA682 (mandatory injunction to remove or alter barn denied).
1351-83 234Mich1, 208NW31, 34 [quot Cyc].
1351-84 234Mich1, 208NW31, 34 [quot Cyc].
1351-85 234Mich1, 208NW31, 34 [quot Cyc].
1352-92½-New. All parol agreements are held to merge in subsequent written contract. NJ 130A447.
1352-92½-New. Purchaser's failure to reply to vendor's letter suggesting certain place for settlement is an acquiescence therein and creates a binding modification. 98NJEq602, 131A585.
1352-92¼-New. In absence of fraud, accident or mistake, oral understanding as to vendor's development of property has no effect on contract. 295Pa 492, 145A586.
1352-94 Vendor's agreement to cure defect in title has been held lacking in consideration where land was sold under contract only in escrow. 116 Or 376, 239P818.
1352-95 240Mich23, 214NW951.
1352-96 92CalA641, 268P697.
1352-98 240Mich23, 214NW951. **Agreement to extend time of payment of purchase** in consideration of improvements to mill held not uncertain. 141 Wash593, 252P141.
1352-2 240Mich23, 214NW951.
1352-3 Agreements supported by sufficient consideration.-178Ark1098, 13SW (2d)587; 222Ky206, 300SW590; 167 Minn384, 209NW22.
1352-3½-New. Vendors cannot be placed in default after extension agreement based on payment to be made on fixed date by mere default in latter payment. 105NJL595, 146A208.
1353-6 321 Ill 442, 151NE877; 51ND 87, 199NW447.
1353-7 51ND87, 199NW447. **An abandonment of a contract in writing may be deduced from circumstances or course of conduct,** etc. 329 Ill 555, 161NE91.
1353-9 326 Ill 556, 158NE216; 333 Ill 629, 165NE148.
1353-10 103CalA183, 284P250; 234Ky 817, 29SW(2d)573 (failure to enforce contract as to all lands); 133 Or581, 291P1009.
1354-11 142 Okl 219, 286P306; 20 SaskL318, [1926] 1DomLR411, [1926] 1 WestWkly186 (default in payment). **Where purchaser refused to pay purchase-money notes,** alleging breach of bond for title will be presumed to be abandoned rights under bond. 160Ga 459, 128SE584. **Evidence held to show abandonment.**-170Minn430, 212NW908.
1354-12 219Ky383, 293SW947 (contract not carried out for seven years).
1354-13 51SD91, 212NW500 (where covenants were dependent).
1354-16½-New. Whether contract has been abandoned may be deduced from circumstances and conduct clearly evincing same. 321 Ill 442, 151NE877.
1354-16½-New. Where vendor, in suit for specific performance, amends bill by asking for cancellation and partition, he thereby abandons contract. 321 Ill 442, 151NE877.
1354-16¼-New. Acceptance by vendor's widow of one half rent from land contracted to be sold shows abandonment. 321 Ill 442, 151NE877.
1354-19 202 Iowa833, 211NW407 (abandonment works forfeiture); 52ND 49, 203NW178.
1354-20 166Minn58, 206NW948.
1354-21 29F(2d)545; 237 IllA341. **After abandonment and acquiescence** seller cannot rely on contract in action for price resulting from later transaction as to same property. 237 IllA 341. **Credit of, earnest money on new contract,** after abandonment, acquiescence and forfeiture of deposit under original agreement, is no recognition of former contract. 237 IllA341.
1355-26 Distinction between rescission and forfeiture is recognized. 201 Iowa 89, 202NW239.
1355-27 29F(2d)230; 168Ark213, 269 SW585; 125Kan574, 577, 265P81 [cit Cyc]; 117 Or328, 243P560. **Rescission not shown.**-116 Or253, 240P886. **Mutual default of vendor and purchaser** is not impediment to mutual rescission. 201 Iowa89, 202NW239. **Evidence held insufficient** to show mutual rescission, in action by vendee for specific performance. 214Ala327, 107S816. **Where vendor failed to sue and paid taxes,** facts held not to warrant mutual rescission. 35GaA698, 134SE633.
1355-31½-New. Mutual rescission is not prevented by supposed lease signed by plaintiff in ignorance of contents, and because of fraudulent misrepresentations as to its nature, purpose and effect. 180Minn88, 230NW262.
1355-32 55ND695, 215NW155; 57ND 674, 223NW808(2dcase); 115Tex193, 280SW158; Utah 250P1045, 1049 [cit Cyc].
1356-33 172Ark1177, 288SW919; 72 Cal 576, 237P776 (evidence of cancellation sufficient); TexCivA 293SW238.
1356-39 55ND695, 215NW155. **In Texas.**-CivA 5SW(2d)799.
1356-40 55ND695, 215NW155.
1356-41 55ND695, 215NW155.
1357-42 43 Ida292, 252P494; 321 Ill 442, 151NE877; 164La175, 113S808; 239Mich383, 214NW94; 73Mont339, 237 P209; NJ 138A696; 57ND674, 223NW 808(2dcase).
1357-43 170Ark1194, 281SW897; 177 Minn208, 225NW19; 73Mont339, 237P 209; 116 Or253, 240P886. **Act of vendor in repossessing himself of property** does not necessarily constitute rescission. 201 Iowa89, 202NW239. **Resale of land by vendor** after purchaser's default or abandonment of contract constitutes rescission terminating contract. 201 Iowa853, 208NW364. **Commencement by vendor of action to foreclose contract and set off rent against payments due** does not give purchaser right to cancel contract where he did not consent to set off prayed for. 52SD20, 216NW 581.
1357-44 101CalA728, 282P416; Tex CivA 28SW(2d)872.
1357-45 170Ark1194, 281SW897; 73 Mont339, 237P209 (lease of premises after abandonment by purchaser with understanding that he should have possession if returned has been held not to terminate contract of sale); 101NJEq 176, 137A849.
1357-46 Sufficiency of consideration.-72Cal 576, 237P776 (relieving assignee of contract by purchase of land from obligation to make transfer to third party is sufficient consideration for cancellation of assignee's contract with assignor); 173Minn302, 217NW352; NJ Sup 136A349. **Implied agreement to accept return of money paid in full settlement,** which should be sufficient consideration for rescission, is not waiver of rights by purchaser not performing who cannot recover money paid. 222 MoA524, 293SW476. **Mutual rescission of partially performed contract is ineffectual** where consideration is lacking. 222MoA524, 293SW476. **Where purchaser withdrew before return of purchase price paid,** agreement for cancellation was not completed contract and was ended. 29 OhA7, 162NE781.
1358-50 125Kan574, 577, 265P81 [cit Cyc]; 164La175, 113S808 (holding vendor could not shift position on ground subsequent contract with third party was null); 9LaA267, 120S113; 177Minn 174, 224NW842; 131 Or509, 283P2. **After express consent to rescission vendor is not entitled to recoupment of loss in purchase price** in subsequent sale of land to another. 34GaA75, 128SE204. **Purchaser of note with notice** of rescission and surrender of possession cannot sue maker. 36GaA570, 137SE104. **Rescission and release** are not sale. 164 Ga190, 138SE55.
1358-51 Sask [1927] 3DomLR35.
1358-52 55ND695, 215NW155. **Where notes were given for purchase price,** the consideration for notes fails. 55ND695, 215NW155.
1358-53 But see 45 Ida58, 260P691; 9 LaA267, 120S113. **Failure to return purchase-money notes** is not ground for reversal of judgment quieting title in vendor. 155Wash14, 283P470.
1359-59½-New. In Alberta defaulting purchaser making quitclaim deed to vendor, who agrees to resell and make certain payments out of money received, has no interest in land. Alta [1930] 4 DomLR93.
1359-60 155Wash14, 283P470. See also Sask [1927] 3DomLR131.
1359-66 73CalA114, 238P166; 203 Iowa1270, 212NW134. **Contract need not contain express forfeiture clause** to give vendor right to rescind. 203 Iowa 1270, 212NW134.
1360-67 73CalA114, 238P166.
1360-69 Contract providing that if vendor could not convey good and marketable title as specified therein, contract should be canceled with return of deposit by purchaser, entitles vendor's assignee to cancel and recover deposit when unable to convey such title. 132 Misc860, 230NYS537.
1360-70½-New. Agreement, giving vendor right to cancel if purchaser insists on title requisition which vendor cannot answer or remove, is not subject to any right of purchaser to specific performance with compensation for unanswerable defect. Can [1928] 3DomLR 620.
1360-74 Waiver.-164La278, 113S847.
1361-77 TexCommnA 25SW(2d)808 (does not exclude other methods of redress). **Contract providing forfeiture of first payment** for default of purchaser does not give purchaser option to rescind by forfeiting payment. 215Ala 161, 110S810. **Vendor may be liable personally** on express contract to reimburse purchaser if dissatisfied. Fla 129S777.
1361-79 Fla 129S777; 90PaSuper269; 52SD20, 216NW581.
1362-84 On sale of saloon subject to

return of consideration in event of National prohibition, vendor must return such consideration though vendee did not pay certain agreed installments. 47 **RI** 210, 132**A**6. **Vendor may be entitled to agreed installments** to date of agreed condition which is to cause rescission and return of cash payment. 47**RI** 210, 132**A**6.

1362–85 Election held to be made within proper time.–244**Mich**46, 221**NW**274.

1363–97 Assumption of mortgage and issuance of new note to mortgage held under facts not to divest unpaid vendor of dominating title. **TexCivA** 293**SW** 238.

1363–99 Cal 270**P**212; 128 **Or**292, 274 **P**318; **SD** 230**NW**219.

1364–1½–New. Owners of undivided interests in property may not withdraw for delay in perfecting contract of sale where two payments had been made by purchasers. 207**Cal** 290, 277**P**1047.

1366–20 Fictitious and speculative value of temporary nature will not be considered. 164**La**993, 115**S**59.

1366–25 Mo 285**SW**409, 411 [citCyc].

1367–28 Stipulations held not covenants to make improvements.–**GaA** 155 **SE**206.

1367–31 93**Fla**46, 111**S**532.

1367–33 93**Fla**46, 111**S**532, 534 [cit Cyc].

1368–37½–New. By statute in some jurisdictions executory contract for sale of real estate whatever its form may be terminated by notice of such termination unless vendee shall make past-due payments within prescribed number of days after service of notice. 166**Minn** 58, 206**NW**948.

1368–37⅓–New. Vendor holding legal title has right to rescind on default in payment of vendor's lien note. **TexCivA** 11**SW(2d)**360.

1368–39 103**CalA**183, 284**P**250; 119**Kan** 534, 240**P**960. **Rule in Louisiana.**–**A** 128 **S**546.

1368–41 84**CalA**499, 258**P**438.

1369–42 128**Misc**618, 219**NYS**99 (six weeks).

1369–43 27**F(2d)**64; **CalA** 274**P**572; 93 **Fla**46, 111**S**532, 534 [citCyc]; 324 **Ill** 367, 155**NE**296; 248 **IllA**559; 207 **Iowa** 278, 222**NW**846; 166**Minn**58, 206**NW** 948, 949 [citCyc] (prior to statute providing for notice); 118**Nebr**129, 223**NW** 670; 143**Wash**302, 255**P**129. See also 152**Wash**382, 278**P**174. But see 119**Kan** 534, 240**P**960; 19 **OhA**210.

1369–48 42 **Ida**302, 246**P**314 [citCyc].

1370–49 93**Fla**46, 111**S**532.

1370–53 72**CalA**725, 238**P**150, 154 [quot Cyc]; 166**Minn**58, 206**NW**948, 949 [cit Cyc] (prior to statute providing thirty days' notice).

1371–54 168**Ark**1133, 272**SW**860, 863 [citCyc].

1371–58½–New. Vendor is not entitled to rescission where vendee tenders small amount due in court, where present value of land far exceeds amount of purchase price. **TexCivA** 17**SW(2d)**859.

1371–61 19 **OhA**210.

1371–62 19 **OhA**210.

1371–63 103**CalA**443, 284**P**692 (under statute).

1371–67½–New. Right of rescission could be defeated by purchasers only by plea setting up facts showing that its exercise would be inequitable. **TexCivA** 11**SW(2d)**360.

1371–68½–New. Purchaser should be permitted to pay amount due and reinstate contract where his default in payments was due to belief that amount due him from vendor was to be applied. 154**Wash**625, 282**P**928.

1371–69 TexCivA 6**SW(2d)**186. **Irrespective of duration of default,** vendee may save forfeiture by tender of unpaid purchaser money. **TexCivA** 6**SW(2d)** 186.

1371–70 115**Tex**193, 280**SW**158.

1372–73 135 **Okl** 237, 275**P**341.

1372–74 115**Tex**193, 280**SW**158.

1373–81 Mo 285**SW**409, 411 [citCyc].

1373–84 32**PortoRico** 12.

1373–85 32**Ariz**331, 258**P**256.

1374–5½–New. Vendor can rescind where option to repurchase is unenforceable. 151**Va**240, 144**SE**444.

1375–7 71**CalA**272, 235**P**455; 200 **Iowa** 798, 205**NW**472.

1375–7½–New. Only effect of contract declaring sale dissolved of right on nonpayment is to waive formal putting of default where purchaser, under statute, has right to pay after expiration of time for payment. 160**La**131, 106**S**720.

1375–7⅓–New. But vendor is not precluded from forfeiting contract because of negligible default for which vendee is responsible. 247**Mich**443, 225**NW**931.

1375–8 72**CalA**278, 236**P**971; 201 **Iowa** 89, 202**NW**239, 243 [citCyc]; 200 **Iowa** 798, 205**NW**472; 245**Mich**442, 222**NW** 715. See also 19 **OhA**210. **Material default.**–71**CalA**272, 235**P**455.

1375–10 32**Ariz**331, 258**P**256; 197**Cal** 674, 242**P**713.

1376–12 324 **Ill** 238, 154**NE**904.

1376–13 93**Fla**46, 111**S**532, 534 [cit Cyc]; 34 **OhA**525, 171**NE**360.

1377–24 98**CalA**245, 276**P**1037; 124 **Misc**906, 210**NYS**320.

1378–26 163**Ga**345, 136**SE**146; **IndA** 158**NE**906; **LaA** 128**S**546; 238**Mich**343, 213**NW**80; 76**Mont**1, 245**P**532; 118**Nebr** 129, 223**NW**670; 292**Pa**343, 141**A**146; 98**PaSuper**604; **Man** [1928] 4**DomLR** 737. See also 8**LaA**422.

1379–28 TexCivA 6**SW(2d)**186.

1380–36 238**Mich**343, 213**NW**80.

1380–37 168**La**15, 121**S**176.

1381–47½–New. Where vendors were required to pay commission on account of sale, were deprived of rental value of property during time of purchasers' possession under contract, and were put to expense of clearing title after cancellation of contract, they should not be required to return payment on purchase price. 206**Cal** 541, 275**P**221.

1381–51½–New. Any damages suffered by vendor may be deducted from purchase money paid. 72**CalA**725, 238**P** 150.

1381–52½–New. Vendor may retain part payment received for ranch where value of personal property received by defendant exceeded such sum. 37**Wyo** 282, 264**P**91.

1382–54 93**Fla**46, 111**S**532, 536 [cit Cyc]; 94**Fla**1192, 115**S**528.

1382–55 93**Fla**46, 111**S**532, 538 [cit Cyc]; 93**Fla**114, 111**S**538, 541 [citCyc perBrown,J]; 200 **Iowa**1023, 205**NW** 867; 125**Kan**395, 398, 264**P**1071 [cit Cyc].

1382–58 But see 238**Mich**343, 213**NW**80.

1382–61 98**CalA**245, 276**P**1037. **Purchaser held not obligated to wait indefinite time** beyond time appointed where moving consideration which induced purchaser to enter into contract was promise of possession of real estate at early date, and action after delay of nine days does not put him in default. 136 **Wash**35, 238**P**989.

1383–65 34**Ariz**49, 267**P**598; 129**Misc** 401, 221**NYS**453.

1383–70 214**Ala**135, 107**S**50.

1383–74 214**Ala**135, 107**S**50.

1383–75 168**Ark**1133, 272**SW**860; 93 **Fla**46, 111**S**532, 534 [citCyc]; 145**Wash** 420, 260**P**666.

1384–76 93**Fla**46, 111**S**532; 145**Wash** 420, 260**P**666. **Time of notice.**–52**ND**589, 204**NW**333.

1384–77 168**Ark**1133, 272**SW**860.

1384–78 201 **Iowa**690, 207**NW**790.

1384–79 201 **Iowa**690, 207**NW**790; 203 **Iowa**17, 212**NW**332; 166**Minn**58, 206**NW** 948. **In Iowa.**–202 **Iowa**1128, 211**NW** 367. **Method of service.**–203 **Iowa**17, 212 **NW**332.

1384–82 93**Fla**46, 111**S**532, 534 [cit Cyc]. See also 152**Wash**382, 278**P**174.

1384–85 See also 206**Cal** 541, 275**P**221.

1384–86 93**Fla**46, 111**S**532, 535 [cit Cyc]; 324 **Ill** 549, 155**NE**477.

1384–87 32**Ariz**331, 258**P**256; 79**CalA** 443, 249**P**886; 99**CalA**510, 278**P**1049; 103**CalA**443, 284**P**692; 325 **Ill** 38, 155**NE** 784; 329 **Ill** 555, 161**NE**91; 89 **IndA**431, 155**NE**539; 262**Mass**203, 159**NE**530; 234 **Mich**52, 207**NW**886; 241**Mich**91, 216**NW** 393, 394 [citCyc]; 285**Pa**112, 131**A**698 (parties treating expired contract as in force); 48**SD**493, 205**NW**239; **TexCivA** 5**SW(2d)**878; **TexCivA** 6**SW(2d)**186; **TexCivA** 15**SW(2d)**203; 68**Utah**12, 249 **P**114, 116, 48**ALR**267 [quotCyc]; 145 **Wash**420, 260**P**666. **Especially where vendor permits purchaser to expend money on improvements** after time limit has expired does he have to give reasonable notice to purchaser for termination. 285**Pa**112, 131**A**698. **Time of notice and demand held insufficient and unreasonable.**–285**Pa**112, 131**A**698. **Vendor is not bound to notify purchaser of termination of waiver** and thus admit waiver which he contends had never occurred. 92**CalA**641, 268**P**697.

1385–88 68**Utah**12, 249**P**114, 116, 48 **ALR**267 [quotCyc].

1385–89 68**Utah**12, 249**P**114, 116, 48 **ALR**267 [quotCyc].

1385–90 68**Utah**12, 249**P**114, 116, 48 **ALR**267 [quotCyc].

1386–93 Iowa 228**NW**91 (notice held sufficient to sustain forfeiture for nonpayment of interest). **Where contract provided that notice should be sent by mail** to "2305 Brookside Avenue" without name of city, the purported address is equivalent to none. 89 **IndA**431, 155 **NE**539. **Notice signed by attorney in fact of vendor's assignee** held sufficient. 171**Minn**127, 213**NW**551. **Statutory notice prescribed by contract.**–171**Minn**127, 213**NW**551. **That vendor asks for something to which he is not entitled** will not defeat forfeiture where notice contains one matter on which he is entitled to give notice of forfeiture. **Iowa** 228**NW** 91.

1386–94 201 **Iowa**690, 207**NW**790.

1386–95 10**LaA**121, 121**S**377; 238**Mich** 343, 213**NW**80 (notice held sufficient as showing intention to terminate contract); **TexCivA** 7**SW(2d)**910. **Notice held indefinite** where purchaser was informed "very substantial payment" must be received. 89 **IndA**431, 155**NE** 539. **Demand for overdue payment** held not sufficient notice. 145**Wash**420, 260 **P**666. **Notice held insufficient.**–**TexCivA** 7**SW(2d)**910.

1386–97 Right to forfeit revived.–89 **CalA**345, 264**P**789.

1386–1 325 **Ill** 559, 156**NE**754; 334 **Ill** 566, 166**NE**56; 145**Wash**420, 260**P**666. **Time allowed by notice held reasonable.**–**Kan** 289**P**975 (ten days). **Where no payments have been made,** time for payment need not be stated. 248**Mich**139, 226**NW**823.

1387–2 325 **Ill** 559, 156**NE**754.

1387–3 But see 207 **Iowa**278, 222**NW** 846.

1387–7½–New. Notice of forfeiture is sufficient when signed in name of vendor by his duly authorized agent. 203 **Iowa**17, 212**NW**332.

1387–7⅓–New. Notice, not intended to be effective when given, will not later enure to benefit of party giving it. **NJ Ch** 146**A**65.

1387–7¼–New. Written notice, after no action on initial ineffective notice does not deprive vendor of benefit of later notice. **Mont** 287**P**629.

1387–10 TexCivA 15**SW(2d)**203. **Where vendors knew purchaser had not received notice** sent by mail, they should give personal notice. 89 **IndA**431, 155 **NE**539. **Where two or more parties are jointly interested,** on one side or other, notice of rescission must be given to or by all of them. 89 **IndA**431, 155**NE**539. **In Minnesota.**–169**Minn**445, 211**NW**827, 828 [citCJ]. **In North Dakota.**–52**ND** 707, 204**NW**338 (purchaser from original purchaser held assignee within statute).

1387–11 130 **Or**570, 281**P**123(1stcase) (notice to bank sufficient though defendant had no knowledge of it).

1387–11½–New. Effect of notice.–Notice of cancellation does not cancel contract under statute giving purchaser one year after service of notice to make good default. 55**ND**449, 214**NW**251.

1387–12 93**Fla**46, 111**S**532, 535 [cit Cyc].

1388–15 201 **Iowa**853, 208**NW**364; **TexCivA** 11**SW(2d)**360.

1388–19 Sask [1929] 2**DomLR**362. But see 80**CalA**609, 252**P**733.

1388–25 76**CalA**541, 245**P**476; 168**Ga** 553, 148**SE**395(1stcase); 144 **Okl** 116, 289**P**331; 68**Utah**12, 249**P**114, 48**ALR** 267. See also 238**Mich**343, 213**NW**80. **Fact that vendee for brief time continued to occupy sleeping-room** held not to affect vendor's rescission. 76**CalA**541, 245**P**476.

1389–26 324 **Ill** 367, 155**NE**296.

1389-29 But see 245Mich448, 222NW 697.
1389-35 CalA 291P870(2dcase); 46 Ida 62, 266P413.
1389-36½-New. Failure to sue on notes for five years held not rescission. 35 GaA698, 134SE633.
1389-36⅓-New. Act of seller's attorney in sending letters to purchaser declaring agreement cancelled and of no effect does not amount to rescission where purchaser never offered to surrender property and all parties continued to treat contract as in force. 285 Pa212, 131A733.
1389-36¼-New. Whether contract has been rescinded may be deduced from circumstances and conduct clearly evincing same. 321 Ill 442, 151NE877.
1389-37 166Ga71, 142SE543; TexCivA 287SW282.
1390-46 117 Okl 27, 245P630.
1390-47 117 Okl 27, 245P630.
1391-50 88CalA339, 263P548; TexCivA 280SW331.
1391-51 TexCivA 280SW331.
1391-52 87 IndA588, 162NE248.
1391-54½-New. Agreement by vendor for consideration to remove defects in title waives vendor's right to terminate, because of attachment subsequent to contract without his fault. Mass 167NE 292.
1391-55 201 Iowa690, 207NW790; 151 Miss486, 118S418(2dcase); Mo 278SW 395 (promptly upon occurrence of event upon which right rests); 52ND589, 204 NW333 (failure to give notice of forfeiture within period fixed by contract). **Delay of eight months,** in exercise of right to rescind, while vendor was prosecuting partition suit to perfect title, of which vendee was charged with notice, amounts to waiver. Mo 278SW395.
1392-58 See also 152Wash382, 278P 174. **Delay in rescinding contract which is result of indulgences extended to defaulting party** may not be availed of as showing laches or affirmance. 208Cal 420, 281P613.
1392-60 288Pa314, 136A221; TexCivA 5SW(2d)197. **Waiver of one ground for rescission** held not waiver of other grounds. 203 Iowa1270, 212NW134. **Acceptance of rent payments** from intending purchaser in possession is not waiver. 181Ark339, 26SW(2d)89.
1393-62 32Ariz331, 258P256 (failure to demand payment and tender performance); 35Ga698, 134SE633, 635 [citCyc] (failure to sue on notes for five years held no election to rescind for default of payment); 145Wash420, 260P666.
1393-62½-New. Failure to file declaration of forfeiture does not preclude assertion of right to recover lands where right to rescind contract is not solely dependent upon such filing. TexCivA 282SW1115.
1393-63 197Cal 674, 242P713 (evidence held to show vendor did not waive payment of amount due at time fixed in contract, so as to entitle vendee to equitable relief); 77Colo 546, 238P38; 89 IndA196, 162NE68.
1393-64 TexCivA 287SW282. See also 168La15, 121S176.
1394-66 Waiver of time element of one provision does not effect waiver of all time specifications. 325 Ill 38, 155NE 784.
1394-67 But see 88CalA339, 263P548.
1394-69 214Ala327, 107S816; 215Ala 433, 111S5; 89CalA345, 264P789; 201 Iowa690, 207NW790; 2LaA787; TexCivA 15SW(2d)203; 145Wash420, 260P 666.
1395-79½-New. If vendor for continued default asserts right of forfeiture, after waiver of right, vendee may maintain bill for redemption and specific performance upon offer to do equity. 214 Ala327, 107S816.
1395-80 76Mont1, 245P532.
1395-81½-New. Failure to give prompt notice of forfeiture for purchaser's default held not to constitute waiver of forfeiture. 248Mich584, 227NW670.
1395-82 201 Iowa690, 207NW790; 208 Iowa417, 224NW508; Kan 289P975; 234Mich80, 208NW50. Contra 79CalA 443, 249P886. **Where purchaser lulled into security.**–234Mich80, 208NW50.
1395-83 201 Iowa690, 207NW790; 234 Mich80, 208NW50.
1396-84 See also 245Mich448, 222NW 697.
1396-85 199Wis497, 226NW954.
1396-91 Assignee of vendee's interest in contract is proper party to action for forfeiture of contract for breach by assignee by sale by separate contract to negro where vendor consented to assignment. 233Mich373, 206NW532. **Negro to whom land was sold in breach of restriction** is not proper party to action to forfeit contract for such breach where sale to negro was by separate contract. 233Mich373, 206NW532. **Who may oppose rescission.**–LaA 128S546.
1397-96 See also 168Ga529, 148SE327 (1stcase); 37Wyo 282, 261P126.
1397-97 71CalA617, 236P349.
1397-99 71CalA617, 236P349; 163Ga 345, 136SE146; 144 Okl 116, 289P331.
1397-2 127Kan142, 272P154.
1397-3½-New. Petition which alleges that defendant failed to complete cash payment necessarily admits that some of cash payment had been made. 127Kan 142, 272P154.
1398-12½-New. Issues, proof, and variance.–Allegations that price was to be paid in cash, but that defendant gave checks in payment of price, with assurance funds would be available to pay checks, and that defendant had failed to provide funds to pay checks, were sufficient to permit introduction of parol evidence. 10LaA575, 121S353.
1398-13 In suit to cancel contract, subordinating vendor's lien to mechanics' lien, based on alleged breach of promise, plaintiff must prove promise was false and made with intent not to perform. TexCommnA 291SW871, 51ALR1135. **Imposition.**–292Pa343, 141A146. **Fraud.**–332 Ill 484, 163NE828. **Damages.**–178 Minn238, 226NW702.
1398-15 168La15, 121S176. **Want of consideration.**–3LaA643. **Evidence held sufficient.**–CalA 274P572; 240Mich697, 216NW374; 52ND49, 203NW178; 155 Wash14, 283P470. **Evidence held insufficient.**–89 IndA431, 155NE539; 160La 131, 106S720; 73Mont339, 237P209; 52 ND49, 203NW178; 52ND589, 204NW 333. **Evidence held to sustain finding** that contract was not procured by fraud or duress and constituted whole agreement. 45 Ida349, 262P512. **In action for rescission for lesion beyond moiety** market value at more than twice amount purchaser paid must be established with legal certainty. 164La993, 115S59. **Sufficiency of evidence to show fraud.**–See 332 Ill 484, 163NE828; 246Mich96, 224NW420; NJCh 144A314; 134Misc 37, 233NYS645. **Proof by preponderance of evidence necessary.**–151SC85, 148 SE699. **Rescission for fraud.**–CalA 291 P441.
1399-17 208Cal 420, 281P613 (accounting of rents and profits from property is within issues).
1399-21 IndA 158NE906; Sask [1925] 3DomLR501 (holding that court may order payment of entire purchase price, though not due, and in default thereof, cancellation of agreement, provided that upon payment of arrears due with interest and costs purchaser may be relieved from immediate payment of amount not yet due).
1399-22 Payment into court.–Sask [1925] 3DomLR335.
1399-24 In Philippines.–46Philippine 801.
1399-24½-New. If judgment quiets title in plaintiff against claims of purchaser, any personal judgment against purchaser should be only for his indebtedness in excess of his equity in property. 52ND49, 203NW178.
1399-24⅓-New. Decree, denying forfeiture after purchaser's default and requiring vendor to execute deed, should impress equitable lien on land and appoint commissioner to sell land to satisfy sum due to vendor, in event of purchaser's failure to perform. 151Miss486, 118S418(2dcase).
1399-24¼-New. In vendor's action to annul contract and forfeit payments made, defendant, on showing that plaintiff was not entitled to relief sought, was entitled to have account stated between parties and time fixed within which payment should be made into court in fulfillment of terms of contract. 89 IndA196, 162NE68.
1399-24⅕-New. Trial court does not err in failing to determine rights of vendee under certain provision of contract, where facts alleged as grounds for relief were denied and not sustained by proof. 84CalA499, 258P438.
1399-24⅙-New. Purchaser may be permitted at last moment to pay off indebtedness and acquire title before final foreclosure. TexCivA 17SW(2d)859.
1399-26 Mich 233NW434; 130 Or255, 279P542, 69ALR951 (purchaser held not entitled to return of any portion of purchase money); TexCivA 10SW(2d)186 (right to recover for conversion of crops). **Payment of the purchase money,** etc. 251Mich23, 231NW47; 171Minn 168, 213NW563; 176Minn601, 224NW 157; 73Mont339, 237P209 (vendor after rescission cannot recover unpaid portion of purchase price, nor past-due interest, nor taxes payable by purchaser). **Vendor exercising option** to terminate contract cannot hold vendee liable to complete it or pay part of unpaid purchase price. 73Mont339, 237P209. **Where note and mortgage were accepted in lieu of cash payment,** vendor could enforce note and mortgage. 171Minn168, 213NW563. **Title is reinvested in vendor.**–TexCivA 5SW(2d)197.
1399-27½-New. Where vendor has negotiated purchase-money note, he becomes primarily liable thereon as between himself and surety on note where he has rescinded contract or acquiesces in abandonment by purchaser. 201 Iowa853, 208NW364.
1399-27⅓-New. Effect of judgment dissolving sale in suit by vendor is to subordinate mortgage given by purchaser to vendor's right to rescind but with reference to any sum due purchaser because of rescission. 169La1170, 126S 695.
1401-47 69CalA211, 230P963; 73Mont 339, 237P209.
1401-51½-New. Vendor held not entitled to recover interest on mortgage and taxes which he paid. 154Wash492, 282 P843.
1402-53 240Mich697, 216NW374. **Measure of compensation is only increase in value** of property due to improvements and not sums expended thereon. 240Mich697, 216NW374.
1402-66 168La15, 121S176.
1403-68 See also 214Ky198, 282SW 1075.
1403-72 69CalA379, 231P364. **Election by vendor to forfeit purchaser's right as respects crop** makes purchaser remaining in possession adverse claimant in respect thereto. 102CalA10, 282P522.
1403-74½-New. Purchaser may retain possession for reasonable time to harvest crop if he desires to do so. 130 Or 255, 279P542, 69ALR951.
1404-76 168La15, 121S176.
1404-79½-New. After rescission vendor may not assert claim, based on the contract, for part of crops raised by purchaser or for cash payment. 69CalA 379, 231P364.
1404-83 102NJ183, 140A11.
1404-86 24F(2d)807; 81CalA786, 254P 684; 98Fla1103, 125S521; 163Ga815, 137SE240 (for breach of representation as to restricted character of property sold); 46 Ida82, 267P447; LaA 124S 599; 251NY79, 167NE178; 5PaDist&Co 365; TexCommnA 25SW(2d)808 (failure to make improvements); BC [1930] 3 DomLR337. **Insistence on material changes in contract.**–32Ariz331, 258P 256. **Failure to level land** for planting crop entitles purchaser to rescind. 71 CalA762, 236P333. **Right to cancel** not affected by purchaser's receipt of part of defendant's agent's commission for procuring contract. DelCh 139A457. **Vendor must have abandoned contract or shown intention not to be bound.**–205 Iowa1019, 218NW611. **Vendor's instruction to escrow holder to obtain receipt for money paid by purchaser to auctioneer, not expressly made condi-**

tion precedent to delivery of deed to purchasers, does not warrant rescission by purchaser not performing or offering to perform. 88CalA430, 263P846. **Failure to prosecute construction of improvements** with reasonable diligence. 249 Mich662, 229NW604.

1405–87 232Ky73, 22SW(2d)442; **Tex CommnA** 15SW(2d)548.

1405–88 205Iowa167, 217NW808, 809 [quotCyc]; **TexCivA** 6SW(2d)445. **Fact that vendee was late in cultivation** does not warrant vendor in terminating contract. 76CalA541, 245P476.

1405–88½–New. Motive actuating rescission is immaterial. **Vt** 146A254.

1405–92 94Cal410, 271P367; 95CalA481, 272P1106; 251Mich533, 232NW378. **Failure to perform an obligation** imposed by executing contract is failure of consideration justifying rescission. 69 CalA621, 232P162.

1405–96 201Iowa928, 208NW276, 46ALR1124; 200Wis331, 228NW505.

1405–97 147Wash434, 266P179.

1406–1 100NJEq421, 136A344.

1406–6 87CalA772, 262P419; 97Fla848, 122S513; 164Ga18, 137SE554; 166Ga113, 142SE538 (upon discovery that vendor has only qualified fee); 204Iowa1373, 215NW658; 168Minn300, 209NW741; 114Nebr508, 207NW509; **NJSup** 137A317; 215AppDiv644, 214NYS582; 295Pa560, 145A678; 88PaSuper318; 5PaDist&Co637; 51SD564, 215NW927, 57ALR1246; **TexCivA** 281SW616; 149Wash433, 271P93; 40Wyo226, 276P452; 22AltaL56, [1926] 2DomLR401, [1926] 1WestWkly758. **Vendee may rescind contract for failure to deliver abstract** as required by contract. 203Iowa480, 212NW933. **Right to rescission does not depend on abstract** and failure of contract to provide that abstract shall be furnished purchaser is immaterial. 51SD564, 215NW927, 57ALR1246.

1407–7 214Ala481, 108S385 (where contract calls for good title, he cannot be compelled to take partial interest).

1407–10 230Ky307, 19SW(2d)976; 2LaA264.

1407–11 18F(2d)954; 37GaA254, 139SE573; **NJCh** 140A881. See also **Vt** 146A254.

1408–12 87CalA772, 262P419.

1408–15½–New. Under statutes in some jurisdictions, where land was sold by the tract to which seller represented he had good title and purchaser acted thereon and it later appeared he did not have title to a portion, such representation entitles purchaser to rescind. 163Ga505, 136SE524.

1409–16 85PaSuper498 (lien in excess of entire balance of purchase money); **Wash** 289P520. **Applications of rule.**–213AppDiv117, 210NYS883. **Where vendor contracted to convey free from encumbrances except first mortgage** and there are other encumbrances and balance due on purchase price is insufficient to discharge them, purchaser is entitled to rescind. 85PaSuper498.

1409–18 33PortoRico676. **Where taxes and liens presently payable amount to less than amount to be paid under contract,** vendor has right to receive and use vendee's money to pay or satisfy them. 168Minn269, 209NW889. **Where contract gives vendor option to pay off encumbrances out of purchase price,** purchaser cannot refuse performance because of existence of encumbrances. 141Wash182, 251P128.

1409–22½–New. But vendor's failure to have mortgage released within year as agreed gives right to rescind. 251NY79, 167NE178.

1409–24 72CalA278, 236P971 (vendee cannot rescind because of lease on premises where evidence shows possession was not intended to be delivered on exercise of option, which court further found was never exercised); 100NJEq421, 136A344. **Applications of rule.**–20SaskL241, [1926] 1DomLR230, [1926] 1WestWkly80. **Where purchaser of agricultural lands was in possession** of sufficient facts to put him on inquiry as to existence of oil and gas permits, and prematurely stopped inquiry, he could not cancel contract. **TexCommnA** 287SW47.

1410–31 73Mont529, 237P521; 84Mont238, 275P267; 154Wash393, 282P215.

1410–32 167Minn453, 209NW323, 46ALR816; 73Mont529, 237P521.

1410–33 87CalA772, 262P419; 246Mich272, 224NW432; 167Minn453, 209NW323, 46ALR816; 73Mont529, 237P521.

1411–34 246Mich272, 224NW432.

1411–35 166La799, 118S24.

1412–47 Contra 41GaA207, 152SE260.

1412–49 217AppDiv337, 216NYS716. **Purchaser in possession six years,** who sold much stock and cut timber held not entitled to rescind for cloud on title, remedy being at law. 217AppDiv337, 216NYS716.

1413–57 72CalA282, 237P64. **Letter requesting one of vendors** to take "some action on your part in less than thirty days" has been held not demand to clear title within that time. 72CalA282, 237P64. **Notice demanding performance** cannot be arbitrary and sudden termination of transaction, and must be express, clear, distinct, and unequivocal. 72CalA282, 237P64.

1413–62 100NJEq389, 135A681. But see 117Okl260, 246P448; 32PortoRico613. **In Quebec.–Can** [1929] 3DomLR898.

1415–78 169Ga237, 149SE790; 242Mich646, 219NW668; 223AppDiv851, 228NYS546; 45Philippine296; **TexCivA** 29SW(2d)877 (absence of warranty of title is no defense); 195Wis485, 218NW854. **In civil law** if land is sold within given boundaries with expression of area, and latter is grossly deficient, vendee has option, either to have price reduced proportionately or to ask for rescission. 45Philippine296. **In Georgia.**–But see 163Ga505, 136SE524.

1416–80 169Ga237, 149SE790.

1416–81 81Colo58, 253P385 (where purchaser was not injured and vendor was willing to correct error); 204Iowa319, 213NW252; 217AppDiv337, 216NYS716 (where purchaser knew minor defect, and deed inadvertently followed description in vendor's deed). **Refusal of vendor to allow adjustment** of shortage held not default. 204Iowa319, 213NW252.

1416–83 99Fla1112, 128S265 (failure to tender deed complying with contract); 164Ga18, 137SE554; 46Ida82, 267P447, 452 [citCyc]; **ND** 229NW114; 143Wash302, 255P129 (dictum).

1417–87 324Ill238, 154NE904; 87IndA588, 162NE248.

1417–88 87CalA772, 262P419; 52ND589, 204NW333.

1417–89 52ND589, 204NW333.

1417–89½–New. Where judgment divesting vendor of title was entered upon express stipulation that adverse claimant would perform vendor's outstanding contracts obligating him to convey, transfer is in subordination of vendee's rights not affording basis for cancellation by vendee for defect in title. 52ND589, 204NW333.

1417–89½–New. Lease by vendor while purchaser is in possession is not such repudiation of contract as entitles purchaser to rescind. 170Minn430, 212NW908.

1417–90 Purchaser's motive for rescinding contract is immaterial if legal reason exists for rescission. **CalA** 291P879.

1417–91 70CalA279, 233P354; **MoA** 271SW545, 546 [citCyc]; **TexCivA** 275SW307 (immaterial whether assumption of notes had been accepted or that party whose debts were assumed knew of fraud).

1417–92 **MoA** 271SW545, 546 [citCyc].

1417–93 70CalA279, 233P354; 41GaA207, 152SE260 (no rescission for fraud unaccompanied with damages).

1418–96 Action for rescission and vendee's lien is properly brought in equity as against contention that it is one for recovery of money judgment only. 242Mich139, 218NW664.

1418–97 **TexCivA** 275SW307.

1419–9 40Wyo226, 276P452.

1420–18 133Okl166, 271P844.

1421–19 73CalA114, 238P166.

1421–23 202Iowa1128, 211NW367. **Attempted forfeiture without giving statutory notice of intention** is not ground for rescission. 205Iowa1019, 218NW611.

1421–24 249Mich553, 229NW469.

1421–25½–New. Judgment against vendor for land subject to stipulation that plaintiff shall perform all outstanding contracts of vendor in relation to land is not breach entitling vendee to rescind. 52ND589, 204NW333.

1421–26 But merely commencing suit for cancellation of contract, though no ground therefor, does not constitute breach entitling vendee to rescind. 52ND589, 204NW333.

1422–23½–New. Existence of easement acquired by condemnation proceedings subsequent to making of contract does not entitle purchaser to rescind. 167Minn453, 209NW323, 46ALR816.

1422–23½–New. Vendee is not entitled to cancellation by reason of vendor's commencement in good faith of suit to cancel for vendee's default where latter was not in technical default by reason of vendor's delay in commencing action. 52ND589, 204NW333.

1422–23¼–New. Where vendor permitted foreclosure on contract which was sole source of his title, making it impossible for him to perform, purchaser may withdraw. 215AppDiv644, 214NYS582.

1422–23½–New. In such case oral statements by vendor as purchaser at foreclosure of readiness and willingness to perform do not affect vendee's right to withdraw. 215AppDiv644, 214NYS582 (statements binding no one).

1422–23⅙–New. It is immaterial that motive for rescinding was ability to buy other land at lower price. 202Iowa993, 210NW133.

1422–23 1/7–New. Vendor's refusal to repair damages caused by fire while in purchaser's possession does not authorize cancellation of contract. 129Misc190, 220NYS689.

1422–23⅛–New. Vendor's delay in doing what he was not legally obligated to do is no ground for rescission by vendee. 129Misc190, 220NYS689.

1422–23 1/9–New. Vendor's liability for unpaid taxes does not warrant rescission of contract of sale. 239Pa356, 137A603.

1422–23 1/10–New. Vendor's insistence on performance by vendee in accordance with erroneous construction of contract is not breach authorizing vendee to rescind where vendor himself offers to perform. 202Iowa1128, 211NW367.

1422–23 1/11–New. Mere breach of oral agreement to make future improvements is not ground for rescission. 97Fla236, 122S708.

1422–23 1/12–New. Disappointment in profits is not ground. 169La528, 126S209.

1422–23 1/13–New. Breach of building regulation is not ground for rescinding sale. **Mass** 170NE462(2dcase).

1422–23 1/14–New. Though bargain made by purchaser may result in hardship to him, only other contracting party can relieve him. 251NY435, 167NE578.

1422–30 200Iowa798, 205NW472; 204Iowa223, 215NW232; 115Nebr136, 211NW998; 12Or230, 257P801.

1422–32 101CalA632, 281P1068; 204Iowa223, 215NW232; **Md** 139A535; **MoA** 272SW1045; **NJCh** 146A65.

1422–33 Ouster from, or loss of, land, or total failure of title, when bill was filed, is condition precedent to rescission of land contract for total failure of title, if proper demand was made, and not subsequently waived. 218Ala448, 118S760.

1422–34 214Ala481, 108S385; 71CalA272, 235P455; 43Ida292, 252P494, 497 [citCyc]; **SD** 224NW937.

1423–35 43Ida292, 252P494, 497 [citCyc].

1423–36 43Ida292, 252P494, 497 [citCyc]; 160La68, 106S677; 249Mich662, 229NW604; 213AppDiv117, 210NYS883; 290Pa283, 138A834.

1423–41 98CalA245, 276P1037; 164Ga581, 139SE56; 166Ga71, 142SE543; 204Iowa223, 215NW232; **Iowa** 229NW832; 124Kan33, 259P1068; 260Mass178, 156

NE903; Mich 233NW421; MoA 28SW (2d)127; 73Mont339, 237P209; 84Mont 238, 275P267; 118 Or347, 246P349; 130 Or590, 280P511; 5PaDist&Co 365. **Purchaser, under contract for deed,** need not put prior contract holder in statu quo. 200 Iowa905, 205NW541. **Exceptions.**–132Misc480, 230NYS116. **Tender must be kept good.**–84Mont238, 275P267. **Must account for rental value and depreciation.**–Utah 286P635.

1424–42 260Mass178, 156NE903.

1424–43 97Fla1085, 119S326.

1424–44 76CalA541, 245P476; 92CalA 216, 267P933; 164Ga581, 139SE56; 166 Ga880, 144SE659; 124Kan33, 259P1068 [citCyc]; 125Me402, 134A539; 260Mass 178, 156NE903; 168Minn216, 209NW 623; NJCh 147A193(2dcase); 10PaDist &Co 327; Utah 286P635; Alta [1925] 3 DomLR329. See also 69CalA291, 231P 563; 39GaA241, 146SE648(1stcase). **Sufficiency of offer to restore.**–43 Ida292, 252P494. **Where land is rented,** purchaser's offer to surrender possession is ineffective unless tenants give their consent. Iowa 227NW504.

1425–47 167Ga828, 146SE849.

1426–52½–New. Where vendor refuses to accept purchasers' offer to return property and does not return consideration paid, purchasers need not abandon property. 132Misc480, 230NYS116.

1426–55 94CalA410, 271P367; 237 IllA 341 (where purchaser stopped checks given in payment). **Sufficiency of tender of conveyance.**–90CalA291, 265P873.

1427–61½–New. Purchaser in possession who has leased property to third person is not thereby disabled from rescinding for defect in title where lease was made with knowledge and acquiescence of vendor, and purchaser within reasonable time offers to surrender premises and rentals to lessor. 114Nebr 308, 207NW509.

1427–61½–New. Rescission is properly allowed for defective title, though no offer of rent is made by purchaser until time of trial. 51SD564, 215NW927, 57 ALR1246.

1427–62 69CalA621, 232P162 (rescission by purchaser in case of continuing contract held to be prompt); 95CalA 481, 272P1106; 98CalA245, 276P1037; Mass 168NE173; 140Miss854, 105S487; Mo 278SW395; TexCivA 275SW307.

1427–62½–New. Purchaser held entitled to rescind when it became apparent that performance by vendor could not be completed in time. 248Mich601, 227NW 783.

1428–63 164Ga581, 139SE56; 166Ga71, 142SE543; 166Ga880, 144SE659; 47 Ida 604, 277P570; 250Mich650, 231NW106; 73Mont339, 237P209; 84Mont238, 275P 267; 86Mont435, 284P147(2dcase); 132 Misc480, 230NYS116; 117 Or328, 243P 560; 125 Or7, 265P441; TexCivA 285 SW670; TexCivA 285SW700; 152Wash 149, 277P445. **Periods of delay held unreasonable under the circumstances.**–200 Iowa805, 204NW219; 84Mont238, 275P267. **Delay due to representations of vendors** that further trial would demonstrate truth of representations prevents vendors from claiming waiver by vendees of right to complain of fraud. 233Mich655, 207NW845.

1428–64 206Cal 526, 275P440; 93CalA 681, 270P246; Mich 233NW192(1st case); Mich 233NW339; TexCivA 285 SW700; 152Wash149, 277P445. **Periods of delay held unreasonable under the circumstances.**–73Mont339, 237P209; Mont 289P1028; 125 Or7, 265P441; RI 145A169. **What is not unreasonable delay.**–206Cal 526, 275P440; 71CalA 272, 235P465 (delay of twenty-nine days after discovering true boundary line); 90CalA291, 265P873; 219AppDiv694, 220NYS545.

1429–65 164Ga581, 139SE56 (dictum); 166Ga880, 144SE659; TexCivA 285SW 700; 152Wash149, 277P445.

1429–66 251Mich663, 232NW237; Mo 278SW395; 22AltaL56, [1926] 2DomLR 401, [1926] 1 WestWkly758. **Purchaser has reasonable time to rescind.**–114 Nebr308, 207NW509. **Lapse of time is not alone decisive of waiver.** 251Mich 663, 232NW237.

1430–72 202 Iowa993, 210NW133 (delay of more than year not unreasonable in view of conflict as to negotiation for settlement).

1430–72½–New. Where purchaser, on discovering defect, immediately informed vendor of intention to rescind, and was prevented from speedily carrying out intention by repeated promises of vendor to secure release from lessee, which promises were not kept by vendor and by which purchaser was lulled into repose and inaction, failure of purchaser promptly to exercise right of rescission could not be taken advantage of by vendor. 167Ga828, 146SE849.

1430–72½–New. Where defect in title is such that vendor cannot acquire it, rescission may be had prior to date set for delivery of deed. Vt 146A254.

1430–76 227AppDiv337, 238NYS67.

1430–77 169Minn198, 210NW871 (right to election not lost by statute giving right to rescind executory agreement on notice). **After loss of right to rescind** by waiver, purchaser's remedy is by action for damages. TexCivA 275SW307. **Purchaser will not be held to have elected to affirm contract** and recover damages at law after giving notice of rescission and abandoning land, by bringing action praying for same money relief to which he would be entitled on rescission, though petition triable at law, and action not entitled either at law or in equity. 202 Iowa993, 210NW133. **If vendee recovers damages** he cannot maintain action to rescind. 126Kan127, 266P935.

1430–79 97CalA462, 276P141; 132Misc 480, 230NYS116. **Bringing suit, etc.**–97 Fla848, 122S513.

1430–80 149Md336, 131A568; 168Minn 300, 209NW741; 40Wyo 226, 276P452. See also 169Minn198, 210NW871. **Where contract is to convey to several parties,** all must join in statutory notice and notice given by one alone is without effect. 166Minn153, 207NW311.

1431–81 32Ariz331, 258P256; NJSup 129A747; NJSup 146A667(1stcase); 100 NJEq421, 136A344; 285Pa112, 131A 698; 51SD138, 213NW11. **Notice to perform** need not be given where vendor is unable to perform through his own fault. 215AppDiv644, 214NYS582.

1431–81½–New. Where no time is fixed or time is not essential, the purchaser may fix a reasonable time within which he will expect title at peril of rescinding agreement. 134SC54, 131SE319.

1431–81½–New. Where purchaser places negotiations in a state of uncertainty, he must give notice that he expects performance at a certain time before vendor can be placed in default for failure to perform. 149Md336, 131A568.

1431–86½–New. Notice not intended to be effective when given will not later enure to benefit of party giving it. NJ Ch 146A65.

1431–87 93CalA209, 269P731; CalA 291 P870(2dcase) (intent as necessary element of rescission).

1431–88½–New. Grantee familiar with terms of grantor's bond for title accepted his deed from grantor with knowledge that it conveyed only equitable title, and where he acquiesced in grantor's conveyance of part of tract to others, there was rescission of his conveyance as to those tracts which required no instrument in writing to evidence such relinquishment. TexCivA 15SW(2d)159.

1431–89 76CalA541, 245P476; 56App DC30, 8F(2d)672 (reconveyance of purchaser to seller without reservation).

1431–90 Action to recover amount paid on contract because of vendor's inability to perform is not one for rescission or on rescission. 215AppDiv644, 214NYS582.

1432–91 215AppDiv644, 214NYS582. **Action to enforce lien** is not one for rescission or on rescission. 215AppDiv 644, 214NYS582.

1432–95 Purchaser is held not estopped from repudiating contract.–46 Ida82, 267 P447.

1432–95½–New. Partial rescission.–Purchaser cannot accept benefits under land contract and repudiate disadvantages. TexCivA 20SW(2d)203.

1432–97 32Ariz331, 258P256; 71CalA 762, 236P333; 166Ga71, 142SE543; 100 NJEq513, 136A339; 251NY79, 167NE 178; 217AppDiv337, 216NYS716 (possession for six years). See also 204 Iowa 223, 215NW232. **Acts not amounting to waiver.**–46 Ida82, 267P447; 47 Ida772, 278P1016; 203 Iowa480, 212NW933, 242Mich646, 219NW668; 213AppDiv117, 210NYS883; 32PortoRico 836. **Purchaser remaining in possession after vendor's insolvency and permitting receiver's assignee to complete irrigation system** waives right to declare rescission on account of vendor's default. 32Ariz331, 258P256.

1433–98 94CalA410, 271P367.

1433–98½–New. Where contract for sale of lots provides five years within which concurrent and dependent covenants by purchaser to pay for lots and vendor to complete improvements thereon, vendee does not waive right to rescind for breach by paying full purchase price within three years. 236Mich294, 210NW 231.

1433–98½–New. Defenses.–Deflation in price does not forbid rescission. 97Fla 788, 122S264.

1433–98½–New. That vendor of land had drilled and equipped well piping water to land in accordance with contract does not prevent purchaser's rescission on account of vendor's failure to clear and plow land within stipulated time, where expense incurred in drilling well and making pipe connections was not due to contract with purchaser, but was part of general development scheme under prior contract. TexCommnA 15 SW(2d)548.

1433–98½–New. Where land contract, induced by representations that certain street with certain improvements would be opened, gave purchaser right by notice in writing delivered to bank to stop payment to vendor of money paid on contract if represented improvements are not made, and bank indorsed acceptance of duty under contract upon it, purchaser's remedy under such provision was exclusive and precluded cancellation for failure to make improvements. TexCivA 14SW(2d)894.

1433–1 See also 217AppDiv337, 216NYS 716.

1433–3 See also Iowa 227NW504.

1433–6½–New. Demanding delivery of property does not waive purchaser's right to rescind where vendor cannot convey all property he contracted to sell. 169Ga237, 149SE790.

1433–6⅓–New. Where purchaser enters into contract after grantor is notified of favorable decision of purchaser's attorney passing on title, purchaser waives right to rescind for defects in title. 48 Ida295, 282P84 (entitled only to remedy of defects on discovery).

1433–8 95CalA481, 272P1106; 333 Ill 41, 164NE205; 247Mich60, 225NW647; NC 155SE238(2dcase); 153Va554, 149 SE519 (waiver by suit for breach of contract). **Continued use of the property after discovery,** etc. TexCivA 8SW (2d)230. **Endeavors to sell the property, together with other acts of full ownership,** etc. 132Misc480, 230NYS116. **Authorizing another to represent him in selling or renting land** operates to effect loss of right to rescind. TexCivA 275SW307. **Purchaser entering into new contract with knowledge of fraud** is not entitled to rescind. 166Ga71, 142 SE543. **Request for extension under contract** constitutes waiver of right to rescind contract for fraud. TexCivA 8 SW(2d)230.

1434–9 117 Or328, 243P560.

1435–14½–New. Remedy of corporations for fraud and deception of stockholder acting as agent in purchase of property, in failing to disclose facts and making secret profit on transaction, is by action at law or by suit in equity for accounting, and not by suit to rescind contract. 97Fla1085, 119S326.

1435–17 TexCivA 25SW(2d)164 (bank holding lien not accepting purchaser's assumption of original debt).

1436–28 Assignee of mortgage given for unpaid part of purchase price is not necessary party where only money judgment against vendor was sought. 90CalA291, 265P873.

1436–28½–New. Where land contracts were issued in name of one, but down

payment was made by another, with note by latter, later paid by him, and purchaser was identified and delivery made to him, difference in name was unimportant in purchaser's suit to rescind contracts for fraud. 246Mich465, 224NW630.

1436-29 DelCh 139A457. **Allegations in complaint held sufficient** and not demurrable. 167Ga159, 144SE904. **Complaint held sufficient** to warrant rescission on ground of vendor's breach. 99Fla535, 126S791.

1436-31 42F(2d)9; 95Fla144, 116S474; 97Fla1085, 119S326; 97Fla777, 122S252; 99Fla613, 126S775 (purchaser's bill held insufficient); 166Ga838, 145SE90. **For complaints held to show the right to rescind on the ground of fraud** see 99WVa176, 128SE378. **Need not allege that representations** were knowingly fraudulent. 222AppDiv152, 225NYS570. **False representation.**–99Fla795, 128S408.

1436-32 Waiver.–TexCivA 275SW307.

1437-34 For petition held sufficient see LaA 124S599.

1437-34½–New. Where plaintiff asks, although in form of damages, for return of money he paid on purchase price and otherwise expended by him in care and improvement of the property while in his possession he is proceeding on theory of rescission of contract. 76CalA541, 245P476.

1437-34½–New. Allegation and proof of payments being kept up held not necessary.–99CalA610, 279P205.

1437-34¼–New. Complaint held broad enough to present issue of right of rescission for failure of consideration. 99CalA610, 279P205.

1437-34½–New. Allegation that purchaser abandoned property is not necessary, after notice of rescission. 99CalA610, 279P205.

1437-35 222AppDiv152, 225NYS570. **Defect in title.**–218Ala448, 118S760; 169Ark491, 276SW588. **Burden of proving fiduciary relation** between defendant and plaintiff is on latter. 164Minn307, 204NW950. **Vendor's inability to perform.**–168Minn300, 209NW741.

1437-36 97Fla777, 122S252. **As to fraud.**–164Minn307, 204NW950; 49SD262, 207NW98 (burden of proving vendors guilty of fraud in not paying registration tax is on purchaser).

1437-37 Evidence admissible to show intent to abandon.–5PaDist&Co 365. **Evidence held sufficient** to sustain finding that vendee retained possession solely to protect his rights. 47Ida772, 278P1016. **Evidence of canceled judgments held inadmissible** in purchaser's action. 41GaA207, 152SE260. **Evidence admissible to show conversation** between prospective purchaser and vendor's agent. CalA 291P879. **Evidence inadmissible** by vendor as to value. CalA 291P879. **Excluding evidence not raised by pleadings is proper.**–CalA 291P879.

1437-38 179Ark678, 18SW(2d)323; 103CalA448, 284P697 (evidence of fraud need not be direct); **TexCivA** 285SW832 (evidence held sufficient to show fraud in representation as to improvements). **Evidence sufficient to show falsity of representations.** 234Mich367, 208NW450. **Evidence insufficient to show falsity of representations.**–118Or347, 246P349. **Evidence sufficient to warrant rescission.**–70CalA279, 233P354; 204Iowa1096, 216NW768; 246Mich465, 224NW630; **TexCivA** 28SW(2d)950. **Evidence held insufficient to warrant rescission.**–98CalA245, 276P1037; 166Ga880, 144SE659; 153Va554, 149SE519; **Wash** 288P925. **Sufficiency of evidence to show fraud.**–206Cal526, 275P440; 208Cal121, 280P530; 84CalA714, 258P636; 87CalA772, 262P419; 99CalA182, 278P243; 103CalA448, 284P697; 127Kan614, 274P221; 230Ky307, 19SW(2d)976; 257Mass509, 154NE175; 245Mich642, 224NW409; 247Mich109, 225NW562; 164Minn307, 204NW950; **Miss** 110S772; **Mont** 289P1028; 219AppDiv694, 220NYS545; 227AppDiv60, 237NYS97; 117Or362, 243P1114; **Tex CommnA** 287SW47. **Fiduciary relation not established.**–164Minn307, 204NW950. **Fraud of vendor of farm** held shown. 234Mich367, 208NW450. **To entitle purchaser to rescission** for fraudulent misrepresentation relied on, it must be clearly established. **Md** 150A28. **When evidence fails to show fraud,** directed verdict for vendor is proper. **TexCivA** 27SW(2d)305(1stcase). **Evidence held sufficient to warrant rescission.**–**Mich** 233NW339. **Evidence held insufficient to warrant rescission.**–**Minn** 233NW243. **Evidence held sufficient** to show that purchaser relied on knowingly false representations by vendor's agent. **CalA** 291P879. **Evidence held insufficient** to show attempt by purchaser to make independent inquiry. **CalA** 291P879.

1437-38½–New. , findings not conflicting and contradictory. **TexCivA** 275SW307.

1437-38½–New. Trial.–Court does not err in directing verdict for defendant where there are no issues to be submitted. 168Ga492, 148SE327(2dcase).

1437-38¼–New. Directed verdict against purchaser seeking rescission held error. 168Ga718, 148SE917.

1438-39 TexCivA 16SW(2d)164. **Where rescission is impossible,** measure of damages applying in action for fraud does not apply. **CalA** 290P591(2dcase).

1438-44½–New. Purchaser fraudulently induced to substitute inferior tract for that contracted for is entitled to rescission in toto where vendor has conveyed to another tract originally contracted for. 90CalA291, 265P873.

1438-45½–New. Judgment for vendor effects no cancellation, contract remaining unchanged. **TexCivA** 27SW(2d)305(1stcase).

1438-46 57ND674, 223NW808(2dcase); 53SD341, 220NW852.

1438-52 See also 73CalA124, 238P126.

1439-53 22AltaL56, [1926] 1WestWkly758, [1926] 2DomLR401.

1439-57 NJSup 137A317.

1440-59 76CalA541, 245P476; 202Iowa993, 210NW133; 22AltaL56, [1926] 2DomLR401, [1926] 1WestWkly758.

1440-60 76CalA541, 245P476.

1441-66 202Iowa993, 210NW133, 137[citCyc].

1441-73 See also 195Wis241, 218NW184.

1442-79½–New. In absence of creditors who could not be paid from intestate's personal estate, one contracting to purchase land from purchaser at partition sale in suit to which all of intestate's heirs, who were also heirs of her deceased husband and devisees under his will if she took only life estate, must take title in accordance with contract, whether she was given only life estate or fee simple. **DelCh** 144A44.

1442-81 98Fla1103, 125S521; 264Mass475, 163NE162; 132Misc48, 228NYS624.

1442-82 15F(2d)323; 213Ala41, 104S239; 90Fla711, 106S876; 163Ga679, 136SE795 (where agreement called for "deed subject to examination"); 43Ida243, 253PS33; 201Iowa788, 208NW283; 167Minn453, 209NW323, 46ALR816; 101NJEq506, 139A163; 102NJEq193, 140A226; 127Misc636, 217NYS207; 116Okl241, 244P424; 36OklACR655; 45Philippine162; **TexCivA** 289SW436; **TexCivA** 4SW(2d)988. **In Philippines.**–45Philippine162. **Conveyance containing restrictions as to use but without clause of forfeiture** conveys absolute fee which is good and marketable title. 13PaDist&Co 468.

1443-83 220AppDiv460, 221NYS641 (where title is one to be approved by title company, refusal of company to approve is default by seller). **Torrens title.**–175Minn144, 220NW415.

1444-85 128Misc16, 217NYS185.

1445-91 "Good and merchantable title" referred to in contract means such title in vendor. 215Ala161, 110S10.

1445-93 See also 37OklACR376.

1445-94 226Ky214, 10SW(2d)837.

1445-98 Provision for conveyance free of encumbrances with specified exceptions and title which company would insure, requires marketable title. 229AppDiv593, 243NYS548.

1446-2 TexCivA 283SW303. See also **TexCivA** 22SW(2d)749.

1446-5 259Mass288, 156NE251; 118Or559, 247P777, 778 ("without covenants of warranty express or implied").

1446-11 321Ill442, 151NE877; **TexCivA** 283SW303.

1447-22 Agreement to convey land by "warranty deed with clear title" is agreement to convey land in "fee simple," that is in its entirety, without incumbrances or conflicting claims of others. **TexCivA** 283SW303.

1447-22½–New. Where contract calls for full covenant and warranty deed purchaser can not be required to take any other. 219AppDiv537, 219NYS383.

1447-22¼–New. Purchaser may not insist on marketable title, in accordance with the printed provisions of blank form of contract, when the typewritten provisions very clearly provide for a title of lesser quality. 204Iowa341, 214NW588.

1447-23 Contract to convey seller's interest in street.–230AppDiv683, 245NYS507.

1450-35½–New. Contract calling for guaranty of title issued by responsible title company is not satisfied by offer of Torrens title certificate and policy of title insurance. 86CalA449, 260P833.

1450-40 15F(2d)323; 234IllA267; 82Mont393, 267P296; 221AppDiv170, 223NYS19; 116Okl241, 244P424; 118Or192, 244P1093; **TexCivA** 296SW649. But see **TexCivA** 1SW(2d)334. **Merchantable title** means marketable title. 122Okl285, 254P719; 129Okl13, 263P109. **Existence of defects shown by record theretofore validated by statute** is not ground for refusal to complete purchase. **Fla** 130S450.

1452-44 244Mich456, 221NW614.

1452-49 15F(2d)323; 23AlaA416, 125S398; 221Ala24, 127S155 (title properly rejected); **CalA** 292P1005; **DelCh** 141A271; 90Fla711, 106S876; 98Fla1103, 125S521; 163Ga679, 136SE795; 321Ill442, 151NE877; 248IllA111; 220Ky113, 294SW804; 259Mass288, 156NE251; 244Mich456, 221NW614; 246Mich473, 224NW368; 82Mont393, 267P296; 98NJEq225, 130A231; 101NJEq84, 137A844; 103NJEq147, 142A422; **NJCh** 144A18; **NJCh** 145A537(1stcase); **NJEq** 150A58; 249NY106, 162NE600; 253NY320, 171NE390; 222AppDiv570, 226NYS544; 229AppDiv593, 243NYS548; 122Okl285, 254P719; 38OklACR103; 118Or559, 247P777; 49SD262, 207NW98; 50SD588, 211NW453; 51SD564, 215NW927, 57ALR1246; **TexCivA** 283SW303; **TexCivA** 296SW649; **TexCivA** 1SW(2d)334; **TexCivA** 6SW(2d)126; 135Wash410, 237P1010 (final divorce decree that husband "entitled" to property gives marketable title); 103WVa733, 138SE449. **Break in title.**–321Ill442, 151NE877. **Reservation of mineral land in patent to vendor's grantor held no objection title.** 204Iowa341, 214NW588. **Determinable fee** held not such title as will support bill for specific performance by vendor. 323Ill338, 154NE144. **"Marketable title" implies fee simple title** to entire realty, without reservations and encumbrances. 204Iowa341, 214NW588. **Opinion of counsel.**–51SD564, 215NW927, 57ALR1246. **Existence of encumbrance not removable prevents delivery of good title.** 92CalA343, 268P408. **Designation of land by wrong number** does not render vendor's title unmerchantable where otherwise correctly designated. 169La577, 125S623.

1454-51 122Okl285, 254P719; **TexCivA** 283SW303; **TexCivA** 296SW649. **Title vesting by statute** will support specific performance even though without statute court would refuse aid. **NJCh** 151A371.

1454-52 122Okl285, 254P719; 36OklACR655; **TexCivA** 283SW303; **TexCivA** 296SW649. **Pendency of condemnation proceedings.**–101NJEq512, 139A484. **Title depending on judgment obtained by constructive service.**–**TexCivA** 4SW(2d)988.

1454-53 15F(2d)323; 23AlaA416, 125S398; 221Ala24, 127S155; 98Fla1103, 125S521; 321Ill442, 151NE877; 164La175, 113S808, 811 [citCyc]; 102NJEq230, 140A458, 57ALR1241; 127Misc636, 217NYS207; 118Or559, 247P777; 88

PaSuper318; 5PaDist&Co 637; 51SD 564, 215NW927, 57ALR1246; Tex CommnA 13SW(2d)73; TexCivA 283SW 303; TexCivA 289SW1045; TexCivA 1 SW(2d)334; TexCivA 6SW(2d)126. **Entry of final decree in divorce case** on motion without filing motion or affidavit does not render title to land acquired under decree unmarketable. 135Wash 410, 237P1010. **Failure to serve prosecuting attorney** in divorce proceedings passing title to vendor, where he appeared, does not render title unmarketable. 135Wash410, 237P1010. **Hazard of litigation must be borne by vendor** who has the burden of curing defects by litigation or otherwise. 51SD564, 215NW927, 57ALR1246. **Bare possibility** of litigation which would be futile is not valid objection to title. TexCivA 2SW(2d)929.

1454–53½–New. Title must not be subject to probable claims of another and must be reasonably free from any doubt which would interfere with its market value. 127Misc636, 217NYS207.

1456–54 158La423, 104S194; 252NY186, 169NE134 (remote and improbable contingency); 213AppDiv595, 211NYS382 (vague uncertainties of impractical and wholly useless character cannot be used as restriction excusing purchaser from accepting title); 51SD564, 215NW927, 57ALR1246; 103WVa733, 138SE449.

1456–55 79CalA428, 249P878; 109Conn452, 146A831; 163Ga679, 136SE795; 203Iowa480, 212NW933; 226Ky214, 10SW(2d)837; 148Md318, 129A364 (unrecorded deed did not make tax title unmarketable); 224AppDiv262, 229NYS761; 38OklACR103; TexCivA 296SW649; 192Wis130, 212NW253. See also NJCh 152A234. **The bare possibility**, etc. 226Ky214, 10SW(2d)837. **Purchaser held not entitled to refuse to accept contract of sale** providing that conveyance was subject to facts shown by survey, especially where vendor offered to insert stipulation that purchase would not have to take title if it was unmarketable. 125Misc177, 210NYS474. **Charge embodying rule need not detail facts** upon which purchaser must rely. 163Ga679, 136SE795. **Purchaser held entitled to reject title** where it is derived through escheat to state and against which claim of ownership as sole heir is outstanding. 224AppDiv756, 230NYS293. **That various financial institutions have refused to make mortgage loan** on certain realty because of condition of title is worthy of consideration, but not conclusive. 244Mich456, 221NW614.

1457–56 That title company is willing to insure it does not render title marketable. 229AppDiv593, 243NYS548.

1458–57½–New. Purchaser may reject title because property had been previously conveyed by corporation without consent of stockholders. 214AppDiv668, 213NYS213 (where corporation had two directors in common but no proof of insolvency).

1458–57½–New. "Marketable" means salable. 102NJL368, 131A888.

1458–57¼–New. Doubt as to whether title based on power of sale is marketable may arise as to construction of power or existence of facts justifying its exercise. TexCivA 296SW649.

1458–59 15F(2d)323, 327 [citCyc]; 76CalA610, 245P455; 263Mass188, 160NE671; 122Okl285, 254P719; TexCivA 6SW(2d)126. **"Fairly deducible of record"** does not mean that county clerk's office of county wherein land is situated is only record to which reference may be had in support of title but reference may be made to judgments of any court of record having jurisdiction in county where land lies. Okl 254P719.

1458–60 But see 263Mass188, 160NE671.

1458–61 5F(2d)829 (parol evidence necessary to show identity of prior grantors makes title unmerchantable); 76CalA610, 245P455.

1459–62 5PaDist&Co 637. See also 100NJEq244, 135A506.

1459–63 Distinction between clear record title and clear title is that first rests upon record alone while second relates to actual title and may be shown by evidence outside record. 258Mass348, 154NE920. **Obligation to deliver good marketable title of record** is not fulfilled when title tendered depends on material facts not susceptible of reasonably definite ascertainment of proof by record evidence. 96Fla435, 118S161.

1460–67½–New. Where all possible interests not present on record, court should not declare title good. 5PaDist&Co 637.

1460–67½–New. Judgment may constitute link in chain of title, but to be good it must be final. TexCommnA 13SW(2d)73.

1460–68 TexCivA 1SW(2d)334.

1460–71 160Ga550, 128SE751 (dictum); NJCh 151A371 (holding title not resting in adverse possession); TexCivA 2SW(2d)929; TexCivA 6SW(2d)126. But see 100NJEq244, 135A506.

1460–72 15DelCh37, 131A142 (as good as record title); 160Ga550, 128SE751 (deed subject to examination); 163Ga679, 136SE795; 232Ky415, 23SW(2d)596; 150Md157, 132A595; 153Md390, 138A250; 217AppDiv797, 216NYS771; 223AppDiv211, 228NYS211; 103WVa733, 138SE449.

1462–73 171Ark644, 286SW801 (undisturbed possession for thirty five years); 217AppDiv797, 216NYS771 (sixty years). **Specific performance will be decreed** where part of title dependent on adverse possession was in adverse possession for statutory period. 132Misc890, 230NYS722.

1462–74 163Ga679, 136SE795 (that real owner is barred); 321Ill442, 151NE877; 5PaDist&Co 637; TexCivA 1SW(2d)334. **The vendor is bound to show**, etc. 132Misc48, 228NYS624.

1465–85 Property in trustees for religious society.–Del 147A165.

1465–88 229AppDiv428, 243NYS483 (possibility of reverter).

1466–91 251Mich124, 231NW114; 223AppDiv98, 227NYS486; 192NC285, 134SE849.

1466–92 220Ky113, 294SW804 (attempted reverter provision in deed by those without interest held not "cloud on title"). **Deceased's husband's deed** held effective to convey later acquired title, giving wife, as administrator, right to payment on termination of action involving title though husband's will devised entire estate to wife so long as she remained a widow. 218Ky679, 291SW1060. **Where holder of defeasible fee was sole heir of contingent remainderman and later became grantee of his interest**, his deed was held to convey good title. 192NC285, 134SE849.

1467–96 Effect of lunacy proceedings, etc.–251NY28, 166NE793.

1468–97 30F(2d)885.

1470–5 See also 225AppDiv486, 233NYS491.

1471–8 Time of recording.–168La588, 122S859.

1471–12½–New. Purchaser is not entitled to reject title as unmarketable on ground that conveyance by corporation thirty-two years before was ultra vires. 219AppDiv668, 220NYS491.

1472–14 DelCh 147A250.

1472–19 100NJEq470, 135A550.

1473–22½–New. It being uncertain whether adopted child having issue will leave issue surviving at her death, specific performance of contract to purchase realty from her grantee will be denied because of doubt as to title. 103NJEq147, 142A422.

1474–24 109Conn452, 146A831 (failure to take out administration on estate of deceased did not make title unmarketable where fifteen years elapsed since death); 122Okl285, 254P719. **Where the owner of an estate in tail**, etc. 15DelCh15, 130A32. **A title to real estate based on a final decree of distribution**, etc. 49SD626, 208NW230. **Bequests to brothers and provision for erection of monument did not render title defective** where brothers predeceased testator and monument had been constructed. 230Ky307, 19SW(2d)976.

1474–25 223Ky327, 3SW(2d)781. **Proof and finding of heirship.–122Okl285, 254P719.**

1475–27 195NC187, 141SE571.

1475–27½–New. Vendor having only life estate, but also power to sell during lifetime, title is not defective. 230Ky307, 19SW(2d)976.

1475–29½–New. Defect in probate proceedings may render title unmarketable. 149Wash29, 270P110.

1475–30 Where no presumption arises, purchase cannot be compelled. 228AppDiv703, 239NYS223 (absence for thirteen years).

1475–31½–New. Deeds by each of two executory devisees of undivided half interest in land to other vests absolute ownership of half in each, and deed by both conveys perfect title which purchaser, under contract, may be compelled to take. 214Ky320, 283SW103.

1476–33 43Ida243, 253P833 (trustee); 48RI27, 134A815, 48ALR1122; TexCivA 289SW436 (holding objection that executors had not qualified by taking statutory oath material); TexCivA 296SW649.

1476–34 Title of innocent purchaser from executor having power of sale is merchantable notwithstanding children were born to testatrix after she had executed will. 101NJEq510, 139A56.

1477–35 Title held good or marketable.–129Okl93, 263P455.

1479–37½–New. Executor's deed stating nominal consideration is insufficient of itself to pass marketable title. NJCh 146A593.

1479–37½–New. Conveyance to one in trust for another reconveying part twenty years thereafter indicates fee in latter whose successor could convey marketable title. 150SC249, 148SE18 (2dcase).

1479–40 51SD564, 215NW927, 57ALR1246.

1479–41 NJ 146A186. **Recitals in trustee's deed** on foreclosure sale only prima facie evidence as to validity of title and court may not as a matter of law declare purchaser had indefeasible title. 191NC784, 133SE3. **That clerk's order was entered nunc pro tunc** after trustee's sale does not in itself invalidate title. 191NC784, 133SE3.

1480–47 51SD564, 215NW927, 57ALR1246.

1480–51½–New. Where vendor asserts that reservations in patent are not encumbrances, title is determinable by escrow instructions constituting contract. 92CalA343, 268P408.

1481–57 Specific performance may be granted in suit by vendor where claim of ownership by heirs of person from whom it escheated have been barred by statute. 128Misc439, 218NYS291. **In New York.–**252NY186, 169NE134.

1482–60½–New. Partition by executor, with discretionary power of sale, of property in which life income was given to one gives good marketable title. 134Misc339, 235NYS416.

1482–65 That there was no showing that it was not homestead property held material objection. TexCivA 289SW436.

1483–73 Disqualification of judge signing judgment quieting title in that he acted for parties at partition sale of land does not render abstract of title submitted by vendors objectionable. 49SD262, 207NW98.

1484–76½–New. Title dependent on divorce decree is sufficient where court had jurisdiction and no appeal was taken. 128Kan426, 278P26.

1484–77 29F(2d)712; 215Ala161, 110S10; 100CalA766, 281P102; 90Fla711, 106S876, 878 [citCyc]; Fla 130S450; 203Iowa1034, 213NW929; 222Ky566, 1SW(2d)963; 101NJEq649, 138A569; 223AppDiv57, 227NYS418; Vt 146A254. **Title held marketable** where property was or could be released from encumbered conditions. 224AppDiv458, 231NYS225.

1484–78 254NY210, 172NE472; 299Pa284, 149A184.

1485–79 TexCivA 283SW303.

1485–80 214Ala481, 108S385; 90Fla711, 106S876; 100NJEq470, 135A550; 116Okl241, 244P424; TexCivA 283SW303.

1485–81 TexCivA 283SW303.

1485–82 TexCivA 283SW303.

1486–85 101NJEq506, 139A163; 130Misc625, 225NYS106.

1487–89 237IllA341 (reservation of

rights of parties in possession in deed); 101NJEq506, 139A163; TexCivA 24SW(2d)499.

1487-90 126Misc465, 466, 214NYS488 [citCyc]; TexCivA 276SW944, 946 [cit Cyc]; TexCivA 289SW436. **Where property is sold subject to prior covenants** prohibiting business buildings or carrying on of any obnoxious trade, such covenants include only restrictions relative to business buildings and noxious trades. 126Misc465, 214NYS488 (not carpenter and blacksmith shops, stoneyards, and similar trades). **In mortgages, not in existence when contract was made,** but contemplated to be drawn and recorded in interval between making of land contract and law day, acceleration clause, which is clause of defeasance of term of mortgage, violates covenant that mortgage shall run for specified term. 132Misc699, 230NYS150.

1487-91 127 Or446, 271P593.

1487-92 Mass 168NE794.

1487-93 233Ky181, 25SW(2d)75; 101 NJEq649, 138A569.

1488-94 54SD634, 224NW187. See also 33PortoRico 94.

1488-96 130Misc721, 224NYS349; 48 RI 213, 136A767.

1488-97 214Ala481, 108S385; 104NJL 248, 139A900; 139SC156, 137SE439.

1489-98 214Ala481, 108S385; TexCivA 289SW436.

1490-8 252NY159, 169NE124. **Thousand-year lease,** being substantially conveyance in fee, title to mortgaged lands is not defective. NJCh 151A497.

1491-11½-New. Five year farm lease, with privilege of obtaining possession by paying tenant certain amount of sale proceeds held not encumbrance on property. NJSup 137A564.

1491-12½-New. Purchaser cannot refuse to take title on ground that streets have been used by public and abutting owners and that reopening thereof would affect his title, where police jury found that streets were never opened. 168La 588, 122S859.

1491-12½-New. Encumbrance at law is every right to, or interest in, land granted to diminution of value of land, but consistent with passing of fee. 225 AppDiv208, 232NYS478.

1491-13 115Nebr493, 213NW587; NM 290P795; TexCivA 276SW944, 946 [cit Cyc]. **If vendor is ready and willing to leave all purchase money with title company** to satisfy mortgage and so informs vendee mortgage is not encumbrance, though noted on certificate as objection. 8PaDist&Co 413. **Where vendor was unable entirely to conform mortgage to terms of contract,** purchaser had right to avail himself of variance and reject title. 136Misc384, 240NYS76.

1492-16 105NJL201, 143A431; 217 AppDiv337, 216NYS716; 127Misc636, 217NYS207 (more than twenty years overdue). **Record of mortgage payable in 1883 and reference to mortgage in deed made in 1869 are not clouds on title** there being presumption of payment. 217AppDiv337, 216NYS716.

1492-17½-New. or has been merged, 100NJEq64, 136A806.

1492-18 But see 135Misc603, 238NYS 651.

1492-20 135Misc603, 238NYS651. But see Iowa 227NW504; 142 Okl 219, 286 P306.

1493-21 247Mich443, 225NW931. See also NJCh 146A583. **Where sufficient of purchase money was to be allotted to discharge mortgage,** purchaser cannot refuse performance because of existence of mortgage. 36 OhA78, 172NE839.

1493-23 TexCivA 276SW944, 946 [cit Cyc]. **Provision giving option to declare mortgage due on change of mortgage tax law.**-248NY145, 161NE450. **Vendor is required to disclose terms of payment of mortgage assumed by purchaser.**-214AppDiv640, 213NYS68 [citCyc] (where contract did mention terms on which mortgage was supposed to be paid). **Failure of vendor to procure extension of mortgage** to conform to terms of contract bars specific performance by vendor. 214AppDiv640, 213NYS68.

1494-25 See also 133Misc312, 232NYS 171.

1495-34 33 OhA452, 169NE836 (statute construed). **Furnishing of indemnity bond** does not obligate purchaser to accept encumbered title. 33 OhA452, 169 NE836.

1495-35 36 OhA78, 172NE839.

1496-38 255Mass542, 152NE41, 51ALR 391.

1496-39 258Mass167, 154NE568; 116 Or661, 242P626.

1496-43 100CalA766, 281P102; 168 Minn441, 210NW586; 101NJEq512, 139 A484; 247NY307, 160NE380; 250NY 216, 164NE912; 252NY159, 169NE124 (lien of transfer tax and federal inheritance tax). **Where unpaid taxes would have been adjusted at closing,** they do not constitute defect in title. 37F(2d) 856.

1497-47½-New. Unmatured bonds of water supply district are not encumbrances, since "lien" for taxes does not exist against property till tax is determined and ascertained. 133Misc370, 232 NYS606.

1497-50 Mo 23SW(2d)1006.

1499-58 13LaA94, 126S84 (under statute); 156Miss142, 125S706 (prior assumption of obligations by seller constitutes charge on land); 188Wis17, 205NW548, 549 [citCyc]. **Charges for water.**-47 Ida490, 276P964.

1499-65 188Wis17, 205NW548, 549 [citCyc].

1499-66 90Fla711, 106S876, 878 [cit Cyc]; 12LaA624, 126S461; 105NJL632, 146A220; NJSup 137A317 (where extent of restriction was doubtful); 245 NY77, 156NE621 (sale of liquor); 222 AppDiv488, 226NYS692; 230AppDiv790, 245NYS42; 188Wis17, 205NW548, 549 [citCyc]; 196Wis70, 219NW354. **Possibilities held not too remote.**-249NY106, 162NE600. **Possibility of reverter** included in covenants restricting use rendered title unmarketable and rule is not affected by improbability of facts arising to call possibility into existence. 249NY106, 162NE600. **Restrictions in use,** based on enumerated prohibitions, are not mere theoretical possibilities in determining marketability of title. 249 NY106, 162NE600.

1500-67 245NY77, 156NE621.

1500-68 100CalA766, 281P102; Me 152 A53; 239Mich357, 214NW163; 104NJL 394, 140A395; 98NJEq225, 130A231; 222AppDiv570, 226NYS544; Pa 151A 812; 188Wis17, 205NW548, 549 [cit Cyc]. But see 228AppDiv721, 239NYS 147. **Title may not be impaired** by restrictions or covenants not within scope of words in subjective clause of contract. 126Misc465, 214NYS488. **Where restriction is more onerous or different than that specified in contract,** title may be refused. 126Misc465, 214NYS488.

1500-69 188Wis17, 205NW548, 549 [cit Cyc].

1500-70 188Wis17, 205NW548, 549 [cit Cyc].

1500-71 188Wis17, 205NW548, 549 [cit Cyc].

1500-71½-New. But where restriction has been extinguished by all interested parties and character of neighborhood shows discharge of restriction, it is no longer burdensome, as to excuse refusal of title by purchaser. 213AppDiv595, 211NYS382.

1500-71½-New. Building restriction as to obstructing view held of such slight importance as not to prevent specific performance. 130Misc625, 225NYS106.

1501-73 188Wis17, 205NW548. But see 90Fla711, 106S876; 227AppDiv666, 236 NYS210. **Zoning ordinance declared void by court** held no such encumbrance as to entitle vendee to rescind. 100NJ Eq447, 136A304. **Violation of New Jersey Tenement House Act.**-NJCh 136A 801.

1501-73½-New. Where restrictions are matter of public knowledge, parties contract with reference thereto and restrictions become part of contract. 37 F(2d)856.

1501-74 229AppDiv593, 243NYS548; 230AppDiv683, 245NYS507; Wash 289 P520 (sewer); 188Wis17, 205NW548.

1501-75 NJCh 152A234; 228AppDiv91, 238NYS322. **Telephone and lighting poles in highway** are not encumbrances on title. 253NY320, 171NE390.

1501-76 See also 136Misc890, 241NYS 288.

1501-78½-New. Vendee of several parcels could not object to title because of easement where vendor owned all parcels. 130Misc625, 225NYS106.

1501-78½-New. Deprivation of easements, even in part, constitutes "encumbrance" on title to realty. 253NY 320, 171NE390.

1501-78½-New. Title company's statement of opinion that there could be no private easements in public street does not affect marketability of title. 229AppDiv593, 243NYS548.

1502-79 100CalA766, 281P102; 259 Mass288, 156NE251 (passageway along boundary line); 251Mich663, 232NW 237; 168Minn269, 209NW889; 78Mont 122, 252P796 (right of way is encumbrance); 298Pa27, 147A838; Vt 146A 254; 106WVa79, 144SE884. See also 145Wash420, 260P666. But see 255Mass 623, 152NE55. **The right of way of a railroad company,** etc. Nebr 231NW 766; 118 Or192, 244P1093 (width falsely represented). **Contract to sell "subject to restrictions"** in former deeds has been held to include merely negative restrictions and not right of way easements. 215AppDiv94, 213NYS589. **Reservation of easement** in prior deed is not included in contract to sell "subject to covenants." 215AppDiv94, 213NYS589. **"Obvious easement."**-104NJL212, 141A 13.

1502-83 Right to construct elevated railroad in abutting highway is encumbrance on title though fee of highway is vested in public. 253NY320, 171NE 390.

1502-84 225AppDiv208, 232NYS478. But see 252NY236, 169NE289. **The existence of a running stream on land purchased,** etc. NJCh 151A554. **Grant of room for necessary ditches along tram or railroad** constitutes encumbrance. 106WVa79, 144SE884. **Rights of upper and lower proprietors** in respect of stream do not constitute easement. 252 NY236, 169NE289. **Sewers and water mains in highway** are not encumbrances on title to abutting property. 253NY 320, 171NE390.

1503-85 92CalA343, 268P408; 101NJ Eq649, 138A569.

1503-88 21AlaA222, 107S909, 914 [cit Cyc]; 259Mass288, 156NE251; NJSup 131A290. **It has been held, however,** etc. NJSup 131A290; 8PaDist&Co 413.

1504-89 21AlaA222, 107S909. But see NJ 137A411.

1504-90 21AlaA222, 107S909.

1504-91 8PaDist&Co 413 (coal vault under sidewalk).

1504-92 40F(2d)583; 103NJEq470, 143 A621. **Title to strip of land in old avenue if omitted from new avenue** vested in original owner passing under his deed so as to give marketable title. 224App Div63, 229NYS201.

1504-93 TexCivA 14SW(2d)953. But see 253NY395, 171NE583.

1505-95 40F(2d)583.

1506-98½-New. That there are encumbrances on adjoining half of highway, even though some of such encumbrances are greater than usually exist in city streets and are not visible on inspection, is no defense to suit by vendor for specific performance. NJCh 144A23.

1506-98½-New. Natural stream inclosed in pipe running under land so as no longer to be visible, open stream tending to depreciate value of property since running diagonally across property and preventing excavation for cellar, and requiring expense and consent of village to change course of pipe line, has been held "encumbrance." 225AppDiv 208, 232NYS478.

1506-99 168La50, 121S188; LaA 124S 687; 100NJEq147, 135A88 (one to one and one-half inches); 88PaSuper318. **Extent of encumbrance** has been held not question before court, but whether there is one making title unmarketable. 100NJEq147, 135A88. **As constituting "encumbrance."**-100NJEq147, 135A88.

1506-1 135Misc598, 238NYS301 (land encroached on was subject to easement in favor of lot on which building stands). **Where contract is "subject to such a state of facts as an accurate survey**

would show" purchaser cannot recover initial payment because survey shows slight encroachment. 245NY43, 156NE 90.

1506-5 167La701, 120S57(1stcase). **Encroachments held not trivial.**–100NJ Eq147, 135A88.

1507-7 CalA 292P1005; NJL 142A667; 101NJEq634, 139A237; 214AppDiv361, 212NYS334. But see 222AppDiv388, 226 NYS58. **Whether municipality owned fee or had only easement in street** has no bearing on question where encroachment on street renders title unmarketable. 214AppDiv361, 212NYS334. **Purchaser held warranted to refuse title where title** company refused to insure title except subject to encroachment, under agreement of insurable title. 218AppDiv854, 219NYS165.

1507-8 101NJEq86, 137A848; NJCh 148A3 (consent of municipality).

1508-10 See also 213Ky503, 281SW514.

1508-11½-New. Fact that city never sought to remove encroachment on its bank is immaterial as city may assert its right at any time. 100NJEq147, 135 A88.

1508-12 20AlaA576, 104S284; 101NJ Eq757, 139A223. But see 223AppDiv820, 228NYS425. **Substantial encroachments** justify refusal to take title, and it is for vendor to show marketability unaffected. 222AppDiv752, 225NYS401.

1508-14 In Philippines.–45Philippine 162.

1509-15 76CalA610, 245P455. **Title must be fairly deducible from record** without reference to extrinsic evidence. 76CalA610, 245P455.

1509-16 76CalA610, 245P455.

1509-17 213Ala41, 104S239 (under contract providing for cash payment by vendee on approval of title, until such approval there is no mutually binding contract).

1510-20 221Ala24, 127S155; 20AlaA 576, 104S284; 11LaA594, 123S366; 229 AppDiv593, 243NYS548; 295Pa560, 145 A678; TexCommnA 6SW(2d)83, 84 [quotCyc]; TexCivA 22SW(2d)749.

1510-21 20AlaA576, 104S284 (good faith of attorney in rejecting title is presumed); 169Ark491, 276SW588 (attorney); 29 OhA44, 163NE37; 295Pa 560, 145A678; TexCommnA 6SW(2d) 83, 84 [quotCyc].

1511-22 20AlaA576, 104S284 (evidence that title is good admissible only on question of good faith); 295Pa560, 145A678. **Testimony of vendees and their attorneys** is admissible on issue of good faith. 20AlaA576, 104S284.

1511-25½-New. Provision requiring title satisfactory to purchaser's attorney is for purchaser's benefit; 217 AppDiv150, 217NYS145.

1511-25⅓-New. and if their attorney is satisfied vendor is bound to convey according to contract. 217AppDiv150, 217NYS145.

1511-25¼-New. Where contract provides that matter of title shall be referred to arbitration, arbitration is not condition precedent to enable purchaser to secure hand money from escrow holder, where vendor does not appoint arbitrator. 295Pa560, 145A678.

1511-25½-New. Attorney is not required to search for outside evidence to cure defects apparent on face of abstract. 23AlaA416, 125S398.

1511-27 Fla 130S450; 204 Iowa341, 214NW588; 154Md510, 142A625.

1513-29 Where purchaser, contracting for delivery of deed free from liens, accepts conveyance subject to deed of trust, specific performance of original agreement cannot be had. 177Ark815, 8SW(2d)443. **Claim against remote vendor is precluded** by accepting title and releasing immediate vendor. 170 La680, 129S128.

1513-30 251 IllA378; 259Mass288, 156 NE251; 237Mich98, 211NW70; 104 NJL519, 140A408; 295Pa560, 145A678; Pa 151A812.

1514-32 251 IllA378 (that purchaser accepted title with defect and cum onere).

1515-40 40F(2d)583; 168La50, 121S 188; 225AppDiv208, 232NYS478.

1516-46 213Ala41, 104S239; 151Miss 584, 118S418(1stcase).

1516-47 213Ala41, 104S239, 241 [cit Cyc].

1516-48 213Ala41, 104S239; 43 Ida 292, 252P494; 321 Ill 442, 151NE877; 324 Ill 48, 154NE401; 253 IllA1; 234 Mich478, 208NW436, 437 [citCyc].

1516-49 TexCivA 32SW(2d)380. See also Ala 130S792.

1517-52½-New. Fact that vendor has good title does not relieve him from complying with provision requiring him to furnish abstract showing merchantable title. 321 Ill 442, 151NE877.

1517-54 Abstract held not sufficient to show good title. TexCivA 295SW632. **Vendee cannot complain of defects** in abstract caused by judgment against him. 204 Iowa223, 215NW232.

1517-55 TexCivA 32SW(2d)380.

1517-57½-New. If vendor delivers dilapidated abstract vendee has legal right to demand and receive new abstract. 203 Iowa480, 212NW933.

1517-59½-New. General charge with hypothesis as to count under which evidence shows right of recovery is erroneous. 214Ala341, 107S903.

1517-60 253 IllA1; 245Mich442, 222 NW715.

1518-62 But see 38 OklACR103. **Abstracts held insufficient.**–221Ala24, 127 S155 (showing mere prima facie title); 321 Ill 442, 151NE877; 134 Okl 278, 273P363.

1518-63 Abstracts held sufficient.–81 Colo 202, 254P764.

1518-64 TexCivA 280SW225.

1519-65 20AlaA576, 104S284; 96Fla 435, 118S161; 237Mich98, 211NW70.

1519-66 In Louisiana.–158La423, 104S 194.

1520-68 But see TexCivA 22SW(2d) 749.

1521-70 TexCivA 12SW(2d)594.

1521-73 97Fla848, 122SE513.

1521-74 Delay of three years has been held unreasonable.–36 OklACR706.

1521-78½-New. Purchaser need not accept abstract showing mere prima facie title. 23AlaA416, 125S398.

1521-78⅓-New. Purchaser need not go outside abstract where contract provided for merchantable title as shown by abstract. TexCivA 22SW(2d)749.

1521-79 335 Ill 278, 167NE74; TexCommnA 12SW(2d)995; TexCivA 289 SW128. **Objection that "abstract does not show merchantable title" to plaintiff** does not point out specific defect as shown by abstracts. TexCivA 289 SW128.

1521-80 TexCivA 4SW(2d)988, 991 [citCyc]; TexCivA 32SW(2d)380.

1522-81 TexCivA 4SW(2d)988, 991 [cit Cyc].

1522-82 Objection that vendor claims under will not probated is invalid where will was registered. 58 OntL 507, [1926] 2DomLR960.

1522-84 161La1022, 109S824; 101 NJEq564, 139A598; 116 Or376, 239P 818. **On failure of concurrent covenants on vendor's default** contract is abandoned. 51SD91, 212NW500. **Purchaser is not estopped** to set up defect discovered after execution of contract. Wash 289P520.

1523-86 116 Or376, 239P818. **This right is an equitable** and not legal one. 116 Or376, 239P818.

1524-91 215Ala41, 108S849; 98Fla 1103, 125S521; 255Mass563, 152NE321; 229AppDiv593, 243NYS548; 48SD602, 205NW661 (purchaser agreeing to accept title without examination cannot rescind for defects). **Conduct of purchaser** in telling vendor no objection to restrictions would be made, held, in view of extensions and concessions, to constitute waiver based on consideration. 100NJEq513, 136A339. **Where time for election to take deed expired,** contract became of no effect unless vendor waived time elements. 327 Ill 254, 158NE442.

1524-92½-New. Waiver of objections to title once made can never be revoked. 130Misc625, 225NYS106.

1524-94 164Ga845, 139SE668.

1525-95 239Mich357, 214NW163; Tex CivA 1SW(2d)334.

1525-96 239Mich357, 214NW163. **Occupying premises with understanding that defendant was to be able to convey good title** on certain day or to make it good within ninety days thereafter is not waiver of defects in title. 49SD626, 208NW230. **Taking possession after the delivery of the abstract.**–97Fla278, 120S329. **Consent to filing different plat.**–MoA 29SW(2d) 230.

1525-97 37F(2d)856; 201 Iowa1107, 206NW959 (objection to title as shown by abstract not made until after entry of decree ignored as too late). See also TexCivA 295SW255.

1525-98 217Ky830, 290SW665; MoA 275SW48; 49SD262, 207NW98; Tex CivA 1SW(2d)481. See also 51SD564, 215NW927, 57ALR1246.

1526-99 164Ga845, 139SE668; 200 Iowa798, 205NW472; 247Mich443, 225 NW931; 115Nebr136, 211NW998; 101 NJEq297, 137A887; 103NJL541, 138A 569; NJCh 148A3; 130Misc625, 225 NYS106; 86PaSuper594.

1527-4½-New. That purchaser sees map showing street not showing on ground before contracting title does not constitute waiver of objections to title. 100NJEq470, 135A550.

1527-4⅓-New. Refusal by purchaser to take title and continuance in possession held waiver of abstract and survey. 131Misc488, 226NYS275.

1527-4¼-New. Purchaser declining to perform and telling vendor to cease perfecting title cannot claim that title was unmarketable. TexCivA 300SW 193.

1527-4½-New. By remaining in possession after breach, purchaser waived strict compliance with requirement that vendor deposit in escrow, by certain date, certificates from state for purchase of lands and assignment thereof. 84 Mont238, 275P267.

1527-4⅙-New. Continuing in possession after certificates are finally placed in escrow by vendor accepts vendor's performance. 84Mont238, 275P267.

1527-4½-New. Suit for specific performance by vendee admits he is content with vendor's title. 248Mich616, 227NW717.

1527-4⅛-New. Vendee cannot after suit for specific performance is brought, change his reasons for declining to perform contract. NJCh 148A3.

1527-4⅛-New. Consideration for waiver.–Pa 151A812.

1527-6 Timely delivery of abstract of title is waived by not taking it when tendered, by entering into undisturbed possession of land, and by so using land that status quo cannot be restored. 201 Iowa1107, 206NW959.

1527-8 335 Ill 33, 166NE541; 205 Iowa 657, 216NW60. **Where purchaser relies on assurance of vendor without having abstract promptly examined** by attorney, and having previously pointed out one defect which was cured, and purchaser then promised to complete payments, there is waiver of right to rescind for defects in title. 51SD564, 215 NW927, 57ALR1246. **Failure to reject abstract within stipulated time** is not waiver of requirement of merchantable title. 253 IllA1.

1527-9½-New. Purchaser may rescind though having waived right by accepting title without examination of abstract where subsequent examination thereof discloses substantial defects which vendor refused to have waived. 51SD564, 215NW927, 57ALR1246.

1528-10 101NJEq512, 139A484.

1528-12 160Ga550, 128SE751; 259Mass 288, 156NE251; 240NYS772.

1528-16 168Ga511, 148SE265.

1529-18 251Mich663, 232NW237; 248 NY145, 161NE450. **Acquiescence in institution of suit by vendor to remove disability of one of minor owners** does not estop purchaser from insisting on abstract of good title where parties were under misapprehension as to method by which such disability could be removed and suit did not result in perfecting title. TexCivA 281SW616. **Expression of preference as to method of removing disability of one of minor owners** does not constitute waiver of right to abstract

of good title. **TexCivA** 281SW616. **Lease of property subject to result of litigation** made by purchaser after setting up defect as defense to action for specific performance is not waiver. **Alta** [1929] 4**DomLR**591.

1529-21½-New. Purchaser does not waive failure of title by refusing to examine abstract. **TexCivA** 48SW(2d)988.

1529-22½-New. Estoppel.-Where purchaser consented that land be conveyed to him subject to mortgage held by individual instead of one held by bank as provided for in contract of sale, he is estopped from setting up such failure as breach. **NJSup** 130A133.

1529-23 167**Minn**453, 209**NW**323, 46 **ALR**816.

1529-24 215**Ala**161, 110S10; 34**Ariz**49, 267P598; **CalA** 268P455; 200 **Iowa**798, 205**NW**472; 203 **Iowa**480, 212**NW**933; 213**Ky**503, 281SW514 (though tender made before such time was refused); 223**Ky**302, 3**SW(2d)**601; 246**Mich**272, 224**NW**432; 167**Minn**453, 209**NW**323, 46 **ALR**816; 78**Mont**122, 252P796; 130 **Misc**625, 225**NYS**106.

1531-25 34**Ariz**49, 267P598; 203 **Iowa** 480, 212**NW**933. **It is not necessary for vendee to grant vendor opportunity to** apply to orphans' court under statute for leave to sell property free from liens of debts of deceased. 290**Pa**283, 138A 834.

1531-26 321**Mo** 639, 12**SW(2d)**453.

1531-27½-New. Request for proof of heirship requires only recorded sworn statements of credible persons to material facts. **TexCivA** 289**SW**128.

1531-27½-New. Where consummation of land sale contract was delayed due to vendors' inability to convey good title, vendors in possession were liable for charges against property accruing during such delay, and for interest on payments already received. 103**NJEq** 328, 143A442.

1531-28 15F(2d)323; 98**Fla**604, 124S 30; 43 **Ida**292, 252P494; 167**Minn**453, 209**NW**323, 46**ALR**816; 221**AppDiv**564, 224**NYS**623. **Purchaser need not accept substitutes for performance** on failure of vendor to remedy defects. 215**App Div**174, 213**NYS**158. **Purchaser** not required to extend time for clearing defect. 215**AppDiv**174, 213**NYS**158.

1531-28½-New. Failure to cure defect before tender of deed is no defense to quiet title till purchaser tenders payment and demands deed. 89**CalA**202, 264P493.

1532-29 41F(2d)634; 171**Ark**644, 286 **SW**801; 176**Ark**974, 4**SW(2d)**946, 57 **ALR**1244; 168**Ga**511, 148**SE**265; 242 **Mich**646, 219**NW**668; 73**Mont**529, 237P 521 (where purchaser pays before final time fixed for payment, though permitted so to do, vendor has reasonable time to remedy defects); 101**NJEq**176, 137A 849; 101**NJEq**564, 139A598; 223**App Div**842, 228**NYS**374; 229**AppDiv**343, 242 **NYS**177; **TexCivA** 281SW616 (action for rescission brought within four months held not premature where contract gave vendor reasonable time to cure defects); **TexCivA** 295**SW**632. See also 33 **OhA**452, 169**NE**836. **Defect promptly remedied** held not to excuse breach of contract. **NJCh** 136A801. **What is reasonable time.**-168**Ga**511, 148 SE265. **Where the vendor has no title at the time fixed for performance,** etc. 43 **Ida**292, 252P494. **Where vendor contracted to give marketable title and** mortgage on bond had been paid but release not filed, procuring and filing release within reasonable time was compliance with contract. 171**Ark**644, 286 **SW**801. **Delay held unreasonable entitling purchaser to rescission.**-98**Fla**397, 123S809. **Purchaser's refusal to extend time for closing held unreasonable.**-251 **NY**224, 167**NE**424.

1532-30 See 164**La**175, 113S808.

1533-32 221**AppDiv**564, 224**NYS**623.

1533-34 48 **Ida**295, 282P84 (may perfect title at trial where objection first made in defendant's answer); 227**App Div**666, 236**NYS**210 (objections cleared before trial).

1533-35 168**Ga**511, 148**SE**265; **NJCh** 136A801; 101**NJEq**176, 137A849; 102 **NJEq**157, 139A902.

1533-36 See also **LaA** 130S889.

1534-43 245**Mich**442, 222**NW**715; **Tex CivA** 24**SW(2d)**499.

1534-45½-New. Encumbrances on realty may be cleared at moment of passing act of sale or deducted from purchase price by purchaser, and promises of sale may be enforced as to property subject to encumbrances where purchase price, including interest accrued and attorney's fees recoverable on purchaser's default, is sufficient to discharge encumbrances. 167**La**665, 120S44.

1534-45½-New. Cancellation of contract for defect in title cannot be granted where at time of suit to enforce vendor's lien vendor tenders good title. 232 **Ky**73, 22**SW(2d)**442.

1534-47 **NJCh** 146A200; **Pa** 151A812; 48**SD**602, 205**NW**661 (action to quiet title held sufficient to remove defect of outstanding mortgage of record). **Where grantor acquired good title after conveyance,** tender of new deed is unnecessary. 223**Ky**390, 3**SW(2d)**769. **Defect not cured.**-158**Md**412, 148A816. **Failure of widow to acquire daughter's share in lands before conveyance** is cured by daughter's deed to purchasers. 109**Conn**452, 146A831.

1535-53 223**Ky**302, 3**SW(2d)**601.

1535-54½-New. Making new contract.-Purchaser waives claim for damages suffered from inability to procure loan because of defect in title where he enters into new contract extending time for payment and receiving deed. 50**SD** 307, 210**NW**49.

1535-55 20**AlaA**576, 104S284; 245**Mich** 442, 222**NW**715.

1536-60½-New. Where vendor is unable without fault to give clear title to land, it has been held, in action for damages for breach of contract, that he was not required to go to expense of perfecting title, even assuming it were possible. 258**Mass**167, 154**NE**568.

1536-61 200 **Iowa**798, 205**NW**472 (vendee is not obliged to make payment to enable vendor to secure title).

1536-66 158**Md**412, 148A816.

1537-70 **Ill** 173**NE**477. **Necessity for** tender of deed is not obviated by vendee's inability to perform. 219**Ky**169, 292**SW**801. **Vendor advising purchaser that he will deliver deed as soon as he is advised to whom transfer is to be made** does not refuse to deliver deed. 27 **OhA**362, 161**NE**287.

1537-71 See also 153**Tenn**380, 284**SW** 354.

1537-73 105**Conn**218, 134A792; 51**SD** 91, 212**NW**500.

1539-79 **CalA** 291P867. See also **Va** 153**SE**681.

1540-82 49**SD**262, 207**NW**98.

1541-87 51**SD**91, 212**NW**500.

1541-89 Placing deed in escrow.-197 **Cal** 674, 242P713.

1542-96 **CalA** 289P242 (under statute); **MoA** 26**SW(2d)**999 (repudiation by purchaser's agent); 104**NJL**212, 141A13; 129**Misc**401, 221**NYS**453; 224**AppDiv** 361, 231**NYS**104; 51**SD**91, 212**NW**500. But see 80**CalA**478, 251P967. **Declaration of intention not to comply with contract** must be positive and unequivocal. 43 **Ida**292, 252P494.

1543-98 51**SD**91, 212**NW**500.

1543-2 189**NC**434, 127**SE**521 (tender is not excused by want of strict performance by purchaser in payment of purchase money).

1543-3 **NJCh** 146A583.

1544-7 See also 29**PortoRico** 745.

1544-8½-New. Attachment subsequent to agreement without fault or collusion of vendor rendering performance by him impossible terminates his obligation if he refunds amount paid. **Mass** 167**NE** 292.

1546-13 202 **Iowa**1128, 211**NW**367.

1546-17 38**GaA**502, 144**SE**342. **In Louisiana.**-158**La**423, 104S194. **Tender of deed, signed by grantor, made by his agent is sufficient,** and there was no need to show that grantors were then alive, death of grantors at delivery being immaterial. 128**Misc**118, 217**NYS**666.

1546-23 264**Mass**303, 162**NE**334; 36 **OhA**78, 172**NE**839.

1546-24 **A tender after suit begun,** etc. 95**CalA**117, 272P614.

1547-25 95**PaSuper**373.

1548-39 128**Misc**118, 217**NYS**666.

1549-50 220**Ala**455, 126S113; 95**CalA** 117, 272P614; **Fla** 129S767; 156**Miss** 142, 125S706; **NJL** 142A667; 218**App Div**545, 218**NYS**601; **TexCivA** 218**SW(2d)** 305. **Quantity of land specified** in sale contract by street number and dimensions cannot be materially lessened in deed of conveyance. 218**AppDiv**545, 218 **NYS**601. **Warranty in deed under contract to convey "right and interest"** by general warranty deed would be right and interest of grantor. **Fla** 129S767.

1549-50½-New. Tender must be as per contract. 5**PaDist&Co** 365.

1549-52 338 **Ill** 620, 170**NE**777; 20 **SaskL**8, [1925] 3**DomLR**1199 (waiver of deficiency). **Acts constituting waiver.**-20**SaskL**8, [1925] 3**DomLR**1199.

1550-56 227**AppDiv**337, 238**NYS**67.

1551-59 213**Ala**41, 104S239; 221**Ala** 610, 130S332. **Vendor's refusal to convey title as specified in contract** excuses purchaser. 221**Ala**610, 130S332 (vendor's refusal is breach).

1551-67 168**La**335, 122S57.

1552-71 134**Misc**866, 236**NYS**486.

1553-77 Where covenants are concurrent neither party can put other in default except by tender of performance on waiver. 51**SD**91, 212**NW**500.

1553-80½-New. Where settlement is to be made on or before certain date, purchaser cannot require performance by vendor before such date. 98**NJEq**458, 131A574.

1553-80½-New. Where contract expressly makes clear title delivered at certain time of essence, purchaser is entitled to clear title at such time. 51**SD** 91, 212**NW**500.

1553-82 52**ND**176, 201**NW**694; 34**Porto Rico** 623. But see **Wash** 288P925. **Description of property.**-87**PaSuper**557 (held sufficient). **Condemnation of unsubstantial portion of land by city does** not put vendor at fault and purchaser must complete contract. 252**NY**320, 169 **NE**399. **Conveyance of part of land to purchaser's assignee** held part performance by vendor. 179**Minn**408, 229**NW** 356.

1554-83 Where agreement for sale refers to future mortgage purchaser need not accept tender subject to interest accruing before due date of mortgage. **Mass** 170**NE**69.

1554-83½-New. Conveyance, by general warranty deed of premises described in contract, free of encumbrance, of premises abutting on highway, where contract makes no mention of fee in adjoining highway, is complete performance. **NJCh** 144A23.

1554-84 265**Mass**540, 164**NE**451.

1554-87 255**Mass**76, 151**NE**81, 45**ALR** 1; **ND** 229**NW**114; **SD** 224**NW**937. **Deed by president in behalf of corporation** is sufficient compliance with contract signed by president without designating capacity, regardless of whether corporation or president owned land. 27 **OhA**320, 161**NE**228.

1555-89 But see 219**Ala**357, 122S435.

1555-92 But see 48 **Ida**295, 282P84.

1555-92½-New. Tender of deed by husband and wife is sufficient, though husband had deeded his share in community property to wife. 30**Ariz**501, 249 P70.

1555-94 50**SD**612, 211**NW**456 (constitutes performance of contract).

1557-10½-New. Where vendor tenders deed not complying with law of state though executed according to laws of foreign state, only method of proving it is by certificate provided by statute. 168**Minn**441, 210**NW**586.

1557-10½-New. After vendor has committed breach of bond for title he cannot compel purchaser to accept deed of property. 37**GaA**257, 139**SE**681.

1558-2 **TexCivA** 276**SW**947.

1558-7 Where contract provides for payment on transfer purchaser cannot be required theretofore to deposit part of price in bank as manifestation of good faith. 51**Philippine**259.

1558-8 234 **Ill**A267. **Refusal to accept title tendered in accordance with terms of sale** constitutes breach of contract by purchaser. 251**NY**435, 167**NE**578.

1558–9 Pending perfection of vendor's title under agreement, purchaser need only be ready to perform. 234 **IllA**267.
1559–15 If contract for sale of plaintiff's land is severable from contract for sale of land of another, covered by same instrument, purchaser has no right to plaintiff's land without payment. **Tex CivA** 208**SW(2d)**803.
1559–22 201 **Iowa**928, 208**NW**276, 46 **ALR**1124; 34**NM**323, 281**P**22 (though vendor had not signed contract).
1560–26½–New. Where insurance company paid vendor balance of purchase price vendor cannot collect from vendee. 215**Ky**465, 284**SW**1094.
1561–42 144**Miss**693, 110**S**504.
1561–44 144**Miss**693, 110**S**504; 95**Pa Super**373; 51**SD**91, 212**NW**500.
1561–46 339 **Ill** 340, 171**NE**263 (duty of vendor to perform).
1562–53 43 **Ida**292, 252**P**494; 54**SD**634, 224**NW**187. **Failure of vendor to furnish abstract** at time deed should have been given and final payment made as required by contract, excuses purchaser from making tender. 43 **Ida**292, 252**P** 494.
1562–54 42 **Ida**349, 245**P**95; 43 **Ida**292, 252**P**494; 325 **Ill** 146, 156**NE**313; **Tex CivA**, 4**SW(2d)**988. **Where purchaser knew that title stood in name of third party** with whom vendor had contracted, but intended to offer performance one day late till informed it would be too late, he waives vendor's status of title as excuse for tendering performance. 323**Mo** 1156, 20**SW(2d)**650.
1562–56 Me 149**A**608; 222**MoA**524, 293**SW**476, 480 [citCJ].
1562–57 43 **Ida**292, 252**P**494; 86 **IndA** 33, 155**NE**709 (refusal to reconvey on ground tenant was not protected); 255 **Mass**542, 152**NE**41, 51**ALR**391; 51**SD** 91, 212**NW**500 (where vendor fails to put himself in readiness to convey he loses right to demand concurrent act of payment by purchaser).
1563–58 88 **IndA**5, 163**NE**112.
1563–64½–New. No tender is required to be made by purchaser or by his trustee in bankruptcy where, prior to adjudication in bankruptcy of purchaser, he released vendor who would not thereafter have accepted tender. 79**CalA**443, 249**P**886.
1563–65 96**CalA**31, 273**P**849; 255**Mass** 265, 151**NE**108. **Insufficient tender.**–255 **Mass**265, 151**NE**108. **Vendor must object to form** of tender at time it is made. 255**Mass**542, 152**NE**41, 51**ALR**391. **Tender held sufficient.**–98**Fla**250, 123**S**739.
1563–66 95**CalA**481, 272**P**1106; 54**SD** 90, 222**NW**607.
1564–68 98**Fla**1103, 125**S**521. **Ability to perform** is essential. 72**CalA**393, 237 **P**751. **Evidence held insufficient.**–72 **CalA**393, 237**P**751.
1564–73½–New. If contract for purchase of land was fully executed by conveyance to defendant's daughters and defendant's execution of unsecured note to be replaced by note of purchasers secured by mortgage, vendor's refusal to accept note and mortgage of purchasers on account of their failure to pay costs incurred in vendor's action to cancel contract and conveyance was unwarranted. 54**SD**90, 222**NW**607.
1564–74 TexCivA 32**SW(2d)**660. **Refusal of vendor to accept tender of less than amount erroneously demanded** does not render offer to pay sum less than amount conceded due equivalent to tender of latter sum. 68**CalA**226, 228**P**681.
1564–79 Deposit of money to credit of vendor and notifying him of such deposit held not to constitute tender. 136 **Wash**84, 238**P**924.
1565–88 159**La**981, 106**S**536 (tender held too late). **Designated last day on Sunday.**–85**PaSuperl**.
1565–91½–New. Tender of money need not be kept alive during time vendor cannot tender good title. 198**Cal** 341, 244**P**1084.
1565–94 42**F(2d)**9; 252**Mass**504, 148 **NE**134.
1566–96 54**SD**90, 222**NW**607.
1566–97 89**CalA**345, 264**P**789.
1566–3 40**F(2d)**583; 242**Mich**73, 218 **NW**789.
1567–12 Right to demand arrears.–89 **CalA**345, 264**P**789.
1567–19 300**Pa**369, 150**A**656. **Failure to pay interest when due** is breach of contract providing therefor. 130 **Or**255, 279**P**542, 69**ALR**951. **Necessity of demand for payment of interest.**–300**Pa** 369, 150**A**656.
1568–25 But see 217**Ala**511, 116**S**681. **Stipulation for interest on amount still due and unpaid** held to require payment on deferred installments of principal. 130 **Or**255, 279**P**542, 69**ALR**951.
1568–25½–New. Purchaser is not liable for interest accrued on vendor's contract of purchase prior to date of contract; **Can** [1925] 3**DomLR**337.
1568–25⅓–New. and fact that part of purchase price was amount corresponding to balance due on vendor's contract of purchase, which purchaser assumed to pay, does not make him liable for interest accrued on such amount prior to date of contract. **Can** [1925] 3**DomLR** 337.
1568–25¼–New. On contrary vendor is liable for such interest, and if purchaser includes such interest in installments paid by him on such prior contract, he may recover same from vendor. **Can** [1925] 3**DomLR**337.
1568–25⅕–New. Where balance of contract price is to be paid in five years in quarter yearly installments beginning on certain date with interest at fixed rate, interest payments are due quarter yearly on whole amount unpaid at each quarter. 20 **OhA**414, 152**NE**198.
1569–29½–New. Where agreement provides for payment of interest on mortgage to be executed on date set for consummation, and contract is not executed on date provided, purchaser must pay interest from such date; 285**Pa**112, 131 **A**698.
1569–29⅓–New. and where parties continued to treat contract as in force and purchaser went into possession until vendor retook possession, in suit for specific performance commenced thereafter by purchaser, he must pay interest from such date till date vendor retook possession. 285**Pa**112, 131**A**698.
1569–30 20 **OhA**414, 152**NE**198 (not implied from provision for interest on other payments in other separate paragraphs).
1569–31 88**CalA**430, 263**P**846; 159**La** 1053, 106**S**562.
1570–32 113**Nebr**821, 205**NW**250 (legal rate is payable on default of purchaser, though deferred payments were at lesser rate).
1570–36½–New. Vendee is not considered in default of interest if previously vendor converted large sum of vendee's funds. 32**NM**384, 257**P**680.
1569–36⅓–New. Where contract did not provide for any specified rate of interest in event of failure to comply with contract, interest was recoverable only at legal rate of six per cent per annum. **TexCivA** 14**SW(2d)**116.
1570–37 98**Fla**250, 123**S**739; 234**Ky** 508, 28**SW(2d)**780. But see **Va** 153**SE** 897.
1570–38 Willful default. Delay in performance held not caused by vendor's willful default so as to bar recovery of interest from purchasers in possession. 248**Mich**527, 227**NW**678(2dcase).
1571–39 218**Ala**448, 118**S**760; 159**La** 1053, 106**S**562.
1571–40 234**Ky**508, 28**SW(2d)**780.
1571–41 221**AppDiv**777, 223**NYS**464.
1571–42 221**AppDiv**777, 223**NYS**464.
1572–43 118 **Or**559, 247**P**777, 779 [cit Cyc]. **Interest on paid part of purchase price** must be deemed equal to rents and profits. 54**SD**634, 224**NW**187.
1572–44 248**Mich**527, 227**NW**678(2d case); **Or** 247**P**777, 779 [citCyc]; 300 **Pa**369, 150**A**656; 152**Va**173, 146**SE**254.
1572–45 118 **Or**559, 247**P**777.
1572–46 94**CalA**349, 271**P**343; 22 **OhA** 466, 153**NE**300, 301 [citCyc] (contract construed as not providing for interest on deferred payments); 118 **Or**559, 247 **P**777.
1573–49 234**Ky**508, 28**SW(2d)**780; 234 **Ky**508, 28**SW(2d)**780; 248**Mich**527, 227 **NW**678(2dcase) (willful default); 6**Pa Dist&Co** 234.
1573–53 232**Ky**415, 23**SW(2d)**596.
1573–54 248**Mich**527, 227**NW**678(2d case).
1574–69 Payment under particular provisions.–244**Mich**49, 221**NW**154; 21 **SaskL**91 [1926] 4**DomLR**293, [1926] 2 **WestWkly**830. **On failure of vendor to install certain improvements,** payment of final deferred payments is not condition precedent to suit for damages. 98 **Fla**1103, 125**S**521.
1575–73 Acceptance of trust deed.–55 **App(DC)**383, 6**F(2d)**686.
1575–76 319**Mo** 290, 3**SW(2d)**701, 704 [quotCyc]
1577–97 Payments under conditional sale contract give purchaser interest in property as made. 163**Ga**434, 136**SE**317.
1578–3½–New. Receipt marked "in full of all adjustments," but not accounting for interest paid by purchaser on account of vendor on vendor's contract of purchase, does not operate as discharge and does not prevent purchaser from recovering same from vendor. **Can** [1925] 3**DomLR**337.
1578–14½–New. Action for abatement commenced before payments are due may be maintained, though there is subsequent default in payments. 73**CalA** 725, 238**P**150.
1578–15 See also 159**La**981, 106**S**536.
1579–16 250**Mich**509, 231**NW**74.
1579–17½–New. Under supplemental agreement to reduce purchase price stated amount if paid within stipulated time purchaser is not entitled to such reduction where amount is not paid or tendered within such time. 135**Wash** 381, 237**P**718.
1579–18 But see 36**GaA**253, 136**SE**462.
1580–28 ND 230**NW**600.
1581–33 92**Fla**48, 109**S**257; 35**GaA**135, 132**SE**110; 36**GaA**253, 136**SE**462; **Iowa** 227**NW**591; 104**WVa**200, 139**SE**714. **That purchaser knew that vendor was not owner of all land contracted to be conveyed** does not affect rule. 35**GaA** 135, 132**SE**110. **Abatement not defeated on theory of benefit to vendee.**–**Iowa** 227**NW**591.
1581–34 92**Fla**48, 109**S**257; 36**GaA**253, 136**SE**462.
1582–36 35**GaA**135, 132**SE**110.
1582–46 92**Fla**48, 109**S**257.
1582–48 48**RI** 213, 136**A**767, 770 [cit Cyc].
1583–50 Where land represented at auction as arable proved to be partly marsh land held purchaser was entitled to abatement in price therefor. 146**Va** 827, 132**SE**685.
1584–59 214**Ala**143, 107**S**92; 170**Ark**58, 278**SW**645; **Ga** 154**SE**911; **Ga** 155**SE** 182; 234 **IllA**516; 204 **Iowa**319, 213**NW** 252; 299**Pa**284, 149**A**184; 20**SaskL**8, [1925] 3**DomLR**1199; **WVa** 155**SE**305. **Abatement for deficiency proper where part of land was owned by government.**–170**Ark**58, 278**SW**645. **Error to consider quality of land in reckoning deficiency.**–170**Ark**58, 278**SW**645.
1584–61 234 **IllA**516; 204 **Iowa**319, 213 **NW**252.
1585–63 Ont [1929] 4**DomLR**693.
1585–65 170**Ga**426, 153**SE**46.
1585–67 170**Ark**58, 278**SW**645 (where both parties were mistaken).
1585–70 170**Ark**58, 278**SW**645; 33**GaA** 676, 127**SE**663; 37**GaA**458, 140**SE**431; 213**Ky**363, 280**SW**1095 (rule allowing no recovery for shortage less than ten per cent); 148**Md**318, 129**A**364. **Relief granted in equity** for serious difference between actual and estimated amount sold. 170**Ark**58, 278**SW**645. **In Georgia,** etc. 37**GaA**458, 140**SE**431.
1586–73 37**GaA**458, 140**SE**431.
1586–74 Inference of fraud from large discrepancy held merely preliminary to issue of actual fraud. 37**GaA**458, 140 **SE**431.
1588–85 33**GaA**676, 127**SE**663; 41**GaA** 771, 154**SE**820; 100**NJEq**73, 134**A**875.
1589–90 227**Ky**677, 13**SW(2d)**1014.
1590–91 170**Ark**58, 278**SW**645.
1591–96 170**Ark**58, 278**SW**645.
1591–98 170**Ark**58, 278**SW**645.
1592–7 39**F(2d)**194; **Ga** 155**SE**182; 104**WVa**200, 139**SE**714.
1593–16 170**Ark**58, 278**SW**645.
1593–18 170**Ark**58, 278**SW**645.
1595–28 92**Fla**48, 109**S**257; **Kan** 292**P**

747; 245Mich665, 224NW321.
1593-41 37GaA458, 140SE431.
1596-42½-New. Purchaser under executory contract requiring credit on purchase price for shortage cannot recover for shortage discovered after acceptance of deed not containing provision. NM 288P1047.
1596-44 218Ala195, 118S379 (construction of provision authorizing mortgage); 83CalA596, 257P157; 324 Ill 77, 154NE426. **Construction of particular contracts.**-69CalA432, 231P344. **Alternative performance.**-105Conn218, 134A 792. **Vendor contracting to sell property part for cash and part by assumption of mortgages** held not required to accept payment by cash alone. 324 Ill 77, 154NE426.
1597-53 225AppDiv102, 232NYS224.
1598-62 179Ark678, 18SW(2d)323. See also 334 Ill 566, 166NE56. **Agreement to deliver mortgage** is not satisfied by tender of document containing covenant against registration thereof. BC [1929] 4DomLR396.
1599-72 Mortgage held sufficient after cure of defect in power under which executed by purchaser's attorney-in-fact. 29PortoRico 901.
1599-78 Contract calling for delivery of certificate of deposit of certain bank as part payment of purchase money is not complied with by tender of such certificate of deposit after bank has become insolvent. 51ND869, 201NW165.
1599-80½-New. Vendor is not obliged to accept bond of assignee of contract of sale where contract provided that purchaser would give a bond. 100NJEq 258, 135A682.
1600-84½-New. Purchaser, instructed to pay mortgagee, having made check payable to vendor and mortgagee, is liable to vendor where drawee bank failed. 180Ark33, 20SW(2d)314.
1600-85 238Mich343, 213NW80. **Agreement for placing certificate of deposit in escrow.**-Vendor who causes purchaser to make payment of matured interest in form of certificate of deposit payable to himself placed in escrow with issuing bank pending efforts to make title merchantable must bear loss resulting from failure of bank. 206 Iowa848, 218NW 488. **Failure to pay note at maturity** puts purchaser in default. 90CalA311, 265P968.
1600-88½-New. Vendee's check cashed by vendor's agent, authorized to receive payment, before expiration of time limit for payment, is sufficient payment. 68CalA657, 229P998.
1601-92 69CalA432, 231P344. **Purchaser suffers loss** of insolvency of bank in which money has been deposited pending vendor's perfection of deed. 205 Iowa834, 210NW797.
1601-97½-New. Any payment made by vendee to his vendor after notice that vendor had conveyed to third person is made at vendee's peril. 50SD378, 210 NW198.
1601-99 129Kan453, 283P636 (assumption by assignee of contract); **Construction of particular agreements as to assumption of liability.**-263Mass409, 161 NE612.
1602-2 TexCivA 5SW(2d)197.
1602-3 Not liable for incumbrances not shown by record. 174Ark406, 295SW 366.
1602-9½-New. Where purchaser was required to pay taxes, vendor could not complain if he received money which should have been paid to county treasurer. 70Utah49, 257P1058.
1602-9½-New. Where buyer agrees "to assume a first mortgage," natural and reasonable inference is that mortgage is to be procured by vendors, 261Mass403, 158NE789.
1602-9¼-New. and purchaser is not required to arrange for mortgage but only to assume it when obtained by defendants. 261Mass403, 158NE789.
1602-13 Vendee not liable to vendor on discharge of lien by third party.-40 F(2d)232 (tax bills paid by city).
1602-15 261Mass403, 158NE789. **Rescission.**-261Mass403, 158NE789.
1603-20 Where purchaser was not required to pay installments of assessment which he agreed to pay because city issued bonds therefor, vendor cannot recover amount. MoA 14SW(2d)685.
1603-20½-New. Purchaser retaining undisputed possession of premises may not defeat action to recover on his assumption agreement because of some defect in title. 201 Iowa561, 207NW610.
1603-20½-New. Evidence held sufficient to show parties did not contemplate furnishing of new abstract but had existing abstract in mind. 201 Iowa561, 207NW610.
1603-22 95CalA106, 272P307; 246Mich 272, 224NW432; 20SaskL318, [1926] 1 DomLR411, [1926] 1WestWkly186. **Vendor held entitled to rescind negotiations and return payment on Sept 16 for purchaser's delay** in performing contract executed August 4, no time being specified. 128Misc618, 219NYS99. **But a mere threat to stop payments** or intention to abandon does not constitute a breach. TexCommnA 27SW(2d)129.
1603-24 TexCivA 21SW(2d)594 (estoppel to claim title).
1603-25 CalA 258P120.
1603-26 In absence of tender or showing of ability to pay amount due and carry out contract, refusal of relief from forfeiture on equitable grounds is justified. 242Mich110, 218NW680.
1604-30½-New. Where purchaser of land has by his own acts put it out of vendor's power to give him good title he can not avoid liability under agreement on that ground. Can [1927] 2DomLR 87.
1604-30½-New. Failure to pay taxes becoming due after tender of payment of last note for price is not ground of forfeiture of rights under contract. 83Colo 95, 262P923.
1604-30¼-New. Failure of purchaser to obtain insurance does not affect his right to deed where he tendered full amount of balance due on purchase price. 83Colo 95, 262P923.
1604-32 72CalA725, 238P150; 242Mich 73, 218NW789; BC [1929] 4DomLR 617.
1605-39 189NC434, 127SE521 (failure of purchaser to pay rent, taxes, insurance, and repairs in consideration of extension held to be breach of covenants and not to work forfeiture).
1605-40 CalA 266P376; 94CalA742, 271P1098; 96CalA111, 273P856; CalA 287P542; 325 Ill 559, 156NE754; 208 Iowa417, 224NW508; 238Mich343, 213 NW80; 246Mich272, 224NW432. See also 20SaskL318, [1926] 1DomLR411, [1926] 1WestWkly186. **Statutes postponing time of forfeiture.**-34Ariz274, 271P30.
1605-41 36 OhA19, 172NE698. But see Kan 289P975. **That purchaser has made lasting and valuable improvements** does not defeat vendor's right of forfeiture. Kan 289P975.
1606-44 325 Ill 38, 155NE784.
1606-49½-New. Although notice to vendee may be insufficient as notice of forfeiture it may be sufficient as notice of rescission. 238Mich343, 213NW 80.
1606-49½-New. Where purchaser tenders balance due on price before forfeiture is declared, failure to take out insurance is immaterial. 83Colo 95, 262 P923.
1606-51 CalA 287P542 (holding that the removal of house and trees did not excuse performance); 98Fla1103, 125S 521; 333 Ill 629, 165NE148; 83NH47, 138A297 (vendor estopped by oral extension of time).
1606-53 69CalA621, 232P162; 46 Ida 82, 267P447; 234Mich478, 208NW436 (failure to furnish abstract of title as agreed); 50SD203, 208NW981.
1607-54 218AppDiv291, 218NYS197; SD 224NW937.
1607-55 218AppDiv291, 218NYS197 (purchaser can refuse to perform on vendor's conveyance to third person).
1607-57½-New. Fraud of vendor inducing making of contract is excuse for withholding payments pending action for damages. 72CalA725, 238P150.
1607-58½-New. Service of writ of garnishment on purchasers under land contract in action against vendors suspends all rights under contract till garnishment is disposed of, notwithstanding time is of essence of contract. 152Wash382, 278P174.
1607-59 205Cal 82, 269P924; 46 Ida69, 266P431; 329 Ill 555, 161NE91.
1607-59 Crop failure induced by unskillful farming held not ground for relief under crop payment agreement. Alta [1927] 3DomLR240.
1608-61 89CalA202, 264P493; 246Mich 272, 224NW432.
1608-66½-New. Difficulty in borrowing money does not excuse failure to comply with notice to meet overdue payments. 68CalA226, 228P681.
1608-66⅓-New. Allegation that after purchase and before maturity of notes land became involved in litigation and vendor not in position to make title not excuse under terms of bond for title. 160Ga459, 128SE584.
1608-66¼-New. Payment of large sum in one month on installment contract does not relieve vendee of payment of stipulated installment each month thereafter. 68Utah12, 249P114, 48ALR267.
1608-66⅙-New. Vendor's obligation to finish construction of building is not condition precedent to vendee's obligation to make installment payment at fixed time, where no time was fixed for performance of vendor's obligation which was made impossible subsequent to time when time for performance of vendee's obligation was fixed. 237Mich 206, 211NW643.
1608-66⅙-New. Claim for damages for misrepresentation or offering to pay in future are insufficient to relieve purchaser of forfeiture. 199Wis514, 226NW 955.
1608-69 79CalA443, 249P886. See also IndA 169NE686(2dcase). **Equitable relief against forfeiture** may be granted vendee where vendor waives it. 168Ark 188, 269SW358. **Evidence held sufficient to show waiver from conduct.**-Vendor's agreement to apply rents as payments, preventing vendee from borrowing money by placing long time mortgages on land, and transferring notes without offer to redeem. 168Ark 188, 269SW358. **Failure of vendor to tender deed.**-50SD203, 208NW981.
1609-70 79CalA443, 249P886.
1609-71 333 Ill 629, 165NE148; Tex CivA 5SW(2d)878.
1609-72 26F(2d)393.
1609-75 But see 94CalA742, 271P1098.
1610-79½-New. Vendor entering into possession after declaring forfeiture does not waive terms of contract by seeking reimbursement for taxes. 325 Ill 559, 156NE754.
1610-79⅓-New. Where vendor repudiates contract for sale on sole ground that her signature had been obtained by fraud, objection to sufficiency of purchaser's tender was waived, in purchaser's suit for specific performance. 99 CalA140, 277P1086.
1610-79¼-New. , nor by vendor telling purchaser prior to due date that he would accept installment if tendered subsequent to due date. 130 Or110, 279 P274 (where purchaser did nothing in reliance on vendor's statement).
1610-80 73CalA98, 238P134; 87CalA 772, 262P419; 89 IndA431, 155NE539; 70Utah49, 257P1058. But see 242Mich 110, 218NW680.
1610-81 43 Ida292, 252P494.
1611-83½-New. Acceptance of past-due installment is not waiver of vendor's right to refuse delivery of deed till paid, though encumbrances exceeded agreed amount. 89CalA202, 264P493.
1611-84 77Colo 546, 238P38. **Permanent waiver of payment** must be supported by consideration. 92CalA641, 268 P697 (payment held not permanently waived).
1611-85 73CalA98, 238P134; 208 Iowa 417, 224NW508; 234Mich80, 208NW50.
1611-86 68CalA226, 228P681; 79CalA 443, 249P886; IndA 169NE686(2dcase); TexCivA 5SW(2d)878. But see 234Mich 80, 208NW50. **Mistaken demand by vendor for payment of street assessments in addition to overdue installments** does not necessarily show bad faith. 68CalA 226, 228P681. **Notices held reasonable time.**-68CalA226, 228P681 (thirty-six days where notice given by mail by ven-

dor in Los Angeles, California, to purchaser in El Paso, Texas). **Purpose of notice.**–68CalA226, 228P681. **Question of what is reasonable time** is one of fact to be determined by trial court upon facts of particular case. 68CalA226, 228P681. **Sufficiency of notice.**–68CalA226, 228P681. **Tender of deed subsequent to time when purchase price was due** places purchaser in default and contract terminates on purchaser's failure to perform. 85CalA399, 259P479. **Waiver of time and forfeiture clause** does not perpetually postpone performance by vendor. 202Iowa1128, 211NW367.

1611–86½–New. Time which was originally of essence of contract ceases to be essential upon subsequent waiver of defaults. 73CalA98, 238P134.

1611–86¼–New. and becomes material thereafter only if vendor again makes it essential by proper notice and demand. 73CalA98, 238P134.

1611–86¼–New. Agreement without consideration extending time has been held not to estop vendor from enforcing contract. 240Mich23, 214NW951.

1612–97 202Iowa640, 210NW784; 167Minn453, 209NW323, 46ALR816.

1612–99 123Or377, 260P1002.

1612–98 215Ala12, 108S858; 238Mich245, 213NW119; 161Ga403, 131SE75; 201Iowa840, 208NW312; 121Kan3, 245P1017; 167Minn453, 209NW323, 46ALR816; 213AppDiv523, 211NYS22; 50ND408, 196NW312; 50ND616, 197NW595; 52ND445, 203NW178. **In Ohio.**–19OhA210. **Mere execution of contract** vests no title or interest in land in purchaser. 142Wash411, 253P640. **Possession under contract by purchaser** who performed until ousted vests equitable title in him. 142Wash411, 253P640. **Purchaser in possession** has contingent equitable interest. 240Mich41, 214NW948. **Though contract is in name of others who advanced down payment** purchaser in possession of land, using and occupying it as home, is equitably and in fact the owner. 238Mich245, 213NW119. **Where agreement under which purchaser is in possession** provides for nullification of contract on purchaser's failure to pay taxes, it is mere agreement to sell and not sale. 159La981, 106S536. **Buyer's equity is encumbrance on owner's title.** 153SC496, 151SE63.

1612–99 232Mich77, 205NW172; 167Minn453, 209NW323, 46ALR816; 213AppDiv523, 211NYS22; 189NC434, 127SE521; 50ND408, 196NW312; 50ND616, 197NW595. **When vendor has been paid in full,** he is bare trustee of land. Sask [1929] 2DomLR77.

1612–1 201Iowa840, 208NW312; 167Minn453, 209NW323, 46ALR816; 213AppDiv523, 211NYS22; 133Misc581, 232NYS680; 50ND616, 197NW595; 123Or377, 260P1002.

1613–2 167Minn453, 209NW323, 46ALR816.

1613–2½–New. Purchaser cannot surrender any rights of vendor. 240Mich41, 214NW948.

1614–27 92CalA526, 268P682; 207Iowa155, 222NW530; 158La982, 105S36; 250Mich593, 231NW80; 251Mich512, 232NW178; 323Mo404, 19SW(2d)287. **Subvendee.**–250Mich593, 231NW80.

1615–32 TexCivA 4SW(2d)572. **If the purchaser was already in possession,** etc. 153Wash168, 279P388 (original entry is not under vendor).

1618–36 243IllA438.

1617–50½–New. Where grantor acquires tax fieri facias against land by transfer, grantor is not entitled to recover taxes on land, but tax fieri facias inures to benefit of claimant, and transferee cannot levy same against claimant. 169Ga298, 150SE156(1stcase).

1619–79 CalA 279P165 (possession of crop after forfeiture).

1620–2 31Ariz147, 250P993, 994 [cit Cyc]. But see TexCivA 25SW(2d)246.

1621–3 31Ariz147, 250P993, 994 [cit Cyc]; 252Mass504, 148NE134; 50RI183, 146A480.

1621–5 78CalA334, 248P526; Sask [1929] 3DomLR488.

1621–6 Purchaser is in constructive possession where contract expressly gives him right of possession, though he is not in personal possession. 242Mich110, 218NW680.

1621–7 38Wyo140, 265P25, 27 [citCyc]. **There is an implied right of possession,** etc. 31Ariz147, 250P993. **Vendee in land contract** holders for deferred payments is entitled to possession on default of assignee of his vendee in second contract. 234Mich52, 207NW886.

1621–8 50RI183, 146A480.

1621–9 31Ariz147, 250P993, 994 [cit Cyc].

1622–13 Where grantor reclaimed vendor's lien vendee's possession becomes wrongful on his repudiation of his purchase or default. 115Tex193, 280SW158.

1622–13½–New. Vendor's breaking and entering into dwelling house in lawful possession of purchaser during latter's absence constitutes trespass. 133Or581, 291P1009.

1622–13½–New. Purchaser in possession by delivering quitclaim deed to vendor surrendered right to possession. SD231NW951.

1622–18 The taking possession by purchaser without authority before time for deed, is not such breach of his contract as will destroy his right to specific performance. 320Ill586, 151NE491.

1622–19 252Mass504, 148NE134 (tenant in possession becoming purchaser under contract for payment in installments must pay rent until he becomes entitled to his deed and cannot accelerate time by premature tender of final installment).

1622–22 Where vendee has defaulted in payments and abandoned premises, entry of vendor with caretaker for protection of property is not trespass breaching contract. 136Wash352, 240P6.

1623–28 See also 32PortoRico264.

1623–29 Even without lease, if purchaser allows vendor to remain in possession right to possession or civil possession is transferred to vendee. 32PortoRico264.

1623–29½–New. Vendor has no right to take forcible possession of house during absence of purchaser and rent it to another in order to keep insurance in force. 12LaA541, 124S783.

1623–29¼–New. Where purchaser's assignee terminates contract and notifies vendor, vendor is entitled to immediate possession. Mont 286P691.

1623–32 236Mich351, 210NW300 (vendee in possession with right to sell lumber land and apply proceeds to purchase price is not trespasser).

1623–36½–New. Where purchasers remain in possession pending litigation as to rescission of contract, they assume relation of trustee. 132Misc480, 230NYS116.

1624–37½–New. Mere entry of prospective premises by purchasers with vendor's knowledge does not give them rights of tenants in possession. 104CalA523, 286P451.

1624–37¼–New. Vendor has right to go on premises to protect his interests. 136Misc500, 241NYS202.

1624–39 77CalA786, 247P543.

1624–42 Purchaser is entitled to remain in possession till crop is made where vendor is unable to convey marketable title. 84Colo82, 267P1005.

1624–46 Vendor has right of action only for value of use and occupation of property from and after time of cancellation, without any right to crops raised thereon. 204Cal524, 269P443.

1624–47 103NJEq398, 143A556.

1625–51 236Mich351, 210NW300.

1625–55 Injuries while purchaser was optionee.–38GaA408, 144SE47.

1626–61 165Ga366, 140SE761.

1627–71 201Iowa327, 207NW372; 120Kan725, 244P861; 164Minn366, 205NW262; 167Minn295, 208NW1001; 315Mo811, 288SW774; 52ND707, 204NW338 (pass to purchaser's assignee also); 133Or407, 291P387; 116Tex337, 291SW219; TexCivA 3SW(2d)932; 154Wash110, 281P9, 66ALR1417. **There can be constructive severance** of growing crop as between vendor and vendee. MoA 271SW857. **Intention of parties exempting crops from conveyance** will be given effect by courts. 133Or407, 291P387.

1627–73 92CalA62, 267P937.

1627–74 102CalA10, 282P522. **Vendor instituting suit to foreclose vendor's lien** has no right to ungathered crops as against vendee till title to land and growing crops has passed to him by foreclosure sale. TexCivA 16SW(2d)894.

1627–75 CalA 279P165 (under provision of contract, after default and forfeiture, vendor could not assert any right to crop nor to appointment of receiver); 52ND707, 204NW338 (rule applies to purchaser's assignee). **Particular provisions.**–102CalA10, 282P522; 52ND707, 204NW338; 54ND87, 208NW974. **Evidence held not to show** separate contract for lien on crop after time fixed in principal contract. 54ND87, 208NW974.

1627–77 69CalA379, 231P364.

1628–78 Alta [1930] 3DomLR959.

1628–78½–New. As respects crops, purchaser in default under executory contract for purchase of real estate, who continues in possession after notice of cancellation, is adverse claimant, and all privity between him and vendor ceases on such notice. 204Cal524, 269P443.

1628–78¼–New. One taking possession under oral contract to purchase without authority of owner is liable for value of crops taken on negotiations for purchase falling through. 104CalA523, 286P451.

1628–80 Mo 22SW(2d)778.

1628–82 Cal 284P905; 101WVa253, 132SE489, 490 [citCyc].

1628–84 Advance payments of rent.–92CalA329, 268P463.

1628–86 178Ark635, 12SW(2d)18.

1628–87 130Kan620, 287P241.

1629–95 Mo 22SW(2d)778.

1629–97 Tenant occupying premises which he had contracted to purchase held liable in damages for occupation prior to conveyance. 258Mass383, 155NE193.

1629–99 5LaA55; 105NJL408, 144A812. **Offsets by purchaser.**–169La258, 125S69. **Storing building materials on premises** to be purchased is not taking possession. 12LaA430, 125S164.

1629–2 249Mich603, 229NW417.

1631–16 221Ala209, 128S396 (vendor in possession after vendee entitled to possession).

1631–19 Payable to grantee.–174Minn233, 219NW79.

1632–22½–New. Where vendor reserves rent tenant is liable to him therefor. Mont 288P616.

1632–25 In absence of stipulation to contrary, vendor is bound to protect property in hands of vendee against charges, mortgages, and privileges burdening property at time of sale. 11LaA436, 123S492.

1632–29 133Misc390, 232NYS635; 225AppDiv567, 233NYS588.

1633–32 Purchasers owing balance greater than amount of lien on lots and not tendering balance due and demanding clear title cannot complain. 154Wash254, 282P58.

1633–32½–New. Defending foreclosure suit.–Purchaser is not required to litigate validity of foreclosure of mortgage executed by vendor. 240Mich41, 214NW948.

1633–37 123Or377, 260P1002; 133Or205, 289P1048 (covenant that there would be no delinquent taxes against land held to mean taxes due and unpaid and constituting lien). **Construction of contract.**–217Ala511, 116S681. **Rights and liabilities of parties are fixed by contract** and not by date of execution and delivery of deed. 217Ky635, 290SW503.

1633–38 83NH582, 145A782(1stcase).

1633–43 But see 179Minn298, 229NW127.

1633–43½–New. Under ordinance authorizing refund to "property owners" of assessment paid "by them," owner who paid assessment held entitled to refund, as against grantee. 235Ky359, 31SW(2d)604 (right to refund depends solely upon ordinance).

1634–44 174Ark33, 294SW5 (taxes for "current year" pro rata share of which is payable by vendor refers to calendar year). **Particular contracts.**–217Ky635,

290SW503; NJSup 150A763.
1634-46 250Mich583, 230NW919.
1634-47 Assessments for improvements, etc. But see 217Ky635, 290SW 503.
1635-48 But see [1930] 4DomLR868 (vendor is primarily liable for taxes).
1635-50 217Ky312, 289SW273; 158La 321, 104S59 (cost of paving street); 118 Okl 244, 247P389; 148Wash512, 269 P812 (deed construed).
1635-52 Iowa 229NW666.
1635-55 221Ky798, 299SW985; 179 Minn298, 229NW127; 123 Or377, 260P 1002. Particular provisions.-98Fla1103, 125S521; 241NY268, 149NE853; 70 Utah234, 259P406. Payment must be within reasonable time after due and before overdue. 47RI 438, 133A815.
1636-56 Or 293P420.
1636-60 285Pa112, 131A698; TexCivA 5SW(2d)197.
1637-63 123Kan72, 254P362; 123 Or 377, 260P1002; 47RI 438, 133A815.
1637-66 47RI 438, 133A815.
1637-68 118 Okl 244, 247P389. In Alberta.-Alta [1929] 3DomLR867.
1637-69½-New. or he may deduct it from purchase price; 193Wis305, 214 NW345.
1637-81 307Mo 462, 271SW370.
1638-85 106Conn484, 138A503; Tex CivA 11SW(2d)551.
1639-88 69CalA211, 230P963; 106Conn 484, 138A503.
1639-97 Purchaser cannot execute chattel mortgage on dwelling house erected by him where he has forfeited or surrendered contract and remains in possession as tenant and thereby invest mortgagee with any right against owner of realty. 201 Iowa190, 206NW 828.
1639-98½-New. Under contract by vendor to improve premises, providing that, if vendor failed to fulfill contract, purchaser should have right to do so or cause premises to be improved and apply cost on mortgage debt, action by purchaser was wholly optional. CalA 273P1070.
1640-1 Expired insurance.-223Ky244, 3SW(2d)634.
1640-2 221Ala322, 128S600 (attorney's fees for undelivered deed).
1640-6 120 Oh19, 165NE350.
1641-12 167Minn453, 209NW323, 46 ALR816.
1641-13 200 Iowa44, 204NW235; Tex CivA 3SW(2d)932.
1641-14 200 Iowa44, 204NW235; 167 Minn453, 209NW323, 46ALR816; MoA 20SW(2d)946 (destruction after purchaser exercises option to purchase); 129Misc190, 220NYS689; 32 OhA66, 166 NE908; TexCivA 3SW(2d)932. Where vendor on vendee's demand made repairs to building damaged by fire, vendee cannot complain of vendor's delay nor question expenditures. 129Misc190, 220NYS689. Infancy of vendor does not take case out of rule. 129Misc190, 220 NYS689. Only where title has passed and purchaser neglected to take possession, does purchaser assume risk of destruction. 13LaA390, 128S310.
1642-21 Me 151A544.
1642-28 Where purchaser has right to obtain deed by paying one-half of purchase price, vendor bears risk of destruction. 13LaA390, 128S310.
1643-34 201 Iowa928, 208NW276, 46 ALR1124.
1644-51 105NJL408, 144A812.
1644-54 200 Iowa44, 204NW235.
1644-58 200 Iowa44, 204NW235 [cit Cyc].
1644-60 200 Iowa44, 204NW235 [cit Cyc].
1644-61 200 Iowa44, 204NW235 [cit Cyc].
1644-62 MoA 20SW(2d)946. Carrying out contract without abatement of price after destruction of building by fire does not affect right of purchaser to have proceeds of insurance applied to satisfaction of price or restoration of property. MoA 20SW(2d)946.
1645-67 129Kan111, 281P891; 129 Misc190, 220NYS689.
1645-68 129Misc190, 220NYS689.
1645-69½-New. In absence of agreement or understanding with subsequent purchaser, as to application of insurance money received by vendors under fire policy, containing loss payable to vendors as their interest might appear clause, subsequent purchaser had no right to direct its application. 244Mich 49, 221NW154.
1645-71 37GaA257, 139SE681.
1646-85 95CalA456, 273P50; 118 Or 182, 245P729, 732 [citCyc].
1646-89 95CalA456, 273P50.
1646-94 85Colo 406, 276P676.
1646-95 Interest on purchase price.-151Va240, 144SE444.
1646-2 167La884, 120S585.
1648-15 TexCivA 275SW494.
1648-15½-New. When owner sells land to one person and timber to another, purchaser of land has no more rights against purchaser of timber than vendor had. Ont [1927] 2DomLR776.
1648-17 32PortoRico 180. In Porto Rico.-32PortoRico 180.
1648-18 8F(2d)115; 89CalA535, 265P 292; 104Conn285, 132A459; 35GaA686, 134SE790; 218AppDiv291, 218NYS197; 21 OhA429, 152NE323; Sask [1929] 3 DomLR488. Where prior contract of sale was binding upon assignees, grantor of vendor held obligated to perform covenant to improve property. 21 OhA 429, 152NE323. Liability of successive vendees on covenants.-21 OhA429, 152NE 323.
1649-19 35GaA686, 134SE790.
1651-24½-New. Conveyance of land subject to contract to sell to third person carries with it title and right to collect amount owing by such third person without delivery of original contract. 201 Iowa333, 207NW338.
1651-24½-New. Obstruction hindering flowage known to purchaser gives no right of action. 220Ky322, 295SW156.
1651-25 170Ark1146, 282SW995 (mortgage); 32PortoRico 180 (applying Civ. Code § 1376).
1651-26 163Ga471, 136SE440. Record of bond of title is notice to world of rights and interest of obligee and of subsequent transferees. 163Ga471, 136SE 440.
1651-27½-New. Statute providing that if same property is sold to different vendees it shall belong to person acquiring it who first recorded it in registry is not applicable where conveyance was made by person who had no title. 8F (2d)115.
1651-27½-New. Subsequent purchaser accepting payment of installments from prior contract vendee is chargeable with notice of terms of such vendee's contract. 21 OhA429, 152NE323.
1653-42 35GaA552, 133SE744; 218App Div291, 218NYS197 (vendee may so treat such conveyance).
1653-44 Grantee with notice of prior contract of sale, who pays taxes payable by vendee, is entitled to personal decree for same against vendee, and grantor cannot treat it as payment to be deducted from amount owed by him to vendee. 236Mich351, 210NW300. Purchaser with notice of prior contract of sale is not entitled to reimbursement from vendee for sums paid in perfecting his title, nor may he convey to vendee less than whole title. 236Mich351, 210 NW300.
1654-52 294Pa221, 144A91. Where purchaser of undivided interest in land had knowledge that vendor owed estate certain amount of rent, interest thus purchased was properly charged with rent owing by vendor. 178Ark140, 9SW (2d)1058.
1655-60½-New. Purchaser leaving vendor to secure release of mortgage held chargeable with vendor's knowledge and acts. SD 230NW233.
1655-62 But see TexCivA 275SW307.
1655-64½-New. Right of holder of indebtedness assumed by purchaser is derivative one and not referable to separate and independent contract between them. TexCivA 275SW307.
1655-64½-New. Therefore if promise of purchaser because of fraud or for lack of consideration is not enforceable by promisee, it is not enforceable by holder of indebtedness assumed. TexCivA 275 SW307.
1655-65 Payment is required to be made by purchaser to effect redemption after foreclosure of contract and mortgage. 57ND128, 220NW625.
1656-66 Where purchaser takes land subject to charge, principal of which is to be paid at death of party named, in action of assumpsit to recover principal sum stated in charge, judgment should be against defendant de terris. 294Pa 221, 144A91.
1658-79 Sask [1929] 2DomLR77.
1659-85 180Ark238, 21SW(2d)162.
1659-87 221Ky627, 299SW549. Unrecorded conveyance held not invalidated by recording law as to creditor with actual notice. 173Minn225, 217NW136. Rights of attaching creditors are to be measured by rights of execution purchaser as regards protection of recording act, in absence of clearly expressed intention on part of legislature to extend provisions. 84Mont276, 275P278. In Montana.-84Mont276, 275P278.
1662-1 234Mich252, 208NW60. Where vendee has fraudulently assigned his interest in land contract, judgment creditor levying on vendee's interest cannot sell such interest until such assignment has been set aside by court of equity. 234Mich252, 208NW60.
1663-15½-New. Quitclaim deed executed by vendor for purpose of levy and sale under execution against vendee need not be delivered to vendee. 168Ga607, 148SE515.
1663-15½-New. Quitclaim deed recorded after vendor's death but before levy of execution is sufficient for purpose of levy of execution on judgment against purchaser for unpaid purchase money. 168Ga607, 148SE515.
1663-16 89CalA535, 265P292; 162Ga 604, 134SE613; 247 IllA265; 233Mich 288, 206NW542 (not fraud on vendee or his creditors where vendee in default and new contract subject to vendee's rights and conditional or successful foreclosure without redemption therefrom).
1663-18 242Mich73, 218NW789.
1663-19 162Ga604, 134SE613.
1663-19½-New. Assignee must be person in case.-35GaA631, 134SE349.
1663-19½-New. Vendor cannot burden land with easement where vendee is not in default. 78CalA334, 248P526.
1663-20 32Ariz331, 258P256; 201 Iowa 333, 207NW338; 215Ky465, 284SW 1094; 236Mich351, 210NW300; 250Mich 311, 230NW184 (takes subject to defense of fraud); 176Minn267, 223NW288; 51 SD72, 212NW512. Assignment of contract to sell by one who has previously conveyed land subject to contract gives assignee no right to money due under contract as against grantee in prior conveyance. 201 Iowa333, 207NW338.
1664-22 52SD292, 217NW397, 59ALR 947.
1664-23 89CalA535, 265P292; 247 IllA 265; 201 Iowa333, 207NW338; 236Mich 351, 210NW300.
1665-30 247Mich312, 225NW600.
1665-31½-New. Effect of assignment as between vendor's assignee and purchaser.-Assignee is not bound to record assignment. 78Mont445, 253P890.
1665-31½-New. and failure to do so does not affect purchaser's right to deal with assignee as vendor's representative prior to record of any instrument showing vendor had conveyed to another. 78Mont445, 253P890.
1665-33 196Cal 8, 235P981; 200Cal 434, 253P718; 323 Ill 443, 154NE231; 242Mich73, 218NW789; 52ND169, 201 NW691 (contract requiring consent of vendor); 118 Or182, 245P729, 731 [cit Cyc]. Sale by vendee without assignment by vendor held to leave land on open market. 234 IllA276. Validity of provisions as to assignment.-242Mich 110, 218NW680.
1666-34 227AppDiv292, 237NYS460.
1667-35 118 Or182, 245P729, 731 [cit Cyc].
1667-36 118 Or182, 245P729, 731 [cit Cyc].
1667-37½-New. Where contract to sell was to be forfeited if lessee transfers without consent of lessor, forfeiture is not presumed from mere rental of premises by lessee. 214Ala135, 107S50.
1667-37½-New. Where contract for sale is to be forfeited on transfer by lessee

without consent of lessor, it is construed merely as a means to prevent transfer without consent. 214Ala135, 107S50.

1667-40 320 Ill 308, 150NE913.

1667-41 320 Ill 308, 150NE913; La 129 S663; 132Misc498, 230NYS141.

1667-42 320 Ill 308, 150NE913; 243 Mich578, 220NW699; 249Mich420, 228 NW685; 155Miss12, 119S192. **Where there is no transfer of title by deed or otherwise,** assignee takes subject to all equities that may be urged by vendor. 132Misc498, 230NYS141.

1667-50 244Mich220, 221NW177; 54SD 250, 223NW59.

1668-52 Where contract provides for bond and mortgage of purchaser to secure deferred payment, vendor cannot be compelled to accept obligation of assignee instead of that of original purchaser. 92PaSuper202.

1668-52½-New. Moneys paid to vendor under land contract by second assignee of purchaser's equity should be returned to him on finding that first assignment is valid. 248Mich195, 226NW828.

1668-54 323 Ill 443, 154NE231; La 129 S663; 218AppDiv519, 218NYS644, 654 [citCyc]; 52ND707, 204NW338; 291Pa 472, 140A270. **Assignee acquires purchaser's lien** for purchase money paid over. 218AppDiv519, 218NYS644.

1669-59 218AppDiv519, 218NYS644. But see 227AppDiv292, 237NYS460.

1669-60 Vendor, or person claiming under him, may set up, against assignee of purchaser, fraud of purchaser. 132Misc 498, 230NYS141.

1669-62 La 129S663.

1669-64 218AppDiv519, 218NYS644.

1669-68½-New. Assignee of option may assert assignor's right to rescind for incumbrance though he had constructive notice thereof at time of assignment. 40 F(2d)583.

1670-69 239Mich383, 214NW94.

1670-74 52ND707, 204NW338, 340 [citCyc]; 52ND707, 204NW338. **Notice of cancellation** must be served on assignee by vendor permitting assignment by purchaser. 52ND707, 204NW338. **Service of notice of cancellation** by vendor permitting assignment on vendee alone does not affect rights of assignee to complete contract. 52ND707, 204NW338.

1670-74½-New. Rights of original optionee under option contract are not destroyed by assignee's notice of rescission of original contract. 202 Iowa993, 210NW133.

1670-74½-New. Especially is such notice of rescission inconsequential where record shows that original option had no value. 202 Iowa993, 210NW133.

1670-74¼-New. Assignee of option contract may not, upon rescinding, recover of original optionor with whom he had no contract amount paid for option. 202 Iowa993, 210NW133.

1670-74⅓-New. Upon rescission by assignee after being put in possession, his liability for use and occupation is measured by reasonable value thereof, and not by provisions of rescinded contract. 202 Iowa993, 210NW133.

1670-74¼-New. Upon rescission, assignee may recover from assignor value of betterments assignee has necessarily been compelled to place on land. 202 Iowa993, 210NW133.

1670-79 Where there is no transfer of title by deed or otherwise, assignee takes subject to all equities by assignee of vendee through whom he takes. 132Misc498, 230NYS141.

1671-81½-New. Vendor, who secures from ultimate transferee of bond for title surrender thereof, has been held not liable to intermediate transferees. 168 Ga792, 149SE201.

1671-83 24F(2d)494; 169Ga419, 150SE 593; 157Md416, 146A385; 252Mich39, 232NW701; Mich 233NW177; Mich 233 NW213; 165Minn245, 206NW391, 392 [citCyc]; 52SD292, 217NW397, 59ALR 947. Contra 218AppDiv519, 218NYS644. **Mere assignment of bilateral executory contract** does not place vendee's assignee under any personal engagement to vendor where there is no privity between them. 250NY159, 164NE890(2dcase).

1671-84 113Nebr821, 205NW250 (assignee of purchaser who had paid nothing on purchase price has been held liable to vendor for whole purchase price, latter having succeeded to interest of purchaser under his contract of sale to assignee); 132Misc498, 230NYS141; 52 SD292, 217NW397, 59ALR947.

1671-85 34Ariz49, 267P598; 204 Iowa 153, 214NW522; 157Md416, 146A385; Mich 233NW213; 250NY159, 164NE890 (2dcase). **Defense that vendor had permitted foreclosure of mortgage** is not available where both purchasers had taken subject to debts. 34Ariz49, 267 P598. **In suit to foreclose land contract,** assumption by defendant's assignee of obligations of contracts, cannot be extended to hold him for sums paid by plaintiff upon mortgages on premises. 245Mich224, 222NW169. **Effect of acceptance of assignment** containing assumption clause. Mich 233NW213.

1671-88½-New. If by conduct assignee assumes personal responsibility of contract with owner of land, his liability is no greater than his vendor's liability, 31Ariz187, 251P453.

1671-86⅓-New. and where, under contract between owner and assignee's vendor, there is provision for liquidated damages and owner retained price paid and repossessed himself of land upon default, such liability of vendee is released. 31Ariz187, 251P453.

1671-86¼-New. Assignee of purchaser on conditional assignment held obligated though purchaser had not performed condition. 219AppDiv537, 219NYS383.

1671-86⅓-New. Purchaser's assignee who is in default held unable to recover earnest money. 219AppDiv537, 219NYS 383.

1671-86¼-New. While mere assignment of contract for purchase of real estate does not cast upon assignee personal liabilities imposed by contract on assignor, it is otherwise if assignee claims benefits of performance. 95CalA456, 273 P50.

1671-88 202 Iowa993, 210NW133; 165 Minn245, 206NW391, 392 [citCyc]; Mich 233NW213; 115Nebr136, 211NW998; 103NJL541, 138A569; 92PaSuper202; TexCivA 296SW925.

1672-91 Failure of assignee to pay purchase price to original vendor in accordance with assignee's contract with assignor whereby property was lost to assignor renders assignee liable for damage sustained. 118 Or182, 245P729. **Payment of mortgage by assignor.**–66 Utah82, 240P1105. **Assignee must protect his interest** as against third persons. 249Mich603, 229NW417. **Evidence held sufficient.**–250Mich606, 230NW907.

1672-92 36GaA176, 136SE326. **Failure of assignor to procure vendor's consent.**–52ND169, 201NW691.

1673-95 221AppDiv879, 224NYS633. **Assignee may recover** if vendee refuses to perform necessary acts under contract to entitle assignee to receive title. 221 AppDiv879, 224NYS633.

1673-99 245Mich24, 222NW215; 222 AppDiv627, 227NYS331. **Representation held material.**–222AppDiv627, 227 NYS331. **Misrepresentation of assignor after execution of contract** held not to authorize rescission by assignee. 222 AppDiv627, 227NYS331.

1673-2½-New. Assignment held procured by fraud. 249Mich420, 228NW 685.

1673-2⅓-New. Fact that plaintiffs in suit to set aside assignments on ground of fraud had not tendered back what they received does not preclude relief. 249Mich420, 228NW685.

1673-4 200Cal 760, 255P188, 52ALR 569. **Persons against whom assignment enforceable.**–200Cal 760, 255P188, 52 ALR569.

1673-5 200Cal 760, 255P188, 52ALR 569.

1674-12 92CalA570, 268P699.

1675-17 234Mich482, 208NW440 (acceptance by vendor from assignee and retention of payments required by contract); Man [1929] 4DomLR1077.

1675-20½-New. Vendor accepting quitclaim given to avoid statutory foreclosure is entitled to rely on contract provision against assignment without his consent. 175Minn502, 221NW871.

1675-21 Chattel mortgage on crops and on use and occupancy and rents and profits of lands is not assignment of purchaser's interest in contract to extent of conveyance therein where purchaser had previously assigned contract of purchase and delivered it to others who are holders of it. 207 Iowa155, 222NW530. **Evidence sufficient to show delivery of assignment.**–249Mich640, 229NW459.

1676-24½-New. That officer taking acknowledgment was disqualified by relationship held not to invalidate deed transferring merely equitable interest under contract of purchase. 215Ala315, 110S465.

1676-29 155Miss12, 119S192. **Approval of title by attorney for holder of option to purchase before vendor had notice of assignment** is binding on holder's assignee where option contract provides that option holder shall have no right to recover option money after approval of title by his attorney. 155 Miss12, 119S192. **Evidence held insufficient to show notice.**–155Miss12, 119S 192.

1676-30 93Fla64, 111S513.

1676-33 226Ky106, 10SW(2d)620; MoA 290SW638. **Vendee of land held under bond for title** is as to third persons, to all intents and purposes true owner of land. 34GaA289, 129SE289.

1677-34 50ND616, 197NW595.

1677-39 Lessee of vendee held enjoinable by vendor from use of timber for turpentine purposes. 165Ga366, 140SE 761.

1677-39½-New. Purchaser conveying land and surrendering possession is without right to reclaim land when last vendee surrenders possession to original owner. TexCivA 296SW925.

1677-39⅓-New. Oral agreement that vendor repossess land and credit original purchaser with revenues, being without consideration, does not estop vendor's executor from claiming revenues. Tex CivA 296SW925.

1677-39¼-New. Conveyance by subsequent grantee to first purchaser's vendor closes equity of redemption and creates no equity in original purchaser. TexCivA 296SW925.

1677-39⅓-New. Contract for purchase of land will not be construed to permit mortgage by purchaser at expense of vendor's security, in absence of clear intent to waive or subordinate vendor's lien. 218Ala195, 118S379.

1677-39¼-New. Where vendor had only undivided half interest in property sold purchaser, reconveyance solely in consideration of cancellation of purchase-money mortgage and mortgage notes and return of latter to purchaser does not constitute retrocession, but mere reconveyance, without effect in so far as rights of purchaser of timber from purchaser are concerned. 167La884, 120S 585.

1677-41½-New. Construction of contract to release parts.–Where vendors who were tenants in common sold land under separate contracts, provision that vendor will release interest in certain lots on pro rata basis of stated sum per acre means that each vendor is entitled to pro rata amount rather than that it shall be divided between them. 238 Mich689, 214NW247.

1677-42 218NYS644, 654 [citCyc].

1677-44 170Ga578, 153SE354; 226Ky 106, 10SW(2d)620; 218AppDiv519, 218 NYS644, 654 [citCyc]; 52ND707, 204 NW338.

1678-49 172Ark783, 290SW361; 241 Mich591, 217NW794.

1679-55 172Ark783, 290SW361.

1680-60 52ND707, 204NW338; 52ND 707, 204NW338, 340 [citCyc].

1681-70 31Ariz187, 251P453; 172Ark 783, 290SW361; 34GaA289, 129SE289 (purchaser of timber from vendee holding land under bond for title); 165Minn 245, 206NW391.

1681-73½-New. Where plaintiff acquiring purchaser's interest resells on subcontract and original vendor trades his interest to plaintiff's vendee plaintiff's remedy is on subcontract. 251Mich207, 231NW571.

1681-78 234Mich52, 207NW886.

1683-89 150Miss750, 117S122.

1683-93 180Ark148, 20SW(2d)636; 84

CalA33, 257P569; 165La299, 115S495.
1684–95 207Iowa1052, 224NW89; 224Ky192, 5SW(2d)1058; 165La299, 115S495.
1685–99½–New. Grantees may sue for trespass committed before acquiring purchase where they sue for grantor's benefit. 165La299, 115S495.
1685–1 218AppDiv519, 218NYS644. **Complaint held sufficient.**–222AppDiv627, 227NYS331.
1685–1½–New. Where vendee's assignee defaults, he cannot complain in his action to quiet title that notice to vendee terminating contract was unreasonable as to time where vendor who received all payments was never served and action was dismissed as to him. 73CalA98, 238P134.
1685–1½–New. Where vendees, who had been in possession five years paying only small rental to which payments were applicable on default, made no attempt to comply with contract for several months after receiving notice of termination, equities were not with their assignee as against subsequent purchasers. 73CalA98, 238P134.
1685–2 Findings.–TexCivA 275SW307. **Pleadings.**–TexCivA 275SW307.
1686–20 Vendor of contract to purchase, quitclaiming interest, is not necessary party to action for failing to convey. 115Nebr136, 211NW998.
1687–24½–New. Original purchaser is necessary party in subpurchaser's action against vendor to recover down payment. 218AppDiv519, 218NYS644.
1687–25 6F(2d)862. **Assignee of contract of sale has burden of proving assignment** or that he assumed its obligation and had become bound to defendant for its performance. 323 Ill 443, 154NE231.
1687–27½–New. Evidence held to show that contract of sale by purchaser was not assigned to owner but canceled. 52SD292, 217NW397, 59ALR947.
1687–27½–New. Evidence has been held to sustain finding that subsequent assignment of plaintiff's equity under land contract is not bona fide transaction but is made to prevent action on previous assignment. 248Mich195, 226NW828.
1687–27¼–New. Vendor's assignee of entire tract not assuming obligation to purchaser of lot to install public improvements is liable to purchaser on breach only for installments paid him. TexCivA 31SW(2d)506.
1687–32 15DelCh192, 133A695; 143 Okl38, 287P390; TexCivA 291SW922.
1688–33 Bona fide purchaser, without notice, to be entitled to protection, must be so, not only at time of contract or conveyance, but till purchase money is actually paid. 96Fla455, 118S216.
1688–33½–New. One claiming power of attorney conveying undivided half interest in whatever might be recovered is not "innocent purchaser." TexCivA 295SW679.
1688–36 215Ala571, 112S189; 96Fla704, 119S123; 99NJEq634, 134A353; NJCh 147A590(2dcase).
1689–37 96Fla704, 119S123; 149Md662, 132A148. **Rule held not applicable to particular facts of case.**–149Md662, 132A148.
1689–41 96Fla704, 119S123.
1690–45 NJCh 147A590(2dcase). **Protection afforded innocent purchaser has no application** to one purchasing under deed not executed or authorized by alleged grantor. TexCivA 10SW(2d)149.
1691–51 336 Ill 490, 168NE340; 115Okl 56, 241P750; 135 Okl 123, 276P200; 41 OklACR118; TexCivA 280SW247. **Under forged deed,** bona fides of purchaser from grantee raises no superior rights. 244Mich309, 221NW338.
1691–51½–New. Grantee acquired no interest as innocent purchaser of apparent title where conveyance carried more of real than of apparent title. TexCivA 295SW679.
1691–53 169Ark299, 274SW6, 10 [quot Cyc]; 93Fla326, 112S55; TexCivA 280SW247 (title under forged deed). **Vendor's oral promise to convey** and other facts held to divest him of title. 121Kan3, 245P1017.
1692–61 169Ark299, 274SW6, 10 [cit Cyc].
1692–63 Contract under which party agreed to convey interest in land which might be recovered cannot support claim of innocent purchaser. TexCivA 295SW679.
1693–67 215Ala571, 112S189; 221Ala173, 128S217; 93Fla326, 112S55; 96Fla704, 119S123; Fla 129S501; 200Iowa790, 205NW464; Iowa 232NW816; 130Kan679, 288P555; 240Mich387, 215NW295; TexCivA 295SW679.
1694–69 240Mich387, 215NW295; 117Okl 195, 246P472.
1694–72 234 IllA516, 524 [quotCyc].
1694–73 71CalA272, 235P455; 234 IllA516, 524 [quotCyc]; TexCommnA 300SW28.
1695–74 101CalA209, 281P506.
1695–75 See also 93Fla326, 112S55.
1696–77 31Ariz324, 253P435, 59ALR625.
1696–78 31Ariz324, 253P435, 59ALR625; 149Miss205, 115S336; 196Wis125, 218NW193.
1696–79 220Ala629, 127S224; 221Ala173, 128S217; Fla 129S501; TexCivA296SW959; 196Wis125, 218NW193.
1697–86 Purchaser claiming solely through executory contract of purchase and sale is not "bona fide" purchaser within meaning of rule. 96Fla704, 119S123.
1697–92 87CalA188, 262P53(2dcase); 15DelCh192, 133A695; DelCh 145A118; 201Iowa333, 207NW338; 99NJEq634, 134A353; 101WVa83, 131SE716.
1698–93 337 Ill 520, 169NE324; 99NJEq634, 134A353.
1698–94½–New. However, one who acquires title as volunteer from bona fide purchaser is himself protected as bona fide purchaser. 15DelCh192, 133A695.
1698–95 137Misc674, 244NYS267.
1698–99 218Ala182, 118S338; 294Pa282, 144A75.
1699–1 125Kan745, 747, 262P1025 [cit Cyc].
1699–6 TexCivA 5SW(2d)224.
1699–8 221Ala163, 128S170; TexCivA295SW295; TexCivA 295SW953; TexCivA 11SW(2d)380.
1701–15 TexCivA 291SW922. **Recited consideration of one dollar** constitutes only nominal, as distinct from valuable, consideration. 127Kan221, 273P468.
1701–16 TexCivA 26SW(2d)478(2dcase).
1702–17 6F(2d)862 (purchaser making partial payment held not purchaser for value); 160Ga638, 128SE807; 148Miss756, 114S879; 313Mo 426, 285SW407, 408 [citCyc]; 99NJEq634, 134A353; TexCivA 26SW(2d)478(2dcase) (nonnegotiable note not paid at time third person brings action for title). **All of purchase money** must have been paid. 101WVa83, 131SE716. **Where purchase price put in escrow** beyond recall, purchaser may be bona fide purchaser. 1F(2d)965. **Subsequent purchaser** paying part of consideration before notice of antecedent unrecorded claim is entitled to pro tanto protection only. TexCivA291SW922.
1702–19 99NJEq634, 134A353.
1702–20 148Miss756, 114S879.
1703–22 But see 11F(2d)971.
1703–25 325 Ill 146, 156NE313; TexCivA 291SW922; 101WVa83, 131SE716.
1703–27 169Ark372, 275SW743; 172Ark405, 288SW929. But see 165La636, 115S807. **Purchasers' title can only be affected** by what they actually or constructively knew at time of purchase. 293Pa459, 143A113.
1703–29 Actual notice is as binding as constructive notice.–117Nebr765, 223NW8.
1703–30 32F(2d)979; 168Ark1133, 272SW860; 169Ark372, 275SW743; 208Cal172, 280P947; 35GaA686, 134SE790; 202Iowa1282, 211NW842; Minn 233NW20; 148Miss756, 114S879; 137Misc674, 244NYS267; 122 Okl 277, 254P748; 128 Okl 87, 261P228; 120 Or313, 252P80; 293Pa459, 143A113; 137SC11, 134SE859; TexCommnA 290SW522; TexCivA 271SW272; 148Va686, 139SE257; 103WVa165, 136SE851. **Facts sufficient to put a purchaser on inquiry** see 168Ark1133, 272SW860; CalA 274P552; 108Conn538, 144A32; 137SC11, 134SE859. **Facts not sufficient to put a purchaser on inquiry** see 232Mich341, 205NW84 (sign on property); 120 Okl 51, 250P427. **Lessee with notice of lessor's prior contract** must make inquiry of former lessee to inquire extent of rights. 152Md146, 136A651. **Circumstances that are dubious or equivocal** are not sufficient to put purchaser on notice. 120Okl 51, 250P427.
1705–31 32F(2d)979; 221Ala163, 128S170; 168Ark1133, 272SW860; 169Ark372, 275SW743; 35GaA686, 134SE790; 322 Ill 589, 153NE679; 202Iowa1282, 211NW842; 148Miss756, 114S879; 122Okl 277, 254P748; 120 Or313, 252P80; 137SC11, 134SE859; TexCommnA 290SW522; 148Va686, 139SE257; 103WVa165, 136SE851.
1705–32 CalA 271P1103(2dcase); 108Conn538, 144A32; 103WVa165, 136SE851. **Extent of duty to make inquiry.**–120 Or313, 252P80 (inquiry of vendor as to contract for sale of standing timber held insufficient); 293Pa459, 143A113; TexCivA 273SW645.
1706–33 120 Or313, 252P80.
1706–34 167La658, 120S42; 120 Okl51, 250P427; 293Pa459, 143A113.
1706–35 120 Okl 51, 250P427.
1706–36 221Ala173, 128S217 (purchaser held not chargeable with notice); 120 Okl 51, 250P427; TexCivA 15SW(2d)155.
1706–36½–New. Knowledge of one of two joint purchasers will be imputed to other. 171Ark791, 286SW1022.
1707–40 73CalA539, 238P1081; 91Fla1053, 109S311; Ill 172NE164 (effect of option in lease); 120 Or313, 252P80; TexCivA 295SW295. **Facts insufficient to put purchaser on inquiry.**–322 Ill 589, 153NE679. **Grantee with notice of prior contract** cannot complain that prior vendee's failure to record contract enabled grantor to defraud him. 236Mich351, 210NW300.
1707–41 Receipt of payments held to charge purchaser with knowledge of prior contract. 21 OhA429, 152NE323.
1708–43 Ga 155SE755.
1708–45 171Ark912, 287SW373; 128Okl 87, 261P228.
1709–48 Grantees of lots abutting on alley are put on notice of private ownership of alley by grantor's decedent's will giving grantor strip of land of alley. 179Ark705, 17SW(2d)869.
1709–52 217Ala159, 115S90; 172Ark870, 290SW597; 103CalA592, 284P971; 203Iowa134, 209NW731; 36 OhA19, 172NE698; TexCivA 292SW932; 148Va686, 139SE257. **Where deed recites it is "subject to a timber lease** of this date for sawmill and turpentine purposes for five years," in view of surrounding facts and circumstances, held purchaser takes subject to rights of lessee though it was not reduced to writing till after conveyance. 35GaA686, 134SE790. **One named as grantee with another making loan secured by deed** was put on notice that transaction was in nature of equitable mortgage. 219Ala273, 122S16, 65ALR110.
1710–53 TexCivA 297SW294.
1710–54 TexCivA 292SW932; TexCivA4SW(2d)102.
1710–57 164Ga694, 139SE346 (purchaser held bound by decree).
1710–57½–New. But pendency of suit by vendee against vendor to establish title is notice to purchase of crops raised on land as to ownership of crops. 120Kan725, 244P861.
1713–80 172Ark405, 288SW929 (from common grantor at time of conveyance); NJCh 147A162 (notice to mortgagee). **In jurisdictions where statute prohibits inheritance by murderer from deceased,** fact that one is incarcerated and charged with murder of his spouse is sufficient notice to anyone dealing with him for interest in real estate to place such person under duty of inquiry. 43 OklACR221.
1713–81½–New. In Louisiana conveyance records are only things to which one dealing with real estate or any real right ever needs to look. 162La1054, 111S418.
1713–82 24F(2d)951; 25F(2d)412; 35

F(2d)462; 40F(2d)333; 215Ala571, 112 S189; 218Ala318, 118S563; 171Ark912, 287SW373; 162Ga735, 134SE771; 338 Ill 420, 170NE252; 203 Iowa134, 209 NW731; 210Ky612, 276SW540; 244 Mich403, 221NW322; 78Mont445, 253P 890; 191NC133, 131SE311; 36 OklACR 647; 132 Okl 204, 270P46; 122 Or531, 259P911; 294Pa47, 143A474; Tex CommnA 290SW522. **Plat referred to in act of sale** need not be recorded. 163 La945, 113S156. **Security deed given by trustee**, and later extinguished, not in chain of title to charge grantee of subsequent security deed. 162Ga735, 134SE771. **In absence of any claim of fraud or misrepresentation**, vendee is put on notice of contents of duly recorded document, and its meaning, referred to in contract of sale. 224App Div458, 231NYS225. **Prior recitals in conveyance are binding** on those who hold under common source and upon those in privity in estate. TexCivA 8 SW(2d)790.

1714–83 215Ala571, 112S189; 219Ala 314, 122S330; 36 OklACR647; 132 Okl 204, 270P46.

1715–86 Reference in deed from father to son to deed under which father acquired property, which described land by boundaries and as being in same quarter section as land conveyed to son, has been held not notice that title which son was getting was defective. 166La 656, 117S763.

1715–91 Ark 30SW(2d)858; 241Mich 591, 217NW794; Okl 291P97.

1715–92 219Ala314, 122S330.

1716–93 Iowa 227NW112 (recital that deed was subject to all mortgages then of record held binding); TexCommnA 280SW736; TexCommnA 290SW522.

1717–98 180Ark517, 218SW(2d)973; Mass 172NE863; 323Mo 1197, 20SW (2d)896; 214AppDiv127, 211NYS641; TexCivA 287SW279; TexCivA 26SW (2d)478(2dcase).

1717–3 243Mich679, 220NW672.

1717–5 241Mich591, 217NW794; 244 Mich403, 221NW322; 134Misc733, 236 NYS194; 122 Or531, 259P911; Tex CivA 290SW256. **Restrictions in original contract of sale** are binding on purchaser from one who purchased from original purchaser though restrictions do not appear in second or third contracts of sale. 241Mich591, 217NW 794.

1718–8 216Ala202, 112S914; 223Ky 433, 3SW(2d)1084, 1085 [citCyc]; Tex CommnA 289SW993 (holding purchaser charged with notice of description).

1718–10 53SD533, 221NW255, 256 [cit Cyc].

1718–14 104Conn285, 132A459.

1719–15 321 Ill 480, 152NE587; 210 Ky612, 276SW540; 132 Okl 141, 269P 1067.

1719–16 321 Ill 480, 152NE587.

1719–17 9PaDist&Co 149.

1719–19 137Misc674, 244NYS267.

1719–20 137Misc674, 244NYS267.

1719–22 Recording act does not create estate.–135Misc837, 240NYS61.

1719–23 330 Ill 136, 161NE306. **Other statements of purpose of registry laws.**–DelCh 141A271.

1719–24 78Colo 464, 242P636; 220Ky 196, 294SW1039; 169La176, 124S772 (third party purchasing from record owner has valid title); 165Minn300, 206 NW444; 147Miss385, 113S336; 102 NJEq60, 139A526; NJCh 145A625; 137SC11, 134SE859; TexCivA 286SW 519 (recognizing rule).

1720–27½–New. Knowledge is not equivalent to registry. 7LaA375.

1720–28 335 Ill 533, 167NE802; 219 Ky418, 293SW986; 147Miss385, 113S 336; 99NJEq359, 131A891; SC 133SE 558; TexCivA 48W(2d)102; TexCivA 11SW(2d)329. **Right to rely on abstract.**–117Nebr765, 223NW8. **Recorded deed conclusively gives notice of its contents and legal effect.**–128 Or483, 275 P45.

1720–29 169Gal, 149SE562; 147Miss 385, 113S336; 148Miss756, 114S879; 99NJEq359, 131A891; TexCommnA 276 SW211; TexCivA 25SW(2d)160 (interest under contract for improvement).

1721–31 9LaA434, 121S224. **No notice of different state of facts.**–165Minn300, 206NW444.

1721–32 108Conn538, 144A32.

1721–33 165Minn300, 206NW444; 117 Nebr765, 223NW8; Pa 151A796; 145 Va669, 134SE707.

1721–34 165Minn300, 206NW444.

1721–35 109Conn433, 146A843.

1721–36 243 IllA258. **Record of purchaser's resale contracts** is not notice to his vendor. 88CalA339, 263P548.

1722–37 170Ga764, 154SE353; Me 151 A138; 147Miss385, 113S336; 78Mont 445, 253P890; 99NJEq359, 131A891 (purchaser bound to search record); 152Tenn648, 280SW408; 154Tenn389, 285SW558. **Within Va. Rev. Code (1819) § 12**, subsequent purchasers are those purchasing after delivery of unrecorded instrument. 11F(2d)971.

1722–38 78Mont445, 253P890.

1722–39 Fla 129S892; 78Mont445, 253 P890.

1722–41 166Ga149, 142SE690.

1722–42 154Tenn389, 285SW558.

1723–44½–New. Option contract having expired prior to plaintiff's purchase is insufficient to import notice of any equitable claim of title in option holder. TexCommnA 17SW(2d)771.

1723–45 Prior mortgage, recorded subsequently to junior deed, is not notice to bona fide purchaser under such junior deed. 11F(2d)971.

1724–56 168La504, 122S596; 189NC 589, 127SE697; 57ND426, 222NW480.

1724–57½–New. Conveyance recorded in county which was subsequently divided need not be recorded in new subdivision to give notice. 213Ala494, 106S150.

1725–65 98NJEq104, 130A470.

1726–69 325 Ill 146, 156NE313.

1726–72 321 Ill 480, 152NE587; 100 NJEq150, 135A264.

1727–81 215Ala515, 110S898; 162Ga 299, 133SE249; 128Me382, 147A816; TexCivA 218SW(2d)532.

1727–81½–New. Notice of inconsistency must be shown before prior deed can be canceled. 215Ala515, 110S898.

1727–83 21F(2d)388; 244Mich403, 221 NW322; 147Miss385, 113S336; 99 NJEq243, 132A291; 122 Or531, 259P 911; TexCivA 275SW673.

1728–84 Ark 31SW(2d)426; 108Conn 538, 144A32; 170Ga662, 153SE759; 243 IllA258; 122Kan709, 253P215; 226 Ky82, 9SW(2d)1095; 157Miss365, 128 S79; MoA 293SW441; 103NJEq478, 143A627; TexCommnA 17SW(2d)771. See also Ga 155SE755. **Purchaser of patented school lands** is not affected with notice of deed from his grantor executed and recorded prior to origin of patented title. TexCivA 272SW809.

1729–85 103WVa165, 136SE851.

1729–88 143Miss782, 109S794.

1729–88½–New. Record of mortgage by stranger to record title is not notice to intending purchaser of prior unrecorded deed to mortgagor. 47 Ida589, 277P548.

1731–3 TexCivA 22SW(2d)688.

1731–6 80CalA459, 251P87.

1731–7 128 Or229, 274P306.

1731–10 122 Okl 277, 254P748; Tex CommnA 276SW211.

1732–13 162Ga299, 133SE249 (deed held not voluntary).

1732–17 196NC309, 145SE557.

1732–19 34 OhA123, 170NE368.

1732–21 324 Ill 48, 154NE401; 325 Ill 146, 156NE313; 165Minn300, 206NW 444.

1733–22½–New. In New Jersey, recorded contract of sale is voided as to subsequent purchasers for value unless vendee sues for specific performance within three months; 99NJEq48, 131A 626.

1733–22½–New. but such statute does not apply to, nor avoid, unrecorded contracts, and it does not require that contracts be recorded to be valid; 99NJEq 48, 131A626.

1733–22¼–New. since it is merely a limitation on right of action against subsequent purchasers with or without notice to vendees who choose to protect their equities by recording their contract. 99NJEq48, 131A626.

1733–23 Iowa 231NW363; 12LaA695, 127S79 (owner need not be designated as such); 227AppDiv98, 237NYS26; 198 NC466, 152SE161. **Mortgage on school lands.**–120 Okl 299, 251P609.

1733–23½–New. Registered chattel mortgage on crop rents is constructive notice to subsequent purchasers of land of lien on rentals. 116Tex337, 291SW 219.

1733–27 114Nebr605, 209NW243.

1733–28 Assignment of rents need not be recorded to bind subsequent purchasers.–129Misc270, 220NYS502.

1733–29 114Nebr605, 209NW243; 23 OhA194, 155NE402; TexCivA 292SW 932. **Executory contract of sale** does not come under recording acts. 23 OhA 194, 155NE402.

1734–31 117Nebr765, 223NW8.

1734–31½–New. Statute making registration essential to conveyances as against creditors and purchasers for value has no application to equities not required to be evidenced by writing, and grantee in registered deed may take subject to such equities. 190NC14, 128 SE494, 40ALR273.

1734–31½–New. In some jurisdictions registration statutes have no application to equitable titles so as to require registration of evidence thereof. 114Tex 516, 272SW1098 (trust agreement).

1734–34 169Ga203, 149SE861, 67ALR 355 (altered before delivery).

1734–35½–New. Reference to his occupation or profession of owner will not render notice from registry of instrument insufficient. 12LaA695, 127S79.

1734–36 169Ga203, 149SE861, 67ALR 355. See also 3LaA484.

1734–37 73CalA98, 238P134; 114Nebr 605, 209NW243; 189NC684, 128SE155 (dictum); 196NC657, 146SE713; Tex CivA 281SW339; TexCivA 283SW324. **Acknowledgment taken by party in interest** does not destroy record notice unless interest appears upon face of instrument. Okl 293P179.

1735–40 See also 173Ark633, 293SW 36.

1735–41 244Mich403, 221NW322; 83 Mont68, 271P695.

1736–43 172Ark405, 288SW929; 243 IllA258; 122Kan709, 253P215; 9LaA 434, 121S224. See also TexCivA 273SW 645.

1737–49 But see 216Ky547, 288SW315.

1737–50 TexCivA 299SW450.

1738–53 Mo 258SW(2d)464.

1738–54 Fla 129S892. **Those who permit records to mislead others must bear loss.**–Fla 129S501.

1738–56 179Ark421, 16SW(2d)457; 147Miss385, 113S336; TexCivA 22SW (2d)688.

1739–58 172Ark405, 288SW929.

1739–59 219Ky418, 293SW986; 12LaA 695, 127S79; 44 OklACR31.

1739–60 243 IllA258; 208 Iowa739, 224 NW489, 63ALR1051.

1740–69 43F(2d)703; 218Ala513, 119 S20; 221Ala173, 128S217; Ariz 286P 930; 92Fla758, 110S352; 166Ga727, 144 SE278; 167Ga170, 144SE893; 322 Ill 589, 153NE679; 216Ky547, 288SW315; 218Ky306, 291SW385; 236Ky54, 32SW (2d)558; 163La257, 111S697 (unrecorded and void except as between parties); 168La504, 122S596; 242Mich152, 218 NW690; 246Mich62, 224NW398; 152 Miss428, 118S829; 84Mont276, 275P 278; 198NC190, 151SE255; 143SC429, 141SE721; TexCommnA 280SW163; TexCivA 286SW519; 40Wyo 226, 278P 76. **Purpose of statute.**–73CalA539, 238 P1081. **Subsequent holders under duly recorded deeds have priority** as against transferee of prior unrecorded bond for title, where transfer was not recorded. 38GaA617, 144SE679.

1741–70 TexCivA 278SW885. **Under statute purchaser may rely on public records** of conveyances and instruments affecting title to realty in security, unless he has notice of, or is chargeable in some way with notice of, some title conveyance or claim inconsistent with it. 331 Ill 508, 163NE340.

1741–71 149Miss205, 115S336; Tex CivA 299SW450.

1741–72 196Cal 380, 238P81.

1742–74 127Kan221, 273P468; 170La 826, 129S217. **Failure to examine rec-**

ord.–165Minn300, 206NW444.
1743–76 58ND351, 226NW529, 65ALR 1009.
1743–79 216Ky547, 288SW315.
1744–85 215Ala9, 109S101; 216Ala202, 112S914; 219Ala191, 121S706; 178Ark 788, 13SW(2d)18; 161Ga711, 132SE 547; 162Ga578, 134SE441; 167Ga170, 144SE893; 317 Ill 184, 148NE2; 203 Iowa320, 211NW389 (dictum); 218Ky 11, 290SW1042; 236Mich351, 210NW 300; 165Minn300, 206NW444; 180Minn 552, 231NW234; 155Miss508, 124S648; 98NJEq167, 130A6; 134Misc96, 234NYS 491; 56ND309, 217NW169; 19 OhA 521; 128 Okl 36, 261P165; 136 Okl 180, 276P732; 143 Okl 97, 287P1011; 289 Pa184, 137A254; TexCommnA 294SW 519; TexCommnA 10SW(2d)692; Tex CivA 275SW90; TexCivA 281SW339; TexCivA 288SW525; TexCivA 289SW 79; TexCivA 289SW442; TexCivA 2 SW(2d)281; TexCivA 13SW(2d)195; TexCivA 29SW(2d)805; 100Vt318, 137 A196; 40Wyo 226, 276P452; 144Va523, 132SE307. **Extent of inquiry.**–Nebr 229 NW330.
1744–85½–New. Virginia statute holding that mere possession is not of itself notice to purchaser does not apply where purchaser had actual notice of existence of prior contract. 144Va523, 132SE307.
1744–85½–New. Object of statute is to prevent actual notice of possession from being construed as constructive notice of title. 144Va523, 132SE307.
1746–86 Ill 172NE164; 236Mich351, 210NW300; TexCivA 281SW339. **Purchaser from record owner in good faith** is entitled to recognition as owner against one in possession with purchaser's knowledge. 12LaA130, 124S601.
1746–87 MoA 15SW(2d)957. **Instructed verdict for plaintiff** in trespass to try title held error where defendants were innocent purchasers without notice of prior unrecorded deed to plaintiff in possession through his tenant. TexCommnA 298SW409.
1746–88 167Ga170, 144SE893.
1747–92 TexCivA 281SW339, 342 [cit Cyc].
1747–93 TexCivA 281SW339, 342 [cit Cyc].
1747–95 92Fla1, 109S297; 48ALR401; 131 Okl 256, 268P704; 131 Okl 253, 268 P706; 132 Okl 183, 270P69; 133 Okl 34, 270P1098; TexCommnA 294SW519; TexCivA 275SW90; TexCivA 281SW339, 342 [citCyc]; 100Vt318, 137A196.
1747–96 143 Okl 97, 287P1011.
1747–97 140Miss294, 105S513; 150Miss 476, 116S879; Nebr 229NW330.
1748–98 161Ga711, 132SE547.
1748–3 CalA 273P587; 161Ga711, 132 SE547; 317 Ill 184, 148NE2; 240Mich 185, 215NW408; MoA 15SW(2d)957; 98 NJEq167, 130A6 (holder of unrecorded assignment of interest in contract to purchase); 289Pa184, 137A254; 296Pa 340, 145A901; TexCommnA 295SW584. **Actual occupancy.**–168Ark262, 271SW 30.
1748–4 33F(2d)248; 155Miss508, 124 S648 (possession under claim of title, not record).
1749–7 233Mich273, 207NW836. **Possession held not to give constructive notice of prior lease.**–152Md146, 136A651. **To constitute constructive notice** by possession of wild uncultivated lands, use or occupancy must be such as to indicate to reasonably prudent person that occupant claimed rights thereon. 236Mich 351, 210NW300.
1750–8 Possession sufficient to constitute notice.–155Miss508, 124S648; TexCivA 281SW339. **Possession insufficient to constitute notice.**–233Mich273, 207NW 836; 98NJEq167, 130A6 (occupancy as tenant in office building by holder of prior unrecorded assignment of interest in contract to purchase). **Possession by bank commissioner** of bank building under lease to bank, coupled with insolvency of bank, has been held such open, notorious, and visible change of possession as to put purchaser of building on inquiry as to equitable mortgage by owner to bank commissioner to secure owner's debt to bank. 120Kan66, 242 P466.
1751–12½–New. Adverse possession of land held to be that of holders of real title rather than that of holders of apparent title, notwithstanding marriage between claimants. TexCivA 295SW679.
1751–14 171Ark1036, 287SW170; 202 Iowa1282, 211NW842 (maintenance of railroad bridge).
1752–22 240Mich185, 215NW408.
1753–31 203 Iowa320, 211NW389; 296 Pa340, 145A901.
1753–33½–New. Where owner of vacant city lot with for sale sign thereon giving his name and address was not in actual possession and had deeded the lot as security, abstract showing he had parted with title, he was not in such possession as would put prospective purchasers upon inquiry. 233Mich 273, 207NW836.
1753–34 Two weeks possession after recordation of deed and month after date of deed held not constructive notice. 201 Iowa107, 204NW294, 48ALR394.
1753–35 201 Iowa107, 204NW294, 48 ALR394 (though deed procured by fraud); 128 Okl 36, 261P165; TexCivA 28SW(2d)837. **Presumption** is that grantor is merely holding over as grantee's tenant at will. 201 Iowa107, 204 NW294, 48ALR394.
1754–36 201 Iowa107, 204NW294, 48 ALR394; 159Tenn337, 17SW(2d)1; TexCivA 13SW(2d)739.
1754–37 101NJEq58, 137A826.
1755–39 101WVa83, 131SE716.
1755–40 78CalA334, 248P526; 233Ky 192, 25SW(2d)365; 56ND309, 217NW 169; SD 226NW267; 101WVa83, 131SE 716. Contra 143SC429, 141SE721.
1756–41 175Ark979, 1SW(2d)1000; 78 CalA334, 248P526; 91Fla1053, 109S311; 201 Iowa840, 208NW312; 240Mich185, 215NW408 (sufficient actual possession not shown as would give any notice to stranger). 34 OhA123, 170NE368. **That vendor had no title does not affect rule** where he assumed equitable ownership and later had such ownership confirmed in him by contract of purchase and deed of conveyance. 201 Iowa840, 208NW 312. **Purchaser in possession has right of possession and right to acquire title** in accordance with terms of contract, and, though such rights do not amount to title, they are substantial rights, such as one having notice and knowledge is bound to respect. 149Wash433, 271P 93.
1756–42 101WVa205, 133SE323.
1756–47 41F(2d)76; 168Ark262, 271 SW30; 173Ark633, 293SW36; 164 Ga96, 137SE833; 209Ky768, 273 SW450; 140Miss294, 105S513; 157 Miss371, 128S103; 48Nev41, 226 P1102; 19 OhA521; TexCivA 289 SW442; TexCivA 31SW(2d)345; 100 Vt318, 137A196. **Option to renew lease.**–140Miss294, 105S513. **Possession of subtenant held to be possession of landlord.**–100Vt318, 137A196.
1757–49 TexCivA 289SW442.
1757–50 But see 98NJEq167, 130A6. **In Texas,** etc. CivA 3SW(2d)822. **Unrecorded lease.**–140Miss294, 105S513.
1758–51 215Ala9, 109S101.
1758–51½–New. Possession by tenant's vendor is not notice that vendor is being taken advantage of or that vendor has rights in property conflicting with rights of vendee. 149Md412, 131A780.
1758–55 164Ga96, 137SE833; TexCivA 289SW79; TexCivA 2SW(2d)281; 100 Vt318, 137A196.
1759–64 203 Iowa320, 211NW389.
1759–65 203 Iowa320, 211NW389.
1760–67½–New. Joint possession is evidence of claim of title of each. 289 Pa184, 137A254.
1760–69 TexCivA 289SW442 (rule held not applicable after possession of one became exclusive).
1760–70 But see 117Nebr488, 221NW 101.
1761–79 317 Ill 184, 148NE2 (where father and son live in separate houses on two parts of farm divided by railroad, fact that son cultivated part where father lived is not notice to judgment creditor of valid contract by father to sell to son even where son has paid all or part of purchase price).
1761–81 CalA 288P810; 164Ga21, 137 SE394; 152Miss428, 118S829.
1762–85½–New. Status of purchaser of beneficiary's interest is determined by status of trustee. 169Ark299, 274SW6.
1762–93 Agency held to exist between purchaser and alleged agent having notice. 232Mich341, 205NW84.
1763–96 324 Ill 615, 155NE762. **Attorney having knowledge of defective acknowledgment** in deed to property subsequently reconveyed to himself is charged with notice. TexCivA 286SW 241.
1763–99 99NJEq48, 131A626; NJCh 144A446(1stcase). But see 98NJEq167, 130A6 [citCyc].
1764–1 41F(2d)76; 96Fla704, 119S123; 201 Iowa333, 207NW338; 99NJEq48, 131A626.
1765–3 But see CalA 274P572. **All or substantial part of purchase price** must have been paid. 313Mo 426, 285SW407.
1765–4 219Ala422, 122S663; 221Ala163, 128S170.
1766–7 172Ark405, 288SW929; 15DelCh192, 133A695 (stating rule conversely); 96Fla704, 119S123; 337 Ill 520, 169 NE324; 49SD174, 207NW74 (bond erroneously included in description); TexCivA 25SW(2d)166; TexCivA 32SW(2d) 660. But see 169La176, 124S772. **Purchaser without notice from purchaser with notice** is bona fide purchaser. 15 DelCh192, 133A695. **One who purchases land on deferred payment secured by mortgage** from holder of property in trust in nature of equitable mortgage is not innocent purchaser. 219Ala273, 122S16, 65ALR110.
1767–9 332 Ill 253, 163NE702.
1767–10 91Fla1053, 109S311; 227Ky 719, 13SW(2d)1031; 157Md504, 146A 579; Nebr 229NW330; 226AppDiv456, 235NYS735; 128 Or292, 274P318; 50 Philippine786; 53SD594, 221NW676; SD 227NW882. **Right of prior purchaser not defeated** by subsequent purchaser's expending money on property. 128 Or292, 274P318.
1768–11 172Ark405, 288SW929 (gas and oil lease); 169Ga1, 149SE562. **Purchaser notified of mistake in date of deed** to purchaser's remote grantor could not claim that grantee's executors are estopped from contradicting order of delivery apparent on record, and from asserting title against his immediate grantor, who purchased without notice. 169 Ga1, 149SE562.
1768–13 196NC24, 144SE365. **Under the recording act of North Carolina,** etc. 192NC126, 133SE558; 196NC657, 146SE 713.
1768–14 73CalA539, 238P1081; 128Me 412, 148A143; 120 Or313, 252P80; 101 WVa83, 131SE716. See also TexCivA 14SW(2d)906.
1769–15 73CalA539, 238P1081.
1769–16 DelCh 141A271.
1770–21 73CalA539, 238P1081.
1770–22 127Kan221, 273P468.
1771–23 144Va523, 132SE307.
1771–27 337 Ill 520, 169NE324; 134 Misc733, 236NYS194. **Applied to lien in nature of equitable mortgage.**–120 Kan66, 242P466. **Change of possession such as to put purchaser on inquiry as to equitable mortgage** has same effect. 120Kan66, 242P466. **When person purchases land on which there is obvious,** visible, and well-defined burden, he does so after full consideration of effect burden would have on his land. 151Va274, 144SE452.
1771–28 247Mich498, 226NW256. **Bona fide purchaser entitled to rely on recorded release of mortgage** executed by mortgagee as against holder of mortgage under unrecorded assignment. 47 Ida106, 273P947. **Vendee with notice of unrecorded assignment of mortgage** takes subject to assignee's claim though he knows record mortgagee has released mortgage. 57ND270, 221NW71.
1771–30 123 Okl 181, 252P437.
1772–36 10LaA582, 121S310. **Defective description of land.**–172Ark405, 288 SW929; 110Conn374, 148A133.
1772–37 150Md291, 133A331.
1772–39 57ND849, 224NW308.
1773–44 40F(2d)583; 218Ala182, 118S 338; CalA 288P810; 15DelCh192, 133A 695; 163La257, 111S697; 242Mich152, 218NW690; 115Nebr547, 213NW829; TexCommnA 3SW(2d)67; TexCivA 295 SW295; TexCivA 2SW(2d)352; Tex CivA 5SW(2d)224.
1774–47 CalA 288P810.
1774–50 274US640, 47SCt714, 71Led

1270; 15DelCh192, 133A695; 115Nebr 547, 213NW829; TexCivA 2SW(2d)352. See also CalA 288P810.

1774-51 218Ala182, 118S338; 137SC11, 134SE859.

1774-53 170Ga662, 153SE759; TexCommnA 280SW163. **Bona fide purchaser** is not affected by notice to vendor. 216Ala225, 113S47.

1774-53½-New. It is policy of law to protect innocent third persons. 323 Ill 585, 154NE414.

1774-53½-New. One cannot be innocent purchaser against title acquired by limitation. TexCivA 295SW679.

1774-53¼-New. One holding forged instrument cannot claim protection against rightful owner on ground he was bona fide purchaser. Wash 291P 1105.

1774-54 15DelCh192, 133A695; 164Ga 21, 137SE394; 167Ga66, 144SE903; 168 Ga129, 147SE387; 167La658, 120S42; 57ND849, 224NW308; ND 230NW600; 293Pa459, 143A113; TexCommnA 17 SW(2d)771; TexCivA 281SW889; TexCivA 294SW894; TexCivA 5SW(2d) 802; TexCivA 6SW(2d)197; 149Wash 494, 271P591. **Equity of vendor** to recover balance of consideration from grantee does not invalidate deed in hands of bona fide purchaser from grantee. 149Md412, 131A780.

1775-55 170Ga87, 152SE252 (duress); 44 Ida461, 259P3 (fraud); 315Mo 1046, 287SW1042 (delivery of deed by agent acting beyond scope of authority); 159 Tenn337, 17SW(2d)1; TexCivA 294SW 894; TexCivA 28SW(2d)584; TexCivA 28SW(2d)837.

1775-56 15DelCh192, 133A695; TexCivA 294SW894.

1775-58 96Fla704, 119S123; 251Mich 381, 232NW220; 316Mo 333, 289SW939.

1775-58½-New. Recorded contract.–By statute in some jurisdictions a purchaser is not protected against prior recorded contract of sale, provided vendee institutes suit for specific performance thereof within three months; 99NJEq48, 131A626.

1775-58½-New. but this statute does not apply to unrecorded contracts nor render void contracts not recorded. 99 NJEq48, 131A626.

1775-58¼-New. One acquiring both prior and later contracts of sale may enforce them against subsequent purchaser with notice. 234Ky817, 29SW (2d)573.

1776-61 234Mich322, 208NW41; TexCivA 25SW(2d)212.

1776-68 39GaA295, 147SE189.

1777-69 32Ariz130, 256P365; 247Mich 283, 225NW518. See also 32Ariz130, 256P365.

1777-70 49SD524, 207NW543.

1777-71 201 Iowa107, 204NW294, 48 ALR394; 165Minn300, 206NW444.

1777-72 12LaA559, 126S566.

1778-76¼-New. No action by purchaser who failed to record purchase against subsequent recording purchasers unless they prevented, by fraud, his recording. 163La257, 111S697.

1778-77 Bill for injunction insufficient.–101WVa83, 131SE716. **Payment of all purchase money** must be alleged. 101 WVa83, 131SE716.

1778-78 202 Iowa1282, 211NW842.

1778-79 Allegation held sufficient.–219 Ala571, 123S61.

1778-84 274US640, 47SCt714, 71L ed 1270; 216Ala225, 113S47; 217Ala188, 115S182; 219Ala571, 123S61; 119 Okl 282, 249P712, 714 [citCyc]; 125 Okl 282, 257P793; 132 Okl 238, 270P26; 144 Okl 264, 291P124; Okl 293P206; 43 OklACR221. But see Ala 119S20.

1779-86 196Wis125, 218NW193.

1779-87 43 OklACR221.

1779-88 43 OklACR221.

1779-89 43 OklACR221.

1779-90 229Ky369, 17SW(2d)207; 43 OklACR221.

1779-91 229Ky369, 17SW(2d)207; 43 OklACR221. **Allegations held sufficient.**–219Ala422, 122S663.

1780-92 137Misc674, 244NYS267.

1780-94 In Virginia.–11F(2d)971.

1780-95 15DelCh192, 133A695; Mo 282 SW392; 119 Okl 282, 249P712, 714 [cit Cyc]; 125 Okl 282, 257P793; 132 Okl 238, 270P26; Okl 293P206; TexCivA 291SW922; TexCivA 292SW932. **In action for trespass** in taking coal from mine, where plaintiff held under deed not constituting constructive notice, defendant must prove purchase without notice, actual or constructive. 218Ky 459, 291SW730.

1781-96 80CalA185, 251P666; 15DelCh 192, 133A695; 137SC11, 134SE859; TexCivA 22SW(2d)688.

1781-97 173Ark533, 294SW25; 73CalA 539, 238P1081; 80CalA185, 251P666; 15DelCh192, 133A695; 218Ky459, 291 SW730; 137SC11, 134SE859.

1781-98 25F(2d)509; 215Ala9, 109S 101; 92Fla758, 110S352; 322 Ill 589, 153NE679; 293Pa459, 143A113. But see 127Kan221, 273P468. **Purchaser entitled to assume that title remains in** holder in condition in which it was received in absence of knowledge or notice. 98NJEq167, 130A6. **Where plaintiff's bill in equity charges notice** anticipating defense of bona fide purchaser, burden is on defendant only to prove purchase for value, and on plaintiff to prove notice. 219Ala571, 123S61.

1782-99 92Fla758, 110S352; Fla 129S 501; 236Ky54, 32SW(2d)558.

1782-99½-New. It is to be presumed that purchaser of land saw instrument conveying it and was informed thereby of exact location of boundary line. 294 Pa47, 143A474.

1782-1 216Ala225, 113S47; 218Ala182, 118S338; 218Ala513, 119S20.

1783-3 TexCivA 3SW(2d)822.

1783-3½-New. Presumption is that purchaser has performed his duty to have title examined. 128Misc299, 218 NYS401.

1783-3⅓-New. Where purchaser receives information or knowledge of facts sufficient to put him on inquiry, failure to make inquiry makes presumption of notice absolute. 33F(2d)248.

1783-4 Parol evidence is admissible to show notice of prior contract. 316Mo 333, 289SW939. **Evidence admissible.**–TexCivA 289SW442. **Evidence inadmissible to show notice.**–168La504, 122S 596; 169La176, 124S772. **Letters between plaintiff's** six months after purchase held inadmissible to show faith. TexCivA 295SW679. **In tresspass to try title,** defendant's attorney's testimony that plaintiff would have been advised of status of title "if inquiry had been made," held admissible. TexCivA 295 SW679.

1784-9 Evidence sufficient to show that a purchaser was a bona fide purchaser.–11F(2d)971; 19F(2d)880; 15DelCh192, 133A695; 86 IndA653, 159NE469; 229 Ky369, 17SW(2d)207; 236Ky54, 32SW (2d)558; 233Mich273, 207NW836; 248 Mich253, 226NW826; 315Mo 1046, 287 SW1042; 293Pa459, 143A113; 144SC 271, 142SE648. **Evidence sufficient to show that a purchaser was not a bona fide purchaser.**–32F(2d)979; 221Ala163, 128S170; 71CalA534, 235P745; Ill 172 NE164; 58ND258, 225NW796; 143 Okl 38, 287P390; TexCivA 295SW679. **Evidence insufficient to show that a purchaser was a bona fide purchaser.**–Mo 282SW392. **Evidence insufficient to show that a purchaser was not a bona fide purchaser.**–167La653, 120S40; 240 Mich234, 215NW524 (relationship to former partner in brokerage firm with which property was listed). **Evidence held to show good faith.**–TexCivA 295 SW679.

1784-10 Evidence sufficient to show payment of valuable consideration.–218 Ala182, 118S338; 15DelCh192, 133A695. **Evidence sufficient to show lack of consideration.**–71CalA534, 235P745. **Evidence insufficient to show payment of all of consideration.**–101WVa83, 131SE716.

1785-11 Evidence sufficient to show notice.–221Ala163, 128S170; 169Ark372, 275SW743; 208Cal 172, 280P947; 71 CalA534, 235P745; 73CalA539, 238P 1081; 77CalA681, 247P516; CalA 274P 552; 127Kan221, 273P468; 243Mich 624, 220NW669; 123 Okl 181, 252P437; 43 OklACR221; TexCivA 295SW679; TexCivA 297SW294; TexCivA 23SW (2d)472; 148Va686, 139SE257. **Evidence insufficient to show notice.**–CalA 273P587; 92Fla758, 110S352; 322 Ill 589, 153NE679. **Evidence sufficient to show want of notice.**–15DelCh192, 133A 695; TexCivA 289SW442. **Clear and unequivocal evidence** must be produced to show notice. 293Pa459, 143A113. **Preponderance of evidence** is required and is sufficient. DelCh 141A619.

1785-12 161Ga711, 132SE547; 322 Ill 589, 153NE679; 208Ky769, 271SW1075. **Evidence of possession held insufficient to impute notice** to one who bought in good faith from owner of record title. 161Ga711, 132SE547.

1786-19 101WVa83, 131SE716.

1787-21 207Cal 600, 279P664, 64ALR 1412; 125 Okl 282, 257P793; TexCivA 294SW894.

1787-23 173Ark633, 293SW36; DelCh 141A619; 125 Okl 282, 257P793; 289Pa 184, 137A254; TexCivA 281SW604; TexCivA 22SW(2d)688.

1787-25½-New. Where issue of actual notice was raised, question of constructive notice is immaterial. TexCivA 295 SW679.

1788-29 214Ala89, 106S500; 216Ala 623, 114S223; 94Fla851, 114S452; 97 Fla1073, 122S710; MoA 282SW546, 547 [citCJ]; TexCivA 30SW(2d)561. **Law implies lien for unpaid purchase price** of land, of which purchase-money notes are mere written evidence. TexCivA 9 SW(2d)275.

1788-31 218Ala195, 118S379; Ark 30 SW(2d)858; 94Fla851, 114S452; 136 Misc493, 241NYS22; TexCivA 25SW (2d)246.

1789-35 216Ala623, 114S223.

1789-37 216Ala623, 114S223; 233Ky 673, 26SW(2d)551.

1789-41 216Ala623, 114S223.

1789-42 216Ala623, 114S223.

1789-43 216Ala623, 114S223; 144 Okl 150, 289P721.

1789-44 230Ky558, 20SW(2d)460.

1790-47½-New. Vendor's lien is included in equitable liens. 90Fla407, 106S127, 43ALR1409.

1790-47½-New. Fact that deed by mutual mistake misdescribed land intended to be purchased did not destroy vendor's lien arising as incident to contract of sale, and right to have deed corrected could be exercised in proceeding for enforcement of lien. TexCivA 9SW(2d)275.

1790-48 216Ala623, 114S223; 87Colo 441, 288P414.

1790-50 175Ark437, 1SW(2d)1004; TexCivA 218SW(2d)17 (vendor's lien arises by operation of law).

1790-51 17F(2d)294; 214Ala603, 108S 519; 216Ala623, 114S223; 118Kan194, 234P944 (vendor's lien arises out of contract). **Minor's undivided interest** held severed by payment under agreement so as to preclude lien. 214Ala603, 108S519.

1791-52½-New. No lien under forged deed.–TexCivA 280SW247.

1791-53 214Ala603, 108S519; TexCivA 21SW(2d)369 (notes not representing unpaid purchase price cannot be secured by vendor's lien).

1791-54 214Ala603, 108S519.

1792-63 107WVa280, 148SE114, 64ALR 1246.

1792-70 Retention of lien in conveyance till full payment makes grant conditional till full payment. TexCommnA 280SW736.

1793-72 249 IllA180; 33PortoRico 885; 154Tenn389, 285SW558.

1793-73 218Ala182, 118S338; TexCivA 13SW(2d)123. **In Texas,** etc. 115Tex 193, 280SW158.

1793-75 Purchaser is not bound by reservation of lien to secure note not executed where agreement was that balance should be paid from first oil produced and none was produced. TexCommnA 274SW125.

1794-82½-New. Delivery of deed is indispensable to retention of vendor's lien attempted to be retained therein. TexCommnA 13SW(2d)69.

1794-87 Contra 32NM5, 250P21.

1795-88 215Ala433, 111S5.

1796-91 17F(2d)294; 214Ala406, 108S 42; 217Ala511, 116S681; 97Fla1073, 122S710; 227Ky258, 12SW(2d) 693;

230Ky558, 20SW(2d)460; 233Ky673, 26 SW(2d)551; 113 Okl 252, 241P1094; 144 Okl 150, 289P721; TexCivA 287SW 155; TexCivA 289SW133; TexCivA 289SW714; TexCivA 297SW863; Tex CivA 48W(2d)121; TexCivA 17 SW(2d)89. In Minnesota.–176Minn188, 222NW916.

1799–92 195NC532, 142SE783.

1801–13 216Ala623, 114S223.

1801–14 216Ala623, 114S223.

1802–19 17F(2d)294; 38Wyo 400, 267P 514, 517, 60ALR1233 [citCyc].

1802–20 17F(2d)294.

1802–24 175Ark437, 1SW(2d)1004.

1803–28 TexCivA 289SW133.

1803–29 See TexCivA 287SW155.

1803–30 Life estate.–233Ky673, 26SW (2d)551. In Saskatchewan.–[1929] 3 DomLR130 (lien cannot arise on sale of land of right of prior purchase of land upon which vendor had squatted).

1804–32 TexCommnA 286SW173.

1805–38 94Fla851, 114S452, 453 [quot Cyc]; 128Misc275, 218NYS545.

1805–39 94Fla851, 114S452, 453 [quot Cyc]. Lien held enforceable by one not grantor.–94Fla851, 114S452. Purchaser who sold to third person who received conveyance from original vendor held to have vendor's lien. 94Fla851, 114S452.

1805–41 36GaA261, 136SE166.

1806–42 36GaA261, 136SE166.

1806–43 36GaA261, 136SE166; [1926] CanSC655, [1926] 4DomLR402.

1806–50 177Ark656, 7SW(2d)755; 113 Okl 252, 241P1094. Debt is secured by vendor's lien to extent that it is renewal of obligation for purchase money used to pay off original vendor. TexCivA 21 SW(2d)92. That portion of price is to be used to liquidate mortgage indebtedness is immaterial. 144 Okl 150, 289P 721.

1806–55 TexCivA 287SW282; TexCivA 289SW714; Sask [1930] 2DomLR272.

1806–56 176Minn188, 222NW916.

1807–59 Interest above the ordinary legal rate, etc. 222Ky646, 1SW(2d)1041 (only legal rate chargeable after maturity).

1807–62 But see 97Fla636, 121S806.

1807–64 Representations as to genuineness of indebtedness.–TexCommnA 24 SW(2d)354.

1807–65 172Ark783, 290SW361.

1808–66 167Ga170, 144SE893; 241Mich 508, 217NW885, 886 [citCyc]; Wash 291 P705; Sask [1930] 2DomLR272.

1809–69 Writing held not essential.–214Ala605, 108S513.

1809–71 Wash 289P1010 (delivery of contract for sale of land); Wash 291P 705. Recordation or acknowledgment of vendor's assignment of future payments is not necessary as between parties. Wash 291P705.

1809–72 TexCivA 278SW885 (by wife of first assignee of lien).

1810–76 Assignment by wife of one to whom note and lien were sold does not transfer lien to assignee as she was not owner of lien or notes. TexCivA 278SW 885.

1810–77 172Ark828, 290SW606; 165Ga 836, 142SE72.

1810–78 But see 167Ga170, 144SE893.

1810–83 160Ga686, 129SE89; 162Ga 604, 134SE613 (as collateral).

1811–86 TexCivA 282SW925.

1811–93 151Va252, 144SE417; Wash 291P705. Vendor's lien notes created under forged deed are of no binding effect, though transferee purchased them in good faith and for value. TexCivA 280SW247.

1812–94 249Mich425, 228NW775; Tex CivA 274SW220. Title or claim to land of purchaser of vendor's lien notes can be no better than title of vendor. Tex CivA 274SW220.

1812–95 In Texas.–CommnA 285SW 268; CivA 286SW906; CivA 15 SW(2d)139; TexCivA 21SW(2d)750.

1812–96 Wash 292P406.

1813–1 If land does not sell for sum sufficient to pay notes, deceased vendor's estate is bound for balance due thereon. 151Va101, 144SE453.

1813–2½–New. Where defendant purchased interest of plaintiffs as vendors in land contract and deducted amount of taxes due, but agreed to collect taxes from purchasers, and thereafter, without attempting to collect amount of taxes from purchasers, she instituted summary proceedings and terminated contract, thereby disabling herself from recovering amount of taxes from purchasers, she was liable to plaintiffs for amount deducted. 244Mich220, 221NW 177.

1813–2⅓–New. Fact that vendor, on execution of deed, taking back note to secure payment of price, did not intend to pass title, has been held not to defeat right of assignee of notes and lien to foreclose, regardless of whether vendor's lien was created, since instruments at least created contract lien. TexCivA 10SW(2d)415.

1813–2¼–New. Where notes for land payable to vendor were indorsed by him and delivered to others, notes became obligations against his estate on account of his indorsement, secured by vendor's lien on land. 151Va101, 144SE453.

1813–4 234Ky376, 28SW(2d)43. Declaration in assumpsit alleging implied warranty that vendor would not release his lien and release of lien without showing that plaintiff has sustained any damage is insufficient. 104WVa284, 140SE8.

1813–10½–New. Vendor's transfer of purchase-money notes by indorsement in blank to bank, together with transfer of executory contract of sale without written transfer, would not affect subsequent purchaser of land from vendor who purchased without notice of transfer to bank, though he had notice of executory contract of sale. 167Ga170, 144 SE893.

1814–14 See 178Ark716, 11SW(2d)486.

1814–18 34 OhA230, 170NE580.

1815–24 151Va101, 144SE453; 104WVa 502, 140SE482.

1815–26 TexCivA 31SW(2d)871. Where payees named in notes made division of notes by assignments without recourse, lien must follow in proportion to amount of notes. 104WVa502, 140SE 482.

1815–27 104WVa502, 140SE482.

1815–31 Assignees of payees have duty to inquire into transactions prior to assignment where recorded deed retaining lien fully described notes. 104WVa502, 140SE482.

1815–31½–New. Notes whose transfer has been recorded will take precedence in payment over notes whose transfer was not acknowledged or recorded. Tex CivA 280SW840.

1815–32 239 IllA553, 559 [citCyc]; Tex CivA 274SW323.

1815–34 239 IllA553, 559 [citCyc].

1815–35 239 IllA553, 559 [citCyc].

1816–37 228Ky216, 14SW(2d)761.

1816–38½–New. It attaches at time of conveyance. 100NJEq236, 135A57.

1816–44 100NJEq236, 135A57.

1816–46½–New. Second lien note held secondary to subrogated rights of mortgagee which had taken up and released prior liens under mistake of fact. Tex CommnA 1SW(2d)857.

1816–47½–New. Lien for maintenance on land conveyed by parents to son is ordinarily paramount to rights of grantee's creditors. 107WVa280, 148SE114, 64ALR1246.

1816–49 TexCivA 286SW519. Upon reconveyance to vendors to satisfy unpaid notes, vendors having expressly reserved lien take free from judgment lien against vendees' grantee since judgment creditor is in no better position than vendees or their grantee. TexCivA 286SW519.

1816–51 100NJEq236, 135A57 (having actual notice).

1817–53½–New. Where consideration stated in deed was "the sum of one dollar and other considerations of value, the receipt of which is hereby acknowledged," and immediately after description of land was found "a lien is retained to secure payment of unpaid purchase money," vendor had no lien for unpaid purchase money as against creditor recovering judgment against purchaser under which execution was levied, under Kentucky statute. 226Ky233, 10 SW(2d)833.

1817–54½–New. Payment of installments due under purchaser's trust deed by assignee of purchase-money notes, before and after conveyance of land to him by purchaser at vendor's lien foreclosure sale, does not inevitably destroy lien of judgment rendered against purchaser after such sale. TexCommnA 11 SW(2d)292.

1818–62 241Mich508, 217NW885, 886 [quotCyc]. Lien reserved in a recorded deed is superior to rights of subsequent mortgagee or lienholder whose only right in property is to subject it to sale for payment of his indebtedness. Tex CivA 286SW519.

1819–65 But see TexCivA 286SW519.

1819–66 94Fla899, 114S441.

1819–70 230Ky558, 20SW(2d)460; 113 Okl 252, 241P1094.

1820–71 128Misc275, 218NYS545.

1820–72 16F(2d)657; Ark 30SW(2d) 858; 128Misc275, 218NYS545; TexCivA 26SW(2d)478(2dcase).

1821–75 227Ky258, 12SW(2d)693. Purchaser retains title till land is purchased at statutory sale.–TexCommnA 276SW199; TexCivA 286SW519; Tex CivA 28W(2d)909. Purchaser is entitled to use, occupation, and rents till he loses title in manner prescribed by law. TexCommnA 276SW199.

1821–79 172Ark783, 290SW361.

1822–91 100NJEq236, 135A57.

1823–94 16F(2d)657.

1823–95 16F(2d)657.

1823–99 TexCivA 287SW279.

1824–5 TexCivA 272SW212 (purchaser may rely on record).

1824–7½–New. Purchaser has right to assume that judgment canceling deed also canceled vendor's lien where there is nothing to apprize him of transfer of lien. TexCivA 272SW212.

1824–7⅓–New. Where record showed cancellation, it was not incumbent on plaintiff to prove that prior holder did not have notice. TexCivA 272SW212.

1824–9 101NJEq58, 137A826.

1824–11 In Alberta.–[1930] 2DomLR 239.

1825–16 TexCommnA 271SW887 (payee might accept subsequent purchaser's liability or rely on such purchaser's grantor); TexCivA 271SW121; Tex CivA 5SW(2d)224.

1825–17 But see TexCommnA 271SW 887.

1825–18 165Ga836, 142SE72. Evidence held insufficient.–165Ga836, 142SE72.

1825–19 But see TexCivA 272SW212.

1825–20 TexCommnA 285SW305.

1826–28½–New. Original vendor of property, transferred by purchasers to bank and resold under contract for sale entered into by original purchasers and assigned to bank, has been held entitled to recover from bank payment made to examiner by subvendee after bank had closed, where express language of assignment required that payment be made to original vendor. 54SD250, 223NW59.

1826–29 214Ala406, 108S842; 241Mich 508, 217NW885, 886 [quotCyc]; 128 Misc275, 218NYS545; TexCivA 48W (2d)121.

1827–33 241Mich508, 217NW885, 886 [quotCyc]; 54SD250, 223NW59; 104 WVa486, 140SE483, 484 [citCyc].

1827–35 97Fla1073, 122S710.

1828–36 TexCivA 288SW267. Vendor's right to foreclose lien was not lost because taking possession and collecting rents. TexCivA 27SW(2d)327.

1828–46½–New. Vendor's lien foreclosure suit on one purchase-money note held not release of others. TexCivA 296 SW627.

1828–46⅓–New. In absence of consideration passing to holder suit on one note held not release of others. TexCivA 296 SW627.

1829–56½–New. Where second deed is quitclaim deed and does not state its purpose to correct prior description, it releases land from vendor's lien as to innocent parties. 177Ark243, 6SW(2d) 305.

1829–57 214Ala406, 108S842; 97Fla 1073, 122S710.

1829–59 TexCommnA 285SW305. But see Sask [1930] 2DomLR272.

1829–59½–New. Vendor's lien is not destroyed because purchaser, with vendor's knowledge, gives mortgage to secure money borrowed for part payment, where no conduct of vendor causes waiver. 97Fla1073, 122S710.

1829-60 But see **TexCivA** 287SW279.
1829-61 **TexCommnA** 289SW1002 (conveyance subject to lien); **TexCivA** 9SW (2d)465.
1830-68½-New. Where purchaser reconveyed land purchased to vendor in consideration of cancellation of vendor's lien notes and lien securing them, it has been held that, in absence of evidence to contrary, court must presume that vendor, in taking such reconveyance, assumed payment of vendor's lien notes, which he had previously transferred to third person. **TexCivA** 9SW(2d)465.
1830-69 **MoA** 282SW546.
1830-70 **MoA** 282SW546.
1832-88 214Ala406, 108S42.
1832-89 235Ky724, 32SW(2d)49.
1834-10 103NJEq227, 143A74; 25 **OhA** 252, 157NE901; 54SD250, 223NW59. **Renewal of note** does not evidence waiver, even though new note bears higher rate of interest. 25 **OhA**252, 157NE901.
1835-19 113 **Okl** 252, 241P1094. **Unexecuted agreement to accept security** does not destroy lien. 83**CalA**87, 256P479.
1836-24½-New. Where promised security is not delivered to vendor, he does not waive lien. 100**NJEq**236, 135A57.
1836-25 55**ND**695, 215NW155; 144 **Okl** 150, 289P721. **Taking of note** as security is for debt, and note is merely evidence of debt. 55**ND**695, 215NW155.
1836-26 **TexCivA** 293SW238.
1838-45 **MoA** 282SW546.
1839-46 25 **OhA**84, 158NE548; **Tex CommnA** 23SW(2d)291.
1839-51 **Where mortgage is not delivered to vendor** as agreed and vendee fails to account for moneys collected thereon, vendor does not waive lien. 100**NJEq**236, 135A57.
1840-63 See also 29**PortoRico** 901.
1840-64 **MoA** 282SW546.
1842-73 239 **IllA**553, 558 [quotCyc].
1842-74 239 **IllA**553, 558 [quotCyc].
1842-79 **MoA** 21SW(2d)222 (renewal of certificate of deposit). **Where note is taken in payment of note** given for purchase price, vendor's lien is satisfied as to such note. **SD** 230NW763.
1843-87 **TexCivA** 21SW(2d)594.
1844-88 234**Ky**376, 28SW(2d)43.
1844-90½-New. Collateral holder of note can enforce vendor's lien regardless of insolvency of original payee of note to whom payments were made. 180**Ark** 470, 21SW(2d)853.
1844-91 **Attorney's fees.-TexCivA** 6SW (2d)186.
1845-1½-New. Grantor upon grantee's default in payment of interest installments is justified in refusing to execute releases of vendor's lien covering designated lots. **TexCivA** 27SW(2d)563.
1846-14 See also **TexCivA** 27SW(2d) 563.
1846-16 **In Texas.-CivA** 289SW714.
1846-22 249**Mich**485, 229NW411.
1847-23 **In Michigan** rule providing for six weeks' notice for foreclosure sale and that publication shall not commence till six months after commencement of suit has no application to foreclosure of land contracts. 248**Mich**184, 226NW882.
1847-29 **Mich** 233NW213. But see 249 **Mich**485, 229NW411.
1847-32 128**Misc**275, 218**NYS**545 (concurrent remedies). **Necessity of election.-31Ariz**201, 251P445.
1848-35 **In Texas.-CivA** 290SW849; **CivA** 17SW(2d)859.
1848-38½-New. Where proceeds of sale on foreclosure of lien are insufficient to satisfy debt, and plaintiff has recovered no deficiency judgment, he may sue at law for deficiency, 31**Ariz**201, 251P445.
1848-38½-New. and he may base his action either on the note secured or on the foreclosure judgment or simply on the indebtedness for the balance due. 31**Ariz**201, 251P445.
1849-44 201 **Iowa**1107, 206NW959 (claim that judgment was rendered for full amount before maturity disregarded in de novo review on appeal, at which time entire amount was due, no objections because of prematurity having been made in trial court). **Enforcement of acceleration clause of contract to purchase price** has been held inequitable, in view of honest dispute as to whether purchaser has right to deduct second year's rent due. 247**Mich**605, 226NW 217.
1849-45 212**Ala**674, 103S880. **Adverse possession by vendee** under vendor's deed is not completion of title within terms of purchase-money note. 212**Ala** 674, 103S880. **In Alabama.-212Ala**674, 103S880. **Where purchaser refuses to perform by seeking to incorporate unauthorized provisions in escrow instructions,** vendee is entitled to enforce lien. 88**CalA**430, 263P846. **Acceleration of maturity.-SD** 226NW763.
1850-52 201 **Iowa**1107, 206NW959; 206 **Iowa**698, 214NW552; 206 **Iowa**693, 214 NW673; 128**Misc**275, 218**NYS**545; 147 **Wash**29, 264P983. **Where tender of deed is made in pleadings,** absence of such tender is especially inconsequential. 206 **Iowa**698, 214NW552.
1850-59 See also 162**Ga**604, 134SE613.
1850-60 215**Ala**18, 109S154 (condition of "complete title" not satisfied if title by adverse possession).
1850-60½-New. Tender of abstract pending purchaser's action to cancel contract held sufficient without further tender where, under contract, no tender by vendor is necessary to put purchaser in default. 206 **Iowa**698, 214NW552.
1850-61½-New. But purchaser may restrain judicial sale enforcing lien pending determination of conflicting interests of vendor and third party where purchaser was ignorant thereof and relied on representation. 194**NC**797, 139 SE691.
1851-62 **Agent of owner,** under agreement to have purchase money above certain sum, could assert vendor's lien on lots sold for his commission as part of purchase money. 218**Ala**141, 117S648, 58**ALR**1495.
1851-64 94**Fla**851, 114S452.
1851-68 **Owner of vendor's lien notes** held unable to sue for recovery of land till sale under foreclosure to him. **Tex CivA** 286SW315.
1851-70½-New. Assignee of written contract for sale of real estate with rights of assignor is entitled to foreclosure regardless of deed to assignee. 208 **Iowa**564, 226NW110, 66**ALR**59.
1852-77 **TexCivA** 286SW519.
1852-81 **TexCivA** 272SW317 (wrongful refusal to accept tender). **Interest in property acquired by one assuming to pay one fifth of amount of vendor's lien notes** against property has been held subject to foreclosure in suit by one claiming vendor's lien by subrogation, though holder of such interest be merely joint tenant. **TexCivA** 21SW(2d)92. **Invalidity of other liens relied on as security for notes** does not render invalid foreclosure of valid vendor's lien. **Tex CivA** 21SW(2d)92.
1852-84 **Restraining enforcement pending conflicting claims** between vendor and third party may be permitted where purchaser was ignorant of such claim and relied on vendor's representation that he had title. 194**NC**797, 139SE691.
1853-92½-New. **Breach of agreement to make advances for improvements** is not available as defense where purchaser is in default in payments on contract and taxes and has committed waste. 235 **Mich**581, 209NW926.
1853-92½-New. **That no title passed to purchaser** does not constitute defense where vendor delivered to escrow holder deed conveying property to purchaser and purchaser refused to complete transaction because mortgage did not contain clause not required by contract. 88**CalA** 430, 263P846.
1853-92¼-New. Insufficiency of description of land in vendor's lien notes sued on is no defense against enforcement of implied lien for balance of purchase money. 158**Tenn**1, 11SW(2d)865.
1853-92½-New. That land was worth less than price and that venture has become unprofitable does not defeat right to enforce lien. **Va** 154SE565.
1853-96 See also 194**NC**797, 139SE691.
1854-3½-New. **Effect of knowledge of encumbrance.**-Where purchaser knew of existence of mortgage at time of purchase and never tendered amount due on contract, he cannot defend action to foreclose contract on ground that vendor cannot convey title free from encumbrances. 235**Mich**581, 209NW926.
1854-4 **Breach of agreement to make advances for improvements** will not sustain claim for damages where purchaser is in default and has committed waste. 235**Mich**581, 209NW926.
1854-7 See also **TexCivA** 32SW(2d) 660.
1855-14 307**Mo** 462, 271SW370. See also 175**Ark**437, 1SW(2d)1004. **Statute regulating manner of extending maturity of debt secured by vendor's lien.-Ark** 30SW(2d)858. **Statute fixing limitation for enforcement of mortgages** does not affect holder of vendor's lien. **Ark** 30SW(2d)858. **Canadian statute construed and applied.-Sask** [1930] 2**Dom LR**272.
1855-16 **TexCommnA** 296SW868; **Tex CivA** 285SW935 (construing statute); **TexCivA** 287SW282; **TexCivA** 290SW 920 (lien not barred); **TexCivA** 23SW (2d)743. **In Texas.-CommnA** 275SW 997. **Vendor's lien has been held not barred by statute of limitation.-118Tex** 526, 18SW(2d)1049.
1856-21½-New. Under some statutes suit on all of series of vendor's lien notes may be brought within statutory period of note last maturing. 117**Tex** 357, 4SW(2d)541.
1856-22 **Payment must be made generally** on balance claimed. **Sask** [1930] 2**DomLR**272.
1856-24 **TexCivA** 287SW282.
1856-30 But see 180**Ark**470, 21SW(2d) 853. **Sixteen years.-220Ala**300, 124S874.
1857-39 **Lien may be foreclosed in county where purchase-money notes were payable** in action by nonresident vendor. **TexCivA** 286SW241.
1857-40 229**Ky**749, 17SW(2d)1023; **TexCivA** 289SW133; **TexCivA** 30SW (2d)561.
1857-42 **Purchaser's assignee** is not entitled to relief from forfeiture on ground that he was not made party where his assignment was not made as required in contract of sale. 242**Mich**110, 218NW 680.
1859-57 **TexCivA** 285SW935.
1860-71 **TexCivA** 2SW(2d)909.
1860-72 **TexCivA** 285SW935.
1860-74 203 **Iowa**174, 210NW747.
1861-82 16F(2d)657.
1861-83 **TexCivA** 273SW634.
1862-95 **TexCivA** 285SW834.
1863-2 194**NC**797, 139SE691.
1863-3 But see 158**Tenn**1, 11SW(2d) 865.
1863-11 **Citation need not be published in county where land is situated,** under some statutes. **TexCivA** 5SW(2d)799.
1863-13 **TexCivA** 2SW(2d)909.
1863-14 212**Ala**674, 103S880 (demurrer pointing out that in face of bill purchase-money note held not matured erroneously overruled); **TexCivA** 17SW (2d)144(3dcase). **Allegations held sufficient to constitute a cause of action.-**163**Ga**911, 137SE76; **TexCivA** 9SW(2d) 275.
1863-14½-New. Vendors are not entitled to foreclose liens for taxes and interest on vendor's lien note, without alleging that they were forced to pay such interest and taxes to protect their interests in property and that defendant had not paid such amounts. **TexCivA** 17SW(2d)144(3dcase).
1864-17 **Averment of valuable consideration for assignment** is not necessary in action by assignee. 99**WVa**498, 129SE 472.
1864-21 **Averment held not demurrable** in devisee's action to foreclose lien. 214 **Ala**605, 108S513.
1864-23 97**Fla**180, 122S559.
1866-52½-New. Where notes on which suit is brought are barred by limitation, vendor may amend petition and sue to rescind contract and recover possession. 144 **Okl** 150, 289P721.
1867-60 **TexCivA** 48SW(2d)1046, 1054 [citCyc].
1868-72½-New. **Offer to reconvey.**-Answer must contain offer to reconvey, and, in absence thereof, answer is fatally defective. 135 **Okl** 161, 274P657.
1868-77½-New. **Cross action to foreclose paving lien** superior to vendor's lien may be set up by answer. **TexCivA**

4SW(2d)213 (allegations held sufficient).
1868-83 TexCivA 10SW(2d)415.
1869-85 MoA 218W(2d)222; 54SD250, 223NW59.
1869-87½-New. Grantor suing to enforce vendor's lien must prove nonpayment, where deed recites full payment of purchase money. 214Ala406, 108S42.
1869-90 94Fla851, 114S452.
1869-91 94Fla851, 114S452.
1869-93 94Fla851, 114S452.
1869-94 Receipt in full filed with answer casts burden on plaintiff to overcome defense of payment. 213Ky521, 281SW497.
1870-98 Failure of vendor to take note may be considered. 214Ala406, 108S42.
1870-99 Land contract admissible in evidence, though mortgage recording tax not paid where purchaser does not get possession until final payment. 128 Misc275, 218NYS545.
1870-1 214Ala406, 108S42.
1870-4 236Ky33, 32SW(2d)538. Evidence held sufficient.-214Ala406, 108S42. Evidence held insufficient.-238Mich700, 214NW61; Va 154SE565. Evidence held to establish that purchasers bought land with knowledge that streets and alleys had been dedicated. Va 154SE565. Admissions of answer may be sufficient to sustain decree of foreclosure. 206 Iowa 698, 214NW552.
1870-5 Evidence held to sustain directed verdict and foreclosure of deed of trust in suit for accounting. TexCivA 287SW121. Evidence of assignment of contract to purchase and its assumption of assignee held insufficient to release purchaser from his obligation to vendor. 201 Iowa1107, 206NW959. Evidence sufficient to show implied waiver of lien.-104WVa486, 140SE483. Evidence sufficient to show purchase price unpaid.-144 Okl 150, 289P721. Evidence sufficient to sustain finding that no lien was reserved.-TexCivA 4SW(2d)121. Evidence sufficient to show vendor's misrepresentation of boundary.-WVa 155SE 305. Evidence insufficient to show fraud.-176Ark1205, 4SW(2d)921; 332 Ill 484, 163NE828. Vendor need show only prima facie title in himself in action to foreclose land contract. 206 Iowa698, 214NW552.
1871-10 See also 160Ga399, 128SE178. Receivership is proper where it appears that vendee's interest has been assigned and otherwise transferred so that it is difficult to ascertain where such interest was when plaintiff acquired vendor's interest and premises are in hands of various persons who, without investment, are collecting rentals with apparent intention of doing so as long as possible and then abandoning premises. 234Mich189, 207NW811.
1871-13½-New. When vacation of appointment of receiver improper.-Where proper case for appointment of receiver was presented, appointment will not be vacated for failure personally to serve alleged lessee with process or copy of order to show cause where his interest in subject matter was questionable and his attorney was present at hearing and, though alleged lessee was subsequently served with process, he did not appear generally and made no attempt to go into merits. 234Mich189, 207NW811.
1872-15½-New. Recovery of possession.-On foreclosure of land contract, court has no power to dispossess defendant and place plaintiff in possession pending foreclosure. 245Mich224, 222 NW169.
1872-30 TexCommnA 289SW1002 (holding question of merger not one of fact in view of recital in conveyance).
1872-30½-New. Whether abstract showed good title for court. TexCivA 295SW632.
1872-30¼-New. Whether plaintiff conveyed land to defendants, and defendants executed vendor's lien note, is question of fact under conflicting evidence, in foreclosure action. TexCivA 15 SW(2d)139.
1872-31 Upon rendition of verdict finding necessary fact trial judge cannot refuse arbitrarily to enter judgment thereon. 116Tex412, 292SW875. Jury's findings held in direct conflict. Tex CivA 300SW123.
1873-38 MoA 287SW1069, 1072 [quot Cyc]; TexCivA 2SW(2d)909; TexCivA 32SW(2d)660.
1873-40 Judgment held sufficient to support sale.-TexCivA 275SW156 (foreclosure against heirs of purchaser disposing of all parties to suit).
1873-41 TexCommnA 276SW199 (judgment held not to give right of possession before sale).
1874-46 115 Or591, 239P195.
1874-51 115 Or591, 239P195.
1874-52 BC [1929] 4DomLR132.
1874-53 Execution cannot issue for sale of property subject to vendor's lien unless judgment establishing lien shall decree foreclosure and sale and distribution of proceeds among interested parties. 195Cal 37, 231P730. As against purchaser from original vendee, only recovery permissible is foreclosure and sale. TexCommnA 276SW199. Interest of wife whose separate estate was used by husband in part payment for land may be sold if sale of husband's interest fails to satisfy judgment, though she was not made party to foreclosure proceedings. TexCivA 280SW228.
1875-54 Retention of vendor's lien till conditions of deed should be fully met gives vendor right of forfeiture on nonperformance. TexCivA 297SW664.
1875-55 Time to perform.-51SD303, 213NW732.
1876-59½-New. Period of redemption should be accorded vendee.-49ND100, 190NW74.
1876-59¼-New. In action under South Dakota statute for strict foreclosure, court has power equitably to adjust rights of all parties thereto. 52SD20, 216NW581.
1876-59¼-New. In such action plaintiff may set off amount due purchaser for rent against payments due from purchaser under contract. 52SD20, 216NW 581.
1876-60 Mich 233NW213.
1876-62 215Ala444, 111S14; 168Ark 754, 271SW703; Mich 233NW213. Vendor declaring contract for sale forfeited and taking immediate possession cannot recover deficiency. Mich 233NW434.
1876-63 161La265, 108S477. In Florida.-91Fla706, 109S677. Where contract created relation analogous to mortgagor and mortgagee, deficiency judgment may be taken under statutes relating to mortgages. 147Wash29, 264P983.
1877-65½-New. In foreclosure suit, where decree fixes liability for deficiency, after confirmation of sale by commissioner, second decree for deficiency is unnecessary and of no legal force. 247 Mich439, 225NW930.
1877-66 161La265, 108S477.
1877-73 115 Or591, 239P195. Vendor has lien for amount due under contract plus interest, and any other amounts purchasers would have been required to pay. 128Misc275, 218NYS545. Judgment requiring purchaser to pay vendor's debt to auctioneer is excessive to extent of such debt. 88CalA430, 263P 846.
1877-75 88CalA430, 263P846; 128Misc 275, 218NYS545. See also TexCivA 16 SW(2d)894. Time from which interest allowed.-TexCivA 6SW(2d)186. Rate stipulated in note governs. TexCivA 6 SW(2)186.
1877-75½-New. Relief to purchaser.-Purchaser is not entitled to recover payments made by him. 206 Iowa693, 214 NW673.
1877-76 In Michigan.-242Mich324, 218 NW687. In Iowa.-229NW239.
1878-81 Iowa 229NW239.
1878-82½-New. Court need not order sale of surface rights to mineral lands separate from mineral interests where lease of mineral rights is subordinate to vendor's lien covering all interests. Tex CivA 2SW(2d)909.
1879-90 TexCivA 275SW156 (Rev. St. art 3754, with reference to furnishing survey of land, field notes of several parcels, and plat showing location, if such article is applicable to sales under judgment of foreclosure upon several tracts sold as a whole, substantial compliance with provisions is necessary to invoke its application). Notice of sale made on advertisement for three successive weeks is sufficient. 215Ala 444, 111S14. Time of sale is not governed by statute relating to mortgage foreclosure. 34NM13, 275P767.
1879-91½-New. Sale of land in bulk or parcels.-In some jurisdictions, under statutes, where land consists of several tracts, demand for sale in parcels may be made by parties. TexCivA 275SW 156.
1879-91½-New. In connection with such demand parties are required to furnish survey of land, field notes of several parcels, and plat showing their location. TexCivA 275SW156.
1879-91¼-New. Substantial compliance with statute is necessary to invoke its application if statute is applicable at all. TexCivA 275SW156.
1879-91½-New. Refusal to accept tender not excused, because tender did not include amount due on personal judgment, where such personal judgment could not be enforced as lien on homestead. TexCivA 272SW317.
1879-91¼-New. Right to enforcement by sale is suspended by wrongful refusal to accept tender. TexCivA 272 SW317.
1879-97 Judgment is conclusive as to matters appealable where motion to set aside sale is made long after close of term at which judgment rendered. Tex CivA 275SW156.
1879-98 TexCivA 275SW156 (conduct of attorneys not amounting to fraud). Fraud not shown by allegations of sale at inadequate price and of agreement by attorneys for heirs of purchaser with attorneys for plaintiff not to appeal from judgment, where six months elapsed between finality of judgment and sale and heirs not alleged to have instructed attorney to appeal or that attorney acted fraudulently in agreeing not to appeal. TexCivA 275SW156.
1880-4 TexCivA 275SW156 (sale in bulk).
1880-7 Purchaser at sale who combined legal title of vendor and equitable title of vendee became owner entitled to possession. 162Ga604, 134SE613. Where security deed empowered sale, purchaser at sale secured interest of vendor subject to equity of vendee. 162Ga604, 134 SE613. Where vendor had given deed to secure assigned purchase-money note, and sale was under such deed, holder of legal title who had quitclaimed for purpose of levy and sale took vendee's title by sheriff's deed. 162Ga604, 134SE 613. Where vendor's lien only covered individed one-fourth interest, sheriff's deed, conveying entire interest, is invalid as to undivided three-fourths interest. TexCivA 30SW(2d)501.
1881-10 Defendant served by publication.-TexCivA 280SW276.
1881-20½-New. Purchaser at vendor's lien foreclosure suit could strengthen title by purchasing purchase-money notes other than those suit is based upon. TexCivA 296SW627.
1881-20½-New. Purchase of unforeclosed vendor's lien notes by purchaser at foreclosure sale under another note did not destroy judgment creditor's right to redeem. TexCivA 296SW627.
1882-21 See also 162Ga604, 134SE613.
1882-23½-New. Purchaser can constructively sever rent cotton by executing chattel mortgages thereon, and prevent title thereto from passing to purchaser at foreclosure sale. TexCommnA 15SW(2d)598.
1882-27 168Ark6, 269SW370 (only in absence of special equities).
1882-27½-New. but where there are special equities in favor of innocent purchaser for value, he is entitled to payment without ratable division; 168Ark 6, 269SW370.
1883-31½-New. After decree cancelling all other notes and encumbrances which might affect vendor's title except note in hands of innocent purchaser for value, latter was entitled to payment from proceeds of sale without ratable division. 168Ark6, 269SW370.
1883-37 249Mich276, 228NW677. Pur-

chaser tendering redemption money before sale is reported and again within time which commissioner would be allowed should be allowed time to redeem. 247Mich381, 225NW484(1stcase). **Purchaser has been held entitled to redeem from foreclosure proceedings.**–247Mich 605, 226NW217. **Right to redeem** from forfeiture of land contract rests in sound discretion of court. 249Mich276, 228NW 677.

1883–40 TexCivA 286SW519. **Judgment in prior suit** by holders of vendor's lien against purchaser's estate and holders of subordinate encumbrance left holders of vendor's lien and holder of subordinate lien in same position as if neither had been party to suit, and will not deprive subordinate lienholder from right to redeem land or enforce rights by foreclosing lien and selling land subject to vendor's lien. **TexCivA** 15 SW(2d)182.

1883–41 TexCivA 286SW519; **TexCivA** 287SW279.

1884–43 One furnishing materials to one holding land under land contract will not be permitted to redeem where judgment terminating interest was rendered long before materialman made tender. 245Mich688, 224NW604.

1884–44½–New. Purchaser of land, who, in consideration of release from his notes, conveyed property to third party, is not entitled to redeem by paying off notes, where sale was free from fraud, especially after lapse of long period. 29F(2d)230.

1884–44¼–New. Equity is loath to declare forfeiture when vendees make adequate tender to redeem within time vendors led vendees to believe was proper. 247Mich381, 225NW484(1stcase).

1884–44¼–New. Holders of vendor's lien, awarded title against purchaser's estate, can require holder of subordinate encumbrance to redeem, and on failure were entitled to cancellation of such encumbrance. **TexCivA** 15SW(2d)182.

1884–44½–New. Court's failure to fix reasonable time to redeem is abuse of discretion which will cause judgment to be set aside or modified as to prescribed reasonable time. 199Wis497, 226NW 954.

1884–44½–New. Trial court's refusal to give purchasers any opportunity at all to redeem by paying amounts due under contracts, where balance due is tendered before action is commenced is abuse of discretion. 199Wis497, 226NW 954.

1884–44½–New. Court, in foreclosure proceedings, will prescribe certain limited time within which purchaser may comply with terms of contract. 199Wis 497, 226NW954.

1884–44¾–New. Whether redemption will be allowed, and time therefor, is in trial court's discretion. 248Mich184, 226NW882.

1884–44¾–New. Period within which vendee may redeem is matter within sound discretion of court, and such time must be reasonable. 199Wis497, 226NW 954.

1885–48 129 Okl 148, 264P182. See also 44 OklACR150.

1885–49 TexCivA 6SW(2d)186. **Under the law of Georgia,** etc. **GaA** 155SE206.

1885–51 TexCivA 6SW(2d)186.

1885–53½–New. Vendor foreclosing contract of sale is not entitled to personal judgment for costs though they may be included in amount required to redeem. **Man** [1929] 1DomLR982.

1885–56 TexCivA 296SW627.

1885–56½–New. Motion to set aside sale cannot serve purpose of appeal. **TexCivA** 275SW156.

1885–56¾–New. Final judgment conclusive as to matters that might have been urged on appeal. **TexCivA** 275SW 156.

1885–56¾–New. Judgment creditor must proceed without laches or delay to subject land to payment of debt. **Tex CivA** 296SW627.

1885–57 TexCivA 275SW156. **Vendee who never paid for land,** and who permitted judgment against him and sale of land on fieri facias cannot hold land or prevent dispossession despite later tender of amount he owed. 162Ga604, 134 SE613. **Purchasers and encumbrancers pendente lite.**–TexCommnA 11SW(2d) 292.

1885–58 TexCivA 274SW220. **Suit by purchaser to rescind land contract for fraud** is not barred by commissioner's judgment in summary proceedings where suit is brought within time allowed to redeem from such judgment. 242Mich139, 218NW664. **Sale void as to reversioners not made party defendants,** vested in purchaser equitable title, placing on reversioners necessity of doing equity before obtaining relief. 220Ala 380, 125S392. **Where purchaser at sale enforcing vendor's lien made payment more than forty-eight years prior to suit** of trespass to quiet title, rights of reversioners have been held barred. 220 Ala380, 125S392.

1886–66 29Ariz156, 240P275; 181Ark 339, 26SW(2d)89; **Iowa** 229NW673 (regardless of vendor's alleged fraud); **Tex CommnA** 25SW(2d)299; **TexCivA** 286 SW519; **TexCivA** 218SW(2d)594; **Tex CivA** 25SW(2d)246. **Existence of lien** by vendor for purchase money does not deprive him of remedy of ejectment. 29 Ariz156, 240P275. **Provision for sale of land** by vendor in case of default of payment, and application of proceeds to payment of note, does not deprive vendor of right to bring ejectment. 29Ariz 156, 240P275.

1887–67 TexCivA 286SW519.

1887–68 Utah 278P811.

1888–74½–New. Purchaser, appealing to court of equity to defend him against legal title to land of which he is in possession, must pay or offer agreed price. 96CalA31, 273P849.

1888–78 160Tenn374, 24SW(2d)894 (parol sale of one half interest).

1888–84½–New. Where vendor contends he conveyed land under promise of vendee to reconvey on certain conditions, he must either disaffirm conveyance and seek to set it aside for fraud or other sufficient reason, or affirm it and rely upon agreement to recover. 120Kan 510, 243P1045.

1888–84¼–New. Vendor in executory contract for purchase of real property, after bringing action for forfeiture of contract, has been held not entitled to appointment of receiver pendente lite, under statute, to collect mesne profits, without showing of fraud. 204Cal 524, 269P443.

1888–84¼–New. Vendor need not show unblemished record title from government down in order to recover possession on default. 207 Iowa155, 222NW 530.

1888–87 89CalA202, 264P493.

1889–90 Contra 251Mich23, 231NW47. **In Michigan.**–234Mich252, 208NW60; 238Mich245, 213NW119; 246Mich538, 224NW385. **Where summary proceedings are permitted under statute,** determination of amount due vendor is merely declaratory and execution cannot be issued therefor. 251Mich23, 231NW47 (amounts for which vendee liable).

1889–93½–New. Established rules of pleading and proof for particular remedy elected must be conformed to. 42 Okl ACR303.

1889–93¾–New. In action to terminate and forfeit purchaser's rights under contract, no receiver for purchaser could be appointed. 102CalA10, 282P522.

1889–93¼–New. In vendor's action to terminate purchaser's rights, remedy consists in recovery of value of use and occupation of land. 102CalA10, 282P 522.

1889–93½–New. Statute allowing equity of redemption held not to apply to proceeding to forfeit option contract to purchase land on installment plan and recover possession. **Kan** 289P975.

1889–95 221Ala588, 130S202(1stcase) (heir of vendor may sue); 96CalA31, 273 P849; 125Kan395, 398, 264P1071 [cit Cyc]; 125 Okl 194, 257P295; **6PaDist &Co** 463; **Utah** 278P811; 199Wis514, 226NW955.

1890–3 208 Iowa417, 224NW508; **Iowa** 229NW673; **Utah** 292P206 (damages recoverable). **Pleadings.**–Utah 292P206.

1891–7 TexCivA 10SW(2d)1043; **Tex CivA** 20SW(2d)1097 (plaintiff may prove cause of action to rescind contract).

1891–16½–New. In trespass to try title, equities and rights of vendor and vendee should be settled. **TexCivA** 20SW (2d)1097.

1892–17½–New. Where vendor's lien note was assigned and paid by maker's grantee as respects his claim for reimbursement, assignment is immaterial. **TexCivA** 288SW525.

1892–21 But see 234Mich52, 207NW886. **Vendee of purchaser** and assignee of such vendee by assuming original vendee's obligations under original contract waives right to notice for recovery of possession in case of default where original vendee had waived such right. 234 Mich52, 207NW886.

1892–23 48SD493, 205NW239 (action for strict foreclosure of contract, where vendor had extended time for payment, if brought without further notice, is premature).

1892–24 106Conn484, 138A503.

1892–26 Utah 292P206 (notice not required to give purchaser alternative of performing conditions of agreement).

1893–27 Iowa 229NW673 (forfeiture not barred by lapse of time after service of notice). **Purchaser's mortgagee** need not be served with notice. 202 Iowa658, 210NW753. **Sufficiency of notice to terminate contract.**–202Iowa658, 210NW753.

1893–33 See also **Alta** [1930] 3DomLR 959.

1893–35½–New. , on purchaser's voluntary abandonment notice of forfeiture becomes unnecessary. 202 Iowa833, 211 NW407.

1893–35¼–New. Where contract provides that it shall be void and defendant lose all rights and forfeit payments upon default in making any payment, declaration of forfeiture and service of notice thereof and demand is not necessary. 68Utah178, 249P470.

1893–37 96CalA31, 273P849. Contra 83CalA183, 256P575; 84Mont521, 277P 14; 128Misc275, 218NYS545; 155Wash 14, 283P470.

1894–38 Tender of deed is necessary before forfeiture where last installment is past due. 155Wash14, 283P470.

1894–41 125Kan395, 398, 264P1071 [cit Cyc].

1894–42½–New. Where vendor has unjustifiably terminated contract he may have cloud of contract removed from land only upon return of money received less value of use and occupation by vendee. **SD** 230NW219.

1894–43 235Mich369, 209NW131 (payment of amount found due prevents issuance of writ of restitution).

1894–44 TexCivA 287SW282.

1895–49 See also 323Mo 404, 19SW(2d) 287.

1895–53½–New. Partial payments by vendee, after declaration of forfeiture and service of three days' notice, have been held insufficient as defense in action of forcible entry and detainer, after declaration of forfeiture for default in subsequent payments and due service of notice. 208 Iowa417, 224NW508.

1895–54 290Pa237, 138A756. **In Michigan.**–234Mich252, 208NW60.

1895–60½–New. In action of ejectment, purchaser may set up facts justifying relief from forfeiture by court of equity. 199Wis514, 226NW955.

1896–64½–New. Process.–Service of notice in summary proceedings to obtain possession of land after forfeiture under land contract must be made at least two days before appearance day in case of both personal and substituted service. 237Mich367, 211NW636.

1896–66 92CalA526, 268P682; 46 Ida 62, 266P413.

1896–67 Purchaser relying on equitable defense in vendor's ejectment action must make out complete equitable title and right to possession in his answer. 96CalA31, 273P849. **Cross complaint held insufficient.**–92CalA526, 268P682.

1896–68 In Utah.–68Utah178, 249P470.

1896–69 Plaintiff in action for strict foreclosure must plead and prove readiness and willingness to perform at time of trial or must show offer of perform-

ance. 488D493, 205NW239.

1897-70½-New. Defendant not pleading that equities arose by reason of improvements may not invoke them. **Tex CivA** 287SW282.

1897-70½-New. Allegation of disclaimer in cross complaint for rescission by purchaser is insufficient as offer to restore. 92CalA216, 267P933.

1897-72 50SD203, 208NW981; **Tex CivA** 208W(2d)1097 (trespass to try title). **Overseer of poor, suing to foreclose land contract** assigned by poor person to reimburse town, has burden of proving amount unpaid. 230AppDiv 402, 245NY819.

1897-73 CalA 287P542 (holding evidence of damage done by vendor to property was inadmissible in action by grantee to quiet title against defaulting purchasers). **Evidence as to matters** not embraced in pleadings are properly excluded. 488D493, 205NW239. **In action for strict foreclosure of land contract,** testimony as to fair rental value and relating to recovery of purchase money is properly excluded. 488D493, 205NW 239.

1897-74 290Pa237, 138A756; **TexCivA** 208W(2d)1097 (trespass to try title). **Evidence held sufficient.**-92CalA526, 268 P682; 213Ky78, 292SW165; 52ND714, 204NW4; **Utah** 278P811. **Evidence held insufficient.**-213Ky711, 281SW811; 161 La618, 109S142; 84Mont521, 277P14; **Mont** 287P629; 52ND714, 204NW4; **Utah** 278P811. **Receipts for partial payments** signed by vendor, held not to show full payment of prior installments. 52ND714, 204NW4. **Counterclaim for pasturage properly disregarded** under evidence where claim first made in answer. **Mont** 287P629.

1898-75 50SD203, 208NW981.

1898-76½-New. Issue of title held not for jury under evidence. **TexCivA** 58W (2d)197.

1898-79 Mont 287P629 (finding held to establish purchaser's willful breach of contract). **Findings construed.**-68Utah 178, 249P470.

1898-81½-New. Finding that vendor is without title to property involved is not inconsistent with finding that vendor was owner on date of sale contract. 96 CalA31, 273P849.

1899-84 92CalA526, 268P682. **In Michigan.**-242Mich545, 219NW596. **Money judgment.**-96CalA31, 273P849.

1899-85 See also 250Mich593, 231NW 80; **ND** 230NW288. **In Michigan.**-235 Mich369, 209NW131; 240Mich366, 215 NW528.

1899-86 TexCivA 271SW418, 421 [cit Cyc]

1899-86½-New. Where court awards possession to vendor it may, where it appears improbable that purchaser can complete contract, impose as condition precedent to purchaser's right to redeem, and before taking of accounts, that he pay into court amount approximately equal to balance due. **Sask** [1925] 3DomLR335.

1899-90 106Conn484, 138A503.

1899-91 53SD341, 220NW852. **Judgment denying vendor recovery will not bar future suit for failure of grantee to perform continuing obligation for support of grantor. TexCommnA** 258W (2d)299.

1900-95½-New. Important difference between decree in mortgage foreclosure and decree for foreclosure of land contract is in time limited for redemption. 238Mich245, 213NW119.

1900-95½-New. Restitution of land after summary judgment in favor of vendor may be enjoined under certain circumstances. 238Mich245, 213NW119.

1900-95¼-New. Summary proceeding to obtain possession of land after forfeiture will not be set aside because of defective service where forfeiture was valid. 237Mich367, 211NW636.

1900-97 51SD552, 215NW778. **Four hundred dollars attorney's fees held not excessive.**-51SD552, 215NW778. **Attorney's fee not recoverable** in unlawful detainer suit. **Utah** 292P206.

1900-99 38GaA502, 144SE342. But see 97CalA532, 275P997(1stcase); 130Misc 394, 223NYS481. **Vendor can recover on check received in part payment which** was stopped by purchaser, where he was ready to perform, and is not limited to action for damages or specific performance. 127Misc487, 216NYS509. **Vendor is entitled to recover on note** received as down payment on purchaser's default. 130Misc394, 223NYS481.

1900-5½-New. Entry of judgment on vendee's note for first year's interest held proper in vendor's action for rescission see 73Mont339, 237P209.

1901-7½-New. Vendor cannot recover on check as payment after he has sold property. 125Misc817, 211NYS586.

1901-7½-New. but must sue merely for breach of contract. 125Misc817, 211NYS 586.

1901-7¼-New. Note and mortgage given as down payment constitute independent transaction and represent indebtedness independent of contract of purchase. 44 Ida539, 258P540.

1901-8 155Md410, 142A598. **Indebitatus assumpsit** will not lie on dependent or conditional promise. 220Ala455, 126 S113.

1901-13 73CalA114, 238P166; 48 Ida 295, 282P84; 235 IlA545; **NC** 154SE 832; 27 OhA362, 161NE287; **TexCivA** 148W(2d)116. See also 8LaA342. **When contract was agreement to sell and not contract of sale,** plaintiff was held to have no right of action. 160La400, 107 S239.

1902-16 Vendor's right to recover purchase price must grow out of deed and not from antecedent agreement. 155Md 410, 142A598.

1902-20½-New. Right to recover on note for purchase price depends, as between vendor and purchaser, on right to recover consideration agreed to be paid. 201 Iowa853, 208NW364.

1902-20¼-New. Joint purchasers of land cannot be held liable in solido for purchase price unless expressly so stipulated and agreed by them. 160La109, 106S711.

1902-20¼-New. Where several parties purchase without specifying interest of each, they are presumed to have acquired in equal proportion and are only bound each for his share of price. 160La109, 106S711.

1902-21 134Misc40, 234NYS404.

1902-22 But see 73CalA114, 238P166.

1903-24 73CalA114, 238P166; 98Fla 118, 123S519(2dcase).

1903-28 122 Or230, 257P801.

1903-34½-New. Where purchaser has attorned to vendor and rent reserved is installments of principal and interest due under agreement, attornment does not extend to acceleration clause so as to permit distraint for moneys due for default by purchaser in payment of taxes, default not being as to principal and interest due under agreement. **Sask** [1928] 3DomLR505.

1904-43 See also 147Miss758, 113S341.

1904-45 201 Iowa853, 208NW364. **Where contract so provides vendor may declare whole purchase price due** and payable at his election and sue for balance unpaid. 79CalA748, 250P1106. **Effect of election.**-53SD262, 220NW506, 68ALR940. **Vendor electing to forfeit and terminate purchase contract** cannot thereafter recover unpaid purchase price. 102CalA10, 282P522.

1904-46 Where the contract provides for a forfeiture by usual forfeiture clause, vendor may sue at law for payments due in equity for foreclosure of lien and deficiency decree, or declare contract forfeited. 245Mich448, 222NW 697.

1905-48½-New. By selling property after breach, vendor shows election to hold defendant for damages. 125Misc 817, 211NYS586.

1905-48¼-New. and cannot sue to recover part of purchase price. 125Misc 817, 211NYS586.

1905-48¼-New. Vendor is not precluded, by election to foreclose, from bringing action against defaulting purchaser for deficiency unsatisfied by proceeds of sale on foreclosure. 153Tenn380, 284 SW354.

1905-50 218Ky846, 292SW513; **Can** [1930] 4DomLR868.

1906-57 235 IlA545.

1906-58 123 Or377, 260P1002.

1907-64 134Misc40, 234NYS404; 123 Or377, 260P1002.

1907-70 36GaA581, 137SE409; 38GaA 502, 144SE342; 134Misc40, 234NYS404; 34 OhA525, 171NE360. **On repudiation of contract,** tender is not necessary. 125Misc817, 211NYS586.

1908-75½-New. Purchaser waiting till whole purchase price is due must be in position to convey before he can recover full price. 125Misc817, 211NYS586.

1908-75¼-New. or any part thereof. 125Misc817, 211NYS586.

1908-77 36GaA581, 137SE409.

1909-78 36GaA581, 137SE409; 41GaA 124, 152SE295.

1909-79 36GaA581, 137SE409.

1909-82 201 Iowa853, 208NW364.

1910-87 33PortoRico 676.

1911-8 122 Or230, 257P801.

1911-9 122 Or230, 257P801.

1912-10 122 Or230, 257P801.

1913-19½-New. Refusal of purchaser to surrender possession of land is not condition precedent to suit on principal amount falling due on default in payment of interest note. 37GaA802, 142 SE215.

1913-29 Fraud of the purchaser in inserting clause, without grantor's knowledge, in deed and notes, relieving himself of liability for failure to pay, will not bar recovery. **TexCivA** 284SW289.

1914-41½-New. It is no defense to recovery on note that purchaser lost property through neglect to pay mortgage and allowed foreclosure without redeeming. 30Ariz501, 249P70.

1914-41¼-New. Where purchaser accepts conveyance with inaccurate description, he cannot hold right to have deed reformed and defeat action for purchase money. 86 IndA178, 156NE 523.

1914-41¼-New. Purchaser in possession cannot successfully resist payment on ground that description was uncertain or imperfect. 86 IndA178, 156NE 523.

1914-41½-New. Vendor's obligation to pay commission to third person is no defense. 235Ky838, 32SW(2d)408.

1914-43 TexCivA 278SW333; **TexCivA** 285SW670. **Statute of limitations** do not apply to defense of fraud. **TexCivA** 278SW333.

1916-53 92PaSuper550.

1919-92½-New. Insolvency of bank holding purchase money held not cause of loss to purchaser who made deposit pending perfection of title. 205 Iowa 834, 210NW797.

1921-7 36GaA253, 136SE462 (partial).

1923-27 39GaA810, 148SE606(2dcase).

1924-34 201 Iowa853, 208NW364; 245 Mich448, 222NW697.

1925-46 36GaA253, 136SE462; 37GaA 257, 139SE681; 45Philippine162 (stipulation for Torrens title means title in respect to which all opposition has been overcome, certificate issued upon judgment which has not become final not satisfying this requirement).

1926-56 93CalA455, 270P232(1stcase).

1927-61 215Ala190, 110S294; 215Ky 526, 286SW780. **In Pennsylvania.**-299 Pa284, 149A184.

1928-62 36GaA570, 137SE104 (showing of fraud essential).

1929-67 36GaA570, 137SE104 (showing of insolvency essential).

1932-96 150Miss143, 116S538.

1932-3 See also 47 Ida188, 273P950.

1935-36 Purchaser in partial possession may defend to extent of failure of title to premises of which he is not in possession. 36GaA253, 136SE462.

1935-37 215Ala190, 110S294.

1936-47 161Ga672, 132SE442; 45Philippine296. **Purchaser's right to have contract reformed** and assert his full rights under reformed contract is not prevented by right of set-off for deficiency in quantity. 161Ga672, 132SE 442.

1937-50 See also 205 Iowa156, 217NW 829.

1937-56 34Ariz49, 267P598; 36GaA 253, 136SE462; 201 Iowa561, 207NW 610; 323Mo 404, 19SW(2d)287. **Where vendor, under contract including alley, did not have title nor possession of alley,** vendees taking possession of lot

could refuse payment for lack of title to alley without rescission and restoration. Iowa 227NW591.

1938-62 Iowa 227NW591.

1939-70 159La1053, 106S562.

1940-80½-New. or alleged failure to deliver deeds; 147Miss758, 113S341.

1941-89½-New. But where vendee in possession has no knowledge of defect and entered under mutual mistake, though mistake of law, resulting in gross injustice, he may set up such facts as defense. 85PaSuper78.

1942-91 237 IllA341 (continuing to hold title and failure to offer to reconvey, after stoppage of checks given in payment for conveyance).

1944-14 117 Or244, 243P767, 772 [cit Cyc].

1946-29 97PaSuper137.

1947-30 39GaA810, 148SE606(2dcase).

1947-30½-New. Where receiver, who held land, turned it over to plaintiff as his agent, receiver and not plaintiff is accountable for rents and profits, and issue whether defendant was entitled to set off fair rental value thereof against plaintiff's purchase-money notes is properly excluded. 39GaA212, 146SE559(2dcase).

1947-34 215Ky526, 286SW780.

1949-44 See also 77Colo 112, 235P350.

1949-45 176Ark1204, 4SW(2d)14; Mich 233NW421; 49SD65, 206NW421 (in action on renewal note representing installment on purchase price).

1949-46 Miss 105S449.

1950-49 But see 170Minn259, 212NW457.

1951-59½-New. In suit by vendor's assignee purchaser's judgment against vendor for fraud may be set off as of date of contract. 250Mich311, 230NW184.

1952-69 42 Ida555, 247P451. **Where it is agreed that note shall not be paid till lien has been removed,** and that, if lien shall not have been removed within one year, maker shall have lien removed and pay balance, action before expiration of year is premature though statute of limitations has run against lien. 42 Ida555, 247P451.

1952-75 See also 10PaDist&Co 794.

1953-84 Declaration held sufficient. 235 IllA545. **Plaintiff entitled to hearing** on cause of action for price of land conveyed by deed sought to be set aside for fraud, though allegations of fraud were insufficient. 197NC329, 148SE425. **A petition against a subpurchaser,** etc. 197NC344, 148SE545.

1954-88 **Fairness or adequacy of consideration need not be alleged.**-73CalA114, 238P166.

1955-95 86 IndA178, 156NE523.

1955-98½-New. **Where contract provides for passing of title by vendee's attorney,** pleading must allege that attorney passed title or capriciously refused to do so. 13PaDist&Co 299.

1955-1 Contra 34Ariz49, 267P598.

1955-3 Oh 171NE94.

1956-9 41GaA124, 152SE295; 222App Div488, 226NYS692.

1956-10 See also 153Tenn380, 284SW354.

1957-15 **Plea held insufficient.**-40GaA385, 149SE791.

1957-16 GaA 155SE206 (allegations not demurrable as conclusions).

1957-17 **Pleas or answers held sufficient.**-37GaA742, 142SE208. **Answer held sufficient.**-Ga 154SE911.

1958-21 39GaA387, 147SE190. **Plea of failure of consideration based on vendor's conveyance of adjoining land for** street purposes held insufficient. 36GaA116, 135SE848.

1959-26 36GaA470, 137SE642, 645. **Pleas or answers held sufficient to show a good defense on the ground of fraud.**-36GaA470, 137SE642; 39GaA387, 147SE190. **Plea or answer held insufficient.**-84Mont304, 275P281; 295Pa492, 145A586; 92PaSuper550.

1960-31 39GaA387, 147SE190. **Discovery of fraud.**-39GaA387, 147SE190; GaA 155SE206.

1960-35 33Ariz101, 261P969, 57ALR107. **Plea by purchaser to rescind for fraud,** alleging that purchaser promptly complained to vendor and offered to restore property has been held specially demurrable for failure to show when purchaser complained and tendered return of deed to vendor. 39GaA387, 147SE190.

1961-39 Ga 154SE911. **Failure to allege vendor's inability** to make title to part of land precludes reduction. 36GaA253, 136SE462. **Plea that purchaser voluntarily abandoned property** for which notes were given, on discovering that vendor held only bond for title instead of deed, has been held insufficient defense to vendor's action on contract. 39GaA241, 146SE648(1stcase).

1964-61½-New. **Cross complaint** held to state cause of action for return of purchase money paid. 42 Ida349, 245P95.

1964-68 **Defendant may amend answer** to show insolvency of vendor as bearing on deficiency in land conveyed. 36GaA253, 136SE462.

1965-71 215Ala190, 110S294 (holding defense not pleaded is not available); 35GaA135, 132SE110.

1965-73 Wash 291P725.

1966-79 169La838, 126S209 (knowledge of condition of property).

1966-82 208 Iowa404, 226NW79; NJ 147A539 (ability to tender title). **Burden of exhibiting or introducing in evidence contract in suit or of accounting for its absence** rests on plaintiff where defendant enters general denial, notwithstanding other defenses based on plaintiff's failure to furnish and present merchantable title. TexCivA 18SW(2d)481.

1967-85 **Burden on defendant** to prove allegation by him in cross action of failure of consideration. TexCivA 285SW698. **Where the defense of failure of consideration is set up,** etc. 50RI 445, 148A597.

1968-86½-New. payment, 23 OhA176, 155NE566.

1969-99 208 Iowa311, 223NW247(2dcase).

1969-3 **Evidence held admissible.**-48 Ida295, 282P84 (purchaser's attorney's opinion on title).

1970-6 170Ga426, 153SE46. **Evidence held inadmissible.**-50RI 445, 148A597.

1971-11 169La838, 126S209. **Evidence of fraudulent representations** made before ratification is properly excluded. 81Colo 399, 255P627.

1972-22 **Evidence held sufficient.**-83CalA720, 257P452; 228Ky51, 14SW(2d)165; 133 Okl 166, 271P844; TexCivA 10SW(2d)1043; TexCivA 20SW(2d)803. **Evidence held insufficient.**-208 Iowa404, 226NW79; 34NM333, 281P23.

1972-23 222Ky443, 1SW(2d)540; Minn 233NW7. **Evidence held sufficient.**-AlaA 129S793; 37GaA742, 142SE208; 54ND 439, 209NW974 (to sustain defendant's verdict for damages).

1972-24 38GaA426, 144SE142(2dcase); 50RI 445, 148A597 (insufficient).

1972-25 **Evidence held sufficient.**-226Ky 343, 10SW(2d)1085; 192Wis545, 213NW309.

1973-26 **Evidence held sufficient.**-222Ky 560, 1SW(2d)961.

1973-27 **Evidence held sufficient.**-178 Ark1098, 13SW(2d)587; 218Ky425, 291SW361.

1973-28 **Evidence held insufficient, etc.**-36GaA470, 137SE642.

1974-37 46Philippine893; Sask [1928] 4DomLR774(2dcase).

1974-38 **Vendor holding vendor contract to purchase** cannot charge his defaulting vendee with expense of procuring loans to secure conveyance, though he relied on vendee's payment to pay his debt. 113Nebr821, 205NW250.

1975-48 GaA 155SE206.

1976-59 221AppDiv170, 223NYS19 (construction of ambiguous contract); TexCivA 17SW(2d)859.

1976-60 208 Iowa404, 226NW79; NJ Sup 146A345; 221AppDiv170, 223NYS19 (construction of ambiguous description in contract where that is a question of fact); 196NC624, 146SE584; TexCivA 276SW947 (payment of consideration); TexCivA 285SW698; 144Wash578, 258P478. **Evidence held sufficient to warrant submission,** etc. 168Minn39, 209NW896. **Evidence held insufficient to warrant submission to jury of question of plaintiff's fraud.**-84Mont304, 275P281.

1976-61 21AlaA563, 110S60; 121Kan383, 247P843.

1977-65 42 Ida349, 245P95 (instruction held properly refused).

1977-66 54ND439, 209NW974 (instructions held proper).

1978-67 170Ga426, 153SE46. **Particular findings construed.**-TexCivA 4SW(2d)157.

1978-72 83CalA720, 257P452.

1979-76 **Leave to apply for further relief.**-Man [1925] 3DomLR689.

1979-78 **Vendor without title** is not entitled to conditional judgment requiring abstract to be brought down to date. 41F(2d)634.

1979-79 See also 205 Iowa156, 217SW829.

1981-89½-New. Where defendant is only possessed of real assets which are not readily available for market, order removing statutory bar in Alberta against execution of judgment till after sale will not be made. Alta [1927] 2 DomLR758.

1981-91 31Ariz187, 251P453.

1981-92 31Ariz187, 251P453; 224Ky649, 6SW(2d)1089, 1090 [citCyc].

1982-94 145Wash420, 260P666.

1982-95 **Purchaser protected by Manitoba War Relief Amendment Act** is not liable to vendor for damages from loss of property by nonpayment of taxes which purchaser covenanted to pay. Man [1929] 4DomLR902.

1982-97 38GaA502, 144SE342.

1982-98 **Election as to time to sue.**-129Misc401, 221NYS453.

1982-99½-New. Stipulation respecting consequences of purchaser's failure to make payments on price does not bar vendor's action for construction and water charges. Ariz 291P997.

1983-8 261Mass114, 158NE346; 250NY262, 165NE285; 129Misc401, 221NYS453.

1983-14 158Md412, 148A816; 261Mass114, 158NE346.

1984-22 **Where seller refused to proceed with negotiations,** he lost his rights to recover liquidated damages. TexCivA 14SW(2d)114.

1984-23 **Vendor must be able to tender or perform without aid from vendee.**-129Misc401, 221NYS453.

1984-30 34 OhA525, 171NE360.

1986-58 **Complaint held sufficient.**-Ala 130S792; Ariz 291P997.

1988-84 **Unless waiver of defects in abstract has been pleaded affirmatively,** evidence thereof is inadmissible. 134 Okl278, 273P363.

1988-89 134 Okl 278, 273P363.

1988-90 129Misc401, 221NYS453.

1989-96 **Evidence held admissible.**-TexCivA 4SW(2d)988.

1989-97 **Evidence outside abstract to show good title** is inadmissible where contract calls for abstract. 134 Okl 278, 273P363.

1989-7 127Kan248, 273P461. **Evidence held insufficient.**-222AppDiv9, 225NYS218; TexCivA 300SW(2d)193.

1989-9 **Penalty or liquidated damages.**-6PaDist&Co 731.

1990-10 Ala 130S792; 144SC349, 142SE591. **It is not error to refuse to direct a verdict** for vendor for profit on sale where cash alternative which vendor elected allowed substantial reduction. 144SC349, 142SE591.

1990-14 Wash 291P725.

1990-17 261Mass114, 158NE346.

1990-22½-New. Vendor's right to damages for failure of purchaser to comply with terms of contract is not limited by provision for vendor's right of repossession. 70Utah175, 259P196.

1991-31 **Two thousand dollars damages for breach of warranty of title** by existence of easement held not excessive. 145Wash420, 260P666.

1991-32 224Ky649, 6SW(2d)1089, 1090 [citCyc]; 26 OhNPNS540. **Commissions,** etc. 222AppDiv9, 225NYS218.

1991-34 **Where vendor does not own property,** defaulting purchaser, with knowledge thereof, is liable for gains prevented. 250NY422, 165NE834.

1992-36 218MoA352, 275SW51.

1992-37½-New. Provision for forfeiture of deposit by purchaser, on failure to

consummate agreements, does not of itself limit damages of vendor to amount of deposit. 69CalA337, 231P361.

1992-38 125Misc817, 211NYS586; 133Misc312, 232NYS171; 26OhNPN540; 70Utah175, 259P196 (whether true market value stipulated in contract or not).

1993-54 26OhNPN540.

1994-62 101NJEq512, 139A484.

1995-66½-New. Forfeiture.–Courts of equity generally refuse to aid in enforcement of forfeiture. 19OhA210.

1997-94 31Ariz187, 251P453; 76CalA541, 245P476; 35GaA552, 133SE744; 201Iowa561, 207NW610; 68Utah12, 249P114, 48ALR267.

1997-95 31Ariz187, 251P453; 76CalA541, 245P476.

1997-96 35GaA552, 133SE744; 68Utah12, 249P114, 48ALR267.

1997-97 31Ariz187, 251P453; 201Iowa561, 207NW610.

1997-98 76CalA541, 245P476; 78CalA133, 248P295, 296 [quotCyc]; 201Cal683, 258P380; 166Ga71, 142SE543; Mich207NW839; 57ND674, 223NW808(2dcase); 117Or328, 243P560, 562 [quotCyc].

1997-99 78CalA133, 248P295, 296 [quotCyc]; 164Ga18, 137SE554; 57ND674, 223NW808(2dcase); 117Or328, 243P560, 562 [quotCyc].

1997-1 181Ark876, 28SW(2d)704; 201Cal683, 258P380; 78CalA133, 248P295, 296 [quotCyc]; 166Ga71, 142SE543; 234Mich128, 207NW839; 57ND674, 223NW808(2dcase); 117Or328, 243P560, 562 [quotCyc].

1998-3 201Cal683, 258P380.

1998-7 204Iowa319, 213NW252; 218AppDiv291, 218NYS197 (against vendor and subsequent purchaser with notice).

1999-16 7Alaska47, 50 [citCyc].

2000-17 Provision for refund of payments, in case vendor was unable to convey clean title, held to preclude right of action for damages. 258Mass167, 154NE568.

2000-22 76CalA541, 245P476; 84Mont238, 275P267; 57ND674, 223NW808(2dcase); BC [1927] 2DomLR742. **Vendee cannot retain both land and purchase price.**–78CalA133, 248P295.

2001-23 76CalA541, 245P476.

2001-31 NJSup 137A784; 98PaSuper61; Ont [1927] 2DomLR559. **Purchaser may recover payments** where terms entering into inducement of contract are made impossible of performance by vendor. 238Mich157, 213NW108. **Purchaser cannot recover purchase money** because street in rear of lots had been vacated without his knowledge where he had access in front. 105WVa259, 142SE443.

2001-34 98Fla140, 123S547.

2001-34½-New. In absence of fraud or misrepresentation, purchaser in order to repudiate contract and recover sums paid on purchase price, must show unwillingness or inability of vendor to perform or commission of act entitling purchaser to rescind. 50SD463, 210NW663.

2001-34½-New. Purchaser's right to recover payments where land was destroyed is determined by situation as it actually existed. 13LaA390, 128S310.

2002-38 36OklACR706 (failure to furnish abstract of title within reasonable time); Ont [1927] 2DomLR559.

2002-39 97Fla392, 121S475.

2002-40 Where contract provided that vendee have privilege to have purchase price refunded, upon giving notice and reconveying, vendee, upon giving notice and tendering deed, was entitled to recover amount paid. 97CalA532, 275P997(1stcase).

2002-42 CalA 291P870(2dcase); 44Ida207, 256P101. Contra 45Ida58, 260P691 (in absence of express or implied agreement for return). 201Iowa89, 202NW239; 200Iowa1023, 205NW867; 32NM384, 257P680; 131Or509, 283P2. **Consideration for release of plaintiff's liability** is supplied by latter's return of property to defendant. MoA 298SW1073. **Return of payments held not implied** from recital in purchaser's quitclaim deed of "other valuable consideration." 44Ida207, 256P101. **Intent to forfeit money paid** must clearly appear. 131Or509, 283P2.

2004-47 93CalA209, 269P731; 11LaA197, 123S177.

2004-48 324Ill238, 154NE904; 233Mich154, 206NW499; NJSup 133A178; 105NJL308, 144A312(2dcase).

2004-49 43Ida292, 252P494; 87IndA588, 162NE248; 36Wyo430, 256P664. **Written notice that contract was terminated** and payments forfeited does not constitute notice of rescission. CalA291P870(2dcase).

2005-55 No right of rescission.–81Colo58, 253P385, 386 [citCyc] (where vendor was willing to rectify error).

2005-56 97Fla236, 122S708.

2005-57 94Cal410, 271P367.

2005-58 81CalA786, 254P684; 97Fla848, 122S513; 98Fla140, 123S547; 261Mass242, 158NE779; NJ 146A187; 250NY310, 165NE459; 95PaSuper242; 36Wyo430, 256P664. **Failure to furnish water to irrigate desert land** in accordance with contract executed in connection with contract for sale of land constitutes breach of contract for sale as respects purchaser's right to recover price paid. 30Ariz82, 244P1022.

2006-59 83CalA197, 256P607; NJSup133A70; NJSup 135A65; 224AppDiv561, 231NYS522; 133Misc755, 233NYS133.

2006-60 81Colo58, 253P385, 386 [citCyc]; 98Fla604, 124S30; 125Misc834, 211NYS580 (where vendor has not refused to perform); 11PaDist&Co737. **Vendor's service of statutory notice of intent to forfeit contract** unless full settlement is made as requested by contract does not constitute repudiation of contract. 202Iowa1128, 211NW367. **Vendor's service of notice of forfeiture, retaking of possession, and institution of action to quiet title** does not constitute such breach, abandonment, or repudiation of contract as to entitle purchaser to declare rescission and recover payments. 202Iowa1128, 211NW367.

2006-63 See also 230Ky304, 19SW(2d)963.

2006-64 21AlaA546, 109S893; 98Fla397, 123S809; 166Ga113, 142SE538; 204Iowa1373, 215NW658; 224Ky649, 6SW(2d)1089, 1091 [citCyc]; 160La68, 106S677; 164La278, 113S847 (where parties had waived statute); 5LaA646; 13LaA171, 125S76; Me 152A53; 259Mass288, 156NE251; 104NJL81, 139A3; NJSup 135A65; 215AppDiv644, 214NYS582; 132Misc48, 228NYS624; 85PaSuper498 (lien in excess of that contracted for); SD 224NW937; TexCivA6SW(2d)126; TexCivA 22SW(2d)749; 192Wis130, 212NW253; 196Wis70, 219NW354. **Purchaser** entitled to immediate return of deposit. 161La1070, 109S841. **Fact that purchaser's name was written in deed by person other** than one to whom vendors had turned over deed does not excuse vendors from returning purchase money on failure of title. 29F(2d)365.

2008-65 Where vendor contracted to convey free from encumbrances except first mortgage, purchaser may rescind and recover money paid on account of purchase price where there are other encumbrances, and balance due on purchase price is insufficient to discharge them. 85PaSuper498.

2008-66 79CalA45, 248P1035; 87CalA772, 262P419; 323Ill443, 154NE231; 158Md412, 148A816; 168Minn269, 209NW889; 313Mo426, 285SW407; NJSup 139A490; 291Pa472, 140A270; TexCivA 14SW(2d)953; 141Wash496, 251P849.

2009-67 MoA 287SW1069, 1071 [quotCyc].

2009-69 18F(2d)954; 87CalA772, 262P419; MoA 256SW103. **Need not show eviction.**–163La976, 113S167.

2009-71 40Wyo226, 276P452.

2009-74 223Ky390, 3SW(2d)769. **In Porto Rico.**–33PortoRico94.

2011-80 87PaSuper280.

2011-82 90Fla711, 106S876 (though vendor is married woman).

2013-86 29F(2d)975. But see 156Miss142, 125S706.

2013-88 102CalA461, 283P111; 102CalA578, 283P365. **Money applied by vendor on subsequent valid contract,** though paid under void contract, cannot be recovered by purchaser on his default. 99CalA230, 278P459.

2013-90 215AlaA209, 110S306; 80CalA618, 252P737; Fla 129S777; 35GaA552, 133SE744; 250NY262, 165NE285. See also 93Fla295, 112S57.

2014-99 70CalA279, 233P354; 54ND439, 209NW974; 131Or185, 282P546; TexCivA 22SW(2d)983(2dcase); Wis232NW875; Man [1930] 2DomLR980 (material representation as to warmth of house). **Purchaser, entitled to rescission,** may compel accounting by other executing vendors and vendees to whom part of the payments have been made by mistake or inadvertence. 200Iowa905, 205NW541.

2015-1 117Okl141, 245P829.

2015-2 Boundaries.–285Pa260, 131A858.

2015-5 Mistake.–214Ky536, 283SW1019.

2016-7 99Fla179, 126S362. **Vendee, obtaining extension because unable to make settlement on appointed day,** cannot hold vendors for fraud on ground that they did not divulge, at execution of extension, that they were unable to comply with settlement requirements of original agreement. 105NJL595, 146A208.

2016-8 Evidence of fraud in representing that land sold was level held insufficient where vendee had opportunity to examine and was informed of gully running across it. TexCivA 292SW259.

2016-10 194NC352, 139SE593.

2017-12 194NC352, 139SE593.

2017-17 178Ark1098, 13SW(2d)587; 90CalA387, 266P294; 118Kan682, 236P449; 230Ky290, 19SW(2d)970; TexCivA 287SW1101. **Where purchasers have not paid purchase money,** they cannot recover sum agreed to be credited to them because deed contained less land than called for. 96CalA90, 273P1104.

2018-18 41GaA808, 154SE822; 120Kan380, 244P236; Va 153SE897. But see 235Ky767, 32SW(2d)325. **In case of fraud,** purchaser may recover for deficiency in quantity. MoA 278SW830. **In Kentucky.**–213Ky595, 281SW536.

2018-19 But see 230Ky290, 19SW(2d)970.

2019-21 216Ky241, 287SW701; 235Ky1, 29SW(2d)571; TexCivA 287SW1101; TexCivA 290SW781. **Fact that land was resold by purchaser for much larger sum** few days after he bought it does not affect his right to recover for shortage. TexCivA 290SW781. **It is no defense to vendor's liability** that he made no representation as to amount of acreage. TexCivA 290SW781. **Purchaser's failure to have survey made or calculate acreage** from field notes contained in conveyance does not constitute negligence precluding recovery. TexCivA290SW781. **Rule that discrepancy must be ten per cent held not to apply.**–216Ky241, 287SW701. **That realty agent was informed by vendor that he did not know exact acreage** is immaterial to vendee's right to recover. TexCivA 290SW781. **Vendor's liability for deficiency in acreage is not affected** by fact that no contract relations existed with vendee prior to deed evidencing completed contract. TexCivA 290SW781.

2019-25 83CalA771, 257P185; NJ 135A353; NJSup 137A784; 214AppDiv589, 212NYS304 (money paid as binder for contemplated contract).

2020-26 222AppDiv837, 226NYS456; Man [1930] 1DomLR367.

2020-27 90Fla711, 106S876 (contract by married woman); 222AppDiv570, 226NYS544; 36Wyo430, 256P664.

2020-29 CalA 290P304.

2020-30 253IllA333 (contract void for lack of mutuality). **Where minds of parties did not meet in sale,** vendor must refund deposit. NJ 135A353.

2021-33 238Mich157, 213NW108; 102NJL635, 133A389 (failure to remove tenant pursuant to agreement); 251NY79, 167NE178.

2022-43½-New. , or that lot separating land sold from corner did not become part of street by being used for widening by city so as to give purchaser "cor-

ner land" as agreed. 238Mich157, 213 NW108.
2024-52 NJSup 133A178.
2025-54 171Ark912, 287SW373.
2025-56 29F(2d)975; 127Misc636, 217 NYS207; 224AppDiv361, 231NYS104. **Vendee's right is not aided** by fact that vendor has failed to cancel contract for vendee's default, in manner provided by statute requiring notice of rescission. 51ND87, 199NW447.
2025-57 100CalA302, 279P1024.
2025-58 86CalA224, 260P890; CalA 290P304; 42 Ida302, 246P314; 44 Ida 539, 258P540; 202 Iowa1128, 211NW 367; 204 Iowa319, 213NW252; 223Ky 302, 3SW(2d)601; 224Ky56, 5SW(2d) 271; 255Mass265, 151NE108; 176Minn 50, 222NW288; 105NJL595, 146A208; 214AppDiv242, 211NYS896; 127Misc 487, 216NYS509; 127Misc636, 217NYS 207; 130Misc394, 223NYS481; Okl 291 P22; 51SD536, 215NW695; 101WVa 557, 133SE125, 126 [citCyc]. **Deposit held not recoverable** where purchaser was in default. 255Mass265, 151NE108. **If default of purchaser is unintentional, not amounting to abandonment,** he is entitled to relief from forfeiture of moneys paid on account of purchase as deposit or otherwise. Ont [1929] 1 DomLR561. **Money paid for extension of time** cannot be recovered by defaulting purchaser. 214AppDiv242, 211NYS 896 (where amount paid for extension was fixed in contract). **Purchaser not making timely deposit under escrow agreement** has been held in default though vendor made no tender. 86CalA 324, 260P890. **Purchaser's notice to one holding earnest money** that he does not intend to perform is sufficient default and precludes recovery of earnest money. Vt 146A254. **Subsequent tender after time limit.**–46 Ida69, 266P431. **Vendee's lien.**–100NJEq381, 136A417. **Vendor can treat anticipatory breach as discharge,** refuse to perform further, and use such breach as defense in action for purchase money paid. 198Wis43, 223 NW579. **Where consideration for contract fails** without fault of defaulting vendee, he may recover purchase money paid. 207Cal 298, 278P227.
2027-59 100CalA302, 279P1024 (notice of election to cancel); 136Misc11, 240 NYS78; 51SD536, 215NW695. **Under a provision that payment shall be considered as rent,** etc. TexCivA 11SW(2d) 551. **Validity and effect of such a provision in the contract.**–46 Ida62, 266P 413. **Election by vendor.**–51SD536, 215 NW695.
2028-60 100CalA302, 279P1024; 202 Iowa1128, 211NW367.
2028-62 127Misc487, 216NYS509.
2028-63 Can [1928] 3DomLR321. **Retaking possession held not declaration of rescission** entitling purchaser to recover payments. 51SD536, 215NW695.
2029-66 198Wis43, 223NW579. **Resale does not authorize vendee to rescind so as to enable him to recover** payments made where he was in default and had abandoned contract. 51ND87, 199NW 447.
2029-68 Cal 268P1050. **Where both vendor and purchaser are unable to perform,** neither can put other in default and purchaser cannot recover price paid. 201 Iowa89, 202NW239. **Where vendee's failure to produce full purchase price in cash was caused by vendor's** failing to produce title upon which mortgage loan could be raised as contemplated by both parties, vendee may recover purchase price paid. 121Kan416, 247P879. **Vendor's acts held not abandonment.**–51SD536, 215NW695. **Mutual rescission held not implied** from vendor's retaking possession on default of purchaser without tendering deed. 51SD536, 215NW 695.
2029-69 MoA 272SW1045.
2029-70 TexCivA 3SW(2d)822. **Acts not amounting to waiver.**–46 Ida82, 267 P447; 13LaA390, 128S310. **Failure to file counterclaim** in vendor's suit to reform contract does not bar purchasers from recovering deposit. 105NJL308, 144A312(2dcase).
2030-73 94CalA410, 271P367; 158Tenn 546, 14SW(2d)963.
2030-74½-New. Purchaser paying money to seller with stipulation that seller would make good for any fraud on his part, held fraud not waived. 34GaA 383, 129SE794.
2031-75½-New. **To whom contract waiver available.**–In action to recover price of desert land for breach of agreement to furnish water for irrigation, purchaser of property of insolvent vendor water company, not binding itself to carry out terms of agreement with purchasers of land, is not entitled to set up provision in sale contract purporting to preclude any relief save damages for breach of contract. 30Ariz82, 244P1022.
2031-77 32Ariz342, 258P304, 305 [quot Cyc]; 81CalA786, 254P684; 201 Iowa 1208, 207NW382, 45ALR1344; 215Ky 604, 286SW690; 236Ky42, 32SW(2d) 536; 251Mich533, 232NW378; 215App Div644, 214NYS582; 218AppDiv519, 218NYS644; 227AppDiv418, 237NYS 274; Wis 232NW877. **Rule not applicable** where no agreement. Man [1930] 1DomLR367.
2032-78 32Ariz342, 258P304, 305 [quot Cyc]; 215Ky604, 286SW690; 78Mont 122, 252P796. **Vendee need not show attempt to place vendor in status quo.**–78Mont122, 252P796.
2032-79 32Ariz342, 258P304, 305 [quot Cyc].
2032-80 32Ariz342, 258P304, 305 [quot Cyc]; 78Mont122, 252P796.
2033-81 40F(2d)583; 156Md1, 142A 489; 219AppDiv252, 219NYS555.
2035-93 230Ky148, 18SW(2d)975; 218 AppDiv519, 218NYS644.
2036-95 **Lien attaches to whole property.**–32Ariz342, 258P304.
2036-96 158Md412, 148A816.
2036-97 49SD524, 207NW543. **Where the record title was not in the vendor,** etc. 49SD524, 207NW543.
2036-98½-New. Purchaser is entitled to lien on personal property retained in his possession under contract because of vendor's inability to convey. 215App Div644, 214NYS582 (where personal property was identified and there was no creditor's contest).
2037-99 40F(2d)583; 218AppDiv519, 218NYS644; ND 229NW114.
2037-2 201 Iowa1208, 207NW382, 45 ALR1344; 58ND66, 224NW661; ND 229NW114.
2037-3 201 Iowa1208, 207NW382, 45 ALR1344; 58ND66, 224NW661.
2038-7 69CalA211, 230P963; 128Misc 118, 217NYS666.
2039-11 128Misc118, 217NYS666. **Tender of last payment held unnecessary** where vendor put it out of his power to perform. 78Mont122, 252P796.
2039-13 Contra 78Mont122, 252P796.
2039-16½-New. If original contract is void and is inseparably connected with later contracts, they are all void and can furnish no means of attaching lien upon vendor's land. 99CalA230, 278P 459.
2040-22 **Purchaser held entitled to priority** over mortgagee inducing purchase by concealment of mortgage. [1926] CanSC566, [1926] 4DomLR625.
2040-24 246Mich465, 224NW630; ND 229NW114.
2041-25 201 Iowa1208, 207NW382, 45 ALR1344.
2041-26 **Purchaser's assignee or vendee has vendor's lien under new contract** to extent of original purchaser's interest. 218AppDiv519, 218NYS644.
2041-28 156Md1, 142A489. But see NJCh 149A26. **A suit to enforce a purchaser's lien** is action on existing contract, and is not action for rescission nor election to treat contract as void in its inception. 225AppDiv440, 233NYS 395. **Recovery of judgment at law** is not waiver of right to enforce lien in equity. 201 Iowa1208, 207NW382, 45 ALR1344.
2042-29 **Burden of proof** is on purchaser from vendor to show want of knowledge of vendee's rights. 201 Iowa 1208, 207NW382, 45ALR1344. **Time.**–128Misc118, 217NYS666.
2042-30 78Mont122, 252P796 (objection to premature action must be pleaded to be available); 219AppDiv252, 219 NYS555. **Demand not essential,** where vendor has denied liability. 78Mont122, 252P796.
2042-30½-New. Action to enforce lien is not one for or on rescission where due to vendor's inability to perform. 215 AppDiv644, 214NYS582.
2042-30½-New. Jurisdiction of action to declare lien is not barred by nonessential allegations. 215AppDiv644, 214 NYS582.
2042-33½-New. Alleging more than necessary to sustain cause to declare lien is not important. 215AppDiv644, 214NYS582 (where no motive to state separate causes).
2042-33½-New. **Proof.**–Nonessential allegations of fraud need not be proved. 215AppDiv644, 214NYS582.
2043-34 **Decree for defendant held error on findings.**–78Mont122, 252P796. **Opportunity to pay** should be given before foreclosure of lien. 246Mich465, 224NW630.
2043-36½-New. Any judgment justified by pleadings and proof may be taken where answer was interposed. 215 AppDiv644, 214NYS582 (notwithstanding complaint charged fraud, not necessary to sustain cause to declare lien).
2043-36⅓-New. Under some statutes vendor is entitled to stay of order of sale where purchaser accepts decree of foreclosure under contract. Nebr 230 NW252.
2043-37 NJ 144A870(1stcase); 228App Div138, 239NYS178.
2044-39½-New. Retention of personal property covered by contract under claim of lien is not inconsistent with action to recover amount paid. 215App Div644, 214NYS582.
2044-39½-New. Action is not one for rescission or on rescission where it is due to vendor's inability to perform. 215AppDiv644, 214NYS582.
2044-39¼-New. Action is not inconsistent with action to declare lien on land where vendor is unable to perform. 215AppDiv644, 714NYS582.
2044-41 261Mass242, 158NE779; 227 AppDiv418, 237NYS274.
2044-43 NJ 144A870(1stcase); NJ 144 A870(2dcase); NJ 148A736. See also NJ 150A401(1stcase).
2045-45 80CalA609, 252P733.
2045-49 97Fla848, 122S513; 99Fla535, 126S791 (remedy is in assumpsit and not in equity); 261Mass130, 158NE502; TexCivA 22SW(2d)1096 (mutual mistake).
2047-55½-New. Purchaser's right to restitution is not defeated by failure to tender interest due under contract. 32 NM384, 257P680.
2047-55½-New. Where vendors will not or do not care to give title, purchasers need not show readiness, ability and willingness to complete contract. 133 Misc626, 233NYS136.
2047-57 204 Iowa223, 215NW232; 100 NJEq421, 136A344; 223AppDiv848, 228 NYS182; 219AppDiv537, 219NYS383. **Sufficiency of tender or demand.**–Cal 286 P1005 (delay not precluding recovery).
2048-61 CalA 291P867; 204 Iowa1373, 215NW658; 261Mass130, 158NE502; 104NJL81, 139A3; 215AppDiv644, 214 NYS582; 133Misc755, 233NYS133; 133 Misc626, 233NYS136; 54SD634, 224NW 187; 68Utah12, 249P114, 48ALR267; Vt 146A254. **If the vendor has no title,** etc. 87CalA772, 262P419. **Where vendor could not convey marketable title on date set for settlement and date was extended,** adjustments for settlement must be made as of latter date, and vendor, by insisting that adjustments be made as of first date set, may be deemed to have waived tender. 105NJL 468, 144A597(2dcase). **Waiver of tender** by notice of inability to perform and express release from default in future payments. 102CalA516, 283P143.
2050-68 MoA 287SW1069.
2050-70½-New. **Where vendor has lost title.**–Where contract for sale of land provides that, in case of failure of title, contract should be canceled and settled by prompt return of money paid by purchaser, including taxes, purchaser is not required to demand return of payment before commencing action therefor after vendor has lost all title to premises. 54 SD634, 224NW187.
2050-72 100NJEq421, 136A344; 40

Wyo 226, 276P452. **Under statute.**–207 Cal 624, 279P428.

2051–73 100CalA12, 279P829.

2051–74 100CalA12, 279P829.

2051–77 215Ala212, 110S308; 204 Iowa 223, 215NW232; MoA 256SW832; 292 Pa412, 141A237; 86PaSuper341. But see 251Mich533, 232NW378. **Must offer to account** for rental value and depreciation exceeding payments. Utah 286P635.

2051–78 200 Iowa1349, 206NW610 (mere tender of reconveyance insufficient where vendee received rents and profits while in possession).

2051–79 196Cal 8, 235P981; 100CalA 12, 279P829.

2052–80 76CalA680, 245P795; 208 Iowa 71083, 226NW768; 168Minn216, 209NW, 623; 86PaSuper341. But see 169La159, 124S766(3dcase).

2052–82 Personal property.–215AppDiv 644, 214NYS582.

2052–83 Conveyance passing no title, etc. 79CalA45, 248P1035.

2053–84 94CalA410, 271P367; 244Mich 46, 221NW274. But see 248Mich601, 227NW783.

2053–86 22AlaA305, 115S147. **Purchaser's rights against vendor are not defeated** by buying from paramount title holder without giving notice to vendor who had no title. TexCivA 228SW (2d)983(2dcase).

2054–89½–New. that plaintiff did not place him in status quo because of not surrendering profits, where he made no demand for them when agreeing to rescind. MoA 298SW1073.

2054–90½–New. Purchaser need not accept vendor's offers of rescission for deficiency absent offer to pay agents commission. 235Ky1, 298W(2d)571.

2055–98 Can [1930] 1DomLR83.

2055–5 122 Or230, 257P801; 98PaSuper 111. **Defense of willingness to abate purchase price** is barred by conveyance to another. 158Md412, 148A816.

2056–10 MoA 298SW(2d)230.

2056–11 Jurisdiction is not barred by nonessential allegations. 215AppDiv 644, 214NYS582.

2057–13 But see TexCivA 218SW(2d) 750.

2057–14 32Ariz342, 258P304.

2058–21 49ND343, 191NW491. **Recovery may be had from persons who were actual vendors** though not nominal vendors and to whom money was paid by purchaser. 94PaSuper564. **Action against true owners for affirmative relief** cannot be maintained in advance of attempt to eject purchaser under void conveyance. 236Ky42, 32SW(2d) 536.

2058–22 250 IllA516.

2059–30½–New. Vendor's niece to whom vendor directed vendee to execute notes is equally responsible with vendor where not shown to be bona fide purchaser. 232Ky59, 22SW(2d)422.

2059–31 That insane vendor was not party to suit does not preclude insanity from being issue in action grounded on such insanity of one of several vendors. 104NJL519, 140A408.

2059–33 207Cal 624, 279P428 (mortgagees are proper parties defendant and are bound by decree). **Third person in whom vendee alleges title is vested** is not necessary party to suit against vendor for restitution of price. 169La 159, 124S766(3dcase).

2059–34 One of two joint purchasers may bring action for money received where money was paid by him alone. 215Ala209, 110S306.

2060–38 167Ga159, 144SE904; 86Mont 435, 284P147(2dcase). **Sufficient statements of causes of action,** etc. 94Fla 1231, 115S529; 97Fla156, 120S309; 168 Ga553, 148SE395(1stcase); 248Mich557, 228NW775; 68Utah12, 249P114, 48ALR 267. **Insufficient bill.**–221Ala16, 127S543 (demurrable for remedy at law and lacking equity); 96CalA90, 273P1104; 98 Fla140, 123S547. **Alleging more than necessary to sustain cause** is not important. 215AppDiv644, 214NYS582 (where no motive to state separate causes). **Bill held demurrable.**–97Fla 465, 121S464. **Declaration held not demurrable.**–96Fla855, 119S135. **Insufficient complaint.**–224AppDiv52, 229NYS 1. **Unnecessary to allege offer to return everything of value** where nothing of value has been received. 204Cal 424, 268P631. **Petition held good against general demurrer.**–TexCivA 218SW(2d) 750. **Petition sufficient.**–13LaA390, 128 S310.

2060–39 102CalA578, 283P365.

2061–40 Plaintiff, purchaser's assignee alleging vendor's inability to convey, need not allege compliance with contract. La 129S663.

2061–41 Where the contract was rescinded by the vendor, etc. 100CalA12, 279P829.

2061–45 6PaDist&Co 589. **Mutual mistake or fraud.**–79CalA45, 248P1035.

2062–46 Md 139A535.

2062–49 79CalA45, 248P1035.

2063–59 Sufficient answers.–22AlaA305, 115S147.

2063–60 22AlaA305, 115S147; TexCivA 281SW616 (plea of waiver of defects in title held insufficient where no consideration pleaded). **Amendment properly allowed** to pray allowance of damages for breach. Utah 286P635. **Necessity for allegation of consideration for waiver of covenant.**–Pa 151A812.

2064–63½–New. Where vendor's answer alleged ability and willingness to perform, and prayed for specific performance, answer itself gave purchasers notice of vendor's refusal to accept their repudiation as a breach of contract and his continued demand for performance. 198Wis43, 223NW579.

2064–67 Nonessential allegation of fraud need not be proved. 215AppDiv 644, 214NYS582. **Proof held material variance under answer.**–95CalA117, 272 P614.

2064–69 285Pa260, 131A858 (issue not raised in pleadings admissible to support allegation of fraud).

2064–70 CalA 292P148; 223AppDiv 211, 228NYS211.

2065–71 128Me412, 148A143; Va 153 SE897 (in absence of proof of misrepresentation, purchaser cannot recover overpayment). **Must show right to rescind.**–290Pa274, 138A843. **Shifting of burden.**–295Pa560, 145A678. **In action for money had and received alleging fraud.**–Me 151A667.

2065–76 In action based on breach of agreement to furnish water to irrigate desert land, where agreement was absolute but contained clause relieving vendor if failure to perform should be due to excepted causes, burden does not rest upon plaintiff to show that failure was not due to excepted causes. 30Ariz 82, 244P1022. **In absence of proof** that vendor has breached contract, purchaser cannot recover down payment. 223App Div458, 228NYS490.

2065–77 NJ 137A411 (holding purchaser must prove that easements in old deed still exist); 223AppDiv211, 228NYS211; 290Pa274, 138A843.

2065–78 105NJL201, 143A431. **Burden of proof** that title rests in adverse possession, contrary to contract is on complainant. 100NJEq244, 135A506.

2065–80½–New. Purchaser has burden of overcoming presumption of payment of mortgage arising from lapse of time, such as by showing payment thereon in interim. 127Misc636, 217NYS207.

2065–80½–New. Vendee suing to recover for shortage in acreage resulting from mutual mistake is not required to prove eviction. TexCivA 290SW781.

2065–81 295Pa560, 145A678. **In suit to recover money deposited as consideration for option** on ground that option was never given, optionor seeking to forfeit money has burden of showing ability and readiness to perform. 108WVa 308, 151SE183.

2065–83 See also 132Misc48, 228NYS 624.

2066–85½–New. Degree of proof required.–285Pa260, 131A858.

2066–87 Good faith in rejecting title.–221Ala24, 127S155. **On issue of solvency of tenants** in building contracted to be sold, purchaser may introduce evidence that bankruptcy proceedings were pending against them at time vendor represented them as solvent, and that their rent was in arrears. 285Pa260, 131A858. **On issue of false representations as to property extending to alley,** purchaser may introduce statements by vendor's agent that plaintiff could cut open a door and use alley, though right to use alley was not raised in pleadings. 285Pa260, 131A858. **Vendor's prospectus,** showing view of vicinity is admissible as bearing upon plaintiff's reliance upon alleged false representations. 131 Misc43, 225NYS690. **That abstract to be furnished purchaser has been submitted to attorney** is proper matter of evidence tending to show title was not rejected arbitrarily. 23AlaA416, 125S 398.

2066–88 220Ala595, 127S168 (plaintiff's purpose to resell quickly at profit); 45 Ida58, 260P691; 13LaA390, 128S310; 102NJL371, 132A750; 50SD463, 210NW 663; 51SD564, 215NW927, 57ALR1246. **Evidence of market value of neighboring lands inadmissible.** TexCivA 285 SW700.

2066–89 72CalA282, 237P64 (admissible as showing waiver of time fixed for clearing title); 100CalA12, 279P829; 45 Ida58, 260P691; 216Ky47, 287SW221. See also 104NJL519, 140A408.

2067–90 102NJL371, 132A750. **Letters and telegrams.**–97Fla848, 122S513; 104 NJL519, 140A408. **Deeds held inadmissible** for want of delivery and acceptance, where they were in possession of defendant at time of trial. 95CalA117, 272P614.

2067–92 Expert testimony that passageway benefit to property is properly admitted. 255Mass623, 152NE55.

2067–94 179Ark678, 18SW(2d)323; MoA 256SW832; MoA 298SW(2d)230; 49ND343, 191NW491; Okl 291P22; 108 WVa308, 151SE183. **Sufficient to sustain verdict** for plaintiff. 70CalA279, 233P354; TexCivA 58W(2d)569. **Insufficient to sustain verdict** for plaintiff. NJSup 138A305. **Sufficient to sustain a finding:** That purchaser was never able, ready and willing to carry out purchase agreement. 255Mass265, 151NE108. That statute was not violated by mention of unrecorded map. CalA 290P304. That purchaser from city knew he was getting less than indefeasible title. 128 Me412, 148A143. That defendant was unable to complete improvements within time stipulated. 248Mich601, 227NW 783. That contract had been rescinded by vendors before time for performance thereof, so as to authorize recovery of such sum. 88 IndA25, 163NE104. **Insufficient to sustain finding:** That covenant restricting lots in subdivision to private residences had been abandoned. 196Wis70, 219NW354. That vendor was at all times ready, willing, and able to comply with contract and execute deed. 54SD634, 224NW187. That purchasers, were obliged to deposit in escrow balance of cash payment till building was completed. 101CalA632, 281P 1068. That vendors had agreed to build and complete bungalow on or before certain date. 101CalA632, 281P1068. **Sufficient to show:** Constructive notice to vendee of existence of blank deed in escrow precluding him from denying its validity. 50SD463, 210NW663. That purchasers are entitled to rescind and recover amount paid. 115Nebr493, 213 NW587. That tract contained not more than seventy acres. 230Ky290, 19SW (2d)970. Misrepresentations by vendors concerning income of apartments. Wash 290P842(2dcase). Deficiency in acreage was in excess of 10 per cent. entitling vendee to relief. 232Ky59, 22SW(2d) 422. No rescission by mutual consent. 86CalA324, 260P890. That transaction failed of consummation because of vendee's default. 86CalA324, 260P890. That vendees waived default of vendors in procuring decree quieting title within time limit fixed by contract. 72CalA 282, 237P64. Mutual mistake as to acreage arising without misrepresentations. TexCivA 290SW781. **Insufficient to show:** Mutual mistake as to dimensions of lots conveyed. TexCommnA 293SW 1100. That notice had been given to vendors terminating vendee's waiver of time limit for clearing title and giving

reasonable time for performance. 72 CalA282, 237P64. That vendor was able to convey title. 87CalA772, 262P419. Fraud. NJCh 151A277. That land was conveyed by defendant as he alleged. 95CalA117, 272P614. Mutual mistake. Can [1930] 4DomLR1041. Rescission or attempt to restore status quo prior to action. Me 151A667. **Evidence held to demand verdict for plaintiff** for return of full amount of partial payment after rescission by agreement. 34GaA75, 128SE204. **Evidence held not to establish mutual rescission.**–45 Ida58, 260P691. **Evidence held not to show agreement to return payments** upon mutual rescission. 45 Ida58, 260P691. **Evidence held not to entitle purchaser to recover.**–29F(2d)975. **Finding held not against preponderance of evidence.**–179Ark533, 17SW(2d)319.

2068–95 132Misc48, 228NYS624. **Less certainty of proof** will justify vendee's refusal to accept title than to open case after title has passed. 285Pa260, 131A858.

2068–96 Evidence held to show vendor sold property which he did not own. 13LaA171, 125S76.

2068–97 Sufficient to show that vendor was not to pay agent's commission so that purchaser could not recover sum paid agent. 179Ark533, 17SW(2d)319. **Instructions held proper.**–232Mich630, 206NW359.

2069–99 220Ala595, 127S168 (instruction properly refused).

2069–3 261Mass130, 158NE502; 232Mich630, 206NW359 (question whether defendant orally agreed to return "earnest money" submitted to jury); 102NJL371, 132A750; 104NJL519, 140A408. **Under conflicting evidence,** etc. 8PaDist&Co 413. **Question whether title of trustee was clear and free from encumbrances** held one of fact. 258Mass348, 154NE920.

2069–4 299Pa148, 149A199 (performance by vendor).

2069–6 20AlaA576, 104S284.

2069–9½–New. Whether purchaser had opportunity to discover fraud as to boundary, made by seller, held question for jury. 34GaA383, 129SE794.

2069–10 But see 102NJL368, 131A888; 290Pa274, 138A843 (question for jury).

2069–10½–New. What is a reasonable time for performance by vendee after waiver of his default is a question of fact for trial court. 73CalA98, 238P134.

2069–10⅓–New. Fraudulent statements of vendor's agent is question for jury. 285Pa260, 131A858.

2069–10¼–New. If facts are in dispute and credibility of witnesses in issue and different inferences could be drawn, court cannot properly rule that title is clear beyond reasonable doubt. 258Mass348, 154NE920.

2069–10½–New. Whether purchaser waived vendor's failure to comply with contract is question of fact. 261Mass242, 158NE779.

2069–10⅚–New. Where facts and legal inferences therefrom are indisputable directed verdict is proper. 104NJL81, 139A3.

2069–12 204Cal424, 268P631.

2070–13 204Cal424, 268P631. **Alternative decree** giving vendor right to perform on receipt of balance of purchase price due cannot be complained of by him in action for rebates from purchase price and cancellation of note where he prays for termination of contract. 72CalA725, 238P150.

2070–14 132Misc48, 228NYS624. **Any judgment justified by pleading and proof** may be made notwithstanding complaint charged fraud, which was not necessary to sustain cause of action. 215AppDiv644, 214NYS582 (where answer interposed). **Purchase-money notes** forming part of consideration price for property should be dealt with. 251NY79, 167NE178. **Allowance of application of purchase-price deposit** to payment of rent was error, where vendee was entitled to return of deposit and rent due was not pleaded as set-off. 28OhA526, 162NE709.

2070–17 73CalA124, 238P126 (interest); 76CalA541, 245P476; 34GaA75, 128SE204 (entitled to return of payments on mutual rescission, absent contrary agreement); 161La1022, 109S824; 164La175, 113S808; NJCh 144A446(1st case); 222AppDiv570, 226NYS544; ND 229NW114. **Where part of purchase price was paid by conveyance of land,** purchaser held entitled to recover amount credited therefor and not merely market value. 324Ill238, 154NE904. **Vendor is liable for interest** on note given to secure repayment of purchase money, even though he has perfected his title since suit. 38GaA250, 143SE911. **Interest at least from time of entry of judgment.**–102CalA461, 283P111. **On accounting, deductions may be made from vendee's recovery** for damages for his failure to maintain and care for property as agreed to. 131Or509, 283P2. **On accounting, purchaser failing to make payments** is chargeable with reasonable rental value from time he was in possession before vendor retook possession. 131Or509, 283P2. **Where payment on contract to purchase land and rental value are equal** purchaser on rescission has been held not entitled to recover interest on payments made. Utah 289P91.

2072–21 See also 195Wis241, 218NW184.

2072–22 10LaA337, 119S573(2dcase).

2072–23½–New. Right of vendee is controlled by equitable principles when he abandons contract after having made payments and recovery would be precluded where vendor has sustained loss in excess of payments made by vendee. 51ND87, 199NW447.

2072–23⅓–New. Vendor retaining possession under alternative decree giving him right to perform on payment of balance of purchase price must return full amount of purchase price paid where land is worth agreed price. 72CalA725, 238P150.

2072–23¼–New. Decree rescinding purchase, fixing recovery at amount of notes owned by third parties with credit for those delivered up, is equitable. 32NM384, 257P680.

2072–23⅕–New. Vendor is entitled to value of use and occupation during purchaser's possession, though purchaser's tenant failed to pay rent. 51SD564, 215NW927, 57ALR1246.

2072–23⅙–New. In suit by purchasers against assignees of vendor, personal money decree will be limited to payments made to them after assignment. 246Mich465, 224NW630.

2072–23⅐–New. Court may make proper deductions for purchaser's use of personal property purchased in connection with business. 251NY79, 167NE178.

2072–23⅛–New. Adjustment of unsettled accounts between parties is to be had in accordance with principles of equity. 131Or509, 283P2.

2072–23⅑–New. Where vendee has been in possession interest on purchase money paid and use of land will be held to offset each other. ND 229NW114.

2072–26 161La1022, 109S824. But see 132Misc48, 228NYS624.

2072–28 76CalA541, 245P476.

2072–30 11LaA594, 123S366; 135Misc603, 238NYS651; 33OhA452, 169NE836 (stipulation for return of earnest money).

2072–31 47Ida772, 278P1016 (with interest from time of payment); 13LaA171, 125S76. **Water assessments paid.**–47Ida772, 278P1016.

2073–40½–New. Attorney's fees not recoverable. 13LaA171, 125S76.

2073–43 76CalA541, 245P476; 87IndA588, 162NE248; 11LaA594, 123S366 (cost of filling lot); ND 229NW114; Man [1930] 1DomLR367. **Plaintiff, suing for value of improvements,** where vendor canceled agreement of sale, need not show that vendor had disposed of property. 162La139, 110S178. **In ascertaining amount for which vendor is liable,** it must be assumed, in absence of a contrary showing, that evidence of work and labor is correct, and also vendor will be allowed to deduct for paying legally recorded lien on property. 162La139, 110S178.

2073–45 76CalA541, 245P476.

2074–50 TexCivA 290SW781.

2074–53 80CalA609, 252P733; 47Ida772, 278P1016 (on rescission granted vendee).

2074–60 NJ 146A187.

2075–72 69CalA211, 230P963.

2076–80½–New. Where vendor was at all times able and willing to perform, purchaser making improvements and paying taxes and interest as owner may not recover same in absence of fraud or misrepresentation. 50SD463, 210NW663.

2079–3 31Ariz187, 251P453; 201Iowa561, 207NW610; TexCommnA 25SW(2d)808. **Damage suit held election of remedies** rather than misapprehension of remedy. 335Ill202, 167NE90.

2079–4 TexCivA 248SW(2d)751.

2080–19½–New. Provision in contract giving purchaser right to stop payment to vendor of money in escrow held not exclusive remedy for vendor's breach but merely option. TexCommnA 25SW(2d)808.

2080–20 291Pa64, 139A590. **Use of adjoining land by subsequent purchaser from vendor** does not give purchaser right of action against vendor, in absence of restrictions or knowledge on part of vendor of intended use. 46Ida785, 271P580(1stcase). **Purchaser, though not entitled to cancellation of** contract for vendor's failure to make improvements because of remedy of recovering payments from holder in escrow, could recover damages for breach of contract. TexCivA 14SW(2d)894.

2080–21 CalA 289P874.

2080–22 235Ky388, 31SW(2d)624 (vendor is liable to purchaser for latent defects in house and lot sold).

2081–26 144Miss841, 110S793.

2081–27 149Wash534, 271P580.

2081–30 Statements made during negotiations leading up to sale of realty cannot form basis of contract action, because all prior negotiations are deemed to be merged in contract or deed, and because of requirements of statute of frauds. 28F(2d)720.

2081–35 But see GaA 155SE533(1st case).

2081–36 215Ala297, 110S391.

2082–37 39F(2d)194.

2082–39½–New. No damages are recoverable before acceptance of offer when purchaser knew vendor had title to but small part of land offered for sale. 144Miss841, 110S793.

2082–43 37GaA254, 139SE573; MoA 256SW103; 21OhA366, 153NE114. **Right of action depends on ability to give clear title,** or inability to do so as result of fault or collusion on part of vendor. 258Mass167, 154NE568.

2082–44 Where vendor unable to give clear title, through no fault on his part, and contract provides for return of payments in such contingency, right of action precluded. 258Mass167, 154NE568.

2083–46 In Porto Rico.–32PortoRico613.

2083–47 299Pa284, 149A184.

2083–53 170La504, 128S291.

2084–60 117Or328, 243P560 (action for fraud).

2085–61 21OhA366, 153NE114.

2085–66 21OhA366, 153NE114. **Previous conveyance of spring.**–132Misc480, 230NYS116.

2085–67 Nebr 231NW766.

2086–71 191NC619, 132SE593; 49SD290, 206NW1004.

2086–72 191NC619, 132SE593; 49SD290, 206NW1004.

2086–73 49SD290, 206NW1004.

2086–75 115Nebr136, 211NW998.

2086–79 91CalA640, 267P384; 217Ky340, 289SW287; 117Or328, 243P560.

2087–83 217Ky340, 289SW287; 105NJL595, 146A208; 223AppDiv848, 228NYS182.

2087–87 But see 37GaA254, 139SE573.

2087–91 217Ky340, 287SW287.

2088–4 78CalA133, 248P295, 296 [quot Cyc].

2089–5 78CalA133, 248P295, 296 [quot Cyc].

2089-6 78CalA133, 248P295, 296 [quot Cyc].
2089-7 78CalA133, 248P295, 296 [quot Cyc]; 117 Or328, 243P560.
2089-8 78CalA133, 248P295, 296 [quot Cyc].
2089-9 78CalA133, 248P295, 296 [quot Cyc].
2089-10 217Ky340, 289SW287, 288 [cit Cyc]; 219Ky169, 292SW801, 802 [cit Cyc].
2089-17 217Ky340, 289SW287, 288 [cit Cyc]; 189NC610, 127SE706.
2089-20 189NC610, 127SE706.
2089-22 37GaA254, 139SE573; NJSup 132A481.
2090-23 189NC610, 127SE706.
2090-27 133Misc755, 233NYS133.
2090-33 **Failure to offer return of deposit** does not prevent vendor from defending. 258Mass167, 154NE568.
2091-39 79CalA428, 249P878.
2091-41 79CalA428, 249P878.
2091-44½-New. Defendant is not precluded from making defense to claim for damages because of unlawful act in selling lot on unrecorded map. 102 CalA578, 283P365.
2091-51½-New. Refusal of wife to join is no defense in action against husband for breach of contract to convey. 216Ala9, 112S151.
2094-90 89CalA37, 264P544.
2094-91 Utah 274P856.
2094-93 20AlaA574, 104S143. **Fraud.**-215Ala297, 110S391; 41GaA771, 154SE 820. **Allegations held insufficient.**-216 Ala564, 114S135; 56AppDC30, 8F(2d) 672. **Declaration in action for damages for loss of bargain** held sufficiently to charge vendor's contract to sell with knowledge that he alone could not complete bargain and not based solely on charge of fraud. 144Va795, 130SE788. **Allegation in suit on bond to perfect title** held sufficient to show attempt to minimize damages. TexCivA 288SW 572. **Petition need not allege** land was sold as oil bearing. TexCivA 288SW 572. **Petition need not conform to rules** of pleading applicable in suit on general warranty. TexCivA 288SW572.
2095-97 82Colo 529, 261P463. **Petition held demurrable.**-Kan 293P396.
2095-1 6LaA699.
2095-3 216Ala564, 114S135; 20AlaA 574, 104S143.
2095-4 197Cal 43, 239P401 (allegations held to state cause of actions for recovery of damages for bad faith); Tex CommnA 294SW531. **Specific allegation of bad faith** need not be made if facts alleged necessarily warrant inference. 197Cal 43, 239P401. **Failure to allege damage** on suit for breach of husband's contract to sell land, the separate property of wife, renders petition subject to general demurrer. TexCivA 298SW443.
2095-9 49SD290, 206NW1004.
2096-13 221Ala674, 130S394; 49SD 290, 206NW1004.
2096-17 See also 134Misc866, 236NYS 486.
2096-17½-New. Complaint not alleging that mortgage was not paid or was lien or encumbrance on realty when action was commenced declared bad on demurrer. 83IndA129, 147NE784.
2098-37 134Misc866, 236NYS486. **Only one of alternative state of facts alleged need be proved** to recover damages for loss of bargain on theory that vendor contracted knowing inability alone to convey marketable title. 144 Va795, 130SE788.
2099-47 134Misc866, 236NYS486 (validity of contract).
2099-43 221Ala674, 130S394; 134Misc 866, 236NYS486; 191NC619, 132SE593; 29 OhA393, 162NE677.
2099-49 191NC619, 132SE593.
2099-50 56ND479, 217NW674; 40Wyo 89, 275P101.
2100-58 **Evidence admissible.**-265Mass 228, 163NE753. **Parol reservation held admissible.**-124Kan618, 261P590.
2100-59 **Evidence not admissible.**-234 IllA267; 248Mich128, 226NW824. **Evidence held immaterial.**-135Misc361, 238 NYS181.
2100-61 **Evidence admissible to show readiness to perform.**-234 IllA267.
2100-62 **Evidence of depreciation held not admissible** where vendee entered under lease pending perfection of title. 234 IllA267.
2101-63 **Testimony of vendor's counsel** is admissible to show he fixed date of foreclosure sale after time for passing title without instructions from defendant, where latter was charged with bad faith in thus fixing date. 266Mass286, 165NE416.
2101-64 20AlaA574, 104S143. **Evidence held admissible** on question of damages. 265Mass228, 163NE753.
2102-65 29 OhA393, 162NE677. **Evidence held not to show consent of defendant's cotenant to sale of land.**-216 Ala564, 114S135.
2102-67 **Evidence held sufficient.**-216 Ala564, 114S135; 89CalA610, 265P317; 234 IllA267; 86 IndA33, 155NE709; 255 Mass563, 152NE321; 248Mich128, 226 NW824; 135Misc146, 236NYS633; 51 ND82, 199NW133; 293Pa379, 142A914; 51SD236, 213NW7; Utah 286P635. **Evidence held to show parol reservation** of wheat to vendor. 124Kan618, 261P 590.
2102-68 236Ky28, 328SW(2d)534; 101 NJEq401, 138A693. **Evidence held insufficient.**-181Ark1146, 248SW(2d)863; 205Cal 764, 272P1052; 82Colo 529, 261 P463; 162La59, 110S88; 168La335, 122 S57; 260Mass178, 156NE903; 248Mich 128, 226NW824; 30NM566, 240P469; 56ND479, 217NW674.
2102-68½-New. Court is not bound to accept as conclusive testimony of witnesses for vendor that value of property is less than contract price. 135Misc361, 238NYS181.
2102-70 **It cannot be held that amortization clause is usual,** or what amortization clause is usual, as matter of law. 133Misc312, 232NYS171.
2102-72 37GaA254, 139SE573; 88Pa Super318; TexCivA 58SW(2d)552.
2102-73 234 IllA267 (verdict held properly directed).
2102-76 191NC619, 132SE593.
2103-81 82Colo 529, 261P463. **Evidence held to warrant instruction on buyer's right to recover loss of bargain** on theory that vendor made option contract knowing he alone could not complete transaction. 144Va795, 130SE788.
2103-84 37GaA254, 139SE573. **Charge held erroneous.**-NJ 145A629.
2103-90 265Mass228, 163NE753.
2103-91½-New. Equities of materialmen and laborers cannot be adjudged. 221Ala674, 130S394.
2103-1 175Ark539, 299SW994; 174 Minn97, 218NW453; 222AppDiv570, 226 NYS544; TexCommnA 294SW531. **Amount actually paid on purchase price** may be recovered where vendor is unable to perform. 37GaA254, 139SE573. **Damages for breach of agreement to furnish abstract showing title clear of liens** are cost of abstract and taxes paid by purchaser with interest. 46 IdaA394, 267 P1074. **Matters not recoverable as damages.**-222AppDiv570, 226NYS544. **Payments made by purchaser and expenses will be declared lien on property.**-222 AppDiv570, 226NYS544. **Damages for vendor's failure to remove violation filed by fire department** is amount reasonably lost on account of breach. 223App Div96, 227NYS237. **Items in addition to sum deposited** by vendee may be included in damages recoverable for breach of contract. 133Misc755, 233NYS 133.
2104-2 **Purchasers, rejecting title as unmarketable, are not entitled to recover from vendors for loss of profits on their contract for resale,** which contract required something more than merely marketable title, which vendors contracted to convey to purchasers. 224 AppDiv262, 229NYS761.
2105-3 109Conn452, 146A831; 104NJL 248, 139A900; 299Pa284, 149A184.
2105-4 76CalA541, 245P476.
2105-7½-New. **Damages for delay in delivering possession** may be recovered in proper case. 170Minn466, 212NW939.
2105-7⅓-New. **Damages for vendor's breach of agreement to make improvements held not excessive.**-21 OhA429, 152 NE323.
2105-7¼-New. **Measure of damages for failure to convey** is value of property less amount of incumbrances. 35F(2d) 818.
2105-7⅙-New. Measure of damages for breach of contract is purchase money paid with interest from date of payment. 153Va591, 151SE146.
2105-7⅙-New. Where contract for sale of lot is void, there is no basis for allowance of damages for breach thereof. 102CalA578, 283P365.
2105-11 58 OntL375, [1926] 1DomLR 1153.
2106-14 91Fla875, 108S883; 236Ky28, 32SW(2d)534; NM 291P489; 104NJL 62, 138A891; 135Misc361, 238NYS181. **In Texas.**-CivA 298SW443. **Where the title offered is defective,** etc. 27 OhA 320, 161NE228. **Damages recoverable by purchaser for vendor's breach of land contract** is amount of purchase money paid with interest and expenses, but damages for loss of bargain are not recoverable. 293Pa379, 142A914.
2107-16 293Pa379, 142A914; TexCivA 298SW443.
2107-17 293Pa379, 142A914.
2108-29 91Fla875, 108S883; 165La407, 115S637; 240Mich357, 215NW355; 104 NJL62, 138A891; 222AppDiv570, 226 NYS544; 293Pa379, 142A914; 144Va 795, 130SE788 (where vendor contracts knowing he alone has no power to complete sale). **It is not every case of fraud, etc.**-TexCivA 298SW443. **Vendee not restricted to proof of fraud or bad faith** if he shows vendor knew his title was defective and he did not possess power to convey marketable title without concurrence of third person. 144Va795, 130SE788. **Facts held to show that vendor acted in bad faith.**-165La407, 115 S637.
2109-31 **In California.**-208Cal 753, 284 P926.
2111-36 CalA 277P525; TexCommnA 294SW531 (failure to perfect title).
2111-38 51SD233, 213NW6 (value of interest at time of contract).
2111-39 51SD233, 213NW6.
2111-40 91Fla875, 108S883.
2114-60 107Conn207, 139A780; 231Ky 498, 21SW(2d)815; 101NJEq279, 137A 408; TexCivA 290SW802; TexCivA 298 SW443.
2115-63 214Ala481, 108S385.
2115-66 122 Or230, 257P801.
2116-69 234 IllA267.
2116-72 55ND905, 215NW484.
2118-81½-New. **Difference between actual value of land received and sum paid as purchase price** is measure of damages for partial failure of consideration. 47 Ida604, 277P570.
2118-84 299Pa284, 149A184.
2119-90½-New. Where vendor falsely represented that land was unencumbered purchaser is entitled to recover difference in value because of presence of railroad right of way and tracks. Nebr 231NW766.
2119-93½-New. **Allowance of interest on difference between contract price and actual value to purchaser** is within discretion of jury, and it is error to instruct jury to make allowance. 37GaA 254, 139SE573.
2120-10 70CalA279, 233P354.
2120-12½-New. Parole evidence to show mistake in description in contract of sale is inadmissible as attempting to reform unambiguous instrument. 103Conn285, 130A387 (in action for "earnest money" for failure of title).
2120-12¼-New. Promise of assignee, making new agreement to sell land in substitution for old one made by other parties with his assignor, to pay for any shortage in acreage, though without consideration to support it, has been held competent evidence, in suit on purchase notes by pledgee, as corroborating or strengthening claim of one of buyers that such was agreement originally. 178Ark1098, 138W(2d)587.
2121-13 169La978, 126S444 (bona fide transaction). **Evidence held to sustain finding** of examiner of titles that letters and unsigned proposed contract did not show final meeting of the minds of parties or constitute a contract to convey lands by plaintiffs in action to

register title. 320 Ill 198, 150NE641. Evidence held insufficient to authorize finding of mistake as to amount of mortgage purchaser could obtain. 259Mass 79, 156NE32.

2121-14½-New. Evidence insufficient, to show binding acceptance. 190NC185, 129SE423.

2121-15 Construction of agreement for sale of land is matter of law. Mass 170NE69.

2121-17 222AppDiv171, 225NYS555.

2121-18 TexCivA 13SW(2d)997.

2122-25 20AlaA576, 104S284; 103CalA 448, 284P697; 105NJL140, 143A432; 155Wash558, 285P453; 199Wis263, 225 NW138.

2122-29½-New. Whether purchaser was negligent in failing to discover that vendor's representations were false is held for jury. 259Mass608, 156NE842.

2122-29¼-New. Reasonable time to be given purchaser before forfeiture of contract is primarily question of fact. 99 CalA510, 278P1049.

VENEER

2122-2½-New. A thin layer of rare or beautiful material fastened upon commoner surface to produce rich artistic effect. 14CustA1.

VENUE

40 Cyc—10-3 Venue of suit is not question of jurisdiction of things in controversy. TexCommnA 292SW174. Venue designates the particular county or city in which the court having jurisdiction may hear and determine the case. 145 Va317, 133SE812.

18-68 86Tex571, 26SW599, 25LRA52.

18-70 67Va537.

18-73 58Vt727, 6A648.

19-75 Fla 130S7.

19-76 33Kan726, 7P550.

19-77 164Minn433, 205NW284; 153NC 117, 68SE1060; 17Utah257, 54P121; 17 Utah498, 55P82; 58Vt727, 6A648.

19-80 26Gratt(67Va)537 [quot 15WVa 609]. Both at common law and under the code, etc. 154Tenn279, 290SW22, 23 [citCyc]. Another distinction.-164 Minn433, 205NW284.

20-82 31Mo 508.

20-84 31NJL309; 86Tex571, 26SW 599, 25LRA52; 58Vt727, 6A648.

20-85 6HillNY82; 17Utah257, 54P121; 17Utah498, 55P498.

20-87 6HillNY82.

20-88 3Serg&RPa500.

20-89 3Serg&RPa500.

21-94 17Utah498, 55P82.

21-96 31NJL309.

24-20 Legislative power.-200 Iowa32, 204NW417.

24-26½-New. On question of venue, character of plaintiff's cause of action must be determined from averments of his petition. TexCivA 28SW(2d)856.

24-26¼-New. Determinative factors of, and limitations upon, venue legislation. Miss 130S302 (discrimination not shown).

24-34 Venue and jurisdiction distinguished.-147Wash1, 264P1005.

26-50 155Tenn565, 4SW(2d)955.

26-53 In absence of statute, chancellor may adopt any reasonable rule. NJCh 149A369.

26-54 When the relief sought by injunction, etc.-TexCivA 19SW(2d)96.

26-54½-New. Chancery court has state-wide jurisdiction. NJCh 149A585.

26-54¼-New. Venue in chancery is matter in sound discretion of chancellor. NJCh 149A369.

28-5 Me 151A667.

29-7 Me 151A667.

31-95½-New. Held not estopped to deny residence in state.-168La326, 122S 54.

36-46 308Mo 77, 271SW806.

36-47 125 Or528, 266P238, 59ALR1436. Action on fire insurance policy is transitory, such as at common law could be brought in any jurisdiction where defendant could be found or lawfully summoned to appear. 173Ark480, 292SW 677.

37-48 33Kan726, 7P550.

39-54 Place of suability and actual residence must be distinguished. 204 Iowa470, 215NW605.

39-54½-New. Place of trial of case depends on nature of action. 131Misc373, 226NYS723.

40-61 195NC532, 142SE783; 115Tex 89, 276SW662. Venue is not governed by the common law, etc. 189NC703, 128 SE20; 115Tex89, 276SW662. Provisions of consolidated statutes must be considered as one act in determining venue and jurisdiction. 189NC703, 128 SE20.

40-68 Effect of constitutional provision giving court general jurisdiction.-52ND 231, 202NW391.

40-69 234Ky202, 27SW(2d)955.

42-80 117Tex113, 298SW516.

43-82½-New. Privilege to be sued in one's own bailiwick is valuable right. TexCivA 7SW(2d)911.

46-4 TexCivA 12SW(2d)849. Pleading has been held to present cause of action on contract.-TexCivA 21SW(2d)65.

46-6 240Mich46, 215NW48.

46-7 Effect of intervention.-Utah 274P 136.

46-8 115Tex89, 276SW662. Construction.-314Mo 373, 284SW464. Statutes in force where suit was begun are controlling. TexCivA 292SW626.

47-23 38 OklAC265.

47-24 99CalA337, 278P452; Kan 289P 480.

48-25 154Tenn279, 290SW22, 23 [quot Cyc]; 155Tenn565, 4SW(2d)955.

48-26 154Tenn279, 290SW22, 23 [quot Cyc]. See also 155Tenn565, 4SW(2d) 955.

49-31 116Tex65, 285SW593.

51-40 Statute providing that proceeding to partition land lying in two counties may be instituted in either is declaratory. 189NC703, 128SE20.

51-43½-New. Joinder of causes of action where one brought in proper county. TexCivA 32SW(2d)399.

52-46 See also 208 Iowa649, 226NW 13.

52-47½-New. Defendant's plea of privilege is properly sustained, where suit on notes prematurely brought is joined with suit on open account not payable in county of suit. TexCivA 15SW(2d) 65.

54-58 164Minn432, 205NW284.

56-78 181Ark722, 27SW(2d)1003; 164 Ga138, 137SE825; TexCivA 290SW276; TexCommnA 29SW(2d)334; TexCivA 282SW816; TexCivA 299SW282; 145 Wash532, 261P97. Texas statute.-Tex CivA 299SW282; TexCivA 8SW(2d)542. County contesting for establishment of its boundary line is not suing for possession of real property within statute. 221Ala182, 128S158.

57-84 Venue of action to recover possession of land and damages for cutting timber and for equitable relief is, as to equitable relief, in county of defendant's residence. 162Ga432, 134SE83.

57-84½-New. Action to cancel deed to real property located in another county is not one to recover real property within statute, but is transitory. 171Ark1, 283SW13.

57-84¼-New. Suit to redeem lands from judicial sale must be brought in county where lands are situated. 34NM 45, 277P32.

57-85 147Cal 467, 82P70, 3AnnCas340; 98Fla541, 123S915 (suit to remove cloud upon title to land); 166La1098, 118S 453; 248Mich450, 227NW811; 198NC 701, 153SE262; 32PortoRico 44; Tex CivA 270SW1066; TexCivA 288SW606; TexCivA 1SW(2d)933; TexCivA 12SW (2d)849; 17Utah498, 55P82.

57-86 Statute permitting suit to be brought in county where land lies is an exception to general rule for plaintiff's benefit. TexCivA 297SW657.

57-88 See also 223Ky751, 4SW(2d)717.

58-89 Suit to subject land to materialman's lien is not one "respecting title to land." 169Ga777, 151SE485.

58-94 231Ky100, 21SW(2d)133 (ten-year leasehold).

58-99 76CalA708, 245P790.

59-2 76CalA708, 245P790; TexCivA 2 SW(2d)347.

59-3 76CalA708, 245P790.

59-5½-New. Action to recover purchase price of land is not local action and may be brought in different county from that in which land is situated, 76CalA708, 245P790.

59-5¼-New. and fact that prayer of complaint asks that defendant be required to specifically perform its obligation does not alter situation. 76CalA 708, 245P790.

59-7 206Cal 128, 273P571; CalA 292P 273; 166Minn442, 208NW203; 167Minn 463, 209NW270; TexCivA 1SW(2d)675; 107WVa33, 147SE31.

60-8 178Minn373, 227NW202(1stcase).

60-9 167Minn463, 209NW270.

61-18 206Cal 515, 274P977; 169Minn 515, 211NW469; TexCivA 293SW315 (suit to determine amount due under contract with building association); TexCivA 24SW(2d)68.

62-21 222AppDiv357, 226NYS350.

63-31 76CalA708, 245P790, 791 [cit Cyc].

63-32 76CalA708, 245P790, 791 [cit Cyc].

63-33 76CalA708, 245P790, 791 [cit Cyc].

64-38 98CalA155, 276P606.

65-45 215Ala205, 110S384. See also 197NC365, 148SE452. But see 171Ark1, 283SW13.

66-56 206Cal 22, 272P1045; TexCivA 18SW(2d)800.

67-64 172Ark1096, 291SW807; 71CalA 266, 235P57; 129Misc478, 221NYS382; TexCivA 283SW548; TexCivA 289SW 133. Subject of action held "situated" in county where it was being used.-Tex CivA 283SW548.

67-65 TexCivA 297SW863. But see 160 Ga448, 128SE65.

67-67 Iowa 228NW570.

67-70 229Ky749, 17SW(2d)1023. Where action is to establish priorities between liens, it may be brought in county of lienholder's residence, though land is in another county. 220MoA85, 279SW428.

68-73 200 Iowa32, 204NW417.

68-74½-New. In Texas it is held that in action on notes secured by mortgage venue may be laid in county where notes are payable without regard to location of land; the notes carry the venue with them as to the action to foreclose. TexCivA 285SW907.

68-77 148SC410, 146SE240; 145Wash 532, 261P97.

69-83 164Ga64, 137SE773.

69-84 TexCivA 282SW816.

70-99 173Ark898, 294SW1; 43 Ida755, 254P1054 (injury to growing crops); 234Ky202, 27SW(2d)955; 248Mich450, 227NW811; TexCivA 4SW(2d)995.

72-1 Miss 127S560.

72-3½-New. Constitutional provision providing that actions for recovery of possession or quieting title to, or enforcement of liens upon, real estate shall be commenced in county where land is situated, must be strictly construed, and cannot be enlarged to include actions for injuries to real estate. 97CalA588, 276P113(2dcase).

72-3¼-New. Action to cancel deed to real property located in another county is not one for injury to land but is transitory. 171Ark1, 283SW13.

72-4 129Fed1, 63CCA651; 97Fla890, 122S516; TexCivA 15SW(2d)126; 17 Utah257, 54P121; 58Vt727, 6A648.

72-7 164La502, 114S112; TexCivA 270 SW1047 (petition not in trespass).

72-9 In Michigan.-240Mich46, 215NW 48.

73-11 116Tex65, 285SW593; TexCivA 9SW(2d)745. See also TexCivA 32SW (2d)399. Slander of title.-Cal 268P626. Flooding lands.-97Fla890, 122S516.

73-12 165Ga292, 140SE876.

73-15 TexCivA 290SW276.

74-17 TexCivA 23SW(2d)817.

74-21 Cal 268P626, 628 [quotCyc]; 206Cal 22, 272P1045.

75-30 Provision of Philippine code of civil procedure is inapplicable to action to recover out of assurance fund damages caused to mortgagee by refusal of register of deeds to note mortgage lien 50Philippine16.

75-31 Negligent destruction by fire.-234Ky202, 27SW(2d)955.

76-39 147Cal 467, 82P70, 3AnnCas340.

76-45 TexCivA 5SW(2d)1030.

79-64 151Miss211, 117S534; 145Wash 532, 261P97; 155Wash124, 283P690.
79-65 131Misc373, 226NYS723.
80-66½-New. Action to recover interest in certain notes may be maintained in county where notes are, though defendant is resident of another county. TexCivA 17SW(2d)95.
81-78 61Md510.
81-80 37GaA215, 139SE586; 169La601, 125S729; 103NJL562, 138A108; 131 Misc373, 226NYS723; 131Misc548, 227 NYS203; TexCivA 286SW633; TexCivA 288SW639 (action on agreement to repurchase notes); TexCivA 294SW991; Tex CivA 19SW(2d)951 (where fraud arose); TexCivA 22SW(2d)336(2dcase); Tex CivA 23SW(2d)534. **Actions for trespass.**–TexCivA 274SW162; TexCivA 281 SW240. **Action for false imprisonment.** –74Mont393, 240P823. **Railroad companies.**–19 OhA77. **Legislature may provide** that civil actions for damages arising in use of automobiles may be brought in county where damages were sustained. 8PaDist&Co 119. **Action based on fraud.**–TexCivA 284SW643. **Codefendant in action on joint contract** may be sued in county where other defendant may be sued. TexCivA 286SW 633. **Exception to rule** is that venue will be fixed in rural, rather than in metropolitan, county. 131Misc548, 227NYS 203. **Actions for fraud.**–99CalA1, 277P 905; TexCivA 12SW(2d)849. **Actions for conversion.**–219Ala8, 121S33, 63ALR 1453; TexCommnA 15SW(2d)598. **Actions for trespass.**–TexCivA 12SW(2d) 811; TexCivA 13SW(2d)957; TexCivA 15SW(2d)717; TexCivA 18SW(2d)716; TexCivA 18SW(2d)765. **Actions for crime committed.**–Action properly in county where crime committed, where unlawfully cutting wire fence, permitting mules to escape, is denounced as crime under Texas Penal Code. Tex CivA 17SW(2d)838. **In Texas.**–CivA 19 SW(2d)951.
82-84 33Ariz64, 262P489; 193Wis129, 214NW500.
83-87 21AlaA438, 109S176, 177 [cit Cyc]; TexCivA 286SW633; TexCivA 293SW286; 193Wis129, 214NW500. **Cause of action for dishonor and protest of draft** arises in county in which draft is dishonored and protested and not in county where draft is drawn. 41 OklACR31.
83-88 Action of conversion through sequestration writ.–TexCivA 286SW612.
83-89 31 OhA303, 165NE304 (action against nonresident); TexCivA 285SW 847 (Texas statute construed); TexCivA 286SW1006; TexCivA 294SW991; Tex CivA 27SW(2d)318. **In California.**–198 Cal15, 247P894. **In Texas.**–TexCivA 286SW531. **Action against corporation** for malicious prosecution may be brought in county where plaintiff was arrested and imprisoned though proceedings were instituted in another county. 198Cal15, 247P894. **To sustain venue in county of suit for false representations** proof merely of transaction which might constitute action of fraud occurring within county is insufficient but proof of fraud with resulting injury therefrom must be shown. Tex CivA 292SW251.
84-90 193Wis129, 214NW500.
84-94 37GaA215, 139SE586.
84-97 33Ariz64, 262P489; TexCommnA 15SW(2d)598. **Action to recover amounts due on written and oral contracts for work and material** is properly brought in county where work was to be performed and material was to be furnished though amount due on oral contract is much greater than that due under written contract. TexCivA 274 SW229.
86-11½-New. to action for treble damages in which penal provision is incidental to right to recover damages generally, 124Misc871, 209NYS555.
87-18 Liability of corporate directors for not filing report of condition is in nature of penalty for venue purposes. Mont 289P577.
87-29 154Tenn279, 290SW22, 23 [quot Cyc].
87-30 20 OhA1, 151NE784.
88-31 154Tenn279, 290SW22, 23 [quot Cyc].
88-33 201 Iowa781, 208NW210 (action against sheriff to set aside execution sale must be brought where sale was made).
88-34 20 OhA1, 151NE784.
88-35 176Ark107, 2SW(2d)44; 99Fla 1258, 128S860; 198NC223, 151SE250; 126 Okl 270, 259P528. **Action against county board in official capacity as representative of drainage district to recover on district bonds** must be brought in county of members' residence. Iowa 229NW711.
88-35½-New. Action against contractor for drainage project and surety on his bond is local and is triable in county in which cause of action arose. 166 Minn499, 207NW648.
90-46½-New. In suit on judgment against insolvent bank in hands of banking commissioner and surety, venue is properly laid in county other than that of seat of government, despite contention suit was in effect for mandamus to head of state department. TexCivA 283SW 189.
90-47 157Miss822, 126S480.
90-48 157Miss822, 126S480.
90-49 Action against sheriff, clerk of court, and bank to set aside execution sale made by sheriff and to enjoin payment of check given on sale must be brought in county where sale was made irrespective of residence of defendants joined with sheriff. 201 Iowa781, 208 NW210.
91-56 67Va537.
91-61 Place of performance must be plainly designated in writing. TexCivA 300SW199.
91-61½-New. Venue cannot be conferred on doubtful construction of contract. TexCivA 300SW199.
91-61½-New. Written shipping instructions held not part of contract as concerns venue. TexCivA 300SW199.
91-62 TexCivA 275SW232 (contract made in county of plaintiff's residence); TexCivA 296SW985. **Place where final proposal was accepted** is place where contract was made, where made by transmission of letter, telegram, or telephone message. TexCivA 275SW232. **In Texas.**–TexCivA 286SW564.
91-64 Wash 290P994. But see TexCiv A 17SW(2d)140. **Place of acceptance by telephone** is place where contract is made as regards venue. TexCivA 3SW(2d) 471.
92-65 206 Cal 4, 272P1057; 87CalA301, 262P452; 78Colo 6, 238P29; 80Colo 369, 250P689; 200 Iowa32, 204NW417; 208 Iowa1354, 227NW400 (interpreting "construction" contract); 231Ky302, 21 SW(2d)439(2dcase) (action on surety bond for defalcation); MoA 11SW(2d) 1070; 74Mont408, 241P233; 117Tex368, 5SW(2d)960, 60ALR672; 117Tex362, 5 SW(2d)963; 117Tex377, 5SW(2d)965, 60ALR665; 118Tex274, 14SW(2d)810; TexCivA 275SW161 (breach of warranty of contract requiring delivery by carrier f. o. b. point of shipment); TexCivA 276SW743; TexCivA 283SW182; Tex CivA 283SW634; TexCivA 288SW239 (where goods are to be inspected at destination); TexCivA 288SW283 (action on note); TexCivA 288SW1106; TexCivA 289SW104; TexCivA 293SW286; Tex CivA 293SW671; TexCivA 295SW210; TexCivA 300SW666; TexCivA 1SW(2d) 670; TexCivA 2SW(2d)933; TexCivA 8SW(2d)1049; TexCivA 10SW(2d)408; TexCivA 11SW(2d)369; TexCivA 15SW (2d)85; TexCivA 16SW(2d)324; Tex CivA 16SW(2d)325(1stcase); TexCivA 18SW(2d)210; TexCivA 18SW(2d)251; TexCivA 19SW(2d)826 (where note is payable); TexCivA 21SW(2d)376; Tex CivA 21SW(2d)576; TexCivA 28SW(2d) 608 (construction of statute); TexCivA 28SW(2d)860; TexCivA 30SW(2d)351. See also TexCivA 295SW341. **Action for breach of warranty.**–TexCivA 294SW 612. **Contract held to be performed at buyer's residence.**–TexCivA 283SW182. **Courts in which statutes applicable.**–TexCivA 276SW743. **Custom to permit inspection by buyer at place of destination** does not establish venue of action for breach of warranty in county of destination. TexCivA 294SW612. **Full, and not part, performance is contemplated by statute providing that actions** upon contracts must be tried in county in which contract was to be performed. 83Mont15, 268P547. **On defendant's motion for change of venue to county of residence,** only issue involved is place where defendant is required by contract to perform. 80Colo 369, 250P 689. **Place of seller's residence** is place of performance where contract of sale states price as f. o. b. seller's place of business. 80Colo 369, 250P689. **Right does not exist in absence of statute.**–208 Iowa49, 222NW548. **Sales contract** held to be performed in county of delivery, though payment was to be made before delivery in another county. TexCivA 288SW1106. **Seller's delivery at place other than that named in contract** does not change rule fixing venue at place of performance named in contract. 80 Colo 369, 250P689. **Statutes requiring contractor's bond to secure laborers and materialmen** do not fix venue of suit for amount due for labor in county. TexCivA 276SW743. **Written provision as to place of performance controls.**–TexCivA 293SW855. **Plea of privilege alleging fraud held insufficient.**–TexCivA 26SW(2d)401. **Contract to be performed in either of two counties.**–TexCivA 30SW(2d)393.
92-65½-New. Where contract made by wire, additional terms sought to be added by letter changing place where differences are to be paid is ineffective as basis for fixing venue. TexCivA 285 SW868.
92-66 78Colo 6, 238P29; 74Mont398, 240P825; 190NC494, 130SE184 (under statute, action for recovery of personal property must be tried in county where subject of action is situated); TexCivA 275SW161; TexCivA 19SW(2d)353; TexCivA 29SW(2d)430(2dcase); Alta [1924] 2DomLR911. See also TexCivA 16SW(2d)984(1stcase). But see 80Colo 369, 250P689; 200 Iowa32, 204NW417. **Contract for commissions on insurance premiums,** without any provision requiring payments of commissions within county is not within statute, authorizing suit either in county where contract is to be performed or where defendant has his domicile. TexCivA 15SW(2d)91. **Contract need not be signed by both parties** where it is signed by one party and accepted by other. TexCivA 298SW640. **Contract must contain express or implied agreement** to perform or pay in county of suit. TexCivA 276SW743. **Gravel checks not written contracts** to pay in county where they do not provide for hauling in county of suit on road contractor's bond for amount of such checks. TexCivA 276SW743. **In action to recover for attorney's services,** silent as to place of payment, venue is properly laid in county of plaintiff's residence. 78Colo 6, 238P29. **Provision in conditional sales contract,** allowing party or his assignees to designate place of payment, did not enable them to maintain suit in county other than that of defendant's residence. Tex CivA 11SW(2d)620. **Where money to become due under contract to furnish stone in certain county is assigned to resident of another county** by assignment not stating place of payment, and assignment is accepted by other contracting party, assignee may sue in county of his residence. 74Mont398, 240P825. **Where road contractor's bond does not provide for payment for labor in county of suit** venue of suit by laborers' assignee cannot be sustained on ground defendants contracted in writing to build road in such county. Tex CivA 276SW743. **Obligation to perform in county in which defendant does not reside** must be plainly present in writing. TexCivA 284SW652. **What constitutes written contract.**–TexCivA 298 SW640 (evidence held to show acceptance). **In case of doubt** contract is construed in favor of plea of privilege. Tex CivA 28SW(2d)893.
92-67 Tex 26SW(2d)903; TexCommnA 27SW(2d)115 (invoice stipulating for payment at seller's principal office); Tex CivA 275SW232 (contract held not one in writing); TexCivA 283SW182; Tex CivA 284SW652; TexCivA 294SW612;

TexCivA 12SW(2d)587; TexCivA 14SW(2d)70; TexCivA 15SW(2d)110; Tex CivA 21SW(2d)576; TexCivA 25SW(2d)173. **Illustrations of contract not within the rule.**–TexCivA 284SW652. **After repudiation of contract** employing plaintiff to act as financial agent in sale of bonds and giving him right to designate banks where bonds were to be shipped, plaintiff cannot designate bank merely to fix venue for suit for breach of contract. TexCivA 297SW344. **Allegation of fraud** held insufficient to retain venue where act occurred in another county. TexCivA 25SW(2d)178. **As respecting implied covenant** and in suit for breach of such implied covenant, venue is in same county as that of action for breach of written contract would be. TexCivA 283SW182. **Authority to indorse note for defendant corporation so as to authorize suit in county where note is payable** is not shown by fact that person making indorsement was vice president and general manager of defendant in some respects. 117Tex124, 298SW550. **"Contract in writing"** is such obligation as may be made basis of suit. TexCivA 284SW652. **Contract made orally over telephone and confirmed in writing** by party sought to be charged and accepted by other party constitutes contract in writing as respects venue. TexCivA 283SW182. **Defendant's written bid accepted and acted upon by plaintiff** constitutes contract in writing. TexCivA 5SW(2d)874. **Letter agreeing to make note payable in certain county** does not warrant commencement in such county of suit for services, on theory that suit is on contract in writing performable in such county. TexCivA 13SW(2d)408. **There must be express agreement** to perform in county other than of residence to authorize suit in such county. TexCivA 11SW(2d)620. **Under statute permitting suit** in county where written contract is to be performed, obligations must rest on defendant and be basis of suit. TexCivA 297SW344. **Venue in accordance with allegations of petition.**–TexCivA 5SW(2d)874. **Voluntary written offer accepted by other party** is sufficient under statute as to venue. 117Tex362, 5SW(2d)963. **Written obligation, according with original oral contract,** sustains venue under statute. 117Tex362, 5SW(2d)963. **In Iowa.**–Iowa 229NW765.

92–67½–New. Bond to perform building contract in certain county does not give venue to that county. TexCivA 288SW584.

92–67⅓–New. Stakeholder necessary party as to venue. TexCivA 295SW210.

92–67¼–New. In California constitution provides that corporation or association may be sued where contract is made or to be performed or where liability arises or breach occurs. 201Cal29, 255P512.

92–67⅙–New. In suit on policy of insurance against loss on account of bodily injuries to anyone from insured's automobile, county where injury should occur and judgment be obtained is place of performance of policy for purpose of venue. 201Cal29, 255P512.

92–67⅛–New. Actions for injuries to personal property.–Conversion of personal property is not "injury" to property within statute authorizing action in county wherein injury occurs. 99CalA219, 278P461(2dcase).

92–67½–New. Suit for commissions under contract of exclusive agency could be brought in county where commissions were earned. Iowa 231NW347.

93–73 "Domicile" is equivalent to "residence," etc. TexCivA 19SW(2d)578.

94–74 87Colo64, 284P1025; 164Ga64, 137SE773; 103NJL562, 138A108; 155Tenn565, 48W(2d)955; 115Tex89, 276SW662; TexCivA 275SW232 (contract construed not promising performance in county of buyer's residence). **Meaning of "person"** includes corporations both public and private except counties in some jurisdictions. 115Tex89, 276SW662. **Privilege of being sued** in county of residence is a valuable right. TexCivA 297SW657. **Citizen of another state** may claim the benefit of being sued in any one of his Texas residences. 115Tex417, 282SW576. **One may maintain several residences** and be sued in any one of them. 115Tex417, 282SW576. **Exception to Venue Act,** allowing suit in county other than domicile, is for plaintiff's benefit. TexCivA 16SW(2d)350.

94–74½–New. Court, having acquired jurisdiction under exception to venue statute, retains it despite discharge of resident defendant, in absence of plea that allegations of petition showing jurisdiction were fraudulent. TexCivA 283SW548.

95–75 Meaning of "domicile" and "residence," etc. NJ 146A317; 115Tex417, 282SW576. **Meaning of "inhabitant of state."**–TexCivA 16SW(2d)350.

95–76 219AppDiv268, 219NYS641 (holding resident sued by nonresident is entitled to have place of trial changed to county of residence).

96–77 80Colo369, 250P689; 131Misc373, 226NYS723. **Where plaintiff is nonresident,** venue is determined by residence of defendant. 131Misc373, 226NYS723. **In North Carolina.**–195NC532, 142SE783. **In Philippines.**–50Philippine16. **Under statute,** venue is properly laid at residence of plaintiff where defendant's residence at time suit is filed is unknown and is not so notorious as to charge plaintiff with notice. TexCivA 20SW(2d)366(1stcase).

96–78 In Porto Rico.–33PortoRico8.

96–78½–New. Plaintiff changing her residence after seduction, can sue in county of new residence. NJ 146A317.

96–78⅓–New. Plaintiff may change his residence from one county to another after cause of action accrues. NJ 146A317.

96–79 221Ala182, 128S158; 71CalA266, 235P57 (action to recover purchase price of land); 76CalA708, 245P790 (corporation has same right as individual); 99CalA398, 278P869; CalA292P273; 82Colo482, 261P861; 160Ga307, 127SE852; 164Ga351, 138SE898; 164Ga625, 139SE147; 165Ga292, 140SE876; 35GaA428, 133SE306; 88IndA68, 163NE295; 200Iowa32, 204NW416 (contract); 203Iowa245, 212NW567; 204Iowa1254, 215NW261; 118Kan717, 236P841 (action in personam and for equitable relief other than to adjudicate interests in land); 231Ky100, 21SW(2d)133; 161La67, 108S127; 164La502, 114S112; 170La680, 129S128; 13LaA6, 125S158(1st case); 1LaA750; 164Minn433, 205NW284; 179Minn583, 229NW318; Miss129S324; 248NY445, 162NE481; 24OhNPNS207; 39OklACR265; 33PortoRico8 (Code Civ. Proc. § 81); 134SC343, 132SE822; 161Tenn346, 31SW(2d)692; 115Tex89, 276SW662; TexCivA 272SW217; TexCivA 290SW823 (suit of personal nature for injunction, to cancel lease and for damages); TexCivA 293SW207 (husband held resident where wife resided though working in another county); TexCivA 295SW341; TexCivA 2SW(2d)881; TexCivA 2SW(2d)933; TexCivA 5SW(2d)1030; TexCivA 14SW(2d)70; TexCivA 14SW(2d)126; TexCivA 21SW(2d)65; TexCivA 28SW(2d)608. See also TexCivA 272SW803. **Action for deceit.**–50SD94, 208NW575. **Actions involving title to land.**–195NC532, 142SE783. **Chancery causes.**–150Miss193, 116S540. **Equitable doctrine of complete relief** held not to affect rule. 204Iowa1254, 215NW261. **Joinder of causes in county where defendant** is not resident as to one cause and other cause is barred by presumption of payment held brought in wrong county. 203Iowa245, 212NW567. **Plaintiff not entitled to have venue removed to his county** because he issued attachment in his county. TexCivA 288SW496. **Residence of defendant at time of filing suit** does not fix venue as matter of law under statute. TexCivA 276SW953. **Right to sue defendant in county of residence** held not precluded by latter's uncontested action against plaintiff in another county. 164Ga625, 139SE147. **Rule held not to apply to preliminary proceedings,** like hearing on demurrer to petition for interlocutory injunction, but only to trial of cause. 165Ga296, 140SE886. **Rule not changed to award multiplicity of suits.** 204Iowa1254, 215NW261. **Statutes authorizing suits in county wherein defendant resides** do not confer extraterritorial jurisdiction or change rules as to venue of local actions. 97Fla890, 122S516. **Though damage occurs in county of plaintiff's residence,** action for deceit must be brought in county of defendant's residence when wrongful act was committed there. 50SD94, 208NW575. **Trust fund doctrine** in corporations held not to change rule. 204Iowa1254, 215NW261. **Where defendant resides or carries on business.**–Man [1929] 1DomLR140. **Word "inhabitant"** used in venue statute includes idea of domicile or residence. 32F(2d)295. **In Massachusetts.**–167NE749. **Question as to residence** of defendant is one of fact. TexCivA 25SW(2d)638. **Defendant is not transient person** liable to be sued in any county in which he may be found where he lives in rented house in H. County and engages in business there, though he sold business with no intention of moving away permanently. TexCivA 19SW(2d)578. **Engaging in real estate business** has been held to establish residence within venue statute. TexCivA 26SW(2d)687. **Cases of ambiguous domicile.**–170Ga779, 154SE240.

97–80 TexCivA 284SW652; TexCivA 15SW(2d)65; TexCivA 25SW(2d)269. See also 218Ky282, 291SW377; TexCivA 298SW318. **Right should not be taken away by strained or doubtful inferences.**–TexCivA 284SW652.

97–81 164Ga351, 138SE898; 164Ga625, 139SE147.

98–83 158La616, 104S388 (place where firm business conducted out of which plaintiff's cause of action arose though defendant lived in another parish); 164La502, 114S112 (trespass); 115Tex89, 276SW662; TexCivA 29SW(2d)454 (trespass); 70Utah284, 259P928. **Where property situated or defendant domiciled.**–170La680, 129S128.

98–84 200Iowa32, 204NW417 (case not exception); Iowa 231NW347 (holding mere residence in another county is not enough for change, where statute allows trial where office is located); 115Tex89, 276SW662; TexCivA 29SW(2d)428 (conversion). **Facts creating exception must have existed** when defendant was brought into suit. TexCivA 274SW184. **Defendant's intention not to perform contract** at time of making is no exception to rule. TexCivA 27SW(2d)290(1stcase). **In negligence action,** plaintiff must prove affirmative negligence to sustain venue. TexCivA 25SW(2d)650. **Petition held sufficient** to sustain venue in county where defalcation occurred. TexCivA 25SW(2d)280. **To maintain suit outside defendant's residence because of fraud,** suit must be predicated upon open facts. TexCivA 27SW(2d)290(1stcase). **Exceptions are for plaintiff's benefit.**–TexCivA 30SW(2d)393.

98–85 200Iowa32, 204NW417; TexCivA 273SW626; TexCivA 11SW(2d)620; TexCivA 28SW(2d)893; TexCivA 30SW(2d)434. **In suit to remove encumbrances on land and for damages against guardian of incompetent** defendant's plea of privilege should be sustained where he is nonresident of county and encumbrances had been removed prior to trial. TexCivA 281SW1099. **In Porto Rico.**–33PortoRico403. **Allegations of controverting affidavit** held not to make prima facie case of venue. TexCivA 28SW(2d)858. **Cases held not to be within exceptions.**–TexCivA 26SW(2d)922. **Controverting affidavit must be construed** in light of petition. TexCivA 28SW(2d)856. **Controverting affidavits to plea of privilege** held sufficient. TexCivA 28SW(2d)856. **Court will not deduce unnecessary inferences** from contracts to defeat defendant's privilege. TexCivA 25SW(2d)269. **Plaintiff need not plead statute** nor specifically refer thereto. TexCivA 28SW(2d)856. **Record of deficiency judgment** held not to show cause of action arose in county of venue. TexCivA 28SW(2d)883. **Statute does not require plaintiff to replead his action.** TexCivA 28SW(2d)856.

98–86 TexCivA 26SW(2d)687.

98-86½-New. Action for bill of discovery must be brought where defendant resides. **TexCivA** 295SW341.

98-86¾-New. Plaintiff cannot, by uniting matters which form subject of personal action with other matters which form subject of local action, compel defendants to have both matters tried in county other than that in which defendants reside. 206Cal515, 274P977.

99-87 219Ala581, 122S693; 174Ark24, 294SW364; 83Colo207, 263P715; 164Ga135, 137SE828; 35GaA177, 132SE247; 45Ida509, 263P477; 123Kan581, 256P1006; 161La1070, 109S841; 164La502, 114S112; 170La212, 127S604; 170La290, 127S631; 157Miss746, 128S563; 314Mo373, 284SW464; 54ND540, 210NW25; 55ND388, 213NW483; 33PortoRico8; 35PortoRico602; 134SC343, 132SE522; 152SC1, 149SE266; SC155SE273; 117Tex387, 5SW(2d)495; 118Tex212, 13SW(2d)65; TexCommnA24SW(2d)23; TexCommnA29SW(2d)319; TexCivA273SW634; TexCivA274SW184; TexCivA282SW871; TexCivA286SW626; TexCivA293SW655 (suit for specific performance). TexCivA300SW666; TexCivA5SW(2d)1007; TexCivA16SW(2d)385; TexCivA21SW(2d)376; TexCivA22SW(2d)542 (plea of privilege is properly sustained where none of defendants resided in county); TexCivA26SW(2d)922; TexCivA29SW(2d)413 (jurisdiction not destroyed by removal of resident defendant from suit); TexCivA29SW(2d)861. See also TexCivA286SW633. **Statute providing that suit against two or more defendants be brought where one resides is mandatory** and not affected or nullified by statute relating to joint liability for fraud. TexCivA 272SW824. **Appearance of nonresident defendant** prior to dismissal of cause against one resident held not to validate judgment. 36GaA815, 138SE244. **Where cause against resident defendant is dismissed** judgment against others is invalid. 36GaA815, 138SE244. **Good faith held essential** to operation of rule. 123Kan581, 256P1006. **Judgment against joint defendant resident in another county** held valid despite dismissal as to resident defendant. 123Kan581, 256P1006. **Rule applies to corporations as well as natural persons.**–314Mo373, 284SW464. **Rule requiring action against corporation in county where cause arose** held not to apply where corporation is joint defendant, unless no cause exists against other defendant. 314Mo373, 284SW464. **Suit against corporation and joint defendant.**–115Tex417, 282SW576. **Where corporation is joint defendant** with another individual as against plea of privilege of joint defendant to be sued in his county, suit is authorized in county where corporation has its headquarters. 115Tex417, 282SW576. **Both can be sued at domicile of either.**–164La502, 114S112. **Where nonresident defendant is not proper or necessary party,** venue of cause as to him should be changed to county of his residence. TexCivA 28SW(2d)1008. **Joint tortfeasors may be sued** at domicile of one of them or where tort was committed. 170La290, 127S631. **Plaintiff held not entitled to retain venue** in his county as against motion of corporate defendant with sole place of business in another county joined in by other defendants. 179Minn583, 229NW318. **Plaintiff must allege and prove facts showing bona fide cause of action** against resident defendant to join nonresident codefendant. TexCivA 29SW(2d)861. **Joint cause of action** against resident and nonresident defendant must be established. Oh172NE659. **In Texas.**–CivA 29SW(2d)861.

99-87½-New. But action on note and contract to pay mortgage securing it, by purchaser of property, cannot be brought in county where none of defendants reside. 200Iowa32, 204NW417.

99-88 TexCivA 8SW(2d)278. **Joint cause of action against defendants** is necessary under some statutes. TexCivA272SW629 (no joint obligation shown). **Nonresident defendant cannot be brought in by cross action** based on claim wholly independent of contracts alleged by plaintiff. TexCivA 272SW629. **Where nonresident defendant is not necessary party,** its plea of privilege is not defeated. TexCivA 272SW629. **To justify action, joinder must be proper.**–124Kan466, 260P645. **Where actions against two defendants are separate and distinct,** resident defendant must be sued in county of his residence. TexCivA 6SW(2d)141. **Under statute,** in order to retain venue in county of one of defendants as against pleas of privilege of defendants residing in other counties, plaintiff must show that cause of action against all of defendants is same. TexCivA 19SW(2d)96.

100-90 Iowa231NW347 (where contract was performed locally).

100-90½-New. Where resident defendant named in pleading is not served, he is not a party so as to affect jurisdiction of nonresident defendants. 218Ky282, 291SW377.

100-91 35GaA5, 131SE524 (anomalous indorsers of note liable as sureties); 35GaA177, 132SE247; TexCivA 271SW124; TexCivA271SW261; TexCivA23SW(2d)748; TexCivA 248SW(2d)485. **Statute authorizing action** against any or all persons bound by contract whether jointly, severally, or both is not held venue statute. 200Iowa32, 204NW417.

100-92 TexCivA 271SW124; TexCivA271SW261; Wash289P1023.

100-92½-New. Action arising ex delicto in which all tort-feasors are bound in solido cannot be brought except at respective domiciles of defendants. 161La784, 109S490.

100-92¾-New. Generally, statute designating venue in actions against corporations is not controlling if sued jointly with another. 194NC703, 140SE718.

100-94 164Ga135, 137SE828; 167Ga389, 145SE460; 169Ga382, 150SE555(2dcase) (levying officer is not necessary party); TexCivA 272SW564 (client improperly joined in action by attorney against debtor after assignment by client); TexCivA 10SW(2d)577; TexCivA22SW(2d)497. **Material defendant,** etc. 202Iowa58, 209NW430 (that defendant is proper party held sufficient); 119Kan796, 241P462; TexCivA 22SW(2d)684. **Action against defendant against whom substantial relief is sought** held well brought in county of his domicile. 164Ga324, 138SE852. **Where pleading showed all were necessary parties,** pleas of privilege should have been overruled. TexCivA 293SW655. **Corporation held necessary party.**–96CalA152, 273P845. **Defendant transferring security deed to son** held necessary party. 167Ga718, 146SE460. **Defendants held not necessary parties.**–TexCivA 12SW(2d)638; TexCivA 18SW(2d)800; TexCivA 29SW(2d)861. **Insurance company** is not necessary party to suit against general agent to recover commissions on insurance premiums. TexCivA 15SW(2d)91. **Grantee of mortgaged premises** is necessary party. TexCivA 16SW(2d)385. **One delivering defective automobile to codefendants** whose employee while driving car injured plaintiff is not necessary party so as to sustain venue in codefendant's county. TexCivA 18SW(2d)765.

100-95 205Cal38, 269P636; 164Ga135, 137SE828; TexCivA 274SW184; TexCivA280SW342; TexCivA283SW246; TexCivA286SW626; TexCivA288SW256; TexCivA 10SW(2d)408; TexCivA19SW(2d)96. **Conditional vendor cannot sue** vendee and transferee in county of latter's residence. 163Ga872, 137SE268. **Where both defendants are material venue is proper at residence of either one.** 164Ga135, 137SE828.

101-97 73CalA571, 239P63; 169Ga382, 150SE555(2dcase) (county of sheriff's residence not proper venue for suit to enjoin tax sale by resident of other county); 173Minn57, 214NW778; ND230NW214; 54SD143, 222NW692; TexCivA280SW342; TexCivA282SW816; TexCivA283SW246; TexCivA19SW(2d)96. **Allegations of complaint are not conclusive** on question of propriety of joinder of resident defendant. 88CalA349, 263P550. **"Necessary parties"** as used in statute refers to necessary as distinguished from proper parties. TexCivA29SW(2d)861.

101-98 73CalA571, 239P63; CalA287P525; 173Minn57, 214NW778; 224AppDiv652, 229NYS40; 54SD143, 222NW692; TexCivA280SW342; TexCivA282SW816; TexCivA283SW246; TexCivA292SW624; TexCivA10SW(2d)577; TexCivA22SW(2d)684. See also TexCivA8SW(2d)278; TexCivA 8SW(2d)772. **Change of venue.**–166Minn442, 208NW203. **Dismissal or nonsuit,** etc. 173Ark417, 292SW391; 121Okl103, 247P402; TexCommnA 285SW307. **Voluntary overpayment by debtor to assignor** does not render proper joinder of assignor. TexCivA 272SW564. **Where cause of action is asserted against several defendants** who are jointly and severally liable, order sustaining plea of privilege as to some of defendants operates only as to cause of action asserted against such defendants, and does not affect proceedings against remaining defendant or defendants shown to be within jurisdiction of county in which suit is brought. TexCivA 9SW(2d)279.

101-99 See also TexCivA 275SW232.

101-2 120Kan321, 243P263 (jurisdiction over state superintendent of public instruction acquired by court in county where some of proper parties defendant resided); 129Kan447, 283P491 (action on contract); 22OhA249, 153NE520.

101-2½-New. **In Porto Rico,** under Code Civ. Proc. § 78, legal residence of merchants, in all that relates to commercial acts and contracts is town where their principal business is located, and where commercial establishments are situated in different judicial districts, their owner may be sued in personal actions at their principal place of business or where obligation was incurred, at election of plaintiff. 29PortoRico850.

102-4 121Okl103, 247P402; 38OklACR474 (action by original payee against maker of promissory note). **In California.**–83CalA403, 256P846. **In Oklahoma.**–116Okl77, 243P183. **Action to cancel contract for fraud** should be brought in county of defendant's residence. 164Minn433, 205NW284. **Though defendant is not resident at filing of** suit, plea of privilege is properly overruled where she was resident at service of process. TexCivA 276SW953.

102-6 33PortoRico8 (Code Civ. Proc. § 81).

102-7 54ND312, 209NW656.

102-8 204Iowa470, 215NW605.

103-10 29PortoRico850, 851 [citCyc]; 33PortoRico8; 134SC343, 132SE822. **Foreign corporation.**–33PortoRico8.

103-11 190NC680, 130SE547.

103-12 33PortoRico8; 134SC343, 132SE822.

103-13 204Iowa470, 215NW605; 194NC703, 140SE718. **Residence of defendant against whom ancillary relief is sought** will not sustain venue as to nonresident defendants against whom main relief is sought. TexCivA 23SW(2d)534.

103-15 214AppDiv799, 210NYS491. **In action on draft accepted before assignment,** held under statute assignee had same standing as would assignor. TexCivA 287SW133.

103-16 **Continuous trespasses in different counties** are those involving affirmative act in each county involved. TexCivA 294SW991.

103-18½-New. Whether action is local or transitory is determined from averments of complaint and character of judgment which might be rendered on default. 76CalA708, 245P790.

104-20 170Ark522, 281SW5 (action for recovery of money); 176Ark642, 3SW(2d)685; 209Ky199, 272SW426; 115Nebr770, 215NW102 (action on guaranty); 143Okl206, 288P964. **Action to recover purchase price of land** is transitory. 71CalA266, 235P57.

105-28 76CalA708, 245P790; TexCivA9SW(2d)753.

105-33 NJ147A862(1stcase).

105-34 Ark31SW(2d)986; 31NJL309; 4CowNY406; 9JohnsNY248; TexCivA

9SW(2d)745. **Conspiracy to evade payment of debt** is not a fraud permitting action to be brought in county where alleged conspiracy took place in view of Rev. St. (1911) art 1830. **TexCivA** 288SW256. **Acts of commission distinguished from acts of omission** in order to determine if "trespass" under venue statute was committed. **TexCivA** 22SW(2d)757. **Failure to perform duty is** not affirmative act of negligence constituting trespass so as to make venue statute applicable. **TexCivA** 22SW(2d)757.

106-36 125Misc457, 211NYS347.

106-39 46RI397, 129A3. But see 10LaA586, 121S667.

106-40 210Ky1, 273SW719 (action may be brought in county to which prosecution was transferred).

107-48 TexCivA 271SW183.

107-50 87Colo64, 284P1025; **TexCivA** 24SW(2d)515 (active negligence must be shown).

107-51 87Colo64, 284P1025.

107-52 170Ark522, 281SW5; 171Ark1, 283SW13; 178Ark546, 11SW(2d)451(2d case); CalA 291P610; 209Ky40, 272SW18; 126Me419, 139A313; 115Neb770, 215NW102; 76Mont128, 245P518; 20OhA47, 151NE777; 155Tenn565, 4SW(2d)955; **TexCivA** 270SW1047 (to defeat plea of privilege, action being founded on fraud, there must be proof that fraud was committed in county where action was brought); **TexCivA** 272SW244; 152Va484, 147SE461. See also 321Mo795, 12SW(2d)451. **In California.**–76CalA708, 245P790. **Corporation has same right as individual** to have suit action tried in county of its residence. 76CalA708, 245P790. **Owner of traveling carnival** is a "transient person." **TexCivA** 16SW(2d)350.

107-53 178Ark250, 11SW(2d)774, 61ALR1348; 179Ark611, 17SW(2d)875; 76Mont128, 245P518; 20OhA47, 151NE777. But see 125Misc457, 211NYS347.

107-53½-New. But action in tort is properly triable in county where tort is committed. 76Mont128, 245P518.

107-54½-New. On consolidation of actions starting in different counties, place of trial rests in discretion of court. 216AppDiv260, 214NYS533.

107-54⅓-New. Priority of actions may properly be considered by court in absence of question of convenience of witnesses. 216AppDiv260, 214NYS533.

107-54¼-New. So also may court consider place of origin of cause, condition of calendars, and character of parties. 216AppDiv260, 214NYS533.

107-54½-New. Thus, where one party was infant in whose county calendar was not crowded, and origin of cause was near such county, fixing place of trial in such county is proper. 216AppDiv260, 214NYS533 (without prejudice to move for change of venue).

108-57 20OhA47, 151NE777 (actions against owners or lessee of railroads); **TexCivA** 32SW(2d)205; **TexCivA** 32SW(2d)520. **Actions to recover moneys due state.**–86CalA558, 261P1080.

108-59 147Miss621, 111S743.

108-60 123Or326, 262P220.

108-62 213Ala614, 105S689; 147Miss621, 111S743; 123Or326, 262P220, 222 [citCyc].

109-63 147Miss621, 111S743; 123Or326, 262P220, 222 [citCyc].

109-64 Court has power to grant nonsuit after plea of privilege till commencement of order transferring case. **TexCommnA** 292SW174. **Plea of privilege is not cross action** or claim for affirmative relief, right to hearing on which cannot be prejudiced by nonsuit. **TexCommnA** 292SW174. **On filing of uncontroverted plea of privilege,** court lost jurisdiction of person of defendant and could only enter judgment of dismissal. **TexCommnA** 292SW174. **Plea of privilege held not waived** by filing cross action subject to court's action on such plea. **TexCivA** 288SW584. **Nature of cause of action** must be determined from allegations of petition. **Tex CivA** 25SW(2d)229. **Overruling plea** held erroneous. **TexCivA** 29SW(2d)861. **Plea of privilege complying with statute** is sufficient. **TexCivA** 29SW(2d)861. **Where plea of privilege admits facts showing venue,** controverting plea is unnecessary. **TexCivA** 26SW(2d)401. **Where plea and evidence fail to show cause of action against either defendant,** venue is not sustained by statute permitting suit against corporation. **Tex CivA** 29SW(2d)861. **Hearing.–TexCivA** 32SW(2d)678(1stcase). **Controverting affidavit.–TexCivA** 32SW(2d)500.

110-67 128Misc138, 217NYS856 (action for death).

111-69 223Ky751, 4SW(2d)717.

111-70 274US208, 47SCt578, 71Led1002; 179Ark611, 17SW(2d)875; 214Ky400, 283SW410; **TexCivA** 296SW929; **TexCivA** 13SW(2d)237. See also **Tex CivA** 17SW(2d)140. **In North Carolina.**–189NC703, 128SE20.

111-71 117Tex113, 298SW516; 145Va317, 133SE812, 815 [quotCyc]. **Plaintiff having notice of cross action** cannot after nonsuit insist upon plea of privilege. **TexCommnA** 287SW1090.

111-71½-New. Plea of privilege is waived by filing motion to quash citation or service. **TexCivA** 293SW207.

111-71⅓-New. Waiver by one defendant held not to affect right of other where neither defendant resided in county. **TexCivA** 293SW207.

111-73 274US208, 47SCt578, 71Led1002; 173Ark417, 292SW391; 86CalA558, 261P1080; 74Mont393, 240P823; 126Okl270, 259P528; 134SC343, 132SE822; **TexCivA** 290SW276. **Objection that jurisdiction in partition proceedings does not extend to land outside county** presents only question of venue to be raised only by timely motion to change. 189NC703, 128SE20. **Action brought against joint tort-feasors in county where neither resides** may be tried there where no demand for trial in proper county is made. 45Ida509, 263P477.

113-82 146Va215, 135SE823.

113-86½-New. After defendant's plea of privilege, plaintiff must establish prima facie case of trespass to sustain suit in county where accident happened. **TexCivA** 23SW(2d)442.

113-86⅓-New. Controversial plea to plea of privilege not mentioning nonresident is insufficient. **TexCivA** 22SW(2d)497.

113-86¼-New. Controverting plea, in not alleging facts sustaining venue, did not constitute proof of facts to sustain venue. **TexCivA** 22SW(2d)497.

113-86⅕-New. Evidence fails to prove trespass within venue statute. **TexCivA** 23SW(2d)442.

113-86⅙-New. Evidence shows contract payable in county of transfer. **TexCivA** 21SW(2d)744.

113-86⅐-New. Matters not necessary in proof of venue are immaterial. **TexCivA** 22SW(2d)960.

113-86⅛-New. No controverting affidavit being filed, court had no jurisdiction to enter judgment, except to order transfer. **TexCivA** 21SW(2d)598.

113-86⅑-New. Plaintiff has burden of proof, at least prima facie to overcome plea of privilege. **TexCivA** 22SW(2d)497.

113-86⅒-New. Plea of privilege is not waived by failure of defendant to call it to attention of court for adjudication. **TexCivA** 21SW(2d)598.

113-86⅓-New. Plea of privilege properly overruled in conversion suit where prima facie case was made. **TexCivA** 22SW(2d)743.

113-86½-New. Proof insufficient to overcome prima facie right to change venue from filing of plea of privilege. **TexCivA** 22SW(2d)497.

113-87 274US208, 47SCt578, 71Led1002; 214Ky400, 283SW410; 153Md464, 138A404; **TexCivA** 13SW(2d)237. **Appearance by nonresident defendant to move to quash citation before filing of plea of privilege** constitutes waiver of right to be sued in county of residence. **TexCivA** 300SW666.

114-88 But see **TexCivA** 13SW(2d)408.

114-89 55AppDC323, 5F(2d)538; 32PortoRico44 (filing demurrer and answer); 33PortoRico986. But see **Iowa** 229NW711.

114-91 189NC703, 128SE20; 115Or456, 239P98; 32PortoRico44 (demurrer to jurisdiction coupled with answer); **Tex CivA** 273SW634. **Where trial judge has disposed of exception to jurisdiction on face of papers showing proper venue,** it is too late to adduce testimony of venue under averments of answer. 159La36, 105S91. **Defendant held not to have waived plea of privilege by pleading over against plaintiff** and thereafter withdrawing cross bill by permission of court. **TexCivA** 283SW581. **Dismissal of pleas evidencing waiver** does not affect waiver. **TexCivA** 29SW(2d)413.

114-92 86CalA558, 261P1080; 50Philippine647.

115-94½-New. Plaintiff does not elect to treat transitory action as local by filing affidavit for attachment of interest in real property. 166Minn442, 208NW203.

115-94⅓-New. Waiver of objection on trial in action on note is not waiver on amendment to claim on oral contract. **TexCivA** 291SW578.

115-94¼-New. Motion to quash service of summons does not constitute waiver. 179Ark611, 17SW(2d)875.

115-94⅕-New. Where, at close of plaintiff's case, it appeared that plaintiff had failed to show any cause of action against other resident and nonresident defendants, and such defendants had been eliminated from action, remaining nonresident defendant, moving that action against it be dismissed for lack of jurisdiction over its person, did not waive jurisdiction. 31OhA288, 165NE376.

115-94⅙-New. Plea in abatement on ground that there was another suit pending is not waiver. **TexCivA** 11SW(2d)242.

115-95 123Or326, 262P220, 222 [cit Cyc].

115-96 TexCivA 295SW210. **In suit by vendee in vendor's county** for breach of contract to convey land, court has jurisdiction of grantor's cross petition for specific performance. 115Nebr136, 211NW998.

115-97 Waiver, when contract out of which litigation arises is relied on to show it, must be, if not express, at least clearly implied. 33PortoRico169.

115-98 168Ga451, 148SE162. **As to counterclaim or affirmative relief.–TexCivA** 15SW(2d)137.

115-99 23F(2d)852; **TexCommnA** 292SW174. **Provision in promissory note for payment** "at the domicile of the holder." 33PortoRico169 (question considered but not decided). **Where notes were made payable in certain county, venue in such county on suit on notes held part** of contract rather than mere privilege. **TexCivA** 283SW560. **In Porto Rico.**–33PortoRico746.

116-1 123Kan581, 256P1006.

116-3 Petition may be evidence of nature of action within exceptions to venue rule. **TexCivA** 29SW(2d)861.

116-3½-New. Where all process in action issues to and is served in other counties, there is no presumption that any of defendants reside in county of suit. 218Ky282, 291SE377.

116-6 164La502, 114S112.

116-6½-New. In suit against insolvent bank, banking commissioner in charge thereof, and surety for bank, banking commissioner alone is entitled to avail himself of plea of privilege that suit was in effect mandamus to head of state department. **TexCivA** 283SW189.

116-6⅓-New. Guardian impleaded in action on note cannot make plea of privilege. **TexCivA** 25SW(2d)268.

116-6¼-New. Plea of privilege is personal and no one can interpose it for another. **TexCivA** 25SW(2d)268.

116-16 Mo6SW(2d)954; MoA12SW(2d)523; 70Utah284, 259P928.

117-18 Iowa230NW409 (change of venue allowed where fraud set up as defense in amended answer in action on written contract); 311Mo32, 276SW872; Mo6SW(2d)954; MoA293SW798; MoA

12SW(2d)523; 70Utah284, 259P928; 85 Wyo 430, 251P460.

117-19 79CalA422, 249P835.

117-23 MoA 26SW(2d)1011; 76Mont 128, 245P518; TexCivA 290SW842.

Prospective operation.–146Miss642, 112 S19.

117-26 Application to pending actions.–146Miss649, 111S133.

117-26½-New. Statute, providing that assignment of note shall not entitle subsequent holder to sue in any other county than that in which suit could have been prosecuted if no assignment was made, has been held not to prevent suit on note in county other than domicile of party executing note. TexCivA 11SW (2d)242.

117-33 198 Ind661, 154NE492; 85 IndA 536, 154NE675.

117-29 Ind 166NE433; 89 IndA302, 166 NE287(1st case).

117-30 99CalA398, 278P869; Ida 287 P947; 86Mont163, 282P861 (denial of motion in libel action not abuse of discretion); 193NC352, 137SE136; 52ND 165, 201NW880; 123 Or33, 261P57; 138 SC532, 137SE139; SC 155SE828; Utah 278P816; 100WVa733, 132SE746.

117-32 176Ark253, 3SW(2d)969; 123 Or33, 261P57.

117-33 In Texas.–CivA 270SW1047.

118-34 Where defendant moves for change of venue on ground which entitles him to change as matter of right, court must grant application. 74Mont 338, 240P388.

118-34½-New. Statutes for change of venue do not apply where jurisdiction of defendant has not been obtained by service of original notice on defendant or agent. 204Iowa958, 216NW10.

118-34½-New. and plaintiff has no right to demand transfer of case to county of defendant's residence. 204 Iowa958, 216NW10.

118-36 234 IllA371.

118-39 234 IllA371 (dictum). **Party interpleaded in action on life insurance policy** is not entitled to change of venue because not resident of county in which action was begun. 54ND312, 209NW 656.

118-43 76CalA708, 245P790.

118-46 203 Iowa792, 206NW586.

119-51 TexCivA 9SW(2d)422. **Suit for false imprisonment** by deputy sheriff, brought against deputy, sheriff, and sureties, though properly commenced in county of which one of sureties was resident, could not be maintained there, where deputy resided in another county in which trespass was committed and filed plea of privilege to be tried therein. 118Tex212, 13SW(2d)65.

119-52 69CalA47, 230P476. **Amendment of complaint.**–69CalA47, 230P476.

119-53 TexCivA 284SW297.

120-54 That resident defendant fails to answer is not ground for change of venue. 55ND388, 213NW483.

120-55 206Cal515, 274P977; 84CalA 516, 258P611; 202 Iowa408, 210NW563; 33PortoRico403.

120-56 206Cal515, 274P977.

120-58 But see TexCivA 297SW596; TexCivA 22SW(2d)684.

120-59½-New. In action for death, court errs in transferring it as against all defendants on plea of privilege by one defendant. TexCivA 15SW(2d)1081.

120-61 A change of venue is not allowable in proceeding by motion to vacate judgment under Pract. Act § 89. 252 IllA476. **Statute held not to authorize court to grant change of venue** in suit for relief from judgment. 84 IndA676, 151NE26. **In Iowa.**–202 Iowa627, 210 NW758. **In Minnesota.**–179Minn94, 228 NW442. **"Suit" and "action"** have been held synonymous in phrase relating to change of venue. Md 149A449.

120-62 Splitting causes should be avoided.–204 Iowa470, 215NW605.

120-63 326 Ill 327, 157NE247.

120-66½-New. Question whether answer sets up fraud sufficiently to justify change under statute is for trial court on settling of issues. 200 Iowa 111, 204NW402.

120-66½-New. Under statute permitting change to county of defendant's residence where defense of fraud is set up in action on contract to be performed in another county, answer held not to allege fraud sufficiently to justify change. 200 Iowa111, 204NW402.

121-70 Proceeding on motion to quash execution is not suit within statute. 311Mo 32, 276SW872.

121-74 79CalA422, 249P835.

121-77½-New. applications after divorce for change of custody of child, Tex CivA 286SW534.

121-78 Ind 166NE433.

121-85 But see Md 149A449. **Where mandamus is merely ancillary** to suit and substitute for execution, right to change venue does not exist. 311Mo 32, 276SW872 (mandamus against city to compel tax levy to pay judgment).

121-87½-New. proceedings for relief from judgment taken by default. 84 IndA 676, 151NE26.

123-99 222Ky108, 300SW331; 74Mont 338, 240P388. **Motion for change of venue and its confession** is tantamount to stipulation for change. 74Mont338, 240P388.

123-5 IndA 165NE764.

124-15 214Ala380, 107SS53; 74Mont 393, 240P823; NJCh 149A585; TexCivA 297SW657; 148Va610, 139SE273. **Statute requiring suit concerning land to be** brought in county where land lies may be waived. TexCivA 297SW657.

124-16 Failure to observe statutory requirements may constitute waiver. 76 Mont128, 245P518. **Plaintiff bringing suit to recover land** in county of defendant's domicile held to have waived privilege of suing where land lies. TexCivA 297SW657.

124-17 Particular stipulations.–IndA 168NE411.

125-18 76Mont128, 245P518; Utah 268 P1029; 145Wash532, 261P97.

125-19 214Ala380, 107SS53; 200 Ind 328, 163NE260(2d case); 57ND217, 220 NW926.

125-21 42F(2d)387. **Appearance of one of several defendants residing elsewhere than where venue laid cannot affect question of right to change of venue.** 32 PortoRico 619.

125-23 TexCivA 284SW297. **General appearance** held no waiver, if motion for change is made before answer. 204 Iowa1254, 215NW261.

125-24 Motion to quash new summons issued without authority pending motion for change of venue does not constitute waiver of motion for change of venue. 74Mont338, 240P388.

126-34 103NJL562, 183A108. **Statute permitting defendant sued on written contract in county of agreed performance to remove cause to county of his residence on showing fraud in inception of contract** has no application to action brought against stockholder of corporation on his stock subscription which contains no agreement as to place of performance. 203Iowa792, 206NW586.

127-43 NJCh 149A585.

127-48½-New. Condition of things existing at time of appearance of parties claiming right to change of venue determines right to change. 69CalA47, 230P 476.

128-49 200 Iowa1310, 206NW604; 204 Iowa470, 215NW605; 219AppDiv731, 219NYS590; TexCivA 16SW(2d)350. **Transitory actions.**–166Minn442, 208NW 203.

128-51 203Cal197, 263P236; 71CalA 266, 235P57; 76CalA708, 245P790; 37 GaA581, 140SE910; 203 Iowa792, 206 NW586; 204 Iowa470, 215NW605; 34 PortoRico711; 48SD577, 205NW378 (suit on supersedeas bond); 50SD94, 208NW575; TexCivA 292SW585; Utah 289P1102; Wash 286P851. **Determination of residence.**–SC 155SE828.

128-52 219AppDiv268, 219NYS641; 125Misc161, 210NYS513; 50Philippine 647. **But where action is brought in county where some of defendants reside,** nonresident defendants are not entitled to change of venue. 69CalA47, 230P476.

128-53 219AppDiv731, 219NYS590; 227AppDiv796, 237NYS211.

129-54 ND 230NW214; TexCivA 284 SW350. **If land has been sold and defendants reside in another county,** it is duty of court to grant plea of privilege for transfer of cause. TexCivA 284SW 350. **In action to foreclose chattel mortgage change of venue to situs of property** should be granted. 155Wash124, 283P690.

129-56 In Utah.–289P1102.

129-58 57ND217, 220NW926.

129-58½-New. General venue statutes govern divorced wife's action to readjudicate custody of children, notwithstanding court rendering divorce judgment undertook to retain jurisdiction, TexCivA 28SW(2d)331.

129-59½-New. and action must be transferred to county of defendant's residence on motion. TexCivA 28SW(2d) 331.

129-59 141 Okl271, 284P634.

130-63 203Cal183, 263P231; 84CalA 516, 258P611.

130-65 212AppDiv766, 210NYS370.

130-67 84CalA516, 258P611.

130-69 48 Ida507, 283P42 (statute liberally construed); 326 Ill 327, 157NE 247. **Affidavit of prejudice against all judges of county** requires sending of case to other county, where parties do not agree on special judge or ask election of special judge. MoA 178SW(2d) 576.

130-70 Not within discretion of court whether he was prejudiced. 326 Ill 327, 157NE247. **Where judge is prejudiced,** petitioner has absolute right. 326 Ill 327, 157NE247.

131-71 48 Ida507, 283P42.

131-72 Where the court has several judges, etc. 239Mich605, 215NW29.

131-77 240 IllA289.

132-89 177Minn169, 225NW109.

133-93 52Nev379, 287P957.

133-99 198 Ind661, 154NE492.

133-1 198 Ind661, 154NE492.

133-3 33PortoRico 13. **Facts, etc.**–33 PortoRico 13. **It must be presumed** that court will consider every fresh case on its merits and not bring into it impressions produced in other litigations. 33 PortoRico 13.

134-21½-New. Relator instituting probate proceedings before respondent could not, at later stage of proceedings, demand hearing before another judge on ground of supposed prejudice on part of respondent against relator. 154Wash 232, 281P998.

135-22 IndA 168NE493. **Fair trial is of paramount importance.**–BC [1926] 3 DomLR324, [1926] 2WestWkly337 [app allowed on other grounds BC [1926] 4 DomLR450, [1926] 3WestWkly136].

135-23 Ind 166NE433.

135-24 231Ky233, 27SW(2d)978; 193 NC352, 137SE136; 55ND770, 215NW 271; 123 Or33, 261P57; 147Wash330, 266P156; Sask [1925] 3DomLR163.

135-26 123 Or33, 261P57; Sask [1925] 3DomLR163 (holding refusal to change venue from place preponderantly convenient not error). **General prejudice** among great body of people not ground for change of venue. TexCivA 296SW 902.

135-27 Not granted for prejudice against witness.–TexCivA 288SW(2d)238.

136-29 176Ark253, 3SW(2d)969.

136-41 219AppDiv731, 219NYS590; 224AppDiv620, 232NYS93; 147Wash 690, 267P503. **Promoting ends of justice.**–But see SC 155SE828.

137-42 86CalA266, 260P954; 78Colo 6, 238P29; 80Colo 369, 250P689; 191NC 366, 131SE748; 195NC532, 142SE783; 196NC358, 146SE681(1st case); 197NC 84, 147SE680; ND 231NW288; 50SD 385, 210NW199; 147Wash690, 267P503. **But a denial of the application will be reversed,** etc. 74Mont393, 240P823.

137-43 81CalA447, 253P963; 86CalA 266, 260P954; 126Kan395, 267P1100; 217AppDiv763, 216NYS433; 50SD385, 210NW199. **Facts and circumstances insufficient,** etc. 203Cal176, 263P516. **Where issue of fact has not been joined,** motion for change of venue cannot be defeated on ground of alleged convenience of witnesses. 83CalA119, 256P491. **Venue will not be changed from rural to metropolitan county for accommodation** of witnesses. 131Misc548, 227NYS203. **As to moving for change.**–131Misc373, 226NYS723. **Denial of application not abuse of discretion.**–ND 231NW283.

137-44 SC 155SE828; 147Wash690, 267 P503.

137-45 55ND388, 213NW483.

137-46 CalA 288P714.
137-47 212AppDiv695, 209NYS557; 57 ND447, 222NW476.
137-49 212AppDiv695, 209NYS557.
138-51 74Mont393, 240P823; 219App Div731, 219NYS590; 225AppDiv818, 232 NYS442.
138-53 226AppDiv701, 234NYS136.
138-56 212AppDiv766, 210NYS370.
138-59 74Mont393, 240P823.
139-61 99CalA398, 278P869. **No abuse of discretion** shown in denial of change see 30Ariz294, 246P765.
139-64 134Misc862, 236NYS342.
139-68 Ida 287P947 (though other party resided in county where action brought).
140-69 125Misc457, 211NYS347 (no reason to contrary appearing). See also 214AppDiv142, 211NYS721.
140-73 55ND388, 213NW483.
140-74 133Misc782, 233NYS517.
140-76 81CalA447, 253P963.
140-78 **Parties not considered witnesses** in considering application. 57ND217, 220NW926.
140-79½-New. General rule that court will not consider convenience of witnesses who are employees of party 214App Div142, 211NYS721.
140-79½-New. is not applicable where public interest requires town official not to be required to suspend functions to defend action in another county. 214 AppDiv142, 211NYS721.
140-80 125Misc457, 211NYS347.
141-88 131Misc80, 225NYS346; 131 Misc548, 227NYS203. **In New York.**-223 AppDiv860, 228NYS547.
141-90 **Motion is necessary** and mere filing of affidavit and demand does not ipso facto change venue. 76Mont128, 245P518. **Word "moves,"** as employed in Montana statute, comprehends things necessary to be done by litigant to obtain order for change of venue. 76Mont 128, 245P518.
142-6 TexCivA 28SW(2d)858 (where defendant's tender destroyed legal effect of amendment).
143-9 **Time for demand.**-216AppDiv544, 215NYS530.
144-19½-New. **Filing bond.**-Defendant not filing or offering to file bond required by statute is not entitled to change of venue on ground that action is on written contract fraudulent in its inception. Iowa 226NW13.
144-26 248 IllA525.
145-27 191NC366, 131SE748.
145-30 Utah 269P1000.
145-31 Utah 269P1000.
145-37 See also 191NC366, 131SE748. **In North Carolina.**-195NC532, 142SE 733.
146-43 **The term "party,"** etc. 118 Or 77, 245P1074 [citCyc] 46ALR1173.
146-47 93CalA553, 269P968; 326 Ill 405, 158NE162.
147-58 82CalA499, 255P884; 219App Div268, 219NYS641 (motion timely when made within statutory time as extended three days due to service of demand by mail); 191NC366, 131SE748; 32Porto Rico 504. **Motion cannot be made at time** demand and affidavit are filed unless in case of waiver. 76Mont128, 245 P518. **In Utah.**-289P1102.
147-60 **Second service of affidavit** and demand for change of venue may be made at any time within twenty days after summons is served. 169Minn260, 211NW11.
147-61 32PortoRico 504; Va 152SE 539.
148-63 326 Ill 405, 158NE162.
148-64 82CalA499, 255P884.
148-65 86Colo 184, 279P46(1stcase); NJSup 146A790. **Right to change of venue has been held waived.**-86Colo 184, 279P46(1stcase).
148-66 **After time for demanding jury trial has expired,** defendant, in action to recover realty and damages for withholding possession, may demand change of venue on ground of local prejudice, where court may order jury trial. 39 Wyo 24, 269P35.
148-69 **Whether too late on eve of trial** is within discretion of court. 255 IllA 389.
148-72 78Colo 6, 238P29.
148-73 204 Iowa1254, 215NW261.
148-75 **In Porto Rico.**-32PortoRico 504.
149-77 195NC532, 142SE783.
149-79 204Cal 223, 267P312.
149-80 84CalA516, 258P611; 78Colo 6, 238P29; 80Colo 369, 250P689; 55ND 388, 213NW483. **Countermotion to retain case for convenience of witnesses** will not lie unless answer has been filed at time motion for change of venue is made. 203Cal 183, 263P231.
150-96 326 Ill 405, 158NE162; 88 IndA 631, 165NE251.
150-98 Wash 286P851. **Where formal notice of time and place of hearing of motions is delayed because of plaintiff's tactics,** defendant is not chargeable with laches or unreasonable delay. Utah 289 P1102 (denial of motion held unjustified).
150-99 See also MoA 17SW(2d)983.
151-3 76Mont128, 245P518.
152-14½-New. Notice of motion need not accompany affidavit of merits and demand for change, 76Mont128, 245P 518.
152-14¼-New. but such practice is commendable. 76Mont128, 245P518.
153-19 255 IllA389.
153-21 82CalA499, 255P884. **Demand for change of venue, accompanied by affidavit of merits,** does not constitute motion for change of venue nor invoke action of court. 82CalA499, 255P884.
153-22 69CalA702, 232P148 (motion asking for change to "property" instead of "proper" county, through clerical error, held improperly denied).
153-26 TexCivA 296SW902.
153-27 176Ark511, 3SW(2d)337; Tex CivA 296SW902.
154-31 **On a plea of privilege.**-TexCivA 284SW350.
154-33 79CalA422, 249P835.
154-41 MoA 272SW701.
155-47 199CalA569, 250P666.
155-48 199CalA569, 250P666; 80Colo 369, 250P689; 74Mont338, 240P388; 49 ND224, 190NW812.
155-50 **Motion may not be renewed on dismissal at trial of action as to resident defendant.**-45 Ida509, 263P477.
155-54 MoA 287SW657, 659 [citCyc].
156-56 Utah 269P1000.
157-66 Contra Ind 166NE433.
157-76 320Mo 746, 8SW(2d)824; MoA 287SW657.
157-78 **Affidavit should state facts.**-78 Colo 6, 238P29.
157-80 CalA 288P714.
158-82½-New. Averment as to place of residence of third party based on information and belief is sufficient. 206Cal 515, 274P977.
158-83 **Defects in affidavit** are of little importance where defendant is entitled to have venue changed to place of his residence. 33PortoRico 746.
158-89 131Misc548, 227NYS203. **Who may make affidavit.**-33PortoRico 403. **Affidavit on information and belief.**-33 PortoRico 403.
158-90 **Affidavit held sufficient.**-81CalA 499, 253P1112. **Affidavit need not state details of merits.**-33PortoRico 403.
158-91 130Misc736, 225NYS22. **Form of statement.**-81CalA499, 253P1112.
159-92 **Form of allegation.**-81CalA499, 253P1112.
159-93 But see 82CalA762, 256P277.
159-97 76Mont128, 245P518. **Supplemental affidavit** may be allowed in court's discretion in proper case. 76 Mont128, 245P518. **Plea of privilege may be amended.** TexCivA 14SW(2d) 959.
160-6 29PortoRico 850 (affidavit insufficient alleging mere conclusion of law as to legal residence of foreign corporation). **Allegations held sufficient.**-203 Cal 197, 263P236.
160-6½-New. **In Porto Rico,** question whether averment that defendant "has as its sole office in Porto Rico the one established by its general agent, Sobrinos de Ezquiaga, in San Juan" is equivalent to saying that defendant has established domicile or residence in San Juan. 29PortoRico 850.
161-20 217Ky683, 290SW494. **Allegations insufficient.**-204Cal 223, 267P312.
162-25 214AppDiv799, 210NYS491; 217 AppDiv763, 216NYS433.
162-26 37BC130, [1926] 3DomLR182, [1926] 2WestWkly440.
162-27 214AppDiv799, 210NYS491; 217 AppDiv763, 216NYS433.
162-29 214AppDiv799, 210NYS491.
163-30 131Misc548, 227NYS203.
163-31 203Cal 176, 263P516; 214App Div799, 210NYS491; 217AppDiv763, 216 NYS433; 131Misc548, 227NYS203; 55 ND388, 213NW483.
163-34 **"On great expectations"** held insufficient. 131Misc548, 227NYS203.
163-35 **Allegations held insufficient.**-131Misc548, 227NYS203.
163-36 326 Ill 327, 157NE247.
163-37 TexCivA 32SW(2d)227 (allowance of filing plea, after application for removal to federal court was acted upon, proper). **Counter application for retention of venue** may be heard after answer is filed to motion for change. CalA 286 P1060. **Failure to file controverting affidavit** within five days does not deprive court of jurisdiction. TexCivA 32SW (2d)227.
163-40 TexCivA 299SW324; TexCivA 32SW(2d)205. **Counter affidavits held sufficient.**-103NJL562, 138A108. **Counter affidavit held insufficient.**-203Cal 176, 263P516; 78CalA117, 248P272; 83CalA 403, 256P846; 125Misc457, 211NYS347. **Controverting plea held sufficient.**-TexCivA 299SW282. **Plea held insufficient.**-TexCivA 299SW324; TexCivA 32SW (2d)205.
164-42 **The affidavit should show** that both convenience of witnesses and ends of justice would be promoted. 78CalA 117, 248P272. **Affidavit failing to allege that convenience of witnesses was that of material and necessary witnesses,** or to show they would testify as affiant assumed, held insufficient to bar order for change of venue. 218AppDiv745, 218 NYS847. **Affidavit supporting counter motion for retention of case** should contain names of witnesses together with testimony expected from each. 84CalA 516, 258P611.
164-44 **Controverting plea may refer to,** and make petition part of, it. TexCivA 32SW(2d)205.
164-44½-New. Under statutes requiring plaintiff to controvert plea of privilege within five days after appearance day, plaintiff may file his affidavit within term where plea is filed. Tex CivA 290SW769.
164-45 **Seasonable motion should be disposed of before trial on merits.**-WVa 153SE493.
164-46 **Motion should be brought on for hearing** as soon as circumstances will permit. 76Mont128, 245P518.
164-47 174Ark560, 298SW30 (whether resident defendant had personal interest in suit, within statute authorizing service on residents of other counties, held for jury); CalA 286P1073.
164-52 85 IndA536, 154NE675; Mo 6 SW(2d)954.
164-54 CalA 286P1073; 55ND770, 215 NW271; 123 Or33, 261P57; TexCivA 9SW(2d)745.
165-57 TexCivA 286SW1006.
165-57½-New. **Question on hearing is as to where transaction alleged took place,** and evidence as to ownership of property involved is not admissible. TexCivA 286SW1006.
165-58 **Specified finding as to defendant's residence** need not be made in denying motion for change of venue. 78 Colo 6, 238P29.
165-58½-New. **Where plea of privilege raises issue,** unless sufficient proof is offered in support of controverting plea, it is duty of court to transfer cause. TexCivA 284SW350.
165-58½-New. In passing on motion it is of primary importance to ascertain what issues are where ground of motion is convenience of witnesses. 81CalA447, 253P963.
165-58¼-New. Any defects in complaint, wherein effort is apparently made in good faith to charge all defendants, as joint tort-feasors, with conversion of part of property on which plaintiff has mortgage lien, are not available to defendant on application for change of place of trial. 205Cal 38, 269P636.
165-58½-New. In some jurisdictions plaintiff is entitled to bring on for hearing at any time defendant's motion for change of venue. Utah 289P1102.
165-58½-New. **Motion to transfer mat-**

ter of administration of estate to another county is question of law. **MoA** 298SW(2d)240.

165-58½-New. Question of residence may be for jury. **SC** 155SE273.

165-59 74Mont408, 241P233, 236 [cit Cyc]; 212AppDiv695, 209NYS557; 52 ND165, 201NW830; 57ND217, 220NW 926; **TexCivA** 286SW1006; **BC** [1927] 2DomLR223. But see **TexCivA** 280SW 342. Contra **TexCivA** 48W(2d)282. **Burden is on plaintiffs** to bring themselves within exception to rule giving defendant right to trial of action in county of residence. **CalA** 292P273.

165-59½-New. Burden is on plaintiff to sustain affidavit controverting plea of privilege. **TexCivA** 299SW324.

165-59⅓-New. Affidavit controverting defendant's plea of privilege held not proof but merely to entitle plaintiff to prove facts alleged. **TexCivA** 299SW 680.

165-59¼-New. Plaintiff must make prima facie showing on question of venue that note was payable in county of suit as against plea of privilege. **Tex CivA** 299SW680.

165-59⅙-New. and evidence other than note is necessary. **TexCivA** 299SW680.

165-59⅙-New. Plaintiff suing on note has burden of proving that defendant filing plea of privilege was brought within purview of statute, providing that where one or more defendants reside in county of suit other parties not residing in that county could be sued therein. **TexCivA** 11SW(2d)242.

165-60 CalA 286P1073 (affidavits); 147Wash690, 267P503.

166-62 84CalA516, 258P611; **CalA** 286 P1060; **MoA** 283SW736; **TexCivA** 290 SW842 (sworn plea of privilege makes prima facie case); **TexCivA** 299SW680.

166-64 MoA 283SW736.

166-67 TexCivA 28SW(2d)856 (plaintiff's pleading held not to preclude establishing right to prosecute suit in county where brought).

166-68 TexCivA 30SW(2d)561. See also **TexCivA** 11SW(2d)242. **Evidence admissible under affidavits.-TexCivA** 25 SW(2d)156.

166-69 Evidence justifying or requiring denial of application.-78Colo 6, 238 P29; 126Kan710, 271P316; 217Ky683, 290SW494; 166Minn442, 208NW203; 217AppDiv763, 216NYS438 (case because of convenience of witnesses not made out for change); **SC** 155SE828; **TexCivA** 298SW318; **BC** [1926] 4DomLR450, [1926] 3WestWkly136. **Evidence justifying or requiring change.-** 203Cal183, 263P231; 168La326, 122S 54; **TexCivA** 282SW816; **TexCivA** 25 SW(2d)156; 147Wash690, 267P503. **Affidavits of third persons as to defendant's residence** are of little weight, affiants being without knowledge of defendant's intent. 73CalA565, 239P60. **Evidence held sufficient to support order** changing venue to county of defendant's residence. 73CalA565, 239P 60; 73CalA571, 239P63. **Evidence held to show residence of defendant** at time of commencement of action in county where trial was had. 78Colo 6, 238P29. **Evidence held to show plaintiff was resident of state** and entitled to sue under statute. **NJ** 149A759(2dcase). **Fraudulent joinder of resident defendant not shown.-45 Ida**509, 263P477. **Proof should be confined** to acts or omissions common to both petition and controverting plea. **TexCivA** 32SW(2d)205.

167-70 128Kan406, 278P33.

167-71 195NC532, 142SE783 (defendant's proposed answer cannot be considered); 54ND540, 210NW25 (right to change of venue as determined by pleadings at time demand is made).

167-71½-New. Showing of no cause of action against defendant joined for purpose of venue is authorized. 73CalA571, 239P63.

167-71⅓-New. Transfer of suit on note on defendant's plea of privilege is required where plaintiff offered no evidence besides note. **TexCivA** 299SW 680.

167-71¼-New. Proof of note, though not objected to, did not raise issue of fact as to execution of note denied by plaintiff. **TexCivA** 299SW680.

167-71⅙-New. Plea of privilege with reply and uncontradicted testimony, showing that place of payment in note was changed without defendant's knowledge, required sustaining plea. **Tex CivA** 299SW680.

167-76 TexCivA 284SW350.

168-83 318Mo 318, 300SW283. But see 229AppDiv342, 242NYS63.

169-90 39Wyo 24, 269P35.

169-91 318Mo 318, 300SW283.

169-91½-New. Causes will not be removed from rural to urban county. 226AppDiv701, 234NYS136.

169-93½-New. Court has no authority to try plaintiff's case and compel trial of claims of defense in another county. **TexCivA** 15SW(2d)137.

169-94½-New. Action will not be sent to urban from rural county. 131Misc 373, 226NYS723.

169-94⅓-New. Notice of motion to change place of trial to county of defendant's residence will not support change to another county. 204Cal 21, 266P290.

169-96 Court has jurisdiction to grant withdrawal of application for change of venue where no order has been entered. 41Wyo 1, 281P196. **Duty to transfer cause.-TexCivA** 32SW(2d)664.

171-23 126 Okl 71, 258P732, 739 [quot Cyc].

171-24 See also 126 Okl 71, 258P732, 739 [quotCyc].

171-25 See also 126 Okl 71, 258P732, 739 [quotCyc].

171-26 126 Okl 71, 258P732, 739 [quot Cyc] (on same day).

171-27 126 Okl 71, 258P732, 739 [quot Cyc].

172-28 See also 126 Okl 71, 258P732, 739 [quotCyc].

172-29 See also 126 Okl 71, 258P732, 739 [quotCyc].

172-35 128 Or405, 272P171.

172-38 TexCivA 281SW590.

172-43½-New. Transfer of case on plea of privilege will not deprive any party of legal right. **TexCivA** 283SW581.

172-43⅓-New. Suit on note in which part of defendants filed pleas of privilege will be transferred as whole, not in part. **TexCivA** 299SW680.

173-45 In Minnesota.-169Minn260, 211 NW11.

173-46 Iowa 230NW409 (failure to file bond in time excused under facts); **Tex CivA** 32SW(2d)384.

173-49 Unperfected stipulation for change of venue does not deprive court of power to entertain motion by intervener to discharge attachment. 50SD 618, 211NW599.

173-55 In Missouri.-317Mo 368, 295SW 534.

173-58 169Minn260, 211NW11. **Deposit required to be made** to be paid to circuit judge trying cause if sent to another circuit. 318Mo 318, 300SW283.

174-59 178Minn617, 225NW926.

174-62 MoA 299SW1116; **TexCivA** 281 SW590.

174-65 But see **TexCivA** 195SW311; **TexCivA** 281SW590.

176-80 Wash 286P851.

176-83 147Wash330, 266P156.

176-84 204 Iowa470, 215NW605; 320 Mo 459, 8SW(2d)61; 222MoA1051, 6 SW(2d)68.

177-86 320Mo 459, 8SW(2d)61.

177-95 Where as to several defendants cause is ordered transferred to other counties, and cause is continued as to all other defendants in original county, abandonment and dismissal of plaintiff's cause of action is deemed to have been worthless as to defendants whose pleas of privilege were granted. **Tex CivA** 276SW787.

178-99 37GaA581, 140SE910.

178-4 84 IndA676, 152NE62. **Time for application.-190NC**608, 130SE505.

178-5 Discretion of court.-50ND341, 195NW555. **Grounds for remanding.-Man** [1929] 4DomLR10.

179-11½-New. In suit for relief from judgment, plaintiff is not estopped from challenging jurisdiction of court to which venue was changed where he moved to remand cause on his first appearance therein. 84 IndA676, 151NE 26.

180-27 317Mo 368, 295SW534. **Return of case to county from which venue was changed** is unauthorized, and does not restore jurisdiction. 317Mo 368, 295SW 534.

180-28½-New. Convenience of witnesses may be considered, after change has been made, upon motion to return case to original county even though that county is one where none of witnesses reside. 212AppDiv766, 210NYS370.

180-30 Party agreeing to withdraw motion will be bound thereby. 86 IndA 558, 155NE219.

181-32½-New. Where venue of personal injury action was laid in S county, though K was proper county, because all parties were residents thereof and cause of action arose therein, and defendant did not make motion under Civ. Pract. Rules, rule 146, to change venue to proper county, and time to make such motion had expired, county where venue was laid became proper county, under Civ. Pract. Act § 186, and motion to change place of trial from S county to K county on ground of convenience of witnesses will be entertained. 132Misc500, 230NYS478.

181-33 37F(2d)320; 168Minn519, 210 NW405. **By retaining answer** in which venue is laid in county of defendant's residence and serving reply plaintiff does not waive objection that change of venue has not been effected. 169Minn 260, 211NW11. **Second trial on reversal.-168Minn**519, 210NW405.

181-34 204 Iowa470, 215NW605.

182-38½-New. Error in transferring cause to other division of county instead of to other county, where affidavit of prejudice was filed against all judges of county, is not waived by failure to move to remand cause in division to which it was transferred. **MoA** 17SW (2d)576.

182-39 131 Or382, 283P12 (answering and going to trial on merits); 134SC 343, 132SE822. **Filing of subsequent application** after first has been denied, based on same ground, waives right to complain of denial. **MoA** 287SW657.

182-40 114Tex548, 273SW808; **Tex CivA** 15SW(2d)126.

183-54 55ND770, 215NW271; **SC** 155 SE828; 100WVa733, 132SE746.

184-56 214Ala380, 107S853.

184-58 CalA 288P714.

184-58½-New. On certiorari to review, refusal of change on statutory ground that fraud is defense to contract sued on, pertinent inquiry is whether pleading purports to base defense thereon and not whether it is sufficiently specific to set up such defense. 200 Iowa 111, 204NW402.

184-59 Evidence not considered by trial court in granting change of venue cannot be incorporated in record on appeal for purpose of sustaining legality of transfer. 32PortoRico 619. **Service of notice of appeal on clerk of court to which case transferred** held insufficient, under Code Civ. Proc. § 296, requiring notice to be served on "secretary of court in which judgment or order appealed from entered." 32PortoRico 618.

184-60 55ND770, 215NW271; 33Porto Rico 169. **Not incumbent upon appellee,** nor upon appellate court "to dissipate all doubt as to the soundness of the conclusion reached below, in the absence of any adequate showing to the contrary." 33PortoRico 169, 171.

184-60½-New. Where order for change of name is reversed on appeal, judgment of default pending such appeal by court to which case was ordered removed is nullity. 34PortoRico 139.

VERDICT

189-46 316Mo 150, 289SW822. **Similar definitions** are: Declaration of truth as to matters of fact submitted to jury. 162Ga161, 132SE769.

189-53 191NC319, 131SE641.

VERIFICATION

193-59 TexCivA 270SW1094.

193-61½-New. Verification must be direct and on such positive terms as would sustain charge of perjury or fake

swearing if verification should prove to be false. TexCivA 270SW1094.
193-61½-New. "Verified by his affidavit" as used in statute means proved to be true or correct; to establish truth of; confirm. TexCivA 270SW1094.
193-61¼-New. Affidavit must show it has been made on personal knowledge of affiant as to truth of allegations verified. TexCivA 270SW1094.

VERIFY

194-64 13CustA61; 116Nebr45, 215NW 564.

VERMOUTH

195-77 See also 11CustA60.

VESSEL

196-83 Bottle is vessel as used in statute regulating weights and measures. 125Mei23, 131A305.
196-84 Term includes large dredging barge.-14F(2d)364.

VEST

197-88 To "vest" power is not necessarily not "to act through" grantee of power. 272US1, 47SCt1, 71L ed131.
197-90 Construed as meaning "payable."-8PaDist&Co 392.

VESTED

198-92 179Ark79, 14SW(2d)250; 123 Or406, 262P833. "It is not the uncertainty of enjoyment in the future, etc." 125Kan290, 293, 264P47 [quotCyc].

VESTED ESTATE

198-93 "An estate is vested," etc. 125 Kan290, 293, 264P47 [quotCyc].

VIAL

201-23½-New. A vessel or bottle. 14 CustA332.

VICINITY

203-47 Term of relativity.-130 Or309, 274P118.

VIGILANTIBUS ET NON DORMIENTIBUS JURA SUBVENIUNT

206-74 Other forms of maxim.-Vigilantibus non dormientibus equitas subveniunt. 99NJEq369, 131A897.

VILLAGE

207-79 127 Okl 203, 260P481.
207-80 127 Okl 203, 260P481.

VIOLENCE

210-99 As synonymous with "physical force."-79CalA101, 248P1078.

VISA

211-22½-New. Visa.-Visa is recognition by country ad quem of validity of passport issued by country a quo. 14 F(2d)679.

VISCERA

211-23½-New. The internal organs. 13CustA542.

VITRIFY

213-40½-New. To fuse into glass or glasslike appearance wholly or only on the surface. 15CustA165.

VOCATION

214-48 Distinguished from: "Avocation." 239Mich663, 215NW8.

VOID AND VOIDABLE

214-56 MoA 282SW739 (of no force or validity).
216-70 TexCommnA 25SW(2d)597.
216-72 CalA 288P143(2dcase).
217-73 See also TexCivA 272SW611.

VOIR DIRE

217-75 197NC478, 149SE735.

VOLENTI NON FIT INJURIA

217-76 221Ala580, 130S87, 89 [quot Cyc]. Applied in: 312Mo 30, 278SW 747; 101WVa310, 133SE360. The effect of the maxim, etc. 260Mass399, 157NE 364. Maxim considered in: 59 OntL259, [1926] 4DomLR132.

VOLUIT SED NON DIXIT

219-81 Applied in: 147Va1068, 133SE 353.

VOLUNTARILY

220-83 93Fla963, 113S103, 54ALR271.
220-88 141Ga413, 81SE120.

VOLUNTEER

222-4 257Mass455, 154NE94.
223-7 257Mass455, 154NE94.

VOTE

224-20 "Votes cast."-314Mo 55, 282SW 715 (votes cast at preceding election as used in statute include votes of both men and women).
224-20½-New. Votes mean ballots cast by legal electors. 314Mo 55, 282SW715.

VOTER

228-25 Fla 130S428. Used in apposition to, or in conflict with, "elector," word "voter" means elector exercising privilege of voting. Fla 130S428.

VOUCHER

229-37 When used, etc.-227Ky114, 12 SW(2d)298.

WAGE

235-70 CalA 286P1068(2dcase).

WAGES

240-8 99NJEq734, 133A542 [citCyc].
241-10 82 IndA624, 147NE283; 174 Minn594, 219NW924. In Porto Rico.-32 PortoRico 766.
241-11 99NJEq734, 133A542.
242-18 99NJEq734, 133A542 [citCyc].
244-25 Term does not include department head's salary and share in profits. 26F(2d)311.

WAIVE

251-36 See also 12CustA145.

WAIVER

252-39 Term is one of equivocal significance.-244NY132, 155NE74.
252-43 20F(2d)214; 216AppDiv409, 215NYS496.
252-44 20F(2d)214; 83CalA144, 256P 453; Fla 130S15; 199 Iowa1311, 203 NW818; 200 Iowa1349, 206NW610; 203 Iowa726, 213NW435; 206 Iowa527, 219 NW318(2dcase); 207 Iowa729, 223NW 493; 130Kan698, 288P574; 124Me369, 129A488; MoA 275SW566; MoA 285 SW141; 221MoA798, 288SW80; 75Mont 466, 244P277; 76Mont254, 246P168; 80 Mont97, 257P1014; 216AppDiv409, 215 NYS496; 129Misc431, 221NYS525; 115 Oh598, 155NE186; 43 OklACR425; 118 Or436, 246P733; 48RI321, 138A39; 144SC130, 142SE234, 235 [citCyc]; Tex CivA 281SW616; Wis 233NW79. "Intentional relinquishment of a known right under the contract based on a consideration." 111 Okl 269, 239P640.
253-45 3Del 541, 140A648; 199 Iowa 1311, 203NW818; 76Mont254, 246P168.
253-46 203 Iowa726, 213NW435; 207 Iowa343, 223NW102; 221MoA1007, 300 SW550; 100NJEq78, 135A83.
253-48½-New. a voluntary relinquishment of a known right; 208 Iowa564, 226NW110, 66ALR59.
253-49 124 Okl 112, 254P105.
253-50 102Conn529, 129A527; 120Kan 205, 243P324; 74Mont142, 238P594; 103NJL541, 138A569; 248NY145, 161 NE450; 133SC491, 131SE603; Tex 12 SW(2d)589; TexCivA 29SW(2d)813.
253-55 53ND777, 208NW115; 121 Okl 124, 247P990, 993 [citCyc].
254-62 240NYS772.
254-64 42F(2d)733; 68CalA239, 228P 731; 104CalA349, 286P165(4thcase); 252 IllA10; 206 Iowa1386, 222NW350; 118 Or436, 246P733; 132SC94, 128SE 861; 188Wis508, 205NW385.
255-66 132SC94, 128SE861. Rule of law, statute, or constitutional provision enacted as matter of public policy cannot be waived. 134Misc529, 236NYS 122.
255-69 118 Or436, 246P733.
256-71 "The distinction," etc. MoA 220SW996.
256-73 194NC683, 140SE706.
256-74 100NJEq513, 136A339; 51ND 757, 201NW176, 183 [citCycperJohnson, Jdisop].
256-77 53ND797, 208NW82, 92 [cit Cyc].
257-78 199 Iowa1311, 203NW818; 201 Iowa506, 207NW761.
257-82 124 Okl 112, 254P105. See also 216AppDiv409, 215NYS496.
257-85 227AppDiv825, 238NYS70.
258-93 TexCivA 281SW616, 621 [cit Cyc].
258-94 247 IllA345.
259-97 124Kan804, 262P571.
259-2 100NJEq78, 135A83; 56ND786, 219NW472, 474 [citCyc]; Alta [1930], 3DomLR999.
259-3 200Cal 204, 252P599; 90CalA 535, 266P329; MoA 285SW141; 75 Mont466, 244P277; 76Mont254, 246P 168; 100NJEq78, 135A83; 53ND797, 208NW82, 92 [citCyc]; 131 Or1, 281P 826; 51SD432, 214NW838; TexCivA 281SW616, 621 [citCyc]; TexCivA 4 SW(2d)988, 992 [citCyc]; TexCivA 7 SW(2d)657. It is not sufficient, etc. 100NJEq78, 135A83.
260-4 Oh 155NE187.
260-5 51SD432, 214NW838.
261-10 20F(2d)214; 214Ala458, 108S 53; 80CalA561, 251P929; 243NY295, 153NE79; 50ND446, 196NW750; 43 OklACR425; Utah 266P1050, 1052 [cit Cyc]; Alta [1930] 3DomLR999.
261-11 16F(2d)554, 556 [citCyc].
261-12 37F(2d)715; 124Kan804, 262P 571; MoA 285SW141; 50Nev181, 254 P1080, 1082 [citCyc]; 128 Or70, 264P 453.
261-13 16F(2d)554, 556 [citCyc]; 35 Ariz392, 278P384; 200Cal 204, 252P 599; 75Mont466, 244P277; 80Mont97, 257P1014; 51Nev76, 269P26, 27 [cit Cyc]; 128 Or70, 264P453; 131 Or1, 281 P826; TexCivA 278SW286.
262-14 16F(2d)554; 19F(2d)110, 113 [citCyc]; 51SD432, 214NW838; Tex CivA 281SW616, 621 [citCyc]; TexCivA 290SW552.
263-20 80CalA561, 251P929; 121 Okl 124, 247P990, 993 [citCyc].
263-22 76Mont254, 246P168.
264-25 19F(2d)110; 35Ariz392, 278P 384; 200 Iowa1349, 206NW610; 100NJ Eq513, 136A339; 111 Okl 269, 239P640; 43 OklACR425; TexCivA 281SW616, 621 [citCyc].
264-26 120Kan205, 243P324, 325 [cit Cyc]; 82NH543, 136A400, 50ALR1276. See also 216AppDiv409, 215NYS496.
265-27 35Ariz392, 278P384; 200 Iowa 1349, 206NW610.
265-28 262Mass99, 159NE505.
265-30 20F(2d)214; Fla 130S15; 124 Okl 112, 254P105; 126 Okl 232, 259P 224; Okl 292P7, 9 [citCyc]; 128 Or600, 275P596; Sask [1930] 3DomLR1004(2d case). Acquiescence with knowledge of facts may constitute waiver of right as matter of law. 233 IllA143. Positive act or positive inaction inconsistent with contract right is necessary to create waiver thereof. 121 Okl 124, 247P990.
266-31 126 Okl 232, 259P224.
266-31½-New. Waiver will not be presumed or implied contrary to intention of party whose rights would be injuriously affected thereby, 121 Or28, 253 P879.
266-31½-New. unless by his conduct opposite party has been misled to his prejudice into honest belief that such waiver was intended or consented to. 121 Or28, 253P879.
266-31¼-New. There must be absolute action or inaction inconsistent with claim on right in order to constitute waiver by conduct. 130Kan698, 288P 574.
267-36 136Misc40, 241NYS749.
267-37 113 OhSt418, 149NE395, 396 [citCyc].
267-38½-New. Pleading.-Where waiver contains no element of estoppel and is not asserted against opposing litigant, it need not be pleaded. 118 Or436, 246 P733.
267-38¼-New. Waiver must be pleaded, or evidence thereof is incompetent. 25 OhA252, 157NE901.
267-38¼-New. Waiver is affirmative

defense which, in order to be taken advantage of, must be pleaded. 208 Iowa 564, 226NW110, 66ALR59.

267-40 39Wyo 84, 270P167.

268-42 74Mont142, 238P594.

268-45 105Conn162, 134A789.

269-47 200Cal 434, 253P718, 725 [cit Cyc]; 240Mich12, 215NW18; 308Mo 453, 273SW95; 25 OhA252, 157NE901.

269-48½-New. Waiver of rights is not presumed. 8LaA224.

269-49 200Cal 204, 252P599 (insufficient); MoA 275SW566; 25 OhA252, 157 NE901; 121 Or28, 253P879.

270-50 120Kan205, 243P324, 325 [cit Cyc].

270-52 234Mich490, 208NW455, 456 [citCyc]; 310Mo 446, 276SW1020; MoA 275SW566; MoA 285SW141; 128 Or 600, 275P596; 132SC16, 128SE876, 41 ALR592; 133SC472, 131SE22.

271-53 TexCivA 20SW(2d)1090(2d case); Vt 148A484 (waiver on undisputed facts held for court).

WANT

292-60 In sense of desire.-126Misc421, 214NYS565.

WANTON

292-66 "Destitute of heed or concern for consequences." 41 Ida106, 238P517.

293-68 192NC154, 134SE425. As used in defining voluntary manslaughter, "wanton" means utterly careless, having no regard for consequences or for safety of others but without malice. 213 Ky356, 281SW164.

293-70 213Ky356, 281SW164.

WANTONNESS

294-78 Form of misconduct more aggravated than negligence.-21AlaA449, 109S282.

295-82 21AlaA281, 107S716.

WAR

303-2½-New. Warfare.-It has become maxim of modern warfare that no longer is it carried on between armies alone of combatant states, but it has developed into contest of entire population of warring countries; it is Napoleonic conception of nation in arms. 99NJEq217, 129A148.

304-5 Local statute of any state cannot bar any effective action to exercise of war power of national sovereign. 12 F(2d)961.

303-23 217AppDiv282, 216NYS225.

318-67½-New. Congress and president have wide discretion as to means to be employed successfully to carry on war. 279US253, 49SCt314, 73L ed688.

318-67½-New. War powers of congress are not limited by restrictions of Fifth and Sixth Amendments to constitution. 29F(2d)597.

318-69 War acts to enable president to conduct war should be liberally construed to cover every necessary emergency and necessity. 5F(2d)99. Lever Act, authorizing president to fix commodity prices, held valid under war power of congress. 288Pa230, 135A759.

318-69½-New. Executive order, restoring order of fuel administrator regulating contracts for coal, was held beyond powers conferred by Lever Act. 255 Mass200, 151NE119.

319-72 See also 115Tex21, 275SW388, 41ALR737 [citCyc].

321-77 War does not affect relatives of parties as to executed contract. 7F(2d) 443. Where only payment remains to be done on executed contract, war suspends payment. 244NY202, 155NE100.

321-78 244NY202, 155NE100. Contract giving option for consideration of restricting business held terminated by war, as it was still executory in part. 244NY202, 155NE100.

321-80 244NY202, 155NE100.

323-98 Trading with Enemy Act and custody of alien property.-269US283, 46 SCt116, 70L ed275; 271US272, 46SCt 538, 70L ed943; 272US1, 47SCt1, 71 L ed131; 272US731, 47SCt264, 71L ed 496; 273US182, 47SCt315, 71L ed596; 281US379, 50SCt337, 74L ed918; 6F(2d) 742; 12F(2d)1009; 15F(2d)259; 15 F(2d)380; 15F(2d)456; 15F(2d)605; 16 F(2d)173; 16F(2d)212; 16F(2d)865; 17 (2d)174; 17F(2d)321; 17F(2d)533; 18 F(2d)560; 18F(2d)932; 19F(2d)999; 21F(2d)667; 22F(2d)491; 22F(2d)494; 22F(2d)870; 23F(2d)414; 23F(2d)595; 23F(2d)989; 26F(2d)609; 27F(2d)383; 27F(2d)674 [certiorari den 278US648, 49SCt83(3dcase), 73L ed560]; 29F(2d) 597; 29F(2d)631; 31F(2d)553; 37F (2d)564; 38F(2d)287; 39F(2d)366; 43 F(2d)937; 43F(2d)969; 55AppDC295, 5 F(2d)119; 56AppDC25, 8F(2d)559; 56 AppDC314, 13F(2d)286; DC 33F(2d) 556; DC 38F(2d)532; 28Hawaii590 (demand by custodian); 237 IllA166; 215 Ky413, 285SW224; 168Minn332, 210 NW47; 97NJEq447, 129A207; 124Misc 697, 209NYS682; 127Misc119, 215NYS 387; 50SD232, 209NW355; TexCivA 29 SW(2d)529; Can [1927] 3DomLR40. Admissibility of evidence.-133 Or266, 289P 375. Alien enemy corporation held not entitled to accounting for payment for its confiscated property by alien property custodian to domestic corporation. 6 F(2d)742. Alien property custodian cannot deduct from fund recovered by claimant expenses incurred in making unsuccessful defense to suit. 24F(2d) 196. Alien enemy property under Canadian statutes.-Can [1928] 3DomLR5. American bank held indebted to Austrian bank for balance of deposit retained by it under bonds delivered to alien property custodian covering statement of account with Austrian bank. 24F(2d)119. Austrian bank's deposit in court under local law held defense to later suit to apply bank's property in hands of alien property custodian to American's claim. 274US253, 47SCt625, 71L ed1034. Citizen, whose property was seized by alien property custodian, may recover interest in proceeds invested in United States securities. 271US298, 46SCt524, 70L ed 953. Citizen whose alien father's property was seized may recover only his share under father's will. 23F(2d)862. Complaint has been held sufficient to state cause of action for conversion in action by alien custodian based on transaction involving sale of seized enemy stock. 133 Or266, 289P375. Congress could authorize president to take possession and title of enemy vessels. 270 US215, 46SCt244, 70L ed553. Constitutionality.-29F(2d)932. Costs are not recoverable in action to recover property taken under Trading with Enemy Act. 15F(2d)872. Declaration of war is not equivalent to demand for deposit by American depositor in foreign alien enemy bank. 7F(2d)443. Decree limiting to foreign depositary bank as offset balance in hands of American depositor at date of declaration of war against Germany held error. 7F(2d)443. Depositor in German bank in son's name held not estopped from asserting ownership by petition to secretary of state in which son joined. 7F(2d)330. Every government may pursue policy it thinks best as to seizure and confiscation of enemy ships in harbor where war occurs. 270 US215, 46SCt244, 70L ed553. Evidence held to show that "saving" realized from sale of tungsten during war was not held by plaintiff for benefit of alien brother. 7F(2d)293. Evidence held to show applicant for return of seized property to be either German citizen or possessed of dual citizenship. 26F(2d)525. Executed contract of domestic reinsurance company to take over contracts of German reinsurance company held not rescinded. 6F(2d)742. French government had right to promulgate decrees taking possession of enemy property in France and to make enactments retroactive. 225AppDiv332, 233NYS206. German bank availing itself of moratorium in reply to demand of depositor cannot object that demand was oral. 7F(2d) 330. German bank held to be alien enemy under Trading with Enemy Act from April 6, 1917 to July 2, 1921. 7F(2d) 330. German company may describe goods by true name of maker, in doing business in new branches, after confiscation of old American branch by Alien Property Custodian. 25F(2d)716. German company may sell its goods within orbit of old American branch, sold by alien property custodian. 25F(2d)716. German legatee of nonenemy alien claimant of money in hands of alien property custodian held to have status of alien friend, where claimant dies since peace treaty with Germany. 16F(2d)286. Immigrant who returned to Germany and joined German Red Cross in 1915 is not resident of Germany nor enemy as affecting right to return of properties under Trading with Enemy Act. 15F(2d) 872. In suit under Trading with Enemy Act to establish claim for deposit in German bank, evidence held sufficient to show demand for payment prior to war. 7F(2d)330. Interest on deposit in German bank held properly allowed at rate agreed upon by bank from refusal of payment to United States' entry in war. 7F(2d)330. Interest on proceeds of sale of citizen's property by alien property custodian is ascertained by taking average rate of interest on proceeds of other sales with which they were commingled and considering average of uninvested proceeds. 271US298, 46SCt524, 70L ed953. Language of report to alien property custodian that plaintiff held money for benefit of alien brother was what counted. 7F(2d)293. Law requiring corporation to transfer enemy stock without surrender of old certificates held not denial of due process. 273US182, 47SCt315, 71L ed596. Legal representative of deceased enemy alien may bring proceeding to recover enemy's real property. 23F(2d)862. Licensee of enemy owned trade-mark cannot sue for its use, after license under Trading with Enemy Act. 16F(2d)723. Licensee, recognizing enemy owned trade-mark as belonging to foreign owner, held not capable of claim of ownership. 16F(2d)723. Nonenemy property held by alien property custodian held not affected by peace treaty with Germany. 16F(2d)286. Order "vesting" executive powers in another officer held sufficient compliance with terms of act. 272US1, 47SCt1, 71L ed131. Parties.-133 Or266, 289P375. Payment into Austrian court, during war, by Austrian bank of kronen due American depositor held in view of Austrian law to extinguish latter's demand. 7F(2d)443. Persons entitled to return of properties not entitled to interest on cash held in treasury. 15F(2d)872. Plaintiff, to recover property seized by alien property custodian, has burden of proving citizenship justifying return. 26F(2d)525. Possession by testator's heirs of property willed to alien enemies does not give heirs right thereto. 50SD232, 209 NW355. Presidential order held to confirm sales of alien property custodian of foreign owned patents, under Trading with Enemy Act. 272US1, 47SCt1, 71L ed131. Provision of settlement of War Claims Act held not to restore to enemy owners ownership of patents or royalties seized by custodian. 39F(2d) 366. Recoverable interests in property seized under Trading with Enemy Act.-56AppDC36, 8F(2d)797. Relation of American depositor and foreign alien enemy bank is that of debtor and creditor, debt becoming due on demand. 7 F(2d)443. Right of action against custodian by creditor of alien for services rendered is dependent on statute submitting government to suit. 24F(2d) 414. Rights of wife of German subject joining German army in property seized held not confiscated by seizure where wife was not declared enemy. 23F(2d) 862. Rules as to sale of trust property by fiduciaries held inapplicable to sales of enemy owned patents by alien property custodian. 272US1, 47SCt1, 71L ed 131. Sale by alien property custodian of property and good will of American agent of German manufacturer by secret process did not vest purchaser with right to the process. 22F(2d)191. Seizure of property of alien entering German army held lawful. 23F(2d)862. Statute relating to return of property seized during World War should be construed liberally. 23F(2d)862. Sufficiency of evidence.-133 Or266, 289P375. Suit is one against United States and only statutory relief may be awarded. 15F(2d) 872. Testamentary bequest to nonresident alien enemy.-316Mo 492, 291SW 120, 51ALR877. United States cannot confiscate earnings of property of American citizen seized by mistake. 271US 298, 46SCt524, 70L ed953. Where de-

fendant paid money due Austrian corporation at beginning of war to public trustee, under order of English chancery court permitting trustee to loan amount of payment to defendant, and defendant week later made loan, trustee was entitled to repayment of loan. 224AppDiv592, 231NYS475.

324-2½-New. Courts in garnishment proceeding against alien property custodian are authorized to enter condemnation judgment as in other garnishment proceedings. DC 41F(2d)974.

329-23 96PaSuper118.

329-25 Mailing notice of hearing on final report of executors ten days theretofore to German legatees at address fifty years old is not valid service of notice. 50SD232, 209NW355. **Notice by publication** to alien enemy is not valid service thereof. 50SD232, 209NW355.

329-26½-New. Alien property custodian is not necessary party to settlement of trustee of alien enemy property. 31F(2d)553.

332-40½-New. Regulations of war industries board.—Wool dealer is not bound by government regulations requiring surrender of excess over certain gross profits as penalty. 30F(2d)728.

332-40½-New. Requirement in government regulations relating to wool, for surrender by wool dealer of excess over five per cent gross profits in case of central dealer and of one and one-half cents per pound in case of country dealer, constituted penalty, which executive department of government had no power to impose. 30F(2d)728.

332-40¼-New. Wool dealer, operating generally as central dealer, is not thereby estopped from refusing to comply with excess profits provisions of regulations. 30F(2d)728.

332-40⅓-New. Agreement by wool dealer with government, to operate as country wool dealer, is effective only as to future dealings. 30F(2d)728.

332-40¼-New. Regulation by which excess profits of wool dealers operating under permit were taken to be kept as separate fund and distributed by acts of favor were invalid. 32F(2d)901.

332-40½-New. Dealer in wool signing agreement to operate subject to rules adopted by board does not contract to abide by illegal regulations. 32F(2d)901.

332-40⅓-New. Shipping board had no authority to cancel contract between owner and charterer for carriage of freight. 278US294, 49SCt100(2dcase), 73Led387 (findings held not to show cancellation).

332-40⅙-New. Right to pursue legitimate business cannot be conditioned on unconstitutional exactions, even in time of war. 32F(2d)901.

332-40 1/10-New. Where owners of vessel signed wheat charter with food administration grain commission to prevent taking over of vessel by government, shipping board did not requisition or take over vessel, so as to entitle owners to compensation for loss from abandonment of existing charter. 278US294, 49SCt100(2dcase), 73Led387.

332-40 1/11-New. Under Lever Act contract fixing price of coal at greater rate than maximum price fixed by president pursuant to act is void. 87PaSuper235.

332-40 1/12-New. Lever Act is not unconstitutional but is enforceable as an existing statute, though inactive for war purposes. 12PortoRicoFed31 (requirements as to violation of conspiracy clause).

332-40 1/13-New. Lever Act and action of president thereunder is proper exercise of congressional authority under implied war power and fixing of price of commodity not invalid as taking of property without adequate compensation. 87PaSuper235.

332-40 1/14-New. Appropriations by congress for expense of collecting excess gross profits under regulations of board is not ratification of invalid regulations. 39F(2d)851.

332-40 1/15-New. Regulations of war industries board and its subdivisions created by president are to be considered as acts of president. 33F(2d)406.

332-40 1/16-New. Administrative orders pursuant to Lever Act should not be given retroactive effect unless language is so clear as to preclude all question of intention. 297Pa278, 146A901.

332-40 1/17-New. Agreement by wool dealer to conduct business according to rules adopted by board only referred to rules within authority of board to adopt. 39F(2d)851.

332-40 1/18-New. Acceptance of prices agreed on between board and wool dealers does not estop dealers from refusing to conform to what they considered unauthorized conditions. 39F(2d)851.

332-40 1/19-New. License or permit issued by board is invalid without legislative or executive order prohibiting doing wool business without permit. 39F(2d)851.

332-40 1/20-New. Recovery of alleged excess profits from wool dealers and distribution amongst wool growers is taking of property for distribution as gratuity to others. 39F(2d)851.

332-40 1/21-New. Administrative order issued pursuant to Lever Act must be construed with reference to subject matter and obvious purpose, and its scope and effect limited accordingly. 297Pa278, 146A901.

332-40 1/22-New. Administrative order issued pursuant to Lever Act authorizing advance in prices for sale of coal by mine operators has been held not to authorize jobber to recover any upward revision of prices in sale contract. 297Pa278, 146A901.

332-40 1/23-New. Contract of wool dealers to operate subject to rules of wool division of war industries board in return for permit to operate as approved wool dealers has been held not void as wanting in consideration. 33F(2d)406.

332-40 1/24-New. Government has been held entitled to maintain action against authorized wool dealers to recover profits received by them in excess of regulations of board limiting profits under resolution declaring war. 33F(2d)406.

332-40 1/25-New. Regulation of wool division of war industries board which allowed commission or compensation of four per cent of selling price with provision for disposition of excess over five per cent by government has been held within authority of board. 33F(2d)406.

332-40 1/26-New. Control of newsprint.—Authority under Canadian statute to impose on newsprint manufacturers liability to compensate others in respect of proportion of newsprint furnished was not effectively exercised. Ont [1929] 4DomLR192.

332-40 1/27-New. Such liability could be enforced only as provided by statute and not by ordinary action in courts. Ont [1929] 4DomLR192.

332-40 1/28-New. Determination of federal trade commission as to excess profits according to contract provision is binding in absence of fraud, gross mistake, or dishonesty. 39F(2d)1012.

332-47½-New. It is sufficient to warrant seizure, detention, and even confiscation of enemy-owned property that owner or reputed owner is resident of enemy's country. DC 33F(2d)556.

333-48 Any defect in authority of alien property custodian to sell seized enemy owned patents to chemical foundation held cured by president's ratification. 5F(2d)191. **Cr. Code § 41,** forbidding officer or agent of any corporation interested in contracts of such corporation to act for United States in transaction of business with such corporation, does not apply to acts done under Trading with the Enemy Act. 5F(2d)191. **Executive order delegating authority** under Trading with the Enemy Act is construed to delegate authority to person named in his official capacity. 5F(2d)191. **Power of alien property custodian** under Trading with the Enemy Act permits him to sell property seized as if he was absolute owner, when president determines public interest so requires. 5F(2d)191. **Price received for German chemical patents** sold by alien property custodian held not to be inadequate. 5F(2d)191. **Sale of enemy owned patents to Chemical Foundation Incorporated,** at instance of officers of United States under conditions permitting use by government for war purposes and by American industries on equal terms and under competitive conditions, was held not to be pursuant to conspiracy to create monopoly. 5F(2d)191. **Sale of property by alien property custodian** is not invalid because congress did not confiscate specific property but employed executive department to determine as war measure specific property to which unrestricted power of sale applied. 5F(2d)191. **Under Trading with the Enemy Act** alien property custodian in selling seized property may impose conditions in public interest regardless of their effect on price obtained. 5F(2d)191. **Confiscation is not consummated** so as to automatically vest debt in government. 251NY243, 167NE430, 65ALR1490.

333-49 Foreign corporation doing business in Germany at time of World War is "enemy" under Trading with the Enemy Act and after seizure of its property cannot preclude alien custodian from holding same by ceasing to do business in Germany. 267US42, 45SCt213, 69Led504. **Foreign corporation which is "enemy"** under Trading with the Enemy Act is not entitled, at termination of war, to return of seized property without express legislation. 267US42, 45SCt213, 69Led504. **Swiss corporation which was "enemy"** under Trading with the Enemy Act is not "citizen" or "subject" of nation other than Germany, Austria, Hungary, or Austro-Hungary, under amendment of June 5, 1920 providing for return of property to such citizen or subject. 267US42, 45SCt213, 69Led504. **Under Trading with the Enemy Act** legal effect of seizure and sale of alien property by alien property custodian is same as if alien owner had sold exclusively to purchaser. 5F(2d)506. **Congress may direct seizure of all property** beneficially owned by enemy subjects followed by such compensation as president may determine. 277US138, 48SCt470, 72Led822 (payment should be made before taking title). **Orders of colony governor purporting to vest title to enemy corporation's stock** wound up in British Colony by colony custodian for purpose of defeating original stockholders effort to secure return of property erroneously taken by alien property custodian has been held ineffective. DC 33F(2d)643.

333-50 Statutory and constitutional limitations affecting property rights have little force in respect of acts of congress and president in exercising war power. DC 33F(2d)556.

334-56 Fact that entire capital stock of corporation belongs to enemy does not require domestic corporation's stock to be treated as enemy owned. 277US138, 48SCt470, 72Led822.

334-60½-New. On termination of war, shares in possession of alien property custodian were not immediately restored thereby to alien legatees. 133Or329, 290P745.

336-73½-New. Villa faction in Mexico had no governmental powers, and its acts in confiscating property, being wrongful, did not divest title of owner. 115Tex21, 275SW388, 41ALR737.

336-73¾-New. Decree of revolutionary general declared to mean that title of property named was vested in revolutionary government. 115Tex32, 275SW392.

337-77 15F(2d)474. **Government requisition of coal** under Lever Act constitutes contract to extent of performance. 15F(2d)474. **Under Levee Act,** coal owner after accepting price for coal may not recover further. 15F(2d)474. **Letter from coal dealer after government's coal requisition,** signifying acceptance under protest, held not notice of refusal of price tendered. 15F(2d)474. **Shipper failing to get proper credits** for coal consigned to coal exchange by fuel administrator until after it had sustained substantial loss held not entitled to recover from government on theory of appropriation by government. 275US188, 48SCt90, 72Led229.

337-79 Coal dealer who after protest as to price fixed for coal requisitioned under Lever Act accepts increased price without objection cannot recover amount in excess thereof. 5F(2d)439. **Just compensation for property taken under powers conferred by war acts** is fair value of property when taken with interest at legal rate. 5F(2d)99. **Market price at time and place of taking** is measure of compensation for private property seized for public use. 267US 292, 45SCt305, 69Led617. **Requisition under Lever Act** providing for full payment of specified price if dealer approves price as satisfactory and for seventy-five per cent. of such price on dealer's refusal to approve, leaving him right to sue for just compensation, does not allow dealer, after approval and acceptance of price specified as full payment, to recover additional amount on theory of duress. 5F(2d)439. **Under War Measures Act,** where charter of vessel does not amount to demise, right of charterer to compensation for requisition by crown is too remote. **Can** [1925] 2DomLR853. **Commissions on freight paid by owner of requisitioned vessel to broker** have been held not to be "recovery" within meaning of requisition charter. 18F(2d)752. **Interest not allowed owner of tug and vessels** taken over by United States where decree shows amount offered and rejected to have been just. 272US533, 47SCt186, 71Led394. **President as commander in chief of army and navy** has constitutional power in war time, in case of emergency, to appropriate private property to public uses, government being bound to make just compensation therefor. 15F(2d)823. **Government's assumption of port charges, pilotages, and other costs** incident to use of vessel includes only items similar to those mentioned. 42F(2d)156. **Owner not entitled to consequential damages** resulting from taking of vessel by government. 42F(2d)156. **Owner's expenses in defending unfounded claim of lien for salvage** have been held not recoverable where government assumed expenses and charges. 42F(2d)156. **Just compensation for requisitioned property** held to include interest from date of use to time of payment. 274US341, 47SCt611, 71Led1083. **Just compensation, in absence of agreement,** is question to be decided by courts. 15F(2d)823. **Agriculture Appropriation Bill for 1920** and subsequent appropriation act are not ratification of regulations of war industries board limiting profits. 15F(2d)823. **War industries board** is without power to impose penalty. 15F(2d)823. **Regulation of war industries board,** organized by council of national defense, forbidding more than four per cent profit by wool dealers, is unauthorized by constitution or statutes. 15F(2d)823. **Shipper is limited to nominal damages** against government directing coal where shipper accepted sum offered by receiver of goods as settlement. 23F(2d)123.

337-79½-New. Sales tax under Canadian Special War Revenue Act.–Where two interlocking companies are respectively manufacturing agency and selling agency, sales tax is calculated on prices charged by selling agency to trade, and not on prices charged by manufacturing agency to selling agency. **Ont** [1929] 1DomLR658.

337-79¾-New. Action for sales tax and for excises or gallonage tax dismissed for failure of proof. **Can** [1930] 1DomLR306.

337-79¼-New. Bank producing own stationery supplies held "producer" liable to tax. **Can** [1930] 1DomLR721.

337-79½-New. Exemption of goods manufactured for export is applicable only where goods are exported by vendor in performance of his contract. **Can** [1930] 2DomLR725.

337-79¼-New. Beverage held taxable. **Man** [1930] 1DomLR1000.

337-79½-New. Crown held without right of action for tax against bank taking over customer's business. **Ont** [1930] 1DomLR664.

337-79⅛-New. Provision exempting goods manufactured for export under regulations held inapplicable where there is export in fact but not under regulations. **Can** [1930] 2DomLR725.

337-79⅛-New. Provision for stamp tax on stock and bond transfers is valid. **BC** [1930] 3DomLR745.

337-79⅛-New. Compensation for appropriation under Canadian War Measures Act.–Interest on compensation money disallowed. **Can** [1930] 1DomLR 1005.

391-38 Jurisdiction of court-martial.–36F(2d)876.

393-55 96PaSuper118. **War with Germany** ceased July 2, 1921. 7F(2d)443. **Versailles Treaty** held not to affect or relate to suit under Trading with Enemy Act to recover deposits by Americans in German or Austrian bank. 7F(2d)443.

393-57½-New. Act recognizing kingdom does not terminate war with other powers. 84IndA373, 150NE391.

393-57⅛-New. Effect.–Executive order requiring nonimmigrant aliens to present passports visaed by consular officers as condition to entry, though issued as war measure, was not abrogated by ending of war. 29F(2d)314.

394-63½-New. Joint regulation of congress terminating war did not abrogate statute regulating ingress and egress of aliens during war and passport regulations prescribed by Amendatory Act of 1921 continuing prior act in force. 8F(2d)940; 22F(2d)288.

WARD

394-1 195Wis515, 218NW837.

WAREHOUSEMEN

400-1 Other definitions.–144Va456, 132SE482; 196Wis419, 220NW217. **Garage keeper is "warehouseman."–NJ** 150A408 (within statute).

400-2 14F(2d)118; 19F(2d)855; 196Wis419, 220NW217. **"Warehouse" is synonymous with "storehouse."**–126Misc260, 213NYS18.

401-5 But see 144Va456, 132SE482.

401-6 116Nebr753, 219NW12. **Garage keeper** held not warehouseman. 200Iowa1051, 205NW983.

401-8 Grain dealer accepting grain for storage or shipment and accepting and complying with statute is public warehouseman. 116Nebr809, 219NW192. **Relation is contractual** between warehouseman and depositor. **Ariz** 293P16.

402-21 40F(2d)846 (business of cotton ginning); 56ND822, 219NW295; **OklCr** 284P903 (statute construed as to scope and matters included). **Purpose of statute providing system for handling grain stated.**–116Nebr809, 219NW192. **Construction of statutes.**–116Nebr809, 219NW192. **Law requiring public warehousemen to perform reasonable public service incident to exercise of rights conferred** are valid. **TexCivA** 3SW(2d)947. **Statutes held not conflicting.–TexCivA** 3SW(2d)947.

403-24 143Va741, 129SE739.

404-37 See also 24OhNPNS443.

404-39 CalA 271P771. **Former notes secured by former mortgages and sums** paid for taxes and insurance and amount paid for machinery and equipment have been held not short term notes which may be refunded by other notes issued without consent of railroad commission. 207Cal630, 280P101. **Where warehouses were not brought till 1927 under operation of statute,** warehouse, as public utility, can sell, lease, or encumber its property without consent of railroad commission. 207Cal630, 280P101.

404-47 143Va741, 129SE739 (warehousemen who are also dealers cannot escape statutory requirements for warehousemen).

404-48 Delivery of corn to elevator company which is not public warehouseman does not impose duty on company to handle it through its elevator or notify owner of its refusal to do so. **MoA** 279SW771.

404-53 160Ga237, 127SE744 (storage in separate compartment for which yearly rental was paid held not to create relation of landlord and tenant); 163Ga440, 136SE436; 190NC209, 129SE585, 42ALR1299 (rule applied to safe deposit company). **Placing cotton in separate compartment** under certain conditions does not create relation of landlord and tenant. 163Ga440, 136SE436. **Rule applied to relationship** between bank and renter of safety box in its vault. 43Ida273, 251P293.

405-56½-New. Statement that elevator company will do what it can with car of corn is not unconditional agreement to run corn through elevator. **MoA** 279SW771.

405-56⅛-New. Order authorizing removal of goods for storage signed only by owner is not completed contract. **CalA** 290P146.

405-57 13F(2d)632 (warehouseman held not entitled to complain of removal of liquor to other warehouse for bottling); 127Kan27, 272P181; 86Mont559, 284P536 (elevator held not entitled to storage charges on portion of wheat sold to it which it was instructed to hold pending determination of rights therein). **Implied agreement for storage in licensed warehouse.**–321Mo1229, 16SW(2d)82.

405-58½-New. Several permits relating to removal of property to storage should be construed together. **CalA** 290P146.

405-59 Performance must be within reasonable time after receiving furniture. 170La461, 128S277.

406-63 170La461, 128S277.

406-64½-New. Warehouseman negligently giving erroneous information to shipper as to location of goods, causing shipper to lose insurance, is liable thereof. 244NY331, 155NE662.

406-66 138Okl251, 280P815(2dcase) (statutory provisions are applicable to all warehouses, whether bonded or not).

406-67 50ND558, 197NW146.

406-68 33F(2d)816. **Substitution of other property.**–49ND1059, 194NW824; ND231NW725. **Under common mass theory** entity is warehouse and not particular bin. 145Wash624, 261P399.

406-70 Warehousemen may ship out and sell any quantity from common mass in excess of that required to redeem outstanding receipts. 50ND558, 197NW146.

406-71 49ND1059, 194NW824; 50ND558, 197NW146.

407-75½-New. Warehouseman who ships out of state and sells all grain stored with him applying proceeds to his own indebtedness and leaving no grain for redemption of storage tickets is guilty of conversion for which he and his bondsman are liable for value of grain. 53ND162, 204NW976.

407-75⅓-New. Warehouse Law is for benefit of grain farmer. 53ND162, 204NW976.

407-75¼-New. Object and purpose of statute is to provide for storing of farmer's grain so that he can hold it for best market and be secured in delivery of like grain and quantity. 53ND162, 204NW976.

407-75⅛-New. Ticket holder may keep his grain stored indefinitely. 53ND162, 204NW976.

407-75⅙-New. Transaction whereby debtor executes note to warehouse and deposits bags of flour as collateral security constitutes pledge, irrespective of whether property can be identified or is part of general mass. 33F(2d)816.

407-75½-New. Question whether flour of certain brand came into possession of assignee of insolvent warehouse must be determined before entering final decree for distribution of proceeds of flour, where warehouse gave receipts for flour pledged to it. 33F(2d)816.

407-75⅛-New. Insolvent warehouse company, taking pledge of flour in storage as collateral security for note, holds flour as agent or bailee for one to whom it transfers its rights as pledgee. 33F(2d)816.

407-75⅙-New. Warehouse company, while it held note of pledgor, could not assert right as pledgee in any of flour deposited with it as collateral security as against holders of warehouse receipts. 33F(2d)816.

407-76 170Minn225, 212NW198; 116Nebr809, 219NW192. **Bond supported by independent consideration may bind**

parties by fixing beginning of liability prior to execution of instrument. 53ND 249, 205NW684. **Failure of warehouseman to issue prescribed storage ticket** does not relieve surety from liability on bond. 170Minn225, 212NW198. **Warehouseman's bond,** given under statute later declared unconstitutional, is valid if based on independent consideration. 53ND249, 205NW684. **Where warehouseman has converted grain before demand,** owner may recover on statutory bond in any appropriate form of action. 141Wash578, 251P872. **Particular statutes construed.**–TexCivA 299 SW340.

407–78 53ND162, 204NW976.

407–79 Surety is liable to pledgee of receipts for warehouseman's conversion. 167Ga354, 145SE761, 61ALR323.

407–79½–New. Sureties are liable for warehouseman's failure to comply with statutory requirements. 49ND1059, 194 NW824; 141Wash578, 251P872.

407–79⅓–New. Under statutes, bond is required to be in sufficient amount to protect holders of outstanding storage tickets. 53ND162, 204NW976.

407–79¼–New. and warehouseman and his bondsmen are liable for conversion of grain after execution of bond and before liability under terms thereof ceases. 53ND162, 204NW976.

407–79⅕–New. Statutes require two-year bond in each case in some jurisdictions. 53ND162, 204NW976.

407–79⅙–New. Surety company furnishing bond is liable thereon for all conversions of warehouseman during two-year period only, 53ND162, 204NW 976.

407–79⅐–New. and there is no right of conversion between sureties on bonds for different periods. 53ND162, 204NW 976.

407–79⅛–New. Bond given by corporation's certified warehouseman specifying no term is conclusively presumed limited to one year for which certificate is granted. 169Ark7, 272SW867.

407–79⅑–New. Sureties on certified warehouseman's bond are not liable for loss or misappropriation occurring after expiration of term of bond or life of annual certificate. 169Ark7, 272SW 867; 172Ark975, 291SW62.

407–79⅒–New. But certified warehouseman is liable as bailee for losses due to his negligence or misconduct where goods are still in his possession after expiration of his certificate of qualification. 169Ark7, 272SW867.

407–79⅓–New. Liability dependent on loss during period of bond.–172Ark975, 291SW62.

407–79½–New. Right of action on bond does not preclude action against persons guilty of conversion. 52ND 721, 204NW614.

407–79⅔–New. Owner suing for conversion after recovery on bond can recover only excess of claim over amount recovered by bond. 52ND721, 204NW 614.

407–79¼–New. Duty to be performed must be within contemplation of statutory bond. TexCivA 299SW340 (handling C. O. D. packages held within bond).

407–79⅕–New. Holder of receipt cannot recover against surety if he knew of nonexistence of goods. 167Ga737, 146SE739.

407–79⅙–New. Surety is estopped from attacking receipts as spurious and fraudulent. 167Ga737, 146SE739.

407–79⅐–New. Surety is not liable on bond where plaintiff who received draft on sale of grain, deposited by him, to warehouseman, negligently fails to present it. 179Minn398, 229NW555.

407–81 51ND757, 201NW176. **Receipt is mere symbol of property,** symbolic only of property it represents. 162Ga 758, 134SE775. **Writings held not warehouse receipts.**–CalA 290P146.

408–82 6F(2d)508.

408–85 116Nebr809, 219NW192.

408–86 167Ga354, 145SE761, 61ALR 323. **Authorized by statute.**–51ND757, 201NW176 (receipt issued and delivered to creditor of owner as security for debt).

409–87 162Ga758, 134SE775; 167Ga 737, 146SE739; 87PaSuper344.

410–89 6F(2d)508 (must acknowledge receipt of merchandise). **Substantial conformity** to requirements of statute is essential. 51ND757, 201NW176 (receipt held in substantial compliance with statute).

410–90 6F(2d)508. **Descriptions held sufficient.**–233Ky290, 25SW(2d)405.

411–91 Authority of warehouse company's officers to issue receipt has been held question of fact. 262Mass588, 160 NE434 (authority not shown).

411–93½–New. Warehouseman held under duty to issue storage tickets. 50ND 295, 195NW654.

411–93⅓–New. Issuance to self.–Warehouse receipt issued to itself by warehouse company and indorsed to another as collateral security for note is valid. 136SC312, 134SE395.

411–93¼–New. Owner of household goods is entitled to warehouse receipt for storage. CalA 290P146.

411–2 114ObSt76, 151NE39. **Elevator's contract with holders of storage tickets** with regard to delivery of grain is found in tickets taken in connection with statutes in force at date of tickets. 51SD180, 212NW922. **Receipts reciting surrender of cotton tickets for** compression and shipment of cotton held not "trust receipts." TexCivA 294 SW331.

412–3 MoA 19SW(2d)565; 51ND757, 201NW176, 184 [citCycperJohnson,Jdis op].

412–9 51ND757, 201NW176.

412–10 49Philippine975.

414–19 See also MoA 19SW(2d)565.

414–20 156Tenn229, 299SW1039.

414–20½–New. Warehouseman held not liable to holder of nonnegotiable receipt for failure to demand surrender of receipt on return of goods to bailor named in receipt. 160La909, 107S618.

414–21 50ND558, 197NW146.

414–23 52ND721, 204NW614.

414–24 50ND558, 197NW146; 52ND 721, 204NW614. **By the Uniform Warehouse Receipts Act** interest of holder of storage tickets for grain deposited with warehouseman attaches proportionately to extent that is required to redeem all outstanding storage tickets, to all grain of kind and quality described in his receipt that may at any time subsequent to its issue be received on account of purchase or general storage into warehouse. 50ND558, 197NW146.

414–30 Delivery of receipt does not operate to transfer more than it represents.–162Ga758, 134SE775. **On transfer of receipt warehouseman** becomes bailee of holder. 163Ga440, 136SE436.

415–31 Warehouse company on paying holders of negotiable receipts in full is entitled to property represented by them as against other claimants. 160 Ga237, 127SE744.

416–37 6F(2d)508 (negotiability).

416–39 6F(2d)508 (whether defenses cut off by bona fide purchase).

416–40 6F(2d)508.

416–45 160Ga237, 127SE744; 163Ga 440, 136SE436.

417–49 6F(2d)508 (Kentucky statute); 218Ala67, 117S622; 167Ga365, 145SE 766; 3LaA191; MoA 19SW(2d)565; 126 Or602, 268P1009; 136SC312, 134SE 395, 396 [citCJ]; 152Tenn528, 279SW 390; TexCivA 15SW(2d)106. **Requisites of negotiability.**–6F(2d)508 (acknowledge receipt and describe goods).

417–52 Omission of rate of storage charges does not render receipts nonnegotiable. 41F(2d)60.

418–53 Statute held not to provide exclusive method for pledging warehouse receipts for debt.–166Ga105, 142SE559.

418–54 Negotiable Instrument Law is inapplicable to warehouse receipts.–167 Ga737, 146SE739.

418–59 154Tenn689, 290SW994.

419–64 But see 136SC312, 134SE395.

419–64½–New. Transaction effecting plan of field storage warehousing between warehousing company and lumber company held valid in regard to negotiability of warehouse receipts. 41 F(2d)60.

419–65 See also 4LaA148.

420–71 Transferee of receipt is entitled to goods on its presentation.–162Ga758, 134SE775.

422–93½–New. Holder of receipt or storage ticket is not estopped to assert his title as against purchaser in good faith from warehousemen. 49ND1059, 194NW824.

422–93⅓–New. Bank, as assignee of storage tickets, may have judgment against sheriff for conversion in levying on tickets. 55ND836, 215NW538.

422–95 Evidence held sufficient to sustain finding of being bona fide purchaser. 29F(2d)465 [certiorari den US 49 SCt349(8thcase), 73Led1015].

422–95½–New. Well understood meaning of bona fide purchaser of warehouse receipt is not affected by statutory definition of good faith in general. 218Ala90, 117S681, 61ALR938.

422–97 23F(2d)939; 162Ga758, 134SE 775, 776 [quotCyc]; 136SC312, 134SE 395, 399 [quotCJperCothran,J].

422–98 152Tenn528, 279SW390.

423–4 Bank to which bankrupt assigned warehouse receipt is not bona fide purchaser where bank's president was director of bankrupt. 110Conn583, 148A669.

425–15½–New. Party selling note secured by warehouse receipt as collateral warrants goods described as in existence and in warehouse. 162Ga758, 134 SE775; 162Ga766, 134SE778; 36GaA 149, 136SE319; 36GaA156, 136SE323.

425–15⅓–New. and purchaser of such note may recover for breach of such implied warranty where goods could not have been delivered. 36GaA149, 136SE 319; 36GaA156, 136SE323.

425–15¼–New. Warranty of existence of goods shown breached where pledgee was not entitled to delivery of goods. 162Ga758, 134SE775.

425–16 69CalA246, 230P980. **Failure to insert charges in nonnegotiable receipt** does not deprive warehouseman of lien for charges under original deposit. 69CalA246, 230P980. **Issuance of nonnegotiable receipt to transferee of nonnegotiable receipt** does not deprive warehouseman of lien or rights under original deposits. 69CalA246, 230P980. **Recital in nonnegotiable receipt that goods are subject to lien** is notice to transferee of warehouseman's lien and entitled warehouseman to lien to full extent of charges. 69CalA246, 230P980.

425–16½–New. Receipts issued by one of joint owners.–Where nonnegotiable receipt is issued by one of joint owners of merchandise in warehouse, purchasers thereof have burden of proving equities superior to other owner; 6F(2d) 508.

425–16⅓–New. and where such other owners did not participate in or have knowledge of fraud practiced on owner issuing receipts and did not hold him out as having right to sell merchandise, purchasers of such receipts from perpetrators of fraud have no equities superior to such other owners. 6F(2d) 508.

425–17 166Ga105, 142SE559. **Effect of failure to recite charges.**–69CalA246, 230 P980.

425–18 23F(2d)939; 29F(2d)465 [certiorari den 279US847, 49SCt345(5th case), 73Led991]; 167Ga737, 146SE 739; 9LaA624, 121S657; 46Philippine 705. **Landlord's lien.**–141Miss463, 106 S760.

426–19 210Ky683, 276SW494.

426–21 210Ky683, 276SW494.

426–21½–New. Owner loses no right by leaving his property in possession of agent who transfers property to warehouse, takes receipts in his own name, and pledges receipts to bank to secure loans made to himself. 210Ky683, 276 SW494.

426–21⅓–New. Transferee of warehouse receipts negotiable in form but requiring proper indorsement as condition precedent to delivery obtained no better title than transferor where person to whose order goods were deliverable had not indorsed them. 154Tenn689, 290 SW994.

426–22 162Ga758, 134SE775 (pledge of receipt authorized by statute).

426–25 CalA 284P977 (efficacy of pledgee's symbolic possession depends

on complete and actual relinquishment of possession and control by pledgor).
426-26 51ND757, 201NW176.
426-29 Utah 265P748.
426-30 CalA 284P977.
427-32 28 OhA93, 162NE460. **Pawnee acquires special property in goods,** but general property remains in owner. 162 Ga758, 134SE775.
427-40 167Ga354, 145SE761, 61ALR323.
428-50½-New. Indorsement and pledge of receipts of warehouse company for own goods creates relation of bailee and bailor between company and pledgee. 167Ga354, 145SE761, 61ALR323.
428-50½-New. Bank furnishing money used in making advances and purchasing goods, and holding negotiable receipts, occupies status of mortgagee in possession. TexCivA 16SW(2d)413.
428-50¼-New. Lien of pledgee of storage receipts covering lumber held not lost by warehouseman's surrendering lumber to extent of identical lumber remaining. 41F(2d)249.
428-51 162Ga758, 134SE775, 776 [quot Cyc]. **Receipt by pledgee of warehouse receipts** of proceeds of goods is defense to suit on pledgor's note, regardless of whether release on orders from pledgee was authorized or not. 131SC391, 127 SE605.
428-52 162Ga758, 134SE775, 776 [quot Cyc]; 136SC312, 134SE395, 399 [quot CJperCothran,J].
428-57½-New. Warehouseman, reissuing, instead of canceling, receipts on surrender by holder, is not liable in trover to subsequent pledgee surrendering receipts under agreement for substituted security. 151Md208, 134A140.
429-62 CalA 269P459; 94CalA562, 271 P532; 43 Ida273, 251P293; 190NC209, 129SE585, 42ALR1299 (rule applied to safe deposit company); 193NC780, 138 SE131, 133, 53ALR1404 [quotCyc]; TexCivA 297SW670.
429-64 193NC780, 138SE131, 133, 53 ALR1404 [quotCyc].
429-65 193NC780, 138SE131, 133, 53 ALR1404 [quotCyc].
429-66 193NC780, 138SE131, 133, 53 ALR1404 [quotCyc].
429-67 193NC780, 138SE131, 53ALR 1404.
429-68 CalA 269P459; 94CalA562, 271 P532; 99CalA417, 278P874; 1LaA41; NJ 148A641; NJ 150A408; 242NY440, 152NE254; 190NC209, 129SE585, 42 ALR1299 (rule applied to safe deposit company); 193NC780, 138SE131, 133, 53ALR1404 [quotCyc]; 287Pa398, 135A 114; TexCivA 297SW670. **Statute as to liability** of warehousemen held declaratory of common law. TexCivA 297SW 670. **Place of storage.**-321Mo 1229, 16 SW(2d)82. **That warehouse was bonded** does not permit exercise of less care. 137Misc160, 241NYS597. **Warehousemen storing cotton** must exercise same degree of care to prevent spread of fire after it has originated. 156Miss514, 126S31.
430-69 IndA 170NE551; 151Miss295, 117S834; 193NC780, 138SE131, 133, 53 ALR1404 [quotCyc]; 287Pa398, 135A 114.
430-70 7LaA342, 343 [quotCyc]; 193 NC780, 138SE131, 133, 53ALR1404 [quot Cyc]; 287Pa398, 135A114; TexCivA 15 SW(2d)132. **Such care and diligence as a prudent man would exercise over his own property,** etc. 43 Ida273, 251P293 (bank renting safe deposit box). **Reasonable care depends** on circumstances of case and character of property. 94CalA 562, 271P532. **Uniform Warehouse Receipts Act,** expressly providing degree of care required of warehousemen, is merely declaratory of common law. TexCivA 15SW(2d)62.
431-72 193NC780, 138SE131, 133, 53 ALR1404 [quotCyc].
431-76 170La461, 128S277 (contracting to store goods in specific place). **Warehouseman's liability** extends to acts by employees. 166La1091, 118S323.
431-76½-New. Where goods are deposited in United States bonded warehouse, depositor divests himself completely of custody of goods and has no control over them till their return. 242NY440, 152NE254.
431-76½-New. Obligations of bonded warehousekeeper to depositor are same as those of any other warehousekeeper within limits of control left by statute to warehousemen. 242NY440, 152 NE254.
431-76¼-New. Bonded warehousekeeper, renting storeroom to government officers for storage of liquor seized, is not liable to owner as bailee of liquor seized. 242NY440, 152NE254.
431-76½-New. Bonded warehouseman, renting storeroom to government officers for the storage of liquor, has no greater duty to owner than to government officers. 242NY440, 152NE254.
431-77 170La461, 128S277 (liable where goods were removed from agreed storage place); 193NC780, 138SE131, 133, 53 ALR1404 [quotCyc]. **Warehousemen must furnish building reasonably safe** for storage, but need not be fireproof in absence of contract. IndA 170NE551.
431-78 Ark 32SW(2d)447. **Agreement between warehouseman and owner of burnt cotton for substitution of same quantity, kind, and quality of cotton** held valid. 193NC780, 138SE131, 53 ALR1404. **Contract exempting warehouseman from liability for loss by fire** is invalid in so far as it attempts to relieve warehouseman from consequences of its negligence. TexCommnA 280SW 527.
432-81 87PaSuper344.
432-82 236 IllA601. **In case of agreement to store in fireproof warehouse,** injury to goods stored in adjoining room, uncompleted, makes warehouseman liable. 236 IllA601.
432-82½-New. Warehouseman is not required to hire watchman and install fire extinguishing system because town had none. 168La605, 122S865.
433-85 216Ky424, 287SW931, 932 [cit Cyc]; 50ND295, 195NW654, 655 [cit Cyc]. **Consideration.**-216Ky424, 287SW 931.
433-86 193NC780, 138SE131, 53ALR 1404.
433-87 44Philippine98.
434-93 193NC780, 138SE131, 53ALR 1404. **Warehouseman insuring goods acts as agent for owners who may ratify** contract after loss. 193NC780, 138 SE131, 53ALR1404.
434-96 **Warehouseman cannot preclude liability for loss of liquor stolen from bonded warehouse** by defense that bailor had no title under Volstead Act, where there was no step taken by government to seize liquor, though balance of liquor was subsequently seized. 218App Div584, 219NYS46.
434-97 43 Ida273, 251P293; 190NC209, 129SE585, 42ALR1299.
435-99 27F(2d)392.
435-2½-New. Holder of receipt of cotton damaged by flood, impounded and sold by receiver in suit of insurer, is not entitled to claim against receiver or insurer any more than value of damaged cotton at time of impounding, in absence of showing that damage could have been avoided by exercise of reasonable care. 31F(2d)701.
435-3 166La1091, 118S323.
435-4 NJ 148A641.
436-14 166La1091, 118S323.
437-16 **Provision of receipt limiting responsibility for article to stated sum unless value is noted on receipt and higher rate paid** is not exemption from liability for want of due care, but is reasonable and enforceable method of fixing proportion between amount of liability and charges collected. 114 OhSt 76, 151NE39.
437-17 27F(2d)392; Ariz 293P16 (or conversion to his own use); CalA 269P 459; 94CalA562, 271P532. **Sufficiency of assent of holder of terms of receipt.**-114 OhSt76, 151NE39. **Necessity of calling limitation of liability clause in receipt to owner's attention.**-170La461, 128S277.
437-18 27F(2d)392.
437-19 81CalA715, 254P909; CalA 269 P459. See also 27F(2d)392.
438-20 117Tex130, 298SW536, 537 [cit Cyc].
438-21 94CalA562, 271P532; 117Tex 130, 298SW536, 537 [citCyc]; TexCivA 20SW(2d)248. See also 249 IllA28.
439-27 **Owner of securities left in safety deposit box rented by her father cannot recover against bank for loss by theft** in absence of contractual relation between bank and such owner. 218App Div283, 218NYS189.
439-28 178Ark753, 13SW(2d)298; 180 Ark106, 20SW(2d)633; 168La605, 122 S865.
440-30 127 Or107, 269P232. **Owner of stored grain is entitled to delivery of grain** when market is satisfactory to him. 53ND162, 204NW976. **Delivery to partner** is delivery to partnership. 241Mich404, 217NW68. **Delivery to holder of receipt.**-116Nebr809, 219NW 192. **Warehouseman has right to accept bill of sale and ship goods on order of** purchaser. Wash 287P5. **What constitutes prompt and efficient deliveries.**-101 CalA146, 281P399.
440-31 51SD180, 212NW922. **Statute requiring delivery by elevators of same grade and quality of grain as that deposited** does not apply to contracts entered into prior to its taking effect. 51 SD180, 212NW922.
440-32 **Contract held to contemplate return of identical goods.**-193NC780, 138 SE131, 53ALR1404.
440-35½-New. Delivery by bank of trunk to depositor's son who had power of attorney has been held not contrary to Warehouse Receipts Act. CalA 291P 221.
440-36 50ND846, 198NW347 (second demand by depositor unnecessary where warehouseman has availed himself of his right to reasonable time to ascertain validity of claim of third person); 145 Wash624, 261P399. **Demand excused.**-171Minn455, 214NW507, 53ALR382; 53 ND162, 204NW976. **Where warehouseman could not comply with demand if made,** proof of demand and refusal of grain stored with public warehouseman is not necessary to establish conversion. ND 231NW725.
441-44 **Delivery to place outside city where warehouse is located** is not necessary under contract. 89CalA243, 264 P534.
441-46 35GaA212, 132SE252; 127Kan 27, 272P181; LaA 124S712; 116 Or549, 240P879 (warehousemen are liable for conversion if they refuse delivery upon surrender of warehouse receipt); 145 Wash624, 261P399; 100WVa154, 130SE 125. **Breach of agreement** to deliver goods deposited by husband to husband alone is negligence. 74CalA87, 239P422. **Warehouseman is not justified in delivering** to wife goods for which he has issued receipt to husband. 74CalA87, 239P422. **Depositor allowed to remove grain** held barred to claim conversion. 145Wash624, 261P399. **Subsequent demand** does not operate as waiver of right to recover value of goods for refusal to deliver on prior demand. 127Kan27, 272P181.
441-50 **Right to demand charges** waived by warehouseman. 228Mich137, 199NW634.
441-51 **Existence of fire in neighborhood** does not excuse refusal to deliver on demand. 100WVa154, 130SE125.
442-53 127Kan27, 272P181. **Diligence in care of property after demand and refusal of delivery** does not excuse warehouseman from liability. 127Kan 27, 272P181.
442-58 **Demand sufficient when refused to warrant action for conversion** though not accompanied by offer to pay storage and other charges accrued, where ground of refusal is denial of any liability for the grain demanded. 50ND 558, 197NW146.
442-58½-New. **Ticket holder's refusal to accept wheat of like grades and amount with that deposited constitutes** waiver of delivery relieving elevator from liability for conversion. 51SD180, 212NW922.
442-58½-New. Defendant cannot escape liability on ground that loss was due to theft and embezzlement of buyer of warehouse. 152Wash89, 277P389.
442-60 **In North Dakota.**-50ND846, 198NW347.
443-61 **Not changed by Uniform Warehouse Receipts Act.**-214Ala202, 107S46.
443-65½-New. Provision of statute excused in some jurisdictions refusal to deliver goods pending determination of

adverse claims, 75CalA585, 243P28.

443-65½-New. but such statute does not apply to controversy wherein warehouseman asserts claim of title adverse to that of claimant. 75CalA585, 243P28.

443-66 240 IllA12. **Failure to exercise diligence in notifying owner concerning attachment** renders warehouseman guilty of conversion. CalA 290P146. **Where owner and bailor was not party to action in which attachment was issued,** surrender of goods by warehouseman is not defense to action for conversion. CalA 290P146.

444-73 See also 245NY383, 157NE502. **Warehouseman takes risk in delivering goods without production of receipts** where goods are stored and deliverable only on return of receipts. 230Ky538, 20SW(2d)173.

444-75 126 Or602, 268P1009.

444-77 Right to production of receipt waived by part delivery. 228Mich137, 199NW634.

445-81 53ND6, 204NW892. **What is reasonable time** for warehouseman to ascertain validity of adverse claim or to bring legal proceedings to compel claimants to interplead is question of fact to be determined from evidence in particular case. 53ND6, 204NW892.

445-82 Conversion takes place on date of demand where warehouseman does not bring legal proceedings for interpleader of claimants within reasonable time. 53ND6, 204NW892 (facts held to show delay of over three months unreasonable). **Evidence held sufficient** to show unreasonable delay by garnishee warehouseman in interpleading claimant after demand. 53ND6, 204NW892. **What is reasonable time is question of fact.**-53ND6, 204NW892.

445-87 53ND6, 204NW892.

445-88 30 OhA76, 164NE127; 122 Or 266, 258P186.

446-91 But see 169La997, 126S505. **Ratification.**-20 OhA523, 152NE686. **Warehouseman is not relieved from liability** in delivering on request of owner's agent where agent had no authority to deliver on credit. TexCivA 294SW 331. **Delivery to buyer of cotton on** request of owner's authorized agent relieves compress company from liability. TexCivA 294SW331.

447-96 122 Or266, 258P186. **Delivery of partnership property to partner who made deposit and took receipts in firm name** is delivery to firm and no liability attaches to warehouseman, although receipts are not surrendered where they have not been negotiated and he has no notice of trouble between partners. 241 Mi h404, 217NW68.

448-1 169La997, 126S505.

449-6½-New. Joint and several liability of warehouseman and person withdrawing goods.-Where warehouseman, without authority, issues certificates to another of goods and permits him to withdraw goods, warehouseman and certificate holder are jointly and severally liable for conversion. 68Utah298, 249P1032.

449-8 35GaA212, 132SE252; Wash 287 P5.

449-13 52ND721, 204NW614. **Amount for which each holder of storage receipt may maintain conversion where part of mass is converted** is limited to amount of grain owned by each, less portion of common mass remaining in storage to which such holder is entitled as owner in common. 52ND721, 204NW614. **Estoppel.**-52ND721, 204 NW614. **Warehouseman selling grain without substituting other grain** is guilty of conversion. ND 231NW725. **When conversion occurs.**-ND 231 NW 725.

449-14 Shipment and sale of grain by warehouseman in excess of that required to redeem outstanding receipts renders him and purchaser guilty of conversion to that extent. 50ND558, 197NW146.

450-25 13F(2d)632 (plaintiff held not entitled to greater charges by reason of change in Prohibition Act); 82CalA 361, 255P548, 550 [quotCyc]; 37GaA 278, 139SE920; 137Misc570, 244NYS44.

Where express contract to pay charges exists, it is no defense that warehouseman knew that goods did not belong to defendant, but to his evicted tenant. 101NJL561, 134A896.

450-26 101NJL561, 134A896 (but tenant is not presumed to owe charges for storage on his goods, stored by his landlord, unless tenant has assumed to pay them); NJ 146A585; 127 Or107, 269P232. See also 37GaA278, 139SE 920, 921 [citCyc]. **Statutory lien warrants implication, etc.**-130Misc293, 224 NYS71.

451-28 But where express agreement is proved, testimony as to custom is properly excluded as immaterial. 101 NJL561, 134A896.

451-29 Necessity of consent of owner to increase charges.-37GaA278, 139SE 920.

451-31 82CalA361, 255P548. **Order of secretary of agriculture** as to rates to be collected by stockyards held not to authorize recovery of payments in excess of rates fixed. 26F(2d)60. **Perishable property.**-82CalA361, 255P548.

454-63 82CalA361, 255P548.

454-66 Rule that common-law lien attaches without reference to ownership does not apply to statutory lien given warehousemen under some statutes. 160Tenn203, 22SW(2d)354.

455-68 145Va199, 133SE881.

455-68½-New. Statutory lien does not exclude other remedies. 30F(2d)842.

456-72 197NC30, 147SE674.

456-77 Lien does not extend to charges due from consignee in respect of prior merchandise stored. 7F(2d)447.

458-89 TexCivA 294SW989. See also 130Misc293, 224NYS71.

458-91 TexCivA 294SW989.

459-98½-New. Buyer of property on which another has lien, having knowledge sufficient to put ordinarily prudent man on inquiry, is not protected by statute. 218Ala90, 117S681, 61ALR 938.

459-98¼-New. Lien of warehouseman on goods stored by conditional vendee is subordinate to lien of conditional vendor under statute. 160Tenn203, 22SW (2d)354.

459-99 MoA 24SW(2d)641.

459-1 Delivery of one of several items of property constituting single bailment without demanding amount of lien does not deprive warehousemen of lien on remaining items for full amount of charges. 69CalA246, 230P980. **By statute,** in some jurisdictions lien is extinguished by surrender of possession. 41F(2d)249. **Privilege of foreclosing lien** may be waived. Ariz 293P16.

459-5½-New. Lien is not waived when property is taken from warehouseman involuntarily, as by replevin. MoA 24 SW(2d)641.

460-14½-New. By conversion.-Warehouseman waives his lien by converting property. 321Mo 1229, 16SW(2d)82.

460-18 Ariz 293P16 (no right to sell unless payment was six months in arrears); 230Ky538, 20SW(2d)173.

461-22½-New. Actions.-In action to enforce lien, where question of priority over judgment creditor of owner of property stored is involved, evidence has been held sufficient to show contract lien for storing. 217Ky48, 288 SW1024.

461-23 230Ky538, 20SW(2d)173.

461-27 See also Ariz 293P16.

463-38 MoA 19SW(2d)565.

463-39 35GaA212, 132SE252.

463-42 50ND295, 195NW654.

464-45½-New. In absence of showing as to what became of goods, pledgee is not estopped to sue warehouseman for nondelivery, on theory of misappropriation by pledgor's manager. 89CalA243, 264P534.

465-54½-New. Proof that warehouseman did not apply property to his own use does not establish defense in action for conversion. 35GaA212, 132SE 252.

465-54½-New. Inconsequential departure from procedure prescribed by federal authorities does not work forfeiture of redress for loss or conversion. 108Conn659, 144A473.

465-54¼-New. In action by pledgee for failure to redeliver, defendant, in absence of collusion, cannot complain that plaintiff failed to apply all deposits against debt secured. 152Wash89, 277 P389.

465-54½-New. Defense that part of goods still remains in warehouse is immaterial where defendant had indicated it would make no delivery. 152Wash 99, 277P393(1stcase).

466-75 166Ga105, 142SE559.

467-81½-New. Warehouseman sued for failure to deliver goods cannot bring in original party defendant to whom he had delivered goods. 128Misc566, 220NYS124.

467-82 TexCivA 31SW(2d)321 (details of bailment contract are immaterial). **Sufficient statement of cause of action.**-IndA 170NE551; MoA 16SW(2d)742; 242NY440, 152NE254.

468-83 Complaints held insufficient to state cause of action for conversion.-69 Or246, 240P879 (failure to allege plaintiff's ownership of property at commencement of action, or that warehousemen wrongfully converted it to their own use).

468-87 Complaint sufficient.-89CalA 243, 264P534.

469-90 But see TexCivA 8SW(2d)756.

469-92½-New. To hold safe deposit company liable as insurer, special contract must be alleged and proved. 190 NC209, 129SE585, 42ALR1299.

469-92¼-New. Allegations insufficient to allege special contract as insurer. 190NC209, 129SE585, 42ALR1299.

469-92¼-New. Where contract of rental of safety deposit box exempted bank from liability if box were opened by one given access by renter, and renter intrusted key to another, allegation that contents were not taken by latter is necessary. 26 OhNPNS347.

470-99½-New. Issues, proof and variance.-One can only prove what he has alleged. 9LaA703, 118S900.

470-1 43 Ida273, 251P293 (after bank shows inability to return property deposited in safe deposit box because of robbery); 222MoA946, 9SW(2d)822. **Construction of statute** placing burden on warehouseman to show excuse for failure to deliver. 27F(2d)4. **Where bailor intrusts key of safe deposit box with another,** burden is on bailor to show contents were not taken by such other. 26 OhNPNS347.

471-2 202Cal 75, 259P81; CalA 269P 459; 94CalA562, 271P532; 217AppDiv 566, 216NYS145; 137Misc160, 241NYS 597 (negligence is inferable from circumstances); 140 Okl 40, 282P165; 144 Wash268, 257P625. **Rebuttal of presumption.**-108Conn659, 144A473. **Prima facie case is established** by proof of loss of or injury to chattels in custody of warehouseman. NJ 150A408.

472-3 89CalA243, 264P534; 217App Div566, 216NYS145; 137Misc160, 241 NYS597.

472-4 217AppDiv566, 216NYS145. **The theft must be proved by the warehouseman,** etc. 137Misc160, 241NYS 597. **Mere disappearance** is not sufficient to show theft. 137Misc160, 241 NYS597.

472-5 CalA 269P459; 94CalA562, 271P 532.

472-6 Eggs.-TexCivA 15SW(2d)132.

473-9 168La605, 122S865; TexCivA 297SW670; TexCivA 15SW(2d)62. But see 201Cal 701, 258P596. Contra 140 Okl 40, 282P165. **In Mississippi.**-143 Miss620, 109S20.

474-12 See also 55ND836, 215NW538.

474-15½-New. Where, after conversion of grain by insolvent warehouseman leaving none for redemption of storage tickets, surety on his bond claims sufficient replenishment of grade of like kind and grade to redeem tickets, he has burden of showing such replenishment, in whole or in part, 53ND162, 204NW976.

474-15¼-New. in absence of which showing court cannot fix liability of sureties on subsequent bond. 53ND162, 204NW976.

474-15¼-New. Prima facie case of conversion is established by proof of failure of warehouseman to surrender prop-

erty on demand of holder of warehouse receipt. 35GaA212, 132SE252.

474-15½-New. Warehouse receipt is prima facie evidence of delivery of quantity of apples called for. 144Wash268, 257P625.

474-15⅓-New. That warehouse receipt is negotiable does not give rise to presumption that it has been negotiated. 37GaA278, 139SE920.

474-15¼-New. Court cannot presume for or against warehousemen in determining value of goods. 89CalA243, 264 P534.

474-16 On issue of estoppel.-52ND721, 204NW614. **On issue of demand and refusal** letters between defendant and plaintiff's attorney are admissible. 52 ND721, 204NW614. **Matters of law inadmissible.**-108Conn659, 144A473.

474-17 TexCivA 20SW(2d)248 (recommendations by insurer's agent after inspection with reference to additional precautions). See also **TexCivA** 10SW(2d) 1040.

474-18 20 OhA523, 152NE686 (bills containing statement of account sent to consignee, invoices for shipment and telegraphic order for goods, are admissible). **Receipts not in statutory form.**-170Minn225, 212NW198.

475-20 TexCivA 31SW(2d)321. **Warehouse receipts** and indorsements thereon are admissible. 166Ga105, 142SE559.

476-27 TexCivA 28SSW920 (statements on letterheads and tags admissible).

476-28 TexCivA 20SW(2d)248. **Evidence held admissible.**-TexCivA 292SW 599 (custom of others as to providing suitable fire hose). **Loss by fire.**-Tex CommnA 280SW527. **Evidence of custom** of other warehousemen of not employing watchmen at certain times is inadmissible. 218AppDiv572, 218NYS561.

478-31½-New. Promise of bank cashier to depositor in hired safety deposit box in bank's vault that bank would repay loss from theft is mere expression of opinion not affecting bank's liability. 43 Ida273, 251P293.

478-32 Evidence held sufficient.-202Cal 75, 259P81; 75CalA585, 243P28; 81 CalA715, 254P909; CalA 269P459; 94 CalA562, 271P532; CalA 290P146; CalA 291P221; 240 IllA307; 245 IllA498; IndA 170NE551; 216Ky424, 287SW931; LaA 124S712; 321Mo1229, 16SW(2d) 82; MoA 272SW998; 222MoA946, 9SW (2d)822; MoA 16SW(2d)742; 116Nebr 809, 219NW192; 218AppDiv572, 218 NYS561; 50ND558, 197NW146; 51ND 757, 201NW176; ND 231NW725; Tex CivA 15SW(2d)132; TexCivA 20SW(2d) 248; TexCivA 31SW(2d)321; Wash 292 P89. **Evidence held insufficient.**-35GaA 212, 132SE252; 160La909, 107S618; 151 Miss295, 117S834; MoA 279SW771; 242 NY440, 152NE254; 227AppDiv299, 237 NYS425; 20 OhA523, 152NE686 (suit by consignor for unauthorized delivery); TexCivA 10SW(2d)1040; TexCivA 15 SW(2d)132. **Evidence held to authorize finding that A stored goods** with warehousemen, though they were bought in name of B. 163Ga440, 136SE436. **Prima facie case is established.**-27F(2d)4; 190NC209, 129SE585, 42ALR1299. **That defendant received missing goods and later exercised dominion over them** constitutes some evidence tending to show conversion. 36 OhA94, 172NE687.

481-41 193NC780, 138SE131, 53ALR 1404; 52ND721, 204NW614; 52ND786, 204NW828; 53ND162, 204NW976 (at time of demand for grain). **Agreement in warehouse receipt** limiting liability, unless value is made known, is not violative of provisions in Warehouse Act that warehouseman cannot limit his liability for failure to exercise ordinary care. 74CalA87, 239P422. **Recovery held too large.**-144Wash268, 257P625. **Depositor not limited to recovery of amount stated in receipt.**-201Cal 701, 258 P596. **Sufficient evidence of value.**-81 CalA715, 254P909. **Where warehouseman knew that crates, later stolen as result of warehouseman's negligence, contained liquor,** warehouseman was liable to owner for value of liquor. 94CalA 562, 271P532. **Liability of depositary for negligence cannot exceed amount he is informed** by depositor, or has reason to believe, thing deposited is worth. 94 CalA562, 271P532. **Burden of proof** is on plaintiff to prove nature, quantity, quality, and value of liquors intrusted to defendant, where not set forth in warehouse receipt. 108Conn659, 144A 473.

481-42 MoA 68W(2d)676; 193NC780, 138SE131, 53ALR1404; 52ND721, 204 NW614 (less storage charges plus freight); 52ND786, 204NW828.

481-43½-New. Interest runs from date of demand. 89CalA243, 264P534.

482-45 See also **NJ** 150A408. **Award held excessive.**-108Conn659, 144A473.

482-45½-New. Interest from date of demand is element of damage. 89CalA 243, 264P534.

482-45⅓-New. Average sale price of spoiled goods is measure of damages in suit for failure to return all stored goods. 89CalA243, 264P534.

482-48 170LA461, 128S277.

482-49 TexCivA 297SW670.

482-52 Breach of contract to sell.-Wash 292P99.

482-54 178Ark753, 13SW(2d)298; 168 La605, 122SS65; 156Miss514, 126S31; 222MoA946, 9SW(2d)822; NJ 148A641; NJ 150A408; 217AppDiv566, 216NYS 145 (as to loss of whisky by burglary); 195NC875, 142SE782; TexCommnA 280 SW527; TexCivA 292SW599 (failure to furnish suitable fire hose); TexCivA 297 SW670. See also **TexCivA** 15SW(2d) 132. **Whether condition of fire hose** was proximate cause of loss by fire held for jury. TexCivA 292SW599.

483-56 156Miss514, 126S31.

483-58 Whether owner's agent authorized compress company to clear cotton in name of buyer held for jury. Tex CivA 294SW331.

483-60 See also **MoA** 16SW(2d)742.

483-61 See also 21F(2d)298.

483-62 Question of conversion is properly withheld from jury where undisputed facts show conversion. 35GaA 212, 132SE252. **Contributory negligence of shipper** in action against warehouseman for causing loss is for jury. 244NY331, 155NE662.

483-62½-New. Whether owner of burned cotton agreed to substitution of same quantity, kind, and quality by warehousemen held for jury. 193NC 780, 138SE131, 53ALR1404.

483-62⅓-New. Inferences for or against warehousemen as to value of goods is for jury. 89CalA243, 264P534.

483-62¼-New. Whether there is actual, open, visible, and unequivocal change of possession to validate pledge of attached goods to holder of warehouse receipts has been held for jury. CalA 284P977.

483-64 108Conn659, 144A473; 101NJL 561, 134A896; 145Wash624, 261P399. **Instructions held proper.**-240 IllA307; 141 Okl 50, 283P990. **Instructions held properly refused.**-178Ark753, 13SW(2d) 298. **Conversion by warehouseman.**-146 SC209, 143S811(2dcase). **Loss or destruction of property.**-201Cal 701, 258P 596; CalA 269P459; 94CalA562, 271P 532; 321 Ill 518, 152NE580. **Instruction on existence of custom not to insure** held properly refused in action on express contract. 216Ky424, 287SW 931. **Instructions held not erroneous.**-167Ga365, 145SE766.

485-65 37GaA278, 139SE920; 101NJL 561, 134A896 (charge held not misleading).

485-69½-New. Decree for pledgee of receipts against warehouseman is not erroneous as to him, though awarding nothing against officer of company storing property and fraudulently withdrawing it. 166Ga105, 142SE559.

486-73 Delivery of goods to bailor without surrender of original receipts is not offense under some statutes where receipts have not been negotiated. 241 Mich404, 217NW68. **Cold storage statutes.**-195Wis361, 218NW192 (conviction not sustained).

486-73½-New. Corpus delicti of offense furnishing false name of owner or producer of tobacco to warehouse is furnishing of such false name. 214Ky760, 285SW237.

486-73⅓-New. If warehouseman was furnished true name of tenants who produced tobacco on shares and actually delivered it to warehouse, statute requiring true name of owner or producer to be furnished is complied with. 214 Ky760, 285SW237.

488-79 Evidence held insufficient to take to jury in prosecution for furnishing to warehouse false name of owner or producer of tobacco. 214Ky760, 285 SW237.

489-82½-New. Safety deposit box renter must prove neglect of bank to take measures to safeguard his property customarily used in community by ordinarily careful institution fairly comparable in size and other conditions with defendant. 8F(2d)321.

489-82⅓-New. Such usage may be shown by one witness having knowledge of prevailing usages. 8F(2d)321.

489-82¼-New. or by many witnesses testifying as to usages in different institutions. 8F(2d)321.

489-82⅕-New. Lessor is liable for failure to perform its duties as bailee, resulting in loss of contents of box. 218AppDiv285, 218NYS191.

489-82⅙-New. Lessee must allege and prove bank's failure to perform its duties in action for loss of contents of box. 218AppDiv285, 218NYS191.

489-82⅐-New. Negligence of bank is actionable only if proximate cause of loss. 218AppDiv285, 218NYS191.

489-82⅛-New. Bank not required to insure contents of safe deposit box under agreement to care for contents as for own property, despite fact that bank insures own property. 218AppDiv 285, 218NYS191.

489-82⅑-New. Bank need not offer reward for apprehension of burglars under safety deposit box lease. 218App Div285, 218NYS191.

489-82 1/10-New. Bank need not attempt to apprehend and prosecute burglars under safety deposit box lease. 218App Div285, 218NYS191.

489-82 1/11-New. Bank not liable for theft of securities from safety deposit box, where contract was between father of owner and bank. 218AppDiv 283, 218NYS189.

489-82 1/12-New. Where defendant and his deceased father held safety deposit box jointly, defendant's entry therein after his father's death was not unlawful. MoA 68W(2d)640.

489-82 1/13-New. Safe depositaries.-That wife, who had key of, and paid rent on, husband's safe deposit box, was permitted to open it by bank is no evidence of bank's negligence. 231Ky 202, 21SW(2d)254(2dcase).

WARRANTY

493-23a Representation distinguished, etc. 173Ark921, 293SW1045; 69Utah 26, 252P270.

WASH

495-28½-New. Fermented wort from which spirit is distilled. 116 Or416, 241 P390 [quotWebsterD.].

WASH BOILER

495-28⅓-New. Wash boiler is kitchen utensil commonly used and ordinarily intended to be used for domestic purposes. 219Ky514, 293SW1076.

WASTE

497-1 92Fla347, 109S424. **Other definitions.**-316 Ill 318, 147NE266; 51ND 491, 200NW497, 36ALR598; 13PaDist &Co 73. **Trespass distinguished.**-92Fla 347, 109S424.

498-2 92Fla347, 109S424.

498-5½-New. Waste is abuse or destructive use of property by one in rightful possession. 92Fla347, 109S424.

501-19 92Fla347, 109S424; 5PaDist& Co 691.

501-23 180Ark342, 22SW(2d)25 (waste to fences not shown).

502-25 92Fla347, 109S424; Can [1929] 2DomLR881.

502-26 92Fla347, 109S424.

505-51 92Fla347, 109S424.

505-52 92Fla347, 109S424.

506-58½-New. Removal of fence defective from ordinary wear and tear or failure to repair slight defect in brick wall is not waste as matter of law. 252 Mass352, 147NE823.

507-64 33NM18, 262P178, 180 [quot Cyc].
509-78 214Ala593, 108S536, 46ALR 1201; 91NC477; 5PaDist&Co 691.
514-9 214Ala593, 108S536, 46ALR 1201.
517-39½-New. D½. Persons Entitled to Relief. Grantees of contingent remaindermen may maintain action to prevent waste. 171Ark117, 283SW379.
517-43 In Ohio.-36 OhA105, 172NE673.
518-44 223Ky603, 4SW(2d)388.
519-49 5PaDist&Co 691.
520-54 5PaDist&Co 691 (writ admits lawful possession by master).
521-63 92Fla347, 109S424; 162Ga336, 133SE857; IndA 169NE71; 24 OhNPNS 435.
522-69 IndA 169NE71.
523-75 IndA 169NE71.
524-86 214Ala400, 108S20, 22 [citCyc].
525-94 But see 148Va503, 139SE286.
527-15 One in possession of lands under contract to purchase them is a tenant at will for purpose of sustaining action on case for waste or destruction. 105NJL408, 144A812.
528-19 Requiring bond.-168Ga133, 147 SE61(2dcase).
532-52½-New. and same is true as to sufficiency of the evidence. 28 OhA 203, 162NE459.
532-52½-New. Evidence held to show that plaintiff had orally sold his undivided interest in farm. 137Misc693, 244NYS300.
533-60 255Mass76, 151NE81, 45ALR1.
534-67½-New. Court has power to dissolve writ of estrepement on conditions. 5PaDist&Co 691.
534-67½-New. Bond required on dissolution of writ of estrepement. 5PaDist &Co 691.
535-77 39F(2d)16.
535-78 In New Jersey.-104NJL102, 140 A298.
536-3 See also 10CustA31. **Waste water.**-52Nev330, 286P963.

WATCHMAN

537-10 315Mo 276, 288SW3.
537-12½-New. ; one who is employed in protecting against depredations or injuries by elements. 128Misc893, 220 NYS289.

WATER RIGHT

540-28 8F(2d)739, 741 [quotCyc].
540-29 8F(2d)739, 741 [quotCyc].
541-29a 8F(2d)739, 741 [quotCyc]; 50 Nev352, 259P632, 634 [citCyc].

WATERS

553-9 218Ala582, 119S606 (running stream).
553-15 124Kan38, 257P966.
554-16 200Cal 81, 252P607 (sloughs); Mass 173NE504; 225AppDiv208, 232 NYS478; 118 Oh360, 161NE12; 114Tex 501, 273SW785, 40ALR833; 116Tex82, 286SW458; 136Wash481, 239P428; 35 Man466, [1926] 1DomLR725, [1926] 1 WestWkly460. **Fact that sloughs make their connection with main channel of river** at elevations which permit waters thereof to enter sloughs only when increment in quantum of such waters, makes possible their passage does not mitigate against their quality as water courses. 200Cal 81, 252P607. **A "water course," "river," or "stream"** consists of bed, banks, and stream of water. 116Tex82, 286SW458.
554-18 114Tex501, 273SW785, 40ALR 833.
554-19 Watercourse may have natural or artificial origin.-84Mont442, 275P 1099.
555-20 200Cal 81, 252P607; 84Mont 442, 275P1099 (flood, seepage, and waste water). 114Tex501, 273SW785, 40ALR 833.
555-21½-New. Where waters of stream are so confined and persistent in their course and flow with such frequency and volume that it is practical and valuable to irrigate therefrom, it is stream to which water rights attach. 114Tex 501, 273SW785, 40ALR833.
555-21½-New. By definite and permanent source of supply of water is meant that there must be sufficient water carried by stream at such intervals as may make it practical to irrigate from or use stream. 114Tex501, 273SW785, 40ALR833.
555-22 116Tex82, 286SW458.
556-23 A swale or depression over which surface water runs, etc. Iowa 230NW881.
556-25 Mass 173NE504; 115Nebr539, 213NW832, 53ALR1174; 118Nebr465, 225NW235; 127 Or420, 272P554; 35 Man466, [1926] 1DomLR725, [1926] 1 WestWkly460.
556-26 115Nebr539, 213NW832, 53 ALR1174. **Where a stream flows in a continuous current,** etc. 115Nebr539, 213NW832, 53ALR1174. **It is not necessary** that natural watercourse have well defined banks and channel for its whole length. 120Kan689, 244P1059.
556-27½-New. The "bed" of a stream is that portion of its soil alternately covered and left bare according to supply of water and adequate to contain it at average and mean stage during entire year without reference to freshets or drouths. 116Tex82, 286SW458.
556-27½-New. "Banks" of stream or river are water washed and relatively permanent elevations at outer lines of river bed serving to separate bed from adjacent upland and to confine water within course. 116Tex82, 286SW458.
556-28 136Wash481, 239P248, 249 [cit Cyc].
557-29 Mass 173NE504; 115Nebr539, 213NW832, 53ALR1174; 118 Oh360, 161NE12; 136Wash481, 239P248, 249 [citCyc]. **All waters in stream** below highest line of normal flow are riparian waters. 116Tex603, 297SW225, 53ALR 1147. **Navasota River in Texas** held a stream to which water rights, riparian or by appropriation, attach. 116Tex 603, 297SW225, 53ALR1147.
557-30 200Cal 81, 252P607. **Riparian right attaches as well to swamp and overflow lands** as to those of different character. 43F(2d)977.
557-32 116Tex82, 286SW458; Utah 292P194.
558-33 200Cal 81, 252P607.
558-34 In California.-101CalA456, 281 P717.
558-35 43F(2d)977; 181Ark216, 26 SW(2d)57 (operation of gravel plant so as to pollute stream held to call for exercise of power of regulation).
558-36 111Conn352, 150A60.
558-37 111Conn352, 150A60; 251Mich 67, 231NW70. **Purchasers of nonriparian land cannot assert title** to water because predecessors received water through ownership of other land. 300 Pa303, 150A633.
559-43 CalA 292P549.
559-39 6PaDist&Co 493, 495 [citCyc].
559-40 150Md125, 132A587; 240Mich 279, 215NW325, 327 [citCyc]. See also 149Wash285, 270P804.
559-44 140Wash558, 250P41. **Nature of right.**-43F(2d)977.
559-46½-New. Owner of lands riparian to two streams cannot be deprived of rights in one stream because his land is riparian to another. 116 Or232, 240P 882.
560-47 181Ark216, 26SW(2d)57; 200 Cal 81, 252P607; 202Cal 56, 259P444, 56 ALR264; 106Conn167, 137A745; 229Ky 339, 17SW(2d)194; 321Mo 186, 9SW (2d)978; 115Nebr539, 213NW832, 53 ALR1174; 131Misc514, 227NYS209, 216 [citCyc]; 132Misc848, 230NYS691; 192 NC102, 133SE421; 123 Or549, 262P243; 116Tex82, 286SW458. **The maxim which expresses the rights of a riparian proprietor,** etc. 115Nebr539, 213NW 832, 53ALR1174. **All land to which water is carried by numerous minor channels** is riparian to the river entering plains from mountains. 200Cal 81, 252 P607. **Riparian right is in nature of tenancy in common** and not separate or severable estate. Cal 287P93.
560-48 111Conn352, 150A60; 192NC 102, 133SE421; 123 Or549, 262P243.
561-49 240Mich279, 215NW325; 192 NC102, 133SE421.
561-50 181Ark216, 26SW(2d)57; 200 Cal 81, 252P607; 88CalA157, 263P318; 229Ky339, 17SW(2d)194; 240Mich279, 215NW325; 132Misc848, 230NYS691; 123 Or549, 262P243. **Riparian rights exist independently of claim of owner.**-CalA 292P549.
561-51 181Ark216, 26SW(2d)57; 202 Cal 56, 259P444, 56ALR264.
561-56 116Tex82, 286SW458.
561-56½-New. Tenure of riparian owner distinguished from that of appropriator.-Tenure of riparian owner as to water is analogous to that of tenant in common, while tenure of appropriator is like tenant in severalty. 116 Or232, 240P882.
561-56½-New. Person cannot claim as riparian proprietor and as appropriator at same time.-116 Or232, 240P882.
561-56¼-New. Rights in flood waters.-Rights of riparian owner attach only to "riparian waters," that is, waters of ordinary flow and underflow, and not to waters rising above line of highest ordinary flow which are to be regarded as "flood waters." 116Tex82, 286SW458.
561-56½-New. and such "line of highest ordinary flow" is line to which stream reaches and maintains for sufficient time to become characteristic when waters are in ordinary and normal condition uninfluenced by recent rainfall or surface run-off. 116Tex82, 286 SW458.
561-56¼-New. Riparian owner has no vested right in such flood waters which are to be treated and suppressed as common enemy, 116Tex82, 286SW458.
561-56¼-New. and his rights will be correlated to rights of riparians and those of public generally to have property and lives protected from overflows and floods. 116Tex82, 286SW458.
562-57 Cal 285P688; 125Misc186, 211 NYS149 (riparian owner who owned to center of stream is entitled to one half natural flow of river); 131Misc514, 227 NYS209; 192NC102, 133SE421; 48RI 376, 136A447. **In Georgia.**-163Ga867, 137SE56.
562-58 192NC102, 133SE421.
526-60 200Cal 81, 252P607; Cal 290P 1036; 88CalA157, 263P318; 240Mich 279, 215NW325; 131Misc514, 227NYS 209; 127Misc834, 217NYS534; 192NC 102, 133SE421; 116Tex82, 286SW458; 116Tex603, 297SW225, 53ALR1147 (riparian owner may take riparian water for use on nonriparian land).
563-65½-New. Fact that riparian owners might artificially regulate natural flow of river so as to render smaller quantity of water sufficient for their uses cannot operate to limit or lessen their riparian rights to uses of water in their natural course. 200Cal 81, 252P 607.
563-65½-New. Riparian rights may not be transferred to another riparian owner for use of nonriparian land remote from stream upon which they depend. CalA 292P549.
563-67 5F(2d)466; 200Cal 81, 252P 607; 111Conn352, 150A60; 116Tex82, 286SW458.
563-68 200Cal 81, 252P607; 116Tex 82, 286SW458 (use working substantial injury to common right).
563-69 200Cal 81, 252P607; 240Mich 279, 215NW326. **Instances of reasonable use.**-200Cal 81, 252P607.
564-70 111Conn352, 150A60; 131Misc 514, 227NYS209.
564-71 131Misc514, 227NYS209.
564-87 200Cal 81, 252P607; 111Conn 352, 150A60; 116Tex82, 286SW458.
565-89 200Cal 81, 252P607.
565-91 200Cal 81, 252P607 (development of power and electric energy); Cal 287P93 (use for generation of electricity). **Upper riparian owner may not impound waters of river for development of power** and electric energy if it would divert usual flow of waters to extent of withdrawing them from large portion of land of lower owners during seasonal period of benefit from flow and overflow. 200Cal 81, 252P607.
565-94 200Cal 81, 252P607; 197Ind 430, 151NE220. **Underflow of streams** carrying water actually used to riparian lands benefited therein is not waste water. 200Cal 81, 252P607.
566-99 127Misc834, 217NYS534.
566-1 127Misc834, 217NYS534.
566-2 200Cal 81, 252P607; CalA 292P 549; 238Mich632, 214NW226; 123 Or

549, 262P243; 116 Or232, 240P882.

567-14 **Evidence held insufficient** to establish lower riparian owner's rights for watering live stock to be superior to upper riparian owner's irrigation rights. Cal 290P1036. **Presumption is that riparian owners made only reasonable use of waters.**–Cal 290P1036.

567-17 **Adjudication of water rights** without adjudication of amount to which upper and lower riparian owners are entitled would be unenforceable for uncertainty. Cal 290P1036.

567-18½-**New.** Disputes between riparian owners as to line of convergence may be settled by agreement or by resort to equity in proceeding akin to partition. 248Mich410, 227NW741.

568-19 114Nebr161, 206NW965; 122 Or 331, 258P183. **Where court properly enjoined defendant from interfering with ditch carrying seepage,** defendant is required to refrain from interfering though ditch might carry flood waters. 100CCA692, 280P1021.

568-25½-**New. Decree determining rights between owners on several forks of stream** and directing installation of division boxes controlling flow of waters from main stream into forks is construed as not determining rights of owners on one fork as between themselves, and, so construed, does not authorize one owner to have dispute between himself and another determined by proceeding to furnish for alleged violation of decree. 116 Or232, 240P882.

568-26 218Ala582, 119S606; 200Cal 81, 252P607; Cal 287P93; 106Conn167, 137 A745; 256 IllA452; 86 IndA411, 157NE 446; Mass 172NE787; 114Nebr161, 206 NW965; 115Nebr539, 213NW832, 53 ALR1174; 131Misc514, 227NYS209; 39 OklACR346; 123 Or28, 260P1100 (dictum); 123 Or549, 262P243; 146Va229, 135SE703. But see 19F(2d)510. **Lower proprietor is not entitled to flow of constant specific quantity.**–Cal 287P93.

569-27 123 Or28, 260P1100; 123 Or549, 262P243.

569-29 225AppDiv208, 232NYS478.

569-30 218Ala582, 119S606; MoA 300 SW301; 98PaSuper540.

569-31 **Common-law rule** that one diverting water from its natural course is insurer against resultant damage does not prevail in Idaho. 43 Ida198, 252P 865.

570-32 131Misc514, 227NYS209.

570-33 See also 202Cal 56, 259P444, 56 ALR264.

570-34 122 Or331, 258P183. See also 192NC102, 133SE421.

571-43 7F(2d)406; 35F(2d)235; 106 Conn167, 137A745.

571-44 See also 146Va835, 132SE707.

571-45 207Cal 465, 279P148.

571-47 131Misc514, 227NYS209; 121 Or628, 253P3.

572-49 215Ala655, 111S907; 202 Iowa 442, 210NW460; 114Nebr161, 206NW 965; 252NY236, 169NE289; 121 Or628, 253P3; 123 Or549, 262P243. **Under covenant restricting use of property,** erection of dam preventing flow for operation of mill held unauthorized, general statutes relating to riparian rights having no application in view of covenant. 165Ga159, 140SE360.

572-50 35F(2d)235; 201 IowaS26, 208 NW499.

572-51 201 IowaS26, 208NW499; 115 Nebr539, 213NW832, 53ALR1174; Tex CivA 258W(2d)916.

573-56 7F(2d)406.

574-57 141 Okl 267, 284P855.

574-59 146Va229, 135SE703. **Railroad company is liable only for negligence.**–141 Okl 267, 284P855.

575-60 215Ky794, 287SW11; 141 Okl 267, 284P855.

576-61 146Va229, 135SE703, 706 [quot Cyc].

576-61½-**New.** Where extraordinary rain caused large quantities of débris to stop at mouth of culvert, railroad's duty to clear away débris is measured by requirements of ordinary care under circumstances. 231Ky107, 21SW(2d) 140.

576-68 106Conn167, 137A745 (regardless of concurrent causes).

577-71½-**New.** Each of several persons using stream with knowledge that his act, combining with acts of others, results in nuisance, is liable as joint tortfeasor with others, though acting independently. 192NC102, 133SE421.

577-73 118Nebr355, 224NW864. But see 170La345, 127S746.

577-75 Mass 173NE504.

578-79 35Man466, [1926] 1DomLR725, [1926] 1WestWkly460.

578-82 But see Mass 173NE504.

579-89½-**New.** Release by lower riparian owner to coal company from damages resulting from discharge of refuse, etc., into creek does not operate as release of damages caused by narrowing of stream and is no bar to recovery therefor. 85PaSuper357.

579-89½-**New.** Act of God held no defense to action for increasing flow of stream. 106Conn167, 137A745.

579-92 **Complaint held insufficient.**–131 Misc514, 227NYS209.

579-95½-**New.** Allegation held to state cause of action for nuisance. 215Ala 655, 111S907.

579-95½-**New.** Complaint should allege that erection of dam was "unlawful." 215Ala655, 111S907.

579-97½-**New.** Where common owner of property bordering on artificial lake, which he created through erection of dam, gave mortgage on property, under foreclosure of which common ownership was severed, lower riparian proprietor, claiming right to drain lake on ground that any implied easement had been foreclosed, had burden to prove that mortgage was given prior to erection of dam. 321Mo 186, 9SW(2d)978.

579-1½-**New. High-water mark.**–Evidence admissible to ascertain average high-water mark of lake. 94Fla502, 113 S708.

580-4 **Evidence held to sustain verdict for defendant.**–106Conn167, 137A745. **Evidence held sufficient** to support verdict and judgment. 115Nebr539, 213 NW832, 53ALR1174.

580-5 136Wash481, 239P248. **Whether course was natural or only course to carry outlaw waters** held jury question despite statute authorizing deposit of debris under certain circumstances. 136 Wash481, 239P248.

580-11 **Propriety of particular instructions.**–175Ark988, 18SW(2d)77; 115Nebr 539, 213NW832, 53ALR1174.

581-26½-**New.** Where one removed obstacle to natural flow of water as result of which accumulation was released and caused damage, it was held he was liable therefor. 20SaskL315, [1926] 1 DomLR422, [1926] 1WestWkly71.

582-33 Contra 215Ky794, 287SW11.

584-50 120Kan689, 244P1059.

585-61 218Ala582, 119S606.

585-64 **Petition held good against general demurrer.**–TexCivA 291SW270 (action against railroad company for damage to growing crops).

585-65½-**New.** Burden of proof to establish defense that extraordinary flood or freshet was act of God is on defendant. 146Va229, 135SE703.

586-80 215Ky794, 287SW11; 140 Okl 45, 282P157; 52SD116, 216NW868; Tex CivA 293SW224; TexCivA 299SW293.

587-82 207Ky776, 271SW71 (proper instruction indicated by appellate court); MoA 29SW(2d)221.

587-83 **Instruction as to extraordinary rainfall** held proper. 145Va94, 133SE 781.

587-83½-**New.** Evidence held sufficient to go to jury on question whether obstructed watercourse was natural watercourse. 120Kan689, 244P1059.

587-83½-**New.** Whether extraordinary flood is act of God is mixed question of law and fact to be submitted to jury with proper instructions by court. 146 Va229, 135SE703.

587-84 But see 146Va835, 132SE707.

589-2 98PaSuper540.

589-6 **Damages held not excessive.**–MoA 29SW(2d)221.

590-8 207Ky776, 271SW71.

591-10 Utah 262P274.

591-15 86 IndA411, 157NE446; 130Kan 691, 288P745 (landowner has been held entitled to mandatory injunction lowering dike).

592-17 Nebr 206NW965.

592-21 229Ky339, 17SW(2d)194.

593-23 130Kan691, 288P745.

593-24 86 IndA411, 157NE446.

593-26 14F(2d)871; 41F(2d)358; 106 Conn167, 137A745; 111Conn352, 150A 60; 234 IllA89; 150Md198, 46ALR1; 22 OhA82, 153NE341. **Right of appropriator of water on public domain.**–207 Cal 8, 276P1017(2dcase).

594-29 14F(2d)871; 240Mich279, 215 NW325; 191NC1, 131SE407 (instruction held proper); 9PaDist&Co 455.

594-29½-**New.** Statute giving incorporated towns jurisdiction over streams to prevent pollution, (Comp. L. [1917] § 786x13), applies where town owns or distributes part only of water. 67 Utah214, 247P290.

594-30 290Pa322, 138A860.

594-34 207Cal 8, 276P1017(2dcase); 111Conn352, 150A60; 240Mich279, 215 NW325.

595-36 314Mo 438, 284SW471.

595-41 22 OhA82, 153NE341 (hog farm).

595-47 TexCivA 286SW335.

595-48½-**New. Discharge of waste from mill resulting in depletion of oxygen causing death of fish** is unreasonable use. 240Mich279, 215NW325.

595-49 234 IllA89; 150Md198, 132A 619, 46ALR1; 196NC506, 146SE215; TexCivA 58W(2d)575. But see 88 IndA 356, 162NE241.

595-50 234 IllA89; 22 OhA82, 153NE 341; 132 Okl 60, 269P241, 243 [quot Cyc]; 126 Or621, 270P781; Can [1928] 3DomLR725. **Size of city held immaterial** as to liability for pollution. 234 IllA89. **Pollution constitutes public nuisance.**–126 Or621, 270P781.

596-52 191NC1, 131SE407 (instruction on liability for pollution held proper).

596-53 18F(2d)736; 87 IndA79, 158NE 514. **Offensive matter cast on land of another.**–227Ky423, 13SW(2d)254.

597-54 7F(2d)583; 87 IndA79, 158NE 514. See also 208Ky723, 271SW1038. **Preferential right over manufacturers and agriculturists** given to mining companies to use waters of streams gives no right to poison waters with refuse. 7 F(2d)583.

597-55½-**New.** Where oil and salt water are negligently allowed to escape from oil wells and pollute streams used to water cattle, it is immaterial whether negligence occurred before or after date of injury for which recovery is sought. 39 OklACR70.

597-57 17AlaA481, 86S113; 240Mich 279, 215NW325.

598-59 256 IllA452; 150Md198, 132A 619, 46ALR1; TexCivA 299SW518.

598-60 TexCommnA 26SW(2d)161 (oil company's pollution of stream held not proximate cause of damage to ice company); TexCivA 299SW518.

598-61 CalA 292P651(2dcase) (deposit of hurtful substances on plaintiffs' land); TexCivA 10SW(2d)250. **Separate acts producing single injury.**–133 Okl 222, 271P1010. **Company is liable** for oily and noisome substance deposited on land by stream into which it disposed of its waste matter. 227AppDiv597, 238 NYS508.

598-61½-**New.** Where each of several persons discharging refuse into stream knows that his act, combining with acts of others, results in pollution and nuisance, they are joint tort-feasors though they act independently. 192NC102, 133 SE421.

598-61½-**New.** Agreement of oil operators, having wells in particular field, to appointment of inspector to direct and control storage and discharge of salt water, under court decree, and their contribution to his salary, and submission to his rulings to prevent release of salt water during farming season, has been held, as matter of law, to render operators jointly and severally liable for loss of plaintiff's crops, resulting from negligence in permitting salt waters to escape to bayou used for irrigation purposes. TexCivA 10SW(2d)250.

598-63½-**New.** Parties may be liable as joint tort-feasors where their independent acts combine to pollute waters and such acts are continued with knowledge

thereof. 192NC102, 133SE421.

598-63½-New. City, authorized to build and maintain adequate system of sewers for disposal of its sewage, has been held not entitled to discharge its sewage without purification into stream which is natural outlet to injury of riparian owner, where sewage could have been purified at reasonable expense, and court found that public necessity did not call for pollution of outlet. 88 IndA356, 162 NE241.

598-64 207Cal 8, 276P1017(2dcase).

599-67 25 OhNPNS473, 475 [quotCyc].

599-68 25 OhNPNS473, 475 [quotCyc].

599-69 25 OhNPNS473, 475 [quotCyc].

599-70 25 OhNPNS473, 475 [quotCyc].

600-76 Mo 30SW(2d)471.

600-78½-New. Custom is not defense. 126 Or621, 270P781.

600-78½-New. Mere fact that ice company had contract with city to furnish water suitable for making ice does not relieve oil company from consequences of pollution of water. TexCivA 16SW (2d)146.

600-79½-New. All joint tort-feasors, each of whose acts, combined with those of others, resulted in pollution and nuisance, are indispensable parties. 192NC 102, 133SE421.

600-79½-New. Cropper is not necessary party in action by landowner for damages to growing crop from pollution of waters. 127 Okl 153, 260P60.

600-79¼-New. Tenant, renting land from landlord under contract whereby landlord was to furnish water for irrigation purposes, and each was to have half interest in matured rice crop, was tenant in common of crops raised, and had joint cause of action with his landlord for loss of crops by reason of defendants' pollution of stream used for irrigation purposes. TexCivA 10SW(2d) 250.

600-80 TexCivA 15SW(2d)1053. Petition has been held insufficient.-40GaA 106, 148SE861.

600-82 7F(2d)583; 224Ky192, 5SW (2d)1058.

600-84 CalA 292P651(2dcase); Mo 30 SW(2d)471. See also TexCivA 10SW (2d)250. Burden is on railway to remove presumption of negligence where derailment caused pollution of stream with oil. TexCommnA 27SW(2d)116.

600-85 Cal 291P204; 87 IndA79, 158 NE514; Kan 292P782 (evidence sufficient); TexCivA 15SW(2d)1053. Evidence as to patronage at plaintiff's mill is competent. 191NC1, 131SE407. Evidence that on account of offensive odors and condition of water and sewer witnesses could not work at plaintiff's mill is competent. 191NC1, 131SE407. Testimony of witness residing on plaintiff's premises that subsequent to completion of sewer system he had malaria is competent. 191NC1, 131S407. Evidence held admissible.-220MoA419, 286SW837; Tex CivA 15SW(2d)1053. Evidence held sufficient.-176Ark353, 3SW(2d)57; 207Cal 8, 276P1017(2dcase); 232Ky539, 23SW (2d)942; 144 Okl 54, 289P296; 127 Okl 153, 260P60; TexCivA 15SW(2d)1053. Evidence held insufficient.-CalA 292P 651(2dcase); 143 Okl 290, 288P981; Tex CommnA 23SW(2d)713. Demurrer to evidence properly sustained.-MoA 11 SW(2d)758.

601-87 TexCivA 16SW(2d)146.

601-90½-New. Evidence held sufficient: To show that water after passing defendant's mill was so depleted of oxygen as to destroy fish. 240Mich465, 215 NW325.

601-90½-New. To show that part of such depletion was due to waste from mill. 240Mich279, 215NW325.

601-90¼-New. To show pollution by city. 234 IllA89.

601-90½-New. Evidence held too vague and intangible to support verdict for plaintiffs. 224Ky192, 5SW(2d)1058.

601-90⅙-New. In action against operators of oil field for damages resulting from pollution by salt water of bayou, rendering waters of bayou unfit for irrigation purposes, evidence has been held sufficient to raise issue of negligence of individual operators in their personal relation to field from which salt water was drained through ditches. TexCivA 10SW(2d)250.

601-91 126 Or621, 270P781. Whether pollution of stream produced injury to property held for jury. 191SE1, 131SE 407. Evidence held sufficient for jury.-127 Okl 153, 260P60. Existence and extent of injury held for jury. TexCivA 5 SW(2d)575. Questions for jury.-Mo 30 SW(2d)471. Negligence of defendant in polluting water, damaging lobsters, is for jury. Mass 172NE67(2dcase). Pollution of stream by oil following wreck held for jury under res ipsa loquitur rule. TexCommnA 27SW(2d)116.

601-92 126 Or621, 270P781 (erroneous instruction). Propriety of particular instructions.-162Ga371, 134SE69; 220MoA 419, 286SW837; 191NC1, 131SE407; 127 Okl 153, 260P60. Instructions held erroneous.-220MoA419, 286SW837. Refusing instruction has been held not error.-Mo 30SW(2d)471.

601-92½-New. Instructions erroneous as affording no criterion for measure of damages to crops, stock, or land. 208 Ky723, 271SW1038.

601-92¼-New. Evidence sufficient to go to jury. MoA 2SW(2d)115.

601-92¼-New. Whether plaintiff's land was damaged by copperas, which escaped from defendant's mine and was carried by branch of river over plaintiff's land, is for jury. 227Ky423, 13SW (2d)254.

601-92½-New. Submission of question whether damages were permanent held proper under evidence. 143 Okl 290, 288 P981.

601-93 176Ark353, 3SW(2d)57; Mo 30 SW(2d)471 (no recovery for loss of trade and profits); 227AppDiv597, 238NYS 508; 20 OhA452, 152NE207 (rental value); 143 Okl 290, 288P981. See also Tex CivA 15SW(2d)1053. Damages to proprietor of bathing pool held not special, speculative, and remote. TexCivA 286 SW335. One thousand seven hundred fifty dollars has been held not excessive for pollution of creek waters resulting from operation of coal washery. 232Ky 539, 23SW(2d)942.

601-94 174Ark603, 299SW2; 208Ky 723, 271SW1038; Mo 30SW(2d)471. Where injury is permanent, plaintiff is entitled to recover entire damages in single action. TexCivA 5SW(2d)575.

601-95 208Ky723, 271SW1038; 224Ky 192, 5SW(2d)1058. To recover for crop damage over period of years each year's conditions must be shown. 224Ky192, 5 SW(2d)1058.

601-96 256 IllA452; 208Ky723, 271SW 1038.

601-98 Mo 30SW(2d)471 (necessity of evidence showing cost of removal).

602-1 208Ky723, 271SW1038; 220MoA 419, 286SW837.

602-2 Where plaintiff did not have title to property during period limited by statute, judgment for damages on basis of complete title will be reversed unless plaintiff remits excess. 20 OhA452, 152 NE207.

602-3 208Ky723, 271SW1038.

602-4 316 Ill 598, 147NE453, 38ALR 1384.

602-7½-New. Mitigation of damages.-Farm owner is under no duty to fence stream to keep cattle from wading in polluted stream and mitigate his damage. 316 Ill 598, 147NE453, 38ALR1384.

602-7½-New. Apportionment of damages held properly made where only part of damage was due to pollution from defendant's mill. 240Mich279, 215NW325.

602-7¼-New. Necessity for causal connection.-Damages having no causal connection with pollution of waters are not recoverable. 127 Okl 40, 259P650.

602-7⅙-New. Speculative damages cannot be recovered. 224Ky192, 5SW(2d) 1058.

602-7⅙-New. Damages avoidable by exercise of ordinary care are not recoverable. 224Ky192, 5SW(2d)1058.

602-7⅙-New. Damages held not shown to be inadequate. TexCivA 1SW(2d)738.

602-7⅛-New. Loss of profits would be element of damages if removal cost would be less than difference in market value. Mo 30SW(2d)471.

602-7⅙-New. Nominal damages may be recovered on showing of breach of duty where no appreciable detriment is shown. 143 Okl 290, 288P981.

602-9 14F(2d)871; 18F(2d)736; 181 Ark216, 26SW(2d)57 (injury to stream rendering it unfit for use of riparian proprietors held not slight); 207Cal 8, 276P1017(2dcase); 249 IllA133; Tex CivA 299SW518; TexCivA 16SW(2d) 408. Parties.-150Md198, 132A619, 46 ALR1. Notice of suit.-150Md198, 132 A619, 46ALR1. Hardship on users of stream will not prevent injunction against pollution of stream. 150Md198, 132A619, 46ALR1. Petition held sufficient.-TexCivA 16SW(2d)408. Injunction against operation of gravel plant so as to pollute stream held not destructive of progress of state. 181Ark216, 26SW (2d)57. Laches not shown.-181Ark216, 26SW(2d)57. Remedy by action for damages successively occurring not adequate.-181Ark216, 26SW(2d)57. That operation of gravel plant is lawful and useful business is not defense to action for injunction. 181Ark216, 26SW(2d) 57.

603-15 TexCivA 16SW(2d)408. Court does not abuse exercise of discretion by granting temporary injunction against one of defendants engaged in sulphur mining. TexCivA 16SW(2d)408.

603-16 59 OntL520, [1926] 4DomLR 1138 (injunction held too wide). Injunction has been held too broad.-Cal 291P 204. Injunction has been held not too broad.-Cal 291P204.

603-17½-New. Evidence held sufficient to show contamination of waters of stream by discharge of water from irrigation canal justifying injunction. 119 Or626, 250P742.

603-17½-New. Evidence held insufficient to show that injunction would destroy defendant's business. 181Ark216, 26SW(2d)57.

604-22 200Cal 81, 252P607; 111Conn 352, 150A60; 150Md125, 132A587, 592 [citCyc]; 99NJEq384, 131A892; 191NC 1, 131SE407 (instruction held proper); 194Wis82, 215NW818.

604-25 220Ala342, 124S896; 99NJEq 384, 131A892; 252NY236, 169NE289; 122 Or331, 258P183.

605-27½-New. Upper riparian proprietor has no cause for complaint or redress concerning use of water after it has passed his land. 206Cal 508, 274P 969.

605-27½-New. Variations brought about by man's intervention, must be given consideration in determining right to divert flow. 338 Ill 211, 170NE260.

605-28 116Tex603, 297SW225, 53ALR 1147.

605-29 111Conn352, 150A60; 99NJEq 384, 131A892; 228AppDiv585, 240NYS 647 (riparian owner held entitled to full flow save such as might lawfully be taken for domestic purposes).

605-31 150Md125, 132A587.

606-33 99NJEq384, 131A892.

606-35½-New. Right to store water of navigable river to injury of lower riparian owners is not justified by claim that it is done in aid of navigation as lessee of federal government where lessee acquired no right to be exercised in aid of navigation. 200Cal 81, 252P607.

606-35½-New. Damages caused by erection of dam by upper riparian owner are damnum absque injuria where dam serves useful purpose and merely increases area of lake thereby occasioning greater evaporation and percolation and interferes, by greater water pressure, with springs in bed of lake. 238Mich 632, 214NW226.

606-36 99NJEq384, 131A892.

606-37½-New. or so dam up water as to appreciably diminish amount of water which would naturally flow to lower owners or materially interfere with continuity of flow; 99NJEq384, 131A 892.

607-40 99NJEq384, 131A892.

607-44 99NJEq384, 131A892.

608-48 Diversion will be enjoined where otherwise statute of limitations would run. 116Tex603, 297SW225, 53 ALR1147.

608-51 219AppDiv83, 219NYS206.

608-52 202Cal 56, 259P444, 56ALR264; 197 Ind430, 151NE220; 131Misc514, 227

NYS209. Where rights of riparian owners between points of diversion and return have been eliminated by condemnation, it is equivalent to consent of all land owners below to upper diversion. 202Cal 56, 259P444, 56 ALR264.

610–66½–New. ; thus an action in trespass will lie. 6PaDist&Co 129.

612–99½–New. Statute of limitations need not be pleaded, in action of trespass against borough for diversion. 6Pa Dist&Co 129.

613–4 207Cal181, 277P330.

613–8 221Ky695, 299SW565. **Evidence as to patronage at plaintiff's mill** is competent. 191NC1, 131SE407.

614–19 Instructions on measure of damages held proper, taking charge as whole. 191NC1, 131SE407. **Instruction not to estimate damages** by flood waters, if unable to determine portion caused by embankment on defendant's land, held erroneous. 116Tex538, 295SW922.

614–24 Cal 287P93.

615–33 Mandatory injunction against defendant not answering to destroy embankment constructed on his land by codefendant held erroneous. 116Tex538, 295SW922.

616–35½–New. Appropriator of flood waters, who trespassed on upper riparian owner's land by backing water over property line, cannot enjoin riparian owner from diverting water. 116Tex603, 297SW225, 53ALR1147.

616–36 See also 205Cal54, 269P915. **Where no damage has been sustained or is threatened,** injunction will not be granted. 228AppDiv585, 240NYS647.

616–42 220Ala342, 124SS896. **Laches** not shown.–228AppDiv585, 240NYS647.

616–43½–New. Diversion of water used to flush defendant's sewerage system from its natural flow and resulting pollution causing irreparable damage to plaintiff's land will be enjoined. 190NC54, 128SE467.

617–47½–New. Riparian owner may not enjoin diversion which, prior to defendant's developments, never flowed into stream, but may enjoin diversion of water formerly running into stream in question. NJCh 129A255.

618–50 One, not a riparian owner, having right to appropriate flood water, cannot enjoin diversion of riparian water by riparian proprietor. 116Tex603, 297SW225, 53ALR1147.

618–53 Evidence held sufficient to show riparian ownership. 202Cal766, 262P799.

619–61 19F(2d)510.

619–62½–New. Order must not be broader than relief demanded. 205Cal54, 269P915.

619–63 219AppDiv83, 219NYS206.

619–65 202Cal766, 262P799.

620–69 174Ark432, 295SW355; 123Or549, 262P243.

620–70 218Ala397, 118SE556; 174Ark432, 295SW355, 357 [quotCyc]; 181Ark574, 268SW(2d)892(2dcase); 231Ky606, 218SW(2d)1010; 251Mich67, 231NW70; 143Miss537, 108S708; 254NY152, 172NE452; 130Or687, 280P340(2dcase); Tex CivA 272SW527. But see 232Ky778, 24SW(2d)599. **Doctrine applies to boundaries of municipalities.**–231Ky606, 218SW(2d)1010. **Exception of land under water from conveyance of adjacent land** should be framed in plain and express words. 254NY152, 172NE452.

620–70½–New. Title to bed of stream being conveyed to plaintiff prior to defendant's acquisition of title to shore line, defendants took with notice. 174Ark432, 295SW355.

620–72½–New. Injunction will not lie against one causing only small percentage of additional volume of stream washing away banks. 150Md198, 132A619, 46ALR1.

620–73 174Ark287, 294SW996.

622–86 130Or687, 280P340(2dcase) (thread of stream remains boundary).

622–89½–New. In absence of evidence as to condition, presumption is that any change occurring during certain period was by accretion and that thread of stream remained substantially the same. 130Or687, 280P340(2dcase).

622–89½–New. Burden of proof is on one alleging that location of boundary **has been changed by forces of nature.** 130Or687, 280P340(2dcase).

622–90 163Ga867, 137SE556; 143Miss537, 108S708, 254NY177, 167NE213. **The law of accretion,** etc. 318Mo991, 2SW(2d)582.

623–91 But see 218Ala397, 118SE556.

623–96 143Miss537, 108S708.

623–1 143Miss537, 108S708. **Old shore line is properly disregarded** in apportioning new shore line between adjoining landowners where river recedes after encroachment. 143Miss537, 108S708.

624–6 254NY177, 167NE213.

624–9 Patentee of lands patented by government in terms of specified acreage in lots of portional sections adjacent to meandered stream holds title to land added by accretion, and there is not a mere rebuttable presumption of such ownership. 119Kan478, 240P400.

624–11 Allegations of answer in action for value of gravel removed held improperly stricken. 181Ark574, 268SW(2d)892(2dcase). **Instructions held proper.**–130Kan356, 286P233.

624–13 Evidence held sufficient.–218Ala397, 118SE556; 220Ala690, 127SE171; 130Kan356, 286P233, 165La929, 118SE555. **Evidence held insufficient.**–MoA 188SW(2d)559.

624–13½–New. In suit for ejectment and conversion of gravel from lands claimed by defendant as accretion by change in channel of stream, evidence that plaintiff had benefit of accretions at another bend in stream, is properly refused. 218Ala397, 118SE556.

625–15 220Ala690, 127SE171. **Avulsion causes boundary to change.**–130Or687, 280P340(2dcase).

625–16 163Ga867, 137SE556; 217Ky231, 289SW257. **Evidence held sufficient to show that straightening of creek occurred soon after defendant moved on land.** 217Ky231, 289SW257.

625–22 168La997, 123SE653.

626–24 "Percolating waters" defined.–148Va437, 139SE308, 55ALR1376.

Character of waters as percolating is not changed by fact that in their underground course they may at places come together to form of veins or rivulets. 148Va437, 139SE308, 55ALR1376.

626–27 Fla 129S582; **Oh** 170NE874; 25OhNPNS325; **Vt** 152A442; 148Va455, 139SE314. See also 30Hawaii 912 (artesian wells).

626–28 25OhNPNS325. See also 69Utah128, 253P677 [citCyc].

627–29 76CalApp, 244P225; 87CalA617, 262P425; **CalA** 266P341.

627–29½–New. Riparian rights attach to percolating waters after they become part of flowing stream. **Vt** 152A442.

627–30 25OhNPNS325; 148Va437, 139SE308, 55ALR1376. **Meaning of "defined and known channel."**–148Va437, 139SE308, 55ALR1376.

628–32 Oh 170NE874.

628–33 87CalA617, 262P425.

628–37 Or 293P424.

628–39 That spring on adjoining land results from seepage from adjoining owner's reservoir does not give owner of reservoir right to use of such waters but they belong to owner of land on which spring is located. 135Wash156, 237P498.

628–39½–New. Water developed by owner of rice lands by means of deep pumps is not natural or riparian water. CalA 266P1076.

629–40 CalA 266P341.

629–41 87CalA617, 262P425.

629–42½–New. Private right of landowner to use of water percolating beneath his land is not made subject to regulation as public property by fact that number of landowners in statutory water district might be affected by such use. CalA 266P341.

629–43 150Md125, 132A587.

629–44 25OhNPNS325; 148Va437, 139SE308, 55ALR1376; 148Va455, 139SE314.

629–45 202Cal47, 258P1095. **Change of place of diversion.**–See also 202Cal47, 258P1095.

630–46 Oh 170NE874; 148Va455, 139SE314. **Mining or quarrying operations,** etc. 219Ky783, 294SW478.

630–47 Waters cannot be thus intercepted, etc. 150Md125, 132A587.

631–54 32F(2d)66.

632–62 148Va437, 139SE308, 55ALR1376. **Evidence held to show** that underground water that fed spring came from percolating waters and not from well defined underground spring. 148Va437, 139SE308, 55ALR1376.

632–63½–New. Evidence held to justify finding that town did not divert water from private springs. 87Colo420, 288P631.

632–64 47Ida119, 272P254. **For permanent and irreparable injury,** measure of damages is diminution in value of property to which water right was appurtenant. 47Ida119, 272P254.

632–66½–New. Evidence held sufficient to go to jury. MoA 28SW(2d)115.

632–66½–New. In action for damages to spring, evidence that defendant constructed bulkhead in mining tunnel on its boundary through which water spurted is competent. 47Ida119, 272P254.

632–66½–New. Damages for destruction of spring may be proved by evidence other than market value of property where property has no market value. Ida 289P608.

632–67 Cal 291P577; 87CalA617, 262P425. **Complaint held to state cause of action.**–52SD458, 218NW599. **Affidavits and depositions taken after notice** held evidence upon which final hearing could be had. 143Va460, 130SE408. **Evidence held to support contention** that complainants would be greatly damaged by diversion of water by piping from spring. 143Va460, 130SE408. **Evidence held to show that diversion did not affect plaintiff's water supply.** 237Mich453, 212NW81. **Evidence held to justify dismissal of bill.**–237Mich453, 212NW81. **Laches.**–52SD458, 218NW599. **Parties.**–CalA 266P341. **Water district has no right of action** where it owns no land affected by diversion of percolating waters. CalA 266P341.

633–68 Evidence in action to enjoin diversion of waters of certain spring held sufficient to sustain finding that spring is tributary to certain creek. 202Cal47, 258P1095. **Evidence supporting finding of interference** with flow of water to plaintiff's spring. CalA 291P419. **Landowner has no plain, speedy, and adequate remedy at law** where city, contrary to agreement, is taking from his land water needed for his use and injunction is necessary to prevent multiplicity of suits. 52SD458, 218NW599. **Complaint held insufficient.**–CalA 266P341. **Evidence held sufficient** to sustain finding that town did not partly divert water from spring. 87Colo420, 288P631.

634–69 167Ga834, 146SE753. **Judgment** not erroneous in not fixing amount of water defendant could take from his spring. CalA 291P419.

634–74½–New. Whether proposed use and diversion of waters is reasonable is question of fact. **Vt** 152A42.

634–74½–New. User of water in stream has interest enabling him to sue to restrain unreasonable diversion of percolating waters in violation of riparian rights. **Vt** 152A42.

634–75 Lake as boundary.–94Fla502, 113S708. **Water which comes to rest** permanently in basin made by nature, though flood water once, becomes a "lake" or "pond." 116Tex603, 297SW225, 53ALR1147.

635–78 233Ill456.

635–79 12PaDist&Co88, 89 [citCyc]. **Owners of lots across street** from Lake Michigan have no riparian rights except as part of public. 339Ill483, 171NE550.

635–80 133Misc202, 235NYS811; 132Misc786, 230NYS621; 116Tex603, 297SW225, 53ALR1147.

635–81 See also 94Fla502, 113S708, 710, [quotCyc]. **"Lowering level."**–94Fla502, 113S708 (Rev. Gen. St. [1920] §§1190, 1191).

636–84½–New. Riparian owners on lake cannot acquire any right by prescription to keep water impounded for boating, bathing, or fishing. 132Misc786, 230NYS621.

636–90½–New. Ownership of lakes.–Fresh water lake having inlet and outlet consisting of small brooks may be sub-

ject to private ownership. 133Misc502, 233NYS11.

636-91 133Misc502, 233NYS11; 254NY152, 172NE452.

637-93 42F(2d)474; 231Ky606, 21SW(2d)1010; 248Mich410, 227NW741; 133Misc502, 233NYS11. **Doctrine applies to boundaries of municipalities.**–231Ky606, 21SW(2d)1010. **Exception of land under water from conveyance of adjacent land** should be framed in plain and express words. 254NY152, 172NE452.

637-95 6PaDist&Co 493.

637-95½-New. Where grantee does not take land under water he has no right to go thereon for any purpose. 254NY152, 172NE452.

637-95⅓-New. User of land under water without owner's permission constitutes trespass. 254NY152, 172NE452.

637-97 7F(2d)882; IndA 162NE661.

638-5 See also 94Fla502, 113S708, 710 [quotCyc]. **Evidence.**–Mass 169NE512.

639-6 See also 94Fla502, 113S708, 710 [quotCyc].

639-7½-New. Where state has title to water and bed of lake it may sue to abate purpresture or eject trespasser. 166La738, 117S812.

639-8 132Misc786, 230NYS621. See also 94Fla502, 113S708, 710 [quotCyc]. **Injunction held properly refused** to prevent use of water by lower proprietor entitled to benefit of restrictive covenant. 165Ga159, 140SE360.

639-9 Abuse of discretion held not shown in denying temporary injunction restraining city counsel from signing contract for construction of sewage system with outlet into lake. 170Minn442, 212NW909.

639-10 74CalA528, 241P418. **Other definitions.**–CalA 283P323.

639-11 39F(2d)165; CalA 283P323; 309Mo 189, 274SW448; 311Mo 175, 279SW50.

640-12 Cal 291P825. **Flood waters, as distinguished from surface waters,** are waters spreading out from overflowing streams having definite channels. 74CalA528, 241P418.

640-16 116Tex82, 286SW458 (recognizing rule). **Flood waters,** of no substantial use to riparian owner or lands, may be appropriated and removed. 94Fla502, 113S708.

641-17 Cal 291P825; 87CalA617, 262P425; CalA 283P323 (water coming on plaintiff's property because of street and other improvements); 164Ga457, 139SE9; 338Ill211, 170NE260; 201Iowa1099, 206NW624; 204Iowa782, 216NW27; Iowa 230NW831; 126Kan158, 266P926; 234Ky511, 28SW(2d)765; 73Mont465, 236P1067 (owner who prevented surface water from flowing on his neighbor's land is not bound to continue to do so); 132Misc556, 230NYS550; 196NC383, 145SE774; 31OhA213, 165NE310; 13PaDist&Co 267; RI 150A78 (2dcase); TexCivA 290SW569. **The rule does not apply to flood waters of river.**–Cal 291P825; CalA 283P323. **Fact that water falling on dominant tenement had no natural outlet** from servient tenement does not relieve servient tenement from receiving water falling on dominant tenement. 332Ill185, 163NE387. **If road is not public road** between lands of plaintiff and defendant, latter may fill ditch on his side of road without liability to plaintiff for overflow. 197NC37, 147SE621. **A "permanent structure,"** authorizing single recovery, when not remedied, removed or abated or of durable character. 234Ky511, 28SW(2d)765. **Remedy against those causing flow** does not relieve lower owner from liability to upper for obstructing flow. CalA 283P323.

641-18 Cal 291P825; 164Ga457, 139SE9. **"Natural" distinguished from "original" flow.**–CalA 283P323.

641-18½-New. **By statute in Texas,** owner of land is forbidden to protect his own land from damage by construction of dikes or embankments diverting surface waters so as to damage adjoining owner. CivA 290SW569.

641-18⅓-New. Under such statute, landowner may recover damages caused by enlargement of embankment by adjoining owner so as to increase volume of water. TexCivA 290SW569.

642-19 29F(2d)630; 39F(2d)165; 221MoA472, 282SW512; MoA 300SW301; Nebr 232NW735; 253NY436, 171NE698; 142SC328, 140SE575; 118Tex310, 15SW(2d)1010; TexCivA 291SW322. See also 116Tex82, 286SW458. **Exception to rule.**–141Miss851, 106S88. **Construction of road embankment.**–176Minn339, 223NW301. **Land is subject to no servitude** to receive water whose natural flow has been diverted to it. 118Tex310, 15SW(2d)1010. **In Texas.**–CivA 17SW(2d)841(2dcase). But see CivA 17SW(2d)187.

643-20 216Ala237, 113S50; 202Iowa1330, 212NW120; 112Okl1, 239P599; 127Or420, 272P554.

643-21 216Ala237, 113S50; 221MoA472, 282SW512; 112Okl1, 239P599; 142SC328, 140SE575. **Hindering waterflow or raising water level,** causing overflow on upper lands, held breach of servitude for natural drainage. 216Ala237, 113S50.

643-21½-New. **In Iowa** neither civil-law nor common-law rule has been adopted in entirety. 201Iowa826, 208NW499.

643-21⅓-New. Landowner seeking to enjoin maintenance of dike to ward off backwater from river.–Determination of question which lands constitute dominant estate depends on relative elevation and not on general movement of flood waters. 201Iowa826, 208NW499.

643-21¼-New. Highlands which are last covered by backwater from river are not servient to adjoining low lands which are first covered by such backwater. 201Iowa826, 208NW499.

643-21⅕-New. Evidence in action to enjoin maintenance of dike held insufficient to show that defendant's land was servient to plaintiff's as to surface water. 201Iowa826, 208NW499.

643-21⅙-New. Defendant held not liable for damages sustained by plaintiff caused by water diverted from its natural flow by others and by defendant's embankment thrown back upon plaintiff's land. TexCivA 283SW584.

643-21⅐-New. Defendant held liable for injury to land resulting from embankment obstructing natural flow of water. TexCivA 283SW584.

643-21⅛-New. Land is subject to no servitude to receive on it water, natural flow of which has been diverted to it. TexCivA 283SW584.

643-21⅑-New. Liability of lower owner held dependent on failure of duty to maintain condition on lower land after purchase by defendant. 216Ala237, 113S50.

643-21 1/10-New. Purchaser of lower lands with notice of conditions causing overflow is under duty to remedy situation. 216Ala237, 113S50.

643-21 1/11-New. Those who build structures across natural drainways are under duty to provide natural passage for waters reasonably to be anticipated. 118Nebr355, 224NW864.

643-22 96PaSuper505 (in absence of negligence); 151Va125, 144SE414. **Erratum.**–In 1926 Annotations, strike out "29ALR1213." **In Pennsylvania.**–13PaDist&Co 267.

643-23½-New. Owner of urban land is not required to accept flow from higher land but can obstruct its flow and turn it back on higher land. 13PaDist&Co 267.

643-25 227AppDiv206, 237NYS273; TexCivA 27SW(2d)574.

644-26 149Miss269, 115S200.

644-27 217Ala82, 114S686; 208Iowa1366, 227NW419(2dcase). But see 204Iowa782, 216NW27.

645-28 112Okl1, 239P599. See also 208Iowa1366, 227NW419(2dcase).

645-29 142Miss743, 107S871. **Railroad closing up opening under tracks along stream** is not liable for injury done to land where stream overflowed. 39F(2d)165. **In Iowa.**–208Iowa1366, 227NW419(2dcase).

645-29½-New. Railroad's construction and maintenance of ditch on its right of way creates **no rights in adjoining land owners** and imposes no servitude on railroad's premises. 208Iowa1366, 227NW419(2dcase).

645-30 TexCivA 288SW481. See also 83Colo510, 267P605.

645-31 Cal 291P825; 164Ga457, 139SE9; 261Mass174, 158NE535; Minn 231NW921; 253NY436, 171NE698 (holding driveway outlet not to be an artificial conduit); 39OklACR346. **Railroad,** digging drainage ditch across yard, held not to have diverted surface waters. TexCivA 288SW481. **Adjoining landowner** could not by additional ditches entering water courses increase flow of water to injury of neighboring lands. 261Mass174, 158NE535. **Plaintiff's land** could not be subjected to servitude of additional flow of water by construction of new ditch. 261Mass174, 158NE535. **Motive in discharging surface water** on lands of another is unimportant in absence of breach of duty by person discharging it. 221MoA472, 282SW512. **Negligence is essential to liability for discharge from artificial pond.**–221MoA472, 282SW512. **Water other than surface water.**–SD 232NW907.

645-31½-New. Lower owner liable for cost where, through irrigation ditch on his land, siphons are necessary to allow natural drainage from upper estate. 158La701, 104S623.

646-32 175Ark1169, 1SW(2d)552; 164Ga457, 139SE9; 208Iowa1229, 227NW91; 115Nebr697, 214NW633; TexCivA 290SW569. **In North Carolina.**–197NC37, 147SE621. See also 196NC383, 145SE774 (upper owner may not increase natural quantity of water or change natural manner of flow on servient land). **Where only gathering of surface water is drained,** acceleration and slight increase in volume, not intended to injure lower proprietor but benefiting land of upper proprietor who constructed drain, does not cause legal injury to lower proprietor. 197Wis366, 222NW307.

646-33 83Colo510, 267P605; 265Mass390, 164NE467; TexCivA 291SW322.

647-35 CalA 283P323; 13PaDist&Co649; TexCivA 292SW560; Sask [1928] 3DomLR56.

647-38 23AlaA479, 127S257; 221MoA472, 282SW512; MoA 300SW301; MoA 1SW(2d)218; 114Nebr397, 207NW680; 132Misc92, 228NYS738; 9PaDist&Co462; 13PaDist&Co 267; TexCivA 291SW322; Man [1927] 1DomLR82; Sask [1929] 2DomLR928. See also 169Ark271, 273SW715. **Negligence in construction of ditch** need not be shown. MoA 300SW301. **Causing waters to back up.**–221MoA472, 282SW512. **Negligence in construction or maintenance of reservoir or pool** renders owner liable for damages resulting therefrom. 221MoA472, 282SW512. **That natural drainage is toward land on which water is cast** does not affect rule. MoA 1SW(2d)218. **Whether ditch is dug exactly or approximately to adjoining land** is immaterial. MoA 1SW(2d)218.

648-39 114Nebr397, 207NW680.

648-40 Cal 291P825; 202Iowa1330, 212NW120; 208Iowa1229, 227NW91; 118Tex633, 15SW(2d)1023; TexCivA 291SW322.

649-41 202Iowa1330, 212NW120.

649-43 234Ky511, 28SW(2d)765 (holding lower estate subject to easement).

649-44 Ida 288P427; 101NJEq462, 138A386; 127Or45, 270P919.

649-45 178Minn203, 226NW569(2dcase), 65ALR124; 127Or45, 270P919; 142SC328, 140SE575. **In making adverse entry, color of title or claim of right of entry** is not necessary in some jurisdictions. 178Minn203, 226NW569(2dcase), 65ALR124 (entry with intent to hold exclusive possession sufficient).

651-53 198Cal586, 246P319, 48ALR1244 (such situation constitutes nuisance); 257Mass107, 153NE337; TexCivA 276SW471, 473 [citCyc].

651-55 TexCivA 1SW(2d)661.

651-57½-New. Casting rainwater on adjoining land by changing grade of one's lot is not actionable, though damage ensues. NJCh 145A337.

651-58 Sask [1929] 2DomLR928. **Ba-**

sis for action is negligence.–234Ky511, 28SW(2d)765.
651–59 Cal 291P825; **CalA** 283P323; 3LaA462. **Basis of action for obstruction** is disregard of upper owner's right, and depreciation in value. 234Ky511, 28SW(2d)765.
651–60 114Nebr397, 207NW680; **Tex CivA** 290SW569; **TexCivA** 3SW(2d)894.
652–63 233Ky152, 25SW(2d)31. **Duty of plaintiff to prevent or mitigate injury.**–**MoA** 1SW(2d)218. **Plaintiff's construction of embankment on defendant's land under mutual mistake as to boundary** does not relieve defendant from liability for damages caused by collection of water on defendant's land in body through ditches thereby causing break in embankment. **MoA** 1SW(2d)218.
652–66½–New. That lower proprietor might have relief against those causing diversion of water does not relieve him of liability to upper owner for obstructing flow. **Cal** 291P825.
652–68 259Mass528, 156NE859.
653–72 259Mass528, 156NE859.
653–74 Refusal to permit plaintiff to raise issue of permanent or temporary character of obstructions held not error under pleading. 234Ky511, 28SW(2d)765.
653–75 142SC328, 140SE575. **Sufficiency of allegations.**–169Ga460, 150SE577; 233Ky187, 25SW(2d)355; 221MoA472, 282SW512; **TexCivA** 285SW338.
653–76 202Iowa1282, 211NW842. **Where both parties treat obstruction as permanent,** court will also so treat it. 234Ky511, 28SW(2d)765.
653–76½–New. Issues.–In action for damages from water draining from defendant's roof, whether voluntary repairs by defendant was admission of liability to make repairs is not within issues in absence of allegation that defendant had leased building to tenant. 221MoA993, 295SW830.
653–76½–New. Evidence of damage not sought in petition is incompetent. 233Ky187, 25SW(2d)355.
653–77 162La815, 111S174; 151Va125, 144SE414.
653–79½–New. Person claiming prescriptive right to maintain dyke obstructing natural drainway across his land has burden of showing with substantial certainty extent of claimed right. **Ida** 288P427.
654–83 198Cal586, 246P319, 48ALR1244 (failure to admit evidence of boundary to show defendant discharged rainwater from roof shed on own ground held error); **TexCivA** 27SW(2d)574 (evidence held admissible).
654–84 198Cal586, 246P319, 48ALR1244 (holding evidence insufficient to sustain finding that rainwater from defendant's shed fell on plaintiff's land); 232Ill185, 163NE387; 202Iowa1330, 212NW120; **Iowa** 230NW881 (evidence sufficient to show depression was natural water course); 235Ky229, 30SW(2d)950; 162La815, 111S174; 172Minn501, 215NW853; 177Minn360, 225NW145(2dcase); **Minn** 231NW921; 73Mont465, 236P1067 (evidence that prior to construction of flume and ditch by defendant storms of like severity did no damage to plaintiff's land held insufficient to show damage would not have occurred but for acts of defendant). **Evidence held to support verdict.**–164Ga457, 139SE9. **Evidence held sufficient** to authorize issuance of injunction. 115Nebr697, 214NW633.
654–87 142SC328, 140SE575. **Proximate cause of injury** is question for jury. **SC** 155SE839.
654–88 82NH350, 134A574. **Whether there was heavy rain on day of injury** is question for jury on conflicting evidence. 221MoA993, 295SW830. **Whether extraordinary rainfall constituted act of God** has been held question for jury in view of evidence that culvert was insufficient to carry off unusual rains. 149Va809, 141SE834.
654–89 265Mass390, 164NE467; **Tex CivA** 11SW(2d)618.
654–90 Propriety of particular instructions.–233Ky187, 25SW(2d)355; 235Ky229, 30SW(2d)950; 176Minn339, 223NW301; 149Miss269, 115S200; **MoA** 1SW(2d)218; 196NC383, 145SE774; 130Okl213, 266P775; **TexCivA** 293SW215. **Instruction held proper.**–164Ga457, 139SE9.
654–91 73Mont465, 236P1067 (evidence that defendant in constructing flume and ditch in gulch did no more than convey surface water which would naturally flow down gulch held not sufficient to submit case to jury where plaintiff's property was injured in severe storm). **Proximate cause of overflow** held for jury. 172Minn501, 215NW853. **Whether obstruction is permanent** is, where there is no room for doubt, a question of law. 234Ky511, 28SW(2d)765.
654–91½–New. Whether plaintiff was negligent in failing to maintain wire basket on downspout to protect against débris from adjoining building is question for jury on conflicting evidence. 221MoA993, 295SW830.
654–91½–New. Whether defendant conveyed water to plaintiff's land in ditches and discharged it there in body is question for jury on conflicting evidence. **MoA** 1SW(2d)218.
654–91¼–New. Findings of jury held consistent. **TexCivA** 27SW(2d)574.
654–91½–New. Whether drainage onto plaintiff's lower lot was caused solely by way defendants graded their lot held jury question. 235Ky229, 30SW(2d)950.
654–92 233Ky187, 25SW(2d)355 (damages sought for diversion of surface waters into basement held temporary); 196NC383, 145SE774. **Where no damage shown,** plaintiff is entitled to nominal damages. 261Mass174, 158NE535. **Damages held not excessive.**–**CalA** 283P323; **MoA** 12SW(2d)518.
655–94 TexCivA 293SW215.
655–96 See also 132Misc556, 230NYS550.
655–99 132Misc556, 230NYS550.
655–1 See also 132Misc556, 230NYS550. **What are permanent injuries.**–130Okl213, 266P775.
656–2 Cal 291P825; **CalA** 283P323; **TexCivA** 273SW622. **Damages held not excessive. Cal** 291P825 (one thousand dollars).
656–5½–New. Landowner may minimize damages from defendant's diverting surface water by erection of wall at reasonable cost. 225Ky255, 8SW(2d)421.
656–6½–New. Where issue of damages to entire tract was submitted and all found injured by precipitation of impounded water on part, damages to entire tract was properly awarded. **Tex CivA** 285SW338.
656–6½–New. Where land would have been flooded if state had done nothing, damages cannot be recovered because work by state did not prevent flooding. 132Misc92, 228NYS738 (building of canal by state).
656–7 126Kan158, 266P926; 261Mass174, 158NE535; 114Nebr397, 207NW680; **NJCh** 129A420; 132Misc556, 230NYS550; 127Or420, 272P554; 9PaDist&Co462; 13PaDist&Co267; **TexCivA** 1SW(2d)661. See also 202Iowa1330, 212NW120. **Where injury doubtful.**–98NJEq373, 129A616. **Petition held sufficient** to show inadequacy of legal remedy and irreparable injury. **TexCivA** 3SW(2d)894. **Burden of proof.**–**Iowa** 228NW561. **Evidence held insufficient** to establish diversion by defendant. **Iowa** 228NW561.
657–8 127Or420, 272P554.
657–9 SD 232NW907, 909 [citCyc]. But see 5LaA484.
657–13 TexCivA 3SW(2d)894.
657–15 118Nebr355, 224NW864.
657–17½–New. Damages may be recovered in injunction suit. 114Nebr397, 207NW680; 132Misc556, 230NYS550.
657–17½–New. Landowner seeking to enjoin maintenance of dike to ward off backwater from river must show that his lands constitute dominant estate, and diked lands servient estate, and that dike materially and substantially interferes with surface drainage. 201Iowa826, 208NW499.
657–17¼–New. Landowner may enjoin construction of building which will discharge from its roof rain water upon his land. **TexCivA** 276SW471.
657–17½–New. Fact of long unmolested use of tile drain on dominant estate discharging surface water on adjoining land is corroborative of claim of original right so to construct and use it. 202Iowa1330, 212NW120.
657–17½–New. Defendant is properly punished for contempt where he failed to comply with judgment ordering him to close up drain and prevent flow therefrom to go on plaintiff's land. 197Wis366, 222NW307.
658–19 See also 123Or501, 262P946, 948 [citCyc]. **Building of dam on nonnavigable stream** and backing up considerable body of water does not change status of stream. **MoA** 282SW473. **Owners may erect fences to prevent others from using waters of artificial lake** overflowing their lands unless such fences constitute nuisance. **MoA** 282SW473. **Owners may open pipes in dam and lower waters of lake** in absence of estoppel or dedication or prescription of waters of dam or lake. **MoA** 282SW473. **Artificial channel serving principally in lieu of channel** for period of prescription becomes "water course." 157Miss498, 128S73.
658–22 Acquisition of voluntary easement in Philippines.–51Philippine15.
658–23 48Ida734, 285P474.
659–27 Right acquired by prescription is limited to extent and manner of use during prescriptive period. 48Ida734, 285P474.
659–30 48Ida734, 285P474.
659–31½–New. In Vermont, action for defendant's failure to open drainage ditch as ordered by town selectman cannot be maintained till plaintiff has opened ditch. 100Vt23, 134A594.
659–31½–New. And before bringing action, plaintiff must open his part of ditch. 100Vt23, 134A594.
660–36 84Mont68, 274P151.
661–40 48SD554, 205NW654.
662–51 Owner of easement of right of way over lands of another must use easement so as not to materially interfere with ordinary use of land by owner. 48Ida734, 285P474.
662–56 321Mo186, 9SW(2d)978.
663–60 Landowner held entitled to construct road at any elevation where flow through pipe was not obstructed. **Utah** 262P274.
663–61 68CalA317, 229P57.
663–62 Land held not subject to easement because brook had been piped across land less than twenty years. 252NY236, 169NE289.
663–63 43Ida198, 252P865; 231Ky745, 22SW(2d)131; **LaA** 130S863.
665–67 169Minn449, 211NW676. **Mere concurrence of damage** by surface water, and construction of ditch, held insufficient to make case for jury. 169Minn449, 211NW676.
665–68½–New. No liability attaches where damage caused by overflowing of natural water courses due to drainage improvement. **Alta** [1927] 2DomLR387.
665–74½–New. Damages for injuries from overflow held sufficient. **LaA** 130S863.
666–84½–New. Level of lake adjoining plaintiff's land held not shown raised above natural level, rendering land unfit, by pumping water into lake. 250Mich505, 230NW900(2dcase).
666–84½–New. Owner of land subject to easement of right of way for ditch is not liable for damages caused by use of land in ordinary course of husbandry. 48Ida734, 285P474.
666–84¼–New. Such owner cannot be enjoined from permitting hogs to run within enclosure within which ditch runs. 48Ida734, 285P474.
666–84½–New. Such owner is not required to fence out hogs from ditch. 48Ida734, 285P474.
666–85 229Ky339, 17SW(2d)194; **MoA** 285SW175; 121Or628, 253P3.
666–86 121Or628, 253P3.
667–89 Drainage district has right as against riparian owners to construct dam across bayou to protect district against overflow waters of river in flood time. 154Miss119, 122S205.
667–89½–New. Right to release im-

pounded waters.–Upper riparian owner who has impounded waters of stream may release impounded waters through his dam without liability to lower owner provided he does not swell natural flow of stream below dam to damage of lower owner. 121 Or628, 257P16.

667-90 CalA 291P892. **Regulation and erection of dams** and maintenance of reservoirs is within police power. **CalA** 291P892.

667-92 State engineer has jurisdiction with respect to power dam constructed on former Indian lands, where title passed from United States, as trustee, into private ownership. 39F(2d)800. **State engineer's approval of plans** for power dam 35 feet high does not amount to necessary statutory approval of 35 foot dam containing superstructure. 39 F(2d)800.

667-97½-New. Matter considered by board upon application for permit for dam or other obstruction. 14PaDist&Co 68.

667-97½-New. County board of supervisors has been held without power to regulate erection of dams and reservoirs under delegated police power. **CalA** 291 P892.

668-2½-New. Parol permission to erect dam is mere license, terminable and revocable at pleasure. 267Mass285, 166 NE861.

668-3 190NC244, 129SE623 (no title adverse to true owner could be founded on exercise of right under license and subsequent judgment). **Prescription gives right to maintain dam and to use water stored** to successors in title. 125 Misc243, 211NYS338.

668-10½-New. Riparian owner, other than owner of dam involved, may acquire right to have water maintained at legal height. 132Misc786, 230NYS 621.

669-11 121 Or628, 253P3.

669-12 121 Or628, 253P3.

671-25½-New. If dam should become out of repair, and ineffectual to maintain lake level at sufficient height to satisfy reciprocal easements, riparian owners would have legal right to enter on defendants' lands and repair or restore dam. 132Misc786, 230NYS621.

671-26 Thus purchaser of land bordering on artificial pond created by dam acquires no riparian rights against use of water made by builder of dam or his successors. 125Misc243, 211NYS338. **Impounded water** remaining in river, after it had ceased to flood, held to be riparian water. 116Tex603, 297SW225, 53ALR1147. **Covenant restricting use of property** on which pond was situated held to give owner of land benefited superior right to water for use of mill. 165Ga159, 140SE360.

671-27 Where state acquired joint use of water from pool created by brush dam, and hydraulic company and predecessors had for many years used water in excess of amount used by state, held latter was entitled to average amount used by it over last nineteen years. 116 OhSt26, 155NE554.

671-28½-New. That owners of dam at outlet of lake used water to operate their mills at dam, and occasionally sold water to lower riparian owners, and sent water down outlet to river, did not of itself establish that they had acquired prescriptive right to draw water down to natural flow and take all that would run down stream. 132Misc786, 230NYS 621.

671-28¼-New. Draining of lake to its natural flow several seasons out of twenty or more years is not such continuous use of water, in such manner or in such quantity as to give owners of dam at outlet of lake similar right for all time by prescription. 132Misc786, 230NYS 621.

671-28¼-New. Such owners of dam cannot increase use of water to any substantial extent, or work detriment or damage to other riparian owners as owners of servient estates. 132Misc786, 230 NYS621.

672-33 Maintaining dam at determined height is not invasion of rights till it causes damage by overflow. 98Vt405, 130A137.

672-36½-New. Owner of concrete dam is not relieved from liability for injuries caused by flowage because dam was maintained at same height as wooden dam which it replaced. 98Vt405, 130A 137.

673-47 190NC244, 129SE623 (in absence of evidence that execution was returned unsatisfied, landowners could not sue to abate dam as nuisance).

674-55 CalA 276P1076; **Ont** [1927] 1 DomLR812.

674-56 87IndA79, 158NE514.

676-75 123 Or549, 262P243; 98Vt405, 130A137 (no invasion of rights till dam causes water to overflow).

676-76 MoA 282SW473; 132Misc786, 230NYS621; 123 Or549, 262P243. **Owner of servient estate acquires no reciprocal rights** by reason of dominant owner's prescriptive right to overflow servient owner's land. **MoA** 282SW473.

677-81 But see 123 Or549, 262P243.

677-82 82NH225, 131A601; 19 OhA89.

677-83 123 Or549, 262P243.

678-90 88 IndA339, 156NE571.

678-91 19 OhA89.

678-91½-New. Where plaintiff negatives any idea of submission in acquiescence to defendant's right to maintain dam by starting first suit for damages within statutory period, no prescriptive right is established. 82NH225, 131A 601.

678-91½-New. A reciprocal easement to have water in lake left at same level may be acquired by owner of flooded land. 132Misc786, 230NYS621.

679-5½-New. Grant of right to deposit coal dirt in creek prevents recovery for damages therefrom except where caused by flood as result of alteration of banks of stream. 290Pa322, 138A860.

679-5½-New. Where deed and flowage contract are parts of same transaction, one may be consideration for other. 176 Minn324, 223NW612.

680-12½-New. One maintaining dam causing damage is not entitled to rely on maintenance of dike by one with whom no contractual relation existed. 98Vt405, 130A137.

680-13 See also 132Misc786, 230NYS 621.

681-22 82NH225, 131A601; **TexCivA** 13SW(2d)929; **TexCivA** 27SW(2d)897 (railroad tracks).

682-26 121 Or628, 253P3; 121 Or628, 257P16.

682-27 Right of action does not accrue till damage has been done–98Vt405, 130 A137. **Notice of injury.**–Utah 262P274.

682-27½-New. Rights of dam owner of flowage and running logs are limited by rule that use must be reasonable. 82NH225, 131A601.

682-27½-New. Railroad company is liable for damages caused by cutting through natural embankment on its land causing river to flood adjoining land. 181Ark517, 26SW(2d)579.

682-27¼-New. In such case that statute requires railroad company to rid its right of way of surface water does not relieve it from liability. 181Ark517, 26 SW(2d)579.

682-29 93Fla387, 112S264; 48SD554, 205NW654 (obstruction of natural water course); 98Vt405, 130A137; 145Wash 106, 258P1033, 54ALR356.

682-30 48SD554, 205NW654 (instruction that defendant city was not liable for flooding plaintiff's premises, if flood was caused by extraordinary freshet, held properly refused in view of fact that freshet, though unusual, was not without precedent); 98Vt405, 130A137.

682-30½-New. , where its cause is not concurrent with any negligence by party maintaining dam. 98Vt405, 130A137.

682-30½-New. Where there is flowage during ordinary and usual conditions of stream, person so maintaining dam is liable for damages caused by unforeseen and unprecedented freshet. 98Vt405, 130A137 (dictum).

682-30¼-New. Owner of dam, in case of flood or unusual high water, has right to permit flood waters to pass through or over dam in such quantities as flowed into it. 121 Or628, 253P3.

682-30½-New. But he is liable for damages to lower owner if in addition to normal flow he suddenly releases large quantities of water in addition to flood water then coming into the dam, 121 Or628, 253P3.

682-30½-New. whether damages were caused solely by water released or concurrently with flood of water which was going down. 121 Or628, 253P3.

682-30½-New. Where dam increased flowage caused by flood, owner is liable. 82NH225, 131A601.

682-31 98Vt405, 130A137 (owner has no right to rely upon dikes of another for protection against flowage of highway). **Private corporation operating dam under absolute control of commission of provincial government** is not liable. **Can** [1930] 1DomLR445.

683-40 99WVa425, 129SE309.

684-41 Act of God.–77Colo 60, 234P 1059.

684-44 77Colo 60, 234P1059 (in absence of concerted action, reservoir owners are not jointly liable for damages from broken dams).

684-46 191NC117, 131SE369.

685-49 An action at common law lies for trespass, and plaintiff is entitled to mandatory injunction where mill dam is built on his land without his permission. 191NC117, 131SE369.

685-51 190NC244, 129SE623.

685-54½-New. Fishing in waters of mill pond does not subject fisherman to action of ejectment by owners. 190NC 244, 129SE623.

685-55 130 Or424, 278P981 (lessee of land from United States real party in interest).

685-56 Flooding meadows by raising dam is not actionable in absence of injury. **Wash** 288P217.

685-57 338 Ill 211, 170NE260.

687-71 130 Or424, 278P981 (statute relating to personal property applicable to injury to crops).

687-72 Action brought within six months after damage arose has been held timely, where complainant claimed damage was caused by ponding of water on his land subsequent to construction of dams. 196NC412, 146SE3.

687-73 220Ky322, 295SW156.

688-84½-New. Parties shown not to have invaded complainant's rights or threatened injurious action has been held not necessary parties. 338 Ill 211, 170 NE260.

688-86 Petition held sufficient.–Tex CivA 25SW(2d)916.

688-87 Ownership of water right held sufficiently alleged to support recovery for damage resulting from destruction of seepage ditch. 31NM457, 247P270.

688-90 Variance not established.–231 Ky745, 22SW(2d)131.

689-92 12LaA132, 125S299; **TexCivA** 27SW(2d)897. **Negligence need not be shown** in construction of pier, where defendant diverted flow of river to plaintiff's farm in constructing bridge pier. 229Ky330, 17SW(2d)249.

689-95 132Misc786, 230NYS621; 123 Or549, 262P243.

689-99 MoA 32SW(2d)296. **Evidence held admissible.**–213Ky346, 281SW174; 222Ky621, 18SW(2d)1076; 82NH225, 131 A601; 130 Or424, 278P981; 147Wash 330, 266P156 (to prove value). **Evidence held not admissible.**–93Fla387, 112 S264; 222Ky621, 18SW(2d)1076; 82NH 225, 131A601. **Fact that dam owner had right to drive logs** in river did not render evidence of plaintiff's damage from high water, caused by dam, inadmissible. 82NH225, 131A601. **Flow of stream preceding injury** is admissible. 82NH225, 131A601.

690-1 35F(2d)317 (evidence sustained finding of abandonment of easement); **CalA** 276P1076 (evidence held to warrant injunction); 229Ky330, 17SW(2d) 249 (evidence sufficient to support verdict); 231Ky107, 21SW(2d)140; 12LaA 132, 125S299 (evidence insufficient to show flooding was caused by neglect or failure of defendant); 170Minn378, 212 NW590; 174Minn443, 219NW459; 154 Miss119, 122S205; 132Misc786, 230NYS 621 (evidence held insufficient to show right to draw water of lake down to

natural flow and also particular rights in respect of withdrawing water); 31 OhA213, 165NE310 (evidence held sufficient to authorize injunction); 121 Or 628, 253P3; 121 Or628, 257P16; 123 Or 549, 262P243; TexCivA 31SW(2d)491 (permanent injury to land); Utah 262P 274; Utah 269P1008; Utah 282P1026 (insufficient to sustain allowance of exemplary damages); 148Wash670, 270P 99 (evidence insufficient); 99WVa425, 129SE309 (evidence sufficient to warrant finding of negligence in failing to protect property from damage by breaking of dam). **Evidence held sufficient.**–68 CalA317, 229P57; 338 Ill 211, 170NE 260; 98Vt405, 130A137; 98Vt405, 130 A137. **Evidence held insufficient.**–Cal 285P688; 338 Ill 211, 170NE260. **Evidence held to show** damage due to independent cause. Wash 288P217. **Evidence held not to show** overflow was caused except in accordance with prescriptive right. 125Misc243, 211NYS 338.

691-2 178Ark329, 11SW(2d)761; 93 Fla387, 112S264; 213Ky346, 281SW174.

691-3 MoA 285SW175; 82NH225, 131 A601.

691-4 37F(2d)707; 68CalA317, 229P57 (whether defendant was actuated by malice question for jury); 88 IndA339, 156NE571; 130 Or424, 278P981 (on conflicting evidence); TexCivA 27SW (2d)897 (whether defendant maintained drains). **Particular matters held questions for jury.**–82NH225, 131A601. **Evidence held sufficient to go to jury.**–121 Or628, 253P3. **Submitting issue as to permanent damages held erroneous** under circumstances. 196NC719, 146SE 867.

691-5 Propriety of particular instructions.–168Ark884, 271SW967; 93Fla 387, 112S264; 208 Iowa752, 226NW161; 213Ky346, 281SW174; 222Ky621, 1SW (2d)1076; MoA 32SW(2d)296; 130 Or 424, 278P981; Utah 269P1008. **Instruction held authorized by pleadings and evidence.**–229Ky330, 17SW(2d)249.

692-7½-New. Instruction that defendant was liable if it negligently managed dam causing injury to plaintiff is not erroneous. 175Ark246, 298SW1029.

692-7½-New. Refusal of court to sign judgment on issues tendered by defendant offering to abate nuisance or remove cause and eliminate issue of permanent damages is erroneous. 196NC719, 146 SE867.

692-7¼-New. Decree preventing rebuilding of pier held erroneous in view of failure to show abandonment of easement in site thereof. 35F(2d)317.

692-8 88 IndA339, 156NE571. See also 222Ky621, 1SW(2d)1076. **Compensation for damage may be limited by contract.**–35GaA128, 132SE104. **Damages held excessive.**–231Ky745, 22SW (2d)131. **Damages held not excessive.**–229Ky330, 17SW(2d)249. **Damages are not limited to amount paid for land or** its mere value. 245Mich541, 222NW 703. **Measure of damages depends largely on use** to which property is put. TexCivA 12SW(2d)263. **Only additional damages caused by railway embankment** may be recovered if part of injury to crops was due to creek's overflow. 208 Iowa752, 226NW161.

692-9 114Nebr641, 209NW501. **Plaintiff held entitled only to temporary damages.**–196NC412, 146SE3.

692-10 130 Or424, 278P981.

692-10½-New. Both future and past damages may be recovered where injury is permanent. 114Nebr641, 209NW 501.

692-11 220Ky322, 295SW156; 174Minn 443, 219NW459.

692-14½-New. Action for overflow of land as whole before drainage project is completed is premature unless completed project will not relieve situation, and district will not adopt another method. 114Nebr641, 209NW501.

692-14½-New. Failure of landowners to exercise statutory right for over twenty years did not affect right of mill owner to pond water, though lapse of time barred recovery of damages. 190 NC244, 129SE623.

692-14¼-New. Exercise of right under easement does not subject party to action for resulting damages. 190NC244, 129SE623.

692-14½-New. Owner not relieved from damage by overflow resulting from greater amount of water held back merely because concrete dams were of same height as wooden dams. 98Vt405, 130A 137.

692-14½-New. Punitive damages.–Judgment for punitive damages is proper in action for malicious destruction of dam, where defendants acted together with knowledge of wrongful act. Utah 269P1008.

692-14½-New. Evidence in such actions has been held sufficient to justify reasonable award of punitive damages. Utah 269P1008.

692-14½-New. Award of five thousand dollars punitive damages where three hundred and sixty-two dollars and fifty cents was awarded for actual damage has been held excessive and disproportionate to actual damage. Utah 269P 1008.

692-14½-New. In lessee's action for flooding land, amount of rental paid is immaterial in determining value of grass or hay. 130 Or424, 278P981.

692-15 98Vt405, 130A137 (injunction modified).

693-20 Cal 285P688.

693-21 See also TexCivA 9SW(2d)435. **Comparison of hardships.**–245Mich541, 222NW703.

693-23 Sufficiency of evidence.–Cal 285 P688.

694-29 MoA 285SW175. **Deed by plaintiff's grantor admissible** to show release of purchaser from all damages sustained by dam. 166Ga100, 142SE552. **Defendant's plea properly amended** to show dedication of dam to public before plaintiff acquired land and use for thirty years. 166Ga100, 142SE552. **Injunction denied** where dam permanent structure thirty-five years old dedicated to public as street and bridge and sanctioned by plaintiff's vendor. 166Ga100, 142SE552.

694-35½-New. Decree should order maintenance of dam at such height as would prevent overflow during ordinary flow, or periodical or usual high water. 98Vt405, 130A137.

694-35½-New. Mandate against maintenance of dam causing overflow "during all times of ordinary flow or periodical or usual high water" was held not objectionable in not defining periodical or usual high water. 98Vt405, 130A137.

694-36 Injunction will not be granted on theory that defendant's continued use may ripen into easement. Cal 285P688.

694-36½-New. Damages do not necessarily follow direction of court for removal of portion of dam. 170Minn378, 212NW590.

694-36½-New. Judgment, though specifying purpose for which owner of dam could use water of lake, has been construed to limit quantity of water which could be drawn from lake, not purposes of use. 132Misc786, 230NYS621.

694-36¼-New. Bill will be dismissed where nuisance caused by dam has been abated since bill was filed. 220Ala676, 126S861.

694-36½-New. Statute has been held not to afford adequate remedy at law, barring right to relief in equity to restrain defendant from obstructing watercourses passing through defendant's property. 121 Oh125, 167NE365.

694-36½-New. Though state engineer cannot impair obligation of contracts, he may, under statute relative to supervision of dam construction, maintain suits to prevent contract from being so executed as to create menace to life and property. 101CalA456, 281P717.

695-39 42F(2d)541; Cal 287P475; 74 CalA286, 240P529; 78CalA266, 248P264; 100CalA692, 280P1021 (right to discharge accumulated waters); CalA 292 P549; 80Mont339, 260P401; 219AppDiv 83, 219NYS206; 228AppDiv585, 240NYS 647 (prescriptive rights held not acquired). But see 238Mich632, 214NW 226. **Where irrigation ditch is appurtenant to land,** question whether plaintiff, in action to establish easement by prescription, paid taxes on right of way has been held not material. 76Mont600, 248P196. **Right may be acquired by prescription** as against lower riparian owner. 74CalA286, 240P529. **Prescriptive rights rest on presumption of grant.**–238Mich632, 214NW226. **Flood waters impounded in reservoir** held subject to appropriation under statute. 33 Ariz93, 263P10. **Rule as to acquisition of easement is not applicable** to right to convey water through natural channel across lands of another. Utah 276P912. **Basis of prescriptive rights.**–CalA 292P549. **Title to adequate water for irrigation purposes by deed** will defeat claim of prescriptive title for same purpose. CalA 292P549.

695-39½-New. Under statutes prohibiting furnishing of water without paying uniform rate, private ownership of water devoted to domestic use of city may not be acquiesced in by adverse use. 43 Ida643, 253P840.

696-40 78CalA266, 248P264; 47 Ida 555, 277P430; 238Mich632, 214NW226; 79Mont485, 257P406; 219AppDiv83, 219 NYS206 (dictum). See also 332 Ill 185, 163NE387.

696-42 74CalA286, 240P529; 79Mont 485, 257P406. See also 116Tex82, 286 SW458.

696-43 74CalA286, 240P529; 78CalA 266, 248P264; CalA 292P549; 85Colo 70, 273P886(1stcase); 238Mich632, 214 NW226; 79Mont485, 257P406; 219App Div83, 219NYS206 (dictum).

696-44 78CalA266, 248P264.

697-45 74CalA286, 240P529.

697-46 74CalA286, 240P529; 70Utah 95, 258P216.

697-48 Cal 278P840; 74CalA286, 240P 529; 79Mont485, 257P406; 219AppDiv 83, 219NYS206.

697-49 78CalA266, 248P264; 219App Div83, 219NYS206. **Interruption must be open and upon claim of right.**–78CalA 266, 248P264. **Occasional interruption** is not sufficient to break continuity of exclusive possession. 78CalA266, 248P 264.

697-50½-New. Right to waste or spring water may be permanent though use interrupted. 130 Or506, 280P518.

697-51 74CalA286, 240P529; 78CalA 266, 248P264; 82Colo 138, 257P361; 219 AppDiv83, 219NYS206 (dictum).

697-52 202Cal 47, 258P1095; 74CalA 286, 240P529; 78CalA266, 248P264; 44 Ida651, 258P534; 79Mont485, 257P406; 219AppDiv83, 219NYS206 (dictum); 116 Tex82, 286SW458. **The diversion of water is of itself notice that the use is adverse,** etc. But see 70Utah95, 258P 216. **Prescriptive right not shown.**–114 Nebr161, 206NW965. **Lower riparian owner cannot gain rights adverse to right of upper riparian owner to maintain dam** since use of lower owner does not encroach upon, and is not adverse to, that of upper proprietors. 238Mich 632, 214NW226. **There must be payment of taxes** by adverse claimant. 74 CalA286, 240P529. **Right to use of water by prescription** cannot be based upon watermaster's distribution to decreed right in preference to undecreed right. 45 Ida380, 263P45. **Exercise of mere riparian right** can never be hostile to land below. Cal 287P475.

698-53 42F(2d)541; 44 Ida651, 258P 534; 116Tex82, 286SW458.

698-54½-New. or license, Tex 286SW 458.

698-58 Cal 278P840; 44 Ida651, 258P 534; 219AppDiv83, 219NYS206 (dictum).

698-60 Cal 287P475; 74CalA286, 240P 529; 219AppDiv83, 219NYS206 (dictum). **User must be visible and notorious.**–238Mich632, 214NW226; 70Utah 95, 258P216. **Matters not constituting notice.**–70Utah95, 258P216.

699-61 116Tex82, 286SW458 (open, plain, notorious).

699-62 Cal 287P475; 80Mont339, 260 P401; 219AppDiv83, 219NYS206 (diminution must be appreciable); 121 Or 655, 257P26.

699-63 80Mont339, 260P401.

699-64 121 Or655, 257P26.

699-65 74CalA286, 240P529; 78CalA 266, 248P264. **Riparian owner may acquire prescriptive title to water distinct from or in addition to normal riparian**

rights. **CalA** 292P549.

699-68 78**CalA**266, 248**P**264.

700-72 Right of city to use waters of river constitutes public right as respects prescription urged by others. **Cal** 287P 475.

700-72½-New. Lower riparian owner appropriating water on privately owned land can acquire no prescriptive right against upper owner by diversion and user for any period however long. 206 **Cal** 508, 274P969.

700-72¼-New. Appropriation of water on land held by owners other than federal government gives appropriator no rights as against subsequent purchaser from United States of riparian land situated on stream above point of diversion. 206**Cal** 508, 274P969.

700-73 Effect of straightening stream.-117 **Or**30, 241P991.

700-77 202**Cal** 47, 258P1095; 74**CalA** 286, 240P529; 78**CalA**266, 248P264; 79 **Mont**485, 257P406. **Allowance held unreasonable in amount.**-74**CalA**286, 240P 529. **Appropriator entitled only to amount reasonably necessary** to accomplish beneficial purposes of diversion. 74**CalA**286, 240P529. **Open ditch method of carrying water** held not unreasonable. 74**CalA**286, 240P529.

700-78 202**Cal** 47, 258P1095; 79**Mont** 485, 257P406.

700-79 117 **Or**30, 241P991; 67**Utah** 553, 248P496 (where defendant's use of waters of plaintiff was against plaintiff's wish, defendant acquired no right by its actual use).

700-79½-New. Claimant, not entitled to easement by adverse possession in water ditch on another's lands, held not entitled to water rights. 79**Mont**485, 257P406.

701-82 No prescriptive rights in riparian owner by frequent temporary diversion where water always returned to other owner's land within short time. 202**Cal** 47, 258P1095.

701-83 76**Mont**1, 245P532; 116**Tex**82, 286**SW**458; 67**Utah**166, 246P367. **In Nevada.**-49**Nev**357, 246P692.

702-84½-New. Right of appropriation does not carry with it right to acquire right of way for ditch by prescription. **Mont** 286P133.

702-89 Mont 286P133. **Purported grant by viceroy of Spain to Mission of San Diego** of right to use waters of San Diego River creates no right permanent to that of pueblo of San Diego for ordinary municipal purposes. 97 **Cal** 377, 275P840.

703-91 8**F(2d)**739; 52**Nev**426, 289P 393.

703-93 45 **Ida**380, 263P45. **In Nebraska.**-228**NW**864. **In New Mexico.**-31**NM**521, 247P550. **California Water Commission Act.**-92**CalA**428, 268P374.

703-94 Statute extending time for proof of beneficial use held not void as retroactive or as depriving inferior permittees of property. 45 **Ida**380, 263P 45.

703-95½-New. Public policy of state is to make largest possible use of water within its boundaries. 30**Ariz**96, 245P369.

703-95¼-New. Statute empowering department of public works to cancel water appropriations held not violative of due process in view of provisions for notice and appeal to courts. **Nebr** 231 **NW**840.

704-7 116**Tex**82, 286**SW**458. **Underground streams,** etc. 30**Ariz**96, 245P 369. **Statute authorizing impounding of flood water** does not grant right to back water past property line of upper riparian owner. 116**Tex**603, 297**SW**225, 53**ALR**1147. **Unappropriated waters in drainage outlet ditch** may be validly appropriated for irrigation purposes. 83 **Colo** 510, 267P605. **Water flowing from spring located on public domain may be appropriated at its source,** as well as after it flows into natural water channel. **Utah** 274P457.

704-8 Or 293P424.

704-8½-New. or to overflow or flood waters, 116**Tex**82, 286**SW**458.

704-9 207**Cal** 8, 276P1017(2dcase); 66 **Utah**25, 239P479. But see **Utah** 262P 828; **Utah** 274P457 (vested right may be acquired to percolating water on public domain). **"Percolating waters" defined.**-66**Utah**25, 239P479. **Under statute,** anyone may appropriate seepage and spring water. 86**Colo** 178, 279P44.

704-10 130 **Or**506, 280P518; 116**Tex**82, 286**SW**458. **Absence of unappropriated water** must clearly appear to warrant rejection of application for water under Utah statute. **Utah** 289P116.

704-11 202**Cal** 56, 259P444, 56**ALR**264; 47 **Ida**157, 274P110; **Ida** 286P608 (landowner not compelled to pay for waste water); **Mont** 286P133; **Mont** 290P266; 130 **Or**506, 280P518; 116**Tex**82, 286**SW**, 458; **Utah** 289P116. **Flood, seepage, and waste water.**-84**Mont**442, 275P1099. **Taking and use of waste water from irrigation system** does not constitute statutory appropriation. 52**Nev**330, 286 P963.

704-11½-New. Underflow of running stream may be appropriated. 30**Ariz**96, 245P369.

704-11¼-New. Statute requiring installation of headgates and measuring boxes by users of waters from stream under decree where water commissioner has been appointed does not license stranger to appropriate water to which he is not entitled merely because owner of right has not complied with such requirements. 77**Mont**91, 250P11.

704-11¼-New. Fact that settler's land is nonriparian does not affect water rights acquired by appropriation. 140 **Wash**558, 250P41.

704-11½-New. Appropriation of water for irrigation purposes for nonriparian land is not prevented by fact of private ownership of land riparian to stream. 140**Wash**558, 250P41.

704-11¼-New. All water rights not attaching as riparian right to lands privately owned may be appropriated by owners of other lands. 140**Wash**558, 250P41.

704-11¼-New. Supervisor who classifies water rights under statute is not justified in disregarding rights of water claimants on ground of existing custom in district. 140**Wash**558, 250P41.

704-11¼-New. Seepage waters may be appropriated subject to rights of prior owner. 44 **Ida**410, 258P176.

704-11½-New. In Texas, by constitution and statutes, unappropriated waters of every river or natural stream and storm or rain waters thereof are declared property of state to be acquired by appropriation for uses named pursuant to permit. 116**Tex**82, 286**SW**458.

704-11¼-New. Such "unappropriated waters" do not include waters granted riparian owners by virtue of grants, except such as are unnecessary for their use. 116**Tex**82, 286**SW**458.

704-11¼-New. Such statutes, in so far as they authorize appropriation of storm and flood waters and other than riparian waters without violation of riparian rights, are valid and constitutional. 116**Tex**82, 286**SW**458.

704-11¼-New. Statutes providing for issuance of permit to appropriate such water are not invalid as conferring judicial duties on board of water emergencies where their duties are purely administrative. 116**Tex**82, 286**SW**458.

704-11¼-New. Waters primarily belong to watershed of origin where there is land therein requiring irrigation. 80 **Mont**339, 260P401.

704-11¼-New. Seepage since belonging to river belongs to people and cannot be transferred by statute but must be subject to appropriation as river water. 86**Colo** 178, 279P44.

705-14 66**Utah**25, 239P479. **Water flowing from spring on privately owned land.**-**Utah** 274P457.

705-15 Legislature cannot under police power determine what are useful and beneficial purposes to which lands in private ownership shall be devoted, or uses to which vested riparian rights therein shall be limited. 200**Cal** 81, 252 P607.

705-16 207**Cal** 8, 276P1017(2dcase); 66**Utah**587, 245P338. **Purchaser in possession of lands under contract for its purchase** may acquire water rights of which vendor cannot deprive him by subsequent conveyance. 76**Mont**1, 245 P532. **Squatter on public lands** may acquire water rights by appropriation. 76**Mont**1, 245P532.

705-18 In Utah.-289P1097. **In Idaho.**-291P1064.

705-19 39**F(2d)**610; 207**Cal** 8, 276P 1017(2dcase). **Constitutional provisions** that such use shall be held to be public use should receive broad construction in light of state history and natural conditions. 77**Mont**229, 250P963.

706-27 33**NM**414, 269P56. **Application to exchange water** to supply potable water for domestic use has been held properly denied where water would be rendered unfit for domestic use. **Utah** 289P116.

706-33 84**Mont**68, 274P151; 33**NM**414, 269P56; **Utah** 274P457. **Under patent providing that conveyance is subject to accrued water rights and rights to ditches** patentee and his successors take land subject to servitude of ditches constructed before entry. 84**Mont**68, 274P151. **Water rights incident or appurtenant to public land** do not pass to purchaser from government as part of real estate. 33**NM**414, 269P56.

708-36 200**Cal** 81, 252P607; 202**Cal** 56, 259P444, 56**ALR**264; 116**Tex**82, 286**SW** 458 (subject, however, to prior grant to another riparian proprietor); 140**Wash** 558, 250P41. **Statutes relating to rights of appropriators are not retroactive** and cannot operate to divest riparian rights vested at time of enactment. 200**Cal** 81, 252P607. **Lower owner can acquire no rights by appropriation against upper riparian owner.**-238**Mich**632, 214**NW** 226. **A mere appropriator of water is trespasser** as against riparian owner until he obtains title by prescription. 202**Cal** 56, 259P444, 56**ALR**264.

709-37 See also 74**CalA**286, 240P529.

709-37½-New. Rights of riparian owner are inferior to rights acquired by prior appropriation. 140**Wash**558, 250 P41.

709-38 Right to use of water is possessory right.-76**Mont**1, 245P532. **Right acquired is to use of water only** and not to corpus. 202**Cal** 47, 258P1095. **Right is easement in gross.**-86**Mont**276, 283P213.

709-38½-New. Appropriator's right not affected by want of legal title in premises on which water used. 76**Mont**1, 245P532.

709-41½-New. Users of adjudicated creek whose rights have been decreed may divide surplus waters among themselves if others' rights are not prejudiced. 77**Mont**229, 250P963.

709-42 19**F(2d)**619; 84**Colo** 174, 269P 574.

710-44 Approval of application to appropriate water merely authorizes applicant to perfect appropriation by actual diversion but does not confer perfected right to use of water. **Utah** 289 P116.

710-45½-New. Alleged right arbitrarily to deny issuance of permit to appropriate water for irrigation and power purposes, existence of water subject to appropriation, and priority among permittees are judicial questions. 207**Cal** 521, 279P128.

710-45¼-New. Application to appropriate water is favored to give applicant opportunity to decide disputed questions. **Utah** 289P116.

710-45¼-New. On application to appropriate water, question whether applicant would be authorized in constructing pipe line at own expense to appropriate is not involved. **Utah** 289P116.

710-45½-New. State engineer is without power to agree with owner of permit for appropriation to accept assignment thereof and retransfer if project proves unfeasible. 132 **Or**405, 285P 1111.

710-45¼-New. Supervisor of hydraulics is not authorized to adjudicate existing rights. **Wash** 289P1018.

710-45¼-New. Granting of permit to appropriate water for power and irrigation purpose is not the right itself, but merely confirming evidence of right theretofore existing, and application cannot arbitrarily be rejected. 207**Cal** 521, 279P128.

710-47 80Colo 398, 252P358; Or 286P562; 125Wash156, 23?P498. Definiteness of intention.-80Colo 398, 252P358.
710-51 80Colo 398, 252P358.
710-55 Verification before interested notary.-86Mont276, 283P213.
711-58 Or 286P563.
711-59 Or 286P563.
711-59½-New. Proceedings by application for permit to appropriate.-Application made to water commissioner construed to be one for permit to appropriate water and not one merely for transfer of point of diversion. 29Ariz 360, 241P503.
711-59½-New. Under statutes in some jurisdictions applicant for permit to appropriate may appeal from decision of water commissioner, to superior court when application denied. 29Ariz360, 241P503.
711-59¾-New. Statutes provide for hearing where water commissioner undertakes in manner provided therein to determine relative rights of claimants to waters of stream. 29Ariz360, 241P503.
711-59½-New. Where statutory procedure is not followed, commissioner has no jurisdiction to settle and determine relative rights of original appropriators and applicant for permit to appropriate water of river. 29Ariz360, 241P503.
711-59¾-New. Mere appearance by courtesy before water commissioner will not give him jurisdiction of subject matter or parties for any purpose except to grant or deny permit. 29Ariz360, 241P503.
711-59½-New. Where commissioner is without jurisdiction to hear and determine respective rights of parties, his decision as to facts is not conclusive. 29Ariz360, 241P503.
711-59¾-New. Facts held insufficient to give notice of intention to acquire additional priorities.-80Colo 398, 252P358.
711-59½-New. Publication of notice to submit proof of application of water to beneficial use is presumed to have been made after notice order required by law. 45 Ida380, 263P45.
711-59¾-New. Powers of water commission as to issuance or denial of permits for appropriation of water are wholly administrative and not judicial. 202Cal 717, 262P724.
711-59¾-New. Notice and map required by statute to be filed marks limit of proposed enterprise. Or 286P563.
711-60 Or 286P563; Utah 292P194.
711-61 39F(2d)37 (plow furrows).
711-62½-New. Conceding that each enlargement of reservoir amounts to new appropriation, 77Mont229, 250P963.
711-62¼-New. principle does not apply if repairs on dam for reservoiring water however substantial do not make reservoir hold more water than its owners originally contemplated. 77Mont 229, 250P963.
711-62 84Colo 174, 269P574; 75Mont 491, 244P141; Or 286P563 (sufficient diligence and within reasonable time); 140Wash558, 250P41. Extension of time by state engineer.-Utah 272P225. Appropriator of waters from adjudicated stream delaying four years after notice of appropriation relied on, before doing anything toward construction of dam or ditch, acquires no right under appropriation. 75Mont491, 244P141. State's refusal to accept irrigation system held not to indicate noncompletion. 45 Ida380, 262P45. In Idaho.-291P1055.
712-67 39F(2d)610; 124 Or44, 259P292; 122 Or495, 285P1111 (rights under permit for appropriation held to have lapsed where nothing was done for twelve years to apply water to beneficial use); Or 286P562; 66Utah25, 239P479; Utah 292P194. But see CalA 292P549 (actual constant distribution of entire maximum amount of water need not be deposited on land).
712-69 77Mont229, 250P963.
712-70 77Mont229, 250P963.
712-71½-New. Lapsed rights under permit for appropriation held not resurrected by house joint resolution purporting to confirm agreement with state engineer. 122 Or495, 285P1111.
712-72 75Mont491, 244P141 (method prescribed exclusive after passage of act); 77Mont229, 250P963; 66Utah25, 239P479; 67Utah166, 246P367; Utah 289P116 (necessity of approval of application). Affirmative finding by engineer that there is unappropriated water has been held not prerequisite to approval of application. Utah 289P116. Judgment denying application to appropriate water has been held erroneous where there was substantial quantity of unappropriated water. Utah 289P116. On appeal from grant of permit by supervisor of hydraulics.-Wash 289P1018.
713-73 129 Or475, 278P583.
713-73½-New. Statutory action to review order of water commission to appropriate water is original action and not proceeding by certiorari or appeal. 202Cal 717, 262P724.
713-74 30Ariz96, 245P369; 77Mont91, 250P11; Utah 269P776. Rights in bed of stream and underflow.-30Ariz96, 245 P369. Right to have diverted waters returned.-30Ariz96, 245P369. "Natural channel" means floor or bed on which water flows and banks on each side thereof as carved out by natural causes. 30Ariz96, 245P369.
714-76 Or 286P563.
714-77 29Ariz360, 241P503; 30Ariz96, 245P369; 86Colo 178, 279P44; 43 Ida 371, 252P489. Orders of water commissioner cannot interfere with vested rights. 29Ariz360, 241P503.
714-84 In computing amount of evaporation for which appropriator of water from his reservoir at outlet of lake discharging waters into stream must account to prior appropriators of all waters of stream, acreage of lake in natural state must be deducted from acreage when water stands at top of spillway of dam. 77Mont229, 250P963.
714-84½-New. Use independent of ownership of land. 76Mont1, 245P532.
714-84½-New. Permittee under state contract may be authorized to appropriate both direct flow and flood to specified amount. 45 Ida380, 263P45.
714-84¼-New. Appropriation may be made for future use of another and for future use on lands which appropriator does not own or contemplate owning. Or 286P563.
714-84½-New. Extent of prior rights to water must be determined before there can be exercise of secondary rights, but cannot be determined before secondary claim is initiated. Utah 289 P116.
714-84¾-New. Rights of city of San Diego to waters of river are essentially governmental in character. Cal 287P 475.
714-85 Water user awarded by decree several water rights in water of creek is entitled to have exact amount allotted diverted from creek and delivered to land less only losses occurring between point of diversion and point of delivery. 45 Ida459, 262P871.
715-86 Effect of joint use of ditch.-45 Ida459, 262P871. Flowage must be maintained at substantially same level as when title was acquired. 220Ala342, 124S296.
715-88 77Mont91, 250P11.
715-91 207Cal 8, 276P1017(2dcase); 74 CalA286, 240P529; 41 Ida216, 240P443 (water used for mill purposes); 74Mont 50, 237P1103; 120 Or237, 251P898; Or 286P562; Utah 269P1008. Uses held beneficial.-Or 286P563 (for generating electricity for lifting water for irrigation). Use of water for power purposes in lifting water for irrigation under statute is beneficial use. Or 286P563. That irrigation system was wasteful and primitive does not warrant court in disturbing water award as excessive. CalA 292P549. Appropriator cannot reserve water without using it while claiming prescriptive or riparian rights to other water from same source for same purpose. CalA 292P549.
715-92 During nonirrigating season water rights in certain quantity allowed for storage for domestic and stock water for settlers may be diverted. Or 286P 562.
716-94 207Cal 8, 276P1017(2dcase); 74 CalA286, 240P529; CalA 292P549; 84 Colo 174, 269P574; 41 Ida216, 240P443 (water used for mill purposes); 44 Ida 583, 258P532; 77Mont91, 250P11; 67 Utah553, 248P496; Utah 289P116. See also 29PortoRico 831. Where increase in capacity of mill requires greater quantities of water than was necessary at time of appropriation, such additional requirements are not effectual against owners of intervening rights. 41 Ida 216, 240P443. Allowance of unreasonable amount erroneous.-74CalA286, 240 P529. No right to excess is conferred by diversion of water in excess of amount reasonably necessary, no matter how long continued. 207Cal 8, 276P 1017(2dcase). Question of fact for court on evidence depending on many different conditions. 207Cal 8, 276P1017(2d case). There is no exact uniform rule for computing reasonable quantity of water for irrigation applicable to all cases alike. 207Cal 8, 276P1017(2d case). Quantity required for irrigation is governed largely by nature of soil, climatic conditions, and use. CalA 292 P549.
716-95 44 Ida583, 258P532. The system of irrigation in common use in the locality, etc. 207Cal 8, 276P1017(2dcase). Long continued use of given quantity may raise presumption of necessary and beneficial use of that amount. 207Cal 8, 276P1017(2dcase). Appropriator is not bound to adopt best methods for utilizing water or to take extraordinary precautions to prevent waste. 207Cal 574, 279P432.
717-96 39F(2d)37; 76Mont1, 245P532.
717-97 76Mont1, 245P532.
717-98 5F(2d)466 (prior appropriator is permitted to divert greater amount during season of heavy flow). But see 86Colo 197, 280P481. One having all water his necessities require or that his ditches will carry must permit excess to remain in stream or return into stream if he has diverted it, though by decree or otherwise he had right to greater flow. 77Mont91, 250P11. Owner irrigating by flood system, common to his locality, is not required to abandon it to benefit others or to deprive himself of necessary quantity under such system. 207Cal 8, 276P1017(2d case).
717-98½-New. Storing in reservoirs.-Flood waters may be impounded and stored in reservoirs in some jurisdictions. 77Mont229, 250P963.
717-98½-New. and constitutional provisions declaring that use of sites for reservoirs necessary for collecting and storing water shall be a public one should receive broad construction to preserve waste waters for irrigation purposes, 77Mont229, 250P963.
717-98¼-New. Under statutes such reservoirs may be constructed in course of or at headwaters of an adjudicated stream if they do not interfere with use by prior appropriators of natural flow of stream to extent of their appropriations. 77Mont229, 250P963.
717-98½-New. Where inflow into reservoired lake may be ascertained with reasonable certainty, suitable measuring devices should be placed at inlets and outlets of lakes to release amount of natural flow into streams when needed by prior appropriators of waters of stream, 77Mont229, 250P963.
717-98½-New. and stored water should be permitted to run into channel and be diverted therefrom with reasonable amount for seepage and evaporation, 77Mont229, 250P963.
717-98½-New. which amount must be released at all times when required by prior appropriators, 77Mont229, 250P 963.
717-98¼-New. in addition to stored water he releases under his reservoir appropriation. 77Mont229, 250P963.
717-98½-New. Though there is insufficient surplus water to fill reservoir needs of prior appropriators, it must be met by release of natural flow, and reservoir owner must be content with amount of water impounded during winter. 77Mont229, 250P963.
717-98¾-New. Expenses necessary to proper distribution of water as between prior appropriators of stream and owners of reservoired lakes must be borne by latter. 77Mont229, 250P963.

717-98¼-New. Such expenses may include cost of additional water commissioner to regulate flow. 77Mont229, 250 P963.

717-98½-New. Where it is not feasible to measure inflow into reservoired lake, proper method to determine amount of water reservoir must release to prior appropriators is to measure natural flow from lake into appropriated stream. 77Mont229, 250P963.

717-98⅓-New. By statute in some jurisdictions prior appropriator must turn back into stream from which water is taken all over and above what is actually and necessarily used by him. 80 Mont339, 260P401.

717-98¼-New. Where water is taken from one watershed to another, burden placed upon water is not to be added to detriment of appropriations for irrigation of lands within area of stream from which water is diverted. 80Mont339, 260P401.

717-98⅕-New. Amount of water necessary for irrigation of land cannot be determined by rule but is question of fact to be determined by evidence in particular case. 207Cal 574, 279P432.

717-98⅙-New. Progressive reclamation held sufficient to retain right to appropriate entire amount of water claimed in original notice. Or 286P563.

717-99 Where riparian owner entitled to use seepage water permits it to increase waters of stream, he may take equal amount of water, less transportation loss, from point higher up stream provided rights of no one else are interfered with. 135Wash156, 237P498.

718-4 Water appropriated for placer mining, when no longer required therefor, must be allowed to flow into stream subject to capture by others. Mont 290 P266.

718-5 44 Ida410, 258P176; 52Nev330, 286P963; Utah 269P1008. **Drainage district commissioner's appropriation of waste and seepage water collected in district's drain** is subject to rights of one who appropriated them before construction of ditch. 44 Ida410, 258P176. **Rights acquired.**-52Nev330, 286P963.

718-5½-New. Where waters of a stream are used principally for placer mining purposes, water may be used in cleaning up process to save gold and for preservation of flumes where such water is not lost, and upon being returned to stream is available to water users below. 120 Or237, 251P898.

718-5⅓-New. Sale of waters for use by others.-Appropriator cannot sell water for use by others in interims when not continually used by him for purposes for which it was appropriated. 80Mont 339, 260P401.

718-5¼-New. Where water taken from one watershed to an adjoining one in which it is used for placer mining is incapable of being returned after use to stream from which it was taken, it becomes fugitive and vagrant and not subject to sale by appropriator. 80Mont 339, 260P401.

718-6 29Ariz360, 241P503.

718-7½-New. Where his water rights have been adjudicated, appropriator is entitled to amount awarded by decree, 77Mont229, 250P963.

718-7⅓-New. and so long as that amount is permitted to flow to his headgates, he cannot complain. 77Mont229, 250P963.

718-8 17F(2d)357; 44 Ida779, 260P 428. **Statutes construed.**-17F(2d)357. **"Reservoir" held included in "canal or ditch."**-17F(2d)357.

719-11 44 Ida779, 260P428; 84Mont68, 274P151. **Owner of ditch may enter land to clean and repair ditch.**-84Mont 68, 274P151. **No claim to title by adverse possession** as against reservoir right of way, acquired under act of congress, can inure to homesteader at time of receiving patent whereby he may assert paramount right. 44 Ida779, 260P 428.

719-13 CalA 292P549.

720-18½-New. Appropriator entitled to specific amount of water at certain place without regard to quality cannot complain of means of transportation where use is not restricted. CalA 292P549.

720-19 30Ariz96, 245P369; 202Cal 36, 258P1090; 86Colo 191, 279P46(2dcase) (where water appropriation has been diverted, used, and returned, it becomes again part of stream in which junior appropriators below acquire vested right); 47 Ida497, 277P550; Ida 291P 1064; 80Mont339, 260P401; Or 286P 563; Utah 267P1017. **Owner having several ditches** has right to use any of them in which he has headgate so long as other users are not injured. 77Mont 91, 250P11. **Rights to use of water and ditches acquired by virtue of statute,** do not give right materially to change point of diversion after intervention of rights acquired in land by others. 84 Mont68, 274P151. **Questions presented in proceedings for change.**-46 Ida787, 271P578(2dcase). **Sale by stockholders of mutual ditch company of part of water right represented by certificates** does not constitute abandonment precluding change of place of diversion where rights of others are not injured. 46 Ida787, 271P578(2dcase). **Stockholders of mutual ditch company,** as appropriators of water, have right to have point of diversion and place of use changed by application under statute so long as rights of others are not injuriously affected. 46 Ida787, 271P578(2d case). **Statute making water rights separable from land** should be given reasonable construction. Or 286P563. **Statute empowering commissioner of reclamation to authorize change** neither creates nor detracts from water rights and incidents thereto. Ida 291P1064. **Equity action for change.**-Ida 291P1064. **On appeal from reclamation commissioner's denial of application for change of place of use** proceedings in district court are de novo. Ida 291P1064. **In proceedings under statute** application must follow statute. Ida 291P1064.

721-20 205Cal 54, 269P915; 86Colo 191, 279P46(2dcase); 87Colo 489, 289P 603; 47 Ida497, 277P550; 80Mont339, 260P401; 124 Or44, 259P292. **Change of conditions.**-74Mont50, 237P1103. **Point of diversion** cannot be changed under statute to point higher up stream if change will injure subsequent appropriators, where water supplied rose between two points and condition existed at time of subsequent appropriations. 42 Ida652, 249P483. **Courts must exercise utmost care** to prevent injury to junior appropriators by change of diversion points. 87Colo 489, 289P603.

721-21 80Colo 522, 253P389; 83Colo 451, 266P204; 84Colo 502, 272P9. **Burden is on petitioner to show** that proposed change will not injuriously affect vested rights of other appropriators. 83Colo 451, 266P204. **Irrigation district must conform to same procedure** that applies to private persons. 83Colo 451, 266P204. **Matters considered.**-83 Colo 451, 266P204. **Protestants not concluded by failure to object to unauthorized division** in absence of knowledge. 83Colo 451, 266P204.

721-22 83Colo 451, 266P204; 86Colo 191, 279P46(2dcase).

721-22½-New. Water right may be enlarged in same manner as new appropriation may be made. 207Cal 8, 276P 1017(2dcase).

721-22¾-New. Under British Columbia statute water comptroller cannot, in issuing a final license, change point of diversion as fixed in conditional license to a point on different watercourse, though two water courses are connected by artificial channel. BC [1928] 2Dom LR993.

721-24 39F(2d)37; 45 Ida380, 263P 45; 75Mont401, 244P141; 77Mont229, 250P963; 140Wash558, 250P41. **Right of relation back is lost if appropriator** fails to complete his appropriation with diligence. 75Mont401, 244P141. **Appropriator's rights date from completion of work of construction** where he has failed to proceed with diligence. 75 Mont401, 244P141.

722-25 77Mont229, 250P963. **Failure to prove date of posting notice on bank of stream** does not prevent right from accruing on date of notice. 86Mont276, 283P213.

722-26 86Mont276, 283P213.

722-27 42F(2d)541; 48 Ida383, 283P 522; 77Mont91, 250P11; Mont 290P 266; 122 Or331, 258P183; 124 Or44, 259P292; Or 286P563; 116Tex82, 286 SW458 (under grant). **New appropriator may use water in order of juniority.**-Mont 290P266. **New water right when allowed** is governed as though appropriator was party to original decree. Mont 290P266.

723-34 Mere possession of water right originated by another does not show privity but contractual relation must be shown. 76Mont1, 245P532.

723-34½-New. Subsequent appropriator of waters along upper reaches of river must be held to have known of prior rights of municipality to use of waters and its expanding needs. Cal 278P840.

723-34⅓-New. City of San Diego has prior and paramount right to use of waters of San Diego River. Cal 287P 496.

723-34¼-New. Permissive grants to private persons over public lands lying along upper reaches of river are subordinate and not superior to already vested rights of city. Cal 287P475.

723-34⅕-New. Prior appropriator cannot so increase use as to deprive subsequent appropriator of right acquired before such increased use. Utah 289P 1097.

723-34⅙-New. Those appropriating and diverting waters of San Diego River must be held to have known as matter of law of prior right of city to use of waters. Cal 287P475.

724-37 44 Ida410, 258P176; 77Mont 229, 250P963; 84Mont442, 275P1099; Mont 290P266; 116Tex82, 286SW458 (entitled only to overflow). But see 29 PortoRico 831.

724-38 Prior appropriator is limited to amount of water reasonably necessary for prior use and project fairly contemplated when appropriated. Or 286P 563.

724-39 Appropriator by means of wells and pumps from independent underground stream is entitled as against subsequent appropriator to have stream level remain so that his means of capture and diversion as originally installed will not be impaired or destroyed or in lieu thereof to have later appropriator deliver him his water in such manner as to make it available for use. 30Ariz96, 245P369.

724-41½-New. Right of prior appropriator of waste and seepage water is not destroyed by destruction of his ditch by construction of drain by drainage district. 44 Ida410, 258P176.

724-42 Particular conveyances construed.-76Mont1, 245P532. **Purchaser of rights and improvements of settler** on land not subject to entry takes water rights relating back to time of his vendor's appropriation. 140Wash558, 250P41.

725-43 77Mont229, 250P963 (reservoir rights). **Holder of possessory right to public land for grazing purposes** may verbally transfer incident water rights with such possessory right. 33NM414, 269P56. **Intention of owner of water rights to transfer them to entryman** must appear. 33NM414, 269P56.

725-44 46 Ida787, 271P578(2dcase); Ida 291P1064; Or 286P563.

725-48 Purchasing of interest in prior appropriator's ditches does not of itself make purchaser prior appropriator of water. 80Mont339, 260P401.

725-50 Definition.-41 Ida216, 240P443. **Joint use of ditch** does not deprive holder of several water right of right to full allotment of water. Ida 262P871.

726-55 See also 129 Or475, 278P583. **Change in point of diversion** is not abandonment of right. Or 286P563.

727-62 86Mont276, 283P213; 67Utah 166, 246P367. **Fact that during period of nonuser others acquired junior rights** does not affect owner's right to resume use. 76Mont1, 245P532. **Neither intent to abandon nor nonuser is sufficient** union of both to constitute abandon-

ment. 76Mont1, 245P532.

727-63 Evidence held to sustain decision refusing cancellation on ground of nonuser for three years. Nebr 228NW 864.

727-64 202Cal 47, 258P1095; 67Utah 166, 246P367. **Nonuser alone even for period exceeding statute of limitations is not conclusive.**-76Mont1, 245P532. **Evidence held to show loss of right to** use spring by failure to use for seven years, under statute. 66Utah25, 239P 479.

727-65 41 Ida216, 240P443; 124 Or44, 259P292. **Abandonment is always voluntary act.**-76Mont1, 245P532. **Intent to abandon and actual relinquishment** must concur. 41 Ida216, 240P443; 76 Mont1, 245P532.

727-66 Colo 291P820; 124 Or44, 259P 292 (abandonment not shown). **Facts held not to show abandonment.**-76Mont 1, 245P532.

728-67 Circumstances not showing abandonment or forfeiture.-41 Ida216, 240P443; Utah 276P912. **Clear proof** is required to establish abandonment. 41 Ida216, 240P443.

728-70 80Mont339, 260P401.

728-70½-New. In Arizona under statute reservoir rights are dependent on water rights and forfeiture of latter works forfeiture of former. 29Ariz304, 241P307.

728-70⅓-New. One whose water rights are derived from the state does not lose them by abandonment of United States land or relinquishment of his rights thereto as entryman. 82Colo 138, 257 P361.

728-70¼-New. Where one abandons claim in ditch and erects independent ditch, water right of his successor dates only from construction of latter ditch and becomes inferior to rights under prior ditch. 140Wash558, 250P41.

728-70½-New. Forfeiture for noncompletion within time.-Under federal statute, rights granted are forfeited if canal or ditch is not completed within five years of location as to any section thereof not completed at such time. 17 F(2d)357; 21F(2d)1001.

728-70⅔-New. Under such statute, natural lake adopted as reservoir, level of which is to be raised, is part of entire project which is embraced by term "canal or ditch," 17F(2d)357.

728-70¾-New. and such proposed reservoir is separate "section" of project and grant as to it is subject to forfeiture if level is not raised within five-year period, 17F(2d)357.

728-70⅞-New. except as to right to take water from lake by means of present outlet structure. 17F(2d)357.

728-70⅞-New. Suit to cancel right of way for irrigation canal is maintainable without congress declaring forfeiture or specifically giving jurisdiction. 22 F(2d)978.

728-71 72Mont472, 234P1086 (nine years insufficient); 72Mont564, 234P 1089 (must be for statutory period); 80Mont339, 260P401; 140Wash415, 249 P781; 152Wash443, 278P147.

728-72 72Mont564, 234P1089 (must be notice of adverse user).

728-74 72Mont472, 234P1086 (use of water plaintiff could not have used was not invasion of water right); 72Mont 564, 234P1089 (taking of water not needed by prior appropriator not adverse use).

728-76 72Mont564, 234P1089 (use not adverse unless deprived of water when in actual need of it); 76Mont1, 245P 532. **Use under claim of right** is not alone sufficient to show adverse use. 76 Mont1, 245P532.

728-76½-New. Use is adverse, when scarcity precludes supplying all parties. 72Mont564, 234P1089.

728-76⅓-New. Presence of sufficient supply for actual needs precludes adverse user. 72Mont564, 234P1089.

728-76¼-New. Right of city of San Diego to use waters of San Diego River is public right, entitled to prevail against prescription urged by others making use of stream. Cal 278P840.

728-76½-New. Forfeiture.-Water rights of water district held not forfeited in absence of action by state. Tex CommnA 258W(2d)813.

729-77 Statutory remedy not exclusive.-77Mont91, 250P11. **Failure to install headgates and measuring boxes in ditches** as provided by statute and by decree adjudicating water rights in stream does not deprive water user of right of action for damages for impairment of water rights. 77Mont91, 250P 11.

729-81½-New. Statutory proceeding to adjudicate priorities of right to use of water is not ordinary civil action or proceeding, and rules governing civil actions are not always applicable. 84 Colo 174, 269P574.

729-82 52Nev279, 286P120; Utah 289 P116. **Question for jury.**-29Ariz304, 241P307. **Proceeding is suit in equity.**-Utah 289P1097.

730-85 42F(2d)541; 42 Ida652, 249P 483. See also 92CalA428, 268P374. **Form of remedy.**-70Utah239, 259P408. **Section in statute relating to water rights held not limitation upon preceding section** as to general determination of rights. 70Utah239, 259P408. **In Utah.**-270P1090.

730-86 See also Utah 269P776.

730-86½-New. Water master and commissioner of reclamation are not required to interfere with diversion of water in absence of proof that diversion was made from tributary of river involved in former adjudication of water rights. 43 Ida371, 252P489.

730-86¼-New. Montana statute providing for appointment of water commissioner does not require appointment on all adjudicated streams and for all seasons, and is intended only for protection of prior water rights in time of need. 77Mont91, 250P11.

730-86¼-New. Operating company as equitable owner of irrigation system held entitled to sue for summary supplemental adjudication of rights under statute. 45 Ida380, 263P45.

730-88 52Nev426, 289P393; 131 Or 586, 283P8.

730-91 Discretionary power vested in district courts.-70Utah239, 259P408. **"General determination," as used in statute, defined.**-70Utah239, 259P408.

730-93½-New. Jurisdiction of water commissioner.-In some jurisdictions jurisdiction of water commissioner in determining relative rights of claimants is in nature of that of referee or master in chancery, most important difference being that water commissioner has original jurisdiction to initiate proceeding. 29Ariz499, 242P1013.

730-93⅓-New. On application for permit to appropriate water of river commissioner is without jurisdiction to settle and determine rights between applicant and objector. 29Ariz499, 242P 1013.

730-93¼-New. On such application only party before commissioner except by curtesy is applicant. 29Ariz499, 242 P1013.

730-94 Cal 290P1036; 83Colo 131, 262 P517. **Parties claiming benefit of irrigation adjudication statutes** must accept also their limitations. 83Colo 131, 262P517.

731-96 Cal 278P840. **Laches not defeating rights.**-Cal 278P840. **Right of city to use waters of river** constitutes public right as respects laches urged by others. Cal 287P475.

731-6 Water users association in public interest may sue on behalf of its stockholders, where if required to make all water users parties it would entail enormous expense and serious complications. 29Ariz360, 241P503.

731-9 67Utah553, 248P496 (under statute permitting joint or several action court cannot make findings or enter decree affecting right of cotenants or joint tenants not before court).

731-10 39F(2d)37; 67Utah553, 248P 496 (right of defendant to use water as against other claimants cannot be determined unless they are parties); 70 Utah239, 259P408. **Intervention.**-43 Ida371, 252P489. **Parties claiming priorities cannot complain of diversion by** drainage district's ditch where waters flowing therein could never have constituted source of supply for them. 84 Colo 99, 268P533.

732-12 45 Ida380, 263P45; 52Nev426, 289P393. See also Utah 288P1068.

732-13 See also 129 Or475, 278P583.

732-13½-New. Publication of statutory notice in proceedings to determine priority of water rights in county is binding on all claimants in other counties in district. 81Colo 468, 256P305.

732-13⅓-New. Plaintiffs actually before court and those they represented could proceed under facts, under statutes. 34NM127, 279P72.

732-14 72Mont564, 234P1089 (complaint dismissed, as not stating cause of action); 84Mont442, 275P1099. **Allegations held sufficient to state cause of action.**-117 Or30, 241P991. **Complaints held sufficient.**-34F(2d)820; 49 Nev35, 234P690. **Complaint need not allege** that all persons using water of stream have been made parties. 84 F(2d)820.

732-15 42F(2d)541. **Estoppel of defendant to assert priority insufficiently alleged.**-42F(2d)541. **Prescriptive right.**-42F(2d)541. **Insufficient allegations.**-42F(2d)541. **Abandonment of priority by defendant insufficiently alleged.**-42F(2d)544.

732-18 Complaint held not objectionable as mere statement of legal conclusions.-49Nev35, 234P690.

732-19½-New. In statutory action to quiet title plaintiff must bring himself within statute by allegations of his complaint. 29Ariz360, 241P503.

732-19⅓-New. But it is not necessary for him to allege defendant's adverse interest in language of statute. 29 Ariz360, 241P503.

732-19¼-New. It is sufficient for complaint to show that defendant claims interest which is adverse to plaintiff's claim. 29Ariz360, 241P503.

733-21 130 Or506, 280P518 (amendments liberally allowed and strict rules of pleading not adhered to); Utah 264 P727.

733-21½-New. Complaint in action to cancel permit to appropriate has been held sufficient upon which to base adjudication of rights of appropriations in river waters. 29Ariz360, 241P503.

733-21⅓-New. Pleadings held sufficient to give court jurisdiction to determine amount of saving of water, if any, by construction of canal and to provide for its distribution. 39 Ida798, 237P700.

733-21¼-New. In absence of statute requiring claimed water right to be set out by certain standard of measurement, such allegation is unnecessary. 49Nev35, 234P690.

733-21⅕-New. Issues.-Denial of any appropriation by plaintiff for irrigation purposes puts in issue question of annual period of plaintiff's appropriation. 46 Ida717, 271P2.

733-21⅙-New. Under allegation of adverse possession for longer period than that prescribed by statute, adverse possession for statutory period may be proved. 84Mont68, 274P151.

733-21⅐-New. In statutory proceedings to determine specific water priority right for irrigation, statutory notice relating to general adjudication proceedings is inapplicable. 87Colo 349, 287P861.

733-21⅛-New. Notice in statutory proceedings determining water right priorities, directed to those "adversely interested" is sufficient. 87Colo 349, 287 P861.

733-21⅛-New. Pleadings may be deemed amended to cover award of small fraction of water rights not claimed in pleadings. 39F(2d)37.

733-22 98CalA489, 277P172; 43 Ida 643, 253P840; Utah 267P1017. **Riparian owner desiring increased supply for land to be developed in near future** has burden of showing that he intends to and will within reasonable time bring more of his land under cultivation and have use for increased amount of water. 135Wash156, 237P498. **Plaintiff seeking to enjoin use of irrigation ditch** must establish exclusive right. 43 Ida

320, 251P617. **Person claiming to have developed waters in close proximity to source of stream previously appropriated by others** has burden of proving that alleged development did not interfere with waters previously appropriated. **Utah** 262P828.

733-24 47 **Ida**157, 274P110. **Failure to prove exact origin of easements** for irrigation ditches across lands of another has been held not to defeat claim. **Utah** 276P912.

733-25 77**Mont**91, 250P11; 67**Utah**553, 248P496.

733-26 77**Mont**91, 250P11. **Evidence as to price of land** cannot affect value of crops raised thereon. 77**Mont**91, 250 P11. **Evidence held sufficient.**–77**Mont** 91, 250P11.

733-26½-New. Burden is on subsequent reservoir user to show noninterference with prior appropriator's rights by construction, maintenance, and use of such reservoir. 77**Mont**229, 250P 963.

733-26¾-New. Where plaintiff suing to quiet title shows that water arose on his lands and that he had been in control thereof for period of years, burden rests on defendant owner of lower lands to show nature and extent of his right. **Utah** 274P457.

733-27 82**Colo** 138, 257P361; 72**Mont** 472, 234P1086; 80**Mont**339, 260P401; 219**AppDiv**83, 219**NYS**206. **Use of stream by upper proprietor** will be presumed to be riparian and not adverse until facts showing adverse use are brought home to lower proprietor. **Cal** 287P93.

733-28 202**Cal** 36, 258P1090. **Abandonment must be proved** by evidence of nonuse and intention to abandon. 87**Colo** 391, 288P177.

734-29 86**Colo** 191, 279P46(2dcase).

734-31 196**Cal** 666, 239P314; 207**Cal** 8, 276P1017(2dcase); **Cal** 287P93; 43 **Ida** 371, 252P489; 77**Mont**229, 250P963; 121 **Or**655, 257P26; **Utah** 269P776; **Utah** 274P457. **Deeds where recordation imparted no notice to defendant** have been held admissible in aid of plaintiff's claim of title by prescription. 196**Cal** 666, 239P314. **Grantee held entitled to show** remote grantor's intention as to use of water. 81**Colo** 10, 253P394. **Statement and proof of claim before water board** may be considered with other evidence. 124 **Or**7, 263P882. **Intention to abandon** may be shown expressly or by implication. 87**Colo** 391, 288P177.

734-32 196**Cal** 666, 239P314 (evidence held to show oral grant of easement for water ditch on defendant's land); 202 **Cal** 36, 258P1090; 207**Cal** 8, 276P1017 (2dcase); 207**Cal** 574, 279P432; **Cal** 287 P93; 74**CalA**286, 240P529; 78**CalA**266, 248P264; **CalA** 292P549; 82**Colo** 138, 257P361 (evidence insufficient to show adverse possession); 84**Colo** 99, 268P 533; 84**Colo** 174, 269P574; 87**Colo** 391, 288P177 (holding failure of appropriator of water to use it for forty years evidences abandonment); 41 **Ida**216, 240P 443; 43 **Ida**320, 251P617 (evidence held to show plaintiffs not entitled to exclusive ownership of irrigation ditch); 44 **Ida**651, 258P534; **Ida** 291P1055; 76 **Mont**1, 245P532; 76**Mont**600, 248P196; 77**Mont**91, 250P11; 77**Mont**229, 250P 963; 79**Mont**485, 257P406; 80**Mont**339, 260P401; 84**Mont**68, 274P151; **Mont** 286P133; 114**Nebr**806, 210NW279; 117 **Or**477, 244P662; 121 **Or**655, 257P26; 122 **Or**331, 258P183; 124 **Or**44, 259P 292; 124 **Or**7, 263P882; **Or** 286P563; 66**Utah**587, 245P338; 67**Utah**553, 248P 496 (evidence held not to establish extent of defendant's right to use water); 70**Utah**95, 258P216; **Utah** 262P828; **Utah** 264P727; **Utah** 272P633; **Utah** 274P457; **Utah** 289P1097; **Utah** 290P 173; 140**Wash**558, 250P41. **Evidence held sufficient.**–207**Cal** 8, 276P1017(2d case); 43 **Ida**371, 252P489; 117 **Or**30, 241P991; 140**Wash**558, 250P41. **Evidence held insufficient.**–207**Cal** 8, 276P 1017(2dcase); 42 **Ida**436, 246P23 (to show abandonment of water right); 219 **AppDiv**83, 219**NYS**206. **Quantity of water.**–82**NH**139, 130A846. **Ex parte affidavits attached to prior void decree held inadmissible** to show surrender of water rights. 81**Colo** 10, 253P394.

Finding of coöwnership in irrigation ditch held erroneous in absence of pleading of adverse possession. 43 **Ida**320, 251P617. **Indubitable proof is essential to establish prescriptive right to divert water.**–219**AppDiv**83, 219**NYS**206. **Weight of evidence.**–140**Wash**558, 250P 41.

734-33½-New. Questions of fact.–Question as to amount of water necessary per acre for irrigation is one of fact and never one of law. 77**Mont**91, 250P 11.

734-33¼-New. Questions for jury.–Character of entry, duration, and manner of use of drainage as easement by prescription are questions for jury. 178 **Minn**203, 226**NW**569(2dcase), 65**ALR** 124.

734-33¾-New. In determining whether water for power in lifting water for irrigation was economical use value or proceeds of power cannot be considered. **Or** 286P563.

734-34 67**Utah**553, 248P496 (findings failing to pro rata part of water to which each of plaintiffs was entitled were held uncertain). **Finding that defendant needed** fifteen inches of water for domestic and stock purposes and for irrigating five acres of land held supported by evidence. 74**Mont**50, 237P 1103. **Particular findings construed.**–**CalA** 292P157.

734-35 See also **Utah** 269P776. **Necessity of finding public character of land.**–206**Cal** 508, 274P969.

734-38 Findings held not inconsistent.–**CalA** 292P549.

735-41 80**Colo** 522, 253P389; **Colo** 291 P820. **Sharing expenses.**–117 **Or**30, 241 P991. **Decree "subject to contract"** held to mean contract is valid. 80**Colo** 522, 253P389. **Court should decide interest of objector** to change point of diversion, before deciding his right to object. 80 **Colo** 522, 253P389. **Decree transferring rights "subject to contract"** held to leave meaning of contract to water officials. 80**Colo** 522, 253P389.

735-42 But see 84**Colo** 174, 269P574.

735-43 74**CalA**286, 240P529. **Meaning of term "inch of water."**–72**Mont**472, 234 P1086 (two inches to acre). **Allowance held excessive.**–74**CalA**286, 240P529. **Court must fix "duty of water,"** which is quantity essential to irrigate land properly. 74**CalA**286, 240P529. **Duty of water figured in inches under given pressure.**–74**CalA**286, 240P529. **Measuring device** for irrigation ditch used by parties held properly ordered by court. 43 **Ida**320, 251P617. **If statute providing for measuring water** is not exclusive, court may adopt other more beneficial method. 117**Tex**10, 295**SW**917. **Adjudication of priority of rights** is not abortive for failure definitely to distribute water. 117**Tex**10, 295**SW**917.

736-44 Utah 290P173.

736-46 But see 46 **Ida**717, 271P2; 80 **Mont**339, 260P401.

736-47 117**Tex**10, 295**SW**917.

736-54 205**Cal** 730, 272P1055; **Mont** 290P266; **Utah** 272P633. **Quantity of water.**–49**Nev**35, 234P690. **Decree quieting title held sufficiently certain.**–**Utah** 267P1017.

737-55 Conclusions of law and decree held not inconsistent with findings.–**CalA** 292P157.

737-58½-New. Decree quieting plaintiff's title to entire creek should not preclude defendant's future application for appropriation. 29**Ariz**360, 241P503.

737-60 77**Colo** 504, 238P64; 87**Colo** 215, 287P652; 66**Utah**300, 242P348; 140**Wash**558, 250P41. **The Colorado statute,** etc. 77**Colo** 504, 238P64; 81 **Colo** 468, 256P305; 87**Colo** 349, 287P 861. **Rights on modification of decree.**–140**Wash**558, 250P41. **Adjudication that certain county is within water district** is binding on all parties thereto. 81 **Colo** 468, 256P305.

737-61½-New. Construction of particular decrees.–81**Colo** 468, 256P305; 76 **Mont**1, 245P532.

737-61¼-New. Finding that defendants had used certain number of inches of water on their land called for decree awarding such amount. 72**Mont**472, 234 P1086.

737-61¼-New. Water not required to be measured at particular place, where method adopted accomplished purpose of decree. 72**Mont**472, 234P1086.

737-61⅓-New. Order fixing location of measuring box held not erroneous. 72 **Mont**472, 234P1086.

737-61½-New. Decree of adverse user declared erroneous. 72**Mont**472, 234P 1086.

737-61½-New. Plaintiff has right to presume that defendant will take water in conformity to decree. 72**Mont**564, 234 P1089.

737-61⅔-New. Decree binding till subsequent change in conditions is shown. 72**Mont**564, 234P1089.

737-61⅚-New. Where decree does not provide for use of water during dry season, defendant should secure modification of decree. 72**Mont**564, 234P1089.

737-61 1/10-New. Determination of water rights of certain owners as to part of stream does not preclude raising of question of general rights under statute. 70**Utah**239, 259P408.

737-61 1/11-New. Matter of waste of water may be drawn in question in general determination of water rights. 70 **Utah**239, 259P408.

737-61 1/12-New. Successive decrees.–81 **Colo** 468, 256P305.

737-61 1/13-New. Supplemental proceeding for modification of decree adjudging priorities does not constitute reopening of original decree so as to make order modifying original decree final decree as of date of order of modification. 81**Colo** 468, 256P305.

737-61 1/14-New. Decree as notice.–80 **Colo** 398, 252P358.

737-61 1/15-New. In action by reservoir owners against prior appropriators of water flowing from reservoired lakes, where inflow into lake may be determined with reasonable certainty, decree should provide for placing of suitable measuring device at inlet and outlet of lakes to enable release of natural flow of lake into channel of stream whenever prior appropriators of waters of stream need it. 77**Mont**229, 250 P963.

737-61 1/16-New. and that stored water should be permitted to run into channel of stream and be diverted therefrom plus a reasonable amount of seepage and evaporation. 77**Mont**229, 250P963.

737-61 1/17-New. Judgment, restraining defendants from taking water from any watercourse emptying into or feeding named creek, is improper as to one defendant whom it was not intended to prevent from taking subsurface or percolating waters. 205**Cal** 730, 272P1055.

737-61 1/18-New. Where plaintiff appropriators were not injuriously affected by decrees complained of, and suit was really for benefit of appropriators outside district, and who were not parties to suit, holders of, or interested in, appropriations, court properly withheld relief. 85**Colo** 555, 277P763.

737-61 1/19-New. All adjudicating proceedings in given water district are to be taken as connected and must be considered in their entirety, and after first proceeding each supplemental one is inferior as to priorities to next preceding one. 85**Colo** 555, 277P763.

737-61 1/20-New. In action to determine use of waters of certain creek, where its flow had been increased by dam constructed in lake by reclamation district, it has been held that such reclamation district was entitled to excess of flow of stream above all other existing rights and needs of other landowners, though, upon proof and findings, there was no sufficient definiteness of amount of increased flow. 149**Wash** 169, 270P303.

737-61 1/21-New. Court, after general decree adjudicating water rights, has jurisdiction to entertain subsequent individual applications for priority. 87 **Colo** 215, 287P652.

737-61 1/22-New. Decree awarding second claimant priority as of date earlier than priority awarded first claimant under earlier decree is erroneous. 87**Colo** 215, 287P652.

737-61 1/23-New. In adjudicating water rights court should suppress all wasting. **Or** 286P563.

737-61 1/24-New. Under statute, public

officials charged with distribution of irrigation water must distribute it according to priority decree therefor. 86 Colo 197, 280P481.

737-61½5-New. Court must declare what constitutes economic use of water and fix amount for that purpose. Or 286P563.

737-61½6-New. Use of quantity of water for purpose of carrying off river débris properly disallowed during irrigation season only as constituting waste. Or 286P563.

737-61½7-New. Claim for water right for irrigation and power development for lifting water under statute may be allowed in part only. Or 286P563.

737-61½8-New. Claim for quantity of water for hydroelectric power held properly allowed. Or 286P563.

737-61½9-New. Law that water priority owner may use quantity awarded only when good irrigation usage, and land's needs justify it is read into decree. 87Colo 489, 289P603.

737-61½0-New. Decree changing points of diversion held erroneous as based on incorrect interpretation of words "continuous flow during irrigation season." 87Colo 489, 289P603.

737-61½1-New. In construing decree adjudicating water rights, all parts of decree must be given effect. Wash 291P710.

737-61½2-New. Under decree adjudicating water rights all land has been held entitled to water for stock and domestic use without regard to priority. Wash 291P710.

737-63 49Nev357, 246P692.

737-64½-New. Nevada Water Law does not give right of appeal from order denying injunction against taking or diversion of water. 49Nev357, 246P692.

737-66 Findings conclusively presumed.-131 Or586, 283P8.

737-67 See also 117 Or30, 241P991. **Remand to lower court and further proceedings therein.**-115 Or27, 237P322.

737-67½-New. Appeal from decision of water commissioner.-Applicant for permit to appropriate water has right of appeal from commissioner's denial of permit. 29Ariz499, 242P1013.

737-67½-New. Objector to application for permit to appropriate water has no right to appeal from decision granting permit. 29Ariz499, 242P1013.

737-67¼-New. Writ of review.-Temporary order directing distribution of waters of stream is not reviewable on writ of review where it does not appear that court exceeded jurisdiction. 39 Ida798, 237P700.

737-67½-New. Appeal will not be dismissed for failure to file notice of appeal in time where timely service of notice was made. 135Wash156, 237P498.

737-67¾-New. Harmless error.-Where husband and wife were jointly awarded water right in amount not greater than husband alone was entitled to receive, fact that wife was not entitled to any water in her own name is of no concern and is not prejudicial to other claimants and husband alone can complain of decree. 76Mont1, 245P532.

737-67½-New. Where evidence justifies finding fixing relative priorities of appropriation of water, party is not injured by action of court in fixing arbitrary date which may or may not correspond with actual date of appropriation so long as priorities are not affected. 76Mont1, 245P532.

737-67½-New. Decree on conflicting evidence will not be disturbed when justified by evidence. 80Colo 398, 252 P358.

737-67½-New. Presentation of appeals together.-Appeals pertaining to adjudication of water rights under stream system should be presented at same time as one case. 124 Or7, 263P882.

737-67½0-New. Findings of fact made by two referees and approved by two judges should not be lightly set aside, but only if manifest error is disclosed by entire record. 85Colo 555, 277P763.

737-67½1-New. Appeal from decision of board of public works lies to district court under Nebraska statute. Nebr 228NW864.

737-67½2-New. In reviewing part of judgment fixing rights to water, appellate court passes on both law and fact questions. Utah 289P1097.

737-67½3-New. Party making no claim to water of particular stream is not prejudiced by adjudication of water therein. Utah 289P1097.

737-67½4-New. Statute limiting reargument or review in water right priority cases to two years from final decree includes decrees determining individual's priority. 87Colo 215, 287P652.

737-67½5-New. Presumption exists that court awarded to appropriators all water necessarily and beneficially used and acquired by prescription. CalA 292 P549.

737-67½6-New. Questions of fact.-Quantity of water allowed for watering stock and period of allowance are questions of fact on which trial court's determination will not be disturbed. CalA 292P549.

738-68 41 Ida216, 240P443; 121 Or 655, 257P26. **Statutes repealed.**-Utah 263P930. **Apportionment and judgment for costs not within power of trial court** in proceeding under statute for adjudication of water rights. Utah 263P 930. **When denial of costs proper.**-Utah 274P457; Utah 289P1097.

738-69 46 Ida175, 267P229. **Reclamation department held not entitled to have costs apportioned** against parties where it failed to file map or place it in court's possession pursuant to order. 46 Ida175, 267P229.

738-70 98CalA489, 277P172; 83Colo 510, 267P605; 48 Ida383, 283P522 (construction of dam and use of natural channel of river); 117 Or30, 241P991; 122 Or331, 258P183. **Temporary injunction against interference with diversion of water** may be issued on proper showing. 43 Ida371, 252P489 (showing held sufficient). **Though damage was originally caused by defendant's predecessor in interest,** suit to restrain further continuing injury will lie. 48 Ida383, 283P522. **Matters not showing consent precluding relief.**-48 Ida383, 283 P522. **That interference was not negligent** does not preclude relief. 48 Ida 383, 283P522. **Use of water for domestic purposes from so-called potholes** does not authorize injunctive relief as against interference with appropriated rights to water of river. 48 Ida383, 283 P522.

738-72 202Cal 47, 258P1095.

738-72½-New. Injunction will not issue where statute provides for stay of proceedings to determine water rights. 49Nev357, 246P692.

738-77 202Cal 47, 258P1095. **Demurrer for misjoinder of parties** is properly overruled where all parties have interest, though not equal interest, in waters of stream and extent of flow. 48 Ida383, 283P522.

739-80 Allegations of irreparable injury held sufficient.-49Nev35, 234P690.

739-82 202Cal 36, 258P1090.

739-86 Injunction restraining all use of water by defendant failing to establish prescriptive right held not too broad. 219AppDiv83, 219NYS206.

739-87 See also 202Cal 36, 258P1090.

740-90½-New. Defendant attempting to defeat decree by his conduct in violation of order is guilty of contempt. 80Colo 452, 252P343.

740-90½-New. Court may issue mandatory orders to enforce injunction as to water rights. 80Colo 452, 252P343.

740-90¼-New. Requests to modify details of injunction should be addressed to trial court. 80Colo 452, 252P343.

740-90½-New. Contempt proceedings for violation of injunction do not involve underground water rights. 80 Colo 452, 252P343.

740-90¾-New. Decree in suit to restrain reservoir owner from interfering with rights of prior appropriators should not make prior appropriators judges of times when water can be used beneficially. 48 Ida383, 283P522.

740-90½-New. Such decree should not require losses exceeding natural loss to be borne by defendant's stored water. 48 Ida383, 283P522.

740-91 Assignment of interest in revenue to be derived from sale is not revoked **on death of assignor. TexCivA** 29SW(2d)461. **Revenue to be derived from sale** in territory with market therefor has such potential existence as to be subject of assignment. **TexCivA** 29SW(2d)461.

740-96½-New. Where state is owner of waters of all its natural streams, United States patent to government land cannot pass title to waters of stream appertaining to such land. 82Colo 138, 257P361.

740-97 88CalA157, 263P318; 235Mich 174, 209NW152; 76Mont1, 245P532; 216AppDiv639, 215NYS741; 132Misc 848, 230NYS691; Vt 150A138. **Attempted transfer of riparian rights by riparian to nonriparian proprietor** is invalid. 111Conn352, 150A60.

741-99 98CalA188, 270P1006. See also Or 256P186.

741-1 116Tex82, 286SW458 (consideration held sufficient). **Settler in possession of public lands of United States** may convey his rights therein with water right appurtenant thereto without consideration to one who takes possession thereof. 76Mont1, 245P532.

741-4 116Tex82, 286SW458 ("grant license or easement"). **Settler in possession of public lands of United States** may convey his rights in same with water right appurtenant thereto orally to one who takes possession thereof. 76 Mont1, 245P532.

742-6 235Mich174, 209NW152. See also 133Misc165, 231NYS664. **Grant of easement** to enter land in mill race and construct electric poles, wires, etc., and operate railroad thereon held to convey interest in land and not merely easement. 114 Oh685, 152NE5.

742-9 City of New York held not fee owner of lands formerly under Sherman's Creek, shown to lie inshore of mean high-water mark. 130Misc103, 224NYS207. **Mexican grants of property** bordering on stream held not to pass title to bed of stream as against state. 117Tex53, 297SW202.

742-10 Where deeds described lots by metes and bounds, rights of parties in lake were determinable by exact boundary lines according to deeds. 133Misc 502, 233NYS11.

742-11½-New. Conveyance of land by United States carries only such portion of its riparian rights as riparian land conveyed bears to whole of lands riparian to stream. 140Wash558, 250P 41.

744-25½-New. Works constructed for use of water, consisting of ditches, canals, flumes, or reservoirs, are not in themselves easements, but are land. 114 Oh685, 152NE5.

744-30½-New. If right of way for irrigation ditch can be obtained by condemnation proceedings, easement cannot be claimed under common-law rules on easements of necessity. 66Utah509, 243P922.

744-31 116Tex82, 286SW458. **Agreement held not to affect ownership of lots,** but merely created easement in use of waters. 133Misc502, 233NYS11.

744-35 Covenant against diverting water of spring from its course to grantor's remaining land has been held not violated, where water flowing through such land did not come exclusively from spring. 229Ky339, 17SW(2d)194.

745-39 See also 116Tex82, 286SW458.

745-39½-New. Deed of land with buildings, and appurtenant thereto a mill dam, mill pond, water rights and privileges, does not convey land under water. 15DelCh168, 132A891.

745-40 TexCivA 278SW316 (to maintain flume).

745-47 83CalA481, 257P105. **Law imposes no obligation on owner of servient estate** to repair or maintain irrigation canal for benefit of dominant estate. 83 CalA481, 257P105.

745-47½-New. Deed requiring grantee to keep flume and rack of gristmill in good repair obligates grantee's successor to provide suitable rack. 82NH139, 130A846.

746-50 170Ga279, 152SE575. **Notice.**-CalA 271P1103. **What are easements.**-CalA 271P1103(2dcase). **Reservation held exception rather than reservation.**-98CalA489, 277P172. **Right to convey water through pipe line and**

ditch across premises conveyed may be reserved by provisions of deed. **CalA** 292P549.

746-51 38GaA278, 143SE780. **Recital in deed, reserving to grantor, heirs, and assigns, "one-half of spring which runs to buildings on premises"** held a reservation. 257Mass499, 154NE87.

746-52½-New. Purchaser of property is charged with constructive notice of contents of patent reserving vested water rights and rights to ditches and reservoirs. **CalA** 271P1103(2dcase).

746-53 TexCivA 10SW(2d)147. **Drainage easement.-Ida** 288P427. **Easement of necessity in nature of drain.-Me** 151 A558.

746-54 38GaA278, 143SE780.

746-55 257Mass499, 154NE87. **Reservation of one half of spring.-257Mass** 499, 154NE87.

747-57½-New. Similarly, grantor is bound not to interfere with grantee's rights and must refrain from any conduct not reasonably necessary for purpose of use reserved. 82NH186, 131A 836.

747-58 82NH186, 131A836. **Reservation held not entitling grantor to contaminate water.-82NH186, 131A836. Restriction on grantee construed with rights reserved.-82NH186, 131A836. Construction of words of reservation.-** 249NY588, 164NE594(2dcase).

747-60½-New. Reservation of winter waters theretofore used by grantor on lands, contained in conveyance of interest in waters of creek does not entitle grantor to use winter waters on section which, prior to reservation, had been irrigated only with summer waters. 66 **Utah**587, 245P338.

747-60⅓-New. Such reservation construed as entitling grantor to use certain disputed ditches regardless of whether they were construed before or after reservation. 66Utah587, 245P338.

747-61 88CalA157, 263P318; 216App Div639, 215NYS741. **Construction of particular grants.-CalA** 292P549; 86 **Mont**276, 283P213; **TexCivA** 271SW300 (mutual mistake); **Utah** 274P454; **Ont** [1929] 3DomLR199 (crown grants). **Finding as to intention** of parties to gristmill deed granting water rights held competent proof in construction of deed. 82NH139, 130A846. **Effect of grant of riparian rights separate from land** is simply to convey grantor's right to use of water on his own riparian land and to estop him to complain against any use of water which grantee may make to injury of such riparian right. 88CalA157, 263P318. **In grant of right to use portion of water before and after season for irrigating crops,** word crops is used in popular sense and includes crop of hay annually irrigated. **Utah** 272P633.

748-64 216AppDiv639, 215NYS741.

748-65 216AppDiv639, 215NYS741. **Exceptions construed to give them practical effect.-216AppDiv639, 215NYS741.**

748-71½-New. Where language is not explicitly such as to create condition, but clearly negatives such construction, provision in deed will be construed to be covenant rather than condition. 82 NH186, 131A836 (requirement that waste water be turned back on grantor's land).

743-72 205Cal 231, 270P444. **Grantees from riparian owner of lots not bordering on stream** cannot have of their own right riparian privileges in its waters. 111Conn352, 150A60.

748-75 Interest, acquired by grantee of riparian rights limited to right of diversion at specified point, consists of grantor's waiver of right to demand entire flow of stream in natural course down to riparian lands. 88CalA157, 263 P318.

749-76 88CalA157, 263P318.

749-78 222Ky569, 1SW(2d)979. See also 207Cal 613, 279P657.

749-79½-New. Right of stranger to question title.-Where purchaser of land and water right ceased to make payments on ground that vendor was without title and vendor took no steps to declare forfeiture, stranger to contract is not in position in action concerning water rights, to question purchaser's title. 76Mont1, 245P532.

749-79½-New. Quality of water.-Grantee of water rights is entitled to protect quality of water granted for domestic use. 82NH186, 131A836.

749-79¼-New. Grantor's reservation of first use of water does not entitle him to contaminate water by allowing cattle to drink therefrom. 82NH186, 131A836.

749-79½-New. Right to use waters for irrigation purposes based on purchase of ditches of prior appropriators for placer mining purposes cannot be earlier than date of deed, being additional burden on use of water. 80Mont339, 260P 401.

749-79½-New. Riparian rights acquired by grant are limited by rights attaching to lands of nonconsenting owners. 88 CalA157, 263P318.

749-79½-New. Grantors may not use waters so as to interfere with rights granted. 133Misc502, 233NYS11.

749-81 Evidence held not to support decree limiting use of water to certain number of hours draft. 82NH139, 130A 846.

749-81½-New. Where use of water for twenty hours a day by grantee in deed conveying gristmill is reasonable use under evidence, he is entitled to such use. 82NH139, 130A846.

749-83 Evidence of conduct of parties immediately following grant may be considered in determining meaning of language as to quantity. 82NH139, 130A 846. **Evidence of custom of operating mills** prior to grant of gristmill and water rights has been held insufficient as basis of finding intention to limit hours of running mill in accordance therewith. 82NH139, 130A846.

749-84 Grant of all water rights except water "actually flowing over crest of dam" held to permit grantor to use only water flowing over dam, including flash boards. 216AppDiv639, 215NYS 741.

750-85 82NH139, 130A846; 216AppDiv 639, 215NYS741; **Vt** 150A138. **Finding** as to contemplation of parties as to installation of modern wheel in mill held not in contradiction of terms of deed. 82NH139, 130A846. **Quantity or manner of use of water.-82NH139, 130A846. Number of cubic feet per second** necessary to run specified machinery, as determined by competent evidence, should be read into deed. 82NH139, 130A846. **Evidence held sufficient** to support finding that grantor and grantee in deed to gristmill and water rights intended change in character of waterwheel. 82 NH139, 130A846. **Grant reserving so much as grantee should not need to run machinery** held to be measure of quantity. 216AppDiv639, 215NYS741.

750-88½-New. Raising of dam has been held not to confer right to greater quantity of water on one millowner to detriment of another having inferior privilege. 82NH139, 130A846.

750-88⅓-New. Decree fixing rights to additional water by raising of dam held correct. 82NH139, 130A846.

750-88¼-New. Grantee has right to protect quantity of water granted. 82 NH186, 131A836.

750-88⅓-New. Quantity, under exceptions in grant, held question of fact. 216 AppDiv639, 215NYS741.

751-91 82NH186, 131A836.

751-93 32F(2d)779.

751-97 114 Oh437, 151NE653, 663 [cit CJ]. **Evidence** that certain use of water is beneficial to grantee and not detrimental to grantor tends to prove grant of such use was intended. 82NH139, 130 A846. **Reasonable use** of water is presumed to have been intended in conveyance of gristmill and water right. 82 NH139, 130A846.

752-98 82NH186, 131A836. **Successor of one conveying all waters flowing from certain spring, except that used on stated acreage,** is not entitled to use all waters of spring which he may desire on such acreage but only quantity necessary for irrigation of, and domestic uses on, such land. **Utah** 274P454.

752-99 Prohibition subject to exigencies of reasonable conduct.-82NH186, 131A836.

752-5½-New. Deed conveying gristmill grants prescribed quantity of water whenever grantee desires to use it unless different intention is shown by surrounding circumstances. 82NH139, 130 A846.

752-5⅓-New. Test of whether prohibition against diversion is violated is whether such diversion substantially affects security of grantor's rights reserved. 82NH186, 131A836.

752-5¼-New. Where diversion for use other than that at grantee's buildings is prohibited, manner of accomplishing diversion is not test of prohibition. 82 NH186, 131A836.

753-6 82NH139, 130A846. **Purpose or quantity of water.-82NH139, 130A846.**

753-7½-New. Where grant is made with probability of varying extent of use according to requirements of parties as time went on, it is not intended to establish definite limit of quantity. 82NH 186, 131A836.

753-8 111Conn90, 149A241. **Acts held not to constitute abandonment.-111Conn** 90, 149A241.

753-9 Evidence held not to show waiver or loss of right by laches. 82NH139, 130A846.

754-13½-New. That privately owned water system was sold by defendant water company to defendant city and became part of public utility, with knowledge and consent of plaintiffs, who, as appurtenant to their lands, owned right to certain quantity of water and proportionate part of water system, has been held not to cause them to lose such rights by abandonment, notwithstanding wells and distributing system were altered and enlarged by defendants, such changes being for defendants' own benefit. 205Cal 231, 270P444.

754-14 74CalA286, 240P529; **CalA** 292 P549; 83Colo 343, 265P693; **Ida** 288P 427; **Mont** 290P255; 149Wash285, 270 P804. **Construction of deed.-34NM246,** 280P253. **Deed conveying land with appurtenances** transfers all water rights appurtenant to land at time of execution of deed. 47 **Ida**490, 276P964. **Deed creating easement to construct drain** is presumed to convey additional right of drainage than that afforded by his right as upland proprietor. 111Conn90, 149A 241. **Division of tract of land to which water is appurtenant,** without segregating or reserving water right, works division of water right in proportion as land is divided. 47 **Ida**490, 276P964. **Drainage right across another's land to carry off surface and surplus irrigation** water, being necessary for reasonable enjoyment of adjoining land, passes to grantee thereof. **Ida** 288P427. **Purchaser at foreclosure sale under mortgage of lands and appurtenant** water rights takes title to land and water rights subject to lien of prior mortgage. **Mont** 290P255.

755-15 191NC790, 133SE199.

755-17 74CalA286, 240P529.

755-22½-New. Agreement with claimant to easement in water ditch does not bind landowner's predecessor or successor so as to validate adverse claim. 79Mont485, 257P406.

755-22⅓-New. Grantor conveying piscatory rights in lake to town could deed abutting property for pumping station and right to take water from lake to water company. 222Ky569, 1SW(2d) 979.

756-25 40GaA690, 151SE238; **TexCivA** 278SW316 (in arid communities). **Covenant to pump water from river** to reservoir on granted land gives easement on grantor's remaining land and dam and power plant thereon. 5F(2d)908. **Water rights are easements** from date of conveyance, and are covenants running with land. **TexCivA** 293SW923.

757-31 74CalA286, 240P529; **Mont** 286 P133 (right of way for ditch is easement); **TexCivA** 278SW316. **Covenant to maintain flume** across canal for grantor held to run with land. **TexCivA** 278 SW316.

757-32 74CalA286, 240P529.

757-33 Water rights represented by

shares of stock in ditch company may pass as appurtenant to land on which it is used. **Mont** 290P255.

758–44 39F(2d)610.

759–49½–New. Purchaser of water right subsequent to lease takes subject to lease. 48Nev41, 226P1102.

759–49⅓–New. Contract of water company to connect property with its sewer so long as landowner should continue to purchase water constitutes rental agreement. 13LaA181, 127S470.

759–49¼–New. Such contract does not impose servitude for benefit of property. 13LaA181, 127S470.

759–57 Value of property of company should be fixed as of date of inquiry for determining rates. 40 Ida690, 236P525.

760–58½–New. Purchaser of water right subject to lease cannot increase rent for unexpired portion of term except by agreement with tenant. 48Nev41, 226P 1102.

760–58⅓–New. Continuance of lessee in use of water right after demand for increased rent by purchaser from lessor is not consent to pay increased rental. 48 Nev41, 226P1102.

760–61 116Tex82, 286SW458.

760–63 But see 116Tex82, 286SW458.

760–66½–New. Permission to construct ditch across land to take waste water thereon does not constitute grant of land for ditch. 44 Ida663, 258P541.

760–66⅓–New. Estoppel.–Where riparian owner gave license to another to construct dam and ditch on land, which was done at great expense, increasing sale value of land, his successors are estopped after many years to deny right of purchasers to use same. 116Tex82, 286SW 458.

760–66¼–New. Grant by riparian owner to coal company of right to deposit coal dirt in creek and release of present and future claims arising therefrom is not license but grant of easement. 290Pa 322, 138A860.

760–66½–New. Grant of right to deposit coal dirt, slate, and refuse materials into a creek is not void as against public policy. 290Pa322, 138A860.

760–66⅙–New. Such grant is covenant running with the land, though grantor's property was not contiguous to that of coal company. 290Pa322, 138A860.

760–66⅐–New. Such grant is not void as against public policy on ground of attempt to limit liability for negligence. 290Pa322, 138A860.

760–69 121 Or591, 256P186 (mere oral agreement for use of water). **Revocation proper where "licensee"** has not made substantial improvements. 121 Or 591, 256P186.

761–72 120 Or237, 251P898.

761–73 Agreement to modify relationship between upper and lower riparian owners in favor of former constitutes easement in latter's land. 41F(2d)358.

761–74 Agreement between upper and grantor of lower riparian owner to dump débris into stream diverting stream on latter's land created easement. 41F(2d) 358.

761–80 Utah 288P1068.

762–81 121 Or591, 256P186; **Vt** 150A 138. **Certainty.**–77Mont221, 250P600. **Water rights are governed by terms of agreement solely,** and may not be enlarged or changed except by mutual consent. 97CalA740, 276P137.

762–84 202Cal 36, 258P1090; 234Ky 656, 28SW(2d)984 (holding covenant to install water trough for grantor's use required grantee to furnish water).

762–86 Where adjoining landowners by mutual agreement construct ditches and dikes between their lands and maintain them for period of years and acquiesce therein, one of them cannot compel other to remove same. 125Kan 149, 629, 264P35, 266P35.

762–88 Particular contracts construed.–**Vt** 150A138.

763–95 Petition held sufficient.–40GaA 690, 151SE238.

763–96 Covenant reserving use of power to grantor of upper site is not breached by grantee constructing dam at lower site. 175Minn81, 220NW404.

763–96½–New. Grantee of dominant estate entitled to easement including right to receive water through pipes on portion of estate not conveyed may maintain action against person interfering with use and enjoyment of easement. 38GaA278, 143SE780.

764–98 50Nev352, 259P632.

764–99 CalA 271P1103(2dcase). **Burden of proof.**–**Ida** 289P72.

764–1 83CalA317, 256P609; **Ida** 289P 72; 191NC790, 133SE199. **Evidence held to show no agreement, but temporary permissive user.**–74CalA286, 240 P529. **Evidence held insufficient to show** that use of ditch on defendant's land is concealed in action to enjoin interference with ditch and road. 100CalA692, 280P1021. **Evidence held to present jury question** of fraudulent representations of ownership of water rights. **Tex CivA** 28SW(2d)926. **Sufficiency of evidence in action to establish drainage easement.**–**Me** 151A558.

764–2 175Minn81, 220NW404.

764–4 Evidence held sufficient in action to quiet title to sustain finding that waters collected from two separate boxes, forty feet apart had same source in one spring and were conveyed by deed of spring. 198Cal 473, 245P1087. **Decree in suit to quiet title** fixing legal title to irrigation instruments held sufficiently to preserve equitable estates of defendants and not to require modification. 16F(2d)114.

764–5 83Colo 343, 265P693; 216App Div639, 215NYS741. **Bill to enjoin interference with right to use water** held to state cause of action. 257Mass499, 154NE87. **Dismissal as to certain defendants held proper** upon finding that one of the defendants was owner of ditch use of which plaintiff sought to enjoin. 83Colo 343, 265P693. **Complainant held not entitled to injunction.**–32F(2d)779. **Complaint held sufficient** as against demurrer. 205Cal 231, 270P 444. **Diversion from unauthorized point.**–88CalA157, 263P318.

764–5½–New. Terms of deed in respect to water power rights have been held sufficiently definite to warrant granting of relief to plaintiff by way of injunction. 249NY588, 164NE594(2d case).

764–5⅓–New. In suit to restrain obstruction of ditch, question whether substituted pipe system was adequate was one of fact. **RI** 146A405(1stcase).

764–5¼–New. Petition in action to enjoin interference with pipe line over defendant's land is insufficient when it fails to show irreparable damage. 170 Ga10, 152SE47(2dcase).

766–11 Reasonable construction of statutes.–**NJSup** 147A720. **Statute providing for city's application** for additional water supply only requires estimate of quantity of water to be obtained from underground sources. **NJSup** 147A720.

766–12 Cal 293P67. **Donation by private individual.**–44Philippine292. **Option to purchase waterworks** is not canceled by cancellation and retirement of water company's bonds. 215Ala120, 110S36. **Deed of water rights held to have been accepted in performance of contract.**–**Or** 289P1044.

766–13 Borough's nonuser of easement for water supply acquired by purchase condemnation and adverse user does not work abandonment of rights. 111 Conn352, 150A60.

766–13½–New. Statutes authorizing merger of water companies held not invalid as class legislation or as discriminating. 287Pa376, 135A362.

766–13⅓–New. "Adjacent territory" used in application to appropriate water for cities refers to territory built up outside of, but immediately adjacent to, cities named. 78CalA209, 248 P275.

766–13¼–New. Application to appropriate water may be granted in part and denied in part. 78CalA209, 248P275.

766–13½–New. Application to appropriate water for municipal purpose may be heard even though it is defective. 78CalA209, 248P275.

766–13⅙–New. Borough purchasing water company's franchise and operating plant assumes its responsibilities, and is subject to same obligations. 287Pa 30, 134A380.

766–13⅐–New. Where there is no finding that acquisition of further source of water supply is reasonably necessary, order of commission requiring additional source of supply is fatally defective. **Vt** 146A71(2dcase).

766–13⅛–New. Water power commission has power to determine most desirable source of city's water supply, even though other than city requests. 227 AppDiv345, 238NYS55.

766–13⅑–New. Power commission's decision that city's water project was better than another justifies approval of propriety of its choice. 227AppDiv345, 238NYS55.

766–13⅒–New. Proceedings by majority of board on city's application for permission to acquire additional water supply, later ratified by full board, held sufficient. **NJSup** 147A720.

766–13⅓–New. On certiorari to review, board's action in granting city permission to acquire new water supply, reasonableness, legality, and form of proceedings only are reviewable. **NJSup** 147A720.

766–14 Statute requiring more than Constitution commands as condition for granting right of eminent domain held not violative of due process provisions. 227AppDiv345, 238NYS55.

767–20 See also 132Misc848, 230NYS 691.

767–23 80Mont64, 257P1038. **Prevention of promiscuous bathing therein.**–111Conn352, 150A60.

768–25 143Wash606, 255P961. **Construction and effect of statutes,** etc. 143 Wash606, 255P961. **Ordinance held not unreasonable.**–143Wash606, 255P961.

768–26 80Mont64, 257P1038. **Irrigation district causing deterioration** in quality of water cannot insist that water company enlarge and reconstruct its plant so as to purify water. 80Mont64, 257P1038. **Doctrine of comparative injury** not applicable to facts of case. 80 Mont64, 257P1038. **Borough's giving notice of intention to protect water supply by preventing bathing** is proper means of minimizing damages which might result from injunction. 111Conn 352, 150A60.

768–27 See also 80Mont64, 257P1038.

768–28 Complaint held to state cause of action.–206Cal 400, 274P538.

768–29 39F(2d)46 (suit by government). **Landowner cannot defeat or abate action** by water district to restrain him from preventing, obstructing, or impeding natural flow of river, merely because costs of litigation are borne from fund made up of taxes. 206 Cal 400, 274P538.

768–30 220AppDiv784, 222NYS665 [aff 129Misc746, 222NYS665]; 124Misc877, 210NYS611; 121 Or340, 255P326.

769–31 172Ark999, 291SW422, 50ALR 1202; 93CalA42, 269P630(1stcase); 235 Ky346, 31SW(2d)386 (statutes not conflicting); 169La458, 125S447 (creating and empowering water works districts). **Under Public Utilities Act,** commission held not required to proceed with construction of works till municipality provided moneys. **Ont** [1927] 3DomLR182. **Act not repealed** by Public Service Commission Act in Missouri. 319Mo 562, 4 SW(2d)773. **Public service commission cannot require certificate** of convenience and necessity for supply beyond municipal units. 319Mo 562, 4SW(2d)773. **Under Pennsylvania General Incorporation Act** borough has right to acquire works of gas and water company twenty years after introduction of water. 299 Pa533, 149A713. **Impairment of obligation of contracts.**–**NJSup** 151A215.

769–33 300Pa439, 150A652 (holding city's right to buy plant qualified by Public Service Company Law); 13Pa Dist&Co 610. **Supplying water beyond city limits.**–121 Or340, 255P326. **Power to supply water** held not to include power of town to sell water without ownership of source. 233 IllA123. **Lapse of time** bars city's right to acquire plant. 300Pa439, 150A652.

770–36 Court may review decision of water power commission to determine

whether it was unlawful, arbitrary, or capricious as to municipality's petition for approval of its water works project. 227AppDiv345, 238NYS55.

770–37 Adverse vote of electors terminates city's right to take over plant. 300 Pa439, 150A652.

770–37½–New. Where trustee under trust deed securing city waterworks bonds offers to pay same rate of interest as other banks to which city sought to transfer funds or revenue, there is no ground for interference by court if trustee's financial responsibility is admitted. 155Tenn63, 290SW990.

770–37⅓–New. Under terms of trust deed by city to secure issue of waterworks bonds, funds or revenue from water plant may be drawn on only for use and benefit of the water plant property. 155Tenn63, 290SW990.

770–37¼–New. and the withdrawal of such fund and loan thereof at higher rate of interest is not application of fund to use and benefit of water plant property under terms of trust deed. 155 Tenn63, 290SW990.

770–37⅓–New. Municipality owning waterworks pursuant to statute does not come under statute authorizing public service commission to regulate water companies. 216Ala318, 113S56.

770–37⅙–New. Statute empowering city to own waterworks does not conflict with statute regulating public utilities. 216Ala318, 113S56.

770–37⅐–New. In supplying water for compensation municipality acts in private, not governmental, capacity. 35 GaA779, 134SE812.

770–37⅛–New. Statute prohibiting waterworks department from charging for supplying or installing fire hydrants is unconstitutional. 31 OhA142, 166NE 597.

770–37⅛–New. Borough may take over water plant of gas and water company having separate plants without taking over gas plant whether latter plant is unprofitable or not. 12PaDist&Co 458.

770–39 220AppDiv734, 222NYS665 [aff 129Misc746, 222NYS665].

770–41 That proposed municipal waterworks will conflict with private company does not show bad faith of councilmen. 216Ala318, 113S56.

771–42 28F(2d)576.

771–43 150Md241, 132A768. **Restriction,** relating to city's sale of water, in option to buy waterworks from company, has been held not to restrict city's use of that water after purchase. 98 NJEq672, 130A557. **Ordinance ultra vires** held conditionally ratified. 150Md 241, 132A768.

771–46 Grantor is not liable for breach of warranty of title or interest in pipe line where description of property conveyed to city does not include same and city has knowledge thereof. TexCivA 4SW(2d)597.

771–47 Objection held not available that notice of intention to exercise option to purchase was not given until six days after date on which statute required it to be given. 150Md241, 132 A768.

771–49 150Md241, 132A768. **Approval held inferable** from passage and approval of ordinance submitting purchase to people. 150Md241, 132A768.

772–52 28F(2d)576. **Suit held premature.**–28F(2d)576. **Evidence insufficient to warrant relief.**–28F(2d)576.

774–65½–New. Water company operating under legislative grant cannot control use and sale of water by city after purchasing waterworks. 98NJEq672, 130A557.

774–65⅓–New. Attempt of water company to restrict city in use of water, after purchase of waterworks by city, has been held violation of public policy. 98NJEq672, 130A557.

774–65¼–New. Sale of property to city and surrender of franchise in effect repeal ordinance granting franchise. 196NC687, 146SE808(2dcase).

774–65⅕–New. Where ordinance granting franchise which required furnishing of free water to public schools was repealed by sale of property to city and surrender of franchise, schools were entitled to free water until notified of city's purpose to charge therefor. 196 NC687, 146SE808(2dcase).

774–70 220Ky822, 295SW1023; 245NY 518, 157NE841; 46Philippine412; 48 Philippine309; 117Tex169, 299SW398; 144Wash585, 258P505. See also 93CalA 42, 269P630(1stcase). **Constitutionality of statutes.**–144Wash585, 258P505. **Concessions or obligations contracted by municipality before transfer** of waterworks to district are binding upon latter. 44Philippine292. **Determination of town board as to benefits to property** by establishment of district may be reviewed by court on question of fact and sufficiency of evidence, but not on question of law on review by certiorari. 223AppDiv485, 229NYS10 (determination of board that railroad would be benefited sustained). **Distribution of profits and purchase price on sale to light and power company.**–175Ark820, 300SW446. **Landowners,** who, after notice of proceedings for establishment of water district, fail to object or appeal are held to have waived right to object to assessments. 220Ky822, 295 SW1023. **Legislature may authorize** issuance of bonds by water district based on assessments to pay balance due for improvement and water system. 220Ky822, 295SW1023. **Liability of realty within water and fire district** for support of district. 230AppDiv767, 244 NYS219. **Lot and improvement owners** in developed portion of district held without interest to urge absence of benefits to vacant lands. 169La458, 125 S447. **Municipality, by joining in authorization to incur debt** for waterworks system in district, has been held to have surrendered independent autonomy. 169 La458, 125S447. **Notice of proceedings for organization.**–82CalA210, 255P281. **Notice of publication of proceedings for organization of water district** held sufficient to justify assessment. 220Ky 822, 295SW1023. **Persons living outside of town** held without interest to complain because towns people were willing to substitute their waterworks system with one to be established by waterwork district. 169La458, 125S447. **Petitions for organization of district** under California County Waterworks District Act stating gross estimate of whole cost does not satisfy statutory requirement of statement of estimate of cost and incidental expenses. 82CalA210, 255P 281. **Statute authorizing water supply district** without providing for hearing on boundaries and benefits held to deny due process. TexCivA 300SW246. **Under statute** waterwork district must be definitely and accurately described in formation proceedings. 208Cal 368, 281P393. **Water district created under unconstitutional statute** is not de facto municipal corporation. 144Wash585, 258P505. **Water district is designated municipal corporation** because it has some governmental functions. TexCivA 21SW(2d)747.

774–70½–New. Statute, requiring approval and registration of bonds other than preliminary, is mandatory. Tex CivA 293SW845.

774–70⅓–New. Statutory proceedings to validate bonds necessitate approval of attorney-general. TexCivA 293SW845.

774–70¼–New. Statute authorizing directors to exclude land before bonds are issued does not mean preliminary bonds. TexCivA 293SW845.

774–70⅕–New. District is temporary until construction, plans, and bonds are approved. TexCivA 293SW845.

774–70⅙–New. If project is abandoned, district continues in existence to discharge its debts. TexCivA 293SW845.

774–70⅐–New. Statute providing for creation of water districts is constitutional. 118Tex120, 12SW(2d)181; Tex CivA 14SW(2d)360.

774–70⅛–New. Act validating organization of water district relates back to original act and becomes merged therewith, thus making district valid as of such date. TexCivA 14SW(2d)360.

774–70⅛–New. Levy of taxes sued for by water district, organized under acts previously held unconstitutional, became valid under validating act. 118Tex120, 12SW(2d)181.

774–70⅒–New. Water district, through its supervisors, has right to contract and sue in its corporate name. TexCivA 11SW(2d)837.

774–70⅓–New. State is not properly joined as party plaintiff in suit to compel water district supervisors to perform their duties. TexCivA 11SW(2d)837.

774–70½–New. Bonds securing faithful performance of water districts supervisor's duties are not fatally defective because they erroneously recite that principals are county supervisors. Tex CivA 11SW(2d)837.

774–70⅓–New. Petition alleging payment of exorbitant sums by supervisors for well and system states cause of action on their bonds and against defendants receiving money wrongfully. Tex CivA 11SW(2d)837.

774–70¼–New. That certain properties are assessed at too high value does not render district invalid. TexCivA 14SW (2d)363.

774–70⅕–New. Validating act rendered water district, created under unconstitutional act, valid. TexCivA 14SW(2d) 363.

774–70⅙–New. Water commissioner is not "town officer" within statute providing for removal of town officers by supreme court. 133Misc315, 232NYS18.

774–70⅐–New. Statute giving town board power to remove water commissioner takes precedence over earlier general laws for removal of town officers. 133Misc315, 232NYS18.

774–70⅛–New. Water commissioner, sought to be removed, is entitled to fair hearing, to have witnesses sworn and cross-examined, and to present testimony in his own defense. 133Misc315, 232NYS18.

774–70⅑–New. Charges against water commissioner should be specific. 133 Misc315, 232NYS18.

774–70⅒–New. Town board, having commenced hearing on charges against water commissioner, cannot abandon proceeding, but must proceed to determination thereof. 133Misc315, 232NYS 18.

774–70⅓–New. Majority of town board has power to hear and determine charges against water commissioner, sought to be removed for neglect of duty. 133 Misc315, 232NYS18.

774–70½–New. Town board, on petition of majority of property owners, may grant relief, sought in part and alter boundaries of district so as to include only property benefited. 249NY398, 164 NE330.

774–70⅓–New. Board may consider testimony and affidavits as to resident ownership of petitioners' assessed property in proposed district, where they were not indicated as owners of taxable property on town assessment rolls. 249 NY398, 164NE330.

774–70¼–New. Acts limiting right to petition for establishment of water districts are not unconstitutional. 249NY 398, 164NE330.

774–70⅕–New. Statute has been held not unconstitutional as failing to afford opportunity to property owners to be heard as to benefits. TexCommnA 12 SW(2d)134, 70ALR1255.

774–70⅙–New. Statute which is unconstitutional and which fails to afford opportunity to property owners to be heard on benefits in organization of district may be validated. TexCommnA 12SW (2d)540.

774–70⅐–New. District attorney can institute suit against supervisors to compel performance of their duties, and to protect and presume public interest, such supervisors being officers. TexCivA 11 SW(2d)837.

774–70⅛–New. Suit against district officers should be instituted in name of district. TexCivA 11SW(2d)837.

774–70⅑–New. Taxpayer is proper party in suit to compel performance of duties by supervisors, though not necessary. TexCivA 11SW(2d)837.

774–70⅒–New. Where vendor's board of directors sustained option with full knowledge of purchaser's claim, pur-

chaser could accept secret profit, though acting in fiduciary capacity. 208Cal 753, 284P926.

774-70½-New. Where directors of water district subsequently ratified option with full knowledge of purchaser's claim, water district has power to execute option in first instance. 208Cal 753, 284P926.

774-71 21F(2d)221; 96CalA269, 274P 415. But see CalA 292P1082; 126Kan 381, 268P111. **Public service commissions.**-21F(2d)221. **Evidence has been held sufficient** to show that company was public utility. Wash 291P346. **Test of status as public utility.**-Wash 291P346. **Whether company is public utility** is to be determined by character of business carried on. Wash 291P346.

775-72 **Under Pennsylvania General Incorporation Act** company previously incorporated for any of purposes enumerated in act is entitled to accept constitution and provisions of act. 299Pa533, 149A713.

775-76½-New. Stockholders of a water company hold the same relation to the corporation that any stockholder holds to a private corporation and the same rules as to maintaining suits apply. 136 Wash116, 238P641.

775-81 **Power of corporations to sell water** depends on legislative grant. 124 Misc877, 210NYS611.

776-85½-New. Franchise granted and accepted is contract enforceable by either party. 126Misc524, 214NYS113.

776-85⅓-New. County board of supervisors acts merely as agent of state in granting franchises, and it cannot limit authority of its principal. 32F(2d)868.

776-85¼-New. Provisions of ordinance for sale of waterworks and franchise authorizing discontinuance of service to delinquent consumers has been held not invalid because applicable only to patrons within corporate limits of city. 230Ky 453, 19SW(2d)1073.

776-85⅙-New. Statute requiring city council to provide at least eighteen months before expiration of any franchise for sale of similar franchise does not invalidate prior city ordinance not complying with its provisions. 230Ky 453, 19SW(2d)1073.

776-85⅛-New. Where ordinance creating and providing for sale of franchise for operation of public waterworks allows rate more than is reasonable, that fact alone cannot void proceedings or contract resulting from sale of franchise. 230Ky453, 19SW(2d)1073.

777-91 **Company has only right to remove its property** within reasonable time. 231Ky484, 21SW(2d)817.

777-94 **Right to reasonable compensation** will not be implied as to board of education. 231Ky484, 21SW(2d)817.

777-94½-New. **Discontinuance.**-Operation of waterworks assuming duties and obligation of public utility have right to discontinue operation as such, TexCommnA 6SW(2d)96.

777-94¼-New. but not until reasonable time is given to enable patrons to provide themselves with other water service. Tex 6SW(2d)96.

777-95 **Franchise confers privileges** but also obligations. 126Misc524, 214NYS 113.

777-99 32F(2d)868; TexCommnA 12 SW(2d)160. **Grants of power to water companies** liberally construed. 287Pa 376, 135A362 (contra).

778-3 287Pa376, 135A362.

778-4 126Misc524, 214NYS113. **In New York.**-126Misc524, 214NYS113. **Rights of taxpayers.**-127Misc545, 217NYS426.

778-6½-New. Right of irrigation district acquiring water system under contract to supply outside consumers. CalA 292P1082.

778-7 **Construction.**-TexCommnA 12SW (2d)160.

778-8 13PaDist&Co 610.

778-9 TexCommnA 12SW(2d)160.

779-11 32F(2d)868.

779-14 48RI 376, 136A447.

782-35½-New. **By statute,** water company has absolute right to relocate and reconstruct any part of public road when necessary for corporate use. 6PaDist& Co 340.

782-36 **Duty of water company to supply** inhabitants of newly opened streets with adequate supply of pure and wholesome water as ordered by village board. 126Misc524, 214NYS113 (by extending mains). **Inadequacy of rates** is no defense to action to compel water company to extend its mains. 126Misc524, 214 NYS113 (ample remedy by company to recover reasonable compensation). **Right to lay mains in streets without limitation** necessarily includes streets subsequently enlarged, changed, or opened. 126Misc524, 214NYS113 (not restricted to existing streets). **Franchise conferring right to lay mains in streets without limitation** obligates water company to extend its mains into streets subsequently opened, when conditions warrant. 126Misc524, 214NYS 113. **Water company** cannot object to board's order to install necessary main on ground of financial inability. NJSup 140A254.

783-42½-New. Consent to blasting which broke water pipe was not shown by water company's sending representative to turn off water. 103NJEq190, 142 A563.

783-42¼-New. Water company is not required to use its own funds to adopt high pressure system in order to satisfy demands of residents of land located above gravity line, where expenditure is not warranted on account of expense and lack of customers. 96CalA269, 274P 415.

784-46½-New. **Water improvement district.**-Under statute declared empowered to levy and collect taxes for expenses and maintenance. TexCivA 271SW278.

784-46⅓-New. Intention of parties governs construction of ambiguous language in contract requiring city to pay certain taxes of water company. 106Conn562, 139A99.

784-46¼-New. Under contract considered city held not required to pay federal income tax and capital stock tax of water company. 106Conn562, 139A99.

784-46⅙-New. Contract requiring city to pay water company taxes should be construed to protect public. 106Conn 562, 139A99.

784-48 NJSup 140A254.

784-48½-New. Discretionary acts of municipality within powers conferred cannot be reviewed in absence of fraud. 126Misc524, 214NYS113.

784-48⅓-New. Thus order of village authorities that water company extend its mains is conclusive, 126Misc524, 214 NYS113.

784-48¼-New. and cannot be reviewed on grounds of unreasonableness, 126 Misc524, 214NYS113.

784-48⅙-New. in absence of fraud, 126 Misc524, 214NYS113.

784-48⅛-New. violation of law, 126Misc 524, 214NYS113.

784-48⅛-New. or invasion of private rights. 126Misc524, 214NYS113.

784-48⅛-New. **Certificate of public convenience approving extension** granted by public service commission cannot be based on stipulation by water company that any loss of profits will be taken care of from proceeds of company and will not result in increased rates. 92PaSuper 591.

784-48⅒-New. **Utility regulation.**-Acquisition of private waterworks by public agency removes property from field of utility regulation. NJSup 151A215.

784-48 1/10-New. Power of public service commission to regulate does not include right to dictate manner in which water company shall conduct business. Mo 30SW(2d)8.

784-48 1/11-New. Public service commission cannot interfere with management of water company by holding company so long as result does not affect public rights. Mo 30SW(2d)8.

784-49 NJSup 132A318. **Charter authority to contract for water supply** is subject to police power of state with respect to rates to be charged. 190NC 70, 128SE465. **Contract providing for extension at end of initial term** held valid in view of practical construction by parties. 125Me446, 134A569. **Contracts between municipalities for water supply.**-NJ 144A162.

785-55½-New. Township's contract is not invalidated by fact that consent to lay water main across navigable river has not been obtained from proper authorities. NJ 144A162.

785-55⅓-New. Township may let contract for construction of distributing system without first obtaining the consent of district water supply commission and board of conservation. NJ 144 A162.

785-55¼-New. Contract under which city agreed that company should manage, operate, and maintain additional water supply system, which city should build, has been held not invalid, as involving unreasonable and improvident business arrangement for city. 149SC 234, 147SE346.

787-66½-New. City is bound to exercise reasonable care to see that no impure water is allowed to enter its mains through water main of railroad. IndA 167NE721.

787-68 85PaSuper134.

787-68½-New. notwithstanding company has, since its incorporation, furnished free water to municipality where the incorporating statute contains no provision for free service, 85PaSuper134.

788-74 **Covenant to pay for hydrant service and for water for schoolhouse and drinking fountains** construed as entire. 125Me446, 134A569. **Provisions of contract providing for arbitration** are superseded upon passage of law establishing utilities commission. 125Me446, 134A569. **Contract held to manifest intention** to extend beyond term covenants to render service and pay therefor. 125Me446, 134A569.

788-75 106Conn562, 139A99.

788-75½-New. Language inserted for benefit of water company will be construed most strongly against it. 106 Conn562, 139A99.

790-91 **In Washington.**-135Wash355, 237P996.

791-97 89PaSuper486. But see 231Ky 484, 21SW(2d)817. **After company's franchise expired** school board could not require continuance of free service, nor could company coerce payment, but if board pays accrued bill to have service continued, it ratifies unauthorized obligation and cannot recover back such payment. 231Ky484, 21SW(2d)817.

791-2 **In Ohio.**-118 Oh295, 160NE902.

791-3½-New. In Ohio constitution provides that "any municipality may acquire, construct, own, lease and operate within or without its corporate limits any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service." Ordinance requiring schools within its limits to pay for water at same rate as other consumers is invalid as in conflict with statute requiring such supply to be free, statute not being in conflict with above section of constitution. 112 Oh607, 148NE350.

791-3⅓-New. City is under duty to notify applicant of lack of water main and permit him to pay for extension. 153Md 419, 138A324.

791-4 220Ala61, 124S96; 153Md419, 138A324; 240Mich667, 216NW385, 55 ALR768. See also 101Vt314, 143A295. **Semipublic utility corporation** is within rule. 240Mich667, 216NW385, 55ALR 768. **Water company is not obliged to supply any number** of inhabitants of municipality on demand, but is charged with public duty of furnishing water where there is reasonable demand for it and reasonable extension of service can be made. 96CalA269, 274P415. **Municipal owner of water plant** is within rule. 206 Iowa261, 218NW563. **Consumers have no right to dictate methods** employed in rendering service. Mo 30 SW(2d)8.

792-5 287Pa30, 134A380. **Village held under no duty to furnish water to nonresidents** where village owned no waterworks but purchased own. 233 IllA 123. **Where no authority exists to supply water,** no duty exists to continue supply. 233 IllA123. **Borough extending privilege to customers beyond its**

limits to take water from service main cannot refuse it to others. 287Pa30, 134A380. **Duty to make connections.**–12Pa Dist&Co 417.

792-6 See also 151Va396, 145SE355.

792-7 See also 90PaSuper523.

792-8 287Pa30, 134A380. **Water company cannot be compelled to connect its system** for emergency uses with that of corporation which was selling water in competition with water company. 323Mo 122, 18SW(2d)420.

793-9 Order dismissing bill held proper where no duty to supply water is shown. 233 IllA123.

793-10 220Ala61, 124S96 (evidence admissible to show element of damages). **Complaint** held insufficient to state cause of action for failure of holder of exclusive franchise to construct water main. 138Misc303, 244NYS605. **Damages held not excessive.**–240Mich667, 216 NW385, 55ALR768.

793-10½-New. Party tapping municipal water line without written permit, under belief in authority by verbal direction, held not deprived of further use of water. 287Pa30, 134A380.

793-10½-New. If application of one for water service is refused, he need not go to expense of installing service line in order to perfect his right of action. 220Ala61, 124S96.

793-10¼-New. Since water service is prime necessity to dwellers in town and cities, water companies undertaking such service have high public duty. 220 Ala61, 124S96.

793-11 Injunction to restrain cutting off supply.–233 IllA30. **Termination.**–233 IllA123. **Evidence held insufficient to show contract** to supply water. 233 IllA30.

793-14 220Ala61, 124S96. **Acceptance by consumers of rules and regulations promulgated by municipality operating waterworks** does not constitute contract binding on municipality. 163Ga829, 137 SE257. **City's acceptance of application for water supply** held to create implied contract to supply water within reasonable time. 153Md419, 138A324. **Where company continued to furnish water after change of occupancy,** with knowledge of use and necessity therefor, implied contract may be found. 214Ala 364, 107S821.

793-14½-New. When water mains are already laid in a street, city cannot compel owner of residence on that street to enter into contract to pay special rate as condition precedent to turning on water. NS [1927] 2DomLR1016.

793-14⅓-New. Whether new system has become paying proposition is not determinable solely by considering return on investment. 96CalA269, 274P 415.

793-14¼-New. Finding held sustained by evidence. 96CalA269, 274P415.

793-14⅕-New. Where realty company deposits money to guarantee cost of operating water system on its subdivision till it becomes paying investment, it is entitled to recover amount deposited on proof that investment is profitable. 96 CalA269, 274P415.

793-14⅙-New. Cities may dispose of surplus production of water. 153Va789, 151SE417.

793-14⅐-New. Contract of municipality to furnish water outside of corporate limits in consideration of improvement of road to water plant to be deed to county is invalid. TexCivA 26SW (2d)417.

793-14⅛-New. It is duty of company to furnish proper application to one who makes known his wishes and readiness to comply with regulations. 220 Ala61, 124S96.

793-14⅑-New. Only owner of premises may apply for new water service connection to water company. 220Ala61, 124S96.

794-18 220Ala61, 124S96; 163Ga829, 137SE257; 240Mich667, 216NW385, 55 ALR768; 243Mich444, 220NW768; 287 Pa30, 134A380. **Regulations requiring written application for service,** being for benefit of water company, may be waived by it. 214Ala364, 107S821. **Reasonableness.**–214Ala364, 107S821. **Control by courts.**–287Pa30, 134A380. **Any form embodying substance of suggested form of service application** as incorporated in rules of water company is sufficient, 220Ala61, 124S96. **Applicant for water service need look no further than to blanks** provided by water company as to their sufficiency. 220 Ala61, 124S96. **Rules adopted pursuant to statutory authorization govern** in so far as such rules modify common-law rules. 220Ala61, 124S96. **Rules must be readily available** to public and their legal advisers. 220Ala61, 124S96.

794-21½-New. payment of bills, 287Pa 30, 134A380.

794-21⅓-New. classification of consumers, 287Pa30, 134A380.

794-22 21F(2d)221.

795-25½-New. Calculations for water charges held insufficient to support findings for collection by sale of land. 103 NJL574, 138A467.

795-25⅓-New. Municipal charge for water must be established with certainty warranting recovery in action for goods sold. 103NJL574, 138A467.

795-25¼-New. Where charges are determined in arbitrary and speculative manner, arrearages of water rent cannot be recovered. NJSup 138A469.

795-25⅕-New. Water company may abandon service only after period enabling patrons to procure new supply, TexCommnA 6SW(2d)96.

795-25⅙-New. Municipal corporation engaged in furnishing water to inhabitants is on same footing as private corporation granted franchise to supply water. 148Va795, 139SE508, 55ALR 781.

795-25⅐-New. Ordinance prescribing regulations for water system maintained by municipality has no more force than by-law of private corporation operating water system under franchise. 148Va795, 139SE508, 55ALR781.

795-26 163Ga829, 137SE257. **Rents for meter.**–163Ga829, 137SE257.

796-31 163Ga829, 137SE257.

796-32½-New. Acceptance of water for six years, without complaint waives right on part of water user to insist on reading of meter which would register only water supplied to him. Mass 168NE159.

796-32⅓-New. Measurement of amount of water, furnished to defendant by deducting readings of meter on adjoining property from that of defendant's property is not contrary to public policy. Mass 168NE159.

796-32¼-New. If otherwise entitled to water service on individual meter connection, applicant is not due to pay additional charges accruing against common service connection. 220Ala61, 124 S96.

796-34 Refusal of consumer to install septic tank instead of cesspool does not justify cutting off of water so long as he pays for service in accordance with regulations. 240Mich667, 216NW385, 55ALR768.

796-34½-New. Right of municipality to abandon private pipe line.–Municipality which has laid pipe line from main to town hall to supply water for its lighting plant and has permitted persons to tap pipe line may abandon pipe line and revoke permit. 170Minn 424, 212NW899.

796-35 103NJL574, 138A467, 468 [cit Cyc]; 288Pa420, 135A726; 85PaSuper 548; 89PaSuper486. **Compensation for water furnished by municipality may be made tax** in absence of constitutional restrictions. 38F(2d)786. **Statute providing for assessment and collection of water rent by city in same manner as other city taxes** is not invalid for failure to provide for uniformity. 38F (2d)786.

796-36 21F(2d)221; 221Ky610, 299SW 582; 98NJCh174, 130A530; NJSup 132 A318 (power delegated to board of public utility commissioners). But see CalA 292P1082. **Rates for service to municipality** filed with public utilities commission are lawful rates until changed by commission. 125Me446, 134A569. **Taxes to which water company is subject** are considered part of its operating expenses. 125Me446, 134A569. **Time for its payment** may be fixed by ordinance. 100NJEq128, 135A869. **Federal court review of state regulation.**–21F (2d)221. **Power to fix rates for water supplied by municipality.**–102NJEq475, 141A455.

797-37½-New. Police power of general court extends to enactment of wholesome and reasonable laws to protect municipalities in furnishing water at reasonable rates. 264Mass460, 163NE 82.

797-41½-New. Terms of contract to furnish water to municipality are not abrogated by passage of law regulating public utilities. 125Me446, 134A569.

797-41⅓-New. Amount to be charged for water furnished to municipality is an administrative question which public service commission is best fitted to decide. 85PaSuper134.

797-41¼-New. Schedule of rates approved by public service commission is binding, not only on parties to litigation before commission, but on every person affected, unless unusual circumstances are present. 285Pa172, 131A 716.

797-41⅕-New. Rate is collectible until set aside in method provided by statute, even though exceptions have been filed. 285Pa172, 131A716.

797-41⅙-New. One making fifteen payments of water rates to city held estopped to question power to establish them by suit for excessive amounts paid. 193Wis522, 213NW888.

797-41⅐-New. State cannot authorize contract as to water rates within municipality for unlimited term which necessarily in time would be grossly unreasonable. 106Conn562, 139A99.

797-41⅛-New. Water rates fixed by contract, authorized by legislature, for indefinite term violates police power, 106 Conn562, 139A99.

797-41⅑-New. and water company may apply to public utilities commission for revision of term and rates. 106Conn 562, 139A99.

797-41 1/10-New. Rates fixed in contract between water company and city are not unalterable but continually subject to exercise of police power. 106Conn562, 139A99.

797-41 1/11-New. Public utilities commission may fix reasonable rates and their duration where rates and duration thereof fixed by contract are unreasonable. 106Conn562, 139A99.

797-41 1/12-New. Where city made contract for water for stated time at stated rate with right to extension of term, extension of term does not prevent public service commission from changing rate. 316Mo 842, 291SW788.

797-41 1/13-New. Upon regulation by public utility commissioners, corporation retains all incidents of ownership except such as are necessarily curtailed for regulatory purpose. NJSup 139A 324.

797-41 1/14-New. Presumption is that power of regulation conferred does not extend beyond express terms of grant. NJSup 139A324.

797-41 1/15-New. Utility board's power to require use of certain accounting system did not authorize order requiring utility company to rewrite books as to capital account. NJSup 139A324.

797-41 1/16-New. Utility board cannot prohibit utility company's keeping accounts relative to fixed capital in addition to accounts required by board. NJ Sup 139A324.

797-41 1/17-New. If reasonable rate on all property used and useful cannot be obtained under existing rate, it may become duty of public service commission to allow general increase in rates based on fair return, notwithstanding stipulation of water company. 92Pa Super591.

797-41 1/18-New. Rates of water company, if adopted by trustee of water district taking over property and franchise, become rates established by district and must be filed with public util-

ities commission. 128Me256, 147A188.

797-42½-New. City can make contract with security holders fixing water rates, where city issued certificates on buying water plant. 32F(2d)795.

797-43 30F(2d)895.

798-45½-New. Contract for water rates between water company and city did not, as to city, contract away police power, in view of provision for arbitration. 106Conn562, 139A99.

798-45⅓-New. City does not impliedly agree to charge rates sufficient to pay certificates where contract between city and security holders fixes rates. 32F(2d)795.

798-45¼-New. Though city impliedly reserves option to increase water rates in contract fixing rates, contract is not lacking in mutuality. 32F(2d)795.

798-46 Supreme court on appeal enters final decree, and does not direct commission to do so. RI 137A873.

798-48 Where water companies have actual notice of proceedings and notice is published in newspapers, failure to give statutory notice is not fatal. 102 NJEq276, 140A781.

798-51½-New. Appeal lies from order of public service commission fixing value of company's property for rate-making purposes after commission has acted on motion for rehearing. 40 Ida690, 236P525.

798-51⅓-New. On appeal from order of public service commission fixing value of property of water company for purpose of determination of rates it is court's duty to determine whether commission regularly pursued its authority. 40 Ida690, 236P525.

798-54 24F(2d)3; 232 IllA252; Tex CommnA 6SW(2d)96; 199Wis536, 227 NW18; Can [1928] 4DomLR461. **Water rates have been held not unjust, unreasonable, and discriminatory.**-199Wis 536, 227NW18.

799-55 272US400, 47SCt144, 71L ed 316. **Rates held confiscatory.**-43F(2d) 478.

799-56 272US400, 47SCt144, 71L ed 316; 30F(2d)846; 31F(2d)600; Tex CommnA 6SW(2d)96. **So-called prudent investment theory** should not be sole criterion for fixing value of company's property for rate-making purposes. 40 Ida690, 236P525. **Method of valuation of property of company by** public service commission stated. 40 Ida690, 236P525. **Return to investors at time of investigation and for reasonable future time** determines issue. 272 US400, 47SCt144, 71L ed316. **Yield of public utilities bonds,** plus brokerage, held not compelling on issue of reasonable return. 272US400, 47SCt144, 71 L ed316. **Five per cent held reasonable.** -48RI 376, 136A447. **Return allowed by public service commission held not excessive.**-Mo 30SW(2d)8.

799-57 272US400, 47SCt144, 71L ed 316; 30F(2d)846; 34F(2d)5; 48RI 376, 136A447; TexCommnA 6SW(2d) 96. **Only such property,** etc. Tex CommnA 6SW(2d)96. **Allowance for depreciation.**-85PaSuper139. **Average price for ten years ending in 1921** held too low in fixing value of company in 1924. 272US400, 47SCt144, 71L ed316. **Capitalization of past losses** is not allowable as a general proposition. 85Pa Super139. **Duty of commission to make findings.**-44 Ida1, 262P863. **Excessive expenditure** for plant of greater capacity than that necessary must be disregarded. TexCommnA 6SW(2d)96. **Expenses incurred in building up company's business** may be allowed for in fixing value of property. 40 Ida690, 236P 525. **Going concern value.**-85PaSuper 139. **Hydrant supplied by town** should not be included in value of water company's property for rates. 48RI 376, 136A447. **No allowance need be made for nonoperative property of company** no longer necessary to serve public in fixing value of property of company for rate-making purposes. 40 Ida690, 236P 525. **Present value is not indicated by pre-war costs.**-272US400, 47SCt144, 71 L ed316. **Property not considered as property of utility.**-44 Ida1, 262P863. **Valuation of water right** should not be limited to single element of cost of acquisition. 44 Ida1, 262P863. **Value in excess of cost of production** should be allowed for. 40 Ida690, 236P525. **Value of personal property** should be considered if reasonably necessary for business or carrying on of business. Tex CommnA 6SW(2d)96. **Value of plant actually used and not estimated cost of different plant** is to be ascertained. 272 US400, 47SCt144, 71L ed316. **Public service commission,** in fixing value for rate purposes, must determine fair value of property. Mo 30SW(2d)8. **Property considered.**-Mo 30SW(2d)8. **Landowner's deposits should not be deducted from cost of reproduction of transmission and distribution system** in arriving at valuation of water company's property for rate purposes. 34F(2d)5. **Method of determining value** adopted by public service commission held proper. Mo 30SW(2d)8. **Evidence held sufficient** to show that value of water company's property for rate making is one million, thirty-two thousand and sixty-four dollars. 34F(2d)5. **Additions and betterments added to plant** after estimate is made and before time when order becomes effective should be taken into consideration in determining rate base valuation. 34F(2d)5.

799-58 272US400, 47SCt144, 71L ed 316; 30F(2d)846; 31F(2d)600; 34 F(2d)5 (working capital for operating expenses); NJ 140A785; NJSup 140 A256; 48RI 376, 136A447; TexCommnA 6SW(2d)96. **Allowance for materials, supplies, and working capital** held not excessive. 272US400, 47SCt144, 71L ed 316. **Allowance of nine and one-half per cent of property value as going concern value** held proper. 272US400, 47 SCt144, 71L ed316. **Amount necessary for working capital** is to be determined by public service commission in its sound discretion. 40 Ida690, 236P525. **Company's deficit** due to conduct of business for benefit of those in control is proper subject of inquiry in fixing rates. 48RI 376, 136A447. **Cost to utility of carrying through ditch water granted for right of way** constitutes part of expense of business. 44 Ida1, 262P863. **Deduction of twenty-five per cent as depreciation** held improper. 272 US400, 47SCt144, 71L ed316. **Disallowance for going value is proper** where plant was in operation when capital expenditures were made. NJ 140A785. **Disallowance for interest on amortization of difference in rates is proper** where company's rates had been reduced for inadequate service. NJ 140 A785. **Disallowance for overhead expenditures in capital investment is proper** where previously charged in expense account. NJ 140A785. **Expenses of litigation** and expenses of such litigation may be distributed over a period of years. 85PaSuper139. **Federal taxes** should be allowed as operating expenses and deducted from return allowed. 85 PaSuper139. **Former gains** not considered in fixing water rates. 48RI 376, 136A447. **Former losses** not considered in fixing water rates. 48RI 376, 136A 447. **Going concern value is to be considered.**-272US400, 47SCt144, 71L ed 316. **Harmless error.**-85PaSuper139. **High wages as of time of determining reasonableness of rate** must be considered. 272US400, 47SCt144, 71L ed316. **Money spent in litigation over franchise** is not conclusive as to value allowable for franchise in valuing company's property. 40 Ida690, 236P525. **Operating expense of average utility is computed** on theory that it is normal utility from which should be deducted percentage which oversize portion bears to value of entire plant. 126Misc382, 212 NYS639. **Price paid for stock of water company at private sale** does not furnish adequate test of value of property for rate purposes. 34F(2d)5. **Prices, prevailing wages, and relevant economic forecasts** for reasonable period are considered on issue of value of public utility. 272US400, 47SCt144, 71L ed316. **Reproduction cost of canal** held to be included in property value. 272US400, 47 SCt144, 71L ed316. **Sum necessary for working capital of utility** rests in sound discretion of commission whose determination will not be set aside in absence of abuse. 44 Ida1, 262P863. **That company is in successful operation** should be considered in fixing value of its property. 40 Ida690, 236P525. **Value is tested by present value of land** plus cost of plant less depreciation. 272US400, 47SCt144, 71L ed316. **Water company not entitled to deficits** before rate schedule went into effect. NJSup 140A256. **Water company not entitled to inclusion of interest** on unpaid earnings in calculation of deficits to be amortized by rate surcharge. NJSup 140A256. **Water rights in river may be counted in determining value** of company. 272US 400, 47SCt144, 71L ed316. **Where no expense in financing is shown,** item of sixty-five thousand dollars for cost of financing should not be included in determining value of property for rate purposes. 34F(2d)5. **Determination of present value of company's property.**-43F(2d)478. **Chart showing rates charged in other cities,** offered as basis for comparison, is properly excluded. 43F(2d)478. **Determination of reasonableness of rates.**-43F(2d)478. **Holding company's charge** of three per cent for services held not unreasonable. Mo 30 SW(2d)8.

799-58½-New. Reasonable amount is properly allowed for working capital in fixing rates. 31F(2d)600.

800-59 Water rates have been held not excessive.-199Wis536, 227NW18.

800-60 272US400, 47SCt144, 71L ed316.

800-61½-New. Water company's charge for "stand-by service" in case of serious fire should be charged to fire district. 48RI 376, 136A447.

800-61⅓-New. Water company must stand loss occasioned by construction of extensive main under expectation of additional business which never materialized. 48RI 376, 136A447.

800-61¼-New. Water company cannot amortize losses due to deficit under existing rates, by increase in valuation of property. 48RI 376, 136A447.

800-61⅕-New. Whether water rates are fixed under contract requiring them to be fair and reasonable or under statute with same requirement is immaterial. 106Conn562, 139A99.

800-61⅙-New. Rates fixed by commission have been held reasonable in view of value of property used and useful and of operating expenses. 316Mo 842, 291 SW788.

800-61⅐-New. Discrimination between cities in increased rate fixed by commission is not effected by deferring date when rate shall be effective as to one of them and making it immediately effective as to another of same class where rates are reasonable as to latter city and loss from delay falls on company. 316Mo 842, 291SW788.

800-61⅛-New. Valuations submitted by water company to public utility commissioners, which were only partial and for particular purpose of securing some immediate relief from low return on property, have been held not to create estoppel preventing water company from showing true value in subsequent proceedings. 30F(2d)846.

800-61⅑-New. Public service commission may refuse to make revaluation of property if former valuation was correct when made and value has not materially changed. Mo 30SW(2d)8.

800-61 1/10-New. City's agreement to accept former valuation of company's property is not binding on commission. Mo 30SW(2d)8.

800-62 Where city purchasing water company's plant raised contract rate with consumer, whereby water company was released from its obligation, city is likewise released of obligation under deed transferring plant subject to obligations of predecessor company to private consumers. 24F(2d)3.

801-63 See also 126Misc382, 212NYS 639. **Reasonable worth to consumer.**-126Misc382, 212NYS639. **Statement of how result of valuation of property usefully employed in public service is computed.**-126Misc382, 212NYS639. **Valua-**

tion as of 1924, on theory of level of prices of one hundred and fifty as against prewar prices of one hundred is proper and just. 126Misc382, 212NYS639. **Rate producing excess** over of what is necessary to take care of all allowances plus return of seven per cent on fair value of property held unreasonable and unjust. 126Misc382, 212NYS639. **Seven per cent rate of return adopted in 1920 proper rate** in 1924. 126Misc382, 212NYS639. **Present as well as original cost of construction must be compared**, so that owner whose property has appreciated in value may not be deprived of it without due process. 126Misc382, 212NYS639. **Profit to utility is not only or paramount consideration.**–126Misc382, 212NYS639. **Straight line method of depreciation** adopted. 126Misc382, 212NYS639 (it being practically method used by company in figuring accrued depreciation). **No allowance made for paying over of mains.**–126Misc382, 212NYS639. **Rates much higher than in communities similarly situated** suggest possibility of unreasonableness. 126Misc382, 212NYS639 (where on basis of water actually consumed and paid for company would receive seventy nine per cent in excess of what it was getting under existing rates). **Reasonableness of rates is part of franchise.**–126Misc382, 212NYS639. **Sanction of commission.**–85PaSuper139.

801-63½-New. Fair value of company's property at time of inquiry must be determined on question of reasonableness of rates. 126Misc382, 212NYS639.

801-63⅓-New. In absence of market value, fair value must be determined from consideration of all relevant facts. 126Misc382, 212NYS639.

801-63¼-New. In determining fair value of company's property on question of reasonableness of rates relevant facts considered among others are original construction cost, 126Misc382, 212NYS639.

801-63½-New. subsequent expenditures for permanent improvements, 126Misc382, 212NYS639.

801-63⅙-New. amount and value of securities of corporation, 126Misc382, 212NYS639.

801-63⅐-New. probable earning capacity of property under particular rates, 126Misc382, 212NYS639.

801-63⅛-New. and sum required to meet operating expenses. 126Misc382, 212NYS639.

801-63⅛-New. Sale by company of parts of its property with its resultant effect must be considered as relevant fact. 126Misc382, 212NYS639.

801-63⅒-New. Rates charged in neighborhood are relevant facts on issue of reasonableness and fairness of rates. 126Misc382, 212NYS639.

801-63 1/11-New. On issue as to whether increased rates are reasonable and fair weight must be given to question of whether company has been fairly dealt with in past and has received recent rate increases. 126Misc382, 212NYS639.

801-63 1/12-New. Quality of service rendered is relevant fact. 126Misc382, 212NYS639.

801-63 1/13-New. In absence of previous deficits going value of concern is not element in rate base. 126Misc382, 212NYS639 (especially where company acquired going concern).

801-63 1/14-New. No allowance is made of severance damages for sale of property to municipality. 126Misc382, 212NYS639.

801-63 1/15-New. Rates should not be fixed arbitrarily. 126Misc382, 212NYS639.

801-63 1/16-New. No allowance is made for extraordinary expenses of litigation. 126Misc382, 212NYS639 (in view of great disparity between increased rate fixed by company and that considered fair).

801-63 1/17-New. Increase in rate for public hydrant over old rate from forty per cent to seventy per cent per year is not fair and reasonable. 126Misc382, 212NYS639.

801-65 24F(2d)3; 288Pa420, 135A726. But see 32F(2d)795. **Under menace of cutting off service** court may determine what rates may not be charged. 126Misc382, 212NYS639. **Injunction is one of remedies** against unreasonable rates. 126Misc382, 212NYS639. **Owners must bear burden of fluctuating values.**–272US400, 47SCt144, 71Led316. **Rate fixed on valuation.**–272US400, 47SCt144, 71Led316. **Stay on appeal.**–RI 133A347. **Court will not stay rate on appeal** unless complainant agrees to reimburse defendant if rate held reasonable. RI 133A804. **Court may interfere only in clear case of violation of legal rights.**–206Iowa261, 218NW563. **Court's duty ceases** on finding rate not unlawful. 206Iowa261, 218NW563.

801-67 Burden of proving rates unreasonable and unfair is on plaintiff. 126Misc382, 212NYS639 (in action to enjoin). **Right of private consumer to reasonable rate** exists irrespective of agreement between municipality and the company. 126Misc382, 212NYS639. **Plaintiff need prove no more than** that rates are unfair and unreasonable. 126Misc382, 212NYS639. **Allegations that taxpayer is consumer held insufficient** to show special interest. 232IllA52. **Petition failing to allege** unreasonableness of rates or other pertinent matter held insufficient in taxpayer's action to enjoin certain water charges as excessive. 232IllA52. **Taxpayer's petition for unreasonable rate** must show special damage. 232IllA52.

801-71 7F(2d)924; 206Iowa261, 218NW563; 126Misc382, 212NYS639. But see 126Misc382, 212NYS639. **Conclusiveness.**–48RI 376, 136A447. **Water company by not exhausting remedies** before commission held not in position to maintain suit to enjoin enforcement of rates. 269US278, 46SCt112, 70Led273.

801-71½-New. Rates fixed under authority denied by delegation of legislative power are presumptively reasonable, 126Misc382, 212NYS639.

801-71⅓-New. but this is rebuttable by evidence. 126Misc382, 212NYS639.

801-71¼-New. But such presumption as to reasonableness does not arise from delegation of legislative power to private corporation. 126Misc382, 212NYS639.

801-71⅕-New. Statutory presumption of reasonableness.–By statute in some jurisdictions rates fixed by commission are prima facie reasonable and just. 316Mo842, 291SW788.

801-72 31F(2d)600; 32F(2d)795; 34F(2d)5; 86PaSuper152. **In action to restrain increase** question of fact is whether increased rates constitute reasonable compensation within statute. 126Misc382, 212NYS639. **Tentative valuation.**–40Ida690, 236P525. **Commission's allowance of sum for working capital** will not be set aside on appeal unless commission has abused its discretion in making such allowance. 40Ida690, 236P525. **Seven per cent** held reasonable return. 272US400, 47SCt144, 71Led316. **Rate base fixed by commission** held arbitrary for failure to consider cost of reproduction at time of hearing. 7F(2d)924. **Appeal.**–RI 137A387. **Water company, though successful in suit is liable for costs.**–43F(2d)478.

801-72½-New. Burden is on one appealing from order of public service commission to show that rates fixed are unreasonable. 190NC70, 128SE465.

801-72⅓-New. Evidence held not to show that rates fixed by public service commission were unreasonable. 190NC70, 128SE465.

801-72¼-New. Water company's sale of pond to customer should be investigated in proceeding to increase rates. 48RI376, 136A447.

801-72⅕-New. Water company held not to have shown necessity for increase of water rates. 48RI376, 136A447.

801-72⅙-New. Town, failing to contest increase in rates before commission, cannot complain if evidence of reasonableness appears convincing. 48RI376, 136A447.

801-72½-New. On appeal commissioner's order approving water rates must **either be sustained or reversed, without remanding for rehearing.** 48RI376, 136A447.

801-72⅛-New. Unless palpable mistake of fact or law has been made by public service commission, its decision will not be departed from. 85PaSuper134.

801-72⅒-New. Where evidence is insufficient to support allowance of going concern value by commission, it will not be sustained. 85PaSuper139.

801-72 1/10-New. Where rates fixed under legislative exercise of police power are manifestly unreasonable, courts will interfere. 106Conn562, 139A99.

801-72 1/11-New. In statutory proceeding to review order of commission fixing rates court is not bound by findings of commission but may determine for itself questions of fact from evidence before commission. 316Mo842, 291SW788.

801-72 1/12-New. Findings of commissioners will not be reversed where supported by evidence. NJ 140A785.

801-72 1/13-New. Company may not attack order of commission as to rates by certiorari after acquiescence therein for two years. NJ 140A785.

801-72 1/14-New. In city's suit to enjoin increase in water rates based on franchise, issue of city's right to regulate rates independently of franchise cannot be considered. TexCivA 4SW(2d)614.

801-72 1/15-New. Evidence held sufficient to support findings of public service commission as to valuation of property and depreciation. Mo 30SW(2d)8.

802-73 206Iowa261, 218NW563, 565 [citCyc]; 128Me256, 147A188; 102NJEq475, 141A455; 288Pa420, 135A726; 300Pa303, 150A633; 48RI376, 136A447. **Discrimination, to be unlawful,** must be unjust and unreasonable. 206Iowa261, 218NW563. **Water district has right to assume** that rates approved by public utilities commission are not unjustly discriminatory. 128Me256, 147A188.

802-73½-New. Judgment or order as to rates cannot be sustained unless findings are supported by evidence. 31F(2d)600.

802-74 Classification must be reasonable and based on matters which present a substantial difference as ground for distinction. 288Pa420, 135A726. **Classification of apartment houses.**–206Iowa261, 218NW563. **Classification within just and reasonable limits** is permissible. 206Iowa261, 218NW563.

802-75 128Me256, 147A188.

802-79 School board is subject to charge for water as well as any individual customer. 11LaA309, 123S419 (1stcase).

802-80 89PaSuper486.

803-83 See also 12PaDist&Co62.

803-84½-New. City is liable for reasonable value of water furnished to it for fire protection. 85PaSuper134.

803-84⅓-New. Exemption of religious and charitable institutions from taxation does not apply to water furnished by municipality to such institutions which are therefore liable for water rents. 85PaSuper548.

803-84¼-New. City purchasing water from water company for use of its citizens in exercise of its corporate powers is a consumer, irrespective of what may thereafter become of the water, and is liable to pay rate fixed by commission. 285Pa172, 131A716.

803-84⅕-New. Husband is liable for water supplied to wife at her request in house provided for her by husband under order of court. 96PaSuper517.

803-84⅙-New. Under some statutes city furnishing water to tenant may enforce charge owner's real estate in accordance with rules and regulations of director of public service. 34OhA450, 171NE256.

803-85 221Ky610, 299SW582.

803-86 102NJEq475, 141A455.

803-87 221Ky610, 299SW582.

803-90 Extra charge for baths.–132Misc426, 229NYS628.

804-98½-New. Where meters are installed, no charge can be made for them.–But see 163Ga829, 137SE257.

804-98⅓-New. City operating water-

works may require consumers to make reasonable deposits or to assign meters installed by them as security. 163Ga829, 137SE257 (ordinance held reasonable).

804-98¼-New. Rate approved by commission is collectible until set aside in method provided by statute, even though exceptions have been filed. 285Pa172, 131A716.

804-98½-New. In some jurisdictions city ordinances provide rate for combined irrigation and domestic water service. 83CalA529, 257P194 (country club held entitled to water under such rate).

804-98¾-New. Change in water rates cannot be held to constitute breach of contract under which consumer constructed pipe line to be paid for in service. 128Me218, 146A695.

804-98⅞-New. Contract under which consumer constructed pipe line to be paid for by water company in service has been held to have been entered with understanding that rates are subject to change by rate-making power of state. 128Me218, 146A695.

804-98⅞-New. Contract providing for specified rate till changed by competent authority permits change by only some authorized public agency. CalA 292P 1082.

804-99 Nonpayment of cost of connection.-120Kan361, 242P154. **Water supply cannot be shut off** when consumer in good faith disputes amount due and liability therefor. 163Ga131, 135SE498. **Ordinance creating and providing for sale of franchise** to operate waterworks is not void because it grants to holder right to enforce payment of water rentals by shutting off service. 230Ky453, 19SW(2d)1073. **Verdict** for wrongfully cutting off water supply held excessive. 221Ala516, 129S5. **Limits of right.**-230Ky 453, 19SW(2d)1073. **Complaint held not demurrable** in action for wrongfully cutting water off. 221Ala516, 129S5. **Customer paying for water as per bill** is not required to go to company to adjust difference arising from latter's additional claim. 221Ala516, 129S5. **Instruction held proper.**-221Ala516, 129S5.

805-1 See also 220Ala61, 124S96.

805-2 221Ala516, 129S5 (complaint held sufficient). **Customer is entitled to damages** for cutting off and refusing to restore service when customer paid bill for service at former residence. 221Ala516, 129S5. **Question of refusal to restore service is for jury** in conflicting evidence. 221Ala516, 129S5.

805-3 Company's wantonness in cutting off supply is for jury. 221Ala516, 129S5.

805-5 163Ga131, 135SE498 (dispute in good faith as to correctness of water bills).

805-8½-New. School board is entitled to injunction to compel supply of water to schools until borough's right to charge therefor can be determined. NJCh 149 A820(2dcase).

805-9 Evidence held to show that price of plant sold to municipality covered extra claims for service. TexCivA 257 SW311.

806-15 Mass 168NE159.

806-16 193Wis522, 213NW888.

806-17 24F(2d)3; 132Misc426, 229NYS 628. **Payment without resort to equity** held not voluntary. 193Wis522, 213NW 888. **Payment under threat to cut off service** held not voluntary. 193Wis522, 213NW888. **Treble damages.**-193Wis 522, 213NW888.

807-18½-New. City collecting water rates acts in proprietary capacity. 193 Wis522, 213NW888.

807-18⅞-New. Water user is estopped from recovering excess water rates where it paid without protest and permitted city to expend money for benefit of all patrons. 193Wis522, 215NW670.

807-18¾-New. Recoupment of sums deducted for inadequate service is properly refused where company acquiesced in deduction order for two years. NJ 140A735.

807-19 264Mass460, 163NE82; 96Pa Super517. See also 132Misc426, 229NYS 628. **Certain liens are additional, not alternative, remedy open to city.** 264 Mass460, 163NE82. **City's unreasonable delay** in shutting off water for nonpayment by tenant and failure of officers to comply with ordinances and regulations does not discharge lien. 264Mass460, 163 NE82. **Lien for water rates is neither tax nor special assessment** for particular benefits, but merely method of securing collection of charge arising from use on realty of public utility essential to health and safety of community. 264Mass460, 163NE82. **Lien for water furnished on order of tenants** and in absence of express direction by owner may be provided for by legislature. 264Mass460, 163 NE82. **Facts that tenant made default** in payment of water charges and became insolvent do not affect lien or enforcement of it. 264Mass460, 163NE82. **Duration.**-38F(2d)786.

807-20 Water furnished tenant creates no lien on landlord's property in absence of privity of contract with landlord. 27 OhNPNS427.

807-22 Notice to health inspector as to polluted condition of water is some notice to city.-136Wash295, 239P831. **Promise by mill company to take action to prevent pollution of water** is no relief to city from liability for injuries from use of bad water. 136Wash295, 239P 831.

808-24 9LaA19, 119S98.

808-28 "Reasonable care" is comparative term, depending on circumstances, and care sufficient for maintenance of placidly flowing ditch may be insufficient for pipe line on mountain side, in presence of known slide areas. 84Colo 342, 270P659.

808-28½-New. Where municipality knows customer to whom it furnishes water for compensation uses same for bottled drinks, it is liable for damage resulting to latter because of existence of chloride of lime in water inserted without notice to him. 35GaA779, 134 SE812.

808-28⅛-New. Owner of warehouse, flooded when city closed wrong valve leading to sprinkler system, held not guilty of contributing negligence. 148 Va60, 138SE503, 54ALR1485.

808-28¼-New. Where company uses covering over meter hole in cellar constructed by some one else, it becomes responsible for all reasonably discoverable defects therein. NH 146A161.

808-28⅜-New. Knowledge of meter readers of defective covering over meter hole is chargeable to company. NH 146 A161.

808-28⅝-New. Fact that plaintiff lost her balance in falling into meter hole having defective covering is immaterial. NH 146A161.

808-28⅞-New. Conditions must be taken as they existed at time of accident in determining issue of negligence. 9LaA 19, 119S98.

808-28⅛-New. Where water in railroad main connected with city main is taken from typhoid polluted water of river, both railroad and city stand charged with notice of character of water. IndA 170NE92.

808-30 Agreements to claim no damage resulting from necessary stoppage of flow applies only where stoppage is necessary and reasonable in view of circumstances. 214Ala364, 107S821.

809-32 105Conn151, 134A807; 197 Ind 457, 151NE333 (both at common law and under statute); 247NY160, 159NE896; 187Wis161, 204NW773. Contra 220Ky 493, 295SW426. **A contrary doctrine,** etc. 127Misc545, 217NYS426 (holding company liable). **Power company.**-187 Wis161, 204NW773. **Collection of water rental or "stand-by-service"** by company from private owner does not give latter right of action for negligence of former in failing to furnish sufficient water to put out fire. 70CalA94, 232P721. **Water company** not relieved from liability because of freezing of hydrant. 220Ky493, 295SW426.

809-32½-New. Such a contract does not give insurance company compelled to pay fire losses right of action against water company for breach thereof. 223 Ky54, 2SW(2d)1027.

809-32⅞-New. Member of public, destruction of whose property by fire was due to failure of water company to supply proper pressure at hydrant has no claim for breach by company of statutory duty, nor cause of action as for common law tort. 247NY160, 159NE 896.

810-33 Complaint held sufficient.-127 Misc545, 217NYS426. **Complaint held based on negligence.**-136Wash312, 239P 1011.

810-34 Complaint for death from polluted water held to state cause of action.-136Wash312, 239P1011.

810-34½-New. Complaint need not allege contract was made in compliance with rules and regulations of public service commission.-214Ala364, 107S821.

810-35 IndA 167NE721; 224AppDiv 239, 229NYS622. **Actual knowledge of unwholesome character of water is not essential element to be proved** in order to establish city's liability in action to recover for death by typhoid contracted from impure water. IndA 167NE721.

810-37 205Cal 84, 269P930, 61ALR448; IndA 163NE599(2dcase); 9LaA19, 119S 98; NH 146A161; 224AppDiv239, 229 NYS622. **Evidence held admissible.**-IndA 167NE721; 153Md419, 138A324. **Evidence held sufficient.**-205Cal 84, 269 P930, 61ALR448 (to justify judgment against city for death from typhoid fever); IndA 162NE255 (to support verdict). **Evidence held insufficient** to show that there was such interference with service in putting out fire as to render liable power company which had contracted with municipality to furnish power for water pump. 187Wis161, 204 NW773. **Hypothetical question, immaterial to issues, held improper.**-136Wash 312, 239P1011. **Testimony held properly admitted.**-NH 146A161. **Admissibility of evidence.**-43F(2d)914.

810-38 214Ala364, 107S821 (instruction held properly refused in action by consumer); 220Ala61, 124S96; IndA 170 NE92; 220Ky493, 295SW426. **Incomplete instruction cured by another instruction supplying omission.**-136Wash 295, 239P831.

810-39 Nebr 232NW785; 224AppDiv 239, 229NYS622; 148Va60, 138SE503, 54 ALR1485; 136Wash295, 239P831. **Evidence held sufficient to present question for jury** in action against city for flooding of plaintiff's basement, whether condition of street prior to breach was such as to put city on inquiry. 216AppDiv 468, 215NYS521. **Particular questions held for jury.**-148Va60, 138SE503, 54 ALR1485. **Negligence of city causing pollution of water** and in failing to remedy defects held question for jury. 136 Wash295, 239P831. **Negligence of city in supplying polluted water is for jury.**-136Wash312, 239P1011. **Whether city had actual or constructive notice of pollution of water held for jury.**-136Wash 295, 239P831.

811-40 84Colo 342, 270P659; 152Md 371, 136A825.

811-42 220Ala61, 124S96 (loss of labor and time). **Question for jury.**-153Md 419, 138A324.

811-43½-New. Limitation of actions. 43F(2d)914.

811-45 140Wash558, 250P41. **In Texas.**-116Tex82, 286SW458 (history of legislation traced). **Water right is property right.**-Ida 291P1064.

812-46 140Wash558, 250P41.

812-47½-New. As against subsequent appropriator riparian claimant has only the right to take for irrigation purposes such proportion of water as his riparian land bears to quantity of riparian lands on stream capable of irrigation. 140 Wash558, 250P41.

812-47⅞-New. Diversion of water from government irrigation system.-Landowner may not appropriate to his own use for irrigation purposes waters from creek most of which comes from government irrigation system which uses creek bed as canal to reach customers below. 18F(2d)642.

812-50 140Wash558, 250P41.

812-51 140Wash558, 250P41.

813-52 140Wash558, 250P41.

813-53 117 Or30, 241P991.

814-60 75CalA57, 242P494; 31NM188, 242P683. See also 34NM346, 282P1 (irrigation is public purpose).

814-61 See also 201Cal 668, 258P593.

814-61½-New. Amendment of list of lands to be reclaimed may be approved

where additional water is not asked for and rights of others are not adversely affected. 45 Ida380, 263P45.

814-61½-New. Irrigation is encouraged by constitution and statutes. Nebr 229NW273.

815-62 75CalA57, 242P494; Wyo 293P 373. **Regulations of water rights** by state is not confiscation. 14F(2d)650. **Under Carey Act** canal company may not knowingly permit waste of water by user. 43 Ida198, 252P865. **In Nevada.**–14F(2d)650.

815-63 75CalA57, 242P494. **California Water Comm. Act** § 12 does not confer judicial power of division of water rights of department of public works and is therefore constitutional. 197Cal 215, 239P1076.

815-64½-New. Issuance of state certificate to entryman under Carey act project does not entitle state to patent nor vest equitable title in entryman. 40 Ida793, 236P532.

815-64⅓-New. State is not entitled to patent merely on approval by secretary of interior of plan to irrigate lands applied for by state, and order segregating them from public domain. 40 Ida793, 236P532.

815-64¼-New. Though federal government and agents must conform to state laws in initiating and perfecting appropriations from nonnavigable stream in Idaho for irrigation system constructed and maintained under National Reclamation Act, 8F(2d)518.

815-64½-New. manager of such government project may under Act of Congress Aug. 13, 1914, withhold water from land within project where owner is in arrears for year for maintenance charge. 8F(2d)518.

815-64⅙-New. State supreme court recognizes measure of regulatory power in congress as to distribution of water appropriated for federal government projects. 8F(2d)518.

815-64½-New. Idaho Statutes provide that irrigation district authorized to be organized to participate in such national projects may act as agent for federal government for collection of charges, 8 F(2d)518.

815-64⅓-New. and as such agents may withhold water from landowner who has failed to comply with federal statutes as to payments, 8F(2d)518.

815-64⅙-New. or is year in arrears for maintenance charge. 8F(2d)518.

815-64 1/10-New. And where there is no such intervening irrigation district, it is not the intention to deny federal government power to do directly what is expressly authorized to be done by its agent. 8F(2d)518.

815-64 1/11-New. Relief under Fact Finders' Act of May 9, 1924, to settler on government project from delinquent maintenance charge is within discretion of secretary of interior. 8F(2d)518.

815-64 1/12-New. Lien on crops required of delinquent water user under Reclamation Act should be maintained unless, on dissolution of injunctive order requiring lien, project manager elects remedy of shutting off water. 8F(2d) 518.

815-64 1/13-New. Contract of irrigation company with United States for construction of reservoirs, dams, pumping plants, etc., is properly canceled by secretary of interior on failure of company to secure financial arrangements required by contract. 24F(2d)886.

815-64 1/14-New. Construction of Carey Act contracts.–Supplemental contract between state and company has been held not intended to limit water available to settlers but to give settlers full water rights under their original contracts. 47 Ida272, 274P1069.

815-64 1/15-New. Federal reclamation project.–Lien upon land for construction expenses of such project. 33F(2d)362.

815-64 1/16-New. Provisions of water code as to time within which full amount of water appropriated should be applied to beneficial use is not applicable to land reclaimed pursuant to contract with state under Carey Act. Or 286P 563.

815-66 Sufficiency of claim for compensation.–87Colo 227, 286P273.

815-68 Or 286P563 (effect of state engineer's declaration that reclamation contract under Carey Act had been completed).

815-72 In California.–197Cal 215, 239P 1076.

816-74½-New. Rights of settlers under Carey Act contract cannot be changed by findings of fact of land board appended to subsequent supplemental contract between state and Carey Act construction company. 47 Ida272, 274P 1069.

816-74⅓-New. In California contracts of canal company engaged as public utility in appropriating water from river and distributing it for irrigation purposes are subject to regulation by railroad commission to remove discrimination between contract holders and consumers not under contract, as against objection that such regulation is taking of contract rights in violation of Fourteenth Amendment. 279US125, 49 SCt325, 73Led637.

816-74¼-New. Authority to forfeit Carey Act reclamation contract is not vested in members of Idaho state land board. Ida 288P424.

816-74½-New. Compensation of water commissioners.–Salary and expenses are required to be borne pro rata by users of water. Utah 284P1004 (statute construed).

816-74⅙-New. Apportioning salary and expenses of water commissioner according to respective areas of land of water users held to result in discrimination and inequality. Utah 284P1004.

816-76 Findings.–42 Ida619, 248P13 (after finding that defendants had right to use irrigation ditch inferior to plaintiff's use of present carrying capacity it was held court should have found capacity of ditch acreage on which waters were to be applied). **Judgment.**–Mont 286P133 (erroneous in suit to quiet title to irrigation ditches).

816-77 TexCivA 24SW(2d)1116.

816-78 Or 291P369.

816-80 Evidence.–30Ariz569, 249P751. **Cost of constructing drainage district** to prevent injury to other project lands from seepage is "operation and maintenances" charge against water users under contract for receiving water from government irrigation project requiring water users to pay such charges. 268 US50, 45SCt383, 69Led843. **Parties to suit for diversion.**–14F(2d)650. **Defenses.**–30Ariz569, 249P751 (that water unavailable to plaintiff no defense). **Instructions.**–30Ariz569, 249P751 (inapplicable and properly refused). **Questions for jury.**–30Ariz569, 249P751. **In suit to enjoin diversion of water,** general denials by state engineer and water commissioner do not overcome specific charges of diversion of water from claimant's land. 14F(2d)650. **Injunction against water master** held properly denied where claimants were already using irrigation water equal to or greater than amounts allowed. Or 292P319.

816-81 Findings.–70Utah57, 257P1060. **Evidence.**–201Cal 668, 258P593. **Status of liens created by state** on bonds granted under Carey Act is determined by law of state. 5F(2d)955. **Matter to be determined.**–70Utah57, 257P1060.

817-82½-New. Under Carey Act, in suit to enforce contractor's lien, all contract holders are necessary parties. But see 8F(2d)227.

817-82⅓-New. In suit to foreclose liens under Carey Act for water rights in Salmon River project recovery may be had, though amount of water furnished is not that contracted for. 8F(2d)227.

817-82¼-New. Interest on recovery in such foreclosure suit under Carey Act commences from time parties received and used water only, though negligible quantity had been received earlier. 8F (2d)227.

817-82⅙-New. Landowner is entitled by way of set-off to reimbursement for losses where water furnished under Carey Act project was sufficient for only three fourths of land for which water rights were sold. 8F(2d)227.

817-83 74CalA681, 242P100; 94CalA 511, 271P514; 76Mont218, 246P167; 80 Mont102, 258P246; 117Nebr125, 219NW 956; Nebr 229NW273 (common carriers); 35Wyo 73, 246P918, 921 [cit Cyc]. **Acts of congress** and of state are part of all contracts under Carey Act. 5F(2d)895. **Members of irrigation district** have proprietary interest in district's property. 198Cal 373, 245P814. **Reclamation district, being only quasi-corporation** and public agency to carry out specific purposes, its organization cannot be attacked as attempt to create corporation for municipal purposes by special law. 195Cal 1, 231P34. **Purpose of organization of district** is that owners of land may make united effort to accomplish purpose of irrigation. 116 Or356, 241P335. **Legislative power** to establish water board is inherent without direct or special constitutional provision. TexCivA 295SW653. **Warrants.**–77CalA367, 246P819. **But irrigation district is no part of sovereignty** and its purpose is generally private and for benefit of private landowners. 84Colo 157, 268P523. **Improvements made therein** are not merely for benefit of private parties. 208Cal 657, 284P218. **Irrigation district is public agency of state** for performance of certain functions of government. CalA 289P678.

817-84 34Ariz38, 267P420; 200Cal 550, 254P542; 129 Or534, 277P1005. See also 200Cal 318, 253P726; 206Cal 581, 275P425. But see 31NM7, 240P482; 149 Wash234, 270P813; 35Wyo 73, 246P918. **General principles applicable to municipal corporations** are applicable to irrigation districts. 197Cal 50, 239P719.

817-85 200Cal 550, 254P542; 116Nebr 373, 217NW607; 49Nev278, 245P285; 51 Nev215, 273P983; 31NM7, 240P482; 33NM583, 274P52; TexCommnA 30SW (2d)301(2dcase); TexCivA 19SW(2d) 186. **Determination of propriety of establishment of irrigation districts** rests with legislature under general powers to provide for welfare of state. 35Wyo 73, 246P918. **Provision of act exempting from taxation** in irrigation district property of veterans, churches, and public utilities held not to render act unconstitutional. 195Cal 1, 231P34. **Act creating new district** which embraced old district and which declared that cost of maintenance should be spread over entire district held to refer to properties acquired after organization of new district. 195Cal 1, 231P34. **Act including old district** in one newly created is not invalid because expense of maintaining existing lesser is imposed only on properties originally liable therefor in old district. 195Cal 1, 231P 34. **District derives all power** from statutes. 200Cal 318, 253P726. **Law providing for liability of district for failure to furnish water** held not repealed. TexCivA 278SW499. **California constitution gives legislature plenary power** over districts organized for reclamation purposes. 201Cal 726, 258P959. **Construction of statutes.**–85Mont94, 277P 627. **Water rights.**–CalA 266P341.

817-85½-New. Irrigation district may be used for drainage purposes to forestall or remedy unfortunate conditions threatening existence of district. 49 Nev278, 245P285.

817-85⅓-New. Question of proportion of land to be held by those imposing by their vote burden upon owners of lands within district is matter of discretion of legislature in first instance. 197Cal 50, 239P719.

817-85¼-New. Term "reclamation" used in statute held large enough to include irrigation. 200Cal 550, 254P542.

817-85⅕-New. Water district is "local improvement district." TexCivA 8SW (2d)319.

817-85⅙-New. Conservancy district organized for flood control under statute with incidental power to promote irrigation, does not require reorganization by conference upon it of power to pursue irrigation as primary object. 34 NM346, 282P1.

817-86 Constitutionality of proceedings for creation.–35Wyo 73, 246P918. **Creation under general laws** is required under some constitutional provisions. 35Wyo 73, 246P918. **Construction of**

statutes.–49Nev278, 245P285.

817–87 31F(2d)515; 31NM7, 240P482 (petition held to comply with requirement of signing by majority of resident freeholders owning more than one half of lands).

818–88 Sufficiency of description.–31NM7, 240P482; Utah 280P722 (aider by reference to plats and other records).

818–89 31NM7, 240P482 (bond held sufficient, though containing repugnant condition through clerical error).

818–90 152Wash353, 277P829. **Constructive service of notice sufficient.**–81Mont170, 261P962; Utah 263P751. **Legislature had wide discretion as to kind of notice to be given.**–122 Okl 116, 251P748. **Legislature cannot dispense with notice** of proposed water improvement district. 122 Okl 116, 251P748. **Publication in newspaper.**–122 Okl 116, 251P748. **Sufficiency of notice.**–122 Okl 116, 251P748. **Errors in notice not fatal to jurisdiction of county commissioners.**–Utah 263P751. **Mailing of petition and notice** to each nonresident landowner in district is jurisdictional. 83Mont 282, 272P543(2dcase). **Publication of petition.**–83Mont282, 272P543(2dcase).

818–91 31F(2d)515. **Statute not providing for adequate hearing** is void. TexCivA 8SW(2d)319 (hearing as to boundaries and benefits).

818–92 31NM7, 240P482 (reference to petition for description held sufficient). **Separate orders allowing prayer of petition, defining boundaries and designating name of district,** are not required. 31NM7, 240P482.

819–95 195Cal 1, 231P34 (Palo Verde Irrigation Act does not require that election to determine question of organization shall be held within sixty days from the taking effect of act).

819–95½–New. Organization of district is not invalid unless substantial provision of statute has been disregarded. 49Nev278, 245P285.

819–95⅓–New. Mere irregularities will not affect validity. 49Nev278, 245P285.

819–95¼–New. Compliance with statute relating to organization of water district is sufficient regardless of later act amending prior general acts not expressly repealing special act. 152Wash 353, 277P829.

819–95½–New. Supreme court decision and decree and orders of trial court held adjudication of water rights within Idaho statute authorizing creation of water districts. 48 Ida680, 285P 64.

819–95⅙–New. Statute validating water improvement district was invalid in its creation. TexCommnA 30SW(2d) 301(2dcase).

819–96 32Ariz1, 255P481; 150Wash 590, 274P181. **Waiver of right to test validity.**–32Ariz1, 255P481. **Organization of district cannot be questioned except as prescribed by law.**–32Ariz1, 255 P481.

819–99 Collateral attack.–66Utah404, 243P107.

819–2½–New. Where irrigation district is acting under forms of law, unchallenged by the state, validity of its organization cannot be attacked either directly or collaterally by private individual. 32Ariz1, 255P481.

819–2⅓–New. Court in which petition for organization of district was filed will be presumed to have heard and determined whether statutory notice was given. 81Mont170, 261P962.

819–2¼–New. In absence of fraud in procuring it, decree creating district is not subject to collateral attack. 81Mont 170, 261P962.

819–2⅕–New. In proceeding for confirmation of resolution passed by commissioners of irrigation district for execution of contract with United States to take over federal irrigation works, persons who did not appear at hearing of petition to organize district after notice and did not appeal from decree, cannot assert that lands were not properly included in district. 81Mont170, 261P962.

819–3 29F(2d)552. But see 83Mont282, 272P543(2dcase).

819–4 See also 33NM583, 274P52.

819–5 97CalA740, 276P137; 116Nebr 373, 217NW607; TexCommnA 30SW (2d)301(2dcase). **Benefit for reclamation system** held question for trial court. 200Cal 550, 254P542. **District embracing lands included in federal reclamation project** may include lands patented before project was started and not included in project or any unit thereof. 81Mont170, 261P962.

820–6 70Utah328, 260P269; Utah 280P 722 (land is within district if it can be identified by reference to plat or list). See also 97CalA740, 276P137. But see 31F(2d)515. **Act defining boundaries of irrigation district** and declaring what properties are deemed to be benefited is not invalid in failing to give property owners an opportunity to be heard. 195 Cal 1, 231P34. **Statutes providing for determination** by commissioners, including platting and listing of lands, require that lands included shall be so designated or described as to be capable of identification. 70Utah328, 260P269. **Decree not conclusive** as to lands not properly described or delineated upon plats and maps required to be filed. Utah 280P722.

820–7 83Mont282, 272P543(2dcase). **Action by owner of property in irrigation district to vacate decree creating district,** and to have her land severed from district on ground of want of notice, was not collateral attack on judgment creating district, and hence was not barred by failure to appeal from such judgment within time allowed by law, under statute making judgments for creation of district and for confirmation of bond issues conclusive where not appealed from. 83Mont282, 272P543(2dcase).

820–11 31F(2d)515; 97CalA740, 276P 137. **Action to sever for want of notice of proceedings.**–83Mont282, 272P543(2d case). **Evidence held sufficient** to show that land would not be benefited. 50 Nev80, 251P351. **Existing statutes applicable to district organized under repealed statutes.**–50Nev80, 251P351. **Findings of board of directors on conflicting evidence** are final, and courts of appeal are bound thereby. 90CalA270, 265P965. **Necessity of notice to, or consent of, owner.**–66Utah404, 243P107. **One who participated in establishing irrigation district may petition to exclude land therefrom** where no improvements had been started, no indebtedness was outstanding, and question of benefits had not been determined. 50Nev80, 251P351. **Railroad right of way may be excluded from district** by stipulation between attorneys for district and attorneys for railroad company confirmed by court. 49Nev278, 245P285. **Statutes repealed by later acts.**–50Nev80, 251P 351 (present statute excluding land if not benefited). **That irregular portions of tract of land cannot be irrigated by gravity** does not require board of directors of district to exclude such portions where it finds that tract of land would be benefited. 90CalA270, 265P965.

820–12½–New. Statute providing for annexation of territory to county water district is construed as providing for notice and hearing. 68CalA297, 228P 1055.

820–12⅓–New. Extension of district.–Lands not included in district at time of organization can be included by board only as provided in statute on application of owners of land. 66Utah 404, 243P107.

820–12¼–New. Allotment of water to land already sufficiently supplied is not beyond jurisdiction of county commissioners where they gave statutory notice of hearing on question of exclusion and inclusion of lands and revision of allotment of water to lands within district. 66Utah404, 243P107.

820–12⅕–New. Release of land from district's control and jurisdiction is proper where nothing has been done or planned by way of extension of water system to such lands and financial condition of district makes such extension in future improbable. 69Utah510, 256 P785.

820–12⅙–New. Motives of directors in changing boundaries of divisions of **district are immaterial and finding therein** in action to declare void resolution for change is also immaterial. 201Cal 100, 255P506.

820–12⅐–New. Under some statutes water directors have power to change boundaries of divisions of district when they deem it advisable provided change keeps each division as nearly equal in area and population as is practicable. 200Cal 100, 255P506.

820–12⅛–New. Under such statutes directors have broad discretion. 201Cal 100, 255P506.

820–12⅑–New. In determining question of such change both elements of area and of population must be considered and equalized as far as possible. 201 Cal 100, 255P506.

820–12 1/10–New. Whether equality is element that shall be considered rests in discretion of directors. 201Cal 100, 255P506.

820–12 1/11–New. Change in numbering of divisions is not abuse of discretion where change was not arbitrary. 201 Cal 100, 255P506.

820–12 1/12–New. Under statute, lands admitted subsequent to creation of district become part of district and have same rights and liabilities as other lands therein. TexCivA 8SW(2d)306.

820–12 1/13–New. Public notice in accordance with a trust deed by landowner did not entitle him to benefit of irrigation. Wyo 293P373.

820–14 80CalA739, 252P765. But see 31NM7, 240P482. **In Montana.**–76Mont 218, 246P167. **Statute prescribing qualifications of voters** in irrigation district is held not unconstitutional. 31NM7, 240P482. **Proceedings for removal.**–80 CalA739, 252P765. **Water master.**–45 Ida653, 264P871. **Elections and contests.**–34Ariz334, 271P715. **Exercise only statutory powers.**–42F(2d)541.

821–15 195Cal 1, 231P34 (constitutional provisions forbidding discriminations among citizens as to privileges and immunities, qualifications of voters, and secrecy of ballot do not apply to elections in reclamation districts). See also 205Cal 320, 270P936.

821–15½–New. As respects ordinary business transactions directors of water district stand on same footing as private individuals or directors of business corporations similarly situated. 76Mont 218, 246P167.

821–17 Requiring payment of warrants.–80Mont102, 258P246.

821–18½–New. Board of directors may construct, acquire, or purchase water rights, canals, ditches, and dams. 74 CalA681, 242P100.

821–18⅓–New. Property so acquired is property of the district. 74CalA681, 242 P100.

821–18¼–New. Under statutes in some jurisdictions board of directors is authorized to estimate and determine amount of money necessary to be raised for purposes therein set forth. 74CalA 681, 242P100.

821–18⅕–New. Such provision of the statute does not authorize expenditure of money raised from sale of bonds toward payment of claims of "mediators" appointed to settle and adjust adverse claims of riparian owners and prior appropriations. 74CalA681, 242P100.

821–18⅙–New. Board is also given power to manage and conduct business and affairs of district and to make and execute all necessary contracts and employ agents and prescribe their duties. 74CalA681, 242P100.

821–18⅐–New. General and comprehensive grant of powers in irrigation statutes are not absolute and independent of other parts of the statute. 74CalA 681, 242P100.

821–18⅛–New. The board has only such powers as are expressly granted or necessarily included in exercise of powers granted. 74CalA681, 242P100.

821–18⅑–New. They cannot abdicate their powers and turn over properties to other corporations. 74CalA681, 242P 100.

821–18 1/10–New. Mandamus will not issue to require payment of warrants drawn upon a so-called construction

fund invalidly attempted to be made as trust fund for benefit of a contractor. 80Mont102, 258P246.

821-18½11-New. And directors may stop payment of such warrants, though engineer's estimates showed they were due. 80Mont102, 258P246.

821-18½12-New. In suit for compensation, question whether county was embraced in water district is for court. 82 Colo 169, 257P1093.

821-18½13-New. Statement showing days of service and rate of charge held insufficient compliance with requirement for limited account. 82Colo 169, 257P1093.

821-18½14-New. Whether salary of director is in lieu of mileage as well as per diem need not be determined in proceeding to prohibit trial of officer for collecting moneys illegally. 80CalA739, 252P765.

821-18½15-New. Directors are liable for expenditure in acquiring reservoir site for individual and exclusive use of certain stockholders in defraud of others. Cal 277P862.

821-18½16-New. Equity has power to remove director for fraud. Cal 277P862.

821-18½17-New. District is not bound by statements and promises of manager and director that it would irrigate certain lands at particular future time. Tex CivA 13SW(2d)209.

821-18½18-New. Board of directors in employing agents, authorizing expenses and levying taxes, assessments, and determining reasonable value and character of materials and labor performed, acts in quasi judicial capacity, and its discretion is not generally interfered with. 94CalA511, 271P514.

821-18½19-New. Liability of officers.-District directors are liable for expenditure in acquiring site for individual use of certain stockholders in fraud of rights of others. 208Cal 508, 282P787.

821-18½20-New. Evidence held to sustain finding that district directors were guilty of fraud in constructing reservoirs for exclusive use of certain favored stockholders. 208Cal 508, 282P787.

821-18½21-New. Provisions extending terms of office until successor qualifies do not apply to person declared elected to office whose right is challenged by quo warranto. Ariz 289P979.

821-18½22-New. Provisions as to filing oath of office and bond do not apply to candidate claiming election where opponent is declared elected. Ariz 289 P979.

821-18½23-New. Owners of residence lots subject only to nominal tax are not qualified voters on election of directors. Ariz 289P979.

821-18½24-New. In suit to determine right to office witnesses not claiming exemption can testify as to whom they voted for. Ariz 289P979.

821-18½25-New. Damages awarded in favor of director suing to recover office held warranted. Ariz 289P979.

821-20 Contracts for construction of irrigation works.-24F(2d)18.

821-21 Ida 286P598 (expenditure for providing unnecessary additional bond for county or state treasurer). See also 94CalA511, 271P514. **Constitutional provision prohibiting creation in state, county, city, town, or village of debt in excess of taxes for current year** is inapplicable to irrigation districts. 35 Wyo 73, 246P918. **Expenditures to protect land from seepage water** held properly charged by board to operation and maintenance account. 201Cal 726, 258 P959. **Officers of irrigation district can bind district on contract,** without submitting proposition to electors. 40 F(2d)827.

821-23½-New. District has only such powers as are expressly given or necessarily implied. 74CalA681, 242P100.

821-23½3-New. In allowing or disallowing claims against district the board of directors acts in judicial or quasi-judicial capacity. 76Mont218, 246P167.

821-23½4-New. If claim against district is disallowed by directors claimant's only remedy is by ordinary judicial proceedings. 76Mont218, 246P167.

821-23½5-New. Order or warrant drawn by directors on county treasurer for payment of claim against district is merely device for drawing money, like bank check. 76Mont218, 246P167.

821-23½6-New. District directors may revoke order or warrant for payment of claim drawn by them on county treasurer, custodian of funds of district. 76Mont218, 246P167.

821-23½7-New. Mandamus will not lie to compel county treasurer to pay warrant drawn on him by district directors in payment of claim against district after such warrant is revoked or rescinded by them. 76Mont218, 246P 167.

821-23½8-New. Under statutes board of directors has no power to transfer moneys in construction fund to any other fund except where surplus remains on completion of project. 75Mont132, 242P431.

821-23½9-New. Resolution of board directing such transfer and bookkeeping entries made in accordance with resolution before completion of project being illegal do not change status of fund as to warrants issued against it. 75 Mont132, 242P431.

821-23½10-New. General powers of irrigation districts are not limited to precise terms of statute in force at time of organization, 197Cal 50, 239P719.

821-23½11-New, nor are methods of management and conduct of districts so limited. 197Cal 50, 239P719.

821-23½12-New. Acts done at business meeting not formally called are not void where all members of board of directors are present. 31NM7, 240P 482.

821-23½13-New. Contract by landowners to convey claims of water rights to district conditional upon organization of district within reasonable time is valid. 31NM7, 240P482.

821-23½14-New. Injunction will not lie to restrain district from making contract to purchase property from irrigation company within scope of its powers merely because by prior contract to which district was not party and which was not binding on district, unauthorized persons agreed to use their influence to have district accept new contract. 29Ariz221, 240P349.

821-23½15-New. Statements of officers are not binding on district unless authorized by board of directors. 66Utah 404, 243P107 (statement of officers that lands included in district would be excluded).

821-23½16-New. Contract between irrigation district and United States for construction by government of drainage system for district is held valid. 49Nev278, 245P285.

821-23½17-New. Oregon statute providing for sale of excess capacity of reservoirs and surplus water and water rights is not unconstitutional. 118 Or 239, 246P527.

821-23½18-New. Landowners waive right to object to contract for sale of excess capacity of reservoirs and surplus water and water rights by failure to object in proceedings for confirmation. 118 Or239, 246P527.

821-23½19-New. Irrigation district has no other power than that expressly conferred by statute or necessarily implied therefrom. 80Mont102, 258P246.

821-23½20-New. Proceedings by board of directors of water improvement district are not irregular and void because meetings of board were held at county seat and outside of improvement district. 122 Okl 116, 251P748.

821-23½21-New. Irrigation district may contract to accept certain amount for services in reclamation and maintenance of state lands. 43 Ida519, 253P128.

821-23½22-New. Contract to satisfy demands against state on account of reclamation held not one abolishing district's statutory lien on purchase of such land by third parties. 43 Ida519, 253P128.

821-23½23-New. District may employ agents. 200Cal 318, 253P726.

821-23½24-New. Officers have express powers under statute and all implied powers necessary to exercise of express powers. 200Cal 318, 253P726.

821-23½25-New. Where contractor's bond was conditional upon payment of any "expense incurred in the performance" of the contract, it was held it covered compensation insurance required by contract. TexCommnA 298 SW273.

821-23½26-New. Under provision for payment for supplies, etc., used in performance of contract, it was held test of liability for goods furnished is whether they were necessary to and wholly consumed in prosecution of the work. TexCommnA 298SW273.

821-23½27-New. Under such provision surety is not liable for general commercial enterprise operated by contractor, but only for portions of accounts representing goods sold to employees. TexCommnA 298SW273.

821-23½28-New. Surety is not liable for auto supplies furnished to contractor and resold to general public, even though part was used in work, the amount not being shown. TexCommnA 298SW 273.

821-23½29-New. The only equipment covered by such bond is such as went into work done by contractor, and liability does not extend to debts for contractor's general equipment. Tex CommnA 298SW273.

821-23½30-New. Statute relative to bonds of contractors with state will be considered as defining obligation of sureties on bond of subcontractor where such was intention of parties. Tex CommnA 280SW767.

821-23½31-New. Where bond given by subcontractor to secure performance of his contract contains special provision for protection of materialmen, persons furnishing groceries, merchandise, and feed for animals to subcontractor's employees can recover on bond. Tex CommnA 280SW767.

821-23½32-New. Persons furnishing materials to employees of subcontractors for construction of irrigation ditch have no lien therefor. TexCommnA 280SW 767.

821-23½33-New. Under some statutes irrigation district is given right to sue and liability to be sued. TexCivA 280 SW838.

821-23½34-New. Agreement for payment of warrants dependent on time funds were provided for held unauthorized. 45 Ida485, 263P40, 56ALR822.

821-23½35-New. Under Montana statute written verified objections to petition for confirmation of district commission's resolution to contract with United States to take over irrigation works and assess irrigable lands in district to make payments may be considered as answers. 81Mont170, 261P962.

821-23½36-New. Where such objections do not deny allegations of petition, truth of all material allegations is admitted. 81Mont170, 261P962.

821-23½37-New. In such proceeding question whether irrigation district can assess nonirrigable lands not affected by federal water rights contracts cannot be considered. 81Mont261, 261P 962.

821-23½38-New. In such proceeding objectors cannot complain of failure to determine irrigable lands in statutory manner. 81Mont170, 261P962.

821-23½39-New. Decree in such proceeding should provide for exempting lands covered by paid up water right contracts with United States from assessment to pay for plant. 81Mont170, 261 P962.

821-23½40-New. Benefit to irrigation district by proposed contract with United States to take over federal reclamation works constitutes sufficient consideration therefor. 81Mont170, 261 P962.

821-23½41-New. Court must look to acts for purposes of water district and powers and duties of its governing board, which are restricted to those prescribed in such acts. TexCivA 13SW(2d)204.

821-23½42-New. Irrigation district is not liable for price of lumber used to build quarters for men who were to construct irrigation system, but who never arrived, where it was explained to materialman that lumber was to be paid

for by contractor. 151Wash31, 274P 709.

821-23½3-New. **Statute requiring submission of claims against district to board of directors on vouchers** is mandatory. 129 Or534, 277P1005.

821-23¼1-New. District directors may divide unneeded real estate into small parcels to enhance value on sale. Ariz 289P979.

821-23½5-New. Exercise of discretion by district board of directors in determining to sell unneeded realty will not be disturbed in absence of abuse. Ariz 289P979.

821-23½0-New. Where district does not need all of property purchased by it, it can sell portion not needed. Ariz 289P979.

821-23½7-New. Bidder claiming mistake in assuming work could be done in certain manner cannot recover back deposit made with bid where he had access to plans and specifications. 155 Wash101, 283P678(2dcase).

821-23½8-New. Contention that statute gives board of directors of irrigation district no power to pass on objections is without merit. 208Cal 657, 284 P218.

821-23½9-New. Contractor who forfeited deposit on bid for construction work is not entitled to recover deposit because bid was amended where record showed second bid was separate bid. 155Wash101, 283P678(2dcase).

821-23½0-New. **Liability for torts.**-Admissibility of evidence. TexCivA 22SW (2d)324.

821-23½1-New. Injury to land and crops are legitimate subjects of damages. TexCivA 22SW(2d)324.

821-23½2-New. Water control and improvement districts are liable in damages for their torts. TexCivA 22SW (2d)324.

821-23½3-New. **Contracts for improvement of system.**-Irrigation district entitled to enforce bond for benefit of laborers and materialmen. 42F(2d)957.

821-23½4-New. Obligation of surety under bond to pay laborers and materialmen. 42F(2d)957.

821-23½5-New. Obligation of contractor to pay laborers and materialmen. 42 F(2d)957.

821-23½6-New. Construction of contract between irrigation district and surety executed after contractor's default. 42F(2d)957.

821-24 24F(2d)18; 74CalA681, 242P 100; 31NM7, 240P482. **Agreement of officers of district, reducing bond issue under revised estimate below amount authorized,** held not to render remaining bonds invalid. 32Ariz1, 255P481. **Statutes construed.**-74CalA681, 242P100.

821-25 **Waiver.**-29Ariz84, 239P504. **Failure to pay taxes** on personalty not disqualification from voting. TexCivA 288SW595. **One whose wife came to and bought lots** in irrigation district is entitled to vote. TexCivA 288SW 595. **One not resident taxpayer** cannot vote. TexCivA 288SW595. **One never abandoning homestead** in irrigation district is entitled to vote. TexCivA 288 SW595. **Ballot from which both affirmative and negative were erased** held properly excluded. TexCivA 288SW 595. **Ballot from which neither affirmative nor negative was erased** properly excluded. TexCivA 288SW595. **One coming to irrigation district with intent** to make it his home can vote. Tex CivA 288SW595.

821-26 **That polls were opened an hour before time fixed by statute** does not invalidate election in absence of fraud or ulterior motive when it does not appear that result would have been different if polls had not been opened until statutory time. 31NM7, 240P482. **Though temporarily absent from residence,** one may vote for irrigation bond issue. TexCivA 288SW595. **Ballots** of qualified voters not invalidated by failure to administer oath. TexCivA 288 SW595. **Law requiring two thirds of voters** to pass upon bond issue does not include illegal votes. TexCivA 288 SW595. **Only those paying poll taxes are allowed to vote for irrigation bonds.** TexCivA 288SW595.

821-26½-New. Statutory requirements as purposes of issue and preliminary proceedings must be observed. 25F(2d) 296.

821-27 **That vote is canvassed by board of county commissioners after same has been canvassed by directors of district** does not render election void. 31NM 7, 240P482.

821-28 197Cal 50, 239P719. **Statute requiring vote of "majority of the qualified electors"** means majority of qualified electors voting. 31NM7, 240P482, 490. **Where supervisors, after confirmatory judgment, reduced number of directors to conform to petition,** remaining directors held authorized to sell improvement district bonds. 32Ariz1, 255P481.

822-29 195Cal 16, 231P40 (under Palo Verde Irrigation District Act president and secretary of board of trustees held to be proper officials to sign bonds and affix seal of district). **Place of payment.**-31NM519, 247P842. **Recitals in bonds of merged district** which were signed by officers of newly created district apply for benefit of bona fide purchasers as effectually as bonds already issued and signed by officers of merged district. 195Cal 16, 231P40. **Act giving officers of new district power to** sell bonds of merged district has been held not to require bonds of merged district to be signed by its officers. 195 Cal 16, 231P40.

822-30 195Cal 1, 231P34 (act held not invalid in failing to provide for sinking fund for repayment of bonds).

822-31 **Palo Verde Irrigation District Act** construed to reserve all existing rights of holders of bonds of the Palo Verde Levee District, particularly taxability of personal property therein for payment of such bonds. 195Cal 1, 231 P34. **In Oregon.**-116 Or694, 242P847. **Bonds issued without consideration and without authority of statute to landowners incorporating district** do not constitute lien on land as against subsequent purchaser of land who received no part of bonds. 119 Or629, 250P745.

822-31½-New. **Bonds are general lien on all land in district.**-116 Or356, 241 P335 (Oregon Irrigation Law has been held not changed in this respect by subsequent statutes).

822-32 24F(2d)18; 51Nev215, 273P983. **Issuance in payment for work or property.**-197Cal 50, 239P719; 202Cal 193, 259P740. **Employment of broker by district to sell bonds** is not within its authority. 47 Ida535, 277P429.

822-33 195Cal 16, 231P40 (act held to authorize sale of bonds below par and above ninety). See also 74CalA681, 242 P100. **Act providing for special election** to decide as to sale of bonds below par does not forbid sale of bonds of merged district at less than par without special election, such sale having been theretofore authorized. 195Cal 16, 231P40. **Current expense warrants** have first call on moneys of irrigation district. 143Wash385, 255P360.

822-34½-New. **Method and manner of issuing bonds** are not limited to precise terms of statute in force at time of organization, 197Cal 50, 239P719.

822-34⅓-New. and legislature is not precluded from making changes in law in this regard. 197Cal 50, 239P719.

822-34¼-New. **Bonds do not constitute lien upon property in district** under Oregon statute. 118 Or239, 246P527.

822-34⅕-New. **Refunding bonded indebtedness.**-Board of trustees of irrigation district organized to take over levee and drainage districts and water system has power to issue district bonds to provide funds to pay or redeem levee and drainage district bonds and thus impose obligation by taxation on owners of property located outside such districts, though such bonded indebtedness was not originally lien on their property. 198Cal 477, 245P1092.

822-34⅙-New. Rights of holders of bonds issued by levee district are not in any way impaired by issuance of refunding bonds by irrigation district for payment of former bonds. 198Cal 477, 245P1092.

822-34½-New. **In action on subcontractor's bond** statutes relating to water improvement districts not applicable. TexCivA 270SW1071.

822-34⅛-New. **Whether subcontractor is liable on his bond** to one furnishing supplies to employee, intention of parties is only test. TexCivA 270SW1071.

822-34⅛-New. Construction company's bond to water improvement, a public corporation, is a statutory bond under Vernon's Sayles Civ. St. Annot. (1914) art 6394f. TexCivA 283SW1098.

822-34¹⁄₁₀-New. Fact that a private corporation is also a beneficiary under a statutory bond in favor of a public corporation does not change the character of the bond. TexCivA 283SW1098.

822-34¹⁄₁₁-New. Bond given by surety company under Vernon's Sayles Civ. St. Annot. (1914) art 6394f, after giving preference to the district. TexCivA 283 SW1098.

822-34½-New. Surety company's bond covering liability, inter alia, for labor and materials in the performance of a contract includes merchandise necessary for workmen, even though part of it is sold to outside parties. TexCivA 283SW 1098.

822-34⅓-New. Surety company's bond covering liability, inter alia, for labor and material is liable to materialman where material furnished is rendered worthless, though not entirely consumed. TexCivA 283SW1098.

822-34¼-New. Surety's company's bond covering liability, inter alia, for labor and materials does not include telephone line which is not and cannot be used in performance of contract. Tex CivA 283SW1098.

822-34⅕-New. Surety company's bond covering liability inter alia, for labor and materials does not cover insurance fees incurred by contractor, not mentioned in bond. TexCivA 283SW1098.

822-34¹⁄₁₆-New. **Authority limited by statute.**-Improvement district in issuing bonds must proceed according to statute authorizing it to do so. 119 Or 629, 250P745.

822-34¹⁄₁₇-New. **Consideration for release of option to purchase.**-Technical consideration, much less than par value of bonds, is insufficient to sustain contract for release of option for purpose of bonds in consideration of issuance of specified amount of bonds. 129 Or534, 277P1005.

822-34¹⁄₁₈-New. **Options to purchase.**-Directors of district have no power to execute option agreement for purchase of bonds. 129 Or534, 277P1005.

822-34¹⁄₁₉-New. Bonds are not invalid because of defective issuance and sale in violation of statute where objections subsequently cured by statute. 86Mont 595, 285P932.

822-34¹⁄₂₀-New. Curative effect is not removed by repeal of curative statute under express exception in repealing statute. 86Mont595, 285P932.

822-34¹⁄₂₁-New. Constitutional provision prohibiting passage of laws imposing on county new liability as to transaction already passed held not applicable to curative statutes affecting irrigation districts. 86Mont595, 285P932.

822-34¹⁄₂₂-New. Curative statutes affecting organization of irrigation district and issuance of its bonds held not violative of due process. 86Mont595, 285 P932.

823-37 32Ariz1, 255P481. **Requirements of publication for three successive weeks** requires publication in three successive weeks but does not require publication for three full weeks or twenty-one days. 31NM7, 240P482.

823-39 32Ariz1, 255P481. See also 31 F(2d)515.

823-44 **In action to collect interest on coupons of bonds,** that property conveyed to irrigation district was not sufficient consideration for bonds, is no defense. 202Cal 193, 259P740.

824-47½-New. In Oregon, bond holder may not foreclose on land in district on default of payment of interest but has statutory right analogous to receivership to hold works of district. 116 Or 694, 242P847.

824-48 See also 94CalA511, 271P514.

824-50½-New. Destruction of unsold bonds.–Statutes in some jurisdiction provide for election to determine whether after completion of ditch system and payment of all demands against district, bonds, remaining in hands of directors voted to be issued but not sold, shall be destroyed. 197Cal 50, 239P719.

824-50¼-New. Under such statutes it is prerequisite to exercise of power given to board of directors to call election for such purpose that they shall have made certain findings of fact, 197Cal 50, 239 P719.

824-50¼-New. of completion of ditch system and payment of all demands against district, 197Cal 50, 239P719.

824-50⅓-New. and also that bonds voted to be issued but not sold were not necessary to be sold for use of district. 197Cal 50, 239P719.

824-50⅙-New. Such findings need not be made in writing in absence of any statutory requirement, 197Cal 50, 239 P719.

824-50⅐-New. and oral findings are sufficient. 197Cal 50, 239P719.

824-50⅛-New. Proceedings under such statute have been approved by court where district had in fact complete water and ditch system for distribution and use of water at date directors called election, 197Cal 50, 239P719.

824-50 1/9-New. though plans for system for development of which earlier issue of bonds was voted had long since been abandoned as apparently impractical. 197Cal 50, 239P719.

824-50 1/10-New. Such statutes providing for destruction of bonds declare that no informalities in conducting election shall invalidate it when otherwise fairly conducted, 197Cal 50, 239P719.

824-50 1/11-New. and further that court hearing contests provided in statute must disregard error, irregularity or omission which does not affect substantial rights of parties. 197Cal 50, 239 P719.

824-50 1/12-New. No substantial rights of district or property owners or electors are affected by irregularities in calling or holding election or in destroying bonds where electors voted unanimously in favor of such destruction. 197Cal 50, 239P719.

824-50 1/13-New. Statutes governing rights of bondholders.–Rights of bondholders as to assessment for payment of principal and interest in bonds are governed by statute in force at date of bonds. 116 Or356, 241P335.

824-50 1/14-New. Bonds have same force and effect if irrigation law was written into them. 116 Or356, 241P335.

824-50 1/15-New. Actions by landowners.–Landowners and electors may sue for benefit of district to recover unlawful expenditures by board of directors after refusal of directors to compel restitution pursuant to request. 129 Or534, 277P 1005.

824-50 1/16-New. Owners of land within irrigation district and electors therein have right to maintain suit to recover for benefit of district value of bonds issued by directors as consideration for release of option for purchase of all bonds issued by district. 129 Or534, 277P1005.

824-50 1/17-New. In such case landowners may maintain suit in conversion to recover value of bonds without necessity of litigating bonds in hands of innocent holder. 129 Or534, 277P1005.

824-50 1/18-New. Evidence in such action has been held sufficient to sustain finding that landowners requested directors to institute proceedings to require restitution of bonds or payment thereof for use of district. 129 Or534, 277P1005.

824-50 1/19-New. Directors of district and district itself are proper parties to such action. 129 Or534, 277P1005.

824-50 1/20-New. Thirty-day limitation for proceeding by voter or assessment payer to determine validity of acts of directors is inapplicable to action of board of directors in granting option for sale of bonds of district. 129 Or534, 277P1005.

824-50 1/21-New. Evidence in action for possession of irrigation district bonds has been held to show that plaintiff took his interest subject to that of defendant and was not entitled to possession. Utah 276P651.

824-50 1/22-New. Nonresident bondholders and holders of interest coupons whose claims were adjudicated held not precluded from seeking equitable relief after dissolution of district because provision for redemption was by assessment. 38F(2d)275.

824-50 1/23-New. In such case there is no adequate remedy at law precluding equitable relief. 38F(2d)275.

824-50 1/24-New. Such relief is not barred by laches where delay is justified. 38F(2d)275.

824-50 1/25-New. Several of such bondholders can sue jointly for such relief where it does not appear that others in same situation are not joined. 38F(2d) 275.

824-50 1/26-New. In such suit subsequent bondholders and landowners are not necessary parties where trustees of such bondholders and district and its trustees are joined. 38F(2d)275.

824-51 198Cal 477, 245P1092 (under power of legislature); 83Mont282, 272 P543(2dcase); 85Mont94, 277P627; 116 Or356, 241P335; 150Wash590, 274P181; Wyo 293P373. But see 117Nebr424, 220 NW680. **Assessment constitutes lien on property.**–118 Or239, 246P527. **Assessment may be equal** where benefits derived equal. 49Nev278, 245P285. **Assessment of high lands not presently requiring drainage.**–Nev 245P288. **Assessment for drainage project must be based on benefits immediately accruing** or which will clearly accrue from construction of work. 49Nev278, 245 P285. **Assessment based on flat rate** and not actual benefit to land is invalid. 49Nev278, 245P285. **Benefits derived from project as basis of assessments.**–49Nev278, 245P285. **Assessment for cost of works of federal reclamation project acquired by irrigation district** may be made against irrigable lands in district not covered by paid up water right contract with United States. 81 Mont170, 261P962. **Collection and control of funds.**–Ida 286P598 (control of certain funds passes to state treasurer). **Constitutionality of apportionment of assessments has been upheld** as against constitutions that constitutional guaranties of equal protection of laws and due process of law were violated. 49 Nev278, 245P285. **District has power to assess** property within boundaries for purpose of raising revenues to secure water to irrigate arid lands. 117Nebr 125, 219NW956. **Essentials and prerequisites to valid assessments.**–70Utah 328, 260P269. **Failure of act embracing existing district** in nearby created district, to provide for assessment of personal property for payment of bonds issued by old district, has been held not to impair rights of holders of bonds of old district. 195Cal 1, 231P34. **Lack of direct immediate benefit** to irrigation project lands held not to preclude assessment of pro rata cost of drainage. 268US50, 45SCt333, 69Led843. **Landowner cannot escape liability by not demanding water** if district can furnish water. TexCivA 5SW(2d)557. **Lands of owner who has paid assessment** are not relieved from liability for further assessments made necessary by delinquencies of others. 74Mont111, 238P 879, 40ALR1344. **Question whether land is susceptible of irrigation** is one of fact. 49Nev278, 245P285. **Subjection of all lands in district to taxation held** not to create lien on lands for benefit of bonds. 78Mont287, 254P162. **Where district fails to furnish water to lands or construct system by which water can be delivered within their boundaries,** assessments are invalid. 69Utah510, 256 P785.

824-52 See also 150Wash590, 274P181. **Mandamus to compel levy.**–116 Or694, 242P847; 118 Or239, 246P527. **Sufficient demand for levy of assessments** to pay bond, interest, and retirement has been held shown by bondholder. 116 Or694, 242P847. **Assessment to make up delinquencies on assessments of preceding year.**–116 Or356, 241P335. **Reliance on delinquent assessments for payment** of bonds and interest would not be in accordance with Oregon statute requiring adequate assessments for that purpose. 116 Or694, 242P847. **Statutory method of providing for bond payments** must be followed. 116 Or694, 242P847. **Statute** providing for levy and collection of taxes by board of directors of district acting through assessor on all property alike has been held to provide for general tax and not special assessment for which hearing on benefits was unnecessary. TexCivA 19SW(2d) 186.

824-54 Assessment should be for cost of amount of water necessary for land which is benefited where no objection is made to allotment of water per acre. 65Utah571, 239P781. **Annual cost of operation and maintenance under contract with reclamation service** may be included in estimates and resulting tax levy for ensuing year, though secretary of interior has not demanded payment till year following. 33NM482, 270P889. **Expenses included in particular budget items.**–33NM482, 270P889.

824-55 Equity has power, where statute provides no remedy, to correct error in allotment of water. 65Utah571, 239 P781. **Computation of amount is governed by statute** in force at time computation is made. 116 Or356, 241P335. **Apportionment according to area, frontage, or value** does not disprove consideration of benefits unless manifestly unjust. Wyo 293P373.

824-55½-New. Nature of special assessments.–Exactions authorized to be made by irrigation districts are essentially assessments for local benefits and are not levied for general governmental purposes. 35Wyo 73, 246P918.

824-56 116 Or356, 241P335. **Equality and uniformity.**–35Wyo 73, 246P918. **Land of municipality** is not expressly exempt from assessment in California. 72CalA503, 237P772. **Liability not affected by failure to use water.**–49Nev 278, 245P285. **Liability to assessment of portions of municipal land** does not render other portions devoted to public use in sewage disposal assessible. 72 CalA503, 237P772. **Municipal property used for sewage disposal purposes** is not liable to assessment, though portions used for agricultural and horticultural purposes. 72CalA503, 237P 772. **Where municipal property is exempt,** city need not attempt to have land excluded from assessment or object to assessment made. 72CalA503, 237P772. **Bonds held not specific lien** on land in district. 78Mont287, 254P 162. **Allotments of restricted Indians,** exempt from taxation by reason of act of congress, cannot be subjected to payment of special assessments for drainage purposes incurred prior to removal of restrictions, while allotments are in hands of allottee or his grantee. 119 Okl 227, 249P416. **Assessments are taxes** within statutes making general taxes first lien on real estate till paid. 117 Nebr125, 219NW956. **Complaint in action to quiet title to lands sold for delinquent taxes** has been held sufficiently to allege compliance of assessment with statutory requirements. Utah 269P138. **Lands subirrigated so as not to be benefited by irrigation** cannot be taxed for operating expenses. 117Nebr424, 220 NW680. **Presumptions in actions to quiet title to lands sold for delinquent taxes.**–Utah 269P138. **That particular part of unit assessed is not directly benefited** does not invalidate delinquent tax sale. Utah 269P138. **Railroad not chargeable with maintenance assessment** under statutes where no water rights were appurtenant to right of way or water available therefor. 48 Ida584, 283 P614. **Statute authorizing taxation of personalty.**–TexCommnA 30SW(2d)301 (2dcase).

824-57 See also 150Wash590, 274P181. **Statute providing for assessment on rate per acre basis** is not unconstitutional. 31NM7, 240P482.

824-58 195Cal 1, 231P34 (Palo Verde Irrigation District Act held not to make any change in method of assessment which impaired obligation of bonds issued by Palo Verde Levee District); 127

Or176, 271P194. **Redemption** must be made before sale in Texas. **TexCivA** 276 SW949. **In Texas.–CivA** 276SW949. **Assessment for more land** than party owns is void as to excess. 65**Utah**571, 239P 781. **One assessed for more land than he owns** is not relieved from paying tax on amount actually owned. 65**Utah**571, 239P781. **Mandamus lies to enforce sheriff's clear duty to issue** delinquency certificate. 121 **Or**366, 254P825. **Equality and uniformity.–TexCommnA** 280 SW169. **Tender of irrigation assessments** held to constitute waiver of irregularity in notice of assessment. 136 **Wash**63, 238P992. **Tender of assessments held sufficient**, where, even though tender was insufficient in amount, owners were ready, able, and willing to pay any additional sum necessary to satisfy assessments. 136**Wash**63, 238P992. **Recital in certificate of sale for delinquent taxes that county was competitive bidder** does not invalidate proceedings though inconsistent with statute peremptorily requiring treasurer to sell delinquent property to county. **Utah** 269P138. **Recovery of taxes paid.**–117 Nebr424, 220NW680. **Sale of land for delinquent taxes.–CalA** 268P959; **Utah** 269P129. **Statute requiring special benefits against each tract to be entered on assessment roll** does not apply to assessments for general purposes of irrigation district not involving special benefits. **Utah** 269P138. **That all land sold for delinquent taxes was not included in deed** is not matter for valid objection by landowner where descriptions in certificate and deed were definite and certain and land described in deed was included in land described in certificate. **Utah** 269P138. **Levy of assessment held invalid** where it was for constructing reservoirs for some stockholders at expense of all. 208**Cal** 508, 282P 737. **Penalties collected from its delinquent taxpayers** are retained by irrigation district and are not payable to county treasurer for benefit of general fund under statute. 35**Ariz**541, 281P465. **Remission of penalty and interest.**–131 **Or** 563, 284P166, 68**ALR**422.

825–59 94**CalA**511, 271P514; **Utah** 280 P722 (complaint held not to negative or exclude delineation of plaintiff's land on plat or map); **Wash** 290P819. **Presumption that all proceedings in organization were regular** and sufficient except alleged defective description of lands. **Utah** 280P722.

825–59½–New. Constitutional provisions for uniform taxation have no relation to irrigation assessments. 35**Wyo** 73, 246P918.

825–59⅓–New. Issuance of refunding bonds whereby whole district assumes burden originally on property within levee district is not inhibited by any constitutional provision where legislature has found that irrigation district will be uniformly benefited by levee construction works theretofore constructed. 198**Cal** 477, 245P1092.

825–59¼–New. Such legislative declaration of benefit and imposition of assessment is not violation of due process. 198**Cal** 477, 245P1092.

825–59⅕–New. Such finding is not reviewable by courts unless shown to be palpably unjust and absurd, 198**Cal** 477, 245P1092.

825–59⅙–New. and is not invalidated by fact that it was made after boundaries of irrigation district were fixed. 198**Cal** 477, 245P1092.

825–59⅐–New. Legislature is not prevented from making such finding as to lands other than those included in levee district by action of board of supervisors in fixing boundaries of the levee district. 198**Cal** 477, 245P1092.

825–59⅛–New. Fact that refunding bonds which are to be charge on entire irrigation district are to be sold to pay only portion of bonds of levee district included in irrigation district is not objectionable, 198**Cal** 477, 245P1092.

825–59⅑–New. even though principal and interest of remaining bonds of levee district continue to be charge only on property originally liable therefor. 198 **Cal** 477, 245P1092.

825–59⅒–New. Property owners obligated under imposition of general tax are not in position to claim that other lands benefited by improvements are not assessed. 198**Cal** 477, 245P1092.

825–59⅑–New. In providing for redemption of bonds of levee district legislature has option of doing it through assessments for benefits or general tax. 198**Cal** 477, 245P1092.

825–59½–New. Property owners in irrigation district within area not originally included in levee district by electing to become part of irrigation district consent to become subject to obligations authorized to be imposed by statute for issuance of refunding bonds. 198**Cal** 477, 245P1092.

825–59⅓–New. Obligation of taxpayers of levee district when district bonds were issued is not impaired by issuance of refunding bonds by irrigation district to pay former bonds by reason of fact that personal property within levee district will be released from obligation to pay taxes for repayment of levee district bonds. 198**Cal** 477, 245P1092.

825–59¼–New. Irrigation District Act has been held not invalid in attempting to render property not in districts composing it chargeable with its debts. 195 **Cal** 1, 231P34.

825–59⅕–New. Assessments as liens.–Under some statutes assessments levied for payment of interest on bonds constitute lien on lands. 74**Mont**346, 240P 837.

825–59⅙–New. Manner of collection of assessments.–In collection of tax or assessment levied for payment of interest on bonds, county treasurer may not seize and sell personal property of delinquent landowner. 74**Mont**346, 240P 837.

825–59⅐–New. Statutory remedy for collection of assessments is exclusive. 74**Mont**346, 240P837.

825–59⅛–New. In collection of tax or assessment levied for payment of interest on irrigation district bonds county treasurer must proceed in manner prescribed by statute for collection of state and county taxes made lien on land. 74**Mont**346, 240P837.

825–59⅑–New. Taxes or assessments levied for such purposes by irrigation district are not within application of Montana statute providing that every lien created thereby shall have force and effect of execution against personal property of delinquent taxpayer. 74 **Mont**346, 240P837.

825–59⅒–New. Constitutionality of statutes providing for taxation by irrigation districts.–Statute providing for executions by irrigation districts for local benefits is not violative of constitutional provision that each law imposing tax shall state object, and that no tax shall be levied except in pursuance of law. 35**Wyo** 73, 246P918.

825–59⅓–New. Where no statutory demand has been made, landowner may not recover assessments paid on ground of insufficiency of water. **TexCivA** 275 SW298.

825–59½–New. No lien arises, under levy of water improvement district prior to assessment and declarations of amount of taxes. **TexCivA** 296SW982.

825–59⅓–New. "Annual assessment" under state constitution does not include levy of special taxes by water improvement district. **TexCivA** 296SW 982.

825–59¼–New. Illegal special assessment tax assessed against restricted Indian allotments, when paid under protest, may be recovered. 119 **Okl** 227, 249P416.

825–59⅕–New. Under Texas statute levy of tax by water improvement district for organization and maintenance expenses before bonds have been voted is not authorized; **TexCommnA** 283SW 151.

825–59⅙–New. and although power to create district and incur expenses involved implies all necessary power to levy and collect taxes to discharge necessary organization expenses, **Tex CommnA** 283SW151.

825–59⅐–New. power to levy tax for such expenses before bonds have been voted cannot be implied, in view of statute providing for payment thereof from proceeds of sale of bonds. **Tex CommnA** 283SW151.

825–59⅛–New. Assessment cannot be levied on lands outside territorial limits of districts. **Utah** 263P751.

825–59⅑–New. Assessment to pay tort of illegal construction is invalid. **Cal** 277P862.

825–59⅒–New. It must be conclusively presumed, from due adjudication of organization of district, determining lands to be therein included, amount of bonds to be issued, and interest to be paid thereon, that total benefits to lands comprised in district were then finally adjudicated. 150**Wash**590, 274P 181.

825–59⅓–New. Provision of statute for lien on water rights and other property of irrigation district for benefit of bondholders is not intended to take place of assessments. 150**Wash**590, 274 P181.

825–59½–New. Purchaser of tax deed cannot question validity of previous deed for failure to comply with government regulation requiring filing in local land office of assignment of homestead entry within district. 40**Wyo** 350, 277P968.

825–59¼–New. Actions to cancel tax deeds.–Owner of land originally entered on under Reclamation Act of June 17, 1902 may bring action within state for cancellation of tax deed involving purely question as to whether laws of state have been complied with in connection with issuance of deed. 40**Wyo** 350, 277P968.

825–59⅕–New. Failure to serve notice of purpose of obtaining tax title personally on occupant of land vitiates tax deed issued pursuant thereto. 40**Wyo** 350, 277P968.

825–59⅙–New. Contest of validity of taxes imposed by water improvement district cannot be sustained unless tax levied is void. TexCivA 19SW(2d)186.

825–59⅐–New. County commissioners held not required to increase tax rate by fifteen per cent of bonds maturing in tax year to cover delinquencies for preceding year. 87**Colo** 204, 286P107.

825–59⅛–New. Land with water rights in irrigation district may be sold for delinquent tax assessments. **Or** 286P 563.

825–59⅑–New. One participating in meetings of water district and receiving benefits of distribution cannot deny liability for share of expenses though district was not legally constituted. 48 **Ida**680, 285P464.

825–59⅒–New. Taxpayers and landowners in district have capacity to sue to restrain dissipation of district property. **Ariz** 289P979.

825–59¼–New. Tax sale is illegal where land was property of federal government at time bonds were issued for payment of which assessment was levied. 104**CalA**319, 285P1096.

825–59⅓–New. Homesteader occupying federal land assumes no legal liability to pay tax by signing agreement purporting to bind him to pay taxes or assessments under local irrigation laws. 104**CalA**319, 285P1096.

825–59½–New. Question whether water master is wrongfully diverting waters in violation of adjudication of rights cannot be determined in action for contribution for expense of water master. 48 **Ida**680, 285P464.

825–59⅕–New. Two-year statute of limitation has been held not applicable to suit by water improvement district for taxes accruing after formation of district. **TexCivA** 19SW(2d)186.

825–59⅙–New. Such agreement does not raise estoppel to assert that federal lands could not be included within district for taxation. 104**CalA**319, 285P1096.

825–59⅐–New. Water user sued for costs and expenses as determined by water commissioner is liable for attorney's fees. 48 **Ida**680, 285P464.

825–59⅛–New. Evidence of market value of lands is not conclusive as to benefits. **Wyo** 293P373.

825–60 Irrigation district can be dissolved only on suit of state.–TexCivA 278SW499.

825-60½-New. Voluntary dissolution of an irrigation district can only be had in accordance with provisions of applicable statutes. 74CalA681, 242P100.

825-60½-New. But in some jurisdictions statutes contain no provision contemplating contracts for dissolution and death of irrigation districts. 74CalA 681, 242P100.

825-61 206Cal 581, 275P425; **Tex CommnA** 280SW196; **TexCommnA** 286 SW185; 35Wyo 496, 252P499. **Evidence held to show** that water company was operating public utility. 196Cal 62, 235 P647. **Company which sells water to all of public who apply** is public utility. 196Cal 62, 235P647. **Statutory lien of bondholders** of irrigation construction company held prior to lien of operating company for maintenance. 274 US630, 47SCt692, 71L ed1243.

825-63 TexCommnA 280SW196.

825-64½-New. Insolvency of corporation organized under statute for purpose of reclaiming lands patented by United States and held by state for benefit of public desiring to settle on lands reclaimed gives court jurisdiction to appoint receiver over its property as going concern. 35Wyo 496, 252P499.

825-64½-New. Where receivership proceedings are pending against such corporation, users of water and owners of land under reclamation project are properly allowed to intervene to protect contracts with company. 35Wyo 496, 252P499.

825-64¼-New. In proceedings to sell property of such corporation to satisfy judgments it will be assumed that assessments against lands were collected but were insufficient to pay judgments and assessments. 35Wyo 496, 252P499.

825-64½-New. Evidence held sufficient to show necessity for sale of franchises and property of such company as going concern to protect settlers and bondholders. 35Wyo 496, 252P499.

825-64¼-New. Insolvency of public utility.-Under statutes in some jurisdictions railroad commission has authority to discontinue functions of hopelessly insolvent irrigation public utility. 75CalA57, 242P494.

825-64½-New. Right of lessee of land to water is derived from statute and not from lease. TexCommnA 280SW 196.

825-64¾-New. Provision of lease that lessee shall have no claim against irrigation company for failure to furnish water will not bar lessee's suit against company for such failure. TexCommnA 280SW196.

825-64½-New. Acts held not such mismanagement as to authorize appointment of receiver. 29F(2d)176.

825-64 1/10-New. Actions by irrigation company.-Complaint against tenants in common of water rights held not demurrable for nonjoinder of one cotenant. Utah 278P585.

825-64 1/11-New. Agreement between water users as to sharing expenses is properly excluded where neither defendants nor their predecessors were parties thereto. Utah 278P585.

825-64 1/12-New. Evidence that water users were deprived of use of water during portions of years involved is properly excluded where not within issues made by pleadings. Utah 278P 585.

825-64 1/13-New. Fraud by construction company on operating company's stockholders held not shown. Ida 290P379.

825-64 1/14-New. Operating company's stockholders knowingly receiving benefits of construction company's reservoir are estopped to assert that maintenance of reservoir was ultra vires operating company. Ida 290P379.

825-65 Right to change point of use.-87Colo 166, 285P1100.

826-68 130 Or401, 280P492; 130 Or408, 280P495(1stcase) (under by-law enforceable as contract). **In Idaho.**-5 F(2d)895. **In Wyoming.**-39Wyo 345, 271P221. **Continuing direct annual assessment** over period of twenty years, exceeding ten per cent of capital stock, held unauthorized under statute permitting reasonable assessments. 45 Ida 244, 263P32. **Remedies of corporation for collection of assessment.**-130 Or401, 280P492; 130 Or408, 280P495(1stcase). **Ratification of assessments.**-Ida 290P 379.

826-68½-New. Action on contract of corporation with third person may not be maintained by stockholders who hold stock as incident to ownership of land benefited, on theory that corporation is trustee for stockholders and is obligated to furnish to stockholders, without profit, service involved in contract. 136Wash116, 238P641.

826-68½-New. Under statutes in some jurisdictions corporations exist whose stockholders are restricted to landowners under reclamation projects authorized and constructed under federal reclamation department. 44 Ida325, 259P 286.

826-68¼-New. No capital stock is issued as such nor payment required other than that stockholders shall be landowners within the reclamation district and shall have severally applied and paid for water rights from the government. 44 Ida325, 259P286.

826-68½-New. Under stock subscription contract between corporation and reclamation department and articles of incorporation and by-laws corporation may levy assessments for operation of corporation. 44 Ida325, 259P286.

826-68¾-New. Corporation is not entitled to enforce collection of assessments levied until it has collected previous assessments levied and not paid. 44 Ida325, 259P286.

826-68½-New. In action to collect such subsequent assessments the defense by a stockholder that former assessments remain unpaid is not a collateral attack. 44 Ida325, 259P286.

826-68⅞-New. Stockholder is not estopped from setting up such defense where there were others who were delinquent in payment of previous assessments. 44 Ida325, 259P286.

826-68½-New. Assignee of water right is not entitled to issuance of stock in irrigation company without assigning water right to such company as provided in articles of incorporation. Utah 273P502.

826-68 1/10-New. Where stockholder of mutual nonprofit corporation accepts water it delivers to him and applies it to beneficial purposes on land, implied promise arises to pay corporation for such service. 130 Or401, 280P492; 130 Or408, 280P495(1stcase).

826-69 205Cal 54, 269P915; **Tex CommnA** 286SW185. **Mere grant of franchise** does not include privilege of so using things granted by state as to injure some citizens in order to enrich others. TexCommnA 286SW185.

826-71 45 Ida244, 263P32.

826-72 TexCivA 13SW(2d)474. See also 206Cal 581, 275P425.

826-73½-New. Water company, acquiring certain water rights and system of irrigation by reason of conveyance from land company, as part of, and to carry out, scheme of subdivision, under agreement that water company as agent had right to take water and to distribute it to lands through its water system, has been held trustee, with mere naked legal title for use of beneficial owners, and mere agent of land company for purpose of distributing waters in accordance with agreement. 204 Cal 646, 269P533.

826-76 Attorney's fees in action by water master to recover for services and maintenance charges are not recoverable where statutory three days' notice to contribute was not given to defendant. 46 Ida505, 269P91. **Counterclaims in actions by water master for services.**-46 Ida505, 269P91. **Members consenting to employment of water master and accepting his services** must pay reasonable value of services. 46 Ida505, 269P91.

826-76½-New. Evidence in action by water master against member for services and maintenance charges is insufficient on theory of association assessments where there is no proof of organization of association nor of its nature, powers, or purpose. 46 Ida505, 269P91.

826-77 Right to members to fix charges.-46 Ida505, 269P91.

827-81 Persons holding stock of corporation owning reservoir site, who utilized site to effect appropriation of flood waters, dedicated site as water right. 39F(2d)610.

827-82 Contract conveying interest in irrigation project held enforceable. 45 Ida731, 266P424 (damages for purchaser's failure to complete project not limited to actual damages). **Contract whereby owner agreed to secure additional permit if necessary and convey it to water district** construed as unconditional contract to convey water rights. TexCommnA 258W(2d)813.

827-83½-New. Conveyance of land with perpetual irrigation rights, not violation of constitution or discriminatory in its character or objects. TexCivA 271SW392.

827-84 Changes in manner of use.-47 Ida619, 277P542. **Extent of right.**-47 Ida619, 277P542. **Initial use** measures rights of irrigation company under grant of right of way indefinite as to width and location. 47 Ida619, 277P 542. **Practical construction of grant.**-47 Ida619, 277P542.

827-85 Ditch must have been completed before land passes into private hands in order to secure vested interest in right of way. 75Mont202, 243P568.

827-85½-New. Until ditch is completed no vested interests to right of way for ditch is secured over public land, under federal statute. 75Mont202, 243P 568.

827-86 78CalA334, 248P526; 126 Or 99, 266P1073.

828-87 66Utah509, 243P922.

828-88 Abandonment.-42 Ida436, 246P 23. **Forfeiture.**-42 Ida436, 246P23. **Vesting of title.**-42 Ida436, 246P23.

828-88½-New. Easement for irrigation ditch upon theory of implied reservation does not exist, however necessary it may be, where statute of eminent domain provides complete remedy. 66Utah 509, 243P922.

828-94 116Nebr736, 219NW11.

829-97½-New. Where landowner acquires easement to discharge water into canal of irrigation district through flume built by county on his land, he owes duty to such district to keep flume in repair. 43 Ida736, 254P1052.

829-97¼-New. Under statute authorizing landowner to change location of lateral across his land he need not thereafter maintain ditch constructed by him. 44 Ida663, 258P541.

829-97¼-New. License granted by landowner, authorizing canal company to construct lateral across property for use permanently as part of canal system, even though verbal, is irrevocable and binding, not only on grantor, but upon grantees. TexCivA 9SW(2d)281.

829-97½-New. Where servitude with which irrigation ditch was burden was that of conveying water to various landowners' land, owner who acquiesced in change of direction of flow of water ditch, such change imposing no greater servitude than existed before, cannot complain of change in action by adjoining landowner to restrain defendant from interfering with plaintiff's use of ditch. TexCivA 10SW(2d)147.

829-97¾-New. Where location of ditch is indefinite except as to termini, court of equity may give it definite location. Mont 286P133.

829-98 Ariz 282P937 (discharge of surface water from water shed collected and discharged at mouth of defendants' canal against plaintiff's canal producing injury); 207Cal 8, 276P1017(2dcase). **Evidence.**-207Cal 8, 276P1017(2dcase).

829-99 47 Ida555, 277P430.

829-2 205Cal 54, 269P915.

829-4 76CalA455, 245P225.

829-4½-New. In suit to enjoin disposition of certain shares in water system and in water and water rights, finding that company was about to sell shares held sustained by evidence. 204Cal 646, 269P533.

829-7 83CalA249, 256P618; TexCivA 13SW(2d)209. **Dedication.**-196Cal 62,

235P647. **Determination of commission** that company has dedicated water to public use cannot be annulled where evidence supports finding. 196Cal 62, 235P647. **Water dedicated to public use** remains such if dedication not revoked. 196Cal 62, 235P647. **Persons entitled to use of water** include all those who belong to class at any specified time, though not theretofore members. **Tex CommnA** 286SW185, 189 [citCyc]. **Easement.–TexCommnA** 286SW185. **Restricted rights.–TexCommnA** 286SW185. **Effect of drought** is to require equal distribution among owners of land adjoining and not adjoining water facilities. **TexCommnA** 286SW185. **Rule as applicable to irrigation districts.**–45 Ida369, 263P988. **Irrigation district,** as common carrier, is bound to furnish water to those entitled at reasonable and uniform rate. Nebr 229NW273.

830–8 TexCivA 13SW(2d)209. **Landowners cannot complain of insufficient supply of water** where they fail to apply for water in manner provided by statute. **TexCivA** 275SW298.

830–10 TexCivA 271SW392 (where all available water is used in meeting demands of contractees).

830–11 75CalA57, 242P494; **Tex CommnA** 16SW(2d)266; **TexCivA** 293SW923; **TexCivA** 13SW(2d)204. See also **Or** 286P563. **Contract held discriminatory.–TexCommnA** 286SW185. **Contract among landowners in improvement district,** discriminating as to rights of some owners, is unenforceable. **TexCivA** 293SW923.

831–12 But see **TexCivA** 271SW392.

831–15 196Cal 62, 235P647. **Dedication of water to public use by company cannot be revoked** by it without consent of all beneficiaries. 196Cal 62, 235P647.

831–19 See also 207Cal 215, 277P487; 207Cal 786, 277P489.

831–20½–New. Customers of canal company are not appropriators within statute providing priority of right to first in time. **TexCommnA** 16SW(2d)266.

832–22 TexCommnA 299SW224. See also **TexCivA** 29SW(2d)405. **Vacation of temporary injunction** was within discretion of court where answer stated that supply was shut off till consumer should pay water charges. **TexCivA** 4SW(2d)204.

832–23 Exclusion of testimony showing that water was needed for cultivation of land is error. **TexCivA** 29SW(2d)405.

832–23½–New. Water rights of entryman under Carey Act project by virtue of contract with company become appurtenant to land when title passes from United States to state. 35Wyo 67, 246P916.

832–23⅓–New. By-law of operating company under Carey Act project authorizing water user to carry over for personal storage water allotted but not used is illegal as contrary to public policy. Ida 285P532.

832–23¼–New. Landowners in improvement district cannot enjoin district from furnishing water to adjoining lands. **TexCivA** 293SW923.

832–23⅕–New. Irrigation district supplying water to landowner so as to flow on high land may not require him to lower his land so as to permit furnishing water at another point. 45 Ida369, 263P988.

832–23⅙–New. Irrigation district may change place of diversion if water user is not injured though he has established point of diversion. 45 Ida369, 263P988.

832–23⅐–New. Duty of transferees of irrigation system.–Irrigation districts acquiring dam and ditch with knowledge of use in conveying water to certain lands assume duty of continued service necessary to beneficial use of such lands, and, where continuous flow of small stream is necessary for beneficial irrigation, such method of irrigation must be continued. 90CalA225, 265P1003.

832–23⅛–New. Reclamation district has been held not entitled to retain property acquired and at same time refuse to comply with agreement to furnish property owners certain supply of water even though such owners were outside of district. 154Wash102, 281P11.

832–23⅑–New. Where reclamation district is able to comply with contract to furnish vendors water supply, vendors of property may have specific performance of contract even though remedy may deprive district of water supply. 154Wash102, 281P11.

832–23 1/10–New. Water user may look to officials of other districts to prevent interference with his rights. 42F(2d)541.

832–24 205Cal 54, 269P915; 70Utah57, 257P1060; Utah 289P151.

832–25 205Cal 54, 269P915.

832–26½–New. Corporation organized by owners of water rights has been held not to have taken rights as trustee for distribution of water at cost to them, and that on corporation's losing its capacity as such on failure to pay license tax, original owners did not hold rights as trustees. 196Cal 62, 235P647.

833–27½–New. Stockholders are entitled to connection with company's pipe line to secure water for domestic use. 70Utah57, 257P1060.

833–27⅓–New. Stockholders have right to conserve water furnished during nighttime for use during day. 70Utah 57, 257P1060.

833–27¼–New. In action to require connection with pipe line of irrigation company, stockholder's title to pipe line right of way is immaterial. 70Utah57, 257P1060.

833–27⅕–New. Stockholder's prior use of water for more than ten years gives him vested right to same use as before ditch was changed so as to entitle him to maintain stop gate in irrigation ditch, where deepening of ditch lowered water surface, notwithstanding by-law prohibiting stop gates. 132 Or128, 283P755.

833–27⅙–New. Evidence in suit to enjoin interference with stop gate in irrigation ditch held sufficient to show that deepening of ditch lowered surface of water. 132 Or128, 283P755.

833–28 82CalA52, 254P922.

833–29 In California.–82CalA52, 254P922.

833–32 Contract for water, to be performed under law for distribution thereof may not contravene such law. **Tex CivA** 293SW923. **Undue discrimination.–TexCommnA** 286SW185. **Judgment operating to perpetuate unlawful priority** as between owners entitled to water supply held unwarranted. **Tex CommnA** 286SW185.

833–33 202Cal 179, 259P937; **TexCivA** 13SW(2d)204. **Purchasers of distributing system must continue to serve customers** previously receiving service though obligation is not expressly assumed. 83CalA249, 256P618.

834–34 83CalA249, 256P618.

833–35 83CalA249, 256P618.

834–36 83CalA249, 256P618.

834–42 TexCivA 271SW392 (sale of permanent water right).

834–43 103CalA592, 284P971.

834–43½–New. On agreement to pay minimum sum on each acre of land owned, it was immaterial that whole of land was incapable of irrigation. **Tex CivA** 271SW392.

835–44 Contract by state modifying original contract for construction of irrigation system in Carey Act segregation is ineffectual to prejudice rights of settlers without their consent as to quantity of water to which they are entitled under prior contracts. 42 Ida 90, 245P78. **Lien for contract price.**–42 Ida90, 245P78. **Foreclosure of Carey Act lien for contract price.**–42 Ida90, 245P78. **Power of board of land commissioners to regulate quantity of water to be supplied to settlers in Carey Act segregation.**–42 Ida90, 245P78. **Contract with purchaser of water rights in Carey Act segregation construed.**–42 Ida 90, 245P78 (delivery of one and one-fourth acre feet per acre during average years has been held not compliance with contract). **Subject to constitutional provisions.**–75CalA57, 242P494. **In action under Carey Act construction company to recover balance due on contract for sale of water rights** defended on ground that part of land was not susceptible of irrigation court should specifically find number of acres susceptible of irrigation within meaning of act. 44 Ida469, 258P180. **Contracts construed.–Or** 286P563 (provision as to amount held not to limit reclamation company's water rights). **Nature of contractual rights.–Or** 286P563 (servitude on ditch is real property).

835–46 207Cal 215, 277P487; 207Cal 786, 277P489.

835–48 Recorded contract binds successor in title of water company's system taking with notice. **Or** 286P563.

835–48½–New. Transfer of properties to irrigation districts.–75CalA57, 242P494.

835–48⅓–New. Sale of water right severed from land.–Owner of Carey Act water right may not sever it from land to which it is appurtenant merely to avoid share of expense of operating works where water right cannot be applied to other lands and owner of right is still using water which would not be available except for company's diversion. 44 Ida427, 258P173.

835–48¼–New. Owners are not bound to secure permit, where they did not exercise option to enter into contract obligating district to supply water and water rights necessary to irrigate owner's lands. **TexCivA** 14SW(2d)321.

835–48⅕–New. Instrument providing that owner, or his named assign, should have right at his or his assign's option to contract with water district as thereinafter set forth, regarding water for irrigation purposes, was mere option. **TexCivA** 14SW(2d)321.

835–48⅙–New. Sale of water by directors of irrigation district for use on lands lying outside of district, without legal authority so to do, furnishes no ground for complaint on part of water user, unless he was deprived of water to which he was entitled by such unauthorized action. 96CalA611, 274P603.

835–48 1/7–New. One claiming shares in mutual water company to be appurtenant to land must prove it. **Cal** 287P102.

835–48⅛–New. Provision of contract for sale of land regarding water rights held to contemplate rights which at time of performance would run with land. **Cal** 287P102.

835–48⅑–New. Language of land contract relative to water rights is surplusage where court finds that there were no water rights. **Cal** 287P102.

835–49 California Irrigation District Act providing for tolls is not unconstitutional because board might cast entire burden of maintaining irrigation system on landowners. 201 Cal 726, 258P959. **Control of irrigation project** passing to operating company, maintenance charges between settlers and construction company are not binding on operating company. **Ida** 292P240. **Rules established by board of directors of irrigation district** providing for ascending scale of rates and requiring payment of tolls in advance are not illegal. 201Cal 726, 258P959. **Board of directors of irrigation district may meter part of district lands** and not others. 201Cal 726, 258P959.

835–51 TexCivA 271SW392 (landowner must prove rate unreasonable).

835–52 45 Ida244, 263P32. **Under California Irrigation District Act** board of directors of district has power to add amount of unpaid tolls to regular annual assessment. 201Cal 726, 258P959.

836–54 Cross action for loss of crop because of failure of water is distinct from action for rental and each requires individual proof. **TexCivA** 286SW574. **Partial performance.–TexCivA** 286SW574. **Water used on land not covered by contract.–Utah** 273P312.

836–54½–New. Foreclosure of lien for water rents not binding on owner not party. **TexCommnA** 296SW868.

836–54⅓–New. Failure to furnish water may justify refusal to pay rental. 103CalA592, 284P971 (finding construed

to mean water furnished according to contract).

836-54¼-New. Statutory method for recovering irrigation maintenance charges by operating company are cumulative and not exclusive. **Ida** 292P 240.

836-55 See also **BC** [1928] 4**DomLR** 258. **On certiorari** to review order of commission in rate fixing proceeding general rules as to review of evidence in certiorari apply. 196**Cal** 62, 235**P**647. **On appeal** from commission in proceedings to fix rates, matters not urged before commission cannot be considered. 196**Cal** 62, 235**P**647. **Railroad commission.**–196**Cal** 62, 235**P**647; 202**Cal** 179, 259**P**937.

838-65 70**CalA**772, 234**P**423; 82**Colo** 333, 259**P**514; 73**Mont**551, 236**P**847 (rule applied in action for injury to property caused by seepage of water from irrigating ditch); **Mont** 286**P**133 (changing flow of waste waters); **Tex CommnA** 11**SW(2d)**506; **TexCivA** 297 **SW**865; **TexCivA** 13**SW(2d)**204; **Utah** 269**P**1026. See also **TexCivA** 13**SW(2d)** 474. **Application of water by landowner in lawful manner** imposes no liability on irrigation district. **Nebr** 229**NW** 273. **Care must be commensurate with damage** which might result from escape of water. **Utah** 269**P**1026. **Deed construed as not exempting irrigation company from liability for seepage negligently caused.**–**TexCommnA** 25**SW(2d)** 603. **Duty of maintaining easement of right of way** is upon irrigation company and not upon owner of land subject to easement. 47 **Ida**619, 277**P**542. **Extent of relief.**–82 **Colo** 333, 259**P**514. **Failure to guard or repair right of way** after soil has been carried away so as to form gulch constitutes actionable negligence. 47 **Ida**619, 277**P**542. **In absence of negligence,** irrigation company incurs no liability by improving existing drainage course. 117**Nebr**288, 220**NW**261. **Injunction will lie** to prevent continuance of injury. 70**CalA**772, 234**P**423. **Injury to animals.**–47 **Ida**619, 277**P**542. **Irrigation district is not insurer** and is liable only for failure to use ordinary care. 86**Mont**562, 284**P** 539. **Irrigation district is responsible in damages** for negligent construction and operation of canal system notwithstanding it is quasi public corporation. **Ida** 288**P**421. **Irrigation district is liable only for negligent construction or operation of its seep ditches** after it has obtained right of way therefor. 117 **Nebr**288, 220**NW**261. **Irrigation districts** are not, as general rule, liable for torts of agents. **Cal** 293**P**53. **Liability dependent on negligence.**–**Tex CommnA** 25**SW(2d)**603 (in action by landowner claiming under irrigation company's deed requiring company to use reasonable care). **Money expended in reasonable effort to avoid injury from escaping water** may be recovered. **Ida** 288**P**421. **Owner is not liable as insurer.**–73**Mont**551, 236**P**847. **Proximate cause.**–**Nebr** 229**NW**273. **Seepage.**–**Nebr** 229**NW**273. **Water improvement districts** are not exempt from liability for negligence of officers and agents. **Tex CivA** 297**SW**865; **TexCivA** 297**SW**868.

839-72 Landowner permitting bull to graze on right of way along irrigation ditch is not guilty of contributory negligence precluding recovery for death of bull from fall into spillway. 47 **Ida** 619, 277**P**542.

839-72½-New. Where owner of irrigation canals constructed large syphon in canal from one side of creek to other, and opening of syphon could not be seen in canal, and was unguarded, concealed danger was created without warning to persons invited by owner to live close by canal, and children tempted to play in canal assumed risk of open and obvious danger incident to canal, but did not assume risk of unknown, concealed, and unguarded danger incident to syphon. 205**Cal** 515, 271**P**1060.

839-73 86**Mont**562, 284**P**539 (complaint held insufficient); **Nebr** 229**NW**273 (seepage). **Complaints held sufficient.**–73**Mont**551, 236**P**847. **Allegations held sufficient.**–**TexCommnA** 25**SW(2d)**603. **Petition has been held not to state cause of action** against district. **TexCivA** 20 **SW(2d)**815.

839-74 Nebr 229**NW**273; **Utah** 269**P** 1026. **Plaintiff need prove** only one of several negligent acts alleged as cause of injury: 78**Mont**199, 253**P**260. **Variance.**–78**Mont**199, 253**P**260. **Plaintiff must show neglect of duty owing to him.**–**NM** 290**P**741.

839-77 205**Cal** 562, 271**P**1091(1stcase); 43 **Ida**198, 252**P**865; 45 **Ida**369, 263**P** 988; 47 **Ida**619, 277**P**542; **Ida** 288**P**421; 86**Mont**562, 284**P**539; 117**Nebr**288, 220 **NW**261; 196**NC**806, 144**SE**923; **TexCivA** 31**SW(2d)**682 (pollution of irrigation ditch resulting in injury to crops). **Evidence declared not to sustain finding** that damage from ditch had not increased during five-year period. 70 **CalA**772, 234**P**423. **Evidence of witnesses as to conditions of break of irrigation walls** held not so impossible as to be unworthy of belief. 78**Mont**199, 253**P** 260. **Proof that negligent act** proximately caused injury held sufficient. 78**Mont**199, 253**P**260. **Evidence held to sustain findings that negligence caused** break in irrigation wall. 78**Mont**199, 253**P**260.

839-77½-New. and instructions 97**CalA** 22, 274**P**993.

839-78½-New. Injunction lies to prevent continuation of injury from escaping water. 70**CalA**772, 234**P**423.

839-78⅓-New. Instructions held proper. 76**CalA**293, 244**P**923.

839-78¼-New. Injunction requiring lining of ditch with cement or watertight flume should not be granted in absence of evidence that cost would not be prohibitive and that improvement would prevent injury. **Utah** 269**P**1026.

839-78⅓-New. Plaintiff, testifying that toe drainage ditch, built after commencement of action, did not stop seepage, but made it greater, could not recover damages because of defendant's failure to construct such ditch before action was brought. 97**CalA**22, 274**P** 993.

839-78⅙-New. Irrigation district which contracts with federal government for construction, operation, and maintenance cannot be charged with negligence of federal government in such operation or maintenance. **TexCivA** 20**SW(2d)** 815.

839-78⅙-New. Liability of landowners.–Landowner applying water in reasonable manner is not liable to adjoining landowner for injury in absence of negligence or willful act. **Nebr** 229**NW** 273 (seepage).

839-78⅙-New. In such case subterranean drainage from irrigation is burden which lower land must bear. **Nebr** 229 **NW**273.

839-78⅛-New. Provision of irrigation company's deed requiring notice of demand arising out of furnishing of water and irrigation service held inapplicable to claim for negligent seepage. **Tex CommnA** 25**SW(2d)**603.

839-78¹⁄₁₀-New. Whether canal was constructed in negligent manner held question for jury under evidence. **Ida** 288 **P**421.

839-78¹⁄₁₁-New. Whether failure of drainage district to construct ditches to take care of seep and percolating waters is question for jury. **Nebr** 229 **NW**273.

839-78¹⁄₁₂-New. Water improvement district maintaining excessive water level in canal is not liable for entire damage where lake water had seeped under plaintiff's land. **TexCivA** 31**SW** **(2d)**457.

839-78¹⁄₁₃-New. Water appropriator using natural channel for conveyance of water is liable for negligent or unlawful use of channel. **Ida** 291**P**1055.

839-78¹⁄₁₄-New. Evidence held to justify injunction against use of natural channel in conveying water in manner causing washing down excessive silt. **Ida** 291**P**1055.

839-78¹⁄₁₅-New. Difference in value is not measure of damages to water logged land which could be restored by drainage. **TexCivA** 31**SW(2d)**457.

839-79 TexCivA 286**SW**574 (formal declaration of breach unnecessary); **TexCivA** 13**SW(2d)**204; **TexCivA** 13**SW** **(2d)**209. See also **TexCivA** 280**SW**838. **Irrigation district may be sued for** breach of contract. **TexCivA** 278**SW** 499. **Irrigation district must supply water according to agreement** on compliance with conditions. **TexCivA** 278 **SW**499. **Irrigation district not liable** for tortious refusal of officers or agents to furnish water. 204**Cal** 542, 269**P**171 (2dcase). **Refusal of landowner to accept water** may justify failure to furnish water. 103**CalA**592, 284**P**971.

840-83 Whether landowner, as ordinarily prudent person, should have cut canal for irrigation purposes held question for jury. **TexCivA** 291**SW**938.

840-84 83**CalA**249, 256**P**618.

840-85 83**CalA**249, 256**P**618.

840-86 83**CalA**249, 256**P**618; 96**CalA** 611, 274**P**603; 133 **Or**121, 285**P**229; 133 **Or**121, 288**P**406; **TexCivA** 291**SW** 938. **Findings held sufficient to support judgment.**–83**CalA**249, 256**P**618.

840-87½-New. Whether irrigation company breached contract with customer is for jury where evidence showed shortage and that some customers were supplied. **TexCivA** 292**SW**863.

840-87⅓-New. Instructions granting customer of irrigation company crop on part of land is erroneous where contract is entire. **TexCivA** 292**SW** 863.

840-87¼-New. Where suit is cross action interposed in suit by irrigation company for water rental, each action is distinct requiring individual proof. **TexCivA** 286**SW**574.

840-87⅙-New. Granting injunction pendente lite requiring owner of irrigation system to transport water as common carrier held not improper. 22 **F(2d)**374.

840-87⅙-New. Preliminary injunction requiring owners of irrigation system to transport water as common carrier properly fixed rates. 22**F(2d)**374.

840-87⅐-New. Whether district met obligation to extend facilities to certain land and supply owner's legal demands for water within time it could and should have done by use of ordinary care is question of fact. **TexCivA** 13 **SW(2d)**209.

840-90 83**CalA**249, 256**P**618; 118 **Or** 520, 247**P**753.

841-91 72**CalA**518, 249**P**53; 118 **Or**520, 247**P**753; **TexCivA** 13**SW(2d)**204.

841-93½-New. Where irrigation company failed to prorate water among customers during shortage as required by statute, measure of damages is that part of loss proximately flowing from such failure; **TexCivA** 286**SW**574.

841-93⅓-New. but in absence of evidence showing what part of loss was due to discrimination there can be no recovery. **TexCivA** 286**SW**574.

841-93¼-New. Customer of irrigation company may deduct expense and damage by reason of breach of contract to furnish water from value of crop due company. **TexCivA** 292**SW**863.

841-94 197 **Ind**430, 151**NE**220.

842-98 Grant to power company does not allow it to exclude exercise of rights to water power by one with previously acquired rights. **Can** [1930] 4**Dom LR**961.

842-3½-New. Construction of Federal Water Power Act see 43**F(2d)**977.

842-3⅓-New. Ordinance making it unlawful to permit animals to run at large within certain distance of stream used for city's water supply or to pollute it held valid. **Utah** 292**P**194.

842-4 Permit from health department.–10**PaDist&Co** 570.

842-5 Such companies held public utilities under statute defining same. 188**Wis**54, 205**NW**551.

842-6½-New. But as public utilities their property has been held protected from condemnation proceedings under statute. 188**Wis**54, 205**NW**551.

842-6⅓-New. Jurisdiction of state corporation commission to grant permission to company to erect dam across nonnavigable river. 153**Va**659, 151**SE** 161.

843-7 Contract held not shown to be one for furnishing of water at speci-

fied rate perpetually.–164Ga306, 138SE 159. **Injunction against city's increase of rates** for water power held properly denied. 164Ga306, 138SE159.

843–10½–New. When utility company enters field of furnishing and selling water power created by dams in navigable waters, it in effect dedicates such to public use. 188Wis54, 205NW551.

844–18½–New. Decree without compensation restraining landowners grazing sheep or goats within certain distance of stream supplying city water held unconstitutional. Utah 292P194.

845–32½–New. Provision of lease granting exclusive right to cut ice that grant does not exclude grantor from cutting ice is mere personal privilege retained by grantor to cut ice for his personal use, and does not run with land so as to pass such right to purchaser of land by deed from owner. 118Nebr72, 223NW461.

WATERWAY

846–1 Used interchangeably with "water courses."–123 Or501, 262P946. **It may be either natural or artificial.**–123 Or501, 262P946.

WATERWORKS

846–3 10PaDist&Co 570, 571 [quotCyc].

WAY

847–11 Term does not include cars of railway company within meaning of statute, requiring written notice of injuries resulting from snow and ice on adjoining "ways" as condition precedent to right of recovery. 255Mass33, 150 NE850.

WEAPONS

852–1 Deadly weapons.–72CalA414, 237 P796; 119Kan323, 244P227, 231 [quot Cyc]; 117 Or515, 243P766. **A pistol, dirk, knife, or gun is a deadly weapon per se.**–106Conn345, 138A132; 324 Ill 363, 155NE316. **Weapons that may become deadly.**–324 Ill 363, 155NE316.

852–9 221AppDiv77, 222NYS647, 649 [quotCyc]. **"Air pistol"** is not included in term "firearm." 221AppDiv77, 222 NYS647.

853–15 76CalA227, 244P930; 328 Ill 494, 160NE86; OklCr 275P393. **"Arms,"** as used in constitutional guaranty of right to bear arms, include only those which militiaman ordinarily carries. OklCr 275P393 (pistol not included).

853–19 157Tenn518, 11SW(2d)678.

853–20 71CalA374, 235P81 (legislature may say that ownership of concealed weapons by person convicted of felony may be harmful to public welfare and fix penalty therefor).

854–22 NJ 130A458 (statute held valid under police power of state). **Recording permit.**–NJSup 134A294.

854–24½–New. Statute making it unlawful for one not citizen of United States to have firearms in his possession is not unconstitutional. 69CalA 137, 230P675.

854–29 41GaA501, 153SE377; 109 TexCr355, 4SW(2d)559. **Prohibition of carrying without permit.**–104NJL312, 140A440.

854–30 Mo 300SW677.

854–30½–New. It is not seizure of weapon that determines commission of crime, but fact of its having been carried by defendant. 35PortoRico 499.

855–31 35PortoRico 715; TexCr 20 SW(2d)774 (carrying home from pawnshop). But see OklCr 275P393. **Knowledge that he is carrying weapon concealed is equivalent to criminal intent.** NC 154SE28.

855–32 104NJL312, 140A440, 442 [quot Cyc]; 104TexCr100, 283SW508. **Mere possession is sufficient to show intent.** 220AppDiv657, 222NYS401.

855–33 28 OhA248, 162NE647. **Iron bar twenty inches long held not "bludgeon."** 220AppDiv657, 222NYS401. **Must be shown that instrument possessed answers description** of prohibited weapons. 220AppDiv657, 222NYS401.

855–34 34PortoRico 766. **Use of razor as arm for offense and defense** is within statutory prohibition though razor is not primarily an arm. 34PortoRico 439.

855–35 100CalA149, 279P1040 (steel wrench adjustable to leather strap held sling shot though not combined when found).

855–36½–New. Shotgun is not dangerous weapon within statute prohibiting possession by minor of specified weapons or other dangerous weapons. 120 Kan370, 244P227.

855–36¼–New. Dagger or dirk.–Carrying of concealed bayonet, part of which has been filed off, has been held to constitute carrying of dagger or dirk. 88 CalA502, 263P836.

856–38 100CalA149, 279P1040 (deadly weapon does not lose such character by becoming temporarily inefficient nor by dismemberment). **That magazine of automatic pistol is slightly out of place** does not constitute weapon unloaded. 176Minn238, 222NW925.

856–38½–New. In Porto Rico cigar maker's knife is prohibited arm when carried under circumstances having no relation to his trade. 34PortoRico 740.

856–38¼–New. Amending statute not specifying particular weapons refers only to weapons intended for offense and defense such as enumerated in statute amended. 34PortoRico 305.

856–38¼–New. Porto Rico statute excepts from its operation folding pocketknife whose blade is less than three inches in length. 34PortoRico 72.

856–38½–New. Statute not specifying weapons or instruments other than general designation of any arm or instrument with which bodily injury may be caused is not unconstitutional. 35Porto Rico 253 (shot gun held within statute).

856–41 Wis 230NW76.

856–43 84Mont24, 273P1049. **Within curtilage of residence.**–OklCr 275P393.

856–44 109TexCr355, 4SW(2d)559. **Exception construed.**–33GaA676, 127SE 619 (accused having possession of pistol on public road is guilty, though he owned land on both sides of road). **Use of pistol in house of another** constitutes no defense. 35PortoRico 306.

856–46 President of municipal assembly not exempted from liability under local statute. 32PortoRico 672. **In New York.**–129Misc650, 222NYS432.

857–47½–New. Under statute prohibiting carrying weapon at social gathering, accused, to be guilty of offense, must have carried pistol at time and place of social gathering. 108TexCr477, 18W(2d)644.

857–47¼–New. Under such statute it is no defense that accused was in his own home, where social gathering was held. 108TexCr477, 18W(2d)644.

857–47¼–New. That pistol was taken from defendant in kitchen is no defense where defendant had passed through rooms where guests were assembled. 108TexCr477, 18W(2d)644.

857–47⅛–New. Carrying weapon with which wound had been inflicted by defendant from scene of event to police headquarters is not within contemplation of law against carrying arms. 35 PortoRico 838.

857–47⅛–New. Constructive possession may be sufficient to establish possession of weapon without permit. 136 Misc174, 240NYS669.

857–47⅞–New. Sitting on cane-knife is not evidence of carrying. 34PortoRico 455.

857–49 In Porto Rico.–32PortoRico 672.

857–49½–New. Antique pistols or revolvers incapable of use as such are expressly excepted from operation of statute in some jurisdictions. 76CalA 227, 244P930.

857–49¼–New. No matter how disabled a weapon may be, if it still retains its efficiency to such an extent that it may in some manner be used as originally intended, a person carrying such a weapon contrary to law will be held criminally liable. 76CalA227, 244P930.

857–56 Constables' within rule.–Mo 295 SW746.

858–57½–New. That accused was special officer with warrant for arrest of one charged with felony is no defense to prosecution for felony in violation of prohibition law while armed. 143Va 554, 130SE416.

858–57¼–New. Conviction of police reservist for unlawfully possessing pistol when not on active duty held proper. 220AppDiv333, 221NYS422.

858–58 105TexCr562, 289SW54. **Mode of travel,** not distance alone, is to be considered. TexCr 31SW(2d)652.

858–59 In Texas.–100TexCr341, 273SW 594 (one transferring effects from one domicile to another). But see 105TexCr 562, 289SW54.

858–62 TexCr 31SW(2d)652.

859–70 TexCr 293SW1116. **Negation of exceptions.**–34PortoRico 100; 35 PortoRico 499 (unnecessary); 157Tenn 518, 11SW(2d)678. **Allegation that pistol taken from defendant when leaving hall** of municipal assembly of which he was president held equivalent to allegation that weapon carried in public assembly, distinct offense cognizable by municipal court. 32PortoRico 672. **Municipal court** has jurisdiction in Porto Rico to try president of municipal assembly on charge of carrying pistol to meeting. 32PortoRico 672. **Information not charging concealment** held insufficient. 322 Ill 70, 152NE567.

860–74 Exhibition of weapon is unnecessary if other circumstances show that defendant carried it. 35PortoRico 49; 35PortoRico 51. **Introduction of arm in evidence** is not indispensable to conviction. 34PortoRico 414.

860–75 No variance.–176Minn238, 222 NW925.

861–76 84Mont24, 273P1049. **In prosecution for possession of weapon by person of foreign birth not citizen** allegation that defendant was never naturalized will be taken as true in absence of evidence to contrary where state proves that defendant was foreign born. 70CalA362, 233P359. **Evidence held insufficient** to sustain conviction of unlawfully carrying bowie knife. 103TexCr 443, 281SW567. **Unnaturalized alien.**–CalA 279P844(2dcase).

861–77 35PortoRico 306; 109TexCr355, 4SW(2d)559.

861–77½–New. Burden of proving naturalization rests on defendant for possession of weapon. 70CalA362, 233P 359.

861–78 322Mo 369, 15SW(2d)760; TexCr 31SW(2d)652.

861–79 308Mo 683, 273SW1062; 100 TexCr341, 273SW594; 105TexCr456, 288SW1077.

861–82 112TexCr20, 13SW(2d)889; 112TexCr322, 16SW(2d)537(istcase). **Sufficiency of conviction, etc.**–93CalA369, 269P1117; 39GaA572, 147SE728(2d case); Ind 168NE481 (insufficient to show that defendant was traveler); 308 Mo 683, 273SW1062; Mo 300SW677; 320Mo 254, 7SW(2d)275; OklCr 281P 167 (carrying pistol into public gathering); OklCr 290P193; 32PortoRico 672; 143Va554, 130SE416 (of carrying firearm while illegally transporting ardent spirits). **Insufficiency of conviction, etc.**–36GaA304, 136SE539; 84Mont 24, 273P1049; 99Tex586, 271SW617; 106TexCr287, 291SW898; 104TexCr575, 285SW1092; TexCr 21SW(2d)672(2d case) (defense that accused was "traveler"). **Evidence held sufficient.**–76CalA 227, 244P930; 37GaA31, 138SE527; 37 GaA380, 140SE425; 37GaA510, 140SE 798; 105TexCr456, 288SW1077; TexCr 7SW(2d)1116(3dcase). **Evidence held insufficient.**–36GaA655, 137SE790; 136 Misc836, 241NYS63. **Ownership need not be proved with absolute certainty** in prosecution for possession. 136Misc 174, 240NYS669.

861–82½–New. In some jurisdictions it is not necessary to prove that weapon is capable of causing bodily injury but only that it may cause such injury. 35 PortoRico 435.

862–84 105TexCr562, 289SW54.

862–84½–New. Question of right to take pistol from proposed purchaser to defendant's home is for jury when raised by evidence. 103TexCr447, 281SW872.

862–86 37GaA510, 140SE798; 39GaA 10, 145SE907(2dcase); 112TexCr323, 16 SW(2d)539(1stcase); TexCr 20SW(2d) 774 (refusal of instruction as to defendant's not carrying weapon outside domicile held error). **Instructions held sufficient.**–76CalA227, 244P930. **Instructions held erroneous.**–322Mo 369, 15 SW(2d)760; 103TexCr443, 281SW567. **Instructions held proper.**–88CalA502, 263P836. **Instruction held improperly**

refused.–TexCr 27SW(2d)546(1stcase).
862–87 156Tenn116, 299SW797. **Instruction not warranted by evidence.–** 113TexCr95, 19SW(2d)67.
863–88 Return of weapon.–32PortoRico 822. **Excessive penalty.–34PortoRico** 203.
863–89 146Misc517, 112S686.
863–91 Whether pistol is dangerous or deadly cannot be basis of conviction under prosecution for "unlawfully possessing pistol which might be concealed on person." 221AppDiv77, 222NYS647. **Bowie knives.–157Tenn120,** 6SW(2d) 318.
863–93 But see 311Mo 443, 278SW974.
863–94 332 Ill 617, 164NE167; 223Ky 248, 3SW(2d)624; 162La902, 111S321; 112TexCr506, 17SW(2d)809; **Wis** 230 NW76. **Partial concealment.–155Miss** 668, 124S807. **Where statute does not define offense as carrying weapon concealed on person,** carrying of pistol is within statute where weapon is so carried that it is readily accessible and available for use. 155Miss668, 124S807.
864–95 223Ky248, 3SW(2d)624; 168La 55, 121S300(5thcase).
864–96 223Ky248, 3SW(2d)624. But see Mo 273SW1058. **Carrying gun in pocket of automobile** held not within statute. 162La902, 111S321. But see 121 Oh280, 168NE135. **Revolvers concealed under automobile seat** are not "on the person." 97PaSuper126.
864–96½–New. Words "concealed about his person" mean concealed in such proximity to person as to be convenient of access and within reach, not necessarily "on" person. 30F(2d)474(2d case).
864–97 30F(2d)474(2dcase); 155Miss 668, 124S807.
864–98½–New. Constructive possession of firearm to be unlawful must be knowing and voluntary and must be in immediate control of accused and available for unlawful use. 221AppDiv136, 222 NYS610.
864–99 228Ky149, 14SW(2d)381. **In Mississippi.–140Miss**897, 105S757. **Night watchman** is not exempt, under some statutes from prosecution for carrying pistol during daytime in village on employer's property. 103TexCr141, 280SW776.
865–2½–New. It is no defense that accused was carrying weapon for another. 108TexCr604, 2SW(2d)252.
865–3 Mo 273SW1060.
865–4 228Ky149, 14SW(2d)381.
866–12½–New. Where evidence shows defendant was carrying pistol on way to pledge it for loan, conviction cannot be sustained. 102TexCr402, 278SW213.
866–12⅓–New. Traveler being specifically exempted from prohibition, any unlawful use of pistol by him would not subject him to conviction for offense of unlawfully carrying arms. 112 TexCr20, 13SW(2d)889.
866–12¼–New. Permit to carry concealed weapons issued by sheriff of one county, under statute, is valid in any other county of state. Iowa 227NW580.
866–13 Mo 273SW1057. **Indictment held sufficient.–71CalA**374, 235P81; 108 TexCr477, 18W(2d)644. **Indictment under N. Y. Pen. L. § 831 subd 2** not stating offense was in connection with an exhibition is demurrable. 129Misc650, 222NYS432. **Not necessary to negative exceptions.–Mo** 273SW1058.
866–14 332 Ill 617, 164NE167; Mo 273 SW1057.
866–15 Failure to allege, except as conclusion, that weapon which defendant was charged with possessing was capable of being concealed upon person affects no substantial right of defendant. 71CalA374, 235P81. **Failure to allege in information** charging possession of revolver by one convicted of felony that at time of possession he had been convicted of felony affects no substantial right of defendant. 71CalA374, 235P81.
866–17 71CalA374, 235P81.
866–18 An averment that the weapon was loaded, etc. 311Mo 443, 278SW974.
867–20 Prima facie case is proved on showing that accused had possession not at home or place of business. 39 GaA531, 147SE788(2dcase).
867–21 39GaA531, 147SE788(2dcase); Iowa 227NW580 (permit); 121 Oh280, 168NE135.
867–23 228Ky149, 14SW(2d)381. **Effect of projectile when fired from pistol** is irrelevant on question of whether pistol is firearm. 221AppDiv77, 222NYS 647. **Evidence of concealment or nonconcealment after arrest** is competent on controlling question of whether defendant had pistol concealed at time of arrest. NC 154SE28.
867–24 156Miss718, 126S646. **This class of evidence should be limited,** etc. Mo 273SW1060.
868–30 Evidence held sufficient.–97Fla 617, 121S787; 39GaA531, 147SE788(2d case); 317 Ill 578, 148NE259; 328 Ill 494, 160NE86; 255 IllA474; 311Mo 443, 278SW974; 28 OhA248, 162NE647; 100 TexCr212, 272SW450; 104TexCr100, 283SW508; Wis 230NW76. **Evidence held insufficient.–321 Ill** 533, 152NE535; 176Minn238, 222NW925; 221AppDiv17, 222NYS593; 221AppDiv136, 222NYS 610; 106TexCr666, 294SW218 (to sustain conviction). **Evidence held not to show** accused possessed revolver in violation of penal law. 216AppDiv240, 214 NYS537. **Request by accused that companion shoot officer** is not evidence to prove unlawful possession by accused. 216AppDiv240, 214NYS537. **"Possession of air pistol"** does not authorize conviction for possessing "firearm" which might be concealed on person. 221AppDiv77, 222NYS647.
868–30½–New. In prosecution against alien for carrying concealed weapon, fact of alienage is part of corpus delicti and uncorroborated extrajudicial admission of fact cannot support conviction. 74CalA636, 241P406.
868–31 100TexCr212, 272SW450 (whether one is traveller ordinarily for jury). **That defendant was off his own premises** with pistol in possession is sufficient to take case to jury under statute. NC 154SE28.
868–32 223Ky248, 3SW(2d)624; 142 Miss440, 107S666 (evidence sufficient to go to jury); Mo 273SW1060; NC 154 SE28; Wis 230NW76.
868–35½–New. Defendant is entitled to peremptory instruction for acquittal where undisputed evidence establishes defense, that he was traveling or setting out on journey beyond neighborhood of his acquaintance and was not tramp. 140Miss897, 105S757.
868–37 Refusal of requests held proper.–104TexCr100, 283SW508.
868–39 221AppDiv136, 222NYS610 (as to constructive possession).
869–40 39GaA531, 147SE788(2dcase); 223Ky248, 3SW(2d)624; 100TexCr81, 271SW914 (instruction on defendant's belief that he had been appointed deputy sheriff sufficient and refusal of special request not error). **Instruction on burden of proof.–103TexCr**297, 280SW 580. **Instructions as to intent** held correct. 311Mo 443, 278SW974. **Establishment of defense requires peremptory instruction.** 156Miss718, 126S646. **Instruction held erroneous.–NC** 154SE28.
869–41 311Mo 443, 278SW974 (evidence insufficient to justify instructions as to intent to conceal weapon).
869–43 Punishment under Illinois statutes.–255 IllA474.
869–49½–New. Information charging possession by unnaturalized foreign born person of weapon capable of being concealed on person held sufficient. 69 CalA137, 230P675.
870–54 Statute prohibiting shooting of firearms across public road with title relating to preservation of fish and game does not prohibit firing of revolver in city street. 103WVa34, 136SE504.
871–67½–New. In Philippines discharge of firearm with intent to kill is not simply "discharge of firearm." 51 Philippine967.
871–69 In Oregon.–122 Or444, 259P893.
871–75 34NM232, 280P248 (evidence excluded in discretion of court). **Resisting of lawful arrest with deadly weapon** is not excused by fact that officer acted from personal motive. 34NM 232, 280P248.
871–76 Mo 300SW1106. **Affidavit held sufficient.–Ind** 168NE481.
871–77 Information held sufficient.–OklCr 290P1111(2dcase).
872–78 Evidence held sufficient, etc. 43 Ida724, 254P210; Mo 300SW1106; OklCr 277P288; OklCr 288P991(2d case); OklCr 290P1111(2dcase). **Evidence held insufficient,** etc. OklCr 277P 288.
872–83 84CalA259, 257P871; 119Kan 323, 244P227, 231 [quotCyc]; 179Minn 490, 229NW869; BC [1925] 3DomLR 442. **Hunter should use reasonable care** to identify object before shooting at it. 83NH60, 138A541. **Degree of care** required of sportsman using firearm must be commensurate with dangers to be avoided. WVa 153SE797. **Person intentionally discharging gun for wrongful purpose** is liable for injury to person unintentionally hit though not known to be in range. 179Minn490, 229 NW869. **Unlawful shooting.–179Minn** 490, 229NW869.
873–84 119Kan323, 244P227, 231 [quot Cyc].
873–85 119Kan323, 244P227, 231 [quot Cyc].
873–86 119Kan323, 244P227, 231 [quot Cyc].
873–87 Mass 173NE536; 132Misc547, 230NYS313; Oh 171NE327(2dcase); 92 PaSuper341. **Complaint against manufacturer of toy revolvers advertised as harmless held to state cause of action.** 230AppDiv114, 243NYS496.
873–89½–New. Complaint alleging defendant fired gun into apartment causing extreme fright and shock resulting in illness states cause of action. 220 AppDiv547, 221NYS737.
873–89⅓–New. Where two persons jointly engaged in hunting expedition fired across public highway and person traveling thereon was shot, two are jointly and severally liable, though impossible to tell which one inflicted injury. 144Miss852, 110S666, 50ALR357.
874–91 Petition held sufficient.–OhA 173NE318.
874–92 Presumption of negligence arises where defendant, shooting at bird, hits dog following bird. BC [1925] 3 DomLR442.
874–93 Mass 173NE536.
874–94 Evidence held sufficient.–Mass 173NE536; MoA 24SW(2d)187.
874–94½–New. To show justification defendant in action for wounding by use of gun must show that injury was inevitable and without fault on his part. MoA 24SW(2d)187.
874–95 MoA 24SW(2d)187.
874–96 Mass 173NE536; 83NH60, 138 A541; 220AppDiv311, 221NY590; 92 PaSuper341. **Proximate cause.–OhA** 173 NE318.
874–96½–New. Award of six hundred dollars for injuries caused by negligent shooting held not excessive. MoA 24 SW(2d)187.
874–96⅓–New. Instructions as to exemplary damages held sufficiently favorable to defendant. 179Minn490, 229 NW869.
874–96¼–New. Damages held not excessive.–179Minn490, 229NW869.

WEARING APPAREL

875–4 It is not confined in its meaning, etc. 113 Okl182, 240P727. **Term has been held to include:** Watches. 214 Ala10, 106S188; 113 Okl 182, 240P727.

WEATHERING

876–7½–New. "Weathering" of natural gas for gasoline means merely evaporating of highly volatile elements to reduce vapor tension of remaining liquid to desired figure. 21F(2d)199.
876–7⅓–New. "Weathering" consists in subjecting raw natural gasoline to atmosphere in open tanks till by evaporation, sometimes accelerated by steam coils, required vapor pressure or vapor tension of remaining liquid is had. 28 F(2d)218.

WEEKLY

877–18 168Ark889, 271SW965 [quot Cyc].

WEIGHTS AND MEASURES

880–33 Construction of statute.–125Me 123, 131A305.
881–36 Tax by municipality on scales used for weighing sugar cane held not

license fee or occupation tax, but tax upon property. 32PortoRico 338.

881-38 252Mass105, 147NE344. **Right to order weighing of coal is** not dependent on previous request therefor by purchaser. 126Misc323, 213NYS384.

882-40 Bread.–35PortoRico 397 (part unwrapped at customer's request).

882-42 Statute regarding weights and measures should be liberally construed.–217AppDiv43, 215NYS702. **Statute forbidding delivery of less quantity than represented** held for protection of food purchasers. 217AppDiv43, 215NYS702.

882-42½-New. California statute regulating sale of grapes and requiring containers, other than those provided by act, to be marked "Irregular Container" held invalid exercise of police power. 99 CalA747, 279P470.

882-44 Failure of appointee to file required bond makes him de facto officer. 126Misc323, 213NYS384. **Right to office cannot be collaterally attacked** where appointee is merely de facto officer because of failure to file required bond. 126Misc323, 213NYS384. **Change in manner of appointment** does not affect incumbent's right to office. 126 Misc323, 213NYS384.

883-45 Confined to recognized units.–125Me123, 131A305. **Terms in which capacity expressed.**–125Me123, 131A305.

884-50 Public weigher not guarantor that weight taken is standard weight. 35Man492, [1926] 2DomLR778, [1926] 1WestWkly966. **Negligence in weighing** only basis for liability of public weigher. 35Man492, [1926] 2DomLR778, [1926] 1WestWkly966.

884-51 Effect of fraud or mistake.–94 CalA424, 271P379.

834-52 Statute authorizing weighing of farm products by bona fide purchaser was not repealed by amendment. 115 Okl 25, 241P744. **In Texas.**–CivA 20 SW(2d)235.

886-63 Evidence.–252Mass105, 147NE 344.

886-64 32PortoRico 827 (Act [1921] No. 25, amending Act [1917] No. 13). **Evidence.**–29PortoRico 970. **In New York.**–245NY621, 157NE883.

887-66 252Mass105, 147NE344.

888-69½-New. Statutory remedy does not bar right to recover damages from wrongdoer. 217AppDiv43, 215NYS702.

888-71 Complaint for selling bread of short weight insufficient, it failing to allege tolerance or variation allowed by regulation, such tolerance not being matter of judicial notice. 32PortoRico 827.

888-73½-New. Complaint held sufficient for sale of bread of short weight through defendant's salesman. 34Porto Rico 202.

WELL

889-8½-New. Term also means being in health; sound in body and mind. 22 AlaA241, 114S418.

WHARVES

894-3 Other definitions are: "An artificial construction which facilitates the landing, loading and unloading of vessels for water carriage." 213Ala466, 105S562.

894-4 213Ala466, 105S562.

895-17 A "gravendock" is one permanently attached to the land as distinguished from floating dock. 129Misc 665, 222NYS394.

896-27 Rights of operator of wharf in absence of franchise.–Cal 292P1076.

896-28 Cal 292P1076. See also 227Ky 376, 13SW(2d)283.

896-28½-New. Whether wharf is public or private depends on service that is rendered and nature of business, and not on title to land on which wharf is operated or facilities employed. 227Ky 376, 13SW(2d)283.

897-34½-New. Dock company acquires no right to land included in road leading to wharf and adjoining land under water over which wharf was built merely by act of incorporating such company, where company did not possess such rights. 102NJL443, 131A870.

897-34⅓-New. Owner of tidelands abutting county road cannot enjoin maintenance of wharf within boundary of road for use of public where county is not made party. 132 Or568, 284P 200.

898-42 Wharf owner's right to unobstructed access to water is not lost by permissive erection of pier by lessee, use of which does not continue after expiration of term. 149Md163, 130A46. **Rights of wharf proprietor to use of waters in front of its wharf is property right which may be leased.**–149Md163, 130A46.

898-44 Lease construed.–256Mass95, 152NE61.

898-46 149Md163, 130A46 (rights of wharf lessee limited by terms of lease); 252Mass439, 148NE444 (lessee held entitled to channel seventy-five feet in width).

898-47 252Mass439, 148NE444.

898-49 252Mass439, 148NE444. **Lessee's express right under lease to erect pier is license coupled with grant and irrevocable only during term.**–149Md163, 130A46.

898-50 149Md163, 130A46 (alteration authorized by lease); 252Mass439, 148 NE444.

898-50½-New. Lessee of wharf may be entitled to injunction to prevent construction of sea wall, which will interfere with his rights and use of wharf. 252Mass439, 148NE444.

898-50⅓-New. Lessor is entitled to assume that erection of pier permitted by lease is not in conflict with its rights as reversioner. 149Md163, 130A46.

898-50¼-New. Pier built on property held by builder under distinct titles in fee and under leases has no inherent quality of permanency which would constitute assertion of any legal rights inconsistent with those acquired under various leases. 149Md163, 130A46.

898-50½-New. Former lessee may be required to bear cost of removing pier permissively erected, where removal and restoration will involve under burden and risk on lessor. 149Md163, 130A46 (where removal and restoration must be in manner to secure rights of lessor and lessee as adjoining owners and lessee has opposed removal and continued to enjoy benefit).

899-52½-New. Lessee's agreement to permit use of his facilities by another for repairs to steamboat is not subletting in violation of lease. 12LaA70, 125S322(2dcase).

899-53 But see 137Misc535, 242NYS 705.

900-74 Adjoining wharf proprietors under similar franchises from state have equal concurrent rights to unobstructed access by water which may not be impaired by any of them by extension of wharf lines. 149Md163, 130A46.

901-78 158Md229, 148A214.

901-79 32F(2d)208. **Admission of evidence** held prejudicial. 32F(2d)208. **Burden of proof** is on plaintiff to prove negligence. 32F(2d)208.

902-84 Control and supervision by public officers.–158Md229, 148A214.

902-87½-New. The owner must concede use of wharf to others even though owner may be common carrier. 22F (2d)317.

903-93½-New. Contract for storage of steamers at city's dock during winter implies undertaking by owners to remove vessels at end of term. 35F(2d) 110.

903-93⅓-New. Personal contract by steamship owners with city for winter storage of their steamers does not imply agreement of shipowners to raise and move vessel which sinks while stored there. 35F(2d)110.

903-99½-New. Decree of injunction restricting defendant's use of river in front of plaintiff's lands but permitting use for legitimate transportation held to include privilege of loading and unloading freight and passengers and mooring at dock. 132 Or350, 285P809.

904-8 Charges by waterfront lessee for use of his facilities for repair to steamboat are not illegal because not made by port authority. 12LaA70, 125S322(2d case).

904-9 See also Cal 292P1076.

905-15 16F(2d)284.

906-30 Under charter, charterer held liable for wharfage in berth but not for wharfage for use of wharf for cargo. 16F(2d)284.

907-34 Under charter contract vessel held liable for wharfage in berth.–16 F(2d)284.

907-37 Owners of privately owned wharves are not bound by rates fixed by statute. 7F(2d)131.

908-44 7F(2d)131.

910-63 7F(2d)131.

910-64 21F(2d)231.

910-65 21F(2d)862. **Right to lien ceases** when vessel is seized under libel. 21F(2d)862.

910-66 24F(2d)441.

910-66½-New. Claim against vessel, consisting of flat charge for merchandise left on pier for loading, has been held to represent service as "wharfage," and to be entitled to maritime lien. 31F(2d) 620.

911-70 7F(2d)131. **Owner of pier** must use reasonable diligence to ascertain authority of charterer to make contract for ship for use of pier. 7F(2d)131.

911-77 Wharfage lien held preferred as claim on proceeds of vessel sold after arrest while discharging cargo. 274 US117, 47SCt482, 71Led955.

912-99 7F(2d)131; 16F(2d)362. **Evidence held insufficient to show pledge of ship's credit to pay for wharfage.**–16 F(2d)362. **Burden of proving affirmative defense.**–12LaA70, 125S322(2dcase).

913-1½-New. In action to remove piling in proximity of plaintiff's wharf, statute and license under authority of which wharf was constructed held rightly admitted in evidence. 252Mass439, 148NE444.

913-1⅓-New. Weight and sufficiency.–Evidence held not to sustain steamboat owner's contention that no charge was to be made. 12LaA70, 125S322(2dcase).

913-4½-New. Question as to existence of contract covering period for which wharfage is claimed is for jury. 244 NY382, 155NE679.

913-7 6F(2d)671; 21F(2d)304. **Obligation toward intruders or trespassers.**–30F(2d)227; 33F(2d)798.

913-9 6F(2d)671; 18F(2d)775; 28 F(2d)624; 30F(2d)227; 38F(2d)990; 43F(2d)334.

913-10 21F(2d)304.

914-11½-New. Liability for acts of independent contractor.–Where owner of dock has engineer present and directing unloading of barge, it is liable for such operations though performed by independent contractor. 33F(2d)798.

914-13 6F(2d)671; 14F(2d)528; 18 F(2d)775.

914-14 6F(2d)671. **Shallow water.**–33 F(2d)798.

914-15 6F(2d)671; 14F(2d)528; 18 F(2d)775.

914-16 14F(2d)528; 18F(2d)775; 18 F(2d)952. **Character of notice.**–18F(2d) 775.

914-18 6F(2d)671; 18F(2d)775; 18 F(2d)952; 37F(2d)934 (uneven bottom); 43F(2d)834. **Lump on bottom within slip** is concealed danger for which wharf owner is responsible. 37F(2d)934.

915-22 42F(2d)564.

915-22½-New. Duty to exercise care and skill extends to wharfinger receiving goods consigned to himself as well as to one maintaining wharf for collecting wharfage. 6F(2d)671.

915-26½-New. Wharf owner who had knowledge of unsafe condition of berth cannot escape liability by showing nature of obstruction and how it came there. 38F(2d)990.

915-27 14F(2d)528; 18F(2d)952 (neglect to make soundings). But see 37 F(2d)934. **That engineer went home for night** leaving boat properly made fast to dock held not negligence. 14F(2d) 528.

916-30½-New. Pleading and proof.–Petition alleging damage due to defective fire box of locomotive crane, and proof showing it was due to defective ash pan held not fatal variance. 13 F(2d)991.

916-30½-New. Contract whereby owner of wharf covenanted to maintain safe berth for vessel was maritime contract. 42F(2d)58.

916-31 Evidence held sufficient.–6F(2d)

671; 34F(2d)226; 38F(2d)990. **Evidence held to warrant recovery.**–21F(2d)304. **Evidence held insufficient to show** that damages to barge from grounding were due to fault of dock owner. 33F(2d)798.

916–32 42F(2d)564. **Evidence held sufficient to show negligence.**–18F(2d)952. **Evidence held insufficient to show negligence.**–42F(2d)564.

916–33½–New. Contributory negligence.–Evidence held sufficient to show that master of lighter was guilty of negligence in reference to making soundings. 18F(2d)952.

916–33½–New. Evidence held sufficient to show freedom from negligence on part of master of lighter in not loosening lines. 18F(2d)952.

916–33¼–New. Evidence held insufficient to show that consignee owned dock. 43F(2d)334.

916–34½–New. liability of defendant. 13F(2d)991.

916–39½–New. Expenses of raising ships.–Where sinking of tug is due to negligence of owners of pier who refuse to aid in necessary raising, owner may recover expense incurred therefor. 13F(2d)772.

916–39⅓–New. In absence of showing that items expended were not made in good faith and in exercise of reasonable diligence. 13F(2d)772.

916–39¼–New. Amount of profit made by wrecking company contracted for and paid by owner to have tug raised recoverable. 13F(2d)772.

916–39⅓–New. Interest on amount of recovery for sums expended is recoverable from time items were actually paid. 13F(2d)772.

917–40 18F(2d)952.

917–40½–New. For loss of goods by fire through negligence while in his control wharf owner is liable to owners of shipment or one for whom he was acting. **TexCommnA** 25SW(2d)588.

917–40⅓–New. Where steamship had unloaded goods at time of fire and railroad had sufficient cars waiting to move them, wharf owner held alone liable for loss. **TexCommnA** 25SW(2d)588.

917–40¼–New. Evidence held to support finding that there was complete delivery of goods to wharf company and that it was in absolute control at time of fire. **TexCommnA** 25SW(2d)588.

918–49 Evidence sufficient to show negligence.–261Mass479, 159NE441.

918–52 261Mass479, 159NE441. **It is jury question** whether railroad owned or controlled staging. 261Mass479, 159NE441.

919–56 42F(2d)58.

WHATSOEVER

920–3 "Any cause whatsoever."–25 OhA100, 157NE393.

920–3½–New. all that, 25 OhA100, 157NE393.

920–3⅓–New. no matter what, 25 OhA100, 157NE393.

920–3¼–New. anything soever which. 25 OhA100, 157NE393.

920–3⅙–New. Word "whatsoever" is an indefinite relative; 25 OhA100, 157NE393.

920–3⅙–New. it has a distinct meaning and is of such breadth that it is without boundary. 25 OhA100, 157NE393.

WHEN

921–16 85PaSuper14.

922–24 85PaSuper14 (refers to time of enjoyment, not vesting).

WHENSOEVER

923–29½–New. At whatever time. Alta [1925] 3DomLR377.

923–29⅓–New. As applied to date of statute.–"Whensoever" used in statute includes point of time prior to coming into force of statute. Alta [1925] 3DomLR377.

WHILE

925–47 Webster New Int. D. [quot 161 Ga559, 131SE359, 360].

926–50 Webster New Int. D. [quot 161 Ga559, 131SE359, 360].

WHISKY

926–57 150Md278, 132A624.

926–58 150Md278, 132A624.

WIDOW

934–4 Cal 292P469; 214AppDiv680, 213NYS6.

WIDOWER

936–6 317Mo216, 295SW83, 85 [cit Cyc].

WIDTH

936–7 83Mont540, 273P290.

WIFE

937–11 Effect of divorce, etc.–104WVa464, 140SE335, 59ALR167.

WILD

938–18½–New. Wild land.–Wild land is land in wilderness state, not used in connection with improved estates. 126Me299, 138A170.

WILFUL AND WILFULLY

938–24 91Fla427, 107S630; 92Fla648, 109S805; 215Ky360, 285SW193; 158Tenn356, 13SW(2d)326. **"Wilful desertion,"** etc. 91Fla427, 107S630. **"Wilful refusal to perform statutory duty."**–148Va585, 139SE478, 58ALR193.

940–25 319Ill326, 150NE242; 99Tex582, 271SW618.

941–26 76CalA354, 244P1089.

941–27 215Ky360, 285SW193.

941–28 91Fla427, 107S630; 114Nebr121, 206NW21; 191NC430, 132SE295. **Wilfully implies a purpose or willingness,** etc. 76CalA354, 244P1089.

941–29 215Ky360, 285SW193.

941–30 215Ky360, 285SW193; 114Nebr121, 206NW21.

942–33 93Fla963, 113S103, 54ALR271; Webster D. [quot 98Vt429, 129A302].

942–34 191NC430, 132SE295. Used in statutes defining perjury.–215Ky360, 285SW193.

942–35 215Ky360, 285SW193.

942–36½–New. ; inclined or favorably disposed in mind; 215Ky360, 285SW193.

942–36⅓–New. desirous, ready to act, prompt to do, give, grant. 215Ky360, 285SW193.

942–38 114Nebr121, 206NW21; 191NC430, 132SE295.

942–41 114Nebr121, 206NW21.

944–45 NS [1927] 2DomLR558.

944–46 319Ill326, 150NE242; 114Nebr121, 206NW21.

944–46½–New. It is malicious because it is intentional. 98Vt429, 129A302.

944–47 148Va585, 139SE478, 58ALR193.

945–49 109TexCr237, 4SW(2d)62; 148Va585, 139SE478, 58ALR193.

947–54 195Cal445, 234P91.

947–56 216Ala416, 113S35. **"Willful"** means more than mere negligence. Ark 31SW(2d)753 (implies consciousness, rather than inadvertence).

948–58 216Ala416, 113S35; 319Ill326, 150NE242.

948–59 319Ill326, 150NE242.

WILFULNESS

949–62 216Ala416, 113S35; 137SC357, 135SE472.

WILLINGLY

950–73 21AlaA375, 108S639, 640 [quot Cyc]; 194NC121, 138SE518.

950–74 21AlaA375, 108S639, 640 [quot Cyc]. **"Fight willingly."**–21AlaA375, 108S639.

WILLS

993–2 124Kan592, 261P597.

993–3 99NJEq762, 134A357; 116Oh684, 157NE377, 54ALR92. See also 259Mass200, 156NE438.

994–4 14F(2d)993; 77Mont182, 250P812. **Includes a recompense.** 14F(2d)993. **"Bequest" may include** legacy in lieu of dower, or to pay debt, or gift to executor on condition that he clothe himself with character. 22F(2d)465. **"Specific bequest."**–247IllA175.

994–6 170La449, 128S273; 133Misc450, 232NYS418. **Other definitions.**–Utah 285P285(2dcase).

994–7 124Kan592, 261P597; 77Mont182, 250P812. ..."**General devise.**"–247IllA175.

994–8 77Mont182, 250P812; 99NJEq762, 134A357.

994–10 320Mo1058, 10SW(2d)47; 99NJEq514, 133A705.

994–11 TexCivA 3SW(2d)864, 870 [cit Cyc].

994–14 319Ill320, 150NE284.

995–15 319Ill320, 150NE284; 241IllA376.

995–16 164Ga885, 139SE661; 319Ill320, 150NE284.

995–17 316Mo1016, 292SW417.

995–18 100NJEq521, 136A322.

995–21 336Ill366, 168NE349; 316Mo483, 291SW132; 125Misc475, 211NYS450; 117Oh215, 158NE89, 90 [quot Cyc]; 286Pa583, 134A513. **Other definitions.**–CalA 272P301; TexCivA 276SW964. **Essence of testamentary disposition** of property is that it be merely declaration of testator's intention as to what shall take place after his death. 201Iowa834, 208NW508, 44ALR1516. **Will is not conveyance.**–238Mich33, 213NW59. **Will is not contract.**–296Pa583, 134A513.

996–22½–New. "Conditional or contingent will" is one which is to take effect as a will only on happening of contingency named in it. 331Ill261, 162NE843.

996–27 156Miss711, 126S648; 316Mo483, 291SW132.

996–34 129Misc15, 220NYS635, 639 [cit Cyc].

996–35 129Misc15, 220NYS635, 639 [citCyc]. **Effect of the feudal system and uses,** etc. 129Misc15, 220NYS635, 639 [citCyc]. **Disposal of one's property after death is controlled by statute.**–217AppDiv342, 217NYS176.

997–37 235Ky189, 30SW(2d)893; 8D230NW884. **"Statutes of wills are enabling acts, etc."**–129Misc15, 220NYS635, 639 [citCyc].

997–38 198Cal103, 243P862; 97CalA138, 275P453; 317Ill401, 148NE274; 327Ill346, 158NE709; 331Ill203, 162NE848, 60ALR305; 79IndA683, 147NE305; 232Ky572, 24SW(2d)282; 79Mont10, 254P875; 217AppDiv342, 217NYS176; 224AppDiv450, 231NYS320; 227AppDiv160, 237NYS162; 118Or308, 246P720; 100Vt217, 136A389. **Not an inherent right.**–79Mont10, 254P875; 100Vt217, 136A389. **Homestead laws** held not to affect laws granting persons right to dispose of property by will. 139SC66, 137SE331.

997–39 315Mo1100, 287SW604; 79Mont10, 254P875; 156Tenn155, 299SW812, 57ALR601; 100Vt217, 136A389; 152Va353, 147SE468 (state must respect federal constitution).

997–39½–New. All persons except infants and persons of unsound mind may make wills in some jurisdictions. 116Or467, 241P996.

997–40 216AppDiv72, 215NYS50 (regardless of validity of decree of foreign state admitting will to probate). **Capacity to bequeath personalty,** etc. 113Misc457, 233NYS145.

998–41 94CalA576, 271P559; 100CalA357, 280P204(2dcase); 328Ill232, 159NE353; 329Ill11, 160NE197; 329Ill568, 161NE65; 220Ky388, 295SW445; 126Me267, 138A59; 152Md407, 137A35; 153Md93, 137A479; 153Md547, 138A415; 235Mich627, 209NW842; 217AppDiv342, 217NYS176; 133Okl156, 271P681; 142Okl197, 286P17; 299Pa415, 149A719; TexCivA 4SW(2d)328; 147Va105, 136SE683; 152Va411, 147SE251; 106WVa183, 145SE177.

998–42 126Me267, 138A59.

998–45 235Mich627, 209NW842.

999–53 131Okl75, 267P623. **Acknowledgment before and approval of will by United States court for Indian Territory or United States commissioner** was essential to validity of will of full-blood Indian allottee disinheriting parent under provisions of act of congress of April 26, 1906. 38OklACR287. **Will of Chickasaw Indian disinheriting** wife and children held invalid for want of certificate of acknowledgment before United States commissioner. 271US484, 46SCt547, 70Led1048. **Effect of will as terminating trust period.**–118Nebr

142, 223NW794. **Necessity of approval by federal agency.**–136 Okl 206, 277P 213.

999–58 In Kentucky.–222Ky211, 300 SW599.

1000–63 204Cal 557, 269P519; 315Mo 1100, 287SW604.

1000–65½–New. To ascertain public policy of state as to right of married woman to dispose of her property by will resort may be had to various legislative enactments of the territory and state. 79Mont10, 254P875.

1001–69 Contra 79Mont10, 254P875.

1001–71 In Montana.–79Mont10, 254P 875.

1001–78 315Mo 1100, 287SW604.

1004–2 88 IndA301, 157NE458; 322 Mo 11, 16SW(2d)212; 21 OhA194, 153 NE119. **Mental condition** determines testamentary capacity. 118 Oh442, 161 NE336.

1004–3 218Ala366, 118S547; 100CalA 357, 280P204(2dcase); 325 Ill 474, 156 NE485; 328 Ill 282, 159NE353; 329 Ill 568, 161NE65; 331 Ill 643, 163NE424; 336 Ill 192, 168NE308 (unequal division of testator's property among heirs does not indicate lack of testamentary capacity); 336 Ill 427, 168NE327, 67ALR 851; 88 IndA301, 157NE458; 120Kan 186, 243P287; 220Ky388, 295SW445; 233Ky744, 26SW(2d)751; 163La489, 112S375; Me 138A59; 150Md79, 132 A425 (all that is required of a testatrix is a capacity to determine to whom she wants her property to go after her death); 253Mass25, 147NE844; 257 Mass21, 152NE3; 234Mich170, 207NW 924; 312Mo 458, 278SW759; 319Mo 1153, 6SW(2d)860; 222MoA1206, 2SW (2d)139, 144 [citCyc]; 86Mont521, 284 P546; NJ 131A213; NJ 133A297; 98 NJEq645, 130A655; 243NY7, 152NE 448; 138Misc381, 245NYS574; 190NC 301, 129SE822; 195NC76, 141SE460; 21 OhA194, 153NE119; 38 OklACR342; 116 Or467, 241P996; 286Pa58, 132A 786; 48Philippine772; 134SC412, 132 SE811; TexCivA 2SW(2d)942; Wis 232 NW845(2dcase). **Other statements of rule.**–196Cal 355, 237P1079; 93Fla311, 112S80; 88 IndA301, 157NE458; 208 Ky672, 271SW1040; 235Ky121, 29SW (2d)637; 317Mo 614, 296SW739; 98 NJEq645, 130A655; 243NY7, 152NE 448; 133Misc858, 234NYS505; 20 OhA 216, 151NE788. **Actual recollection** of objects of bounty is not necessary. 318 Ill 445, 149NE507. **No greater capacity than making gift** is required. 153Md 547, 138A415. **Testator should understand ordinary affairs of life,** value of his estate, names and number of his intended beneficiaries, their capacities and necessities. 314Mo 305, 284SW488. **Test is not whether testator actually appreciated deserts of persons excluded from will,** but whether he had at time capacity to do so. 179Ark186, 14SW (2d)547.

1004–4 23F(2d)754; 217Ala506, 116S 686; 220Ala445, 125S659; 199Cal 759, 251P778; 200Cal 152, 252P325; 94CalA 576, 271P559; 93Fla311, 112S80; 99 Fla600, 126S762; 317 Ill 401, 148NE 274; 318 Ill 445, 149NE507; 320 Ill 577, 151NE526; 325 Ill 474, 156NE485; 337 Ill 572, 169NE767; 200 Iowa1180, 206NW95; 201 Iowa586, 207NW598; 202 Iowa565, 210NW813; 202 Iowa849, 211NW500; 126Me267, 138A59 (to make will no matter how complicated); Md 149A454(2dcase); 234Mich170, 207NW924; 240Mich465, 215NW323; 142Miss210, 106S753; 314Mo 305, 284 SW488; MoA 278SW1063; 86Mont521, 284P546; Nebr 227NW928; NJ 131A 213; 98NJEq645, 130A655; NJOrphans 133A42; 217AppDiv342, 217NYS176 (woman); 190NC301, 129SE822; 194 NC583, 140SE193; 20 OhA216, 151NE 788; 21 OhA194, 153NE119; 112 Okl 25, 239P592; 131 Okl 142, 268P296; 134 Okl 22, 272P410; 142 Okl 197, 286P17; 38 OklACR342; 121 Or574, 256P390; 125 Or333, 267P534; 290Pa249, 138A 764; 134SC412, 132SE811; TexCivA 4 SW(2d)328; 147Va478, 137SE511; 152 Va411, 147SE251; Wis 232NW845(2d case). See also 205Cal 292, 270P961. **A will may be sustained,** where testatrix by will before husband's death disposed of property devised to her. 239 Mich616, 215NW51. **"Sound mind"** required means ability to understand generally nature and extent of property, relation to natural objects of bounty, and practical effect of the will. 93Fla 311, 112S80 (Rev. Gen. St. [1920] § 3592). **Status and mode of life** must be considered in determining capacity. 286Pa58, 132A786. **Person need only have sufficient mentality** to know what he is doing. TexCivA 29SW(2d)867.

1006–5 202 Iowa849, 211NW500; 234 Mich170, 207NW924; 240Mich7, 215 NW35; 239Mich616, 215NW51; NJ 133 A297. **Soundness of mind need be only** that of weakest class of sound minds. 126Me267, 138A59. **Moderate capacity.**–NJOrphans 134A651.

1006–6 234Mich170, 207NW924; 239 Mich616, 215NW51.

1006–7 150Md79, 132A425 (occasional failures to recognize old acquaintances).

1006–8 179Ark877, 18SW(2d)352; 318 Ill 445, 149NE507; 208 Iowa607, 224 NW69; 210Ky575, 276SW500; 163La 489, 112S375; 133Misc858, 234NYS505; 134SC412, 132SE811. **Ability to reason logically** is not test of testamentary capacity. 195Cal 699, 235P45. **Asking idle question** and repeating those asked does not show incapacity to make a will. NJ 133A297.

1006–10 194NC583, 140SE193.

1006–11 44 Ida625, 258P1082; 318 Ill 528, 149NE483; 336 Ill 192, 168NE308; 126Me267, 138A59; 150Md79, 86, 132A 425 ("making a will requires no greater capacity than making a gift").

1007–12 318 Ill 445, 149NE507; 336 Ill 427, 168NE327, 67ALR851; 126Me 267, 138A59.

1007–14 195Cal 711, 235P1012; 199Cal 759, 251P778; 44 Ida625, 258P1082; 202 Iowa565, 210NW813; 220Ky98, 294 SW785; 234Mich170, 207NW924; 39 OklACR342; 125 Or333, 267P534; Tex CivA 4SW(2d)328. **Less business judgment is required to make a will than a gift.** 286Pa58, 132A786.

1007–15 201 Iowa586, 207NW598; 220 Ky98, 294SW785; 133Misc858, 234NYS 505; 38 OklACR342; 125 Or333, 267P 534; 286Pa58, 132A786. **In some jurisdictions,** etc. 197NC8, 147SE433. **One who has not sufficient intellect** to digest all parts of a contract may still be competent to make a will. NJ 133A297.

1007–15½–New. Time when mental capacity is required is that of execution of will and not of prior drawing of will. 318 Ill 445, 149NE507.

1007–15⅓–New. Mental incapacity as annulling will depends on particular facts of each case as applied to general principles of law. TexCivA 283SW347.

1007–15¼–New. One may be of unsound mind and memory to some extent and still be competent to make valid will. 325 Ill 474, 156NE485.

1007–15⅕–New. Testamentary capacity and soundness of mind as defined by law, not medical soundness of mind, governs in determining mental capacity to execute a will. 133Misc858, 234NYS 505.

1007–15⅙–New. Law does not disqualify person from making will because of slovenliness of person, dress, or manner of living. 133Misc858, 234NYS505.

1008–16 220Ala445, 125S659; 202Cal 308, 260P543; 104Conn419, 133A209; 329 Ill 568, 161NE65; 334 Ill 398, 166 NE90(2dcase); 336 Ill 192, 168NE308; 201 Iowa1268, 203NW812; 200 Iowa 1122, 206NW40; 201 Iowa687, 207NW 748; 202 Iowa565, 210NW813; 202 Iowa849, 211NW500; 208 Iowa1265, 227NW129(2dcase); 163La489, 112S 375; 156Md489, 144A698; 239Mich616, 215NW51; 314Mo 305, 284SW488; 133 Misc858, 234NYS505; 38 OklACR342; 121 Or574, 256P390; 125 Or333, 267P 534; TexCommnA 12SW(2d)978; Tex CivA 2SW(2d)942; 152Va411, 147SE 251. **Senile dementia as applied to testamentary capacity.**–200 Iowa1122, 206 NW40.

1008–17 196Cal 639, 238P944; 329 Ill 588, 161NE124; 201 Iowa1268, 203NW 812.

1008–18 329 Ill 588, 161NE124; 201 Iowa1268, 203NW812; 156Md489, 144A 698; 121 Or574, 256P390; 125 Or333, 267P534.

1008–19 100CalA255, 279P846; 336 Ill 192, 168NE308; 200 Iowa1122, 206NW 40; 202 Iowa565, 210NW813; 202 Iowa 849, 211NW500; 314Mo 305, 284SW 488.

1009–21 163La489, 112S375.

1009–23 126Me267, 138A59.

1009–26 But see 152Va411, 147SE251.

1009–27 Mass 172NE228. **Safe-guards required.**–Mass 172NE228.

1009–29 210Ky575, 276SW500; 239 Mich616, 215NW51; 21 OhA194, 153NE 119; 125 Or333, 267P534; 46Philippine 701; 48Philippine485; SD 224NW942.

1010–30 NJ 133A297; NJOrphans 133 A43 (invalid held competent to make will two days before death); 20 OhA 216, 151NE788; 121 Or574, 256P390.

1010–31 NJOrphans 134A651.

1010–32 325 Ill 201, 156NE270.

1010–33 104Conn419, 133A209. **Old and infirm person suffering from diabetes** not lacking capacity. TexCivA 29SW(2d)867.

1010–38 325 Ill 201, 156NE270 (evidence insufficient to show testamentary capacity).

1011–44 SD 224NW942.

1011–45 202Cal 308, 260P543; 239Mich 616, 215NW51.

1011–47 142 Okl 197, 286P17 (if he has adequate understanding at time).

1011–49 104Conn419, 133A209; 317 Ill 585, 148NE263 (eccentricity, miserliness, uncleanness, slovenliness, neglect of person and clothing, offensive and disgusting personal habits combined); 328 Ill 282, 159NE353; 329 Ill 568, 161NE65; 336 Ill 192, 168NE308; 201 Iowa687, 207NW748; 150Md79, 132A425; 317Mo 614, 296SW739; NJ 131A213 (acted and spoke peculiarly, questioned children's legitimacy and peevish and stubborn concerning them); 10PaDist&Co 49; Alta [1927] 2DomLR333.

1012–50 318 Ill 528, 149NE483; 221Ky 709, 299SW585; 233Ky744, 26SW(2d) 751.

1012–52 208Ky686, 271SW1034; 221 Ky709, 299SW585; 150Md79, 132A425; 235Mich342, 209NW75.

1012–54 221Ky709, 299SW585.

1012–60 221Ky709, 299SW585.

1013–61 196Cal 355, 237P1079.

1013–62 202 Iowa565, 210NW813 (senile dementia).

1013–63 248NY421, 162NE473.

1013–64 195Cal 699, 235P45; 150Md 79, 132A425 (scattered incidents must be inconsistent with sanity to prove mental incapacity). **Unsound mind,** under Indiana statute, includes lunatics, idiots, noncompos, monomaniac or distracted persons. 88 IndA301, 157NE 458.

1013–65 88 IndA301, 157NE458; Tex CommnA 3SW(2d)77.

1013–66 126Me267, 138A59 (rule applies no matter how simple instrument is).

1013–68 196Cal 355, 237P1079; 206 Iowa151, 218NW293, 296 [quotCyc]; 240Mich393, 215NW299; 134SC412, 132 SE811; TexCivA 295SW326. **Other definitions.**–100CalA255, 279P846; 210 Ky731, 276SW820; 103NJEq346, 143A 325.

1014–69 195Cal 699, 235P45; 196Cal 355, 237P1079; 100CalA357, 280P204 (2dcase); 206 Iowa151, 218NW293; 240Mich393, 215NW299; 98NJEq645, 130A655; 216AppDiv399, 215NYS292; 132 Or234, 285P224; TexCivA 295SW 326. **Peculiar religions or political beliefs** are not a test of insanity. 318 Ill 528, 149NE483.

1014–70 196Cal 639, 238P944; 100CalA 255, 279P846; 206 Iowa151, 218NW293; 240Mich393, 215NW299; 98NJEq645, 130A655 (belief founded on what appealed to his reasoning powers as sufficient evidence); NJPrerog 140A281; 216AppDiv399, 215NYS292 (hostility toward person disinherited); TexCivA 295SW326. **Remark of testator's daughter** that as between father or mother dying she preferred father's death is basis for father's belief that she desired his death, however faulty his reasoning. 240Mich393, 215NW299.

Belief must be one that cannot be removed by evidence.–206 Iowa151, 218 NW293.

1015–73 195Cal 699, 235P45; 196Cal 355, 237P1079; 98NJEq645, 130A655 (immaterial that he lacked discernment or power to weigh evidence or discriminate between true and false); Tex CivA 295SW326.

1015–74 317 Ill 401, 148NE274; Tex CivA 295SW326 (injustice of prejudices no ground for defeating will). **Testator's hostility toward person disinherited, no matter how illogical,** held no evidence of delusional insanity if based on facts to any degree. 216AppDiv399, 215NYS292.

1015–75 240Mich393, 215NW299. **Insane delusion is belief,** as to truth of which there is not only no evidence, but clearest evidence to contrary. 199Cal 119, 248P514.

1015–76 218Ala445, 118S647; 195Cal 699, 235P45; 200Cal 57, 251P916; 200 353; 88 IndA161, 163NE533; 114Nebr 849, 211NW205; 117Nebr630, 222NW Cal 152, 252P325; 328 Ill 282, 159NE 63; NJ 134A622; NJOrphans 137A823; 216AppDiv399, 215NYS292; 290Pa249, 138A764; 134SC412, 132SE811; Tex CivA 295SW326; 187Wis10, 203NW718.

1015–77 329 Ill 568, 161NE65. **Insane delusion as to matter relative to testator's free agency to act** in disposing of property by will will invalidate will as not having been his free act. 210Ky 731, 276SW820.

1015–79 134SC412, 132SE811.

1016–80 134SC412, 132SE811.

1016–81 NJOrphans 137A823; 216AppDiv399, 215NYS292 (where son was disinherited, but will was not shown result of such delusions).

1016–84 200Cal 57, 251P916; 200Cal 152, 252P325; 114Nebr849, 211NW205.

1016–85 202Cal 205, 259P755; 124Kan 790, 791, 262P554 [quotCyc]; 168La 624, 122S886.

1017–86 TexCivA 4SW(2d)328.

1017–87 328 Ill 282, 159NE353; 336 Ill 427, 168NE327, 67ALR851; TexCivA 4SW(2d)328.

1017–88 152Va411, 147SE251.

1018–93 199Cal 750, 251P637. See also TexCivA 4SW(2d)328.

1018–94 196Cal 639, 238P944; 104Conn 419, 133A209; 325 Ill 474, 156NE485; 336 Ill 427, 168NE327, 67ALR851; Iowa 210NW813; 153Md93, 137A479; 317Mo 614, 296SW739; NJ 133A297; NJOrphans 133A43; 21 OhA194, 153NE119; 92PaSuper553; 46Philippine701.

1018–95 196Cal 639, 238P944; 202 Iowa 565, 210NW813.

1018–96 Failure of memory does not prove incapacity unless total or so extended as to make incapacity practically certain. 286Pa58, 132A786.

1018–1 179Ark186, 14SW(2d)547; 195 Cal 699, 235P45; 196Cal 355, 237P1079; 196Cal 623, 238P938; 199Cal 759, 251P 778; 200Cal 152, 252P325; 98CalA97, 276P366; 318 Ill 445, 149NE507; 334 Ill 315, 166NE50; 213Ky789, 281SW 1028; 163La489, 112S375; 168La624, 122S886; 150Md79, 132A425; 152Md 407, 137A35; 153Md547, 138A415; 257 Mass21, 152NE3; 240Mich393, 215NW 299; 98NJEq645, 130A655; 26 OhNP NS112; 286Pa58, 132A786; 286Pa155, 133A144; 296Pa74, 145A810, 66ALR 222; 299Pa430, 149A737; Alta [1927] 2DomLR333; BC [1925] 3DomLR1069. See also TexCivA 4SW(2d)328. Contra 107WVa38, 146SE894. **Old age, sickness, distress, or debility of body** neither prove nor raise presumption of incapacity, nor will inability to transact business, physical weakness or peculiar beliefs and opinions. 286Pa58, 132A786.

1019–2 200Cal 299, 252P1049. **Where the testator has been adjudged insane,** etc. 201 Iowa586, 207NW598; 204 Iowa260, 214NW514; 118 Oh442, 161 NE336. **Remote adjudication of insanity** not showing general and settled unsoundness of mind and followed by confinement in hospital seven months which testator then left mentally sound and thereafter always managed his business as normal man raises no presumption of insanity at time of making will. 201 Iowa586, 207NW598.

1019–3 200Cal 152, 252P325; Alta [1927] 2DomLR333. But see 179Ark 877, 18SW(2d)352; 233Ky744, 26SW (2d)751.

1019–4 Alta [1927] 2DomLR333.

1019–5 Unequal or unnatural disposition does not raise presumption of incapacity unless so gross or ridiculous as to give rise to presumption of insanity. 286Pa58, 132A786, 789 [citCyc].

1019–6 249Mich653, 229NW485.

1020–7 202Cal 205, 259P755. **The rule is otherwise stated,** etc. TexCivA 4SW (2d)328.

1020–8 202Cal 205, 259P755. See also 200Cal 299, 252P1049. **No presumption that periods of temporary or intermittent mental incapacity** continued to and existed on date of execution of will. Miss 107S676.

1020–9½–New. nor will it be presumed from fact that testatrix, eighty years old, named man fifty years and made will in his favor. 143Wash423, 255P 370.

1020–9½–New. Delusion three weeks before execution of will does not supply inference of permanent mental incapacity. 156Md489, 144A698.

1020–9¼–New. Presumption of invalidity of will does not arise from fact that testatrix was elderly, quite feeble, and living in squalor. 133Misc858, 234 NYS505.

1020–9½–New. Presumption in favor of will is not overcome by showing that testator was of advanced age or enfeebled in mind and body. 228AppDiv 119, 239NYS44.

1020–11 179Ark186, 14SW(2d)547; 195 Cal 699, 235P45; 199Cal759, 251P778; 202Cal 205, 259P755; 202Cal 490, 261P 709; 69CalA16, 230P181; 334 Ill 315, 166NE50; 202 Iowa565, 210NW813; 240Mich393, 215NW299; 240Mich465, 215NW323; NJOrphans 134A651; 58 ND109, 224NW915; 131 Okl 142, 268P 296; 133 Okl 156, 271P681; 142 Okl 197, 286P17; 38 OklACR342; 284Pa 169, 130A501; 286Pa58, 132A786; Alta [1927] 2DomLR333; BC [1925] 3DomLR1069. **The New York decisions,** etc. 130Misc514, 223NYS843. **Evidence held insufficient to overcome presumption of sanity.**–208 Iowa607, 224NW69.

1021–12 165Ga451, 141SE306; 325 Ill 201, 156NE270; 126Me267, 138A59; 253 Mass25, 147NE844; 263Mass427, 161 NE616; 172Minn217, 214NW892; 180 Minn256, 230NW781; 312Mo 458, 278 SW759; Mo 286SW120; 317Mo 614, 296SW739; 319Mo 1153, 6SW(2d)860; 320Mo 920, 13SW(2d)548; Mo 19SW (2d)1033; MoA 27SSW1063; 117Nebr 168, 220NW251; Nebr 227NW928; 120 Or38, 250P753; 121 Or574, 256P390; 125 Or545, 267P396; 48RI 341, 137A 908; TexCommnA 291SW873 (charge requiring proof of sanity to satisfaction of jury held error); TexCivA 273SW 961; TexCivA 276SW964; TexCivA 283 SW347; TexCivA 4SW(2d)328; 107 WVa38, 146SE894. See also Me 152A 84; 214AppDiv683, 213NYS66. **In Illinois.**–332 Ill 509, 163NE772.

1021–16 217Ala506, 116S686; 284Pa 169, 130A501. But see 69CalA16, 230P 181.

1022–17 217Ala506, 116S686.

1022–18 152Md407, 137A35.

1022–19 216Ala43, 112S360; 196Cal 355, 237P1079; 200Cal 147, 252P597; 200Cal 299, 252P1049; 328 Ill 282, 159 NE353; 88 IndA161, 163NE533; 98NJ Eq645, 130A655; 118 Oh442, 161NE336; TexCivA 275SW206; 143Wash28, 254P 455. But see 338 Ill 102, 170NE221. Contra 312Mo 458, 278SW759.

1023–20½–New. Contestant has burden of proving undue influence or fraud. Alta [1927] 2DomLR333.

1023–21 338 Ill 102, 170NE221; 312Mo 458, 278SW759; TexCivA 300SW985. **Admissibility of circumstance** affecting mental capacity is within discretion of trial court. TexCommnA 291SW873.

1023–22 94CalA576, 271P559; 338 Ill 102, 170NE221. **As bearing on weight of evidence,** fact that testimony of witness was based on condition of testator long subsequent to execution of will must be considered. 116 Or467, 241P 996. **Documents written by alleged mentally incompetent testator within one or two years of will** held admissible. 219AppDiv528, 220NYS329.

1023–23 167Ga502, 146SE156. **Evidence held inadmissible.**–118 Or308, 246 P720. **Exclusion of evidence of invalidity of later will and validity of lost will held error,** where question of capacity at time of prior will and later incapacity was in issue. 149Md498, 132 A55.

1023–24 200Cal 57, 251P916; 225Ky 480, 9SW(2d)220. **Letters written by testator's son** are not admissible. 256 Mass10, 152NE97. **Transactions after death of testatrix** are immaterial. 216 Ala43, 112S360. **Evidence of value of testatrix's home** held inadmissible. 25 F(2d)542. **Evidence held insufficient to show testamentary incapacity.**–173Ark 1181, 293SW1023; **Evidence not relevant to issues** will not be received. 262 Mass273, 159NE610. **Evidence will not be received of collateral matters.**–334 Ill 23, 165NE175. **Evidence that testator was atheist** is inadmissible. 233Ky744, 26SW(2d)751.

1023–25 150Md79, 132A425.

1023–27 286Pa58, 132A786 (countryside reputation or talk regarding person leading secluded life held not competent to establish incapacity).

1023–28 286Pa58, 132A786 (incapacity must be established in positive manner); TexCivA 273SW961 (of little probative force, but admissible). **That signature to will was normal** tends to disprove contention of mental and physical weakness. 299Pa430, 149A737.

1023–29 326 Ill 462, 158NE154 (evidence held sufficient); 328 Ill 282, 159 NE353; 234Mich363, 208NW438; 120 Or38, 250P753; TexCivA 283SW 347; 154Wash675, 282P920. **Evidence held insufficient to show testamentary incapacity.**–196Cal 355, 237P1079; 196 Cal 639, 238P944; 199Cal 759, 251P 778; 200Cal 57, 251P916; 200Cal 152, 252P325; 200Cal 147, 252P597; 202Cal 450, 261P470; 202Cal 490, 261P709; 205Cal 292, 270P961; 317 Ill 401, 148 NE274; 122Kan741, 253P536; 124Kan 790, 262P554; 214Ky769, 284SW389; 168La624, 122S886; Me 152A84; 240 Mich7, 215NW35; 239Mich616, 215NW 51; 251Mich346, 232NW256; 131Misc 874, 227NYS550; 132Misc171, 229NYS 805; 133Misc858, 234NYS505; 138Misc 381, 245NYS574; 286Pa155, 133A144; 299Pa398, 149A701; 70Utah456, 261P 15; 142Wash637, 254P236; Wis 230 NW617; Can [1929] 3DomLR749. **Evidence held sufficient to show testamentary capacity.**–25F(2d)542; 174Ark 1153, 298SW492; 195Cal 699, 235P45; 196Cal 623, 238P938; 96CalA204, 273P 1097; 103CalA691, 284P987; 162Ga149, 132SE893; 163Ga149, 135SE721; Ga 155SE180(2dcase); 316 Ill 513, 147NE 419; 317 Ill 585, 148NE263; 318 Ill 445, 149NE507; 325 Ill 474, 156NE485; 329 Ill 568, 161NE65; 331 Ill 643, 163NE 424; 332 Ill 509, 163NE772; 332 Ill 639, 164NE133; 334 Ill 23, 165NE175; 336 Ill 192, 168NE308; 338 Ill 102, 170 NE221; 338 Ill 276, 170NE298; 119 Kan286, 239P965; 122Kan291, 251P 1078; 127Kan803, 275P149; 210Ky575, 276SW500; 213Ky147, 280SW947; 219 Ky534, 293SW1071; 150Md369, 133A 117; Mass 172NE228; 240Mich465, 215 NW323; 251Mich346, 232NW256; 167 Minn63, 208NW425; 176Minn456, 223 NW771; 177Minn226, 225NW102; 180 Minn70, 230NW275; 180Minn256, 230 NW781; 144Miss424, 110S111; 145 Miss23, 110S862; 317Mo 614, 296SW 739. **Evidence held sufficient,** etc. 316 Mo 916, 292SW1039; Mo 19SW(2d) 1033; 73Mont481, 237P214; 114Nebr 593, 208NW961; Nebr 227NW928; 98 NJEq381, 129A131; NJ 131A213; 98 NJEq645, 130A655; 102NJEq346, 140 A564; NJOrphans 134A651; 214App Div500, 212NYS456; 128Misc237, 219 NYS127; 134Misc671, 236NYS529; 137 Misc773, 244NYS742; 49ND761, 193NW 605; 56ND793, 219NW562; 21 OhA194, 153NE119; 21 OhA516, 153NE234; OhA

173NE197; 134 Okl 22, 272P410; 142 Okl 197, 286P17 (user of drugs); 116 Or467, 241P996; 121 Or574, 256P390; 121 Or619, 256P1119; 125 Or545, 267 P396; 128 Or591, 275P605; 286Pa58, 132A786; 298Pa285, 148A297; 299Pa 430, 149A737; SD 224NW942; TexCivA 27SW(2d)624; 147Va105, 136SE683; 150Va452, 143SE683; 141Wash619, 252 P139; 142Wash698, 253P120; 143Wash 142, 254P837; 151Wash436, 276P86; 106WVa183, 145SE177; 195Wis345, 219 NW378; 196Wis377, 220NW380; 199 Wis37, 225NW136. **Evidence held sufficient to show want of testamentary capacity.**–173Ark1181, 293SW1023; 206 Cal 286, 274P351; 103CalA349, 284P 464; 99Fla600, 126S762; 161Ga615, 131 SE535; 204 Iowa260, 214NW514; 120 Kan136, 243P207; 123Kan696, 256P 799; 214Ky294, 283SW77; 214Ky350, 283SW102; 228Ky83, 14SW(2d)413; 228Ky582, 15SW(2d)479; 235Ky121, 29SW(2d)637; 126Mo 267, 138A59; 172 Minn217, 214NW892; MoA 278SW1063; 86Mont521, 284P546; Nebr 230NW495; Nebr 231NW837(2dcase); 219AppDiv 528, 220NYS329; 58ND109, 224NW 915; 15 OhA321; 132 Or421, 285P 1032; 289Pa361, 137A616; 294Pa391, 144A277; 49Philippine450; TexCivA 283SW347; TexCivA 29SW(2d)867; 149Wash357, 270P1031. **Evidence held insufficient to show want of testamentary capacity.**–104Conn419, 133A209; 208Ky686, 271SW1034; 161La155, 108 S319; 240Mich121, 215NW296; Miss 107S676; 319Mo 1153, 6SW(2d)860 (sickness and old age); TexCivA 2SW (2d)942; TexCivA 4SW(2d)328; 143 Wash423, 255P370. **Preponderance of evidence** is required to overcome presumption of sanity and show that testator was of unsound mind. 200Cal 152, 252P325. **Evidence held sufficient to show mental capacity.**–318 Ill 528, 149 NE483. **Evidence of both proponent's and contestant's** witnesses must be considered in determining whether evidence sustains verdict against testator's capacity. 200Cal 57, 251P916. **Evidence of incapacity must clearly preponderate** to make will invalid. 318 Ill 445, 149 NE507. **Evidence must be viewed in** light most favorable to validity of will. 286Pa58, 132A786. **Proof of mental incapacity must be clear, convincing and satisfactory.**–199Wis37, 225NW136. **Evidence to overcome prima facie proof of testamentary capacity** must be substantial. 317Mo 614, 296SW739 (scintilla held insufficient). **Evidence held insufficient to raise question of fact** of testator's lack of mental capacity. 214 AppDiv683, 213NYS66. **Evidence held to show testator was of sound mind.**–La 105S13. **Strongest evidence of testator's soundness of mind and memory** is positive testimony that he always transacted his ordinary business intelligently. 336 Ill 192, 168NE308. **Suicide of testator** is insufficient to sustain finding of incapacity. 249Mich653, 229NW 485.

1024–32 312Mo 458, 278SW759.

1024–33 196Cal 639, 238P944.

1024–34 196Cal 639, 238P944. 72CalA 773, 238P171; NJ 131A213.

1024–36 336 Ill 192, 168NE308; NJ 131 A213.

1024–37 328 Ill 282, 159NE353.

1024–38 72CalA773, 238P171; 298Pa 285, 148A297 (disordered mind).

1024–42 150Md79, 132A425 (mumbling and inattention).

1024–42½–New. spoke peculiarly, NJ 131A213.

1024–43 150Md369, 133A117; NJ 131A 213.

1024–43½–New. Evidence that testator had senile dementia is alone insufficient to support finding of testamentary incapacity. 216AppDiv266, 213NYS662.

1024–43⅓–New. Contestant must show either such a complete mental derangement of testator as denotes utter incapacity to know and understand things necessary to possess testamentary capacity, 199Cal 759, 251P778.

1024–43¼–New. or he must show existence of specific insane delusion which affected the making of the will. 199Cal 759, 251P778.

1024–43⅙–New. Evidence of respective financial condition of legatee and contestant inadmissible to prove want of capacity where legatee alone would have inherited in case of intestacy. 220Ky 388, 295SW445.

1024–43⅙–New. Proof of attempts to commit suicide does not disqualify one from making will. NJ 133A297.

1024–43⅐–New. Testator's capacity to make will held shown. NJ 133A297.

1024–43⅛–New. Incapacity must be established by weight of evidence. 290Pa 249, 138A764.

1024–43⅛–New. In Texas, by statutes, mental capacity of testator must be shown "to satisfaction of jury." Tex CivA 283SW347.

1024–43 1/10–New. In some jurisdictions testimony of attesting witnesses only is admissible as to competency. 327 Ill 346, 158NE709.

1024–43 1/11–New. Jury may consider testator's age, habits, associations, claims of interested parties on his bounty, and character, extent and disposition of property, in will contest. 29 OhA457, 163NE728.

1024–43 1/12–New. Every attestation of signature to will is direct evidence by witness that testator was competent to understand and execute will. 299Pa430, 149A737.

1024–44 218Ala445, 118S647; 235Ky 121, 29SW(2d)637 (how he acquired property disposed of); 321Mo 310, 11SW (2d)16; 134SC412, 132SE811, 814 [cit Cyc]. **That testatrix had no money or personal property to satisfy money bequest** when she made will is admissible on question of testamentary capacity. TexCivA 27SW(2d)624.

1024–46 153Md93, 137A479.

1025–47 161Ga615, 131SE535 (that testator for several years usually came to express office to get shipments of liquor); 336 Ill 427, 168NE327, 67ALR 851 (use of intoxicants); 153Md93, 137A 479; 257Mass21, 152NE3 (evidence of household conditions held admissible in connection with testimony of neglect of person though remote). **Habit of drinking whisky** in certain years is admissible in evidence. 161Ga615, 131SE535.

1025–48 174Ark1153, 298SW492; 44 Ida 625, 258P1082; 1084 [citCyc]; 134Misc 671, 236NYS529. **Letters written for testator by another** are admissible. 332 Ill 509, 163NE772.

1025–50 235Ky121, 29SW(2d)637.

1025–52 195Cal 699, 235P45 (attorney, not employed by testator may testify as to conversation relating to business dealings); 334 Ill 576, 166NE209; IndA 168NE34(2dcase) (admissible to sustain will); 149Md308, 131A463 (instructions to person preparing will); 153Md93, 137 A479; 319Mo 744, 8SW(2d)38. But see 208 Iowa1265, 227NW129(2dcase).

1026–53 44 Ida625, 258P1082.

1026–54 153Md547, 138A415. **Scattered incidents and remarks of testatrix** held not to show mental incapacity sufficient to make will. 150Md79, 132A425.

1026–55 22F(2d)588; 318 Ill 528, 149 NE483; 329 Ill 11, 160NE197; 338 Ill 102, 170NE221; 229Ky103, 16SW(2d) 788; 156Md489, 144A698; 155Miss449, 124S498; TexCivA 295SW326; TexCivA 300SW985. **Declarations previous to the will.**–194NC583, 140SE193.

1027–56 194NC583, 140SE193.

1027–59 TexCivA 4SW(2d)328.

1027–59½–New. or made statements to effect that he never had made a will, Tex CivA 283SW347.

1027–59⅓–New. or that testator had sought advice about property and had not mentioned about executing will, Tex CivA 283SW347.

1027–64 202Cal 450, 261P470; 317 Ill 561, 148NE293 (only when both wills are in substantial conformity and on proof of capacity when first will was executed); 149Md308, 131A463 (to show will in substantial conformity with such former will).

1028–74½–New. Statements of third persons in testator's presence that he was not able to take care of himself or of his property made while arranging for his future maintenance and welfare are admissible. 312Mo 458, 278SW759.

1028–75 195Cal699, 235P45; 199Cal 759, 251P778; 200Cal 152, 252P325; 69CalA 16, 230P181; 217Ky720, 290SW687; 152 Md407, 137A35; Miss 107S676; 29 OhA 457, 163NE728; 113 Okl 156, 242P238; 131 Okl 142, 268P296. **Actual mental condition at time is test, not what it** might have been. 195Cal 699, 235P 45. **Evidence of temporary lapses held insufficient to show incapacity.**–152Md 407, 137A35.

1028–76 152Md407, 137A35.

1028–77 195Cal 699, 235P45; 199Cal 759, 251P778; 202Cal 205, 259P755; 69CalA 16, 230P181; 100CalA357, 280P204(2d case); 325 Ill 201, 156NE270; 334 Ill 23, 165NE175; 241NYS513; 118 Oh442, 161 NE336; 286Pa155, 133A144; 290Pa249, 138A764; 54SD184, 223NW41. **Particular evidence held admissible.**–202Cal 205, 259P755.

1029–79 156Md489, 144A698.

1029–82 199Cal 759, 251P778; 200Cal 152, 252P325; 95CalA617, 273P165; 150 Md79, 132A425 (testimony of testatrix's confusion eighteen months before making will held no evidence of insanity); Mo 19SW(2d)1033; 136Misc555, 241NYS 513. **Permanency or continuity of incapacity must appear** where testimony is directed to time other than that of execution of will. 156Md489, 144A698.

1029–83 156Md489, 144A698; 131 Okl 142, 268P296.

1029–84 317 Ill 561, 148NE293; 203 Iowa5, 212NW348; 290Pa249, 138A764; 153Va437, 150SE389. **Evidence has been held admissible** of commitment to state hospital for inebriety two years before execution of will. 202Cal 205, 259P755.

1029–85 197NC347, 148SE437.

1030–87 218Ala445, 118S647; 29 OhA 457, 163NE728. **Dislike of relatives,** with or without reason, is not necessarily proof of insanity. 195Cal 699, 235 P45.

1030–88½–New. Evidence held insufficient to show testatrix had undue prejudice toward nephew because of rumor that he had deserted his wife. 325 Ill 474, 156NE485.

1030–89 149Md308, 131A463 (capacity to execute valid deed or contract).

1030–90 98NJEq381, 129A131.

1030–91 Cal 291P182; 234Mich170, 207 NW924.

1031–93 72CalA773, 238P171; 44 Ida 625, 258P1082; 316 Ill 513, 147NE419 (evidence that niece and housekeeper were consulted insufficient to show that testator did not exercise his own judgment); 317 Ill 401, 148NE274 (fact that testatrix trusted all business affairs to confidential agent does not show incapacity); Vt 150A65.

1031–95 150Md79, 132A425.

1031–96 233Ky744, 26SW(2d)751.

1031–2 328 Ill 282, 159NE353; 221Ky 709, 299SW585; 117Nebr630, 222NW63; 134SC412, 132SE811, 814 [citCyc]. **Evidence held not to justify court's** conclusion that testator's obsession that some of his wife's children were not his did not affect or influence testator in making will. 187Wis10, 203NW718. **Evidence has been held insufficient** to show that testatrix was suffering from insane delusion. 137Misc668, 244NYS 250.

1032–3 196Cal 355, 237P1079 (belief shown not to accord with fact). **Evidence of insane delusion,** etc. 196Cal 355, 237P1079; 202Cal 308, 260P543; 86 CalA125, 260P586; 100CalA357, 280P 204(2dcase); 208 Iowa1293, 227NW160; NJ 147A577; 98NJEq645, 130A655; NJ 'rerog 140A281; 216AppDiv399, 215NYS 292; 132 Or234, 285P224. **Evidence held sufficient to show that there was no insane delusion.**–195Cal 699, 235P45. **Evidence held insufficient** to show insane delusions. TexCivA 295SW326. **Evidence held to show basis for belief leading to disinheriting son.**–216AppDiv399, 215NYS292. **Prejudices, dislikes, and antipathies** cannot be classed as insane delusions. 195Cal 699, 235P45.

1032–3½–New. Questioning legitimacy of children, not amounting to a fixed delusion, is insufficient to show mental incapacity. NJ 131A213.

1032–6 TexCivA 2SW(2d)942.

1033–11 219Ala199, 121S718; 161Ga55,

129SE769; 150Md79, 132A425; 316Mo 728, 293SW105; 318Mo 1078, 2SW(2d) 707 (name "Talbot Augustin" written "Albert Austin" may be considered by jury); 116Nebr827, 219NW189; 290Pa 249, 138A764; TexCivA 295SW326; Tex CivA 2SW(2d)942. **Gifts for benefit of animals** do not of themselves evidence lack of testamentary capacity. Mass 167NE665(2dcase). **Gift of income terminable on marriage** is not of itself evidence of lack of testamentary capacity. Mass 167NE665(2dcase).

1033-12 196Cal 355, 237P1079; 196Cal 639, 238P944; 200Cal 152, 252P325 (will held fair and just).

1033-14 104Conn419, 133A209; 229Ky 103, 16SW(2d)788 (unnatural provisions); 117Nebr630, 222NW63; 140SC1, 138SE355, 359 [quotCyc]; TexCommnA 285SW275. But see 230Ky230, 18SW (2d)997. **Where daughter is married and in no need of father's aid,** natural justice rule is inapplicable to her contest on ground of insane delusion. 240Mich 393, 215NW299. **Alleged injustice may be rebutted** by evidence of advances to children during lifetime of testator. TexCivA 2SW(2d)942.

1034-15 318 Ill 445, 149NE507; 156Md 489, 144A698; 140SC1, 138SE355, 359 [quotCyc]. **Result of proof of gross inequality** is that free, deliberate, and disposing mind must be clearly and satisfactorily shown to establish will as true and valid. 229Ky103, 16SW(2d)788. **Inequality not amounting to injustice.**–SD 224NW942.

1034-16 229Ky103, 16SW(2d)788; 194 NC583, 140SE193; 197NC347, 148SE437; 140SC1, 138SE355, 359 [quotCyc]; Tex CivA 285SW275.

1034-17 140SC1, 138SE355, 359 [quot Cyc].

1034-18 93Fla311, 112S80; 318 Ill 445, 149NE507; 228Ky582, 15SW(2d)479; 150Md79, 132A425; 152Md407, 137A35; 247Mich389, 225NW576; 286Pa58, 132A 786; 10PaDist&Co 49; 140SC1, 138SE 355, 359 [quotCyc]; 147Va105, 136SE 683; 152Va411, 147SE251; 142Wash637, 254P236. **Evidence held not to show inequality** in provisions of will. 210Ky 575, 276SW500.

1034-19 195Cal 699, 235P45; Mo 19SW (2d)1033; NJ 134A622.

1035-20 153Md547, 138A415 (question whether contestant had married man of means held proper); Nebr 230NW495 (financial condition of contestant); 197 NC347, 148SE437; 140SC1, 138SE355, 359 [quotCyc]. But see 216Ala43, 112S 360; 219Ala199, 121S718.

1035-21 140SC1, 138SE355, 359 [quot Cyc].

1035-22 140SC1, 138SE355, 359 [quot Cyc].

1035-23 140SC1, 138SE355, 359 [quot Cyc].

1035-25 167Ga502, 146SE156.

1035-27 140SC1, 138SE355, 359 [quot Cyc].

1035-27½-New. Changes in will immaterial in determination of validity. 290 Pa249, 138A764.

1035-29 195Cal 711, 235P1012; 327 Ill 346, 158NE709; 120 Or38, 250P753; 121 Or574, 256P390; BC [1925] 3DomLR 1069. **Testimony of subscribing witness** that deceased appeared to understand nature and purpose of act in executing will is sufficient to establish such fact. 145Miss23, 110S862.

1036-31 195Cal 711, 235P1012 (weight of testimony of subscribing witness as to mental capacity is for jury); 121 Or 574, 256P390; Va 154SE687. **Evidence held sufficient** to sustain burden on proponents to make out prima facie case. 332 Ill 509, 163NE772.

1036-32 Opinions of subscribing witnesses are entitled to more weight than that of one who is merely passive. 200 Cal 57, 251P916.

1036-35 200 Iowa1180, 206NW95; 156 Md81, 143A648; 312Mo 458, 278SW759; BC [1925] 3DomLR1069. **What physicians within rule.**–200 Iowa1180, 206NW 95.

1037-40 208Ky686, 271SW1034. **Evidence held insufficient** to avoid nonsuit. 196Cal 639, 238P944 (too remote in time). **Expert witness cannot testify as to existence or nonexistence of very facts** which jury must determine. 202 Iowa 807, 211NW495.

1037-41 BC [1925] 3DomLR1069 (carefully scrutinized).

1037-45 208Ky686, 271SW1034; 44 Philippine573.

1037-45½-New. Court is not bound to accept opinion of experts who had not examined testator for long time when opposed to that of intelligent laymen who were in daily contact with him. BC [1925] 3DomLR1069.

1037-45⅓-New. and to that of equal array of experts on other side, BC [1925] 3DomLR1069.

1037-45¼-New. but may draw its own inferences from all evidence as whole. BC [1925] 3DomLR1069.

1037-45½-New. Testimony of doctor that he does not believe testator was capable of making a will has no probative value where witness not shown to be acquainted with law's criterion of testamentary capacity. 199Cal 759, 251 P778.

1038-48 200 Iowa1180, 206NW95; 208 Ky672, 271SW1040 (where facts are insufficient opinion is incompetent); 208 Ky686, 271SW1034 (no probative effect beyond that justified by facts); 214Ky 769, 284SW389; 149Md308, 131A463 (as to capacity to execute valid deed or contract); 234Mich170, 207NW924; 239 Mich616, 215NW51 (must first give facts showing reasonable basis for opinion); 192NC656, 135SE798; 120 Or38, 250P 753; TexCivA 273SW866; BC [1925] 3 DomLR1069. **It is provided by statute in California.**–195Cal 699, 235P45 (court has wide discretion in admitting evidence of an intimate acquaintance as to sanity). **Nonexpert witness cannot state opinion as to testator's mental capacity** based on recital of facts as to his physical condition. 202 Iowa807, 211NW495.

1040-49 150Md369, 133A117.

1040-50 195Cal 699, 235P45; 202 Iowa 807, 211NW495; 192NC656, 135SE798.

1040-52 208Ky672, 271SW1040; 208Ky 686, 271SW1034.

1041-58 199Cal 759, 251P778; 74CalA 48, 239P364 (opinion of witness can have no stronger weight than reasons on which it is based); 202 Iowa849, 211NW 500; 208Ky686, 271SW1034; 44Philippine573. **Evidence held insufficient.**–196 Cal 639, 238P944; 235Mich627, 209NW 842. **Nonexpert witness cannot testify as to existence or nonexistence of very facts** jury must determine. 202 Iowa807, 211NW495.

1041-58½-New. Opinion of nonexpert is not admissible to show unsoundness of testator's mind upon recital of facts pertaining solely to his physical condition. 202 Iowa849, 211NW500.

1041-58½-New. Testimony inconsistent with prior conduct of witness is unworthy of credit. 286Pa155, 133A144.

1041-66 318 Ill 528, 149NE483; 201 Iowa586, 207NW598; 125Kan154, 264P 77; 118 Oh442, 161NE336. **An adjudication merely of mental incapacity to take care of property,** etc. 131 Okl 142, 268P296. **Existence of guardianship** does not constitute legal incapacity to make will but is only evidence of fact, which may be overcome. 113 Okl 156, 242P238.

1042-67 318 Ill 528, 149NE483; 328 Ill 282, 159NE353; 124Kan790, 262P554. But see 202Cal 205, 259P755. **Actual mental condition of testator when he was adjudged insane** for purpose of treatment may be shown to prove nature and extent of his affliction at that time. 201 Iowa586, 207NW598.

1042-68 113 Okl 156, 242P238.

1043-71 196Wis377, 220NW380. **Adjudication of insanity** for treatment admissible, though made twenty-five years before execution of will. 201 Iowa586, 207NW598.

1043-73½-New. Adjudication of insanity such as to require treatment is of less probative force upon question of testamentary capacity than adjudication that person is incapable of caring for his property and requires guardian. 201 Iowa586, 207NW598.

1043-73⅓-New. That decedent was committed to insane asylum nearly year after making will does not justify finding that he did not possess legal mental capacity at time of execution of will. 133Misc858, 234NYS505.

1043-75. Partner's interest in land held by mining partnership is devisable. 115 Tex469, 283SW754.

1043-76 316 Ill 583, 147NE446 (statute of wills gives to person having statutory qualifications right to dispose of his property as he may see fit to do). **In Philippines.**–45Philippine216 (quotCiv. Code art. 763). **Deceased's interest in partnership good will may pass by will** in absence of agreement as to disposition in case of decease of partner. 127 Misc206, 216NYS523.

1043-77 124Kan642, 261P838.

1043-79 NC 154SE832.

1043-80 130Kan424, 286P252; 231Ky 731, 22SW(2d)133; 232Ky251, 22SW (2d)612 (defeasible fee); 319Mo 591, 4 SW(2d)807. **Limitation of forced heirs in civil law.**–45Philippine216. **By retaining control of property,** grantor in deed of gift had right to will it to others than grantee. 193NC278, 136SE 879. **In Louisiana.**–163La734, 112S667. **Title may be in corporation** owned solely by testator. 138Misc372, 245NYS703. **Property disposed of under power of will** is not part of testator's estate. Del Ch 151A712.

1043-80½-New. A specific legatee of encumbered chattel is entitled to have encumbrance paid out of general assets but not out of other specific legacies. Ont [1927] 2DomLR1043.

1043-82 338 Ill 611, 170NE774.

1043-83½-New. Extension of range of legislation restricting one's rights to dispose of property by will is not to be made beyond express language used. 204 Iowa648, 215NW710.

1043-83⅓-New. Sole stockholder has right to direct executor and trustee under his will to cause corporation to convey its property to whomsoever he sees fit instead of disposing of stock. 133 Or65, 283P747.

1043-86 132Misc910, 231NYS16.

1044-87 124Kan267, 259P707 (dictum); 217AppDiv767, 216NYS410; 129Misc15, 220NYS635.

1045-91 338 Ill 611, 170NE774 (interest acquired by join tenant by survivorship after making will); 124Kan267, 259P 707.

1046-97 129Misc15, 220NYS635.

1046-98 243 IllA386; 134Misc494, 236 NYS331.

1046-2 30F(2d)604; 173Ark33, 291SW 799 (wife receiving conveyance from husband can make devise during husband's lifetime effective after death of both spouses as to both legal and equitable title); 28Hawaii590. **Land purchased in name of corporation in which testator was sole stockholder** with money furnished by him is devisable by him. 136Misc19, 240NYS208.

1046-3 Md 152A261; 240Mich661, 216 NW446.

1046-7½-New. Right of owner of equitable title under contract to convey is unaffected by vendor's will. IndA 157 NE7.

1046-7⅓-New. That title to realty stood in name of corporation, of which testator owned all the stock did not defeat devise. 132Misc332, 230NYS305.

1047-11½-New. Land may be devised, though subject to option to purchase. 49 RI 349, 142A609.

1048-24 317Mo 587, 296SW382.

1048-25 129Misc506, 221NYS692.

1048-26 106Conn627, 138A809; Conn 151A345; DelCh 152A115; 125Mc306, 133 A689; 134Misc99, 234NYS329(2dcase).

1048-27 192NC285, 134SE849.

1049-28 134Misc99, 234NYS329(2d case); 192NC285, 134SE849.

1049-29 128Misc791, 221NYS220; 19 Oh A122. But see 169Ga543, 150SE912.

1049-30 Va 155SE802.

1049-33 Right of wife of residuary legatee to husband's distributive share in estate as his sole legatee held to depend on proof that his interest had vested prior to his death. 27 OhA197, 161 NE218.

1049-35 Va 155SE802.

1049-36 198Cal 91, 243P431; 97Fla916,

123S668(2dcase) (subject to widow's dower rights); 200 Iowa1070, 205NW 870; 204 Iowa606, 215NW615; TexCivA 281SW580, 587 [citCyc]. **The proceeds of accident or casualty insurance** may be denied by will. 125 Okl 151, 256P912, 62 ALR935. **Statute providing that insurance** payable to estate of insured "shall enure to the separate use" of surviving spouse and children applies only where there is no will. 200 Iowa1070, 205NW 870, 873.

1049–37 TexCivA 281SW580, 587 [cit Cyc].

1050–41 327 Ill 448, 158NE706; Mo 30 SW(2d)1073; 131 Okl 144, 268P245.

1050–46 204Cal 557, 269P519; TexCivA 26SW(2d)701; 149Wash29, 270P110. **In California.**–198Cal 91, 243P431. **In Washington.**–152Wash543, 278P673(1st case). **Residuary legatees cannot first raise question that property was community** after death of surviving spouse. 146Wash577, 262P959. **Disposition of testator's share.**–35Ariz166, 275P2(2d case). **Constitutionality of statutes.**–203Cal 106, 263P1017. **Retroactive operation of statutes.**–203Cal 106, 263P 1017.

1050–46½–New. Property acquired by joint industry of husband and wife may be disposed of by will by surviving spouse to whom it has come where there is no issue born of the marriage. 123 Okl 193, 252P847.

1050–46½–New. What law governs.–Law in force at time community property was acquired and not that in force at time of wife's death determines whether she has divisable interest in community property. Cal 263P1013.

1050–46¼–New. Wife's attempt to devise community property required at time when her interest was contingent on her surviving her husband is ineffectual, though law in force at time gave her power to make testamentary disposition of one half of community property. Cal 263P1013.

1050–48 An estate for the life of the testator, etc. 249Mich474, 229NW465; 146Wash577, 262P959. **Fee subject to be defeated on death without heirs of the body** may not be disposed of by will. 190NC815, 130SE867.

1050–51 6PaDist&Co 720.

1051–53 31Ariz272, 252P521; 87Colo 144, 286P114(2dcase); 336 Ill 427, 168 NE327, 67ALR851 (testatrix may distribute property among heirs or strangers); 136Misc555, 241NYS513; 50RI 242, 146A628; TexCommA 14SW(2d) 1009; 100Vt407, 138A730; 199Wis273, 226NW306 (competent person may devise his property as he wishes within public policy of state). **Right to receive property by will** is not a natural right but is controlled by will. 120 Or80, 250 P735. **To be void as against public policy,** will must contravene some positive, well-defined expression of settled will of people as found in constitution, statute, or judicial decisions. 316Mo 492, 291SW120, 51ALR877. **Policy of law** favors freedom in testamentary disposition of property. 316Mo 492, 291SW120, 51ALR877. **Conversely,** disposition, designed to carry into effect some purpose which law regards as immoral, illegal, or impolitic is void. 225AppDiv 29, 232NYS84.

1051–54 10PaDist&Co 465.

1051–57½–New. Testator may direct distribution of estate as he sees fit, within legal limits. 98NJEq554, 131A302.

1051–63 128Misc240, 218NYS385.

1052–64 12F(2d)625.

1052–65 BC [1925] 3DomLR854 (adopted child).

1052–66½–New. Right of corporation to take under a will is governed by statutes existing at death of testator. 204 Iowa648, 215NW710.

1052–66⅓–New. Right of surviving spouse to take under will of deceased spouse is governed by statutes existing at time of death of testate spouse. 204 Iowa648, 215NW710.

1052–67 See also TexCivA 14SW(2d) 956.

1052–68 170Ga771, 154SE355(2dcase).

1052–69 But see 162Ga767, 135SE90. **Testator may provide for devise of shares, in trust,** in corporation to be created to carry on his business. 162Ga 767, 135SE90.

1052–70 47RI 406, 133A662, 46ALR823.

1052–71 DelCh 147A252; 48RI 200, 136 A434, 435 [citCJ].

1053–79 130Misc1, 223NYS321.

1053–82 125 Or553, 267P821. **Bequest to county hospital** is not bequest to state or any state institution or for use or benefit of state or any state institution so as to obviate necessity of husband's consent. 197Cal 28, 239P397.

1053–85 15F(2d)347 (Georgia code provision held to invalidate bequest); 5Pa Dist&Co 359; 11PaDist&Co 709. **New York statutes.**–220AppDiv313, 221NYS 751; 218NYS385. **Bequest to University of Heidelberg,** state institution formed for scientific, literary, and educational purposes, held invalid. 196Cal 778, 239 P307. **In Georgia.**–164Ga462, 139SE15. **Two months clause intended to protect testator and all heirs and kindred against pressure in last moments of testator to influence bequests.** 218AppDiv 392, 218NYS201. **Will made three days before death is invalid** under New York law requiring devises to parks or libraries to be made two months before death. 218AppDiv392, 218NYS201. **Date of charitable gift made by will** is not computed as of date of codicil, which makes no effective gifts. 289Pa297, 137 A268. **Bequest for masses** is gift for religious use. 130Misc765, 225NYS187. **Bequest for perpetual care of burial plot** is for "charitable and benevolent use." 130Misc765, 225NYS187. **Value of decedent's property at time of his death** determines whether statute is violated. 130Misc765, 225NYS187. **Where value of decedent's jewelry not disclosed,** court cannot determine whether statute has been violated. 130Misc765, 225NYS187.

1054–86 204 Iowa648, 215NW710; 127 Misc579, 217NYS328 (one half); 128Misc 51, 217NYS318, (one half); 128Misc56, 217NYS316 (one half); 129Misc596, 222 NYS716; 130Misc337, 224NYS366; 130 Misc716, 224NYS363; 135Misc611, 238 NYS160; 135Misc691, 238NYS267 (proceeds of residence held debt); 230App Div290, 243NYS606. **In New York.**–126 Misc99, 213NYS422; 128Misc56, 217NYS 316; 130Misc1, 223NYS321 (Decedent Estate L. § 17); 130Misc337, 224NYS 366; 131Misc526, 227NYS470; 130Misc 716, 224NYS363. **In Georgia.**–164Ga 462, 139SE15. **In Oregon.**–123 Or406, 262P833. **Computation of value of remainders given to charity** determined on basis of actual duration of life estate, where life tenant has power to use corpus, and where such estate has already terminated. 130Misc1, 223NYS 321. **As general legacy for fixed sum; interest.**–128Misc51, 217NYS318. **Income tax held debt of testator.**–128Misc 51, 217NYS318. **Increase in value of property after testator's death** goes to trustees for benefit of those entitled under intestate succession, not to charity. 127Misc579, 217NYS323. **Charges and expenses of converting realty; to whom chargeable.**–128Misc51, 217NYS 318. **Time as of which proportion determined** is testator's death. 130Misc 1, 223NYS321.

1054–87 196Cal 778, 239P307 (University of Heidelberg held not exempt from provision forbidding bequests to charitable corporations by will made within thirty days before decease, as being exempt from taxation); 225AppDiv118, 232 NYS127; 135Misc611, 238NYS160. **In California.**–199Cal 661, 250P657. **In Mississippi.**–148Miss799, 114S740. **In New York.**–129Misc596, 222NYS716; 130 Misc336, 224NYS431. **Bequest for improvement and care of cemetery plot** is a gift for charitable and benevolent uses by statute. 127Misc579, 217NYS323. **Statute limiting devises for parks and libraries held not impliedly repealed** by decedent estate law limiting testamentary gifts to certain institutions and corporations. 218AppDiv392, 218NYS201. **Devise to fraternal corporation and unincorporated association** affiliated therewith, equally, latter incapable of taking former does not get latter's shares. 130 Misc1, 223NYS321. **Determination of status of corporation.**–225AppDiv118, 232NYS127. **That association was organized under special act** does not establish that it is not charitable or benevolent corporation, within statute. 225 AppDiv118, 232NYS127.

1055–88 148Miss799, 114S740; 98Pa Super360. **Devise to nonreligious charitable institution** intended for charitable work held void. 148Miss799, 114S740. **In Mississippi.**–148Miss799, 114S740. **Bequest to cemetery for ornamentation of lot** is not within statutory limitations. 230AppDiv290, 243NYS606.

1055–89 Law invalidating devises of over one half estate under condition held further conditioned by prior clause that will must be made two months before death, so that devise to library made by testatrix dying without leaving husband, etc., is invalid if made within two months of death. 218AppDiv392, 218 NYS201. **In New York.**–130Misc336, 224 NYS431.

1055–90 164Ga462, 139SE15; 225App Div118, 232NYS127. **Computation of amount.**–127Misc579, 217NYS323; 128 Misc56, 217NYS316; 132Misc319, 230 NYS266; 137Misc730, 244NYS398. **Computation based on expectancy of life of widow** may be adopted. 132Misc319, 230NYS266. **Gifts to more than one corporation.**–225AppDiv118, 232NYS127.

1056–91 164Ga462, 139SE15.

1056–92 164Ga462, 139SE15; 127Misc 579, 217NYS323. See also 130Misc1, 223 NYS321. **Only the excess is void,** etc. 128Misc56, 217NYS316. **Liability for expenses, taxes, and charges.**–127Misc 579, 217NYS323. **Subject to other legacies.**–127Misc579, 217NYS323.

1056–93 130Misc1, 223NYS321 (anyone who would derive a benefit therefrom); 230AppDiv290, 243NYS606. **In Iowa.**–207 Iowa127, 222NW431. **Contestant's stipulation on settlement of contest** that bequests were valid and legatees authorized to take is not a waiver of right to invoke limitation against religious bequest. 230AppDiv290, 243NYS606.

1056–93½–New. Act or certificate of incorporation determines whether corporation is benevolent or charitable corporation within prohibition of statute. 129 Misc596, 222NYS716.

1056–93⅓–New. Devise to charitable corporation must be determined as of date of testatrix's death in passing upon effect of prohibition against excessive testamentary gifts to such corporations. 222AppDiv341, 226NYS484.

1057–95 97Fla916, 123S668(2dcase); 322Mo 697, 16SW(2d)49; 131 Okl 144, 268P245; 118 Or96, 245P1069.

1057–96 118 Or96, 245P1069; 147Va 105, 136SE683.

1057–98 In Oklahoma.–267US373, 45SCt 247, 69LEd664. **Statute held not to apply** to disposition by wife of property she acquired in separation proceedings. 124Kan642, 261P838.

1057–99 97Fla916, 123S668(2dcase). **Husband's consent** to bequest by wife for charitable purposes is not operative as consent to codicil for different charitable purposes. 197Cal 28, 239P397. **Evidence held sufficient** to show that wife's consent was not freely and understandingly given. 127Kan314, 273P447.

1057–1½–New. In Oklahoma statute prohibits husband or wife from bequeathing more than two thirds of property away from one another. 41 OklAGR 63.

1057–1⅓–New. Under British Columbia Testator's Family Maintenance Act court will not make allowance to widow left by will in as good financial condition as in husband's lifetime. [1929] 4DomLR208.

1057–3 97Fla916, 123S668(2dcase) (except homestead rights); 124Kan633, 261 P532; 232Mich37, 205NW191; 23 OhA 462, 155NE168.

1058–4 158La516, 104S310 (bequest from mother to son held remunerative donation). **In Louisiana.**–158La516, 104 S310. **Remunerative donation** becomes dation en paiement when value of services is little inferior to gift. 158La516, 104S310.

1058–6 167La725, 120S275. **Donation need not state value of thing given**

or of services to be recompensed. 158 La516, 104S310. **Remunerative donations** cannot be reduced below estimated value of services rendered, if value of latter is but little inferior to that of gift. 158La516, 104S310. **Remunerative donation may be carved** out of legitime of forced heirs. 158La516, 104S310. **Remunerative donation to son** is not subject to reduction because of claim of forced heirs where value of services rendered is in excess of value of donation. 158La516, 104S310. **"Collation" under Louisiana statute.**–167La725, 120S275. **Only right of forced heir,** deprived by will of all share in estate, is to claim his legitime from other heirs. 167La 1095, 120S869.

1058–6½–New. Adopted child willed testator's interest in land of testator's intestate father need not be heir of intestate by lawful adoption. 220Ala654, 127S221.

1058–7 248NY421, 162NE473. **In Louisiana.**–170La921, 129S530.

1059–13 In Louisiana.–11LaA45, 122S 871(2dcase).

1059–14 248NY421, 162NE473.

1059–17 On the other hand, in case of marriage illegal but made by honest mistake in belief it was legal, putative husband may take as legal husband. 161La975, 109S782. **In Louisiana.**–166 La1020, 118S120, 62ALR281.

1060–28 212Ky209, 278SW555; 252 Mass176, 147NE842.

1061–30 208Ky760, 271SW1082.

1062–42 In Vermont.–Vt 146A253.

1063–49 192Wis111, 211NW652, 654, 51ALR1106 [quotCyc].

1063–50 192Wis111, 211NW652, 654, 51 ALR1106 [quotCyc]. **In Wisconsin.**–192Wis111, 211NW652, 51ALR1106.

1063–51 192Wis111, 211NW652, 654, 51 ALR1106 [quotCyc].

1063–52 192Wis111, 211NW652, 654, 51 ALR1106 [quotCyc].

1063–54 37F(2d)527; 216Ala232, 113S 40; 171Ark626, 286SW822; 204Cal 604, 269P450(2dcase); 98CalA306, 277P123; 244 IllA474; 87 IndA42, 157NE104; 203 Iowa1183, 212NW343; 124Kan449, 260 P651; Me 149A833(2dcase); 153Md1, 137A518; 219AppDiv627, 220NYS785; 127Misc387, 215NYS553; 121 Or432, 253 P869; 124 Or574, 265P425; 126 Or193, 268P75; 126 Or358, 268P988; 153Wash 625, 280P70; 103WVa394, 137SE543; 33Wyo 439, 240P927, 43ALR1010. **Contract may be parol.**–103WVa394, 137SE 543. **That property constitutes homestead** does not invalidate agreement between parents and son that property shall belong to son on parents' death in consideration of his remaining at home, running farm, and providing for care and support of parents till their death. 116Nebr789, 219NW142. **Contract to make will containing legacy compensating another** for services is valid. 41 GaA673, 154SE379.

1064–55 Suicide shortly after making will of itself does not show insanity. Or 290P751(2dcase).

1064–56 203 Iowa1183, 212NW343; 124Kan449, 260P651; 127Misc387, 215 NYS553 (oral agreement); 33Wyo 439, 240P927, 43ALR1010.

1064–57 Forbearance to sue is not sufficient consideration for contract to devise especially when contract rests in parol. 121 Or432, 253P869.

1064–58 204Cal 604, 269P450(2dcase); 205 Iowa687, 216NW679; 101NJEq275, 137A565; 127Misc889, 217NYS169.

1064–59 IndA 173NE333; 153Md1, 137 A518; 101NJEq275, 137A565; 222App Div82, 225NYS317; 127Misc387, 215 NYS553 (oral agreement); 127Misc889, 217NYS169; 23 OhA462, 155NE168; 53SD98, 220NW462, 60ALR619. **The promise is not sufficiently certain,** etc. 252Mass162, 147NE585. **General description held sufficient.** 216Ala232, 113 S40. **Beneficiaries need not be named in contract** if ascertainable by other writings. 244 IllA474.

1065–60 23 OhA462, 155NE168.

1065–61 23 OhA462, 155NE168.

1065–64 252Mass162, 147NE585; 237 Mich168, 211NW95; 87PaSuper333. See also 145Wash394, 260P259.

1065–68 TexCivA 19SW(2d)936 (contract held valid). **Doubtfully adopted child** held not entitled to specific performance of contract as heir at law. 23 OhA462, 155NE168.

1065–71½–New. Agreement not unenforceable because executed jointly by husband and wife. 216Ala232, 113S40.

1065–72 Sufficient consideration.–27F (2d)35.

1065–73 216Ala232, 113S40; 87 IndA 42, 155NE528; 202 Iowa1166, 211NW 699 (written contract importing consideration); 203 Iowa1183, 212NW343; 205 Iowa687, 216NW679; 216Ky674, 288SW301 (withdrawal of bastardy proceeding is sufficient consideration for agreement to prove will for child); 128Me133, 145A893(2dcase); 127Misc 889, 217NYS169; Or 290P751(2dcase) (holding consideration sufficient); 298 Pa235, 148A83; TexCivA 292SW273; 33Wyo 439, 240P927, 43ALR1010. See also 244 IllA474. **Sufficient consideration.**–42 Ida614, 247P10, 49ALR598; 208 Iowa412, 226NW10; 215Ky394, 285 SW188; 222Ky396, 300SW876; Mich 233 NW372; 222AppDiv82, 225NYS317; 103 WVa394, 137SE543. **Consideration held insufficient.**–33Wyo 439, 240P927, 43 ALR1010. **Inadequacy of consideration** cannot be complained of by party agreeing to make will where such party received all consideration asked for. 87 IndA42, 155NE528. **Promisee's going to live with promisor** held good consideration. 203 Iowa1183, 212NW343. **Legal obligation must be supported by something beyond consent to make will.**–101NJEq275, 137A565. **Performance of services as consideration.**–127Misc889, 217NYS169. **Plaintiff's promise held too indefinite to constitute good consideration.**–127Misc889, 217NYS169. **Oral contract to bequeath property to minor child of widow** in case of marriage has been held without legal and sufficient consideration. Kan 289P464. **Under mutual agreement between husband and wife to provide for certain relatives** undertaking of each is sufficient consideration for promise of other. 250 Mich302, 230NW156.

1066–74 Evidence insufficient to show immoral consideration.–126 Or193, 268 P75.

1066–75 Contract held to be controlled by law of place where made and where will was executed. 87 IndA42, 155NE 528.

1066–76 75CalA617, 243P62 (construed not to intend devise or bequeath of any part of property but that plaintiff should acquire residue of estate after payment of debts and cost of administration); 98CalA306, 277P123; 124Kan 449, 260P651; TexCivA 19SW(2d)936 (subsequent agreement made in reference to original adoption agreement constitutes merely reaffirmation of original contract). **Agreement to devise to children** coming to live with promisor casts benefit of promisor's estate on survivor of children where death of one preceded that of promisor. 203 Iowa1183, 212 NW343. **Particular agreements construed.**–251NY450, 167NE583.

1067–77 203Iowa1183, 212NW343.

1067–80 203 Iowa1183, 212NW343; 124 Kan449, 260P651. **Strict performance by promisee** is essential. 126 Or358, 268 P988.

1067–81 See also 218AppDiv341, 218 NYS317.

1067–84 202Cal 622, 262P723. **Anticipatory breach** occurs where promisor disavows agreement and declares intention not to abide by it and action for damages then accrues. 156Miss597, 126S388.

1067–86½–New. Where will devises land pursuant to contract to devise it, such provision of will cannot be defeated by subsequent revoking devise. 129 Or77, 276P270.

1067–86½–New. Agreement held not enforceable. 251NY450, 167NE583.

1068–88 171Ark626, 286SW822. **Clear and cogent testimony held essential** to show abandonment. 203 Iowa1183, 212 NW343.

1068–89 203 Iowa1183, 212NW343. **Acceptance of provisions of will** held not estoppel to claim under contract to make will. 119Kan644, 239P607.

1068–90½–New. But rescission of contract cannot be claimed by party who accepts benefits of will. 318 Ill 323, 149 NE256.

1068–97 218AppDiv341, 218NYS317; 199Wis162, 225NW831, 64ALR180. But see 83Mont214, 271P433. **Mutual agreement between husband and wife regarding disposition of property by will** is irrevocable by wife after death of husband who had performed. 250Mich302, 230NW156.

1068–98 289Pa331, 137A455.

1068–99 98CalA306, 277P123.

1068–2 87 IndA42, 155NE528. But see 98CalA306, 277P123.

1069–5 Mo 27SW(2d)6 (will conflicting with contract held void); 218AppDiv 341, 218NYS317. But see 131Misc208, 225NYS453.

1069–6 219AppDiv425, 219NYS166 (to compel declaration of constructive trust in property devised in breach of contract).

1069–7 See also 203 Iowa1183, 212NW 343.

1069–8½–New. Where husband and wife each made will giving other life estate and husband gave remainder to collateral kin and wife died first, husband can make later will with no provision for kin. Wash 292P743.

1069–10 44 Ida797, 260P423; 202 Iowa 1304, 211NW839; 156Miss597, 126S388; 196NC247, 145SE233.

1070–11 131 Okl 219, 268P291, 292 [quotCyc].

1070–15 32 OhA350, 166NE914. **Action to enjoin revocation of contract** may be maintained during lifetime of promisor. 87 IndA42, 157NE104.

1070–15½–New. Recorded contract that devise in will of one party to contract should act as deed to other party will prevail over later conveyance by testator to third party, 202 Iowa1166, 211NW699.

1070–15½–New. especially where grantee had actual notice of contents of will and of the contract. 202 Iowa1166, 211 NW699.

1070–16 215Ala23, 109S155; 100NJEq 417, 136A327; 196NC247, 145SE233; 146SC59, 143SE552, 59ALR1297.

1070–17 202 Iowa1304, 211NW839, 841 [citCyc].

1070–18 202 Iowa1304, 211NW839, 841 [citCyc].

1070–19 114Nebr728, 209NW614 (judgment in equity allowed as claim).

1071–20 195Cal 354, 233P330.

1071–21½–New. In suit in equity available proceeds of wrongful sale of realty to innocent purchaser may be subjected to payment of plaintiff's claim. 114 Nebr728, 209NW614.

1071–21½–New. Injunction.–Daughter contracting with father to care for him and at his death to have certain property may enjoin others by suit from interference with performance of the contract. 202 Iowa1304, 211NW839.

1071–22 131 Okl 219, 268P291, 292 [quotCyc].

1071–23 But see 27F(2d)35.

1071–24 215Ala23, 109S155 (only available remedy).

1072–26½–New. Where suit is one to impress trust on residue of estate after payment of debts and costs of administration, the heirs of deceased are the necessary and only proper parties, 75 CalA617, 243P62.

1072–26½–New. and neither the administrator nor the purchasers of property of the estate at probate sale are interested. 75CalA617, 243P62.

1072–28 207 Iowa252, 222NW872; 128 Me133, 145A893(2dcase); 322Mo 682, 15SW(2d)818. **Damages.**–197Cal 577, 241P861. **Answer and cross complaint** insufficient to sustain for damages. 197 Cal 577, 241P861. **Complaint held sufficient to set out cause of action in equity against executor and attorney for fraud, conversion and accounting.**–225AppDiv 597, 234NYS818.

1072–29 237Mich168, 211NW95; 51ND 543, 200NW94; TexCivA 16SW(2d) 366. **Promisee must prove performance on his part.**–207 Iowa252, 222NW872.

1072–30 163Ga138, 135SE734 (evidence

that testator told witness that certain tools belonged to claimant held admissible to establish agreement recited in will). **Memorandum** in handwriting of one alleged to have made oral agreement to make will is admissible to show such agreement had been made. 119Kan644, 239P607. **Acquisition of property.**–119Kan644, 239P607. **Prior will of decedent** providing for beneficiary of contract in accordance with alleged contract held admissible although defectively executed. 219AppDiv627, 220NYS785.

1072–31 37F(2d)527; 43 Ida354, 253P849, 851 [citCyc]; 203 Iowa1183, 212NW348; 130Kan834, 288P743; 216Ky674, 288SW301 (evidence held sufficient); Me 149A833(2dcase); 232Mich664, 206NW500; 101NJEq275, 137A565; 127Misc387, 215NYS553; 121 Or432, 253P869; 126 Or358, 268P988. **Evidence held sufficient.**–195Cal354, 233P330; 163Ga138, 135SE734; 163Ga703, 136SE893; 202 Iowa1304, 211NW839; 119Kan644, 239P607; 252Mich437, 233NW372; 127Misc387, 215NYS553; 225AppDiv719, 231NYS340; 289Pa331, 137A455. **Evidence held insufficient.**–317Ill441, 148NE308; 202 Iowa1166, 211NW699; 130Kan834, 288P743; Mich 211NW950; 322Mo 682, 15SW(2d)818; 322Mo 697, 16SW(2d)49; 196NC247, 145SE233; 131SC414, 127SE719. **Contract must be established beyond all reasonable doubt.**–153Wash625, 280P70.

1072–32 43 Ida354, 253P849, 851 [cit Cyc]. **Evidence held sufficient** to establish prima facie case. 219AppDiv627, 220NYS785.

1072–32½–New. Evidence of oral contract not to make will must be clear, definite and certain. 132 Or684, 288P210 (evidence held insufficient).

1073–33 Evidence held sufficient.–98NJEq126, 130A833; 188Wis50, 205NW401.

1073–34½–New. Evidence sufficient to show performance of services. 98NJEq126, 130A833.

1073–38½–New. Oral contract to transfer realty by will or deed in consideration for personal services may be shown by parol proofs and the oral agreement. 114Nebr728, 209NW614.

1073–38½–New. though will was subsequently destroyed, 114Nebr728, 209NW614.

1073–38¼–New. where personal services were fully performed and accepted. 114Nebr728, 209NW614.

1073–38⅓–New. Such performance of services by confidential attendant may be shown by evidence that attendant was frequently seen at her duties, and that they were performed and were acknowledged and accepted by other party. 114Nebr728, 209NW614.

1073–38⅓–New. Request for such services may be implied from evidence that they were rendered and accepted. 114Nebr728, 209NW614.

1073–38½–New. Breach of such oral contract for transfer of realty may be shown by failure to pay for services and evidence that transfer was never made and that means of performance were destroyed. 114Nebr728, 209NW614.

1073–38½–New. Evidence, consisting of oral testimony and document insufficient as will because of formal defects, held sufficient to warrant finding of agreement to make will in return for services. 99NJEq186, 131A634.

1073–39 35 Ida30, 204P472, 42ALR189; 203 Iowa985, 213NW567; 222Ky396, 300SW876; 231Ky682, 22SW(2d)111; Mo 27SW(2d)6 (value of stock at deceased's death); 114Nebr728, 209NW614; TexCivA 287SW110. See also 225Ky15, 7SW(2d)487. But see 119Kan633, 240P582.

1073–40 Where defendant abandoned medical practice to marry plaintiff on her agreement to make will bequeathing her property to him, his measure of damages is compensation for detriment suffered by change of position. 197Cal577, 241P861.

1073–42½–New. Measure of damages for failure to will property as agreed is difference in present value of property willed and such value of property legatee would have received otherwise. 318 Ill 323, 149NE256.

1073–42⅓–New. Plaintiff held entitled to have title to real estate vested in him. Mo 27SW(2d)6.

1073–45 198Cal 103, 243P862; 320 Ill 371, 151NE244; 326 Ill 425, 158NE127; 238Mich282, 213NW85; 316Mo 483, 291SW132; 228AppDiv579, 240NYS260; 47 RI 274, 132A721, 45ALR830; Wash 292P401; 33Wyo 439, 240P927, 43ALR1010. **Will creates no rights cognizable by court till death** of testator. 198Cal 103, 243P862.

1074–46 218Ala549, 119SE678; 326 Ill 425, 158NE127; 316Mo 483, 291SW132; 228AppDiv579, 240NYS260; RI 148A184; TexCivA 295SW206; Wash 292P401; 33Wyo 439, 240P927, 43ALR1010. **Attempt by specific terms to reserve right to change will** without complying with statutory requirements is ineffectual but does not render will invalid. 47RI 274, 132A721, 45ALR830.

1074–49 51ND543, 200NW94.

1074–52 218Ala549, 119SE678; Cal 287P964; 94CalA453, 271P542; 326 Ill 425, 158NE127; 129Misc15, 220NYS635; 228AppDiv579, 240NYS260; 26 OhA48, 159NE840; 5PaDist&Co 493; 156Tenn155, 299SW812; 57ALR601; TexCivA 295SW206; 146Wash537, 264P12; Wash 292P401; 38Wyo 365, 267P426, 60ALR1046.

1074–54 156Tenn155, 299SW812, 57ALR601.

1074–57 28F(2d)936; 219Ala497, 122SE24; 12PaDist&Co 16. **Where testator executes will in one state** while resident therein dies resident of another state, will is valid if executed according to law of either state. 174Minn13, 218NW447.

1075–58 213Ala27, 104SE234; 200Cal482, 253P921 (holographic will); 56AppDC333, 13F(2d)305; 328 Ill 431, 159NE780; 206 Iowa597, 220NW1; 148Miss799, 114SE740; 104NJL78, 138A873; 156Tenn404, 1SW(2d)1015. **State has inherent right** to regulate devise of land within its borders. 213Ala27, 104SE234.

1076–59 320Mo 519, 8SW(2d)71.

1076–60 320Mo 519, 8SW(2d)71.

1076–63 154Md307, 141A368; Sask [1929] 4DomLR1080.

1077–72 89CalA238, 264P542; 105Conn261, 135A555; 235Ky189, 30SW(2d)893. **Animus testandi must apply to particular instrument offered as will.**–235Ky189, 30SW(2d)893. **Essence of testamentary disposition** is that it must be declaration of testator's intention as to what shall take place after his death. 235Ky189, 30SW(2d)893.

1077–73 Cal 287P964; Iowa 229NW705; 232Ky525, 23SW(2d)956; 235Ky189, 30SW(2d)893; ND 231NW728; 11PaDist&Co 183; 153Va530, 150SE249, But see 108WVa466, 151SE715. **Will is made in contemplation of death,** but not necessarily under pressure of knowledge that death is near. 71CalA324, 235P54. **There is no definite reply by which testamentary intent may be gauged** but each case must stand on its particular facts. 196Cal 301, 237P739. **Intent of maker is not conclusive** as to whether instrument is to be testamentary in character. 188Wis4, 205NW486. **Writing must evidence present purpose of declaring bequest** and does not constitute will where it merely evidences intent to make such provision in future. 172Ark922, 290SW932. **One may act animo testandi** without knowing he is making a will if he manifests intent to dispose of property after decease. 47RI 274, 132A721, 45ALR830. **Where trust deed was executed at same time as will** with required formalities and with intention that the two should operate together. 47RI 274, 132A721, 45ALR830. **Informal document must be read in light of circumstances under which it was written** in determining whether it was intended as testamentary disposition. 202Cal 138, 259P431. **Statements in certain of deceased's letters** that house and lot were to belong to daughter and granddaughter has been held mere promise to make will. 153Va530, 150SE249. **"Testamentary intent" means** that writing offered for probate must have been executed by testator with intent that such writing take effect as his last will. 153Va530, 150SE249. **Will held to show sufficient testamentary intent** though containing statements inconsistent with such intent. 108WVa466, 151SE715. **Instrument expressing merely what testator intends to do more formally in future** cannot constitute will. 235Ky189, 30SW(2d)893.

1078–74 235Ky189, 30SW(2d)893.

1078–76½–New. Informal instrument which expresses intention of giving posthumous destination to maker's property is good testamentary disposition. 224 IllA562.

1078–78 51Philippine267; 108WVa466, 151SE715. **Disposition held valid.**–49 RI 308, 142A605.

1078–80½–New. Codicil purporting to pass interest never acquired, makes no effective gift. 289Pa297, 137A268.

1078–80½–New. Will disposing of estate aggregating eight hundred and seventy-eight thousand dollars, with express bequests of forty thousand dollars held valid. 99CalA617, 279P196.

1079–82 163La831, 112S802.

1079–84 Mass 169NE423; 157SC407, 154SE426; 108WVa466, 151SE715.

1079–88 196Cal 355, 237P1079; 329 Ill 588, 161NE124; 334 Ill 398, 166NE90(2d case); 226Ky42, 10SW(2d)474; 151Md 644, 135A841, 50ALR232; 240Mich7, 215NW35; 239Mich616, 215NW51; 164 Minn377, 205NW271; 316Mo 916, 292SW1039; NJ 129A742 (without regard to moral or ethical considerations); 133 Misc858, 234NYS505; 225AppDiv29, 232NYS84; 125 Or545, 267P396; 132 Or234, 285P224; Or 291P356; 290Pa249, 138A764; 296Pa74, 145A810, 66ALR222; 298Pa285, 148A297; 45Philippine216, 223 [quotCyc]; 48RI 1, 135A35; 70Utah456, 261P15; 192Wis111, 211NW652, 51ALR1106. See also 150Va452, 143SE683. But see 133Misc112, 231NYS596.

1079–89 199Cal 750, 251P637; 200Cal410, 253P697; 200Cal 710, 254P561; 205Cal 292, 270P961; 94CalA453, 271P542; 98CalA97, 276P366; 104Conn419, 133A209; 93Fla311, 112S80; 96Fla194, 117S887; 206 Iowa606, 219NW512; 151Md644, 135A841, 50ALR232; 155Md230, 141A531; 164Minn377, 205NW271; 316Mo 728, 293SW105; 98NJEq645, 130A655; 127Misc731, 217NYS493; 228AppDiv119, 239NYS44; Or 291P356; 293Pa465, 143A125; 45Philippine216, 223 [quotCyc]; 49RI 332, 142A536; 134SC412, 132SE811; 54SD42, 222NW491; TexCommnA 158SW(2d)571; 142Wash637, 254P236; 192Wis111, 211NW652, 51ALR1106; 197Wis323, 222NW255. But see MoA 278SW1063. **Preterition of blood relatives** does not render will invalid. 45Philippine216. **Omission of mention of child** does not invalidate will under statute. 179Ark543, 16SW(2d)996, 65ALR466. **Wills held not unnatural.**–230Ky230, 18SW(2d)997 (devise of all property to wife).

1079–89½–New. A new will cannot be set aside merely because it departs from the old. 293Pa465, 143A125.

1080–90 200Cal 710, 254P561; 45Philippine216, 233 [quotCyc]; 192Wis111, 211NW652, 51ALR1106.

1080–91 45Philippine216, 233 [quot Cyc].

1080–91½–New. Provision authorizing life tenant to disinherit any of his children turning out bad as respects remainder rights held void. 128Misc905, 220NYS505.

1080–93 83Colo 188, 263P413; 27Hawaii136, 141 [quotCyc]; 332 Ill 551, 164NE1; 116Nebr764, 219NW4, 8 [quot Cyc]; 126Misc25, 211NYS723; 128Misc370, 219NYS687; 132Misc710, 230NYS785; 58ND109, 224NW915; 144SC18, 142SE50. **Disposing portions and appointment of executor.**–163LaS31, 112S802. **Testator's intention to dispose of entire estate does not render provisions inseparable.** 144SC18, 142SE50.

1081–96 27Hawaii136 (where will contained clauses for benefit of enemy country in time of war).

1081–1 144SC18, 142SE50. **Provision devising land to executor for distribution of rents and profits to beneficiaries**

for fifty years creates valid trust for twenty one years from testator's death but is void as to remaining period. 144SC18, 142SE50.

1081-2 116Nebr764, 219NW4, 8 [quot Cyc]. But see 79CalA468, 250P195; Mo 30SW(2d)19.

1082-9 That parent has by will sought to deprive child of his share in estate is no ground for annulling will as whole. 167La1095, 120S869.

1082-9½-New. Where will is attacked for testatmentary incapacity, it must stand or fall as whole. 79CalA468, 250 P195.

1082-9⅓-New. Untrue statement in will that property owned by testator is his separate property does not invalidate will. 34PortoRico 594.

1082-12 TexCivA 288SW833, 835 [quot Cyc].

1083-17 TexCivA 288SW833.

1083-18 228Ky226, 14SW(2d)777; Tex CivA 288SW833; Alta [1929] 3DomLR 564. **Language held to make will contingent.-TexCivA** 288SW833.

1083-18½-New. Interest of testator, as reflected from writing and purpose to be served, will determine whether will is contingent. **TexCivA** 288SW833.

1083-18⅓-New. Intention to make will conditional must clearly appear from language thereof. 331 Ill 261, 162NE 843.

1084-19 See also **TexCivA** 16SW(2d) 400.

1084-24 In Kansas.-120Kan13, 241P 1087.

1084-26 100NJEq196, 134A822.

1084-29 198Wis538, 224NW739. **Words may be significant** though not changing legal effect. 49RI 74, 139A 665.

1084-31 249Mich640, 229NW459; 142 SC531, 141SE156. **The distinction between wills and deeds,** etc. 99Vt56, 130 A687. **Reservation by maker of right** to control land during life negatives intention to make will. 212Ala512, 103 S591.

1084-32 207Cal 391, 278P1031 (marriage agreement); **Iowa** 229NW705; 121 Oh159, 167NE389; 286Pa509, 134A 379; **Can** [1930] 4DomLR1037(2dcase).

1084-33 196NC271, 145SE393, 62ALR 288; **OhA** 161NE548; **TexCivA** 25SW (2d)689.

1085-34 47RI 274, 132A721, 45ALR 830.

1085-35 206 Iowa1121, 221NW851; 12PaDist&Co 44; 148Wash72, 268P132. **Mere fact that writing is to become effective only after death of party** is not sufficient to give it testamentary character. 88PaSuper128.

1085-37 284Pa169, 130A501. But see 212Ala512, 103S591; CalA 277P758.

1085-41½-New. Whether instrument is testamentary depends on intention of testator.-140Wash472, 249P992.

1085-41⅓-New. Evidence held insufficient to show that instrument was intended as testamentary disposition. 140 Wash472, 249P992.

1085-41¼-New. Extraneous circumstances may be considered, if necessary, to determine whether instrument is of testamentary character. 249Mich640, 229NW459.

1085-42 212Ala512, 103S591; 121Kan 678, 249P671; 142SC531, 141SE156; **TexCivA** 297SW509; **Man** [1927] 3 DomLR550. **Irrevocability.**-212Ala512, 103S591.

1085-43 212Ala512, 103S591; 207Cal 391, 278P1031; 164Ga201, 138SE78; 164Ga661, 139SE519; **NJ** 144A183; 116 Okl 180, 244P813; **TexCivA** 286SW 624; **TexCivA** 297SW509. **Evidence held inconsistent with intention to make present conveyance.**-Mass 168NE96.

1085-44 164Ga661, 139SE519.

1085-45 176Ark418, 3SW(2d)62.

1085-46 See also 85CalA720, 260P342.

1085-47 Cal 287P459; 91CalA554, 267 P375; 164Ga661, 139SE519; 121Kan 678, 249P671; **Mo** 289SW579; 116 Okl 180, 244P813; **Man** [1927] 3DomLR 550. But see 338 Ill 23, 169NE817.

1086-48 121Kan678, 249P671; 83Mont 214, 271P433; 133 Okl 247, 271P420. **Instrument not intended to pass title till grantor's death cannot be upheld as will,** unless executed in manner and form provided by statute for execution of wills. 116 Okl 180, 244P813.

1086-49 212Ala512, 103S591; 219Ala 340, 122S354; 164Ga201, 138SE78; 167 Ga368, 145SE661; 203 Iowa979, 213NW 605; 148Miss299, 114S621; 76Mont403, 247P554; 116 Okl 180, 244P813; **Tex CommnA** 29SW(2d)949; **TexCivA** 286 SW624. **Evidence held to warrant finding that** deed conveyed present vested interest. Mass 168NE96.

1086-50 TexCivA 297SW509.

1087-51 212Ala512, 103S591; 173Ark 561, 293SW705; 164Ga201, 138SE78; 167Ga623, 146SE311; 320 Ill 371, 151 NE244; 203 Iowa979, 213NW605; 206 Iowa1, 218NW35; 148Miss299, 114S 621; 76Mont403, 247P554; 116 Okl 180, 244P813; **TexCommnA** 293SW815; **Tex CivA** 286SW624; **TexCivA** 297SW509 (instrument construed to be deed though not to take effect until grantor's death); **TexCivA** 28W(2d)481.

1087-52 164Ga201, 138SE78; 116 Okl 180, 244P813. **Delivery to third persons to hold until grantor's death.**-203Cal 165, 263P220; 91CalA554, 267P375; 203 Iowa979, 213NW605; 265Mass265, 163 NE851; 76Mont403, 247P554.

1088-53 250Mich408, 230NW152.

1088-54 See also 83Colo 430, 266P217.

1088-55 249Mich640, 229NW459.

1088-56 212Ala512, 103S591; Cal 285 P314; 130Kan243, 285P574(2dcase); 232Ky525, 23SW(2d)956; 307Mo 269, 270SW646. **Deed reserving control, to be delivered at death,** would be invalid, since in fact a will executed without required formalities. 226AppDiv596, 236 NYS205.

1088-57 307Mo 269, 270SW646.

1088-58 212Ala512, 103S591; 164Ga 661, 139SE519.

1088-58½-New. Instrument in form deed held not effective as will where not witnessed in form prescribed for wills. 130Kan595, 287P596.

1088-66 238Mich282, 213NW85; 49RI 74, 139A665; 142SC531, 141SE156. **Wills and particular contracts distinguished.**-CalA 272P301; 88PaSuper 128; 150Wash391, 273P524.

1089-67 8PaDist&Co 504; 200Wis360, 228NW496.

1089-70 191NC679, 132SE796; 148 Wash72, 268P132.

1089-71 49RI 74, 139A665; 142SC531, 141SE156 (preamble written on same sheet containing note executed by decedent must be read as part of document). See also **TexCivA** 286SW624. **Agreement, in fact a will, held ineffectual to pass title** where not executed with formalities required. **TexCivA** 19 SW(2d)936.

1089-71½-New. Acquiescence of testator's wife in marriage agreement is immaterial in determining whether instrument was testamentary disposition. 207Cal 391, 278P1031.

1089-73 103CalA39, 283P949; 188Wis 4, 205NW486. But see 5PaDist&Co 493.

1089-73½-New. Mere fact that note was executed by deceased contemporaneously with will or that possession was retained by deceased till death does not make note testamentary document. 188Wis4, 205NW486.

1090-74 Instrument containing note to constitute contract instead of instrument of testamentary character, must have created present vested right. 142 SC531, 141SE156.

1090-76 88PaSuper128.

1090-78 TexCommnA 29SW(2d)949 (deed of trust held effective on delivery).

1090-80 TexCommnA 29SW(2d)949 (instrument held absolute conveyance); 140Wash472, 249P992.

1090-81 254Mass584, 150NE866; Mass 168NE96 (absolute conveyance followed by grantee's voluntary declaration of trust); 238Mich282, 213NW85; 83NH 489, 144A848; 102NJEq454, 141A267; **NJPrerog** 146A471; 99Vt56, 130A687. **Deed of trust made in lieu of will** does not render instrument testamentary disposition of property. 336 Ill 366, 168 NE349. **Evidence held sufficient to sustain finding** that declaration of trust by grantee was voluntary. Mass 168NE96.

1091-85 Notwithstanding the fact that it purports expressly to reserve the power to change or amend its provisions by nontestamentary act, it is subject to probate as a valid will. 48RI 72, 135A 402. **Trust deed is given force and character of will** merely because it was probated as such. **TexCommnA** 29SW (2d)949.

1091-87 336 Ill 366, 168NE349; 254 Mass584, 150NE866.

1091-88½-New. However, instrument designating new beneficiaries under trust is operative, although invalid as will. 220Ky43, 294SW767.

1091-90 232 IllA156.

1091-93 Nebr 228NW619; 83NH489, 144A848.

1091-94 228Ky259, 14SW(2d)1096; 232 Ky469, 23SW(2d)922 (evidence held at most to show nuncupative will rather than gift causa mortis); 163La458, 112 S298; **NJCh** 145A462. **Indorsement of certificates of stock to children to be effective if indorser failed to return from trip** is not gift but is testamentary act. 84CalA253, 257P911.

1091-95 Ill 173NE100; 228Ky82, 14SW (2d)189; 56ND152, 217NW150; 283Pa 375, 129A98; 49RI 74, 139A665.

1091-95½-New. But mere form of instrument of deposit of money in book to joint account is not conclusive on question whether present gift or quasi testamentary disposition intended. 260Mass 481, 157NE517.

1091-96 98NJEq728, 130A628; 133Misc 93, 231NYS251; 153Va530, 150SE249.

1091-96½-New. Deposit to joint account of decedent and another is invalid because not made by will, if intended to take effect at death. 260Mass 481, 157NE517.

1091-98 CalA 272P301; 338 Ill 328, 170 NE257; 322Mo 1219, 18SW(2d)77; 117 Nebr257, 220NW269; 287Pa448, 135A 119.

1092-1 235Ky189, 30SW(2d)893; Mass 169NE423. **Form of instrument** not conclusive on question of testamentary character. 188Wis4, 205NW486. **Instrument must contain language showing testamentary intent.**-ND 231NW728.

1092-2 170La449, 128S273; 320Mo 852, 8SW(2d)931; 125 Okl 151, 256P912, 914 [quotCyc], 62ALR935; 84Pa169, 130A 501. **Good-faith wills are solemn instruments** not to be set aside because of mere irregularities as to form, but should be upheld whenever possible. **IndA** 167NE141.

1092-2½-New. Testator is not required to write all provisions of his will in one sentence or in one paragraph. 121Kan 57, 245P1039.

1092-4 213Ala178, 104S500 (under statute); 158La74, 103S515. **Verbal instructions of a testator,** etc. 83Colo 188, 263P413. **Writing includes printing on paper.**-213Ala184, 104S500.

1092-5 Mass 169NE423.

1092-6 213Ala184, 104S500. **Part typewritten and part written** is sufficient compliance with statute. 213Ala184, 104S500.

1092-9 320Mo 1058, 10SW(2d)47; **Tex CivA** 22SW(2d)313(2dcase) (will held not void for uncertainty). **Description of property.**-323 Ill 303, 154NE135.

1092-11 231Ky360, 21SW(2d)433(2d case).

1092-11½-New. Legacy of two $1,000 bonds held sufficiently certain, where testatrix left numerous such bonds. 289 Pa297, 137A268.

1092-12 196Cal 301, 237P739; 202Cal 138, 259P431; **CalA** 277P758; 252Mass 162, 147NE585 (incurable uncertainty); 8PaDist&Co 621; 108WVa466, 151SE 715 (held to show testamentary intent).

1093-14 See also **Iowa** 229NW261.

1093-17 196Cal 301, 237P739; 201Cal 357, 256P1101; 149Va896, 141SE753. But see **Utah** 285P299.

1093-20 206 Iowa1121, 221NW851; 128Misc254, 219NYS313.

1093-21 131 Or481, 283P39.

1093-22½-New. Indian is not required to make two wills, one for allotted land held in trust by government and another for other property. 48 Ida810, 285P478.

1094-23 212Ala605, 103S594; 196Cal 301, 237P739; **Me** 151A150 (sheets consecutively numbered); **Mass** 169NE423;

283Pa282, 129A90. **Where will probated** is on separate unattached sheets of paper, inquiry should be as to whether it is identical writing attested and signed by testatrix and witnesses. 220Ky817, 295SW1035. **If all sheets were in room at time of execution** and testator intended to execute them as one will the separate sheets may be probated. **Me** 151A150. **Internal evidence of coherence of subject matter necessary.**–Me 151A150.

1094-24 220Ky817, 295SW1035; **Me** 151A150 (probate warranted); 283Pa282, 129A90. **Credible parol proof of** identity of disconnected sheets offered with those executed as will is sufficient without necessity of physical or coherent attachment. 220Ky817, 295SW1035.

1094-26 123Kan681, 256P800; 210Ky654, 276SW563; **PrEdwIsl** [1929] 1DomLR418. **Limitations of rule.**–126Misc616, 214NYS461; 128Misc254, 219NYS313; 283Pa285, 129A94. **Where deed referred to in will was never delivered,** it does not become part of will as devise after death. 51Nev437, 279P32.

1095-27 But see 170La449, 128S273.

1095-29 204Cal166, 267P104.

1095-30 **Me** 151A150.

1096-33 **Evidence insufficient to show existence.**–Me 151A150.

1096-36½–New. Purpose for which instrument was made is immaterial. 210Ky654, 276SW563.

1096-38½–New. Will may be valid execution of power of appointment though made before death of person whose will created the power. 105Conn57, 134A155.

1096-40 228Ky226, 148SW(2d)777; **Ont** [1929] 1DomLR542. **Writings held not codicils.**–Utah 285P285(2dcase).

1096-43 284Pa169, 130A501.

1096-44 220Ala576, 126S636.

1096-44½–New. Where alleged codicil with will only by reference to beneficiary named, rejection thereof in proceedings for probate held proper. 143Wash578, 255P960.

1096-44¾–New. Codicils need not be physically attached to original will or to each other. 196NC271, 145SE393, 62ALR288.

1096-45 47RI274, 132A721, 45ALR830.

1097-53 152Va411, 147SE251.

1097-55½–New. Insertion of words in will which are necessary to fill blanks or to complete sense of will are not "alterations," and do not come under rule of law requiring explanation. 334Ill115, 165NE644, 67ALR1127.

1097-55¾–New. Name of beneficiary may not be changed by any person. TexCivA 148SW(2d)956.

1097-57 198Cal103, 243P862 (form of execution is matter of statutory regulation); 204Cal166, 267P104; 317Ill401, 148NE274; **NJOrphans** 134A340; 217AppDiv342, 217NYS176; 128Misc718, 221NYS205; 129Misc77, 220NYS781; 130Misc172, 223NYS691; 132Misc625, 229NYS821; 118Or308, 246P720; 50Philippine30; **SD** 230NW884; 146Wash537, 264P12. **Substantial compliance is sufficient.**–232Ky572, 248SW(2d)282; 112Okl25, 239P592; 38OklACR342. **Rigid enforcement of statutory requirements is limited to cases of** palpable violation of law. 163La831, 112S802. **Statute stating requirements in execution of will** is designed to prevent fraud and needs application to given case to prevent fraud on testator. 149Md498, 132A55. **Testatrix's intent is not sufficient to make will valid** if statute is not complied with. 129Misc77, 220NYS781. **What testator did and not what he intended to do** determines whether will was executed with statutory formalities. 130Misc907, 225NYS536.

1098-60 325Ill201, 156NE270; 118Or308, 246P720. **Strained and technical construction of statute** will not be adopted to defeat will. 125Or288, 266P630.

1098-60½–New. Substantial compliance with statutory requirements is sufficient. 126Misc704, 214NYS678 (in absence of fraud, deception, undue influence, or manual incapacity).

1098-60¼–New. Approval of Indian will by secretary of interior may be set aside more than year after death of Indian, though not on ground of fraud, but that full hearing was not had. 24F(2d)613.

1098-66 286Pa583, 134A513.

1099-71 **NJOrphans** 134A340; **35OhA** 283, 172NE386. **Codicil to will need not be separately dated** if it has appearance of having been written at same time as will itself. 170La449, 128S273.

1100-76½–New. [g] **½ Forged Will.** That spurious paper propounded as will was signed by decedent does not make it any less a forgery if fraudulently altered by addition of witnesses' signatures and false certificate of acknowledgment. 127Misc187, 215NYS230.

1100-77 132SC63, 128SE850, 851 [cit Cyc]; TexCivA 308SW(2d)573. **Evidence held to show that testator dictated will** substantially as written. **La** 105S13. **Intention of testator is immaterial** in testing validity of execution. 128Misc254, 219NYS313.

1100-78 132SC63, 128SE850.

1100-81 239Mich616, 215NW51.

1100-83 8PaDist&Co601.

1101-85 8PaDist&Co601.

1101-88 132SC63, 128SE850, 851 [cit Cyc].

1101-92 121Kan474, 247P868; 82NH281, 133A166, 45ALR1433. **Special statute** as to signature of will is not limited by general statute as to signatures of writings. 188Wis183, 205NW814, 42ALR951.

1102-93 213Ala178, 104S494; TexCivA 286SW673; **Ont** [1928] 4DomLR786.

1102-95 84IndA459, 150NE376; 232Ky572, 248SW(2d)282; 154Md117, 140A56, 57ALR828; 126Misc704, 214NYS678.

1102-95½–New. Test of what constitutes signature is whether testator intended name or mark to be his signature. 88PaSuper556.

1102-96 133Misc745, 234NYS239; **Or** 246P720, 722 [citCyc]; 286Pa466, 133A645; 289Pa554, 137A734 (reasons held to justify mark); 299Pa398, 149A701; 88PaSuper556. **In Pennsylvania.**–92PaSuper314 (facts held to bring case within statute). **Testator may be physically assisted in making mark.**–13PaDist&Co314.

1102-96½–New. Lack of education held to permit mark. 289Pa554, 137A734.

1102-96¾–New. Weakness held to permit mark. 289Pa554, 137A734.

1103-99 286Pa466, 133A645; 9PaDist&Co512; 13PaDist&Co314.

1103-1 82NH281, 133A166, 45ALR1433; 286Pa466, 133A645; 289Pa267, 137A260; 289Pa554, 137A734 (grounds for implying authorization); 9PaDist&Co538. **Knowledge of document and seeing signing.**–286Pa466, 133A645. **Direction to sign may be express or implied.**–286Pa466, 133A645. **Statute applicable where physical disability prevents signing.**–286Pa466, 133A645. **In Pennsylvania.**–13PaDist&Co314. **Permission to append signature may be implied.**–13PaDist&Co314.

1104-3 **Ont** [1930] 1DomLR603 (compliance sufficient by person directed by testator signing his own name and not that of testator).

1104-5 133Misc745, 234NYS239; 289Pa554, 137A734; 188Wis183, 205NW814, 42ALR951.

1104-7 195Cal711, 235P1012; 225AppDiv674, 231NYS188; 118Or308, 246P720, 722 [citCyc]; 289Pa267, 137A260; 289Pa554, 137A734; 8PaDist&Co601.

1104-8 **Extent of aid given is immaterial** in such case. 8PaDist&Co601.

1104-9½–New. It is not necessary that person, guiding hand of testator, certify that he wrote his name at his request. 118Or308, 246P720.

1105-12 **IndA** 167NE141; **IndA** 168NE250; **Iowa** 229NW261; **Mass** 168NE162; 243Mich566, 220NW764; 177Minn390, 225NW398. **What amounts to signing under statute of frauds** is sufficient under statute requiring will to be signed. **Iowa** 229NW261. **Signature immediately followed by attestation clause** preventing insertion of other matter sufficiently shows signing of completed will. **Iowa** 229NW261.

1105-13 197Cal36, 239P404. **Signature in exordium clause** held insufficient. 197Cal36, 239P404.

1105-14 134Misc154, 235NYS711; 138Misc192, 245NYS206.

1106-19 197Cal36, 239P404; 129Misc77, 220NYS781.

1106-23 129Misc77, 220NYS781; 133Misc174, 231NYS90; 134Misc154, 235NYS711; 138Misc192, 245NYS206.

1106-24 134Misc154, 235NYS711.

1107-26 **Provision naming executor is no part of will** when written in after signature of testatrix. 136Misc413, 243NYS229.

1107-27 129Misc77, 220NYS781; 133Misc174, 231NYS90.

1107-28 96PaSuper26.

1107-30 39Wyo482, 273P684, 64ALR203.

1108-36 85CalA87, 258P969; 161Ga690, 131SE885; 254Mass576, 151NE87; 82NH281, 133A166, 45ALR1433; 100NJEq521, 136A322; TexCivA 168SW(2d)400. **The chief purpose in subscribing,** etc. 154Miss381, 122S496, 63ALR1188. **All required of testator must be done** before witnesses can sign. 99NJEq363, 132A115.

1108-39½–New. Witness impliedly testifies he saw testator's name in will and that testator acknowledged it as his signature. 215Ala402, 110S705.

1108-41 213Ala178, 104S494; 161Ga690, 131SE885; 233Ky23, 248SW(2d)902; 126Me256, 137A771, 53ALR208 (three witnesses essential); 320Mo519, 8SW(2d)71; 99NJEq363, 132A115. **Where one witness signed, and then two acknowledged,** second witness signing will thereafter, will held invalid. 99NJEq363, 132A115.

1109-46 126Me256, 137A771, 53ALR208; **Me** 152A84.

1110-47 **Official, professional, business, or personal relations** between witnesses to will and proponent did not disqualify witnesses, or render them incompetent, in will contest. 264Mass276, 162NE312. **Where testator names two witnesses in body of will,** attestation by one of such witnesses and another is sufficient. 127Kan340, 273P480, 68ALR743.

1110-47½–New. All witnesses may be closely related to each other by blood or marriage if otherwise qualified. Mass 172NE228.

1110-48 296Pa48, 145A697(2dcase); 143Wash578, 255P960.

1110-52 See **NJPrerog** 143A92.

1110-53 99Fla600, 126S762; 125Kan154, 264P77. **Witnesses are presumed to have performed their duty** in matter of satisfying themselves of competency of testator. 154Miss381, 122S496, 63ALR1188.

1110-53½–New. Witnesses should be satisfied that testator is not under restraint or undue influence.–125Kan154, 264P77.

1111-54 **Me** 152A84. **Nature of interest.**–Me 152A84.

1111-55 **That subscribing witness to will revoking prior wills was disinherited by will revoked does not invalidate revocation.** 118Nebr634, 225NW869, 64ALR1299.

1111-56 126Me256, 137A771, 53ALR208; **Me** 152A84.

1111-58 126Me256, 137A771, 53ALR208. **Club member held disinterested** where club was beneficiary. 126Me256, 137A771, 53ALR208. **In Pennsylvania.**–296Pa48, 145A697(2dcase).

1111-60 **Presence of legatee at making of will does not render it invalid,** under statute providing that he cannot be witness. **La** 105S13.

1111-61 102NJEq408, 141A88; 143Wash578, 255P960.

1112-63 82Colo5, 256P630.

1112-68 157Miss221, 127S901; **SD** 233NW274.

1113–70 126Me256, 137A771, 53ALR 208 (dictum).

1113–74 200Cal 147, 252P597; 143 Wash578, 255P960. **Employees of bank** which is appointed executor and trustee of will are not disqualified to act as subscribing witnesses. 200Cal 147, 252 P597.

1114–79½–New. A stockholder of a bank named executor was held not a credible witness under statute. 320 Ill 50, 150NE337.

1114–79⅓–New. A devise to a bank as executor and trustee for beneficiaries is not void because witnesses were stockholders of the bank. 320 Ill 50, 150NE337.

1114–79¼–New. A stockholder of a bank which is appointed executor under a will may be compelled to testify as a witness if there are not sufficient attesting witnesses without him. 320 Ill 50, 150NE337.

1114–80 200Cal 147, 252P597.

1114–82 But see Me 152A84.

1114–83 126Me256, 137A771, 53ALR 208 (dictum).

1114–86 126Me256, 137A771, 53ALR 208 (dictum); 289Pa297, 137A268 (where witnesses' connection with organization was limited to matters of doctrine and discipline). **In Pennsylvania.**–290Pa374, 139A129; 296Pa48, 145A697(2dcase). **Witness to will giving bequest to Odd Fellow's Orphans' Home is disinterested and competent,** under statute, he being ineligible for admission and having no children who might obtain admission through his death, though member of order. 290 Pa374, 139A129.

1115–89 See also 157Miss221, 127S901.

1115–98 55ND664, 215NW160.

1115–99 TexCivA 286SW673, 676 [quot Cyc]. **In Texas.**–CivA 286SW673.

1115–1 100CalA676, 280P987; 82Colo 5, 256P630 [citCyc]; 213Ky147, 280SW 947; 129Misc361, 222NYS268; 222App Div64, 225NYS244; 38 OklACR342; Tex CivA 286SW673, 676 [quotCyc].

1115–2 38 OklACR342; TexCivA 286 SW673, 676 [quotCyc].

1115–3 195Cal 711, 235P1012; 145Miss 23, 110S862; TexCivA 286SW673, 676 [quotCyc].

1115–4 82Colo 5, 256P630 [citCyc]; 213 Ky147, 280SW947; TexCivA 286SW673, 676 [quotCyc].

1116–6 TexCivA 286SW673, 676 [quot Cyc].

1116–9 145Miss23, 110S862; 319Mo 87, 5SW(2d)383; 215AppDiv180, 213NYS 455; TexCivA 286SW673, 676 [quotCyc].

1116–10 TexCivA 264SW231, 233 [quot Cyc]; TexCivA 286SW673, 676 [quot Cyc]; 146Wash324, 262P646.

1117–18 213Ala178, 104S494; 334 Ill 115, 165NE644, 67ALR1127; 154Miss 381, 122S496, 63ALR1188.

1117–19 55ND664, 215NW160.

1117–21 82Colo 5, 256P630; 129Misc 361, 222NYS268.

1117–22 82Colo 5, 256P630; 48 Ida171, 279P625; 145Miss23, 110S862; 112 Okl 25, 239P592 [citCyc] (substantial compliance with statute sufficient). **There is a sufficient publication,** etc. 48 Ida 171, 279P625. **Writing of will by subscribing witness at request of deceased** and embodying therein disposition deceased desired to make of his property and signing of will by deceased is sufficient declaration that paper was his last will and testament. 145Miss23, 110S862.

1118–23 Market value.–102Conn684, 129 A721. **Notarial phrase** indicating will to have been made and executed in presence of witnesses ("asi lo dice y otorga a presencia de los testigos") held sufficient. 29PortoRico 762, 763.

1119–30 213Ala178, 104S494; 334 Ill 115, 165NE644, 67ALR1127; 154Miss 381, 122S496, 63ALR1188; 125 Or288, 266P630. **Reading of will in presence of witnesses** is not required. 118 Or308, 246P720.

1120–33 222AppDiv686, 224NYS733.

1120–36 Me 151A150.

1120–37 219Ala265, 122S29; 234Mich 170, 207NW924; 126Misc704, 214NYS 678.

1120–38 213Ala178, 104S494; 213Ala 184, 104S500; 219Ala265, 122S29; 161 Ga690, 131SE885, 887 [citCyc]; Mass 168NE162; 99NJEq363, 132A115; 55 ND664, 215NW160. **Will need not be read to testator** in presence of subscribing witness. TexCivA 30SW(2d)573.

1120–41 19F(2d)705; 213Ala178, 104S 494; 233Ky23, 24SW(2d)902; 130Misc 547, 225NYS203; 189NC509, 127SE549; 195Wis345, 219NW378.

1121–44 126Misc704, 214NYS678; 130 Misc547, 225NYS203.

1121–45 99NJEq363, 132A115.

1121–46 Contra 196Cal 321, 237P738; 99NJEq363, 132A115.

1121–47 CalA 288P120; 126Misc704, 214NYS678. Contra 99NJEq363, 132A 115.

1121–48 213Ala178, 104S494; 213Ala 184, 104S500; 256 IllA218; 174Minn13, 218NW447. **In Illinois.**–339 Ill 126, 171 NE163.

1122–49 219Ala265, 122S29; 232Ky572, 24SW(2d)282; 125 Or288, 266P630.

1122–50 130Misc547, 225NYS203.

1122–55 126Misc704, 214NYS678. **Witness in position where he could and ought to have seen testator sign** is sufficient "signing in presence." 126Misc704, 214NYS678.

1123–58 241Mich679, 207NW924.

1123–59 213Ala178, 104S494; 84 IndA 459, 150NE376; 234Mich170, 207NW924; 55ND664, 215NW160. **Whole number must subscribe.**–99NJEq363, 132A115. **Testator need not actually view act of signing by attesting witnesses,** but circumstances must be such that testator could have seen signing, such being meaning of word "presence." 96CalA 640, 274P623.

1123–62 19F(2d)705; 256 IllA218; 125 Or288, 266P630.

1124–66 126Kan145, 267P26.

1125–70 339 Ill 126, 171NE163; 233Ky 23, 24SW(2d)902; 243Mich566, 220NW 764; 125 Or288, 266P630. But see 234 Mich170, 207NW924. **In Philippines.**–45Philippine216. **Clerical error** consisting of omission of "the" from expression "of the others" in attestation clause held harmless. 45Philippine216.

1125–72 82Colo 5, 256P630; 256 IllA 218; 46Philippine701 (clause held sufficient).

1125–74 46Philippine841 (statute held mandatory); 46Philippine922; RI 141 A616. But see 48Philippine506; 50 Philippine30.

1126–76 35PortoRico 832 (not required to be stated by notary attesting will that witnesses assured themselves of testator's legal capacity). But see 50Philippine30. **Attestation clause held sufficient.**–45Philippine215. **Illustrations.**–339 Ill 126, 171NE163. **Essential of attestation clause under Philippine statute stated.**–50Philippine30.

1126–78 226Ky311, 10SW(2d)1106.

1127–84 47RI 274, 132A721, 45ALR830. **Notary public taking acknowledgment of will** becomes in law also witness. 154 Miss381, 122S496, 63ALR1188.

1127–86 128Misc71, 218NYS234.

1127–87 128Misc71, 218NYS234.

1127–88 But see 128Misc71, 218NYS234.

1128–94 84 IndA459, 150NE376.

1128–97 Wills on separate sheets.–46 Philippine700.

1128–97½–New. One whose name appeared on next to last page of will, in handwriting close to cross which had been penned on paper, with word "his" above cross and word "mark" below it, was not "subscribing witness" to will. 133Misc547, 233NYS235.

1129–4 Alta [1929] 3DomLR564. **Absence of period at end of concluding paragraph** does not render will incomplete where no periods were used in closing other paragraphs or sentences. 85CalA 486, 259P956. **That only twenty-four words of seven hundred word letter were claimed to constitute will** does not invalidate letter as testamentary disposition. Cal 287P964.

1129–5 198Cal 721, 247P577 (will dated and written, but not signed, insufficient); 170La122, 127S386. **Document held valid will.**–196Cal 623, 238P938. **Letter written by soldier in actual military service is effectual as will,** there being ample proof of handwriting. NJ Orphans 134A88. **Letter held to constitute holographic will.**–Cal 287P964.

1129–6 47 Ida668, 279P291.

1129–7 197Cal 36, 239P404; 198Cal 721, 247P577; 226Ky311, 10SW(2d) 1106; 166La695, 117S777; 196NC373, 145SE689; Utah 285P285(2dcase). See also 108WVa466, 151SE715.

1129–8 198Cal 721, 247P577; La 117S 777; 168La413, 122S274(3dcase); ND 231NW728. See also 166La681, 117S 772.

1130–9 198Cal 721, 247P577; 166La 695, 117S777. **Words "Love from Muddy" near end of letter** propounded as will is valid signature. Cal 287P964. **That envelope containing instrument bears signed superscription that document is will** is insufficient. 170La122, 127S386. **That signature appeared on margin instead of end of letter,** propounded as will does not render letter invalid as will. Cal 287P964.

1130–10 89CalA238, 264P542; 125 Okl 151, 256P912, 914 [quotCyc], 62ALR935; 34PortoRico 50; 34PortoRico 234 (sufficient). **Letter from husband to wife expressing intent to have war risk insurance policy changed** is not entitled to probate as holographic will. 172Ark 922, 290SW932.

1130–11 125 Okl 151, 256P912, 914 [quotCyc], 62ALR935.

1130–12 200Cal 482, 253P921.

1130–13½–New. Holographic will may be made in form of letter. 34PortoRico 234.

1130–14 Keeping with private papers in locked drawer warrants finding that will was among valuable papers and effects. 198NC577, 152SE685.

1130–17 If will is entirely written, dated, and signed by testator it is sufficient without being written on same day, at one time, and in same ink. 164La620, 114S489. **Location of signature.**–138 Misc192, 245NYS206.

1130–19 205Cal 719, 273P552, 61ALR 393; 103CalA577, 284P1067. **Printed heading of office stationery on which will was written** has been held not to invalidate olographic will. 203Cal 618, 265P183. **Will written on paper bearing printed matter** may be olographic will where printed matter was not intended by testator to be part of will. Utah 285 P299. **Will written on printed bill containing printed poetic stanza** is olographic will where written portions are complete in themselves. Utah 285P285 (2dcase).

1131–20 Holographic will, witnessed, and signed, showing testamentary intention, held to pass items therein, as beneficiaries were listed with amounts opposite their names, although no formalities were embodied, as preamble or title. 126Misc726, 215NYS318.

1131–21 197Cal 36, 239P404.

1131–22 ND 231NW728; Utah 285P 299. But see 168La728, 123S306.

1131–23 168La728, 123S306; ND 231 NW728. But see 103CalA577, 284P1067.

1131–27 168La728, 123S306 (below signature).

1131–28 85CalA486, 259P956; 94CalA 674, 271P753. **Signature below paragraph below first signature** held sufficient to make whole writing valid. 196 Cal 623, 238P938. **Whether signature in** body of will is token of execution is determined from entire instrument. 94 CalA674, 271P753.

1131–29 Will not signed at end held complete and executed. 200Cal 400, 253 P702. **Where signing is not in customary place** it must be established on face of instrument that it is complete. 200 Cal 400, 253P702.

1131–30½–New. Will signed "Your loving mother" held sufficient. 196Cal 623, 238P938.

1131–30¼–New. Fact that will is holographic resolves many informalities in favor of probate of instrument. 126Misc 704, 214NYS678.

1131–30¼–New. Envelope in which original holographic will and codicil were inclosed, and which bore inscriptions, "holographic will of M. C. S., July 14, 1926. Date of will," and, "codicil dated October 13, 1926. Opened and resealed by self, October 13, 1926," followed by testator's signature, did not of itself constitute will incorporating by ref-

erence two documents sealed within. 94 CalA674, 271P753.

1131-30½-New. Time of dating.–Will may be dated subsequent to execution. 168La728, 123S306.

1132-35 212Ky209, 278SW555; 168La 728, 123S306.

1132-36 See 243Mich566, 220NW764.

1132-39 Evidence held to show holographic will not established. 43 Ida447, 252P868. **Evidence held sufficient.**–125 Okl 151, 256P912, 62ALR935.

1132-41 212Ky209, 278SW555 (without destroying devise).

1132-41½-New. As evidence and issues of fact in proceedings to probate will are solely for court, jury is properly excluded during hearing of preliminary proofs. 196Cal 623, 238P938.

1132-41¼-New. Where printed words appearing on paper were not essential to validity of instrument as holographic will, court will not presume that testator made them part of instrument without some evidence appearing on face of instrument manifesting such intention. 205Cal 719, 273P552, 61ALR393.

1132-42 202Cal 124, 259P437, 54ALR 913; 196NC271, 145SE393, 62ALR288.

1132-43½-New. Original holographic will, referred to in codicil as "codicil will," is sufficiently incorporated therein, where correct date is recorded and description of contents of former instrument is accurate, and two documents are sealed together in single envelope bearing inscription "holographic will." 94 CalA674, 271P753.

1132-47 Evidence held sufficient to submit issue of undue influence to jury. TexCivA 275SW124 (wife).

1133-56 159La1044, 106S559; 134Misc 671, 236NYS529 (unattested writing by deceased soldier is not entitled to probate under New York statute, in nuncupative proceedings). See also 316Mo 483, 291 SW132.

1133-59 127Misc784, 217NYS489. **What is actual service.**–242Mich287, 218 NW774.

1134-60 Member of marine corps is not mariner on shipboard when attending training school on shore. 242Mich287, 218NW774.

1134-63 In Porto Rico.–33PortoRico 309.

1135-64 Contemplation of death, etc. 127Misc784, 217NYS488 (holding that soldier in camp at home before starting for front contemplating that death is imminent, may make oral will in extremis, not necessarily meaning in articulo mortis).

1136-71 156Miss711, 126S648.

1136-74 159La1044, 106S559; 156Miss 711, 126S648 (dictated letter addressed to executor).

1137-80 167Ga38, 144SE774. **The statement of testamentary purposes made on two occasions,** each time to a single witness, but in substantially identical terms, is sufficient. 127Misc784, 217NYS 488.

1137-81 162Ga433, 134SE52; 167Ga 38, 144SE774; 169Ga485, 151SE8.

1138-86 169Ga485, 151SE8. **Testator need not call upon each witness** to bear in mind that he is making his will. 169 Ga485, 151SE8.

1138-95 162Ga433, 134SE52.

1138-96 127Misc784, 217NYS488; 134 Misc671, 236NYS529 (statute must be strictly followed).

1138-96½-New. or by fire, 160La771, 107S569.

1139-4 Reduction to writing of circumstances of testamentary dispositions.–162Ga433, 134SE52. **In Georgia.**–167Ga 38, 144SE774.

1139-6 167Ga38, 144SE774.

1140-14 Failure of witnesses to hear and understand dictation of will does not render will nullity where they were in position to hear and understand and voluntarily signed after hearing will read to and approved by testator. 163 La831, 112S802. **Understanding of language by testator.**–See also 2LaA178.

1140-15 The testator's declarations need not be taken down word for word.–163La831, 112S802. **The notary may interrogate the testator,** etc. 163La458, 112S298. **Notary's transcription of dispositions in presence of testator after making mental note of entire will is** sufficient compliance with statutory requirement. 163La831, 112S802.

1140-16 159La1044, 106S559. **Failure to read will to testator invalidates it.**–159La1044, 106S559.

1140-17 161La499, 109S44 (executions held to comply with statute).

1140-18 161La499, 109S44. **Recitals held sufficient compliance with statutory requirement.**–163La458, 112S298.

1142-29 161La155, 108S319. **Where due to physical disabilities testatrix was unable to sign her name,** fact that she affixed her mark held not to invalidate will even though she knew how to sign her name. 161La155, 108S319.

1142-30 Witness held qualified to sign as resident of place where will was executed where he had no home other than that of his mother who resided at place of execution. 161La155, 108S 319. **Witness held resident of place where will was executed** where he had his home there, though he registered as voter in another city and stated in his will that he was resident thereof. 161La155, 108S319.

1142-35 Md 149A454(2dcase).

1142-36 208 Iowa353, 223NW752.

1142-37 TexCivA 288SW575.

1143-47½-New. Fact that son of testator did not contradict belief, expressed by testator when he was dictating to son proposed provisions for his will, that testator's daughter was addicted to use of liquor or drugs is not sufficient to hold son guilty of fraud where he is not shown to have known truth or falsity of testator's belief. 196Cal 355, 237P1079.

1143-47½-New. In such case rule that, where confidential relation exists, it is duty of one in whom confidence is reposed fully to disclose all material facts known to him relating to transaction and that any concealment is fraud, does not apply. 196Cal 355, 237P1079.

1143-49 132SC63, 128SE850, 852 [quot Cyc]. See also 166La1020, 118S120. 62 ALR281. But see Mo 300SW487. **Mistake of law or fact does not affect validity of will** unless mistake goes to identity of instrument or is fundamental error. 132SC63, 128SE850.

1144-52 199Cal 750, 251P637; 213Ky 664, 281SW1005; 216AppDiv658, 215 NYS749; 20 OhA216, 151NE788 (not all influence is undue). **"Controlling influence,"** etc. 199Cal 750, 251P637.

1144-53 216Ala30, 112S313; 217Ala46, 114S465; 179Ark877, 18SW(2d)352; 195Cal 711, 235P1012; 196Cal 355, 237 P1079; 199Cal 750, 251P637; 200Cal 152, 252P325; 200Cal 410, 253P697; 200Cal 710, 254P561; 202Cal 490, 261P 709; 93Fla311, 112S80; 167Ga502, 146 SE156; 316 Ill 513, 147NE419; 317 Ill 451, 148NE314; 325 Ill 474, 156NE485; 334 Ill 398, 166NE90(2dcase); 334 Ill 576, 166NE209; 336 Ill 427, 168NE327, 67ALR851; 337 Ill 572, 169NE767; Ill 173NE121; 200 Iowa948, 205NW770; 200 Iowa1180, 206NW95; 201 Iowa687, 207NW748; 202 Iowa807, 211NW495; 202 Iowa1391, 212NW122 (equivalent moral coercion essential); 208 Iowa353, 223NW752; Iowa 231NW301; 123Kan 415, 256P141; 213Ky664, 281SW1005; 213Ky779, 281SW982; 230Ky230, 18 SW(2d)997; 148Md584, 129A896; 152 Md407, 137A35; 235Mich342, 209NW75; 251Mich588, 232NW190(2dcase); 164 Minn377, 205NW271; 155Miss449, 124 S498; 316Mo 916, 292SW1039; 73Mont 481, 237P214; 114Nebr512, 208NW637; NJ 130A245 ("undue influence" defined); NJ 134A622; 98NJEq381, 129A 131; NJOrphans 133A43; NJOrphans 134A341; 216AppDiv658, 215NYS749; 190NC221, 129SE589; 190NC301, 129SE 822; 30 OhA184, 164NE644; 112 Okl 25, 239P592; 142 Okl 197, 286P17; 44 Okl ACR256; 116 Or467, 241P996; 120 Or 38, 250P753; 121 Or574, 256P390; 125 Or545, 267P396; 284Pa169, 130A501; 289Pa361, 137A616; 299Pa430, 149A 737; 48Philippine772; TexCivA 275SW 124 (exercise of acts or conduct of one person toward another, by means of which mind of latter is subject to will of person seeking to control it); Tex CivA 275SW226; TexCivA 296SW613; 152Va411, 147SE251; Va 154SE687.

Fraud and coercion.–208 Iowa353, 223 NW752. **Presence of person exercising influence** is not essential. 200 Iowa948, 205NW770. **Other statements.**–224App Div450, 231NYS320. **Undue influence resulting in will of another than testator** is species of fraud. 217Ala46, 114S465. **Undue influence as applied to wills** is included under "coercion" or "fraud" at common law. 217Ala46, 114S465. **Undue influence is species of constructive fraud.**–Me 150A378. **Will is not act of testator unless it is his free and voluntary act.**–232Ky594, 24SW(2d)311.

1144-53½-New. Undue influence to avoid will must amount to moral or physical coercion and must result in control over mind of testator that he could not resist. 98NJEq381, 129A131.

1145-54 195Cal 711, 235P1012; 196Cal 639, 238P944; 199Cal 750, 251P637; 200Cal 152, 252P325; 200Cal 410, 253P 697; 202Cal 258, 259P935; 78CalA189, 248P537; 93Fla311, 112S80 (free use of sound mind will be presumed until contrary appears); 317 Ill 401, 148NE 274; 325 Ill 474, 156NE485; 200 Iowa 948, 205NW770; 200 Iowa1180, 206NW 95; 201 Iowa687, 207NW748; 202 Iowa 1391, 212NW122; 208 Iowa353, 223NW 752; 123Kan415, 256P141; 213Ky147, 280SW947; 213Ky779, 281SW982; 219 Ky534, 293SW1071; 152Md407, 137A 35; Md 149A454(2dcase); 232Mich129, 205NW191; 236Mich136, 210NW314 (mere opportunity insufficient); 237 Mich147, 211NW56; 237Mich691, 213 NW64; 73Mont481, 237P214, 216 [cit Cyc]; 133Misc858, 234NYS505; 112 Okl 25, 239P592; 44 OklACR256; 120 Or38, 250P753; 121 Or574, 256P390; 54SD42, 222NW491; TexCivA 275SW 124; 193Wis264, 213NW626. **Undue influence must be such as to destroy free agency of testator and amount to moral or physical coercion. NJOrphans** 134A341.

1145-55 199Cal 750, 251P637; 200Cal 410, 253P697; 200Cal 710, 254P561; 74 CalA48, 239P364; 325 Ill 474, 156NE 485; 329 Ill 568, 161NE65; 334 Ill 398, 166NE90(2dcase); 334 Ill 576, 166NE 209; 336 Ill 427, 168NE327, 67ALR851; 200 Iowa1180, 206NW95; 202 Iowa1391, 212NW122; 166La1020, 118S120, 62 ALR281; Mo 19SW(2d)1033; 73Mont 481, 237P214, 216 [citCyc]; 133Misc 858, 234NYS505; 112 Okl 25, 239P592; 44 OklACR256; TexCivA 275SW124. **Will will be sustained** if on day of execution testator's mind was strong enough to resist undue influence. 74 CalA48, 239P364.

1146-56 329 Ill 588, 161NE124; 334 Ill 576, 166NE209; 336 Ill 427, 168NE327, 67ALR851; 193Wis264, 213NW626; 197 Wis323, 222NW255; Wis 224NW255.

1146-57 196Cal 639, 238P944 (will not unfair); 199Cal 750, 251P637; 317 Ill 451, 148NE314; 325 Ill 474, 156NE485; 200 Iowa948, 205NW770; 202 Iowa1391, 212NW122 (influence must dominate and control making of will); 73Mont481, 237P214 [citCyc]; NJ 134A622; NJ Orphans 134A341; 216AppDiv658, 215 NYS749; 116 Or467, 241P996; 193Wis 264, 213NW626.

1146-57½-New. It must be proved that act done was result of such coercion. NJ 130A245.

1146-58 TexCivA 283SW347; Va 154 SE687.

1146-59 204 Iowa260, 214NW514; 234 Mich131, 207NW870; TexCivA 275SW 124. **Sufficient mental capacity to execute a will,** etc. 133Misc858, 234NYS 505. **Use of intoxicating liquors.**–199 Cal 750, 251P637.

1146-59½-New. Mental condition of testator, as a fact or circumstance, is of a kind with opportunity of beneficiary, relative to undue influence. Tex CivA 285SW275.

1146-61 337 Ill 572, 169NE767; Ill 173 NE121 (advice); 213Ky779, 281SW982; 216AppDiv658, 215NYS749; 120 Or38, 250P753; 121 Or574, 256P390; 152Va 411, 147SE251.

1147-62 73Mont481, 237P214.

1147-63 337 Ill 572, 169NE767; Ill 173 NE121 (persuasion); 200 Iowa948, 205 NW770; 200 Iowa1180, 206NW95; 201 Iowa687, 207NW748; 202 Iowa849, 211 NW500; 202 Iowa1391, 212NW122; 208

Iowa353, 223NW752; Iowa 231NW301; NJOrphans 133A43; 216AppDiv658, 215NYS749; 20 OhA216, 151NE788; 293Pa465, 143A125; 152Va411, 147SE251.

1147-64 317 Ill 451, 148NE314; 329 Ill 588, 161NE124; 329 Ill 519, 161NE129; 337 Ill 572, 169NE767; Ill 173NE121 (affection); 213Ky664, 281SW1005; 213Ky779, 281SW982; 230Ky230, 18SW(2d)997; 242Mich572, 219NW658; 222MoA1206, 28W(2d)139; NJOrphans 134A341; 133Misc858, 234NYS505; 134Misc413, 235NYS317; 121 Or574, 256P390; 48RI 341, 137A908.

1148-69 It is insufficient that testator was unjustly prejudiced towards relatives if his volition was not interfered with. 55ND664, 215NW160.

1148-70 235Mich342, 209NW75.

1148-72 196Cal 639, 238P944; 200Cal 410, 253P697; 317 Ill 451, 148NE314; 325 Ill 474, 156NE485; 334 Ill 398, 166NE90(2dcase); 196 Ind341, 148NE409; 126Kan619; 219Ky534, 293SW1071; 237Mich147, 211NW56 (wife); 237Mich 691, 213NW64 (housekeeper); 242Mich 685, 219NW639, 640 [citCyc]; 316Mo 916, 292SW1039; 73Mont481, 237P214; 98NJEq381, 129A131; 112 Okl 25, 239P592; TexCivA 275SW124; TexCivA 275SW226, 228 [quotCyc].

1148-73 Mass 172NE257 (attorney drafting will); TexCivA 275SW226, 228 [quotCyc]. See also 133Misc745, 234NYS239 (practice for nurse to draw wills for patient is unwise, and should be discouraged).

1148-74 180Ark170, 21SW(2d)414; TexCivA 275SW226, 228 [quotCyc].

1148-75 TexCivA 275SW226, 228 [quotCyc].

1148-76 126Kan619; 73Mont481, 237P214; 98NJEq621, 130A806; TexCivA 275SW124; TexCivA 275SW226, 228 [quotCyc].

1149-77 116 Or467, 241P996 (proper for wife to exert influence on husband in disposal of his property); TexCivA 275SW124; TexCivA 275SW226, 228 [quotCyc]. The strict rules applicable to gifts, etc. 242Mich685, 219NW639, 640 [quotCyc].

1149-79 200Cal 410, 253P697; 325 Ill 474, 156NE485; 126Kan619; 237Mich 691, 213NW64 (housekeeper); TexCivA 275SW124 (wife); TexCivA 296SW613.

1149-79½-New. That executor and testamentary trustee called lawyer who drew will and summoned witnesses does not invalidate will where he took nothing thereunder. 337 Ill 572, 169NE767.

1149-80 73Mont481, 237P214; 289Pa361, 137A616.

1149-84 214Ky294, 283SW77; Mo 30SW(2d)19.

1149-85 214Ky294, 283SW77.

1149-86 Validity is tested by circumstances existing when will made, and not by after circumstances. 206 Iowa 1314, 221NW935.

1149-87 289Pa361, 137A616. But see Mo 30SW(2d)19. Cardinal test of undue influence is result of will. 187Wis 10, 203NW718. Where undue influence affects whole will, it is wholly void. 289Pa361, 137A616.

1149-88 219Ala586, 123S22, 63ALR942; 116Nebr764, 219NW4, 8 [quotCyc]; 116 Or467, 241P996; 300Pa185, 150A585.

1149-88½-New. Bequests otherwise valid must be rejected when they cause defeat of testator's wishes by disallowance of invalid bequests. 300Pa185, 150A585.

1150-89 45Philippine216.

1150-90 213Ky789, 281SW1028; 263Mass334, 160NE812; 240Mich7, 215NW35; 321Mo 920, 13SW(2d)548; 73Mont481, 237P214; NJ 131A213; NJPrerog 150A219; 286Pa58, 132A786 (presumption of absence of undue influence arises where validity of will is prima facie established); 286Pa155, 133A144; 45Philippine216; 48RI 341, 137A908; 152Va411, 147SE251; 187Wis10, 203NW718; 197Wis323, 222NW255. Circumstances held to raise no presumption of undue influence. 25F(2d)542.

1150-91 199Cal 750, 251P637; 201Cal 185, 256P200 (dictum); 108Conn572, 143A890; 93Fla311, 112S80; 334 Ill 576, 166NE209; Ill 172NE765; Ill 173NE121; 200 Iowa1180, 206NW95; 208 Iowa 1265, 227NW129(2dcase); Iowa 231NW301; 213Ky789, 281SW1028; Me 152A84; Md 149A454(2dcase); Mass 172NE228; 240Mich7, 215NW35; 248Mich 263, 226NW862; 164Minn377, 205NW271; 167Minn120, 208NW535 (throughout trial); 180Minn256, 230NW781; Minn 232NW1 (burden does not shift); 321Mo 310, 11SW(2d)16; 321Mo 920, 13SW(2d)548; Mo 24SW(2d)116; 73Mont481, 237P214; 114Nebr512, 208NW637; 114Nebr593, 208NW961, 962 [citCyc]; Nebr 227NW928; NJ 131A213; 98NJEq381, 129A131; NJOrphans 134A341; NJPrerog 150A786; 248NY421, 162NE473; 216AppDiv658, 215NYS749; 132Misc178, 229NYS819; 133Misc858, 234NYS505; 224AppDiv450, 231NYS320; 226AppDiv715, 233NYS400; 135Misc740, 240NYS694; 230AppDiv163, 244NYS221; 116 Or467, 241P996; 120Or38, 250P753; 121 Or574, 256P390; 125 Or545, 267P396; Or 291P356; 284Pa491, 131A374; 286Pa58, 132A786; 293Pa465, 143A125; 48RI 341, 137A908; RI 148A184; 152Va411, 147SE251; Va 154SE687; 143Wash28, 254P455. But see 332 Ill 509, 163NE772. One asserting undue influence must prove that but for undue influence particular disposition would not have been made. NJOrphans 134A341. That husband of principal residuary legatee gave directions in regard to will held alone insufficient to lift burden of proof of undue influence. NJOrphans 134A341. Burden does not shift.-216AppDiv658, 215NYS749. Burden is on contestant to show testator would have made a different will, if left to his own judgment. TexCivA 297SW336, 339 [cit CJ].

1150-92 120 Or38, 250P753. See also 93Fla311, 112S80.

1150-92½-New. There is strong presumption in favor of validity of will in holograph. 134Misc413, 235NYS317.

1150-92½-New. Active part which gives rise to presumption of undue influence between decedent and legatee must go to substance of testamentary act not to some mere formal matter. 296Pa74, 145A810, 66ALR222.

1150-92¼-New. Mere making of new will materially changing provisions of old will raises no presumption of fraud. 152Va411, 147SE251.

1151-94 200Cal 152, 252P325; 200Cal 710, 254P561; 317 Ill 401, 148NE274; 329 Ill 519, 161NE129; 219Ky534, 293SW1071; 267Mass310, 166NE622(2dcase); 240Mich7, 215NW35; 242Mich 291, 218NW660; 316Mo 916, 292SW1039; 222MoA1206, 28W(2d)139; 73Mont481, 237P214; NJ 131A213 (constant attendance to exclusion of all others not conclusive of undue influence); NJOrphans 134A341; Or 291P356; Wis 229NW535(1stcase).

1151-95 219Ky534, 293SW1071; 150Md79, 132A425 (testatrix's residence in house of beneficiary); Nebr 231NW837 (2dcase); NJOrphans 134A341.

1151-96 219Ala586, 123S22, 63ALR942; 198Cal 407, 245P197 (attorney sole beneficiary); 200Cal 185, 256P200; 202Cal 450, 261P470; 234Mich131, 207NW870; 319Mo 87, 5SW(2d)383; 319Mo 744, 8SW(2d)38; 321Mo 168, 9SW(2d)960; 321Mo 920, 13SW(2d)548; Mo 19SW(2d)1033; 142 Okl 197, 286P17; 296Pa74, 145A810, 66ALR222; 10PaDist&Co 613; Va 154SE687. Existence of fiduciary relation between proponent and testator must be shown before burden of establishing want of undue influence is cast on proponent. 235Mich627, 209NW842. Evidence held insufficient to show relationship raising presumption. 318Mo 1078, 2SW(2d)707.

1151-97 195Cal 711, 235P1012; 316 Ill 513, 147NE419; 317 Ill 401, 148NE274; 329 Ill 568, 161NE65; 334 Ill 576, 166NE209; 337 Ill 572, 169NE767; Ill 172NE765; Ill 173NE121; 224 IllA562; 98NJEq381, 129A131; 284Pa169, 130A501; 284Pa491, 131A374; 299Pa430, 149A737 (attorney in fact); TexCivA 275SW226; TexCivA 299SW682; Wash 288P265.

1151-98 96CalA283, 273P1088; NJPrerog 150A786.

1151-2 MoA 274SW1103.

1151-5 CalA 288P841.

1151-6 317 Ill 451, 148NE314 (brother and sister were partners and lived in same house).

1151-7 316Mo 916, 292SW1039.

1151-8 102NJEq49, 139A808; 98NJEq621, 130A806; TexCivA 275SW226. The presumption is one of fact only, etc. NJPrerog 150A786.

1152-9 195Cal 711, 235P1012; 198Cal 407, 245P197; 329 Ill 588, 161NE124; 337 Ill 572, 169NE767. Legatee who merely summoned attorney and handed him draft of will did not have burden of proof on question of undue influence. 296Pa74, 145A810, 66ALR222.

1152-10 202Cal 308, 260P543; 331 Ill 643, 163NE424; 98NJEq621, 130A806. But see 196Cal 355, 237P1079.

1152-11 195Cal 711, 235P1012; 202Cal 258, 259P935; 337 Ill 572, 169NE767; 167Minn120, 208NW535.

1152-12 317 Ill 401, 148NE274; Nebr 230NW495; 98NJEq621, 130A806. See 293Pa465, 143A125.

1152-13 240Mich7, 215NW35; 98NJEq621, 130A806; 44 OklACR256. Caring for testator.-216Ala30, 112S313. Matters not raising issue of confidential relation.-TexCivA 300SW661.

1153-14 216Ala30, 112S313; 219Ala586, 123S22, 63ALR942; 202Cal 258, 259P935.

1153-14½-New. Where there is no evidence that son or daughter in confidential relation and benefiting by the will was active in procuring execution of will or participated therein to any extent, there is no burden on him or her to show that will was not induced by coercion or fraud. 196Cal 355, 237P1079.

1153-15 74CalA48, 239P364.

1153-19 216Ala30, 112S313; DelCh 152A129; 238Mich87, 212NW965 (fact that children did shopping for mother and performed other filial duties held not to show fiduciary relationship); 242Mich 685, 219NW639; 316Mo 916, 292SW1039; 114Nebr593, 208NW961, 962 [quotCyc]; 284Pa491, 131A374. Burden is on contestant, where natural relation of parent and child obtains in ordinary manner, to show dominance of child over parent's will. 216Ala30, 112S313. That daughter beneficiary was living with testator when will was made and that she assisted him in his business affairs does not cast burden of showing want of undue influence on her. 235Mich627, 209NW842.

1153-22 195Cal 711, 235P1012; 201Cal 185, 256P200; 317 Ill 401, 148NE274; 224 IllA562; 135Misc311, 238NYS112 (attorney); 37 OklACR562; 13PaDist&Co 532. But see 319Mo 1068, 5SW(2d)66; 284Pa491, 131A374. That one of two brothers making mutual wills secured attorney and instructed him how to draft will held not to place burden upon him. 286Pa58, 132A786. That testator's legal advisor who drew will was allowed maximum commission as executor does not place burden on him to rebut undue influence. NJPrerog 150A219.

1154-23½-New. But attorney preparing will and witnessing same, who is named as executor, is not favored legatee to give rise to presumption of undue influence. NJ 130A245 (in view of 4 Comp. St. [1910] p 5862 § 4).

1154-24 230AppDiv163, 244NYS221; 6PaDist&Co 743. But see 135Misc740, 240NYS694.

1154-25 196Cal 355, 237P1079; 200Cal 152, 252P325; 150Md369, 133A117; Md 149A454(2dcase); 319Mo 1153, 6SW(2d)860; 98NJEq381, 129A131; 133Misc858, 234NYS505; 286Pa58, 132A786; 45Philippine216; TexCivA 300SW661.

1154-26 200Cal 152, 252P325; 45Philippine216. But see 226Ky42, 10SW(2d)474.

1154-27 78CalA189, 248P537; MoA 278SW1063; Nebr 231NW837(2dcase); 286Pa58, 132A786; 45Philippine216. But see 108Conn572, 143A890. "Natural objects of testator's bounty," within Connecticut rule imposing burden of disproving undue influence on proponent where such objects are excluded from participation, are those who would take

in absence of will. 108Conn572, 143A890.

1154-28 Nebr 230NW495; 296Pa74, 145A810, 66ALR222; 298Pa285, 148A297.

1155-29 37 OklACR562. But see 132Misc178, 229NYS819. **Insufficient declaration.**–284Pa491, 131A374.

1155-31 216Ala30, 112S313; 162La571, 110S759; 256Mass10, 152NE697; 316Mo916, 292SW1039; 222MoA1206, 2SW(2d)139; 289Pa554, 137A734 (testamentary interest in making mark may be shown by extensive evidence); 48RI341, 137A908; TexCivA 275SW124 (when sufficiently related in time to bear on issue); TexCivA 283SW347; TexCivA 297SW336; TexCivA 300SW985; TexCivA 9SW(2d)172.

1155-37 TexCivA 9SW(2d)172.

1155-39 225Ky480, 9SW(2d)220; 148Md200, 129A10 (fraud unknown to testator and without effect on will); 149Md308, 131A463 (exclusion of copy of will of testator's wife not error where unnecessary to show undue influence); 264Mass276, 162NE312; 321Mo310, 11SW(2d)16; TexCivA 300SW661; TexCivA 20SW(2d)396 (amount of friends testatrix's husband has); Vt 150A65 (occurrences after execution of will). **Undue influence in other transactions** than one of execution of will is immaterial. 325 Ill 474, 156NE485.

1156-40 264Mass276, 162NE312.

1156-40½-New. Exclusion of testimony as to residuary legatee's statement to witness showing her knowledge before testator's death that he had made will has been held proper. 264Mass276, 162NE312.

1156-42 150Md79, 132A425 (excluding such evidence held error).

1156-43 217Ala506, 116S686; 93Fla311, 112S80; 200 Iowa1180, 206NW95; Iowa 231NW301; 150Md79, 132A425; Mass 172NE257; NJ 134A622; 293Pa465, 143A125; TexCommnA 12SW(2d)978; TexCivA 285SW275. **Testator's charitableness held admissible.**–TexCivA 20SW(2d)396.

1157-45 22F(2d)588; 161Ga651, 131SE507; 134Misc671, 236NYS529; 48RI341, 137A908; TexCivA 300SW985.

1157-46 78CalA189, 248P537; 334 Ill576, 166NE209; 237Mich147, 211NW56; 238Mich87, 212NW965; 240Mich7, 215NW35; 321Mo310, 11SW(2d)16; 132Misc178, 229NYS819; 135Misc311, 238NYS112; TexCivA 272SW252. See also 98CalA97, 276P366.

1158-47 78CalA189, 248P537; 160Ga872, 129SE532; 161Ga651, 131SE507; 237Mich147, 211NW56; 238Mich87, 212NW965; 321Mo168, 9SW(2d)960; Tex CommnA 12SW(2d)978.

1158-48 78CalA189, 248P537; 153Md93, 137A479; 240Mich7, 215NW35; 319Mo87, 5SW(2d)383; 102NJEq346, 140A564; 48RI341, 137A908.

1158-49 216Ala30, 112S313; 78CalA189, 248P537; 128Kan691, 280P763; 153Md93; 137A479; 155Miss449, 124S498; 48RI341, 137A908.

1158-50 TexCivA 272SW252.

1159-51 242Mich291, 218NW660; 251Mich117, 231NW79.

1159-52 78CalA189, 248P537; 238Mich87, 212NW965; 242Mich291, 218NW660. **Declarations inadmissible** in absence of evidence of undue influence as foundation. 242Mich685, 219NW639.

1160-55 78CalA189, 248P537.

1160-55½-New. Declarations of testator are admissible to effect that he had never made will; TexCivA 283SW347.

1160-55½-New. and evidence that testator had sought advice about property and had not mentioned about executing will is also admissible. TexCivA 283SW347.

1160-56 321Mo168, 9SW(2d)960; 216AppDiv658, 215NYS749; TexCivA 283SW347.

1160-57 216Ala30, 112S313; 78CalA189, 248P537; 104Conn419, 133A209; TexCivA 283SW347. **Financial condition of natural objects of bounty.**–190NC301, 129SE822; 197NC347, 148SE437. **Financial condition of contestant.**–Nebr 230NW495.

1160-57½-New. or to consider whether the will is devoid of natural duty or affection, TexCivA 283SW347.

1161-58 Mo 19SW(2d)1033.

1161-60 150Md79, 132A425 (but evidence as to who was present at time of execution of will held properly excluded as immaterial on issue of undue influence); TexCivA 275SW124.

1161-61 154Tenn304, 285SW576 (prior will may be offered in evidence to show that will sought to be probated is not true will of testator who executed it).

1161-62 118 Oh508, 161NE540.

1161-63 Ill 172NE765; 45Philippine216.

1162-64 78CalA189, 248P537; 93Fla311, 112S80; 167Ga502, 146SE156; Tex CivA 288SW575. **Evidence of attention to home duties and devotion to husband by testator's wife** held admissible. 78CalA189, 248P537.

1162-66½-New. Benefits to executor by prior instrument.–On issue of undue influence by executor, executor may testify that he derived no financial advantage from prior deed of trust executed by testator naming him trustee. 149Md308, 131A463.

1162-67 190NC301, 129SE822 (financial condition).

1162-68 216Ala30, 112S313; 264Mass276, 162NE312; TexCommnA 285SW275.

1163-69 TexCommnA 285SW275, 277 [citCyc]. **Effect of opportunity** is increased accordingly as the proof may show exclusiveness of intimate contact and availability of means to make the opportunity effectual. TexCivA 285SW275. **Habitual subjection of testator to control of beneficiary** is relevant to use of undue influence. TexCivA 285SW275.

1163-70 Evidence as to undue influence held inadmissible in absence of evidence that testatrix was in mental condition to hear and understand statements. Tex CivA 283SW699.

1163-71 TexCivA 9SW(2d)172.

1163-74 202 Iowa565, 210NW813; 202 Iowa1391, 212NW122; 238Mich87, 212NW965.

1163-76 Truth or falsity of statements made to testator by party alleged to have exerted undue influence is properly excluded. 253Mass518, 149NE198.

1164-77 99CalA617, 279P196.

1164-78 196Cal639, 238P944; 325 Ill474, 156NE485; 329 Ill588, 161NE124; 202 Iowa807, 211NW495; 232Ky594, 24SW(2d)311; 232Mich129, 205NW191; 164Minn377, 205NW271; 176Minn360, 223NW677; 180Minn256, 230NW781 (must convince trier of fact that mind of testator was subjected to that of some other person); 318Mo1078, 2SW(2d)707; 321Mo310, 11SW(2d)16; MoA 274SW1103; 222MoA1206, 2SW(2d)139; 217AppDiv607, 217NYS26 (fairly and necessarily inferred); 234AppDiv450, 231NYS320; 30 OhA184, 164NE644; TexCivA 275SW124. See also 164La514, 114S116. **Direct and substantial proof** of undue influence is necessary to justify overthrow of express intention of will. 73Mont481, 237P214. **Evidence must warrant conclusion** that mind of testator was subjected to that of another, to establish undue influence. 164Minn377, 205NW271. **Undue influence not inferred from nature and opportunity.**–216AppDiv658, 215NYS749. **Evidence held to support finding that defendant was not guilty of fraud.**–329 Ill568, 161NE65. **Slight evidence of disposition by beneficiary to unduly influence testator is sufficient** where evidence shows opportunity. Wis 231NW177.

1164-79 216Ky348, 287SW921; 8PaDist&Co421. **Clear and convincing evidence** is necessary to sustain finding of undue influence. Minn 232NW1.

1164-80 218Ala366, 118S547; 196Cal355, 237P1079; 200Cal410, 253P697; 109Conn733, 146A494(1stcase); 210Ky575, 276SW500; 150Md369, 133A117; 152Md407, 137A35; 238Mich87, 212NW965; 240Mich7, 215NW35; 164Minn377, 205NW271; 73Mont481, 237P214; Nebr 227NW928; NJOrphans 134A341; 44OklACR256; 121 Or574, 256P390; Tex CivA 300SW661. **Finding that beneficiary may have participated in procuring execution of will based on facts affording grounds only for suspicion** would be product of speculation and conjecture. 196Cal355, 237P1079.

1164-82 218Ala366, 118S547; 244Mich469, 221NW659(3dcase); NJ 130A458 (held proponent met burden of proof of presumption of undue influence); 224AppDiv450, 231NYS320. See also 156Md81, 143A648.

1164-83 74CalA48, 239P364; 240Mich7, 215NW35; 216AppDiv658, 215NYS749; 8PaDist&Co421.

1164-83½-New. The sufficiency of the evidence to establish undue influence overruling the will depends on particular facts of each case as applied to general principles of law. TexCivA 283SW347.

1164-83½-New. Proof of mere execution of the will is not sufficient to show assent to its contents where executed on testator's death bed largely through the agency of a party highly interested in result. 140SC1, 138SE355.

1165-85 224AppDiv450, 231NYS320; 48RI341, 137A908. But see 298Pa285, 148A297. **The evidence of undue influence should be clear and convincing,** etc. See also TexCivA 275SW226; 152Va411, 147SE251; 187Wis647, 205NW320. **On question of undue influence,** evidence must be viewed in light most favorable to validity. 286Pa58, 132A786. **Evidence held insufficient** to establish fraud. 208Iowa353, 223NW752.

1165-86 218Ala366, 118S547; 179Ark877, 18SW(2d)352; 196Cal639, 238P944 (codicil); 198Cal407, 245P197; 202Cal258, 259P935; 126Kan84, 267P9; 128Kan691, 280P763; 212Ky56, 278SW162; 213Ky805, 281SW1024; 214Ky294, 283SW77; 235Ky121, 29SW(2d)637; 164La514, 114S116; 167Minn120, 208NW535; 176Minn360, 223NW677; Minn 232NW1; MoA 278SW1063; Nebr 230NW495; 98NJEq621, 130A806; 135Misc740, 240NYS694; 58ND109, 224NW915; 37 OklACR562; 289Pa361, 137A616; TexCivA 283SW347; TexCivA 288SW575; 150Va452, 143SE683; Va 154SE687; 145Wash408, 260P662; Wis 231NW177; Can [1925] 2DomLR641. **Evidence held sufficient to support finding of absence of undue influence.**–114Nebr593, 208NW961; 134Misc671, 236NYS529.

1165-87 215Ala274, 110S406; 195Cal354, 233P330; 195Cal699, 235P45; 196Cal355, 237P1079; 196Cal639, 238P944; 199Cal750, 251P637; 200Cal152, 252P325; 200Cal147, 252P597; 200Cal410, 253P697; 200Cal710, 254P561; 202Cal450, 261P470; 202Cal490, 261P709; 203Cal92, 263P214; 205Cal292, 270P961; 74CalA48, 239P364; CalA287P516; CalA 292P167; 82Colo5, 256P630; 162Ga149, 132SE893; 163Ga149, 135SE721; 316 Ill513, 147NE419; 317Ill451, 148NE314; 325 Ill474, 156NE485; 329 Ill588, 161NE124; 329 Ill519, 161NE129; 331 Ill643, 163NE424; 332Ill639, 164NE133; 334 Ill398, 166NE90(2dcase); 334 Ill576, 166NE209; 336Ill427, 168NE327, 67ALR851; 338 Ill102, 170NE221; Ill 172NE765; 196 Ind341, 148NE409; 200 Iowa1180, 206NW95; 202 Iowa807, 211NW495; 206 Iowa1314, 221NW935; 208 Iowa353, 223NW752; 119Kan286, 239P965; 122Kan741, 253P586; 124Kan790, 262P554; 126Kan619; 213Ky147, 280SW947; 213Ky779, 281SW982; 213Ky789, 281SW1028; 216Ky348, 287SW921; 219Ky534, 293SW1071; 148Md200, 129A10; 149Md308, 131A463; 150Md79, 132A425; 150Md369, 133A117; 152Md407, 137A35; Md149A454(2dcase); 232Mich129, 205NW191; 234Mich363, 208NW438; 237Mich147, 211NW56; 238Mich87, 212NW965; 240Mich7, 215NW35; 240Mich121, 215NW296; 240Mich465, 215NW323; 242Mich685, 219NW639; 250Mich289, 230NW161; 164Minn377, 205NW271; Mich208NW425; 176Minn456, 223NW771; 177Minn226, 225NW102; 180Minn70, 230NW275; 180Minn256, 230NW781; 144Miss424, 110S111; 316Mo916, 292SW1039; 319Mo1068, 5SW(2d)66; 321Mo310, 11SW(2d)16; 73Mont481, 237P214; NJ 130A245; NJ 130A458; NJ131A213; NJ 134A622; NJ 150A430; 98NJEq645, 130A655; 102NJEq346, 140A564; NJPrerog 150A219 (ambiguity in will not clearly established by

scrivener); NJOrphans 134A341; 216 AppDiv658, 215NYS749; 217AppDiv607, 217NYS26; 131Misc874, 227NYS550; 133Misc858, 234NYS505; 137Misc773, 244NYS742; 224AppDiv450, 231NYS 320; 228AppDiv119, 239NYS44; 137 Misc668, 244NYS250; 138Misc381, 245 NYS574; 49ND761, 193NW605; 55ND 664, 215NW160; 21 OhA194, 153NE119; 23 OhA522, 155NE493; 112 Okl 25, 239 P592; 142 Okl 197, 286P17; 116 Or 467, 241P996; Or 246P720; 121 Or574, 256P390; 121 Or619, 256P1119; 128 Or 591, 275P605; Or 291P356; 296Pa74, 145A810, 66ALR222; 298Pa285, 148A 297; 299Pa398, 149A701; 299Pa430, 149A737 (evidence held to establish absence of undue influence); 13PaDist& Co 532; 45Philippine216; RI 140A 472; 54SD42, 222NW491; SD 233NW 274; TexCivA 275SW124; TexCivA 275 SW226 (sister's will making brother sole beneficiary); TexCivA 297SW336; 70Utah456, 261P15; Vt 150A65; 141 Wash436, 276P86; 154Wash675, 282P 920; 193Wis264, 213NW626; 196Wis 377, 220NW380; 197Wis323, 222NW 255; Can [1926] 4DomLR105; Can [1929] 3DomLR749. **Evidence held insufficient** to sustain special finding that codicil was result of fraud practiced by brother of testator. 196Cal 639, 238P 944. **Evidence held sufficient** to support finding of absence of undue influence. 332 Ill 509, 163NE772; 152Va411, 147 SE251; 195Wis596, 219NW378. **That testimony of proponent on cross-examination was self-contradictory** and in conflict with other testimony does not establish undue influence where he gave no testimony tending to establish undue influence. 240Mich7, 215NW35.

1166–88 78CalA189, 248P537; 202Cal 258, 259P935; 329 Ill 268, 160NE594; 235Ky121, 29SW(2d)637 (certain circumstances to be considered); 232 Mich129, 205NW191; 133Misc858, 234 NYS505; TexCivA 275SW124; TexCivA 275SW226. **Circumstantial evidence must indicate purpose to gain advantage redounding** to benefit of proponent. 316 Mo 916, 292SW1039.

1166–89 202Cal 308, 260P543; 78CalA 189, 248P537; 93CalA617, 279P196; 200 Iowa948, 205NW770; 200 Iowa1180, 206 NW95; 204 Iowa260, 214NW514; 210 Ky575, 276SW500; 216Ky348, 287SW 921; 230Ky230, 18SW(2d)997; 232 Mich129, 205NW191; 235Mich627, 209 NW842; 237Mich691, 213NW64; 248 Mich263, 226NW862; 250Mich289, 230 NW161; 164Minn377, 205NW271; 72 Mont481, 237P214; 98NJEq381, 129A 131; 224AppDiv450, 231NYS320; 230 AppDiv163, 244NYS221; Or 291P356; RI 148A184; 145Wash408, 260P662. **Actual exercise of undue influence** as well as opportunity must be shown. 220 Ky619, 295SW885. **Mere opportunity to exercise undue influence** is insufficient in absence of facts and circumstance from which it can fairly and reasonably be inferred. 217AppDiv607, 217NYS 26.

1167–91 Opportunity and disposition unduly to influence testator are insufficient to prove undue influence. Iowa 231NW301.

1167–94 218Ala493, 119S21; 200Cal 152, 252P325; 104Conn419, 133A209; 225Ky480, 9SW(2d)220; 156Md81, 143 A648; 232Mich129, 205NW191; 237 Mich691, 213NW64; 164Minn377, 205 NW271; Mo 24SW(2d)116; NJOrphans 133A43 (but will of invalid who lived with mother, which left her only certain jewelry, held not product of undue influence where mother was otherwise well provided for); 133Misc858, 234NYS505; 116 Or467, 241P996; 296Pa74, 145A810, 66ALR222; TexCivA 275SW124 (insufficient); TexCivA 285SW275; 145 Wash408, 260P662. See also 118 Or308, 246P720. **Evidence held insufficient.**–104 Conn419, 133A209; 284Pa491, 131A374. **If instrument is actually testator's will,** injustice or partiality cannot vitiate it. 16AppDiv658, 215NYS749. **In Georgia.**– 166Ga555, 144SE116. **That person accused of undue influence was most favored beneficiary** does not indicate undue influence. Iowa 231NW301.

1168–99 But see 248Mich263, 226NW 862.

1168–3 299Pa530, 149A737.

1168–4 225Ky480, 9SW(2d)220; 232 Mich129, 205NW191; TexCivA 285SW 275.

1168–9 202Cal 450, 261P470.

1168–10 196Cal 639, 238P944.

1168–10½–New. acts and statements of testator tending to show that after will's execution testator was never conscious of its existence; TexCivA 285SW275.

1168–10⅓–New. facts showing subversion of testator's mind; TexCivA 285SW275.

1168–10¼–New. habitual subjection of testator to control of beneficiary; Tex CivA 285SW275.

1168–11 250Mich289, 230NW161; 73 Mont481, 237P214.

1169–12 215Ala274, 110S406; 237Mich 691, 213NW64; 286Pa155, 133A144. **Evidence held insufficient to warrant finding of illicit relations** between testatrix and man she afterward married. 286Pa155, 133A144.

1169–13 200Cal 147, 252P597 (that decedent was customer of executor bank, official of which assisted in redrafting will).

1169–14 TexCivA 299SW682.

1169–15 196Cal 639, 238P944 (between testator and his brother); 202Cal 490, 261P709; 334 Ill 576, 166NE209; 167 Minn120, 208NW535; 73Mont481, 237 P214; 112 Okl 25, 239P592. **Evidence held sufficient.**–Mo 19SW(2d)1033; 222 MoA1206, 2SW(2d)139. **Evidence held insufficient** to show confidential relationship. 200Cal 710, 254P561. **In will contest, evidence held clearly to establish confidential relationship** between testator and principal beneficiary. 321Mo 168, 9SW(2d)960.

1169–16 Evidence held insufficient to show that attorney who drafted will was, or had been acting as, attorney for principal beneficiary on date of execution of will or previous thereto. Mo 19SW(2d)1033.

1169–20 219Ky534, 293SW1071; 248 Mich263, 226NW862; TexCivA 275SW 124.

1169–21 316Mo 916, 292SW1039. **Evidence held sufficient** to justify directed verdict in favor of daughter as proponent of father's will. 235Mich627, 209 NW842.

1169–22 TexCivA 275SW226.

1170–23 73Mont481, 237P214.

1170–25 Presumption held rebutted.– 224 IllA562.

1170–25½–New. Fact that will is holographic and subscribing witnesses swear each was alone with testator negatives fraud or undue influence. 126Misc704, 214NYS678.

1170–25⅓–New. Formal question of attorney put to testatrix, whether document was her last will and testament, does not show undue influence. 118 Or308, 246P720.

1170–25¼–New. It is not evidence of undue influence that attorney who prepared will was made executor. 118 Or 308, 246P720.

1170–25⅙–New. Fact that testatrix gave will to executor for safe-keeping and charged him not to inform anyone that she had made will is not evidence of undue influence. 118 Or308, 246P720.

1170–25⅛–New. That testator stated reason for not signing will at first was that he feared to exert himself and thus anger nurse who asked him to keep quiet is insufficient to warrant inference of undue influence or that testator was in fear of attendants. 149Md308, 131A 463.

1170–25⅐–New. Fact that executor was made trustee in prior deed of trust, under which he would receive no benefits except commissions as trustee, is not of itself evidence of undue influence by executor. 149Md308, 131A463.

1170–25⅛–New. Constant attendance by proponents on testator to exclusion of all others, although suggestive of an unfavorable presumption, is not in itself conclusive evidence of undue influence. NJ 131A213.

1170–25⅑–New. In proceedings contesting probate of will leaving property to wife as induced by undue influence, evidence of relationship and business arrangements between testator and mother and brothers and sisters, showing merely that there was some moral obligation resting on testator, which should have induced him to make will different from that which he did make, has been held not to establish undue influence, courts not having power to compel execution of wills and distribution of property as it ought to be done. 225 Ky480, 9SW(2d)220.

1170–25 1/10–New. Few isolated, detached, trivial, and inconsequential incidents remote from date of will are of little weight. 205Cal 292, 270P961.

1170–25 1/11–New. That "no admittance" sign was placed on door of testator's room in hospital does not tend to establish undue influence of children who disregarded it. 250Mich289, 230NW161.

1170–27 325 Ill 474, 156NE485 (recognizing rule).

1170–28 30F(2d)748.

1170–29 TexCivA 285SW275.

1170–31 237Mich691, 213NW64 (contrary to natural justice); Nebr 231NW 837(2dcase); 286Pa58, 132A786 (holding unreasonable or unnatural disposition may become of utmost importance in considering question of undue influence); TexCivA 275SW124 (will not unnatural or unjust); 145Wash408, 260 P662.

1170–32 216AppDiv658, 215NYS749 (that comparative stranger was named executrix and legatee held not to create suspicion of undue influence); 145Wash 408, 260P662.

1170–33 TexCivA 275SW124; 145Wash 408, 260P662.

1170–34 145Wash408, 260P662.

1171–35 Mass 172NE257; 145Wash 408, 260P662. **Sufficient to make out prima facie case** of undue influence when taken in connection with confidential relations with testator. 167Minn120, 208 NW535.

1171–39 149Md498, 132A55; 142Miss 210, 106S753; 134Misc405, 235NYS692; 33Wyo 439, 240P927, 43ALR1010.

1171–40 149Md498, 132A55; 154Md307, 141A368.

1171–42½–New. Sense of moral obligation, which moves testator to make testamentary provision for benefit of wife of son who had expended money on testator's house does not forbid him to change his mind thereafter. 249NY183, 163NE 554.

1171–42⅓–New. One may validly renounce power to revoke his will. 204 Cal 604, 269P450.

1172–48 243 IllA386; 154Md307, 141A 368; 98NJEq645, 130A655; 127Misc215, 216NYS325; 213AppDiv512, 210NYS 187 (plain intent of testator in destroying codicil must control, when it does not run counter to established law or public policy); 132Misc332, 230NYS305; 13PaDist&Co 87; SD 225NW719; Tex CivA 289SW1057.

1172–50½–New. Will may be revoked at any time before death of testator. 163 La458, 112S298.

1172–50⅓–New. Revocation must be during lifetime of testatrix. 100Vt395, 138A725, 54ALR1369.

1172–50¼–New. Revocation of original is revocation of duplicate. 286Pa583, 134A513.

1172–50⅙–New. Duplicate will occupies no higher position than unexecuted copy and is mere evidence of contents of original. 286Pa583, 134A513.

1172–54 256 IllA236; 263Mass47, 160 NE331; 128Misc659, 220NYS398; 15 OhA388.

1172–56 98NJEq645, 130A655. **Instrument not identifying will** is insufficient. 169Ark282, 273SW1026.

1173–57 169Ark62, 272SW873; 169Ark 282, 273SW1026; 98NJEq645, 130A655; 13PaDist&Co 87. **Instrument signed in name of testator by third person** is not valid as revocation where such person did not attest signature as witness. 169 Ark282, 273SW1026.

1173–61 196Cal 339, 238P76; 191NC 802, 133SE168.

1173–62 217Ala364, 116S427; 195Cal 711, 235P1012; 196Cal 333, 238P74; 196Cal 339, 238P76; 196Cal 576, 238P 666; 123Kan681, 256P800 (wording not so important as showing of intent); 191

NC802, 133SE168; 200Wis360, 228NW496.

1174-63 315Mo578, 286SW58, 61 [cit Cyc], 51ALR639.

1174-63½-New. By reexecuting original will.-To constitute a revocation by execution of "some other will" it is not necessary that such other will be executed on a different sheet of paper but may be accomplished by reexecuting original will. 127Misc215, 216NYS325.

1174-63½-New. Thus, where attorney, at testatrix's direction, drew lines through certain provision of will and through signatures of testatrix and attesting witnesses and changed date of will, and will was thereafter republished and reexecuted as a new will, will was revoked by "some other will" within statute. 127Misc215, 216NYS325.

1174-63¾-New. but such method of revoking a will should be condemned as opening the door to needless litigation and expense with possibility of defeating testator's intent. 127Misc215, 216NYS325.

1174-63⅞-New. Mere statement in will that no former will shall affect its terms unless so specified in later instrument does not deprive testator of power of revocation. 254NY283, 172NE499.

1174-64 95CalA580, 273P92; 315Mo578, 286SW58, 61 [cit Cyc], 51ALR639; 254NY283, 172NE499; 125Misc175, 211NYS150 (will held revoked); 239NYS144; Pa 151A789; 92PaSuper180. **Every person competent to make will has right to make later will.** 235Ky189, 30SW(2d)893.

1174-67 315Mo578, 286SW58, 61 [cit Cyc], 51ALR639.

1174-67½-New. Will with such clause has no legal effect till testator's death. 332Ill27, 163NE384.

1175-68 196Cal333, 238P74; 196Cal339, 238P76; 196Cal576, 238P666; 48Ida810, 285P478; 315Mo578, 286SW58, 61 [cit Cyc], 51ALR639; 125Misc175, 211NYS150 (will held revoked); 135Misc630, 239NYS252; Pa 151A789; Tex CivA 299SW682. **A subsequent will which makes a full disposition of all the testator's property,** etc. 196Cal333, 238P74; 196Cal339, 238P76; 95CalA580, 273P92; 127Misc286, 216NYS431; 106WVa663, 146SE729.

1175-69 196Cal339, 238P76; 196Cal576, 238P666; 315Mo578, 286SW58, 51ALR639; 106WVa663, 146SE729. **The form of the subsequent will is of little consequence,** etc. 196Cal333, 238P74 (holographic will naming no executor). **Effect of appointment or non-appointment of executors.**-220Ala576, 126SE636.

1175-70 196Cal333, 238P74; 196Cal339, 238P76; 196Cal576, 238P666; 315Mo578, 286SW58, 61 [cit Cyc], 51ALR639; 133Misc30, 231NYS359; TexCivA 299SW652.

1176-71 315Mo578, 286SW58, 61 [cit Cyc], 51ALR639.

1176-72 196Cal339, 238P76; 315Mo578, 286SW58, 61, 51ALR639 [cit Cyc].

1177-75 Effect of invalidity.-207Cal391, 278P1031 (earlier disposition made by marriage contract, testamentary in character, is given effect).

1178-82 106WVa663, 146SE729.

1178-85 332Ill27, 163NE384.

1179-91 Pa 151A697.

1179-91½-New. Especially where there is an express provision in the codicil to that effect, 106Conn19, 137A20.

1179-92 213AppDiv512, 210NYS187.

1179-93 202Cal124, 259P437, 54ALR913; CalA 290P302; 230Ky488, 20SW(2d)90; 125Misc153, 210NYS427; 213AppDiv512, 210NYS187; 284Pa334, 131A188; Pa 151A697; TexCivA 2SW(2d)339. **Refusal of option in codicil held not to deprive beneficiary of provision in will.** Pa 151A697.

1179-94 158La74, 103SE515; 153Va437, 150SE389.

1180-95 154Md378, 140A100; 291Pa304, 139A839. **Where provision in codicil is absolutely void,** rule is not applicable. 138Okl115, 280P413.

1180-97 35OhA283, 172NE386; Tex CommnA 158SW(2d)567. **Instances of clauses in codicil not inconsistent with will.**-125Misc153, 210NYS427; 35OhA283, 172NE386.

1181-98 125Misc153, 210NYS427; 138Misc104, 244NYS758; 284Pa334, 131A188, 95PaSuper26.

1181-5 169Ark282, 273SW1026.

1182-7 136Misc270, 239NYS717; 138Misc104, 244NYS758 (revocation of appointment of executor not revoking trust tecdip); 284Pa334, 131A188.

1182-8 284Pa334, 131A188.

1183-10 284Pa334, 131A188 (revokes will only so far as repugnant); 288Pa308, 136A210, 211 [cit Cyc]; 8PaDist&Co477. **Particular provisions revoked.**-230Ky488, 208SW(2d)90. **Particular codicils construed.**-157SC407, 154SE426.

1183-11 232AppDiv229, 226NYS104.

1183-11½-New. Will is not affected by fact that executor and trustee named in will, but not witness thereto, was witness to codicil not inconsistent with trust created by will. 284Pa334, 131A188.

1184-15 217Ala364, 116SE427; 98NJEq645, 130A655, 191NC679, 132SE796.

1185-17 TexCivA 289SW1057.

1185-18 217Ala364, 116SE427.

1185-19 TexCivA 295SW236.

1186-23 132Misc625, 229NYS821; Tex CommnA 248SW(2d)819.

1186-24 TexCivA 295SW236.

1186-25 TexCivA 289SW1057.

1187-27 149Md498, 132A56; 154Md307, 141A368; 9PaDist&Co212. **Revocation by destruction needs testator's mind capable of understanding nature of act to be effective.** 149Md498, 132A...

1188-30 9PaDist&Co212.

1189-35 11PaDist&Co364.

1190-37 13PaDist&Co87.

1190-39 29F(2d)633; 265Mass265, 163NE851; 9PaDist&Co212.

1190-40 175Ark369, 299SW389.

1191-41 All circumstances showing what occurred at time of tearing, including what testator said, are admissible to show intent of testator. Pa 151A789.

1191-42 124Okl275, 257P757, 758 [quotCyc]; Pa 151A789.

1191-43 Tearing off or cutting out signatures.-124Okl275, 257P757; 9PaDist&Co212.

1193-54 47Ida668, 279P291 (holographic will).

1193-55 169Ark62, 272SW873.

1194-59 47Ida668, 279P291.

1195-71 137Misc522, 244NYS612.

1196-79 47Ri274, 132A724, 726, 45ALR830 [cit Cyc].

1196-82 217Ala364, 116SE427, 428 [cit Cyc].

1197-85 217Ala364, 116SE427, 428 [cit Cyc]; 166Minn65, 207NW189. **Mere influence is not sufficient to prevent effect of revocation of will by intentional destruction.** 217Ala364, 116SE427.

1197-90 1LaA167, 171 [quotCyc].

1197-91 329Ill519, 161NE129.

1198-95 Will is presumed to have been destroyed or canceled where such change in status or personal relations of testator as under statute affects revocation is shown to exist. 198Cal103, 243P862. **Adoption of daughter for life held not revocation of will.** 193NC439, 137SE306.

1198-96½-New. Manner of revocation is matter of statutory regulation.-198Cal103, 243P862.

1198-96½-New. Change in personal status.-Legislature has power to declare that change in personal status of testator after execution of will shall operate as revocation of will. 198Cal103, 243P862.

1198-96¾-New. Revocation by implication is not favored. Wash 292P401.

1198-97 Previously executed will may be revoked by statute.-198Cal103, 243P862.

1198-99 169Ga602, 150SE910.

1200-15 97Fla916, 123SE668(2dcase).

1200-18 315Mo1100, 287SW604; 223AppDiv640, 229NYS171.

1201-21 198NC510, 152SE391(1stcase). **In California.**-99CalA330, 278P473. **In Illinois.**-321Ill421, 152NE220. **In New York.**-129Misc398, 222NYS345. **In Pennsylvania.**-See also 11PaDist&Co371. **In Washington.**-292P401. **Request to married woman not made in contemplation of marriage does not prevent revocation by subsequent marriage to legatee.** 137Misc58, 244NYS195.

1202-22 318Ill610, 149NE481; 321Ill421, 152NE220. **Common-law rule as to presumptive revocation of will by marriage of testator does not obtain in Illinois.** 318Ill610, 149NE481.

1202-23 136Misc793, 242NYS249.

1203-25 180Ark855, 228SW(2d)1011; 215Ky432, 284SW1106; 315Mo1100, 287SW604. **Application and extent of rule.**-198Cal103, 243P862; 297Pa428, 147A92. **Retroactive operation of statutes.**-198Cal103, 243P862.

1204-27 315Mo1100, 287SW604.

1204-30 244Mich197, 221NW116.

1205-32 170La449, 128SE273; 114Oh579, 151NE708 (statute applicable to adopted child adopted after making of will).

1205-33 106Conn76, 137A17. **Adopted child may have will revoked.** 114Oh579, 151NE708. **Statute held prohibitory, not only directory,** and to require strict compliance. 106Conn76, 137A17. **Reason for statute.**-106Conn76, 137A17.

1205-34 Provision for contingency of birth of issue means foresight of chance of event happening and does not require of testator more in treatment of possible future issue than of children in existence. 106Conn76, 137A17.

1205-34½-New. Fact that shares of after born children arising by force of statute consume the entire estate subject to dower and homestead does not of itself revoke will subsequently probated. 321Ill198, 151NE577.

1205-34½-New. In New Jersey, birth of child after execution of will is held not to destroy power of executor to sell real estate. 101NJEq510, 139A56.

1205-34¼-New. Under some statutes birth of child after execution of will does not revoke will absolutely but only contingently. 117Tex302, 38SW(2d)408.

1205-34⅛-New. Under some statutes birth of illegitimate child to testator after making of will, which makes no provision for such child, does not revoke will, notwithstanding testator during his lifetime acknowledged child as his own. IndA 163NE288.

1205-34⅛-New. On birth of posthumous child, will is merely modified to give child portion she would receive in case of intestacy. 33E(2d)856.

1205-35 98NJEq153, 130A840; 34OhA474, 171NE375. **Revocation by divorce is provided by statute** in some jurisdictions and is applicable to all wills offered for probate after enactment of statute regardless of when will was executed, or of which spouse was at fault. 146Wash537, 264P12 (where testator died after enactment).

1205-36 233Mich440, 207NW10, 42ALR1283. Contra 169Ga602, 150SE910; SD 225NW719. **Presumption of revocation is not rebuttable.**-233Mich440, 207NW10, 42ALR1283.

1205-37 162La758, 111886; 233Mich663, 208NW38; 315Mo485, 286SW371; NJCh 150A687(2dcase); SD 231NW912. **Principle rests upon presumption** of change in intention of testator arising from conveyance of devised property. 233Mich663, 208NW38. **Question of intention.**-237Mich252, 211NW623.

1209-56 But see DC 37F(2d)995.

1209-60 34OhA474, 171NE375; SD 227NW568.

1210-65 Changing form of property from personalty to realty does not change testamentary disposition thereof. 216AppDiv639, 214NYS479.

1210-73 198Cal103, 243P862, 865 [quotCyc]; 321Ill198, 151NE577.

1211-79½-New. Rights conferred by will may be enforced in equity despite revocation. TexCivA 295SW206.

1211-79¾-New. Effect on clause nominating executors.-Where will providing for entire disposition of testator's estate and nominating executors therein is revoked by implication by new will making completely different disposition of property, but without naming executors, clause of former will nominating executors fails with instrument. 106WVa663, 146SE729.

1211-80 154Md249, 140A208.

1212-81 See 83NH345, 142A692.

1212-84 13PaDist&Co87 (rule of common law rather than ecclesiastical law will be applied in Pennsylvania).

1213-92 228Ky226, 148SW(2d)777; 315

Mo 1100, 287SW604, 606 [citCyc]; 213 AppDiv512, 210NYS187 (rule applicable to codicils as well as wills).

1213-93 315Mo 1100, 287SW604, 606 [citCyc]. See also TexCivA 288SW833. **Testimony as to testator's intention after revocation to allow will to stand** is incompetent and immaterial. 233Mich 440, 207NW10, 42ALR1283.

1213-93½-New. Statutory method exclusive.–Intention to republish revoked will must be expressed in way prescribed by statute. 233Mich440, 207NW 10, 42ALR1283.

1213-94 198Cal 103, 243P862; 170La 449, 128S273 (revival by codicil confirming bequests). **Effect of amendment of statute.**–198Cal 103, 243P862.

1214-97 Pa 151A789. **In New York.**–136Misc230, 242NYS415; 137Misc522, 244NYS612; 135Misc630, 239NYS252.

1215-2 134Misc803, 237NYS215.

1215-3 13PaDist&Co 87.

1215-4 13PaDist&Co 87.

1215-5 13PaDist&Co 87.

1215-6 315Mo 1100, 287SW604. **First will revived if intention is clear** from wording of instrument. 123Kan681, 256P800.

1216-10 176Ark287, 3SW(2d)26, 29 [quotCyc].

1216-14 176Ark287, 3SW(2d)26, 29 [quotCyc]; 126Me267, 138A59; 154Md 632, 141A377; 133Misc450, 232NYS418; 298Pa540, 148A843; 47RI 274, 132A721, 45ALR830; Sask [1928] 4DomLR51.

1216-16 26 OhNPNS112, 113 [citCyc].

1217-17 126Me267, 138A59.

1217-19 209Ky3, 272SW3.

1217-22 123Kan681, 256P800; 209Ky 3, 272SW3; 26 OhNPNS112, 113 [citCyc].

1217-23 213AppDiv512, 210NYS187, 192 [quotCyc].

1218-24 123Kan681, 256P800; 26 Oh NPNS112, 113 [citCyc].

1218-25½-New. Destroyed codicil.–Destruction of codicil does not revive prior codicils to will, which destroyed codicil had revoked. 213AppDiv512, 210NYS187.

1218-25¼-New. Testator's statement after destroying codicil that he had will back as he wanted it did not revive prior codicil, which had been revoked by destroyed codicil. 213AppDiv512, 210 NYS187.

1220-35 26 OhNPNS112; 129 Or77, 276 P270.

1220-36 26 OhNPNS112. **Codicils executed as required by statute** republished and revived codicils which have been revoked by previously destroyed codicils, if such was testator's intention, to be determined from all circumstances. 213 AppDiv512, 210NYS187.

1220-41 126Me267, 138A59; 12PaDist &Co 435 (inheritance of child born after will, not mentioned therein and not mentioned in codicil held defeated).

1223-54½-New. Statute requiring wills to be recorded held not to vest title to recorded will in state. 130Misc131, 222 NYS572.

1223-58 196Cal 294, 237P744; 166La 102, 116S714; 149Va896, 141SE753. **Purpose of probate.**–255 IllA567.

1224-60 218Ala292, 118S342; 196Cal 294, 237P744; 207Cal 381, 278P1033; 79CalA468, 250P195; 255Mass611, 152 NE220; 167Minn447, 209NW267; 194 NC583, 140SE193; 154Tenn304, 285SW 576; 158Tenn479, 14SW(2d)740.

1224-61 But see 320Mo 519, 8SW(2d) 71.

1224-62 255 IllA567 (probate of a will is a special statutory proceeding); 32 OhA226, 167NE698 (probate is not adversary proceeding). **Proceeding is neither at common law nor in equity** but is governed by principles of ecclesiastical law except where changed by statute or where application is impossible or unwise. 154Tenn304, 285SW576.

1225-67 IndA 164NE494.

1225-67½-New. Public policy requires court to shorten litigation as far as possible. 154Tenn304, 285SW576.

1225-67¼-New. The probate of wills is governed entirely by statute. 323 Ill 328, 154NE156; 327 Ill 346, 158NE709.

1225-67¼-New. Proceeding to probate will is in nature of equitable action, 126 Okl 210, 259P579.

1225-67⅛-New. and when statutory requirements are complied with, no others can be prescribed. 323 Ill 328, 154 NE156; 327 Ill 346, 158NE709.

1225-67⅛-New. Proceeding is entirely statutory. 331 Ill 261, 162NE843.

1225-69 212Ala512, 103S591; 215Ala 98, 109S746, 48ALR1032; 94CalA453, 271P542; 28 OhA227, 162NE627; 158 Tenn479, 14SW(2d)740; 117Tex302, 3 SW(2d)408. **Probate not essential** before title to real property vests in a devisee. 128Misc714, 220NYS141.

1226-70 176Ark660, 3SW(2d)974. **Instruments held to be of testamentary character.**–176Ark660, 3SW(2d)974.

1226-71 327 Ill 346, 158NE709. **Agreement among heirs** that will should not be probated does not authorize court to refuse probate. 327 Ill 346, 158NE709.

1226-72 In partition action supreme court may give effect to will not probated in state as evidence of title between defendants. 215AppDiv180, 213 NYS455.

1226-73 But see Wash 291P471.

1226-76 175Ark182, 299SW370, 372 [quotCyc].

1226-77 54ND858, 211NW810. **Effect of failure of devisee having control of will to offer it for probate.**–123Kan142, 254P334. **Bank held not liable.**–54ND 858, 211NW810.

1226-77½-New. Who may compel production of will.–In New York one claiming to be interested in decedent's estate may petition for production of will. 215AppDiv369, 213NYS511.

1226-77¼-New. One who claimed one half interest in deceased legatee's estate under alleged agreement is an interested person entitled to compel production of will containing legacy. 215 AppDiv369, 213NYS511.

1226-77¼-New. Proceedings to compel production.–216AppDiv595, 216NYS112.

1226-79 Instrument not intended as testamentary in character must be rejected. CalA 277P758. **Will giving property to wife, who predeceased testator, during widowhood** and to named children on her death or marriage should be admitted to probate. TexCivA 26SW(2d)415.

1226-80 Will held entitled to probate.–TexCivA 276SW964.

1227-83 83Colo 188, 263P413; 128Misc 254, 219NYS313 (invalidly executed addenda); 215AppDiv506, 213NYS723; 132SC63, 128SE850; TexCivA 276SW 964, 966 [citCyc]. **If not wholly and absolutely revoked,** will should be probated. 117Tex302, 3SW(2d)408. **Lost will may be allowed in part,** if parts are separable. 248Mich425, 227NW817.

1227-85½-New. In New York will to be admitted to probate must be "genuine." 125Misc475, 211NYS450 (surrogate court act § 144).

1227-85¼-New. "Genuine" within this act means true, real, and authentic. 125 Misc475, 211NYS450.

1227-85¼-New. Will revoked by later instrument, 125Misc475, 211NYS450.

1227-85⅛-New. and not revived by publication is not "genuine" to entitle it to probate. 125Misc475, 211NYS450.

1227-85⅛-New. Mistake of scrivener in designation of testator's children by name is not ground for refusing to probate will where descriptive language clearly indicates persons intended by testator and other provisions of will are not affected by mistake. 132SC63, 128 SE850.

1227-85½-New. Instrument expressly revoked by codicil cannot be probated. TexCivA 295SW206.

1227-85⅛-New. If by mistake or fraud will has been admitted to probate, and it is ascertained that testator executed subsequent will revoking first, county or probate court having jurisdiction of probate of will may, upon petition in proper case, admit subsequent will to probate revoking probate of earlier will. 332 Ill 27, 163NE384.

1227-85⅛-New. Will in foreign language should be admitted to probate if complying with testamentary requirements. NJ 147A479.

1228-89 47RI 274, 132A721, 45ALR830.

1228-90 DC 29F(2d)633; 13PaDist &Co 369. **Courts have power at any time after probating will** and before estate is settled to admit to probate supplemental instrument as part of will. 47RI 274, 132A721, 45ALR830. **Note payable after maker's death** and accompanying letter directing bank to keep note till maker's death, and stating that note was to be valid claim against estate, were properly probated as will. 198Wis538, 224NW739. **Unattested separate writing appended to holographic will by brass clasp** is not entitled to probate. 136Misc769, 242 NYS228.

1228-91 218Ala366, 118S547.

1228-96 13PaDist&Co 87.

1228-99 Unattested codicils to holographic will are not entitled to probate. 136Misc769, 242NYS228.

1229-2 See also 128Misc254, 219NYS 313.

1229-3½-New. Codicil never offered for probate or actually probated cannot be considered part of will. 216Ky755, 288 SW694.

1228-3⅛-New. Where paper offered as codicil to will was not attached to will, its probate depended on identifying will offered as one to which codicil referred. 228Ky226, 14SW(2d)777.

1229-6 162Ga153, 132SE768 (legal party on behalf of legatees to conduct litigation involving caveat to final adjudication); 207 Iowa959, 221NW451. **Nominated executor is legal party on behalf of legatees to conduct litigation** involved in caveat to will. 160Ga469, 128SE582.

1229-8 176Ark660, 3SW(2d)974, 975 [citCyc]; 255Mass611, 152NE220; 138 Misc104, 244NYS758; TexCivA 288SW 602; 117Tex302, 3SW(2d)408. **Probate on application of purchaser from heirs** held proper regardless of notice to devisee on his application. TexCivA 288SW602. **Purchaser of property entitled to ask for probate** of deceased owner's will. TexCivA 288SW602. **Executors have no prior right** over other interested parties. 138Misc104, 244NYS 758.

1229-9 120Kan200, 243P296; 138Misc 104, 244NYS758. **A person is sufficiently interested,** etc. 120Kan200, 243P296; 255Mass611, 152NE220.

1230-13 145Miss436, 111S359, 58ALR 1457. **An interested party is not estopped,** etc. 83Colo 188, 263P413. **Burden of proof** is on party, asserting right to oppose probate, to establish such right. 255Mass611, 152NE220. **Whether contestant is party entitled to oppose probate** is preliminary to whether instrument is to be allowed, even though both issues tried together. 255Mass 611, 152NE220. **Person who is not heir or next of kin** and is interested as legatee only is not person interested in event. 135Misc394, 238NYS372.

1230-17 Contra 145Miss809, 110S836; 145Miss436, 111SE359, 58ALR1457.

1231-19 Mere stranger or interloper is not intended to be authorized to contest will where he has no interest whatever in estate. 145Miss809, 110S836. **Right of "any one interested" is limited** to any one interested in estate. 145Miss 809, 110S836.

1231-23 27Hawaii136, 140 [quotCyc]; 323 Ill 328, 154NE156; 327 Ill 346, 158 NE709; 37 OklACR484; 37 OklACR 551 (only issue triable is factum of will or devisavit vel non); 132 SC63, 128SE 850; 114Tex418, 267SW244, 270SW 1001 (statutory quantum of proof required for probate of will); TexCivA 276SW964, 966 [citCyc]; TexCivA 295 SW206 (county courts limited). **Determination of property rights.**–120Kan 200, 243P296. **Duty of court.**–120Kan 200, 243P296. **Whether scrivener's mistaken use of names of certain beneficiaries defeats testator's intent** is question of construction not necessary for determination of probate court in proceeding to admit will to probate. 132 SC63, 128SE850. **One seeking to defeat will on ground of undue influence** has remedy in chancery by bill of contest. 323 Ill 328, 154NE156. **One who objects to probate on ground of testator's sanity, capacity or unlawful constraint** must resort to chancery. 323 Ill 328, 154NE156. **Ground of forfeiture of bequest.**–228Ky226, 14SW(2d)777. **In action to establish will rejected by pro-**

bate court will may be construed to determine whether plaintiffs have direct pecuniary interest in property devised so as to entitle them to maintain action. 319Mo 108, 5SW(2d)428. **Generally it is not province of court to construe will.**–TexCivA 26SW(2d)415.

1232-24 158Md112, 148A114; 191NC 567, 132SE472, 473 [quotCyc]; 117 Tex302, 3SW(2d)408. See also 198Wis 457, 224NW735; 199Wis332, 225NW 938(4thcase). **In New York.**–126Misc 511, 214NYS154; 129Misc495, 222NYS 591; 137Misc270, 241NYS757.

1232-24½-New. Questions of testamentary capacity and undue influence are considered by court together. 179Ark 877, 18SW(2d)352.

1232-24¾-New. Whether legacy to spouse of one of subscribing witnesses is valid is properly raised on probate instead of on decree of distribution. Vt 146A253.

1232-25 7Alaska466; 161Ga967, 132SE 542; Ga 155SE515; **NJPrerog** 150A 52; 120Or38, 250P753. **In Virginia.**–144Va727, 130SE794. **State may petition for will to be probated in solemn form** where under allegations of petition it has such interest in property of alleged testator as to require such probate and it may caveat probate thereof upon grounds set out in such petition. 161Ga967, 132SE542.

1233-28 120Or38, 250P753. **When probate in solemn form is denied.**–NJ Prerog 150A52. **Application for probate in solemn form is addressed to court's sound discretion.**–NJ 150A52.

1233-29 337Ill65, 168NE685.

1233-33 116Nebr764, 219NW4, 8 [quot Cyc].

1234-38½-New. Refusal to probate codicil puts validity of whole will in issue. 126Me267, 138A59.

1234-43 Statutes which permit revival of will contest on death of contestant by his heirs, assigns, or representatives, is not retroactive, and cannot operate to permit revival of contest pending when statute was enacted. 332Ill11, 163NE428. **Death of executor presenting application for probate before entry of decree** does not render decree void. 110Conn646, 149A250.

1234-44 Death of contesting widow after entry of decree revoking probate and declaring her sole heir and pending appeal therefrom is not ground for abatement of proceedings and vacation of decree. 120Or38, 241P70.

1234-45 110Conn646, 149A250.

1234-46 158Tenn479, 14SW(2d)740.

1234-47½-New. Admitting will to probate.–In New York by statute, before admitting will to probate, surrogate must inquire particularly into all facts and circumstances surrounding will, 125Misc475, 211NYS450.

1234-47⅛-New. and must be satisfied with genuineness of will, 125Misc475, 211NYS450.

1234-47¼-New. and validity of its execution. 125Misc475, 211NYS450.

1234-47½-New. This devolves duty upon surrogate which cannot be disregarded even if no objection to probate is filed. 125Misc475, 211NYS450.

1234-47⅝-New. Court must refuse probate of will which is not "genuine," even though no objections are filed. 125Misc475, 211NYS450.

1234-48 94CalA79, 270P710; 126Me 534, 140A199. **Exercise of power discretionary.**–196Wis332, 219NW953. **Power discretionary** in probate court. Mass 167NE636.

1235-59 130Misc327, 224NYS369.

1235-62 133Misc112, 231NYS596.

1235-64 See also 130Misc327, 224NYS 369.

1236-65 That applicant was infant or incompetent at time of entry of probate decree is no justification for reopening decree. 136Misc555, 241NYS513.

1236-66 203Cal92, 263P214.

1236-67 Mass 169NE150; 130Misc327, 224NYS369.

1236-69 265Mass567, 164NE482; 144 Miss424, 110S11 (beneficiary acquiescing in probate later annulled in one state not estopped to have probate in another state annulled).

1236-69½-New. Caveator must show that he did not have knowledge of facts invalidating will and could not have known them in exercise of ordinary diligence. 158Md555, 149A283.

1236-71 175Minn538, 229NW875.

1236-73½-New. Conditional revocation.–Where sufficient grounds appear, court may order vacation of probate on condition that applicants prove relationship to testator before referee and bear cost of trial if unsuccessful. 130 Misc327, 224NYS369.

1236-75 Under the Ohio statutes, etc. 26OhNPNS209 (pocket worn will cannot be probated as spoliated will).

1237-78 216Ala411, 113S500; Mass 172NE786; 130Misc172, 223NYS691.

1237-79 Prerogative court has concurrent jurisdiction with court of chancery and orphans' court in such proceedings. 102NJEq14, 133A762, 763 [citCyc].

1237-83 132Misc625, 229NYS821.

1237-87 56AppDC333, 13F(2d)305; 233Ky23, 24SW(2d)902; 166La102, 116 S714; 50ND662, 197NW862. **Opposing or contesting probate.**–But see TexCivA 19SW(2d)428. **Who may probate.**–36GaA681, 137SE800. **Compliance with statutory provisions as condition precedent.**–328Ill431, 159NE780. **Effect of record** is to give constructive notice of contested will. 328Ill431, 159NE780. **Holographic** will admitted to probate in foreign state will be admitted to probate in Kentucky when shown to be holographic will. 233Ky23, 24SW(2d) 902.

1238-88 Authentic wills under Quebec statute.–Sask [1929] 4DomLR1080.

1238-89 Execution and proof according to the law of the jurisdiction where ancillary probate is asked, etc. 233Ky 23, 24SW(2d)902.

1239-90 But see 199Cal391, 249P517.

1239-91 135Misc25, 237NYS701. **What questions are open.**–166La102, 116S 714.

1239-94 135Misc25, 237NYS701.

1239-95 In New York.–135Misc483, 237 NYS699.

1239-96 50ND662, 197NW862, 864 [cit Cyc].

1240-98 15F(2d)990; 196Cal294, 237P 744; 332Ill11, 163NE428; 255IllA567 (object is to set aside probate); 221 MoA675, 283SW727; 121Oh401, 169NE 450. **Right is exclusively statutory.**–TexCommnA 5SW(2d)744. **Invalidity of will cannot be determined in proceeding for removal of administrator.**–Cal 287P450.

1240-99 15F(2d)990; 199Cal391, 249 P517; 317Ill401, 148NE274; 122Kan 741, 253P586. See also 10PaDist&Co 79. **Though action is in federal court,** conditions imposed by state statute must control. 15F(2d)990.

1240-2 199Cal391, 249P517; MoA 17 SW(2d)566.

1240-4 Contest is in nature of appeal from probate. 221MoA675, 283SW727.

1240-6 122Kan741, 253P586.

1240-7 122Kan741, 253P586 (fraud). **Contest of will and not action to recover property** is remedy of heir for fraud in procuring will. 122Kan741, 253P586.

1240-8 122Kan741, 253P586. **It is no ground for denial of probate** that will is executed in violation of contract calling for different disposition. 195Cal 354, 233P330. **Death of testator few days after making will** not ground for setting it aside. 216Ala43, 112S360.

1240-8½-New. Testator's breach of contract to leave property at death is no ground for contest of will. 126Misc 436, 213NYS119.

1240-8⅓-New. Incapacity of county to take property devised to it as trustee for public charity and incapacity to act as such trustee and invalidity of charity are grounds for contest. 122Kan741, 253P586.

1240-8¼-New. Lack of original jurisdiction as ground of contest or revocation is not ground authorized by statutes in some jurisdictions. 199Cal391, 249P517.

1240-40 See also 94CalA453, 271P542.

1241-20 22OhA430, 153NE277.

1241-21 22OhA430, 153NE277.

1241-22 162Ga44, 132SE639; 122Kan 741, 253P586 (anyone having an interest may contest); 161La707, 109S395; 244NY63, 154NE823 (person who by valid agreements assigns or releases his rights to testator cannot contest); 217 AppDiv342, 217NYS176; 9PaDist&Co 538; 154Tenn304, 285SW576; TexCivA 286SW295; TexCivA 294SW689. See also 88IndA626, 165NE80. **Legatee in former will** superseded by will which was in turn superseded by will offered for probate is without interest permitting her to contest probate of latter will. 15F(2d)895. **Pretermitted child has no interest** authorizing him to be heard in action to contest or revoke probate. 199Cal391, 249P517. **Kindred of first of two predeceased husbands of testatrix** cannot contest will. 317 Mo148, 295SW118. **"Person interested"** means anyone who has interest in subject matter of proceeding, which is estate of decedent, at any time within four years within which contest can be instituted. TexCommnA 5SW(2d)744. **Children of legatee whose legacy lapsed because of death before testator** are not entitled to contest probate. TexCommnA 24SW(2d)819.

1242-23 219Ala10, 121S17; 332Ill11, 163NE428.

1242-25 252Mass197, 147NE674; 217 AppDiv342, 217NYS176; 154Tenn304 285SW576; TexCivA 286SW295.

1242-26 180Ark1084, 24SW(2d)336; 94CalA453, 271P542; 126Kan84, 267P9. **Heir excluded by prior will.**–126Kan84, 267P9. **Adopted child.**–160Ga872, 129 SE532. **Where property was conveyed and subsequently reacquired by one to whom it came as heir,** both conveyances having been for valuable consideration, blood relative of original owner but not of such heir cannot maintain action to contest will of such heir. 21OhA214, 152NE687. **Legitimate child and not collateral heirs.**–161La707, 109S395. **Whether adopted son of testatrix is proper party** depends on legality of adoption. 135Misc244, 237NYS658.

1243-27 217AppDiv342, 217NYS176.

1243-28 95CalA617, 273P165; 252 Mass197, 147NE674; **NJOrphans** 134A 651; 118OhSt442, 161NE336; 154Tenn 304, 285SW576. But see 168La712, 123 S300. **Persons claiming under later will** are entitled to contest will. 154Tenn 304, 285SW576. **Prior will constituting contract.**–104CalA33, 285P348.

1243-28½-New. Equitable owners, under contract to convey, are not required to contest devise of property under vendor's will. IndA 157NE7.

1243-29 NH 146A89; 28OhA227, 162 NE627; 118Tex565, 17SW(2d)1037. **Collateral heirs excluded** where testatrix survived by legitimate children. 161La707, 109S395.

1243-30 219Ala10, 121S17; Md 150A 861. **Widow** cannot contest will of husband's relative in equity after husband's death on ground of inchoate dower interest. 219Ala10, 121S17. **What constitutes sufficient contingent interest.**–Md 150A861.

1243-31½-New. It is within discretion of court to permit sole heir at law to intervene in contest conducted by special administrator. 252Mass197, 147NE 674.

1243-31⅓-New. Adult illegitimate children born before effectiveness of statute declaring every child legitimate child of its natural parents born after statute became effective cannot contest father's will as invalidated by such statute. 32Ariz573, 261P40.

1243-31¼-New. In determining good faith and probable cause of will contest, contestant should be bound by facts and circumstances existing when stipulation for settlement of controversy was entered into, and not by record subsequently made as contemplated in stipulation. 94CalA453, 271P542.

1243-31⅝-New. Persons without sufficient interest to caveat codicil cannot complain of caveator's abandonment of proceeding. Md 150A861.

1243-22 But see TexCommnA 5SW(2d) 744, 746 [quotCyc].

1243–33 332 Ill 11, 163NE428. But see TexCommnA 5SW(2d)744, 746 [citCyc]. Contra 94CalA453, 271P542; TexCivA 286SW295. In Texas.–CommnA 5 SW(2d)744 (children have no right to contest will).

1244–38 Illegitimate children have no right to attack probate of father's will. 168La973, 123S644.

1244–39 TexCivA 273SW961 (in absence of showing of election to stand by will, widow not estopped from pleading invalidity). Widow, electing to renounce provisions made for her in will and to take under statutes of descent, is not thereby precluded from contesting validity of will on theory that she had no interest in estate. 88 IndA626, 165 NE80.

1244–40 Adopted child may contest, where decree in adoption made adoptive parents' promise not to disinherit child one of conditions of decree. 85 Colo 28, 273P21.

1244–43 See also 219Ala10, 121S17. Contra TexCivA 286SW295.

1245–48 33 OhA66, 168NE574 (acceptance of legacy); TexCivA 276SW327. Suit to contest inures to benefit of all persons interested with contestant, though some of parties might be barred by statute of limitations or otherwise estopped. 118Kan598, 236P649. Acceptance of benefits under will by person ignorant of facts invalidating will does not preclude right to contest will. 118Kan598, 236P649. Ratification by devisees of deeds conveying to them during testator's lifetime land devised to them held to preclude assertion of partial intestacy based on will's incompleteness of description. 174Ark703, 297SW1018. Circumstances amounting to estoppel.–153Md31, 137A482. Testamentary trustee estopped from attacking validity of his own acts. 127Misc705, 217NYS633. Testator's widow, electing to renounce testamentary provisions and to take under statutes, is not thereby estopped to contest validity of will. 88 IndA626, 165NE80.

1245–48½–New. Heirs accepting legacies under will are estopped, after long lapse of time, from contesting possession of immovable property left to one whom they must have known was testator's concubine, and transferred to third person. 160La589, 107S437.

1245–48⅓–New. Heirs filing withdrawals of their waiver of service of citation and consent to probate of will, and further proceedings after motion to strike caveat, filed on day citation was returned are not estopped to contest validity of will and demand jury. 85Colo 276, 275P905.

1245–48¼–New. Legatee, upholding probate of original will and appealing from probate of codicil, cannot contest probate of codicil except on ground of mental incapacity and undue influence in its execution. 228Ky226, 14SW (2d)777.

1245–49 99NJEq179, 138A193; 124 Misc723, 209NYS589; TexCivA 276SW 327. But see 228Ky226, 14SW(2d)777. Evidence held to show that conveyance by devisee to other heirs, pending proceedings to probate will, was part of family settlement in consideration that will should stand. 219Ala234, 121S528.

1245–50 244NY63, 154NE823. Separation agreement between husband and wife whereby wife gave up claim on husband's estate prevents her from contesting his will, not being party in interest. 125Misc475, 211NYS450. Agreements made with testator before death not to contest will are cognizable only in equity. 244NY63, 154NE823. Letters and papers signed by testator's heirs by which they agree for sum paid not to contest will must be interpreted according to purpose of parties and surrounding circumstances. 244NY63, 154 NE823. Settlements and compromises made in good faith, between heirs and next of kin and representatives of estate after the death of testators, are valid and not against public policy. 244 NY63, 154NE823.

1245–51 177Ark1069, 9SW(2d)315; 206 Iowa606, 219NW512; 217AppDiv 342, 217NYS176; 124Misc723, 209NYS 589; 295Pa146, 144A904. Contract not against public policy.–217AppDiv342, 217NYS176. Failure to file objections to probate and destruction thereof after contract of settlement of contest held not badges of fraud vitiating contract. Iowa 230NW401. Representations held not fraudulent inducing settlement of will contest. Iowa 230NW401. Effect of termination of agreement.–Mich 233 NW327.

1245–51½–New. Heir may consent that one who was concubine of testator be placed in possession of immovable property left her by testator. 160La589, 107 S437.

1245–51⅓–New. Conversely, agreement among beneficiaries to divide estate in certain proportions if will is not contested cannot be enforced if will is contested. 287Pa436, 135A116.

1245–51¼–New. Where executor agreed with heir, for consideration not to probate will, court errs in refusing probate without notifying other beneficiaries and taking testimony as to circumstances under which will was torn by testator. 154Md307, 141A368.

1245–51⅙–New. Where devisee to whom was devised remainder in homestead as part of family settlement joined in conveyance to other heirs of other real property in consideration that will should stand, he acquired perfect equity in homestead which court of equity should protect, notwithstanding failure to probate will. 219Ala234, 121S528.

1245–51⅙–New. Law favors family settlements to avoid will contest. 219Ala 234, 121S528.

1245–56 48 Ida485, 283P598; 210Ky 575, 276SW500 (testator's residence as used in statute held to mean his legal domicile); 166La102, 116S714; 170La 828, 129S361; 129Misc241, 221NYS 726; 135Misc25, 237NYS701; 130Misc 499, 223NYS777; 50ND662, 197NW862, 864 [citCyc]; 11PaDist&Co 341; 13Pa Dist&Co 111, (court of county where testator had summer home held without jurisdiction where he was employed and lived most of time in another county); 195Wis128, 217NW709. But see 221 MoA675, 283SW727.

1246–58 221MoA675, 283SW727.

1246–59 Domicile of wife suing for divorce at time of her death is not that of her husband residing in another state. 85CalA675, 259P1014.

1246–61 Proof of domicile.–244Mich641, 222NW146; 134Misc192, 235NYS741.

1246–61½–New. Determination of jurisdiction must be from evidence adduced before examiner and considered by chancellor. 98Fla695, 124S34.

1247–63 135Misc483, 237NYS699. Assets brought into jurisdiction after death.–131Misc859, 229NYS304 (widow returning to state for permanent residence and bringing decedent's assets with her).

1247–64 29F(2d)213; 134Misc399, 235 NYS683; 136Misc400, 241NYS102; 137 Misc270, 241NYS757.

1247–65 129Misc113, 221NYS535.

1248–71 101WVa320, 132SE735. See also 197Wis98, 221NW401.

1248–72 215Ala659, 111S917; 126Me 534, 140A199; 144SC509, 142SE602; 158Tenn479, 14SW(2d)740; 117Tex302, 3SW(2d)408.

1249–76–7 Courts of equity have no jurisdiction to probate wills. 101WVa 320, 132SE735.

1249–80 TexCivA 273SW993.

1249–81 37GaA788, 142SE170.

1249–82½–New. In Tennessee filing of will contest transfers jurisdiction of probate proceeding to circuit court. 154 Tenn304, 285SW576.

1249–82⅓–New. In such case proceedings in circuit court are original and not appellate. 154Tenn304, 285SW576.

1249–82¼–New. In such case regulation and control of advent of parties into proceeding is vested in circuit court. 154Tenn304, 285SW576.

1249–82⅙–New. On collateral attack on various ancient probate orders such orders should be construed where too imperfect or vague to give controlling effect to intention of court as may be gathered from entire record of administration. TexCivA 273SW993.

1251–91 In New York.–220NYS144.

1251–92 216Ala411, 113S500; Mass 172 NE786. In New York.–220NYS144. Destruction of will without knowledge or consent of testatrix constitutes such fraud as to give probate court jurisdiction according to statute. 220NYS 144.

1252–96 175Ark530, 1SW(2d)16. Jurisdiction attaches on filing petition.–78 CalA189, 248P537.

1253–98 220Ala175, 124S247 (special equities of person non compos mentis).

1253–1 Court has no jurisdiction to set aside probate in another county. 221 MoA675, 283SW727. In Tennessee.–158 Tenn479, 14SW(2d)740.

1253–3 215Ala659, 111S917; 219Ala10, 121S17; 221MoA675, 283SW727; 133 Okl 156, 271P681. Probate in probate court is condition precedent to contest of will in chancery court. 215Ala659, 111 S917. Probate of will after contest was filed did not give chancery court jurisdiction. 215Ala659, 111S917.

1254–5½–New. Bill to charge land in another state with trust superior to claims under will is not bill to set aside will and hence is not required to be brought in state where lands are situated. 160Tenn1, 22SW(2d)1.

1254–6 55ND517, 214NW798.

1255–10 221MoA675, 283SW727.

1255–12½–New. On the contrary, law requires prompt settlement of estates of decedents. 154Md541, 140A850.

1255–13 Failure of purchaser of property from heirs of deceased to ask for probate held excused. TexCivA 288SW 602. Laches.–136 Okl 206, 277P213. In Alabama.–220Ala654, 127S221. In Texas.–117Tex302, 3SW(2d)408.

1255–13½–New. Laches may bar suit to establish lost will. 176Ark537, 3SW (2d)298.

1256–14 Forfeiture of legacy or devise. –105WVa638, 144SE576.

1256–15 Statute is not denial of jurisdiction of county court but is addressed to control its action in exercise of jurisdiction. TexCivA 280SW243.

1256–16 117Tex302, 3SW(2d)408. See also 149Wash291, 270P1020. Excuse for delay.–TexCivA 280SW243.

1256–17 215Ala659, 111S917.

1256–17½–New. Under statute limiting time to contest order probating or refusing to probate will to two years from time of making order, order referred to is one determining issue whether will was duly executed by competent testator under no restraint. 120 Kan200, 243P296.

1256–17½–New. Under such statute time is not set running by order dismissing proceeding for probate on application of remainderman on ground that applicant has no interest in property of testator. 120Kan200, 243P296.

1256–17¼–New. Under some statutes, will may be probated after limited period if party offering probate was not in default in offering probate within period. TexCivA 291SW626 (admitted when there is any evidence of probative force which would excuse failure to offer will sooner).

1256–17⅙–New. Evidence held sufficient to show deponents not in default in offering will for probate. TexCivA 291 SW626.

1256–21 196Cal 294, 237P744; 154Md 541, 140A850.

1257–22 204 Iowa487, 215NW497; 121 Kan884, 250P275 (two years after probate); 122Kan741, 253P586 (two years); 153Wash687, 280P87; 155Wash 308, 284P89. Retrospective operation of statutes.–125Kan548, 265P63. When statute begins to run.–122Kan741, 253 P586.

1258–23 Motion to set aside order construing will by party interested but having had no notice of proceedings held well made after term. 203 Iowa497, 211 NW358.

1258–24 TexCommnA 12SW(2d)978; TexCivA 300SW985.

1258-25 122Kan741, 253P586. **Will contest initiated after time originally appointed** for hearing of petition, but before hour to which such hearing has been postponed, is in time. 205Cal581, 271P1083.

1258-26½-New. Disability of some of contestants as to defense of limitations precludes defense as against others. Tex CommnA 12SW(2d)978.

1258-26⅔-New. Limitation against right to contest will, though not running against married woman at time of probate of will, begins to run as against her daughters after her death, notwithstanding daughters were under coverture. TexCivA 13SW(2d)726.

1258-27 95CalA617, 273P165.

1258-30 Mo 31SW(2d)766.

1259-31 121Kan884, 250P275.

1259-32 15F(2d)895; 134Misc508, 236NYS223 (gross laches); 134Misc750, 236NYS226; 134Misc759, 236NYS229.

1259-32½-New. Proceedings to set aside will probated and probate a later will held barred by laches when brought six years after probate of first will and when rights of third party had intervened. 145Va184, 133SE672.

1259-33½-New. Deceased beneficiary's brother having actual or imputed knowledge of facts may be estopped by laches to petition for rescission of order refusing probate of will. 154Md307, 141A368.

1259-35 Creditors are not proper parties to proceeding to probate will. 68 Utah213, 249P803.

1259-36 135Misc296, 238NYS117. **Notice of appearance is not without effect** because authority of attorney to appear is not filed, where contestants are served with citation and court has jurisdiction. 135Misc296, 238NYS117.

1260-38 2LaA161; 154Md541, 140A850.

1260-43 161Ga465, 131SE53 (demurrer to caveat of intervener properly sustained for lack of his interest); 255 Mass611, 152NE220. **In Philippines.**-51 Philippine665.

1261-51 154Tenn304, 285SW576. **Strict common-law rules as to parties will not** be enforced but more liberal rules will be applied. 154Tenn304, 285SW576. **Persons having possible interest in estate under one or more wills are proper** parties. 154Tenn304, 285SW576. **Only those desiring to oppose contest** become litigants in such opposition, under California statute. 207Cal381, 278P1033.

1261-51½-New. Only executors and decedent's heirs at law are rightly parties to will contest, where legatee, having interest adverse to those of other legatees or executor, is permitted to become party in court's discretion, or legatee under prior will is given less, or nothing, under instrument involved. 266 Mass340, 165NE382.

1261-53 145Miss809, 110S836 (administrator not proper interested party).

1261-57 82Mont198, 266P378, 57ALR 1169.

1262-63 15F(2d)990 ("must" in statute not construed as "may"); 50SD232, 209NW355.

1262-64 319Mo 87, 5SW(2d)383; 50SD 232, 209NW355; TexCivA 300SW985.

1262-65 15F(2d)990.

1262-66 See also 126Kan84, 88, 267P9 [citCyc]. **Where no property devised to executor** and property is not required to pay debts, executor is not necessary party. 126Kan84, 267P9.

1263-68 Uninterested applicant has no legal right to examine subscribing witnesses. 136Misc636, 243NYS759.

1263-69 Time of intervention.-Tex CommnA 24SW(2d)819. **Petition held not to show facts relieving petitioner from bar of limitations.**-TexCommnA 24 SW(2d)819.

1263-71 When refusal of permission proper.-95CalA617, 273P165.

1263-73 326 Ill 425, 158NE127.

1263-74 200Cal 410, 253P697; 205Cal 360, 270P670; 207Cal 381, 278P1033; 7CalA189, 248P537; 97CalA79, 270P 710; 326 Ill 425, 158NE127 (only heirs-at-law devisees and legatees of decedent entitled to notice); 204 Iowa487, 215 NW497; 154Md541, 140A850; 52Nev 432, 290P411; 135Misc296, 238NYS117; 9h 173NE305. But see CalA 290P515 (1st case). **Statute strictly construed.**-130Misc786, 226NYS441.

1264-75 Oh 173NE305. But see 95 CalA617, 273P165. **Failure to receive notice** held not to invalidate probate of will. 234 IlA287.

1264-76 205Cal 360, 270P670.

1264-78 Clerk has discretion to vary time and manner of giving notice. 204 Iowa487, 215NW497.

1264-79 TexCivA 297SW582. See also TexCivA 328SW(2d)488(2dcase). **Order for publication of notice must be** of record. 203 Iowa497, 211NW358. **Time and place** of hearing must be specified. 203 Iowa497, 211NW358. **Legatees designated as class** are not entitled to notice under statute requiring notice "to legatees named." 207Cal 381, 278P1033. **Matters not curing defects in citation.**-TexCivA 328SW(2d)488(2dcase).

1264-79½-New. Citation does not give jurisdiction of person who was not named therein. 94CalA79, 270P710.

1264-80 144SC509, 142SE602.

1264-81 Mass 169NE150; 130Misc786, 226NYS441. **Publication in compliance with statute.**-199Cal 391, 249P517. **Sheriff's return showing posting** in three named places held sufficient. TexCivA 297SW582. **Order for substituted service** of citation on testator's son traveling abroad will not be granted merely to expedite probate. 130Misc786, 226NYS 441. **Mailing copies of published notice** is not required where names and residences of heirs are deemed unknown to petitioner, because petition is silent thereon. 207Cal 381, 278P1033.

1265-82 Filing.-199Cal 391, 249P517. **Insufficiency of notice.**-207Cal 381, 278P 1033.

1265-84 Jurisdiction.-205Cal 360, 270 P670. **Where citations issued on behalf of contestants were returnable** Nov. 10 and 25, 1927, and default, if any, in making service of citation, could not have antedated return dates, application for relief from defaults, if any, filed May 2, 1928, was within six-month period. 205Cal 360, 270P670.

1265-91 See also 117Nebr168, 220NW 251. **In Texas.**-CivA 297SW582. **In probate of will of real and personal property of nonresident decedent,** petition should be for probate of will of personal property only where no real property in state. 129Misc113, 221NYS535. **Names, ages, and residences of heirs and devisees** must be stated only if known to petitioner. 52Nev432, 290P411.

1266-93 154Md125, 140A87.

1266-95 13PaDist&Co 111.

1266-97 Petition need not allege that executors named are not disqualified by law. TexCivA 297SW582.

1266-97½-New. Petition in action to establish will rejected by probate court must bring plaintiffs strictly within statutory requirements. 319Mo 108, 5 SW(2d)428.

1266-1½-New. Where it does not appear that there is any real property in jurisdiction petition for probate of foreign will can only be admitted as will of personal property and should be amended accordingly. 135Misc483, 237 NYS699.

1267-10 Under statute requiring verified answer, answer not verified is defective, though power of attorney acknowledging answer is filed. 135Misc 296, 238NYS117. **Where contestants failed to verify answer containing objections,** they should be given opportunity to verify answer. 135Misc296, 238NYS 117.

1267-12 Sufficient objections.-213Ala 178, 104S494. **Objection to probate of codicil because of objectionable language therein and raising no issues as to validity** of codicil must be stricken out. 128 Misc899, 221NYS223. **Motion to strike objections to probate** is equivalent to motion to dismiss if probate of will is triable by equitable proceedings. 207 Iowa451, 223NW486. **Motion to make objection more specific.**-207 Iowa451, 223 NW486 (question of revocation by later will becoming moot by reason of proceeding to establish lost will).

1267-13 Allegations held sufficient.-166 Ga156, 142SE673.

1267-15 Allegations held sufficient.-166 Ga156, 142SE673.

1267-16 218Ala493, 119821.

1267-17 162Ga44, 132SE639.

1267-17½-New. Parties in interest represented by attorney who also represented party having no interest take benefit of objections filed in behalf of such disinterested party. 125Misc476, 211NYS460 (in view of Surrogate's Court Act § 144).

1267-17⅓-New. It is no objection to probate of will that testator had made contract to dispose of property in different manner than that provided in will. 128Misc659, 220NYS398.

1267-17¼-New. Proper procedure to eliminate objectionable matter from testamentary instrument is by motion to preclude recording of such matter. 128 Misc899, 221NYS223.

1267-17⅙-New. Surrogate cannot disregard duty to inquire into validity of execution of will though no exceptions to probate filed. 130Misc907, 225NYS 536.

1267-17⅛-New. Where certified copy of decree in adoption, containing condition against disinheritance, is attached to caveat of adopted child, and is made part of caveat by express reference, it is as good as if recited at length in caveat. 85Colo 28, 273P21.

1267-17⅐-New. In proceedings to probate will, motion to strike out objection to probate as barred by statute of limitations is in substance demurrer. 207 Iowa451, 223NW486.

1267-17⅛-New. Contestant has right to plead as many defenses as he desires. 226AppDiv715, 233NYS400.

1267-17½-New. Rights of other legatees under former will cannot be injected into contest by amendment. 99CalA 15, 277P881.

1267-17 1/10-New. Application to amend by alleging that contestant was legatee under former will is properly denied where proponents tender amount of such legacy. 99CalA15, 277P881.

1268-19½-New. Paragraph of answer raising issue of residence, though immaterial on question of court's jurisdiction, will not be stricken out. 137 Misc270, 241NYS757.

1268-21 Kan 289P480.

1268-22 321Mo 310, 11SW(2d)16; Tex CivA 295SW236. **Bill held sufficient.**-320 Ill 61, 150NE268.

1269-23 The names of the parties in interest, etc. 207Cal 381, 278P1033.

1269-24 321Mo 310, 11SW(2d)16.

1269-29 154Md541, 140A850.

1269-31 329 Ill 268, 160NE594; 312 Mo 458, 278SW759; TexCommnA 38W (2d)77. But see 167La705, 120858.

1269-32 329 Ill 519, 161NE129.

1269-33 216Ala43, 112S360; 218Ala 366, 118S547; 202Cal 258, 259P935; 329 Ill 519, 161NE129; 163La468, 112S298. But see 218Ala493, 119821.

1270-41 Answer may be waived.-201 Cal 185, 256P200.

1270-43½-New. There can be no affirmative defense in will contest. 29 OhA 457, 163NE728.

1270-44 General and special demurrers to caveat of one alleging interest as adopted child of testator are properly overruled where special demurrer raised question only as to whether claimant of such interest by virtual adoption could caveat will. 160Ga872, 129SE532.

1271-46½-New. Bill in equity contesting will is not subject to demurrer going to complainant's right to maintain suit if any one of complainants has right to contest will. 219Ala10, 121S817.

1271-47 161Ga690, 131SE885 (caveat amended to admit prima facie case). **Denial on ground of laches.**-44 Ida625, 258P1082.

1271-51 321Mo 310, 11SW(2d)16. **In a contest on the ground of fraud,** etc. 261 Mass82, 158NE333. **Evidence held admissible** under allegation of monomania. 161Ga615, 131SE535 (use of intoxicating liquor). **Signature.**-178Ark951, 12 SW(2d)896.

1272-53 202Cal 490, 261P709. **Testamentary capacity is res judicata** where parties to contest same as parties to probate. 261Mass82, 158NE333.

1272-55 219Ala265, 122S29; 56AppDC 333, 13F(2d)305; Ga 155SE515; 326 Ill 474, 158NE485; MoA 17SW(2d)566;

133 Okl 156, 271P681; 142 Okl 197, 286 P17; 45Philippine216; 114Tex418, 267 SW244, 270SW1001; TexCivA 275SW 206; TexCivA 276SW964, 966 [citCyc]. **Burden does not shift when proponent makes prima facie case.**–329 Ill 268, 160 NE594. **Prima facie showing** by proponent, though shifting burden of evidence to contestant, does not relieve proponent of burden of proof when prima facie evidence is weakened. TexCivA 4 SW(2d)620. **Erratum.–"Burden of proving subsequent will revoking prior will** see infra, XI, K, 1, c, (I)" should be **"Burden of proving subsequent will revoking prior will** see infra, XI, J, 1, c, (I)."

1272–55½–New. even though burden of introducing evidence may shift to contestant. 325 Ill 474, 156NE485.

1272–57 Alta [1927] 2DomLR333.

1272–57½–New. Burden to set aside probate is on contestant. TexCivA 288 SW602.

1272–57½–New. Presumption of abandonment of application for probate arising from delay is rebuttable. TexCivA 280SW243.

1272–57¼–New. In proceedings for probate of will, claimant, filing appearance as contestant, has burden to prove that she is heir at law and next of kin of deceased, and failure to sustain burden warrants striking of her name from record. 264Mass112, 162NE225.

1272–57½–New. Will upheld if theory consistent with validity is as probable as contrary theory. Me 151A150.

1272–57¾–New. Burden is on proponent to establish his statutory interest in subject matter. 138Misc104, 244NYS 758.

1272–58 165Ga451, 141SE306; 323 Ill 328, 154NE156; 325 Ill 474, 156NE485; Mass 168NE162; 172Minn217, 214NW 892; 174Minn13, 218NW447; 180Minn 256, 230NW781; 317Mo 614, 296SW739; 321Mo 920, 13SW(2d)548; 117Nebr168, 220NW251; NJPrerog 150A786; 189NC 509, 127SE549; 131 Okl 142, 268P296; 45Philippine216; 107WVa38, 146SE894. **In Alabama.**–213Ala178, 104S494. **Prima facie case for probate is made** when proponent makes proof of age of testator and that will was signed and attested as required by statute. 323 Ill 328, 154NE 156.

1273–59 200 Iowa948, 205NW770; Me 151A150; 137Misc52, 244NYS192. **Signature of testator.**–22 OhA430, 153NE 277. **Testator's ability to write name and spell it correctly** is presumed where he was able to write. 178Ark951, 12SW (2d)896.

1273–60 332 Ill 509, 163NE772; Tex CivA 15SW(2d)164.

1273–61 166La487, 117S565; Me 151A 150; 164Minn377, 205NW271; 174Minn 13, 218NW447. **Presumption that will was signed when written** is greater in case of holographic will. 19F(2d)705. **Date of will** is presumed to be that stated in it. 286Pa155, 133A144. **Testimony of subscribing witness may be insufficient to overcome presumption.**–174 Minn13, 218NW447. **Every reasonable presumption** will be indulged in favor of due execution and attestation of will. 334 Ill 115, 165NE644, 67ALR1127. **Signing by testator before acknowledgment** will be presumed in absence of evidence as to when will was signed. 232Ky572, 24SW(2d)282.

1274–64 215Ala402, 110S705; TexCivA 286SW673. **Though witnesses did not notice testator's signature** on will when they signed, presumption will apply. TexCivA 286SW673.

1274–65 178Ark241, 10SW(2d)377; 325 Ill 474, 156NE485 (shifts to contestant); 142Wash637, 254P236. **Where testimony for proponent made out prima facie case,** burden of rebutting is on contestant. 289Pa267, 137A260.

1274–66 161Ga690, 131SE885; NJ 130 A245. **Attestation clause denied.**–130 Misc907, 225NYS536. **'Where subscribing witnesses testify that they saw no writing on document propounded as will,** attestation clause is without force to raise presumption of due execution. 219 Ala265, 122S29.

1274–66½–New. There is presumption that witness could not and did not see testator sign where testator signed in street and witness subscribed in his office in adjoining building. 161Ga690, 131SE885 (presumption not overcome by evidence).

1274–66¼–New. Person writing his name under word "witness" at testator's request and in his presence impliedly certifies that he saw testator sign his name to instrument, 213Ala178, 104S494.

1274–66¼–New. or that he saw name of testator on it and testator acknowledged that it was his signature. 213Ala 178, 104S494.

1274–66½–New. Person writing his name under words "executed in the presence of" or other equivalent phrase impliedly thereby certifies that he saw testator sign his name to instrument, 213Ala184, 104S500.

1274–66½–New. or that he saw name of testator on it and testator acknowledged that it was his signature. 213Ala 184, 104S500.

1274–66½–New. Where court specifically finds testator to be of sound mind, presumption that testator remained of sound mind throughout execution of will justifies conclusion that testator was not unconscious or asleep. 96CalA 640, 274P623.

1274–66¾–New. That instrument was executed under supervision of competent attorney affords strong presumption of compliance with statute. 133Misc858, 234NYS505.

1274–66⅞–New. It will not be presumed that testator wrote will on loose pages to circumvent statute of wills. Me 151A 150.

1275–67 47 Ida668, 279P291; 96Pa Super26. Contra 327 Ill 25, 158NE401. **Rule held not applicable.**–166La102, 116 S714.

1276–68 See also 334 Ill 115, 165NE644, 67ALR1127.

1276–70 334 Ill 115, 165NE644, 67ALR 1127; 128Misc662, 219NYS701 (where will showed some alterations in connection with name of one of executors).

1276–70½–New. Duty to provide explanations of interlineations and changes in will, when required, rests upon proponents. 334 Ill 115, 165NE644, 67ALR 1127.

1277–71½–New. Where printing on top of will blank containing publisher's name and address and code letters, showing date blank was printed, were cut off, satisfactory explanation by proponent is required. 126Misc511, 214NYS 154.

1277–73 47RI 274, 132A721, 45ALR830. **Propounder not bound to show** reasons testatrix may have had for excluding her blood relative from her estate, giving preference to him. 45Philippine216.

1277–76 154Miss381, 122S496, 63ALR 1188.

1278–77 164Minn377, 205NW271; 154 Miss381, 122S496, 63ALR1188; Pa 151 A694; 46Philippine750 (presumptive knowledge of dialect held conclusive where not rebutted). See also Alta [1928] 1DomLR423.

1278–78 Adjudication of insanity of decedent raises presumption of incapacity. 200Cal 299, 252P1049.

1279–85 126Misc511, 214NYS154; 133 Misc112, 231NYS596; 133Misc745, 234 NYS239. **Burden of proving forgery** to exclusion of every other reasonable hypothesis is not on contestants. 126 Misc511, 214NYS154.

1279–86 126Misc511, 214NYS154.

1279–86½–New. Upon proof of due execution burden of proof is shifted from proponent to a contestant alleging forgery. 8PaDist&Co 601.

1279–91 NJPrerog 143A92; 130Misc 172, 223NYS691.

1279–91½–New. Burden of showing testator's mental incapacity after he was last seen with possession of will is on proponent. 134Misc405, 235NYS692.

1279–92 125Kan636, 639, 266P33 [quot Cyc]; 100Vt395, 138A725, 728, 54ALR 1369 [citCyc]. See also 100Vt395, 138 A725, 54ALR1369.

1279–92½–New. Where material portion is lost or destroyed, such portion must be established before will can be admitted to probate. 26 OhNPNS209.

1279–94 169Ark62, 272SW873. See also TexCivA 4SW(2d)620. **To prevent probation of will contestants must show its destruction or revocation** as provided by statute. TexCivA 272SW823.

1280–95 169Ark62, 272SW873. **Proponent** has burden of making explanation and giving satisfactory reason for change of testator's intent in addition to that which would ordinarily suffice. 126Misc511, 214NYS154 (where prior wills carefully prepared showing general scheme of distribution and testamentary intent).

1280–99 217Ala364, 116S427; 169Ark 62, 272SW873; TexCivA 295SW236. **Will torn in pieces** and not pasted together as found in testator's trunk raises prima facie presumption of intention to revoke. 126Misc749, 215NYS 428.

1280–1 Where proponent shows that he took sealed will from safe of deceased and delivered it, still sealed, to his attorney with instructions to deliver it to probate judge, who opened it, he may invoke presumption that testator made cancellations. 47 Ida668, 279P291.

1280–2 199Cal 641, 250P676; 334 Ill 107, 165NE650; Mass 172NE786; NJ Prerog 143A92; 133Misc395, 232NYS 654; 134Misc405, 235NYS692; 135Misc 630, 239NYS252; 49Philippine902. **Such presumption is not overcome** by statutory presumption of continued existence of thing once shown to exist. 199Cal 641, 250P676. **Where will is executed in duplicate or triplicate,** and one of examples is not found, law presumes that example not so found was destroyed animo revocandi, such destruction revoking all examples. 133Misc395, 232 NYS654.

1281–3 199Cal 641, 250P676.

1281–6½–New. Burden of proving that cancellation of will was procured by undue influence rests on proponent. 48 SD474, 205NW47.

1281–6½–New. Burden of proving that testator was not mentally competent to revoke will rests on proponent. 48SD 474, 205NW47.

1281–8 334 Ill 107, 165NE650; 142Miss 210, 106S753; 243NY468, 154NE312; 125Misc475, 211NYS450; 137Misc522, 244NYS612; 286Pa583, 134A513; Pa 151A789; 13PaDist&Co 87; 149Wash 291, 270P1020; Ont [1929] 3DomLR 248. **Where a will is intrusted to another,** etc. 313Mo 256, 281SW417. **Burden of showing lack of capacity to revoke** rests on party seeking to establish will. 142Miss210, 106S753. **Proponent of will executed in triplicate** has burden of overcoming presumption by adequate proof that example of will executed in triplicate not found was destroyed animo revocandi. 133Misc 395, 232NYS654.

1283–10 149Wash291, 270P1020; Can [1930] 2DomLR532. **Proof of permanent mental incapacity to revoke** before time will is shown to have been in existence overcomes presumption of revocation. 142Miss210, 106S753.

1283–10½–New. In proceedings to establish lost will, contestant who affirmed at trial that he had taken will from testatrix's safety deposit box and delivered it to her has burden of retracing it into testatrix's hands. 149Wash291, 270P1020.

1283–11 In Quebec.–[1930] 2DomLR 459.

1283–14 45Philippine216.

1283–15 TexCivA 295SW236.

1283–18 But see 117Nebr168, 220NW 251.

1283–18½–New. Witness may testify that testator showed him draft of will. 318 Ill 528, 149NE483.

1284–19 See also 264Mass276, 162NE 312.

1284–20 But see 319Mo 744, 8SW(2d) 38.

1284–20½–New. Evidence held sufficient to show consideration for compromise agreement to permit probate of will 124Misc723, 209NYS589.

1284–20½–New. Evidence insufficient to show consent to destruction of will on part of beneficiaries other than contestant. 210Ky575, 276SW500.

1284–20¼–New. Probate court is not

empowered to weigh evidence further than to determine if prima facie case has been made out. 323 Ill 328, 154NE 156.

1284-20½-New. Evidence of amount and value of estate and source from which it was acquired is admissible under some circumstances. 140SC1, 138 SE355.

1284-20¾-New. Evidence held inadmissible as to whom farm belonged being immaterial. 220Ky388, 295SW445.

1284-20⅞-New. Evidence held sufficient to show domicile of testator within state. 126 Okl 210, 259P579.

1284-20⅞-New. Agreement among heirs not to have will probated cannot be considered. 327 Ill 346, 158NE709.

1284-20⅞-New. General rules of evidence apply in probate proceedings. 94 CalA782, 271P923; 332 Ill 509, 163NE 772; 228Ky83, 14SW(2d)413; 264Mass 112, 162NE225; 264Mass276, 162NE 312; 321Mo 310, 11SW(2d)16; 26 Oh NPNS112; 51SD184, 223NW41.

1284-20⅞-New. Evidence held to show execution of will under mistake of law and fact.–48 Ida810, 285P478.

1284-20⅞-New. Evidence held insufficient to establish facts necessary to admit instrument to probate as will. Ind 170NE57.

1284-20⅞-New. Right to dispose of property by will should not be defeated upon slight, remote, or unsubstantial testimony. 232Ky572, 24SW(2d)282.

1284-20⅞-New. Facts which will constitute prima facie case in caveat proceeding must be of sufficient probative force to be legal basis for finding invalidating will. 158Md555, 149A283.

1284-20¾-New. Evidence held sufficient to show that testator was domiciled in New York and authorized independent original probate of will in New York. 135Misc25, 237NYS701.

1284-20⅞-New. In will contest on appeal from register's order probating will proponents make prima facie case by offering register's record. 299Pa430, 149A737.

1284-21 212Ala605, 103S594 (all circumstances and conditions surrounding preparation, execution, and witnessing of will are competent); 218Ala366, 118 S547; 48 Ida171, 279P625 (testimony of witnesses other than subscribing witnesses held admissible); 327 Ill 346, 158 NE709; 220Ky388, 295SW445; 225Ky 480, 98W(2d)220; Me 151A150; 264 Mass276, 162NE312; 321Mo 310, 11SW (2d)16; 135 Okl 77, 274P30, 62ALR690; 49RI 224, 141A616; 100Vt395, 138A725, 54ALR1369; 103WVa124, 136SE777. **Evidence held admissible.**–193NC494, 137SE427. **Testimony of party interested in event** held competent, on question whether will offered for probate is same as when executed by testator. 192 NC248, 134SE649. **Extrinsic evidence as to date** of olographic will cannot be received. 166La631, 117S772.

1284-21½-New. Surrogate may inquire into circumstances surrounding custody of paper propounded. 126Misc511, 214 NYS154.

1284-21¾-New. Only testimony to be heard as to due execution and competency of testator is that of attesting witnesses. 323 Ill 328, 154NE156.

1284-21¾-New. Proponent is limited in probate court to attesting witnesses for proof that testator was of sufficient age to make will. 323 Ill 328, 154NE156.

1284-21¾-New. that he executed it in conformity with requirements of statute. 323 Ill 328, 154NE156.

1284-21¾-New. that subscribing witnesses were competent as such, 323 Ill 328, 154NE156.

1284-21¾-New. and that they believed testator was of sound mind and memory at time he executed instrument. 323 Ill 328, 154NE156.

1284-24 213Ala178, 104S494; 26 OhNP NS209; TexCivA 289SW1057; Can [1924] 2DomLR565. **Evidence held sufficient** to prove that testator signed instrument purporting to be his will. 213 Ala184, 104S500; 214Ky769, 284SW 389. **Attestation clause.**–216AppDiv111, 215NYS149. **Evidence of will being in handwriting of testator and signed by witnesses in his presence makes prima facie case for probate, though contested** as witnesses before signed. 215Ala 402, 110S705. **Evidence of attestation as well as signature of testator** is material part of proof of execution. 322 Ill 42, 152NE545.

1284-24½-New. Proof that testator was under no unlawful constraint is not essential to prima facie case for probate of will. 323 Ill 328, 154NE156.

1284-24½-New. and proof of undue influence is not cause for refusal of probate. 323 Ill 328, 154NE156.

1285-25 213Ala184, 104S500. **Probate court has no power to refuse probate on** ground other than failure of proof of requirements of statute or proof of improper conduct in execution of will. 323 Ill 328, 154NE156. **On proof that requirements of statute have been complied with probate court is required to admit will to probate,** in absence of proof of fraud, forgery, compulsion or other improper conduct. 323 Ill 328, 154NE156. **Separate sheets of paper** held properly probated in view of evidence as to identity with those prepared and executed as will. 220Ky817, 295 SW1035.

1285-26 94CalA782, 271P923; 325 Ill 474, 156NE485; 167Minn63, 208NW425 (evidence held sufficient); 216AppDiv 111, 215NYS149 (holographic will, evidence sufficient); 217AppDiv671, 216 NYS613 (evidence held sufficient to warrant finding of improper execution); 132 Misc171, 229NYS805; 137Misc773, 244 NYS742 (sufficient); 121 Oh129, 167NE 370; 112 Okl 25, 239P592. **In uncontested cases,** etc. 39Wyo 482, 273P684, 64ALR203. **Evidence held sufficient.**–96 CalA640, 274P623; 339 Ill 126, 171NE 163; 125Kan636, 266P33; 166La695, 117S777; Mass 168NE520; 145Miss23, 110S862; NJPrerog 129A151; 131Misc 874, 227NYS550; 133Misc858, 234NYS 505; 49ND277, 191NW343; 55ND664, 215NW160; 135 Okl 77, 274P30, 62ALR 690; 125 Or288, 266P630; 188Wis183, 205NWS14, 42ALR951; 195Wis596, 219 NW378; 39Wyo 482, 273P684, 64ALR 203; **Evidence held insufficient.**–226Ky 311, 10SW(2d)1106; 247Mich690, 226 NW661; 137Misc52, 244NYS192; Tex CommnA 158SW(2d)571; TexCivA 158SW (2d)164. **Acknowledgment of signature to witnesses shown.**–219Ala265, 122S29. **Evidence held to warrant verdict** that alleged will was not in handwriting of decedent. 200Cal 299, 252P1049. **Evidence of dissimilarities between characters of writing and usual handwriting of deceased** is not alone sufficient to discredit paper otherwise above suspicion where there is substantial evidence that it is genuine. 103WVa124, 136SE777. **"Fair preponderance" of evidence** is necessary. 126Misc511, 214NYS154 (which means probability of truth). **Silent circumstances shown by examination of will** held more reliable than oral testimony of subscribing witnesses. 126 Misc511, 214NYS154. **In Louisiana.**–168 La728, 123S306. **Testimony that testator stated to witnesses that he had signed paper** is insufficient to prove execution. 137Misc52, 244NYS192. **Genuineness of testator's signature.**–Pa 151 A694.

1285-27 213Ala184, 104S500 (sufficient); 215Ala402, 110S705 (though subscribing witness swears will was not properly executed); 216AppDiv111, 215NYS149; 49RI 224, 141A616; Tex CommnA 291SW873. **Evidence held sufficient.**–128Kan699, 280P916; 317Mo 614, 296SW739; 125Misc475, 211NYS 450; TexCivA 286SW673. **Evidence held insufficient** to show independent advice required by Kansas statute where will is prepared by sole or principal beneficiary who was confidential agent or legal adviser of testator or occupied position of trust or confidence to testator. 120Kan13, 241P1087. **Evidence held to show disposition of all of testator's property.**–125Misc475, 211NYS450. **Mere suggestions or probabilities** are not sufficient to authorize finding in favor of person having affirmative of issue. 219Ala265, 122S29.

1285-27½-New. On question of due execution each case must be decided on its facts in light of attending circumstances. 126Misc704, 214NYS678.

1285-27½-New. General rules of evidence as to weight to be accorded evidence apply in will contest. 199Cal 641, 250P676.

1285-27¼-New. Evidence held insufficient to support finding that will was destroyed after death of testator. 199 Cal 641, 250P676.

1285-27½-New. Careless or slovenly drawing of will is not necessarily evidence that there has been noncompliance with law. 334 Ill 115, 165NE644, 67ALR1127.

1286-28 166Minn374, 208NW22.

1286-31 Evidence held sufficient.–120 Kan13, 241P1087.

1286-33 145Miss23, 110S862.

1286-33½-New. Evidence sufficient to show mental capacity. 145Miss23, 110 S862.

1286-34 149Md498, 132A55 (declarations of testatrix); 47RI 274, 132A721, 45ALR830. But see 128Misc254, 219 NYS313.

1286-36 214Ala291, 107S835 (evidence admissible to show motive); 149Md498, 132A55; 133Misc112, 231NYS596.

1287-39 196Cal 301, 237P739; 127Misc 784, 217NYS488 (letters written by soldier subsequent to oral will); 188Wis 4, 205NW486; Can [1930] 4DomLR 1037(2dcase). **Declarations of testator** may be admissible for such purpose. 196Cal 301, 237P739.

1287-40 188Wis4, 205NW486.

1287-41 Evidence held sufficient to show that codicil was entirely in handwriting of testator. 170La449, 128S 273.

1287-42 213Ala178, 104S494 (after preliminary testimony of subscribing witnesses); 213Ala184, 104S500.

1287-43 Foreign will.–85CalA489, 259 P767.

1288-44 Evidence of unauthorized record of will in probate office held erroneously admitted. 217Ala364, 116S427.

1288-46 334 Ill 115, 165NE644, 67ALR 1127.

1288-47 Weight of evidence.–334 Ill 115, 165NE644, 67ALR1127; 166La102, 116S714; 128Misc662, 219NYS701. **Evidence held to show** alterations prior to execution. 327 Ill 25, 158NE401. **Date of will.**–334 Ill 115, 165NE644, 67 ALR1127. **Date of alteration.**–334 Ill 115, 165NE644, 67ALR1127.

1288-49 As to filling in blanks.–213Ala 184, 104S500. **Parol proof** that papers offered for probate were ones executed by testator held admissible. 220Ky817, 295SW1035. **Testamentary intent.**–235 Ky189, 30SW(2d)893.

1289-58 202 Iowa1391, 212NW122 (as to undue influence).

1289-60 264Mass276, 162NE312.

1290-64½-New. In will contest, paper executed by contestants whereby they offered to pay legacies received into court on disallowance of will has been held properly excluded. 264Mass276, 162NE312.

1290-65 202 Iowa1391, 212NW122. But see 259Mass397, 156NE680. **Declarations of propounder of will,** made before its execution, who is afterward named therein as executor and legatee, are inadmissible to impeach will. 163 Ga149, 135SE721.

1290-66 259Mass397, 156NE680 (admission of legatee in effect sole beneficiary held admissible).

1290-70 TexCivA 289SW1057. **To reestablish part obliterated by stranger** parol evidence is admissible if obliteration is so complete as to make obliterated part unintelligible. 169Ark62, 272SW873. **Circumstances surrounding delivery of destroyed will to testatrix** admissible on issue of revocation. 149 Md498, 132A55. **Circumstances surrounding making of later will** admissible on issue of revocation. 149Md498, 132A55. **Declarations of testator incompetent to show nonrevocation** made shortly before his death to relatives of legatee concerning his will and objects of his bounty. 126Misc749, 215NYS 428.

1290-72 Revocation by marriage.–99 CalA330, 278P473.

1290-73 127Misc215, 216NYS325; 136 Misc230, 242NYS415; 114Tex418, 267 SW244, 270SW1001. **Finding of two wills of different dates in sealed envelope with indorsement** in testator's handwriting that it contained his last will and testament to probate court is of no weight where not part of res gestæ relating to execution and publication of later instrument. 315Mo 578, 286SW58, 51ALR639.

1291-77 Pa 151A789. See also 149Md 498, 132A55.

1291-79 13PaDist&Co 87.

1291-79½-New. Parol evidence is admissible to explain changes in will before execution thereof.-127Misc215, 216 NYS325.

1291-82½-New. That contestant had opportunity to destroy will is not evidence that he did so. 133Misc395, 232 NYS654.

1292-84½-New. When there is proof which raises issue that testator signed subsequent will containing revoking clause, though all its contents cannot be proved, it is admissible upon issue as to whether former will had been revoked. 114Tex418, 267SW244, 270 SW1001.

1292-84½-New. Evidence admissible only when indication on face of revocation. TexCivA 295SW236.

1292-84¼-New. On issue of revocation by subsequent inconsistent testamentary disposition, facts surrounding execution and publication of papers in dispute may be shown so as to place court, as far as may be, in position of testator, at time last document was executed, in order to ascertain his intention. 106WVa663, 146SE729.

1292-85 175Ark369, 299SW389; TexCivA 295SW236; 149Wash291, 270P 1020. **Evidence held sufficient to show revocation.**-196Cal 339, 238P76; 202Cal 424, 261P298; 125Misc475, 211NYS450; 124 Okl 275, 257P757. **Evidence held sufficient to show want of revocation.**-TexCommnA 15SW(2d)571. **Evidence held insufficient.**-332 Ill 27, 163NE384; 243 IllA386; 98NJEq645, 130A655; 193NC494, 137SE427. **One witness may be sufficient.**-196Cal 576, 238P 666. **Negative testimony of subscribing witness,** in absence of any evidence suggesting execution of subsequent will or revocation of will offered for probate, is sufficient to sustain finding that will was not revoked. TexCivA 300SW661. **Evidence sufficient to show will not revoked.**-NJPrerog 129A151. **Clear, satisfactory, and convincing proof required.**-Iowa 232NW674.

1292-86 NJPrerog 141A313. **Evidence held sufficient.**-Can [1930] 2DomLR532. **Evidence held insufficient to overcome presumption.**-134Misc405, 235NYS692. **Evidence held insufficient to rebut presumption.**-Ont [1929] 3DomLR248.

1292-87 243NY468, 154NE312; 133 Misc395, 232NYS654.

1292-88½-New. In absence of evidence to overcome presumption of intention to revoke from finding of torn pieces not pasted together will cannot be probated. 126Misc749, 215NYS428.

1292-88½-New. Evidence that proponent **had access to safe in which will was found** does not rebut presumption that testator made cancellations. 47 Ida668, 279P291.

1292-90 213AppDiv512, 210NYS187; 135Misc35, 237NYS535.

1292-91 Evidence held to show that testator, in executing codicil, did not intend to republish and revive prior codicil destroyed by him. 213AppDiv512, 210NYS187.

1293-93 233Ky23, 24SW(2d)902.

1295-8 Declarations of testator are admissible in corroboration of other evidence of execution, loss and nonrevocation. 313Mo 256, 281SW417.

1295-9 149Md498, 132A55.

1295-11 149Md498, 132A55.

1295-12 149Md498, 132A55. **Testimony of draftsman of lost will** held admissible as to its execution and signature. 149Md498, 132A55.

1295-13 313Mo 256, 281SW417. **Declarations of testatrix as to whereabouts of will held incompetent to establish its existence at her death.** 243NY468, 154 NE312. **Evidence held to show destruction or secretion of earlier will** by beneficiary for own purposes. 149Md498, 132A55.

1296-15 See also 149Md498, 132A55.

1297-20 But see 132Misc625, 229NYS 821.

1297-23 203 Iowa888, 210NW537; 207 Iowa448, 223NW484; 223Ky705, 4 SW(2d)694; Mass 172NE786; 243NY 468, 154NE312; 132Misc625, 229NYS 821; SD 227NW84; TexCivA 289SW 1057 (evidence held insufficient to show existence of subsequent will). **Evidence held sufficient.**-313Mo 256, 281SW417; Can [1930] 2DomLR532. **Evidence held insufficient.**-176Ark537, 3SW(2d)298; 202Cal 424, 261P298; 203 Iowa888, 210 NW537; 207 Iowa448, 223NW484; Miss 109S794; NJPrerog 143A92. **Evidence held not to show destruction of will.** 243NY468, 154NE312. **Evidence held to show execution, contents, and existence of lost will,** and when testator died, as required by statute. 128Misc71, 218 NYS234. **Facts to be thus proved are** due execution and contents of will. 203 Iowa888, 210NW537. **Proof showing substance and intent of lost will held sufficient.**-149Md498, 132A55. **Testimony of draftsman held prima facie proof of execution of lost will.**-149Md498, 132 A55. **Rule is not relaxed by fact** that such will was last seen in possession of testator's wife. 203 Iowa888, 210NW 537. **Copy of olographic will held properly probated** under evidence showing that original was destroyed. 168La303, 121S874. **Execution of lost will.**-SD 227 NW84.

1298-24 SD 228NW376 (mere preponderance of evidence is insufficient).

1299-28 Evidence held insufficient.-334 Ill 107, 165NE650; 135Misc35, 237NYS 535.

1299-29½-New. If proponent admits destruction of will but claims want of testamentary capacity after will was last seen in his possession, he must exclude every reasonable possibility of testamentary capacity. 134Misc405, 235NYS 692.

1299-30 313Mo 256, 281SW417.

1300-32 But see 248Mich425, 227NW 817. **Copy of draft equivalent to one witness,** etc. 128Misc71, 218NYS234. **Testimony of main beneficiary under will,** testifying to execution of will, may not be considered in establishing lost will. 176Ark537, 3SW(2d)298.

1300-33 128Misc254, 219NYS313 (evidence of attesting witness, though hazy in recollection, held sufficient); 130Misc 172, 223NYS691. **Identification.**-75CalA 554, 243P33. **Evidence held to show purported will to be forgery.**-164La514, 114S116. **Evidence held sufficient.**-136 Misc769, 242NYS228; Utah 285P285(2d case).

1300-35 Evidence held sufficient.-197 NC332, 148SE469.

1300-36½-New. That will is holographic and subscribing witnesses swear each was alone with testator shows testamentary intent of testator. 126Misc704, 214NYS678.

1300-37 Evidence held insufficient in proceedinge to probate nuncupative will. 167Ga38, 144SE774; 169Ga485, 151SE8. **In Porto Rico.**-33PortoRico 309.

1300-37½-New. To set aside nuncupative will, proof of noncompliance with essentials as recited in notarial act must be peculiarly strong to overcome presumption in favor of will, and testimony against will of witnesses who attested to compliance of formalities is entitled to little weight. 166La487, 117S565.

1301-39 SD 228NW376.

1301-42 See also 166La487, 117S565.

1301-43 220Ky817, 295SW1035.

1301-45 40GaA624, 150SE863(2dcase) (execution of lost will must be proved by three subscribing witnesses); 327 Ill 346, 158NE709; 220Ky817, 295SW1035. **Testimony based wholly on attestation clause** is admissible though witness has no independent recollection. TexCivA 300SW661.

1301-46 322 Ill 426, 153NE600; 325 Ill 474, 156NE485.

1301-46½-New. where properly identified, 325 Ill 474, 156NE485 (identification held sufficient).

1303-57 213Ala178, 104S494; 154Miss 381, 122S496, 63ALR1188; 317Mo 614, 296SW739; 49RI 224, 141A616.

1303-58 213Ala178, 104S494; 213Ala 184, 104S500 (nonsubscribing witnesses); 130Misc547, 225NYS203; Pa 151A694; 12PaDist&Co 77. But see 327 Ill 346, 158NE709. **Nonsubscribing witnesses may testify** that they saw testator sign his name to instrument. 213 Ala184, 104S500. **Secondary evidence not admissible** where identity, name and residence of attesting witness not shown. 322 Ill 54, 152NE542.

1303-58½-New. Where attesting witnesses in proceedings are unable to testify to necessary facts showing that will was duly executed, such facts may not be supplied by secondary evidence till other subscribing witnesses have been examined or their absence accounted for. TexCivA 15SW(2d)164.

1303-59 313Mo 256, 281SW417.

1303-60 313Mo 256, 281SW417.

1303-60½-New. Proof of mental capacity of testator is not confined to attesting witnesses. 154Miss381, 122S496, 63 ALR1188.

1303-61 213Ala178, 104S494; 219Ala 265, 122S29; 174Minn13, 218NW447, 450 [citCyc]; 130Misc514, 223NYS843; 49Philippine380. See also 45Philippine 216.

1304-64 82Colo 5, 256P630; 161Ga690, 131SE885; 334 Ill 115, 165NE644, 67 ALR1127; 99NJEq363, 132A115; 216 AppDiv111, 215NYS149 (holographic will); 130Misc547, 225NYS203; 286Pa 58, 132A786 (certificate may be used to refresh recollection of witness and as substantial proof). See also 126Miss704, 214NYS678. **Evidence held sufficient** to show that testator declared will and requested signatory witnesses to act as such. 82Colo 5, 256P630.

1304-65 216AppDiv111, 215NYS149; 286Pa58, 132A786 (evidence held to make prima facie case of validity). **That witnesses did not remember details** and did not seem to know what testamentary capacity is held not to detract from probative force of attestation clause. 286Pa58, 132A786.

1304-66 339 Ill 126, 171NE163; 216 AppDiv111, 215NYS149; 125 Or238, 266 P630.

1304-67½-New. Where subscribing witnesses identify document as one which they subscribed, it should be received in evidence for inspection. 219 Ala265, 122S29.

1304-67½-New. While it is competent to offer proof of probate of will, together with subscribing witnesses' depositions, it does not relieve proponents of necessity of making prima facie case in proceeding to contest will. 332 Ill 509, 163 NE772.

1304-68 96CalA640, 274P623; 161Ga 690, 131SE885; 325 Ill 201, 156NE270; 99NJEq363, 132A115. **Attestation clause may be overcome** by testimony of witnesses themselves, or other witnesses, or proof of inconsistent facts and circumstances. 99NJEq363, 132A115. **Evidence held sufficient** to show that will written by subscribing witness at testator's request was properly attested in testator's presence. 145Miss23, 110S862.

1304-68½-New. Even though testimony of subscribing witnesses conflicts, corroboration of attestation clause by one of witnesses is sufficient to establish will. NJ 130A245.

1304-68½-New. Certificate of subscribing witnesses' oath is not prima facie proof of validity of will where evidence is conflicting. 325 Ill 474, 156NE485.

1304-68¼-New. Evidence was held sufficient to justify finding will was properly executed and witnesses signed in presence of testatrix. TexCivA 299 SW682.

1304-68½-New. Under statute requiring examination of subscribing witnesses if they are present in county at time of contest, testimony is not conclusive. 48 Ida171, 279P625.

1305-69 209Ky3, 272SW3.

1305-70 154Miss381, 122S496, 63ALR 1188.

1305–72 322 Ill 54, 152NE542; 255Mass 611, 152NE220; Vt 150A128(2dcase).
1306–75 100CalA676, 280P987; 255 Mass611, 152NE220 (or is out of jurisdiction); 130Misc547, 225NYS203; 130 Misc514, 223NYS843.
1307–80 255Mass611, 152NE220; 49RI 224, 141A616. **Deposition of absent witnesses.** etc. 255Mass611, 152NE220.
1307–81 195Wis596, 219NW378.
1308–82 49RI 224, 141A616; 195Wis 596, 219NW378. But see 322 Ill 42, 152 NE545.
1308–85 255Mass611, 152NE220.
1308–86 130Misc172, 223NYS691.
1309–87 213Ala178, 104S494; Ill 172 NE917(2dcase). **Evidence held sufficient.**–213Ala184, 104S500; 49RI 224, 141A616.
1309–90 Testimony of subscribing witness based on attestation clause is sufficient to sustain finding that testator subscribed will in presence of both subscribing witnesses though witness has no independent recollection. **TexCivA** 300SW661.
1309–90½–New. In Philippines confusion in testimony of attesting witnesses as to order of signing and whether all signed with same pen has been held unimportant. 51Philippine216.
1309–91 213Ala178, 104S494; 213Ala 184, 104S500; 163La831, 112S802; 174 Minn13, 218NW447 (proponent not concluded by testimony of subscribing witness); 216AppDiv111, 215NYS149 (witness sixty-seven years of age testifying twenty five years after execution); 147 Va105, 136SE683 (impeaching mental capacity). See also 329 Ill 588, 161NE 124.
1309–92 129Misc361, 222NYS268; 130 Misc42, 224NYS186.
1309–93 Ill 172NE917(2dcase).
1310–94 Contradictions in testimony of witnesses on minor details held insufficient to discredit them. 46Philippine 701.
1310–94½–New. Neither contestants nor proponents in contested proceeding are bound by subscribing witnesses' testimony. 129Misc437, 222NYS340.
1310–96 Ill 172NE917(2dcase). **Sufficiency of evidence.**–335 Ill 458, 167NE 122; 164La514, 114S116 (forgery shown); 133Misc112, 231NYS596; 137 Misc52, 244NYS192. **Where authenticity of purported will cannot be fully ascertained without physical and chemical examination,** examination will be permitted with proper measures to safeguard preservation of instrument. 14PaDist &Co 263.
1310–97 Sufficiency of evidence.–133 Misc745, 234NYS239.
1311–99 53SD70, 220NW149; TexCivA 296SW907 (evidence held sufficient to show will written wholly by testator). **Expert evidence held not essential.**–200 Cal 299, 252P1049.
1311–1 19F(2d)705 execution sufficiently shown); 200Cal 299, 252P1049 (evidence held insufficient).
1311–4 See also 200Cal 299, 252P1049.
1311–5½–New. Proof of handwriting need not be by witnesses having actual knowledge of deceased's handwriting. TexCivA 296SW907.
1311–6 Evidence sufficient to show signatures of witnesses genuine. 136 Misc340, 242NYS222. **In New York.**–136Misc428, 240NYS840.
1311–7 213Ala184, 104S500. **Comparison of handwriting,** etc. 213Ala178, 104 S494 (card and check excluded where signatures thereon offered for comparison not shown to be genuine); TexCivA 286SW673. **Evidence held to show** signature not that of testator. 126Misc511, 214NYS154. **Persons knowing testator's signature** are competent to testify as to genuineness of testator's signature. **Tex CivA** 286SW673. **Evidence that person alleged to have signed will could not write** is admissible where will purports to have been signed by person signing by name. 178Ark951, 12SW(2d)896. **Difference between color of ink in signature of testator and those of attesting witnesses** is insufficient to attack genuineness of signatures. 51Philippine 216. **Divergence of one of testator's signatures from horizontal** held not to indicate that it was placed after witnesses had signed. 51Philippine216. **That entire estate was left to niece of testator and nothing to sister** does not cast suspicion on genuineness of signature when explained. 51Philippine216. **Evidence held sufficient** to show genuineness of signatures of witness subscribing will. TexCivA 30SW(2d)573.
1311–7½–New. Testimony that loose sheets of paper propounded as will were in handwriting of testator held admissible. Me 151A150.
1312–9 251Mich346, 232NW256; Tex CivA 272SW252. **Statute construed.**–253 Mass518, 149NE198.
1312–12 264Mass276, 162NE312.
1312–13 167Minn63, 208NW425 (declaration of testator as to purpose and intent in disposal of property under prior will not in dispute inadmissible).
1312–13½–New. Testimony that testator stated to witness that caveatrix was the legally adopted daughter was not irrelevant to issue under pleadings presenting such issue and submitted to jury under proper instructions. 160Ga872, 129SE532.
1312–13¼–New. Written declarations of testator have far greater weight than testimony of witnesses as to oral declarations. 137Misc668, 244NYS250.
1313–14 243NY468, 154NE312. Contra 198Cal 1, 242P939; 200Cal 410, 253P697.
1313–15 212Ala605, 103S594 (testimony of scrivener as to whether papers propounded were what testatrix dictated held competent); 135 Okl 77, 274P30, 62 ALR690. Contra 198Cal 1, 242P939 (admissible as part of res gestæ); 200Cal 410, 253P697; 170Ga788, 154SE325.
1313–16 94CalA782, 271P923; 334 Ill 107, 165NE650. But see 214Ala291, 107S 835; TexCivA 286SW673; 103WVa124, 136SE777.
1313–17 TexCivA 286SW673 (understood it as his).
1314–20 224 IllA562; 158La74, 103S 515; 98NJEq645, 130A655 (intention to make another will); 45Philippine216. **On issue of forgery.**–133Misc112, 231 NYS596.
1314–21 196Cal 301, 237P739; 202Cal 308, 260P543; TexCivA 4SW(2d)620.
1314–24½–New. Sufficiency.–Declarations of soldier to his camp associates, though made separately, held sufficient to establish valid nuncupative will. 134 Misc671, 236NYS529.
1314–26 NJPrerog 141A313.
1315–29 Vt 147A687.
1315–32 TexCivA 289SW1057.
1316–35 TexCivA 4SW(2d)620.
1318–44 Hearing of petition for probate and of contest.–199Cal 257, 248P1015. **Determination of jurisdictional questions.**–195Wis128, 217NW709.
1318–49 In civil actions, including will contests, nonsuit may be granted only where plaintiff's case is entirely unsupported by evidence, or where no evidence has been presented on some indispensable averment of complaint, and, if different conclusions reasonably may be drawn from evidence, or even if any doubt exists as to whether evidence is sufficient, nonsuit should be denied. 94CalA576, 271P559. **Where evidence of relationship uberrimæ fidei did not appear prior to motion,** nonsuit should have been granted, in absence of proof of undue influence. CalA 288P841.
1318–49½–New. Issues of whether contestants are barred from contesting will by agreement with testator are properly heard under Civil Practice Act on separate proceeding before main contest. 244NY63, 154NE823.
1318–49¼–New. Will first introduced at hearing regarding distribution of estate could not be admitted to probate at such hearing against relative's attorney's objections. 153Md111, 137A473.
1318–49¼–New. Contestants of will have been held not barred from instituting second contest by reason of voluntary dismissal of first contest since, under Code Civ. Proc. §§ 1308, 1327, § 581 is applicable to probate proceedings, and it is immaterial that words "without prejudice" did not appear in order dismissing first contest. 205Cal 581, 271P 1083.
1319–51 Compromise of contingent remainders.–253NY260, 170NE912 (compromise justified).
1319–51½–New. Contract for division of estate and withholding of will from probate held sufficient to prevent probate. TexCivA 26SW(2d)415.
1319–52 162Ga153, 132SE768 (refusal of continuance not abuse of discretion).
1319–55 194NC583, 140SE193. **In California.**–A 292P167.
1320–56 199Cal 257, 248P1015 (on contest). **In California.**–199Cal 257, 248P 1015.
1320–57 201Cal 194, 256P204; 69CalA 413, 231P346 (action brought under Code Civ. Proc. § 1330); 255Mass 152, 151NE110; 257Mass153, 153NE796; 262Mass268, 159NE605; 51Nev170, 271 P689; 217AppDiv342, 217NYS176 (denial of jury held not abuse of discretion). See also 259Mass409, 156NE542; 265Mass362, 164NE89. **That petitioner for probate of will was justice of appellate court** held not to render denial of motion by contestant erroneous or to require reversal. 257Mass153, 153NE 796. **Refusal to frame issue** as to testatrix's mental capacity held not error. 259Mass409, 156NE542. **Motion to frame issues** should be denied where opposition is unfounded in law and calculated only to induce legatees to buy settlement. 259Mass409, 156NE542. **Jury trial of issue of undue influence** may be denied on petition to revoke probate where will was probated after contest. CalA 292P167.
1320–57½–New. The judge should not direct an issue to jury unless statements of requesting counsel indicate reasonable hope for favorable result. 255Mass 155, 150NE900.
1320–57¼–New. Validity of agreement not to contest will is not a "question of fact" which surrogate must submit to jury under statute, but a preliminary that may be determined by surrogate; 217AppDiv342, 217NYS176.
1320–57¼–New. and act of surrogate in determining validity of such agreement without jury before hearing to establish will is not an abuse of discretion although contestants contended testatrix was incompetent when agreement was made and that agreement was induced by deceit and undue influence. 217AppDiv 342, 217NYS176.
1320–57½–New. Whether writing produced was last will and testament of deceased involves mixed question of law and fact and cannot be subject of issue devisavit vel non. 299Pa415, 149 A719.
1321–61 253Mass152, 148NE461; 216 AppDiv658, 215NYS749. **Evidence insufficient.**–85PaSuper230. **Issues refused.**–136Misc784, 242NYS257; 15 OhA 339.
1321–62 200Cal 299, 252P1049 (uncorroborated evidence may be sufficient to go to jury); 253Mass152, 148NE461; 265 Mass314, 163NE767(1stcase); 265Mass 362, 164NE89; 267Mass310, 166NE622 (2dcase); 216AppDiv658, 215NYS749; 290Pa249, 138A764. **In Pennsylvania.**–85PaSuper230 (no substantial dispute). **Test** is whether honest, genuine, and doubtful question of fact is presented on motion to frame issue for jury. Mass 171NE447(2dcase).
1321–63 Mass 169NE922; 298Pa285, 148 A297; 300Pa435, 150A626. **To entitle contestants to have issues framed,** there must be presentation of facts upon which there can warrantably be based reasonable hope for result favorable to contestants. 265Mass582, 164NE445.
1321–64 199Cal 257, 248P1015; 253 Mass152, 148NE461; 286Pa466, 133A 645. See also 169Ark62, 272SW873. **Issue granted.**–252Mass197, 147NE674.
1321–66 204 Iowa260, 214NW514; 253 Mass25, 147NE844; 253Mass152, 148NE 461. **Unless there is such dearth of evidence that granting of nonsuit would be proper** issues raised by will contest should be submitted to jury. 199 Cal 257, 248P1015.
1321–66½–New. Rule that will contest should be submitted to jury, if there is scintilla of evidence supporting contention of contestant, is not applicable to supply or furnish proof when there is none, or to elevate mere probability to

degree of proof. 225Ky480, 9SW(2d) 220.

1321-68 Mass 169NE513; 321Mo 310, 11SW(2d)16; 13PaDist&Co 314; 153Va 437, 150SE389. **Issue granted.**–218Ala 445, 118S647; 169Ark62, 272SW873; 199Cal 257, 248P1015; 204 Iowa260, 214 NW514; 210Ky559, 276SW547; 223Ky 525, 4SW(2d)410; 226Ky142, 10SW(2d) 474; 253Mass152, 148NE461; 259Mass 397, 156NE680; 263Mass427, 161NE616; Mass 167NE665(2dcase); Mass 168NE 72; Mass 171NE447(2dcase); 216App Div658, 215NYS749; 142Wash698, 253 P120. **Issue refused.**–94CalA576, 271P 559; 202 Iowa807, 211NW495; 225Ky 480, 9SW(2d)220; 226Ky42, 10SW(2d) 474; 152Md407, 137A35 (temporary mental lapses); 154Md390, 140A599; 253Mass25, 147NE844; 265Mass582, 184 NE445; Mass 167NE250; Mass 169NE 922; Mass 170NE75; Mass 172NE257; Mass 173NE511(1stcase); 251Mich117, 231NW79 (mental incapacity); Miss 107 S676; 319Mo 1153, 6SW(2d)860 (mere statement of nonexpert's opinions); 290 Pa249, 138A764; 299Pa415, 149A719; 85PaSuper230; 92PaSuper553. **Issue properly withdrawn from jury.**–201 Iowa 687, 207NW748 (where showing was one merely of testator's old age, peevishness, childishness, and eccentricity); 152Md407, 137A35 (omission to make grandchildren beneficiaries). **Issue improperly refused.**–286Pa466, 133A645. **Evidence held sufficient to present issue.**–314Mo 305, 284SW488. **Evidence held insufficient to go to jury.** 153Md547, 138A415.

1322-69 289Pa554, 137A734. **Issue granted.**–265Mass314, 163NE767(1st case); 13PaDist&Co 314. **Issue refused.**–253Mass152, 148NE461; 85Pa Super230. **Issue improperly refused.**–286Pa466, 133A645.

1322-70 Mass 169NE513. **Issue granted.**–259Mass397, 156NE680. **Issue refused.**–264Mass276, 162NE312.

1322-71 267Mass310, 166NE622(2d case); Mass 169NE513; RI 148A184. **Issue granted.**–200Cal 185, 256P200; 204 Iowa260, 214NW514; 210Ky559, 276SW547; 226Ky42, 10SW(2d)474; 230Ky230, 18SW(2d)997; 259Mass397, 156NE680; 267Mass157, 166NE820; Mass 168NE72; Mass 172NE257; 248 NY421, 162NE473; 13PaDist&Co 314. **Issue refused.**–99CalA617, 279P196; 202 Iowa807, 211NW495; 210Ky575, 276SW 500; 225Ky480, 9SW(2d)220; 226Ky 42, 10SW(2d)474; 230Ky230, 18SW(2d) 997; 152Md407, 137A35 (contra as to minor domestic matters); 156Md81, 143 A648; 264Mass276, 162NW312; Mass 167NE250; Mass 170NE75; Mass 172 NE257; 248Mich263, 226NW862; 216 AppDiv658, 215NYS749; 300Pa435, 150 A626; 85PaSuper230; 6PaDist&Co 263; 8PaDist&Co 421. **Question properly withdrawn from jury.**–201 Iowa687, 207 NW748; 253Mass25, 147NE844. **Testimony resting on hearsay and self-serving inferences** are insufficient upon which to grant an issue as to undue influence. 8PaDist&Co 421.

1322-72 **Issue refused.**–156Md32, 143A 585.

1323-73 **Issue granted.**–13PaDist&Co 314.

1323-74 321Mo 310, 11SW(2d)16.

1323-74½-New. Jury may not review equity of testator's determination of objects of his bounty. 251Mich234, 231 NW566.

1323-75 259Mass409, 156NE542; 197 NC545, 149SE852 (description of instrument in issue); 32 OhA226, 167NE698. See also 5PaDist&Co 114.

1323-76 259Mass397, 156NE680 (decree will not be reversed if supported by statements in offer of proof). **Finding and decision on motion** held comprehensive although only one issue was mentioned. 258Mass133, 154NE549. **Motion to frame issues** as to mental capacity of testatrix and undue influence of petitioner was properly heard, and properly before appellate court, upon interrogatories to petitioner and answers thereto, and statements of counsel as to what was to be proved thereby. 258 Mass 133, 154NE549. **Issue submitted held sufficient** as arising on pleadings. 197NC215, 148SE175.

1323-77 **Determination of issues raised by contest on preliminary showing of due execution.**–199Cal 257, 248P1015.

1323-77½-New. In framing the issues for jury, it cannot be presumed in advance that counsel will go beyond established bounds and jury will not be restricted to real issues. 253Mass152, 148NE461.

1323-77½-New. Court may reserve determination of testator's domicile until after jury disposition of issues affecting validity of will. 136Misc400, 241NYS 102.

1324-78-79 154Md125, 140A87. **Court before submitting contest** of will to jury is not required to determine whether, by reason of agreement to will, all property to person other than contestant, the latter had right to contest will. 198Cal 407, 245P197.

1324-80 160Ga872, 129SE532 (whether caveator had been virtually adopted by testator is properly submitted); 257 Mass153, 153NE796.

1324-82 201Cal 194, 256P204.

1324-83 201Cal 194, 256P204. **Prior jury trial held not to require** submission of issues to jury in absence of request. 201Cal 194, 256P204. **Sufficiency of petition.**–Mo 30SW(2d)19.

1325-86 **Construction of statute.**–Mass 168NE251.

1325-87 58ND109, 224NW915.

1325-89 **As to testamentary capacity.**–TexCivA 294SW265 (additional interrogatory held properly refused).

1325-90 197NC215, 148SE175.

1325-91 **Issues held not violative of rule.**–142Miss210, 106S753.

1326-93½-New. **Where two wills are offered for probate and applications are consolidated,** it is proper to submit both for determination as to whether one or, if not, that one, other is true will. 154 Tenn304, 285SW576.

1326-93¾-New. **Issues held not to assume facts in issue.**–142Miss210, 106S 753.

1326-93¼-New. Issues of undue influence and testamentary capacity held not inconsistent in sense that they cannot both be submitted to jury. 204 Iowa 260, 214NW514.

1326-94½-New. Where beneficiary of fraud was not willed whole estate, issue should be was will procured by fraud or undue influence in whole or in part and if in part what part. 252Mass197, 147NE674.

1326-99 317 Ill 561, 148NE293.

1327-1 330 Ill 106, 161NE99; 194NC 583, 140SE193.

1327-2½-New. In some jurisdictions the trial judge sits as a chancelior and is not bound by the verdict and should not sustain it against manifest weight of evidence. 8PaDist&Co 601.

1327-7 **Premature admission not error** where subsequent evidence, with antecedent evidence, established prima facie case of due execution. 217Ala506, 116S686.

1327-8½-New. On preliminary examination before filing objections to probate, allowed by statute, production of prior wills by subpœna duces tecum or by ordering witness to produce them cannot be had. 129Misc437, 222NYS 340.

1328-11 **On preliminary examination of subscribing witnesses** to will under New York Surrogate's Court Act § 141, next of kin are entitled to production of prior wills. 221AppDiv129, 222NYS751. **Statute providing for preliminary examination of witnesses** to will without first filing objections to probate should be liberally construed. 221AppDiv129, 222NYS751.

1328-12½-New. **In New York,** on preliminary examination of subscribing witnesses under statute, testator's next of kin are entitled to inspection of prior wills in possession of proponent's attorney. 133Misc572, 233NYS321.

1328-14 128Misc679, 220NYS773; 135 Misc25, 237NYS701. **Under New York Surrogate's Court Act,** contestants have right at expense of estate to full examination by open commission of nonresident subscribing witnesses before filing objection to probate. 128Misc679, 220 NYS773. **Statute relating to preliminary examination of witnesses** is intended to enable possible objectors to probate to gain knowledge of facts before objecting. 128Misc679, 220NYS773.

1328-17 317Mo 614, 296SW739; Tex CivA 15SW(2d)166.

1329-18 **Under statutes** in some jurisdictions making contestant plaintiff and petitioner defendant and directing that plaintiff shall open and defendant close proponent does not have right of opening and closing. 44 Ida625, 258P1082.

1329-19 161Ga690, 131SE885.

1329-21 194NC583, 140SE193.

1329-23 86CalA125, 260P586. **Preliminary proof.**–213Ala178, 104S494. **The reception of evidence of a fact that is conceded,** etc. 149Md308, 131A463. **Evidence at proceeding to probate will held admissible** in later trial involving same will. 218AppDiv841, 218NYS677. **Evidence may be limited** to relevant matters. 253Mass518, 149NE198. **Offer to prove** that attitude of persons alleged to have exerted undue influence was nagging held properly refused. 253 Mass518, 149NE198. **Where offer of proof** was not renewed, exclusion held not error. 253Mass518, 149NE198. **Offer of proof limited to alleged execution of will** was properly rejected by court offering to permit proof of contents of will. 150Wash620, 274P186.

1329-24 320 Ill 577, 151NE526 (evidence properly excluded).

1330-26 317 Ill 561, 148NE293; Mo 24 SW(2d)116; 222MoA1206, 2SW(2d)139. See also 320 Ill 577, 151NE526. **Proponents must offer in chief,** not only evidence making prima facie case, but all other evidence relating to issue of testamentary capacity. 332 Ill 509; 163 NE772.

1330-27 198Cal 1, 242P939; 317 Ill 561, 148NE293; 153Va437, 150SE389

1330-28 217Mo 614, 296SW739; Mo 19 SW(2d)1033.

1331-31½-New. On preliminary examination before filing objections to probate, allowed by statute, cross-examination of witnesses cannot go beyond scope of direct examination. 129Misc 437, 222NYS340.

1331-31¼-New. And where there is no direct examination, cross-examination should be confined to facts surrounding execution and whether testator was of sound mind and free from restraint. 129Misc437, 222NYS340.

1331-31¼-New. Evidence which is admissible only to rebut undue influence should be excluded where contestants offer no evidence to support plea of undue influence. TexCivA 286SW673.

1331-32 But see 213AppDiv387, 210 NYS615. **Hypothetical questions.**–235 Mich627, 209NW842. **Limiting testimony.**–198Cal 1, 242P939. **Evidence held insufficient.**–206 Iowa151, 218NW293. **Statute providing for examination of person** destroying or concealing another's will held inapplicable to destruction of will under testator's direction. 131Misc576, 226NYS756. **Reexamination.**–218Ala366, 118S547. **Preliminary examination.**–133Misc572, 233 NYS321. **Person not interested in event cannot examine witnesses.**–135Misc394, 238NYS372.

1331-35 178Ark951, 12SW(2d)896; 338 Ill 162, 170NE221; 318Mo 1078, 2SW (2d)707.

1331-36 **Overruling objections to proponent's argument** that it was not necessary for testatrix to comprehend nature and extent of estate or objects of her bounty and business she was about to transact held erroneous. TexCommnA 283SW765.

1331-36½-New. Counsel must not appeal to religious bias or passion, or warrant sarcasm as to sectarian view. 253 Mass152, 148NE461.

1331-37 **Statements by proponent's attorney held improper.**–TexCivA 283SW 699.

1331-37½-New. Argument of counsel held nonprejudicial where court instructed jury to disregard. 220Ky388, 295SW445.

1331-39 **Validity of agreement not to contest will** is preliminary question of law for court. 217AppDiv342, 217NYS 176.

1331-40 199Cal 750, 251P637; 201Cal 194, 256P204; 203 Iowa5, 212NW348 (withdrawal of question of due execution from jury proper in absence of evidence for contestant); 208Ky672, 271 SW1040; 248Mich263, 226NW862 (evidence insufficient to raise jury question); 251Mich588, 232NW190(2dcase); 23 OhA522, 155NE493; TexCivA 275SW 124; TexCivA 283SW347 (recognizing rule); 70Utah456, 261P15. **In determining sufficiency of evidence to require submission to jury** rules in other civil cases apply. TexCivA 275SW124.

1331-41 164Ga450, 139SE27 (existence of will); 329 Ill 268, 160NE594; Iowa 230NW401 (whether contract for settlement of will contest unconscionable); 241 Mich156, 216NW420; 319Mo 744, 8SW (2d)38; 222MoA1206, 2SW(2d)139; 217 AppDiv342, 217NYS176; TexCivA 275 SW124. **Questions involving motives and inferences to be deduced from circumstances** held for jury. 78CalA189, 248P537. **Weight of value of evidence** is for jury. TexCommnA 291SW873. **Weight and value of circumstances of probative force** are for jury. TexCivA 300SW985. **Evidence held sufficient to take to jury** question whether writing, offered as holographic will, was found among deceased's valuable papers and effects, as required by statute. 196NC 373, 145SE689.

1331-41½-New. Whether or not will is unjust is matter of opinion of testator for which opinion of jury cannot be substituted. 196Cal 355, 237P1079.

1331-41½-New. Whether reasons present in testator's mind for discrimination against contestants as shown by evidence were good or bad is not for jury to say. 196Cal 355, 237P1079.

1331-42 22F(2d)588; 217Ala506, 116 S686; 218Ala366, 118S547; 219Ala199, 121S718; 219Ala586, 123S22, 63ALR 942; 171Ark505, 284SW743; 200Cal 152, 252P325; 86CalA125, 260P586; 317 Ill 561, 148NE293; 318 Ill 528, 149NE 483; 318 Ill 445, 149NE507; 331 Ill 643, 163NE424; 84 Ind398, 150NE65; 204 Iowa260, 214NW514; 208 Iowa607, 224 NW69; 124Kan790, 262P554; 127Kan 803, 275P149; 208Ky686, 271SW1034; 213Ky147, 280SW947; 214Ky294, 283 SW77 (conflicting evidence); 221Ky709, 299SW585; 220Ky664, 2SW(2d)1060; 228Ky582, 15SW(2d)479; 229Ky103, 16 SW(2d)788; 230Ky230, 18SW(2d)997; 232Ky493, 23SW(2d)919; 232Ky594, 24 SW(2d)311; 153Md93, 137A479; 153 Md547, 138A415; 156Md81, 143A648; 158Md481, 148A814; 263Mass427, 161 NE616; 236Mich136, 210NW314 (for jury); 247Mich389, 225NW576; 251 Mich346, 232NW256; 154Miss381, 122 S496, 63ALR1188; 318Mo 1078, 2SW (2d)707; 319Mo 744, 8SW(2d)38; 321 Mo 310, 11SW(2d)16; 322Mo 11, 16SW (2d)212; Mo 24SW(2d)116; 222MoA 1206, 2SW(2d)139; 116Nebr827, 219NW 189; 117Nebr630, 222NW63; Nebr 230 NW495; 194NC583, 140SE193; 49ND 74, 189NW690; 21 OhA516, 153NE234 (evidence sufficient for jury); 29 OhA 457, 163NE728; 30 OhA184, 164NE644; 113 Okl 156, 242P238; 38 OklACR342; 286Pa466, 133A645; RI 145A310(2d case); 140SC1, 138SE355 (duty of court to submit issue to jury if any testimony tending to show lack of testamentary capacity); TexCivA 283SW347; TexCivA 290SW231 (evidence held sufficient to go to jury); TexCivA 295SW 326; TexCivA 4SW(2d)328; TexCivA 29SW(2d)867; Va 154SE687. **Sanity,** etc. IndA 168NE34(2dcase). **Evidence sufficient to take case to jury.**–200Cal 147, 252P597; 200 Iowa1122, 206NW 40; 214Ky350, 283SW102; 228Ky83, 14 SW(2d)413; 228Ky582, 15SW(2d)479; 233Ky105, 25SW(2d)54; 233Ky744, 26 SW(2d)751; 312Mo 458, 278SW759; 243 NY7, 152NE448; 140SC1, 138SE355; TexCivA 273SW961. **Evidence insufficient to go to jury.**–199Cal 119, 248P514; 202Cal 308, 260P543; 82Colo 5, 256P 630; 200 Iowa500, 203NW298; 200 Iowa 1122, 206NW40; 200 Iowa1180, 206NW 95; 202 Iowa565, 210NW813; 202 Iowa 849, 211NW500; 206 Iowa645, 220NW 5; 208 Iowa1265, 227NW129(2dcase); Iowa 231NW301; 148Md200, 129A10; 257Mass21, 152NE3; 263Mass334, 160 NE812; 263Mass315, 160NE814; 237 Mich691, 213NW64; 240Mich121, 215 NW296; 249Mich653, 229NW485; 155 Miss449, 124S498; 127Misc428, 217NYS 337; 70Utah456, 261P15. **Scintilla of evidence** is sufficient to take to jury question of testator's mental capacity. 220Ky619, 295SW885. **Where there is no evidence that ought reasonably to satisfy jury** of lack of testamentary capacity, it is error to submit question of capacity to jury notwithstanding there is another issue in case, undue influence, as to which evidence is conflicting. 317 Ill 401, 148NE274. **Courts will carefully scrutinize evidence** of testamentary capacity to determine whether it is jury question. TexCivA 2SW (2d)942. **Evidence held insufficient to raise issue of want of testamentary capacity** or of unsoundness of mind. Tex CommnA 15SW(2d)571. **Evidence of lack of testamentary capacity held insufficient to go to jury.**–237Mich240, 211 NW640. **Evidence of incapacity held** sufficient to take case to jury. 214Ky 294, 283SW77. **Nonsuit held proper under evidence** as to contention of testamentary incapacity. 98CalA97, 276P 366. **Old age, mental peculiarities, and devise to society for prevention of cruelty to animals** held not to warrant submission of issue of testamentary capacity to jury. 255Mass155, 150NE900. **Opinions of nonexpert witnesses,** unless based on tangible facts, are insufficient alone to take question of mental capacity to jury. 232Ky493, 23SW(2d) 919. **There being no evidence** that testator did not know or understand contents of will, issue should not have been submitted to jury. 156Md489, 144A698. **Weight of record of adjudication of insanity** of testator twenty five years before execution of will is for jury. 201 Iowa586, 207NW598. **Where evidence is conflicting** as to whether testator had sufficient mental capacity to make will, question of fact is presented to be determined by jury. 179Ark186, 14SW (2d)547. **Where there is any evidence of incapacity,** question is for jury. 233 Ky744, 26SW(2d)751. **Where there is no evidence tending to establish incapacity,** it is error to submit question to jury. 233Ky526, 26SW(2d)565. **Where evidence is conflicting,** question is for jury. Nebr 231NW837(2dcase). **Whether witnesses observed testatrix** on day will was executed, as they claim, is question for jury. 286Pa466, 133A645.

1332-43 199Cal 119, 248P514 (evidence of unsoundness of mind held insufficient for jury); 160Ga848, 129SE98 (directed verdict for propounders proper where no conflict in evidence which demanded it); 208Ky672, 271SW1040; 317Mo 614, 296 SW739; Nebr 227NW928 (no question for jury where proponent makes prima facie case and there is no conflict in evidence; TexCivA 295SW326. **Evidence held insufficient.**–202Cal 205, 259P 755; 217Ky720, 290SW687.

1332-45 241Mich156, 216NW420; 196 NC271, 145SE393, 62ALR288.

1332-46 22F(2d)588; 216Ala30, 112S 313; 179Ark186, 14SW(2d)547; 200Cal 152, 252P325; 202Cal 258, 259P935; 96CalA283, 273P1088; 111Conn313, 149 A782; 317 Ill 401, 148NE274; 329 Ill 268, 160NE594; 331 Ill 643, 163NE424; 84 IndA398, 150NE65; 204 Iowa260, 214NW514; 124Kan790, 262P554; 213 Ky147, 280SW947; 214Ky294, 283SW 77 (conflicting evidence); 218Ky743, 292SW330 (evidence sufficient for submission to jury); 220Ky664, 2SW(2d) 1060; 232Ky594, 24SW(2d)311; 235Ky 121, 29SW(2d)637; 253Mass518, 149NE 198; 244Mich469, 221NW659; 318Mo 1078, 2SW(2d)707; 319Mo 87, 5SW(2d) 383; 319Mo 1153, 6SW(2d)860; 319Mo 744, 8SW(2d)38; 321Mo 168, 9SW(2d) 960; 321Mo 920, 13SW(2d)548; Mo 19 SW(2d)1033 (credibility of testimony); MoA 278SW1063; Nebr 230NW495; 190NC221, 129SE589 (evidence insufficient to go to jury); 49ND74, 189NW 690; OhA 144NE644; 29 OhA457, 163 NE728; 286Pa58, 132A786 (evidence held insufficient to go to jury); RI 145 A310(2dcase); TexCommnA 285SW275 (under the evidence); TexCommnA 15 SW(2d)571; TexCivA 283SW347; Tex CivA 290SW231; TexCivA 29SW(2d) 891; 149Wash291, 270P1020. **Sufficiency of evidence to go to jury.**–25F(2d) 542; 216Ala30, 112S313; 219Ala586, 123S22, 63ALR942; 78CalA189, 248P 537; 108Conn572, 143A890; 317 Ill 561, 148NE293; 325 Ill 474, 156NE485; Ill 173NE121; 200 Iowa500, 203NW298; 202 Iowa849, 211NW500; 202 Iowa1391, 212NW122; 206 Iowa645, 220NW5; 206 Iowa1021, 221NW546; 208 Iowa 607, 224NW69; Iowa 231NW301; 213 Ky789, 281SW1028; 214Ky294, 283SW 77; 148Md584, 129A896; 263Mass334, 160NE812; 237Mich240, 211NW640; 238Mich87, 212NW965; 237Mich691, 213NW64; 240Mich7, 215NW35; 240 Mich121, 215NW296; 242Mich291, 218 NW660; 242Mich572, 219NW658; 142 Miss210, 106S753; 155Miss449, 124S 498; Mo 24SW(2d)116; MoA 274SW 1103; 222MoA1206, 2SW(2d)139; 127 Misc428, 217NYS337 (undue influence); 195NC76, 141SE460, 466 [citCyc]; 293 Pa465, 143A125; TexCommnA 12SW (2d)978; TexCivA 285SW275; Tex CivA 16SW(2d)311; 70Utah456, 261P 15. **Withdrawing from jury issue of undue influence** has been held proper, in view of absence of any evidence warranting submission of such issue. 334 Ill 23, 165NE175. **Opportunity and disposition, plus persuasion and importunity,** are not sufficient to take question of undue influence over testator in making will to jury. 208 Iowa353, 223 NW752.

1332-47 199Cal 750, 251P637 (direction of verdict proper where evidence insufficient to support finding of undue influence); 200Cal 710, 254P561; 160Ga848, 129SE98 (directed verdict for propounders proper where no conflict in evidence which demanded it); 203 Iowa 5, 212NW348 (issue properly withdrawn from jury); 208Ky672, 271SW1040; 284Pa169, 130A501; TexCivA 294SW 265 (evidence of undue influence held insufficient for jury). **Testator's statement** that he destroyed former will because unsatisfactory to his family held insufficient to take question of undue influence to jury. 220Ky619, 295SW 885. **Evidence that testator's second wife** engineered marriage year before will was drawn held insufficient to take question of undue influence to jury. 220 Ky619, 295SW885.

1332-47½-New. Submission of issue of undue influence and constructive fraud in executing contract for settlement of will contest properly refused under evidence. Iowa 230NW401.

1332-48 218Ala493, 119S21; 94CalA 782, 271P923. But see 216AppDiv111, 215NYS149.

1332-49 23 OhA522, 155NE493.

1332-50 111Conn253, 149A673; 142 Miss210, 106S753.

1332-50½-New. Confusion of witnesses as to execution of will makes question for court as to fact of execution. 188Wis183, 205NW814, 42ALR951.

1333-52 213Ala184, 104S500 (whether subscribing witnesses each saw testator's name on will and whether testator acknowledged it as such); 322 Ill 426, 153NE600; 251Mich346, 232NW256; 154Miss381, 122S496, 63ALR1188; 216 AppDiv111, 215NYS149 (under circumstances of case for jury); 189NC509, 127SE549; 196NC418, 145SE782; 196 NC742, 146SE860; 286Pa466, 133A645; RI 145A310(2dcase). **Evidence held sufficient to go to jury.**–178Ark951, 12 SW(2d)896; 197NC332, 148SE469. **Evidence held insufficient to go to jury.**–96CalA204, 273P1097. **Genuineness of signature of testator for jury.**–Pa 151 A694.

1333-54½-New. Whether paper is in handwriting of testator and signed by him is question for jury. 225Ky480, 9SW(2d)220.

1333-54½-New. Whether attesting witnesses were over fourteen years of age is question for jury. TexCivA 24SW (2d)65(2dcase).

1333-56 217Ala364, 116S427. **On contest of will on ground of subsequent revoking will which was not produced,** question whether revoking will was executed in accordance with statute has

been held for jury. TexCivA 272SW 823. Intention is question of law for court where language of subsequent will is unambiguous in making complete disposition of all property. 315Mo 578, 286 SW58, 51ALR639. Evidence insufficient to require submission of question of revocation to jury.–Iowa 232NW674.

1333–56½–New. Question of lack of capacity to revoke will has been held one for jury under evidence. 142Miss210, 106S753.

1333–56¼–New. Whether explanation of changes in will before execution is satisfactory is question of fact in each case. 127Misc215, 216NYS325.

1333–58 See also 153Va437, 150SE389.

1333–60 123Kan415, 256P141; 319Mo 1153, 6SW(2d)860. Demurrers properly sustained.–123Kan415, 256P141. All evidence favorable to contestant taken as true upon proponent's demurrer. MoA 278SW1063.

1333–62 195Cal 711, 235P1012; 198Cal 407, 245P197 (sufficient evidence to sustain one of several grounds of contest prevents direction of verdict for defendant); 169Ga602, 150SE910; 325 Ill 474, 156NE485; 337 Ill 572, 169NE 767; Ill 173NE121 (test whether direction of verdict upholding will is erroneous); 206 Iowa151, 218NW293; 235 Mich627, 209NW842; Nebr 227NW928; 137Misc668, 244NYS250; TexCivA 275 SW124 (contestee's motion viewed in favor of contestant). When granted.–99CalA617, 279P196 (special verdict on each issue presented); 162Ga149, 132 SE893 (for propounder of will); 337 Ill 572, 169NE767; Ill 173NE121 (upholding will); 201 Iowa687, 207NW 748; 217Ky720, 290SW687; 240Mich 7, 215NW35; 239Mich616, 215NW51; 240Mich121, 215NW296 (insufficient evidence of mental incapacity and undue influence); 114Nebr512, 208NW 637; TexCommnA 24SW(2d)819. When denied.–329 Ill 268, 160NE594; 337 Ill 572, 169NE767; 236Mich136, 210NW 314; 126Misc749, 215NYS428. It is error not to direct verdict for proponents where there is no substantial evidence to support any of contentions of contestants. 195Cal 711, 235P1012. On contestee's motion in contest for undue influence.–TexCivA 275SW124. Party resisting motion is entitled to benefit of all evidence considered in its most favorable aspect together with all reasonable presumptions to be drawn therefrom. 337 Ill 572, 169NE767. Where contestants have no interest in estate under issues as made peremptory charge as to them is proper. TexCommnA 24 SW(2d)819. When there is evidence tending to establish matter in issue court should not grant peremptory instruction although it might be compelled to grant new trial after verdict. 233 Ky105, 25SW(2d)54.

1334–63 Where denied, etc. MoA 278 SW1063.

1334–63½–New. Nonsuit.–If evidence presented by contestant viewed in its most favorable light would not support verdict in his favor court should grant motion for nonsuit. 196Cal 639, 238P 944.

1334–63¼–New. Use of word "last" in connection with "will and testament" in directing verdict on issues of execution of will and undue influence has been held not to foreclose other issues. 142 Miss210, 106S753.

1334–63¼–New. As against motion for nonsuit all evidence in favor of contestants must be taken as true and contradictory evidence if any must be disregarded. 200Cal 710, 254P561.

1334–63⅓–New. Then, if there is substantial evidence to make out case for contestant, motion for nonsuit must be denied and case given to jury. 200Cal 710, 254P561.

1334–63⅙–New. In ruling on nonsuit, power to weigh evidence does not obtain as it does on submission of cause. 98 CalA97, 276P366.

1334–63½–New. Where evidence introduced by contestant is such that, if verdict should be rendered in favor of contestant, trial court would be bound to set it aside, order of nonsuit is justified. 96CalA283, 273P1088.

1334–65 318 Ill 445, 149NE507; 15 OhA339 (jury not misled by use of undefined term "prima facie"); TexCivA 273SW866 (explanation in submission of special issue, if error declared harmless); TexCivA 22SW(2d)338. Instructions held not misleading.–318 Ill 445, 149NE507; 332 Ill 509, 163NE772; 210Ky559, 276SW547; 234Mich170, 207 NW924. Instructions held correct.–234 Mich170, 207NW924.

1334–66 318 Ill 445, 149NE507; 202 Iowa837, 211NW361 (instructions held not conflicting); 312Mo 458, 278SW759; 314Mo 305, 284SW488; 150Va452, 143 SE683. Instructions held not violative of rule.–111Conn253, 149A673.

1334–67 318 Ill 445, 149NE507.

1334–68 318 Ill 445, 149NE507.

1334–69 But see 15 OhA339. Refusal of instruction that opinion of subscribing witnesses is entitled to more weight on question of mental capacity than opinion of other witnesses who were merely passive was error. 95CalA617, 273P165.

1334–70 213Ky664, 281SW1005; 312 Mo 458, 278SW759.

1335–71 318 Ill 445, 149NE507.

1335–72½–New. Instruction erroneous "that jury must not separate the codicil into its constituent parts and find for or against any part thereof." 209Ky3, 272SW3.

1335–73 160Ga872, 129SE532 (question of interest of caveatrix as adopted daughter of testatrix properly submitted); 161Ga615, 131SE535 (sufficient instruction on mental capacity); 316 Ill 513, 147NE419; 220Ky388, 295SW 445; Mo 286SW120. Requests erroneously refused.–213Ala184, 104S500 (as to signature by testator and acknowledgment thereof). Instruction improperly refused.–166Ga555, 144SE116. Instructions held proper.–Vt 147A687.

1335–74 319Mo 744, 8SW(2d)38.

1335–75 Unsoundness of mind.–TexCivA 273SW866.

1335–76 TexCommnA 298SW549; 107 WVa38, 146SE894. Instructions held proper.–22F(2d)588; 216Ala43, 112S 360; 165Ga451, 141SE306; 167Ga502, 146SE156; 318 Ill 445, 149NE507; 325 Ill 474, 156NE485; 332 Ill 509, 163NE 772; 338 Ill 102, 170NE221; 88 IndA 237, 157NE111; 88 IndA301, 157NE458; IndA 168NE34(2dcase); 203 Iowa5, 212 NW348 (materiality of testator's ability to understand or speak English); 263 Mass427, 161NE616; 234Mich170, 207 NW924; 312Mo 458, 278SW759; 316Mo 728, 293SW105; 319Mo 744, 8SW(2d) 38; Mo 24SW(2d)116; 194NC583, 140 SE193; 15 OhA339; TexCivA 283SW 347; 152Va411, 147SE251. Instructions held improper.–217Ala506, 116S686; 169 Ark62, 272SW873; 161Ga651, 131SE507; 167Ga502, 146SE156; 320 Ill 577, 151NE 526; 329 Ill 11, 160NE197; IndA 168 NE198; 203 Iowa5, 212NW348; 107WVa 38, 146SE894. Charge held erroneous.–MoA 274SW1103. Failure to state time when mental incapacity must exist to make will invalid held not fatal in view of other instructions. 318 Ill 445, 149 NE507. Instructions requiring ability to "recall to mind his property" held not improper in connection with other parts of instruction. 318 Ill 445, 149NE507. Instruction as to time mental incapacity must have existed held correct. 318 Ill 445, 149NE507. Instruction as to effect of unequal distribution by will held not erroneous. 318 Ill 445, 149NE507. Instruction as to effect of mental weakness or impairment of mental faculties held not erroneous. 318 Ill 445, 149NE507. Instructions properly refused.–95CalA 617, 273P165; 312Mo 458, 278SW759. Instructions improperly refused.–95 CalA617, 273P165, 329 Ill 11, 160NE 197; 48RI 341, 137A908. Presumption of sanity.–263Mass427, 161NE616; 152 Va411, 147SE251. Requested instructions held properly refused. 165Ga451, 141SE306. Testamentary capacity and undue influence.–167Ga502, 146SE156. That mind need not be unbroken, unimpaired or unshattered by disease or otherwise held not erroneous. 318 Ill 445, 149NE507.

1336–78 161Ga615, 131SE535. Instructions held erroneous and not warranted by evidence. 216Ala43, 112S360. Evidence held not to authorize instruction.–233Ky744, 26SW(2d)751.

1336–80 161Ga615, 131SE535; 322Mo 11, 16SW(2d)212; TexCommnA 3 SW(2d)77; 152Va411, 147SE251.

1337–82 152Va411, 147SE251.

1337–84 Instructions held not to withdraw issue of fraud.–233Mich117, 206 NW559. Charge that testator must have lost dominion over family is erroneous. 216Ala30, 112S313. Instruction requiring proponent to be active in preparation or execution of will is error. 216 Ala30, 112S313.

1337–85 218Ala493, 119S21; 202Cal 258, 259P935; 161Ga651, 131SE507 (instructions held improper); 167Ga502, 146SE156; 325 Ill 474, 156NE485 (refusal to instruct held proper under evidence); 209Ky3, 272SW3 (instruction erroneous); 214Ky294, 283SW77 (though procured by only one of beneficiaries); 319Mo 744, 8SW(2d)38; 48 RI 341, 137A908. Charge held proper.–218Ala493, 119S21. Charge held improper.–218Ala493, 119S21. Evidence held insufficient to require instruction. 210Ky782, 276SW799, 233Ky105, 25 SW(2d)54. Instructions held erroneous.–IndA 168NE198. Instructions held not erroneous.–329 Ill 568, 161NE65; Mo 19SW(2d)1033. Instructions held proper.–170Ga242, 152SE445. Instruction held not improper as suggesting degree of influence depends on condition of mind, or that any influence procuring execution of will of old man would make will unlawful, or because there was no evidence of impairment of testator's mind. 161Ga651, 131SE507. Instruction as to burden of proving undue influence held proper.–234Mich131, 207NW 870.

1337–86 161Ga651, 131SE507; 317 Ill 401, 148NE274 (instruction incorrect); 214Ky294, 283SW77; 319Mo 744, 8 SW(2d)38; 321Mo 310, 11SW(2d)16. Requested instruction held misleading.–MoA 278SW1063. Instructions properly refused.–319Mo 744, 8SW(2d)38.

1337–88½–New. Words "coercion" or "force" should not be applied to fraud inducing signing of will by trickery without knowledge of its effect. 217Ala 46, 114S465.

1337–88¼–New. Instruction that undue influence to avoid will must be equivalent to force or fear overcoming free agency by testator is proper, where no question of fraud by deceit was presented. 217Ala46, 114S465.

1338–89 134SC412, 132SE811. Refusal of instruction improper.–95CalA617, 273 P165. Instructions held not erroneous.–169Ga770, 151SE381(2dcase).

1338–90 152Va411, 147SE251.

1338–91 95CalA617, 273P165; 170Ga 242, 152SE445; 88 IndA301, 157NE458; TexCivA 20SW(2d)396 (refusal to charge that husband has right to influence wife's will so long as it does not result in undue influence held error). Instruction that jury cannot pass on propriety, justice or wisdom of will except on issue of mental capacity held erroneous. 314Mo 305, 284SW488. Charge on effect of old age and weakness of intellect, as respects capacity to make will, has been held erroneous as failing to further charge that reasonableness or unreasonableness of disposition should have weight in determining question in case of doubt. 167Ga502, 146SE156.

1338–92 247Mich389, 225NW576.

1338–93 216Ala43, 112S360.

1338–93½–New. Charge has been held not erroneous as excluding from jury reasonableness or unreasonableness of disposition of estate. 167Ga502, 146SE 156.

1338–95 219Ala265, 122S829 (acknowledgment of signature sufficient though bad in form); 208 Iowa607, 224NW69; 196NC373, 145SE689 (holographic will). See also 178Ark241, 10SW(2d)377. Instruction that testator's signature by mark, with intent thereby to sign and execute will, is sufficient, has been held not erroneous. 332 Ill 509, 163NE

772. **Instruction, that attempted disposition by testator of property not his own** would not affect validity of remainder of will, has been held not erroneous. 152Va411, 147SE251. **Instructions held not misleading.**–Nebr 230NW495.

1338–96 168Ga442, 148SE88; 332 Ill 509, 163NE772.

1339–4 219Ala265, 122S29; 197NC215, 148SE175; 48RI 341, 137A908. **Instruction as to presumption of validity of will** from certificates of oaths of subscribing witnesses held not misleading. 318 Ill 445, 149NE507. **Instruction held not misleading.**–Nebr 230NW495.

1339–5 195Cal 711, 235P1012 (instruction held sufficient); 318 Ill 445, 149NE507; 334 Ill 315, 166NE50; TexCivA 275SW206; TexCivA 283SW347; TexCivA 15SW(2d)166; 152Va411, 147SE251. **Instruction held erroneous.**–325 Ill 474, 156NE485. **Instructions properly refused.**–95CalA617, 273P165; 312Mo 458, 278SW759.

1339–6 319Mo 744, 8SW(2d)38; 48RI 341, 137A908.

1339–9 Instructions held proper.–Va 154SE687.

1339–10 318 Ill 445, 149NE507.

1339–14 Where old will was destroyed and new one was executed as parts of same transaction, finding that new will was result of undue influence compels finding that old will was destroyed as result of some influence. 166Minn65, 207NW189. **Immaterial findings** may be disregarded. 126Misc749, 215NYS428. **Verdict on issue not raised by pleadings or supported by evidence** is erroneous. 316Mo 728, 293SW105.

1340–15 Ambiguous verdict construed in view of erroneous instructions. 209Ky3, 272SW3.

1340–16 209Ky3, 272SW3 (finding against will and for codicil which was divided into two parts one ratifying will and other making original divise construed as finding only for devise in view of erroneous instructions).

1340–17 SC 140SE604.

1341–21½–New. Finding of testamentary capacity includes finding of lack of delusions. TexCivA 295SW326.

1341–21¾–New. Construction.–Where main issue was whether will was forged, negative answers to special questions as to acknowledgment, publishing and request to sign not merely noncompliance with legal requirements. 127Misc 187, 215NYS230.

1341–22 194NC583, 140SE193.

1341–23 119Kan286, 239P965; 49SD 181, 207NW77 (lost will).

1341–25 Judgment should be entered by court based on its own interpretation of evidence and determination of facts where advisory jury's verdict and special findings are disapproved by it. 119Kan286, 239P965.

1341–26½–New. In contest in which contestant asserts forgery it is improper to announce decision on main issue before hearing all competent evidence contestant has to offer. Mass 171NE54.

1341–27 See also 290Pa249, 138A764. **As to necessity,** etc. 258Mass133, 154NE549; 172Minn217, 214NW892. **Specific finding on question of existence of fiduciary relationship between testator and proponent** is not required, being finding on probative or evidentiary fact. 195Cal 354, 233P330. **Will as found must be maintained if any theory consistent** with its validity can be suggested which appears to be as probable as the theory on which argument for the invalidity is based. 213Ala178, 104S494; 213Ala184, 104S500.

1341–27½–New. No findings need be made on admitted facts to render judgment valid. 196Cal 623, 238P938.

1341–27¾–New. To admit will to probate, court is only required to find that witnesses believed at the time that testator was of sound mind and memory. 323 Ill 328, 154NE156.

1342–28 264Mass112, 162NE225.

1342–29 SC 140SE604; TexCivA 9SW(2d)172. **By introducing evidence.**–Mo 19SW(2d)1033.

1342–31 135Misc42; 237NYS515; TexCivA 286SW673.

1342–32 Comparison of testator's handwriting without production of original will: First, is ground for new trial where will is found one hour after judgment is rendered (TexCivA 286SW673); second, fact that appellant did not move for continuance does not bar his right to new trial where due diligence was exercised to discover it (TexCivA 286SW673).

1343–35 199Cal 759, 251P778 (insufficiency of evidence).

1343–36 Refusal of new trial has been held not abuse of discretion, since testimony should have been produced at trial in exercise of due diligence. 206Cal 286, 274P351. **When moving affidavits are contradicted by persons who subscribed them,** new trial is properly denied. 51Philippine960. **Sufficiency to produce different result.**–251Mich560, 232NW248.

1343–37½–New. Parties who have admitted due execution of will held not entitled to reargument on ground that they have been deprived of due process with reference to establishment of fact. NJ Prerog 152A6.

1343–42 Validity of judgment or order admitting will to probate is not dependent upon recitals therein of existence of facts or performance of acts upon which jurisdiction of court must rest. 196Cal 623, 238P938.

1343–43 Failure of judgment to recite all facts necessary to admit will to probate does not render judgment void. 175Ark530, 1SW(2d)16.

1344–44 256 IllA236.

1344–46 Court has jurisdiction to decide whether decedent died intestate or not in proceeding to contest probated will, revoke probate, and probate later destroyed holographic will, though it denied probate of such will. 196Cal 576, 238P666. **Recitals.**–199Cal 391, 249P517. **Court's refusal to declare void inconsistent residuary clauses of two wills** of same date is not prejudicial. 149Va896, 141SE753. **Order directing probate of two wills bearing same date** is not adjudication that they were executed at same hour and constituted single testamentary act. 149Va896, 141SE753.

1344–51½–New. After establishing lost or destroyed will supreme court must remit matter to surrogate's court for issuance of letters. 220NYS144.

1344–51¾–New. Probate court after establishing of lost or destroyed will by supreme court must record will and issue letter thereon; this is a ministerial act. 220NYS144.

1344–51¼–New. Decree admitting will to probate is void where record shows existence of later will filed in another county without determination as to which is last will. 179Minn538, 229NW875.

1344–52 Exclusion of objectionable matter from will.–128Misc899, 221NYS223.

1345–57½–New. Statute requiring court to make certificate of facts found and attach them to will does not apply to probate of will, but only to contest. 196Cal 623, 238P938.

1345–57¾–New. Effect.–Decree of probate is conclusive except on appeal. 215AppDiv180, 213NYS455.

1345–57¼–New. Entry of judgment nunc pro tunc is authorized where executor presenting application for probate died after hearing. 110Conn646, 149A250.

1345–57⅛–New. Such entry may be made by court of its own motion. 110Conn646, 149A250.

1345–60 But see Me 152A84; 262Mass570, 160NE446.

1346–63 General extent of the power.–134Misc508, 236NYS223.

1346–64 Evidence insufficient to show fraud. 175Ark530, 1SW(2d)16. **Evidence held to sustain finding** that contest was not prevented by misrepresentations. 134 Okl 156, 273P213.

1346–65 175Ark182, 299SW370; 134Misc759, 236NYS229 (evidence held to require denial of application to vacate on ground that waiver of citation was forged). **Rescinding order refusing probate.**–154Md307, 141A368.

1347–66 Nature of new matter.–134Misc508, 236NYS223.

1347–69 134Misc508, 236NYS223 (not substitute for appeal).

1347–69½–New. Finding of undue influence is sufficient to set aside probate of will, irrespective of question of testamentary capacity. TexCommnA 15SW(2d)562.

1347–69⅓–New. Evidence held insufficient to warrant reopening of probate decree. 136Misc555, 241NYS513.

1347–69¼–New. Facts according substantial basis for contesting will and reasonable probability of success must be shown to warrant reopening of decree. 136Misc555, 241NYS513.

1347–69⅙–New. In Philippines judgment admitting will to probate may be set aside where attorney for oppositor without authority compromised litigation and withdrew opposition. 51Philippine613.

1347–70 See also 29Hawaii297.

1347–72 175Ark182, 299SW370; 129Misc541, 222NYS250. But see 29Hawaii 297.

1348–73 201Cal 194, 256P204.

1348–74 175Ark182, 299SW370; 221MoA675, 283SW727; 222AppDiv728, 225NYS294. **Petition not stating facts indicating that petitioner will be successful will be denied.** 129Misc541, 222NYS250. **Petition held insufficient.**–221MoA675, 283SW727.

1348–78 220Ky388, 295SW445; 196Wis125, 218NW193.

1349–83 107Conn354, 140A731; 337 Ill 65, 168NE685; Mass 172NE228. **Proceeding to certify will contest to circuit court,** though not strictly appeal from probate court, partakes of nature of appeal. 235Mich201, 209NW83.

1349–84 337 Ill 65, 168NE685.

1349–89½–New. In probate appeals, the practice is according to equity so far as practicable and applicable. 254Mass471, 150NE223.

1349–90 TexCivA 280SW243.

1349–97 199Cal 140, 248P509 (only orders appealable are designated in Code Civ. Proc. § 963 subd 3); 202Cal 424, 261P298; 255 IllA567 (distinguished from suit to contest probated will); 153Md31, 137A482; 266Mass363, 165NE496. **Illustrations.**–153Md31, 137A482. **Order admitting will to probate** is reviewable by appeal. 196Cal 294, 237P744. **In Montana.**–73Mont596, 237P1105. **In Tennessee.**–158Tenn479, 14SW740. **Judgments and orders appealable.**–199Cal 140, 248P509. **Judgments or orders not appealable.**–199Cal 140, 248P509. **Where issue was referred to common pleas court,** losing party must appeal directly from judgment therein. 289Pa267, 137A260. **Order denying motion to vacate judgment not appealable.**–202Cal 424, 261P298. **Judgment denying probate in ex parte proceedings** is appealable. Ind 170NE857.

1350–98 Order directing jury trial of issue raised by objections not appealable. 213AppDiv387, 210NYS615.

1350–99 225Ky480, 9SW(2d)220; 153Md31, 137A482. **For example,** order of court declaring that caveatrix is not estopped from prosecuting caveat attacking will is not appealable. 153Md31, 137A482. **In California.**–But see 202Cal 424, 261P298. **Clerk's decision as to notice,** etc. 204 Iowa487, 215NW497.

1351–1 255 IllA567 (nephew not heir or beneficiary held not "person interested"); 167Minn447, 209NW267; 120Or223, 251P711; 300Pa185, 150A585 (person having no interest in distribution is not "person aggrieved"); 118Tex565, 21SW(2d)296; TexCivA 273SW961 (statutory right of appeal cannot be limited by conditions imposed by courts). **Parties may appeal jointly or separately.**–But see 96PaSuper26. **Legatees of specific bequests, not aggrieved,** not entitled to appeal. 202Cal 672, 262P305.

1351–3 82Mont198, 266P378, 57ALR1169; 120 Or223, 251P711.

1352–15 200Cal 710, 254P561 (grounds of contest); 201Cal 185, 256P200; 201Cal 162, 256P204; 75CalA554, 243P33; 103CalA349, 284P464; CalA 288P841; 318 Ill 610, 149NE481; 202 Iowa837, 211NW361 (comment by counsel); 214Ky769, 284SW389; 321Mo 920, 13SW(2d)548; 49ND761, 193NW605; 289Pa

361, 137A616; TexCommnA 38SW(2d) 77.

1352-18 75CalA554, 243P33; 140SC1, 138SE355; Vt 147A687 (objection to deposition held too general). See also 264 Mass112, 162NE225. **Failure to object to answer to question** precludes raising question on appeal. 75CalA554; 243P 33.

1352-19 170Ga242, 152SE445; 190NC 855, 129SE192 (no exceptions to issues submitted); TexCivA 15SW(2d)166.

1352-20½-New. Findings of fact and conclusions of law are necessary in some jurisdictions, to enable appellate court to review errors assigned, though issues were submitted to jury which returned general verdict and answered special interrogatories. 52SD387, 217 NW676.

1352-20½-New. Failure of contestant to move to set aside verdict sustaining will implies that, if charge is correct, verdict on evidence is reasonable. 111 Conn253, 149A673.

1352-21 245Mich520, 222NW702.

1352-25½-New. Minor child and legatee not party to probate proceedings in county court nor to appeal was nevertheless entitled to contest will after appeal to district court. TexCivA 296 SW613.

1352-25½-New. One interested in probating or contesting will has absolute right to enter case after appeal to district court although not party to appeal. TexCivA 296SW613.

1352-25¼-New. Parties having conflicting interests may be permitted to join in contest on appeal from order admitting will to probate. 180Ark1084, 24SW(2d)336.

1352-25½-New. Right to appeal from decree denying probate survives in favor of administrator of executor who applied for probate and died after hearing. 110Conn646, 149A250.

1352-26 220Ala127, 124S294 (statute applied to appeals from circuit court after removal there by appeal from probate court); 107Conn354, 140A731; 5 PaDist&Co 737. **Forged wills.**-13PaDist &Co 171.

1353-28 102NJEq17, 138A465.

1353-30 48RI 14, 135A156 (leave granted to ignorant petitioner unfairly prevented from presenting case). **Appeal properly denied.**-234Mich363, 208 NW438. **Discretion of judge.**-234Mich 363, 208NW438. **Evidence** more substantial than would make mere prima facie case for jury on trial of merits is necessary to justice granting petition for belated appeal. 234Mich363, 208NW438. **Burden is on petitioner** for allowance of belated appeal to convince court that justice requires allowance. 234Mich363, 208NW438. **Merits of issues** of testator's mental capacity and undue influence need not be passed on by judge on petition to file belated appeal. 234Mich363, 208NW438. **On hearing of petition for belated appeal** from allowance of probate, circuit judge should consider all evidence presented by petition and affidavits. 234Mich363, 208NW438. **No abuse of discretion** in passing on petition for belated appeal if facts presented are fairly passed on, though judgment erroneous, unless clearly against reason and evidence or judge acted arbitrarily and unreasonably. 234Mich363, 208NW438. **Judge's finding** on petition for belated appeal not disturbed on appeal unless clear abuse shown. 234Mich363, 208NW438.

1353-30½-New. It has been held that allowing appeal after expiration of statutory limitation is not a matter of right but in discretion of court; 285Pa74, 131A651.

1353-30½-New. and where it appeared that son did not learn of father's death till five years thereafter but then allowed four years to pass, order refusing a nunc pro tunc appeal was proper on ground of laches. 285Pa74, 131A651.

1353-30¼-New. Death of executor presenting will for probate after final hearing and before entry of decree denying probate extends time to appeal until administrator on his estate is appointed. 110Conn646, 149A250.

1353-31 248Mich360, 227NW813.

1353-32 In Alabama.-216Ala43, 112S 360. **That bond by foreign surety company was not countersigned by resident agent** held not ground for dismissal where it was executed by attorney in fact. 48 Ida810, 285P478.

1354-33 202Cal 424, 261P298; 245Mich 520, 222NW702. **Service of notice in proceedings to certify contest to circuit court** may be waived by general appearance in case. 235Mich201, 209NW 83. **Time for giving notice.**-167Minn 447, 209NW267. **As administrator is not adverse party** within statute, filing of bond running to him and service upon him of notice of appeal from order of probate court allowing will does not give appellate court jurisdiction. 232Mich338, 205NW115. **Where rules as to notice not observed,** extensions of time are discretionary with judge. 102 NJEq17, 138A465. **Amendment of notice of appeal** will not be allowed after time to appeal has expired. 222AppDiv 724, 226NYS111. **Under statute** providing for service of notice on appeal, executor is "adverse" party to those seeking disallowance of will. 245Mich 520, 222NW702.

1354-37 Appeal does not bar heir from obtaining order, pursuant to statute, requiring proponent to produce a prior will since application for such order is an independent, special proceeding. 216 AppDiv595, 216NYS112.

1355-38 In Philippines.-45Philippine 216 [cit Sup. Ct. Rules, rule 20].

1355-39 See also Mo 24SW(2d)116.

1355-42 But see TexCivA 26SW(2d) 293. Contra 321Mo 168, 9SW(2d)960. **Assignment of error is asking nonexpert witness** his conclusion as to sanity has been held not complete or failing to show no foundation was laid for conclusion and what foundation, if any, was laid. 161Ga651, 131SE507.

1355-43½-New. Where correctness of court's ruling is dependent on marital status of testator under laws of Kansas, ruling could not constitute fundamental error justifying appellate court in reversing judgment in absence of assignment of error, as law of another state is question of fact. TexCommnA 15SW(2d)606.

1355-44 107Conn354, 140A731. **Material facts found by judge** must be printed in record on appeal. 254Mass471, 150NE223. **Exclusion of attesting witness'** statement, not in record, held not error. 25F(2d)542. **Narration of testimony not required** on appeal with full report of evidence. Mass 172NE228. **Proceedings not part of record.**-Ind 170 NE857. **Where evidence is not reported,** subsidiary findings and conclusions stand. Mass 172NE786.

1355-46 337Ill 65, 168NE685; 207 Iowa451, 223NW486. **Allegations that plaintiffs are duly** and legally appointed and qualified trustees is sufficient allegation of representation capacity in suit to enforce testamentary trust and cannot be questioned on motion to dismiss. 201Iowa1226, 207NW362. **Moot questions.**-160Ga469, 128SE582. **Proceedings to certify contest to circuit court** may be dismissed by circuit court where it appears that contestant is not interested party. 235Mich201, 209NW 83. **Plea in abatement of appeal** may be asserted where appeal is not taken in time. 107Conn354, 140A731.

1355-47 245Mich240, 222NW154. **Statute providing for affirmance of decree appealed from** on failure to prosecute appeal with reasonable diligence, applies to perfected appeals from allowance of will to probate by probate court. 245Mich240, 222NW154.

1355-48½-New. Upon transfer of will contest from district court of appeals supreme court is not prevented from dismissing appeal by fact of denial of motion to dismiss in district court of appeals. 199Cal 140, 248P509.

1355-48½-New. Appeal from judgment denying probate in ex parte proceedings will not be dismissed for improper joinder as appellee of one not party in probate court. Ind 170NE857.

1355-48¼-New. but appeal may be dismissed as against appellees who were not parties below. Ind 170NE857.

1356-49 327Ill 346, 158NE709; 167 Minn447, 209NW267; 172Minn217, 214 NW892; 216AppDiv111, 215NYS149 (statutes); 144SC509, 142SE602; 143 Wash28, 254P455. But see 49ND277, 191NW343. Contra 213Ala178, 104S 494; Nebr 230NW495.

1356-50 327Ill 346, 158NE709. **On appeal from order refusing to vacate decree admitting will to probate and to probate later will,** court should determine which was last will. 179Minn 538, 229NW875.

1356-52 264Mass112, 162NE225. But see 98Fla748, 124S169.

1356-52½-New. On certification of will contest to circuit court, circuit court, in exercise of its appellate jurisdiction, has power to determine whether contestant is interested party within statute. 235Mich201, 209NW83.

1356-53 172Minn217, 214NW892.

1356-54 172Minn217, 214NW892; 118 Tex565, 21SW(2d)296 (interested party).

1356-54½-New. In action to contest order refusing to admit will to probate burden of proving due attestation rests on plaintiff. 125Kan154, 264P77.

1356-56 Mass 168NE520.

1356-57 300Pa45, 150A101. **In Illinois.**-323Ill 328, 154NE156.

1357-58½-New. In some jurisdictions, on appeal, contestants are confined to testimony of subscribing witnesses, and cross-examination of proponents' witnesses. 327Ill 346 158NE709.

1357-60 180Ark131, 21SW(2d)170; 327Ill 346, 158NE709. **Appellate court has no power to refuse probate** on ground other than failure of proof of requirements of statute or proof of improper conduct in execution of will. 323Ill 328, 154NE156. **On proof that requirements of statute have been complied with,** appellate court is required to admit will to probate in absence of proof of fraud, forgery, compulsion or other improper conduct. 323Ill 328, 154NE156. **When finding below is lack of testamentary capacity,** court of appeal will consider only evidence favorable to verdict. TexCivA 288SW575. **Evidence held sufficient to show forgery.**-13PaDist&Co 171.

1357-60½-New. Contestants, but not proponents, bound by testimony of subscribing witnesses and limited to cross-examination of proponents' other witnesses. 326Ill 462, 158NE154.

1357-66 TexCivA 288SW575 (testimony admitted over objection as a whole not reversible error in absence of specific objection).

1358-67 213AppDiv387, 210NYS615. **Court impaneling jury, may thereafter discharge jury** and decide issues. 180 Minn256, 230NW781.

1358-72 201Cal 357, 256P1101; 259 Mass397, 156NE680; 49ND277, 191NW 343; 150Wash522, 273P958; 198Wis 457, 224NW735. See also 82Colo 463, 260P1081. **Judgment for costs presumed separately appealable.**-202Cal 500, 261P713. **Weight to be given decision of probate judge** is that to which it seems entitled in light of whole record. 265Mass582, 164NE445.

1358-72½-New. In determining whether verdict is sustained by evidence, court must consider testimony not favorable to verdict, disregarding conflicts, contradictions, and all adverse evidence. TexCivA 283SW347.

1358-73 201Cal 162, 256P204; 231 CalA413, 231P346; 154Md125, 140A87; 257Mass153, 153NE796 (denial of issues). **Judgment will not be disturbed** if judicial mind could reasonably have reached same conclusion as trial court. 296Pa74, 145A810, 66ALR222.

1358-74 255Mass152, 151NE110; 262 Mass268, 159NE605; 265Mass582, 164 NE445; 230AppDiv296, 243NYS438; 298Pa285, 148A297. See NJPrerog 143 A92. **Denying motion to permit amendment** after certification to circuit court has been held not abuse of discretion. 248Mich360, 227NW813.

1358-75 195Cal 711, 235P1012 (mental capacity); 197Cal 36, 239P404 (due execution of will); 200Cal 299, 252P 1049; 200Cal 185, 256P200; 86CalA125, 260P586; 104Conn419, 133A209; 160 Ga872, 129SE532; 166Ga156, 142SE 673; 318Ill 528, 149NE483; 328Ill

282, 159NE353; 338 Ill 102, 170NE221; Ill 172NE917(2dcase); 208Ky686, 271 SW1034; 213Ky147, 280SW947 (mental capacity and undue influence); 218 Ky743, 292SW330 (undue influence); 219Ky534, 293SW1071; 223Ky525, 4 SW(2d)410; 223Ky705, 4SW(2d)694; 228Ky582, 15SW(2d)479; Me 151A150; 254Mass471, 150NE223 (finding of fact by probate judge); Mass 168NE520 (where fact question arose on oral testimony heard by probate judge); Mass 172NE228; 251Mich560, 232NW248; 166Minn374, 208NW22; 318Mo 1078, 2 SW(2d)707; 319Mo 744, 8SW(2d)38; 321Mo 310, 11SW(2d)16; 116Nebr827, 219NW189; Nebr 230NW495; 190NC 301, 129SE822; 131 Okl 142, 268P296; 125 Or428, 259P299 (questions submitted to advisory jury); 289Pa361, 137A616; 52SD482, 218NW881; Tex CivA 275SW124 (cannot weigh evidence except to determine whether case made for jury); 70Utah456, 261P15; Utah 285P285(2dcase) (findings of trial court); Va 154SE687; Wis 229NW656. See also 210Ky559, 276SW547; Mass 169NE150. **Findings of trial court.**–49 ND277, 191NW343; 112 Okl 25, 239P 592; 113 Okl 156, 242P238; 37 OklACR 562; 39 OklACR342 (finding of testamentary capacity). **Finding of trial court as to testamentary capacity.**–69 CalA16, 230P181; 113 Okl 156, 242P 238. **Trial court's conclusion,** drawn from testimony practically free from conflict, that testator's obsession as to illegitimacy of children did not influence him in making will does not have force and effect of finding of fact on conflicting testimony. 187Wis10, 203 NW718. **Finding of undue influence will not be sustained** where record does not disclose clear, convincing, and satisfactory proof necessary to sustain finding. 187Wis647, 205NW320. **Decree of orphans' court will not be reversed on ground that testator was not domiciled in state** where judge who presided at hearing and orphans' court decided that on evidence submitted verdict in favor of foreign domicile could not be sustained. 285Pa287, 131A926. **In Ohio.**–20 OhA216, 151NE788. **In Oklahoma.**–126 Okl 210, 259P579; 135 Okl 77, 274P30, 62ALR690. **Applies to finding by trial court** as to execution. 289Pa554, 137A734. **Findings of fact by probate judge** on conflicting evidence will be set aside where he misapprehended legal effect of evidence as entirety. 93Pa311, 112880. **Finding of testamentary capacity** on conflicting evidence not disturbed on appeal. 141 Wash619, 252P139. **Rule applied to findings below** on question of notice of hearing. 234 IllA287. **To justify reversal of judgment denying probate** it must be palpably against weight of testimony. 325 Ill 201, 156NE270. **But where verdict is against weight of evidence,** it is not binding on appeal. 289 Pa267, 137A260. **Where verdict of jury cannot be approved,** trial judge should set aside probate. 289Pa361, 137A616. **Conflicting evidence not considered** in determining sufficiency of evidence to sustain verdict for contestants. 70 Utah456, 261P15. **Where evidence would sustain verdict for either side,** it is important that trial be free from serious errors in rulings on evidence and instructions. 329 Ill 11, 160NE197. **Credibility of witnesses** is for jury. 223 Ky525, 4SW(2d)410. **Findings of justice of supreme court of probate on issues of mental capacity and undue influence** are conclusive when supported by evidence. 127Me542, 141A620. **Probative force of evidence** is for trial court. TexCivA 300SW985. **Evidence must be considered most favorably to plaintiff's** position on defendant's appeal. TexCivA 300SW985. **Where evidence on issue of testamentary capacity was conflicting,** supreme court cannot say as matter of law that testator lacked testamentary capacity. 179Ark186, 14 SW(2d)547. **Finding of court supported by evidence** will be sustained though against great preponderance of evidence. 103CalA691, 284P987. **Finding on conflicting evidence as to mental incompetency** will not be disturbed. 86 Mont521, 284P546. **On appeal from judgment of intermediate court on jury trial,** verdict of jury has same effect as is given verdict in other civil cases. 232Ky493, 23SW(2d)919. **Verdict on issue of testamentary capacity** will not be disturbed unless clearly wrong. Nebr 231NW837(2dcase).

1359–76 166Ga156, 142SE673. But see 290Pa249, 138A764. **Verdict on conflicting evidence approved by chancellor** will not be disturbed. 142Miss210, 106S753. **Verdicts against weight of evidence.**–142Miss210, 106S753.

1359–76½–New. Finding of court on conflicting evidence that will was not destroyed on stated date is binding on appellate court. 199Cal 641, 250P676.

1359–76½–New. The order of probate judge, directing issue of testator's mental capacity to be submitted to jury, is entitled to weight and consideration on appeal. 255Mass155, 150NE900.

1359–77 200Cal 152, 252P325; 202Cal 490, 261P709; 69CalA413, 231P346; 78 CalA189, 248P537; 99CalA617, 279P 196; CalA 288P841; 162Ga153, 132SE 768 (remark of court in giving request charge); 317 Ill 561, 148NE293; 325 Ill 474, 156NE485; 210Ky559, 276SW 547; 218Ky743, 292SW330 (admission of immaterial evidence); 220Ky388, 295 SW445; 150Md79, 132A425 (subsequent admission of previously excluded testimony cures error); 158Md481, 148A 814; 253Mass518, 149NE198; 165Minn 349, 206NW457; 319Mo 744, 8SW(2d) 38; MoA 278SW1063; 132SC63, 128SE 850; 118Tex565, 218W(2d)296; Tex CivA 275SW124; TexCivA 294SW265 (argument of counsel for proponent on failure to call him as witness held not to require reversal); TexCivA 299SW 682. **Where one of two independent issues is supported by the evidence,** error, etc. 103CalA349, 284P464. **Illustrations.**–30F(2d)748; 213Ala178, 104S 494; 202Cal 205, 259P755; 78CalA189, 248P537; 86CalA125, 260P586; 100 CalA255, 279P846; 218Ky743, 292SW 330 (error in admitting evidence waived, where, after its exclusion, no motion was made to discharge jury and continue case); 153Md547, 138A415; 234 Mich170, 207NW924; 247Mich667, 226 NW650; Nebr 230NW495; 195NC76, 141SE460; 197NC545, 149SE852; Tex CivA 275SW124; TexCivA 294SW265. **Prejudicial error.**–44 Ida625, 258P1082; 242Mich576, 219NW627. **Exclusion of evidence undisputed or admitted without objection** is not prejudicial error. 149Md308, 131A463. **Exclusion of evidence as to insanity** in testator's family is not reversible error. 216Ala43, 112 S360. **Error in failure to resubmit interrogatories** is harmless where interrogatories not decisive of issues. 88 IndA237, 157NE111. **Where issue was withdrawn,** refusal to instruct in regard thereto is harmless. 88IndA237, 157NE111. **Where contestant made no request for mistrial,** he cannot ask for new trial on ground of newspaper publication. 21 OhA194, 153NE119. **Permitting counsel for proponent** to make improper argument as to testamentary capacity held prejudicial error. Tex CommnA 283SW765.

1359–77½–New. Proper construction of will is immaterial, on appeal from judgment rejecting paper for want of testamentary intent. 196Cal 301, 237P739.

1359–78 266Mass363, 165NE496. **Where will was probated with codicil,** on appeal from probate of codicil, will and codicil must stand or fall together. 228Ky226, 148SW(2d)777.

1359–79 205Cal 292, 270P961; 215Ky 432, 284SW1106; NJPrerog 150A786; 38 OklACR565 (affirmance of order denying application to set aside admission of will to probate); 289Pa361, 137A616. **Appellate court** will not reverse decision of probate court unless clearly wrong. 259Mass409, 156NE542. **Reluctance of court to reverse** where case has been tried before two juries each of whom found against will. Ill 172NE917(2d case).

1359–80 216AppDiv658, 215NYS749. **Judgment reversed and rendered for proponent for refusal of peremptory instruction** on issue of testamentary capacity. Miss 107S676. **On reversal of order denying probate,** appellate court may order probate. 216AppDiv658, 215 NYS749.

1360–82 327 Ill 346, 158NE709.

1360–83 243NY7, 152NE448; 289Pa 361, 137A616. **In New York.**–243NY7, 152NE448.

1360–83½–New. Sole beneficiary held entitled to benefit of decision upholding will, though he did not appeal. 120 Or 223, 251P711.

1360–83½–New. Where there have been successive verdicts.–Where case has been twice tried and there have been two verdicts finding undue influence on substantially same evidence which has been held by appellate court to be sufficient, order of trial court setting aside second verdict and granting judgment notwithstanding will be reversed with direction for judgment consistent with verdict unless new trial is granted on grounds other than insufficiency of evidence or that verdict is contrary to law. 166Minn65, 207NW189.

1360–87 Harmless error will not justify reversal. 318 Ill 528, 149NE483.

1360–88 218Ala292, 118S342; 218Ala 366, 118S547; 218Ala445, 118S647; 334 Ill 576, 166NE209; 312Mo 458, 278SW 759; 21 OhA194, 153NE119 (no request made to withdraw juror and continue cause because of publication of newspaper articles alleged to influence jury); TexCivA 98SW(2d)172; TexCivA 198SW (2d)428; Vt 150A65.

1361–89 See also TexCivA 78W(2d) 683.

1361–90 179Ark877, 18SW(2d)352; 96 CalA204, 273P1097; 320 Ill 577, 151NE 526; 329 Ill 268, 160NE594; 255Mass 611, 152NE220 (fact trial judge disbelieved contestant's evidence no ground for reversal); 244Mich108, 221NW121; 319Mo 1153, 6SW(2d)860; 117Nebr630, 222NW63; 30 OhA184, 164NE644; 125 Okl 151, 256P912, 62ALR935. See also 94CalA782, 271P923; 95Fla922, 117S 703. **In Missouri.**–313Mo 256, 281SW417; 317Mo 614, 296SW739; Mo 198W(2d) 1033. **Findings of probate court not disturbed on appeal.**–75CalA554, 243P 33. **Finding on conflicting evidence that an holographic will was written entirely by testator** will not be disturbed on appeal. 125 Okl 151, 256P912, 62ALR 935. **Verdict of jury is conclusive** on appellate court when supported by substantial evidence. Mo 198W(2d)1033 (weight and credibility of evidence is for jury).

1361–91 95CalA617, 273P165; 329 Ill 568, 161NE65; 209Ky3, 272SW3; 255 Mass152, 151NE110; 255Mass611, 152 NE220; 29 OhA457, 163NE728; 142 Okl 197, 286P17; 38 OklACR565.

1361–92 258Mass133, 154NE549; 258 Mass201, 154NE755; 263Mass47, 160NE 331; TexCivA 273SW961 (appellate court will not presume that evidence was improperly used in argument where record did not show the argument). **Directing verdict.**–317 Ill 401, 148NE274.

1361–94 216Ala30, 112S313; 166Ga632, 144SE18; 318 Ill 445, 149NE507; 329 Ill 568, 161NE65; 332 Ill 639, 164NE 133; 334 Ill 23, 165NE175; 207 Iowa 959, 221NW451; 153Md93, 137A479; 264 Mass276, 162NE312; 117Nebr630, 222 NW63; 196NC742, 146SE860; OhA 173 NE197; TexCommnA 128W(2d)978; TexCivA 300SW661. See also 218Ala366, 118S547; 218Ala445, 118S647; 178Ark 241, 10SW(2d)377; 94CalA674, 271P 753; 94CalA782, 271P923. **In action to set aside will** on grounds of incapacity and undue influence, decision below adverse to will will not be reversed because of fact that evidence is insufficient to support second ground provided there in enough evidence to sustain first. 317 Ill 561, 148NE293. **Admission or exclusion of evidence.**–153Md93, 137A479. **Order allowing motion for submission of issues** to jury in will contest will not be reversed when supported by offer of proof. 259Mass397, 156NE680. **Reversible error.**–329 Ill 588, 161NE124. **Prejudicial error.**–220Ky664, 28W(2d) 1060; 117Nebr168, 220NW251 (remarks of court); 548D184, 223NW41. **In-**

struction omitting elements of proclamation by testator that will was his, and proof that it was signed by witnesses at his request, in defining prima facie proof, has been held harmless, where no question was made of such matters. 332 Ill 509, 163NE772. **Excluding parts torn or taken from letters of testatrix** has been held harmless, where such exhibits would have been cumulative evidence. 30 OhA184, 164NE644. **Statement of judge to jury intimating that testator was of sound mind** has been held prejudicial error. 85CalA691, 259P980.

1361-94½-New. New trial awarded where court erroneously submitted question of undue influence. 190NC221, 129 SE589.

1361-94¾-New. Discussion of rulings on issue of undue influence held unnecessary in view of finding of want of testamentary capacity. 153Md93, 137A 479.

1361-94¼-New. On appeal from decree allowing motion to frame issues it is presumed that decision was governed by principles stated in earlier case. 259 Mass397, 156NE680.

1361-94⅛-New. On appeal from denial of motion to frame issues, questions of fact as well as of law will be reviewed, especially where testimony was upon interrogatories. 258Mass133, 154NE549.

1361-94¼-New. In determining question whether record presented case for jury on question of undue influence in execution of will, court must consider testimony which is most favorable to claim of undue influence. 244Mich469, 221NW 659(3dcase).

1361-94½-New. Will contest must be tried on appeal on same theory as in trial court. 322Mo 11, 16SW(2d)212.

1361-94⅛-New. Defeated litigant in contest is not entitled to trial de novo on appeal. 117Nebr630, 222NW63.

1361-94½-New. Reviewing court must view evidence through eyes of trial court who viewed witnesses and whose province it was to judge their credibility and weight of testimony. 179Ark877, 18 SW(2d)352.

1361-94½-New. On review by certiorari of decree in suit to set aside probate court is without jurisdiction to grant relief not within grounds specified in application for writ. **TexCommnA** 24 SW(2d)819.

1361-94½-New. It will be assumed, contrary not appearing, that court excluded incompetent statement. **Vt** 150 A65.

1362-96 198Cal 469, 245P1089; 266 Mass340, 165NE382. **Judgment for costs to proponent is premature** when allowed before judgment in contest has become final and will be reversed. 202 Cal 500, 261P713.

1362-98 Mass 167NE656 (contested cases); 143Wash28, 254P455. **On failure of contestant to revoke or annul will,** court cannot exercise discretion or award him costs. 143Wash28, 254P 455.

1362-99½-New. In some jurisdictions costs cannot be awarded until final determination of case. 44 Ida625, 258P 1082.

1362-99⅛-New. and each party must pay own costs subject to recovery depending on final outcome. 44 Ida625, 258P1082.

1362-99¼-New. In some jurisdictions costs cannot be awarded until final determination of case, 44 Ida625, 258P 1082.

1362-99⅛-New. Costs of litigation during contest of will which does not result in any material benefit to estate is not chargeable against estate. 149Wash 291, 270P1030.

1362-1 Unsuccessful contestant cannot recover costs.-143Wash28, 254P455.

1362-2 See also 128Misc122, 217NYS 847. **Costs will be divided** where will is probated on appeal, but letters testamentary not awarded. 117Tex302, 3 SW(2d)408.

1362-4 127Misc187, 215NYS230; **Tex CivA** 2SW(2d)942, 956 [citCyc]. **Refusal to award costs to unsuccessful contestant named as executor in another will** is erroneous. 229AppDiv809, 242 NYS621. **Executor unsuccessfully attempting solemn form probate of lost will not probated in common form** has been held not entitled to attorney's fees and costs. **Ga** 155SE515.

1363-5 127Misc187, 215NYS230 (fraud, undue influence, forgery, alteration). **Evidence held sufficient to show unsuccessful proponent guilty of fraud** and chief actor in scheme to foist spurious will on court, disentitling him to costs and expenses. 127Misc187, 215NYS230.

1363-6 127Misc187, 215NYS230.

1363-6½-New. Under New York statute allowance to unsuccessful proponent of costs is discretionary with surrogate. 127Misc187, 215NYS230.

1363-7 Ga 155SE515; **MoA** 17SW(2d) 566; **TexCivA** 273SW961.

1363-8 127Misc428, 217NYS337 (not in good faith).

1363-9 NJ 150A430 (contestant continuing litigation by pretracted trial).

1363-10 120 Or223, 251P711.

1363-11 178Ark951, 12SW(2d)896.

1364-12 Where unsuccessful proponent attempts to foist spurious will on court and participated in fraudulent procurement or alteration thereof, costs of contestants will be awarded against him personally. 127Misc187, 215NYS230.

1364-13 127Misc187, 215NYS230 (costs of contestant awarded against unsuccessful proponent personally).

1364-14 200Cal 299, 252P1049; **NJ** 134 A622.

1364-15 30F(2d)748; 200Cal 299, 252P 1049. **Exercise of court's discretion,** under statute, by charging costs on estate, is not subject to review on appeal, unless so manifestly wrong as to indicate abuse of power. 249NY229, 164 NE33. **Error to tax costs against estate where probate of will confirmed.**-**Okl** 292P1115.

1364-16½-New. Judgment against defendant executrix for costs held valid, though previous part of judgment provided that defendant recover all costs from plaintiff. **TexCivA** 282SW283.

1364-16⅛-New. Judgment against prevailing executrix for fees of two guardians who had contested will held not erroneous even if good reason for taxation against prevailing party did not appear in record. **TexCivA** 282SW283.

1364-16¼-New. Where guardians, contesting will after successful appeal from adverse decree, were discharged on petition of wards on removal of disability, and will giving executrix who was residuary beneficiary power to dispose of estate without accounting was admitted to probate, held it was within court's discretion to tax fees of guardians against executrix. **TexCivA** 282SW 283.

1365-18 89PaSuper516. **In New York.** -249NY229, 164NE33. **Premiums on appeal bonds** paid by successful party are not assessable as costs. 89PaSuper 516. **Stenographic expenses** are not assessable as costs under agreement to bear expenses equally. 89PaSuper516.

1365-24 Time of allowance.-198Cal 469, 245P1089.

1365-25 266Mass340, 165NE382.

1365-27 On failure of appellate court to exercise discretion, clerk's insertion of remittitur held erroneous. 200Cal 299, 252P1049. **Court of appeals direction that costs in all courts abide event** did not deprive surrogate of discretionary power, under statute, to determine that costs of proceeding, including appeal, should be paid from estate, rather than by proponent personally. 249NY 229, 164NE33.

1365-30 200Cal 185, 256P200.

1366-31 200Cal 185, 256P200.

1366-33 Mass 172NE228.

1366-38 29Hawaii455. **Denial of motion as abuse of discretion.**-29Hawaii 693.

1366-40 135Misc296, 238NYS117.

1367-41 101NJEq716, 138A199. **Allowance without petition or notice to other parties** is error. 215AppDiv62, 213NYS268. **In Massachusetts.**-266 Mass340, 165NE382.

1367-42 206 Iowa6, 218NW37. See also 156Md32, 143A585. **In Massachusetts.**-266Mass340, 165NE382. **In Philippines.**-51Philippine665.

1367-43 TexCivA 2SW(2d)942. **But where executor proponent participates in fraud** in procurement or alteration of will, expenses incurred in unsuccessfully attempting to procure probate thereof will not be allowed. 127Misc187, 215 NYS230 (holding evidence of fraud sufficient).

1367-46 101NJEq716, 138A199.

1367-46½-New. Services must be shown to have resulted in advantage to estate. 132Misc611, 230NYS326.

1367-47 86Mont521, 284P546; 101NJ Eq716, 138A199.

1368-48 Fee of attorneys for guardian of legatee entitled to share of estate on attaining stated age should not be ordered paid out of such legatee's conditional estate without protecting persons entitled to such share on death of legatee before attaining such age and who were represented by other attorneys. 217Ky660, 290SW475.

1368-48½-New. One performing professional services in will contest has no standing for application to probate court for order for compensation. **Mass** 171NE447(1stcase).

1368-48⅛-New. Rule governing expenses and attorney's fees in will contests does not necessarily govern in actions to set aside will already probated. **Iowa** 230NW519.

1368-49 217Ky660, 290SW475. **In view of protracted litigation and want of evidence to contest will of five or six million dollars estate, contestant's counsel's fees should be reduced from twenty-four to five thousand dollars. NJ** 150A430. **Allowance held excessive.**-**NJ Prerog** 152A7.

1368-50 Construction of decree.-199 Cal 705, 251P311.

1368-54 218Ala292, 118S842; 240Mich 661, 216NW446, 447 [citCyc]. See also 244 IllA237.

1369-59 Notice.-144Va727, 130SE794.

1369-62 See also **TexCivA** 5SW(2d)178.

1370-66½-New. Final probate of will with detached codicil is tantamount to judgment holding that reference in codicil is to will probated, and not to will of another date, as mentioned in codicil. 228Ky226, 14SW(2d)777.

1370-76 TexCivA 280SW243.

1370-77 175Ark182, 299SW370; 84 CalA678, 258P622; 255 IllA567; 209Ky 3, 272SW3; 221MoA675, 283SW727; 300Pa45, 150A101; 7PaDist&Co 350; **TexCommnA** 26SW(2d)179. **Conversely,** etc. 132SC136, 128SE841. **A codicil, which is inconsistent with the probated will,** etc. 228Ky226, 14SW(2d)777. **In action for revocation of probate of will,** order admitting will to probate, though not conclusive, is presumed correctly to determine and set forth rights of parties. 98CalA97, 276P366. **Federal courts and collectors** of internal revenue are bound by decisions of appropriate state courts on probate of wills. 34 F(2d)174.

1372-86 196NC418, 145SE782; 198NC 510, 152SE391(1stcase); 132SC136, 128 SE841. **In Quebec.**-**Can** [1930] 2Dom LR459.

1372-86½-New. Probate of will in common form with alteration apparent upon its face raises presumption that alteration was made after execution, and upon expiration of period to petition probate in solemn form, presumption becomes indisputable. 132SC136, 128SE841.

1372-86⅛-New. Probate of will inured to benefit of purchaser from heirs. **Tex CivA** 288SW602.

1372-87 122Kan741, 253P586.

1372-88 196Cal 508, 238P681; 128Kan 699, 280P916. **Probate granted on ground of residence** within jurisdiction at time of death is conclusive as to such residence, though probate might have been granted on ground deceased, though nonresident has property within jurisdiction. 196Cal 508, 238P681.

1372-89 TexCivA 295SW236.

1373-90 TexCivA 295SW236.

1373-91 196Cal 294, 237P744 (partial revocation); **TexCivA** 295SW236. **Question of revocation by cancellation or obliteration** must be presented when will is presented for probate or by proceeding or contest brought within one year thereafter. 196Cal 294, 237P744.

1373-94 122Kan741, 253P586. Contra 317 Ill 401, 148NE274.

1373-95 122Kan741, 253P586.

1373-96 132SC136, 128SE841; Tex CivA 295SW206. **Questions decided on appeal.**-48RI 72, 135A402.

1374-98½-New. Rendition of decision by supreme court on appeal from judgment in probate proceedings, where appeal related only to question of validity of will, did not deprive trial court of jurisdiction to set aside judgment as to certain defendants not personally served, where judgment set aside related only to question of determination of heirship not presented on appeal. 83 Mont400, 272P525.

1374-98½-New. Construction given will in final judgment in probate proceeding is binding on all parties interested in estate until reversed or set aside on appeal or in proceeding constituting direct attack on such construction. 198Wis457, 224NW735.

1374-2 218Ala292, 118S342; 255Mass 611, 152NE220; 292Pa336, 141A253; TexCivA 292SW273 (claimant of share of estate is charged with knowledge of recorded will and instruments in partition thereunder); 196Wis125, 218NW 193. **Doctrine of constructive notice** from probate of will does not apply in proceeding to vacate judgment quieting title to land obtained by publication of notice to unknown persons where probate was not in county where land lay and no actual knowledge of will was shown. 309Mo 312, 273SW1050. **In South Dakota.**-52SD448, 218NW597.

1374-3 228AppDiv579, 240NYS260. **In California.**-196Cal 294, 237P744.

1374-3½-New. Posthumous child is bound by decree in proceeding to probate father's will. 199Cal 391, 249P517.

1374-4 199Cal 391, 249P517; 166La 102, 116S714; La 129S920; 159Tenn 642, 21SW(2d)622. But see 135Misc25, 237NYS701. **Finding in ancillary proceeding that foreign probate was proper** is binding on collateral attack. 199Cal 391, 249P517. **Persons included.**-199 Cal 391, 249P517. **Record of original proceedings.**-199Cal 391, 249P517. **Judgment of foreign court admitting foreign will to credit is entitled to full faith and credit.**-233Ky23, 24SW(2d) 902.

1374-5 In Kentucky.-233Ky23, 24SW (2d)902.

1375-6 56AppDC333, 13F(2d)305; 328 Ill 431, 159NE780.

1375-7 320Mo 519, 8SW(2d)71; 196 Wis125, 218NW193. **Presumptions and probative force of record.**-50ND662, 197 NW862

1375-9 Ancillary letters are automatically annulled by successful will contest. TexCivA 19SW(2d)428.

1375-10 232Ky751, 24SW(2d)555. **Order decreeing that decedent died intestate** is necessarily limited to will contested. CalA 290P515(1stcase).

1376-11 Order dismissing proceedings for probate on ground that applicant had no interest in estate does not determine issue as to whether will is valid and is not res judicata in subsequent proceeding to probate will. 120Kan200, 243P296.

1376-12½-New. Other rights under will not affected by denial of probate. TexCivA 295SW206.

1376-13 128Misc553, 220NYS188 (executor released from personal liability); 300Pa45, 150A101. Contra 317 Ill 401, 148NE274.

1377-17 199Cal 705, 251P311; 221MoA 675, 283SW727; 137Misc271, 242NYS 486 (in foreign state); 196NC418, 145 SE782; 128 Okl 193, 252P847; 152 Wash643, 278P673(1stcase). **What proceedings are collateral.**-175Ark530, 1 SW(2d)16; 196Cal 294, 237P744; 199 Cal 705, 251P311. **Irregularity intervening** in procedure and decree is not ground for collaterally impeaching probate of will. 218Ala292, 118S342.

1378-23 199Cal 705, 251P311.

1379-35 That all facts upon which court acted do not appear on face of record does not render order admitting will to probate open to collateral attack **for fraud.** 175Ark530, 1SW(2d)16.

1379-36 128Kan699, 280P916 (burden of proof is on one attacking jurisdiction).

1379-37 52SD448, 218NW597.

1379-38 232Ky751, 24SW(2d)555.

1379-45½-New. Decree revoking probate is not subject to collateral attack. 79CalA468, 250P195.

1379-45½-New. If attempted probate thereof is void, anyone interested can assail instrument whenever adverse rights are attempted to be asserted under it. 118Tex565, 21SW(2d)296.

1380-49 16F(2d)841; 198Cal 32, 243P 423; 228AppDiv579, 240NYS260; Tex CivA 299SW450. **Purported will without signature, not showing decedent's authorship,** held without evidential force. NJSup 136A428. **Protocol of will of record owner** containing inventory and partition deed joined in by one through whom plaintiff claimed is admissible. 16F(2d)841.

1380-51½-New. Record alone is legal evidence of probate of will. 219Ala234, 121S528.

1380-51½-New. Presumptions.-Where authenticated copy of probate proceedings in another state is presented, it will be presumed that guardian ad litem was appointed, if such appointment appears necessary. 32 OhA226, 167NE698.

1381-59 See also 153Md235, 138A261, 53ALR1165.

1381-60½-New. In action involving title will may be established by common-law proof. 215AppDiv180, 213NYS455 (statutory method is not exclusive).

1381-60½-New. Statute requiring preservation of wills and production on subpœna duces tecum is designed to safeguard will and not affect admissibility in evidence. 153Md235, 138A261, 53 ALR1165.

1382-62 217Ala46, 114S465; 336 Ill 299, 168NE359; 79 IndA683, 147NE305; 127Misc647, 217NYS381; 198NC642, 153 SE114; 32 OhA69, 167NE592. **Rules of construction are but aids to determine intent.**-216AppDiv639, 214NYS479. **Court cannot make will under guise of construction.** 85CalA500, 259P992. **That testator did not anticipate every contingency** furnishes no excuse for execution of will by judicial construction. 85CalA500, 259P992.

1382-63 215Ala159, 110S3; 174Ark454, 295SW722; 178Ark892, 12SW(2d)866; 195Cal 643, 234P898 (rule applied in determining whether will illegally suspends power of alienation); 103CalA 243, 284P231; 84Colo 596, 272P660; 124Kan592, 261P597; 226Ky548, 11SW (2d)423; 158La815, 104S726; 245Mich 208, 222NW182; 216AppDiv639, 214 NYS479 (construction may not override plain, lawful intent); 127Misc679, 216 NYS422; 134Misc296, 235NYS308; 134 Misc837, 236NYS443; 195NC324, 142 SE2; 297Pa448, 147A101 (though intestacy results after devisee's death).

1382-64 200Cal 335, 253P706.

1382-66 Law of descent and distribution does not apply to wills. TexCivA 292SW273.

1382-66½-New. Each will must be guide of its own construction. 128Misc 635, 219NYS577.

1382-66½-New. It is court's duty to interpret and construe will and not to construct a new one. 129Misc15, 220 NYS635.

1382-66¼-New. There is no specific rule for construction of wills. 26 OhA 377, 160NE488.

1382-66½-New. Testator cannot, by any provision in his will, modify or prevent application of federal statute. 30 F(2d)73.

1382-66¾-New. Supreme court's decisions, so far as applicable, become part of every will. 340 Ill 11, 171NE919(2d case).

1382-68 Validity of will passing realty governed by place of realty. 216App Div72, 215NYS50.

1382-69 108Conn611, 144A461; 253 Mass55, 147NE899; 260Mass250, 157 NE358; 315Mo 485, 286SW371 (testator bound to know existing statutes); 133 Misc457, 233NYS145; 98Vt424, 129A 166 (operative effect of will settled by law of domicile at death); Sask [1928] 4DomLR181. **Temporary residence,** etc. 253Mass55, 147NE899. **As general proposition** wills are supposed to speak in reference to domiciliary laws of testator. 125Me22, 130A433.

1383-71 222MoA901, 6SW(2d)673, 674 [quotCyc]. **There is no presumption** that testator had in mind law of another state in making will with gift over to "descendants," so that adopted children residing in that state can take as issue under its laws. 237 IllA410.

1384-74 219Ala497, 122S824; 196Cal 508, 238P681; 260Mass250, 157NE358; 50RI 252, 146A857; BC [1925] 3Dom LR853 (holding determination of status of adopted child of predeceased legatee as next of kin, taking in his stead under will, is to be determined by law of domicile of legatee).

1384-75 212Ala526, 103S465; 213Ala 27, 104S234; 316 Ill 460, 147NE433; 328 Ill 431, 159NE780; 206 Iowa597, 220NW1; Iowa 229NW241; 226Ky668, 11SW(2d)721; 260Mass250, 157NE358; 216AppDiv72, 215NYS50 (regardless of validity of decree of foreign state admitting will to probate); 50 RI 252, 146 A857.

1385-76 In suit for construction of will of testator domiciled in another state as to notes representing proceeds of denied land within state, sold by testator before his death, refusal to allow proof of laws of state of testator's domicile as to construction was held proper. 213 Ala27, 104S234. **Foreign will** as to land within state has same construction and effect as domestic will. 213Ala27, 104S 234.

1385-76½-New. Legal effect of donee's will as valid exercise of power of appointment depends on law of state of donor's domicile. 111Conn594, 151A 252.

1385-77 317Mo 556, 296SW1001, 1003 [citCyc]; 115 Oh139, 152NE387.

1385-78 337 Ill 232, 168NE900, 66ALR 1062; 128Misc240, 218NYS385.

1385-79 157Md492, 146A432; 100NJEq 196, 134A822.

1386-83 82NH380, 134A536; 128Misc 240, 218NYS385.

1386-85 12F(2d)896; 15F(2d)719; 19 F(2d)454; 23F(2d)754; 23F(2d)994; 24F(2d)257; 34F(2d)18; 42F(2d)613; 212Ala512, 103S591; 213Ala676, 105S 881; 217Ala418, 116S116; 218Ala549, 119S678; 220Ala524, 126S409(2dcase); 221Ala364, 128S458; Ala 130S801; 170 Ark679, 280SW993; 172Ark1065, 291SW 823; 173Ark277, 292SW370; 174Ark 703, 297SW1018; 178Ark337, 10SW(2d) 491; 180Ark552, 22SW(2d)370; 181 Ark439, 26SW(2d)113; Ark 30SW(2d) 834; 196Cal 339, 238P76 (under statute); 199Cal 661, 250P657; 199Cal 724, 251P799; 200Cal 482, 253P921; 204Cal 399, 268P647; 68CalA420, 229P898; 70 CalA409, 235P670; 76CalA723, 245P 776; 89CalA238, 264P542; 95CalA580, 273P92; 97CalA485, 275P875; 99CalA 586, 278P925; CalA 289P892; CalA 290P302; 80Colo 461, 251P595; 81Colo 152, 254P161; 83Colo 540, 266P714; 103Conn54, 130A92; 103Conn308, 130A 483; 106Conn236, 137A764; 106Conn 178, 138A159; 111Conn120, 149A229; 15DelCh84, 131A529; 15DelCh255, 136 A149; 15DelCh342, 138A167; DelCh 145 A671; 89Fla457, 105S106; 90Fla540, 106S412; 92Fla327, 109S435; 96Fla194, 117S887; Fla 129S835; 161Ga448, 131 SE154; 164Ga171, 137SE921; 166Ga 134, 142SE884; 29Hawaii854, 857 [cit Cyc]; 316 Ill 583, 147NE446; 317 Ill 85, 147NE382; 318 Ill 301, 149NE279; 318 Ill 544, 149NE476; 322 Ill 597, 153 NE746; 323 Ill 269, 154NE101; 323 Ill 303, 154NE135; 324 Ill 574, 155NE378; 325 Ill 500, 156NE758; 326 Ill 608, 158 NE444; 331 Ill 28, 162NE152; 331 Ill 287, 162NE855; 332 Ill 645, 164NE135; 333 Ill 112, 164NE154; 333 Ill 138, 164 NE222; 336 Ill 299, 168NE359; 337 Ill 232, 168NE900, 66ALR1062; 337 Ill 442, 169NE197; 236 IllA168; 237 IllA372; 237 IllA410; 246 IllA305; 79 IndA683, 147NE305; 86 IndA89, 155NE178; IndA 158NE598; 203 Iowa754, 208NW337; 202 Iowa842, 211NW254; 202 Iowa966,

211NW380; 202 Iowa1094, 211NW488; 203 Iowa603, 213NW392; 207 Iowa71, 218NW926(2dcase); 206 Iowa597, 220 NW1; 207 Iowa374, 223NW106; Iowa 227NW614; Iowa 228NW629; Iowa 229 NW705; Iowa 230NW353; Iowa 230 NW434; 124Kan267, 259P707; 124Kan 592, 261P597; 124Kan633, 261P582; 124Kan792, 262P601; 212Ky114, 278 SW591; 214Ky400, 283SW410; 217Ky 362, 289SW303; 219Ky562, 293SW1087; 225Ky699, 9SW(2d)1020; 225Ky725, 9 SW(2d)1074; 228Ky116, 14SW(2d)201; 229Ky162, 16SW(2d)756; 232Ky83, 22 SW(2d)416; 232Ky666, 24SW(2d)558; 233Ky554, 26SW(2d)497; 158La516, 104S310; 160La217, 106S833; 161La 155, 108S319; 161La1032, 109S827; 162 La649, 110S891; 165La357, 115S618; 125Me22, 130A433; 125Me127, 131A206; 125Me305, 133A689; 126Me78, 136A350; Me 149A623; 150Md478, 133A333; 150 Md539, 133A308; 154Md249, 140A208; 154Md632, 141A377; 155Md483, 142A 627; 257Mass492, 154NE397; 259Mass 539, 156NE724; 259Mass465, 156NE 885; 260Mass250, 157NE358; 263Mass 173, 160NE665; 266Mass4, 164NE460; 265Mass515, 164NE464; 266Mass500, 165NE657; Mass 167NE261; Mass 168 NE102; Mass 171NE828; Mass 172NE 647; 238Mich33, 213NW59; 240Mich68, 214NW941; 249Mich474, 229NW465; 150Miss179, 116S734; 157Miss412, 128 S268; 309Mo 488, 274SW798; 315Mo 392, 286SW79; 315Mo 485, 286SW371; 315Mo 627, 287SW316; 316Mo 492, 291 SW120, 51ALR877; 316Mo 626, 291SW 488; 317Mo 1028, 298SW91, 56ALR 1276; Mo 300SW487; 320Mo 852, 8SW (2d)931; Mo 12SW(2d)505; 323Mo 620, 19SW(2d)898; Mo 28SW(2d)999; Mo 32SW(2d)591; MoA 28SW(2d)420; MoA 31SW(2d)271; MoA 31SW(2d) 283; 117Nebr257, 220NW269; 118Nebr 246, 224NW1; NH 139A759; 83NH453, 144A63; NJ 129A742; 99NJEq339, 131 A515; 99NJEq333, 133A188; 102NJEq 235, 140A413; 98NJEq242, 130A549 (will construed in light of interpretation adopted by courts); 99NJEq514, 133A 705; NJOrphans'Court 148A193; 243 NY1, 152NE447; 244NY236, 155NE110; 248NY361, 162NE283; 217AppDiv150, 217NYS145; 217AppDiv377, 216NYS 652; 220AppDiv379, 222NYS848; 221 AppDiv409, 223NYS491; 223AppDiv579, 228NYS587; 125Misc150, 210NYS424; 125Misc224, 210NYS729; 126Misc220, 214NYS145; 126Misc233, 214NYS142; 126Misc296, 214NYS176; 127Misc380, 216NYS747; 127Misc679, 216NYS422; 128Misc635, 219NYS577; 128Misc791, 221NYS220; 128Misc905, 220NYS505; 129Misc15, 220NYS635; 129Misc78, 220 NYS816; 131Misc21, 227NYS296; 131 Misc238, 226NYS637; 131Misc526, 227 NYS470; 133Misc695, 234NYS109; 134 Misc363, 236NYS280; 135Misc247, 238 NYS765; 137Misc644, 244NYS566; 137 Misc758, 244NYS686; 217AppDiv188, 216NYS535; 128Misc292, 217NYS849; 219AppDiv216, 219NYS129; 224AppDiv 152, 230NYS74; 224AppDiv540, 231NYS 446; 225AppDiv29, 232NYS884; 133 Misc812, 234NYS99; 134Misc285, 235 NYS165; 134Misc296, 235NYS308; 134 Misc160, 235NYS705; 227AppDiv125, 237NYS141; 135Misc223, 237NYS412; 136Misc330, 240NYS98; 136Misc532, 241NYS506; 137Misc113, 243NYS127; 137Misc663, 244NYS262; 137Misc386, 244NYS366; 138Misc253, 245NYS631; 189NC577, 127SE582; 190NC147, 129SE 187; 190NC215, 129SE611; 191NC203, 131SE575; 191NC802, 133SE168; 192 NC94, 133SE410; 192NC131, 133SE431; 195NC324, 142SE2; 195NC315, 142SE 4; 197NC159, 147SE809; 116 Oh684, 157NE377, 54ALR92; 114 OhSt535, 151 NE649 (Gen. Code § 10580 is not in conflict with general rule); 20 OhA279, 151NE795; 24 OhA400, 157NE497; 26 OhA377, 160NE488; 30 OhA289, 165NE 49; 30 OhA345, 165NE101; 35 OhA283, 172NE386; 35 OhA526, 172NE629; 25 OhNPNS393; 122 Or246, 257P818; 285 Pa460, 132A529; 286Pa335, 133A558; 287Pa334, 135A262; 289Pa101, 137A 132; 289Pa473, 137A676; 289Pa542, 137A802, 52ALR1251; 292Pa336, 141A 253; 292Pa470, 141A294; 294Pa261, 144A129; 90PaSuper100; 6PaDist&Co 200; 11PaDist&Co 434; 11PaDist&Co 545; 12PaDist&Co 4; 12PaDist&Co 49; 12PaDist&Co 51; 12PaDist&Co 117; 46 Philippine642; 48RI 127, 136A15; 48 RI 411, 137A875; 49RI 319, 142A330; 49RI 308, 142A605; 49RI 349, 142A609; 50RI 252, 146A857; RI 150A819; 139 SC262, 137SE727; 157SC407, 154SE 426; SD 232NW89; 160Tenn57, 22SW (2d)6; TexCommnA 293SW165; Tex CommnA 299SW889; 118Tex91, 118SW (2d)496; TexCommnA 15SW(2d)220; TexCommnA 22SW(2d)1065; TexCivA 291SW570; TexCivA 297SW915; Tex CivA 2SW(2d)339; 99Vt480, 134A581; 100Vt407, 138A730; 101Vt242, 143A 280; 101Vt325, 143A384; 101Vt464, 144A457; 101Vt502, 144A686; Vt 151A 654; 142Va680, 128SE252; 142Va149, 128SE450; 142Va285, 128SE550; 144 Va533, 132SE344; 147Va1068, 133SE 353; 145Va721, 134SE704; 145Va742, 134SE673; 148Va322, 138SE491; 148 Va503, 139SE286; 149Va746, 141SE 756; 151Va1018, 145SE827; 153Va449, 150SE394; 153Va636, 151SE157; 135 Wash303, 237P721; 145Wash503, 261P 104; 152Wash82, 277P385, 68ALR753; 153Wash247, 279P591(2dcase); 155 Wash535, 285P422; Wash 292P257; 194Wis113, 216NW130; 194Wis330, 216 NW501; 194Wis428, 216NW840; 195 Wis88, 217NW726; 197Wis98, 221NW 401; 197Wis304, 222NW323; 198Wis 573, 225NW181; 200Wis386, 228NW 495. See also Md 149A689. **Rules of construction are not absolute but serve to aid in determining intention which** is dominant consideration. 142Va840, 128SE247. **Reason and common sense** are not to be excluded in ascertaining intent. 107Conn409, 140A639. **Well settled principles of law must be applied.** 49RI 40, 139A659. **Where will creates life estate in definite unequivocal terms,** circumstances making estate of no value and burdened with taxes cannot defeat clearly expressed intent of testator, though he may not have known legal incidents of life estate. 218 Ala320, 118S553. **Where language of will is clear, plain, and unambiguous on its face** and clearly manifests testator's intention, courts must give effect to that intention, whatever may be consequences. **TexCivA 9SW(2d)269. Legal insufficiency of testator's wish** is immaterial in determining his intention. CalA 290P314.

1388–86 14DelCh457, 130A283; 127 Misc647, 217NYS381; 289Pa101, 137A 132.

1388–87 125Me305, 133A689; 117Nebr 257, 220NW269; 82NH260, 132A525; 127Misc647, 217NYS381; 289PaA101, 137A132. **Precedents and technical rules** are overridden by testator's clearly expressed will. 125Me305, 133A689.

1388–88 179Ark543, 16SW(2d)996, 65 ALR466; 316 Ill 583, 147NE446; 317Mo 556, 296SW1001. **Intention of testator has been held not to contravene any** principle of public policy. 337 Ill 232, 168NE900, 66ALR1062.

1388–88½–New. Court should consider effect of intestacy as bearing on question of testator's intent. 126Misc220, 214 NYS145.

1388–88½–New. Testator is deemed to intend result which statutory rules produce to same extent as though statutory provisions were embodied in will. 97 CalA138, 275P453.

1388–90 12F(2d)896; 19F(2d)454; 213 Ala579, 105S669; 215Ala685, 112S222; 220Ala524, 126S409(2dcase); 29Ariz138, 240P280; 175Ark236, 299SW1; 178Ark 337, 10SW(2d)491; 178Ark558, 11SW (2d)460; 179Ark30, 13SW(2d)810; 181 Ark439, 26SW(2d)113; 197Cal 276, 240 P498; 199Cal 716, 251P202; 199Cal 724, 251P799; 68CalA420, 229P898; 70CalA 409, 235P670; 76CalA723, 245P776; 78 CalA412, 248P680; 85CalA500, 259P 992; 89CalA238, 264P542; 80Colo 461, 251P595; 84Colo 596, 272P660; 102 Conn503, 129A382; 103Conn54, 130A92; 105Conn57, 134A155; 106Conn267, 137 A737; 106Conn236, 137A764; 111Conn 120, 149A229; 15DelCh84, 131A529; 90 Fla540, 106S412; 164Gal71, 137SE921; 317 Ill 241, 148NE17; 318 Ill 301, 149 NE279; 318 Ill 474, 149NE486; 318 Ill 544, 149NE476; 322 Ill 579, 153NE611; 323 Ill 303, 154NE135; 324 Ill 574, 155 NE378; 328 Ill 47, 159NE217; 330 Ill 624, 162NE164; 331 Ill 213, 162NE873; 332 Ill 645, 164NE135; 333 Ill 112, 164 NE154; 333 Ill 643, 165NE208; 335 Ill 395, 167NE94; 337 Ill 232, 168NE900, 66ALR1062; 337 Ill 387, 169NE232; 236 IllA168; 237 IllA372; 237 IllA410; 246 IllA342; 85 IndA394, 154NE293; IndA 173NE327; 202 Iowa842, 211NW254; 204 Iowa1237, 212NW306; 204 Iowa 1231, 213NW395; Iowa 216NW753; 206 Iowa597, 220NW1; 206 Iowa187, 220 NW25; 120Kan148, 242P135; 124Kan 267, 259P707; 124Kan633, 261P582; 124Kan792, 262P601; 210Ky654, 276 SW563; 214Ky400, 283SW410; 216Ky 289, 287SW710; 219Ky562, 293SW1087; 223Ky49, 2SW(2d)1057; 225Ky699, 9 SW(2d)1020; 227Ky643, 13SW(2d) 1001; 232Ky666, 24SW(2d)558; 160La 217, 106S833; 165La803, 116S192; 170 La449, 128S273; 125Me127, 131A206; 125Me171, 132A211; 125Me298, 133A 305; 125Me305, 133A689; 126Me78, 136 A350; 127Me104, 141A188; Me 151A429 (2dcase); 155Md483, 142A627; 257Mass 492, 154NE397; Mass 172NE647; 239 Mich274, 214NW104; 248Mich571, 227 NW726; 149Miss201, 115S344; 157Miss 38, 127S561; 309Mo 488, 274SW798; 315Mo 392, 286SW79; 316Mo 1016, 292 SW417; 317Mo 594, 296SW401; 323Mo 633, 19SW(2d)634; Mo 29SW(2d)116; MoA 5SW(2d)662; MoA 31SW(2d)271; 99NJEq333, 133A188; NJ 144A714; 99 NJEq498, 133A868; NJCh 144A804; NJ OrphansCt 148A193; 250NY45, 164NE 737; 216AppDiv639, 214NYS479 (testator speaks through will); 217AppDiv 150, 217NYS145; 220AppDiv64, 220NYS 757; 125Misc376, 211NYS629; 126Misc 296, 214NYS176; 126Misc421, 214NYS 565; 128Misc582, 219NYS614; 128Misc 635, 219NYS577; 128Misc791, 221NYS 220; 128Misc906, 220NYS509; 131Misc 526, 227NYS470; 133Misc695, 234NYS 109; 134Misc182, 236NYS143; 137Misc 758, 244NYS686; 128Misc240, 218NYS 385; 224AppDiv217, 231NYS611; 133 Misc399, 232NYS308; 133Misc450, 232 NYS418; 133Misc868, 234NYS97; 134 Misc296, 235NYS308; 134Misc837, 236 NYS443 (construction best effectuating testator's intention will be adopted); 134Misc791, 236NYS518 (intention gathered only from words); 135Misc93, 236 NYS709; 135Misc156, 237NYS293; 135 Misc24, 237NYS533; 136Misc199, 239 NYS588; 137Misc113, 243NYS127; 137 Misc46, 243NYS136 (court may not write new will); 137Misc451, 244NYS115; 137Misc386, 244NYS366; 137Misc785, 244NYS404; 190NC147, 129SE187; 192 NC94, 133SE410; 193NC294, 136SE 733; 195NC315, 142SE4; 197NC215, 148 SE175; 197NC488, 149SE731; 115 Oh 139, 152NE387; 116 Oh684, 157NE377, 54ALR92; 114 OhSt535, 151NE649; 15 OhA372 (cannot be changed by order in which items are arranged); 24 OhA400, 157NE497; 28 OhA325, 162NE714; 35 OhA283, 172NE386; 35 OhA411, 172NE 431; 35 OhA526, 172NE629; 118 Or96, 245P1069; 286Pa335, 133A558; 287Pa 334, 135A262; 289Pa101, 137A132; 291 Pa198, 139A868; 300Pa146, 151A339; 46Philippine642; 47RI 444, 134A276; 49RI 349, 142A609; RI 142A617; RI 151A131; 142SC239, 140SE596; 148SC 330, 146SE149; 157SC407, 154SE426; TexCommnA 14SW(2d)1009; Tex CommnA 22SW(2d)1065; TexCivA 192 SW273; TexCivA 291SW924; 99Vt480, 134A581; Vt 150A126; Vt 151A654; 147Va1068, 133SE353; 145Va116, 133SE 773; 145Va721, 134SE704; 148Va322, 138SE491; 148Va503, 139SE286; Va 152SE339; 155Wash535, 285P422. **Interpretation depends upon distinctive language employed or surrounding circumstances.** 125Misc369, 211NYS529. **Will expresses animus testandi** where in due form of law, though testator executed another instrument which was not witnessed. 224 IllA562. **Effect should be given to every word and clause in will.**–237 IllA410. **Court not empowered to make will or attempt to improve on will made.** TexCivA 2SW(2d)339. **Court construing will cannot first infer testator's intention and then construe**

will so as to give effect to such inferred intention. **TexCivA 28W(2d)339. Court cannot make will for testator.**–220Ala 524, 126S409(2dcase).

1389–91 125Me305, 133A689; 126Me78, 136A350; 248Mich571, 227NW726; 244 NY236, 155NE110.

1389–92 318 Ill 544, 149NE476; 328 Ill 47, 159NE217.

1389–93 **IndA** 154NE682; 206 **Iowa**187, 220NW25; 315**Mo** 627, 287SW316; 99 **NJEq**333, 133A188; 98**NJEq**242, 130A 549; **NJOrphans** 134A284; 127Misc647, 217NYS381; 196NC755, 147SE286; 24 **OhNPNS**129; 284Pa482, 131A377; 145 **Wash**503, 261P104.

1389–94 78**CalA**412, 248P680; **CalA** 290P314; 15**DelCh**84, 131A529; 317 Ill 241, 148NE17; 204 **Iowa**1231, 213NW 395; 216Ky289, 287SW710; 262**Mass** 321, 159NE919; **Mo** 23SW(2d)32; 217 **AppDiv**377, 216NYS652; 293Pa133, 143 A121, 59**ALR**1402; 150SC111, 147SE 659; **TexCivA** 300SW203, 205 [citCyc]; 147Va1068, 133SE353; 151**Va**322, 144 SE497(2dcase). **In absence of patent or latent ambiguity there is no field for construction of will.**–217**AppDiv**377, 216 NYS652. **Construction of will held not objectionable as conjectural.**–107**Conn** 409, 140A639.

1390–95 29**Ariz**138, 240P280; 179**Ark** 543, 16SW(2d)996, 65**ALR**466; 78**CalA** 412, 248P680; 89**CalA**238, 264P542; **CalA** 289P889; 106**Conn**627, 138A808; 318 Ill 544, 149NE476; 337 Ill 232, 168 NE900, 66**ALR**1062; 339 Ill 45, 170NE 699; 236 **IllA**168; 216Ky289, 287SW 710; 227Ky728, 13SW(2d)1039; 154**Md** 390, 110A599; 239**Mich**274, 214NW104; 134**Misc**285, 235NYS165; 134**Misc**527, 235NYS744 (court cannot make new will by construction); 134**Misc**564, 236NYS 326 (court cannot make will for decedent but is limited to words used); 190NC 147, 129SE187 (if at variance with obvious meaning of words used); 195NC 822, 143SE835; 118 **Or**96, 245P1069; 291Pa198, 139A868; 292Pa556, 141A 484; 293Pa56, 141A730; **TexCivA** 28W (2d)997, 1000 [citCyc]; **TexCivA** 13SW (2d)176; 147Va1068, 133SE353; 145**Va** 721, 134SE704. **Courts will not make new will for party** interjecting in place of plain provisions others that court may say he intended but mistakenly omitted. 215**AppDiv**73, 213NYS277. **Failure to change will** after principal legatee predeceased testator does not authorize construction that nephews named as prospective distributees should share entire estate. 134**Misc**705, 236NYS176.

1390–96 199 **Iowa**250, 201NW574.

1390–97 118 **Or**96, 245P1069.

1390–97½–New. Because of diversity of wills no set rule for construction can be made. 199 **Iowa**250, 201NW574.

1390–97¾–New. If language of will is clear and unequivocal, it must be taken to express intention of testator and must be given effect unless it violates some rule of law. 145Va721, 134SE704.

1390–97¼–New. Canons for construing wills are not intended to affect intention ascertainable from will but to aid in ascertaining intention when doubtful. 137 **Misc**46, 243NYS136.

1390–99 76**CalA**723, 245P776; **Miss** 130 S734; 134**Misc**409, 235NYS484; 230**App Div**574, 245NYS436. **Erratum.**–in 1926 Permanent Annotations, citation "130A 136" should be "120A136."

1390–2 85 **IndA**394, 154NE293.

1390–3 76**CalA**723, 245P776; 317 Ill 241, 148NE17; 326 Ill 608, 158NE444; **Me** 149A603; 256**Mass**273, 152NE356; **Miss** 130S734; 134**Misc**409, 235NYS484; **TexCivA** 48W(2d)268, 271 [quotCyc].

1391–4 15**DelCh**84, 131A529; 267**Mass** 203, 166NE703. **A gift by implication cannot be inferred from mere silence,** etc. 84**Colo** 596, 272P660; 317 Ill 241, 148NE17.

1392–11 12**F(2d)**896; 15**F(2d)**719; 220 **Ala**524, 126S409(2dcase); 179**Ark**543, 16 **SW(2d)**996, 65**ALR**466; 197**Cal**276, 240 **P**498; 199**Cal** 661, 250P657; 199**Cal** 716, 251P202; 70**CalA**409, 235P670; 196**Cal** 301, 237P739; 76**CalA**723, 245P776; 103**Conn**54, 130A92; 105**Conn**57, 134A 155; 106**Conn**267, 137A737; 106**Conn** 236, 137A764; 111**Conn**120, 149A229; 317 Ill 150, 147NE738; 318 Ill 301, 149 NE279; 323 Ill 269, 154NE101; 323 Ill 303, 154NE135; 324 Ill 574, 155NE378; 333 Ill 138, 164NE222; 236 **IllA**168; 237 **IllA**372; 237 **IllA**410; **Ind** 170NE 20; 202 **Iowa**842, 211NW254; 202 **Iowa** 966, 211NW380; 202 **Iowa**1094, 211NW 488; 207 **Iowa**374, 223NW106; **Iowa** 228NW629; 124**Kan**592, 261P597; 124 **Kan**633, 261P582; 130**Kan**433, 286P 195; 223Ky792, 4SW(2d)745; 225**Ky** 725, 9SW(2d)1074; 125**Me**127, 131A206; 125**Me**305, 133A689; 125**Me**378, 134A 195; 150**Md**478, 133A333; **Md** 149A689; 257**Mass**492, 154NE397; 258**Mass**427, 155NE438; 263**Mass**534, 160NE275; 263 **Mass**173, 160NE665; 265**Mass**515, 164 NE464; 149**Miss**70, 115S109; 309**Mo** 488, 274SW798; 317**Mo** 616, 297SW70; **Mo** 300SW487; 319**Mo** 680, 5SW(2d)77; 320**Mo** 852, 8SW(2d)931; 323**Mo** 633, 19SW(2d)634; **MoA** 31SW(2d)271; 77 **Mont**182, 250P812; 83**NH**453, 144A63; 99**NJEq**498, 133A868; 100**NJEq**196, 134 A822; 244NY236, 155NE110; 215**App Div**25, 213NYS131 (and common experience of mankind); 125**Misc**150, 210NYS 424; 129**Misc**15, 220NYS635; 131**Misc** 905, 229NYS299; 135**Misc**247, 238NYS 765; 136**Misc**612, 244NYS119; 137**Misc** 644, 244NYS566; 127**Misc**647, 217NYS 381; 219**AppDiv**131, 219NYS436; 134 **Misc**705, 236NYS176; 134**Misc**893, 236 NYS595; 136**Misc**532, 241NYS506; 191 **NC**802, 133SE168; 192**NC**94, 133SE410; 192**NC**131, 133SE431; 114 **OhS**535, 151 NE649; 115 **Oh**35, 152NE10; 115 **Oh** 139, 152NE387; 116 **Oh**684, 157NE377, 54**ALR**92; 20 **OhA**279, 151NE795; 121 **Or**351, 255P333; 289**Pa**407, 137A627; 289**Pa**542, 137A892, 52**ALR**1251; 292**Pa** 454, 141A256; 293**Pa**433, 143A121, 59 **ALR**1402; 86**PaSuper**241; 49**Philippine** 333, 334 [citCyc]; 49**RI** 308, 142A605; 49**RI** 349, 142A609; **TexCommnA** 15SW (2d)220; **TexCivA** 15SW(2d)1110; 101 **Vt**464, 144A457; **Vt** 151A654; 142**Va** 840, 128SE247 (circumstances of execution to be considered); 142**Va**680, 128 SE252 (in giving force to presumption that intestacy not intended); 142**Va**149, 128SE450; 143**Va**117, 129SE347; 147 **Va**1068, 133SE353; 145**Va**721, 134SE 704; 149**Va**746, 141SE756; 153**Va**636, 151SE157; **Va** 153SE647; 145**Wash**503, 261P104; 100**WVa**585, 131SE449; 198 **Wis**457, 224NW735; 198**Wis**573, 225NW 181. See also 218**Ala**147, 117S670; 216 **AppDiv**639, 214NYS479. **Precedents are** of little value except to furnish rules of construction. 215**AppDiv**25, 213NYS131. **Where will prepared by layman, no** different effect is given rules of construction. 126**Misc**421, 214NYS565. **Interpretation depends** upon distinctive language employed or surrounding circumstances. 125**Misc**369, 211NYS529. **Extrinsic facts construed to support** testator's intention as expressed in will. 197 **Cal** 276, 240P498.

1392–11½–New. , but this rule is not inflexible. 216**AppDiv**639, 214NYS479.

1393–12 214**Ala**288, 107S838; 133**Misc** 399, 232NYS308; 116 **Oh**684, 157NE 377, 54**ALR**92.

1393–13 323 Ill 269, 154NE101; 124 **Kan**633, 261P582; 130**Kan**433, 286P 195; 316**Mo** 626, 291SW488; 99**NJEq** 498, 133A868; 127**Misc**647, 217NYS 381; 116 **Oh**684, 157NE377, 54**ALR**92; 121 **Or**351, 255P333; 289**Pa**407, 137A 627; 49**RI** 349, 142A609.

1393–14 106**Conn**267, 137A737; 124 **Kan**633, 261P582; 121 **Or**351, 255P333.

1393–15 12**F(2d)**896; 105**Conn**98, 134 A530; 115 **Oh**35, 152NE10; 116 **Oh**684, 157NE377, 54**ALR**92.

1393–17 331 Ill 182, 162NE888; 210**Ky** 654, 276SW563; 317**Mo** 594, 296SW401; 116 **Oh** 684, 157NE377, 54**ALR**92; 24 **OhA**117, 156NE223; 25 **OhA**48, 156NE 915; 292**Pa**556, 141A484; **TexCivA** 292 SW273.

1393–19½–New. or by other subsequent events. 82**NH**503, 136A266.

1393–20 150**Md**478, 133A333; **Mo** 271 SW815; 124**Misc**692, 209NYS779; 91 **PaSuper**245; **TexCivA** 22SW(2d)313 (2dcase).

1393–21 12**F(2d)**896.

1394–22 332 Ill 645, 164NE135; **Alta** [1927] 1**DomLR**1078.

1394–23 231Ky731, 22SW(2d)133; 125 **Me**127, 131A206; 126**Me**78, 136A350; 195NC324, 142SE2; 115 **Oh**139, 152NE 387; 24 **OhA**400, 157NE497; 28 **OhA** 325, 162NE714; 6**PaDist&Co** 200. **Rules of construction are merely aids** in determining testator's intention. 83**Colo** 575, 267P408.

1394–24 164**Ga**171, 137SE921; 337 Ill 49, 168NE681; **Ind** 170NE20; 206 **Iowa** 597, 220NW1; 124**Kan**592, 261P597; 216**Ky**289, 287SW710; 219**Ky**562, 293 SW1087; 126**Me**78, 136A350; 238**Mich** 33, 213NW59; 240**Mich**68, 214NW941; 249**Mich**474, 229NW465; 315**Mo** 627, 287SW316; 317**Mo** 594, 296SW401; 319 **Mo** 108, 5SW(2d)428; **Nebr** 227NW917; 82**NH**380, 134A536; 99**NJEq**333, 133A 188; **NJOrphans** 134A284; 244NY400, 155NE685; 248NY361, 162NE283; 125 **Misc**90, 210NYS143; 135**Misc**48, 237 NYS649; 137**Misc**449, 243NYS751; 28 **OhA**325, 162NE714; 286**Pa**382, 133A 545, 46**ALR**777; 289**Pa**101, 137A132; 289**Pa**473, 137A676; 45**Philippine**216. **"Rules of law,"** as used in statute requiring intent of testator to be followed so far as consistent with rules of law, do not mean rules of construction in conflict with rule established by such statute. **Nebr** 227NW917.

1394–24½–New. Technical rules of construction applicable to deeds of conveyance are not imperatively applicable to wills. 238**Mich**33, 213NW59.

1394–24¾–New. Established rules of interpretation may not be disregarded, in absence of peculiarities evincing necessity for so doing in order to give effect to intention. 214**Ala**288, 107S838.

1395–25 79 **IndA**683, 147NE305; 221 **AppDiv**409, 223NYS491; 127**Misc**735, 217NYS512; 128**Misc**370, 219NYS687.

1395–26 Rule is used only as last resort.–127**Misc**735, 217NYS512.

1395–27 Court cannot alter will to obviate provision in violation of statute barring restraints on alienation on ground that testator was ignorant of effect of provisions and would have provided otherwise had he known law. 128 **Misc**370, 219NYS687.

1395–27½–New. Court cannot rewrite will to evade application of statute against perpetuities, by giving effect to one part of a provision in will and repudiating another part of same provision. 125**Misc**95, 210NYS155.

1396–32 127**Misc**647, 217NYS381; 21 **OhA**236, 152NE768.

1396–33 127**Misc**647, 217NYS381.

1396–34 12**F(2d)**896; 44**F(2d)**172; 216**Ala**448, 113S501, 506 [citCyc;per Thomas,J]; **DelCh** 152A129; **IndA** 158 NE598; 124**Kan**592, 261P597; 149**Md** 583, 132A53; 137**Misc**785, 244NYS404; **NC** 155SE605; 289**Pa**101, 137A132; **TexCivA** 22SW(2d)313(2dcase); **Va** 153SE647; **Wash** 292P257.

1396–34½–New. Testator's language must be followed where directions are clear. 125**Misc**351, 211NYS510.

1396–35 But see 136**Misc**270, 239NYS 717.

1396–36 134**Misc**705, 236NYS176.

1396–37 196**Cal** 301, 237P739; **CalA** 289P889; **NH** 139A759.

1396–37½–New. Words first used may be explained or made plain by those subsequently employed. 289**Pa**101, 137 A132.

1396–37¾–New. It is not necessary to use any particular form of expression to give effect to disposition by will. 127**Misc**579, 217NYS323.

1396–37¼–New. After testator's intention from language is ascertained, rules of law and property are applied to determine whether it can be given effect. 340 Ill 11, 171NE919(2dcase).

1396–38 103**Conn**54, 130A92; **Conn** 138A440; 237 **IllA**410, 413 [citCyc]; 263**Mass**1, 160NE441; 320**Mo** 543, 8SW (2d)1008; **NH** 139A759; 195NC324, 142SE2; 115 **Oh**139, 152NE387, 389 [quotCyc]; 116 **Oh**668, 157NE760; 25 **OhNPNS**16; **TexCivA** 9SW(2d)269.

1396–39 215**Ala**685, 112S222; 217**Ala** 426, 116S127; 111**Conn**452, 150A526; **Conn** 151A166; 124**Kan**592, 261P597; 263**Mass**173, 160NE665; 143**Miss**427, 108S799, 47**ALR**516; 157**Miss**412, 128S 268; 320**Mo** 1058, 10SW(2d)47; 323**Mo** 633, 19SW(2d)634; **MoA** 28SW(2d)420; 77**Mont**182, 250P812; 82**NH**503, 136A

266; 98NJEq242, 130A549; 217AppDiv 377, 216NYS652; 223AppDiv579, 228 NYS587; 219AppDiv131, 219NYS436; 224AppDiv152, 230NYS74; 137Misc785, 244NYS404; 115 Oh139, 152NE387, 389 [quotCyc]; 116 Oh684, 157NE377, 54 ALR92; 21 OhA236, 152NE768; 24 OhA 117, 156NE223; 24 OhA324, 156NE913; 25 OhA48, 156NE915; 35 OhA283, 172 NE386; 25 OhNPNS16; 130 Or577, 281 P178; 289Pa101, 137A132; 289Pa542, 137A802, 52ALR1251 (as in contracts); 142SC239; 140SE596; 198Wis573, 225 NW181. **Where will was drawn by layman,** language should be interpreted as layman's language. 207 Iowa71, 218NW 926(2dcase) (will drawn by testator's wife). **Court should not be influenced by customary use of phrase** where language is plain, though unusual. 137 Misc386, 244NYS366.

1397–40 215Ala685, 112S222; 217Ala 426, 116S127; 103Conn54, 130A92; Del Ch 145A671; 237 IllA410, 413 [cit Cyc]; 143Miss427, 108S799, 47ALR516; 217AppDiv377, 216NYS652; 115 Oh139, 152NE387, 389 [quotCyc]; 25 OhA48, 156NE915; 25 OhNPNS16. **Testamentary words derive their particular meaning** from context. 125Me378, 134A195.

1397–41 115 Oh139, 152NE387, 389 [quotCyc]; 145Va116, 133SE773.

1397–42 102NJEq235, 140A413; 115 Oh139, 152NE387, 389 [quotCyc].

1398–43 217AppDiv377, 216NYS652; 115 Oh139, 152NE387, 389 [quotCyc]; 289Pa542, 137A802, 52ALR1251.

1398–44 23F(2d)994; 85CalA500, 259P 992; 210Ky654, 276SW563; 217AppDiv 377, 216NYS652; 115 Oh139, 152NE387.

1398–45 115 Oh139, 152NE387, 389 [quotCyc]. **The mere fact,** etc. 127 Misc731, 217NYS493.

1398–47 217Ala418, 116S116; 173Ark 277, 292SW370; 179Ark167, 14SW(2d) 545(2dcase); 200Cal482, 253P921; 126 Me78, 136A350; 153Md248, 138A5; 143 Miss427, 108S799, 47ALR516; 222MoA 901, 6SW(2d)673; 129Misc447, 221NYS 714; 190NC215, 129SE611; 114 OhSt 535, 151NE649 (words "legal heirs" construed to be used in technical sense); 115 Oh139, 152NE387; 145Va116, 133 SE773. See also 101Vt325, 143A384.

1399–48 216Ala448, 113S501, 506 [cit CycperThomas.J]; 200Cal482, 253P 921; 149Md583, 132A53; 100NJEq250, 135A514; 116 Oh684, 157NE377, 54 ALR92; 291Pa129, 139A832; TexCivA 158SW(2d)1110; 145Va116, 133SE773; 108WVa480, 151SE709. **Testator held to have intended** to include "trust estate" in "estate." 99NJEq498, 133A868.

1399–50 200Cal482, 253P921; 328 Ill 47, 159NE217. See also 217Ala418, 116 S116. **Undue weight should not be given to technical terms** when used by layman. 142Va680, 128SE252.

1399–50½–New. So court should consider property of testator, surrounding circumstances, his relation to beneficiaries, and fact that will is holographic. 116 Oh684, 157NE377, 54ALR92.

1399–50¼–New. Where will is drawn by one familiar with legal terms, omission of such terms in their usual connection is significant. 219Ala89, 121S67.

1399–51 89CalA238, 264P542; 142Va 840, 128SE247.

1399–52 See also 10PaDist&Co 299.

1399–53 Though language is same, circumstances attendant may so differ as to necessitate widely divergent construction. 142Va840, 128SE247.

1400–54 216Ala448, 113S501, 506 [cit CycperThomas.J]; 80Colo 499, 252P 816; 237 IllA372; 124Kan633, 261P 582; 260Mass577, 157NE707; 247NY 195, 160NE8.

1400–55 CalA 290P54; 237 IllA372.

1400–56 80Colo 499, 252P816; 124Kan 633, 261P582; 247NY195, 160NE8. See also 12PaDist&Co 4, 13 [citCycper Gest.J].

1400–57 80Colo 499, 252P816; 324 Ill 574, 155NE378; 339 Ill 197, 171NE139; 237 IllA372; 122Kan59, 251P392; 124 Kan633, 261P582; 143Miss427, 108S 799, 47ALR516; 247NY195, 160NE8; 129Misc15, 220NYS635; 224AppDiv152, 230NYS74; 190NC147, 129SE187; Ont [1929] 1DomLR454. **"Personal" will be stricken** to effectuate intention to pass realty as well as personalty in will giving "all my personal property, etc." 215AppDiv285, 213NYS480. **False description of shares,** described as advanced, corrected by omission of word "ten," balance of will identifying advances as one hundred shares. 237 IllA 372.

1400–58 237 IllA372.

1401–59 CalA 290P314; 326 Ill 608, 158NE444; 332 Ill 551, 164NE1; Mo 300SW487; MoA 31SW(2d)271; 247 NY195, 160NE8; 129Misc15, 220NYS 635; 224AppDiv152, 230NYS74; 190 NC147, 129SE187; 49Philippine333, 334 [citCyc]; Va 152SE339.

1401–60 Mo 300SW487; 247NY195, 160NE8; 212AppDiv558, 209NYS341; 129Misc15, 220NYS635; 224AppDiv152, 230NYS74; 190NC147, 129SE187; 150 SC111, 147SE659.

1401–61 87 IndA149, 165NE435; 254 Mass398, 150NE179 ("for" for "and"); 91PaSuper53; 8PaDist&Co 681.

1402–62 80Colo 499, 252P816; 122Kan 59, 251P392; 254Mass398, 150NE179; 82Mont198, 266P378, 57ALR1169; 212 AppDiv558, 209NYS341; Va 152SE339.

1402–63 80Colo 499, 252P816; 324 Ill 574, 155NE378; 232 IllA314; 149Miss 201, 115S344; 315Mo 392, 286SW79; Mo 29SW(2d)116; MoA 31SW(2d) 271; 127Misc731, 217NYS493; 137Misc 386, 244NYS366; 116 Oh684, 157NE377, 54ALR92.

1402–64 80Colo 499, 252P816; 338 Ill 391, 170NE243; 232 IllA314; 323Mo 633, 19SW(2d)634; 128Misc906, 220 NYS509; 129Misc447, 221NYS714; 134 Misc527, 235NYS744; 160Tenn345, 24 SW(2d)896.

1402–65 338 Ill 391, 170NE243; 174 Minn568, 219NW919; 323Mo 633, 19 SW(2d)634; 137Misc386, 244NYS366; 131SC527, 128SE421.

1402–66 323Mo 633, 19SW(2d)634; 82 Mont198, 266P378, 57ALR1169.

1402–67 232 IllA314; 122Kan393, 251 P392; 254Mass398, 150NE179. **Excision should be used only as last resort.–** 122Kan59, 251P392.

1402–68 See also 150SC358, 148SE188.

1402–68½–New. Excision will only be used when efforts to reconcile inconsistency by construction has failed. 125 Misc351, 211NYS510.

1403–69 217Ala426, 116S127; 83Colo 540, 266P714; 105Conn98, 134A530; 29 Hawaii854; IndA 158NE643; 233Mich 249, 206NW366; 320Mo 543, 8SW(2d) 1008; 82NH503, 136A266; 83NH453, 144A63; 102NJEq235, 140A413; 99 NJEq514, 133A705 (holding rule inapplicable); 214AppDiv1, 211NYS276; 126 Misc421, 214NYS565 (word "want"); 128Misc532, 219NYS614; 192NC240, 134SE641; 291Pa129, 139A832; 97Pa Super273; 99Vt437, 134A632, 46ALR 169; 101Vt242, 143A280. **"Above named devisees"** construed to mean same in different clauses of will. 233Mich249, 206NW366. **Words construed as making substituted gift to lineal heirs of remainderman** will be construed likewise respecting other remaindermen. 128 Misc582, 219NYS614.

1403–70 17F(2d)666.

1403–71 17F(2d)666; IndA 158NE 643; 87 IndA149, 165NE435; 82NH503, 136A266; 214AppDiv1, 211NYS276; 192NC240, 134SE641. **That testatrix was not accustomed to use proper pronunciation** or choice diction nor familiar with preparing wills may be considered. 137Misc46, 243NYS136.

1403–74 215Ala685, 112S222; 29Hawaii 854, 861 [quotCyc]; 324 Ill 574, 155NE 378; 129Misc15, 220NYS635; 291Pa 458, 140A502; 10PaDist&Co 426 [cit Cyc]; TexCivA 22SW(2d)313(2dcase). **Punctuation may be substantial aid** in ascertaining intent when grammatically used. Iowa 229NW693.

1403–75 75CalA776, 243P454 (holographic will which was neither punctuated nor capitalized); 129Misc15, 220 NYS635.

1404–76 29Hawaii854, 861 [quotCyc].

1404–77 100NJEq196, 134A822; 45 Philippine216, 233 [quotCyc].

1404–78 45Philippine216, 233 [quot Cyc]; Vt 150A126. **Most adequate and reasonable interpretation** is imperative. 45Philippine216.

1404–79 45Philippine216, 233 [quot Cyc].

1404–81 199Cal716, 251P202; 157Miss 38, 127S561 (courts are bound by words of desire); 101NJEq482, 138A530, 531 [quotCyc].

1404–82 158La969, 105S31 (clause directing disposition of property not belonging to testator); 257Mass492, 154 NE397; 100NJEq431, 136A187; 101NJ Eq482, 138A530, 531 [quotCyc]. **Request that widow dispose of income to designated persons** held not to obligate her to adopt disposition suggested. 257 Mass492, 154NE397.

1404–83 36F(2d)337 (memorandum attached to will); 101NJEq482, 138A530, 531 [quotCyc]; 134Misc705, 236NYS 176; 134Misc791, 236NYS518; 135Misc 156, 237NYS293; 135Misc223, 237NYS 412; 197NC704, 150SE328; 98PaSuper 453.

1405–84 199Cal716, 251P202; 231Ky 360, 21SW(2d)433(2dcase); 82Mont198, 266P378, 57ALR1169; 101NJEq482, 138 A530, 531 [quotCyc]. **The words "wish" and "desire"** held synonymous. 101NJ Eq252, 137A582, 52ALR965. **"Want"** construed as mandatory. 126Misc421, 214NYS565 (creating valid bequest).

1405–85 Conn 151A345; Mo 32SW(2d) 591. **But see** Mass 171NE717. **Illustrations.–IndA** 158NE643; 126Me78, 136A 350; 101NJEq66, 137A434; 126Misc726, 215NYS318 ("expenses" held to refer to funeral and administration expenses, in absence of contrary evidence); 291Pa 129, 139A832.

1406–87 336 Ill 299, 168NE359.

1407–88 228Ky116, 14SW(2d)201.

1407–89 197NC159, 147SE809.

1407–91 Word "heir" construed as meaning children. 145Va116, 133SE773.

1407–93 225Ky725, 9SW(2d)1074; 77 Mont182, 250P812; NJCh 139A47; 116 Oh684, 157NE377, 54ALR92; TexCivA 291SW924; 142Va840, 128SE247 (bequest often construed to mean devise and vice versa). **The word "devise" or "devisee,"** etc. TexCivA 291SW924. **"Bequest" has been held to mean any gift** by will whether of personal or real property. 318 Ill 474, 149NE486.

1407–93½–New. Word "give" may be construed to be equivalent to "devise" and to include real, as well as personal, property, 259Mass200, 156NE438.

1407–94 208 Iowa693, 225NW845; 134 Misc409, 235NYS484.

1407–94½–New. Phrase "to belong to and invest in and become property of" is equivalent to "I give and devise." 290 Pa508, 139A144.

1407–96½–New. Use of word "pay" in direction of will is not of unbending significance but is only one of many things to be considered in its construction. 142Va840, 128SE247.

1407–96¼–New. "Bequests" usually deal with personal property, while "gifts" have wider significance. 142Va 840, 128SE247.

1407–96¼–New. Word "give" is adapted to ruling purpose of testamentary disposition to confer property rights gratuitously. 142Va840, 128SE247.

1407–96½–New. "Securities" will not be construed to include stock certificates, if contrary intention appears in later provision of will. 212AppDiv727, 209NYS 649.

1407–96¾–New. Word "all" in gift over to testator's legal heirs on death of all his children without issue has been held not to mean "any" of his children. 103 Conn398, 130A483.

1407–96⅞–New. "Age of maturity" in reference to testator's youngest child carries its ordinary and usual sense in absence of indicated contrary intent. 146Miss552, 112S691.

1407–96⅛–New. "Their" death has been construed to mean death of issue of testator's children. 318 Ill 474, 149NE486.

1407–96⅛–New. Words "dying intestate" in substitutionary gift where property is in question means dying intestate as to that property. 257Mass72, 153NE 337.

1407-96 1/10-New. Grandchildren "living at the time of my decease" includes those en ventre sa mere. 129Misc447, 221NYS 714.

1407-96 1/11-New. Adverbs of time, such as "after" used in directing distribution of trust estate, relate to time of right of use, possession, and enjoyment, and not to vesting of interest. 125Me 378, 134A195.

1407-96 1/12-New. Words "worldly goods" will be construed to pass real, as well as personal, property where technical meaning was not intended. 116 Oh684, 157 NE377, 54ALR92.

1407-96 1/13-New. Children of deceased beneficiary, taking her share under codicil, are beneficiaries with codicil devising remainder to all beneficiaries "named" in will. 291Pa198, 139A868.

1407-96 1/14-New. Under will creating trust for children and grandchildren in being at testator's death, words "in being at my death" is phrase of limitation, not condition of gift. 227AppDiv 160, 237NYS162.

1407-96 1/15-New. Construction of phrase, "after payment of debts and funeral charges." Mass 172NE228.

1407-97 42F(2d)613; 218Ala549, 119S 678; 219Ala265, 122S29; 197Cal 276, 240P498; 200Cal 482, 253P921; 86 CalA173, 260P575; 104CalA1, 285P 365; 105Conn98, 134A530; 107Conn 409, 140A639; 337 Ill 442, 169NE197; 79 IndA683, 147NE305; IndA 158NE 598; 160La217, 106S833; 146Miss 246, 111S353; 315Mo 485, 286SW371; 247NY195, 160NE8; 248NY361, 162 NE283; 220AppDiv313, 221NYS751; 124Misc692, 209NYS779; 127Misc579, 217NYS323; 128Misc370, 219NYS687 (courts sustain validity of will wherever possible); 129Misc78, 220NYS816; 131 Misc238, 226NYS637; 131Misc526, 227 NYS470; 132Misc805, 231NYS9; 134 Misc263, 236NYS280; 128Misc292, 217 NYS549; 133Misc365, 232NYS198; 134 Misc893, 236NYS595; 284Pa334, 131A 188; 50RI 242, 146A628; 50RI 252, 146 A857.

1408-98 106Conn137, 137A388; IndA 158NE598; Iowa 231NW327; 24 OhNP N8129. **A construction which does not violate the rule against perpetuities,** etc. 103Conn54, 130A92; 103Conn122, 130A 116; 106Conn627, 138A809; IndA 158 NE598; 146Miss246, 111S353; 315Mo 485, 286SW371; 131Misc723, 228NYS 234.

1408-99 200Cal 482, 253P921; IndA 158NE598; 124Misc692, 209NYS779; TexCivA 228SW(2d)313(2dcase). **Presumption that children were born before** death of testatrix rather than after will be indulged where there is nothing to suggest contrary. IndA 158NE598. **General presumption is that testator intended legatee to receive something in** any event. 136Misc91, 242NYS453.

1408-1 160La217, 106S833; TexCivA 228SW(2d)313(2dcase). See also 248NY 361, 162NE283.

1408-2 217Ala46, 114S465; DelCh 145 A671; 318 Ill 474, 149NE486; 330 Ill 624, 162NE164; 340 Ill 11, 171NE919(2d case); 246 IllA342; IndA 158NE598; 88 IndA72, 163NE287; 206 Iowa187, 220 NW25; Me 151A429(2dcase); 156Miss 736, 126S656; 320 Mo 543, 8SW(2d) 1008; 320 Mo 1058, 10SW(2d)47; 118 Nebr246, 224NW1; 82NH503, 136A266; MoA 218SW(2d)271; 128Misc370, 219 NYS687; 33 OhA223, 169NE579; 128 Or 211, 274P212; 284Pa334, 131A188; 284 Pa482, 131A377; TexCommnA 148SW (2d)1009; TexCommnA 158SW(2d)220; TexCivA 228SW(2d)313(2dcase); Vt 151 A654; 151Va322, 144SE497(2dcase). **Courts cannot strike out any part of item of will because of ambiguity if it** can be reasonably construed to include all of language used therein. 87 IndA 440, 159NE11.

1409-3 318 Ill 474, 149NE486; 331 Ill 213, 162NE873; 249Mich238, 228NW 703; 82NH503, 136A266; 220AppDiv 379, 222NYS848; Va 152SE339. **Presumption that every word used intended** to have some meaning. 42F(2d)613.

1409-3 1/2-New. Where no direction is stated in will as to how corporate beneficiary is to expend property devised or bequeathed, it will be presumed that gift is limited to corporate purposes and therefore valid. 125Misc634, 211NYS 841.

1409-4 19F(2d)974; 213Ala512, 105S 641; 218Ala147, 117S670; 218Ala219, 118S402; 173Ark277, 292SW370; 174 Ark703, 297SW1018; 177Ark392, 7SW (2d)15; 196Cal301, 237P739; 197Cal 276, 240P498; 200Cal 482, 253P921; 86CalA173, 260P575; 81Colo 152, 254P 161; 83Colo 540, 266P714; 83Colo 575, 267P408; 103Conn122, 130A116; 105 Conn98, 134A530; 106Conn137, 137A 388; 107Conn409, 140A639; 28Hawaii 590; 29Hawaii359; 317 Ill 241, 148NE 17; 318 Ill 301, 149NE279; 321 Ill 368, 151NE905; 323 Ill 519, 154NE337; 324 Ill 574, 155NE379; 326 Ill 608, 158NE 444; 328 Ill 47, 159NE217; 337 Ill 387, 169NE232 (residuary clause); 338 Ill 611, 170NE774; Ill 172NE730; 249IllA 98; 85 IndA394, 154NE293; 85 IndA 528, 152NE870; IndA 158NE598; 88 IndA72, 163NE287; 206 Iowa187, 220 NW25, 27 [citCyc]; Iowa 230NW434; 119Kan402, 239P747, 748 [citCyc]; 124 Kan267, 259P707; 124Kan592, 261P 597; 124Kan633, 261P582; 130Kan433, 286P195; 214Ky375, 283SW941; 220 Ky101, 294SW776; 225Ky725, 9SW(2d) 1074; 233Ky448, 26SW(2d)13; 148Md 157, 129A18 (presumption must be in harmony with will itself); 256Mass107, 152NE95; 259Mass465, 156NE885; 260 Mass577, 157NE707; 266Mass4, 164NE 460; 233Mich663, 208NW38; 239Mich 274, 214NW104; 309Mo 488, 274SW 798; 315Mo 627, 287SW316, 325 [cit Cyc]; 317Mo 587, 296SW382; 317Mo 594, 296SW401, 406 [quotCyc]; 317Mo 586, 296SW1001, 1007 [citCyc]; Mo 300 SW487; 320Mo 852, 8SW(2d)931; 320 Mo 1058, 10SW(2d)47; 83NH564, 145A 666; 98NJEq538, 131A208; 99NJEq 625, 133A872; NJCh 151A741; 212App Div558, 209NYS341; 215AppDiv285, 213NYS480 (strong presumption, and is applied to all cases); 220AppDiv313, 221NYS751; 125Misc150, 210NYS424; 126Misc421, 214NYS565; 127Misc579, 217NYS323, 327 [citCyc]; 129Misc78, 220NYS816; 129Misc711, 222NYS511; 133Misc17, 231NYS355; 133Misc695, 234NYS109; 135Misc48, 237NYS649 (part intestate); 135Misc247, 238NYS 765; 135Misc262, 238NYS761; 224App Div152, 230NYS74; 133Misc222, 231 NYS613; 133Misc399, 232NYS308; 134 Misc409, 235NYS484; 134Misc337, 236 NYS443; 134Misc791, 236NYS518; 135 Misc156, 237NYS293; 136Misc532, 241 NYS506; 137Misc113, 243NYS127; 137 Misc663, 244NYS262; 137Misc868, 244 NYS607; 190NC147, 129SE187; 190NC 215, 129SE611; 195NC469, 142SE711; 197NC488, 149SE731; 116 Oh684, 157 NE377, 54ALR92; 292Pa37, 140A549; 85PaSuper14; 88PaSuper530; 7PaDist &Co 408; 8PaDist&Co 52; 9PaDist&Co 20; 9PaDist&Co 206; 50RI 242, 146A 628; 50RI 252, 146A857; RI 151A193; 159Tenn281, 178W(2d)910; 160Tenn11, 228W(2d)4; TexCommnA 158SW(2d) 220; TexCivA 228SW(2d)313(2dcase); 101Vt502, 144A686; 142Va840, 128SE 247; 142Va680, 128SE252; 148Va322, 138SE491; 151Va622, 144SE620; 194 Wis330, 216NW501; 196Wis357, 220NW 383. **Where the residue of testator's property,** etc. 315Mo 627, 287SW316 (as to lapsed legacies); 8PaDist&Co 52. **A residuary clause,** etc. 333 Ill 577, 165 NE348; 127Misc579, 217NYS323. **Will which seeks to create trust** as to use of realty for life for three lives in being, will be construed as creating successive life estates and good as power in trust or passive trust. 125Misc496, 211NYS 177. **Where will names all next of kin and provides for each of them,** presumption is strengthened. 213Ala512, 105S 641. **Law abhors construction resulting** in intestacy. 101NJEq482, 138A530. **Will declaring entire estate community property** of testator and wife and making gifts to wife and children passes entire estate to them as his personal representatives. TexCivA 138W(2d)430. **It is court's duty,** in construing will, to favor construction which will avoid intestacy. 224AppDiv540, 231NYS446.

1410-5 CalA 290P314; 124Kan592, 261 P597; 124Kan633, 261P582.

1410-6 133Misc399, 232NYS308; 134 Misc409, 235NYS484. **That will has general residuary clause** shows intent to avoid partial intestacy. 106Conn137, 137A388.

1410-7 19F(2d)974; 84Colo 596, 272P 660; 137Misc46, 243NYS136. **Where will expressly proposes to pass all property,** all reasonable intendments will be indulged in favor of carrying out express purpose. 213Ala512, 105S641 (where all beneficiaries are named and each is provided for).

1411-8 323Mo 633, 19SW(2d)634; 101 Vt502, 144A686. **Provision clearly omitted** cannot be written in. 83Colo 540, 266P714. **Partial intestacy not avoided by conjecture or supplying omission.** -CalA 289P889.

1411-9 19F(2d)974; 124Kan425, 260P 658; 223Ky792, 4SW(2d)745; 239Mich 274, 214NW104; 309Mo 488, 274SW798; 317Mo 587, 296SW382; TexCommnA 15 SW(2d)220; 101Vt502, 144A686. **Where testator fails to dispose of part of his property,** etc. 239Mich274, 214NW104; 88PaSuper530.

1411-10 195Cal 643, 234P898; 30 Hawaii217; 150Miss179, 116S734; 157 Miss412, 128S268; Mo 32SW(2d)591; 195NC469, 142SE711; 138Misc253, 245 NYS631; 35 OhA283, 172NE386. **It is not presumed testator intended to do useless thing** or that objects of bounty should receive no benefits of substantial value. TexCivA 15SW(2d)1110.

1411-11 105Conn98, 134A530; 228Ky 116, 14SW(2d)201; 233Ky448, 26SW (2d)13; 133Misc365, 232NYS198; 134 Misc730, 236NYS367; 136Misc113, 240 NYS528. **Construction which admits children to compete with their living parents is to be avoided unless plainly** testator's intention. 103Conn54, 130A 92.

1411-12 220AppDiv64, 220NYS757; 90 PaSuper100; TexCivA 297SW915; 192 Wis111, 211NW652, 51ALR1106.

1412-13 337 Ill 232, 168NE900, 66ALR 1062 (widow).

1412-15 Mo 271SW815, 821 [citCyc].

1412-16 20F(2d)446; 215Ala159, 110 S3; 111Conn1, 149A515; 328 Ill 47, 159NE217; IndA 158NE643; 150Miss179, 116S734; Mo 271SW 815, 821 [citCyc]; 126Misc233, 214 NYS142 (presumption that testator did not intend to disinherit direct descendants); 128Misc577, 219NYS619; 142Va 840, 128SE247, 249 [citCyc]; 192Wis 333, 212NW781. **As among collateral relatives or strangers** favoring presumptions carry little or no weight against testator's apparent meaning. 142Va840, 128SE247. **Presumption favoring heirs is vanishing presumption** where there is residuary claim and each next of kin complaining have been remembered. 142Va840, 128SE247. **Provision of will for benefit of wife** should be construed liberally in her favor. 128Misc577, 219 NYS619. **Heirs or next of kin cannot be excluded by words of doubtful or uncertain meaning,** etc. 87 IndA149, 165NE435; 206 Iowa187, 220NW25.

1412-17 17F(2d)666; 20F(2d)446; 179 Ark543, 16SW(2d)996, 65ALR466; 83 Colo 575, 267P408; 317 Ill 241, 148NE 17; 326 Ill 608, 158NE444; Mo 271SW 815, 821 [citCyc]; 320Mo 852, 8SW(2d) 931; 248NY361, 162NE283; 220AppDiv 64, 220NYS757; 129Misc15, 220NYS635, 642 [citCyc]; 131Misc559, 227NYS443; 127Misc647, 217NYS381; 227AppDiv 265, 237NYS558; 230AppDiv741, 244 NYS47; 137Misc785, 244NYS404; 137 Misc868, 244NYS607; 292Pa37, 140A 549; 90PaSuper512; Vt 151A654; 153 Va530, 150SE249. **Provisions in a will for the testator's widow,** etc. 133Misc 399, 232NYS308; 133Misc812, 234NYS 99; 8PaDist&Co 336.

1412-18 17F(2d)666; 89CalA238, 264P 542; 111Conn1, 149A515; 161Ga356, 130SE575; 317 Ill 241, 148NE17; 248 IllA57; 206 Iowa187, 220NW25; 129 Misc15, 220NYS635, 642 [citCyc]; 190 NC147, 129SE187; 291Pa198, 139A868; Pa 151A809; 6PaDist&Co 200; 145Wash 563, 261P104. **Legal certainty** as to testator's intention to take away title of heirs at law must be manifested. 151 Va622, 144SE620.

1413-19 220AppDiv64, 220NYS757; 126

Misc233, 214NYS142; 291Pa129, 139A 832. **Right of testator to omit heir from will** is not to be denied or curtailed. 190 NC147, 129SE187.

1413-19½-New. Husband's collateral kin are not "heirs" of wife under statutes of descent. Wash 292P743.

1413-20 CalA 290P54; 289Pa542, 137A 802, 52ALR1251. **Construction most favorable to devisee is favored.**-338 Ill 391, 170NE243.

1413-21 80Colo 499, 252P816; Mo 271 SW815, 821 [citCyc]; 91PaSuper245.

1413-22 198Cal 352, 246P48; 208 Iowa 693, 225NW845; 124Kan792, 262P601; 212AppDiv727, 209NYS649; 289Pa542, 137A802, 52ALR1251; 259Mass39, 155 NE788.

1413-24 103Conn308, 130A483; 9Pa Dist&Co 20. **At times,** provisions in will may be transposed but at other times order in which they appear is significant. 289Pa473, 137A676. **Erratum.**-"154Pa. St. 285, 26 Atl. 428," should be "109 Pa. St. 235."

1414-26 12F(2d)896; 19F(2d)974; 42 F(2d)613; 213Ala676, 105S881; 217Ala 46, 114S465; 221Ala364, 128S458; 170 Ark679, 280SW993; 173Ark277, 292SW 370; 176Ark548, 3SW(2d)305; 178Ark 100, 9SW(2d)1059; 178Ark892, 12SW (2d)866; 180Ark552, 22SW(2d)370; 196Cal 333, 238P74; 198Cal 352, 246P 48; 199Cal 661, 250P657; 76CalA723, 245P776; CalA 289P892; 80Colo 461, 251P595; 106Conn267, 137A737; 106 Conn236, 137A764; 107Conn409, 140A 639; 108Conn611, 144A461; DC 37 F(2d)997; 89Fla457, 105S106 (rule prevails whether entire will or specific part is being construed); 92Fla327, 109 S435; Fla 129S835; 162Ga528, 134SE 301; 29Hawaii854; 316 Ill 460, 147NE 433 (rule not abrogated by statute on conveyances); 318 Ill 301, 149NE279; 318 Ill 544, 149NE476; 323 Ill 269, 154 NE101; 323 Ill 303, 154NE135; 323 Ill 519, 154NE337; 325 Ill 500, 156NE 758; 326 Ill 608, 158NE444; 328 Ill 47, 159NE217; 330 Ill 624, 162NE164; 331 Ill 287, 162NE855; 331 Ill 213, 162NE 873; 331 Ill 182, 162NE888; 338 Ill 328, 170NE257; 339 Ill 11, 170NE767; 237 IllA372; Ind 170NE20; 83 IndA 531, 149NE190; 86 IndA89, 155NE178; 88 IndA72, 163NE287; 203 Iowa754, 208NW337; Iowa 216NW753; 207 Iowa 374, 223NW106; Iowa 229NW705; 121 Kan57, 245P1039; 122Kan59, 251P392; 124Kan267, 259P707; 124Kan592, 261 P597; 124Kan792, 262P601; 130Kan 433, 286P195; 212Ky114, 278SW591; 216Ky289, 287SW710; 223Ky792, 4 SW(2d)745; 224Ky5, 5SW(2d)477; 225 Ky699, 9SW(2d)1020; 225Ky725, 9 SW(2d)1074; 227Ky169, 12SW(2d) 319; 228Ky116, 14SW(2d)201; 230Ky 429, 20SW(2d)83; 230Ky488, 20SW (2d)90; 233Ky388, 25SW(2d)1040; 233Ky448, 26SW(2d)13; 233Ky611, 26 SW(2d)544; 233Ky737, 26SW(2d)1034; 235Ky259, 30SW(2d)965; 236Ky77, 32 SW(2d)556; 124Me386, 130A177; 125 Me127, 131A206; 125Me378, 134A195; Me 149A623; Me 151A429(2dcase); 149 Md583, 132A53; Md 149A689; 257 Mass586, 154NE191; 257Mass492, 154 NE397; 258Mass427, 155NE438; 259 Mass465, 156NE885; 260Mass577, 157 NE707; 262Mass321, 159NE919; 263 Mass534, 160NE275; 233Mich663, 208 NW38; 239Mich274, 214NW104; 240 Mich68, 214NW941; 249Mich474, 229 NW465; 250Mich385, 230NW151; Mich 233NW230; 166Minn269, 207NW618; 147Miss515, 112S603; 150Miss179, 116 S734; 157Miss38, 127S561; 157Miss 412, 128S268; Mo 271SW815; 315Mo 392, 286SW79; 317Mo 516, 297SW70; 320Mo 543, 8SW(2d)1008; Mo 12SW (2d)505; Mo 29SW(2d)116; MoA 296 SW833; MoA 5SW(2d)662; MoA 31 SW(2d)271; 117Nebr257, 220NW269; 117Nebr776, 223NW17; 118Nebr246, 224NW1; 83NH453, 144A63; 98NJEq 55, 130A22 (every word must be given due consideration); 102NJEq235, 140 A413; 98NJEq242, 130A549; 100 NJEq196, 134A822; 244NY400, 155NE 685; 247NY97, 159NE875; 212AppDiv 727, 209NYS649; 220AppDiv379, 222 NYS48; 223AppDiv579, 228NYS587; 125Misc153, 210NYS427; 126Misc421, 214NYS565; 127Misc735, 217NYS512; 128Misc370, 219NYS687; 129Misc78, 220NYS816; 134Misc182, 236NYS143; 127Misc647, 217NYS381; 127Misc639, 217NYS393; 134Misc26, 234NYS316; 134Misc285, 235NYS165; 134Misc409, 235NYS484; 134Misc527, 235NYS744; 134Misc705, 236NYS176; 134Misc791, 236NYS518; 135Misc93, 236NYS709; 135Misc156, 237NYS293; 136Misc43, 239NYS250; 136Misc330, 240NYS98; 136Misc532, 241NYS506; 137Misc451, 244NYS115; 137Misc785, 244NYS404; 137Misc868, 244NYS607; 138Misc90, 245NYS173; 230AppDiv439, 245NYS 213; 190NC147, 129SE187 (all provisions considered together and construed in entirety); 191NC802, 133SE168; 192NC191, 134SE451; 192NC744, 135 SE871; 195NC324, 142SE2; 195NC469, 142SE711; 115 Oh35, 152NE10; 20 OhA279, 151NE795; 24 OhA117, 156 NE223; 28 OhA325, 162NE714; 32 OhA168, 167NE611; 35 OhA283, 172 NE386; OhA 173NE11; 25 OhNPNS 393; 131 Okl 75, 267P623; 122 Or246, 257P818; 125 Or428, 259P290; 125 Or 428, 259P299; 283Pa258, 129A94; 284 Pa482, 131A377 ("four corners"); 286 Pa335, 133A558; 287Pa334, 135A262; 289Pa101, 137A132; 289Pa542, 137A 802, 52ALR1251; 290Pa508, 139A144; 292Pa470, 141A294; 297Pa92, 146A451; Pa 151A697; Pa 151A809; 10PaDist &Co 1; 13PaDist&Co 634; RI 136A771; 48RI 411, 137A875; RI 138A55; 49RI 40, 139A659; 49RI 308, 142A605; RI 150A121; 142SC239, 140SE596; 150 SC358, 148SE188; 159Tenn281, 17SW (2d)910; TexCommnA 22SW(2d)1065; TexCivA 294SW935; TexCivA 4SW(2d) 268; TexCivA 9SW(2d)269; TexCivA 22SW(2d)313(2dcase); TexCivA 26SW (2d)415; TexCivA 27SW(2d)852; 101 Vt242, 143A280; 101Vt325, 143A384; 101Vt502, 144A686; 142Va840, 128SE 247 (will must be read as whole); 144 Va533, 132SE344; 146Va134, 135SE 819; 151Va622, 144SE620; Va 152SE 339; 145Wash503, 261P104; 194Wis 428, 216NW840; 196Wis357, 220NW 383; Alta [1927] 3DomLR46. **Will containing many inaccuracies** due to testator's lack of legal skill will be looked at as consistent whole. 213Ala 512, 105S641 (rather than give technical meaning to one phrase which would defeat general intent). **Rule applies except where repugnancy or ambiguity** precludes its operation. 80Colo 461, 251P595. **Will construed as whole to show advancements** mentioned in will were of one hundred shares and not "ten" shares as will stated. 237 IllA 372. **No clause to which reasonable effect can be given may be rejected.**-42 F(2d)613.

1415-27 260Mass577, 157NE707; 10Pa Dist&Co 227.

1415-28 76CalA723, 245P776; 318 Ill 544, 149NE476; 124Kan792, 262P601; 157Miss38, 127S561; Mo 271SW815; 127 Misc735, 217NYS512; 127Misc647, 217 NYS381; 192NC191, 134SE451.

1415-28½-New. or in gathering intent of testator, 125Misc498, 211NYS 778.

1415-29 333 Ill 643, 165NE208; 212 AppDiv727, 209NYS649; 124Misc692, 209NYS779; 290Pa55, 138A538; 142SC 239, 140SE596; TexCommnA 15SW(2d) 220. See also 247NY97, 159NE875. **Gift to wife of all property which she would take under statutes governing descent and distribution of estates of intestates** is construed as limited by specific legacies and residuary gift to property which she could take under statutes, against adverse testamentary disposition by husband where under statute of descent and distribution she would be entitled to entire estate. 166Minn269, 207 NW618. **Specific provision** controls one of more general nature. TexCivA 281 SW580; 144Va533, 132SE344.

1415-30 195NC324, 142SE2; 150SC358, 148SE188. **Clear and unambiguous provision.**-Mo 271SW815. **Where no doubt as to earlier clause** and doubt as to later, construction giving effect to both should be adopted. 126Misc421, 214NYS565. **Any doubt suggested by subsequent words** is resolved in favor of estate first conveyed. CalA 290P302.

1415-31 CalA 290P302; Mo 271SW815; MoA 31SW(2d)271; 124Misc692, 209 NYS779; 126Misc421, 214NYS565; 127 Misc735, 217NYS513; 137Misc758, 244 NYS686; 135Misc156, 237NYS293; 136 Misc169, 238NYS747; 19 OhA43; 144 Va533, 132SE344; 101WVa344, 133SE 508, 510 [citCyc]. **Limitations on absolute devise** need imperative language. 127Misc735, 217NYS513.

1416-32 TexCivA 4SW(2d)268, 271 [quotCyc].

1416-35 12F(2d)896; 86Colo 221, 279 P721(2dcase); 246 IllA342; 83 IndA 531, 149NE190; 88 IndA72, 163NE287; 122Kan59, 251P392; 232Ky666, 24SW (2d)558; 259Mass200, 156NE438; 239 Mich274, 214NW104; 317Mo 594, 296 SW401, 405 [quotCyc]; 320Mo 852, 8 SW(2d)931; 212AppDiv727, 209NYS 649; 220AppDiv126, 220NYS645; 192 NC744, 135SE871; 195NC324, 142SE2; 20 OhA279, 151NE795; 289Pa407, 137A 627; 157SC407, 154SE426; TexCivA 22 SW(2d)313(2dcase); 99Vt480, 134A581; 101Vt464, 144A457.

1416-36 80Colo 461, 251P595 (dictum); 109Conn170, 145A882; 316 Ill 460, 147 NE433; 317Mo 594, 296SW401, 405 [quotCyc]; TexCommnA 14SW(2d)1009.

1416-36½-New. Where estate or interest is given in one clause in clear and decisive terms, it cannot be cut down by subsequent words that are not as clear and decisive. 213Ala676, 105S881.

1417-37 217Ala46, 114S465; 179Ark 1004, 18SW(2d)1037; 196Cal 333, 238 P74; 316 Ill 460, 147NE433; 331 Ill 287, 162NE855; 332 Ill 645, 164NE135; 337 Ill 232, 168NE900, 66ALR1062; 230 Ky488, 20SW(2d)90; 164La620, 114S 489; 149Md583, 132A53; 157Miss412, 128S268; 212AppDiv727, 209NYS649; 286Pa382, 133A545, 46ALR777; 289Pa 407, 137A627; 7PaDist&Co 184; 13Pa Dist&Co 634; 100Vt407, 138A730; 101 Vt502, 144A686; 144Va533, 132SE344. But see 191NC802, 133SE168. **Testator may qualify in later clause** absolute estate created by previous clause. 230Ky 488, 20SW(2d)90. **Where later provision is void,** rule is not applicable to destroy earlier provision. 138 Okl 115, 280P 413.

1417-39 117Nebr776, 223NW17; NJ Ch 151A275; 225AppDiv773, 232NYS 36; 58 OntL138, [1926] 1DomLR151.

1417-40 219Ala89, 121S67; 155Miss 188, 124S321; 225AppDiv502, 233NYS 602; 30 OhA289, 165NE49; 124 Okl 18, 253P489; 49RI 40, 139A659; 137SC380, 135SE469; TexCommnA 14SW(2d)1009; 101Vt502, 144A686. **Subsequent language must be clear and unmistakable** to cut down estate of inheritance created by language of will standing alone. 340 Ill 11, 171NE919(2dcase). **Subsequent or ambiguous words** cannot limit estate conveyed by clear and concise terms. 136Misc231, 242NYS224.

1417-41 See also 248NY361, 162NE283.

1417-42 127Misc735, 217NYS512 (rule used only as last resort); 286Pa382, 133 A545, 46ALR777; 289Pa407, 137A627. **Illustrations.**-289Pa407, 137A627.

1418-43 149Md583, 132A53 (prior clause restricted to pass life estate by devise, as was obvious intention from latter clause).

1418-44 337 Ill 232, 168NE900, 66ALR 1062.

1418-46 217Ala46, 114S465; 133Misc 519, 232NYS204. **Rule that latter expression of testator's intention is shown** by location is not absolute and is last resort of construction. 133Misc450, 232 NYS418.

1418-46½-New. Where gift of property was made followed by subsequent gift cutting down first, it was held that second gift was void. 58 OntL138, [1926] 1DomLR151.

1418-48 105Conn261, 135A555; 106 Conn514, 138A440; 106Conn627, 138A 809; DelCh 151A712; 323 Ill 397, 154 NE216; IndA 158NE598; Iowa 230NW 434 (residuary clause given effect); 249 Mich238, 228NW703; 146Miss246, 111 S353; 157Miss412, 128S268; 82Mont 198, 266P378, 384 [quotCyc], 57ALR 1169; 116Nebr764, 219NW4; NJCh 139 A397; 213AppDiv319, 210NYS531; 216 AppDiv179, 214NYS467; 217AppDiv275, 216NYS626; 126Misc722, 215NYS237; 128Misc370, 219NYS687; 130Misc345,

224NYS446; 132Misc710, 230NYS785; 133Misc695, 234NYS109; 127Misc705, 217NYS633 (though limitation over on another contingency is invalid, valid part of will not invalidated); 130Misc 174, 223NYS782; 134Misc791, 236NYS 518; 135Misc170, 237NYS890; 229App Div356, 243NYS328; 123 Or406, 262P 833; 146SC294, 144SE1. See also Mass 167NE261; 250NY45, 164NE737. **The invalidity of any particular interest,** etc. 148Md371, 129A294. **Absolute vested interest** cannot be cut down by invalid substitutionary gift over. 106Conn627, 138A809. **Invalidity of residuary clause** may render certain legacies invalid while not affecting validity of others. 82Mont 198, 266P378, 57ALR1169.

1419-49 DelCh 151A712; **IndA** 158NE 598; 82Mont198, 266P378, 384 [quot Cyc], 57ALR1169; 130Misc345, 224NYS 446; 229AppDiv302, 241NYS589 (void to extent of suspending alienation for three lives).

1419-50 217Ala46, 114S465; 195Cal 643, 234PS98; 222AppDiv577, 226NYS 712; 133Misc695, 234NYS109; 146SC 294, 144SE1.

1419-51 199Cal 724, 251P799; 105Conn 261, 135A555; **IndA** 158NE598; **NJCh** 139A397; 247NY195, 160NE8; 126Misc 722, 215NYS237; 131Misc723, 228NYS 234; 134Misc803, 237NYS215; 135Misc 574, 240NYS220; 134Misc893, 236NYS 595; 135Misc223, 237NYS412; 137Misc 660, 244NYS183; 123 Or406, 262P833; 284Pa94, 130A315; 296Pa348, 145A824, 66ALR1342. **Where estate is given to wife for life in trust and remainder in trust to grandchildren,** which did not vest, valid trust to wife can remain, and trust to grandchildren, being void, can be stricken from will. 125Misc95, 210 NYS155.

1419-52 NJCh 139A397. See also 109 Conn563, 145A161. **A void provision for accumulation,** etc. 109Conn563, 145A 161; 213AppDiv319, 210NYS531.

1420-53 199Cal 724, 251P799; 332 Ill 551, 164NE1; 217AppDiv275, 216NYS 626 (absolute power of sale).

1420-54 195Cal 643, 234PS98; 199Cal 724, 251P799; 223AppDiv646, 229NYS 193; 137Misc660, 244NYS183; 25 Oh NPNS516. **Trust to grandchildren being valid as to those living at time of death** of testator but invalid as to those born thereafter must fail as trust to both classes is so inseparably connected that one must fail with other. 125Misc 95, 210NYS155.

1420-55 339 Ill 178, 171NE131; 223App Div646, 229NYS193.

1420-56 284Pa94, 130A315.

1420-56½-New. Invalidity of trust provision to beneficiary will not preserve alternative provision for public charity. 230Ky429, 20SW(2d)83.

1420-58 106Conn627, 138A809.

1420-59 106Conn514, 138A440 (alternative remainder held effective).

1421-63 15DelCh84, 131A529; 208Ky 441, 271SW600, 603 [quotCyc]; 156Tenn 155, 299SW812, 57ALR601. But see 189 NC558, 127SE684.

1421-65 196Cal 333, 238P74 (under statute); 196Cal 339, 238P76; 124Kan 592, 261P597; 125Misc153, 210NYS427; 296Pa99, 145A715; 5PaDist&Co 262 (codicils read together); 8PaDist&Co 477; 11PaDist&Co 555; TexCivA 299 SW682; 149Va746, 141SE756.

1421-66 DelCh 145A671; 235Ky658, 32SW(2d)8; 102NJEq294, 140A279; 195NC315, 142SE4; 283Pa285, 129A94; 8PaDist&Co 621.

1421-67 149Va896, 141SE753.

1421-69½-New. In construing will exercising power of appointment, provisions must be read in conjunction with will granting power. 137Misc852, 244 NYS616.

1421-70 23F(2d)994; 176Ark287, 3SW (2d)26; 84CalA371, 258P154; CalA 290 P302; 106Conn19, 137A20; 124Kan592, 261P597; 230Ky488, 20SW(2d)90; 235 Ky658, 32SW(2d)8; 126Me267, 138A59; 127Misc735, 217NYS512; 132Misc731, 230NYS789; 133Misc365, 232NYS198; 133Misc450, 232NYS418; 193NC787, 138 SE163 (codicil construed as to vested and contingent remainders); 195NC315, 142SE4; 196NC755, 147SE286; 34 OhA 311, 171NE257; 121 Or48, 252P964; Pa 151A697; 284Pa482, 131A377; 157SC 407, 154SE426; TexCivA 28SW(2d)339; 101Vt502, 144A686. See also 296Pa99, 145A715. **A revoked codicil,** etc. 125 Misc153, 210NYS427.

1422-71 DelCh 149A432; 126Me267, 138A59; 150Md539, 133A308; 127Misc 735, 217NYS512; 193NC787, 138SE163; 284Pa482, 131A377; 296Pa99, 145A715. **Enlarged life estate devised by second codicil held subject to conditional limitations** imposed by first codicil. 142Va 824, 128SE264. **Codicil giving residue of estate on wife's demise to niece held not to cut down gift of dwelling and lot to testator's wife in will,** codicil going only to property not devised. 127Misc735, 217NYS513. **Provision that testator "confirm, republish and redeclare my said will,"** contained in codicil, is republication of will as of date of codicil, as though rewritten and reexecuted on such date. 106Conn19, 137A20. **Clause in will giving nephew's share to named persons on his death without issue relates to personalty given to nephew by** will and not to remainder in land given by codicil when original will gave nephew no interest in realty. 195NC187, 141 SE571.

1422-72 232 IllA314; 124Kan592, 261 P597; 319Mo 680, 5SW(2d)77; 320Mo 1058, 10SW(2d)47; 193NC787, 138SE 163 (codicil eliminating words of survivorship in original will); 101Vt502, 144 A686. **A doubtful expression in a codicil,** etc. 319Mo 680, 5SW(2d)77. **Though codicil expressly revokes clause in will,** such revoked clause may be considered in arriving at testator's real intention in codicil. 8PaDist&Co 144. **Language of codicil must be as plain, definite, and unequivocal as that of prior provision.**—319Mo 680, 5SW(2d)77.

1423-73 84CalA371, 258P154; 106Conn 19, 137A20; 15DelCh12, 130A28; 101Vt 502, 144A686.

1424-84 15DelCh105, 132A142; Me 149 A603; 129Misc15, 220NYS635, 639 [cit Cyc]; 5PaDist&Co 262 (construction of intention).

1424-85 218Ala549, 119S678; 219Ala 89, 121S67; 200Cal 252, 252P1039, 1040 [quotCJ]; 106Conn178, 138A159; Del 142A825; 15DelCh105, 132A142; Del Ch 152A129; 160Ga449, 128SE393; 332 Ill 11, 163NE428; 337 Ill 232, 168NE 900, 66ALR1062; 339 Ill 11, 170NE767; 338 Ill 611, 170NE774; 206 Iowa1121, 221NWS51; 229Ky162, 16SW(2d)756; 229Ky726, 17SW(2d)1007; 230Ky488, 20SW(2d)90; 233Ky554, 26SW(2d)497; 235Ky562, 31SW(2d)919; 125Me171, 132A211; 125Me378, 134A195; 157Md 492, 146A432; 237Mich252, 211NW623; 239Mich616, 215NW51; 315Mo 578, 286 SW58, 51ALR639; 315Mo 485, 286SW 371; 316Mo 492, 291SW120, 51ALR877; Mo 28SW(2d)790; Mo 32SW(2d)591; 98NJEq242, 130A549; 100NJEq196, 134 A832; 99NJEq625, 133A872; 216AppDiv 639, 214NYS479; 222AppDiv577, 226 NYS712; 129Misc15, 220NYS635, 639 [citCyc]; 132Misc731, 230NYS789; 133 Misc695, 234NYS109; 137Misc56, 245 NYS204; 128Misc240, 218NYS385; 133 Misc450, 232NYS418; 134Misc527, 235 NYS744; 136Misc520, 240NYS826; 137 Misc75, 243NYS123 (absent contrary intent); 190NC147, 129SE187; 193NC278, 136SE879; 25 OhA242, 158NE12; 284 Pa334, 131A188; 90PaSuper533; 5Pa Dist&Co 262; 5PaDist&Co 439; 8PaDist &Co 52; 13PaDist&Co 220; 49RI 308, 142A605; 49RI 349, 142A609; 139SC66, 137SE331; Vt 150A126; 152Wash448, 277P988; Wash 292P401; 199Wis151, 225NW184. **Character of estate devised** held fixed at death of testator. 25 OhA 242, 158NE12. **Legacy of money in bank.**—200Cal 252, 252P1039.

1425-86 216AppDiv639, 214NYS479; 129Misc15, 220NYS635, 639 [citCyc]; 24 OhA331, 157NE423; 284Pa334, 131A 188; 14PaDist&Co 105. See also 215Ky 136, 284SW1032. **Construction of will at time of petition** has been held proper under circumstances. 137Misc75, 243 NYS123.

1425-87 129Misc15, 220NYS635; 190 NC147, 129SE187; 8PaDist&Co 52.

1425-89 206 Iowa786, 221NW369; Mich 233NW230; 252NY381, 169NE616. **Exceptions.**—165La357, 115S618.

1425-90 160Ga449, 128SE393.

1425-91 98NJEq242, 130A549 (there is no gift until will operates on subject matter).

1425-91½-New. Rights of devisees are controlled by statutes existing at time of probate of will. 204 Iowa473, 215NW 761.

1426-92 175Ark236, 299SW1; 150Md 478, 133A833; 99NJEq625, 133A872; 118 Or96, 245P1069; 14PaDist&Co 55.

1426-93 121 Or351, 255P333.

1426-96 6PaDist&Co 167. See 132Misc 910, 231NYS16. **If testator devises lands and then contracts for the sale of them,** etc. 154Md632, 141A377.

1426-97 154Md632, 141A377.

1427-2 236 IllA168; 223Ky448, 3 SW(2d)1076; TexCommA 22SW(2d) 1065 (presumption of devise of interest in estate and not entire estate itself); TexCivA 28SW(2d)997. See also Tex CivA 48SW(2d)262. **Presumed that testator intended to dispose only of property subject to disposition.** MoA 274 SW486.

1427-2½-New. Husband is presumed to know that widow's statutory rights in his estate are paramount to his will. 89 Ch157, 195S196.

1427-2½-New. There is presumption that testator framed his will in view of general rules of constructions adopted by courts. 98NJEq242, 130A549.

1427-2¼-New. Maker is presumed to have intended that all parts of his will should take effect. 191NC802, 133SE 168.

1427-2⅓-New. It is presumed that testator, member of bar, employed words in meaning defined by courts. 98NJEq 569, 131A210.

1427-2⅓-New. Court may presume that testatrix knew legatee's surviving husband would be entitled to her share as "heir" since will was not changed after legatee's death. 106Conn178, 138A159.

1427-2½-New. Testator is not presumed to have legal knowledge. 107Conn409, 140A639.

1427-2¾-New. Knowledge of practice in reference to declaring dividends on corporate stock will be imputed to testator owning large quantity of stock. 23F(2d)994.

1427-2⅙-New. Court presumes testator knows law and understands and appreciates effect of language used by him in will. 206 Iowa187, 220NW25.

1427-2 1/10-New. It may be assumed that testator knew whether objects of his bounty were living or dead when will was made. 177Minn469, 225NW439(2d case).

1427-2 1/11-New. Burden is on one who asserts intention is to have interest on legacy to child run from date other than death of testator. 297Pa92, 146A451 (St. [1920] § 8509).

1427-2½-New. It is presumed that testator appreciated effect of words used in will. Iowa 228NW655.

1427-2 1/13-New. It will be presumed that testator intended to dispose of his own property alone in absence of unequivocal expression in will of contrary intention. 130Kan424, 286P252.

1427-2 1/14-New. Testator is presumed to have intended income for maintenance where she was bequeathed remainder interest payable when she attained twenty one. 137Misc449, 243NYS751.

1427-2 1/15-New. Intention of testator is presumed to be to prevent lapse of devise or legacy. Mo 32SW(2d)591.

1427-3 226Ky548, 11SW(2d)423; 177 Minn311, 225NW156, 67ALR1268; 121 Or48, 252P964, 967 [citCyc]. But see 227Ky643, 13SW(2d)1001. **Family understanding of clear and simple devise** cannot affect its judicial construction. 122Kan814, 253P600. **Demand by purchaser of land from testator's estate for** quitclaim deed from grandson has no effect in determining whether will should be construed to include guardian. Tex CivA 292SW273.

1427-6 121 Or48, 252P964, 967 [cit Cyc].

1427-6½-New. Contention by unknown party in another state that word "children" in will included guardian held

without bearing in construction of will. TexCivA 292SW273.

1427-8 221Ala364, 128S458; 161Ga356, 130SE575; 318 Ill 544, 149NE476; 323 Ill 303, 154NE135; 330 Ill 624, 162NE 164; 331 Ill 182, 162NE888; 236 IllA 168; 237 IllA372; 120Kan148, 242P135; 128Kan262, 276PS23; 130Kan433, 286P 195; 224Ky5, 5SW(2d)477; 231Ky682, 22SW(2d)111; 239Mich274, 214NW104; 147Miss728, 113S197; Mo 280SW707; 315Mo 578, 286SW58, 51ALR639; MoA 5SW(2d)662; 98NJEq554, 131A302; 127Misc731, 217NYS493; 131Misc526, 227NYS470; 134Misc160, 235NYS705; 35 OhA411, 172NE431; 130 Or577, 281P 178; TexCivA 300SW203; TexCivA 2 SW(2d)997; 148Va322, 138SE491. **Where will devises all one's property,** it is presumed that testator intended to include general power of appointment held by him, and extrinsic evidence is not admissible to show intention to make different disposition of property from that appearing on face of will. 258Mass319, 154NE863.

1428-10 43F(2d)881; 213Ala27, 104S 234; 213Ala579, 105S669; 196Cal 508, 238P681 (evidence of intention that law of another state shall apply to lapsed legacy excluded); 318 Ill 544, 149NE 476; 236 IllA168; 237 IllA372; Iowa 227NW614; 128Kan262, 276P823; 210 Ky654, 276SW563; 217Ky59, 288SW 1016; 231Ky682, 22SW(2d)111; 239 Mich274, 214NW104; 315Mo 578, 286 SW58, 51ALR639; 320Mo 543, 8SW(2d) 1008; 98NJEq554, 131A302 (may not show trust to be spendthrift trust); 245 NY71, 156NE186; 217AppDiv377, 216 NYS652; 129Misc447, 221NYS714; 134 Misc564, 236NYS326; 135Misc656, 240 NYS710; 292Pa470, 141A294; 297Pa 442, 147A96; TexCivA 28W(2d)997; 142Va680, 128SE252 (dictum); Wash 292P257. **Where testator used ordinary words,** evidence of peculiar meaning is inadmissible. 127Misc731, 217NYS493. **Evidence to show that at time decedent executed will he did not intend to exercise power of appointment conferred on him by trust deed** is inadmissible to vary terms of will. 258Mass319, 154NE 863.

1429-11 133Misc399, 232NYS308; 134 Misc235, 235NYS165; 134Misc160, 235 NYS705.

1429-12½-New. Extraneous evidence of decedent's intention is inadmissible where it is discernible from will. 137 Misc46, 243NYS136.

1429-13 76CalA723, 245P776; 105Conn 57, 134A155; 331 Ill 182, 162NE888; 237 IllA372; 203 Iowa497, 211NW358; 120Kan148, 242P135; 317Mo 594, 296 SW401; 222MoA768, 8SW(2d)98; 98 NJEq554, 131A302; 125Misc498, 211 NYS778; 129Misc15, 220NYS635, 641 [citCyc]; 129Misc447, 221NYS714 (may not show that testator did mean what he said, though words were chosen by attorney); 133Misc399, 232NYS308; 137Misc46, 243NYS136; 142Va680, 128 SE252; 147Va1068, 133SE353; 148Va 322, 138SE491; 198Wis457, 224NW735.

1429-13½-New. Extrinsic evidence may be considered where literal execution of bequest would result in extravagance and folly. 128Misc803, 221NYS225.

1430-14 CalA 290P314; 237 IllA372; 147Miss728, 113S197; 98NJEq554, 131A 302; 148Va322, 138SE491; Va 153SE 647. **Evidence held sufficient** to show that testatrix intended to exercise and execute power of appointment. 105Conn 57, 134A155.

1430-15 327 Ill 85, 158NE356. **Doubt resolved by context.**-210Ky654, 276SW 563.

1431-16 134Misc285, 235NYS165; 134 Misc160, 235NYS705.

1431-17 202Cal 124, 259P437, 54ALR 913; CalA 290P314; IndA 173NE327.

1431-17½-New. Depositions of third parties to prove that testatrix of will intended that, on death of either of two named legatees, survivor should take all, effect of which would be to make will, has been held inadmissible. 226Ky668, 11SW(2d)721.

1431-19 12F(2d)896; 218Ala320, 118S 553; 221Ala364, 128S458 (parol); Fla 129S835; 237 IllA372; 237 IllA410; 248 IllA57; 248 IllA453; 202 Iowa966, 211 NW380; Iowa 216NW753; 239Mich274, 214NW104; 149Miss201, 115S344; 315 Mo 627, 287SW316; 222MoA768, 8 SW(2d)98; 101NJEq252, 137A582, 52 ALR965; 248NY280, 162NE79; 126 Misc54, 213NYS286; 136Misc612, 244 NYS119; 195NC405, 142SE493; Tex CommnA 299SW889; TexCivA 26SW(2d) 415; 142Va680, 128SE252; 147Va1068, 133SE353; 148Va322, 138SE491; 148 Va503, 139SE286; 153Va449, 150SE394; 145Wash503, 261P104; 152Wash82, 277 P385, 68ALR753. See also 339 Ill 11, 170NE767. **Relation of testator to corporation** and to his business associates therein is admissible to show meaning of securities as used by him in bequest of stock and securities of such corporation. 217Ala426, 116S127. **Rule that devise of all one's property is presumed to include general power of appointment held by him** does not exclude evidence of surrounding facts known to testator. His purpose is to be gathered from language of will taken in connection with attendant circumstances. 258Mass319, 154NE863.

1432-22 12F(2d)896; 105Conn98, 134 A530; 147Va1068, 133SE353.

1433-24 210Ky654, 276SW563; 131 Okl 75, 267P623.

1433-26 105Conn57, 134A155. **Evidence held sufficient** to show that testator knew of power of appointment which she possessed. 105Conn57, 134A155.

1433-27 217Ala426, 116S127.

1433-27½-New. Testator's knowledge of statute legitimatizing children born out of wedlock by subsequent marriage is imputed to him. 125Misc376, 211 NYS629.

1433-28 CalA 290P314; 317 Ill 441, 148 NE308; 158La815, 104S726 (holding declarations by testator not circumstance in aid of discovery of intention); Me 151A429(2dcase); 256Mass107, 152 NE95; 258Mass319, 154NE863; 315Mo 578, 286SW58, 51ALR639; 213AppDiv 479, 210NYS763; 225AppDiv29, 232 NYS84; 118 Or96, 245P1069; TexCivA 287SW687; TexCivA 28W(2d)997; Tex CivA 8SW(2d)334; 144Va375, 132SE 347, 45ALR738; 147Va1068, 133SE353. **Contemporaneous declarations,** etc. 128 Misc803, 221NYS225. But see 315Mo 578, 286SW58, 51ALR639.

1434-29 315Mo 578, 286SW58, 51ALR 639; 118 Or96, 245P1069; 198Wis518, 224NW713(2dcase).

1434-31 120Kan148, 242P135; 315Mo 578, 286SW58, 51ALR639.

1435-32 315Mo 578, 286SW58, 51ALR 639.

1435-33 103Conn213, 130A112.

1435-35 109Conn170, 145A882; Tex CommnA 22SW(2d)1065; 198Wis518, 224NW713(2dcase).

1435-35½-New. Evidence of declarations of testator expressing doubt as to whether particular person has grandson may be considered as evidence of circumstances and attitude of testator's mind, but not as evidence of his intention. 147Va1068, 133SE353.

1435-36 317Mo 594, 296SW401; 213 AppDiv479, 210NYS763.

1436-41 See also 317 Ill 441, 148NE308. **Attorney who drew and attested will may testify as to prior wills to determine intention of testator.**-217AppDiv 377, 216NYS652. **Where attorney who drew will was witness, his testimony is admissible.**-217AppDiv377, 216NYS652.

1436-42 239Mich274, 214NW104.

1436-43 But see 216Ky674, 288SW301.

1437-44 103Conn213, 130A112 (or scrivener); 320Mo 1058, 10SW(2d)47.

1437-45 319Mo 1246, 6SW(2d)594.

1437-46 103Conn213, 130A112 (either of testator or scrivener); 323 Ill 303, 154NE135; 239Mich274, 214NW104. **Testimony that testator intended to dispose of all his property held inadmissible.** 239Mich274, 214NW104.

1437-46½-New. But extrinsic evidence is admissible to enable court to read will in light of circumstances surrounding him so as to determine his intention. 323 Ill 303, 154NE135.

1437-48 Presumption.-125 Or428, 259P 299. **Evidence held sufficient** to show that omission was intentional. 177Minn 169, 225NW109; RI 144A156.

1438-50 98NJEq554, 131A302; 118 Or 96, 245P1069; 144Va375, 132SE347, 45 ALR738. **"Personal estate," in residuary clause,** though ambiguous as to personal property intended cannot be enlarged to cover real property by extrinsic evidence of testator's intention. 103 Conn213, 130A112. **Testator presumed to have given unqualified interest or estate** in absence of terms limiting same. 98NJEq554, 131A302.

1438-51 103Conn213, 130A112 (whether "personal estate" in residue used in broad or restricted meaning with reference to personal property); 101NJEq 252, 137A582, 52ALR965; 98NJEq554, 131A302; 148Va322, 138SE491.

1439-61 172Ark1073, 291SW818; Del Ch 149A432; 331 Ill 182, 162NE888; 338 Ill 391, 170NE243; 203 Iowa497, 211 NW358; 128Me14, 145A395; Mo 22SW (2d)790; 101NJEq252, 137A582, 52ALR 965; 131Misc238, 226NYS637; 49RI 468, 144A155; 132SC63, 128SE850; 148Va 322, 138SE491.

1440-64 DelCh 149A432; Ont [1929] 3DomLR373.

1440-67 172Ark1073, 291SW818, 822 [citCyc]; 118 Or96, 245P1069. **The term "heirs," etc.** 118Nebr208, 224NW 2.

1441-73 But see 111Conn1, 149A515.

1441-74 203 Iowa497, 211NW358; 195 NC734, 143SE541.

1442-75 Under devise to orphans' homes in state, extrinsic evidence is inadmissible to show that particular homes were intended. 217Ky59, 288SW 1016.

1442-77 323 Ill 303, 154NE135; 338 Ill 391, 170NE243; 147Miss728, 113S197; 101NJEq252, 137A582, 52ALR965; 133 Misc399, 232NYS308; 148Va322, 138SE 491; 198Wis518, 224NW713(2dcase).

1443-79 323 Ill 303, 154NE135; 189NC 790, 128SE404; 297Pa442, 147A96; 148 Va322, 138SE491; 153Va449, 150SE394.

1443-80 148Va322, 138SE491.

1443-81 118 Or96, 245P1069; 297Pa 442, 147A96; TexCommnA 15SW(2d) 232; TexCivA 300SW203.

1444-84 147Miss728, 113S197.

1445-92 109Conn563, 145A161; 117Tex 566, 8SW(2d)641. **A description may be sufficiently accurate,** etc. 123Kan697, 257P223.

1445-93 172Ark1073, 291SW818, 822 [quotCyc]; 83Colo 188, 263P413; 256 Mass273, 152NE356; Mo 22SW(2d)790; RI 142A617. See 224AppDiv152, 230 NYS74. **Use of word "relative" as including all persons related to testator in any way by consanguinity or affinity** renders invalid for uncertainty provision to which it relates. 82Mont198, 266P 378, 57ALR1169. **Direction in will that** trustee pay specified beneficiaries or their specified heirs in being at time of testator's death, at time and manner in their judgment. 315Mo 627, 287SW316.

1446-94 106Conn236, 137A764; 82NH 281, 133A166, 45ALR1433; 13PaDist& Co 196.

1446-95 106Conn236, 137A764; 126Me 67, 136A289; 246Mich288, 224NW425; 82NH260, 132A525; 82NH281, 133A 166, 45ALR1433.

1446-96 126Misc726, 215NYS318 (where address of institution appeared below name of beneficiary in holographic will).

1446-99 106Conn236, 137A764; 316 Ill 583, 147NE446; 123Kan697, 700, 257P 223 [citCyc]; 9PaDist&Co 206; 12Pa Dist&Co 573 (person claiming legacy held not to comply with description). **Description held insufficient,** etc. 82NH 281, 133A166, 45ALR1433; Va 153SE 647 (to show feeble-minded son of testator as one of two idiots referred). **The "friends"** held not synonymous with "relatives." 82NH281, 133A166, 45 ALR1433. **Devise applies to person** answering description at date of will. 192 NC726, 135SE858.

1446-2 106Conn236, 137A764. **Gardener held included in bequest to "domestic servants."**-106Conn236, 137A764.

1446-5 123Kan697, 700, 257P223 [cit Cyc]; 9PaDist&Co 206. **Children who signed certain deed.**-Designation of beneficiaries as children who signed certain quitclaim deed does not include child

who signed different quitclaim deed one year after execution of deed specified. 162Ga408, 134SE81.

1447-6 265Mass259, 163NE899; 320Mo 543, 8SW(2d)1008.

1447-7 320Mo 1058, 10SW(2d)47.

1447-8 107Conn409, 140A639; 320Mo 1058, 10SW(2d)47.

1447-10 338 Ill 391, 170NE243; 125Me 219, 132A519; 126Me67, 136A289, 290 [citCyc]; 99NJEq514, 133A705; 103NJ Eq516, 143A745; 26 OhNPNS14; 47RI 406, 133A662, 46ALRS23; 49RI 468, 144 A155; 50RI 200, 146A762; 132SC63, 128SES50.

1448-11 126Me67, 136A289; 103NJEq 516, 143A745.

1448-12 MoA 296SW833; 47RI 406, 133A662, 46ALRS23; 50RI 200, 146A 762.

1448-13½-New. Court cannot change name of beneficiary. TexCivA 14SW (2d)956.

1448-16 111Conn1, 149A515; 27Hawaii 462; 156Md428, 144A367; 315Mo 392, 286SW79; 101NJEq446, 139A821; 126 Misc233, 214NYS142 (child or children); 25 OhNPNS16; 49RI 93, 139A793; Tex CivA 292SW273. **Children lawfully born** construed as including child in existence. 147Va1068, 133SE353.

1448-17 126Misc233, 214NYS142.

1448-18 176Ark548, 3SW(2d)305. See also 331 Ill 28, 162NE152. But see Me 150A375. **"Children" construed to mean "heirs."**-129Kan430, 283P642.

1449-22 103Conn308, 130A483; Alta [1927] 3DomLR46.

1449-23 See also 331 Ill 28, 162NE 152. **Statute must clearly state that** "children," where issued in will, shall mean descendants in order to effect such result. TexCivA 292SW273.

1449-24 Conn 151A345; Del 149A306; 322 Ill 579, 153NE611; 156Md428, 144A 367; 315Mo 392, 286SW79; 252NY65, 168NE831; 7PaDist&Co 475; 50RI 242, 146A628; TexCivA 292SW273; Can [1930] 4DomLR609; Ont [1929] 4Dom LR433. **Especially if will is prepared by one skilled in law.**-215Ala159, 110S3.

1449-25 131SC527, 128SE421.

1449-26 215Ala159, 110S3; 177Minn 469, 225NW439(2dcase); 252NY65, 168 NE831; 126Misc233, 214NYS142; 13Pa Dist&Co 629. **Will of layman written by himself held to include grand-daughter** in term "our children." 215 Ala159, 110S3. **Guardian has burden of proving** that testator included him in devise to wife to be divided between "our children." TexCivA 292SW273.

1450-29 290Pa508, 139A144; 291Pa 129, 139A832. **"Only one child" as term of limitation rather than of condition.** 224AppDiv152, 230NYS74.

1450-30 27Hawaii462; 25 OhNPNS16. **Respective children.**-321 Ill 368, 151NE 905.

1450-30½-New. Where two interpretations of word "child" is possible, courts are disposed to adopt one which will not serve to disinherit heirs of testator. 126 Misc233, 214NYS142.

1451-31 25 OhNPNS16; Can [1929] 2 DomLR244.

1451-32 **Child born out of wedlock** legitimized by subsequent marriage of parents is entitled to trust fund as remainderman under will on death of father. 125Misc376, 211NYS629.

1451-34½-New. Children born out of wedlock and legitimized according to laws of domicile held within class of "children" to whom father may make valid appointment. 151Md321, 134A497.

1451-35 25 OhNPNS16; 147Va1068, 133SE353. **"Children" construed to mean the children of one marriage only.**-135Misc24, 237NYS533. **Reference to future marriage.**-147Va1068, 133SE353. **"Our children"** construed to mean children of present marriage only. 192Wis 333, 212NW781. **Does not include those who have acquired character of children by marriage.** 25 OhNPNS16.

1452-37 Iowa 228NW629; 240Mich631, 216NW428, 429 [quotCyc]; 116 Oh668, 157NE760; RI 151A131; Can [1929] 2DomLR244; Sask [1928] 4DomLR181. **Child of person other than testator does not refer to adopted child, unless language in will or surrounding circumstances of testator make contrary intention clear.** 317 Ill 150, 147NE788. **In Massachusetts.**-253Mass55, 147NE899. **Child, bound out to devisee of will,** under instrument limiting right to custody, held not to have status of "child" entitled to take under will. 152Md263, 136 A637.

1452-38 240Mich631, 216NW428, 429 [quotCyc].

1452-39 111Conn1, 149A515; 240Mich 631, 216NW428, 429 [quotCyc]; 231App Div747, 245NYS355; 138Misc670, 245 NYS710; RI 151A131 (will construed not to include adopted child); Can [1929] 2DomLR244. **A devise to testator's "adopted daughter."**-196Cal 29, 235P725 (will containing devise to "adopted daughter" is to be interpreted as though devise was natural offspring of testatrix). **Children adopted after making of will have been held not to** take under devise to testator's son and son's wife for life and remainder to their children surviving, if any. 240Mich631, 216NW428. **Will has been held not to include adopted child** where donor of power died many years before date of adoption. 111Conn1, 149A515.

1452-39½-New. Whether person was adopted child of legatee depended on status at time of alleged adoption. 152 Md263, 136A637.

1452-40 IndA 158NE598; 129Misc447, 221NYS714; 138Misc210, 245NYS291.

1452-41 138Misc213, 245NYS310.

1453-45 136Misc441, 243NYS222; 137 Misc367, 244NYS138.

1453-48 TexCivA 18SW(2d)842. But see 13SSC475, 136SE742.

1453-49 77CalA493, 246P1087; NY 213 AppDiv479, 210NYS763. But see 86 IndA89, 155NE178.

1453-50 177Minn469, 225NW439.

1454-54 93PaSuperI.

1454-55½-New. Will directing testator's brother to educate daughters of sister and divide rest equally except for two nephews to be given less than others excludes brother and sister. 197NC215, 148SE175.

1454-55½-New. Class of nephews and nieces made remaindermen may be limited to children of designated sisters. 136Misc199, 239NYS588.

1454-56 111Conn683, 151A265. **One adopted by testator's daughter** after his death is not lineal descendant. 111Conn 683, 151A265. **No presumption exists** that testator intended "lineal descendants" to include child to whose adoption he was a stranger. 111Conn683, 151 A265. **Whether adopted child is included** depends upon testator's intention ascertained from circumstances when executed. 111Conn683, 151A265.

1454-57 105Conn98, 134A530; 136Misc 436, 240NYS378. **As including children but excluding grandchildren** in substitutionary gift see 192NC121, 133SE407.

1454-60½-New. , or adopted children. 237 IllA410.

1454-63 TexCivA 28SW(2d)189 ("my employees" as including porter in building owned by testatrix's minor son). **Not employees.**-178Minn572, 227NW 898 (leader of orchestra playing in tea room of department store).

1454-64 **Employment of bookkeeper** by another with knowledge and consent of testatrix does not disqualify her from bequest to "servants" in sense of employees. 126Misc91, 213NYS426. **Leave of absence to serve in war** given by testatrix does not interrupt employment so as to disqualify chauffeur from receiving legacy, where he returned to testatrix's service on discharge from army. 126 Misc91, 213NYS426. **Paralyzed employee sent to hospital** maintained by testatrix and receiving half pay is not disqualified to take. 126Misc91, 213NYS 426. **Per diem employees and employees engaged part of time** on per diem basis and part of time on monthly basis are included in bequests to "servants." 126 Misc91, 213NYS426. **Receipt of relatively small wages** does not disqualify employee from bequest. 126Misc91, 213 NYS426. **Servants held not restricted to household servants** but include chauffeur and those employed on grounds. 126 Misc91, 213NYS426.

1454-66 Mo 23SW(2d)1058 (intention of both testator and employee of controlling importance where employee serving in army at testator's death and intending to return to employment which was being held open for him).

1454-67 222AppDiv622, 226NYS609.

1455-71 **Child adopted by son of testator** held not "legal representative" of family. 116 Oh668, 157NE760.

1455-73 82NH260, 132A525.

1455-74 **"Family" may be construed** to include grandnephews and grandnieces. 97CalA576, 275P971.

1455-75 49RI 93, 139A793. **Grandchild by adoption.** 138Misc670, 245NYS710.

1455-76 245NY618, 157NE882.

1456-80 138Misc670, 245NYS710. See also 129Misc447, 221NYS714.

1456-80½-New. **Grandchild born less** than two hundred eighty days after testator's death was in ventre sa mere and included in grandchildren "living" at that time. 129Misc447, 221NYS714.

1456-88½-New. Omission of name of wife in will of husband does not invalidate will under statute preserving rights of omitted party. 34PortoRico 594.

1456-89 17F(2d)666; 103Conn54, 130A 92; 103Conn122, 130A116; 257Mass72, 153NE337; 98NJEq55, 130A22; 138 Misc213, 245NYS310.

1457-90 17F(2d)666; 103Conn122, 130 A116; 110Conn117, 147A367; 110Conn 150, 147A562; 257Mass12, 153NE337; 5PaDist&Co 437; 131SC527, 128SE421.

1457-90 See also 29Hawaii278. **Where testatrix's nephew died before execution of will,** his widow is not entitled to take under will giving share of residue to children of testatrix's deceased brother, including issue of any deceased child. 108Conn100, 142A851.

1457-91 17F(2d)666; 24F(2d)257; 103 Conn54, 130A92; 103Conn122, 130A116; 106Conn514, 138A440; 110Conn117, 147 A367; 110Conn150, 147A562; 228Ky 758, 16SW(2d)173; 98NJEq55, 130A22 (includes all descendants); 130Misc283, 224NYS285 ("issue" and "descendants" are interchangeable terms); 34 OhA311, 171NE257; 49RI 93, 139A793; TexCivA 298SW470; Vt 151A654; 155Wash535, 285P422.

1457-91½-New. having legal right to claim benefit of their derivation, 126 Misc366, 214NYS243.

1457-92 103Conn54, 130A92; 103Conn 122, 130A116 ("children" of testator's children); 103Conn308, 130A483; 257 Mass72, 153NE337; 130MiscS04, 224 NYS606; 131SC527, 128SE421; Can [1930] 4DomLR609.

1458-93 103Conn122, 130A116; 131SC 527, 128SE421; 155Wash535, 285P422.

1458-94 98NJEq55, 130A22.

1458-95½-New. **Adopted child not included** by "issue." 5PaDist&Co 437.

1458-96 131SC374, 127SE607. But see 110Conn117, 147A367. Contra 103Conn 122, 130A116. **Children of bigamous marriage** not included in absence of anything in will showing such intent. 126Misc366, 214NYS243.

1458-97 131SC527, 128SE421. Contra 103Conn122, 130A116.

1458-4 197Cal 20, 239P406, 409 [cit Cyc]; 222Ky180, 300SW636; Mass 173 NE435; 82Mont198, 266P378, 382 [cit Cyc], 57ALR1169; 82NH281, 133A166, 45ALR1433; 117 Or399, 244P526; 161 Tenn184, 30SW(2d)246. See also 133 Misc519, 232NYS204. **"Nearest relative,"** etc. DelCh 152A129; 243NYS603.

1459-5 Mass 173NE435; 135Misc618, 237NYS529; 117 Or399, 244P526.

1459-6 82Mont198, 266P378, 383 [cit Cyc], 57ALR1169.

1459-10 200Cal 335, 253P706; 68CalA 420, 229P898; 105Conn98, 134A530; 318 Ill 544, 149NE476; 333 Ill 112, 164 NE154; 336 Ill 299, 168NE359; Iowa 216NW753; 209Ky63, 272SW48; 153 Md248, 138A5 [quotCJ]; 146Miss748, 111S833; 320Mo 1058, 10SW(2d)47; 98 NJEq35, 129A698; 193NC294, 136SE 783; 198NC503, 152SE888; 114 OhSt 535, 151NE649; 25 OhA242, 158NE12; 24 OhNPNS357 (rule not applicable where circumstances manifest intention to carry out wishes expressed in husband's will); RI 144A671; TexCivA 13 SW(2d)176; 199Wis154, 225NW818.

Where other technical terms are used in will, term "heirs" held intended for use in technical sense. 153Md248, 138A5.

1459-11 318 Ill 544, 149NE476; 153Md248, 138A5; 146Miss748, 111S833.

1459-12 200Cal335, 253P706; 68CalA420, 229P898; 323 Ill 519, 154NE337; 154Md249, 140A208; 98NJEq569, 131A210; 128Misc260, 219NYS318 (term may be synonymous with "next of kin"); 24 OhA331, 157NE423; 99Vt437, 134A632, 46ALR169; 99Vt480, 134A581.

1460-13 See also 24 OhA331, 157NE423. **Statute of what time.**-13PaDist&Co 220.

1460-14 219Ala533, 122S625; 83Colo540, 266P714, 715 [citCyc]; 106Conn178, 138A159; Iowa 228NW629; 126Misc722, 215NYS237; 193NC294, 136SE733; 25 OhA242, 158NE12; 122 Or387, 259P290; 5PaDist&Co 425; Alta [1929] 4DomLR405. **Where will designates heirs,** it prevents construction of term according to statute of descent. 331 Ill 213, 162NE873.

1460-14½-New. Whether surviving husband of legatee was heir of such legatee predecessing testatrix is to be determined from surrounding circumstances known to testatrix when making will. 108Conn178, 138A159.

1460-14½-New. Testatrix's division of estate held not to show intent to limit bounty to heirs of blood so as to exclude nieces surviving husband. 106Conn178, 138A159.

1460-15 222Ky566, 1SW(2d)968; 34OhA157, 170NE601. See also 179Ark30, 13SW(2d)810.

1461-16 CalA 290P302; 219Ky562, 293SW1087; 194NC288, 139SE437; 196NC668, 146SE710; 13PaDist&Co 634. **If devisee takes same quality and nature of estate** as he would have taken in case of intestacy, he takes by descent and not by purchase. 192NC614, 135SE632.

1461-17 207 Iowa71, 218NW926, 930 [citCyc]; 209Ky63, 272SW48; 223Ky327, 3SW(2d)781; 146Miss748, 111S833 ("lawful heirs" held to mean heirs of body).

1461-18 207 Iowa71, 218NW926, 930 [citCyc]; Iowa 228NW629; 286Pa578, 134A442.

1461-19 146Miss748, 111S833 ("other heirs" held to mean heirs of testator).

1461-20 Iowa 228NW629; 133Misc322, 232NYS521; 224AppDiv647, 232NYS143; 194NC288, 139SE437.

1461-21 98NJEq569, 131A210 (legal meaning); 135Misc614, 238NYS166; 192NC614, 135SE632; BC [1925] 3DomLR854 (bequest of personalty).

1461-21½-New. Legal personal heirs **and representatives** held to mean blood relatives. 100NJEq250, 135A514.

1461-23 198Cal746, 247P906; 202Iowa966, 211NW380 (those subsequently designated, barring others); 320Mo1058, 10SW(2d)47.

1462-24 213Ala422, 104S805; 176Ark660, 3SW(2d)974; 83Colo540, 266P714; 105Conn98, 134A530 (lawful heirs); 170Ga94, 152SE448; 317 Ill 150, 147NE788; 322 Ill 579, 153NE611; 338 Ill 391, 170NE243; 202 Iowa966, 211NW380 ("lawful heirs" followed by designation of children bars those not named); 209Ky63, 272SW48; 222Ky566, 1SW(2d)968; 233Ky737, 26SW(2d)1034; 252Mass518, 148NE141; 83NH225, 140A708; NJCh 148A398; 190NC37, 128SE477 (devise of land after expiration of trust to "heirs of my children," in view of statute); 21 OhA140, 152NE772. But see 150SC358, 148SE188. **The intention to use "heirs" as meaning "children."**-49RI 93, 139A793. **"Heirs" of life tenant will not be construed to mean "children"** merely because life tenant had children living at time of testator's death. 309Mo 302, 274SW684. **Devise by wife to husband** and "his and my heirs" has been held to limit devise to their children. 213Ala422, 104S805. **To avoid perpetuity "heirs" must be construed** "children" where such is intent of testator. 145Miss365, 110S788.

1462-25 218Ala320, 118S553; 317 Ill 150, 147NE788; 331 Ill 128, 162NE152.

1463-27 317 Ill 150, 147NE788 (child adopted by son of testator held not included); Iowa 228NW629 (direct heir held not to include adopted daughter). **An adopted child,** etc. See also BC [1925] 3DomLR854. **"Lawful children"** does not include child adopted in accordance with law of foreign state. Ont [1929] 4DomLR427.

1463-28 317 Ill 150, 147NE788; 140Miss726, 106S442; 197NC449, 149SE590(1stcase). **Children of bigamous marriage** are not heirs. 126Misc366, 214NYS243.

1463-30 197NC449, 149SE590(1stcase); 27 OhNPNS193.

1463-32 246 IllA305; 134Misc285, 235NYS165; 7PaDist&Co 750; TexCivA 20SW(2d)244. See also 245NY606, 157NE877.

1463-33 106Conn178, 138A159; 118Nebr208, 224NW2. **Surviving husband of legatee** predeceasing testatrix held heir. 106Conn178, 138A159.

1463-34 83Colo540, 266P714; IndA158NE643; 87 IndA149, 165NE435; 223Ky49, 2SW(2d)1057; Mass 167NE648.

1463-34½-New. Widow of predeceased son is not heir of father. 133 Or417, 290P1095.

1464-35 See also 134Misc285, 235NYS165.

1464-35½-New. Devise of use to son, title to vest twenty years after testator's death, remainder, if son dies in meantime, to son's heirs, held "heirs" used in legal sense with reference to ancestral property. 25 OhA242, 158NE12.

1464-36 99NJEq514, 133A705.

1464-37 99NJEq514, 133A705.

1465-40 See also 105Conn98, 134A530.

1466-43 **"Heirs of the body,"** etc. 131SC527, 128SE421 (changed to words of purchase).

1466-44½-New. "Heirs of body" included grandchildren. 160Tenn477, 26SW(2d)141.

1466-44½-New. "Heirs of body by legal marriage" means lawful heirs. 160Tenn477, 26SW(2d)141.

1466-46 111Conn683, 151A265; 128Misc221, 219NYS306. **Time of ascertainment.**-13PaDist&Co 220; Can [1928] 1DomLR239; Ont [1928] 4DomLR797. **Adopted child.**-BC [1925] 3DomLR854.

1466-47 **There is no presumption** that testator intended "next of kin" to include child to whose adoption he was stranger. 111Conn683, 151A265.

1466-48 DelCh 145A671; 135Misc656, 240NYS710; 136Misc551, 241NYS364; 145Va721, 134SE704. **Term includes all who answer description at death of person named.**-128Misc221, 219NYS306. **Statute in force at time of testator's death** is not applicable on distribution of contingent remainder to class determinable at future date. 136Misc551, 241NYS364.

1466-49 DelCh 145A671.

1467-50 293Pa433, 143A121, 59ALR1402.

1467-51 DelCh 145A671; 293Pa433, 143A121, 59ALR1402.

1467-51½-New. **"Legal distributees"** will be construed to include legal heirs and distributees where intention appears in will. 108WVa480, 151SE709.

1467-52 13PaDist&Co 196; 45Philippine216; Ont [1929] 1DomLR260. **The intention must be plainly manifested,** etc. 135Misc16, 237NYS523.

1467-53 **Intention to devise merely for purpose of distribution has been held not shown,** though blood relatives excluded. 45Philippine216.

1468-55 316 Ill 583, 147NE446; 200Iowa1070, 205NW870; 99NJEq506, 133A883.

1468-57 137Misc910, 244NYS632.

1468-58 105Conn98, 134A530; NJCh148A398.

1468-59 105Conn98, 134A530.

1469-62 99NJEq506, 133A883.

1469-63 103NJEq516, 143A745; 47RI406, 133A662, 46ALR823.

1469-65 162Ga767, 135SE90. **Corporation to be created to carry on decedent's business held not mere vehicle** of administration where will had bequest of shares to widow and children. 162Ga767, 135SE90.

1469-66 **Incorporated grand lodge cannot take property** devised to affiliated unincorporated voluntary society incapable of taking. 222App.Div841, 226NYS484.

1469-66½-New. Change of corporation's name after testatrix's death does not affect its right to receive bequest. 131Misc138, 227NYS96.

1469-67 103NJEq516, 143A745; 289Pa297, 137A268 (where identity was not questioned); 47RI406, 133A662, 46ALR823. **A department,** etc. 130Misc1, 223NYS321.

1470-68 47RI406, 133A662, 46ALR823.

1470-69 49RI316, 142A335. **In Canada.**-[1930] 3DomLR241.

1470-70 DelCh 149A432; 47RI406, 133A662, 46ALR823.

1471-71 But see 130Misc1, 223NYS321.

1471-73 Mo 22SW(2d)790. "College" construed to include undergraduate, graduate, or professional departments of college or university. 106Conn627, 138A809. **"Young ladies seminary"** construed to include any private preparatory school. 106Conn627, 138A809.

1471-76 204 Iowa648, 215NW710. **In Canada.**-NS [1929] 2DomLR197(2d case). **In Nova Scotia.**-[1928] 2DomLR791. **Where consolidation agreement** between churches was ratified prior to testator's death, devising interest in property to church, devise did not vest in church. 28 OhA325, 162NE714.

1472-77 50RI200, 146A762.

1472-78 135Misc18, 237NYS529.

1472-80½-New. Consolidation of church named in will with another church does not constitute dissolution so as to void legacy payable to consolidated church. 135Misc59, 237NYS632.

1473-85 129Misc318, 222NYS256; 131Misc720, 228NYS652; 227AppDiv265, 237NYS558; 137Misc910, 244NYS632; TexCivA 158SW(2d)86; NS [1927] 2DomLR549; NS [1927] 2DomLR1048. **Scope of words descriptive of class may depend** largely on scheme of will, and may be enlarged or restricted to carry out testator's intent. 213AppDiv479, 210NYS763. **Devise of remainder proportionately between brothers and sisters of testator and of his wife** is gift to class. 135Misc574, 240NYS220.

1473-86 8PaDist&Co 277. **Will directing balance of trust fund from residue of estate to be divided** equally among children of testatrix's deceased brother, "including the issue of any deceased child per stirpes," has been held to include issue of child of testatrix's brother who died before execution of will. 108Conn100, 142A851.

1473-86½-New. Will that estate be distributed according to law held to indicate intent to leave final distribution to law. 257Mass492, 154NE397.

1473-87 12F(2d)896; 202 Iowa966, 211NW380; 83NH453, 144A63; 292Pa37, 140A549; 9PaDist&Co 793. **Under devise of income of trust to children and issue of deceased children,** grandchildren took income as class. 103Conn122, 130A116. **Intention of testator controls as to whether** gifts are to class or individuals, and general scope of will, testator's general purpose, language used, relationship of parties, and surrounding circumstances may be considered in determining such intent. 12F(2d)896. **Surrounding circumstances may be considered to determine if son not named** is to share as one of "lawful heirs" where others are named and he is not. 202 Iowa966, 211NW380. **Remainder to children as class.**-Ga 155SE183.

1474-88 Mass 167NE296; 137Misc910, 244NYS632; 101NJEq446, 139A321; NJCh 148A398; 220AppDiv805, 222NYS221; 47RI406, 133A662, 46ALR823; 145Va116, 133SE773.

1474-89 202 Iowa966, 211NW380; 125Me171, 132A211; 266Mass320, 165NE121; 99NJEq514, 133A705; 133Misc36, 231NYS414; 7PaDist&Co 465; 199Wis154, 225NW818. **Bequest to class followed by operative words to named devisees** held to create estate in common in which devisees take shares in proportions as made in will, and words describing class are merely for identification. 202 Iowa966, 211NW380. **Words "share and share alike, during their respective lives,"** though indicating parties are to take severally, does not prevent increase in amount to be taken by survivor shown by intention. 256Mass273, 152NE356.

1474–90 205Cal 757, 272P1060; 98CalA 306, 277P123; 202 Iowa966, 211NW380; 203 Iowa603, 213NW392 (prima facie); 205 Iowa505, 218NW271; 125Me171, 132 A211; 125Me378, 134A195; 266Mass454, 165NE489; 317Mo 556, 296SW1001; NJ Ch 148A398; 99NJEq514, 133A705; 129 Misc318, 222NYS256; 131Misc720, 228 NYS652. See also 83NH453, 144A63; 133Misc454, 232NYS427. **A gift in equal shares, etc.**–See also 203 Iowa603, 213 NW392. **Devise to "lawful heirs" followed by designation of heirs** bars participation by child not named. 202 Iowa 966, 211NW380. **Bequest to named individuals described as** "children of my deceased daughter" named is bequest to individuals and not to class. 203 Iowa 603, 213NW392.

1475–91 12F(2d)896; 203 Iowa603, 213 NW392; 233Mich249, 206NW366; 125 Misc150, 210NYS424 (husband and wife as class); 125Misc153, 210NYS427; 133 Misc454, 232NYS427. **Segregation of several named children from others for** different treatment held to indicate intention to constitute them distinct class. 12F(2d)896. **Gift to named beneficiaries "or survivor of them"** held to constitute gift to class, term "survivors" not being used as meaning children. 12F(2d) 896.

1475–92 123Kan697, 257P223; NS [1927] 2DomLR549. **Question must, if possible, be answered by will itself** without resort to rules of construction. 223Ky327, 3SW(2d)781.

1475–93 219Ky562, 293SW1087; 98NJ Eq569, 131A210; 125Misc130, 210NYS 605; 96PaSuper125; NS [1927] 2Dom LR549. See 155Md483, 142A627.

1476–95 71CalA409, 235P670; 108Conn 100, 142A851; 161Ga448, 131SE154; 317 Ill 86, 147NE382; 205 Iowa505, 218 NW271; 259Mass465, 156NE885; 145 Miss368, 110S685; 99NJEq592, 133A 531; 128Misc260, 219NYS318; 128Misc 582, 219NYS614; 134Misc753, 236NYS 388; 194NC341, 139SE692; 284Pa334, 131A188; 289Pa101, 137A132; 293Pa 433, 143A121, 59ALR1402; 9PaDist&Co 809; 144SC205, 142SE496; Vt 150A 126. **Under will giving substituted gift to remainderman's lineal heirs,** remainder interest of sixty-two-year-old unnamed lady held to pass as intestate property to testatrix's next of kin as of testatrix's death. 128Misc582, 219NYS 614.

1476–96 194NC341, 139SE692; 289Pa 101, 137A132; 145Va116, 133SE773.

1476–97 99NJEq592, 133A531 (dictum); 128Misc582, 219NYS614; 284Pa 334, 131A188.

1476–98 145Miss368, 110S685.

1477–99 194NC341, 139SE692.

1477–1 71CalA409, 235P670; 289Pa 101, 137A132.

1477–3 223Ky327, 3SW(2d)781; 315 Mo 392, 286SW79; 98NJEq569, 131A 210; 220AppDiv64, 220NYS757; 125 Misc224, 210NYS729; 128Misc582, 219 NYS614; 128Misc905, 220NYS505; 135 Misc574, 240NYS220; 192NC121, 133SE 407; NS [1927] 2DomLR549. But see 257Mass492, 154NE397.

1478–4 24F(2d)257; DelCh 145A671; 329 Ill 604, 161NE141; 219Ky562, 293 SW1087; 315Mo 392, 286SW79; 98NJ Eq569, 131A210; 220AppDiv64, 220 NYS757; 128Misc582, 219NYS614; 128 Misc905, 220NYS505; 227AppDiv265, 237NYS558; 192NC121, 133SE407; 196 NC29, 144SE370; 101Vt242, 143A280; 145Va116, 133SE773, 775 [quotCyc]. But see Mo 28W(2d)803. **Provision for substituted gift held to indicate** intent to make survivorship at time of distribution test of right to participate in fund. 128Misc582, 219NYS614.

1479–5 157Md100, 145A361; 192NC 121, 133SE407 (device to survivors of class); 293Pa56, 141A730; 99Vt480, 134A581; 145Va721, 134SE704. **Words of survivorship,** etc. TexCivA 18W(2d) 485. **Postponed "gift to be paid"** "when" last child dies has been held to refer to time of distribution and not to vesting of estate, and not to make devise contingent, but vested at time of testator's death. 85PaSuper14. **Remainder to those entitled under intestate laws** construed to mean those entitled at time of testator's death, not time of distribution. 85PaSuper14.

1479–7 14PaDist&Co 271. See also 161 Ga448, 131SE154.

1479–8 98NJEq242, 130A549; 101NJ Eq446, 139A321; 241NY583, 150NE 564; 194NC341, 139SE692, 693 [quot Cyc]; 6PaDist&Co 303; 101Vt242, 143 A280. But see 227AppDiv265, 237NYS 558.

1480–10 170Ga94, 152SE448; Ga 155 SE183; 321 Ill 368, 151NE905; 125Misc 224, 210NYS729; TexCivA 276SW776. See also 200 Iowa398, 202NW434, 204 NW156.

1481–16 68CalA420, 229P898; 105 Conn261, 135A555; 106Conn178, 138A 159; 160Ga449, 128SE393; 318 Ill 544, 149NE476; 254Mass347, 150NE434; 259Mass465, 156NE885; Mass 167NE 648 ("my legal heirs"); 213AppDiv82, 209NYS433; 128Misc260, 219NYS318; 85PaSuper14 (postponed gift); 7PaDist &Co 49. **Rule applied to trust** providing that on death of last beneficiary, fund to be paid over to heirs at law "wherever and whoever they may be," such words not indicating element of futurity as to time of payment. 68 CalA420, 229P898. **Rule is almost without exception,** where, in addition to devise to heirs or next of kin of testator, there is reference to statute of distribution. 160Ga449, 128SE393. **Right of husband of devisee,** predeceasing testatrix to take as heir wife's share, would be determined by law in force when estate vested on death of life tenant. 106 Conn178, 138A159. **Held to include grandchildren** of testator born after his death. 222Ky566, 18W(2d)968.

1482–17 213AppDiv82, 209NYS433; 128Misc260, 219NYS318; 192NC121, 133 SE407; 85PaSuper14 (postponed gift); 145Va721, 134SE704; NS [1927] 3Dom LR70; 62 OntL275, [1928] 2DomLR 966.

1482–18 28A4Pa334, 131A188, 190 [cit Cyc] (nieces and nephews).

1482–19 68CalA420, 229P898; 318 Ill 544, 149NE476; Iowa 216NW753; Mass 167NE648; 98NJEq569, 131A210; 213 AppDiv82, 209NYS433; 126Misc722, 215NYS237 (intention clearly shown); 192NC121, 133SE407; 284Pa334, 131A 188. **Clear and unambiguous language** to show intention is necessary. 160Ga 449, 128SE393.

1482–20 263Mass1, 160NE441; 62 OntL275, [1928] 2DomLR966.

1482–21 82NH380, 134A536; 98NJEq 569, 131A210 (limitation over on happening of event held not to vest on happening of event but to remain contingent till death of life tenant); 126Misc 722, 215NYS237; 136Misc551, 241NYS 364; 34 OhA157, 170NE601; 288Pa39, 135A724 (under statute relating to devise in trust with remainder over).

1482–22 Words "now living" held to refer to time of making will. 106Conn 178, 138A159.

1482–22½–New. Bequest of remainder of trust on death of life tenant to persons who have been entitled thereto, had testator died intestate, was construed to refer heirs and next of kin of testator, living at time of his death, 125Misc348, 211NYS519.

1482–22¼–New. and not to heirs and next of kin living at time of life tenant's death. 125Misc348, 211NYS519.

1482–22¼–New. Words "heirs," "next of kin," or "persons taking by intestacy" are construed in two senses, the primary sense as describing persons within that class at time of testator's death, 125Misc348, 211NYS519.

1482–22½–New. and secondary sense as describing persons of class at date or event subsequent to death, assumption that testator died at such later date. 125Misc348, 211NYS519.

1482–22¾–New. Presumption is that testator used such words to designate those who in fact take by intestacy, 125Misc348, 211NYS519.

1482–22½–New. unless intention to contrary appears in will. 125Misc348, 211NYS519.

1482–22¾–New. Construction in favor of determination as of date of testator's death as heirs or next of kin, is not changed by fact that life estate precedes gift or that gift is contingent. 213App Div82, 209NYS433.

1482–22½–New. Description of class, as those who "would have been so entitled thereto had I died intestate," relates to time of death of testator. 213AppDiv 82, 209NYS433.

1482–23 219Ky562, 293SW1087; 309 Mo 302, 274SW684 (devise to daughter "during her life and after her death to her heirs" has same meaning as devise to daughter and heirs of her body). **Under will devising to daughter of testator for life and after her death to her heirs,** heirs of the life tenant at time of her death took title. 309Mo 302, 274 SW684. **"If either of them be dead"** in will devising interest subject to life tenancy held to refer to time of life tenant's death. 219Ky562, 293SW1087.

1483–26 137Misc910, 244NYS632.

1483–30 199Cal 135, 248P517; 15Del Ch84, 131A529; DelCh 152A115; 323 Ill 519, 154NE337; 204 Iowa1237, 212 NW306; 222Ky180, 300SW636; 231Ky 731, 22SW(2d)133; 320Mo 1058, 108W (2d)47; 87PaSuper521; TexCommnA 294SW518. **Law favors equality of forced heirs.**–161La1032, 109S827.

1483–31 Del 149A304 (will construed as giving each of three children one third of trust estate); 15DelCh84, 131A 529; 325 Ill 500, 156NE758; 134Misc 558, 236NYS218; 19 OhA234; 26 Oh NPNS192; TexCommnA 26SW(2d)179. **General scheme of equality** held not destroyed by nature or value of specific bequests. 150Md539, 133A308.

1484–32 161La1032, 109S827; 177Minn 266, 225NW17.

1485–35 26 OhNPNS192.

1485–39½–New. Where testator bequeathed property to his daughter and her children, and daughter was only and forced heir, of testator, so that disposable portion of his estate was two-thirds, daughter is entitled to her share of legacy in addition to her legitime. 167La1063, 120S857.

1485–40 6PaDist&Co 371. **Bequest in codicil held in lieu of devise in will** and to be considered with appraised value of estate. 150Md539, 133A308. **Particular provisions construed.**–82NH281, 133A 166, 45ALR1433.

1485–45 Present value of legacy payable at future time specified should be taken in determining owelty under will. 150Md539, 133A308.

1486–49 200Cal 335, 253P706; 325 Ill 212, 156NE364; 222MoA901, 68W(2d) 673; 192NC614, 135SE632.

1486–50 337 Ill 232, 168NE900, 66ALR 1062; 298Pa25, 147A840; 13PaDist&Co 42.

1486–51 200Cal 335, 253P706. **Son's widow not entitled to take under devise to surviving children or their heirs.** 325 Ill 212, 156NE364.

1486–52½–New. Laws in force at time of testator's death determine distribution of estate. 337 Ill 232, 168NE900, 66ALR1062.

1487–59 85PaSuper14.

1487–60 A gift, etc. 11PaDist&Co 297. **Gift of "proceeds"** of estate construed as gift of income. BC [1929] 4DomLR358.

1487–61 88PaSuper7.

1487–66 But see 323 Ill 519, 154NE337.

1488–73 19 OhA234; 26 OhNPNS14.

1488–79 136Misc532, 241NYS506; 11 PaDist&Co 644. **Technical and well-known term "residue of my estate"** will be affected as such unless it is manifest that decedent intended other meaning. 143Miss427, 108S799, 47ALR516. **Though subsequent provision devises undistributed sums,** rule applies. 143 Miss427, 108S799, 47ALR516.

1489–81 22 OhA41, 153NE273; 142Va 149, 128SE450. **Clear and unambiguous** will held not to exclude legatee from participating in residue. 213Ala579, 105 S669.

1489–85 13PaDist&Co 605.

1489–86 Iowa 227NW510(2dcase).

1489–87 CalA 289P892. **Legatees named only in codicil** held not entitled to share in residue given by will to pecuniary legatees named therein pro rata. 15 DelCh12, 130A28.

1489–87½–New. Where residuary clause shows intention to give residue of estate to two persons, or to one of them and to

appoint other executor and trustee, there is no intestacy as to half of residue, especially if testatrix has indicated that only person who would be benefited by intestacy should not share in estate. 212 AppDiv558, 209NYS341.

1489–87½–New. Where residuary paragraph directed executors to divide residue "to my devisees heretofore named in the same proportion as the specific devises heretofore given them may have to each other," and subsequent codicil making other money bequests recited that codicil should be taken as addition to and part of will, additional money legatees named in codicils became residuary legatees under original will, entitled to share proportionately with other residuary legatees therein named. 133Misc 450, 232NYS418.

1490–88 125Misc90, 210NYS143; 125 Misc224, 210NYS729; 126Misc769, 215 NYS781 (where there are no qualifying words); 129Misc539, 222NYS714 (common-law rule); 145Va116, 133SE773. But see **Iowa** 233NW41; 125Me127, 131 A206.

1490–89 126Misc769, 215NYS781; 192 NC505, 135SE332; **TexCivA** 294SW935. **Where devise to parent and children,** it has been held that they take per capita. 215Ky307, 284SW1077. **Very faint glimpse of different intention** is sufficient to rebut presumption of per capita distribution. 129Misc539, 222NYS714.

1490–90 153Md443, 138A225; 124Misc 318, 210NYS296; 7**PaDist&Co** 1.

1490–91 125Me127, 131A206; 263Mass 1, 160NE441; **NJCh** 150A187; 129Misc 539, 222NYS714; 12**PaDist&Co** 677.

1490–91½–New. Degree of consanguinity to testator may be considered in determining intent as to whether division is to be per capita or per stirpes. 192 NC505, 135SE332.

1490–92 105**Conn**98, 134A530; 331 **Ill** 28, 162NE152; 201 **Iowa**784, 208NW 369; 212**Ky**114, 278SW590; 215**Ky**307, 284SW1077; 222**Ky**180, 300SW636; 125 Me127, 131A206; 153**Md**443, 138A225; 258Mass427, 155NE438; 126Misc769, 215NYS781 (dictum); 138Misc371, 245 NYS642; 192NC505, 135SE332; 12**Pa Dist&Co** 677; 48**RI** 200, 136A434; 145 Va116, 133SE773. See also 215Ky136, 284SW1032. **Between children.**–71**CalA** 409, 235P670. **Will providing for share and share alike on equal terms provides** for per capita distribution. 212Ky114, 278SW590.

1491–93 201 **Iowa**784, 208NW369; **Iowa** 233NW41; 212**Ky**114, 278SW591; 215Ky307, 284SW1077; 153Md443, 138 A225; 126Misc769, 215NYS781; 14**Pa Dist&Co** 135; **TexCivA** 294SW935.

1491–94 125Misc130, 210NYS605.

1491–96 29**Hawaii**359; 125Me127, 131A206 ("heirs of A" and other designated individuals); 192NC505, 135SE 332; 196NC29, 144SE370; 12**PaDist& Co** 677; 48**RI** 200, 136A434; 141SC13, 139SE203.

1491–97 153Md248, 138A5.

1491–98 201 **Iowa**784, 208NW369, 370 [citCyc]; **Iowa** 233NW41; 153Md248, 138A5; **TexCivA** 294SW935.

1491–99 201 **Iowa**784, 208NW369, 370 [citCyc].

1492–3 28F(2d)936; 201 **Iowa**784, 208 NW369; 212Ky114, 278SW591, 592 [cit Cyc]; 153Md248, 138A5; **NJCh** 150A 187; **TexCivA** 294SW935. **Intention of testator,** if discoverable from will, should prevail despite presumption. 212 Ky114, 278SW590.

1492–4 212Ky114, 278SW591, 592 [cit Cyc]. **Presumption held overcome** by further provisions of will. 212Ky114, 278SW591.

1492–6 201 **Iowa**784, 208NW369; 212 Ky114, 278SW591, 592 [citCyc]; 263 Mass1, 160NE441.

1493–7 111**Conn**1, 149A515; 222**MoA** 901, 6SW(2d)673, 674 [quotCyc]; **NJ Orphans** 134A284 (children and grandchildren of deceased distributee held entitled per capita); 124Misc818, 210NYS 296; 133Misc242, 232NYS425; 138Misc 42, 244NYS673. But see 126Misc769, 215 NYS781. **"Issue" entitled to take per capita.**–98NJEq55, 130A22; 126Misc 769, 215NYS781. **"Issue" entitled to take per stirpes.**–245NY514, 157NE839; 129Misc539, 222NYS714. **In New York.**–129Misc539, 222NYS714.

1493–9 196NC29, 144SE370.

1494–13 153Md248, 138A5; 126Misc 769, 215NYS781; 90PaSuper512; **Tex CivA** 294SW935. See also 127Misc459, 215NYS778. **Children and grandchildren.**–6PaDist&Co 568.

1494–15 125Misc90, 210NYS143.

1494–16 **CalA** 291P432; 103Conn308, 130A483; 232Ky83, 22SW(2d)416; 153 Md248, 138A5; 101NJEq816, 139A173; **NJCh** 150A187 ("respective heirs"); 127 Misc360, 216NYS747; 127Misc459, 215 NYS778 (gift to issue of deceased daughter or next of kin of said deceased daughter goes per stirpes); 129 Misc539, 222NYS714; 130Misc283, 224NYS285; 227AppDiv265, 237NYS558; 198NC503, 152SE388; 198NC562, 152SE625(1st case); 34 **OhA**311, 171NE257; **RI** 150A 121. **Devise to daughter and in case of her death without issue to descendants** of testator's son goes to son's issue per stirpes. 127Misc380, 216NYS747.

1495–18 103Conn308, 130A483; 127 Misc380, 216NYS747; 50**RI** 78, 145A98. **Under devise to daughter should she remain single,** but, in case of her marriage or death, to testator's then surviving children or their heirs share and share alike, surviving children of testator's children deceased before daughter's death unmarried take per stirpes (their parent's share. 19 **OhA**122.

1495–19 71**CalA**409, 235P670, 671 [quot Cyc].

1495–20 71**CalA**409, 235P670, 671 [quot Cyc].

1495–21 71**CalA**409, 235P670, 671 [quot Cyc].

1495–22 71CalA409, 235P670, 671 [quot Cyc]; 214Ky375, 283SW941; 233Ky 611, 26SW(2d)544.

1496–23 153Md248, 138A5; 192NC505, 135SE332.

1496–25 48**RI** 200, 136A434.

1497–28 5**PaDist&Co** 165.

1497–33 216Ala448, 113S501.

1497–34 33 **OhA**379, 169NE460. **Devise to widow held valid under restriction** "in full of every claim" despite failure of deceased to change her rights as beneficiary under insurance policy for which devise was substitute intended. 244NY 236, 155NE110.

1498–39½–New. Testamentary trust remainderman is not excluded from remainder because receiving annuities under trust where there are other life annuities. 105Conn261, 135A655.

1498–39⅓–New. Gift of life estate is not inconsistent with, nor repugnant to, remainder to life tenant of same property. 259Mass200, 156NE438.

1498–39¼–New. Under will creating trust for testator's wife and son, with remainder over to testator's heirs at law, that son was sole heir at law at testator's death does not raise presumption of intention to exclude him. 99Vt480, 134A581.

1498–39½–New. That first taker is among members of the class or sole member thereof, at testators' death, may be considered in ascertaining testator's real intention, and in determining whether testator has impliedly excluded such first taker from the gift over. 99Vt480, 134A581.

1498–40 179Ark543, 16SW(2d)996, 65 **ALR**466; 137Misc113, 243NYS127. **Where codicil "disinherits son-in-law his heirs and assigns,"** his daughter is not prevented from taking directly under will. **CalA** 290P302.

1499–41 216Ala448, 113S501; 212App Div558, 209NYS341.

1499–42 **Will directing transfer of property to testator's estate** sufficiently indicated desired objects of bounty so as to exclude named person. 137Misc 113, 243NYS127.

1499–43 **Testator's widow, though given estate for life, took remainder at his death** where exclusion of grandson in will made her sole heir of testator. 254 Mass347, 150NE434.

1499–45 **DelCh** 139A457; 103NJEq502, 143A725. **Gift over to descendants of** dead beneficiaries bars adopted children. 237 **IllA**410.

1499–46 See also **Kan** 292P942. **Gift to survivor if either legatee dies "before the execution of this will"** construed as **referring to time** when executor will execute directions contained in will. 131Misc905, 229NYS299.

1499–47 15**DelCh**84, 131A529; 15**DelCh** 99, 131A536; **Mo** 29SW(2d)116; 136 Misc231, 242NYS224 (remainderman without interest in property never vesting in life tenant); 135Misc581, 240NYS 699; 136Misc416, 241NYS398. **Where devise made in fee,** and in case of death to another in fee, devise interpreted as referring only to death in testator's lifetime, unless coupled with other circumstances. 331 **Ill** 287, 162NE855.

1500–48 219Ala533, 122S625; 15**DelCh** 84, 131A529 ("in case of death"); 126 Me78, 136A350; 135Misc581, 240NYS 699.

1500–49 99NJEq88, 133A197; 137Misc 910, 244NYS632. **Devise to testator's son for life, remainder to adopted son, his heirs and assigns, with limitation over,** if such adopted son should die without heirs, conferred absolute title on adopted son who survived testator's son. 99NJEq88, 133A197.

1500–49½–New. Devise to one person absolutely and in case of his death to another, death referred to is that within lifetime of testator. 126Misc28, 211 NYS772.

1500–49⅓–New. Clause providing for survivorship as between legatees or devisees generally refers to that happening in testator's lifetime. 289Pa473, 137A 676.

1500–49¼–New. Where will devised property to wife for life, and then to niece, if living, otherwise to testator's brother for life, and niece died before testator's wife, estate did not vest in niece on death of testator, and did not pass to mother of niece as her heir, but title of niece was divested by death before life tenant. 245Mich208, 222NW 182.

1500–50 316 **Ill** 460, 147NE433. But see 33 **OhA**379, 169NE460. **Grant held not to survive,** where will bequeathed "privilege to buy" property to adjoining owner. 129Misc118, 221NYS534.

1500–51 137Misc663, 244NYS262. But see 339 **Ill** 11, 170NE767. **Survival of legatees and devisees beyond life of testator** is always implied in wills and testamentary disposition of property. 329 **Ill** 519, 161NE129.

1501–52 120 **Oh**26, 165NE539. **Will construed.**–128Misc635, 219NYS577.

1501–53 316 **Ill** 460, 147NE433; 253NY 177, 170NE569. **Gift over relative to principal or income does not take effect** where beneficiary is still living when time for payment arrives. 253NY177, 170NE569.

1501–56 316 **Ill** 460, 147NE433.

1502–59 9**PaDist&Co** 84.

1502–64 192NC121, 133SE407 (stating common-law rule); 286Pa237, 133A252; 295Pa92, 144A895(2dcase).

1502–65 **In North Carolina.**–192NC121, 133SE407.

1503–66 214Ky320, 283SW103 (without bodily issue). **Will held to provide** for contingency of life tenant's death without issue after testator's death without during lifetime. 286Pa237, 133A252.

1503–67 192NC121, 133SE407 (stating common-law rule).

1503–68 83NH225, 140A708; 192NC 121, 133SE407 ("dying without issue" at common law).

1504–69 **Bequest to daughter** provided she support and pay certain sum to another at his majority and gift over in case of death at his majority and gift over in case of daughter without heirs held to vest estate in daughter subject to fulfillment of condition and subject to be divested by her death without issue. 115 **Oh**35, 152NE10.

1504–70 14**PaDist&Co** 105.

1504–70½–New. Devise of life estate with gift over if devisee dies without issue generally implies remainder in life tenant's issue, heirs, or children if any. 289Pa473, 137A676.

1504–70⅓–New. Under statute testator has right to provide gift over in case of devisee's death without issue. 219Ala 533, 122S625.

1504–71 212Ky847, 280SW156. But see 192NC121, 133SE407.

1504–72 318 **Ill** 474, 149NE486; 89

IndA33, 165NE562; 207 Iowa71, 218NW926(2dcase); 223Ky656, 4SW(2d)690; 232Ky251, 22SW(2d)612; Va 152SE339. See also 225AppDiv502, 233NYS602.

1504-73 318 Ill 474, 149NE486; 206 Iowa597, 220NW1; 208 Iowa693, 225NW845; Mo 29SW(2d)116; Mo 32SW(2d)591; 225AppDiv502, 233NYS602; 91PaSuper245.

1505-74 307Mo 462, 271SW370 (construing Kentucky decisions); 192NC 121, 133SE407.

1506-75 206 Iowa597, 220NW1.

1506-76 218Ky442, 291SW739 (devise of remainder to bodily heirs of life tenant with remainder over should she die "not leaving bodily heirs" did not vest fee in sole child of life tenant predeceasing his mother); 227Ky169, 12SW(2d)319; 228Ky639, 15SW(2d)513; 266 Mass454, 165NE489; 319Mo 108, 5SW(2d)428. But see 192NC121, 133SE407.

1506-78 See also 192NC121, 133SE407.

1506-79 But see 223Ky656, 4SW(2d)690.

1507-85 134Misc564, 236NYS326; 99 Vt204, 130A683 (presumed to relate to death of testator). "Survivor" is synonymous with "living." 138Misc253, 245 NYS631.

1508-87 108Conn100, 142A851.

1508-89 83NH453, 144A63; 7PaDist&Co 237.

1508-90 317Mo 556, 296SW1001; 83NH 453, 144A63; 132Misc710, 230NYS785; 101Vt242, 143A280.

1508-91 256Mass273, 152NE356; 83 NH453, 144A63.

1509-92 NJCh 148A398.

1509-93 226Ky668, 11SW(2d)721; 230 Ky488, 20SW(2d)90; 232NYS427. In Louisiana.-165La803, 116S192.

1509-94 12F(2d)896; 266Mass4, 164 NE460; 83NH453, 144A63; NJCh 148 A398; 98NJEq514, 131A159; NJOrphans 134A284 (survivor of three cousins held under will entitled to share of one dying without issue). Where will gave distributive shares to cousins, and if any should die to issue or to their survivors, it has been held that shares vested in children of one at his death and on death of one of his children before distribution without issue to his surviving children. NJOrphans 134A 284. Testamentary trust income.-13Pa Dist&Co 487.

1509-97 111Conn120, 149A229; 337 Ill 49, 168NE681; 315Mo 392, 286SW79.

1510-2 192NC121, 133SE407.

1510-3½-New. Where will directed that remainder on death of life tenant without issue be divided between surviving children of deceased brothers of testator, remainder passed to surviving child of deceased brother at time of death of life tenant as against issue of child surviving testator but dying before life tenant. 242NY246, 151NE441.

1510-3 12F(2d)896; Del 149A306; 245 NY618, 157NE882; 138Misc287, 245NYS 570; 87PaSuper518.

1510-5 193Wis26, 213NW671.

1511-6½-New. Under devise to nieces providing that share of niece dying before division leaving issue shall go to issue, deceased niece's issue is entitled only to parent's share. 111Conn120, 149A229.

1511-7 8PaDist&Co 144.

1511-8 219Ala533, 122S625; 88 IndA 374, 162NE448; 137Misc663, 224NYS 262; 191NC203, 131SE575; 191NC802, 133SE168; 193NC787, 138SE163; 284 Pa497, 131A280 (fee not reduced by words of survivorship); Vt 151A654.

1511-9 219Ala89, 121S67; 219Ala533, 122S625; 193NC787, 138SE163; 284Pa 497, 131A280; 291Pa129, 139A832.

1512-10 162Ga596, 134SE298; 322 Ill 579, 153NE611; 223Ky327, 3SW(2d)781, 782 [quotCyc]; 135Misc48, 237NYS 649; 191NC203, 131SE575; 193NC787, 138SE163. But see 7PaDist&Co 421.

1512-11 223Ky327, 3SW(2d)781, 782 [quotCyc]; 245NY618, 157NE882; 191 NC203, 131SE575; 7PaDist&Co 335; 8 PaDist&Co 144.

1513-12 10PaDist&Co 109.

1513-13 216Ala448, 113S501. Gift over on contingency that if either should die without issue survivor should take whole estate, on happening of contingency whole estate vests in survivor. 99Vt204, 130A683.

1513-15 100NJEq250, 135A514.

1513-17 103Conn308, 130A483; 98NJ Eq55, 130A22 (vested share of survivor passes upon death to personal representative).

1513-18 103Conn308, 130A483.

1514-23 103Conn308, 130A483.

1514-27 DelCh 152A115; 98NJEq55, 130A22 (share of survivor held to vest absolutely as independent gift); 138Misc 253, 245NYS631.

1515-32 151Va322, 144SE497(2dcase); 151Va622, 144SE620; 196Wis357, 220 NW383.

1515-33 228Ky758, 16SW(2d)173; 232 Ky92, 22SW(2d)414; 266Mass320, 165 NE121; 320Mo 543, 8SW(2d)1008. Where residuary legatee, not relative of testatrix, dies before death of testator, his heirs do not take by substitution. 125Me171, 132A211 (rule not applicable to facts).

1516-36 223Ky35, 2SW(2d)1053. In Iowa.-203 Iowa603, 213NW392.

1516-40 NJCh 148A398.

1517-43 71CalA409, 235P670.

1517-48 TexCommnA 24SW(2d)819.

1518-57½-New. In New Jersey, statute prohibits representation among collaterals. 98NJEq569, 131A210.

1518-62 197NC159, 147SE809; 141SC 32, 139SE196. "Substitution" defined.-331 Ill 213, 162NE873; 163La734, 112S 667. "Direct substitution" defined.-331 Ill 213, 162NE873. Other gifts held substitutional.-317Mo 556, 296SW1001.

1518-64 127Misc437, 217NYS313.

1518-64½-New. Under will to designated children with substitutional gift to testator's lineal descendants on death of any child without issue, share of child so dying rests in surviving brothers and sisters, to exclusion of their children. 192NC121, 133SE407.

1518-64¼-New. Where a will granted remainder to deceased brother's children surviving testator, issue of deceased child of deceased brother was held to take share, though he died before the life tenant. 242NY246, 151NE441.

1518-64¼-New. Testator's legacy in lieu of dower to wife who predeceased him may be payable to her next of kin where failure to qualify or revoke legacy. Md 150A793.

1519-66 117Nebr168, 220NW251; 99NJ Eq514, 133A705; 9PaDist&Co 520.

1519-67 125Me171, 132A211; 199Wis 154, 225NW818.

1519-69 339 Ill 11, 170NE767; 125Me 171, 132A211; 135Misc614, 238NYS166. Estate to daughter or her heirs has been held to go by substitution. 125Me22, 130A433.

1520-73 228Ky116, 14SW(2d)201; 137 Misc868, 244NYS607.

1520-74½-New. Gift to one trustee in trust for a beneficiary and in case trustee predeceases testatrix to another trustee for same beneficiary, held not "prohibited substitution," under code. 163 La734, 112S667.

1520-74¼-New. Provision in joint will of spouses that, if husband predeceases wife, certain relatives shall take and that, if any predecease, husband survivors will inherit, is substitutional. 51 Philippine267.

1520-81½-New. Substitutional gift to "personal representatives of legatees dying before distribution" has been construed to mean distributees under the law of intestacy and not the executors or administrators of deceased legatees, 127Misc437, 217NYS313.

1520-81¼-New. and under such provision gift to legatee dying before testator vests in his legal distributees. 127 Misc437, 217NYS313.

1520-81¼-New. Devise of residue to three sons named, "executors and administrators in equal shares" is not intended to be substitutional where one son predeceased testator, leaving daughter surviving who took share devised to brother. 130Misc387, 224NYS433.

1521-84 259Mass211, 156NE15. Gifts held substitutional.-99CalA583, 278P 912; DelCh 145A671; 223Ky327, 3SW(2d)781; 160La217, 106S833; 125Me22, 130A433; 118Nebr246, 224NW1; 128 Misc582, 219NYS614; 129Misc711, 222 NYS511; 138Misc253, 245NYS631.

1521-85 See also 284Pa164, 130A319. Issue of legatee or devisee take as substituted legatees or devisees and not as heirs. 117Nebr168, 220NW251.

1521-86 99NJEq506, 133A882. Words of condition do not necessarily create substitutional gifts. 48RI 231, 136A883.

1522-88 98NJEq514, 131A159 (contrary intention manifest).

1523-92½-New. Devise to brothers and sisters "in event of death share to be divided among children" included child of brother who died before execution of will. 48RI 231, 136A883.

1523-94 205 Iowa505, 218NW271; 98 NJEq514, 131A159.

1523-95 98NJEq514, 131A159; 99NJ Eq506, 133A883.

1524-96 99NJEq506, 133A883.

1524-97 98NJEq514, 131A159 ("if any child died" construed equivalent to disposition described in text).

1525-5 99NJEq514, 133A705. Where contingency of executory devise is as to event or subject matter, but not as to person, heirs at law of executory devisees dying before event on which property was to vest in such heirs take, as such, interest of such executory devisees. 160Ga449, 128SE393. Devisees taking.-Gift to wife's next of kin on her failure to exercise power of appointment is effective only as to wife's next of kin at time of her death. 135Misc170, 237 NYS390.

1525-8 200Cal 482, 253P921.

1525-10 134Misc558, 236NYS218. See 49RI 308, 142A605. Provision in will appointing executors for real and personal property, and providing that interest of heirs dying without heirs of their own shall revert back to testator's heirs, included entire interest in estate both real and personal. 218Ala320, 118 S553.

1525-10½-New. Fact that option to purchase land preceded execution of will specifically devising it is recognized as of importance in determining whether intention was to pass all interest, including right to purchase price. 49RI 349, 142A609.

1525-10½-New. Word "share" dividing share of unmarried sons dying without children refers to personalty and not to realty. 167Ga723, 146SE548.

1525-10¼-New. Devise of "my undivided half interest in farm" held controlling over provision referring to portion thereof. 230Ky429, 20SW(2d)83.

1525-10½-New. Other words held to pass entire estate. 138Misc287, 245NYS 570.

1525-11 259Mass200, 156NE438; 77 Mont182, 250P812; 127Misc731, 217NYS 493; 195NC734, 143SE541; 47RI 314, 132A888; 142Va840, 128SE247. "Estate" means residence remaining in hands of executor after payment of debts of deceased and expenses of administration. 199Cal 135, 248P517. Interest as beneficiary of trust passes under will disposing of all of testator's estate taking effect after expiration of trust period. 240Mich661, 216NW446. Words "net estate" mean property remaining after payment of debts and expenses. 130Misc684, 225NYS190.

1526-12 77Mont182, 250P812.

1526-13 "Personal estate" may have restricted or broad meaning in view of context and extrinsic evidence, but will not be construed to include real estate especially when used in residuary clause. 103Conn213, 130A112.

1526-16 Alta [1929] 4DomLR405.

1527-21½-New. Community property is not disposed of by will bequeathing "all property . . . of which I may die possessed" where will was executed at time when statute gave testatrix only "mere expectancy as heir." 95CalA754, 273P 109.

1528-27 290Pa55, 138A538.

1528-31 323 Ill 303, 154NE135; 128Me 191, 146A439; 230AppDiv574, 245NYS 436. See also 124Misc674, 209NYS776; Sask [1928] 1DomLR357. Devise of land misdescribing it as fraction of "township 13 in township 13" held sufficiently to identify land in "section 13" where testator owned no land elsewhere. 323 Ill 303, 154NE135. Devise of "strip

of timber land" on east side of road of forty-acre tract held to pass four-acre block greater in length than in width which was only timber land on tract and was northeast of road designated. 323 **Ill** 303, 154**NE**135.

1528–32 76**CalA**723; 245**P**776.

1528–34½–New. Where will describes no property bequeathed to named legatees, it cannot be given effect as to them. **Iowa** 230**NW**434.

1528–35 158**La**815, 104**S**726 (in bequest to one of "contents of bank box" followed by words "such as scarf pins and other personal effects to be distributed by him as he sees fit," the entire contents are included in bequest); **Mo** 276**SW**17.

1529–37 217**Ala**46, 114**S**465.

1529–38 217**Ala**46, 114**S**465; **Vt** 151**A** 654.

1529–39 29**Hawaii**854, 863 [quotCyc]; **Me** 151**A**429(2dcase); 126**Misc**99, 213 **NYS**422; 128**Misc**244, 218**NYS**380; 142 **SC**407, 141**SE**26. **For example,** provision giving legatee certain articles of jewelry, wearing apparel, "and other purely personal effects" includes all jewelry, wearing apparel, and toilet articles not otherwise specifically bequeathed, but not furniture, pictures, etc. 126**Misc**99, 213**NYS**422. **Where provision of will gave widow homestead** and all household goods and furniture, personal effects and contents therein, automobile largely employed in professional calls was included, but professional tools passed under residuary clause. 128**Misc**244, 218**NYS**380.

1530–40 Property may be construed to mean real property, where construction of term as personal property would have effect of making two bequests of same personal property in one clause of will. 212**AppDiv**558, 209**NYS**341.

1530–42 Mo 276**SW**17; 292**Pa**454, 141**A** 258; 49**RI** 349, 142**A**609. **Will devising real estate** does not include proceeds of realty sold by trustees. 226**AppDiv**515, 234**NYS**601.

1530–43 The word "bequeath," etc. 200 **Cal** 482, 253**P**921.

1530–45½–New. Under will by testatrix conveying "my real estate," word "my," used by testatrix having nothing in expectancy in nature of real estate, gave rise to presumption that she believed she owned something which she was attempting to bequeath. 132 **Misc**416, 230**NYS**437.

1531–49 262**Mass**321, 159**NE**919.

1532–58½–New. Devise of house to sister for life has been held to pass testatrix's one-half undivided interest in realty lived in by testatrix. 137**Misc** 46, 243**NYS**136.

1532–62 100**NJEq**196, 134**A**822.

1532–63 Devise of homestead will include additional property appurtenant to it which has long been considered part of the homestead. 109**Conn**170, 145**A**882.

1533–64 262**Mass**159, 159**NE**513.

1533–66½–New. Statement in will that devises included buildings upon land and all easements and appurtenances thereunto belonging does not of itself create easement. 210**Ky**654, 276**SW**563.

1533–66½–New. Incorporation by reference in will of map, showing roads on land devised, gives devisees rights of way in one another's land. 210**Ky** 654, 276**SW**563.

1533–69 130**Kan**236, 285**P**534.

1533–69½–New. Devise of specifically described tract, containing no mention of another tract, does not include latter tract. 148**Md**157, 129**A**18.

1533–71 RI 138**A**55. **A rear lot facing on another street,** etc. Contra 9**PaDist &Co** 617. **Devise of houses and lots bearing same** held to include only such lots and houses and not whole lots as shown by assessor's plat. **RI** 138**A**55.

1534–72 223**AppDiv**579, 228**NYS**587.

1534–73 Vacant inside lot does not pass under will covering southwesterly corner of Astoria and Eighth Avenues. 230 **AppDiv**741, 244**NYS**47.

1534–74½–New. Devise of given number of acres "to be cut off my farm on the new river, on the east side of the branch" is construed devise of land only on east side though tract contained less acreage. 143**Va**117, 129**SE**347.

1534–76 174**Ark**703, 297**SW**1018.

1534–76½–New. Land excluded from description.–Will describing land by location in state and by particular description and declaring that such land is only land owned by testator within state does not devise other land owned by testator within state. 149**Miss**201, 115**S**344.

1534–77 189**NC**790, 128**SE**404 (at least seventy-five acres of land to include dwelling house and to be located as she may want it to be and as near four square as it is consistent).

1534–78 Only property within lines designated in will passes by will. 297 **Pa**442, 147**A**96.

1535–80 48**RI** 231, 136**A**883.

1535–82 Undivided interest in realty does not pass as realty "possessed." 39**F(2d)**502.

1535–83½–New. Grant of right to occupy "residence property" in tract consisting of ten acres held to include all such tract. 84 **IndA**176, 149**NE**108.

1535–86½–New. Will devising interest in land "now standing" in name of estate of deceased husband held to refer to land previously received from said estate. 107**Conn**409, 140**A**639.

1536–94 Bequest to widow of so much of income of specified property as she may choose to take for her own support and use authorizes her to take whole income for that purpose. **NJCh** 130**A**11.

1536–97 29**Hawaii**815, 818 [citCyc]; 87 **IndA**149, 165**NE**435; 195**NC**405, 142 **SE**493; 157**SC**407, 154**SE**426.

1537–98 IndA 158**NE**643; 195**NC**405, 142**SE**493.

1538–6 Where widow was not obligated under will to account for income as it accrued, it became hers absolutely. 257**Mass**492, 154**NE**397.

1538–11 292**Pa**433, 141**A**261.

1539–15 Attempted disposition of another's property must be conclusively shown by will, to be given effect. **Tex CivA** 28**SW(2d)**997. **Will should not be construed to dispose of property not owned by testator** unless language is susceptible of no other construction. **TexCommnA** 22**SW(2d)**1065.

1539–21 154**Md**632, 141**A**377 (reversionary interest in ninety-nine year lease).

1540–26 But see 132**Misc**416, 230**NYS** 437.

1541–34 See also 252**Mass**176, 147**NE** 842.

1541–35 49**RI** 349, 142**A**609.

1541–37 239 **IllA**127, 137 [quotCyc].

1541–38 CalA 289**P**889.

1541–41 DC 37**F(2d)**997 (house with all its contents). **Gift of "all my personal property** including . . . household furniture," in will drafted by layman, has been held to include realty. 215**AppDiv**285, 213**NYS**480 (where no other dispositive provisions).

1542–45 236**Ky**77, 32**SW(2d)**556; 142 **SC**407, 141**SE**26, 39 [citCyc]. **Where enumeration of things is followed** by a more general description, only enumerated articles pass. 218**AppDiv**130, 217 **NYS**865. **Will leaving purely "personal effects"** under ejusdem generis rule does not include jewelry not specifically bequeathed. 218**AppDiv**130, 217**NYS**865.

1542–46 Illustrations.–165**La**755, 116**S** 175.

1542–47 Contra 149**Va**746, 141**SE**756.

1542–48 Contra 149**Va**746, 141**SE**756.

1542–50 Me 151**A**429(2dcase).

1542–50½–New. Will giving remainder of personal belongings to one and remainder of money to charity is construed as giving former all personal and household effects and residue of personalty to latter. 126**Misc**455, 214 **NYS**574.

1542–50½–New. Will devising residence and ground does not embrace personal property or furniture contained in house. 130 **Or**577, 281**P**178.

1543–55 29**Hawaii**854, 863 [quotCyc].

1543–57 131**Misc**21, 227**NYS**296.

1543–62 29**Hawaii**854, 863 [quotCyc].

1543–64 29**Hawaii**854, 863 [quotCyc].

1544–71 Money on hand or in bank.–136**Misc**169, 238**NYS**747; 190**NC**215, 129**SE**611. **Bequests of German marks** are regarded not as measure of value but as a commodity and are to be satisfied by payment in gold marks which pass as marks at time legacies are paid not in depreciated paper marks. 250 **NY**502, 166**NE**182, 63**ALR**521. **If at time of depreciated paper currency,** testator provides for legacy in dollars, legacy is payable in any money that is legal tender at time of his death. 250 **NY**502, 166**NE**182, 63**ALR**521.

1544–72 Bequest of "money in savings bank" as represented by savings bank books held to exclude deposits in savings department of national bank. 257 **Mass**415, 154**NE**80.

1544–73 126**Misc**455, 214**NYS**574; 190 **NC**215, 129**SE**611.

1544–77 83 **IndA**622, 149**NE**448; **NJCh** 151**A**741.

1545–80 Proceeds of sale of mortgaged real estate within gift of one third of proceeds means selling price less amount of mortgage. 199**Cal** 135, 248**P**517.

1545–81½–New. Bequest of proceeds of notes and mortgages excludes money not shown to be such proceeds. 142**SC** 407, 141**SE**26.

1545–86½–New. Stock in executor's possession when testatrix's son died is not included in bequest of "all my stocks and bonds" by testatrix. 111 **Conn**452, 150**A**526.

1545–87 A stock dividend, etc. 30 **Hawaii**680. **Stock dividends** pass to residuary legatees, if legacies of stock are general legacies. 192**NC**687, 135 **SE**855. **Recipients of "specific legacy" of shares of stock** are entitled to stock dividends. 192**NC**687, 135**SE**855. **"My stock in any company I may hold."** 9 **PaDist&Co** 307.

1546–94 162**La**649, 110**S**891.

1546–96 See also **MoA** 296**SW**833. **An erroneous description of corporate stock,** etc. 134**Misc**343, 236**NYS**239.

1546–96½–New. Gift of shares of stock will not fail because they are property of corporation in which testator owned all stock. 124**Misc**674, 209**NYS**776.

1546–96½–New. Bequest of stock of corporation of which testator was sole owner held to be free from any claim of estate for advances made. **TexCivA** 158**SW(2d)**1110.

1546–98½–New. "Securities" has been held to include stocks and bonds. 217 **Ala**426, 116**S**127.

1547–5½–New. Selection by auditing judge of one two thousand dollars bond for two one thousand dollars bonds called for by will held proper. 289**Pa** 297, 137**A**268.

1547–6 Bequest of notes does not pass debentures in form of notes. **Ont** [1928] 2**DomLR**322.

1547–8½–New. Testamentary disposition of nonnegotiable note is disposition of right of proceeds. 165**La**357, 115**S** 618.

1547–8½–New. Bequest of promissory notes will not include debentures in form of promissory notes. 62 **OntL**184, [1928] 3**DomLR**54.

1547–12½–New. Devise of half interest in business entitles beneficiary to income from business as then conducted. **CalA** 290**P**54.

1547–18 205 **Iowa**132, 215**NW**643.

1548–30 30**Hawaii**217, 223 [quotCyc].

1549–39 But see **Mass** 168**NE**102.

1549–43 106**Conn**19, 137**A**20, 23 [citCyc]; 208**Ky**441, 271**SW**600 (bequest construed as giving corpus of wife's estate but not income); 169**La**696, 125**S** 858 (usufruct); 83**NH**422, 144**A**523; 103**NJEq**435, 143**A**222. **Rule applies alike to common and preferred stock.**–106**Conn**19, 137**A**20. **Income and dividends on stock accruing prior to testator's death,** whether in cash, property, or stock dividend, belongs to testator and are not part of specific legacy or pass to specific legatee in absence of contrary intent. 106**Conn**19, 137**A**20. **Devise of fee to survivor's issue** on death of either of grandchildren without issue does not entitle survivor to life income of entire estate. **Vt** 151**A** 654.

1550–44 83**NH**422, 144**A**523.

1550–45 106**Conn**19, 137**A**20. **Stock di-**

vidends consisting of stock in another corporation declared in testator's lifetime do not pass with specific legacy. 106Conn19, 137A20. **Intention to exclude stock dividend** declared in testator's lifetime held shown by republication and redeclaration of will in codicil executed after declaration of dividend. 106Conn19, 137A20. **Intention to include stock dividend** declared in testator's lifetime held not shown. 106 Conn19, 137A20.

1550-47½-New. Fact that declaration of stock dividend in testator's lifetime reduces value of specific legacy of shares of stock does not entitle legatee to proportionate share therein. 106Conn19, 137A20.

1550-48 268US161. 45SCt475. 69L ed 897; 15DelCh84. 131A529; 315Mo 627. 287SW316; 101NJEq432, 138A530; 128 Misc909, 220NYS770; 133Misc17, 231 NYS355; 135Misc247, 238NYS765; 133 Misc222, 231NYS613; 296Pa185, 145A 806. **Where net balance of income of trust is given absolutely** beneficiary has vested equitable interest in capital. Pa 151A577.

1550-50 131Misc238, 226NYS637 (bequest to trustee to pay income only to charity).

1551-51 157Miss38, 127S561; 136Misc 36, 242NYS447; 25 OhA48, 156NE915.

1551-52 220Ky101, 294SW776.

1551-53 220Ky101, 294SW776.

1551-53½-New. , except where a contrary intention clearly appears. 260 Mass250, 157NE358.

1551-58 130Misc299, 224NYS308. **In possession of legatee.**-265Mass285, 163 NE877.

1552-60 165La357, 115S618.

1552-63 See also 10PaDist&Co 617.

1552-65 165La357, 115S618.

1554-78½-New. Provision that nephew shall not be required to pay any indebtedness owing to testator at time of testator's death cancels indebtedness of corporation, capital stock of which is all owned by nephew. 160Tenn57, 22 SW(2d)6.

1554-79 220Ala654, 127S221.

1555-84 TexCivA 286SW642. **Wife's interest in community property** not disposed of where there is a specific provision in will stating so. TexCommnA 15SW(2d)220. **Community real property in another state is not included** in devise to wife of half of community property to which she is entitled, and remaining half to others. CalA 289P 889.

1555-85 TexCivA 286SW642.

1555-87½-New. Bequest to wife of all property of which testator should die seized and possessed does not include community estate. TexCommnA 22SW (2d)1065.

1555-87½-New. Community real property of sister state does not pass "by laws of California," decedent's state, within meaning of testamentary provision. CalA 289P889.

1556-95 129Misc15, 220NYS635.

1556-96 CalA 291P851; 337 Ill 387, 169NE232; 338 Ill 611, 170NE774; 124 Kan267, 259P707; 86NY210; 129Misc 15, 220NYS635; 8PaDist&Co 52. See also 10NYS935. Contra 10PaigeNY140. **Though will only mentions realty by implication,** nevertheless after-acquired realty passes. 99NJEq625, 133A872. **Will devising all testator's interest in family homestead which came to her from her parents** held to carry after-acquired inherited interest. 129Misc15, 220NYS635.

1557-98 124Kan267, 259P707.

1557-2 129Misc15, 220NYS635.

1557-4 Me 149A603. Contra 129Misc 15, 220NYS635.

1557-5 217AppDiv767, 216NYS410. **An enumeration of the pieces of the property devised,** etc. 309Mo 488, 274SW798. **Presumption against intestacy** did not authorize court to include after-acquired property where will did not show intention. Me 149A603.

1558-10 129Misc15, 220NYS635.

1558-11 Will disposing of specific property, making special bequests definitely limited in amount, and containing no residuary clause, cannot be construed as passing after acquired property. 213Ala512, 105S641.

1559-21 107Conn409, 140A639; 327 Ill 85, 158NE356; 338 Ill 391, 170NE243; 149Miss70, 115S109; 134Misc753, 236 NYS388.

1559-23 338 Ill 391, 170NE243; 149 Miss70, 115S109; 135Misc538, 240NYS 339.

1560-26½-New. Slight inaccuracies in description will be disregarded where testator's intention was reasonably apparent. 134Misc753, 236NYS388.

1560-27 All personal property "except notes" held to include certificates of deposit. 215Ala685, 112S222.

1560-28 91PaSuper53.

1560-28½-New. Exception in will is something existing as part of thing devised but which is excepted from operation of instrument. TexCommnA 22SW (2d)1065.

1560-30 DelCh 149A432; 288Pa525, 136A778. **Bequests held substitutional.**-232Ky83, 22SW(2d)416.

1561-31 153Md291, 138A20; 191NC802, 133SE168, 170 [citCyc]; 288Pa91, 135A 618, 619 [quotCyc]. **Burden of showing that will bequeathed two legacies** is on legatee. 288Pa91, 135A618.

1561-32 263Mass1, 160NE441; 191NC 802, 133SE168, 170 [citCyc].

1561-33 82NH281, 133A166, 45ALR 1433.

1562-34 DelCh 149A432.

1562-35½-New. Clause, bequeathing sums to be paid monthly, followed by clause giving residue to trustee, has been held to cover merely period when estate was in probate and to terminate when trust began. 12F(2d)896.

1562-36 DelCh 149A432; 191NC802, 133SE168. **Intent of testatrix** that legacies should not be cumulative must be disclosed by words of instrument itself. DelCh 149A432.

1562-40 153Md291, 138A20.

1562-45 DelCh 149A432; 289Pa433, 137A608; 8PaDist&Co 263.

1563-46 289Pa433, 137A608; 8Pa Dist&Co 263. **Rule is inapplicable** where original legacy is given to legatee directly and subsequent legacy is given to trustee for his benefit. 292Pa556, 141A 484.

1563-52 81Colo 152, 254P161; 333 Ill 577, 165NE348; 137Misc46, 243NYS136 (sole legatee held residuary legatee under statute); 192NC131, 133SE431; 47 RI 314, 132A888. **Particular work held to create residence.**-81Colo 152, 254P161. **Will stating that relatives other than these mentioned shall not share** does not make one of those mentioned residuary legatee. 85CalA500, 259P992.

1563-53 175Ark1130, 1SW(2d)809; 266 Mass500, 165NE657; 194Wis330, 216 NW501.

1563-54 127Misc579, 217NYS323 (pay over balance). **"Balance" to be divided,** following enumeration of bequests, held to mean residue of estate, rather than remainder of personalty. 142Va680, 128 SE252.

1563-55 86CalA173, 260P575; 261Mass 205, 158NE659; 263Mass47, 160NE331; 131Misc720, 228NYS652; 192NC131, 133 SE431; 151Va622, 144SE620. **Illustrations.**-190NC147, 129SE187, 188. **Term "undisposed of"** used in will is meant to convey idea of parting or not parting with something. 289Pa101, 137A132. **Words held insufficient to constitute residuary clause.**-151Miss33, 117S830. **Clause disposing of practically entire balance of estate among named legatees** held to constitute residuary clause. RI 151A193.

1564-57 See also 126Misc726, 215NYS 318.

1564-57½-New. Residuary clause in a will must be read together with rest of instrument so as to give effect to intention of the testator. 218AppDiv130, 217 NYS865.

1564-57¾-New. Residuary claim in will of donee of power of appointment of trust is sufficient execution of power where there is nothing in will showing intention to contrary. 257Mass72, 153 NE337.

1564-57¾-New. To give effect to all parts of will, general words of residuary clause may be limited in application. 320Mo 543, 8SW(2d)1008.

1564-58 19F(2d)974; 124Kan267, 259 P707; MoA 296SW833; 127Misc579, 217 NYS323. See also 315Mo 627, 287SW 316, 325 [quotCyc]; 190NC147, 129SE 187. **This rule is not for the determination of who shall be distributees but for** the determination of what property shall go into the residuum. 315Mo 627, 287 SW316.

1564-59 207 Iowa374, 223NW106. See also 315Mo 627, 287SW316, 325 [quot Cyc].

1564-60 190NC147, 129SE187. See also 315Mo 627, 287SW316, 325 [quot Cyc]. **But a general and unambiguous residuary clause** should be construed neither broadly nor narrowly but according to testator's intention. 315Mo 627, 287SW316.

1564-60½-New. Purpose of general residuary clause is to dispose of things forgotten, overlooked, or unknown. 190 NC147, 129SE187.

1565-61 162La758, 111S86.

1565-61½-New. Courts of equity cannot permit disposition of residue so as to defeat intention of testator or allow trustee to use it for its own purposes. 30 OhA345, 165NE101.

1565-62 190NC147, 129SE187. **Rule ejusdem generis is rarely applied** to restrict the meaning of language contained in a residuary clause. 8PaDist&Co 52.

1565-65 262Mass159, 159NE513; 229 AppDiv574, 243NYS165; 137Misc627, 244NYS255.

1567-70½-New. Intention to include every interest is presumed and intention to exclude must appear from other parts of will. 137Misc627, 244NYS255.

1567-71 CalA 290P54; 81Colo 152, 254 P161; DelCh 152A115; 263Mass47, 160 NE331; 149Miss201, 115S344; 134Misc 574, 236NYS316; 194Wis330, 216NW 501. See also 218Ala147, 117S670; 49 RI 308, 142A605. **Interest in partnership realty where interest in partnership otherwise disposed of.**-213Ky203, 280SW960. **Residue "from whatever source derived"** does not include property in which testator had been left life estate with power to dispose, but remaining "undisposed of." 221AppDiv 211, 223NYS361; 221AppDiv209, 223 NYS364.

1567-74 Whole will must be considered to determine whether legacy of shares of stock is specific or general. 192NC 687, 135SE855.

1567-75½-New. Residue of estate must be considered as formed at death of testator. Mass 167NE281.

1567-76 259Mass200, 156NE438; 8Pa Dist&Co 52 ("my other belongings"). **The words "give and bequeath,"** etc. 259Mass200, 156NE438 (word "give" alone). **Provision as to receiving stated amount in cash** if residue does not amount to certain sum does not limit previous gift of one half of residue, real and personal, to personal property. 259 Mass200, 156NE438. **Direction "to pay over" balance of funds, to care for poor patients, and to endow beds** does not show intention to exclude realty because amount thereof would be too large, since excess over that needed to endow beds could be used to care for poor patients. 127Misc579, 217NYS323.

1568-77 See also 154Md378, 140A100. But see 294Pa261, 144A129. **Payment over of balance of "funds" held not to show intention to exclude realty.**-127 Misc579, 217NYS323.

1568-80 337 Ill 387, 169NE232; 124 Kan267, 259P707.

1569-82½-New. Residuary clause disposing of balance passes only balance of personal property where previous clause disposed of personal property. 197NC 761, 150SE359.

1569-86 108Conn100, 142A851; Mass 171NE734 (provision bequeathing property of which testator may die seized does not prevent operation of rule); 134Misc574, 236NYS316. **Income per autre vie.**-125Misc32, 210NYS24. **Under will devising one-half of residue of estate to children of testator's grandson on grandson's death,** income from such residue is to be distributed as income of intestate estate, and not to be accumulated. 109Conn7, 144A659(2d case).

1569-86½-New. Testator, in making will, is presumed to have known law regarding payment of income on shares of residue to residuary legatees of estate pending estate's settlement. 108Conn 100, 142A851.

1569-86½-New. Residuary legatees are entitled to income on residuary estate. 133Misc826, 234NYS892.

1569-87 80Colo 461, 251P595, 596 [cit Cyc]; 31Colo 152, 254P161; 326 Ill 425, 158NE127; 317Mo 587, 296SW382; 194 Wis330, 216NW501. See also 248 IllA 406. **Trust fund, lapsing for death of beneficiary,** passes by residuary clause. 80Colo 461, 251P595.

1570-91 200Cal 252, 252P1039; 35 OhA 283, 172NE386.

1570-93 315Mo 627, 287SW316, 325 [quotCyc].

1570-94 239 IllA127, 133 [quotCyc]; 266Mass500, 165NE657.

1571-95½-New. Interest of residuary legatee can be determined only by settlement of estate and ascertainment of what residuary estate consists of. Iowa 229NW721.

1571-95½-New. Whether there is a residuary estate can only be determined by court having jurisdiction of settlement of estate. Iowa 229NW721.

1571-99 106Conn137, 137A388 (descriptive words unnecessary).

1571-1 286Pa382, 133A545, 46ALR777.

1571-2 That testatrix owned only undivided interest in property held not to void gift thereof. 289Pa297, 137A268.

1571-3 124Kan633, 261P582; 212App Div558, 209NYS341; 296Pa126, 145A 706. **Devise may be construed as limited** rather than absolute in order to effectuate testator's intention. 233Ky737, 26SW(2d)1034.

1571-5 Estate granted by one clause cannot be cut down by subsequent clause unless language is plain and unequivocal. 317Mo 516, 297SW70.

1571-5½-New. Residuary estate devised to cemetery association with direction to keep testator's lot in good condition may be used for any general purpose of association. 125Misc634, 211 NYS841.

1571-5½-New. Testator is presumed to have given an unqualified interest or estate in absence of terms limiting the same. 98NJEq554, 131A302.

1571-5¼-New. Subsequent words will not reduce absolute estate unless such intention of donor is reasonably apparent. 285Pa186, 131A714.

1571-5½-New. Fact of disposal of real and personal property in same sentence is circumstance indicating same estate in both kinds of property. 331 Ill 287, 162NE855.

1571-5¼-New. That testator disposed of real and personal property in same sentence does not give rise to conclusive presumption that he intended residuary devisees and legatees to take same estate in both kinds of property. 331 Ill 287, 162NE855.

1571-5½-New. Rules of construction as to estate created obtain whether gifts are of realty or personalty. NJCh 145 A540(2dcase).

1571-6 253NY260, 170NE912.

1572-10½-New. Language of clause creating limitation of estate in will must be clear as that of first clause creating estate; but, if it shows clearly any intention to impose limitation on estate, such intention will be given effect. 330 Ill 624, 162NE164.

1572-12 Gift of "first right to my home" gives beneficiary only right to take home at fair valuation. 88PaSuper 530.

1573-24 50RI 369, 147A884. **Particular provisions,** etc. 132SC120, 128SE837.

1573-26 218Ala219, 118S402; 316 Ill 460, 147NE433 (prior to statute); 321 Ill 368, 151NE905; 124Kan592, 261P 597; Mo 276SW17; 194NC411, 139SE 838 (unrestricted devise); 122 Or246, 257P818; 287Pa334, 135A262. **Construction of will as vesting fee held proper.**-227Ky643, 13SW(2d)1001.

1573-29 321 Ill 368, 151NE905; 324 Ill 574, 155NE378.

1574-30 321 Ill 368, 151NE905; 212 AppDiv558, 209NYS341.

1574-31 124Kan592, 261P597.

1574-32½-New. "All that certain house and lot" is sufficient to vest fee. 290 Pa508, 139A144.

1574-34 119Kan402, 239P747 (devise and bequest to testator's wife "as long as life doth last" construed as giving fee); 227Ky643, 13SW(2d)1001; 194 NC411, 139SE838; 196Wis357, 220NW 383.

1574-34½-New. Provision giving beneficiary "first right to my home" is insufficient to pass fee. 88PaSuper530.

1574-35 218Ala320, 118S553; 109Conn 7, 144A659(2dcase); 222Ky143, 300SW 330; 229AppDiv302, 241NYS589; 230 AppDiv704, 243NYS158; 137SC380, 135 SE469. **"Body heirs"** may sometimes be words of purchase. 129Kan786, 284P 436. **"Heirs" may take by purchase** where that intention clearly appears. 233Ky737, 26SW(2d)1034.

1575-37 Nebr 228NW618; 137SC380, 135SE469; 150SC111, 147SE659; 151 Va472, 145SE300.

1575-33 NJ 146A55.

1576-39 34F(2d)690; DelCh 147A244; 322 Ill 597, 153NE746; 124Kan592, 261 P597; MoA 31SW(2d)271; NJCh 145A 540(2dcase); 30 OhA34, 164NE57; 122 Or246, 257P818; 291Pa458, 140A502; 300Pa146, 151A339; 47RI 403, 133A661.

1576-40 316 Ill 460, 147NE433; 321 Ill 368, 151NE905; 85 IndA528, 152NE870; 223Ky792, 4SW(2d)745; 99NJEq762, 134A357; 212AppDiv558, 209NYS341; 287Pa334, 135A262 (to husband and assigns); 290Pa213, 138A822; 293Pa21, 141A644; 95PaSuper187; 47RI 403, 133 A661. **Fact that there is gift over at death of devisee,** construed to mean death in lifetime of testator, does not prevent gift without words of inheritance from being fee. 47RI 403, 133A 661. **Will devising estate to widow to hold and enjoy as she thinks best, as long as she remains widow,** devises fee. 293Pa21, 141A644.

1577-41 316 Ill 460, 147NE433 (intention drawn from whole instrument); 331 Ill 287, 162NE855; 223Ky792, 4SW (2d)745; 127Misc735, 217NYS513; 192 NC191, 134SE451; 290Pa508, 139A144; 104WVa274, 139SE858.

1577-42 321 Ill 368, 151NE905; 322 Ill 597, 153NE746; Iowa 228NW655; 134 Misc837, 236NYS443; 95PaSuper187 (rule applied in construing single sentence); 148Va503, 139SE286; 104WVa 274, 139SE858.

1577-42½-New. Presumption arising under statute of North Carolina that estate in fee simple is intended may be overcome by plain and express words. 192NC191, 134SE451.

1577-43 NJCh 139A47; 26 OhA377, 160 NE488; 100Vt51, 134A853.

1578-46 IndA 152NE863; 250Mich385, 230NW151.

1578-51 127Misc735, 217NYS513.

1578-52 IndA 152NE863; Mo 26SW (2d)778; 293Pa21, 141A644; 11PaDist &Co 265. **Words held mandatory** and to reduce fee to life estate. 287Pa334, 135 A262. **"Request."**-30 OhA34, 164NE57.

1579-54 321 Ill 368, 151NE905.

1579-55 321 Ill 368, 151NE905.

1579-56 122Kan814, 253P600; Mo 29 SW(2d)116; 99NJEq762, 134A357; NJ Ch 145A540(2dcase); 137Misc46, 243 NYS136. **Devise of fee subject to life estate** gives estate in fee to plaintiff devisee after death of life tenant. 105Conn 308, 135A394. **Simple reservation of use of coal to family** does not prevent grant from being absolute fee. 284Pa482, 131 A377.

1579-56½-New. Devise of right of dower in real estate has been held not to constitute prior life estate supporting remainders in fee to children. 331 Ill 287, 162NE855.

1580-60 221Ala364, 128S458; 99NJEq 592, 133A531.

1580-61 326 Ill 608, 158NE444.

1580-63 215Ala603, 112S241; 15DelCh 174, 138A613; 321 Ill 368, 151NE905; 322 Ill 597, 153NE746; 227Ky466, 13 SW(2d)494; 100NJEq343, 134A758; 98 NJEq532, 131A521; 99NJEq592, 133A 531; 100NJEq48, 135A347; NJCh 145A 540(2dcase); NJCh 151A275; 215App Div285, 213NYS480 (where property not otherwise disposed of); 133Misc42, 231 NYS191; 189NC628, 127SE626; 91Pa Super245; 10PaDist&Co 111; 104WVa 274, 139SE858; 194Wis428, 216NW840. See also Iowa 228NW655; 225Ky215, 7 SW(2d)1043. But see 134Misc803, 237 NYS215. **Absolute power to dispose of fee** held not affected by statute as to collateral or naked powers. 215Ala603, 112S241. **Implied power to consume** entails right to dispose of property. 293 Pa21, 141A644. **Grant of discretionary power to devisee to hold and enjoy property "as she thinks best"** indicates intention to permit devisee to dispose of and consume property. 293Pa21, 141A 644.

1581-64 156Miss885, 127S581; NJCh 139A47.

1581-67½-New. , or in vague terms as to nature of power. 99NJEq592, 133A 531.

1582-68 101Vt464, 144A457. **A life-estate only, etc.-WVa** 140SE407.

1582-69 218Ky691, 291SW1054. See also 100NJEq48, 135A347.

1583-77 225Ky725, 9SW(2d)1074.

1583-78 Mo 29SW(2d)116.

1584-82 21 OhA236, 152NE768. **Will providing for payment of net proceeds of rental** of farm to legal heirs for twenty five years, when land may be sold or divided for them, devised a fee to such heirs. 179Ark30, 13SW(2d)810.

1584-83 15DelCh84, 131A529 (gift over on death); 316 Ill 460, 147NE433; 330 Ill 624, 162NE164; 153Md408, 138A258; 286Pa382, 133A545, 46ALR777; 88Pa Super113. **A devise of lands,** etc. 221 AppDiv211, 223NYS361. **Gift over on death of devisee husband** held to give life estate to husband. 213Ala676, 105 S881. **Fee title does not vest** where will directs certain payments to be made. TexCivA 22SW(2d)313(2dcase).

1584-84 Fla 129S835; 316 Ill 460, 147 NE433; 286Pa382, 133A545, 46ALR777.

1585-85 100NJEq48, 135A347.

1585-85½-New. or is intended to refer to facts existing at time of testator's death; 284Pa497, 131A280 (survivorship).

1585-85¼-New. Where language sufficient to create fee simple in absence of clear intention to cut down a fee simple estate will pass. 324 Ill 574, 155NE 378.

1585-88 105Conn308, 135A394; 318 Ill 474, 149NE486; 79 IndA683, 147NE305; 118Kan215, 234P1000; 291Pa458, 140A 502. **Estate cannot be limited** by subsequent words not as clear and decisive as words giving estate. 126Misc28, 211 NYS772. **Unambiguous and positive language** capable of only one meaning is necessary to cut down positive and express devise of estate in fee. 105Conn 308, 135A394. **Language too ambiguous** to cut down fee simple. 318 Ill 474, 149NE486. **Substitutionary gift to lineal descendants** will not destroy the absolute gift to the more immediate relatives, unless that intention appears in language which is free from ambiguity. 109Conn7, 144A659(2dcase).

1585-86½-New. Devise in fee simple is not invalid by reason of attempt to charge invalid legacies thereon. 212App Div558, 209NYS341.

1585-86½-New. Testator cannot impose conditions incompatible with usual and necessary incidents of a fee simple. 144Va297, 132SE351.

1585-86¼-New. Where alleged limitation over is a mere reservation, the fee is not reduced. 284Pa482, 131A377.

1585-86½-New. Bequest of personalty as life estate after devise of realty in same instrument does not reduce fee simple in realty. 324 Ill 574, 155NE 379.

1585-86¼-New. If intent to vest in first legatee uncontrolled power of disposition is shown limitation over is void. 100NJEq48, 135A347.

1585-86½-New. Rule declaring life estate only in first taker does not apply where he had unrestricted power of alienation. 100NJEq48, 135A347.

1585-86½-New. Where estate of first taker is by express words disclosed to be in fee simple, subsequent provisions reducing estate must clearly show intent. 217Ala418, 116S116.

1585-86½-New. Where estate of first

taker is not expressly declared to be in fee but such is legal import of terms, presumption that they are used in technical sense may be overcome by subsequent provisions. 217Ala418, 116S116.

1585-86½-New. Under will providing that guardian should take possession of and manage certain mineral lands until beneficiary became of age, beneficiary took an estate in fee, in that limitation therein referred to period of guardian's management and possession and not to estate limited to grandson. 218Ala219, 118S402.

1585-87 77CalA792, 247P1093; 105 Conn261, 135A555; 322 Ill 597, 153NE 746; 327 Ill 288, 158NE567; Iowa 227 NW614; 118Kan215, 234P1000; 210Ky 773, 276SW844; 217Ky158, 289SW221; 231Ky370, 21SW(2d)477; 152Md459, 136A895; 176Minn516, 223NW785; 309 Mo 488, 274SW798; NJ 146A55; 100 NJEq48, 135A347; 193NC294, 136SE 733; 20 OhA279, 151NE795; 24 OhA 117, 156NE223; 122 Or246, 257P818; 287Pa334, 135A262; 290Pa213, 138A 822; 150SC111, 147SE659; 144Va297, 132SE351; 144Va533, 132SE344; 148 Va503, 139SE286. **A fee can be defeated only by a subsequent provision which shows clearly,** etc. Mo 26SW(2d)778; 290Pa213, 138A822. **If testator's intention,** is that gift should be other than fee simple, it is wholly immaterial in what part of will such intention is manifested. 333 Ill 643, 165NE208. **Rule has no application where defeasible fee is given.**-232Ky251, 22SW(2d)612.

1585-88 77CalA792, 247P1093; 327 Ill 288, 158NE567; 152Md459, 136A895; NJ 146A55; 100NJEq48, 135A347; 132 Misc269, 230NYS165; 135Misc156, 237 NYS293 (reversion of share on son dying before his wife); 20 OhA279, 151NE 795; 148Va503, 139SE286. **Limitation over on death of first taker held to mean in testator's lifetime.** 105Conn308, 135 A394.

1586-90 172Ark1073, 291SW818, 822 [quotCyc]; 228Ky639, 15SW(2d)513; 193NC294, 136SE733. But see 20 OhA 279, 151NE795. **Devise to wife for life** with remainder to legatee named and her bodily heirs held to create estate in fee simple in legatee on death of wife. 173Ark277, 292SW370.

1586-92 189NC628, 127SE626.

1586-93 77CalA792, 247P1093; IndA 167NE617(2dcase); 122 Or246, 257P 818; 290Pa213, 138A822.

1587-95 221Ala364, 128S458; 168Ga 779, 149SE124(2dcase); 318 Ill 474, 149 NE486; 321 Ill 368, 151NE905; 79 IndA 683, 147NE305; IndA 152NE863; IndA 167NE617(2dcase); 220Ky101, 294SW 776; Mo 271SW815; 309Mo 488, 274 SW798; 320Mo 852, 8SW(2d)931; Mo 32SW(2d)591; MoA 31SW(2d)271; 116 Nebr785, 219NW138; 115 Oh35, 152NE 10; 21 OhA174, 151NE733 (language must be as clear as that granting fee); 24 OhA117, 156NE223; 290Pa213, 138A 822; 293Pa21, 141A644; 296Pa31, 145 A674; 297Pa283, 146A892; 104WVa 274, 139SE858. But see 317Mo 516, 297 SW70; 138Misc372, 245NYS703; 286 Pa382, 133A545, 46ALR777. **Language of will which undertakes to cut down an estate must be as clear as that which makes the gift.** 30 OhA73, 163NE922. **Where words immediately following language suitable to create fee indicate dominant intent to give less estate,** purpose will be upheld. 13PaDist&Co 103.

1587-95½-New. Inconsistent limitation following estate in fee should be construed as applying to event of prior devisee in fee dying in testator's lifetime. 105Conn308, 135A394.

1587-95½-New. Provision for life estate in widow of devisee held meant to take effect only if devisee died before testator. 105Conn308, 135A394.

1587-95¼-New. Fee to devisee held not to be cut down by subsequent gift over in case of devisee's death without children. 105Conn308, 135A394.

1587-95½-New. Devise of fee to widow on understanding that she should devise half of her share to others, without directing gift over in case of failure of power of appointment is a devise of fee subject to be divested by execution of appointment. 98CalA306, 277P123.

1587-95½-New. Will providing trustee could make payments to third parties on behalf of brother, if necessary, did not prevent vesting of estate. 296Pa 185, 145A806.

1587-95¾-New. Authority of brother to dispose of property was not prevented by fact that income was not given directly to beneficiary but through a trustee. 296Pa185, 145A806.

1587-95½-New. Inconsistent limitation is to be reconciled by reading latter disposition as applying exclusively to event of prior devisee in fee dying in the lifetime of testator. 109Conn7, 144 A659(2dcase).

1587-95½-New. Under statute providing that, when no further devise to take effect after devisee's death is made, a fee-simple estate vests in devisee, such estate implied in undefined grant may be limited by later disposition in terms revealing such intention of devisee, though less explicit than required to cut down fee expressly given. 320Mo 852, 8SW(2d)931.

1587-96 Iowa 227NW614; 208Ky843, 272SW15; 217Ky158, 289SW221; 100 NJEq48, 135A347; 30 OhA34, 164NE 57; 101Vt464, 144A457; 144Va533, 132 SE344. But see 98CalA306, 277P123.

1587-97 322 Ill 597, 153NE746; 100NJ Eq48, 135A347.

1587-98 296Pa31, 145A674.

1587-99 232Ky92, 22SW(2d)414.

1587-1 217Ky158, 289SW221; 231Ky 370, 21SW(2d)477; 198NC661, 153SE 118(2dcase); 285Pa460, 132A529; 144 Va533, 132SE344. **Will held to show intention to make absolute gift.**-126 Misc28, 211NYS772.

1588-2 15DelCh84, 131A529 (gift over on death); Fla 129S835; 331 Ill 287, 162NE855; 233Ky388, 25SW(2d)1040; 309Mo 488, 274SW798; 127Misc647, 217 NYS381; 127Misc639, 217NYS393; 221 AppDiv211, 223NYS361; 221AppDiv 209, 223NYS364; 135Misc690, 238NYS 266; 21 OhA174, 151NE783; 25 Oh NPNS393; 285Pa460, 132A529; 287Pa 334, 135A262; 88PaSuper113; Man [1930] 3DomLR820.

1588-3 15DelCh84, 131A529; 248NY 76, 161NE425; 221AppDiv211, 223NYS 361; 221AppDiv209, 223NYS364.

1588-5 178Ark100, 9SW(2d)1059; 105 Conn261, 135A555; 135Misc568, 239 NYS155; 21 OhA236, 152NE768; 287 Pa334, 135A262; 11PaDist&Co 555.

1588-6 176Ark548, 3SW(2d)305; Nebr 227NW917; 24 OhA117, 156NE223; 9 PaDist&Co 439.

1589-15 316 Ill 460, 147NE433; 214 Ky320, 283SW103, 106 [citCyc]; 289 Pa473, 137A676.

1590-20 316 Ill 460, 147NE433; 338 Ill 391, 170NE243; 232Ky251, 22SW (2d)612.

1590-21 172Ark1073, 291SW818; 83 Colo 575, 267P408; 199Wis51, 225NW 184.

1590-22 137SC380, 135SE469.

1590-23 5PaDist&Co 551; 150SC111, 147SE659.

1590-24 316 Ill 460, 147NE433; 232 Ky666, 24SW(2d)558; 192NC285, 134 SE849; 197NC488, 149SE731.

1590-25 216Ky289, 287SW710; 192 NC285, 134SE849.

1590-26 Va 152SE339.

1591-32 25 OhA242, 158NE12 (death within twenty years).

1591-39½-New. Limitation of fee after fee.-Fee may be limited after fee by will. 193NC294, 136SE733.

1591-39½-New. In order that fee may be limited after fee there must be some contingency which defeats estate of first taker. 193NC294, 136SE733.

1591-39¼-New. In all cases of vested estates in several, with survivorship among them, devisees take base fee. 219Ala89, 121S67.

1591-40 218Ala320, 118S553; 219Ala 533, 122S625; 172Ark1065, 291SW823; DelCh 147A244; 168Ga492, 148SE327 (2dcase); 207 Iowa71, 218NW926(2d case); 210Ky824, 276SW977; 214Ky 320, 283SW103, 106 [citCyc]; 221Ky 642, 299SW541; 223Ky656, 4SW(2d) 690; 228Ky639, 15SW(2d)513; 229Ky 640, 17SW(2d)741; 232Ky251, 22SW (2d)612; 316Mo 626, 291SW488; 128 Misc553, 220NYS188; 190NC815, 130SE 867; 192NC240, 134SE641; 192NC285, 134SE849; 197NC488, 149SE731; 20 OhA279, 151NE795; 131SC374, 127SE 607; 153SC382, 150SE895 (one procuring interest of devisee and all others has fee simple though devisee dies without issue); Va 152SE339. See also 191 NC332, 131SE647. But see 230Ky488, 20SW(2d)90. **A devise of personalty,** etc. 102NJEq489, 141A449.

1592-41 214Ky320, 283SW103; 20 OhA279, 151NE795; 6PaDist&Co 305.

1592-41½-New. There can be no fee conditional where there is a good executory devise over. 150SC111, 147SE 659.

1592-42 214Ky320, 283SW103, 106 [cit Cyc].

1592-45 101NJEq411, 138A103. **Where beneficiary dies before reaching designated age** leaving issue, bequest goes to administrator. 101NJEq411, 138A103.

1592-47 105Conn308, 135A394.

1593-49 210Ky824, 276SW977. **Appointment of trustee** for devisee held to indicate estate in fee defeasible on her death at any time. 210Ky824, 276SW 977.

1593-50 103Conn308, 130A483; 132SC 120, 128SE837.

1593-51 103Conn308, 130A483.

1593-52 216Ky289, 287SW710; Nebr 229NW124; 133Misc566, 238NYS414; 293Pa21, 141A644; 6PaDist&Co 609. **Marriage later annulled for insanity of spouse** held sufficient to postpone distribution under will. 216Ala448, 113S 501.

1593-53 247NY97, 159NE875. But see 146SC194, 143SE818.

1593-54 233Ky554, 26SW(2d)497.

1593-56 192NC726, 135SE858; 192NC 744, 135SE871.

1593-57 334 Ill 448, 166NE70.

1593-59 131SC374, 127SE607; 137SC 380, 135SE469.

1594-63 137SC380, 135SE469.

1594-67 225Ky215, 7SW(2d)1043.

1595-81 214Ala288, 107S838.

1595-82 146Va134, 135SE819.

1596-86 Restraint on alienation is ineffective where estate tail with its legal consequences is created, especially where no effective bar or alternative consequence to enforce it is provided. 124 Kan604, 261P840.

1597-88 Provision for distribution after deaths of life tenants to their bodily heirs in fee simple does not create estate tail, words in fee simple being inconsistent with usual form of limitation in estate tail to bodily heirs. 28 OhA 172, 162NE608.

1597-90 319Mo 1001, 5SW(2d)74.

1597-92 15DelCh15, 130A32 ("to him and the heirs of his body lawfully begotten free and discharged of all trusts," notwithstanding substitutional gifts in fee simple on failure of contingency upon which estate vested).

1597-93 See also Kan 289P431(2d case).

1597-97 170Ark679, 280SW993; 119 Kan773, 241P696 (devise to designated person and to his children of his own blood, born in lawful wedlock).

1598-98 126Kan610. **Devise to daughters and their children to be entailed for their use and benefit** creates life estate and remainder to children. 234Ky104, 27SW(2d)679.

1598-99 Can [1928] 3DomLR773.

1598-1 124Kan604, 261P840.

1598-4 214Ala288, 107S838 (holding rule applicable, though clause in same item devised other land "to himself," meaning first taker); 146Va134, 135SE 819.

1598-7 126Kan610; 232Ky666, 24 SW(2d)558. See also Ont [1928] 4DomLR666.

1598-7½-New. Devise to brother and sister and their heirs forever is not within rule in Wild's case. 193NC294, 136SE733.

1598-8 193NC294, 136SE733.

1598-10 Can [1928] 3DomLR773.

1599-11 15DelCh15, 130A32.

1599-14 210Ky824, 276SW977.

1599-18 121Kan312, 246P982.

1599-19 210Ky824, 276SW977; Mo 150A875; 286Pa237, 133A252. **Where only life estate is given** and right of male heir to take is to be determined by existence of such person at death of first taker, only limited estate will pass. 286Pa237, 133A252.
1599-20 15DelCh15, 130A32.
1601-28 129Kan430, 283P642; 130Kan 634, 287P904; Kan 289P433.
1601-29 210Ky824, 276SW977. **Indefinite failure of issue means failure of issue** which may occur any time in future. Kan 289P433.
1602-42 200Cal 335, 253P706; IndA 169NE472(1stcase); NJPrerog 145A 867; 192NC630, 134SE629; 195NC268, 142SE10; 12PaDist&Co 416; TexCivA 48W(2d)268; Alta [1927] 3DomLR46. See also 11PaDist&Co 781. But see 161 Tenn187, 30SW(2d)227. **Other statements of rule.**–331 Ill 28, 162NE152.
1603-43½-New. Devise not creating remainder nor reflecting semblance of remainder is not within scope of provisions of rule in Shelley's case. 193NC 294, 136SE733.
1603-44 192NC630, 134SE629.
1603-46 15DelCh367, 138A606; 189NC 452, 127SE517. See also 10PaDist&Co 353.
1603-47 Mo 271SW815; 101NJEq439, 138A536; 152Tenn572, 280SW28.
1603-48 179Ark1004, 188SW(2d)1037; 131SC527, 128SE421 (rule not applicable). **If there is neither freehold in testator's children nor remainder to their heirs generally,** testator's children do not take fee under rule. 317 Ill 150, 147 NE788.
1603-49 333 Ill 112, 164NE154; 151Md 477, 135A245; NJPrerog 145A867; 192 NC630, 134SE629 (rule of property also); 197NC488, 149SE731; TexCivA 13SW(2d)176.
1604-50 331 Ill 28, 162NE152. **Devise to two sons subject to life estate** held to give fee simple estate to only son surviving testator. 289Pa473, 137A676.
1604-51 248 IllA57.
1604-52 156Md428, 144A367.
1604-53 200Cal 335, 253P706; 156Md 428, 144A367; 5PaDist&Co 301; 13Pa Dist&Co 26.
1605-54½-New. Under will devising property to trustees for benefit of son and of his heirs, son was vested of an equitable estate of inheritance in fee. 333 Ill 112, 164NE154.
1605-58 TexCivA 13SW(2d)176.
1605-60 The mere fact that a power is given to the first taker, etc. NS [1929] 1DomLR592.
1605-63 179Ark167, 14SW(2d)545(2d case); 179Ark402, 16SW(2d)569(1st case); 200Cal 335, 253P706; 15DelCh 367, 138A606; 318 Ill 266, 149NE245; 151Md477, 135A245; 192NC630, 134SE 629; 293Pa490, 143A200.
1606-64 318 Ill 266, 149NE245; 189NC 452, 127SE517.
1606-65 196NC668, 146SE710. **Statutes transforming estates tail to a fee,** etc. 213Ky547, 281SW522.
1606-66 NC 154SE660; TexCivA 4 SW(2d)268.
1607-69 317 Ill 150, 147NE788; 331 Ill 28, 162NE152; 12PaDist&Co 525.
1607-69½-New. Where estate in remainder is limited to children or grandchildren of ancestor, rule in Shelley's case does not apply. 317 Ill 150, 147NE 788.
1607-69½-New. Word "heirs" in will is not word of limitation describing those who are to take from generation, but is word of purchase describing persons who are to take estate at termination of trust. 317 Ill 150, 147NE788.
1607-69¼-New. There being neither freehold in testator's children nor remainder to their heirs generally, claim of testator's children that they take fee under rule is without merit. 317 Ill 150, 147NE788.
1607-69½-New. To bring rule in Shelley's Case into operation, word "heirs," in its technical sense, as importing class of persons to take indefinitely in succession, or some equivalent expression, must be used in limiting remainder. 331 Ill 28, 162NE152.
1607-69¾-New. Before a devise to one and his heirs is removed from the rule in Shelley's Case on ground that heirs take directly from testator, they must take independently of fact that they are heirs of person named as life tenant. 293Pa490, 143A200.
1607-70 151Md477, 135A245.
1607-71 TexCivA 13SW(2d)176. But see 331 Ill 28, 162NE152.
1607-76 161Ga356, 130SE575.
1607-77 Mo 271SW815. **Particular words following general.**–158La815, 104 S726. **Bequest for life with no gift over** creates absolute bequest. 15DelCh174, 138A613.
1608-81 Mo 271SW815.
1608-82 82NH380, 134A536.
1608-83 Mo 271SW815.
1608-84 Mo 271SW815.
1608-89 85 IndA528, 152NE870; 90Pa Super130.
1608-89½-New. Gifts of income of a fund in perpetuity is gift of fund despite directions for investment of fund unless language is clearly to the contrary. Ont [1927] 2DomLR113.
1608-89¾-New. Devise of personalty to sister until she died devised personalty subject to debts and expenses. 137Misc 46, 243NYS136.
1609-93 299Pa369, 149A646; 10PaDist &Co 28.
1609-96 Mo 271SW815; NJ 129A742 (words "such part as may remain" after life estate have reference to shrinkage or loss of investments and do not give first taker right to expend any part of principal).
1610-3 15DelCh174, 138A613; IndA 152NE863; 100NJEq48, 135A347; NJ Ch 139A47; 194NC707, 140SE620.
1611-4 DelCh 139A787; 100NJEq48, 135A347; 144Va297, 132SE351. **Rule that effect be given to every part of will** is subordinate to rule that absolute bequest cannot be cut down by subsequent words not equally clear and decisive. 126Misc421, 214NYS565.
1611-5 5F(2d)582; 126Me78, 136A350; 258Mass244, 154NE861 (limitation must be clearly established from whole will without hesitation or conjecture); 195 NC324, 142SE2. **There must be clear intention, etc.–DelCh** 139A787. **Clause providing for division of bank stock among children** is not limited by another clause devising real estate to children and remainder to grandchildren. 228Ky 594, 15SW(2d)456.
1611-6¼-New. Absolute estate will not be reduced by subsequent words unless such intention of donor is reasonably apparent. 285Pa186, 131A714.
1611-8 Where testator uses words sufficient to vest fee and later uses words indicating a contrary intention, court must determine primary intent from whole will. 290Pa508, 139A144.
1612-9 DelCh 139A787; TexCivA 4 SW(2d)262; TexCivA 4SW(2d)268. **Subsequent paragraphs** in form of request and positive direction does not limit bequest absolute in form. 126Misc 421, 214NYS565.
1612-10 But see 199Wis51, 225NW184. **A gift of property remaining,** etc. 248 NY76, 161NE425.
1612-10½-New. Gift to one subject to gift to another, of property remaining on first taker's decease, is valid. 220 AppDiv379, 222NYS48.
1612-11 21 OhA236, 152NE768 (device of "whole of said proceeds of said farm to the Preachers' Aid Society but said society are not to sell the farm" is gift absolutely and in fee); 144Va297, 132 SE351.
1612-13 See also 86PaSuper312. **Words held not to create trust.**–126Misc 421, 214NYS565 (where in form of mere request).
1612-17 See also 13PaDist&Co 634.
1613-21 98NJEq538, 131A208; 288Pa 308, 136A210 (as to effect of codicil).
1613-23 174Ark454, 295SW722 (devise of real estate "for payment of legacies" with other clauses held to show intention to devise life estate); Mo 271SW 815; NJCh 151A275; 128Misc353, 219 NYS488; 286Pa382, 133A545, 46ALR 777. See also 149Md583, 132A53.
1613-26½-New. A life tenant may have a vested contingent interest in remainder. 254Mass398, 150NE179.
1613-26¾-New. When absolute estate is in terms given by will, but subsequent passages therein plainly show that it is intended that beneficiary should take life interest only, gift is restricted accordingly. 101Vt464, 144A 457.
1613-27 13PaDist&Co 629. **Devise held to rebut presumptions of cross-remainder** for life of surviving daughter. 214 Ky375, 283SW941.
1614-29 330 Ill 624, 162NE164; 220Ky 101, 294SW776; 217AppDiv229, 216 NYS673. **Life estate in note.**–24 OhA 324, 156NE913.
1614-30 217AppDiv229, 216NYS673 (devise with power of disposition for needs); 131Misc21, 227NYS296. **Bequest of money.**–NJ 129A742.
1614-31 217AppDiv229, 216NYS673.
1614-32 127Misc238, 216NYS598. **Life tenant** gets only a fair return upon the property. 127Misc821, 216NYS593. **Extraordinary stock dividends go to life beneficiaries** unless they intrench on capital of trust fund, in which case they go to fund or are to be apportioned. 127Misc701, 217NYS605. **Evidence held to show** extraordinary dividends from earnings and go to life beneficiaries. 127Misc701, 217NYS605. **Whether extraordinary stock dividends go to remaindermen or life beneficiaries** depends on whether property paid out as dividends is derived from earnings, profits, or accumulations of corporation, and language of will. 127Misc701, 217 NYS605.
1614-32½-New. Testator's intent as gotten from will is guide to be used as to apportionment of stock dividend between life tenant and remainderman. 128Misc732, 219NYS449.
1615-33 173Ark277, 292SW370; 124 Kan599, 261P596; 210Ky551, 276SW 514; 211Ky842, 278SW137; 235Ky259, 30SW(2d)965; 238Mich33, 213NW59; 19 OhA43; 284Pa455, 131A265 (during and for his life); 286Pa509, 134A379; 156Tenn284, 300SW9. **Deed to grantor's son-in-law, his heirs and assigns,** to have and hold "during his time of life and at his death to be equally divided between his heirs" held to create life estate. 211Ky842, 278SW137. **Devise to granddaughter for life and, if no children, then to her brother,** vested devisee with only life estate. 197NC 488, 149SE731. **Words held not to show intention to devise life estate.**–137 Misc46, 243NYS136.
1615-36 90Fla540, 106S412; 321 Ill 368, 151NE905; 216Ky512, 287SW975; 257Mass492, 154NE397; NJ 129A742, 744 [citCyc]; 25 OhA242, 158NE12; 284Pa455, 131A265.
1615-38 87 IndA35, 154NE695 (with power of sale where necessary to provide for comfort, or to pay bills or expenses); 130Kan424, 286P252; 157 Miss38, 127S561.
1616-39 223Ky792, 48W(2d)745.
1616-41 33 OhA379, 169NE460 (vesting legal title in trustee with authority to manage estate does not give life tenant unqualified right to enjoyment).
1616-42 44F(2d)144; NS [1930] 4Dom LR310.
1616-46 214Ky400, 283SW410; 219Ky 1, 292SW338. But see 95PaSuper187.
1616-47 214Ky400, 283SW410; 219Ky 1, 292SW338.
1617-48 198Cal352, 246P48; 321 Ill 368, 151NE905; 340 Ill 11, 171NE919 (2dcase); 157Miss38, 127S561; 98NJEq 532, 131A521; 98NJEq538, 131A208 (expressly limited for life); 284Pa455, 131A265; 292Pa327, 141A152; 197Wis 98, 221NW401.
1617-52 316Mo 626, 291SW488; NJCh 145A540(2dcase); 286Pa382, 133A545, 46ALR777; 5PaDist&Co 699. **Will held not to create life estate.**–131Misc495, 227 NYS682. **Implications allowed only** when no other construction is reasonable. 87 IndA149, 165NE435.
1618-53 Devise held to create life estate, though legacies were charged against devise and not against estate. 174Ark454, 295SW722.
1618-56 98NJEq538, 131A208; 216App Div675, 216NYS58.
1618-59 286Pa520, 134A402.

1618-60 But see 252Mass518, 148NE 141.
1619-62 285Pa460, 132A529; Man [1926] 3DomLR27, [1926] 1WestWkly 886 [app dism Man [1927] 1DomLR417, [1926] 3WestWkly755].
1619-63 162Ga528, 134SE301; 238Mich 33, 213NW59; 157Miss38, 127S561; 98 NJEq532, 131A521; 221AppDiv211, 223 NYS361; 221AppDiv209, 223NYS364; 287Pa334, 135A262; 291Pa129, 139A 832; Man [1927] 1DomLR417. **Right to final remainder held to vest in widow** and at her death passed under will. 257Mass492, 154NE397. **Where gift over to heirs follows life tenancy,** life tenant, if included within class, takes remainder. 257Mass492, 154NE397.
1619-64 233Ky448, 26SW(2d)13; 248 Mich458, 227NW537(2dcase); Mo 271 SW815.
1620-66 206 Iowa187, 220NW25.
1620-69 164Ga171, 137SE921 (life tenant may be one of class of remaindermen of same estate); 127Misc647, 217 NYS381; 122 Or387, 259P290.
1620-70 129Kan786, 284P436; Mo 271 SW815; 317Mo 587, 296SW382; 142SC 239, 140SE596; 161Tenn187, 30SW(2d) 227.
1621-71 283Pa255, 129A64.
1621-73 330 Ill 624, 162NE164; 121 Kan57, 245P1039; 214Ky600, 283SW 943; 229Ky90, 16SW(2d)800; 231Ky 682, 22SW(2d)111 (remainder to son); 231Ky731, 22SW(2d)133; 102NJEq94, 139A803; 128Misc905, 220NYS505; 122 Or387, 259P290; 283Pa255, 129A64; 291Pa129, 139A832.
1622-75 214Ky375, 283SW941.
1622-79 89 IndA11, 165NE448; 137 Misc75, 243NYS123; 297Pa448, 147A 101. **During widowhood,** etc. 10PaDist &Co 170.
1623-80 Mo 28SW(2d)999; 102NJEq 235, 140A413; 221AppDiv211, 223NYS 361; 221AppDiv209, 223NYS364. **Remaindermen do not take as heirs,** under will making gift over to heirs if life tenant should marry, where life tenant never married. Mo 28SW(2d) 999.
1623-82 215Ky307, 284SW1077. **Rule that unequivocal gifts of life estate are not to be limited by later doubtful clauses relating to management** is inapplicable where extent of life interest devised is limited to income and control of corpus is reposed in one other than devisees. 198Cal 352, 246P48.
1624-87 124Kan633, 261P582, 584 [quotCyc].
1624-88 124Kan633, 261P582, 584 [quotCyc]; 146SC294, 144SE1. **Rule declared that life estate will not be enlarged into fee by failure to devise remainder after death.** 206 Iowa187, 220 NW25 (rule held inapplicable to present case).
1624-90 DelCh 149A430. **Under will giving widow life estate** with power to "dispose of" property, property undisposed of after her death to go to children, it was held that lease by widow for term of years not expiring until after her death, lessee to make valuable improvements was beneficial to remaindermen and valid. 314Mo 214, 284SW121.
1624-91 232Ky358, 23SW(2d)553; Mo 276SW17; 134Misc705, 236NYS176.
1625-93½-New. General or limited power to dispose of part or all of estate may be attached to life estate. 201 Iowa 918, 208NW341, 45ALR515.
1625-93½-New. Power to sell given in will creates "life estate with power of sale." 260Mass162, 157NE338.
1625-94 Power given to widow as executrix to convert realty devised to her for life into personalty does not convert life estate into fee. 116 Or184, 240P223.
1625-95 Mo 276SW17. **Gift for life will full power of sale** held to give widow life estate with power of disposition for her own use and benefit. 126Misc 296, 241NYS176. **Power held not limited** to personalty. Mo 276SW17. **To cut down power of disposal given by will,** precatory words must imperatively indicate testamentary intent so to do. 134Misc705, 236NYS176.
1625-96 203 Iowa754, 208NW337; Mo 276SW17.
1625-97 NJ 129A742; TexCivA 16SW (2d)366; 194Wis428, 216NW840. **In some jurisdictions,** etc. 15DelCh174, 138A613.
1626-1 Fla 129S835; 163Ga64, 135SE 505; 88 IndA72, 163NE287; 203 Iowa 754, 208NW337; Iowa 227NW614; 156 Md428, 144A367; 172Minn48, 215NW 196 (rule otherwise under subject to future estate of children if power of alienation not exercised); 98NJEq532, 131A 521 (power to use so much of principal as needed); 242NY196, 151NE205; 189 NC628, 127SE626; 197NC274, 148SE 229; 30 OhA289, 165NE49; 26 OhNPNS 493; 287Pa448, 135A119; 194Wis428, 216NW840. But see 221Ala150, 128S 149; 134Misc705, 236NYS176; 157Tenn 571, 11SW(2d)867. Contra 160Tenn11, 22SW(2d)4; 148Va503, 139SE286. **Where the absolute power of disposal is given,** etc. 104WVa553, 140SE554. **Right of full enjoyment** held not absolute power so as to create fee. 104WVa 507, 140SE487. **Where absolute and unlimited power of disposition** appears to be primary or dominant intent of testator, fee-simple estate will be thereby created. 104WVa553, 140SE554. **Where estate given is not especially limited to life of donee,** it may be enlarged into fee by unlimited power of disposition. 101Vt464, 144A457. **Power to sell and convey subject to testator's disposition provided** for in later part of will will not give devisee fee simple. Iowa 227NW614.
1626-2 Under code provision fee passes as to rights of creditors and purchasers and so far as essential to exercise of power but subject to remainder estate in so far as not exercised. 217Ala418, 116S116. **Where devisee is given full power to sell and convey** any and all real property devised to him that may be necessary or convenient for his maintenance, comfort, and support, without any limitation, power of disposition construed to be dominant. 104WVa553, 140SE554.
1627-2½-New. A power of sale is not inconsistent with life estate. 287Pa448, 136A119.
1627-3 160Tenn11, 22SW(2d)4.
1627-4 226Ky806, 11SW(2d)949; 98 NJEq532, 131A521; 157Tenn571, 11SW (2d)867; 160Tenn11, 22SW(2d)4.
1627-5 DelCh 149A430; 208Ky843, 272 SW15; Me 150A531; 98NJEq532, 131A 521; 212AppDiv768, 210NYS33; 133 Misc17, 231NYS355; 287Pa448, 135A 119; 300Pa146, 151A339; 160Tenn11, 22SW(2d)4; 101Vt464, 144A457. **Where insufficiency of the income,** etc. 98NJEq532, 131A521. **Such power given to life tenant is lawful.**-287Pa448, 135 A119.
1629-9 214Ky400, 283SW410; 156Md 428, 144A367; 99NJEq164, 133A205; 153Va614, 151SE300. See also 197Wis 98, 221NW401. **Direction to sell property remaining after death of life tenant** gives life tenant no power of testamentary disposition. 197NC274, 148SE229.
1629-12 162Ga528, 134SE301; 172Minn 48, 215NW196.
1630-14 221Ala364, 128S458; 35Ariz 274, 276P850; 203 Iowa754, 208NW337; 130Kan424, 286P252; 210Ky773, 276 SW844; 232Ky358, 23SW(2d)553; Me 150A531; 257Mass492, 154NE397; 249 Mich474, 229NW465; 117Nebr257, 220 NW269; 98NJEq532, 131A521; 212App Div768, 210NYS33; 128Misc353, 219 NYS488; 134Misc511, 236NYS275; 127 Misc647, 217NYS381; 127Misc639, 217 NYS393; 8PaDist&Co 459 (power to consume real estate includes power to convey); TexCivA 198W(2d)805; Ont [1929] 3DomLR651. **"Undisposed of"** in such will does not include disposition by life tenant's will, but disposition during life tenant's life. 221AppDiv209, 223NYS364.
1630-15 178Ark1178, 13SW(2d)813; 88 IndA72, 163NE287; 208Ky843, 272SW 15; 225Ky699, 9SW(2d)1020; 231Ky 370, 21SW(2d)477; Mo 31SW(2d)778; NJ 146A55; 227AppDiv125, 237NYS 141; 196NC470, 146SE88(2dcase); 88 PaSuperl13; TexCommnA 14SW(2d) 1009; 101Vt464, 144A457.
1630-16 174Ark454, 295SW722; 98NJ Eq532, 131A521; 221AppDiv209, 223 NYS364; 300Pa146, 151A339.
1630-16½-New. Life tenant with full power to expend principal may not convey fee absolute to himself. 242NY196, 151NE205.
1631-17 232Ky358, 23SW(2d)553.
1631-18 210Ky773, 276SW844.
1631-19 127Misc647, 217NYS381. See also 210Ky773, 276SW844.
1631-22 128Misc263, 219NYS295.
1631-23 128Misc263, 219NYS295.
1632-26 247 IllA98.
1632-29 128Misc263, 219NYS295 (where fund is deficient, other property may be used).
1632-30 133Misc17, 231NYS355; 136 Misc86, 242NYS447; 229AppDiv574, 243 NYS165; 19 OhA43; 8PaDist&Co 671.
1633-36 11PaDist&Co 585.
1633-39 196Cal 29, 235P725 (trust provision to testatrix's adopted daughter construed as intended for maintenance of beneficiary). **The principal was held,** etc.-127Misc647, 217NYS381.
1635-44 11PaDist&Co 716.
1635-48 321 Ill 368, 151NE905. **Tenancy in common** held to have been intended. 258Mass399, 155NE193. **Where half of residuary estate was devised to certain persons and other half to "heirs at law,"** the "heirs at law" have undivided moiety in farm with devisees named. 192NC614, 135SE632. **Will devising one half to son, three eighths with buildings to daughter, and** one eighth to another son held to devise land to them as tenants in common. 199Wis332, 225 NW938(4thcase).
1636-49 103Conn308, 130A483; 132 Misc209, 229NYS799.
1636-50 233Mich249, 206NW366; 317 Mo 556, 296SW1001; 131Misc720, 228 NYS652.
1636-53 321 Ill 368, 151NE905.
1637-54 Mo 30SW(2d)97; 152Va677, 148SE781, 783 [citCyc].
1637-56 321 Ill 368, 151NE905; 152Va 1036, 148SE783.
1638-59 321 Ill 368, 151NE905; 137 Misc46, 243NYS136; TexCommnA 290 SW739.
1638-60½-New. , or to B and her children. 137SC380, 135SE469.
1638-61½-New. Bequest to L and to several lodges in equal shares, being gift to named recipients individually, does not create joint tenancy. Mass 171 NE717.
1638-63 321 Ill 368, 151NE905.
1638-64 231Ky731, 22SW(2d)133.
1638-65 197NC159, 147SE809.
1639-69 103Conn308, 130A483 (word "survivor" here used merely to indicate one living after death of another). **In Iowa.**-203 Iowa603, 213NW392.
1639-77 194NC698, 140SE622.
1639-78 IndA 173NE333.
1640-80 321 Ill 368, 151NE905; 330 Ill 624, 162NE164; 214Ky320, 283SW102; 197NC488, 149SE731 (remainder by implication); 291Pa129, 139A832; 157SC 407, 154SE426. **Devise to widow for life to "revert" to testator's son if living or to his heirs** held remainder in fee. 190NC822, 130SE836. **Provision that property be held in trust for heirs** for twenty-five years did not create remainder. 179Ark30, 13SW(2d)810. **Extent of interest.**-138Misc253, 245NYS631.
1640-85 330 Ill 624, 162NE164.
1641-93 193NC294, 136SE733.
1641-96 321 Ill 368, 151NE905; 257 Mass492, 154NE397 (estate for life with power of disposition); 195NC469, 142 SE711.
1642-3 32F(2d)189. **Cross remainder defined.**-321 Ill 368, 151NE905.
1642-4 321 Ill 368, 151NE905; 233Mich 249, 206NW366.
1643-5 321 Ill 368, 151NE905. **To create cross remainder by implication,** will must show intention that whole estate go over together to ultimate taker and that no one inherit only part or take it by remainder during lives of any devisees. 321 Ill 368, 151NE905.
1643-6 321 Ill 368, 151NE905.
1643-10 224Ky97, 5SW(2d)906.
1643-13 Conn 152A69; 323 Ill 338, 154 NE144; NC 155SE605. **Conditional limitations are never to be extended,** etc. 142Va824, 128SE264 (conditional limitations on life estate held not to af-

fect property received under will as heir of cobeneficiary). **Limitation of life estate upon condition of attempt of creditor to subject it to debts** renders inapplicable rule that estate possessed by person even for life is liable for his debts. 142Va824, 128SE264. **Particular provisions construed.**–NC 155SE605.

1644–14 142Va824, 128SE264 (provision for termination of life estate and vesting in remainderman upon attempt of creditor to subject property to debts of life tenant held valid).

1644–15 125Me22, 130A433 [citCyc].

1644–16 114 OhSt535, 151NE649 [quot Cyc]. **Fee passes to heirs at law** till contingency happens. 156Tenn155, 299 SW812, 57ALR601.

1644–23 214Ky320, 283SW103; 193NC 294, 136SE733.

1645–35 108Conn339, 143A236.

1645–40 189NC628, 127SE626 (if fee be limited after a fee by way of executory devise taker of first fee cannot generally bar taker of second fee by deed of bargain and sale with warranty).

1646–46 189NC628, 127SE626; 20 OhA 279, 151NE795.

1646–48 Provision that, if either of testatrix's living sons should die leaving no bodily heirs, land devised to deceased son and his children should revert to "surviving child," created executory devise. 150SC111, 147SE659.

1646–53 214Ky320, 283SW103.

1647–54 99Vt204, 130A683.

1647–55 214Ky320, 283SW103 (bodily issue); 146SC194, 143SE818.

1648–60 141SC32, 139SE196. **Will construed and children of testatrix held only executory devisees,** having interest in executory devise as purchasers, there being no substitution if they survived testatrix. 141SC32, 139SE196.

1648–60½–New. Devise to brother with directions to pay money to certain beneficiaries gives brother right to take contingent on balance remaining after making payments. **TexCivA 22SW(2d)**313 (2dcase).

1648–66 214Ky320, 283SW103.

1648–67 214Ky320, 283SW103.

1648–68 214Ky320, 283SW103.

1648–71 170Ga94, 152SE448; 47 Ida 364, 276P302(2dcase); 334 Ill 448, 166 NE70; 125Kan290, 264P47; 125Me305, 133A689; 124Misc906, 210NYS320, 324 [citCyc]; 24 OhA176, 156NE459; 27 OhA197, 161NE218; 288Pa294, 135A 637; 11PaDist&Co 787.

1649–72 125Me305, 133A689; 212App Div768, 210NYS33 (life estate with power to tenant to consume principal, remainder vests at death of testator, not at death of tenant. And this is not defeated by expression "at her death whatever is then remaining" I give, etc.); 288Pa294, 135A637.

1649–73 125Me305, 133A689; Mass 172 NE865; 24 OhA176, 156NE459; 7Pa Dist&Co 216. **Gift of legacy "at" "when" or "after" given events** rests only on happening thereof. 99NJEq509, 133A 881.

1649–74 128Misc240, 218NYS385; Vt 151A654.

1649–75 338 Ill 328, 170NE257; 24 OhA 176, 156NE459. **Futurity annexed to substance of gift** may make it contingent. 99Vt204, 130A683.

1650–76 99Vt204, 130A683. See also 128Misc240, 218NYS385.

1650–77 106Conn267, 137A737; NJCh 151A552; 129Misc318, 222NYS256; 24 OhA176, 156NE459; 35 OhA411, 172 NE431. But see 338 Ill 328, 170NE257.

1650–78½–New. Devised estate will not be held contingent unless it is necessary so to hold or unless will indicates such intention. 99Vt204, 130A683.

1650–79 19F(2d)974; 106Conn267, 137 A737; 323 Ill 397, 154NE216; 339 Ill 197, 171NE139; 125Me305, 133A689; 315Mo 627, 287SW316, 325 [quotCyc]; 99NJEq333, 133A188; 99NJEq514, 133 A705; 129Misc318, 222NYS256; 289Pa 101, 137A132; 10PaDist&Co 524; 99Vt 204, 130A683; 99Vt437, 134A632, 46ALR 169. **Language of will and surrounding circumstances determine issue.**–106Conn 267, 137A737. **Within legal limitations,** testator may fix time of vesting. 154 Md249, 140A208.

1650–80 19F(2d)974; 318 Ill 585, 149 NE489; 338 Ill 328, 170NE257; 212Ky 847, 280SW156; 134Misc837, 236NYS 443; 191NC802, 133SE168; 299Pa333, 149A473.

1650–81 19F(2d)974; 219Ala89, 121S 67; 170Ark1181, 283SW16; 178Ark337, 10SW(2d)491; 179Ark30, 13SW(2d)810; 199Cal 724, 251P799; 83Colo 575, 267 P408; 106Conn267, 137A737, 739 [cit Cyc]; 106Conn627, 138A809; 108Conn 339, 143A236; 28Hawaii590; 317 Ill 86, 147NE382; 326 Ill 608, 158NE444; 328 Ill 47, 159NE217; 338 Ill 391, 170 NE243; 246 IllA342; 88 IndA374, 162 NE448; 212Ky847, 280SW156; 221Ky 642, 299SW541; 125Me305, 133A689; 125Me378, 134A195; 252Mass518, 148 NE141; 309Mo 302, 274SW684; 315Mo 627, 287SW316, 325 [citCyc]; Mo 22 SW(2d)790; 118Nebr208, 224NW2; NJ Ch 144A804; 212AppDiv768, 210NYS33; 223AppDiv496, 228NYS522; 128Misc 221, 219NYS306; 132Misc805, 231NYS 9; 135Misc48, 237NYS649; 128Misc292, 217NYS849; 191NC802, 133SE168; 26 OhA377, 160NE488; 286Pa335, 133A 558; 289Pa101, 137A132; 296Pa185, 145 A806; Pa 151A799; 13PaDist&Co 683; 49RI 319, 142A330; RI 144A671; 50RI 78, 145A98; 132SC120, 128SE837; 99 Vt437, 134A632, 46ALR169; 99Vt480, 134A581; Vt 151A654; 196Wis357, 220 NW383; 199Wis51, 225NW184. **If future gift is postponed to let in some other interest,** gift is vested, though enjoyment is postponed. 89Fla457, 105S106. **Presumption that legacy was intended to vest applies with far greater force to provision for child** or grandchild than where gift is to stranger or collateral relative. 89Fla457, 105S106. **Strongest argument against contingency and in support of early vestiture of devises,** no contrary intent being shown, is provision for enjoyment of income by devisee prior to coming in possession of inheritance. 89Fla457, 105S106. **In case of doubt, construction favoring vesting is adopted.**–106Conn267, 137A737. **Strength of presumption as to child or grandchild,**–125Me305, 133A689.

1651–82 Intention of testator as to time of vesting within period allowed by law will be given effect. 319Mo 108, 5 SW(2d)428.

1651–83 170Ark1181, 283SW16; 172 Ark1065, 291SW823; 173Ark277, 292 SW370; 106Conn267, 137A737; Conn 151A345; Conn 152A69; 89Fla457, 105 S106; 47 Ida364, 276P302(2dcase); 323 Ill 397, 154NE216; 335 Ill 239, 167NE 52; 336 Ill 299, 168NE359; IndA 154 NE682; IndA 170NE354; 212Ky847, 280SW156; 154Md249, 140A208; 245 Mich208, 222NW182; 145Miss368, 110S 685; 309Mo 302, 274SW684; Mo 22SW (2d)790; Mo 32SW(2d)591; 191NC802, 133SE168; 192NC744, 135SE871; 195 NC469, 142SE711; 198NC642, 153SE 114; 24 OhA400, 157NE497 (in absence of words of survivorship indicating vesting at time of distribution, or where will is ambiguous or doubtful as to time, earlier date will be taken); 32 OhA423, 168NE220; 35 OhA411, 172NE 431; RI 152A254; 132SC120, 128SE 837; TexCivA 18W(2d)485; 101Vt242, 143A280; Vt 151A654; Va 152SE339; 107WVa559, 149SE611; 199Wis51, 225 NW184.

1651–84 170Ark1181, 283SW16; 200 Cal 482, 253P921; 71CalA409, 235P670; 106Conn267, 137A737; Conn 151A345; Conn 152A69; 89Fla457, 105S106 (devises); 28Hawaii590; 47 Ida364, 276P 302(2dcase); 318 Ill 585, 149NE489; 336 Ill 299, 168NE359; 338 Ill 328, 170 NE257; 249 IllA617; 79 IndA683, 147 NE305; 88 IndA374, 162NE448; IndA 170NE354; 122Kan118, 250P1075, 1076 [quotCyc]; 259Mass465, 156NE885; 319Mo 108, 5SW(2d)428, 432 [citCyc]; 99NJEq514, 133A705; 131Misc323, 227 NYS526; 134Misc198, 236NYS136; 24 OhA400, 157NE497; 99Vt437, 134A632, 46ALR169; 101Vt242, 143A280. **Death of legatee after testator's death does** cause legacy to lapse. 162Ga280, 133 SE471. **Whether present or prospective as to enjoyment,** interests created by will rest prima facie on will taking effect. 108Conn339, 143A236.

1651–85 19F(2d)974; 89Fla457, 105S 106; 154Md249, 140A208; Mass 167NE 261; Mass 171NE717; 309Mo 302, 274 SW684; 190NC558, 130SE166; 24 OhA 331, 157NE423; 99Vt480, 134A581; 101Vt242, 143A280. **"Upon the death of my wife,"** used in devise of remainder, relates to period of enjoyment of devise, and not to time of vesting. 88 IndA 374, 162NE448.

1651–86 89Fla457, 105S106; 24 OhA 331, 157NE423; 289Pa101, 137A132.

1652–87 216Ala448, 113S501; 48 Ida 485, 283P598 (gift to children if wife died before testator is defeated by prior death of testator).

1652–88 24 OhA176, 156NE459. **Limitation over to heirs "at" death of life tenant, conditional upon death of remainderman without issue before life tenant,** does not vest upon death of remainderman but remains contingent until death of life tenant. 98NJEq569, 131 A210.

1652–89 216Ala448, 113S501; Mass 171NE717.

1652–89½–New. Where contingency on which estate is to vest has arrived at time of testator's death, estate vests on such death. 318 Ill 585, 149NE489.

1652–91 223AppDiv646, 229NYS193.

1652–96 89Fla457, 105S106; 24 OhA 176, 156NE459.

1653–99 28Hawaii590; 99NJEq72, 132 A673; 135Misc247, 238NYS765.

1653–3 89Fla457, 105S106 ("when" held to indicate only time when enjoyment to commence); 136Misc113, 240 NYS528.

1653–4 99NJEq72, 132A673; 133Misc 717, 233NYS674.

1653–7 224AppDiv217, 231NYS611; 27 OhNPNS403.

1654–14½–New. Devise carrying income to accrue till age specified is reached will be construed as conferring vested interest. 89Fla457, 105S106.

1654–15 136Misc113, 240NYS528.

1655–20 Mass 167NE261; 128Misc791, 221NYS220. But see 130Misc324, 224 NYS312.

1655–20½–New. Gift after life estate to persons designated "or their heirs" vests upon death of testator, word "or" being equivalent to "and." 132SC120, 128SE837.

1655–25½–New. Where devise was to lawful heirs of testator's children, such children took vested estate in remainder subject to such interest being opened up for after-born children. 222 Ky566, 1SW(2d)968.

1655–26 85PaSuper14.

1656–28 99NJEq333, 133A188. **Devise to sons in trust till majority, with fee of half to widow on such contingency,** held not vested estate in widow. 200 Cal 335, 253P706.

1656–29 Iowa 232NW826; 125Misc130, 210NYS605; 127Misc679, 216NYS422; 135Misc413, 239NYS368; Can [1928] 3 DomLR834. See also 215AppDiv25, 213 NYS131.

1656–30 289Pa101, 137A132.

1656–32 130Misc324, 224NYS312.

1656–33 289Pa101, 137A132.

1656–33½–New. As respects vesting, direction to divide is same as direction to sell and divide proceeds. NC 155SE 605.

1657–34 106Conn267, 137A737; 109 Conn7, 144A659(2dcase); 28Hawaii590; 318 Ill 585, 149NE489; 247 IllA196; 99 NJEq333, 133A188; NJCh 150A783; 99 NJEq514, 133A705; 212AppDiv558, 209NYS341; 130Misc716, 224NYS363; 35 OhA411, 172NE431; 289Pa101, 137 A132; 85PaSuper14; 99Vt480, 134A 581; BC [1926] 4DomLR887, [1926] 3 WestWkly370. **Substitutionary clause in will using term "There"** held not to refer to time, but equivalent to "in such case." 106Conn267, 137A737. **Unless time is annexed to gift itself,** mere postponement of payment does not render gift contingent. 289Pa101, 137A 132. **Vesting not postponed by** clause "after payment of debts and funeral charges." Mass 172NE228.

1657–35 318 Ill 585, 149NE489; 323 Ill 397, 154NE216; 99NJEq333, 133A188; 289Pa101, 137A132.

1657–36 28Hawaii590; 99NJEq333, 133 A188.

1657–37 175Ark50, 297SW1022; 165Ga 848, 142SE156; 99NJEq333, 133A188; 129Misc78, 220NYS816; 85PaSuper14.

1657–38 106Conn267, 137A737; 323 Ill 397, 154NE216; 27 OhA197, 161NE218. But see 212AppDiv558, 209NYS341.

1657–38½–New. Direction to pay income till payment of principal at future period is indication that legacy is vested. 99NJEq514, 133A705.

1658–39 Iowa 232NW826.

1658–40 235Ky259, 30SW(2d)965.

1658–43 Conn 152A69; 164Ga885, 139 SE661; 317 Ill 625, 148NE384 (charging land with payment by owner within certain time after death of testator); 339 Ill 197, 171NE139.

1658–44½–New. A devise of residue with provision that if daughter regained sanity residue should go to her gave the residuary legatees estate in fee, where daughter had not regained her sanity prior to testatrix's death. 199Wis51, 225NW184.

1659–45 338 Ill 328, 170NE257.

1659–45½–New. Under devise of land on condition that devisee pay stated sum to another within stated time, right to such sum does not vest until time fixed for payment. Iowa 232NW826.

1659–46 But see 27 OhA197, 161NE218.

1659–49 NJCh 151A552.

1659–51 318 Ill 585, 149NE489; 287Pa 354, 135A130; Alta [1929] 1DomLR445. **Fact that income is not paid to beneficiary** thereof for life and widowhood does not prevent gift from being vested. 287Pa354, 135A130.

1660–57 85PaSuper14 (income not specifically devised held to be vested and follow principal).

1660–61 106Conn19, 137A20 (vests at testator's death).

1660–64 320Mo 543, 8SW(2d)1008; RI 152A254. **Gift held vested.–NJCh** 146A 466.

1661–68 99NJEq72, 132A673; Tex CommnA 285SW607.

1661–69 99NJEq72, 132A673.

1662–78 105Conn261, 135A555; BC [1926] 4DomLR887, [1926] 3WestWkly 370.

1662–79 99NJEq72, 132A673; 99NJEq 514, 133A705; 212AppDiv558, 209NYS 341 (estate otherwise vested not affected by intervening void trust).

1664–86½–New. Absence of limitation over on death of ultimate devisees surviving testatrix tends to show vesting in them. 289Pa101, 137A132.

1664–86⅓–New. Where there is gift over in event of legatees dying before legacy takes effect, words "take effect" mean to take effect or vest in point of right. 109Conn7, 144A659(2dcase).

1664–87 133Misc834, 234NYS119.

1664–88 170Ga94, 152SE448; 338 Ill 328, 170NE257; 125Me305, 133A689; 156Md428, 144A367; 24 OhA176, 156NE 459. **Other definitions.**–332 Ill 533, 164 NE5.

1664–89 170Ga94, 152SE448; 338 Ill 328, 170NE257; 125Me305, 133A689; 101Vt242, 143A280. **Other definitions,** etc. 332 Ill 533, 164NE5; 192NC94, 133 SE410. **Remainder "vested subject to be divested"** is contingent. 133Misc834, 234NYS119.

1664–90 24 OhA176, 156NE459.

1664–96 24 OhA176, 156NE459; RI 152 A254.

1665–99 24F(2d)187; 338 Ill 328, 170 NE257.

1665–4 332 Ill 533, 164NE5; 156Md 428, 144A367; TexCivA 4SW(2d)268, 271 [quotCyc].

1665–8 108Conn339, 143A236; 339 Ill 45, 170NE699; 125Kan290, 264P47; 98 NJEq538, 131A208; 135Misc262, 238 NYS761; 135Misc774, 238NYS533; 286 Pa335, 133A558; 85PaSuper14 (remainder to those entitled under intestate laws); 159Tenn281, 17SW(2d)910. **That legatee is not specifically described as remainderman does not render him incapable of acquiring vested remainder** where will requires return of trust fund to residuary estate on death of cestui que trust and legatee is entitled to two thirds of residue. 83Colo 575, 267P408.

1666–10 Uncertainty as to whether remainderman with life estate will survive preceding life tenant affects value but not right of property in remainder. 125 Kan290, 264P47.

1666–11½–New. , or the fact that the remainderman, outliving testator, dies before termination of preceding life estate. 98NJEq538, 131A208.

1666–12 194NC448, 139SE840; 160 Tenn345, 24SW(2d)896.

1666–13 37F(2d)304.

1666–14 165Ga665, 141SE902.

1666–14½–New. Where those in expectancy were different individuals at different periods of time during continuance of intermediate estate, remainder is contingent. 28 OhA172, 162NE608.

1666–15 83Colo 575, 267P408; 164Ga 171, 137SE921; 318 Ill 301, 149NE279; 323 Ill 338, 154NE144 (whether remainder contingent or vested depends upon language used); 339 Ill 45, 170NE699 (depends on language employed in creating it); IndA 154NE682; 125Me305, 133A689; 191NC203, 131SE575; 6Pa Dist&Co 303; 159Tenn27, 16SW(2d)27; TexCommnA 15SW(2d)567.

1666–16 19F(2d)974; 164Ga171, 137SE 921 (by statute); 170Ga94, 152SE448; 317 Ill 86, 147NE382; Iowa 232NW826; 125Kan290, 264P47; 125Me305, 133A 689; 257Mass586, 154NE191; 118Nebr 208, 224NW2; 99NJEq514, 133A705; 135Misc247, 238NYS765; 135Misc574, 240NYS220; 289Pa101, 137A132; 159 Tenn281, 17SW(2d)910; TexCivA 1 SW(2d)485, 487 [citCyc]. **Construction against disinheritance of remaindermen dying before determination of precedent estate favored.–TexCivA** 1SW(2d)485. **Remainder after life estate** is regarded as vested. 89Fla457, 105S106. **Failure to provide gift over** indicates that testator considered remainder as vesting. 89Fla457, 105S106. **Words of present gift** are significant in determining that remainder is vested. 257Mass586, 154 NE191.

1667–17 170Ark1181, 283SW16; 257 Mass492, 154NE397; 191NC203, 131SE 575.

1667–18 170Ark1181, 283SW16; 164Ga 171, 137SE921 (by statute); 166Ga639, 144SE27; 328 Ill 47, 159NE217; 257 Mass492, 154NE397; 233Mich249, 206 NW366; Mo 29SW(2d)116; 99NJEq 514, 133A705; 223AppDiv636, 229NYS 176; 133Misc834, 234NYS119; 135Misc 581, 240NYS699; 191NC203, 131SE575. **Words "I give, devise and bequeath"** clearly import present gift. 135Misc 203, 237NYS417.

1667–19 170Ark1181, 283SW16; 103 Conn308, 130A483 (capacity to take gift in remainder, on occurrence of event on which limited, determines question of vesting); Iowa 232NW826; 99NJEq 514, 133A705.

1667–21 125Me305, 133A689; 135Misc 581, 240NYS699.

1667–23 338 Ill 328, 170NE257; Iowa 232NW826; 125Me305, 133A689; 99 NJEq514, 133A705; 245NY550, 157NE 853; 222AppDiv229, 226NYS104; 135 Misc574, 240NYS220; 133Misc222, 231 NYS613; 286Pa335, 133A558; 85Pa Super14; 159Tenn281, 17SW(2d)910; TexCommnA 12SW(2d)987; TexCivA 1 SW(2d)485, 488 [citCyc]. **Rule does not require construction contrary to clear intent of testator.–**206 Iowa597, 220 NW1.

1668–24 317 Ill 86, 147NE382; 318 Ill 585, 149NE489.

1668–26 191NC203, 131SE575.

1668–27 Life estate to widow with remainder to son or his heirs gives vested remainder and on death of son unmarried and intestate before widow, remainder merges with life estate. 222AppDiv 229, 226NYS104.

1668–30½–New. Will by which testatrix gave entire estate to father with directions that half of estate remaining be divided in specified amounts among specific legatees vests remaining half in father's estate at his death, 125Misc 351, 211NYS510.

1668–30⅓–New. while specific legacies as to other half is effective. 125Misc351, 211NYS510.

1668–30¼–New. Remainder to be "disposed of as part of my residuary estate" given to twenty-two persons, share of any such legatee dying before division of residuary estate to go to his representatives, gives a vested remainder to designated residuary legatee, as of date of primary distribution and not of death of life tenant. 127Misc437, 217NYS313.

1668–31 124Misc906, 210NYS320.

1669–35 257Mass492, 154NE397; 133 Misc42, 231NYS191; 24 OhA176, 156NE 459. See 192NC94, 133SE410. **Devise to widow for life with power of disposition with remainder over** held to create contingent remainder. 257Mass492, 154 NE397.

1669–36 108Conn339, 143A236; 162Ga 528, 134SE301; 98NJEq538, 131A208; 99NJEq514, 133A705; 134Misc527, 235 NYS744; 85PaSuper14; 107WVa318, 148SE120. See BC [1926] 4DomLR887, [1926] 3WestWkly370.

1670–39 Conn 152A69; 336 Ill 299, 168 NE359; 125Me305, 133A689; 99NJEq 333, 133A188; 99NJEq131, 132A671; 99 NJEq514, 133A705; 130Misc324, 224 NYS312; 35 OhA411, 172NE431; 289Pa 101, 137A132; 13PaDist&Co 629; 147 SC259, 145SE113. **Share of residuary legatee, dying before death of life tenant,** held vested. 99NJEq333, 133A188. **Under will containing immediate gift of residue to executor** in trust, corpus of fund vests in both trustee and residuary legatee at testator's death. 99NJEq333, 133A188. **On death of mother who has life estate cestui under testamentary devise of share in remainder in trust** takes remainder absolutely. 128Misc96, 218 NYS239.

1670–40 106Conn267, 137A737; 224 AppDiv735, 230NYS37; 135Misc413, 239 NYS368; 24 OhA331, 157NE423; 289 Pa101, 137A132.

1670–41 316 Ill 460, 147NE433; 323 Ill 338, 154NE144; IndA 154NE682; 213 Ky547, 281SW522; 258Mass205, 154NE 851; 258Mass399, 155NE193; 99NJEq 514, 133A705; 125Misc224, 210NYS729; 134Misc837, 236NYS443; 137Misc910, 244NYS632; 141SC32, 139SE196, 202 [citCJ]; TexCivA 1SW(2d)485. **Gift effective on termination of intervening life estate with substitution in case of death** held to refer to death prior to termination of life estate. 128Misc582, 219NYS614. **Will leaving remainder to grandchildren or child if there are any** living leaves a vested remainder. 128 Misc769, 220NYS151.

1671–42 98NJEq569, 131A210. **Devise to daughter with remainder to her children and to testator's other children if daughter dies without issue** creates contingent remainder in daughter's children. 206 Iowa597, 220NW1.

1671–43 222AppDiv229, 226NYS104; 125Misc224, 210NYS729.

1671–44 319Mo 108, 58W(2d)428; NJCh 147A548; 128 Or211, 274P312; 299Pa 333, 149A473.

1671–45 316 Ill 460, 147NE433; 200 Iowa672, 203NW28; 127Misc193, 216 NYS426; 130Misc298, 224NYS287. But see 102NJEq494, 141A574; 223AppDiv 496, 228NYS522. **Time of vesting.–98 NJEq569,** 131A210.

1671–45½–New. Remainder at termination of widow's life estate to son "if he be alive or to his heirs" is contingent. 190NC822, 130SE836.

1671–45⅓–New. Remainder to testator's widow upon death of life tenant, or if not living to his descendants then living, gives testator's posthumous son contingent remainder. 134Misc26, 234NYS316.

1672–46 255Mass347, 151NE311; 259 Mass465, 156NE885; 267Mass203, 166 NE703; 125Misc224, 210NYS729 (where gift of property is made to take effect in future on termination of intervening life estates, with substantial gift to others in case of death, death referred to will be held to be death any time prior to termination of life estates).

1672–47 219Ala89, 121S67; 200Cal776, 254P1108; 318 Ill 301, 149NE279; 339 Ill 45, 170NE699; 156Md428, 144A367; 150Miss179, 116S734; 315Mo 392, 286 SW79; 98NJEq569, 131A210; 128Misc

240, 218NYS385; Vt 151A654; Va 155 SE802.

1672-48 128Misc769, 220NYS151 (words denoting time of vesting).

1673-49 233Ky554, 26SW(2d)497.

1673-50 200Cal 776, 254P1108; 339 Ill 45, 170NE699; 130Kan634, 287P904 (contingency is not determinable till life tenant's death); 257Mass586, 154 NE191; 315Mo 392, 286SW79; 98NJEq 569, 131A210; 135Misc581, 240NYS699; 24 OhA176, 156NE459. **Provision if no child of brother was "then living"** at death or marriage of brother's widow, fund went to testator's children, held to create contingent remainder in latter. 257Mass586, 154NE191.

1673-51 88 IndA204, 169NE539; 156Md 428, 144A367; Mass 171NE717; 98NJ Eq569, 131A210; 99NJEq509, 133A881; 135Misc656, 240NYS710; 9PaDist&Co 49.

1673-52 181Ark439, 26SW(2d)113; 320 Ill 31, 150NE333; 225Ky699, 9SW(2d) 1020; 134Misc160, 235NYS705; 191NC 688, 132SE669.

1673-53 100NJEq358, 135A146; 99NJ Eq514, 133A705.

1674-54 99NJEq514, 133A705; 12Pa Dist&Co 247.

1674-57 108Conn339, 143A236; 160 Tenn345, 24SW(2d)896 (death of life tenant).

1674-59 170Ga94, 152SE448; 258Mass 399, 155NE193; 135Misc203, 237NYS 417.

1674-60 172Ark1073, 291SW818; 194 NC698, 140SE622.

1675-61 178Ark337, 10SW(2d)491; 206 Iowa597, 220NW1, 207 Iowa526, 220 NW344, 60ALR786; 225Ky699, 9SW (2d)1020; 136Misc426, 243NYS224; 136 Misc270, 239NYS717; 191NC203, 131SE 575; 29 OhA296, 163NE573; 144SC205, 142SE496; TexCommnA 12SW(2d)987.

1675-63 Conn 151A345; 164Ga171, 137 SE921; 321 Ill 368, 151NE905; 209Ky 63, 272SW48; 214Ky375, 283SW941; 252Mass518, 148NE141; 145Miss368, 110S685; Mo 28W(2d)803; 118Nebr 208, 224NW2; 82NH380, 134A536; 103 NJEq113, 142A414; 128Misc260, 219 NYS318; 289Pa101, 137A132; 8PaDist &Co 392; 50RI 78, 145A98; TexCivA 1 SW(2d)485; 99Vt480, 134A581. **Where life estate is created with remainder over,** title vests in remaindermen subject to life estate on death of testator rather than on death of life tenant. 242 Mich52, 217NW771. **Rights of such after-born grandchildren cannot be destroyed** by conveyance by life tenant and remaindermen in esse at date of testator's death. NJCh 145A537(1st case).

1676-64 170Ark1181, 283SW16; 103 Conn122, 130A116; Conn 151A345; 321 Ill 368, 151NE905; 330 Ill 624, 162NE 164; 336 Ill 299, 168NE359; 145Miss 368, 110S685; 137Misc75, 243NYS123. **Grandchild's share of trust income, vested at testator's death as member of class subject to opening, and power of appointment in parent, becomes indefeasible upon parent's death** without appointment and will pass by will or by right of descent under statute. 103 Conn122, 130A116.

1676-67 176Ark251, 3SW(2d)303; 103 NJEq113, 142A414 [aff 144A918(4th case)]; 61 OntL412, [1928] 1DomLR 179. **Purchaser of remainder interest** of grandchildren vesting only on death of both life tenants cannot claim interest on death of one life tenant. 176Ark 251, 3SW(2d)303.

1677-69 24 OhA176, 156NE459.

1677-70 289Pa101, 137A132. **Under devise to daughters for life,** corpus to their issue on daughters' death, where daughters die without issue, legacy lapses. TexCivA 298SW470.

1677-71 289Pa101, 137A132; 148SC52, 145SE623.

1677-72 28F(2d)936; 126Misc722, 215 NYS237; 99Vt480, 134A581. **Gift held not to class.**–126Misc233, 214NYS142.

1677-73 150Miss179, 116S734.

1677-74 103Conn308, 130A483; 109 Conn7, 144A659(2dcase); 122Kan406, 251P1083; 144Miss493, 110S204; 98NJ Eq569, 131A210; 126Misc722, 215NYS 237; 21 OhA140, 152NE772; 24 OhA 176, 156NE459; 24 OhA331, 157NE423. **Gift held to pass to named members of class** in equal shares and to descendants per stirpes. 126Misc233, 214NYS 142.

1677-75 125Me378, 134A195; 238 Mich33, 213NW59, 60 [citCyc]; 191NC 203, 131SE575. **But where the remainder is contingent and is given at, when, or after given event happens,** it does not vest in heirs until such event happens, and those heirs only living at such time will take. 98NJEq569, 131A210.

1677-76 209Ky63, 272SW48; 125Me22, 130A433; 99NJEq131, 132A671; 245 NY550, 157NE853; 128Misc260, 219 NYS318; 191NC203, 131SE575; 118 Or 96, 245P1069; 293Pa433, 143A121, 59 ALR1402; RI 144A671. **Under will devising homestead to widow for life and providing for equal division on her death among testator's legal heirs then living,** title vests in children on testator's death subject to be divested as to heir dying before widow. Iowa 216NW 753.

1678-77 162Ga528, 134SE301; 331 Ill 624, 162NE164; 238Mich33, 213NW59, 60 [citCyc]; 35 OhA411, 172NE431; 286 Pa335, 133A558.

1678-78½-New. Remainders in wills have been construed to vest in persons who are next of kin of testator at death of life tenant. 318 Ill 544, 149NE476.

1678-78½-New. Such provision is not contrary to law. 318 Ill 544, 149NE476.

1678-79 190NC354, 129SE820.

1678-82 323 Ill 338, 154NE144; 118 Or 96, 245P1069.

1678-83 190NC354, 129SE820; 20 OhA 209, 151NE778.

1679-84 209Ky63, 272SW48.

1679-85 225Ky699, 9SW(2d)1020; 309 Mo 302, 274SW684; 27 OhNPNS193. **Statute providing that devise to one for life** and after her death to his "children or heirs or right heirs in fee" shall vest a "remainder in fee simple in such children" does not create vested estate till death of daughter under devise to her "during her life and after her death to her heirs." 309Mo 302, 274SW684.

1679-86 IndA 154NE682; 191NC203, 131SE575. **Remaindermen substituted for remainderman predeceasing life tenant** held to take from testator by purchase under will. 191NC203, 131SE575. **Where will devised land to wife for life, and on her death to surviving children or their heirs,** wife and children could not convey fee simple title to timber and trees. 191NC203, 131SE575.

1679-87 160Tenn477, 26SW(2d)141. See also 28 OhA172, 162NE608.

1679-88 321 Ill 368, 151NE905; 338 Ill 328, 170NE257; 200 Iowa115, 202NW 601 (remainder subject to trust for remainderman vests legal title in trustee till expiration of trust period); 208 Iowa693, 225NW845; 125Me305, 133A 689; 100NJEq358, 135A146; NJCh 148 A398; 99NJEq514, 133A705; 35 OhA 411, 172NE431; 289Pa101, 137A132; 13PaDist&Co 683; Vt 151A654. **Or it may be vested on the death of the life-tenant,** etc. See also 199Cal 724, 251P 799.

1679-89 15DelCh1, 130A34; 332 Ill 533, 164NE5; 99NJEq514, 133A705; 136Misc532, 241NYS506; 289Pa101, 137 A132.

1680-92 144Miss493, 110S204; 213App Div319, 210NYS531.

1680-93 125Me305, 133A689; 245NY 568, 157NE860; 137Misc449, 243NYS 751.

1680-94 220Ala319, 125S828; 106Conn 267, 137A737; 125Misc95, 210NYS155; 227AppDiv160, 237NYS162; 24 OhA176, 156NE459.

1680-95 Me 150A375.

1680-96 19F(2d)974; 338 Ill 328, 170 NE257; 233Ky554, 26SW(2d)497; 227 AppDiv125, 237NYS141; 289Pa101, 137 A132 (remainders not to be paid till certain property disposed of).

1680-97 24F(2d)257; 332 Ill 533, 164 NE5.

1680-98 9PaDist&Co 617.

1680-98½-New. Whether condition is precedent or subsequent as respects vested or contingent remainders depends on whether it is incorporated into the gift or descriptive of the remainderman or is added as a separate clause after words which created vested interest. 338 Ill 328, 170NE257.

1680-99 19F(2d)974; 83Colo 575, 267P 408; 15DelCh1, 130A34; 321 Ill 368, 151 NE905; 220Ky101, 294SW776; 224Ky 5, 5SW(2d)477; 125Me171, 132A211; 258Mass244, 154NE861; 100NJEq358, 135A146; 98NJEq538, 131A208; 5Pa Dist&Co 333; 13PaDist&Co 653; 13Pa Dist&Co 683; 99Vt437, 134A632, 46ALR 169; 193Wis10, 212NW634. See also 215AppDiv25, 213NYS131. **Gift over of principal of trust estate in case of death of life tenant without issue to be divided "equally among her brothers and sisters and their issue per stirpes"** held contingent remainders which vested at testator's death. 103Conn54, 130 A92, 93. **Where gift was of income to wife for life,** and on her death to child surviving, equally with sister of testator, held that on death of wife before testator child takes half of income and sister other half absolutely. 128Misc97, 218NYS236. **Gift of income carries principal in absence of disposition of remainder.**–128Misc97, 218NYS236. **Gift of principal to two sons equally when younger reaches thirty five,** till which time income is to be divided equally, providing that if either dies before such time all shall go to survivor, creates vested, not contingent, remainder. 125Me305, 133A689. **That trustees are appointed to preserve corpus and pay income to cestui que trust during life** does not prevent vesting of remainder upon death of testator. 83 Colo 575, 267P408.

1681-1 133Misc868, 234NYS97.

1681-2 220Ala319, 125S28 (youngest child reaching majority); 98NJEq569, 131A210 (on happening of certain event); 194NC448, 139SE840; OhA 173 NE301; 289Pa101, 137A132. **Remainder vesting in surviving life tenant** held payable to her executor. 259Mass465, 156NE885.

1681-3 259Mass465, 156NE885; 98NJ Eq569, 131A210 (time of death of life tenant).

1681-9 99NJEq509, 133A881. See also 135Misc48, 237NYS649.

1681-10 98NJEq188, 130A811; 133 Misc36, 231NYS414; 137Misc868, 244 NYS607; 24 OhA331, 157NE423; 24 Oh NPNS129. **The contingency,** etc. NS [1928] 1DomLR554. **Where divested remainder is bequeathed** by remainderman's will, bequest is also divested. 24 F(2d)257.

1682-12 258Mass399, 155NE193.

1682-13½-New. Remainder vested in life tenant's children at birth is not divested by death before time for enjoyment. Conn 151A345.

1682-14 106Conn627, 138A809; NJCh 147A569(1stcase) (remainder not divested where son died childless); 49RI 162, 141A326.

1682-15 TexCivA 276SW776. **Vested remainder subject to be opened** to let in after-born children under statute. 227 AppDiv265, 237NYS558.

1682-16 103Conn122, 130A116.

1682-17 221Ala150, 128S149; 99NJEq 131, 132A671; 21 OhA174, 151NE783.

1682-18 216Ala448, 113S501, 506 [cit CycperThomasJ.].

1682-20 258Mass244, 154NE861.

1682-21 TexCivA 4SW(2d)268, 271 [quotCyc].

1683-22 129Misc711, 222NYS511.

1683-24 24F(2d)257.

1683-28 See also 37 OklACR484, 245P 36.

1683-30 TexCivA 291SW570.

1683-32 154Md378, 140A100.

1684-33 47RI 444, 134A276; 101Vt325, 143A384.

1684-34 **No condition created.**–32 OhA 423, 168NE220 (provision that within one year after death of testator and wife sons should make certain payments created merely charge upon estate); TexCivA 291SW570.

1686-43 101Vt325, 143A384.

1686-52 DelCh 151A712; 124Kan792, 262P601; 167La766, 120S289; 229App

Div356. 243NYS328; 33 OhA66. 168NE 574; 296Pa185. 145A806; 5PaDist&Co 749. **Conditions tending to defeat estates** are strictly construed, though intent will be followed if not illegal or contrary to public policy. TexCivA 297 SW915.

1686-53 5PaDist&Co 749. **Public policy of state** is to be found embodied in constitution, statutes, and decisions of courts. 339 Ill 178. 171NE131. **Condition held not illegal as against public policy.**–134Misc893. 236NYS595.

1686-54 But see 134Misc893. 236NYS 595.

1687-59 125Kan782. 262P601.

1687-65 50Philippine267.

1688-68 127Kan178. 272P104. 62ALR 585. **Provisions as to forfeiture** are strictly construed. 220Ky703. 295SW 1063.

1688-70 102NJEq287. 140A568.

1689-71 Provision making income payable to husband if he should meet reverses reducing income to certain amount a year at any time during his life is not effective because of failure to make profit one year from operation of farm. 135Wash303. 237P721.

1689-79 Whether condition requiring devisee to remain with testator's widow until he reached majority was condition precedent or subsequent is immaterial in determining his rights after attaining majority. 224Ky97. 5SW(2d)906.

1690-80 80Colo461. 251P595; 128 Misc292. 217NYS849. **Conditions subsequent are preferred to conditions precedent** in construing will. 128Misc292. 217NYS849.

1690-81 Difference between condition precedent and subsequent is tested by language of clause in will, as to whether conditional act is to be performed before estate can vest, or on contrary, does not preclude vesting of estate but may follow it. 128Misc292. 217NYS849.

1690-83 Presumption favors conditions subsequent rather than conditions precedent to vesting of estates created by will. 198NC642. 153SE114.

1691-87½-New. Conditions subsequent are not favored in the law, and language of instrument, such as will, will be otherwise construed, if possible, without violating maker's plain intent. 101Vt 825. 143A384.

1691-89 80Colo461. 251P595.

1692-6 216Ky550. 288SW317.

1693-12 Conn 152A69; 128Misc292. 217 NYS849. **Devise of land for park conditioned on acceptance by trustees** held to vest at once, subject to divesting of title on failure to accept. 128Misc292. 217NYS849.

1693-13 124Kan792. 262P601.

1694-18½-New. Provision in codicil that no devisee addicted to excessive use of liquor or drugs shall be a beneficiary is valid condition subsequent. 117Nebr 776. 223NW17.

1694-19 194NC324. 139SE453.

1695-23 194NC324. 139SE453; Sask [1928] 3DomLR22. But see 134Misc893. 236NYS595. **In Philippines.**–50Philippine867.

1695-26 85 IndA639. 155NE524; 224 Ky97. 5SW(2d)906; Sask [1928] 3DomLR22.

1697-35 214Ky596. 283SW957.

1698-40 35 OhA526. 172NE629.

1699-60 168La286. 121S868. **Conditions held not contrary to public policy or good morals.**–167La766. 120S289.

1699-61½-New. Where charitable gift is subject to condition precedent, where intention is clear for charitable gift, court will apply doctrine of cy-pres. Alta [1927] 2DomLR1093.

1699-63 15DelCh84. 131A529, 535 [cit Cyc]; Mo 28SW(2d)999; 124Misc692. 209NYS779; Alta [1930] 3DomLR235. **This public policy of state** to safeguard and protect marriage relation. 339 Ill 178. 171NE131.

1701-67½-New. marriage to person outside particular faith; 124Misc692, 209NYS779.

1701-71 Mo 28SW(2d)999.

1702-73 Mo 28SW(2d)999; Alta [1930] 3DomLR235 (holding condition valid as providing for sister while unmarried, not to compel celebacy).

1702-82 15DelCh84, 131A529. **Condition held not void as in terrorem.**–15Del Ch84. 131A529.

1703-84 Devise to testator's widowed daughter-in-law, passing to her children upon her remarriage, is valid. 202 Iowa207. 207NW571. 45ALR1216.

1703-84½-New. However, interest of children is not only ground upon which validity of such conditions has been placed; 15DelCh84, 131A529.

1703-84½-New. and whether or not the welfare of children would be better served thereby, a condition imposed by husband on marriage of widow is valid. 15DelCh84. 131A529.

1703-84¼-New. It has been held that a marriage subsequently annulled as void ab initio does not affect rights of widows under will containing condition against remarriage. 130Misc34, 224NYS 75.

1703-86 339 Ill 178. 171NE131; 5Pa Dist&Co 749.

1704-87 127Kan340. 273P480. 68ALR 743.

1705-90½-New. Provision that, if wife should return to live with her husband, from whom she was then separated, she should receive no part of testator's estate, was held not void, as against public policy, where person named had returned to her husband before testator's death. 225AppDiv29. 232NYS84.

1705-96 208Cal476. 281P1010; CalA 276P583; 262Mass490. 160NE882. 58 ALR1548; 247Mich512. 226NW253. 255 [citCyc]; 322Mo1086. 18SW(2d)30. 67 ALR41; 102NJEq470. 141A450; 189NC 577. 127SE582; 33 OhA66. 168NE574. **Strictly construed.**–132Misc805. 231NYS 9. **Contest of claim under contract made by decedent and not under his will** is not within provision in will that if will contested estate should go to charity. 93PaSuper566.

1705-97 189NC577. 127SE582. **Under will providing that portion of contestants** should "revert" to those who stood firmly by testator's wishes, neutrals who took no part in contest held entitled to no share in forfeited portions. 189NC 577. 127SE582.

1705-98 99CalA586. 278P925; 189NC 577. 127SE582; 103WVa216. 137SE1. 52ALR83. But see 33 OhA66. 168NE 574. Contra 262Mass490. 160NE882. 58 ALR1548.

1706-99 103WVa216. 137SE1. 52ALR 83.

1706-1 103WVa216. 137SE1. 52ALR83.

1707-10 124Kan792. 262P601.

1708-11 124Kan792. 262P601.

1708-14 85 IndA639. 155NE524; 102 NJEq287. 140A568. 569 [quotCyc]. **Construction.**–205Cal744. 272P748.

1708-16 Ont [1929] 3DomLR459 (provision construed as requiring legatee to be of Lutheran religion at time of testator's death). **Particular provisions construed.**–ImpPC [1930] 4DomLR321.

1709-20½-New. Religious restriction operating only on choice of wife is too remote to be coercive of religious faith. 13PaDist&Co 413.

1710-33 127Kan178. 272P104. 62ALR 585. **"Department expenses,"** within language of bequest to public library in case municipality appropriated certain percentages of department expenses for public library, include expenses of schools, police department, licensing board, and finance commission. 263 Mass173. 160NE665. **Provision construed as covenant and not as condition of payment of legacy.**–132Misc274. 230NYS 174.

1711-38 Devise of farm with provision that devisee shall support widow and keep her at farm if she desires held to give widow right to select home. 214 Ky596. 283SW957.

1712-45 135Misc70. 237NYS6 (devise of testator's residence to son for life held independent of life estates in other dwellings and not subject to restrictions).

1713-54 125 Or428. 259P299 (provision void).

1713-56½-New. Condition against contest is not violated by proceedings by devisees to a final accounting and possession of real estate. 77Mont182. 250 P812.

1713-58 131Misc863. 229NYS308; 192 NC709. 135SE611; 122 Or246. 257P818. 820 [citCyc]; 144Va297. 132SE351.

1714-59 122Or246. 257P818; 144Va 297. 132SE351.

1714-61 122 Or246. 257P818.

1714-66 215Ky88. 284SW419; Nebr 227NW917.

1715-69 122 Or246. 257P818.

1716-76 314Mo508. 284SW497. **Contingent remainder** may be subjected to like conditions. 314Mo508. 284SW497.

1717-78 Conveyance in violation of valid testamentary restraint on alienation is voidable only by testator and heirs not joining. 223Ky321. 28W(2d) 405. **Condition in devise of residence to trustee with use to testator's wife for life that use shall not be assignable** is not violated by subletting part of premises so long as she maintained residence there. 252 IllA337.

1717-79 208Cal476. 281P1010 (forfeiture of legacy in case of contest of will); 214Ky596. 283SW957; Nebr 227 NW917.

1719-80 134Misc893. 236NYS595 (beneficiaries should not be permitted to repudiate condition while insisting on gift).

1719-88 Deed given in violation of restriction against alienation for limited time without provision for forfeiture or limitation over is voidable and not void. Nebr 227NW917.

1719-88½-New. Right of devisee to possession and income subject to be divested where conditions not performed will be withheld until conditions are performed if such appears to be intention of testator. 117Nebr776. 223NW 17.

1721-1 Matters not constituting contest.–208Cal476. 281P1010.

1721-2 CalA 276P583.

1721-4 134Misc791. 236NYS518. See 132Misc805. 231NYS9.

1721-6½-New. Clause inoperative where contest is entirely aside from, and outside of, will. NJCh 148A167.

1722-7 Condition as to "occupancy" may not require "personal occupancy."–190NC37. 128SE477.

1722-13½-New. Condition that widow maintain family home for children gives her wide discretion as to character of home to be maintained. 213AppDiv395. 211NYS128.

1722-14 OhA 173NE301. **Time for adoption of name.**–OhA 173NE301. **Necessity of presentation of election to take** or refuse name. OhA 173NE301.

1723-19 127Kan178. 272P104. 62ALR 585. **Purchase of stock exchange seat during testator's lifetime and retention thereof for three months after testator's death** constitutes performance of condition of purchase of seat within three months after testator's death. 103 NJEq111. 142A352.

1723-22 See also 232Ky666. 24SW(2d) 558.

1723-23 88 IndA595. 163NE531.

1724-31 85 IndA639. 155NE524.

1726-40 252 IllA337.

1726-42 Defeasance of absolute estate is looked upon with disfavor, unless will clearly establishes such intent. 124 Misc692. 209NYS779.

1726-47 But see 247Mich512. 226NW 253.

1727-49 CalA 276P583.

1727-52½-New. Equitable relief pending ejectment.–Pending ejectment suit commenced by beneficiary of condition to recover property for breach of condition is no bar to suit to restrain legatee from selling land or timber thereon. 85PaSuper292.

1727-52¼-New. Decrees of partial distribution of estate does not prevent legatee from impressing trust on property obtained by other legatees in accordance with provisions of forfeiture in will. CalA 276P583.

1727-52¼-New. Findings as to legatee's participation in will contest proceedings held not to require conclusion that legatee contested suit. 208Cal476. 281P1010.

1727-54 78CalA412. 248P680; DelCh 139A613; 158La815. 104S726 (where no particular persons to whom property is to be delivered at any particular time are mentioned, essentials of trust are wanting); Me 149A623; 131Misc526,

227NYS470; 144Wash281, 257P848.
1727-54½-New. Failure to mention trustee does not invalidate trust. 129 Misc394, 222NYS271.
1727-55½-New. Gift accompanied by direction to donee that he shall do certain things will be construed as a trust where direction is imperative and subject and object are certain. Alta [1927] 2DomLR1001.
1727-56 204Cal 399, 268P647; 138 Misc210, 245NYS291; 13PaDist&Co 103; 145Va742, 134SE673.
1728-57 26F(2d)543; 197Cal 189, 240P 21; 30Hawaii246, 254 [quotCyc]; Me 149A623; 82NH281, 133A166, 45ALR 1433; 137Misc758, 244NYS686; 136 Misc516, 238NYS554; 137Misc588, 244 NYS561; 195NC405, 142SE493; Tex CivA 158W(2d)86. **Court will not declare trust to be invalid** unless language actually used admits of no other reasonable construction. 197Cal 189, 240 P21.
1728-59 See also 145Va742, 134SE673.
1729-67 Me 149A626(2dcase).
1729-69 Devise of share of remainder of estate with direction that it be invested and income only paid to son held to create trust. 128Misc96, 218NYS239.
1729-72½-New. Bequest of sum of money to be invested in annuity bonds held to create trust. 87 IndA42, 155NE 528.
1729-73 78CalA412, 248P680.
1729-74 205Cal 757, 272P1060.
1729-76 174Minn568, 219NW919.
1729-77 137Misc449, 243NYS751; Tex CivA 298SW470.
1731-89½-New. Trust held not created by will devising realty to devisee and directing executors not to sell realty on trust estate for years. 24 OhA117, 156 NE223.
1731-89½-New. Legal estate necessary.-Where a will directed executor to distribute residue of estate for charitable purpose, but vested no legal estate in him, no trust was created. 218 AppDiv317, 218NYS325.
1731-90 78CalA412, 248P680; 82NH 281, 133A166, 45ALR1433; 218AppDiv 317, 218NYS325; 137Misc758, 244NYS 686; Alta [1927] 3DomLR46.
1732-91 101NJEq66, 137A434. **Amount of bequest of money** must be fixed with reasonable certainty. 106Conn137, 137 A388.
1732-95 104CalA1, 285P365; 246Mich 288, 224NW425; 315Mo 627, 287SW 316; 160Tenn11, 22SW(2d)4 (provision for expenditure of residue after death of testator's wife for erection of monuments and fence at family burial ground held not void for uncertainty).
1733-96 315Mo 627, 287SW316.
1733-96½-New. Trust is not void for uncertainty because will provided that income should be used for education maintenance and support of testator's sons "only in such manner as said trustee in his own judgment shall determine." 70Utah258, 259P919.
1733-97 134Misc893, 236NYS595 (provisions held not inconsistent); TexCivA 15SW(2d)86; 144Wash281, 257P848 [quotCyc].
1733-98 144Wash281, 257P848 [quot Cyc].
1733-99 291Pa175, 139A734; 144Wash 281, 257P848 [quotCyc].
1734-2 Mo 26SW(2d)778; 49RI 40, 139A659, 661 [citCyc]; 144Wash281, 257P848; 192Wis333, 212NW781.
1735-5 104CalA15, 284P948(2dcase); 87 IndA42, 155NE528; 192Wis333, 212 NW781. **Intention of testator** is primary question. 125Misc369, 211NYS 529. **Context of will** determines whether word wish creates trust. Iowa 229 NW247.
1735-6 231Ky497, 21SW(2d)814.
1735-7 Iowa 229NW247; BC [1928] 3DomLR558.
1735-8 179Ark30, 13SW(2d)810; 154 Miss295, 122S493; 138Misc210, 245NYS 291; 138Misc372, 245NYS703. **Held to create trust.**-213Ky330, 280SW1099.
1736-11 213Ky330, 280SW1099; 246 Mich288, 224NW425. **Statement of rule,** etc. 87 IndA42, 155NE528, 531 [quotCJ].
1737-14 124AppDiv548, 108NYS1047.
1737-15 104CalA15, 284P948(2dcase); 162La981, 111S393; 100NJEq48, 135A 347; NC 155SE567(2dcase). **Rule sustaining precatory trusts** does not apply where gift over relates to sale of property remaining at death of first taker. 100NJEq48, 135A347.
1737-15½-New. Interpretation in such cases depends upon destructive language used, 125Misc369, 211NYS529.
1737-15½-New. or upon surrounding circumstances. 125Misc369, 211NYS 529.
1738-16 Mo 26SW(2d)778. **"Desire"** 128Misc505, 219NYS125 (where trust failed for want of devise of legal title to trustees or direction to apply income); 49RI 40, 139A659, 661 [citCyc]. **"Wish."**-105Conn261, 135A555; 144 Wash281, 257P848. **"Request."**-105 Conn261, 135A555; Alta [1927] 3 DomLR46. **"Suggest."**-144Wash281, 257P848. **"See."**-204 Iowa927, 216NW 55. **"Desire."**-330 Ill 624, 162NE164; 144Wash281, 257P848. **For his support.**-137Misc451, 244NYS115.
1740-22 86 IndA47, 155NE721 (word "request"); 125Misc369, 211NYS529 (where codicil was drawn by unskilled draftsman); 49RI 40, 139A659, 661 [cit Cyc].
1740-24 192Wis333, 212NW781.
1741-29 198Cal 352, 246P48; 227Ky 169, 12SW(2d)319.
1741-30 252Mass518, 148NE141. **Trust held active.**-198Cal 352, 246P48. **Discretionary power of trustees to sell property** and deposit money in bank does not make trust dry one, since court will require active supervision of such money. 198Cal 352, 246P48.
1742-31 See also 13PaDist&Co 683.
1742-33 163La467, 112S301.
1742-34 219Ky1, 292SW338; 261Mass 373, 158NE791. **Limited power to dispose of personalty** given to life tenant of all real and personal property does not create trust in realty. 261Mass373, 158NE791.
1742-34½-New. Where will directs, upon homestead's passing to nephew, trustee to pay specified sum as income to nephew for life, trust created. 128 Misc553, 220NYS188.
1742-34½-New. Creation of life estate with power of disposal does not raise trust in favor of beneficiary. 134Misc 339, 235NYS416.
1743-36 Direction for payment of debts and funeral expenses of life tenant does not create a trust, but a mere charge upon property of estate in hands of trustee. 199Cal 724, 251P799.
1743-36½-New. Other payments directed not creating trust.-Will charging life tenants with payment of taxes, expenses of repair, and insurance out of income. 233Mich249, 206NW366.
1743-38 7F(2d)118; 7F(2d)461; 108 Conn412, 143A416, 61ALR663; 121Kan 57, 245P1039; 158Md315, 148A447; MoA 273SW759. **Spendthrift trust not created.**-202 Iowa1094, 211NW488; 292 Pa454, 141A256; 292Pa556, 141A484; 9PaDist&Co 242. **Courts will give effect** to plain intent to restrict beneficiary's enjoyment of trust property. 7F(2d) 461. **No particular form of words** is necessary to restrict power of beneficiary to enjoy trust property. 7F(2d) 461. **Intent to create spendthrift trust will not be defeated** where it can be gathered from language of will. 292Pa 556, 141A484.
1744-39 204 Iowa314, 213NW608; 121 Kan57, 245P1039; MoA 273SW759; 87 PaSuper184.
1745-41 Wife's claim for support held not barred under trust. 289Pa542, 137 A802, 52ALR1251. **Words held not to create inalienable trust.**-30 OhA73, 163 NE922. **Assignment in violation of spendthrift clause** in will is invalid. 13 PaDist&Co 508.
1745-42 162Ga767, 135SE90.
1745-44 162Ga767, 135SE90.
1746-47 NJPrerog 145A110(2dcase).
1746-48 78CalA412, 248P680.
1747-50½-New. Absolute gift, with gift over of "what remains" on beneficiary's death, does not indicate intention that trustee be appointed to hold fund or control its use by beneficiary. 260 Mass250, 157NE358.
1748-54 106Conn627, 138A809; Me 149A623; 135Misc93, 236NYS709 (absolute devise to wife of her own share and son's share till latter became of age).
1749-58 118 Or96, 245P1069 (will held not to create trust to provide income for widow).
1749-62 Me 149A623; NJ 129A429. **Trust not created.**-137Misc451, 244NYS 115.
1750-63 133Misc566, 233NYS414.
1750-64 246 IllA229.
1751-67 NJ 129A429.
1752-72 198Cal 352, 246P48; 106Conn 627, 138A809 (will appointing trustees and providing they should have complete control of estate, though not conveyed to them in express terms); 136 Misc113, 240NYS528 (deposit of money in bank in name of infant). **Trust not created.**-168La286, 121S868.
1753-74 181Ark276, 25SW(2d)421; 333 Ill 643, 165NE208.
1753-75 104CalA1, 285P365.
1754-80 Utah 286P631.
1755-87 Attorney's silent acquiescence in client's devising realty to him under secret trust is equivalent to express promise to carry out trust. 131Misc 602, 228NYS388.
1755-87½-New. Oral trust in legatee springs from testator's intention and legatee's promise. Mass 167NE264.
1756-90 138Misc210, 245NYS291; 138 Misc371, 245NYS642; 14PaDist&Co 189 (intention of testator). **Intention of testator.**-170Ark679, 280SW993; Del 149A304; 202 Iowa1094, 211NW488; 213Ky213, 280SW956 (provision construed as giving certain devisee right of occupancy only so long as trustees continued to use it as homestead). **Construction as whole.**-196Wis383, 220 NW175. **Will held to create only one trust.**-RI 149A799.
1757-93½-New. Equity will not imply provision for forfeiture where none is expressed. 83NH564, 145A666.
1757-96½-New. Time when trust is created depends upon intention of testator as expressed in will. 241NY184, 149NE827.
1757-96½-New. It does not depend upon action or nonaction of executor or trustee. 241NY184, 149NE827.
1757-96¼-New. nor upon their caprice or diligence. 241NY184, 149NE827.
1757-96½-New. Where nothing to contrary appears, trust is created on testator's death. 241NY184, 149NE827.
1757-96½-New. Trust is created at time when beneficiary is to receive income. 241NY184, 149NE827.
1758-1 78CalA638, 248P754; 88 IndA 374, 162NE448. **Estate in trust is to be limited to trust purposes.** 105Conn261, 135A555. **Care of cemetery lot.**-88PaSuper372.
1759-2 195Cal 643, 234P898 (testamentary trust declared invalid); 315Mo 627, 287SW316.
1761-5 Provision in residuary clause adding property to trust established by another clause will be governed by terms of clause establishing trust. 103Conn 54, 130A92.
1761-6 155Md483, 142A627; 133Misc 365, 232NYS198; 131Misc495, 227NYS 682.
1761-7½-New. Spendthrift trust not rejected because in separate paragraph from other trust provisions. 288Pa348, 135A626.
1762-17 DelCh 142A827.
1763-23 Appointment by beneficiary.-68Utah49, 249P128.
1763-23½-New. Where statutory scheme providing for transfer of trusteeships by banking corporations on transfer of business of banks, was in effect at date of will creating trust, testator is deemed to have adopted scheme for substitution of trustees prescribed by act. 97CalA138, 275P453.
1763-25 203 Iowa409, 212NW688. **Life tenant, with right to use principal, if necessary,** held not "trustee." 128Misc 577, 219NYS619.
1765-29 102NJEq94, 139A803.
1767-41 167Ga1, 144SE787.
1767-43 197Cal 189, 240P21 (use of word "bargain" in relation to power of

sale held not used in sense outside legal purpose of trust); 126Kan328, 267P 1093.

1767-47 87 IndA440, 159NE11; 315Mo 627, 287SW316.

1768-50 9PaDist&Co 639.

1768-51 204Cal 399, 268P647; 162Ga 610, 134SE603; 166Ga134, 142SE884; 134Misc182, 236NYS143; 49ND653, 193 NW317; SD 232NW89; TexCivA 298 SW470; Vt 151A654. **Execution of discretionary powers by trustees** does not require vesting title in them. 337 Ill 49, 168NE681.

1770-53 **Trust company as testamentary trustee is devisee** under law and takes as trustee under will at death of testator. 197Cal 189, 240P21. **Will held not to vest title in trustees.**-337 Ill 49, 168 NE681.

1770-54 338 Ill 391, 170NE243. **Trustee under will takes only estate commensurate with powers conferred** and purposes to be accomplished. 89Fla 457, 105S106.

1770-55 89Fla457, 105S106; 162Ga610, 134SE603; 325 Ill 212, 156NE364; 49 ND653, 193NW317. **Devise to trustee for A during "her natural life,"** and after death to her children and representatives of children, held to embrace fee in premises, giving trustee full title, and title in remainders being in trustee until beneficiaries become ascertainable. 162Ga 610, 134SE603.

1771-57 88 IndA374, 162NE448.

1772-61½-New. It may be dry passive trust or mere resting place for legal title. 89Fla457, 105S106.

1772-66 215Ky601, 286SW779.

1773-71 82NH281, 133A166, 45ALR 1433; 101NJEq66, 137A434.

1774-73 42F(2d)613; 29Hawaii474; NJ 135A354; 133Misc587, 233NYS426; 217AppDiv377, 216NYS652; 296Pa348, 145A824, 66ALR1342. **Child of cestui held entitled to support from fund.**-82 NH210, 132A10. **Divorced wife of cestui held entitled to support** from date of trust to date of divorce. 82NH210, 132A 10. **Divorced wife of cestui of spendthrift trust** held not entitled to support from fund. 82NH210, 132A10.

1775-76 162Ga610, 134SE603; 204 Iowa314, 213NW608; 49ND653, 193NW 317.

1775-80 109Conn268, 146A727 (trust for payment of income to widow for life and distribution thereafter to remainder men creates separate and distinct interests in property); 227Ky169, 12SW (2d)319; 265Mass515, 164NE464; 266 Mass454, 165NE489; MoA 288SW963; 133Misc587, 233NYS426; 24 OhA331, 157NE423. **Devisee may become both beneficiary and remainderman** under certain conditions without invalidating devise. 229AppDiv356, 243NYS328.

1776-82 106Conn137, 137A388; 103NJ Eq421, 143A547.

1777-83 121Kan57, 245P1039; 137Misc 54, 242NYS733.

1777-85 169Minn273, 211NW465.

1777-86 24 OhA331, 157NE423.

1778-89 Alta [1929] 1DomLR589.

1778-91 128Misc553, 220NYS188.

1778-92 202 Iowa1094, 211NW488.

1779-95 NH 146A857; 224AppDiv540, 231NYS446; 135Misc600, 238NYS164; TexCivA 22SW(2d)313(2dcase).

1780-97 **Under will bequeathing named securities and sufficient cash to make trust fund of certain amount,** etc. 83NH 422, 144A523. **Under will bequeathing named securities and sufficient cash to make trust fund of certain amount,** value of stock should be computed as of year after testator's death, and balance necessary will constitute amount of pecuniary legacy. 83NH422, 144A523.

1782-6½-New. Term "securities" may be used in will in its broadest sense to include stocks as well as bonds. 132 Misc150, 229NYS641.

1783-14½-New. Under will, giving income to widow for life, with right to use principal, if necessary, taxes and repairs held payable out of principal and not chargeable against widow. 128Misc 577, 219NYS619.

1783-16 Mass 167NE296; 261Mass158, 158NE530; Mass 172NE647; 127Misc 701, 217NYS605; 136Misc270, 239NYS 717; 286Pa389, 133A548. **Where will does not provide for disposition of income** pending termination of trust, it is payable to person presumptively entitled to next eventual estate. 129Misc78, 220 NYS816. **Life tenant, made sole judge of necessity of invading principal,** can demand same only on good faith determination of necessity. 129Misc497, 222 NYS588.

1784-17 130Misc313, 224NYS376, 382 ("wasting securities"); 283Pa185, 129A 74 (legatee entitled on distribution to only so much of stock dividend as will make total awarded them of equal value with shares bequeathed as of date of testator's death). **Life beneficiary is entitled to net income earned during period of administration of estate** after deduction of costs of administration. 80 Colo 499, 252P816. **Where will creating trust does not mention income** omission must be held intentional. CalA 290P528. **Life tenant not entitled to income on unproductive property in trust estate.**-Mass 172NE106.

1784-18 **In case of contingent legacies,** income falls into residue, and does not attach to corpus. NJCh 150A783.

1784-20 15DelCh84, 131A529; 136Misc 270, 239NYS717. **"Trust fund" construed as income only.**-15DelCh84, 131 A529.

1785-21 78CalA412, 248P680; 224Ky5, 5SW(2d)477; 258Mass331, 155NE18; 219AppDiv216, 219NYS129; 134Misc212, 236NYS149 (trustee's payment from principal to son for purpose of building up estate for son's second wife held unauthorized); 137Misc644, 244NYS566. See also NJCh 146A466. **Part of principal for support.**-224Ky5, 5SW(2d)477. **Will expressly providing for income to widow, and for use of part of principal, if necessary for her support,** held to permit payment of her expenses out of principal if in excess of income, but not to authorize payments to her in excess of income. 219AppDiv216, 219NYS129.

1786-22 15DelCh84, 131A529.

1787-24 **Cessation of income on remarriage.**-Mass 172NE106.

1787-28½-New. Where will directs payment to testator's son "for living expenses of himself and family" such portion of income as trustees deem advisable for specified period, such trust is for benefit of son's family as well as son and on son's death his widow is entitled to income for support of herself and her child until termination of trust. 127 Misc202, 216NYS331.

1787-28⅓-New. **Under trust for support of son's family until grandson reaches twenty-five,** excess of income over that paid for support may be accumulated only during minority of grandson, but thereafter accumulation would be void. 127Misc202, 216NYS 331.

1788-30 317Mo 1028, 298SW91, 56ALR 1276; 130Misc313, 224NYS376. See also 133Misc554, 233NYS326.

1788-31 317Mo 1028, 298SW91, 56ALR 1276; 127Misc399, 216NYS267; 97Pa Super548.

1789-34 104CalA181, 285P363; 134 Misc554, 236NYS232 (under will devising rents of realty to wife for life, widow is entitled to income from proceeds of realty in case it is sold). **Apportionment between principal and income should be made of profit realized by** testamentary trustees on resale of premises conveyed to them by mortgagors pending foreclosure in ratio principal sum bears to interest due at time of realizing on securities. 98NJEq55, 130 A22.

1789-35 NH 148A21 (savings bank dividends); 253NY213, 170NE895. **Extraordinary stock dividend.**-127Misc701, 217NYS605. **Income from "wasting securities"** over and above life tenant's fair return on capital value is principal. 130Misc313, 224NYS376.

1790-36 23F(2d)994; 15DelCh255, 136 A149; NJCh 150A5; NJCh 150A11; 253NY213 170NE895 (stock dividends from subsidiary company); 127Misc701, 217NYS605. **Stock dividends.**-317Mo 1028, 298SW91, 56ALR1276 (provision that trustee should collect income and profits and dispose of net income to distributees held not to show intent that stock dividends should be income); NJ OrphanCt 148A193. **Distribution of stock dividends to life beneficiaries** held not deprivation of property of remainderman without due process of law, where value of shares in trust fund was not diminished. 127Misc701, 217NYS 605. **Dividends bequeathed to life tenant** in trust must be from corporation's profits in net earnings. 15DelCh 255, 136A149. **Extraordinary dividend, declared from earnings realized by corporation,** before testator's death is allocated to corpus of trust. Md 150A15 (2dcase). **Liquidating dividend** declared by real estate corporation should be appropriated to corpus of trust. Md 150A15(2dcase). **Profit on stock** is earnings as distinguished from increment in capital valuation. 253NY213, 170NE895.

1790-37 27F(2d)101; 127Misc701, 217 NYS605. See also 199Wis131, 225NW 733. **Undeclared earnings,** resulting from increase in value of stock, are part of corpus and belong to remainder men. 127Misc399, 216NYS267.

1791-38 See also 266Mass500, 165NE 657.

1792-39½-New. Bequest to remainderman, after life estate, of principal of corporate stock and "unpaid income and dividends," does not give to remainderman income which had accrued and been distributed as dividends, but only such income and dividends as had not been paid by corporation. 285Pa186, 131A 714.

1792-41 136Misc566, 240NYS410.

1793-46 105Conn261, 135A555. But see 283Pa185, 129A74.

1793-46½-New. Losses from wear and tear of capital fall on remainder men and reversioners, not life tenant of trust. 25F(2d)528.

1793-46⅓-New. Where principal is directed to be divided and specific sum paid to each of several remainder men at death of life tenant they take any increase in the principal though each thereby receives more than their specified share. 12PaDist&Co 463.

1793-47 283Pa185, 129A74.

1793-49 80Colo 499, 252P816; 227App Div554, 238NYS678 (deduction of commissions from income); 136Misc218, 241NYS86. **Improvements.**-233Mich499, 206NW979. **Carrying charges** payable by life tenant out of income. 233Mich 499, 206NW979.

1794-50 80Colo 499, 252P816; Mass 172NE106; NH 148A21; 213AppDiv 395, 211NYS128; 136Misc218, 241NYS 86; 135Misc93, 236NYS709. See also 199Wis131, 225NW733.

1794-51 106Conn137, 137A388; 137 Misc758, 244NYS686.

1795-54½-New. Intention of testator controls whether charges of realty should be restored to income. Mass 172 NE106.

1795-56 19F(2d)198; 105Conn261, 135 A555; 248NY361, 162NE283; 13PaDist &Co 557. **Surplus income passes under residuary clause** which includes estate not effectually devised or bequeathed. 229AppDiv574, 243NYS165.

1796-57 134Misc554, 236NYS232; 134 Misc574, 236NYS316.

1796-58 259Mass612, 157NE159; 296 Pa94, 145A702.

1797-59 150Md478, 133A333; Mass 171 NE734; 134Misc198, 236NYS136 (accumulated income not otherwise disposed of must be added to residue). **Income undisposed of,** etc. 102NJEq300, 140A273.

1797-62 105Conn261, 135A555; 130 Misc313, 224NYS376; 130Misc635, 224 NYS599; 135Misc516, 238NYS554.

1798-63 127Misc202, 216NYS331. **In New York.**-126Misc728, 215NYS235.

1798-63½-New. Law does not favor accumulations. 109Conn7, 144A659(2d case).

1798-65 Iowa 230NW353; 134Misc554, 236NYS232. **Principal of trust should not be invaded** while beneficiary has other income to maintain her. 125Misc 901, 212NYS267. **Trustee appointed by chancellor,** where will appoints no trustee, may be authorized to expend principal in accordance with directions of

will. DelCh 142A827.

1798-66 Remainderman's rights in corpus are superior to life tenant's rights, as respects sale of testator's realty to make up deficiency in income. NJCh 150A684. **Recourse cannot be had to principal** to make up deficiency of income to pay designated payments to life tenant. NJCh 150A684.

1798-68 See also 266Mass161, 165NE4.

1799-71 283Pa185, 129A74 (reimbursement from stock dividend).

1800-73 NH 148A21.

1800-74 134Misc198, 236NYS136; 134Misc714, 236NYS135; 134Misc878, 236NYS541. **"Accrued income"** payable to remaindermen on life tenant's death is income earned on investments but not yet payable. 134Misc195, 235NYS763.

1800-75 196Cal 29, 235P725 (under trust provision construed as intended for maintenance of adopted daughter, she is entitled to income from death of testatrix); 80Colo 499, 252P816; 259Mass612, 157NE159; Mass 172NE106; 241NY184, 149NE827 (trust construed created as of time of testator's death when beneficiary was to receive income); 131Misc495, 227NYS682; 133Misc554, 233NYS326; 136Misc237, 242NYS445; 137Misc658, 244NYS686; 137Misc325, 243NYS535; 286Pa389, 133A548. See also 127Misc701, 217NYS605. But see NH 148A21. **Apportionment of extraordinary dividends between life tenant and remainderman** is made at time of testator's death unless contrary intention appears. 241NY184, 149NE827.

1801-76 NH 148A21 (income received during year following testator's death became merged in estate); 134Misc198, 236NYS136. **Provisions imposing duty of payment of income on trustees who do not begin to act until administration is closed** do not affect general rule that income from rents and profits of trust begins to run from death of testator. 80Colo 499, 252P816. **Where executor is named as trustee,** beneficiaries are entitled to income accrued on trust fund from time fund is set apart for purposes of trust. 160Tenn57, 22SW(2d)6.

1801-76½-New. Whether trustee receives income by way of ordinary or extraordinary dividend in amount does not affect right of beneficiary to income after death of testator where testator's intention was to have trust created as of time of his death. 241NY184, 149NE827.

1802-78 87IndA440, 159NE11. **Direction for advancements.**-229Ky162, 16SW(2d)756. **Discretion as to payment of income before period of distribution.**-NJCh 146A466.

1803-79 136Misc566, 240NYS410.

1803-80½-New. Where income is directed to be appropriated to enlargement and beautifying of public park, income should be paid to city by trustees for such purpose, and not expended by them directly. 82NH557, 131A352.

1803-80⅓-New. Where trustee has made advances of dividends to beneficiary, he may deduct such advances from dividends subsequently earned. 174Ark1105, 299SW617.

1803-81 130Misc313, 224NYS376; 137Misc658, 244NYS686 (amount actually earned by income producing securities); 138Misc90, 245NYS173; 10PaDist&Co 808; 156Tenn284, 300SW9. **Widow bequeathed three fourths of income of trust fund** if income did not exceed twenty thousand dollars was held entitled to entire income where it did not exceed seven thousand dollars. 256Mass107, 152NE95. **"Wasting securities."**-130Misc313, 224NYS376.

1803-82 156Tenn284, 300SW9.

1803-83 80Colo 499, 252P816; 254Mass476, 150NE193; 160Tenn57, 22SW(2d)6.

1804-84 135Misc516, 238NYS554 (beneficiary not entitled to excess income).

1804-88 See also Mass 167NE281.

1805-93½-New. Whole income tax of beneficiaries, receiving testamentary annuities tax free, should be apportioned between trustees and beneficiary in proportion of annuity to other income. 48RI 370, 136A440, 51ALR451.

1805-93⅓-New. Income tax previously paid by trustees of tax free annuity should be regarded as part of beneficiary's income. 48RI 370, 136A440, 51ALR451.

1805-94 80Colo 499, 252P816 (discretion as to payment of expenses out of income); 107Conn9, 139A305; 135Misc578, 240NYS206. **Discretion given to trustee** as to payment of capital to life tenant, predeceasing testatrix, held not to render whole trust invalid. 197Cal276, 240P498. **As to charging expenditures as between principal and income** discretion given executor by will must be exercised subject to rules, practices, and decisions of court. 130Misc339, 224NYS435. **In determining whether income from testamentary trust is sufficient for widow's maintenance,** trustee may consider testator's gift after executing will, but not those given before. 136Misc771, 242NYS237.

1805-95 107Conn9, 139A305; 35OhA394, 172NE540.

1806-96 12PaDist&Co 753.

1806-97 Where discretion subject to scrutiny, as to fraud or diversion, life tenant or remainderman may have right to invoke it. 127Misc797, 217NYS702. **Abuse of discretion not shown.**-136Misc771, 242NYS237. **Testator's widow must show abuse of discretion** in trustee's refusal to make payments. 136Misc771, 242NYS237.

1806-98 127Misc797, 217NYS702.

1806-99 Words "used," "applied," "maintained," and "supported" may impose duty on trustee to see that funds are applied to beneficiary's support and are not used in violation of trust for use of some other person. 127Misc797, 217NYS702.

1807-2 NH 151A81(1stcase); 134Misc893, 236NYS595. **Extension of trust.**-83NH104, 138A323. **Distribution of capital** held to be "as" payments under trust provisions cease, and not "when" they cease, so as to validate will under rule against perpetuities. 247NY195, 160NE8.

1807-6½-New. Testator has right to determine when beneficiary of trust has demonstrated capacity to care for corpus of fund. 100NJEq348, 133A381.

1807-6⅓-New. Though estate is in excess of amount needed to support annuitants, trust cannot be terminated as to part of estate earlier than specified time. Mass 167NE357.

1807-7 30Hawaii246; 126Me371, 138A564; 156Md428, 144A367; 133Misc601, 233NYS418; 35OhA526, 172NE629; 283Pa185, 129A74 (interpretation of certain provisions immaterial where at termination of trust every member of each class was living). **Trust character not removed** from realty where personal property was sufficient to pay annuities provided by testator. 105Conn261, 135A555. **Beneficiary requesting trustees to sell house** which was corpus of trust had no further rights under will. Mass 167NE357.

1808-9 Will providing for trust period of not less than ten years is not terminated on death of beneficiary within ten years. 198NC241, 151SE263.

1809-12 319Mo128, 3SW(2d)726.

1809-16 Mass 172NE647; 133Misc365, 232NYS198; 286Pa389, 133A548; 159Tenn27, 16SW(2d)27; 153Wash247, 279P591(2dcase) (trust for absent son to be conveyed to him if found or claims right); 200Wis386, 228NW495 (termination on having lawful issue of body or death without issue). **Provision for termination of trust if son outlives wife** does not become operative on wife obtaining divorce. NH 147A897. **Power to dissolve trust** given to majority of children then living. Pa 151A809.

1809-17 260Mass285, 157NE361; 266Mass454, 165NE489; NJCh 149A822; 131Misc526, 227NYS470; 292Pa327, 141A152. **Prior to death of beneficiary.**-131Misc559, 227NYS443. **On death of beneficiary while receiving income** before reaching age for receiving principal, bequest does not pass as his estate where will provides for gift over in such eventuality. 260Mass285, 157NE361.

1810-18 252Mass518, 148NE141; Mass 167NE357; TexCivA 298SW470.

1810-19 260Mass577, 157NE707 (will held to intend that share of child dying without issue should become part of principal).

1810-20 See also 266Mass454, 165NE489.

1810-21 102Conn503, 129A382; 150Va375, 143SE736.

1810-24 318Ill585, 149NE489; Md 149A689; 127Misc705, 217NYS633; 131Misc526, 227NYS470; 132Misc805, 231NYS9; 195Wis88, 217NW726. But see 134Misc182, 236NYS143.

1811-27½-New. Where will gives income of trust to beneficiaries for life, trust continues in existence during their lives, though remainder over was in form of trust of unlimited duration. 15DelCh84, 131A529.

1811-27⅓-New. Under will creating testamentary trust, express object of which was to keep testator's estate together as long as possible to provide an income for his wife and children, but providing that estate was no longer to be kept together for benefit of wife on her remarriage, but thereafter was to be kept together only for benefit of children, trust would continue during minority of testator's children, whether widow remained as trustee or not due to her remarriage. 150Va375, 143SE736.

1811-28 6PaDist&Co 651 (share will be awarded without intervention of the trustee).

1812-30 11PaDist&Co 69; 13PaDist&Co 3 (provision of will construed as authorizing termination of trust for benefit of testator's children on request of sole surviving child).

1813-34 201Iowa1226, 207NW362; 136Misc270, 239NYS717; 5PaDist&Co 425.

1813-38 110Conn117, 147A367 (accrued income at son's death held payable to surviving wife for life); 162Ga767, 135SE90; 318Ill544, 149NE476; 150Md478, 133A333; 137Misc588, 244NYS561; 24OhA331, 157NE423; 293Pa56, 141A730; 195Wis88, 217NW726. **Conversion of personalty into money.**-49RI 162, 141A326. **Devise in trust to married woman for life** may be with remainder over to children born or to be born. 162Ga767, 135SE90. **Provision directing distribution of trust fund on certain date** with provisions for extension of trust for grandchildren referred only to grandchildren whose parents died in testatrix's lifetime. 325Ill212, 156NE364. **Will construed to leave income to son** if he survived wife of testator. 247NY195, 160NE8. **Sole surviving beneficiary** held entitled to entire proceeds. 131Misc559, 227NYS443. **Share of child dying after testator's death,** in trust fund for children, passes to surviving child in absence of disposition of remainder if both children survived testator. 293Pa56, 141A730. **Termination of trust and acceleration of remainder** by renunciation of net income by life tenants is not authorized where it would defeat testator's intention. 159Tenn27, 16SW(2d)27. **Taking as heir and not survivor.**-155Md483, 142A627.

1814-39 125Me378, 134A195; 286Pa389, 133A548; 9PaDist&Co 1. **Provisions of testamentary trust for division at stated time** held to call for actual division of property rather than sale and distribution. NJCh 130A5. **Gift over if life tenant dies intestate** implies a testamentary power of appointment in life tenant. 257Mass72, 153NE337. **Income accruing during trust** must be paid to life tenants or their personal representatives. 130Misc196, 224NYS183.

1814-40 128Misc582, 219NYS614.

1814-41 110Conn150, 147A562 (where son died without issue, remaining son of testatrix is entitled to remainder of trust); 265Mass515, 164NE464; Mass 167NE357; 132Misc748, 230NYS329; 198NC241, 151SE263; 286Pa389, 133A548. See also 155Md483, 142A627.

1815-42 Mass 171NE828; 33OhA532, 170NE31.

1816-43 Mass 171NE828; 131Misc559, 227NYS443.

1816-44 Me 149A623; Pa 151A809.

1817-45 Under particular will held that beneficiary of trust on attaining majority took fee-simple estate defeasible on his death unmarried and child-

less. 141SC32, 139SE196.

1817-45½-New. Under a provision that on remarriage of beneficiary of income of trust fund, "trust fund" shall pass to another person, term "trust fund" has been construed to mean income only and not the corpus. 15Del Ch84, 131A529.

1817-45½-New. Where trust estate, payable to beneficiaries at stated intervals, is given to others on death of beneficiaries without issue before termination of trust, time of distribution is not at testator's death, but when contingent events happen, 24 OhA331, 157 NE423.

1817-45¼-New. and the gift over in such case is to a class, which is determinable only when events happen. 24 OhA331, 157NE423.

1817-45⅛-New. Will passing income of trust to defendant on life annuitant's death, and corpus to defendant's children if he did not survive, or to charities if no issue, entitled defendant to corpus on surviving life annuitants without issue. 130Misc856, 225NYS407.

1817-47 99NJEq238, 132A206. **Where some of trusts created by will are valid,** trustee holds legal title subject to valid trusts. 99NJEq238, 132A206. **Executors' power of sale** held not limited by invalidity of testamentary trust. 99NJEq238, 132A206.

1818-50 Ark 30SW(2d)834; 247NY 195, 160NE8. **Legal title in trustee** holding for heirs at law and next of kin of testator. 99NJEq238, 132A206.

1819-53 287Pa102, 134A462.

1819-55 13PaDist&Co 257.

1819-56 But see 319Mo1068, 5SW(2d) 66. **Where devise failed to create trust,** beneficiaries held to take subject to power in executrices to sell, at their discretion. 128Misc505, 219NYS125.

1819-58½-New. Invalidity of secret trust attempting to carry out power of appointment created by deed causes failure of attempted exercise of power, and property passes to persons named in alternative provision of deed. 131 Misc602, 228NYS388.

1820-59 203 Iowa409, 212NW688.

1821-78 213Ky330, 280SW1099; **Tex CivA** 128SW(2d)659. **Will giving residue to executors with power to sell and divide proceeds** does not create trust but is valid as a power. 130Misc12, 223NYS626. **Provision authorizing widow to provide for care and support of adopted daughter in whatever way she thinks best,** is sufficient authority for conveyance by widow to adopted daughter. 207 Iowa127, 222NW431. **Right to dispose of property** follows the implied power to consume. 296Pa185, 145A806.

1821-80 259Mass39, 155NE788. **Power not given.**-257Mass492, 154NE397; 99 NJEq339, 131A515; 12PaDist&Co 713 (power of appointment not implied).

1822-82 213Ky330, 280SW1099; 320 Mo852, 8SW(2d)931. **Power not given.** -90Fla540, 106S412.

1823-86 A trust created.-15F(2d)719.

1823-86½-New. Purpose of testator to allow trustees to dispose of personalty among an undefined class, as he himself would exercise, held to be in contravention of statute. 82NH281, 133A166, 45ALR1433.

1823-87 27F(2d)198; 197Cal189, 240 P21 (words expressing power need not be imperative but may be discretionary); 163Ga884, 137SE386; 88 IndA 374, 162NE448; 207 Iowa264, 222NW 843(2dcase); 213Ky213, 280SW956. **Circumstances held to authorize execution of power of sale.**-213Ky213, 280SW 956.

1824-88 77Mont182, 250P812; 127Misc 773, 216NYS620; 128Misc505, 219NYS 125. **Trustee given discretion to use principal for beneficiary's support** does not give trustee power of sale. 127Misc 773, 216NYS620.

1825-90 220AppDiv126, 220NYS645.

1825-92½-New. Provision directing executor to distribute residue to previously named persons in such amounts as he in his discretion may determine is valid. 215AppDiv506, 213NYS723 (no objection that no specified amount payable to each legatee is mentioned).

1825-92½-New. Residuary devisees held subject to exercise of power of sale and conveyance rested in executor. 321 Ill266, 151NE893.

1825-94 226Ky548, 118SW(2d)423; 292 Pa94, 140A626.

1826-95 207 Iowa264, 222NW843(2d case); 14PaDist&Co 55. **Power given to executor to sell real estate** is not void as repugnant to preceding clause vesting title absolutely in devisees subject only to life estate and payment of debts. 201 Iowa284, 207NW116.

1826-97 Particular provisions construed.-Pa 151A697.

1826-98 298Pa438, 148A506; **Sask** [1929] 4DomLR1074. **Any ambiguity in will giving trustee power to lease property** must be resolved in light of circumstances existing when will was made, including condition of property. 217AppDiv443, 217NYS815.

1826-1 197Cal189, 240P21; 320Mo 852, 8SW(2d)931; 242NY196, 151NE 205; 129Misc390, 222NYS247; TexCivA 19SW(2d)805. But see 231Ky122, 21 SW(2d)153.

1827-5½-New. Power to change remainderman's interest. 235Ky363, 31 SW(2d)606.

1828-8 136Misc688, 242NYS207; 287 Pa478, 135A109; 85PaSuper123; 10Pa Dist&Co 167. **Gift in trust to dispose of property to testator's friends** held power coupled with trust to which principles incident to trust apply. 82 NH281, 133A166, 45ALR1433.

1828-9 287Pa478, 135A109 (power to divide between "joint issue" does not require equal division). See also 98 CalA306, 277P123. **Power of disposition** held limited as to beneficiaries but not as to amount of shares. 126Misc25, 211NYS723. **Exercise of power of disposition** to other than those named in will creating power is void. 126Misc25, 211NYS723. **Persons named in will giving residue** to executors with power to distribute amounts, in his discretion, to persons named, preference to be given to testator's nearest blood relatives, may not be denied right to participate. 215 AppDiv506, 213NYS723.

1829-10 138Misc42, 244NYS673; 287 Pa478, 135A109; 298Pa540, 148A843. **Power given to life tenant to distribute residue to such charitable institutions as he shall appoint by will** can be exercised only by outright bequest or devise. 13PaDist&Co 331. **Power given to life tenant to distribute residue to such charitable institutions as he shall appoint by will,** etc. Such power cannot be exercised by giving principal in trust to trustee to pay income to charity. 13PaDist&Co 331.

1829-12 315Mo627, 287SW316; 100NJ Eq348, 133A881; 127Misc647, 217NYS 381; 288Pa348, 135A626. **Husband held authorized under power in will** to create spendthrift trust. 288Pa348, 135A626.

1830-14½-New. Where unaffected by invalid provisions as to principal, provisions as to disposition of income will be sustained. 288Pa348, 135A626.

1830-15 5F(2d)718 (power to appropriate part of property to charitable institutions without jeopardizing object of trust construed); 35Ariz274, 276 P850; 197Cal276, 240P498 (will held not to show intention that estate should be distributed by trustee in same manner as beneficiary should devise her estate); 203 Iowa754, 208NW337; 155 Md483, 142A627; 314Mo214, 284SW 121; Mo 318SW(2d)778 (construction of power to widow to sell for support of self and children as excluding absentees and including children regardless of age); 19 OhA43; Pa 151A799; 8Pa Dist&Co 461; 9PaDist&Co 485. **Life tenant with power of sale** could not make gift of property or convey it without consideration. 260Mass162, 157 NE338. **Construction of particular powers.**-NJCh 148A578.

1831-16 34 OhA348, 171NE245. **Where life tenant dies without exercising power,** it may be dismissed from consideration. 213Ala676, 105S881.

1831-17 DelCh 149A430; 219Ky604, 293SW153; 232Ky358, 23SW(2d)553; 249Mich474, 229NW465; 127Misc647, 217NYS381.

1832-18 88 IndA72, 163NE287.

1832-19 233Ky388, 25SW(2d)1040.

1832-20½-New. Power in life tenant to dispose of principal is subject to no trust or condition. 242NY196, 151NE 205.

1832-20½-New. Such power is "absolute" within Real Prop. L. § 149. 242 NY196, 151NE205.

1832-21 Mo 31SW(2d)778; 136Misc 127, 238NYS775.

1833-22 130Misc110, 222NYS532.

1833-24 234Ky407, 28SW(2d)463(2d case); 249Mich474, 229NW465; Mo 31 SW(2d)778; 219MoA694, 284SW145; 127Misc647, 217NYS381; Pa 151A799. **No right to devise** property exists in donee of power to sell and consume estate for support and comfort. 287Pa 448, 135A119.

1833-24½-New. Will giving wife income for life and power of sale, consumption, and reinvestment for her support and comfort, gives her unlimited right to use estate for such purposes. 287Pa448, 135A119.

1833-24½-New. but her consumption of estate must be in good faith for such purposes, 287Pa448, 135A119.

1833-24¼-New. and where donee in good faith she may sell, transfer, and consume estate even to extent of leaving nothing at her death, 287Pa448, 135A119.

1833-24½-New. but transfer with intent not to consume for herself, but to preserve for others after her death and change beneficiaries after her would be fraud on testator and his will. 287Pa 448, 135A119.

1833-24¼-New. Generally courts are slow to condemn widow's expenditures as contrary to power to sell and consume for her support and comfort, unless made merely to defeat testator's intent or prefer certain heirs and beneficiaries. 287Pa448, 135A119.

1833-24½-New. Power to sell without order from court and without notice and use proceeds as set forth in will, conferred full power to sell property without limitation by necessity to sell for support. 167Ga790, 146SE635(2dcase).

1833-24¼-New. Funeral expenses of devisee with life estate are not payable out of corpus. 234Ky407, 28SW(2d) 463(2dcase).

1833-24½-New. Death of those for whose support property is charged gives life tenant having power to sell, right to convey fee simple title. 298Pa152, 148 A71.

1833-25 242NY196, 151NE205. **Property subject to power of appointment** under will is general power and equivalent to fee. 21F(2d)164.

1833-26 259Mass39, 155NE788.

1833-26½-New. Where donee of power to distribute residue is also one of appointees, he must refuse to act as trustee. 215AppDiv506, 213NYS723.

1833-26½-New. One, who was to have remainder in trust fund, if power was not exercised, has no interest which he could convey to appointee where power was exercised. 99NJEq164, 133A205.

1833-26¼-New. If will directs sale and application of proceeds grant is merely power of sale, but if there is devise to sell and apply proceeds power grants an estate. 335 Ill395, 167NE694.

1833-26½-New. That estate of widow is less than fee simple does not deprive her of power to convey fee-simple title, where will provided that she should possess such power. 226Ky548, 118SW(2d) 423.

1833-28 216Ky780, 288SW736 (sale held valid).

1833-29 98CalA306, 277P123. See also 137Misc222, 243NYS380.

1834-30 137Misc222, 243NYS380 (remaindermen).

1834-32 Blood relatives are entitled to as much, if not more, than others under will giving residue to executor with power to distribute to persons named amounts in his discretion preference to be given to testator's nearest blood relatives. 215AppDiv506, 213NYS723.

1834-32½-New. Power of disposition amongst any of testator's children, does not require, to grant or devise estate to all children, but entitles to choose from amongst children those desired to take

remainder. 226Ky806, 11SW(2d)949.
1834-34 226Ky806, 11SW(2d)949; NS [1929] 2DomLR278.
1834-34½-New. Gifts from trust for testator's son donee of power, should be paid direct to appointees named in son's will and not to administrator with will annexed of son's estate. 137Misc 222, 243NYS380.
1835-42 124Misc906, 210NYS320.
1835-44 101NJEq439, 138A536 (holding no exercise of power); 136Misc127, 238NYS775; 85PaSuper123; 5PaDist&Co 369. But see 325 Ill 212, 156NE364. **Devisees of remainder** had power to dispose during their lifetime, under provisions of will. 227AppDiv125, 237NYS 141.
1835-45 15DelCh174, 138A613; 163Ga 64, 135SE505; 259Mass39, 155NE788; 129Misc390, 222NYS247. Contra 325 Ill 212, 156NE364. **Clause giving all money and securities testatrix shall be possessed of or entitled to at decease** held not to show intention to exercise of power. 259Mass39, 155NE788; 48RI 258, 137A145.
1835-45½-New. Power to designate by will proportions nephews may take may be exercised by appointment of trustees for benefit of nephews. Mass 167NE 294.
1835-45½-New. Validity of exercise of power.-Second life tenant exercising power of appointment by creating third life estate does not give third life tenant absolute fee. 134Misc803, 237NYS 215.
1836-46 The whole life of the donee, etc. 226Ky548, 11SW(2d)423.
1836-47 130Misc339, 224NYS435.
1836-48 Interest of remainderman as heir of life tenant held not defeated because whole trust scheme was dissipated on death of testatrix. 197Cal 276, 240P 498.
1836-49 197Cal 276, 240P498 (will construed to give life tenant power of disposal by will only if she survived testatrix).
1836-49½-New. Where right given is election and not a power, question of exercise of power granted to donee after donee's death, as to property discovered after distribution, is not presented. 99NJEq339, 131A515.
1836-51 153Md408, 138A258.
1836-52 298Pa438, 148A506 (power fails on accomplishment of purpose thereof).
1836-52½-New. Duration of power of sale depends on donor's intention as derived from instrument itself. 226Ky 548, 11SW(2d)423.
1836-52½-New. Powers of sale persist until purposes of their creation are consummated. 226Ky548, 11SW(2d)423.
1836-52¼-New. Conduct of beneficiaries in acquiescing to delay in exercise of power may continue power until testator's wish is in fact executed. 226Ky 548, 11SW(2d)423.
1836-55 213Ky213, 280SW956 (will construed as giving power to sell homestead).
1837-56 101NJEq439, 138A536 (holding no exercise of power).
1837-57 219Ky604, 293SW153; 288Pa 348, 135A626; 14PaDist&Co 105; 155SC 123, 152SE24; 161Tenn111, 29SW(2d) 659.
1837-58 98CalA306, 277P123; 210Ky 773, 276SW844; 320Mo 852, 8SW(2d) 931; 101NJEq439, 138A536. **Will construed to dispose of remainder as in case of failure to exercise power of appointment.** 130Misc804, 224NYS606.
1837-59 215Ala603, 112S241; 220Ala 247, 125S39; 134Misc363, 236NYS280.
1837-60 134Misc803, 237NYS215; 14 PaDist&Co 105.
1837-61 99NJEq131, 132A671; 286Pa 520, 134A402. **Nonexercise of power of appointment to determine shares of members of class** cannot defeat testator's intention to benefit class. NS [1929] 2DomLR278.
1837-62½-New. Property not disposed of under power to sell and consume for support and comfort, and unconsumed proceeds of property sold under such power, pass under will of testator creating power. 287Pa448, 135A119.
1837-62¼-New. Such property and proceeds pass to testator's residuary legatee as against beneficiaries under will of donee of power. 287Pa448, 135 A119.
1837-62¼-New. Children of deceased member of class take share of parent when power of appointment is not exercised. 161Tenn111, 29SW(2d)659.
1837-62½-New. Power to sell granted executor in will does not deprive devisees of right to sell property, executor not having acted. 221Ala219, 128S387 (3dcase).
1837-62½-New. Statute providing remainder over coupled with power of disposal is not defeated except to extent of exercise of power should be liberally construed. 153Va614, 151SE300.
1837-63 124Misc906, 210NYS320 (conveyance by remainderman does not extinguish power of sale to life tenant unless all beneficially interested concur).
1838-65 37F(2d)225; 218Ala320, 118S 553; 207Iowa71, 218NW926(2dcase).
1838-66 325 Ill 500, 156NE758; 98NJ Eq572, 131A212; 101WVa320, 132SE 735. **Where no other relief is sought** court of equity will not generally entertain jurisdiction of suit for construction of will. Mo 30SW(2d)47.
1838-67 14DelCh457, 130A283; 325 Ill 500, 156NE758; 101WVa320, 132SE735. But see Mo 30SW(2d)47.
1839-68 15DelCh253, 135A849; 249 IllA98. **Where question of fact is involved,** court held without jurisdiction. 15DelCh253, 135A849.
1839-69 323 Ill 303, 154NE135; IndA 158NE299; 37 OkiACR551 (partition suit). **Bill for settlement of accounts** as executor, not alleging any property came into his hands or any indebtedness, held not sufficient to justify construction of will. 101WVa320, 132SE 735. **Unless other relief prayed for** is practicable and calls for present action to preserve right against loss or invasion, equity will not construe will. 101 WVa320, 132SE735.
1839-70½-New. And even though it would not have jurisdiction otherwise. IndA 158NE299.
1841-77 Fla 129S835; 157SC407, 154 SE426.
1842-82 176Ark660, 3SW(2d)974; 110 Conn150, 147A562.
1844-91 In Wisconsin.-198Wis573, 225 NW181.
1845-95 219Ala497, 122S824.
1845-99 163Ga884, 137SE386; 320 Ill 547, 151NE539; 98NJEq572, 131A212. **Construction held necessary.**-OhA 173 NE301.
1845-1 219Ala497, 122S824; 170Ark 679, 280SW993 (will held sufficiently ambiguous to justify action for construction); 333 Ill 577, 165NE348. But see 220Ala524, 126S409(2dcase).
1845-2 83NH225, 140A708; 98NJEq 572, 131A212.
1845-3 98NJEq572, 131A212; 83NH 225, 140A708.
1845-4 157Md565, 146A742; 98NJEq 572, 131A212.
1846-8 12F(2d)896, 903 [quotCyc]; 15 F(2d)719; 30Hawaii246, 257 [quot Cyc]; 333 Ill 577, 165NE348; 154Md 261, 140A212; 157Md565, 146A742 (whether bequest to plaintiff would become void under forfeiture clause of will); 98NJEq572, 131A212 (suit entertained only when positive directions for actions of trustee are sought); 103 NJEq113, 142A414 [aff 144A918(4th case)]; 132Misc270, 230NYS168. **Where bill seeks directions as to distribution,** action cannot be entertained until time for distribution arrives. 98 NJEq572, 131A212.
1847-11 99NJEq514, 133A705 (academic); 230NYS267; 135Misc387, 238NYS 109 (academic question); 33 OhA379, 169NE460; TexCivA 48W(2d)268, 271 [quotCyc]. See also 319Mo 128, 3SW (2d)726.
1847-16 219Ala497, 122S824; 162La 758, 111S86; 83NH345, 142A692; 99 NJEq538, 134A84; TexCivA 4SW(2d) 268, 271 [quotCyc].
1847-17 126Me371, 138A564. **One claiming merely legal title to testator's realty by descent** cannot maintain suit in equity for construction of will. Mo 30SW(2d)47.
1848-18 221Ala150, 128S149 (remainderman or reversioner); 175Ark1130, 1SW(2d)809. **Where challenge to charitable bequest in excess of amount authorized by statute was successfully made by persons authorized,** other parties claiming interest in remaining portion of estate have right to maintain action to secure judicial determination of their right thereto, without regard to whether they would have authority to question validity of such charitable bequest. 207 Iowa127, 222NW431. **Claimant of legal title.**-Mo 30SW(2d)47.
1848-20 163Ga884, 137SE386; 237Mich 252, 211NW623; Mo 30SW(2d)47; NJ Ch 139A596; 198NC642, 153SE114.
1848-21 83NH225, 140A708; 193NC 294, 136SE733; 194Wis113, 216NW130.
1848-22 221Ala150, 128S149; 175Ark 1130, 1SW(2d)809; Mo 30SW(2d)47. But see 219Ala497, 122S824.
1848-23 162Ga767, 135SE90; 83NH225, 140A708. **In Georgia.**-162Ga767, 135SE 90.
1848-25 237Mich252, 211NW623; Mo 30SW(2d)47; 198NC642, 153SE114. **Where legatee sues for recovery of property under will** construction may be invoked. 162Ga767, 135SE90. **Legatee is not entitled to file cross-petition for construction of will** where it is not shown that executor was requested to file such action and failed to do so. 33 OhA379, 169NE460.
1849-33 98NJEq572, 131A212 (action premature until time of distribution); 131Misc495, 227NYS682; RI 136A771.
1850-34 But see 133Misc587, 233NYS 426.
1850-35 125Me171, 132A211 (time of distribution of a fund controls the statute of limitations and laches for bill to construe the will).
1850-36 Contra 193Wis10, 212NW634. **Delay not fatal.**-193Wis10, 212NW634 (ten years).
1850-38 15DelCh253, 135A849; 6Pa Dist&Co 256. But see 86Colo 259, 280P 882. **Executor personally interested.**-237Mich252, 211NW623.
1850-40 Md 149A689 (legatees need not join as parties).
1851-44 104Conn97, 132A411; 317 Ill 535, 148NE317 (unborn legatee); 125 Me171, 132A211; 319Mo 857, 5SW(2d) 374; 48RI 72, 135A402 (beneficiary is proper party). See also 146SC194, 143 SE818. **Trustees who are also cestuis que trustent** should be joined as individuals and as cestuis que trustent. NJ Ch 130A5. **Minors should be served** personally notwithstanding appearance of guardian. 187Wis105, 203NW748. **Beneficiaries** under will are proper parties. 83 IndA622, 149NE448. **Executor of estate in which testator had interest** at time of death is not proper party to bill for construction of will. 102NJEq 94, 139A803.
1851-45½-New. Deceased executor's administrators should be joined in action to construe will of executor's testator where two estates are mingled. 83 IndA 622, 149NE448.
1852-47 323 Ill 397, 154NE216; 145 Wash503, 261P104, 106 [citCyc]. **Possible contingent interests of heirs at law of testatrix affected by will** held sufficiently protected. 323 Ill 397, 154NE 216.
1852-52½-New. Bill for instruction is remedy for raising questions involving construction of will. 15DelCh253, 135 A849.
1852-52¼-New. Surrogate's court may accept uncontested allegations of value of estate and relationship of parties as proof in proceedings to construe will. 131Misc526, 227NYS470.
1853-54 27 OhA197, 161NE218; 151Va 322, 144SE497(2dcase).
1853-59 162Ga767, 135SE90. **In Georgia.**-162Ga767, 135SE90.
1854-60 Bill is insufficient.-101WVa 320, 132SE735.
1854-66 Complaint sufficient.-83 IndA 622, 149NE448.
1854-70 Prayer to remove cloud on title, where only way cloud could be removed was by construction of will, bill is regarded as one for such construc-

tion. 46RI 492, 129A499.

1855–74 323 Ill 397, 154NE216. **Allegation of answer affecting question whether beneficiary of spendthrift trust was in fact a spendthrift** held irrelevant. 323 Ill 397, 154NE216.

1855–79½–New. Where bill seeks to establish specific construction, validity of such construction may be tested by demurrer. 218Ala147, 117S670.

1856–81 Supreme court required to make new findings on bill certified by superior court, though superior court made findings at request of parties. 46 RI 492, 129A499.

1856–82 Questions which have not arisen and may never arise will not be determined. 80Colo 499, 252P816.

1856–84 106Conn137, 137A388; 207 Iowa71, 218NW926(2dcase); 228Ky226, 14SW(2d)777. **Forfeiture of bequest** may be considered. 228Ky226, 14SW (2d)777.

1856–85 218Ala292, 118S342; 104Conn 97, 132A411; 130Misc320, 224NYS316; 127Misc647, 217NYS381. **Where will suggests need of further facts aliunde** for a proper construction thereof, a demurrer should not be interposed to a complaint calling for such construction, unless all such facts are made part of the record. 104Conn97, 132A411. **Evidence held sufficient.**–131Misc602, 228 NYS388. **Evidence held to require finding** that true location of tract was as claimed by devisee, in suit to construe will. 153Va295, 149SE817.

1857–87½–New. Statute requiring superior court to certify to supreme court for determination all bills in equity for construction of, or instructions relative to, any will did not require superior court to make findings of fact. 46RI 492, 129A499.

1857–87½–New. Where time for distribution has not arrived, action of court should be confined to instructions as to present duty or duty likely to arise under present conditions. 98NJEq572, 131 A212.

1857–89 See also MoA 296SW833.

1858–92 15F(2d)719; Conn 151A345.

1859–99½–New. Where judgment follows court's findings, motion to modify is properly denied. 83 IndA622, 149NE 448.

1860–10 218Ala320, 118S553; 252 IllA 337; 122Kan814, 253P600; 259Mass539, 156NE724; 196NC398, 145SE776. **Federal courts and collectors of internal revenue** are bound by decisions of appropriate state courts on construction of wills. 34F(2d)174.

1861–11 252 IllA337; Utah 286P631.

1861–13 But see 145Wash503, 261P104.

1861–15½–New. Construction of judgment.–Where meaning of decree construing will is doubtful, doubt must be settled by construction of will in accordance with evidence as to intention of testator. 161Ga448, 131SE154.

1862–17 200 Ind608, 165NE545.

1862–18 100Vt407, 138A730.

1862–19 Administrator with will annexed may appeal, though not personally aggrieved. 194Wis113, 216NW130.

1862–21 174Minn28, 218NW235. **Amendment of notice of appeal** will not be allowed after time to appeal has expired. 222AppDiv724, 226NYS111.

1863–24 108Conn611, 144A461; 87 IndA440, 159NE11; 206 Iowa1301, 221 NW932 (discretion of lower court in setting aside default judgment); 177Minn 311, 225NW156, 67ALR1268.

1863–26 197Wis98, 221NW401.

1863–29½–New. Brief of trustee as petitioner supporting claim of one defendant held contrary to equity rule. 257 Mass586, 154NE191.

1863–29½–New. It will be presumed that material facts presented on appeal from probate court were presented below. 257Mass415, 154NE80.

1865–38 In New York.–131Misc559, 227 NYS443; 133Misc739, 232NYS670.

1865–40 233Mich499, 206NW979 (charged against corpus).

1866–45 128Me14, 145A395.

1866–47 Ont [1926] 3DomLR352.

1867–52 105Conn98, 134A530 (holding expenses and counsel fees taxable against properties devised in parts of will construed in proportion to value as of commencement of action).

1868–55 213Ala579, 105S669 (only where estate benefits); 102Conn503, 129 A382; 337 Ill 232, 168NE900, 66ALR 1062; 131Misc559, 227NYS443. **In Alabama.**–213Ala579, 105S669. **Action to set aside judgment construing will** for want of jurisdiction is not one involving construction and validity of will. 128 Kan287, 276P826. **Not allowed unless services beneficial to estate.**–155Md1, 141 A396. **In New York.**–131Misc559, 227 NYS443.

1868–56 337 Ill 49, 168NE681 (solicitor's fees not allowed from estate to legatees); 337 Ill 442, 169NE197.

1869–62 164Ga885, 139SE661; Ind 170 NE20; 121Kan102, 245P1026, 1027 [quotCyc]; Me 152A268; 83NH422, 144A523; 103NJEq435, 143A222; 133 Misc199, 232NYS214; 195NC822, 143SE 835; 8PaDist&Co 681. **Devise of homestead** consisting of one hundred and thirty acres in named county held specific devise. TexCivA 282SW638. **Legacy of testator's interest** as heir to another estate is specific. 200Cal 252, 252 P1039. **Mere enumeration of specific articles** in residuary clause will not make the bequest specific as to such article. 244NY400, 155NE685. **Other statements.**–293Pa570, 143A214. **Bequest designated by its source or origin** or sum received or obtained from certain estate is regarded as specific legacy. Ind 170NE20. **Legacy payable only out of specified fund** is specific. Ind 170NE20.

1870–63 319 Ill 320, 150NE284; 121 Kan102, 245P1026, 1027 [quotCyc]; 136 Misc91, 242NYS453. **Misdescription** is not fatal where property may be identified from description. 121Kan102, 245 P1026. **The property must be identified, etc.**–Specific bequest usually deals with thing in being when will is executed and is described by apt words of identification as of that date. 218Ala549, 119A 678. **Devise of land to be "specific"** need not definitely locate land. Tex CommnA 299SW889.

1870–64 106Conn19, 137A20; 121Kan 102, 245P1026, 1027 [quotCyc]; 128Me 191, 146A439; 287P102, 134A462 (gift of proceeds of house to be sold at death of life tenant held specific legacy). **Must be bequest of specific thing, so** distinguishable from other property that delivery may be made to legatee without requirement of reparation. 142 Va229, 128SE533. **Similar definitions.**–32 OhA168, 167NE611.

1870–64½–New. Will directing sale of land and giving specific amounts to legatees grants specific legacies, no other fund being provided in case of deficiency, and legatees are entitled to proceeds of land till sold. TexCivA 285 SW911.

1870–65 106Conn19, 137A20; IndA 163NE233; 121Kan102, 245P1026, 1027 [quotCyc].

1870–66 121Kan102, 245P1026, 1027 [quotCyc]; 319Mo 192, 5SW(2d)437, 440 [quotCyc].

1870–67 Ind 170NE20; 121Kan102, 245P1026; 151Miss33, 117S830; 8Pa Dist&Co 681.

1870–68 133Misc199, 232NYS214; 135 Misc876, 239NYS740 (gift to charity); 195NC822, 143SE835.

1870–69 151Miss33, 117S830. **The mere possession by the testator at the date of his will of stock,** etc. 151Miss33, 117S 830 (where testator directed surrender of shares and issuance of new shares). **Legacy of stock with alternative bequest of cash** constitutes general pecuniary legacy. 49RI 188, 141A464.

1870–70 218Ala549, 119S678; DC 37 F(2d)997; Ind 170NE20; 121Kan102, 245P1026; Me 152A268; Mich 233NW 230; 134Misc198, 236NYS136; 32 OhA 168, 167NE611 (particular fund only for purpose of pointing out convenient mode of payment). **Legacy held demonstrative.**–IndA 163NE233; 131Misc863, 229NYS308; 136Misc532, 241NYS506; 195NC822, 143SE835. **A pecuniary legacy, given with a particular security,** etc. IndA 163NE233. **Other statements.**–195NC822, 143SE835. **Legacies of certain sums to be paid out of income** must be paid out of residuary estate, if fund fails and residuary estate is sufficient for that purpose. 195NC822, 143 SE835.

1871–71 Mich 233NW230; 32 OhA168, 167NE611. **Intention is to be determined by language of will** and not from extrinsic and parol evidence where will is free from ambiguity. 319Mo 192, 5 SW(2d)437.

1871–72 DC 37F(2d)997; 136Misc532, 241NYS506.

1871–77 106Conn19, 137A20; Ind 170 NE20; Me 152A268; Mich 233NW 230; 319Mo 192, 5SW(2d)437; MoA 28 SW(2d)420; 102NJEq408, 141A88; 136 Misc91, 242NYS453; 32 OhA168, 167NE 611. **Whether gift be realty or personalty** same test applies in determining whether legacy or bequest is specific. 97CalA485, 275P875.

1872–79 102NJEq408, 141A88.

1872–80 102NJEq408, 141A88.

1872–82 106Conn19, 137A20; 106Conn 19, 137A20; Me 152A268; 151Miss33, 117S830; MoA 28SW(2d)420; 102NJ Eq408, 141A88; 136Misc91, 242NYS 453; 192NC687, 135SE855; 195NC822, 143SE835; 293Pa570, 143A214; 85Pa Super545. **Law favors demonstrative or general,** rather than specific, legacies, which are extinguished if the specified thing is not in being as part of estate on death of testator. 218Ala549, 119S 678.

1872–84½–New. Courts are averse to construe legacies to be specific, as distinguished from demonstrative, and will not do so unless such is testator's clear intention. IndA 163NE233.

1872–85 136Misc91, 242NYS453; 192 NC687, 135SE855; 293Pa570, 143A214. **Ownership** of property at time of death of testator is necessary to make legacy effective. 121Kan102, 245P1026.

1873–3 Money legacy in codicil in substitution for specific devise of realty to which testator no longer had title is general legacy. 267Mass291, 166NE756. **Pecuniary legacy with particular security** is demonstrative legacy. 136Misc 532, 241NYS506.

1874–5 11PaDist&Co 373.

1874–6 97CalA485, 275P875.

1874–7 No actionable interest in unpaid note acquired by bequest of all of property for life. 24 OhA324, 156NE 913.

1874–9 DC 37F(2d)997; Me 152A268; 134Misc198, 236NYS136; 136Misc91, 242NYS453; 12PaDist&Co 745.

1874–10 Ind 170NE20; 32 OhA168, 167NE611. **Legacy held specific.**–319 Ill 320, 150NE284.

1875–14 106Conn19, 137A20; 103NJEq 435, 143A222; 85PaSuper545; Ont [1927] 3DomLR270.

1875–15 136Misc91, 242NYS453; 85Pa Super545.

1875–16 202Cal 284, 260P296; 106 Conn19, 137A20; 192NC687, 135SE855; 293Pa570, 143A214.

1875–17 106Conn19, 137A20; 136Misc 91, 242NYS453. **But see** 142Va229, 128 SE533. **That testator bequeathed only portion of shares of stock owned by him** is not conclusive proof that general legacy was intended. 319Mo 192, 5 SW(2d)437. **That active trust in stock with power of sale was created** indicates intention to make specific legacy. 319Mo 192, 5SW(2d)437.

1876–18 MoA 28SW(2d)420.

1876–19 319Mo 192, 5SW(2d)437.

1876–20 142SC407, 141SE26.

1876–21 292Pa470, 141A294.

1876–22 97CalA481, 275P874.

1876–25 218Ala549, 119S678; 103NJ Eq435, 143A222; 133Misc199, 232NYS 214.

1877–28 128Me191, 146A439.

1877–29 But see 142SC407, 141SE26 (limited by "ejusdem generis" and held specific).

1877–31 103NJEq435, 143A222.

1877–33 108Conn100, 142A851; 207 Iowa264, 222NW843(2dcase).

1877–34 Where a fund is set aside, etc.–319 Ill 320, 150NE284.

1878–39 TexCommnA 299SW889, 893 [quotCyc]; TexCivA 293SW264. **But** see 85Colo 397, 277P5.

1878–41½–New. Devisee of land sold

by incompetent testator's committee has been held entitled only to net proceeds of sale with interest. 136Misc607, 241NYS563.

1878–43 10PaDist&Co 595.

1878–45 Provision of will that executors set aside sufficient property to produce annual income of twenty-nine thousand dollars at five per cent requires setting aside of such amount regardless of income. 251NY458, 167NE586.

1880–54 See also 244Mich170, 221NW275.

1880–55 Mich 233NW230; 136Misc91, 242NYS453; 6PaDist&Co 503.

1881–61 202Cal 284, 260P296.

1881–62½–New. Dividends on stock pass to residuary estate if legacies of stock are general but to specific legatees if legacies are specific. 136Misc91, 242NYS453.

1881–66½–New. Interest on amount of income cannot be recovered. NH 148A21.

1881–67 103NJEq516, 143A745.

1882–68 108Conn100, 142A851; Wis 231NW256. **Where no provision is made for payment of income on legacy** pending time when legatee obtains possession, it is held payable to persons presumptively entitled to next eventual estate. 129Misc78, 220NYS816.

1882–69 See also 106Conn19, 137A20.

1883–78 Will held not to authorize trustee to pay annuitant any sum from principal other than annuity. 262Mass222, 159NE621.

1883–80 125Misc321, 209NYS684.

1883–83½–New. Annuity for widow cannot be paid from fund arising on sale of realty or interest on proceeds to which widow was entitled. 134Misc554, 236NYS232.

1883–84 On death of annuitant.–205 Iowa521, 218NW297.

1884–89 262Mass321, 159NE919. **Executors, whose decision, will provided, should be final and conclusive,** could be called to account only for clear abuse of discretion. 86Colo 259, 280P882.

1884–90 83NH345, 142A692.

1884–91 102NJEq287, 140A568.

1884–93 See also 135Misc600, 238NYS164.

1885–96 236 IllA168, 185 [citCyc]. See also 134Misc902, 236NYS720. But see 126Misc421, 214NYS565.

1885–97 126Misc421, 214NYS565.

1885–98 CalA 258P125; 236 IllA168, 185 [citCyc]; 126Misc421, 214NYS565. **In absence of language in will or evidence** to show legacy was intended to pay debt, held such legacy is not in payment of debt. 126Misc421, 214NYS565 (no evidence of nature or amount of claim).

1886–99 236 IllA168, 185 [citCyc]; 146Wash95, 261P788.

1886–1 13PaDist&Co 433 (doctrine disfavored).

1886–3 236 IllA168; 221AppDiv228, 222NYS463.

1886–4 236 IllA168.

1886–5 236 IllA168, 185 [citCyc]; 233Ky808, 27SW(2d)416; 85PaSuper313; 139Ga66, 137SE331.

1886–7 85PaSuper313.

1887–11 236 IllA168, 185 [citCyc].

1887–12 236 IllA168, 186 [citCyc]. **Where will gave power to executors to settle debts,** devise to daughters held not in payment of claim for assignment of their shares in brother's estate to mother. 236 IllA168.

1887–14 146Wash95, 261P788. But see 137Misc299, 242NYS499.

1887–15 233Ky808, 27SW(2d)416.

1888–21 317Mo 1336, 298SW34; 126Misc421, 214NYS565 (pays debt).

1889–23½–New. Provision construed as legacy rather than debt.–Direction to pay just debts not overlooking or omitting payment of indebtedness to testatrix's daughter. 241Mich170, 216NW396.

1889–27 13PaDist&Co 433.

1890–35 202 Iowa842, 211NW254; 191NC96, 131SE377 (facts held not to disclose intention to release legatee's obligation under note and chattel mortgage); 46RI 470, 129A263. See also 90PaSuper466. **Will held clearly to express intention that trust fund, bequeathed to debtor,** should remain intact till happening of contingencies upon which others will have interest in it. 191NC96, 131SE377.

1890–38 See also 191NC96, 131SE377.

1892–45 222MoA1094, 12SW(2d)943.

1892–48 TexCommnA 299SW889, 893 [quotCyc].

1892–49 148Miss799, 114S740.

1892–50 154Md378, 140A100; 148Miss799, 114S740.

1892–51 21 OhA496, 153NE252.

1893–54 NS [1930] 4DomLR310.

1893–56 154Md378, 140A100. See also 100Vt407, 138A730. **Determination whether beneficial.**–154Md378, 140A100.

1893–57 100Vt407, 138A730.

1893–60 CalA 276P583; 236 IllA168; Md 150A870; 48Philippine394. Contra 125Misc224, 210NYS729. **Persons acknowledging receipt of legacies under will** are estopped to deny existence and probate of will and propriety of order for chronicle of contents. 130Kan53, 285P554.

1894–61 213Ky482, 281SW480; 235Ky259, 30SW(2d)965; 193NC311, 136SE705.

1895–62 CalA 276P583. **An actual payment,** etc. Contra 154Md125, 140A87.

1895–64 129Kan671, 284P411; 213Ky482, 281SW480; 235Ky259, 30SW(2d)965; 262Mass490, 160NE882, 58ALR1548; 21 OhA496, 153NE252.

1896–71 154Md125, 140A87.

1897–77 154Md125, 140A87.

1897–91 125Misc224, 210NYS729.

1898–93 125Misc224, 210NYS729.

1898–94½–New. Acceptance of farm machinery by son held under evidence not election barring right to land devised. 198NC754, 153SE321.

1898–95 213Ky482, 281SW480.

1898–97 204 Iowa314, 213NW608; 154Md378, 140A100; 137Misc741, 244NYS470; 21 OhA496, 153NE252. **Property received by heirs** of class named in void limitation under decree at request of remainderman's widow held not to pass under will, but by grant from widow. 172Ark1073, 291SW818. **Beneficiary may renounce without objection that act is fraud on creditors.**–204 Iowa314, 213NW608. **Beneficiaries receiving less under power of appointment than if not exercised** can repudiate benefits and take directly from donor. 137Misc666, 244NYS198.

1898–98 172Ark1073, 291SW818 (widow of remainderman and heirs of class named in void limitation held not estopped to assert invalidity of limitation). **Renunciation not shown.**–101CalA20, 281P518(2dcase).

1898–4 154Md378, 140A100.

1899–5 154Md378, 140A100; 148Miss799, 114S740; 137Misc730, 244NYS398.

1899–6 100CalA615, 280P561.

1899–7 119Kan698, 241P685 (evidence held insufficient to establish renunciation as against creditors of devisee); 154Md378, 140A100.

1899–7½–New. Sufficiency of evidence of renunciation is governed by general rules. 154Md378, 140A100.

1899–7½–New. Abandonment or forfeiture of legacy.–Specific legatees are not deprived of rents and profits of land from testator's death until land is sold by reason of having contested will. Tex CivA 285SW911.

1899–8½–New. Abatement of all legacies and devises does not operate to destroy will. 321 Ill 198, 151NE577.

1899–8½–New. Payments to heir in settlement of will contest may be apportioned between legatee and several trust funds in ratio to principal received. 230AppDiv290, 243NYS606.

1899–9 83 IndA531, 149NE190.

1899–11 256Mass90, 152NE75. **Legacies based on valuable consideration** have preference over mere bounties. 83IndA531, 149NE190.

1900–12 Conn 151A323; 242NY389, 152NE124. **Intention of testator controls.**–142Va285, 128SE550; 256Mass90, 152NE75.

1900–13 83 IndA531, 149NE190.

1900–16 242NY389, 152NE124; 289Pa407, 137A627; 292Pa571, 141A478. **Construction of testamentary provision.**–242NY389, 152NE124.

1900–17 292Pa571, 141A478. **Will held to show intention that legacies to brother and sister** should have privilege over general residuary legacies. 256Mass90, 152NE75. **Intention of testator as to order of payment must control.**–136Misc627, 241NYS661.

1901–19½–New. Under will giving lot to brother of testator and specifically directing executrix to pay all bills for construction of building thereon to extent of stated amount, direction in will operated as equitable conversion of fund into realty, and should be disposed of as if in fact investment had been made, and has preference over other provisions of will, though resulting in some diminution of other legacies. 133Misc299, 232NYS526.

1901–25–26 321 Ill 198, 151NE577.

1902–33 135Misc421, 239NYS360.

1902–39 232 IllA156; 244NY400, 155NE685; 136Misc433, 240NYS688; 10PaDist&Co 436. **Bequest of specific sum to wife takes precedence over bequest of residue** of estate to grandson, although bequest to grandson named specific articles, proceeds of which were to go into residue. 244NY400, 155NE685. **Residuary devise.**–85Colo 397, 277P5.

1903–41 256Mass90, 152NE75.

1904–44 232 IllA156; 267Mass291, 166NE756; 151Miss33, 117S830; 135Misc876, 239NYS740; 292Pa470, 141A294. **Money legacy in codicil in substitution for specific devise of realty** to which testator no longer had title, is general legacy not entitled to priority over other general legacies, in absence of contrary intent. 267Mass291, 166NE756.

1904–46 See also 47RI 314, 132A888.

1905–54 135Misc876, 239NYS740.

1905–56 But compare 129Misc829, 223NYS772.

1906–58 136Misc627, 241NYS661 (services rendered by decedent's housekeeper). **Legacy pursuant to antenuptial agreement** entitled to priority. 256Mass90, 152NE75.

1906–60 256Mass90, 152NE75; 49RI308, 142A605.

1909–70 319 Ill 320, 150NE284; 232IllA156; 262Mass321, 159NE919; 287Pa102, 134A642. **Bequest for care of cemetery lot** is entitled to preference. 136Misc627, 241NYS661. **Bequest to hospital for endowment of memorial beds** is entitled to preference. 136Misc627, 241NYS661. **Legacies to organizations to have prayers for dead said for decedent and wife** are entitled to preference. 136Misc627, 241NYS661.

1909–73 218Ala549, 119S678; 319 Ill320, 150NE284; 133Misc199, 232NYS214; 32 OhA168, 167NE611; Wis 229NW535(2dcase).

1910–74½–New. Bequest of money to widow and specific legacies given preferment by will are held payable without abatement where debts and expenses exceed amount of personalty. 130Misc339, 224NYS435.

1910–75 319 Ill 320, 150NE284; IndA163NE233. But see DC 37F(2d)997.

1910–78 136Misc532, 241NYS506. **Legacy in token of services performed** payable out of proceeds of business is not defeated by failure of fund. 125Me298, 133A305.

1911–80 But see 128Misc263, 219NYS295. **Provision for payment of annuities as soon as possible** with direction to set aside sum sufficient for payment from income or proceeds of sale of property shows intent that there should be no proportionate abatement of annuities. 292Pa571, 141A478.

1912–97 TexCivA 158SW(2d)86.

1914–12 200Cal 252, 252P1039; 97CalA485, 275P875; 228Ky758, 16SW(2d)173; NH 139A759. See also Mich 233NW230. **Other definitions.**–MoA 256SW558.

1914–13 164Ga367, 138SE849; 202 Iowa842, 211NW254; Iowa 231NW468(2dcase); 228Ky758, 16SW(2d)173. **General legacy,** such as bonds, is not deemed by sale thereof during testator's lifetime. 85PaSuper545.

1914–14 Applied more stringently to specific legacy than to legacy of proceeds from sale of property. 142SC407, 141SE26.

1914–15 IndA 154NE505. **Testator's conveyance to son held not to revoke de-**

vise to son of half of property of which testator might die owner. **IndA** 154**NE** 505.

1914–15½–New. Ademption is not involved where testator was never in possession of property. 164**Ga**367, 138**SE** 849.

1914–15¾–New. Doctrine of ademption held not applicable to devises of real estate. **IndA** 154**NE**505.

1914–15¼–New. Neither antenuptial agreement with second wife nor transfer of property to second wife will defeat intent or change disposition of first wife's estate. 219**AppDiv**131, 219**NYS** 436.

1914–15½–New. Death of devisee of entire property prior to testator's death does not effect ademption. 228**Ky**758, 16**SW(2d)**173.

1914–16 218**Ala**549, 119**S**678; 205 **Iowa** 1311, 217**NW**441. **Written instrument need not expressly provide for ademption,** but court must determine from all facts and circumstances whether intention to make ademption existed. 205 **Iowa**1311, 217**NW**441. **Bequest to child may be deemed** by subsequent conveyance of real estate. 241**Mich**329, 217**NW** 65.

1914–18 6**PaDist&Co** 167.

1914–20 92**Fla**327, 109**S**435. But see 235**Ky**658, 32**SW(2d)**8. **In Iowa.**–205 **Iowa**1311, 217**NW**441 (son's receipt of money under contract to make monthly payments to mother and lump sum payment to brother held ademption pro tanto).

1915–21 92**Fla**327, 109**S**435; 202 **Iowa** 842, 211**NW**254; 154**Md**632, 141**A**377; 241**Mich**329, 217**NW**65; 142**Va**285, 128 **SE**550. **Time of intent.**–241**Mich**329, 217 **NW**65. **Will need not show intention** of testator that subsequent benefits should be charged against child to work ademption. **Iowa** 231**NW**468(2dcase).

1915–24 131**Misc**863, 229**NYS**308.

1915–26 202 **Iowa**842, 211**NW**254, 255 [citCyc]; 198**NC**754, 153**SE**321.

1916–29 Ademption is decreed to preserve equality.–**Iowa** 231**NW**468(2dcase).

1916–30 Iowa 231**NW**468(2dcase) (holding father's payment of son's note after execution of will calling for equal distribution, was ademption).

1916–38 241**Mich**329, 217**NW**65.

1917–43 263**Mass**47, 160**NE**331.

1917–50 Evidence held sufficient to show conclusively that gift of farm was not intended to affect legacy to testator's son. 241**Mich**329, 217**NW**65.

1918–53 But see **IndA** 154**NE**505.

1918–54 Evidence held to warrant finding mother's payment of son's note, after execution of will, caused ademption to son. **Iowa** 231**NW**468(2dcase).

1918–60 228**Ky**758, 16**SW(2d)**173; 248 **Mich**571, 227**NW**726; 147**Miss**728, 113 **S**197; 7**PaDist&Co** 116. **Time to which description refers.**–218**Ala**549, 119**S**678.

1919–61 147**Miss**728, 113**S**197. **Loss of clothing and jewelry at time of death** when ship sank does not cause ademption of legacy of such articles. 136**Misc** 334, 242**NYS**234.

1919–64 136**Misc**91, 242**NYS**453; 9**Pa Dist&Co** 731. See also 164**Ga**367, 138**SE** 849.

1919–65 162**La**758, 111**S**86. But see 218 **Ala**549, 119**S**678.

1919–66 12**PaDist&Co** 745 (collection of notes out of which bequests were payable).

1919–66½–New. Testatrix's acceptance of deed of conveyance to mortgaged property does not constitute ademption of devise of testatrix's interest in mortgage on such property. 97**CalA**485, 275 **P**875.

1919–66¼–New. Testatrix's action in attempting to dispose of all property, leaving no residuary estate, may indicate lack of intent to destroy bequest of mortgage by subsequently accepting deed to property on which mortgage lien attached, since construction of will is preferred which leaves no intestacy. 97**CalA**485, 275**P**875.

1919–66¼–New. Alteration in subject of bequest, which does not wholly destroy its identity, is insufficient to adeem it. 97**CalA**485, 275**P**875.

1919–67 121**Kan**102, 245**P**1026, 1027 [quotCyc]; 147**Miss**728, 113**S**197. But see 49**RI** 188, 141**A**464. **Exchange.**–147 **Miss**728, 113**S**197.

1919–68 97**CalA**481, 275**P**874; 169**Ga** 217, 150**SE**98; 121**Kan**102, 245**P**1026, 1027 [quotCyc]; **Mo** 300**SW**487; 132 **Misc**332, 230**NYS**305; 137**Misc**785, 244 **NYS**404; 8**PaDist&Co** 442. But see 134 **Misc**343, 236**NYS**239. **Exchange of land for property of like character held not to cause ademption.**–164**Ga**462, 139**SE**15. **Land held by deed held** not property of "like kind" with note secured by deed to same land. 164**Ga**462, 139**SE**15.

1919–69 97**CalA**481, 275**P**874; 106**Conn** 19, 137**A**20; 121**Kan**102, 245**P**1026, 1027 [quotCyc]. **It is consistent for person to lease lands** which he has devised by will to others. 178**Ark**183, 10**SW(2d)**14.

1920–70 See also 137**Misc**56, 245**NYS** 204. **Sale of real estate under order of court** while testator is insane is not an ademption as to remaining proceeds. **MoA** 256**SW**558.

1920–71 106**Conn**19, 137**A**20; 121**Kan** 102, 245**P**1026.

1920–72 121**Kan**102, 245**P**1026; **Tex CivA** 15**SW(2d)**86.

1920–73 213**Ala**27, 104**S**234 (devise held to attach to identified proceeds of sale).

1920–73½–New. Under Kentucky statute, providing that conversion of money or property devised to testator's heirs shall not work ademption, widow is not "heir" of her husband. 228**Ky**758, 16 **SW(2d)**173.

1920–74 Bequest of interest in estate is ademed where cash received therefrom by testator is mingled with general assets of his estate. 97**CalA**481, 275**P** 874.

1921–79½–New. , and the same rule has been applied to a bequest of the proceeds of notes and mortgages collected by testatrix in her lifetime. 142**SC**407, 141**SE**26.

1921–80 164**Ga**462, 139**SE**15; 208**Ky** 441, 271**SW**600, 603 [quotCyc]; 134**Misc** 753, 236**NYS**388 (mortgages, from proceeds of which bequests were made increased in amount).

1921–81 208**Ky**441, 271**SW**600, 603 [quotCyc].

1921–82 208**Ky**441, 271**SW**600, 603 [quotCyc].

1921–83 208**Ky**441, 271**SW**600, 603 [quotCyc].

1921–84 208**Ky**441, 271**SW**600, 603 [quotCyc].

1921–86 229**Ky**162, 16**SW(2d)**756. **Will forgiving advances** made to son and daughter did not forgive balance appearing under head of loan accounts. 298**Pa**514, 148**A**704.

1922–88 92**Fla**327, 109**S**435; 202 **Iowa** 842, 211**NW**254; 205 **Iowa**1311, 217**NW** 441; 125 **Or**333, 267**P**534.

1922–89 217**Ky**716, 290**SW**718.

1922–90 285**Pa**219, 131**A**727; **Wash** 292 **P**257. See 177**Ark**518, 7**SW(2d)**770.

1923–91 235**Ky**658, 32**SW(2d)**8. **Unless intended by testator at time of advancement** as it appears by parol or other evidence, advancement is not under statutes in some jurisdictions satisfaction in whole or in part of devise or bequests in previous will. 217**Ky**716, 290**SW**718. **Though amounts paid by testator were not in legal contemplation advancements,** they must be so treated and deducted where testator so treated them and will so directs. 192**Wis**200, 212**NW**247. **When legatee dies after execution of will** items chargeable against him should be deducted from his share passing to his children. 241**Mich**329, 217**NW**65.

1923–91½–New. When debt treated as in nature of advancement.–120 **Or**338, 250**P**617.

1923–94 153**Md**364, 138**A**232; 241**Mich** 329, 217**NW**65; 285**Pa**219, 131**A**727. **Evidence held insufficient to overcome presumption of advancement.**–204 **Iowa** 1237, 212**NW**306. **What included under notes.**–241**Mich**329, 217**NW**65.

1924–96½–New. or by fact that executors are given discretion as to collection of debt. 285**Pa**219, 131**A**727.

1924–1 But see 298**Pa**514, 148**A**704.

1924–4 237 **IllA**372, 387 [citCyc].

1924–7 237 **IllA**372, 387 [citCyc] (dictum).

1924–10 237 **IllA**372. **Value is price at sale for distribution** where will fixes value as of date thereof. 237 **IllA**372.

1925–16 Interest is chargeable on advancements from date of testator's death where will directs deduction of advancements for purpose of equalizing shares. 241**Mich**329, 217**NW**65.

1925–17 TexCivA 25**SW(2d)**171. **Devise not identical with distributive share** held not to lapse by testator surviving devisee. 204 **Iowa**1231, 213**NW**395. **Statute providing that wife living in adultery** shall forfeit interest in husband's estate has been held not applicable to devise to wife. 232**Ky**365, 23**SW(2d)**601.

1925–18 196**Cal** 323, 23**P**1070; 197**Cal** 276, 240**P**498 (trust plant in codicil giving life estate to niece held to become effective only on death of testatrix); 98 **CalA**306, 277**P**123; 84**Colo** 596, 272**P** 660; **DelCh** 149**A**432; 89**Fla**457, 105**S** 106 (intention of testator controls); 164 **Ga**367, 138**SE**849; 253 **IllA**46; 206 **Iowa** 786, 221**NW**369; 165**La**803, 116**S**192; **Me** 149**A**626(2dcase); 157**Md**492, 146**A** 432; 317**Mo** 556, 296**SW**1001, 1007 [cit Cyc]; 117**Nebr**168, 220**NW**251; 102**NJ Eq**470, 141**A**450; 99**NJEq**335, 133**A**481; 217**AppDiv**377, 216**NYS**653; 125**Misc**790. 211**NYS**173; 125**Misc**498, 211**NYS**778; 131**Misc**720, 228**NYS**652; 133**Misc**450, 232**NYS**418; 134**Misc**705, 236**NYS**176; 137**Misc**99, 244**NYS**187; 137**Misc**910, 244 **NYS**632; 193**NC**294, 136**SE**733; 117 **Or** 399, 244**P**526; 48**RI** 200, 136**A**434, 435 [citCJ]; 142**SC**395, 140**SE**801; **Tex CommnA** 24**SW(2d)**819; 152**Va**677, 148 **SE**781; 192**Wis**333, 212**NW**781; 199**Wis** 154, 225**NW**818. But see 205 **Iowa**1311, 217**NW**441. **Interest of heir of life tenant devisee** held not affected by death of devisee before testatrix. 197**Cal** 276, 240 **P**498. **Bequest of expected bequest** held to lapse as to beneficiary of first legatee upon latter's death before original testator's. 164**Ga**367, 138**SE**849. **Bequest of unpaid notes** to makers for support of mother of testator lapsed on death of mother before testator. 142**SC**395, 140 **SE**801. **Will providing that legacy or devise shall fail on death of beneficiary** is construed to mean death of beneficiary during life of testatrix. 135**Misc**156, 237 **NYS**293.

1927–21 72**CalA**268, 236**P**930; 103**CalA** 243, 284**P**231 (before distribution of estate); **Iowa** 232**NW**826; 89**Fla**457, 105**S** 106 (intention of testator controls); 320 **Ill** 31, 150**NE**333; 129**Misc**398, 222**NYS** 345 (vesting of corpus); 26 **OhNPNS**14; 50**RI** 369, 147**A**884; **Vt** 151**A**654.

1927–22 197**Cal** 276, 240**P**498 (upon death of sole legatee and devisee after death of testator, property devised goes to heirs of legatee or to beneficiaries under legatee's will); **Iowa** 232**NW**826. **Failure of will to provide for payment of debts** does not cause legacy to lapse. 162**Ga**280, 133**SE**471.

1927–23 89**Fla**457, 105**S**106 (where time of enjoyment postponed); 162**Ga**280, 133**SE**471; 135**Misc**203, 237**NYS**417. **Death of devisee before probate** but after death of testator does not cause lapse, as title vests on testator's death. 134 **Wash**524, 236**P**274. **Death of legatee or devisee before probate of will** does not prevent vesting. 114**Nebr**517, 208**NW** 665.

1928–24 129**Misc**78, 220**NYS**816.

1928–27 217**AppDiv**377, 216**NYS**652.

1928–27½–New. , or dies after testator but before time of vesting of corpus. 129**Misc**398, 222**NYS**345.

1928–29 See also 128**Misc**97, 218**NYS** 236.

1928–29½–New. Where remainderman dies in lifetime of life tenant, remainder lapses. 129**Misc**398, 222**NYS**345.

1929–32 133**Misc**418, 232**NYS**418.

1930–38 266**Mass**454, 165**NE**489; 125 **Misc**153, 210**NYS**427; 125**Misc**790. 211**NYS**173.

1930–39 106**Conn**627, 138**A**809.

1930–40 125**Misc**153, 210**NYS**427.

1931–41 125**Misc**153, 210**NYS**427.

1931–42 Wash 288**P**231.

1931–44 326 **Ill** 425, 158**NE**127; 207 **Iowa**127, 222**NW**431; 133**Misc**80, 230 **NYS**734; 47**RI** 461, 134**A**16, 47**ALR**60.

1932–51 323**Mo** 633, 19**SW(2d)**634. **Bequest to employee payable on winding up business** held absolute. 125**Me**298, 133**A**305.

1932–54 Property bequeathed for build-

ing cannot be recovered for unreasonable delay in utilization where amount available rests partly on remainder after unexpired life estate. 131Misc674, 227NYS648.

1933-55 Amount set aside for erection of chapel vault by provision naming no legatee or devisee does not become lapsed legacy where erection of vault becomes impossible. 80Colo499, 252P816.

1933-60½-New. Remarriage of widow where remarriage terminates the life estate does not divest gift over to testator's daughters. 102NJEq94, 139A803.

1933-62 317Mo556, 296SW1001, 1007 [quotCyc]. **Testator's intentions must be declared,** etc. 157Md492, 146A432.

1934-63 204Iowa1231, 213NW395; 27OhA197, 161NE218. **Test is whether under terms of will legacy or devise vests on testator's death or is contingent on beneficiary's being alive at time of payment.** 89Fla457, 105S106.

1934-64 Trust not saved from lapsing.-222AppDiv577, 226NYS712.

1934-65 106Conn627, 138A809; Mass171NE828; 317Mo556, 296SW1001, 1007 [quotCyc]; 127Misc437, 217NYS313. **Provisions not such as to prevent lapse.**-157Md492, 146A432.

1935-68 127Misc437, 217NYS313 ("personal" representations).

1935-69 NJCh139A596.

1936-71 133Misc80, 230NYS734; 10Pa Dist&Co69. **Where testator and devisee died in same disaster** and there is no evidence that devisee died before testator, heirs of devisee cannot be deemed substituted under statute providing that, if devisee dies before testator, his heirs shall inherit property devised to him in absence of contrary intent appearing in will. 201Iowa969, 204NW448, 43ALR1340.

1936-74 117Or399, 244P526.

1937-75 196Cal323, 237P1070; 119Oh17, 162NE42.

1937-76½-New. Where testator is continuously incompetent to alter or cancel will from time of legatee's death statute is inapplicable. 157Md492, 146A432.

1937-76¾-New. Burden is on executor to show such incompetence. 157Md492, 146A432.

1937-76¼-New. Question of such continuous incompetence is one of fact. 157Md492, 146A432.

1937-80 But see 5PaDist&Co240.

1938-87 131Misc720, 228NYS652. Contra 5PaDist&Co240.

1938-95 27OhA400, 161NE366.

1939-1 137Misc99, 244NYS187; TexCivA15SW(2d)86.

1939-6½-New. Statute must be applied to carry out intent of testator. 15DelCh342, 138A167.

1939-6¾-New. Where intention appears to include certain person, intention will not be affected by mistake as to number of parts into which residue should be divided. 15DelCh342, 138A167.

1939-7 Contrary intent must plainly appear.-137Misc99, 244NYS187.

1939-8 15DelCh342, 138A167. See also 108Conn100, 142A851.

1940-9 137Misc99, 244NYS187.

1940-10 Phrase "before will is executed" means "made," and has no reference to carrying out of provisions of will. 162Ga280, 133NE471.

1940-11 15DelCh342, 138A167 (held applicable to void legacies).

1940-12 Legacy to nephews and nieces held to include children of niece who died before execution of will. 15DelCh342, 138A167.

1941-20 86CalA173, 260P575; 83Colo188, 263P413; 15DelCh105, 132A142; 98Fla748, 124S169; 337Ill442, 169NE197; 207Iowa127, 222NW431; 167La725, 120S275; 252Mass176, 147NE842; 266Mass454, 165NE489; Mass171NE717; 154Miss295, 122S493; Miss130S734; 116Nebr764, 219NW4; NJCh139A596; NJCh150A779; 128Misc553, 220NYS188; 129Misc398, 222NYS345; 131Misc526, 227NYS470; 133Misc695, 234NYS109; 193NC294, 136SE733; 119Oh17, 162NE42, 44 [citCyc]; 28OhA325, 162NE714; 50RI369, 147A884; TexCivA298SW470. **In case of gift over of remainder on death of life tenant without children,** there is intestacy as to remainder, if life tenant has children. 132SC120, 128SE337. **Where devise of testator's estate to charitable institutions failed as to three-fourths thereof because contrary to statute** and there was no residuum into which it could fall or provision for reverter, such three-fourths interest goes to testator's heirs as property undisposed of. 207Iowa127, 222NW431.

1942-21 Any lapsed devise or reversion to parent estate carried by widow's election to take against will is subject to distribution under statute of descents. 89Fla457, 105S106.

1942-22 239Mich274, 214NW104; 100NJEq196, 134A822; 135Misc611, 238NYS160; 197NC761, 150SE359; 154SC78, 151SE199(2dcase) (failure to dispose of remainder); 198Wis518, 224NW713(2dcase).

1942-22½-New. Where testator domiciled in New Jersey dies intestate as to surplus income from real estate in New York, laws of New York govern disposition thereof. 100NJEq196, 134A822.

1942-22¾-New. Courts have no power relative to revision of wills, and in absence of disposition by will statute, not court, provides for disposition of estate. 250NY45, 164NE737.

1942-24 85CalA500, 259P992; Mass171NE717; NJCh151A741; 129Misc398, 222NYS345. **In New Jersey.**-NJCh139A596.

1942-25 132Misc616, 230NYS569. **Where testator dies without issue,** property in lapsed legacy coming to him from former deceased spouse descends equally to kin of testator and of the deceased spouse. 119Oh17, 162NE42.

1942-25½-New. Gift to designated person dead at execution of will held to go to such person's issue living at death of testator under statute in Rhode Island. 48RI200, 136A434.

1942-25¾-New. Statute to be liberally construed.-48RI200, 136A434.

1942-25¼-New. On failure of disposition by death of beneficiaries, administratrix of latter's estates cannot represent surviving son of one of such beneficiaries with respect to his share. 98CalA306, 277P123.

1943-26 207Iowa127, 222NW431.

1943-28 85CalA500, 259P992.

1943-30 266Mass454, 165NE489; 82Mont198, 266P378, 385 [citCyc], 57ALR1169. **Nephews "hereinabove mentioned"** held to refer to all nephews mentioned in will. 131Misc526, 227NYS470. **"Persons presumptively entitled to next eventual estate."**-131Misc526, 227NYS470.

1943-31 Lapsed devise becoming part of trust estate vests in surviving beneficiaries. Vt151A654.

1944-36 Mo22SW(2d)778.

1944-37 216AppDiv179, 214NYS467; 155Wash535, 285P422.

1945-38 Del149A306 (testator's reversionary interest also remainder over after life estate); 129Misc711, 222NYS511; 137Misc758, 244NYS686; TexCivA282SW638.

1945-39 156Tenn495, 2SW(2d)90.

1945-41 6F(2d)986 (Nebraska statute); 205Cal757, 272P1060; 80Colo461, 251P595; 108Conn100, 142A851; 15DelCh105, 132A142; 333Ill577, 165NE348; 339Ill45, 170NE699; 339Ill11, 170NE767; 165La803, 116S192; 157Md565, 146A742 (where real estate under terms of will was converted into personalty); 266Mass4, 164NE460; 315Mo627, 287SW316 (will should be construed to prevent intestacy); 320Mo543, 8SW(2d)1008; 82NH281, 133A166, 45ALR1433; 103NJEq516, 143A745; 137Misc758, 244NYS686; 137Misc730, 244NYS398; 192NC131, 133SE431; 33OhA66, 168NE574; 287Pa478, 135A109; 300Pa185, 150A585; 47RI461, 134A16, 47ALR60; 156Tenn495, 2SW(2d)90; 194Wis330, 216NW501. **Refused legacy passes under residuary clause.**-6F(2d)986. **Construction of residuary clause** to prevent intestacy unless there is apparent intention to contrary. 339Ill11, 170NE767. **Exception** where legacies are given to several persons and residue is given to same persons, does not apply where executors are included as residuary distributees. 253IllA46. **In Illinois.**-253IllA46.

1947-42 129Misc711, 222NYS511. See also Va155SE802.

1948-44½-New. Where will directs alternative disposition if any provision is declared invalid such provision refers to invalidity at testatrix's death. 128Misc553, 220NYS188.

1948-44¾-New. Alternative disposition in will does not govern where conditions of legacy failed. 128Misc553, 220NYS188.

1948-44¼-New. In Delaware statute relative to saving lapsed or void legacies where legatees leave issue surviving held applicable. Ch147A252.

1948-46 Ademption of alternative devise to heirs does not prevent consideration of devising clause as showing purpose to withdraw property and its proceeds from operation of residuary clause. 156Tenn495, 2SW(2d)90.

1948-47 156Tenn495, 2SW(2d)90.

1949-50 15DelCh105, 132A142; 233Ky554, 26SW(2d)497 (by statute); 154Md378, 140A100.

1950-51 233Ky554, 26SW(2d)497; TexCivA27SW(2d)852. **A reversionary or contingent interest, etc.**-But see 317Mo587, 296SW382.

1950-54 6F(2d)986; 196Cal323, 237P1070; 80Colo461, 251P595; 339Ill11, 170NE767; 100NJEq254, 135A509; 129Misc297, 221NYS468; TexCivA27SW(2d)852. **Particular residuary clause construed as sufficiently broad to include all property of decedent not effectually disposed of by will.** 196Cal323, 237P1070. **Testator is presumed to know that in case of total or partial lapse of devise such lapsed devise or part thereof would go to residuary devisee and legatee.** 196Cal323, 237P1070. **Lineal descendants of residuary devisee take residuum where will provided that lapsed devise should go to residuary devisee whether he survived or predeceased testator.** 196Cal323, 237P1070 (takes both under will and statute).

1951-55 196Cal323, 237P1070; 134Misc803, 237NYS215. **Testator's intention controls general presumption** that testator intended to dispose of entire estate. TexCivA27SW(2d)852.

1951-57 84Colo596, 272P660; 109Conn563, 145A161; 110Conn150, 147A562; 15DelCh105, 132A142; 252Mass176, 147NE842; 82Mont198, 266P378, 57ALR1169; 102NJEq470, 141A450; 250NY45, 164NE737; 223AppDiv646, 229NYS193; 129Misc711, 222NYS511; 131Misc720, 228NYS652; 133Misc450, 232NYS418; 137Misc660, 244NYS183; 137Misc910, 244NYS632; 12PaDist&Co783; 154SC78, 151SE199(2dcase) (determination of heirs at law); TexCivA298SW470; Man[1930]3DomLR453. **A revoked bequest or devise,** etc. 15DelCh105, 132A142.

1952-59 205Cal757, 272P1060; 339Ill11, 170NE767; 85IndA394, 154NE293, 294 [quotCyc]; 315Mo627, 287SW316; 131Misc720, 228NYS852; 9PaDist&Co63. See also 77CalA49, 246P1087. But see 103Conn308, 130A483; RI151A193. **Lapse of general legacy to one of several residuary legatees.**-See also 196Cal323, 237P1070. **On death of one of several residuary legatees** before death of testator, there is intestacy as to such share. 125Misc498, 211NYS778.

1953-61½-New. Elimination of illegal trust provisions will not invalidate residuary disposition vesting remainders. 229AppDiv356, 243NYS328.

1953-64 108Conn100, 142A851; 128Misc896, 221NYS317; 145Wash503, 261P104. But see 106Conn627, 138A809. **Rule applied.**-128Misc896, 221NYS317. **Balance of net income.**-108Conn100, 142A851.

1954-65 Me149A626(2dcase); 148Miss799, 114S740; NJCh144A804; 130Misc774, 225NYS777; 135Misc170, 237NYS390; TexCivA26SW(2d)415. See also 98CalA119, 276P394(1stcase). But see Me149A626(2dcase); 135Misc170, 237NYS390; 138Misc42, 244NYS673.

1954-67 See also 250NY45, 164NE737. But see Me149A626(2dcase).

1954-68 135Misc170, 237NYS390. But see Me149A626(2dcase). **Remainder to testator's grandchildren** cannot be ac-

celerated where number and identity of all who might take are unascertained. 137Misc660, 244NYS183.

1955–70 145Miss419, 110S835.

1955–73 267Mass203, 166NE703. See also 266Mass454, 165NE489.

1955–73½–New. Failure of limitation over as to one devisee will not destroy testamentary scheme so as to entitle such devisee to share in estate as if there were intestacy. 162Ga767, 135SE 90.

1956–74 83Colo 540, 266P714; 161Ga 356, 130SE575; 326 Ill 608, 158NE144; 256Mass273, 152NE356; Mo 58SW(2d) 405; 134Misc753, 236NYS388; 137Misc 785, 244NYS404; 292Pa327, 141A152. **Provision excluding certain persons** from taking cannot be given effect in determining persons who take intestate property. 256Mass273, 152NE356.

1958–87 316 Ill 583, 147NE446; 265 Mass259, 163NE899 (under will devising property to named beneficiaries at time property is divided, and providing that, if one of beneficiaries was not living when property was divided, her share was to go to her son if living, otherwise to revert to estate, it was held that, by fixing time of division, rather than that of death of husband's testatrix, when those who take should be ascertained, it was intention of testatrix that only those who could personally receive property should be beneficiaries).

1958–88 Provision that devises or legacies which fail shall go to residuary devisees rather than trust estate does not include unenforceable provisions other than legacies and devises. 80Colo 499, 252P816.

1959–89 99NJEq339, 131A515; Tex CommnA 285SW272; 101WVa344, 133 SE508, 510 [citCyc].

1959–90 252 IllA620; 41 OklACR63.

1959–93 252 IllA620; 219Ky1, 292SW 338; 317Mo435, 297SW36; 189NC558, 127SE684; 41 OklACR63; 6PaDist&Co 464; TexCommnA 290SW739; TexCivA 8SW(2d)334; 100Vt407, 138A730 (beneficiary may take under either will or descent laws).

1959–93½–New. Election may be provided for in will by making two alternative gifts and expressly directing that legatee elect which to choose. 99NJEq 339, 131A515.

1959–94 NH 149A866; TexCivA 282 SW638; 152Wash499, 278P186; 100 WVa585, 131SE449 (intention governs); 101WVa344, 133SE508, 510 [quotCyc]. See also 173Ark188, 293SW1. **Devise, generally of "all property,"** obviates election as there is an interest capable of disposition. 236 IllA168.

1959–95 236 IllA168; 196NC79, 144SE 559; TexCivA 290SW244 (holding compensation need not be equivalent to value of donee's interest); 101WVa344, 133SE508, 510 [quotCyc].

1959–95½–New. As between coöwners, election is not necessary where it is not clear that testator intended to devise greater estate than he owned. 215Ky 149, 284SW1029.

1959–96 205 Iowa1194, 219NW311; 227Ky764, 14SW(2d)168; 99NJEq339, 131A515 (two alternative bequests in will with express direction to elect); 138 Okl 216, 280P563; 101WVa344, 133 SE508, 510 [quotCyc].

1959–96½–New. Where only two thirds of testator's realty in Louisiana could be devised and testamentary trust as to remainder is void, property vests in children in fee on testator's death and children were thus not required to elect to take under will or under Louisiana law. 126Misc54, 213NYS286.

1960–2 Will probated prior to enactment of statute is not within application of statute. 204 Iowa473, 215NW 761 (statute as to presumption that widow takes under will unless refusal filed within certain time).

1960–5 123Kan254, 255P62, 64 [cit Cyc]; 129Misc514, 222NYS262; Tex CommnA 294SW518; 101WVa344, 133 SE508.

1961–6 Creditors of estate not required to elect, but are entitled to both interests, where mother devised to daughters who had transferred their share of brother's estate to creditors of her estate. 236 IllA168. **Devise of community property of testator and deceased wife to children,** with provision that any child not consenting to will shall be entitled only to inheritance from deceased mother, shows intention to treat entire land as testator's own and to put children to election. TexCivA 281SW580.

1962–14 TexCivA 238W(2d)414.

1962–16 126Misc603, 215NYS142; 189 NC558, 127SE684. Contra 129Misc398, 222NYS345.

1962–18½–New. A person made devisee under will of parent who had right of disposal of property has no right of election to renounce will and claim as heir. 173Ark188, 293SW1.

1962–18½–New. The only parties interested in a will may have it probated and property distributed in probate court, or may divide the property according to the law of descent and distribution. TexCivA 48W(2d)302.

1963–22 213Ala46, 104S330 (fraud cannot be predicated on widow's exercise of right to elect); 172Ark437, 288SW 923; 97Fla916, 123S668(2dcase); NH 149A72; 118 Or96, 245P1069; 47RI 150, 131A556. **Right of election is property right.**–67Utah256, 247P481. **Foreign will.**–156Penn101, 18W(2d) 1015. **Election against will which accorded with antenuptial agreement** will be sustained where such agreement made provision for wife grossly disproportionate to estate. 96PaSuper527. **Widow's right to elect is personal and absolute,** incontestable by devisees, legatees, heirs or creditors. Fla 130S596.

1964–23 172Ark437, 288SW923; 125 Misc712, 212NYS123; 126Misc479, 214 NYS167 (election necessary); 138 Okl 216, 280P563; 41 OklACR63; 47RI 150, 131A556.

1964–24 NH 149A866 (intention need not be express); 125Misc654, 211NYS 174; 138 Okl 216, 280P563; TexCivA 4 SW(2d)262. **Wills construed as making provision in lieu of distributive share.**–67Utah256, 247P481.

1964–25 See also 152Wash499, 278P 186.

1964–27 In New Jersey.–99NJEq538, 134A84.

1964–27½–New. Before widow can be put to election where will does not state that gift is in lieu of dower, it must appear that claim for dower is inconsistent with, and repugnant, to its dispositions. 126Misc479, 214NYS167.

1964–27½–New. Where testatrix devised son estate of inheritance, if he is dead estate to his representatives to be applied as if his share for part of his estate, son's widow had to renounce provisions under his will before taking life estate under testatrix's will. 316 Ill 583, 147NE446.

1964–29 TexCommnA 294SW518; 101 WVa507, 140SE487.

1964–30 130Kan424, 286P252 (will held not to create necessity for election); 6PaDist&Co 464.

1964–31 175Ark1130, 18W(2d)809; 168Ga798, 149SE198; 125Misc790, 211 NYS173; 132Misc274, 230NYS174; 138 Misc363, 245NYS617; 154SC64, 151SE 110, 68ALR501; 100WVa585, 131SE449. **Intention of testator governs.**–100WVa 585, 131SE449. **Whole will must be examined** to determine question, where no specific statement appears in will. 126 Misc479, 214NYS167. **Burden of proof** that widow made binding election to take under will is on those who assert such fact. 320 Ill 31, 150NE333. **Statutory allowance** of four hundred and fifty dollars is payable to widow before distribution where there is no expression in will of contrary intention, though widow elects to take under will in lieu of dower. 172Ark437, 288SW923. **Legacy in will executed prior to marriage** is not in lieu of dower. Del 142A825.

1965–32 178Ark558, 11SW(2d)460; 168 Ga798, 149SE198; 245NY587, 157NE 868; 125Misc712, 212NYS123; 129Misc 398, 222NYS345; 130Misc742, 225NYS 84; 100WVa585, 131SE449. **Provision in lieu of dower held to be offer by testator** to purchase widow's legal rights for benefit of his estate which she may elect to accept or renounce. 320 Ill 31, 150NE333.

1965–33 47RI 150, 131A556; 100WVa 585, 131SE449 (creation of jointure putting widow to election). **Where a will directs a sale of certain real estate,** etc. See also 100WVa585, 131SE449. **Though law favors dower right** such rule cannot modify terms of a will clearly showing testator's intention to give wife bequest in lieu of dower. 47RI 150, 131A556.

1965–34 169Ark572, 276SW579; 172 Ark437, 288SW923; 98NJEq199, 129A 752; 100NJEq161, 134A829; 221App Div612, 224NYS727; 154SC64, 151SE 110, 68ALR501; 100WVa585, 131SE449. **Gift held in lieu of dower** in will which divided residue into three equal shares between widow, daughter, and deceased son's children, "legacies" not to be paid till realty is sold, giving executors power to sell, lease, or otherwise dispose or not in their discretion. 126Misc479, 214NYS167. **Where estate is insufficient to pay legacies exclusive of widow's one third interest** widow is put to election. 41 OklACR63.

1966–35 98NJEq199, 129A752. **Will devising specific property to widow** and "all of the residue" per stirpes to testator's children and grandchildren held not to show purpose to deprive widow of statutory allowances so as to require election. 169Ark572, 276SW579. **Where will directs that widow receive equal share with** other beneficiaries, there is a clear expression of testator's intention that she receive such share in lieu of dower, since otherwise equality of distribution would be disturbed. 47RI 150, 131A556.

1966–36 40F(2d)208 (construing Kentucky and Ohio statutes); 326 Ill 425, 158NE127.

1966–36½–New. Where testator makes specific gift and expressly states that it is not in lieu of, but in addition to, dower in absence of expressions in will indicating contrary, it will be presumed that testator intended widow should have dower in residue of property. 178 Ark558, 118W(2d)460.

1966–36½–New. Under will devising homestead and certain personal property to wife, and providing that such property was not in lieu of dower but in addition thereto, and directing that residue of property should be divided one-half to wife, having no children, and one-half to testator's collateral heirs, wife took dower interest in residue, after taking specific property bequeathed to her. 178Ark558, 118W(2d) 460.

1966–37 103NJEq359, 143A445; 100 WVa585, 131SE449 (with contingent fee).

1967–43 125Misc654, 211NYS174; 98 NJEq199, 129A752; 125Misc654, 211 NYS174; 221AppDiv612, 224NYS727; 132Misc274, 230NYS174. **Will held to manifest intention that acceptance** of benefit of trust be in lieu of dower. 125 Misc712, 212NYS123.

1968–47 In Illinois.–320 Ill 480, 151NE 369. **But such statute does not apply** where estate consists of personalty only. 320 Ill 480, 151NE369.

1968–50 189NC558, 127SE684 (where will was void as to personalty widow may elect to take legacy under will or dissent therefrom and claim dower in real estate).

1968–52 151Miss23, 117S371.

1969–54 In British Columbia.–[1930] 2 DomLR42.

1969–58½–New. Statutory allowances are in addition to dower and widow is not put to her election in regard thereto, unless will clearly shows that devise was intended to be in lieu of allowances as well as of dower. 169Ark572, 276SW 579.

1969–59 TexCommnA 276SW191.

1969–59 TexCivA 286SW642; TexCivA 290SW244; TexCivA 28W(2d)997; Tex CivA 8SW(2d)334.

1970–60 Not put to election unless clearly required by language of will. 169Ark572, 276SW579 (homestead not part of dower).

1970–61 TexCivA 286SW642.

1970-63 189NC558, 127SE684; 10Pa Dist&Co 152.
1970-64 189NC558, 127SE684.
1971-69 See also Mo 30SW(2d)1073.
1971-70 DC 38F(2d)539.
1971-73 201 Iowa1290, 207NW369 (bequest to widow of one dollar does not require her to elect).
1972-82 MoA 274SW486; NH 149A72.
1972-85 NH 149A866. **Estoppel by misconduct.**–148Miss634, 114S733.
1972-86 204 Iowa648, 215NW710; NH 149A866; 35 OhA452, 172NE563. **Husband's right under will to administer estate** and act as trustee is valuable right under rule preventing acceptance of benefits and renunciation of burdens. 317 Mo 435, 297SW36. **Waiver of rights of curtesy.**–317Mo 435, 297SW36. **Failure to dispose of residue** is not evidence that testatrix intended husband to take distributive share therein. NH 149A866. **Will has been held to show no evidence** that bequest to husband was not intended to be in lieu of his statutory rights. NH 149A866. **Recording of election.**–12PaDist&Co 745. **Election may be withdrawn** if done promptly. 12Pa Dist&Co 745.
1972-87 252 IllA620. See also 236 IllA 168.
1973-90 81Colo 335, 255P463; 254Mass 57, 149NE626; 266Mass525, 165NE686. **1973-90 Where husband waived rights of curtesy by electing to take under will,** his creditors could not assert rights by curtesy. 317Mo 435, 297SW36.
1973-92½-New. Only persons specified in statute may exercise right to renounce will and take share under law of descent and distribution. 333 Ill 284, 164NE678.
1973-94 254Mass57, 149NE626; 41 Okl ACR63; 288Pa354, 136A236.
1973-95 81Colo 335, 255P463; 254Mass 57, 149NE626; 138 Okl 216, 280P563; 41 OklACR63.
1973-98½-New. Under statutes, widow bequeathed life estate in lieu of dower will be held to have died possessed of survivor's share of deceased husband's estate. Iowa 227NW335.
1974-1 125Misc712, 212NYS123.
1974-2 125Misc712, 212NYS123; 9Pa Dist&Co 657. But see 67Utah256, 247P 481. **In Missouri.**–317Mo 828, 297SW 382.
1974-3½-New. Act giving insane persons and their heirs two years after removal of disability to assert their rights has been held not to permit heirs to file renunciation of will within two years after widow's death, where widow's disability was not removed except by death. 333 Ill 284, 164NE678.
1974-5½-New. Heirs of insane widow after widow's death are not entitled to file renunciation of widow's rights under deceased husband's will since her heirs took nothing under will and were not within class of persons given right to renounce by statute. 333 Ill 284, 164NE 678.
1974-8 Fla 129S911; Fla 130S596; 125 Misc712, 212NYS123 (supreme court); 130Misc721, 224NYS349; 9PaDist&Co 657; 67Utah256, 247P481. **Conditional election** by court is not complete unless condition is complied with. 130Misc721, 224NYS349.
1974-9 Probate jurisdiction of county judge does not include election to dissent in behalf of insane widow. Fla 130 S596. **Power of equity court.** Fla 130 S596.
1974-10 Fla 130S596; 9PaDist&Co 657; 67Utah256, 247P481. **That widow's guardian had expended portion of income bequeathed to her** should be considered. 67Utah256, 247P481.
1974-11 Fla 130S596; 67Utah256, 247P 481. **Evidence held to show that election to take under will was proper.**–67 Utah256, 247P481.
1974-12 Renunciation of husband's will in behalf of insane widow not authorized under circumstances. Fla 130S596.
1974-13½-New. Independent executor or trustee cannot be compelled to make election provided for by will. TexCivA 281SW580.
1975-18 328 Ill 388, 159NE782. **Failure of guardian of incompetent widow to elect for her within time limited** is not binding on her where it is not for her best interests to renounce provisions of will and statute gives such effect to failure to make timely election. 67Utah 256, 247P481. **Purpose of statute allowing** widow one year to elect was to enable her to determine condition of estate and which course would be most advantageous to her. 252 IllA575.
1975-19 81Colo 335, 255P463; 103Conn 213, 130A112 (failure to elect held to bar husband of statutory share under express terms). **Statute as to time for making election** held not repealed by subsequent statute. 81Colo 335, 255P 463.
1975-20 204 Iowa648, 215NW710 (under Code of 1873); 204 Iowa473, 215NW 761.
1976-24 TexCivA 286SW642, 644 [cit CJ]. **In Kansas.**–121Kan215, 246P987.
1976-36 81Colo 335, 255P463; 288Pa 354, 136A236; 291Pa458, 140A502. See also 86 IndA47, 155NE721.
1976-38½-New. In Iowa, under statute, no election by widow to take under will or under law is effective unless election is entered of record or facts are shown constituting estoppel. 201 Iowa247, 207 NW241.
1976-38½-New. Release by widow to remaindermen of all interest she might elect to take in property in exchange for interest of remaindermen in other property, made to avoid will contest and not filed in probate, does not constitute election or estoppel under such statute. 207 Iowa247, 207NW241.
1977-39 287Pa105, 134A468 (evidence held to show that beneficiary did not elect to take under will); 101WVa344, 133SE508, 510 [citCyc].
1977-40 170Ark670, 280SW635 (failure to renounce under will held not necessarily to defeat right of action for services rendered); 328 Ill 388, 159NE782; 204 Iowa648, 215NW710; 117 Okl 46, 245P641; 287Pa105, 134A468; TexCivA 286SW642, 644 [citCyc].
1977-43 160Ga824, 129SE95 (must have actual knowledge); 252 IllA575; Tex CommnA 285SW272; TexCivA 286SW 642; TexCivA 8SW(2d)334.
1977-44 117 Okl 46, 245P641; Tex CommnA 285SW272; TexCivA 286SW 642, 644 [citCJ]. **Mere intention,** however, is not election. TexCivA 286SW 642.
1977-45 204 Iowa473, 215NW761; Tex CivA 286SW642.
1977-46 Widow held to have had knowledge of amount of money testator had when he died, where she had possession of his deposit slips. 172Ark437, 288SW923.
1978-47 160Ga824, 129SE95 (legatee not estopped by election made in ignorance of material facts); 252 IllA575; 287Pa105, 134A468; TexCivA 286SW 642. But see 172Ark437, 288SW923.
1978-48 TexCivA 286SW642.
1978-50 252 IllA575; 285Pa408, 132A 343.
1978-51 204 Iowa473, 215NW761.
1978-53 213Ala206, 104S420 (where devisee renounced right to act as executrix and declined to take anything under will); TexCommnA 285SW272.
1978-53½-New. Mere consent to probate does not constitute election to take under will. 117 Okl 46, 245P641.
1979-54 123Kan254, 255P62; 317Mo 435, 297SW36; TexCivA 8SW(2d)334; 152Wash499, 278P186.
1979-56 317Mo 435, 297SW36.
1979-57 204 Iowa473, 215NW761; 123 Kan254, 255P62; TexCommnA 276SW 191.
1979-58 204 Iowa648, 215NW710.
1979-59 204 Iowa78, 214NW548; 125 Kan727, 265P1113.
1979-60 32F(2d)817; 204 Iowa473, 215 NW761; 129Misc514, 222NYS262; 6Pa Dist&Co 251; TexCommnA 276SW191; TexCommnA 285SW272; 152Wash499, 278P186.
1979-61 172Ark437, 288SW923 (part payment).
1980-63 IndA 172NE502.
1980-64½-New. , or where beneficiary gives receipt in which she agrees to abide by terms of will. 172Ark437, 288SW923.
1980-67 Widow, who recovered on testator's insurance certificates, held not precluded from receiving legacy in lieu of dower and of all other claims. 213 AppDiv784, 210NYS639.
1980-68 320 Ill 31, 150NE333 (acceptance of rent for part of realty held not binding election to take under will in absence of showing that it was received as life tenant rather than under the renunciation and election); IndA 172NE 502.
1980-72 204 Iowa78, 214NW548; 193 NC311, 136SE705.
1981-73 204 Iowa78, 214NW548; 297 Pa348, 147A70.
1981-74 144Wash528, 258P851.
1981-75 144Wash528, 258P851. **Occupation of homestead not an election.**–TexCivA 286SW642. **Widow's occupation during life of land in which life estate was devised to her** does not constitute election to take under will. 201 Iowa247, 207NW241.
1981-76 202 Iowa689, 210NW958 (leasing property); 101WVa344, 133SE508.
1982-82½-New. Inventorying all of community property is not necessarily inconsistent with surviving widow's claim against will. TexCommnA 285 SW272.
1982-82½-New. Acceptance of sum derived from sale of personalty is not election to take under will where there was no injury to anyone. 328 Ill 388, 159NE782.
1982-83 172Ark437, 288SW923; 202 Iowa689, 210NW958; Alta [1929] 4 DomLR710.
1982-84 180Minn134, 230NW575; 118 Or96, 245P1069. But see 88 IndA568, 163NE612. **Failure of widow to have lands assigned for dower,** and not commencing action for dower within year of testator's death is election to take under will in lieu of dower. 126Misc 479, 214NYS167.
1982-85½-New. Where statute abolishes curtesy and gives widower same share in wife's real estate as widow takes in real estate of deceased husband, widower's failure to renounce wife's will leaves him bound by its provisions. 319Mo 1001, 5SW(2d)74.
1982-90 125Misc707, 212NYS119; 130 Misc285, 224NYS299.
1983-92½-New. An order, on application made by committee of incompetent widow, for permission to release her dower right in certain realty of husband, is not election to take her dower right instead of benefits under the will. 125Misc712, 212NYS123 (where no request for election by supreme court is made).
1983-92½-New. Unsuccessful prosecution by legatee of money of suit for specific performance of agreement to devise to him, in consideration of services, real property devised to another does not constitute election to take against will. 252 IllA620.
1983-93 266Mass525, 165NE686.
1983-96 99NJEq339, 131A515; 131 Or 1, 281P826. **A receipt,** etc. 172Ark437, 288SW923.
1983-97 Statute must be strictly followed.–169Ark145, 273SW366.
1983-98½-New. Widower failing to sign election presented by commission appointed by probate court, though expressing satisfaction with wife's will to which he had not consented and asking time to consider, does not elect to take under will. 121Kan215, 246P987.
1983-99 DC 38F(2d)539.
1983-1 DC 38F(2d)539.
1983-5 215Ky472, 285SW218.
1984-6 121 Oh241, 167NE880 (provided her rights have been fully explained to her prior to election).
1984-7 215Ky472, 285SW218. **Wife's renunciation of husband's will held not ineffective,** because not filed until after death. 215Ky472, 285SW218. **Entry of dissent to foreign will.**–156Tenn404, 1 SW(2d)1015. **Recording election without filing** is insufficient. 297Pa348, 147 A70.
1984-8 156Tenn404, 1SW(2d)1015, 1016 [citCyc]. **Defective election.**–169 Ark145, 273SW366.
1984-12½-New. Where under terms of will, widow is given right of election between alternative provisions, an instrument making election, executed by

executor and widow, and recorded as deed, is sufficient showing that election was made. 99NJEq339, 131A515.

1984-12½-New. Such an instrument, also, when containing clause to effect that widow has elected in writing, is evidence of prior written election as well as statement of then present election; 99NJEq339, 131A515.

1984-12½-New. and it is sufficient compliance with terms of will requiring widow to make election. 99NJEq339, 131A515.

1984-12½-New. A recorded written instrument executed by widow and executor, and giving effect to election may, if defective, be remedied in equity. 99 NJEq339, 131A515.

1984-13 See also **TexCommnA** 276SW 191.

1984-13½-New. Evidence of election; burden of proof. **TexCivA** 286SW642.

1984-14 Wife's renunciation of husband's will held not conditional by reasons of provisions therein for its recordation immediately after death of wife. 215Ky472, 285SW218.

1984-17½-New. Waiver by widow of provisions of will, authorizing an election to take under will, or to waive any of its provisions for her benefit, must be absolute, and not contingent or conditional. 266Mass525, 165NE686.

1985-18 246 IllA496; 124Kan646, 261P579.

1985-24 252 IllA575.

1985-26 252 IllA575; 124Kan646, 261 P579 (dictum).

1985-28 Discovery by widow that property conveyed to corporation for distribution to children was of greater value than she supposed does not constitute after-discovery of property entitling her to change election made with knowledge of conveyance to corporation. 201 Iowa878, 208NW319.

1985-29 252 IllA575; 124Kan646, 261 P579; 285Pa408, 132A343. But see 297Pa299, 146A891.

1985-34 Knowledge by elector of conduct, causing change of position, held essential. 124Kan646, 261P579.

1985-34½-New. Estoppel to change election.—Widow who with full knowledge of all material facts affecting extent of estate freely and voluntarily accepts provisions of will in her behalf is estopped to change election. 201 Iowa878, 208NW310.

1986-35 124Kan646, 261P579.

1986-43 Suit by personal representative.—254Mass87, 149NE626. **Evidence held insufficient.**—160Ga824, 129SE95. **Burden of proof** is on legatee seeking relief against election to take under will to show alleged ignorance of reversionary interest in land devised to another. 160Ga824, 129SE95. **Complaint** must plead state of facts that would afford complainant relief in equity. **TexCommnA** 285SW272. **Illegal election of insane widow through guardian.**—317Mo828, 297SW382 (facts held to show that election to renounce will was not for best interest of widow).

1986-43½-New. When complaint in equitable action to set aside election shows that widow was, by provisions of will, duly put to her election and that she made valid election and now desires to withdraw it and take both under gift under will and dower, it states no cause of action. 98NJEq199, 129A 752.

1986-44 124Kan646, 261P579.

1987-46 172Ark437, 288SW923; 287 Pa448, 135A119; **TexCivA** 8SW(2d) 334; 101WVa344, 133SE508, 510 [cit Cyc]. **Widow's acceptance** under intestate statute of testator's domicile prevents her from taking under will in ancillary administration. 152Md661, 136A905. **Where the only parties interested under will** elect to take according to law of descent, will is no evidence of title, and its provisions cannot control distribution. **TexCivA** 4 SW(2d)302.

1987-47 266Mass525, 165NE686.

1987-48 172Ark437, 288SW923; 191 NC392, 131SE760; 287Pa105, 134A468; **TexCivA** 290SW244; 101WVa344, 133 SE508.

1987-49 101WVa344, 133SE508.

1987-50 172Ark437, 288SW923. **On election of children to take under will devising community property of testator and deceased wife,** interest of children in community property must be considered as belonging to testator as of date of death; and in such case, where testator, after death of wife, had moved with children on community tract exceeding in extent acreage allowed for homestead, homestead of testator at time of death should be treated as extending to full acreage allowed for homestead. **TexCivA** 281SW580.

1987-54½-New. Renunciation does not deprive widow of right to act as executor. 326 Ill 425, 158NE127.

1987-54½-New. Power of appointment not lost by renunciation. 326 Ill 425, 158NE127.

1988-56 See also 206 Iowa432, 220NW 20.

1988-58½-New. Beneficiary having interest in property erroneously included in testamentary disposition, cannot defeat such disposition and take under will, too. 129Misc514, 222NYS262.

1988-58½-New. Property included; discovery after distribution. Where property as to which legatee had right of election is discovered after election and distribution, such property is included and belongs to party electing; 99NJEq339, 131A515.

1988-58½-New. and where the right of election was as to undivided half of testator's property, grant was not restricted to any particular part of estate, but transferred undivided one-half interest in the whole; 99NJEq339, 131A515.

1988-58½-New. including a one-half interest in property discovered after death of legatee entitled to elect which must go to such legatee's residuary legatees. 99NJEq339, 131A515.

1988-58½-New. Devisee electing to take under his father's will portion of father's interest in note payable to father and mother jointly is not estopped from asserting claim based on interest in his mother's estate upon her death. 205 Iowa1194, 219NW31[illegible].

1988-58½-New. Husband is not barred from statutory right to half of wife's property on renunciation of her will by having abandoned her for year preceding death. 322Mo 697, 16SW(2d)49.

1988-58½-New. Rights of husband electing to take under statute in Connecticut. 110Conn36, 147A290.

1988-63 223Ky418, 3SW(2d)1076; 287 Pa448, 135A119 (bound by provisions); **TexCommnA** 290SW739 (though in absence of will widow would have taken entire estate).

1988-67 228AppDiv861, 240NYS790; 142Va149, 128SE450 (entitled to have her legacy charged on real estate, though testator's intention thereto doubtful). See also 47RI 64, 129A832.

1989-69 136Misc199, 239NYS588 (widow held not estopped from sharing in fund passing by intestacy).

1989-70 172Ark437, 288SW923 (barred from dower but not statutory allowance); 163Ga89, 135SE429; 316 Ill 583, 147NE416; 337 Ill 232, 168NE900, 66ALR1062; 88 IndA568, 163NE612; IndA 172NE502; 223AppDiv640, 229 NYS171; 129Misc398, 222NYS345; 135 Misc389, 237NYS713 (share in fund); 154SC64, 151SE110, 68ALR501. See also 231Ky442, 21SW(2d)818.

1989-74½-New. Homestead property. Election does not deprive widow of dower or possession of homestead till dower is assigned. 98Fla344, 1238777.

1989-74½-New. Widow's failure to reply to executor's notice to elect whether she would take under will does not estop her from claiming under resulting trust. Iowa 229NW147.

1989-74¼-New. Acceptance of will does not prevent assignment to widow of dower in homestead. 98Fla276, 1238 768.

1989-75 Del 141A695; 164Ga181, 138 SE60; 320 Ill 31, 150NE333; 320 Ill 270, 150NE630 (entitled only to dower under Dower Act); 323 Ill 519, 154NE 337; 328 Ill 388, 159NE782; 27 OhA 512, 161NE550; 67Utah256, 247P481. **Widow held not entitled to personalty.**—323 Ill 519, 154NE337. **Widow's election to take against will** held to require distribution as if she had then died. 288Pa91, 135A618. **Widow takes as heir where deceased leaves no issue.**—328 Ill 388, 159NE782. **Widow's election to renounce will** does not restore all property of testator to operation of statute of descent. 328 Ill 388, 159NE 782.

1989-76 26 OhNPNS387. But see 323 Ill 519, 154NE337; 248NY399, 162NE 295.* **In Alabama.**—213Ala38, 1048328. **Renunciation by widow does not convert husband's estate into intestate estate** or entitle her to one third of husband's lands in fee under Descent Act, but only entitles widow to dower in husband's lands as fixed by Dower Act. 320 Ill 270, 150NE630.

1990-77 337 Ill 232, 168NE900, 66ALR 1062.

1990-79 See also **NJCh** 144A27.

1990-80 191NC334, 132SE17.

1990-83 218Ala292, 1188342; 250Mich 117, 229NW414 (does rights under lease); 194Wis113, 216NW130. But see 153Va614, 151SE300. **Wife wrongfully occupying property** which would have been hers if she had chosen to take under will is accountable for net income of property to owner. 250Mich117, 229 NW414.

1990-84 Renunciation by widow makes only such changes in will as law compels.—158Md315, 148A447.

1990-84½-New. Widow claiming community interest in property instead of taking under trust becomes tenant in common with trustee. 200Cal776, 254 P1108.

1990-84½-New. Widow having waived provisions of will did not share in portion of estate distributed to husband's heirs at law on lapse of share in remainder. 266Mass454, 165NE489.

1990-84¼-New. Widow suing in name of husband's legal representatives, after election against will, cannot recover on right of action which husband had lawfully relinquished. 297Pa399, 147A 90.

1990-84½-New. Widow's renunciation of will will not release her from duty thereby imposed to select monument. Ill 173NE110.

1990-85½-New. Nor does election of husband to take under law instead of under will render latter imperative as to remaining beneficiaries so as to permit partition. 84 IndA176, 149NE108.

1991-89½-New. Son having life estate in realty under will may occupy two-thirds thereof for life though father elects to take two-thirds law allows instead of taking under will. 84 IndA176, 149NE108.

1991-89½-New. Heirs of surviving wife are not estopped to insist that wife took dower interest and not under will by the separate act of husband apart from, and prior to, society under agreement to pay interest thereon to him and wife during their lifetime, and that wife received interest after his death. 204 Iowa473, 215NW761.

1991-89¼-New. Widow's election to take against will requires distribution of balance as if she had died. 291Pa 198, 139A868.

1991-89½-New. Husband's renunciation held not to affect bequest to legatee. 157Md565, 146A742.

1991-94 326 Ill 425, 158NE127. See also 133Misc739, 232NYS670.

1991-97 6F(2d)986; 175Ark236, 299 SW1; 164Ga181, 138SE60; 326 Ill 425, 158NE127. **When widow renounces will, she being entitled only to dower in lands under Dower Act, her share becomes intestate estate and descends to children as heirs.** 320 Ill 270, 150NE 630. **Remaining provisions of will operate** on part of estate not included within widow's statutory share. Ill 173 NE110.

1991-98 6F(2d)986.

1992-1½-New. Election by widow to take against will is equivalent to her death as to payment of legacies and distribution under will on happening of

such event. 89Fla457, 105S106.

1992-1½-New. Estate is distributable as though widow were dead on her electing to take against will bequeathing her life estate. 296Pa348, 145A824, 66ALR 1342.

1992-2 164Ga181, 138SE60; 320 Ill 31, 150NE333. **Under will devising to husband all realty** and personalty for life and other personalty to mother and if either deceased prior to testatrix, property to go to one then alive and at decease of all parties mentioned, remainder to go to church, husband having rejected will mother takes realty in life tenancy and remainder goes to church. 124Me386, 130A177. **Estate per autre vie** held not to be created upon renunciation by widow of life estate. 320 Ill 31, 150NE333.

1992-3 180Ark552, 22SW(2d)370; 164 Ga181, 138SE60; 291Pa22, 139A582; 153Va614, 151SE300; 194Wis113, 216 NW130.

1993-4 175Ark236, 299SW1; 89Fla 457, 105S106 (doctrine of acceleration yields to intent of testator). **Where the widow's death is time fixed for payment,** etc. 329 Ill 546, 161NE88.

1993-5 320 Ill 31, 150NE333; 121 Oh 490, 169NE570.

1993-7 201 Iowa1226, 207NW362.

1993-8 201 Iowa1226, 207NW362. See also 194Wis113, 216NW130.

1993-10 TexCivA 298SW470.

1993-11½-New. Where testator's widow elected to take weekly payments, provided for her in separation agreement, instead of payments provided in will, such payment should be made from funds in hands of trustees, notwithstanding possible invasion of principal, rather than by purchase of annuity for widow. 133Misc739, 232NYS670.

1993-11½-New. Widow's renunciation does not remove from protection of spendthrift provision income which beneficiary would be entitled if widow did not renounce. 158Md315, 148A447.

1993-12 287Pa105, 134A468.

1993-13 132 IllA156.

1994-14 132 IllA156; 252 IllA620.

1994-17 175Ark1130, 18SW(2d)809; 232 IllA156.

1995-22½-New. Title.-104Conn97, 132 A411 (will is source of beneficiaries' title in case of all testate estates).

1995-24 103Conn352, 130A472; 201 Iowa284, 207NW116; 240Mich661, 216 NW446; 156Miss736, 126SE656; 77Mont 182, 250P812; 217AppDiv210, 216NYS 699. **Testator ceases to be owner on death** and realty becomes property of life tenant and remaindermen under will. 217AppDiv210, 216NYS699. **Statute relating to title acquired from heir** does not affect title acquired by legatee or his grantee under will. 135Misc134, 237NYS106.

1995-25 240Mich661, 216NW446.

1995-27 215Ala98, 109S746, 748, 48 ALR1032 [quotCyc]; 101CalA20, 281P 518(2dcase); 103Conn352, 130A472; 104Conn97, 132A411; 201 Iowa284, 207 NW116; 240Mich661, 216NW446; 114 Nebr517, 208NW665; 100Vt217, 136A 389; 196Wis125, 218NW193. But see 228Ky32, 14SW(2d)189. **Rents and profits.**-124Kan230, 257P962.

1996-29 116 Or593, 240P883, 242P605.

1996-32 116 Or593, 240P883, 242P605; 146Wash530, 264P4 (under statute). But see Sask [1928] 3DomLR36.

1996-35 104Conn97, 132A411 (beneficiaries do not have full title until distribution); 136Misc91, 242NYS453. **Legatee receives equitable interest** in property of estate though interest may be subject to abatement. 11F(2d)948, 48ALR207.

1997-36 280US327, 50SCt115, 74Led 457; 25F(2d)915; 148Md620, 129A898. But see 13F(2d)252; 30F(2d)604; 101 CalA20, 281P518(2dcase); 97Fla916, 123S668(2dcase); 114Nebr517, 208NW 665. **Ownership of legatee is subject only** to superior rights of creditors and expense of administration. 204 Iowa927, 216NW55.

1997-36½-New. Stock bequeathed by bailee is held by legatee as trustee for bailor, just as it was held by original bailee. 142Va391, 128SE568.

1997-36¾-New. Title of property discovered after distribution is, nevertheless in execution as of date of death of testator. 99NJEq339, 131A515.

1997-36¼-New. Under Rhode Island statute relating to compromise right in estate arising from compromise is same as that of legatee. 11F(2d)948, 48ALR 207.

1997-36½-New. In Florida life insurance inures to widow and children under Comp. Gen. L. (1927) § 7065, and not under statute of descent or dower. 97Fla916, 123S668(2dcase).

1997-38 Residuary legatee and administratrix held not precluded by terms of will from taking usufruct pending sale and distribution among legatees. TexCommnA 293SW165.

1997-39 NJ 129A742 (life estate with right to consume remainder).

1997-40 133Misc17, 231NYS355. **Bond** is not required of life tenant, given use and income of all testator's property, with right to invade principal. 133Misc 17, 231NYS355.

1998-42 On death of life tenant failing to execute power of consumption, his executors have duty of turning over property to representatives of testator. 287Pa448, 135A119.

1998-43 NJ 129A742.

1998-43½-New. Devisees are entitled to all rents from realty accruing after death of testator. 321 Ill 442, 151NE 877.

1998-45 103NJEq339, 143A361.

1998-47½-New. Legatee is entitled to possession and enjoyment of pecuniary legacy though income is subject to charges. 103NJEq498, 143A724.

2000-64 107Conn716, 142A466. **Option to purchase property at stated price** held for entire property and not one half thereof. 221AppDiv711, 225NYS 142.

2001-65 88PaSuper530. **Where beneficiary, given right to purchase at fair price, takes possession claiming fee,** remedy of persons interested is by petition for appraisal and not by petition for partition. 88PaSuper530.

2001-68 29F(2d)1010.

2001-69 107Conn716, 142A466. See also 30Hawaii500. **Evidence held to show compliance with option within six months' period** sufficient for enforcement thereof without any notice to or action by court of probate within six months' period. 107Conn716, 142A466.

2001-70 107Conn716, 142A466.

2001-70½-New. Tender, by one designated devisee and strangers, of amount which will requires purchasing devisee to pay for acquisition of lands is ineffectual as made partially for benefit of strangers. 31F(2d)641.

2001-72 245NY589, 157NE869 (sale of realty to pay legacies forbidden where annuity was left as "a lien upon" such realty).

2002-74½-New. In action by legatees to secure legacies, judgment providing that, if income out of estate out of which legacies were to be satisfied had been diverted or property used for purposes to which other funds or property should have been applied, funds or property intended for, or properly applicable to, these specific purposes, could be substituted for diverted income, has been held proper. 195NC822, 143SE835.

2002-74⅓-New. Legatees taking through exercise of power of appointment held entitled to earnings of trust fund from date of appointor's death. 137Misc222, 243NYS380.

2002-77 166Minn315, 207NW629; 147 Miss515, 112S603.

2002-79 242 IllA501; Mass 168NE793.

2002-84 242 IllA501; 245NY589, 157 NE869; 132Misc731, 230NYS789.

2003-86½-New. Where whole estate is not specifically disposed of, it is chargeable with trust of amount sufficient to produce income of specified amount to be paid designated beneficiary. 214App Div153, 211NYS746.

2003-87 227Ky728, 13SW(2d)1039; 155SC123, 152SE24.

2003-88 147Miss515, 112S603.

2005-95½-New. Effect of charge.-Where real property is devised to one person for life with remainder in fee to children of devisee's body and maintenance of incompetent person is made personal charge on devisee with proviso that in case of failure of devisee to discharge obligation, incompetent shall be entitled to rents, income, and profits, provision for support of incompetent has no effect on devolution of title or legal character of estate of devisee. 121 Kan312, 246P982.

2005-95⅓-New. In such case provision for support of incompetent is condition subsequent which does not affect vesting of title. 121Kan312, 246P982.

2005-96 Legacy in lieu of dower held payable only out of personalty. 244NY 236, 155NE110. **Fact that legacy is in lieu of dower held not conclusive as to** its being payable out of realty or personalty. 244NY236, 155NE110.

2005-1 325 Ill 500, 156NE758; 242 IllA 501; 129Kan671, 284P411 (provisions for wife and maintenance of home held to require children to bear charge equally); 232Ky83, 22SW(2d)416. **Realty acquired by deceased after execution of will** is chargeable to pay general legacies as gathered from intention of testator in construing will. 125Misc498, 211NYS778.

2006-7 Legacies not payable from realty are limited in payment from difference between value of personalty and decedent's debts. 137Misc501, 244NYS 135.

2008-18 325 Ill 500, 156NE758; 223 AppDiv636, 229NYS176; 155SC123, 152 SE24.

2008-19 129Kan671, 284P411 (provisions for widow held charge on testator's entire business). **Residue is chargeable** with deficiencies in general legacies. 126Misc99, 213NYS422.

2008-21 10PaDist&Co 354.

2008-23 DC 37F(2d)997.

2008-24 195NC822, 143SE835.

2009-26 128Misc263, 219NYS295.

2009-27 252NY218, 169NE282. **Annuity to daughter for benefit of minor child.**-126Misc54, 213NYS286.

2010-29 232 IllA78; 244NY236, 155NE 110; 142Va840, 128SE247. **Where will provided legacies in excess of personal** property, personalty vested in executrix as primary fund for application ratably to legacies after payment of prior charges. 144Va727, 130SE794.

2010-31 But see 202Cal 284, 260P296.

2011-35 Mere demonstrative legacy held chargeable to general estate only after debts are paid. 232 IllA78.

2011-41 120Kan148, 242P135; 128Kan 262, 276P823; TexCivA 293SW264; 142 Va840, 128SE247; 142Va149, 128SE450; 142Va285, 128SE550. See 103Conn213, 130A112. But see 323Mo 620, 19SW(2d) 898. **Where personal property insufficient to pay** legacies, legatees have claim for balance due against real estate not devised in hands of heirs at law. 144Va 727, 130SE794. **Real estate not devised to be sold for payment of debts and charges against it** can only be subjected in invitum in equity, after personalty exhausted, at suit of creditors or legatees, executrix having no power over it. 144Va727, 130SE794. **Where legacies exceed personal property, if debts unduly paid out of order or personalty exhausted** whether by devastavit or distribution, real estate not disposed of could be subjected in hands of heirs at law. 144Va727, 130SE794.

2013-42 338 Ill 145, 170NE276; 213Ky 179, 280SW921, 922 [citCyc]. **Realty willed to named beneficiaries** should be sold last where sale is necessary to support husband, life beneficiary. 128Misc 353, 219NYS488.

2013-43 120Kan148, 242P135; 244NY 236, 155NE110; 136Misc330, 240NYS 98; 47RI 314, 132A888; TexCivA 293 SW264; TexCivA 32SW(2d)681; 142Va 285, 128SE550. **Construction of particular wills as to charge of legacies on real estate,** etc. 217Ky362, 289SW303.

2014-44 323Mo 620, 19SW(2d)898; 244

NY236, 155NE110; 215AppDiv639, 214NYS479 (including codicil); 126Misc220, 214NYS145; 142Va840, 128SE247; 142Va149, 128SE450; 142Va285, 128SE550.

2014–45 120Kan148, 242P135; 215AppDiv639, 214NYS479; 126Misc220, 214NYS145; 142Va840, 128SE247; 142Va285, 128SE550.

2015–46 212AppDiv558, 209NYS341; 136Misc330, 240NYS98; 142Va840, 128SE247. **Language of will** should be given ordinary meaning free of any technical rules regarding legacies and as to charging them to realty. 216AppDiv639, 214NYS479.

2016–56 Iowa 232NW826; 108WVa417, 151SE324.

2017–64 212AppDiv558, 209NYS341.

2017–67 120Kan148, 242P135.

2017–68 215AppDiv639, 214NYS479; 126Misc220, 214NYS145; 142Va149, 128SE450.

2018–71 155SC123, 152SE24.

2019–76 325Ill500, 156NE758; 134Misc409, 235NYS484; 142Va149, 128SE450.

2020–77 325Ill500, 156NE758.

2022–84 216AppDiv639, 214NYS479. But see 120Kan148, 242P135. **Will construed to charge realty obtained subsequent to execution with money legacies.** 216AppDiv639, 214NYS479.

2023–91 147Miss515, 112S603 (entire estate); 142Va840, 128SE247 (will construed as whole held to dispose of entire estate and make all gifts general charge thereon). **Direction for payment of legacies out of estate "at once"** does not require payment out of personal property only. 142Va840, 128SE247. **Bequest of sum received from first husband's "estate,"** not shown to have come from husband's personal estate, held significant of intention to charge legacies on entire estate. 142Va840, 128SE247.

2023–94 85Colo397, 277P5. See also Mo 12SW(2d)505.

2023–95 131Misc526, 227NYS470; 137Misc46, 243NYS136 (residuary personalty exempted from payment of legacies).

2024–97½–New. Mortgage on land constituting residue held given to secure money to pay legacy and debts and not to pay legacy, making without merit claim that payment of legacy from residuary would twice burden it. 85Colo397, 277P5.

2024–97⅓–New. Where accumulation of income to pay off provision in residuary clause for mortgages was illegal, payment of mortgages became primary charge on principal of residue. 134Misc791, 236NYS518.

2024–98 93PaSuper549; 142Va285, 128SE550.

2027–18 See also 130Misc339, 224NYS435.

2028–22 137Misc501, 244NYS135; 19OhA484, 487; TexCivA 293SW264; Sask [1929] 4DomLR1086(1stcase).

2029–24 136Misc612, 244NYS119.

2029–25 134Misc753, 236NYS388; 36OhA15, 172NE669.

2031–33½–New. Devisee of life estate required by will to pay for land devised exceeding seventy-five acres, must pay full amount stipulated. 217Ky362, 289SW303.

2031–33⅓–New. In Manitoba where testator leaves no estate out of which bequests may be paid except land devised to named beneficiary, land is charged with payment. [1930] 2DomLR348.

2031–35 See also 85PaSuper292.

2032–37 But see 85PaSuper292.

2033–41 325Ill500, 156NE758; 85PaSuper292.

2038–73 137Misc735, 244NYS357.

2038–77 Direction to pay prior legacies in full regardless of effect on provisions following held not charge on realty notwithstanding power of sale, where personalty was sufficient to pay all legacies at time of executing will. 126Misc220, 214NYS145.

2039–82½–New. Where testator directed that his real estate be converted and out of the proceeds his debts and legacies be paid, it was held that he created a mixed fund to be resorted to pro rata for that purpose. 20SaskL288, [1926] 1DomLR206, [1926] 1WestWkly125.

2039–82⅓–New. Will making annuity charge on realty.–Power of sale in such a will does not convert realty into personalty. 217AppDiv188, 216NYS535.

2040–88 Will held not to charge remainders with support of widow.–118Or96, 245P1069.

2042–98 138Misc90, 245NYS173.

2043–3 235Ky259, 30SW(2d)965.

2045–22 103NJEq339, 143A361.

2046–30 103NJEq339, 143A361.

2047–36 Presumption from lapse of time.–13PaDist&Co737. **Requisites of formal discharge of lien.**–13PaDist&Co737.

2047–38 32OhA423, 168NE220.

2050–64 Will cannot be rescinded by beneficiary. 214Ky596, 283SW957.

2052–78½–New. Pecuniary legatee may sue executor for devastavit or residuary devisee. 85Colo397, 277P5.

2053–82 85PaSuper292.

2053–86 217Ky362, 289SW303.

2053–90½–New. Pecuniary legatee bringing suit on official bond against executor for devastavit exhausts remedy as to personalty entitling her to proceed against residuary devisee. 85Colo397, 277P5.

2054–93 287Pa105, 134A468 (unless amount has been transferred to another to hold on express trust for beneficiary).

2054–99 235Ky259, 30SW(2d)965; 85PaSuper292.

2055–5 Under devise of farm for support of testator's widow, her only relief is to compel payment by action at law as lien on farm with right of sale subject to lien. 214Ky596, 283SW957.

2058–22 Contingent remaindermen are not necessary parties to proceeding for sale of lands to discharge annuities, under will creating residue subject to life annuity, in absence of affirmative showing of existence of some person with vested interest in remainder. 153Miss829, 121S852. **Wife of devisee** is proper party to action to enforce lien by sale of realty devised. 108WVa417, 151SE324.

2058–25 Plea of former suits pending must allege that case, parties, rights asserted, and relief prayed for are same. 85PaSuper292.

2059–31 214Ky596, 283SW957 (sale ordered only as last resort where it is improbable that land sold subject to lien for future support will bring fair value).

2060–36 Security may be required of legatee entitled to possession and enjoyment of pecuniary legacy, subject to payment of charges. 103NJEq498, 143A724.

2060–36½–New. By whom sale made.–Where decree appoints chancery clerk as commissioner to sell land to pay accumulated annuities, sale may be made by person holding position of clerk at time of sale. 153Miss829, 121S852.

2060–38 See also 178Ark558, 118SW(2d)460.

2060–40 Legacy held not debt entitled to preference. 83IndA531, 149NE190.

2061–42½–New. Direction in will that testator's just debts be paid held meaningless as to actual debts since law makes payment mandatory. 289Pa407, 137A627.

2061–42⅓–New. Calling gift "just debt" cannot create obligation to prejudice of existing debts against estate or of widow's interest. 289Pa407, 137A627.

2061–43 164Ga885, 139SE661; 232IllA78; 127Misc732, 216NYS519; 5PaDist&Co354; 144Va727, 130SE794. **Real estate not devised to be sold for payment of debt** can only be subjected in invitum in equity, after personalty exhausted, at suit of creditors, executrix having no power over it. 144Va727, 130SE794. **General estate held required to bear its proportion of income tax** assessed against widow. 241NY513, 150NE534. **Will held to manifest intention that income taxes should be paid out of general estate.**–241NY513, 150NE534.

2061–45 144Va727, 130SE794 (costs of administration payable out of personalty in hands of executrix).

2061–48 85PaSuper313 (maintenance); 150Wash482, 273P735.

2061–49 85PaSuper313.

2061–51 But see 267Mass301, 166NE833.

2062–52½–New. Income tax.–Will held to manifest intention that income tax will be paid out of general estate. 241NY513, 150NE534.

2062–52⅓–New. Direction to pay debts out of "estate" unless modified by something extraneous does not impose limitation to personal property as source of payment. 142Va840, 128SE247.

2062–52¼–New. Income tax.–Income to be paid widow must bear share of income tax directed to be paid out of "general estate." 241NY513, 150NE534 (since income to widow is paid out of general estate like that of other legatees).

2062–58 Evidence held sufficient to sustain verdict for daughter claiming property under decedent's oral contract in devisee's action to quiet title. IndA157NE7.

2063–59 Ala 130S801; 146Wash530, 264P4.

2063–64 32F(2d)392; 214Ala671, 108S561; 95CalA652, 273P130; 232IllA78; 315Mo485, 286SW371. See 26F(2d)998. **At common law devisee of mortgaged realty could subject various funds to discharge of encumbrance** in following order: General or residuary personal estate; lands expressly devised to pay debts; lands not devised; and lands specifically devised charged with debts. 315Mo485, 286SW371. **In New Jersey.**–100NJEq196, 134A822.

2064–68 Mich 233NW233(2dcase); 152Va725, 148SE835 (realty held subject to encumbrance, notwithstanding provision charging personal estate with payment of debts).

2064–69 315Mo485, 286SW371; 320Mo580, 8SW(2d)614; Sask [1927] 3DomLR464. **An express direction in the will,** etc. 315Mo485, 286SW371. **Direction that all debts be first paid out of personal estate** does not evidence clear intent that mortgage on devised real estate shall be paid from personal or residuary estate. 315Mo485, 286SW371.

2064–70 Direction in will to pay testator's debts is not direction to pay out of personal estate. 320Mo580, 8SW(2d)614.

2064–72 204Iowa606, 215NW615.

2065–77½–New. Rule of exoneration, except as abrogated by act applied to heirs and devisees of deceased mortgagor and to "a widow in favor of her dower, in an estate mortgaged to secure the purchase money." NJ 144A619.

2065–77⅓–New. Will containing formal and unnecessary direction that all testator's just debts be paid, and then, after bequesting his library, devising to his sisters all rest and residue of his property, has been held not to indicate intention that the entire community debts be paid from his one-half community interest. 150Wash482, 273P735.

2065–77¼–New. Community debts, subject to which, surviving wife of testator and devisees and legatees of his half interest take property to which they are entitled, include debts secured by mortgages on community real estate, executed by both spouses. 150Wash482, 273P735.

2065–79 244IllA276; 131Or71, 278P586; 283Pa185, 129A74.

2066–80 232Ky525, 23SW(2d)956.

2066–80½–New. Direction in will to pay all debts without mentioning estate means payment out of individual estate in absence of contrary intention. 297Pa99, 146A453, 64ALR737.

2066–81 204Iowa606, 215NW615; 58ND501, 226NW485, 65ALR852.

2066–82 338Ill145, 170NE276.

2066–84 213Ky179, 280SW921.

2066–85 204Iowa606, 215NW615; 213Ky179, 280SW921. **Provision for payment of debts and funeral expenses before general legacy of all personalty** is not sufficient to charge personalty before realty not devised. 213Ky179, 280SW921.

2067–87½–New. Charge of debt on leg-

acy is extinguished where debt is satisfied during lifetime of testator. 148Miss 375, 114S615.

2067-88 283Pa185, 129A74 (debts declared not payable from income).

2067-90 142SC407, 141SE26.

2067-93 214Ala671, 672, 1088561 [cit Cyc].

2067-94 214Ala671, 672, 1088561 [cit Cyc].

2067-95 213Ky179, 280SW921.

2067-96 213Ky179, 280SW921.

2067-97½-New. Though personalty is charged with payment of debts, real estate not devised must be first exhausted. 213Ky179, 280SW921.

2067-98 32F(2d)392; 214Ala671, 672, 1088561 [citCyc]; CalA 288P122(2d case) (expenses of administration); 164 Ga885, 139SE661; 234 IllA183; 239 IllA 127, 133 [quotCyc]; 247 IllA175; 137 Misc501, 244NYS135; 47RI 64, 129A832. Administration expenses must be paid out of residuary estate. 126Misc220, 214 NYS145. Federal taxes on gift of stock are to be paid out of residue in absence of statutory provisions. 127Misc779, 217NYS638.

2068-1 47RI 64, 129A832 (share of pretermitted child declared chargeable against residuary personal estate).

2068-2 232 IllA78, 85[quotCyc]. But see 87Colo 144, 286P114(2dcase).

2068-3 200Cal 252, 252P1039; 202Cal 284, 260P296; 164Ga885, 139SE661; 232 IllA78, 85 [quotCyc].

2068-4 200Cal 252, 252P1039; 232 IllA 78, 85 [quotCyc].

2068-5 232 IllA78, 85 [quotCyc].

2068-6 232 IllA78, 85 [quotCyc].

2068-7 232 IllA78, 85 [quotCyc].

2068-8 232 IllA78, 85 [quotCyc].

2068-8½-New. Specific devises are used only after exhaustion of residuum. 234 IllA[illegible]

2068-9 319 Ill 320, 150NE284; 232 IllA 78.

2069-11 196NC398, 145SE776; 152Va 725, 148SE835.

2069-13 232 IllA78. Will construed as exempting personalty from primary liability for business debts.-196NC398, 145 SE776.

2070-17 232IllA78.

2070-21 329 Ill 93, 160NE172.

2071-22 232 IllA78 (dictum).

2071-24 319 Ill 320, 150NE284; 103 WVa556, 138SE118, 119 [citCyc]. Will not showing intent to, charge.-169Ark 173, 273SW705; 317Mo 1336, 298SW34.

2071-25 213Ky179, 280SW921.

2072-28½-New. Direction in will for payment of encumbrances on estate of decedent evinces intent that estate shall pass to devisee unencumbered, 199Cal 716, 251P202.

2072-28⅓-New. and this is so regardless of means by which succession of devisee to property was in law to be accomplished, 199Cal 716, 251P202.

2072-28¼-New. and even though succession is by termination of joint estate rather than by devise under will. 199Cal 716, 251P202.

2072-29 319 Ill 320, 150NE284.

2073-38 103WVa556, 138SE118; 106 WVa626, 146SE876.

2073-41 Additional gifts.-289Pa433, 137 A608. Where testator gives widow one half of income of trust fund "free from taxes etc.," her share is not liable to any tax. 214AppDiv1, 211NYS276.

2073-41½-New. Under will giving widow one half net income, free of any tax, it has been held that income tax on widow's share is payable out of remaining half of net income. 214AppDiv1, 211 NYS276.

2074-42 130Kan433, 286P195; 129 Misc297, 221NYS468.

2074-45½-New. Taxes, commissions, and expenses are not chargeable against religious corporation which is residuary legatee. 213AppDiv487, 211NYS179.

2074-45⅓-New. Under will directing payment of transfer taxes out of residue, executor is required to pay out of residue federal estate tax on transfer by irrevocable deed of gift inter vivos; 127Misc440, 217NYS349.

2074-45¼-New. and under such provision, also, executor is required to pay out of residue inheritance tax of another state assessed against specific beneficiaries. 127Misc440, 217NYS349.

2074-45⅕-New. Under statute providing that when secured claim is allowed against an estate same shall not be paid until security has been exhausted, life tenant and remaindermen were not required to pay indebtedness secured by deed of trust on land devised to them, according to their respective interests. 320Mo 580, 8SW(2d)614.

2074-45⅙-New. Tax imposed on property transferred by will, in absence of contrary intention expressed in will shall be deducted from amount so transferred. 87Colo 144, 286P114(2dcase).

2074-45½-New. Deficit, when designated property is insufficient in absence of residuary estate, must be ratably spread over several devises or legacies. 58ND 501, 226NW485, 65ALR852.

2075-51 103WVa556, 138SE118.

2075-53½-New. Effect of mortgage or deed of trust by devisee.-Under West Virginia statute, where devisee executes deed of trust on real estate devised to him, to secure loan, within limited time given the personal representative to institute suit to subject realty to payment of debts and no suit has been instituted by the personal representative within such time lien of trust deed is taken subject to rights of creditors, of which mortgagee is charged with notice. 106 WVa626, 146SE876.

2076-59 196NC398, 145SE776.

2077-67½-New. Specific devise exonerated from contribution to share of pretermitted child, as are devisees of residue of real estate when not included in general residuary devise. 47RI 64, 129 A832.

2077-73 267Mass301, 166NE833. Creditor whose claim is not included in order for payment on distribution of decedent's estate cannot force heirs or legatees to contribute. CalA 291P871.

2078-79 208Ky594, 271SW666 (statute requiring lapse of six months after presentation of claims against estate of decedents has no application to actions against heirs or devisees).

2079-87 106Conn602, 138A795.

2080-97 267Mass301, 166NE833.

2081-14 Judgment should be against defendant as sole devisee and legatee, rather than as individual. TexCivA 27 SW(2d)893.

2083-30 123Kan612, 256P1010; 5Pa Dist&Co 354.

2084-45 230Ky56, 18SW(2d)859(2d case); 51SD588, 215NW884.

2085-50 198NC331, 151SE622.

2085-53 214Ky400, 283SW410 (life estate); 218Ky691, 291SW1054; 198NC 331, 151SE622. Amount received and expended for ordinary living expenses by insolvent legatee has been held not recoverable by judgment creditor. 198 NC331, 151SE622.

2086-62 Creditors may have execution on share of estate left to purchase land where creditors are vendors of such land so purchased but not paid for. 123 Kan612, 256P1010.

2086-65 See also 169Minn273, 211NW 465.

2087-70 192NC484, 135SE353 (construing N. C. St. c 3 § 614).

2088-90 287Pa354, 135A130.

2089-96 See also 27 OhA197, 161NE218.

2089-97 135Misc611, 238NYS160.

2090-6 Courts' policy is to enforce valid wills and resist improvident beneficiaries' attempts to obtain estates outright. 137Misc77, 243NYS126.

2091-14 Life beneficiary of income of trust fund, to whom fund is bequeathed in trust as residuary legatee, is not entitled to immediate possession of fund upon settlement of executor's accounts, but it must be held and administered by trustee thereof in accordance with provisions of will. 103NJEq516, 143A 745.

2093-29 If life estate is invalid contingent remainders also fail and cannot be accelerated. 127Misc193, 216NYS 426.

2093-30 Del 149A304.

2093-32½-New. Interest on pecuniary legacy is incident to legacy itself, and obligation for interest rests on estate. 83NH422, 144A523.

2093-34 128Misc51, 217NYS319; 133 Misc826, 234NYS92; 44Philippine808 (legacy paid by order of court or within terms of stipulation does not bear interest); 289Pa407, 137A627.

2094-35 21F(2d)381, 383 [citCyc]; 83 NH422, 144A523; NH 148A21 (the rule is inapplicable in case of residuary legatee); NH 148A28(1stcase) (even if executor has no right to pay legacy by such time); 103NJEq516, 143A745; 128Misc51, 217NYS319; 127Misc579, 217NYS323 (recognizing rule); 135Misc 611, 238NYS160; 195NC822, 143SE835; 160Tenn57, 22SW(2d)6; 195Wis58, 217 NW740; 58 OntL301, [1926] 1DomLR 822. Contra 108Conn100, 142A851. Rule should not yield to doubtful indications in will of contrary intent. 195 Wis58, 217NW740.

2095-39½-New. Where income on property accruing before charitable trust is set up is turned over to trustees, trustees are not entitled to interest thereon on theory that general legacy resulted. 127Misc579, 217NYS323.

2095-40 But see 134Misc730, 236NYS 367.

2096-43 Pa 146A451; 58 OntL301, [1926] 1DomLR822 (dictum).

2097-53 But see 11PaDist&Co 252.

2099-72 21F(2d)381; DC 37F(2d)997; 150Md539, 133A308; 129Misc458, 221 NYS532; 134Misc730, 236NYS367; 58 OntL301, [1926] 1DomLR822 (dictum).

2100-73 129Misc458, 221NYS532. Where will provides for payment of legacies out of cash left in hands of executors, and, if such cash is insufficient, out of proceeds of sale of real estate which is not to be sold within ten years of testator's death unless sale is approved by testator's brother, legacies draw interest from one year after testator's death. 195Wis58, 217NW740.

2100-77 132Misc646, 229NYS639.

2100-83 195Wis58, 217NW740.

2101-85 106Conn19, 137A20 (shares of stock); MoA 28SW(2d)420; TexCivA 285SW911; 195Wis58, 217NW740. But see 83NH422, 144A523.

2101-86 But see 134Misc788, 236NYS 706.

2101-86½-New. On the other hand, income and dividends accruing prior to testator's death belong to testator and do not pass to specific legatee, 106Conn 19, 137A20.

2101-86⅓-New. unless will shows intention to contrary. 106Conn19, 137A 20 (contrary intention held not shown).

2102-97 21F(2d)381.

2102-98 Legacies and devises held payable without interest, though conversion of estate into cash was delayed beyond period stipulated in will. 263Mass534, 160NE275.

2103-99½-New. That will provides for sale of realty to pay cash legacies does not show intention to depart from usual interest rule. 133Misc826, 234NYS92.

2104-9 83NH422, 144A523.

2106-29 295Pa333, 145A300. Acquiescence of legatee in long delay in probating will and acceptance of collateral agreement for payment of legacy renders estate not liable for interest. 202 Iowa386, 210NW528.

2106-30 13PaDist&Co 737. Tender of principal of legacies requiring legatees to waive their claims is ineffective to stop running of interest. NH 148A28 (1stcase).

2106-31 Special provision in will construed to mean that interest payable out of residue on legacies during delay in payment thereof should be at rate specified regardless of interest earned by residue. Mo 274SW825.

2106-32 135Misc611, 238NYS160. But compare 225AppDiv118, 232NYS127.

2107-33 Mo 274SW825; Mo 274SW826.

2107-35 But see 135Misc611, 238NYS 160.

2107-36½-New. General legatees taking whole estate are entitled to interest at rate actually earned from appointor's death to date of payment. 137Misc222, 243NYS380.

2107-37 244Mich148, 221NW165; 323 Mo 716, 19SW(2d)662 (evidence insufficient to establish agreement); TexCivA

276SW327; 146Va504, 131SE692; 151 Wash201, 275P571. **Estoppel by contract.**–219MoA51, 266SW750. **Signature by attorney.**–TexCivA 276SW327.

2107–38 38F(2d)566; 325 Ill 165, 156 NE334; 218Ky707, 292SW311 (forbearance to contest will is sufficient consideration for family settlement); 225Ky 699, 9SW(2d)1020; TexCivA 276SW327. **Trustee under will is not concerned with settlement** by beneficiaries. 325 Ill 165, 156NE334.

2107–41 104Conn97, 132A411; 151 Wash201, 275P571.

2107–42 109Conn268, 146A727 (agreement of heirs and beneficiaries of trust as to distribution of income is binding on remaindermen); 338 Ill 185, 170NE 269 (duty to explain to widow her rights before executing trust agreement); Tex CivA 276SW327. **Beneficiaries not affected by terms of agreement between other beneficiaries** are not necessary parties to agreement. TexCivA 276SW327. **Where only part of devisees participate** in agreement purporting to divide entire estate, such distribution is not valid as a whole. 104Conn97, 132A411.

2108–44 325 Ill 165, 156NE334; 338 Ill 185, 170NE269; 218Ky707, 292SW311; 295Pa515, 145A533. **Facts held not to show fraud.**–151Wash201, 275P571. **Burden of proof** rests on children to clearly show that in signing contract widow made an election with full knowledge of facts in widow's action to set aside trust deed. 338 Ill 185, 170NE269. **Evidence held sufficient.**–338 Ill 185, 170 NE269.

2108–45 141Wash86, 250P947 (legatees estopped to deny fraud). See also 51 Nev437, 279P32 (parties entitled to rescission of agreement made on mistaken belief as to disposition of certain property by testator).

2108–46 204 Iowa927, 216NW55; 295 Pa248, 145A70. **Beneficiaries may renounce will** by agreement and permit entire estate to pass by descent. 204 Iowa927, 216NW55.

2108–49 104Conn97, 132A411 (distribution will be valid though informal); 167Ga723, 146SE548; NJCh 146A364 (2dcase); 217AppDiv255, 216NYS689; 151Wash201, 275P571. **Agreement to allocate** certain stock, amounting to half of estate, to one party and realty to another, valuation as of testatrix's death, held to require valuation of property to be delivered only as of testatrix's death, and balance as of distribution. 217AppDiv255, 216NYS689. **Particular agreements construed.**–109 Conn268, 146A727; 110Conn150, 147A 562.

2108–49½–New. Evidence held sufficient to show that widow understood nature and legal effect of agreement. TexCivA 276SW327.

2108–49¼–New. Agreement, notwithstanding will, to divide property of decedent equally will not estop parties from claiming notes owned by decedent and his wife by entireties and which were no part of estate. 219MoA 51, 266SW750.

2108–49¼–New. Where will charges entire estate with burden of expense of supporting and maintaining widow, agreement by widow to take less than is necessary for such purpose is without consideration and not binding. 147 Miss515, 112S603.

2108–49⅓–New. Compromise agreement providing for distribution of estate between beneficiary and family of testatrix allocating stock not exceeding one half of net estate to one party and real estate of beneficiary on same terms, contemplates equal division of estate. 244NY51, 154NE819.

2108–49⅙–New. Under such agreement testator's property should be valued as of date of death rather than date of distribution. 244NY51, 154NE819.

2108–49⅐–New. Title of one given pipe organ, as part of her share on distribution of estate among devisees by agreement, was not defeated by any interest of distributee's daughter, where on daughter's death distributee succeeded to her interest as her sole heir. 321 Mo 212, 9SW(2d)957.

2108–49⅛–New. Uncorroborated testimony of complainant and husband not sufficient to establish agreement for division contrary to express provisions of will. NJCh 146A364(2dcase).

2108–49⅙–New. Agreement by beneficiary who had received gift during testator's lifetime to convey gift to estate and share in general division held without consideration. Iowa 230 NW532.

2108–49 1/10–New. The concerted action of all of several beneficiaries to absolve their estates from conditions and restrictions imposed by testatrix is no more effective than the sole action of sole beneficiary. 121 Oh401, 169NE450.

2108–49 1/11–New. Such agreement held abandoned where beneficiaries distributed estate without reserving portion for promisor. Iowa 230NW532.

2108–51 110Conn150, 147A562; 135 Misc134, 237NYS106; 144Va727, 130SE 794 (facts not authorizing cancellation of deed from legatees and heirs to executrix). **Conveyance of realty binding** where made with full knowledge and for fair and adequate considerations. 202 Iowa7, 209NW447. **Mortgage executed by devisees, entitled to possession at time of execution,** is valid and enforceable. 83Mont68, 271P695.

2108–52 94CalA453, 271P542; 46 Ida 379, 268P3; 135Misc774, 238NYS533. **Evidence held sufficient.**–205 Iowa1379, 219NW492.

2108–53 11F(2d)948, 48ALR207.

2109–57 But see 135Misc774, 238NYS 533.

2109–58 Facts held not to show that assignment was received in good faith. –142Wash620, 254P254. **Burden of proving good faith** does not rest on father of legatee interpleaded in action by daughter's administrator to recover proceeds of bequest in trust which father claimed by assignment from daughter. 205 Iowa1379, 219NW492. **Confidential relation between legatee and parents** under will, providing that trust funds should be paid to child when she became of age provided parents certified to her competency to care for same, terminates when consent of parents to payment is given. 205 Iowa1379, 219NW492.

2109–61 114Nebr126, 206NW749 (subject to equities which existed against legacy in hands of assignor). **In New York.**–134Misc163, 235NYS696. **Conflicting assignees.**–134Misc168, 235NYS 696.

2109–61½–New. Conveyance of legacy. –Heir of legatee cannot complain of executor's purchase of legacy from legatee after she has been put in possession by judgment and order of court, in absence of fraud. 158La969, 105S 31.

2109–61⅓–New. As between legatees assigning interests to secure debt of one latter's interest should be exhausted before recourse to others. 290Pa420, 139A131.

2109–61¼–New. Persons equally liable on assignments of interests should contribute equally to discharge liability. 290Pa420, 139A131.

2109–61⅕–New. Assignee's assignment of his rights in legacy to another transfers so much of legacy only as remained after deducting his indebtedness to estate, where executors had right to retain such amount. 30F(2d)178.

2109–61⅙–New. Interest on amounts payable by certain legatees to another and guaranteed by legatee, acting for himself and authoritatively for one other legatee but unauthorizedly for third legatee, is payable out of legacies of legatees authorizing guaranty as to amount authorized and as to amount unauthorizedly guaranteed interest is payable from guarantor's legacy. 133 Misc826, 234NYS92.

2109–61⅐–New. Agreed payment by legatee to another out of legacy bears interest from time legacy becomes payable. 133Misc826, 234NYS92.

2109–61⅛–New. Equitable assignment of funds results from agreement for payment of part of legacies of legatee to another duly performed by executors, and funds bear interest from year after issuance of letters. 133Misc826, 234 NYS92.

2109–62 Under the New York statutes, etc. 135Misc774, 238NYS533.

2109–64 192NC285, 134SE849; NC 155 SE449. **An estate in remainder,** etc. 192NC285, 134SE849 (when contingent remainderman is specified and known). **Deed of residuary legatee,** executed after testator's death, and widow's acceptance of joint will held effective to convey interest as to remainderman in property in which testator's widow was given life estate. TexCivA 297SW603. **Where land is not specifically devised,** rents or proceeds of sale by executor are assignable only as cash remaining after payment of expenses. 85CalA21, 258P986. **Burden of proving** that conveyance by devisee was not in conformity to power possessed by him is on one attacking conveyance. TexCivA 19SW(2d)805. **Contingent remainder is alienable,** subject to rights of after-born children. 179Ark1004, 18SW(2d)1037.

2109–65 Conveyance in violation of restriction against alienation until youngest child should attain majority is voidable and not void; and cause of action for violation of such restriction, if any, arises only in favor of other heirs. 215 Ky88, 284SW419.

2109–66 213Ky482, 281SW480; 151Va 1018, 145SE827. See also 156Miss885, 127S581. **The rights of remaindermen,** etc. But see 319Mo 680, 5SW(2d)77.

2110–67½–New. Devisee in possession can give good title to property subject only to lien of testator's creditors. 103 Conn352, 130A472.

2110–67⅓–New. Widow can encumber her individual interest, consisting of life estate, under deceased husband's will, but cannot pledge or dispose of any interest other than that vested in her. 229Ky90, 16SW(2d)800.

2110–67¼–New. Creditors of estate held not entitled to restrain sale of interest of sole devisee who, as administratrix mortgaged land. NC 155SE449.

2110–68 TexCivA 292SW958.

2110–69 Devisee selling lots to innocent purchaser must account for proceeds after annulment of will. Tex CivA 292SW958.

2110–71½–New. Petition by devisees to cancel deed by testator held sufficient. 168Ga742, 149SE30(2dcase).

2110–71⅓–New. Actions against legatee.–Legatee may be entitled to credit for amount paid plaintiff by executor and collected from estate. 170La163, 127S587.

2110–72 331 Ill 261, 162NE843; Tex CivA 276SW964, 966 [citCyc]. See also 12PaDist&Co 93. **Other definitions.**–331 Ill 261, 162NE843, 845.

2110–73 166Ga738, 144SE319; 126Kan 619; 215Ky394, 285SW188; 134 Okl 219, 273P246. See also 12PaDist&Co 93.

2111–76 331 Ill 261, 162NE843; 215Ky 394, 285SW188. See also 12PaDist&Co 93. **Joint and mutual will defined.**– 134 Okl 219, 273P246.

2111–77 215Ky394, 285SW188.

2112–80 Iowa 227NW614; 53SD98, 220 NW462, 60ALR619; TexCivA 16SW (2d)366; 134Wash560, 236P285; 154 Wash675, 282P920. **Mutual wills of spouses in one instrument held not contract** where survivor executed new will. 53SD98, 220NW462, 60ALR619. **Wills held individual wills.**–Iowa 227NW614.

2112–81 Other instruments held not joint wills.–53SD382, 220NW868, 60 ALR625.

2113–85 156Tenn155, 299SW812, 813 [citCyc], 57ALR601.

2113–86 Where will is ineffective as to one testator.–134 Okl 219, 273P246.

2113–87 331 Ill 261, 162NE843; 215Ky 394, 285SW188.

2113–88 TexCivA 276SW964, 966 [cit Cyc].

2113–89 TexCivA 276SW964, 966 [cit Cyc].

2114–91 See also 9PaDist&Co 732.

2114–93½–New. Two persons may execute valid joint and mutual will.–107W Va57, 146SE896.

2114–94 156Tenn155, 299SW812, 57 ALR601.

2115–95 156Tenn155, 299SW812, 813 [quotCyc], 57ALR601.

2116–99 204Cal 604, 269P450(2dcase) (retaining income from estate in ac-

cordance with mutual will of husband does not preclude wife from revoking); 166Ga738, 144SE319; 9PaDist&Co 732. But see 126Kan619. Contra 215Ky394, 285SW188. **Effect of statute.**–204Cal 604, 269P450(2dcase). **In order to attribute to mutual will quality of irrevocability,** there must be indisputable evidence of agreement which is relied on to change its ambulatory nature, and presumptions will not and should not take place of proof. 204Cal 604, 269 P450(2dcase).

2116–99½–New. Where the wills were to be irrevocable without notice, a party to the contract who surrendered right to compensation for legal services on strength of the agreement is entitled to notice of revocation of will by other party. 249NY58, 159NE723.

2117–6 215Ky394, 285SW188; 250Mich 302, 230NW156; 249NY58, 159NE723; 220AppDiv253, 221NYS279; 199Wis162, 225NW831, 64ALR180. **When survivor has accepted benefits under will,** agreement may be enforced in equity against his estate by remainderman under will, despite revocation at law of will as to survivor by his subsequent marriage. 107WVa57, 146SE896.

2117–8 250Mich302, 230NW156; Tex CivA 16SW(2d)366.

2118–9 166Ga738, 144SE319; 157Tenn 140, 7SW(2d)53. **The parties must have a contractual intention,** etc. 317 Ill 441, 148NE308. **The mere fact that parties make similar wills,** etc. 166Ga 738, 144SE319; 32 OhA350, 166NE914; TexCivA 16SW(2d)366. **Burden** of proving that wills of testator and his deceased wife naming each other as beneficiary were made pursuant to agreement rests on party asserting it. Tex CivA 16SW(2d)366.

2118–10 Attempted joint disposition of property is stronger evidence of contract than alternative provisions inoperative by its terms if other survives. 53SD98, 220NW462, 60ALR619. **If wills do not disclose contract terms** other proof must be made. 53SD98, 220 NW462, 60ALR619.

2118–14 215Ky394, 285SW188, 189 [cit Cyc].

2119–17 126Kan619, 623 [quotCyc].

2119–18 215Ky394, 285SW188; 32 OhA350, 166NE914.

WINDING UP

2120–2 To "wind up" affairs of business usually synonymous with to "liquidate" business. 94Fla1023, 114S760.

WINE

2121–10 See also 11CustA60.

WISH

2122–24 101NJEq252, 137A582, 52ALR 965. **Construed as creating a trust,** etc. 101NJEq252, 137A582, 52ALR965. **Construed as of precatory nature.**–105 Conn261, 135A555. **As identical with "desire."**–101NJEq252, 137A582, 52ALR 965.

2123–25 See also 9PaDist&Co 809.

WITHIN

2127–80 130Kan714, 288P764.

2127–85 56ND531, 218NW223. **"Within ten days" after injury.**–257Mass414, 153NE884.

WITHOUT PREJUDICE

2131–12 54ND657, 210NW180, 182 [cit Cyc].

2131–13 54ND657, 210NW180, 182 [cit Cyc].

2131–14 54ND657, 210NW180, 182 [cit Cyc].

WITNESSES

2155–4 Word "witness" is derived from Anglo-Saxon word "witan" which means to know. 161Ga690, 131SE885.

2155–5 Choice of process is in discretion of courts. 25F(2d)733. **State court has jurisdiction** to order sheriff to produce as witness one imprisoned under federal court commitment. 37F(2d) 619.

2156–12½–New. Federal court has no power to order sheriff to produce as witness in state court one whom federal court has ordered sheriff to commit as defendant. 37F(2d)619.

2156–14 78CalA561, 248P990 (statute mandatory); 124Misc766, 210NYS68 (Commissioner of accounts of New York has this power in relation to examination of departmental accounts); 127 Misc683, 217NYS565; 130Misc456, 224 NYS210. **Witness cannot be required to answer questions** unless shown to be material and pertinent. 130Misc456, 224NYS210. **Any doubt as to power of commission** to subpœna and examine witnesses must be resolved in favor of commission. 130Misc456, 224NYS210. **Refusal to answer** questions which are unauthorized and immaterial during transit commission's investigation is not punishable. 130Misc491, 224NYS249. **Attorney-general's power to subpœna witnesses** in investigating fraudulent securities under General Business Law is limited to attendance preliminary to court action. Thereafter Civil Practice Act governs subpœnas. 129Misc698, 223NYS351.

2156–15½–New. Right of permanent receiver to subpœna witness. 138Misc 282, 245NYS486.

2156–17 23AlaA297, 124S402 (right defined); 94Fla469, 114S450; 161La 771, 109S485; 144Wash236, 257P385; TexCr 30SW(2d)330. **Statutes held constitutional.**–196Cal 344, 238P88 (statute making speed trap testimony inadmissible in prosecutions for violation of Motor Vehicle Act). **Right may be waived.**–49ND348, 191NW628. **Right limited to cases where punishment may be death or imprisonment at hard labor.**–161La771, 109S485. **Seasonable application must be made,** etc. 83Colo 4, 262 P892. **Provision is mandatory.**–83Colo 4, 262P892. **Statute** defining competency of witnesses in criminal cases, under which codefendant cannot testify on behalf of defendant in joint trial, is not invalid as violating compulsory process article in constitution. 168La204, 121S 744.

2157–18 216Ky358, 287SW924, 925 [cit Cyc].

2158–30½–New. Under his constitutional guaranty defendant is entitled, even after time allowed by statute for furnishing such list and until end of trial, upon learning that certain witnesses are important to his defense, to furnish list of such witnesses and procure compulsory process for their attendance. 144Wash236, 257P385.

2158–30⅓–New. Right of accused to compulsory process is not violated by statute requiring accused to furnish prosecution list of witnesses reasonable time after receiving list of state's witnesses. 144Wash236, 257P385 (five days held reasonable time).

2158–31 32PortoRico 788.

2158–32 32PortoRico 788.

2158–37½–New. Number of expert witnesses is limited by statute in some jurisdictions. Ont [1925] 3DomLR45.

2158–38 Discretion of court.–5F(2d) 231; 83Colo 4, 262P892. **Distance from which witness summoned.**–83Colo 4, 262 P892. **Expert witnesses.**–83Colo 4, 262 P892.

2159–39 Utah 277P972. **Advancement of fees.**–216Ky358, 287SW924.

2159–40½–New. Every competent citizen is under obligation to further justice when summoned as witness by legal process. 253Mass374, 149NE115, 41 ALR1319.

2159–43½–New. Citizens are subject to duty to appear and testify and produce books and papers in court of law when duly subpœnaed in case pending therein. NJCh 147A220.

2159–43⅓–New. Every competent citizen is under obligation to attend when summoned to give evidence. 108WVa 184, 150SE539.

2163–80 Subpœna is not independent process and issues only in connection with action or special proceeding. 127 Misc455, 215NYS773.

2163–81 78CalA561, 248P990.

2163–82 78CalA561, 248P990; 75Mont 317, 243P1063.

2163–88 131Misc220, 226NYS585.

2163–90 In Georgia.–163Ga1, 135SE75.

2163–92 89 IndA254, 166NE28.

2164–5 127Misc455, 215NYS773. **Only court authorized to issue subpœna** is court before which action is pending. 127Misc455, 215NYS773.

2165–11 In Arizona.–32Ariz307, 257P 986, 56ALR169.

2165–15 34Wyo 288, 243P123.

2165–17 8F(2d)791.

2166–36 251Mich701, 232NW373. **Where both witness and certain documents in his possession are in court,** etc. 30 OhA512, 165NE751.

2166–37 163La824, 112S799; 46RI 394, 129A1 (must be handed to court or read aloud at court's request).

2166–37½–New. Wherever testimonial compulsion is predicated by statute, process for document will be implied. 32F(2d)844.

2166–38 Transportation of books and papers from one parish to another cannot be compelled. 162La251, 110S340. **Subpœna refused** where matter sought to be disclosed is purely speculative. 26F(2d)388. **Where facts can be otherwise established,** writ should not be issued. 26F(2d)388.

2167–39 276US134, 48SCt288, 72L ed 500.

2167–41½–New. Statutes not strictly or literally interpreted. 159La169, 105 S278.

2167–41⅓–New. In Pennsylvania, common pleas has no jurisdiction, where action pending in another state, to issue such subpœna in aid of pleadings or proof. 6PaDist&Co 301.

2167–43½–New. Subpœna duces tecum may be issued in aid of probate proceeding in another state. 14PaDist&Co 239.

2167–44 Subpœna for production of corporate records should be directed to officer or employee who is custodian of records, or, if directed to corporation, should designate officer or agent who shall respond thereto. 163La824, 112S 799.

2167–46 276US134, 48SCt288, 72L ed 500 (Sherman Act).

2167–48½–New. Corporation cannot be compelled to respond to subpœna duces tecum where order does not designate some officer or agent through whom it may act. 169La606, 125S730.

2167–49 156Miss182, 125S529(4thcase) (stenographic evidence in separate criminal prosecution involving subject matter).

2168–59 163La824, 112S799, 801 [quot Cyc].

2168–60½–New. Reports and letters of state corporation commission regarding bank can be obtained by subpœna duces tecum in bank's action on cashier's fidelity bond notwithstanding statute. Va 154SE492.

2169–66 26F(2d)388; 156Miss182, 125S 529(4thcase).

2169–70½–New. Applicant must show that other sources of information, revealed by application, have been exhausted. 159La169, 105S278; 163La 824, 112S799.

2169–70⅓–New. Necessity for subpœna duces tecum must be shown. 163La824, 112S799 (necessity not shown).

2169–70¼–New. Reasonable compliance with statutory requirements is necessary. 163La824, 112S799.

2169–70⅓–New. Request for subpœna duces tecum must be procured in time as not to delay trial. 13LaA1, 126S741.

2169–74½–New. Where applicant has means of obtaining information sought by production of papers, he may not shift expense of producing them. 159 La169, 105S278.

2169–76 Evidence sufficient to show noncompliance with writ.–87Colo 97, 285 P942.

2170–79 276US134, 48SCt288, 72L ed 500.

2170–80 38GaA328, 144SE29.

2170–88½–New. Upon refusal to comply with demands of subpœna duces tecum, facts stated and sworn to are considered as having been confessed. 159La169, 105S278.

2170–88⅓–New. To compel production of more than five thousand agreements

or copies thereof is too great burden. 159La169, 105S278 (unjust and unfair).
2170-89 In Louisiana.–159La169, 105S 278.
2171-95½-New. Party cannot be required to produce evidence for adverse party at great expense unless expense is first tendered. 91Fed47.
2171-96 167La1016, 120S631.
2172-98 Court is not bound to order attachment ex mero motu on failure of witness to appear in answer to summons. 220Ala501, 126S127(2dcase).
2172-99 279US597, 49SCt452, 73Led 867.
2172-2 Request for attachment made in open court is improperly denied. 110TexCr142, 7SW(2d)1076.
2173-5 Application need not be in writing.–110TexCr142, 7SW(2d)1076.
2173-9 In Alabama.–216Ala321, 113S 495. **State court desiring production of federal prisoner not in custody of sheriff of county** where court sits must employ habeas corpus. 37F(2d)619.
2173-10 By statutes, all courts of record in Montana and federal courts have power to issue writs of habeas corpus to produce witnesses. 37F(2d)619.
2173-11 265Mass101, 163NE870.
2174-19 152Wash365, 278P149. **Right of court to order reduction of bond.** 169La187, 124S823. **Witness' failure to give notice of intention to apply for certiorari and reduction of bond** is not ground for dismissal of rule to show cause why witness should not be released on bond. 169La187, 124S823.
2175-31 152Wash365, 278P149.
2177-52 131Misc220, 226NYS585. **Whether person has refused to answer subpœna without reasonable cause** held for court. 243NY423, 154NE298.
2178-59 154Wash144, 281P335.
2178-60 110Conn482, 148A551 (authority of justices of peace). **If question is not pertinent to issues** of case, refusal of witness to answer it is not contempt. 22 OhA141, 153NE297. **Questions held immaterial and irrelevant,** for refusing to answer which plaintiff could not be punished for contempt. 22 OhA141, 153 NE297 (as to disposition of money withdrawn from bank). **Incarceration for contempt** for refusal to answer questions before grand jury and district judge, as tending to incriminate, held unauthorized. 107TexCr421, 295SW1097. **Acceptance of disclosure** is within trial court's discretion, and, in absence of abuse thereof, is not reviewable. 100Vt 325, 137A319.
2178-61 30F(2d)865. **Bank cashier** is immune from punishment for contempt for refusal to produce bank records for purpose of taxation. 116 Oh623, 157NE 327.
2178-61½-New. Court determines whether witness who refuses to appear or answer a subpœna in a proceeding before attorney general has privilege to do so. 243NY423, 154NE298.
2178-61⅓-New. In California, for disobedience of subpœna person therein named may be punished according to expressed will of legislature. 78CalA561, 248P990.
2178-61¼-New. In California, under the Corporate Securities Act commissioner is given authority to issue subpœnas requiring witnesses to appear before him and testify and furnish documentary evidence. 78CalA561, 248P990.
2178-61⅓-New. Violation of subpœna is made public offense punishable by imprisonment or fine or both. 78CalA561, 248P990.
2178-61⅙-New. Order committing witness to jail for failure to testify may be conditioned for its termination on performance of act required. 110Conn482, 148A551.
2178-61⅐-New. Witness summoned to testify is entitled to reasonable information as to purpose of inquiry. 110Conn 482, 148A551.
2181-88 Iowa 231NW380.
2182-92 75Mont317, 243P1063, 1066 [citCyc].
2182-93 89PaSuper367.
2182-98 44 Ida363, 257P38.
2182-99 But see **Iowa** 231NW380.
2183-1 In election contest voters challenged are "interested parties" and not entitled to fees. TexCivA 28SW(2d)610.
2183-5 129 Or558, 278P581; 12PaDist &Co 34.
2184-7 See also 12PaDist&Co 34.
2184-14 114Nebr423, 207NW674, 45 ALR1418.
2185-15. For determination of court in each case based on necessity of attendance and circumstances under which witness was called and remains in attendance upon court. 75Mont317, 243P 1063.
2186-30 57ND105, 220NW903.
2186-32 170Minn378, 212NW590 (allowance to civil engineer in discretion of court).
2187-35 133 Okl 3, 270P321; 118 Or 568, 247P815 (impromptu answers sufficient); 108WVa184, 150SE539. Contra 89PaSuper367.
2187-37 89PaSuper367; 154Wash144, 281P335.
2187-38 118 Or568, 247P815; 154Wash 144, 281P335; 108WVa184, 150SE539.
2188-39 4HawaiiFed648; 44 Ida363, 257P38.
2188-47 75Mont317, 243P1063.
2188-47½-New. Under California Penal Code witness from another state attending criminal trial without subpœna, and not pursuant to undertaking, may not be allowed payment of reasonable expenses on certificate of judge. 75CalA 152, 242P115.
2188-47⅓-New. California Political Code provides for reimbursement of witness from another state voluntarily attending criminal trial, provided method prescribed by law for payment is pursued. 75CalA152, 242P115.
2189-48 44 Ida363, 257P38.
2189-50 7F(2d)579 (mileage traveled within district by witnesses voluntarily coming from out of state held properly taxed).
2189-52 97CalA166, 275P478.
2189-55 Actual mileage and not legal distance as fixed by statute controls in determining mileage fees of witnesses subpœnaed to attend outside of county of residence. 75CalA345, 242P885.
2190-60 196NC450, 146SE74. **Duty to compel attendance of witness to examine is on contestant of will** and he is under duty to pay fees and expenses. 128Misc 122, 217NYS847.
2191-78 Iowa 220NW338.
2192-87 86 IndA326, 157NE448 (competency is the rule, incompetency the exception). **Feeble minded girls in teens** may be competent. 250Mich679, 231NW 63.
2192-88 219Ky163, 292SW486; 111TexCr124, 12SW(2d)206, 63ALR978. See also 86 IndA326, 157NE448. **The Legislature has plenary power,** etc. 146Wash 478, 263P957. **Charge of reckless driving** depending on speed of automobile falls within law relating to competency of arresting officers. CalA 288P44.
2193-90½-New. There is difference between competency of one to be witness and right to use witness to prove certain facts in his knowledge. 117 Or621, 245P321.
2193-90⅓-New. Disbelief in our form of government or that our courts do not properly administer justice is not disqualification. 167Minn216, 208NW761.
2193-94 33F(2d)326; 213Ala494, 106S 150; 203Cal 211, 263P806; CalA 288P 57; IndA 152NE288; 231Ky550, 21SW (2d)983; 232Ky602, 24SW(2d)301 (part owner of land on matters touching land owned); 149Md522, 131A834; NJ 151 A624; 133 Or95, 285P1105; 68Utah41, 249P125. **Witness held not incompetent to testify** as to policy because not speaking from his own knowledge. 254Mass 520, 150NE854. **Employee of insurance carrier** is competent to testify to existence of policy. TexCivA 78W(2d)1112.
2194-95 214Ala530, 108S373.
2194-96 24F(2d)738; 31F(2d)53; 44 F(2d)134; 214Ala187, 106S807; 21AlaA 423, 109S125; 22AlaA231, 115S80; 23 AlaA27, 122S804(2dcase) [certiorari den 219Ala504, 122S805]; 333 Ill 218, 164NE 182; 215Ky273, 284SW1082; 319Mo 1040, 6SW(2d)591; TexCivA 272SW340; TexCivA 283SW208. See 214Ala187, 106 S809. But see 288Pa221, 135A624. **Clerk, not pharmacist or chemist,** being ignorant of contents of bottle sold, is incompetent to testify. 326 Ill 104, 157 NE76. **Evidence properly excluded** in absence of showing qualification. Wash 288P258.
2195-97 18F(2d)930. But see 237Mich 182, 211NW749.
2195-98 MoA 256SW105.
2195-99 219Ala504, 122S805; SD 228 NW409; 134Wash48, 234P1021 (office offering opportunity for commission of crime). **Witness may describe automobile skid marks** though he did not see collision. IndA 152NE288.
2196-8 105TexCr669, 290SW534.
2196-9 But see 158Md393, 148A585.
2196-11 30F(2d)22; 215Ala143, 110S 372; 130Kan356, 286P233; 152Miss476, 119S581.
2196-11½-New. Fact that witness testified he was in employ of company in certain year does not preclude him from testifying as to transactions with such company since then where he has personal knowledge of facts involved. 149 Md522, 131A834.
2196-11⅓-New. One cannot testify that X-ray pictures were properly made and that doctor taking them was qualified and equipped to do so, in absence of evidence showing how he could know such facts. TexCivA 283SW208.
2196-12 220Ala577, 126S872 (absolute knowledge is not test of qualification); 85CalA306, 259P361; 101TexCr220, 276 SW228; 113TexCr324, 21SW(2d)518(2d case). **Extent of knowledge of prosecutrix as to nature of act of rape** affects weight of her testimony and not admissibility. 85CalA306, 259P361.
2196-13 71CalA181, 235P72; 160La 661, 107S481 (holding admission of such evidence proper, as defendant might correct or complete version given by witness); 165La718, 115S914.
2197-21 168La161, 121S609; TexCivA 20SW(2d)248.
2197-22 318Mo 318, 300SW283.
2198-30 70CalA17, 232P991; 202 Iowa 1321, 210NW782; 204 Iowa137, 214NW 531; 166Minn371, 208NW129, 130 [cit Cyc]; NJ 135A90, 91 [citCyc]; 243NY 134, 152NE700; 195NC47, 141SE468; 106TexCr90, 291SW238; 111TexCr342, 13SW(2d)380. **Time of knowledge.**–166 Minn371, 208NW129. **Qualification of witness question for court.**–166Minn371, 208NW129. **Testimony as to basis for or nature of reputation** affects only probative value of testimony as to moral character. 213Ky221, 280SW970. **Ex-soldier's reputation may be proved** by instructors and attendants at vocational school, members of post for disabled men, and men who served with him in war. 243NY134, 152NE700. **That witness does not know residence of person whose character is subject of inquiry** does not render him incompetent. 85 CalA406, 259P481. **Place to which knowledge relates.**–224Ky126, 5SW(2d) 889. **One in position to hear comment** if there was any may testify as to reputation of another in the neighborhood. NJ 148A725. **That witnesses had not discussed defendant's reputation and had known her only three months** did not disqualify them as character witnesses. 113TexCr457, 21SW(2d)1047.
2198-31 325 Ill 334, 156NE342.
2198-32 NJ 135A90, 91 [citCyc]; 243 NY134, 152NE700. **Witness who never heard defendant's reputation for peace** and quiet discussed in community may state that such reputation is good. 84 CalA58, 257P592.
2199-33 204 Iowa137, 214NW531; 243 NY134, 152NE700.
2199-34 16F(2d)117; 42F(2d)793; 22 AlaA99, 112S813; 79CalA328, 249P231; 163La563, 112S486; 167La967, 120S 614; 168La1115, 123S800; 193NC236, 136SE730; TexCr 23SW(2d)390. **Where witness testified that he did not know where accused lived,** he was held incompetent to testify to accused's reputation. 103NJL18, 134A886.
2199-35 79CalA328, 249P231; 254Mass 441, 150NE184.
2199-35½-New. Reputation of place. Witness, who knows general reputation of place for particular kind of business, is qualified to testify as to such repu-

tation at time and place. **OklCr** 277P 685.

2199-35½-New. Testimony of lay witness, who lived in neighborhood all his life, as to what people called boundary line, is competent. 218Ala527, 119S215.

2199-36 Where witness testified he did not know condition of property before fire his testimony as to damages is properly excluded. 233Ky230, 25SW(2d) 370.

2199-37 OklCr 270P90.

2199-41 220Ala127, 124S294.

2199-45 200 Iowa495, 203NW794 [cit Cyc] (witness as to value of land held incompetent); 104WVa589, 140SE685; 194Wis520, 217NW298.

2200-55 71CalA138, 234P917 (child incompetent).

2200-56 217Ala233, 115S249; 99CalA 290, 278P242; 214Ky88, 282SW781.

2200-57 214Ky88, 282SW781; Miss 130S729; TexCivA 22SW(2d)528 (admission not error); 106TexCr310, 292 SW240 (child eight years old held competent). Girl of twelve, mentally backward, held competent to testify against stepfather in prosecution for carnally knowing her. 142Wash7, 252P108. Child unable to understand nature of oath is incompetent as witness. 164Ga 292, 138SE238.

2200-58 68CalA588, 229P983 (boy of eleven years); 73CalA402, 238P794; 102CalA787, 283P830; 81Colo 113, 253P 827; 89Fla212, 103S636; 121Kan22, 245P1037, 1038 [citCyc]; 122Kan186, 250P1059; 214Ky88, 282SW781; Miss 130S729; 33 OklCr25, 242P274; 100TexCr541, 271SW915 (seven years). Facts showing lack of sufficient intelligence, etc. 162Ga204, 132SE892. Weight to be attached to testimony of youths. 45 Philippine9. Child not understanding obligation of oath is incompetent. 103 TexCr163, 280SW829. Rule applies though child possesses sufficient intelligence to relate transaction. 103TexCr 163, 280SW829.

2201-59 22AlaA99, 112S813; 83CalA 508, 257P114; 91CalA684, 267P390; 103CalA249, 284P485; 81Colo 113, 253 P827; 164Ga292, 138SE238 (competency of nine-year old boy); 121Kan22, 245P1037, 1038 [citCyc]; 214Ky88, 282 SW781; Mo 295SW788 [citCyc]; NJ 141A575; 33 OklCr25, 242P274; 34 PortoRico 538; 100TexCr541, 271SW 915; 103TexCr163, 280SW829; 103Tex Cr562, 281SW1078 (child seven years of age); 113TexCr439, 22SW(2d)674; 150 Wash66, 272P89. Facts held not to show abuse of discretion.–164Ga292, 138 SE238. Competency is to be determined by examination before court.–103TexCr 163, 280SW829.

2201-60 18F(2d)448; 36F(2d)565; 177 Ark392, 7SW(2d)15; 328 Ill 338, 159 NE775; 159La589, 105S631 (former insanity not disqualification); 132Misc 786, 230NYS621; 5PaDist&Co 410; Tex CivA 285SW639. In prosecution for rape, etc. 161Ga421, 131SE163. The discharge of a person from an insane asylum, etc. 159La589, 105S631. No inference that witness understands sanctity of oath from fact that witness answers questions correctly and intelligently. TexCivA 285SW639. No presumption that insane person appreciates sanctity of oath. TexCivA 285SW639. That person who was present at time of deposition thought insane person understood sanctity of oath does not show that insane person did so understand it. TexCivA 285SW639. Information alleging incapacity to consent does not render erroneous admission of prosecutrix' testimony. 86Colo 406, 282P257.

2201-61 104Conn585, 134A73; 328 Ill 365, 159NE774; 168Minn319, 210NW75. An inquisition of lunacy found against one, etc. But see 88CalA272, 263P339.

2202-62 18F(2d)448; 88CalA272, 263P 339; 168Minn319, 210NW75. Time of disability.–NJCh 152A246.

2202-62½-New. Question of competency is for determination of court before which witness appears. 18F(2d)448.

2202-62⅓-New. Where indictment for rape alleges prosecutrix mentally diseased so as to have no will to oppose act, she is not competent witness. 109 TexCr266, 4SW(2d)37.

2202-62¼-New. Witness is not incompetent to testify on grounds of his insanity merely because he has been adjudged insane and has been confined in insane asylum. 113TexCr235, 20 SW(2d)202.

2202-71 Blind witness held competent to testify in prosecution for assault and battery. 32PortoRico 207.

2202-74 167Minn216, 208NW761.

2203-76 121Kan507, 247P635.

2203-77 104Conn585, 134A73; 89Fla 212, 103S636; 167Minn216, 208NW761.

2203-78 18F(2d)448; 179Ark507, 16SW (2d)991. Facts showing sufficient understanding of oath.–Ill 173NE278; 121 Kan507, 247P635. Vague and indefinite understanding of oath may be considered by jury. Ill 173NE278.

2203-78½-New. There is no impropriety in state's attorney's informing weak-minded witness of punishment for false testimony. 100TexCr220, 272SW480.

2204-79 35GaA493, 133SE647; BC [1929] 1DomLR806. Evidence of mental tests, though objectionable as based on hearsay, held not prejudicial error. 36Wyo 78, 252P1030. Matter rests largely within discretion of court. 107 TexCr239, 296SW554.

2204-80 40GaA78, 149SE60; 113TexCr 439, 22SW(2d)674.

2204-81 179Ark507, 16SW(2d)991; 169 La22, 124S132; 318Mo1149, 2SW(2d) 758; 101TexCr12, 274SW599. Understanding held sufficient.–101TexCr12, 274SW599. Understanding held not sufficient.–35GaA493, 133SE647; 106 TexCr215, 291SW550.

2205-82 Presumption of competency may be overcome. 318Mo 1149, 2SW(2d) 758.

2205-93 89Fla439, 105S137 (unchastity does not disqualify); 94Fla163, 113S699 (unchastity does not disqualify).

2205-95 109TexCr164, 3SW(2d)804.

2205-96½-New. Testimony of salesman as to weight of commodity sold by him is not rendered inadmissible because he has not subscribed to oath required of him as salesman of such commodity under statute. 34GaA363, 129SE553.

2205-97 148SC322, 146SE95. But see TexCr 32SW(2d)455(2dcase). Confession of unpardoned convict is admissible in evidence against him. 101TexCr467, 276SW270. Evidence involving statement of criminal.–101TexCr467, 276SW 270. Competency as witness in own behalf.–101TexCr467, 276SW270.

2206-98 101TexCr63, 274SW588 (felony).

2206-99 318Mo 581, 300SW765; 148SC 322, 146SE95; 113TexCr335, 21SW(2d) 675(3dcase). A witness is not disqualified by a conviction of: False pretenses. 156Md167, 143A708. Person is not disqualified by conviction of murder. 225 Ky288, 8SW(2d)404.

2207-1 12F(2d)852; 92Fla699, 109S 811; 199 Ind89, 155NE257; 204 Iowa 1394, 213NW225; 208 Iowa1049, 226NW 770; 152Miss48, 118S354; Mont 286P 1108; 148SC322, 146SE95. A person under sentence of death, etc. 70CalA 531, 233P980. That witnesses were self-confessed criminals and were under separate indictments for same offense does not make their testimony inadmissible. 318Mo 1179, 3SW(2d)369.

2207-2 92Fla699, 109S811.

2207-4 148SC360, 146SE116. Confessed perjurer not convicted for perjury is competent. 223Ky831, 4SW(2d)728.

2208-5 103TexCr636, 282SW251.

2208-6 100WVa121, 130SE81. In Texas.–100TexCr239, 272SW778.

2208-11 But see TexCivA 272SW210.

2209-15 101TexCr63, 274SW588. A conditional pardon, etc. 139 Okl 237, 281P952(2dcase); TexCr 28SW(2d)547. A pardon of one convicted of perjury, etc. Contra 139 Okl 237, 281P952(2d case). In Texas.–103TexCr620, 281SW 852; TexCr 26SW(2d)208(2dcase).

2209-18 148SC322, 146SE95; TexCr 25SW(2d)323. Disqualification shown by oral testimony received without objection. 101TexCr63, 274SW588. Oral proof insufficient where objected to. 110 TexCr296, 8SW(2d)186. Record must be correctly authenticated.–TexCr 32SW (2d)455(2dcase).

2209-20 200 Iowa1063, 205NW979; Wash 289P36.

2209-21 200 Iowa1063, 205NW979.

2210-24 13F(2d)564; 25F(2d)967; 32 F(2d)602; 176Ark654, 3SW(2d)980; 177Ark177, 6SW(2d)10; 181Ark818, 28 SW(2d)68; 247 IllA345; 210Ky833, 275 SW813; 157Miss807, 128S749; 157Miss 669, 128S885(2dcase) (husband's statement part of res gestæ); 193NC581, 137 SE657; 127 Okl 4, 259P561; 12PaDist& Co 639; 32PortoRico 140, 141 [quot Cyc]; 150SC117, 147SE749; 109TexCr 195, 3SW(2d)811; 39QueKB359, [1926] 1DomLR639, 45CanCrCas181 (under Canada Evidence Act). But see 334 Ill 590, 166NE481. Statute relating to liquor cases held not to change rule. 176 Ark654, 3SW(2d)980. Woman with whom defendant lived in adultery may testify against him in murder trial. 108 TexCr285, 300SW75. Time of marriage. –OklCr 277P278(2dcase).

2211-25 221Ala466, 129S21; 103CalA 610, 284P1077 (incompetent); 234 IllA 151 (after death of husband); 241 IllA 242; 204 Iowa384, 214NW725; 222Ky 361, 300SW913; 123Kan304, 255P68; 232Ky432, 23SW(2d)555 (competent); 10LaA70, 120S72(2dcase); 258Mass109, 154NE562 (if witness is willing); 220 MoA76, 278SW1050; MoA 275SW769; 30NM557, 240P303; 24 OhNPNS603 (wife may testify where husband inflicted cruel injury on child resulting in death); 32PortoRico 140, 141 [quot Cyc]; 145Va370, 133SE659. See also CalA 293P106. Under statute excepting testimony against spouse for cruelty to their children, husband may testify against wife for murder of his child, her stepchild. 26 OhNPNS406. In rape prosecution wife is competent witness against husband. 86Colo 406, 282P257.

2212-26 197 Ind169, 150NE56; 123Kan 304, 255P68; Kan 289P409; 314Mo 95, 282SW1014; 220MoA76, 278SW1050; MoA 278SW1051; MoA 31SW(2d)238; 32PortoRico 140, 141 [quotCyc].

2212-27 32PortoRico 140, 141 [quot Cyc].

2212-28 221Ala466, 129S21; 140 Okl 55, 282P151; 32PortoRico 140, 141 [quot Cyc]. Husband as witness against wife in action by wife against third person.–140Miss474, 106S6. Enabling statutes must be strictly construed, etc. But see 219Ky787, 294SW493.

2212-29 32PortoRico 140, 141 [quot Cyc].

2212-30 32PortoRico 140, 141 [quot Cyc].

2212-31 32PortoRico 140, 141 [quot Cyc].

2213-32 32PortoRico 140, 141 [quot Cyc]; 100TexCr489, 272SW141.

2213-33 32PortoRico 140, 141 [quot Cyc].

2213-33½-New. Rule of federal courts forbidding husband or wife to testify for or against each other in criminal case is not based on common law but on Judiciary Act. 18F(2d)685.

2213-34 22AlaA296, 115S72; 176Ark 1188, 5SW(2d)916; 70CalA485, 233P 413; 168Ga136, 147SE97; 103TexCr420, 281SW210. Contra 159Tenn507, 19SW (2d)228. Statements which are part of the res gestæ, etc. 158La791, 104S717 (testimony of person to whom wife made statement). In prosecution for unlawful possession of intoxicating liquors it is not error to permit evidence of wife's warning to accused of sheriff's approach upon which accused acted in endeavoring to dispose of liquor. 70CalA489, 233P413. Testimony that wife warned accused of sheriff's approach and that accused acted on warning is not violative of statute prohibiting husband or wife from being examined for or against other. 70CalA489, 233P413.

2213-35 OklCr 277P278(2dcase). Cross-examination of husband as to sales of Jamaica ginger by his wife in his presence held not objectionable, as compelling him to testify against wife, when wife not on trial. 158La400, 104S185.

2213-36½-New. Officer's testimony as to statements of accused's wife, made in presence of accused after arrest, is not in nature of testimony of wife against

husband and is admissible. 171Ark40, 283SW25.

2213–36⅓–New. Wife's affidavit is not sufficient to issue search warrant against husband which may be means for gathering evidence in criminal prosecution against him. 215Ky523, 284SW1116.

2214–41 234 IllA151. Contra 245 IllA 325.

2214–44 253 IllA89; 148Miss137, 114S 257. But see 140 Okl 55, 282P151.

2215–50 In proceedings in aid of execution upon judgment against husband, wife is incompetent witness for judgment creditor for purpose of showing that she has in her possession and control money or property of husband which should be applied upon judgment. 118Nebr240, 224NW16.

2215–53 234Ky73, 27SW(2d)432; 143 Okl 73, 288P947.

2215–54 143 Okl 73, 288P947. **In Arkansas.**–180Ark1144, 24SW(2d)960.

2216–57 4HawaiiFed696, 701 [citCyc]. But see 19F(2d)850; 43F(2d)890.

2217–60 105TexCr15, 284SW960.

2217–63 115Nebr601, 213NW971 (husband competent witness in action by wife). But see 241 IllA242; Ind 164 NE496. **Husband not competent in action by wife** for alienation of affections without her consent. 82Colo 133, 257P 359.

2217–64 149Miss5, 115S36. **In rape prosecution,** wife's testimony impeaching husband's character is incompetent. 193NC581, 137SE657.

2217–66 32PortoRico 140 (L. of Evid. § 40); 34PortoRico 843; 140SC117, 147 SE749.

2218–70 170Ga349, 153SE11; 230Ky 545, 20SW(2d)170 (mental anguish and willful neglect); 197NC465, 149SE585 (1stcase). But see 10PaDist&Co 124. Contra 224Ky18, 4SW(2d)1106. **In Kentucky.**–219Ky787, 294SW493.

2218–73 160Ga369, 127SE772; 160Ga 497, 128SE66; 170Ga349, 153SE11; 237 Mich459, 212NW80.

2219–74 160Ga369, 127SE772; 136Misc 656, 241NYS445 (incompetent notwithstanding failure to object). **Statutory provision** that husband or wife is incompetent to testify against each other cannot be waived. 136Misc656, 241NYS 445.

2219–79½–New. In action for separation, wife's testimony has been held incompetent on issue of abandonment under statute, 217Ky126, 288SW1050.

2219–79⅓–New. but competent on issue of cruel and inhuman treatment. 217Ky126, 288SW1050.

2219–79¼–New. Wife seeking divorce for cruel treatment against husband filing cross libel for adultery may testify to cruel treatment, but not to adultery. 170Ga349, 153SE11.

2219–80 171Ark620, 286SW871, 48ALR 1189; 159La900, 106S374; 32PortoRico 140 (Law of Evid. § 40); 34PortoRico 843; 101TexCr439, 276SW252. **Rape.**–159La900, 106S374. **Statute authorizing spouse to testify against the other, where injury has been done against person or property of either** held not to limit testimony only to cases involving physical injury. 171Ark620, 286SW871, 48ALR1189.

2219–81 235Ky449, 31SW(2d)697; 156 Miss663, 126S662.

2220–82 One spouse is not competent, etc.–157Miss807, 128S749. **Though parties live apart undivorced,** husband is not competent against wife in prosecution for offense not against person. 156 Miss663, 126S662 (wife's burning of house where separated husband lived is not "assault" nor injury to person).

2220–83 156Miss522, 126S197; OklCr 277P278(2dcase). Contra 130Kan492, 287P248; 158Tenn510, 14SW(2d)720.

2220–87 See also 171Ark620, 286SW 871, 48ALR1189.

2221–91 Permitting state's witness in bigamy prosecution to identify defendant's first wife in jury's presence is not error. TexCr 26SW(2d)645.

2221–96 Second wife is competent to prove bigamous marriage after proof of valid former marriage. TexCr 29SW (2d)381(1stcase).

2221–97 Common-law marriage after previous divorce may be proved by conversations between parties tending to show agreement. 28 OhA297, 162NE675.

2222–3 129Kan19, 281P925, 68ALR416; 237Mich375, 211NW746; 117 Or621, 245 P321; Ont [1925] 3DomLR873. See also 136Misc863, 242NYS464. But see 119Kan816, 244P844; Minn 233NW300 (2dcase). **In North Dakota.**–53ND333, 205NW877.

2222–4 237Mich383, 211NW735; 237 Mich375, 211NW746; 117 Or621, 245P 321. But see 121Kan601, 249P682.

2222–5 237Mich459, 212NW80; Ont [1925] 3DomLR873.

2222–6 237Mich383, 211NW735. But see 124Misc800, 210NYS335.

2222–8 Contra 107WVa563, 149SE669.

2222–9½–New. Where impossibility of access has been proved by other evidence, mother may testify as to who was father of child. 120Kan565, 244P844.

2222–9⅓–New. Acts and conduct of spouse may throw light on question such as parentage of children, though incompetent to give evidence directly. 253NY 1, 170NE471.

2223–16 143 Okl 45, 287P396.

2223–23½–New. After annulment wife may testify against husband on prosecution for burglary as to everything except communications between them during coverture. 80Mont181, 260P138.

2223–23⅓–New. Judgment annulling marriage does not render wife competent witness against husband in prosecution for rape where judgment has not become final. 88CalA713, 263P1036.

2224–24 215Ky85, 284SW409; 222Ky 678, 2SW(2d)403; 227Ky67, 11SW(2d) 978; 115 Okl 302, 242P1035. But see 233Ky714, 26SW(2d)563.

2225–25 215Ky85, 284SW409.

2225–26 215Ky85, 284SW409.

2225–27 173Ark1181, 292SW373.

2226–28 148Miss137, 114S257.

2226–33 148Miss137, 114S257.

2227–35 In a proceeding by an execution creditor to reach property, etc. But see 118Nebr240, 224NW16.

2227–40 Waiver of disqualification.–33 OhA445, 169NE833.

2228–42 34PortoRico 519 (cross-examination permitted).

2228–43 119 Or312, 249P364.

2228–44 241 IllA242 (evidence held inadmissible in suit for alienation).

2228–48 175Ark763, 300SW437. But see 227Ky353, 13SW(2d)266.

2229–49 A statutory prohibition, etc. 204 Iowa384, 214NW725.

2230–57 143 Okl 45, 287P396.

2230–58 Mo 5SW(2d)405.

2231–62 205 Iowa379, 218NW39; 118 Nebr373, 224NW860.

2231–63 248Mich665, 227NW689. But see 238Mich625, 214NW184.

2231–65 28F(2d)150.

2231–66 119 Or312, 249P364, 366 [cit Cyc].

2231–66½–New. (13) Spouse confined in asylum. Where at time of hearing on bill to annul marriage defendant was confined in insane asylum and appeared by conservator ad litem, complainant is not competent witness in suit. 241 IllA 359.

2232–70½–New. State cannot compel wife to give testimony which shall be used as basis of impeachment against her on subsequent trial of husband. 112 TexCr390, 16SW(2d)1065.

2232–72 215Ky613, 286SW696; 161La 125, 108S309; 104TexCr483, 284SW586; Minn 231NW414. **Counsel who was formerly city attorney is competent** to testify for commonwealth as to investigation conducted by him in connection with case in which he is now representing defendant. 215Ky613, 286SW696.

2232–73 199Wis162, 225NW831, 64ALR 180. See also 116Nebr670, 218NW746. **Practice of attorneys testifying is not approved** except where circumstances require. 234Ky333, 28SW(2d)24.

2233–75 203 Iowa57, 212NW360; 161 La125, 108S309; 236Mich136, 210NW 314 (practice is not to be commended); 251Mich346, 232NW256; 116Nebr670, 218NW746; 104TexCr483, 284SW586; PrEdwIsl [1930] 1DomLR838. **Impeaching witness.**–104TexCr483, 284SW 586. **Prosecuting attorney a competent witness for state.**–MoA 7SW(2d)375.

2233–76½–New. Associate counsel is not disqualified from testifying as to formal matters not relating to merits of case, 3Del 450, 139A66.

2233–76⅓–New. but is disqualified from testifying in contradiction of opposing witnesses. 3Del 450, 139A66.

2234–87 6F(2d)498, 499 [citCyc]; 77 CalA438, 246P1072; 125 Okl 66, 256P 704, 52ALR1270.

2235–88 106TexCr158, 291SW892; 106 TexCr361, 293SW1108.

2235–89 See also 77CalA438, 246P1072.

2235–89½–New. Where court has possession of evidence for or against party, it may be adduced only by examination of judge in trial presided over by another judge. 6F(2d)498.

2236–7 91PaSuper544.

2236–8 216Ky618, 287SW985 (holding juror in condemnation proceedings competent witness on trial de novo).

2237–18 Testimony of commissioner assessing damages is competent. Mo 30 SW(2d)729; Mo 30SW(2d)733.

2237–26½–New. Prosecuting attorney is competent witness in case. 194Wis 387, 216NW483.

2237–26⅓–New. Determination of question whether prosecuting attorney should be permitted to testify lies largely within discretion of trial court. 198 Wis180, 223NW419.

2237–26¼–New. Action of trial court in permitting district attorney to take stand to testify as to witness' former statement, for purpose of impeachment, has been held not error, where mere collateral matter was involved and testimony merely confirmed that of other witnesses. 198Wis180, 223NW419.

2237–27 210Ky833, 275SW813, 814 [quotCyc].

2237–28 CalA 288P57; 210Ky833, 275 SW813, 814 [quotCyc]; 139 Okl 233, 281 P950; 99Vt329, 132A37. See also Miss 130S729. **Objection made after testimony was in held too late.**–99Vt329, 132 A37.

2238–29 210Ky833, 275SW813, 814 [quotCyc]; 134 Okl 70, 272P857.

2238–30 210Ky833, 275SW813, 814 [quotCyc].

2238–30½–New. Wife's competency as witness against husband cannot be determined until she is offered as witness. 205 Iowa778, 218NW475.

2238–30⅓–New. Incompetency of witness should be objected to when called or as soon thereafter as disqualification appears. 33 OhA445, 169NE833.

2238–31 210Ky833, 275SW813, 814 [quotCyc].

2238–32 210Ky833, 275SW813, 814 [quotCyc].

2238–33 210Ky833, 275SW813, 814 [quotCyc]; 134 Okl 79, 272P868.

2239–35 139 Okl 233, 281P950. **Wife is subject to cross-examination** when called and examined by her husband as defendant. NJ 148A776.

2239–36 MoA 294SW426; 134 Okl 70, 272P857; 139 Okl 233, 281P950.

2239–40 Wife suing husband for divorce has right to take husband's deposition, and by doing so she waives his competency as witness. 230Ky545, 20 SW(2d)170.

2239–42 315Mo 1091, 287SW610, 612 [citCyc].

2239–42½–New. Incompetency of defendant's wife as witness in murder prosecution is not waived, though sworn without objection which was made when defendant connected with crime. 33 OhA 445, 169NE833.

2239–43 162Ga178, 132SE899; 199 Iowa815, 202NW519; 152Miss656, 120 S747; 102NJL388, 132A93.

2239–44 199 Iowa815, 202NW519.

2239–45 CalA 288P57; 162Ga178, 132 SE899.

2239–46 In absence of showing that policeman was patroling street under Vehicle Act requiring red car, testimony of city policeman chasing speeder in black car is admissible. CalA 288P57.

2239–47 CalA 288P57; 101TexCr12, 274SW599 (where child of thirteen prima facie competent). See also 112TexCr 355, 15SW(2d)643.

2240–53½–New. Proof that witness had been adjudged insane and is inmate of

insane asylum makes prima facie case of unsound mind. 199 **Iowa**815, 202**NW** 519.

2240–54 **CalA** 288P57; 199 **Iowa**815, 202**NW**519; 102**NJL**388, 132A93 (court should determine competency of witness, charged with insanity, by inspection); 38**Wyo** 340, 266P1056. **The mode of eliciting and determining the fact of competency,** etc. 38**Wyo** 340, 266P1056.

2240–55 **Sufficiency of evidence.**–162**Ga** 178, 132**SE**899.

2241–56 **CalA** 288P57; 223**Ky**821, 4**SW (2d)**757; 33 **OhA**338, 169**NE**588. **Sufficiency of evidence.–Miss** 130S112(2d case).

2241–62 **Allowance or rejection of questions to test witnesses' understanding of import of oath** is within discretion of trial court. 47 **Ida**457, 276P39, 68**ALR** 1061. **Refusal to permit cross-examination** to determine competency may be error. **CalA** 288P44.

2241–63 **Form of examination to determine competency of witness as to reputation testimony.–NJ** 148A725.

2242–75 But see 139 **Okl** 237, 281P952 (2dcase).

2242–80 164**Ga**292, 138**SE**238; 46 **Ida** 456, 268P1; 199 **Iowa**815, 202**NW**519; 201 **Iowa**368, 207**NW**393; 176**Minn**349, 223**NW**452(4thcase); 34**NM**494, 285P 497; 101**TexCr**12, 274**SW**599; **Vt** 151A 642. **Competency of witness to testify as to general reputation** is largely matter of discretion of trial court. 199**Cal** 235, 248P906. **Submission of question** to jury is generally error. 164**Ga**292, 138**SE**238. **Whether or not witness was wife of defendant is** for trial court. **CalA** 292P675.

2243–81 **Instructions to jury.**–162**Ga** 178, 132**SE**899.

2243–82 36**F(2d)**565; 164**Ga**292, 138**SE** 238; 201 **Iowa**368, 207**NW**393; **TexCivA** 285**SW**638; 101**TexCr**12, 274**SW**599.

2243–83 164**Ga**292, 138**SE**238; 201 **Iowa**368, 207**NW**393; **TexCivA** 285**SW** 638; 100**TexCr**220, 272**SW**480 (abuse not shown).

2243–84 But see 104**Conn**585, 134A73.

2243–85½–New. **Express finding as to capacity is required** where proof shows that witness has been adjudged insane and is inmate of asylum. 199 **Iowa**815, 202**NW**519.

2243–85⅓–New. Competency of seduced girl as witness should be estimated with great care. 104**Conn**585, 134A73.

2243–85¼–New. **Permitting feeble-minded girl,** without knowledge of oath, to testify in action by father for her seduction is abuse of discretion. 104 **Conn**585, 134A73.

2243–85⅙–New. **Overruling of objection to competency** constitutes ruling that witness is competent. 164**Ga**292, 138**SE** 238.

2243–85⅙–New. **Testimony given by infant witness** may be considered in determining his competency as witness. 164**Ga**292, 138**SE**238.

2244–90 160**Ga**497, 128**SE**66.

2245–92 104**WVa**396, 140**SE**338.

2245–96 232**Ky**532, 23**SW(2d)**959; 49 **Nev**124, 240P435, 437 [citCyc].

2247–8 233**Ky**27, 24**SW(2d)**917.

2249–16 **Pa** 151A676 (guardian who executed deed claimed fraudulent).

2249–18 49**Nev**124, 240P435.

2252–23 **MoA** 12**SW(2d)**510.

2252–26 104**WVa**396, 140**SE**338.

2256–38 But see 34**PortoRico** 338.

2256–39 21**AlaA**417, 109S119; 204 **Iowa** 537, 214**NW**531; 223**Ky**381, 3**SW(2d)** 770; 145**Miss**652, 110S211; **MoA** 10**SW (2d)**680; **SD** 228**NW**240; 104**WVa**396, 140**SE**338. See also **NJCh** 152A246.

2256–39½–New. Spouse of defendant in criminal prosecution may testify under some statutes, on request of accused; 104**WVa**396, 140**SE**338.

2258–40 99**Fla**328, 126S789; **Md** 150A 28; 252**NY**121, 169**NE**110; **TexCommnA** 17**SW(2d)**783.

2259–44 208 **Iowa**818, 222**NW**394.

2260–49 160**Ga**497, 128**SE**661. **Words in statute** disqualifying party to action "in consequence" of adultery from testifying apply to initiatory, as well as to proximate, cause of suit. 170**Ga**349, 153 **SE**11.

2260–50 170**Ga**349, 153**SE**11.

2260–52 21**F(2d)**207; 23**F(2d)**825; 249 **IllA**180; 209**Ky**598, 273**SW**438; 217**Ky** 227, 289**SW**305; 50**Nev**205, 255P999; **NJ** 140A439; **NJCh** 151A48; 191**NC**176, 131**SE**587; 192**NC**371, 135**SE**288; 129 **Okl** 265, 264P628; **TexCivA** 283**SW**271; **TexCivA** 286**SW**680. **Statute requiring corroboration of interested party in such** case not applicable, in view of other statute, to assured in action involving surety's liability on bond of deceased official, where surety a corporation having agent capable of testifying. 143**Va**291, 130**SE** 411. **Purpose of statute.**–115 **Okl** 153, 241P342.

2262–53 95**Fla**321, 116S31, 37 [citCyc]; **MoA** 10**SW(2d)**680; 48**Nev**441, 233P846, 847 [quotCyc]; 49**Nev**451, 248P893 [quotCyc]; **TexCommnA** 276**SW**647; **TexCivA** 29**SW(2d)**529. **The statute should be liberally construed in favor of competency, etc.**–But see **TexCivA** 5**SW (2d)**831. **Statute should be strictly construed against incompetency.–Ga** 155**SE** 24.

2262–54 **MoA** 24**SW(2d)**183; 48**Nev**441, 233P846, 847 [quotCyc]; 49**Nev**451, 248 P893 [quotCyc]; 50**Nev**205, 255P999; 198**NC**309, 151**SE**641; 138 **Okl** 272, 281 P251; **TexCommnA** 276**SW**647.

2263–62½–New. Manifest purpose of statute of placing parties on equal footing will not be defeated by application of it which would convert it into instrument of oppression. **TexCommnA** 276 **SW**647.

2264–67 **TexCivA** 271**SW**311; 154**Wash** 69, 280P745.

2264–69 129**Misc**760, 223**NYS**701. **In Idaho.**–290P200. **Statute applicable whether representative is plaintiff or defendant.**–But see 50**Philippine**698.

2264–70 **TexCivA** 271**SW**116.

2265–71 216**Ala**625, 114S292; 216**Ala** 636, 114S301; 175**Ark**43, 295**SW**13.

2266–82 235**Ky**189, 30**SW(2d)**893; 145 **Miss**683, 110S237 (legatee, not an heir, may testify as to insanity of testatrix, such testimony tending, not to establish, but to defeat her claim); 49**ND**74, 189 **NW**690; **SD** 233**NW**274. See also 214 **Ala**291, 107S835. But see 135 **Okl** 77, 274P30, 62**ALR**690; **TexCivA** 294**SW** 347. Contra 207 **Iowa**959, 221**NW**451; 208 **Iowa**1265, 227**NW**129(2dcase); 194 **NC**583, 140**SE**193.

2267–83 **CalA** 290P887(2dcase); 203 **Iowa**144, 212**NW**327; 220**Ky**569, 295**SW** 863; 235**Mich**613, 209**NW**816 (as to matters equally within knowledge of decedent); 168**Minn**426, 210**NW**284; 128 **Misc**422, 220**NYS**204; **Wis** 230**NW**137. **Claimant's wife though competent is an** interested witness. 128**Misc**622, 220**NYS** 204.

2268–84 50**Philippine**698. **Action to quiet title.–CalA** 290P668.

2268–86 **In suit by executor against executor of another estate,** legatee claiming specific legacy from plaintiff solvent estate is competent. 209**Ky**675, 273**SW** 548.

2268–88½–New. Testimony of widow suing to have certain property declared community property as to conversations with deceased is admissible. **CalA** 288P 870.

2268–89 256 **IllA**401; **NJ** 129A434. But see **Ida** 291P1071.

2269–90 **MoA** 271**SW**862. Contra 253 **IllA**444.

2269–92 **Iowa** 232**NW**816. But see 87 **Colo** 223, 286P112.

2269–93 Contra 100**CalA**746, 281P504.

2269–95 221**Ky**633, 299**SW**560; 100**Vt** 51, 134A853.

2269–98 **Partner of decedent** may testify as to declarations of decedent in regard to loan. 124**Misc**836, 209**NYS**300.

2270–8 230**Ky**835, 20**SW(2d)**1015. **In North Dakota.**–58**ND**817, 227**NW**555.

2271–9 221**Ky**679, 299**SW**576; 197**NC** 574, 150**SE**13; 54**SD**501, 223**NW**717. See also **TexCivA** 16**SW(2d)**160.

2272–10 322 **Ill** 606, 153**NE**589; 333 **Ill** 208, 164**NE**405; 208 **Iowa**1004, 224**NW** 583(2dcase); 208 **Iowa**1359, 227**NW**341 (2dcase); 209**Ky**598, 273**SW**438 (one claiming as heir against others making like claims cannot testify to statements of alleged ancestor and decedent); 217 **Ky**670, 290**SW**475; 218**Ky**425, 291**SW** 361; 218**Ky**495, 291**SW**710; 222**Ky**542, 18**SW(2d)**966; 224**Ky**386, 6**SW(2d)**458; 236**Mich**5, 209**NW**916; 175**Minn**27, 220 **NW**154; **NJCh** 151A48; 10**PaDist&Co** 595; 49**Philippine**894; **TexCivA** 275**SW** 96; **TexCivA** 283**SW**271 (alleged widow); **TexCivA** 283**SW**531; 140**Wash**593, 250P26. **On bill to ascertain amount due on mortgage and to restrain foreclosure proceedings,** debtor mortgagor and purchaser of part of mortgaged property are opposite parties as regards estate of deceased mortgagee. 235**Mich**579, 209 **NW**924. **In action to remove executor** adverse party may be examined. 128 **Misc**219, 219**NYS**124. **Compulsory joinder of necessary party plaintiff as party defendant** under statute does not render such party any less an adverse party within statute when interest is actually adverse. 141 **Okl** 264, 284P859.

2273–11 13**PaDist&Co**21 (defendant sued with administrator for joint negligence of himself and decedent held not competent as witness for plaintiff against codefendant); **SD** 224**NW**929. **Test of whether parties are adverse** is relation they sustain to particular issue in controversy. **SD** 224**NW**929. **Courts will look through forms of procedure** to determine who are incompetent parties. **NJCh** 151A48.

2273–12 87 **IndA**462, 151**NE**735; 56**ND** 899, 219**NW**784.

2273–14 33**F(2d)**788; 164**Ga**552, 139**SE** 31; **TexCivA** 16**SW(2d)**844.

2273–15 333 **Ill** 208, 164**NE**405; 209**Ky** 598, 273**SW**438; **SD** 226**NW**740.

2274–16 168**Ga**317, 147**SE**711.

2274–17 164**Ga**552, 139**SE**31; 168**Ga** 156, 147**SE**106; 236**Mich**5, 209**NW**916; 252**NY**121, 169**NE**110; 96**PaSuper**585. Contra 237 **IllA**372; **TexCivA** 275**SW**96; **TexCivA** 13**SW(2d)**905.

2274–18 93**Fla**67, 111S541; 319**Mo** 660, 4**SW(2d)**819.

2275–23 **TexCivA** 4**SW(2d)**262. **Partition suit.**–80 **IndA**556, 148**NE**643.

2275–25 **Heir is party to action** by administrator against other heirs. 195**Wis** 47, 217**NW**719.

2276–28½–New. One not beneficiary and another not directly benefited are competent to testify to trust deed transactions in action to set aside deed of trust and gifts. 132**Misc**294, 230**NYS** 226.

2276–28⅓–New. **Relatives of party** are not incompetent under statute excluding testimony of parties. 59**ND**47, 228**NW** 459.

2276–29 204 **Iowa**896, 216**NW**20.

2276–32 **TexCivA** 6**SW(2d)**227.

2277–39 49**Nev**124, 240P435; 191**NC** 176, 131**SE**587.

2277–40 321**Mo** 1244, 14**SW(2d)**583; **NJCh** 151A48 (persons improperly joined). **Executor cannot join uninterested person** as party and thereby deny him the right to testify. 87**Colo** 223, 286 P112.

2277–41 32**F(2d)**725; 217**Ky**227, 289 **SW**305; **Mo** 300**SW**487; 49**Nev**124, 240 P435; **TexCommnA** 17**SW(2d)**784.

2277–42 38**Wyo** 365, 267P426, 60**ALR** 1046.

2278–45 **NJCh** 151A48. Contra 176**Ark** 1149, 6**SW(2d)**28.

2278–47 297**Pa**348, 147A70. **In Pennsylvania.**–152A38.

2278–48 121**Kan**180, 246P976. But see 254**NY**139, 172**NE**269.

2278–50½–New. Widow with child, suing for husband's overpayment of note, is not incompetent, as heir, to testify, but competent as survivor of community. **TexCommnA** 18**SW(2d)**605.

2279–53 220**MoA**837, 272**SW**75.

2279–59 166**Ga**717, 142**SE**86; 326 **Ill** 302, 157**NE**161; 230**Ky**835, 20**SW(2d)** 1015 (wife of deceased husband); 191 **NC**176, 131**SE**587; 198**NC**765, 153**SE** 451; **TexCivA** 283**SW**531; **TexCivA** 16 **SW(2d)**160. But see 181**Ark**986, 26**SW (2d)**97. **Liability for costs.**–245**NY**17, 156**NE**81. **Rule is inapplicable** to disinterested witness. **TexCivA** 293**SW**577. **Witness having no interest** in subject matter of litigation is competent to testify. **TexCivA** 22**SW(2d)**961.

2279–59½–New. By statute, sisters in proceedings for compensation are not disqualified from testifying for each other. 220**Ky**449, 295**SW**406.

2279-59½-New. Agent of deceased.-That witness was agent of deceased does not remove restriction otherwise applicable against testimony of person who has been interested adversely to administrator of deceased in subject of action. **SD** 224NW929.

2280-60 95Fla321, 116S31; 326 Ill 302, 157NE161; 220MoA76, 278SW1050; 136 Misc745, 241NYS742.

2280-61 95Fla321, 116S31; 220MoA76, 278SW1050.

2280-62 95Fla321, 116S31; 228Ky5, 14 SW(2d)216; 232Mich664, 206NW500; 220MoA76, 278SW1050; 130Misc684, 225NYS190. **Direct benefit** to witness from judgment for one party is one test of interest. 198NC765, 153SE451.

2281-67 TexCivA 16SW(2d)160.

2281-68 220MoA76, 278SW1050; MoA 278SW1051.

2281-69 251 IllA240; 256 IllA523; 208 Iowa353, 223NW752; 215Ky663, 286SW 929.

2281-70 218Ky750, 292SW297; 220 MoA76, 278SW1050 (wife); 49Nev124, 240P435; 298Pa1, 147A848; 153Tenn 130, 282SW206 (interest of officers in fines).

2281-71 32F(2d)725; 217MoA119, 273 SW768; 289Pa579, 137A728.

2282-75 236 IllA126 (brother of deceased boy killed by auto, in action for next of kin under statute); 237Mich278, 211NW629.

2282-77 But see 49Nev124, 240P435.

2282-78 198NC298, 151SE645; 289Pa 579, 137A728; 146Wash638, 264P1003; 196Wis426, 220NW194.

2282-79 233Ky27, 24SW(2d)917; 234 Ky353, 28SW(2d)35; Wash 287P41; 104WVa382, 140SE346. See also 107 WVa402, 148SE380. But see 218Ky750, 292SW297.

2282-80 214Ky24, 282SW555; MoA 297SW425. But see 236 IllA126.

2282-80½-New. That witness is related to party affects credibility, but not competency, of his testimony. 232Mich664, 206NW500.

2282-81 322 Ill 606, 153NE589; 325 Ill 253, 156NE352; 201 Iowa73, 204NW404 (wife who participated in transaction and was financially interested held incompetent to testify as to genuineness of alleged indorsement of certificate of deposit by incompetent person); 217Ky 758, 290SW700; 218Ky750, 292SW297, 298 [citCyc]; 225Ky288, 8SW(2d)404; 234Ky353, 28SW(2d)35; Mo 27SW(2d) 6; 298Pa124, 148A61; 87PaSuper448; 9PaDist&Co 670; 11PaDist&Co 585; 12 PaDist&Co 792; TexCivA 281SW331; TexCivA 283SW531; TexCivA 294SW 347 (husband of beneficiary under will being necessary party, held incompetent to testify in suit to set aside probate). But see 205 Iowa1379, 219NW492; TexCivA 294SW347.

2283-82 216Ala610, 114S204; 219Ala 94, 121S82; 162Ga302, 133SE239 (husband competent); 145Miss652, 110S211; 220MoA102, 278SW806 (civil action); 220MoA76, 278SW1050; MoA 278SW 1051; 48Nev441, 233P846; 130Misc865, 226NYS1; ND 231NW888. **Husband is incompetent:** Where he has legal or pecuniary interest in result of suit. 162 Ga302, 133SE239. Where he acts as agent of wife. 162Ga302, 133SE239. But his mere presence at time of transaction does not show him to be agent so as to disqualify him. 162Ga302, 133SE 239.

2283-83 178Minn452, 227NW501; 226 AppDiv683, 233NYS355; 134Misc902, 236NYS720 (where services rendered are separate and distinct). Alabama.-214 Ala412, 108S233. Michigan.-237Mich 278, 211NW629; 238Mich272, 213NW67. New York.-219AppDiv594, 220NYS331; 136Misc745, 241NYS742. North Carolina.-198NC37, 150SE634. **Husband of testator's granddaughter** is not disqualified, in will contest, from testifying to conversations with testator. Minn 232 NW1.

2284-84 But see 171Minn358, 214NW 49.

2285-85½-New. Widow, heir at law, is incompetent being person interested. 34 GaA314, 129SE445.

2285-86 226Ky621, 11SW(2d)434; 171 Minn358, 214NW49 (wife and children); TexCivA 281SW331; TexCivA 288SW 598; TexCivA 3SW(2d)478; TexCivA 5SW(2d)831. But see 165Ga335, 141SE 67.

2285-87 SD 226NW740.

2285-90 87 IndA462, 151NE735.

2285-91 148Md620, 129A898; MoA 275 SW769. See also 234 IllA183.

2285-93 TexCivA 294SW265 (members of church which is beneficiary under will are competent to testify). **Legatee agreeing before contract** to transfer claim to contestant, is incompetent to testify in support of will. 145Miss683, 110S237.

2286-94 Creditor whose debt is directed to be paid along with other debts is not legatee and is competent to testify in action by debtor's administrator to quiet title. 204 Iowa896, 216NW20.

2286-99½-New. Even though trustee is pecuniarily interested in result of suit he is not incompetent as witness where only claims of beneficiaries are involved and not quantum of estate. 217Ala426, 116S127.

2286-99½-New. Under statutes, trustee is competent witness in all matters concerning estate. 35Ariz457, 281P38.

2286-8 235Mich579, 209NW924.

2287-12 173Ark1181, 292SW143; 326 Ill 226, 157NE245; 245 IllA75; Tex CommnA 298SW412. **Indorser not disqualified,** in action by indorser's legatee, though indorser had, as indorsee's agent, converted proceeds of renewal note. 326 Ill 226, 157NE245.

2287-13 131Misc854, 228NYS494.

2288-14 107WVa402, 148SE380.

2288-15½-New. Member of partnership may be witness for defendant in replevin action brought by partnership. 79 Mont1, 254P863.

2288-18½-New. Claimants against partnership are not disqualified so long as active partner with whom they contracted is living. 232Ky583, 24SW(2d) 287.

2288-18½-New. Surviving partner interested in having debts paid out of partnership assets is not disqualified as to particular claims. 232Ky583, 24SW (2d)287.

2288-19 168Ga156, 147SE106; 220MoA 837, 272SW75; MoA 274SW510; MoA 5 SW(2d)662; 23 OhA535, 156NE231; 52 SD601, 219NW478.

2288-20 IndA 148NE505; 228Ky5, 14 SW(2d)216.

2289-21 8F(2d)365; 85 IndA450, 150 NE31. **Circumstances not constituting agency.**-48Nev441, 233P846. **The agent may testify as to a transaction between his principal and a person since deceased, etc.**-85 IndA450, 150NE31.

2290-23 15F(2d)306.

2290-24 331 Ill 160, 162NE877. See also 194Wis387, 216NW483. But see Va 154SE687.

2290-25 168Ga439, 148SE81.

2290-28 32F(2d)725; 216Ala625, 114 S292; 127Kan456, 274P132.

2290-29 125Me191, 132A417, 44ALR 1333.

2290-30 56AppDC327, 13F(2d)299; 130Misc684, 225NYS190.

2291-31 318Mo 969, 2SW(2d)733; 117 Nebr198, 220NW255. Contra 201 Iowa 1094, 206NW143. **Officers or trustees of religious or charitable institutions,** etc. 133Misc766, 234NYS246.

2291-32 Member of religious society.-49Nev124, 240P435.

2291-33 219Ala662, 123S45. Contra 201 Iowa1094, 206NW143.

2292-38 124Me399, 130A210.

2293-41 191NC176, 131SE587.

2294-46 191NC176, 131SE587.

2294-52 101NJEq275, 137A565. But see CalA 273P1070.

2295-53 94PaSuper216.

2295-54 But see 230Ky835, 20SW(2d) 1015. **Grantor cannot testify** as to nature and terms of trust in deceased grantee. 314Mo 175, 282SW1022. **Person who purchased land but had deed made to daughter** has no such interest as disqualifies him to testify in behalf of his daughter's grantee, in action of ejectment against him, as to conversation with person since deceased through whom plaintiff claims. 121Kan606, 249 P668.

2295-55½-New. Where deceased grantee's wife claimed no rights under deed to property involved, grantor was competent to testify on her behalf. Mo 291 SW485.

2296-63½-New. In suit to determine title to real estate which defendant claimed her deceased husband had bought with her money, defendant is incompetent witness. Mo 291SW485.

2296-67 89Fla194, 103S825 (surviving party cannot testify to "transaction or communications" with deceased, unless representative of deceased testifies thereto); 163Ga774, 136SE901; 238Mich 108, 213NW145; 318Mo 969, 2SW(2d) 733; Pa 152A38; 90PaSuper565; Utah 279P502; 196Wis625, 220NW651. **Disqualification of interested survivor extends only to transactions between witness and decedent.** 222MoA510, 281SW 75. **New debtor in novation is not incompetent to testify to conversation with deceased creditor.** 180Minn75, 230 NW468.

2297-69 175Ark633, 300SW408; 314Mo 13, 283SW51, 45ALR1466 (husband's statutory cause of action against railroad for negligent killing of wife not same cause of action wife had for injury moment before death as to exclude testimony of engineer as surviving party).

2297-70 222MoA510, 281SW75. **Interested surviving party may testify** until purpose to give testimony excluded by death of adverse party appears. 222 MoA510, 281SW75.

2297-72 220MoA76, 278SW1050; MoA 278SW1051. **Party to contract or one primarily interested only barred by rule.**-220MoA76, 278SW1050. **Wife of party** held not incompetent to testify, when not party to contract. MoA 278SW1051.

2298-79 220Ky54, 294SW783; TexCivA 286SW680. **Payee of promissory note** may testify that she rescinded letter purporting to have been written by deceased acknowledging obligation and promising to pay it. 119Kan666, 240P 853. **Wife who signed note given in payment to one sued on** is not incompetent as witness for defendant, though payee was dead. 220MoA76, 278SW1050.

2298-80½-New. Maker of note is not competent to testify to fraud of payee who is insane at time of action by indorsee. 203 Iowa20, 212NW359.

2298-83 220Ala338, 124S898; 161Ga 517, 131SE483; 215Ky364, 285SW235; 225Ky288, 8SW(2d)404; Mo 282SW53; 314Mo 95, 282SW1014; 132Misc294, 230 NYS226. But see 169Ark1102, 278SW 36; 313Mo 27, 281SW445.

2298-83½-New. Where deed conveyed land to person since deceased but title was taken in deceased person's wife who had since conveyed to another, vendor was competent witness. 214Ala150, 107 S94.

2298-84 86 IndA160, 155NE212.

2298-85 229Ky116, 16SW(2d)782.

2298-86 205 Iowa929, 218NW912.

2298-88 231Ky801, 22SW(2d)285.

2299-89 245NY17, 156NE81; 132Misc 294, 230NYS226; 90PaSuper589.

2299-93½-New. That claimant against estate for services rendered to deceased is also heir, does not change his relationship as opposite party so as to make his testimony admissible. 236Mich5, 209NW916.

2299-94 256 IllA401.

2299-99 165Ga335, 141SE67.

2300-3 163Ga774, 136SE901; 238Mich 108, 213NW145.

2300-14½-New. Where there were several persons on opposite side of transaction to that of witness, witness is not excluded from testifying, unless all of them are dead. 49Nev451, 248P893.

2301-13 220MoA821, 278SW822.

2301-14 222MoA510, 281SW75.

2301-16 216Ala686, 114S301; 121Kan 180, 246P976; 50Nev205, 255P999.

2302-17 TexCivA 8SW(2d)301. **Tenant by curtesy** is survivor within protection of West Virginia statute. 105WVa385, 142SE845. **In action to hold defendant personally liable on contract between him and decedent** rule excluding testimony of party as to transaction with decedent does not apply. 57ND624, 223 NW700.

2302-18½-New. Adverse claimant held incompetent witness regarding transactions with deceased agent of adversary's remote grantor. 234Ky64, 27SW(2d) 382.

2303-19 19F(2d)186; 220Ky54, 294SW 783. **Maker's testimony respecting conversations** with deceased holder's agent is competent. 19F(2d)186.

2303-20 117Nebr198, 220NW255.

2303-22 83Colo 280, 264P657; 84Colo 565, 272P621; 162Ga664, 135SE195; 36 GaA61, 135SE220; 45 Ida724, 265P697; 323 Ill 545, 154NE457; 158Md393, 148 A585; MoA 282SW747; MoA 8SW(2d) 1027; 129Misc760, 223NYS701; 191NC 176, 131SE587; 120 Oh55, 165NE533; 124 Okl 280, 256P34 (where there are two adverse parties both are disqualified); 141 Okl 264, 284P859; 54SD501, 223NW717; SD 230NW29(2dcase); Tex CivA 274SW204; TexCivA 283SW271; TexCivA 286SW680; TexCivA 18SW (2d)221; TexCivA 27SW(2d)597. **Not applicable to actions** by surviving spouse to quiet title to real property against estate of deceased spouse. 79 CalA69, 248P1039. **Plaintiff is not competent as to anything occurring before appointment of executors.** MoA 24 SW(2d)183.

2304-23 325 Ill 529, 156NE802.

2304-24 MoA 10SW(2d)680.

2304-24½-New. Testimony tending to show trust agreement with wife of deceased held admissible in spite of statute. TexCivA 293SW577.

2304-25 162Ga664, 135SE195. But see 101NJEq615, 138A876. **Action between heirs.**-331 Ill 160, 162NE877. **Evidence should be admitted but limited so as not to affect child as heir** when pertaining to transactions with deceased and offered against widow and child. TexCivA 24 SW(2d)786 (excluded as incapable of limitation). **Plaintiffs seeking to set aside deed from deceased mother to daughter** are not incompetent. 337 Ill 520, 169NE324.

2304-26 169Ark1102, 278SW36; 167Ga 54, 145SE45; NJCh 135A330.

2304-27 142 Okl 233, 286P335, 69ALR 681; TexCivA 4SW(2d)144; TexCivA 23SW(2d)414; TexCivA 27SW(2d)893.

2305-28 169Ark1102, 278SW36; 142 Okl 233, 286P335, 69ALR681.

2305-31 191NC176, 131SE587; 298Pa 124, 148A61.

2305-34 125Kan305, 264P37.

2305-37 117Nebr276, 220NW274.

2305-39 226Ky343, 10SW(2d)1085.

2306-49 207 Iowa954, 222NW442.

2307-55 222MoA510, 281SW75. **A surviving partner,** etc. 87CalA684, 263P 353; 19 OhA64. Contra 129Kan747, 284 P374.

2307-56 87PaSuper448. **Joint contractor.**-129Kan747, 284P374.

2307-58 214Ala143, 107S92; 37GaA 776, 142SE173. But see 232Ky195, 22 SW(2d)580. **In an action by or against a corporation,** etc. See also 52Nev140, 283P403. **Administrator** is not agent. Ga 155SE24.

2308-59 201 Iowa1094, 206NW143 (deceased husband as agent of wife party to suit making no claim under kinship); 54SD492, 223NW713.

2308-60 41Wyo 324, 285P797.

2309-62 But see 329 Ill 334, 160NE597.

2309-67 320Mo 57, 6SW(2d)576, 67 ALR489.

2310-75 216Ala610, 114S204; MoA 21 SW(2d)202; MoA 31SW(2d)98; Tex CivA 29SW(2d)529.

2311-77 180Minn391, 231NW10.

2311-79 143Miss291, 108S492 (testimony of transactions during deceased's lifetime tending to establish claim is inadmissible); 295Pa120, 144A912; 46 Philippine193.

2312-95 235Mich613, 209NW816; 235 Mich579, 209NW924; 236Mich221, 210 NW237; 239Mich290, 214NW135; 246 Mich377, 224NW657; 246Mich545, 224 NW752; 249Mich269, 228NW698; 251 Mich688, 232NW353; 251Mich309, 232 NW369. **Testimony held incompetent.**-234Mich102, 207NW919; 235Mich613, 209NW816; 235Mich579, 209NW924; 239Mich290, 214NW135; 249Mich16, 227NW539. **Term "matter"** as used in statute means fact or facts material to issue being tried. 237Mich76, 211NW 75. **Matters within knowledge of deceased is question of fact.**-246Mich377, 224NW657.

2312-96 Mo 278SW382.

2313-2 TexCivA 271SW641.

2313-3 175Ark43, 295SW13; 161Ga 517, 131SE483; 166Ga717, 142SE86; 36 GaA61, 135SE220; 37GaA668, 141SE 419; 39GaA730, 148SE358(2dcase); 246 IllA442; 83 IndA335, 147NE736; 217Ky670, 290SW475; 219Ky35, 292 SW495; 219Ky695, 294SW156; 220Ky 569, 295SW863; 226Ky311, 10SW(2d) 1106; 226Ky621, 11SW(2d)434; 228Ky 83, 14SW(2d)413; 228Ky802, 16SW (2d)452; 232Ky739, 24SW(2d)554; 125 Me292, 133A164; 156Md610, 145A204; 222MoA510, 281SW75; 100NJEq417, 136A327; 242NY405, 152NE129; 243NY 130, 152NE699; 126Misc436, 213NYS 119; 228AppDiv19, 238NYS443; 228 AppDiv119, 239NYS44; 136Misc 893, 242NYS417; 191NC176, 131 SE587; 193NC494, 137SE427; 128 Okl 118, 261P216, 44 OklACR199; 49SD442, 207NW449; SD 226NW 740 (statute strictly construed); Tex CivA 3SW(2d)478; TexCivA 16SW(2d) 160; TexCivA 16SW(2d)366; 67Utah 45, 245P695; 99WVa673, 129SE709. **Such transactions are not of themselves incompetent** but evidence thereof may be given by persons not disqualified by statute. 117Nebr198, 220NW 255.

2314-4 212Ala685, 103S892; 84Colo 565, 272P621; 115Nebr557, 213NW809; 49SD442, 207NW449, 450 [citCyc].

2314-5½-New. Statutory prohibition against testifying to omission, by deceased includes denial that transaction occurred. 217Ky148, 289SW215. **Evidence held properly excluded under this rule.**-217Ky148, 289SW215.

2314-6 165Ga103, 139SE870; 49SD 442, 207NW449, 450 [quotCyc]. **Under statute** prohibiting testimony by party to action by executor, question as to what constitutes transaction depends on circumstances of particular case. TexCivA 18SW(2d)221.

2314-7 49SD442, 207NW449, 450 [quot Cyc].

2314-8 TexCivA 3SW(2d)478, 480 [cit Cyc]; 41Wyo 324, 285P797.

2314-9 Transaction held not to constitute personal transaction or communication with deceased.-191NC176, 131SE 587.

2314-9½-New. Transaction or communication is one such as deceased, if alive, could deny, rebut, or explain. 165Ga 103, 139SE870.

2315-14½-New. Opinions of heirs, beneficiaries, or executors as to undue influence over testator are not admissible in will contest. TexCivA 276SW964.

2316-35 236 IllA126 (automobile accident). **Includes tortious occurrences.**-317 Ill 620, 148NE391, 41ALR343 (accident resulting in death). **Testimony held incompetent,** etc. 95Fla321, 116 S31 (marriage); 207 Iowa1287, 224NW 554; 242NY405, 152NE129; 54SD325, 223NW208; TexCivA 16SW(2d)160. **Transactions with opposite party** held to embrace automobile accident in which brother of witness was killed. 236 IllA 126.

2316-36 34F(2d)899; 204 Iowa490, 215 NW607; 206 Iowa680, 218NW575; 206 Iowa514, 219NW305; TexCivA 18SW (2d)221. **Testimony held competent,** etc. Iowa 224NW550; 49SD442, 207NW449; TexCivA 283SW271 (that witness was daughter of alleged widow of decedent).

2316-36½-New. Testimony as to how injury to decedent occurred is transaction with deceased within statute. Tex CivA 3SW(2d)478.

2317-37 201 Iowa148, 205NW833 (receipt of letter). Contra 37GaA668, 141 SE419. **Whose signature** was attached to letter received may be testified to. 201 Iowa148, 205NW833. **Physical condition of instrument** when witness signed it may be testified to. 201 Iowa148, 205 NW833. **Fact of collision** equally within knowledge of deceased may be inadmissible. 250Mich645, 231NW120.

2317-40 161Ga517, 131SE483; 201 Iowa586, 207NW598; 206 Iowa514, 219 NW305; 177Minn577, 226NW195; 230 AppDiv330, 243NYS597; 44 OklACR 199; TexCivA 30SW(2d)565; 146Va 325, 131SE830.

2318-42 8F(2d)365; 167Ga498, 146SE 187; 206 Iowa809, 221NW460; 222Ky 454, 1SW(2d)767; 168Minn426, 210NW 284; MoA 290SW119; NJCh 134A360; 245NY17, 156NE81; 249NY58, 159NE 723; 119 Oh603, 165NE301; 120 Oh55, 165NE533; 44 OklACR199; Pa 151A 690 (lessee); TexCivA 274SW204; Tex CivA 281SW328; 153Wash119, 279P 391 (incompetent). **Testimony as to transaction with deceased agent in which note was given** is incompetent. 37GaA776, 142SE173.

2318-43 168Minn426, 210NW284.

2318-44½-New. But witness may testify to explain his own conduct negativing existence of contract. 126Misc436, 213NYS119.

2319-49 Iowa 232NW133; 155Md243, 141A706; MoA 297SW425; 23 OhA83, 155NE247; 294Pa323, 144A141; Tex CivA 5SW(2d)816.

2319-51 MoA 297SW79.

2319-53 But see TexCivA 5SW(2d)816.

2319-53½-New. Administrator living with intestate who has paid doctor's bill, may testify as to such claim. 217 Ala323, 116S161.

2320-57 Contra 217Ky148, 289SW215.

2320-58 197NC407, 149SE381. But see TexCivA 295SW211.

2320-60 245 IllA423; TexCivA 283SW 271 (claim of alleged common-law wife of decedent that she lived with him for twenty-nine years till his death); Tex CivA 2SW(2d)963.

2320-64 TexCivA 286SW680 (amount received on note).

2320-66 45 Ida724, 265P697; 229Ky 666, 17SW(2d)733; Mo 292SW25; 131 Misc490, 227NYS690; TexCommnA 17 SW(2d)786(2dcase). **In Minnesota.**-166 Minn153, 207NW311.

2321-67 Holder of executory contract of sale may testify as to failure of deceased grantees to perform by payment. TexCivA 282SW1115.

2321-75½-New. Evidence denying testimony of bookkeeper of insane maker of note as to payment is admissible. 176Ark328, 2SW(2d)1089, 59ALR899.

2321-76 217Ky50, 288SW1037; 221Ky 679, 299SW576; 102WVa454, 135SE390. But see 36F(2d)337; TexCivA 11SW (2d)350. **The executor,** etc.-130Misc865, 226NYS1. **Testimony of witness for plaintiff in suit for specific performance** to enforce parol gift of land, that he ran south line to plot of land as directed by plaintiff is not inadmissible as referring to transaction with deceased. 165Ga103, 139SE870. **In Virginia.**-150Va56, 142SE378. **Grandsons of donor not incompetent** merely because they are sons of one donee and nephews of another donee. 102WVa454, 135SE390.

2321-77 160Ga281, 127SE848 (or to fact of decedent's knowledge or that with knowledge no objection was made); 165Ga103, 139SE870; MoA 2SW(2d) 207; 83NH489, 144A848; ND 231NW 888; TexCommnA 12SW(2d)114, 63 ALR435; TexCivA 271SW311; Tex CivA 275SW96. But see 237 IllA570. **Possession of the thing derived from decedent,** etc. 165Ga103, 139SE870.

2322-83 143Miss291, 108S492; MoA 13 SW(2d)1076; 197NC246, 148SE242.

2322-84 176Ark1149, 6SW(2d)28.

2322-85 204 Iowa490, 215NW607.

2322-91 218Ky459, 291SW730 (usual royalty paid for privilege of mining coal).

2322-93 131Misc490, 227NYS690; Tex CivA 2SW(2d)481.

2323-95 86 IndA201, 156NE574; 201 Iowa586, 207NW598; TexCivA 17SW (2d)116. **Beneficiary may testify as to conversations with testator** for purpose of laying foundation to testify as to testator's mental condition. 177Minn226, 225NW102.

2323-96 201 Iowa586, 207NW598; Tex CivA 281SW331. See also TexCivA 271 SW311. But see 180Minn70, 230NW 275; TexCivA 20SW(2d)396. **Opinions of heirs, beneficiaries, or executors** as to sanity of testator is inadmissible in will contest. TexCivA 276SW964.

2323-98 217Ky846, 290SW690; Tex CivA 5SW(2d)208.

2333-99 220Ky626, 295SW900; 227Ky 431, 13SW(2d)279; 232Ky44, 22SW (2d)435.
2323-4 Ga 155SE24. But see 298Pa 124, 148A61.
2323-6 198NC765, 153SE451. **In Kentucky.**–219Ky163, 292SW486.
2324-14 101WVa535, 133SE131, 133 [quotCyc].
2324-18 165Ga103, 139SE870; 101WVa 535, 133SE131, 133 [quotCyc].
2324-19½-New. Rule does not exclude documentary evidence. 333 Ill 208, 164 NE405.
2324-20 Identification of note as one referred to in presence of third person.–37GaA668, 141SE419.
2325-28½-New. Payee charged with having fraudulently raised amount of note after maker signed it may be permitted to answer question as to whether such was fact and to deny having altered note. **TexCommnA** 276SW647.
2325-28⅓-New. Admission of check and bank book as evidence that defendant delivered check to deceased is not erroneous. 154SC126, 151SE228.
2325-30 TexCivA 16SW(2d)154.
2325-31 TexCivA 18SW(2d)708; **Tex CivA** 32SW(2d)513.
2325-32 See also 117Nebr198, 220NW 255 (letter proved by competent evidence admissible). But see 194NC583, 140SE193.
2325-33 Proof by writer's copy.–SD 224 NW929.
2326-36 119Kan666, 240PS53.
2326-36½-New. Testimony that witness sent letter to deceased which was never returned is not incompetent. 49 Nev451, 248PS93.
2326-39 83NH160, 139A750.
2326-43½-New. Testimony from recollection refreshed by books.–Partner incompetent to testify to transaction with deceased partner cannot testify from recollection refreshed by memorandum entered in books of partnership. 187 Wis640, 205NW402.
2326-47 249Mich218, 228NW696.
2327-48 But see SD 225NW225.
2327-50 119Kan666, 240PS53; 145 Wash405, 260P247.
2327-51 215Ala507, 111S235; **TexCivA** 13SW(2d)419.
2327-54½-New. Testimony by plaintiff seeking to enforce parol gift of land, that sale of certain plot by donor was not consummated because he objected to it and would not sign deed is incompetent. 165Ga103, 139SE870.
2327-55 Party charged with fraudulent alteration of instrument may deny it. TexCommnA 276SW647.
2328-59 SD 225NW225.
2328-60 77Colo 370, 237P165, 166 [cit Cyc].
2328-61 77Colo 370, 237P165, 166 [cit Cyc].
2328-62 206 Iowa514, 219NW305; 205 Iowa1379, 219NW492; 125Kan466, 265 P42; 226Ky621, 11SW(2d)434; 99NJ Eq657, 134A173; **NJSup** 140A25; 190 NC66, 128SE475; 56NDS99, 219NW784; **TexCommnA** 148SW(2d)808; 195Wis47, 217NW719.
2330-64 TexCivA 16SW(2d)1110.
2330-69 Promise of decedent to witness' father to pay witness for services is personal transaction between witness and decedent. **Iowa** 230NW330.
2330-70 220Ky54, 294SW783; 49Nev 451, 248P893; 87PaSuper448; **Wash** 287P41. But see 48SD302, 204NW167.
2331-71 See also 220Ky54, 294SW783.
2332-73 179Ark387, 16SW(2d)9. **Testimony as to transaction with deceased cashier of adverse party** properly excluded. 218MoA645, 266SW496.
2332-74 335 Ill 52, 166NE477; **NH** 148 A582; 316 Ill 221, 147NE40; 67Utah 171, 246P535.
2333-79 TexCivA 29SW(2d)529. **For purpose of showing good faith and intent.**–134Misc143, 235NYS428.
2333-79½-New. Mere reference to fact which admittedly exists and has been set up by one party as necessary basis of defense cannot be regarded as testimony against that party. **TexCommnA** 276SW647.
2333-83 NJCh 150A783.
2334-85 Testimony of widow showing that decedent is not resident of New York, in proceeding to probate will, has been held not incompetent in absence of showing that evidence is inadmissible under laws where decedent is claimed to have been resident. 134Misc192, 235 NYS741.
2334-86 163Ga267, 135SE923; 313Mo 1, 281SW445.
2334-87 163Ga267, 135SE923; 222Ky 476, 1SW(2d)532; 154Miss713, 123S 865; 313Mo 27, 281SW445; 200Wis248, 227NW877.
2335-89 222Ky454, 18SW(2d)767.
2335-90 219Ky770, 294SW497.
2335-91 145Miss652, 110S211.
2335-94 317 Ill 561, 148NE293; 243NY 130, 152NE699; 248NY421, 162NE473; 228AppDiv119, 239NYS44.
2336-95 242NY405, 152NE129. **Rule applied.**–242NY405, 152NE129.
2336-96½-New. Executor's testimony as to transaction with deceased being admissible, its introduction did not waive disqualification of opposite party. **TexCivA** 18SW(2d)221.
2336-97 83 IndA335, 147NE736.
2336-98 215Ky5, 284SW101.
2337-99 163Ga271, 136SE81 (relatives of deceased may testify).
2337-3½-New. Deposition of complainant who dies excluded in so far as personal transactions were covered. 99 NJEq857, 133A273.
2337-3¼-New. Statute permitting reading of depositions regardless of death of party held not to apply to personal transactions. 99NJEq857, 133A273.
2338-6 219AppDiv632, 220NYS788 (holding plaintiff's testimony given to corroborate evidence of her son as to contract related to personal transaction).
2338-8 243NY130, 152NE699; **TexCivA** 286SW680, 685 [quotCyc].
2338-8½-New. but it becomes admissible where adverse party offers in evidence such witness' testimony taken in former trial. 243NY130, 152NE699.
2338-8¼-New. Where witness dies during postponement of trial, testimony given before postponement is not rendered inadmissible. 240Mich368, 215 NW289.
2338-9½-New. Plaintiff in personal injury action is not incompetent because of death of driver of wagon causing injury where driver's deposition was used at trial. **MoA** 285SW797.
2339-11 But see 86 IndA79, 156NE165.
2339-12 After a party, etc. 86 IndA 79, 156NE165.
2339-16 236 IllA126; 125Me292, 133A 164; 237Mich76, 211NW75; 246Mich 545, 224NW752; 129Misc302, 221NYS 181; 136Misc893, 242NYS417; 191NC 176, 131SE587; **TexCivA** 286SW680; 99 WVa407, 129SE482. **Effect of Ohio statute** is to enlarge right of parties to testify in own behalf. 120 Oh206, 165NE 727. 64ALR1144. **Adverse evidence must be introduced on trial of action or special proceeding on merits.**–254NY 139, 172NE269.
2340-18 236 IllA126; 298Pa108, 148A 53(2dcase). But see 198NC765, 153SE 451.
2341-20 236 IllA126; 115 Okl 153, 241 P342. But see 197NC407, 149SE381.
2341-21 36GaA61, 135SE220; 236 IllA 126 (by statute); 118Tex1, 299SW862. **Where brother of deceased testified** as to facts causing brother's death by defendant's automobile, he was interested witness so as to admit defendant's testimony. 236 IllA126.
2341-22½-New. Cross-examination as to plaintiff's reason for amending complaint does not render competent evidence as to personal transaction with deceased. 192NC371, 134SE288.
2341-22¼-New. Testimony by intestate's attorney, who was not agent, does not remove incompetency of defendant. 25F(2d)247.
2341-23 166Ga794, 144SE271; 191NC 176, 131SE587; **TexCivA** 278SW873; **TexCivA** 286SW680.
2342-24 TexCivA 278SW873.
2342-25 TexCivA 286SW680 (referring to conflict in Texas decisions).
2342-26 168Minn426, 210NW284.
2342-26½-New. In order that incompetency be removed, decedent must actually have testified in former trial, **Tex CivA** 286SW680.
2342-26¼-New. and mere fact that decedent was alive at former trial and might have testified but did not, is insufficient to render testimony admissible. **TexCivA** 286SW680.
2342-33½-New. Deposition of decedent taken when he was competent to testify does not render testimony of adverse party admissible. 168Minn426, 210NW 284.
2342-33¼-New. Deceased's letter to plaintiff held not such "memorandum" as to qualify plaintiff as witness. **Me** 150A491.
2342-34 317 Ill 620, 148NE391, 41ALR 343; 204 Iowa473, 215NW761; 132Misc 531, 229NYS563; 35 OhA443, 172NE 561; 120 Or144, 251P763; **Pa** 152A38; 105WVa385, 142SE845.
2343-35 241 IllA58; **TexCivA** 30SW (2d)565. **Admission of irrelevant evidence by adverse party did not** warrant admission of incompetent testimony of witness. 234Ky353, 28SW(2d)35.
2344-36 23F(2d)317; 237Mich76, 211 NW75; 145Miss683, 110S237; 307Mo 98, 270SW662; 248NY421, 162NE473; 128Misc422, 220NYS204; 226AppDiv10, 221NYS309; 198NC34, 150SE670; 59 ND47, 228NW459; 120 Oh206, 165NE 727. 64ALR1144; **TexCivA** 299SW950; **TexCivA** 4SW(2d)620; **TexCivA** 30SW (2d)565; 100Vt51, 134A853; 103WVa 665, 138SE376. See also 215AppDiv516, 213NYS684. **Calling in probate court as affecting competency on trial de novo in appellate court.**–307Mo 98, 270SW662. **In proceeding to discover assets of decedent's estate,** incompetency of defendant to testify as to conversations or transactions with decedent is waived as to whole proceedings where plaintiff examined defendant in reference thereto, in probate court, before filing written interrogatories. 316Mo 1094, 295SW563. **That plaintiff called defendant for cross-examination under statute** does not affect rule. 59ND47, 228NW459.
2344-37 216Ala435, 113S306; 88CalA 322, 263P371; **CalA** 290P887(2dcase); 315Mo 1091, 287SW610; **MoA** 28W(2d) 178; 128Misc422, 220NYS204; 290Pa 43, 138A217; 50Philippine698. **Defendant's cross-examination of plaintiff on previous trial as to irrelevant matters only** is not waiver of objection to plaintiff's competency on retrial of same action to testify as to transactions with deceased. 315Mo 1091, 287SW610. **Heirs who are necessary parties defendant** with right to any defense that executor could make held entitled to call adverse party as on cross-examination. 20 OhA497, 152NE761.
2345-39 228Ky719, 15SW(2d)511.
2345-41 214Ala143, 107S92.
2345-43 243NY130, 152NE699; 214App Div493, 212NYS377; 226AppDiv10, 221 NYS309. **Omission by later act of provision of former act** waiving objection to testimony as to transactions with deceased where witness was examined thereto in discovery proceedings is not repeal of such provision. 214AppDiv 493, 212NYS377.
2345-43½-New. In New York, in administrator's discovery proceedings, defendant who claimed articles in question may testify upon issue of title. 243NY 130, 152NE699.
2346-45½-New. Calling agent of adverse party for cross-examination.–Under some statutes, where representative of deceased, suing physician for causing decedent's death by administration of anesthetic, calls defendant's assistant for cross-examination under statute and thereby elicits testimony otherwise inadmissible as matter equally within knowledge of decedent, defendant is entitled to full explanation by witness of subject inquired into. 237Mich76, 211 NW75.
2346-46 TexCivA 275SW96.
2346-46½-New. Fact that **executors** had placed satisfaction of **mortgaged** debt on record is not tantamount to their having been called as witnesses so as

to permit defendants to testify. 295 Pa120, 144A912.

2346-49 TexCivA 275SW96.

2346-50 125Me292, 133A164; 33 OhA 97, 168NE750; 298Pa108, 148A53(2d case); TexCivA 275SW96.

2347-55 154SC126, 151SE228.

2347-57 Plaintiff by calling surviving defendant charged jointly with negligence for cross-examination does not render himself competent as witness against decedent's estate. 13PaDist&Co 21.

2347-58 Pa 152A38; TexCivA 4SW(2d) 620; 54SD325, 223NW208; 99WVa407, 129SE482. **In Pennsylvania.**–152A38.

2348-59 100Vt51, 134A853.

2349-62 84 IndA508, 151NE701; MoA 282SW735; 136Misc863, 242NYS464; 23 OhA83, 155NE247; TexCivA 275SW96; 67Utah474, 248P122. See also MoA 297 SW425. **Sole owner of decedent's estate** by conceding complainant entitled to reformation of deed waives objection as to testimony of transaction with deceased persons. 213Ala163, 104S321.

2349-65 TexCivA 4SW(2d)144.

2350-68 See also 217MoA119, 273SW 768.

2350-70 CalA 288P870.

2350-72 143SC429, 141SE721.

2351-75 307Mo 98, 270SW662.

2351-78 33 OhA97, 168NE750. **Party held not to have waived objection** by conduct of counsel. 238Mich108, 213 NW145.

2351-79 CalA 290P630; TexCivA 275 SW93.

2351-79½-New. Plaintiff examining defendant under oath, under authority of statute, held to waive his incompetency. 316Mo 483, 291SW132.

2351-80 CalA 290P887(2dcase); 241 NY354, 150NE141; TexCivA 22SW(2d) 961. See also 132Misc531, 229NYS563.

2351-81 Committee of incompetent could waive objections where it believed cross-examination would be of benefit to incompetent. 241NY354, 150NE 141.

2352-82½-New. By placing witness on stand party waives his incompetency, even with respect to answers which are not responsive to questions. 141Miss 617, 106S881.

2352-82¾-New. Courts will not raise waiver of incompetency upon mere pretext. 217MoA119, 273SW768.

2352-82¼-New. Introduction of cross interrogatory and evidence as to matters not relating to transactions with deceased does not waive bar. TexCivA 2 SW(2d)963.

2352-83 100Vt51, 134A853.

2352-84 307Mo 98, 270SW662; MoA 290SW119. **Plaintiff's waiver of defendant's incompetency** to testify that deceased grantor delivered deed does not waive incompetency as to other matters. 215Ala507, 111S235.

2352-85 241NY354, 150NE141.

2352-85½-New. But reading of testimony of incompetent at former trial may not be objected to. 241NY354, 150 NE141.

2352-87 95Fla321, 116S31. But see 94 PaSuper216.

2352-88 TexCivA 275SW96 (testimony of persons not interested in estate as to what occurred in sanitorium's office not waiver of executor's right to object to defendant's testimony that "deceased gave him key to tin box").

2352-90½-New. Evidence of payment of claim to one since deceased held sufficiently corroborated. 149Val, 141SE 134.

2352-90¾-New. Evidence has been held sufficient to establish facts so as not to disqualify witness claimed to have acted as agent of decedent. MoA 15SW(2d) 957.

2352-91 95Fla321, 116S31; 86Mont260, 283P423 (2dcase) (admitted only where exclusion will result unjustly). See also MoA 275SW769.

2352-93½-New. Corroboration of testimony.–In action by personal representative against husband and wife on note in which husband interposed plea of set-off, both defendants are adverse or interested parties whose testimony is required to be corroborated. 153Va315, 149SE409 (defendants cannot corroborate each other).

2352-93¼-New. Weight of testimony.–All evidence relative to conversations with deceased must be viewed with caution by jury. 86Mont260, 283P423(2d case).

2352-93¼-New. Adverse or interested party in action against personal representative must be corroborated on some essential fact whose establishment is necessary to sustain judgment. 153Va 315, 149SE409.

2352-93½-New. Testimony of adverse party seeking recovery against estate has been held not corroborated under statute by book entry for goods furnished deceased where entry is for lump sum and is made four or five years after work is done. 153Va315, 149SE409.

2352-93¾-New. In action by personal representative, in which defendant asserts claim for work and material furnished seven years before, defendant's testimony has been held not sufficiently corroborated. 153Va315, 149SE409.

2352-95 150Miss621, 116S287; 26 Oh NPNS521. See also 255 IllA503.

2353-98¼-New. No confidential relation exists between police officer and accused. 163La112, 111S617.

2353-99 149Miss455, 115S555.

2353-2 165Ga210, 140SE625.

2353-4 165Ga210, 140SE625; 170Ga 349, 153SE11; 234 IllA78; 197 Ind169, 150NE56 (dictum); 232Ky739, 24SW (2d)554; 242Mich422, 218NW667; 175 Minn414, 221NW639; 220MoA489, 274 SW103; 220MoA76, 278SW1050; MoA 278SW1051; MoA 29SW(2d)240; MoA 31SW(2d)238; 80Mont181, 260P138; 215AppDiv553, 214NYS307; 26 OhA442, 160NE478; 33 OhA445, 169NE833; 158 Tenn531, 14SW(2d)735; TexCr 31SW (2d)815; 106WVa672, 146SE726, 63ALR 101.

2354-5 102CalA370, 283P94; 170Ga 349, 153SE11 (communications not confidential); 123Kan304, 255P68; MoA 31SW(2d)238; 215AppDiv553, 214NYS 307; 70Utah456, 261P15.

2354-6 198 Ind156, 152NE803; 123Kan 304, 255P68; 164La813, 114S696; 26 OhA442, 160NE478; 70Utah456, 261P 15. **Consideration of letter** on issue of prior abandonment held not error against contention that letter was confidential, not being induced by marriage relation. 241NY446, 150NE511 (though if error, it was not substantial). **Widow's testimony as to testator's handwriting** is not incompetent in contest of husband's will. 235Ky189, 30SW(2d) 893.

2354-8 Where husband and wife are joint parties and have joint interest in action, they may testify for or against each other. 38 OklACR390. **Testimony of divorced wife that she saw stains resembling blood on husband's clothing** is competent. 103TexCr205, 280SW586. **Testimony of divorced wife that she burned husband's shirt on which she saw certain stains** is competent. 103 TexCr205, 280SW586.

2354-9 But see 241NY446, 150NE511.

2355-16 80Mont181, 260P138, 146 [quot Cyc].

2355-22 But see 220Ky256, 294SW1085.

2355-26½-New. Husband's testimony as to wife's alleged confession of adultery. 125Misc851, 213NYS4.

2355-26¼-New. An alleged agreement by husband to buy realty in their joint names on promise of wife to refrain from further adultery is properly excluded. 125Misc851, 213NYS4 (in action by wife in partition tried together with husband's action to be declared sole owner).

2355-26¼-New. Evidence of taking defendant's blood-strained coat from chair in house, not obtained from his wife, held not inadmissible as involving wife's testimony against husband. 289Pa284, 137A261.

2355-26½-New. Wife's testimony as to the act of her husband shooting another in her presence is not privileged. 33 OhA445, 169NE833.

2355-27 201Cal 689, 258P588.

2356-28 254 IllA469 (statute construed as restricting competency); 38 OklACR 390.

2356-29 38 OklACR390.

2356-30 9PaDist&Co 397.

2356-32 70Utah456, 261P15, 28 [quot Cyc].

2356-33 70Utah456, 261P15, 28 [quot Cyc]. But see 265Mass189, 163NE906.

2356-34½-New. But in actions relating to real estate former husband's testimony as to wife's alleged confession of adultery is properly excluded. 125Misc 851, 213NYS4.

2356-36½-New. Co-conspirators.–Where husband and wife are such co-conspirators, declarations not privileged. 100TexCr442, 273SW845.

2357-37 198 Ind156, 152NE803; 70 Utah456, 261P15, 28 [quotCyc].

2357-39 70Utah456, 261P15, 28 [quot Cyc].

2357-40 170Ga349, 153SE11.

2357-41 30F(2d)80 [certiorari den 279 US852, 49SCt348(5thcase), 73L ed995]; 165Ga210, 140SE625; Iowa 231NW380; NC 155SE452; 108TexCr408, 1SW(2d) 615.

2358-48 285Pa49, 131A657, 660 [cit Cyc]. **Letters in the possession of the personal representative,** etc. But see 165Ga210, 140SE625.

2358-49 285Pa49, 131A657, 660 [cit Cyc]. **In North Carolina.**–155SE452.

2358-50 285Pa49, 131A657, 660 [cit Cyc].

2358-54½-New. Wife's diary kept from husband showing guilt of adultery is not inadmissible. Wis 230NW80.

2359-57½-New. Privilege is not affected though marital relation is terminated by death or otherwise. 30F(2d)80 [certiorari den 279US852, 49SCt348(5th case), 73L ed995].

2359-57¼-New. Letter written after separation, and just before commencement of divorce proceedings is not privileged as confidential communication induced by marital relation. 215AppDiv 553, 214NYS307.

2359-58. 78CalA380, 248P975, 978 [cit Cyc]; MoA 31SW(2d)238; 215AppDiv 553, 214NYS307; 197NC376, 148SE450; 129 Or11, 276P248; 100TexCr442, 273 SW845; 105TexCr669, 284SW965; 105 TexCr458, 288SW1071; 110TexCr460, 9 SW(2d)259.

2359-61 Okl 290P181(2dcase). But see 106WVa672, 146SE726, 63ALR101.

2359-63 IndA 169NE362 (conversations in which husband took no part); 205 Iowa379, 218NW39, 40 [citCyc].

2359-64 78CalA380, 248P975.

2359-65 78CalA380, 248P975, 978 [cit Cyc]; 267Mass157, 166NE820; 197NC 376, 148SE450; 106WVa672, 146SE 726, 63ALR101.

2360-69½-New. In habeas corpus to determine custody of child one parent may testify against other. 90PaSuper 400.

2360-71 In proceedings to set aside decree declaring wife feme sole trader husband has been held incompetent to testify against wife. 90PaSuper410.

2360-73 165Ga210, 140SE625; 197 Ind 169, 150NE56 (dictum).

2360-74 But see 165Ga210, 140SE625.

2361-80 164La813, 114S696; 30NM 557, 240P303.

2361-81 220Ala210, 124S420; 103CalA 624, 284P1096; 165Ga210, 140SE625; 206 Iowa281, 218NW944; 158Md393, 148A585; 167Minn93, 208NW805; MoA 294SW736 (basis of rule); 84Mont14, 273P1044; 79Mont198, 255P737; 116 Nebr670, 218NW746; Nebr 232NW781; 117 Or107, 241P62; 289Pa331, 137A 455; 33PortoRico 276; 155Tenn371, 293SW539; TexCivA 289SW79; Tex CivA 15SW(2d)1060; TexCivA 25SW (2d)989; 106TexCr652, 294SW571; 99 Vt343, 132A45; 104WVa382, 140SE346; Can [1927] 3DomLR265. **In Oregon.**–117 Or107, 241P62. **Notary.**–32Porto Rico 591. **Privilege must be waived** by client. 33PortoRico 276. **Privilege arises by reason of confidential relation** rather than by reason of character or importance of advice sought. 241Mich 156, 216NW420.

2362-82 117 Or107, 241P62; 155Tenn 371, 293SW539. **Rule is based on public policy.**–165Ga210, 140SE625.

2362-83 165Ga210, 140SE625.

2362-84 Exclusion of deposition of representative of adjustment agency to which plaintiff intrusted his case has

been held error in action for injuries. 248Mich237, 226NW854.

2362-92 Rule does not extend to case where communication was made at time principal was acting hostile to agent. 5F(2d)45.

2363-96 Ark 308SW(2d)849; **35Porto Rico** 481. **Question as to whether accused employed counsel to defend another held not** improper as requiring disclosure of confidential communication. **Va** 152SE547.

2363-2 204 **Iowa**881, 216NW258; 312 **Mo** 510, 279SW411; 117 **Or**107, 241P62; 99Vt343, 132A45; 104WVa382, 140SE 346. **No formal retainer is necessary.**–117 **Or**107, 241P62. **Communications between public officer and attorney employed by his superior** are not privileged in prosecution of officer for embezzlement. 312Mo 510, 279SW411. **Testimony relating to conversation between witness and deceased husband** in her behalf may be admitted. **Mass 171** NE661.

2365-5 217Ala426, 116S127; 322 **Ill** 492, 153NE740, 743 [citCyc] (rule held inapplicable); 117 **Or**107, 241P62.

2365-7 14PaDist&Co 239.

2366-11 Iowa 227NW601 (attorney visiting defendant at request of latter's mother); 310Mo 287, 275SW540; 155 **Tenn**371, 293SW539.

2366-12 117 **Or**107, 241P62. But see **Ont** [1925] 2DomLR966.

2366-15 316Mo 1032, 292SW1033, 1036 [citCyc]; 117 **Or**107, 241P62.

2367-21 117 **Or**107, 241P62.

2367-22 322 **Ill** 492, 153NE740; **MoA** 294SW736, 738 [citCyc]; **Nebr** 232NW 781.

2367-24 78**CalA**223, 248P716; 316**Mo** 1032, 292SW1033, 1036 [citCyc]; 117 **Or** 107, 241P62; 155**Tenn**371, 293SW539; 99Vt343, 132A45.

2368-25 206 **Iowa**732, 221NW474; 263 **Mass**288, 160NE892; 81**Mont**311, 263P 683; 142 **Okl** 152, 286P322; 288Pa527, 136A796; 289Pa331, 137A455 (attorney drafting contract of sale held not attorney for both parties). See also 32 **PortoRico** 591.

2368-26 51**ND**554, 215NW881.

2368-27 206 **Iowa**281, 218NW944; 231 **Ky**801, 228W(2d)285; 320Mo 57, 6SW (2d)576, 586 [quotCyc], 67ALR489.

2369-29 135Misc356, 238NYS121.

2369-32 222AppDiv204, 226NYS70; 26 **OhA**335, 159NE481; 39 **OklACR**378. But see 32NM319, 255P396; 131Misc 428, 226NYS68. **Access to statements to district attorney,** in seeking evidence to prosecute public offenses, should be denied. 222AppDiv204, 226NYS70. **Reason for rule.**–222AppDiv204, 226NYS70. **Where informers disclose to district attorney facts** which may constitute crime, rule of privilege applies. 222AppDiv204, 226NYS70.

2369-33 TexCr 292SW609.

2369-34 BC [1929] 4DomLR231.

2370-36 170Ark823, 281SW391; 320 **Ill** 371, 151NE244; 322 **Ill** 492, 153NE740; 206 **Iowa**732, 221NW474; 312Mo 510, 279SW411; **Mont** 292P725; 228AppDiv 795, 240NYS44; 39 **OklACR**378; 99Vt 343, 132A45; 36**Wyo** 12, 252P790.

2370-37 99**Cal** 409, 278P855.

2370-38 99Vt343, 132A45.

2370-41 TexCommnA 298SW409.

2371-47 36**Wyo** 12, 252P790.

2371-48 170Ark823, 281SW391; **Tex CivA** 158W(2d)166; 36**Wyo** 12, 252P 790.

2371-49½-New. Attorney may testify as to custody of instrument.–36Wyo 12, 252P790.

2371-53 312Mo 510, 279SW411; **Mont** 292P725; 117 **Or**107, 241P62.

2372-55 328 **Ill** 420, 159NE790. **Communications held not privileged.**–328 **Ill** 420, 159NE790; **MoA** 294SW736.

2372-58 356**GaA**340, 133SE307.

2372-59 356**GaA**340, 133SE307.

2373-62 312Mo 510, 279SW411.

2373-63 22F(2d)66; 312Mo 510, 279SW 411.

2373-64 22 **OhA**58, 153NE269. See also 32**PortoRico** 591. But see 105WVa46, 141SE434.

2374-67 217Ala432, 116S520, 524 [cit Cyc].

2374-72 217Ala432, 116S520, 524 [cit Cyc].

2374-73 217Ala432, 116S520, 524 [cit Cyc]; 322 **Ill** 492, 153NE740; 206 **Iowa** 732, 221NW474; 119 **Or**636, 250P840; 285Pa533, 132A709. But see 23AlaA112, 121S499(2dcase); **OhA** 173NE611. **Delivery of deed to be delivered to grantee.**–85CalA720, 260P342.

2375-75 316Mo 1032, 292SW1033, 1036 [citCyc].

2375-79 99**Cal** 409, 278P855; 322 **Ill** 492, 153NE740; 206 **Iowa**281, 218NW 944; 127**Kan**688, 275P160; 130Misc499, 223NYS777; 222AppDiv82, 225NYS317.

2376-80 79**Mont**198, 255P737. **Illustrations.**–79Mont198, 255P737.

2376-83 33**PortoRico** 620. But see 33 **PortoRico** 276.

2376-87 See also 30F(2d)584.

2376-89½-New. Letters written by client to attorney are admissible to prove that same party wrote anonymous letters properly in evidence. 318 **Ill** 114, 149NE3.

2377-91½-New. Rule does not prevent examination of attorney as to possession of contract involved in suit. 219 **Ala**382, 122S619.

2377-91½-New. Written instruments are communications within rule of privilege. 241**Mich**156, 216NW420.

2377-91¼-New. Condition of written instrument.–Privilege includes testimony as to condition of written instruments. 241**Mich**156, 216NW420.

2377-91⅛-New. Testimony of attorney as to whether will, when shown to him by person who wrote it and who consulted him professionally, contained same language as when offered for probate should be excluded as privileged communication. 241**Mich**156, 216NW 420.

2377-91⅛-New. Foregoing rule applies though neither attorney nor client had claim under will. 241**Mich**156, 216NW 420.

2377-95 204 **Iowa**881, 216NW258; 206 **Iowa**281, 218NW944; 206 **Iowa**732, 221 NW474; 316Mo 333, 289SW939, 941 [citCyc]; 127**Misc**579, 217NYS323; 21 **OhA**496, 153NE252; 289Pa331, 137A 455, 457 [quotCyc]. **Rule does not apply** where third person was present in capacity of attorney for client. 322 **Ill** 492, 153NE740.

2377-96 320 **Ill** 371, 151NE244; 218**Ky** 508, 291SW718; 199**Wis**162, 225NW 831, 64ALR180.

2377-97 320 **Ill** 371, 151NE244. But see 106**TexCr**652, 294SW571. **Where circumstances indicate communications were not intended to be confidential** attorney may testify. 102**CalA**647, 283P 368.

2377-98 36**GaA**266, 136SE460; 231**Ky** 337, 218W(2d)441; 320Mo 57, 6SW(2d) 576, 586 [quotCyc], 67ALR489.

2378-99 316**Mo** 333, 289SW939.

2378-1 316**Mo** 333, 289SW939; 289**Pa** 331, 137A455, 457 [quotCyc].

2378-2 Testimony of conversation between attorney and client heard through wire tapping held not inadmissible. 7 F(2d)760.

2379-11 MoA 294SW736, 738 [citCyc].

2379-12 203**Cal** 61, 263P200; 165**Ga** 210, 140SE625; 316Mo 1032, 292SW 1033, 1036 [citCyc].

2379-13 316**Mo** 1032, 292SW1033, 1036 [citCyc].

2379-14 165**Ga**210, 140SE625. Contra 46**Philippine**938.

2380-17 165**Ga**210, 140SE625.

2380-18 14**PaDist&Co** 239.

2380-19 217**Ala**426, 116S127, 131 [cit Cyc]. But see 116**Nebr**670, 218NW746.

2381-20 217**Ala**364, 116S427, 428 [cit Cyc]; 177**Minn**169, 225NW100. **Attorney's secretary included.**–135**Misc**311, 238NYS112.

2381-21 135**Misc**630, 239NYS252.

2381-25 MoA 178W(2d)658. See also 86 **IndA**335, 157NE467, 468 [citCyc].

2381-26 232**Ky**726, 248W(2d)680; 243 **Mich**250, 220NW697.

2381-27 42F(2d)48; 171**Ark**1074, 287 SW583; 174**Ark**372, 295SW715; 200**Cal** 299, 252P1049; 41 **Ida**697, 243P647; 86 **IndA**326, 157NE448; 86 **IndA**335, 157 NE467, 468 [citCyc]; 118**Kan**323, 235P 96 (existence of privilege is not personal to physician); 232**Mich**36, 204NW771; 142**Miss**210, 106S753; 145**Miss**702, 110 S586 (mere rule of evidence); 149**Miss** 455, 115S555; 150**Miss**621, 116S287; 219**AppDiv**246, 219NYS152; 284**Pa**299, 131A186 (limited to communications tending to blacken character of patient); 69**Utah**309, 254P1005. See also 152**Miss** 747, 118S437. **Privilege is purely statutory.**–25F(2d)680. **Rule of exclusion is rule of adjective law.**–149**Miss**455, 115S 555. **In North Carolina.**–194NC199, 139 SE228.

2381-27½-New. No unfavorable inference can be drawn from exercise of privilege as to testimony of physicians. 218 **AppDiv**431, 218NYS490.

2382-29 25F(2d)680; **Miss** 130S733; 116**Nebr**125, 216NW294; 52**ND**633, 204 NW341, 343 [perChristianson,J,quot Cyc]; 69**Utah**268, 254P142; 69**Utah**309, 254P1005. **Statute, being in derogation of common law needs strict construction.** 25F(2d)680. **Under Veteran's Compensation Act.**–171**Ark**1074, 287SW 583. **Privilege does not extend to physician who examined plaintiff for adverse party,** when doctor is called by plaintiff as witness. 142**Wash**25, 252P164. **Hospitals.**–86 **IndA**335, 157NE467. **Exclusion of statement made to physician after relationship of physician and client has been terminated,** and not to enable physician to prescribe treatment, has been held prejudicial error. 197**NC**571, 150SE32(1stcase).

2382-30 116**Nebr**125, 216NW294; 52 **ND**633, 204NW341, 342 [perChristian son,J,quotCyc].

2382-31 52**ND**633, 204NW341, 343 [per Christianson,J,quotCyc].

2383-32 52**ND**633, 204NW341, 343 [per Christianson,J,quotCyc].

2383-33 52**ND**633, 204NW341, 342 [per Christianson,J,quotCyc]; 69**Utah**268, 254P142.

2383-34 See also 118**Kan**323, 235P96.

2383-35 152**Miss**747, 118S437; 52**ND** 633, 204NW341.

2383-37½-New. Testimony of insurance company's physicians as to insured's condition when examined by them before issuance of policy is not privileged in company's action to cancel policy for false representations in insured's application. 218**AppDiv**431, 218 NYS490.

2383-37⅞-New. Where relationship of physician and client did not exist between employer's physician and employee, in examination before he started to work physician may testify. 69**Utah** 309, 254P1005.

2383-38 156**Miss**693, 126S650, 68ALR 167 (chiropractors not included); **Miss** 130S50.

2384-40 MoA 256SW501.

2384-42 116**Nebr**125, 216NW294.

2384-44 Assistant physician is in same position as main physician. 86 **IndA** 335, 157NE467.

2384-45 Wis 232NW873.

2384-45½-New. In Pennsylvania only those communications are privileged which tend to blacken character of patient; 284Pa299, 131A186.

2384-45⅛-New. so that a physician may testify that patient had convulsions, provided he does not testify further that they were symptoms of a loathsome disease. 284Pa299, 131A186.

2384-46 35**Ark**35, 274P166; **IndA** 154 NE395; 52**ND**633, 204NW341, 342 [per Christianson,J,quotCyc]; 69**Utah**268, 254P142.

2385-47 IndA 154NE395.

2385-48 That examination was without knowledge or consent of injured person's attorney does not render testimony incompetent. **MoA** 178W(2d)658.

2385-49 52**ND**633, 204NW341, 343 [cit Cyc]. **Principle applied** where physician examined prisoner at sheriff's request and thereafter gave treatment for venereal disease discovered in prisoner. 52 **ND**633, 204NW341.

2385-49½-New. Statement is not privileged when made to attending doctor who ran into injured person. **IndA** 152 NE288.

2385-52 116**Nebr**125, 216NW294; 69 **Utah**268, 254P142.

2385-53 116**Nebr**125, 216NW294.

2386-55 Contra 69Utah268, 254P142.
2386-61 86 IndA326, 157NE448; 24 OhA471, 157NE803.
2386-62 41F(2d)12.
2387-64 86 IndA326, 157NE448.
2387-68 86 IndA326, 157NE448; 223 AppDiv461, 228NYS354.
2387-69 197Cal 702, 242P703; 95CalA 617, 273P165; 152Miss747, 118S437; 219AppDiv246, 219NYS152. **Hospital records are within rule.**–Wash 291P 1101.
2387-70 **Testimony of private practitioner** who observed accused in jail, as to accused's sanity, held not privileged. 163La701, 112S655.
2387-71 181Ark528, 27SW(2d)85. But see 295Pa349, 145A437.
2387-72 232Mich36, 204NW771; 153 Miss53, 120S180. But see 136Misc167, 238NYS702.
2387-72½-New. Physician's certificate of cause of death is not privileged communication. 251NY208, 167NE223(2d case).
2387-72½-New. Testimony of physician in public health institution, as to health of patient in such institution, is not privileged communication, where statutory provision, requiring receiving physician of such institution to make report of each case with his diagnosis, renders such report public record. 28 OhA497, 162NE822.
2388-76 25F(2d)680; 46 Ida622, 269P 993. **Autopsy by physician who never treated patient.**–Privilege does not apply generally. 86 IndA335, 157NE467. **Autopsy performed by physician who treated patient.**–86 IndA335, 157NE467.
2388-77 29Ariz405, 242P436, 439 [cit Cyc]; 205 Iowa621, 218NW334; 142 Miss210, 106S753.
2388-78 29Ariz405, 242P436, 439 [cit Cyc]. **Court may properly require witness to show that he can disregard opinion based on treatment.**–29Ariz405, 242P436.
2388-79 See also 249NY78, 162NE589.
2388-80 89CalA336, 265P281; 204 Iowa 819, 216NW104.
2388-83 150Miss621, 116S287; 52ND 633, 204NW341. But see 168Ark1145, 273SW19; 205 Iowa1130, 217NW225.
2389-85 143Miss121, 108S433, 436 [per McGowen,J,dis.op.quotCyc], 45ALR1348. See also 232Mich36, 204NW771. **In action on life policy,** insured being patient the communications may be privileged. 207 Iowa167, 216NW62, 62ALR31.
2389-86 143Miss121, 108S433, 436 [per McGowen,J,dis.op.quotCyc], 45 ALR 1348. Contra 69Utah268, 254P142.
2389-87 143Miss121, 108S433, 436 [per McGowen,J,dis.op.quotCyc], 45ALR1348.
2389-87½-New. As mere rule of evidence, rule of privilege is applicable in action under Federal Employers' Liability act. 145Miss702, 110S586.
2389-87½-New. Privilege does not apply in action by patient for alleged negligence. Cal 290P441.
2389-88 200Cal 299, 252P1049; 142 Miss210, 106S753; 143Miss121, 108S433, 436 [perMcGowen,J,dis.op.,quotCyc], 45 ALR348.
2389-89 143Miss121, 108S433, 436 [per McGowen,J,dis.op.quotCyc], 45ALR348.
2390-95½-New. Testimony of public health nurse, as to health of insured, is not privileged communication, since public nurse is not named in statute relating to privileged communications. 28 OhA497, 162NE822.
2390-95¼-New. **Communications to nurse** are not privileged under statutes in some jurisdictions unless made when acting as physician's assistant or agent. 55ND546, 214NW857.
2390-95¼-New. as where communications are received or heard from patient and are necessary to enable physician to prescribe or act for patient. 55ND 546, 214NW857.
2391-8 255 IllA503; 172Minn106, 214 NW732; 152Va368, 147SE267. But see Kan 289P412; 265Mass166, 165NE467. **Information obtained in course of examination of banks.**–307Mo 185, 270SW 110; 315Mo 75, 285SW513, 47ALR688. **Source of information.**–WVa 155SE656. **Statute prohibiting state officers from disclosing information regarding bank** should be strictly construed when invoked for limitation of judicial inquiry. Va 154SE492. **Communication made to county judge** by one claiming allowance as widow of decedent relative to her relations with deceased is not privileged in absence of showing that it was made in official confidence. 52SD472, 218NW 633, 59ALR1549.
2391-9 15F(2d)163; 16F(2d)563; 39 F(2d)903(1stcase); SD 227NW66(1st case) (prohibition agent as witness). But see 153Miss616, 121S278; 154Miss 212, 122S398. Contra 151Miss518, 118 S539.
2393-22 4HawaiiFed475.
2393-27 312Mo 458, 278SW759.
2393-28 312Mo 458, 278SW759.
2394-29 312Mo 458, 278SW759.
2394-32 143Miss121, 108S433 [quot Cyc], 45ALR1348; 285Pa533, 132A709; 51SD554, 215NW881; TexCivA 15 SW(2d)1060.
2394-33 143Miss121, 108S433 [quot Cyc], 45ALR1348; 285Pa533, 132A709.
2394-34 143Miss121, 108S433 [quot Cyc], 45ALR1348; 285Pa533, 132A709. **Daughter seeking to set aside deed of deceased father** held not his personal representative. 285Pa533, 132A709.
2394-35 143Miss121, 108S433 [quot Cyc], 45ALR1348.
2394-36 Ark 30SW(2d)855; 204 Iowa 819, 216NW104; 143Miss121, 108S433 [quotCyc], 45ALR1348; 173Minn51, 216 NW311; 285Pa533, 132A709. **Defendant in prosecution for rape** cannot claim privilege in respect to physician's testimony regarding examination of prosecutrix. Ark 30SW(2d)855.
2395-37 143Miss121, 108S433, 45ALR 1348 [quotCyc]; 285Pa533, 132A709. But see 42F(2d)48.
2395-40½-New. In action for alienation of wife's affections, brought at a time when wife had become wedded to defendant, defendant, not interposing objection has been held not entitled to claim privilege, where plaintiff testified as to communications made to him by his former wife, privilege of having communication withheld from witness stand being that of wife and plaintiff. 129 Or 11, 276P248.
2395-41 337 Ill 111, 168NE908; 312Mo 458, 278SW759, 766 [citCyc].
2395-42 55ND546, 214NW857. **Objection should be made to each question** calling for privileged information. 55 ND546, 214NW857.
2395-46½-New. No unfavorable inference can be drawn against party to action for objecting to testimony of doctor on ground of privilege. 55ND546, 214 NW857.
2395-47 52ND633, 204NW341, 343 [per Christianson,J,citCyc]; 46Philippine 625; 104WVa382, 140SE346; 108WVa 254, 150SE740.
2396-55 117 Or107, 241P62. **Statement by court held ruling as to admissibility.**–127Misc281, 215NYS794.
2397-59½-New. It is erroneous to exclude evidence to show that relation of attorney and client did not exist. 228 AppDiv674, 239NYS603.
2397-60 Ark 32SW(2d)162; 201Cal 689, 258P588; 101CalA396, 281P629; 164La 813, 114S696; 312Mo 458, 278SW759.
2397-61 In Oklahoma.–39OklACR229 (testimony by husband).
2397-62 197Cal 702, 242P703; 79CalA 488, 250P190; 264Mass181, 162NE356; 33PortoRico 276. **That client's testimony tends to impeach attorney** does not render it inadmissible. 79CalA488, 250P190.
2397-63 79CalA488, 250P190; 322 Ill 492, 153NE740; 207 Iowa167, 216NW 62, 62ALR31; 264Mass181, 162NE356; 146Miss339, 111S433; 51SD554, 215NW 881.
2397-64 46 Ida622, 269P993, 996[cit Cyc]; 219AppDiv246, 219NYS152 (privilege is bar to testimony of witness unless waived by personal representative). Contra 142Miss210, 106S753. **Adopted child** may waive privilege. Mo 5SW(2d) 405. **Heir at law** can waive privilege of communication between decedent and physician. 46 Ida622, 269P993. **Question is determined** from interpretation of statute in light of common law. 46 Ida622, 269P993. **Beneficiary in policy of insurance** may waive privilege. 42F(2d)48.
2398-66 See also 146Miss339, 11S433.
2398-70½-New. Where attorney acted under general power of attorney he may consent to admission of confidential communications. 12PortoRicoFed 119.
2399-71 176Ark1174, 5SW(2d)340; 146Miss339, 111S433.
2399-73 207 Iowa167, 216NW62, 62 ALR31.
2399-75 248Mich380, 227NW755 (statement of wife's counsel to court to go ahead with examination of husband held waiver); 147Wash345, 265P 1082. **Disclosure, by introduction of proofs of death, of deceased's ailments,** held no waiver of privilege as to prior treatments by doctors. 219AppDiv 246, 219NYS152. **Failure to object to introduction of evidence** held waiver of privilege by spouse. 96PaSuper288.
2399-76 Ark 32SW(2d)162; 95CalA 617, 273P165; 204 Iowa819, 216NW 104; 22 OhA58, 153NE269 (privilege is waived where client is willing to testify and consents that attorney may do so).
2399-77 32F(2d)195; 95CalA617, 273 P165.
2399-80 See also Cal 290P441.
2400-81 196Wis29, 219NW448, 62ALR 675. **In Indiana.**–A 148NE501.
2400-82 See also 147Wash345, 265P 1082.
2400-83 41F(2d)12; 116 Oh693, 158 NE176, 178 [citCyc], 54ALR406. **Stipulation that any physician who "has been consulted" may be examined** as to any matter learned by such consultation does not embrace physicians subsequently consulted by insured. 207 Iowa167, 216NW62, 62ALR31.
2400-85 See also 137Misc542, 242NYS 715. **Signed affidavit of claimant as to illness** in which he agreed to allow physicians who had treated him to give information as to past or present physical condition does not waive privileges because it forms no part of insurance contract and is not supported by consideration. 69Utah309, 254P1005.
2400-86½-New. **Privilege of secrecy between attorney and client** is waived where attorney becomes subscribing witness. 125Misc475, 211NYS450.
2400-86⅓-New. **By voluntarily testifying to material facts** in behalf of his clients, attorney waives privilege as to communications between them showing his interest in subject matter of litigation. TexCivA 275SW606.
2400-86¼-New. Admitting statements without objection is waiver of privilege. 164La813, 114S696.
2400-86⅓-New. **Provision of insurance contract requiring insured, as condition precedent to any liability of insurer,** to furnish insurer with report in writing from attending physician or surgeon, does not constitute waiver of statutory privilege against introduction of physician's testimony without consent of patient. 153Miss60, 120S836.
2400-86⅓-New. Beneficiary may waive privilege by offering testimony touching insured's physical condition. 42 F(2d)48.
2401-88 5F(2d)824; 205 Iowa621, 218 NW334; 206 Iowa281, 218NW944; 124 Okl 260, 256P727; 130 Okl 251, 267P 252; 117 Or107, 241P62; SD 214NW 881. **Testimony which is not voluntary,** etc. 135 Okl 53, 273P988. **Attorney may testify that defendants admitted offense** to him and told him they wanted to plead guilty after they have testified that they pleaded guilty as result of implied advice of attorney. 5F(2d)824. **Patient's testimony before grand jury** renders physician competent to testify to facts learned by him in treatment of patient. 204 Iowa819, 216NW104.
2401-90 But see 231Ky337, 21SW(2d) 441.
2402-91 MoA 293SW84, 86 [quotCyc]. But see 264Mass181, 162NE356. **Testimony on cross-examination** is not "voluntary," in sense constituting waiver of privilege. Miss 130S479. Plain-

tiff testifying on cross-examination that he was willing for physician to testify does not constitute waiver. **Miss** 130S479.

2402–92 The taking of depositions of witnesses, etc. 130Kan5, 285P539.

2402–94 146Miss339, 111S433; **ND** 231 NW854.

2402–95 TexCr 32SW(2d)360. **Acts and conduct by which husband and wife waive privilege.**–97CalA30, 275P 448.

2403–97 243Mich250, 220NW697.

2403–2½–New. Where patient has detailed facts to persons with whom he had no confidential or professional relations, physician may testify to facts learned in treatment of patient. 204 Iowa819, 216NW104.

2403–4 217AppDiv377, 216NYS652 (will); 30 OhA184, 164NE644.

2403–5½–New. Execution of document incorporating physician's affidavit does not make affidavit admissible, if it was procured by agent of insurance company, and beneficiary signed document without reading it or having it read to him. 232Mich36, 204NW771.

2403–6 288Pa527, 136A796 (holding attorney entitled to meet imputation of fraud); 51SD554, 215NW881.

2405–15 142Miss210, 106S753; 116 Nebr670, 218NW746.

2405–18 But see 224AppDiv168, 230 NYS51.

2405–19 Okl 291P106.

2405–20 MoA 30SW(2d)190.

2405–21 MoA 30SW(2d)190.

2406–24½–New. Where witness waives privilege or court disregards it, party against whom evidence is used cannot complain of error. 32F(2d)195.

2406–25 266Mass374, 165NE513(2d case); 105NJL618, 147A636 (trial court must restrict examination of witness to material inquiry); 192NC20, 133SE190; 54ND543, 210NW19. **Failure of court to instruct** as to what is meant by general reputation for peace and quietude has been held not error, where witness was having trouble in testifying. **Ind** 167 NE531. **When necessary to keep long trial within some limit,** trial judge should reprove counsel in examination of witnesses. 35F(2d)689. **But counsel need not propound questions in form suggested by court;** they may frame own questions. 152Md216, 136A609.

2406–27 169La109, 124S188; **TexCivA** 300SW659.

2406–28 77Colo 432, 236P1022 (insolent behavior of witness should be reprimanded); 135Wash248, 237P708.

2406–30 169Ark326, 275SW667 (record held to show that prosecutrix in prosecution for carnal abuse was not compelled to testify to any given facts but merely to give testimony); 200Wis454, 229NW31.

2407–34½–New. It is duty of court to compel recalcitrant witness to testify. 169Ark326, 275SW667.

2407–34½–New. Where ignorant witness becomes excited or confused, it is duty of court to relieve him from fear or nervousness. 34NM494, 285P497.

2408–54 Examination must be confined to matters relevant to issue.–21AlaA464, 109S375.

2408–58½–New. Extent to which prosecuting attorney shall question any witness is in his discretion. 294Pa544, 144 A542.

2408–62 87Colo 6, 284P341; **Ga** 155SE 7; 46 Ida561, 270P417; 202 Iowa450, 209NW468, 473 [citCyc]; 230Ky250, 19 SW(2d)218; 255Mass104, 151NE84; 262 Mass416, 160NE252; 57ND900, 225NW 319; 33 OhA488, 169NE716; 44Philippine30; 137SC145, 134SE885; 136Wash 106, 238P920; 143Wash397, 255P146; Wash 292P737. **Control of conduct and demeanor of witness** must necessarily be left largely to judge's discretion. **Mo** 29SW(2d)156. **Right to examine witnesses** is essential element in conduct of trial. 124Misc668, 208NYS803.

2409–64 152Md380, 136A900.

2409–66 25F(2d)581; 42 Ida517, 246P 313; 104NJL291, 140A287.

2409–67 255Mass104, 151NE84; 266 Mass286, 165NE416; **MoA** 296SW838; 50ND927, 198NW698; 136Wash106, 238 P920.

2409–68 OklCr 282P686.

2409–69 35F(2d)633; 44Philippine30.

2409–70 49Nev386, 248P48.

2409–71 266Mass374, 165NE513(2d case).

2410–76 230Ky250, 19SW(2d)218; 50 ND927, 198NW698; 136Wash106, 238P 920.

2410–76½–New. Court may permit juror to question witness, but is not required to. 220MoA290, 286SW432.

2410–77 163La435, 112837; 318Mo 1149, 28W(2d)758. **Statements of judge as to results of his previous examination of child** in habeas corpus proceedings without jury are improperly read into record, where he was not sworn and examined as witness. **TexCivA** 275SW606.

2410–78 71CalA683, 236P174 (where judge at close of trial questioned witness).

2411–82 71CalA138, 234P917. But see 246Mich130, 224NW636. **Admission of unsworn testimony of children** incapable of understanding nature of oath is error, and attempt by court to affirm children did not cure error. 134 Misc475, 235NYS672.

2412–2 109Conn711, 145A655.

2412–3 Nebr 230NW440.

2412–4 TexCivA 299SW660; **TexCivA** 32SW(2d)688.

2413–13 In case of witness who was physically incapable of speaking or even whispering it was held error to appoint his wife as interpreter on ground that she alone could understand his answers. 69CalA475, 231P572.

2413–15 233 IllA331.

2413–17 76CalA168, 243P894.

2414–24½–New. Appointment of prosecutrix's mother as her interpreter, in prosecution for rape, held not improper, where she could communicate only with persons with whom she was familiar. 21AlaA466, 109S371.

2414–28 213Ala576, 105S583 (in prosecution for murder where issue of self-defense was raised objection to question whether defendant's son told him deceased was "hanging around" held properly sustained); 217Ala432, 116S 520; 293Pa97, 141A638.

2414–29 101TexCr329, 275SW713.

2414–31 In divorce proceedings right to call opposite party for cross-examination should be exercised sparingly and to reach relevant facts difficult or incapable of proof otherwise. 234Mich 444, 208NW428.

2415–35 159La589, 105S631 (holding it not prejudicial to permit witness to tell what she knows about case). See also 104NJL291, 140A287. **On cross-examination,** narrative may and should be allowed where story is of character calling for utmost liberality in testing state's principal witness' ability to restate it. 236Mich226, 210NW219.

2415–37 191NC690, 132SE788; 100Vt 334, 137A199; 38Wyo 190, 266P117.

2416–38 166La924, 118885. See also **TexCivA** 28SW(2d)622.

2416–39 105Conn366, 135A391; 100Vt 334, 137A199.

2416–40 Mass 172NE113 (explanation of plans held proper).

2416–41 8F(2d)16; 38Wyo 190, 266P 117.

2416–42 50Nev271, 257P619; 191NC 378, 131SE743. **Time of taking.**–191NC 378, 131SE743.

2416–43 214Ala187, 106S811.

2416–44 38Wyo 190, 266P117.

2416–45 167La1003, 120S626.

2417–47 Exhibit held not competent where there was no testimony of credible nature that it was accurate. 23 OhA 304, 154NE361.

2417–47½–New. Memorandum made by witness is admissible for purpose of identifying matters referred to in questions and answers to make them intelligible. 176Minn480, 224NW146.

2417–48 200 Iowa843, 205NW511 (witness may make mathematical computation as summary of detail record evidence).

2417–51 158La300, 103S821. **Question by proponent to subscribing witness** held proper in view of his prior testimony. 215Ala402, 110S705.

2417–56 NJSup 135A348.

2417–57 See also **NJSup** 135A348.

2417–64 But see 30Ariz366, 247P129.

2417–66½–New. Question not definite as to time properly excluded. 21 OhA 143, 153NE95.

2417–66½–New. Question held objectionable as to form and as not indicating intended illegal use of premises. **NJ** 135A348.

2417–66¼–New. Question embracing separate and distinct issues is improper. **TexCommnA** 288SW817.

2417–66⅓–New. In examination of witnesses as to particular conversation, counsel should ask if witnesses had such conversations, and what substance was. 227Ky528, 138SW(2d)521.

2417–66⅓–New. Questions asking for plaintiff's contentions in case may be improper since they are presumably fixed by plaintiff's attorneys. 158Md 525, 149A275.

2418–67 154Md213, 140A95; 266Mass 374, 165NE513(2dcase); 84Mont158, 274 P489; 103TexCr318, 280SW202; 66 Utah1, 239P29; 69Utah557, 257P658. **Answer to question not bearing upon issue** properly excluded: 21AlaA155, 106S797. **Question not within issue.**–215Ala576, 105S583.

2418–68 48 Ida405, 283P519; 200 Iowa 660, 204NW278. But see 23AlaA572, 129S316.

2418–70 Questioning of witness concerning his war service to explain his present physical condition held not erroneous where defect in speech. 155 Wash622, 285P938.

2418–71 22AlaA140, 114S73.

2418–71½–New. or tests **his recollection,** 48SD400, 204NW899.

2418–73½–New. Autobiography of witness not relevant to issue should be excluded. 101TexCr59, 274SW158.

2418–75 72CalA226, 237P66; 93Fla372, 112873; **Iowa** 228NW75; 255Mass285, 151NE302; **Mass** 173NE551; 195NC 363, 142SE229; **ND** 232NW6(2dcase); 132 Or145, 285P214.

2419–76 21AlaA631, 111S190; 171Ark 271, 284SW17; 255Mass285, 151NE 302.

2419–79 110Conn312, 147A807; 336 Ill 11, 167NE807.

2419–85 That fact that witness was inmate of penal institution was brought out in answer to question as to residence is not ground of error available to accused in criminal case. 206 Iowa365, 218NW936.

2419–86 217Ala164, 115S101.

2420–88 209Ky787, 273SW515.

2420–89 215Ala576, 105S583 (holding that question, in prosecution for homicide, whether defendant's son told him deceased was "hanging around" was uncertain and indefinite as to time); 72 CalA226, 237P66, 69 [citCyc]; 48 Ida 688, 284P845; 264Mass208, 162NE368; 21 OhA143, 153NE95 (question indefinite as to time); **RI** 139A301; **Vt** 147A 346. **If adverse party fails to cross-examine,** he may not complain that testimony as to negotiations was indefinite in regard to time. 31NM457, 247P270. **Question held not uncertain or confusing.**–22AlaA123, 113S320.

2421–91 21AlaA289, 107S791; 22AlaA 39, 111S767; 23AlaA572, 129S316; 72 CalA226, 237P66; **NJSup** 130A437; 224 AppDiv168, 230NYS51.

2422–92 216Ala189, 113S16. But see 216Ala151, 112S761.

2422–93 Objection to interrogatory permitting witness to make any other statement he might think of which might be of advantage of either or both parties has been properly sustained. 21AlaA 44, 104S887.

2422–95 214Ala187, 106S809; 214Ala 364, 107S821 (question held argumentative); 216Ala403, 113S265; 217Ky491, 290SW333 (question whether witness saw plaintiff in time to stop car); 52 ND659, 204NW350.

2422–97 214Ala187, 106S809; 199Cal 513, 250P164; 98Fla1196, 125P694; 163 Ga186, 136SE72; 325 Ill 474, 156NE485; 201 Iowa1202, 203NW284; 212Ky112, 278SW568; 220Ky640, 295SW983; 220 Ky808, 295SW1064; **Mo** 278SW412; 113 Nebr739, 204NW784; 114Nebr106, 206 NW19; **NJCh** 130A24; 54ND840, 211 NW585 (held harmless, however); **Tex CivA** 272SW222; **TexCivA** 268W(2d)

1081; 104TexCr371, 283SW816. But see 77CalA587, 247P245.

2423-98 201 Iowa1202, 203NW284.

2423-99 163Ga186, 136SE72.

2423-1 20AlaA617, 104S559; 85CalA 691, 259P980. **Question as to testimony at former trial** held leading where examiner did not state that it was to refresh memory. 214Ala187, 106S809.

2423-2 85CalA691, 259P980; 212Ky 112, 278SW568; 158La300, 103S821; 159La589, 105S631; 165La842, 116S 206; 103NJL200, 134A834; 108TexCr 210, 299SW907. **Questions held not leading.**–TexCivA 27SW(2d)568.

2423-4 161Ga517, 131SE483; 159La 589, 105S631; 164La813, 114S696; 84 Mont130, 276P437; 192Wis379, 212NW 879. **Rule** that witness might be asked if he intended, in giving deposition taken before trial, to make answer it contained has been held not erroneous. NH 146 A862.

2424-6 SD 226NW763.

2424-7 209Ky787, 273SW515.

2424-8 86 IndA632, 155NE712.

2424-12 166La924, 118S85; 169La947, 126S434 (question whether any of three named parties were in restaurant and which one, if any, was there held not leading).

2425-14 218Ala616, 119S635.

2425-16 221Ala585, 130S199.

2425-23 38F(2d)399; 221Ala556, 130 S69; 221Ala592, 130S203; 163La563, 112S486; 169La141, 124S672; 179Minn 444, 229NW556; 153SC25, 150SE321.

2426-24 22AlaA483, 118S170; 212Ky 112, 278SW568; 229Ky284, 17SW(2d) 233; 159La589, 105S631 (touching prosecutrix in incest case); 166La924, 118S 85; 168La95, 121S586; 311Mo 391, 279 SW23; 156SC509, 153SE480; TexCivA 289SW159; TexCivA 23SW(2d)401; 105TexCr126, 286SW1099; 108TexCr 210, 299SW907.

2427-26 35F(2d)483; 21AlaA5, 105S 161; 216Ala342, 113S391; 221Ala29, 127 S188; 221Ala322, 128S600; 21AlaA125, 106S67; 21AlaA214, 107S29; Ark 32SW (2d)158; 197Cal 200, 239P1080; 202 Cal 424, 261P298; 82Colo 233, 259P 1038; 39GaA111, 146SE518(2dcase); 202 Iowa1067, 208NW360; 165La842, 116S206; 257Mass421, 154NE91; 261 Mass281, 158NE840; 176Minn210, 222 NW924; 176Minn331, 223NW605; Mo 278SW1014; Mo 26SW(2d)957; 114 Nebr106, 206NW19; 82NH387, 134A 344; 103NJL200, 134A834; 103NJL 361, 137A575; NJSup 133A415; NJSup 151A484; 191NC528, 132SE151; 52ND 659, 204NW350; 55ND580, 214NW855; 35 OklCr279, 250P544, 49ALR1129; 141 Okl 133, 284P21; 116 Or635, 242P603; 137SC145, 134SE885; TexCivA 278SW 873; TexCivA 11SW(2d)594; TexCivA 18SW(2d)778; Vt 150A128(2dcase); 38 Wyo 190, 266P117.

2427-27 20AlaA570, 104S140; 21AlaA 517, 110S167; 69CalA127, 230P974; 163 Ga186, 136SE72; 35GaA386, 133SE518; 47 Ida162, 272P1010; 200 Iowa313, 202 NW212; 202 Iowa1067, 208NW360; 165 La822, 116S199, 203 [citCyc]; 103NJL 361, 137A575; 52ND659, 204NW350; 35 OklCr279, 250P544, 49ALR1129; 116 Or 635, 242P603; 117 Or430, 244P538.

2427-28 7F(2d)867; 23AlaA127, 123S 263; 197Cal 200, 239P1080; 83CalA332, 259P470; 163Ga80, 135SE408; 163Ga 186, 136SE72; 35GaA386, 133SE518; 27 Hawaii8; 125Kan252, 264P59; 252Mass 552, 148NE105; 259Mass211, 156NE15; 261Mass281, 158NE840; Mo 278SW1014; 52ND659, 204NW350; 55ND580, 214NW 855; 35 OklCr279, 250P544, 49ALR1129; 109TexCr40, 28W(2d)860.

2429-30 21AlaA125, 106S67; 21AlaA 214, 107S29; 197Cal 200, 239P1080; 163 Ga186, 136SE72; Ga 154SE337; 27 Hawaii8; 202 Iowa1067, 208NW360; 160 La26, 106S662, 665 [quotCyc]; Mo 278 SW1014; 191NC528, 132SE151; 52ND 659, 204NW350; 52ND925, 204NW889; 55ND580, 214NW855; 35 OklCr279, 250 P544, 49ALR1129; 116 Or635, 242P603. **Circumstances amounting to abuse of discretion.**–234Ky531, 28SW(2d)774; 114Nebr106, 206NW19.

2429-31 23AlaA274, 124S123(2dcase); 180Ark267, 21SW(2d)172; 99CalA409, 278P885; 42 Ida517, 246P313; 128Kan 299, 278P1; 234Ky531, 28SW(2d)774; 120 Or144, 251P763, 767 [quotCyc]; 52 SD582, 219NW263; 112TexCr92, 14SW (2d)63(2dcase).

2430-32 100TexCr220, 272SW480 (of limited vocabulary). See also 120 Or 144, 251P763, 767 [quotCyc].

2430-33 See also 120 Or144, 251P763, 767 [quotCyc].

2430-35 See also 120 Or144, 251P763, 767 [quotCyc].

2430-37 120 Or144, 251P763, 767 [quot Cyc].

2430-40 120 Or144, 251P763, 767 [quot Cyc].

2430-43 30Hawaii308; 336 Ill 580, 168 NE650 (discretion not abused); 227Ky 153, 12SW(2d)308.

2431-45 Mo 22SW(2d)787.

2431-46 336 Ill 580, 168NE650; 243 Mich638, 220NW737; 35 OklCr279, 250 P544, 49ALR1129. But see Va 154SE 508. **Answering in way not expected** in view of previous affidavit justifies conclusion of judge that witness is hostile. 243Mich638, 220NW737.

2431-48 35F(2d)483 (discretion not abused); 336 Ill 580, 168NE650; 66 Utah543, 244P654.

2431-49 120 Or144, 251P763; 141Wash 324, 251P589.

2432-51 69CalA127, 230P974.

2432-52 162Ga267, 134SE36; 120 Or 144, 251P763, 767 [citCyc].

2432-54 **Confronting witness with previous affidavit** is proper. 243Mich638, 220NW737.

2432-55 RI 140A2.

2432-57 152Wash365, 278P149.

2432-60 168La95, 121S586; 148Md188, 129A31; 103NJL361, 137A575; 52ND 925, 204NW889; 54ND840, 211NW585.

2433-64½-New. It is not error to exclude question relating to immaterial matter. NJSup 130A437.

2433-65 234Ky531, 28SW(2d)774; 160 La26, 106S662, 665 [quotCyc].

2433-67 234Mich88, 207NW865.

2433-68 212Ala597, 103S884; 221Ala 592, 130S203; 21AlaA456, 109S293; 22 AlaA289, 115S66; 23AlaA460, 126S890 (2dcase); 41GaA268, 152SE619; 336 Ill 11, 167NE807; 200 Ind43, 161NE265; 200 Iowa272, 204NW301; 206 Iowa629, 221NW59; 163La563, 112S486; 158Md 24, 148A238; 104NJL397, 140A419. **Questions held not objectionable,** etc. TexCivA 26SW(2d)451.

2435-70 52ND659, 204NW350.

2435-75 TexCivA 22SW(2d)737.

2435-77 116 Okl 202, 244P170 [quot Cyc].

2435-80 21AlaA289, 107S791; 86CalA 532, 261P732; 37GaA818, 142SE201; 253 IllA148; 253 IllA176; 201 Iowa10, 206NW635; 217Ky491, 290SW333; 165 Minn396, 206NW728; 95PaSuper212. See also 21AlaA5, 105S161. **Questions held not objectionable,** etc. See 108TexCr394, 1SW(2d)296.

2436-81 214Ala187, 106S809; 217Ala 71, 114S684; 121Kan29, 245P1036; 195 NC697, 143SE513. **Questions held not objectionable,** etc. 160La26, 106S662 (question in form asking for opinion as to understanding of counsel as to effect of previous testimony).

2436-86 32PortoRico 668.

2436-89 200 Ind43, 161NE265.

2437-93 102CalA169, 282P996; 41GaA 204, 152SE266; 45 Ida143, 260P1035; 158Md424, 149A4; 266Mass374, 165NE 513(2dcase); 150Miss787, 117S119; MoA 279SW253; 149SC125, 146SE684.

2437-95 35F(2d)633; 267Mass501, 167 NE235; NJSup 133A415; 153SC25, 150 SE321 (direction to counsel, "don't repeat," not abuse of discretion); 156SC 509, 153SE480; Vt 147A682; Vt 147A 687.

2437-96 IndA 151NE33; 52ND925, 204 NW889. **Repetition held not error** in view of circumstances. IndA 151NE33.

2438-98 22AlaA289, 115S66; 23AlaA 405, 126S185; AlaA 130S168; Mo 24 SW(2d)1020.

2438-1 214Ala187, 106S811; 217Ala225, 115S297; 21AlaA300, 107S731; 171Ark 203, 284SW28; 107TexCr614, 298SW 426; 107TexCr635, 298SW433; 149Va 447, 141SE118. **Repetitions and prolonged examinations of witnesses** should be eliminated by court to expedite proceedings. 149Va447, 141SE118.

2438-1½-New. And so, generally, court has discretion in preventing undue lengthening of case by repetition of testimony. 85PaSuper5.

2439-4 5F(2d)799; 6F(2d)498; 36 F(2d)694; 44F(2d)45; 22AlaA373, 115 S849; 72CalA611, 237P824; 79CalA27, 248P924; CalA 290P916; 201 Iowa1, 206NW281; 204 Iowa137, 214NW531; 118Kan620, 236P849; Mass 169NE516; 170Minn341, 212NW599 (to induce direct answer); MoA 294SW747; 82NH 133, 130A743; 83NH435, 144A124; Okl Cr 292P1053; 90PaSuper596, 608; 150 SC341, 148SE184; 153SC25, 150SE321; 143Wash127, 254P1086. **Where witnesses are reluctant,** etc. 53SD438, 221 NW53.

2440-5 Ind 172NE176; 204 Iowa137, 214NW531.

2440-6 Mo 22SW(2d)787 (examination held not erroneous).

2440-11 55AppDC381, 6F(2d)684 (no prejudice shown).

2440-14½-New. Court may not employ questioning of defendant as means of testifying himself to facts within his own knowledge. 6F(2d)498.

2440-15½-New. Extended cross-examination by court is not favored. 55App DC381, 6F(2d)684.

2440-16 322 Ill 473, 153NE710 (examination held too extensive).

2441-18½-New. If judge's examination of witnesses is extensive it should be done after that of counsel has been completed. 177Minn428, 225NW287(3d case).

2441-18⅓-New. Occasion for and extent of examination of witnesses by presiding justice are largely matters of discretion with court. 83NH435, 144A 124.

2441-18¼-New. Extent of examination by jury is within court's discretion. 230AppDiv487, 245NYS245.

2441-19 22AlaA373, 115S849.

2441-20 82NH133, 130A743; 82NH 518, 136A358 (question held not to assume matter not in evidence).

2441-21 82NH133, 130A743.

2441-22 82NH133, 130A743.

2441-23 MoA 15SW(2d)356; Tex CommnA 276SW426.

2441-25 177Minn428, 225NW287(3d case); 82NH133, 130A743; 142Va649, 128SE514.

2442-26 147SC82, 144SE839; 142Va 649, 128SE514. **Confession by defendant in prior interview with judge.**–6F(2d)498.

2442-27½-New. Improper questions amounting to testifying by judge himself constitutes error necessitating reversal. 6F(2d)498.

2442-28 **Where no objections** made to question by court, questions held not reversible error. 201 Iowa1, 206NW 281.

2442-29 CalA 287P559 (handwriting expert); Fla 130S582; 322 Ill 473, 153 NE710. **Court may call eyewitness to crime** whose veracity and integrity state's attorney may doubt. 333 Ill 469, 165NE235. **Court may call witness whose name is indorsed on indictment** and leave him open to cross-examination by either side. 338 Ill 636, 170NE 750. **Practice of court's calling witness** ought not to be adopted, except where it is shown that otherwise there may be miscarriage of justice. 333 Ill 469, 165NE235; 339 Ill 448, 171NE540. **Witness called by court may be examined by either party.**–339 Ill 448, 171 NE540.

2442-30½-New. Calling, by court, as witness, one who was not present at commission of burglary, is error. 333 Ill 469, 165NE235.

2442-32 **Jury have right to know witness' character** as regards propriety of answer stating his age, fallibility, and inexperience. 221Ala313, 128S606.

2443-40 104TexCr649, 285SW621.

2443-42 216Ky669, 288SW291.

2443-43 **Positive statement that third person could see object** is not objectionable as supposition of witness. 108 TexCr394, 1SW(2d)296.

2443-45 Mo 6SW(2d)903.
2443-46 214Ala187, 106S811; 37GaA 386, 140SE415; TexCivA 20SW(2d)248.
2443-47 21AlaA588, 110S320.
2444-53 23AlaA127, 123S263; 30Ariz 45, 243P916; 240Mich360, 215NW341; 318Mo 605, 300SW823; 49SD429, 207 NW454; TexCivA 23SW(2d)494; 113 TexCr75, 19SW(2d)41; 99Vt499, 134A 700; Vt 147A351. See also 100Vt476, 138A741. **Answers held not responsive.**–23AlaA94, 121S446; Ill 173NE139; 213Ky221, 280SW970; 317Mo 843, 297 SW397; 196NC395, 145SE781; Tex CivA 272SW803. **Answer held sufficiently responsive:**–221Ala511, 129S282; 167Ga766, 146SE754; 257Mass272, 153 NE784; 75Mont350, 243P537; 107Tex Cr19, 294SW564; 113TexCr335, 218W (2d)675(3dcase); 36Wyo 473, 257P484. **It is largely within trial court's discretion** whether improper voluntary statement of witness calls for mistrial. MoA 284SW850.
2446-54 217Ala120, 115S16; 36Wyo 473, 257P484.
2447-61 194NC42, 138SE342; 99Vt227, 131A16; 36Wyo 473, 257P484.
2447-63 194NC42, 138SE342; 36Wyo 473, 257P484.
2447-64 194NC42, 138SE342.
2448-70 30Ariz197, 245P354; 163Ga 186, 136SE72; 37GaA240, 139SE686; 223Ky633, 4SW(2d)731; 103TexCr311, 280SW817.
2449-74½-New. Refreshment of memory does not impeach or contradict witness. TexCommnA 17SW(2d)805.
2449-77 33F(2d)713 (extent to which memoranda may be referred to and inspected); 113TexCr591, 23SW(2d)731 (2dcase).
2449-78 Discretion held not abused.–DC 32F(2d)947.
2449-79 77CalA146, 246P157; 315Mo 409, 286SW45, 50 [citCyc]; 66Utah543, 244P654.
2450-81 315Mo 409, 286SW45, 50 [cit Cyc]; 113TexCr324, 21SW(2d)518(2d case).
2450-83 234Ky531, 28SW(2d)774.
2450-85 337 Ill 259, 169NE206; Iowa 228NW9; 315Mo 409, 286SW45, 50 [cit Cyc]; 104TexCr391, 283SW813.
2450-86 315Mo 409, 286SW45, 50 [cit Cyc]; 34NM65, 277P22; TexCivA 299 SW325.
2451-89 14F(2d)366; 15F(2d)955 (recognizing rule); 215Ala612, 111S901; 217Ala120, 115S16; 102Conn708, 130A 184; Conn 152A148; 162Ga267, 134SE 36; 37GaA240, 139SE686; 203 Iowa485, 210NW767; 255Mass369, 151NE839; 217MoA592, 274SW941 (expert witness); MoA 290SW630; 117 Or173, 242 P1114; 120 Or297, 252P84; 101TexCr 144, 274SW577, 579 [citCyc]; 103TexCr 311, 280SW817.
2451-90 203 Iowa485, 210NW767; Tex CivA 18SW(2d)726.
2451-91 219Ala607, 122S814.
2451-93 102Conn708, 130A184; 255 Mass369, 151NE839; NJSup 130A441.
2452-94 15F(2d)955.
2452-94½-New. Memoranda used by witness to refresh recollection and not intended to be offered in evidence should not be marked for identification. 102 Conn708, 130A184.
2452-94½-New. Sketch of land showing boundaries admissible, though its weight is for jury. 105Conn366, 135A 391.
2452-97 219Ala374, 122S630, 65ALR 1473; 102Conn708, 130A184.
2452-98 214Ala172, 106S692; 214Ala 473, 108S339; 30Ariz197, 245P354; 77 CalA146, 246P157; Conn 152A148; 37 GaA240, 139SE686.
2452-99 214Ala172, 106S692; 30Ariz 197, 245P354; 335 Ill 299, 167NE106; 11LaA184, 123S164; 53ND564, 207NW 438; 92PaSuper105. **A memorandum made by witness from book entries,** etc. MoA 282SW135.
2453-1 214Ala172, 106S692; 77CalA 146, 246P157.
2453-2 30Ariz197, 245P354; 37GaA 240, 139SE686.
2453-3 30Ariz197, 245P354; 77CalA 146, 246P157; 98Fla132, 123S564.
2454-4 214Ala473, 108S339; 203Cal 144, 263P216; 77CalA146, 246P157; 37 GaA240, 139SE686; 203 Iowa485, 210 NW767 (in part).
2454-6 219Ala374, 122S630, 65ALR 1473; 77CalA146, 246P157; MoA 285 SW1028; 139 Okl 181, 281P763.
2454-7 214Ala473, 108S339; 255Mass 575, 152NE704; 12PaDist&Co 287 (X-ray record of hospital).
2454-9 92PaSuper321; 97PaSuper78.
2454-12 104Conn54, 132A553; 3Del 497, 139A259; 131 Or242, 282P772.
2455-14 255Mass327, 151NE466 (garage record book kept pursuant to statute); 103TexCr311, 280SW817.
2455-15 3Del 497, 139A259.
2455-16 See also 149Md134, 131A31.
2455-18 214Ala172, 106S692.
2455-19 21AlaA393, 108S643; MoA 282 SW135.
2455-21 217Ala120, 115S16; 122Kan 136, 137, 251P631 [citCyc].
2456-25 TexCommnA 17SW(2d)805.
2456-27 218Ala599, 119S644.
2456-31 23F(2d)636; 169Ark225, 273 SW13 (testimony before grand jury); 87CalA440, 262P380; 90CalA764, 266P 606; 163Ga186, 136SE72; 206 Iowa615, 220NW59; 207 Iowa221, 222NW552.
2457-32 101TexCr144, 274SW577. See also 198Cal 426, 245P426.
2457-33 88CalA272, 263P339; 99Vt91, 130A758.
2457-41½-New. or phonographic reporter. 77CalA146, 246P157(2dcase).
2457-43½-New. Police officer who reads an anonymous letter to defendant may testify from memory as to what he said to defendant, using letter to refresh his recollection. 258Mass410, 155NE448.
2458-46 TexCivA 25SW(2d)671.
2458-47 Any writing which stimulates and revives recollection may be used to refresh memory. 106WVa658, 146SE 732. **Examining photograph** permissible by witness to refresh memory. NJ Sup 130A441. **Paper need not be original** where witness' recollection is refreshed after reading it. 49ND867, 194 NW113. **National Petroleum News and handbook** may be used to refresh memory of expert as to market value of oil. TexCivA 25SW(2d)671.
2459-50 255Mass575, 152NE704; NJ Sup 140A404.
2459-51 5F(2d)549; 13F(2d)847; 19 F(2d)813; 219Ala374, 122S630, 65ALR 1473.
2459-52 19F(2d)813.
2459-55 3F(2d)867; 30F(2d)962; 223 Ky633, 4SW(2d)731; 49ND867, 194NW 113; 111TexCr372, 13SW(2d)100. **Memorandum made by person incompetent to testify** may not be used to refresh memory of competent witness. 241Mich 608, 217NW919.
2460-56 1F(2d)315; 232Mich36, 204 NW771. See also 49ND867, 194NW113.
2460-57 251 IllA109.
2461-58 3Del 497, 139A259. **Carbon copies.**–219MoA519, 282SW535. **Statement of account made by bookkeeper of defendant from time book kept by plaintiff's daughter held admissible to refresh plaintiff's memory as to time work was done.** 174Ark1180, 298SW195. **Rule that copy of book account is not admissible** is based on entirely different principle from rule permitting use of copy to refresh memory. 3Del 497, 139 A259. **Copy of ledger sheets cannot be used to refresh memory** where such sheets are not shown to be books of original entry. MoA 285SW755.
2462-61 MoA 285SW755; Man [1925] 3DomLR447 (holding it insufficient that witness swear copy contains correct statement of what accused said where there is no evidence that it is correct copy or was compared with original).
2462-64 21F(2d)683; 107TexCr514, 298SW296.
2463-66½-New. Where original memorandum is available and witness has no independent recollection of facts, copies or notes thereof prepared by witness for purpose of examination may not be referred to. 15F(2d)955.
2463-67 201Cal 341, 257P64; 46RI 394, 129A1. See also 32PortoRico 134. But see 34GaA144, 128SE924. **Limit of examination.**–8F(2d)711.
2463-68 46RI 394, 129A1; 143Wash 313, 255P382. **Where there is no request to produce,** witness need not produce writing. 3Del 541, 140A648.
2463-69 3Del 541, 140A648, 653 [cit Cyc].
2464-70 46RI 394, 129A1.
2464-71 46RI 394, 129A1.
2464-74 219Ala374, 122S630, 65ALR 1473; IndA 168NE604; 126Kan282, 267 P1109.
2465-75 37GaA240, 139SE686; 149Md 19, 129A895. See also MoA 277SW578. **It is erroneous to reject proof of truth of written statement** where witness' recollection was not refreshed thereby. NH 149A70.
2466-76 8F(2d)922; 150Miss245, 116S 593. But see 30F(2d)962; 46 Ida561, 270P417; 335 Ill 299, 167NE106.
2466-78 216Ala398, 113S256; MoA 279 SW761; 113TexCr546, 22SW(2d)676; 145Wash227, 259P395. **Exclusion of testimony from record,** which witness does not claim is made from information furnished him or is correct record of dates which his duties required him to keep, is not error. 178Ark933, 12SW(2d) 887.
2467-80 36F(2d)461.
2467-81 256Mass159, 152NE307; Mass 172NE224; Sask [1927] 1DomLR426.
2467-83 30F(2d)467; 219Ala374, 122S 630, 65ALR1473; 22AlaA300, 115S149; 77CalA146, 246P157; 104Conn54, 132A 553; 256 IllA170; 152Miss885, 120S 211; 117 Or173, 242P1114; 120 Or297, 252P84; 131 Or242, 282P772; 101TexCr 144, 274SW577.
2467-84 78CalA11, 247P917.
2467-85 219Ala374, 122S630, 65ALR 1473; 104Conn54, 132A553; 87 IndA 462, 151NE735; 97PaSuper78. **If witness testifies memorandum made by him at time was true when made and does not refresh his memory,** it may be admitted. 250Mich398, 230NW181. **If witness cannot remember all material matters recorded but can assert truth of statement at time,** it is admissible in evidence. NH 149A70.
2467-86 78CalA11, 247P917.
2467-86½-New. Introduction of memorandum in evidence without objection does not render testimony incompetent. 92PaSuper321.
2467-86½-New. Affidavit may not be indirectly introduced in evidence by showing it for purpose of refreshing recollection, where affidavit was previously excluded. 128Me141, 146A7.
2467-86¼-New. Affidavit made **four months after conversation** is improperly admitted. 250Mich398, 230NW181.
2467-86½-New. Documentary evidence introduced to show true date of policy may not be excluded as record used to refresh memory. 111Conn415, 150A 310.
2467-86⅚-New. That defendant used notes used by plaintiff's medical expert to refresh memory did not make them competent as evidence. Mass 172NE 224.
2468-89 157Md596, 146A750; 99Vt91, 130A758.
2468-92 La 124S188 (party testifying on his own behalf may be recalled).
2468-93 24F(2d)910; 216Ala342, 113 S391; 216Ala475, 113S393; 22AlaA364, 115S767; 158La244, 103S755; 164La 423, 114S83; NJ 140A452; 110TexCr 499, 78SW(2d)559.
2469-94 231Ky494, 21SW(2d)808; 164 La423, 114S83.
2469-95 164La423, 114S83; 106TexCr 593, 294SW573.
2470-96 24F(2d)910; 22AlaA364, 115 S767; 164La423, 114S83; 106TexCr593, 294SW573. **Refusal to permit recalling of witness** for third time held not reversible error. 129Misc232, 220NYS214.
2470-97 Improper to allow recalled witness to bolster up his testimony by statement that he had told truth in giving his previous testimony. 22AlaA383, 115 S855.
2470-98 85CalA670, 259P1019; 94Fla 656, 114S429; 158La244, 103S755; 142 Va857, 128SE367.
2470-99 164La423, 114S83.
2470-1 228Ky765, 15SW(2d)525.
2471-4 Recalling defendant for purpose of laying grounds for rebuttal as to acts and declarations held not prejudicial. 216Ky376, 287SW933.
2471-7 106TexCr593, 294SW573.

2472-13 41 Ida729, 241P1014; 165 Minn396, 206NW728; Mo 24SW(2d)116 (in court's discretion); 54ND801, 211 NW435; 57ND844, 224NW297; 20 OhA 497, 152NE761; 86PaSuper266; 53SD 588, 221NW675. **In North Dakota.**–57 ND844, 224NW297.

2472-14 CalA 291P879; 54SD184, 223 NW41. **Officer of corporation** must be adverse to party calling him at time of trial. 169Minn321, 211NW163. **Foreman** in charge of work carried on by partnership is not adverse party to plaintiff suing partnership. 58ND430, 226NW483.

2472-16 **Nominal party who did not appear** cannot be called for cross-examination. 180Minn104, 230NW277.

2472-17 164Minn466, 206NW380 (officer legally removed before trial not subject to cross-examination under statute); 175Minn197, 220NW602 (foreman of car department of railroad company held properly called for cross-examination); 176Minn331, 223NW605; 52ND721, 204 NW614 (witness held managing officer); 292Pa164, 140A871; 54SD446, 223NW 585 (president of plaintiff bank). **Managing agent must be such at time of trial** to be subject to cross-examination under statute. 51ND889, 200NW910. **Officers of bank in hands of commissioner of banks for liquidation** may be called for cross-examination. 176Minn 108, 222NW576. **One who has ceased to represent corporation** in official capacity cannot be called as on cross-examination. 169La838, 126S209.

2473-22 147Wash345, 265P1082.

2473-23 94CalA303, 271P134; 105NJL 477, 144A566; 149Wash409, 271P85.

2473-23½-New. Right is not absolute, but rests in sound discretion of trial court. Mo 3SW(2d)244.

2473-24 But see 96CalA84, 273P820. **Refusal to permit cross-examination** of party called for cross-examination by coparty held not abuse of discretion. 41 Ida756, 242P798.

2473-24½-New. Party calling adverse party as witness is not required to state what he expects to prove. 54SD184, 223 NW41.

2473-24½-New. Scope of cross-examination of party called as witness by adverse party is largely within trial judge's discretion. 267Mass501, 167NE 235.

2473-25 19F(2d)352; 20F(2d)289; 39 F(2d)524; 39GaA207, 146SE503(3d case); 203 Iowa676, 213NW431; Md 183A601 (rebuttal witness); 116Nebr 131, 216NW299; NJ 151A867; NJSup 136A712 (holding codefendant had right to cross-examine witnesses of plaintiff); 124Misc668, 208NYS803; 136 Misc893, 242NYS417; 117 Or541, 244P 875 (very valuable right to every litigant); 133SC491, 131SE603, 609 [cit Cyc]; TexCivA 2SW(2d)963; 107TexCr 174, 296SW588. **Right is absolute** and not mere privilege. 70Utah296, 259P 1044, 54ALR1463. **Refusal of cross-examination by defendant is not error after cross-examination by codefendant** where interests are identical. Wis 231 NW252. **In consolidated action,** defendant, though not party to action brought by objecting plaintiff, may cross-examine all witnesses on matters pertaining to common issues. 227App Div72, 237NYS69.

2474-26 316Mo 31, 292SW434; 217App Div546, 217NYS97.

2474-26½-New. **Request to continue cross-examination** of plaintiff is essential to obtain right thereto where cross-examination was interrupted on withdrawal of count which is subsequently restored. 107Conn380, 140A724.

2475-27 23AlaA125, 121S904; 209Ky 263, 272SW721 (as to version of dying declarations of deceased in homicide case); Mo 296SW433; 133SC491, 131 SE603; Va 154SE508. **Defendant entitled to cross-examine witness in preliminary examination** as to admissibility of confession. 319 Ill 606, 150NE347.

2475-28 26F(2d)551; 80CalA293, 251 P643; 209Ky263, 272SW721 (as to version of dying declarations of deceased in homicide case); 161La827, 109S505; 316Mo 31, 292SW434; NH 152A276; 254NY192, 172NE466; 53ND95, 204NW 969; 39 OklACR229, 230 [citCyc]. **Defendant waives his constitutional privilege of silence,** etc. 26F(2d)551; 80 CalA293, 251P643.

2475-30 121Kan777, 250P303; 259Mass 46, 156NE61 (not error to limit cross-examination to matters of direct examinations).

2476-31 156Miss731, 126S824(2dcase); 32NM48, 250P842; 217AppDiv546, 217 NYS97. See also 33PortoRico 179. **Primary idea of confrontation** of adverse witness is opportunity for cross-examination. 33PortoRico 179.

2476-32 217AppDiv546, 217NYS97.

2476-33 252 IllA 194; MoA 294SW747. **Where a witness proves hostile,** etc. 242 Mich491, 219NW724; MoA 294SW747; Mont 288P186; 53SD291, 220NW492; 66Utah543, 244P654; 153Va909, 150SE 407. **Permission to a party to cross-examine his own witnesses is discretionary,** etc. 127Kan832, 275P166(1st case); 314Mo 662, 285SW62 (unwilling witness); 66Utah543, 244P654.

2476-35½-New. Counsel may waive right to cross-examine witness for state. 137SC98, 135SE641.

2476-35½-New. Where witness for state who left stand before completion of examination, with consent of attorney for defendant, was not recalled, and attention of court was not called to fact, it was held that right to cross-examination was waived. 137SC98, 135SE641.

2476-37 165La270, 115S484. See 21 AlaA346, 108S261. See also 196 Ind238, 147NE776.

2477-40 150Md687, 133A847. **In Washington.**–135Wash429, 237P1012. **In conspiracy case** refusal to permit examination of witness being reëxamined by district attorney with regard to evidence offered against codefendant held not error. 261Mass20, 158NE260.

2477-42½-New. As regards admissibility of ex parte statement, right of cross-examination is not saved, where no right to cross-examination at time exists, by party being sworn and subject to cross-examination later. 34F(2d) 334.

2477-43 But see 135Wash429, 237P 1012.

2477-44 165La1082, 116S565; 27 OhA 466, 161NE561. **A defendant in a criminal case,** etc. OklCr 275P361; 106 TexCr68, 291SW226.

2477-45 161La863, 109S519.

2477-46 5F(2d)567.

2477-47 **Province** of cross-examination is to correct any omissions in facts or to test accuracy of witness. 243NY588, 154NE616.

2478-48 217AppDiv532, 216NYS629.

2479-49 34Ariz458, 272P647.

2479-50 99Vt191, 130A697 (but to do so is not error).

2479-52 133SC491, 131SE603, 609 [cit Cyc]. **Failure to move to strike out** held not waiver of right to cross-examine. 133SC491, 131SE603. **Where evidence is harmful to defendant in criminal prosecution,** mistrial should be ordered. 133 SC491, 131SE603.

2479-54 80CalA293, 251P643, 645 [quot Cyc].

2479-55 80CalA293, 251P643, 645 [quot Cyc].

2480-56 87PaSuper114; 87PaSuper 202.

2480-56½-New. Testimony confessing and avoiding effect of previous testimony does not affect latter's competency. TexCivA 295SW665.

2480-59 19F(2d)202; 24F(2d)153; 43 F(2d)987; 213Ala551, 105S709 (fullest cross-examination of defendant's witnesses in seduction prosecution held proper); 221Ala29, 127S188; 20AlaA 550, 104S50; 21AlaA479, 109S887; 23 AlaA419, 126S414; 170Ark654, 280SW 630; 90Fla299, 105S834; 97Fla591, 121 S793(2dcase); 34GaA144, 128SE924; 40GaA4, 148SE757; 237 IllA211; 167 La373, 119S261; 151Md118, 134A166; MoA 273SW213, 217 [quotCyc]; 74Mont 236, 239P1037; 54ND166, 209NW212, 214, 45ALR1487 [quotCyc]; 20 OhA461, 152NE678; 19OhA63; 118 Okl 165, 244 P22; 121 Or236, 252P400; 33Porto Rico 179; 153SC25, 150SE321 (more latitude allowed than in direct); 49SD 535, 207NW547; TexCivA 295SW646; TexCr 32SW(2d)194; 99Vt329, 132A 37; 144Va559, 131SE131. **In prosecutions for rape,** etc. 86Mont569, 284P 549 (prosecutrix); 122 Or504, 259P917. **Cross-examination allowed of defendant** held not abuse of court's discretion. 214 Ala545, 108S362. **Rule as to relevancy** is liberal in cross-examination. 99Vt 329, 132A37. **Admission of evidence under cross-examination held proper.**–267 Mass402, 166NE867. **Cross-examination held proper.**–218Ala566, 119S610(2d case). **Matters material to controversy.**–GaA 155SE85.

2481-60 242 IllA166; 199 Ind592, 159 NE420; 208 Iowa1233, 227NW166; 54 ND166, 209NW212, 214, 45ALR1487 [quotCyc]; OklCr 292P76; Vt 147A 352; 136Wash106, 238P920. But see NJSup 130A225.

2481-61 166Ga176, 142SE667; 54ND 166, 209NW212, 214, 45ALR1487 [quot Cyc]; 102TexCr524, 278SW444.

2481-62 41 Ida729, 241P1014; 54ND 166, 209NW212, 214, 45ALR1487 [quot Cyc].

2481-63 214Ala239, 107S98; Mo 30SW (2d)1069; 54ND166, 209NW212, 214, 45 ALR1487 [quotCyc].

2481-64 44F(2d)45; 213Ala169, 104S 438; 221Ala242, 128S211; 221Ala614, 130S379; Ala 130S541; Ala 130S807; 21AlaA307, 107S720; 21AlaA321, 108S 654; 21AlaA479, 109S887; 80CalA151, 251P335; 83CalA111, 256P551; 339 Ill 225, 171NE152 (refusing to permit cross-examination of prosecuting witness as to identification of defendant is erroneous); 235 IllA426; 254Mass223, 150NE162; 255Mass104, 151NE84; Mass 173NE529; 180Minn13, 230NW 128; 311Mo 391, 279SW23; 316Mo 31, 292SW434; Mo 296SW433; Mo 25SW (2d)109; MoA 273SW213, 218 [quot Cyc]; 72Mont306, 233P602; 49Nev386, 248P48; NJSup 133A415; 54ND166, 209NW212, 214, 45ALR1487 [quotCyc]; OhA 173NE312; 33PortoRico 179; 133 SC491, 131SE603; 136Wash624, 241P1; Wis 233NW76. **Cross-examination calling for hearsay testimony** should not be allowed. 21AlaA460, 109S294. **Whether defendant's son knew of any reason why** state witness present when fight began should testify against defendant is proper on cross-examination. 104TexCr649, 285SW621.

2483-65 216Ala26, 112S307; 22AlaA17, 111S899; 198Cal 534, 246P62; 199Cal 235, 248P906; 104Conn54, 132A553; 97 Fla332, 120S762; 88 IndA399, 164NE 284; IndA 168NE585; 265Mass189, 163 NE906; 316Mo 31, 292SW434; MoA 273 SW213, 218 [quotCyc]; 74Mont236, 239 P1037 (condition of eyesight of automobile driver suing for injuries sustained in collision); 116Nebr131, 216NW299; 225AppDiv813, 232NYS484; NC 154SE 604; 54ND166, 209NW212, 214, 45ALR 1487 [quotCyc]; 121 Or236, 252P400; 88PaSuper182; 133SC491, 131SE603; 153SC168, 150SE652(2dcase); 105TexCr 327, 288SW458; 99Vt91, 130A758; 99 Vt329, 132A37; 100Vt395, 138A725, 54 ALR1369; 136Wash106, 238P920. **Unduly restricting cross-examination constitutes** reversible error. 214AppDiv164, 212NYS43 (in action to foreclose mortgage limiting cross-examination of witness used to prove payment and signature to alleged receipts for payment).

2483-66 See also 90Fla299, 105S834.

2484-67 MoA 273SW213, 217 [quot Cyc].

2484-69 24F(2d)153; AlaA 129S791; 80CalA167, 251P327; 82CalA389, 255P 839; 106Conn665, 138A790; 199 Ind592, 159NE420; 201 Iowa99, 202NW604; 160 La667, 107S484; NJSup 140A30; 100 TexCr341, 273SW594. **Evidence must be self-evidently incompetent** for any purpose to be subject to objection that it is immaterial. MoA 272SW117. **Cross-examination tending to prejudice witness in minds of jury** by innuendo and insinuation is erroneous. 339 Ill 78, 170NE690.

2484-72 99Vt499, 134A700.

2484-73 237 IllA178; 252Mass450, 148 NE113.

2484-73½-New. **Witness should be cross-examined only as to facts.**–213Ala 563, 105S652 (improper to ask witness

whether subdividing line in survey was crooked).

2484-73⅓-New. It is improper to require witness to express his opinion as to truth or falsity of testimony contradicting him. 112TexCr307, 17SW(2d)56(2dcase).

2484-74 42F(2d)721; 214Ala181, 106S871; 215Ala47, 109S278 (in land damage case general depreciation of land values may be shown by cross-examination of plaintiff); 22AlaA79, 112S535; 74CalA464, 241P275; 205 Iowa279, 218NW54; 207 Iowa113, 222NW416, 62ALR1174; 148Md628, 129A915; Mo 271SW471; 128 Okl 102, 261P549; RI 137A778; 103TexCr395, 281SW563; 104TexCr447, 284SW568; 108TexCr408, 18SW(2d)615.

2485-75 102TexCr444, 278SW446 (that accused had been friendly with prosecuting witness).

2486-76 99Vt91, 130A758; 155Wash63, 283P439.

2486-79 214Ala91, 106S503; 214Ala545, 108S362; 128 Okl 102, 261P549. See also 155Md384, 142A515.

2487-80 128 Okl 102, 261P549; 144Wash528, 258P323.

2487-82 128 Okl 102, 261P549; 144Wash528, 258P323.

2488-83 But see TexCivA 273SW666. **Asking witness to characterize testimony of another witness** not permissible. 102Conn708, 130A184.

2488-85 99Vt499, 134A700.

2488-85½-New. Cross-examination of character witness regarding sources of knowledge. 42F(2d)793.

2488-87 26F(2d)902; 120Kan434, 243P1014; 150Miss293, 116S430; 311Mo391, 279SW23; Mo 29SW(2d)156; 128 Okl 102, 261P549.

2488-88 214Ky620, 283SW958.

2488-89 171Ark762, 286SW937; 175Ark1170, 299SW354.

2488-90 171Ark762, 286SW937; 316Mo31, 292SW434.

2488-91 175Ark120, 298SW867.

2489-92 23AlaA572, 129S316; 69CalA214, 230P997; 102CalA169, 282P996; 104CalA389, 285P866; 100TexCr209, 272SW455.

2489-94 102Conn708, 130A184; 90Fla299, 105S834; 311Mo391, 279SW23; 102TexCr524, 278SW444; TexCivA 24SW(2d)786; 195Wis19, 216NW522.

2489-96 215Ky302, 284SW1080; 311Mo391, 279SW23.

2489-97 213Ala410, 104S840; 311Mo391, 279SW23; 102TexCr524, 278SW444. But see 102Conn708, 130A184. **Interest, bias or animus** may be elicited as to credibility. 102TexCr524, 278SW444.

2489-99 209Ky787, 273SW515; 160La667, 107S484. **Cross-examination held improper as attempt to test memory.**–82NH493, 136A268.

2489-1 79CalA76, 249P20; 316Mo31, 292SW434; 117 Or541, 244P875, 877 [citCyc]. **A witness who testifies to the fact of ownership,** etc. 77Mont572, 252P307.

2489-2 79CalA76, 249P20; 214Ky620, 283SW958; 236Mich226, 210NW219.

2490-3 216Ala671, 114S49; 216Ala642, 114S298; 220Ala309, 125S51; 21AlaA27, 104S873; 22AlaA550, 117S610; 209Ky787, 273SW515; 35Wyo482, 251P468.

2490-4 150Miss293, 116S430.

2490-5 102TexCr434, 278SW432 (rule applies equally to police officers).

2490-7 90Fla299, 105S834.

2490-8 221Ala138, 127S840; MoA 25SW(2d)536.

2490-9 21AlaA471, 109S757.

2490-10 But see 104Conn83, 132A467.

2490-12 20AlaA550, 104S50; 120 Or666, 253P527. But see 20AlaA663, 104S838.

2491-15 21AlaA462, 109S369.

2491-16 201Cal290, 257P46; Iowa 230NW851; 215Ky302, 284SW1080; 238Mich108, 213NW145; 125 Or389, 266P900. But see 86Colo35, 278P594, 65ALR1260. **Rule not applicable** where witness has answered in negative as to conversation. 26F(2d)185. **Declarations in one's favor,** etc. 152Wash448, 277P988.

2491-17 238Mich108, 213NW145.

2491-18 22AlaA383, 115S855; 198Cal534, 246P62; 238Mich108, 213NW145; 156SC509, 153SE480; 105TexCr581, 289SW409 (refusal to permit repetition of testimony of prosecutrix held not error).

2492-20 215Ala209, 110S306; 226Ky660, 11SW(2d)726; 160La525, 107S393; RI 137A778.

2492-21 28F(2d)663; AlaA 129S720; 329 Ill 11, 160NE197; 236Mich226, 210NW219 (to show mental attitude); NJ 143A735 (defendant in criminal prosecution); 298Pa329, 148A474; RI 137A778; 49SD535, 207NW547; SD 231NW601. **Domiciliary intention in divorce case.**–48Nev153, 238P402.

2492-22 23AlaA79, 121S6; Mo 6SW(2d)903. But see 96CalA503, 274P393.

2492-23 RI 137A778.

2492-24 85Colo508, 277P770; 40GaA341, 149SE657; 140Miss719, 106S268; 217AppDiv546, 217NYS97; RI 137A778; 99Vt65, 130A749. **Questions designed to show negligence of bus driver** because conversing with passenger at time of collision are admissible. 158Md424, 149A4.

2492-25 221Ala29, 127S188; Ida 289P74; 221MoA380, 283SW741 (motive); TexCivA 272SW501 (bringing suit for divorce); 105TexCr101, 287SW53 (purpose in taking out girls); 110TexCr390, 10SW(2d)549(2dcase). But see 23AlaA595, 129S489; 22AlaA329, 115S420; 101NJL561, 134A896. **Cross-examination of assessing officer as to mental processes used in making assessment** should not be permitted in action to restrain enforcement of assessment where fraud is not involved. 237Mich138, 211NW55.

2492-25½-New. District attorney may not ask for reason of accused's failure to place a certain party on stand and then prove that party was looking after interest of accused. 104TexCr85, 282SW587.

2492-26 40 OklCr380, 269P390.

2493-28 74CalA464, 241P275; 82Colo541, 261P661; 90Fla299, 105S834 (to ascertain his truthfulness); 120Kan434, 243P1014; 12PaDist&Co583. **Within court's discretion.**–262Mass416, 160NE252.

2493-34 136Wash106, 238P920.

2493-36 20AlaA626, 104S777; Ida 289P74; 160La316, 107S123; NJSup 130A205.

2493-37 15F(2d)359; 212Ala531, 103S553; 21AlaA156, 106S685; 220Ala332, 124S884; 20AlaA663, 104S838; 21AlaA152, 106S341; 21AlaA185, 106S393; 21AlaA357, 108S265; 22AlaA34, 111S765; 22AlaA170, 113S646; AlaA 130S531; 71CalA453, 236P163; 76CalA144, 244P101; 77CalA434, 246P822; 85CalA406, 259P481; 102CalA169, 282P996; CalA 286P703; 87Colo188, 285P1102; 102Conn708, 130A184; 106Conn454, 138A456; 107Conn670, 142A461; DC 29F(2d)798; Ga 155SE28; 42 Ida458, 246P304; 42Ida522, 247P740; 46 Ida561, 270P417; 48 Ida688, 284P845; 327 Ill 162, 158NE462; 334 Ill 516, 166NE97; 337 Ill 300, 169NE182; 339 Ill 78, 170NE690; 202Iowa1382, 212NW137; 206 Iowa1178, 221NW804; 210Ky385, 275SW819; 219Ky38, 292SW492; 252Mass450, 148NE113; 260Mass566, 157NE702 (examination as to pecuniary condition); 263Mass574, 161NE608; 266Mass374, 165NE513(2dcase); Mass 168NE785; 318Mo647, 300SW511; 320Mo672, 8SW(2d)599; 74Mont408, 241P233; 76Mont351, 246P956; 84Mont141, 274P844; 48Nev405, 233P523; 49Nev326, 245P700; 82NH225, 131A601 (as to number of times witness testified for adversary, where question not so put as to evince such information); 82NH518, 136A358; 101NJL543, 129A198; NJSup 129A480; NJSup 130A15; NJSup 130A205; 101NJL561, 134A896; 104NJL361, 140A324; 32 OklCr203, 240P1075; 118 Okl165, 244P22; 118 Or568, 247P815; 133Or701, 289P1053; 136SC9, 134SE145; 136SC68, 134SE213; 50SD226, 209NW343; 51SD117, 212NW496; 100TexCr459, 273SW864; 112TexCr307, 17SW(2d)56(2dcase); 113TexCr207, 19SW(2d)322; TexCr 28SW(2d)794; 100Vt443, 138A782; Vt 151A562; 148Va194, 138SE721; 149Wash316, 270P1029. But see 156Miss731, 126S824(2dcase). **Matters not in issue are not proper subject of cross-examination.** 73Mont385, 236P545. **In claim and delivery cross-examination regarding lien on crop properly excluded.** 136SC9, 134SE145. **Question whether accused remembered statement** in opinion of federal judge issuing injunction held collateral matter. 102Conn708, 130A184. **Refusal to permit cross-examination as to details of debts** stated to have been incurred in reliance on defendant's alleged promise to pay bonus in addition to salary held not error. 168Ark943, 272SW663. **Test determining whether facts inquired of are collateral.**–Miss 130S511.

2495-38 312Mo373, 278SW1016, 1025 [citCyc]; 283Pa304, 129A91; SD 230NW29(2dcase).

2495-39 200 Ind417, 164NE273; MoA 272SW117; 76Mont351, 246P956; Tex CivA 16SW(2d)910.

2495-40 252Mass450, 148NE113; Tex CivA 295SW945.

2495-41 221Ala453, 129S722(1stcase); 251Mich249, 231NW555. But see 169La377, 125S277.

2496-42 MoA 272SW117 (to be subject to objection that it is immaterial cross-examination must be self-evidently incompetent); 99Vt91, 130A758.

2496-43 22AlaA557, 117S804; 71CalA453, 236P163; 106TexCr462, 294SW200.

2496-43½-New. Cross-examination on self-evident or unimportant matters is not erroneous. 148SC392, 146SE245.

2496-46½-New. Court properly refused to allow cross-examination of prohibition agent as to assumed name. 28F(2d)681.

2496-46¼-New. Refusal to permit cross-examination of government witness as to place where he lived has been held not erroneous. 41F(2d)157.

2496-47 221Ala585, 130S199 (cross-examination of jurors to determine credibility of affidavits); 21AlaA321, 108S654; CalA 288P841; 72Mont306, 233P602, 604 [quotCyc]. See also 32NM48, 250P842, 847 [quotCyc].

2496-49 Basis of opinion.–107TexCr585, 298SW587.

2496-50 23AlaA257, 123S292(2dcase) (if he had heard about defendant making whisky); 105NJL618, 147A636 (specific questions tending to show that they do or do not know of facts inconsistent with assertions made on direct examination); SC 155SE409. **Reputation of witness.**–307Mo291, 270SW298. **Witness may be asked in what respect character is good or bad.**–195NC47, 141SE468.

2497-51 21AlaA409, 108S658; 22AlaA288, 115S67; CalA 293P72; 99TexCr627, 271SW87. **Limit as to time.**–31F(2d)902; 21AlaA196, 106S696. **Conduct antecedent to offense only** may be inquired into. 109TexCr624, 6SW(2d)369. **Inquiry regarding defendant's past conduct must be confined** to happenings antecedent to offense charged. TexCr 27SW(2d)213. **Refusal to permit cross-examination of character witnesses for state merely to impeach** is not reversible error. 198NC807, 153SE400.

2497-52 23F(2d)756; 39F(2d)782; 43F(2d)273; 21AlaA196, 106S696; 168Ark1087, 273SW374; 201Cal341, 257P64; 70CalA143, 232P772; 79CalA20, 248P1027; 100CalA344, 279P1022 (what defendant did to little girl on certain occasion); CalA 288P113; 41GaA360, 153SE94(1stcase); 206 Iowa51, 220NW51, 58ALR1147; Kan 291P950; 158La209, 103S742; Mo 271SW471; Mo 22SW(2d)1050; 321Mo553, 12SW(2d)428; 49Nev386, 248P48; 101TexCr315, 276SW247; 103TexCr508, 281SW1054; 104TexCr456, 284SW578; 105TexCr556, 289SW407; 105TexCr669, 284SW965; 111TexCr45, 10SW(2d)999; 113TexCr142, 18SW(2d)663. **The witness may be asked,** etc. 15F(2d)163; 21AlaA196, 106S696; 99TexCr569, 270SW1025. **Cross-examination as to defendant's alleged misconduct at distant points not** objectionable. 49Nev386, 248P48. **Evidence is admissible only to test credibility of witness.**–43F(2d)273.

2497-53 201Cal341, 257P64; 202Cal159, 259P750; 70CalA143, 232P772; 71CalA730, 236P214; 229Ky646, 17SW(2d)751; 99TexCr569, 270SW1025; 100

TexCr376, 272SW791 (if he had not paid fine for such person); 104TexCr 293, 283SW819; 105TexCr436, 289SW 61; 106TexCr90, 291SW238; 112TexCr 385, 16SW(2d)1096(2dcase); TexCr 27 SW(2d)213; TexCr 27SW(2d)219(2d case); TexCr 28SW(2d)541; TexCr 29 SW(2d)381(1stcase). **Arrest of other witness.**–307Mo 291, 270SW298.

2497–54 31F(2d)846; 208 Iowa1233, 227NW166; 106TexCr90, 291SW238.

2497–55 Ark 31SW(2d)527; 316Mo 31, 292SW434; 131 Or224, 282P237; 105 TexCr556, 289SW407; 106TexCr90, 291 SW238; 112TexCr590, 18SW(2d)627.

2497–56 168Ark1087, 273SW374; 314 Mo 574, 285SW997; Mo 18SW(2d)48. **Inquiry must be confined to happenings** antecedent to offense charged. 105Tex Cr556, 289SW407.

2497–57 104TexCr456, 284SW578.

2497–58 21AlaA409, 108S658; 337 Ill 310, 169NE243; 104TexCr456, 284SW 578; 105TexCr669, 284SW965.

2497–58½–New. In prosecution for keeping house for purpose of gambling state cannot be permitted to show defendant had bad reputation as gambler. 101TexCr584, 276SW705.

2497–58⅓–New. Character witness may be asked concerning rumors of misconduct, though such testimony would disclose commission of crime. Mo 271SW 471.

2497–58¼–New. Question to witness as to whether he knew deceased's reputation for peace is not objectionable for failure to lay proper basis therefor. 164 La813, 114S696.

2497–58⅓–New. Witness for state in criminal prosecution may be asked as to whether he knew his own reputation for morality where he resided. 318Mo 647, 300SW511.

2498–63½–New. Witness may be asked whether he has heard reports of mental unsoundness of person where he has testified as to soundness of mind of such person. 204 Iowa881, 216NW258.

2498–70 215Ala143, 110S372.

2498–71 82CalA532, 255P854; 82Colo 541, 261P661; 203 Iowa676, 213NW431 (even where fraud was not in issue under pleading); 155Md384, 142A515.

2499–72 99Vt227, 131A16 (whether he did not insure property for amount in excess of value testified to). **Cross-examination as to values of real estate in portion of city remote from that involved** is properly denied. 176Minn62, 222NW522.

2499–79 3Del 497, 139A259.

2499–81 Vt 147A682. **Cross-examination held error.–Iowa** 232NW677. **Where witness has summarized books and documents of voluminous or technical character** and explained them for information of jury, liberal right of cross examination should be allowed. 33 OklCr125, 243P251. **Where plaintiff sues on written memorandum of employment,** silent as to duration, cross-examination as to oral understanding is competent. 258Mass65, 154NE572.

2500–82 227Ky528, 13SW(2d)521.

2500–86 243 IllA562.

2500–89 But see 97CalA377, 275P840.

2500–90 MoA 4SW(2d)478.

2500–91 102Conn708, 130A184; 167La 547, 119S869. **Cross-examination as to accused's belief of the right to confiscate railroads held admissible,** where on direct examination he made many voluntary statments on that subject. 102Conn708, 130A184.

2500–92 46 Ida214, 267P222; 99Vt91, 130A758.

2500–93 37GaA695, 141SE511; 214Ky 416, 283SW402; 161La532, 109S56; 166La924, 118S85; 154Miss21, 122S98; 154Miss862, 123S892.

2501–94 5F(2d)818; 14F(2d)93; 15 F(2d)503; 19F(2d)813; 41F(2d)495; 21AlaA409, 108S658 (cross-examination of character witness); 70CalA130, 232P 752; 70CalA567, 234P129; 74CalA74, 241P924; 75CalA657, 243P64; 80CalA 293, 251P643; 81CalA122, 252P1067; 86CalA355, 260P894; 92CalA683, 268P 915; 97CalA205, 275P851; 107Conn681, 142A455; 109Conn616, 145A31; 93Fla 504, 112S883; 46 Ida214, 267P222; 316 Ill 158, 147NE44; 318 Ill 204, 149NE 302; 332 Ill 295, 163NE668, 62ALR274; 336 Ill 11, 167NE807; 236 IllA84; 199 Ind592, 159NE420; Ind 173NE229; 206 Iowa816, 221NW521 (character witness); 210Ky421, 276SW119; 160La 667, 107S484; 166La924, 118S85; 167 La986, 120S620; 151Md87, 133A899; 151Md571, 135A373; 151Md514, 135A 383, 49ALR1366; Md 150A452; 172 Minn250, 215NW181 (cross-examination not objectionable); Mo 256SW819; Mo 23SW(2d)122; MoA 279SW253; 73 Mont385, 236P545; 77Mont477, 251P 517; 118Nebr281, 224NW236; 49Nev 386, 248P48; 102NJL388, 132A93 (examination held proper); 102NJL635, 133A389; 101NJL419, 129A191; NJSup 133A415; NJSup 135A670; 217AppDiv 532, 216NYS629; 50ND330, 196NW303, 307 [citCyc]; 51ND445, 200NW20; 52 ND659, 204NW350; 53ND564, 207NW 438; 54ND166, 209NW212, 45ALR1487; ND 230NW1; 118 Okl 165, 244P22; 130 Okl 93, 265P633; 142 Okl 89, 285P27; 121 Or236, 252P400; 132 Or46, 284P 567; 284Pa59, 130A398; 300Pa125, 150 A290(2dcase); Pa 151A676; 88Pa Super84; 50SD226, 209NW343; 103Tex Cr674, 282SW235; 109TexCr195, 3SW (2d)811; Utah 276P166; 99Vt91, 130A 758; 153Va890, 149SE459; 101WVa356, 132SE728; 104WVa396, 140SE338; 38 Wyo 72, 264P1017. See 22AlaA579, 118S 49. But see 201Cal 290, 257P46; 327 Ill 162, 158NE462. **Cross-examination as to letters introduced by party calling witness held proper.**–120Kan572, 245P 114. **Cross-examination as to testimony elicited on direct examination but stricken out** is improper. 77Mont477, 251P 517. **One who testifies merely as to the execution,** etc. 77Mont477, 251P517. **Cross-examination of wife testifying for husband.**–318Mo 542, 300SW699; 104 TexCr447, 284SW568; 112TexCr133, 14 SW(2d)277. **Cross-examination held proper.**–103Tex674, 282SW235. **Limits as to time.**–206 Iowa816, 221NW521. **Questions on cross examination attributing to witness statements not made in direct examination** is properly excluded. 169La947, 126S434.

2504–95 54ND166, 209NW212, 45ALR 1487; 130 Okl 93, 265P633; 284Pa59, 130S398 (dictum); 100WVa121, 130SE 81 (party bringing out new matter on cross-examination makes witness his own as to such new matter); 101WVa 356, 132SE728. But see 54SD446, 223 NW585.

2505–96 TexCivA 278SW873 (where plaintiff calls defendant for special purpose, latter may be cross-examined as to defense).

2505–97 18F(2d)197; Conn 151A321; 88 IndA399, 164NE284; Iowa 218NW 147; SD 233NW281. **Cross-examination held proper.**–197Cal 82, 239P709, 41ALR 1027; 204 Iowa456, 215NW767.

2505–98½–New. Defendant is entitled to have plaintiff state positively the right he relies on and testifies to on direct examination. TexCivA 28SW(2d) 225.

2505–99 29Hawaii441; 161La532, 109S 56; 315Mo 199, 285SW984; 314Mo 574, 285SW997.

2505–1 4F(2d)888; 20F(2d)289; 23 AlaA144, 122SE301(2dcase); 85CalA 580, 259P998; 338 Ill 340, 170NE219; 227Ky142, 12SW(2d)324; 161La827, 109S505; 157Miss639, 128S737(1stcase). **Proper cross-examination.**–166La924, 118S85; 314Mo 673, 285SW726.

2505–2 206 Iowa833, 221NW493; 161 La532, 109S56; 314Mo 574, 285SW997.

2506–3 4F(2d)888; 314Mo 673, 285SW 726; 321Mo 564, 12SW(2d)445.

2506–4 85CalA697, 259P1009; 223Ky 233, 3SW(2d)629; 165La822, 116S199.

2506–5 34F(2d)406; 34F(2d)863; 85 CalA697, 259P1009; 100CalA587, 280P 708; 109Conn394, 146A837; 41 Ida616, 243P359; 339 Ill 480, 171NE544; 167La 963, 120S612; 314Mo 675, 285SW726; 156SC375, 153SE344; 103TexCr311, 280 SW817; 111TexCr482, 14SW(2d)278. See also Mo 296SW155.

2506–7½–New. Accused having testified on matters concerning his character on direct examination, may be cross-examined on subject. 295Pa264, 145A 89.

2506–7⅓–New. Defendant as witness in criminal case has no special privileges. Wash 288P249.

2506–10 17F(2d)246; 38F(2d)3, 212 Ala606, 103S468; 20AlaA550, 104S50; 35Ariz205, 276P322; 77CalA231, 246P 147; 77CalA434, 246P822; 27Hawaii 65; 249 IllA432; 206 Iowa833, 221NW 493; 124Kan533, 261P600; 166La43, 116S588; 252Mass44, 147NE345; 261 Mass281, 158NE840; 257Mass721, 154 NE91; Mo 274SW54; NJSup 130A205; 34NM65, 277P22; 54ND166, 209NW212, 45ALR1487; 99Vt329, 132A37; 144Va 559, 131SE131; 143Wash397, 255P146. **Range of cross-examination** is largely within discretion of trial court, depending on variety of considerations, chief one being remoteness of matter to pivotal issue. 13F(2d)558. **Court does not err in barring question on cross-examination** bearing on point excluded on direct examination. 163Ga734, 137 SE260.

2506–11 54ND166, 209NW212, 45ALR 1487. **Limits of discretion.**–Mo 271SW 471; 134Wash48, 234P1021.

2506–12 17F(2d)246; 124Kan533, 261 P600; 54ND166, 209NW212, 45ALR 1487. See also 144Va559, 131SE131. **Circumstances constituting abuse of discretion.**–Violation of rule is prejudicial where witness being examined is husband of defendant, and he was thus required to become witness against his wife. 118Nebr281, 224NW286. **Discretion not abused.**–23AlaA382, 125S899. **Restricting cross-examination held not** abuse of discretion. 205Cal 519, 271P 1055.

2507–13 77CalA231, 246P147; 77CalA 434, 246P822; 99Vt329, 132A37.

2507–14 73Mont385, 236P545; 217App Div532, 216NYS629.

2507–15 88 IndA639, 165NE67.

2507–16 217Ala180, 115S230; 201Cal 290, 257P46; 339 Ill 421, 171NE557; 154Md171, 140A64; 218MoA563, 267SW 6; 72Mont306, 233P602; 77Mont477, 251P517; 104NJL402, 140A300; 217 AppDiv532, 216NYS629; 121 Or236, 252P400; 123 Or215, 261P691; 131 Or 612, 282P768; 33PortoRico 179; 49RI 392, 143A602; 54SD446, 223NW585; 103TexCr311, 280SW817; 104TexCr358, 284SW556; 143Wash31, 254P244; 144 Wash60, 256P777; 104WVa396, 140SE 338. See also 151Md571, 135A373. **Cross-examination held improper.**–75 CalA657, 243P64. **Exclusion of proper cross-examination held error.** 217App Div532, 216NYS629.

2507–17 34Ariz458, 272P647; 199Cal 513, 250P164; 151Md514, 135A383, 49 ALR1366; 217AppDiv532, 216NYS629; 121 Or236, 252P400; 33PortoRico 179; 35PortoRico 220; Vt 147A687; 136 Wash624, 241P1. See also 151Md571, 135A373.

2508–18 103TexCr566, 281SW1080.

2508–18½–New. Fact that evidence called forth by legitimate cross-examination also tends to sustain some defense affords no reason why it should be excluded. 121 Or236, 252P400.

2508–19 22AlaA579, 118S49; 160La667, 107S484.

2508–20 160La667, 107S484. **Refusal to allow cross-examination** to show that source of witness' information was secured illegally held error. 6F(2d)870.

2508–22 219Ala607, 122S814; 121Kan 797, 250P308; TexCivA 27SW(2d)621; 99Vt191, 130A697. **Cross-examination held proper** see 219Ala384, 122S322; 220Ala188, 124S416; Ark 31SW(2d) 421; 93CalA1, 268P1061; GaA 155SE 85; 121Kan777, 250P303 (defendant called as witness for plaintiff); Md 150 A787; Mass 168NE802(2dcase); 174 Minn61, 218NW163; 180Minn13, 230NW 128; MoA 284SW857; NJSup 147A 504. **Cross-examination held improper.**–43 Ida80, 251P295; 166Minn29, 206NW 950 (evidence properly excluded); 85 Mont571, 281P348; 128 Or643, 275P 680; 49SD563; 207NW539. **Rejection held error.**–168Ga259, 147SE513(2dcase) (as abridging right of thorough cross-examination). **Defendant called by plaintiff as witness against himself** can be cross-examined by defendant's counsel. Ga 155SE7.

2509–23 31F(2d)499; Vt 147A346 (whether covered by direct examination or not).

2509–24 18F(2d)197; 30F(2d)349; 212Ala503, 103S569; 219Ala384, 122S 322; 23AlaA8, 122S313(1stcase) [certiorari den 219Ala324, 122S313(2d case)]; 23AlaA20, 122S467(2dcase); 23 AlaA258, 123S275(2dcase); CalA 288P 1096; 43 Ida80, 251P295; 266Mass286, 165NE416; 267Mass361, 166NE879; MoA 28SW(2d)395; NJ 151A593; 152 Va368, 147SE267.

2509–25 112TexCr307, 17SW(2d)56(2d case).

2509–27½–New. Where defendants have pleaded separately and appear by separate counsel, but their interests are practically identical, one defendant may be refused the right to cross-examine his codefendant's witness. 36BC345, [1926] 1DomLR1171, [1926] 1WestWkly543.

2509–27½–New. Case will not be reversed because of immaterial and irrelevant question asked plaintiff on cross-examination. 217Ala33, 114S468.

2509–27¼–New. Statute authorizing calling and examination of adverse party as if under cross examination should be construed so as to accomplish purpose. Cal 287P343.

2510–29 271US494, 46SCt566, 70Led 1054; 5F(2d)818 (defendant testifying is subject to cross-examination and impeachment to no greater extent than any other witness); 18F(2d)863; 19 F(2d)813; 26F(2d)902; 31F(2d)499; 20AlaA547, 104S48; 168Ark396, 270SW 945; 75CalA74, 241P924; 199Cal 513, 250P164; 102Conn708, 130A184 (question whether defendant agreed with definition of word upon card handed him held without error); Ill 172NE812; 199 Ind89, 155NE257; 200 Ind156, 162NE 49; 208 Iowa1049, 226NW770; 215Ky 728, 286SW1040; 161La827, 109S505; 234Mich282, 207NW920; Mo 271SW471; 116Nebr563, 218NW416; 82NH220, 131 A598; 226AppDiv569, 235NYS386; 194 NC206, 139SE230; 53Md95, 204NW969; 119 Oh231, 163NE28; OklCr 281P322 (2dcase); OklCr 285P990; 118 Or397, 247P146; 295Pa264, 145A89; 100Tex Cr541, 271SW915; 103TexCr258, 280 SW836; 103TexCr395, 281SW563; 106 TexCr68, 291SW226; 113TexCr257, 20 SW(2d)196(2dcase). **Cross-examination held proper.**–5F(2d)9; 6F(2d)522; 39F(2d)294; 217Ala212, 115S223; 21 AlaA300, 107S731; 199Cal 155, 248P 504; 71CalA402, 235P467; 78CalA451, 248P929 (in prosecution for burglary); 80CalA293, 251P643; 86CalA617, 261 P479; 91CalA290, 266P1000; 43 Ida180, 250P239 (prosecution for bigamy); 207 Iowa760, 223NW535; Iowa 232NW636; 158La400, 104S185; 160La456, 107S 304; 164La813, 114S696; 165La47, 115S363; 167La963, 120S612; 257Mass 473, 154NE260; 264Mass535, 163NE 158; 234Mich282, 207NW920; 174Minn 323, 219NW176; 308Mo 560, 274SW70; 309Mo 498, 274SW734; 314Mo 673, 285 SW726; NJ 143A735; NJSup 140A404; 22 OhA357, 153NE902; 295Pa264, 145 A89; 137SC145, 134SE885; 53SD488, 221NW91; SD 228NW395; 100TexCr 54, 271SW902; 100TexCr114, 272SW 149; 103TexCr171, 280SW213; 105Tex Cr392, 289SW52; 105TexCr436, 289SW 61; 106TexCr169, 291SW554; 106Tex Cr506, 294SW202; 107TexCr559, 298 SW569; 137Wash172, 242P21; 143 Wash31, 254P244; 148Wash149, 268P 167; 33Wyo 360, 239P952. **Cross-examination held improper.**–43F(2d)353; 177Ark812, 7SW(2d)987; 75CalA74, 241 P924; 76CalA178, 244P106; 81CalA 456, 254P281; 85CalA580, 259P998; 92 CalA550, 268P651; 96Fla723, 119S118; 324 Ill 224, 154NE909; 334 Ill 516, 166 NE97; 206 Iowa833, 221NW493; 207 Iowa760, 223NW535; 215Ky705, 286 SW1043; 225Ky671, 9SW(2d)1018; 226 Ky660, 11SW(2d)726; 176Minn562, 223 NW917; Mo 284SW801; MoA 7SW(2d) 375; 116Nebr493, 218NW137; 116Nebr 629, 218NW421; 20NY185, 164NE900; 132 Or401, 286P149; 133SC491, 131SE 603; 149SC445, 147SE600; 103TexCr 588, 281SW572; 104TexCr1, 282SW218.

2510–30 26F(2d)400; 120Kan166, 241 P1083; 126Kan565, 268P845; 169La 109, 124S188; 149Md298, 131A452; 257 Mass473, 154NE260; 264Mass217, 162 NE337; Mo 271SW471; 105NJL618, 147A636; 104NJL10, 139A417; 22 OhA 357, 153NE902. **Cross-examination held proper.**–142SC24, 140SE258.

2511–31 20F(2d)289; 42F(2d)721; 168Ark396, 270SW945; 338 Ill 636, 170 NE750 (right of state to cross examine defendant as to anything to which he did not testify in chief); 149Md298, 131 A452 (greater than ordinary latitude); 252Mass450, 148NE113; 296Pa164, 145 A692; 157SC142, 153SE924(1stcase). See also 6F(2d)522. **Cross-examination held proper.**–171Ark1188, 284SW721; 34 NM533, 285P486. **In criminal trial** rule limiting cross-examination to matter brought out on direct examination is inapplicable. 104NJL10, 139A417.

2511–31½–New. Defendant under cross-examination may not be asked whether statements sworn to by other witnesses are lies. 227Ky142, 12SW(2d)324.

2511–31½–New. It is improper to require defendant to express his opinion as to truth or falsity of testimony contradicting him. 112TexCr307, 17SW (2d)56(2dcase) (criminal action).

2511–32 321 Ill 526, 152NE569; 324 Ill 516, 155NE373; 53ND183, 204NW983, 985 [citCyc]; OklCr 291P989 (cross-examination by state). **Cross-examination held proper.**–170Ark1194, 283SW 372; 325 Ill 578, 156NE798; 329 Ill 186, 160NE192; 53ND183, 204NW983 (whether he had been arrested or prosecuted for crime under investigation). **Cross-examination held improper** see 127 Or415, 272P561. **Defendant has been held not unduly limited in cross-examination of accomplice.**–208Cal 64, 280P354(2dcase). **Where accomplice's testimony shows he has no knowledge of** subject of question, latter is properly ruled out. 71CalA788, 236P185.

2511–33 53ND183, 204NW983, 985 [citCyc].

2511–33½–New. Cross-examination of defendant's witness jointly indicted with him held error. Iowa 232NW692.

2511–36 No abuse of discretion to permit special prosecutor to reëxamine defendant on cross-examination after county attorney had already done so. 105 TexCr119, 286SW1104. **Cross-examination by several counsel,** where there are several defendants, held proper. 204 Iowa555, 215NW664.

2511–37 But see 334 Ill 11, 165NE178.

2511–37½–New. Defendant called by plaintiff as witness may be examined by codefendant represented by different attorneys. 71CalA752, 236P365.

2511–38 127Kan487, 274P245. **Trial judge has right of cross-examination in** criminal cases. 224AppDiv546, 231NYS 557.

2511–39 157Md596, 146A750 (where question would have been entirely proper if asked by opposing attorney).

2511–40 82CalA602, 255P897.

2511–41½–New. Conduct of trial as regards permitting accused personally to cross-examine witnesses, where he is represented by counsel, must be left largely to discretion of trial court. 111 TexCr570, 13SW(2d)874.

2512–43 7F(2d)867; 16F(2d)125; 20F (2d)289; 23F(2d)561; 24F(2d)153; 31 F(2d)499; 34F(2d)406; 38F(2d)545; 215Ala47, 109S278; 219Ala384, 122S 322; Ala 130S541; 23AlaA264, 124S282; 170Ark654, 280SW630; Ark 31SW(2d) 421; 205Cal 519, 271P1055; 99CalA240, 279P178; 82Colo 233, 259P1038; 84 Colo 403, 270P869 (discretion is judicial); 87Colo 290, 287P647; 109Conn 616, 145A31; DC 41F(2d)976; 97Fla 591, 121S793(2dcase); 330 Ill 532, 162 NE196; 334 Ill 11, 165NE178; 339 Ill 101, 170NE712; 200 Ind417, 164NE273; 86 IndA440, 157NE10; 200 Iowa483, 203 NW806; 206 Iowa1178, 221NW804; 208 Iowa1139, 226NW186; Iowa 232NW 692; 120Kan221, 243P280; 120Kan434, 243P1014; 121Kan516, 247P430; 127 Kan832, 275P166(1stcase); 227Ky142, 12SW(2d)324; 161La296, 108S543; 156 Md81, 143A648; 253Mass490, 149NE 311; 255Mass369, 151NE839; 260Mass 233, 157NE538; 263Mass39, 160NE315; 264Mass276, 162NE312; 265Mass382, 163NE251(2dcase); Mass 168NE785; 233Mich514, 206NW996; 234Mich419, 208NW458; 238Mich74, 213NW456; 239Mich105, 214NW130; Mo 271SW471; 311Mo 391, 279SW23, 29 [citCyc]; Mo 25SW(2d)109; Mo 29SW(2d)156; MoA 285SW549; MoA 294SW747; 74Mont 201, 239P1002; 83NH190, 139A753; 33 NM540, 273P919; 34NM112, 278P210; 34NM507, 285P500; 192NC20, 133SE 190; 54ND166, 209NW212, 45ALR1487; 55ND194, 212NW857; 20 OhA461, 152 NE678; 30 OhA328, 165NE363; 19 OhA 1; 124 Okl 71, 254P14; 117 Or541, 244 P875; 121 Or236, 252P400; 122 Or504, 259P917; 123 Or632, 263P400; 131 Or 224, 282P237; 132 Or67, 284P276; 295 Pa264, 145A89; 48RI 244, 137A2, 5 [cit Cyc]; RI 147A667; 137SC58, 135SE 635; 148SC392, 146SE245; SC 155SE 409; 49SD1, 205NW710; 49SD535, 207 NW547; 101TexCr267, 275SW837; 70 Utah296, 259P1044, 54ALR1463; 100Vt 268, 137A97; 101Vt427, 144A194; 143 Wash397, 255P146; 143Wash522, 255P 923; 153Wash549, 280P50 (adduction of evidence); Wash 291P1093; 99WVa 694, 129SE748; WVa 154SE769. **Cross-examination held not improper.**–TexCivA 8SW(2d)683.

2513–44 20F(2d)289; 23AlaA393, 126 S174(2dcase); 82Colo 205, 258P226; 166Ga758, 144SE301; 204 Iowa555, 215 NW664; 120Kan221, 243P280; 161La 296, 108S543; 253Mass490, 149NE311; 255Mass369, 151NE839; Mo 256SW819, 822 [citCyc]; 311Mo 391, 279SW23, 29 [citCyc]; MoA 285SW155; 250NY185, 164NE900; 143Wash397, 255P146.

2513–45 20F(2d)289; 215Ala436, 111S 17; 220Ala194, 124S423; 170Ark654, 280SW630; 82Colo 205, 258P226; 327 Ill 162, 158NE462; Ind 173NE229; 86 IndA440, 157NE10; 121Kan516, 247P 430; 234Mich419, 208NW458; 236Mich 226, 210NW219; 238Mich74, 213NW 456; 239Mich105, 214NW130; 311Mo 391, 279SW23, 29 [citCyc]; 54ND166, 209NW212, 45ALR1487; 19 OhA68; 48 RI 244, 137A2; 153SC25, 150SE321; 100Vt268, 137A97; 99WVa694, 129SE 748. **Court should consider rule excluding evidence which tends to degrade witness** unnecessarily in exercising its discretion. 38F(2d)545.

2513–46 20F(2d)289; 170Ark654, 280 SW630; 86 IndA440, 157NE10; 252 Mass465, 148NE123; 260Mass233, 157 NE538; 234Mich419, 208NW458; 236 Mich226, 210NW219; 258Mich74, 213 NW456; 311Mo 391, 279SW23, 29 [cit Cyc]; 74Mont201, 239P1002; 103NJL 663, 138A575; 54ND166, 209NW212, 45 ALR1487; 121 Or236, 252P400 (discretion not abused); 122 Or504, 259P917; 101TexCr267, 275SW837; 99Vt191, 130 A697; 99WVa694, 129SE748. **Discretion not abused.**–143Wash522, 255P923.

2514–48 21AlaA156, 106S685; 21AlaA 629, 111S188 (asking witness why he did not produce article after he had testified he did not know where it was); 22AlaA170, 113S646; 161La296, 108S 543; 264Mass276, 162NE312; 55ND194, 212NW857; RI 147A667; 100Vt268, 137 A97. **Held not unduly restricted.**–149 Wash452, 271P89.

2514–49 218Ala328, 118S552; 90CalA 590, 266P295; 78Colo 235, 242P45; 121 Kan516, 247P430; 264Mass276, 162NE 312. **Restriction held not abuse of discretion.**–22AlaA526, 117S500.

2514–51 161La296, 108S543; 238Mich 74, 213NW456; 101TexCr267, 275SW 837; 107TexCr19, 294SW564.

2515–52 170Ark654, 280SW630.

2515–53 43F(2d)987; 41 Ida729, 241P 1014. See also 236Mich226, 210NW219. **Trial judge should always be liberal** in rulings on form of interrogations on cross-examinations. 285Pa561, 132A810. **Cross-examination held not unduly restricted.**–100CalA775, 281P95.

2515–54 121Kan797, 250P308.

2515–54½–New. Where accused admitted he killed his wife, it is proper to cross-examine on such basis. 216Ala 336, 113S64.

2515–54⅓–New. Court generally should not withdraw witness in criminal case until cross-examination has been completed by defendant. SC 155SE409.

2515–54¼–New. Such withdrawal is not error where witness is afterwards re-

turned and is fully cross-examined. SC 155SE409.

2515–57 Permitting prosecuting attorney to require defendant to read on cross-examination written statement made by his son is not error, jurors not being advised of its contents. 106 TexCr446, 292SW901.

2515–58 Ark 294SW707. But see 34 GaA144, 128SE924.

2516–61 Ark 294SW707.

2517–71 192Wis1, 211NW926.

2516–62 NJ 150A414.

2517–73½–New. Confronting defendant in assault prosecution with several successive persons while questions are put to him as to his alleged participation in assaults upon them is reversible error. 250NY185, 164NE900.

2517–74 Questions held improper.–49 Nev194, 242P582.

2517–76 255Mass369, 151NE839; 250 NY185, 164NE900.

2517–77 21AlaA261, 107S226; 255Mass 327, 151NE466; 255Mass369, 151NE 839.

2517–78 70CalA92, 232P724; 96Fla723, 119S118; 264Mass276, 162NE312; 32 NM48, 250P842; 33PortoRico 825; 49 SD356, 207NW153. **Asking witness whether he is as sure of certain facts testified to as of others** is not improper. 103TexCr488, 280SW1068.

2518–79 CalA 290P77; 88 IndA399, 164 NE284.

2518–81 42F(2d)793; 23AlaA94, 121S 446; 161Ga421, 131SE163; 88 IndA399, 164NE284; Md 183A601; 255Mass369, 151NE839; 103NJL663, 138A575. **Question held not objectionable.**–71CalA453, 236P163; 265Mass382, 163NE251(2d case); 152Wash492, 278P178.

2518–83 215Ala407, 110S818; 21AlaA 460, 109S294; 21AlaA566, 110S61; 92 CalA69, 268P388; 96Fla723, 119S118; 220MoA919, 296SW190; 121 Or552, 255 P477; 123 Or632, 263P400; 104TexCr 85, 282SW587. **Question held not argumentative.**–103TexCr508, 281SW1054.

2518–87 68CalA95, 228P417; 89CalA 451, 265P276; 217Ky688, 290SW514; 166La924, 118S85; 266Mass374, 165NE 513(2dcase); 107TexCr19, 294SW564. See also Mo 295SW547.

2519–88 215Ala143, 110S372; 23AlaA 348, 128S359(2dcase); 23AlaA264, 124 S282; 71CalA788, 236P185; 78CalA476, 248P981; 81CalA484, 254P292; 166Ga 758, 144SE301; Iowa 228NW48; 217 Ky688, 290SW514; 262Mass416, 160NE 252; 52SD566, 219NW252; 100Vt268, 137A97; 101Vt124, 141A686. **Where witness had previously testified she could not remember facts asked** in question on cross-examination, objection to question is properly sustained. 81CalA 484, 254P292.

2519–89 22AlaA364, 115S767; 153Md 312, 138A269.

2519–92½–New. Where party's witness testified that partnership business was carried on in name of partner's mother and that partnership carried no account in particular bank, objection to cross-examination of witness for adverse party as to whether business of partnership was conducted at that bank in name of partner is properly sustained. 88 IndA399, 164NE284.

2520–2 79CalA413, 249P832. See also 254 IllA169.

2520–4 103WVa427, 137SE649, 650 [quotCyc].

2520–7 20F(2d)289; 99Vt337, 131A845.

2520–8 20F(2d)289.

2521–9 99Vt337, 131A845.

2521–10 99Vt337, 131A845.

2521–11 34Ariz139, 268P615, 616 [quot Cyc]; 252Mass450, 148NE113; 255Mass 369, 151NE839; 84Mont510, 276P950; TexCivA 278SW272; 99Vt337, 131A845 (as to reasons for starting suit so soon after accident).

2522–12 22AlaA141, 113S478; 43 Ida 661, 254P528; 261Mass281, 158NE840; 167Minn437, 209NW317; Mo 271SW 500; 222MoA740, 9SW(2d)824; 84Mont 510, 276P950; NH 146A503; 198NC 137, 150SE874; 52ND925, 204NW889; 119 Or682, 250P1098; 289Pa565, 137A 797; 100TexCr476, 273SW561; 104Tex Cr495, 283SW497. **Where incompetent, etc.**–145Va694, 134SE728. **New matter brought out on cross-examination.**–28 F(2d)730; 126Kan129, 266P939.

2523–13 104Conn83, 132A467; 256 IllA 493; 84Mont510, 276P950; 289Pa565, 137A797; 291Pa252, 139A848.

2524–14 111Conn261, 149A772; 43 Ida 661, 254P528; 327 Ill 152, 158NE386 (opportunity to correct mistake should be given); 200 Iowa483, 203NW806; 164La813, 114S696; 262Mass416, 160NE 252; Mo 282SW38, 45 [citCyc]; Mo 12 SW(2d)510; TexCivA 278SW272; Tex CivA 284SW983; 106TexCr589, 293SW 1102; 100Vt246, 136A697. **The witness may be asked as to what he meant,** etc. 99Vt91, 130A758. **Excluding question held not error.**–262Mass416, 160NE252.

2524–15 218Ala493, 119S21; 21AlaA 423, 109S123; 43 Ida661, 254P528; 324 Ill 516, 155NE377; NJ 134A611; 105 NJL117, 143A354; NJSup 146A688(2d case); 54ND840, 211NW585; TexCivA 278SW272; 106TexCr245, 291SW906; 106TexCr589, 293SW1102; Vt 147A682; 144Va795, 130SE788; 148Va194, 138SE 721.

2525–18 200 Iowa660, 204NW278; 174 Minn590, 219NW926; Nebr 233NW450; TexCivA 278SW272; TexCivA 14SW (2d)304; 106TexCr245, 291SW906; 111 TexCr440, 15SW(2d)21(1stcase); TexCr 23SW(2d)726(2dcase). But see 6F(2d) 120.

2525–19 49Nev386, 248P48; NJ 134A 611; 54ND840, 211NW585; 9PaDist& Co 161; TexCivA 290SW292; 104Tex Cr495, 283SW497; 104TexCr210, 283 SW850 (where promise of immunity to witness appeared in cross-examination, it may be shown on redirect examination that, after refusal to testify after offer of immunity, he told county attorney he would "come clean"); 41 Wyo 72, 283P151. **Conviction of crime.**–50ND728, 197NW859.

2526–20½–New. Sustaining objection as to whether witness told truth at inquest held not error where party allowed to examine witness fully as to contradictory statements. 153SC25, 150 SE321.

2526–21 21AlaA348, 108S262; 22AlaA 364, 115S767; 103Conn454, 143A561; Minn 231NW721; 113TexCr112, 18SW (2d)643; 144Wash337, 258P22. **Where counsel on cross-examination examined witness on conversation,** opposing party could bring out balance of conversation on direct examination. 134Misc 902, 236NYS720.

2526–22 22AlaA33, 111S760; Tex CommnA 24SW(2d)347.

2527–23 127Kan399, 273P458; 84Mont 510, 276P950.

2527–26½–New. Where witness was asked in redirect examination if there had been any talk between him and any one of defendants, and he made no answer, his naming of two defendants was held allowable on next question as to who those defendants were. 257Mass421, 154NE91.

2527–30 78CalA455, 248P927; 227Ky 613, 13SW(2d)784.

2528–32 206 Iowa51, 220NW51, 58ALR 1147; 174Minn61, 218NW163; 145Wash 44, 258P826.

2528–33 119 Or682, 250P1098; 145 Wash44, 258P826.

2528–34 21AlaA508, 109S566; 55ND 194, 212NW857.

2528–35 255Mass369, 151NE839.

2529–36 145Va694, 134SE728. Contra 55ND194, 212NW857.

2529–38 167Minn437, 209NW317.

2529–39 72CalA757, 238P143.

2529–41 21AlaA409, 108S658; 255Mass 369, 151NE839; OklCr 287P782.

2530–43 255Mass369, 151NE839; Mass 171NE651 (master); Mo 271SW500; 289Pa565, 137A797. **Court may confine reëxamination to new matter** brought out on cross-examination. 289 Pa565, 137A797.

2530–45 264Mass276, 162NE312.

2530–48 OhA 173NE312.

2530–49 Leading question on redirect examination is properly excluded in court's discretion. 255Mass369, 151NE 839.

2530–54 165La842, 116S206; 255Mass 369, 151NE839.

2531–55 21AlaA300, 107S731; Md 183 A601 (rebuttal witness).

2531–56 148Md560, 129A836.

2531–57 169Ark275, 273SW718; 148 Md560, 129A836.

2531–58 78CalA554, 248P964 (immaterial evidence excluded).

2531–59½–New. Nor may questions be asked which are repetitions of questions asked on cross-examination. 76 Mont574, 248P179.

2531–59⅓–New. Recross-examination cannot be used as substitute for motion to strike improper testimony received on cross-examination. 76Mont 574, 248P179.

2531–59¼–New. Redirect after recross-examination.–Testimony held admissible as to matters referred to on recross-examination. 8F(2d)697.

2531–60 42F(2d)686. **Effect of promise of secrecy.**–140Miss719, 106S268 [cit Cyc]. **Advice of counsel** is not justification for refusal to answer questions which are legal, constitutional, and material. 130Misc456, 224NYS210. **Person is not exempt from testifying** to material matters merely because they are private. 130Misc456, 224NYS210.

2532–69 154Miss286, 122S495.

2533–74 159La831, 106S321.

2533–77 159La831, 106S321.

2534–85 See also 94Fla163, 113S699.

2535–90 5F(2d)471; 85CalA454, 259P 488; Ill 172NE812; 241IllA537; 251 Mich688, 232NW353; 173Minn512, 217 NW935; Mo 30SW(2d)466; MoA 18SW (2d)560; 22 OhA141, 153NE297; 294 Pa406, 144A294. Contra Alta [1925] 3DomLR395.

2535–91 Questioning held to involve danger of self incrimination.–42F(2d) 686. **Questions held not to involve danger of self incrimination.**–42F(2d)686. **In Canada.**–Ont [1930] 3DomLR59.

2536–7 Mo 22SW(2d)642.

2537–17 38F(2d)1005.

2537–21 This is a limitation upon the power of the federal government only, etc. 238Mich39, 213NW448, 52ALR136.

2537–22 238Mich39, 213NW448, 52ALR 136. See also 80CalA293, 251P643.

2537–23 191NC595, 132SE667. **Constitutional guaranty does not protect** persons from giving evidence against others. 297Pa462, 147A93.

2537–24 4F(2d)888; 154SC97, 151SE 233; SD 228NW240 (scope of privilege, under common law, not enlarged or narrowed by language of constitutional provisions). **Evidence procured by compulsion,** inconsistent with exercise of volition, should not be admitted. 191NC 595, 132SE667. **Motive of witness** in claiming privilege is immaterial. 28 F(2d)122.

2538–25 Committing defendant to jail for failure to disclose satisfactorily, held not objectionable as compelling admission of perjury. 100Vt325, 137A 319.

2538–27 Statutes held constitutional.–176Minn308, 223NW144. **Statute requiring disclosure from persons convicted of intoxication** as to persons from whom liquor was obtained held unconstitutional. Vt 148A489.

2538–28 97Fla710, 122S225.

2539–30 243NY423, 154NE298; 213App Div414, 210NYS269 (statute requiring Ku Klux Klan inter alia to file oath, constitution, by-laws, and roster, and making it criminal offense to attend meeting when this has not been done, does not violate constitutional guarantee against self-incrimination); 129Misc708, 222NYS552 (Blue Sky Law investigations).

2539–32½–New. Statute providing for abatement of nuisances is not void under constitutional provision on ground that defendant in answer to bill filed thereunder might incriminate himself. 238Mich39, 213NW448, 52ALR136.

2539–33½–New. Statute compelling witness to testify in examination by attorney-general and protecting witness against use of such testimony against him in state courts is constitutional though no such protection is afforded in federal courts. 243NY423, 154NE 298.

2539–33⅓–New. Statute making proof of father's abandonment and desertion of children prima facie proof that abandonment was willful and without excuse does not involve self-incrimina-

tion. 94CalA791, 271P926.

2539-33¼-New. Recalling defendant in criminal case.-Action of court in permitting state to call defendant after defendant had closed his testimony and state had closed, except in rebuttal, does not require defendant to give testimony against himself. OklCr 275P361.

2539-33⅓-New. Constitutional rights of accused depend on fact and substance, not form. SD 228NW240.

2539-34 Bastardy proceeding, being criminal in nature, held reversible error to compel defendant to testify against himself. 33 OhA125, 168NE568.

2539-36 255 IllA288; 297Pa462, 147A 93.

2540-37 28F(2d)122; 180Minn573, 231 NW217; NJCh 147A338 (criminal contempt). **Contempt proceedings.**-260Mass 344, 157NE684, 54ALR1422. **One who files income tax return** is a witness within meaning of Const. Amendm. V. 15F(2d)809.

2540-38 238Mich39, 213NW448, 52ALR 136; SD 228NW240; 152Va368, 147SE 267. **Attorney cited to answer charges** is not compelled to be witness or to give answers tending to criminate himself. 30Ariz407, 248P29. **Witness in bankruptcy proceedings** is protected against disclosure. 18F(2d)358.

2540-39 But see 40F(2d)201. **Privilege available before federal grand jury** on ground that answer might incriminate witness under state law. 42F(2d)686.

2540-39½-New. Officer guilty of contempt in refusing to render account ordered by court having jurisdiction cannot purge himself of contempt by reliance on constitutional privilege of refraining from answering incriminating questions. 49ND851, 193NW928.

2540-39⅓-New. Constitutional privilege may be asserted either at preliminary examination after arrest or at statutory preliminary judicial investigation prior to issuance of warrant of arrest to determine whether, and by whom, crime has been committed. SD 228NW240.

2540-39¼-New. Person may not be called as witness or subjected to inquisition in any judicial inquiry whose primary object is determination of such person's guilt or innocence of given offense. SD 228NW240.

2540-40 110Conn482, 148A551; 143 Miss262, 108S709. **Testimony must have direct tendency to incriminate** remote or speculative possibility being insufficient. 40F(2d)201.

2540-41 42F(2d)686; 4HawaiiFed724; MoA 18SW(2d)560; 9PaDist&Co 395.

2540-42 110Conn482, 148A551 (danger must be real and appreciable not imaginary and unsubstantial).

2541-44½-New. The taking of finger prints of prisoner is not in violation of privilege. 9PaDist&Co 389.

2541-48 Objection may be made at trial to testimony offered against defendant given by him in statutory John Doe proceeding. SD 228NW240.

2541-51½-New. In seduction prosecution, statement of prosecuting witness that her affidavit charging third party with rape was false is not admissible. 322Mo 1180, 18SW(2d)67.

2542-55 229AppDiv62, 241NYS369 (disbarment); 99Vt490, 134A697, 48ALR 985. **Patent infringement being civil contempt** defendant may be compelled to testify thereof. 39F(2d)181.

2542-62 42F(2d)686; 18F(2d)965. **Insufficiency of showing by state** that defendant came within statute. 339 Ill 474, 171NE559, 69ALR852.

2543-63½-New. Privilege extends only to crimes which may be prosecuted within jurisdiction where witness is examined. 264Mass318, 162NE345, 59 ALR891.

2543-64 Prohibition Act providing that self-incrimination shall not excuse witnesses subpœnaed from testifying applies only to those called by government. 39F(2d)312.

2543-66½-New. Dismissal of indictment against witness does not deprive him of privilege of refusing to testify as to prior offenses as to which dismissal did not acquit him. 68CalA457, 229P974.

2543-66⅓-New. Defendant corporation in suit for violation of trade-mark and unfair competition cannot object to answering interrogatories because complaint asks treble damages. 16F(2d) 130.

2543-66¼-New. In prosecution for conspiracy to violate Prohibition Act, individual defendants may be required to testify for government as to custody and authenticity of corporate books and records. 31F(2d)229.

2543-67 220Ky546, 295SW871; 243NY 423, 154NE298; 127Misc791, 217NYS 477; 128Misc84, 218NYS57. **Statute authorizing attorney-general to compel security dealers to furnish information** is not violative of right when it guarantees immunity to witness. 128Misc 84, 218NYS57.

2545-71 Statute granting witnesses compelled to testify immunity in state courts held not unconstitutional, though no immunity is granted in federal courts. 243NY423, 154NE298.

2545-72 339 Ill 474, 171NE559, 69ALR 852.

2545-76½-New. Bankruptcy Act does not afford witness complete immunity from prosecution. 18F(2d)358.

2545-76⅓-New. Immunity statute is not waived by failure to claim privilege and refusing to testify. 28F(2d)424.

2545-76¼-New. That witnesses testified as corporate officers, and not as individuals, does not deprive them of personal immunity. 28F(2d)424.

2545-76⅕-New. Extent or applicability of immunity granted witness by National Prohibition Act is not dependent on importance, quantity, or materiality of testimony procured from witness. 28 F(2d)424.

2546-79½-New. Immunity granted by court order must be equivalent to constitutional guaranty. 339 Ill 474, 171 NE559, 69ALR852.

2546-79⅓-New. Witness is not guilty of contempt by refusing to answer questions contrary to prior agreement under state's promise of immunity. 339 Ill 474, 171NE559, 69ALR852.

2546-80 169La151, 124S676(1stcase); 191NC595, 132SE667. **Defendant should be given opportunity,** in absence of jury, to produce or decline to produce books or papers previously called for, and in latter case secondary evidence may be offered. 191NC595, 132SE667. **Rule requiring witness to show real danger of incrimination** applies in regard to production of documents. 110 Conn482, 148A551.

2547-85 26F(2d)847 (caution that answer would open door to cross-examination on such matters); 41GaA300, 152 SE609 (caution by court did not deprive accused of right of cross-examination); SD 228NW240 (discretionary with court).

2547-86 Contra 50ND813, 197NW854. **Where accused in criminal prosecution is called as witness by his counsel,** court is under no duty to warn him of his legal rights. 118 Or397, 247P146.

2547-88 273US103, 47SCt302, 71L ed 560; 110Conn482, 148A551 (as to each specific question asked); 218AppDiv 753, 218NYS102 (right is personal); SD 228NW240.

2547-89 273US103, 47SCt302, 71L ed 560.

2547-90 273US103, 47SCt302, 71L ed 560.

2547-90½-New. Where statute provides that testimony in supplementary proceedings shall not be used as evidence in a criminal proceeding, use of such evidence requires reversal where evidence of defendants, if believed, warranted their acquittal. 22AppDiv54, 225 NYS149.

2547-90⅓-New. Provisions of such statute are mandatory. 222AppDiv54, 225NYS149.

2547-91 54ND801, 211NW435. **Defendant in criminal prosecution.**-258Mass98, 155NE8.

2548-92 21AlaA631, 111S190; 203 Iowa 1008, 213NW603; MoA 30SW(2d)176 (personal choice on facts); 50ND813, 197NW854; 54ND801, 211NW435; OklCr 280P630; Wash 287P23 (unavailable to defendant father of witness). **Fraudulently asserting privilege intending to protect others is not contempt if** answer actually tends to incriminate witness. CalA 287P125.

2548-93 224AppDiv127, 230NYS28; 54 ND801, 211NW435.

2548-94 204 Iowa819, 216NW104; 50 ND813, 197NW854; Utah 277P972.

2548-95 54ND801, 211NW435.

2548-96 54ND801, 211NW435. **Where the witness is a party,** etc. See also 294Pa406, 144A294.

2549-97½-New. Witness held not to have acted in bad faith by claiming privilege from self incrimination on advice of counsel despite his own judgment. MoA 24SW(2d)196.

2549-98 Ill 173NE181.

2549-1 Ill 173NE181.

2549-3 Ill 173NE181; 218AppDiv753, 218NYS102; 134Misc474, 235NYS217.

2549-4½-New. Question whether privilege was violated in John Doe proceeding cannot be raised by motion to obtain transcript of testimony of other witnesses. SD 228NW240.

2549-6 Claim must be made under oath in some jurisdictions. 54ND801, 211NW 435.

2550-7 12F(2d)683.

2550-8 238Mich39, 213NW448, 52ALR 136; 22 OhA141, 153NE297.

2550-9 273US103, 47SCt302, 71L ed 560; 28F(2d)122; CalA 287P125; 264 Mass318, 162NE345, 59ALR891; 238 Mich39, 213NW448, 52ALR136; 130Misc 456, 224NYS210; 22 OhA141, 153NE 297; 99Vt490, 134A697, 48ALR985.

2550-10 273US103, 47SCt302, 71L ed 560; 28F(2d)122; 42F(2d)686; 110 Conn482, 148A551; Ill 173NE181; 255 IllA288 (full and truthful disclosure required); 22 OhA141, 153NE297; 99 Vt490, 134A697, 48ALR985.

2551-12 CalA 287P125; MoA 18SW (2d)560.

2552-19 173Minn512, 217NW935, 936 [citCyc]; 82NH518, 136A358.

2552-22 273US103, 47SCt302, 71L ed 560; Ill 172NE812; 203 Iowa1008, 213 NW603; 248Mich134, 226NW895; 191 NC479, 132SE162; SD 228NW240. **Acts held not to constitute waiver.**-42F(2d) 686. **Privilege is waived if** not brought to attention of trial court. 273US103, 47SCt302, 71L ed560.

2552-23 10PaDist&Co 678.

2552-25½-New. Under National Prohibition Amendment, immunity is not waived, when testifying before grand jury, by failure to claim privilege. 15 F(2d)593.

2552-26 5F(2d)471.

2552-27 Where state gave notice to produce certain papers, and at trial defendant was ordered to produce them, held such order imported compulsion. 191NC595, 132SE667.

2553-28 271US494, 46SCt566, 70L ed 1054; 218Ala363, 118S506(1stcase); 22 AlaA220, 114S280; 22AlaA220, 114S281; 72CalA559, 237P789 (cross-examination of defendant held not beyond scope of direct examination); 199Cal 513, 250P 164; 96Fla768, 119S380; 202 Iowa153, 209NW279; 226Ky802, 11SW(2d)959; 227Ky792, 13SW(2d)1053; 231Ky838, 22SW(2d)295; 234Mich95, 207NW867; 169Minn349, 211NW305; 176Minn349, 223NW452(4thcase); 82NH518, 136A 358; NH 146A503; OklCr 279P982(2d case); 118 Or397, 247P146; 35Porto Rico 617; 146SC138, 143SE674; 113Tex Cr388, 218SW(2d)1064; 155Wash63, 283 P439. See also 191NC479, 132SE162. But see 5F(2d)818.

2553-29 SD 228NW240.

2553-31½-New. Accepting employment as agent or fiduciary is not waiver of privilege against self-incrimination. CalA 287P125.

2553-31⅓-New. Giving deposition was not waiver of privilege against self-incrimination. CalA 287P125.

2553-31¼-New. Right of national prohibition officer waived to extent of disclosure in petition for removal of indictment to federal court. 12PaDist& Co 557.

2553-32 271US494, 46SCt566, 70L ed 1054 (defendant in criminal case on cross-examination may be required to disclose that he did not testify at first trial); 258Mass98, 155NE8; 173Minn 391, 217NW343; 118 Or397, 247P146.

2554–33 43 Ida180, 250P239; Ill 172 NE812; 151Wash306, 275P717.

2555–36 Single credible witness outweighs any indefinite number of witnesses who do not possess attributes of ability and credibility. 15F(2d)258.

2555–37 170Ark594, 280SW625; 172 Ark386, 289SW1; 82Colo 121, 257P355; 201 Iowa20, 206NW680; 252Mass275, 147NE827; 253Mass25, 147NE844; 80 Mont537, 261P341; 130Misc229, 224NYS 275. See also 34GaA380, 129SE297.

2555–38 172Ark386, 289SW1; 5PaDist &Co 410; 108TexCr672, 2SW(2d)223.

2555–38½–New. Person may be competent witness and yet not credible one. NC 154SE604.

2555–39 208 Iowa1049, 226NW770; 233 Ky545, 26SW(2d)489; 161La823, 109S 504; NJ 151A855; 119 Or430, 249P 1049; 51Philippine201; 35PortoRico 516.

2555–40 NJ 151A855; 45Philippine9 (criminal record); 35PortoRico 516 (attorney and notary no exception to rule). **Presumption that witness speaks truth may be overcome** by manner in which he testifies, character of his testimony, or by evidence affecting his motives. 119 Or430, 249P1049.

2555–41 83Colo 430, 266P217; NJ 151 A855.

2555–42 22AlaA34, 111S765; 37GaA 386, 140SE415; 159La779, 106S302; 153Miss467, 121S143; 317Mo 759, 297 SW10; 108TexCr308, 300SW74.

2555–45 23AlaA452, 126S887; 91CalA 139, 266P972; 218AppDiv363, 218NYS 297; TexCivA 2SW(2d)866; TexCivA 23SW(2d)522; 111TexCr70, 11SW(2d) 513; 152Va1014, 148SE821.

2556–47 317Mo 759, 297SW10; 225 AppDiv19, 232NYS66. **The fact that the witness has been contradicted,** etc. Tex CivA 2SW(2d)866. **Admitting evidence that witness identified defendant in police station to support his present identifying testimony is error.** 215AppDiv 270, 213NYS449 (even though case is not capital one).

2556–50 TexCivA 300SW641.

2556–51 218Ala599, 119S644; 219Ala 353, 122S437; 161Ga837, 132SE79; 222 Ky89, 300SW365; Mo 278SW733; 317 Mo 759, 297SW10; TexCivA 296SW987; 104TexCr649, 285SW621. **Attempt to show witness has made inconsistent statements** does not put general reputation for truth and veracity in issue. MoA 25SW(2d)558.

2557–52 161Ga837, 132SE79; 159 Tenn297, 17SW(2d)913.

2557–56 84Colo 403, 270P869; 3Del 195, 133A790; 168La95, 121S586; 255 Mass369, 151NE839; NJ 151A867; Tex CivA 9SW(2d)413.

2558–57 38F(2d)545; 128Kan659, 280 P780; 131 Or209, 282P233; 132 Or374, 284P830.

2558–60½–New. 82NH189, 131A606.

2558–60¼–New. Question of permitting use of testimony of impeaching character is one of fact for trial judge. 82NH189, 131A606.

2558–61 339 Ill 448, 171NE540 (eyewitness called by court is not witness of either party within rule preventing impeachment); 107TexCr312, 296SW 887 (wife testifying for husband). **In New Mexico.**–34NM507, 285P500. **Wife taking hand in defendant husband's behalf is subject to impeachment.** 105 TexCr327, 288SW458.

2558–62 143 Okl 45, 287P396. **Impeachment of party by own counsel, when called by adversary.**–Where party is called as witness by adversary, counsel for such party may impeach him on cross-examination. 103Conn583, 131A 432, 44ALR785. **Conversely,** where party was not witness, evidence of prior criminal conviction held inadmissible. Iowa 213NW786.

2558–63 5F(2d)818 (defendant can be impeached to no greater extent than any other witness); 13F(2d)777; 20AlaA 547, 104S48; 169Ark636, 276SW365; 171Ark68, 283SW23; 175Ark1115, 1SW (2d)553; 329 Ill 186, 160NE192; 333 Ill 469, 165NE235; 200 Ind156, 162NE 19; 203 Iowa192, 210NW749; 120Kan 177, 243P326; 215Ky802, 287SW10; 162La340, 110S497; 163La473, 112S303; 163La1000, 113S222; 166La924, 118S 85; 169La109, 124S188; 255Mass369, 151NE839; 308Mo 695, 274SW470; 314 Mo 574, 285SW997; 316Mo 581, 292SW 49; Mo 18SW(2d)48; 116Nebr563, 218 NW416; 189NC766, 128SE354; 194NC 206, 139SE230; OklCr 281P322; OklCr 285P990; 118 Or397, 247P146; 285Pa 232, 132A168; 13PaDist&Co 361; 133 SC491, 131SE603; 100TexCr241, 272SW 788; 112TexCr606, 18SW(2d)632; Utah 287P909; 141Wash1, 250P453.

2559–64 143Miss324, 108S711, 46ALR 895.

2559–65 13F(2d)972; 214Ala187, 106S 811; 216Ala1, 110S283; 218Ala616, 119 S635; 218Ala619, 119S833; 22AlaA373, 115S849; AlaA 129S787; 170Ark1194, 282SW17; Cal 287P343; 77CalA462, 247P236; 103Conn583, 131A432, 44ALR 785; 252 IllA194; 200 Iowa843, 205NW 511; 205 Iowa127, 215NW593; 230Ky 78, 18SW(2d)866; MoA 294SW747; 222 MoA307, 297SW129; MoA 8SW(2d)88; 222MoA1176, 15SW(2d)946; 129Misc 232, 220NYS214; 194NC394, 139SE762; 198NC200, 151SE257; 30 OhA572, 165 NE862; 120 Or144, 251P763; 120 Or 607, 253P531; 32PortoRico 126; 153SC 25, 150SE321; TexCivA 278SW350, 352 [citCyc]; TexCivA 295SW947, 949 [cit CJ]; TexCr 27SW(2d)803; 66Utah543, 244P654; 100Vt395, 138A725, 54ALR 1369; 136Wash232, 239P553. **Impeachment of own witness** is allowed only in case such witness prejudices case of party calling him. 81CalA226, 253P735; TexCivA 278SW350. **Refusal to permit defendants** to lay predicate to impeach their witness held proper where answers on cross-examination were not unexpected. TexCivA 295SW947. **Rule is not violated by recall of own witness** to dispel unfavorable impression of cross-examination, even where such recall tends to discredit witness. 273US392, 47SCt377, 71L ed700, 50ALR989. **Where plaintiff calls defendant as witness,** he vouches for his good character and is bound by his uncontroverted testimony. 105Conn453, 135A554. **Under statute authorizing, impeachment by proof of statements inconsistent with testimony,** competent purpose for impeachment must be shown. 81CalA226, 253P735. Under such statute, where witness for people in prosecution has testified that he saw nothing at place of homicide except several automobiles, he may be impeached by proof of statements that he saw deceased staggering out of house. 81CalA226, 253P735. **Where plaintiff took deposition** witness was that of plaintiff, even though offered in person by defendant. TexCivA 300SW256. **Testimony on cross-examination.**–Ind 166NE654. **Plaintiff vouches for credibility of own witness.**–TexCivA 29SW (2d)484(2dcase); TexCommnA 24SW (2d)354. **Hostile witness.**–169La947, 126S434; 150SC449, 148SE472; 53SD 291, 220NW492. **Discretion of court** not abused in excluding evidence. MoA 8 SW(2d)88.

2560–67 20F(2d)545; 24F(2d)910; 170 Ark1194, 282SW17; 81CalA122, 252P 1067; 170Minn482, 212NW944; Mont 288P186; 102NJL134, 130A642; 129 Misc232, 220NYS214; TexCivA 300SW 256; 136Wash232, 239P553. **State, in criminal prosecution, surprised by its own witness,** may neutralize effect thereof by proving self-contradictory statements of witness. 103NJL18, 134A886. **Entitled to refresh memory.**–129Misc232, 220NYS214. **Examination as to testimony on preliminary hearing.**–192Wis 379, 212NW879. **Surprise need not be confined to what develops after witness takes stand.**–Mont 288P186.

2560–68 104CalA662, 286P711; 116Ga 10, 142SE160; 194NC394, 139SE762; 150SC449, 148SE472; 100TexCr154, 272 SW474 (where witness merely fails to remember, refuses to testify, or fails to make out state's case, he cannot be impeached); 104TexCr464, 284SW219; 113 TexCr543, 22SW(2d)939; 66Utah543, 244P654; 136Wash232, 239P553. **Where witness is manifestly hostile,** court may grant state permission to cross-examine him so as to weaken or nullify his adverse testimony. 82NH189, 131A606.

2560–69½–New. One cannot impeach own witness by introducing evidence as to her supposed hostility before she had been examined. 129Misc232, 220NYS 214.

2560–69¼–New. Question to defendant's wife called by state as witness was held admissible to rebut defendant's statement that deceased was then at his home, and not objectionable as impeaching state's own witness. 164La813, 114 S696.

2560–69¼–New. Permitting a party to cross-examine his own witness when adverse is within discretion of court. 299 Pa79, 149A104.

2560–70 236Mich672, 211NW39 (where examination was limited solely to impeachment of hostile witness); 139 Okl 95, 281P259; 286Pa344, 133A508.

2561–71 174Minn13, 218NW447.

2561–72 Witness called by court in criminal case who gives evidence detrimental to state may be impeached by state. 91Fla682, 108S842.

2561–73 205 Iowa334, 218NW49, 50 [quotCyc]; 117 Or107, 242P1112. Contra 166Ga794, 144SE271; 286Pa344, 133 A508. But see 97PaSuper398. **Fact alone that garnishee is examined as adverse witness** does not discredit him. 143Va46, 129SE219.

2561–75 119Kan333, 239P1103, 1104 [citCyc]; 33PortoRico 147; 100Vt395, 138A725, 54ALR1369.

2562–83 3F(2d)852; TexCivA 295SW 947. **That witness called by defendant was subpœnaed by state** cannot be shown by defendant. 231Ky463, 21SW (2d)800.

2562–85 94Fla318, 113S689.

2563–94 Method of impeaching one's own witness is prescribed by statute in some jurisdictions and should be substantially followed. 43 Ida540, 253P 854.

2564–95 159La779, 106S302. **Method of attack on defendant is not limited to cross-examination** by statutes providing that defendant testifying in own behalf shall be subject to all rules of law relating to cross-examination of other witnesses. 141Wash1, 250P453. **Witness may be discredited in other methods than those prescribed by code.**–41GaA 76, 151SE663(1stcase).

2564–97 213Ala301, 104S668; 221Ala 585, 130S199; 22AlaA350, 115S701; 177 Ark885, 7SW(2d)969; 99CalA240, 279 P178 (testing credibility or weight of testimony); 203 Iowa192, 210NW749 (defendant); 163La473, 112S303; 168 La198, 121S742; 255Mass369, 151NE 839; MoA 282SW507; 117 Or541, 244P 875; 101Vt30, 139A918.

2564–98 70CalA567, 234P129; 99Fla 1032, 128S1; 161Ga421, 131SE163; 160 La26, 106S662, 665 [quotCyc]; 252Mass 71, 147NE574 (reasonable cross-examination to prove falsity, bias, or prejudice is matter of right); 255Mass369, 151NE839; Mo 296SW433, 436 [cit Cyc]; NC 154SE604; 112 Okl 202, 240 P732; 33PortoRico 179; 101Vt30, 139 A918; Vt 148A484. **A witness may be,** etc. 166La924, 118S85.

2564–99 117 Or541, 244P875; 107 TexCr174, 296SW588.

2564–1 90Fla632, 106S462 (where witness had testified that only two guys were customarily used on derricks, held proper to bring out that three guys were used on job after accident). **Improper to cross-examine witness** as to whether his testimony at previous trial was true. 21AlaA227, 107S37. **Cross-examination of defendant** as to whether he drew checks, not paid for lack of funds, was permissible to contradict his statement on direct examination that he was not in need of funds when he uttered such check. 23AlaA101, 121S451(2dcase). **Cross-examination of accused, as to fact that he was anxious** about condition of accomplice shot at time of burglary, has been held proper to discredit his statement that ill feeling existed between him and accomplice. 167La986, 120S620.

2565–3 Cal 292P645.

2565–4 22AlaA72, 112S365; 218Ala566, 119S610(2dcase); 203 Iowa192, 210NW 749.

2565–5 316Mo 31, 292SW434; 117 Or 541, 244P875; 101Vt30, 139A918.

2565–7 70CalA567, 234P129; 206 Iowa

1134, 221NW802; 316Mo 31, 292SW434; 108TexCr516, 1SW(2d)885; 101Vt30, 139A918.

2566-13 160La26, 106S662, 665 [quot Cyc]; 316Mo 31, 292SW434; MoA 282 SW507; 33PortoRico 179. **Cross-examination held proper.**–22AlaA93, 112S806; 333 Ill 104, 164NE138; 165La622, 115S 802; 117 Or541, 244P875 (reading letters to witness); 33PortoRico 179; TexCivA 18SW(2d)189. **Laying foundation.**–33 PortoRico 179. **Refusal to allow cross-examination as to whether like testimony** had been given on former trial has been held error. 229Ky139, 16SW(2d)793.

2568-14 14F(2d)888; 247 IllA505; 128 Kan659, 280P780; 249Mich391, 228NW 687.

2569-16 199 Ind592, 159NE420, 427 [citCyc].

2569-18 84CalA685, 258P463; MoA 282 SW507.

2569-18½-New. Examination as to specific act of immorality for purposes of impeachment properly excluded. 105 TexCr327, 288SW458.

2569-19 22AlaA579, 118S49; 312Mo 655, 280SW1040; 53ND333, 205NW877; 105TexCr276, 288SW441; 108TexCr320, 300SW65; 69Utah557, 257P658. **Defendant in criminal proceeding.**–53ND95, 204NW969; 123 Or173, 261P411.

2569-20 322 Ill 473, 153NE710; 169 La559, 125S617; 251Mich597, 232NW 371; 123 Or173, 261P411. See also 50 SD533, 210NW721. **State may cross-examine defendant in criminal prosecution as to collateral matters** for purpose of discrediting him. 200 Ind165, 162NE 234. **Permitting prosecutor to cross-examine defendant** concerning other liquor violations held abuse of discretion. 147Va585, 136SE501. **Matters held not collateral.**–251Mich597, 232NW371.

2570-22 168Ark1145, 273SW19; 168La 95, 121S586; Miss 130S511; 123 Or173, 261P411.

2570-23 19F(2d)850; 22AlaA579, 118 S49; 108Conn521, 143A902; 209Ky619, 273SW439; Me 149A618; 255Mass369, 151NE839; 261Mass68, 158NE338; 263 Mass34, 160NE274; 263Mass220, 160NE 888; 239Mich105, 214NW130; 180Minn 310, 230NW826; 221AppDiv26, 222NYS 497; 112 Okl 202, 240P732; 108TexCr 516, 1SW(2d)885; 113TexCr75, 19SW (2d)41; 135Wash377, 237P727, 728 [cit Cyc]; 151Wash599, 276P873, 65ALR 405. But see 70CalA567, 234P129. **Allowing question on cross-examination of defendant in criminal case** regarding failure to have certain witness subpœnaed is not abuse of discretion. 20AlaA 700, 104S926. **If defendant on direct examination in criminal prosecution** refers in general way to subject, he may on cross-examination be examined in detail as to that subject. 314Mo 574, 285SW 997 (on denial of manufacturing liquor).

2571-27 161LaS51, 109S515.

2571-30 273US392, 47SCt377, 71Led 700, 50ALR989; 13F(2d)777; 200 Iowa 660, 204NW278; 49RI 397, 143A604; 106TexCr628, 294SW589; 113TexCr81, 18SW(2d)661(2dcase). But see Or 289 P369.

2572-31 180Minn310, 230NW826; 189 NC766, 128SE354. **Sustaining evidence held properly excluded.**–105TexCr494, 288SW1074.

2572-32 216Ala642, 114S298; 178Ark 862, 12SW(2d)772, 68ALR1303; 3Del 229, 134A630; 94Fla318, 113S689, 695 [citCyc]; 40GaA230, 149SE174 (party may show any fact or circumstance that may affect credit of an opposing witness); 203 Iowa192, 210NW749 (memory, history, motives, etc.); 126Me136, 136A808; 151Md456, 135A189; 255Mass 369, 151NE839; 251Mich597, 232NW 371; 316Mo 31, 292SW434; TexCivA 283SW604; 107TexCr354, 295SW621; 107TexCr174, 296SW588. **Question** whether defendant had been indicted for theft six years previously held not too remote. 107TexCr354, 295SW621. **Collusion.**–26F(2d)438.

2573-33 148Wash65, 268P133. **Collateral matters.**–216AppDiv23, 214NYS 517 (where defendant had testified as never having sold whisky).

2573-34 200 Ind156, 162NE49; 199 Iowa815, 202NW519. **Illness not affecting mental capacity.**–See also 148Wash 65, 268P133.

2573-35 But see 5PaDist&Co 410.

2573-36 TexCivA 285SW638.

2574-42 21AlaA407, 108S645; 23AlaA 51, 121S698; 327 Ill 162, 158NE462; 228Ky149, 14SW(2d)381; 261Mass281, 158NE840; 154Miss742, 123S867 (homicide); MoA 292SW443; NJSup 135A 664; 122 Or504, 259P917, 918 [citCyc]; TexCr 29SSW575; TexCr 27SW(2d)189 (2dcase). **Fact that evidence was conflicting as to witness'** intoxication at time of shooting does not render evidence of his sobriety few hours later admissible. 23AlaA35, 120S301(2dcase).

2575-43 219Ala692, 123S215.

2575-44 110TexCr384, 10SW(2d)561.

2575-48 Habitual use of drugs causing mental confusion and impairment of moral character may be shown. 48Nev 205, 228P615, 239P801.

2575-50 99Fla1032, 128S1.

2575-51 MoA 290SW119.

2575-52 214Ala2, 106S617; 197 Ind62, 147NE771; 229Ky499, 17SW(2d)403. **Question asking witness to describe last person seen before defendant,** when witness had not seen another person that day, held remote. 22AlaA170, 113S646.

2576-53 214Ala2, 106S617.

2576-57 18F(2d)930.

2576-58 172Ark609, 290SW66.

2576-59 18F(2d)930.

2577-69 100TexCr241, 272SW788 (accused in homicide case).

2577-72½-New. Witness' testimony as to agreement between plaintiff's decedent and defendant may be impeached by denying that witness was present when agreement was made. 36GaA61, 135SE220.

2577-72¼-New. Where witness introduced notebook showing purchase of liquor on certain days, questions as to whether he bought liquor on other days properly excluded. 160La316, 107S123.

2577-73 41F(2d)129 (agreement among witnesses subsequently arrived at); 168 Ark396, 270SW945 (that he used different name and offered to sell car afterward proved to have been stolen); 235 IllA401; 214Ky458, 283SW427; LaA 129S379; NJSup 130A437; 67Utah45, 245P695. **Plaintiff's settlement with defendant's joint tort-feasor** is admissible against him as affecting credibility of his testimony in action against latter. TexCivA 14SW(2d)304.

2578-74 195NC777, 143SE865; Tex CivA 4SW(2d)169.

2579-80½-New. Where judge accused plaintiff of shaking head toward witness, his silence is not admission of attempt to tell witness what to say. Vt 148A484.

2579-85 131 Or350, 281P172 (refusal to answer material questions).

2579-86 104TexCr637, 285SW826.

2579-87 But see MoA 291SW525.

2580-96½-New. In will contest where one of residuary legatees testified for proponent, question whether he had told tenant on testator's farm, who testified for contestant, not to make his testimony too strong because witness and proponent might yet own farm was proper cross-examination as showing attempt to intimidate and influence other witness. 54SD184, 223NW41.

2580-96¼-New. Offer of compensation to party to testify as to adulterous conduct of spouse is improper and affects credibility. Md 150A286.

2580-98 Iowa 230NW425.

2580-99½-New. Judge's accusation that plaintiff shook head toward witness is admissible in subsequent trial where not denied. Vt 148A484.

2581-1 85CalA388, 259P484. **Evidence held not to raise inference of fraud.**–218 Ala505, 119S11.

2581-8 180 Iowa721, 163NW463; 205 Iowa271, 215NW649, 217NW874; 208 Iowa228, 225NW268; Md 151A21; 251 Mich597, 232NW371; TexCivA 118SW (2d)593; 105TexCr327, 288SW458. **Evidence held inadmissible.**–208 Iowa228, 225NW268.

2583-15 152Va548, 147SE228.

2583-21 32F(2d)359.

2583-23 232Mich194, 205NW49.

2583-24½-New. Interest of parties must be considered in weighing testimony. 232Mich194, 205NW49.

2584-26 101Vt30, 139A918.

2584-29 Duress in obtaining testimony of witness does not render him incompetent. 144Miss420, 110S208.

2584-29½-New. Duress prior to introduction of witness goes to credibility and not competency. 145Miss675, 110S 367.

2584-30 99Vt191, 130A697 (where witness had been engaged in business other than he had testified to).

2584-32 222MoA64, 300SW554.

2584-34 23AlaA572, 129S316 (cross-examination held proper); 67Utah45, 245 P695. See also 321Mo 17, 10SW(2d)936.

2585-36 286Pa344, 133A508, 510 [cit Cyc]; 50Philippine545.

2585-37 286Pa344, 133A508, 510 [cit Cyc].

2585-38 286Pa344, 133A508, 510 [cit Cyc].

2585-39 But see 223AppDiv511, 228 NYS722.

2585-42 But see 51Philippine201. **Discrepancies do not always indicate falsifying** unless matter involved demands precision. 2?F(2d)438.

2586-45 20 OhA518, 152NE767; 193 Wis496, 211NW782.

2586-46 20 OhA518, 152NE767.

2586-47 258Mass165, 154NE859; 20 OhA518, 152NE767; 193Wis496, 211NW 782.

2586-51 214Ala597, 108S509; 216Ala 549, 114S43; 21AlaA206, 106S621 (dictum); 77CalA164, 247P212; 206 Iowa629, 221NW59; 236Mich471, 210 NW478; 85Mont585, 281P551; 133Misc 507, 231NYS654; 123 Or111, 261P72; 91 PaSuper571; 48Philippine485; TexCivA 28SW(2d)907. Contra 171Ark1118, 287 SW400. **Though jury disbelieve testimony of defendant charged with murder,** they could not find him guilty if consideration of entire evidence did not show guilt beyond reasonable doubt. 324 Ill 131, 154NE715. **Surrogate's Court as trier of facts** need give no credence to witnesses in view of deliberate perjury and exaggeration. 136Misc581, 240NYS 380.

2588-53 172Ark244, 288SW904; 77CalA 164, 247P212; 105Conn539, 136A85; 252Mass236, 147NE561; 126Misc342, 215NYS170; 91PaSuper571; SD 230 NW20.

2588-54 126Misc342, 215NYS170. See also 46PhilippineS01, 804 [citCyc].

2588-54½-New. Jury's disbelief of sole testimony as to double employment of plaintiff would not be positive evidence justifying findings of such employment. 265Mass500, 164NE388.

2588-54¼-New. Where judge believed that defendant willfully swore falsely, such conduct could be considered in nature of admission from which, with other evidence, liability might be inferred. 265Mass350, 164NE87(2dcase).

2588-55 21AlaA206, 106S621; 21AlaA 562, 110S563; 35Ariz432, 280P672; 52 Nev115, 282P1024; NJ 140A454; 190NC 444, 130SE116. **It is willfully false testimony to material fact** which impeaches testimony of witness. 21AlaA31, 104 S871.

2589-58 115Nebr535, 213NW839.

2589-61 41F(2d)682; 21AlaA31, 104S 871; 82Mont170, 266P400.

2591-74½-New. Fact that witnesses vary slightly in their testimony on particular detail only adds to credibility. 214 Ky137, 282SW1082.

2591-75 322 Ill 473, 153NE710. **Discrepancy on immaterial matter** does not discredit witness. 40GaA741, 151SE659.

2591-79½-New. In suit for divorce, absence of witnesses who could have corroborated testimony of defendant and corespondent, if true, militated against their credibility. 168La195, 121S741.

2593-90 172Ark1176, 288SW915; 94Cal A243, 271P127; 36GaA645, 137SE795; 214Ky228, 282SW1060; 219Ky389, 293 SW155; 127Me316, 143A178; 253Mass 25, 147NE844; 190NC444, 130SE116; 25 OhA120, 157NE308; 25 OhA157, 157 NE825; 136Wash534, 240P902; 192Wis 391, 212NW662.

2593-91 241NY460, 150NE516; Tex CommnA 286SW20; 104TexCr244, 283 SW846; 113TexCr108, 18SW(2d)637(2d case); 136Wash534, 240P902 (except as

corroborated by other evidence); 192 Wis391, 212NW662.

2593-91½-New. and this is so even though witness is corroborated by several witnesses, 172Ark1176, 288SW915.

2593-92 38GaA348, 144SE8; 119Kan 494, 240P964, 42ALR893; 153Miss1, 120S206. See also 145Va838, 133SE761.

2593-93 25 OhA120, 157NE308; 25 OhA 157, 157NE825.

2593-97 252Mass275, 147NE827; Mo 26 SW(2d)962 (contradictory testimony of witness); MoA 25SW(2d)122; 85Mont 492, 279P374, 66ALR587; 101TexCr495, 276SW438; 136Wash534, 240P902.

2594-98 37F(2d)668; 179Ark225, 15 SW(2d)391; 252Mass275, 147NE827; 265Mass408, 164NE374; 267Mass501, 167NE235; 307Mo 365, 270SW291; 315 Mo 713, 290SW135; 220MoA791, 277SW 58; 220MoA869, 295SW129; MoA 18 SW(2d)564; 83NH10, 138A315; 20 OhA 436, 152NE197 (as to damages). **Only false testimony of material matters authorizes jury to distrust balance of witness' evidence unless corroborated.** Mont 292P734.

2594-99 Evidence held not necessarily opposed to elementary laws of nature as affecting credibility. 83NH10, 138A315.

2594-99½-New. Where witness has made inconsistent statements in his testimony, it is for jury to say which, if either, it would believe. 254Mass298, 150NE86.

2594-2 215Ala619, 112S157; 21AlaA 482, 109S888; 171Ark68, 283SW23; 172 Ark23, 287SW765; 27Hawaii 28; 255 Mass369, 151NE839; 104TexCr495, 283 SW497. **Purpose of character evidence** is to enable jury to place proper estimate upon testimony of witnesses. 192 NC318, 135SE32.

2594-3 220MoA483, 280SW720; 196NC 712, 146SE804; TexCivA 282SW830, 831 [citCyc].

2594-4 215Ala619, 112S157; 20AlaA 663, 104S838; 21AlaA482, 109S888; 22 AlaA170, 113S646; 170Ark765, 281SW 17; 171Ark68, 283SW23; 170Ark1194, 283SW372; 171Ark536, 285SW17; 171 Ark762, 286SW937; 71CalA550, 236P 158; 206Cal29, 273P568; 199 Ind160, 155NE824; 200 Ind156, 162NE49; 255 Mass369, 151NE839; 320Mo 389, 8SW (2d)20; 320Mo 417, 8SW(2d)29; Mo 296 SW152; 194NC795, 139SE601; 195NC 47, 141SE468; 195NC537, 143SE3; 285 Pa232, 132A168; 91PaSuper518; 133SC 491, 131SE603; TexCivA 282SW830, 831 [citCyc]; 108TexCr678, 2SW(2d)457. Contra 9PaDist&Co 97.

2595-7 215Ala619, 112S157; 22AlaA 388, 115S858; 171Ark68, 283SW23; 171Ark589, 285SW18; 172Ark23, 287 SW765; 176Ark1203, 3SW(2d)1002; 205 Iowa1374, 219NW405; 206 Iowa390, 220NW328; Iowa 228NW75; 209Ky832, 273SW511, 514 [citCyc]; 215Ky802, 287 SW10; Mo 271SW471; Mo 285SW89; Mo 295SW786; 320Mo 389, 8SW(2d)20; 320Mo 417, 8SW(2d)29; 220MoA317, 286 SW408. **Failure to instruct that such proof is admissible only to impeach is error.** 227Ky578, 13SW(2d)763.

2596-8 170Ark765, 281SW17; 219Ky 446, 293SW961; 114Nebr238, 206NW 735; 121 Or202, 253P1042; TexCivA 272 SW291; 106TexCr349, 292SW245; 99 Vt191, 130A697; 152Va1014, 148SE821. **Where the accused in a criminal proceeding,** etc. 149SC445, 147SE600. **That plaintiff is contradicted by witnesses as to vital facts** does not make evidence as to his general reputation admissible. MoA 286SW738.

2597-10 Time not too remote.-209Ky 832, 273SW511 (two and one-half to three years).

2597-11 171Ark68, 283SW23 (cross-examination concerning prior unlawful or immoral conduct held proper regardless of time); 200 Iowa17, 202NW225; MoA 288SW970; 99TexCr647, 271SW389 (three years not too remote); 108TexCr 326, 300SW67.

2598-13 105TexCr605, 289SW386. **The inquiry as to the character of a person accused of crime** may refer to time after commission of offense. 95CalA249, 272 P756.

2598-15½-New. It has been held that character evidence for impeachment may include all time anterior to time witness testifies. 215Ala472, 110S812.

2598-16 206Cal29, 273P568; MoA 278 SW1056. **Nine-year period covered by inquiry held not abuse of discretion.** MoA 278SW1056.

2598-16½-New. In prosecution for homicide, objection is not tenable that testimony as to reputation was not limited to time of homicide. 201 Iowa 10, 206NW635.

2598-17 267Mass591, 166NE742.

2600-34 224Ky837, 7SW(2d)502; 220 MoA317, 286SW408; 283Pa331, 129A 109.

2600-35 35F(2d)941; Mo 22SW(2d) 772; 283Pa331, 129A109; TexCivA 288 SW575.

2601-37 21AlaA653, 111S648; 171Ark 589, 285SW18; 177Ark1124, 9SW(2d) 574; 76CalA178, 244P106; 77CalA377, 246P818; 78CalA554, 248P964; 89CalA 768, 265P505; 99CalA492, 278P918; 46 Ida456, 268P1; 323 Ill 11, 153NE720; 337 Ill 310, 169NE243; 213Ky675, 281 SW819; 220Ky59, 294SW795; 165Minn 440, 206NW933; 317Mo 354, 296SW397; 318Mo 28, 298SW817; Mo 18SW(2d)139; 320Mo 417, 8SW(2d)29; 322Mo 1180, 18 SW(2d)67; 220MoA317, 286SW408; 114Nebr238, 206NW735; 121 Or202, 253 P1042; 156SC509, 153SE480; 161Tenn 177, 29SW(2d)255; TexCommnA 293SW 558; 101TexCr377, 276SW291; 104Tex Cr495, 283SW497; 106TexCr29, 290SW 167 (issuing checks); 108TexCr397, 1 SW(2d)305; 109TexCr32, 2SW(2d)846; 109TexCr541, 5SW(2d)990; 110TexCr 371, 7SW(2d)961; 110TexCr308, 7SW (2d)1091; 110TexCr448, 10SW(2d)92; 111TexCr161, 12SW(2d)215; 147Va617, 136SE658 (discharge from army inadmissible in homicide case); 151Wash 599, 276P873, 65ALR405; Wash 290P 701; 34Wyo 90, 241P705; 34Wyo 84, 241P707.

2602-39 But see 323Mo 681, 20SW(2d) 523, 67ALR476.

2602-40 172Ark23, 287SW765; 41GaA 556, 153SE616(2dcase); 47 Ida457, 276 P39, 68ALR1061; 82Mont170, 266P400; 122 Or504, 259P917; 106TexCr652, 294 SW571; 154Wash29, 280P737.

2602-41 27Hawaii 28 (witness may be asked whether he was living in adultery with woman named). Contra 145Wash 250, 259P711.

2602-42 105TexCr405, 289SW73. Contra 105TexCr47, 285SW316.

2603-44 172Ark23, 287SW765.

2603-45 Mo 18SW(2d)139.

2603-48½-New. In equity proceedings it is proper for court to consider that witness has been guilty of such gross misconduct as to cause his disbarment. 296Pa414, 146A94.

2603-48½-New. That witness had made an illegal seizure would not affect his credibility. 35PortoRico 699.

2603-50 8F(2d)711; 18F(2d)402; 19 F(2d)62; GaA 155SE511(2dcase); 151 Md456, 135A189, 193 [quotCyc]; MoA 286SW729; 195NC537, 143SE3; 285Pa 251, 132A120; 9PaDist&Co 97; TexCivA 292SW972, 99TexCr627, 271SW87; 100 TexCr549, 272SW157; 108TexCr326, 300 SW67; 109TexCr423, 5SW(2d)138; 110 TexCr529, 7SW(2d)1083; TexCr 32SW (2d)362; 146Wash109, 261P777. See also TexCr 32SW(2d)362. Contra 105TexCr 47, 285SW316; 109TexCr586, 6SW(2d) 363; 111TexCr621, 13SW(2d)834; TexCr 29SW(2d)350. But see 164La813, 114S696; 104TexCr127, 283SW512; 106 TexCr506, 294SW202; 106TexCr636, 294SW582. **Mere charge, though embodied in indictment,** does not itself show guilt, and ruling which overrules objection to such question constitutes error of law. 250NY185, 164NE900.

2604-51 15F(2d)163; 15F(2d)690; 42 F(2d)793; 227Ky479, 13SW(2d)493; 106TexCr577, 294SW207 (that witness had been in jail is inadmissible); 110 TexCr159, 8SW(2d)947. But see 145 Va838, 133SE761. Contra 200 Ind156, 162NE49. **Error without prejudice.**-5F (2d)9. **It is improper** to ask defendant whether he was arrested at particular time. 5F(2d)9 (dictum).

2604-52 22AlaA39, 111S767; 179Ark 1198, 20SW(2d)114(1stcase); 195Cal 295, 232P974; 323 Ill 11, 153NE720; 163 La473, 112S303; 295Pa264, 145A89; TexCommnA 18SW(2d)581; TexCivA 272 SW291; TexCivA 272SW517; 104TexCr 533, 286SW204 (in prosecution for robbery, evidence of indictment for felony is admissible as affecting credibility); 110TexCr529, 7SW(2d)1083; TexCr 29SW(2d)339 (indictment for felony involving act for which defendant on trial); 33Wyo 360, 239P952. See 107TexCr345, 296SW525. Contra 100TexCr389, 273SW575; 101TexCr479, 276SW268; 105TexCr189, 287SW256; 106TexCr387, 292SW887; 108TexCr 441, 1SW(2d)633; 108TexCr576, 2SW (2d)245; 108TexCr623, 2SW(2d)249; 109TexCr209, 4SW(2d)64. But see 100 TexCr241, 272SW788; 101TexCr598, 276 SW283; 104TexCr185, 283SW520; 112 TexCr223, 15SW(2d)1046; TexCr 24SW (2d)435; TexCr 27SW(2d)219(2dcase); TexCr 29SW(2d)339; TexCr 29SW(2d) 778. **Where defendant in rape prosecution** had become witness, state can prove he had been indicted for felony. 107 TexCr345, 296SW525. **Offenses similar to that for which accused on trial.**-Where defendant, charged with rape, testifies to never having been arrested except once for investigation, evidence that he had been indicted and arraigned for attempted rape is admissible for impeachment. Mo 289SW562.

2604-52½-New. nor to prove testimony at trial of witness which does not tend to put his character or reputation in issue. TexCivA 272SW517.

2605-53 Minn 233NW307; 307Mo 291, 270SW298; 103NJL663, 138A575; 149 SC445, 147SE600. **Contra.**-205 Iowa 1374, 219NW405.

2605-54 But see 42F(2d)793.

2605-55 7F(2d)313; 178Ark1052, 13SW (2d)304; 94Fla163, 113S699; 165La705, 115S909; 7LaA546; 252Mass450, 148NE 113 (that she had been mistress of her husband before marriage to him); 167 Minn263, 209NW4; 156Miss612, 126S 390(2dcase); 114 Nebr238, 206NW735; 49RI 386, 143A413; 99TexCr543, 270 SW1018; 101TexCr12, 274SW599; 105 TexCr272, 288SW207. Contra 317Mo 354, 296SW397; 108TexCr494, 1SW(2d) 630.

2606-56 250Mich679, 231NW63; 114 Nebr238, 206NW735.

2606-57 90Fla659, 106S479; 94Fla163, 113S699; 169La1197, 126S921; 82Mont 170, 266P400.

2606-58 94Fla163, 113S699 (rule stated); Ida 289P74; 327 Ill 463, 158NE716; 246Mich429, 224NW387; Mich 233NW 355.

2606-59 252Mass450, 148NE113; 108 TexCr576, 2SW(2d)245; 112TexCr590, 18SW(2d)627; 151Wash599, 276P873, 65 ALR405. **Unchastity does not so discredit witness** as to make his testimony unworthy of belief. 89Fla439, 105S137; 94Fla163, 113S699. **Unchastity does not raise presumption of untruthfulness.**-89Fla439, 105S137; 94Fla163, 113S699.

2607-61 6F(2d)120 (violation of liquor law); 12F(2d)852; 13F(2d)777; 14F(2d) 281; 18F(2d)402; 37F(2d)343; 22AlaA 83, 112S461; 29Ariz523, 243P601; 171 Ark589, 285SW18; 77CalA377, 246P 818; 77CalA434, 246P822; 94CalA470, 271P351; 3Del195, 133A790 (where witness admits prior convictions, production of record subsequently is unnecessary); 96Fla723, 119S118; 96Fla768, 119S380; Ill 172NE743; 208 Iowa1049, 226NW770; 234Ky33, 27SW(2d)387; 170 La69, 127S368; 156Md167, 143A708; 165 Minn440, 206NW933; 171Minn515, 213 NW923; 172Minn250, 215NW181; 149 Miss5, 115S36; Mo 292SW440; Mo 24 SW(2d)985; 118Nebr318, 224NW687; 103NJL663, 138A575; 34 OklCr59, 244P 817 (rape); OklCr 284P651; 117 Or179, 242P1116 (larceny); 121 Or 202, 253P1042; Or 289P369; 285Pa 251, 132A120; 285Pa232, 132A168; 86PaSuper5; 97PaSuper202; TexCivA 300SW256; 100TexCr545, 272SW157; 100TexCr566, 272SW202; 102TexCr506, 278SW843; 103TexCr182, 280SW798; 105TexCr430, 289SW44; 109TexCr108, 3SW(2d)91; 110TexCr77, 7SW(2d)555; 113TexCr257, 20SW(2d)196(2dcase); 145Wash4, 258P845. See also 45Philippine9. But see 229AppDiv790, 242NYS 178. **Citation to appear before probate court for embezzlement** held not to show commission of crime. 83NH236, 141A

136. **Only crimes admissible are such crimes that affect credibility** and refer to conviction of felony or misdemeanor in nature of crimen falsi. 295Pa264, 145A89. **Former conviction of offense growing out of same transaction** as that forming basis of present prosecution may be shown. 88PaSuper142. **While such impeaching evidence affects credibility,** it does not destroy it. 225Ky288, 8SW(2d)404. **Defendant's testimony that he had previously pleaded guilty to and served sentence for larceny** held properly admitted to impeach him. 41GaA76, 151SE663(1stcase).

2608–62 13F(2d)777; 37F(2d)203; 23AlaA140, 122S301(1stcase); 76CalA178, 244P106; 77CalA377, 246P818; 77CalA434, 246PS22; 3Del195, 133A790 (witness may be asked as to prior convictions on cross-examination, though court record is best evidence); 218Ky72, 290SW1075; Mo 23SW(2d)1; 114Nebr238, 206NW735 (inadmissible if below grade of felony); 115Nebr634, 214NW256; Tex CommnA 1SW(2d)581; 109TexCr32, 2SW(2d)846; 111TexCr621, 13SW(2d)834. **A conviction of a statutory felony,** etc. But see 215Ala619, 112S157. **Proof of plea of guilty** is admissible. 101TexCr670, 276SW919. **Proceedings in juvenile court,** not being penal, and finding of such court not amounting to conviction of felony, record of such court is inadmissible for impeachment purposes. 199Cal155, 248P504. **That offense is punishable by fine** does not prevent it from being felony in alternative. 106TexCr335, 292SW244.

2608–63 285Pa232, 132A168. **English cases construing act** similar to Pennsylvania Act of March 15, 1911 held not applicable thereto. 285Pa232, 132A168. **Evidence of former conviction** of crime of robbery does not violate Pennsylvania Act of March 15, 1911. 285Pa232, 132A168. **Pennsylvania Ast of March 15, 1911** applies only to cross-examination of defendant and does not apply to evidence offered against him. 285Pa232, 132A168.

2608–64 42F(2d)793; 41GaA76, 151SE663(1stcase); TexCommnA 12SW(2d)997; 101TexCr192, 274SW974; 102TexCr506, 278SW843; 105TexCr581, 289SW409 (criminal assault conviction six years prior); 107TexCr326, 296SW885; 109TexCr108, 3SW(2d)91; 110TexCr448, 10SW(2d)92. **Complaint against witness may be shown** and he has burden of proof of failure to indict. 108TexCr249, 300SW55. **Violation of National Prohibition Act** is crime involving moral turpitude. 104Conn257, 132A540, 48ALR259. **Misdemeanor may involve moral turpitude.** 106TexCr335, 292SW244. **If conviction was subsequent to time offense became felony,** testimony in regard thereto is admissible. 42F(2d)793.

2608–65 171Ark589, 285SW18; 177Ark1124, 9SW(2d)574; 77CalA377, 246P818; 46Ida765, 271P322; 322Ill606, 153NE589; 213Ky675, 281SW819; 218Ky72, 290SW1075; 170Minn250, 212NW413; 115Nebr634, 214NW256; 116Nebr313, 217NW89; TexCivA 1SW(2d)760; 100TexCr95, 271SW629; 102TexCr506, 278SW843. **Proof of conviction for unlawfully carrying arms** held not legal impeachment. 102TexCr506, 278SW843. **In Virginia.**–147Va617, 136SE658. **Questioning witness as to plea of guilty** to misdemeanor held **error.** 116Nebr313, 217NW89

2608–66 18F(2d)407; 215Ala619, 112S157; 21AlaA501, 109S561; 21AlaA644, 111S426; 214Ala435, 108S250 (violation of ordinance); 102TexCr506, 278SW843; 105TexCr401, 288SW1084; 109TexCr32, 2SW(2d)846; TexCr 23SW(2d)373 (plea of guilty). See also 171Minn246, 213NW900. **Desertion is not crime and does not involve moral turpitude** so as to make conviction thereof by court martial admissible to affect credibility of witness. 29Ariz523, 243P601.

2608–67 18F(2d)407; 22AlaA39, 111S767; AlaA 129S797; 104Conn121, 132A399; 321Ill143, 151NE563; 322Ill606, 153NE589. See also 104Conn355, 132A913.

2608–67½–New. Conviction of violation of city ordinance cannot be shown. 311Mo521, 278SW971.

2610–68 169Ark221, 275SW327; 99TexCr659, 271SW91; 100TexCr512, 271SW625. See also Mo 289SW895.

2610–68½–New. Statute relating to admission in evidence of conviction of one not a juvenile is not repealed by act declaring inadmissible proceedings in juvenile court. 169La753, 126S49.

2610–68¼–New. Juvenile court proceedings cannot be used against accused in other courts though he has since passed the juvenile age. 169La753, 126S49.

2610–69 43F(2d)44; 23AlaA368, 125S902(2dcase); 100TexCr549, 272SW157; 113TexCr188, 19SW(2d)319; 113TexCr235, 20SW(2d)202; TexCr 20SW(2d)423.

2610–70 14F(2d)497; 170La755, 129S154; 165Minn440, 206NW933; 151Miss862, 119S796; 156Miss316, 126S12; 103TexCr212, 280SW597; 111TexCr351, 12SW(2d)1034. **Fact that witness gives details of crime** is not reversible error. 157Miss746, 128S563.

2610–71 151Miss862, 119S796.

2610–72 But see 23AlaA135, 122S611.

2611–75 99TexCr655, 271SW609; 113TexCr124, 18SW(2d)1070; TexCr 26SW(2d)216. See 110TexCr254, 8SW(2d)171. **Time of confinement in penitentiary** is to be considered on question of remoteness. TexCivA 300SW256. **Whether testimony is too remote does not depend entirely upon lapse of time,** but also upon intervening circumstances. 111TexCr621, 13SW(2d)834. **Conviction not too remote.**–In trial for burglary, testimony that defendant had been convicted of similar crime eight years before has been held not too remote. 111TexCr249, 12SW(2d)572. **Evidence of indictment and trial** twelve and twenty years respectively before, held too remote. 113TexCr450, 21SW(2d)499. **Question of remoteness is for trial court.**–TexCr 24SW(2d)435.

2611–76 20F(2d)470.

2611–77 DC 41F(2d)979. But see TexCr 25SW(2d)870. **Testimony of witness as to having been in workhouse** held properly stricken where conviction not shown. NJSup 137A428.

2611–82½–New. Conviction in summary proceeding for reckless driving held not such conviction of crime as may be shown under statute. NJSup 148A175.

2611–83 141Wash324, 251P589. Contra 214Ky620, 283SW958; 314Mo333, 284SW433.

2612–86 22F(2d)753; CalA 287P116; 3Del195, 133A790; TexCivA 300SW256; 100TexCr489, 272SW141.

2612–87 204Cal582, 269P427, 59ALR1480. Contra 3Del195, 133A790. But see 86CalA324, 260P946.

2612–93 Mo 22SW(2d)772.

2612–95 124Kan500, 260P616; 105TexCr401, 288SW1084.

2612–95½–New. Loyalty to United States and interest in anarchistic movements is proper as bearing on credibility. 255Mass369, 151NE839.

2613–96 99Vt191, 130A697. But see 28F(2d)681.

2613–98½–New. Witness' reputation of being bootlegger is not admissible. 110TexCr250, 8SW(2d)127.

2613–98¼–New. State may not on cross-examination ask defense witness about being in the whisky business as method of impeaching him. 104TexCr85, 282SW587.

2613–98¼–New. In Kentucky, under statute, witness cannot be impeached by proof of particular wrongful act, as carrying on occupation of bootlegger, or owner of roadhouse of bad repute. 212Ky303, 278SW1097.

2613–99 216Ky98, 287SW235. But see 49SD563, 207NW539.

2613–1 253Mass152, 148NE461.

2614–7 25F(2d)581; 22AlaA388, 115S858; 169Ark636, 276SW365; 172Ark23, 287SW765; 255IllA127; 215Ky802, 287SW10; 218Ky217, 291SW47; 251Mich597, 232NW371; Mo 284SW799(2dcase); Mo 285SW89; Mo 23SW(2d)16 (defendant's reputation is subject to attack where he testified in his own behalf); 220MoA483, 280SW720; 114Nebr238, 206NW735; 103NJL663, 138A575; 121Or202, 253P1042; 49RI386, 143A413; TexCivA 282SW830; 104TexCr199, 283SW785; 153Va228, 149SE619; 141Wash1, 250P453 (defendants testifying in his own behalf).

2615–9 TexCommnA 1SW(2d)581; TexCivA 282SW830.

2615–10 Objection to question whether witness would believe government witness under oath held properly sustained. 25F(2d)581.

2615–11 112TexCr511, 17SW(2d)811 (2dcase). **In criminal prosecutions other than for violations of liquor law,** conviction of violation of prohibitory liquor law as crime under statute may be shown to affect credibility of witness. OklCr 280P851(2dcase) (homicide prosecution). **Presence of another still after arrest** held proper subject of cross-examination of defendant in liquor law prosecution. 171Ark756, 286SW949.

2615–11½–New. Testimony as to sale of whisky at another time and place not admissible in impeachment. 171Ark68, 283SW23.

2615–11¾–New. , or of having been bootlegger. 212Ky303, 278SW1097.

2615–13 171Ark68, 283SW23; 176Ark895, 2SW(2d)67; 3Del195, 133A790; 255Mass369, 151NE839; Mo 278SW1014; Mo 29SW(2d)156; 218AppDiv638, 219NYS73; 33Wyo428, 240P219, 221 [cit Cyc]; Alta [1930] 2DomLR414.

2615–14 Mo 278SW1014.

2616–17 23AlaA572, 129S316; 102Conn708, 130A184 (letters showing that accused preached anarchy are inadmissible to affect credibility as word "anarchy" has more than one definition); 233IllA526.

2616–20 169Ark332, 275SW659; 77Colo546, 238P25; Iowa 227NW601; 179Minn187, 228NW615; 118Or397, 247P146. **Cross-examination held erroneous.**–Utah 287P909.

2616–20½–New. Cross-examination on religious belief has been held not appreciably harmful. NC 154SE604.

2616–21 Va 152SE547.

2616–21½–New. Question as to witness having been brought into court on murder charge is unnecessary repetition where he has fully testified thereof. Va 152SE547.

2616–22 27F(2d)569.

2617–23 7F(2d)263 (cross-examination of accused as to going under various assumed names and having been in jail held not error); 171Ark68, 283SW23; 171Ark536, 285SW17; 171Ark762, 286SW937; 171Ark768, 286SW939; 172Ark61, 287SW747; 172Ark156, 287SW1026 (beating wife); 175Ark1169, 299SW1004; 175Ark752, 2SW(2d)36; 176Ark895, 2SW(2d)67; 176Ark578, 3SW(2d)962; Ark 30SW(2d)855; Ark 31SW(2d)421; 120Kan177, 243P326; 165La622, 115S802; Mo 278SW1014; 318Mo679, 300SW687; Mo 30SW(2d)132; 34NM214, 279P561(1stcase) (accused in criminal prosecution); 149SC445, 147SE600; 54SD417, 223NW337. Contra 114Nebr238, 206NW735. **False statement in civil service application.**–Accused in criminal prosecution may be asked whether he stated falsely in civil service application for appointment as police officer that he had never been convicted of felony, where he has testified as to former membership on police force and resignation therefrom. 202Iowa632, 210NW901. **Divorce.**–Ark 30SW(2d)855.

2618–24 113TexCr142, 18SW(2d)663. **Witness not discredited by refusal to answer.**–TexCr 21SW(2d)733.

2618–25 120Kan177, 243P326.

2618–26 168Ark1082, 272SW833; 169Ark332, 275SW659; 171Ark536, 285SW17; 175Ark1169, 299SW1004; 179Ark20, 13SW(2d)805; 221MoA1101, 297SW119; 194NC206, 139SE230; Wash 288P249 (liquor prosecution and other liquor transactions). **Question held improper** when act committed was not necessarily crime. 171Ark536, 285SW17. **Asking witness, companion of accused, whether they were preparing to commit a crime** held relevant to question of witness' credibility. 170La203, 127S601.

2618–28 120Kan177, 243P326.

2618–30 27F(2d)569; 76CalA175, 244P106 (asking defendant whether he had

engaged in boxing contests): 168La 297, 121S872; 85Mont553, 281P757 (whether road house conducted by accused was also place where prostitution was practiced). See 27F(2d)569.

2619-32 27F(2d)569; 169Ark332, 275 SW659; 307Mo 291, 270SW298; 155 Wash63, 283P439.

2619-33 108TexCr494, 18W(2d)630. Contra 114Nebr238, 206NW735.

2619-34 See also MoA 285SW1012.

2619-37 147Wash198, 265P481, 59ALR 688.

2619-38 218Ala527, 119S215; 80CalA 243, 251P699; 47 Ida162, 272P1010; 210Ky385, 275SW819 (moonshining); 250NY185, 164NE900; 295Pa264, 145A 89; 147Va617, 136SE658.

2620-43 76CalA178, 244P106 (cross-examination of defendant in criminal prosecution). Contra 49SD563, 207NW539.

2620-48 96CalA503, 274P393; 122 Or 504, 259P917. But see 34NM507, 285P 500.

2620-50 172Ark23, 287SW765; 177Ark 885, 7SW(2d)969; 165La842, 116S206; Mo 29SW(2d)150.

2620-50½-New. It is error in criminal prosecution to ask defendant on cross-examination as to his commitment to reform school and his return thereto for incorrigibility. 76CalA178, 244P106.

2620-50¼-New. Cross-examination as to possession of stolen cars is improper, where witness is not shown to have known that they were stolen. 18F(2d) 402.

2620-50¼-New. Testimony of defendant that prohibition agents had previously taken young girls to roadhouses properly excluded in jointist prosecution. Wash 286P51.

2620-51½-New. Loyalty to United States, and interest of witness in anarchistic movements may be inquired into on cross-examination as affecting credibility. 255Mass369, 151NE839.

2620-53 21AlaA637, 111S314; 171Ark 536, 285SW17; 252Mass450, 148NE113 ("known in police circles"); 102NJL 94, 131A292; TexCivA 294SW899.

2620-54 21AlaA637, 111S314; 169Ark 286, 273SW1035; 171Ark536, 285SW17; 321 Ill 157, 151NE584; 165La1082, 116 S565; Mo 296SW423; 222AppDiv347, 225NYS761; 285Pa251, 132A120; 93 PaSuper190; TexCivA 294SW899; 108 TexCr413, 18W(2d)315; 111TexCr642, 13SW(2d)697(2dcase); TexCr 29SW (2d)356 (complaint). Contra 161La296, 108S543; 167La963, 120S612; 101 TexCr178, 274SW607; 101TexCr329, 275SW713; 103TexCr258, 280SW836; 105TexCr101, 287SW53; 105TexCr458, 288SW1071; 108TexCr187, 299SW399; 112TexCr199, 15SW(2d)1050. But see 218AppDiv638, 219NYS73; 100TexCr 209, 272SW455; TexCr 21SW(2d)1044 (2dcase); TexCr 25SW(2d)870. **After direct testimony by defendant as to his** arrest on numerous occasions, cross-examination without objection as to various charges held not misconduct by district attorney. 73CalA334, 238P770. **Where grand jury convened and adjourned** subsequent to filing of complaint charging witness with felony, evidence is incompetent. 105TexCr605, 289SW386.

2621-55 15F(2d)163; 21AlaA637, 111 S314; 321 Ill 157, 151NE584; 247Mich 260, 225NW540; 171Minn246, 213NW 900; 307Mo 291, 270SW298; 102NJL 94, 131A292; 197NC125, 147SE731(1st case); OklCr 280P636; 92PaSuper404; 149SC445, 147SE600; 50SD533, 210NW 721; TexCivA 294SW899; 112TexCr31, 13SW(2d)845; TexCr 27SW(2d)198(2d case). Contra 161La296, 108S543; 192 NC318, 135SE32. But see 243Mich630, 220NW889; 172Minn250, 215NW181; NH 146A503; 108TexCr339, 1SW(2d) 295.

2621-56 169Ark286, 273SW1035; 169 Ark589, 276SW577; 171Ark536, 285SW 17; 154Md63, 139A564; 222AppDiv347, 225NYS761; 115 Oh136, 152NE28; 127 Or415, 272P561; TexCivA 294SW899; 105TexCr451, 288SW1082; 105TexCr 605, 289SW386. Contra 161La296, 108 S543; 165La622, 115S802; 195NC537, 143SE3; 103TexCr258, 280SW836; 103 TexCr583, 281SW1074; 105TexCr91, 286SW1096; 105TexCr458, 288SW1071; 107TexCr365, 296SW552; 108TexCr240, 299SW904; 108TexCr441, 1SW(2d)633; 108TexCr544, 2SW(2d)238; 108TexCr 623, 2SW(2d)249; 108TexCr650, 2SW (2d)272; 111TexCr351, 12SW(2d)1034; 111TexCr520, 14SW(2d)855; TexCr 29 SW(2d)390. But see 100TexCr459, 273 SW864; 112TexCr498, 17SW(2d)821; 113TexCr167, 18SW(2d)649. In Texas.–108TexCr371, 1SW(2d)294; 109 TexCr164, 3SW(2d)804. **In criminal prosecution,** prosecuting witness may be asked whether he has been charged with, or indicted for, crime for commission of which defendant is on trial. 169Ark 286, 273SW1035. **Where testimony involved another witness** of defendant, and it was not shown he had been indicted, it was reversible error as regards reference to other witness. 112 TexCr331, 16SW(2d)537(2dcase). **Details of crime.**–113TexCr167, 18SW(2d) 649. **Permitting proof of indictment of** witness to impeach him is erroneous. DC 37F(2d)1008.

2622-57½-New. Exclusion of question whether witness is not a defendant in a criminal case, where record shows case was filed and defendant placed on probation, is not error. 255Mass369, 151 NE839.

2622-60 13F(2d)777; 27F(2d)569; 21 AlaA637, 111S314; 33Ariz93, 264P 1083; 169Ark589, 276SW577; 171Ark 536, 285SW17; 174Ark296, 295SW53; 76CalA178, 244P106; 77CalA434, 246P 822; 78CalA455, 248P927; 79CalA306, 249P240; 79CalA682, 250P698; 99Fla 1032, 128S1; 46 Ida765, 271P322; 199 Ind89, 155NE257; 199 Ind160, 155NE 824; Iowa 230NW425; 220Ky368, 295 SW159 (though conviction is in another state); 169La55, 124S143(2dcase); 154 Md63, 139A564; 171Minn246, 213NW 900; 171Minn515, 213NW923; Mo 1 SW(2d)139; 115Nebr94, 211NW605 (if witness admits conviction, further examination in that line should cease; if he denies, only record of conviction is admissible); 115Nebr557, 213NW809; 82NH220, 131A598; 102NJL94, 131A 292 (statute); 53ND333, 205NW877; OklCr 280P636; 285Pa251, 132A120; 88PaSuper142; 93PaSuper365; 7Pa Dist&Co 547; TexCivA 300SW256; 100 TexCr459, 273SW864; 103TexCr129, 280SW824, 825; 103TexCr534, 281SW 864 (felony or offense involving moral turpitude); 106TexCr193, 291SW557; 107TexCr326, 296SW885; 110TexCr345, 7SW(2d)571; 113TexCr235, 20SW(2d) 202; 193Wis126, 213NW645. Contra 20 AlaA539, 103S480. But see 18F(2d) 863; 210Ky385, 275SW819. **The name of the particular crime may be mentioned.**–79CalA306, 249P240; 34GaA146, 128SE686. **On redirect examination.**–136Wash624, 241P1. **In Nebraska.**–115 Nebr94, 211NW605. **Where conviction too remote,** examination is not allowed. 107TexCr453, 296SW602. **Where nature of particular felony witness had been convicted of is** shown, refusal of further cross-examination is not error. 78 CalA455, 248P927. **Pardon does not affect right of cross-examination.**–22 F(2d)753. **But it is immaterial** whether he was guilty or innocent or what punishment or term of service was. 33 NM540, 273P919. **Witness admitting conviction may not be further asked** if he had served his term or paid his fine where record did not show any term or fine imposed. SD 227NW73.

2623-61 13F(2d)777; 175Ark1115, 1 SW(2d)553; 220Ky368, 295SW159; 100 TexCr459, 273SW864; 103TexCr212, 280SW597. But see 231Ky463, 21SW (2d)800.

2624-63 103TexCr129, 280SW824, 825.

2624-66 179Ark346, 15SW(2d)988. **Plea of guilty occurring fifteen months** before trial has been held too remote. 111TexCr156, 12SW(2d)210(2dcase).

2624-67 220Ky368, 295SW159.

2624-68 175Ark1047, 1SW(2d)546; 34 GaA146, 128SE686; Nebr 230NW846.

2624-69 4F(2d)884 (permitting cross-examination of defendant as to prior conviction of violation of National Prohibition Law held reversible error, such conviction being neither for felony nor infamous crime); 22F(2d)740; 23AlaA 78, 121S3; 92CalA405, 268P439; 154Md 63, 139A564; 106TexCr439, 292SW901; 112TexCr31, 13SW(2d)845; 113TexCr 124, 18SW(2d)1070. But see 178Ark 928, 12SW(2d)909. **In Idaho.**–19F(2d) 620. **Not limited to felonies.**–199 Ind89, 155NE257.

2624-70 Where prosecutor in cross-examination endeavored to make clear to witness understanding of particular crime in question, this was held no error. NJ 135A658. **Cross examination as to other convictions which defendant denied** and convictions not proved held improper. 104CalA107, 285P401.

2624-71 13F(2d)777; 169Ark332, 275 SW659 (conviction of violating federal statute growing out of same transaction); 72CalA160, 236P987; 79CalA 306, 249P240; 84CalA685, 258P463; 86 CalA30, 260P389; 95CalA92, 272P786; 77Colo 546, 238P25; 202 Iowa632, 210 NW901; 208 Iowa1049, 226NW770; 163La1000, 113S222; 163La95, 121S586; 235Mich340, 209NW81; 315Mo 199, 285 SW984; 76Mont526, 248P215; 50ND 728, 197NW859; 38 OklCr87, 259P179; 39OklACR230; 40 OklCr347, 268P998(3d case); 12PaDist&Co 331; 103TexCr212, 280SW597; 103TexCr258, 280SW836; 101TexCr178, 274SW607; Utah 287P 909 (and name of felony); 135Wash309, 237P726 (misdemeanor); 141Wash324, 251P589; 145Wash117, 259P29 (crime dissimilar to one in question); 154Wash 304, 282P48; Wash 292P107(2dcase) (defendant charged as second offender). Contra 116Nebr629, 218NW421. But see 20AlaA639, 104S685; 113TexCr167, 18 SW(2d)649. **That conviction in federal court was based on transaction for which accused is being prosecuted** does not render cross-examination in relation thereto improper. 169Ark332, 275SW 659. **Nature of crime.**–195Wis181, 217 NW697. **Where accused has been pardoned of crime** such as would ordinarily affect credibility, judgment of conviction may be inquired into, and issuance of pardon may also be shown. 295Pa264, 145A89. **State can properly question defendant as to nature of crime** and extent of punishment inflicted upon him. 150Wash466, 273P742.

2624-71½-New. Witness cannot be asked whether he was guilty of crime for which he was convicted. 93Fla1063, 113 S91.

2624-71⅓-New. Cross-examination of defendant respecting whether he was then a paroled violator of law, asked in attacking his credibility as a witness, has been held not objectionable. 167 La484, 119S523.

2624-71¼-New. Care should be taken not to confuse cross-examination to show motive or affect credibility as to incidents that may be of criminal nature but connected with crime on trial. 295Pa 264, 145A89.

2624-71⅕-New. Where state's witness admits conviction of crime on cross-examination, state is entitled on redirect examination to ask witness of what crime he has been convicted. 151Wash 599, 276P873, 65ALR405.

2625-72 176Ark895, 2SW(2d)67.

2626-75 19F(2d)756; 27F(2d)569; 21 AlaA637, 111S314; 175Ark1115, 1SW (2d)553; 28Hawaii458; 199 Ind89, 155 NE257; Iowa 227NW601 (defendant in criminal prosecution); 124Kan500, 260 P616; 124Kan533, 261P600; 129Kan 360, 282P735; Kan 292P931; 255Mass 369, 151NE839; 255Mass575, 152NE704 (exclusion of questions relating to pleas to indictments, within discretion); Mo 23SW(2d)1; Mo 30SW(2d)132; 141 Wash270, 251P289; 155Wash63, 283P 439.

2626-78 28Hawaii458; 252Mass450, 148NE113.

2626-79 Iowa 229NW190; 120Kan177, 243P326.

2626-80 21AlaA637, 111S314; 28 Hawaii458; 120Kan177, 243P326; 318 Mo 1233, 3SW(2d)365.

2627-82 53ND95, 204NW969.

2627-83 28Hawaii458; 53ND95, 204 NW969; 55ND269, 213NW355.

2627-85 100TexCr566, 272SW202.

2627-87 Mont 287P933 (question objectionable as assuming conviction). **Specification by name of robbery victims in crime** used to impeach witness is to be condemned. TexCr 25SW(2d)870.

2627-88 That witness was excluded

from information in order to be used as witness for prosecution does not prevent his being credible witness, especially in absence of showing his interest in testifying against accused. 50Philippine780.

2627–89½–New. Exclusion of witness' testimony on cross-examination as to divorce obtained by his wife held not error where no records were offered. Mo 30SW(2d)132.

2627–90 175Ark752, 2SW(2d)36; 176 Ark895, 2SW(2d)67; 202 Iowa1382, 212 NW137; 320Mo1190, 9SW(2d)635; Mo 30SW(2d)132; 250NY185, 164NE900; 218AppDiv638, 219NYS73; 58ND82, 224 NW878; 94PaSuper37; 110TexCr448, 10SW(2d)92; 111TexCr161, 12SW(2d) 1215; 112TexCr137, 15SW(2d)642; 152 Va715, 148SE811.

2628–91 115Nebr557, 213NW809; 103 TexCr534, 281SW864.

2628–93 Ala 130S778; 99CalA409, 278 P885; 227Ky613, 13SW(2d)784; 170La 755, 129S154; MoA 271SW851. **Foundation held sufficient.**–Wis 233NW76.

2628–94 206 Iowa833, 221NW493; 258 Mass145, 154NE577; 194NC795, 139SE 601; TexCivA 25SW(2d)717; TexCr 27SW(2d)653(2dcase). But see TexCivA 282SW830; 141Wash627, 251P879. **In Washington.**–141Wash302, 251P586.

2629–99 22AlaA99, 112S813; 128Kan 659, 280P780; 194NC795, 139SE601. **Statements of witness as to knowledge.**–154Md604, 141A416. **Witness held qualified.**–23AlaA60, 120S467.

2630–8 5F(2d)319; 267Mass591, 166 NE742.

2631–12 103NJL663, 138A575 (one year not allowed).

2631–13 21AlaA655, 111S649; 224Ky 126, 5SW(2d)889.

2632–32 14F(2d)801 (inquiry as to reputation of impeached witness for honesty and veracity held too broad to be basis for inquiry whether impeaching witness would believe him under oath); 326 Ill 216, 157NE211; 227Ky 479, 13SW(2d)493. **Impeaching witness** examined as to general reputation may not pass judgment on effect of interest on credibility of defendant's testimony. 326 Ill 216, 157NE211.

2633–33 194NC795, 139SE601.

2633–34 194NC795, 139SE601.

2633–35 Forms of question held improper.–87Colo188, 285P1102.

2634–38 104TexCr85, 282SW587.

2634–38½–New. Improper to permit witness to testify, where reputation of witness is such as to warrant jury in not believing him under oath as infringing on prerogatives of jury. 104TexCr 85, 282SW587.

2635–39 221AppDiv376, 222NYS737.

2635–49 Scope of cross-examination as to general reputation.–Iowa 233NW55.

2635–50 21AlaA381, 108S652; 21AlaA 601, 110S913. **Where sheriff's knowledge of existence of warrant not shown** his cross-examination was improper on that point. Wash 287P3.

2637–55 222MoA483, 280SW720. See also 220MoA317, 286SW408.

2637–59 See also 23AlaA107, 121S453.

2638–67 But see 227Ky479, 13SW(2d) 493.

2638–68½–New. Court, having required impeaching witness to answer question on cross-examination as to whether state's witness could tell truth, should overrule state's objection to question whether he wanted to. 23AlaA107, 121 S453.

2638–69 168Ark783, 272SW674.

2638–71 168Ark783, 272SW674.

2639–73 168Ark783, 272SW674 ("what all the people say about him" held improper basis for impeachment).

2639–83½–New. Letter in connection with cross-examination by defendant in criminal prosecution is properly admissible as affecting defendant's credibility. 179Minn187, 228NW615.

2640–85½–New. 105TexCr29, 285SW 312.

2640–85½–New. Admitting evidence, showing defendant "fugitive from justice" without introducing indictment or affidavit, is error. 29 OhA416, 163NE626 (2dcase).

2640–86 13F(2d)863; 76CalA178, 244P 106; 79CalA306, 249P240; 108Conn733, 143A844; 110Conn55, 147A118 (unsigned complaint); 46 Ida765, 271P322; 321 Ill 143, 151NE563; 326 Ill 216, 157NE 211; Ill 172NE743; 263Mass356, 161NE 245; 117 Or179, 242P1116; 285Pa232, 132A168; 88PaSuper142; 91PaSuper 518. **Cross-examination of defendant not necessary** before introduction of record of conviction. 148Wash701, 269P 1051. **Evidence of conviction is competent** to impeach witness. 225Ky288, 8 SW(2d)404. **Time for introducing record** is after state closes or rests its case. 38GaA693, 145SE484(1stcase).

2640–87 196Cal19, 235P721; 321 Ill 143, 151NE563; Mo 274SW47; 311Mo 521, 278SW971; 91PaSuper518; 100Tex Cr489, 272SW141.

2640–88 92CalA371, 268P472; 170Ga 585, 154SE149; 321 Ill 143, 151NE563; 326 Ill 216, 157NE211; 311Mo 521, 278 SW971; 115Nebr557, 213NW809; 115 Nebr634, 214NW256. **Admission of letter by plaintiff's husband charging plaintiff's witness with larceny** is reversible error. 170Ga585, 154SE149.

2641–89 But see 100TexCr489, 272SW 141.

2641–92 167La390, 119S402; 115Nebr 94, 211NW605; 115Nebr557, 213NW 809; 103TexCr258, 280SW836. **Record admissible, although witness admits conviction.**–But see 115Nebr557, 213NW809 (admitting record held error). **Witness may be asked nature of crime,** after admission of conviction. 145Wash4, 258P 845. **If witness denies conviction** he may be contradicted by court record. Utah 287P909.

2641–93 326 Ill 216, 157NE211; 115 Nebr634, 214NW256; 118Nebr318, 224 NW687; 9PaDist&Co 97. **Mere unsigned memorandum** of conviction is insufficient. 107Conn156, 139A688 (defects not curable by clerk's testimony). **Question of conviction of infamous crime** is not properly presented either for consideration of jury or appellate court in absence of proper proof thereof. 327 Ill 194, 158 NE431.

2641–93½–New. It is improper for state to show that former prosecutions were dismissed because presence of state's witnesses could not be obtained. 111 TexCr361, 12SW(2d)1031.

2642–94 331 Ill 380, 163NE149.

2643–7 23AlaA572, 129S316; 85Pa Super253 (though collateral to issue); 100TexCr459, 273SW864; 102TexCr 421, 278SW197 (proof of good reputation for truth and veracity); 113TexCr 450, 21SW(2d)499.

2643–8 18F(2d)863.

2643–10½–New. Cannot sustain on cross-examination unless impeached on direct. 21AlaA655, 111S649.

2644–12½–New. Discretion of trial court.–Permitting witnesses to testify to sustain character of another witness rests largely within discretion of trial court. 159Tenn297, 17SW(2d)913.

2644–14 209Ky817, 273SW503; 85Pa Super253 (though collateral to issue); 106TexCr636, 294SW582.

2644–15 16F(2d)117; 101TexCr12, 274 SW599; 109TexCr20, 28W(2d)437. **Defendant in criminal prosecution cannot show good reputation for truth and veracity** until it is attacked by state. 317Mo 413, 297SW63.

2644–16 147Wash251, 265P727.

2644–17 Mo 11SW(2d)1035. **In Texas.**–113TexCr380, 22SW(2d)658.

2645–19 317Mo413, 297SW63, 68 [cit Cyc].

2645–22 Contradiction of testimony.–Where testimony of witness for state in criminal prosecution is in direct conflict with that of defendant and witness has been subjected to cross-examination, it is not abuse of discretion for court to permit state to introduce testimony to sustain character of witness. 159Tenn297, 17SW(2d)913.

2645–24½–New. Refusal to permit testimony of witness as to good character of accused in criminal case before accused has testified is not error. 241Mich1, 216 NW372.

2645–25½–New. Where witness has been shown to have been charged with crime, witnesses other than impeached witness may not be called to explain charge. 106TexCr636, 294SW582.

2645–26 21AlaA655, 111S649; 22AlaA 99, 112S813; 116Nebr73, 215NW789.

2645–27 314Mo673, 285SW726.

2646–30 23AlaA1, 121S9(2dcase); 101 Vt124, 141A686. **Evidence of reputation for official integrity** is not competent as proof of general good reputation. 16 F(2d)117.

2646–31 23AlaA1, 121S9(2dcase); 166 La891, 118S73; Mo 11SW(2d)1035; MoA 290SW82; 112TexCr245, 16SW(2d)127. See also 229Ky358, 17SW(2d)201 (2dcase).

2646–31½–New. "I think I would believe him under oath" held admissible. 21AlaA653, 111S648.

2646–35 106TexCr636, 294SW582.

2646–36 106TexCr636, 294SW582. **Explanation of charges.**–106TexCr636, 294 SW582.

2646–36½–New. Where indictment of accused has been shown on his cross-examination he may explain circumstances on redirect examination. 103 TexCr583, 281SW1074.

2646–36½–New. Such explanation may be rebutted. 103TexCr583, 281SW1074.

2646–38 TexCr 29SW(2d)343. But see 23AlaA1, 121S9(2dcase).

2647–44 176Minn175, 222NW906; 104 TexCr195, 283SW516; TexCr 29SW(2d) 347; 101Vt124, 141A686.

2647–45 101Vt124, 141A686; 136Wash 624, 241P1 (holding that where witness pleaded guilty of being drunk, as evidenced by judgment of conviction, exclusion of evidence that witness pleaded guilty on advice of counsel, who paid his fine, held not error). See also 101TexCr 584, 276SW705. **That state fails to object to objectionable questions** in impeachment of witness by accused does not entitle state to prove over objection by accused immaterial facts sustaining witness on points of attack by accused. 101TexCr584, 276SW705. **Credit of witness impeached as violator of law cannot be sustained** by testimony of state officer that it was necessary to employ crooks as enforcement officers. 101 TexCr584, 276SW705.

2648–51 Opinion of employer that witness' services had been satisfactory inadmissible. 101TexCr584, 276SW705.

2648–54 See also Mo 11SW(2d)1035.

2648–59 21AlaA655, 111S649.

2648–60 34Wyo84, 241P707.

2648–61 216Ala536, 114S12.

2648–62 321Mo378, 11SW(2d)268. But see 18F(2d)863. **Refusal to allow defendant** to prove innocence under other pending indictments held error. 106 TexCr280, 291SW896. **Showing as to conviction of misdemeanor.**–102TexCr 410, 278SW210 (circumstances of conviction may be explained). **Witness may be allowed to explain circumstances** of offense, if in extenuation of act or in mitigation of its effect. 156Md81, 143 A648.

2649–71 Mo 12SW(2d)39. See also 37 GaA386, 140SE415. **Examination by court** as to previous occasions when witness testified to character of accused held improper. 324 Ill 204, 154NE892.

2650–75 103CalA624, 284P1096. **Testimony may be limited within reasonable bounds** within discretion of trial court. 79CalA413, 249P832.

2650–77 89CalA768, 265P505; 200 Iowa 636, 204NW307; 285Pa251, 132A120 (criminal records of witnesses do not affect their right to contract). **Conflict in statements of plaintiff** does not warrant taking case from jury. 191NC589, 132SE 567.

2651–78 208 Iowa1049, 226NW770; Mo 23SW(2d)22; TexCr 31SW(2d)1084. **Impeaching testimony cannot be considered as substantive evidence in case.**–224 Ky126, 5SW(2d)889.

2651–79 191NC589, 132SE567. See also TexCivA 280SW877.

2651–82 126 Or193, 268P75. See also 7LaA278.

2651–84½–New. Defendant should be allowed to disavow knowledge of forgery of notes held by him and sold as owner because of its bearing on his credibility as a witness. 313Mo169, 281SW422.

2651–84½–New. That witness admitted-

ly was guilty of forgery rendered valueless his testimony that signatures to notes to him were genuine. 22F(2d)230.

2651–85 23AlaA582, 129S478; 23AlaA584, 129S492; 20AlaA547, 104S48; 21AlaA193, 106S622; Mass 171NE451; 312Mo173, 279SW89; Mo 296SW391; 74Mont166, 239P1000; TexCivA 300SW230; TexCivA 16SW(2d)341; 102TexCr524, 278SW760; 104TexCr495, 283SW497; 107WVa213, 148SE1. **Jury in weighing testimony** should be in possession of all facts calculated to exert influence upon witness. 216Ky430, 287SW949. **Jury may disregard testimonial witness** interested in result. TexCivA 292SW964. **Street improvement proceedings.**–219Ala465, 122S448. **In weighing testimony,** jury ought to be in possession of all facts calculated to exert any influence on witness. 22AlaA529, 117S497.

2652–86 218Ala674, 120S153; 20AlaA627, 104S674; 21AlaA345, 108S269; 22AlaA75, 112S367; AlaA 130S531; 206Cal213, 273P547; 234Ky552, 28SW(2d)790; 312Mo173, 279SW89; 320Mo1234, 10SW(2d)931; 53ND669, 207NW991; TexCivA 271SW142; 99TexCr543, 270SW1018 (feeling toward party not connected with case excluded); 99TexCr569, 270SW1025; 102TexCr524, 278SW760; 104TexCr495, 283SW497; 152Va1014, 148SE821; 143Wash39, 254P460. **Inference of duress is not warranted** by fact that state's witness had been committed to jail in default of bond to appear as witness. RI 136A8.

2652–88½–New. State witness under duty to disclose all knowledge to prosecuting attorney, and where he does no more, cannot fairly be charged with partisanship. 252Mass71, 147NE574.

2653–90 103Conn436, 130A668 (financial responsibility where defendant was only partner who was responsible); 39GaA224, 146SE648(2dcase); 41GaA317, 152SE847; 161La607, 109S83; 307Mo682, 271SW489; 286Pa344, 133A508; 67Utah45, 245P695. **As to certain testimony** independent contractors may not be interested parties. TexCivA 298SW(2d)484(2dcase). **Testimony of parties indirectly interested** should be carefully scrutinized. 233Ky27, 24SW(2d)917.

2653–92 286Pa344, 133A508 (where it vindicates him from criminal fault).

2653–93 286Pa344, 133A508 (where it vindicates him from criminal fault).

2653–94 130Misc42, 224NYS186.

2653–95 121Or531, 255P606 (calling adverse party as witness held to vouch for his credibility).

2653–96 286Pa344, 133A508 (where witness would be guilty of criminal fault unless he vindicated himself from presumption arising from transaction credibility is for jury, and they may disregard his testimony, though unimpeached).

2653–97 21AlaA348, 108S262; 21AlaA409, 108S658. But see 202Iowa1382, 212NW137.

2654–99 21AlaA193, 106S622 (that witness for state was under indictment for same offense may be shown); 75CalA428, 243P52; 324Ill516, 155NE373; 204Iowa137, 214NW531; 232Mich522, 205NW589; 222MoA346, 300SW845; 241NY460, 150NE516. See also 334Ill168, 165NE605. **Interest under guaranty of note in suit,** held not to require submission of truth of testimony to jury, in absence of fraud or defect of title. 51SD507, 215NW490.

2655–2 That witness is bondsman of accused in criminal case is admissible as affecting his credibility. 169Ark348, 275SW669.

2655–3 100Vt1, 134A706 (cross-examination of attorney as to whether he was attorney for insurer held proper).

2655–4 21AlaA81, 105S431 (such questioning is relevant to show interest); 20AlaA627, 104S674; 26OhNPNS242.

2655–5 20AlaA627, 104S674 (whether based on friendship or hate); 21AlaA193, 106S622; 22AlaA16, 111S897; 81CalA417, 253P964; CalA 292P500; 324Ill516, 155NE373.

2655–5½–New. That witness for defendant in criminal prosecution was jointly indicted for same crime may be shown as affecting his credibility. 169Ark348, 275SW669.

2655–6 204Iowa137, 214NW531; 72Mont306, 233P602.

2656–7 See also TexCommnA 12SW(2d)536.

2656–8 See also 75CalA428, 243P52.

2656–10½–New. Instruction that, as bearing on question of interest of government employees, jury might consider that such employees bore certain relationship to government with reference to compensation, has been held error. 245Mich277, 222NW123.

2656–11 6F(2d)575; 20AlaA281, 102S147 (evidence of schoolboy fights between witness and defendant excluded as too remote); 21AlaA217, 107S31; 22AlaA75, 112S367; 22AlaA529, 117S497; 23AlaA572, 129S316; 122Kan695, 253P233; 230Ky638, 20SW(2d)475; 160La228, 106S837; 160La435, 107S296; 264Mass221, 162NE308; 233Mich543, 213NW683, 685 [quotCyc]; 312Mo173, 279SW89 (such bias or interest never irrelevant); 221MoA537, 282SW1037; 48Nev134, 228P582 (relation of alleged common-law wife of accused); 23OhA104, 154NE747; 298Pa1, 147A848; 50SD29, 208NW166; 101TexCr587, 276SW699; 105TexCr369, 288SW227; 100Vt65, 135A5; 153Va954, 151SE286; 107WVa490, 148SE843 (intimacy of accused with female witness as tending to show bias). **Evidence of witness' illicit relation with defendant** held proper. 160La435, 107S296. **"Bias"** covers all varieties of hostility or prejudice against or favorable to parties. 23AlaA419, 126S414.

2656–12 168Ark710, 271SW326 (not error to refuse statement of particular cause of feeling); 238Mich543, 213NW683, 685 [quotCyc].

2656–13 20AlaA599, 104S555; 22AlaA36, 111S763; 23AlaA29, 120S299; 174Ark950, 298SW323; 324Ill516, 155NE377; Ill 173NE474; 213Ky190, 280SW1086; 143Miss352, 108S727; 101TexCr587, 276SW699; 101TexCr670, 276SW919; 105TexCr189, 287SW256; 153Va954, 151SE286.

2656–14 197Ind62, 147NE771; NJSup139A427; 298Pa1, 147A848.

2657–17 253IllA328; IndA 152NE288 (it is proper to show such fact on cross-examination).

2657–20½–New. Previous business relations between witness and party should be considered in weighing his testimony. 237Mich665, 213NW70.

2657–21 111TexCr4, 10SW(2d)730.

2658–23 In will contest relationship to attorney and deceased husband of contestant does not raise presumption of untruthfulness of witness' testimony. 125Misc475, 211NYS450.

2658–23½–New. Testimony of defendant's witness in criminal case that he was related to one arrested with defendant but not to defendant is admissible. 112TexCr498, 17SW(2d)821.

2658–27 Offer of money by one witness to another to testify to certain fact for defendant in criminal prosecution is admissible to show bias of one making offer. 20AlaA610, 104S556.

2659–32 125Kan431, 264P1036; 99WVa694, 129SE748 (prosecuting witness).

2659–34 20AlaA610, 104S556.

2660–35 33NM159, 262P532.

2661–37 MoA 286SW729.

2662–44½–New. External circumstances, from which witness' bias may be inferred, should have some clearly apparent force, as tested by experience of human nature, and not be too remote. 218Ala674, 120S153.

2662–46 23AlaA60, 120S467; 21AlaA193, 106S622; 21AlaA345, 108S269; 22AlaA617, 118S677; 87CalA208, 261P1072; CalA 292P500; 104CalA662, 286P711; 339Ill480, 171NE544 (motive); Iowa 220NW38; 319Mo1196, 8SW(2d)846, 60ALR448; 53ND183, 204NW983; 53ND669, 207NW991; OklCr 284P651; 89PaSuper269; 101TexCr587, 276SW699; 103TexCr272, 280SW827; 101Vt30, 139A918; 135Wash248, 237P708; 135Wash482, 238P11. **Correctness of ruling on admissibility** is not affected by answers to question. 100Vt1, 134A706. **Cross-examination improperly refused.**–23AlaA460, 126S890(2dcase). **Prejudice or hostility** must be directed against party to whom evidence relates. 39F(2d)524.

2662–47 21AlaA193, 106S622; 205Cal519, 271P1055; CalA 292P500; 161Ga421, 131SE163; Iowa 220NW38; 103TexCr272, 280SW827; 112TexCr625, 17SW(2d)1059; 101Vt30, 139A918. **Permitting cross-examination held erroneous.**–AlaA 130S531.

2663–51 93Fla387, 112S264; Mo 25SW(2d)109. **Amount of compensation of detective.**–74Mont201, 239P1002.

2663–52 22AlaA516, 117S498; 168La297, 121S872; 321Mo840, 12SW(2d)747; 127Or320, 272P273; 87PaSuper66; 112TexCr625, 17SW(2d)1059. But see 53SD488, 221NW91. **Attorney testifying to material facts in behalf of client** may be interrogated as to his interests in subject matter of litigation. TexCivA 275SW606.

2664–53 263Mass220, 160NE888.

2664–54 18F(2d)912; Ark 31SW(2d)527 (whether defendant's witness had talked with defendant's attorney); 41GaA70, 151SE690 (defendant paying witness); 210Ky385, 275SW819; 168La297, 121S872; 261Mass68, 158NE338; Mass 171NE451; NC 154SE604; 103TexCr272, 280SW827; 195Wis19, 216NW522.

2665–55 34NM507, 285P500.

2665–57 30F(2d)586.

2665–58 23AlaA60, 120S467.

2665–59 218Ala11, 117S466.

2665–60 TexCommnA 18SW(2d)595, 63ALR1009. **Charge or indictment for crime.**–Witness may be asked whether he has been charged with, or indicted for, same crime as that for which defendant is on trial. 169Ark286, 273SW1035.

2665–64½–New. Witness having fully declared his interest, it was held not error to decline further cross-examination as to his interest. 214Ala339, 108S29.

2666–65 34F(2d)86; 22AlaA39, 111S767; 171Ark271, 284SW17; 55ND683, 215NW157; OklCr 284P651; 87PaSuper66; TexCr 24SW(2d)417. **Cross-examination disallowed** where relations between witness and party were sufficiently developed. 215Ala635, 112S212. **Answer properly excluded** where no inquiry made as to state of witness' feeling toward party. 216Ala52, 112S442. **Improper question.**–Question to prosecuting witness, whether year or so before one of his sons and others jumped on defendant and knocked him senseless. 23AlaA79, 121S6.

2667–66 219Ala674, 123S55; OklCr 275P401(2dcase).

2667–67 234Ky45, 27SW(2d)410; 143Miss352, 108S727; 103TexCr387, 281SW569. But see 218Ala527, 119S215.

2667–68 180Ark197, 20SW(2d)872; 325Ill313, 156NE310; 257Mass198, 153NE793; 252Mass71, 147NE574; 216AppDiv468, 215NYS521; OklCr 275P655; 153SC25, 150SE321; TexCivA 291SW692. But see 40GaA571, 150SE561. **Undue intimacy for purposes of impeachment** may be shown but evidence must be legal and not by insinuation or innuendo. 21AlaA217, 107S31. **Expression of pleasure at homicide.**–307Mo291, 270SW298.

2669–70 See also 23AlaA379, 125S788.

2670–76 92CalA470, 268P473.

2670–80 MoA 272SW105 (where there was no evidence connecting certain witnesses with insurance company, it was reversible error to permit cross-examination to show that such witnesses were retained by insurance company). **Introduction of letter.**–52ND511, 204NW13.

2670–81 100Vt1, 134A706 (attorney for insurer); 99Vt512, 134A710.

2670–82 TexCivA 6SW(2d)432.

2671–83 But see 218Ala674, 120S153.

2671–85 See also 22AlaA644, 119S248.

2671–86 OklCr 291P575.

2671–87½–New. Question as to whether witness is out of employment not proper and does not show bias or prejudice unaided by other evidence. 213Ala522, 105S874.

2671–88 53ND669, 207NW991. See also 146Va279, 135SE700. **Question held**

improper as to how much witness paid for testimony in absence of showing of well-founded belief that witness was receiving more than legal pay of witnesses. 135Wash248, 237P708. **An expert witness,** etc. 118Nebr169, 223NW955. **In prosecution under prohibition law,** it was held error to refuse to permit cross-examination of deputy constables conducting raid as to ulterior financial motive. 122Kan520, 253P598.

2671–89 12PaDist&Co 423 (questioning of prosecution's witness properly refused in absence of showing of bad faith).

2672–91 53ND183, 204NW983. But see 29F(2d)454.

2672–91½–New. That witness may have received favorable consideration from district attorney for testimony may be disclosed on cross-examination. CalA 292P500.

2672–92 323 Ill 11, 153NE720 (restriction of examination held error).

2672–93 Kan 291P950; 103TexCr272, 280SW827.

2672–94 21AlaA227, 107S37.

2672–95 21AlaA345, 108S269; 335 Ill 590, 167NE857; 252Mass71, 147NE574; NC 154SE604; 53ND669, 207NW991; RI 136A8; TexCivA 270SW1101.

2672–97 21AlaA384, 108S656; 21AlaA 601, 110S913 (whether witness was brother of another state witness excluded); 22AlaA617, 118S677; 87CalA208, 261P1072; 230Ky250, 19SW(2d)218; 168La976, 123S645. **Matters too remote and indefinite** to show bias are properly excluded. 219Ala15, 121S34.

2673–98 82NH518, 136A358 (holding testimony of officer, as to matter which he had not volunteered to defendant's counsel, inadmissible to show bad faith).

2673–98½–New. Refusal to permit repetition of same question is no error. 200 Ind544, 165NE321.

2674–2 21AlaA389, 108S628.

2674–4½–New. Question to defendant's wife was held objectionable as too broad. 222Ky393, 300SW874.

2674–5 234Ky552, 28SW(2d)790; 218 AppDiv422, 218NYS428. **This exception to general rule is limited** to unequivocal acts and declarations establishing hostility. 218AppDiv422, 218NYS428.

2675–8½–New. Permitting state to ask witness, on redirect examination, if he has been offered any immunity, is not error. 111TexCr570, 13SW(2d)874.

2676–14½–New. Proper to show, on re-examination that witness had not been charged with, or convicted of, crime. 99TexCr659, 271SW91.

2676–16 87CalA208, 261P1072; 90CalA 27, 265P366; DelSuper 143A254; 93 Fla387, 112S264; Iowa 233NW257; 52 ND511, 204NW13 (on cross-examination); TexCivA 284SW664. Contra 52 SD302, 217NW383; 106TexCr202, 291 SW544.

2676–17 101TexCr12, 274SW599.

2677–20 214Ala2, 106S617; 23AlaA582, 129S478; 22AlaA34, 111S765 (evidence that state witness offered to drop charge held competent); 22AlaA128, 113S467; CalA 286P1050 (that witness had assigned note to plaintiff for collection on fifty-fifty basis); 169La291, 125S127; 265Mass270, 163NE888; 137SC145, 134 SE885; 100TexCr387, 272SW798; 101 TexCr12, 274SW599 (motive and animus inspiring testimony of witness); 101TexCr180, 274SW638; 106TexCr202, 291SW544; 113TexCr247, 20SW(2d) 431; TexCr 31SW(2d)643(2dcase); 143 Wash39, 254P460. **Motives** may be shown. 101TexCr637, 276SW925.

2677–21 93Fla387, 112S264.

2678–22 21AlaA264, 107S323; 87CalA 145, 261P740; 90CalA657, 266P558; 257Mass479, 154NE95; 222MoA912, 6 SW(2d)1007; 105TexCr227, 288SW225.

2679–25 Where there is no evidence of any overt act or hostile demonstration, evidence of previous threats are not admissible to show bias or prejudice. 168 La903, 123S614.

2679–27½–New. Evidence that witness has no interest in case is admissible. 137SC145, 134SE885.

2679–27½–New. Even where witness admits bias, its extent may be shown. 106TexCr202, 291SW544.

2679–28 19F(2d)232; 215Ala635, 112S 212; MoA 279SW253.

2679–29 19F(2d)232; 101TexCr158, 274SW619.

2680–30 216Ky430, 287SW949.

2680–34 331 Ill 581, 163NE373. **Pending civil action by parents** of prosecutrix, child of tender years, held admissible in prosecution for rape. 216Ky 430, 287SW949.

2680–37 40GaA230, 149SE174.

2680–38 94Fla318, 113S689, 694 [cit Cyc]; 52SD302, 217NW383; TexCivA 18SW(2d)942; 104TexCr495, 283SW 497; 106TexCr202, 291SW544. But see TexCivA 296SW902. **Extent of inquiry.–** 6F(2d)575 (defendant and accuser).

2680–39 6F(2d)575 (details of antagonism); 94Fla318, 113S689, 694 [cit Cyc] (in murder trial, asking witness if defendant's mother put up bond for witness was held proper); 321 Ill 47, 151NE555; 101TexCr637, 276SW925; 104TexCr495, 283SW497; 106TexCr202, 291SW544; 111TexCr493, 14SW(2d) 1032. **Shooting of accused by state witness** may be shown. 101TexCr637, 276 SW925.

2681–40 94Fla318, 113S689, 694 [cit Cyc]; 143Miss352, 108S727; 51ND445, 200NW20; 299Pa547, 149A696 (declarations as to threats to compel witness to testify in favor of accused); 52SD 302, 217NW383; 101TexCr637, 276SW 925; 104TexCr649, 285SW621; 106 TexCr202, 291SW544.

2682–41 216Ala30, 112S313; 327 Ill 152, 158NE386. But see 52ND511, 204 NW13.

2682–45 TexCivA 284SW664.

2683–48 21AlaA412, 109S168.

2683–48½–New. Question whether witness regarded defendant same way as brother is irrelevant and was properly excluded. 21AlaA152, 106S341.

2683–49 143Miss352, 108S727. **Evidence held inadmissible** under rule. 109 TexCr342, 4SW(2d)551. **As affecting credibility of prosecutrix** accusing father in rape case, evidence showing trouble between parties because of objection to her keeping company with a young man is admissible. 38Wyo 462, 268P189.

2683–53 169Ark286, 273SW1035; 75 CalA404, 242P1067, 1069 [quotCyc].

2684–54 75CalA404, 242P1067, 1069 [quotCyc].

2684–55 75CalA404, 242P1067, 1069 [quotCyc]; 108TexCr291, 300SW83. **Where no case was pending against witness,** questions as to her expectation that as result of her testimony against defendant there would be no proceeding against her, or sentence, held rightly excluded. 257Mass479, 154NE95. **Where no promises or inducements were made to witness** question as to opinion of witness, whether she got out of prosecution by her testimony, held properly excluded. 257Mass479, 154NE95.

2684–57½–New. ,or that he assaulted witness on other side after former trial for giving contradictory testimony. 100 TexCr387, 272SW798 (exclusion in criminal case held reversible error).

2684–60 254Mass520, 150NE854; 143 Wash39, 254P460 (circumstances of bias after fact of hostility had been proven). **Rejection of further offer to show bias held not abuse of discretion** where cross-examination of witness was sufficient to show bias. 254Mass520, 150NE854.

2684–61 Where state's attorney testified that he had not offered immunity or probation to accomplice testifying for people, it was error to exclude question as to whether he had promised immunity or probation to attorney of such accomplice. 331 Ill 380, 163NE149.

2685–69 TexCivA 273SW974.

2685–71 111TexCr106, 10SW(2d)102.

2685–72 23F(2d)561; 171Ark271, 284 SW17; 219Ky681, 294SW138 (in suit on life insurance policies, evidence that insurer's agent made statements derogatory to insurer, may be rebutted); 54SD184, 223NW41; TexCivA 273SW 974; TexCr 25SW(2d)870.

2685–73 88CalA67, 262P1106; 99TexCr 543, 270SW1018; 105TexCr436, 289SW 61.

2686–74 Vt 147A682.

2686–85½–New. Evidence to show want of interest or freedom from bias.–Witness may be asked, in first instance as bearing on his credibility, questions showing that he had no interest or bias. 99Vt280, 131A788.

2686–85½–New. Thus, in an action for personal injuries received in an automobile collision, motor vehicle inspector, testifying for defendant that he made observations and took measurements shortly after accident, may be asked his duties as an inspector, to show he obtained information in due performance of official duties and did not act as partisan or through curiosity. 99Vt280, 131A788.

2687–86 127Misc518, 217NYS341 (evidence of conversation and admissions received with caution).

2687–87 210Ky444, 276SW137.

2687–88 23AlaA395, 126S178.

2687–89 23AlaA395, 126S178; 208Ky 466, 271SW559.

2687–90 208Ky466, 271SW559.

2687–91 92CalA683, 268P915.

2687–93 13F(2d)704; 32F(2d)145; 214Ala291, 107S835; 219Ala23, 121S24; 219Ala24, 121S30; 219Ala353, 122S437; 20AlaA576, 104S345; 21AlaA2, 106S 344; 21AlaA412, 109S168; 22AlaA319, 115S294; AlaA 130S902; 171Ark589, 285SW18; 175Ark1170, 299SW354; 178 Ark1007, 13SW(2d)14; 71CalA453, 236 P163; 71CalA752, 236P365; 78CalA380, 248P975; 88CalA222, 263P306; 95CalA 428, 273P76; CalA 285P1059; CalA 286 P1087; 106Conn454, 138A456; 37GaA 219, 139SE735; 38GaA487, 144SE403; 40GaA265, 149SE301; 27Hawaii177; 235 IllA469; 236 IllA386; 196 Ind675, 148NE193; IndA 163NE515; 200 Iowa 660, 204NW278; 201 Iowa368, 207NW 393; 208 Iowa228, 225NW268; 210Ky 217, 275SW689; 220Ky128, 294SW1062; 228Ky19, 14SW(2d)194; 229Ky584, 17 SW(2d)697; 235Ky368, 31SW(2d)618; 236Ky68, 32SW(2d)550; 168La161, 121 S609; 158Md233, 148A453; 254Mass 337, 150NE92; 256Mass450, 152NE741; Mass 171NE16; 251Mich597, 232NW 371; 150Miss621, 116S287; 311Mo 476, 278SW755; 315Mo 987, 288SW777; 316 Mo 213, 292SW721, 726 [citCyc]; Mo 2SW(2d)755; MoA 281SW83; 221MoA 1158, 298SW125; MoA 20SW(2d)540; MoA 27SW(2d)1039; 116Nebr18, 215 NW556; 116Nebr776, 219NW145; 52 Nev115, 282P1024 (witness must have sworn falsely on material matter); 32 NM191, 252P1003; 240NY411, 148NE 597; 227AppDiv62, 236NYS669; 190 NC429, 130SE5; 51ND445, 200NW20; 28 OhA133, 162NE439; 31 OhA77, 166 NE427; OklCr 277P254(2dcase); 122 Or24, 256P770; 123 Or521, 262P954; 286Pa114, 133A31; 139SC545, 138SE 354; TexCommnA 17SW(2d)805; Tex CivA 11SW(2d)821; TexCivA 17SW(2d) 96; TexCivA 288SW575; 99TexCr551, 270SW1021; 101TexCr329, 275SW713; 103TexCr566, 281SW1080; 105TexCr 119, 286SW1104; 105TexCr260, 288SW 204; 105TexCr327, 288SW458; 105 TexCr543, 289SW686; TexCr 292SW 609; 107TexCr365, 296SW552; 107 TexCr312, 296SW887; 110TexCr186, 7 SW(2d)548; 111TexCr278, 12SW(2d) 574; 99Vt473, 134A585; 141Wash689, 252P131; 104WVa93, 138SE664; 107 WVa213, 148SE1.

2690–94½–New. Nominal defendant, friendly to plaintiff, may be impeached. NJSup 137A716.

2690–94½–New. Cross-examination of prosecutrix as to similar charges against other men is inadmissible as inconsistent statement where she had not stated that any other than defendant had committed crime. 80CalA243, 251P 699.

2690–95 13F(2d)704; 71CalA453, 236P 163; 90Fla659, 106S479; 243NY273, 153NE72; 112TexCr390, 16SW(2d)1065.

2690–96 71CalA453, 236P163.

2690–97 21AlaA422, 109S118; 71CalA 453, 236P163; Fla 130S582; 170Ga843, 154SE232; 200 Ind156, 162NE49; 311 Mo 476, 278SW755; 314Mo 574, 285SW 997; 316Mo 581, 292SW49; 55ND194, 212NW857; 101TexCr329, 275SW713.

2691–99 20AlaA643, 104S774; 218Ala 616, 119S635; 20AlaA610, 104S556; 21 AlaA252, 107S228; 74CalA178, 240P 502 (failure of witness to remember does not make prior statements admissible); 87CalA440, 262P380; 94CalA248, 270P

998; 227Ky153, 12SW(2d)308; 243Mich 380, 220NW708; 243NY273, 153NE72; 214AppDiv414, 212NYS253; 125Misc 164, 210NYS472; 194NC394, 139SE762; 30 OhA572, 165NE862; TexCivA 278 SW350; 100TexCr154, 272SW474 (state cannot prove former positive identification of person by witness where on trial witness merely failed to remember); 101TexCr59, 274SW158. **Testimony of third parties as to previous contradictory statements** is inadmissible to impeach one's own witness. 125Misc164, 210NYS472. **In Montana.**–77Mont477, 251P517.

2692–1 CalA 291P251; 196 Ind675, 148 NE193 (state could impeach its own witness where testimony was prejudicial).

2692–1½–New. State may impeach its witnesses by proof of contradictory statements. 112TexCr289, 16SW(2d) 241(1stcase).

2692–2 MoA 6SW(2d)676; 120 Or573, 253P7; 53SD291, 220NW492; TexCr 27SW(2d)1102. **Where the court holds that a "witness' testimony" is adverse,** etc. 100TexCr523, 272SW205.

2692–4 107Conn728, 142A403; 286Pa 344, 133A508 (party calling adversary as witness, not concluded by his testimony). Contra 16F(2d)39.

2692–4½–New. Recall to lay predicate for impeachment allowed in discretion of court, does not make party adversary's witness. 21AlaA412, 109S168.

2693–5 100TexCr523, 272SW205.

2694–10 17F(2d)223; 20F(2d)545; 24 F(2d)910; 28F(2d)147; 20AlaA610, 104 S556; 170Ark1194, 282SW17; 179Ark 625, 17SW(2d)317; 77CalA146, 246P 157; 40GaA397, 149SE814; 335 Ill 590, 167NE857; 196 Ind534, 149NE59; 165 La270, 115S484; 167La1085, 120S865; 152Miss476, 119S581; 222MoA238, 296 SW860; 38 OklCr87, 259P179; 34Porto Rico 519; 53SD291, 220NW492; Tex CivA 278SW350; 100TexCr24, 271SW 81; 141Wash648, 251P864; 107WVa490, 148SE843. But see 66Utah543, 244P 654. Contra 214AppDiv414, 212NYS353. **Rule applicable in criminal as well as civil cases.**–176Ark1203, 3SW(2d)292. Contra 80CalA783, 252P1061; Va 154 SE508. **Latitude to be allowed in examining witness** is within discretion of judge. 17F(2d)223. **Discretion of court.**–Nebr 230NW769.

2695–11 48 Ida688, 284P845.

2695–12 208Ky112, 270SW998; NJSup 137A716; OklCr 273P1027; TexCivA 3SW(2d)555; 101TexCr135, 274SW586; 66Utah543, 244P654. **Where a party places a witness upon the stand with notice,** etc. 101TexCr135, 274SW586; 104TexCr464, 284SW219. **Whether or not counsel was surprised** is question for judge. NJSup 137A716. **Where witness gave no affirmative testimony of inconsistent negative answers on which impeachment rests,** he cannot be impeached by showing that he made statements denied by him. 141Wash 648, 251P864. **Where three convicts repudiate joint statement,** government may not claim surprise as to other signers. 28F(2d)147.

2696–16 Iowa 228NW9; OklCr 287P 1099; 100TexCr24, 271SW81; 104Tex Cr464, 284SW219; 66Utah543, 244P 654; 37Wyo 432, 263P607. **Mere failure to make proof** is no ground for impeachment. TexCr 27SW(2d)1102.

2696–17 169Ark636, 276SW365; OklCr 287P1099; TexCivA 278SW350; 110Tex Cr250, 8SW(2d)127.

2697–18 OklCr 287P1099; TexCivA 278 SW350; 110TexCr250; 8SW(2d)127.

2697–20 3F(2d)860, 20F(2d)545; 20Ala A643, 104S774 (dictum); 87Colo 44, 285 P162; 32NM48, 250P842; 243NY273, 153 NE72; 120 Or144, 251P763; 50RI 356, 147A878; 66Utah543, 244P654; 105WVa 358, 143SE85.

2698–25 243NY273, 153NE72.

2698–26 165La270, 115S484; 32NM48, 250P842; 243NY273, 153NE72; 66Utah 543, 244P654.

2698–27 243NY273, 153NE72.

2698–28 243NY273, 153NE72.

2699–32 90Fla659, 106S479. Contra 243NY273, 153NE72. But see 66Utah 543, 244P654.

2699–33 77Mont477, 251P517; Okl 293 P225.

2699–35 78CalA380, 248P975; Mo 29 SW(2d)148. **Statements of former title holder as to his equity held admissible.**–161Ga93, 129SE778.

2699–37½–New. Rebuttal of accused's character witness held not error. 221 Ala632, 130S175.

2699–38 32F(2d)208; 34F(2d)848 (material matters); 39F(2d)524; 212Ala 614, 103S682; 214Ala476, 108S349; 219 Ala353, 122S437; 22AlaA133, 114S63; 22AlaA309, 115S289; 22AlaA331, 115S 417; 77CalA587, 247P245 (statement made on cross-examination); 86CalA 298, 260P901; 37GaA212, 139SE734; 37GaA219, 139SE735; 41GaA622, 154SE 283; 324 Ill 11, 154NE451; 203 Iowa192, 210NW749; Iowa 218NW470; 216Ky 376, 287SW933; 168La95, 121S586; 171Minn173, 213NW923 (admission in discretion of court); Miss 110S503; Miss 130S511; 52Nev115, 282P1024; 99 NJEq369, 131A897; 122 Or504, 259P 917; TexCivA 272SW501; 100TexCr147, 272SW493 (defendant in criminal prosecution); 103TexCr658, 282SW221; 147 Va678, 137SE473; 155Wash63, 283P 439. **Matter held collateral, irrelevant or immaterial,** see 77CalA587, 247P245. **Evidence properly excluded.**–171Minn 173, 213NW923 (testimony offered to discredit testimony of prosecutrix in prosecution for attempted rape).

2701–39 196 Ind675, 148NE193; 203 Iowa192, 210NW749 (test is whether contradictory statements were material); 145Miss247, 110S503; 123 Or173, 261P411. **Matters held not collateral, irrelevant, or immaterial.**–76CalA91, 243 P878; 324 Ill 11, 154NE451; 208 Iowa 228, 225NW268; 315Mo 987, 288SW 777; 51ND445, 200NW20; 123 Or173, 261P411; 108TexCr258, 1SW(2d)298. **Matters held collateral, irrelevant, or immaterial.**–324 Ill 11, 154NE451.

2701–40 212Ala614, 103S682; 21AlaA 155, 106S797; 77CalA231, 246P147; CalA 280P154 (inconsistency appearing inferentially is insufficient); 227Ky153, 12SW(2d)308; 254Mass520, 150NE 854; 256Mass450, 152NE741; MoA 7SW(2d)719; TexCivA 23SW(2d) 516; 141Wash689, 252P131; 104 WVa93, 138SE664; 33Wyo 346, 239 P526, 41ALR717 (witness denying knowledge as to matter asked about). **Testimony held impeachable** by proof of prior statement. 161La187, 108S410. **Statement not sufficiently inconsistent to be available for impeachment.**–192 NC580, 135SE456. **Evidence held admissible.**–331 Ill 268, 162NE839. **Inconsistency of witness' opinion** right after transaction with his testimony is to be determined by whole effect of opinion. 227AppDiv430, 237NYS348. **Mere amplification of testimony given at preliminary hearing** is not sufficient reason for questioning integrity of witness. 168La1099, 123S781. **Statements held not contradictory.**–181Ark674, 27 SW(2d)516.

2702–41 77CalA146, 246P157; 206 Iowa 629, 221NW59; TexCommnA 17SW(2d) 805; 104WVa93, 138SE664.

2703–42 77CalA231, 246P147.

2703–43 77CalA146, 246P157; 198 Ind 633, 154NE485; NJ 151A867; 215App Div379, 213NYS666 (statement after accident that employer knew chauffeur was using car is admissible to contradict witness now saying he used car without authority); Oh 171NE27 (where defendant in bribery prosecution testified he received check which he denied before trial); 54SD184, 223NW41; 99Vt 91, 130A758. **Statements sufficiently inconsistent,** etc. 13F(2d)704; 168Ark 580, 271SW330; 179Ark207, 14SW(2d) 1115; 77CalA146, 246P157; 198 Ind633, 154NE485; 318Mo 542, 300SW699.

2704–44 254Mass337, 150NE92; 99Vt 91, 130A758. **Substantial inconsistency.**–168Ark580, 271SW330.

2704–45 210Ky5, 273SW533; 126Me 136, 136A808. But see 225Ky340, 8SW (2d)422.

2704–46 212Ala614, 103S682.

2705–47 210Ky217, 275SW689.

2705–48 212Ala614, 103S682.

2705–49 212Ala614, 103S682, 686 [cit Cyc]; 217Ala255, 115S171, 173 [cit Cyc]. See also 110TexCr153, 8SW(2d) 150.

2706–52 214Ky211, 282SW1109 (holding evidence of prior statement not mentioning threats of deceased against defendant was competent); 32NM319, 255 P396.

2706–54 103TexCr112, 280SW222. But see Miss 130S511.

2707–56 Fla 130S582; Ga 155SE484; 235 IllA469 (telephone conversations); 165La497, 115S728; 116Nebr131, 216 NW299; 118 Oh494, 161NE534; 120 Oh 177, 165NE721; 112TexCr370, 17SW(2d) 61; 69Utah557, 257P658. **Unsigned statement held inadmissible.**–79CalA541, 250P406. **Rule applies to written evidence** not delivered to persons intended. 116Nebr131, 216NW299.

2707–57 Sworn tax list is erroneously admitted where list is not required to be under oath. 108Conn115, 142A812.

2707–58 12LaA350, 125S469; MoA 31 SW(2d)394.

2707–59 29Ariz247, 240P863; 70CalA 652, 234P107.

2708–60 70CalA652, 234P107.

2708–61 29Ariz247, 240P863; 70CalA 652, 234P107; 200 Iowa660, 204NW278.

2708–62 14F(2d)893; 21F(2d)810; 21 AlaA165, 106S348; 181Ark185, 25SW (2d)766; 71CalA752, 236P365; 267Mass 501, 167NE235; 77Mont572, 252P307; 103TexCr403, 281SW844. **Testimony held inadmissible for purpose of impeachment.** 103TexCr658, 282SW221. **Witness testifying as to value of land may not be contradicted by testimony in previous case as to damage to adjoining land not shown to be substantially same.** 213Ala630, 105S896.

2709–63 21AlaA655, 111S649; 168Ark 783, 272SW674 (admissible only to contradict conflicting testimony given by witness at trial); 169Ark225, 273SW13; 169Ark353, 275SW662; 173Ark1054, 294 SW390; 234Ky681, 28SW(2d)977; 93 PaSuper365; 33PortoRico 179; 111Tex Cr476, 14SW(2d)842; 112TexCr390, 16 SW(2d)1065; 113TexCr501, 21SW(2d) 1057(2dcase).

2709–64 179Ark625, 17SW(2d)317; 171 Ark180, 283SW353; 230Ky250, 19SW (2d)218; 238Mich15, 213NW135; 32NM 319, 255P396; OklCr 280P473(2dcase); 104TexCr533, 286SW204. **Document containing testimony** must be properly authenticated. 100CalA413, 279P1086.

2709–65 219Ala21, 121S76; 255IllA127; 247Mich164, 225NW566.

2710–67 331 Ill 581, 163NE373; Ind 166NE654; 167La1085, 120S865; Utah 289P146. **Directing witness to answer whether she made certain statement at inquest** held not error. 153SC25, 150 SE321.

2710–72½–New. For effort to prove contradictory statement at former trial, only so much of record may be introduced, as is necessary to show contradiction is not entire record. 21AlaA165, 106S349.

2710–72½–New. In introducing record of former trial to prove contradiction court is under no duty to pick out the contradictions. Failure to point out contradictions is ground for excluding the record. 21AlaA165, 106S349.

2710–72¼–New. Evidence that defendant expected to pay his attorneys held admissible to discredit witness whose testimony at injunction hearing was contrary. TexCivA 21SW(2d)694.

2711–75 84CalA642, 258P638; 103Tex Cr98, 280SW779; 103TexCr112, 280SW 222. But see 110TexCr159, 8SW(2d) 947; 111TexCr348, 13SW(2d)102.

2711–76 Claims filed against estate held inadmissible.–Iowa 233NW28. **Pleadings held inadmissible.**–Iowa 233NW28.

2711–79½–New. Evidence of trustee's statement in bankruptcy petition is admissible to impeach him. IndA 170NE 863.

2711–80½–New. Plea of guilty for reckless driving admissible to impeach driver testifying in action against employer

for injuries in automobile collision. 211 Ky669, 278SW100.

2712–84 29F(2d)87.

2712–85 214Ala476, 108S349; 219Ala 392, 122S349; 323Mo 840, 20SW(2d)684, 66ALR263 (cross-examination held to call for opinion); MoA 7SW(2d)719; 121 Oh80, 167NE158, 64ALR981; 104 WVa93, 138SE664. But see MoA 279 SW438. **Admission of contradictory opinion** held prejudicial error. 104WVa 93, 138SE664. **Admission** that plaintiff did not think driver of auto at fault must be considered in connection with positive statement that she did not see auto. MoA 7SW(2d)719.

2713–86 261Mass68, 158NE338.

2713–87 But see 227AppDiv430, 237 NYS348.

2713–90 162La310, 110S486, 489 [quot Cyc]; TexCr 27SW(2d)215.

2714–92 337 Ill 531, 169NE180 (statement of accomplice outside of defendant's presence); 233Mich222, 206NW562 (cross-examination of accused in prosecution for negligent homicide as to testimony given by another witness at inquest held improper).

2714–93 26F(2d)902; 213Ala169, 104S 438; 213Ala260, 104S509; 22AlaA350, 115S701; 23AlaA232, 123S288; Ark 31 SW(2d)421; 168Ark396, 270SW945; 76CalA91, 243P878; 80CalA151, 251P 335; Ind 173NE453; 224Ky502, 6SW (2d)502; 262Mass185, 159NE518; Miss 108S711; 220MoA303, 286SW709; 315 Mo 987, 288SW777; NJSup 147A585; 243NY273, 153NE72; 54ND543, 210NW 19; 128 Okl 102, 261P549; 122 Or24, 256P770; 122 Or504, 259P917; TexCivA 272SW256; 101TexCr329, 275SW713; 104TexCr391, 283SW813; 135Wash353, 237P497. **It is discretionary with court** to allow or refuse recall by defendant of state's witness for impeachment. 31 F(2d)42.

2716–95 213Ala260, 104S509; Ill 173 NE383; 315Mo 987, 288SW777; 101Tex Cr329, 275SW713. **Though former statements were made as agent,** it is error to refuse cross-examination for purpose of laying foundation. 28 OhA133, 162NE439.

2716–96 199 Ind592, 159NE420, 427 [citCyc]; 207 Iowa113, 222NW416, 62 ALR1174; 157Miss548, 128S579; 323 Mo 840, 20SW(2d)684; 66ALR263; 103 TexCr171, 280SW213; Sask [1929] 3 DomLR593.

2717–98 169La1197, 126S921; 105NJ L15, 143A811.

2717–2 333 Ill 583, 165NE155.

2717–4 38GaA617, 144SE921(2dcase).

2717–5 72CalA526, 237P786.

2717–6 161La532, 109S56, 68 [citCyc].

2718–7 79CalA295, 249P525.

2718–10 222MoA740, 9SW(2d)824.

2718–10½–New. Witness for state may, on cross-examination, be shown to have testified before coroner's jury to one state of facts, when first examined, and to facts contradictory thereof on being recalled. 21AlaA407, 108S645.

2719–15 217Ala255, 115S171; 164La 423, 114S83; 254Mass520, 150NE854. **Sustaining exception to cross-examination of witness** held not abuse of discretion. 254Mass520, 150NE854.

2719–16 21AlaA566, 110S61.

2719–17½–New. **Cross-examination as to questions and answers in deposition of witness** is properly disallowed when deposition was not previously introduced in evidence. 219MoA519, 282SW535.

2719–17⅓–New. Question requiring witness to pass upon implications of his statements is improper. 103NJL663, 138 A575.

2719–17¼–New. It is discretionary with trial judge, to exclude question in form of affirmative statement that witness had made prior conflicting statements. 255Mass369, 151NE839.

2719–17⅙–New. Question as to witnesses having admitted untruthfulness of prior testimony has been held properly excluded for duplicity. NJSup 143A 142.

2719–18 13F(2d)704; 17F(2d)246; 212 Ala630, 103S689; 213Ala78, 104S250; 21AlaA2, 106S617; 215Ala612, 111S901; 218Ala410, 118S755; 169Ark353, 275 SW662; 170Ark1194, 282SW17; 175Ark 1170, 299SW354; 195Cal 272, 232P710; 77CalA231, 246P147; 89CalA6, 264P 336; 90CalA528, 266P349; 104CalA422, 286P476; CalA 291P626; 166Ga10, 142 SE160; 40GaA251, 149SE283; 45 Ida 760, 265P24; 233 IllA262; 241 IllA477; 201 Iowa368, 207NW393; 210Ky150, 275SW630; 210Ky217, 275 SW689; 210 Ky385, 275SW819; 210Ky542, 276SW 507; 223Ky544, 4SW(2d)368; 228Ky 5, 14SW(2d)216; 230Ky250, 19SW(2d) 218; 159La779, 106S302 (error not to permit laying of foundation); 162La 310, 110S486; 151Md525, 135A587; 238 Mich15, 213NW135; 173Minn23, 216NW 316; Mo 256SW753; 323Mo 37, 18SW (2d)8; 323Mo 64, 18SW(2d)445; MoA 256SW826; NJ 151A737(2dcase); 243 NY273, 153NE72; 228AppDiv27, 238 NYS429; 50Philippine132; 50Philippine 780; 32PortoRico 112; TexCivA 291SW 343; 106TexCr605, 294SW566; Wash 291P728; 107WVa418, 148SE131. Contra 116Nebr18, 215NW556. **Where no proper foundation was laid** impeaching affidavit was held properly excluded. 170Ark1194, 282SW17.

2722–19 116Nebr18, 215NW556 (witness as party); 289Pa498, 137A683.

2722–23 199CalA562, 250P572; 69Utah 557, 257P658.

2722–24 17F(2d)223; 20AlaA643, 104S 774; 170Ark1194, 282SW17; 90CalA 730, 266P558; 84Mont348, 275P757.

2723–25 259Mass437, 156NE711; 259 Mass388, 156NE712.

2723–26 Wash 291P728.

2723–27 219Ala353, 122S437; 116Nebr 18, 215NW556; 33PortoRico 6; 54SD 184, 223NW41.

2723–29 202Cal 326, 260P553; 38GaA 431, 144SE218(2dcase); 162La310, 110 S486. **In trial for theft,** testimony that owner told witness that he sold calf to defendant is properly excluded as hearsay without foundation. 110TexCr374, 7 SW(2d)1089.

2723–30 210Ky542, 276SW507.

2724–31 MoA 272SW117.

2724–32 But see MoA 272SW117.

2725–33 100CalA113, 279P1070.

2725–39 MoA 18SW(2d)133; 228 AppDiv27, 238NYS429 (stenographer's notes); TexCivA 291SW343. But see 79 CalA541, 250P406. **Where witness states that he remembers having signed written statement** failure to lay foundation prescribed by statute is immaterial. 75 CalA44, 242P109.

2726–40 210Ky385, 275SW819; Mo 16 SW(2d)35.

2726–40½–New. **Statements sought to be elicited must be clearly impeaching** in order to bring into operation rule requiring laying of foundation. 43 OklACR340.

2726–42 32PortoRico 112; TexCivA 291 SW343.

2727–46 104NJL397, 140A419.

2728–56 22AlaA317, 116S110; 71CalA 453, 236P163; 130 Or392, 280P496 (questions too indefinite). **Question asked to impeach witness must relate to specific contradictory statement** and embrace one of like import. 220Ala544, 126S848.

2728–57 Ala 130S778; 168Ark580, 271 SW330; 71CalA453, 236P163; 43 Okl ACR340; OklCr 280P473(2dcase) (to questions and answers at preliminary hearing); 119 Or409, 243P72; TexCivA 291SW343.

2728–58 168Ark580, 271SW330; MoA 282SW525; TexCivA 291SW343.

2728–59 90CalA730, 266P588; 4Hawaii Fed238; 90PaSuper14; TexCivA 291 SW343.

2729–61 But see Ala 130S402.

2729–62 220Ala544, 126S848; 22AlaA 140, 114S73; 22AlaA309, 115S289; 170 Ark1194, 282SW17; 71CalA453, 236P 163; 73CalA580, 239P82; 76CalA91, 243 P878; Ill 173NE155; 200 Iowa660, 204 NW278; 210Ky385, 275SW819; 26 OhA 435, 160NE500; 43 OklACR340; 119 Or 409, 243P72; 129 Or11, 276P248; 32 PortoRico 112 (deposition sworn to before notary). **Evidence inadmissible.**–Vt 150A65.

2730–63 71CalA453, 236P163; Ill 173 NE155; 200 Iowa660, 204NW278; 228 AppDiv27, 238NYS429; 43 OklACR340.

2730–64 22AlaA140, 114S73; 22AlaA 309, 115S289; AlaA 130S520; 73CalA 580, 239P82; 246 IllA334; 210Ky385, 275SW819; 43 OklACR340; 119 Or409, 243P72. **Presence of accused,** in whose presence witness testified statement was made, need not be shown by state. 200 Iowa660, 204NW278.

2731–65 170Ark1194, 282SW17; Vt 150 A65.

2731–67 21AlaA412, 109S168 (question held sufficiently definite and certain); 90Fla659, 106S479. **Questions held sufficiently definite and certain.**–57ND908, 224NW906.

2732–68 58ND881, 228NW217 (discrepancy rendering impeachment ineffective).

2732–71 201 Iowa368, 207NW393.

2732–74 48Nev134, 228P582, 584 [quot Cyc]. **Rule that document should first have been regularly introduced into evidence,** held inapplicable in case of cross-examination as to oral statements of witness, where document was transcript of stenographer's notes. 82NH518, 136 A358.

2732–75 240Mich98, 215NW62; 48Nev 134, 228P582, 584 [quotCyc]; 32Porto Rico 112; TexCivA 291SW343, 345 [cit Cyc].

2732–76 38F(2d)545; 215Ala548, 112S 120; 73CalA580, 239P82; 74CalA359, 240P293; 80CalA167, 251P327; 222MoA 64, 300SW554; MoA 18SW(2d)133; 48 Nev134, 228P582, 584 [quotCyc]; 32 PortoRico 112; TexCivA 291SW343, 345 [citCyc].

2733–77 210Ky385, 275SW819; 240 Mich98, 215NW62; 222MoA740, 9SW (2d)824; 48Nev134, 228P582, 584 [quot Cyc]; 228AppDiv27, 238NYS429; 50 Philippine780; TexCivA 291SW343, 345 [citCyc]. But see 48Philippine894.

2733–78 240Mich98, 215NW62; 48Nev 134, 228P582, 584 [quotCyc]. **How much of testimony before committing magistrate must be read,** before any part may be used on cross-examination, rests in discretion of court. 240Mich98, 215 NW62.

2733–79 210Ky385, 275SW819.

2734–80 TexCivA 291SW343, 345 [cit Cyc].

2734–82 22AlaA427, 117S617.

2734–83 74CalA359, 240P293 (deposition); 174Minn258, 219NW95.

2734–84 **Merely asking as to genuineness of signature** is not sufficient. MoA 18SW(2d)133.

2734–88 TexCivA 291SW343.

2735–92 Contra 73CalA580, 239P82. **In California.**–73CalA580, 239P82.

2735–92½–New. **Proof of authenticity of transcript of prior testimony** need not be made before reading statement to witness. 73CalA580, 239P82.

2735–92⅓–New. It was not error to direct witness to read whole of former testimony for purposes of impeachment, where no objection was made to limit scope of testimony. 219Ala670, 123S 50.

2735–95 175Ark786, 300SW426; DC 26 F(2d)989. **Where witness admitted failure to tell sheriff facts related to trial,** refusal to permit counsel to ask him whether, in written statement to district attorney, he attempted to tell all he knew, and had mentioned such facts, was held error. 32NM319, 255P396.

2735–96 120 Oh177, 165NE721.

2735–97 14F(2d)893.

2735–98 14F(2d)893.

2735–99 39F(2d)294; AlaA 130S520; 175Ark786, 300SW426; 88CalA399, 263 P553; Iowa 230NW425; 169La291, 125 S127; 146Miss285, 111S378; 222MoA 43, 299SW622; MoA 18SW(2d)133; NJ Sup 144A310; ND 232NW897; 27 Oh NPNS548; 131 Or209, 282P233; Tex CivA 10SW(2d)1051; TexCivA 21SW (2d)347; 148Va194, 138SE721. But see 335 Ill 590, 167NE857. **On denial of signature** it is proper to examine concerning oral statements as to impeaching matters in written statements to lay foundation for introduction thereof. MoA 18SW(2d)133.

2737–1 147Va709, 137SE528.

2737–2 58ND82, 224NW878; 283Pa331, 129A109. **Effect of denial of admission.**–Utah 272P229.

2738–3 127 Okl 171, 260P4.

2738–5 160La661, 107S481, 483 [cit Cyc]; 27 OhNPNS548; 127 Okl 171, 260

P4; 120 Or573, 253P7.

2738-6 212Ala614, 103S682.

2739-12 44 Ida633, 258P1082. **Exclusion of evidence offered to impeach witness held proper,** where his testimony did not contain statement sought to be impeached. 324 Ill 21, 154NE446. **Evidence admissible.**-180Ark873, 23SW(2d) 627; TexCr 24SW(2d)825. **Photographs of defendant held admissible.** 44F(2d)45.

2739-13 212Ala597, 103S884.

2739-16 But see TexCivA 3SW(2d)563.

2740-19 99Vt91, 130A758.

2740-22½-New. **Though not admissible as admission against corporation,** statements by former officer may become competent as impeachment of his testimony. 164Minn323, 204NW961.

2740-22⅓-New. **Impeaching evidence must be such as would be admissible** independent of impeachment. 117 Okl 4, 245P46.

2740-22¼-New. It is error to strike answer of witness at corner's inquest which tended to impeach. 338 Ill 56, 170NE 14.

2740-23 212Ala614, 103S682; 212Ala 597, 103S884; 216Ala342, 113S391; 32 NM83, 251P384; TexCivA 272SW291. **Question asked impeaching witness need not be in same words.**-201 Iowa368, 207 NW393.

2740-24 AlaA 130S520; 210Ky217, 275 NW689; 153Va909, 150SE407.

2741-28 Ala 130S778.

2741-35 CalA 290P513; 152Wash365, 278P149. **Sufficiency of foundation for impeachment** is to be determined by trial judge. 131 Or209, 282P233 (foundation held sufficient).

2742-36 179Minn187, 228NW615 (account in defendant's handwriting); MoA 15SW(2d)964; 48Nev441, 233P846 (appraisement); 103NJL351, 135A786, 787 [citCyc]; TexCr 24SW(2d)41. **Statements properly excluded.**-Ida 290P200; Nebr 230NW769.

2742-37 20AlaA610, 104S556; 75CalA44, 242P109; IndA 152NE288; IndA 157 NE464; 128Kan603, 278P737; 264Mass 235, 162NE307; 316Mo 213, 292SW721. **Where party admitted his signature** inquiries on cross-examination as to contents is not necessary. IndA 152NE288.

2742-39 103NJL351, 135A786, 787 [cit Cyc]. **Where document was not supported by evidence of its authority** held it was properly excluded. 103NJL351, 135A786.

2743-49 26F(2d)574; 252 IllA33; 105 NJL266, 144A875; TexCivA 11SW(2d) 371.

2743-50½-New. Witness may not be impeached by merely showing that at some time in the past he executed an I. O. U. 119 Or430, 249P1049.

2743-52 But see 170Ark801, 281SW8.

2743-55 But see 48 Ida688, 284P845.

2744-56½-New. Admitting written statements containing opinions in error. 215AppDiv390, 213NYS697.

2744-56⅓-New. Voluntary stipulation in civil action is admissible in criminal prosecution to impeach parties when called as witnesses. 180Minn378, 230 NW818.

2744-57 3F(2d)860 (failure of party examining as to inconsistent statements to introduce affidavit in evidence is not error); 13F(2d)847 (recognizing rule); 212Ala325, 104S808; 226Ky173, 10SW (2d)643; 150Miss621, 116S287; RI 137 A697. **Affidavit of continuance** made by defendant is admissible. 229Ky584, 17 SW(2d)697. **In Virginia.**-37F(2d)320. **Affidavit is inadmissible** where it creates no conflict in evidence. Iowa 228NW9.

2744-60 Mo 271SW525 (but deposition must be offered in evidence); 219MoA 162, 272SW108; Vt 147A285. **Deposition must be offered in evidence.**-Mo 271 SW525.

2744-61 **Proof of former testimony necessary.**-MoA 31SW(2d)117.

2745-62 169Minn287, 211NW463; 298 Pa352, 148A527. See also Wis 233NW 76.

2745-63 194NC279, 139SE433. **Exclusion of complaint** held not erroneous. Utah 290P774.

2745-65 See also Ala 130S786. **Unverified pleading signed only by attorney,** is admissible in evidence for impeachment purposes. 169Minn287, 211 NW463.

2745-67½-New. **Pleadings containing inconsistent or contradictory statements** are available for purpose of impeachment. 202 Iowa333, 208NW726.

2745-69 29Ariz104, 239P789; 95CalA 428, 273P76; 118Kan641, 236P855 (letters of accused as witness); 164Minn 331, 205NW219; 165Minn440, 206NW 933; 128 Or415, 274P1098(2dcase); 99 Vt227, 131A16; 100WVa381, 130SE465.

2746-73 See also Wis 231NW593.

2747-80 MoA 9SW(2d)541; 103NJL 351, 135A786; TexCivA 283SW1073.

2747-84 MoA 279SW438.

2747-87 213AppDiv411, 210NYS811. See also 215AppDiv390, 213NYS697.

2747-88 213AppDiv411, 210NYS811; 215AppDiv390, 213NYS697 (only competent parts should be read in evidence). But see 126Kan582.

2747-88½-New. Where confession is admissible part of it cannot be offered in evidence. 324 Ill 516, 155NE373.

2748-95 207 Iowa113, 222NW416, 62 ALR1174.

2748-96 TexCivA 291SW681 (that witness did not testify to fact, which he states at present trial, he did).

2748-97 123 Or521, 262P954.

2748-1 157Miss548, 128S579; TexCivA 22SW(2d)947. **In Wyoming.**-33Wyo 346, 239P526, 41ALR717.

2748-1½-New. Exclusion of question asked witness for purpose of impeachment was not error, where counsel disclaimed intention of producing contradictory evidence. NJSup 134A183.

2749-4 But see 228AppDiv705, 238NYS 458.

2749-7½-New. **Record** properly proved or certified may be introduced in evidence. 210Ky385, 275SW819.

2749-8 19F(2d)186; 21AlaA566, 110S 61; 206 Iowa664, 221NW210; 162La 717, 111S72; 316Mo 1104, 295SW757; MoA 282SW525; 228AppDiv27, 238NYS 429. But see 57ND652, 223NW705; OklCr 280P473(2dcase).

2750-9 **In Alabama.**-23AlaA448, 126S 612.

2750-10 **Where witness admits he gave answer read by counsel** court properly refused to strike out impeaching evidence for being incomplete in that the transcript was not introduced. 337 Ill 555, 169NE753.

2750-11½-New. In prosecuting for robbery, on cross-examination of prosecuting witness, ruling that portions of transcript should be taken up one at a time has been held proper. 100CalA509, 280P379(2dcase).

2750-13 Mo 7SW(2d)442; 219MoA162, 272SW108; 28 OhA468, 162NE826.

2750-13½-New. Entire deposition must be read. 215Ala612, 111S901.

2750-14 Mo 23SW(2d)22.

2750-14½-New. To impeach witness by his deposition whole deposition need not be read in evidence, but witness may be asked if certain questions were asked and certain answers given by him, provided the questions and answers are subsequently read in evidence. 316Mo 1104, 295SW757.

2750-14½-New. Deposition taken in public proceedings before civil service commission acting in quasi-judicial capacity is competent to impeach witness. 87CalA246, 262P78(3dcase).

2750-15 But see 23AlaA448, 126S612.

2751-22 123 Or521, 262P954. **Entire testimony of witness on preliminary examination** is admissible to show that he did not then testify to matters testified to on trial. 103TexCr614, 281SW1068.

2751-24 97CalA569, 275P892; 130 Or 392, 280P496. **Impeaching witness may only give impeaching testimony.**-26 OhA 435, 160NE500.

2752-25 72CalA757, 238P143; TexCr 27SW(2d)229 (objection to question erroneously sustained).

2752-28 106WVa672, 146SE726, 63ALR 101.

2752-31 97CalA569, 275P892; 204 Iowa406, 215NW258. **Questions held sufficiently definite and certain** as to time, place, and parties present. 99 CalA13, 277P874.

2753-37 **Cross-examination held proper.**-26 OhA435, 160NE500. **Discretion of court.**-DC 41F(2d)976.

2753-38 **Evidence held to raise issue as to truth of witness' testimony.**-133 Misc361, 231NYS666.

2753-41 317 Ill 401, 148NE274 (holding that where witness denies having made alleged contradictory statement, and there being no proof that he did make it, it is improper to examine him as to things he did say on occasion in question and objection thereto is properly sustained).

2753-42 164La883, 114S721.

2753-43 204 Iowa406, 215NW258; 104 TexCr378, 283SW824 (holding that in trial for robbery, testimony of officer that prosecuting witness told him defendant had robbed him, was admissible to rebut testimony of defendant's witnesses that he told them he did not know who robbed him). **Cumulative evidence.**-204 Iowa406, 215NW258.

2754-46 MoA 9SW(2d)650; RI 137A 697.

2754-52 20AlaA426, 103S707; Ind 173 NE453; 215Ky717, 286SW1053; Mass 172NE97; Mo 26SW(2d)781; 123 Or 521, 262P954; 101TexCr439, 276SW 252.

2755-53 251Mich696, 232NW397(2d case); MoA 10SW(2d)313; 108TexCr 210, 299SW907.

2755-54 251Mich696, 232NW397(2d case); MoA 10SW(2d)313.

2755-56 255Mass369, 151NE839; 321 Mo 553, 12SW(2d)428; 123 Or521, 262 P954; 293Pa537, 143A192.

2755-57 167Minn437, 209NW317; 107 TexCr115, 295SW190; 108TexCr210, 299SW907.

2756-62 101TexCr315, 276SW247.

2757-79½-New. Question of sufficiency of explanation between witness' testimony and that in independent litigation is for jury. 126Me299, 138A170.

2757-80 334 Ill 324, 166NE129; 170La 69, 127S368 (threat for telling truth); 105TexCr15, 284SW960.

2758-81 299Pa547, 149A696; 100TexCr 580, 272SW173.

2758-83 100TexCr580, 272SW173.

2758-87 212Ala614, 103S682; 100Vt 436, 138A729.

2758-88 147Wash589, 266P727.

2759-90 215Ala612, 111S901.

2759-91 107Conn437, 140A733.

2759-91½-New. **Right to inspect contradictory written statement.**-Where witness admits signing statement inconsistent with his testimony, party introducing witness has right to inspect writing, where it is in court and in possession of adverse party. 142Wash580, 253P1083.

2759-92 214Ala291, 107S835; 219Ala 353, 122S437; TexCivA 9SW(2d)182; 104TexCr338, 283SW840; 104TexCr447, 284SW568; 108TexCr659, 2SW(2d)455; 111TexCr511, 14SW(2d)274; 112TexCr 245, 16SW(2d)127. **Proof of general good character** is admissible in some jurisdictions. 219Ala353, 122S437.

2760-94 88CalA67, 262P1106; 126Kan 784, 271P296; 265Mass289, 163NE755; Mo 23SW(2d)22; 189NC766, 128SE354; 198NC200, 151SE257; SD 225NW214; 106TexCr280, 291SW896; 105TexCr19, 284SW955; 106TexCr259, 291SW900; 108TexCr659, 2SW(2d)455; 110TexCr 384, 10SW(2d)561; 111TexCr134, 11 SW(2d)803; TexCr 20SW(2d)785(2d case); TexCr 25SW(2d)870; TexCr 28 SW(2d)813. **Such statements are not substantive evidence.**-189NC766, 128SE 354.

2761-95 13F(2d)451; Mo 26SW(2d) 781; Va 152SE366. **Rule has no application** where in fact witness has not made inconsistent statements. 204 Iowa 406, 215NW258.

2761-96 21AlaA532, 109S611; 204Cal 109, 266P807; 88CalA67, 262P1106.

2762-98 81CalA734, 254P639; 107Tex Cr115, 295SW190 (witness may be cross-examined as to explanation).

2762-99 25F(2d)542; 213Ala260, 104S 509; 102Conn481, 129A379; 333 Ill 494, 165NE131, 65ALR1; 210Ky217, 275SW 689; 235Ky833, 32SW(2d)414; 257Mass 6, 153NE97; 261Mass68, 158NE338; 285Pa251, 132A120; TexCivA 290SW 231.

2762-2 170Ark1194, 282SW17; Cal 291 P190; 100CalA96, 279P1045; 206 Iowa 28, 217NW453; 261Mass68, 158NE338;

OklCr 273P1012; 285Pa251, 132A120; TexCommnA 17SW(2d)805.

2762–3 86CalA298, 260P901; 316Mo 742, 293SW111; Va 152SE357.

2762–4 MoA 287SW787; 119 Okl 55, 248P319.

2763–5 MoA 295SW517; 191NC153, 131 SE670; 119 Okl 55, 248P319; 285Pa251, 132A120; TexCivA 290SW231; 112Tex Cr632, 18SW(2d)620. See also 37GaA 389, 140SE632. **Testimony of subscribing witnesses to will** contrary to prior affidavits should be disregarded, where circumstances support validity of will. 286Pa155, 133A144.

2763–6 MoA 15SW(2d)964; 285Pa251, 132A120.

2763–8 CalA 287P116.

2764–10 242Mich326, 218NW673.

2764–15½–New. Statement in plaintiff's deposition was not binding upon him at trial, and, if there was any inconsistency between that testimony and that given at trial, court of appeals will take what he said at trial. MoA 8SW (2d)81.

2764–16 42F(2d)736; 212Ala638, 103S 867; 213Ala260, 104S509; 34Ariz87, 267 P947; Ariz 282P930; 170Ark1194, 282 SW17; 200 Ind483, 164NE626; Iowa 228NW9; 210Ky217, 275SW689; 232 Ky119, 22SW(2d)413 (affidavit); 261 Mass68, 158NE338; 251Mich696, 232NW 397(2dcase); 178Minn347, 227NW352; MoA 4SW(2d)499; MoA 17SW(2d)639; MoA 27SW(2d)1039; 116Nebr776, 219 NW145; 134 Okl 145, 272P475; 124 Or 560, 264P859; 297Pa86, 146A455; Tex CommnA 1SW(2d)861; TexCivA 1SW (2d)393; TexCivA 11SW(2d)371; Tex CivA 22SW(2d)714; Wash 291P1081; 36Wyo 390, 256P76; Sask [1929] 3DomLR593. Contra 120 Or144, 251P763. **Prior inconsistent statements** may render nugatory affirmative evidence of different state of facts. 41 Ida756, 242 P798.

2765–17 170Ark1194, 282SW17; 261 Mass68, 158NE338; MoA 27SW(2d) 1039; Sask [1929] 3DomLR593.

2765–18 213Ala260, 104S509.

2765–19 215Ala276, 110S407; 21AlaA 412, 109S168; 23AlaA79, 121S6; 165 Ga326, 140SE889; 165Ga335, 141SE67; 41GaA451, 153SE376; 315Mo 987, 288 SW777; 72Mont338, 233P613; 74Mont 269, 240P365; 222AppDiv179, 225NYS 486; 143 Okl 45, 287P396; 125 Or80, 265P801; 49SD366, 207NW158; Tex CivA 297SW1083; TexCivA 28SW(2d) 225; TexCivA 28SW(2d)264; 105Tex Cr552, 289SW402; 105TexCr543, 289 SW686; 36Wyo 78, 252P1030, 1033 [cit Cyc] (wife testifying in favor of husband).

2766–20 255 IllA127; 255 IllA322.

2766–21 91CalA290, 266P1000; 165Ga 326, 140SE889; Mo 24SW(2d)985; 101 TexCr587, 276SW699; 106TexCr188, 291 SW552; 108TexCr240, 299SW904.

2766–22 Testimony of accomplice who testifies for state is not conclusive on defendants. 113TexCr124, 18SW(2d) 1070.

2766–23 13F(2d)972; 24F(2d)201; 212 Ala638, 103S867; 196 Ind534, 149NE 59; 208 Iowa722, 217NW239; 208 Iowa 818, 222NW394; Iowa 228NW9; 125 Kan636, 266P33; Mo 278SW1014; Mo 293SW122; Mo 31SW(2d)4; 103NJL 340, 135A890; 198NC200, 151SE257; 51ND113, 199NW191; 58ND430, 226 NW483 (witness erroneously ,permitted to be examined as on cross-examination); 30 OhA572, 165NE862; 34 OhA 551, 171NE419; 135 Okl 63, 273P1000; 120 Or144, 251P763; 33PortoRico 147 (Law of Evidence § 156); TexCivA 22 SW(2d)737; TexCivA 25SW(2d)639; 108TexCr282, 18SW(2d)312; 111TexCr 48, 10SW(2d)997; 111TexCr285, 12SW (2d)576; TexCr 27SW(2d)1102. **Showing of surprise** to party caused by testimony of witness produced by him, or that he was misled thereby, is necessary to justify contradiction of such witness. 73Mont456, 236P1093. **To contradict his own witness** party must show he was surprised or misled. 73Mont456, 236P1093. **State's witnesses do not impeach one another,** however much their testimony may present variant theories. 111TexCr285, 12SW(2d)576. **Testimony on cross-examination.**–Testimony of state's witness on cross-examination favorable to defendant is not binding on state, which is bound by its witness' exculpatory statements only when it takes initiative. 111TexCr285, 12SW (2d)576. **In Ontario.**–[1930] 2DomLR 565.

2768–24 8LaA720, 722 [quotCyc]; 49 RI 455, 143A673.

2768–25 196 Ind534, 149NE59; 154Md 171, 140A64; 233Mich514, 206NW996 (court held justified in excluding testimony of defendant's counsel that witness called by him had made statements contradictory to his evidence); 320Mo 146, 6SW(2d)920. **Recall of state's witness,** to fix his position with reference to injured party, held not effort to contradict another state witness. 106Tex Cr387, 292SW887.

2768–25½–New. Where state has been given permission by court, to cross-examine own witness as hostile, it may ask him questions tending to weaken or nullify his adverse testimony. 82NH 189, 131A606.

2768–25½–New. Whether party, surprised by testimony of his witness, may contradict it is within discretion of trial judge. 154Md171, 140A64.

2768–26 16F(2d)39; 320Mo 146, 6SW (2d)920; 286Pa344, 133A508, 510 [cit Cyc]; TexCivA 297SW267. See also 166 Ga794, 144SE271. **State cannot contradict letters** that were admitted as evidence and explained by accused. 102 Conn708, 130A184. **Competent evidence is not rendered incompetent** merely because it contradicts testimony previously given by adverse party when called for cross-examination under statute. 31 OhA365, 166NE695.

2768–27½–New. Where plaintiff whose deposition was introduced by defendant was uncertain whether instrument executed by him was blank warranty deed or contract for deed, testimony of witness, who had seen instrument, that it was warranty deed, was not inadmissible as contradicting defendant's own witness. MoA 11SW(2d)1101.

2769–31 206 Iowa1134, 221NW802; 208 Iowa228, 225NW268; 232Ky590, 24SW (2d)280 (contradiction of part of answer); 257Mass234, 153NE561; 171 Minn246, 213NW900; 315Mo 987, 288 SW777; 34NM533, 285P486; 13PaDist &Co 448; 101TexCr587, 276SW699; 144 Wash528, 258P323. Contra 171Ark180, 283SW353. But see 180Ark267, 21SW (2d)172; NH 152A276.

2769–32 168La198, 121S742.

2769–33 NC 154SE28.

2769–34 77CalA377, 246P818; 202 Iowa 1382, 212NW137; 207 Iowa760, 223NW 535; 226Ky584, 11SW(2d)410; 116 Nebr563, 218NW416; 218AppDiv638, 219NYS73; 227AppDiv208, 237NYS235; 105TexCr8, 284SW961.

2770–35 Ariz 267P618; 179Ark1066, 20SW(2d)189; 77CalA377, 246P818; 37 GaA212, 139SE734; 37GaA219, 139SE 735; 329 Ill 536, 161NE76; 333 Ill 469, 165NE235; 202 Iowa1382, 212NW137; 213Ky664, 281SW1005; 230Ky250, 19 SW(2d)218; 158La713, 104S627; 170 La803, 129S209(1stcase); 152Miss250, 119S172; 151Miss862, 119S796; 312Mo 655, 280SW1040; 321Mo 540, 11SW(2d) 1040; Mo 27SW(2d)16; 221MoA748, 286SW412; Mont 292P734; 115Nebr94, 211NW605; 218AppDiv638, 219NYS73; 49SD366, 207NW158; 103TexCr387, 281 SW569; 105TexCr543, 289SW686; 101 Vt124, 141A686; 101Vt483, 144A684; 152Va1014, 148SE821; 141Wash96, 250 P945; 142Wash7, 252P108; Wash 288 P249; NS [1929] 1DomLR702.

2771–36 41F(2d)177; 219Ala392, 122S 349; 168Ark590, 271SW708; 168Ark 1019, 273SW1; 172Ark156, 287SW1026; 176Ark1206, 2SW(2d)87; 90CalA472, 265P976; 200 Ind165, 162NE234; 202 Iowa1382, 212NW137; 128Kan659, 280 P780; 213Ky664, 281SW1005; 226Ky 584, 11SW(2d)410; 168La95, 121S586; 252Mass311, 147NE739; 257Mass234, 153NE561; 263Mass34, 160NE274; 233 Mich615, 208NW27; 145Miss215, 110S 589; 309Mo 498, 274SW734; 321Mo 378, 11SW(2d)268; 218AppDiv638, 219NYS 73; 218AppDiv422, 218NYS428; 50ND 91, 194NW917; 119 Oh231, 163NE28; 88PaSuper216; 153SC11, 150SE312; 105TexCr8, 284SW961; 70Utah224, 259 P326; 101Vt483, 144A684. But see 266 Mass286, 165NE416. **Introduction of incompetent evidence by cross-examination,** under guise of laying foundation for impeachment, does not furnish foundation to introduce further incompetent evidence by way of impeachment. 120 Oh97, 165NE569.

2772–37½–New. Answers may be impeached if opposing counsel reëxamines as to them. 119 Oh231, 163NE28.

2772–38 158La400, 104S185; 72Mont 306, 233P602.

2773–39 152Miss250, 119S172; 151Miss 862, 119S796; 115Nebr94, 211NW605; 58ND82, 224NW878. **Matters held not collateral, etc.**–175Ark1166, 28SW(2d)66; 158La400, 104S185; 309Mo 155, 274SW 734; NJ 148A608; 101TexCr587, 276 SW699; 103TexCr586, 281SW1075; 110 TexCr353, 7SW(2d)569. **Matters held collateral.**–151Miss862, 119S796.

2773–40 73CalA495, 238P1059; 152Va 1014, 148SE821.

2774–44½–New. Where defendant on cross-examination denied seeing prohibition inspector before, sufficient foundation was laid to show falsity of statement. 168La198, 121S742.

2774–44⅛–New. When effect of offering impeaching testimony is or will be to bring incompetent evidence to knowledge of jury, it is duty of court to require that such impeaching testimony be confined to questions for which foundation has been laid, and which do not include incompetent evidence. 120 Oh 97, 165NE569.

2774–46½–New. Contradiction of state's witness of part of defendant's testimony at former trial admissible. 154Md332, 140A218.

2775–55 See also 33PortoRico 6.

2775–57½–New. Examination of witness for purpose of contradicting testimony of another witness as to statements made was not erroneous where substantially same questions were asked both witnesses. 178Ark199, 10SW(2d)5.

2775–58 37GaA212, 139SE734. **Evidence laying foundation held admissible.**–210Ky536, 276SW513. **Evidence unlawfully obtained** cannot be used on rebuttal to contradict accused. 21F(2d) 902. **In automobile accident case,** defendant is not entitled to impeach plaintiff by showing that on previous occasion he had been stopped when driving car in excess of thirty miles an hour, though plaintiff stated on cross-examination that he had never driven over twenty-five miles an hour. 101Vt 459, 144A378.

2776–59 105TexCr119, 286SW1104; 143Va479, 129SE348. **Where defendant denied receipt of letter** and letter itself was introduced to contradict his testimony and impeach his credibility, letter could be considered in its entirety, though it indicated reason which led to commission of act in question. 294 Pa190, 144A127.

2776–61 TexCivA 272SW223.

2777–68½–New. Evidence of statement made in defendant's presence, where he remains silent, is competent in contradiction. 253Mass509, 149NE205.

2777–73½–New. Series of crimes constituting system of defrauding.–Where one is on trial for extorting money by blackmail from one person and proof shows general conspiracy and plan to extort from series of selected victims, credibility of defendant who denies knowledge of, or connection with, any such cases including one on trial may be attacked by proof of his connection with such other crimes. 252Mass465, 148NE123.

2777–77½–New. Contradictory testimony was admissible to show witness for defendant tried to keep state witnesses from testifying. 22AlaA17, 111 S899.

2777–77⅛–New. Witness who has asserted that he could not identify defendant as accomplice in crime, may be contradicted by evidence as to his efforts to conceal defendant's identity and his declarations that he would do so. 82NH189, 131A606.

2777–77¼–New. Where, in will contest, one of proponents denies having made

statement to one of contestants testimony of such contestant that statement was made is admissible to contradict witness. 312Mo 458, 278SW759.

2777–77⅓–New. Telegram received in reply to one sent to defendant's former partner is admissible to contradict defendant. **TexCivA** 3SW(2d)484.

2777–77⅙–New. Specific acts of violence are inadmissible to impeach widow as to knowledge of deceased's general character for violence. 38GaA297, 143SE773.

2777–77½–New. Testimony of witness who defendant's brother had testified told him of threats by deceased against defendant held admissible in denial of such communication. **TexCr** 26SW(2d)915.

2777–78 43F(2d)549; 20AlaA632, 104S681; 21AlaA539, 110S157; 175Ark1118, 1SW(2d)823; 98CalA610, 277P347; CalA 279P1032; 111Conn497, 150A511 (testimony in former case); 86IndA92, 156NE181; 204Iowa1108, 216NW702; 215Ky128, 284SW91; 231Ky720, 22SW(2d)105; 255Mass327, 151NE466; 114Nebr783, 210NW165, 169 [quot Cyc]; 115Nebr621, 214NW70; 137Okl283, 279P332; 287Pa304, 135A260; 294Pa190, 144A127; 151SC391, 149SE111; 100TexCr128, 271SW909; TexCr 29SW(2d)787 (evidence held germane); 99Vt191, 130A697; 102WVa107, 134SE599; 107WVa181, 147SE759.

2778–80 22F(2d)230; 219Ala674, 123S55; 21AlaA348, 108S262 (holding that fact, that assaulted party telephoned accused soon after the assault, was relevant, where former had testified that he was unconscious at time); 255Mass327, 151NE466; 49SD366, 207NW158; 99Vt191, 130A697; 102WVa107, 134SE599. **In action to foreclose mortgage,** testimony tending to show plaintiff's willingness to surrender mortgaged house to mortgagee is admissible to contradict testimony of plaintiff with respect to notes and mortgage. 197NC66, 147SE672. **In prosecution for transporting liquor,** officer's testimony regarding his pursuit of defendant, and seeing defendant pour whisky out of car and break jars is admissible for impeachment of defendant. 111TexCr325, 13SW(2d)86.

2780–86 Ill 172NE743. See also 22AlaA583, 118S242.

2780–88 168La198, 121S742.

2780–90 176Ark1205, 2SW(2d)1085; 178Ark329, 11SW(2d)761; 234Ky423, 28SW(2d)486; 153Md613, 139A289; 253Mass509, 149NE205; 265Mass270, 163NE888; 167Minn362, 209NW27; 154Miss858, 123S891; 102NJL318, 133A403; NJSup 145A734.

2782–97 14F(2d)893, 897 [citCyc]; 38F(2d)545 (discretion not abused); 114Nebr783, 210NW165, 169 [citCyc]; 82NH139, 131A606.

2782–1 213Ala358, 104S656.

2782–2 133Misc53, 231NYS130.

2782–3 But see 92CalA470, 268P473.

2782–7 16F(2d)117; 219Ala353, 122S437; 220Ala237, 124S519; 39GaA467, 147SE430; TexCommnA 288SW817. But see 104TexCr338, 283SW840.

2783–8 336 Ill 111, 167NE795.

2783–10 49Philippine94.

2783–11 245 IllA197.

2784–13½–New. Jury not bound to believe testimony contradicted by other evidence. **TexCivA** 293SW851.

2784–14 18F(2d)863; 37F(2d)711; 171Ark658, 285SW367; 102Conn708, 130A184; 221Ky148, 298SW385; 194NC394, 139SE762; NC 154SE674(2dcase); 49SD366, 207NW158. **Impeached witness,** after denying charge of adultery, may show his general character and reputation for chastity. 166La891, 118S73. **If accused testifies in his own behalf,** he may be corroborated. 169La109, 124S188.

2784–15 23AlaA584, 129S492.

2784–15½–New. In Virginia, corroborative testimony must of itself exhibit corroborative character by pointing with reasonable certainty to supporting matter not then material. 142Va500, 129SE356.

2784–15⅓–New. In action by executor on bond given decedent, defendant's testimony of prior payment must be corroborated. 142Va500, 129SE356.

2784–15¼–New. Witness may be corroborated by failure of adverse witness to deny statements. **TexCommnA** 299SW875.

2784–16 71CalA575, 236P189 (where credibility of witness is not attacked evidence in corroboration is inadmissible); 317Mo759, 297SW10; 33OhA185, 168NE848; 155Tenn200, 291SW1069 (prior consistent statements cannot be used for corroboration).

2784–17 86CalA298, 260P901, 904 [quot Cyc]. **Evidence of witness' good reputation for truth** and veracity is not admissible in corroboration of his testimony. 105TexCr252, 288SW220.

2785–19 23F(2d)561; 216Ala189, 113S16. **In Virginia.**–6F(2d)218.

2785–20 49Nev451, 248P893.

2785–21 23F(2d)561; 32F(2d)851; 158Md243, 148A216.

2785–22 13F(2d)605 (holding broker's sales sheets and letters, from retailers to wholesalers, represented by him, admissible to corroborate independent testimony concerning market price); 94CalA303, 271P134; MoA 11SW(2d)1101; 86Mont553, 284P769; NC 154SE674(2dcase).

2786–27 Bank slip may be admissible to corroborate party's testimony as to transfer of accounts. 198NC389, 151SE877.

2786–29 173Ark322, 292SW359 (checks to corroborate mother's testimony that son contributed to her support held admissible).

2787–34 GaA 155SE368; Iowa 233NW51; 191NC210, 131SE577; 33OhA185, 168NE848.

2787–36½–New. In prosecution for arson, testimony as to aid given by defendant to state witness, while he was in jail charged with burning another building, held competent to corroborate witness by showing his relation to defendant. 170Ark1194, 283SW372.

2787–36⅓–New. Records are not admissible in corroboration of another witness, where entries therein were not made from personal knowledge of witness testifying thereto, but from information furnished by others. 255Mass369, 151NE839.

2787–36¼–New. The extent of testimony offered by witness, in corroboration of his own testimony, rests in discretion of trial judge, 255Mass369, 151NE839.

2787–36⅙–New. as does testimony offered by witness to induce belief in reliability of his own recollection. 255Mass369, 151NE839 (holding evidence properly excluded.)

2787–36⅛–New. Testimony of experts is admissible in corroboration of other evidence. 295Pa120, 144A912.

2787–36½–New. Hearsay evidence will be excluded. 110TexCr298, 8SW(2d)129.

2787–36⅛–New. Declarations by witness outside of court are generally inadmissible to corroborate his testimony. Va 152SE366.

2787–38 88CalA67, 262P1106, 1110 [cit Cyc]; 166Ga15, 142SE105; 316 Ill 292, 147NE251; 206 Iowa1018, 221NW504; 206 Iowa816, 221NW521; 210Ky150, 275SW630; 210Ky536, 276SW513; 154Miss742, 123S867; 224AppDiv193, 230NYS66; 27OhA412, 160NE873; 115Okl 92, 241P765, 767 [quotCyc]; 155Tenn200, 291SW1069; 101TexCr59, 274SW158; Utah 272P229. Contra 190NC506, 130SE308; 194NC394, 139SE762. **Such proof may be given** when impeachment by proof of prior contradictory statements is attempted. 108TexCr494, 1SW(2d)630.

2788–39 43F(2d)1; 115Okl 92, 241P765, 767 [quotCyc]. **Written application for fire insurance signed by soliciting agent only,** is admissible to corroborate his testimony as to knowledge of concurrent insurance, only if application was written at very time he got data from insured. **TexCivA** 291SW257.

2789–40 213Ala84, 104S3; 23AlaA185, 122S296; 20AlaA457, 103S902; 115Okl 92, 241P765, 767 [quotCyc]. But see **TexCivA** 295SW289 (evidence held admissible).

2789–41 94Cal463, 271P509; 316 Ill 292, 147NE251; 210Ky150, 275SW630; 252Mass465, 148NE123; Minn 231NW721; 317Mo319, 296SW132; 132Misc583, 230NYS273; 225AppDiv19, 232NYS66; 225AppDiv284, 232NYS329; 194NC206, 139SE230; 115Okl 92, 241P765, 767 [quotCyc]; 139Okl 95, 281P259; 155Tenn200, 291SW1069, 1070 [citCyc]; 107TexCr115, 295SW190. See also 166Ga15, 142SE105; NC 154SE674(2dcase). **Rehabilitating statements must have been made when motive did not exist.**–317Mo319, 296SW132.

2789–42 Mo 118SW(2d)1037; 115Okl 92, 241P765, 767 [quotCyc].

2789–42½–New. Previous contradictory statements of witness are not admissible in corroboration of witness. 194NC394, 139SE762.

2790–43 221Ala538, 130S70. **Testimony of stenographer as to taking dictation of letter** is admissible in corroboration of testimony of person who dictated it as to date and fact. 219MoA519, 282SW535.

WOODS AND FORESTS

2795–4 327 Ill 479, 158NE801.

2795–6 336 Ill 624, 168NE690.

2796–8 170Ark1146, 282SW995; 176Ark906, 4SW(2d)928; 167Ga489, 145SE840; 168Ga382, 148SE98; 244Mich403, 221NW322.

2796–13½–New. In taxpayer's bill, allegation that expenses of commissioners of forest preserve district did not "amount to or equal" sums paid on account thereof was held not construable as meaning that expenses might have been either more or less than sums paid. 320 Ill 454, 151NE271.

2796–13⅓–New. Though two separate estates may be created in land and timber thereon, timber does not thereby become immovable possessing equal rank and dignity with land. 169La240, 124S841.

2797–28½–New. Appropriation of state taxes for improvement work in state forest land held constitutional. NH 149A321.

2797–39 27F(2d)410.

2798–41 See also 274US264, 47SCt597, 71Led1040.

2798–43 217AppDiv328, 216NYS785. **Adverse possession.**–217AppDiv328, 216NYS785. **Determination of title.**–217AppDiv328, 216NYS785. **In action to recover forest preserve lands owned by state,** evidence held to show that grantee under quitclaim deed took title, knowing that land had been conveyed to state for forest preserve, and that he was therefore not purchaser in good faith. 217AppDiv328, 216NYS785. **Necessity for recording deed to state.**–217AppDiv328, 216NYS785. **Neither legislature, nor any officers, nor department of state,** has power to dispose of, or in any manner deprive people of, title to forest preserves. 217AppDiv328, 216NYS785. **Purpose of prohibition against alienation** of forest preserve lands is to protect state's title in lands owned by it, and not to protect title of individuals. 217AppDiv328, 216NYS785. **Purpose of provision stated.**–228AppDiv73, 239NYS31. **Statute authorizing construction of bob-sleigh slide** requiring removal of 2500 trees violates constitutional provision. 253NY234, 170NE902 [aff 228AppDiv73, 239NYS31]. **What lands protected.**–217AppDiv328, 216NYS785. **Mere claim of title** is not protected by provision. 130Misc409, 224NYS22.

2798–44 In action to determine title state cannot concede title but must leave determination to court. 130Misc409, 224NYS22. **Compromise agreement** held not conclusive on state in suit to determine title. 130Misc409, 224NYS22. **Legislature has power to regulate** reasonably use and preservation of wild forest lands. 253NY234, 170NE902.

2798–45½–New. In the matter of issuance of bonds by forest preserve district, all statutory requirements must be observed. 319 Ill 389, 150NE262.

2798–45⅓–New. Bonds issues by a forest preserve district without ordinance, which is a condition precedent to authority to issue bonds, are void. 319 Ill 389, 150NE262.

2798–45¼–New. Bond cannot be issued by a forest preserve district without a vote of the people, where such vote is a condition precedent to the issuance of bonds. 319 Ill 389, 150NE262.

2798–45⅙–New. Where bonds were issued by a forest preserve district for the purpose of creating and managing such district, and not for the purpose of acquiring lands, without submitting the proposition to the voters for their approval, they were held void. 319 Ill 389, 150NE262.

2798–45⅙–New. Occupation with inclosure, under lease from state of part of hot springs property, granted by congress for public use, held public nuisance. 44 Ida353, 256P953.

2798–45⅙–New. State may exercise ordinary police power over United States forest reservations for preservation of public health. 143Wash606, 255P961.

2798–45⅛–New. Allegations in complaint that defendants, without right, occupy premises of national forest are sufficient to invoke equity jurisdiction to grant injunction. 31F(2d)764.

2798–45⅙–New. Government agreeing to grant right of way permit to power company cannot invoke aid of court of equity to enjoin company from maintaining power lines. 31F(2d)853.

2798–45 1/10–New. Grazing privileges.–Lessee of forest reserves who separately purchases from lessor grazing privileges thereon incurs no liability to lessor by allowing privileges to lapse. 86Colo 202, 280P486.

2798–45 1/11–New. Restriction in deeds conveying land for reservation against shows and other amusements is not violated by grant of permit to matron of reservation to sell light refreshments. Mass 170NE423.

2798–45½–New. Government has right to abate by injunction purpresture on public forest reserve. 41F(2d)711.

2798–51 253NY234, 170NE902 (forest Preserve and Adirondack Park within it are for reasonable use and benefit of public).

2798–52½–New. In Illinois, tract not actually connecting existing forest preserves cannot be acquired under Forest Preserve Act. 327 Ill 479, 158NE801.

2799–53 Idaho Forestry Law giving state forestry board certain authority held valid. 47 Ida74, 272P707.

2799–53½–New. County commissioners, although ex officio commissioners of forest preserve under statute, while in performance of their duties as commissioners of the district, are not officers of the county. 320 Ill 454, 151NE271.

2799–53⅓–New. Their resolution is not authority for the withdrawal of any money from the treasury of the forest preserve district. 320 Ill 454, 151NE271.

2799–53¼–New. The appropriation by commissioners of forest preserve of fund for payment of expenses incurred by each commissioner, does not authorize equal periodical distribution of such fund, among commissioners, without regard to actual expense incurred by each. 320 Ill 454, 151NE271.

2799–53⅙–New. A taxpayer may, by injunction prevent commissioners of forest preserve district from making illegal payments to themselves for unaudited expenses. 320 Ill 454, 151NE 271.

2799–53⅙–New. Under the facts of the case, it was held that payment to commissioners of forest preserve for unaudited expenses was unlawful. 320 Ill 454, 151NE271.

2799–53⅛–New. Forest preserve districts have no inherent power to issue bonds. 319 Ill 389, 150NE262.

2799–53¼–New. The grant of power to issue bonds by the legislature, to local government subdivisions such as forest preserve districts, will be strictly construed. 319 Ill 389, 150NE262.

2799–53⅙–New. Any doubt as to power of forest preserve district to issue bonds must be resolved in favor of taxpayer. 319 Ill 389, 150NE262.

2799–53 1/10–New. A forest preserve district, that issues bonds without complying with the statute, is without authority to levy taxes to pay without interest on such bonds. 319 Ill 389, 150NE262.

2799–53 1/11–New. Persons appointed by state forester are state appointees, 168 Minn359, 209NW941.

2799–53 1/12–New. including town supervisors and other municipal officials, whom he is authorized under statute to appoint as fire wardens for their respective districts. 168Minn359, 209NW 941.

WOOL

2799–2 See also 12CustA62.

WOOLEN

2800–4 14CustA328.

WORDS

2800–11 Other definitions.–253NY234, 170NE902.

WORK

2802–17 151Miss43, 117S334. **As used in a statute, etc.**–261Mass226, 158NE759, 55ALR640.

WORK AND LABOR

2806–1 177Ark681, 7SW(2d)325, 58 ALR1124; 221Ky644, 299SW543; 125Me 491, 135A197.

2807–2 56ND571, 218NW637.

2807–4 Mont 288P455; 113 OhSt177, 148NE682.

2808–7 Necessity of voluntary acceptance.–56ND571, 218NW637.

2808–8 176Ark533, 8SW(2d)301; 78 CalA127, 248P301 (with knowledge and without dissent); 94CalA441, 271P374; 83 IndA488, 149NE85; 254Mass18, 149 NE603; Mass 171NE447(1stcase); 82 Mont9, 264P944; Mont 288P455; 134 Misc902, 236NYS720; 136Misc581, 240 NYS380; 284Pa541, 131A468.

2808–9 78CalA127, 248P301; 10LaA629, 121S205(2dcase); TexCivA 292SW863.

2809–10 83 IndA488, 149NE85.

2809–11 126Me609, 139A680.

2809–12 204 Iowa638, 215NW713.

2809–13 26F(2d)442; 170Ark670, 280 SW635; 176Ark1075, 5SW(2d)291; 107 Conn691, 142A398; 35GaA792, 134SE 814; 36GaA748, 138SE445; 40GaA571, 150SE561; 83 IndA488, 149NE85; 205 Iowa16, 212NW138; 204 Iowa638, 215 NW713; 204 Iowa857, 216NW33; 206 Iowa512, 219NW929(1stcase); 12LaA 394, 126S258; 126Me609, 139A680; 158 Md292, 148A536; Md 151A240; MoA 273 SW741; 128Misc884, 220NYS454; 229 AppDiv614, 243NYS476; 138Misc101, 244NYS764; 196NC247, 145SE233; 141 Okl 9, 283P556; 118 Or357, 246P214; 124 Or461, 263P916; 126 Or456, 270P 534; 199Wis139, 225NW822; Alta [1925] 3DomLR948. **Benefit.**–Alta [1925] 3 DomLR948. **Presumption not conclusive** but casts burden on party contesting liability. 134Misc902, 236NYS720. **Wiring of house under contract with vendee in possession** does not make vendor liable therefor although he failed to object and repossessed premises. 136 Misc500, 241NYS202.

2810–15 169La1006, 126S508 (stone furnished and installed).

2810–17 21AlaA593, 110S321; 100CalA 217, 279P810(2dcase); CalA 290P1080; 104Conn519, 133A746; 109Conn507, 147 A33; LaA 128S715; 284Pa541, 131A 468.

2811–19 284Pa541, 131A468.

2811–22 158Md292, 148A536 (immateriality of personal or individual benefit).

2812–36 Mass 172NE216; 172Minn242, 214NW928, 54ALR545.

2813–38 209Ky173, 272SW415 (under statute, board furnished without agreement presumed of courtesy); 172Minn 242, 214NW928, 54ALR545.

2813–44 125Me491, 135A197; 138Misc 101, 244NYS764; 198Wis500, 224NW 741(2dcase). **Landlord and tenant.**–IndA 171NE667.

2815–48 176Ark533, 8SW(2d)301; 205 Iowa16, 212NW138; 204 Iowa857, 216 NW33; 123Kan491, 255P1108; 240Mich 291, 215NW358; 82Mont9, 264P944, 945 [quotCyc]; 138Misc581, 245NYS 378; 126 Or456, 270P534; 103WVa665, 138SE376.

2815–49 204 Iowa857, 216NW33; 123 Kan491, 255P1108.

2815–50 36GaA748, 138SE445; 204 Iowa857, 216NW33; 123Kan491, 255P 1108; 125Me420, 134A510; MoA 13 SW(2d)560; 119 Or473, 249P1052; 103 WVa665, 138SE376. **Sufficiency of promise or agreement.**–240Mich291, 215 NW358. **It is not enough to show that valuable services** were rendered. 125Me 420, 134A510. **Contract** must be proved in accordance with ordinary rules of burden of proof. 125Me420, 134A510.

2815–51 204 Iowa857, 216NW33; 125 Me420, 134A510; 82Mont9, 264P944; 103WVa665, 138SE376.

2816–54 119 Or473, 249P1052.

2816–55 126 Or456, 270P534.

2817–58 219Ala94, 121S82; 36GaA748, 138SE445; 125Me420, 134A511; Mass 172NE246 (in absence of express contract child may recover on implied contract); 126 Or456, 270P534. **Where the parent and child reside together,** etc. 232Mich579, 206NW508. **Child must show services were not merely gratuitous performance of his duty to parent.** Mass 172NE246.

2817–59 321 Ill 450, 152NE133; 125Me 420, 134A511.

2817–60 36GaA748, 138SE445; 125Me 420, 134A511.

2819–71 Iowa 232NW816; 232Mich579, 206NW508. **Express or implied promise to pay must be proved by competent evidence.**–Iowa 232NW816.

2820–75 36GaA748, 138SE445.

2820–82 219Ala94, 121S82.

2821–83 204 Iowa857, 216NW33.

2821–84 321 Ill 450, 152NE133.

2822–88 240Mich291, 215NW358.

2822–89 240Mich291, 215NW358.

2822–94 NJSup 140A401. **Express contract,** etc. Contra NJSup 140A401. **Where person, on being solicited, left position in another state** to reside with stepsister who was to furnish her permanent home, she could recover for services when stepsister's conduct precluded continuance. 101CalA359, 281P 704.

2823–98 126 Or456, 270P534; 284Pa 541, 131A468 (does not create presumption of gratuity).

2823–99 82Mont9, 264P944, 945 [quot Cyc]; 103WVa665, 138SE376.

2824–8 Iowa 231NW350; 130Kan9, 285 P589; 252Mass88, 147NE572; Mass 172 NE246.

2824–9 216NYS900.

2824–11 137Misc881, 244NYS61. But see 137Misc570, 244NYS44.

2824–12½–New. Father making definite proposition to sons without reserving right to determine compensation must pay accordingly on performance by sons. 40F(2d)176.

2825–14 82CalA35, 255P235; 107Conn 181, 139A695, 59ALR599; 158Md292, 148A536; 137Misc881, 244NYS61; Tex CommnA 23SW(2d)329; TexCivA 19 SW(2d)451 (execution of contract denied); TexCivA 27SW(2d)639. **Where a contract is too indefinite or unintelligible,** etc. 49Nev120, 239P396. **Where the minds,** etc. 254Mass18, 149NE603. **Where contract void for indefiniteness,** law implies no promise by vendor to pay for premises pursuant to such contract. 107Conn181, 139A695, 59ALR 599.

2826–15 Iowa 231NW705; 128 Or673, 275P670. **Where contract does not comply with statute** no recovery may be had on quantum meruit. 104CalA 462, 286P173.

2826–16½–New. Failure of defendant to perform part of his agreement will not entitle plaintiff to recover on quantum meruit where agreement was indefinite and uncertain. MoA 218SW(2d)203.

2826–17 22F(2d)403; 214Ala473, 108S 339; 220Ala593, 127S153 (waiver of defects); 209Ky239, 272SW717; 253 Mass239, 148NE456; TexCivA 31SW (2d)839. **Benefit to other party.**–209Ky 239, 272SW717. **Substantial performance.**–Mass 172NE91.

2828–18 253Mass239, 148NE456.

2828–19 209Ky239, 272SW717; 253 Mass239, 148NE456.

2828–22 Where only objection was to excessive price charged, claim for work and labor cannot be defeated on ground that it was not according to contract. 215Ala118, 110S131.

2828–22½–New. There can be no recovery for work done and materials

furnished in absence of good faith on part of contractor and intention completely to perform contract. 253**Mass** 239, 148**NE**456.

2828–24 205 **Iowa**1305, 217**NW**228; 253 **Mass**239, 148**NE**456.

2829–26 84**Colo** 385, 270**P**865.

2829–27 49**RI** 408, 143**A**609.

2829–28 97**CalA**77, 275**P**257; 102**NJL** 418, 131**A**871 (project for building abandoned by owner).

2830–29 96**Fla**151, 117**S**853.

2830–30 **TexCivA** 118**SW(2d)**354.

2830–35 88 **IndA**685, 148**NE**430.

2831–39 34**Ariz**68, 267**P**794; **Cal** 292**P** 960; 48 **Ida**611, 284**P**257; 253**Mass**239, 148**NE**456; 242**Mich**253, 218**NW**801; **Mich** 233**NW**399; 102**NJL**418, 131**A**871; 49**RI** 408, 143**A**609. **Refusal to pay.**–90 **CalA**298, 265**P**887. Plaintiff, solicited by stepsister to leave position in another state and make permanent home with stepsister, can treat contract as rescinded and recover on quantum meruit for part performance, where stepsister's conduct prevented continuance of arrangement. 101**CalA**359, 281**P**704.

2832–41 **Me** 151**A**559.

2833–42 26**F(2d)**442; 206**Cal** 468, 274**P** 966 (where unfinished work is of no benefit to employer); 108**Conn**186, 142 **A**683; 125**Me**411, 134**A**506, 47**ALR**1156; 149**Md**86, 131**A**34; **TexCivA** 23**SW(2d)** 786. **Refusal to pay for work done** does not excuse abandonment of work in absence of agreement to pay during progress of work. 242**Mich**253, 218**NW** 801. **When there is no meeting of the minds** there can be no recovery on quantum meruit. 125**Me**411, 134**A**506, 47 **ALR**1156.

2833–43 208 **Iowa**1113, 224**NW**785; 223 **Ky**619, 4**SW(2d)**748; **MoA** 256**SW**134. **Damages resulting to other party from breach** will be deducted. 41 **Ida**653, 240 **P**932.

2834–47 27**F(2d)**32; 220**MoA**1077, 279 **SW**769.

2835–54 243**NY**473, 154**NE**314.

2835–55½–New. An offeree cannot recover in quantum meruit for services rendered in attempt to fulfill terms of proposal. 257**Mass**563, 154**NE**84.

2835–56 213**Ala**321, 108**S**787; 318**Mo** 1155, 6**SW(2d)**947, 952 [quotCyc]; 220 **MoA**1077, 279**SW**769; **MoA** 292**SW**738; **MoA** 27**SW(2d)**1079. See also 84**CalA** 567, 258**P**453.

2836–57 132 **Or**137, 284**P**838.

2836–61 **In case owner has contracted to convey land in consideration of services to be performed by plaintiff,** rule requiring surrender of possession as condition of right to maintain action for reasonable value of services has no application, if plaintiff resided on premises only as tenant of owner and owner was in possession. 69**CalA**291, 231**P** 563.

2837–68 Where the contract was for work, labor, and materials to be prepared to satisfaction of employer, he cannot defend on ground that resulting articles were of no value without first returning or offering to return them. 125**Misc**78, 210**NYS**129.

2837–69 10**LaA**618, 119**S**754.

2837–70½–New. Though plaintiff to save expense has used cheaper materials than was proper, he is not, in absence of contract, precluded from recovery of value of work done, especially if owner was present frequently enough to acquaint himself with character and progress of the work. 254**Mass**18, 149 **NE**603.

2838–87 205 **Iowa**483, 218**NW**325.

2838–99½–New. Plaintiff, expelled from defendant's house and farm after latter had repudiated contract to provide for him for life, and otherwise compensate him, could recover on quantum meruit though time for performance had not expired. **NJSup** 147**A**578.

2839–6 **TexCommnA** 296**SW**506.

2839–7 217**Ala**301, 116**S**154; 49**Nev** 451, 248**P**893. **Sufficiency of statement of cause of action.**–97**CalA**77, 275**P**257; 120**Kan**380, 244**P**236 (board and lodging); **MoA** 27**SW(2d)**1079; 73**Mont**321, 236**P**550; 74**Mont**43, 238**P**877; 82**Mont** 434, 268**P**512; 117 **Or**22, 242**P**600; 122 **Or**306, 258**P**820; 126 **Or**1, 267**P**1035. **Failure to allege reasonable worth of services** is not fatal defect in complaint based on quantum meruit. 49**Nev**451, 248**P**893. **Reasonable value of services** must be alleged. 46 **Ida**505, 269**P**91. **Contract need not be specifically stated.** 221**Ala**619, 130**S**329.

2839–11 84**Colo** 470, 271**P**183.

2839–12 **Sask** [1927] 4**DomLR**1145 (claim for wages held insufficient).

2839–13 221**Ky**644, 299**SW**543.

2840–14 But see 221**Ala**619, 130**S**329. **Complaint held sufficient** as to allegation of performance by plaintiff. 117 **Or**22, 242**P**600.

2840–17 **Common count for work done** should be preceded by allegation of indebtedness if not preceded by other common counts. **Fla** 129**S**763.

2840–17½–New. Where complaint sets out work claimed to have been done under contract and alleges contract, amount earned by plaintiff can readily be ascertained by calculation and complaint is sufficient. 117 **Or**22, 242**P**600.

2840–20 **MoA** 256**SW**134; **MoA** 28**SW (2d)**432. **Contract within statute of frauds.**–82**CalA**35, 255**P**235.

2840–23 231**Mich**628, 204**NW**746.

2840–24 84**Colo** 470, 271**P**183.

2841–31 But see **NS** [1927] 3**DomLR** 325.

2841–33 **Must apprise plaintiff of defects.**–221**Ala**619, 130**S**329.

2841–40½–New. Defendant failing to plead noncompliance with contract in action on quantum meruit waives such defense. 84**CalA**567, 258**P**453.

2841–42 **Ill** 173**NE**270; 230**Ky**465, 19 **SW(2d)**1078 (reasonable value is sole issue where answer admits employment and performance).

2841–43 97**Fla**150, 119**S**864(2dcase); **MoA** 256**SW**134.

2842–45 208 **Iowa**905, 225**NW**950. **In action on joint liability for labor done,** joint liability or individual liability of either defendant could be established without variance. 127**Me**187, 142**A**727.

2842–45½–New. **No recovery if no evidence as to value** of work done. 289**Pa** 579, 137**A**728.

2842–46 78**CalA**111, 248**P**299; 9**LaA** 354, 120**S**506.

2842–47 78**CalA**111, 248**P**299.

2842–49 69**CalA**291, 231**P**563.

2842–52 73**CalA**140, 238**P**749.

2842–54 96**CalA**306, 273**P**1114. See also **TexCivA** 23**SW(2d)**858.

2843–57 101**CalA**382, 281**P**639.

2843–58 49**Nev**451, 248**P**893.

2844–66 **MoA** 256**SW**555.

2845–76½–New. There is no fatal variance in receiving evidence of express contract, fully performed, under complaint on quantum meruit. 178**Minn**411, 227**NW**358.

2845–82 **MoA** 297**SW**425; 284**Pa**541, 131**A**463; 12**PortoRicoFed**39.

2845–86 220**Ala**282, 124**S**901 (full performance of contract and failure to pay); 78**Colo** 231, 241**P**539; 11**LaA**207, 123**S**518; 253**Mass**239, 148**NE**456 (burden is on plaintiff to prove substantial performance and good faith); 242**Mich** 253, 218**NW**801.

2846–87 220**Ala**282, 124**S**901; 90**CalA** 298, 265**P**887; 78**Colo** 231, 241**P**539; **Fla** 129**S**592(3dcase) (proof of fixed compensation or reasonable value is essential); 162**La**891, 111**S**271; 11**LaA** 207, 123**S**518 (burden not discharged); **MoA** 256**SW**555; 136**Misc**581, 240**NYS** 380.

2846–87½–New. **Burden of proving employment** rests on plaintiff. 78**Colo** 231, 241**P**539.

2846–89 100**CalA**217, 279**P**810(2dcase); 205 **Iowa**16, 212**NW**138; 222**MoA**260, 296**SW**183; **MoA** 297**SW**425; 118 **Or**357, 246**P**214.

2846–91 33**Ariz**64, 262**P**439.

2846–92 204 **Iowa**857, 216**NW**33.

2846–92½–New. Payment for board raises no presumption of payment for services actually rendered. 220**MoA**102, 278**SW**806.

2846–92¾–New. Where there is no presumption of gratuity in rendering personal services, and facts imply promise to pay, burden of proving that no debt was intended is on person denying liability. 284**Pa**541, 131**A**468.

2846–92¾–New. As to quantum of proof no distinction is made between action by relative and any other civil case. 125**Me**420, 134**A**510.

2846–92½–New. After unreasonable delay to complete work value of proving value of his work is on plaintiff. 15**F (2d)**545.

2846–95 **Evidence held admissible.**–69 **CalA**291, 231**P**563; **Mass** 172**NE**91 (statement of architect as to mistake in insertion of iron pipes is admissible to show good faith in use of steel pipes); 180**Minn**100, 230**NW**478. **Evidence held inadmissible.**–230**Ky**465, 19**SW(2d)**1078; 87**PaSuper**396.

2848–5 **Evidence held admissible.**–33 **Ariz**64, 262**P**489; 78**CalA**111, 248**P**299; 92**CalA**513, 268**P**379; 175**Minn**201, 220 **NW**606; **MoA** 293**SW**79; **NJ** 141**A**10; **TexCivA** 19**SW(2d)**451. **Evidence held inadmissible.**–242**Mich**253, 218**NW**801; **MoA** 293**SW**79.

2848–6 **MoA** 292**SW**738.

2849–14½–New. Opinions of witnesses as to reasonable value of board, lodging and washing furnished to aged man are admissible without proof that there was no market value for such services. 69**CalA**291, 231**P**563.

2849–16 73**CalA**140, 238**P**749; 84**CalA** 567, 258**P**453; 101**CalA**382, 281**P**639; 164**Minn**207, 204**NW**929; 169**Minn**72, 210**NW**854, 49**ALR**1115 (contract void under statute of frauds); **MoA** 292**SW** 738; 129**Misc**612, 222**NYS**315, 319 [cit Cyc]; 40 **OklACR**233 [reh pending]; 123 **Or**193, 261**P**422. **Preliminary written agreement merged in final contract** is inadmissible. 242**Mich**123, 218**NW** 694.

2849–17 84**CalA**567, 258**P**453.

2849–18 101**CalA**382, 281**P**639 (where defendants repudiated contract).

2849–24 12**LaA**527, 126**S**525. **Sufficiency of evidence as to waiver of special contract.**–80**CalA**450, 252**P**652. **Sufficiency of evidence of set-off or counterclaim.** –9**LaA**514, 119**S**727. **Sufficiency of evidence as to expenses.**–73**Mont**321, 236**P** 550. **Sufficiency of evidence as to value of services,** etc. **CalA** 290**P**317; 12**LaA** 394, 126**S**258; 255**Mass**603, 152**NE**50. **Evidence held sufficient to support verdict** for plaintiff. 72**CalA**323, 237**P**401; 78**CalA**111, 248**P**299; 89**CalA**427, 264**P** 799; 83 **IndA**488, 149**NE**85; 213**Ky**785, 281**SW**987; 11**LaA**193, 123**S**197; 125 **Me**411, 134**A**506, 47**ALR**1156; 125**Me** 420, 134**A**511; **Mass** 171**NE**447(1stcase); 242**Mich**253, 218**NW**801; 174**Minn**602, 218**NW**248; 178**Minn**411, 227**NW**358; 118 **Or**357, 246**P**214; 126 **Or**456, 270**P** 534; **TexCivA** 4**SW(2d)**251; 102**WVa** 103, 134**SE**592 (action for work in repairing and remodeling store). **Evidence held insufficient to support verdict for plaintiff.**–**IndA** 168**NE**582; 127**Me**187, 142**A**727; 250**Mich**123, 229**NW**605; 138 **Misc**581, 245**NYS**378; 33**PortoRico** 256. **Evidence sufficient to prove unenforcible oral contract and performance of its terms by plaintiff.**–69**CalA**291, 231**P**563. **Evidence held to show** oral contract to be confirmed later by written contract. 186**Wis**399, 202**NW**662. **Evidence held sufficient** to support finding that work was done under personal supervision of defendant. 71**CalA**308, 235**P**76. **Amount paid to assistant** by expert accountant because measure of reasonable value of services and refusal so to instruct is error. 73**Mont**321, 236**P**550. **Contract price** is prima facie reasonable value of work. 90**CalA**298, 265**P**887. **Contract to pay necessary expenses** incurred by expert accountant and reasonable value of services of others may be inferred from nature of employment and surrounding circumstances. 73**Mont**321, 236**P**550. **Evidence held sufficient to justify finding as to value of improvements made on land.**–69**CalA**291, 231**P**563. **Preparing to start work under plans** authorizes inference that plans were satisfactory. **MoA** 28**W(2d)**631.

2851–25 240**Mich**291, 215**NW**358 (testimony in support of agreement must be clear and explicit). **Evidence held insufficient to support verdict for plaintiff.**–119**Kan**639, 240**P**962. **Evidence held sufficient to support verdict for plaintiff.**–240**Mich**291, 215**NW**358.

2851–27 89**CalA**427, 264**P**799; 235**Ky** 296, 31**SW(2d)**373; 11**LaA**699, 124**S**696; 126**Me**609, 139**A**680; 158**Md**292, 148**A**

536; 155Miss804, 125S338; 134Misc902, 236NYS720; Alta [1925] 3DomLR948. **Expenses of sending telegrams and telephone calls are allowable when properly incurred in performance of work.** 73 Mont321, 236P550. **Only nominal recovery can be had** where value of services is not shown. 138Misc581, 245NYS378. **Reasonable profit** is included in reasonable value. Iowa 231NW705.

2852–29 101CalA382, 281P639 (interest not recoverable before entry of judgment); 203 Iowa518, 210NW453.

2852–32 Additional or extra compensation.–166La685, 117S774.

2853–33 126Me609, 139A680. But see Iowa 231NW705. **Contract to pay incidental expenses** may be inferred from employment of professional man. 73 Mont321, 236P550. **Value of services may be measured** by wants of persons benefited. 188Wis4, 205NW486.

2853–34 162La945, 111S337. **Shorthand reporters compensated for work at rate in locality** in absence of agreement. 162 La945, 111S337. **Shorthand reporters held entitled** to actual cost of board, lodging and travelling expenses. 162La 945, 111S337. **Actual count of words and not estimate** held to govern compensation of shorthand reporters. 162La 945, 111S337.

2853–36½–New. Where contractor unreasonably delayed completion of work, he is entitled to recover for benefits received by defendant, not exceeding contract price. 15F(2d)545.

2853–37 Amount held excessive.–11LaA 522, 124S316 (accountant's claim reduced two hundred dollars from amount allowed by trial court); 73Mont321, 236 P550; 102WVa103, 134SE592. **Amount held not excessive.**–101CalA382, 281P 639; 101CalA359, 281P704; 10LaA618, 119S754; 125Me506, 131A10 (four hundred and thirty-three dollars and eighty-two cents for twenty-nine weeks as nurse and housekeeper); 169Minn72, 210NW 854, 49ALR1115; 180Minn100, 230NW 478.

2853–44 88 IndA685, 148NE430; 220 MoA1077, 279SW769; 49Nev451, 248P 893; 136 Okl 69, 276P182; 132 Or137, 284P838. **In action on express contract** one cannot recover on quantum meruit. 220MoA1077, 279SW769. **Price fixed by agreement** is reasonable value of services. 73Mont321, 236P550. **Services of assistant.**–73Mont321, 236P550.

2854–45 253Mass239, 148NE456.

2854–46 102NJL418, 131A871; Tex CivA 16SW(2d)983.

2854–48 208 Iowa1113, 224NW785; 49 RI 408, 143A609.

2854–52 MoA 256SW134; 49RI 408, 143A609.

2854–54 Contract price for construction of building does not control amount of contractor's damages in assumpsit for materials furnished and work done, after rescission for defendant's nonperformance. 49RI 408, 143A609.

2854–55½–New. Intentional departure from contract in material matter, without justification, prevents recovery. 253 Mass239, 148NE456.

2854–55⅓–New. Contractors who diligently pursued work have been held entitled to recover at contract price for work done less payments received. 234 Ky794, 29SW(2d)545.

2855–58 27F(2d)32; 242Mich253, 218 NW801; 73Mont321, 236P550. **Presumption of promise to pay** is not rebutted, as matter of law, by evidence of plaintiff's personal interest in outcome. 100 CalA217, 279P810(2dcase). **Whether plaintiff's work went into defendant's building rather than on truck** has been held for jury. MoA 278SW(2d)1079. **Whether services were fully paid for** is for jury. NJ 150A417.

2855–59 158Md292, 148A536.

2855–60 Evidence held sufficient to take question of employment to jury. MoA 2SW(2d)631.

2855–61 125Me411, 134A506, 47ALR 1156; 99Vt39, 130A578.

2855–62 49RI 408, 143A609. **Whether workman actually worked number of hours charged** is pure matter of fact for jury to determine on conflicting evidence. TexCivA 11SW(2d)615. **Substantial performance.**–126Misc373, 213 NYS387.

2855–63 176Ark1075, 5SW(2d)291; 94 CalA441, 271P374; 125Me506, 131A10; 125Me411, 134A506, 47ALR1156; Mass 172NE91 (question of substantial performance); 174Minn602, 218NW248; 49RI 408, 143A609. **Benefit received by owner as measure of recovery by building contractor who has defectively performed** express contract to be determined by jury under all facts. 209Ky 239, 272SW717. **Evidence sufficient to warrant submission to jury.**–78Colo 231, 241P539.

2856–65 Jury may fix value of services without aid of expert testimony, where value of services is within common knowledge. 94CalA441, 271P374.

2856–66 204 Iowa857, 216NW33.

2856–67 204 Iowa857, 216NW33; 125 Me420, 134A511.

2856–69 176Ark1075, 5SW(2d)291; 220 MoA1077, 279SW769; 143Va656, 129SE 687. **Instructions held proper.**–Iowa 229 NW237; MoA 27SW(2d)709.

2856–70 Instructions held proper.–MoA 27SW(2d)1079.

2856–72 Instructions held not misleading.–242Mich253, 218NW801.

2856–74 36GaA748, 138SE445.

2857–78 36GaA748, 138SE445.

2857–88 See also 84CalA567, 258P453; 99CalA769, 279P481 (finding that within four years defendants became indebted for services and materials requested and agreed to be paid is not finding that they were reasonably worth amount of judgment).

2858–96 118 Or357, 246P214.

2858–3½–New. Where court finds from the evidence that work has been performed, judgment may be entered for amount stipulated to be paid therefor. 122 Or306, 258P820.

2858–5 235Mich337, 209NW204; 85Pa Super236; 143Va656, 129SE687.

WORKING-DAY

2859–9 Working-days, as used in building construction contract, held to include all days except Sundays, holidays, and rainy days, including cold weather. 104Conn430, 133A677.

WORKMAN OR WORKING-MAN

2860–16 151Md11, 133A888.

WORKSHOP

2862–24½–New. Any building, room, or inclosure, premises, place of establishment where any goods, works, merchandise, commodities, or products are manufactured, made, finished, printed, or engraved, worked on, altered, repaired, polished, cleaned, renovated, or assorted in whole or in part, for sale or for wages or compensation. 316 Ill 519, 147NE384, 38ALR1533.

WORLDLY

2863–25 116 Oh684, 157NE377, 54ALR 92; 290Pa136, 138A497, 53ALR1027. **Contrasted with "religious."**–290Pa136, 138A497, 53ALR1027. **"Worldly employment or business"** etc. 290Pa136, 138A497, 53ALR1027; 8PaDist&Co 77 (Sesqui-centennial exposition as a worldly employment or business). **"Worldly goods"** etc. But see 116 Oh 684, 157NE377, 54ALR92 (held to include realty).

2863–25½–New. ; devoted to, interested in, or connected with this present life, and its cares, advantages, or pleasures, to the exclusion of those of a future life. Century D. [quot 116 Oh684, 157 NE377, 379, 54ALR92].

2863–25⅓–New. Pertaining to world; devoted to temporal and neglectful of eternal things; not spiritual, secular, or lay as opposed to churchly or monastic. Standard D. [quot 8PaDist&Co 77, 84].

WORT

2864–37½–New. Mash after malt or other active ingredient has been added, either before or during fermentation. 116 Or416, 241P390.

WOUND

2865–43 312Mo 15, 278SW743, 746 [quotCyc]. **"Wounding"** requires fracture of skin. 150Va580, 142SE354.

WRECK

2865–51½–New. Has no technical legal signification outside of maritime or marine law. 203 Iowa623, 213NW259, 51 ALR1327.

2865–51⅓–New. As a verb, "to destroy, or disable, or seriously damage; to cause to suffer ruin; to disorganize or cause serious injury to anything." Webster New Int. D. [quot 203 Iowa623, 213NW 259, 261, 51ALR1327].

WRIT

2866–54 Of possession.–Writ of possession is execution within meaning of Comp. Okla. St. (1921) § 692 subd. 2. 43 OklACR119.

2868–56 44 Ida43, 254P788, 52ALR463.

YEAR

2877–32½–New. Two years equivalent to twenty-four calendar months. 101 NJL419, 129A191.

YEN SHEE

2878–42½–New. The residuum left after opium is smoked. 198Fed88, 89, 117 CCA294. See also Opium 46 C. J. p 1119.

ZEOLITES

2880–55½–New. Chemical compounds able, when saturated with solution of sodium chloride, to take up from water passed through them such hardening elements as calcium or magnesium. 37F (2d)385.

WORKMEN'S COMPENSATION ACTS SEE PAGE 2612 OF THIS VOLUME

KF 154 .C6 1931
3 8198 312 222 233
Corpus juris. 1926 Annotations UI main
THE UNIVERSITY OF ILLINOIS AT CHICAGO

THIS BOOK IS FOR USE
ONLY IN THE LIBRARY
IT DOES NOT CIRCULATE